No. 00-10481-D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMES D. DOWNING,

Plaintiff-Appellee

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS INTERVENOR

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Downing v. Board of Trustees of the Univ. of Ala., No. 00-10481-D

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following listed persons or entities have an interest in the outcome of this appeal:

William Acker, U.S. District Court Judge

The Board of Trustee of the University of Alabama, Defendant/Appellant

Samuel Fisher, Counsel for Appellee

Lisa Huggins, Counsel for Defendant/Appellant

Joel Isenberg, Counsel for Appellee

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Daniel M. Strunk, Defendant/Appellant

STATEMENT REGARDING ORAL ARGUMENT

The United States does not believe oral argument is necessary to resolve the legal argument presented in this case. If this Court elects to hear oral argument, however, the United States should be permitted to participate. See 28 U.S.C. 2403(a).

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MISCELLANEOUS:

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JURISDICTIONAL STATEMENT

On August 26, 1998, plaintiff filed a complaint in the United States District Court for the Northern District of Alabama alleging, inter alia, that defendant sexually harassed him and terminated his employment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. This appeal is from a final judgment entered on January 18, 2000. The defendant filed a timely notice of appeal.

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). 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 provisions of Title VII that prohibit sex discrimination, including sexual harassment, by States are a valid exercise of Congress's authority to enforce the Fourteenth Amendment.

2. Whether the anti-retaliation provisions of Title VII are a valid exercise of Congress's authority to enforce the Fourteenth Amendment.

STATEMENT OF THE CASE

This suit is a private action filed by plaintiff James D. Downing, a former police lieutenant employed at the University of Alabama, against the Board of Trustees (hereinafter "defendant"). Plaintiff alleges that his male supervisor sexually harassed him and that the chief of police failed to take corrective action when plaintiff complained of this harassment. Plaintiff further alleges that defendant disciplined him and ultimately terminated his employment in retaliation for his sexual harassment complaint (R2).[1/] Plaintiff alleges, inter alia, that defendant's actions violated Title VII and seeks injunctive and monetary relief (R2).

Defendant moved to dismiss the Title VII claims based on Eleventh Amendment immunity. The district court denied

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[1/] References to "R__-__" are to the docket entry number and (where applicable) to the page number of the original document in the record. "Br.__" refers to the Appellant's Brief.

defendant's motion on January 18, 2000. (R42). Defendant appealed.[2/]

Because the questions of Congress's power to abrogate the States' Eleventh Amendment immunity are purely ones of law, this Court reviews the issues de novo. See Hundertmark v. Florida Dep't of Transp., 205 F.3d 1272, 1274 (11th Cir. 2000).

SUMMARY OF ARGUMENT

1. The Eleventh Amendment does not bar federal courts from exercising jurisdiction over plaintiff's sexual harassment claim. The Fourteenth Amendment prohibits intentional discrimination on the basis of sex. Sexual harassment that is carried out "because of" the victim's sex is merely one form of such intentional discrimination. Title VII's prohibition of sexual harassment proscribes the type of conduct that, when carried out by States, would violate the Equal Protection Clause. As the Seventh Circuit has recently held, Congress's authority "to enforce, by appropriate legislation," the Fourteenth Amendment includes the power to authorize the recovery of monetary relief in sexual harassment claims against state employers. See Holman v. Indiana, No. 99-1355, 2000 WL 520600, at *7 n.2 (7th Cir. May 1, 2000).

The fact that this case involves an allegation of male-on-male sexual harassment does not change the analysis. The Equal

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[2/] The court also held that plaintiff's claims under the Rehabilitation Act and Americans With Disabilities Act were barred by the Eleventh Amendment. Downing has dismissed without prejudice his cross-appeal of that ruling.

Protection Clause prohibits intentional sex discrimination against males as well as females. Congress has authority to prohibit all forms of intentional sex discrimination by States, whether the victim is male or female.

Moreover, Congress's decision to hold employers, including States, liable for sex discrimination carried out by supervisory employees, simply incorporates common law agency principles and is an appropriate means of enforcing the Fourteenth Amendment. Congress has broad power to pass legislation that deters and remedies constitutional violations. The principle that employers may be held liable for the torts of their employees was firmly established in the common law when the Fourteenth Amendment was adopted. Congress could have reasonably determined that those principles would be an effective means of encouraging state employers to take actions to prevent discrimination, including sexual harassment. Vicarious liability also ensures that the state employer adequately compensates victims of discrimination, so that victims are not forced to seek recompense from individual defendants who may not have the resources to pay a monetary judgment.

2. The anti-retaliation provisions of Title VII are also an appropriate exercise of Congress's Section 5 enforcement power. Congress's power "to enforce" the Fourteenth Amendment is not limited to passing legislation that prohibits unconstitutional discrimination. Congress may also enact ancillary provisions that reasonably aid in deterring and remedying such

discrimination. In light of the reluctance of many victims of discrimination to come forward, Title VII's prohibition on retaliation is an appropriate means of encouraging persons who believe they have been discriminated against to seek relief.

ARGUMENT

I

TITLE VII'S PROHIBITION OF SEXUAL HARASSMENT IS AN APPROPRIATE MEANS OF ENFORCING THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

In Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), the Supreme Court set forth the following two-part inquiry to determine whether a statute validly abrogates the States' Eleventh Amendment immunity:

> 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 and quotations omitted). The Seminole Tribe Court held that Congress could not use its Article I powers to abrogate the States' Eleventh Amendment immunity. See id. at 59-73. The Court reaffirmed, however, that Congress may use its power "to enforce, by appropriate legislation," the Fourteenth Amendment, Amendment XIV, Sec. 5, to abrogate the States' Eleventh Amendment immunity to private suits in federal court. See id. at 59.

This Court recently held that "Congress unequivocally expressed its intent to abrogate the states' Eleventh Amendment immunity when it amended Title VII to cover state and local governments," In re Employment Discrimination Litigation Against

Ala., 198 F.3d 1305, 1317 (11th Cir. 1999), and defendant does not contest the issue in this appeal (see Br. 9-12). We, therefore, proceed to the second part of the Seminole Tribe inquiry: whether Title VII's prohibition of sexual harassment, as applied to the States, is an "appropriate" exercise of Congress's power under Section 5 of the Fourteenth Amendment. See Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 644 (2000).

A. Title VII's Prohibition Of Sexual Harassment By States Proscribes Unconstitutional Conduct

Title VII's prohibition of sexual harassment by States enforces the Equal Protection Clause's ban on intentional sex discrimination. The Equal Protection Clause prohibits intentional discrimination on the basis of sex by state actors. See United States v. Morrison, Nos. 99-5 & 99-29, 2000 WL 574361, p. 9 (U.S. May 15, 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). Sexual harassment is a form of intentional discrimination, see Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 755 (1998), that is inherently irrational and serves no legitimate governmental objective. Therefore, sexual harassment by state actors violates the Equal Protection Clause when the perpetrator carries out the harassment because of the victim's sex. See Hartley v. Parnell, 193 F.3d 1263, 1268 (11th Cir. 1999); Johnson v. Martin, 195 F.3d 1208, 1216-1218 (10th Cir. 1999).

Contrary to defendant's representations (Br. 23-27), the Supreme Court has interpreted Title VII's ban on sexual

harassment to proscribe the type of conduct that, when carried out by state actors, is also prohibited by the Constitution. Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "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). In Meritor Savings Bank, FSB, v. Vinson, 477 U.S. 57, 64 (1986), the Supreme Court held that "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex" within the plain meaning of these terms. The Court also concluded that Title VII's prohibition on discrimination in the "terms, conditions, or privileges, of employment" demonstrates an intent "to strike at the entire spectrum of disparate treatment of men and women" in employment. Id. at 64. The Court has concluded, therefore, that Title VII prohibits not only sexual harassment that culminates in the denial of tangible employment benefits, but also other sexual harassment that is so "severe or pervasive" that it "'alter[s] the conditions of employment and create[s] an abusive working environment.'" See id. at 67 (quoting Henson v. Dundee 682 F.2d 897, 902 (11th Cir. 1982)).[3/]

[3/] This court has referred to harassment that creates a hostile employment environment as a "constructive" alteration of the terms and conditions of employment. See Llampallas v. Mini-Circuits Lab, Inc., 163 F.3d 1236, 1247 n. 19 (11th Cir. 1998), cert. denied, 120 S. Ct. 327 (1999). This concept, like the concept of a constructive eviction, simply recognizes that an

(continued...)

Defendant is simply wrong, therefore, in suggesting (Br. 20) that sexual harassment law has been judicially created out of whole cloth. The Supreme Court has simply recognized that sexual harassment is one form of intentional sex discrimination. The cause of action for sexual harassment is firmly grounded in Title VII's text.

Moreover, the Court has made clear that "Title VII does not prohibit all verbal or physical harassment in the workplace * * *." See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998). Rather, Title VII is directed only at discrimination because of sex, i.e., working conditions in which "'members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" See id. at 80 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993)(Ginsburg, J. concurring)).

The fact that this case involves allegations of sexual harassment of a male employee does not change the analysis. Sex discrimination against males by state actors is subject to the same scrutiny under the Equal Protection Clause as gender

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[3/](...continued)
employer's harassment can be sufficiently severe that it effectively changes the terms and conditions of employment, even though the formal responsibilities and benefits of the job -- job title, duties, pay, hours, etc. -- remain unchanged. Defendant wrongly equates (Br. 25) this well- recognized doctrine defining the scope of Title VII with the recently repudiated notion that a State may "impliedly" or "constructively" waive its Eleventh Amendment immunity. See College Sav. Bank v. Florida Prepaid PostSecondary Educ. Expense Bd., 527 U.S. 666, 675-687 (1998) (overruling Parden v. Terminal Ry., 377 U.S. 184 (1964)). The two doctrines are unrelated.

discrimination against females. See J.E.B., 511 U.S. at 141; Hogan, 458 U.S. at 723 (that a state action "discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review"). Because sexual harassment of females is, when carried out because of the victim's sex, intentional sex discrimination, it follows that sexual harassment of males because of their sex also constitutes intentional sex discrimination. See Oncale, 523 U.S. at 80.

Of course, in order to prevail in a same-sex harassment case, the plaintiff must show that the harassment "actually constitute[s] discrimina[tion] * * * because of * * * sex." Id. at 81. When that showing can be made, same-sex harassment is no less violative of Title VII and the Fourteenth Amendment's ban on intentional sex discrimination as harassment by males of female employees. See id. at 80-81. In the related context of racial discrimination and ethnic discrimination in the workplace, the Supreme Court has rejected any conclusive presumption that employers will not discriminate against members of their own race or ethnicity. See id. at 78; Castaneda v. Partida, 430 U.S. 482, 499 (1977). Similarly, nothing in Title VII or the Fourteenth Amendment bars a claim of gender discrimination merely because the plaintiff and the defendant are of the same sex. See Oncale, 523 U.S. at 79.

Despite defendant's argument (Br. 23-27), the fact that plaintiffs may rely on circumstantial evidence to prove their claims does not establish that Congress has attempted to alter

the substantive obligations of the States. Circumstantial evidence is often used to prove discriminatory intent in claims brought under the Fourteenth Amendment,[4/] and courts permit the use of circumstantial evidence in virtually every other area of the law as well.[5/] The frequent use of circumstantial evidence in Title VII cases simply reflects the fact that defendants rarely acknowledge their discriminatory motives and that plaintiffs must use circumstantial evidence to prove the defendant's state of mind.[6/] See, e.g., United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) ("There will seldom be 'eyewitness' testimony as to the employer's mental processes."); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-806 (1973).[7/]

[4/] See, e.g., Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977)("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.").

[5/] See, e.g., Kevin F. O'Malley et. al., Federal Jury Practice & Instruction Ch. 4 App. E (5th ed.).

[6/] See also Llampallas v. Mini-Circuits Lab, Inc., 163 F.3d 1236, 1246 (11th Cir. 1998) ("It is an extraordinary case in which a defendant employer admits it has taken an adverse action against a plaintiff employee 'because of' the employee's sex. Thus, courts must rely on inferences drawn from the observable facts to determine whether a Title VII violation has occurred.") (footnote omitted), cert. denied, 120 S. Ct. 527 (1999).

[7/] Defendant also notes (Br. 26) that in some circumstances an employer may be held liable for an employment decision where the decision-maker merely rubber-stamps an employment decision recommended by a lower-level discriminating supervisor, even if the decision-maker did not harbor any discriminatory animus. Courts have reached this result, however, by simply applying common law principles of causation, not by expanding the

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The applicable case law all supports the position that Title VII's prohibition on sex discrimination, including its prohibition on sexual harassment, is constitutional. Recently, in Holman v. Indiana, No. 99-1355, 2000 WL 520600, *7 n.2 (7th Cir. May 1, 2000), the Seventh Circuit held that the plaintiffs' Title VII sexual harassment claims, including one claim of same-sex harassment, were not barred by the Eleventh Amendment. Similarly, every circuit that has considered the issue, including this Court, has held that the Equal Pay Act, 29 U.S.C. 206(d), which prohibits unequal pay by state employers on the basis of sex, is a valid exercise of Congress's Section 5 power to enforce the Equal Protection Clause. See Hundertmark v. Florida Dep't of Transp., 205 F.3d 1272, 1274 (11th Cir. 2000); Anderson v. State Univ. of N.Y., 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). These cases properly recognize that Congress's Section 5 power includes the power to prohibit sex discrimination by States.

[7/] (...continued)
substantive protections of Title VII. See Llampalas, 163 F.3d at 1246.

Furthermore, we note that the Supreme Court has previously held that Title VII is valid Section 5 legislation, see Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), and this Court recently reaffirmed that holding in the context of a challenge to Title VII's disparate impact provisions. See In re Employment Discrimination Litigation Against Ala., 198 F.3d 1305 (11th Cir. 1999). Although those cases involved claims of race discrimination, there is no reason to believe that Congress's power to prohibit gender discrimination is significantly less broad than its power to prohibit race discrimination. "Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination." Personnel Adm'r. v. Feeney, 442 U.S. 256, 273 (1979) (emphasis added). In Kimel v. Florida Board of Regents, 120 S. Ct. 631, 645 (2000), the Court equated Congress's power to prohibit race and sex discrimination, noting that governmental conduct based on race and sex, is "'so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy'" (quoting City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985)).[8/]

[8/] The Supreme Court's recent decision in United States v. Morrison, Nos. 99-5 & 99-29, 2000 WL 574361 (U.S. May 15, 2000), is consistent with the above cited cases and does not support a different result. The Court held in that case that Section 13981 of the Violence Against Women Act (VAWA), which provides a private cause of action for victims of gender motivated violence, was not a valid exercise of Congress's Section 5 authority. The Court noted that although the Fourteenth Amendment prohibits only

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B. The Ample Evidence Before Congress Of Sex Discrimination By States Was More Than Sufficient To Support Title VII's Prohibition Of Sex Discrimination, Including Sexual Harassment, By State Employers

1. Defendant's argument (Br. 17, 20-23) that Congress was required to find a pattern of sexual harassment by States in order to abrogate their immunity for sexual harassment claims lacks merit. 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 Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 639 (1999). When a statutory prohibition is tailored to detect and remedy constitutional violations, a court need not inquire about the frequency of such constitutional violations. Thus, 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). Nor

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[8/](...continued)
state action that violates an individual's constitutional rights, Section 13981 is directed at individuals who have committed criminal acts motivated by gender bias, even where the individual is not acting under color of state law. See id. at p. 11. The Court noted further that the VAWA provision "visits no consequence whatever" on the State or state officials. See ibid. The constitutional problem that the Court identified in Morrison is not present here. Title VII's prohibition of discrimination by state employers imposes liability on the State, not on individuals who are not acting under color of state law.

did Congress have to find that state actors were violating the Fourteenth Amendment in order to establish a cause of action for such violations in 42 U.S.C. 1983. For similar reasons, Congress was not required to make findings that sexual harassment was prevalent in state employment in order to ban such unconstitutional conduct.[9/] See Holman v. Indiana, No. 99-1355, 2000 WL 520600, *7 n.2 (7th Cir. May 1, 2000) (holding that the plaintiffs' Title VII sexual harassment claims were not barred by the Eleventh Amendment, without inquiring into whether Congress had made any findings that state employers sexually harassed their employees).

Defendant's reliance (Br. 17) on Kimel v. Florida Board of Regents, 120 S. Ct. 631 (2000), and Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999), is misplaced. Those cases simply recognize that when a

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[9/] We also disagree with defendant's suggestion (Br. 20) that Congress is powerless to exercise its Section 5 authority absent evidence of a 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's 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) (making similar point with respect to inequities in pay to women). 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 v. Florida Bd. of Regents, 120 S. Ct. 631, 648-649 (2000), the Supreme Court has never suggested that Congress's Section 5 authority is limited to attacking widespread constitutional violations.

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 if 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, 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. 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). The Supreme Court concluded, therefore, that the application of the ADEA to the States "was an unwarranted response to a perhaps inconsequential problem." Id. at 648-649.

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's Section 5 authority. The Court emphasized that patent infringement by States violates the due process clause only if: (1) it is intentional (as opposed to inadvertent) and (2) state tort law fails to provide an adequate remedy. See Florida Prepaid, 527 U.S. at 643-645. 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. See 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. See id. at 645-646.

Thus, 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. Those concerns

are not present here. In contrast to the conduct at issue in Kimel and Florida Prepaid, the sexual harassment at issue here is intentional sex discrimination that violates the Equal Protection Clause when practiced by the States.[10/]

2. We also disagree with defendant's suggestion (Br. 17, 22-23) that Congress must always make findings even when the remedial nature of the challenged legislation 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). While the legislative record may be of assistance in determining whether

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[10/] We recognize that Title VII also prohibits certain facially neutral employment practices that have a disparate impact on one sex, if that impact is not justified by business necessity. See 42 U.S.C. 2000e-2(k). Those provisions are not at issue in this case, however, because plaintiff alleges solely intentional sex discrimination. In any event, it is well established that Congress's 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 applying this principle, this Court and the other circuits that have considered the issue have all upheld the constitutionality of disparate impact claims under Title VII as a valid exercise of Congress's power to enforce the Fourteenth Amendment. See In re Employment Discrimination Litigation Against Ala., 198 F.3d 1305 (11th Cir. 1999); 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); 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).

the proper 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. As the Second Circuit explained recently in Kilcullen v. New York State Department of Labor, 205 F.3d 77 (2d Cir. 2000), "[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 81 (emphasis added).

There is no question that States have engaged in a widespread pattern of unconstitutional sex discrimination and that the problem is not an "inconsequential" 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 on the basis of sex in employment). Because the Court itself has determined that the States have engaged in sex discrimination, 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 [by States] 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)).

3. In any event, even if we were required to identify evidence of sex discrimination by state employers that was before Congress, that requirement is easily met. In the early 1970s, Congress addressed discrimination against women by States in several pieces of legislation. Specifically, Congress: (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); (3) sent the Equal Rights Amendments to the States to be ratified, see S. Rep. No. 450, 93d Cong., 1st Sess. 4 (1973); and (4) 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 action, 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,[11/] and that existing remedies, both at the state and federal level, were inadequate.[12/] Much of this evidence revealed

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[11/] 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 Problems of Women: Hearings Before the Joint Econ. Comm., Pt. 1, 93d Cong., 1st Sess. 131 (1973) (Economic) (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 & Women 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"). See also note 12, infra.

[12/] See Discrimination Against Women: Hearings Before the Special Subcomm. on Educ. of the House Comm. on Educ. & Labor, Pt. 1, 91st Cong., 2d Sess. 304 (1970) (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"); Equal Employment Opportunity Enforcement Procedures: Hearings Before the Gen. Subcomm. on Labor of the House Comm. on Educ. & Labor, 91st Cong., 1st & 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 & Pub. Welfare, 91st Cong., 1st Sess. 51-52 (1969) (1969 Senate EEO). (William H. Brown III, Chair, EEOC) ("most of these [State and

(continued...)

widespread and entrenched sex discrimination in employment in state universities.[13/] Indeed, 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

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[12/](...continued)
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. & 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).

[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, Pt. 1, at 302 (Dr. Bernice Sandler, Women's Equity Action League) (noting instances of sex discrimination in employment by state-supported universities); id. at 379 (Dr. Pauli Murray) ("in light of the 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 On Women's Rights And Responsibilities) (noting "the growing body of evidence of discrimination against women faculty in higher education"); id., Pt. 2, at 738 (Rep. Griffiths) ("The extent of discrimination against women in the educational institutions of our country constitutes virtually a national calamity."); id., Pt. 1, at 235 (Rep. May) ("[S]ex discrimination in the colleges and universities of this Nation * * * it seems to me, that it is running rampant!"); Equal Rights at 269 (Dr. Bernice Sandler, Women's Equity Action League) ("there is no question whatsoever of a massive, pervasive, consistent, and vicious pattern of discrimination against women in our universities and colleges").

deal of problems both with educational institutions and State and local governments."[14/]

In the committee reports and floor debates concerning legislation aimed at redressing sex discrimination, Congress noted the "scope and depth of the discrimination"[15/] 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."[16/] This conclusion is consistent with Congress's assessment that the "well documented" record revealed "systematic[]," and "widespread" sex discrimination by States,[17/]

[14/] Economic, Pt. 1, at 105-106.

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

[16/] 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.").

[17/] 118 Cong. Rec. 3936, 5804 (1972) (Sen. Bayh) ("[d]iscrimination against females on faculties and in administration is well documented"); 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.").

which "persist[ed]" despite the fact that it was "violative of the Constitution of the United States."[18/]

4. Having been presented with ample evidence that sex discrimination in state employment was a serious problem, Congress was justified in extending Title VII's prohibition of sex discrimination, and its authorization of claims for back pay, to the States. Defendant acknowledges (Br. 21) that the legislative history to the 1972 amendments to Title VII contains "some evidence of sex discrimination" in "promotions, pay, hiring and termination." Defendant claims, however (Br. 21), that Congress could not outlaw sexual harassment, absent "evidence of widespread harassment against either men or women." Thus, under defendant's theory, Congress cannot simply prohibit sex discrimination or, presumably, race discrimination, by States. Rather, it must proceed in a piecemeal fashion and outlaw only those aspects of such noxious and unconstitutional discrimination that it determines, on an individual basis, are widespread.

Defendant's crabbed view of Congress's Section 5 power is not the law. Section 5 of the Fourteenth Amendment does not require Congress to enact the least-restrictive alternative or to document individually every aspect of the discrimination that it chooses to regulate. For example, in Oregon v. Mitchell, 400 U.S. 112 (1970), while the Court agreed that literacy tests were probably not being used to deny blacks the right to vote in every State, it concluded that Congress had the authority to deal with

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[18/] 118 Cong. Rec. 1412 (1972) (Sen. Byrd).

the issue on a nationwide basis and prohibit the use of literacy tests throughout the country. See especially id. at 283-284 (opinion of Stewart, J.); see also Fullilove v. Klutznick, 448 U.S. 448, 483 (1980) (plurality); id. at 501 n.3 (Powell, J., concurring). Similarly, Congress could have rationally concluded that intentional sex discrimination was sufficiently harmful that it was appropriate to prohibit all forms of such discrimination. Sexual harassment need not have been the focus of Congress's concern when it extended Title VII to the States in 1972. Sexual harassment is merely one manifestation of gender-based hostility to persons in the workforce.[19/] For Congress to have outlawed other forms of gender-based hostility, while leaving employers free to sexually harass employees based on gender, would have been only a partial solution to the serious problem of gender discrimination that Congress identified.

In any event, defendant's suggestion (see Br. 24-25) that Congress never had before it any evidence of sexual harassment in the workplace is mistaken. In 1991, Congress amended Title VII, to, inter alia, authorize compensatory damages against employers, including States. See 42 U.S.C. 2000e-5. In the hearings that

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[19/] Women and the Workplace: The Glass Ceiling: Hearings Before The Subcomm. on Employment and Productivity of the Senate Labor and Human Resources Comm., 102d Cong., 1st Sess. 41 (1991) (Glass Ceiling) (1991) (Pat Taylor, President of Business and Professional Women); id. at 43 (Judith L. Lichtman, President, Women's Legal Defense Fund) ("Working women face discrimination at every turn, at the point of hire, as well as on the job. Pay inequities, sex stereotyping, mommy track practices, sexual harassment, lack of job-protected leave, and discrimination based on pregnancy and marital status are all components of this * * * discrimination.").

preceded the enactment of that legislation, Congress heard extensive evidence that sexual harassment was a serious problem, both in private industry and in state and local government, that existing federal and state law remedies were inadequate, and that compensatory and punitive damages were necessary to deter this evil.[20/]

Nor is there any support for defendant's argument that Congress was required to find that sexual harassment against men in particular was a problem in order to prohibit it. Although

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[20/] See, e.g., Hearings on H.R. 4000, The Civil Rights Act of 1990 -- Vol. 1: Joint Hearings Before the House Comm. on Educ. & Labor and the Subcomm. on Civil and Constitutional Rights of the House Judiciary Subcomm., 100th Cong., 2d. Sess. 270, 273, 286-287 (1990) (Hearings on H.R. 4000) (Marcia D. Greenberger, Managing Attorney, Nat'l Women's Law Center) (stating that "[s]exual harassment is a severe problem for a large percentage of women" and detailing numerous examples of sexual harassment by employers including local governments); id., Vol. II, at 29-30 (Nancy Kreiter, Women Employed Institute) (discussing representative examples of sexual harassment in utility company and city zoo); Hearings on H.R. 1, The Civil Rights Act of 1991: Hearings Before the House Committee On Education & Labor, 102d Cong., 1st Sess. 381 (1991) (Hearings on H.R. 1) (Brenda Berkman) (detailing sexual harassment by New York City fire department); id. at 587-589, 596-618, 629 (report by Nat'l Women's Law Center describing several court cases involving sexual harassment by employers including cases against municipal employers and sexual harassment against female professor at the University of Iowa); id. at 798-800 (letter from Alison Wetherfield, Director, Women's Legal Defense and Education Fund) (summarizing analysis of state statutes and common law remedies in all fifty states and the District of Columbia that concluded that state remedies are not adequate for victims of sexual harassment in employment); Glass Ceiling, n. 19, supra at 31-35 (Pat Taylor, President of Business and Professional Women) (describing incidents of sexual harassment in the workplace, including pattern of harassment at university in Indiana); id. at 42-49 (Judith L. Lichtman, President, Women's Legal Defense Fund) (describing problem of sexual harassment in employment and giving examples); id. at 51-53 (Marcia Greenberger, Co-President, National Women's Law Center) (same).

"male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII [,] * * * statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils." See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998). The fact that a statute may apply "in situations not expressly anticipated by Congress" merely demonstrates Congress's intent to address the problem in a broad fashion. See Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206, 212 (1998).

Our nation's experience with sex discrimination has demonstrated that sexual stereotypes often adversely affect men as well as women. See, e.g., J.E.B., 511 U.S. 127; Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982). Congress's decision to include men within Title VII's reach simply reflects a decision to enforce the Equal Protection Clause equally. Protecting men from sex discrimination is no different analytically from including white persons who have not suffered the same history of discrimination as minorities within Title VII's ban on race and ethnic discrimination. It was reasonable for Congress to take the same approach as the drafters of the Fourteenth Amendment and to outlaw all state actions that deny equal protection on the basis of sex.

C. Congress's Decision To Incorporate Common Law Agency Principles Into Title VII, With The Result That Sexual Harassment By Governmental Supervisors May Be Imputed To The State Employer, Is A Congruent And Proportional Means Of Enforcing The Fourteenth Amendment

1. Defendant's argument (Br. 23-25) that Congress had no authority to impose vicarious liability on state entities for sexual harassment by supervisors lacks merit. Section 5 of the Fourteenth Amendment is "a positive grant of legislative power," and Congress's power to enforce the Fourteenth Amendment, while not unlimited, is broad. See City of Boerne v. Flores, 521 U.S. 507, 517 (1997). Congress's power "to enforce" the Amendment "includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 644 (2000).

Therefore, 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." See id. at 645 (quoting City of Boerne, 521 U.S. at 532). Although "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 * * * Congress must have wide latitude in determining

where it lies." Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 629 (1999) (emphasis added). "It 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." City of Boerne, 521 U.S. at 536 (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)). So long as there is a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," enforcement legislation is appropriate within the meaning of the Fourteenth Amendment. See City of Boerne, 521 U.S. at 520.

2. Judged under these standards, Congress's decision to incorporate respondeat superior liability into Title VII was an "appropriate" means of enforcing the Fourteenth Amendment. By defining "employer" to include any "agent" of an employer, 42 U.S.C. 2000e(b), Congress directed courts to "look to traditional principles of the law of agency" in determining the circumstances in which employers would be liable for an employee's acts. See Faragher v. City of Boca Raton, 524 U.S. 775, 791 (1998).

Applying those common law principles, as reflected in Section 219(2)(d) of the Restatement (Second) of Agency, the Supreme Court has held that employers are liable for sexual harassment perpetrated by supervisors if the harassment "culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." See Faragher, 524 U.S. at 808; Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998).

When the harassment does not result in any tangible employment action, the Court held, the employer is still subject to liability for the supervisor's harassment. The employer may avoid liability in this situation, however, by proving that: (1) it exercised reasonable care to prevent and correct any harassment, and (2) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or otherwise unreasonably failed to prevent the harm. See Faragher, supra; Burlington Indus., supra. The Court derived this standard from the common law rule that an employer is liable for torts committed by its agent if the agent is "aided in accomplishing the tort by the existence of the agency relation." See Faragher, 524 U.S. at 801 (quoting Restatement (Second) Agency § 219(2)(d)).

Contrary to Defendant's contentions (Br. 25), Title VII's qualified respondeat superior liability does not impose new substantive requirements beyond what is required by the Fourteenth Amendment. By the time that the Fourteenth Amendment was ratified in 1868, see City of Boerne, 521 U.S. at 522, respondeat superior was a well-recognized theory for imposing liability on employers for the tortious activity of employees.[21/] Congress was not required to justify independently its decision to direct courts to borrow these long-established principles of

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[21/] See Susanah M. Mead, 42 U.S.C. 1983 Municipal Liability: The Monell Sketch Becomes A Distorted Picture, 65 N.C. L. Rev. 517, 538 (1987); W. Page Keeton, et al., Prosser and Keeton on the Law Of Torts, § 131, at 1051-1055 (W. Keeton 5th Ed. 1984).

vicarious liability for Title VII claims. Congress was entitled to infer that the same common law principles that courts have determined are appropriate for other common law tort actions are also appropriate for Title VII claims.

In any event, imposing limited vicarious liability for sex discrimination that is perpetrated by the agents of state employers is a reasonable means of enforcing the constitutional ban on sex discrimination by state officials. Subjecting state entities to vicarious liability encourages States to take action to prevent and redress unlawful discrimination by their employees that might otherwise go unchallenged. See Faragher, 524 U.S. at 802. Imposing vicarious liability for actions of supervisory employees is particularly likely to be effective in preventing discrimination given that employers have an opportunity "to guard against misconduct by supervisors" by "screen[ing] them, train[ing] them, and monitor[ing] their performance." See id. at 803.

In addition, vicarious liability ensures that persons who are harmed by unconstitutional conduct that could have been prevented by the state employer will be able to obtain compensation from the State. In the absence of such vicarious liability, the victim would be forced to seek redress solely from individual defendants who often do not have the financial resources to make the victim whole. See Hearings on H.R. 1, note 20, supra at 617 (Report by the National Women's Law Center).

Because vicarious liability is a reasonable means of deterring and remedying unconstitutional conduct, Congress's decision to incorporate common law agency principles into Title VII is an "appropriate" means of enforcing the Fourteenth Amendment.

II

TITLE VII'S ANTI-RETALIATION PROVISIONS ARE A VALID EXERCISE OF CONGRESS'S AUTHORITY TO ENFORCE THE FOURTEENTH AMENDMENT

Defendant argues (Br. 15) that plaintiff's retaliation claims[22/] are not valid Section 5 legislation, because retaliation is not prohibited by Equal Protection Clause. Defendant's analysis ignores the Supreme Court's admonition that "Congress' [Section] 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, 120 S. Ct. 631, 644 (2000).

Congress's Section 5 power includes the power 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); Corpus v. Estelle, 605 F.2d 175, 178 n.4 (5th Cir. 1979), cert. denied, 445

[22/] 42 U.S.C. 2000e-3(a) makes it unlawful to take any adverse employment action against an employee "because he has opposed any practice made an unlawful employment practice [by Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing [under Title VII]."

U.S. 919 (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.

Title VII's anti-retaliation provisions are also an appropriate means of encouraging victims of discrimination to seek relief. The right to be free of unlawful discrimination could be rendered meaningless if the employer were free to retaliate against employees who exercise or assert that right. See Hanson v. Hoffmann, 628 F.2d 42, 53 (D.C. Cir. 1980). The authority to prohibit States from punishing those who seek to exercise their civil rights is a necessary component of Congress's core Section 5 power to protect those rights by statute in the first instance.

Victims of discrimination often are reluctant to complain openly because they fear retaliation, they fear that future employers will be reluctant to hire them, and/or they fear the stress and inconvenience that accompanies litigation. Such concerns are likely to be particularly acute in sexual harassment cases, where a public complaint may entail disclosing embarrassing and intimate details about the employer's sexual misconduct. Congress could have reasonably concluded that a

statutory prohibition on retaliation, enforced through a claim for monetary relief, was necessary to ensure that discrimination victims are willing to take on the substantial risks and burdens of complaining against their employers.

Congress was not required to hold hearings or make legislative findings to support the obvious conclusion that a prohibition on retaliation would advance the federal interest in encouraging victims to complain of unconstitutional conduct. We note, however, that when Congress extended Title VII to the States in 1972, and again when it amended Title VII in 1991 to authorize claims for compensatory damages, it heard testimony that victims of discrimination, including victims of sexual harassment, often face retaliation.[23/] This legislative history

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[23/] See, e.g., Fair Labor Standards Amendments of 1971: Hearings Before the Subcomm. on Labor, Senate Labor and Pub. Welfare Comm., Pt. 1, 92d Cong., 1st Sess. 289 (1971) (1971 FLSA) (Lucille Shriver, Director, National Federation of Business and Professional Women's Clubs, Inc.) (women fear reprisal and are reluctant to complain of sex discrimination); Discrimination, note 12, supra, Pt. 1, at 302 (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, note 11, supra, Pt. 1, at 138 (Aileen Hernandez, former member, EEOC) (giving examples of retaliation against employees who complained of discrimination); Glass Ceiling, note 19, supra at 32 (Pat Taylor) (victims of sexual harassment reluctant to complain because they fear, inter alia, disclosing the harassment to family members); id. at 41 (Pat Taylor, President, Business and Professional Women) ("Studies have shown that only three percent of women who have been harassed make a formal complaint"); id. at 68 (Letter from Dr. Margaret Jensvold, Institute for Research on Women's Health) (complaining of harassment is risky).

further supports the appropriateness of Title VII's prohibition on retaliation.[24/]

CONCLUSION

The district court's judgment denying defendant's motion to dismiss should be affirmed.

Respectfully submitted,

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[24/] Title VII's prohibition on States retaliating against individuals for complaining to the government about governmental discrimination or litigating their grievance in court is also appropriate legislation to enforce the First Amendment right to petition the government for redress of grievances. See, e.g., Wildberger v. Bracknell, 869 F.2d 1467 (11th Cir. 1989) (retaliation for filing a grievance violates the First Amendment); accord San Filippo v. Bongiovanni, 30 F.3d 424, 434-443 (3d Cir. 1994), cert. denied, 513 U.S. 1082 (1995); Gable v. Lewis, 201 F.3d 769 (6th Cir. 2000). Congress's power to enforce the Fourteenth Amendment includes the power to enforce the guarantees of the First Amendment which, pursuant to the due process clause of the Fourteenth Amendment, apply to the States. See City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B). It contains 9045 words.

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2000, copies of the attached BRIEF FOR THE UNITED STATES AS INTERVENOR and MOTION OF THE UNITED STATES TO INTERVENE were served by first-class mail, postage prepaid, on the following counsel of record:

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