No. 10-1016

IN THE

Supreme Court of the United States

DANIEL COLEMAN,

Petitioner,

v.

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

Respondents.

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

BRIEF OF SENATOR TOM HARKIN, REPRESENTATIVE GEORGE MILLER, AND ADDITIONAL MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Amici Senators and Representatives are committed to securing equal opportunity for women in the workplace. *Amici* include 45 current Members of Congress, many of whom played leadership roles in the development of the Family and Medical Leave Act of 1993 ("FMLA" or "the Act"), and two former Members of Congress who were instrumental in the Act's drafting and passage. *Amici* have a strong interest both in ensuring that the federal courts give "much deference" and "wide latitude" to Congress's power to enact legislation to secure the guarantees of the Fourteenth Amendment, and in providing this Court with information regarding Congress's efforts to exercise its power, under Section 5 of the Fourteenth Amendment, to remedy and deter gender discrimination by the States through the enactment of the FMLA.

INTRODUCTION AND SUMMARY OF ARGUMENT

With the Family and Medical Leave Act, Congress sought "to promote the goal of equal employment opportunity for women and men." 29 U.S.C. § 2601(b)(5).

At the time of passage, the Act guaranteed employees temporary leave in four situations:

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[1] Counsel for the *amici curiae* authored this brief in its entirety. No person or entity other than *amici* and its counsel made a monetary contribution to the preparation of this brief. Letters of consent from all parties have been filed with the Clerk of the Court.

> (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.
>
> (B) Because of the placement of a son or daughter with the employee for adoption or foster care.
>
> (C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.
>
> (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

29 U.S.C. § 2612(a)(1)(A)-(D).

The enactment of these leave benefits was the culmination of nearly two decades of legislative efforts to remedy persistent gender inequalities in the workplace. While Title VII of the Civil Rights Act of 1964 and the Pregnancy Discrimination Act of 1978 had "far-reaching" effects on such discrimination, Congress concluded that "much remains to be done." H.R. Rep. No. 102-40, pt. 1, at 16 (1991); H.R. Rep. No. 103-8, pt. 2, at 8-9 (1993). After developing an extensive record through hearings over many years concerning women's employment opportunities, Congress designed the FMLA to fill important gaps in Title VII and the PDA.

In particular, Congress adduced evidence regarding the disproportionate impact that inadequate employee-leave policies had on women because of the increasing frequency with which they served as both family caretakers and breadwinners. In the text of the Act itself, Congress announced its finding that "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). This was coupled, however, with the trend that "the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly." *Id.* § 2601(a)(1). The legislative record showed that women were far more likely than men to be at the head of these single-parent households. *See* S. Rep. No. 103-3, at 5, 10 (1993).

Accordingly, Congress recognized that, due to competing work and family responsibilities, women, in particular single heads of household, felt the effect of catastrophic events—whether raising a newborn, caring for a sick parent, enduring a problematic pregnancy, or facing serious illness—more gravely than men. *See id.* at 10 ("'For this highly vulnerable group, whose numbers have exploded, a job guarantee for periods when they or their children have serious health conditions is urgently necessary'") (quoting Eleanor Holmes Norton).

Despite the devastating consequences that women faced under these circumstances, employers continued to afford them inadequate protection. Congress found a "lack of employment policies to accommodate working parents" and "inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods." 29 U.S.C. § 2601(a)(3) & (4); *see also* S. Rep. No. 103-3, at 12-13 (examining studies indicating that "a significant percentage of employers of all sizes have yet to adopt [family and medical leave] policies," and that "150,000 workers lose their jobs each year due to the lack of medical leave alone").

In light of these findings, Congress identified as goals of the FMLA:

> [T]o balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity; . . .
>
> to entitle employees to *take reasonable leave for medical reasons*, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition.

29 U.S.C. § 2601(b)(1)-(2) (emphasis added).

The FMLA's text and history thus make clear that Congress designed the Act to eliminate the need for women to choose between family and work by affording leave to mitigate the disproportionate impact that women faced both *during* pregnancy *and* when *either* they or their family members became seriously ill.

The legislative record also supported Congress's decision to extend the leave benefits on a gender-neutral basis. Congress concluded that, if the benefits were provided only to women, employers might avoid hiring women altogether. *See* H.R. Rep. No. 102-135, pt. 1, at 30 (1991) ("A law providing special protection to women or any defined group, in addition to being inequitable, runs the risk of causing discriminatory treatment," where "[e]mployers might be less inclined to hire women"). Accordingly, Congress made clear that it intended to provide benefits for the "eligible" family-related and medical reasons a woman might need to take a leave, and to provide this benefit on a gender-neutral basis; it designed the Act:

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

29 U.S.C. § 2601(b)(4) (emphasis added).

In *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), this Court held that Congress validly abrogated the States' sovereign immunity from damages in the context of a lawsuit brought under Subsection C of the FMLA, the family-leave provision. In so ruling, *Hibbs* recognized that the FMLA, *as a whole*, "aims to protect the right to be free from gender-based discrimination in the workplace," a purpose that was "clear" from the text of the Act itself. *Id.* at 728, n.2 (citing 29 U.S.C. § 2601(a)(5), (b)(4) & (5)). The Court explained that gender-based classifications such as those targeted by the FMLA face heightened scrutiny, which made it "easier for Congress to show a pattern of state constitutional violations." *Id.* at 736. The Court acknowledged, as Congress had found, that, as of the passage of the FMLA, "States continue to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits." *Id.* at 730. As a result, the Court held that "the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation." *Id.* at 735. In light of the extensive record of discriminatory administration of leave

benefits generally, the Court found that the Act's leave provisions, including the family-care provision, constituted a proportional deterrent to this constitutional harm. *Id.* at 737. The Court identified numerous limitations on the breadth of the family-care provision that ensured that the remedy was congruent to the significant constitutional evil of gender discrimination in the workplace. *Id.* at 737-40. These limitations apply equally to all of the types of leave, including medical leave, that the Act provides.

The Court of Appeals below, and several other appellate courts, erred in concluding that the analysis in *Hibbs* does not control the matter at hand: whether the States are likewise subject to damages suits when they deny their employees the leave that Congress provided under the FMLA's medical-leave provision (29 U.S.C. § 2612(a)(1)(D)).[2] To arrive at this incorrect result, these courts misapplied this Court's three-step test for whether prophylactic Section 5 legislation validly abrogates sovereign immunity. In particular, the lower courts misinterpreted this Court's Section 5 jurisprudence as requiring Congress to create a detailed legislative record with evidence sufficient to justify its Section 5 authority as to each remedial subsection in the Act,

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[2] *See* Pet. App. 13-14; *Nelson v. Univ. of Tex.*, 535 F.3d 318 (5th Cir. 2008); *Touvell v. Ohio Dep't of Mental Retardation & Developmental Disabilities*, 422 F.3d 392 (6th Cir. 2005); *Toeller v. Wis. Dep't of Corr.*, 461 F.3d 871 (7th Cir. 2006); *Miles v. Bellfontaine Habilitation Ctr.*, 481 F.3d 1106 (8th Cir. 2007) (per curiam); *McKlintic v. 36th Judicial Circuit Court*, 508 F.3d 875 (8th Cir. 2007) (per curiam); *Brockman v. Wyo. Dep't of Family Servs.*, 342 F.3d 1159 (10th Cir. 2003).

rather than looking to the record underlying the Act as a whole.[3]

Contrary to these lower courts' reasoning, this Court has repeatedly indicated that the Section 5 analysis turns on the sufficiency of the legislative record with respect to the *right* at issue—not with respect to the particular remedial provision under which a plaintiff brings suit. Where, as here, a statute seeks to deter a singular constitutional wrong—gender discrimination in the workplace—courts must review the Act, and the record underlying the Act, as a whole to determine the appropriateness of Congress's prophylactic measures.

Thus, when this Court found in *Hibbs* that Congress had adduced sufficient evidence to warrant prophylactic legislation addressing the administration of leave benefits, that ruling was dispositive on all suits seeking damages for denial of leave in one of the situations Congress found necessary to remedy gender discrimination in the workplace. So too, *Hibbs*'s analysis that the FMLA's remediation of gender discrimination in the workplace was congruent and proportional is controlling here.

Even if the court below were correct that Congress had the burden of identifying, in isolation, state discriminatory conduct in the provision of medical leave—Congress met that burden. Congress adduced ample evidence of the disproportionate impact felt by women when they cannot work due to illness or pregnancy, and of the inadequacy of existing laws and plans to protect women in these situations.

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[3] This Court presumptively construes statutes not "by a single sentence or member of a sentence, but [by] look[ing] to the provisions of the whole law, and to its object and policy." *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1850).

Congress also appropriately afforded medical leave on a gender-neutral basis, to ensure that women were not shut out of the workplace by virtue of this federally-protected leave.

ARGUMENT

I. *HIBBS*'S HOLDING THAT CONGRESS VALIDLY ABROGATED STATES' SOVEREIGN IMMUNITY FROM DAMAGES SUITS FOR DENIAL OF FAMILY-LEAVE UNDER THE FMLA ALSO APPLIES TO SUITS TO ENFORCE THE ACT'S MEDICAL-LEAVE PROVISION.

A. Courts Must Give Congress "Much Deference" And "Wide Latitude" To Enact Prophylactic Legislation Under Section 5 Of The Fourteenth Amendment.

To understand how the court below erred in applying the test for abrogation of state sovereign immunity pursuant to Section 5, it is necessary first to articulate the test.

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 ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court." *Bd. of Trs. v. Garrett*, 531 U.S. 356, 363 (2001).

This principle of state sovereignty, however, is "necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." *Fitzpatrick v.*

Bitzer, 427 U.S. 445, 456 (1976) (citation omitted); *see also Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 80 (2000). Congress may "abrogate such immunity in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment." *Hibbs*, 538 U.S. at 726.

Congress's intention to abrogate the States' immunity from suits under the FMLA "is not fairly debatable." *Ibid.*; *see* 29 U.S.C. § 2617(a)(2) (establishing that the right of action "to recover the damages or equitable relief prescribed in paragraph (1) may be maintained against any employer (*including a public agency*) in any Federal or State court of competent jurisdiction") (emphasis added). The only remaining question is whether the FMLA and its medical-leave provision was a valid exercise of Congress's Section 5 power.

The Fourteenth Amendment provides, in relevant part:

> *Section 1*. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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.
>
> . . . .
>
> *Section 5*. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

"[Section] 5 is an affirmative grant of power to Congress." *Kimel*, 528 U.S. at 80. "It is for Congress

in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to *much deference*." *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (emphasis added) (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)).

In enacting "appropriate legislation" enforcing Fourteenth Amendment rights, "Congress is not limited to mere legislative repetition of this Court's constitutional jurisprudence." *Garrett*, 531 U.S. at 365; *see also Kimel*, 528 U.S. at 81 ("Congress' § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment"). Rather, Congress's enforcement power 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. Accordingly, "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Hibbs*, 538 U.S. at 727-28; *see also Kimel*, 528 U.S. at 88 ("Difficult and intractable problems often require powerful remedies").

This Court has emphasized that, in acting pursuant to the enforcement power, Congress must respect the "line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law." *Boerne*, 521 U.S. at 519. At the same time, however, the Court has recognized that this line "is not easy to discern" and thus, "Congress must have *wide latitude* in determining where it lies." *Id.* at 519-20 (emphasis added).

In *Boerne*, this Court articulated the standard for whether prophylactic Section 5 legislation falls on the right side of that line: "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id*. at 520. The Court has identified three steps for assessing whether legislation satisfies this standard.

"The first step of the *Boerne* inquiry requires us to *identify the constitutional right* or rights that Congress sought to enforce" when enacting the legislation. *Tennessee v. Lane*, 541 U.S. 509, 522 (2004) (emphasis added); *see also Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 639 (1999) ("we must first identify the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy"). This analysis must be done "with some precision." *Garrett*, 531 U.S. at 365.

In identifying the constitutional right at step one, the Court also assesses the level of scrutiny afforded to alleged violations of that right. Gender discrimination is "subject to heightened scrutiny." *Hibbs*, 538 U.S. at 728; *see also, Garrett*, 531 U.S. at 365-66 (finding at step one that the right at issue in Title I of the ADA is afforded "rational-basis review" by looking "to our prior decisions under the Equal Protection Clause dealing with this issue").

For the second step, the Court "inquire[s] whether Congress had evidence of a pattern of constitutional violations on the part of the States in this area." *Hibbs*, 538 U.S. at 729. A record of constitutional violations may be established by reference to, *inter alia*, "judicial findings of unconstitutional state action, and statistical, legislative, and anecdotal evidence." *Lane*, 541 U.S. at 529; *see also Hibbs*, 538

U.S. at 729-35. This record need not "be predicated solely on evidence of constitutional violations by the States themselves." *Lane*, 541 US. at 527 n.16; *see Hibbs*, 538 U.S. at 730 (citing survey of private-sector employees). Moreover, the Court gives weight both to Congress's findings "in the text of the [statute] itself" as well as the legislative record that underlies it. *Lane*, 541 U.S. at 529.

Although this Court expects more than "scant" evidence of constitutional violations in the legislative record, it does not require a detailed, state-by-state record. *Compare Fla. Prepaid*, 527 U.S. at 646 (noting "scant" evidence of constitutional violations related to target of Patent and Plant Variety Protection Remedy Clarification Act insufficient), *with Hibbs*, 538 U.S. at 735 (finding record sufficient with respect to FMLA), *and Lane*, 541 U.S. at 528 (same with respect to Title II of the ADA). As explained outside the Section 5 context, "Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994) (Kennedy, J., plurality opn.).

Moreover, it is "easier for Congress to show a pattern of state constitutional violations" where, as here, the classifications are subject to heightened scrutiny. *Hibbs*, 538 U.S. at 736; *see also*, *Lane*, 541 U.S. at 528-29 ("We explained [in *Hibbs*] that because the FMLA was targeted at sex-based classifications, which are subject to a heightened standard of scrutiny, 'it was easier for Congress to show a pattern of state constitutional violations'").

The Court does not require evidence of violations by each of the 50 States to justify abrogation. *See, e.g.*, *Lane*, 541 U.S. at 524-29 (finding evidence sufficient

without state-by-state analysis). Indeed, the burden on Congress to establish state violations of constitutional rights must remain sufficiently limited to avoid causing the precise type of conflict between state and federal authority that *Boerne* sought to avoid. *Id.* at 537 (Ginsburg, J., concurring) ("It seems to me not conducive to a harmonious federal system to require Congress, before it exercises authority under § 5 of the Fourteenth Amendment, essentially to indict each State for disregarding the equal citizen-citizenship stature of persons with disabilities").

Finally, at step three of the *Boerne* analysis, the Court considers whether "Congress' chosen remedy" is "'congruent and proportional to the targeted violation.'" *Hibbs*, 538 U.S. at 737 (quoting *Garrett*, 531 U.S. at 374). This turns on whether the legislation "is an appropriate response to th[e] history and pattern of unequal treatment." *Lane*, 541 U.S. at 530.

B. As In *Hibbs*, The FMLA Viewed As A Whole Satisfies The *Boerne* Test.

Because the court below, and other federal courts, misapplied the preceding test, they incorrectly concluded that the analysis in *Hibbs* pertains only to the FMLA's family-care leave provision, not its medical-leave provision. *See* Pet. App. 11 ("The Court's analysis, focused as it is on the gender-related nature of § 2612(a)(1)(C), does not support the validity of Congress's abrogation of sovereign immunity for violations of § 2612(a)(1)(D)."); *Brockman v. Wyo. Dep't of Family Servs.*, 342 F.3d 1157, 1164 (10th Cir. 2003); *Toeller v. Wis. Dep't of Corr.*, 461 F.3d 871, 879 (7th Cir. 2006). These courts both (1) erroneously imposed a burden on Congress to adduce detailed evidence sufficient to support each remedial subsection in the Act, rather than evidence

supporting the Act's remedial goals as a whole, and (2) failed (even under their flawed interpretation) to evaluate Subsection D in light of the language, structure, purpose, and history of the Act to determine whether to uphold Congress's expressed intent to abrogate state sovereign immunity for violations of Subsection D.

1. Step One—Identifying The Constitutional Right

Properly applied, at step one, the question regarding the constitutional right at issue results in the same answer here as in *Hibbs*—"[t]he FMLA aims to protect the right to be free from gender-based discrimination in the workplace." *Hibbs*, 538 U.S. at 728. As *Hibbs* explained:

> The text of the Act makes this clear. 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." In response to this finding, Congress sought "to accomplish the [Act's other] purposes . . . in a manner that . . . minimizes the potential for employment discrimination *on the basis of sex* **by ensuring generally that leave is available** . . . *on a gender-neutral basis[,]* and to promote the goal of equal employment opportunity for women and men."

Id. at 728 n.2 (quoting 29 U.S.C. § 2601(a)(5), (b)(4) & (5)) (emphasis in bold added; citation omitted).

Congress sought both to remedy decades of workplace discrimination against women, and to ensure that its remedy did not exacerbate that

intractable problem. Policies allowing some leave were not always equally available to men and women, and policies that denied anyone leave had a disproportionate impact on women. Congress found that women were serving as single heads of household more frequently than men, while still bearing greater family responsibilities, and that women faced greater consequences in the face of the serious medical issues suffered by them *or* their families. *See* 29 U.S.C. § 2601(a)(1), (a)(5); S. Rep. No. 103-3, at 5, 10. The Act thus aimed to ensure leave for family reasons and for personal medical reasons, including pregnancy. *See* 29 U.S.C. § 2601(b)(1)-(2).[4]

Nowhere does the Act suggest that providing leave only for family reasons, but not for medical reasons, will be sufficient to remedy the intractable problem of gender discrimination in the workplace. Such a notion is irreconcilable with the very title of the Act—"Family and Medical Leave Act." The language and history confirm the reasonableness of Congress's judgment that protection of an employee's job while taking leave, whether for family or medical reasons, was critical to achieving the Act's goals.

Because Congress intended the FMLA to eliminate gender discrimination, Congress's efforts must be adjudged against the backdrop of "heightened scrutiny" applied to "statutory classifications that distinguish between males and females." *Hibbs*, 538 U.S. at 728.

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[4] Congress recognized pregnancy was associated with numerous health issues, often necessitating care for weeks before and after childbirth. *See* H.R. Rep. No. 102-135, pt. 1, at 44.

2. Step Two—Evidence Of A Pattern Of Violations

At step two, given "*this common foundation* that, as Congress found, has historically produced discrimination in the hiring and promotion of women," *Hibbs* relied on evidence pertaining to inequities and infirmities in the administration of leave benefits generally, not just in family-care leave, to conclude that Congress had adduced sufficient evidence of constitutional violations to justify its prophylactic power. *Hibbs*, 538 U.S. at 731 n.5 (emphasis added). The same evidence cited in *Hibbs* therefore supports a finding that Congress adduced sufficient evidence to support its express decision to abrogate state sovereign immunity against damages actions for violations of the rights provided under Subsection D.

There are few instances in *Hibbs* where the Court cited evidence related exclusively to family-care leave. *See id.* at 728-36. Instead, *Hibbs* cited evidence of the inadequacy and disproportionate impact of limitations of leave in all four protected areas, as well as evidence applicable to inadequate leave as a whole:

- Bureau of Labor Statistics data regarding the lack of "maternity leave policies" in the private sector. *Id.* at 730 (relating to Subsections A, B, D).
- Congressional testimony regarding the rarity of "'[p]arental leave for fathers.'" *Id.* at 731 (Subsection A, B).
- A state reference guide assessing several States' plans, finding "[m]any States offered women extended 'maternity' leave that far exceeded the typical 4-to 8-week period of physical disability *due to pregnancy* and

childbirth, but very few States granted men a parallel benefit." *Ibid.* (emphasis added) (Subsections A, B, C, D).

- Congressional testimony showing that "child care leave" *and* "maternity leave" was often afforded only to women. *Id.* at 731 n.5 (Subsections A, C, D).
- Congressional testimony regarding the discriminatory application of facially neutral leave policies, including about "'[t]he lack of uniform parental *and medical leave* policies in the work place.'" *Id.* at 732 (emphasis added) (Subsections A, B, C, D).
- The existence of state-leave programs that were deficient for numerous reasons includeing "childcare leave provisions that applied to women only." *Id.* at 733 (Subsections A, B, C, D).
- Congressional testimony regarding the impact of stereotypes underlying the targeted discrimination—"'[t]his prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers *or mothers-to-be.*'" *Id.* at 736 (emphasis added) (Subsections A, B, D).
- Anecdotal evidence that "stereotypes . . . fostered employers' stereotypical views about women's commitment to work and their value as employees." *Ibid.* (Subsections A, B, C, D).

On this record, *Hibbs* found at step two that Congress's extensive evidence pertaining to unequal administration of leave benefits generally justified a

prophylactic response. "In sum, the States' record of unconstitutional participation in, and fostering of, gender-based discrimination *in the administration of leave benefits* is weighty enough to justify the enactment of prophylactic § 5 legislation." *Id.* at 735 (emphasis added). This was particularly so because Congress was acting in the context of gender discrimination. *Id.* at 730 ("The long and extensive history of sex discrimination prompted us to hold that measures that differentiate on the basis of gender warrant heightened scrutiny; here, as in *Fitzpatrick*, the persistence of such unconstitutional discrimination by the States justifies Congress' passage of prophylactic § 5 legislation").

By ignoring the "common foundation" supporting the four leave provisions discussed in *Hibbs*, the lower courts erred in ruling that only evidence specific to medical leave was relevant to step two of the *Boerne* analysis. The court below, and several other federal courts, held that "Congress did not adduce any evidence establishing a pattern of the states as employers discriminating *on the basis of gender in granting leave for personal reasons*." Pet. App. 12 (emphasis added).[5] That is not merely factually incorrect (Congress did adduce such evidence as discussed in Section II, *infra*), but it asks the wrong question. The lower court should not have limited its review to evidence related only to medical leave, rather than to the record of workplace discrimination against women, and the impact of

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[5] *See also Touvell*, 422 F.3d at 399 n.2 (finding that Congress did not provide any "concrete evidence" to "justify the self-care provision of the Act *solely* on the basis of the possibility that such discrimination might also impact self-care leave") (emphasis added); *Toeller*, 461 F.3d at 879; *Brockman*, 342 F.3d at 1164.

inadequate leave benefits in exacerbating that intractable problem.

3. Step Three—Congruence And Proportionality Of The Remedy

At step three, as well, the result here must be the same as in *Hibbs*: the FMLA's remedial scheme is "congruent and proportional" to addressing the harm of gender discrimination in the workplace.

Hibbs cited these aspects of the family-care provision in concluding that it was "congruent and proportional": (1) available equally to men and women, (2) "affects only one aspect of the employment relationship," (3) limited to employees "who have worked for the employer for at least one year and provided 1,250 hours of service within the last 12 months," (4) unavailable to "[e]mployees in high-ranking or sensitive positions," (5) unavailable to elected officials, (6) requires advance notice from the employee, (7) requires certification from a health care provider, (8) only extends 12 weeks, (9) limits damages to "actual monetary losses," (10) limits backpay to the two-year statute of limitations. *Hibbs*, 538 U.S. at 737-40. Each applies equally to Subsection D.[6]

The court below and other federal courts have apparently drawn great significance from *Hibbs*'s framing of its holding at this third step. The Court

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[6] *See* 29 U.S.C. §§ 2612(a)(1)(D) (available to men and women), 2612 (single aspect of employment relationship), 2611(2)(A) (one year's work and 1,250 hours work within year), 2611(2)(B)(i) & 2611(3) (unavailable to high-ranking employees), 203(e)(2)(C) (unavailable to elected officials), 2612(e) (advance notice); 2613 (requires physician certification), 2612(a)(1) (12 weeks), 2617(a)(1)(A)(i)-(iii) (damages only actual monetary losses), 2617(c)(1) (backpay limited to two years).

stated that "we conclude that § 2612(a)(1)(C)"—rather than the entire Act—"is congruent and proportional to its remedial object." *Id.* at 740; *cf.* Pet. App. 13; *Brockman*, 342 F.3d at 1164; *Toeller*, 461 F.3d at 879.

Yet, given that the medical-leave provision has the exact same features as the provision found proportional in *Hibbs*, it is ultimately not determinative whether the Court purported to engage in a 'facial' or 'as applied' analysis at step three. Either way, the Court's analysis of whether Congress acted within its "wide latitude" to adopt prophylactic measures in the FMLA to remedy gender discrimination is controlling.

C. *Lane* Does Not Dictate A Different Result.

In addition to misreading *Hibbs*, the lower courts have erred in construing the Court's decision in *Lane*, *supra*, to mandate an 'as applied' or 'subsection by subsection' analysis of the FMLA's medical-leave provision. *See* Pet. App. 13 ("we know of no basis for adopting such an undifferentiated analysis or concluding that the *Hibbs* Court did so") (citing *Lane*, 541 U.S. at 530-31); *Touvell*, 422 F.3d at 400 n.3 ("The Supreme Court has made clear, however, that this type of line-drawing is a valid and necessary function of the courts," citing *Lane*). Not so.

Lane considered whether Title II of the ADA, which relates to "public services, programs, and activities," was a valid exercise of Congress's Section 5 enforcement power. *Lane*, 541 U.S. at 516-17, 522. The Court concluded that Title II, "as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of

Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment." *Id.* at 533-34.

Both the majority and a dissenting opinion explained that the Court had never performed, nor needed to perform, such line drawing prior to *Lane*, because the statutes all involved only one constitutional right.[7] In the Section 5 cases from *Boerne* to *Hibbs*, the Court evaluated statutes that address singular constitutional goals—and it did so each time by considering the record as a whole.[8] Even in *Lane*, when evaluating the legislative record supporting Congress's prophylactic power, the Court relied on evidence about the access of disabled persons to public services generally, not just related to courthouses. *See Lane*, 541 U.S. at 524-25 (discussing marriage, jury service, imprisonment, education, and voting).

The Court has thus consistently held that the record supporting a statute that seeks to enforce one constitutional right should be reviewed as a whole. There is no reason to abandon that rule now. *Cf.*

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[7] By contrast, Title II "seeks to enforce a *variety* of other basic constitutional guarantees." *Lane*, 541 U.S. at 522 (emphasis added); *see also id.* at 530 ("Title II—unlike . . . other statutes we have reviewed for validity under § 5—reaches a wide array of official conduct in an effort to enforce an equally wide array of constitutional guarantees"); *id.* at 540 (Rehnquist, C.J., dissenting) ("This task was easy in *Garrett, Hibbs, Kimel*, and *City of Boerne* because the statutes in those cases sought to enforce only one constitutional right").

[8] *See Kimel*, 528 U.S. at 91 (finding "legislative record *as a whole*, then, reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age") (emphasis added); *Boerne*, 521 U.S. at 529; *Fla. Prepaid*, 527 U.S. at 646; *Garrett*, 531 U.S. at 368.

United States v. IBM, 517 U.S. 843, 856 (1996) ("we frequently have declined to overrule cases in appropriate circumstances because *stare decisis* '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. [E]ven in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some special justification'") (quotation marks and internal citation omitted).

Of course, there may be future cases involving statutes like Title II that target multiple constitutional evils, which demand the courts to draw lines, and for those statutes, *Lane*'s analysis will control. But the lines will be defined by the *rights* Congress sought to vindicate, not by the particular remedial subpart under which a plaintiff files suit. *See* Kevin S. Schwartz, *Applying Section 5: Tennessee v. Lane and Judicial Conditions on the Congressional Enforcement Power*, 114 Yale L.J. 1133, 1155 (2005) ("*Lane*'s as-applied methodology differs critically from a purely fact-based as-applied ruling. In testing the rights condition, the *Lane* Court did not limit its finding to the particular facts presented by George Lane or others. That is because Congress's power to pass a Section 5 law hinges not on the facts of a case, but rather on the constitutional right or rights at stake.").

Any other rule would transform the test for the validity of Congress's exercise of its constitutional power under Section 5 of the Fourteenth Amendment into one that depended on formalistic distinctions. For example, even if Congress had organized the protections of Title II into a single section, the Court

presumably still would have asked whether the abrogation was valid as applied to courthouse access. Here, the fact that Congress drafted the FMLA's remedial scheme in four subparts rather than in one should not dictate that Congress needed to adduce a separate body of evidence pertaining to each subpart, particularly where all subparts address continuing gender discrimination in the workplace by providing gender-neutral leave.

II. EVEN VIEWING SUBSECTION D IN ISOLATION, AMPLE EVIDENCE SHOWS THAT THIS SUBSECTION WAS A CONGRUENT AND PROPORTIONAL RESPONSE TO GENDER DISCRIMINATION IN THE WORKPLACE.

Even if this Court were to agree with the lower court that the FMLA's medical-leave provision must be analyzed in isolation to determine if it falls within Congress's Section 5 power, the Court should still validate that provision as a congruent and proportional response to gender discrimination in the workplace. Although the lower court nominally applied *Boerne*'s three-step analysis, it did not evaluate the statute's language and legislative history in any detail, or afford Congress the broad deference and wide latitude that courts must give to Congress's express invocation of its authority under Section 5.

A. The Purpose Of The Medical-Leave Provision Was To Eliminate Gender Discrimination.

The text of the Act shows, for purposes of step one, that Congress intended to address gender discrimination in the workplace in significant part through the provision of leave for medical reasons, including pregnancy. As the Act's title also confirms,

medical leave was central to the protections Congress adopted to serve the overarching purpose "to promote the goal of equal employment opportunity for women and men." 29 U.S.C. § 2601(b)(5). Congress articulated findings in the Act about women's dual roles in the home and office. *See id.* § 2601(a)(1), (5). Congress also announced findings of inadequacies in current medical-leave policies. *See id.* § 2601(a)(4). Thus, to further a broader goal of eliminating gender discrimination, the Act includes the aim of "entitl[ing] employees to take reasonable leave for medical reasons [and] for the birth or adoption of a child." *Id.* § 2601(b)(2).

The legislative history supports the text. Congress was aware that neither the Pregnancy Discrimination Act (PDA) nor Title VII had ended gender discrimination in either the affording of leave, or the disproportionate impact of inadequate leave. The PDA amended Title VII to require employers to treat pregnancy similarly to other reasons for leave, and preclude them from explicitly excluding pregnancy from coverage. *Cf. Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 138-39 (1976); 42 U.S.C. § 2000e(k). But merely outlawing such exclusion proved insufficient to provide women the leave they needed to participate fully in the workplace, whether that leave was for personal medical reasons (including, but not limited, to pregnancy) or for family-related reasons. Congress's answer to this was the FMLA. As the House Report states, "*[p]erhaps most importantly*, [the Act] addresses the needs of the most vulnerable of wage earners, the single woman head of household." H.R. Rep. No. 103-8, pt. 2, at 22 (emphasis added).

For example, Congress heard testimony that:

> Our work with PDA [Pregnancy Discrimination Act] enforcement has made us painfully aware that those with minimum or no coverage tend disproportionately to be women and nonwhite, concentrated in industries where wages are low and women predominate. And we are especially concerned with the more than 6.4 million women who are single heads of household for whom, along with their financially precarious families, lack of job protection renders illness a catastrophe. The Parental Leave and Disability Act [a precursor to the FMLA] would fill that gap by creating a reasonable time period during which *an absence from work for medical reasons* cannot result in termination of an employee.

Parental and Disability Leave: Joint Hearing H.R. 2020 Before the Subcomm. on Civil Serv. and the Subcomm. on Compensation and Employee Benefits of the H. Comm. on Post Office and Civil Serv. and the Subcomm. on Labor Mgmt. Relations and the Subcomm. on Labor Standards of the H. Comm. on Educ. and Labor, 99th Cong. 8 (1985) (statement of Professor Wendy Williams) (emphasis added).[9]

Although Congress was concerned in Subsection D about ensuring affirmative provision of leave for pregnancy, Congress also recognized denial of leave for other medical reasons obstructed women's ability to participate equally in the workplace. The Act's broad provision of leave:

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[9] *See, e.g.*, Reva B. Siegel, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 Yale L.J. 929 (1985) (discussing need for disparate-impact action under PDA).

> means that one of the risks that currently faces families planning to have children—*the risk of job loss of the mother*—is eliminated. . . . It means that women deciding whether to bear children can be secure in knowing that they *can* continue their incomes after childbirth and the attendant disability period is over.

The Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor-Mgmt. Relations and the Subcomm. on Labor Standards of the H. Comm. on Educ. and Labor, 99th Cong. 104 (1986) (first emphasis added).

Other testimony explained that affording women leave prior to childbirth was critical to achieve equal opportunity in the workplace:

> [I]ts provision for temporary medical leave would ensure that new mothers don't lose their jobs when they temporarily cannot work due to pregnancy—and childbirth—related disability (as part of ensuring that employees in general do not lose their jobs when they are temporarily unable to work because of a serious health condition).

S. Rep. No. 102-68, at 23 (1991); *see also* H.R. Rep. No. 102-135, pt. 1, at 45-46 (articulating that pregnancy-related disability was one of the conditions protected by the new medical-leave provision).

Nevertheless, the lower court suggested that the medical-leave provision was *not* targeted at eliminating gender discrimination in the workplace, because there was evidence in the "legislative history" regarding additional benefits of the medical-leave provision, including "alleviat[ing] the economic effect on employees and their families of job loss due to sickness and also to protect employees from being

discriminated against because of their serious health problems." Pet. App. 12; *see also Brockman*, 342 F.3d at 1164. That Congress identified benefits of the medical-leave provision beyond the eradication of gender discrimination, however, does not change the fact that Subsection D—and the Act as a whole—was designed to address that one constitutional wrong. For example, *Hibbs* found that Subsection C targeted gender discrimination even though it could be argued that affording family-care leave had the additional aim of ensuring the availability of caretakers for the elderly. *See, e.g.*, 29 C.F.R. § 825.101(b) ("Increasingly, America's children and elderly are dependent upon family members who must spend long hours at work."); H.R. Rep. No. 103-8, pt. 1, at 38 (discussing conditions suffered by elderly that necessitate care). To hold otherwise would restrict Congress, when protecting fundamental rights, only to those remedies that would have no ancillary beneficial purposes or effects. Nowhere does the Constitution impose such a counter-productive limitation on Congress's Section 5 power.

The lower court and other courts have similarly been misled by the fact that Subsection D provides leave benefits on a gender-neutral basis for illnesses to which women and men are equally susceptible. This does not mean, as these courts concluded, that the provision of such leave was unrelated to the goal of eliminating and deterring gender discrimination. To the contrary, the record is overwhelmingly clear that the remedy had to be gender-neutral to avoid a pill that was worse than the poison:

> Another significant benefit of the *temporary medical leave* provided by this legislation is the form of protection it offers women workers who bear children. *Because the bill treats all*

> *employees who are temporarily unable to work due to serious health conditions in the same fashion, it does not create the risk of discrimination against pregnant women posed by legislation which provides job protection only for pregnancy related disability.*

S. Rep. No. 102-68, at 30 (emphasis added).

Indeed, the legislative record abounds with evidence that Congress was wary of indirectly locking women out of the workplace by singling them out for protection. For example, the 1991 House Report indicated:

> A law providing special protection to women or any defined group, in addition to being inequitable, runs the risk of causing discriminatory treatment. Employers might be less inclined to hire women or the members of any group provided special treatment. For example, legislation addressing the needs of pregnant women only might encourage discriminatory hiring practices against women of child bearing age. Legislation addressing the needs of all workers equally does not have this effect.

H.R. Rep. No. 102-135, pt. 1, at 30; *see also* H.R. Rep. No. 101-28, pt. 1, at 14 (1989).

The framing of the medical-leave provision as gender-neutral therefore does not mean that Congress had abandoned its intent to address workplace gender discrimination; such neutrality was essential for ensuring that the Act would actually help women rather than provoke further discrimination:

> Faced with the knowledge that *job-protected leaves* were required for working mothers and working mothers only, employers would very

> likely be reluctant to hire or promote women of child-bearing age. Under the proposed legislation, however, *because employers would be required to provide job-protected leaves for all employees in circumstances that affect them all approximately equally, they would have no incentive to discriminate against women.*

Family and Medical Leave Act of 1987: Joint Hearing on H.R. 925 Before the Subcomm. on Civil Serv. and the Subcomm. on Compensation and Employee Benefits of the H. Comm. on Post Office and Civil Serv. ("Hearing on H.R. 925"), 100th Cong. 39 (1987) (supplemental statement of Professor Eleanor Holmes Norton) (emphasis added, footnote omitted).

B. Congress Adduced Sufficient Evidence That Women Were Disproportionately Harmed By Inadequate Medical Leave.

In what ostensibly was step two of its analysis, the lower court found that 'even if' Subsection D targeted gender discrimination, there was no evidence of a pattern of discriminatory conduct in the administration of medical leave. Pet. App. 12. The lower court drew this sweeping conclusion about years of legislative effort without citing even a single-piece of the legislative record. *Ibid*. Due deference for Congress's efforts to enforce Section 5 requires far more.

The legislative record contains ample evidence—particularly when considering the heightened scrutiny applicable to gender issues—of the way in which the administration of medical leave in the workplace denied women equal opportunity in the

workplace.[10] It shows: (1) the increasing and disproportionate representation of women as single heads of household; (2) the influence of gender stereotypes in subjecting women to unequal pay and discriminatory employment policies; and (3) the inadequacy of existing laws for remedying the disproportionate impact upon women of inadequate leave policies.

1. The congressional reports for the FMLA detail Congress's awareness that the number of women in the workforce had dramatically increased:

> In its Corporate Reference Guide to Work-Family Programs, the Families and Work Institute predicts that by 1995, two-thirds of women with pre-school children and three-quarters of the women with school-age children will be in the labor force. Today, according to the Bureau of Labor Statistics, 96 percent of fathers and 65 percent of mothers work outside the home. The participation of women in the labor force was 19 percent in 1900; today 74 percent of women aged 25-54 are in the labor force. Fifty-six percent of mothers with children under age six and 51 percent of mothers with children under age one are in the labor force.

S. Rep. No. 103-3, at 4.

Congress also adduced compelling statistical evidence that, not only were women working more, but they were more frequently serving either as single heads of households or responsible for an important share of the financial burden in low-

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[10] As in *Hibbs*, the legislative record over a number of years is relevant here. *See Hibbs*, 538 U.S. at 731 nn.4-5 (citing history of PDA and 1987 FMLA-precursor); *id.* at 732-33 (citing history of 1991 FMLA-precursor).

income households. *See* S. Rep. No. 102-68, at 22 ("Two out of every three women working outside the home today are either the sole providers for their children or have husbands who earn less than $18,000 a year. . . . The new economic reality is that today's families depend on a woman's income to survive."). A substantial increase in "[d]ivorce, separation, and out-of-wedlock births" meant that "millions of women [were] struggl[ing] as single heads of households to support themselves and their children," and such women "often cannot keep their families above the poverty line. H.R. Rep. No. 103-8, pt. 1, at 26. [11]

Congress identified the unique pressures faced by such single-women heads of household. Although "[t]he need for job protected medical leave arose long before the dramatic new changes in the work force. . . . such losses are felt more today." S. Rep. No. 103-3, at 6; *see also* H.R. Rep. No. 103-8, pt. 1, at 27. For a woman heading a household alone or providing vital support to a low-income family, "the loss of [her] job *because of illness* can have devastating consequences." S. Rep. No. 103-3, at 6 (emphasis added).

Further underscoring the size and vulnerability of this large swath of working women, Congress noted

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[11] Women's participation in the workforce is close to its highest during the years that women tend to be pregnant or give birth. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Women in the Labor Force, A Databook*, 5 tbl. 1 (2006), *available at* http://www.bls.gov/cps/wlf-databook-2006.pdf (70-73% of women ages 20-34 are in the labor force); Barbara Downs, U.S. Census Bureau, *Current Population Reports: Fertility of American Women: June 2002*, 2 tbl. 1 (Oct. 2003), *available at* http://www.census.gov/prod/2003pubs/p20-548.pdf (by age 34, 72.4% of women have had at least one child).

that "[i]n 1987, 20 percent of all children under age six lived with single mothers. The poverty rate among these young children was 61.4 percent, more than five times the poverty rate of 11.6 percent among children living in two-parent families." H.R. Rep. No. 103-8, pt. 1, at 26.

2. Congress also found that the increase in women wage-earners was taking place against a backdrop of continuing, intractable, and pervasive gender discrimination in the workplace. Such disparate treatment was evident in unequal pay *and in* discriminatory employment policies. Congress learned, for example, that women "still earn[ed] on average only two thirds of what white males earned," and that "roughly half of this earnings gap may [have been] attributable to discriminatory employment practices." H.R. Rep. No. 102-40, at 20-21. In addition to "substantial sex segregation" between occupations or job titles, women earned less than men in nearly every occupation. *Ibid*. Congress also had before it evidence that women workers "remain in female intensive, relatively low paid jobs *and are less likely than men to have adequate job protections and benefits*." H.R. Rep. No. 101-28, pt. 1, at 5 (emphasis added).

The absence of adequate medical leave policies, particularly for women, had a significant impact on women's earnings. One study found that "workers without leave suffer added unemployment and earnings losses after *childbirth or illness* because they cannot return to their former jobs;" when they do return, "it is often at lower hourly wage rates." S. Rep. No. 103-3, at 16 (emphasis added). A second study estimated that "by the year after birth, the earnings of mothers were $1.40 an hour lower than those of women who did not give birth ([even though]

they had been higher before birth)." S. Rep. No. 102-68, at 24. Yet another study estimated that working women without employer-provided leave "had average annual earnings $5,000 lower than women with job-guaranteed leave." S. Rep. No. 103-3, at 13. Still more grave, "[t]he lack of job-guaranteed leave leads to even further losses in earnings," where "working women without leave lost $9,279 or 86 percent of their pre-birth earnings after childbirth" while "women with leave lost 51 percent of their pre-birth earnings." *Ibid.*

3. In adopting the FMLA's medical-leave provision, Congress also had before it nearly two decades of evidence regarding the patchwork of inadequate or unequal leave policies, which were premised on stereotypes that women were mothers first and workers second. *Cf. Hibbs*, 538 U.S. at 736 (noting "employers' stereotypical views about women's commitment to work and their value as employees"). In adopting the PDA, Congress identified policies "forc[ing] women who bec[a]me pregnant to stop working regardless of their ability to continue," "set[ting] arbitrary time limits" before which women could not return to work, and refusing "to credit women with accumulated seniority after a pregnancy disability leave on the same terms applicable to other persons absent from work for other disabilities." S. Rep. No. 95-331, at 6 (1977).

During the FMLA hearings, Congress heard testimony from many women who, despite the protections of the PDA, lost their jobs after becoming pregnant or after childbirth. *See Parental and Medical Leave Act of 1987: Hearing on S. 249, Before the Subcomm. on Children, Family, Drugs, and Alcoholism of the S. Comm. on Labor and Human Res.*, 100th Cong., pt. 2 at 16 (1987) (woman who lost

job after childbirth). Professor Eleanor Holmes Norton testified that: "[women] risk losing their jobs when they are temporarily unable to work [due to] pregnancy and childbirth [because of the inadequacy of their employer's leave policy]." *Hearing on H.R. 925*, at 35.[12]

Although *Amici* do not believe it is necessary or appropriate for Congress to conduct a state-by-state analysis of medical-leave policies, (*see supra*, 12-13, and *Lane*, 541 U.S. at 524-29), in *Hibbs*, this Court already identified the deficiencies in each of the States' leave programs—deficiencies that implicated *all* of the FMLA's leave provisions, including medical leave. *See, e.g., Hibbs*, 538 U.S. at 729, 733-34, nn.6-9. The need to afford medical leave to both public and private employees to remedy gender discrimination in the workplace is thus ample to support Congress's use of its prophylactic authority afforded by Section 5 to remedy gender-based discrimination.

C. Subsection D Was A "Congruent And Proportional" Response To This Evidence.

At step three, the medical-leave provision was a "congruent and proportional" response to the preceding evidence of persistent gender discrimination in this arena.[13] As explained *supra*, 19, Subsection D of the Act shares all of the same limitations on scope that the Court found sufficient in the context of Subsection C to ensure that Congress

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[12] *See Hibbs*, 538 U.S. at 730 n.3 (explaining that Congress had sufficient evidence that deficiencies in private-employer leave plans were equally prevalent in public-employer plans).

[13] The court below did not reach step three, concluding instead that "[w]ithout such evidence, the self-care provision cannot pass the congruence-and-proportionality test." Pet. App. 12.

had not exceeded its prophylactic power. *See Hibbs*, 538 U.S. at 737-40.[14]

The language of the Act, and the legislative history that specifically addresses medical leave, confirms what *Hibbs* previously found to be true for Subsection C (and, as *Amici* respectfully submit in Part I, *supra*, to be true of all of the leave provisions). In enacting Subsection D as part of the FMLA, Congress was addressing years of gender discrimination in the workplace, which was manifest both in inadequate leave policies for pregnancy and illness, and in the disproportionate impact that such leave policies had on the ever-expanding category of women wage-earners, who were more likely to be single heads of households, and who were more likely to be deterred from starting families if they could not count on job protection before and after their child was born. This record is ample to uphold Congress's express intent to exercise its authority, under Section 5 of the Fourteenth Amendment, to abrogate state sovereign immunity from damages to remedy such gender discrimination.

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[14] As in *Hibbs*, Congress saw gender-neutrality as key to ensuring the remedy was congruent and effective. *Hibbs*, 538 U.S. at 737; H.R. Rep. No. 102-135, pt. 1, at 30.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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September 27, 2011