No. 02-8003

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LORNA WILKES,

Plaintiff-Appellant
v.

WYOMING DEPARTMENT OF EMPLOYMENT,
DIVISION OF FAIR LABOR STANDARDS,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF WYOMING
THE HONORABLE WILLIAM DOWNES

BRIEF FOR THE UNITED STATES AS INTERVENOR

ORAL ARGUMENT CONDITIONALLY REQUESTED

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STATEMENT OF RELATED CASES:

There are no prior or related appeals to this case.

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BRIEF FOR THE UNITED STATES AS INTERVENOR[1]

JURISDICTIONAL STATEMENT

The plaintiff filed a complaint in the United States District Court for the District of Wyoming, alleging that the Wyoming Department of Employment, Fair Labor Standards Division 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

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[1] The United States intervened in this case pursuant to 28 U.S.C. 2403(a) for the sole purpose of defending the constitutionality of the abrogation of States' Eleventh Amendment immunity to suits by private parties under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Because the district court did not rule on the Eleventh Amendment issue, the United States did not file an opening brief in this appeal. However, because the defendant-appellee raised the Eleventh Amendment issue in its Brief as Appellee, the United States now files this Brief as Intervenor to respond to the constitutional arguments raised by the State defendant.

U.S.C. 1331.[2] This appeal is from a final judgment entered on December 12, 2001. The defendant filed a timely notice of appeal on January 10, 2001. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1291. See *Puerto Rico Aqueduct and Sewer Auth.* v. *Metcalf and 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

This is an action brought by plaintiff Lorna Wilkes against her employer, the Wyoming Department of Employment, Fair Labor Standards Division. She alleges in her amended complaint, filed May 1, 2001, that the defendant violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, by discriminating against her in the terms and conditions of her employment on the basis of her sex, by harassing her on the basis of her sex, and by retaliating against her after she complained about the alleged discrimination and harassment (App. 7-12).[3]

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[2] The district court dismissed the underlying action as barred by *res judicata*. The United States does not take a position on that issue or on the merits of the underlying complaint.

[3] References to "App. _" are to page numbers in the "Plaintiff's/Appellant's Appendix"; references to "R. _" are to entries on the district court docket sheet; references to "Br. _" are to pages in the appellee's brief.

The plaintiff is seeking compensatory damages, attorneys' fees, punitive damages, and equitable relief (App. 12). In the district court, the state defendant moved for judgment on the pleadings on the ground that, *inter alia*, Title VII is not valid Section 5 legislation, and therefore is not a valid abrogation of States' Eleventh Amendment immunity (App. 20-23). The United States intervened in the case pursuant to 28 U.S.C. 2403(a) for the sole purpose of defending the constitutionality of Title VII's abrogation of Eleventh Amendment immunity (R. 42, R. 44). The district court dismissed the plaintiff's complaint on grounds of *res judicata*, and declined to reach the Eleventh Amendment issue (App. 24-33). The plaintiff filed a timely notice of appeal (App. 34).

SUMMARY OF ARGUMENT

Congress may abrogate the Eleventh Amendment immunity of States when it both clearly expresses its intent to do so and acts under the authority of Section 5 of the Fourteenth Amendment. In extending the reach of Title VII to cover state employers, Congress unquestionably satisfied both of these requirements. The defendant does not contest the fact that Congress clearly expressed its intent to abrogate States' immunity.

Although the defendant argues that the disparate impact provision of Title VII is not a congruent and proportionate response to constitutional violations, there is no disparate impact claim in this case. The complaint alleges intentional disparate treatment on the basis of sex, which is conduct prohibited by the Equal Protection Clause. Because Title VII's protections against disparate treatment on

the basis of sex, including sexual harassment, codify the protections of the Constitution, they are by definition congruent and proportional, and that is all this Court need find to uphold the abrogation. Contrary to the defendant's contentions, when Congress merely codifies the protections of the Constitution, it need not compile evidence of a widespread pattern of unconstitutional conduct by States. But even if Congress were required to amass such evidence, it clearly did so before extending the reach of Title VII to cover States.

ARGUMENT

Section 1 of the Fourteenth Amendment to the United States Constitution prohibits States from "deny[ing] to any person within its jurisdiction the equal protection of the laws." Section 5 of that Amendment commands that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Congress's power under Section 5 includes the authority to enact "corrective legislation * * * such as may be necessary and proper for counteracting * * * such acts and proceedings as the states may commit or take, and which by the amendment they are prohibited from committing or taking." *The Civil Rights Cases*, 109 U.S. 3, 13-14 (1883). As the Supreme Court recently reaffirmed, "[i]t is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions

are entitled to much deference."[4] *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 80-81 (2000) (citing *City of Boerne* v. *Flores*, 521 U.S. 507, 536 (1997)).

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

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

The defendant 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, the defendant asserts (Br. 8-9, n.1) that recent Supreme Court opinions have "call[ed] into question" the continuing efficacy of that decision. But

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[4] 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)).

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.

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

The central inquiry in determining whether legislation is a valid exercise of Congress's Section 5 authority is whether the legislation is an appropriate means of deterring or remedying constitutional violations or whether it is "so out of proportion to a supposed remedial or preventive object that it cannot be understood

as responsive to, or designed to prevent, unconstitutional behavior." *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 85 (2000) (quoting *City of Boerne*, 521 U.S. at 532). Because Title VII's prohibition of disparate treatment on the basis of sex codifies the protections of Section 1 of the Fourteenth Amendment, it is by definition appropriate Section 5 legislation.

During the past five years – a period of time in which the defendant claims (Br. 8-9) that "the United States Supreme Court has formulated a new test for determining whether Congress has properly enacted federal legislation pursuant to its Section 5 enforcement authority" – six courts of appeals have held that Title VII's abrogation is effective. See *Okruhlik* v. *University of Arkansas*, 255 F.3d 615, 624-626 (8th Cir. 2001) (race discrimination, sex discrimination, disparate impact, and retaliation); *Holman* v. *Indiana*, 211 F.3d 399, 402 n.2 (7th Cir. 2000) (sex discrimination), cert. denied, 531 U.S. 880 (2000); *Johnson* v. *University of Cincinnati*, 215 F.3d 561, 571 (6th Cir. 2000) (race discrimination and retaliation), cert. denied, 531 U.S. 1052 (2000); *Jones* v. *WMATA*, 205 F.3d 428, 434 (D.C. Cir. 2000) (retaliation); *In re Employment Discrimination Litig.*, 198 F.3d 1305, 1321-1322 (11th Cir. 1999) (disparate impact); *Ussery v. Louisiana*, 150 F.3d 431, 434-435 (5th Cir. 1998) (sex discrimination). This Court should do the same.

A. *Title VII's Prohibition Of Disparate Treatment On The Basis Of Sex Proscribes Unconstitutional State Conduct*

The plaintiff in this case has alleged that she "was harassed and discriminated against due to gender" while employed by the defendant (Amended

Complaint at ¶ 6).[5] Title VII makes it unlawful for employers (including state

[5] The plaintiff has also claimed that the defendant retaliated against her for complaining about being subjected to discrimination on the basis of sex, in violation of 42 U.S.C. 2000e-3(a). Although the defendant has not asserted that Title VII's anti-retaliation provision is not valid Section 5 legislation, and has therefore waived its right to do so, if this Court wishes to reach the issue, it should find that the anti-retaliation protection afforded in 42 U.S.C. 2000e-3 is an element of an individual's right to be free from state-sponsored disparate treatment on the basis of sex, and is therefore appropriate Section 5 legislation.

The Supreme Court has admonished 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. 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). Indeed, Congress heard testimony that victims of discrimination often face retaliation. See *Discrimination Against Women: Hearings Before the Special Subcomm. on Educ. of the House Comm. on Educ. and Labor*, Pt. 1, 91st Cong., 2d Sess. 302 (1970) (*Discrimination*) (Dr. Bernice Sandler, Women's Equity Action League) (stating that it is "very dangerous for women students or women faculty to openly complain of sex discrimination on their campus" and giving examples of retaliation at public universities); *Economic Problems of Women: Hearings Before the Joint Econ. Comm.*, Pt. 1, 93d Cong., 1st Sess. 138 (1973) (*Economic*) (Aileen Hernandez, former member, EEOC) (giving examples of retaliation against employees who complained of discrimination). The authority to prohibit States from punishing those who seek to

(continued...)

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)(1). This provision prohibits intentional discrimination on the basis of sex, see *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187, 199-200 (1991), including sexual harassment, *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57, 64-66 (1986). Likewise, the Equal Protection Clause prohibits discrimination by state governments on the basis of sex. *United States* v. *Morrison*, 529 U.S. 598, 620 (2000); *United States* v. *Virginia*, 518 U.S. 515, 523 (1996); *J.E.B.* v. *Alabama*, 511 U.S. 127, 130-131 (1994); *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 723 (1982). This Court has also held that the Equal Protection Clause prohibits sexual harassment by state employers. *Starrett* v. *Wadley*, 876 F.2d 808, 814 (10th Cir. 1989).

This Court has held that the elements needed to prove a plaintiff's Title VII disparate treatment claim are the same as those needed to prove an equal protection violation in the employment context. See *English* v. *Colorado Dep't of Corr.*, 248 F.3d 1002, 1007-1008 (10th Cir. 2001); *Drake* v. *City of Fort Collins*, 927 F.2d 1156, 1162 (10th Cir. 1991).

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[5](...continued)
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.

The defendant does not assert that Title VII's prohibition of disparate treatment on the basis of sex makes unlawful any constitutional conduct.[6] Instead, it asserts that Title VII's prohibition of practices with an unjustified disparate impact makes unlawful a certain amount of conduct that is constitutionally permissible. But that issue is not before the court: the plaintiff in this case did not assert a disparate impact claim, and the defendant is not subject to liability for a disparate impact violation.[7]

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[6] Indeed, Title VII's prohibition on sex-based discrimination is less restrictive of state employment practices than the Constitution. Unlike the Constitution, which requires States to justify all classifications on the basis of sex with an "exceedingly persuasive justification," *United States* v. *Virginia*, 518 U.S. at 524 (internal citation and quotation marks omitted), Title VII permits employers to classify employees on the basis of sex where "sex * * * 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).

[7] Even if the Court were to reach the validity of Title VII's prohibition of disparate impact, it should find that Congress has the power under Section 5 of the Fourteenth Amendment to prohibit employment practices that have the effect of sex discrimination (in the absence of a business necessity), even without proof of purposeful discrimination.

First, a statute prohibiting disparate impact is appropriate when facially neutral criteria are used, at least in part, as a subterfuge for intentional discrimination. Congress was aware of massive discrimination against women, both overt and subtle, in the area of employment. See *infra* nn.8-14. Concealed intentional discrimination, combined with persistent "subconscious stereotypes and prejudices," have led Congress to make unlawful practices that can "in operation be functionally equivalent to intentional discrimination," despite the inability of a plaintiff to prove discriminatory intent. *Watson* v. *Fort Worth Bank and Trust*, 487 U.S. 977, 990, 987 (1988). Second, the disparate impact standard recognizes the continuing repercussions of past intentional discrimination and seeks to assure that employers are not acting in a way that perpetuates those effects. See *infra* nn.8-14. As the Court explained, it is appropriate to prohibit "practices that are fair in form, but discriminatory in operation," when the practice is not a business necessity, because the disparate impact is likely traceable to the

(continued...)

B. *Title VII's Prohibition Of Disparate Treatment On The Basis Of Sex Need Not Be Justified By A Legislative Record*

The bulk of the defendant's argument is that Title VII cannot be appropriate Section 5 legislation because "[t]he legislative history of the 1972 amendments to Title VII contains no evidence of a pattern of unconstitutional sex discrimination in employment by state governments," and Congress therefore "lacked authority under Section 5 to authorize private individuals to sue state governments for money damages in federal court for violations of Title VII" (Br. 13-14). But the defendant misconstrues the decisions of the Supreme Court.

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[7](...continued)
long history of intentional discrimination. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430-431 (1971); see also *Gaston County* v. *United States*, 395 U.S. 285, 297 (1969) (Voting Rights Act) ("'Impartial' administration of the literacy test today would serve only to perpetuate these inequities [in education] in a different form."). In crafting policies to "enforce" a prohibition on intentional discrimination, Congress may take cognizance of the longstanding history of discrimination in this country on the basis of sex, the difficulty of proving discriminatory intent, and the well-established maxim that "an invidious discriminatory purpose may often be inferred from * * * the fact, if it is true, that the law bears more heavily on one [group] than another." *Washington* v. *Davis*, 426 U.S. 229, 242 (1976).

This Court should follow every other court of appeals that has addressed this issue by upholding the constitutionality of disparate impact claims under Title VII as a valid exercise of Congress's power to enforce the Fourteenth Amendment in cases involving sex discrimination. See *Okruhlik*, 255 F.3d at 626-627; *In re Employment Discrimination Litig.*, 198 F.3d at 1321-1322; *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); *Scott* v. *City of Anniston*, 597 F.2d 897, 899 (5th Cir. 1979), cert. denied, 446 U.S. 917 (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); *Liberles* v. *County of Cook*, 709 F.2d 1122, 1135 (7th Cir. 1983); *Blake* v. *City of L.A.*, 595 F.2d 1367, 1373 (9th Cir. 1979), cert. denied, 446 U.S. 928 (1980).

When a statute simply codifies the protections of Section 1 of the Fourteenth Amendment, it is by definition appropriate Section 5 legislation because the statute is congruent and proportional to the targeted constitutional harm. Thus, for example, the Supreme Court has twice upheld, as a proper exercise of Congress's Section 5 authority, 18 U.S.C. 242, a criminal statute that prohibits persons acting under color of law from depriving individuals of constitutional rights, without inquiring into the extent to which such criminal acts occurred. See *Williams* v. *United States*, 341 U.S. 97 (1951); *Screws* v. *United States*, 325 U.S. 91 (1945); cf. *Ex parte Virginia*, 100 U.S. (10 Otto) 339 (1879) (upholding criminal statute prohibiting exclusion of blacks from juries as valid Section 5 legislation).

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

The Supreme Court's recent decisions in *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), do not hold to the contrary. Those cases simply recognize that, when a statute regulates a significant amount of conduct that is not prohibited by the Constitution, it may be necessary to examine the record before Congress to

determine whether Congress could have reasonably concluded that such a prophylactic remedy was appropriate.

In *Kimel*, the Supreme Court held that the Age Discrimination in Employment Act (ADEA), which prohibits employers, subject to a limited *bona fide* occupational qualification defense, from taking age into account in making employment decisions, was not appropriate Section 5 legislation. The Court emphasized that intentional discrimination based on age is only subject to rational basis review under the Equal Protection Clause and that the Supreme Court had upheld, as constitutional, governmental age classifications in each of the three cases that had come before it. See *Kimel*, 528 U.S. at 83. Measuring the scope of the ADEA's requirements "against the backdrop of * * * equal protection jurisprudence," *id*. at 86, the Court concluded that the ADEA prohibited "substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard." *Ibid*. The Court therefore found it necessary to analyze whether a "[d]ifficult and intractable" problem of unconstitutional age discrimination existed that would justify the broad and "powerful" regulation imposed by the ADEA. *Id*. at 88. Surveying the record before Congress, however, the Court determined that "Congress never identified any pattern of age discrimination by the States, much less *any* discrimination whatsoever that rose to the level of constitutional violation." *Id*. at 89 (emphasis added). The Supreme Court concluded, therefore,

that the application of the ADEA to the States "was an unwarranted response to a perhaps inconsequential problem." *Ibid.*

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

dozen" incidents of relevant conduct (*i.e.*, potentially unconstitutional discrimination by States as employers against people with disabilities), *id.* at 369, and had not made a specific finding that discrimination in public sector employment was pervasive, *id.* at 370. The Court found that the record was insufficient to justify the prophylactic remedies in Title I. *Id.* at 374.

Thus, the Court looked for evidence of constitutional violations in *Kimel* and *Garrett*, *only* because it determined that evidence of constitutional violations was necessary to justify the breadth of the remedy. See also *Kovacevich* v. *Kent State Univ.*, 224 F.3d 806, 820 n.6 (6th Cir. 2000) ("In *Kimel*, the Court only considered legislative findings after determining that on its face, the ADEA prohibited substantially more state employment decisions and practices than would likely be held unconstitutional under the Fourteenth Amendment."); see also *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."). Those concerns are not present here. In contrast to the conduct at issue in *Kimel* and *Garrett*, the plaintiff here seeks to hold the defendant liable for the kind of sex discrimination that, when practiced by the States, violates the Equal Protection Clause.

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

Even if Congress were entitled to codify the protections of the Equal Protection Clause only in response to a widespread pattern of unconstitutional

discrimination by States, there is no doubt that, in 1972, Congress had before it sufficient evidence that States had engaged in unconstitutional discrimination on the basis of sex.

1. In the early 1970s, Congress addressed discrimination against women by States in several pieces of legislation. Specifically, Congress: (1) extended Title VII to state and local employers, see Pub. L. No. 92-261, § 2, 86 Stat. 103 (1972); (2) sent the Equal Rights Amendments to the States to be ratified, see S. Rep. No. 450, 93d Cong., 1st Sess. 4 (1973); and (3) extended the protections of the Equal Pay Act, which prohibits gender discrimination in wages, to all state employees, see Pub. L. No. 93-259, 88 Stat. 55 (1974).

Prior to taking such actions, Congress held extensive hearings and received reports from the Executive Branch on the subject of sex discrimination by States. The testimony and reports illustrate that sex discrimination by state employers was common,[8] and that existing remedies, both at the state and federal level, were

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[8] See, *e.g.*, The President's Task Force on Women's Rights and Responsibilities, *A Matter of Simple Justice* 4 (Apr. 1970) ("At the State level there are numerous laws * * * which clearly discriminate against women as autonomous, mature persons."); U.S. Equal Employment Opportunity Comm'n, 2 *Minorities and Women in State and Local Government 1974, State Governments*, Research Report No. 52-2, iii (1977) (study concluding that "equal employment opportunity has not yet been fulfilled in State and local government" and that "minorities and women continue to be concentrated in relatively low-paying jobs, and even when employed in similar positions, they generally earn lower salaries than whites and men, respectively"); *Economic*, Pt. 1, at 131 (Aileen C. Hernandez, former member EEOC) (State government employers "are notoriously discriminatory against both women and minorities"); *id.*, Pt. 3, at 556 (Hon. Frankie M. Freeman, U.S. Comm'n on Civil Rights) ("[S]tate and local government employment has long been recognized as an area in which discriminatory employment practices deny jobs to women and minority workers."); *Equal Rights for Men and Women*

(continued...)

inadequate.[9] Indeed, even after Congress extended Title VII to the States, the Chair of the Equal Employment Opportunity Commission agreed that state and local

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[8](...continued)
1971: Hearings Before Subcomm. No. 4 of the House Comm. on the Judiciary, 92d Cong., 1st Sess. 479 (1971) (*Equal Rights*) (Mary Dublin Keyserling, National Consumers League) ("It is in these fields of employment [of state and local employees and employees of educational institutions] that some of the most discriminatory practices seriously limit women's opportunities."); *id.* at 548 (Citizen's Advisory Council on the Status of Women) ("numerous distinctions based on sex still exist in the law" including "[d]iscrimination in employment by State and local governments").

[9] See *Discrimination*, Pt. 1, 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 the Fourteenth Amendment were interpreted to prohibit sex discrimination, legislation "would be needed if we are to begin to correct many of the inequities that women face"); *Equal Employment Opportunity Enforcement Procedures: Hearings Before the Gen. Subcomm. on Labor of the House Comm. on Educ. and Labor*, 91st Cong., 1st and 2d Sess. 248 (1969-1970) (*1970 House EEO*) (Dr. John Lumley, National Education Association) ("We know we don't have enough protection for women in employment practices."); *Equal Employment Opportunities Enforcement Act: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare*, 91st Cong., 1st Sess. 51-52 (1969) (*1969 Senate EEO*) (William H. Brown III, Chair, EEOC) ("most of these [State and local governmental] jurisdictions do not have effective equal job opportunity programs, and the limited Federal requirements in the area (e.g., 'Merit Systems' in Federally aided programs) have not produced significant results"); *Higher Education Amendments of 1971: Hearings Before the Special Subcomm. on Educ. of the House Comm. on Educ. and Labor*, Pt. 2, 92d Cong., 1st Sess. 1131 (1971) (*Higher Educ.*) (study by American Association of University Women reports that even state schools that have good policies don't seem to follow them); *Discrimination*, Pt. 1, at 133 (Wilma Scott Heide, Pennsylvania Human Relations Comm'n) (urging coverage of educational institutions by Title VII because "[o]nly a couple States have or currently contemplate any prohibition of sex discrimination in educational institutions"); *1969 Senate EEO* at 170 (Howard Glickstein, U.S. Comm'n on Civil Rights) (some States' laws do not extend to state employers).

governments were "the biggest offenders" of Title VII's prohibition on sex discrimination.[10]

In the committee reports and floor debates concerning legislation aimed at redressing sex discrimination, Congress noted the "scope and depth of the discrimination,"[11] 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."[12] This conclusion is consistent with Congress's assessment that the "well documented" record revealed "systematic[]" and "widespread" sex discrimination

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

[11] H.R. Rep. No. 554, 92d Cong., 1st Sess. 51 (1971) (report for Education Amendments).

[12] 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. 19 (1971) ("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) (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"); 118 Cong. Rec. 5982 (1972) (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.").

by States,[13] which persisted despite the fact that it was "violative of the Constitution of the United States."[14]

2. In any event, there is no question that States have engaged in a widespread pattern of unconstitutional sex discrimination. The Supreme Court has noted 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." *J.E.B.* v. *Alabama*, 511 U.S. 127, 136 (1994) (citation omitted); see also *United States* v. *Virginia*, 518 U.S. 515, 531-532, 545 (1996) (noting, *inter alia*, governmental discrimination on the basis of sex in employment); *Personnel Adm'r* v. *Feeney*, 442 U.S. 256, 273 (1979) ("Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination."). Because the Court itself has determined that the States have engaged in pervasive sex discrimination, it is not necessary to examine whether the legislative history also supports that conclusion. See *Kilcullen* v. *New York State Dep't of Labor*, 205

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[13] 118 Cong. Rec. 3936, 5804 (1972) (Sen. Bayh) ("[d]iscrimination against females on faculties and in administration is well documented"); *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*, Pt. 1, at 3 (Rep. Green) ("too often discrimination against women has been either systematically or subconsciously carried out" by "State legislatures"); *Discrimination*, Pt. 2, at 750 (Rep. Heckler) ("Discrimination by universities and secondary schools against women teachers is widespread.").

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

F.3d 77, 81 (2d Cir. 2000) ("The 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.") (emphasis added). In extending the reach of Title VII to cover state employers, Congress can be assumed to have relied on the same evidence underlying these decisions and, in some cases, on the decisions themselves.

The conclusions of Congress based on an extensive record confirm the pronouncements of the Supreme Court – that States had consistently engaged in invidious discrimination on the basis of sex. Nothing more is required of Congress to justify its extension of Title VII to the States.

CONCLUSION

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

STATEMENT REGARDING ORAL ARGUMENT

If this Court chooses to reach the Eleventh Amendment immunity question, the United States requests that the Court grant oral argument so that the Court may decide this important question of constitutional law with the benefit of the full assistance of the parties, including the intervenor United States of America.

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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2002, two copies of the foregoing Brief for the United States as Intervenor were served by federal express on the following counsel:

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