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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In passing the Family and Medical Leave Act, as the Court recognized in *Nevada Department of Human Resources v. Hibbs,* Congress intended to eliminate gender discrimination in the granting of sick leave. Its purpose and findings are supported by the legislative record. The question presented for review is:

Whether Congress constitutionally abrogated states' Eleventh Amendment immunity when it passed the self-care leave 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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PETITION FOR WRIT OF CERTIORARI

Petitioner, Daniel Coleman, respectfully requests that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit, entered in this case on November 10, 2010.

OPINIONS BELOW

The November 10, 2010, opinion of the United States Court of Appeals for the Fourth Circuit is published at *Coleman v. Maryland Court of Appeals*, 626 F.3d 187 (4th Cir. 2010); App. 1-14. The May 7, 2009, order granting Maryland Court of Appeals' Motion to Dismiss Plaintiff's Amended Complaint is unpublished. App. 15-20.

STATEMENT OF JURISDICTION

The Fourth Circuit Court of Appeals entered its final judgment on November 10, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

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

The Fourteenth Amendment provides, in pertinent part:

> Section 1. No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have 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. 29 U.S.C. § 2612(a)(1). The pertinent provisions provide:

> (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.

STATEMENT UNDER SUP. CT. R. 29.4(b)

Because this proceeding draws into question the constitutionality of the self-care provision of the Family and Medical Leave Act of 1993, 29 U.S.C. § 2612(a)(1)(D), an Act of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. § 2403(a) may be applicable.

The record in this case does not reflect that either the United States District Court for the District of Maryland or the United States Court of Appeals for the Fourth Circuit certified to the Attorney General the fact that the constitutionality of such an Act of Congress has been drawn into question.

In *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), the Solicitor General's office filed a Brief in Opposition stating that it was "lodging with the Court copies of letters from the Solicitor General notifying Congress of his decision to decline further defense of the abrogation of Eleventh Amendment immunity for claims brought under 29 U.S.C. 2612(a)(1)(D)." Brief for the United States in Opposition, *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (No. 01-1368), 2002 WL 32135355, at *8 n.2. The letters attached to this lodging explained that this would continue to be the Solicitor General's position "absent changed circumstances." This issue is discussed in more detail at pages 24 to 27 of the Petition.

STATEMENT OF THE CASE

I. Overview

The United States Court of Appeals for the Fourth Circuit held that the self-care provision of the Family and Medical Leave Act (FMLA) does not validly abrogate Eleventh Amendment immunity. This decision directly contradicts Congress' expressed

purpose. In the FMLA, Congress intended to act in a manner consistent with 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).

II. Mr. Coleman's Termination

Daniel Coleman was an employee of the Maryland Court of Appeals for six years. He served as the executive director of procurement and contract administration for four of the six years. App. 2. Mr. Coleman satisfied all performance standards and received every incremental raise to which he was entitled during his time at the court. App. 3. Mr. Coleman received no reprimands or negative reviews in his six years of employment, except for an unexplained letter of reprimand discussed in more detail below, which he received for performing his assigned duties. *Id.*

In October 2005, as part of his job duties, Mr. Coleman initiated an investigation of two employees under his supervision. One of these employees, Larry Jones, was related to one of Mr. Coleman's supervisors, Faye Gaskins. App. 2-3. Mr. Coleman found evidence of misconduct on Mr. Jones' part, resulting in a five-day suspension of Mr. Jones. App. 3. Ms.

Gaskins and Frank Broccolina, another one of Mr. Coleman's supervisors, intervened in the investigation and reduced Mr. Jones' suspension to only one day. *Id.* "In retaliation for Coleman's investigation, Jones falsely alleged that Coleman had steered contracts to vendors in which Coleman had an interest." *Id.* Mr. Broccolina investigated the accusations against Mr. Coleman. App. 3. Despite finding no evidence of wrongdoing, Mr. Broccolina perpetuated the accusations against Mr. Coleman with knowledge that they were false. *Id.*

Following the suspension of Mr. Jones and despite the fact that Mr. Broccolina could find no wrongdoing by Mr. Coleman, Ms. Gaskins then issued Mr. Coleman a reprimand. *Id.* In April 2007, Mr. Coleman unsuccessfully appealed the reprimand. *Id.* In August 2007, Mr. Coleman sent a letter to Mr. Broccolina requesting sick-leave for a documented medical condition. *Id.* This request was not only denied, but Mr. Broccolina replied with an ultimatum for Mr. Coleman: resign or be terminated. *Id.* Mr. Coleman was then fired. *Id.*

III. Proceedings Below

After exhausting his administrative remedies, Mr. Coleman filed suit against the Maryland Court of Appeals, Mr. Broccolina, and Mr. Jones. App. 3. Mr. Coleman alleged race discrimination in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2(a)), unlawful retaliation in violation of 42

U.S.C. § 2000e-3(a), and a violation of the FMLA's self-care provision, 29 U.S.C. § 2612(a)(1)(D). App. 4. The District Court granted the defendants' Rule 12(b)(6) motion to dismiss as to the Title VII claims for failure to state a claim upon which relief can be granted. The District Court also dismissed Mr. Coleman's FMLA claim, holding that the FMLA's self-care provisions did not validly abrogate Eleventh Amendment immunity. App. 17.

The Fourth Circuit affirmed the District Court on all counts. App. 14. The court affirmed the Title VII dismissals because, in the Fourth Circuit's opinion, Mr. Coleman's complaint did not sufficiently allege race discrimination, or any protected Title VII activity for purposes of retaliation. App. 6-7.

In addressing the Eleventh Amendment immunity issue, the Fourth Circuit affirmed the dismissal of Mr. Coleman's claim, finding that Congress failed to validly abrogate Eleventh Amendment immunity for the FMLA's self-care provision. The Fourth Circuit noted that in a prior case it had held that "Congress exceeded its authority in applying the FMLA to the States." App. 11. In light of *Hibbs*, the court in *Coleman* went on to recognize that its prior "analysis [was] no longer valid." App. 12. Despite this acknowledgment, the Fourth Circuit again determined that the self-care provision of the FMLA was not a valid exercise of Congress' power under section 5 of the Fourteenth Amendment. The Fourth Circuit primarily relied on cases from other circuits. These

decisions had characterized the issue as "close" or presenting a "colorable" claim for abrogation of the States' Eleventh Amendment immunity. App. 13.

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS FOLLOWING *HIBBS* DEMONSTRATE THAT THE ISSUE OF WHETHER THE SELF-CARE PROVISION IS A VALID ABROGATION OF ELEVENTH AMENDMENT IMMUNITY IS ONE THIS COURT SHOULD RESOLVE.

A. Introduction.

Congress enacted the FMLA, at least in part, to combat gender-related discrimination in the workplace. 29 U.S.C. § 2601(b); *Hibbs,* 538 U.S. at 728. The FMLA enables employees to take twelve weeks of unpaid leave "[b]ecause 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)(1)(D). In *Hibbs,* the Court held that Congress validly abrogated Eleventh Amendment immunity with regard to the FMLA's family-care provision (29 U.S.C. § 2612(a)(1)(C)). The Court reasoned that the purpose of the FMLA is to prevent gender-based discrimination in the workplace, and the family-care provision is both "congruent and proportional" to this end. *Hibbs*, 538 U.S. at 728. The *Hibbs* Court found that Congress effectively utilized its powers under the Fourteenth Amendment to abrogate Eleventh

Amendment immunity. *Id.* at 735. *Hibbs*, however, did not directly address whether the self-care provision was a valid abrogation of the states' Eleventh Amendment immunity.

Since *Hibbs*, six circuits have held that Congress exceeded its authority under the Fourteenth Amendment when it passed the self-care provision of the FMLA.[1] This appearance of unanimity, however, masks the closeness and importance of the issue.[2] The Court has repeatedly demonstrated that the decision to grant certiorari is not merely a mathematic exercise of counting the number of circuits on one side of

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[1] *Coleman v. Maryland Court of Appeals*, 626 F.3d 187 (4th Cir. 2010); *Nelson v. Univ. of Tex. at Dallas*, 535 F.3d 318 (5th Cir. 2008); *Touvell v. Ohio Dep't of Mental Retardation & Dev. Disabilities*, 422 F.3d 392 (6th Cir. 2005); *Toeller v. Wisc. Dep't of Corr.*, 461 F.3d 871 (7th Cir. 2006); *Miles v. Bellfontaine Habilitation Ctr.*, 481 F.3d 1106 (8th Cir. 2007); *Brockman v. Wyo. Dep't of Family Servs.*, 342 F.3d 1159 (10th Cir. 2003). Additionally, three state courts have found no valid abrogation of sovereign immunity. *See, e.g.*, *UTEP v. Herrera*, 322 S.W.3d 192 (Tex. 2010); *Nicholas v. Att'y Gen.*, 168 P.3d 809 (Utah 2007); *Lizzi v. Wash. Metro. Area Transit Auth.*, 862 A.2d 1017 (Md. 2004).

[2] *See Montgomery v. Maryland*, 72 F. App'x. 17, 19 (4th Cir. 2003) (per curiam) (reasoning that sovereign immunity is waived in FMLA actions); *McKlintic v. 36th Judicial Circuit Court*, 508 F.3d 875, 878 (8th Cir. 2007) (Bright J., concurring) (reasoning that an argument can be made that the self-care provision validly waives sovereign immunity). *Lee v. State*, 765 N.W.2d 607 (table decision), *appeal docketed*, No. 07-1879 (Iowa Ct. App. 2009) (holding that the self-care provision was a valid abrogation of sovereign immunity).

an issue.[3] In *Hibbs*, the Court granted certiorari despite the fact that seven circuits had already held the FMLA was not enacted pursuant to a valid exercise of Congress' power. One of the specified considerations of whether a grant of certiorari is appropriate is where "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). This is especially true when a court of appeals has invalidated an act of Congress, as the Fourth Circuit has done here.[4] This case presents a fundamental issue of constitutional law that warrants this Court's resolution.

B. Some of the leading cases post-*Hibbs* recognize that the issue presents a "close question" or that there is a "colorable claim" of valid abrogation.

In *Brockman v. Wyoming Department of Family Services*, the first post-*Hibbs* case to address the self-care issue, the Tenth Circuit held that *Hibbs* did not extend to the FMLA's self-care provision and was

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[3] *See, e.g.*, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 448 (1976) (certiorari granted "to resolve this important constitutional question").

[4] *See Adkins v. Children's Hosp.*, 261 U.S. 525, 544 (1923) (holding that the "judicial duty of passing upon the constitutionality of an act of Congress is one of great gravity and delicacy"); *United States v. Gainey*, 380 U.S. 63, 65 (1965) (certiorari granted "to review the grave act of annulling an Act of Congress").

limited in its applicability to the family-care provision. 342 F.3d 1159, 1164. Despite this ruling, the court recognized that there is a "colorable argument to the effect that the self-care provision of the FMLA must be viewed as part of the Act as a whole, and that it would therefore be a valid abrogation of states' sovereign immunity." *Id.*

In *Toeller v. Wisconsin Department of Corrections*, the Seventh Circuit relied on *Brockman* to find that *Hibbs* did not extend to the FMLA's self-care provision. 461 F.3d at 873. Like *Brockman*, however, *Toeller* described the issue of whether Congress abrogated Eleventh Amendment immunity with respect to the self-care provision as a "close question." *Id.*

Others to address the issue have been more explicit. In *McKlintic v. 36th Judicial Circuit Court*, Judge Bright wrote separately "to observe that an argument can be made that the self-care provision of the FMLA permits a suit against the State. This issue therefore needs resolution by the United States Supreme Court." 508 F.3d at 878 (8th Cir. 2007) (Bright J., concurring). As discussed below, *Brockman* and *Toeller* are the foundation upon which many of the other circuits' decisions are built. These foundational cases recognize that the question of whether the self-care provision is a valid abrogation of Eleventh Amendment immunity is an issue subject to differing interpretations. This Court should grant certiorari to definitively resolve the question.

C. Other circuits have relied upon *Brockman* and *Toeller* with limited analysis.

Following the Tenth Circuit's decision in *Brockman*, several other circuits found that Congress did not abrogate Eleventh Amendment immunity with respect to the self-care provision. However, their analysis was based in large part on *Brockman* and *Toeller*.

In *Touvell v. Ohio Department of Mental Retardation,* the Sixth Circuit relied heavily on the reasoning in *Brockman*. 422 F.3d at 399. The court stated, "we agree with the Tenth Circuit that the Supreme Court's holding in *Hibbs* does not apply to the self-care provision of the FMLA, and that private suits for damages may not be brought against states for alleged violations of the Act arising from claimed entitlement to leave under § 2612(a)(1)(D)." 422 F.3d at 400.

Similarly in *Toeller*, the Seventh Circuit relied on the reasoning of *Brockman* and *Touvell*, noting "[w]e are not the first to be asked to decide, in the light of *Hibbs*, whether the self-care provision of the FMLA is another valid abrogation of the State's sovereign immunity." 461 F.3d at 878. The Seventh Circuit ultimately held that "[w]hile we consider the question a close one . . . [we agree] with our sister circuits that [*Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001)] controls the self-care

provision, and thus that the State is entitled to immunity here."[5] *Id.* at 873.

In *Nelson v. University of Texas at Dallas*, the Fifth Circuit failed to provide any independent analysis of the issue. 535 F.3d 318, 321 (5th Cir. 2008). The court stated that since *Hibbs*, "the Sixth, Seventh, and Tenth Circuits have recognized that . . . states may still assert an Eleventh Amendment immunity defense to claims brought pursuant to subsection D." *Id.* After discussing *Brockman* and *Touvell*, the court simply held that "we agree with the rationale . . . that the Supreme Court's ruling in *Hibbs* only applies to subsection C." *Id.* This is the extent of the analysis employed by the Fifth Circuit.

In *Coleman*, the Fourth Circuit observed that "since *Hibbs* was decided, each of the four circuits to consider the issue has concluded Congress did not validly abrogate sovereign immunity as to the FMLA's self-care provision." App. 13-14. The Fourth Circuit did not provide any new or independent analysis. It simply decided to "join [the other] circuits" in holding that Congress did not abrogate Eleventh Amendment immunity with regard to the self-care provision. App. 14.

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[5] *See* note 10 and accompanying text in Section II, *infra*, which addresses the issue of why *Garrett* is not the controlling authority.

D. The other circuits, finding no valid abrogation, have simply relied on their pre-*Hibbs* cases.

Despite the Court's ruling in *Hibbs*, circuits continue to rely on pre-*Hibbs* rationale. A number of these courts have reasoned that their own pre-*Hibbs* case law was controlling because *Hibbs* was limited to the family-care provision. Without Supreme Court guidance, courts will continue to employ this potentially misplaced reliance.

No better example of this reliance can be found than in the Eighth Circuit. In *Townsel v. Missouri*, 233 F.3d 1094 (8th Cir. 2000), the Eighth Circuit first struck down the entire FMLA as applied to the states on Eleventh Amendment grounds. In *Townsel*, the court had explained that "the FMLA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 1096 (internal quotations omitted). This decision was, at least in part, subsequently overruled by *Hibbs*.

The Eighth Circuit had its first opportunity to address the FMLA's self-care provision in light of the *Hibbs* decision in *Miles v. Bellfontaine Habilitation Center*, 481 F.3d 1106 (8th Cir. 2007) (per curiam). In *Miles*, the Eighth Circuit, in a four paragraph opinion, noted that its previous decision in *Townsel* was "overruled in part" by *Hibbs*. 481 F.3d at 1106. However, the Eighth Circuit then relied on this partially overruled pre-*Hibbs* analysis noting, "[t]he 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 1094). Although the court did mention that *Hibbs* overruled *Townsel* in part, it did not say which part was overruled, nor did it address the fact that *Townsel*'s holding on the validity of the entire FMLA was explicitly overruled in *Hibbs*. *Id.* In the one sentence of its opinion dedicated to this issue, the court accepted the *Brockman* decision that the self-care provision was not a valid abrogation of Eleventh Amendment immunity. *Id.*

When the *McKlintic* case came before the Eighth Circuit, the court stated that it was "bound by the earlier decision of a [different] panel of [that] court." 508 F.3d at 877 (citing *Miles*, 481 F.3d at 1107 (8th Cir. 2007) (per curiam)). Constrained by its earlier decision, the court was prevented from "reconsidering the question of whether the Eleventh Amendment bars a suit against a state for violation of the self-care provisions of the FMLA." *Id.* The fact that the court in *McKlintic* felt compelled to follow its own circuit precedent, which relied on pre-*Hibbs* analysis, no doubt explains Judge Bright's concurrence noting that the Supreme Court needs to resolve the issue. *See id.* at 878 (Bright J., concurring).

Similarly, in *Touvell,* the Sixth Circuit focused its analysis on its own pre-*Hibbs* precedent. Prior to *Hibbs*, the Sixth Circuit in *Sims v. University of Cincinnati*, had reasoned that Congress was "crafting

a piece of social legislation rather than a remedy for ongoing state violations of the Equal Protection Clause." 219 F.3d 559, 564 (6th Cir. 2000). The *Touvell* court relied upon pre-*Hibbs* analysis stating, "[w]e 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."[6] 422 F.3d at 400.

Likewise, the Fifth Circuit in *Nelson* merely relied on its pre-*Hibbs* precedent. 535 F.3d 318. 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 subsection 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 have 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.*

Given the analysis employed by the circuits, it is doubtful that a more defined split will develop. Several circuits have indicated that this issue warrants further review. Others simply adopt the holdings used

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[6] Even *Coleman* acknowledged that its pre-*Hibbs* precedent was subsequently overruled and no longer good law. This is directly in conflict with the Sixth Circuit's findings in *Touvell*.

by fellow circuits, employing limited independent analysis. Still others feel constrained by their own pre-*Hibbs* resolutions of the issue. Without the guidance of this Court, this pattern may continue for years to come. This Court should grant review in order to definitively resolve this important constitutional issue.

II. THIS COURT SHOULD PROVIDE GUIDANCE AND CERTAINTY TO CONGRESS, THE COURTS, AND THE STATES REGARDING THE NATURE OF THE LEGISLATIVE RECORD REQUIRED TO VALIDLY ABROGATE ELEVENTH AMENDMENT IMMUNITY UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT.

The Court in *Hibbs* seemed to answer the question of what type of legislative record Congress must develop when legislating pursuant to its powers under section 5 of the Fourteenth Amendment to effect a valid abrogation of Eleventh Amendment immunity. The Court required that "Congress [have] evidence of a pattern of constitutional violations on the part of the states in [the relevant area]." *Hibbs*, 538 U.S. at 729. The Court considered the legislative record, particularly testimony and reports that indicated Congress' general intent to prevent gender-discrimination in the workplace. *Id.* Its examination of the legislative record led the Court to find that even after Congress enacted Title VII, "[s]tates continue[d] to rely on invalid gender stereotypes in the

employment context, specifically in the administration of leave benefits." *Id.* According to the Court, this was precisely the evidence Congress relied on in enacting the FMLA.

In light of this legislative record, the Court found that "[t]he persistence of such unconstitutional discrimination by the States justifies Congress' passage of prophylactic § 5 legislation." *Id.* at 730. "Congress' chosen remedy, the family-care leave provision of the FMLA, is congruent and proportional to the targeted violation." *Id.* at 737 (internal quotations omitted). The Court did not offer an opinion as to whether this legislative history supports abrogation of the states' Eleventh Amendment immunity as to the entire FMLA. However, the Court seemed to have found sufficient evidence in the legislative record to support Congress' enactment of the FMLA as a comprehensive prophylactic legislative scheme that is congruent and proportional.

Following *Hibbs*, confusion has developed over exactly what type of legislative record Congress must develop to sufficiently abrogate Eleventh Amendment immunity, and whether there must be a sufficient record created for each individual subpart of the relevant provisions. Some courts have required a very specific record for all parts of the statute. These courts do not read the FMLA as a whole and seem to require a sufficient legislative record to support each subpart. Conversely, other courts, parties, and even the United States Government have reasoned that the FMLA as a whole was congruent and proportional

to what Congress identified as the potential for gender-based discrimination. This theory rests on the notion that the FMLA's subparts should be viewed as part of the FMLA's comprehensive scheme.

The ensuing confusion has resulted in Congress legislating without guidance, hoping that in the end, it will have provided an adequate record to accomplish a valid abrogation of Eleventh Amendment immunity. This issue is especially relevant where, as here, Congress promulgates legislation with provisions that have directly related subparts, which Congress included as integral parts of its comprehensive response to an important constitutional issue (i.e., states engaging in gender discrimination and stereotyping).

Some courts seem to read *Hibbs* to require a specific legislative record for each individual subpart. Because the question in *Hibbs* concerned the FMLA's family-care provision, these courts reason that the *Hibbs* Court's finding of congruence and proportionality is not relevant to whether the next clause of the same section, the self-care provision, is congruent and proportional. For example, in *Brockman*, the Tenth Circuit believed that the legislative history revealed that the self-care provision's purpose was to alleviate economic burdens on employees and to avoid discrimination against those with serious health problems. 342 F.3d at 1164. The *Brockman* court analyzed the FMLA's legislative history and applied it on a section-by-section basis.

Relying heavily on *Brockman* and *Laro*, the *Touvell* court agreed that *Hibbs* did not apply to the self-care provision. *Touvell*, 422 F.3d 392; *see Laro v. New Hampshire*, 259 F.3d 1 (1st Cir. 2001). The Sixth Circuit seemed to rely solely on the legislative record enunciated in *Hibbs*. It found that the legislative record did not "sufficiently tie[ ] the [self-care] provision to the prevention of gender-based discrimination." *Touvell*, 422 F.3d at 400 (quoting *Brockman*, 342 F.3d at 1164) (internal quotation marks omitted). The court viewed the Act's subparts separately and disagreed with the argument that the self-care provision "[was] a prophylactic measure necessary to effectuate the broader anti-discriminatory purpose of the FMLA as a whole." *Id.* at 403-05.

Additionally, in *Toeller*, the Seventh Circuit believed that the FMLA's subparts should be viewed separately and determined that it had to find "comparable justification in the statute for self-care to that which persuaded the [*Hibbs*] Court for family-care." 461 F.3d at 879. The *Toeller* court did not engage in an extensive analysis of the legislative record, but simply stated that "what counts is that we see nothing in either the text or the legislative history of the FMLA to indicate that Congress found" that women would be more likely than men to have the need for short-term medical needs unrelated to pregnancy. *Id.* at 879.

Conversely, other courts, parties and the United States Government[7] have recognized 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.[8] In *Montgomery*, for example, the Fourth Circuit read *Hibbs* as an affirmation of Congress' complete abrogation of Eleventh Amendment immunity against actions brought under the FMLA. 72 F. App'x. at 19. Likewise, in *Lee v. State*, the Iowa Court of Appeals chose to read the legislative history as generally

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[7] *See* discussion of the United States' position in *Bylsma v. Freeman*, 346 F.3d 1324 (11th Cir. 2003), Section III, *infra*.

[8] We recognize that some courts have reasoned that *Garrett* controls the issue of whether the FMLA's individual subsections should be parsed. *Garrett*, however, is distinguishable because the court was wrestling with Title I and Title II of the Americans with Disabilities Act. Whereas the FMLA's leave provisions are subparts of the same statutory provision, Title I and Title II are separate and distinct provisions of the ADA. Specifically, Title I applies to states and private entities as employers and was designed to prevent discrimination in employment regarding disabilities. *See generally* 42 U.S.C. § 12112. Conversely, Title II applies only to public entities, protecting qualified disabled individuals from being excluded from "participation in or [from being] denied the benefits of services, programs, or activities of a public entity, or [from being] subjected to discrimination by any such entity." *See generally* 42 U.S.C. § 12132. Interestingly, even the Court in *Toeller* noted the potential distinction between *Garrett's* treatment of Titles I and II of the ADA and the FMLA in reasoning that the courts in *Brockman* and *Touvell* "implicitly decided that the Supreme Court would be willing to evaluate the statute not only on a title by title basis, as the court had done with the ADA in *Garrett* . . . , but on a subsection by subsection basis." *Toeller*, 461 F.3d at 878.

applicable to the entire Act and held that "neither the language of the FMLA nor the legislative record provides an indication that the self-care provision should be treated differently from the family-care provision at issue in *Hibbs*." 765 N.W.2d 607, *appeal docketed,* No. 07-1879 (Iowa Ct. App. 2009).[9]

A dissenting judge in *Laro* made a similar argument. 259 F.3d at 17 (1st Cir. 2001) (Lipez, J., dissenting). Because Congress enacted the FMLA as a prophylactic measure against gender discrimination, it is "inappropriate to evaluate in isolation a personal medical leave provision that supplements the caretaking provisions of the FMLA with an important protection for women against gender discrimination in employment." *Id.* at 17-18.

The proper method for analyzing the FMLA's legislative history to determine whether Congress validly abrogated Eleventh Amendment immunity in the self-care provision remains unclear. Specifically, what the legislative history needs to contain to clearly abrogate Eleventh Amendment immunity and whether that history applies to the statute as a whole or in part are important questions that this Court needs to resolve.[10] The answer to these questions

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[9] *Lee* is a table decision and its opinion is available on Westlaw. The appeal is currently pending before the Iowa Supreme Court.

[10] *See Maitland v. Univ. of Minn.*, 260 F.3d 959, 965 (8th Cir. 2001) (stating the Constitution does not require point-by-point

(Continued on following page)

affects Congress' ability to legislate effectively, states' Eleventh Amendment immunity interests, and federal interests in ensuring qualified employees' right to protected leave from work under the FMLA.

III. GIVEN THE CONFLICTING POSITIONS TAKEN BY THE UNITED STATES ON THIS ISSUE AND BECAUSE IT PRESENTS AN IMPORTANT AND RECURRING CONSTITUTIONAL ISSUE, IT WARRANTS THIS COURT'S RESOLUTION.

The Court has repeatedly recognized the need to resolve issues of Eleventh Amendment immunity by granting review in controversies involving other sections of the FMLA and other employment statutes.[11] Additionally, the volume of cases addressing whether the FMLA's self-care provision is a valid exercise of congressional power under the Fourteenth Amendment

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parsing of the legislative history to determine whether section 5 statutes are congruent and proportional).

[11] *See Hibbs*, 538 U.S. 721 (granting certiorari and holding that Congress validly abrogated Eleventh Amendment immunity as to the FMLA's family-care leave provision); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (granting certiorari and holding the Age Discrimination in Employment Act (ADEA) did not abrogate states' Eleventh Amendment immunity because age was a non-suspect class, and therefore, the ADEA failed the congruence and proportionality test); *Garrett*, 531 U.S. 356 (granting certiorari and holding that the rights and remedies created by the ADA against the states raised concerns as to congruence and proportionality, supporting a determination that Congress did not validly abrogate Eleventh Amendment immunity).

demonstrates the importance of this issue. Including both pre-*Hibbs* and post-*Hibbs* cases, the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits,[12] and numerous district courts[13] and state courts[14] have been asked to consider the constitutionality of the FMLA's self-care provision.

Since *Hibbs*, the issue has been the subject of at least three petitions for certiorari.[15] In light of the

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[12] *See, e.g., Laro*, 259 F.3d 1; *Hale v. Mann*, 219 F.3d 61 (2d Cir. 2000); *Chittister v. Dep't of Cmty. & Econ. Dev.*, 226 F.3d 223 (3d Cir. 2000); *Coleman v. Maryland Court of Appeals*, 626 F.3d 187 (4th Cir. 2010); *Nelson*, 535 F.3d 318; *Touvell*, 422 F.3d 392; *Toeller*, 461 F.3d 871; *Miles*, 481 F.2d 1106; *Hibbs v. Nevada Department of Human Resources*, 273 F.3d 844 (9th Cir. 2001), *aff'd*, 538 U.S. 721 (2003); *Brockman*, 342 F.3d 1159; *Garrett v. University of Alabama at Birmingham Board of Trustees*, 193 F.3d 1214 (11th Cir. 1999), *rev'd sub nom., Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001).

[13] *Darby v. Hinds County Dep't of Human Servs.*, 83 F. Supp. 2d 754 (S.D. Miss. 1999); *Williamson v. Ga. Dep't of Human Res.*, 150 F. Supp. 2d 1375 (S.D. Ga. 2001); *Livitis v. County of Luzerne*, 52 F. Supp. 2d 403 (M.D. Pa. 1999); *Serafin v. Conn. Dep't of Mental Health & Addiction Servs.*, 118 F. Supp. 2d 274 (D. Conn. 2000); *Knussman v. Maryland*, 935 F. Supp. 659 (D. Md. 1996); *Jolliffe v. Mitchell*, 986 F. Supp. 339 (W.D. Va. 1997).

[14] *See, e.g., UTEP v. Herrera*, 322 S.W.3d 192 (Tex. 2010); *Lee v. State*, 765 N.W.2d 607 (Iowa Ct. App. 2009), *appeal docketed*, No. 07-1879 (Iowa Sup. Ct. 2008); *Nicholas v. Att'y Gen.*, 168 P.3d 809 (Utah 2007); *Lizzi v. Wash. Metro. Area Transit Auth.*, 862 A.2d 1017 (Md. 2004).

[15] *See, e.g.*, Petition for Writ of Certiorari, *Touvell v. Ohio Dep't of Mental Retardation & Dev. Disabilities*, 546 U.S. 1173 (2006) (No. 05-752); Petition for Writ of Certiorari, *Matthews v. Military Dept., State of Louisiana*, 129 S.Ct. 82 (2008) (No. 07-1435); Petition for Writ of Certiorari, *Montgomery v. Maryland*, 535 U.S. 1075 (2002) (No. 01-1079).

significant and recurring nature of the question presented, this Court should not delay in resolving the issue.

Furthermore, the fact that the United States has taken inconsistent positions on the issue indicates that this Court should provide guidance and clarity. At the very least, this Court should request that the United States clarify its position. In *Laro,* the United States vigorously defended the constitutionality of the self-care provision on the ground that it was enacted to prevent gender discrimination against both men and women. Supplemental Brief of Intervenor United States of America, *Laro v. New Hampshire*, 259 F.3d 1 (1st Cir. 2001) (No. 00-1581), 2001 WL 36019418. In a supplemental brief filed to address the Supreme Court's then-recent decision in *Garrett*, the United States was very specific: "*Garrett* did not alter the relevant inquiry for determining whether Congress has acted within the scope of its Fourteenth Amendment power . . . [Congress'] attempt to remedy employment practices based on gender stereotypes falls within its Fourteenth Amendment powers." *Id.*

In 2002, consistent with its position in *Laro*, the United States filed a brief in *Bylsma v. Freeman* supporting the constitutionality of the FMLA, including the self-care provision. Brief of the United States as Intervenor-Appellant, *Bylsma v. Freeman*, 346 F.3d 1324 (11th Cir. 2003) (No. 01-16102 AA), 2002 WL 32366215. The United States emphatically argued that the FMLA abrogated Eleventh Amendment immunity through a proper exercise of section 5 authority. *Id.* at

*9-11. While the controversy in *Bylsma* focused on the family-leave provision of the FMLA, much of the government's brief was non-specific, indicating that "[t]he FMLA directly remedies discrimination against men, by affording men the leave that they are often denied." *Id.* at *9.

Despite its defense of the self-care provision's constitutionality in *Bylsma* and *Laro*, the Office of the Solicitor General filed a Brief in Opposition in *Hibbs*, stating that it was "lodging with the Court copies of letters from the Solicitor General notifying Congress of his decision to decline further defense of the abrogation of Eleventh Amendment immunity for claims brought under 29 U.S.C. 2612(a)(1)(D)." Brief for the United States in Opposition, *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (No. 01-1368), 2002 WL 32135355, at *8 n.2. The government further explained that in light of the Supreme Court's decision in *Garrett,* the Solicitor General would "take the extraordinary step of abandoning further constitutional defense of the abrogation of Eleventh Amendment immunity for the individual sick leave provision." *Id.* at *8.

The Solicitor General's letters to Congress gave two reasons for the Office's refusal to defend the self-care provision. First, the letter indicated frustration with the eight circuit court decisions rendered before *Hibbs* that had rejected the Solicitor General's

arguments in defense of the provision. App. 22.[16] Second, the Solicitor General relied on the reasoning in the *Garrett* decision. The letter reasoned that while the *Garrett* decision was only aimed at the ADA, the decision "effectively eliminated [its] ability to defend the medical-leave provision as protecting against discrimination on the basis of temporary disability." App. 23. Finally, the letter indicated that this position will only be held by the Office "absent changed circumstances." App. 22.

The *Hibbs* decision undermined the rationale of many of the circuit court decisions referenced in the Solicitor General's letter. Further, as discussed above, the United States Government had vigorously defended Congress' abrogation of Eleventh Amendment immunity, not only as an appropriate response to disability-based discrimination, but also to address gender-based discrimination perpetrated by the states.

Hibbs represents a change in circumstances substantial enough to warrant a policy review by the United States. The United States has not taken any clear position on this issue in the Court since *Hibbs*, and the very text of the letter begs the question as to what the United States' position is in light of *Hibbs*. Because the Government's defense of the constitutionality of the self-care provision has been inconsistent,

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[16] Letter from Theodore Olson, Solicitor General, to Richard Cheney, President of the Senate (Dec. 20, 2001) (on file with the Supreme Court of the United States). The letter is attached as an appendix. App. 21. A similar letter was sent to J. Dennis Hastert, Speaker of the House. We have not reproduced it.

this Court should grant certiorari, and resolve this important question.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Fourth Circuit. Additionally, this Court should invite the Solicitor General to file a brief in this matter expressing the position of the United States.

Respectfully submitted this 8th day of February, 2011.

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