No. 01-3448

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NAVREET NANDA,

Plaintiff-Appellee

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, BELLUR PRABHAKAR, Ph.D., GERALD MOSS, M.D., ELIZABETH HOFFMAN, Ph.D., DAVID C. BROSKI, and JAMES STUKEL, Ph.D.,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES AS INTERVENOR

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JURISDICTIONAL STATEMENT

The plaintiff filed a complaint in the United States District Court for the Northern District of Illinois, alleging that the University of Illinois and its officials violated, *inter alia*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* For the reasons discussed in this brief, the district court had jurisdiction over this action pursuant to 42 U.S.C. 2000e-5(f)(3) and 28 U.S.C. 1331. This appeal is from a final judgment entered on August 21, 2001. The defendants filed a timely notice of appeal on September 18, 2001. This Court has jurisdiction over this

appeal pursuant to 28 U.S.C. 1291. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993).

ISSUE PRESENTED

Whether, in extending the reach of Title VII to cover state employers, Congress validly abrogated States' Eleventh Amendment immunity to suits for damages by private parties.

STANDARD OF REVIEW

Because the question whether Congress properly exercised its power to abrogate the States' Eleventh Amendment immunity in extending the reach of Title VII to cover state employers is purely one of law, this Court reviews the issue *de novo*. See *Thiel* v. *State Bar of Wis.*, 94 F.3d 399, 400 (7th Cir. 1996).

STATEMENT OF THE CASE

On August 20, 2000, the plaintiff, Navreet Nanda, filed this suit against the defendants, the University of Illinois and several of its officers. In her complaint, Nanda stated claims against the University under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000e *et seq.*, against the University and its officers under 42 U.S.C. 1983, and against one of the University's officers under state tort laws (R. 1, Complaint). On April 30, 2001, the defendants filed a motion to dismiss all the claims under Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1) on the grounds that: (1) the University enjoys sovereign immunity under the Eleventh Amendment to the United States Constitution to private suits under Title VII; (2) none of the defendants is a "person" within the meaning of Section 1983;

and (3) the pendant state law claim is preempted by the Illinois Human Rights Act (R. 54, Motion to Dismiss). The district court granted in part and denied in part the defendants' motion to dismiss on August 21, 2001. The court denied the University's motion to dismiss the Title VII claim, holding that the University is not immune from suit under the Eleventh Amendment. The court granted the defendants' motion to dismiss the Section 1983 claim for damages, but refused to dismiss the Section 1983 claim for injunctive relief, and granted the defendant's motion to dismiss the state law claim.

On September 18, 2001, the defendants filed a timely notice of appeal pursuant to 28 U.S.C. 1291. Because the University is challenging the constitutionality of the abrogation in Title VII, the United States has respectfully exercised its right under 28 U.S.C. 2403(a) to intervene in order to defend the constitutionality of Title VII's abrogation of Eleventh Amendment immunity. The United States has intervened for the sole purpose of defending the constitutionality of Title VII's abrogation of Eleventh Amendment immunity and does not take a position on either the merits of Nanda's underlying claims, or the other legal issues raised in this appeal.

STATEMENT OF FACTS

The plaintiff, Navreet Nanda, was hired by the University of Illinois in 1996 as a professor in the Department of Microbiology and Immunology (R. 1 at 1-2). In 1998, the University issued a "terminal contract" to Nanda, under the terms of which Nanda's employment with the University would cease on August 31, 1999

(R. 1 at 2-3). Nanda sought review of that decision through the University's internal grievance procedures (R. 1 at 3). Although the decision to issue the terminal contract was upheld, the contract was extended to August 31, 2000 (R. 1 at 3).

In April 1999, Nanda filed a complaint with the Equal Employment Opportunity Commission (EEOC), claiming that the University had violated Title VII by intentionally discriminating against her on the basis of her sex, race, and national origin. The complaint alleges intentional disparate treatment. Nanda alleged that this unlawful discrimination was manifest in several actions taken by the University, including: (1) issuing a terminal contract, (2) failing to timely provide a suitable laboratory to Nanda, (3) precluding her from teaching during the 1999-2000 academic year, (4) preventing her from serving on faculty and academic committees, and (5) denying her access to graduate and postdoctoral students for assistance in her laboratory research (R. 1 at 5-6). Nanda also alleged that she had been injured by the discriminatory actions taken by the University (R. 1 at 6-10). On June 19, 2000, the EEOC issued a "right to sue" letter to Nanda (R. 1 at 5), and this suit followed. Nanda seeks equitable relief, compensatory damages, and attorneys' fees under Title VII (R. 1 at 10-12).

SUMMARY OF ARGUMENT

Congress may abrogate the Eleventh Amendment immunity of States when it both clearly expresses its intent to do so and acts under the authority of Section 5 of the Fourteenth Amendment. In extending the reach of Title VII to cover state

employers, Congress unquestionably satisfied both of these requirements. The University does not even contest the fact that Congress clearly expressed its intent to abrogate States' immunity. The disparate treatment provisions of Title VII are aimed at conduct that is prohibited by Section 1 of the Fourteenth Amendment. By enacting those provisions, Congress was, by definition, acting pursuant to its Section 5 powers. The Equal Protection Clause of the Fourteenth Amendment prohibits a state employer from discriminating against its employees on the bases of race, sex, and national origin. Because Title VII's protections are identical to the protections of the Constitution, they are by definition congruent and proportional, and that is all this Court need find to uphold the abrogation. Contrary to the University's contentions, when Congress merely codifies the protections of the Constitution, it need not compile evidence of a widespread pattern of unconstitutional conduct by States. But even if Congress were required to amass such evidence, it clearly did so before extending the reach of Title VII to cover States.

ARGUMENT

Section 1 of the Fourteenth Amendment to the United States Constitution prohibits States from "deny[ing] to any person within its jurisdiction the equal protection of the laws." Section 5 of that Amendment commands that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Congress's power under Section 5 includes the authority to enact "corrective legislation * * * such as may be necessary and proper for counteracting

* * * such acts and proceedings as the states may commit or take, and which by the amendment they are prohibited from committing or taking." *The Civil Rights Cases*, 109 U.S. 3, 13-14 (1883). As the Supreme Court recently reaffirmed, "[i]t is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference."[1] *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 80-81 (2000) (citing *City of Boerne* v. *Flores*, 521 U.S. 507, 536 (1997)).

It is now firmly established that Congress may abrogate States' Eleventh Amendment immunity to suit by private parties in federal court where Congress has both "unequivocally expresse[d] its intent to abrogate the immunity," and "acted 'pursuant to a valid exercise of power.'" *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 55 (1996) (quoting *Green* v. *Mansour*, 474 U.S. 64, 68 (1985)). In subjecting States to liability under Title VII of the Civil Rights Act of 1964, Congress both clearly expressed its intent to abrogate the Eleventh Amendment immunity of state employers, and did so pursuant to its authority under Section 5 of the Fourteenth Amendment.

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[1] In enforcing the Fourteenth Amendment, Congress also has the power to prohibit "a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text," as long as such "prophylactic" legislation is "congruen[t]" and "proportional[]" to the "injury to be prevented or remedied." *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 81 (2000) (citing *City of Boerne* v. *Flores*, 521 U.S. 507, 518-520 (1997)).

I. CONGRESS INTENDED TO ABROGATE STATES' ELEVENTH AMENDMENT IMMUNITY TO TITLE VII CLAIMS

The University does not argue that Title VII lacks a clear statement of Congress's intent to abrogate States' Eleventh Amendment immunity. However, the University does criticize the Eighth Circuit's holding in *Okruhlik* v. *University of Arkansas*, 255 F.3d 615 (8th Cir. 2001), upon which the district court relied, for its reliance on *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976). In holding that Title VII contains a clear statement of Congress' intent to abrogate 11th Amendment immunity, the Eighth Circuit correctly found that it was "bound by the Supreme Court's ruling in *Fitzpatrick*." *Okruhlik*, 255 F.3d at 622. Indeed, this Court has relied on *Fitzpatrick* in noting that Title VII abrogates States' Eleventh Amendment immunity. See *Varner* v. *Illinois State Univ.*, 150 F.3d 706, 717-718 (7th Cir. 1998), vacated and remanded, 528 U.S. 1110 (2000), reinstated, 226 F.3d 927 (7th Cir. 2000); see also *Holman* v. *Indiana*, 211 F.3d 399, 402 n.2 (7th Cir.), cert. denied, 531 U.S. 880 (2000).

Although Title VII, as originally enacted, did not subject States to liability, in 1972 Congress amended the statute to include "governments [and] governmental agencies" within its definition of "person," and, by extension, its definition of "employer." 42 U.S.C. 2000e(a), (b). In *Fitzpatrick* v. *Bitzer*, the Supreme Court held that this amending language demonstrated that "congressional authorization to sue the State as employer is clearly present." 427 U.S. at 452 (citation and quotations omitted). Indeed, the Supreme Court later confirmed that holding: "In

Fitzpatrick v. *Bitzer*, the Court found present in Title VII * * * the 'threshold fact of congressional authorization' to sue the State as employer, because the statute made explicit reference to the availability of a private action against state and local governments." *Quern* v. *Jordan*, 440 U.S. 332, 344 (1979) (citation omitted). This Court is bound by that precedent.

II. CONGRESS VALIDLY ABROGATED STATES' ELEVENTH AMENDMENT IMMUNITY FOR RACE DISCRIMINATION CLAIMS

The central inquiry in determining whether legislation is a valid exercise of Congress's Section 5 authority is whether the legislation is an appropriate means of deterring or remedying constitutional violations or whether 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* v. *Florida Bd. of Regents*, 528 U.S. 62, 85 (2000) (quoting *City of Boerne*, 521 U.S. at 532). Because Title VII's prohibition of disparate treatment on the bases of race, sex, and national origin codifies the protections of Section 1 of the Fourteenth Amendment, it is by definition appropriate Section 5 legislation.

A. *Title VII's Prohibition Of Disparate Treatment On The Bases Of Race, Sex, And National Origin Proscribes Unconstitutional State Conduct*

Title VII makes it unlawful for employers (including state employers) "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a). This provision prohibits intentional

discrimination on the bases of race, sex, and national origin. See *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187, 199-200 (1991); *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 985-986 (1988); *United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 715 (1983). Likewise, the Equal Protection Clause prohibits discrimination by state governments on the basis of race, *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 481-482 (1997); *City of Mobile* v. *Bolden*, 446 U.S. 55, 62 (1980); *Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *Washington* v. *Davis*, 426 U.S. 229, 238-248 (1976), on the basis of sex, *United States* v. *Morrison*, 529 U.S. 598, 620 (2000); *United States* v. *Virginia*, 518 U.S. 515, 523 (1996); *J.E.B.* v. *Alabama*, 511 U.S. 127, 130-131 (1994); *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 723 (1982), and on the basis of national origin, *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988); *Attorney Gen. of N.Y.* v. *Soto-Lopez*, 476 U.S. 898, 906 n.6 (1986); *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *Oyama* v. *California*, 332 U.S. 633, 640 (1948). These prohibitions extend to discrimination in government employment. *Davis* v. *Passman*, 442 U.S. 228 (1979); *Hazelwood Sch. Dist.* v. *United States*, 433 U.S. 299, 309-310 & n.15 (1977).

This Court has held that "when intentional discrimination is charged under Title VII the inquiry is the same as in an equal protection case." *American Nurses' Ass'n* v. *Illinois*, 783 F.2d 716, 722 (7th Cir. 1986); *Riordan* v. *Kempiners*, 831 F.2d 690, 695-696 (7th Cir. 1987). It is therefore not surprising that the University

does not contend that Title VII's prohibition of disparate treatment on the bases of race, sex, and national origin makes unlawful any constitutional conduct.[2]

B. *Title VII's Prohibition Of Disparate Treatment On The Bases Of Race, Sex, And National Origin Need Not Be Justified By A Legislative Record*

The bulk of the University's argument is that Title VII cannot be appropriate Section 5 legislation because, in extending the reach of Title VII to cover state employers, Congress "utterly failed to identify or demonstrate in the Legislative Record a history or a wide-spread pattern of 'irrational state discrimination' in employment based upon" race, sex, or national origin[3] (Br. 22). Only then, the

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[2] Indeed, with respect to sex and national origin, Title VII is less restrictive of state employment practices than the Constitution. Unlike the constitution, which subjects all state classifications on the basis of national origin to strict scrutiny, *Clark* v. *Jeter*, 486 U.S. at 461, and requires States to justify all classifications on the basis of sex with an "exceedingly persuasive justification," *United States* v. *Virginia*, 518 U.S. at 524, Title VII permits employers to classify employees on the basis of sex or national origin where "sex[] or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise," 42 U.S.C. 2000e-2(e).

[3] The University's suggestion (Br. 22) that Congress must identify evidence of state-sponsored employment discrimination against Asian persons and persons of Indian descent specifically as opposed to identifying state-sponsored discrimination on the bases of race and national origin generally is untenable. Discrimination by States on the bases of race and national origin is unconstitutional regardless of the particular race or national origin of an individual victim. See *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 273-274 (1986) ("The Court has recognized that the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination. * * * *Any preference* based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." (emphasis added) (internal citations and quotation marks omitted)).

University contends, is the statute congruent and proportional to the legislative record of a pattern of constitutional violations. But the University misconstrues the decisions of this Court and the Supreme Court. When a statute simply codifies the protections of Section 1 of the Fourteenth Amendment, it is by definition appropriate Section 5 legislation because the statute is congruent and proportional to the targeted constitutional harm.

Thus, for example, 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 or the availability of state remedies. See *Williams* v. *United States*, 341 U.S. 97 (1951); *Screws* v. *United States*, 325 U.S. 91 (1945); cf. *Ex parte Virginia*, 100 U.S. (10 Otto) 339 (1879) (upholding criminal statute prohibiting exclusion of blacks from juries as valid Section 5 legislation).

Nor did Congress have to make a record of state actors violating the Fourteenth Amendment in order to establish a cause of action for such violations in 42 U.S.C. 1983. A violation of a single individual's constitutional rights is a proper subject of Congress's enforcement authority, regardless of whether it is part of a larger pattern of unlawful conduct. Thus, when it is clear that a statute simply prohibits unconstitutional actions, judicial inquiry is at an end.

The University's reliance on *Kimel* v. *Florida Board of Regents*, 528 U.S. 62 (2000), and *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S.

356 (2001), is misplaced for precisely these reasons. Those cases simply recognize that when a statute regulates a significant amount of conduct that is not prohibited by the Constitution, it may be necessary to examine the record before Congress to determine whether Congress could have reasonably concluded that such a prophylactic remedy was appropriate.

In *Kimel*, the Supreme Court held that the Age Discrimination in Employment Act (ADEA), which prohibits employers, subject to a limited *bona fide* occupational qualification defense, from taking age into account in making employment decisions, was not appropriate Section 5 legislation. The Court emphasized that intentional discrimination based on age is only subject to rational basis review under the Equal Protection Clause and that the Supreme Court had upheld, as constitutional, governmental age classifications in each of the three cases that had come before it. See *Kimel*, 528 U.S. at 83. Measuring the scope of the ADEA's requirements "against the backdrop of * * * equal protection jurisprudence," *id*. at 86, the Court concluded that the ADEA prohibited "substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard." *Ibid*. 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 88. 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 89 (emphasis added). The Supreme Court concluded, therefore, that the application of the ADEA to the States "was an unwarranted response to a perhaps inconsequential problem." *Ibid.*

In *Garrett*, the Court held that Congress did not validly abrogate States' Eleventh Amendment immunity to suits by private individuals for money damages under Title I of the Americans with Disabilities Act (ADA). 531 U.S. at 364-374. The Court in *Garrett* reaffirmed that, in assessing the validity of legislation enacted pursuant to Section 5, "[t]he first step * * * is to identify with some precision the scope of the constitutional right at issue." *Id.* at 365. Noting that, under the Equal Protection Clause, distinctions made on the basis of disability are subject to rational basis review and that "States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational," the Court concluded that the remedies in the ADA reach beyond the guarantees of Section 1 of the Fourteenth Amendment. *Id.* at 365-368. Only after determining that the statutory right in question was significantly broader than the constitutional rights inherent in the Fourteenth Amendment, did the Court turn to the legislative record to determine whether Congress had identified "a history and pattern of unconstitutional employment discrimination by the States against the disabled" sufficient to justify the breadth of the statutory remedy. *Id.* at 368; see also *id.* at 365 (noting that "§ 5 legislation *reaching beyond the scope of § 1's actual guarantees* must exhibit 'congruence and proportionality between the

injury to be prevented or remedied and the means adopted to that end'" (emphasis added)). The Court then concluded that Congress had identified only "half a dozen" incidents of relevant conduct (*i.e.*, potentially unconstitutional discrimination by States as employers against people with disabilities), *id.* at 369, and had not made a specific finding that discrimination in public sector employment was pervasive, *id.* at 370. The Court found that the record was insufficient to justify the prophylactic remedies in Title I. *Id.* at 374.

Thus, the Court looked for evidence of constitutional violations in *Kimel* and *Garrett only* because it determined that evidence of constitutional violations was necessary to justify the breadth of the remedy. See *Cherry* v. *University of Wis. Sys. Bd. of Regents*, 265 F.3d 541, 552 (7th Cir. 2001) ("In *Garrett*, the Court first determined whether the scope of the ADA is congruent with the Fourteenth Amendment's Equal Protection Clause."); see also *Kovacevich* v. *Kent State Univ.*, 224 F.3d 806, 820 n.6 (6th Cir. 2000) ("In *Kimel*, the Court only considered legislative findings after determining that on its face, the ADEA prohibited substantially more state employment decisions and practices than would likely be held unconstitutional under the Fourteenth Amendment."). Indeed, in repeatedly upholding the Equal Pay Act as valid Section 5 legislation, this Court has followed the Supreme Court's example and found that, where a statute prohibits very little constitutional conduct, "the importance of congressional findings of unconstitutional State action is 'greatly diminished.'" *Cherry*, 265 F.3d at 553

(quoting *Varner* v. *Illinois State Univ.*, 226 F.3d 927, 935 (7th Cir. 2000) (*Varner II*)). Consequently, the University is simply mistaken in its assertion (Br. 25) that:

> [T]he congressional act under scrutiny can be congruent and proportional to the §1 protections all day long, but if the Legislative Record fails to identify such a wide spread pattern by the quantum and quality of proof required by *Garrett*, then the congressional act is the product of an invalid exercise of §5 power by Congress and the States' rights to immunity must not be abrogated.

As this Court has held, "[a]ll *Garrett* does is further demonstrate that the legislative record is an important factor *when the statute in question pervasively prohibits constitutional State action.*" *Cherry*, 265 F. 3d at 553. In contrast to the conduct at issue in *Kimel* and *Garrett*, the plaintiff here seeks to hold the University liable for the kind of discrimination that violates the Equal Protection Clause when practiced by the States.

C. *In Any Case, The Ample Evidence Before Congress Of Discrimination By States Was More Than Sufficient To Support Title VII's Prohibition Of Discrimination By State Employers*

Even if Congress were entitled to codify the protections of the Equal Protection Clause only in response to a widespread pattern of unconstitutional discrimination by States, there is no doubt that in 1972 Congress had before it sufficient evidence that States had engaged in unconstitutional discrimination on the bases of race, sex, and national origin.

1. The Supreme Court has recognized that the "history of racial discrimination in this country is undeniable." *McKleskey* v. *Kemp*, 481 U.S. 279, 298 n.20 (1987); cf. *Shaw* v. *Reno*, 509 U.S. 630, 650 (1993) (noting "our

country's long and persistent history of racial discrimination in voting").[4] Indeed, prior to the extension of Title VII to the States, the Court had identified widespread state-sponsored race discrimination in a variety of areas. See, *e.g.*, *Oregon* v. *Mitchell*, 400 U.S. 112 (1970) (voting); *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966) (voting); *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954) (education); *Hernandez* v. *Texas*, 347 U.S. 475 (1954) (jury selection); *Terry* v. *Adams*, 345 U.S. 461 (1953) (voting); *Sweatt* v. *Painter*, 339 U.S. 629 (1950) (education); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948) (racially restrictive covenants); *Smith* v. *Allwright*, 321 U.S. 649 (1944) (voting); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886) (selective prosecution).

Similarly, 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

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[4] See also *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 272 (1995) (Ginsburg, J., dissenting) ("For generations, our lawmakers and judges were unprepared to say that there is in this land no superior race, no race inferior to any other. In *Plessy* v. *Ferguson*, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), not only did this Court endorse the oppressive practice of race segregation, but even Justice Harlan, the advocate of a 'color-blind' Constitution, stated: 'The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.' *Id.*, at 559, 16 S. Ct., at 1146 (dissenting opinion)."); *id.* at 255 (Stevens, J., dissenting) ("The Fourteenth Amendment directly empowers Congress at the same time it expressly limits the States. This is no accident. It represents our Nation's consensus, achieved after hard experience throughout our sorry history of race relations, that the Federal Government must be the primary defender of racial minorities against the States, some of which may be inclined to oppress such minorities." (footnote omitted)).

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 on the basis of sex in employment); *Personnel Adm'r* v. *Feeney*, 442 U.S. 256, 273 (1979) ("Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination.").

In addition, condemning discrimination by States on the basis of national origin, the Court has stated that, "as a general rule, [d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Oyama* v. *California*, 332 U.S. at 646 (internal quotation marks omitted); see also *Cleburne*, 473 U.S. at 440 (noting that national origin classifications "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others"); *Massachusetts Bd. of Ret.* v. *Murgia*, 427 U.S. 307, 313 (1976) (noting that this country has subjected persons to "a history of purposeful unequal treatment" on the basis of national origin); cf. *Trimble* v. *Gordon*, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting) (stating that "the Framers obviously meant [the Fourteenth Amendment] to apply [to] classifications based on race or on national origin, the first cousin of race"). Prior to the extension of Title VII to cover States, the Court identified instances of state-sponsored discrimination on the basis of national origin. See, *e.g.*, *Oregon* v.

Mitchell, 400 U.S. at 276 (noting that literacy tests have been used by States to disenfranchise "Americans of Mexican ancestry"); *Hernandez* v. *Texas*, 347 U.S. at 478-482 (discrimination in jury selection).

In extending the reach of Title VII to cover state employers, Congress can be assumed to have relied on the same evidence underlying these decisions and, in some cases, on the decisions themselves.

2. In any event, prior to extending the reach of Title VII to cover States, Congress held extensive hearings and received reports from the Executive Branch on the subject of employment discrimination by States. The testimony and reports illustrate that discrimination on the bases of race, sex, and national origin by state employers was common,[5] and that existing remedies, both at the state and federal

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[5] See, *e.g.*, U.S. Equal Employment Opportunity Comm'n, 2 *Minorities and Women in State and Local Government 1974, State Governments*, Research Report No. 52-2, iii (1977) (study concluding that "equal employment opportunity has not yet been fulfilled in State and local government" and that "minorities and women 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"); U.S. Commission on Civil Rights, *For All the People . . . By All the People – A Report on Equal Opportunity in State and Local Government* (1969), reprinted in 118 Cong. Rec. 1816, 1817 (1972) (*For All the People)* ("State and local government employment is pervaded by a wide range of discriminatory practices. These practices violate the requirements of the equal protection clause of the 14th amendment and accordingly must be eliminated."); *id.* at 1815 ("State and local governments have failed to fulfill their obligation to assure equal job opportunity[.] * * * Not only do State and local governments consciously and overtly discriminate in hiring and promoting minority group members, but they do not foster positive programs to deal with discriminatory treatment on the job." (omission in original)); The President's Task Force on Women's Rights and Responsibilities, *A Matter of Simple Justice* 4 (Apr. 1970) ("At the State level there are numerous laws * * * which clearly discriminate against women as autonomous,

(continued...)

level, were inadequate.[6] The floor debates and Congressional reports specifically

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[5](...continued)
mature persons."); *Economic Problems of Women: Hearings Before the Joint Econ. Comm.*, Pt. 1, 93d Cong., 1st Sess. 131 (1973) (*Economic*) (Aileen C. Hernandez, former member EEOC) (State government employers "are notoriously discriminatory against both women and minorities"); *id*., Pt. 3, at 556 (Hon. Frankie M. Freeman, U.S. Comm'n on Civil Rights) ("[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."); *Equal Rights for Men & Women 1971: Hearings Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess. 479 (1971) (*Equal Rights*) (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"); see generally U.S. Commission on Civil Rights, *Mexican Americans and the Administration of Justice in the Southwest* 78-86, 89 (1970) (detailing the significant under-representation of Mexican Americans and Spanish-surnamed Americans in law enforcement and other justice administration jobs).

[6] See *Equal Employment Opportunities Enforcement Act: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor & Pub. Welfare*, 91st Cong., 1st Sess. 51-52 (1969) (*1969 Senate EEO*) (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"); *id.* at 170 (Howard Glickstein, U.S. Comm'n on Civil Rights) (some States' laws do not extend to state employers); *For All the People*, reprinted in 118 Cong. Rec. at 1817 (1972) ("State and local government employment opportunities for minorities are restricted by overt discrimination in personnel actions and hiring decisions, a lack of positive action by governments to redress the consequences of past discrimination, and discriminatory and biased treatment on the job."); *Discrimination Against Women: Hearings Before the Special Subcomm. on Educ. of the House Comm. on Educ. & Labor*, Pt. 1, 91st Cong., 2d Sess. 26 (1970) (*Discrimination*) (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
(continued...)

related to the 1972 extension of Title VII to cover States demonstrate that Congress intended to target an identified problem of "blatant,"[7] "pervasive,"[8] "well-documented and widespread"[9] discrimination by state employers. Moreover, the

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[6](...continued)
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"); *Equal Employment Opportunity Enforcement Procedures: Hearings Before the Gen. Subcomm. on Labor of the House Comm. on Educ. & Labor*, 91st Cong., 1st & 2d Sess. 248 (1969-1970) (*1970 House EEO*) (Dr. John Lumley, National Education Association) ("We know we don't have enough protection for women in employment practices."); *Higher Education Amendments of 1971: Hearings Before the Special Subcomm. on Educ. of the House Comm. on Educ. & Labor*, Pt. 2, 92d Cong., 1st Sess. 1131 (1971) (*Higher Educ.*) (study by American Association of University Women reports that even state schools that have good policies don't seem to follow them); *Discrimination*, Pt. 1, at 133 (Wilma Scott Heide, Pennsylvania Human Relations Comm'n) (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").

[7] 118 Cong. Rec. 1393 (1972) (reprinting testimony of William Brown, Chair of the EEOC) ("Discrimination in State and local employment is as blatant and as widespread as in any section of private business.").

[8] 118 Cong. Rec. 1815 (1972) (Sen. Williams) ("[E]mployment discrimination in State and local governments is more pervasive than in the private sector."); *id.* at 581 (Sen. Javits) ("Perpetuation of past discriminatory practices * * * were found to be widespread, and if anything more pervasive than in private employment."); *id.* at 4931 (Sen. Cranston) ("Both the Constitution and Federal law prohibit job discrimination by State and local governments, but the existence of pervasive discrimination in State and local government is all too well documented.").

[9] 118 Cong. Rec. 1815 (1972) (Sen. Williams) ("In fact, the well-documented and widespread discrimination among State and local government employees is a shameful condition that should be eliminated wherever and whenever possible."); H.R. Rep. No. 238, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S.C.C.A.N. 2137, 2152 ("[W]idespread discrimination against minorities
(continued...)

legislative record established that employment discrimination was a problem in state educational institutions,[10] and in particular that there was widespread and entrenched sex discrimination in employment in state universities.[11] Indeed, even

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[9](...continued)
exists in State and local government employment, and * * * the existence of this discrimination is perpetuated by the presence of both institutional and overt discriminatory practices."); 118 Cong. Rec. 590 (1972) (Sen. Humphrey) ("The presence of discrimination in State and local governments has been well documented by the U.S. Commission on Civil Rights."); *id.* at 4817 (Sen. Stevenson) ("Sex discrimination, especially in employment, is not new. But it is widespread and persistent.").

[10] 118 Cong. Rec. 1992 (1972) (Sen. Williams) ("The existence of discrimination in the employment practices of our Nation's educational institutions is well known, and has been adequately demonstrated by overwhelming statistical evidence as well as numerous complaints from groups and individuals. Minorities and women continue to be subject to blatant discrimination in these institutions."); *ibid.* ("Perhaps the most extensive discrimination in educational institutions, however, is found in the treatment of women. * * * [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 promotions policies."); *id.* at 4817-4818 (Sen. Stevenson) ("Perhaps nowhere can this problem be seen in better perspective than in higher education * * *. In 1965-66, the median annual salary of women was $410 less than men at the instructor's level, $576 less at the assistant professor's level, $742 less at the associate professor's level, and $1,119 less at the professor's level."); *id.* at 4931-4932 (Sen. Cranston) ("As in other areas of employment, statistics for educational institutions indicate that minorities, and particularly women, are precluded from the more prestigious and higher paying positions.").

[11] 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*, Pt. 1, at 302 (Dr. Bernice Sandler, Women's Equity Action League) (noting instances of sex discrimination in employment by State-supported universities); *id*. at 379 (Dr. 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,
(continued...)

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."[12] This evidence was more than sufficient to support Congress's conclusion that state-sponsored

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[11](...continued)
President's Task Force On Women's Rights And Responsibilities) (noting "the growing body of evidence of discrimination against women faculty in higher education"); *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*., Pt. 2, at 738 (Rep. Griffiths) ("The extent of discrimination against women in the educational institutions of our country constitutes virtually a national calamity."); *id*., Pt. 1, at 235 (Rep. May) ("[S]ex discrimination in the colleges and universities of this Nation * * * it seems to me, that it is running rampant!"); *Equal Rights* at 269 (Dr. Bernice Sandler, Women's Equity Action League) ("there is no question whatsoever of a massive, pervasive, consistent, and vicious pattern of discrimination against women in our universities and colleges").

[12] *Economic*, Pt. 1, at 105-106.

employment discrimination was a serious problem[13] and violative of the Fourteenth Amendment.[14]

Thus, based on an extensive legislative record, Congress reached the same conclusion as had the Supreme Court – that States had consistently engaged in invidious discrimination on the bases of race, sex, and national origin.

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[13] H.R. Rep. No. 238, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S.C.C.A.N. 2137, 2153 ("The problem of employment discrimination is particularly acute and has the most deleterious effect in these governmental activities which are most visible to the minority communities (notably education, law enforcement, and the administration of justice) with the result that the credibility of the government's claim to represent all the people equally is negated."); 118 Cong. Rec. 1815 (1972) (Sen. Williams) ("In fact, the well-documented and widespread discrimination among State and local government employees is a shameful condition that should be eliminated wherever and whenever possible."); *id.* at 1816 (Sen. Williams) ("It is thus clear that the guarantee of equal protection must extend to discriminatory practices of State and local governments, where such discrimination is based upon race, color, religion, sex or national origin.").

[14] H.R. Rep. No. 238, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S.C.C.A.N. 2137, 2154 ("The expansion of Title VII coverage to State and local government employment is firmly embodied in the principles of the Constitution of the United States. The Constitution has recognized that it is inimical to the democratic form of government to allow the existence of discrimination in those bureaucratic systems which most directly affect the daily interactions of this Nation's citizens. The clear intention of the Constitution, embodied in the Thirteenth and Fourteenth Amendments, is to prohibit all forms of discrimination."); 118 Cong. Rec. 1412 (1972) (Sen. Byrd) ("[T]he fact remains that discrimination in employment, on the basis of race, does exist, and discrimination against sex does persist. Wherever there is such discrimination in employment, it is violative of the Constitution of the United States.")

CONCLUSION

The Eleventh Amendment is no bar to the plaintiff's Title VII claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached brief is proportionately spaced, has a typeface of 14 points and contains 6,598 words.

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