NO OBJECTION TO ORAL ARGUMENT

No. 99-1528

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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CHERYL PAWLOWSKI,

Plaintiff-Appellee

v.

REGENTS OF THE UNIVERSITY OF COLORADO,

Defendant-Appellant

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(Honorable Wiley Y. Daniel)

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# BRIEF FOR THE UNITED STATES AS INTERVENOR

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## STATEMENT OF RELATED CASES

There are no prior or related appeals.

IN THE UNITED STATES COURT OF APPEALS
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No. 99-1528

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# BRIEF FOR THE UNITED STATES AS INTERVENOR

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## JURISDICTIONAL STATEMENT

Plaintiff-appellee filed a complaint in the United States District Court for the District of Colorado, alleging, inter alia, that the Regents of the University of Colorado (hereinafter "the University") violated the Equal Pay Act of 1963, 29 U.S.C. 206(d). This appeal is from a final judgment entered on October 21, 1999, pursuant to a jury verdict. The University 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). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1291.

## STATEMENT OF THE ISSUE

Whether the application of the Equal Pay Act to the States is a valid exercise of Congress's power to enforce the Fourteenth Amendment.[1/]

## STATEMENT OF THE CASE

This suit is a private action filed by Dr. Cheryl Pawlowski, a former instructor in the Communications Department of the University of Colorado. Dr. Pawlowski alleges, inter alia, that the University violated the Equal Pay Act by paying her less than similarly situated males. After a trial on the merits, the jury returned a verdict in favor of Dr. Pawlowski on her Equal Pay Act claim.[2/] On appeal, the University contends, inter alia, that Congress lacked authority to abrogate the States' Eleventh Amendment immunity in the Equal Pay Act.

## SUMMARY OF ARGUMENT

The Eleventh Amendment does not bar federal courts from exercising jurisdiction over plaintiff's Equal Pay Act claim. Congress may use its power to enforce the Fourteenth Amendment to abrogate the States' Eleventh Amendment immunity from suit. The application of the Equal Pay Act to the States is a valid exercise of that power. States plainly violate the Equal

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[1/] Although the University raises other issues on appeal, the United States' intervention is limited to defending the constitutionality of the Equal Pay Act.

[2/] Dr. Pawlowski also prevailed on her Title VII claim against the University. The University has not challenged the constitutionality of Title VII. We note, however, that Title VII contains a valid abrogation of the States' Eleventh Amendment immunity. See Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

Protection Clause of the Fourteenth Amendment if they intentionally pay men and women different wages for the same work. The Equal Pay Act is tailored to ferret out precisely this form of intentional discrimination.

The modest burden-shifting scheme established in the Equal Pay Act does not render it unconstitutional. The Act simply presumes that if men and women are paid different wages for the same work, and if the employer cannot show that any factor other than gender explains the disparity, then the employer's action is motivated by gender. In light of the ease with which employers can disguise their discriminatory motives, this is a reasonable means of detecting and remedying intentional discrimination. The Supreme Court has made clear that Congress's power to enforce the Fourteenth Amendment includes the power to enact a statute that reaches constitutional, as well as unconstitutional, conduct if the statute is an appropriate means of deterring and remedying constitutional violations.

Nothing in the Supreme Court's recent decision in Kimel v. Florida Board of Regents, 120 S. Ct. 631 (2000), changes the relevant analysis or supports a different result. In Kimel, the Court invalidated the Age Discrimination in Employment Act of 1967 (ADEA) only after noting that the ADEA imposed far more rigorous standards on States than the Equal Protection Clause. The Court noted the critical differences in the Constitution's treatment of classifications based on age, which are presumptively valid, and the standards for review of

discrimination based on race and sex, which is presumptively unconstitutional.

Because the Court in Kimel concluded that the ADEA outlaws very little conduct that is unconstitutional, it found that there would have to be some evidence of a pattern of unconstitutional conduct by the States to justify such a broad prophylactic remedy. The Equal Pay Act, however, outlaws very little conduct that would not be unconstitutional if practiced by the State. Furthermore, the Equal Pay Act targets discrimination against women who, unlike the class of older persons at issue in Kimel, have been subjected to a "history of purposeful unequal treatment" by States. See Kimel, 120 S. Ct. at 645 (quotations and citations omitted).

Because the Equal Pay Act is tailored to enforce the Equal Protection Clause's ban on intentional sex discrimination, there was no need for Congress to have before it the evidence of widespread constitutional violations by States that might have been appropriate if it had enacted more far-reaching legislation. In fact, the Supreme Court has noted the pervasive history of sex discrimination by States and has pointed to that history as a basis for applying heightened judicial scrutiny to state classifications based on gender.

In any event, the legislative record of the Equal Pay Act and of other anti-discrimination legislation from the same time period confirms that Congress had before it ample evidence that sex discrimination by state employers, including unequal pay by

States, was a serious problem. This Court should, therefore, follow the eight other courts of appeals to address the issue, and hold that the Equal Pay Act is a valid exercise of Congress's power to enforce the Fourteenth Amendment.

## ARGUMENT

### THE EQUAL PAY ACT, AS APPLIED TO THE STATES, IS A VALID EXERCISE OF CONGRESS'S AUTHORITY TO ENFORCE 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, U.S. Const. Amend. XIV, § 5, to abrogate the States' Eleventh Amendment immunity to private suits in federal court. See Seminole Tribe, 517 U.S. at 59.

The University does not dispute (Br. 17)[3/] that Congress unequivocally expressed its intent to abrogate the States' immunity in the Equal Pay Act. In Kimel v. Florida Board of

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[3/] "Br.__" refers to the appellant's brief.

Regents, 120 S. Ct. 631 (2000), the Supreme Court held that the private enforcement mechanism set forth in 29 U.S.C. 216(b), which authorizes private suits to enforce the ADEA, as well as the Equal Pay Act, "clearly demonstrates Congress' intent to subject the States to suit for money damages at the hands of individual employees." Kimel, 120 S. Ct. at 640. The University also correctly concedes (Br. 18) that there is no requirement that Congress explicitly invoke its Fourteenth Amendment power in order to abrogate the States' immunity. As this Court has held, "congressional action may be upheld under [Section] 5 even when Congress does not expressly rely on that provision as the source of its abrogation power." Union Pacific R.R. Co. v. Utah, 198 F.3d 1201, 1203 (10th Cir. 1999) (citing EEOC v. Wyoming, 460 U.S. 226, 243 n. 18 (1983)). We proceed, therefore, to the second part of the Seminole Tribe inquiry: whether the Equal Pay Act, as applied to the States, is an "appropriate" exercise of Congress's Section 5 power. See Kimel, 120 S. Ct. at 644; Union Pacific, 198 F.3d at 1206.

### A. The Equal Pay Act Is An Appropriate Means Of Enforcing The Fourteenth Amendment's Prohibition On Intentional Sex Discrimination By The States

1. Section 5 of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. Amend. XIV, § 5. As the University correctly notes (Br. 17), Section 5 authorizes Congress to deter and remedy constitutional violations, but it does not give Congress the power to redefine

the substance of the States' constitutional obligations. See City of Boerne v. Flores, 521 U.S. 507, 517-519 (1997). Legislation is considered substantive, rather than remedial, when it is "'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'" Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 645 (2000) (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 always 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, 639 (1999) (quoting City of Boerne, 521 U.S. at 519-520).

There is no question that the Equal Pay Act is designed to remedy and deter intentional sex discrimination in wages. The Equal Pay Act prohibits employers from discriminating on the basis of sex in paying wages. 29 U.S.C. 206(d). Enacted in 1963, and extended to the States in 1974, the Equal Pay Act is "part of a wider statutory scheme to protect employees in the workplace" from "invidious bias in employment decisions." McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 357 (1995).

Intentional sex discrimination by state actors violates the Equal Protection Clause of the Fourteenth Amendment. 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 ex rel. T.B., 511 U.S. 127, 130-131 (1994); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723 (1982). There is no question, therefore, that the Equal Pay Act is aimed at conduct that, when practiced by a state employer, is unconstitutional. See, e.g., Noland v. McAdoo, 39 F.3d 269, 271 (10th Cir. 1994) (sex discrimination by public employer violates Equal Protection Clause); Cross v. Alabama Dep't of Mental Health & Mental Retardation, 49 F.3d 1490, 1507 (11th Cir. 1995) (same).

2. The University argues (Br. 20) that the Equal Pay Act is not proper remedial legislation, because it "penalizes conduct that is not unconstitutional." The University is apparently referring to the Equal Pay Act's standard of proof for imposing liability. To prevail on an Equal Pay Act claim, an employee must first prove that the employer is paying different wages to members of the opposite sex.[4/] 29 U.S.C. 206(d)(1). Furthermore, the employer must eliminate the most common non-discriminatory reasons for the disparity by proving that the

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[4/] The Equal Pay Act provides in pertinent part:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; ii) a merit system; iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex * * *.

employer paid unequal wages for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." See ibid. Once an employee has proven equal work and unequal pay, the employer may then avoid liability by showing that the wage differentials are based on a seniority system, a merit system, a system that awards compensation based on quantity or quality of production, or "on any other factor other than sex." 29 U.S.C. 206(d)(1)(iv) (emphasis added); Corning Glass Works v. Brennan, 417 U.S. 188, 196 (1974); Sprague v. Thorn Americas, Inc., 129 F.3d 1355, 1364 (10th Cir. 1997).

In essence, the Equal Pay Act establishes a rebuttable presumption that unequal pay to men and women who are doing equal work is most likely a result of intentional sex discrimination. It permits employers to rebut that presumption, however, by showing that the actual cause of the disparity is a factor other than sex. Thus, the Equal Pay Act does not impose a new substantive constitutional standard on the States. At most, it simply removes the presumption of validity that normally applies to state action in the narrow circumstance where the employee makes a prima facie showing that the state employer is treating men and women unequally. As the Supreme Court has noted, the burden-shifting provisions of the Equal Pay Act are designed "to confine the application of the Act to wage differentials attributable to sex discrimination." See County of Washington v. Gunther, 452 U.S. 161, 170-171 (1981). Thus, "although the form

of the * * * 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." In re Employment Discrimination Litigation, 198 F.3d 1305, 1322 (11th Cir. 1999) (analyzing disparate impact claims under Title VII and holding that such claims were not barred by the Eleventh Amendment).

3. The mere fact that the Equal Pay Act imposes a different standard of proof than the standard that would normally apply in an action brought directly under the Fourteenth Amendment does not render it invalid. "Congress' § 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). "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" See City of Boerne v. Flores, 521 U.S. 507, 518 (1997) (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)). "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," it is appropriate Fourteenth Amendment legislation. See City of Boerne, 521 U.S. at 520.

The modest rebuttable presumption established in the Equal Pay Act is a proportional and congruent response to the problem Congress sought to address. In enacting the Equal Pay Act, Congress "had substantial justification to conclude that pervasive discrimination existed whereby women were paid less than men for equal work." Varner v. Illinois State Univ., 150 F.3d 706, 716 (1998), vacated, 120 S. Ct. 928 (2000).[5/] Congress also determined that this disparity was rooted in "the false concept that a woman intrinsically deserves less money than a man." H.R. Rep. No. 1714, 87th Cong., 2d Sess. 2 (1962). Furthermore, Congress concluded not only that intentional sex discrimination in wages existed, but also that it was being "successfully concealed" by some employers. Ibid. Because defendants frequently cloak their discriminatory motives in pre-textual explanations,[6/] proving that a defendant's true motives were discriminatory may present a considerable challenge. See, e.g., United States Postal Serv. Bd. of Governors v. Aikens, 460

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[5/] The Court vacated Varner for further consideration in light of its decision in Kimel.

[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 employment 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. 327 (1999).

U.S. 711, 716 (1983) ("There will seldom be 'eyewitness' testimony as to the employer's mental processes.").

To expose the intentional, but concealed, discrimination in wages that Congress identified, it was reasonable for Congress to establish a statutory rebuttable presumption that reflects its finding of widespread sex discrimination and that places the burden on the employer to show that there is another reason for the disparity in pay. If men and women are paid different wages for the same work and the employer cannot show that there is a legitimate reason other than gender that explains the disparity, then it is reasonable to conclude that the employer's action is motivated by gender.[7/] See Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 275 (1979) (disparate impact would signal

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[7/] Some courts have interpreted the "differential based on any other factor other than sex" defense to require that the factor be business related. See, e.g., EEOC v. J.C. Penney Co., 843 F.2d 249, 252-253 (6th Cir. 1988); Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 524-525 (2d Cir.), cert. denied, 506 U.S. 965 (1992). Other courts appear to interpret the defense more broadly. See, e.g., Fallon v. Illinois, 882 F.2d 1206, 1211 (7th Cir. 1989); Strecker v. Grand Forks County Social Serv. Bd., 640 F.2d 96, 103 (8th Cir. 1980). See also Timmer v. Michigan Dep't of Commerce, 104 F.3d 833, 844 (6th Cir. 1997)("an employer may argue that a wage disparity is due to a mistake, i.e. a factor other than sex"). The Tenth Circuit has not addressed the issue. Even under the more narrow interpretation of the affirmative defense, however, it is clear that where an employer cannot show any business related reason for paying different wages to men and women for the same job, it is highly likely that the wage differential is based on sex. Cf. In re Employment Discrimination Litigation Against Ala., 198 F.3d 1305, 1321-1322 (11th Cir. 1999) ("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?"); Reeves v. Sanderson Plumbing Prods., Inc., No. 99-536, 2000 WL 743663, at *9 (U.S. June 12, 2000).

intentional discrimination "[i]f impact * * * could not be plausibly explained on a neutral ground"). As the Supreme Court recently reaffirmed, when an employer does not have a legitimate reason for an employment decision, "'it is more likely than not the employer, who we generally assume acts with some reason, based his decision on an impermissible consideration.'" Reeves v. Sanderson Plumbing Prods., No. 99-536, 2000 WL 743663, at *9 (U.S. June 12, 2000) (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)). Moreover, shifting the burden of persuasion to the employer in this situation is appropriate, because the information that relates to the disparity in pay is "peculiarly within the knowledge" of the employer, cf. South Carolina v. Katzenbach, 383 U.S. 301, 332 (1966), and "the employer is in the best position to put forth the actual reason for its decision," Reeves, 2000 WL 743663 at *9.

4. In other contexts the Supreme Court has approved as appropriate Section 5 legislation measures that shift the burden of proof to the State to disprove an inference of discriminatory intent. For example, in South Carolina v. Katzenbach, supra, and Georgia v. United States, 411 U.S. 526 (1973), the Supreme Court upheld as a valid exercise of Congress's Section 5 authority the provisions of the Voting Rights Act that prohibit covered jurisdictions from implementing certain changes to their voting procedures, unless the covered jurisdiction demonstrates the

absence of a discriminatory purpose or effect.[8/] See South Carolina, 383 U.S. at 331-332; Georgia, 411 U.S. at 536-539. As then Justice Rehnquist noted, Congress plainly has the power under Section 5 of the Fourteenth Amendment to "place the burden of proving lack of discriminatory purpose on" the States. See City of Rome v. United States, 446 U.S. 156, 214 (1980) (Rehnquist, J., dissenting).

The Supreme Court has also repeatedly affirmed 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, 529 (1997)(" * * * Congress can prohibit laws with discriminatory effects in order to prevent racial discrimination in violation of the Equal Protection Clause * * *."); City of Rome v. United States, 446 U.S. 156, 177 (1980); South Carolina v. Katzenbach, 383 U.S. at 325-337. Furthermore, the Court has made clear that Congress can prohibit practices that are facially non-discriminatory to prevent those practices from being used in a discriminatory manner. For example, in Oregon v. Mitchell,

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[8/] Cf. also Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 28 (1976) (legislative presumptions are consistent with due process as long as there is some rational connection between the fact that is proven and the fact that is presumed); Mobile, Jackson & Kansas City R.R. Co. v. Turnipseed, 219 U.S. 35, 43 (1910) (statute did not violate Due Process or Equal Protection Clause when it created a presumption of liability under certain circumstances).

400 U.S. 112 (1970), the Court approved a nationwide ban on literacy tests, even though it agreed that literacy tests were probably not being used to deny blacks the right to vote in every State. See especially id. at 283-284 (opinion of Stewart, J.). And in Katzenbach v. Morgan, 384 U.S. at 652-658, the Court upheld a ban on literacy tests that prohibited certain people schooled in Puerto Rico from voting. Cf. also James Everhard's Breweries v. Day, 265 U.S. 545 (1924) (upholding ban on medical prescription of intoxicating malt liquors as appropriate to enforce Eighteenth Amendment ban on manufacture, sale, or transportation of intoxicating liquors for beverage purposes).

In applying the principle that Congress may enact legislation that reaches constitutional, as well as unconstitutional, conduct in order to deter and remedy constitutional violations, all of the lower courts that have considered the issue have upheld the constitutionality of disparate impact claims under Title VII as a valid exercise of Congress's power to enforce the Fourteenth Amendment.[9/] Most recently, in In re Employment Discrimination Litigation Against Alabama, 198 F.3d 1305 (11th Cir. 1999), the Eleventh Circuit

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[9/] 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); Liberles v. County of Cook, 709 F.2d 1122, 1135 (7th Cir. 1983); Blake v. City of L.A., 595 F.2d 1367, 1373-1374 (9th Cir. 1979), cert. denied, 446 U.S. 928 (1980); In re Employment Discrimination Litig. Against Ala., 198 F.3d 1305 (11th Cir. 1999); cf. also Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 689 n.7 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981).

upheld Title VII's disparate impact provisions as valid Section 5 legislation, rejecting the State's argument that City of Boerne required a different result. The Court recognized that the disparate impact standard prohibits "discriminatory result[s]" that are not justified by business necessity rather than discriminatory intent, and, therefore, "differs from [the standard of proof] used in a case challenging state action directly under the Fourteenth Amendment." See id. at 1321-1322. The Court held, however, that the disparate impact standard was a valid exercise of Congress's Section 5 authority, because it can "reasonably be characterized as [a preventive rule]" that targets intentional discrimination.[10/] See id. at 1322.

The same reasons that support the conclusion that proscribing discriminatory effects is an appropriate means of enforcing the Fourteenth Amendment's prohibition of intentional discrimination also mandate the conclusion that the Equal Pay Act's limited burden-shifting scheme is a valid exercise of Congress's Section 5 authority. The provisions of the Equal Pay

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[10/] Although the disparate impact cases cited above 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., 442 U.S. at 273 (emphasis added). In Kimel v. Florida Board of Regents, the Supreme 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.'" 120 S. Ct. at 645 (quoting City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985)).

Act are well within the bounds of Congress's broad authority to enforce the Fourteenth Amendment.

5. Consistent with the above considerations, the eight circuits to consider the issue thus far have all upheld the Equal Pay Act as an appropriate means of enforcing the Fourteenth Amendment's prohibition on intentional sex discrimination. See Anderson v. State Univ. of N.Y., 169 F.3d 117 (2d Cir. 1999), vacated, 120 S. Ct. 929 (2000)[11/]; 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); Varner v. Illinois State Univ., 150 F.3d 706, 717 (7th Cir. 1998), vacated, 120 S. Ct. 928 (2000); O'Sullivan v. Minnesota, 191 F.3d 965 (8th Cir. 1999); Hundertmark v. Florida Dep't of Transp., 205 F.3d 1272, 1274 (11th Cir. 2000). The University makes no attempt to distinguish this precedent (see Br. 19-21).

The University's reliance (Br. 20-21) on the Supreme Court's decisions in Kimel and Florida Prepaid is misplaced. In Kimel, the 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 a valid exercise of

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[11/] The Supreme Court vacated the decision in Anderson for reconsideration in light of Kimel.

Congress's Section 5 enforcement power. Critical to its decision, however, was its conclusion that because age-based classifications are presumptively valid and rarely violate the Equal Protection Clause, the ADEA prohibited "substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard." 120 S. Ct. at 647. 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. The Court concluded, therefore, that the intrusive regulation imposed by the ADEA was out of proportion to what it termed the "perhaps inconsequential problem" of unconstitutional age discrimination. See id. at 648-649. The Court made clear, however, that it was breaking no new ground but was simply "[a]pplying the same 'congruence and proportionality' test" that it had set forth in City of Boerne. See id. at 645.

Similarly, in Florida Prepaid, the Court held that the Patent Remedy Act, which authorizes 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 would violate the Due Process Clause only if: (1) it was intentional (as opposed to inadvertent); and (2) state tort law failed to provide an adequate remedy for the infringement. See Florida Prepaid, 527 U.S. at 644-645. However, although state patent legislation would be unconstitutional only in relatively narrow circumstances, 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. 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. Id. at 645-646.

The Equal Pay Act, however, is not a disproportionate response to intentional sex discrimination. In contrast to the ADEA and the Patent Remedy Act, which the Court found outlaw very little unconstitutional conduct, the Equal Pay Act almost exclusively proscribes intentional sex discrimination. Intentional sex discrimination, unlike the age discrimination and patent infringement at issue in Kimel and Florida Prepaid, is subject to heightened judicial scrutiny and almost always violates the Equal Protection Clause when practiced by the States. Recognizing this distinction, the Eleventh Circuit recently upheld the Equal Pay Act after finding that nothing in the Supreme Court's decisions in Kimel and Florida Prepaid required a different result. See Hundertmark, 205 F.3d at 1276-

1277. This Court should follow Hundertmark and the seven other circuits to address the issue before Kimel and hold that the Equal Pay Act is valid Section 5 legislation.[12/]

B. Because The Equal Pay Act Is Appropriately Tailored To Remedy Intentional Sex Discrimination, Congress Was Not Required To Make Findings Concerning The Extent Of Such Discrimination

1. The University's argument (Br. 21) that Congress was required to make findings that States have engaged in unconstitutional conduct in order to abrogate their immunity in the Equal Pay Act 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) "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

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[12/] The Supreme Court's recent decision in United States v. Morrison, 120 S. Ct. 1740 (2000), 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 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 when the individual is not acting under color of state law. See id. at 1758. The Court further noted 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. The Equal Pay Act's prohibition of discrimination by state employers imposes liability on the State, not on individuals who are not acting under color of state law.

Broad. Sys., Inc. v. FCC, 520 U.S. 180, 213 (1997). Rather, the Equal Pay Act must be upheld as a valid exercise of Congress's Section 5 authority so long as this Court can "discern some legislative purpose or factual predicate that supports the exercise of that power." EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983).

While the legislative record may be of assistance in determining whether the proper legislative purpose or factual predicate exists, "the lack of support in the legislative record is not determinative." Florida Prepaid, 527 U.S. at 646; accord, Union Pacific R.R. Co. v. Utah, 198 F.3d 1201, 1205 (10th Cir. 1999). 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).

When a statute is carefully tailored to detect and remedy constitutional violations by States, a court need not inquire about the frequency at which such constitutional violations are actually occurring. 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 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.

Neither Kimel v. Florida Board of Regents, 120 S. Ct. 631 (2000), nor Florida Prepaid establish that Congress must always gather evidence of constitutional violations by the States before it can abrogate the States' Eleventh Amendment immunity. The Court looked to the legislative record 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. Here, by contrast, the Equal Pay Act is tailored to uncover intentional discrimination on the basis of sex. As the Eighth Circuit noted in upholding Title IX, because the Supreme Court has repeatedly held that the Equal Protection Clause proscribes intentional sex discrimination by States, it is difficult "to understand how a statute enacted specifically to combat such discrimination could fall outside the authority granted to Congress by § 5." See Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir. 1997).

2. In any event, there can be 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 ex. rel. T.B., 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 against women in employment). Because the Court itself has determined that women "have suffered * * * at the hands of discriminatory state actors during the decades of our Nation's history," J.E.B., 511 U.S. at 136, it is not necessary to examine whether the legislative history also supports that conclusion.

### C. Even Assuming That Congress Was Required To Identify Evidence Of Sex Discrimination By State Employers, The Legislative Record Before Congress Is Replete With Such Evidence

1. In any event, the relevant legislative record refutes the University's claim (Br. 21) that "there was nothing in the legislative history" that revealed sex discrimination by the States.[13/] In the early 1970s, Congress addressed discrimination against women by States in several pieces of legislation. By the time Congress extended the protections of the Equal Pay Act to all state employees in 1974, Congress had (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

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[13/] Copies of the relevant excerpts of the legislative history cited in this section are attached as an addendum to the brief.

(1972); (2) extended Title VII to state and local employers, see Pub. L. No. 92-261, § 2, 86 Stat. 103 (1972); and (3) sent the Equal Rights Amendments to the States to be ratified, see S. Rep. No. 450, 93d Cong., 1st Sess. 4 (1973). Prior to enacting such legislation, Congress held extensive hearings[14/] and received numerous reports from the Executive Branch[15/] on the subject of sex discrimination by States.

The testimony and reports illustrate that sex discrimination by state employers was common,[16/] that state employers

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[14/] See, e.g., Economic Problems of Women: Hearings Before the Joint Econ. Comm., 93d Cong., 1st Sess. (1973) (Economic); Equal Rights for Men & Women 1971: Hearings Before Subcomm. No. 4 of the House Comm. on the Judiciary, 92d Cong., 1st Sess. (1971) (Equal Rights); Higher Education Amendments of 1971: Hearings Before the Special Subcomm. on Educ. of the House Comm. on Educ. & Labor, 92d Cong., 1st Sess. (1971) (Higher Educ.); Equal Employment Opportunities Enforcement Act of 1971: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor & Pub. Welfare, 92d Cong., 1st Sess. (1971) (1971 Senate EEO); Equal Employment Opportunity Enforcement Procedures: Hearings Before the Gen. Subcomm. on Labor of the House Comm. on Educ. & Labor, 92d Cong., 1st Sess. (1971) (1971 House EEO); Discrimination Against Women: Hearings Before the Special Subcomm. on Educ. of the House Comm. on Educ. & Labor, 91st Cong., 2d Sess. (1970) (Discrimination); Equal Employment Opportunity Enforcement Procedures: Hearings Before the Gen. Subcomm. on Labor of the House Comm. on Educ. & Labor, 91st Cong., 1st & 2d Sess. (1969-1970) (1970 House EEO); Equal Employment Opportunities Enforcement Act: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor & Pub. Welfare, 91st Cong., 1st Sess. (1969) (1969 Senate EEO).

[15/] See, e.g., The President's Task Force on Women's Rights and Responsibilities, A Matter of Simple Justice 6 (Apr. 1970); U.S. Dep't of Labor, Women's Bureau, Fact Sheet on the Earnings Gap (Feb. 1970) (reprinted in Discrimination at 17-19).

[16/] See, e.g., President's Task Force at 4 ("At the State level there are numerous laws * * * which clearly discriminate against women as autonomous, mature persons."); Economic, Pt. 1, at 131 (Aileen C. Hernandez, former member EEOC) (State government

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discriminated against women in wages,[17/] and that existing remedies, both at the state and federal levels, were inadequate.[18/] Much of this evidence revealed widespread and

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[16/](...continued)
employers "are notoriously discriminatory against both women and minorities"); Equal Rights at 479 (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").

[17/] See, e.g., Discrimination at 301 (Dr. Bernice Sandler) ("Salary discrepancies abound. * * * Numerous national studies have documented the pay differences between men and women with the same academic position and qualifications."); 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. at 971-973 (Helen Astin) (one of types of discrimination "most frequently encountered" was "differential salaries for men and women with the same training and experience"); id. at 1034-1036 (Alan Bayer & Helen Astin) (empirical study of recent doctoral recipients reports that "[a]cross all work settings [including public universities], fields, and ranks, women experience a significantly lower average academic income than do men in the academic teaching labor force for the same amount of time. Within each work setting, field, and rank category, women also have lower salaries."); 1971 House EEO at 486, 489 (Modern Language Association) (in survey of college professors, half from public colleges, "salary differences between men and women full-time faculty members are substantial" even "at equivalent ranks in the same departments"); id. at 510 (Dr. Ann Scott) (National Organization for Women) ("It is within these categories [exempted from the Equal Pay Act, including state governments], however, that women suffer some of the worst discrimination.").

[18/] Prior to the extension of the Equal Pay Act and Title VII to the States, some state employers were governed by federal non-discrimination requirements as a condition for receiving federal contracts or certain types of funds. However, these provisions and private suits under the Equal Protection Clause were described as ineffective in eradicating the discrimination. See Discrimination at 26 (Jean Ross, American Association of

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entrenched employment discrimination against women in state universities.[19/] Congress also heard detailed testimony that women at state universities throughout the country were

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[18/](...continued)
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"); 1970 House EEO at 248 (Dr. John Lumley, National Education Association) ("We know we don't have enough protection for women in employment practices."); 1969 Senate EEO at 51-52 (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."). Nor were effective state remedies available. See Higher Educ. at 1131 (study by American Association of University Women reports that even state schools that have good policies don't seem to follow them); Discrimination at 133 (Wilma Scott Heide, Pennsylvania Human Relations Commission) (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 did not extend to state employers).

[19/] 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 at 302 (Dr. Bernice Sandler, Women's Equity Action League) (noting instances of employment discrimination by state-supported universities); id. at 379 (Prof. 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) (noting "the growing body of evidence of discrimination against women faculty in higher education"); Equal Rights at 269 (Dr. Bernice Sandler) ("there is no question whatsoever of a massive, pervasive, consistent, and vicious pattern of discrimination against women in our universities and colleges").

consistently paid less than male employees for substantially the same work.[20/]

The evidence before Congress supported the conclusion of one of the members of the United States Commission on Civil Rights that "[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."[21/] A comprehensive EEOC study of employment discrimination by state and local governments in 1974, the year that Congress extended the Equal Pay Act to the States, concluded that "equal employment opportunity has not yet been fulfilled in State and local

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[20/] See Higher Educ. at 298 (describing a report from the Department of Health, Education and Welfare finding that at the University of Michigan "women are in many cases getting less pay than men with the same job titles, responsibilities, and experience * * *. Equally alarming is the documented tendency toward giving men higher starting salaries than women in the same job classifications."); id. at 274-275; Discrimination at 151, 159 (Dr. Ann Scott) (survey of State University of New York "women in the same job categories, administrative job categories, with the same degrees as men received considerably less money as a group, and as the salaries increase so does the gap"); id. at 1225 (Jane Loeb) ("Comparison of the salaries of male and female academicians at the University [of Illinois] * * * strongly suggest that men and women within the same departments, holding the same rank, tend not to be paid the same salaries: women on the average earn less than men."); id. at 1228 (Salary Study at Kansas State Teachers College) ("Women full-time faculty members experience wide discrimination throughout the college in matters of salaries for their respective academic ranks."); Equal Rights at 268 (Dr. Bernice Sandler) ("At the University of Arizona, women who were assistant and associate professors earned 15 percent less than their male counterparts. Women instructors and full professors earned 20 percent less."); ibid. (in a "comprehensive study at the University of Minnesota, women earned less in college after college, department after department -- in some instances the differences exceeding 50 percent").

[21/] Economic at 556 (Hon. Frankie M. Freeman, U.S. Comm'n on Civil Rights).

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."[22/]

In the committee reports and floor debates concerning legislation aimed at redressing sex discrimination, Congress noted the "scope and depth of the discrimination"[23/] 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."[24/] Congress concluded that

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[22/] U.S. Equal Employment Opportunity Comm'n, 2 Minorities and Women in State and Local Government 1974, State Governments, iii Research Report No. 52-2 (1977) (emphasis added). This study concluded that women who worked for the state government were disproportionately concentrated in low-paying jobs and "earned somewhat less than men similarly employed." Id. at 25.

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

[24/] 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.").

"conscious" sex discrimination in wages by States was widespread,[25/] and that current laws were ineffective.[26/]

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[25/] Discrimination at 434 (Rep. Mink) ("these differences [in median pay of men and women professors] do not occur by accident. They are the direct result of conscious discriminatory policies."); see also 118 Cong. Rec. 5805 (1972) (Sen. Bayh) (figures show that "those women who are promoted often do not receive equal pay for equal work."); id. at 4818 (Sen. Stevenson) ("There are some who would say that much of this discrimination is caused by [lack of equal education]. * * * But the comparative figures I quoted above, for comparative ranks and salaries within educational institutions * * * belie such simplistic explanations."); 117 Cong. Rec. 39,250 (1971) (Rep. Green) ("Our two volume hearing record contains page upon page citing the pervasiveness of this discrimination [against women] in our society and in our institutions."); 118 Cong. Rec. 5804 (1972) (Sen. Bayh) ("Over 1,200 pages of testimony document the massive, persistent patterns of discrimination against women in the academic world."); id. at 5805 (Sen. Bayh) ("According to testimony submitted during the '1970 [Discrimination] Hearings,' the women at the University of Pittsburgh calculated that the University was saving $2,500,000 by paying women less than they would have paid men with the same qualifications."); id. at 1840 (Sen. Javits) ("Not only is this applicable to minorities; it is also applicable on the ground of sex. The committee report reflects that very clearly in terms of the differentiation not only between members of minorities and others * * * by States and their local subdivisions, but also, it applies to women where, based upon overall figures, it is obvious that something is not right in terms of the way in which the alleged concept of equal opportunity is being administered now."); 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 at 740 (Rep. Griffiths) ("Numerous studies document the pay differences between men and women with the same academic rank and qualifications.").

[26/] See 118 Cong. Rec. 274 (1972) (Sen. McGovern) ("weak, ineffective tools the Federal Government is [currently] using to combat" discrimination against women); Discrimination at 235 (Rep. May) (without the extension of laws to educational institutions "there is no effective legal way to get at them!"); id. at 745 (Rep. Griffiths) (referring to Equal Pay Act: "We must use every available tool and mechanism to combat sex discrimination which irrationally and unjustly deprives millions

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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 deal of problems both with educational institutions and State and local governments."[27/] This statement is consistent with Congress's assessment that the "well documented" record revealed "systematic[]," and "widespread" sex discrimination by States,[28/] which "persist[ed]" despite the fact that it was "violative of the Constitution of the United States."[29/]

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[26/](...continued)
of people of equal employment opportunities simply because of their sex."); id. at 750 (Rep. Heckler) (Fourteenth Amendment "has not been effective in preventing sex discrimination against teachers in public schools"); Equal Rights at 85, 87 (Rep. Mikva) (extension of Title VII to States and Equal Pay Act to professionals "needed interim to and supplemental to" ERA and is "implementation under the 14th amendment"); 118 Cong. Rec. 4931-4932 (Sen. Cranston) (employees of educational institutions "are, at present, without an effective Federal remedy in the area of employment discrimination"); 118 Cong. Rec. 5804 (1972) (Senator Bayh) ("a strong and comprehensive measure is needed to provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women").

[27/] Economic at 105-106.

[28/] 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.").

[29/] 118 Cong. Rec. 1412 (1972) (Sen. Byrd).

Thus, when Congress considered extending the Equal Pay Act to the States, it did so against the backdrop of all of the information previously put before it demonstrating that state employers were discriminating against women, including paying women less than men for the same job, and that existing federal and state remedies were not adequately deterring that discrimination. The University's suggestion (Br. 21) that this Court should only look to evidence that Congress specifically considered when it extended the Equal Pay Act to the States has no support in law or logic. Members of Congress do not ignore information they learned from one set of hearings or debates when looking at another proposal on the same subject. Rather, "[o]ne appropriate source [of evidence for Congress] is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area." Fullilove v. Klutznick, 448 U.S. 448, 503 (1980) (Powell, J., concurring).

2. In any event, the hearings that focused on extending the Equal Pay Act to the States[30/] also contained extensive evidence

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[30/] See To Amend the Fair Labor Standards Act: Hearings Before the Gen. Subcomm. on Labor of the House Comm. on Educ. & Labor, Pt. 1, 91st Cong., 2d Sess. (1970) (1970 FLSA); Fair Labor Standards Amendments of 1971: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor & Pub. Welfare, Pt. 1, 92d Cong., 1st Sess. (1971) (1971 FLSA); Fair Labor Standards

(continued...)

of sex discrimination by state employers. There was testimony that because public employees were exempted from the Equal Pay Act, wages for women in such jobs "are most often lower than their male counterparts."[31/] There was also testimony that existing anti-discrimination remedies were insufficient.[32/] In addition to testimony that unequal pay for equal work was pervasive at universities and colleges generally,[33/] witnesses identified a number of state universities in particular that were paying women less than men for the same work.[34/] Witnesses also testified that female public school teachers were underpaid in

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[30/](...continued)
Amendments of 1973: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor & Pub. Welfare, App. Pt. 2, 93d Cong., 1st Sess. (1973) (1973 FLSA).

[31/] 1971 FLSA at 292-293 (Judith A. Lonnquist, National Organization for Women).

[32/] See 1971 FLSA at 288-289 (Lucille Shriver, National Federation of Business and Professional Women's Clubs) (extending Title VII is not sufficient); 1973 FLSA at 46a (1973) (National Federation of Business and Professional Women's Clubs) (coverage of state employers "is sorely needed").

[33/] See 1971 FLSA at 321 (Dr. Bernice Sandler); id. at 350 (Alan Bayer & Helen Astin); id. at 363 (Helen Bain, National Education Association), id. at 747 (Jean Ross, American Association of University Women).

[34/] See 1971 FLSA at 322-323 (evidence from University of Arizona, University of Minnesota, Kansas State Teachers College, University of Pittsburgh, and Michigan State University that "[w]omen are simply paid less than their male counterparts"); id. at 747 (University of Minnesota); 1970 FLSA at 477-478 (Wilma Scott Heide, National Organization of Women) (SUNY Buffalo, University of Maryland and University of Pittsburgh); id. at 557-558 (Salary Study at Kansas State Teachers College).

comparison to their male counterparts.[35/] In light of the extensive evidence of discrimination against women and the deference accorded Congress in determining whether legislation is appropriate to enforce the Equal Protection Clause, this Court should uphold the Equal Pay Act as a valid exercise of Congress's Section 5 power.

## CONCLUSION

The district court's judgment that the Eleventh Amendment does not bar the plaintiff's Equal Pay Act claim should be affirmed.

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[35/] See 1971 FLSA at 317 (Dr. Ann Scott, National Organization for Women) ("discrimination of salaries paid to woman teachers pervades the entire public school system"); see also Equal Rights at 548 (Citizen's Advisory Council on the Status of Women) ("numerous distinctions based on sex still exist in the law" including "[d]ual pay schedules for men and women public school teachers"); 1971 Senate EEO at 433 (National Organization for Women) ("For example, in Salina, Kansas, the salary schedule provides $250 extra for male teachers; in Biloxi, Mississippi, men receive an additional $200.").

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B). It contains 9,253 words. This brief has been prepared in monospaced typeface using Wordperfect 7.0, with Courier typeface at 10 characters per inch.

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CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2000, two copies of the foregoing Brief for the United States as Intervenor were served by first-class mail, postage prepaid, on the following counsel:

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