No. 98-6300

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

_____

AUDRA BEASLEY,

Plaintiff-Appellee

UNITED STATES OF AMERICA,

Intervenor-Appellee

v.

ALABAMA STATE UNIVERSITY, et al.,

Defendants-Appellants

_____

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

_____

BRIEF FOR THE UNITED STATES AS INTERVENOR-APPELLEE

_____

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AND CORPORATE DISCLOSURE STATEMENT

CASE NO. 98-6300

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STATEMENT REGARDING ORAL ARGUMENT

We believe that the constitutionality of the federal statute abrogating Eleventh Amendment immunity is clear and that oral argument is not necessary. But should the Court determine it is needed, the United States believes that its presence at oral argument would be appropriate. See 28 U.S.C. 2403(a).

CERTIFICATE OF TYPE SIZE AND STYLE

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* Authorities chiefly relied upon are marked with an asterisk.

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STATEMENT OF JURISDICTION

Plaintiff filed a complaint in the United States District Court for the Middle District of Alabama, alleging that the Alabama State University and its officials violated, inter alia, Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq. For the reasons discussed in this brief, the district court had jurisdiction over the case pursuant to 28 U.S.C. 1331.

This appeal is from an interlocutory judgment entered on March 23, 1998. The defendants filed a notice of appeal on April 20, 1998. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

Whether 42 U.S.C. 2000d-7, which removes States' Eleventh Amendment immunity from discrimination suits brought under Title IX, is a valid exercise of Congress' authority under the Spending Clause or Section 5 of the Fourteenth Amendment.

STATEMENT OF THE CASE

1. Title IX of the Education Amendments of 1972 prohibits any "education program or activity receiving Federal financial assistance" from "subject[ing] to discrimination" any person "on the basis of sex." 20 U.S.C. 1681(a). The Supreme Court has held that individuals have a private right of action against entities receiving federal funds that violate this prohibition. See Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 76 (1992); Cannon v. University of Chicago, 441 U.S. 677, 705-706 (1979).

In 1985, the Supreme Court held that an analogous statutory provision that prohibited discrimination on the basis of disability by programs receiving federal funds (Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794) was not clear enough to evidence Congress' intent to authorize private damage actions against state entities in federal court. See Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 245-246 (1985). In response to Atascadero, Congress enacted 42 U.S.C. 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003, 100 Stat. 1807, 1845 (1986). Section 2000d-7 provides in pertinent part:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

2. This is an action by a private plaintiff against her school, the Alabama State University and its officials (the defendants), under, inter alia, Title IX. The defendants moved to dismiss the action for lack of subject-matter jurisdiction based on the Supreme Court's decision in Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), arguing that the statutory provision removing States' Eleventh Amendment immunity for Title IX claims was unconstitutional. Pursuant to 28 U.S.C. 2403(a), the United States was granted leave to intervene to defend the constitutionality of the statute.

The district court denied the defendants' motion on March 23, 1998, holding that by accepting federal funds after the enactment of 42 U.S.C. 2000d-7, the defendants had consented to the waiver of their Eleventh Amendment immunity. See Beasley v. Alabama State Univ., 3 F. Supp.2d 1304, 1311-1316 (M.D. Ala. 1998). This timely appeal followed.

3. Because the constitutionality of Title IX's abrogation of Eleventh Amendment immunity is a question of law, this Court reviews the issue de novo. See Sea Servs. of the Keys, Inc. v. Florida, No. 97-4309, 1998 WL 681473, at *1 (11th Cir. Oct. 2, 1998).

SUMMARY OF ARGUMENT

The Eleventh Amendment is no bar to this action brought by a private plaintiff under Title IX to remedy discrimination on the basis of sex. Section 2000d-7 contains an express statutory abrogation of Eleventh Amendment immunity for Title IX suits. This abrogation is a valid exercise of Congress' power under the Spending Clause to impose unambiguous conditions on States receiving federal funds. By enacting Section 2000d-7, Congress put States on notice that accepting federal funds waived their Eleventh Amendment immunity to discrimination suits under Title IX. In addition, Section 2000d-7 is a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment, which authorizes Congress to enact "appropriate legislation" to "enforce" the Equal Protection Clause. Five courts of appeals have upheld Section 2000d-7 on this basis. Under either power, the abrogation for Title IX suits is constitutional and the district court had jurisdiction over the action.

ARGUMENT

42 U.S.C. 2000d-7 VALIDLY REMOVES ELEVENTH AMENDMENT IMMUNITY FOR CLAIMS UNDER TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

Section 2000d-7 of Title 42 provides that a "State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of * * * title IX of the Education Amendments of 1972." The Supreme Court has characterized Section 2000d-7 as meeting its requirement that Congress must unambiguously express in the text of the statute

its intent to remove the Eleventh Amendment bar to private suits against States in federal court. See Lane v. Pena, 518 U.S. 187, 198 (1996); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 72 (1992); id. at 78 (Scalia, J., concurring); see also Lussier v. Dugger, 904 F.2d 661, 669 (11th Cir. 1990). Indeed, the defendants concede (Br. 34-35) that Congress intended to remove their Eleventh Amendment immunity. The only question is whether it is a valid exercise of any of Congress' powers.[1/]

As explained more fully below, the defendants waived their

[1/] Defendants argue (Br. 35-38) that the Section 2000d-7 removed immunity only for non-damage remedies. But when suing States in their own name, there is no Eleventh Amendment distinction between monetary and non-monetary relief: "the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment." Seminole Tribe, 517 U.S. at 58. By providing in Section 2000d-7 that a "State shall not be immune under the Eleventh Amendment * * * from suit in Federal court" for Title IX claims, Congress meant exactly what it said. When confronted with such an unambiguous and unlimited abrogation, there is no need for a distinct abrogation for damage claims. Cf. Pennsylvania Dep't of Corrections v. Yeskey, 118 S. Ct. 1952, 1956 (1998). Were there any uncertainty, Section 2000d-7(a)(2), which assures that no special rules of statutory construction are used to limit those remedies available against a state entity, confirms this interpretation.

Eleventh Amendment immunity to Title IX suits when they elected to accept federal funds after the effective date of Section 2000d-7. Moreover, Congress properly abrogated Eleventh Amendment immunity from Title IX claims pursuant to its authority under Section 5 of the Fourteenth Amendment.

A. Defendants Waived Their Eleventh Amendment Immunity To Title IX Suits By Accepting Federal Funds After The Enactment Of Section 2000d-7

Section 2000d-7 may be upheld as a valid exercise of Congress' power under the Spending Clause, Art. I, § 8, Cl. 1, to prescribe conditions for States that voluntarily accept federal financial assistance. Contrary to the defendants' claims, the Supreme Court's decision in Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), does not somehow prohibit such an exercise of the Spending Clause power. Indeed, it is well-settled that Congress may condition the receipt of federal funds on a waiver of Eleventh Amendment immunity so long as, as here, the statute provides unequivocal notice to the States of this condition.

States may waive their Eleventh Amendment immunity and agree to be sued in federal court. See Seminole Tribe, 517 U.S. at 65; Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 276 (1959); Premo v. Martin, 119 F.3d 764, 770-771 (9th Cir. 1997), cert. denied, 118 S. Ct. 1163 (1998). A State may manifest its waiver in at least two ways: (1) through an express statutory provision (not at issue here), or (2) by participating in a program "where Congress explicitly abrogates a state's Eleventh Amendment immunity as an express condition of participation in

federal programs." Cate v. Oldham, 707 F.2d 1176, 1182 n.4 (11th Cir. 1983). Under the second method of waiver, a State may "by its participation in the program authorized by Congress * * * in effect consent[] to the abrogation of that immunity." Edelman v. Jordan, 415 U.S. 651, 672 (1974); see also Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 n.1 (1985) ("[a] State may effectuate a waiver of its constitutional immunity by * * * waiving its immunity to suit in the context of a particular federal program").

Atascadero held that Congress had not provided sufficiently clear statutory language to remove States' Eleventh Amendment immunity for Section 504 claims. And it reaffirmed that "mere receipt of federal funds" was insufficient to constitute a waiver. 473 U.S. at 246. But the Court stated that if a statute "manifest[ed] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity," the federal courts would have jurisdiction over States that accepted federal funds. Id. at 247; see also Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147, 153 (1981) (Stevens, J., concurring).

Section 2000d-7 was a direct response to the Supreme Court's decision in Atascadero. See 131 Cong. Rec. 22,344-22,345 (1985). And Section 2000d-7 makes unambiguously clear that Congress intended the States to be amenable to suit in federal court under Title IX if they accepted federal funds. See Lane, 518 U.S. at

200 (acknowledging "the care with which Congress responded to our decision in Atascadero by crafting an unambiguous waiver of the States' Eleventh Amendment immunity" in Section 2000d-7). As the Department of Justice explained to Congress at the time the statute was being considered, "[t]o the extent that the proposed amendment is grounded on congressional spending powers, [it] makes it clear to states that their receipt of Federal funds constitutes a waiver of their [E]leventh [A]mendment immunity." 132 Cong. Rec. 28,624 (1986).

Section 2000d-7 thus embodies exactly the type of unambiguous condition discussed by the Court in Atascadero, by putting States on express notice that part of the "contract" for receiving federal funds was the requirement that they consent to suit in federal court for alleged violations of Title IX. Thus, as the Ninth Circuit held in a case involving Section 2000d-7's abrogation for Section 504 claims, Section 2000d-7 "manifests a clear intent to condition a state's participation on its consent to waive its Eleventh Amendment immunity." Clark v. California, 123 F.3d 1267, 1271 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998).

The defendants do not contest that Congress has the authority under the Spending Clause to require States that accept federal funds to comply with the substantive requirements of Title IX. See Grove City College v. Bell, 465 U.S. 555, 575 (1984). Indeed, "[c]ourts have held innumerable times that the federal government may impose conditions on the receipt and use

of federal funds." Alabama v. Lyng, 811 F.2d 567, 568 (11th Cir.), cert. denied, 484 U.S. 821 (1987) (collecting cases). They also concede (Br. 34 n.10) that Congress may authorize individuals to enforce their Title IX right to be free from sex discrimination through private rights of action in court.

They argue, however, (Br. 25-34) that Congress cannot condition the federal funds on a State's agreement to waive its Eleventh Amendment immunity so that these suits can be heard in federal court.[2/] But defendants do not explain why they should not be held to this part of the bargain. They acknowledge (Br. 29-30) that when exercising its Spending Clause power, there is no constitutional "prohibition on the indirect achievement of

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[2/] Defendants raise the specter (Br. 32-33) of large damage awards as a reason not to give effect to Section 2000d-7. But even without the waiver of Eleventh Amendment immunity, defendants would be subject to damage actions. Because the Eleventh Amendment only immunizes States from private suits in federal court, defendants can be sued for damages in state court by private plaintiffs for violations of federal law. See Kimel v. Board of Regents, 139 F.3d 1426, 1429 n.4 (11th Cir. 1998) (opinion of Edmondson, J.); Hufford v. Rodgers, 912 F.2d 1338, 1341 & n.1 (11th Cir. 1990), cert. denied, 499 U.S. 921 (1991); Coleman v. Alabama State Docks Terminal Ry., 596 So.2d 912, 913 (Ala. 1992) (entertaining federal cause of action against State that was barred in federal court by Eleventh Amendment); Jacoby v. Arkansas Dep't of Educ., 962 S.W.2d 773 (Ark. 1998) (same).

objectives which Congress is not empowered to achieve directly." South Dakota v. Dole, 483 U.S. 203, 210 (1987).[3/] Indeed, the Court held that the federalism-based limitations on Congress' power to directly regulate States that are embodied in the Tenth Amendment do "not concomitantly limit the range of conditions legitimately placed on federal grants." Ibid. (citing Oklahoma v. Civil Serv. Comm'n, 330 U.S. 127 (1947)). That is because, as this Court explained, "those who seek federal financial assistance, whether it be states, non-profit organization[s] or individuals, have a choice whether to participate in a federal program. But once that decision to participate is made, the grant recipient is bound by any mandatory rules imposed by federal law." Autery v. United States, 992 F.2d 1523, 1527 n.7 (11th Cir. 1993) (dictum), cert. denied, 511 U.S. 1081 (1994); see also Massachusetts v. Mellon, 262 U.S. 447, 480 (1923) ("[T]he powers of the State are not invaded, since the statute imposes no obligation [to accept the funds] but simply extends an option which the State is free to accept or reject.").[4/]

[3/] To the extent defendants' are asking (Br. 30) this Court to follow Justice O'Connor's dissent in Dole, that is beyond this Court's authority.

[4/] For this reason, this Court has consistently rejected claims that conditions attached to the acceptance of federal funds implicate Tenth Amendment concerns. See, e.g., Chiles v. United States, 69 F.3d 1094, 1097 (11th Cir. 1995) (requirement that

(continued...)

The defendants' reliance (Br. 30-31) on the "independent constitutional bar" doctrine, as articulated in Dole, is simply unavailing. As the Supreme Court explained, that doctrine embodies "the unexceptionable proposition that the [spending] power may not be used to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power." Dole, 483 U.S. at 210-211. But the Constitution places no limitations on defendants' choice to waive its Eleventh Amendment immunity. When defendants "succumb[ed] to the blandishments offered by Congress" and waived their Eleventh Amendment immunity by continuing to accept federal funds in light of Section 2000d-7, "the State's action in so

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[4/](...continued)
States receiving federal funds provide benefits to illegal immigrants does not violate Tenth Amendment), cert. denied, 517 U.S. 1188 (1996); Lyng, 811 F.2d at 570 (prohibition on States receiving federal funds for food stamps from taxing food stamp purchases does not violate Tenth Amendment); Florida v. Mathews, 526 F.2d 319, 326 (5th Cir. 1976) (requirement that States receiving federal funds for nursing homes license such homes in a manner specified by federal law does not violate Tenth Amendment).

doing [does] not violate the constitutional rights of anyone." Id. at 211.[5/]

Defendants also suggest (Br. 31-34) that requiring State recipients of federal funds to waive their Eleventh Amendment immunity is coercive. But defendants always have the choice not to accept federal funds. See Grove City, 465 U.S. at 575. "Although we do not doubt that in some cases this may be an unrealistic option," Congress clearly conditioned the receipt of funds on the waiver of immunity to suit in federal court, and if defendants wish to keep their federal money, "that obligation is the price a federally funded school must pay." Board of Educ. v. Mergens, 496 U.S. 226, 241 (1990).

[5/] Defendants suggest throughout their brief that they did not have the authority under state law to waive their Eleventh Amendment immunity in exchange for the federal funds. As this Court recently explained, however, even when not expressly authorized by a "state statute or constitutional provision, a state may consent to a federal court's jurisdiction through its affirmative conduct." In re Burke, 146 F.3d 1313, 1318 (11th Cir. 1998); see also Wisconsin Dep't of Corrections v. Schacht, 118 S. Ct. 2047, 2056 (1998) (Kennedy, J., concurring). Moreover, this Court has recently noted that Alabama's sovereign immunity can sometimes be waived in cases involving breached contracts. See Harbert International, Inc., v. James, No. 97-6793, 1998 WL 716706, at *6-*7 (11th Cir. Oct. 14, 1998).

Having elected to continue accepting federal funds after the effective date of Section 2000d-7, they have waived their Eleventh Amendment immunity to suit in this case. See Clark, 123 F.3d at 1271; Sandoval v. Hagan, 7 F. Supp.2d 1234, 1269, 1271-1272 (M.D. Ala. 1998), appeal pending, No. 98-6598 (11th Cir.); Litman v. George Mason Univ., 5 F. Supp.2d 366, 375-376 (E.D. Va. 1998). "Requiring States to honor the obligations voluntarily assumed as a condition of federal funding * * * simply does not intrude on their sovereignty." Bell v. New Jersey, 461 U.S. 773, 790 (1983).[6/]

[6/] Defendants argue (Br. 36-39) that at the time they accepted the federal funds, they did not know that damages could be recovered against them for violating their obligations, and thus the waiver was ineffective as to damages. Unsurprisingly, they cannot cite a single case that suggests that a recipient must have actual knowledge of the potential remedies available if they fail to comply with the substantive obligations of a federal program. Indeed, the Supreme Court has rejected that argument, holding that States need not be on notice of the "remedies available against a noncomplying State." Bell, 461 U.S. at 790 n.17. While it must be clear that the money comes with "strings" attached, the scope of the attendant duties and remedies are governed by ordinary rules of construction, and defendants need not have known of their precise breadth in order to be bound. See School Bd. of Nassau County v. Arline, 480 U.S. 273, 286 n.15

(continued...)

B. Section 2000d-7 Is A Valid Exercise Of Congress' Power Under Section 5 Of The Fourteenth Amendment

In addition, Section 2000d-7 is also a valid exercise of Congress' authority under Section 5 of the Fourteenth Amendment to permit private suits against States for discriminating against individuals on the basis of sex in violation of federal law.

1. Congress need not expressly state its intent to rely upon its Section 5 authority. See EEOC v. Wyoming, 460 U.S. 226, 243-244 n.18 (1983); Lesage v. Texas, No. 97-50454, 1998 WL 717230, at *3 (5th Cir. Oct. 13, 1998). Nevertheless, the legislative history makes clear that in enacting Section 2000d-7, Congress so intended. See Fitzpatrick v. Bitzer, 427 U.S. 445, 453 n.9 (1976) (relying on legislative history in determining whether "Congress exercised its power under § 5 of the Fourteenth Amendment"). Senator Cranston, the provision's primary sponsor, described the proposed legislation as "clearly authorized" by

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[6/](...continued)
(1987); Bennett v. Kentucky Dep't of Educ., 470 U.S. 656, 665-666, 669 (1985); United States v. Board of Trustees, 908 F.2d 740, 749-750 (11th Cir. 1990); Georgia Ass'n of Retarded Citizens v. McDaniel, 716 F.2d 1565, 1577-1578 (11th Cir. 1983). Based on settled law, the Court in Franklin held that damages were available for violations of Title IX, and applied that holding to the case before it. Although that holding may have "surprised" the defendants in this case, they are bound by that holding just as the defendants in Franklin were.

both the Spending Clause and Section 5 of the Fourteenth Amendment. 131 Cong. Rec. 22,346 (1985). The Senate Committee Report likewise referred to both of these constitutional provisions as permitting abrogation of state immunity. See S. Rep. No. 388, 99th Cong., 2d Sess. 27 (1986). After the Senate version of the bill was adopted in conference, Senator Cranston submitted for the record a letter from the Department of Justice stating that

> [t]he proposed amendment * * * fulfills the requirements that the Supreme Court laid out in Atascadero. Thus, to the extent that the proposed amendment is grounded on congressional powers under section five of the fourteenth amendment, [it] makes Congress' intention 'unmistakably clear in the language of the statute' to subject States to the jurisdiction of Federal courts.

132 Cong. Rec. 28,624 (1986) (citations omitted).

Moreover, it is also clear that Congress' decision to abrogate States' Eleventh Amendment immunity from discrimination cases arising under Title IX is a proper exercise of its Section 5 power. This was conclusively resolved in Fitzpatrick, in which the Court held that Congress' decision to abrogate States' Eleventh Amendment immunity from sex discrimination suits brought under Title VII, 42 U.S.C. 2000e et seq., was a proper exercise of its Section 5 power. See 427 U.S. at 456. The Supreme Court explained that "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." Ibid. (citation omitted). The Court concluded that "Congress may, in determining what is 'appropriate legislation' for the

purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials." Ibid.[7/]

Not surprisingly, every court of appeals considering the constitutional basis of Section 2000d-7 since Seminole Tribe was decided has held that it was an appropriate exercise of Congress' Section 5 authority. See Lesage, 1998 WL 717230, at *2-*4; Franks v. Kentucky Sch. for the Deaf, 142 F.3d 360, 363 (6th Cir. 1998); Doe v. University of Ill., 138 F.3d 653, 660 (7th Cir.

[7/] That Title IX prohibits more than simply disparate treatment does not preclude it from being "appropriate" legislation to enforce the Equal Protection Clause. See City of Boerne v. Flores, 117 S. Ct. 2157, 2169 (1997) ("Congress can prohibit laws with discriminatory effects in order to prevent racial discrimination in violation of the Equal Protection Clause."); United States v. Marengo County Comm'n, 731 F.2d 1546, 1559 & n.20 (11th Cir.), cert. denied, 469 U.S. 976 (1984); Scott v. City of Anniston, 597 F.2d 897, 900 (5th Cir. 1979), cert. denied, 446 U.S. 917 (1980); accord Varner v. Illinois State Univ., 150 F.3d 706, 716-717 (7th Cir. 1998) (upholding Equal Pay Act, which does not require proof of intentional discrimination, as valid Section 5 legislation); Reynolds v. Alabama Dep't of Transp., 4 F. Supp.2d 1092, 1098-1112 (M.D. Ala. 1998) (upholding Title VII disparate impact standard as valid Section 5 legislation), appeals pending, Nos. 98-6474 & 98-6600 (11th Cir.).

1998), petition for cert. filed (July 13, 1998) (No. 98-126); Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir. 1997); Clark, 123 F.3d at 1270. This was also the consensus before Seminole Tribe.[8/]

2. The defendants argue (Br. 23-25) that Section 2000d-7 cannot be valid Section 5 legislation because Title IX was not originally enacted pursuant to the Fourteenth Amendment. We believe it appropriate to focus first on whether Congress validly enacted the abrogation pursuant to Section 5. See Lesage, 1998 WL 717230, at *4; Varner v. Illinois State Univ., 150 F.3d 706, 713 n.7 (7th Cir. 1998); Timmer v. Michigan Dep't of Commerce, 104 F.3d 833, 838-839 n.7 (6th Cir. 1997). For even assuming arguendo that Title IX was solely Spending Clause legislation when originally enacted,[9/] that would not be dispositive as to

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[8/] See United States v. Yonkers Bd. of Educ., 893 F.2d 498, 503 (2d Cir. 1990); Santiago v. New York State Dep't of Correctional Servs., 945 F.2d 25, 31 (2d Cir. 1991) (dictum), cert. denied, 502 U.S. 1094 (1992); Stanley v. Darlington County Sch. Dist., 879 F. Supp. 1341, 1363-1364 (D.S.C. 1995), rev'd in part on other grounds, 84 F.3d 707 (4th Cir. 1996); Martin v. Voinovich, 840 F. Supp. 1175, 1187 (S.D. Ohio 1993).

[9/] As a non-discrimination statute, Title IX as applied to State programs and activities evidences a "legislative purpose * * * that supports the exercise" of Congress' Section 5 power. EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983) (discussing how to

(continued...)

the constitutional basis of Section 2000d-7.

In Fitzpatrick, for example, the Supreme Court found that the abrogation of States' Eleventh Amendment immunity for Title VII suits was a valid exercise of Congress' Section 5 authority, see 427 U.S. at 456, even though Title VII itself originally governed only private employers and was enacted pursuant to the Commerce Clause. See United Steelworkers v. Weber, 443 U.S. 193, 206 n.6 (1979). Similarly, the courts of appeals have all held that the extension to the States and concomitant abrogation contained in the Equal Pay Act are valid exercises of Section 5 authority, even though the Act was initially enacted pursuant to the Commerce Clause. See Ussery v. Louisiana, 150 F.3d 431, 435-

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[9/](...continued)
determine whether legislation can be upheld on the basis of Section 5). Compare Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 732 (1982) (assuming that Title IX is Section 5 legislation), and Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 472 n.2 (1987) (stating that Section 504 of the Rehabilitation Act, which was modeled on Title VI and Title IX, was enacted pursuant to Section 5), with Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1397-1399 (11th Cir. 1997) (en banc), petition for cert. granted, 1998 WL 663332 (Sept. 29, 1998) (No. 97-843). The Supreme Court has declined to resolve whether Title IX may be upheld as Section 5 legislation, see Franklin, 503 U.S. at 75 n.8, and there is no need for this Court to do so in this appeal.

436 (5th Cir. 1998); Varner, 150 F.3d at 709-717; Timmer, 104 F.3d at 838-839; Usery v. Charleston County Sch. Dist., 558 F.2d 1169, 1171 (4th Cir. 1977); Usery v. Allegheny County Inst. Dist., 544 F.2d 148, 155 (3d Cir. 1976), cert. denied, 430 U.S. 946 (1977).

We thus disagree with the defendants' suggestion (Br. 24) that Congress cannot act using different fonts of authority when extending the scope or remedies under a statute, even if Congress elects to extend the statute to only a sub-set of governmental units. For example, Title VII applies only to a government employer that "engage[s] in an industry affecting commerce [and] who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. 2000e(b). But the Supreme Court in Fitzpatrick found that Congress, in extending Title VII to government employers meeting those conditions, was acting pursuant to Section 5 of the Fourteenth Amendment. Similarly, this Court in Mitten v. Muscogee County School District, 877 F.2d 932, 937 (11th Cir. 1989), cert. denied, 493 U.S. 1072 (1990), held that the Education for the Handicapped Act was a valid exercise of Congress' Section 5 authority even though it was tied to the receipt of federal funds, and thus was also an exercise of the Spending Clause.

Instead of looking for evidence of Congress' subjective intentions as to the source of its authority, we believe so long as Congress could have enacted Title IX's substantive and

remedial provisions (including the abrogation) under the Fourteenth Amendment, the entire provision should be found to be a valid exercise of Congress' power. See Lesage, 1998 WL 717230, at *4. Consistent with the four other courts of appeals to address the issue, see supra pp. 16-17, the Seventh Circuit explained:

> It is not at all unlikely that Congress, perceiving the possible limits upon its Fourteenth Amendment power over non-State actors, initially chose to use its Spending Clause power to bind such actors to the requirements of Title IX. When Congress subsequently chose, via [Section 2000d-7], to make those same strictures more readily enforceable against State-run schools, it used the already existing federal funds framework of Title IX. Congress' consistent use of federal funds as the "trigger" for Title IX coverage, however, does not mean that it did not also intend to act pursuant to its acknowledged powers over State actors granted by Section 5 of the Fourteenth Amendment.
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> * * * * *
>
> The appropriate question is, were the objectives of Title IX within Congress' power under the Fourteenth amendment? The answer is, quite plainly, that they were. As the court below noted, protecting Americans against "invidious discrimination of any sort, including that on the basis of sex," is a central function of the federal government. Prohibiting arbitrary, discriminatory government conduct is the very essence of the guarantee of "equal protection of the laws" of the Fourteenth Amendment. Title IX prohibits such discriminatory government conduct on the basis of sex when it occurs in the context of State-run, federally funded educational programs and institutions. This Court holds, therefore, that Congress enacted Title IX and extended it to the States, at least in part, as a valid exercise of its powers under Section 5 of the Fourteenth Amendment. For that reason, Congress validly abrogated the States' Eleventh Amendment immunity from suit when it passed the Equalization Act expressly making States subject to suits to enforce Title IX.

Doe v. University of Ill., 138 F.3d 653, 659, 660 (7th Cir. 1998) (citations, brackets, ellipses and some quotation marks omitted), petition for cert. filed (July 13, 1998) (No. 98-126).

Thus the abrogation of States' Eleventh Amendment immunity for Title IX may be upheld as a valid exercise of Congress' Section 5 authority, even if Congress originally intended only to exercise its Spending Clause Power in enacting Title IX.

CONCLUSION

The district court's judgment denying defendants' motion to dismiss due to Eleventh Amendment immunity should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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