KIMEL v. FLORIDA BD. OF REGENTS

120 S. CT. 631 (2000)

SUPREME COURT RULES THAT STATES ARE NOT IMMUNE FROM AGE DISCRIMINATION SUITS

I. FACTS

In December of 1994, two associate professors instituted a suit against their state employer in a federal district court,[1] alleging violation of the Age Discrimination in Employment Act ("ADEA") of 1967.[2] The professors, aged 57 and 58, alleged that the University discriminated against them on the basis of age and retaliated against them for having previously filed charges of discrimination with the Equal Employment Opportunity Commission, and alleged that the University's evaluation system had a disparate impact on older faculty members.[3] The University filed a motion to dismiss on the ground that the federal district court lacked subject matter jurisdiction as the University was immune from suits brought under the ADEA by virtue of the Eleventh Amendment.[4] The federal district court granted the motion to dismiss and held that Congress demonstrated a clear intent to abrogate states' immunity to suit under the Eleventh Amendment; however, the ADEA was not enacted or extended pursuant to Congress' enforcement power under the Fourteenth Amendment and thus, did not abrogate the states' Eleventh Amendment immunity.[5]

In April of 1995, several on-staff and former faculty members and librarians of two state universities, all of whom were over the age of 40, instituted a suit against the Florida Board of Regents in a federal district court.[6] The Plaintiffs alleged that the Board's refusal to

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1. Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 638 (2000) (seeking declaratory and injunctive relief, along with backpay, promotions, and compensatory and punitive damages).

2. 81 Stat. 602, as amended, 29 U.S.C. § 621 *et seq.* (1994 ed. & Supp. III).

3. *See Kimel*, 120 S. Ct. at 638 (2000).

4. *Id.*

5. *Id.*

6. *See id.* (requesting the court to grant backpay, liquidated damages, and permanent

enforce a prior agreement in which the salaries of qualifying university employees were to be allocated funds to reflect adjustments in the market, violated the ADEA and a Florida statute as it effected a disparate impact on the base pay of older employees who had worked the longest for the universities.[7]

In May of 1996, another state employee instituted a suit against his Florida state employer in federal district court.[8] The employee alleged failure to promote on the basis of age and retaliation for having previously filed grievances of age discrimination.[9]

In both of these cases, the state employer filed a motion to dismiss the suit based on its Eleventh Amendment immunity from suits brought by private individuals.[10] The federal district courts denied the motions and held that under the ADEA, Congress expressed a clear intent to abrogate the states' Eleventh Amendment immunity and that Congress was authorized under § 5 of the Fourteenth Amendment to enact or extend the ADEA.[11]

All three cases were appealed to the Eleventh Circuit.[12] The United States intervened to support its position that the ADEA abrogated the states' Eleventh Amendment immunity.[13] The Eleventh Circuit consolidated all three appeals and held in a divided panel opinion that the ADEA does not abrogate the states' Eleventh Amendment immunity.[14]

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salary adjustments as equitable relief).

7. Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 638 (2000) (contending that failure to allocate funds had a disparate impact on the base pay for employees with a longer record of service).

8. *Id.* at 639 (filing against the Florida Department of Corrections in the United States District Court for the Northern District of Florida).

9. *Id.* (seeking similar equitable relief of backpay, injunctive relief, and punitive damages).

10. *Id.* at 638-39.

11. *Id.* at 639.

12. Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 639 (2000).

13. *Id.*

14. *Id.* at 639. The Eleventh Circuit reasoned that the ADEA did not clearly indicate an abrogation of the states' Eleventh Amendment immunity. *Id.* at 639. Judge Edmondson asserted that the ADEA makes no reference to the Eleventh Amendment and states' sovereign immunity and nowhere states "in one place, a plain statement" that individuals may maintain suits against states in a federal court. *Id.* In his concurrence, Judge Cox did not address Congressional intent. *Id.* He asserted that Congress was not authorized under § 5 of the Fourteenth Amendment to abrogate the states' Eleventh Amendment immunity for the reasons that the ADEA conferred more rights than provided by the Fourteenth Amendment, and the Act was not enacted to remedy a "widespread violation of the elderly's constitutional rights." *Id.* Chief Judge Hatchett dissented on both grounds. *Id.*

II. HOLDING

The United States Supreme Court held that Congress expressed a clear intent to abrogate states' Eleventh Amendment immunity under the ADEA, as amended.[15] However, the Court declared that Congress was not authorized to extend coverage of the ADEA to the states; therefore, the ADEA did not validly abrogate states' Eleventh Amendment immunity from suit by private individuals.[16]

III. ANALYSIS

The United States Supreme Court granted certiorari to resolve a conflict among the Federal Courts of Appeals on the question of whether the ADEA[17] validly abrogates the states' Eleventh Amendment immunity from suit by private individuals.[18] To resolve the question, the Court looked to whether Congress expressed a clear intent to abrogate the states' Eleventh Amendment immunity and whether Congress had the authority to extend coverage of the Act to the states.[19]

A. Clear Intent to Abrogate States' Eleventh Amendment Immunity

The Court asserted that § 626(b) clearly provided for suits against states by private individuals. Section 626(b) provides that the ADEA "shall be enforced in accordance with the powers, remedies, and procedures provided in §§ 211(b), 216 *(except for subsection (a) thereof)*, and 217 of this title, and subsection (c) of this section."[20] Section 216(b) is a provision under the Fair Labor Standards Act of 1938[21] ("FLSA") which "authorizes employees to maintain actions for backpay against any employer (including a public agency) in any

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15. *Id.* at 639 (granting certiorari originally to resolve the conflict among Federal Courts of Appeals of "whether the ADEA validly abrogates the states' Eleventh Amendment immunity").

16. *Id.* at 645-46 (recognizing that age is not a suspect classification under the Equal Protection Clause and that states may discriminate "on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest").

17. *See* 29 U.S.C. § 623(a)(1) (1974) ("The [ADEA] makes it unlawful for an employer 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."). The protected class of individuals is anyone 40 years or older. *Kimel*, 120 S. Ct. at 637.

18. *Kimel*, 120 S. Ct. at 639.

19. *Id.* at 640 (indicating that the two issues to consider are whether Congress expressed its intent "to abrogate that immunity, and second, if it did, whether Congress acted pursuant to a valid grant of constitutional authority").

20. *Id.*

21. 88 Stat. 61, *as amended*, 29 U.S.C. § 216(b) (1994 ed. & Supp. III).

Federal or State court of competent jurisdiction . . . ."[22] The Court noted that § 203(x), defines "public agency" as including "the government of a State or a political subdivision of a State."[23] The Court drew the conclusion that the plain language of the aforementioned provisions demonstrated a clear congressional intent to subject states to suits by private individuals.[24]

Respondents argued that these provisions were not unmistakably clear for two reasons: (1) an enforcement mechanism is already contained in the ADEA under § 626(c)(1)[25] and (2) the existence of § 626(c)(1) "renders Congress' intent to incorporate the clear statement of abrogation in § 216(b), the FLSA's enforcement provision, ambiguous."[26] The Court responded that § 626(b) "clearly states that the ADEA 'shall be enforced in accordance with the powers, remedies, and procedures provided in [§ 216(b)] *and* subsection (c) of this section."[27] The Court maintained that the remedies provided under ADEA § 626(c)(1) and the remedies provided under the incorporated FLSA enforcement provision (§ 216(b)), both operated in conjunction to provide relief.[28]

Respondents' also argued that the phrase, "court of competent jurisdiction" under FLSA § 216(b) rendered congressional intent of abrogation unclear.[29] For support, Respondents cited *Kennecott Copper Corp. v. State Tax Comm'n,*[30] and argued that Congress intended ADEA suits to be maintained only under circumstances in which states had previously agreed to waive immunity.[31] In response, the Court explained that in *Kennecott,* it found that the state statute was unclear, in part, for the reason that it provided that taxpayers may "bring an action in *any court* of competent jurisdiction."[32] The Court further

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22. *Kimel,* 120 S. Ct. at 640.

23. *Id.*

24. *Id.* (applying the "simple but stringent test: 'Congress may abrogate the states' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute'") (quoting Dellmuth v. Muth, 491 U.S. 223, 228 (1989)).

25. *See* 29 U.S.C. § 626(c)(1) (1974) ("Any person aggrieved 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.").

26. *Kimel,* 120 S. Ct. at 640-41.

27. *Id.* at 641.

28. *Id.* (referencing McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 357 (1995)).

29. *Id.* (relying heavily on Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 574 (1946) in which the Court disagreed).

30. 327 U.S. 573 (1946).

31. *Kimel,* 120 S. Ct. at 641.

32. *Id.*

explained that under the facts of the case and the state statute in question, it was clear that suit may be brought in a state court but not in a federal court.[33] In contrast, the Court noted that FLSA § 216(b) provided that employees may bring suits against states "in any *Federal or State* court of competent jurisdiction."[34] The Court asserted that the "choice of language" is a clear indication of congressional intent to abrogate the states' Eleventh Amendment immunity.[35]

B. Congressional Authority to Extend Coverage of the ADEA to the States

Relying on precedent, the Court reaffirmed that "the ADEA constitutes a valid exercise of Congress' power to regulate Commerce . . . among the several states and that the Act did not transgress any external restraints imposed on the commerce power by the Tenth Amendment."[36] Additionally, the Court reaffirmed that "Congress lacks power under Article 1 to abrogate the states' sovereign immunity."[37] The Court asserted that the source of Congress' power to abrogate states' Eleventh Amendment immunity does not lie in the Commerce Clause; rather, it lies in the enforcement clause of § 5 of the Fourteenth Amendment and therefore, if Congress' power to enact the ADEA rested solely on the Commerce Clause, then the extension of the Act to the states is impermissible.[38] The Court reaffirmed the principle that the states' sovereign immunity is constitutionally mandated.[39]

1. Appropriate Legislation Under § 5 of the Fourteenth Amendment

The Court asserted that Congress may remedy and deter violations of "rights guaranteed under the [Fourteenth Amendment] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."[40] However,

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33. *See id.* (authorizing employee suits against states at both federal and state levels).

34. *Id.*

35. *Id.* (emphasizing that the language used in § 216(b) eliminates the ambiguity at issue in Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946)).

36. Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 643 (2000).

37. *Id.* (citing Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72-73 (1996)).

38. *See id.* (explaining that under Article I, § 8, cl. 3, Congress "has authority to regulate commerce, and because the court found the ADEA valid under the Commerce Clause, it was unnecessary to determine whether the Act could also be supported by Congress' power under § 5 of the Fourteenth Amendment").

39. *See id.* (citing the Court's decision in Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72-73 (1996), holding that Congress cannot abrogate the states' sovereign immunity under Article I).

40. *Id.*

the Court cautioned that Congress' enforcement power is limited to "the 'power to enforce,' not the power to determine what constitutes a constitutional violation [as] [t]he ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch."[41] The Court applied the "congruence and proportionality" test to determine whether the ADEA was "appropriate legislation under § 5 of the Fourteenth Amendment."[42]

2. Age is Not a Suspect Classification

The Court reaffirmed its prior holdings[43] that age is not a suspect classification.[44] Classifications based on age differ from classifications based on race or gender in that age classifications "cannot be characterized as 'so seldom relevant to the achievement of any legitimate state interest.'"[45] Moreover, "[o]lder persons . . . have not been subjected to a 'history of purposeful unequal treatment'"[46] and "[o]ld age also does not define a discrete and insular minority" as the status of old age is one which all persons, regardless of race or gender, may experience.[47]

3. Rational Basis Standard vs. Heightened Scrutiny Standard

The Court asserted that it is not violative of the Fourteenth Amendment for the states to discriminate on the basis of age "if the age classification in question is rationally related to a legitimate state interest."[48] In contrast, the Court maintained that "[t]he substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act."[49] The Court argued that the ADEA "through its broad restriction on the use of age as a discriminating

41. Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 643 (2000).

42. *Id.* at 644.

43. *See generally* Gregory v. Ashcroft, 501 U.S. 452 (1991); Vance v. Bradley, 440 U.S. 93 (1979); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (per curiam) (finding age classifications not violative of the Equal Protection Clause).

44. *Kimel*, 120 S. Ct. at 645 (indicating that the Court considered claims of unconstitutional age discrimination based upon Equal Protection on three prior occasions in which it was not persuaded (*see supra* text and notes accompanying note 41)).

45. *Id.* (quoting Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985)).

46. *Id.* (citing *Murgia*, 427 U.S. at 313 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973))).

47. *Id.* (citing *Murgia*, 427 U.S. at 313-14).

48. *Id.* at 646.

49. Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 645 (2000).

factor,[50] prohibit[ed] substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard."[51] Petitioners argued that the ADEA does not overreach; rather, the ADEA's prohibitions coupled with its exceptions[52] protected against "arbitrary age discrimination."[53] The Court contended that despite the available affirmative bona fide occupational qualification defense, under the ADEA, "the state's use of age is prima facie unlawful."[54] The result, the Court concluded, is such that the ADEA's substantive requirements imposed significantly higher burdens on state employers "at a level akin to our heightened scrutiny cases under the Equal Protection Clause."[55]

Petitioners also argued that the clause permitting "employers to engage in conduct otherwise prohibited by the Act 'where the differentiation is based on reasonable factors other than age'" § 623(f)(1) operated to protect against arbitrary age discrimination.[56] However, the Court interpreted the clause as further demonstrating the Act's over breadth.[57] Under the ADEA, an employer may not use age as a proxy while "[u]nder the Constitution, . . . states may rely on age as a proxy for other characteristics."[58] The Court concluded "that Congress, through the ADEA, has effectively elevated the standard for analyzing age discrimination to heightened scrutiny."[59]

4. Legislative Record

The Court's inquiry into whether the ADEA is appropriate legislation under § 5 of the Fourteenth Amendment, included an examination of the legislative history behind the Act.[60] The Court

50. The ADEA makes unlawful, in the employment context, all "'discriminat[ion] against any individual . . . because of such individual's age.'" 29 U.S.C. § 623(a)(1) (1974).

51. *Kimel*, 120 S. Ct. at 647.

52. *See* 29 U.S.C. § 623(f)(1) (1974) (providing that employers may use age as a factor "when it is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business").

53. *Kimel*, 120 S. Ct. at 647.

54. *Id.*

55. *Id.* at 648.

56. *See id.* (confirming that protection under the ADEA exceeds the requirements of the Equal Protection Clause, as interpreted by the Court).

57. *Id.* at 649 (reasoning that Congress failed to identify a pattern of age discrimination by the states or any age discrimination warranting a constitutional violation).

58. Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 648 (2000).

59. *Id.*

60. *See id.* at 648 (suggesting that "[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one") (citing South Carolina v. Katzenbach, 383

maintained that Congress did not identify a history of age discrimination by states against state employees and none which "rose to the level of constitutional violation."[61] The Court found "that Congress virtually had no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age."[62] The Court did not find Petitioners' evidence of "isolated sentences clipped from floor debates and legislative reports" persuasive.[63] The Court concluded that the ADEA was not appropriate legislation under § 5 of the Fourteenth Amendment and its extension to the states was invalid.[64]

The Court dismissed the suits and affirmed the Eleventh Circuit's ruling.[65]

IV. SEPARATE OPINIONS

A. Justice Stevens (dissenting in part, concurring in part)

Justice Stevens concurred that Congress manifested a clear intent to subject states to suits brought by private individuals for violations of the ADEA.[66] He argued that "Congress' power to regulate the American economy includes the power to regulate both the public and the private sectors of the labor market."[67] In accordance with this power, Justice Stevens maintained that federal rules which prohibit workplace discrimination are enforceable against both public and private employers.[68] He stated that "Congress' power to authorize federal remedies against state agencies that violate federal statutory obligations is coextensive with its power to impose those obligations

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U.S. 301, 308 (1966)). The Court further concludes that Congress' 1974 extension of the ADEA to the states was inappropriate for solving an inconsequential problem. *Id.* at 648-49.

61. *Id.* at 649.

62. *Id.*

63. Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 649 (2000) (reasoning that petitioners' evidence did not convince the Court that states engaged in any unconstitutional age discrimination and that evidence presented to the Court "was cobble[d] together from a decade's worth of congressional reports").

64. *See id.* at 650 (concluding that Congress had no reason to institute broad legislation, nor did Congress have reason to believe such legislation was necessary).

65. *See id.* (holding that the ADEA is not an appropriate exercise of congressional power under § 5 of the Fourteenth Amendment).

66. *Id.* at 652 n.5.

67. *Id.* at 650.

68. Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 650-51 (2000) (stating that the applicability of federal rules outlawing workplace discrimination to public and private sector employers is comparable to federal rules that apply to the regulation of wages, hours, or health and safety provisions).

on the states in the first place."[69] Justice Stevens further argued that the Judicial Branch was not the "constitutional guardian" of state interests.[70] Rather, he reasoned that the Framers protected against federal infringement of state interests by designing such structural safeguards as "equal representation in the Senate" by each state and a House "composed of Representatives selected by voters in the several states."[71] Therefore, Justice Stevens surmised that "[w]henever Congress passes a statute, it does so against the background of state law already in place; the propriety of taking national action is thus measured by the metric of the existing state norms that Congress seeks to supplement or supplant."[72] Justice Stevens reasoned that the correct interpretation of the Eleventh Amendment is a "textual limitation on the diversity jurisdiction of the federal courts."[73] In this case however, the court's diversity jurisdiction was not invoked and the claims pursued arose under federal law.[74] Thus, Justice Stevens contended that the Opinion of the Court "rest[ed] entirely on a novel judicial interpretation of the doctrine of sovereign immunity, which the Court treats as though it were a constitutional precept."[75] Justice Stevens concluded that Congress' power to create federal rights coexisted with the power to enforce violations of those rights in federal courts.[76]

B. Justice Thomas (concurring in part, dissenting in part)

1. Clear Statement by Incorporation (The Sequence of Events Argument)

Justice Thomas explained that the ADEA, as originally enacted in 1967, incorporated by reference § 216(b), the enforcement provision of the FLSA.[77] However, § 216(b) did not contain a clear statement of abrogation of states' immunity as the Court found in *Employees of Dep't*

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69. *Id.* at 651.

70. *Id.* (citing Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954)).

71. *Id.*

72. *Id.*

73. Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 652-53 (2000).

74. *Id.* at 655 (expressing that diversity of the parties was inconsequential, given the fact that plaintiffs asserted claims arising out of federal law).

75. *Id.*

76. *Id.* at 651 (explaining that Congress can "use its broad range of flexible legislative tools to approach the delicate issue of how to balance local and national interests in the most responsive and careful manner").

77. *See id.* at 655 (interpreting the Fair Labor Standards Act of 1938 and 29 U.S.C. § 216(b) (1970)).

of Public Health & Welfare of Mo. v. Department of Public Health & Welfare of Mo.,[78] a case in which the Court was called upon to interpret this section of the FLSA.[79] In 1974, this section was modified and included language Petitioners argued evidenced a clear statement of abrogation.[80] Justice Thomas noted that there is no mention of ADEA § 626(b) in the legislation amending FLSA § 216(b) and § 6(d)(1) of the 1974 Amendments.[81] As such, he was "unwilling to indulge the fiction that Congress, when it amended § 216(b), recognized the consequences for a separate Act (the ADEA) that incorporates the amended provision."[82] Justice Thomas acknowledged that although § 28 of the 1974 Amendments modified select provisions of the ADEA, which implied that Congress recognized the consequences of FLSA § 6(d)(1) on the ADEA, an examination of the effect of FLSA § 6(d)(2)(A) on the ADEA revealed implications to the contrary.[83] FLSA § 6(d)(2)(A) added subsection (d) to FLSA statute of limitations § 255, which is incorporated by reference in the ADEA by virtue of § 7(e) of the ADEA.[84] However, FLSA § 255(d)—which suspended the statute of limitations[85] for actions brought under § 16(b) of the FLSA[86]—had no application to the ADEA because the ADEA's substantive requirements were not applicable to the states until 1974.[87] As such, prior to 1974, "there were no ADEA suits against states that could be affected by § 255(d)'s tolling provision."[88] Justice Thomas asserted

78. 411 U.S. 279 (1973).

79. *Kimel*, 120 S. Ct. at 654-55 (stating that in this case, the ADEA's substantive mandates extended to janitors, security guards, and secretaries (among others) "in every office building in a state's governmental hierarchy").

80. *See id.* (quoting and illustrating the 1974 amended version of 29 U.S.C. § 216(b) which states in part that "an action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction").

81. *See id.* at 655-56 (raising issues of Congress' consideration of possible consequences the amendment poses for the other referenced Act).

82. *Id.* at 656.

83. *See id.* (criticizing that Congress "was oblivious to the impact of § 6(d)(2)(A) on the ADEA").

84. *See* Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 656 (2000) (disclosing that § 255 became part of the ADEA in 1974, yet the new § 255(d) could not have applied to the ADEA because its substantive mandates were inapplicable prior to 1974).

85. The statute of limitations was suspended for 180 days after the effective date of the 1974 Amendments for actions brought on or before April 18, 1973. *Id.*

86. The FLSA suspended the statute of limitations for purposes of allowing "FLSA plaintiffs who had been frustrated by state defendants' invocation of Eleventh Amendment immunity under *Employees* to avail themselves of the newly amended § 216(b)." *Id.*

87. *Id.*

88. *Id.*

that if Congress was aware of this "overinclusiveness problem," it would have amended ADEA § 626(e) to incorporate by reference only § 255(a)-(c) in the same way it treated ADEA § 626(b), which incorporated FLSA § 216 with exception to "subsection (a) thereof."[89] Justice Thomas argued this evidenced that "Congress did not clearly focus on the impact of § 6(d)(2)(A) on the ADEA" which further "suggest[ed] that Congress was similarly inattentive to the impact of § 6(d)(1)."[90] Justice Thomas concluded that the Court may at best only *infer* that Congress was aware of "every last ripple those amendments might cause in the ADEA" but the Court cannot *conclude* that Congress expressed an "'unequivocal declaration'" of abrogation.[91]

2. THE ADEA INCORPORATES ONLY "EXTRAS" FROM THE FLSA, NOT OVERLAPPING PROVISIONS

Justice Thomas argued further that ADEA § 626(b) did not incorporate FLSA § 216(b) in its entirety—specifically, the portion creating a private right-of-action—but assuming arguendo that it did, Justice Thomas maintained that FLSA § 216(b) was not a clear statement of abrogation.[92] He argued that the ADEA already provided for a private right-of-action in ADEA § 626(c)(1).[93] As such, the FLSA's § 216(b) private right-of-action overlaps the ADEA's § 626(c)(1).[94] Justice Thomas maintained that the Court's interpretation of these overlapping provisions as allowing individuals to choose between the two for support of their right of action is a "permissible inference" but not an "unequivocal declaration . . . that Congress intended to exercise its powers of abrogation."[95]

Justice Thomas argued that the decision rendered in *Hoffmann-*

89. Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 656 (2000).

90. *Id.*

91. *Id.* at 657 (quoting Dellmuth v. Muth, 491 U.S. 223, 232 (1989)).

92. *See id.* (expressing the two reasons why the Court believed this was not such a case to provide clarity to an amendment, even if doing so might sometimes provide a clear statement to abrogate for purposes of the Act).

93. *See* 29 U.S.C. § 626(c)(1) (1974) ("Any person aggrieved 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."). *Cf.* The FLSA § 216(b) provision which provides that "[a]n action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction . . . ." 88 Stat. 61, *as amended*, 29 U.S.C. § 216(b) (1994 ed. & Supp. III).

94. *Kimel*, 120 S. Ct. at 657 (arguing that "the ADEA . . . contains a vital element found in both Title VII and the Fair Labor Standards Act: It grants an injured employee a right of action to obtain the authorized relief" (quoting McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358 (1995))).

95. *Id.* at 658 (quoting *Dellmuth*, 491 U.S. at 232).

LaRoche Inc. v. Sperling,[96] and relied upon by the Court actually lent support to his argument that the ADEA incorporated only "extras" from the FLSA—not overlapping provisions.[97] In *Hoffman-LaRoche*, the Court was presented with the issue of whether the ADEA, through its incorporation of FLSA § 216(b), authorized the maintenance of collective actions.[98] Justice Thomas contended that the clause, "and other employees similarly situated" was not an overlapping provision but merely added a type of relief not already provided for in ADEA § 626(c)(1).[99] Furthermore, the *Hoffman-LaRoche* Court did not address "§ 216(b)'s implications for the Eleventh Amendment clear statement rule" as the Court selectively quoted the provision by "omitting the words '(including a public agency)'" in its interpretative analysis of the provision.[100] Justice Thomas argued that the other cases[101] the Court relied on also did not address the Eleventh Amendment issue and further lent support that the ADEA incorporated only "extras" from the FLSA—not overlapping provisions.[102] The essence of Justice Thomas' argument is that the exclusive private right-of-action is provided in ADEA § 626(c)(1) and the incorporated provision of FLSA § 216(b) by virtue of ADEA § 626(b), operated to provide additional relief (i.e., the "extras")—such as collective actions, attorney's fees, and liquidated damages—not already provided for under the ADEA.[103] Justice Thomas maintained that this interpretation resolved the overlapping problem.[104]

Assuming arguendo that the ADEA § 626(b) did incorporate FLSA § 216(b) in its entirety—including the portion creating a private right-of-action, Justice Thomas maintained that FLSA § 216(b) was

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96. 493 U.S. 165 (1989).

97. *Kimel*, 120 S. Ct. at 658 n.5 (indicating that the Hoffmann-LaRoche Court failed to incorporate § 216(b)'s implications for the "clear statement rule" as provided by the Eleventh Amendment due to its "selective quotations of § 216(b)–omitting the words '(including a public agency)'").

98. *Id.* (citing § 216(b) of the FLSA).

99. *Id.* (analyzing § 216(b) of the FLSA and § 626(c)(1) of the ADEA).

100. *Id.* at 658 n.5.

101. *See* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352 (1995); Lorillard v. Pons, 434 U.S. 575 (1978).

102. *Kimel*, 120 S. Ct. at 658 n.6.

103. *See id.* at 658 (explaining that "if § 216(b)'s private right-of-action provision were incorporated by § 626(b) and hence available to ADEA plaintiffs, the analogous right-of-action established by § 626(c)(1) would be wholly superfluous–an interpretive problem" which the court refused to entertain).

104. *See id.* (stating that an ADEA plaintiff may choose either § 626(c)(1) or § 216(b) as the basis for her private right-of-action, but the plausibility of this would remain a "permissible inference").

not a clear statement of abrogation as the provision provided that a suit may be maintained in "any Federal or State court of *competent* jurisdiction."[105] Justice Thomas argued "that a federal court is not 'competent' under the Eleventh Amendment to adjudicate a suit by a private citizen against a State unless the State consents to the suit," and he supported his argument by referring to *Employees* where the Court stated that "'a federal court is not *competent* to render judgment against a nonconsenting State.'"[106]

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105. *Id.* at 659 (quoting 29 U.S.C. § 216(b) (emphasis added)).

106. *Id.* (quoting Employees of Dep't of Public Health & Welfare of Mo. v. Department of Public Health & Welfare of Mo., 411 U.S. 279, 284 (1973)) (emphasis added).