No. 00-3460

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ESTER LUNNIE, DOROTHY ROBINSON, and GAYLE D. PORTIS,

Plaintiffs-Appellees

v.

UNIVERSITY OF ARKANSAS BOARD OF TRUSTEES,
a Body Politic and Corporate,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS INTERVENOR

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

CONSTITUTION AND STATUTES:

STATUTES (continued): **PAGE**

LEGISLATIVE HISTORY:

LEGISLATIVE HISTORY (continued): **PAGE**

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SUMMARY OF THE CASE

Several African-American employees brought suit against the University of Arkansas and various state officials alleging that the officials had subjected them to discrimination on the basis of race 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. However, if the Court elects to hear argument, the United States would like to participate and would suggest that argument in this case be heard along with any argument ordered in *Okruhlik v. University of Arkansas*, No. 00-3159, which is currently pending before this Court. *Okruhlik* concerns similar issues and involves the same defendant.

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 race 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 Litig. Against Ala., 198 F.3d 1305 (11th Cir. 1999)

SUMMARY OF ARGUMENT

The Eleventh Amendment is no bar to plaintiffs' claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. 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 damages 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 race discrimination. Like the Equal Protection Clause itself, Title VII prohibits state employers from intentionally discriminating on the basis of race. 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 race 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 race discrimination.

ARGUMENT

It is now firmly established that Congress may abrogate States' Eleventh Amendment immunity to suit by private parties in federal court only in limited

circumstances – where Congress has both "unequivocally expresse[d] its intent to abrogate the immunity," and "acted 'pursuant to a valid exercise of power.'" *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 55 (1996). In subjecting States to liability under Title VII of the Civil Rights Act of 1964, Congress was unquestionably acting within these limits.

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

1. Title VII prohibits employers from discriminating on the basis of race in the compensation, terms, conditions, or privileges of employment. See 42 U.S.C. 2000e-2(a). Although Title VII as originally enacted did not subject States to liability, in 1972 Congress amended the statute to include "governments [and] governmental agencies" within its definition of "person," and, by extension, its definition of "employer." 42 U.S.C. 2000e(a), 2000e(b). In *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), the Supreme Court held that this amending language demonstrated with sufficient clarity 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 relied on *Fitzpatrick* in holding 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).

Although Defendants acknowledge the holding of *Fitzpatrick* (Br. 16), they argue that the method of reaching the holding has been rejected by later cases. That argument is irrelevant and unavailing. In reaching the conclusion that Title VII abrogates States' Eleventh Amendment immunity, the *Fitzpatrick* Court necessarily reached and decided affirmatively the threshold question whether Title VII contained a sufficiently clear intent to abrogate. 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 whether Title VII contains a sufficiently clear statement of intent to subject States to private suits 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).[1]

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[1] Moreover, even if this Court entertains Defendants' argument and ultimately chooses to examine anew the question whether Title VII contains a clear statement of intent to abrogate, this Court should find that it does. Last term, the

(continued...)

2. In 1991, Congress amended Title VII to allow victims of discrimination to seek compensatory damages in addition to the back pay and other equitable relief they had previously been authorized to seek. 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 contend (Br. 17) that, even if Title VII does abrogate States' immunity from suit, that abrogation does not extend to the 1991 Act and therefore does not include compensatory damages remedies. Although the compensatory damages provision was not placed in the same chapter as the rest of Title VII, the plain

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[1](...continued)
Supreme Court decided *Kimel* v. *Florida Board of Regents*, 120 S. Ct. 631 (2000), in which they found that, although Congress had exceeded its authority under Section 5 of the Fourteenth Amendment in enacting the Age Discrimination in Employment Act (ADEA), that statute did contain a sufficiently clear statement of congressional intent to subject States to suit in federal court to pass muster under the first prong of the *Seminole Tribe* test. *Id.* at 640. The authorizing language of the ADEA is not materially different from that of Title VII. The *Kimel* Court described the statutory language in the ADEA authorizing employee suits "against any employer (including a public agency) in any Federal or State court of competent jurisdiction," 29 U.S.C. 216(b), 29 U.S.C. 626(b), as "clearly provid[ing] for suits by individuals against States," 120 S. Ct. at 640. The term "public agency" in the ADEA is defined to include "the government of a State or political subdivision thereof" and "any agency of * * * a State, or a political subdivision of a State." 29 U.S.C. 203(x). "Read as a whole," the Court wrote, "the plain language of these provisions clearly demonstrates Congress' intent to subject the States to suit for money damages at the hands of individual employees." 120 S. Ct. at 640. The statutory language of Title VII is substantially similar. Title VII authorizes aggrieved private parties to file suit against an employer where, *inter alia*, "the Attorney General in a case involving a government, governmental agency, or political subdivision" has elected not to file suit on her own. 42 U.S.C. 2000e-5(f)(1). The statute also authorizes such suits to be brought in any "United States district court and each United States court of a place subject to the jurisdiction of the United States" or "in any judicial district in the State" in which the contested events occurred. 42 U.S.C. 2000e-5(f)(3). This language is every bit as unequivocal as the language approved of in *Kimel*.

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 demonstrate in an "action brought" under Title VII that a "respondent" engaged in "unlawful intentional discrimination" prohibited by Title VII. Thus, far from creating a separate cause of action requiring a distinct abrogation of immunity, this provision applies to an existing action already brought under Title VII. 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 that

these very provisions, plus the inclusion of States as employers, were sufficient to abrogate Eleventh Amendment immunity to suits under Title VII, and they are equally sufficient to abrogate States' immunity to compensatory damages under Title VII.[2]

Nor is there any reason to believe that Congress intended to exclude States from Title VII's abrogation of immunity for compensatory damages 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,*

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[2] The fact that the compensatory damages remedy was added to Title VII in 1991 rather than being included in the original 1964 enactment is irrelevant. As the Supreme Court stated in *Kimel*, "[t]he clear statement inquiry focuses on what Congress did enact, not when it did so. [The Court] will not infer ambiguity from the sequence in which a clear textual statement is added to a statute." 120 S. Ct. at 642.

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. *Univ. 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 STATES' ELEVENTH AMENDMENT IMMUNITY FOR RACE 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 v. Bitzer*, 427 U.S. 445 (1976)). 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.

Thus, 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. 17-28) that Title VII is not appropriate Section 5 legislation. After the Supreme 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. *Univ. 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 Race 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 race. See *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 985-986 (1988). Likewise, the Equal Protection Clause prohibits intentional discrimination on the basis of race by state governments. See *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 481-482 (1997); *City of Mobile* v. *Bolden*, 446 U.S. 55, 62 (1980); *Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *Washington* v. *Davis*, 426 U.S. 229, 238-248 (1976). This

prohibition extends to race discrimination in government employment. See *Hazelwood Sch. Dist.* v. *United States*, 433 U.S. 299, 309-310 & n.15 (1977).

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. *Bd. 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 race discrimination.

2. Instead, defendants contend (Br. 24) that Title VII's prohibition on race 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 whether Congress could have reasonably concluded that such a prophylactic remedy was appropriate.[3]

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

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[3] Moreover, before inquiring into the legislative record, the *Kimel* Court first judged the ADEA "against the backdrop of [the Court's] equal protection jurisprudence," and found that the ADEA targeted "substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection * * * standard." 120 S. Ct. at 647. This approach emphasizes the fact that the "ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch." *Id.* at 644. An inquiry into Congressional findings, therefore, is only helpful where the conduct prohibited by a particular statute falls outside the range of conduct previously adjudged by a court to be unconstitutional. See *Stevens* v. *Illinois Dep't of Transp.*, 210 F.3d 732, 737 (7th Cir. 2000) ("[W]e look to judicial rulings, not congressional pronouncements, in our consideration of whether the conduct targeted by the ADA is unconstitutional."); accord *Crawford* v. *Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997) (holding that the inquiry into whether Congress legislated pursuant to Section 5 requires this Court to "make an objective inquiry"). See pp. 16 - 18, infra.

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*, plaintiffs seek to hold defendants liable for the kind of race discrimination that violates the Equal Protection Clause when practiced by the States.

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

1. Defendants seem to suggest (Br. 13, 19-24) 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 race discrimination. The Supreme Court has recognized that the "history of racial discrimination in this country is undeniable." *McKleskey* v. *Kemp*, 481 U.S. 279, 298 (1987); cf. *Shaw* v. *Reno*, 509 U.S. 630, 650 (1993) (noting "our country's long and persistent history of racial discrimination in

voting").[4] Indeed, prior to the extension of Title VII to the States, the Court had identified widespread State-sponsored race discrimination in a variety of areas. See, *e.g.*, *Oregon* v. *Mitchell*, 400 U.S. 112 (1970) (voting); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (public accommodation); *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966) (voting); *Brown* v. *Bd. of Educ.*, 347 U.S. 483 (1954) (education); *Hernandez* v. *Texas*, 347 U.S. 475 (1954) (jury selection); *Terry* v. *Adams*, 345 U.S. 461 (1953) (voting); *Sweatt* v. *Painter*, 339 U.S. 629 (1950) (education); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948) (racially restrictive covenants); *Smith* v. *Allwright*, 321 U.S. 649 (1944) (voting); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886) (selective prosecution). 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 race discrimination, it is not necessary to

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[4] See also *Adarand* v. *Pena*, 515 U.S. 200, 272 (1995) (Ginsburg, J., dissenting) ("For generations, our lawmakers and judges were unprepared to say that there is in this land no superior race, no race inferior to any other. In *Plessy* v. *Ferguson*, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), not only did this Court endorse the oppressive practice of race segregation, but even Justice Harlan, the advocate of a 'color-blind' Constitution, stated: 'The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.' *Id.*, at 559, 16 S. Ct., at 1146 (dissenting opinion)."); *id.* at 255 (Stevens, J., dissenting) ("The Fourteenth Amendment directly empowers Congress at the same time it expressly limits the States. This is no accident. It represents our Nation's consensus, achieved after hard experience throughout our sorry history of race relations, that the Federal Government must be the primary defender of racial minorities against the States, some of which may be inclined to oppress such minorities.") (footnote omitted).

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 race discrimination by state employers that was before Congress, that requirement is easily met. Prior to extending Title VII to cover States, Congress held extensive hearings and received reports from the Executive Branch on the subject of race discrimination by States. The testimony and reports illustrate that race discrimination by state employers was common,[5] and that existing remedies, both

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[5] See, *e.g.*, 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"); U.S. Commission on Civil Rights, *For All the People . . . By All the People – A Report on Equal Opportunity in State and Local Government* (1969), reprinted in 118 Cong. Rec. 1816, 1817 (1972) (*For All the People)* ("State and local government employment is pervaded by a wide range of discriminatory practices. These practices violate the requirements of the equal protection clause of the 14th amendment and accordingly must be eliminated."); *id.* at 1815 ("State and local governments have failed to fulfill their obligation to assure equal job opportunity[.] * * * Not only do State and local governments consciously and overtly discriminate in hiring and promoting minority group members, but they do

(continued...)

at the state and federal level, were inadequate.[6] The floor debates and Congressional reports specifically related to the 1972 extension of Title VII to cover States demonstrates that Congress intended to target an identified problem of "blatant,"[7] "pervasive,"[8] "well-documented and widespread"[9] race-based

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[5](...continued)
not foster positive programs to deal with discriminatory treatment on the job.") (omission in original).

[6] *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"); *1969 Senate EEO* at 170 (Howard Glickstein, U.S. Comm'n on Civil Rights) (some States' laws do not extend to state employers); *For All the People*, reprinted in 118 Cong. Rec. at 1817 (1972) ("State and local government employment opportunities for minorities are restricted by overt discrimination in personnel actions and hiring decisions, a lack of positive action by governments to redress the consequences of past discrimination, and discriminatory and biased treatment on the job.").

[7] 118 Cong. Rec. 1393 (1972) (reprinting testimony of William Brown, Chair of the EEOC) ("Discrimination in State and local employment is as blatant and as widespread as in any section of private business.").

[8] 118 Cong. Rec. 1815 (1972) (Sen. Williams) ("[E]mployment discrimination in State and local governments is more pervasive than in the private sector."); *id.* at 581 (Sen. Javits) ("Perpetuation of past discriminatory practices * * * were found to be widespread, and if anything more pervasive than in the private sector.").

[9] 118 Cong. Rec. 1815 (1972) (Sen. Williams) ("In fact, the well-documented and widespread discrimination among State and local government employees is a shameful condition that should be eliminated wherever and whenever possible."); H.R. Rep. No. 238, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S.C.C.A.N. 2137, 2152 ("[W]idespread discrimination against minorities
(continued...)

discrimination by state employers. Moreover, Congress specifically found that employment discrimination was a problem in state educational institutions.[10] This evidence was more than sufficient to support Congress's conclusion that State-sponsored employment discrimination was a serious problem[11] and violative of the Fourteenth Amendment.[12]

The conclusions of Congress based on an extensive record thus confirm the pronouncements of the Supreme Court – that States had consistently engaged in

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[9](...continued)
exists in State and local government employment, and * * * the existence of this discrimination is perpetuated by the presence of both institutional and overt discriminatory practices.").

[10] 118 Cong. Rec. 1992 (1972) (Sen. Williams) ("The existence of discrimination in the employment practices of our Nation's educational institutions is well known, and has been adequately demonstrated by overwhelming statistical evidence as well as numerous complaints from groups and individuals. Minorities and women continue to be subject to blatant discrimination in these institutions.").

[11] H.R. Rep. No. 238, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S.C.C.A.N. 2137, 2153 ("The problem of employment discrimination is particularly acute and has the most deleterious effect in these governmental activities which are most visible to the minority communities (notably education, law enforcement, and the administration of justice) with the result that the credibility of the government's claim to represent all the people equally is negated.").

[12] H.R. Rep. No. 238, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S.C.C.A.N. 2137, 2154 ("The expansion of Title VII coverage to State and local government employment is firmly embodied in the principles of the Constitution of the United States. The Constitution has recognized that it is inimical to the democratic form of government to allow the existence of discrimination in those bureaucratic systems which most directly affect the daily interactions of this Nation's citizens. The clear intention of the Constitution, embodied in the Thirteenth and Fourteenth Amendments, is to prohibit all forms of discrimination.").

invidious discrimination on the basis of race. 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 race discrimination, can be held valid Section 5 legislation.

C. *Title VII's Prohibition Of Retaliation Is Appropriate Section 5 Legislation*

In their complaint, Plaintiffs also included claims that they were retaliated against for filing complaints with the Equal Employment Opportunity Commission. While the defendants have not specifically addressed the constitutionality of Title VII's prohibition of retaliation, thus forfeiting any right to do so at this stage, we briefly address Congress's power to prohibit such behavior on the chance that this Court considers the issue properly presented.

Title VII makes it an "unlawful employment practice for an employer to discriminate against any of his employees * * * because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge * * * under [Title VII]." 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, 52 (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. A prohibition on retaliation 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);[13] cf. *Fitzpatrick*, 427 U.S. at 456-457 (upholding validity of award of attorneys' fees against State in Title VII action as "follow[ing] necessarily from" the Court's holding that Title VII abrogated States' immunity). Thus, Congress acted appropriately under its Section 5 authority in prohibiting States from retaliating against employees for invoking their rights under Title VII.

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[13] 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).

CONCLUSION

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

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I hereby certify pursuant to Eighth Circuit Rule 28A(c) that the attached Brief for the United States as Intervenor was prepared using WordPerfect 9 in Times New Roman 14 point font.

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