

No. 10-1016

In the
Supreme Court of the United States

DANIEL COLEMAN,
Petitioner,

v.

MARYLAND COURT OF APPEALS, *ET AL.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

**BRIEF OF THE STATES OF TEXAS, ALABAMA, ALASKA,
ARIZONA, ARKANSAS, COLORADO, GEORGIA, IDAHO,
INDIANA, KANSAS, KENTUCKY, LOUISIANA, MAINE,
MICHIGAN, NEBRASKA, NEW HAMPSHIRE, NORTH
DAKOTA, OKLAHOMA, PENNSYLVANIA, SOUTH
CAROLINA, TENNESSEE, UTAH, VIRGINIA, WEST
VIRGINIA, WISCONSIN, AND WYOMING AS AMICI
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QUESTION PRESENTED

Do the States retain sovereign immunity from claims for money damages based on alleged violations of the “self-care” provision of the Family and Medical Leave Act, 29 U.S.C. § 2612(a)(1)(D)?

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INTEREST OF AMICI CURIAE

The States employ approximately 5.3 million full- and part-time workers. U.S. Census Bureau, *2010 Public Employment and Payroll Data: State Governments*, <http://www2.census.gov/govs/apes/10stus.txt>. As some of the Nation's largest employers, the States have a significant practical interest in federal employment laws and policies, particularly those that may expose state governments to liability for civil damages. And as guardians of their citizens' public fisc, the States also have an interest in ensuring that any abrogation of their immunity comports with the constitutional framework for such action. Because the decision below adhered to the Court's well-established precedent for determining when Congress may abrogate the States' immunity under Section 5 of the Fourteenth Amendment, the States have an interest in seeing the Fourth Circuit's decision upheld.

SUMMARY OF THE ARGUMENT

The Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. §§ 2601-2654 (2006), was enacted to create a nationwide labor standard providing up to 12 weeks of unpaid leave to persons working for private or public employers with 50 or more employees. When it was adopted, the FMLA entitled eligible employees to leave in four specified situations: the birth of a child, *id.* § 2612(a)(1)(A); the adoption of a child or placement of a foster child, *id.* § 2612(a)(1)(B); the need to care for a parent, child, or spouse with a serious health condition, *id.* § 2612(a)(1)(C); and the inability to work due to the

employee's own serious health condition, *id.* § 2612(a)(1)(D).¹

Many States provided their employees personal sick leave and leave to care for ailing family members prior to enactment of the FMLA, and the States have uniformly endorsed the motives behind the FMLA and the policies it has inspired. And the amici States fully recognize that the FMLA applies to state governments and do not challenge the validity of any of its provisions as Commerce Clause legislation. Indeed, Texas and the other amici States instruct their agencies and employees to follow the FMLA's letter and spirit. But the amici States are also charged with protecting their citizens' public fisc from awards of monetary damages that would drain scarce state financial resources when such awards are not authorized by the Constitution.

To validly exercise its authority under Section 5 of the Fourteenth Amendment to abrogate state sovereign immunity, Congress must identify unconstitutional conduct by States and enact an appropriate remedy for those violations. *City of Boerne v. Flores*, 521 U.S. 507, 519-520 (1997). In this case, consistent with the decisions of eight other circuits, the Court of Appeals correctly determined that the "self-care" provision of the FMLA, 29 U.S.C. § 2612(a)(1)(D), does not validly abrogate the States' sovereign immunity from suit. Pet. App. 12. The reason is straightforward: when Congress

1. Congress recently amended the FMLA to provide leave for exigencies arising from a relative's service in the Armed Forces. 29 U.S.C. § 2612(a)(1)(E); Pub. L. No. 110-181, § 585, 122 Stat. 3, 129 (2008).

adopted the self-care provision of the FMLA, it was not attempting to remedy a pattern of unconstitutional state conduct. Congress identified no such pattern of conduct. In fact, Congress specifically documented and highlighted the fact that most States were ahead of the Federal Government in addressing the family and medical leave needs of their employees. Accordingly, the judgment of the Court of Appeals should be affirmed.

ARGUMENT

I. CONGRESS HAS LIMITED POWER TO ABROGATE STATE SOVEREIGN IMMUNITY UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT.

Immunity from suit “is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments.” *Alden v. Maine*, 527 U.S. 706, 713 (1999).² And, as this Court has made clear, the States’ preexisting immunity that the Eleventh Amendment secured has a broader reach than merely stripping federal courts of jurisdiction over claims against one State by the

2. The Court has also explained that the phrase “Eleventh Amendment immunity” is “convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.” *Alden*, 527 U.S. at 713.

citizens of another.³ Specifically, the Court has explained that while the terms of the Amendment reference only suits against a State by citizens of another State, its cases have recognized that a State's sovereign immunity extends to suits by citizens against their own State. See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 72-73 (2000); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 669-670 (1999).

Congress can abrogate state sovereign immunity only when: (1) it unequivocally expresses its intent to abrogate the immunity; and (2) it acts "pursuant to a constitutional provision granting Congress the power to abrogate." *Seminole Tribe v. Florida*, 517 U.S. 44, 55, 59 (1996). The Court has already determined that the FMLA satisfies the first requirement. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003). Therefore, this case turns on whether Congress acted within its constitutional authority when it sought to abrogate the States' immunity for purposes of the FMLA's self-care provision.

Section 1 of the Fourteenth Amendment provides that no State may "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Section 5 of the

3. The 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 of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

Amendment grants Congress the power “to enforce” the substantive guarantees of Section 1 of the Amendment by enacting “appropriate legislation.” U.S. CONST. amend. XIV, § 5; see also *City of Boerne*, 521 U.S. at 536.

Because Congress’s enforcement authority under Section 5 is both remedial and preventative, the Court has recognized that “Congress may, in the exercise of its Section 5 power, do more than simply proscribe conduct that [the Court has] held unconstitutional.” *Hibbs*, 538 U.S. at 727. “Rather, Congress’ power ‘to enforce’ the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment’s text.” *Kimel*, 528 U.S. at 81.

Nonetheless, although state sovereign immunity is subject to Congress’s enforcement power under Section 5 of the Fourteenth Amendment, that power is limited. As the Court confirmed in *City of Boerne* and its progeny, it is the responsibility of the Court, not Congress, to determine the Fourteenth Amendment’s substantive meaning and define the substance of its constitutional guarantees. See *Hibbs*, 538 U.S. at 728; *Kimel*, 528 U.S. at 81; *City of Boerne*, 521 U.S. at 519-524. And Section 5 legislation that reaches beyond the scope of Section 1’s specific guarantees must be an appropriate remedy for identified constitutional violations, not an “attempt to substantively redefine the States’ legal obligations.” *Kimel*, 528 U.S. at 88.

The Court has likewise made clear that, “in order to authorize private individuals to recover money damages

against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation.” *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001). Thus, in order to validly exercise its Section 5 authority to abrogate state sovereign immunity, Congress must meet the test described in *City of Boerne* and its progeny: it must (1) identify unconstitutional conduct by States and (2) enact an appropriate remedy for those violations. *Hibbs*, 538 U.S. at 728-729; see also *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring) (“The predicate for money damages against an unconsenting State in suits brought by private persons must be a federal statute enacted upon the documentation of patterns of constitutional violations committed by the State in its official capacity.”).

Applying this test, the Court has invalidated several congressional attempts to improperly expand its Section 5 power. See *Garrett*, 531 U.S. at 374 (invalidating Congress’s attempt to subject States to suit under Title I of Americans with Disabilities Act); *Kimel*, 528 U.S. at 82-83 (same under Age Discrimination in Employment Act); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647 (1999) (same under Patent Act); *City of Boerne*, 521 U.S. at 532 (holding that the Religious Freedom Restoration Act was an invalid exercise of Congress’s Section 5 authority). In so doing, the Court has made clear that, when Congress enacts legislation that reaches beyond the scope of Section 1’s specific guarantees, it must meet the *City of*

Boerne test to successfully abrogate state sovereign immunity.

II. CONGRESS DID NOT VALIDLY ABROGATE THE STATES' SOVEREIGN IMMUNITY IN THE FMLA'S SELF-CARE PROVISION.

The Court's Section 5 cases present the framework for assessing whether legislation meets the *City of Boerne* test and appropriately abrogates the States' sovereign immunity. See, e.g., *Garrett*, 531 U.S. 365-368; *Kimel*, 528 U.S. at 80-82. The first step of the analysis requires the court to "identify with some precision the scope of the constitutional right at issue." *Garrett*, 531 U.S. at 365. The second step is to determine whether the legislative means adopted by Congress have a congruence and proportionality to the constitutional injury to be prevented or remedied. See, e.g., *Kimel*, 528 U.S. at 81 ("[R]ecognizing that 'Congress must have wide latitude in determining where [the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in governing law] lies,' we [have] held that '[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" (quoting *City of Boerne*, 521 U.S. at 520)).

In performing the second step, *i.e.*, deciding whether legislation is congruent to a constitutional violation, the Court has consistently looked to the legislative record to determine whether Congress has identified a history and pattern of unconstitutional state action. See, e.g., *Garrett*, 531 U.S. at 368-374; *Kimel*, 528 U.S. at 90-91; *Fla. Prepaid*, 527 U.S. at 640. When these steps are

properly performed concerning the self-care provision of the FMLA, it is evident—as the Court of Appeals correctly concluded—that this provision is not designed to address gender-based discrimination, and in any event Congress failed to identify any history or pattern of unconstitutional state action that could support the abrogation of state immunity through the self-care provision.

A. The Self-Care Provision Is Designed To Relieve Economic Burdens Imposed on Temporarily Disabled Employees and To Prevent Discrimination Against Them.

Petitioner’s analysis of the question whether the self-care provision properly abrogates the States’ immunity is flawed at the outset because it is premised on the mistaken assumption that it was designed to address gender-based discrimination. See Pet. Br. 13. Petitioner correctly notes that the scope of constitutional protection against gender-based discrimination under the Fourteenth Amendment is broader than that against mere arbitrary classifications. See *id.* at 30-34. Where gender-based discrimination is at issue, a State must justify its discrimination by a showing of considerably more than mere rationality. See, e.g., *United States v. Morrison*, 529 U.S. 598, 620 (2000). And gender-based discrimination violates the Equal Protection Clause unless it “serves important governmental objectives and . . . the discriminatory means employed are substantially related to the achievement of those objectives.” *United States v. Virginia*, 518 U.S. 515, 533 (1996) (citation and internal quotation marks omitted).

But it is apparent from both the FMLA's text and its legislative history that Congress did not intend to remedy gender-based discrimination with the self-care provision. First, the text of the self-care provision itself does not suggest that its purpose was to combat unconstitutional gender-based discrimination in the workplace. It allows for personal medical leave when a "serious health condition" prevents any employee from performing his or her job. 29 U.S.C. § 2612(a)(1)(D). And the term "serious health condition" in the self-care provision is not limited to or focused on those health conditions wholly or predominantly experienced by female workers, but rather is broadly defined to include *any* "illness, injury, impairment, or physical or mental condition" that involves "inpatient care" at some type of medical facility or "continuing treatment by a health care provider." *Id.* § 2611(11).⁴ Likewise, the congressional finding most relevant to the self-care provision makes no distinction between male and female employees. See *id.* § 2601(a)(4) (stating that "there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods").⁵

4. Common sense also dictates that "[s]erious health conditions are not necessarily related to family and gender discrimination." *Hale v. Mann*, 219 F.3d 61, 69 (2d Cir. 2000) (quoting *Garrett v. Univ. of Ala. Bd. of Trs.*, 193 F.3d 1214, 1220 (11th Cir. 1999), *rev'd on other grounds*, 531 U.S. 356 (2001)).

5. The lack of distinction between male and female employees in Congress's relevant finding is unsurprising, given that the evidence before it showed that men and women are almost equally likely to take personal medical leave. See H.R. REP. NO.

Likewise, the legislative history of the FMLA establishes two motivations for the inclusion of the self-care provision, both of which are unrelated to gender-based discrimination, and neither of which can support the abrogation of the States' sovereign immunity. The primary purpose of the self-care provision was relieving the economic burdens on employees and their families that are imposed by illness-related job loss. See, *e.g.*, S. REP. No. 103-3, at 11 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 3, 13-14 ("The *fundamental rationale* for [a personal medical leave] policy is that it is unfair for an employee to be terminated when *he or she* is struck with a serious illness and is not capable of working. Job loss because of illness has a particularly devastating effect on workers who support themselves and on families where two incomes are necessary to make ends meet or where a single parent heads the household." (emphases added)); H.R. REP. No. 101-28, pt. 1, at 23 ("The temporary medical leave requirement is intended to provide basic, humane protection to the family unit when it is most in need of help. It will also

101-28, pt. 1, at 15 (1989) ("Recent studies provided to the [House Education and Labor] Committee indicate that men and women are out on medical leave approximately equally. Men workers experience an average of 4.9 days of work loss due to illness or injury per year, while women workers experience 5.1 days per year. The evidence also suggests that the incidence of serious medical conditions that would be covered by medical leave under the bill is virtually the same for men and women.").

help reduce the societal cost born [sic] by government and private charity.”).⁶

The second purpose of the self-care provision was to prevent employment discrimination against those with serious health problems. See, e.g., S. REP. No. 103-3, at 12 (citing testimony that a quarter of all cancer survivors face “some form of employment discrimination” and that “such discrimination against qualified employees costs society millions of dollars in lost wages, lost productivity and needless disability payments”); H.R. REP. No. 101-28, pt. 1, at 23 (“[A] worker who has lost a job due to a serious health condition often faces future discrimination in finding a job which has even more devastating consequences for the worker and his or her family.”).⁷

6. See also *Touvell v. Ohio Dep’t of Mental Retardation & Developmental Disabilities*, 422 F.3d 392, 401 (6th Cir. 2005) (“One purpose of [the self-care provision] was alleviating the economic burdens on employees and their families of illness-related job-loss.”); *Laro v. New Hampshire*, 259 F.3d 1, 12 (1st Cir. 2001) (“Attention to the legislative history reveals that Congress’s primary motivation for including the personal medical leave provision contained in subsection (D) was to protect families from the economic dislocation caused by a family member losing his or her job due to a serious medical problem.”).

7. See also *Touvell*, 422 F.3d at 401 (“The other purpose of the self-care provision was to prevent employment discrimination against those with serious health problems.”); *Laro*, 259 F.3d at 12-13 (“A secondary motivation that appears in the legislative history is a concern to protect workers who were temporarily disabled by serious health problems from discrimination on account of their medical condition.”)

B. Because Congress Was Not Remediating Unconstitutional State Conduct, It Could Not Validly Abrogate the States' Sovereign Immunity Through the Self-Care Provision.

Congress's concern with relieving economic burdens on temporarily disabled workers and their families "clearly goes to Congress's power under the Commerce Clause and not Section 5." *Laro*, 259 F.3d at 12. Congress may not abrogate the States' sovereign immunity through its Commerce Clause power. See *Garrett*, 531 U.S. at 364; *Kimel*, 528 U.S. at 79.

And, to the extent the self-care provision targets discrimination based on disability, it is subject to rational-basis review. *Garrett*, 531 U.S. at 366-367. Under rational-basis review, to make the necessary finding of unconstitutional State action, Congress would have been required to identify disparity of treatment of temporarily disabled workers involving *irrational* State conduct. See *id.* ("Under rational-basis review, where a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." (citations and internal quotation marks omitted)). Making such a finding would be particularly difficult given that the Court has made clear that the Fourteenth Amendment does not require the States to make special

accommodations for the disabled, so long as their actions toward such individuals are rational. *Id.* at 367.

But the Court need not reach the question whether the self-care provision could be congruent and proportional to address a pattern of constitutional transgressions by the States against temporarily disabled workers, because the legislative record reveals no such conduct on the part of the States. Rather, the record establishes that “Congress identified no link between the desire to provide a safety net for the seriously ill, or the desire to prevent discrimination against the seriously ill, and any pattern of discriminatory stereotyping on the part of states as employers.” *Touwell*, 422 F.3d at 401-402; see also *Kazmier v. Widmann*, 225 F.3d 519, 528 (5th Cir. 2000), (“The legislative record for the FMLA is devoid of any evidence of a pattern of discrimination by the States against the temporarily disabled . . .”), *overruled in part by Hibbs*, 538 U.S. 721. And, “[w]ithout direct evidence of substantial unconstitutional discrimination by the States [against the temporarily disabled], there simply is no Fourteenth Amendment evil to which [the self-care provision] could possibly be congruent and proportional.” *Kazmier*, 225 F.3d at 529 (internal quotation marks omitted).

Indeed, at the time the FMLA was enacted, the data available to the Federal Government established that ninety-five percent of full-time state- and local-government employees were covered by paid sick leave plans and ninety-six percent of such employees likewise enjoyed short-term disability protection through sick leave or sick leave and sickness and accident insurance.

See Bureau of Labor Statistics, U.S. Department of Labor, *Employee Benefits in State and Local Governments*, 17-26 (1994) (surveying state and local government benefits as of 1992). Notably, a number of States provided personal medical leave benefits that functioned in ways similar to, and in several instances more generously than, the entitlement ultimately provided in the FMLA's self-care provision. For example, as Congress recognized, Connecticut had already enacted a 24-week family and medical leave law for all state employees, Maine had a similar law requiring state government to grant up to 8 weeks of unpaid personal medical leave within a two-year period, and Wisconsin required that state employees be allowed up to 2 weeks of general disability leave in a 12-month period. See H.R.REP. NO.101-28, pt. 1, at 17.⁸

8. See also, *e.g.*, ALASKA STAT. § 39.20.305 (West 1992) (employees may take leave up to 18 weeks every 2 years to care for the illness of a child, parent, spouse, or the illness of the employee); ARK. CODE § 21-4-214 (West 1987) (providing a "catastrophic leave program" for employees who are incapacitated due to a catastrophic illness); IDAHO CODE § 67-5333(6) (West 1981) ("If an absence for illness or injury extends beyond the sick leave accrued to the credit of the officer or employee, the employee may be granted leave without pay."); LA. REV. STAT. § 42:441-444 (West 1993) (employees who have exhausted all personally accrued leave may request leave from the pool leave account for a "personal emergency" that may include a catastrophic illness or serious injury of the employee); OHIO REV. CODE § 124.385 (West 1993) (providing that a disability leave program be established for public employees, including provisions for the allowance of disability leave due to illness or injury, and provisions for approving a leave of absence for medical reasons when an employee has exhausted all other leave).

And, at the time the FMLA was enacted, California, New York, New Jersey, Rhode Island, and Hawaii provided “temporary disability insurance” (“TDI”) programs to state employees. See Donna Lenhoff & Claudia Withers, *Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace*, 3 Am. U. J. Gender & L. 39, 53-54 (1994) (describing state TDI programs); see also Women’s Bureau, U.S. Department of Labor, *State Maternity/Family Leave Law*, 2-18 (1993). These TDI programs, under which a small percentage of employee salaries goes into an insurance fund from which an employee is paid if he or she becomes seriously ill, allow temporarily disabled public employees to continue to receive a salary during their recovery. Lenhoff & Withers, *supra*, at 53-54.

In short, far from remedying a pattern of unconstitutional conduct among the States concerning the availability of personal medical leave, Congress was actually creating its own substantive entitlement program, modeled on preexisting state self-care leave policies.

For these reasons, and particularly given Congress’s failure to identify any pattern of unconstitutional state conduct regarding discrimination against temporarily disabled workers and its related failure to identify *irrational* state conduct, Congress lacked authority

under Section 5 to abrogate state immunity in the self-care provision.⁹

C. Even Assuming the Self-Care Provision Is Designed To Address Gender-Based Discrimination, It Cannot Validly Abrogate State Immunity.

Even assuming that gender-based discrimination motivated Congress in enacting the self-care leave provision of the FMLA, it remains constitutionally invalid to the extent it purports to abrogate state sovereign immunity. The reason is simple: there is no evidence in the lengthy legislative history of the FMLA “establish[ing] any nexus between gender neutral medical leave for one’s own health conditions and the prevention of discrimination on the basis of gender *on the part of the states as employers.*” *Laro*, 259 F.3d at 13-14.

In this regard, Petitioner describes in some detail the nearly 8-year process leading to the enactment of

9. Even if Congress had identified a pattern of unconstitutionally discriminatory conduct by the States against workers with serious health conditions, the across-the-board FMLA remedy of 12 weeks per year of leave for a personal illness is too broad to satisfy *City of Boerne’s* strict congruence-and-proportionality test. *Chittister v. Dep’t of Cmty. & Econ. Dev.*, 226 F.3d 223, 229 (3d Cir. 2000) (“Unlike the Equal Protection Clause, which the FMLA is said to enforce, the FMLA does much more than require nondiscriminatory sick leave practices; it creates a substantive entitlement to sick leave. This requirement is disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act.” (citation and internal quotation marks omitted)).

the self-care provision of the FMLA. See Pet. Br. 37-51. Nonetheless, he cannot point to any evidence in the FMLA’s legislative history—which includes at least 18 House and Senate reports, numerous hearings before congressional committees and subcommittees, and substantial floor debate—that shows a pattern of gender-based discrimination by any State in the provision of personal medical leave. Petitioner’s inability to locate proof in the FMLA’s legislative history that any State discriminated on the basis of gender concerning personal medical leave is unsurprising, as nine federal circuits have likewise been unable to discover such evidence.

Prior to the Court’s decision in *Hibbs*, five circuits specifically addressing the issue had held that the enactment of the *self-care provision* of the FMLA did not abrogate the States’ immunity because the congressional record lacked the necessary findings of unconstitutional conduct by the States and because the remedy imposed by the provision does not meet the “congruence and proportionality” test. See, e.g., *Chittister*, 226 F.3d at 228-229 (“Notably absent is any finding concerning the existence, much less the prevalence, in public employment of personal sick leave practices that amounted to intentional gender discrimination in violation of the Equal Protection Clause. . . . Moreover, even if there were relevant findings or evidence, the FMLA provisions at issue here would not be congruent or proportional.”); *Hale*, 219 F.3d at 69 (“There is no evidence that this conferment of federally protected [self-care] leave is tailored to remedy sex-based employment discrimination. . . . Thus, we find that Congress did not have the authority

to abrogate the sovereign immunity of the states on claims arising under the [self-care provision] at issue here. Its attempt to do so was not congruent or proportional to the harms targeted by the Fourteenth Amendment.”¹⁰

And since *Hibbs* upheld the *family-care* provision of the FMLA as a valid abrogation of state immunity, seven circuits issued decisions either holding for the first time or reaffirming prior decisions that the *self-care* provision does not validly abrogate the States’ sovereign immunity. See, e.g., *Touvell*, 422 F.3d at 402 (“Congress adduced no evidence of a pattern of discrimination on the part of the states regarding leave for personal medical reasons sufficient to permit the abrogation of state sovereign immunity.”); *Brockman v. Wyo. Dep’t of Family Servs.*, 342 F.3d 1159, 1164-1165 (10th Cir. 2003) (“The legislative history does not, however, identify as the basis for subsection (D) a link

10. See also *Laro*, 259 F.3d at 16 (“[T]he personal medical leave provision of the FMLA does not exhibit a sufficient congruence to the prevention of unconstitutional state discrimination to validly abrogate the states’ Eleventh Amendment immunity.”); *Kazmier*, 225 F.3d at 528-529 (“In sum, subsection (D) prohibits the States from engaging in such a wide array of perfectly constitutional practices that we have difficulty conjuring up *any* unconstitutional conduct by the States to which that subsection’s proscriptions might possibly be proportional and congruent. . . . Without direct evidence of substantial unconstitutional discrimination by the States, there simply is no ‘Fourteenth Amendment evil’ to which subsection (D) could possibly be congruent and proportional.” (footnotes omitted)); *Garrett*, 193 F.3d at 1219 (“[W]e hold in this case that Congress did not have the authority to abrogate the sovereign immunity of the states on claims arising under the [self-care] provision at issue here.”).

[to] any pattern of discriminatory stereotyping on the part of the states as employers.”).¹¹

Because Congress identified no link between the self-care provision and any discriminatory practices by the States as employers, gender-based or otherwise, that provision cannot be understood as targeting unconstitutional behavior, and it likewise cannot be

11. See also *Banks v. Court of Common Pleas*, 342 F. App'x 818, 821 (3d Cir. 2009) (per curiam) (unpublished) (“In [*Chittister*] we ruled that Congress did not validly abrogate the states’ Eleventh Amendment immunity when it enacted provisions of the FMLA. Although the ‘family-care’ provisions of the FMLA were upheld by the Supreme Court in [*Hibbs*], private suits still may not be brought against states where the self-care provisions of the Act are implicated.”); *Nelson v. Univ. of Tex. at Dallas*, 535 F.3d 318, 321 (5th Cir. 2008) (“[W]e agree with the rationale of the Sixth, Seventh, and Tenth Circuits that the Supreme Court’s ruling in *Hibbs* applies only to subsection C. Therefore, this Court’s decision in *Kazmier* still remains the law of this circuit with respect to subsection D.”); *Batchelor v. S. Fla. Water Mgmt. Dist.*, 242 F. App'x 652, 653 (11th Cir. 2007) (per curiam) (unpublished) (“Our holding in *Garrett* that Congress is without authority to abrogate state sovereign immunity for claims arising under the self-care provision of the FMLA remains the law of this Circuit.”); *Miles v. Bellfontaine Habilitation Ctr.*, 481 F.3d 1106, 1107 (8th Cir. 2007) (per curiam) (“The district court properly dismissed with prejudice Miles’s FMLA claim, which was brought under FMLA’s self-care provisions. As an agency of the state of Missouri, the Center is entitled to Eleventh Amendment immunity from the claim.” (citations omitted)); *Toeller v. Wis. Dep’t of Corr.*, 461 F.3d 871, 879 (7th Cir. 2006) (“We know of no reason why women would be more likely to have [a short-term] medical problem than men. Furthermore, whether we know about it is not the point in the end: what counts is that we see nothing in either the text or the legislative history of the FMLA to indicate that Congress found this to be the case.”).

considered valid enforcement legislation congruent or proportional to the constitutional evil—gender discrimination—allegedly being prevented. Cf. *City of Boerne*, 521 U.S. at 520 (requiring congruence and proportionality).¹²

III. HIBBS DOES NOT ESTABLISH THAT THE SELF-CARE PROVISION VALIDLY ABROGATES THE STATES' IMMUNITY.

Recognizing the impossibility of establishing that the self-care provision itself meets the *City of Boerne* test, Petitioner argues that the validity of Congress's abrogation of state sovereign immunity through the self-care provision is analytically intertwined with the abrogation of immunity associated with the FMLA's three other original leave provisions. See, e.g., Pet. Br. 9-10, 13. According to Petitioner, the FMLA's four original leave provisions are like a "four-legged table," and the self-care provision—a "leg" that is necessary for the table to stand—is an integral part of a unitary statutory scheme abrogating the States' immunity from suit. See *id.* If Coleman were correct, *Hibbs* would be controlling here: the Court's holding that Congress validly abrogated the States' immunity under the family-care "leg" of the table would necessarily mean

12. Notably, the United States, well aware that the Court has granted certiorari to decide whether the self-care provision validly abrogates the States' sovereign immunity, has chosen not to participate in this case. This decision comports with the position it took in *Hibbs*, recognizing that "the difference [between the family-care and self-care provisions] matters." See Brief for the United States in Opposition at 7-8, *Hibbs*, 538 U.S. 721.

that it also validly abrogated the States' immunity under the self-care "leg."

But Petitioner is wrong. He incorrectly presumes that all of the FMLA's leave provisions address the same constitutional rights, and that proof in the congressional record of unconstitutional conduct regarding, for example, the provision of leave to care for sick family members, also establishes unconstitutional conduct regarding the provision of personal medical leave. It is clear, however, that the self-care provision addresses different constitutional rights than the family-care provision. The Court confirmed in *Hibbs* that the family-care provision addresses gender-based discrimination concerning leave to care for ill family members. 538 U.S. at 735. As demonstrated herein and in Respondents' Brief, see *supra* Part II.A; Resp. Br. 14-17, and as the circuits have overwhelmingly concluded, the self-care provision addresses concerns related to Congress's Commerce Clause power, particularly relieving economic burdens on temporarily disabled employees and their families, and concerns that such employees will suffer disability-based discrimination.

Likewise, the answer to the question whether Congress identified a history and pattern of unconstitutional state action involves independent inquiries as between the family-care and self-care provisions. Just as these two FMLA leave provisions address differing constitutional concerns, they also implicate distinct types of proof to establish a pattern of unconstitutional conduct on the part of the States. For example, evidence of a state policy that

unconstitutionally discriminated on the basis of gender regarding leave to care for an ill family member would provide no proof that the State also acted unconstitutionally regarding the provision of leave to its employees to care for personal medical conditions.

The Court recognized as much in *Hibbs*. In that case, contrary to Petitioner’s theory that the FMLA’s leave provisions must be analyzed as a unit regarding abrogation, the Court made clear that it would *not* address abrogation of the States’ immunity under the FMLA as a whole. Rather, in addressing the question whether the family-care provision validly abrogated the States’ immunity, the Court focused solely on the constitutional right protected by the family-care provision and the record of unconstitutional conduct relevant specifically to the availability of leave to care for seriously ill family members. See *Hibbs*, 538 U.S. at 729-737.¹³ The Court’s analysis and holding in *Hibbs*

13. For example, the Court initially observed that “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.” See *Hibbs*, 538 U.S. at 729 n.2 (emphasis added) (citation and internal quotation marks omitted). The Court went on to identify a history of gender-based discrimination against women regarding leave to care for ill family members that resulted in the “denial or curtailment of women’s employment opportunities [due to] the pervasive presumption that women are mothers first, and workers second.” *Id.* at 736 (citation and internal quotation marks omitted). The Court ultimately concluded that, given the heightened scrutiny to which gender discrimination is subject, the family-care provision at issue in *Hibbs* is congruent and proportional to the targeted violation: *i.e.*, gender-based

that money-damages suits could proceed against States under the family-care provision was likewise premised on conclusions that it connected exclusively to family-care leave, rather than the FMLA leave provisions *in toto*. *Id.* at 737 (“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”); see also *Tennessee v. Lane*, 541 U.S. 509, 519 (2004) (noting that in *Hibbs* the Court considered whether a state employee “could recover money damages against the State for its failure to comply with the family-care leave provision of the [FMLA]”).

The Court also rejected such an “all or nothing” approach to the abrogation of the States’ sovereign immunity regarding the Americans With Disabilities Act (“ADA”) provisions at issue in *Garrett* and *Lane*. In *Garrett*, the Court held that Title I of the ADA, which concerned employment discrimination against the disabled, was not a valid exercise of Congress’s Section 5 power because it was unsupported by a relevant history and pattern of constitutional violations. 531 U.S. at 368, 374. In *Lane*, the Court upheld the abrogation of the States’ immunity for claims made under Title II of the ADA related to access to the courts. 541 U.S. at 524-534.

In sum, Petitioner’s “all or nothing” approach to abrogation analysis fails to appreciate that the

discrimination by the States regarding family-care leave. *Id.* at 737.

congruence and proportionality test turns on the identification of pervasive unconstitutional conduct on the part of the States regarding the constitutional right targeted by Congress's remedial legislation.

IV. If *Hibbs* Is Controlling, It Should Be Reexamined and Overturned.

The validity of Congress's abrogation of the States' immunity in the self-care provision should be determined by applying the Court's congruence and proportionality test to the self-care provision itself, not to all of the FMLA's original leave provisions together as suggested by Petitioner. If the Court determines that Petitioner is correct, however, its decision in *Hibbs* controls the result in this case: the valid abrogation of the States' immunity as to the family-care provision must apply equally to all the FMLA's leave provisions. See *supra* Part III.

Under this circumstance, *Hibbs* should be reexamined and overturned. The Court has made clear that “*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Citizens United v. FEC*, 130 S. Ct. 876, 920 (2010) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). Nonetheless, the Court has also confirmed that *stare decisis* is “neither an inexorable command nor a mechanical formula of adherence to the latest decision,” *id.* (citations and internal quotation marks omitted), and this is especially true in constitutional cases, *id.*

Indeed, “if the precedent under consideration itself departed from the Court’s jurisprudence, returning to the intrinsically sounder doctrine established in prior cases may better serve the values of *stare decisis* than would following the more recently decided case inconsistent with the decisions that came before it.” *Id.* at 921 (citations and internal quotation marks omitted). Thus, “Abrogating the errant precedent, rather than reaffirming or extending it, might better preserve the law’s coherence and curtail the precedent’s disruptive effects.” *Id.*

Hibbs departed from the Court’s prior precedent concerning the abrogation of the States’ immunity from suit. Although amici States agree that “women historically have been subjected to conditions in which their employment opportunities are more limited than those available to men,” Congress addressed this problem by abrogating the States’ sovereign immunity in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). *Hibbs*, 538 U.S. at 745 (Kennedy, J., dissenting). *Hibbs* presented the question whether, despite Title VII and similar state laws, the States nonetheless continued to practice “widespread discrimination on the basis of gender in the provision of family leave benefits.” *Id.* at 745-746. If such a pattern of unconstitutionally discriminatory conduct on the part of the States were established, Congress could create a congruent and proportional remedy and abrogate the States’ immunity. *Id.* at 745.

But no such showing was made in *Hibbs*. The FMLA’s findings of purpose are “devoid of any discussion of the relevant evidence” of such

discrimination, and the evidence before Congress related to the discriminatory practices of the private sector, not the States as employers. *Id.* at 746. As Justice Kennedy’s dissent observed, “While the evidence of discrimination by private entities may be relevant, it does not, by itself, justify the abrogation of States’ sovereign immunity.” *Id.*

The Court’s conclusion that “even where state laws and policies were not facially discriminatory, they were applied in discriminatory ways,” *id.* at 732 (majority opinion), was equally flawed. This conclusion was premised on “the parental leave policies of Federal executive branch agencies,” not the States. *Id.* at 749 (Kennedy, J., dissenting) (quoting H.R. REP. NO. 103-8, pt. 2, at 10 (1993)). Although a pattern of discrimination by the Federal Government might support an inference that the States engaged in similar conduct, the Court failed to explain why such an inference was justified regarding the FMLA. *Id.*

Further, such an inference of unconstitutional conduct on the part of the States was particularly unwarranted because the States were actually “ahead of Congress in providing gender-neutral family leave benefits.” *Id.* at 750. The congressional record confirmed that, “[t]hirty States, the District of Columbia, and Puerto Rico had adopted some form of family-care leave in the years preceding the [FMLA’s] adoption.” *Id.* (citing H.R. REP. NO. 103-8, pt. 1, at 32-33; S. REP. NO. 103-3, at 20-21); see also *The Family and Medical Leave Act of 1991: Hearing on H.R. 2 Before the Subcomm. on Labor-Management Relations of the H. Comm. on Education and Labor*, 102d Cong. 4

(1991) (statement of Rep. Marge Roukema) (noting that the provision of family leave was “an issue which has picked up tremendous momentum in the States, with some 21 of them having some form of family or medical leave on the books”). Tellingly, Congress also recognized that “many States had implemented leave policies more generous than those envisioned by [the FMLA].” 538 U.S. at 750 (Kennedy, J., dissenting) (citing H.R. REP. NO. 103-8, pt. 1, at 50; S. REP. NO. 103-3, at 38). Although these state policies may have been imperfect or insufficiently generous, they certainly did not provide evidence that the States were engaged in unconstitutional discrimination. See *id.* at 751-52.

Given the lack of evidence of a widespread pattern of unconstitutional conduct by the States regarding the provision of family and medical leave, Congress was not responding with a congruent and proportional remedy to a documented course of unconstitutional conduct on the part of the States. Rather, Congress enacted an entitlement program of its own, relying at least in part on the States’ experience with similar entitlement programs. See, e.g., S. REP. NO. 103-3, at 12-14; *The Parental and Medical Leave Act of 1987: Hearings on S. 249 Before the Subcomm. on Children, Family, Drugs and Alcoholism of the S. Comm. on Labor and Human Resources*, 100th Cong., pt. 2, 194-195, 533-534 (1987). Arguably the most powerful evidence that Congress enacted an entitlement program, as opposed to a remedial one, is that the FMLA “does not even purport to bar discrimination in some leave programs the States do enact and administer.” *Hibbs*, 538 U.S. at 756 (Kennedy, J., dissenting). The FMLA allows a State, for example, to provide 24 weeks of family leave to women,

but only 12 weeks to men. *Id.* Such a state law likely would not survive scrutiny under the Equal Protection Clause or Title VII, but it would not violate the FMLA. See *id.*

In *City of Boerne* and subsequent cases preceding *Hibbs*, the Court made clear that Congress may not “enforce a constitutional right by changing what the right is.” *City of Boerne*, 521 U.S. at 519. The requirements established in *City of Boerne* that Congress identify a pervasive pattern of unconstitutional state conduct and that it create a remedy that is proportional and congruent to the violation, was “designed to separate permissible exercises of congressional power from instances where Congress seeks to enact a substantive entitlement under the guise of its § 5 authority.” *Hibbs*, 538 U.S. at 756 (Kennedy, J., dissenting). If the Court agrees with Petitioner that the validity of Congress’s abrogation of the States’ immunity in the self-care provision is analytically intertwined with the FMLA’s other leave provisions, and that *Hibbs* is therefore controlling here, *Hibbs* should be reexamined. And, because *Hibbs* departs substantially from the established doctrine set forth in *City of Boerne* for determining whether Congress has appropriately exercised its Section 5 authority, it should be overturned.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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