No. 00-50092

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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THERESA M. SILER-KHODR,

Plaintiff-Appellee

v.

THE UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER,
SAN ANTONIO, et al.

Defendants-Appellants

_____

BRIEF FOR THE UNITED STATES AS INTERVENOR

_____

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BRIEF FOR THE UNITED STATES AS INTERVENOR

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JURISDICTIONAL STATEMENT

Plaintiff filed a complaint in the United States District Court for the Western District of Texas, alleging, inter alia, that the University of Texas Health Science Center at San Antonio (the University) violated the Equal Pay Act of 1963, 29 U.S.C. 206(d). This appeal is from a final judgment entered on January 7, 2000, pursuant to a jury verdict in plaintiff's favor. For the reasons discussed in this brief, the district court had jurisdiction over the case pursuant to 29 U.S.C. 216(b). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

Whether the application of the Equal Pay Act to the States is a valid exercise of Congress's power to enforce the Fourteenth Amendment.[1/]

[1/] Although the University raises other issues on appeal, the (continued...)

STATEMENT OF THE CASE

This suit is a private action filed by Dr. Theresa M. Siler-Khodr (Dr. Khodr), a full professor in the Obstetrics and Gynecology Department of the University. Dr. Khodr alleges, inter alia, that the University violated the Equal Pay Act by paying her less than a similarly situated male colleague. After a trial, the jury returned a verdict in favor of Dr. Khodr on her Equal Pay Act claim. On appeal, the University contends, inter alia, that Congress lacked authority to abrogate the States' Eleventh Amendment immunity in the Equal Pay Act.

SUMMARY OF ARGUMENT

In Ussery v. Louisiana, 150 F.3d 431 (5th Cir. 1998), cert. dismissed, 526 U.S. 1013 (1999), this Court held that the abrogation of the States' Eleventh Amendment immunity in the Equal Pay Act was a valid exercise of Congress's authority to enforce the Fourteenth Amendment. The University's argument that the Supreme Court's intervening decisions in Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999), and Kimel v. Florida Board of Regents, 120 S. Ct. 631 (2000), undermine Ussery is meritless. Kimel and Florida Prepaid merely apply the legal principles that were in effect when this Court decided Ussery.

[1/] (...continued)
United States' intervention is limited to defending the constitutionality of the Equal Pay Act.

Precedent squarely contradicts the University's contention that the Equal Pay Act cannot be applied to the States merely because Congress did not specify that it was exercising its Fourteenth Amendment power. As this Court noted in Ussery, the Supreme Court has long held that respect for Congress's position as a coordinate branch of government mandate that courts examine only whether, as an objective matter, legislation is within Congress's broad authority to enforce the Fourteenth Amendment. Florida Prepaid did not purport to overrule this long established rule. Moreover, the structure and purpose of the Equal Pay Act make clear that it is intended to, and does, enforce the Fourteenth Amendment's requirement that the States not discriminate on the basis of sex.

Nor do Kimel or Florida Prepaid undermine Ussery's conclusion that the Equal Pay Act's provisions are a congruent and proportional response to the problem of intentional sex discrimination in wages by state employers. Unlike the legislation at issue in Kimel and Florida Prepaid, which prohibited a substantial amount of conduct by States that would not be unconstitutional, the Equal Pay Act reaches almost exclusively intentional sex discrimination in wages that is unconstitutional when practiced by States. The modest burden shifting provisions of the Equal Pay Act permit the trier of fact to impose liability only when the plaintiff has shown that the employer pays men and women different wages for the same work and when the defendant has failed to

show that any other factor explains the disparity. In such a case, it is reasonable to infer that unlawful discrimination is almost always the real reason for the difference in pay. Courts have consistently approved similar burden shifting mechanisms in the Voting Rights Act and Title VII.

Because the Equal Pay Act is carefully tailored toward eliminating unconstitutional sex discrimination, there was no need for Congress to have before it the evidence of widespread constitutional violations by States that might have been appropriate if it had enacted more far-reaching legislation. In fact, the Supreme Court has noted the pervasive history of sex discrimination by States and has pointed to that history as a basis for applying heightened judicial scrutiny to state classifications based on gender. In any event, the legislative record of the Equal Pay Act and of other anti-discrimination legislation from the same time period confirms that Congress had before it ample evidence that sex discrimination by state employers, including unequal pay by States, was a serious problem.

Notably the three other courts of appeals to consider the constitutionality of the Equal Pay Act's abrogation of state immunity after Kimel have agreed that the abrogation is constitutional. See Kovacevich v. Kent State Univ., No. 98-3678, 2000 WL 1205859 (6th Cir. Aug. 25, 2000); Varner v. Illinois

State Univ., No. 97-3253, 2000 WL 1257266 (7th Cir. Sept. 6, 2000); Hundertmark v. Florida Dep't of Transp., 205 F.3d 1272, 1274 (11th Cir. 2000). This Court should, therefore, reaffirm its decision in Ussery, which is in agreement with the seven other courts of appeals to address the issue, and hold that the Equal Pay Act is a valid exercise of Congress's power to enforce the Fourteenth Amendment.

STANDARD OF REVIEW

Because the questions of Congress's power to abrogate the States' Eleventh Amendment immunity in this case are purely ones of law, this Court reviews the issues de novo. See Ussery v. Louisiana, 150 F.3d 431, 434 (5th Cir. 1998), cert. dismissed, 526 U.S. 1013 (1999).

ARGUMENT

CONGRESS CONSTITUTIONALLY ABROGATED THE STATES' ELEVENTH AMENDMENT IMMUNITY IN THE EQUAL PAY ACT

The Equal Pay Act prohibits employers from discriminating on the basis of sex in paying wages.[2/] 29

[2/] The Equal Pay Act provides in pertinent part:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex * * *.

(continued...)

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 Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), the Supreme Court set forth the following two-part inquiry to determine whether a statute validly abrogates the States' Eleventh Amendment immunity:

> we ask two questions: 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 and quotations omitted); accord Kazmier v. Widmann, No. 99-30242, 2000 WL 1210502 (5th Cir. Aug. 25, 2000). The Seminole Tribe Court held that Congress could not use its Article I powers to abrogate the States' Eleventh Amendment immunity. See id. at 59-73. The Court reaffirmed, however, that Congress may use its power "to enforce, by appropriate legislation," the Fourteenth Amendment, U.S. Const. Amend. XIV, § 5, to abrogate the States' Eleventh Amendment immunity to private suits in federal court. See Seminole Tribe, 517 U.S. at 59. The Court noted that the Fourteenth Amendment "by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the

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[2/](...continued)
29 U.S.C. 206(d).

Constitution." Ibid. As a result, the power to abrogate the States' immunity from suit is a necessary component of Congress's power to enforce the Fourteenth Amendment. See ibid.

The University does not dispute (Br. 28)[3/] that Congress unequivocally expressed its intent to abrogate the States' imunity in the Equal Pay Act. In Kimel v. Florida Board of Regents, 120 S. Ct. 631 (2000), the Supreme Court held that the private enforcement mechanism set forth in 29 U.S.C. 216(b), which authorizes private suits to enforce the Age Discrimination in Employment Act (ADEA), as well as the Equal Pay Act, "clearly demonstrates Congress' intent to subject the States to suit for money damages at the hands of individual employees." Kimel, 120 S. Ct. at 640. We proceed, therefore, to the second part of the Seminole Tribe inquiry: whether the Equal Pay Act, as applied to the States, is an "appropriate" exercise of Congress's Section 5 power. See Kimel, 120 S. Ct. at 644.

A. The Equal Pay Act's Prohibition Of Sex Discrimination In Wages By The States Is An Exercise Of Congress's Section 5 Authority

The University argues (Br. 30-33) that the Equal Pay Act may not be upheld as an exercise of Congress's Section 5 power because, when Congress extended the Equal Pay Act to the States, it did not specify that it was exercising its

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[3/] "Br.__" refers to the appellant's brief.

Section 5 authority. This Court rejected that same argument in Ussery v. Louisiana, 150 F.3d 431 (5th Cir. 1998), cert. dismissed, 526 U.S. 1013 (1999), and it should do so again.

1. As this Court noted in Ussery, 150 F.3d at 436, the Supreme Court has held that "the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." See Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948); accord EEOC v. Wyoming, 460 U.S. 226, 243-244 n.18 (1983). As Ussery affirmed, the second part of the Seminole Tribe test is an objective inquiry: "namely whether Congress could have enacted the legislation at issue pursuant to a constitutional provision granting it the power to abrogate." See 150 F.3d at 436 (quoting Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir. 1997)). As long as Congress had the authority under the Fourteenth Amendment to abrogate, it is irrelevant whether Congress specifically understood that it was legislating pursuant to that authority. See ibid. The ten other circuits to address this issue have reached the same conclusion.[4/]

[4/] 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 sub nom. Connecticut v. Counsel, 488 U.S. 955 (1988); Wheeling & Lake Erie Ry. Co. v. Public Util. Comm'n, 141 F.3d 88, 92 (3d Cir. 1998), cert. denied, 120 S. Ct. 323 (1999); Abril v. Virginia, 145 F.3d 182, 186 (4th Cir. 1998); Franks v. Kentucky Sch. for the Deaf, 142 F.3d 360, 363 (6th Cir. 1998); Board of Educ. v. Kelly E., 207 F.3d 931, 935 (7th Cir. 2000); 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

(continued...)

The objective inquiry mandated by Ussery, EEOC v. Wyoming, and Woods properly accords Congress the respect it is due as a coordinate branch of government. 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's power. See, e.g., Close v. Glenwood Cemetery, 107 U.S. 466, 475 (1883); United States v. Harris, 106 U.S. 629, 635 (1883). Thus, when constitutional challenges are brought "question[ing] the power of Congress to pass the law * * * [i]t is * * * necessary to search the Constitution to ascertain whether or not the power is conferred." Harris, 106 U.S. at 636 (emphasis added).

An objective inquiry is particularly appropriate here, because at the time that Congress extended the Equal Pay Act to the States, in 1974, the Supreme Court had never held that the sole constitutional basis by which Congress could abrogate the States' Eleventh Amendment immunity was through Section 5 of the Fourteenth Amendment. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 59 (1996). Congress's 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

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[4/](...continued)
Cir. 1999); United States v. Moghadam, 175 F.3d 1269, 1275 (11th Cir. 1999), cert. denied, 120 S. Ct. 1529 (2000).

its Commerce Clause power to abrogate the States' Eleventh Amendment immunity, courts exceed the bounds of their authority if they nullify Congress's intent merely because Congress did not "correctly guess[] the source of [its] power."[5/] See Timmer v. Michigan Dep't of Commerce, 104 F.3d 833, 839 (6th Cir. 1997). As Judge Easterbrook recently observed in holding that the Individuals with Disabilities Education Act (IDEA) validly abrogated the States' Eleventh Amendment immunity:

> Congress did what it could to ensure that states participating in the IDEA are amenable to suit in federal court. That the power comes from the spending clause rather than (as Congress may have supposed) the commerce clause or the fourteenth amendment is not relevant to the issue
> whether the national government possesses the asserted authority. Otherwise we require the legislature to play games ("guess which clause the judiciary will think most appropriate"). What matters, or at least should matter, is the extent of national power, rather than the extent of legislative prevision.

Board of Educ. v. Kelly E., 207 F.3d 931, 935 (7th Cir. 2000), petition for cert. pending, No. 99-2027. This observation applies with equal force to the Equal Pay Act.

We recognize 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

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[5/] The University's continued reliance (Br. 32-33) on Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981), is unfounded. As this Court noted in Ussery, the statement in Pennhurst on which the University relies announced a rule of statutory question to be applied where Congressional intent is ambiguous, not a limitation on Congress's authority to legislate. See Ussery, 150 F.3d at 436; EEOC v. Wyoming, 460 U.S. at 244 n.18; Gregory v. Ashcroft, 501 U.S. 452, 570 (1991).

Court cannot sustain Congress's extension of the same protections to the States under Section 5. The fact 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 this court has previously held. See Ussery, 150 F.3d at 436-437; 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).

2. The University urges this Court (Br. 32) to disregard Ussery, the Supreme Court decisions on which it relied, and the positions taken by ten other courts of appeals, based solely on a footnote in Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999). The University is mistaken. The Florida Prepaid footnote did not establish a new rule requiring Congress to state the constitutional authority for its legislation. The Court merely concluded that, where the statute and legislative history were devoid of any "suggestion * * * that Congress had in mind the Just Compensation Clause," that was made applicable to the States through the Fourteenth Amendment, the Court would not consider whether the Patent Remedy Act enforced that Clause. See 527 U.S. at 642 n.7.

The Court's failure to consider whether the statute could be viewed as a valid means of enforcing the Just Compensation Clause, and its decision to view the statute as enforcing the Due Process Clause instead, was a straightforward application of the long-established principle that the Court must be able to "discernsome legislative purpose or factual predicate" for each claimed exercise of the Section 5 power. See Wyoming, 460 U.S. at 243-244 n.18.

In this case, by contrast, the connection between the anti-discrimination mandate of the Equal Pay Act and the enforcement of the Equal Protection Clause is clear. The Equal Protection Clause prohibits arbitrary discrimination by the States. Any statute that prohibits a State from engaging in arbitrary discrimination on the basis of sex necessarily enforces the requirements of that clause. See Varner v. Illinois State Univ., No. 97-3253, 2000 WL 1257266, at *8 n.2 (7th Cir. Sept. 6, 2000). As the supporters of the Equal Pay Act recognized when testifying before Congress in support of its enactment, "equal pay for equal work is consistent with the constitutional principle of equality for all."[6/] The application of the Equal Pay Act to the States plainly

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[6/] See To Prohibit Discrimination On Account of Sex in the Payment of Wages By Employers Engaged In Commerce: Hearings Before the Special Subcomm. on Labor of House Comm. on Educ. & Labor, 88th Cong., 1st Sess. 298 (1963) (To Prohibit Discrimination) (Supplemental Statement of Ruth Thomson); S. Rep. No. 2263, 81st Cong. 2d Sess. 6 (1950) ("Equality of opportunity is one of the basic concepts of our government.").

enforces the constitutional requirement that States treat women and men equally.[7/]

Furthermore, the Supreme Court did not even cite to Woods and EEOC v. Wyoming in the Florida Prepaid footnote, much less purport to disavow them. See Florida Prepaid, 527 U.S. at 642 n.7. Indeed, the Court's subsequent decision in Kimel v. Florida Board of Regents, 120 S. Ct. 631 (2000), demonstrates that the Supreme Court does not require Congress to specify that it is passing legislation pursuant to its Section 5 power in order to hold that Congress has validly exercised that power. Although the ADEA, like the Equal Pay Act, was amended without specific language stating the basis of Congress's power, the Kimel Court examined whether the ADEA was a valid exercise of Congress's Section 5 authority. See Kimel, 120 S.Ct. at 644. The Court's action in Kimel further "supports the notion that Congress need not specifically address the basis of its power to legislate." Hundertmark v. Florida Dep't of Transp., 205 F.3d 1272, 1275 n.2 (11th Cir. 2000).

[7/] The University's claim (Br. 30-32) that Congress made clear that it intended to use only its Commerce Clause power when it extended the Equal Pay Act to the States was squarely rejected in Ussery, where this Court concluded that the legislative history of the 1974 amendments contained "no definitive statement by Congress as to the Constitutional authority on which it acted." See 150 F.3d at 436 n.2; accord Varner, 2000 WL 1257266, at *8 n.2; Timmer, 104 F.3d at 838-839 n.7. Even if the University were correct that Congress's intention to rely solely on the Commerce clause would be relevant, Ussery's holding that the legislative history does not disclose such an intention would dispose of the University's claim.

Contrary to the University's contention (Br. 32), this Court has never suggested, much less held, that the footnote in Florida Prepaid overrules Woods. In Chavez v. Arte Publico Press, 204 F.3d 601, 603 (5th Cir. 2000), this Court considered whether the Copyright Remedy Clarification Act was a valid exercise of Congress's Section 5 enforcement power even though Congress did not invoke that power in passing the statute. Moreover, the courts of appeals to consider the issue after Florida Prepaid have continued to hold that it is not necessary to determine what powers Congress intended to exercise in abrogating the States'Eleventh Amendment immunity from suit. See Varner, 2000 WL 1257266, at *8 n.2 (Equal Pay Act); Union Pac. R.R. Co. v. Utah, 198 F.3d 1201, 1203 (10th Cir. 1999); Hundertmark v. Florida Dep't of Transp., 205 F.3d 1272, 1274 (11th Cir. 2000) (Equal Pay Act). Because the Supreme Court has not overruled Woods, this court continues to be bound by the rule announced in Woods and reaffirmed in EEOC v. Wyoming. See Agostini v. Felton, 521 U.S. 203, 237 (1997) (court of appeals may not determine that Supreme Court decision has been overruled by implication).

B. The Equal Pay Act Is An Appropriate Means Of Enforcing The Fourteenth Amendment's Prohibition On Intentional Sex Discrimination By The States

1. In Ussery v. Louisiana, 150 F.3d 431 (5th Cir. 1998), cert. dismissed, 526 U.S. 1015 (1999), this Court held that the Equal Pay Act's abrogation of the States' Eleventh Amendment immunity was a valid exercise of Congress's "power to enforce, by appropriate legislation," U.S. Const. Amend.

XIV, § 5, the Fourteenth Amendment. This Court reasoned that the Equal Pay Act was designed to eliminate intentional sex discrimination in pay and other employment benefits. This Court concluded that because the Fourteenth Amendment bars intentional sex discrimination by States,[8/] the extension of the Equal Pay Act to the States was a valid means of deterring and remedying such discrimination. See Ussery, 150 F.3d at 437. Every other court of appeals to consider the issue has likewise held that the extension of the Equal Pay Act to the States was a valid exercise of Congress's Section 5 power. See Anderson v. State Univ. of N.Y., 169 F.3d 117 (2d Cir. 1999), vacated for reconsideration in light of Kimel, 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, 526 U.S. 1013 (1999); Kovacevich v. Kent State Univ., No. 98-3678, 2000 WL 1205859 (6th Cir. Aug. 25, 2000); Varner v. Illinois State Univ., No. 97-3253, 2000 WL 1257266 (7th Cir. Sept. 6, 2000); O'Sullivan v. Minnesota, 191 F.3d 965 (8th Cir. 1999); Hundertmark v. Florida Dep't of Transp., 205 F.3d 1272, 1274 (11th Cir. 2000).

[8/] See United States v. Morrison, 120 S. Ct. 1740, 1755 (2000); United States v. Virginia, 518 U.S. 515, 523 (1996); Cross v. Alabama, 49 F.3d 1490, 1507 (11th Cir. 1995) (sex discrimination by public employer violates Equal Protection Clause).

2. The University's argument (Br. 29) that the Supreme Court's decision in Kimel v. Florida Board of Regents, 120 S. Ct. 631 (2000), implicitly overrules Ussery is meritless. Kimel did not alter the law that was in place when this Court decided Ussery. Kimel merely applied the congruence and proportionality standard that was first articulated, prior to Ussery, in City of Boerne v. Flores, 521 U.S. 507 (1997). See Kimel, 120 S. Ct. at 644-645.

As Kimel recognized, Section 5 authorizes Congress to deter and remedy constitutional violations, but it does not give Congress the power to redefine the substance of the States' constitutional obligations. See Kimel, 120 S. Ct. at 645; City of Boerne, 521 U.S. at 517-519. Legislation is considered substantive, rather than remedial, only when it is "'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'" Kimel, 120 S. Ct. 631, 645 (2000) (quoting City of Boerne, 521 U.S. at 532). So long as there is a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," Congress's chosen remedy should be upheld as appropriate Fourteenth Amendment legislation. See City of Boerne, 521 U.S. at 520.

In Kimel, the Court applied this framework to hold 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 a valid exercise of Congress's Section 5 enforcement power. The Court found that because age-based classifications are presumptively valid and rarely violate the Equal Protection Clause, the ADEA prohibited "substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard." 120 S. Ct. at 647. The Court, therefore, found it necessary to analyze whether a "[d]ifficult and intractable" problem of unconstitutional age discrimination existed that would justify the broad and "powerful" regulation imposed by the ADEA. Id. at 648. Surveying the record before Congress, however, the Court determined that "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation." Id. at 649. The Court concluded, therefore, that the intrusive regulation imposed by the ADEA was too far out of proportion to what it termed the "perhaps inconsequential problem" of unconstitutional age discrimination. See id. at 648-649.

3. As this Court recently noted, Kimel suggests that courts should consider the nature of the constitutional violation a statute is designed to prevent, and the extent to which the statue prohibits conduct that is constitutional. See Kazmier v. Widmann, No. 99-30242, 2000 WL 1210502, at *2 (5th Cir. Aug. 25, 2000). These factors both weigh heavily

in favor of the validity of the Equal Pay Act. First, Congress's authority is most broad when it enacts legislation that targets classifications that are subject to heightened scrutiny, such as race and sex. See ibid.; Kimel, 120 S. Ct. at 645-646. Congress thus enjoys broad latitude in fashioning legislation, such as the Equal Pay Act, that prohibits sex discrimination.

Second, the Equal Pay Act's substantive provisions outlaw almost exclusively conduct that is unconstitutional when practiced by States. To prevail on an Equal Pay Act claim, an employee must first prove that the employer is paying different wages to men and women 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). Once an employee has proven equal work and unequal pay, the employer may then avoid liability by showing that the wage differentials are based on a seniority system, a merit system, a system that awards compensation based on quantity or quality of production, or "on any other factor other than sex." 29 U.S.C. 206(d)(1)(iv) (emphasis added); Corning Glass Works v. Brennan, 417 U.S. 188, 196 (1974); Peters v. City of Shreveport, 818 F.2d 1148, 1153 (5th Cir. 1987), cert. dismissed, 485 U.S. 930 (1988).

In essence, the Equal Pay Act establishes a rebuttable presumption that unequal pay to men and women who are doing equal work is most likely a result of intentional sex

discrimination. See Varner v. Illinois State Univ., No. 97-3253, 2000 WL 1257266, at *3 (7th Cir. Sept. 6, 2000). The Act permits employers to rebut that presumption, however, by showing that the actual cause of the disparity is a factor other than sex. See ibid. Thus, the Equal Pay Act does not impose a new substantive constitutional standard on the States. At most, it simply removes the presumption of validity that normally applies to state action in the narrow circumstance where the employee makes a prima facie showing that the state employer is treating men and women unequally. As the Supreme Court has noted, the burden-shifting provisions of the Equal Pay Act are designed "to confine the application of the Act to wage differentials attributable to sex discrimination." County of Washington v. Gunther, 452 U.S.161, 170-171 (1981). Thus, although the form of the inquiry differs from that used in a case challenging state action directly under the Fourteenth Amendment, the Equal Pay Act "is targeted at the same kind of discrimination prohibited by the Constitution." See Varner, 2000 WL 1257266, at *4.

4. The University argues (Br. 36) that the Equal Pay Act is not proper remedial legislation because it "deviates" from the standard of proof that would otherwise apply to a claim of intentional sex discrimination. That argument ignores volumes of precedent. "Congress' § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment." Kimel, 120

S. Ct. at 644. "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.'" City of Boerne v. Flores, 521 U.S. 507, 518 (1997) (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)). "It 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." City of Boerne, 521 U.S. at 536 (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)). In fact, in Kimel, the Court noted that even legislation that prohibits "very little conduct that is likely to be unconstitutional" might be a valid exercise of Congress's Section 5 power in appropriate circumstances.[9/] See Kimel, 120 S. Ct. at 648.

This case does not require this Court to explore the outer limits of Congress's Section 5 authority, however, for the modest rebuttable presumption established in the Equal Pay Act is plainly a proportional and congruent response to

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[9/] In Kazmier, the court stated in dictum that "if legislation 'prohibits substantially more state employment decisions and practices than would likely be unconstitutional under the applicable equal protection * * * standard,' the legislation will not be considered congruent and proportional." See 2000 WL 1210502, at *2 (quoting Kimel, 120 S. Ct. at 647). In light of the statement from Kimel quoted above in the text, Kazmier's dictum is incorrect. Kazmier's dictum is not relevant to the question presented here, however.

the problem Congress sought to address. In enacting the Equal Pay Act, Congress sought to remedy the pervasive discrimination that existed whereby women were paid less than men for equal work. See Varner, 2000 WL 1257266, at *7. Furthermore, Congress concluded not only that intentional sex discrimination in wages existed, but also that it was being "successfully concealed" by some employers. See H.R. Rep. No. 1714, 87th Cong., 2d Sess. 2 (1962). Because defendants frequently cloak their discriminatory motives in pre-textual explanations,[10/] proving that a defendant's true motives were discriminatory may present a considerable challenge. See, e.g., United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) ("There will seldom be 'eyewitness' testimony as to the employer's mental processes.").

To expose the intentional, but concealed discrimination in wages that Congress identified, it was appropriate for Congress to establish a statutory rebuttable presumption that reflects its finding of widespread sex discrimination and that places the burden on the employer to show that there is another reason for the disparity in pay. Shifting the burden of persuasion to the employer in this situation is fair, because the information that relates to the disparity in pay

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[10/] See also Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1246 (11th Cir. 1998) ("It is an extraordinary case in which a defendant employer admits it has taken an adverse employment action against a plaintiff employee 'because of' the employee's sex. Thus, courts must rely on inferences drawn from the observable facts to determine whether a Title VII violation has occurred.") (footnote omitted), cert. denied, 120 S. Ct. 327 (1999).

is "peculiarly within the knowledge" of the employer, cf. South Carolina v. Katzenbach, 383 U.S. 301, 332 (1966), and "the employer is in the best position to put forth the actual reason for its decision," Reeves v. Sanderson Plumbing Prods, Inc., 120 S. Ct. 2097, 2109 (2000).

5. Courts have approved, as appropriate Section 5 legislation, analogous provisions in the Voting Rights Act and Title VII that shift the burden of proof to the State to disprove an inference of unlawful discrimination. In South Carolina v. Katzenbach, supra, and Georgia v. United States, 411 U.S. 526 (1973), the Supreme Court upheld as a valid exercise of Congress's Section 5 authority the provisions of the Voting Rights Act that prohibit covered jurisdictions from implementing certain changes to their voting procedures, unless the covered jurisdiction demonstrates the absence of a discriminatory purpose or effect. See South Carolina, 383 U.S. at 331-332; Georgia, 411 U.S. at 536-539. As then Justice Rehnquist noted, Congress plainly has the power under Section 5 of the Fourteenth Amendment to "place the burden of proving lack of discriminatory purpose on" the States. City of Rome v. United States, 446 U.S. 156, 214 (1980) (Rehnquist, J., dissenting).

The Supreme Court has also repeatedly affirmed that Congress's power to enforce the Equal Protection Clause includes the power to prohibit discriminatory effects on a protected class, even though the Constitution only prohibits actions that are intentionally discriminatory. See Lopez v.

Monterey County, 525 U.S. 266, 282-283 (1999); City of Boerne v. Flores, 521 U.S. 507, 529 (1997) (" * * * Congress can prohibit laws with discriminatory effects in order to prevent racial discrimination in violation of the Equal Protection Clause * * *."); City of Rome, 446 U.S. at 177; South Carolina, 383 U.S. at 325-337. In applying this principle, all of the lower courts that have considered the issue have upheld the constitutionality of the disparate impact standard of Title VII.[11/] That standard, similar to the Equal Pay Act, requires the employer to prove that employment practices that have a disparate impact on persons in a protected group are justified by a business necessity. See In re Employment Discrimination Litig., 198 F.3d 1305, 1321-1322 (11th Cir. 1999).

Most recently, in In re Employment Discrimination Litigation, supra, the Eleventh Circuit upheld Title VII's disparate impact standard as valid Section 5 legislation, rejecting the State's argument that City of Boerne required a different result. The court recognized that the disparate impact standard prohibits "discriminatory result[s]" that are not justified by business necessity rather than

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[11/] 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); Liberles v. County of Cook, 709 F.2d 1122, 1135 (7th Cir. 1983); Blake v. City of L.A., 595 F.2d 1367, 1373-1374 (9th Cir. 1979), cert. denied, 446 U.S. 928 (1980); In re Employment Discrimination Litig., 198 F.3d 1305 (11th Cir. 1999); cf. also Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 689 n.7 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981).

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. The court held, however, that the disparate impact standard was a valid exercise of Congress's Section 5 authority, because it can "reasonably be characterized as [a preventive rule]" that targets intentional discrimination.[12/] See id. at 1322.

The same reasons that support the conclusion that proscribing discriminatory effects is an appropriate means of enforcing the Fourteenth Amendment's prohibition of intentional discrimination also mandate the conclusion that the Equal Pay Act's limited burden-shifting scheme is a valid exercise of Congress's Section 5 authority. The provisions of the Equal Pay Act are well within the bounds of Congress's broad authority to enforce the Fourteenth Amendment.

6. Furthermore, unlike the ADEA that was at issue in Kimel, the Equal Pay Act almost exclusively outlaws

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[12/] Although the disparate impact cases cited above involved claims of race discrimination, there is no reason to believe that Congress's power to prohibit gender discrimination is significantly less broad than its power to prohibit race discrimination. "Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination." Personnel Adm'r v. Feeney, 442 U.S. 256, 273 (1979) (emphasis added). In Kimel, the Supreme Court equated Congress's power to prohibit race and sex discrimination, noting that governmental conduct based on race and sex, is "'so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.'" 120 S. Ct. at 645 (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985)).

intentional sex discrimination that violates the Constitution when practiced by the State. If men and women are paid different wages for the same work and the employer cannot show that there is a legitimate reason other than gender that explains the disparity, then it is reasonable to conclude that the employer's action is motivated by gender. See Personnel Adm'r v. Feeney, 442 U.S. 256, 275 (1979) (disparate impact would signal intentional discrimination "[i]f impact * * * could not be plausibly explained on a neutral ground"). As the Supreme Court recently reaffirmed, when an employer does not have a legitimate reason for an employment decision, "'it is more likely than not the employer, who we generally assume acts with some reason, based his decision on an impermissible consideration.'"[13/] Reeves v. Sanderson Plumbing Prods., Inc., 120 S. Ct. 2097, 2108 (2000) (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)). Thus, "in the great majority of cases, the Equal Pay Act does not subject employers to liability in situations where the Constitution does not." See Varner, 2000 WL 1257266, at *6.

The close fit between the conduct proscribed by the Equal Pay Act and the constitutional prohibition on

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[13/] Cf. In re Employment Discrimination Litig., 198 F.3d 1305, 1321-1322 (11th Cir. 1999) ("If, after a prima facie demonstration of discriminatory impact, the employer cannot demonstrate that the challenged practice is a job related business necessity, what explanation can there be for the employer's continued use of the discriminatory practice other than that some invidious purpose is probably at work?").

intentional sex discrimination by States distinguishes this case from Kimel and Florida Prepaid, on which the University rely (Br. 29). In Kimel, the Court concluded that because age-based classifications are presumptively valid, the ADEA's virtual prohibition on an employer taking age into account in employment decisions went far beyond the constitutional prohibition on arbitrary age-based classifications. See 120 S. Ct. at 647-648.

Likewise, in Florida Prepaid, the broad scope of the Patent Remedy Act, which authorizes damage claims against States for patent infringement, led the Court to conclude that the Act was not a valid exercise of Congress's Section 5 authority. As the Court emphasized, patent infringement by States violates the Due Process Clause only if: (1) it is intentional (as opposed to inadvertent); and (2) state tort law fails to provide an adequate remedy for the infringement. See Florida Prepaid, 527 U.S. at 644-645. Thus, patent infringement by States would be unconstitutional only in relatively narrow circumstances. The Court found, however, that the federal legislation applied to an "unlimited range of state conduct" and that no attempt had been made to confine its sweep to conduct that was "arguabl[y]" unconstitutional. Id. at 646. The Court further determined that Congress had found little, if any, evidence that States were engaging in unconstitutional patent infringement that would justify such an "expansive" remedy. Id. at 645-646.

The flaws the Court identified in the legislation challenged in Kimel and Florida Prepaid do not apply to the Equal Pay Act. The Equal Pay Act prohibits sex discrimination, which is presumptively unconstitutional when practiced by States. See Kimel, 120 S. Ct. at 646. And the Equal Pay Act's limited burden shifting mechanism confines liability to situations that almost certainly reflect intentional sex discrimination.[14/] Compare Florida Prepaid, 527 U.S. at 646. As the Sixth Circuit recently recognized, although the liability standards under the Equal Protection Clause and the Equal Pay Act are not identical, "they are sufficiently similar such that most cases of state-sponsored wage discrimination that have no explanation 'other than sex' also constitute equal protection violations under the Constitution." See Kovacevich v. Kent State Univ., No. 98-3678, 2000 WL 1205859, at *9 (Aug. 25, 2000).

[14/] Although we disagree with the result, this Court's recent decision in Kazmier v. Widmann, No. 99-30242, 2000 WL 1210502 (5th Cir. Aug. 25, 2000), is also distinguishable from this case. In Kazmier, the majority held that those portions of the Family Medical Leave Act that guarantee employees up to 12 weeks leave to care for a family member or because of the employee's own serious health condition are not a valid exercise of Congress's Section 5 authority. The Court noted that because the constitution does not guarantee state employees any such leave, much less 12 weeks, the requirement imposed far greater obligations than those mandated by the constitution. See id. at *6. Even if Kazmier were correctly decided, its holding has little relevance to the issues presented here. Indeed the Sixth Circuit's recent decisions invalidating the abrogation in the Family Medical Leave Act, see Sims v. University of Cincinnati, 219 F.3d 559 (2000), while upholding the abrogation in the Equal Pay Act, see Kovacevich v. Kent State Univ., No. 98-3678, 2000 WL 1205859 (Aug. 25, 2000), underscores the significant differences in the two statutes for purposes of judging their validity under the Fourteenth Amendment.

The courts to consider the constitutionality of the Equal Pay Act after Kimel have all concluded that nothing in Kimel undermines the conclusion that the Equal Pay Act represents a valid exercise of Congress's Section 5 authority. See Kovacevich 2000 WL 1205859; Varner, 2000 WL 1257266; Hundertmark v. Florida Dep't of Transp., 205 F.3d 1272, 1274-1275 (11th Cir. 2000); Anderson v. State Univ. of N.Y., No. 95-CV-0979, 2000 WL 1014018 (N.D.N.Y. July 18, 2000); Stewart v. S.U.N.Y Maritime Coll., No. 99-5153, 2000 WL 1218379 (S.D.N.Y. Aug. 25, 2000). Consistent with the decisions in the Sixth, Seventh, and Eleventh Circuits, this Court should reaffirm its prior decision in Ussery and hold that the Equal Pay Act is valid Section 5 legislation.

C. Because The Equal Pay Act Is Appropriately Tailored ToRemedy Intentional Sex Discrimination, Congress Was Not Required To Make Findings Concerning The Extent Of SuchDiscrimination

1. There is no merit to the University's argument (Br. 39-41) that Congress was required to make findings that States have engaged in unconstitutional conduct in order to abrogate their immunity in the Equal Pay Act. Legislation is valid under Section 5 of the Fourteenth Amendment if it can reasonably "be viewed as remedial or preventive legislation aimed at securing the protections of the Fourteenth Amendment." Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 639 (1999). "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, 520 U.S. 180, 213 (1997). Rather, the Equal Pay Act must be upheld as a valid exercise of Congress's Section 5 authority so long as this Court can "discern some legislative purpose or factual predicate that supports the exercise of that power." EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983).

While the legislative record may be of assistance in determining whether the proper legislative purpose or factual predicate exists, "the lack of support in the legislative record is not determinative." Florida Prepaid, 527 U.S. at 646; Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 646 (2000). As the Second and Seventh Circuits have both recently recognized "[t]he ultimate question remains not whether Congress created a sufficient legislative record, but rather whether, given all of the information before the Court, it appears that the statute in question can appropriately be characterized as legitimate remedial legislation." Kilcullen v. New York State Dep't of Labor, 205 F.3d 77, 81 (2d Cir. 2000); Varner v. Illinois State Univ., No. 97-3252, 2000 WL 1257266, at *7 (7th Cir. Sept. 6, 2000).

Neither Kimel nor Florida Prepaid establish that Congress must always gather evidence of constitutional violations by the States before it can abrogate the States' Eleventh Amendment immunity. The Court looked to the legislative record for evidence of constitutional violations in Kimel and Florida Prepaid only because it determined that

some evidence of constitutional violations was necessary to justify the breadth of the remedy. See Kimel, 120 S. Ct. at 648; Florida Prepaid, 527 U.S. at 645-646. Here, by contrast, the Equal Pay Act is tailored to uncover intentional discrimination on the basis of sex. As this Court noted in Ussery, because the Supreme Court has repeatedly held that the Equal Protection Clause proscribes intentional sex discrimination by States, it is difficult "to understand how a statute enacted specifically to combat such discrimination could fall outside the authority granted to Congress by § 5." Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir. 1997).

When a statute is carefully tailored to detect and remedy constitutional violations by States, a court need not inquire about the frequency at which such constitutional violations are actually occurring. See Varner, 2000 WL 1257266, at *7. Thus, the Supreme Court has twice upheld as a proper exercise of Congress's Section 5 authority 18 U.S.C. 242, a criminal statute that prohibits persons acting under color of law from depriving individuals of constitutional rights, without inquiring into the extent to which such criminal acts occurred. See Williams v. United States, 341 U.S. 97 (1951); Screws v. United States, 325 U.S. 91 (1945). Nor did Congress have to find that state actors were violating the Fourteenth Amendment in order to establish a cause of action for such violations in 42 U.S.C. 1983.

2. In any event, 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, 545 (1996) (noting, inter alia, governmental discrimination against women in employment). Because the Court itself has determined that women "have suffered * * * at the hands of discriminatory state actors during the decades of our Nation's history," J.E.B., 511 U.S. at 136, it is not necessary to examine whether the legislative history also supports that conclusion.

D. Even Assuming That Congress Was Required To Identify Evidence Of Sex Discrimination By State Employers, The Legislative Record Before Congress Is Replete With Such Evidence

1. In any event, the relevant legislative record refutes the University's claim (Br. 40) that the legislative history "contains absolutely no discussion of sex discrimination by the states."[15/] In the early 1970s, Congress addressed 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

[15/] Copies of the relevant excerpts of the legislative history cited in this section are attached as an addendum to the brief.

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 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). Prior to enacting such legislation, Congress held extensive hearings[16/] and received numerous reports from the Executive Branch[17/] on the subject of sex discrimination by States.

[16/] See, e.g., Economic Problems of Women: Hearings Before the Joint Econ. Comm., 93d Cong., 1st Sess. (1973) (Economic); Equal Rights for Men & 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 & Pub. Welfare, 92d Cong., 1st Sess. (1971) (1971 Senate EEO); Equal Employment Opportunity Enforcement Procedures: Hearings Beforethe Gen. 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 House Comm. on Educ. & Labor, 91st Cong., 2d Sess. (1970) (Discrimination); Equal Employment Opportunity Enforcement Procedures: Hearings Before the Gen. 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 & Pub. Welfare, 91st Cong., 1st Sess. (1969) (1969 Senate EEO).

[17/] See, e.g., The President's Task Force on Women's Rights and Responsibilities, A Matter of Simple Justice 6 (Apr. 1970); U.S. Dep't of Labor, Women's Bureau, Fact Sheet on the Earnings Gap (Feb. 1970) (reprinted in Discrimination at 17-19).

The testimony and reports illustrate that sex discrimination by state employers was common,[18] that state employers discriminated against women in wages,[19] and that existing remedies, both at the state and federal levels, were inadequate.[20] Much of this evidence revealed widespread and

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[18] See, e.g., President's Task Force at 4 ("At the State level there are numerous laws * * * which clearly discriminate against women as autonomous, mature persons."); Economic, Pt. 1, at 131 (Aileen C. Hernandez, former member EEOC) (State government employers "are notoriously discriminatory against both women and minorities"); Equal Rights 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."); id. at 548 (Citizen's Advisory Council on the Status of Women) ("numerous distinctions based on sex still exist in the law" including "[d]iscrimination in employment by State and local governments").

[19] See, e.g., 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 paying 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.").

[20] 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

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entrenched employment discrimination against women in state universities.[21/] Congress also heard detailed testimony that women at state universities throughout the country were

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[20/](...continued)
and private suits under the Equal Protection Clause were described as ineffective in eradicating 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."); 1969 Senate 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. Comm'n on Civil Rights) (some States' laws did not extend to state employers).

[21/] See President's Task Force at 6-7 (urging extension of Title VII to state employers and finding that "[t]here is gross discrimination against women in education"); Discrimination 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").

consistently paid less than male employees for substantially the same work.[22/]

The evidence before Congress supported the conclusion of one of the members of the United States Commission on Civil Rights that "[s]tate and local government employment has long been recognized as an area in which discriminatory employment practices deny jobs to women and minority workers."[23/] A comprehensive EEOC study of employment discrimination by state and local governments in 1974, the year that Congress extended the Equal Pay Act to the States, concluded that "equal employment opportunity has not yet been fulfilled in State and local government" and that "minorities and women

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[22/] See Higher Educ. at 298 (describing 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 * * *. Equally alarming is the documented tendency toward giving men higher starting salaries than women in the same job classifications."); 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 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").

[23/] Economic at 556 (Hon. Frankie M. Freeman, U.S. Comm'n on Civil Rights).

continue to be concentrated in relatively low-paying jobs, and even when employed in similar positions, they generally earn lower salaries than whites and men, respectively."[24/]

In the committee reports and floor debates concerning legislation aimed at redressing sex discrimination, Congress noted the "scope and depth of the discrimination"[25/] and stated 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, education and other areas."[26/] Congress concluded that "conscious" sex discrimination in wages by States was widespread,[27/] and that current laws were ineffective.[28/]

[24/] U.S. Equal Employment Opportunity Comm'n, 2 Minorities and Women in State and Local Government 1974, State Governments, iii Research Report No. 52-2 (1977) (emphasis added). This study concluded that women who worked for the state government were disproportionately concentrated in low-paying jobs and "earned somewhat less than men similarly employed." Id. at 25.

[25/] H.R. Rep. No. 554, 92d Cong., 1st Sess. 51 (1971) (report for Education Amendments).

[26/] S. Rep. No. 689, 92d Cong., 2d Sess. 7 (1972) (report on the Equal Rights Amendment) (emphasis added); see also H.R. Rep. No. 238, 92d Cong., 1st Sess. 19 (1971) ("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"); 118 Cong. Rec. 5982 (1972) (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.").

[27/] Discrimination at 434 (Rep. Mink) ("these differences [in median pay of men and women professors] do not occur by accident. They are the direct result of conscious discriminatory

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policies."); see also 118 Cong. Rec. 5805 (1972) (Sen. Bayh) (figures show that "those women who are promoted often do not receive equal pay for equal work"); 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 institutions * * * belie such simplistic explanations."); 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 women at 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 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.").

[28/] See 118 Cong. Rec. 274 (1972) (Sen. McGovern) (noting the "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. 4931-4932 (Sen. Cranston) (employees of educational

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Even after Congress extended Title VII 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."[29/] This statement is consistent with Congress's assessment that the "well documented" record revealed "systematic[]," and "widespread" sex discrimination by States,[30/] which "persist[ed]" despite the fact that it was "violative of the Constitution of the United States."[31/]

Thus, by the time that Congress extended the Equal Pay Act to the States, it "had developed a clear understanding of the problem of gender discrimination on the part of States." See Varner, 2000 WL 1257266, at *7. The University's suggestion (Br. 39-40) that this Court may only consider the

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[28/](...continued)
institutions "are, at present, without an effective Federal remedy in the area of employment discrimination"); 118 Cong. Rec. 5804 (1972) (Senator Bayh) ("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").

[29/] Economic at 105-106.

[30/] 118 Cong. Rec. 3936, 5804 (1972) (Sen. Bayh) ("[d]iscrimination against females on faculties and in administration is well documented"); Discrimination, Pt. 1, at 3 (Rep. Green) ("too often discrimination against women has been either systematically or subconsciously carried out" by "State legislatures"); Discrimination, Pt. 2, at 750 (Rep. Heckler) ("Discrimination by universities and secondary schools against women teachers is widespread.").

[31/] 118 Cong. Rec. 1412 (1972) (Sen. Byrd).

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 v. Klutznick, 448 U.S. 448, 503 (1980) (Powell, J., concurring); accord Varner, 2000 WL 1257266,at *7; see also Kilcullen v. New York State Dep't of Labor, 205 F.3d 77, 79-80 (2d Cir. 2000) (upholding Rehabilitation Act as valid exercise of Congress's Section 5 authority based on legislative record of statute that was enacted 16 years after Rehabilitation Act).

2. In any event, the hearings that focused on extending the Equal Pay Act to the States[32/] also contained extensive evidence of sex discrimination by state employers. There was

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[32/] See To Amend the Fair Labor Standards Act: Hearings Before the Gen. Subcomm. on Labor of the House Comm. on Educ. & Labor, Pt. 1, 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 & Pub. Welfare, Pt. 1, 92d Cong., 1st Sess. (1971) (1971 FLSA); Fair Labor Standards Amendments of 1973: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor & Pub. Welfare, App. Pt. 2, 93d Cong., 1st Sess. (1973) (1973 FLSA).

testimony 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."[33/] There was also testimony that existing anti-discrimination remedies were insufficient.[34/] In addition to testimony that unequal pay for equal work was pervasive at universities and colleges generally,[35/] witnesses identified a number of state universities in particular that were paying women less than men for the same work.[36/] Witnesses also testified that female public school teachers were underpaid in comparison to their male counterparts.[37/] In light of the extensive evidence of

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[33/] 1971 FLSA at 292-293 (Judith A. Lonnquist, National Organization for Women).

[34/] See 1971 FLSA at 288-289 (Lucille Shriver, National Federation of Business and Professional Women's Clubs) (extending Title VII is not sufficient); 1973 FLSA at 46a (1973) (National Federation of Business and Professional Women's Clubs) (coverage of state employers "is sorely needed").

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

[36/] See 1971 FLSA at 322-323 (evidence from University of Arizona, University of Minnesota, Kansas State Teachers College, University of Pittsburgh, and Michigan State University 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 557- 558 (Salary Study at Kansas State Teachers College).

[37/] See 1971 FLSA at 317 (Dr. Ann Scott, National Organization for Women) ("discrimination of salaries paid to woman teachers pervades the entire public school system"); see also Equal Rights at 548 (Citizen's Advisory Council on the Status of Women)

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discrimination against women and the deference accorded Congress in determining whether legislation is appropriate to enforce the Equal Protection Clause, this Court should uphold the Equal Pay Act as a valid exercise of Congress's Section 5 power.

CONCLUSION

The district court's judgment that the Eleventh Amendment does not bar the plaintiff's Equal Pay Act claim should be affirmed.

Respectfully submitted,

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("numerous distinctions based on sex still exist in the law" including "[d]ual pay schedules for men and women public school teachers"); 1971 Senate EEO at 433 (National Organization for Women) ("For example, in Salina, Kansas, the salary schedule provides $250 extra for male teachers; in Biloxi, Mississippi, men receive an additional $200.").

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B). It contains words. This brief has been prepared in monospaced typeface using Wordperfect 7.0, with Courier typeface at 10 characters per inch.

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2000, two copies of the foregoing Brief for the United States as Intervenor were served by first-class mail, postage prepaid, on the following counsel:

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