No. 98-6532

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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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,

Defendants-Appellees

_____

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

_____

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS INTERVENOR

_____

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AND CORPORATE DISCLOSURE STATEMENT
CASE NO.98-6532

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The Board of Trustees of the University of Alabama, Appellee

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES:

CASES (continued): **PAGE**

CASES (continued): **PAGE**

UNITED STATES CONSTITUTION:

STATUTES:

LEGISLATIVE HISTORY: **PAGE**

LEGISLATIVE HISTORY (continued): **PAGE**

LEGISLATIVE HISTORY (continued): **PAGE**

MISCELLANEOUS:

I. CONGRESS CLEARLY ABROGATED IMMUNITY IN 29 U.S.C. 216(b)

In Alden v. Maine, 119 S. Ct. 2240 (1999), the Court held that Congress did not have the power to validly abrogate state sovereign immunity in state court for claims under the Fair Labor Standards Act. Before deciding that question, the Court first held that 29 U.S.C. 216(b), the same enforcement provision at issue in this case, "purport[s] to authorize private actions against States in their own courts." Id. at 2246; see also id. at 2261 (Act "purport[s] in express terms to subject nonconsenting States to private suits"). Since the same clear-statement rule is employed in deciding whether Congress intended to permit States to be sued in state or federal court, see Hilton v. South Carolina Pub. Rys. Comm'n, 502 U.S. 197, 205-206 (1991), Alden necessarily holds that Section 216(b) clearly abrogates States' Eleventh Amendment immunity to Equal Pay Act suits.[1]

II. CONGRESS HAD THE POWER TO ENACT THE EQUAL PAY ACT UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

In Florida Prepaid Postsecondary Education v. College Savings Bank, 119 S. Ct. 2199 (1999), the Supreme Court held that Congress' attempt to abrogate Eleventh Amendment immunity for State violations of the Patent Act was in excess of its Section 5 authority to enact "appropriate" legislation. The Court specifically reaffirmed, though, that "'[l]egislation which

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[1] Because of the Act's broad severability provision, see 29 U.S.C. 219, the Court's decision invalidating Section 216(b) as applied to FLSA suits against States in state court does not effect the validity of Section 216(b) in this case. See Alewine v. City Council of Augusta, 699 F.2d 1060, 1069-1070 (11th Cir. 1983), cert. denied, 470 U.S. 1027 (1985); Pearce v. Wichita County, 590 F.2d 128, 131-132 (5th Cir. 1979).

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,"'" and that "'the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies.'" Id. at 2206 (quoting City of Boerne v. Flores, 521 U.S. 507, 518, 519-520 (1997)).[2]

We agree with defendants (Jt. Supp. Br. 8) that the Court simply "reaffirmed its holding in City of Boerne and applied it to the Patent Remedy Act." Thus, our previous discussion of Boerne continues to apply, as does this Court's decision applying Boerne to uphold the Americans with Disabilities Act as valid Section 5 legislation. See Kimel v. Board of Regents, 139 F.3d 1426 (11th Cir. 1998), petition for cert. filed on ADA question, 67 U.S.L.W. 3364 (Nov. 16, 1998) (No. 98-829). Defendants' main argument to bring this case within the holding of Florida Prepaid -- that there was not sufficient evidence of state discrimination against women to justify the Equal Pay Act -- is unavailing.

A. The Court's Conclusion That Women Have Been Subject To A History Of Discriminatory Treatment By The States Pretermits The

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[2] In a companion case, College Savings Bank v. Florida Prepaid Postsecondary Education, 119 S. Ct. 2219 (1999), the Court did not reach the breadth of Congress' remedial authority because it found that violations of the statute at issue never could constitute violations of the Due Process Clause.

Need For Further Inquiry Into The "Evil". Unlike the subject matter in Florida Prepaid (patent infringements by States), there can be no question that States have engaged in a widespread pattern of unconstitutional sex discrimination. In J.E.B. v. Alabama, 511 U.S. 127 (1994), the Supreme Court concluded that "'our Nation has had a long and unfortunate history of sex discrimination,' a history which warrants the heightened scrutiny we afford all gender-based classifications today." Id. at 136 (citation omitted); see also United States v. Virginia, 518 U.S. 515, 531-532 (1996). As the Court itself has determined that women "have suffered * * * at the hands of discriminatory state actors during the decades of our Nation's history," id. at 136, no additional inquiry on the scope of the problem is necessary for statutes involving sex discrimination. (The appropriateness of the remedial scheme Congress enacted is discussed in Section C, infra).[3]

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[3] Defendants suggest (Jt. Supp. Br. 14-15) that the fact that some States prohibit sex discrimination in wages is relevant. In Florida Prepaid, 119 S. Ct. at 2208, the Court looked to state remedies because a procedural due process violation is not complete until the State deprives a person of property and denies an adequate remedy. But a violation of the Equal Protection Clause is complete at the time the state actor invidiously discriminates. See United States v. Raines, 362 U.S. 17, 25 (1960) ("It is, however, established as a fundamental proposition that every state official, high and low, is bound by the Fourteenth and Fifteenth Amendments. We think this Court has already made it clear that it follows from this that Congress has the power to provide for the correction of the constitutional violations of every such official without regard to the presence of other authority in the State that might possibly revise their actions." (citation omitted)); see also note 8, infra (discussing absence of effective state remedies).

B. The Relevant Legislative History Reflects Widespread Discrimination Against Women By States. Assuming that this Court believes further evidence of discrimination is required, we disagree with the defendants' approach to legislative history. Congress need not compile a legislative record in order to enact constitutional legislation. But if a court has cause to question whether a remedial scheme is "appropriate," it may look to all the evidence placed before the Congress to see if it could have rationally concluded that there was a problem. See Fullilove v. Klutznick, 448 U.S. 448, 477-478 (1980) (plurality).

1. The early 1970s were a time when Congress was addressing the question of discrimination against women by States. By the time Congress extended the protections of the Equal Pay Act to all state employees in 1974, Congress had (1) enacted the Education Amendments of 1972, which extended a non-discrimination prohibition to all education programs receiving federal funds and extended the Equal Pay Act to all 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).

Members of Congress, of course, did not hermetically seal away the information they learned from one set of hearings or debates when looking at another proposal on the same subject. As Justice Powell noted, "[o]ne appropriate source [of evidence for

Congress] is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area." Fullilove, 448 U.S. at 503. Examined in this light, Congress clearly had before it evidence of a widespread pattern of discrimination against women by States.

Congress engaged in extensive hearings[4] and received reports from the Executive Branch[5] before legislating regarding sex discrimination by States. The testimony and reports contained

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

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

evidence that such discrimination was common,[6] that State employers were discriminating against women in wages,[7] and that

[6] See, e.g., Economic at 131 (Aileen C. Hernandez, former member EEOC) (State government employers "are notoriously discriminatory against both women and minorities"); id. at 556 (Hon. Frankie M. Freeman, U.S. Commission on Civil Rights) ("State and local government employment has long been recognized as an area in which discriminatory employment practices deny jobs to women and minority workers."); Discrimination at 46 (President's Task Force on Women's Rights and Responsibilities) ("At the State level there are numerous laws * * * which clearly discriminate against women as autonomous, mature persons."); id. at 48 (urging extension of Title VII to state employers and finding that "[t]here is gross discrimination against women in education"); id. at 302 (Dr. Bernice Sandler, Women's Equity Action League) (noting instances of employment discrimination by state-supported universities); id. at 379 (Prof. Pauli Murray) ("in light of the overwhelming testimony here, clearly there is
* * * a pattern or practice of discrimination in many educational institutions"); id. at 452 (Virginia Allan, President's Task Force) (noting "the growing body of evidence of discrimination against women faculty in higher education"); Equal Rights at 269 (Dr. Bernice Sandler) ("there is no question whatsoever of a massive, pervasive, consistent, and vicious pattern of discrimination against women in our universities and colleges"); id. at 479 (Mary Dublin Keyserling, National Consumers League) ("It is in these fields of employment [of state and local employees and employees of educational institutions] that some of the most discriminatory practices seriously limit women's opportunities."); 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").

[7] See Discrimination at 301 (Dr. Bernice Sandler) ("Salary discrepancies abound. * * * Numerous national studies have documented the pay differences between men and women with the same academic position and qualifications."); id. at 645 (Peter Muirhead, Department of Health, Education and Welfare) ("the inequities are so pervasive that direct discrimination must be considered as p[l]aying a share, particularly in salaries, hiring, and promotions, especially to tenured positions"); id. at 971-973 (Helen Astin) (one of types of discrimination "most frequently encountered" was "differential salaries for men and women with the same training and experience"); id. at 1034-1036 (Alan Bayer & Helen Astin) (empirical study of recent doctoral recipients reports that "[a]cross all work settings [including public universities], fields, and ranks, women experience a significantly lower average academic income than do men in the academic teaching labor force

(continued...)

existing remedies were inadequate.[8] In the Committee Reports to

[7](...continued)
for the same amount of time. Within each work setting, field, and rank category, women also have lower salaries."); 1971 House EEO at 486, 489 (Modern Language Association) (in survey of college professors, half from public colleges, "salary differences between men and women full-time faculty members are substantial" even "at equivalent ranks in the same departments"); id. at 510 (Dr. Ann Scott) (National Organization for Women) ("It is within these categories [exempted from the Equal Pay Act, including state governments], however, that women suffer some of the worst discrimination.").

There was also detailed testimony about the discriminatory salary practices of specific public universities, including a report from the Department of Health, Education and Welfare finding that at the University of Michigan "women are in many cases getting less pay than men with the same job titles, responsibilities, and experience. * * * Equally alarming is the documented tendency toward giving men higher starting salaries than women in the same job classifications." Higher Educ. at 298; see also id. at 274-275; Discrimination at 151, 159 (Dr. Ann Scott) (survey of State University of New York "found--we analyzed [wages] in terms of degree, age, and sex--we discovered a clear pattern of discrimination. For instance, 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 shows that f]or all 84 matched pairs of respondents, the mean salaries reported for 1969-70 were $11,880.38 for men and $10,461.05 for women. These data 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.").

[8] 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 (continued...)

various provisions, Congress noted the "scope and depth of the discrimination" against women, and that "[m]uch of this discrimination is directly attributable to governmental action both in maintaining archaic discriminatory laws and in perpetuating discriminatory practices in employment, education and other areas."[9] Similarly, individual members of Congress

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

[9] H.R. Rep. No. 554, 92d Cong., 1st Sess. 51 (1971) (report for Education Amendments); S. Rep. No. 689, 92d Cong., 2d Sess. 7 (1972) (report on the Equal Rights Amendment); see also H.R. Rep. No. 238, 92d Cong., 1st Sess. 4 (1971) (report for Title VII finds "there exists a profound economic discrimination against women workers"); id. at 19 ("Discrimination against minorities and women in the field of education is as pervasive as discrimination in any
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made clear that they had concluded that sex discrimination in wages by States was a serious problem,[10] for which current

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[9](...continued)
other area of employment."); H.R. Rep. No. 359, 92d Cong., 1st Sess. 5-6 (1971) (Separate Views) (report for ERA finding that "women as a group are the victims of a wide variety of discriminatory [state] laws" including "restrictive work laws"); id. at 11 (minority views of Rep. Celler) ("Discrimination against women does exist. Of that there is no denial.").

[10] Many members of Congress relied on the information reported in the Department of Labor's Fact Sheet, which had found large differences in median wages between men and women full-time workers in very general occupational groupings. While the Fact Sheet cautioned that these figures "do not necessarily indicate that women are receiving unequal pay for equal work," because of the breadth of the categories used, it noted that even "within some of these detailed occupations, men usually are better paid. For example, in institutions of higher education in 1965-66, women full professors had a median salary of only $11,649 as compared with $12,768 for men. Comparable differences were found at the other three levels [associate professors, assistant professors, and instructors]." Discrimination at 18. Members of Congress determined that "these differences [in median pay of men and women professors] do not occur by accident. They are the direct result of conscious discriminatory policies." Id. at 434 (Rep. Mink); 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 institutes * * * belie such simplistic explanations.").

Members of Congress credited different studies and testimony in reaching the same conclusion, rejecting other possible explanations for the disparities. See 117 Cong. Rec. 39,250 (1971) (Rep. Green) ("Our two volume hearing record contains page upon page citing the pervasiveness of this discrimination [against women] in our society and in our institutions."); 118 Cong. Rec. 5804 (1972) (Sen. Bayh) ("Over 1,200 pages of testimony document the massive, persistent patterns of discrimination against women in the academic world."); id. at 5805 (Sen. Bayh) ("According to testimony submitted during the '1970 [Discrimination] Hearings,' the University of Pittsburgh calculated that the University was saving $2,500,000 by paying women less than they would have paid men with the same qualifications."); id. at 1840 (Sen. Javits) ("Not only is this applicable to minorities; it is also applicable

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lawswere ineffective.[11] Indeed, even after Title VII had been extended to the States, the Chair of the EEOC agreed that State and local governments were "the biggest offenders" of Title VII's prohibition on sex discrimination and that "[w]e have a great deal of problems both with educational institutions and State and local governments."[12] This is consistent with the assessment of

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[10](...continued)
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.").

[11] See 118 Cong. Rec. 274 (1972) (Sen. McGovern) ("weak, ineffective tools the Federal Government is [currently] using to combat" discrimination against women); Discrimination at 235 (Rep. May) (without the extension of laws to educational institutions "there is no effective legal way to get at them!"); id. at 745 (Rep. Griffiths) (referring to Equal Pay Act: "We must use every available tool and mechanism to combat sex discrimination which irrationally and unjustly deprives millions of people of equal employment opportunities simply because of their sex."); id. at 750 (Rep. Heckler) (Fourteenth Amendment "has not been effective in preventing sex discrimination against teachers in public schools"); Equal Rights at 85, 87 (Rep. Mikva) (extension of Title VII to States and Equal Pay Act to professionals "needed interim to and supplemental to" ERA and is "implementation under the 14th amendment"); 118 Cong. Rec. 4931-4932 (Sen. Cranston) (employees of educational institutions "are, at present, without an effective Federal remedy in the area of employment discrimination").

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

Congress that the "well documented" record revealed "systemic[]", "rampant," "widespread and persistent," and "endemic" sex discrimination by States,[13] which "persist[ed]" despite the fact it was "violative of the Constitution of the United States."[14] As Senator Bayh explained, the evidence showed that "a strong and comprehensive measure is needed to provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women." 118 Cong. Rec. 5804 (1972).

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[12](...continued)
than whites and men, respectively.").

[13] 118 Cong. Rec. 3936, 5804 (1972) (Sen. Bayh) ([d]iscrimination against females on faculties and in administration is well documented"); Discrimination at 3 (Rep. Green) ("too often discrimination against women has been either systematically or subconsciously carried out" by "State legislatures"); id. at 235 (Rep. May) ("[S]ex discrimination in the colleges and universities of this Nation * * * it seems to me, that it is running rampant!"); 118 Cong. Rec. 4817 (Sen. Stevenson) ("Sex discrimination, especially in employment, is not new. But it is widespread and persistent."); Equal Rights at 95 (Rep. Ryan) ("Discrimination levied against women does exist; in fact, it is endemic in our society."); see also 118 Cong. Rec. 5804 (1972) (Sen. Bayh) ("It is difficult to indicate the full extent of discrimination against women today."); id. at 5982 (Sen. Gambrell) ("In my study of the proposed equal rights amendment to the Constitution, I have become aware that women are often subjected to discrimination in employment and remuneration in the field of education."); id. at 4817 (Sen. Stevenson) ("grave problem of discrimination in employment against women"); Discrimination at 738 (Rep. Griffiths) ("The extent of discrimination against women in the educational institutions of our country constitutes virtually a national calamity."); id. at 750 (Rep. Heckler) ("Discrimination by universities and secondary schools against women teachers is widespread."); Equal Rights at 55 (Sen. Ervin) ("No one can gainsay the fact that women suffer many discriminations in [the employment] sphere, both in respect to the compensation they receive and the promotional opportunities available to them.").

[14] 118 Cong. Rec. 1412 (1972) (Sen. Byrd).

2. Even if limited only to the hearings focused on extending the Equal Pay Act to the States, defendants fail to note the full range of evidence Congress heard on the subject. Congress heard testimony that state employers, particularly public colleges and universities, were persistently paying women less than men for the same job, leading one Congressman to say the evidence showed that "sex discrimination is rather pervasive."[15] Indeed, we think defendants' discussion of the evidence makes our case for us. They appear to concede (Jt. Supp. Br. 13) that the evidence supports the inference that professors and teachers were subjected to wage discrimination at state schools, but argue that

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[15] To Amend the Fair Labor Standards Act: Hearings Before the General Subcomm. on Labor of the House Comm. on Education & Labor, 91st Cong., 2d Sess. 550 (1970) [1970 FLSA] (Rep. Burton). Congress heard testimony that because most public employees were exempted from the Equal Pay Act, wages for women "are most often lower than their male counterparts." Fair Labor Standards Amendments of 1971: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare, 92d Cong., 1st Sess. 292-293 (1971) [1971 FLSA] (Judith A. Lonnquist, National Organization for Women); see also Fair Labor Standards Amendments of 1973: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare, 93d Cong., 1st Sess., pt. 2, 46a (1973) (National Federation of Business and Professional Women's Clubs) (coverage of state employers "is sorely needed"). In addition to general testimony supporting the proposition that unequal pay for equal work was pervasive at universities and colleges, see 1971 FLSA at 321 (Dr. Bernice Sandler), 350 (Alan Bayer & Helen Astin), 363 (Helen Bain, National Education Association), 747 (Jean Ross, American Association of University Women), state universities were specifically identified as violators, see id. at 322 (evidence from University of Arizona, University of Minnesota, and Kansas State Teachers College that "[w]omen are simply paid less than their male counterparts"), 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), 558 (Salary Study at Kansas State Teachers College).

other employers were doing it too.[16] But we do not need to show that state employers are worse than other employers. It is sufficient to show that they were no better, given the undisputed evidence Congress gathered that there was "a serious and endemic problem of employment discrimination in private industry." Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).[17]

C. The Equal Pay Act's Coverage And Standards Are Proportionate To The "Evil". Congress targeted the Equal Pay Act at a discrete problem: discriminatory distinctions in wages between men and women performing the same job. While shifting the burden of persuasion after an employee has shown "equal work

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[16] While defendants point (Jt. Supp. Br. 14) to testimony that wage discrimination was not a problem in public schools, there was also evidence to the contrary, 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"); Equal Rights at 548 (Citizen's Advisory Council on the Status of Women) ("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."), which Congress apparently chose to credit, see Equal Rights at 115 (Rep. Abzug) (there is a "very rampant area of sex discrimination in employment--employment in the public school system").

[17] Because Florida Prepaid addressed a recently enacted statute, it did not address whether post-enactment evidence can be used to support the constitutionality of a statute. Cf. Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1565-1568 (11th Cir. 1994). Because we believe that sufficient evidence existed at the time of the Equal Pay Act's extension to the States in 1974, we have not marshalled such evidence. Nonetheless, we note that a district court recently concluded that there was strong evidence that Alabama systemically discriminated against women employees, including paying women lower rates than men for the same work. See Shuford v. Alabama State Bd. of Educ., 897 F. Supp. 1535, 1562-1563 (M.D. Ala. 1995).

on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions," 29 U.S.C. 206(d)(1), the employer may avoid liability by showing that its decision was "based on any other factor other than sex." 29 U.S.C. 206(d)(1)(iv) (emphasis added). In most cases, then, an employee will only prevail when the reason for the wage differential is sex. Even those who have espoused a narrow view of Congress' Section 5 authority have not suggested that this is inappropriate. See City of Rome v. United States, 446 U.S. 156, 214 (1980) (Rehnquist, J., dissenting) (Congress has the power under Section 5 to "place the burden of proving lack of discriminatory purpose on" government); Kimel, 139 F.3d at 1446 (Cox, J., dissenting in part) (Congress may "tweak procedures, find certain facts to be presumptively true, and deem certain conduct presumptively unconstitutional").

Contrary to defendants' suggestion (Jt. Supp. Br. 18), Section 5's requirement that legislation "enforce" the Equal Protection Clause does not require Congress to enact the least-restrictive alternative. For example, in Oregon v. Mitchell, 400 U.S. 112 (1970), while the Court agreed that there was little evidence that literacy tests were unconstitutional in every state, it concluded that Congress had the authority to deal with the issue on a nationwide basis. See especially id. at 283-284 (opinion of Stewart, J.); see also Fullilove, 448 U.S. at 483 (plurality); id. at 501 n.3 (Powell, J., concurring). Moreover, this is not a case like City of Boerne where the legislation's

"[s]weeping coverage ensure[d] its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." 521 U.S. at 532; see also Florida Prepaid, 119 S. Ct. at 2210 (patent legislation applies to an "unlimited range of state conduct"). Instead, this act is targeted at the pay of men and women working substantially similar jobs, an area where there was substantial evidence of a pervasive and persistent problem of constitutional dimension.[18]

Respectfully submitted,

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[18] The Act's remedial provisions are also tailored to restore the employee to the position he or she would have been in absent the discrimination. Unlike Title VII, which permits compensatory damages, injunctive relief, and prejudgment interest, Equal Pay Act relief is confined to double back pay. See 29 U.S.C. 216(b). While defendants persist (Jt. Supp. Br. 17-18, 19) in calling the Equal Pay Act's doubling provision "punitive," the Supreme Court has held that this money is "compensation, not a penalty or punishment" and serves as remuneration for "damages too obscure and difficult of proof," Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 583-584 (1942), as well as a substitute for prejudgment interest, see Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 715-716 (1945). Nor do they note the district court's discretion to not award these damages if the employer's "act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the" Equal Pay Act. 29 U.S.C. 260.

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 1999 two copies of the foregoing Supplemental Brief for the United States as Intervenor were served by first-class mail on the following counsel:

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