No. 02-253

In the Supreme Court of the United States

UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER AT SAN ANTONIO, PETITIONER

v.

THERESA M. SILER-KHODR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The United States will address the following question:

Whether Congress acted within its power under Section 5 of the Fourteenth Amendment in abrogating the States' sovereign immunity from suit under the Equal Pay Act of 1963, 29 U.S.C. 206(d).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 261 F.3d 542.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 2001. A petition for rehearing was denied on May 16, 2002 (Pet. App. 28a-37a). The petition for a writ of certiorari was filed on August 14, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Equal Pay Act of 1963 (Equal Pay Act), 29 U.S.C. 206(d), as an amendment to the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* (Supp. IV 1938). Originally, the Equal Pay Act did not apply to public entities. See 29 U.S.C. 206(d) (Supp. V 1963). In 1974, however, Congress amended the Fair Labor Standards Act to apply its prohibitions, including

those in the Equal Pay Act, to state and local governments. See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6, 88 Stat. 58-59.

In its current form, the Equal Pay Act provides that a covered employer shall not

> discriminate * * * 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.

29 U.S.C. 206(d).

2. Respondent is employed by petitioner University of Texas Health Science Center at San Antonio (University) as a tenured professor specializing in reproductive endocrinology. She began her employment with the University in 1976. In 1989, the University hired Dr. Sydney Shain, a male, who is also a reproductive endocrinologist. Dr. Shain has substantially the same qualifications as respondent, and was given substantially the same responsibilities. The University set Dr. Shain's starting salary at $83,000 a year, which was approximately $20,000 more than the University was paying respondent. That disparity continued until the time of suit. See Pet. App. 1a-3a.

3. Respondent brought suit in Texas state court alleging violations of, among other things, the Equal Pay Act, 29 U.S.C. 206(d), and Title VII of the Civil Rights

Act of 1964, 42 U.S.C. 2000e *et seq.* The University removed the case to federal district court. A jury subsequently found in favor of respondent on her Equal Pay Act and Title VII claims and awarded back pay and compensatory damages. The district court awarded liquidated damages under the Equal Pay Act. Pet. App. 2a-4a.

4. The court of appeals affirmed. Pet. App. 1a-15a.

As relevant here, the court of appeals held that Congress acted within its constitutional authority under Section 5 of the Fourteenth Amendment in extending the Equal Pay Act to the States and abrogating their sovereign immunity from suits under that Act.[1]

The court of appeals rejected the University's argument that Congress acted only under the Commerce Clause, not under the Fourteenth Amendment, in abrogating the States' immunity from suit under the Equal Pay Act. (This Court held in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), that Congress may not abrogate States' immunity through an exercise of its powers under Article I.) The court of appeals reasoned that Congress's invocation of its Commerce Clause authority to apply the Equal Pay Act to private employers in 1963, and its silence on the source of its authority to extend the Act to public entities in 1974, did not show that Congress was relying only on its Commerce Clause authority in abrogating the States' immunity. Pet. App. 12a-13a & n.4.

The court of appeals also rejected the University's argument that the Equal Pay Act's abrogation of sovereign immunity is not valid Section 5 legislation. Apply-

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[1] The United States intervened in the court of appeals under 28 U.S.C. 2403(a) to address the constitutionality of the Equal Pay Act's abrogation of sovereign immunity.

ing *Kimel* v. *Florida Board of Regents*, 528 U.S. 62 (2000), and *Board of Trustees* v. *Garrett*, 531 U.S. 356 (2001), the court of appeals determined that the Equal Pay Act provides a remedy that is "congruent and proportional" to the injury of intentional sex-based discrimination in state employment. Pet. App. 13a. The court of appeals distinguished *Kimel* and *Garrett* as involving discrimination that is not subject to heightened scrutiny under the Equal Protection Clause. *Ibid.* The court of appeals also held that Congress was not required to make specific findings to justify the extension of the Equal Pay Act to the States, observing that "the historical record clearly documents state discrimination on the basis of gender." *Id.* at 14a n.6.

Judge DeMoss dissented from the court of appeals' decision with respect to the Equal Pay Act. He asserted that the Equal Pay Act should be viewed as an exercise of Congress's authority only under the Commerce Clause, and not under Section 5 of the Fourteenth Amendment. Pet. App. 15a-33a. Alternatively, he asserted that the Equal Pay Act exceeds Congress's authority under Section 5 to the extent that, by virtue of its burden-shifting mechanism, it may reach conduct that is not proven to be "intentional sex discrimination" in violation of the Equal Protection Clause. *Id.* at 34a-36a.

ARGUMENT

Petitioner contends (Pet. 7-21) that Congress did not validly abrogate the States' immunity from suit under the Equal Pay Act, 29 U.S.C. 206(d). As petitioner acknowledges (Pet. 8), however, "there is no circuit split" on that question, which has now been addressed by seven courts of appeals. This Court recently denied a petition for certiorari raising the same question.

Illinois State Univ. v. *Varner*, 533 U.S. 902 (2001). There is no reason for a different result here. The unanimous consensus of the courts of appeals is correct and consistent with the holdings of this Court.

In *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), the Court held that Congress may not abrogate the States' sovereign immunity pursuant to its Article I powers, including its power under the Commerce Clause. See *id.* at 55; accord *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 73 (2000). Congress may, however, abrogate the States' immunity pursuant to a proper exercise of its authority to enforce the Fourteenth Amendment. See, *e.g.*, *Board of Trustees* v. *Garrett*, 531 U.S. 356, 364 (2001); *Kimel*, 528 U.S. at 80. That power is not unlimited. As the Court has explained, "§ 5 legislation reaching beyond the scope of § 1's actual guarantees must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Garrett*, 531 U.S. at 364 (quoting *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997)). The Equal Pay Act, as applied to the States, is appropriate Section 5 legislation under that standard.

1. Petitioner observes (Pet. 10-14) that Congress did not explicitly invoke its authority under Section 5 of the Fourteenth Amendment (or any other provision of the Constitution) when it enacted the 1974 amendment extending the Equal Pay Act to the States and other public employers. Petitioner argues that the amendment consequently can be viewed only as an exercise of Congress's authority under the Commerce Clause, the constitutional provision on which Congress explicitly relied in enacting the original Equal Pay Act in 1963 that applied only to private employers. Petitioner's attempt to confine the inquiry to the particular source

of authority identified by Congress is inconsistent with the decisions of this Court and other courts of appeals.

This Court has recognized that the "constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948); see *EEOC* v. *Wyoming*, 460 U.S. 226, 243 n.18 (1983); *United States* v. *Harris*, 106 U.S. 629, 636 (1883) (when constitutional challenges are brought "question[ing] the power of Congress to pass [a] law," it is "necessary to *search* the Constitution to ascertain whether or not the power is conferred") (emphasis added). Thus, in *EEOC* v. *Wyoming*, the Court rejected the assertion that "congressional action could not be upheld on the basis of § 5 [of the Fourteenth Amendment] unless Congress expressly articulated its intent to legislate under § 5." 460 U.S. at 243 n.18 (citation omitted). The Court went on to observe:

> It is in the nature of our review of congressional legislation defended on the basis of Congress' powers under § 5 of the Fourteenth Amendment that we be able to discern some legislative purpose or factual predicate that supports the exercise of that power. That does not mean, however, that Congress need anywhere recite the words "section 5" or "Fourteenth Amendment" or "equal protection."

Ibid.

The Court's recent sovereign immunity opinions are consistent with that understanding. In those opinions, the Court has described the relevant inquiry as whether "the statute *is* appropriate § 5 legislation," or whether the statute can "be viewed as" appropriate Section 5 legislation. *Garrett*, 531 U.S. at 364 (emphasis added); *Florida Prepaid Postsecondary Educ. Expense*

Bd. v. *College Sav. Bank*, 527 U.S. 627, 639 (1999).[2] The Court's inquiry has not turned on whether Congress specifically invoked Section 5 as the source of its authority to enact the statute at issue.

Thus, in *Kimel*, the Court considered whether the abrogation provision of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, was permissible Section 5 legislation. The ADEA, like the Equal Pay Act, was initially enacted as an amendment to the Fair Labor Standards Act, applied solely to private employers, and was explicitly premised on the Commerce Clause. See *Kimel*, 528 U.S. at 68. Congress subsequently extended the nondiscrimination requirements of both statutes to state employers, without specifically identifying the source of its authority to do so. See *ibid.* Yet, the Court in *Kimel*

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[2] Contrary to petitioner's suggestion (Pet. 13), nothing in *Florida Prepaid* supports the proposition that, because Congress did not explicitly identify Section 5 as the source of its authority to abrogate the States' immunity from suit under the Equal Pay Act, the abrogation cannot be sustained as permissible Section 5 legislation. In the Patent Remedy Act, the statute at issue in *Florida Prepaid*, Congress explicitly invoked its authority under Section 5. See 527 U.S. at 635-636. The case consequently presented no question whether, if Congress had failed to do so, any Section 5 inquiry would have been foreclosed. Petitioner relies on a portion of *Florida Prepaid* in which the Court, as part of its Section 5 "congruence and proportionality" analysis of the Patent Remedy Act, sought to "identify the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy." *Id.* at 639. The Court rejected the suggestion that Congress had intended to remedy violations of the Just Compensation Clause of the Fifth Amendment, because the statutory text and history indicated that Congress had instead intended to remedy violations of the Due Process Clause of the Fourteenth Amendment. *Id.* at 642 n.7. None of that discussion related to whether Congress was required to identify the constitutional source of its authority to enact the statute.

did not quibble over whether Congress believed that its authority derived from the Commerce Clause or from the Fourteenth Amendment. Instead, the Court held that the abrogation would be effective "if, and only if, the ADEA *is* appropriate legislation under § 5." *Id.* at 80 (emphasis added). The Court's ultimate holding that the ADEA was not appropriate Section 5 legislation rested not on the Congress's failure to identify Section 5 as the source of its authority, but on the ADEA's lack of "congruence and proportionality" to constitutional violations. *Id.* at 82-91.[3]

The courts of appeals have likewise recognized, including in cases challenging Congress's power to enact a statute implicating state sovereign immunity, that "[w]hat matters, or at least should matter, is the extent of national power, rather than the extent of legislative prevision." *Board of Educ. of Oak Park* v. *Kelly E.*, 207 F.3d 931, 935 (7th Cir.) (Easterbrook, J.), cert. denied, 531 U.S. 824 (2000). "Otherwise," as one court observed, "we require the legislature to play games ('guess what clause the judiciary will think most appropriate')." *Ibid.*; see, *e.g.*, *Abril* v. *Virginia*, 145 F.3d 182, 186 (4th Cir. 1998) ("[U]nder general principles of constitutional adjudication, [an] abrogation does not require that a specific provision be invoked as the source of congressional power."); *Wheeling & Lake Erie Ry.* v. *Public Util. Comm'n*, 141 F.3d 88, 92 (3d Cir. 1998) ("[W]hen determining the sources of Congress's authority to legislate, we may look beyond the expressed consti-

[3] So, too, Congress initially enacted Title VII pursuant to its Commerce Clause authority and later extended it to public employers. See *United Steelworkers of Am.* v. *Weber*, 443 U.S. 193, 206 n.6 (1979). That did not prevent this Court from holding that the extension of Title VII to the States was valid under Section 5. See *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 452-456 (1976).

tutional basis in a statute's preamble or legislative history."), cert. denied, 528 U.S. 928 (1999).[4]

It is thus well settled that, contrary to petitioner's suggestion, the constitutionality of the Equal Pay Act's abrogation of state sovereign immunity turns on "whether Congress had the authority to adopt the legislation, not whether it correctly guessed the source of that power." *Abril*, 145 F.3d at 186 (quoting *Usery* v. *Charleston County Sch. Dist.*, 558 F.2d 1169, 1171 (4th Cir. 1977)).

2. Petitioner further contends (Pet. 14-21) that the Equal Pay Act is not, in any event, an "appropriate" exercise of Congress's power under Section 5 of the Fourteenth Amendment. The court of appeals held, however, that the Equal Pay Act is sustainable under Section 5 as a "congruent and proportional" means of preventing and remedying intentional sex discrimination in employment. Pet. App. 13a. That holding is correct and is consistent with the holdings of every other court of appeals that has addressed the question, both before and after *Kimel* and *Garrett*.[5]

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[4] See also, *e.g.*, *Union Pac. R.R.* v. *Utah*, 198 F.3d 1201, 1203 (10th Cir. 1999); *United States* v. *Moghadam*, 175 F.3d 1269, 1275 (11th Cir. 1999), cert. denied, 529 U.S. 1036 (2000); *Franks* v. *Kentucky Sch. for the Deaf*, 142 F.3d 360, 363 (6th Cir. 1998); *Oregon Short Line R.R.* v. *Department of Revenue*, 139 F.3d 1259, 1265-1266 (9th Cir. 1998); *Mills* v. *Maine*, 118 F.3d 37, 43-44 (1st Cir. 1997); *Crawford* v. *Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997); *Counsel* v. *Dow*, 849 F.2d 731, 735-737 (2d Cir.), cert. denied, 488 U.S. 955 (1988).

[5] See *Varner* v. *Illinois State Univ.*, 226 F.3d 927, 928-936 (7th Cir. 2000), cert. denied, 533 U.S. 902 (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),

The extension of the Equal Pay Act to the States, with its attendant abrogation of sovereign immunity, is a permissible exercise of Congress's power under Section 5 of the Fourteenth Amendment to enact "appropriate legislation" to "enforce" the substantive guarantees of the Equal Protection Clause. This Court has recognized that Congress, in exercising that power, "is not limited to mere legislative repetition of this Court's constitutional jurisprudence." *Garrett*, 531 U.S. at 365. "Rather, Congress' power 'to enforce' the [Fourteenth] 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." *Ibid.* (quoting *Kimel*, 528 U.S. at 81).

The Court has explained that Section 5 legislation that "reach[es] beyond the scope" of constitutional guarantees "must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Garrett*, 531 U.S. at 365 (quoting *Boerne*, 521 U.S. at 520). In order to determine whether a statute satisfies that standard, the Court has prescribed a three-step analysis: first, the court must "identify with some precision the scope of the constitutional right at issue," *ibid.*; second, the court must "examine whether Congress identified a history and pattern of unconstitutional * * * discrimination by the States" against the group protected by the

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vacated, 528 U.S. 1111 (2000), on remand, 107 F. Supp. 2d 158 (N.D.N.Y. 2000) (reaffirming validity of abrogation); *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); see also *Usery* v. *Charleston County Sch. Dist.*, 558 F.2d at 1171; *Usery* v. *Allegheny County Inst. Dist.*, 544 F.2d 148, 155 (3d Cir. 1976), cert. denied, 430 U.S. 946 (1977).

statute, *id.* at 368; and, finally, the court must assess whether the "rights and remedies created" by the statute are "designed to guarantee meaningful enforcement" of the constitutional rights that Congress determined the States were violating, *id.* at 372, 373. The court of appeals properly applied "these now familiar principles," *id.* at 365, in determining that Congress permissibly abrogated the State's immunity from suit under the Equal Pay Act.

1. *The scope of the constitutional right*: 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). "Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *United States* v. *Virginia*, 518 U.S. 515, 531 (1996) (quoting *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 724 (1982)). In contrast to state action based on age (as in *Kimel*) or disability (as in *Garrett*), state action based on sex bears a "burden of justification" that is "demanding" and "rests entirely on the State." *Id.* at 533. The State must demonstrate "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Ibid.* The justification for gender-based state action "must be genuine, not hypothesized or invented *post hoc* in response to litigation," and "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Ibid.* The constitutional right to be free from intentional sex discrimination by the government applies to state employment. See *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 273 (1979).

2. *The history of unconstitutional state discrimination against women*: This Court has found that women have historically been the subject of a pattern of invidious discrimination by States. See, *e.g.*, *Virginia*, 518 U.S. at 531-532, 543-544; *J.E.B.*, 511 U.S. at 135-136; *Mississippi Univ. for Women*, 458 U.S. at 725 n.10. It should thus be unnecessary to engage in any extended inquiry into whether Congress could also have found that such a pattern existed. In any event, however, Congress extended the Equal Pay Act to the States in the face of ample evidence of a pattern of state constitutional violations.

a. 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) (plurality opinion). 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 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." *Ibid.* 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 *J.E.B.*, 511 U.S. at 136 (noting that women, like racial minorities, have "suffered * * *

at the hands of discriminatory state actors during the decades of our Nation's history").

This 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 *Virginia*, 518 U.S. at 531 (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, 544 (noting, *inter alia*, governmental sex discrimination in employment); *Mississippi Univ. for Women*, 458 U.S. at 725 n.10 ("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 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. Cf. *Kimel*, 528 U.S. at 91 (noting that an examination of the legislative record is not necessary in all circumstances). This case stands in sharp contrast to *Kimel* and *Garrett* with respect to the need to consult the record before Congress. *Kimel* concerned Congress's efforts to prohibit discrimination on the basis of age, a classification that is not subject to heightened scrutiny, in part because the Court has found no "history of purposeful unequal treatment" of older workers by the government. *Massachusetts Bd. of Ret.* v.

Murgia, 427 U.S. 307, 313 (1976). Similarly, in *Garrett*, the Court addressed a statute prohibiting employment discrimination against individuals with disabilities. See 531 U.S. at 365-366. Such discrimination is subject to rational basis scrutiny, in part, because "lawmakers have been addressing the[] difficulties [of individuals with disabilities] in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary." *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 443 (1985). In both cases, the Court looked to the legislative record to determine whether, notwithstanding the absence of case law premised on the existence of a pattern of unconstitutional discrimination, Congress itself had established the existence of such discrimination against individuals with disabilities or older workers. See *Garrett*, 531 U.S. at 368-372; *Kimel*, 528 U.S. at 88-91. Here, however, the cases discussed above represent a judicial confirmation of a pattern of unconstitutional discrimination against women that justifies both this Court's decision to apply heightened Equal Protection scrutiny to sex discrimination and Congress's decision to abrogate States' immunity from suit under the Equal Pay Act.

b. In any event, when Congress extended the Equal Pay Act to public employers in 1974, it was aware of the extensive findings and legislative records compiled through a series of recent legislative efforts at eradicating sex discrimination by States. Extending the Equal Pay Act to the States was the last of four steps taken by Congress in the early 1970s to address sex discrimination by state and local governments.[6] Specifically,

[6] As Justice Powell noted, "[a]fter Congress has legislated repeatedly in an area of national concern, its Members gain experi-

Congress enacted the Education Amendments of 1972, which extended a non-discrimination prohibition to all education programs receiving federal funds, including those of state universities, and extended the Equal Pay Act to all employees of educational institutions, see Education Amendments of 1972, Pub. L. No. 92-318, Title IX, §§ 901-907, 86 Stat. 373-375; Congress extended Title VII's prohibition against discrimination in employment to state and local employers, see Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103; Congress submitted the Equal Rights Amendment to the States for ratification, see H.R. J. Res. No. 208, 92d Cong., 2d Sess. (1972); and Congress extended the protections of the Equal Pay Act to state employees, see Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55. Between 1969 and 1973, Congress held extensive hearings[7] and received numerous reports from the Execu-

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ence 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, 502-503 (1980) (opinion of Powell, J.).

[7] See, *e.g.*, *Economic Problems of Women: Hearings Before the Joint Econ. Comm.*, 93d Cong., 1st Sess. (1973) (*Economic Problems*); *Oversight Hearings on Discrimination Against Women: Before the Ad Hoc Subcomm. on Discrimination Against Women of the House Comm. on Educ. and Labor*, 92d Cong., 2d Sess. (1972) (*Discrimination Against Women (1972)*); *Oversight Hearings on Unemployment and Discrimination in Employment Before the General Subcomm. on Labor of the House Comm. on Educ. and Labor*, 92d Cong., 2d Sess. (1972) (*Unemployment and Discrimination*); *Equal Rights for Men and Women 1971: Hearings Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971) (*Equal Rights (1971)*); *Higher Education Amendments of 1971: Hearings Before the Special Subcomm. on Higher Educ. of the House Comm. on Educ. and Labor*, 92d Cong., 1st Sess. (Pt. 2) (1971) (*Higher Education 2)*; *Higher Education Amendments of 1971: Hearings Before the Special*

tive Branch[8] on the subject of sex discrimination, including sex discrimination by the States. Congress heard extensive testimony that sex discrimination by state employers was common,[9] that state employers

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Subcomm. on Higher Educ. of the House Comm. on Educ. and Labor, 92d Cong., 2d Sess. (Pt. 1) (1971) (*Higher Education 1*); *Equal Employment Opportunities Enforcement Act of 1971: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare*, 92d Cong., 1st Sess. (1971) (*Equal Employment (Senate 1971)*); *Equal Employment Opportunity Enforcement Procedures: Hearings Before the Gen. Subcomm. on Labor of the House Comm. on Educ. and Labor*, 92d Cong., 1st Sess. (1971) (*Equal Employment (House 1971)*); *Discrimination Against Women: Hearings Before the Special Subcomm. on Educ. of the House Comm. on Educ. and Labor*, 91st Cong., 2d Sess. (1970) (*Discrimination Against Women (1970)*); *The "Equal Rights" Amendment: Hearings on S.J. Res. 61 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970) (*Equal Rights (1970)*); *Equal Employment Opportunity Enforcement Procedures: Hearings Before the Gen. Subcomm. on Labor of the House Comm. on Educ. and Labor*, 91st Cong., 1st & 2d Sess. (1969-1970); *Equal Employment Opportunities Enforcement Act: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare*, 91st Cong., 1st Sess. (1969) (*Equal Employment (1969)*).

[8] See, *e.g.*, President's Task Force on Women's Rights and Responsibilities, *A Matter of Simple Justice* (Apr. 1970) (*Simple Justice*); Women's Bureau, U.S. Dep't of Labor, *Fact Sheet on the Earnings Gap* (Feb. 1970) (reprinted in *Discrimination Against Women (1972)* 17-19); see also President's Comm'n on Status of Women, *American Women* (1965); President's Comm'n on Status of Women, *Report of the Committee on Federal Employment* (1963); President's Comm'n on Status of Women, *Report of the Committee on Civil and Political Rights* (1963).

[9] See, *e.g.*, *Economic Problems* 131 (Aileen C. Hernandez, former member, EEOC) (state and local government employers "are notoriously discriminatory against both women and minorities"); *id.* at 556 (Frankie M. Freeman, U.S. Comm'n on Civil Rights) ("State and local government employment has long been recog-

nized as an area in which discriminatory employment practices deny jobs to women and minority workers."); *Equal Rights (1971)* 479 (Mary Dublin Keyserling, National Consumers League) ("It is in these fields of employment [*i.e.*, state and local government and educational institutions] that some of the most discriminatory practices seriously limit women's opportunities."); *id.* at 548 (Citizen's Advisory Council on Status of Women) ("numerous distinctions based on sex still exist in the law" including "[d]iscrimination in employment by State and local governments"); *Higher Education 2* at 1131 (study by American Association of University Women) ("women do not have equal status with men in academe," "particularly * * * in the large public institutions"); *American Women* 19-20 (noting "prejudicial attitudes and practices" by, *inter alia*, "governmental organizations" in "hiring, wages, and promotion").

The President's Commission on the Status of Women surveyed States regarding their employment policies toward women. Eleven States gave the appointing officer "the unrestricted right to specify male or female" candidates for original appointments, and 15 States "permit[ted] the appointing officer to limit his consideration to one sex in promotion." *Report of the Committee on Federal Employment* 68. Even among those States that limited the appointing officer's discretion not to consider women, many excluded women from broad categories of jobs. For example, Michigan "require[d] that men only shall apply for classes such as State police trooper, steeplejack, bulldozer operator, prison guard, liquor enforcement operator, [and] patrol boat captain"; Colorado considered only men for "jobs on night shifts, working bars, * * * or where heavy lifting is required"; Illinois considered only men for positions such as prison guard and district office police clerk; and Indiana and Texas considered only men for positions requiring physical strength. *Id.* at 71-73. Even when women were not formally excluded from positions, States reported that their agencies did not consider women for positions for which they were qualified. See *id.* at 72 (Oregon reported that "the employing agencies sometimes ignore the women certified"; Montana reported that "we have certain positions that could be filled by women for which men are usually selected").

discriminated against women with respect to wages,[10] and that existing remedies, at both the state and the federal levels, were inadequate.[11] Much of that

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[10] See, *e.g.*, *Equal Employment (House 1971)* 486, 489 (Modern Language Association) (in survey of language departments, half at public colleges and universities, "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) (noting that women in state employment "suffer some of the worst discrimination," which could be addressed by extension of the Equal Pay Act); *Discrimination Against Women (1970)* 301 (Dr. Bernice Sandler, Women's Equity Action League) (noting that "[s]alary discrepancies abound" in the academic ranks of public and private universities; "[n]umerous national studies have documented the pay differences between men and women with the same academic position and qualifications"); *id.* at 644-645 (Peter Muirhead, Deputy Assistant Secretary, Department of Health, Education and Welfare) (observing, with respect to public and private universities, that "[a]t all faculty ranks, women are paid less than their male colleagues," and that such "inequities are so pervasive that direct discrimination must be considered as p[l]aying a share"); *id.* at 1034-1036 (Dr. Alan Bayer and Dr. 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").

[11] Before the extension of the Equal Pay Act and Title VII to the States, some state employers were subject to federal non- discrimination requirements as a condition of receiving federal contracts or certain federal funds. Congress was advised, however, that neither those requirements nor suits under the Equal Protection Clause were sufficient to eradicate discrimination against women in state employment. See, *e.g.*, *Discrimination Against Women (1970)* 26 (Jean Ross, American Association of University Women) ("[A]s in the case of [racial minorities], the additional protective acts of recent years, such as the Equal Pay for Equal Work Act and the Civil Rights Act[,] are required and need strengthening to insure the equal protection under the law which

evidence revealed widespread and entrenched employment discrimination against women employed at state colleges and universities.[12] Congress heard detailed testimony that women at state institutions throughout

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we are promised under the Constitution."); *id.* at 304 (Dr. Bernice Sandler) (noting the need for additional legislation "to begin to correct many of the inequities that women face," including "salary inequities" at colleges and universities); *Equal Employment (1969)* 51-52 (William H. Brown III, Chair, EEOC) (observing that "most" state and local governments "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 perceived to be available. See, *e.g.*, *Discrimination Against Women (1970)* 133 (Wilma Scott Heide, Pennsylvania Human Relations Comm'n) (urging that Title VII be extended to educational institutions because "[o]nly a couple States have or currently contemplate any prohibition of sex discrimination in educational institutions"); *Equal Rights (1970)* 744 (while 31 States had laws requiring equal pay for equal work, only nine of those laws applied to public employment); *Equal Employment (1969)* 170 (Howard Glickstein, U.S. Comm'n on Civil Rights) (noting that state and local fair employment commissions had not dealt effectively with discrimination in public employment).

[12] See, *e.g.*, *Simple Justice* 6-7 (urging extension of Title VII to state employers and finding that "[t]here is gross discrimination against women in education"); *Equal Rights (1971)* 269 (Dr. Bernice Sandler) (noting the "massive, pervasive, consistent, and vicious pattern of discrimination against women in our universities and colleges" and citing examples of such discrimination at state institutions); *Discrimination Against Women (1970)* 299-302 (Dr. Bernice Sandler) (noting instances of employment discrimination by state-supported universities); *id.* at 379 (Dr. Pauli Murray) (urging that Title VII be extended to "public and private institutions of learning" given the "pattern or practice of discrimination in many educational institutions"); *id.* at 452 (Virginia Allan, President's Task Force on Women's Rights and Responsibilities) (noting "the growing body of evidence of discrimination against women faculty in higher education").

the country were paid less than men for substantially the same work.[13] For example, officials of the Department of Health, Education, and Welfare reported to Congress on their investigation into such discrimination at one large state university, which the officials described as "not unlike other universities" in that regard.[14]

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[13] See, *e.g.*, *Discrimination Against Women (1970)* 151, 159 (Dr. Ann Scott) (describing study at the State University of New York-Buffalo that found that "women in the same job categories, administrative job categories, with the same degrees as men received considerably less money as a group"); *id.* at 1225 (study by Dr. Jane Loeb, Chairman, Urbana AAUP Committee on Status of Women) ("The[] data strongly suggest that men and women within the same departments [at the University of Illinois at Urbana-Champaign], 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 (1971)* 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").

[14] See, *e.g.*, *Higher Education 1* at 298 (letter of Don F. Scott, Office for Civil Rights, Dep't of Health, Education, and Welfare) (noting Department's findings that at the University of Michigan "women are in many cases getting less pay than men with the same job titles, responsibilities, and experience" and that "men [are receiving] higher starting salaries than women in the same job classifications"); *id.* at 275 (Owen Kiely, Chief, Contract Compliance Div., Office of Civil Rights, Dep't of Health, Education, and Welfare) ("We found that there were differences in rates of pay [at the University of Michigan] for the same positions in the academic

The congressional committee reports on the various enactments of the period noted the "scope and depth of the discrimination" against women, much of which was found to be "directly attributable to governmental action both in maintaining archaic discriminatory laws and in perpetuating discriminatory practices in employment, education and other areas." H.R. Rep. No. 554, 92d Cong., 1st Sess. 51 (1971) (Higher Education Act of 1971); S. Rep. No. 689, 92d Cong., 2d Sess. 7 (1972) (Equal Rights Amendment). A number of Members of Congress expressed the view that the "well documented" record developed at the hearings revealed "widespread," "persistent," "endemic," "systemic[]," and "rampant" sex discrimination,[15] including sex dis-

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area so that females generally got less for the same position than males did. We found similar patterns in the nonacademic area."); *id.* at 277-278 (Stanley Pottinger, Director, Office of Civil Rights, Dep't of Health, Education, and Welfare) (noting that, "although we have concentrated our actions here on the [U]niversity [of Michigan], it is not unlike other universities").

[15] See 118 Cong. Rec. 3936, 5804 (1972) (Sen. Bayh) (observing that "[d]iscrimination against females on faculties and in administration is well documented" and referencing both public and private institutions); *id.* at 4817-4818 (Sen. Stevenson) (observing that "[s]ex discrimination, especially in employment, * * * is widespread and persistent," and relying, *inter alia*, on disparities in male and female salaries at institutions of higher education); *Equal Rights (1971)* 95 (Rep. Ryan) ("Discrimination levied against women does exist; in fact, it is endemic in our society."); *Discrimination Against Women (1970)* 3 (Rep. Green) ("too often discrimination against women has been either systematically or subconsciously carried out" by "Congress and State legislatures"); *id.* at 235 (Rep. May) ("[S]ex discrimination in the colleges and universities of this Nation * * * is running rampant."); *id.* at 738 (Rep. Griffiths) ("The extent of discrimination against women in the educational institutions of our country constitutes virtually a national calamity."); *id.* at 750 (Rep. Heckler) ("Discrimination by

crimination by state government employers that "persist[ed]" despite the fact that it was "violative of the Constitution of the United States."[16] And, more specifically, they concluded that many employers, including state government employers, were not paying women equal wages for equal work[17] and that the

universities and secondary schools against women teachers is widespread.").

[16] 118 Cong. Rec. at 1412 (Sen. Byrd).

[17] Members of Congress relied, *inter alia*, on the Department of Labor's *Fact Sheet on the Earnings Gap* (see note 8, *supra*), which found large differences in median wages between men and women full-time workers in general occupational groupings. For example, the *Fact Sheet* reported that, "in institutions of higher education in 1965-66, women full professors had a median salary of only $11,649 as compared with $12,768 for men," and that "[c]omparable differences" were found among associate professors, assistant professors, and instructors. *Discrimination Against Women (1970)* 18. Members of Congress determined that "these differences [in median pay of men and women faculty members] do not occur by accident," but instead "are the direct result of conscious discriminatory policies." *Id.* at 434 (Rep. Mink); see 118 Cong. Rec. at 5805 (Sen. Bayh) (noting that women faculty members "often do not receive equal pay for equal work"); *id.* at 4817-4818 (Sen. Stevenson) (citing salary disparities between male and female faculty members as evidence of discrimination).

Members of Congress also relied on other evidence of wage disparities to conclude that public and private employers were discriminating against women. See, *e.g.*, 117 Cong. Rec. 39,250 (1971) (Rep. Green) (noting the "ample documentation" contained in a "two volume hearing record" of discrimination against women in institutions of higher learning); 118 Cong. Rec. at 5804-5805 (Sen. Bayh) (noting that "[o]ver 1,200 pages of testimony document the massive, persistent patterns of discrimination against women in the academic world," such as testimony that "the University of Pittsburgh calculated that [it] was saving $2,500,000 by paying women less than they would have paid men with the same qualifications"); *id.* at 1840 (Sen. Javits) (noting that state and local governments' "differentiation * * * in respect of income" among

existing laws did not adequately address that problem.[18] Thus, "Congress had developed a clear understanding of the problem of gender discrimination on the part of States through its passage of legislation such as the Education Amendments * * * and its extension of Title VII to state and local employers."

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male and female employees indicates that "something is not right in terms of the way in which the alleged concept of equal opportunity is being administered"); *id.* at 1992 (Sen. Williams) ("Perhaps the most extensive discrimination in educational institutions, however, is found in the treatment of women. * * * [T]his discrimination does not only exist as regards to the acquiring of jobs, but * * * 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 Against Women (1970)* 740 (Rep. Griffiths) ("Numerous studies document the pay differences between men and women with the same academic rank and qualifications.").

[18] See, *e.g.*, 118 Cong. Rec. at 4931-4932 (Sen. Cranston) (employees of educational institutions "are, at present, without an effective Federal remedy in the area of employment discrimination"); *id.* at 5804 (Sen. Bayh) (noting the need for "a strong and comprehensive measure" to "provide women with solid legal protection from * * * persistent, pernicious discrimination" in higher education); *id.* at 274 (Sen. McGovern) (describing as "weak" and "ineffective" the measures then available to the federal government to combat "discrimination against women in our academic institutions"); *Equal Rights (1971)* 85, 87 (Rep. Mikva) (arguing that the extension of Title VII and the Equal Pay Act were "needed interim to and supplemental to" the ratification of the Equal Rights Amendment and its "implementation under the 14th amendment"); *Discrimination Against Women (1970)* 235 (Rep. May) (unless the civil rights laws are extended to educational institutions, "there is no effective legal way to get at them"); *id.* at 750 (Rep. Heckler) (observing that the Fourteenth Amendment "has not been effective in preventing sex discrimination against teachers in public schools").

Varner v. *Illinois State Univ.*, 226 F.3d 927, 935 (7th Cir. 2000), cert. denied, 533 U.S. 902 (2001).

c. In addition to the evidence developed before the enactment of the Equal Pay Act, the hearings on the legislation that ultimately extended the Equal Pay Act to the States revealed extensive evidence of sex discrimination by States as employers.[19] Congress heard testimony that, because public employees were exempted from the Equal Pay Act, wages for women in state and local government jobs "are most often lower than [those of] their male counterparts."[20] Congress also heard testimony that existing anti-discrimination remedies were insufficient.[21] In addition, Congress heard testimony not only that women received unequal pay for equal work at universities and colleges generally,[22] but also that a number of state universities,

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[19] See *To Amend the Fair Labor Standards Act: Hearings Before the Gen. Subcomm. on Labor of the House Comm. on Educ. and Labor*, 91st Cong., 2d Sess. (Pt. 1) (1970) (*FLSA Hearings (1970)*); *Fair Labor Standards Amendments of 1971: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare*, 92d Cong., 1st Sess. (Pt. 1) (1971) (*FLSA Hearings (1971)*); *Fair Labor Standards Amendments of 1973: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare*, 93d Cong., 1st Sess. (Pt. 2) (1973) (*FLSA Hearings (1973)*).

[20] *FLSA Hearings (1971)* 292-293 (Judith A. Lonnquist, National Organization for Women).

[21] See *FLSA Hearings (1971)* 288-289 (Lucille Shriver, National Federation of Business and Professional Women's Clubs) (expressing the view that extending Title VII would not be sufficient); *FLSA Hearings (1973)* 46a (National Federation of Business and Professional Women's Clubs) (FLSA coverage of state employers "is sorely needed").

[22] See *FLSA Hearings (1971)* 321 (Dr. Bernice Sandler) ("Salary differences between men and women doing the same work and with the same title are the rule, rather than the exception in

in particular, paid women less than men for the same work.[23] Witnesses also testified that public elementary and secondary schools[24] did not pay women equally with their male counterparts for equal work.[25]

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universities and colleges."); *id.* at 350 (article by Dr. Alan Bayer and Dr. Helen Astin) ("Across all work settings, 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."); *id.* at 363 (Helen Bain, National Education Association) ("At the college level women faculty members, almost without exception, receive, on the average, substantially less for the same work than do their male counterparts."); *id.* at 748 (Jean Ross) (although "nationally, women comprise about 22 percent of the faculty at all ranks in higher education in the United States," "women are not filling a comparable proportion of the higher paying posts in higher education in either faculty or administrative positions").

[23] See *FLSA Hearings (1971)* 322-324 (Dr. Bernice Sandler) (reporting on evidence from University of Arizona, University of Minnesota, Kansas State Teachers College, University of Pittsburgh, Michigan State University, and University of California at Berkeley that "[w]omen are simply paid less than their male counterparts"); *id.* at 747 (Jean Ross) (University of Minnesota); *FLSA Hearings (1970)* 477-478 (Wilma Scott Heide, National Organization for Women) (University of Minnesota, State University of New York at Buffalo, University of Maryland, and University of Pittsburgh); *id.* at 558 (Salary Study at Kansas State Teachers College).

[24] Although school districts are generally not "arms of the state" protected by the Eleventh Amendment, see *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 280-281 (1977), there are some significant exceptions to this rule. See *Belanger* v. *Madera Unified Sch. Dist.*, 963 F.2d 248 (9th Cir. 1992) (California school districts are protected by Eleventh Amendment), cert. denied, 507 U.S. 919 (1993); *Rosenfeld* v. *Montgomery County Pub. Schs.*, 41 F. Supp. 2d 581 (D. Md. 1999) (Maryland school districts are protected by Eleventh Amendment). The law in other States remains in flux. See, *e.g.*, *Martinez* v. *Board of Educ. of Taos Mun. Sch. Dist.*, 748 F.2d 1393 (1984) (New Mexico school districts are

Thus, whether one focuses solely on the hearings concerning the Equal Pay Act extension or on the record more broadly, the existence of a pattern of unconstitutional discrimination against women by States was well established.

d. That record is further bolstered by the "extensive litigation and discussion of the constitutional violations" in the federal courts. See *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring). This Court has repeatedly invalidated state laws and practices that invidiously discriminated on the basis of sex.[26] In addition, the

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protected by Eleventh Amendment), overruled by *Duke* v. *Grady Mun. Schs.*, 127 F.3d 972 (10th Cir. 1997); *Harris* v. *Tooele County Sch. Dist.*, 471 F.2d 218 (1973) (Utah school districts are protected by Eleventh Amendment), overruled by *Ambus* v. *Granite Bd. of Educ.*, 995 F.2d 992 (10th Cir. 1993) (en banc). Given that some school districts are "beneficiaries of the Eleventh Amendment," the evidence before Congress regarding the treatment of women in public schools is relevant in assessing the legislative record. See *Garrett*, 531 U.S. at 369.

[25] See *FLSA Hearings (1971)* 317 (Dr. Ann Scott) ("discrimination of salaries paid to woman teachers pervades the entire public school system"); see also *Equal Rights (1971)* 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"); *Equal Employment (Senate 1971)* 433 (Mary Jean Collins-Robson, 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."); *Unemployment and Discrimination* 221 (Mary King, school board member) ("The cleaning men and cleaning women in the Euclid schools do almost the same work, although there are slightly different job descriptions. The women earn $2,500 less per year than the men.").

[26] See, *e.g.*, *Virginia*, *supra* (higher education); *J.E.B.*, *supra* (jury peremptory challenges); *Kirchberg* v. *Feenstra*, 450 U.S. 455 (1981) (property disposition); *Stanton* v. *Stanton*, 421 U.S. 7 (1975)

lower federal courts continue to find that States discriminate against women in employment in violation of both the Equal Protection Clause and the disparate treatment provisions of Title VII.[27] Those cases provide "confirming judicial documentation," *ibid.*, of unconstitutional state sex discrimination.

3. *The congruence and proportionality of the remedy to the constitutional violation*: The Equal Pay Act is a narrowly tailored response to a documented pattern of unconstitutional state discrimination in the wages paid female workers. See *County of Washington* v. *Gunther*, 452 U.S. 161, 170 (1981) (observing that Congress sought "to confine the application of the [Equal Pay] Act to wage differentials attributable to sex discrimination"). The Equal Pay 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). The Constitution itself forbids such disparities if they result from intentional discrimination on the basis of sex.

(child support); *Taylor* v. *Louisiana*, 419 U.S. 522 (1975) (jury service); *Reed* v. *Reed*, 404 U.S. 71 (1971) (estate administration).

[27] See, *e.g.*, *White* v. *New Hampshire Dep't of Corrs.*, 221 F.3d 254 (1st Cir. 2000); *Thomas* v. *Texas Dep't of Criminal Justice*, 220 F.3d 389 (5th Cir. 2000); *Lathem* v. *Department of Children and Youth Servs.*, 172 F.3d 786 (11th Cir. 1999); *Nicks* v. *Missouri*, 67 F.3d 699 (8th Cir. 1995); *Cross* v. *Alabama*, 49 F.3d 1490 (11th Cir. 1995); *Catlett* v. *Missouri Highway and Transp. Comm'n*, 828 F.2d 1260 (8th Cir. 1987), cert. denied, 485 U.S. 1021 (1988); *Craik* v. *Minnesota State Univ. Bd.*, 731 F.2d 465 (8th Cir. 1984); *Sweeney* v. *Board of Trustees of Keene State Coll.*, 604 F.2d 106 (1st Cir. 1979), cert. denied, 444 U.S. 1045 (1980).

The Equal Pay Act enforces that constitutional prohibition by shifting the evidentiary burden when a wage disparity is shown. Once an employee proves equal work and unequal pay, an employer bears the burden of persuasion (if it chooses to mount an affirmative defense) to show that the difference was based on "any other factor other than sex." 29 U.S.C. 206(d)(1)(iv); *Corning Glass Works*, 417 U.S. at 196-197. In essence, Congress has established a rebuttable presumption that unequal pay of male and female workers for equal work represents 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 burden-shifting mechanism does not, as petitioner suggests (Pet. 15-16), render the Equal Pay Act an impermissible exercise of Congress's power under Section 5. That mechanism, which serves to ensure that cases of intentional unconstitutional sex discrimination do not evade judicial detection and remedy, is well within Congress's authority to enact prophylactic and remedial legislation to enforce the Fourteenth Amendment. This Court itself has created burden-shifting mechanisms for the same purpose of discovering discriminatory motives that can easily be concealed. See, *e.g.*, *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248 (1981) (burden shifting for claims of sex discrimination under Title VII). Moreover, this Court has recognized that "Congress can prohibit laws with discriminatory effects in order to prevent racial discrimination in violation of the Equal Protection Clause." *Boerne*, 521 U.S. at 529 (citing cases); 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*, 531 U.S. at 373-374 (discussing *South Carolina* v. *Katzenbach* with approval); *Lopez* v. *Monterey County*, 525 U.S. 266, 283 (1999). Here, Congress did not impose an effects test, but simply shifted the burden to the State to prove a 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, *Florida Prepaid*, 527 U.S. at 639 (quoting *Boerne*, 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.

Nor was Congress required, as petitioner asserts (Pet. 17), to apply the Equal Pay Act only to those States identified as most likely to engage in sex discrimination in employment. This Court has not required Congress to enforce the Fourteenth Amendment on a state-by-state basis. It is true that the Court has observed that the geographic restrictions in certain provisions of the Voting Rights Act serve to assure that those provisions are congruent and proportional to the constitutional problems that they address. See, *e.g.*, *Boerne*, 521 U.S. at 532-533. The Court has also made clear, however, that Section 5 legislation does not require "geographic restrictions, or egregious predicates." *Ibid.* In fact, this Court has repeatedly upheld other provisions of the Voting Rights Act that apply nationwide as valid Section 5 legislation. See *Oregon* v. *Mitchell*, 400 U.S. 112, 118 (1970) (nationwide ban on literacy tests); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966) (nationwide ban on English literacy require-

ments). Singling out particular jurisdictions for individualized prohibitions, while sometimes justifiable, is highly unusual, administratively difficult, and disruptive of comity. See *Katzenbach*, 383 U.S. at 328-329. Here, moreover, the record before Congress indicated that the constitutional problem was not limited to a few States or to a single region. See, *e.g.*, pp. 16-23, 24-25 notes 9-10, 12-15, 17, 22-23, *supra.* Finally, the difficulties in proving discriminatory intent that Congress sought to address through the burden-shifting scheme of the Equal Pay Act arise in every case, regardless of jurisdiction. Congress was entitled to conclude that effective enforcement of the Equal Protection Clause is important in all jurisdictions, even in those where violations might be less frequent.[28]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[28] Petitioner also contends (Pet. 21-22) that, as a matter of law, a university should be able to defeat a Title VII claim of pay disparity by establishing that the reason for the disparity is the need to pay a sufficient salary to attract a new faculty member. The United States intervened in this case solely to address petitioner's Eleventh Amendment challenge to the Equal Pay Act and, consequently, does not address that second question.