

No. 97-30427

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BETH PEDERSON, et al.,

Plaintiffs-Appellees

v.

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND
AGRICULTURAL AND MECHANICAL COLLEGE,
WILLIAM E. DAVIS AND JOE DEAN,

Defendants-Appellants

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

RESPONSE FOR THE UNITED STATES AS INTERVENOR-APPELLEE
TO THE PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

	PAGE
ARGUMENT:	
A. Congress Intended To Utilize Its Fourteenth Amendment Power In Removing States' Eleventh Amendment Immunity To Title IX Suits, Even Though Such Intent Is Not Required	1
B. The Abrogation Of Eleventh Amendment Immunity For Title IX Claims Was A Valid Exercise Of Congress's Section 5 Authority	6
C. In The Alternative, Defendants Waived Their Eleventh Amendment Immunity By Accepting Federal Funds After The Effective Date Of 42 U.S.C. 2000d-7	10
CONCLUSION	10
CERTIFICATE OF SERVICE	

ARGUMENT

The panel's unanimous opinion in this case is consistent with every other court of appeals in holding that the Eleventh Amendment is no bar to private suits brought against States under Title IX of the Education Amendments of 1972. See Litman v. George Mason Univ., 186 F.3d 544 (4th Cir. 1999), cert. denied, 2000 WL 198966 (Feb. 22, 2000); Franks v. Kentucky Sch. for the Deaf, 142 F.3d 360, 363 (6th Cir. 1998); Doe v. University of Ill., 138 F.3d 653, 660 (7th Cir. 1998), vacated and remanded, 119 S. Ct. 2016 (1999), reinstated in pertinent part, 200 F.3d 499 (7th Cir. 1999); Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir. 1997). There is no reason for this Court to rehear this appeal en banc.

A. **Congress Intended To Utilize Its Fourteenth Amendment Power In Removing States' Eleventh Amendment Immunity to Title IX Suits, Even Though Such Intent Is Not Required**

Defendants concede (Pet. 14) that in 42 U.S.C. 2000d-7 Congress made clear that it intended to remove their Eleventh Amendment immunity to suits alleging violations of Title IX. Defendants instead argue (Pet. 5-7), as they did before the panel, that Congress must have also had the intent to use its power under Section 5 of the Fourteenth Amendment.

1. While we disagree with defendants' contention, the disagreement has no effect on this case. When Congress enacted Section 2000d-7 in 1987, it specifically and expressly invoked its power under the Fourteenth Amendment. Senator Cranston, the provision's primary sponsor, described the proposed legislation

as "clearly authorized" by both the Spending Clause and Section 5 of the Fourteenth Amendment. 131 Cong. Rec. 22,346 (1985). The Senate Committee Report likewise referred to both of these constitutional provisions as permitting abrogation of state immunity. See S. Rep. No. 388, 99th Cong., 2d Sess. 27 (1986). After the Senate version of the bill was adopted in conference, Senator Cranston submitted for the record a letter from the Department of Justice stating that "to the extent that the proposed amendment is grounded on congressional powers under section five of the fourteenth amendment, [it] makes Congress' intention 'unmistakably clear in the language of the statute' to subject States to the jurisdiction of Federal courts." 132 Cong. Rec. 28,624 (1986). As this Court found in Lesage v. Texas, 158 F.3d 213 (5th Cir. 1998), rev'd and remanded on other grounds, 120 S. Ct. 467 (1999):

Congress unquestionably enacted 42 U.S.C. § 2000d-7 with the "intent" to invoke the Fourteenth Amendment's congressional enforcement power. * * * The Congressional Record contains specific references to exercising congressional power under Section Five of the Fourteenth Amendment to accomplish this abrogation of Eleventh Amendment immunity. The state's argument thus rests on presumptions regarding subjective intent which are simply incorrect with respect to the relevant statute.

158 F.3d at 218-219 (footnote omitted).

Thus, defendants entire first question (Pet. 1), involving reliance on a "dormant Fourteenth Amendment power as constitutional basis for an abrogation statute," is not raised in this case.

2. Apparently recognizing this, defendants argue (Pet. 12-13) that while Congress expressed its intent to use its Section 5 power to remove States' Eleventh Amendment immunity to Title IX suits, Congress could not do so because the intent also has to be present at the time the underlying statute was enacted in 1972. But that is inconsistent with the approach adopted by the Supreme Court in Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 119 S. Ct. 2199 (1999). In that case, the Court examined the validity of the Patent Remedy Act, a statute enacted in 1992 specifically to abrogate immunity for violations of patent laws previously enacted under the Patent Clause. Id. at 2203. The Court pointed to the legislative history of that 1992 act in noting that Congress "justified" the abrogation under its Fourteenth Amendment power. Id. at 2205, 2206.

3. In any event, Congress's intent as to which enumerated power it is exercising is not a necessary condition for validly upholding a statute under that power. As defendants appear to recognize (Pet. 4), their argument has been consistently rejected by the Supreme Court,^{1/} this Court,^{2/} and the ten other courts of

^{1/} See EEOC v. Wyoming, 460 U.S. 226, 243-244 n.18 (1983); Fullilove v. Klutznick, 448 U.S. 448, 473-478 (1980) (opinion of Burger, C.J.); Griffin v. Breckenridge, 403 U.S. 88, 107 (1971); Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948); United States v. Butler, 297 U.S. 1, 61 (1936); Keller v. United States, 213 U.S. 138, 147 (1909); United States v. Harris, 106 U.S. 629, 636 (1883).

^{2/} See Lesage, 158 F.3d at 217-218; Ussery v. Louisiana, 150 F.3d 431, 436-437 (5th Cir. 1998), cert. dismissed, 119 S. Ct. 1161 (1999); Crawford v. Pittman, 708 F.2d 1028, 1037 (5th Cir. 1983); Williams v. City of New Orleans, 729 F.2d 1554, 1578 (5th Cir. 1984). (continued...)

appeals to address the question.^{3/} Defendants suggest that this wealth of precedent must be cast aside in light of Florida Prepaid. But there is nothing in that opinion that imposes a new requirement on Congress to expressly articulate what power it is using when it enacts legislation. The Court's detailed survey of the "historical record," the text, and the legislative history of the abrogation provision was simply an application of the EEOC v. Wyoming 460 U.S. 226, 243-244 n.18 (1983), standard of being "able to discern some legislative purpose or factual predicate that supports the exercise of that power." Thus, even after Florida Prepaid, the only court of appeals to address the issue has declined to require an express invocation of the Fourteenth Amendment. See Union Pacific R.R. Co. v. Utah, 198 F.3d 1201, 1203-1204, 1208-1209 (10th Cir. 1999).

Subsequent to Florida Prepaid, the Supreme Court addressed the validity of another abrogation in Kimel v. Florida Board of

^{2/} (...continued)

Cir. 1984) (en banc) (Wisdom, J., concurring in part and dissenting in part).

^{3/} 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. Co. v. Public Util. Comm'n, 141 F.3d 88, 92 (3d Cir. 1998), cert. denied, 120 S. Ct. 323 (1999); Abril v. Virginia, 145 F.3d 182, 186 (4th Cir. 1998); Franks v. Kentucky Sch. for the Deaf, 142 F.3d 360, 363 (6th Cir. 1998); Doe v. University of Ill., 138 F.3d at 660; Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir. 1997); Oregon Short Line R.R. Co. v. Department of Revenue, 139 F.3d 1259, 1265-1266 (9th Cir. 1998); Union Pac. R.R. Co. v. Utah, 198 F.3d 1201, 1203-1204, 1208-1209 (10th Cir. 1999); United States v. Moghadam, 175 F.3d 1269, 1275 n.10 (11th Cir. 1999), petition for cert. pending, 68 U.S.L.W. 3367 (Nov. 23, 1999) (No. 99-879).

Regents, 120 S. Ct. 631 (2000), without inquiring into, much less declaring dispositive, the question whether Congress intended to exercise its Section 5 authority. To the contrary, it explained that "[b]ecause [in EEOC v. Wyoming] we found the ADEA valid under Congress' Commerce Clause power, we concluded that it was unnecessary to determine whether the Act also could be supported by Congress' power under § 5 of the Fourteenth Amendment. Resolution of today's cases requires us to decide that question." Id. at 643 (emphasis added and citations omitted); see also id. at 644 ("the private petitioners in these cases may maintain their ADEA suits against the States of Alabama and Florida if, and only if, the ADEA is appropriate legislation under § 5"); id. at 654 n.1 (Thomas, J., concurring in part) ("the purported abrogation of the States' Eleventh Amendment immunity in the ADEA falls outside Congress' § 5 enforcement power"). Thus, the objective inquiry about power continues to govern.

While it is clear that Congress intended to use federal spending as the trigger for coverage under Title IX, there is no rule that Congress can only "enforce" the Fourteenth Amendment through prohibitory legislation. That Congress is using the "carrot" of federal funds to assure nondiscrimination does not remove Title IX from the ambit of Fourteenth Amendment legislation. See Fullilove v. Klutznick, 448 U.S. 448 (1980); Doe, 138 F.3d at 659.

B. The Abrogation Of Eleventh Amendment Immunity For Title IX Claims Was A Valid Exercise Of Congress's Section 5 Authority

Defendants also claim that the abrogation for Title IX is not valid Section 5 legislation. Their argument has both a procedural and substantive component. Neither was raised before the panel and neither merits further review.

1. While conceding (Pet. 10) that Congress can prohibit sex discrimination under the Fourteenth Amendment, defendants claim (Pet. 13-14) that Congress failed to create a sufficient legislative record of unconstitutional sex discrimination by States to justify Title IX and its abrogation. That argument was never made to the panel.

In any event, the Supreme Court in Kimel made clear, as it had in Florida Prepaid, that "lack of support [in the legislative record] is not determinative of the § 5 inquiry." 120 S. Ct. at 649; see also Kilcullen v. New York State Dep't of Labor, No. 99-7208, 2000 WL 217465, at *3 (2d Cir. Feb. 24, 2000) (citations omitted) ("In making this determination, courts have always been free to consider evidence beyond that which is contained in the legislative record. Nothing in the Supreme Court's recent Eleventh Amendment jurisprudence casts doubt on this fundamental principle. Indeed, the Court has explicitly stated that it has no such intention.").

In J.E.B. v. Alabama, 511 U.S. 127 (1994), the 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." 511 U.S. at 136 (citation omitted); see also United States v. Virginia, 518 U.S. 515, 531-532 (1996). 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 legislative inquiry on the scope of the problem is necessary for statutes involving sex discrimination. See also Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 n.10 (1982) ("History provides numerous examples of legislative attempts to exclude women from particular areas simply because legislators believed women were less able than men to perform a particular function."). Indeed, Kimel stressed that the classification at issue in that case (age) was fundamentally different from classifications based on race and gender, which are "so seldom relevant to the achievement of any legitimate state interest that * * * [they] are deemed to reflect prejudice and antipathy," 120 S. Ct. at 645, and are thus presumptively the proper subject for Section 5 legislation.

2. Finally, defendants argue that Title IX itself is not valid Section 5 legislation because (according to defendants) it "contains provisions irreconcilable with the Fourteenth Amendment" (Pet. 7), and plaintiffs can prevail without showing "discriminatory intent" (Pet. 10). Again, we note that neither of these arguments was raised before the panel. To the contrary, defendants stated in their opening brief before the panel (at 16) that "[t]he abrogation clause contained in [Section 2000d-7] is

unconstitutional because Title IX was enacted under Congress' Article I Spending Power. There is no other basis for the denial of Eleventh Amendment immunity in these proceedings."^{4/} In any event, none of these claims is worthy of this Court's en banc review.

a. Defendants contend (Pet. 7-8) that because Title IX does not prohibit certain things that the Equal Protection Clause of its own force prohibits, it is "irreconcilable with the Fourteenth Amendment." Congress's decision not to prohibit sex discrimination in every aspect of every educational program cannot and does not deprive Title IX of its constitutional validity in those areas where it does govern. No one disputes, for example, that Title VII is valid Section 5 legislation even though it does not cover state employers with less than 15 employees. See 42 U.S.C. 2000e(b). Underinclusive Section 5 legislation is not unconstitutional.

b. Defendants contend that the substantive requirements of Title IX exceed those of the Equal Protection Clause. But the panel held that defendants engaged in "systematic, intentional, differential treatment of women" based on "outdated attitudes about women." Slip op. 53, 52. As actions motivated by a

^{4/} In their reply brief (at 23), defendants did assert that "no Court has ever held that the constitutional requirements imposed on the states under the Fourteenth Amendment are consistent with the regulatory requirements placed on federal fund recipients by the Office of Civil Rights of the Department of Education." That sentence hardly seems sufficient to preserve the argument that Title IX could not be a valid exercise of Congress's Section 5 authority.

discriminatory intent are themselves prohibited by the Equal Protection Clause, defendants' arguments about the potential reach of Title IX are irrelevant in this case.

In any event, "Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 644 (2000). Part of Congress's Section 5 authority to ferret out on-going discrimination and remedy the continuing effects of past and present intentional discrimination is to prohibit discriminatory effects. See Lopez v. Monterey County, 525 U.S. 266, 283 (1999); In re Employment Discrimination Litig. Against Ala., 198 F.3d 1305, 1320-1323 (11th Cir. 1999); Coolbaugh v. Louisiana, 136 F.3d 430, 438 (5th Cir.), cert. denied, 119 S. Ct. 58 (1998); Scott v. City of Anniston, 597 F.2d 897, 900 (5th Cir. 1979), cert. denied, 446 U.S. 917 (1980).^{5/} The panel did not err in holding that Title IX was valid Section 5 legislation.

^{5/} Defendants assert (Pet. 11) that Title IX "has been interpreted as an affirmative action statute." But the only case they cite for this proposition, Cohen v. Brown Univ., 991 F.2d 888 (1st Cir. 1993), does not support their claim. Indeed, in a subsequent appeal, the First Circuit held that "Title IX is not an affirmative action statute; it is an anti-discrimination statute, modeled explicitly after another anti-discrimination statute, Title VI. No aspect of the Title IX regime at issue in this case--inclusive of the statute, the relevant regulation, and the pertinent agency documents--mandates gender-based preferences or quotas, or specific timetables for implementing numerical goals." Cohen v. Brown Univ., 101 F.3d 155, 170 (1996), cert. denied, 520 U.S. 1186 (1997).

C. In The Alternative, Defendants Waived Their Eleventh Amendment Immunity By Accepting Federal Funds After The Effective Date Of 42 U.S.C. 2000d-7

The panel did not reach the alternative ground for affirmance pressed by the United States and plaintiffs--that the defendants waived their immunity by participating in federal programs and receiving federal funds after the effective date of 42 U.S.C. 2000d-7. This argument has been accepted by a number of courts in upholding Section 2000d-7. See Litman v. George Mason Univ., 186 F.3d 544, 555 (4th Cir. 1999), cert. denied, 2000 WL 198966 (Feb. 22, 2000); Sandoval v. Hagan, 197 F.3d 484, 494 (11th Cir. 1999); Clark v. California, 123 F.3d 1267, 1271 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998); see also Little Rock Sch. Dist. v. Mauney, 183 F.3d 816, 831-832 (8th Cir. 1999) (same for identical language in Individuals with Disabilities Education Act). Because the removal of Eleventh Amendment immunity can be sustained on this ground as well, there is no reason for this Court to rehear this case simply to address the Fourteenth Amendment issue raised in the petition.

CONCLUSION

The petition for rehearing en banc should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2000, two copies of the foregoing Response For The United States As Intervenor-Appellee To The Petition For Rehearing En Banc were served by first-class mail, postage prepaid, on the following counsel:

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