No. 98-4924

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

_____

JANE MARIE HUNDERTMARK,

Plaintiff-Appellee,

UNITED STATES OF AMERICA,

Intervenor

v.

THE HONORABLE BEN G. WATTS, in his official capacity as Secretary of the Florida Department of Transportation; FLORIDA DEPARTMENT OF TRANSPORTATION,

Defendant/Appellants,

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

_____

BRIEF FOR THE UNITED STATES AS INTERVENOR

_____

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Watts v. Hundertmark

No. 98-4924

C-1

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Florida Department of Transportation

Gold, the Honorable Alan S., U.S. District Judge

Goshgarian, John P., Florida Assistant Attorny General

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Watts, Ben G., Secretary, Florida Department of Transportation

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STATEMENT REGARDING ORAL ARGUMENT

This Court has already heard oral argument in this matter. The United States does not believe further oral argument is necessary to resolve the legal argument presented. If this Court elects to hear further oral argument, the United States should be permitted to participate. See 28 U.S.C. 2403(a).

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BRIEF FOR THE UNITED STATES AS INTERVENOR

STATEMENT OF JURISDICTION

Plaintiff-appellee Jane Marie Hundertmark filed a complaint in the United States District Court for the Southern District of Florida, alleging that the defendants violated, inter alia, the Equal Pay Act, 29 U.S.C. 206(d). For the reasons discussed in this brief, the district court had jurisdiction over the case pursuant to 28 U.S.C. 1331 and 29 U.S.C. 216(b).

This appeal is from an order entered on May 6, 1998. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1291. See Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993)

STATEMENT OF THE ISSUE

Whether The Equal Pay Act Is A Valid Exercise Of Congress' Power To Enforce The Equal Protection Clause Of The Fourteenth Amendment.

STATEMENT OF THE CASE

1. This suit is a private action brought by an employee of the Florida Department of Transportation against the defendants for monetary and equitable relief under, inter alia, the Equal Pay Act, 29 U.S.C. 206(d).

2. The defendants moved to dismiss the plaintiff's Equal Pay Act action for lack of subject-matter jurisdiction based on the Supreme Court's decision in Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996). The district court denied the motion on May 6, 1998, finding that Congress unequivocally expressed its intent to abrogate the state's Eleventh Amendment immunity and that Congress had the power under Section 5 of the Fourteenth Amendment to enact the Equal Pay Act.

3. On June 4, 1998, defendants filed a notice of appeal.

4. Because the constitutionality of the Equal Pay Act is a question of law, this Court reviews the issue de novo. See Kimel v. State of Florida Bd. of Regents, 139 F.3d 1426 (11th Cir. 1998), aff'd, 120 S. Ct. 631 (2000).

SUMMARY OF ARGUMENT

The Eleventh Amendment does not bar federal courts from exercising jurisdiction over plaintiffs' Equal Pay Act claim. Although Seminole Tribe made new law regarding Congress' authority to rely on the Commerce Clause to abrogate Eleventh Amendment immunity, the opinion expressly reaffirmed prior decisions that Congress may use the power granted it by Section 5 of the Fourteenth Amendment to abrogate a State's Eleventh Amendment immunity.

Like other civil rights legislation, the purpose of the Equal Pay Act was to combat discrimination on the basis of sex. Contrary to the state's assertions, it is irrelevant that Congress did not specifically invoke its powers under Section 5 of the Fourteenth Amendment. As the Supreme Court has made clear, and as this Court's recent decision in United States v. Moghadam, 175 F.3d 1269 (11th Cir. 1999), petition for cert. pending, 68 U.S.L.W. 3367 (U.S. Nov. 23, 1999), (No. 99-879) makes clear, the only relevant inquiry is whether legislation may be upheld as a valid exercise of Congress' Section 5 enforcement authority, not whether Congress specifically thought that it was using this authority.

Here, Congress determined that it was appropriate to create a presumption against an employer who provides unequal pay for equal work between men and women, where the statute permits an employer to escape liability by showing that the differential is not because of sex. Both the Supreme Court and this Court have

repeatedly confirmed, most recently in City of Boerne v. Flores, 521 U.S. 507 (1997) and Crum v. Alabama, 198 F.3d 1305 (11th Cir. 1999), that Congress may prohibit practices that are discriminatory in effect under its Section 5 authority even though the equal protection clause only prohibits practices that are intentionally discriminatory. Based on its broad authority under Section 5 and the vast legislative record of discrimination against women by states that it had before it, Congress could have rationally concluded that the extension of the Equal Pay Act to the States was an appropriate response to the persistence of gender discrimination by state employers. Consistent with the six other courts of appeals to address the question, this Court should hold that the extension of the Equal Pay Act to the States is a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause.

ARGUMENT

THE EQUAL PAY ACT IS A VALID EXERCISE OF CONGRESS' POWER TO ENFORCE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

The Equal Pay Act prohibits employers from discriminating on the basis of sex in paying wages. 29 U.S.C. 206(d). Enacted in 1963, and extended to the States in 1974, the Equal Pay Act is "part of a wider statutory scheme to protect employees in the workplace" from "invidious bias in employment decisions." McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 357 (1995). In determining whether this established anti-discrimination statute has abrogated the States' Eleventh Amendment immunity to private suits in federal court, Seminole

Tribe of Florida v. Florida, 517 U.S. 44 (1996), articulated a two-part test:

> first, whether Congress has unequivocally expressed its intent to abrogate the immunity; and second, whether Congress has acted pursuant to a valid exercise of power.

Id. at 55 (citations, quotations and brackets omitted).

As Defendants concede (Br. 7; Supp. Br. 2),[1/] and as the Supreme Court recently held in Kimel v. Florida Board of Regents, 120 S. Ct. 631, 640-642 (2000), the private enforcement provisions set forth in 29 U.S.C. 216(b), which authorize private suits to enforce the Equal Pay Act as well as other federal statutes, "clearly demonstrate Congress' intent to subject the States to suit for money damages at the hands of individual employees."[2/] Kimel, 120 S. Ct. at 640. Thus the sole issue in this appeal is whether the Equal Pay Act, as applied to the

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[1/] "Br. __" refers to the initial brief of the Defendant-Appellants filed in this case. "Supp. Br. __" refers to the Supplemental Brief of the Appellants.

[2/] The private enforcement provision of the Fair Labor Standards Act, which also provides the enforcement procedures for the Equal Pay Act, authorizes employees to maintain actions for legal relief, including back-pay and liquidated damages, "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." 29 U.S.C. 216(b). The term "employer" is defined in the Fair Labor Standards Act to "include[] a public agency," which in turn is defined as "the government of a State or political subdivision thereof" and any agency of a State. 29 U.S.C. 203(d), 203(x). The term "employee" is defined to include "any individual employed by a State." 29 U.S.C. 203(e)(2)(C). In Kimel, the Supreme Court held that Section 216(b) was a clear expression of Congress' intent to subject the States to suit for money damages. See Kimel, 120 S. Ct. at 640.

States, is a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment.

C. The Equal Pay Act May Be Upheld As An Exercise Of Congress' Section 5 Authority Even If Congress Did Not Specifically Intend To Use That Authority When It Passed The Equal Pay Act

Defendants argue (Appellants' Br. 7-20) that Congress did not intend to exercise its Section 5 authority in extending the Equal Pay Act to the States, but rather thought that it was acting pursuant to its Commerce Clause authority. However, Congress need not specifically intend to exercise its Section 5 authority in order for legislation to be so upheld. The longstanding rule of judicial review is that "the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." EEOC v. Wyoming, 460 U.S. 226, 243-244 n.18 (1983) (quoting Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948)); United States v. Moghadam, 175 F.3d 1269 (1999), pet. for cert. pending, 68 U.S.L.W. 3367 (U.S. Nov. 23, 1999) (No. 99-879).

This Court's recent decision in Moghadam illustrates this principle. In Moghadam, this Court upheld an anti-bootlegging statute as a valid exercise of Congress' power to regulate interstate commerce, even though neither the statute nor the legislative history mentioned the Commerce Clause and the legislative history indicated that Congress "thought it was acting under the Copyright Clause." See id. at 1275.

This Court's decision in Moghadam properly recognizes that once Congress has enacted legislation to address a problem, its

statutes are presumed constitutional and may be struck down only if they are shown to be beyond Congress' power. See, e.g., Close v. Glenwood Cemetery, 107 U.S. 466, 475 (1883); United States v. Harris, 106 U.S. 629, 635 (1883). It is consistent with that traditional canon of judicial review to assume that Congress intends to use its full panoply of constitutionally granted authority. Thus, when constitutional challenges are brought "question[ing] the power of Congress to pass the law * * * [i]t is, therefore, necessary to search the Constitution to ascertain whether or not the power is conferred." Harris, 106 U.S. at 636 (emphasis added).[3/] As Judge Easterbrook explained in a statement on behalf of all the active judges in the Seventh Circuit, "Congress need not catalog the grants of power under which it legislates; courts do not remand statutes for better statements of reasons." Doe v. University of Ill., 138 F.3d 653, 678 (7th Cir. 1998), vacated on other grounds, 119 S. Ct. 2016 (1999), reinstated in relevant part, 200 F.3d 499 (7th Cir. 1999).

We acknowledge, as Defendants contend (Br. 7-12), that the Commerce Clause is the constitutional basis for the Equal Pay Act's regulation of private employers. That does not mean, however, that this Court cannot sustain Congress' extension of the same protections to the States under Section 5. The fact

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[3/] See also, e.g., Fullilove v. Klutznick, 448 U.S. 448, 473-478 (1980) (opinion of Burger, C.J.); Griffin v. Breckenridge, 403 U.S. 88, 107 (1971); United States v. Butler, 297 U.S. 1, 61 (1936); Keller v. United States, 213 U.S. 138, 147 (1909).

that Title VII was originally enacted pursuant to the Commerce Clause, see United Steelworkers of Am. v. Weber, 443 U.S. 193, 206 n. 6 (1979), did not preclude the Supreme Court from holding in Fitzpatrick v. Bitzer, 427 U.S. 445, 452-456 (1976), that the extension of Title VII to the States could be upheld under Section 5. The same is true for the Equal Pay Act's extension to the States, as three courts of appeals have held. See Ussery v. Louisiana, 150 F.3d 431, 436-437 (5th Cir. 1998), cert. dismissed, 119 S. Ct. 1161 (1999); Varner v. Illinois State Univ., 150 F.3d 706, 713 n.7 (7th Cir. 1998), vacated, 120 S. Ct. 928 (2000)[4/]; Timmer v. Michigan Dep't of Commerce, 104 F.3d 833, 838-839 n.7 (6th Cir. 1997); see also EEOC v. Calumet County, 686 F.2d 1249, 1253 (7th Cir. 1982) (noting pattern of extending commerce-based civil rights statutes to States under Section 5).

Congress' ultimate goal in enacting the 1974 amendments to the Equal Pay Act was to eliminate sex discrimination by state employers. Even if Congress incorrectly predicted that the Supreme Court would ultimately decide that Congress could use its Commerce Clause power to abrogate the States' Eleventh Amendment immunity,[5/] the court's "duty in passing on the constitutionality of legislation is to determine whether Congress had the authority

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[4/] The Court vacated Varner for further consideration in light of its decision in Kimel.

[5/] Defendant's claim (Br. 7-8) that Congress made clear that it intended to use only its Commerce Clause power when it extended the Equal Pay Act to the State has been rejected by every other court of appeals to address the question. See Ussery, 150 F.3d at 436 n.2; Varner, 150 F.3d at 714; Timmer, 104 F.3d at 838-839 n.7.

to adopt legislation, not whether it correctly guessed the source of that power." See Timmer, 104 F.3d at 839. This approach is most consistent with the proper respect due Congress as a coordinate branch of government.[6/]

Defendant's reliance (Br. 20-22) on Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981), is unfounded. In Pennhurst, the Court was confronted with an ambiguously worded statute and was seeking to determine whether Congress intended the statute to "impose[] an obligation on the States to provide, at their own expense, certain kinds of [medical] treatment." Id. at 15. Although some parties in Pennhurst argued that the statutory obligations were conditioned on the acceptance of federal funds, one of the parties contended that the statute had been enacted pursuant to the Fourteenth Amendment, and thus applied to all States regardless of the receipt of federal funds. Ibid. In the course of finding that the statute imposed no obligations on States at all, regardless whether they accepted federal funds, the Court rejected the latter claim, stating that

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[6/] The rule also has a practical justification. As one scholar has noted:

> if Congress mistakenly identified an insufficient power to support its legislation, and the Supreme Court found the law therefore to be unconstitutional, Congress could rectify its error by subsequently repassing the statute under a sufficient constitutional source of authority. When both the insufficient and sufficient grants of authority allegedly support direct regulation of the same conduct, the judicial exercise of invalidating the initial legislation would be futile and would result in an unnecessary expenditure of time by both Congress and the Court.

Margaret G. Stewart, Political Federalism and Congressional Truth-Telling, 42 Cath. U. L. Rev. 511, 517-518 (1993) (footnote omitted).

"we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." Id. at 16.

The Supreme Court has subsequently explained that Pennhurst did not articulate a rule used to determine the constitutionality of statutes, but the meaning of ambiguous statutes. In Wyoming, 460 U.S. at 244 n.18 (citations omitted), a majority of the Supreme Court specifically noted that "[o]ur task in Pennhurst * * * was to construe a statute, not to adjudge its constitutional validity." It explained that "[t]he rule of statutory construction invoked in Pennhurst was, like all rules of statutory construction, a tool with which to divine the meaning of otherwise ambiguous statutory intent." Ibid. In contrast, Congress' intent here is unambiguous: to apply the Equal Pay Act to the States. The observations in Pennhurst, therefore, simply have no relevance.

Similarly, in Gregory v. Ashcroft, 501 U.S. 452 (1991), the Court was confronted with ambiguous statutory language and was attempting to divine its meaning. It held that a "plain statement" would be required before it would interpret a federal statute to "upset the usual constitutional balance of federal and state powers." Id. at 460. In doing so, the Court noted that the Pennhurst rule was a "rule of statutory construction to be applied where statutory intent is ambiguous." Id. at 470; see also Salinas v. United States, 118 S. Ct. 469, 474-475 (1997).

Not surprisingly, every other court of appeals to address the issue has agreed with this Court's conclusion in Moghadam that Congress' intentions as to the power it was exercising are irrelevant.[7/] As Chief Judge Posner of the United States Court of Appeals for the Seventh Circuit recently explained, Congress "would doubtless be happy if any provision [of the Constitution] enabled the section of [the statute] that authorizes suits against the state to survive challenge under the Eleventh Amendment. If that provision is section 5 of the Fourteenth Amendment, Congress would hardly object to our holding that [the Act] is authorized by section 5's grant of power to Congress." Velasquez v. Frapwell, 160 F.3d 389, 391 (7th Cir. 1998).

B. The Equal Pay Act As Applied To The States Is A Valid Exercise Of Congress' Power Under Section 5 Of The Fourteenth Amendment

1. The Legislative Record Before Congress Makes Clear That Congress Could Have Reasonably Concluded That The Equal Pay Act Was An Appropriate Response To Sex Discrimination By State Employers

Defendants' suggestion (Br. 22) that Congress could not have reasonably concluded that the Equal Pay Act was an appropriate

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[7/] See, e.g., Mills v. Maine, 118 F.3d 37, 43-44 (1st Cir. 1997); Counsel v. Dow, 849 F.2d 731, 735-737 (2d Cir.), cert. denied, 488 U.S. 955 (1988); Wheeling & Lake Erie Ry. v. Public Utility Comm'n, 141 F.3d 88, 92 (3d Cir. 1998); Abril v. Virginia, 145 F.3d 182, 186 (4th Cir. 1998); Pederson v. Louisiana State Univ., --- F.3d ---, 2000 WL 19350 (5th Cir. Jan. 27, 2000) (No. 94-30680); Franks v. Kentucky Sch. for the Deaf, 142 F.3d 360, 363 (6th Cir. 1998); Goshtasby v. Board of Trustees, 141 F.3d 761, 767-768 (7th Cir. 1998); Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir. 1997); Oregon Short Line R.R. Co. v. Department of Revenue, 139 F.3d 1259, 1265-1266 (9th Cir. 1998); Union Pacific R.R. Co. v. Utah, 198 F.3d 1201, 1203 (10th Cir. 1999)

response to unconstitutional conduct by state employers ignores the substance and volume of the legislative record upon which Congress acted. Unlike City of Boerne v. Flores, in which the Court found the "legislative record lack[ed] examples of modern instances" of intentional discrimination, 521 U.S. 507, 530 (1997), Congress enacted the Equal Pay Act based on a record that employers were intentionally and systematically paying women less than men for equal work.[8/]

Although Congress need not compile a legislative record in order to enact constitutional legislation, if a court has cause to question whether a remedial scheme is "appropriate," it may look to all the evidence before Congress to see if it could have rationally concluded that there was a problem. See Fullilove v. Klutznick, 448 U.S. 448, 477-478 (1980) (plurality).
In the early 1970s, Congress addressed the question of discrimination against women by States in several pieces of legislation. By the time Congress extended the protections of the Equal Pay Act to all state employees in 1974, Congress had (1) enacted the Education Amendments of 1972, which extended a non-discrimination prohibition to all education programs receiving federal funds and extended the Equal Pay Act to all

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[8/] See S. Rep. No. 176, 88th Cong., 1st Sess. 1 (1963); H.R. Rep. No. 1714, 87th Cong., 2d Sess. 2 (1962); S. Rep. No. 2263, 81st Cong., 2d Sess. 2, 4 (1950); S. Rep. No. 1610, 79th Cong., 2d Sess. 2-3 (1946); Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974); see also Kahn v. Shevin, 416 U.S. 351, 353 (1974) (finding that "firmly entrenched practices" made "the job market * * * inhospitable to the woman seeking any but the lowest paid jobs").

employees of educational institutions, see Pub. L. No. 92-318, tit. IX, 86 Stat. 373-375 (1972); (2) extended Title VII to state and local employers, see Pub. L. No. 92-261, § 2, 86 Stat. 103 (1972); and (3) sent the Equal Rights Amendments to the States to be ratified, see S. Rep. No. 450, 93d Cong., 1st Sess. 4 (1973).

Defendants' suggestion (Supp. Br. 5) that this Court may only look to evidence that Congress specifically considered when it extended the Equal Pay Act to the States has no support in law or logic. Members of Congress do not ignore information they learned from one set of hearings or debates when looking at another proposal on the same subject. Rather, "[o]ne appropriate source [of evidence for Congress] is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area." Fullilove, 448 U.S. at 503 (Powell, J. concurring). Lower courts have agreed that in considering whether legislation is within Congress' power, courts should not limit their consideration solely to the legislative record concerning that statute, but should also consider Congress' "accumulated institutional expertise" on the subject matter. See United States v. Kenney, 91 F.3d 884, 890-891 (7th Cir. 1996); United States v. Janus, 48 F.3d 1548, 1556 (10th Cir.), cert. denied, 516 U.S. 824 (1995).

Examined in this light, Congress clearly had before it evidence of a widespread pattern of discrimination against women by States. Congress held extensive hearings[9/] and received numerous reports from the Executive Branch[10/] on the subject of sex discrimination by States. The testimony and reports contained evidence that sex discrimination by state employers was common,[11/] that State employers were discriminating against women

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[9/] See, e.g., Economic Problems of Women: Hearings Before the Joint Economic Comm., 93d Cong., 1st Sess. (1973) (Economic); Equal Rights for Men and Women 1971: Hearings Before Subcomm. No. 4 of the House Comm. on the Judiciary, 92d Cong., 1st Sess. (1971) (Equal Rights); Higher Education Amendments of 1971: Hearings Before the Special Subcomm. on Educ. of the House Comm. on Educ. & Labor, 92d Cong., 1st Sess. (1971) (Higher Educ.); Equal Employment Opportunities Enforcement Act of 1971: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare, 92d Cong., 1st Sess. (1971) (1971 Senate EEO); Equal Employment Opportunity Enforcement Procedures: Hearings Before the General Subcomm. on Labor of the House Comm. on Educ. & Labor, 92d Cong., 1st Sess. (1971) (1971 House EEO); Discrimination Against Women: Hearings Before the Special Subcomm. on Educ. of the Comm. on Educ. & Labor, 91st Cong., 2d Sess. (1970) (Discrimination); Equal Employment Opportunity Enforcement Procedures: Hearings Before the General Subcomm. on Labor of the House Comm. on Educ. & Labor, 91st Cong., 1st & 2d Sess. (1969-1970) (1970 House EEO); Equal Employment Opportunities Enforcement Act: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare, 91st Cong., 1st Sess. (1969) (1969 Senate EEO).

[10/] See, e.g., President's Task Force on Women's Rights and Responsibilities, A Matter of Simple Justice (Apr. 1970); U.S. Department of Labor, Women's Bureau, Fact Sheet on the Earnings Gap (Feb. 1970) (reprinted in Discrimination at 37-75 & 17-19).

[11/] See, e.g., Economic at 131 (Aileen C. Hernandez, former member EEOC) (State government employers "are notoriously discriminatory against both women and minorities"); Discrimination at 46 (President's Task Force on Women's Rights and Responsibilities) ("At the State level there are numerous laws * * * which clearly discriminate against women as autonomous, mature persons.); id. at 548 (Citizen's Advisory Council on the Status of Women) ("numerous distinctions based on

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in wages,[12/] and that existing remedies were inadequate.[13/] The

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[11/](...continued)
sex still exist in the law" including "[d]iscrimination in employment by State and local governments"). See also nn. 12, 14-15, supra.

[12/] See Discrimination at 301 (Dr. Bernice Sandler) ("Salary discrepancies abound. * * * Numerous national studies have documented the pay differences between men and women with the same academic position and qualifications."); id. at 645 (Peter Muirhead, Department of Health, Education and Welfare) ("the inequities are so pervasive that direct discrimination must be considered as p[l]aying a share, particularly in salaries, hiring, and promotions, especially to tenured positions"); id. at 971-973 (Helen Astin) (one of types of discrimination "most frequently encountered" was "differential salaries for men and women with the same training and experience"); id. at 1034-1036 (Alan Bayer & Helen Astin) (empirical study of recent doctoral recipients reports that "[a]cross all work settings [including public universities], fields, and ranks, women experience a significantly lower average academic income than do men in the academic teaching labor force for the same amount of time. Within each work setting, field, and rank category, women also have lower salaries."); 1971 House EEO at 486, 489 (Modern Language Association) (in survey of college professors, half from public colleges, "salary differences between men and women full-time faculty members are substantial" even "at equivalent ranks in the same departments"); id. at 510 (Dr. Ann Scott) (National Organization for Women) ("It is within these categories [exempted from the Equal Pay Act, including state governments], however, that women suffer some of the worst discrimination.).

There was also detailed testimony about the discriminatory salary practices of specific public universities, including a report from the Department of Health, Education and Welfare finding that at the University of Michigan "women are in many cases getting less pay than men with the same job titles, responsibilities, and experience" Higher Educ. at 298; see also id. at 274-275; Discrimination at 151, 159 (Dr. Ann Scott) (survey of State University of New York "women in the same job categories, administrative job categories, with the same degrees as men received considerably less money as a group, and as the salaries increase so does the gap"); id. at 1225 (Jane Loeb) ("Comparison of the salaries of male and female academicians at the University [of Illinois] strongly suggest that men and women within the same departments, holding the same rank, tend not to be paid the same salaries: women on the average earn less than men.); id. at 1228 (Salary Study at Kansas State Teachers College) ("Women full-time faculty members experience wide discrimination throughout the college in matters of salaries for

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evidence supported the conclusion that, as one member of the United States Commission on Civil Rights testified, "[s]tate and local government employment has long been recognized as an area in which discriminatory employment practices deny jobs to women

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12/ (...continued)
their respective academic ranks."); Equal Rights at 268 (Dr. Bernice Sandler) ("At the University of Arizona, women who were assistant and associate professors earned 15 percent less than their male counterparts. Women instructors and full professors earned 20 percent less.); ibid. (in a "comprehensive study at the University of Minnesota, women earned less in college after college, department after department--in some instances the differences exceeding 50 percent").

13/ Prior to the extension of the Equal Pay Act and Title VII to the States, some state employers were governed by federal non-discrimination requirements as a condition for receiving federal contracts or certain types of funds. However, these provisions and private suits under the Equal Protection Clause were described as ineffective in stopping the discrimination. See Discrimination at 26 (Jean Ross, American Association of University Women) ("[A]s in the case of [racial minorities], the additional protective acts of recent years, such as the Equal Pay for Equal Work Act and the Civil Rights Act are required and need strengthening to insure the equal protection under the law which we are promised under the Constitution."); id. at 304 (Dr. Bernice Sandler) (even if Fourteenth Amendment were interpreted to prohibit sex discrimination, legislation "would be needed if we are to begin to correct many of the inequities that women face"); 1970 House EEO at 248 (Dr. John Lumley, National Education Association) ("We know we don't have enough protection for women in employment practices."); Senate 1969 EEO at 51-52 (William H. Brown III, Chair, EEOC) ("most of these [State and local governmental] jurisdictions do not have effective equal job opportunity programs, and the limited Federal requirements in the area (e.g., 'Merit Systems' in Federally aided programs) have not produced significant results."). Nor were effective state remedies available. See Higher Educ. at 1131 (study by American Association of University Women reports that even state schools that have good policies don't seem to follow them); Discrimination at 133 (Wilma Scott Heide, Pennsylvania Human Relations Commission) (urging coverage of educational institutions by Title VII because "[o]nly a couple States have or currently contemplate any prohibition of sex discrimination in educational institutions"); 1969 Senate EEO at 170 (Howard Glickstein, U.S. Commission on Civil Rights) (some States' laws did not extend to State employers).

and minority workers."[14/] The breadth of this evidence refutes Defendants' argument (Supp. Br. 5) that the legislative material documenting discrimination by state employers refers solely to discrimination occurring in state universities and colleges. See nn. 11, 14, supra. Of course, there was extensive evidence of employment discrimination in state education,[15/] and that evidence also supports Congress' decision to extend the Equal Pay Act to the States.

In the committee reports and floor debates, Congress noted the "scope and depth of the discrimination" against women, and that "[m]uch of this discrimination is directly attributable to governmental action both in maintaining archaic discriminatory laws and in perpetuating discriminatory practices in employment,

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[14/] See Economic at 556 (Hon. Frankie M. Freeman, U.S. Commission on Civil Rights).

[15/] See Discrimination at 48 (urging extension of Title VII to state employers and finding that "[t]here is gross discrimination against women in education"); id. at 302 (Dr. Bernice Sandler, Women's Equity Action League) (noting instances of employment discrimination by state-supported universities); id. at 379 (Prof. Pauli Murray) ("in light of the overwhelming testimony here, clearly there is * * * a pattern or practice of discrimination in many educational institutions"); id. at 452 (Virginia Allan, President's Task Force) (noting "the growing body of evidence of discrimination against women faculty in higher education"); Equal Rights at 269 (Dr. Bernice Sandler) ("there is no question whatsoever of a massive, pervasive, consistent, and vicious pattern of discrimination against women in our universities and colleges"); id. at 479 (Mary Dublin Keyserling, National Consumers League) ("It is in these fields of employment [of state and local employees and employees of educational institutions] that some of the most discriminatory practices seriously limit women's opportunities.").

education and other areas."[16/] The legislative history makes clear that Congress had concluded that sex discrimination in wages by States was a serious problem,[17/] for which current laws were ineffective.[18/] Legislators often cited the information

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[16/] H.R. Rep. No. 554, 92d Cong., 1st Sess. 51 (1971) (report for Education Amendments); S. Rep. No. 689, 92d Cong., 2d Sess. 7 (1972) (report on the Equal Rights Amendment); see also H.R. Rep. No. 238, 92d Cong., 1st Sess. 4 (1971) (report for Title VII finds "there exists a profound economic discrimination against women workers"); id. at 19 ("Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment."); H.R. Rep. No. 359, 92d Cong., 1st Sess. 5-6 (1971) (Separate Views) (report for ERA finding that "women as a group are the victims of a wide variety of discriminatory [state] laws" including "restrictive work laws"); id. at 11 (minority views of Rep. Celler) ("Discrimination against women does exist. Of that there is no denial.").

[17/] 118 Cong. Rec. 5805 (1972) (Sen. Bayh) (figures show that "those women who are promoted often do not receive equal pay for equal work."); Discrimination at 434 (stating that "these differences [in median pay of men and women professors] do not occur by accident. They are the direct result of conscious discriminatory policies.") (Rep. Mink); id. at 4818 (Sen. Stevenson) ("There are some who would say that much of this discrimination is caused by [lack of equal education]. * * * But the comparative figures I quoted above, for comparative ranks and salaries within educational institutes * * * belie such simplistic explanations.").

[18/] See 118 Cong. Rec. 274 (1972) (Sen. McGovern) ("weak, ineffective tools the Federal Government is [currently] using to combat" discrimination against women); Discrimination at 235 (Rep. May) (without the extension of laws to educational institutions "there is no effective legal way to get at them!"); id. at 745 (Rep. Griffiths) (referring to Equal Pay Act: "We must use every available tool and mechanism to combat sex discrimination which irrationally and unjustly deprives millions of people of equal employment opportunities simply because of their sex."); id. at 750 (Rep. Heckler) (Fourteenth Amendment "has not been effective in preventing sex discrimination against teachers in public schools"); Equal Rights at 85, 87 (Rep. Mikva) (extension of Title VII to States and Equal Pay Act to professionals "needed interim to and supplemental to" ERA and is "implementation under the 14th amendment"); 118 Cong. Rec. 4931-

(continued...)

reported in the Department of Labor's Fact Sheet, see n. 10, supra, which had found large differences in median wages between men and women full-time workers in very general occupational groupings.[19/] Other studies and testimony also led Congress to conclude that discrimination in pay for women by state employers was widespread.[20/]

[18/](...continued)
4932 (Sen. Cranston) (employees of educational institutions "are, at present, without an effective Federal remedy in the area of employment discrimination").

[19/] See n. 17, supra. While the Fact Sheet cautioned that these figures "do not necessarily indicate that women are receiving unequal pay for equal work," because of the breadth of the categories used, it noted that even "within some of these detailed occupations, men usually are better paid. For example, in institutions of higher education in 1965-66, women full professors had a median salary of only $11,649 as compared with $12,768 for men. Comparable differences were found at the other three levels [associate professors, assistant professors, and instructors]." Discrimination at 18.

[20/] See 117 Cong. Rec. 39,250 (1971) (Rep. Green) ("Our two volume hearing record contains page upon page citing the pervasiveness of this discrimination [against women] in our society and in our institutions."); 118 Cong. Rec. 5804 (1972) (Sen. Bayh) ("Over 1,200 pages of testimony document the massive, persistent patterns of discrimination against women in the academic world."); id. at 5805 (Sen. Bayh) ("According to testimony submitted during the '1970 [Discrimination] Hearings,' the University of Pittsburgh calculated that the University was saving $2,500,000 by paying women less than they would have paid men with the same qualifications."); id. at 1840 (Sen. Javits) ("Not only is this applicable to minorities; it is also applicable on the ground of sex. The committee report reflects that very clearly in terms of the differentiation not only between members of minorities and others * * * by States and their local subdivisions, but also, it applies to women where, based upon overall figures, it is obvious that something is not right in terms of the way in which the alleged concept of equal opportunity is being administered now."); id. at 1992 (Sen. Williams) ("[T]his discrimination does not only exist as regards to the acquiring of jobs, but that it is similarly prevalent in the area of salaries and promotions where studies have shown a (continued...)

Indeed, even after Title VII had been extended to the States, the Chair of the EEOC agreed that State and local governments were "the biggest offenders" of Title VII's prohibition on sex discrimination and that "[w]e have a great deal of problems both with educational institutions and State and local governments."[21/] This is consistent with Congress' assessment that the "well documented" record revealed "systemic[]", "rampant," "widespread and persistent," and "endemic" sex discrimination by States,[22/] which "persist[ed]"

[20/](...continued)
well-established pattern of unlawful wage differentials and discriminatory promotion policies."); Discrimination at 740 (Rep. Griffiths) ("Numerous studies document the pay differences between men and women with the same academic rank and qualifications.").

[21/] Economic at 105-106; see also EEOC, 2 Minorities and Women in State and Local Government 1974: State Governments iii (1977) ("The 1974 data reveal that * * * even when employed in similar positions, [minorities and women] generally earn lower salaries than whites and men, respectively.").

[22/] 118 Cong. Rec. 3936, 5804 (1972) (Sen. Bayh) ([d]iscrimination against females on faculties and in administration is well documented"); Discrimination at 3 (Rep. Green) ("too often discrimination against women has been either systematically or subconsciously carried out" by "State legislatures"); id. at 235 (Rep. May) ("[S]ex discrimination in the colleges and universities of this Nation * * * it seems to me, that it is running rampant!"); 118 Cong. Rec. 4817 (Sen. Stevenson) ("Sex discrimination, especially in employment, is not new. But it is widespread and persistent."); Equal Rights at 95 (Rep. Ryan) ("Discrimination levied against women does exist; in fact, it is endemic in our society."); see also 118 Cong. Rec. 5804 (1972) (Sen. Bayh) ("It is difficult to indicate the full extent of discrimination against women today."); id. at 5982 (Sen. Gambrell) ("In my study of the proposed equal rights amendment to the Constitution, I have become aware that women are often subjected to discrimination in employment and remuneration in the field of education."); id. at 4817 (Sen. Stevenson) ("grave problem of discrimination in employment against women"); Discrimination at 738 (Rep. Griffiths) ("The extent of
(continued...)

despite the fact it was "violative of the Constitution of the United States."[23/] As Senator Bayh explained, the evidence showed that "a strong and comprehensive measure is needed to provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women." 118 Cong. Rec. 5804 (1972). There is, therefore, no support for Defendants' suggestion (Supp. Br. 6) that the legislative record reflects solely discrimination in the private sector. In fact, the legislative history makes clear that Congress believed that unlawful discrimination was at least as prevalent in state government as in the private sector.[24/]

Thus, when Congress considered extending the Equal Pay Act to the States, it did so against the backdrop of all of the

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[22/](...continued)
discrimination against women in the educational institutions of our country constitutes virtually a national calamity."); id. at 750 (Rep. Heckler) ("Discrimination by universities and secondary schools against women teachers is widespread."); Equal Rights at 55 (Sen. Ervin) ("No one can gainsay the fact that women suffer many discriminations in [the employment] sphere, both in respect to the compensation they receive and the promotional opportunities available to them.").

[23/] 118 Cong. Rec. 1412 (1972) (Sen. Byrd).

[24/] See supra at nn. 11, 14, 15. See also 118 Cong. Rec. 1815 (1972) (Sen. Williams) ("* * * employment discrimination in State and local governments is more pervasive than in the private sector."); 118 Cong. Rec. 1393 (1972) (reprinting testimony of William Brown, Chair of the EEOC) ("Discrimination in State and local employment is as blatant and as widespread as in any section of private business."); 118 Cong. Rec. 590 (1972) ("The presence of discrimination in State and local governments has been well documented by the U.S. Commission on Civil Rights in two extensive studies done in the past two years" and "no adequate remedy has been available.")

information previously put before it demonstrating that state employers were paying women less than men for the same job. In the hearings that focused on extending the Equal Pay Act to the States,[25/] Congress again heard the full range of that evidence. The testimony demonstrated that because public employees were exempted from the Equal Pay Act, wages for women in such jobs "are most often lower than their male counterparts."[26/] In addition to testimony that unequal pay for equal work was pervasive at universities and colleges generally,[27/] state universities were specifically identified as violators.[28/]

[25/] To Amend the Fair Labor Standards Act: Hearings Before the General Subcomm. on Labor of the House Comm. on Education & Labor, 91st Cong., 2d Sess.(1970) (1970 FLSA); Fair Labor Standards Amendments of 1971: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare, 92d Cong., 1st Sess. 292-293 (1971) (1971 FLSA); Fair Labor Standards Amendments of 1973: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare, 93d Cong., 1st Sess., (1973) (1973 FLSA).

[26/] 1971 FLSA 292-293 (Judith A. Lonquist, National Organization for Women); see also id. at 288-289; (Lucille Shriver, National Federation of Business and Professional Women's Clubs) (extending Title VII is not sufficient); 1973 FLSA 46a (1973) (National Federation of Business and Professional Women's Clubs) (coverage of state employers "is sorely needed").

[27/] See 1971 FLSA at 321 (Dr. Bernice Sandler), 350 (Alan Bayer & Helen Astin), 363 (Helen Bain, National Education Association), 747 (Jean Ross, American Association of University Women),

[28/] See id. at 322 (evidence from University of Arizona, University of Minnesota, and Kansas State Teachers College that "[w]omen are simply paid less than their male counterparts"); id. at 747 (University of Minnesota); 1970 FLSA at 477-478 (Wilma Scott Heide, National Organization of Women) (SUNY Buffalo, University of Maryland and University of Pittsburgh); id. at 558 (Salary Study at Kansas State Teachers College).

2. Congress Has Broad Power To Detect, Deter And Remedy Constitutional Violations By Prohibiting Conduct That Is Not Itself Unconstitutional

In assessing the appropriateness of the remedy Congress chose to address the persistent problem of unequal treatment of women by state employers, it is important to consider the breadth of Congress' authority to enforce the equal protection guarantees of the Fourteenth Amendment. Section 1 of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws," and Section 5 gives Congress "power to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]." Like the Necessary and Proper Clause (Art. I, § 8, Cl. 18), Section 5 is a broad affirmative grant of legislative power:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Ex parte Virginia, 100 U.S. 339, 345-346 (1879).

The Equal Pay Act prohibits employers from paying workers of one sex more than workers of the opposite sex who perform equal work. See Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974). Once an employee has proven equal work and unequal pay, an employer bears the burden of persuasion (if it chooses to mount an affirmative defense) to show the difference is not based on sex. See id. at 196-197; Meeks v. Computer Assoc. Int'l, 15 F.3d 1013, 1019 (11th Cir. 1994). In essence, the Equal Pay Act

establishes a rebuttable presumption that unequal pay to employees of the opposite sex for equal work is intentional sex discrimination, but permits employers to rebut that presumption by showing that the actual cause of the disparity is a factor other than sex.

Relying on City of Boerne v. Flores, 521 U.S. 507 (1997), Defendants argue (Br. 20) that because the Equal Pay Act permits courts to find violations without proof of the discriminatory intent that would be necessary to prove a constitutional violation, the Equal Pay Act is substantive, non-remedial legislation beyond Congress' Section 5 enforcement power. Defendants are wrong.

In City of Boerne, the Court addressed the constitutionality of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb et seq., which Congress had enacted in response to the Supreme Court's decision in Employment Div. v. Smith, 494 U.S. 872 (1990). Smith held that the Free Exercise Clause did not require States to provide exceptions to neutral and generally applicable laws even when those laws significantly burdened religious practices. See id. at 887. In RFRA, Congress attempted to overcome the effects of Smith by imposing through legislation a requirement that laws substantially burdening a person's exercise of religion be justified as in furtherance of a compelling state interest and as the least restrictive means of furthering that interest. See 42 U.S.C. 2000bb-1. The Court found that in enacting this standard, Congress was not acting in response to a history of unconstitutional activity and that "RFRA's legislative

record lack[ed] examples of modern instances of generally applicable laws passed because of religious bigotry." City of Boerne, 521 U.S. at 530. The Court found that Congress was "attempt[ing] a substantive change in constitutional protections," id. at 532, rather than attempting to "enforce" a recognized Fourteenth Amendment right.[29/]

City of Boerne specifically reaffirmed, however, that when enacting remedial or preventive legislation under Section 5, Congress is not limited to prohibiting unconstitutional activity. "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" 521 U.S. at 518 (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)). Moreover, the Supreme Court cited with approval and reaffirmed, ibid., the holdings of South Carolina v. Katzenbach, 383 U.S.

[29/] In City of Boerne the Court found that RFRA was so "out of proportion" to the problems identified that it could not be viewed as preventive or remedial. Id. at 532. First, it found that there was no "pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in Smith." Id. at 534; see also id. at 531 (surveying legislative record). It also found that RFRA's requirement that the State prove a compelling state interest and narrow tailoring imposed "the most demanding test known to constitutional law" and thus possessed a high "likelihood of invalidat[ing]" many state laws. Id. at 534. While stressing that Congress was entitled to "much deference" in determining the need for and scope of laws to enforce Fourteenth Amendment rights, id. at 536, the Court found that Congress had simply gone so far in attempting to regulate local behavior that, in light of the lack of evidence of a risk of unconstitutional conduct, RFRA could no longer be viewed as remedial or preventive.

301, 325-337 (1966) and City of Rome v. United States, 446 U.S. 156, 177 (1980), in which the Court upheld the constitutionality of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, which prohibits covered jurisdictions from implementing any electoral change that is discriminatory in effect. Indeed, it expressly stated that "Congress can prohibit laws with discriminatory effects in order to prevent racial discrimination in violation of the Equal Protection Clause." 521 U.S. at 507 (citing City of Rome and Fullilove v. Klutznick, 448 U.S. 448 (1980)). The Boerne Court thus made clear that Congress may exercise its Section 5 authority to prohibit conduct that is not itself unconstitutional as long as there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Id. at 520.

Decisions subsequent to Boerne have made clear that Boerne's congruence and proportionality requirement permits Congress to prohibit laws with discriminatory effects in order to prevent unlawful discrimination in violation of the Equal Protection Clause. In Lopez v. Monterey County, 525 U.S. 266, 283 (1999), for example, the Court reaffirmed its pre-Boerne holdings that Section 5 of the Voting Rights Act's prohibition of voting practices that have only a discriminatory effect was a constitutional exercise of Congress' authority to enforce the Fifteenth Amendment. In so holding, the Court expressly reaffirmed Boerne's holding that Congress had the same power under Section 5 of the Fourteenth Amendment. See id. at 282.

Furthermore, in Crum v. State of Alabama, 198 F.3d 1305 (11th Cir. 1999), this Court reaffirmed that Title VII's prohibition against policies with disparate impact was a valid exercise of Congress' power under Section 5. This Court had reached the same conclusion in Scott v. City of Anniston, 597 F.2d 897 (5th Cir. 1979), cert. denied, 446 U.S. 917 (1980).[30/] In Crum, this Court rejected the defendants' argument that City of Boerne and its progeny required a different result. The court recognized that the disparate impact standard prohibits "discriminatory results" that are not justified by business necessity rather than discriminatory intent, and, therefore, "differs from [the standard of proof] used in a case challenging state action directly under the Fourteenth Amendment." See id. at 1321-1322. This Court held, however, that the disparate impact standard was constitutional as applied to the States because it could "reasonably be characterized as [a preventive rule] that evidence[s] a 'congruence between the means used and the ends to be achieved.'" See id. at 1322 (quoting Boerne, 521 U.S. at 530). Every other court of appeals to address the validity of the Title VII disparate impact standard under Section

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[30/] In Scott, this Court rejected the argument that Congress could not prohibit unintentional discrimination under its Section 5 power because the Equal Protection Clause only prohibited intentional discrimination, explaining that "Congress is authorized to enact more stringent standards than those provided by the fourteenth and fifteenth amendments in order to carry out the purpose of those amendments." Id. at 900. It concluded that "whether the employer be private or public, the same prerequisites to Title VII liability apply, and discriminatory purpose need not be shown." Ibid.

5 has reached the same conclusion.[31/] Similarly, this Court has upheld as a valid exercise of Congress' Section 5 power that provision of the Voting Rights Act, 42 U.S.C. 1973(a), which prohibits policies that have discriminatory "results." See United States v. Marengo County Comm'n, 731 F.2d 1546, 1559 & n.20 (11th Cir.), cert. denied, 469 U.S. 976 (1984).

The Supreme Court reaffirmed Boerne's articulation of Congress' broad Section 5 authority in Florida Prepaid Post-Secondary Education Expense Board v. College Savings Bank, 119 S. Ct. 2199, 2206 (1999), where it reiterated that "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies." (emphasis added) (citations and quotations omitted).

Most recently, in Kimel v. Florida Board of Regents, 120 S. Ct. 631, 644 (2000), the Supreme Court once again explained that "Congress § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment. Rather, Congress' power to enforce the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a

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[31/] . See Guardians Ass'n v. Civil Serv. Comm'n, 630 F.2d 79, 88 (2d Cir. 1980), cert. denied, 452 U.S. 940 (1981); United States v. Virginia, 620 F.2d 1018, 1023 (4th Cir.), cert. denied, 449 U.S. 1021 (1980); Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 689 n.7 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981); Blake v. City of Los Angeles, 595 F.2d 1367, 1373 (9th Cir. 1979), cert. denied, 446 U.S. 928 (1980); United States v. City of Chicago, 573 F.2d 416, 423-424 (7th Cir. 1978).

somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." The Court reaffirmed that "difficult and intractable problems require powerful remedies" and that Section 5 permits Congress to enact "reasonably prophylactic legislation." See id. at 647.

3. The Equal Pay Act's Coverage And Standards Are Proportionate To The "Evil Presented"

As the Supreme Court emphasized in Kimel, "[t]he appropriateness of remedial measures must be considered in light of the evil presented." Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 648 (2000) (quoting City of Boerne v. Flores, 521 U.S. 507, 530-531 (1997)). The Court found that the statute at issue in City of Boerne was attempting to expand the substantive meaning of the Fourteenth Amendment by imposing a strict scrutiny standard on the States in the absence of evidence of widespread use of constitutionally improper criteria. In contrast, the Equal Pay Act, as applied to the States, is simply seeking to make effective the constitutional right to be free from intentional sex discrimination in wages by government employers by establishing a remedial scheme tailored to detecting and preventing those acts (unequal pay for equal work) most likely to be the result of such discrimination. In assessing the validity of this legislation, it is important to bear in mind that "Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." Turner Broad. Sys., Inc. v. FCC, 117 S. Ct. 1174, 1197 (1997); accord Fullilove, 448 U.S. at 474

(Opinion of Burger, J.). Rather, the Equal Pay Act must be upheld as a valid exercise of Congress' Section 5 authority so long as this Court can "discern some legislative purpose or factual predicate that supports the exercise of that power." See EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983); Cheffer v. Reno, 55 F.3d 1517, 1520-1521 (11th Cir. 1995).

Here, the legislative record before Congress demonstrates a clear basis in fact to conclude that women were being paid less for no reason other than intentional sex discrimination. Furthermore, Congress concluded not only that intentional sex discrimination in wages existed, but that it was being "successfully concealed" by some employers. H.R. Rep. No. 1714, 87th Cong., 2d Sess. 2 (1962).[32/] To ferret out this intentional but concealed discrimination and to redress the effects of past discrimination, Congress may establish a statutory rebuttable presumption that reflects its finding of widespread sex discrimination, and to place the burden on the employer to show

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[32/] Indeed, while the enactment of the Equal Pay Act and Title VII has narrowed the disparity in pay between men and women, "there still exists a significant wage gap that cannot be explained by differences between male and female workers." Council of Economic Advisers, Explaining Trends in the Gender Wage Gap i (June 1998) (attached as an addendum). The President's Council of Economic Advisers explained in a recent report that studies have uncovered "compelling evidence of the continued existence of gender discrimination in the labor market" that leads to "substantial pay differences between men and women working in the same narrowly defined occupations and establishments." Id. at 10. The report credits a "recent and thorough study" finding that "a substantial portion -- at least one quarter -- of the pay gap is the result of differences in pay between men and women working in similar jobs and establishments" that cannot be attributed to other measurable factors. Ibid.; see also id. at 11 (collecting other studies).

that there is another reason for the disparity in pay. See, e.g., Georgia v. United States, 411 U.S. 526, 536-539 (1973); South Carolina v. Katzenbach, 383 U.S. 301, 332 (1966). Cf. also Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 28 (1976); Mobile, Jackson & Kansas City R.R. Co. v. Turnipseed, 219 U.S. 35, 43 (1910).

Congress tailored the Equal Pay Act to solving a discrete problem: discriminatory distinctions in wages between men and women performing the same job. An employee must prove unequal pay for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions," 29 U.S.C. 206(d)(1). The employer may avoid liability by showing that its decision was "based on any other factor other than sex." 29 U.S.C. 206(d)(1)(iv) (emphasis added). Thus, Congress reasonably presumed that if men and women are paid different wages for the same work, and the employer cannot show that any factor other than gender explains the disparity, then the employer's action is motivated by gender.[33/] Even those who have been skeptical of the breadth of Congress' Section 5 authority in certain cases have made clear that such burden shifting is generally appropriate.

[33/] Defendants wrongly assert (Supp. Br. 8) that "employers can easily lose cases in which it is quite clear that there was no intent to discriminate against an employee [because of sex.]" However, if the employee has shown that the employer "pays different wages to employees of opposite sexes for equal work on jobs [requiring] equal skill, effort, and responsibility" see Mulhall v. Advance Sec., 19 F.3d 586, 590 (11th Cir. 1994), and the employer fails to show that any factor other than sex explains the differential, then it is highly doubtful, not "clear," that there is an innocent explanation.

See City of Rome v. United States, 446 U.S. 156, 214 (1980) (Rehnquist, J., dissenting) (Congress has the power under Section 5 to "place the burden of proving lack of discriminatory purpose on" government); Kimel, 139 F.3d at 1446 (Cox, J., dissenting in part) (Congress may "tweak procedures, find certain facts to be presumptively true, and deem certain conduct presumptively unconstitutional"). Furthermore, the same reasons that supported this Court's and the Supreme Court's decisions that the prohibitions of discriminatory effects in other civil rights statutes are an appropriate means of enforcing the Fourteenth Amendment's guarantee of equal protection, see pp. 25-28, supra, also mandate the conclusion that the limited burden shifting scheme in the Equal Pay Act is constitutional as applied to the States.

This is not a case like City of Boerne v. Flores, 521 U.S. at 532, where the legislation's "[s]weeping coverage ensure[d] its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." See also Florida Prepaid Post Secondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, 2210 (patent legislation applies to an "unlimited range of state conduct"). Instead, this act is targeted at the pay of men and women working substantially similar jobs, an area where there was substantial evidence of a pervasive and persistent problem of constitutional dimension.

Finally, there is no support for Defendants' suggestion (Supp. Br. 5-6) that the Equal Pay Act is invalid as applied to

the States because it outlaws conduct prohibited by Title VII or because a significant portion of the state discrimination about which Congress heard testimony concerned discrimination in education. Section 5's requirement that legislation "enforce" the Equal Protection Clause does not require Congress to enact the least-restrictive alternative or to document discrimination in every aspect of the state government that it chooses to regulate. For example, in Oregon v. Mitchell, 400 U.S. 112 (1970), while the Court agreed that there was little evidence that literacy tests were unconstitutional in every state, it concluded that Congress had the authority to deal with the issue on a nationwide basis. See especially id. at 283-284 (opinion of Stewart, J.); see also Fullilove, 448 U.S. at 483 (plurality); id. at 501 n.3 (Powell, J., concurring). Thus, Congress could have rationally concluded that the problem of unequal pay required a separate legislative scheme and that a nationwide prohibition was the most effective means of accomplishing that objective.

4. The Supreme Court's Recent Decision In Kimel Does Not Compel A Different Result

Significantly, the six circuits that have thus far considered the issue have all upheld the Equal Pay Act as valid Section 5 legislation. See Anderson v. State Univ. of New York, 169 F.3d 117 (2nd Cir. 1999), vacated, 120 S.Ct. 929 (2000); Usery v. Allegheny County Inst. Dist., 544 F.2d 148, 155 (3d Cir. 1976), cert. denied, 430 U.S. 946 (1977); Usery v. Charleston County Sch. Dist., 558 F.2d 1169, 1171 (4th Cir. 1977) Ussery v.

Louisiana, 150 F.3d 431 (5th Cir. 1998), cert. dismissed, 119 S. Ct. 1161 (1999); Timmer v. Michigan Dep't of Commerce, 104 F.3d 833,(6th Cir. 1997); Varner v. Illinois State Univ., 150 F.3d 706 (7th Cir. 1998), vacated, 120 S. Ct. 928 (2000); O'Sullivan v. Minnesota, 191 F.3d 965 (8th Cir. 1999). While the Supreme Court vacated and remanded Varner and Anderson for further reconsideration in light of Kimel v. Florida Board of Regents, 120 S. Ct. 631 (2000), a close analysis of Kimel makes clear that it neither alters Boerne's congruence and proportionality analysis nor affects the validity of the analysis employed by the courts of appeal in upholding the Equal Pay Act.

In Kimel, the Supreme Court held that the Age Discrimination in Employment Act (ADEA), which prohibits employers, subject to a limited bona fide occupational qualification defense, from taking age into account in making employment decisions, was not valid Section 5 legislation as applied to the States. The Court emphasized that it was applying the same "congruence and proportionality" test it had used in City of Boerne v. Flores, 521 U.S. 507 (1997). See Kimel, 120 S. Ct. at 645. Crucial to its holding was the fact that classifications based on age are subject to only rational basis review under the equal protection clause and that the Supreme Court had in fact upheld governmental age classifications in each of the three cases in which they had been challenged as violative of the equal protection guarantee. See ibid. Thus, the ADEA prohibited "substantially more state employment decisions and practices than would likely be held

unconstitutional under the applicable equal protection, rational basis standard." Id. at 646.

Moreover, the Court found that the legislative record indicated that Congress had "never identified any pattern of age discrimination by the state, much less any discrimination whatsoever that rose to the level of a constitutional violation." See id. at 647. In light of the limited protection given to age classifications, the breadth of the prohibition on age discrimination in the ADEA, and the lack of any indication that Congress was aware of a pattern of arbitrary age discrimination by the States, the Supreme Court concluded that the application of the ADEA to the States "was an unwarranted response to a perhaps consequential problem." See id. at 648. In so ruling, the Court emphasized the difference between classifications based on age, which are presumptively valid, and those based on race and gender, which are "so seldom relevant to the achievement of any legitimate state interest that * * * [they] are deemed to reflect prejudice and antipathy." See id. at 645 (quoting Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985)).

Unlike the subject matter in Kimel, there can be no question that States have engaged in a widespread pattern of unconstitutional sex discrimination and that the problem is not an "inconsequential" one. In J.E.B. v. Alabama, 511 U.S. 127 (1994), the Supreme Court concluded that "'our Nation has had a long and unfortunate history of sex discrimination,' a history which warrants the heightened scrutiny we afford all gender-based

classifications today." Id. at 136 (citation omitted); see also United States v. Virginia, 518 U.S. 515, 531-532 (1996). As the Court itself has determined that women "have suffered * * * at the hands of discriminatory state actors during the decades of our Nation's history," id. at 136, no additional inquiry on the scope of the problem is necessary for statutes involving sex discrimination. However, as we have made clear, pp. 14-22, supra, when Congress enacted the Equal Pay Act, it had before it voluminous evidence that discrimination by state employers was a serious problem and that strong measures were needed to detect, deter, and remedy it.

In contrast to what the Supreme Court characterized as the "perhaps inconsequential problem" of age discrimination at issue in Kimel, the Equal Pay Act is tailored to ferreting out intentional discrimination on the basis of sex. This problem, like race discrimination, demands "strong measures." Indeed, as the Fifth Circuit recently noted, given the national history of sex discrimination by States and the heightened scrutiny accorded gender classifications, it would be difficult "to understand how a statute enacted specifically to combat [gender] discrimination could fall outside the authority granted to Congress by Section 5." See Pederson v. Louisiana State Univ., --- F.3d ---, 2000 WL 19350, at *14 (5th Cir. Jan. 27, 2000) (No. 94-30680) (quoting Crawford v. Davis, 109 F.3d 1281 (8th Cir. 1997)). In any event, the focused provisions of the Equal Pay Act do not exceed Congress' broad Section 5 authority.

Given Congress' superior fact-finding ability and the attendant "wide latitude" to which it is entitled in exercising its Section 5 authority, City of Boerne, 521 U.S. at 520, the Equal Pay Act's scheme to detect and deter sex discrimination in wages is an appropriate exercise of Congress' Section 5 authority. In City of Boerne, the Supreme Court reaffirmed that "[i]t is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." Id. at 536 (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)). Following this principle, this Court should join the six other courts of appeals to address the question and uphold the Equal Pay Act as valid Section 5 legislation.

CONCLUSION

The district court's judgment denying the defendants' motion to dismiss the plaintiff's Equal Pay Act claims due to Eleventh Amendment immunity should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C), that the attached BRIEF FOR THE UNITED STATES AS INTERVENOR complies with Federal Rule of Appellate Procedure 32(a)(7)(B). It contains 10,578 words.

_____TIMOTHY J. MORAN
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2000, copies of the attached MOTION OF THE UNITED STATES TO INTERVENE and BRIEF FOR THE UNITED STATES AS INTERVENOR, were served by first-class mail, postage prepaid, on the following counsel of record:

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