OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: J. DANIEL KIMEL, JR., ET AL., Petitioners v. FLORIDA BOARD OF REGENTS, ET AL.; and UNITED STATES, Petitioner v. FLORIDA BOARD OF REGENTS, ET AL.

CASE NO: 98-791 & 98-796 C.2

PLACE: Washington, D.C.

DATE: Wednesday, October 13, 1999

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REVISED

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IN THE SUPREME COURT OF THE UNITED STATES

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

Petitioners :

v. : No. 98-791

FLORIDA BOARD OF REGENTS, :

ET AL.; :

and :

UNITED STATES, :

Petitioner :

v. : No. 98-796

FLORIDA BOARD OF REGENTS, :

ET AL. :

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Washington, D.C.

Wednesday, October 13, 1999

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

JEREMIAH A. COLLINS, ESQ., Washington, D.C.; on behalf of Petitioners Kimel, et al.

BARBARA D. UNDERWOOD, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of Petitioner United States.

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APPEARANCES:

JEFFREY S. SUTTON, ESQ., Columbus, Ohio; on behalf of the Respondents.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 98-791, J Daniel Kimel v. The Florida Board of Regents and the United States versus the same.

Mr. Collins.

ORAL ARGUMENT OF JEREMIAH A. COLLINS

ON BEHALF OF PETITIONERS KIMEL, ET AL.

MR. COLLINS: Mr. Chief Justice, and may it please the Court:

Employees of State agencies who have been injured by violations of the Age Discrimination in Employment Act are not barred by the Eleventh Amendment from suing the States in Federal court for redress, because Congress unequivocally authorized such suits in the statute, and Congress had the power to do so under section 5 of the Fourteenth Amendment.

The authorization of these suits is established by the incorporation into the ADEA of section 16(b) of the Fair Labor Standards Act. That section specifically provides for suits by employees against public agencies, including the States, in State or Federal court and, as this Court observed last year in Alden, it provides for those suits without regard for consent.

By incorporating this provision into the ADEA,

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together with provisions which state that claims under the ADEA will be deemed to be claims under the Fair Labor Standards Act for this purpose, Congress unequivocally authorized these suits and abrogated the State's Eleventh Amendment immunity.

QUESTION: Mr. Collins, how many other Federal statutes purport to abrogate State sovereign immunity without specifically referring to the Eleventh Amendment or to sovereign immunity?

MR. COLLINS: I'm not sure --

QUESTION: Because this statute doesn't.

MR. COLLINS: That's correct, Justice --

QUESTION: And I just wondered how many others there might be that use similar language without any reference to the --

MR. COLLINS: I don't have the number, Justice O'Connor. The statute, of course in Seminole Tribe did not refer to the Eleventh Amendment, and the statute in Union Gas didn't refer to the Eleventh Amendment or sovereign immunity, and the Court held in both of those cases that the intent was clear to abrogate.

QUESTION: In our case, Kennecott Copper, though, we didn't think that the phrase, court of competent jurisdiction, was enough to do the --

MR. COLLINS: And that was true in Missouri

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Employees as well, Your Honor, under the FLSA, but here Congress has gone further, as the Court observed in Alden, and clearer, in that it refers among other things to courts State or Federal, and to suits against any employer, including a public agency.

And we also know, not merely from legislative history but from the retroactivity provision of the 1974 amendments to section 16(b), that Congress amended section 16(b) into its present form for the specific purpose of providing the clear statement of intent to abrogate that the Court had found lacking in Missouri Employees.

So in these -- in this situation the specific phrasing referring to public agencies, State or Federal courts, combined with the retroactivity provision making it unambiguous that the purpose of this provision is to provide an abrogation as to suits against States in Federal court, we believe is unequivocally clear.

QUESTION: Is --

QUESTION: Suppose you had -- excuse me.

Suppose you had a jurisdiction where the State has waived its Eleventh Amendment immunity in its own courts, but insists on the immunity in the Federal courts, wouldn't it be fair to say that the State court is a court of competent jurisdiction, but that the Federal court is not?

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MR. COLLINS: I don't believe that's correct, Justice Kennedy. The -- of course, competent jurisdiction is a phrase used in many statutes. If it weren't used, a person conceivably could sue in an appellate court, sue in a small claims court, but this Court held in Wisconsin Department of Correction v. Schacht that the fact that an Eleventh Amendment immunity could be available in a particular case does not mean that the Federal court lacks jurisdiction over that case, lacks original jurisdiction.

So it seems to me that the phrase, competent jurisdiction, cannot properly be construed as importing defenses of consent or lack of consent, immunity defenses. I think Schacht is clear on that, and again, it is quite clear, I think not only from Alden but from the retroactivity provision of the '74 amendments that we have here a statute that's unusually explicit in being designed to provide the statement of clear intent that the Court upheld in Missouri to have been missing from the FLSA prior to the '74 amendments.

QUESTION: Mr. Collins, in answer to Justice O'Connor's question, you mentioned the IGRA that figured in Seminole that didn't use, make specific reference to the Eleventh Amendment. Remind me about title VII. Does title VII make a specific reference to it?

MR. COLLINS: That's right, Justice Ginsburg,

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no, it does not, and I believe that there are numerous others that do not make a specific reference.

QUESTION: And in this case the term public agency is specifically defined to include a State, is that correct?

MR. COLLINS: That's correct.

Now, Congress had the power to abrogate State immunity from claims under this statute because this is a statute aimed at arbitrary discrimination against a class of people based on stereotypes about that class.

QUESTION: Well, probably the statute goes beyond any constitutional substantive limit, does it not?

MR. COLLINS: It does, Justice O'Connor, and it certainly goes beyond what the courts acting without congressional guidance could find to be unconstitutional, but it does so, as I'll undertake to explain, in a way that's congruent, to use this Court's terms, with the constitutional prohibition.

And the heart of the statute, the core, the reason it was enacted, and the purpose that is served by its various provisions, is to get at a form of what this Court has called invidious discrimination in McKennon --

QUESTION: Was there any more indication in the history of this legislation other than trying to reach the private sector? There's very little that indicates there

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was some need to reach State and local employment --

MR. COLLINS: I don't think that's the case, Justice --

QUESTION: -- legislation, isn't that true?

MR. COLLINS: I would say not, Justice O'Connor, because even in 1967, in the years leading up to the initial enactment, what Congress was looking at, and what the Labor Department, for example, studied in the reports it gave to Congress, was the general approach that employers of all sorts took to decisionmaking based on age, and the Labor Department surveys, for example, did include public agencies.

Many -- there were -- Congressmen referred to public agencies along with private employers in '67, and what Congress was finding in 1967, based on the information it was receiving, was essentially a pervasive problem in our society of how people look at older workers.

QUESTION: You say that Congress was addressing its attention to invidious discrimination and yet, in our Murgia case, we said in effect that there wasn't, under the Constitution, invidious discrimination when you classify it on the basis of age, so can Congress change that constitutional law?

MR. COLLINS: No, Congress is not changing

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constitutional law, Mr. Chief Justice, and in Murgia the Court did not say that there could never be unconstitutional or invidious discrimination based on --

QUESTION: No, but certainly it approved the use of stereotypes.

MR. COLLINS: I would not -- not a stereotype of the sort that Congress was concerned with in the statute. It approved a generalization, but what Congress --

QUESTION: Well, what's the difference between a generalization and a stereotype?

MR. COLLINS: Well, I would say the difference, Mr. Chief Justice, what Congress --

QUESTION: I would like your answer to that question, not what Congress --

MR. COLLINS: One can make a generalization regarding any classification which is for the most part true but will have certain exceptions, and which is essentially grounded in a rational determination.

One can have a stereotype, which is what Congress found to be happening with regard to age, where one has a generalization that first of all is not accurate even on the average, which is what Congress -- what the Labor Department determined and what Congress accepted, and which reflects not a rational assessment of qualifications, but a prejudice, an unfounded prejudice.

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QUESTION: Any unfounded prejudice is unconstitutional.

MR. COLLINS: At least --

QUESTION: I mean, I find it extraordinary that Congress would have felt the need to enforce the Fourteenth Amendment in an area where there was no opinion of this Court saying that the Fourteenth Amendment was violated, and a suggestion that it wasn't violated. Congress just went ahead and identified on its own this serious constitutional violation that had been occurring throughout the United States that, the existence of which is not reflected in a single opinion of the Supreme Court.

MR. COLLINS: Justice Scalia, the judgment Congress made is in no way inconsistent with anything reflected in the decisions of this Court. What the Court had said in Murgia and Vance and Gregory was not that age in general, or certainly not always, is a rational basis for decisions.

The Court in those cases looked at the particular jobs in question, looked particularly in Gregory at the difficulty, in the circumstances, of making individual judgments, and found a rational basis under a form of --

QUESTION: Do you think it's unconstitutional -- suppose a State says, you know, we just don't have enough

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jobs. We're just concerned, and we're going to increase the number of jobs in the labor force by having mandatory retirement at age 55, no indication that people can't do the job after that, and that is unconstitutional.

MR. COLLINS: That kind of a judgment would be closer, Justice Scalia, because it would not be based on the kinds of stigmatizing attitudes towards people's ability that Congress found to be pervasive.

What Congress found to be the basic reason that older workers were not being retained were stereotypes about their qualifications, not economic judgments of the nature of --

QUESTION: But in Murgia -- in Murgia, it wasn't economic. It was what you might call stereotypes about going downhill after a certain age, which --

MR. COLLINS: But --

QUESTION: -- a lot of us can testify to.

(Laughter.)

MR. COLLINS: But Mr. Chief Justice, I think two points are crucial about Murgia and Vance and Gregory. First, the Court emphasized the nature and in some instances the evidence about the particular jobs that made it rational to conclude there was a significant problem of inability of older workers, and an impossibility of making individual determinations.

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And secondly, and equally important, the Court emphasized that it was applying a mode of review that applies when the courts are acting without congressional guidance. As the Court said in Cleburne, standards of review are rules the courts devise when Congress has not spoken, and that were being applied to legislative judgments where the legislators don't -- can't be called into court to explain all their reasons.

The Court in fact emphasized that one of the justifications for the limited role the courts play in reviewing age-based classifications is that age is a matter that the political process can deal with. It's not a discrete and insular minority, and Congress --

QUESTION: Well, was the suggestion that the political process could deal with it by making new constitutional law?

MR. COLLINS: No, Mr. Chief Justice, and we don't believe that's what's been done here. The basic constitutional law here is that you cannot use arbitrary classifications where they are too attenuated.

This Court has said, for example, property ownership, it's not a suspect classification, but the Court held unanimously in 1989 that it violated the Equal Protection Clause to deny certain Government positions to people because they didn't own property.

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QUESTION: Yes, and if Congress had addressed itself in the ADEA to simply arbitrary and irrational judgments based on age, but it seems to me it went a good deal further than that and said that between 40 and 65, that you simply could not discriminate in any way between these people.

MR. COLLINS: It didn't go quite that far, Mr. Chief Justice, and I think actually it established a scheme which is more proportional to the Equal Protection Clause core than in the voting rights cases, for example, because what Congress did, it recognized, it learned from the Labor Department that there are some instances when employers rely on age in a noninvidious, rational way.

One area was benefits. Another was where an employer can show that some older workers, because of their age, are unable to perform satisfactorily, and it's not practical to make individual determinations, as was the situation in Gregory, for example, as the Court emphasized. Sometimes you can't. Congress allows reliance on age in that circumstance.

So what Congress has fashioned here is a system of proof and defenses which, we submit, is well-calculated to get at the arbitrary, invidious discrimination that Congress was aiming at.

QUESTION: Is there any indication in the

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statute or, as far as you know, in the legislative history that Congress believed that such invidious discrimination by the States was unconstitutional?

MR. COLLINS: There's no reference to the Constitution, Justice Scalia.

QUESTION: That's extraordinary.

MR. COLLINS: There are comparisons to title VII and to other discrimination statutes which Congress certainly knew had been passed to deal with constitutional problems, but of course --

QUESTION: You're saying Congress took this action in order to enforce the Fourteenth Amendment, but makes no reference to the Fourteenth Amendment in the text of the statute, or any reference to the fact that it thought this action was unconstitutional.

MR. COLLINS: That's correct, Justice Scalia. That was the case in Fullilove, and that was the situation, of course, in Wyoming, where the Court --

QUESTION: Fullilove has been overruled.

MR. COLLINS: Not on the point that Congress' section 5 power could be considered as a source of the statute, despite the fact that Congress hadn't mentioned the Fourteenth Amendment. It's been overruled in terms of the substantive analysis of when one can take race into account in that context, but the lead opinion in

Fullilove, and even the dissent, both said we will view this -- we will analyze this as legislation adopted under section 5 of the Fourteenth Amendment, even though the fact was Congress had not referred to that.

And the Court has always said that what we do when we review the permissibility of a congressional enactment is to look at what Congress has done and see, with a presumption of constitutionality, whether there is any constitutional power to support it. The Court has never required that Congress identify the power it's invoking.

QUESTION: But it's one thing to say you're acting under section 5, which gives the enforcement power to Congress, but then for Congress to go and say we're acting under section 5 but we don't even mention what constitutional provision we're talking about seems strange.

MR. COLLINS: But I submit, Mr. Chief Justice, that if Congress has made clear its judgment as to the nature of the conduct it is dealing with, and it made that clear here not only in '67 but in the '74 legislative history that it believed it was dealing with arbitrary, invidious discrimination, it seems to me the fact that Congress did not then finish the sentence and say, and that violates the Constitution, is not dispositive as to

Congress' possession of the power to enact the statute.

QUESTION: Thank you, Mr. Collins.

Ms. Underwood, we'll hear from you.

ORAL ARGUMENT OF BARBARA D. UNDERWOOD

ON BEHALF OF PETITIONER UNITED STATES

MS. UNDERWOOD: Mr. Chief Justice, and may it please the Court:

The Age Discrimination Act was passed after Congress heard extensive evidence that employers were refusing to hire people over the age of 40 on the basis of myths and stereotypes. People in their forties and fifties who lost their jobs or reentered the job market after child-rearing couldn't find new jobs because of this prejudice.

The legislative findings say explicitly that older workers are, quote, disadvantaged in their efforts to retain employment and especially to regain employment when displaced from jobs, and when Congress extended the ban on age discrimination to public employers in 1974, public employers State and Federal, it did so on the basis of evidence that public employers were also engaging in this arbitrary and irrational discrimination. It had evidence in the form of an extensive report that had been done in the State of California --

QUESTION: Oh, excuse me. It's arbitrary and

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irrational as to any particular individual, but it's not arbitrary and irrational in gross.

MS. UNDERWOOD: Well --

QUESTION: Which I thought is the usual test for rational basis scrutiny.

MS. UNDERWOOD: Actually, the --

QUESTION: I mean, in gross you could say, you know, I'm better off hiring people under 60. Is that an irrational calculation? You can say it's irrational as to this individual. You can't say for sure that he can't do the job just because he's over 60. But if I make a generalization, I'm better off having younger workers, is that irrational?

MS. UNDERWOOD: The evidence before Congress was of a decision that was common, and it was irrational. It wasn't under 60, Justice Scalia, it was under 40, and what Congress found was that employers that -- there were studies that showed that more than half the jobs in the workplace were closed to people under 40, or under 45 --

QUESTION: So is that irrational? Is that irrational?

MS. UNDERWOOD: And what they --

QUESTION: I want to hire somebody who will be with my company for a long time. I don't want somebody that's going to be retiring relatively soon.

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MS. UNDERWOOD: And what Congress found was that those decisions were predominantly based on beliefs that Congress also found, on the basis of studies, to be false, that --

QUESTION: But that's not false --

MS. UNDERWOOD: It is --

QUESTION: -- if the person who's 40 is going to be retiring sooner than the person who's 20. How is that false?

MS. UNDERWOOD: It's false --

QUESTION: Now, you can say as a policy matter we shouldn't allow this. That's fine.

MS. UNDERWOOD: It's false --

QUESTION: But to say that it's unconstitutional because it's irrational, I -- it just boggles my mind.

MS. UNDERWOOD: The studies before Congress showed that in fact younger employees did not stay with companies longer than people who joined them at the age -- in their forties and fifties.

It's true, Justice Scalia, that in principle, if one were speculating about the probabilities, one might suppose that. But the studies showed that while they may leave for different reasons, they leave more often, not less often than older workers. The studies showed that it's -- that the workers in the protected class were not

more often absent, did not -- were not less loyal, that is, did not move around, and were not less productive. That's the evidence --

QUESTION: And didn't retire sooner.

MS. UNDERWOOD: They didn't leave sooner. Obviously, they left for retirement sooner than younger workers left for retirement, but younger workers --

QUESTION: Exclude one reason. I mean, you can exclude one reason for losing the worker, and that's not irrational.

MS. UNDERWOOD: Well, what Congress found was that the reasons actually used by employers, namely, the belief that they were less productive, more often absent, and left sooner, were false, that that's what the studies showed, and that that's the belief on which the employers were by and large acting, and on the basis of that kind of information, Congress passed this law.

QUESTION: Well, at the very least there wasn't any focus, was there, on State action?

MS. UNDERWOOD: There was, even in 1967 when the law was passed, evidence before Congress about State action, although --

QUESTION: There's just very little reference to State action, and don't most States have their own age discrimination laws today?

MS. UNDERWOOD: Well, by now they do. Actually, when the statute was --

QUESTION: They certainly do now.

MS. UNDERWOOD: When the statute was passed in '67, there were only a few. When the statute --

QUESTION: Could not these very plaintiffs have pursued State law actions? Certainly Florida has actions --

MS. UNDERWOOD: It's actually not clear about the Alabama plaintiff. There's a question --

QUESTION: But Florida clearly has laws.

MS. UNDERWOOD: Florida has laws. The existence of State laws doesn't suggest that there's not a problem. In fact, to the contrary. It suggests that the States recognize that there's a problem and, in fact, the State officials charged with enforcing the laws that were in effect, the State laws that were in effect in 1974, were eager to have Federal law passed because they said they didn't have the resources or the ability to enforce their laws adequately, so they didn't feel displaced but, rather, supported by the Federal effort.

And the fact that States as a matter of policy prohibit age discrimination doesn't mean that States as employers don't engage in it. Indeed, the extensive California study that was before Congress was exactly such

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a case. It was a State with an employment -- with an age discrimination law, and yet the studies that California had done established that age discrimination was rampant in the public service in California, and that further legislative efforts and administrative efforts would be necessary to do something about it.

QUESTION: Ms. Underwood, in that respect it resembles title VII, doesn't it, because there were EEO laws in the States long before title VII came on the books, and I believe when title VII was extended to public employment, State and Federal, the vast majority of States had their own antidiscrimination statutes.

MS. UNDERWOOD: That's correct. It's never -- it would be surprising to think that the existence of race discrimination and sex discrimination law somehow eliminated the race and sex discrimination problem and made it unnecessary even in public employment, and made it unnecessary for a Federal law to address a problem either in the workplace at large or in public employment generally.

QUESTION: Of course, the reason for the unconstitutionality of race discrimination is not some generalized notion that it's irrational, but the explicit constitutional prohibition of it. That's quite a different --

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MS. UNDERWOOD: That's correct, although the history of sex discrimination is a little bit more ambiguous. That is to say, at the point at which Congress extended the title VII to the States, this Court had not yet held that sex discrimination requires heightened scrutiny, and it still hasn't put it in the same category as race discrimination, and nevertheless, it is appropriate for Congress to -- this Court has endorsed the proposition that title VII is proper legislation even against the States.

QUESTION: Maybe, but I've never heard it argued on the basis of irrationality, that the reason Congress can do this is that sex discrimination is irrational, and therefore -- and therefore title -- the Fourteenth Amendment is triggered.

MS. UNDERWOOD: The fact that age discrimination is not entitled to the same kind of constitutional scrutiny as race discrimination and therefore has to be irrational before it's unconstitutional, as distinguished from the different tests that would be applied to race, doesn't put it beyond the race, the reach of the Protection Clause or beyond the reach of Congress.

When this Court analyzed in Romer and in Cleburne, this Court was looking at grounds of discrimination that are not entitled -- have never been

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held entitled to strict --

QUESTION: But --

MS. UNDERWOOD: -- or even heightened scrutiny.

QUESTION: But Ms. Underwood, by that standard, things that are dealt with on a rational basis approach, zoning decisions and that sort of thing, they're all within Congress' section 5 power under your view, because there can be existent cases of arbitrary exercises of that authority.

MS. UNDERWOOD: Well --

QUESTION: And I presume Congress could then address the subject.

MS. UNDERWOOD: Well, Congress -- what happened here isn't that Congress identified an occasional instance of arbitrary use of age and provided a remedy. It found that there was widespread use of a class-based stereotype, that it also found was false, that was depriving people of the ability to make a living, which is -- I'm not suggesting that's a fundamental right, but that it was having sufficient harmful impact to warrant Federal intervention.

QUESTION: What if Congress were to look over a whole bunch of zoning decisions and say, there's just evidence throughout the country that people are being deprived of their right to make the best use of their

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property by these zoning decisions, so we're just going to make it a Federal statute that allows you to bring everything in Federal court.

MS. UNDERWOOD: No, I don't think that would be an appropriate exercise of the section 5 power. That wouldn't involve a determination -- now, if Congress were to find that a particular class on the basis of stereotypes and myths about that class, were being regularly --

QUESTION: Well, let's say their class is developers.

MS. UNDERWOOD: Well, I think that a -- the kind of person -- class-based judgment based on personal characteristics have traditionally been the subject of persistent discrimination that has a kind of impact on an individ -- on a group --

QUESTION: Don't you think that the far-reaching nature of these questions respecting Congress' power under the Fifth -- Fifth Clause of the Fourteenth Amendment is a reason why we should insist on a very clear statement of intent to abrogate in the first place, then Congress could have these debates. Congress did not have this debate that we are having here.

MS. UNDERWOOD: Congress --

QUESTION: It didn't come to anything close to

it.

MS. UNDERWOOD: Congress had the debate about the rationality of the use of age. That was extensively debated. It was in years of hearings and reports, and it was discussed on the floor.

QUESTION: Ms. Underwood, when Congress makes a conclusion of irrationality regarding the treatment of some insular minority within the electorate, I'm inclined to credit it. When Congress makes such a determination of irrationality with regard to the treatment of a body of voters that is enormous, I am a little more skeptical.

MS. UNDERWOOD: Well, I'd like to mention --

QUESTION: And a body of voters that changes. I mean, we're all going to be old. It's unlike other personal characteristics that you mentioned, race, sex and so forth. Some of us never have to worry about that, right, and you cannot say that about age. We're all going to be old, and therefore you can assume that the laws regarding what happens to the elderly will be more fairly -- will be more fairly adopted than those regarding race or sex.

MS. UNDERWOOD: Well, I think you've identified a distinction, but that doesn't mean that Congress didn't have the power to find what this Court couldn't.

I'd like to save the balance of my time for

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rebuttal, if I may.

QUESTION: Very well, Ms. Underwood. It's you rather than Mr. Collins, then, who will do the rebuttal.

MS. UNDERWOOD: That's correct.

QUESTION: Very well.

Mr. Sutton.

ORAL ARGUMENT OF JEFFREY S. SUTTON

ON BEHALF OF THE RESPONDENTS

MR. SUTTON: Thank you, Mr. Chief Justice, may it please the Court:

In 1974, Congress became the 26th legislature in the country to enact an age discrimination law that applied to public employees. In 1983, 7 years later, this Court in EEOC v. Wyoming held that the Age Discrimination Act was permissible Commerce Clause legislation that applied to the States. We do not challenge that holding.

In the Wyoming case, four justices also reached the question whether the age laws were permissible section 5 legislation. They concluded that they were not. We agree with that reasoning for two reasons. First, Congress failed unmistakably to abrogate the States' immunity from suit and, second, lacked the power to do so.

As to the clear statement point, I'd like to pick up on some of the questioning in the first half of the argument. There are two principal problems, we would

submit, with the clear statement claim petitioners have made. First of all, they have read 626(c) out of the statute. The court enforcement provision that has existed in 626(c) from 1967 all the way to the present accomplishes nothing if petitioners' reading of the incorporation argument is correct, and that's the first problem.

The second problem is 626(c), even on its own terms, and I would even submit 216(b), does not suffice precisely for the reason Justice Kennedy identified, that the phrase, court of competent jurisdiction, still creates an ambiguity about abrogation. Indeed, that's exactly what the Court recognized in the Missouri Employees case.

QUESTION: Mr. Sutton, I don't understand this argument of yours. How does 626(c) have independent effect under your interpretation? I mean, it seems to me under either one it's swallowed up by the later provision, the incorporation of section 216, no?

MR. SUTTON: Yes, Your Honor. Our position is that in incorporating some of the powers and remedies of the FLSA enforcement provision, this is simply not one of the ones that was picked up, for the basic reason that the 626(c) enforcement provision already existed, was not repealed in 1974, and has not been repealed since, so in order to credit petitioner's argument one must assume that

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Congress did a useless act.

The useless act was to have 626(c), the very first sentence, still in existence after 1974, and it's an accepted canon of construction that Congress doesn't do a useless act, that the words of every statute have some purpose and meaning. That may not be the best reading of all of these statutes, but that's not our burden. Our burden is simply to show that it's a plausible one, and that they have not left any reason beyond a doubt that their reading is the correct one.

QUESTION: When I put these statutes together by using quotes and brackets and so forth, I got the following: bracket, the ADEA, bracket, shall be enforced in accordance with the, bracket, quote, following, quote, provision. A suit for violation, quote, may be maintained by, quote, any employee, quote, against any employer including, quote, a State or a political subdivision of a State, end quote, in any Federal, dot, dot, dot, court of competent jurisdiction.

Now, if I put them together, how could it be clearer?

MR. SUTTON: Two problems, Your Honor. First of all, the --

QUESTION: If I put them together right.

MR. SUTTON: First of all, the problem that

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Justice Kennedy identified, the phrase, court of competent jurisdiction by itself is ambivalent, the reason being there are two issues in an abrogation case. The first question is whether the subsequent provisions of the law have been extended to the public agency. We don't dispute that. They have been extended.

But the second question is whether one of the principal defenses to those claims has been abrogated. There's plenty of reason to have a statute that reads just as you've read it. I would point out that you've used several subchapters and incorporated several of them, but I admit correctly under petitioner's reading.

The problem with it is, you could still have a situation where you need that statute for a Federal Government action against a State for money damages, which is permissible under the Eleventh Amendment. You could have a situation in which you bring such claims in Federal Court and the State waives its immunity from suit, which is permissible, or you could have Justice Kennedy's situation, where such claims are permissible in State courts of competent jurisdiction where there's a waiver.

But your reading does leave a redundancy, and the redundancy is in 626(c)(1), and the thing I've not heard raised or shown by petitioners is how 626(c)(1) accomplishes anything. It's at page 93a of the cert

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petition.

QUESTION: If that section had been repealed, would you then agree that there had been a valid abrogation, or are you arguing in effect that Congress must say in so many words that the Eleventh Amendment immunity, the States shall not be immune under the Eleventh Amendment?

MR. SUTTON: Our case gets much harder, Your Honor, at that point. In effect at that point I'd be saying that it didn't even suffice for the FSLA, which of course is a difficult argument. In 1973, the Missouri Employees decision came out saying the abrogation was insufficient. One year later, they did amend the statute, clearly for the purpose of correcting that problem.

QUESTION: Without saying, and the Eleventh Amendment is hereby abrogated.

MR. SUTTON: And they've not used what we'll call magic words to say the Eleventh Amendment, so my case --

QUESTION: So what would you here -- if you say, you don't need those magic words, what in addition to the repealing of the section -- whose number I forgot, what, in addition, would it have taken?

MR. SUTTON: Just what we have in Seminole Tribe, which is several mentions of the phrase, State, in

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the enforcement provision, the State itself, not just in the court enforcement provision, but throughout the whole remedial scheme.

QUESTION: How about title VII?

MR. SUTTON: Well, title VII is -- does mention the public body in the scheme itself. In other words, when they made the amendment, I think it's in '72, to extend title VII to the States, they mentioned State in the enforcement provision, and so that does suffice.

QUESTION: Although they didn't say the immunity under the Eleventh Amendment is abrogated.

MR. SUTTON: That's true, they did not, Your Honor.

QUESTION: And so they could have been thinking of State in an Ex parte Young sense, the injunctive relief.

MR. SUTTON: That is true, and I think that is an ambiguity, and I think that's one of the things that Justice Kennedy's question prompts, is the question --

QUESTION: So you think Fitzpatrick v. Bitzer was decided wrongly.

MR. SUTTON: No, Your Honor. No one raised the clear statement question, and I'm not saying -- I don't want to be mistaken, and I hope I didn't misspeak. I'm not saying there is an insufficient clear statement in

title VII. That's -- we don't take that position. In fact, we think the title VII case is very much like Seminole Tribe and is controlled by it.

If I could, I'd like to switch to the power question.

QUESTION: Just before you get there --

MR. SUTTON: Yes.

QUESTION: Has either Florida or Alabama permitted a suit in its own court, waived sovereign immunity in its own courts, in State courts?

MR. SUTTON: Your Honor, there are published Florida opinions where there are money damages actions brought against public employees in State court against Florida, public employers, as to --

QUESTION: Under this statute?

MR. SUTTON: Oh, under that -- I'm -- excuse me, Your Honor. I'm not aware of that, and I don't know the answer. My assumption is that most of these claims are brought in Federal court. Keep in mind, and Hallett v. Rose was a case that came from Florida, it would be a difficult situation for a State to abrogate immunity as to State law age discrimination claims and then not abrogate it as to Federal claims.

QUESTION: Howell wasn't the State, was it? I mean, wasn't it a county or something?

MR. SUTTON: It was a county, Your Honor. I'm not saying it would be controlling, but I'm just raising the issue, and I think the issue would be, at least in the language of Hallett, and Justice Stevens can back me up, the language of Hallett would be the question of whether the State is discriminating against Federal rights, and that could potentially be a problem. I'm not taking a position one side or the other, but it is in an issue.

QUESTION: Can I quickly ask you on that 626(c)(1), it looks as if its there either to specify legal and equitable or for the purpose of putting in the proviso.

MR. SUTTON: Right. Right, Your Honor. Well, the proviso, we're not referring to the redundancy there. It would be the first sentence --

QUESTION: Wall, you could write (c)(1) in order to put in the proviso. You want to know why did Congress write it if the other thing means what it says, and the answer could be, because they wanted to stick in that proviso.

MR. SUTTON: Uh-huh. Well, let me answer the first question, which it turns out is a little easier than the second.

As to the first question, 216(b), the so-called incorporated provision, also refers to legal or equitable

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relief, so in that sense they are utterly -- they are utterly redundant.

As to your second point, I suppose that is a conceivable argument, but again I would go back to what my burden is, is not to rebut every conceivable argument, but to show that it wasn't clear.

As to power, City of Boerne makes clear that there were two inquiries. The first is -- and I want to be clear, two inquiries when it comes to prophylactic legislation. That is, section 5 legislation that goes beyond what in this case the Fourteenth Amendment requires. The first inquiry is whether there is a sufficient predicate for imposing extra constitutional requirements on the States. The second is whether the section 5 law at the end of the day is, in fact, proportional.

As to the predicate, we would submit that, while there may well be age discrimination in an Article I sense in the States, in the Federal Government, in the private sector, when it comes to Fourteenth Amendment equal protection discrimination by State employers, the record shows absolutely nothing.

First of all, the law was extended in 1974. Murgia isn't even decided until 1976. The whole concept of constitutional violations regarding the elderly wasn't

even on the radar screen in 1974, and that's exactly why the Congressional Record is so silent. It wasn't something anyone was debating.

But even if one goes beyond 1974, and we think that would be permissible, all the way to the present, looking at cases from this Court, the State courts, the Federal courts, the record is still silent.

Now, the Federal Government in its reply brief has identified three cases. These, by the way, are the only three cases that have been identified so far in the briefing in this case regarding State discrimination against the elderly under the Equal Protection Clause. None of them suffice.

First, for the most obvious reason, none of them involve State employment. Every single one of them dealt with State laws. They didn't involve State employers violating the equal protection rights of their State employees, which after all is just what the ADEA is about.

One of the cases, the Seventh Circuit case, was on a motion to dismiss, a situation where the State simply hadn't supplied any rational basis, and the court of appeals properly said, at a minimum, you've got to give us something, and rejected the motion to dismiss. There's no indication that there was a constitutional violation.

The second case is even worse. That's a case in which the discrimination was against 22 and 21-year-olds who were denied the opportunity to live off campus in college. 23-year-olds were given that right. Well, there was a violation of the U.S. Constitution, but it was certainly not one that helps prevent discrimination against those over 40.

And the third case from Colorado is a State court case, involve violations under the State and U.S. Constitution, which of course precluded review here and again did not involve a State employee.

But again, Congress does have authority to do more. In other words, they don't have to wait till a record of violations piles up and suddenly act after there have been 50 or so. There's no doubt they can head the problem off, cut it off at the pass, but there's no such threat, and to use the words of Florida Prepaid, any such harm is exceedingly speculative, and the reason it's speculative, we would submit, is if you look at page 38 in our brief, we've identified what I think are eight preconditions for an equal protection violation by a State employer to go unremedied.

First, the States would have to not properly enforce their age discrimination laws, which, after all, overprotect the constitutional rights of their employees.

Then the State and Federal lower courts would have to deny relief under the Equal Protection Clause. This Court would have to deny relief under the Equal Protection Clause. The individual would not be able to get Ex parte Young relief in Federal court, which is, after all, still permissible after EEOC v. Wyoming.

The EEOC as a Federal agency would have to decide that however grave this violation was, it wasn't important enough for them to bring the action for money damages in Federal court and then, perhaps most importantly, the judgment in Vance v. Bradley that even improvident decisions by State and Federal Governments usually are corrected by the political process, and one would presume that would likely be the case in that particular --

QUESTION: Of course, seven out of those eight steps can be eliminated by the simple fact that the elderly employee just says, life is too short, and doesn't seek litigation. I mean, that would jump over seven of the eight. I mean, it's possible that it is a problem, but people just haven't had the time or the incentive or the gumption or whatever to sue about it.

MR. SUTTON: No doubt, Your Honor, but that is not a problem the ADEA is going to cure. If they're not going to use the State laws, if they're not going to use

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the U.S. Constitution, the State constitution, the political process, it seems to me exceptionally unlikely --

QUESTION: Doesn't the ADEA require you to touch base with State law? That is, before you can institute a Federal suit, mustn't you invoke the State process?

MR. SUTTON: That is true, and there's a 60-day wait before you can bring a Federal action, but there's nothing about the age laws that require you to wait. All one has to do is file in State, and it can be rather informal, just with the Human Rights Commission, and at that point there's a 60-day timetable before you can bring a Federal court action.

There's no requirement, which would be, I think, somewhat respectful of the State --

QUESTION: There's no exhaustion requirement.

MR. SUTTON: Excuse me.

QUESTION: There's no exhaustion requirement.

MR. SUTTON: Exactly. Exactly, so you do have the precondition of filing in State court, but there's no requirement that you sit and wait and see if you get State relief.

QUESTION: Well, there's one point in this that puzzles me. I think I heard you concede that there could be an action for injunctive relief, an Ex parte Young

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relief, forward-looking, against a State that is maintaining a practice of discriminating against people over the age of 40. Did you say that that legitimately under Ex parte Young the State could be sued?

MR. SUTTON: I -- I'm sure I did, and I most clearly misspoke. It would have to be an action against a State official under Ex parte Young.

QUESTION: Yes, I mean that. Last --

MR. SUTTON: Okay. Well, no, then I -- my -- I'm pretty sure I made that concession.

QUESTION: Okay. So we have action against a State official --

MR. SUTTON: Right.

QUESTION: -- to stop using this formula to calculate salaries because it discriminates against older people, stop order from the Federal court. Armed with that stop order, could the employee then go into his State court, which has a State law that waives the State sovereign immunity in its own court, and say, here's my Federal judgment, it says the practice was illegal, that's issue preclusion, now figure out what compensation I'm owed?

MR. SUTTON: Well, Your Honor, that raises some of the questions we were addressing earlier, and that's whether the State waiver with respect to claims under

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State law constitutes a waiver for Federal law claims. That would be one problem we have there.

QUESTION: But it's not a Federal law claim. It's a State law claim, but the fact question, was there discrimination against older workers under this formula, has already decided, been decided in the Federal court.

Then the worker comes to State court, suing under State law, and all he's saying is, this fact issue has been precluded, so the only thing that the State can do, following ordinary rules of issue preclusion, is to figure out how much.

MR. SUTTON: Your Honor, the premise of the question about ordinary rules of issue and claim preclusion, and I'm certainly underarmed against you on this particular issue, if that is correct, I think that would be a problem.

QUESTION: Wouldn't that depend on State law?

MR. SUTTON: Absolutely. I mean, if they -- that's exactly what I'm saying. If those rules of issue and claim preclusion do apply in State courts under State law, then there's no reason you couldn't do it, just for the same reason you couldn't go in reverse.

If you won under -- in a State claim under Federal law, if the Federal rules of issue and claim preclusion permitted it, you could do the same thing in

Federal court, but again, on the assumption that those rules of preclusion did apply, and permissibly applied as to claims in one court based on --

QUESTION: But I don't follow the beginning in the State, because you'd have no reason to go into the Federal court for Ex parte Young injunctive relief if you win on the merits in the State, where you could get both.

MR. SUTTON: That is true. I'm just saying as a --

QUESTION: And you might be -- if you tried it, that, encounter a problem of splitting your claims.

MR. SUTTON: No, I'm just saying as a theoretical matter, one could. I'm not saying it would be a practical thing to do.

The second problem with the ADEA is one regarding proportionality, and the proportionality problem I think is best illustrated by this Court's decision in Western Airlines v. Criswell, which dealt with an age law claim, and it was actually a situation in which the corporate employer came in and tried to win the age claim on the grounds that there was a rational basis for the disparate treatment of an individual over 40.

And the Court quite categorically made clear that rational basis review does not apply in an age claim, and in fact said that that's a virtually unreviewable

standard, and one in which an employer would always win. In fact, there would be no reason even to go to a jury in an age claim and --

QUESTION: Well, does that -- given your argument, does that as a practical matter entail that there simply cannot be general statutory enforcement of a first tier equal protection claim in the practical world, so that your position really is that you can enforce -- Congress can enforce by general legislation antidiscrimination against suspect categories and so on, but that is really in practical terms the extent of the enforcement power under section 5?

MR. SUTTON: Well, Your Honor, they -- and I think I'm answering your question -- they can always pass legislation that creates a standard that parallels the equal protection standard and supplies --

QUESTION: What would that -- true, but what would that accomplish? I mean, as a practical matter, what good would it do?

MR. SUTTON: Well, I --

QUESTION: Why not simply leave it to the individual claimant to come in under 1983? That would --

MR. SUTTON: Well --

QUESTION: Would there be any advantage?

MR. SUTTON: No, I -- 1983 is an enforcement

statute --

QUESTION: Yes.

MR. SUTTON: -- and I think you're right to suggest that there aren't going to be many situations where an individual is going to have a successful equal protection claim for discrimination against the elderly.

QUESTION: On your view.

MR. SUTTON: Well, yes. I --

QUESTION: I'm not suggesting that as a cosmic matter that I am adopting your view.

MR. SUTTON: No, no, no.

(Laughter.)

QUESTION: I'm simply exploring your position.

MR. SUTTON: No, but I -- and I'm answering it by referring to this Court's cases, and that would be under Murgia, Bradley, and Gregory v. Ashcroft, that that seems to me a very difficult standard to meet.

I mean, my guess is we could posit utterly irrational laws that discriminate on the basis of age and in which there was no rational justification, even after the fact, no conceivable basis, but that hasn't happened. the Fourteenth Amendment has been around since 1868, and no one's found one yet, so it does strike me as very unlikely, completely unlikely up to now, and very unlikely into the future.

But Your Honor --

QUESTION: Mr. Sutton, where do you put sex discrimination, then, in the -- because as I understand it, there's race and national origin and religion in title VII --

MR. SUTTON: Yes, Your Honor.

QUESTION: -- which all had something before the Civil Rights Act in 1964 to suggest that those were suspect categories, but sex discrimination, as I think was pointed out, even in the time title VII was extended, the only decision on the book was Reed v. Reed, and that applied a rational basis test.

MR. SUTTON: Yes, Your Honor. Title VII, when it comes to gender discrimination, is an excellent example of the fact that Congress is allowed, as a predictive matter, to make its own judgment about what the Constitution means, and in 1972 it is true, when Congress extended title VII to gender discrimination, gender discrimination still received rational basis review. That doesn't mean it would be impossible to use it, but it would have made it a lot more difficult.

In 1976, when Fitzpatrick was decided, or if this issue were reviewed today, it would not receive rational basis review. It would get exacting scrutiny. So Congress is fully entitled to make that predictive

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judgment.

The thing it can't do, as City of Boerne reveals, is, it can't make a predictive judgment and then impose it on the court. Ultimately, when that section 5 claim gets to the court, it's the court's judgment as to what the Constitution means.

Now, as to remedies, the extent of them, Congress does get wide discretion, as City of Boerne confirms.

The other thing is, I think gender discrimination and really all of the protected classes in title VII not only are presumptively unconstitutional classifications, whereas age is presumptively constitutional, those are all instances where you're going to have a predicate of some violations. Just looking at this Court's cases you're going to find that predicate, so the --

QUESTION: Could you add anything to the catalogue? You said you recognize that Congress was making a prediction, which the court later bore out, in that sex classifications deserved exacting scrutiny. Is there anything else that's not in the catalogue yet that could be there, that Congress could make a predictive judgment about, or are we at the limit?

MR. SUTTON: I couldn't begin to answer that. I

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apologize, but I mean, I wouldn't even want to step into Congress' shoes on that point.

It seems to me they are allowed to look at that issue. They are allowed to decide that perhaps there is a discrete and insular group with immutable characteristics that do warrant additional constitutional protection. That judgment's entitled to some respect, but it's not entitled to complete respect.

When that case, and when that legislative judgment gets to this Court, it seems to me that's the important issue, and I'm not disagreeing with your question. I don't think the important question is whether such classes are out there. The important question is, what happens when that section 5 law gets to court.

And what happens is, this Court decides whether there's proportionality and whether there's a predicate for this prophylactic legislation, and if it turns out they predict correctly, well, it's really not that prophylactic. It may be in most cases that the legislative standard parallels the constitutional standard, in which case there's not much of a section 5 inquiry.

QUESTION: Do you take the position, when considering proportionality with respect to a first tier rational basis equal protection category, that it is

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irrelevant, or at least unnecessary for us to consider the defenses in the statute, e.g., bona fide occupational qualification and so on, and limitations on remedies? In this case, I think the remedy is limited simply to back pay.

Are those things really irrelevant, because the burden of proof issue, and the scope of coverage which follows from it, is so dispositive that we never get to look at these other things like defenses and limited remedies and so on.

MR. SUTTON: Well, Your Honor, first of all I would say the defenses don't parallel Equal Protection Clause defenses, so that's one of the central arguments we're making, and I think it is borne out by this Court's decision in Western Airlines, but there are -- it's true, there are things in the statute. Justice Ginsburg identified one. There's a 60-day waiting period before the claim can be brought in Federal court. Elected State officials and their top staff are insulated from ADEA claims.

So it's true that --

QUESTION: That certainly goes to federalism, but is it -- do you take the position that it's irrelevant to the question of proportionality?

MR. SUTTON: No, it is relevant. It just

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doesn't do the trick. It's not even --

QUESTION: It just doesn't get you across the line. But in any case, you are taking the position that the disparity between the scope, as determined by the burden of proof, let's say in 1983 litigation, and the burden of proof under this statute, is not dispositive totally, without consideration of such factors as those that Justice Ginsburg and I have been mentioning.

MR. SUTTON: Just, when you say 1983 litigation, you're referring to litigation involving equal protection claims --

QUESTION: Yes.

MR. SUTTON: -- exactly. Well, Your Honor, I do think it is unfortunately a contextual facts, fact and circumstances inquiry where you have to look at all of those things, but it seems to me at the threshold this Court's Western Airlines decision makes it crystal clear that on the one hand the age laws were designed to deal with prohibiting the employers from making the generalization that mental and physical acuity decline with age.

In contrast to that are this Court's trilogy of decisions where they say that is permitted by Federal and State legislatures, so that -- that strikes me as a very serious threshold problem.

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Now, it doesn't mean that you don't consider at all, it all. In fact, I think we should embrace the fact that it is a fact and circumstances test, and that there is no Rosetta Stone here, and the reason that's good is because the greater the underlying violations, the more remedial power Congress ought to have.

So I think it's appropriate to embrace that fact and circumstances problem, because while it's difficult for this Court when it comes to drawing those lines, I think it's appropriate to have the freedom to give Congress much more authority in situations where there truly has been a record, in the case of voting rights a record of pervasive and systematic discrimination against certain classes --

QUESTION: Mr. Sutton, can I just ask one very minor question. The facts aren't very clear, because everybody just got right to the legal issues. Am I correct in assuming that in all three cases the plaintiffs are citizens of the same State that they're suing, so that this is not the real Eleventh Amendment, in my view of the two Eleventh Amendment problems.

MR. SUTTON: With that last caveat, yes, Your Honor.

QUESTION: Yes.

MR. SUTTON: That is true.

The -- I would like to, if I could, in closing, it seems to us, we would respectfully submit, that the age laws are unlike any other prophylactic section 5 law this Court has ever upheld.

Instead of pervasive discrimination by State employees, we have a situation in which all 50 States overprotect the constitutional rights of their citizens. Instead of a calibrated remedy that seeks to parallel the constitutional standard, we have an entirely new standard of review that directly contradicts this Court's decision in Western Airlines, and instead of systematic, constitutional violations of the protected class, we have absolutely none.

It would seem to me a sad and unfortunate irony to uphold this broadest of section 5 laws precisely in the areas where the State is not only respecting the constitutional rights of their citizens, but in fact overprotecting them.

Unless there are any other questions --

QUESTION: Thank you, Mr. Sutton.

MR. SUTTON: Thank you, Your Honor.

QUESTION: Ms. Underwood, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF BARBARA D. UNDERWOOD

ON BEHALF OF PETITIONER UNITED STATES

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MS. UNDERWOOD: As to the fact that this Court has not found an age discrimination unconstitutional, I'd like to point out that this is no different from what happened with literacy tests for voting.

The Court upheld English literacy tests as a reasonable voting requirement, then Congress found that English literacy tests were being used invidiously and prohibited them, and this Court said Congress had properly used its fact-finding power to enforce the Equal Protection Clause of the Fourteenth Amendment.

As to the -- well, in fact, this is stronger than that, because Congress in 19 --

QUESTION: It's not quite parallel, because the discrimination there is discrimination on the basis of race or national origin, which was clearly unconstitutional discrimination, and the only issue was whether this device achieved it or not. What we have here is whether the discrimination on the basis of age in and of itself is unconstitutional.

MS. UNDERWOOD: Well, no, it's whether -- I think it's -- the parallel is much stronger. It's whether age discrimination which could in principle be proper, as literacy tests could in principle be proper, was being used in an unconstitutional, arbitrary, and irrational way, warranting congressional review, warranting a remedy

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under the enforcement power of the Equal Protection Clause.

As to the proposition that age is different from race and sex, Congress calibrated this statute to that. The reason age was not put in the 1964 Civil Rights Act was that there was an awareness that there are proper uses of age, that seniority systems and pension plans and other decisions that are made in the workforce are properly calibrated to age, but there are also irrational and arbitrary ones, and so a separate study was commissioned and a separate statute was written to deal with precisely that problem, to tailor the remedy to the constitutional violation that Congress perceived.

As to Mr. Sutton's observation that there is no predicate for this, there wasn't then and there isn't now in the world, Mr. Sutton is right to focus on individual decisions of State employers. That is what the act is largely aimed at today in view of the demise of mandatory retirement, but the reported cases under State and Federal statutes do show examples of irration -- the same kind of irrational, unconstitutional, arbitrary age discrimination that Congress was concerned about, situations of employers essentially harassing and insulting an older worker because of his age, situations where a reduction in force was required and the employer simply went down the age

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list and reduced from the top down, and the allegation in this case is that --

QUESTION: Would you say that was irrational under the -- under our constitutional jurisprudence?

MS. UNDERWOOD: I would say that Congress -- that it was irrational under our jurisprudence if it was based on the belief -- false beliefs, as Congress found that these decisions were.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Underwood. The case is submitted.

(Whereupon, at 11:00 a.m., the case in the above-entitled matters was submitted.)

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J. DANIEL KIMEL, JR., ET AL., Petitioners v. FLORIDA BOARD OF REGENTS, ET AL.; and UNITED STATES, Petitioner v. FLORIDA BOARD OF REGENTS, ET AL.
CASE NO: 98-791 & 98-796

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.