No. 98-739

In the Supreme Court of the United States

OCTOBER TERM, 1998

STATE OF LOUISIANA, ET AL., PETITIONERS

v.

KAREN M. USSERY

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

SETH P. WAXMAN
Solicitor General
Counsel of Record
BILL LANN LEE
Acting Assistant Attorney General
JESSICA DUNSAY SILVER
SETH M. GALANTER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether Congress clearly expressed its intent to abrogate the States' Eleventh Amendment immunity in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

2. Whether Congress's abrogation of the States' Eleventh Amendment immunity in the Equal Pay Act of 1963, 29 U.S.C. 206(d), falls within Congress's power under Section 5 of the Fourteenth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 150 F.3d 431. The opinion of the district court (Pet. App. B1-B19) is reported at 962 F. Supp. 922.

JURISDICTION

The court of appeals entered its judgment on August 5, 1998. The petition for a writ of certiorari was filed on November 3, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners, the State of Louisiana, through the Louisiana Department of Health and Hospitals, Pinecrest Developmental Center, employ respondent. Pet.

App. B2. She alleged that petitioners violated the Equal Pay Act of 1963, 29 U.S.C. 206(d), by requiring her to wait longer than similarly situated men for a promotion attributable to earning a master's degree. She also claimed that petitioners violated both the Equal Pay Act and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, by requiring her to resign and be rehired on probationary status to qualify for a new pay status. Pet. App. B2, B17-B18.[1]

Petitioners moved to dismiss the suit on the ground that the Eleventh Amendment barred the claims. Petitioners argued that the Title VII claims were foreclosed because, although Congress had the power under Section 5 of the Fourteenth Amendment to abrogate Eleventh Amendment immunity for respondent's Title VII claims, Pet. App. B8-B9, Title VII did not contain a clear expression of congressional intent to effect such an abrogation, *id.* at B5-B6. Petitioners contended that the Equal Pay Act claim was also barred because, although Congress clearly intended to abrogate Eleventh Amendment immunity in that statute, *id.* at B9, it had no power to do so because the Equal Pay Act was not authorized by Section 5 of the Fourteenth Amendment, *ibid.*

The district court denied the motion to dismiss the federal claims, concluding that both Title VII and the Equal Pay Act contain valid abrogations of Eleventh Amendment immunity. Pet. App. B5-B13.[2]

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[1] Respondent also filed three state-law claims, which the district court dismissed. Pet. App. B13-B15.

[2] The district court also denied petitioners' motion for summary judgment on the Title VII and Equal Pay Act claims. Pet. App. B15-B19.

2. Petitioners took an interlocutory appeal of the denial of Eleventh Amendment immunity. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). The United States intervened on appeal, pursuant to 28 U.S.C. 2403(a), to defend the abrogations of Eleventh Amendment immunity in both statutes. The court of appeals affirmed. Pet. App. A2-A13.

Adhering to this Court's decision in *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), the court of appeals held that Congress clearly expressed its intent to abrogate the States' Eleventh Amendment immunity in Title VII. Pet. App. A5-A6. The court further ruled that, even if *Fitzpatrick* left the issue open, Congress made its intent to abrogate "unmistakably clear when it amended Title VII's definition of 'person' [who could be sued under the statute] to include governments, governmental agencies, and political subdivisions, and simultaneously amended the definition of employees to include individuals 'subject to the civil service laws of a State government, governmental agency, or political subdivision.'" *Id.* at A6 (internal citation omitted).

Agreeing with every other court of appeals that has addressed the question, the court also held that the Equal Pay Act is a valid exercise of Congress's legislative authority under Section 5 of the Fourteenth Amendment. Pet. App. A6-A13. Indeed, because the Equal Pay Act "is designed to eliminate discrimination in pay * * * based on an employee's gender" and because "the substantive provisions of the Fourteenth Amendment prohibit the States from discriminating on the basis of gender," the court of appeals was "'unable to understand how a statute enacted specifically to combat such discrimination could fall outside the authority granted to Congress by § 5.'" *Id.* at A11.

ARGUMENT

The court of appeals' ruling that Title VII and the Equal Pay Act validly abrogate the States' Eleventh Amendment immunity is correct and consistent with the decisions of this Court and every other court of appeals to address the questions. Accordingly, further review is unwarranted.

1. In *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), this Court held that the question whether Congress has abrogated Eleventh Amendment immunity in particular legislation contains two elements: "first, whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity,' * * * and second, whether Congress has acted 'pursuant to a valid exercise of power.'" *Id.* at 55 (quoting *Green* v. *Mansour*, 474 U.S. 64, 68 (1985)). Petitioners concede (Pet. 8, 20) that Congress has the power pursuant to Section 5 of the Fourteenth Amendment to abrogate Eleventh Amendment immunity for private Title VII claims against state employers, but argue (Pet. 5-21) that Title VII does not contain a "clear statement" of Congress's intent to abrogate that immunity. Petitioners' claim is without merit.

a. Petitioners' argument is foreclosed by this Court's decision in *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976). Contrary to petitioners' claim (Pet. 19-21), in *Fitzpatrick* the Court expressly held that Congress intended to abrogate Eleventh Amendment immunity for Title VII claims. While the Court devoted most of its opinion to explaining that Congress had the power, under Section 5 of the Fourteenth Amendment, to abrogate the States' Eleventh Amendment immunity, a "necessary predicate" for the decision was determining that Congress intended to effect such an abrogation in

the first instance. 427 U.S. at 451 (stating that the "necessary predicate" had been absent in *Edelman* v. *Jordan*, 415 U.S. 651 (1974)). The Court noted that, "in this Title VII case the 'threshold fact of congressional authorization' * * * to sue the State as employer is clearly present." 427 U.S. at 452 (quoting *Edelman*, 415 U.S. at 672); see also *Fitzpatrick*, 427 U.S. at 447 ("In the 1972 Amendments to Title VII of the Civil Rights Act of 1964, Congress * * * authorized federal courts to award money damages in favor of a private individual against a state government."); *id.* at 449 n.2 ("The 1972 Amendments * * * *made clear* that that right [to file a private lawsuit] was being extended to persons aggrieved by public employers.") (emphasis added).[3]

Despite *Fitzpatrick*'s repeated references to Congress's intent to abrogate immunity in Title VII, petitioners contend (Pet. 19-21) that *Fitzpatrick* stands "merely for the proposition that the Fourteenth Amendment allows Congress to abrogate [Eleventh Amendment] immunity," and not that such an abrogation actually was accomplished by Title VII. That reading not only ignores the language of the opinion, but also would render *Fitzpatrick*'s comprehensive analysis of the constitutional intersection of the Eleventh and Fourteenth Amendments purely advisory, contrary to the long-established principle that constitutional adjudications will not be undertaken unless absolutely nec-

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[3] In *Quern* v. *Jordan*, 440 U.S. 332 (1979), this Court reiterated that "[i]n *Fitzpatrick* v. *Bitzer* the Court found present in Title VII of the Civil Rights Act of 1964 the 'threshold fact of congressional authorization' to sue the State as employer, because the statute made explicit reference to the availability of a private action against state and local governments." *Quern*, 440 U.S. at 344 (citation omitted).

essary. See *New York City Transit Auth.* v. *Beazer*, 440 U.S. 568, 582 (1979) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."); *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Moreover, if the *Fitzpatrick* Court had decided only that Congress had the power to abrogate, it would have been necessary to remand the case for consideration of whether abrogation was in fact clearly intended, but no such remand was ordered. 427 U.S. at 457.

b. Petitioner argues in the alternative (Pet. 21) that *Fitzpatrick* has been "implicitly overruled" by *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985), and subsequent cases, which require that Congress express its intent to abrogate Eleventh Amendment immunity "in unmistakable language in the statute itself," *id.* at 243. But *Atascadero* can hardly be viewed as overruling *Fitzpatrick*, when it cited *Fitzpatrick* with approval. 473 U.S. at 238, 243; accord *Seminole Tribe*, 517 U.S. at 59, 65-66. Indeed, *Fitzpatrick* represents a link in the continous development of Eleventh Amendment jurisprudence, citing *Edelman* (427 U.S. at 448, 450-452, 456-457) and being cited in turn in *Atascadero*.

c. Even were *Fitzpatrick* not dispositive, this Court's review would not be warranted because the court of appeals' decision is correct and does not conflict with the ruling of any other circuit. First, petitioner concedes (Pet. 10) that no other court has ruled that Title VII lacks a clear abrogation of Eleventh Amendment immunity.

Second, the court of appeals' ruling is correct. Petitioner's argument that no abrogation occurred because

the words "States," "Eleventh Amendment immunity," and "sovereign immunity" are absent from the statutory text is mistaken. This Court has made clear that Congress need not employ specific terminology to manifest its intent to abrogate. See *Seminole Tribe*, 517 U.S. at 55-57; *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 13-14 (1989) (plurality), overruled on other grounds, 517 U.S. 44 (1996); *id.* at 29-30 (Scalia, J., concurring in part and dissenting in part). Instead, Congress need only make clear that it intends to authorize private persons to sue States in federal courts. See *Seminole Tribe*, 517 U.S. at 57; *Dellmuth* v. *Muth*, 491 U.S. 223, 233 (1989) (Scalia, J., concurring) (no "explicit reference to state sovereign immunity or the Eleventh Amendment" is necessary to abrogate).

Petitioners also err in arguing (Pet. 13-16) that Title VII's authorization of private plaintiffs to sue "governments, governmental agencies, [and] political subdivisions" in federal court does not clearly encompass States.[4] While in some contexts the term "government," standing alone, might not include the States, it

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[4] Title VII defines an "employer" as a "person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. 2000e(b). The statute, in turn, defines "person" to include "governments, governmental agencies, [and] political subdivisions," 42 U.S.C. 2000e(a), and defines "employee" in a manner that includes "employees subject to the civil service laws of a State government, governmental agency or political subdivision," 42 U.S.C. 2000e(f). Title VII further provides that, once the prescribed administrative remedies have been exhausted, "a civil action may be brought against the respondent * * * by the person claiming to be aggrieved," 42 U.S.C. 2000e-5(f)(1), and that federal district courts "shall have jurisdiction of actions brought under this subchapter," 42 U.S.C. 2000e-5(f)(3).

is impossible to escape the conclusion that it does include them in the context of this statute. See *Seminole Tribe*, 517 U.S. at 57 (looking to "various provisions" of the statute to dispel "[a]ny conceivable doubt as to the identity of the defendant in an action" to enforce the statute).

At the same time Congress added the language "governments, governmental agencies, [and] political subdivisions," to the definition of employer, Congress removed the provision that specifically excludes "a State or political subdivision thereof" from Title VII's coverage. See *Fitzpatrick*, 427 U.S. at 449 n.2. Congress simultaneously expanded the definition of "employee" to cover all persons employed by an employer except "any person elected to public office in any State or political subdivision" and certain persons who work for them who are not "subject to the civil service laws of a State government, governmental agency or political subdivision." 42 U.S.C. 2000e(f). These provisions would be pointless unless state employees were otherwise covered by Title VII.[5] Finally, if "governments" does not refer to States, the term would be mere surplusage, as political subdivisions of a State are already expressly included, and the federal government is covered in another portion of Title VII. See 42 U.S.C. 2000e-16 (1994 & Supp. II 1996); see also 42 U.S.C. 2000e(b) (excluding the United States from definition of "employer"); see generally *Bailey* v. *United States*, 516 U.S.

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[5] Indeed, Congress enacted the Government Employee Rights Act of 1991, 2 U.S.C. 1201 *et seq.*, to extend some of the protections of Title VII to those state employees previously exempted because of their close relationship to elected officials. See 2 U.S.C. 1220 (1994 & Supp. II 1996) (entitled "Coverage of previously exempt State employees").

137, 145 (1995) ("[A] legislature is presumed to have used no superfluous words.") (internal quotation marks omitted). Thus, even under the abrogation standard proposed by petitioners, Title VII contains an unequivocal statement of congressional intent that States be subject to private suits in federal court.[6]

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[6] Petitioners contend (Pet. 15-16) that other circuits have found statutory references to governmental entities to be insufficiently lucid to evince Congress's intent to abrogate. See *Lane* v. *First Nat'l Bank*, 871 F.2d 166 (1st Cir. 1989) ("governmental bodies"); *Richard Anderson Photography* v. *Brown*, 852 F.2d 114 (4th Cir. 1988) ("governmental bodies"), cert. denied, 489 U.S. 1033 (1989); *In re Willington Convalescent Home, Inc.*, 850 F.2d 50 (2d Cir. 1988) ("governmental unit"). Those cases, however, involved different statutes—the Copyright Act and the Bankruptcy Code. Further, unlike the 1972 amendments to Title VII, Congress did not insert into the text of those statutes language that deliberately subjected "governments" to coverage as defendants and simultaneously deleted a previous statutory exemption for the States. Rather, in the Copyright Act, the references to governmental bodies and States appeared in exemptive provisions, and the phrase "governmental bodies" was never defined to include the States. See *Lane*, 871 F.2d at 170-172; *Richard Anderson Photography*, 852 F.2d at 119-120; see also *BV Eng'g* v. *University of Calif., Los Angeles*, 858 F.2d 1394, 1398-1399 (9th Cir. 1988), cert. denied, 489 U.S. 1090 (1989). (Congress has since amended the copyright law to abrogate the States' Eleventh Amendment immunity. Copyright Remedy Clarification Act, Pub. L. No. 101-553, § 2, 104 Stat. 2749 (codified at 17 U.S.C. 511(a)).) With respect to the Bankruptcy Code, the Second Circuit's opinion in *Willington*, and this Court's plurality decision affirming that judgment, *Hoffman* v. *Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989), focused on the particular structure of the relevant bankruptcy provision to conclude only that the States' immunity was not waived with respect to a single subsection of the statute; neither this Court nor the court of appeals held or even suggested that the phrase "governmental unit" is inherently ambiguous and insufficient to abrogate immunity. *Willington*, 850 F.2d at 54-57;

2. With respect to the Equal Pay Act, petitioners do not dispute that Congress clearly expressed its intention to abrogate the States' Eleventh Amendment immunity in that statute. Pet. 21; Pet. App. A6.[7] Instead, petitioners contend (Pet. 21-25) that Congress lacked the authority to effect the abrogation because the Equal Pay Act was not enacted pursuant to Congress's power under Section 5 of the Fourteenth Amendment. See *Seminole Tribe*, 517 U.S. at 59, 65-66 (Section 5 of the Fourteenth Amendment grants Congress the power to abrogate the Eleventh Amendment). That claim does not merit this Court's review.

First, every court of appeals to address the question has ruled that the extension of the Equal Pay Act to the States was a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment. See *Varner* v. *Illinois State Univ.*, 150 F.3d 706, 709-717 (7th Cir. 1998); *Timmer* v. *Michigan Dep't of Commerce*, 104 F.3d 833, 838-839 (6th Cir. 1997); *Usery* v. *Charleston*

Hoffman, 492 U.S. at 101-104 (opinion of White, J.). (The Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, Tit. I, § 113, 108 Stat. 4117, amended the Bankruptcy Code to abrogate the States' Eleventh Amendment immunity for the provision at issue in *Willington* and *Hoffman*.)

[7] Eight other courts of appeals have held that the definitional and enforcement provisions of the Equal Pay Act contain the necessary "clear statement" of congressional intent to abrogate the States' Eleventh Amendment immunity. See *Mills* v. *Maine*, 118 F.3d 37, 42 (1st Cir. 1997); *Close* v. *New York*, 125 F.3d 31, 36 (2d Cir. 1997); *Abril* v. *Virginia*, 145 F.3d 182, 186 (4th Cir. 1998); *Timmer* v. *Michigan Dep't of Commerce*, 104 F.3d 833, 837-838 (6th Cir. 1997); *Varner* v. *Illinois State Univ.*, 150 F.3d 706, 710-711 (7th Cir. 1998); *Humenansky* v. *Regents of the Univ. of Minn.*, 152 F.3d 822, 825 (8th Cir. 1998); *Hale* v. *Arizona*, 993 F.2d 1387, 1391-1392 (9th Cir.) (en banc), cert. denied, 510 U.S. 946 (1993); *Aaron* v. *Kansas*, 115 F.3d 813, 814-815 (10th Cir. 1997).

County Sch. Dist., 558 F.2d 1169, 1171 (4th Cir. 1977); *Usery* v. *Allegheny County Inst. Dist.*, 544 F.2d 148, 155 (3d Cir. 1976), cert. denied, 430 U.S. 946 (1977).[8]

Second, petitioners' argument (Pet. 24) that the abrogation is invalid because Congress "did not say, or even imply, that it was acting pursuant to the Fourteenth Amendment" when it extended the Equal Pay Act to the States is wrong. "[T]he 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). Thus, in enacting legislation pursuant to Section 5 of the Fourteenth Amendment, Congress need not "anywhere recite the words 'section 5 or 'Fourteenth Amendment.'" *EEOC* v. *Wyoming*, 460 U.S. 226, 243 n.18 (1983); see also *Close* v. *Glenwood Cemetery*, 107 U.S. 466, 475 (1883); *United States* v. *Harris*, 106 U.S. 629, 635 (1883).

Petitioners place too much weight (Pet. 23-24) on the statement in *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981), that courts "should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." *Id.* at 16. This Court has made clear that *Pennhurst* did not articulate a rule for determining the constitutionality of Acts of Congress, but rather established a rule for discerning the meaning of

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[8] We are aware of appeals involving the validity of the Equal Pay Act's abrogation pending in three other circuits. See *Larry* v. *Board of Trustees*, 975 F. Supp. 1447 (1997), aff'd on reconsideration, 996 F. Supp. 1366 (N.D. Ala. 1998), appeal pending, No. 98-6532 (11th Cir.) (briefing completed Dec. 21, 1998); *O'Sullivan* v. *Minnesota*, No. 98-2706 (8th Cir.) (briefing completed Oct. 15, 1998); *Anderson* v. *State Univ. of NY*, No. 98-7025 (2d Cir.) (oral argument heard Sept. 22, 1998).

ambiguous statutory provisions. See *Gregory* v. *Ashcroft*, 501 U.S. 452, 470 (1991) (the *Pennhurst* rule is a "rule of statutory construction to be applied where statutory intent is ambiguous"); *EEOC* v. *Wyoming*, 460 U.S. at 244 n.18 ("Our task in *Pennhurst* * * * was to construe a statute, not to adjudge its constitutional validity.") (citations omitted); see also *Salinas* v. *United States*, 118 S. Ct. 469, 474-475 (1997). Here, no issue of statutory construction is presented in the appeal; petitioner concedes (Pet. App. A6) that Congress's intent to abrogate is clear.[9]

Third, contrary to petitioners' argument (Pet. 24-25), the Equal Pay Act falls squarely within Congress's power under Section 5 of the Fourteenth Amendment. The Equal Pay Act prohibits employers from paying workers of one sex more than workers of the opposite sex for performing equal work. See *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 195 (1974). Once an employee has proven equal work and unequal pay, an employer bears the burden of persuasion (if it chooses to mount an affirmative defense) to show the difference is not based on sex. See *id.* at 196-197. In essence, Congress has established a rebuttable presumption that

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[9] There is no question that the Commerce Clause provides the constitutional basis for the Equal Pay Act's regulation of private employers. The Commerce Clause is also the basis for Title VII's regulation of private employers. See *United Steelworkers of Am.* v. *Weber*, 443 U.S. 193, 206 n.6 (1979). However, the fact that Title VII was originally enacted pursuant to the Commerce Clause did not preclude this Court from holding in *Fitzpatrick* that the extension of Title VII to the States could be upheld under Section 5 of the Fourteenth Amendment. 427 U.S. at 452-456. Similarly, the Equal Pay Act's extension to the States may be upheld under Section 5 regardless of the basis upon which the statute was initially enacted.

unequal pay of opposite sex employees for equal work is intentional sex discrimination, but permits employers to rebut that presumption by showing that the actual cause of the disparity is a factor other than sex.

Petitioners argue (Pet. 24-25) that the Equal Pay Act falls beyond Congress's power under Section 5 because it permits the imposition of liability without the showing of intentional discrimination that the Equal Protection Clause requires, see *Washington* v. *Davis*, 426 U.S. 229 (1976). In *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), however, this Court reaffirmed that, when enacting remedial or preventive legislation under Section 5, Congress is not limited to prohibiting unconstitutional activity. "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." *Id.* at 518. Similarly, in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), and *City of Rome* v. *United States*, 446 U.S. 156 (1980), this Court upheld the constitutionality of Section 5 of the 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. *South Carolina* v. *Katzenbach*, 383 U.S. at 325-337; *City of Rome*, 446 U.S. at 177; see also *Thornburg* v. *Gingles*, 478 U.S. 30, 35 (1986); *Mississippi Republican Exec. Comm.* v. *Brooks*, 469 U.S. 1002 (1984) (mem.) (upholding 1982 amendments to the Voting Rights Act that permitted challenges based on the discriminatory effects of voting practices, even though the Court had ruled that discriminatory effects alone do not violate the Fourteenth Amendment). Indeed, in *Flores*, the Court expressly noted that "Congress can prohibit laws with discriminatory effects in order to

prevent racial discrimination in violation of the Equal Protection Clause." 521 U.S. at 529 (citing *City of Rome*, *supra*, and *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980) (plurality opinion)). Congress's authority to prevent sex discrimination is equally broad.

Moreover, unlike the statute at issue in *Flores*, which imposed a strict scrutiny standard on all state action substantially burdening religion even though there was little evidence of widespread constitutional violations, 521 U.S. at 530-533, the Equal Pay Act seeks only to enforce the settled constitutional right to be free of gender discrimination in salaries, by establishing a remedial scheme that is carefully tailored to detecting and preventing those acts (unequal pay for equal work) most likely to be the result of such unlawful discrimination. And, also unlike *Flores*, in which the Court found the "legislative record lack[ed] examples of modern instances" of intentional discrimination, 521 U.S. at 530, Congress enacted the Equal Pay Act based on a record that employers were intentionally and systematically paying women less than men for equal work.[10]

Given Congress's superior fact-finding ability and the attendant "wide latitude" (*Flores*, 521 U.S. at 520) to which Congress is entitled in exercising its "comprehensive remedial power" under Section 5 of the Four-

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[10] See S. Rep. No. 176, 88th Cong., 1st Sess. 1 (1963); H.R. Rep. No. 1714, 87th Cong., 2d Sess. 2 (1962); S. Rep. No. 2263, 81st Cong., 2d Sess. 2, 4 (1950); S. Rep. No. 1576, 79th Cong., 2d Sess. 2-3 (1946); *Corning Glass Works*, 417 U.S. at 195; see also *Kahn* v. *Shevin*, 416 U.S. 351, 353 (1974) (finding that "firmly entrenched practices" made "the job market * * * inhospitable to the woman seeking any but the lowest paid jobs"); *Varner*, 150 F.3d at 716-717.

teenth Amendment,[11] the Equal Pay Act's scheme to detect and deter sex discrimination in wages is an appropriate exercise of Congress's Section 5 authority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
BILL LANN LEE
Acting Assistant Attorney General
JESSICA DUNSAY SILVER
SETH M. GALANTER
Attorneys

JANUARY 1999

[11] *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 488 (1989) (opinion of O'Connor, J.) (quoting *Fullilove* v. *Klutznick*, 448 U.S. at 483).