No. 12-532

In The Supreme Court of the United States

SGT. BILL BROWN, ET AL.,
Petitioners,

v.

CRYSTAL HENLEY,
Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals for the Eighth Circuit

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REPLY TO BRIEF IN OPPOSITION

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Respondent Henley correctly observes that we "place a lot of weight on a single case that[, according to Respondent,] is not on point[:] … *Brown v. General Services Administration*, 425 U.S. 820 (1976)." Brief in Opposition at 8-9. Curiously, she makes that statement soon after citing key language from a House committee report, H.R. Rep. No. 92-238 (1971), reprinted in 1972 U.S.C.C.A.N. 2137 ("House Committee Report" or "Report"). What she fails to do is discuss *Brown* and the committee report together. Thus, she fails to tackle the real problem this petition brings to the Court: that the Court's analysis in *Brown* cannot be reconciled with the holding of the Eighth Circuit here—nor with similar holdings by other lower courts.

Here is the language that Respondent cites from the House Committee Report: "the remedies available … under Title VII are co-extensive with the individual's right … under ... 42 U.S.C. § 1981, and … the two procedures … are not mutually exclusive." 1972 U.S.C.C.A.N. at 2154. Respondent uses that language to buttress her defense of the Eighth Circuit's conclusion that in many employment cases government employees have two options: sue under Title VII, or sue on the much more general § 1983.

But in *Brown*, this Court expressly rejected that conclusion as to § 1981 employment claims against the *federal* government. 425 U.S. at 833-35. Yet the logic and the language in the House Committee Report make no distinction between employment claims against the federal government and employment claims against state and local

governments. Thus, if the House Committee Report accurately reflects the proper interpretation of the amendment to Title VII, then this Court must have been wrong in *Brown*.

At issue in *Brown* was § 1981, which—despite whatever the authors of the House Committee Report may have believed—*does* reach employment discrimination, *see Johnson v. Ry. Exp. Agency, Inc.*, 421 U.S. 454, 459-60 (1975), and would, on its face, apply to the federal government. Given the House Committee Report language, it was appropriate—perhaps even necessary—for the Court to lay out, in *Brown*, Congress's confusion regarding the scope of employment discrimination claims against the federal government. *See* 425 U.S. at 827-29. The Court concluded that "[t]he legislative history thus leaves little doubt that Congress was persuaded that federal employees who were treated discriminatorily had no effective judicial remedy." *Id*. at 828.

The Court went on to hold that

> [w]hether that understanding of Congress was in some ultimate sense incorrect is not what is important . … For the relevant inquiry [is] … what [Congress's] perception of the state of the law was.
>
> … [C]ongressional intent in 1972 was to create an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination.

Id. at 828-29 (footnote omitted). The question here is whether, in enacting the 1972 amendment to Title

VII, Congress intended "to create an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination," *id.* at 829, but *at the same time* to create a non-exclusive, optional, or alternative judicial scheme for the redress of state and local government discrimination. And the House Committee Report shines no more light on that specific subject than it does on the parallel federal question answered in *Brown*.

To the contrary, the House Committee Report consistently treats state and local government employment like federal employment. For example, it states: "The [act] extend[s] … jurisdiction to include Federal, State, county and municipal employees … *As there is currently no uniform Federal law which applies in this area* …." 1972 U.S.C.C.A.N. at 2142 (emphasis added). The Report concludes that "[f]ew [state and local government employees] are afforded the protection of an effective forum to assure equal employment." *Id.* at 2152. It states: "the adequacy of protection against employment discrimination by state and local governments *has been severely impeded by the failure of the Congress to provide Federal administrative machinery to assist the aggrieved employees*." *Id.* at 2153 (emphasis added). Rather than use those findings as bases for writing different rules for state and local as opposed to federal employment, the Report makes largely parallel observations about federal employment. *See, e.g., id.* at 2160 ("There is serious doubt that court review is available to the aggrieved Federal employee."). And it lumps federal employment together with other government employment in explaining the need for the legislation. *Id.* at 2153. ("The Constitution is *as* imperative in its prohibition of discrimination in

state and local government employment as it is in barring discrimination in Federal jobs.") (emphasis added).

The Report does note two exceptions to its conclusion that federal law did not, at that time, provide a remedy for public employment discrimination: there were non-discrimination requirements contained in "Federal Merit Standards provisions"[1] (FMS) and in Department of Housing and Urban Development (HUD) contracts. But, otherwise, the authors of the Report believed that "*state and local governments constitute the only large group of employees in the nation who are almost entirely exempt from Federal nondiscrimination protections*." (Emphasis added). *Id.*

It is the "almost" in that sentence—and not the entire universe of employment discrimination claims—that the House Committee Report seems to have meant to capture by stating that Title VII would not be mutually exclusive with § 1983. *Id.* at 2154. That is, if an employee can reach, via

[1] At the time Congress amended Title VII to cover state and local employers, "45 C.F.R. 70.4 … require[d] that states administering programs that receive federal assistance pursuant to the federal merit standards statutes adopt laws, rules and regulations expressly prohibiting discrimination on the ground of race, color, national origin, religious or political affiliation." *United States by Mitchell v. Frazer*, 317 F. Supp. 1079, 1082 (M.D. Ala. 1970). However, that regulation covered only 250,000 employees. H.R. Rep. 92-238, 1972 U.S.C.C.A.N. at 2153. The amendment to Title VII added protection to 12,880,000 employees. *Id.* at 2142. The Report, in noting that § 1983 was still available, meant that those 250,000 employees did not lose their right to assert a violation of 45 C.F.R. 70.4 via section 1983's general right to recover for violations of federal law.

§ 1983*, some other statutory right prohibiting discrimination*—for example, under the noted FMS provisions or HUD—then Title VII does not preempt.[2] But, as far as the Report's authors were aware, there was no effective federal remedy for general employment discrimination. *Id*. So, by stating that § 1983 claims could still be maintained, the Report was not stating much.

The language from the House Committee Report is the cornerstone upon which lies the theory that Title VII does not preempt § 1983 with respect to general employment discrimination claims. *See*, *e.g.*, *Russell v. Drabik*, 24 F. App'x 408, 411 (6th Cir. 2001) (holding that, based on language contained in H.R. Rep. No. 92-238, Title VII does not preempt § 1983); *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1574 (5th Cir. 1989) (same); *Trigg v. Fort Wayne Cmty. Sch.*, 766 F.2d 299, 301 (7th Cir. 1985) (same). Once the cornerstone is removed, the entire edifice crumbles. *Brown* removed the cornerstone, and there is no reason to allow the lower courts to build upon it anew.

That is particularly true because of the comprehensive nature of the Title VII scheme. Thus in *Brown*, this Court went on to hold that the comprehensive nature of Title VII revealed Congress's preemptive intention with respect to the Equal Employment Opportunity Act of 1972. *Brown*, 425

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[2] Indeed, the Report does not acknowledge the existence of a § 1983 employment claim asserting the Fourteenth Amendment generally, and its authors apparently did not believe that § 1983 was available to remedy such violations. That is why the Report notes that "[l]egislation to implement this aspect of the 14th Amendment is long overdue." H.R. Rep. 92-238, 1972 U.S.C.C.A.N. at 2154.

U.S. at 834. Since then, this Court has repeatedly reaffirmed the principle that a precisely drawn, detailed statute preempts more general remedies. *See Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 285 (1983); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20-21 (1981); *Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366, 375-78 (1979). That is good policy. And it should be consistently applied. To apply it to federal employees but not to state and local employees makes no sense.

Because both the statutory language at issue in *Brown* and the House Committee Report explaining that language draw no distinction between federal and state and local government employees as to preemption of claims made in the civil rights laws, this Court should grant the petition and take up the question as to whether the Eighth Circuit and other courts are justified in creating such a distinction.

Respectfully Submitted,

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