No. 01-60798

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DR. AHMAD A. VADIE,

Plaintiff-Appellee

v.

MISSISSIPPI STATE UNIVERSITY,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS INTERVENOR

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not request oral argument in this appeal.

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FOR THE NORTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES AS INTERVENOR

JURISDICTIONAL STATEMENT

The plaintiff filed a complaint in the United States District Court for the Northern District of Mississippi, alleging that Mississippi State University 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 September 24, 2001. The defendant filed a timely notice of appeal on October 5, 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.

STATEMENT OF THE CASE

Dr. Ahmad A. Vadie formerly served as a tenured professor at Mississippi State University (MSU) (R.E. 23).[1] In 1992, Vadie was notified by MSU that the department in which he worked was to be eliminated (R.E. 23). Vadie interviewed for available alternative positions at MSU, but was not hired (R.E. 23). On January 24, 1995, Vadie filed his first charge with the Equal Employment Opportunity Commission (EEOC), claiming that, in November 1994, MSU had discriminated against him on the basis of his race and national origin by refusing to offer him a position as a professor of chemical engineering (R.E. 34). On May 16, 1995, the EEOC issued a right-to-sue letter to Vadie based on the Commission's determination that it would be unable to complete its investigation process within 180 days from the filing of the charge (R.E. 39). On June 16, 1995, Vadie filed suit in federal district court against MSU and certain of its agents alleging violations of, *inter alia*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (Title VII) (R.E. 3). On November 27, 1995, Vadie filed a second charge with the

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[1] References to "R.E. __" are to pages in the Record Excerpts, filed by the Appellant; references to "Apt. Br. __" are to pages in the Appellant's opening brief; references to "Rep. Br. __" are to pages in the Appellant's reply brief.

EEOC, claiming that MSU had again discriminated against him by refusing to hire him both because of his national origin and as a means of retaliating against him for filing his first EEOC charge (R.E. 40). On January 30, 1996, the EEOC dismissed Vadie's second charge and issued a right-to-sue letter on the basis that Vadie already had a claim pending in federal district court (R.E. 41). On March 12, 1996, by leave of the court, Vadie filed an amended complaint that included an additional claim of national origin discrimination and a claim of unlawful retaliation (R.E. 5).

On November 2, 1995, the defendants filed a motion to dismiss or for summary judgment, alleging that they were protected from suit by both qualified immunity and sovereign immunity (R.E. 3). The district court denied the motion as to Vadie's Title VII claims against MSU, and MSU appealed (R.E. 5). On appeal, in an unpublished opinion, a panel of this Court affirmed the district court's decision, holding that the Eleventh Amendment does not shield MSU from suit under Title VII because Congress effectively abrogated States' immunity when it extended the reach of Title VII to cover States in 1972 (R.E. 25-26). On remand, the parties agreed to dismiss all defendants except MSU and all remaining claims except those under Title VII (R.E. 30-31). After trial, a jury found in favor of Vadie on the claims of national origin discrimination and retaliation on October 1, 1998 (R.E. 18). The jury awarded compensatory damages in the amount of $350,000 (*ibid.*), which was subsequently reduced by the court to $300,000 (R.E. 32).

MSU appealed the verdict and award. On appeal, a panel of this Court found both that Vadie's first EEOC charge was not timely filed and that Vadie had failed to present sufficient evidence to support the jury's finding that MSU had discriminated against him on the basis of his race or national origin, and therefore reversed the district court's denial of MSU's motion for judgment as a matter of law as to those claims. *Vadie* v. *Mississippi State Univ.*, 218 F.3d 365, 371-374 (5th Cir. 2000), cert. denied, 531 U.S. 1113 (2001). However, the Court affirmed the jury's finding of liability on the retaliation claim. *Id.* at 374-375. The Court also determined that the compensatory damages award was excessive on the retaliation claim alone, and remanded the case "for a new trial on retaliation damages unless Dr. Vadie accepts a remittitur in the amount of $290,000, reducing the damages award to $10,000." *Id.* at 375-378.

On remand again, Vadie refused to accept the remittitur (R.E. 14). On July 24, 2001, before a new damages trial could be held, MSU again moved for dismissal on, *inter alia*, Eleventh Amendment grounds (R.E. 15). On September 24, 2001, the district court again denied MSU's motion (R.E. 19-21), and MSU filed a timely notice of appeal (R.E. 17). On March 5, 2002, the United States was granted leave to intervene for the purpose of defending the constitutionality of Title VII's abrogation of States' Eleventh Amendment immunity.

SUMMARY OF ARGUMENT

This Court should decline to consider the Eleventh Amendment defense asserted by MSU because that claim is precluded by the doctrine of "law of the

case." Because that very issue was decided by this Court in a prior appeal of the instant case, the doctrine of "law of the case" counsels against its reconsideration. Moreover, none of the standard exceptions to the "law of the case" doctrine applies in this case because there has been no change in controlling authority since the previous decision.

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. MSU does not even contest the fact that Congress clearly expressed its intent to abrogate States' immunity. The Equal Protection Clause of the Fourteenth Amendment prohibits a state employer from discriminating against its employees on the bases of race and national origin. Title VII's anti-discrimination provisions simply codify these protections and are, therefore, by definition congruent and proportional. Contrary to MSU's contentions, when Congress merely codifies and enforces the protections of the Constitution, it need not compile evidence of a widespread pattern of unconstitutional conduct by States. The anti-retaliation provisions of Title VII are a valid means of protecting the rights guaranteed in the anti-discrimination provisions.

ARGUMENT

I. MSU IS PRECLUDED BY THE DOCTRINE OF "LAW OF THE CASE" FROM ASSERTING AN ELEVENTH AMENDMENT DEFENSE

This Court should not consider MSU's assertion of Eleventh Amendment immunity because that issue has already been decided in a previous appeal in this case. Under the doctrine of "law of the case," an issue of fact or law decided on appeal may not be reexamined either by the district court on remand or, as here, by the appellate court on a subsequent appeal. *United States* v. *Becerra*, 155 F.3d 740, 752 (5th Cir. 1998). This preclusive rule extends to all issues previously decided, regardless of whether they were decided expressly or by necessary implication. *Conway* v. *Chemical Leaman Tank Lines, Inc.*, 644 F.2d 1059, 1062 (5th Cir. 1981). MSU's attempt (Rep. Br. 3) to evade the rule of "law of the case" by claiming that the Court "has not addressed the Eleventh Amendment abrogation issue" with regard to claims of retaliation under Title VII is therefore unavailing. When this Court held in an unpublished opinion in 1997 that "MSU is not protected by sovereign immunity when sued under Title VII" (R.E. 26), and remanded the case for a trial on the merits, Vadie's claim of unlawful retaliation under Title VII was part of the lawsuit. This Court therefore ruled by necessary implication that MSU was not immune from suits for retaliation under Title VII, even if it did not expressly parse out the various elements of Vadie's Title VII claim.

Nor do any of the traditional exceptions to the "law of the case" doctrine apply in this case. This Court has identified three circumstances in which it might

be inappropriate to apply "law of the case" as a bar to reconsideration of a previously decided issue: where (1) the evidence on a subsequent trial was substantially different, (2) controlling authority has since made a contrary decision on the law applicable to the relevant issues, or (3) the decision was clearly erroneous and would work a manifest injustice. *Becerra*, 155 F.3d at 752-753. MSU claims (Rep. Br. 3) that the second exception applies in this case because the Supreme Court's decisions in *Board of Trustees of University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), *Kimel* v. *Florida Board of Regents*, 528 U.S. 62 (2000), *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, 527 U.S. 627 (1999), *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), and *City of Boerne* v. *Flores*, 521 U.S. 507 (1997) constitute a change in controlling authority since the time of the 1997 appeal in this case.

Nothing in any of those cases, however, altered the analytical framework within which courts consider claims of Eleventh Amendment immunity. The Supreme Court's decision in *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996) – which was decided *before* the 1997 appeal in this case and expressly relied upon by this Court's decision in that appeal (R.E. 25) – altered the Eleventh Amendment landscape by overruling a previous determination that Congress could abrogate States' Eleventh Amendment immunity pursuant to its powers under the Commerce Clause. 517 U.S. at 66-72. But nothing in any of the Court's subsequent Eleventh Amendment cases has disturbed the long-standing

acknowledgment that Congress may abrogate States' immunity pursuant to its powers under Section 5 of the Fourteenth Amendment. In holding that Congress had failed to exercise that power appropriately in enacting the Religious Freedom Restoration Act, the *City of Boerne* Court did not announce a new rule of law. Rather, the Court relied on long-standing principles from pre-*Seminole* cases to support its holding. See, *e.g.*, *City of Boerne*, 521 U.S. at 524 ("The remedial and preventive nature of Congress' enforcement power, and the limitation inherent in the power, were confirmed in our earliest cases on the Fourteenth Amendment."). Likewise, none of the post-*Boerne* cases has altered the Eleventh Amendment analytical framework. The fact that those cases concluded that Congress had failed to exercise its Section 5 powers appropriately in enacting statutes that are not at issue in the instant case does not mean that there has been a change in controlling authority.

Because none of the exceptions to the doctrine of "law of the case" are applicable to the instant case, and because the very issue MSU presents to this Court was decided on a previous appeal, this Court should decline to consider MSU's assertion of Eleventh Amendment immunity.

II. TITLE VII'S ABROGATION OF ELEVENTH AMENDMENT IMMUNITY FOR RETALIATION CLAIMS IS CONSTITUTIONAL

Section 1 of the Fourteenth Amendment to the United States Constitution prohibits States both from "depriv[ing] any person of life, liberty, or property, without due process of law" and 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."[2] *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

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[2] 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)).

1964, as amended, 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. Indeed, when confronted with this issue, this Court has consistently held that Title VII effectively abrogates States' Eleventh Amendment immunity. *Ussery* v. *Louisiana*, 150 F.3d 431, 434-435 (5th Cir. 1998); *Pegues* v. *Mississippi State Employment Serv.*, 899 F.2d 1449, 1453 (5th Cir. 1990); *Whiting* v. *Jackson State Univ.*, 616 F.2d 116, 127 n.8 (5th Cir. 1980).

A. *Congress Intended To Abrogate States' Eleventh Amendment Immunity To Title VII Claims*

MSU does not argue that Title VII lacks a clear statement of Congress's intent to abrogate States' Eleventh Amendment immunity. Nor could it, in light of the Supreme Court's holding in *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976). Instead, MSU asserts (Apt. Br. 17) that recent Supreme Court opinions have "cast doubt" on the continuing efficacy of that decision. But nothing in any subsequent Supreme Court case has called into question the holding in *Fitzpatrick*.

As originally enacted in 1964, Title VII 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*, 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 the holding that, in extending the reach of Title VII to cover state employers, Congress clearly expressed its intent to abrogate States' Eleventh Amendment immunity. *Quern* v. *Jordan*, 440 U.S. 332, 344 (1979) ("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 * * * ." (citation omitted)). This Court is bound by that precedent.

B. *Congress Validly Abrogated States' Eleventh Amendment Immunity For Claims Of Retaliation Under Title VII*

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*, 528 U.S. at 85 (quoting *City of Boerne*, 521 U.S. at 532). Because Title VII's prohibition of disparate treatment on the basis of race and national origin mirrors protections of Section 1 of the Fourteenth Amendment, it is by definition appropriate Section 5 legislation. The anti-retaliation provisions are a valid means of enforcing these protections.

1. *Title VII's Prohibition Of Disparate Treatment On The Bases Of Race 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 the type of intentional discrimination on the bases of race and national origin that was originally alleged to have occurred in the instant case. See *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, *Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *Washington* v. *Davis*, 426 U.S. 229, 238-248 (1976), and on the basis of national origin, *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988); *Oyama* v. *California*, 332 U.S. 633, 640 (1948). These prohibitions extend to discrimination in government employment. *Hazelwood Sch. Dist.* v. *United States*, 433 U.S. 299, 309-310 & n.15 (1977).

This Court has held that the elements necessary to prove a claim of disparate treatment under Title VII are the same as those needed to prove a violation of the Equal Protection Clause. *Lee* v. *Conecuh County Bd. of Educ.*, 634 F.2d 959, 962 (5th Cir.1981). It is therefore not surprising that MSU does not contend that Title

VII's prohibition of disparate treatment on the bases of race and national origin makes unlawful any constitutional conduct.[3]

2. *Title VII's Prohibition Of Retaliation For Filing A Claim Of Employment Discrimination Need Not Be Justified By A Legislative Record*

The bulk of MSU'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 did not identify a 'pattern of irrational retaliation' across this nation by the States against those who filed EEOC complaints or those who participated in EEOC investigations and lawsuits growing from those EEOC complaints" (Apt. Br. 21). Absent such an identified pattern, MSU contends, Title VII cannot be construed as being "responsive to unconstitutional behavior" (Apt. Br. 23). But MSU misconstrues the decisions of 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

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[3] Indeed, with respect to 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*, 486 U.S. at 461, Title VII permits employers to classify employees on the basis of national origin where "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).

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.

MSU'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 both *Kimel* and *Garrett*, the Court recognized 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." *Garrett*, 531 U.S. at 365. Because both of the

statutes at issue in those cases – the Age Discrimination in Employment Act in *Kimel* and the Americans with Disabilities Act in *Garrett* – prohibited types of discrimination that would be subject to rational basis review under the Equal Protection Clause, the Court determined that the statutes prohibited "substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard." *Kimel*, 528 U.S. at 86; accord *Garrett*, 531 U.S. at 365-368.

Only after determining that the statutory rights in question were 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" class protected by the statute sufficient to justify the breadth of the statutory remedy. *Garrett*, 531 U.S. 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) (citation omitted)); accord *Kimel*, 528 U.S. at 88. The Court then concluded that the record was insufficient to justify the prophylactic remedies in the statutes in question. *Garrett*, 531 U.S. at 374; *Kimel*, 528 U.S. at 89.

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, 820-821 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."); cf. *Siler-Khodr* v. *University of Texas Health Science Center*, 261 F.3d 542, 550 (5th Cir. 2001) ("*Kimel* held that the ADEA was not an appropriate use of Congress's § 5 power because it was not congruent and proportional to the means employed by the Equal Protection Clause to prohibit discrimination by the states on the basis of age."). Those concerns are not present here. In contrast to the conduct at issue in *Kimel* and *Garrett*, Vadie seeks to hold MSU liable for the kind of unlawful retaliation that vitiates a citizen's right to be free from state-sponsored disparate treatment on the bases of race and national origin.[4]

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[4] In addition, Title VII's prohibition on States retaliating against an individual for filing a complaint about unlawful governmental discrimination or otherwise opposing such discrimination is appropriate legislation to enforce the right to speak freely and the right to petition the government for redress of grievances, as guaranteed by the First Amendment. See, e.g., *Victor* v. *McElveen*, 150 F.3d 451, 456 (5th Cir. 1998) (holding that protesting racial discrimination is protected by the First Amendment); *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972) (finding that the right to petition the government includes the right to petition administrative agencies); accord *Anderson* v. *Davila*, 125 F.3d 148, 161 (3d Cir. 1997) (holding that a state employee's filing of an EEOC complaint "constituted protected activity under the First Amendment"). Congress's power to enforce the Fourteenth Amendment

3. *Title VII's Prohibition Of Retaliation For Filing A Claim Of Employment Discrimination Is A Valid Means Of Enforcing The Guarantees Of The Equal Protection Clause*

MSU argues (Apt. Br. 23) that Title VII's anti-retaliation provisions are not valid Section 5 legislation because they do "not identify any protected group that Congress has identified as having been historically subjected to purposeful, unequal treatment by the States" and because they "identif[y] no conduct that would otherwise transgress the Fourteenth Amendment." But MSU's argument misunderstands both the nature of the anti-retaliation provisions in Title VII and the nature of Congress's power under Section 5 of the Fourteenth Amendment. Title VII's anti-retaliation provisions protect exactly the same class of people that is protected by Title VII's anti-discrimination provisions – individuals who have suffered employment discrimination on the bases of "race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a). The anti-retaliation protection afforded in 42 U.S.C. 2000e-3 is a necessary component of an individual's right to be free from state-sponsored disparate treatment on the bases of, in this case, race and national origin.

Moreover, MSU's analysis ignores the Supreme Court's admonition that "Congress's § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment." *Kimel* v. *Florida Bd.*

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includes the power to enforce the guarantees of the First Amendment which, pursuant to the due process clause of the Fourteenth Amendment, apply to the States. See *City of Boerne* v. *Flores*, 521 U.S. 507, 519 (1997).

of Regents, 528 U.S. 62, 81 (2000). Congress's power under Section 5 includes the authority to create ancillary remedies that aid in enforcing the substantive prohibitions of the Fourteenth Amendment. Thus, Congress may authorize courts to award attorney fees for prevailing parties in cases alleging constitutional violations, even though the Fourteenth Amendment itself does not require payment of attorney fees. See *Maher* v. *Gagne*, 448 U.S. 122, 132 (1980). In fact, in *Maher*, the Court held that Congress could authorize attorney-fee awards for successful prosecution of non-constitutional claims if there were a substantial pendent constitutional claim that had been settled favorably prior to adjudication. See *Maher*, 448 U.S. at 132. The Court held that such attorney-fee awards "further[] the Congressional goal of encouraging suits to vindicate constitutional rights." See *id.* at 133; cf. *Fitzpatrick*, 427 U.S. at 456-457 (upholding validity of award of attorney fees against States in Title VII action as "follow[ing] necessarily from" the Court's holding that Title VII abrogated States' immunity).

Title VII's anti-retaliation provisions are also an appropriate means of encouraging victims of discrimination to seek relief. An employee's right to be free from unlawful discrimination necessarily includes the right to be free from retaliation for exercising or asserting that right. See *Hanson* v. *Hoffmann*, 628 F.2d 42, 53 (D.C. Cir. 1980). This Court has held that "the enforcement of Title VII rights *necessarily depends* on the ability of individuals to present their grievances without the threat of retaliatory conduct by their employers." *Jones* v. *Flagship Int'l*, 793 F.2d 714, 726 (5th Cir. 1986) (emphasis added), cert. denied, 479 U.S.

1065 (1987); see also *Pettway* v. *American Cast Iron Pipe Co.*, 411 U.S. 998, 1007 (1969) (finding that Title VII "protect[s an employee's] right to file charges" "in order to afford him the enunciated protection from invidious discrimination"). The authority to prohibit States from punishing those who seek to exercise their civil rights flows from Congress's core Section 5 power to protect those rights by statute in the first instance. Thus, Congress acted appropriately under its Section 5 authority in prohibiting States from retaliating against employees for invoking their rights under Title VII.

CONCLUSION

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

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CERTIFICATE OF SERVICE

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