No. 97-3253

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IRIS I. VARNER, et al.,

Plaintiffs-Appellees

v.

ILLINOIS STATE UNIVERSITY, et al.,

Defendants-Appellants

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

BRIEF FOR THE UNITED STATES AS INTERVENOR

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STATEMENT OF SUBJECT MATTER JURISDICTION

Plaintiffs-appellees filed a complaint in the United States District Court for the Central District of Illinois, alleging that Illinois State University and its officials violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., and the Equal Pay Act, 29 U.S.C. 206(d). For the reasons discussed in this brief, the district court had jurisdiction over the case pursuant to 29 U.S.C. 216(b) and 42 U.S.C. 2000e-5(f)(3).

STATEMENT OF APPELLATE JURISDICTION

This appeal is from a final judgment entered on July 30, 1997. The defendants filed a timely notice of appeal on August 28, 1997. 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).

STATEMENT OF THE ISSUES

1. Whether the Equal Pay Act is a valid exercise of Congress' power to enforce the Equal Protection Clause of the Fourteenth Amendment.

2. Whether the disparate impact provisions of Title VII are a valid exercise of Congress' power to enforce the Equal Protection Clause of the Fourteenth Amendment.

STANDARD OF REVIEW

Because the questions of Congress' power to abrogate the States' Eleventh Amendment immunity are purely ones of law, this Court reviews the issues de novo. See Thiel v. State Bar of Wis., 94 F.3d 399, 400 (7th Cir. 1996).

STATEMENT OF THE CASE

1. This suit is a private action filed by Dr. Iris Varner and two other female professors employed at Illinois State University against the university and various state officials (collectively referred to as defendants) alleging that female professors are paid less than their male counterparts (App. 14-15).[1/] Plaintiffs alleged violations of Title VII and the Equal Pay Act and sought injunctive and monetary relief (App. 2, 25).

Defendants moved to dismiss the Equal Pay Act claim based on Eleventh Amendment immunity (App. 3). Defendants also moved to

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[1/] "App. __" refers to the Required Short Appendix filed by Appellants. "Sep. App. __" refers to the Separate Appendix filed by Appellants with their Brief on Remand. "Br. __" refers to Appellants' Brief on Remand. "U.S. Br. __" refers to the initial Brief for the United States as Intervenor. Relevant excerpts of the legislative history cited in this brief are reprinted in an separate appendix submitted with this brief.

dismiss plaintiffs' claims for compensatory damages under Title VII, arguing that the statute did not contain an express abrogation of Eleventh Amendment immunity for such damages (App. 7), but they did not raise the Eleventh Amendment as a potential bar to the disparate impact claims against them. The magistrate judge denied the motion to dismiss (App. 31), and the district court affirmed (App. 6). Defendants appealed the court's judgment.

2. On July 21, 1998, this Court affirmed in a unanimous decision. See Varner v. Illinois State Univ., 150 F.3d 706 (7th Cir. 1998). The Court rejected the University's argument that Congress had not exercised its power under Section 5 of the Fourteenth Amendment in extending the Equal Pay Act to the States. Relying on EEOC v. Elrod, 674 F.2d 601, 604-609 (7th Cir. 1982), and subsequent decisions, the Court held that the relevant inquiry was whether the objectives of the Equal Pay Act "are within Congress' power under the [Fourteenth] amendment." Varner, 150 F.3d at 712. The Court further held that, even assuming that Elrod would be inapplicable if Congress had "expressly declared its intention to proceed solely pursuant to its Commerce Clause powers," id. at 714, the legislative history did not reveal such an intent. The Court found that the Committee Report excerpt relied on by defendants established only that the Committee believed that "'it had the power to extend the [Fair Labor Standards Act] to the States under the Commerce Clause,'" id. at 713, not that Congress had intended to rely

solely on that power with respect to the Equal Pay Act, see id. at 714.

This Court also held that the Equal Pay Act was within Congress' power to enforce the provisions of the Fourteenth Amendment. The Court noted that Congress "had substantial justification to conclude that pervasive discrimination existed whereby women were paid less than men for equal work." Varner, 150 F.3d at 716. The Court also noted that the scope of the affirmative defenses of the Equal Pay Act "protects employers from liability when the employer has sound reasons for wage disparities * * * but they allow for liability when no such reasons exist." Id. at 717. The Court concluded that the Equal Pay Act was "reasonably tailored to remedy intentional gender-based wage discrimination" and that its provisions, to the extent that they included "some constitutional conduct" within their prohibitions, were not "out of proportion to the harms that Congress intended to remedy and deter." Ibid.

The Court declined to address defendants' argument, first raised on appeal in a one-sentence footnote, that Title VII's disparate impact provisions were not valid Section 5 legislation. The Court noted that previous decisions of this Circuit held that the extension of Title VII to the States was a valid exercise of Congress' Section 5 power and held that defendants had waived any argument that those decisions should be overruled by failing to brief the issue. See id. at 717 n.14.

3. Defendants petitioned for certiorari limited to the question whether the Equal Pay Act contains a valid abrogation of their Eleventh Amendment immunity (Sep. App. S.2-S.39). The Supreme Court granted the petition and vacated this Court's prior decision for reconsideration in light of Kimel v. Florida Board of Regents, 120 S. Ct. 631 (2000). See Illinois State Univ. v. Varner, 120 S. Ct. 928 (2000). This Court ordered further briefing.

SUMMARY OF ARGUMENT

This Court correctly held that the Eleventh Amendment does not bar federal courts from exercising jurisdiction over plaintiffs' Equal Pay Act claim, and nothing in the Supreme Court's recent decision in Kimel v. Florida Board of Regents, 120 S. Ct. 631, 640-642 (2000), supports a different result. In Kimel, the Court invalidated the Age Discrimination in Employment Act (ADEA) only after noting that the ADEA imposed far more rigorous standards on States than the Equal Protection Clause. Under the Constitution, the Court found, intentional age discrimination is presumptively valid, and usually constitutional; but the ADEA prohibits all age-based employment classifications subject to very limited affirmative defenses. Because the Court concluded that the ADEA outlaws very little conduct that is unconstitutional, it found that there would have to be some evidence of a pattern of unconstitutional conduct by the States to justify such a broad prophylactic remedy.

The Equal Pay Act, however, outlaws very little conduct that would not be unconstitutional if practiced by the State. States plainly violate the Equal Protection Clause if they intentionally pay women less than men for equal work. And, as this Court found, the Equal Pay Act is tailored to ferret out precisely this form of intentional discrimination. The modest burden-shifting scheme established in the Equal Pay Act simply presumes that if men and women are paid different wages for the same work, and if the employer cannot show that any factor other than gender explains the disparity, then the employer's action is motivated by gender. This is a reasonable means of detecting and remedying intentional discrimination.

Because the Equal Pay Act is tailored to enforce the Equal Protection Clause's ban on intentional discrimination, there was no need for Congress to have before it the evidence of widespread constitutional violations by States, which might have been appropriate if it had enacted more far reaching legislation. In any event, the legislative record of the Equal Pay Act and of other anti-discrimination legislation from the same time period confirms that Congress had before it ample evidence that sex discrimination by state employers was a serious problem.

The only Court of Appeals that has addressed the constitutionality of the Equal Pay Act after Kimel has held the Equal Pay Act was a valid exercise of Congress' Section 5 powers. See Hundertmark v. Florida Dep't of Transp., No. 98-4924, 2000 WL 253593 (11th Cir. Mar. 7, 2000). This Court and six other courts

of appeals had previously upheld the Equal Pay Act. This Court should reaffirm its earlier judgment that the extension of the Equal Pay Act to the States is a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause.

This Court previously held that defendants had waived their right to challenge Title VII's prohibition on unjustified disparate impacts on the basis of sex. That holding is the law of the case, and there is no reason for the Court to reach a different result now. Assuming this Court decides to reach the issue, however, it should hold, consistent with its prior holdings and with every other court of appeals that has addressed the question, that the disparate impact provisions of Title VII are a valid exercise of Congress' Section 5 power.

ARGUMENT

I

CONGRESS CONSTITUTIONALLY ABROGATED STATES' ELEVENTH AMENDMENT IMMUNITY IN THE EQUAL PAY ACT

In determining whether a statute validly abrogates the States' Eleventh Amendment immunity to private suits in federal court, Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), articulated a two-part test:

> we ask two questions: first, whether Congress has unequivocally expressed its intent to abrogate the immunity; and second, whether Congress has acted pursuant to a valid exercise of power.

Id. at 55 (citations, quotations and brackets omitted).

Defendants no longer dispute that Congress unequivocally expressed its intent to abrogate the States' immunity in the Equal Pay Act. In Kimel v. Florida Board of Regents, 120 S. Ct. 631, 640-642 (2000), the Supreme Court held that the private enforcement provisions set forth in 29 U.S.C. 216(b), which authorize private suits to enforce the ADEA, as well as the Equal Pay Act, "clearly demonstrate Congress' intent to subject the States to suit for money damages at the hands of individual employees." Kimel, 120 S. Ct. at 640.[2/] We therefore proceed to the second part of the Seminole Tribe inquiry: whether the Equal Pay Act, as applied to the States, is a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment.

C. The Equal Pay Act May Be Upheld As An Exercise Of Congress' Section 5 Authority Even If Congress Did Not Specifically Intend To Use That Authority When It Passed The Act

Defendants again argue (Br. 21-22 n.4) that the Equal Pay Act may not be upheld unless there is evidence that Congress had a "conscious understanding" that it was acting pursuant to its Fourteenth Amendment power. This Court properly rejected that

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[2/] The private enforcement provision of the Fair Labor Standards Act, which also provides the enforcement procedures for the Equal Pay Act, authorizes employees to maintain actions for legal relief, including back-pay and liquidated damages, "against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. 216(b). The term "employer" is defined in the Fair Labor Standards Act to "include[] a public agency," which, in turn, is defined as "the government of a State or political subdivision thereof" and any agency of a State. 29 U.S.C. 203(d), 203(x). The term "employee" is defined to include "any individual employed by a State." 29 U.S.C. 203(e)(2)(C).

argument in its previous decision, see Varner, 150 F.3d at 712-714, and nothing in Kimel requires a different result.

As we noted in our initial brief (U.S. Br. 8-13), a court's duty in passing on the constitutionality of legislation is to determine whether Congress in fact had the authority to adopt legislation, not whether it correctly guessed the source of that power. This Court recently relied on this very principle in upholding the removal of Eleventh Amendment immunity in the Individuals with Disabilities Education Act (IDEA), explaining that

> Congress did what it could to ensure that states participating in the IDEA are amenable to suit in federal court. That the power comes from the spending clause rather than (as Congress may have supposed) the commerce clause or the fourteenth amendment is not relevant to the issue whether the national government possesses the asserted authority. Otherwise we require the legislature to play games ("guess which clause the judiciary will think most appropriate"). What matters, or at least should matter, is the extent of national power, rather than the extent of legislative prevision.

Board of Educ. v. Kelly E., No. 99-1589, 2000 WL 303162, at *2 (7th Cir. Mar. 24, 2000).[3/]

[3/] Every other court of appeals to address the issue is in agreement. 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.), Wheeling & Lake Erie Ry. Co. v. Public Util. Comm'n, 141 F.3d 88, 92 (3d Cir. 1998), cert. denied, 120 S. Ct. 324 (1999); Abril v. Virginia, 145 F.3d 182, 186 (4th Cir. 1998); Pederson v. Louisiana State Univ., 201 F.3d 388 (5th Cir. 2000); Franks v. Kentucky Sch. for the Deaf, 142 F.3d 360, 363 (6th Cir. 1998); Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir. 1997); Oregon Short Line R.R. Co. v. Department of Revenue, 139 F.3d 1259, 1265-1266 (9th Cir. 1998); Union Pacific R.R. Co. v. Utah, 198 F.3d 1201, 1203 (10th Cir. 1999); United States v. Moghadam, 175 F.3d 1269, 1275 (11th Cir. 1999), cert. denied, No. 99-879, 2000 WL 305841 (Mar. 27, 2000).

B. The Equal Pay Act As Applied To The States Is A Valid Exercise Of Congress' Power Under Section 5 Of The Fourteenth Amendment

1. The Equal Pay Act's Standards Are A Congruent And Proportionate Response To Gender Discrimination By The States

In its initial opinion, this Court found that the Equal Pay Act was "reasonably tailored to remedy intentional gender-based wage discrimination" and was not "out of proportion to the harms that Congress sought to address." Varner v. Illinois State Univ., 150 F.3d 706, 717 (1998). Nothing in Kimel casts doubt on that conclusion.

a. In Kimel, the Court reaffirmed that the central inquiry in determining whether legislation is a valid exercise of Congress' 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 objective that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." 120 S. Ct. at 645 (quoting City of Boerne v. Flores, 521 U.S. 507, 532 (1997)). The Supreme Court also emphasized in Kimel that "[t]he appropriateness of remedial measures must be considered in light of the evil presented." 120 S. Ct. at 648 (quoting City of Boerne, 521 U.S. at 530-531).

This Court properly applied these principles in upholding the Equal Pay Act. The "evil" targeted by the Equal Pay Act is intentional sex discrimination in wages. To prevail on an Equal Pay Act claim, an employee must first prove unequal pay for

"equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions," 29 U.S.C. 206(d)(1). Once an employee has proven equal work and unequal pay, an employer may avoid liability by showing that the wage differentials are based on a seniority system, a merit system, a system that awards compensation based on quantity or quality of production, or "on any other factor other than sex." 29 U.S.C. 206(d)(1)(iv); Corning Glass Works v. Brennan, 417 U.S. 188, 196-197 (1974); Fallon v. Illinois, 882 F.2d 1206, 1211 (7th Cir. 1989). In essence, Congress has established a rebuttable presumption that unequal pay of opposite-sex employees for equal work is most likely intentional sex discrimination, but permits employers to rebut that presumption by showing that the actual cause of the disparity is a factor other than sex.

This modest rebuttable presumption is a proportional and congruent response to the problem the Equal Pay Act is designed to address. As this Court noted in its initial decision, Congress in enacting the Equal Pay Act "had substantial justification to conclude that pervasive discrimination existed whereby women were paid less than men for equal work." Varner, 150 F.3d at 717. Furthermore, Congress concluded not only that intentional sex discrimination in wages existed, but also that it was being "successfully concealed" by some employers. H.R. Rep. No. 1714, 87th Cong., 2d Sess. 2 (1962). To ferret out this intentional but concealed discrimination and to redress the

effects of past discrimination, it was reasonable for Congress to establish a statutory rebuttable presumption that reflects its finding of widespread sex discrimination and that places the burden on the employer to show that there is another reason for the disparity in pay. See, e.g., Georgia v. United States, 411 U.S. 526, 536-539 (1973); South Carolina v. Katzenbach, 383 U.S. 301, 332 (1966). Cf. also Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 28 (1976); Mobile, Jackson & Kansas City R.R. Co. v. Turnipseed, 219 U.S. 35, 43 (1910). If men and women are paid different wages for the same work and the employer cannot show that any reason other than gender explains the disparity, then it is reasonable to assume that the employer's action is motivated by gender. See Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979) (disparate impact would signal intentional discrimination "if impact could not be plausibly explained on a neutral ground").

b. Defendants do not argue that the Equal Pay Act is not tailored to uncover intentional discrimination. Rather they speculate (Br. 30) that liability might be imposed where an employer actually has a gender-neutral reason for the disparity in wages but fails to carry its burden of persuading the trier of fact. From this assumption, they conclude (Br. 29) that the Equal Pay Act "deviates from the established constitutional standards concerning discrimination."

Even assuming that shifting the burden to the employer once the plaintiff has established a prima facie case of differential

pay based on sex constitutes a "deviation" from the constitutional standard, the modest burden-shifting provisions of the Equal Pay Act are well within the scope of Congress' "broad" Section 5 enforcement powers. City of Boerne, 521 U.S. at 518. As this Court held in its initial decision, Congress may exercise its Section 5 power to prohibit conduct that is not itself unconstitutional -- including prohibiting practices that have a discriminatory effect but are not intentionally discriminatory -- as long as there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Varner, 150 F.3d at 715-716 (quoting City of Boerne, 521 U.S. at 520).

In Kimel, the Supreme Court once again explained that "Congress' § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment. Rather, 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." 120 S. Ct. at 644. The Court reaffirmed that "[d]ifficult and intractable problems often require powerful remedies" and that Section 5 permits Congress to enact "reasonably prophylactic legislation." Id. at 648. The Court stated that in appropriate circumstances even legislation that prohibits "very little conduct likely to be held unconstitutional" could be a valid exercise of Congress' Section

5 authority. Ibid. Similarly, in Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627, 629 (1999), the Court reiterated that "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies." (emphasis added; citations and quotations omitted).

c. Defendants' attempt (Br. 15-20) to align this case with Kimel and Florida Prepaid is misguided. In Kimel, the 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 "reasonably prophylactic" Section 5 legislation as applied to the States. The Court's reasoning, however, only underscores the critical differences between the ADEA and the Equal Pay Act. The Kimel Court began its analysis by noting 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 governmental age classifications in each of the three cases in which they had been challenged under the Equal Protection Clause. See 120 S. Ct. at 645. Measuring the scope of the ADEA's requirements "against the backdrop of * * * equal protection jurisprudence," id. at 647, 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.

Because the ADEA imposed "substantially higher burdens on state employers" than the Equal Protection Clause, it was not immediately clear whether the ADEA was an appropriate means of deterring and remedying constitutional violations, or whether it was "merely an attempt to substantively redefine the States' legal obligations with respect to age discrimination." Id. at 648. 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 648. 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 649 (emphasis added).

In light of the limited protection given to age classifications, the breadth of the prohibition on age discrimination in the ADEA, and the lack of any indication that Congress was aware of a pattern of arbitrary age discrimination by the States, the Supreme Court concluded that the application of the ADEA to the States "was an unwarranted response to a perhaps inconsequential problem." Id. at 648-649. In so ruling, the Court emphasized the difference between intentional discrimination based on age, which is presumptively valid, and

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.'" Id. at 645 (quoting City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985)).

This Court's recent decision in Erickson v. Board of Governors, No. 98-3614, 2000 WL 307121 (Mar. 27, 2000), confirms this reading of Kimel. Although we disagree with the result reached by the majority in that case, the opinion made clear that one of the "principal propositions" of Kimel was that "because the rational-basis test applies to age discrimination, almost all of the ADEA's requirements stand apart from the Constitution's rule." Id. at *3. Thus, Erickson properly understood that Kimel's analysis would be irrelevant when the classification at issue is subject to heightened scrutiny, as it is in the Equal Pay Act and Title VII.

Similarly in Florida Prepaid, the Court held that the Patent Remedy Act, which authorized damage claims against States for patent infringement was not a valid exercise of Congress' Section 5 authority. The Court emphasized that patent infringement by States would violate the due process clause only in narrow circumstances: if it was intentional (as opposed to inadvertent) and if state tort law failed to provide an adequate remedy. See Florida Prepaid, 527 U.S. at 644-645. In contrast to the narrow application of the due process clause to patent infringement, the Court found that the federal legislation applied to an "unlimited

range of state conduct" and that no attempt had been made to confine its sweep to conduct that was "arguabl[y]" unconstitutional. Id. at 646. The Court further determined that Congress had found little, if any, evidence that States were engaging in unconstitutional patent infringement that would justify such an "expansive" remedy. Ibid.

Thus, in both Kimel and Florida Prepaid, the Court determined that Congress had imposed sweeping remedies prohibiting a broad range of constitutional conduct with very little evidence that there was any unconstitutional conduct to remedy. That is not the case here. In contrast to the ADEA, which the Court determined prohibited "very little conduct likely to be held unconstitutional," Kimel, 120 S. Ct. at 648, virtually all of the conduct proscribed by the Equal Pay Act is intentional sex discrimination that would violate the Equal Protection Clause when practiced by the State.

d. Defendants' argument (Br. 9, 16) that Congress was required to make explicit findings that States have engaged in a widespread pattern of unconstitutional conduct in order to abrogate their immunity in the Equal Pay Act ignores this critical distinction. Legislation is valid under Section 5 of the Fourteenth Amendment if it can reasonably "be viewed as remedial or preventive legislation aimed at securing the protections of the Fourteenth Amendment." Florida Prepaid, 527 U.S. at 639. When a statute is carefully tailored to detect and remedy constitutional violations, a court need not inquire about

the frequency at which such constitutional violations are actually occurring. Thus, the Supreme Court has twice upheld as a proper exercise of Congress' 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. See Williams v. United States, 341 U.S. 97 (1951); Screws v. United States, 325 U.S. 91 (1945).[4/] The Court looked for evidence of constitutional violations in Kimel and Florida Prepaid only because it determined that some evidence of constitutional violations was necessary to justify the breadth of the remedy. Here, by contrast, the Equal Pay Act is tailored to ferret out intentional discrimination on the basis of sex.

In any event, there can be no question that States have engaged in a widespread pattern of unconstitutional sex discrimination and that the problem is not an "inconsequential"

[4/] We also disagree with defendants' contention (Br. 9, 16) that Congress is powerless to exercise its Section 5 authority absent evidence of a "widespread" "pattern of constitutional violations" by States. A violation of a single individual's constitutional rights can cause devastating harm and is a proper subject of Congress' concern, regardless of whether it is part of a larger pattern of unlawful conduct. Cf. H.R. Rep. No. 1714, 87th Cong., 2d Sess. 2 (1962). Furthermore, even in situations where States are by and large complying with their constitutional obligations, Congress may determine that the availability of strong enforcement measures makes it more likely that voluntary compliance will continue. Cf. S. Rep. No. 2263, 81st Cong., 2d Sess. 3 (1950). Although the extent to which states have engaged in widespread constitutional violations may be relevant in determining whether a prophylactic remedy that sweeps far beyond what the Constitution requires is appropriate, see, e.g., Kimel, 120 S. Ct. at 648-649, the Court has never suggested that Congress' Section 5 authority is limited to attacking widespread constitutional violations.

one. In J.E.B. v. Alabama, 511 U.S. 127 (1994), the Supreme Court concluded that "'our Nation has had a long and unfortunate history of sex discrimination,' a history which warrants the heightened scrutiny we afford all gender-based classifications today." Id. at 136 (citation omitted); see also United States v. Virginia, 518 U.S. 515, 531-532, 545 (1996) (noting, inter alia, governmental discrimination against women in employment).

We disagree with defendants' suggestion (Br. 9, 16) that Congress itself must make findings even if the evidence of constitutional violations by States is otherwise apparent. "Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 212 (1997). Rather, the Equal Pay Act must be upheld as a valid exercise of Congress' Section 5 authority so long as this Court can "discern some legislative purpose or factual predicate that supports the exercise of that power." EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983).

While the legislative record may be of assistance in determining whether such a legislative purpose and/or factual predicate exists, "the lack of support in the legislative record is not determinative." Florida Prepaid, 527 U.S. at 646. In its recent decision in Kilcullen v. New York State Department of Labor, No. 99-7208, 2000 WL 217465 (Feb. 24, 2000), the Second Circuit rejected the State's argument that Kimel required Congress to develop a contemporaneous legislative record demonstrating that Section 504 of the Rehabilitation Act was

valid Section 5 legislation. The court explained that "[t]he ultimate question remains not whether Congress created a sufficient legislative record, but rather whether, given all of the information before the Court, it appears that the statute in question can appropriately be characterized as legitimate remedial legislation." Id. at *4 (emphasis added). Applying this standard, the court upheld Section 504 based, in part, on the subsequent legislative record that Congress accumulated in passing the Americans With Disabilities Act, sixteen years after the enactment of Section 504. See id. at *4-*5.

Because the Court itself has determined that women "have suffered * * * at the hands of discriminatory state actors during the decades of our Nation's history," J.E.B., 511 U.S. at 136, it is not necessary to examine whether the legislative history also supports that conclusion. As the Fifth Circuit recently noted, given the national history of sex discrimination by States and the heightened scrutiny accorded gender classifications, it would be difficult "'to understand how a statute enacted specifically to combat [gender] discrimination could fall outside the authority granted to Congress by § 5.'" Pederson v. Louisiana State Univ., 201 F.3d 388, 406 (5th Cir. 2000) (upholding Title IX) (quoting Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir. 1997)).

e. The seven other circuits that have considered the issue thus far have all upheld the Equal Pay Act as a congruent and proportional means of enforcing the Fourteenth Amendment's prohibition on sex discrimination. See Anderson v. State Univ.

of New York, 169 F.3d 117 (2d Cir. 1999), vacated, 120 S. Ct. 929 (2000); Usery v. Allegheny County Inst. Dist., 544 F.2d 148, 155 (3d Cir. 1976), cert. denied, 430 U.S. 946 (1977); Usery v. Charleston County Sch. Dist., 558 F.2d 1169, 1171 (4th Cir. 1977); Ussery v. Louisiana, 150 F.3d 431 (5th Cir. 1998), cert. dismissed, 526 U.S. 1013 (1999); Timmer v. Michigan Dep't of Commerce, 104 F.3d 833 (6th Cir. 1997); O'Sullivan v. Minnesota, 191 F.3d 965 (8th Cir. 1999). Most recently, in Hundertmark v. Florida Department of Transportation, No. 98-4924, 2000 WL 253593, at *2 (Mar. 7, 2000), the Eleventh Circuit upheld the Equal Pay Act after finding that nothing in the Supreme Court's decision in Kimel required a different result. Because the applicable legal standards have not changed after Kimel, this Court should reaffirm its earlier holding that the Equal Pay Act is valid Section 5 legislation.

2. Even Assuming That Congress Was Required To Identify Evidence Of Sex Discrimination By State Employers, The Legislative Record Before Congress Is Replete With Such Evidence

a. In any event, defendants' claim (Br. 21) that Congress "heard no evidence suggesting that there existed a widespread pattern of gender discrimination by the States" ignores the relevant legislative record. Congress enacted the Equal Pay Act in 1963 after concluding that employers were intentionally and systematically paying women less than men for equal work.[5/]

[5/] See S. Rep. No. 176, 88th Cong., 1st Sess. 1 (1963); H.R. Rep. No. 1714, 87th Cong., 2d Sess. 2 (1962); S. Rep. No. 2263, 81st Cong., 2d Sess. 2, 4 (1950); S. Rep. No. 1576, 79th Cong., 2d Sess. 2-3 (1946); Corning Glass Works v. Brennan, 417 U.S.

(continued...)

Congress found that intentional wage discrimination against women workers was "not confined to industrial women workers," but occurred in all "business and professional occupations," requiring corrective legislation to protect "all * * * women citizens."[6/] Congress was entitled to infer that the discriminatory practices and stereotyped attitudes pervading the private sector also occur in the public sector. See Hundertmark, 2000 WL 253593, at * 2. Generally, there is no reason to think that employment decisions made by individuals acting under color of state law are more likely to be free of bias than the decisions of their private counterparts.[7/]

b. Contrary to defendants' contention (Br. 21), however, Congress did not rest its decision to extend the Equal Pay Act to

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[5/](...continued)
188, 195 (1974).

[6/] See S. Rep. No. 1576, 79th Cong., 2d Sess. 3 (1946); H.R. Rep. No. 2687, 79th Cong., 2d Sess. 3, 5 (1946).

[7/] Cf. Jefferson County Pharm. Ass'n v. Abbot Labs., 460 U.S. 150, 158 (1983) ("economic choices made by public corporations * * * are not inherently more likely to comport with the broader interests of national economic well being than are those of private corporations acting in furtherance of the interest of the organization and its shareholders"). The language from Kimel on which defendants rely (Br. 19) does not hold that Congress can never infer discrimination by state employers based on widespread evidence of discrimination in the private sector. Rather, the primary point was that evidence of intentional age discrimination by private employers, which itself would often not be unconstitutional even if practiced by the States, did not support a finding of "unconstitutional age discrimination in the public sector." Kimel, 120 S. Ct. at 649; see also Erickson, 2000 WL 307121, at *5 (noting that intentional discrimination on the basis of disability, a classification subject to rational-basis review, is "constitutionally permissible" so long as it is "[r]ational discrimination"). By contrast, intentional sex discrimination by state actors is virtually always unconstitutional.

the States solely on evidence of discrimination in the private sector. In the early 1970s, Congress addressed discrimination against women by States in several pieces of legislation. By the time Congress extended the protections of the Equal Pay Act to all state employees in 1974, Congress had (1) enacted the Education Amendments of 1972, which extended a non-discrimination prohibition to all education programs receiving federal funds and extended the Equal Pay Act to all employees of educational institutions, see Pub. L. No. 92-318, tit. IX, 86 Stat. 373-375 (1972); (2) extended Title VII to state and local employers, see Pub. L. No. 92-261, § 2, 86 Stat. 103 (1972); and (3) sent the Equal Rights Amendments to the States to be ratified, see S. Rep. No. 450, 93d Cong., 1st Sess. 4 (1973). Prior to enacting such legislation, Congress held extensive hearings[8/] and received

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

numerous reports from the Executive Branch[9/] on the subject of sex discrimination by States.

The testimony and reports illustrate that sex discrimination by state employers was common,[10/] that state employers discriminated against women in wages,[11/] and that existing

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[9/] See, e.g., The President's Task Force on Women's Rights and Responsibilities, A Matter of Simple Justice 6 (Apr. 1970); U.S. Dep't of Labor, Women's Bureau, Fact Sheet on the Earnings Gap (Feb. 1970) (reprinted in Discrimination at 17-19).

[10/] See, e.g., President's Task Force at 4 ("At the State level there are numerous laws * * * which clearly discriminate against women as autonomous, mature persons."); Economic at 131 (Aileen C. Hernandez, former member EEOC) (State government employers "are notoriously discriminatory against both women and minorities"); Discrimination 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"); Equal Rights at 479 (Mary Dublin Keyserling, National Consumers League) ("It is in these fields of employment [of state and local employees and employees of educational institutions] that some of the most discriminatory practices seriously limit women's opportunities.").

[11/] See, e.g., Discrimination at 301 (Dr. Bernice Sandler) ("Salary discrepancies abound. * * * Numerous national studies have documented the pay differences between men and women with the same academic position and qualifications."); id. at 645 (Peter Muirhead, Department of Health, Education and Welfare) ("the inequities are so pervasive that direct discrimination must be considered as p[l]aying a share, particularly in salaries, hiring, and promotions, especially to tenured positions"); id. at 971-973 (Helen Astin) (one of types of discrimination "most frequently encountered" was "differential salaries for men and women with the same training and experience"); id. at 1034-1036 (Alan Bayer & Helen Astin) (empirical study of recent doctoral recipients reports that "[a]cross all work settings [including public universities], fields, and ranks, women experience a significantly lower average academic income than do men in the academic teaching labor force for the same amount of time. Within each work setting, field, and rank category, women also have lower salaries."); 1971 House EEO at 486, 489 (Modern Language Association) (in survey of college professors, half from public colleges, "salary differences between men and women full-time faculty members are substantial" even "at equivalent ranks in the same departments"); id. at 510 (Dr. Ann Scott) (National

(continued...)

remedies, both at the state and federal level, were inadequate.[12/] Much of this evidence revealed widespread and entrenched employment discrimination against women in state universities.[13/]

[11/](...continued)
Organization for Women) ("It is within these categories [exempted from the Equal Pay Act, including state governments], however, that women suffer some of the worst discrimination.).

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

[13/] 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 at 302 (Dr. Bernice Sandler, Women's Equity Action League) (noting instances of employment discrimination by state-supported universities); id. at 379 (Prof. Pauli Murray) ("in light of the (continued...)

Congress also heard detailed testimony that women at state universities throughout the country were consistently paid less than male employees for substantially the same work.[14/]

The evidence before Congress supported the conclusion of one of the members of the United States Commission on Civil Rights that "[s]tate and local government employment has long been recognized as an area in which discriminatory employment

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[13/](...continued)
overwhelming testimony here, clearly there is * * * a pattern or practice of discrimination in many educational institutions"); id. at 452 (Virginia Allan, President's Task Force) (noting "the growing body of evidence of discrimination against women faculty in higher education"); Equal Rights at 269 (Dr. Bernice Sandler) ("there is no question whatsoever of a massive, pervasive, consistent, and vicious pattern of discrimination against women in our universities and colleges").

[14/] See Higher Educ. at 298 (describing a report from the Department of Health, Education and Welfare finding that at the University of Michigan "women are in many cases getting less pay than men with the same job titles, responsibilities, and experience * * * Equally alarming is the documented tendency toward giving men higher starting salaries than women in the same job classifications."; id. at 274-275; Discrimination at 151, 159 (Dr. Ann Scott) (survey of State University of New York "women in the same job categories, administrative job categories, with the same degrees as men received considerably less money as a group, and as the salaries increase so does the gap"); id. at 1225 (Jane Loeb) ("Comparison of the salaries of male and female academicians at the University [of Illinois] strongly suggest that men and women within the same departments, holding the same rank, tend not to be paid the same salaries: women on the average earn less than men."); id. at 1228 (Salary Study at Kansas State Teachers College) ("Women full-time faculty members experience wide discrimination throughout the college in matters of salaries for their respective academic ranks."); Equal Rights at 268 (Dr. Bernice Sandler) ("At the University of Arizona, women who were assistant and associate professors earned 15 percent less than their male counterparts. Women instructors and full professors earned 20 percent less.); ibid. (in a "comprehensive study at the University of Minnesota, women earned less in college after college, department after department -- in some instances the differences exceeding 50 percent").

practices deny jobs to women and minority workers."[15/] A comprehensive EEOC study of employment discrimination in state and local government in 1974, the year that Congress extended the Equal Pay Act to the States, concluded 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."[16/]

In the committee reports and floor debates of legislation aimed at redressing discrimination against women, Congress noted the "scope and depth of the discrimination" against women and stated that "[m]uch of this discrimination is directly attributable to governmental action both in maintaining archaic discriminatory laws and in perpetuating discriminatory practices in employment, education and other areas."[17/] Congress concluded

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[15/] Economic at 556 (Hon. Frankie M. Freeman, U.S. Commission on Civil Rights).

[16/] 2 U.S. Equal Employment Opportunity Comm'n, Minorities and Women in State and Local Government 1974, State Governments, iii Research Report No. 52-2 (1977). This study concluded that women who worked for the state government were disproportionately concentrated in low paying jobs and "earned somewhat less than men similarly employed." Id. at 25.

[17/] H.R. Rep. No. 554, 92d Cong., 1st Sess. 51 (1971) (report for Education Amendments) (emphasis added); S. Rep. No. 689, 92d Cong., 2d Sess. 7 (1972) (report on the Equal Rights Amendment); see also H.R. Rep. No. 238, 92d Cong., 1st Sess. 4 (1971) (report for Title VII finds "there exists a profound economic discrimination against women workers"); id. at 19 ("Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment."); H.R. Rep. No. 359, 92d Cong., 1st Sess. 5-6 (1971)

(continued...)

that "conscious" sex discrimination in wages by States was widespread,[18] and that current laws were ineffective.[19]

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[17] (...continued)
(Separate Views) (report for ERA finding that "women as a group are the victims of a wide variety of discriminatory [state] laws" including "restrictive work laws"); id. at 11 (minority views of Rep. Celler) ("Discrimination against women does exist. Of that there is no denial.").

[18] Discrimination at 434 (Rep. Mink) ("these differences [in median pay of men and women professors] do not occur by accident. They are the direct result of conscious discriminatory policies."); see also 118 Cong. Rec. 5805 (1972) (Sen. Bayh) (figures show that "those women who are promoted often do not receive equal pay for equal work."); id. at 4818 (Sen. Stevenson) ("There are some who would say that much of this discrimination is caused by [lack of equal education]. * * * But the comparative figures I quoted above, for comparative ranks and salaries within educational institutes * * * belie such simplistic explanations."); 117 Cong. Rec. 39,250 (1971) (Rep. Green) ("Our two volume hearing record contains page upon page citing the pervasiveness of this discrimination [against women] in our society and in our institutions."); 118 Cong. Rec. 5804 (1972) (Sen. Bayh) ("Over 1,200 pages of testimony document the massive, persistent patterns of discrimination against women in the academic world."); id. at 5805 (Sen. Bayh) ("According to testimony submitted during the '1970 [Discrimination] Hearings,' the University of Pittsburgh calculated that the University was saving $2,500,000 by paying women less than they would have paid men with the same qualifications."); id. at 1840 (Sen. Javits) ("Not only is this applicable to minorities; it is also applicable on the ground of sex. The committee report reflects that very clearly in terms of the differentiation not only between members of minorities and others * * * by States and their local subdivisions, but also, it applies to women where, based upon overall figures, it is obvious that something is not right in terms of the way in which the alleged concept of equal opportunity is being administered now."); id. at 1992 (Sen. Williams) ("[T]his discrimination does not only exist as regards to the acquiring of jobs, but that it is similarly prevalent in the area of salaries and promotions where studies have shown a well-established pattern of unlawful wage differentials and discriminatory promotion policies."); Discrimination at 740 (Rep. Griffiths) ("Numerous studies document the pay differences between men and women with the same academic rank and qualifications.").

[19] See 118 Cong. Rec. 274 (1972) (Sen. McGovern) ("weak, ineffective tools the Federal Government is [currently] using to (continued...)

Even 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."[20/] This statement is consistent with Congress' assessment that the "well documented" record revealed "systemic[]," "rampant," "widespread and persistent," and "endemic" sex discrimination by States,[21/] which "persist[ed]" despite the fact that it was

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[19/](...continued)
combat" discrimination against women); Discrimination at 235 (Rep. May) (without the extension of laws to educational institutions "there is no effective legal way to get at them!"); id. at 745 (Rep. Griffiths) (referring to Equal Pay Act: "We must use every available tool and mechanism to combat sex discrimination which irrationally and unjustly deprives millions of people of equal employment opportunities simply because of their sex."); id. at 750 (Rep. Heckler) (Fourteenth Amendment "has not been effective in preventing sex discrimination against teachers in public schools"); Equal Rights at 85, 87 (Rep. Mikva) (extension of Title VII to States and Equal Pay Act to professionals "needed interim to and supplemental to" ERA and is "implementation under the 14th amendment"); 118 Cong. Rec. 4931-4932 (Sen. Cranston) (employees of educational institutions "are, at present, without an effective Federal remedy in the area of employment discrimination"); 118 Cong. Rec. 5804 (1972) (Senator Bayh) ("a strong and comprehensive measure is needed to provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women").

[20/] Economic at 105-106.

[21/] 118 Cong. Rec. 3936, 5804 (1972) (Sen. Bayh) ("[d]iscrimination against females on faculties and in administration is well documented"); Discrimination at 3 (Rep. Green) ("too often discrimination against women has been either systematically or subconsciously carried out" by "State legislatures"); id. at 235 (Rep. May) ("[S]ex discrimination in the colleges and universities of this Nation * * * it seems to me, that it is running rampant!"); 118 Cong. Rec. 4817 (1972) (Sen. Stevenson) ("Sex discrimination, especially in employment, (continued...)

"violative of the Constitution of the United States."[22/]

c. Thus, when Congress considered extending the Equal Pay Act to the States, it did so against the backdrop of all of the information previously put before it demonstrating that state employers were discriminating against women, including paying women less than men for the same job. Defendants' suggestion (Br. 22) that this Court may only look to evidence that Congress specifically considered when it extended the Equal Pay Act to the States has no support in law or logic. Members of Congress do not ignore information they learned from one set of hearings or debates when looking at another proposal on the same subject. Rather, "[o]ne appropriate source [of evidence for Congress] is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national

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[21/](...continued)
is not new. But it is widespread and persistent."); Equal Rights at 95 (Rep. Ryan) ("Discrimination levied against women does exist; in fact, it is endemic in our society."); see also 118 Cong. Rec. 5804 (1972) (Sen. Bayh) ("It is difficult to indicate the full extent of discrimination against women today."); id. at 5982 (Sen. Gambrell) ("In my study of the proposed equal rights amendment to the Constitution, I have become aware that women are often subjected to discrimination in employment and remuneration in the field of education."); id. at 4817 (Sen. Stevenson) ("grave problem of discrimination in employment against women"); Discrimination at 738 (Rep. Griffiths) ("The extent of discrimination against women in the educational institutions of our country constitutes virtually a national calamity."); id. at 750 (Rep. Heckler) ("Discrimination by universities and secondary schools against women teachers is widespread."); Equal Rights at 55 (Sen. Ervin) ("No one can gainsay the fact that women suffer many discriminations in [the employment] sphere, both in respect to the compensation they receive and the promotional opportunities available to them.").

[22/] 118 Cong. Rec. 1412 (1972) (Sen. Byrd).

concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area." Fullilove v. Klutznick, 448 U.S. 448 (1980) (Powell, J., concurring). This Court has agreed that in considering whether legislation is within Congress' power, courts should not limit their consideration solely to the legislative record concerning that statute, but should also consider Congress' "accumulated institutional expertise" on the subject. United States v. Kenney, 91 F.3d 884, 890-891 (7th Cir. 1996).

d. In any event, the hearings that focused on extending the Equal Pay Act to the States[23/] also contained extensive evidence of gender discrimination by States as employers. There was testimony that because public employees were exempted from the Equal Pay Act, wages for women in such jobs "are most often lower than their male counterparts."[24/] There was also testimony that existing anti-discrimination remedies were insufficient.[25/] In addition to testimony that unequal pay for equal work was

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[23/] See To Amend the Fair Labor Standards Act: Hearings Before the Gen. Subcomm. on Labor of the House Comm. on Educ. & Labor, Pt. 1, 91st Cong., 2d Sess. (1970) (1970 FLSA); Fair Labor Standards Amendments of 1971: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor & Pub. Welfare, Pt. 1, 92d Cong., 1st Sess. (1971) (1971 FLSA); Fair Labor Standards Amendments of 1973: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor & Pub. Welfare, App. Pt. 2, 93d Cong., 1st Sess. (1973) (1973 FLSA).

[24/] 1971 FLSA at 292-293 (Judith A. Lonquist, National Organization for Women).

[25/] See 1971 FLSA at 288-289 (Lucille Shriver, National Federation of Business and Professional Women's Clubs) (extending Title VII is not sufficient); 1973 FLSA at 46a (1973) (National Federation of Business and Professional Women's Clubs) (coverage of state employers "is sorely needed").

pervasive at universities and colleges generally,[26] witnesses identified a number of state universities in particular that were paying women less than men for the same work.[27] Witnesses also testified that women public school teachers were underpaid in comparison to their male counterparts.[28]

3. Congress Is Not Required To Consider Whether State Remedies Are Adequate When Exercising Its Section 5 Authority

Defendants argue (Br. 25-26) that Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 119 S. Ct. 2199 (1999) establishes that Congress may abrogate the States' immunity only if it finds that the state remedies are "insufficient." Defendants are wrong.

In Florida Prepaid, the Court considered whether the Patent Remedy Act, which authorized suits for damages against States for

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[26] See 1971 FLSA at 321 (Dr. Bernice Sandler); id. at 350 (Alan Bayer & Helen Astin); id. at 363 (Helen Bain, National Education Association), id. at 747 (Jean Ross, American Association of University Women).

[27] See 1971 FLSA at 322-323 (evidence from University of Arizona, University of Minnesota, Kansas State Teachers College, University of Pittsburgh, and Michigan State University that "[w]omen are simply paid less than their male counterparts"); id. at 747 (University of Minnesota); 1970 FLSA at 477-478 (Wilma Scott Heide, National Organization of Women) (SUNY Buffalo, University of Maryland and University of Pittsburgh); id. at 558 (Salary Study at Kansas State Teachers College).

[28] See 1971 FLSA at 317 (Dr. Ann Scott, National Organization for Women) ("discrimination of salaries paid to woman teachers pervades the entire public school system"); see also Equal Rights at 548 (Citizen's Advisory Council on the Status of Women) ("numerous distinctions based on sex still exist in the law" including "[d]ual pay schedules for men and women public school teachers"); 1971 Senate EEO at 433 (National Organization for Women) ("For example, in Salina, Kansas, the salary schedule provides $250 extra for male teachers; in Biloxi, Mississippi, men receive an additional $200.").

patent violations, was an appropriate exercise of Congress' Section 5 authority. As the Court noted, the Due Process Clause does not prohibit all interference with property rights, only interference that deprives property "without due process." Id. at 2208. Thus, patent infringement by States does not violate the Constitution unless, at minimum, "the State provides no remedy or only inadequate remedies, to injured patent owners." Ibid. The Court, therefore, examined the adequacy of state remedies only because a procedural due process violation is not complete until the State deprives a person of property and denies an adequate remedy. Ibid.

A violation of the Equal Protection Clause is complete at the time the state actor invidiously discriminates, regardless of whether redress is available in the courts. As the Supreme Court held in United States v. Raines, 362 U.S. 17, 25 (1960), it is "established as a fundamental proposition that every state official, high and low, is bound by the Fourteenth and Fifteenth Amendments. * * * [I]t follows from this that Congress has the power to provide for the correction of the constitutional violations of every such official without regard to the presence of other authority in the State that might possibly revise their actions." (citation omitted and emphasis added). Congress heard testimony that although a number of States had statutes prohibiting gender discrimination, state remedies were generally inadequate.[29/] Such evidence was not necessary for Congress to

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[29/] See n.12, supra; see also Hearings on H.R. 1, The Civil

(continued...)

act, however, because "[t]he Federal Government need not rely on state remedies to ensure that its interests are served." Bill Johnson's Restaurants v. NLRB, 461 U.S. 731, 747 n.14 (1983).

II

THE DISPARATE IMPACT PROVISIONS OF TITLE VII ARE A VALID EXERCISE OF CONGRESS' SECTION 5 AUTHORITY

In its initial decision, this Court ruled that defendants had forfeited any argument that disparate impact provisions of Title VII exceeded Congress' Section 5 authority because they had not raised it in the district court and had not adequately briefed it on appeal. See Varner v. Illinois State Univ., 150 F.3d 706, 717 n.14 (7th Cir. 1998). This determination is the law of the case and is not affected by the Supreme Court's vacatur and remand for reconsideration in light of Kimel, particularly since defendants did not seek certiorari on the disparate impact issue. See United States v. M.C.C. of Florida, Inc., 967 F.2d 1559, 1562 (11th Cir. 1992). Moreover, this Court previously held that defendants' prior briefing on this issue was inadequate because, among other things, it did not explain why this Court should overrule its decisions in Liberles v. County of Cook, 709 F.2d 1122, 1135 (7th Cir. 1983), and United States v. City of Chicago, 573 F.2d 416, 422-423 (7th Cir. 1978), which

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[29/](...continued)
Rights Act of 1991: Hearings Before the House Comm. on Educ. & Labor, 102d Cong., 1st Sess. 799-800 (1991) (1991 Civil Rights Act) (NOW Legal Defense and Education Fund) (describing survey finding that most states do not provide adequate remedies for discrimination and concluding that Congress "cannot look to the states to provide * * * adequate remedies and disincentives for discrimination").

upheld the disparate impact provisions of Title VII as valid Section 5 legislation. See Varner, 150 F.3d at 717 n.14. Defendants have not even attempted to cure this defect in their brief on remand, as they still do not cite this precedent, much less offer any "compelling reasons," Goshtasby v. Board of Trustees of the Univ. of Ill., 141 F.3d 761, 766 (7th Cir. 1998), as to why it should be overruled.

Assuming this Court decides to reach this issue, defendants' arguments should be rejected. Congress' power to enforce the Equal Protection Clause includes the power to prohibit discriminatory effects on a protected class, even though the Constitution only prohibits actions that are intentionally discriminatory. See Lopez v. Monterey County, 525 U.S. 266, 282-283 (1999); City of Boerne v. Flores, 521 U.S. 507, 518 (1997); City of Rome v. United States, 446 U.S. 156, 177 (1980); South Carolina v. Katzenbach, 383 U.S. 301, 325-337 (1966). In accord with every other circuit to address the issue,[30/] this Court applied this principle to uphold the Title VII disparate impact standard as valid Fourteenth Amendment enforcement legislation in Liberles and City of Chicago.

To the extent that defendants are arguing that this Court's precedent is no longer valid in light of City of Boerne v. Flores

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[30/] See Guardians Ass'n v. Civil Serv. Comm'n, 630 F.2d 79, 88 (2d Cir. 1980), cert. denied, 452 U.S. 940 (1981); United States v. Virginia, 620 F.2d 1018, 1023 (4th Cir.), cert. denied, 449 U.S. 1021 (1980); Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 689 n.7 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981); Blake v. City of Los Angeles, 595 F.2d 1367, 1373 (9th Cir. 1979), cert. denied, 446 U.S. 928 (1980).

and its progeny, the Eleventh Circuit properly rejected this argument in In re Employment Discrimination Litigation Against Alabama, 198 F.3d 1305 (1999). In that case, the court, after an exhaustive analysis of the disparate impact provisions of Title VII, concluded that those provisions could reasonably be characterized as "preventive rules" designed to root out intentional discrimination. Id. at 1322.

The Eleventh Circuit's analysis is sound. In enacting the disparate impact provisions, Congress reasonably determined that if an employment practice has a significantly discriminatory result, and the employer cannot offer a good business justification for the practice, then "some invidious purpose is probably at work." Ibid. This presumption is a reasonable means of detecting the "often subtle" intentional discrimination against women, see Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979), that might otherwise not be effectively challenged. See Griggs v. Duke Power Co., 401 U.S. 424, 431, 435 (1971). Disparate impact suits also prevent employers from perpetuating the effects of prior educational and other state-sponsored discrimination by requiring employers to "remove barriers that have operated in the past" to deny employment opportunities to members of the protected class and that cannot be justified by business necessity. Id. at 430.

Although much of the above-cited precedent regarding the scope of Congress' Section 5 authority involved claims of racial discrimination, the fact that this case involves sex discrimination does not support a different result.

"Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination." Feeney, 442 U.S. at 273 (emphasis added). In Kimel v. Florida Board of Regents, 120 S. Ct. 631, (2000), the Court equated Congress' power to remedy racial and sexual discrimination, noting that intentional sex discrimination, like intentional race discrimination, is presumptively unconstitutional and that women, like racial minorities, have been subjected to a "history of purposeful unequal treatment." Id. at 645-646 (quotations omitted).

Defendants' argument (Br. 34) that Title VII's legislative history "is devoid of any evidence of gender discrimination by the States" blatantly misapprehends the legislative record. As noted previously (pp. 21-32, supra), by the time that Congress extended Title VII to state and local governments in 1972, see Pub. L. No. 92-261, § 2, 86 Stat. 103 (1972), it had heard extensive evidence that state and local government employers were engaged in "gross discrimination against women" and that extending Title VII to state and local governments was necessary to ensure equal employment opportunities for women.[31/] Morever, the legislative history of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, in which Congress codified the disparate impact standard established in Griggs, supports Congress' conclusion that the disparate impact standard is critical in "root[ing] out the subtle and not-so-subtle practices

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[31/] President's Task Force at 6; see also nn.10-28, supra.

of discrimination" against "minorities and women."[32/] The evidence considered by Congress revealed that "sex discrimination hinders women at every step and at every level of the workforce," including sex discrimination by state and local governments.[33/] In light of the extensive evidence of discrimination against women and the deference accorded Congress in determining whether

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[32/] Civil Rights Act of 1990: Hearing Before the Senate Comm. on Labor & Human Resources, 101st Cong., 1st Sess. 2 (1989) (1990 Civil Rights Act) (Senator Kennedy); see also id. at 231 (Marcia Greenberger, National Women's Law Center) ("Disparate impact suits have been extremely important to women trying to overcome arbitrary requirements for employment"); id. at 21, 26 (William T. Coleman, Jr.); H.R. Rep. No. 40, Pt. 1, 102d Cong., 1st Sess. 21 (1991) ("[e]xperts have identified numerous types of employment practices which may perpetuate sex segregation and artificially limit the earnings potential of women and minorities"); H.R. Rep. No. 40, Pt. 2, 102d Cong., 1st Sess. 9 (1991) (the "requirement that the employer must prove business necessity [has] played a major role in opening many job opportunities for the first time to women, blacks and other minorities"); 1991 Civil Rights Act at 379-382 (Brenda Berkman, United Women Firefighters) (Griggs standard effective in overturning standards designed to keep women from becoming firefighters); id. at 434 (David L. Rose, Esq., former Chief of Employment Litigation Section, Civil Rights Division, United States Department of Justice) (without legislation, employers would reinstitute artificial and unnecessary barriers to employment of women and minorities).

[33/] Women & the Workplace: The Glass Ceiling: Hearing Before the Subcomm. on Employment & Productivity of the Senate Comm. on Labor & Human Resources, 102d Cong., 1st Sess. 43 (1991) (Judith Lichtman, Women's Legal Defense Fund); see, e.g., 1990 Civil Rights Act at 35 (Hon. Shirley M. Hufstedler) (discussing discrimination against women in state and local government, including the North Carolina Highway Patrol); id. at 218 (Judith Lichtman, Women's Legal Defense Fund) (extending Title VII to state and local governments has increased employment opportunities for women); id. at 758 (National Education Association) (discussing pending cases alleging sex discrimination against public school teachers); 1991 Civil Rights Act at 50 (Heidi Hartmann, Institute for Women's Policy Research) (female secondary school teachers earn less than male secondary school teachers); id. at 379-382 (Brenda Berkman, United Women Firefighters) (women face discrimination when attempting to become firefighters).

legislation is appropriate to enforce the Equal Protection Clause, the disparate impact provisions of Title VII's prohibition on sex discrimination should be upheld as a valid exercise of Congress' Section 5 power.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32(d)(2). This brief was prepared using WordPerfect 7 and contains 11,162 words, and 1278 lines of monospace type.

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I hereby certify that on April 3, 2000, two copies of the foregoing Brief for the United States as Intervenor and one copy of the Separate Appendix were served by first-class mail, postage prepaid, on the following counsel:

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