No. 00-50092

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THERESA M. SILER-KHODR,

Plaintiff-Appellee

v.

THE UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER, SAN ANTONIO, et al.

Defendants-Appellants

RESPONSE FOR THE UNITED STATES AS INTERVENOR TO THE PETITION FOR REHEARING EN BANC

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ARGUMENT

The panel's opinion in this case is consistent with every other court of appeals in holding that the Eleventh Amendment is no bar to private suits brought against States under the Equal Pay Act of 1963. See *Cherry* v. *University of Wis. Sys. Bd. of Regents*, No. 00-2435, 2001 WL 1028282, at *3-*8 (7th Cir. Sept. 7, 2001); *Varner* v. *Illinois State Univ.*, 226 F.3d 927 (7th Cir. 2000), cert. denied, 121 S. Ct. 2241 (2001); *Kovacevich* v. *Kent State Univ.*, 224 F.3d 806, 819-821 (6th Cir. 2000); *Hundertmark* v. *Florida Dep't of Transp.*, 205 F.3d 1272, 1274 (11th Cir. 2000); *O'Sullivan* v. *Minnesota*, 191 F.3d 965, 968 (8th Cir. 1999); *Anderson* v. *State Univ. of N.Y.*, 169 F.3d 117 (2d Cir. 1999), vacated, 528 U.S. 1111 (2000);[1] *Ussery* v. *Louisiana*, 150 F.3d 431, 435-437 (5th Cir. 1998), cert. dismissed, 526 U.S. 1013 (1999); *Timmer* v. *Michigan Dep't of Commerce*, 104 F.3d 833, 837-842 (6th Cir. 1997). There is no reason for this Court to rehear this appeal en banc.

A. The Constitution Does Not Require Congress To Identify In The Text Or Legislative History Of A Statute The Source Of Authority By Which It Is Legislating

Defendant does not dispute that Congress intended to abrogate States' Eleventh Amendment immunity to private suits under the Equal Pay Act. Instead, it contends (Pet. 5-8) that even though Congress made its intent to abrogate clear, and even if Congress has the power to do so under one of the Constitution's grants

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[1] The court of appeals in *Anderson* remanded the case to the district court. After the district court again upheld the validity of the abrogation, see *Anderson* v. *State Univ. of N.Y.*, 107 F. Supp. 2d 158 (N.D.N.Y. 2000), the case settled.

of legislative power, the abrogation would be ineffective because Congress did not make clear that it intended to exercise that particular power. But Article I, Section 7 of the Constitution dictates the procedural requirements for the enactment of laws, and there is no requirement in this "finely wrought and exhaustively considered procedure," *INS* v. *Chadha*, 462 U.S. 919, 951 (1983), that Congress must identify the source of its authority for its legislation.

The Constitution grants Congress discretion to regulate its internal proceedings, U.S. Const. Art. I, § 5, which allows it to establish committees and authorize committee reports; the Constitution grants Congress the authority, incidental to lawmaking, to conduct investigations and hold hearings to gather information regarding national problems, see *McGrain* v. *Dougherty*, 273 U.S. 135, 174-175 (1927); cf. *Watkins* v. *United States*, 354 U.S. 178, 193 (1957) (noting rarity of legislative hearings in 1800's); and the Constitution grants Congress broad discretion in determining what must be published in the official record, see *Field* v. *Clark*, 143 U.S. 649, 671 (1892); cf. David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 U. Chi. L. Sch. Roundtable 161, 166 (1995) (noting that in the early congresses, consistent with practice during the Articles of Confederation, Senate deliberations were not open to the public and the House did not provide verbatim transcripts of debates). These grants of authority to Congress, which have become utilized with greater regularity as the nation has matured, provide no textual basis for *requiring* Congress to hold hearings, issue committee reports, publish a

Congressional Record, or enact findings or statements of purpose, even though such requirements might assist in the process of judicial review. See *Nixon* v. *United States*, 506 U.S. 224, 228-229 (1993); cf. *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978).

In recognition of the Constitution's delimited requirements in this regard, the Supreme Court has never held that the constitutionality of a statute is contingent on Congress's intention regarding the power exercised. To the contrary, it has adopted a strong presumption of constitutionality that places the burden on the party challenging the federal statute to make "a *plain showing* that Congress has exceeded its constitutional bounds." *United States* v. *Morrison*, 529 U.S. 598, 607 (2000) (emphasis added); accord *Union Pac. Ry. Co.* v. *United States*, 99 U.S. (9 Otto) 700, 718 (1878) ("Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt."). As the Court explained in *United States* v. *Harris*, 106 U.S. (16 Otto) 629 (1883), the presumption makes it "necessary" for a court adjudging the constitutionality of a federal statute "to *search* the Constitution to ascertain whether or not the power is conferred" including those provisions that only "in the remotest degree" had any possible application to the statute at issue. *Id.* at 636 (emphasis added). This understanding regarding the appropriate inquiry has been

continually adhered to by the Supreme Court[2] and this Court.[3] To hold to the contrary would lead to the absurd result that Congress could validate a statute that was enacted under the "wrong" power simply by reenacting the statute verbatim and substituting different language in the committee reports.

Defendant suggests that this wealth of precedent must be cast aside in light of *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, 527 U.S. 627 (1999), and this Court's decision in *Chavez* v. *Arte Publico Press*, 204 F.3d 601 (5th Cir. 2000). But there is nothing in those opinions that imposes a new requirement on Congress to expressly articulate what power it is using when it enacts legislation. The singular footnote in *Florida Prepaid* relied on by defendant, 527 U.S. at 642 n.7, has nothing to do with requiring Congress expressly to invoke its source of legislative authority. The Court found that Congress clearly intended to invoke its Section 5 authority, but only wanted to enforce one right: the procedural component of the Due Process Clause, not the

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[2] See, *e.g.*, *EEOC* v. *Wyoming*, 460 U.S. 226, 243-244 n.18 (1983); *Fullilove* v. *Klutznick*, 448 U.S. 448, 473-478 (1980) (opinion of Burger, C.J.); *Griffin* v. *Breckenridge*, 403 U.S. 88, 107 (1971); *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948); *United States* v. *Butler*, 297 U.S. 1, 61 (1936); *Keller* v. *United States*, 213 U.S. 138, 147 (1909).

[3] See, *e.g.*, *Lesage* v. *Texas*, 158 F.3d 213, 217-218 (5th Cir. 1998), rev'd on other grounds, 528 U.S. 18 (1999); *Ussery* v. *Louisiana*, 150 F.3d 431, 436-437 (5th Cir. 1998), cert. dismissed, 526 U.S. 1013 (1999); *Crawford* v. *Pittman*, 708 F.2d 1028, 1037 (5th Cir. 1983); *Williams* v. *City of New Orleans*, 729 F.2d 1554, 1577-1578 (5th Cir. 1984) (en banc) (Wisdom, J., concurring in part and dissenting in part).

Just Compensation Clause. But these clauses are not sources of legislative authority; they are the constitutional rights that Section 5 grants Congress the authority to enforce. Thus the Court's refusal to consider the Just Compensation Clause was not, as defendant claims, a *sub rosa* reversal of centuries of precedent grounded in elemental separation of powers principles. Similarly, while the panel in *Chavez* stated that there was language in *Florida Prepaid* that "support[ed]" the argument that Congress must invoke a particular constitutional authority, it chose not to rely on this ground, but proceeded to hold "on the merits" that the statute at issue was not a valid exercise of Congress's authority to enforce the Fourteenth Amendment. 204 F.3d at 605.

Subsequent to *Florida Prepaid* and *Chavez*, the Supreme Court addressed the validity of another abrogation in *Kimel* v. *Florida Board of Regents*, 528 U.S. 62 (2000), without inquiring into, much less declaring dispositive, the question whether Congress intended to exercise its Section 5 authority. To the contrary, it explained that "[b]ecause [in *EEOC* v. *Wyoming*] we found the ADEA valid under Congress' Commerce Clause power, we concluded that it was unnecessary to determine whether the Act also *could be supported* by Congress' power under § 5 of the Fourteenth Amendment. Resolution of today's cases requires us to decide that question." *Id*. at 78 (emphasis added and citations omitted); see also *id*. at 80 ("the private petitioners in these cases may maintain their ADEA suits against the States of Alabama and Florida if, and only if, the ADEA is appropriate legislation under § 5"). Thus, the objective inquiry about power continues to govern.

Not surprisingly, courts of appeals continue to decline to require an express invocation of the Fourteenth Amendment. As Judge Easterbrook explained on behalf of a panel of the Seventh Circuit in assessing the constitutionality of the removal of Eleventh Amendment immunity in the Individuals with Disabilities Education Act (IDEA):

> Congress did what it could to ensure that states participating in the IDEA are amenable to suit in federal court. That the power comes from the spending clause rather than (as Congress may have supposed) the commerce clause or the fourteenth amendment is not relevant to the issue whether the national government possesses the asserted authority. Otherwise we require the legislature to play games ("guess which clause the judiciary will think most appropriate"). What matters, or at least should matter, is the extent of national power, rather than the extent of legislative prevision.

Board of Educ. v. *Kelly E.*, 207 F.3d 931, 935 (7th Cir.), cert. denied, 531 U.S. 824 (2000). The other circuits to address the issue since *Florida Prepaid* are in accord. See, *e.g.*, *Bradley* v. *Arkansas Dep't of Educ.*, 189 F.3d 745, 755 (8th Cir. 1999), vacated in other part, 197 F.3d 958 (en banc), cert. denied, 121 S. Ct. 2591 (2001); *In re Mitchell*, 209 F.3d 1111, 1119 (9th Cir. 2000); *Union Pac. R.R. Co.* v. *Utah*, 198 F.3d 1201, 1203-1204, 1208-1209 (10th Cir. 1999); *Hundertmark* v. *Florida Dep't of Transp.*, 205 F.3d 1272, 1275 (11th Cir. 2000).

Apart from the settled rule discussed above, the subject-matter of the law itself is sufficient in this case to indicate what power can sustain the legislation. Statutes regarding immigrants, taxation, post offices, etc., need not specifically invoke those portions of Article I in order to be upheld as such. Similarly, when Congress acts to extend a prohibition on discrimination on the basis of sex in

employment to State employers, such legislation falls presumptively within the ambit of Section 5 of the Fourteenth Amendment.

B. The Constitution Does Not Require Congress To Make Findings, Especially When Courts Have Already Taken Judicial Notice Of Historical Facts, But In This Instance Congress Did Assemble A Substantial Record Of Unconstitutional Sex Discrimination By States

Attempting to impose another procedural requirement on Congress's legislative authority, defendant next contends (Pet. 9) that Congress must "make findings to justify abrogation." That too is incorrect. While formal findings may be helpful in assessing the constitutionality of a statute, they are not required to sustain a statute's constitutionality. See *United States* v. *Lopez*, 514 U.S. 549, 562-563 (1995). Indeed, even the state of the legislative record is "not determinative." *Kimel*, 528 U.S. at 91; *Florida Prepaid*, 527 U.S. at 646; see also *City of Boerne* v. *Flores*, 521 U.S. 507, 531 (1997) ("Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but 'on due regard for the decision of the body constitutionally appointed to decide.'").

Especially when the statute does not extend substantially beyond what the Constitution already forbids, the need for any findings or record is attenuated. Here, the need for findings or a record is further diminished because the Supreme Court has already found that women have been the subject of a historical pattern of invidious discrimination by States.

1. A year before Congress extended the Equal Pay Act to the States, a plurality of the Court declared, without contradiction, that "[t]here can be no doubt

that our Nation has had a long and unfortunate history of sex discrimination." *Frontiero* v. *Richardson*, 411 U.S. 677, 684 (1973). The plurality explained that, as a result of "paternalistic attitude[s]" toward women, state "statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes." *Id*. at 684-685. For example, "[n]either slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children." *Id*. at 685. The plurality further observed that, even in 1973, "women still face[d] pervasive, although at times more subtle, discrimination in our educational institutions [and] in the job market." *Id*. at 686; see also *J.E.B.* v. *Alabama*, 511 U.S. 127, 136 (1994) (noting that women, like racial minorities, have "suffered * * * at the hands of discriminatory state actors during the decades of our Nation's history").

The Court has since recognized that this historical pattern of state-sanctioned discrimination against women "warrants the heightened scrutiny we afford all gender-based classifications today." *J.E.B.*, 511 U.S. at 136; see *United States* v. *Virginia*, 518 U.S. 515, 531 (1996) (observing that the judiciary's "skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history"). The Court has also recognized that the pattern of discrimination extends to the sphere of employment. See *Virginia*, 518 U.S. at

531-532, 534 (noting, *inter alia*, governmental discrimination on the basis of sex in employment); *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 725 n.10 (1982) ("History provides numerous examples of legislative attempts to exclude women from particular areas [of employment] simply because legislators believed women were less able than men to perform a particular function."); *Frontiero*, 411 U.S. at 689 n.22 (plurality opinion) (women "have historically suffered discrimination in employment").

In view of the Supreme Court's own determination that the States engaged in a pattern of intentional sex discrimination, there should be no need to assess whether the record before Congress also demonstrated such a pattern. This case thus stands in sharp contrast to *University of Alabama* v. *Garrett*, 121 S. Ct. 953 (2001), with respect to the need to consult the record before Congress. *Garrett* concerned Congress's efforts to prohibit discrimination on the basis of disability, a classification that is not subject to heightened scrutiny. In *Garrett*, the Court looked to the legislative record to determine whether, notwithstanding the absence of case law establishing the existence of a pattern of unconstitutional discrimination against workers with disabilities, Congress itself had established the existence of such discrimination. Here, however, there is extensive case law documenting a pattern of unconstitutional discrimination against women.

2. In any event, defendant is mistaken in asserting (Pet. 8-10) that Congress did not identify unconstitutional conduct by the States prior to extending the Equal Pay Act to them and abrogating their immunity in 1974. To the contrary, as we

documented at length in our brief as intervenor (at pp. 31-40), between 1969 and 1973, Congress held extensive hearings and received numerous reports from the Executive Branch on the subject of sex discrimination, including sex discrimination by the States. The testimony and reports illustrate that sex discrimination by state employers was common, that state employers discriminated against women with respect to wages, and that existing remedies, at both the state and federal level, were inadequate. Much of that evidence revealed widespread and entrenched employment discrimination against women employed at state colleges and universities. The Eighth Circuit, reviewing this same record, concluded that "[t]he legislative record before Congress identified a history and pattern of discrimination by the states on the basis of * * * gender." *Okruhlik* v. *University of Ark.*, 255 F.3d 615, 625 (2001); see also *Varner* v. *Illinois State Univ.*, 226 F.3d 927, 935 (7th Cir. 2000), cert. denied, 121 S. Ct. 2241 (2001).

C. The Equal Pay Act's Rebuttable Presumption Of Discrimination Is An Appropriate Means Of Enforcing The Equal Protection Clause's Prohibition on Intentional Sex Discrimination

It is "axiomatic" that "[i]ntentional discrimination on the basis of gender by state actors violates the Equal Protection Clause." *J.E.B.* v. *Alabama*, 511 U.S. 127, 130-131 (1994). As the panel correctly found, the Equal Pay Act is a congruent response to a historical pattern of intentional and unconstitutional state discrimination on the basis of sex in payment of wages. The Act prohibits employers from paying workers of one sex more than workers of the opposite sex for performing "equal work on jobs the performance of which requires equal skill,

effort, and responsibility, and which are performed under similar working conditions." 29 U.S.C. 206(d)(1); see *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 195 (1974). While a plaintiff need not prove intentional discrimination, the Equal Pay Act is not a "strict liability" statute, for once an employee has proven equal work and unequal pay, an employer may escape liability if it can show that the difference was based on "any other factor other than sex." 29 U.S.C. 206(d)(1)(iv).

In essence, Congress has established a rebuttable presumption that unequal pay of male and female workers for equal work is intentional sex discrimination, but permits employers to rebut that presumption by showing that the actual cause of the disparity is "any" factor other than sex. The courts have employed a similar presumption in attempting to determine whether an employer has engaged in intentional discrimination. See *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000) (fact finder may rely on employer's inability to justify differential treatment of employees as basis for concluding that employer relied on discriminatory grounds). The burden-shifting provisions of the Equal Pay Act are thus designed "to confine the application of the Act to wage differentials attributable to sex discrimination." *County of Washington* v. *Gunther*, 452 U.S. 161, 170 (1981).

The Supreme Court has recognized that "Congress can prohibit laws with discriminatory effects in order to prevent racial discrimination in violation of the Equal Protection Clause." *Flores*, 521 U.S. at 529; see *South Carolina* v.

Katzenbach, 383 U.S. 301, 325-337 (1966) (upholding constitutionality of Section 5 of Voting Rights Act, 42 U.S.C. 1973c, which prohibits covered jurisdictions from implementing any electoral change that is discriminatory in effect, even if no discriminatory intent is shown); see also *Garrett*, 121 S. Ct. at 967 (discussing *South Carolina* v. *Katzenbach* with approval); *Lopez* v. *Monterey County*, 525 U.S. 266, 283 (1999). Here, by contrast, Congress did not impose an effects test, see *Gunther*, 452 U.S. at 170-171, but simply shifted the burden to the State to prove any non-discriminatory reason for a wage disparity between men and women doing the same job.

Given the "wide latitude" to which Congress is entitled in exercising its comprehensive remedial power under Section 5 of the Fourteenth Amendment, *Florida Prepaid*, 527 U.S. at 639 (quoting *Flores*, 521 U.S. at 519-520), the Equal Pay Act's scheme to detect and deter sex discrimination in wages is an appropriate exercise of Congress's Section 5 authority. Every court of appeals has reached this conclusion. No further review is required.

CONCLUSION

The petition for rehearing en banc should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2001, two copies of the foregoing Response for the United States as Intervenor To The Petition For Rehearing En Banc and one 3 ½ inch computer disk containing Response text were served by Federal Express, on each of the following persons:

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