SUPREME COURT OF THE UNITED STATES

Nos. 98–791 and 98–796

J. DANIEL KIMEL, JR., ET AL., PETITIONERS
98–791 *v.*
FLORIDA BOARD OF REGENTS ET AL.

UNITED STATES, PETITIONER
98–796 *v.*
FLORIDA BOARD OF REGENTS ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[January 11, 2000]

JUSTICE THOMAS, with whom JUSTICE KENNEDY joins, concurring in part and dissenting in part.

In *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234 (1985), this Court, cognizant of the impact of an abrogation of the States' Eleventh Amendment immunity from suit in federal court on "the usual constitutional balance between the States and the Federal Government," reaffirmed that "Congress may abrogate . . . only by making its intention unmistakably clear in the language of the statute." *Id*., at 242. This rule "'assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'" *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 65 (1989) (quoting *United States* v. *Bass*, 404 U. S. 336, 349 (1971)). And it is especially applicable when this Court deals with a statute like the Age Discrimination in Employment Act of 1967 (ADEA), whose substantive mandates extend to "elevator operators, janitors, charwomen, security guards, secretaries, and the like in every office building in a State's governmental hierarchy."

Employees of Dept. of Public Health and Welfare of Mo. v. *Department of Public Health and Welfare of Mo.*, 411 U. S. 279, 285 (1973). Because I think that Congress has not made its intention to abrogate "unmistakably clear" in the text of the ADEA, I respectfully dissent from Part III of the Court's opinion.[1]

I

It is natural to begin the clear statement inquiry by examining those provisions that reside within the four corners of the Act in question. Private petitioners and the government correctly observe that the ADEA's substantive provisions extend to the States as employers, see 29 U. S. C. §623(a) (providing that "[i]t shall be unlawful for an employer" to engage in certain age discriminatory practices); §630(b) (defining "employer" to include "a State or a political subdivision of a State"); §630(f) (defining "employee" as "an individual employed by any employer"), and that the ADEA establishes an individual right-of-action provision for "aggrieved" persons, see §626(c)(1) ("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"). Since, in the case of a state employee, the only possible defendant is the State, it is submitted that Congress clearly expressed its intent that a state employee may qualify as a "person aggrieved" under §626(c)(1) and bring suit against his state employer in federal court.

While the argument may have some logical appeal, it is squarely foreclosed by precedent— which explains the Court's decision to employ different reasoning in finding a clear statement, see *ante*, at 9. In *Employees*, we con-

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[1] I concur in Parts I, II, and IV of the Court's opinion because I agree that the purported abrogation of the States' Eleventh Amendment immunity in the ADEA falls outside Congress's §5 enforcement power.

fronted the pre-1974 version of the Fair Labor Standards Act (FLSA), which clearly extended as a substantive matter to state employers, and included the following private right-of-action provision: "'Action to recover such liability may be maintained in any court of competent jurisdiction.'" *Employees, supra,* at 283 (quoting 29 U. S. C. §216(b) (1970 ed.). We held that this language fell short of a clear statement of Congress' intent to abrogate. The FLSA's substantive coverage of state employers could be given meaning through enforcement by the Secretary of Labor, which would raise no Eleventh Amendment issue, 411 U. S., at 285–286, and we were "reluctant to believe that Congress in pursuit of a harmonious federalism desired to treat the States so harshly" by abrogating their Eleventh Amendment immunity, *id.,* at 286. See also, *e.g., Dellmuth* v. *Muth*, 491 U. S. 223, 228 (1989) (holding that Congress had not clearly stated its intent to abrogate in a statute that authorized "parties aggrieved . . . to 'bring a civil action . . . in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy'") (quoting 20 U. S. C. §1415(e)(2) (1982 ed.)).

The ADEA is no different from the version of the FLSA we examined in *Employees*. It unquestionably extends as a substantive matter to state employers, but does not mention States in its right-of-action provision: "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." 29 U. S. C. §626(c)(1). This provision simply does not reveal Congress' attention to the augmented liability and diminished sovereignty concomitant to an abrogation of Eleventh Amendment immunity. "Congress, acting responsibly, would not be presumed to take such action silently." *Employees, supra,* at 284–285.

II

Perhaps recognizing the obstacle posed by *Employees*, private petitioners and the government contend that the ADEA incorporates a clear statement from the FLSA. The ADEA's incorporating reference, which has remained constant since the enactment of the ADEA in 1967, provides: "The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section." 29 U. S. C. §626(b). It is argued that §216(b)– one of the incorporated provisions from the FLSA– unequivocally abrogates the States' immunity from suit in federal court. That section states in relevant part 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." 29 U. S. C. §216(b).

But, as noted in the above discussion of *Employees*, §216(b) was not always so worded. At the time the ADEA was enacted in 1967, a relatively sparse version of §216(b)– which *Employees* held insufficient to abrogate the States' immunity– provided that an "[a]ction to recover such liability may be maintained in any court of competent jurisdiction." 29 U. S. C. §216(b) (1964 ed.). It was not until 1974 that Congress modified §216(b) to its current formulation. Fair Labor Standards Amendments of 1974 (1974 Amendments), §6(d)(1), 88 Stat. 61.

This sequence of events suggests, in my view, that we should approach with circumspection any theory of "clear statement by incorporation." Where Congress amends an Act whose provisions are incorporated by other Acts, the bill under consideration does not necessarily mention the incorporating references in those other Acts, and so fails to inspire confidence that Congress has deliberated on the consequences of the amendment for the other Acts. That is the

case here. The legislation that amended §216(b), §6(d)(1) of the 1974 Amendments, did not even acknowledge §626(b). And, given the purpose of the clear statement rule to "'assur[e] that the legislature has in fact faced'" the issue of abrogation, *Will*, 491 U. S., at 65 (quoting *Bass*, 404 U. S., at 349), I am 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.

To be sure, §28 of the 1974 Amendments, 88 Stat. 74, did modify certain provisions of the ADEA, which might suggest that Congress understood the impact of §6(d)(1) on the ADEA. See *ante*, at 11. But §6(d)(2)(A), another of the 1974 Amendments, suggests just the opposite. Section 6(d)(2)(A) added to the statute of limitations provision of the FLSA, 29 U. S. C. §255, a new subsection (d), which suspended the running of the statutory periods of limitation on "any cause of action brought under section 16(b) of the [FLSA, 29 U. S. C. §216(b)] . . . on or before April 18, 1973," the date *Employees* was decided, until "one hundred and eighty days after the effective date of [the 1974 Amendments]." The purpose of this new subsection– revealed not only by its reference to the date *Employees* was decided, but also by its exception for actions in which "judgment has been entered for the defendant on the grounds other than State immunity from Federal jurisdiction"– was to allow 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).[2] It appears, how-

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[2]That Congress had this purpose in mind as to the FLSA does not mean that the product of Congress' efforts– the amended §216(b)– qualifies as a clear statement. The amended §216(b)'s description of the forum as "any Federal . . . court of *competent* jurisdiction," 29 U. S. C. §216(b) (emphasis added), is ambiguous insofar as a Federal

ever, that Congress was oblivious to the impact of §6(d)(2)(A) on the ADEA. The new §255(d), by operation of §7(e) of the ADEA, 29 U. S. C. §626(e) (1988 ed.) ("Sectio[n] 255 . . . of this title shall apply to actions under this chapter"),[3] automatically became part of the ADEA in 1974. And yet the new §255(d) could have no possible application to the ADEA because, as the Court observes, *ante*, at 11 (citing §28(a) of the 1974 Amendments), the ADEA's substantive mandates did not even apply to the States until the 1974 Amendments. Thus, before 1974, there were no ADEA suits against States that could be affected by §255(d)'s tolling provision. If Congress had recognized this "overinclusiveness" problem, it likely would have amended §626(e) to incorporate only §§255(a)–(c). Cf. §626(b) (incorporating "the powers, remedies, and procedures provided in sectio[n] . . . 216 (*except for subsection (a) thereof*") (emphasis added)). But since Congress did not do so, we are left to conclude that Congress did not clearly focus on the impact of §6(d)(2)(A) on the ADEA. And Congress' insouciance with respect to the impact of §6(d)(2)(A) suggests that Congress was similarly inattentive to the impact of §6(d)(1).

Insofar as §6(d)(2)(A) is closer to §6(d)(1) in terms of space and purpose than is §28, the implication I would draw from §6(d)(2)(A) almost certainly outweighs the inference the Court would draw from §28. In any event, the notion that §28 of the 1974 Amendments evidences

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court might not be "competent" unless the State defendant consents to suit. See *infra*, at 10–12. My present point is simply that, even assuming the amended §216(b) qualifies as a clear statement, the 1974 Congress likely did not contemplate the impact of the new §216(b) on the ADEA.

[3]The ADEA was amended in 1991 to remove the incorporating reference. See Civil Rights Act of 1991, §115, 105 Stat. 1079, 29 U. S. C. §626(e).

Congress' awareness of every last ripple those amendments might cause in the ADEA is at best a permissible inference, not "the unequivocal declaration which . . . is necessary before we will determine that Congress intended to exercise its powers of abrogation." *Dellmuth*, 491 U. S., at 232.

The Court advances a more general critique of my approach, explaining that "we have never held that Congress must speak with different gradations of clarity depending on the specific circumstances of the relevant legislation . . . ." *Ante*, at 11–12. But that descriptive observation, with which I agree, is hardly probative in light of the fact that a "clear statement by incorporation" argument has not to date been presented to this Court. I acknowledge that our previous cases have not required a clear statement to appear within a single section or subsection of an Act. *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1, 7–10 (1989), overruled on other grounds, *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44 (1996); see also *id.*, at 56–57 (confirming clear statement in one statutory subsection by looking to provisions in other subsection). Nor have our cases required that such separate sections or subsections of an Act be passed at the same time. *Union Gas*, *supra*, at 7–13, and n. 2 (consulting original provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 and 1986 amendments to that Act). But, even accepting *Union Gas* to be correctly decided, I do not think the situation where Congress amends an incorporated provision is analogous to *Union Gas*. In the *Union Gas* setting, where the later Congress actually amends the earlier-enacted Act, it is reasonable to assume that the later Congress focused on each of the various provisions, whether new or old, that combine to express an intent to abrogate.

III

Even if a clarifying amendment to an incorporated provision might sometimes provide a clear statement to abrogate for purposes of the Act into which the provision is incorporated, this is not such a case for two reasons. First, §626(b) does not clearly incorporate the part of §216(b) that establishes a private right-of-action against employers. Second, even assuming §626(b) incorporates §216(b) in its entirety, §216(b) itself falls short of an "unmistakably clear" expression of Congress' intent to abrogate the States' Eleventh Amendment immunity from suit in federal court.

A

I do not dispute that §626(b) incorporates into the ADEA some provisions of §216(b). But it seems to me at least open to debate whether §626(b) incorporates the portion of §216(b) that creates an individual private right of action, for the ADEA already contains its own private right-of-action provision– §626(c)(1). See *McKennon* v. *Nashville Banner Publishing Co.*, 513 U. S. 352, 358 (1995) ("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. 29 U. S. C. §626(c)"); 1 B. Lindemann & P. Grossman, Employment Discrimination Law 573–574 (3d ed. 1996) ("The ADEA grants any aggrieved person the right to sue for legal or equitable relief that will effectuate the purposes of the Act" (citing §626(c)(1)) (footnote omitted)). While the right-of-action provisions in §626(c) and §216(b) are not identically phrased, compare §626(c)(1) ("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"), with §216(b) ("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 . . . "), they are certainly similar in function.

Indeed, 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 the Court does not even pause to acknowledge. To avoid the overlap, one might read the ADEA to create an *exclusive* private right-of-action in §626(c)(1), and then to add various embellishments, whether from elsewhere in the ADEA, see §626(c)(2) (trial by jury), or from the incorporated parts of the FLSA, see, *e.g.*, §216(b) (collective actions); *ibid.* (attorney's fees); *ibid.* (liquidated damages).[4]

Of course the Court's interpretation– that an ADEA plaintiff may choose §626(c)(1) or §216(b) as the basis for his private right of action– is also plausible. "But such a permissible inference, whatever its logical force, would remain just that: a permissible inference. It would not be the unequivocal declaration which . . . is necessary before we will determine that Congress intended to exercise its powers of abrogation." *Dellmuth*, 491 U. S., at 232. Apparently cognizant of this rule, the Court resorts to extrinsic evidence: our prior decisions. See, *e.g.*, *ante*, at 10 ("[T]he ADEA incorporates enforcement provisions of the Fair Labor Standards Act of 1938, and provides that the ADEA shall be enforced using certain of the powers, remedies, and procedures of the FLSA'" (alteration in original)) (quoting *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U. S. 165, 167 (1989) (citation omitted)). But judicial opinions, especially those issued subsequent to the enact-

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[4]The ADEA expressly limits this last remedy to "cases of willful violations." 29 U. S. C. §626(b); see *Lorillard* v. *Pons*, 434 U. S. 575, 581 (1978).

ments in question, have no bearing on whether *Congress* has clearly stated its intent to abrogate in the text of the statute. How could they, given that legislative history— which at least antedates the enactments under review— is "irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment"? *Dellmuth, supra,* at 230. In any event, *Hoffmann-La Roche,* which did not present the question of a State's Eleventh Amendment immunity,[5] is perfectly consistent with the view that the ADEA incorporates only "extras" from the FLSA, not overlapping provisions. *Hoffmann-La Roche* involved the ADEA's incorporation of FLSA's authorization of collective actions, which *follows* §216(b)'s individual private right-of-action provision, see §216(b) ("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 by any one or more employees for and in behalf of himself or themselves *and other employees similarly situated*" (emphasis added)), and so may be viewed as falling outside the overlap described above.[6]

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[5]That the *Hoffmann-La Roche* Court did not consider §216(b)'s implications for the Eleventh Amendment clear statement rule is apparent from its selective quotation of §216(b)— omitting the words "(including a public agency)." See *Hoffmann-La Roche, Inc.* v. *Sperling,* 493 U. S., at 167–168 ("This controversy centers around one of the provisions the ADEA incorporates, which states, in pertinent part, that an action 'may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated'" (alteration in original)) (quoting 29 U. S. C. §216(b) (1982 ed.)).

[6]The other two cases upon which the Court relies, see *ante,* at 10 (citing *McKennon* v. *Nashville Banner Publishing Co.,* 513 U. S. 352, 357 (1995), and *Lorillard* v. *Pons, supra,* at 582), are also consistent with the view that the ADEA incorporates only "extras" from the FLSA, not overlapping provisions. In neither case did we consider whether the ADEA incorporates the part of §216(b) that creates a private action

B

Even if §626(b) incorporates §216(b)'s individual right-of-action provision, that provision itself falls short of "unmistakable" clarity insofar as it describes the forum for suit as "any Federal or State court of *competent* jurisdiction." §216(b) (emphasis added). For it may be 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. As we explained in *Employees*, "[t]he history and tradition of the Eleventh Amendment indicate that by reason of that barrier a federal court is not *competent* to render judgment against a *nonconsenting* State." 411 U. S., at 284 (emphasis added). The Court suggests, *ante*, at 12, that its ability to distinguish a single precedent, *ante*, at 10 (discussing *Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U. S. 573 (1946)), illuminates this aspect of §216(b). But the Court neither acknowledges what *Employees* had to say on this point nor explains why it follows from the modern §216(b)'s clarity *relative* to the old §216(b) that the modern §216(b) is clear enough as an *absolute* matter to satisfy the *Atascadero* rule, which requires "unmistakable" clarity.

That is not to say that *the FLSA as a whole* lacks a clear statement of Congress' intent to abrogate. Section 255(d) elucidates the ambiguity within §216(b). Section 255(d), it will be recalled, suspended the running of the statute of limitations on actions under §216(b) brought against a State or political subdivision on or before April 18, 1973 (the date *Employees* was decided) until "one hundred and eighty days after the effective date of the [1974 Amendments], except that such suspension shall not be applicable if in such action judgment has been entered for the

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"against any employer (including a public agency) in any Federal or State court of competent jurisdiction."

defendant on the grounds other than *State immunity from Federal jurisdiction*." §255(d) (emphasis added). As I explained in Part II,[7] however, not only does §255(d) on its face apply only to the FLSA, but Congress' failure to amend the ADEA's general incorporation of §255, 29 U. S. C. §626(e) (1988 ed.), strongly suggests that Congress paid scant attention to the impact of §255(d) upon the ADEA. Accordingly, I cannot accept the notion that §255(d) furnishes clarifying guidance in interpreting §216(b) for ADEA purposes, whatever assistance it might provide to a construction of §216(b) for FLSA purposes.[8]

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For these reasons, I respectfully dissent from Part III of the Court's opinion.

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[7] *Supra*, at 5–6.

[8] While §255 once was incorporated by the ADEA, see §7(e), 81 Stat. 605, 29 U. S. C. §626(e) (1988 ed.), the ADEA was amended in 1991 to remove the incorporating reference, see Civil Rights Act of 1991, §115, 105 Stat. 1079, 29 U. S. C. §626(e). The current "unavailability" of §255(d) for ADEA purposes perhaps explains why the Court, which purports to examine only the statute in its current form, *ante*, at 12, does not rely on §255(d). But, as I have explained, without the light §255(d) sheds on §216(b), §216(b) falls short of a clear statement of Congress' intent to abrogate.