

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-554

TITLE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Appellant
v. WYOMING ET AL

PLACE Washington, D. C.

DATE October 5, 1982

PAGES 1 thru 43



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1 IN THE SUPREME COURT OF THE UNITED STATES

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 Appellant
 v. : No. 81-554.
 Wyoming Et Al

 Washington, D.C.
 Tuesdat, October 5, 1982

 The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 2:09 o'clock p.m.

APPEARANCES:

 REX E. LEE, Esq. Solicitor General, U.S.
 Department of Justice, Washington, D.C.
 behalf of the Appellant.

 BRUCE A. SALZBURG, Esq., Senior Assistant
 Attorney General, State of Wyoming, 123
 Capitol Building, Cheyenne, Wyoming 82002;
 on behalf of the Appellees.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 next in EEOC against Wyoming. General, I think you may
4 proceed whenever you're ready.

5 ORAL ARGUMENT OF REX E. LEE, ESQ.

6 ON BEHALF OF THE APPELLANT

7 MR. LEE: Mr. Chief Justice, and may it please
8 the Court:

9 The Age Discrimination in Employment Act
10 prohibits the federal government, with some exceptions,
11 from employment discrimination based on age, regardless
12 of the employee's age; and prohibits other employers
13 engaged in interstate commerce from such discrimination
14 against employees between the ages of 40 and 70.

15 At issue in this case is the constitutionality
16 of that provision of the 1974 amendment to that Act,
17 which extended provisions to state and local government
18 employees.

19 Bill Crump, who was employed as a district game
20 supervisor by the Wyoming Game and Fish Department was
21 forced to retire at age 55, pursuant to a Wyoming
22 statute which, with some exceptions, requires the
23 retirement of all Game and Fish Department employees at
24 age 55.

25 Mr. Crump filed a charge of unlawful age

1 discrimination with the Equal Employment Opportunity
2 Commission, which in turn filed this action in the
3 United States District Court for the District of Wyoming
4 seeking declaratory relief, back pay and liquidated
5 damages for persons adversely affected by the state's
6 retirement policy.

7 The district court granted the state's motion
8 to dismiss on 10th Amendment, National League of Cities
9 and Towns versus Usery grounds: Because the case comes
10 to this Court in the posture of a granted motion to
11 dismiss, there is no evidence in this record that either
12 Bill Crump individually or Wyoming game wardens 55 years
13 old as a group are, in fact, less fit to perform their
14 duties because of the fact that they have turned 55.

15 QUESTION: Do you recall, Mr. Solicitor
16 General, whether in Murgia there was any subjective
17 evidence with respect to capacity to perform the job?

18 MR. LEE: I believe there was.

19 QUESTION: In relation to the particular --

20 MR. LEE: To Mr. Murgia.

21 QUESTION: -- or men under a particular age?

22 MR. LEE: The evidence in that case, as I
23 recall, was that there was a general deterioration of
24 certain physical abilities that were related to capacity
25 to perform as members of the uniformed police force.

1 And the evidence similarly was that as to Mr. Murgia,
2 whatever his name was, that it had not happened in his
3 case.

4 Congress's congressional authority to extend
5 the Age Discrimination in Employment Act to state and
6 local governments can be found in either of two separate
7 sources; the Commerce clause and Section V of the 14th
8 Amendment. I will discuss each of them separately.

9 With regard to the Commerce clause, the issue
10 is whether the state of Wyoming has satisfied each of
11 the three hurdles plus the balancing test specified by
12 this Court in National League of Cities and Towns versus
13 Usery and Hodel versus Virginia Surface Mining.

14 It is common ground that the ADEA regulates the
15 states as states. But beyond that, Wyoming has not made
16 its case and cannot. The reasons, which are spelled out
17 in more detail, can be best summarized and put in most
18 helpful perspective by examining just what it is that
19 Wyoming seeks to do with its mandatory retirement
20 program, and the impact of Congress's statute on the
21 achievement of that objective.

22 The state itself has identified its goal. It
23 is, and I'm quoting from the state's brief, "To assure
24 the physical preparedness of Wyoming game wardens to
25 perform their duties." The only effect of the

1 congressional requirement on that concededly proper
2 state goal is to require a tighter fit between the goal
3 and the means for achieving it.

4 There are two basic approaches to the problem
5 of eliminating from the work force those whose age
6 impedes effective performance. The first is a
7 presumptive group approach, in which all members of the
8 class are automatically swept out, notwithstanding the
9 fact that everyone recognizes, as was true in Murgia,
10 that some members of that group are under no age
11 disability.

12 The advantage of this concededly over-inclusive
13 approach is that it's easier to administer, and the
14 court held in Murgia that it satisfies the rational
15 basis test.

16 The other approach is to determine on an
17 individual basis those particular persons who are and
18 those who are not less able to perform because of age.

19 The starting point for analysis is that
20 Congress has not prohibited the group approach. The
21 ADEA permits the mandatory retirement of groups as
22 groups, rather than individuals as individuals, which of
23 course is always available to the state, so long as the
24 state can show that in fact, age is a bona fide
25 occupational qualification for the group to which the

1 dragnet is to be applied.

2 The key element in proving a bona fide
3 occupational qualification, according to the test that
4 has been approved by almost all of the federal courts
5 that have faced the issue, is proof that all or
6 substantially all persons beyond the designated age are
7 unable to perform the job safely and effectively.

8 Now, the sensible premise of this requirement
9 is that if all or almost all the members of the group
10 share the disability, then the group approach is
11 appropriate to identify the disability. Age is then a
12 proxy for disability, because by hypothesis, it is
13 shared by virtually all of the members of the group.

14 Therefore, under the ADEA, the state's very
15 proper goal of weeding out the age-impaired from its
16 work force can be achieved by either of two means. One,
17 a mandatory retirement program applicable to all members
18 of the group if the state can show that, in fact, as to
19 that group, the approach does identify the age-impaired
20 with sufficient precision as to all members of the group.

21 QUESTION: General Lee, the Congress of the
22 United States itself has imposed a mandatory retirement
23 age for similarly situated federal prsonnel, as I
24 understand it.

25 MR. LEE: Yes.

1 QUESTION: Maybe that indicates to us that
2 there is a BFOQ defense for the state as a matter of law.

3 MR. LEE: I don't think so, Justice O'Connor.
4 It is true that Congress, in its 1978 amendment, did
5 consider the possibility of these little enclaves of
6 federal employees whom it was leaving, who were still
7 subject to mandatory requirements. And there was a
8 proposal at that time to eliminate all of those.

9 It is fairly apparent from the legislative
10 history, as is spelled out from our brief statements by
11 Representative Spellman and Representative Hawkins. The
12 reason that that was not done is that some of these
13 enclaves applying to such people as CIA, air traffic
14 controllers, law enforcement and fire fighters and some
15 others, were subject to the jurisdiction, the primary
16 jurisdiction of other committees and they did not want
17 to trounce on their turf before giving them an
18 opportunity to pass on that issue.

19 But insofar as the constitutional significance
20 is concerned, here I submit is the only significance of
21 the fact that Congress has not extended this rule yet to
22 all federal employees.

23 QUESTION: Do you recall the case involving the
24 foreign service officers?

25 MR. LEE: Vance versus Bradley, yes.

1 QUESTION: There certainly there was a policy
2 decision by the Congress of the United States that there
3 was an inherent impediment on foreign service officers
4 after reaching the age of 60.

5 MR. LEE: That is correct.

6 QUESTION: Doesn't that relate to the question
7 Justice O'Connor put to you?

8 MR. LEE: It certainly does. And what that
9 shows is that either Congress or any other legislative
10 policy-making body, including the state of Wyoming or
11 including the state of Massachusetts, may conclude by
12 legislative action that mandatory retirement programs
13 are constitutional, or at least that they are required
14 in the interest of the achievement of some state
15 objective. And if that's all you have, then it passes
16 constitutional muster. That's Vance versus Bradley, and
17 that's Murgia versus -- that's Massachusetts Board of
18 Retirement versus Murgia.

19 What you have in this case applicable to
20 Wyoming is an additional element, and that is a
21 supervening legislative judgment that in certain kinds
22 of contexts the line should be drawn with greater
23 precision, and for reasons that I will discuss, Congress
24 also has the right to make that decision.

25 The only argument that can be made against it

1 is that Congress has been under-inclusive, and
2 particularly with respect to Congress's both Commerce
3 clause judgments and also 14th Amendment judgments. The
4 under-inclusive argument simply has not met with much
5 success.

6 The most that you can say is that Congress has
7 been somewhat inconsistent, or at least that it has not
8 yet taken the ultimate step that complete consistency
9 might indicate it should. But that is not sufficient
10 basis to render it unconstitutional.

11 QUESTION: How would compare the functions of a
12 game warden with the functions of the officer involved
13 in the Murgia and, I think, Feeney cases?

14 QUESTION: Or with an FBI agent?

15 MR. LEE: Or with an FBI agent. This -- I
16 think it would be difficult to imagine a case in which
17 the case for mandatory retirement is less strong than it
18 is in the case of Bill Crump, because he was not just a
19 game warden; he was a game warden supervisor, which was
20 basically a supervisory kind of responsibility. And for
21 that reason, I think that it does not rise to the same
22 level as the foreign service employees in Vance, or the
23 uniformed police in Murgia.

24 But that is not the controlling point. The
25 controlling point is that just as this Court very

1 properly held in Murgia and Vance versus Bradley, that
2 it does not violate the 14th Amendment for a
3 policy-making body to adopt a mandatory retirement
4 program. And, just as for reasons that I will discuss,
5 it is also constitutional for Congress, pursuant to its
6 commerce and its 14th Amendment powers, to prescribe
7 that in certain contexts to be identified by Congress
8 more is required than the dragnet approach of the broad,
9 overall inclusive approach is also constitutional.

10 The fact that Congress does both at the same
11 time and that those exist side by side does not affect
12 the constitutionality of either, because the
13 constitutionality of both rests on separate grounds.
14 That is perhaps best illustrated when we turn to the
15 comparison of the state and federal interests, the final
16 inquiry that is specified by Hodel and Usery.

17 On the state's side, the state's objective in
18 maintaining a physically fit game warden force is left
19 intact by the ADEA. The only requirement is that
20 fitness itself must be the inquiry, and unlike the Fair
21 Labor Standards Act, the ADEA does not prescribe to the
22 states any level of expenditures.

23 The countervailing federal interest by contrast
24 is weighty; it is threefold. The first is prevention of
25 unnecessary unemployment and lack of productive capacity

1 in areas of endeavor affecting interstate commerce.
2 Congress had before it evidence which indicated that the
3 magnitude of that loss of productive endeavor throughout
4 the United States was on the order of several billion
5 dollars a year.

6 The second is the prevention of unnecessary
7 demands on the federal Social Security system. And
8 third and perhaps most important of all was the
9 prevention of arbitrary discrimination.

10 QUESTION: General Lee, supposing we just
11 confine ourselves for the moment to the first ground,
12 the interest in the work force, and Congress found that
13 it would be, there's a shortage of jobs and it would be
14 better to have younger men occupying these positions in
15 the long run and that therefore, they imposed a
16 mandatory retirement age of 55 for nationwide, game
17 wardens, law enforcement people throughout the country.
18 Would that be constitutional?

19 MR. LEE: I think it would be constitutional
20 under Murgia.

21 QUESTION: Wasn't that part of the theory in
22 Congress in putting a limit on the foreign service
23 officers so that there would be an inducement for
24 younger people to get in the system and not have these
25 over-aged men of 60 blocking their progress?

1 (Laughter.)

2 MR. LEE: That was a much more powerful
3 argument to me a few years ago than it is right now.

4 QUESTION: General Lee, in amplification of
5 Justice Stevens' question, supposing that Congress
6 imposed a mandatory retirement age of 50, feeling that
7 it really wanted to get the younger people up there, and
8 Wyoming came with a showing that half of its game
9 wardens were over 50, and therefore, it really was
10 impairing its right to structure its own employment
11 system? That would be a fair amount closer to the
12 application of the Fair Labor Standards Act.

13 MR. LEE: I think it would be a fair amount
14 closer, yes, because it does -- while Hodel said that
15 economic impact alone is not sufficient, it certainly is
16 relevant. And at least you would have an economic
17 impact at that point.

18 I think the point, Justice Stevens, and Chief
19 Justice Burger, in answer to both of your questions is
20 this. That these are difficult policy questions. And
21 they are questions that can be resolved either by the
22 group approach or by the individual approach, and they
23 can be resolved either by the policy that says we need
24 to have more young people in the work force, or by
25 saying we need to preserve the productivity of the older

1 and the more experienced persons.

2 But Congress can make the judgment either way,
3 and similarly, it can make the judgment and say we're
4 going to take it one step at a time, and we're only
5 going to identify part of the people to whom our policy
6 is going to extend at a time.

7 QUESTION: But earlier, you said the case was
8 really one of drawing the line with greater precision.
9 It seems to me the question is, rather, Congress has
10 decided who shall be drawing the line. Because they say
11 the EEOC shall draw the line, not the state of Wyoming.

12 MR. LEE: Well, that's true, that is correct.
13 But it's consistent with the policy. That is simply
14 fleshing in the BFOQ, which in turn was set by Congress.

15 QUESTION: General Lee, --

16 QUESTION: Doesn't this action of Congress in
17 the position you're taking reject the concept that is
18 associated with Justice Brandeis that the state should
19 be allowed to have wide latitude in experimenting with
20 various programs? They might find, for example, that in
21 Florida after a period of time the game wardens and
22 police officers would last longer than they would in the
23 rigorous climate of Wyoming. Isn't that the whole
24 concept of Brandeis?

25 MR. LEE: That's a good point, Mr. Chief

1 Justice, and it does very little if any violence at all
2 to that concept which I fully support, for this reason.
3 It permits Florida to reach one judgment and Wyoming to
4 reach another with respect to what is a bona fide
5 occupational qualification.

6 All that Congress has done is to say that
7 you've got to have a more accurate measure for what is
8 the disability than age itself. That you've got to act
9 on something that's more solidly based than just
10 stereotypes and hunches.

11 QUESTION: From your description, Congress was
12 a good deal more stringent than that, if the principle
13 of the BFOC is that all or substantially all have to be
14 disabled from performing. That's a very difficult
15 requirement for any state to show. So it seems to me
16 that Congress has virtually outlawed any sort of a
17 mandatory retirement age.

18 Under the ADEA would it be permissible for,
19 say, Wyoming or some other state to say we think that we
20 want to take it on a more individualized basis, but we
21 also think that as you go past 55, you run more of a
22 risk. So although we require physicals every two years
23 for people under 55, we're going to require physicals
24 every six months for people over 55? Or would the EEOC
25 say that's age discrimination?

1 MR. LEE: I don't know what the EEOC would say,
2 but I would say that it's an acceptable procedure.

3 QUESTION: Well, that doesn't mean the EEOC
4 wouldn't say it's age discrimination.

5 MR. LEE: I agree with that.

6 Following up on that point, and the extent to
7 which Congress can make these judgments, Bill Crump is a
8 citizen of Wyoming.

9 QUESTION: Are you personally acquainted with
10 him that you refer to him by name all the time, or is it
11 just kind of an argument tool?

12 MR. LEE: Just kind of an argument tool.

13 (Laughter.)

14 Mr. Crump is not only a citizen of Wyoming; he
15 is also a citizen of the United States. And the United
16 States has a legitimate interest which is rooted in
17 Congress's Section V 14th Amendment power to insure that
18 if he and other like him are to be removed against their
19 will from the work force for which they have been
20 trained, which they know best, at an age in life which
21 may well represent the point which may be the peak of
22 their professional careers, then at the very least, the
23 state must show that it is acting on something more
24 solid than just anecdotes and stereotypes.

25 And that brings us to the second source of

1 Congress's authority to pass this statute, which is
2 Section V.

3 QUESTION: Do you mean by that, Mr. Solicitor
4 General, that Congress was acting on a stereotype with
5 respect to foreign service officers, FBI agents,
6 military people, where they have arbitrary retirement
7 ages, all of them down the line? Is that a stereotype
8 or is that a considered judgment in how to manage their
9 responsibilities?

10 MR. LEE: I don't know. All I do know is that
11 under this Court's decision in Vance versus Bradley, the
12 court is willing to assume that since that fell within
13 their authority to enact, it was proper for them to make
14 that judgment.

15 In South Carolina versus Katzenbach, Congress's
16 prohibition against the use of literacy tests was
17 upheld, notwithstanding the fact of this Court's earlier
18 holding that literacy tests themselves do not violate the
19 Constitution. The principle is that while Congress may
20 not define constitutional rights, it can pass
21 legislation appropriate for the purpose of more
22 effectively enforcing constitutional rights which have
23 been identified by this Court.

24 This case is identical to South Carolina versus
25 Katzenbach in this respect. Murgia and Vance versus

1 Bradley make clear that the equal protection clause
2 protects against age discrimination, and Congress has
3 taken steps to enforce that general guarantee.

4 QUESTION: What statement did Murgia make about
5 the Constitution protecting against age discrimination?

6 MR. LEE: It is simply an inference, Justice
7 Rehnquist, from the fact that the court rejected age as
8 a suspect classification, it rejected employment as a
9 fundamental right, and then went on to find that there
10 was a rational basis, all of which is consistent with if
11 the court had, in fact, held that age is not protected
12 by the equal protection clause, all of that analysis
13 would have been surplusage. Therefore, I say that
14 necessarily the holding is built on the premise that age
15 is protected by the -- or, is included within the 14th
16 Amendment.

17 QUESTION: Do you find that a very satisfying
18 analysis?

19 MR. LEE: Oh, indeed, I do.

20 QUESTION: Doesn't that merely say that age --
21 you assume for purposes of a decision that it's
22 protected, and then go ahead and make the analysis.

23 MR. LEE: The court did not say in so many
24 words that age -- but if there is any doubt on that, --
25 and may I add that the dozen or so lower federal courts

1 that have considered the issue, the same premise is
2 built in -- I see no reason that age should not be
3 protected.

4 This Court has said that the legal protection
5 clause prohibits all forms of discrimination, and
6 indeed, it should. And certainly, the argument can be
7 made that there is no crueler form of discrimination
8 than discrimination based on age precisely because --
9 there comes a point at which it is rational as to all
10 people, but because of that fact, it is more easy to
11 erect the stereotypes in the age context than perhaps
12 any other.

13 QUESTION: Did I understand you to say, Mr.
14 Solicitor General, that if Congress enacted the statute
15 requiring retirement of all federal law enforcement
16 officers to retire at age 55, that that would be valid?

17 MR. LEE: Well, yes. While that issue is not
18 before the Court, --

19 QUESTION: Wouldn't that be equally
20 discriminatory?

21 MR. LEE: No, I think that is squarely covered
22 by -- it may be discriminatory in the sense that it
23 draws classifications in the sense that virtually any
24 statute passed by any legislature is discriminatory, but
25 it passes the rational basis test, and that's Murgia and

1 Vance versus Bradley.

2 QUESTION: You were talking about
3 discrimination against the people in this case who are
4 compelled to retire at 55. It would seem to me that the
5 federal employees would similarly be discriminated
6 against.

7 MR. LEE: Indeed, that argument can be made.
8 And the answer to it is, as this Court has clarified on
9 many occasions, that the under-inclusiveness argument
10 simply is a very weak one in the equal protection
11 context, and that Congress can take it one step at a
12 time. Congress may conclude, either on the one hand
13 that its policies that it wishes to enact are achieved
14 by mandatory retirement programs, or it can make the
15 opposite conclusion.

16 Now, in this case as to some people it has made
17 one of those conclusions, and as to other people it has
18 made others. But that does not detract from the fact
19 that it has the power to do each. And the most that can
20 be said is that it has been under-inclusive.

21 There was the proposal that was put before
22 Congress in 1978 to do the job completely, to take care
23 of both federal and state all in one fell swoop.
24 Because largely of the overlapping jurisdiction and the
25 committee problem, Congress elected not to do that at

1 that time.

2 But it has the authority to do either, and it
3 also follows, in my view, that it has the authority to
4 do both simultaneously, side by side.

5 QUESTION: Do you suppose Congress was
6 experimenting on the states collectively in this area?

7 MR. LEE: Experimenting in the sense - to the
8 extent that it's experimenting, it's doing it both
9 ways. It imposes on itself, on the federal government,
10 a more stringent requirement insofar as the age
11 limitations are concerned. The cap is off insofar as
12 federal employees are concerned. The Act prohibits all
13 age discrimination to the federal government, and to the
14 states, there are no exceptions except the exceptions --
15 well, the exceptions as to the state are age exceptions,
16 between the ages of 40 and 70. Over 70, under 40, the
17 state is subject only to those strictures that are
18 imposed by this Court's decision in the Murgia case.

19 The final issue that I'd like to deal with just
20 briefly is the state's argument, and one that the
21 district court followed, that the 14th Amendment -- that
22 Congress cannot exercise its 14th Amendment power
23 without saying so, and saying so rather explicitly.
24 That, I submit, is an erroneous argument for two reasons.

25 One is that we believe that Congress did intend

1 to exercise its 14th Amendment powers. That is a view
2 that is shared by the overwhelming majority of lower
3 federal courts. Probably the best observation is in the
4 Seventh Circuit's opinion in Calumet that the dominant
5 feature of the legislative history was a concern that
6 embedded and inaccurate stereotypes were producing
7 irrational employment decisions. That is the language
8 of equal protection for prohibition of discriminatory
9 conduct and not of commerce.

10 But even if we're wrong on that issue, the
11 premise of the state's argument is itself in error.

12 The Constitution requires passage by two Houses
13 of Congress and signature by the President. It also
14 requires that Congress action be authorized by some
15 constitutional provision. It does not require that
16 Congress identify what that provision is. That is a
17 judicial function and not a legislative function.

18 The function of legislative history where it
19 exists is to ascertain congressional intent. It is not
20 to determine whether Congress knows as much as this
21 Court knows about constitutional law.

22 The district court has, in effect, held that if
23 Congress does elect to provide legislative history for
24 the purpose of clarifying substantive meaning, which it
25 need not do at all, the price that Congress pays for

1 that clarification is to put its statute at
2 constitutional risk.

3 This Court's decision in Pennhurst is not to
4 the contrary; this Court's decision in Pennhursts
5 properly read also includes only an inquiry into
6 congressional intent and not to require that Congress
7 receive a passing grade on its constitutional law exam.

8 I would like to reserve the rest of my time for
9 rebuttal.

10 CHIEF JUSTICE BURGER: Very well. Mr. Salzburg?

11 ORAL ARGUMENT OF BRUCE A. SALZBURG, ESQ.

12 ON BEHALF OF THE APPELLEES

13 MR. SALZBURG: Mr. Chief Justice, and may it
14 please the Court:

15 Wyoming enforces a mandatory retirement policy
16 for two classes of individuals. They are both covered
17 by the same Act. It is the Act that is here challenged
18 by the EEOC. The Act covers Wyoming's highway patrol
19 officers, and it covers those game and fish wardens for
20 the state of Wyoming who are also full-time law
21 enforcement officers. It does not, as the Solicitor
22 General suggests, cover most game and fish employees.
23 So we are talking, first of all, about Wyoming's
24 treatment of its law enforcement officers, and only its
25 law enforcement officers.

1 The Solicitor General predicates his argument
2 on the premise that what we are concerned with here
3 today is arbitrary discrimination. Wyoming suggests
4 that this is not arbitrary discrimination at all; that
5 this is activity by a state which is a reasonable
6 classification based upon age, and that therefore, the
7 question for the Court's determination is simply whether
8 or not the 10th Amendment to the United States
9 Constitution, which embodies our constitutional
10 federalism, reserves to the state of Wyoming the right
11 to treat its law enforcement officers and to make
12 fundamental employment decisions in exactly the same
13 fashion that the United States Congress exercises its
14 employment decisions with regard to federal law
15 enforcement officers.

16 The position of the state of Wyoming is that
17 under the Commerce clause, that Congress has no power to
18 regulate the states in this fashion. Moreover, if the
19 Court should reach the question of whether or not
20 Congress has any power under Section V of the 14th
21 Amendment, that that power is insufficient as well.

22 The requirements for determining whether or not
23 this is an appropriate exercise of Congress's commerce
24 power, of course, were set down by this Court in
25 National League of Cities versus Usery. The tests are

1 three. The first, the Act must regulate the states as
2 states. That test is conceded by the Solicitor General
3 in this case.

4 The second is that the Act must address a
5 matter which is indisputedly a matter of state
6 sovereignty. We have some argument there. The
7 Solicitor General posits --

8 QUESTION: There was a third one. Are you
9 going to get to that?

10 MR. SALZBURG: Yes, Your Honor.

11 The Solicitor General posits that the attribute
12 of state sovereignty which Wyoming here seeks to protect
13 is the ability to discriminate arbitrarily. Your
14 Honors, the state of Wyoming suggests no such thing. We
15 do not here suggest that it is appropriate for any state
16 to arbitrarily discriminate against any employee on the
17 basis of age or any other classification.

18 The attribute of state sovereignty which we
19 seek to protect is the ability of the legislature of the
20 state of Wyoming to make fundamental employment
21 decisions. The Constitution does not vest the Congress,
22 nor does the Constitution vest the federal courts with
23 the ability to make employment decisions concerning who
24 shall be a law enforcement officer in the state of
25 Wyoming.

1 QUESTION: Mr. Salzburg, supposing that Wyoming
2 had a law that said all game wardens shall be men?
3 Could the federal government prohibit that?

4 MR. SALZBURG: Your Honor, Wyoming could not
5 have such a law because sex discrimination is
6 unconstitutional in this context. Understand that in
7 this case, although the Solicitor General chooses to
8 call this arbitrary discrimination, what we have here is
9 clearly not arbitrary discrimination. The Solicitor
10 General does not argue -- no one in this case argues --
11 that what Wyoming has done here violates the
12 Constitution.

13 The distinction between what Wyoming has done
14 is that this conduct is constitutionally permissible;
15 whereas, a statute which presumed to discriminate on the
16 basis of sex would clearly be unconstitutional. Wyoming
17 has no reserved right under the 10th Amendment to
18 violate the Constitution. Wyoming does have a right
19 that is embodied in the 10th Amendment to make its own
20 fundamental decisions.

21 This Court recognized last term in FER versus
22 Mississippi that perhaps the quintessential attribute of
23 state sovereignty is the ability to make decisions in
24 areas --

25 QUESTION: Isn't the only issue here the 10th

1 Amendment issue?

2 MR. SALZBURG: Your Honor, we submit that the
3 only issue here is the 10th Amendment issue. Because
4 lower courts and Solicitor General have argued --

5 QUESTION: Suppose we reversed the judgment
6 that the Act is unconstitutional on 10th Amendment
7 grounds? If we decide that the decision was wrong,
8 that's all we would do, isn't it? There may be some
9 more left to the case.

10 MR. SALZBURG: Yes, Your Honor.

11 QUESTION: Why do we have to go on to issues
12 that were never decided below?

13 MR. SALZBURG: In this particular case, it
14 seems to me clear that the Court would not have to. But
15 we might be right back here, no matter what.

16 QUESTION: That may be, but the only question
17 raised in the papers and argued in the briefs is the
18 10th Amendment.

19 MR. SALZBURG: Well, Your Honor, we certainly
20 raise the same arguments that we raised before the
21 district court. Because the district court did not get
22 past the 10th Amendment issue --

23 QUESTION: You're respondent here, I take it.

24 MR. SALZBURG: We are appellant, Your Honor.
25 Excuse me, Appellee.

1 QUESTION: Appellee. And you described the
2 question as a single question; whether the Age
3 Discrimination Act is unconstitutional on 10th Amendment
4 grounds. That's the only question that's here. It's
5 the only question the government presented.

6 MR. SALZBURG: The third test of National
7 League of Cities versus Usery is whether or not the
8 regulation interferes with the ability of the state to
9 structure integral operations of traditional state
10 functions.

11 The problem that we wish to bring to the
12 Court's attention is that the interference that is
13 presented by this Act is the most severe interference
14 that could possibly be made by Congress. Congress is
15 attempting to instruct the states on who its game and
16 fish wardens will be. Congress is saying, in essence,
17 if the construction of the EEOC is correct, that Wyoming
18 -- we would not retain this particular individual solely
19 because he is 55. However, you must retain him, even
20 though he is 55. Or in the alternative, go into a
21 federal court and justify the rationality of your
22 decision.

23 QUESTION: General Salzburg, this isn't as
24 intrusive, is it, as making the Fair Labor Standards Act
25 applicable, where in effect, the government would have

1 been telling Wyoming what to pay to every single state
2 employee? This is just shearing off a few at the
3 further end of the age spectrum and saying then you may
4 have to treat somewhat differently than you want to.

5 MR. SALZBURG: Your Honor, it's more
6 intrusive. The reason is because we would submit it's
7 not merely telling us how much to pay; it's telling us
8 who will deliver the essential governmental services
9 that the state of Wyoming has a right to deliver to its
10 citizens.

11 It is saying you will have police officers who
12 are over a certain age after the state legislature has
13 made a decision that is properly vested in the state
14 legislature under the Constitution that those
15 individuals will not deliver the state police services
16 to the people in the state of Wyoming. In that regard,
17 this is far more intrusive than the case was in National
18 League of Cities versus Usery.

19 The integral operations of any state system, of
20 any state function, of any traditional state function,
21 it seems to Wyoming depends integrally on who delivers
22 the function itself.

23 The Solicitor General suggests that the
24 existence of the bona fide occupational qualification
25 vindicates the state's ability to make these sorts of

1 decisions, so long as the state is able to show a
2 rational basis for the decision. That ignores what the
3 BFOQ does.

4 First, the BFOQ turns equal protection analysis
5 -- and I speak of equal protection analysis because it's
6 impossible to talk about reasonable classifications even
7 in the commerce sense without talking about equal
8 protection -- the reason that BFOQ does not suffice is
9 twofold.

10 First, the BFOQ defense forces the state of
11 Wyoming to justify its admittedly constitutional conduct
12 to a federal court. Again, no one in the case suggests
13 that what Wyoming has done by requiring our law
14 enforcement officers to retire is unconstitutional.
15 That is because everyone recognizes that this Court's
16 decision in Mass. versus Murgia would control.

17 Nonetheless, the Congress, through the
18 enactment of the BFOQ defense, is the only method for
19 the state of Wyoming to vindicate its constitutional
20 conduct. It forces Wyoming to go into court and bear an
21 unconstitutional burden; unconstitutional in the sense
22 that it requires far more for the vindication of its
23 constitutional conduct than this Court would require.

24 QUESTION: Mr. Salzburg, do you think it's open
25 to us to decide that Wyoming has established a BFOQ

1 defense as a matter of law because of the congressional
2 enactment exempting its own law enforcement personnel
3 from application of the Act?

4 MR. SALZBURG: It is clear from the legislative
5 history, Your Honor, that the Congress treats its own
6 law enforcement officers as being presumptively entitled
7 to a bona fide occupational qualification. It seems,
8 therefore, to me to be clear that the court could decide
9 as a matter of law that Wyoming is entitled to the same
10 BFOQ as a matter of law --

11 QUESTION: Would that solve your problem?

12 MR. SALZBURG: It would certainly solve our
13 problem in this case, Your Honor.

14 QUESTION: What would be the theory on which we
15 would reach such a decision?

16 MR. SALZBURG: The theory is, Your Honor, that
17 there is no constitutionally significant difference in
18 the facts between the federal government's
19 across-the-board requirement for its law enforcement
20 officers -- and understand that it's not little
21 enclaves. The legislative history which supports the
22 reduction in 1974 of the mandatory retirement age for
23 federal law enforcement officers indicates that they
24 were talking about 41,600 individuals in the federal
25 service. We're not talking about something that's

1 nominal.

2 The point is that if it is possible to find
3 that law enforcement as a generic term would entitle a
4 state or the federal government to a BFOQ in age
5 discrimination matters, it shouldn't be any different
6 for the federal government than it is for the states.

7 QUESTION: Well, certainly we wouldn't do it as
8 a matter of congressional intent, then, because there's
9 no indication that I can find that Congress intended age
10 to be an automatic BFOQ in the case where it was
11 applying the ADEA to states.

12 MR. SALZBURG: No, Your Honor. There are many
13 references in the briefs and the legislative history to
14 statements made that the Congress, when it enacted the
15 BFOQ defense, was recognizing that there were certain
16 physically strenuous occupations that the states
17 control, including law enforcement occupations, fire
18 fighter occupations and those sorts of things, which the
19 BFOQ was specifically designed to protect.

20 The problem occurs because this Court's test in
21 terms of the states protecting its constitutional right
22 to make fundamental employment decisions is one of mere
23 rationality.

24 The BFOQ, on the other hand, as you recognized
25 in the Solicitor General's argument, imposes quite a

1 different burden. The burden is all or substantially
2 all employees above a certain age are incapable of
3 performing the functions, and moreover, that it is
4 impossible or impractical to test individually for the
5 particular factor that you are trying to determine, such
6 that age is the only reasonable qualifier.

7 QUESTION: Do you take the position that all
8 enforcement officers are the same?

9 MR. SALZBURG: All law enforcement officers?

10 QUESTION: Yes, please don't take that position.

11 MR. SALZBURG: No, Your Honor.

12 QUESTION: Which I think you are saying.

13 MR. SALZBURG: No, Your Honor. I'm saying --

14 QUESTION: I don't know of any two police
15 forces in any two states that are the same. They're
16 about as different as you can get.

17 MR. SALZBURG: Let me say it this way, Your
18 Honor, --

19 QUESTION: How are you going to get to that
20 point?

21 MR. SALZBURG: The record, as the Solicitor
22 General points out, consists only of a complaint. And
23 of course, since the complaint was dismissed, the
24 factual allegations of the complaint are deemed to be
25 true. However, that doesn't mean that our record is

1 devoid of evidence about what these people do. The
2 court can judicially notice the statutes in the state of
3 Wyoming which set certain of the requirements for
4 Wyoming game and fish wardens who are law enforcement
5 officers.

6 They include generally, the enforcement of the
7 game and fish violations. That's poaching, license
8 violations, the taking of an elk out of season. It is
9 not, it seems to me, a very severe leaving of the record
10 to take the next step by implication and understand that
11 those violations do not occur, by and large, on the
12 streets of Cheyenne, Wyoming but rather, occur during
13 hunting season in areas where hunting occurs.

14 So it's clear enough from this record that the
15 court can determine that the duties that are set by
16 Wyoming statute for these particular law enforcement
17 officers are strenuous indeed.

18 Now, the lower courts have avoided the 10th
19 Amendment constitutional challenge, and found that
20 rather than this statute being an exercise of the 10th
21 Amendment -- excuse me, of the commerce power -- they
22 have assumed that Congress used its Section V power
23 under the 14th Amendment.

24 The Solicitor General states that this Court's
25 ruling last year in Pennhurst cannot apply to this case

1 simply because it is clear from this statute that the
2 Congress intended to regulate the states. We submit
3 that that is not the question to ask. The question that
4 was decided in Pennhurst is whether absent an indication
5 of -- absent an express statement of an intent to
6 enforce Section V of 14, courts should not lightly
7 assume that Congress, in fact, did that.

8 We are not requiring or asking this Court to
9 require that Congress adopt legislative history. We
10 clearly cannot do that. We're not asking the Court to
11 do that. We are simply asking the Court to follow what
12 seems to us to be a very clear statement of the rule in
13 Pennhurst, and find that there is no reason to go to the
14 14th Amendment analysis, because Congress never once
15 expressed any intent that that's what it wished to
16 enforce.

17 The legislative history that the Solicitor
18 General relies on in making his conclusion, it seems to
19 us, is simply insufficient to reach the question. There
20 are certainly vague allusions to discrimination; there
21 are statements in the legislative history which state
22 that the effects of age discrimination are as bad as the
23 effects of racial discrimination or discriminations
24 based upon sex, and we don't dispute that.

25 But to say that the effects of age

1 discrimination are as bad as the effects of racial
2 discrimination or discriminations based upon sex is not
3 to say that the Congress is therefore using its Section
4 V enforcement power in order to --

5 QUESTION: May I just ask you -- it really is
6 the second half of your opponent's argument. Supposing
7 the statute said pursuant to the powers vested by
8 Section V of the 14th Amendment, Congress hereby adopts
9 the following law, and they re-enacted the law. Would
10 that be a difference case?

11 MR. SALZBURG: It would certainly be a
12 different case, Your Honor, with respect to whether or
13 not it's proper for the court to assume that the Section
14 V power exists. It would be no different in the result.

15 QUESTION: Does the scope of their power depend
16 on what they say at the outset of the statute?

17 MR. SALZBURG: No, Your Honor. Clearly not.

18 QUESTION: Then can't we assume that they did,
19 in effect, say that, and still have the same problem
20 that you won't argue?

21 MR. SALZBURG: I am saying this, Your Honor,
22 that if you use Pennhurst, you never reach the second
23 question. If you find that Pennhurst is no bar, then
24 you reach the second question but the result is the
25 same. Because we believe that the 14th Amendment power

1 is also insufficient to regulate the states in this
2 manner.

3 QUESTION: Now, why is that? Is that because
4 discrimination on account of age is simply not -- it
5 would never be subject to the 14th Amendment?

6 MR. SALZBURG: No, Your Honor, I need to
7 clarify that because my argument has apparently been
8 misapprehended.

9 Our position is this. The 14th Amendment
10 enforcement power grants the Congress very broad power
11 to enforce the provisions of the amendment itself. This
12 Court has held many times that that power is plenary
13 within the terms of the grant.

14 Our position is that ADEA is not appropriate
15 legislation to enforce the 14th Amendment simply because
16 what the state has done here -- and I need to limit
17 myself to the application in this case -- what the state
18 has done here is not a constitutional violation.

19 Now, the 14th Amendment grants to Congress
20 basically three powers. Of course, it grants the
21 Congress the ability to prohibit conduct which in and of
22 itself would violate the equal protection clause.
23 Further, it also grants to Congress the ability to pass
24 legislation which remedies the current effects of past
25 constitutional violations. And finally, it grants to

1 Congress the power to enact legislation which prohibits
2 conduct which the Congress finds would present a risk of
3 future discriminations, future constitutional violations.

4 In this case, we have none of those situations,
5 and the Congress recognized that. The Congress in its
6 legislative history immediately prior to passing its law
7 prohibiting mandatory retirements said if the courts are
8 not going to declare this conduct unconstitutional, we
9 must act to make it illegal.

10 We say fine and good. The Congress has the
11 power to make mandatory retirement illegal under the
12 commerce clause. But the Congress has no power to
13 address an evil pursuant to the 14th Amendment which is
14 not contemplated by the amendment itself.

15 Now, --

16 QUESTION: Isn't your broader position that the
17 states have never delegated to the federal government
18 the authority to tell them how to run the state
19 government in terms of its employment?

20 MR. SALZBURG: That's exactly right, Your
21 Honor. And this Court held as much in National League
22 of Cities versus Usery. The analysis was limited to the
23 Congress's commerce power, and that was precisely the
24 holding of the case; that the 10th Amendment is an
25 affirmative bar to the exercise of congressional power

1 under the commerce clause, which is otherwise
2 appropriate. No one said that the Congress could not
3 have enacted federal minimum wage laws under the
4 commerce power because it clearly had that power to
5 regulate interstate commerce in that fashion.

6 However, when it came to regulating the states,
7 the 10th Amendment was an affirmative limitation on
8 Congress's ability to do so.

9 QUESTION: Do you think that before the 14th
10 Amendment, the states could have discriminated against
11 women on police forces?

12 MR. SALZBURG: It's a difficult question to
13 speculate about, Your Honor.

14 QUESTION: At any rate, after the 14th
15 Amendment they could not.

16 MR. SALZBURG: Clearly not. Because the 10th
17 Amendment, again, is no bar to congressional action
18 which prohibits a state constitutional violation. The
19 state does not reserve to itself any power to act
20 unconstitutionally.

21 Finally, Your Honor, I need to discuss the
22 problem of the closer fit. The Solicitor General's
23 argument is that Congress, notwithstanding this Court's
24 ruling in Massachusetts Board of Retirement versus
25 Murgia, has the power to require a closer fit between

1 the goals which the state may legitimately have, and the
2 means which the state chooses to get there.

3 As applied in this case, that argument leads to
4 the conclusion that the Congress has the power to
5 overrule this Court on questions of constitutional law.
6 The Congress has no --

7 QUESTION: Again, do you think the issue here
8 is whether the Wyoming regulation or statute -- it's a
9 regulation, isn't it?

10 MR. SALZBURG: Pardon me? The statute itself
11 is what is being challenged.

12 QUESTION: But the imposition of the age
13 requirement was by regulation, wasn't it, under this
14 statute?

15 MR. SALZBURG: No, Your Honor. The statute
16 authorizes --

17 QUESTION: Well, in any event, what is the
18 statute or regulation? The issue here isn't whether it
19 violates the Age Discrimination Act, is it? That isn't
20 the issue here. The issue here is whether the Age
21 Discrimination Act is constitutional.

22 MR. SALZBURG: That's correct, Your Honor.

23 QUESTION: Are you just responding about the
24 closer fit because the Solicitor General has argued an
25 issue that isn't here?

1 MR. SALZBURG: Your Honor, the Solicitor
2 General presents the closer fit argument as
3 justification for the constitutionality of the Act. I
4 wish to address the argument to demonstrate that his
5 conclusion is wrong; that the Act cannot be -- that
6 Congress has no such power to constitutionally require a
7 fit beyond what this Court has required in determining
8 equal protection cases, if in fact this was an exercise
9 of any equal protection enforcement power.

10 Your Honors, for the reasons that I've just
11 stated, we would respectfully request that the decision
12 of the state of Wyoming to retire its law enforcement
13 officers be affirmed.

14 CHIEF JUSTICE BURGER: Do you have anything
15 further, Mr. Solicitor General?

16 ORAL ARGUMENT OF REX E. LEE, ESQ.

17 ON BEHALF OF THE APPELLEES -- Rebuttal

18 MR. LEE: Just a couple of matters, Mr. Chief
19 Justice.

20 First, with regard to Mr. Salzburg's final
21 argument, it's exactly the same argument that New York
22 made in Morgan. New York in the Morgan case argued that
23 its English language requirement could not be prohibited
24 by Congress because the Constitution did not require
25 it. And that's exactly -- and the significance of

1 Morgan is that it gives Congress the authority to go
2 beyond when all that Congress is doing is to identify
3 means of enforcing those constitutional rights that have
4 been already identified by this Court.

5 With regard to EEOC and -- this is one
6 instance, Justice Rehnquist, in which I guessed right as
7 to what EEOC would do -- there are opinions, apparently,
8 in both the Department of Labor and EEOC that more
9 frequent physical examinations for older employees is
10 not violative of the ADEA.

11 With regard to the question of whether Congress
12 has, in effect, concluded that there is a BFOQ for law
13 enforcement, that is not the approach. And indeed, if
14 it were it would excuse privately employed security
15 guards covered by the ADEA. Rather, Congress's approach
16 has simply been to go not as far as it might.

17 With regard to the states, it has not
18 prohibited age discrimination under age 40 or over age
19 70, and with regard to the federal government, it has
20 not yet applied to all federal employees.

21 QUESTION: Well, there are a number of federal
22 employees who are not subject to as stringent
23 limitations on retirement as the state of Wyoming's will
24 be, isn't that true?

25 MR. LEE: That is correct. As I say, it is an

1 under-inclusiveness argument.

2 Finally, let me take Justice Stevens' question
3 one step further. Congress reenacts and says that it's
4 acting pursuant to the 14th Amendment. The same result
5 obtains, I submit, if Congress reenacts and says
6 absolutely nothing. There is no constitutional
7 requirement that Congress either provide legislative
8 history or specify the constitutional basis for what it
9 has done. In this case, the determinative fact is that
10 there is a constitutional basis, and Congress exercised
11 that constitutional basis. Whether it was smart enough
12 to know that that is what it was doing or not is for
13 this Court to determine.

14 For this reason, the judgment of the District
15 Court of the Wyoming should be reversed.

16 CHIEF JUSTICE BURGER: Thank you, gentlemen,
17 the case is submitted.

18 (Whereupon, at 3:04 p.m., the oral argument in
19 the above-entitled matter was submitted.)

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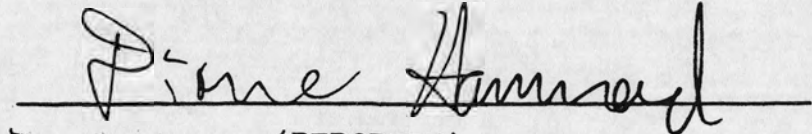
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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION v. WYOMING ET AL
No. 81-554

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BY

A handwritten signature in cursive script, appearing to read "Pione Hammar", is written over a horizontal line.

(REPORTER)