No. 00-3159

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IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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GWENN OKRUHLIK,

Plaintiff-Appellee
v.

UNIVERSITY OF ARKANSAS by and through the Chairman of the Board of Trustees, J. Thomas May, and its President, B. Allen Sugg; DONALD O. PEDERSON; BERNARD L. MADISON; MARK CORY; ADNAN HAYDAR; MOUNIR FARAH; STEVEN NEUSE; DONALD KELLEY; JEFF RYAN; TODD SHIELDS; and CONRAD WALIGORSKI, in their Official and Individual Capacities,

Defendants-Appellants

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS

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# BRIEF FOR THE UNITED STATES AS INTERVENOR

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## SUMMARY OF THE CASE

An employee brought suit against the University of Arkansas and various state officials alleging that they had subjected her to discrimination on the basis of sex in violation of, *inter alia*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. Defendants moved to dismiss on the grounds of Eleventh Amendment immunity. The district court denied the motion, holding that Congress had validly abrogated States' Eleventh Amendment immunity for Title VII. Defendants filed this timely interlocutory appeal.

The United States does not believe oral argument would assist the Court in resolving defendants' Eleventh Amendment challenge.

## STATEMENT OF THE ISSUES

1. Whether Title VII of the Civil Rights Act of 1964 contains a clear statement of Congress's intent to abrogate States' Eleventh Amendment immunity.

*Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976)

*Ussery* v. *Louisiana*, 150 F.3d 431 (5th Cir. 1998),
cert. dismissed, 526 U.S. 1013 (1999)

*Varner* v. *Illinois State Univ.*, 150 F.3d 706 (7th Cir. 1998),
vacated and remanded, 120 S. Ct. 928 (2000),
reinstated, 226 F.3d 927 (7th Cir. 2000)

2. Whether the provisions of Title VII that prohibit sex discrimination by States are a valid exercise of Congress's authority to enforce the Fourteenth Amendment, thereby abrogating States' Eleventh Amendment immunity.

*Kimel* v. *Florida Bd. of Regents*, 120 S. Ct. 631 (2000)

*Holman* v. *Indiana*, 211 F.3d 399 (7th Cir. 2000)

*O'Sullivan* v. *Minnesota*, 191 F.3d 965 (8th Cir. 1999)

*Crawford* v. *Davis*, 109 F.3d 1281 (8th Cir. 1997)

*In re Employment Discrimination Litigation Against Alabama*,
198 F.3d 1305 (11th Cir. 1999)

## SUMMARY OF ARGUMENT

The Eleventh Amendment is no bar to plaintiff's claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e. In *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), the Supreme Court held that Title VII contained an express abrogation of States' Eleventh Amendment immunity. That holding, never overruled by the Court, binds this Court. Likewise, the abrogation extends to the compensatory damage remedy that Congress added after *Fitzpatrick* had been decided.

The abrogation is a constitutional exercise of Congress's power under Section 5 of the Fourteenth Amendment as applied to cases involving sex discrimination. Like the Equal Protection Clause itself, Title VII prohibits state employers from intentionally discriminating on the basis of sex. Title VII's prohibitions are thus "congruent and proportional" to the underlying constitutional standard and no additional findings are required. In any event, the Supreme Court has consistently taken notice of the pervasive practice of state-sponsored sex discrimination in this country. Congress heard testimony to the same effect at the time it extended Title VII to the States. Thus, there is no basis for holding that Congress lacked the power to authorize private suits against state employers accused of violating Title VII's prohibition on sex discrimination.

# ARGUMENT

## I

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

1. Title VII prohibits employers (including state employers) from discriminating because of sex in the compensation, terms, conditions or privileges of employment. See 42 U.S.C. 2000e-2(a). In *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), the Supreme Court held that Congress's 1972 amendment to Title VII, which amended the definition of "person" to include "governments [and] governmental agencies," 42 U.S.C. 2000e(a), was sufficient to demonstrate that "congressional authorization to sue the State as employer is clearly present." *Id*. at 452 (citation and quotations omitted). Indeed, the Supreme Court later explained that "[i]n *Fitzpatrick* v. *Bitzer* the Court found present in Title VII of the Civil Rights Act of 1964 the 'threshold fact of congressional authorization' to sue the State as employer, because the statute made explicit reference to the availability of a private action against state and local governments in the event the Equal Employment Opportunity Commission or the Attorney General failed to bring suit or effect a conciliation agreement." *Quern* v. *Jordan*, 440 U.S. 332, 344 (1979) (citation omitted). Likewise, this Court has held, relying on *Fitzpatrick*, that Title VII abrogates States' Eleventh Amendment immunity. See, *e.g.*, *Winbush* v. *Iowa*, 66 F.3d 1471, 1483 (8th Cir. 1995); *Greenwood* v. *Ross*, 778 F.2d 448, 453 (8th Cir. 1985).

Defendants acknowledge the holding of *Fitzpatrick*, but argue (Br. 13-14) that the method of reaching the holding has been rejected by later cases. While we disagree with that contention, see *Ussery* v. *Louisiana*, 150 F.3d 431, 435 (5th Cir. 1998) (rejecting same argument), cert. dismissed, 526 U.S. 1013 (1999), it is ultimately irrelevant. Finding that Title VII contained a sufficiently clear intent to abrogate Eleventh Amendment immunity was a necessary threshold holding in order to enter a judgment against the state defendant in that case. And this Court is bound by such holdings. "'[I]f a precedent of [the Supreme Court] has direct application in a case * * *, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.'" *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997); see also *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (per curiam). As the question has been definitively resolved by the Supreme Court, this Court cannot revisit it. See *In re Employment Discrimination Litig. Against Ala.*, 198 F.3d 1305, 1317 (11th Cir. 1999).

2. Prior to 1991, Title VII remedies consisted of back pay and other equitable relief. See 42 U.S.C. 2000e-5(g)(1). Congress amended Title VII in the Civil Rights Act of 1991 to permit victims of unlawful intentional discrimination to collect compensatory damages. See Civil Rights Act of 1991, Pub. L. No. 102-166, Tit. I, § 102, 105 Stat. 1072 (1991) (codified at 42 U.S.C. 1981a). Defendants argue (Br. 14) that Title VII's abrogation does not extend to the compensatory damage remedies. Although not placed in the same chapter as the rest of Title VII,

the plain language of the statute makes clear that it is intended as an additional remedy for Title VII violations, to be adjudicated in conjunction with liability, rather than as a separate cause of action. The 1991 Amendment simply "expanded the remedies available to Title VII plaintiffs to include compensatory damages (for emotional pain, suffering, mental anguish, etc.)." *Kim* v. *Nash Finch Co.*, 123 F.3d 1046, 1063 (8th Cir. 1997). Section 1981a(a)(1) provides:

> In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination * * * prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3), and provided that the complaining party cannot recover under [42 U.S.C. 1981], the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5(g)], from the respondent.

In order to be eligible for compensatory damages, a "complaining party" (defined to mean "a person who may bring an action or proceeding under title VII," 42 U.S.C. 1981a(d)(1)) must show in an "action brought" under Title VII that a "respondent" engaged in "unlawful intentional discrimination" prohibited by Title VII. Thus, this provision applies to "an action" already brought, and does not create a separate cause of action requiring a distinct abrogation of immunity. Instead, the district court's jurisdiction is granted by 42 U.S.C. 2000e-5(f)(1) & 5(f)(3), which together provide that "a civil action may be brought against the respondent named in the charge * * * by the person claiming to be aggrieved," and that "[e]ach United States district court * * * shall have jurisdiction of actions brought under this subchapter." The Court in *Fitzpatrick* found these provisions,

plus the inclusion of States as employers, were sufficient to abrogate Eleventh Amendment immunity. They are equally sufficient here.

Nor is there any reason to believe that Congress intended to exclude States from Title VII's abrogation of immunity for compensatory damage claims. States are within the class of "respondent[s]" from which a "complaining party may recover compensatory * * * damages." 42 U.S.C. 1981a(a)(1). The term "respondent" is defined in 42 U.S.C. 2000e(n) to include "employer[s]." And "employer" is defined as a "person," which in turn is defined as including "governments, governmental agencies [and] political subdivisions." 42 U.S.C. 2000e(a), (b); see also 42 U.S.C. 2000e-5(f)(1) (discussing procedures when "respondent" is a "government, governmental agency, or political subdivision"). Thus, authorizing damages against Title VII "respondents" includes authorizing damages against States.

This plain meaning of the term "respondent" is confirmed by Section 1981a(b). Section 1981a(b)(1) provides that a plaintiff "may recover punitive damages under this section against a respondent (*other than a government, government agency or political subdivision*)" (emphasis added). No such exemption for governmental respondents would be necessary unless Congress intended the expanded Title VII remedies to be otherwise applicable to government entities like defendants. See *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 13 (1989) ("a limitation of liability is nonsensical unless liability existed in the first place"); *id*. at 30 (Scalia, J., concurring in part & dissenting in part). Thus, the language

and structure of Section 1981a lead to the inescapable conclusion that Congress intended that Title VII plaintiffs be able to recover compensatory damages from States in federal court just as they could recover other remedies. See *Varner* v. *Illinois State Univ.*, 150 F.3d 706, 717-719 (7th Cir. 1998), vacated and remanded, 120 S. Ct. 928 (2000), reinstated, 226 F.3d 927 (7th Cir. 2000); *Gehrt* v. *University of Ill.*, 974 F. Supp. 1178, 1185 (C.D. Ill. 1997); *Blankenship* v. *Warren County*, 931 F. Supp. 447, 450-451 (W.D. Va. 1996). This is all that is required to find an abrogation of Eleventh Amendment immunity.

## II

## CONGRESS VALIDLY ABROGATED ELEVENTH AMENDMENT IMMUNITY FOR SEX DISCRIMINATION CLAIMS

Congress has the power to abrogate States' Eleventh Amendment immunity to private suits under federal statutes enacted pursuant to Section 5 of the Fourteenth Amendment, which authorizes Congress to enact "appropriate" legislation to "enforce" the Equal Protection Clause. See *Kimel* v. *Florida Bd. of Regents*, 120 S. Ct. 631, 644 (2000) (citing *Fitzpatrick*). 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. *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*, 120 S. Ct. at 644.

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." *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). "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. 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. *Id*. at 520.

Defendants argue (Br. 15-25) that as applied to sex discrimination, Title VII is not appropriate Section 5 legislation. After the Court's decision in *Kimel*, its most recent opinion addressing the scope of Congress's Section 5 authority, three courts of appeals have held that Title VII's abrogation is effective. See *Holman* v.

*Indiana*, 211 F.3d 399, 402 n.2 (7th Cir. 2000) (sex discrimination); *Johnson* v. *University of Cincinnati*, 215 F.3d 561, 571 (6th Cir. 2000) (race discrimination and retaliation); *Jones* v. *WMATA*, 205 F.3d 428, 434 (D.C. Cir. 2000) (retaliation). This Court should do the same.

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

1. Title VII makes it unlawful for employers (including state employers) "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a). This provision prohibits intentional discrimination on the basis of sex. See *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187, 199-200 (1991). Likewise, the Equal Protection Clause prohibits intentional discrimination on the basis of sex by state governments. See *United States* v. *Morrison,* 120 S. Ct. 1740, 1755 (2000); *United States* v. *Virginia*, 518 U.S. 515, 523 (1996); *J.E.B.* v. *Alabama*, 511 U.S. 127, 130-131 (1994); *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 723 (1982). This prohibition extends to sex discrimination in government employment. See *Davis* v. *Passman*, 442 U.S. 228 (1979).

This Court has concluded that the inquiry whether a government employer has violated the Equal Protection Clause is "essentially the same" as a Title VII action alleging disparate treatment. See *Briggs* v. *Anderson*, 796 F.2d 1009, 1021

(8th Cir. 1986); see also *Richmond* v. *Board of Regents*, 957 F.2d 595, 598 (8th Cir. 1992) (in employment discrimination context, elements of 42 U.S.C. 1983 equal protection claim are same as Title VII). Not surprisingly, defendants do not seriously contend that Title VII's disparate treatment standard makes unlawful any conduct that would be constitutional under the Supreme Court's current standards for reviewing sex discrimination.

2. Instead, defendants contend (Br. 22) that Title VII's prohibition on sex discrimination in employment is "disproportionate to any findings of a pattern of unconstitutional conduct by the States." But that is not the correct inquiry. In assessing whether a statute is "remedial or preventive," the Court has held that "congruence and proportionality" between the statutory prohibitions and constitutional prohibitions is critical. See *Kimel*, 120 S. Ct. at 644-655, 647. It has not held, as defendants would contend, that there must be a congruence and proportionality between the statutory prohibitions and a historical pattern of violations.

Congress is not powerless to exercise its Section 5 authority absent evidence of a "pattern" of constitutional violations by States. When a statutory provision is drawn to prohibit and remedy constitutional violations, a court need not inquire about the frequency of such constitutional violations. Thus, for example, the Supreme Court has twice upheld as a proper exercise of Congress's Section 5 authority 18 U.S.C. 242, a criminal statute that prohibits persons acting under color of law from depriving individuals of constitutional rights, without inquiring into the

extent to which such criminal acts occurred or the availability of state remedies. See *Williams* v. *United States*, 341 U.S. 97 (1951); *Screws* v. *United States*, 325 U.S. 91 (1945); cf. *Ex parte Virginia*, 100 U.S. (10 Otto) 339 (1879) (upholding criminal statute prohibiting exclusion of blacks from juries as valid Section 5 legislation).

Nor did Congress have to 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. A violation of a single individual's constitutional rights can cause devastating harm and is a proper subject of Congress's enforcement authority, regardless of whether it is part of a larger pattern of unlawful conduct. 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. But neither the language of Section 5 nor the Supreme Court's decisions support the idea that Congress's power is limited to attacking widespread constitutional violations.

Defendants' reliance 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 for precisely these reasons. Those cases simply recognize that when a statute regulates a significant amount of conduct that is not prohibited by the Constitution, it may be necessary to examine the record before Congress to determine 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. See *Kovacevich* v. *Kent State Univ*., 224 F.3d 806, 821 n.6 (6th Cir. 2000). Those concerns are not present here. In contrast to the conduct at issue in *Kimel* and *Florida Prepaid*, plaintiff seeks to hold defendants liable for the kind of sex discrimination that violates the Equal Protection Clause when practiced by the States.

This understanding explains the holding of this Court's decision in *Crawford* v. *Davis*, 109 F.3d 1281 (8th Cir. 1997), which rejected a State's challenge to an Eleventh Amendment abrogation in another federal statute

prohibiting sex discrimination. *Crawford* involved a suit brought under Title IX of the Education Amendments of 1972, which prohibits educational programs receiving federal financial assistance from discriminating on the basis of sex. This Court held that Title IX and its abrogation were valid Section 5 legislation "[b]ecause the Supreme Court has repeatedly held that [the Equal Protection Clause] proscribe[s] gender discrimination in education" and Title IX was "enacted specifically to combat such discrimination." *Id.* at 1283. See also *O'Sullivan* v. *Minnesota*, 191 F.3d 965 (8th Cir. 1999) (upholding abrogation for Equal Pay Act, which prohibits unequal pay by state employers on the basis of sex).

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

1. Defendants seem to suggest (Br. 11, 19-21) that even though Title VII in large measure prohibits state conduct already unlawful under the Equal Protection Clause itself, Title VII is not valid Section 5 legislation because Congress did not make "findings." But Congress is not a lower court required to make findings of fact. See *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 212 (1997). In any event, there is no question that States have engaged in a widespread pattern of unconstitutional sex discrimination. 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); *Personnel Adm'r* v. *Feeney*, 442 U.S. 256, 273 (1979) ("Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination."). The Court has reiterated that "the lack of support in the legislative record is not determinative." *Florida Prepaid*, 527 U.S. at 646; *Kimel*, 120 S. Ct. at 649. Because the Court itself has determined that the States have engaged in pervasive sex discrimination, it is not necessary to examine whether the legislative history also supports that conclusion. 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).

2. 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,[1] and that existing remedies, both at the state and federal level, were

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[1] 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").

inadequate.[2] Much of this evidence revealed widespread and entrenched sex discrimination in employment in state universities.[3] Indeed, even after Congress

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[2] See *Discrimination Against Women: Hearings Before the Special Subcomm. on Educ. of the House Comm. on Educ. & Labor*, Pt. 1, 91st Cong., 2d Sess. 26 (1970) (*Discrimination*) (Jean Ross, American Association of University Women) ("[A]s in the case of [racial minorities], the additional protective acts of recent years, such as the Equal Pay for Equal Work Act and the Civil Rights Act are required and need strengthening to insure the equal protection under the law which we are promised under the Constitution."); *id.* at 304 (Dr. Bernice Sandler) (even if Fourteenth Amendment were interpreted to prohibit sex discrimination, legislation "would be needed if we are to begin to correct many of the inequities that women face"); *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 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).

[3] 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

(continued...)

extended Title VII to the States, the Chair of the EEOC agreed that state and local governments were "the biggest offenders" of Title VII's prohibition on sex discrimination and that "[w]e have a great deal of problems both with educational institutions and State and local governments."[4]

In the committee reports and floor debates concerning legislation aimed at redressing sex discrimination, Congress noted the "scope and depth of the discrimination"[5] 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."[6] This conclusion is consistent with Congress's assessment that the "well

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[3](...continued)
growing body of evidence of discrimination against women faculty in higher education"); *id.* at 645 (Peter Muirhead, Department of Health, Education and Welfare) ("the inequities are so pervasive that direct discrimination must be considered as p[l]aying a share, particularly in salaries, hiring, and promotions, especially to tenured positions"); *id*., 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").

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

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

[6] 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
(continued...)

documented" record revealed "systematic[]," and "widespread" sex discrimination by States,[7] which "persist[ed]" despite the fact that it was "violative of the Constitution of the United States."[8]

The conclusions of Congress based on an extensive record thus confirm the pronouncements of the Supreme Court – that States had consistently engaged in invidious discrimination on the basis of sex. Nothing more is required of Congress before its extension to the States of Title VII, a statute that in large part tracks the Equal Protection Clause's prohibitions on sex discrimination, can be held valid Section 5 legislation.

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[6](...continued)
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.").

[7] 118 Cong. Rec. 3936, 5804 (1972) (Sen. Bayh) ("[d]iscrimination against females on faculties and in administration is well documented"); *id.* at 1992 (Sen. Williams) ("[T]his discrimination does not only exist as regards to the acquiring of jobs, but that it is similarly prevalent in the area of salaries and promotions where studies have shown a well-established pattern of unlawful wage differentials and discriminatory promotion policies."); *Discrimination*, Pt. 1, at 3 (Rep. Green) ("too often discrimination against women has been either systematically or subconsciously carried out" by "State legislatures"); *Discrimination*, Pt. 2, at 750 (Rep. Heckler) ("Discrimination by universities and secondary schools against women teachers is widespread.").

[8] 118 Cong. Rec. 1412 (1972) (Sen. Byrd).

### C. *Title VII's Prohibitions Of Policies And Practices That Have An Unjustified Disparate Impact On The Basis Of Sex And Retaliation Are Appropriate Section 5 Legislation*

Defendants note (Br. 1) that plaintiff's complaint identifies two other violations of Title VII: disparate impact discrimination and retaliation for filing a complaint with the Equal Employment Opportunity Commission. While the defendants have not specifically addressed the constitutionality of these provisions, thus forfeiting any right to do so at this stage, we briefly address Congress's power to prohibit such practices on the chance that this Court considers the issues properly presented.

1. In addition to prohibiting disparate treatment, Title VII also prohibits an "employment practice that causes a disparate impact" on the basis of sex that is not "job related for the position in question and consistent with business necessity." 42 U.S.C. 2000e-2(k); *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977). It is not clear whether this prohibition is at issue in this case. While the phrase "disparate impact" is used in a heading of plaintiff's complaint, the factual allegations of the complaint all involve differential treatment of men and women or actions motivated by discriminatory intent.

Whether or not plaintiff's complaint states a disparate impact claim (an issue not pressed by defendants or addressed by the district court), the Eleventh Amendment is no bar to such a claim. Congress has the power under Section 5 of the Fourteenth Amendment to prohibit employment practices that have the effect of

sex discrimination (in the absence of a business necessity), even without a showing of purposeful discrimination required to show a constitutional violation.

First, a statute prohibiting disparate impact is appropriate when facially neutral criteria are used, at least in part, as a subterfuge for intentional discrimination. Congress was aware of massive discrimination against women, both overt and subtle, in education and employment. Concealed intentional discrimination, combined with persistent "subconscious stereotypes and prejudices," have led Congress to make unlawful practices that can "in operation be functionally equivalent to intentional discrimination," despite the inability of a plaintiff to prove discriminatory intent. *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 990, 987 (1988). Second, the disparate impact standard recognizes the continuing repercussions of past intentional discrimination and seeks to assure that employers are not acting in a way that perpetuates those effects. As the Court explained, it is appropriate to prohibit "practices that are fair in form, but discriminatory in operation," when the practice is not a business necessity, because the disparate impact is likely traceable to the long history of intentional discrimination. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430-431 (1971); see also *Gaston County* v. *United States*, 395 U.S. 285, 297 (1969) (Voting Rights Act) ("'Impartial' administration of the literacy test today would serve only to perpetuate these inequities [in education] in a different form.").

In crafting policies to "enforce" a prohibition on intentional discrimination, Congress may take cognizance of the well-established maxim that "an invidious

discriminatory purpose may often be inferred from * * * the fact, if it is true, that the law bears more heavily on one [group] than another." *Washington* v. *Davis*, 426 U.S. 229, 242 (1976). The longstanding history of discrimination in this country on the basis of sex, the close (albeit not inevitable) correlation between intent and effects, and the difficulty of proving the former, together justify a prophylactic rule that prohibits the latter absent proof of untainted and legitimate justifications. It is thus 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).

Applying this principle, this Court upheld the Equal Pay Act as valid Section 5 legislation "[e]ven though the [Act] does not require an employee to show purposeful discrimination to recover." *O'Sullivan* v. *Minnesota*, 191 F.3d 965, 968 (8th Cir. 1999).[9] The courts of appeals that have addressed the issue have all

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[9] This is in accord with every other circuit that has considered the issue, both before and after *Kimel*. See *Kovacevich* v. *Kent State Univ.*, 224 F.3d 806, 819-821 (6th Cir. 2000); *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); *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); *Usery* v. *Allegheny County Inst. Dist.*, 544 F.2d 148,

(continued...)

upheld the constitutionality of disparate impact claims under Title VII as a valid exercise of Congress's power to enforce the Fourteenth Amendment in cases involving race or sex discrimination.[10] The most recent decision upholding Title VII's prohibition on employment practices with an unjustified disparate impact is *In re Employment Discrimination Litigation Against Alabama*, 198 F.3d 1305 (11th Cir. 1999). After an extensive survey of the elements of a disparate impact case and the Supreme Court's decision in *City of Boerne*, the Eleventh Circuit concluded that

> [t]hough the plaintiff is never explicitly required to demonstrate discriminatory motive, a genuine finding of disparate impact can be highly probative of the employer's motive since a[n] * * * "imbalance is often a telltale sign of purposeful discrimination." If, after a *prima facie* demonstration of discriminatory impact, the employer cannot demonstrate that the challenged practice is a job related business necessity, what explanation can there be for the employer's continued use of the discriminatory practice other than that some invidious purpose is probably at work? * * *
>
> All of this is not to say that the plaintiff is ever required to prove discriminatory intent in a disparate impact case; it is clear that what plaintiffs must demonstrate is a discriminatory result, coupled with a finding that the employer has no explanation as to why the challenged practice should be

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[9](...continued)
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).

[10] See *Guardians Ass'n* v. *Civil Serv. Comm'n*, 630 F.2d 79, 88 (2d Cir. 1980), cert. denied, 452 U.S. 940 (1981); *United States* v. *Virginia*, 620 F.2d 1018, 1023 (4th Cir.), cert. denied, 449 U.S. 1021 (1980); *Scott* v. *City of Anniston*, 597 F.2d 897, 899 (5th Cir. 1979), cert. denied, 446 U.S. 917 (1980); *Detroit Police Officers' Ass'n* v. *Young*, 608 F.2d 671, 689 n.7 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981); *Liberles* v. *County of Cook*, 709 F.2d 1122, 1135 (7th Cir. 1983); *Blake* v. *City of L.A.*, 595 F.2d 1367, 1373 (9th Cir. 1979), cert. denied, 446 U.S. 928 (1980).

> sustained as a job related business necessity. What our analysis does show, however, is that the disparate impact provisions of Title VII can reasonably be characterized as "preventive rules" that evidence a "congruence between the means used and the ends to be achieved." Congress has not sought to alter the "substance of the Fourteenth Amendment's restrictions on the States" with the disparate impact provisions of Title VII. Our analysis of the mechanics of a disparate impact claim has led us unavoidably to the conclusion that although the form of the disparate impact inquiry differs from that used in a case challenging state action directly under the Fourteenth Amendment, the core injury targeted by both methods of analysis remains the same: intentional discrimination.

*Id*. at 1321-1322 (citations omitted). This Court should follow the Eleventh Circuit's persuasive decision and uphold Title VII's disparate impact standard as valid Section 5 legislation.

2. Plaintiff has also claimed that defendants retaliated against her for filing a complaint with the Equal Employment Opportunity Commission, in violation of 42 U.S.C. 2000e-3(a). 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.[11] A prohibition on retaliation

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[11] Indeed, Congress heard testimony that victims of discrimination often face retaliation. See *Discrimination*, 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*, Pt. 1, at 138 (Aileen Hernandez, former member, EEOC) (giving examples of retaliation against employees who complained of discrimination).

may be regarded, like statutes that award prevailing plaintiffs attorneys fees, as an appropriate means to encourage persons who believe they have been discriminated against to seek relief. See *Maher* v. *Gagne*, 448 U.S. 122, 132-133 (1980).[12] Thus, Congress appropriately acted under its Section 5 authority in prohibiting States from retaliating against employees for invoking their Title VII rights.

## CONCLUSION

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

Respectfully submitted,

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[12] In addition, a statute prohibiting States from retaliating against individuals for filing a complaint with a government agency may be regarded as "appropriate legislation" to provide a remedy for the First Amendment right to petition for redress of grievances. See, *e.g.*, *Greenwood* v. *Ross*, 778 F.2d 448, 456-457 (8th Cir. 1985) (retaliation for filing an EEOC charge states First Amendment claim). 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 SERVICE

I hereby certify that on December 6, 2000, two copies of the foregoing Brief for the United States as Intervenor and one 3 ½" disk containing the brief's text, scanned for viruses and determined to be virus free, were served by first-class mail, postage pre-paid, on the following counsel:

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