No. 98-6532

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ETHEL LOIS LARRY; DENESE POUNDS,

Plaintiffs-Appellants

UNITED STATES OF AMERICA,

Intervenor

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA
AND THE UNIVERSITY OF ALABAMA AT BIRMINGHAM,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

REPLY BRIEF FOR THE UNITED STATES AS INTERVENOR

BILL LANN LEE
Acting Assistant Attorney General

JESSICA DUNSAY SILVER
SETH M. GALANTER
Attorneys
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078
(202) 307-9994

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REPLY BRIEF FOR THE UNITED STATES AS INTERVENOR

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ARGUMENT

I

THE EQUAL PAY ACT CONTAINS A CLEAR STATEMENT OF CONGRESS' INTENT TO ABROGATE STATES' ELEVENTH AMENDMENT IMMUNITY

Defendant argues (Br. 7-17)[1/] that while it is clear that States are governed by the Equal Pay Act's substantive obligations, Congress did not make it clear that it wanted private parties to be able to enforce these rights against the States in federal court. We agree with defendant (Br. 12-13) that simply subjecting States to the regulatory provisions of a

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[1/] "Br." refers to the Brief of Defendant/Appellee. "U.S. Br." refers to the Brief for the United States as Intervenor.

statute is not enough. And we also agree (Br. 12, 13-14) that Congress need not expressly mention the Eleventh Amendment or sovereign immunity in order to manifest its intent to abrogate. See Fitzpatrick v. Bitzer, 427 U.S. 445, 452-453 (1976); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 55-57 (1996).

Instead, what is required is a clear statement that Congress intended States to be sued in federal court by private individuals. See Dellmuth v. Muth, 491 U.S. 223, 233 (1989) (Scalia, J., concurring). Unlike the statute in Dellmuth, the Equal Pay Act clearly manifests Congress' intent to abrogate, as it specifically identifies States as appropriate defendants in the same provision where it identifies individual employees as appropriate plaintiffs and federal court as the appropriate forum. Section 216(b) of Title 29 contains all these elements by providing that an action to enforce the Equal Pay Act "may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees." The term "public agency" is defined to mean "the government of a State or political subdivision thereof" and any agency of a State. 29 U.S.C. 203(x).

Defendant relies (Br. 7-8, 15-16) on Judge Edmondson's separate opinion in Kimel v. Board of Regents, 139 F.3d 1426 (11th Cir. 1998),[2/] for the proposition that 29 U.S.C. 216(b)

[2/] Three petitions for certiorari have been filed from this Court's judgments in Kimel. See Kimel v. Board of Regents, 67 (continued...)

does not clearly abrogate Eleventh Amendment immunity. But as defendant concedes (Br. 8), neither of the other judges on the panel agreed with this part of Judge Edmondson's opinion. See id. at 1435-1436 (Hatchett, C.J.) (disagreeing on this point); id. at 1445 (Cox, J.) (declining to address the question).

Moreover, Judge Edmondson's discussion of the question was far from definitive. In examining whether the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 et seq., contained a clear abrogation, he rejected the argument that the ADEA's incorporation of Section 216(b) by reference was sufficient to manifest Congress' intent. He explained that the reference to "sections of a different Act * * * is hardly straightforward." 139 F.3d at 1432 n.11. Instead, he believed that the clear-statement rule required "in one place, a plain, declaratory statement that States can be sued by individuals in federal court." Id. at 1431.

Drawing on language in a footnote in Judge Edmondson's opinion, see id. at 1432 n.11, defendant suggests (Br. 14) that authorizing suit in "any Federal or State court of competent jurisdiction" is insufficient, as federal courts are not "competent" to adjudicate claims against States because of the

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[2/](...continued)
U.S.L.W. 3348 (Nov. 13, 1998) (No. 98-791); United States v. Board of Regents, 67 U.S.L.W. 3348 (Nov. 16, 1998) (No. 98-796); Florida Dep't of Corrections v. Dickson, 67 U.S.L.W. 3364 (Nov. 16, 1998) (No. 98-829).

Eleventh Amendment. But Judge Edmondson's abbreviated discussion of the question has been superceded by the Supreme Court's subsequent decision in Wisconsin Department of Corrections v. Schacht, 118 S. Ct. 2047 (1998). In that case, the Court held that a defendant had properly removed a claim from state to federal court under a statute that permits removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." Id. at 2051 (quoting 28 U.S.C. 1441(a)). It held that "original jurisdiction" included any case that could have been brought in federal court, and rejected the claim that the Eleventh Amendment barred a district court from having "original jurisdiction" of cases. It explained:

> The Eleventh Amendment, however, does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it.

Id. at 2052 (citations omitted). Similarly, we would suggest that district courts are courts of "competent jurisdiction" for Equal Pay Act claims because when plaintiffs initially file their claim, the Eleventh Amendment does not "automatically destroy * * * jurisdiction." And even when raised, the Eleventh Amendment is not a bar to a federal court taking jurisdiction because it is competent to hear claims when Congress has abrogated immunity. Instead of being a oblique reference to the Eleventh Amendment, the language requiring a court of "competent

jurisdiction" was intended to exclude specialized federal and state courts (such as the Court of International Trade or state courts that adjudicate only criminal cases) from being obliged to hear Equal Pay Act claims.

As this Court stated in Thomas v. Louisiana, 534 F.2d 613, 614 (5th Cir. 1976), and Wade v. Mississippi Coop. Extension Service, 528 F.2d 508, 521 n.13 (5th Cir. 1976), Congress amended Section 216(b) to its present form in 1974 (at the same time it extended the Equal Pay Act to the States) in response to the Supreme Court's decision that Congress had not made its intent to abrogate sufficiently clear. See also Kimel, 139 F.3d at 1435 n.5 (Hatchett, C.J.). As we noted in our opening brief (U.S. Br. 6 n.2), every court of appeals to address the question has found that Congress' amendments were sufficient to do what Congress intended. There is no basis for this Court to reject binding Fifth Circuit precedent and create a split in the circuits on this issue. See also Powell v. Florida, 132 F.3d 677 (11th Cir. 1998) (implicitly holding that Section 216(b) intended to abrogate for the Fair Labor Standards Act, but holding that Congress did not have the power under Section 5 to abrogate for overtime claims), cert. denied, 118 S. Ct. 2297 (1998).

II

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

A. The Equal Pay Act Is An Exercise Of Congress' Section 5 Authority

Defendant argues (Br. 18-25) that Congress did not intend to exercise its Section 5 authority in extending the Equal Pay Act to the States. In doing so, it confuses the two parts of the Seminole Tribe inquiry. In resolving the first question -- whether Congress intended to abrogate immunity -- courts must look for a "clear legislative statement." Seminole Tribe, 517 U.S. at 55. Once a court has determined that Congress intended to abrogate Eleventh Amendment immunity, nothing in Seminole Tribe or any other case requires Congress to indicate the constitutional power by which it acts. To the contrary, in resolving the second Seminole Tribe question, it is the obligation of the courts to uphold the Equal Pay Act if there exists any power with which Congress constitutionally could have proceeded.

Congress need not specifically intend to exercise its Section 5 authority in order for legislation to be so upheld. To the contrary, 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." Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948); EEOC v. Wyoming, 460 U.S. 226, 243-244 n.18 (1983) (quoting Woods).

Congress is authorized to make laws by following the procedures described in Article I, § 7, of the Constitution. As a coequal branch of government, the courts can strike down those laws only if they exceed Congress' constitutional authority or otherwise violate rights guaranteed by the Constitution. 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), petition for cert. filed, 67 U.S.L.W. 3083 (July 13, 1998) (No. 98-126).

Congress is a legislative body charged with solving real-life problems by use of its constitutional powers. Once it 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/]

Of course we acknowledge defendant's contention (Br. 6, 19-20) that the Commerce Clause is the constitutional basis for the Equal Pay Act's regulation of private employers. It is also the basis for Title VII's regulation of private employers. See United Steelworkers of Am. v. Weber, 443 U.S. 193, 206 n.6 (1979). However, the fact that Title VII was originally enacted pursuant to the Commerce Clause 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 States could be upheld under Section 5. Similarly, the Equal Pay Act's extension to States may be upheld under Section 5 even if the statute was initially enacted as an exercise of another constitutional power. See Ussery v. Louisiana, 150 F.3d 431, 436-437 (5th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3337 (Nov. 3, 1998) (No. 98-739); Varner v. Illinois State Univ., 150 F.3d 706, 713 n.7 (7th Cir. 1998); Timmer v. Michigan Dep't of Commerce, 104 F.3d 833, 838-839 n.7 (6th Cir. 1997); see also EEOC v. County of Calumet, 686 F.2d 1249, 1253 (7th Cir. 1982) (noting pattern of extending commerce-based civil rights statutes to States under Section 5).

[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).

Congress' ultimate goal in enacting the 1974 amendments to the Equal Pay Act was to eliminate sex discrimination by state employers. Thus, even if Congress incorrectly predicted what the Supreme Court would ultimately decide about the relationship between the Commerce Clause and the Eleventh Amendment,[4/] "[c]ommon sense suggests that where Congress has enacted a statutory scheme for an obvious purpose," the determination that it erred in estimating the scope of one of its various powers should not "cause Congress' overall intent to be frustrated." New York v. United States, 505 U.S. 144, 186 (1992) (discussing severability of statutes). This approach is most consistent with the proper respect due Congress as a coordinate branch of government.[5/]

[4/] Defendant's claim (Br. 19-20) 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.

[5/] 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

(continued...)

Defendant's reliance (Br. 20-22) on Pennhurst State School & Hospital 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 "we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." Id. at 16.

The 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 Court

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[5/](...continued)
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).

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. Here, there is no doubt what the intent of Congress was: to extend the application of the [Act] to the States. The observations in Pennhurst therefore simply have no relevance to the question of whether, in this case, Congress acted pursuant to its powers under § 5." Ibid. Instead, the proper inquiry, according to the Court, was whether the Court could "discern some legislative purpose or factual predicate that supports the exercise of that power. That does not mean, however, that Congress need anywhere recite the words 'section 5' or 'Fourteenth Amendment' or 'equal protection.'" Id. at 243 n.18.

Again in Gregory v. Ashcroft, 501 U.S. 452 (1991), as in Pennhurst, 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, it 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). But as we discussed above, the Equal Pay Act contains an

unambiguous statement of congressional intent to abrogate States' Eleventh Amendment immunity.

Following this tradition, every court of appeals to address the issue has held that Congress' intentions as to the power it was exercising are irrelevant.[6/] As Chief Judge Posner 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).

[6/] 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); Lesage v. Texas, 158 F.3d 213, 217-218 (5th Cir. 1998); 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).

Once Congress enacted the amended Equal Pay Act, the job of "search[ing] the Constitution," Harris, 106 U.S. at 636, for the grounds to uphold the statute falls to the Executive Branch (which is usually obliged to defend the statute) and the courts (which are obliged to uphold the statute if at all possible). As discussed, infra, the antidiscrimination mandate embodied in the Equal Pay Act could have been enacted pursuant to Section 5. As such, defendant's attempt to divine Congress' specific intent about the power it was exercising is unnecessary. Although Congress could have accommodated this process by expressly invoking the Fourteenth Amendment, it was not required to do anything more than it did.

B. The Equal Pay Act Is Plainly Adapted To Enforcing The Equal Protection Clause

In the alternative, defendant argues (Br. 25-30) that Congress did not have the power under Section 5 of the Fourteenth Amendment to abrogate Eleventh Amendment immunity for suits under the Equal Pay Act. As we explained (U.S. Br. 8, 15), and as defendant agrees (Br. 27-28), the Equal Pay Act does not require the plaintiff to bear the burden of proving that the wage disparities for equal work are because of sex. Instead, once the plaintiff shows unequal pay of opposite sex employees for equal work, the employer bears the burden of showing that this disparity is "based on any other factor other than sex." 29 U.S.C. 206(d)(1)(iv). We agree with defendant (Br. 26) that this allocation of the respective burdens of proof differs from what

the Supreme Court has established for violations of the Equal Protection Clause. However, we disagree with its contention (Br. 28-30) that Congress' decision to shift those burdens is in excess of its power under Section 5.

Defendant compares (Br. 26, 30) the Equal Pay Act to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., which was extended to the States in 1972. It seems to argue (Br. 30) that Congress believed it properly extended Title VII to the States pursuant to the Fourteenth Amendment because it prohibits only intentional discrimination, but that Congress refrained from invoking the Fourteenth Amendment in extending the Equal Pay Act because it does not require plaintiffs to bear the burden of proving intentional discrimination. In doing so, it misdescribes the scope of Title VII. In addition to prohibiting intentional discrimination, Title VII also prohibits policies and practices that have unjustified disparate impacts, see Griggs v. Duke Power Co., 401 U.S. 424, 431-432 (1971); Dothard v. Rawlinson, 433 U.S. 321, 328-330 (1977), and Congress intended the disparate impact standard of liability to apply to States, see Connecticut v. Teal, 457 U.S. 440, 447 n.8, 449 (1982).

In Scott v. City of Anniston, 597 F.2d 897, 900 (5th Cir. 1979), cert. denied, 446 U.S. 917 (1980), this Court held that Title VII's disparate impact standard was valid Section 5 legislation. Given this Court's strong rule against overruling binding circuit precedent, defendant wisely does not ask this Court to overturn that decision. See Florida League of Prof'l

Lobbyists, Inc. v. Meggs, 87 F.3d 457, 462 (11th Cir.), cert. denied, 117 S. Ct. 516 (1996); United States v. Smith, 122 F.3d 1355, 1359 (11th Cir.), cert. denied, 118 S. Ct. 614 (1997). Nor does defendant defend the district court's untenable attempt to distinguish Scott as a case involving a city, not a State. As we explained in our opening brief (U.S. Br. 12-13), Section 5 legislation that is "appropriate" can validly abrogate Eleventh Amendment immunity.

Instead, despite the fact that Scott was discussed by the district court and relied upon in both opening briefs, defendant has elected to ignore the case entirely, offering no basis for distinguishing it from this case. Nor has defendant distinguished any of the cases (cited in U.S. Br. 10-12) in which the Supreme Court and this Court have upheld congressional enactments under the Enforcement Clauses of the Civil War Amendments that prohibit discriminatory effects. See also Kimel, 139 F.3d at 1438 (Hatchett, C.J.) (citing Scott with approval).

Defendant seems to suggest (Br. 28, 30) that the legislative history of the Equal Pay Act does not contain sufficient evidence to support the burden-shifting mechanism contained in the Act. But "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). Rather, so long as this Court can "perceive[] a factual basis on which Congress could have concluded" that there was "'invidious discrimination in

violation of the Equal Protection Clause,'" then this Court must uphold the Equal Pay Act as valid Section 5 legislation. City of Boerne v. Flores, 117 S. Ct. 2157, 2168 (1997); see also Oregon v. Mitchell, 400 U.S. 112, 216 (1970) (opinion of Harlan, J.); Cheffer v. Reno, 55 F.3d 1517, 1520-1521 (11th Cir. 1995).

There was evidence before Congress of widespread intentional discrimination against women in pay. The legislative history of the Equal Pay Act cited in our opening brief (U.S. Br. 14 n.5)[7/] demonstrates Congress' extensive research and longstanding conclusions on the matter. But just as Congress did not limit itself to enacting the Equal Pay Act to redress discrimination against women in employment, so too this Court is not limited to the facts Congress compiled in enacting that Act. Congress' "special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source 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, 502-503 (1980) (opinion of Powell, J.). In extending the Act to the

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[7/] Our brief provided an incorrect citation for the 1946 Senate Report. The correct citation is S. Rep. No. 1576, 79th Cong., 2d Sess. 2-3, 5-6 (1946).

States in 1974, Congress was acting on evidence about discrimination against women in public employment it had compiled in conjunction with the 1972 amendments to Title VII of the Civil Rights Act of 1964,[8/] as well as the enactment of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq., which prohibits sex discrimination by educational programs receiving federal funds.[9/] This evidence must also be weighed in determining whether Congress could have rationally concluded that there was invidious discrimination against women in employment and wages.

Congress concluded not only that intentional sex discrimination in wages existed, but that it was being

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[8/] See S. Rep. No. 415, 92d Cong., 1st Sess. 7-8, 12 (1971) (describing discrimination against women in state employment, including educational institutions, while extending Title VII to state employers); H.R. Rep. No. 238, 92d Cong., 1st Sess. 4-5, 20 (1972) (same).

[9/] See North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 523 n.13 (1982) (noting that "[m]uch of the testimony" at the hearings for Title IX "focused on discrimination against women in employment"). Title IX, like Title VII, prohibits unjustified disparate impacts as well as intentional discrimination. See, e.g., Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 832-833 (10th Cir.), cert. denied, 510 U.S. 1004 (1993); Sharif by Salahuddin v. New York State Educ. Dep't, 709 F. Supp. 345, 360-361 (S.D.N.Y. 1989).

"successfully concealed" by some employers. H.R. Rep. No. 1714, 87th Cong., 2d Sess. 2 (1962).[10/] To ferret out this intentional but concealed discrimination, and redress the effects of past discrimination, Congress is permitted to establish a rebuttable statutory presumption that reflects its finding of widespread discrimination, and place the burden on the employer to show that there is another reason for the disparity.

[10/] 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).

CONCLUSION

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the district court granting defendant's motion to dismiss due to Eleventh Amendment immunity should be reversed.

Respectfully submitted,

BILL LANN LEE
Acting Assistant Attorney General

JESSICA DUNSAY SILVER
SETH M. GALANTER
Attorneys
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078
(202) 307-9994

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 1998, two copies of the foregoing Reply Brief for the United States as Intervenor were served by first-class mail on the following counsel:

Ann C. Robertson, Esq.
Maury S. Weiner, Esq.
Laura M. Hitt, Esq.
Gordon, Silberman, Wiggins & Childs
SouthTrust Tower, Suite 1400
420 North 20th Street
Birmingham, AL 35203-3204

Lisa Huggins, Esq.
Board of Trustees of the University
of Alabama System
Office of Counsel
701 South 20th Street
Birmingham, AL 35294-0108

SETH M. GALANTER
Attorney
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078
(202) 307-9994