No. 10-1016

In The

Supreme Court of the United States

DANIEL COLEMAN,

Petitioner,

v.

MARYLAND COURT OF APPEALS, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the court of appeals correctly conclude – consistent with the unanimous view of the five other courts of appeals to consider the issue following this Court's decision in *Nevada Department of Human Resources v. Hibbs,* 538 U.S. 721 (2003) – that the States retain sovereign immunity from claims for money damages made under the "self-care" provision of the Family and Medical Leave Act, 29 U.S.C. § 2612(a)(1)(D)?

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STATEMENT OF THE CASE

1. Congress enacted the Family and Medical Leave Act of 1993 ("FMLA") "to promote the goal of equal employment opportunity for women and men." 29 U.S.C. § 2601(b)(5). 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." 29 U.S.C. § 2601(a)(5). Congress also found that "employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants . . . who are of that gender." 29 U.S.C. § 2601(a)(6). In response to the effects of past gender discrimination and stereotyping in employment that it had found, Congress acted to regulate employee leave policies "in a manner that . . . minimizes the potential for employment discrimination on the basis of sex" by ensuring that leave is available "on a gender-neutral basis." 29 U.S.C. § 2601(b)(4).

As originally enacted, the FMLA authorized qualified employees to take up to 12 weeks of unpaid leave annually in four circumstances, three of which concern caring for family members: bearing and caring for a child, *see* 29 U.S.C. § 2612(a)(1)(A), adopting or providing foster care for a child, *see* § 2612(a)(1)(B), and caring for a spouse, child, or parent with a serious health condition, *see* § 2612(a)(1)(C). The fourth circumstance, and the one

at issue here, applies when "a serious health condition . . . makes the employee unable to perform the functions" of his or her job. 29 U.S.C. § 2612(a)(1)(D).[1]

The FMLA creates a private right of action permitting an employee to sue an employer for injunctive relief or money damages if the employer has denied the employee rights afforded under the FMLA. *See* 29 U.S.C. §§ 2615(a), 2617(a). The Secretary of Labor may also conduct investigations and bring civil actions to enforce the FMLA. *See* 29 U.S.C. § 2617(b), (d).

2. Petitioner Daniel Coleman, an African-American male was employed by the Administrative Office of the Courts for the Maryland judiciary, where he was responsible for matters related to contract administration and procurement. Pet. App. 5. Respondents Frank Broccolina and Larry Jones were also employees there. Pet. App. 15. The third Respondent is Maryland's highest court, whose Chief Judge is responsible for supervising the administrative operations of the court system. *See* Md. Code Ann., Cts. & Jud. Proc. § 13-101.

In August 2007, Mr. Coleman was terminated from his employment. Pet. App. 3. Mr. Coleman alleges that his termination was preceded by an internal investigation begun in 2005, a reprimand in

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[1] More recently, Congress has amended the FMLA to authorize leave because of an exigency arising from a relative's service in the military. *See* 29 U.S.C. § 2612(a)(1)(E).

April 2007, and the Chief Judge's rejection of Mr. Coleman's appeal of that reprimand. Pet. App. 17 n.2. Mr. Coleman alleges that he sent Mr. Broccolina a sick-leave request for a personal illness on August 2, 2007, and that, on August 3, Mr. Broccolina contacted Mr. Coleman to inform him that he was being offered the choice of being terminated immediately or taking 30 days administrative leave and then resigning. Pet. App. 3, 16-17.

3. On September 19, 2008, Mr. Coleman initiated this action in the United States District Court for the District of Maryland. Pet. App. 3; J.A. 2. His complaint named the respondents as defendants and alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), and the FMLA; it also asserted a state-law defamation claim. Pet. App. 3-4 & n.1. Mr. Coleman alleged that he was fired because he requested sick leave and because he is black; he also alleged that Mr. Jones and Mr. Broccolina had falsely accused him of having abused his position to steer procurement contracts and that these accusations also played a role in his termination. Pet. App. 3. The complaint also alleged that the letter of reprimand he had received in April 2007 was issued because of his race. Pet. App. 7 n.2.

On the same day he filed this action in federal court, Mr. Coleman, represented by the same counsel, filed a complaint in the Circuit Court for Baltimore

City, in which he named the same defendants.[2] The two complaints contained 41 virtually identical paragraphs, advanced the same three causes of action, and requested the same six forms of relief. The allegations made in the state-court complaint that pertain to Mr. Coleman's FMLA claim (paragraphs 30-34) are identical to the corresponding paragraphs in the federal-court complaint (paragraphs 30-34). (Mr. Coleman later amended his complaint in federal court. The same five paragraphs are unchanged except that typographical errors were corrected. J.A. 26.)

The respondents moved to dismiss the complaint in both cases, and renewed their motion in the federal action after Mr. Coleman amended his complaint. On January 15, 2009, while the motion to dismiss Mr. Coleman's amended complaint was pending in federal court, the Circuit Court for Baltimore City entered an order granting the respondents' (unopposed) motion in state court, and dismissed his claims on the merits "with prejudice." Mr. Coleman did not appeal from the state-court judgment. The federal district court

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[2] Mr. Coleman's state-court action was docketed as No. 24-C-08-005975. The docket is available through the Maryland Judiciary Case Search website, http://casesearch.courts.state.md.us/inquiry/inquiry-index.jsp. The court filings in the state-court action are not a part of the record in this case. Copies of the official docket, Mr. Coleman's complaint, and the State court's order of final judgment have been provided to counsel of record for Mr. Coleman in this Court, who did not represent him in either of the trial courts.

granted the respondents' motion and dismissed the case on May 7, 2009. Pet. App. 20.

4. In granting the respondents' Rule 12(b) motion, the district court held that Mr. Coleman had failed to state a claim under Title VII, because his complaint was "devoid of any facts from which to infer race-based discrimination." Pet. App. 16. With respect to the FMLA claim, the court determined that the leave that Mr. Coleman had sought was "'self-care' because Mr. Coleman was seeking leave to care for his own illness, rather than 'family-care' to care for a family member." Pet. App. 16. The court held that this claim under the self-care provision of the FMLA, 29 U.S.C. § 2612(a)(1)(D), was barred by the State's sovereign immunity. Pet. App. 17. The court observed that this holding was in accord with the "universal agreement of the Federal Courts of Appeals that have considered the issue" all of which had concluded that Congress had not "abrogated state sovereign immunity with respect to the FMLA's self-care provision." Pet. App. 17. The district court also dismissed Mr. Coleman's state-law defamation claim. Pet. App. 19-20.

Mr. Coleman appealed the district court's dismissal of his Title VII and FMLA claims, and the United States Court of Appeals for the Fourth Circuit affirmed. The court of appeals agreed with the district court that Mr. Coleman's complaint did not "establish a plausible basis for believing" that Mr. Coleman was treated differently from similarly situated employees or that race was the true basis for his termination.

Pet. App. 6-7. The court therefore affirmed the dismissal of Mr. Coleman's Title VII claim.

The court of appeals also agreed that Mr. Coleman's self-care claim under the FMLA was barred by the State's sovereign immunity. In analyzing this issue, the court declined to rely on circuit precedent that had held that the Eleventh Amendment bar applies to all FMLA claims, because the court recognized that the reasoning of that 2001 decision is "no longer valid in light of" this Court's decision in *Nevada Department of Human Resources v. Hibbs,* 538 U.S. 721 (2003). Pet. App. 11 n.4. Accordingly, the court of appeals proceeded to examine the Eleventh Amendment question by applying the *Hibbs* analytical framework to the FMLA's self-care provision. Pet. App. 8-14.

The court of appeals discussed the standards applied in determining whether an act of Congress has validly abrogated a state's immunity from private suits for money damages. Pet. App. 8-9. The court then discussed this Court's analysis in *Hibbs.* Pet. App. 10-11. The court of appeals observed that "*Hibbs* concerned only [the FMLA's] family-care provision," 29 U.S.C. § 2612(a)(1)(C), and its "gender-related nature," and therefore "did not discuss whether Congress validly abrogated states' immunity with regard to the self-care provision, § 2612(a)(1)(D)." Pet. App. 11. Examining the legislative history of the statute, the court of appeals observed that "preventing gender discrimination was not a significant motivation for Congress in including the self-care

provision"; rather, that provision had been enacted to "alleviate the economic effect" of job loss due to sickness and to "protect employees from being discriminated against because of their serious health problems." Pet. App. 12. The court of appeals also observed that the legislative record did not establish that "states as employers [had been] discriminating on the basis of gender in granting leave for personal reasons." Pet. App. 12. Based on these observations, the court concluded that the self-care provision "cannot pass the congruence-and-proportionality test" that this Court has articulated in its cases addressing congressional authority, under § 5 of the Fourteenth Amendment, to abrogate the states' sovereign immunity. Pet. App. 12.

REASONS FOR DENYING THE PETITION

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted. Moreover, this case provides a poor vehicle for addressing the question presented, for two reasons – the factual record was not developed below, and a state court's final judgment against Mr. Coleman on the claim at issue here prevents him from obtaining any meaningful relief from a favorable decision by this Court.

I. The Circuit Court Holdings Are Unanimous on the Issue Presented Here.

As Mr. Coleman acknowledges, Pet. 9, six circuit courts of appeals have addressed the precise question at issue here since *Hibbs* was decided in 2001, and each of them has reached the same conclusion. *See Coleman v. Maryland Court of Appeals,* 626 F.3d 187 (4th Cir. 2010); *Nelson v. University of Texas,* 535 F.3d 318 (5th Cir. 2008); *Miles v. Bellfontaine Habilitation Ctr.,* 481 F.3d 1106 (8th Cir. 2007); *Toeller v. Wisconsin Dep't of Corr.,* 461 F.3d 871 (7th Cir. 2006); *Touvell v. Ohio Dep't of Mental Retardation & Developmental Disabilities,* 422 F.3d 392 (6th Cir. 2005), *cert. denied,* 546 U.S. 1173 (2006); *Brockman v. Wyoming Dep't of Family Servs.,* 342 F.3d 1159 (10th Cir. 2003), *cert. denied,* 540 U.S. 1219 (2004). Thus, it is plainly unnecessary for this Court to grant review in order to resolve any split in the circuits. *See* Sup. Ct. Rule 10(a).

Mr. Coleman argues, however, that this "appearance of unanimity . . . masks the closeness and importance of the issue." Pet. 9. In support of this contention, Mr. Coleman points to statements by some of the circuit courts to the effect that the argument Mr. Coleman advances here (and that each of those courts rejected in unanimous decisions) is "colorable" or presents a "close question." Pet. 11. The mere use of those common appellate terms of art does not, however, signal that a question is worthy of this Court's review. The courts of appeals regularly, and capably, evaluate colorable arguments and decide close questions. When six of those courts, in

unanimous panel decisions, all resolve an issue the same way, there is no important division of authority that calls for this Court to step in and establish uniformity.

Mr. Coleman also criticizes the depth of analysis employed by these courts, by suggesting that the mounting consensus is the result of courts simply following the lead of their sister circuits or that some courts have merely adhered to their pre-*Hibbs* circuit precedent. Pet. 12-13, 14-17. Neither criticism can fairly be directed at the Fourth Circuit's decision here.

First, that court expressly declined to rely on the reasoning of its pre-*Hibbs* decision in *Lizzi v. Alexander,* 255 F.3d 128 (4th Cir. 2001), because it recognized that "the opinion's rationale was not specific to the self-care provision" and its "analysis is no longer valid in light of *Hibbs.*" Pet. App. 11 n.4. The court then went on to perform an analysis that was specific to the self-care provision and that followed the analytical framework set forth in *Hibbs.* Pet. App. 10-12.

Second, although the Fourth Circuit noted that the conclusion it had reached by applying the *Hibbs* analysis was consistent with "each of the four circuits to consider the issue," Pet. App. 13-14,[3] it is not true that the Fourth Circuit failed to conduct an

[3] The Court of Appeals omitted from its count the Eighth Circuit, a fifth court of appeals to reach the same conclusion following *Hibbs.*

"independent analysis," Pet. 13. The court announced it was joining the other circuits only after explaining the basis for its own conclusion.[4]

Finally, there is nothing remarkable or disturbing about one court finding another court's reasoning persuasive, particularly when that reasoning properly applies the "congruence and proportionality" standard this Court has prescribed for evaluating when Congress has validly abrogated the states' sovereign immunity, *see City of Boerne v. Flores,* 521 U.S. 507, 520 (1997), and when that reasoning tracks the application of those standards by this Court in evaluating a different provision of the same statute, as it did in *Hibbs,* 538 U.S. at 728.

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[4] The court of appeals' careful analysis is "independent" in a further respect. Mr. Coleman's brief in that court devoted approximately two pages to his FMLA argument, cited only *Hibbs* as support for his position, and did not acknowledge the decisions of other courts that contradicted his assertion that "[t]here is no distinction which the lower court can cite to indicate that the self-care provision of FMLA is to be treated differently from the family-leave provision." Brief of Appellant (4th Cir. No. 09-1582) at 18.

II. The Decision Below Does Not Conflict with this Court's Precedent, the Decision Is Correct, and There Is No Need to Provide Further Guidance to Lower Courts or Litigants.

A. The Court of Appeals Analyzed the Issue Presented Here in Conformity with this Court's Precedents, and its Decision Is Correct on the Merits.

Mr. Coleman does not assert that the court of appeals decided this case in a way that directly "conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Rather, he argues that this Court's holding in *Hibbs,* which was expressly limited to the question of whether the FMLA's family-care provisions validly abrogated the states' sovereign immunity, should be extended to the very different question of whether the self-care provision of the FMLA likewise subjects the states to suits for money damages. Although *Hibbs* did not address the question presented here, it did supply the analytical framework for answering that question. The court of appeals applied that analytical framework, and it did so correctly.

1. As this Court did in *Hibbs,* 538 U.S. at 726-28, the court of appeals began by reviewing the standards, established in this Court's precedents, that courts are to use in evaluating whether a congressional enactment validly abrogates the states' sovereign immunity, Pet. App. 8-9. As this Court did, 538 U.S. at 728, the court of appeals concluded that the congressional enactment would have to be shown

to address an identified constitutional violation by creating a remedy that exhibits "congruence and proportionality" under the test set forth in *City of Boerne,* 521 U.S. at 520, Pet. App. 9, 12-13. In applying that test, this Court examined the legislative record to determine whether the enactment was aimed at a constitutional violation, and, if so, whether Congress "had evidence of a pattern of violations on the part of the States in this area," *Hibbs,* 528 U.S. at 729-32; the court of appeals in this case did the same, Pet. App. 12.

This Court held in *Hibbs* that the family-leave provision addressed a valid Fourteenth Amendment objective in combating gender discrimination and that Congress had compiled a record of states engaging in that discrimination as employers. *See* 538 U.S. at 735-36. The Court further determined that the remedy chosen by Congress was an appropriate one, narrowly targeted to redress the constitutional violations that Congress had identified. *See id.* at 740. The court of appeals, applying the same analysis, found that the self-care provision was not intended to address gender discrimination and that there was no record of discrimination in public employers' practices regarding medical leave. Pet. App. 12. Accordingly, the court of appeals concluded that the self-care provision could not "pass the congruence-and-proportionality test." Pet. App. 12.

2. Although the same analysis used in *Hibbs* resulted in a different outcome in this case, both outcomes are correct. The *Hibbs* analysis yielded a

different outcome here simply because the court of appeals was analyzing a provision that differs in material respects from the one this Court analyzed in *Hibbs*. Mr. Coleman does not argue that granting unpaid leave to employees for their own medical needs furthers a valid Fourteenth Amendment objective; nor does he point to any part of the legislative record to show that the self-care provision was targeted at a constitutional violation that is examined under heightened scrutiny; nor does he argue that the court of appeals overlooked portions of the legislative record demonstrating that States discriminated against their employees in the granting of medical leave (either along gender lines or as part of a "widespread pattern" of irrational discrimination on other lines, *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 90 (2000)); nor, finally, does he explain how the self-care provision would remedy any problem of discrimination.

Mr. Coleman's objection to the outcome in his case, then, is that he believes the *Hibbs* analysis should not have been undertaken at all. He is therefore "left to argue," as the court of appeals observed, that the question of abrogation can be asked only by considering the FMLA "as a whole rather than considering the self-care provision individually." Pet. App. 13. The court of appeals responded to that argument by stating, "we know of no basis for adopting such an undifferentiated analysis," Pet. App. 13,

and indeed there is no basis.[5] In *Hibbs,* this Court examined the family-care provision individually, not the FMLA as a whole. And this Court has elsewhere applied the same abrogation analysis to different parts of the same statute, while reaching different conclusions, in determining whether Title I and Title II of the Americans with Disabilities Act ("ADA") abrogate state sovereign immunity. *Compare Tennessee v. Lane,* 541 U.S. 509 (2004), *with Board of Trustees of the Univ. of Alabama v. Garrett,* 531 U.S. 356 (2001); *see also Lane,* 541 U.S. at 530-31 ("[N]othing in our case law requires us to consider Title II" of the ADA "as an undifferentiated whole.").

Congress should not be inhibited from including in the same statute provisions authorized by Congress's Commerce Power and provisions authorized by its power under § 5 of the Fourteenth Amendment.

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[5] The only authority cited by Mr. Coleman for the proposition that "the Constitution does not require point-by-point parsing of the legislative history to determine whether section 5 statutes are congruent and proportional," Pet. 22 n.10, is *Maitland v. University of Minnesota,* 260 F.3d 959 (8th Cir. 2001). There, the Eighth Circuit rejected the contention that, although the Eleventh Amendment does not bar Title VII sex-discrimination actions brought by women, a separate congruence-and-proportionality test must be undertaken to determine whether the Eleventh Amendment bar has been removed with respect to Title VII claims brought by men. *See* 260 F.3d at 965. The Eighth Circuit appears unwilling to extend this "anti-parsing" principle as far as Mr. Coleman urges, in view of that court's decision holding that the Eleventh Amendment bars self-care claims, but not family-care claims, under the FMLA. *See Miles,* 481 F.3d at 1107.

That is what it did here. *See* S. Rep. No. 103-3, at 16 (1993) (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"); H.R. Rep. No. 103-8, pt. 1, at 29 (1993) (same). When Congress does draw on both powers for different provisions of a statute, the provision supported by the Commerce Power alone will not serve as a basis for abrogating state sovereign immunity, *see Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 55 (1996), whereas the provision supported by § 5 of the Fourteenth Amendment will serve as a basis for abrogation, if the congruence-and-proportionality test is met. The self-care provision of the FMLA belongs in the first category, whereas the family-care provision belongs in the second. That is the outcome of the decision by the court of appeals below, and it is correct.

B. Review by this Court is Unnecessary to Remove any Confusion or Uncertainty Surrounding the Issue Presented Here.

1. Mr. Coleman's petition rests on the unfounded assertion that, "[f]ollowing *Hibbs,* confusion has developed" concerning the analysis to be applied in determining whether a particular provision of a congressional enactment serves to abrogate the states' sovereign immunity. Pet. 18. On the contrary, the unanimity among the courts of appeals demonstrates that this Court has provided adequate

guidance to direct lower courts' application of the "congruence and proportionality" test. Those courts have employed the analytical approach established by this Court's decisions in *Hibbs* and other cases involving congressional abrogation of Eleventh Amendment immunity.

Mr. Coleman points to only two cases that he claims have taken a view supporting his position, by "recogniz[ing] that if the legislative record supports abrogation generally, then it applies to the statute as a whole and does not require an explanation supporting each individual subpart." The first of these cases is the unpublished decision of the Fourth Circuit in *Montgomery v. Maryland,* 72 Fed. Appx. 17 (4th Cir. 2003) (*per curiam*). That decision lends no support to Mr. Coleman's argument. First, the court *dismissed* the FMLA claim, and the statement made as dicta, on which Mr. Coleman relies, refers only to an "FMLA claim," without even noting that it was a self-care claim.[6] Second, the court's implicit assumption that *Hibbs* resolved the scope of Congress's abrogation of Eleventh Amendment immunity for all claims under the FMLA is unaccompanied by any analysis. Finally, and most importantly, the case in which the Fourth Circuit did analyze that question and that establishes the rule of decision for cases in that circuit is *this* case, which rejected Mr. Coleman's argument.

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[6] The self-care nature of the claim can be discerned only by consulting an earlier opinion in that case. *See Montgomery v. Maryland,* 266 F.3d 334, 336 (4th Cir. 2001).

The second case that Mr. Coleman cites, to support his theory that congruence and proportionality need only be measured for one part of a Congressional enactment to support abrogation of the states' sovereign immunity for all parts of the statute, is a decision of an Iowa intermediate appellate court, *Lee v. State,* 765 N.W.2d 607 (Iowa Ct. App. 2009) (table), which also is unpublished and therefore, under that State's rules, does "not constitute controlling authority," Iowa R. App. P. 6.904(c). Moreover, as Mr. Coleman acknowledges, that case is now pending on appeal before the Iowa Supreme Court. Pet. 22 n.9. If Iowa's highest court departs from the consensus of the federal courts of appeals, that case may be a candidate for review by this Court. *See* Sup. Ct. Rule 10(b). This case is not.

2. Mr. Coleman perceives confusion not only in the lower courts, but in what he describes as the "conflicting positions taken by the United States on this issue." Pet. 23. Mr. Coleman's perception in this regard, too, is mistaken.

As an initial matter, this Court's role is to review lower-court judgments, not to straighten out inconsistent positions taken by a litigant, even one as important as the United States; the responsibility to ensure uniformity in the federal government's litigation positions is an Executive Branch function. Moreover, there is no basis for suggesting that the United States' performance of that function has lacked either direction or consistency. Indeed, the United States has been thoroughly consistent in its position on the scope of abrogation effected by Congress's enactment

of the FMLA since this Court's decision in *Hibbs,* and even before.

Since 2001, the position of the United States on the question presented in the petition has been consistent not only with this Court's subsequent analysis in *Hibbs*, but also with the unanimous view of the courts of appeals that have considered the issue after *Hibbs*, and – most importantly – with the holdings of both lower courts in this case. The steadfast position of the United States is that Congress abrogated Eleventh Amendment immunity with respect to claims that are made under the family and parental leave provisions of the FMLA, but that Congress did not abrogate the States' immunity with respect to claims, like Mr. Coleman's, that are made under the self-care leave provision of the FMLA.

As Mr. Coleman acknowledges, Pet. 26-27, the Solicitor General informed Congress in 2001 that, in light of this Court's decision in *Garrett* earlier that year, the United States had "no sound basis to continue defending the abrogation of Eleventh Amendment immunity in . . . medical-leave cases" under the FMLA. Pet. App. 23. The Solicitor General's letter explained that the United States viewed Congress's objective in enacting the self-care provision to be "protecting against discrimination on the basis of temporary disability," and that it viewed the pursuit of that objective as "an appropriate exercise of Congress's Commerce Clause Power." Pet. App. 22-23. The letter emphasized, however, that the government would continue to defend abrogation of Eleventh

Amendment immunity with respect to the family-care provisions, because Congress's enactment of those provisions was an appropriate exercise of its powers under § 5 of the Fourteenth Amendment. Pet. App. 23.

The United States adhered to this view before this Court in *Hibbs* five months later. In its brief in opposition, the United States explained that the apparent division of authority in the lower courts concerning whether the FMLA validly abrogates state sovereign immunity was largely explained by the fact that some cases involved the self-care provision while others, including the *Hibbs* case, involved the family-care provisions. Brief for the United States in Opposition (No. 01-1368) (May 2002), at 7-8. As the United States emphasized then, "the difference matters." *Id.* at 8. The United States explained that the question of Congress's authority to enact the family medical leave provision and the sick leave provision *present distinct constitutional questions, the analysis of which should not be intertwined.*" *Id.* at 10 n.3 (emphasis added).

In its brief on the merits in *Hibbs,* the United States continued to observe this distinction between the family-care and self-care provisions of the FMLA. Throughout the brief, the United States confined its arguments in defense of abrogation to the family-care provision, *see* Brief for the United States (No. 01-1368) (Oct. 2002), just as this Court confined its analysis to that provision when it decided *Hibbs.*

Mr. Coleman's suggestion that "*Hibbs* represents a change in circumstances substantial enough to warrant a policy review by the United States," Pet. 27, is perplexing, because in *Hibbs* this Court *vindicated* the policy position advanced by the United States. The only evidence Mr. Coleman can muster to support his claim that "the United States has taken inconsistent positions on the issue," Pet. 25, consists of two briefs the government filed in lower courts before *Hibbs*: the first was filed in March 2001, before the Solicitor General's December 2001 letter to Congress, and the second was filed in a case involving the family-care provision (although Mr. Coleman states that "much of the government's brief was non-specific"). Pet. 25-26. Thus, there is no support for the suggestion that the United States is uncertain of its position on this issue. Since *Hibbs,* the government has not veered from the position announced by the Solicitor General in December 2001: it is appropriate to analyze the self-care and family-care provisions as separate and distinct for purposes of determining whether Congress validly abrogated the states' sovereign immunity from suits for money damages. That is precisely the approach taken by the court of appeals in this case, and it did so correctly.

III. This Case Provides a Poor Vehicle for Certiorari Review.

Even if the question presented by the petition were otherwise worthy of this Court's discretionary

review, this case is not a suitable vehicle for that review.

First, unlike this case, another case might present itself on appeal with a more fully developed factual record and provide context that would aid the Court's consideration of the legal issues presented. Mr. Coleman's claim did not proceed past the respondents' successful invocation of sovereign immunity at the pleading stage. Consequently, the factual record is limited to the untested allegations made in Mr. Coleman's complaint (which, with respect to the FMLA claim at issue here, consists principally of five spare factual averments). That factual deficit should not exist in all, or even most, cases involving an alleged violation of the self-care provision of the FMLA. Mr. Coleman did not pursue injunctive relief under *Ex parte Young,* 209 U.S. 123 (1908), which creates an exception to the doctrine of Eleventh Amendment immunity for injunctive-relief claims against state officials.

Unlike Mr. Coleman, other plaintiffs will seek money damages while simultaneously invoking the *Ex parte Young* exception to pursue injunctive relief. *See, e.g., Nelson,* 535 F.3d at 321, 324 (noting Eleventh Amendment bar to self-care claim against official in his official capacity, but authorizing injunctive claim for reinstatement under *Ex parte Young*). In a case seeking injunctive relief under this theory, if the self-care claim is meritorious, the case will proceed past the pleading stage to summary judgment or trial. Thus, even if, as Mr. Coleman predicts, Pet. 17,

the courts continue to decide the question presented here as the lower courts in this case did, the merits of other litigants' claims will be decided on a factual record.

A second factor militating against review is that, even if this Court resolved the question presented by Mr. Coleman's petition in his favor, it would afford him no relief. The futility of his appeal in this action is foreordained, because he brought the same FMLA self-care claim against the respondents in State court, where it was dismissed on the merits with prejudice. Mr. Coleman did not appeal from that judgment, which was entered before the federal district court had ruled on the respondent's pending motion to dismiss the claims in that court. As a result, Mr. Coleman's attempt to obtain review by this Court will avail him nothing.

A ruling by this Court in Mr. Coleman's favor on the merits would result in a remand to the district court. That court would be required to "give the same preclusive effect to [the] state-court judgment" against Mr. Coleman that a Maryland court would give. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 293 (2005) (quoting *Parsons Steel, Inc. v. First Alabama Bank,* 474 U.S. 518, 523 (1986)). Under the Maryland *res judicata* principles that would apply, Mr. Coleman's claim would be barred, *see Laurel Sand & Gravel, Inc. v. Wilson,* 519 F.3d 156, 161-62 (4th Cir. 2008) (citing *Anne Arundel*

County Bd. of Educ. v. Norville, 390 Md. 93, 107-08 (2005)).[7] Thus, a decision by this Court reversing the lower courts' rulings would not alter the legal relationship between the parties. In other words, Mr. Coleman's petition asks this Court to revive a claim that is long past the point of resuscitation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 31, 2011

[7] Because the respondents' Rule 12(b) motion was successful, they were not required to file an answer to the complaint. *See* Fed. R. Civ. P. 12(a)(4). Had the motion been denied, the respondents would have been able to assert in their answer a claim-preclusion defense based on the state-court judgment that had been entered while the federal-court motion was pending. *See* Fed. R. Civ. P. 8(c)(1) (listing *res judicata* as defense to be raised in answer).

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