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 THE CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Constitutional Accountability Center ("CAC") is a think tank, public interest law firm and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars and the public to improve understanding of the Constitution and to preserve the rights, freedoms and structural safeguards that it guarantees. CAC accordingly has a strong interest in the Court's interpretation of the Eleventh Amendment and of Congress's enforcement powers under the Fourteenth Amendment.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

This case poses a fundamental question about the permissible role of Congress in passing laws to enforce constitutional rights. It also poses a fundamental question about the permissible role of this Court in responding to congressional action to enforce constitutional rights.

Congress passed a law that authorizes Daniel Coleman to enforce a legal right in federal court. Ac-

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission. Petitioner and Respondent have granted blanket consent to the filing of *amicus* briefs.

cording to the State of Maryland, the Constitution nevertheless shuts the federal courthouse door to Mr. Coleman for two related reasons. First, the Eleventh Amendment generally bars federal actions against a State by its citizens. Second, Congress purportedly lacks power in the context of this particular law to override the Eleventh Amendment.

Maryland's position is doubly flawed. The first proposition is not faithful to the language and purpose of the Eleventh Amendment. The second proposition is not faithful to the language and purpose of Section 5 of the Fourteenth Amendment.

The Eleventh Amendment does not, by its terms, apply to a suit by a citizen against his or her own State. Accordingly, this Court should no longer apply an expansive, extra-textual penumbra to deprive federal courts of jurisdiction over suits by a citizen against his or her own State. An interpretation of the Eleventh Amendment that accords with its language and historical purpose is sufficient to reject the removal of federal court jurisdiction advocated by Maryland.

Even if this Court continues to apply the Eleventh Amendment to a suit by a citizen against his or her own State (notwithstanding the Amendment's explicit language), the language and purpose of Section 5 of the Fourteenth Amendment readily establish that Congress possessed ample authority to enact the self-care provision of the Family Medical Leave Act (the "FMLA" or the "Act") and to apply it to state employers.

ARGUMENT

I. The Eleventh Amendment Does Not Bar Mr. Coleman's Claim.

It is important and appropriate for this Court to revisit its Eleventh Amendment framework.

The Framers of the Eleventh Amendment crafted precise constitutional language in response to a specific historical event. That event was this Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which adjudicated a federal lawsuit by a citizen of one State against a State that was not his own. Subsequently, Congress passed, and the States ratified, an Amendment with language that targets that exact circumstance: "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* . . . ." U.S. Const. amend. XI (emphasis added).

Nearly a century later, in *Hans v. Louisiana*, 134 U.S. 1 (1890), this Court overrode the Amendment's plain language and began applying a "second" Eleventh Amendment to effectuate a far broader concept of state sovereign immunity that bars most claims for damages brought by a citizen against his or her own State in federal court. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 23 (1989) (Stevens, J., concurring) ("It is important to emphasize the distinction between our two Eleventh Amendments. There is first the correct and literal interpretation of the plain language of the Eleventh Amendment . . . . In addition, there is the defense of sovereign immunity that the

Court has added to the text of the Amendment . . . ."); *cf. Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) ("[W]e have understood the Eleventh Amendment to stand . . . for the presupposition . . . that the States entered the federal system with their sovereignty intact . . . .").[2]

This judicial approach erroneously rejects the plain language of an unambiguous provision. It also is based on a mistaken view of the purpose and history of the Eleventh Amendment and its relationship to the sovereign immunity doctrine.[3]

A correct understanding of the Amendment's history, purpose and plain language demonstrates that

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[2] *See also, e.g.*, John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 Yale L.J. 1663, 1683 (2004) ("[T]he *Hans* Court relied on the political context and the temper of the times to infer a broader spirit than the Amendment's text could bear . . . .").

[3] *See, e.g.*, *Alden v. Maine*, 527 U.S. 706, 763-64 (1999) (Souter, J., dissenting) ("There is almost no evidence that the generation of the Framers thought sovereign immunity was fundamental in the sense of being inalterable."); *Seminole Tribe of Fla. v. Florida*, 544 U.S. 44, 130 (1996) (Souter, J., dissenting) (similar); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 258-59 (1985) (Brennan, J., dissenting) (similar); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033, 1035-37 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889, 1890-91 (1983).

the Eleventh Amendment does not bar a federal suit by an individual against his or her own State.

A. The Eleventh Amendment's Purpose Highlights Its Limited Scope.

The circumstances of *Chisholm* led directly to the language of the Amendment and inform its original purpose. The historical context reveals that the Amendment's Framers specifically designed it to limit Article III's Citizen-State diversity jurisdiction by proscribing litigation by citizens of one State against another State when the only basis for federal jurisdiction is diversity of citizenship.

1. *Chisholm* Led to the Scope and Contours of the Eleventh Amendment.

Chisholm arose from a 1777 transaction in which Robert Farquhar, a South Carolina merchant, sold goods to commissioners of the State of Georgia for soldiers quartered in Savannah. *Chisholm v. Georgia*, Case File, Records of the Supreme Court of the United States, Record Group 267 (National Archives) *cited in* Doyle Mathis, *Chisholm v. Georgia: Background and Settlement*, 54 J. Am. Hist. 19, 20 (1967). Although the Georgia House of Representatives authorized payment for these goods, the State's commissioners never paid. *Journal of the House of Representatives of the State of Georgia* 365 (1789) *cited in* Mathis, *supra*, at 21; 5 Documentary History of the Supreme Court of the United States 1789-1800: Suits Against the States 127 (Maeva Marcus ed. 1994) [hereinafter, "__ DHSC"]. After Farquhar's death, Alexander Chisholm, and other executors of Farqu-

har's estate, requested payment from the legislature, but it refused. *Journal of the House of Representatives of the State of Georgia* 359, 364-66 (1789) *cited in* Mathis, *supra*, at 22 n.15; *Journal of the Senate of the State of Georgia* 111, 227 (1789) *cited in* Mathis, *supra*, at 22 n.15.

Chisholm then brought a common law claim against Georgia in federal court, seeking 100,000 pounds sterling in damages. *See* 5 DHSC, *supra*, at 127-29. Georgia raised a sovereign immunity defense. Def.'s Plea to Jurisdiction, *Farquhar v. Georgia*, No. RG 21 (C.C.D. Ga. filed Oct. 17, 1791) (arguing that Georgia, as a "free, sovreign [sic] and independent state . . . cannot be drawn or compelled . . . to answer, against the will of the said State") *reprinted in* 5 DHSC, *supra*, at 143. Justice Iredell – who heard the circuit court case along with district Judge Nathaniel Pendleton – concluded that Georgia was not subject to suit in the lower federal courts because the Supreme Court holds original jurisdiction over cases in which a State is party. 5 DHSC, *supra*, at 131, 153-54; Mathis, *supra*, at 23. Accordingly, the circuit court dismissed the case for want of jurisdiction.

Subsequently, this Court heard the case pursuant to its original jurisdiction. Georgia never appeared in the proceedings, refusing to recognize the Court's authority. *Chisholm*, 2 U.S. (2 Dall.) at 429. In seriatim opinions, the Court found for Chisholm four-to-one, holding that Article III and the Judiciary Act of 1789 gave federal courts authority to grant the plaintiff relief against Georgia. *Id.* at 450-53 (Blair, J.), 453-66 (Wilson, J.), 467-69 (Cushing, J.), 469-79 (Jay, C.J.).

The Court held only that federal courts were authorized to hear common law claims when the plaintiff is diverse from the State being sued – *i.e.,* when a citizen of one State sues a different State in federal court. Four opinions relied upon Article III's plain language and the notion that the States, were subordinate to the national "people" – the only sovereign the Constitution contemplates. Thus, the plea of sovereign immunity to a common law cause of action, in the suit by a citizen of one State against another State, was ineffectual.

The Court did not address federal question jurisdiction. *See Atascadero*, 473 U.S. at 282-83 (Brennan, J., dissenting). Notably, Justice Iredell, the lone dissenter, distinguished between common law claims, such as Chisholm's, and claims raising federal questions. *Chisholm*, 2 U.S. (2 Dall.) at 449 (opining that he need not determine whether Georgia is subject to suit based on federal law). Moreover, Justice Iredell noted that the Court neither addressed nor needed to address whether Congress had authority to pass a "new law" that would subject the States to federal court jurisdiction. *Id.*; *see also Atascadero*, 473 U.S. at 283 (Brennan, J., dissenting) ("[E]ven Justice Iredell's dissent did not go so far as to argue that a State could *never* be sued in federal court.").

The Eleventh Amendment was a reaction to *Chisholm*'s holding regarding diversity jurisdiction. This precipitating event did not involve federal question jurisdiction, or a suit by a citizen against his own State.

2. The Development of the Amendment's Text Further Demonstrates Its Limited Scope.

Within two days of this Court's decision, members of Congress proposed two different amendments to overturn the decision. The proposal that ultimately prevailed reveals that the Amendment was limited to the specific concern in *Chisholm* – Article III's Citizen-State diversity clause.

The first proposal, which Massachusetts Representative Theodore Sedgwick introduced on February 19, 1793, contained very broad language:

> [N]o state shall be liable to be made a party defendant, in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons, whether a citizen or citizens, or foreigner or foreigners, or of any body politic or corporate, whether within or without the United States.

Proceedings of the United States House of Representatives, Gazette of the U.S. (Phila. Feb. 19, 1793) *reprinted in* 5 DHSC, *supra*, at 605-06. This proposed amendment would have removed from federal jurisdiction *any* suit brought by *any* citizen against *any* State.[4]

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[4] Several States proposed similar restrictions on Article III as a condition of ratification. *See* 3 Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787, at 660-61 (Jonathan Elliot 2d rev. ed. 1891) (Virginia proposal) [hereinafter, "__ Elliot"]; 4

The following day, a narrower alternative was introduced in the Senate.

> The Judicial power of the United States shall not extend to any suits 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.

3 Annals of Cong. 651-52 (Feb. 20, 1793). This proposal – reflecting the language of Article III's Citizen-State diversity clause – removed federal jurisdiction only from suits brought by an individual who was not a citizen of the state defendant.

Congress tabled both proposals.

In January 1794, Congress revisited the issue and rejected Representative Sedgwick's broad proposal. Both houses of Congress introduced identical resolutions that closely resembled the narrow proposal initially offered in the Senate. These resolutions, which eventually became the Eleventh Amendment, merely added the words "be construed to" to the prior Senate resolution.

> The Judicial power of the United States shall not *be construed to* extend to any suit in law

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Elliot, *supra*, at 246 (North Carolina proposal); 2 Documentary History of the Constitution of the United States of America 1786-1870, at 317 (U.S. Dep't of State 1894) (Rhode Island proposal); 1 St. George Tucker, Blackstone's Commentaries: with Notes of Reference, to the Const. and Laws, of the Fed. Gov't of the United States; and of the Commonwealth of Virginia 352 & n.* (1803) (Massachusetts and New Hampshire proposals). None of these proposals was adopted.

> 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.

4 Annals of Cong. 25 (Jan. 2, 1794) (proposal) (emphasis added); *id.* at 30-31 (Jan. 14, 1794) (passing the Senate 23-to-2); *id.* at 477-78 (Mar. 4, 1794) (passing the House 81-to-9).

The required twelve States ratified the Amendment quickly – in less than a year. However, Congress did not receive notice of ratification from all of these States until January 8, 1798. *See* Letter from Pres. John Adams to U.S. Congress (Jan. 8, 1798) *reprinted in* 5 DHSC, *supra*, at 637.

By rejecting the broad language proffered by Representative Sedgwick and accepting the narrow alternative, the Framers of the Eleventh Amendment did not constitutionalize broad sovereign immunity in the language of the Amendment, and, in fact, explicitly declined to do so. Instead, in the language they chose, they adopted a specific limitation of Article III to exclude federal suits by citizens of one State against another State.

B. The Court Has Relied on an Erroneous Interpretation of the Framers' Understanding of Sovereign Immunity.

In its Eleventh Amendment jurisprudence, the Court has invoked the Framers' views of the Constitution as a reason for giving the Amendment a broader sweep than its language commands. For example, in *Pennhurst v. State School & Hospital v. Halderman*, the Court parsed the constitutional debates and concluded that the "Amendment's

language overruled the particular result in *Chisholm*, but . . . its greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III." 465 U.S. 89, 98 (1984)*; see also Blatchford*, 501 U.S. at 779.

This conclusion misapprehends the Framers' views on sovereign immunity. The Court's jurisprudence has been interpreted as suggesting that "everyone involved in framing or ratification of the Constitution" had an expansive view of state immunity, *Atascadero*, 473 U.S. at 259 (Brennan, J., dissenting).

The Court's view is inaccurate. As Justice Souter explained in his *Alden* dissent, "[t]he American Colonies did not enjoy sovereign immunity, that being a privilege understood in English law to be reserved for the Crown alone." 527 U.S. at 764-65. Importantly, the Crown's immunity from the courts was a *personal* privilege that did not extend to other government actors. *See, e.g.*, Joseph Chitty, A Treatise on the Law of the Prerogatives of the Crown 5 (1820); Edwin M. Borchard, *Government Liability in Tort*, 34 Yale L. J. 1, 4 (1924); Gibbons, *supra*, at 1895-96.

Moreover, subjects of the Crown were not without recourse for wrongs committed by the Crown. They could pursue remedies via the "petition of right" or the *monstrans de droit*. *See, e.g.*, *Monckton v. Att'y Gen.*, 2 Mac. & G. 402, 412 (Ch. 1850) (Lord Cottenham) *cited in* Borchard, *supra*, at 5 n.10; *see also Alden*, 527 U.S. at 769-70 (Souter, J., dissenting); Gibbons, *supra*, at 1895-96. Thus, "sovereign immunity" in the English tradition was far from absolute.

Furthermore, a review of colonial charters and constitutions supports the conclusion that the ratifiers held a narrower view of sovereign immunity than the Court has suggested. For example, the charters of New England, Massachusetts Bay, Connecticut, Georgia, and Rhode Island and Providence Plantations expressly provided that the governing authorities could be sued. *See* Charter of New England – 1620 *reprinted in* 5 Sources & Documents of United States Constitutions 16, 19 (William F. Swindler ed. 1973) [hereinafter, "__ Swindler"]; Charter of Massachusetts Bay – 1629 *reprinted in id.* at 32, 36; Charter of 1662 (Connecticut) *reprinted in* 2 Swindler, *supra*, at 131; Charter of Rhode Island & Providence Plantations – 1663 *reprinted in* 8 Swindler at 362, 363; Charter of 1732 (Georgia) *reprinted in* 2 Swindler at 433, 434. Connecticut and Rhode Island each adopted its existing charter as the State constitution, adding only bills of rights that reinforced that the government was subject to suit. *See* Constitutional Ordinance of 1776 *reprinted in* 2 Swindler, *supra*, at 143; 8 Swindler at 351. Similarly, the Delaware and Massachusetts constitutions made clear that their citizens had judicial remedies for *all* wrongs committed against them, without immunizing the State. *See* A Declaration of Rights & Fundamental Rules of the Delaware State *reprinted in* 2 Swindler at 197, 198; Constitution of Massachusetts – 1780 *reprinted in* 5 Swindler at 92, 94.

The ratification debates further undermine the suggestion of a sweeping view of sovereign immunity at the time the Eleventh Amendment was ratified. The debates discussing Article III are especially salient and indicate that the Framers did not have a monolithically expansive view of sovereign immunity

– or uniformly believe that the concept should be constitutionalized.

For instance, during the Pennsylvania convention, James Wilson – a supporter of the Constitution and future Supreme Court justice – touted federal jurisdiction over the States (for the purpose of enforcing the treaty with Britain) as a justification for ratification. 2 Elliot, *supra*, at 490.[5] Moreover, in the North Carolina convention, Federalist William Davie praised Article III as a means to provide a neutral forum when a State was party to litigation. 4 Elliot, *supra*, at 159. In addition, Alexander Hamilton – who was "among the leading participants in the debate surrounding ratification" who favored the Constitution and whose comments provide "[t]he only arguable support for the Court's absolutist view" on sovereign immunity, *Alden*, 527 U.S. at 773 (Souter, J., dissenting) – acknowledged the possibility that the States could surrender immunity "in the plan of the convention." Federalist No. 81, at 446 (Hamilton) (E.H. Scott ed., 1898). In fact, he noted that States *would* be subject to federal jurisdiction in cases that "involve the *peace* of the *Confederacy*," including suits by foreigners based on the treaty with Britain. Federalist No. 80, at 434 (Hamilton) (E.H. Scott ed., 1898).

Relatedly, opponents of the Constitution did not believe that it codified broad sovereign immunity.

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[5] Notably, Justice Wilson (who ruled in Chisholm's favor) and Edmund Randolph (who argued on Chisholm's behalf) served on the Committee of Detail, which drafted Article III. 2 The Records of the Federal Convention of 1787, at 106 (Max Farrand ed. 1937).

For example, William Grayson observed that "the consent of foreign nations must be had before they become parties; *but it is not so with our states*. It is fixed in the Constitution that they *shall* become parties." 3 Elliot, *supra*, at 567 (emphasis added); *see also* Gibbons, *supra*, at 1907. Patrick Henry, another anti-Federalist, rejected Madison's argument that Article III ensured only that a State could participate as a plaintiff in federal court. *See* 3 Elliot, *supra*, at 533 ("The only operation [Article III] can have is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court."). To Henry, Madison's argument was not supported by the text of Article III and, therefore, was "perfectly incomprehensible." *Id.* at 543. According to Henry, "[t]here is nothing to warrant [Madison's] assertion . . . . What says the paper? That it shall have cognizance of controversies between a state and citizens of another state without discriminating between plaintiff and defendant." *Id.*

Against this backdrop, "[s]ome Framers" concluded that "sovereign immunity was an obsolete royal prerogative inapplicable in a republic." *Alden*, 527 U.S. at 764 (Souter, J., dissenting); *see also Seminole Tribe*, 517 U.S. at 95-98 (Stevens, J., dissenting).

A central component of the justification for expanding the Eleventh Amendment beyond its text – that there was a uniform intent to constitutionalize sovereign immunity, which the Eleventh Amendment restored – does not square with history. A reliance on history, therefore, is an unsound justification for overriding the explicit language of the Eleventh Amendment.

C. The Court Should Apply the Plain Language of the Amendment.

The Eleventh Amendment does not bar Daniel Coleman's congressionally authorized suit from being heard in federal court. The Amendment's text is specific and unambiguous. It bars only a suit against "one of the United States by [a] Citizen[] of *another State*." U.S. Const. amend. XI (emphasis added). Mr. Coleman is a citizen of Maryland seeking to bring a suit asserting a federal right against an entity and officials of his home State.

A contrary conclusion can be reached only by disregarding the Amendment's plain language. *See, e.g.*, *Blatchford*, 501 U.S. at 779 ("Despite the narrowness of its terms, . . . we have understood the Eleventh Amendment to stand *not so much for what it says* . . . .") (emphasis added).

Courts should not easily disregard the precise language of the Amendment. *See Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202-03 (1819) ("But if, in any case, the plain meaning of a [constitutional] provision . . . is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application."). The language the Amendment's Framers chose "was not due to chance or ineptitude." *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646-47 (1949) (Frankfurter, J., dissenting).

The precise language of the Eleventh Amendment reflects a carefully crafted provision revealing that

its Framers decided "to go so far and no farther" in addressing the issue being targeted – the Citizen-State diversity clause as interpreted in *Chisholm*. Manning, *supra*, at 1750. Accordingly, the Court should honor the language that the Framers employed, the language that Congress approved, and the language that the States ratified.

As a threshold matter, then, the Eleventh Amendment does not provide a sound basis for dismissing Mr. Coleman's case. For this Court to hold otherwise is to continue rewriting the Eleventh Amendment, unjustifiably shutting the federal courthouse door to litigants seeking redress and vindication of their federal rights.

II. Congress Permissibly Used Its Broad Power Pursuant to Section 5 of the Fourteenth Amendment to Enact the Self-Care Provision of the FMLA.

Even if the Court does not at this time re-visit its interpretation of the Eleventh Amendment, the Court nonetheless should permit Mr. Coleman's claim to proceed. In adopting the self-care provision of the FMLA, Congress permissibly exercised its powers under the Fourteenth Amendment and abrogated Eleventh Amendment immunity.

Section 5 of the Fourteenth Amendment, by its terms, is broad and majestically unadorned: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. The Amendment, as passed by Congress and ratified by the States, vests Congress with explicit constitutional authority to ensure that the post-Civil War constitutional guarantees, includ-

ing Equal Protection and Due Process, are enforced. Accordingly, state sovereign immunity is "necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727 (2003) (citation omitted).

A proper understanding of the language and purpose of Section 5 establishes that the self-care provision is a permissible exercise of Congress's power. In describing the boundaries of congressional power under Section 5 in *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), the Court stated that there must be "congruence and proportionality" between the injury to be prevented or remedied and the measures adopted to achieve that end. An application of *Boerne* to this case establishes that the self-care provision falls well within Congress's broad enforcement authority under Section 5.

Even though, in this case, the relevant enforcement legislation passes the *Boerne* test, scholarship since *Boerne* has concluded that the congruence and proportionality test constricts the scope of Section 5 beyond its appropriate compass. As a result, a test that is more reflective of the constitutional language and purpose should be considered.

Whether through an application of *Boerne* or a rethinking of its premise, the principle of broad congressional enforcement power – firmly rooted in the text and history of Section 5 of the Fourteenth Amendment – should be reiterated and applied in this case.

A. Congress Has Broad Enforcement Power Pursuant to Section 5 of the Fourteenth Amendment.

The text and history of Section 5 make clear that, by design, Congress has substantial powers to enact legislation to enforce the Fourteenth Amendment. An analysis of the leading voices from the pre-Civil War period to Reconstruction – the individuals who debated, drafted, proposed and ratified the Amendment – leads to the conclusion that Congress has broad authority under Section 5 to use its judgment to enforce Fourteenth Amendment guarantees.

1. The Plain Language of the Fourteenth Amendment Gives Congress Broad Discretion to Choose the Means by Which It Legislates.

The text of the Fourteenth Amendment establishes Congress's broad discretion to enact legislation pursuant to Section 5. The Framers of the Amendment deliberately chose language calculated to give Congress wide latitude in selecting the legislative measures it deemed necessary. The plain language vests Congress with the "power to enforce" the substantive protections "by appropriate legislation." U.S. Const. amend. XIV, § 5.

The use of the phrase "by appropriate legislation" was no accident; it carried a specific meaning in 1866. This meaning gave effect to the expressed wishes of the Amendment's supporters to assign Congress a powerful role in protecting against unconstitutional actions by States. In particular, the phrasing echoed Chief Justice Marshall's classic statement in

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), that established the fundamental principle for determining the scope of Congress's powers under the Necessary and Proper Clause: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are *appropriate*, which are plainly adapted to that end, which are not prohibited, but consist[ent] with the letter and spirit of the constitution, are constitutional." *Id.* at 421 (emphasis added); *see also Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 614-15 (1870) (quoting this passage in full and declaring that "[i]t must be taken then as finally settled . . . that the words" of the Necessary and Proper Clause are "equivalent" to the word "appropriate"); Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. Rev. 1801, 1810-15 (2010); Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 822-27 (1999); Steven A. Engel, *The* McCulloch *Theory of the Fourteenth Amendment:* City of Boerne v. Flores *and the Original Understanding of Section 5*, 109 Yale L.J. 115, 131-34 (1999); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 Harv. L. Rev. 153, 178 n.153 (1997).

By linking Section 5 to the Supreme Court's classic elucidation of congressional power under Article I – well known at the time of the ratification of the Amendment – it was understood that Congress would have wide discretion to choose whatever legislative measures it deemed "appropriate" for achieving the purposes of the Amendment. *See McCulloch*, 17 U.S. at 421 (indicating that "the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution").

The Framers of the Amendment chose this broad, sweeping language conferring on Congress the power to enforce the Constitution's new guarantees of liberty and equality because they were reluctant to leave the judiciary with the sole responsibility for protecting constitutional rights. In the aftermath of the decision in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), the Framers were determined to give Congress a primary role in securing the guarantees of the Fourteenth Amendment. *See* McConnell, *supra*, at 182 (explaining that the Enforcement Clause was "born of the fear that the judiciary would frustrate Reconstruction by a narrow interpretation of congressional power"); Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 Wm. & Mary L. Rev. 743, 765 (1998) (observing that the Framers "did not entrust the fruits of the Civil War to the unchecked discretion of the Court that decided *Dred Scott*").

The Framers thus expected courts to review acts of Congress pursuant to Section 5 with the deferential posture taken by Chief Justice Marshall in *McCulloch*. *See* 17 U.S. at 423 (refusing "to pass the line which circumscribes the judicial department, and to tread on legislative ground"). Pursuant to this review, a court would strike down an act of Congress only when Congress "adopt[ed] measures which are prohibited by the constitution." *Id.*[6]

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[6] Under this deferential standard, this Court in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), upheld the Fugitive Slave Act – a comprehensive federal legislative scheme. In doing so, the Court cited *McCulloch* and specifically noted Congress's broad power: "The end being required . . . the means to accomplish it are given also; . . .

By borrowing language from *McCulloch* in drafting the text of the Fourteenth Amendment enforcement clause, the Framers thus adopted a broad understanding of congressional power. From their perspective, Congress would be the primary judge of the necessity of any measure that was directed at a legitimate end. *See* Cong. Globe, 39th Cong., 1st Sess. 1118 (1866) (Rep. Wilson).

2. The Ratification Process Confirms That the Framers Sought to Confer Broad Legislative Discretion on Congress.

In light of the broad sweep of Section 5, the debates over the Fourteenth Amendment proved to be an extension of a larger debate over federalism and congressional power. And the outcome was decisive. In ratifying the Amendment, the nation confirmed that Congress should have significant autonomy and discretion in choosing what measures were appropriate under Section 5 to secure the rights and liberties promised by the Amendment.

From the early stages, the leading proponents of the Amendment – Senator Jacob Howard and Representative John Bingham – were clear regarding the Amendment's purpose: shifting the balance of power between the States and the federal government by giving Congress wide latitude to enact "appropriate" measures. Introducing the proposed Amendment to the Senate in May 1866, Senator Howard empha-

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the power flows as a necessary means to accomplish the end." *Id.* at 619.

sized that the antebellum Constitution had not granted Congress adequate authority to protect constitutional rights against state infringement. *See* Cong. Globe, 39th Cong., 1st Sess. 2764-66 (1866). According to Howard, the proposed enforcement clause in Section 5 would remedy this deficiency by providing a "direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution." *Id*. at 2766.

Senator Howard rejected any narrow reading of Congress's enforcement power. Section 5, Howard declared, conferred authority to pass any "laws which are appropriate to the attainment of the great object of the amendment." *Id*. Further, it cast "upon Congress the responsibility of seeing to it, for the future, that . . . no State infringes the rights of persons or property." *Id.* at 2768.

Members of the House echoed these sentiments, confirming the breadth and significance of congressional enforcement power. Representative Bingham emphasized that Section 5 would bring a fundamental and necessary change in the balance of power between the federal and state governments. *Id.* at 2542 (noting that Section 5 would correct the constitutional defect that had led to "many instances of State injustice and oppression"). Other supporters concurred, praising Congress's broad enforcement power and the protection it would afford citizens from state encroachments. *See id.* at 2498 (Rep. Broomall) ("We propose . . . to give power to the Government of the United States to protect its own citizens within the States, within its own jurisdiction. Who will deny the necessity of this? No one."); *id.* at 2510-11

(Rep. Miller) ("And as to the States it is necessary . . . ."). These supporters understood, moreover, that the Amendment would grant Congress the authority to decide what is "appropriate" for an enforcement mechanism. *See* Cong. Globe, 39th Cong., 1st Sess. 43 (1865) (Sen. Trumbull) ("What that 'appropriate legislation' is, is for Congress to determine, and nobody else."); Cong. Globe, 39th Cong., 1st Sess. 1124 (1866) (Rep. Cook) ("Congress should be the judge of what is necessary . . . .").

The Fourteenth Amendment's opponents did not disagree with this understanding. To the contrary, they also understood Section 5 to confer broad discretion on Congress to enforce the Amendment's provisions. In fact, this broad power was one of the reasons for their opposition to the Amendment. *See* Cong. Globe, 39th Cong., 1st Sess. 2500 (1866) (Rep. Shanklin); *id.* at 2538 (Rep. Rogers); *id.* at 2940 (Sen. Hendricks). In State after State in the South, opponents of the Fourteenth Amendment feared that the authority to pass "appropriate legislation" would give Congress excessive power to define the obligations of States with respect to their citizens. As one Texas State Senator put it, "[w]hat is 'appropriate legislation?' The Constitution is silent; therefore, it is left for the Congress to determine." *Journal of the Senate of the State of Texas*, 11th Legis., 421-22 (1866). In a similar vein, Governor Jenkins of Georgia lamented that Congress would have too much power over the States, and that it would "be contended that [members of Congress] are the proper judges of what constitutes appropriate legislation. If therefore, the amendment be adopted, and . . . Congress . . . be empowered 'to enforce it by appropriate legislation,' what vestige of hope remains to the people of those

States?" James E. Bond, No Easy Walk to Freedom: Reconstruction and the Ratification of the Fourteenth Amendment 238 (1997). While supporters and opponents parted ways on the merit of the Amendment, both sides agreed that it would provide Congress broad enforcement authority.

3. The Understanding of Section 5 During Reconstruction Underscores Congress's Broad Discretion to Adopt Enforcement Measures It Deems Appropriate.

Post-ratification interpretations of Section 5 confirm that the provision was understood to give Congress wide latitude in selecting the legislative measures it deemed appropriate.

First, subsequent Congresses understood the power conferred by Section 5 to be broad. Senator Sumner, for instance, reasoned that "the Supreme Court will not undertake to sit in judgment on the means employed by Congress in carrying out a power which exists in the Constitution." Cong. Globe, 42nd Cong., 2nd Sess. 728 (1872). Likewise, Representative Lawrence stated that Congress would be the "exclusive judge of the proper means to employ" its power under Section 5. Cong. Rec., 43rd Cong., 1st Sess. 414 (1874). In fact, it was widely accepted that Congress would retain great discretion in deciding what is "appropriate" in enforcement legislation. *See, e.g.*, Cong. Globe, 41st Cong., 2nd Sess. 3882 (1870) (Rep. Davis) ("No broader language could be adopted than this with which to clothe Congress with power . . . . Congress, then, is clothed with so much

power as is necessary and proper to enforce the [Fourteenth Amendment], and is to judge from the exigencies of the case what is necessary and what is proper."); Cong. Globe, 41st Cong., 2nd Sess. App. 548 (1870) (Rep. Prosser) ("The amendments to the Constitution were not adopted for theoretical, but for practical purposes.").

Second, this Court, in its foundational construction of Section 5 in *Ex parte Virginia*, 100 U.S. 339 (1879), concurred with this expansive view of Congress's powers. Employing language that tracked *McCulloch*, this Court stated: "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain . . . if not prohibited, is brought within the domain of congressional power." *Id.* at 345-46; *see also Strauder v. West Virginia*, 100 U.S. 303, 311 (1879) ("The form and manner of the protection may be such as Congress in the legitimate exercise of its legislative discretion shall provide.").

Congressional and judicial interpretations of Section 5 shortly after ratification confirm that the clause afforded nearly unfettered discretion to enact enforcement legislation, so long as that legislation did not run afoul of any specific constitutional prohibition.

B. Application of the *Boerne* Test Confirms the Permissibility of the Self-Care Provision of the FMLA.

Under an appropriate interpretation of *Boerne*, Mr. Coleman's claim should be permitted to proceed. The language, history and purpose of Section 5 pro-

vide the correct framework for the proper application of that test.

The purpose of Section 5 was to grant Congress broad enforcement powers and "discretion, with respect to the *means* by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people." *McCulloch*, 17 U.S. at 421 (emphasis added). In other words, Congress would have authority to pass any laws appropriate to the "attainment of the great *object* of the amendment." Cong. Globe, 39th Cong., 1st Sess. 2766 (emphasis added); *see also Ex parte Virginia*, 100 U.S. at 345-46 (indicating that legislation is "appropriate" where it is "adapted to carry out the objects the amendments have in view"); *McCulloch*, 17 U.S. at 421 ("Let the *end* be legitimate . . . .") (emphasis added). This purpose – which focuses on ends rather than means – should guide the application of the congruence and proportionality test set forth in *Boerne*.

In fact, *Boerne* itself recognizes that the congruence and proportionality test is intended to be used primarily to identify and assess the ends of Section 5-based legislation, rather than question the means Congress employs to achieve proper objectives. As this Court has explained, the *Boerne* test ensures that the "*object* of valid § 5 legislation [is] the . . . remediation or prevention of constitutional violations." *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 672 (1999) (emphasis added). Put simply, it is an inquiry into whether Congress's legislative ends are legitimate.

Under *Boerne*, only a legislative effort to redefine the Constitution exceeds the bounds of Congress's Section 5 enforcement powers. *See* 521 U.S. at 519-20. Thus, the main function of the congruence and proportionality test is to distinguish between an enforcement and a redefinition of a constitutional right.

> While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.

Id.; *see also* Steven G. Calabresi & Nicholas P. Stabile, *On Section 5 of the Fourteenth Amendment*, 11 U. Pa. J. Const. L. 1431, 1436 (2009) ("On the appropriateness question, . . . [s]o long as the law really 'enforces' Section 1, rather than chang[es] it, Congress ought to have wide latitude in choosing among enforcement remedies.").

In light of this limited inquiry, this Court has noted that it is "for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference." *Boerne*, 521 U.S. at 536 (internal citations omitted). Thus, in *Boerne*, Congress overstepped its enforcement authority in passing the Religious Freedom Restoration Act only because the legislation was "so out of proportion to a supposed remedial or preven-

tive *object* that it cannot be understood as responsive to, or designed to prevent unconstitutional behavior." *Id.* at 532 (emphasis added).

This focus on the legislation's object – rather than the means to achieve that object – is consistent with the original meaning of the Fourteenth Amendment. *See McCulloch*, 17 U.S. at 421; *see also* Samuel Estreicher & Margaret H. Lemos, *The Section 5 Mystique,* Morrison*, and the Future of Federal Antidiscrimination Law*, 2000 Sup. Ct. Rev. 109, 151-52 (2000) ("The Court introduced the test in *Boerne* – and applied it in *Kimel* and *Florida Prepaid* – as a way to assess whether the object of Section 5-based legislation is legitimate. In other words, the congruence and proportionality test speaks to the question of power in the premises: Is this an issue with regard to which Congress is authorized to act? Understood this way, the congruence and proportionality test is consistent with the Court's traditional deference to Congress under the *McCulloch* standard."). Conversely, where the congruence and proportionality test focuses instead on the *means* Congress employs in pursuing a proper objective, the original meaning is undermined. The rationale behind this approach in *McCulloch* – which afforded "considerable latitude" to Congress – was that the "relation between the action and the end . . . is not always so direct and palpable as to strike the eye of every observer." Joseph Story, Commentaries on the Constitution of the United States 417 (1883).

In accordance with this original understanding of the Fourteenth Amendment's enforcement clause, Congress's choice of means is entitled to substantial deference when applying the congruence and propor-

tionality test. At the core, the test must focus on whether the object itself was proper, not on the means employed to achieve that object. Accordingly, where a court agrees that Congress has acted within the bounds of its enumerated powers – that the end is legitimate, and that the means chosen are plausibly directed to achieving that end – the law should be sustained. *See Hibbs*, 538 U.S. at 737-40.

Properly applied, the congruence and proportionality test demonstrates that the self-care provision – like the FMLA provision at issue in *Hibbs* – involves a valid exercise of Congress's enforcement power under Section 5. Enforcing the broad terms of the Equal Protection Clause, and "extending its guarantee to 'any person,'" the FMLA ensures that state employers "treat citizens as individuals, not as simply components of a . . . sexual class." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152-53 (1994) (Kennedy, J., concurring). At the core, the text and legislative history of the FMLA make clear that the self-care provision was designed to fill the gaps of past legislative efforts to eradicate sex discrimination. Thus, it is congruent and proportional to the targeted violation.

In *Hibbs*, this Court explained that Congress's past efforts to enforce a constitutional guarantee affect the proportionality of a given piece of Section 5 legislation. *See* Kevin S. Schwartz, *Applying Section 5:* Tennessee v. Lane *and Judicial Conditions on the Congressional Enforcement Power*, 114 Yale L.J. 1133, 1141 (2005) (noting that "the Hibbs Court applied greater deference by measuring the law's remedial proportionality in light of Congress's coordinate role in enforcement over time"). Therefore, although the

legislation at issue in *Hibbs* presented "across-the-board, routine employment benefit[s] for all eligible employees," this Court determined that Congress was justified in employing broad prophylactic measures "because Congress was confronting the "difficult and intractable problem" of sex discrimination, and previous legislative attempts to tackle this problem – such as Title VII of the Civil Rights Act and the Pregnancy Discrimination Act (the "PDA") – had failed. 538 U.S. at 737. The Court noted that the breadth and gender-neutrality of the family-care provision ensured that leave "would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men." *Id.* For this reason, "Congress' chosen remedy" was "congruent and proportional to the targeted violation." *Id.*

The same analysis holds true here. The text and history of the FMLA establish that the self-care provision, although broad, was congruent and proportional to the legitimate end of eliminating sex discrimination, particularly as it related to pregnant women and single mothers.

First, the provision recognizes that, because of the sex-specific incidence of pregnancy-related illness and disability, personal medical leave is subject to sex discrimination. In crafting the FMLA, Congress left no doubt that it intended to enforce the Fourteenth Amendment's ban on sex discrimination. The goal of the Act, for instance, was to "minimize 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).

The legislative history of the Act similarly demonstrates that Congress viewed the self-care provision as an important tool to uproot discrimination against those who might "bear children." *See, e.g.*, S. Rep. No. 102-68, at 35 (1991). For instance, among the serious medical conditions encompassed by the provision, Congress expressly identified pregnancy, miscarriages, complications or illness related to pregnancy, severe morning sickness, the need for prenatal care, and recovery from childbirth. S. Rep. No. 103-3, at 29 (1993) (noting that a "pregnant patient is generally under continuing medical supervision").

In this respect, the self-care provision met a perceived need not addressed by Title VII or the PDA. Specifically, there was a gap in the prior legislative schemes because they did not require the provision of pregnancy-related leave by employers who offered no benefit provisions for leave at all.[7] As such, the self-care provision of the FMLA was necessary to ensure that all employers provided leave for medical conditions related to pregnancy. H.R. Rep. No. 103-8, at 10-11 (1993) (indicating that the FMLA was "designed to fill those gaps [that an] anti-discrimination law by its nature cannot fill").

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[7] It is "not unlawful under the PDA to terminate an employee absent by reason of pregnancy if the employer would have terminated an employee absent by reason of a different temporary disability." *In re Carnegie Ctr. Assoc.*, 129 F.3d 290, 297 (3d Cir. 1997).

The breadth of the self-care provision, moreover, highlights Congress's intent to combat sex discrimination. Although Congress could have required leave for pregnancy-related conditions only, that would have created a disincentive to hire, retain or promote women because only women would take advantage of such leave, thereby reinforcing the stereotype that "[u]ntil a woman passes the child-bearing age, she is viewed by employers as potentially pregnant." H.R. Rep. No. 95-948, at 6-7 (1978); *see also* S. Rep. No. 102-68, at 73 (1991) (economist Deborah Walker testifying that it might be cost-effective to discriminate against women of child-bearing age because these women would end up costing their employer more than they contribute). In this manner, a provision that incorporated only pregnancy-related leave would have perpetuated the very discrimination that Congress sought to prevent. The self-care provision, however, averted this problem and ensured that women were able to take leave for pregnancy-related conditions without fear of discrimination by requiring employers to allow all employees to take leave for serious health conditions. *See* S. Rep. No. 102-68, at 35 (1991) ("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."); *see also* S. Rep. No. 103-3, at 16 (1993) ("A law providing special protection to women or any defined group . . . runs the risk of causing discriminatory treatment. [The FMLA],

by addressing the needs of all workers, avoids such a risk.").[8]

Second, in addition to Congress's concern about discrimination against women by virtue of their "potentially pregnant" status, the legislative history also reflects Congress's fears regarding the status of single mothers. In particular, the concern expressed was that single parents, who in most cases are women, might lose their jobs if they were unable to work during the time of a serious health condition. The Senate Report expressly notes that job loss because of illness has a "particularly devastating effect" where a single mother is a head of a household. S. Rep. 103-3, at 11 (1993). As Delegate Eleanor Holmes Norton testified, "[f]or the single parent, usually a woman, losing her job when she is unable to work during a time of serious health condition can often mean borrowing beyond prudence, going on welfare, or destitution for herself and her family." *Id.* at 11-12. Thus, for this "highly vulnerable group," the self-care provision – which provided a "job guarantee for periods when they . . . have serious health conditions" – was "urgently necessary." *Id.* at 12.

The text and legislative history of the FMLA therefore clarify that Congress employed the self-care provision as a nuanced, tactical method of combating sex discrimination. Like the family-care provision,

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[8] Under a sex-neutral approach, employers could anticipate equal use of leave by male and female employees. *See* Donna R. Lenhoff & Sylvia M. Becker, *Family and Medical Leave Legislation in the States: Toward a Comprehensive Approach*, 26 Harv. J. on Legis. 403, 419 (1989). This, in turn, would eliminate the disincentive to hire, retain or promote women of childbearing age.

the self-care provision incorporates across-the-board benefits for all eligible employees, ensuring that leave would no longer be "stigmatized" in a sex-specific manner, and that employers could not evade their obligations by only hiring and promoting men. *See Hibbs*, 538 U.S. at 737. In this respect, the self-care provision works in concert with other FMLA provisions to effectuate the anti-discriminatory purposes of the Act as a whole.[9]

Because the self-care provision plays an integral role in de-stigmatizing leave, it is congruent and proportional to the legitimate end of eliminating sex discrimination. Congress thus had authority to abrogate state sovereign immunity with respect to claims arising under the provision. For this additional reason, Mr. Coleman's claim did not warrant dismissal.

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[9] Although Respondents urged this Court to disregard Congress's overall objective in the FMLA and assume that Congress acted on separate motivations in each FMLA provision, *see* BIO to Petition for Writ of Certiorari 15-17, this proves to be an erroneous and unjustified assumption. In actuality, Congress envisioned the provisions of the FMLA – and the self-care and family-care provisions in particular – to be interrelated and interdependent. *See, e.g.*, H. Rep. No. 102-135, at 27-28 (1991) (noting that the FMLA "protects employees from possible job loss as a result of a serious health condition, including childbirth or the care of a family member").

C. In Light of Congress's Broad Power Under Section 5, the Congruence and Proportionality Test Should Be Reconsidered.

Although Congress's enactment of the self-care provision fits comfortably within the *Boerne* test, it may be appropriate for this Court to reconsider the *Boerne* standard.

A growing body of scholarship since *Boerne* has concluded that the standard outlined in *McCulloch*, as opposed to the congruence and proportionality test, is the proper framework under which to assess congressional enforcement power. *See, e.g.*, Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 Harv. J.L. & Pub. Pol'y 991, 1002-03 (2008) ("If one were to apply – as one probably should – the then-prevalent, *McCulloch*-driven broad understanding of Congress's powers under the Necessary and Proper Clause to these linguistically similar provisions ('proper'/'appropriate'), one ends up with a truly sweeping assignment of new legislative power to the national government."); Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 Stan. L. Rev. 1127, 1196 (2001) ("In the end, it is difficult to develop a satisfactory justification for the [] unique application of heightened means-ends scrutiny in the Section 5 context that can explain *Boerne* and all of its progeny. Given the strong originalist arguments favoring, and the century-plus of judicial decisions embracing, the *McCulloch* standard in the Section 5 context, the congruence and proportionality test seems an . . . anomaly[.]"); *see also* Balkin, *supra*, at 1815 (observing that *Boerne* cannot be squared with the text of Section 5 since "the language of

McCulloch is actually *embedded in the text* of Section 5") (emphasis added).

Under a revised approach that hews to the language, history and purpose of Section 5, the Court would strike down an act of Congress only "if there is a clear opposition between the Constitutional text and the law." Engel, *supra*, at 118-19; *see also McCulloch*, 17 U.S. at 423.[10] As long as a law is reconcilable with the constitutional text, it should stand. This formulation of congressional enforcement power, which allows broad prophylactic measures, would comport with the intent of the Framers, who desired for Congress to have power to enforce constitutional guarantees through any "appropriate legislation" not inconsistent with the Constitution.

* * * * *

In order to bar Mr. Coleman from federal court, this Court must give an expansive interpretation to an Amendment for which the text, history and purpose require a narrow reach (the Eleventh Amendment), and it must give a narrow interpretation to a constitutional provision for which the text, history and purpose require an expansive reach (Section 5 of the Fourteenth Amendment).

Neither approach would comport with constitutional language and legacy. Both approaches would

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[10] This amounts to what has been called a "presumption of constitutionality." McConnell, *supra*, at 185-88; *see also* Calabresi & Stabile, *supra*, at 1435; Estreicher & Lemos, *supra*, at 158.

operate to frustrate democratically determined remedies for democratically proscribed wrongs.

Mr. Coleman should be permitted to proceed in federal court with the right vested in him by Congress.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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