No. 10-1016

In The
Supreme Court of the United States

DANIEL COLEMAN,

Petitioner,

v.

MARYLAND COURT OF APPEALS; FRANK BROCCOLINA, STATE COURT ADMINISTRATOR; LARRY JONES, CONTRACT ADMINISTRATOR,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED FOR REVIEW

As the Court recognized in *Nevada Department of Human Resources v. Hibbs*, Congress passed the Family and Medical Leave Act with the intention of eliminating gender discrimination in the granting of employee leave. The question presented for review is, in light of *Hibbs*, whether Congress validly abrogated the States' Eleventh Amendment immunity when it passed the self-care provision of the Family and Medical Leave Act.

PARTIES TO THE PROCEEDING

All parties to this action are set forth in the caption.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1-14) is reported at 626 F.3d 187 (4th Cir. 2010). The district court order granting Maryland Court of Appeals' Motion to Dismiss Plaintiff's Amended Complaint (Pet. App. 15-20) is unreported.[1]

JURISDICTION

The judgment of the Fourth Circuit was entered on November 10, 2010. The petition for writ of certiorari was filed on February 8, 2011 and was granted on June 27, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (2006).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens

[1] Citations to the "J.A." refer to the Joint Appendix. Citations to the "Pet. App." refer to the appendix of the petition for certiorari.

> of another State, or by Citizens or Subjects of any Foreign State."

The Fourteenth Amendment provides, in pertinent part:

> "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." . . . Section 5 gives "Congress [the] power to enforce, by appropriate legislation, the provisions of this article."

The Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, et seq. provides employees up to twelve weeks of unpaid leave for medical reasons or other qualifying exigencies. The pertinent provisions provide:

2611. Definitions

* * *

(2) Eligible employee

(A) In general

The term "eligible employee" means an employee who has been employed –

(i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and

(ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

* * *

(4) Employer

(A) In general

The term "employer"

(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

* * *

(iii) includes any "public agency," as defined in section 203(B) of this title; and

(B) Public agency

For purposes of subparagraph (A)(iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

* * *

(11) Serious health condition

The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves

(A) inpatient care in a hospital, hospice, or residential medical care facility; or

(B) continuing treatment by a health care provider.

* * *

2612. Leave requirement.

(1) Entitlement to leave

Subject to Section 103 [29 U.S.C. § 2613] of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(E) Because of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.

The entire text of the Family and Medical Leave Act, 29 U.S.C. § 2601, et seq., has been reproduced in the appendix to this brief.

STATEMENT OF THE CASE

I. Overview

On November 10, 2010, the United States Court of Appeals for the Fourth Circuit held that the self-care provision of the Family and Medical Leave Act of 1993 ("FMLA") does not validly abrogate the States' Eleventh Amendment immunity. Congress intended to use its Section 5 Fourteenth Amendment power when it enacted the FMLA. That power, often recognized as the zenith of Congressional authority, can be used to enact provisions necessary to carry into force the other provisions of the Fourteenth Amendment. In the FMLA, Congress explicitly stated that it was acting pursuant to the Equal Protection Clause of the Fourteenth Amendment to "minimize[ ] the potential for employment discrimination on the basis of sex by ensuring that leave is available for eligible health reasons (including maternity-related disability) . . . on a gender-neutral basis; and to promote the goal of equal opportunity for women and men." 29 U.S.C. § 2601(b)(4)-(5) (2006).

A. Petitioner Coleman's Termination and FMLA Claim

1. Petitioner Coleman's FMLA Claim

Daniel Coleman challenged his termination in federal court; he alleged that the State of Maryland discriminated against him on the basis of race in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2(a) (2006)), unlawfully retaliated against him, also in violation of Title VII (§ 2000e-3(a)), and refused to allow Mr. Coleman self-care leave in violation of the FMLA (29 U.S.C. § 2612(a)(1)(D) (2006)). (Pet. App. 5-6, 15-16, J.A. 10-12). The District Court granted the Maryland Court of Appeals' motion to dismiss the Title VII claims for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6). (Pet. App. 16). The District Court also dismissed Mr. Coleman's FMLA claim on a Rule 12(b)(1) motion, holding that the FMLA's self-care provision was not a valid abrogation of the States' Eleventh Amendment immunity. (Pet. App. 16-20).

The only issue before this Court involves Petitioner's FMLA claim. The District Court dismissed this claim before discovery and before the parties had any opportunity for factual development. As a result, the factual record is minimal. The limited record shows that on August 2, 2007, Mr. Coleman sent his supervisor, Frank Broccolina, a request for sick leave. (J.A. 10, Pet. App. 3, 16). At that time, Mr. Coleman was placed under doctor's care for ten days to recover

from a documented illness. (J.A. 10, Pet. App. 3). This illness appears to have been a "serious health condition" as it is defined by the FMLA. Mr. Broccolina denied Mr. Coleman's request and issued him an ultimatum: resign with thirty days' leave, or be terminated immediately. (J.A. 10, Pet. App. 3, 17). Mr. Coleman alleges that he was fired immediately upon his refusal to resign. (Pet. App. 3, 15).

2. Daniel Coleman's Employment and Termination

Mr. Coleman was employed by the Maryland Court of Appeals for six years and served as the executive director of procurement and contract administration for four of those six years. (J.A. 5). Mr. Broccolina and Faye Gaskins were his supervisors. *Id.* During his employment with the Maryland Court of Appeals, Mr. Coleman satisfied all performance standards and received every incremental raise to which he was entitled. (J.A. 11, Pet. App. 3).

In October of 2005, Mr. Coleman investigated a matter involving Larry Jones, who was a member of Mr. Coleman's staff and a relative of Ms. Gaskins. (J.A. 6, Pet. App. 3). The investigation resulted in a five-day suspension for Mr. Jones; however, once Mr. Broccolina and Ms. Gaskins intervened, the suspension was reduced to one day. *Id.* As a result of his investigation, Mr. Coleman received a letter of reprimand from Ms. Gaskins regarding a "communication protocol." (J.A. 9-10, Pet. App. 3). Mr. Coleman tried

to appeal the reprimand but was unsuccessful. *Id.* Mr. Coleman believed this treatment was based upon his race. (J.A. 10, Pet. App. 3-4, 16).

As noted above, on August 2, 2007, Mr. Coleman sent his supervisor a request for leave. Mr. Coleman's request was denied and he was terminated the following day. (J.A. 10, Pet. App. 3, 15-17).

3. Proceedings Below

The District Court dismissed Mr. Coleman's FMLA claim, holding that the FMLA's self-care provision did not validly abrogate the States' Eleventh Amendment immunity. (Pet. App. 16-18). The Fourth Circuit affirmed the District Court's ruling. (Pet. App. 8-14). The Fourth Circuit referenced the Court's analysis in *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003) but believed that the Court's focus on the gender-related nature of the FMLA's family-care provision did not impact the validity of the self-care provision. (Pet. App. 10-11). The court reasoned that the *Hibbs* analysis of the family-care provision did not support a valid abrogation of the States' Eleventh Amendment immunity for the FMLA's self-care provision, 29 U.S.C. § 2612(a)(1)(D) (2006). (Pet. App. 11). Recognizing that the Fourth Circuit's pre-*Hibbs* ruling – that Congress had exceeded its powers in applying the FMLA to the States – was no longer valid, the Fourth Circuit still insisted that the FMLA's legislative history showed that gender discrimination was not a

motivating factor for enacting the self-care provision. (Pet. App. 11 n.4).

SUMMARY OF THE ARGUMENT

The Family and Medical Leave Act, passed pursuant to Congress' comprehensive powers under Section 5 of the Fourteenth Amendment, validly abrogates the states' immunity from suits by citizens seeking monetary relief from the states. Congress enacted the FMLA to assure both private and public employees equal access to workplace leave regardless of their sex. The FMLA makes plain what its legislative history demonstrates: that Congress carefully crafted the leave provisions of the Act as a remedy for sex discrimination on the job.

As the Court recently held in *Hibbs*, Congress unambiguously intended to abrogate the States' Eleventh Amendment immunity when it passed the family-care provision of the FMLA. That intent, combined with historic sex discrimination and the legislative record of the FMLA, demonstrate that Congress meant to target gender discrimination in the granting of family-care leave by private and state employers. This rationale applies with equal force to the self-care provision of the FMLA.

Congress recognized that the nation has an extensive history of sex discrimination in employment. The self-care provision directly responds to sex discrimination by preventing employers from

discriminating against women. The self-care provision provides gender-neutral access to leave to employees with serious medical conditions, including, but not limited to, pregnancy-related disabilities. Additionally, the legislative history of the FMLA, which spans eight years, five Congressional sessions and two Presidential vetoes, demonstrates that the four original provisions, including the self-care provision, are an integrated response to gender discrimination. The self-care provision responds directly to outdated stereotypes regarding what roles men and women are to play in society. At the same time, the self-care provision helps to avoid putting women at a disadvantage in the job market due to a perception that, if hired, they would be the only ones taking leave under the FMLA.

The FMLA as a whole is greater than the sum of its component parts. None of the four varieties of leave provided in the FMLA could accomplish Congress' purpose without the other three. The interrelated provisions of the FMLA must not be wrenched apart. Just as a table loses structural integrity when one of its four legs is sawed off, so too does the FMLA fail if one of the four original leave provisions is severed.

Finally, the FMLA with the self-care provision is both a congruent and a proportional response to the harm Congress sought to remedy. In light of the country's regrettable history of sex discrimination, the self-care provision, as well as the entire FMLA, is a targeted response to gender discrimination and is

constitutional. The lower courts that have held differently have relied on rationale rejected by *Hibbs*, therefore they can provide no guidance to the Court. Similarly, the Fourth Circuit's decision disregards Congress' express intent, undermines the notion that Congress was acting at the height of its power in order to address the intractable problem of sex discrimination in employment, and ignores the Court's analysis in *Hibbs*.

This Court should find that the self-care provision is a valid abrogation of the States' Eleventh Amendment immunity and reverse the Fourth Circuit's decision.

ARGUMENT

I. Congress Acted Within Its Expansive Powers Under Section 5 Of The Fourteenth Amendment In Passing The FMLA As A Targeted Response To Gender Discrimination.

A. Introduction

Following almost a decade of analysis and discussion, Congress passed the Family and Medical Leave Act as a targeted response to gender-based discrimination in the granting of family care and medical leave to both public and private employees. As Chief Justice Rehnquist explained, "[t]he FMLA aims to protect the right to be free from gender based discrimination in the workplace." *Hibbs*, 538 U.S. at 728. In recognizing that Congress acted in a manner

consistent with its broad powers under the Fourteenth Amendment, the Court found that Congress had properly exercised its power when enacting the family-care provision of the FMLA and had validly abrogated the States' Eleventh Amendment immunity. *Id.* at 740. The Court supported its holding by explaining that Congress had enacted the FMLA to remedy our country's regrettable history of sex discrimination in the workplace,[2] and it did so pursuant to its broad powers under Section 5 of the Fourteenth Amendment. *Id.* at 726-27. The Court also noted that the legislative record further buttressed the fact that the FMLA was designed to address gender discrimination in employment. *Id.* at 730-35.

Congress' considered deliberations of the FMLA and its predecessor statutes included debates over a multitude of options as to how to best address the issue of sex discrimination in the granting of employment leave. Ultimately, Congress concluded that

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[2] The FMLA was also enacted, in part, pursuant to the Commerce Clause. H.R. REP. NO. 103-8, pt. 1, at 32 (1993) (indicating that "[the FMLA] is based not only on the Commerce Clause, but also on the guarantees of equal protection and due process embodied in the Fourteenth Amendment"); 29 U.S.C. 2611(4)(A)(i); *see also Hibbs*, 538 U.S. at 726. In *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996), the Court held that Congress cannot abrogate the states' immunity through its Title I Commerce Clause authority. In this case, the sole issue presented is whether, pursuant to the Fourteenth Amendment, Congress validly abrogated the States' Eleventh Amendment immunity in suits against the states seeking monetary relief.

a four-pronged response would be appropriate. Congress provided that,

> an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following: (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter. (B) Because of the placement of a son or daughter with the employee for adoption or foster care. (C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition. (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

29 U.S.C. § 2612(A)-(D) (2006).

Much like the four legs of a table, each of the FMLA's four family and medical leave provisions is essential to achieving Congress' intent to eliminate gender discrimination in the granting of employee leave. The self-care provision is an integral part of Congress' response. Of course, a table could stand with only three legs; but the effectiveness, stability, and strength of that table would be compromised without the support of the fourth leg. Similarly, if Congress' response to gender discrimination is deprived of one of these crucial legs – the self-care provision – the effectiveness of the FMLA in addressing gender discrimination will be greatly diminished.

The FMLA entitles a limited group of eligible employees to take unpaid leave in situations that place significant stress on families. Such situations particularly affect single-parent households, which predominantly are led by single mothers.[3] Congress sought to remedy gender inequality in the granting of workplace leave and to respond to the sex-based stereotypes driving some of these gender inequalities. These stereotypical perceptions included the beliefs that women were "destined solely for the home and the rearing of family," *Stanton v. Stanton*, 421 U.S. 7, 14 (1975), and that the role of men was "not that of homemaker but rather that of the family breadwinner." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 652 n.20 (1975).

Congress had the foresight to see a potential negative repercussion of legislation that would either provide leave only to women or leave that would be perceived by employers as leave that only women would take. Because of "traditional" gender stereotypes, employers would anticipate that women would take more leave than men in order to take care of their family members. Accordingly, employers could find it more expedient to simply hire a man for the

[3] The U.S. Census Bureau released a report in 2009 finding that 82.6% of custodial parents are mothers. U.S. Census Bureau, *Custodial Mothers and Fathers and Their Child Support: 2007*, 2 (2009) *available at* http://www.census.gov/prod/2009pubs/p60-237.pdf. In 1993, the year the FMLA was passed, 84% of custodial parents were mothers. *Id*. at 3.

job and avoid having to grant women family or medical leave.[4] By enacting the FMLA's crucial fourth leg, the self-care provision, Congress addressed this possible negative repercussion and directly responded to sex discrimination and sex-based stereotyping in the granting of leave.

The FMLA originally specified four different events that would entitle an individual to up to 12 weeks of unpaid leave from work: the birth of a child, the adoption of a child, the illness of a family member, or serious illness of the employee necessitating time to care for himself or herself. 29 U.S.C. § 2612 (2006). Congress later amended the FMLA to include protections for family members of those in the armed services to take leave when the servicemember is called into active duty, creating any "qualifying exigency." 29 U.S.C. § 2612(E).

Leaving aside subsection (E), which was not added to the FMLA until 2008, the original four prongs of the FMLA were designed as an integrated response to gender discrimination; they ensured that a man and a woman would have leave equally available if he or she needed to care for his or her family or for himself or herself. Indeed, the title of the FMLA, "The Family and Medical Leave Act," denotes an

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[4] *See* H.R. REP. NO. 103-8, pt. 2, at 9 (1993) (explaining that self-care was made gender neutral so employers would not have an incentive to hire men over women). A more detailed discussion can be found *infra* at pages 43-51.

intention to provide leave not only to care for a member of the family, but also to care for oneself, should the need arise.

B. The FMLA, Including The Self-care Provision, Validly Abrogates The State's Eleventh Amendment Immunity.

Congress provided that when a state violates the provisions of the FMLA, that state can be held liable for damages. 29 U.S.C. § 2617(2) (2006). While states usually would be immune from suits seeking monetary relief, state employees may sue for damages when Congress validly abrogates the States' Eleventh Amendment immunity. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). Congress validly abrogates immunity only if the statutory language shows Congress' clear intent to abrogate Eleventh Amendment immunity and Congress acts pursuant to a requisite Constitutional power granting such authority. *Seminole,* 517 U.S. at 44. As the Court explained in *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001), "Congress may abrogate the States' Eleventh Amendment immunity when it both unequivocally intends to do so and 'act[s] pursuant to a valid grant of constitutional authority.'" *Garrett*, 531 U.S. at 363 (quoting *Kimel v. Florida Bd. Of Regents*, 528 U.S. 62, 73 (2000)). Later, in *Hibbs*, the Court reiterated that "Congress may . . . abrogate such immunity in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its

power under § 5 of the Fourteenth Amendment." 538 U.S. at 726.

C. Congress Unambiguously Expressed Its Intent To Abrogate The States' Eleventh Amendment Immunity In The FMLA.

The statute provides a right of action against employers who violate the FMLA (29 U.S.C. § 2617(2)), and it explicitly includes public agencies within the definition of employer. 29 U.S.C. § 2611(4)(A). In doing so, Congress authorized suits against public agencies for money damages for violations of the FMLA. In analyzing the family-care provision of the FMLA, the Court in *Hibbs* found that the FMLA's statutory language met the clear intent standard for abrogating Eleventh Amendment immunity. 538 U.S. at 726. The Court explained that "the clarity of Congress' intent . . . is not fairly debatable." *Id.* at 726. In his dissent, Justice Kennedy likewise observed that Congress' intent to abrogate the States' Eleventh Amendment immunity in the FMLA was clear. *Id.* at 744.

In several prior cases, the Court interpreted similar language under other statutes to be an unmistakable expression of Congress' intent to abrogate Eleventh Amendment immunity. For example, the language of the FMLA is similar to the Age Discrimination in Employment Act of 1967 ("ADEA"), which was found to be a clear indication of Congress' intent to abrogate immunity. *Id*. at 726; *Kimel v. Florida Bd.*

of Regents, 528 U.S. 62, 73 (2000). The ADEA, like the FMLA, also specifically identifies public agencies as falling under the right of action in the statute. 29 U.S.C. § 630(b) (2006). Like the Court in *Kimel* and *Hibbs*, this Court should find that Congress "unequivocally" expressed its intent to abrogate Eleventh Amendment immunity by enacting the FMLA.

D. Under Section 5, Congress' Powers Are Broad, And Congress Intended To Act Pursuant To Those Powers.

Eleventh Amendment immunity is not absolute. *See, e.g., College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666, 670 (1991) (citing *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976)). Since 1879, the Court has held that the Fourteenth Amendment limits the sovereign immunity of the states. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 (1976) (citing *Ex parte Virginia*, 100 U.S. 339, 345 (1879)). Section 5 gives Congress "power to enforce, by appropriate legislation, the provisions" of the Amendment, including "the equal protection of the laws" afforded by Section 1 of the Amendment, which no state may deny to any person. U.S. Const. amend. XIV. Congress has "a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989).

So important and fundamental are the rights guaranteed by the Fourteenth Amendment that the

Amendment grants Congress "unique" powers to abrogate Eleventh Amendment immunity in order to protect those rights. *Croson*, 488 U.S. at 487-88. Of course, this unique power does not entitle Congress to substantively add to or alter the rights guaranteed by the Fourteenth Amendment; rather, Congress is charged with "enforcing" those rights, as stated in the Constitution. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). Accordingly, the Fourteenth Amendment gives Congress "the authority both to remedy and to deter violation of rights" that are protected therein. *Kimel*, 528 U.S. at 81.

In order to effectuate these constitutional mandates, Congress may prohibit a "broad[ ] swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel*, 528 U.S. at 81; *see also Hibbs*, 538 U.S. at 727; *Garrett*, 531 U.S. at 365. Through this broad power, Congress can investigate violations, identify their suspected causes, and assess proposals both to remedy past harm and to discourage future violations.[5] This enforcement power authorizes Congress to enact legislation that is preventive or "prophylactic" with regard to possible violations of Equal Protection rights. "Congress may,

[5] *See* H.R. REP. NO. 103-8, pt. 1 (1993). In pursuit of passing the FMLA, Congress investigated violations at the state level, had experts explain causes, and then created the FMLA to remedy these past harms and discourage future violations. *See also Garrett*, 531 U.S. at 365 (observing that Congress can remedy and deter under Section 5 of the Fourteenth Amendment).

in the exercise of its § 5 power, do more than simply proscribe conduct . . . held unconstitutional" by the courts in the past. *Hibbs* 538 U.S. at 727. *See also id.* at 756 (Kennedy, J., dissenting) ("[F]ederal 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.") (internal quotations omitted)). Unlike the courts, the legislature may also act without the presentation of a case or controversy, providing an opportunity to construct valuable prophylaxis without awaiting a controversy involving injury to such valuable rights.

The FMLA's self-care provision is valid Section 5 legislation that was enacted as a response to sex discrimination in the granting of workplace leave. By enacting the FMLA, Congress did not create new rights. Rather, Congress created a defensive barrier to ensure the equal protection of the law that the Constitution guarantees to all people. Congress has authority to impose requirements beyond what the Constitution mandates when Congress intends to surround fundamental rights with an extra layer of protection. *See Hibbs* at 727-28 ("Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.").

One of the extra layers Congress may provide is allowing suits against states that would be "constitutionally impermissible in other contexts." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). Congress has this

broad authority to abrogate the states' immunity only in the areas of suspect classification discrimination such as gender and race. By contrast, the Court has held that Congress' power to abrogate the states' sovereign immunity is more constrained when the allegations are that the states engaged in discrimination based upon non-suspect classifications like age or disability. *Kimel,* 528 U.S. at 62.

In this instance, Congress was legislating against a national background of gender discrimination. Congress investigated and found that the states were continually violating the Fourteenth Amendment by discriminating against individuals because of their gender. In such a circumstance, remedial and prophylactic legislation under Section 5 is proper. *See Hibbs*, 538 U.S. at 735.

E. Congress Acted Pursuant To This Broad Remedial Power When Enacting The FMLA.

The FMLA expressly frames its purpose with reference to the Equal Protection Clause. The Act aims "to promote the goal of equal employment opportunity for women and men, pursuant to [the Equal Protection] [C]lause." 29 U.S.C. § 2601(b)(5) (2006). Preventing gender discrimination is one of the "core promises" of the Fourteenth Amendment. *See Wilson-Jones v. Caviness*, 99 F.3d 203, 209 (6th Cir. 1996). "Analysis may appropriately begin with the reminder that *Reed* emphasized that statutory

classifications that distinguish between males and females are 'subject to scrutiny under the Equal Protection Clause.'" *Craig v. Boren*, 429 U.S. 190, 197 (1976) (quoting *Reed v. Reed*, 404 U.S. 71, 75 (1971)).

The statute is designed to support family life and to provide reasonable leave for workers "in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons . . . and for compelling family reasons, on a gender-neutral basis." 29 U.S.C. § 2601(b)(4) (2006). The Act aimed to "promote the goal of equal employment opportunity for women and men, pursuant to [the Equal Protection] [C]lause." § 2601(b)(5). When debating this issue, the Senate noted that it is fundamentally "unfair for an employee to be terminated when he or she is struck with a serious illness and is not capable of working." S. REP. NO. 103-3, at 11 (1993). It is even more unfair when one sex bears this burden because of the societal stereotypes regarding the roles each sex is to fulfill. Congress wanted to eliminate this problem and achieve gender equality by enacting the FMLA.

Hibbs confirmed that Congress validly exercised its powers under the Fourteenth Amendment when it enacted the family-care provision of the FMLA. *Hibbs*, 538 U.S. at 726. In *Hibbs*, the Supreme Court found that Congress acted in response to, among other things, gender discrimination in enacting the

family-care provision of the FMLA. As Chief Justice Rehnquist, writing for the majority, explained:

> By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men. By setting a minimum standard of family leave for all eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.

Hibbs, 538 U.S. at 737.

Similarly, by including the self-care provision, Congress provided across-the-board access to leave that is available to both men and women for any serious medical condition. The self-care provision is not a stand-alone provision directed toward combating disability discrimination.[6] Instead, Congress included the provision because "employment standards that apply to one gender only have serious potential for

[6] The self-care provision does involve leave for disability, but the major evil Congress attempted to combat was gender discrimination in the granting of medical leave.

encouraging employers to discriminate against employees and applicants for employment who are of that gender." 29 U.S.C. § 2601(a)(6) (2006). More specifically, because employers may be less inclined to hire a woman due to anticipation of pregnancy-related complications or gender-specific medical conditions, the self-care provision allows for "leave [to be] available for eligible medical reasons on a gender-neutral basis." § 2601(b)(4).

The language and the legislative record of the FMLA make it clear that Congress, in enacting the self-care provision, intended to prevent gender discrimination in the granting of employment leave. The Court in *Hibbs* acknowledged this in finding the FMLA was a response to gender discrimination. Because the self-care provision is an integral part of Congress' carefully tailored statutory scheme, it should be viewed as part of the interrelated response to gender discrimination.

II. The Nation's History Of Unconstitutional Gender Discrimination, Combined With The Congressional Record, Is A Sufficient Factual Basis For Congress To Abrogate Eleventh Amendment Immunity.

A. The Nation, Including The States, Have A Long History Of Unconstitutional Sex Discrimination, Which Persists.

As the Court has explained, the "propriety of any § 5 legislation 'must be judged with reference to the

historical experience . . . it reflects.'" *Florida Prepaid*, 527 U.S. at 640 (citing *Boerne*, 521 U.S. at 525). This nation's "long and unfortunate history of sex discrimination" cannot be denied. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973). As the Court has repeatedly recognized, erroneous notions about the roles of women have resulted in gender stereotypes that characterize women as being "destined solely for the home and the rearing of family," *Stanton v. Stanton*, 421 U.S. 7, 14 (1975), and depict the role of men as "not that of homemaker but rather that of the family breadwinner." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 652 n.20 (1975). In the not-so-distant past, these gender stereotypes were repeatedly reinforced by federal and state statutes and even sanctioned by the Court. *See Hibbs*, 538 U.S. at 729; *see, e.g., Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872); *Goesaert v. Clearly*, 335 U.S. 464, 466 (1948).

From the nation's origin, federal and state governments have denied women the liberties that were routinely bestowed upon men. As the United States correctly summarized in its briefing in *Hibbs*, "it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded to men so long as any 'basis in reason' could be conceived for the discrimination." Brief of Respondent United States at 12, *Nev. Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (No. 01-1368) 2002 WL 31455490, at *13 (citing *United States v. Virginia*, 518 U.S. 515, 531 (1996)). The United States noted that as a result, "state-sanctioned

discrimination pervaded virtually every aspect of women's lives." *Id.* (citing *United States v. Virginia*, 518 U.S. at 536-37 & n.9 (discussing history of discrimination against women seeking higher education)).

Throughout much of the 20th century, state-sponsored gender discrimination resulted in women being denied the right to vote, "hold office, serve on juries, or bring suits 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." *Frontiero*, 411 U.S. at 685. As the United States recognized, this gender discrimination, and the ubiquitous sex stereotypes that preceded, "took strong hold in matters of employment." Brief of Respondent United States at 13, *Nev. Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (No. 01-1368) 2002 WL 31455490, at *13. In its briefing in *Hibbs*, the United States analyzed other laws that "excluded women from mining jobs, manufacturing and mechanical positions, construction work, teaching (at least after marriage), and occupations deemed to involve physically strenuous or hazardous work."[7]

[7] This history of sex discrimination is long and pervasive. The United States' brief reviews this history of gender discrimination in employment. Brief of Respondent United States at 14, *Nev. Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (No. 01-1368) 2002 WL 31455490, at *14 (citing Women's Bureau, U.S. Dep't of Labor, *Summary of State Labor Laws for Women*, 17 (1969) (17 States prohibited women from mining); *see also Holden v. Hardy*, 169 U.S. 366 (1898) (discussing Utah constitutional provision on mining); *Commonwealth v. Riley*, 97

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The *Hibbs* Court also acknowledged and analyzed "the history of the many state laws [that] limit[ed] women's employment opportunities." *Hibbs*, 538 U.S. at 728-30.

Not only have women been unjustly prohibited from engaging in certain types of employment as a result of state-sanctioned gender discrimination, "[s]tate laws frequently subjected women to distinctive restrictions, terms, conditions, and benefits for those jobs they could take." *Hibbs*, 538 U.S. at 729. For example, in *Muller v. Oregon*, 208 U.S. 412, 419 (1908), the Court upheld the constitutionality of a law

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N.E. 367, 369 (Mass. 1912) (restriction on work necessary "that the health and endurance of the individual may be ensured and the ultimate strength and virility of the race be preserved"); *Bd. of Rev. v. Johnson*, 76 So. 859 (Ala. 1917) (construction); *Grimison v. Board of Educ. of City of Clay Ctr.*, 16 P.2d 492, 493 (Kan. 1932) ("[R]eproduction is indispensable to continued existence of the human race, and if, following marriage of a female under contract to teach, the reproductive function should become operative, and should progress to fruition within the period of employment, successful performance of the contract on the teacher's part might be interfered with or prevented."); *Backie v. Cromwell Consol. Sch. Dist. No. 13*, 242 N.W. 389, 390 (Minn. 1932) (accepting a rule that gave unmarried teachers preference over married teachers); *Ansorge v. City of Green Bay*, 224 N.W. 119, 121 (Wis. 1929) ("Many circumstances . . . might lead to the belief that a male teacher would be more suitable for employment than a female teacher" and "the same may be said with respect to married and unmarried teachers."); *Jones Metal Prods. v. Walker*, 281 N.E.2d 1, 6 n.4 (Ohio 1972) (prohibiting the employment of women for jobs such as crossing watchman, gas or electric meter reader, baggage or freight handling, trucking, and jobs requiring heavy lifting).

that limited the hours that women could work. The Court reasoned that at least 19 States "impose[d] restrictions in some form or another upon the hours of labor that may be required of women," *id.* at 419 n.1, and that these restrictions were appropriate in order to protect a woman's "physical structure and a proper discharge of her maternal functions." *Id.* at 422. Connecticut prohibited women from working four weeks before and four weeks after childbirth. Conn. Gen. Stat. § 31-26 (repealed 1972). Ohio had prohibitions on the employment of women in specific occupations that required the routine lifting of more than 25 pounds. Ohio R. C. § 4107.43 (repealed 1982). Women were commonly fired or forced to take leave when they became pregnant, regardless of their ability to work. *See, e.g.*, *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (striking down rules regarding mandatory leave after the fifth month of pregnancy and limiting return to work until after child was three months old).

These state laws encouraged employers to systematically discriminate against women on the basis of sex. Despite "official action denying rights or opportunities based on sex" being well-documented in the "volumes of history," *United States v. Virginia*, 518 U.S. 515, 531 (1996), it was not until 1971 that "for the first time in our Nation's history, the Court ruled in favor of a woman who complained that her State had denied her the equal protection of its laws." *Reed v. Reed,* 404 U.S. 71, 73 (1971) (holding unconstitutional an Idaho Code provision that provided

that males were to be preferred over females when claiming they are equally entitled to a share of an estate). Five years passed following the *Reed* decision before the Court acknowledged that gender discrimination demands heightened scrutiny. *Craig v. Boren*, 429 U.S. 190, 197-99 (1976).

> The Court consistently has subjected gender-based classifications to heightened scrutiny in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of archaic and overbroad generalizations about gender or based on outdated misconceptions concerning the role of females in the home rather than in the marketplace and world of ideas.

United States v. Virginia, 518 U.S. at 531.

Congress has taken action to address sex discrimination with the enactment of Title VII of the Civil Rights Act of 1964,[8] the Equal Pay Act of 1963[9] and the Pregnancy Discrimination Act.[10] The FMLA is a critical element in this overall remedial scheme. Despite these laws, sex discrimination persists. As the Court acknowledged in 1973, "it can hardly be doubted that women still face pervasive, although at times more subtle, discrimination in our educational

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[8] 42 U.S.C. § 2000(e) (2006).

[9] 29 U.S.C. § 206(d)(1) (2006).

[10] 42 U.S.C. § 2000e(k) (2006).

institutions [and] in the job market." *Frontiero*, 411 U.S. at 686. Even after Congress enacted the FMLA, the Court acknowledged that women have "suffered at the hands of discriminatory state actors during the decades of our nation's history." *J.E.B. v. Alabama*, 511 U.S. 127, 136 (1994).

B. Because Of This Documented History Of Sex Discrimination, Congress Did Not Need To Compile The Type Of Detailed Record Of Unconstitutional Conduct That The Court Found Lacking In *Kimel* And *Garrett*.

The Supreme Court has consistently affirmed that Congress, under Section 5 of the Fourteenth Amendment, is "to determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," and these conclusions are entitled to deference. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)). The Court recently recognized the appropriate deference to be accorded to an Act of Congress. "We fully appreciate that judging the constitutionality of Congress is the 'gravest and most delicate duty that [the] Court is called on to perform. The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States."[11] *Nw. Austin*

[11] Of course, "[t]he ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning

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Mun. Util. Dist. One v. Holder, 129 S.Ct. 2504 (2009). The Court has further explained that the long-standing history of invidious gender discrimination across the country warrants heightened scrutiny when analyzing statutory protections that attempt to remedy discrimination based on sex. *See, e.g.*, *Boren*, 429 U.S. at 197; *Hibbs*, 538 at 729-30.

An extensive review of Congress' legislative history when it has enacted remedial legislation pursuant to its Section 5 powers is unnecessary. In *Hibbs*, the Court noted that there were different standards for what was required of Congress in creating a legislative record depending on the harm the legislation sought to remedy. The Court stated that "[b]ecause the standard for determining the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test . . . it was easier for Congress to show a pattern of state constitutional violations." *Id*. at 736. *See also Oregon v. Mitchell*, 400 U.S. 112 (1970) (nationwide ban on literacy tests upheld, despite geographically limited evidence of abuse); *Katzenbach v. Morgan*, 384 U.S. 641, 649 (1966) (Harlan, J., dissenting) (literacy test ban added to statute on the floor of Congress); *cf. Lopez v. Monterey County*, 525 U.S. 266 (1999) (deterrent provision of the Voting Rights Act sustained without examination of the legislative record); *Ansonia*

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remains the province of the Judicial Branch." *Hibbs*, 538 U.S. at 728 (citing *Kimel*, 528 U.S. at 81).

Bd. of Educ. v. Philbrook, 479 U.S. 60, 67 (1986) (Title VII's ban on religious discrimination was added "on the floor of the Senate with little discussion").

In *FCC v. Beach Comms.*, 508 U.S. 307 (1993), the Court observed that "because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." 508 U.S. at 315. Furthermore, as the Court has repeatedly recognized, " . . . legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. . . . Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function." *Id.* Congress enacted the FMLA to remedy an extensive history of gender discrimination; therefore, the Court should require less evidence of the states' discriminatory actions in the FMLA's legislative record.

This conclusion – that less evidence of states' unconstitutional discrimination is required when a suspect classification is at issue – is supported by the Court's discussion of the legislative history in *Kimel*, 528 U.S. at 89-91; *Garrett*, 531 U.S. at 368-72; and *Hibbs*, 538 U.S. at 729-35. In *Kimel* and *Garrett*, the Court examined the legislative history of the ADEA and the ADA extensively. These decisions analyzed the legislative history in depth because the Court had to determine the nature of the alleged constitutional

violations that Congress sought to remedy. Because the Court was reviewing statutes that dealt with non-suspect classifications, thus only triggering rational basis review, the Court required extensive proof of state discrimination in the legislative records. *Kimel*, 528 U.S. at 83-4; *Garrett,* 531 U.S. at 366. In *Kimel*, the Court explained that "[o]lder persons . . . unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a 'history of purposeful unequal treatment.'" 528 U.S. at 83.

The Court also noted in *Kimel* that "[t]he appropriateness of remedial measures must be considered in light of the evil presented," thereby requiring the Court to identify the "evil presented." 528 U.S. at 89 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)). Because it was not clear that the ADEA remedied unconstitutional age discrimination, the Court was required to review the legislative record in great detail. This review convinced the Court that Congress failed to "uncover any significant pattern of unconstitutional [age] discrimination." *Kimel*, 528 at 91. The Court found that the ADEA prohibited very little unconstitutional conduct and as a result there was "no reason to believe that broad prophylactic legislation was necessary." *Id*. at 91. Similarly, the Court in *Garrett* found that Congress had failed to identify a pattern of unconstitutional state employment discrimination against people with disabilities. *Garrett,* 531 U.S. at 368-72. Employing the rational basis test, the Court posited that it "would be entirely rational (and therefore constitutional) for a state

employer to conserve scarce financial resources by hiring employees who are able to use existing facilities." *Id*. at 372.

In contrast to *Kimel* and *Garrett*, *Hibbs* did not require an in-depth analysis of the legislative record. Before reviewing the legislative history of the FMLA, the Court examined a history of decisions that demonstrated the widespread problem of gender discrimination in employment. *Hibbs*, 538 U.S. at 729-30. The pervasiveness of the constitutional violation remedied by the FMLA made an extended recitation of the legislative history unnecessary, especially in light of the Court's numerous decisions regarding gender discrimination.

The heightened scrutiny review, combined with the well-documented history of state gender discrimination in the employment context, alleviated the need for a microscopic review of the FMLA's legislative history in *Hibbs*. 538 U.S. at 730-32. In *Tennessee v. Lane*, 541 U.S. 509 (2004), the Court explicitly recognized that a less extensive legislative record is required when gender discrimination is at issue. *See generally* 541 U.S. 509. As the United States noted in its briefing in *Hibbs*:

> Section 5 legislation, like the FMLA, that Congress designed to combat employment discrimination, 'outdated misconceptions,' *J.E.B.*, 511 U.S. at 135, and entrenched stereotypes – discrimination that has triggered and continues to trigger the application of heightened scrutiny by this Court – has been sustained as appropriate Section 5 legislation

> without determining whether the legislative record documented a history of constitutional violations by the States.

Brief of Respondent United States at 28, *Nev. Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (No. 01-1368) 2002 WL 31455490, at *28.

The Court has already acknowledged the enduring and widespread pattern of unconstitutional sex discrimination in employment by the states. Accordingly, requiring a thorough review of the legislative record would not enhance the Court's interpretation of statutory language. The Court has, through its prior decisions, established that Congress is entitled to great deference when passing legislation to combat such invidious discrimination. Thus, a thorough review of the legislative record would be unnecessary in this situation.

C. Congress Nevertheless Documented That The Self-care Provision Responded To Unconstitutional Gender Discrimination.

Because Congress was acting pursuant to its powers under the Fourteenth Amendment to address gender discrimination in the granting of employment leave, Congress was not required to compile a comprehensive record merely repeating what decades of court cases demonstrated. Even though there was no need to establish an expansive record reciting the history of gender discrimination in employment,

Congress provided specific evidence in the FMLA's extensive legislative record confirming that it was acting to remedy unconstitutional gender discrimination. In a legislative effort spanning eight years and two presidential vetoes, Congress made it clear that the FMLA was intended to combat sex discrimination. Starting in 1985, Congress began to compile a legislative history showing that the self-care provision is an integral and indispensable part of the statute that the 103d Congress eventually enacted.[12] Without the self-care provision, the FMLA could not accomplish Congress' intent to eliminate gender discrimination by state and other employers.

1. The Self-care Provision Directly Responds To Sex Discrimination In The Granting Of Leave.

The FMLA sets forth the factual findings that the statute means to address. Congress recognized that illness affects careers of men and women differently. The self-care leave provision at its core is a direct response to gender discrimination in the granting of employment leave. The FMLA proactively addresses

[12] A predecessor of the FMLA, the Parental and Disability Leave Act of 1985, was introduced by Representative Patricia Schroeder. *Parental and Disability Leave: Joint Hearing Before the Subcomm. on Civil Serv. and the Subcomm. on Comp. and Emp. Benefits of the Comm. on Post Office and Civil Serv. and the Subcomm. on Labor Mgmt. Relations and the Subcomm. on Labor Standards of the H. Comm. on Educ. and Labor*, 99th Cong. 1-2 (1985).

this ongoing discrimination against women. The language of the statute explicitly addresses female-specific serious medical conditions. *See* 29 U.S.C. § 2601(b)(4) ("eligible medical reasons" include "maternity related disability"). Subsequent regulations explaining the FMLA confirmed this. 29 C.F.R. § 825.114(a)(2)(ii) ("serious health condition" includes "any period of incapacity due to pregnancy, or for prenatal care"). Congress left no doubt that discrimination against women was the target of the FMLA. The Senate stated,

> [w]orkers and their families have always suffered when a family member loses a job for medical reasons. But such losses are felt more today because of the dramatic rise in single heads of household who are predominantly women workers in low-paid jobs. For these women and their children, the loss of job because of illness can have devastating consequences.

S. REP. NO. 103-3 at 7 (1993). With nearly "57 million women . . . working or looking for work," in 1990, Congress saw that women needed more than ever the protection from sex discrimination provided in the FMLA. *Id.*

The self-care provision attacks the evils caused by gender stereotypes by enabling "leave [to be] available for eligible medical reasons . . . on a gender-neutral basis." § 2601(b)(4). Congress understood the lack of job protections afforded to women who needed leave in order to care for their own health due to

pregnancy. During a 1985 hearing, Congress recognized:

> Only a few companies provide paid leave other than disability leave for childbirth. The limited protection that is provided derives from the Pregnancy Discrimination Act of 1978, which requires employers who provide disability insurance coverage to treat pregnancy as a disability. But there is no requirement that employers provide disability insurance in the first instance, and only half of all employers provide such coverage. In addition, the employers least likely to provide disability coverage are those with the highest concentration of female employees.[13]

Throughout the FMLA hearings, Congress heard testimony from women who lost their jobs because of pregnancy and childbirth-related leave, notwithstanding the protections provided by the Pregnancy Discrimination Act.[14] Eleanor Holmes Norton testified

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[13] *Parental and Disability Leave: Joint Hearing H.R. 2020 Before the Subcomm. on Civil Service and the Subcomm. on Compensation and Emp. Benefits of the H. Comm. on Post Office and Civil Service and the Subcomm. on Labor Mgmt. Relations and the Subcomm. on Labor Standards of the H. Comm. on Educ. and Labor*, 99th Cong. 2 (1985) (statement of Representative William Clay, Chair, Subcommittee on Labor-Management Relations).

[14] *Parental and Medical Leave Act of 1987: Hearing on S.249, pt. 2, Before the Subcomm. on Children, Family, Drugs, and Alcoholism of the S. Comm. of Labor and Human Res.,* 100th Cong. 16-19 (1987) (statement of Linda Pillsbury (despite being assured that she would have a job to return to, she was

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that "women who are temporarily unable to work due to pregnancy, childbirth and related medical conditions such as morning sickness, threatened miscarriage, or complications arising from child birth, often lose their jobs because of the inadequacy of their employer's leave policies."[15] Likewise, at a 1987 House Subcommittee hearing, Congress heard testimony with respect to that version of the FMLA from Donna Lenhoff, the Associate Director for the Legal Policy and Programs at the Women's Legal Defense Fund. Ms. Lenhoff explained that the protection provided by the bill

> means security and certainty for the American family faced with the serious health problems of one of its breadwinners. This is an essential protection for single-parent and low-income families. It means that one of the risks that currently faces [sic] families planning to have children, the risk of job loss of the mother, is eliminated. . . . It means that women deciding whether to bear children can be secure in knowing that they can

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told three weeks after her child was born that her job no longer existed due to a reorganization); statement of Rebecca Webb (despite a verbal agreement with her supervisor for three months of leave post-childbirth, Ms. Webb, when seven months pregnant, was told she would not receive any leave and that she had to renegotiate her contract immediately)).

[15] *The Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor-Mgmt. Relations and the Subcomm. on Labor Standards of the H. Comm. on Educ. and Labor*, 99th Cong. 147 (1986).

> continue their incomes after childbirth and the attendant disability period is over.

The Family and Medical Leave Act of 1987: Joint Hearings on H.R. 925 Before the Subcomm. on Labor-Mgmt. Relations and the Subcomm. on Labor Standards of the H. Comm. on Educ. and Labor, 100th Cong. 237 (1987).

Congress also intended the FMLA to address gender discrimination against men. In a joint hearing before the House Subcommittee on Labor and Management Relations, the Washington Council of Lawyers testified: "Parental leave for fathers . . . is rare. . . . Where child-care leave policies do exist, men, both in the public and private sectors, receive notoriously discriminatory treatment in their requests for such leave."[16]

Without self-care leave, the childbirth, adoption, and family-care provisions would often fall short of achieving their purpose.

2. Self-care Seeks To Guarantee That The Sexes Are Treated Equally In The Granting Of Leave.

While Congress was responding directly to gender discrimination in the granting of leave, Congress

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[16] *The Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor-Mgmt. Relations and the Subcomm. on Labor Standards of the H. Comm. on Educ. and Labor*, 99th Cong. 147 (1986).

also perceived that a remedy imposing a gender differential would likely further disadvantage the gender that it purported to help. If the statute imposed special obligations on employers with regard to one sex, then it would make applicants of the other, less encumbered sex more attractive to hire. Congress found that

> due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; [but] . . . employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.

29 U.S.C. § 2601 (a)(5)-(6) (2006).

Congress addressed this challenge by bundling together four categories of leave with the combined effect of neutralizing the gender inequalities entrenched in the workforces of large employers, including the states. The purpose of this integrated package is made plain by the statute itself:

> to accomplish [relief for working families dealing with illness] in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that

> leave is available for eligible medical reasons . . . and for compelling family reasons, on a gender-neutral basis; and . . . to promote the goal of equal employment opportunity for women and men.

29 U.S.C. § 2601(b)(4)-(5) (2006).

Congress recognized that the self-care provision was what kept the FMLA from having a discriminatory effect on women.

> A law providing special protection to women or any defined group, in addition to being inequitable, runs the risk of causing discriminatory treatment. [The FMLA], by addressing the needs of all workers, avoids such a risk. Thus [the FMLA] is based . . . on the guarantees of equal protection and due process embodied in the Fourteenth Amendment.

H.R. REP. NO. 103-8, pt. 1, at 29 (1993).

This legislative intent is unmistakable in even the earliest version of the legislation.[17] The four legs of the statute were already fastened together in the predecessor of the FMLA, first introduced by Representative Patricia Schroeder in April 1985.[18] The next

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[17] A 1991 congressional report details the bill's history up until that time. See H.R. REP. NO. 102-135, pt. 1, (1991).

[18] *Id.* at 16. ("H.R. 2020, the Parental and Disability Leave Act of 1985 . . . required that employees be allowed parental leave in cases involving the birth, adoption or serious illness of a

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year, at a House subcommittee hearing on an updated bill, the chair of the National Women's Political Caucus, Irene Natividad, vividly described the integral connection of family-care and self-care. "[M]y primary purpose is to stress that parental and medical leave are inseparable. In the words of the old song, 'You can't have one without the other,'" *The Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor-Mgmt. Relations and the Subcomm. on Labor Standards of the Comm. on Educ. and Labor*, 99th Congress, 33 (1986). Ms. Natividad, continued:

> Adoption of parental leave protections without medical leave would lead to ill-will in the workplace between married women and single women and between women and men. Worst of all, parental leave without medical leave would encourage discrimination against women of child-bearing age, who constitute approximately 73% of all women in the labor force. Employers would tend to hire men, who are much less likely to claim this benefit. . . . Parental leave without medical leave would be the modern version of protective labor laws, which also required employers to apply different personnel policies to women than men.

Id. at 34.

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child and temporary disability leave in cases involving the inability to work due to nonoccupational medical reasons.")

Throughout its consideration of the FMLA, Congress continued to target sex discrimination. A House committee chaired by Rep. Schroeder in 1988

> recognize[d] that a special "maternity leave" requirement could be used to deny women job opportunities. Faced with the knowledge that job-protected leaves were required for working mothers and working mothers only, hard-pressed [employers] would very likely be reluctant to hire or promote women of child-bearing age. However, since employers would be required under [the FMLA] to provide job-protected leave for all employees, they would have little incentive to discriminate against women.

H.R. REP. NO. 100-511, pt. 1, at 9 (1988).

Even though the self-care and family-care provisions of the bill had always supported each other in Congress' design, self-care appeared in a separate section of the bill up until 1991. In 1990, leave provisions for childbirth, adoption, and family-care appeared as a "family leave requirement," listed sequentially just as they would be in the FMLA enacted three years later. Family and Medical Leave Act of 1990, H.R. 770, 101st Cong. § 103 (1990). But self-care leave appeared separately, in Section 104, as a "temporary medical leave requirement." *See* H.R. REP. NO. 101-479, at 6 (1990). Family-care leave was capped at ten work weeks in any 24-month period, while self-care leave was more generous: 15 work weeks per 12-month period. *Id.* Nevertheless, the

same statement of purpose covered both sections, and, significantly, family-care and self-care both were subject to the identical certification requirements in Section 105 for the "serious health condition." *Id.* Thus, the commonality of language, certification, and purpose still confirm Congress' unified intention for the two mutually supporting varieties of leave. Then, in the 1991 version of the legislation, Congress determined that self-care should no longer appear as a stand-alone provision. Instead, Congress brought self-care and family-care together under one umbrella in the same section of the bill. *See* H.R. REP. NO. 102-303, at 10 (1991).

As the bill went through its successive re-draftings, Congress received expert warnings about the danger of disadvantaging working women by appearing to require more leave for them than for male workers. For example, a House committee considered a statement submitted by the National Federation of Independent Business (NFIB), relaying the results of a 1991 poll of small business owners. *Legislative Hearing on H.R. 1, the Family and Medical Leave Act. Hearing Before the Subcomm. on Labor-Mgmt. Relations of the H. Comm. on Educ. and Labor*, 103d Cong. (1993). The poll indicated that "45% of respondents will be less likely to hire young women" if the FMLA were passed. *Id.* at 92. The NFIB warned that the bill had the potential to exacerbate sex discrimination:

> Requiring employers to provide parental leave benefits creates clear pressures for

> subtle discrimination based on age *and* sex. When choosing between two equally qualified candidates, an employer may be more likely to hire the candidate least [sic] likely to take the leave. It is the wage levels and jobs of women of childbearing years which are most at risk in such a situation.[19]

Id. at 95.

Senator Nancy Kassebaum expressed a similar caution on the floor of the Senate. She cited an economist's prediction that to mandate only family leave "will have a negative impact on job opportunities for women." 103 Cong. Rec. S1694 (1993). Because "the expected cost of parental leave is greater for women than for men," employers would opt to hire male workers whose leave time will cost less than that of female workers. *Id.* "It is thus possible," according to the economic study cited by Senator Kassebaum, "that mandated benefit programs can work against the interest of those who most require the benefit being offered." *Id.*; *see also* H.R. REP. NO. 103-8, at 65-66 (1993) (excerpting the 1989 testimony of a personnel director who anticipated that "working women will be viewed as the most likely candidates for parental leave, hidden discrimination will occur if this bill becomes law").

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[19] The survey presumably referred to the 1990 version of the FMLA, in which the crucial fourth provision – self-care leave – was listed separately from family-care leave. *See* Section 103 (a)(1)(A) to (C) of H.R. 770, H.R. REP. NO. 101-479, at 5 (1990).

Congress was well aware of this concern and acted to minimize this danger by balancing family-care with self-care. Even the early legislative discussion demonstrates this. A 1989 Senate report noted that

> [a] significant benefit of the temporary medical leave provided by this legislation is the form of protection it offers women workers who bear children. Because the bill treats all employees who are temporarily unable to work due to serious health conditions in the same fashion, it does not create the risk of discrimination against pregnant women posed by legislation which provides job protection only for pregnancy-related disability. Legislation solely protecting pregnant women gives employers an economic incentive to discriminate against women in hiring policies; legislation helping all workers equally does not have this effect.

S. REP. NO. 101-77, pt. 1, at 32 (1989). Self-care leave remained an integral part of the FMLA as signed into law in 1993. 29 U.S.C. § 2612(a)(1)(D). On the strength of the self-care provision, Senator Boxer explained to the Senate:

> The act does not just apply to women, but to men and women, to fathers, as well as to mothers. . . . So to say that women will not be hired by business is a specious argument, unless you assume that men are not caring parents and men are not loving sons. I believe that they are. Men also get sick. They get cancer. They get heart disease. They have

> ailments. And this bill applies to men and women.

103 Cong. Rec. S1697 (1993). These efforts, which spanned three presidencies and five sessions of Congress, and even survived two presidential vetoes, represent an acknowledgment by Congress not only of the necessity of this legislation, but also of the importance of thoughtful consideration throughout nearly a decade of debate. The FMLA as a whole, with all four of its leave provisions operative, represents Congress' unified plan to combat gender discrimination when employees need time off to handle illness or temporary disability in the family. Therefore, the statute "provides no incentive to discriminate against women, because it addresses the leave needs of workers who are young and old, male and female, married and single." H.R. REP. NO. 102-135, pt. 1, at 28 (1991).

3. Congress Found That, Despite State Laws Prohibiting Sex Discrimination, Most States, Like Other Employers, Were Free To Engage In Sex Discrimination In Employment.

In order to address gender discrimination in the workplace, Congress also analyzed various leave policies provided by some of the states. *Hibbs* at 731. However, as the United States recognized in its briefing in *Hibbs*, "Insistence on well-documented proof of particularized constitutional violations is 'hardly practicable' if, 'during most of our country's

existence . . . women were completely excluded' from many employment opportunities." Brief for Respondent United States at 35-6, *Nev. Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (No. 01-1368) 2002 WL 31455490, at *35-6 (quoting *J.E.B. v. Alabama*, 511 U.S. 127 at 131 (1994)). It is impossible to discriminate against women in the workplace if they are not in the workplace to begin with. This type of subtle discrimination is difficult to prove because the laws themselves were based on gender stereotypes. *Id.* at 36-37.

Congress considered a report of the states' response to this issue in a House Report prepared for the vote on what was to become the final version of the FMLA. *See* H.R. REP. NO. 103-8, pt. 1, at 77-83 (1993) (drawing on information from the Department of Labor current as of August 1992). The report explained that although "[t]he debate on family and medical leave suggests that many States have already passed such leave benefits as are contained in [the FMLA]. Yet, that is not the case." *Id.* at 78. Fourteen states had no law resembling the FMLA, and another fourteen had passed leave legislation limited to public sector. *Id.* Furthermore, "[n]o State ha[d] . . . pass[ed] State legislation that is as broad in scope and coverage as that pending in Congress." *Id.* The report then provided a state-by-state synopsis of the benefits guaranteed by law in the individual

states. *Id.* at 78-83.[20] Thus, Congress was fully informed of the inadequacy of the patchwork provisions for family leave in the individual states, and Congress determined that a targeted, national remedy was required to help ensure the promises of the Fourteenth Amendment.

The House Report also recognized that some state civil service regulations might provide additional coverage for state employees. *Id.* at 78. However, such regulations are enforceable primarily through administrative procedures. The road to the state courthouse for aggrieved state employees is a long one. Moreover, without federal legislation, federal judicial relief would be available to state employees only upon a showing of a constitutional violation, a burden that few families needing leave for serious health issues would be willing or able to shoulder. The Court has observed that it is not necessary to prove the targeted type of discrimination with evidence from each and every state. Instead, it recognized that evidence of some discrimination in some states is more than sufficient to uphold blanket Federal legislation correcting a Constitutional wrong.

> Nationwide application avoids the often difficult task of drawing a line between those States where a problem is pressing enough to

[20] A Senate Report also surveyed data and described the inadequate leave provisions in the policies of private employers. *See* S. REP. NO. 103-3, at 14-15 (1993). The report summarized existing state legislation as well. *Id.* at 20-21.

> warrant [such] federal intervention and those where it is not . . . nationwide application may be reasonably thought appropriate when Congress acts against an evil such as racial discrimination which in varying degrees manifests itself in every part of the country.

Oregon v. Mitchell, 400 U.S. 112, 283-84 (1970) (Stewart, J., concurring in part and dissenting in part).

Indeed, Justice Stewart recognized that "[i]n the interests of uniformity, Congress may paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records." *Id.* at 284.

Congress, by enacting the FMLA, put state employers on notice that federal remedies are available, and in this way Congress encouraged the states to establish conforming gender-neutral leave policies. Those policies would then already be in place when families found themselves in need, often unexpectedly so. The remedial effect of the FMLA is prophylactic in that it encourages the states to bring their own employment policies, as well as their statutes, up to a standard that does not offend the Constitution with regard to equal protection for the sexes.

III. The Court Should Not Unravel Interrelated Provisions Of The FMLA, Requiring Independent Support For Every Provision In Determining Whether The Self-care Provision Is Valid Section 5 Legislation.

When Congress creates an interrelated response to an issue, the Court should not separate the components requiring a legislative record supporting each subpart. Congress has not, and cannot, meaningfully legislate in this manner. The Court should not view each leave provision of the FMLA separately, but rather, it should analyze the Act as a whole.

Congress envisioned the self-care provision as complementary to the other three varieties of leave. Congress acted in a coordinated attempt to rectify what it perceived to be a significant and fundamental issue of gender discrimination in employment. Reports from both the House and Senate emphasized the interdependence of the self-care and family-care provisions of the FMLA. A 1991 house report explains:

> The FMLA addresses the basic leave needs of all employees. *It protects employees from possible job loss as a result of a serious health condition, including childbirth or the care of a family member.* It does not favor the needs of one group of employees over the needs of other employees. . . .

H.R. REP. NO. 102-135, pt. 1, at 27-28 (1991) (emphasis added).

While the *Hibbs* Court addressed only the limited issue presented to it, its analysis is applicable to the self-care provision. Congress validly abrogated Eleventh Amendment immunity with respect to the self-care provision for many of the same reasons the Court found that the family-care provision was a valid abrogation.

The Court has already interpreted the FMLA family-care provision as a valid abrogation of Eleventh Amendment immunity; it would defy logic to interpret Congress' valid abrogation of Eleventh Amendment immunity as applying only to one of the four subsections of the FMLA's leave provisions. Not only would this be illogical, but it would also squander limited legislative resources. This type of legislative review would consume the limited resources of Congress as well as those of the court system. Each and every interrelated subsection of a new law should not be individually subjected to litigious scrutiny over the legislative record.

The Court's treatment of different sections of the ADA does not counsel a different conclusion. In *Garrett,* the Court held that Title I of the ADA was not a valid abrogation of Eleventh Amendment immunity. 531 U.S. at 374. Title I addresses discrimination in employment and the Court was not convinced that the evidence before Congress supported a history of unconstitutional disability-based discrimination by the states. *Id*. at 368. In contrast, the Court in *Lane* found that Title II of the ADA was a valid abrogation of the States' immunity. *Tennessee v. Lane*, 541 U.S.

509, 529 (2004). Title II addresses discrimination in public accommodations.

The Court did not parse interrelated parts of a statute when it found that Title II of the ADA was a valid abrogation of Eleventh Amendment immunity and that Title I was not. Rather, the Court examined two separate provisions of a statute. Indeed, in *Garrett*, the Court recognized the vast difference between the employment and the public accommodation provisions of the ADA. *See* 531 U.S. 356.

The FMLA addresses only employment discrimination and is fundamentally different from the ADA. The FMLA's four original leave provisions work together in a different way than the separate titles of the ADA. The interrelated FMLA provisions are not divergent and disconnected like the titles of the ADA. The four provisions of the FMLA are all centered on one purpose: to remedy gender discrimination in the granting of leave. Because the FMLA is designed to address gender discrimination, the Fourteenth Amendment's force can be brought to bear on the issue. Indeed as discussed *infra* at 45 to 51 over the years that Congress considered the FMLA, Congress treated the self-care and family-leave provisions as part of an integrated response to the problem it was confronting.

Finally, reviewing the language of the FMLA reveals Congress' intent to use these provisions as a combined solution. For example, the family-care and self-care provisions both use the phrase "serious

health condition." 29 U.S.C. § 2612(a)(1)(C)-(D) (2006). Congress would not intend that this phrase have a different meaning for each provision. Also, when describing intermittent leave, Congress combines family-care and self-care leave. 29 U.S.C. § 2612(b)(1). Had Congress meant to separate these provisions, it would have done so. Similarly, this Court should not separate these interrelated provisions in determining whether the FMLA responds to gender discrimination in leave policies.

Contrast the interrelated four provisions of the FMLA with the later amended section (E), the military caregiver family-leave provision. Congress drafted, debated, and passed the first four provisions together as a group in 1993 as the Family and Medical Leave Act. Those provisions, as a targeted reaction to gender discrimination, work together as a single response. By contrast, subsection (E) of the FMLA was passed 14 years later as part of the FY 2008 Defense Appropriations Bill. 153 Cong. Rec. S10,371 (daily ed. July 31, 2007) (statement of Sen. Christopher Dodd). Additionally, the first four provisions, as a group, are designed to address a fundamentally different issue from subsection (E). Congress' differing considerations in passing subsection (E) shows that when Congress crafts different sections to address different issues, it acts accordingly.

IV. The FMLA Is A Congruent And Proportional Response To Gender Discrimination, The Constitutional Harm Congress Addressed In The FMLA.

Even when acting pursuant to the broad powers granted under the Fourteenth Amendment, Congress must make its response congruent and proportional to the harm it seeks to remedy. *Boerne*, 521 U.S. at 530 (1997). The Court explained there must be a "congruence and proportionality" between means and ends when Congress legislates pursuant to this power. *Kimel*, 528 U.S. at 63 (citing *Boerne*, 521 U.S. at 520 on the congruent and proportional standard); *Garrett*, 531 U.S. at 365 (again citing the *Boerne* standard in relation to Section 5 legislation); *Hibbs*, 538 U.S. at 728 (2003) (citing *Boerne*, 521 U.S. at 519-24).

When enacting Section 5 legislation, Congress "must tailor its legislative scheme to remedying or preventing" the unconstitutional conduct it has identified. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 639 (1999). In *Hibbs*, the Court held that the FMLA's family-care provision was "congruent and proportional to the targeted violation," namely sex discrimination in the workplace. *Hibbs*, 538 U.S. at 737. The Court reached this conclusion because the FMLA's protections are narrowly tailored and contain significant limitations on their applicability. *Id*. at 738-739. The Court noted that not only does the FMLA provide solely for unpaid leave, but it also limits leave availability to

employees of a year or more who have worked at least 1,250 hours in the last year. *Hibbs*, 538 U.S. at 738-40; *see also* 29 U.S.C. §§ 2611(2)(A), 2612(a)(1). Additionally, high ranking employees, including state elected officials and their staff are not entitled to FMLA leave. 29 U.S.C. §§ 2611(2)(B)(i), (3). These limitations placed on the reach of the FMLA's power, especially in State government, demonstrate clear Congressional intent to make these provisions congruent and proportional.

At the same time Congress limited the applicability to employees who have been employed for at least a year, it provided other limitations and restrictions on how this leave could be taken. The FMLA does not provide a blanket right to take leave by any employee and at any time. The FMLA, in fact, requires advance notice of foreseeable leave. 29 U.S.C. § 2612(e). Congress acknowledged the potential burden on employers and created a number of requirements necessary to be eligible for leave. For example, an employer is entitled to request certification by a doctor to demonstrate a serious health condition requiring FMLA leave. 29 U.S.C. § 2613(a). Similarly, the medical leave provisions allow an employer to require certification from a health care provider as to the need for employees to care for a family member. 29 U.S.C. § 2613(a). These limitations demonstrate that the FMLA's targeted scheme was designed to redress gender discrimination in a congruent and proportional manner, in compliance with the Court's Fourteenth Amendment jurisprudence.

These same limitations, which helped convince the Court that the FMLA's family-care provision was congruent and proportional, apply to the FMLA's self-care provision as well. The FMLA even went so far as to limit recovery to actual losses and liquidated damages equal to the amount of actual losses for willful violations against State defendants for FMLA violations. The FMLA provides that employers shall be liable only for "damages equal to the amount of any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation." 29 U.S.C § 2617. These limitations further show Congress' desire to provide a congruent and proportional response to unconstitutional gender discrimination.

The FMLA, with the self-care provision, fills the gap in coverage left by the Pregnancy Discrimination Act and Title VII. The FMLA's legislative record indicates that the FMLA was intended to root out gender discrimination that persisted despite earlier legislation. Congress acknowledged that Title VII had been ineffective in deterring the two types of discrimination that the FMLA is designed to prevent: employers' refusal to grant family leave to men, and employers' reluctance to hire or promote women based on gender stereotypes. Congress observed, that "[d]espite the apparent conflict with Title VII of the Civil Rights Act, only 37 percent of the[ ] companies extended parental leave rights to fathers and often on a different (and less extended) basis than to mothers." H.R. REP. NO. 100-511, pt. 2, at 24 (1988).

Moreover, Congress designed the self-care provision of the FMLA to fill the gap in coverage that still remained after the passage of the Pregnancy Discrimination Act of 1978 (PDA), which amended Title VII of the Civil Rights Act of 1964. "Thus, while Title VII, as amended by the Pregnancy Discrimination Act, has provided that benefits and protection be provided to millions of previously unprotected women wage earners, it leaves gaps which an anti-discrimination law by its nature cannot fill. [The FMLA] is designed to fill those gaps." H.R. REP. NO. 103-8, pt. 2, at 11 (1993).

Under the PDA, "[w]omen who become disabled because of pregnancy-related conditions are entitled to paid sick leave, personal leave, disability benefits, medical insurance, and hospitalization on the same basis as other disabled workers." *Id.* at 10. New mothers "are entitled to return to work on the same basis as other temporarily disabled workers." *Id.* Thus, the PDA left employers free to deny new mothers either childbirth leave or reinstatement as long as the employers did not offer those benefits to workers temporarily disabled for reasons other than pregnancy. This gap was closed by the self-care provision of the FMLA. In this way, Congress designed the self-care provision of the FMLA to work hand in hand with the childbirth provision so that neither women nor men are disadvantaged in the labor market by illnesses specific to their sex.

It is up to Congress to dictate what type of remedy would be effective to rectify a national wrong. *Boerne*, 521 U.S. 507. Congress' findings with respect to the

ineffectiveness of Title VII's nondiscrimination norm amply support its decision to enact the FMLA's more specific remedial scheme.

The self-care provision is narrowly targeted to remedy invidious sex-based discrimination in the workplace. By enacting the FMLA, Congress created a narrow cause of action that would protect only qualified employees so as to avoid overburdening employers.

V. The Circuits' Analysis Of The Self-care Provision Largely Contradicts The Rationale Of *Hibbs*.

As though the *Hibbs* decision had never come down, six Circuit Courts of Appeals have held that the self-care provision of the FMLA is not a valid abrogation of the States' Eleventh Amendment immunity. Those Circuits failed to do what this Court would expect: be informed by Supreme Court precedent on a Constitutional issue. Even though the *Hibbs* decision confines itself to the family-care provision of the FMLA, the logic of that decision supersedes much of the prior precedent on the issue. It certainly undermines the rationale for finding no valid abrogation of immunity upon which most of these circuits relied. In particular, the *Hibbs* Court found that attacking gender discrimination was Congress' principal motivation for passing the FMLA. Circuit courts that have addressed the self-care provision since the *Hibbs* decision have ignored this

crucial finding. This Court should adopt and develop the rationale of the *Hibbs* decision, which recognized a legislative history sufficient to justify abrogation of Eleventh Amendment immunity with regard to the family-care provision of the FMLA.

Many Circuits continue to rely on precedent that was expressly rejected in *Hibbs*. Those Circuits have engaged primarily in one of three flawed modes of analysis. First, some chose to apply reasoning that was expressly rejected by *Hibbs*. In particular, they overlooked the fact that *Hibbs* found the FMLA to be Congress' response to gender discrimination. Second, some Circuits felt compelled to follow their own pre-*Hibbs* precedent regarding self-care because *Hibbs* did not address self-care specifically. Third, the superseded precedent of other Circuits was merely adopted by others, with little further analysis of their own. These analyses provide no guidance to the Court.

One instance of a Circuit relying upon a rationale explicitly rejected by *Hibbs* appears in *Townsel v. Missouri*, 233 F.3d 1094 (8th Cir. 2000), where the Eighth Circuit held that the entire FMLA was an unconstitutional exercise of congressional power. The court reasoned that "the FMLA is so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 1096 (quoting *Boerne*, 521 U.S. at 537). But, this rationale was explicitly rejected by the *Hibbs* decision, which held that, at the very least, the family-care provision of the FMLA was a valid abrogation of Eleventh

Amendment immunity. 538 U.S. at 740. The Eighth Circuit nevertheless continued to rely on this partially overruled reasoning in *Miles v. Bellfontaine Habilitation Ctr.*, 481 F.3d 1106 (8th Cir. 2007) (per curiam). There, the court explained that "[the] district court properly dismissed with prejudice Miles's FMLA claim" because "[a]s an agency of the state of Missouri, . . . the Center is entitled to Eleventh Amendment immunity." 481 F.3d at 1107 (citing *Townsel*, 233 F.3d at 1096). While the panel did admit that *Hibbs* in part overruled some of their reasoning, the court did not explain which part of their decision was previously overruled. Additionally they did not explain why they relied on a decision whose analysis of the FMLA was expressly overruled in *Hibbs*.

Other courts that continue to apply the overruled rationale do so without regard to the effect of the *Hibbs* decision on their holdings and on the analysis they had employed in their pre-*Hibbs* decisions. For instance, in *Touvell v. Ohio Dep't of Mental Retardation*, 422 F.3d 392 (6th Cir. 2005), the Sixth Circuit supported its analysis with its own pre-*Hibbs* precedent. The *Touvell* court simply relied upon pre-*Hibbs* analysis, stating, "We do not believe that *Hibbs* undermines the holdings of the First, Second, Fourth, Tenth, and Eleventh Circuits that the self-care provision of the FMLA is unconstitutional insofar as it purports to abrogate state sovereign immunity." 422 F.3d at 400.

Likewise, the Fifth Circuit, in *Nelson v. Univ. of Tex. at Dallas*, 535 F.3d 318 (5th Cir. 2008), relied on

its pre-*Hibbs* precedent. Prior to *Nelson,* the Fifth Circuit in *Kazmier v. Widmann*, had "declared that the Eleventh Amendment immunized states from suits for money damages brought under subsections C and D of § 2612(a)(1)." *Id.* at 321 (citing *Kazmier v. Widmann*, 225 F.3d 519, 526-29 (5th Cir. 2000)). The Fifth Circuit observed that, since *Hibbs,* three other circuits had found no valid abrogation of Eleventh Amendment immunity. Without further analysis, the court found that the "decision in *Kazmier* still remains the law of this circuit with respect to subsection D." *Id*.

Finally, in *McKlintic v. 36th Judicial Circuit Court*, 508 F.3d 875 (8th Cir. 2007), the court stated that it was confined by its pre-*Hibbs* precedent. The court felt that it was "bound by the earlier decision of a [different] panel of [that] court." 508 F.3d at 877 (citing *South Dakota v. United States Department of Interior*, 487 F.3d 548, 551 (8th Cir. 2007)). Constrained by its own precedent, the court declined to "reconsider the question of whether the Eleventh Amendment bars a suit against a state for violation of the self-care provisions of the FMLA." *Id.*

By relying on others' superseded precedents, those Circuits have built a house of cards. This Court should not take shelter in it, but should instead use the solid rationale of the *Hibbs* Court to construct an enduring resolution to this weighty issue.

CONCLUSION

The *Hibbs* decision, rendered only eight years ago, provides all the guidance necessary for this Court to find that the self-care provision is a valid abrogation of Eleventh Amendment immunity. Not only is the legislative history of the FMLA, as a whole, sufficient to support the entire body of the legislation as a valid abrogation, but the self-care provision's intent and effect proves its constitutionality standing alone. The Legislative and Executive branches underwent a rigorous process to craft and pass this legislation as valid Fourteenth Amendment prophylaxis. We respectfully request that this Court reverse the decisions of the United States District Court for the District of Maryland as well as the Court of Appeals for the Fourth Circuit and remand for further proceedings.

Respectfully submitted this 20th day of September, 2011.

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Family and Medical Leave Act

29 U.S.C. § 2601

a) Findings

Congress finds that –

(1) the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly;

(2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions;

(3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;

(4) there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods;

(5) due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and

(6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.

(b) Purposes

It is the purpose of this Act –

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

(3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;

(4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

Subchapter I. General Requirements for Leave (Refs & Annos)

§ 2611. Definitions

As used in this subchapter:

(1) Commerce

The terms "commerce" and "industry or activity affecting commerce" mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include "commerce" and any "industry affecting commerce", as defined in paragraphs (1) and (3) of section 142 of this title.

(2) Eligible employee

(A) In general

The term "eligible employee" means an employee who has been employed –

(i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and

(ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

(B) Exclusions

The term "eligible employee" does not include –

(i) any Federal officer or employee covered under subchapter V of chapter 63 of Title 5; or

(ii) any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50.

(C) Determination

For purposes of determining whether an employee meets the hours of service requirement specified in subparagraph (A)(ii), the legal standards established under section 207 of this title shall apply.

(D) Airline flight crews

(i) Determination

For purposes of determining whether an employee who is a flight attendant or flight crewmember (as such terms are defined in regulations of the Federal Aviation Administration) meets the hours of service requirement specified in subparagraph (A)(ii), the employee will be considered to meet the requirement if –

(I) the employee has worked or been paid for not less than 60 percent of the applicable total monthly guarantee, or the equivalent, for the previous 12-month period, for or by the employer with respect to whom leave is requested under section 2612 of this title; and

(II) the employee has worked or been paid for not less than 504 hours (not counting personal commute time or time spent on vacation leave or medical or

sick leave) during the previous 12-month period, for or by that employer.

(ii) File

Each employer of an employee described in clause (i) shall maintain on file with the Secretary (in accordance with such regulations as the Secretary may prescribe) containing information specifying the applicable monthly guarantee with respect to each category of employee to which such guarantee applies.

(iii) Definition

In this subparagraph, the term "applicable monthly guarantee" means –

(I) for an employee described in clause (i) other than an employee on reserve status, the minimum number of hours for which an employer has agreed to schedule such employee for any given month; and

(II) for an employee described in clause (i) who is on reserve status, the number of hours for which an employer has agreed to pay such employee on reserve status for any given month,

as established in the applicable collective bargaining agreement or, if none exists, in the employer's policies.

(3) Employ; employee; State

The terms "employ", "employee", and "State" have the same meanings given such terms in subsections (c), (e), and (g) of section 203 of this title.

(4) Employer

(A) In general

The term "employer" –

(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(ii) includes –

(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(II) any successor in interest of an employer;

(iii) includes any "public agency", as defined in section 203(x) of this title; and

(iv) includes the Government Accountability Office and the Library of Congress.

(B) Public agency

For purposes of subparagraph (A)(iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

(5) Employment benefits

The term "employment benefits" means all benefits provided or made available to employees by an employer, including group life insurance, health insurance,

disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer or through an "employee benefit plan", as defined in section 1002(3) of this title.

(6) Health care provider

The term "health care provider" means –

(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(B) any other person determined by the Secretary to be capable of providing health care services.

(7) Parent

The term "parent" means the biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a son or daughter.

(8) Person

The term "person" has the same meaning given such term in section 203(a) of this title.

(9) Reduced leave schedule

The term "reduced leave schedule" means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.

(10) Secretary

The term "Secretary" means the Secretary of Labor.

(11) Serious health condition

The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves –

(A) inpatient care in a hospital, hospice, or residential medical care facility; or

(B) continuing treatment by a health care provider.

(12) Son or daughter

The term "son or daughter" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is –

(A) under 18 years of age; or

(B) 18 years of age or older and incapable of self-care because of a mental or physical disability.

(13) Spouse

The term "spouse" means a husband or wife, as the case may be.

(14) Covered active duty

The term "covered active duty" means –

(A) in the case of a member of a regular component of the Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country; and

(B) in the case of a member of a reserve component of the Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country under a call or order to active duty under a provision of law referred to in section 101(a)(13)(B) of Title 10.

(15) Covered servicemember

The term "covered servicemember" means –

(A) a member of the Armed Forces (including a member of the National Guard or Reserves) who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness; or

(B) a veteran who is undergoing medical treatment, recuperation, or therapy, for a serious injury or illness and who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during the period of 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.

(16) Outpatient status

The term "outpatient status", with respect to a covered servicemember, means the status of a member of the Armed Forces assigned to –

(A) a military medical treatment facility as an outpatient; or

(B) a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.

(17) Next of kin

The term "next of kin", used with respect to an individual, means the nearest blood relative of that individual.

(18) Serious injury or illness

The term "serious injury or illness" –

(A) in the case of a member of the Armed Forces (including a member of the National Guard or Reserves), means an injury or illness that was incurred by the member in line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in line of duty on active duty in the Armed Forces) and that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating; and

(B) in the case of a veteran who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during a period described in paragraph (15)(B), means a qualifying (as defined by the Secretary of Labor) injury or illness that was incurred by the member in line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in line of duty on active duty in

the Armed Forces) and that manifested itself before or after the member became a veteran.

(19) Veteran

The term "veteran" has the meaning given the term in section 101 of Title 38.

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§ 2612. Leave requirement

(a) In general

(1) Entitlement to leave

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(E) Because of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of

the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.

(2) Expiration of entitlement

The entitlement to leave under subparagraphs (A) and (B) of paragraph (1) for a birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

(3) Servicemember family leave

Subject to section 2613 of this title, an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember shall be entitled to a total of 26 workweeks of leave during a 12-month period to care for the servicemember. The leave described in this paragraph shall only be available during a single 12-month period.

(4) Combined leave total

During the single 12-month period described in paragraph (3), an eligible employee shall be entitled to a combined total of 26 workweeks of leave under paragraphs (1) and (3). Nothing in this paragraph shall be construed to limit the availability of leave under paragraph (1) during any other 12-month period.

(5) Calculation of leave for airline flight crews

The Secretary may provide, by regulation, a method for calculating the leave described in paragraph (1)

with respect to employees described in section 2611(2)(D) of this title.

(b) Leave taken intermittently or on reduced leave schedule

(1) In general

Leave under subparagraph (A) or (B) of subsection (a)(1) of this section shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise. Subject to paragraph (2), subsection (e)(2) of this section, and subsection (b)(5) or (f) (as appropriate) of section 2613 of this of this title, leave under subparagraph (C) or (D) of subsection (a)(1) of this section or under subsection (a)(3) of this section may be taken intermittently or on a reduced leave schedule when medically necessary. Subject to subsection (e)(3) of this section and section 2613(f) of this title, leave under subsection (a)(1)(E) of this section may be taken intermittently or on a reduced leave schedule. The taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a) of this section beyond the amount of leave actually taken.

(2) Alternative position

If an employee requests intermittent leave, or leave on a reduced leave schedule, under subparagraph (C) or (D) of subsection (a)(1) of this section or under subsection (a)(3) of this section, that is foreseeable

based on planned medical treatment, the employer may require such employee to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified and that –

(A) has equivalent pay and benefits; and

(B) better accommodates recurring periods of leave than the regular employment position of the employee.

(c) Unpaid leave permitted

Except as provided in subsection (d) of this section, leave granted under subsection (a) may consist of unpaid leave. Where an employee is otherwise exempt under regulations issued by the Secretary pursuant to section 213(a)(1) of this title, the compliance of an employer with this subchapter by providing unpaid leave shall not affect the exempt status of the employee under such section.

(d) Relationship to paid leave

(1) Unpaid leave

If an employer provides paid leave for fewer than 12 workweeks (or 26 workweeks in the case of leave provided under subsection (a)(3) of this section), the additional weeks of leave necessary to attain the 12 workweeks (or 26 workweeks, as appropriate) of leave required under this subchapter may be provided without compensation.

(2) Substitution of paid leave

(A) In general

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), (C), or (E) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection.

(B) Serious health condition

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection, except that nothing in this subchapter shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave. An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, family leave, or medical or sick leave of the employee for leave provided under subsection (a)(3) of this section for any part of the 26-week period of such leave under such subsection, except that nothing in this subchapter requires an employer to provide paid sick leave or paid medical leave in any situation in which the employer would not normally provide any such paid leave.

(e) Foreseeable leave

(1) Requirement of notice

In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) of this section is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(2) Duties of employee

In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) of this section or under subsection (a)(3) of this section is foreseeable based on planned medical treatment, the employee –

(A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, parent, or covered servicemember of the employee, as appropriate; and

(B) shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(3) Notice for leave due to covered active duty of family member

In any case in which the necessity for leave under subsection (a)(1)(E) of this section is foreseeable, whether because the spouse, or a son, daughter, or parent, of the employee is on covered active duty, or because of notification of an impending call or order to covered active duty, the employee shall provide such notice to the employer as is reasonable and practicable.

(f) Spouses employed by same employer

(1) In general

In any case in which a husband and wife entitled to leave under subsection (a) of this section are employed by the same employer, the aggregate number of workweeks of leave to which both may be entitled may be limited to 12 workweeks during any 12-month period, if such leave is taken –

(A) under subparagraph (A) or (B) of subsection (a)(1) of this section; or

(B) to care for a sick parent under subparagraph (C) of such subsection.

(2) Servicemember family leave

(A) In general

The aggregate number of workweeks of leave to which both that husband and wife may be entitled under subsection (a) of this section may be limited to

26 workweeks during the single 12-month period described in subsection (a)(3) of this section if the leave is –

(i) leave under subsection (a)(3) of this section; or

(ii) a combination of leave under subsection (a)(3) of this section and leave described in paragraph (1).

(B) Both limitations applicable

If the leave taken by the husband and wife includes leave described in paragraph (1), the limitation in paragraph (1) shall apply to the leave described in paragraph (1).

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§ 2613. Certification

(a) In general

An employer may require that a request for leave under subparagraph (C) or (D) of paragraph (1) or paragraph (3) of section 2612(a) of this title be supported by a certification issued by the health care provider of the eligible employee or of the son, daughter, spouse, or parent of the employee, or of the next of kin of an individual in the case of leave taken under such paragraph (3), as appropriate. The employee shall provide, in a timely manner, a copy of such certification to the employer.

(b) Sufficient certification

Certification provided under subsection (a) of this section shall be sufficient if it states –

(1) the date on which the serious health condition commenced;

(2) the probable duration of the condition;

(3) the appropriate medical facts within the knowledge of the health care provider regarding the condition;

(4)(A) for purposes of leave under section 2612(a)(1)(C) of this title, a statement that the eligible employee is needed to care for the son, daughter, spouse, or parent and an estimate of the amount of time that such employee is needed to care for the son, daughter, spouse, or parent; and

(B) for purposes of leave under section 2612(a)(1)(D) of this title, a statement that the employee is unable to perform the functions of the position of the employee;

(5) in the case of certification for intermittent leave, or leave on a reduced leave schedule, for planned medical treatment, the dates on which such treatment is expected to be given and the duration of such treatment;

(6) in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 2612(a)(1)(D) of this title, a statement of the medical necessity for the intermittent leave or leave on a reduced leave schedule, and the expected duration of the intermittent leave or reduced leave schedule; and

(7) in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 2612(a)(1)(C) of this title, a statement that the employee's intermittent leave or leave on a reduced leave schedule is necessary for the care of the son, daughter, parent, or spouse who has a serious health condition, or will assist in their recovery, and the expected duration and schedule of the intermittent leave or reduced leave schedule.

(c) Second opinion

(1) In general

In any case in which the employer has reason to doubt the validity of the certification provided under subsection (a) of this section for leave under subparagraph (C) or (D) of section 2612(a)(1) of this title, the employer may require, at the expense of the employer, that the eligible employee obtain the opinion of a second health care provider designated or approved by the employer concerning any information certified under subsection (b) of this section for such leave.

(2) Limitation

A health care provider designated or approved under paragraph (1) shall not be employed on a regular basis by the employer.

(d) Resolution of conflicting opinions

(1) In general

In any case in which the second opinion described in subsection (c) of this section differs from the opinion

in the original certification provided under subsection (a) of this section, the employer may require, at the expense of the employer, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employer and the employee concerning the information certified under subsection (b) of this section.

(2) Finality

The opinion of the third health care provider concerning the information certified under subsection (b) of this section shall be considered to be final and shall be binding on the employer and the employee.

(e) Subsequent recertification

The employer may require that the eligible employee obtain subsequent recertifications on a reasonable basis.

(f) Certification related to covered active duty or call to covered active duty

An employer may require that a request for leave under section 2612(a)(1)(E) of this title be supported by a certification issued at such time and in such manner as the Secretary may by regulation prescribe. If the Secretary issues a regulation requiring such certification, the employee shall provide, in a timely manner, a copy of such certification to the employer.

§ 2614. Employment and benefits protection

(a) Restoration to position

(1) In general

Except as provided in subsection (b) of this section, any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave –

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(2) Loss of benefits

The taking of leave under section 2612 of this title shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

(3) Limitations

Nothing in this section shall be construed to entitle any restored employee to –

(A) the accrual of any seniority or employment benefits during any period of leave; or

(B) any right, benefit, or position of employment other than any right, benefit, or position to which the

employee would have been entitled had the employee not taken the leave.

(4) Certification

As a condition of restoration under paragraph (1) for an employee who has taken leave under section 2612(a)(1)(D) of this title, the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

(5) Construction

Nothing in this subsection shall be construed to prohibit an employer from requiring an employee on leave under section 2612 of this title to report periodically to the employer on the status and intention of the employee to return to work.

(b) Exemption concerning certain highly compensated employees

(1) Denial of restoration

An employer may deny restoration under subsection (a) of this section to any eligible employee described in paragraph (2) if –

(A) such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;

(B) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury would occur; and

(C) in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.

(2) Affected employees

An eligible employee described in paragraph (1) is a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed.

(c) Maintenance of health benefits

(1) Coverage

Except as provided in paragraph (2), during any period that an eligible employee takes leave under section 2612 of this title, the employer shall maintain coverage under any "group health plan" (as defined in section 5000(b)(1) of Title 26) for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave.

(2) Failure to return from leave

The employer may recover the premium that the employer paid for maintaining coverage for the employee

under such group health plan during any period of unpaid leave under section 2612 of this title if –

(A) the employee fails to return from leave under section 2612 of this title after the period of leave to which the employee is entitled has expired; and

(B) the employee fails to return to work for a reason other than –

(i) the continuation, recurrence, or onset of a serious health condition that entitles the employee to leave under subparagraph (C) or (D) of section 2612(a)(1) of this title or under section 2612(a)(3) of this title; or

(ii) other circumstances beyond the control of the employee.

(3) Certification

(A) Issuance

An employer may require that a claim that an employee is unable to return to work because of the continuation, recurrence, or onset of the serious health condition described in paragraph (2)(B)(i) be supported by –

(i) a certification issued by the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(1)(C) of this title;

(ii) a certification issued by the health care provider of the eligible employee, in the case of an employee

unable to return to work because of a condition specified in section 2612(a)(1)(D) of this title; or

(iii) a certification issued by the health care provider of the servicemember being cared for by the employee, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(3) of this title.

(B) Copy

The employee shall provide, in a timely manner, a copy of such certification to the employer.

(C) Sufficiency of certification

(i) Leave due to serious health condition of employee

The certification described in subparagraph (A)(ii) shall be sufficient if the certification states that a serious health condition prevented the employee from being able to perform the functions of the position of the employee on the date that the leave of the employee expired.

(ii) Leave due to serious health condition of family member

The certification described in subparagraph (A)(i) shall be sufficient if the certification states that the employee is needed to care for the son, daughter, spouse, or parent who has a serious health condition on the date that the leave of the employee expired.

§ 2615. Prohibited acts

(a) Interference with rights

(1) Exercise of rights

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

(2) Discrimination

It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

(b) Interference with proceedings or inquiries

It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual –

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter;

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.

§ 2616. Investigative authority

(a) In general

To ensure compliance with the provisions of this subchapter, or any regulation or order issued under this subchapter, the Secretary shall have, subject to subsection (c) of this section, the investigative authority provided under section 211(a) of this title.

(b) Obligation to keep and preserve records

Any employer shall make, keep, and preserve records pertaining to compliance with this subchapter in accordance with section 211(c) of this title and in accordance with regulations issued by the Secretary.

(c) Required submissions generally limited to annual basis

The Secretary shall not under the authority of this section require any employer or any plan, fund, or program to submit to the Secretary any books or records more than once during any 12-month period, unless the Secretary has reasonable cause to believe there may exist a violation of this subchapter or any regulation or order issued pursuant to this subchapter, or is investigating a charge pursuant to section 2617(b) of this title.

(d) Subpoena powers

For the purposes of any investigation provided for in this section, the Secretary shall have the subpoena authority provided for under section 209 of this title.

§ 2617. Enforcement

(a) Civil action by employees

(1) Liability

Any employer who violates section 2615 of this title shall be liable to any eligible employee affected –

(A) for damages equal to –

(i) the amount of –

(I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or

(II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks (or 26 weeks, in a case involving leave under section 2612(a)(3) of this title) of wages or salary for the employee;

(ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and

(iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer who has violated section 2615 of this title proves to the satisfaction of the court that the act or omission which violated section 2615 of this title was in good faith and that the employer had

reasonable grounds for believing that the act or omission was not a violation of section 2615 of this title, such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively; and

(B) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(2) Right of action

An action to recover the damages or equitable relief prescribed in paragraph (1) may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of –

(A) the employees; or

(B) the employees and other employees similarly situated.

(3) Fees and costs

The court in such an action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant.

(4) Limitations

The right provided by paragraph (2) to bring an action by or on behalf of any employee shall terminate –

(A) on the filing of a complaint by the Secretary in an action under subsection (d) of this section in which restraint is sought of any further delay in the payment of the amount described in paragraph (1)(A) to such employee by an employer responsible under paragraph (1) for the payment; or

(B) on the filing of a complaint by the Secretary in an action under subsection (b) of this section in which a recovery is sought of the damages described in paragraph (1)(A) owing to an eligible employee by an employer liable under paragraph (1),

unless the action described in subparagraph (A) or (B) is dismissed without prejudice on motion of the Secretary.

(b) Action by Secretary

(1) Administrative action

The Secretary shall receive, investigate, and attempt to resolve complaints of violations of section 2615 of this title in the same manner that the Secretary receives, investigates, and attempts to resolve complaints of violations of sections 206 and 207 of this title.

(2) Civil action

The Secretary may bring an action in any court of competent jurisdiction to recover the damages described in subsection (a)(1)(A) of this section.

(3) Sums recovered

Any sums recovered by the Secretary pursuant to paragraph (2) shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to each employee affected. Any such sums not paid to an employee because of inability to do so within a period of 3 years shall be deposited into the Treasury of the United States as miscellaneous receipts.

(c) Limitation

(1) In general

Except as provided in paragraph (2), an action may be brought under this section not later than 2 years after the date of the last event constituting the alleged violation for which the action is brought.

(2) Willful violation

In the case of such action brought for a willful violation of section 2615 of this title, such action may be brought within 3 years of the date of the last event constituting the alleged violation for which such action is brought.

(3) Commencement

In determining when an action is commenced by the Secretary under this section for the purposes of this subsection, it shall be considered to be commenced on the date when the complaint is filed.

(d) Action for injunction by Secretary

The district courts of the United States shall have jurisdiction, for cause shown, in an action brought by the Secretary –

(1) to restrain violations of section 2615 of this title, including the restraint of any withholding of payment of wages, salary, employment benefits, or other compensation, plus interest, found by the court to be due to eligible employees; or

(2) to award such other equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(e) Solicitor of Labor

The Solicitor of Labor may appear for and represent the Secretary on any litigation brought under this section.

(f) Government Accountability Office and Library of Congress

In the case of the Government Accountability Office and the Library of Congress, the authority of the Secretary of Labor under this subchapter shall be exercised respectively by the Comptroller General of the United States and the Librarian of Congress.

§ 2618. Special rules concerning employees of local educational agencies

(a) Application

(1) In general

Except as otherwise provided in this section, the rights (including the rights under section 2614 of this title, which shall extend throughout the period of leave of any employee under this section), remedies, and procedures under this subchapter shall apply to –

(A) any "local educational agency" (as defined in section 7801 of Title 20) and an eligible employee of the agency; and

(B) any private elementary or secondary school and an eligible employee of the school.

(2) Definitions

For purposes of the application described in paragraph (1):

(A) Eligible employee

The term "eligible employee" means an eligible employee of an agency or school described in paragraph (1).

(B) Employer

The term "employer" means an agency or school described in paragraph (1).

(b) Leave does not violate certain other Federal laws

A local educational agency and a private elementary or secondary school shall not be in violation of the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.), section 794 of this title or title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), solely as a result of an eligible employee of such agency or school exercising the rights of such employee under this subchapter.

(c) Intermittent leave or leave on reduced schedule for instructional employees

(1) In general

Subject to paragraph (2), in any case in which an eligible employee employed principally in an instructional capacity by any such educational agency or school requests leave under subparagraph (C) or (D) of section 2612(a)(1) of this title or under section 2612(a)(3) of this title that is foreseeable based on planned medical treatment and the employee would be on leave for greater than 20 percent of the total number of working days in the period during which the leave would extend, the agency or school may require that such employee elect either –

(A) to take leave for periods of a particular duration, not to exceed the duration of the planned medical treatment; or

(B) to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified, and that –

(i) has equivalent pay and benefits; and

(ii) better accommodates recurring periods of leave than the regular employment position of the employee.

(2) Application

The elections described in subparagraphs (A) and (B) of paragraph (1) shall apply only with respect to an eligible employee who complies with section 2612(e)(2) of this title.

(d) Rules applicable to periods near conclusion of academic term

The following rules shall apply with respect to periods of leave near the conclusion of an academic term in the case of any eligible employee employed principally in an instructional capacity by any such educational agency or school:

(1) Leave more than 5 weeks prior to end of term

If the eligible employee begins leave under section 2612 of this title more than 5 weeks prior to the end of the academic term, the agency or school may require the employee to continue taking leave until the end of such term, if –

(A) the leave is of at least 3 weeks duration; and

(B) the return to employment would occur during the 3-week period before the end of such term.

(2) Leave less than 5 weeks prior to end of term

If the eligible employee begins leave under subparagraph (A), (B), or (C) of section 2612(a)(1) of this title or under section 2612(a)(3) of this tile during the period that commences 5 weeks prior to the end of the academic term, the agency or school may require the employee to continue taking leave until the end of such term, if –

(A) the leave is of greater than 2 weeks duration; and

(B) the return to employment would occur during the 2-week period before the end of such term.

(3) Leave less than 3 weeks prior to end of term

If the eligible employee begins leave under subparagraph (A), (B), or (C) of section 2612(a)(1) of this title or under section 2612(a)(3) of this title during the period that commences 3 weeks prior to the end of the academic term and the duration of the leave is greater than 5 working days, the agency or school may require the employee to continue to take leave until the end of such term.

(e) Restoration to equivalent employment position

For purposes of determinations under section 2614(a)(1)(B) of this title (relating to the restoration of an eligible employee to an equivalent position), in the case of a local educational agency or a private elementary or secondary school, such determination shall be made on the basis of established school board

policies and practices, private school policies and practices, and collective bargaining agreements.

(f) Reduction of amount of liability

If a local educational agency or a private elementary or secondary school that has violated this subchapter proves to the satisfaction of the court that the agency, school, or department had reasonable grounds for believing that the underlying act or omission was not a violation of this subchapter, such court may, in the discretion of the court, reduce the amount of the liability provided for under section 2617(a)(1)(A) of this title to the amount and interest determined under clauses (i) and (ii), respectively, of such section.

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§ 2619. Notice

(a) In general

Each employer shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees and applicants for employment are customarily posted, a notice, to be prepared or approved by the Secretary, setting forth excerpts from, or summaries of, the pertinent provisions of this subchapter and information pertaining to the filing of a charge.

(b) Penalty

Any employer that willfully violates this section may be assessed a civil money penalty not to exceed $100 for each separate offense.

Subchapter II. Commission on Leave

§ 2631. Establishment

There is established a commission to be known as the Commission on Leave (referred to in this subchapter as the "Commission").

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§ 2632. Duties

The Commission shall –

(1) conduct a comprehensive study of –

(A) existing and proposed mandatory and voluntary policies relating to family and temporary medical leave, including policies provided by employers not covered under this Act;

(B) the potential costs, benefits, and impact on productivity, job creation and business growth of such policies on employers and employees;

(C) possible differences in costs, benefits, and impact on productivity, job creation and business growth of such policies on employers based on business type and size;

(D) the impact of family and medical leave policies on the availability of employee benefits provided by employers, including employers not covered under this Act;

(E) alternate and equivalent State enforcement of subchapter I of this chapter with respect to employees described in section 2618(a) of this title;

(F) methods used by employers to reduce administrative costs of implementing family and medical leave policies;

(G) the ability of the employers to recover, under section 2614(c)(2) of this title, the premiums described in such section; and

(H) the impact on employers and employees of policies that provide temporary wage replacement during periods of family and medical leave.

(2) not later than 2 years after the date on which the Commission first meets, prepare and submit, to the appropriate Committees of Congress, a report concerning the subjects listed in paragraph (1).

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§ 2633. Membership

(a) Composition

(1) Appointments

The Commission shall be composed of 12 voting members and 4 ex officio members to be appointed not later than 60 days after February 5, 1993, as follows:

(A) Senators

One Senator shall be appointed by the Majority Leader of the Senate, and one Senator shall be appointed by the Minority Leader of the Senate.

(B) Members of House of Representatives

One Member of the House of Representatives shall be appointed by the Speaker of the House of Representatives, and one Member of the House of Representatives shall be appointed by the Minority Leader of the House of Representatives.

(C) Additional members

(i) Appointment

Two members each shall be appointed by –

(I) the Speaker of the House of Representatives;

(II) the Majority Leader of the Senate;

(III) the Minority Leader of the House of Representatives; and

(IV) the Minority Leader of the Senate.

(ii) Expertise

Such members shall be appointed by virtue of demonstrated expertise in relevant family, temporary disability, and labor management issues. Such members shall include representatives of employers, including employers from large businesses and from small businesses.

(2) Ex officio members

The Secretary of Health and Human Services, the Secretary of Labor, the Secretary of Commerce, and the Administrator of the Small Business Administration

shall serve on the Commission as nonvoting ex officio members.

(b) Vacancies

Any vacancy on the Commission shall be filled in the manner in which the original appointment was made. The vacancy shall not affect the power of the remaining members to execute the duties of the Commission.

(c) Chairperson and vice chairperson

The Commission shall elect a chairperson and a vice chairperson from among the members of the Commission.

(d) Quorum

Eight members of the Commission shall constitute a quorum for all purposes, except that a lesser number may constitute a quorum for the purpose of holding hearings.

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§ 2634. Compensation

(a) Pay

Members of the Commission shall serve without compensation.

(b) Travel expenses

Members of the Commission shall be allowed reasonable travel expenses, including a per diem allowance, in accordance with section 5703 of Title 5 when performing duties of the Commission.

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§ 2635. Powers

(a) Meetings

The Commission shall first meet not later than 30 days after the date on which all members are appointed, and the Commission shall meet thereafter on the call of the chairperson or a majority of the members.

(b) Hearings and sessions

The Commission may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission considers appropriate. The Commission may administer oaths or affirmations to witnesses appearing before it.

(c) Access to information

The Commission may secure directly from any Federal agency information necessary to enable it to carry out this subchapter, if the information may be disclosed under section 552 of Title 5. Subject to the previous sentence, on the request of the chairperson or vice chairperson of the Commission, the head of such agency shall furnish such information to the Commission.

(d) Use of facilities and services

Upon the request of the Commission, the head of any Federal agency may make available to the Commission any of the facilities and services of such agency.

(e) Personnel from other agencies

On the request of the Commission, the head of any Federal agency may detail any of the personnel of such agency to serve as an Executive Director of the Commission or assist the Commission in carrying out the duties of the Commission. Any detail shall not interrupt or otherwise affect the civil service status or privileges of the Federal employee.

(f) Voluntary service

Notwithstanding section 1342 of Title 31, the chairperson of the Commission may accept for the Commission voluntary services provided by a member of the Commission.

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§ 2636. Termination

The Commission shall terminate 30 days after the date of the submission of the report of the Commission to Congress.

Subchapter III. Miscellaneous Provisions

§ 2651. Effect on other laws

(a) Federal and State antidiscrimination laws

Nothing in this Act or any amendment made by this Act shall be construed to modify or affect any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability.

(b) State and local laws

Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act.

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§ 2652. Effect on existing employment benefits.

(a) More protective

Nothing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act or any amendment made by this Act.

(b) Less protective

The rights established for employees under this Act or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan.

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§ 2653. Encouragement of more generous leave policies

Nothing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous

than any policies that comply with the requirements under this Act or any amendment made by this Act.

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§ 2654. Regulations

The Secretary of Labor shall prescribe such regulations as are necessary to carry out subchapter I of this chapter and this subchapter not later than 120 days after February 5, 1993.

Current through P.L. 112-28 approved 8-12-11