Nos. 98-796 and 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 WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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A. Congress Expressed Its Clear Intent To Abrogate The States' Eleventh Amendment Immunity

When Congress in 1974 extended to state employees the protections of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.*, Congress also expressed its clear intent to abrogate the States' immunity to suits under both the ADEA and the wage and hour provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.* Congress did so, *inter alia*, by amending the FLSA to authorize 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), and by expressly incorporating that provision into the ADEA, 29 U.S.C. 626(b).

Respondents acknowledge (Br. 17) that Congress inserted that language into the FLSA for the express purpose of

abrogating state immunity (see also *Alden* v. *Maine*, 119 S. Ct. 2240, 2261 (1999)), and that Congress did so in response to the holding in *Employees of the Department of Public Health & Welfare* v. *Department of Public Health & Welfare*, 411 U.S. 279 (1973), that the prior version of the statute did not contain a sufficiently clear statement of intent to abrogate. Respondents offer several arguments for refusing to give effect to that abrogation under the ADEA, but none can withstand analysis.

Respondents protest first (Br. 17) that the incorporation of the FLSA's enforcement provision entails too much "page turning through the United States Code." In fact, Section 626(b) requires only one turn of the page to Section 216(b)'s explicit abrogation provision. The other incorporated "powers, remedies, and procedures" for which respondents find the page turning too arduous have no bearing on the States' liability to private suits in federal court. In any event, the clear-statement rule is a rule of clarity, not ease of reference. As long as Congress's intent is plain, the number of steps in the statutory path is irrelevant.[1]

Respondents (Br. 17-18) and their amicus (Pa. Repub. Caucus 4) next contend that the ADEA should not be read to incorporate Section 216(b)'s enforcement provision because it would be redundant, overlapping with the cause of action created in Section 626(c). But they are mistaken for four

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[1] Amici Ohio, *et al.* (Ohio) argue (Br. 11) that a provision of law incorporated into another statute is merely a "coy hint" rather than a clear statement. But it is "well-settled" that a provision adopted by reference "is the same as [if] the statute or provisions adopted had been incorporated bodily into the adopting statute." *Hassett* v. *Welch*, 303 U.S. 303, 314 (1938) (citation omitted); see also *Panama R.R.* v. *Johnson*, 264 U.S. 375, 391-392 (1924) ("Criticism is made of the statute because it does not set forth the new rules but merely adopts them by a generic reference. But the criticism is without merit. * * * This is a recognized mode of incorporating one statute or system of statutes into another, and serves to bring into the latter all that is fairly covered by the reference."); Gov't Br. 15 n.15.

reasons. First, Congress's language could not be plainer: all of Section 216's "powers, remedies, and procedures" are incorporated except those in "subsection (a) thereof." 29 U.S.C. 626(b). Second, this Court has already recognized that Section 216(b)'s cause of action against public agencies is incorporated into the ADEA. See Gov't Br. 15 n.15 (citing cases). Third, the two provisions are not redundant. Section 216(b) authorizes actions for unpaid wages and overtime compensation. Section 626(c) broadly authorizes all "legal or equitable relief." Together, the two provisions ensure full relief for victims of age discrimination. Fourth, the existence of two overlapping jurisdictional provisions applicable to the States underscores, rather than obscures, Congress's intent to abrogate.

Respondents (Br. 18) and Ohio (Br. 11-12) also argue that Section 216(b)'s enforcement provision can only waive the States' immunity from liability for violations of the FLSA's minimum wage and hour provisions, and not for violations of the ADEA, because the Section 216(b) cause of action only applies to "[a]n action to recover the liability prescribed in either of the preceding sentences." But Congress expressly extended Section 216(b)'s coverage to ADEA violations by "deem[ing]" "[a]mounts owing to a person as a result of a violation" of the ADEA "to be unpaid minimum wages or unpaid overtime compensation *for purposes of section[] 216*," and by "deem[ing]" any "act prohibited under section 623 of [the ADEA] * * * to be *a prohibited act under Section 215*" of the FLSA. 29 U.S.C. 626(b) (emphases added).

Finally, respondents suggest (Br. 16-17) that the statutory language authorizing suit in any "court of competent jurisdiction," 29 U.S.C. 626(b) and (c), is ambiguous because it is susceptible to the interpretation that, where the State is immune, federal courts are not competent to hear the suit. But that argument has no merit in the context of the 1974 amendments to the FLSA and ADEA, where the particular suits authorized in courts of competent jurisdiction are suits

by public employees against their public employers, and where the undisputed purpose of the language was to overcome the holding of *Employees* that the FLSA did not contain a sufficiently clear statement of intent to abrogate immunity. Moreover, even where Eleventh Amendment immunity exists, federal courts are not *incompetent* to hear private claims against the States. See *Wisconsin Dep't of Corrections* v. *Schacht*, 524 U.S. 381, 389 (1998) ("The Eleventh Amendment * * * does not automatically destroy original jurisdiction. * * * Unless the State raises the matter, a court can ignore it.") (citations omitted).[2] Lastly, respondents' claim that the phrase "competent jurisdiction" limits the cause of action to state court suits (Br. 16) cannot be correct, because abrogation of immunity to suit in state courts is governed by the same clear-statement rule that applies in federal court. See *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 205-206 (1991).[3]

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

Respondents and their amici do not dispute that classifications based on age are subject to scrutiny under the Equal Protection Clause. Nor do they question that the Equal Protection Clause forbids States, in the conduct of governmental activities, to "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.

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[2] See also *Schacht*, 524 U.S. at 393-394 (Kennedy, J., concurring); *United States* v. *Morton*, 467 U.S. 822, 828 (1984) ("The concept of a court of 'competent jurisdiction' " is "usually used to refer to subject-matter jurisdiction," and not to personal jurisdiction over particular defendants.).

[3] Respondents and their amici offer no answer to the argument that, just like the Title VII provisions at issue in *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 449 n.2 (1976), the 1974 amendments to the ADEA placed States as employers squarely within a pre-existing enforcement scheme that specifically and expressly contemplated suits by employees against employers in federal court.

Cleburne Living Ctr., 473 U.S. 432, 446 (1985). Instead, respondents argue (Br. 44-47) that Congress's authority to enforce the Fourteenth Amendment is narrower than this Court's in that it does not extend to the enforcement of rights subject only to rational basis review by the courts. But the text of Section 5 of the Fourteenth Amendment offers no support for the proposition that Congress's power should wax and wane based on categories this Court crafted to constrain *judicial* review under the Clause nearly a century after the Fourteenth Amendment's enactment. And this Court has repeatedly emphasized that 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. *Ex parte Virginia*, 100 U.S. 339, 345 (1880); see also Gov't Br. 22 n.22. Section 5 thus 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* v. *Klutznick*, 448 U.S. 448, 501 n.3 (1980) (opinion of Powell, J.).

Respondents mistakenly claim (Br. 44) that no holding of this Court supports a congressional exercise of its protective enforcement authority under Section 5 to prohibit classifications subject only to rational basis review. 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. See Gov't Br. 21 & n.21. While this Court later determined that gender discrimination merited heightened scrutiny, it never suggested that Congress was wrong to act in the absence of a judicial determination to that effect. Indeed, the Court found the considered legislative judgment embodied in Title VII significant in coming to the conclusion that gender distinctions merited heightened judicial scrutiny. See *Frontiero* v. *Richardson*, 411 U.S. 677, 687-688 (1973)

(plurality opinion) ("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."). That history demonstrates that Section 5 does not confine Congress to a reactive role or to prohibiting only those classifications that have been judicially determined to warrant heightened scrutiny.

Respondents' suggestion (Br. 44-45) that *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), forecloses Section 5 legislation targeted at age discrimination is incorrect. To the contrary, while the Court invalidated Congress's effort to lower the voting age in state elections, no Justice advanced the view that Congress lacked the power to proscribe arbitrary age classifications or to enforce rights subject only to rational basis scrutiny.[4] Since that would have been a much more straightforward argument than any theory offered by a Justice in the majority, the failure to advance it strongly suggests that the power exists.

Finally, respondents' concern (Br. 46-47) that adherence to Section 5's plain text would afford Congress virtually unbridled legislative authority is misplaced, because the threat to Fourteenth Amendment rights against which Congress may legislate must be real and not speculative. See *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 119 S. Ct. 2199, 2208-2210 (1999).

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[4] Justice Harlan concluded that the legislation was invalid because, in his view, the Fourteenth Amendment simply did not encompass "political rights" like the right to vote. *Oregon*, 400 U.S. at 140. Justice Black concluded that the Constitution exclusively reserves to the States the power to set voter qualifications. *Id.* at 124-130. Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, agreed with Justice Black, and also concluded that there was no basis for Congress to determine that the particular age classification prohibited by Congress constituted invidious discrimination. See 400 U.S. at 203-206. Four Justices considered the statute to be appropriate enforcement legislation. *Id.* at 138-144 (Douglas, J.); *id.* at 239-250, 278-281 (Brennan, White, & Marshall, JJ.).

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

The legislative history of the ADEA amply documents Congress's conclusion that older workers were widely subjected to "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" so irrational that some employers lowered their performance standards rather than hire older workers. See Gov't Br. 31-36. Moreover, "Congress * * * established that [those] same conditions existed in the public sector," including state governments. *Goshtasby* v. *Board of Trustees*, 141 F.3d 761, 772 (7th Cir. 1998); see also Gov't Br. 36-38 & nn.40, 41.

1. Respondents and Ohio are mistaken to argue (Br. 1-3, 31-39, Ohio Br. 20-21, 29) that the existence of state laws proscribing age discrimination in employment undercuts any congressional judgment that there either was a history or is a contemporary threat of unconstitutional age discrimination by state employers. First, Congress was entitled to credit the testimony and evidence before it, some of which was provided by state officials themselves, demonstrating that state age discrimination laws generally were ineffective and that national legislation was needed.[5] Just as state laws against

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[5] See Gov't Br. 47 & n.52; *Age Discrimination in Employment: Hearings on H.R. 3651, H.R. 3768, H.R. 4221 Before the Gen. Subcomm. on Labor of the House Comm. on Educ. & Labor*, 90th Cong., 1st Sess. 184 (1967) (California study noting that state officials with employment responsibilities "are human beings and like other human beings have acquired attitudes over the years which influence their decisions"); *id.* at 334 (in combating age discrimination, California "took a step and then sat down to contemplate our temerity, and there, * * * legislative and otherwise, we still sit"); see also *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 114 (1991) ("It also may well be that Congress thought state agency consideration generally inadequate to ensure full protection

race discrimination in employment have neither eradicated race discrimination nor undermined the basis for subjecting state employers to federal bans on race discrimination,[6] Congress was entitled to conclude that the same holds true for state laws against age discrimination.

Second, an equal protection violation in public employment is complete when a public official takes action for an invidiously discriminatory reason; the existence of a remedy does not eradicate the violation.[7] Indeed, the existence of so many state statutes prohibiting age discrimination in public employment could well be evidence that such discrimination is sufficiently pervasive to warrant a legislative remedy, rather than evidence that state laws have eradicated the problem.

2. Respondents assert that no court has found a state age classification unconstitutional (Br. 35), and thus that Congress could not credibly have found a history of unconstitutional age discrimination by state agencies. They are mistaken as to both the facts and the appropriate inference to be

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against age discrimination in employment"; citing New York's own amicus curiae brief noting "the shortfalls of its procedures and resources").

[6] See, *e.g.*, H.R. Rep. No. 238, 92d Cong., 1st Sess. 17 (1971) (although 37 States had equal employment opportunity laws at the time Title VII was extended to the States, Congress determined that race discrimination was as pervasive in state employment decisions as it was in the private sector); S. Rep. No. 415, 92d Cong., 1st Sess. 10, 19 (1971) (same).

[7] See *United States* v. *Raines*, 362 U.S. 17, 25 (1960) ("Congress has the power to provide for the correction of the constitutional violations of every such official without regard to the presence of other authority in the State that might possibly revise their actions."). Respondents (Br. 38-39) and Ohio (Br. 20) thus err in relying on *Florida Prepaid*, *supra*. That decision found the potential existence of state remedies relevant because the constitutional right being enforced there was the right to procedural due process after a taking—that is, the right to a remedy under state law. 119 S. Ct. at 2208. Accordingly, the adequacy of state remedies was important because their existence could prevent a constitutional violation from coming to fruition.

drawn. Courts have in fact struck down age discrimination by state agencies as a denial of equal protection.[8]

More importantly, Congress is not a court. It has distinctive institutional capacities that enable it to identify, remedy, and prevent constitutional violations that might escape discovery within the confines of individualized courtroom litigation. While Congress is bound by this Court's holdings that distinctions based on age violate the Fourteenth Amendment only if they are arbitrary and irrational, Congress is not confined to courtroom procedures for receiving and analyzing evidence in its effort to identify situations that "threaten [that] principle[] of equality" (*City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (opinion of O'Connor, J.)). To the contrary, Congress "may inform itself through factfinding procedures such as hearings that are not available to the courts." *Bush* v. *Lucas*, 462 U.S. 367, 389 (1983). Congress's "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"; it need not "confine its vision to the facts and evidence adduced by particular parties." *Fullilove*, 448 U.S. at 502-503 (Powell, J., concurring). Indeed, Congress can find invidious discrimination in state action "even though a court in an individual lawsuit might not have reached that factual conclusion." *Oregon*, 400 U.S. at 296 (Stewart, J.). "The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of

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[8] See *Gault* v. *Garrison*, 569 F.2d 993, 996-997 (7th Cir. 1977), cert. denied, 440 U.S. 945 (1979); *Cooper* v. *Nix*, 496 F.2d 1285, 1287 (5th Cir. 1974); *Industrial Claim Appeals Office* v. *Romero*, 912 P.2d 62, 66-70 (Colo. 1996). Moreover, the absence of more such cases may be due in part to the fact that most courts have held that the ADEA precludes Equal Protection Clause suits under 42 U.S.C. 1983 (1994 & Supp. III 1997). See, *e.g.*, *Migneault* v. *Peck*, 158 F.3d 1131, 1140 (10th Cir. 1998), petition for cert. pending, No. 98-1178; *Lafleur* v. *Texas Dep't of Health*, 126 F.3d 758 (5th Cir. 1997); *Zombro* v. *Baltimore City Police Dep't*, 868 F.2d 1364 (4th Cir.), cert. denied, 493 U.S. 850 (1989).

remedies may vary with the nature and authority of the governmental body." *Croson*, 488 U.S. at 489 (opinion of O'Connor, J.). Congress's unique institutional capacity "to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations," *id.* at 490, thus does not merely echo, but supplements and complements the Court's own enforcement of the Equal Protection Clause.

Contrary to respondents' suggestion (Br. 37), the ADEA does not reflect a congressional attempt to change the substance of the equal protection right. The ADEA enforces the precise equal protection right defined by this Court, namely, a right against age discrimination that is "arbitrary or irrational" (*Cleburne*, 473 U.S. at 446), "divorced from any factual context from which we could discern a relationship to legitimate state interests" (*Romer* v. *Evans*, 517 U.S. 620, 635 (1996)). Applying that same legal test to the wealth of information it compiled over two decades of study, hearings, reports, and testimony regarding the use of age in employment decisionmaking nationwide in a variety of contexts, Congress concluded that employment decisions based on age are in general too arbitrary or irrational to pass constitutional muster. See Gov't Br. 46 n.51. It is thus the decisionmaking forum, not the right, that has changed.

3. Respondents argue (Br. 33) that the ADEA was not aimed at any irrational age discrimination in the public sector, but rather at the disparity in treatment between public and private sector employees. That argument assumes an inconsistency between the two objectives that does not exist. A legislature that finds many age classifications arbitrary and irrational, and prohibits the use of such classifications in the private sector, will have not one but two reasons for extending the ban to the public sector: eliminating irrational age classifications and eliminating the disparity between public and private sector employees.

The legislative record demonstrates that both objectives were salient to Congress. Senator Bentsen first called for the extension of the ADEA to the States because of the "mounting evidence" that "State and local governments have also been guilty of discrimination toward older employees." 118 Cong. Rec. 7745 (1972). Senator Smathers advised that "many State governments" flatly state that "[w]e do not take on anyone who has reached the age of 35 or 45." 110 Cong. Rec. 13,490 (1964). Other Members of Congress and the Committee Reports echoed that concern about arbitrary and irrational acts of age discrimination by State employers. See Gov't Br. 37 & n.40. Indeed, the State of California submitted to Congress its own study of age discrimination in California public agencies, which showed that, despite the existence of a state-law prohibition, state agencies impermissibly relied upon age. *Id.* at n.40. Respondents thus are simply mistaken in their claim (Br. 38) that Congress "did not unearth a single shard of State misconduct."[9]

Respondents insist (Br. 34-37), however, upon more elaborate and particularized findings or legislative history detailing constitutional violations by the States, with supporting documents included in the "record" so that they can be subjected to examination and rebuttal (Br. 36). But nothing in the "finely wrought and exhaustively considered procedure," *INS* v. *Chadha*, 462 U.S. 919, 951 (1983), that Article I, Section 7 of the Constitution establishes for federal legislation requires Congress to identify the purpose of, or factual predicate for, its laws. The Constitution authorizes Congress to conduct investigations and hold hearings to gather information regarding national problems, incidental to lawmaking,

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[9] The Pennsylvania House Republican Caucus errs in asserting (Br. 10 n.27) that evidence Congress gleaned of state age discrimination during the ADEA's enactment in 1967 is irrelevant. See *Fullilove*, 448 U.S. at 503 (Powell, J., concurring) ("One appropriate source [of evidence for Congress] is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation.").

see *Watkins* v. *United States*, 354 U.S. 178, 187 (1957), and gives it broad discretion to determine what must be published in the official record, see *Field* v. *Clark*, 143 U.S. 649, 671 (1892). There is no textual basis for imposing additional requirements on the lawmaking process. Thus, "Congress need [not] make particularized findings in order to legislate." *Perez* v. *United States*, 402 U.S. 146, 156 (1971).[10]

Accordingly, the question before this Court is simply whether Congress could reasonably conclude that the ADEA prevents state employers from relying upon the same arbitrary and irrational myths and false stereotypes about older workers that it found pervaded the private sector and the federal government. Respondents argue both that Congress did not in fact reach a constitutional judgment (Br. 35), and that any such judgment would not be supported by the evidence before Congress (*id.* at 35-39). But they are wrong.

First, it blinks reality to assert, as respondents do (Br. 35-39), that Congress's stark description of employers' uses of age as "invidious," "wholly irrational," "unjustifiable," "completely arbitrary," "rooted in past prejudices," "stereotyped," and "as insidious, as damaging, and as deplorable as racial or religious discrimination" (see Gov't Br. 35 & n.38, 38) lacks constitutional underpinnings. That is not the language of economic "policy" (Resp. Br. 35). The constitutional character of Congress's judgment is further underscored by its coupling of that censure with the additional determination that the rationales offered for age classifications by employers were the product of myths and stereotypes, rather than objective reality. See Gov't Br. 31-32 & nn.33-34, 35 & n.38. Congress did not merely disagree with the economic

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[10] See also *United States* v. *Lopez*, 514 U.S. 549, 562 (1995) ("Congress normally is not required to make formal findings."); *Fullilove*, 448 U.S. at 502 (Powell, J., concurring) ("Congress is not expected to act as though it were duty bound to find facts and make conclusions of law."); *Katzenbach* v. *McClung*, 379 U.S. 294, 299 (1964) ("[N]o formal findings were made, which of course are not necessary.").

policies of private and governmental employers; it found in traditional equal-protection language that discrimination against older workers was 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). Congress's repeated analogizing of the ADEA to Title VII and of age discrimination to unconstitutional race and gender discrimination[11] further belies the suggestion that Congress was merely advocating economic policy in the ADEA. See also *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 361 (1995) ("The ADEA, like Title VII, is not a general regulation of the workplace but a law which prohibits discrimination.").

Second, as for the adequacy of the legislative record, the evidence on which Congress found a threat to constitutional rights under the ADEA at least equals the legislative record on which Title VII's ban on gender discrimination was extended to the States. Cf. *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976) (upholding Title VII's abrogation of Eleventh Amendment immunity in gender discrimination case).[12] The legisla-

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[11] See, *e.g.*, S. Rep. No. 690, 93d Cong., 2d Sess. 55 (1974); H.R. Rep. No. 913, 93d Cong., 2d Sess. 40 (1974); 110 Cong. Rec. at 2597 (Rep. Pucinski); *id.* at 9912 (Sen. Smathers); *id.* at 13,491 (Sen. Gore); 112 Cong. Rec. 20,821 (1966) (Sen. Javits); 113 Cong. Rec. 31,256-31,257 (1967) (Sen. Young); *id.* at 34,742 (Rep. Burke); *id.* at 34,744 (Rep. Kelly); *id.* at 34,746 (Rep. Olsen); 118 Cong. Rec. at 15,895 (Sen. Bentsen) ("I believe that the principles underlying these provisions in the EEOC bill are directly applicable to the [ADEA]."); 123 Cong. Rec. 29,004-29,005 (1977) (Rep. Findley); *id.* at 29,009 (Rep. Pepper); *id.* at 29,011 (Rep. Cohen); *id.* at 29,014 (Rep. Waxman); *id.* at 30,557 (Rep. Hillis); *id.* at 30,563 (Rep. Pepper); *id.* at 30,566 (Rep. McKinney); H.R. Rep. No. 756, 99th Cong., 2d Sess. 7 (1986); S. Rep. No. 493, 95th Cong., 1st Sess. 3 (1977); *id.* at 34 (additional views); see also Gov't Br. 27 & nn.28, 29, 35.

[12] The ADEA's legislative record far surpasses what Congress compiled in the course of enacting other Section 5 legislation as well. See *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 67 (1986) (Title VII's ban on religious discrimination); *Fullilove*, 448 U.S. at 458-462 (opinion of

tive record supporting the extension of Title VII to the States in 1972 contained specific evidence and findings of race discrimination by state and local government employers, but only general statistics demonstrating the disparity between women and men in wages and employment opportunity, and general data concerning women employed in higher education, the professions, and the federal government; it contained no specific data or findings regarding women in state or local government.[13] In addition, the record contains the same types of observations that, under the ADEA, respondents dismiss as the language of policy and not constitutional violation.[14]

Burger, C.J.); *Oregon*, 400 U.S. at 216 (Harlan, J.); *Katzenbach* v. *Morgan*, 384 U.S. 641, 654 & n.14 (1966); *id.* at 669 & n.9 (Harlan, J., dissenting) (literacy test ban was added to statute on the floor of Congress).

[13] See 118 Cong. Rec. at 1840 (Sen. Javits) (specifically citing evidence of discrimination against minorities by state and local governments, but referencing only "overall figures" for women); *id.* at 1816-1819, Exhibit 1 (findings only as to racial discrimination); *id.* at 1815 (Sen. Williams) (offering only general statistics demonstrating disparity between women and men in wages and employment opportunity); S. Rep. No. 415, 92d Cong., 1st Sess. 7 (1971); 118 Cong. Rec. at 4935 (Tables); *id.* at 4817-4818 (Sen. Stevenson); *id.* at 3800 (Sen. Williams); *id.* at 1383 (Sen. Percy); *id.* at 590 (Sen. Humphrey); *id.* at 580 (Sen. Javits); *id.* at 295 (Sen. Williams); 117 Cong. Rec. 31,960 (1971) (Rep. Perkins); *id.* at 32,096 (Rep. Abzug); *id.* at 32,104 (Rep. Fraser).

[14] H.R. Rep. No. 238, *supra*, at 4 (generally describing employers' treatment of women as "blatantly disparate" and "particularly objectionable"); S. Rep. No. 415, *supra*, at 8 (inequities are "blatant" and "widespread"); 117 Cong. Rec. at 31,960 (Rep. Perkins) (treatment of women is "disappointing"); 118 Cong. Rec. at 3383 (Sen. Javits) ("very serious"); *id.* at 1840 (Sen. Javits) ("something is not right"); *id.* at 1383 (Sen. Percy) ("glaring" inequities); *id.* at 590 (Sen. Humphrey) ("unconscionable"); *id.* at 4817 (Sen. Stevenson) (a "grave problem"); 117 Cong. Rec. at 31,975 (Rep. Drinan) ("outrageous," a "disgrace," "pervasive," and "serious"); *id.* at 32,105 (Rep. Mink) (an "injustice"). The isolated references made to the Constitution in the context of gender discrimination noted only the unremarkable propositions that the Constitution prohibits discrimination by state and local governments, S. Rep. No. 415, *supra*, at 10; 118 Cong. Rec. at 1816 (Sen. Williams), and that race- or sex-based discrimination can

4. Finally, respondents argue (Br. 27-30) that, regardless of the constitutional and legislative foundation for the ADEA, the statute cannot be upheld because Congress did not "warn[]" (*id.* at 11) them that it would defend its legislation on Section 5 grounds. Nothing in the Constitution, however, makes Congress's explicit invocation of authority a prerequisite to the valid enactment of legislation. This Court has explained that Congress need not "anywhere recite the words 'section 5' or 'Fourteenth Amendment' or 'equal protection.'" *EEOC* v. *Wyoming*, 460 U.S. 226, 243 n.18 (1983). Instead, "congressional legislation [may be] defended on the basis of Congress' powers under § 5 of the Fourteenth Amendment" if the Court is "able to discern some legislative purpose or factual predicate that supports the exercise of that power." *Ibid.* Similarly, in *United States* v. *Harris*, 106 U.S. 629 (1883), this Court held that, when the power of Congress to pass legislation is questioned, it is "necessary to *search* the Constitution to ascertain whether or not the power is conferred," and consider those provisions that only "in the remotest degree" have potential application to the statute at issue. *Id.* at 636 (emphasis added).[15] Those holdings reflect the fundamental

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violate the Constitution, *id.* at 1412 (Sen. Byrd). Congressional hearings on the 1972 amendments also were silent on the subject of unconstitutional gender discrimination by State governments. See *Equal Employment Opportunities Enforcement Act of 1971: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor & Pub. Welfare*, 92d Cong., 1st Sess. (1971); *Equal Employment Opportunity Enforcement Procedures: Hearings Before the Gen. Subcomm. on Labor of the House Comm. on Educ. & Labor*, 92d Cong., 1st Sess. (1971); *Equal Employment Opportunity Enforcement Procedures: Hearings Before the Gen. Subcomm. on Labor of the House Comm. on Educ. & Labor*, 91st Cong., 1st & 2d Sess. (1969-1970); *Equal Employment Opportunities Enforcement Act: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor & Pub. Welfare*, 91st Cong., 1st Sess. (1969).

[15] See also Gov't Br. 18 n.18; *United States* v. *Butler*, 297 U.S. 1, 61 (1936); *Keller* v. *United States*, 213 U.S. 138, 147 (1909); cf. *Fullilove*, 448 U.S. at 476-478 (opinion of Burger, C.J.) (holding that legislation could be a

separation of powers principle that a court should undertake the delicate and constitutionally sensitive task of invalidating legislation duly enacted by the Congress and President only when legislation is beyond Congress's power, and not simply because Congress enacted perfectly valid legislation with an arguably incomplete accompanying legislative history.

Respondents' reliance (Br. 28) on *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981), is misplaced. "*Pennhurst* established a rule of statutory construction to be applied where statutory intent is ambiguous," *Gregory* v. *Ashcroft*, 501 U.S. 452, 470 (1991), not a rule of constitutional limitation. *Pennhurst* "simply ha[s] no relevance to the question of whether, in this [ADEA] case, Congress acted pursuant to its powers under § 5" because "there is no doubt" that Congress intended to extend the ADEA to the States. *Wyoming*, 460 U.S. at 244 n.18.[16] In any event, Congress's repeated comparisons of the ADEA to Title VII—

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proper exercise of Section 5 power even though Congress never referenced that power in the statute or its legislative history).

[16] Respondents' reliance (Br. 29) on a footnote from *Florida Prepaid*, 119 S. Ct. at 2208 n.7, is likewise misplaced. The Court did not in that footnote establish a new rule requiring Congress to state the constitutional authority for its legislation. The Court merely concluded that, where the statute and legislative history were devoid of any "suggestion * * * that Congress had in mind the Just Compensation Clause," *ibid*, the Court would not consider whether the Patent Remedy Act enforced that Clause. *Ibid*. The Court's disinclination to consider the Just Compensation Clause in *Florida Prepaid* thus was simply a straightforward application of the long-established principle that the Court must be able to "discern some legislative purpose or factual predicate" for each claimed exercise of the Section 5 power. *Wyoming*, 460 U.S. at 243 n.18. In this case, by contrast, the connection between the anti-discrimination statute and the enforcement of the Equal Protection Clause is obvious; the central command of the Equal Protection Clause is to prohibit arbitrary discrimination by the States, and any statute that, by its name as well as its terms, prohibits a State from engaging in arbitrary discrimination is necessarily grounded, at least in part, in that Clause.

which also was originally enacted as Commerce Clause legislation and later extended to the States under Congress's Section 5 power—and other aspects of the ADEA's legislative history more than sufficed to "warn" respondents of Congress's design.[17]

D. The ADEA Is Reasonably Tailored

The ADEA's proof scheme is tailored to ferreting out intentional and irrational uses of age by employers. The Act generally requires plaintiffs to bear the ultimate burden of showing that they were treated adversely because of age. If the employer can identify a reasonable justification for its action other than age or can show that the use of age was reasonably necessary, then the employer will prevail. While the burdens of proof are different from those in an action under 42 U.S.C. 1983 (1994 & Supp. III 1997), the core conduct for which States will be liable—unreasoned and unreasonable uses of age—remains the same. See Gov't Br. 39-42.

Respondents argue that the ADEA is not properly tailored because, like Title VII, it "applies in equal measure to State and private employers," is of indefinite duration (Br. 39), and in many other respects is modeled on Title VII (*id.* at 40-44). Respondents contend that Title VII's statutory scheme is congruent and proportional to the regulation of race discrimination, which is presumptively unconstitutional, but not to the regulation of age discrimination, which is not. *Ibid.* As an initial matter, the distinction between the purposes of Title VII and the ADEA is not so sharp: Title VII prohibits discrimination based not only on race, but also on

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[17] See Gov't Br. 18 n.18; *Age Discrimination in Employment Act Amendments: Hearing Before the Subcomm. on Employment Opportunities of the House Comm. on Educ. & Labor*, 98th Cong., 2d Sess. 122 (1984) (courts have repeatedly sustained the ADEA under "§ 5 of the Fourteenth Amendment") (Clarence Thomas); *Amendments in 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. 57-58, 236-241 (1976).

gender, which fell within the same presumptively rational category as age at the time Title VII was extended to the States. Second, the relevant features of the statutory scheme are as well suited to one form of discrimination as the other.

Respondents object (Br. 43-44) to the ADEA's burden-shifting scheme. But the shifting of litigation burdens is a reasonable and frequently employed means of exposing intentional, invidious discrimination, because it "sharpen[s] the inquiry into the elusive factual question of intentional discrimination." *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 255 n.8 (1981); cf. *Lopez* v. *Monterey County*, 119 S. Ct. 693, 703 (1999). Burden shifting does not change the ultimate legal inquiry, but simply serves as a means of organizing the evidence to determine whether the actual cause of the adverse action was age or some other factor. See *Wichmann* v. *Board of Trustees of So. Ill. Univ.*, 180 F.3d 791, 800 (7th Cir. 1999) (the ADEA "does not require searching judicial scrutiny, but is more like a rationality test in forbidding discrimination on the arbitrary grounds of age") (internal quotation marks omitted).

Respondents protest (Br. 40-42) that the ADEA's scrutiny of mandatory retirement laws differs from the Constitution's. To be sure, the ADEA's operation does not parrot rational basis review. Nor do the Voting Rights Act or Title VII mimic their respective constitutional tests. Congress's Section 5 power is not confined "to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional." *Katzenbach* v. *Morgan*, 384 U.S. 641, 648-649 (1966). Section 5 allows Congress to prohibit activities that are not themselves unconstitutional as long as to do so reasonably furthers Congress's remedial and deterrent scheme. *City of Boerne* v. *Flores*, 521 U.S. 507, 518, 520, 525-527, 532 (1997).

Respondents, moreover, are largely chasing phantoms. As respondents frequently remind us, all 50 States proscribe

age discrimination by their own laws[18] and have largely abolished mandatory retirement laws and other across-the-board uses of age in employment decisions (other than those public-safety laws that the ADEA also permits). The bulk of litigation under the ADEA concerns ad hoc, individualized employment decisions.[19] No legitimate government interest is furthered when, in a regime of individualized assessments of competency, a qualified person is fired (or not hired or promoted) simply because he or she is old. This is the core constitutional violation addressed by the ADEA.

Respondents make no claim that the ADEA's review of such individualized employment decisions departs so dramatically from the Constitution's as to render Congress's remedial scheme unreasonable. A primary rationale under which this Court sustained the mandatory retirement policies—that democratically-elected bodies had chosen to use age as an across-the-board rule to avoid individualized determinations of qualifications[20]—obviously has little relevance to the constitutionality of ad hoc employment decision-

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[18] Respondents' complaint (Br. 1) that the ADEA "displace[s]" state age discrimination laws is puzzling. Given that "[v]irtually all of them forbid the same practices as the ADEA, and many of them offer more avenues of relief than the ADEA itself" (*id.* at 2-3), the ADEA has no effect on the operation of those state laws. To the contrary, the ADEA's structure respects and supports application of those laws by requiring that state age discrimination remedies be invoked before an ADEA suit commences. 29 U.S.C. 633(b).

[19] Our own research found that, of the 32 district court opinions reported on Westlaw for 1998 involving ADEA suits against state employers, 28—or 88%—involved challenges to individualized employment decisions, rather than to broad age-based policies. (A list of the 32 decisions is reproduced in an appendix to this brief.) See also H. Eglit, *The Age Discrimination in Employment Act at Thirty*, 31 Univ. Rich. L. Rev. 579, 622 (1997); G. Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Law*, 24 J. Legal Stud. 491, 510 (1995).

[20] *Gregory*, 501 U.S. at 471-473; *Vance* v. *Bradley*, 440 U.S. 93, 108-109 (1979); *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 316 (1976).

making.[21] That is especially true when, as occurs in most cases, employers do not contend that the use of age was justified, but that age was not the basis of the decision. In short, reality belies respondents' claim (Br. 40-44) that the ADEA broadly impinges on any state sovereign right to discriminate in employment on the basis of age.[22]

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For the foregoing reasons, and for those stated in our opening brief, the judgments of the court of appeals should be reversed, and the cases remanded for further proceedings.

Respectfully submitted.

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Solicitor General

SEPTEMBER 1999

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[21] The contrasting approaches and results in *Cleburne*, *supra*, and *Allegheny Pittsburgh Coal Co.* v. *County Commission*, 488 U.S. 336 (1989), compared with *Heller* v. *Doe*, 509 U.S. 312 (1993), and *Nordlinger* v. *Hahn*, 505 U.S. 1 (1992), evidence the practical constitutional differences under the rational-basis standard between challenges to general governmental policymaking and to individualized decisionmaking by government officials. See also *County of Sacramento* v. *Lewis*, 523 U.S. 833, 847 n.8 (1998) (judicial test for substantive due process violation by individual officer differs from that for actions of legislative body).

[22] Ohio objects (Br. 27-28) that the possibility of disparate impact litigation renders the ADEA too burdensome to be valid Section 5 legislation. But, to the extent disparate impact claims are available under the ADEA (see Gov't Br. 41 n.45), the States are subject to that substantive prohibition as a concededly valid exercise of the Commerce Clause power (Resp. Br. 14; Ohio Br. 29) and it can be enforced against them in federal court by private litigants under *Ex parte Young*, 209 U.S. 123 (1908). Thus the Section 5 issue presented in this case will have no impact on whether States must conform their employment practices to a substantive disparate impact standard.

APPENDIX

The following is a list of the 32 district court opinions reported on Westlaw for 1998 involving ADEA suits against state employers:

Zielonka v. *Topinka*, 28 F. Supp. 2d 1081 (N.D. Ill. 1998);

Munjal v. *Board of Trustees of Univ. of Ill.*, No. 97 C 2222, 1998 WL 895660 (N.D. Ill. 1998);

Keenan v. *New York State Div. for Youth*, No. 97-CV-0133E(M), 1998 WL 864914 (W.D.N.Y. Dec. 4, 1998);

Willett v. *Department of Children & Family Serv.*, No. 98 C 4715, 1998 WL 867406 (N.D. Ill. Dec. 3, 1998);

Beller v. *Board of Trustees of Univ. of Ill.*, No. 97 C 4888, 1998 WL 832636 (N.D. Ill. Nov. 24, 1998);

Naval v. *Fernandez*, No. 97-CV-6800, 1998 WL 938942 (E.D.N.Y. Nov. 20, 1998);

Valdivia v. *University of Kan. Med. Ctr.*, 24 F. Supp. 2d 1177 (D. Kan. 1998);

Driesse v. *Florida Bd. of Regents*, 26 F. Supp. 2d 1328 (M.D. Fla. 1998) ;

Kaplan v. *California Pub. Employees' Retirement Sys.*, No. C 98-1246 CRB , 1998 WL 575095 (N.D. Cal. Sept. 3, 1998);

Gomes v. *California Dep't of Correcti*ons, No. C97-1072 MJJ, 1998 WL 556578 (N.D. Cal. Aug. 31, 1998);

Meekison v. *Voinovich*, 17 F. Supp. 2d 725 (S.D. Ohio 1998);

Weiner v. *City College of City Univ. of N.Y.*, No. 95 CIV. 10892 (JFK), 1998 WL 474093 (S.D.N.Y. Aug. 11, 1998);

Heckman v. *University of N.C.*, No. 1:97CV00184, 19 F. Supp. 2d 468 (M.D.N.C.), appeal dismissed, 166 F.3d 1209 (4th Cir. 1998);

Jones v. *University of Tex.*, No. CA 3:97-CV-0845-R, 1998 WL 460283 (N.D. Tex. July 29, 1998);

McGinty v. *New York*, 14 F. Supp. 2d 241 (N.D.N.Y. 1998);

Gately v. *Massachusetts*, No. CIV.A.92-13018-MA, 1998 WL 518179 (D. Mass. June 8, 1998);

Glab v. *California State Bd. of Equalization*, No. 98 C 3012, 1998 WL 293189 (N.D. Ill. May 22, 1998);

Fisher v. *Maryland Dep't of Housing and Community Dev.*, 32 F. Supp. 2d 257 (D. Md.), aff'd, 166 F.3d 1208 (4th Cir. 1998);

Alaimo v. *SUNY*, No. 97-CV-0285E(H), 1998 WL 214743 (W.D.N.Y. Apr. 27, 1998);

Eible v. *Houston*, No. CIV. A. 96-4655, 1998 WL 303692 (E.D. Pa. Apr. 21, 1998), aff'd, No. 98-1736 (3d Cir. Apr. 13, 1999), petition for cert. pending, No. 99-238;

Pease v. *University of Cincinnati Med. Ctr.*, 6 F. Supp. 2d 706 (S.D. Ohio 1998), aff'd, No. 98-3583, 1999 WL 427373 (6th Cir. June 16, 1999);

Recknall v. *New York Power Auth.*, No. 94-CV-1675 (RSP/GLS), 1998 WL 178806 (N.D.N.Y. Apr. 8, 1998);

Hines v. *Ohio State Univ.*, 3 F. Supp. 2d 859 (S.D. Ohio 1998);

Butler v. *New York State Dep't of Law*, 998 F. Supp. 336 (S.D.N.Y. 1998);

Schibrat v. *New York State Hous. Fin. Agency*, No. 96 CIV. 2004 (JFK), 1998 WL 118171 (S.D.N.Y. Mar. 13, 1998);

Snooks v. *University of Houston, Clear Lake*, 996 F. Supp. 686 (S.D. Tex. 1998);

Hall v. *Missouri Highway and Transp. Comm'n*, 995 F. Supp. 1001 (E.D. Mo. 1998);

Arnett v. *CA Employees' Retirement*, No. C95-03022 CRB, 1998 WL 118180 (N.D. Cal. Mar. 2, 1998), rev'd, No. 98-15574, 1999 WL 618033 (9th Cir. June 2, 1999);

Ullman v. *Rector and Visitors of Univ. of Va.*, 996 F. Supp. 557 (W.D. Va. 1998);

Young v. *Pennsylvania House of Representatives, Republican Caucus*, 994 F. Supp. 282 (M.D. Pa. 1998);

Haynes v. *Florida*, No. 97-6339-CIV-GOLD, 1998 WL 271462 (S.D. Fla. Jan. 26, 1998);

Boland v. *Illinois Dep't of Mental Health and Developmental Disabilities*, No. 97C 2913, 1998 WL 25761 (N.D. Ill. Jan. 12, 1998).