

No. 10-1016

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IN THE  
*Supreme Court of the United States*

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DANIEL COLEMAN,

*Petitioner,*

—v.—

MARYLAND COURT OF APPEALS, Frank Broccolina, State Court  
Administrator, Larry Jones, Contract Administrator,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT

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**BRIEF OF *AMICUS CURIAE*  
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW  
IN SUPPORT OF PETITIONER**

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## STATEMENT OF INTEREST

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") submits this brief, with the consent of the parties,<sup>1</sup> in support of Petitioner's argument that Congress properly exercised its powers under the Fourteenth Amendment when it enacted the self-care leave provision of the Family and Medical Leave Act ("FMLA"). Specifically, the Lawyers' Committee submits this brief to argue that Congress is entitled to substantial deference when Courts review legislation enacted under Section 5 of the Fourteenth Amendment that is intended to enforce a core Fourteenth Amendment right.

The Lawyers' Committee was formed in 1963 at the request of President Kennedy to involve private attorneys in the effort to ensure the civil rights of all Americans. The Lawyers' Committee has been involved as amicus curiae or counsel in several cases before the Court involving the scope of Congress' legislative power. *See, e.g., Northwest Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504 (2009); *Tennessee v. Lane*, 541 U.S. 509 (2004); *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Medical Bd. of California v. Hason*, 537 U.S. 1028 (2002), cert. dismissed, 538 U.S. 958 (2003); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001); *Lopez v. Monterey Cnty.*, 525 U.S. 266 (1999). In addition, the Lawyers' Committee frequently advocates in sup-

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<sup>1</sup> Counsel for the Lawyers' Committee authored this brief in its entirety. No person or entity other than the Lawyers' Committee, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief.

port of the prevention of gender discrimination. Consequently, the Lawyers' Committee has an interest in advancing Congress' power to enact legislation to protect the Fourteenth Amendment's safeguards.

### SUMMARY OF ARGUMENT

The power granted to Congress under Section 5 of the Fourteenth Amendment permits Congress to enforce the rights guaranteed therein through the enactment of "appropriate legislation." U.S. CONST. amend. XIV, § 5. Congress' power to ensure the Fourteenth Amendment's constitutional guarantees through Section 5 is a "broad power indeed." *Lane*, 541 U.S. at 519. But this enforcement power is limited, as Congress may not create rights or change the nature of existing rights. See *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). As a result, the Court has set forth a three-step inquiry for the Court to follow when determining if Congress has properly exercised its Section 5 powers. First, the Court must identify the right at issue. Second, the Court must examine whether Congress has identified a history of unconstitutional conduct by the States that justifies its remedial measure. Third, the Court must decide whether the challenged legislation is congruent and proportional to the targeted violation. Importantly, the Court defers to Congress when it exercises its Section 5 powers to protect a right subject to heightened scrutiny. Indeed, both of the Court's recent decisions that considered legislation enacted to protect rights subject to heightened scrutiny upheld such legislation. See *Tennessee v. Lane*, 541 U.S. 509 (2004) (holding

that Congress' enactment of Title II of the Americans with Disabilities Act was a valid exercise of Congress' Section 5 powers); *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (finding that Congress properly exercised its Section 5 powers in enacting the family-care leave provision of the Family and Medical Leave Act).

By enacting the self-care provision of the Family and Medical Leave Act based on the evidence of discrimination before it, Congress sought to enforce the right to be free from gender discrimination, a right subject to heightened scrutiny. Consequently, the Court should defer to Congress' decision to enact that legislation, and find that the self-care provision of the Family and Medical Leave Act is a valid application of Congress' Fourteenth Amendment enforcement powers. Indeed, because Congress' intent to abrogate the States' sovereign immunity is clear and because Congress has properly sought to enforce the right to be free of gender discrimination, the Lawyers' Committee respectfully urges the Court to uphold Congress' use of its Section 5 powers and reverse the decision below.

## ARGUMENT

The question before the Court is whether Congress acted appropriately pursuant to its Fourteenth Amendment enforcement authority to prevent gender discrimination by abrogating states' sovereign immunity when it enacted 29 U.S.C. § 2612(a)(1)(D), the "self-care provision" of the Family and Medical Leave Act ("FMLA"). The Lawyers' Committee respectfully requests that the Court confirm that the application of the three-

part standard of review set forth in *City of Boerne v. Flores*, 521 U.S. 507 (1997), requires substantial deference to Congress' actions pursuant to Section 5 of the Fourteenth Amendment where Congress seeks to protect a right subject to heightened scrutiny review, and as a result, Congress appropriately exercised its Fourteenth Amendment powers in this case.

**I. THE CIVIL WAR AMENDMENTS GRANT CONGRESS THE POWER TO ENFORCE THOSE AMENDMENTS IN ORDER TO PROTECT THE RIGHTS GUARANTEED UNDER THOSE AMENDMENTS.**

In the five years following the Civil War, the United States amended the Constitution by adding the Thirteenth, Fourteenth, and Fifteenth Amendments. These Amendments (collectively, the "Civil War Amendments") changed the Constitutional landscape through the provision of new, far-reaching rights: the Thirteenth Amendment abolished slavery, the Fourteenth, *inter alia*, guaranteed broader citizenship rights and provided for equal protection and due process, and the Fifteenth prohibited voting discrimination on the basis of race. U.S. CONST. amend. XIII, § 1; U.S. CONST. amend. XIV, § 1; and U.S. CONST. amend. XV, § 1. Together, the Civil War Amendments were directed at ending racial discrimination and preventing States from encroaching on the rights guaranteed therein. *See Oregon v. Mitchell*, 400 U.S. 112, 127 (1970). The Civil War Amendments were indisputably targeted at the States. For example, the Fourteenth Amendment limited the States' abilities to "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.” U.S. CONST. amend. XIV, § 1. Similarly, the Fifteenth Amendment provided that the rights of citizens to vote “shall not be denied or abridged . . . **by any State** on account of race, color, or previous condition of servitude.” U.S. CONST. amend. XV, § 1 (emphasis added).

To ensure that the federal government would have the authority to effectuate the Civil War Amendments, the Amendments contain explicit language providing that Congress shall have power to enforce these articles by “appropriate legislation,” a positive grant of power to Congress absent in any of the previous Constitutional amendments. *See* U.S. CONST. amend. XIII, § 2; U.S. CONST. amend. XIV, § 5; and U.S. CONST. amend. XV, § 2. This language gives Congress the “full remedial powers” necessary to make the protections offered by the Civil War Amendments “fully effective” through the passage of legislation. *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (quoting *Ex parte Com. of Virginia*, 100 U.S. 339, 345 (1879)).

The Supreme Court has made clear that when Congress appropriately exercises its Fourteenth Amendment enforcement powers to limit state authority, Congress is not infringing upon state sovereignty:

The prohibitions of the Fourteenth Amendment are directed to the States, and they are, to a degree, restrictions of State power.

It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact.

*Fitzpatrick v. Bitzer*, 427 U.S. 445, 454 (1976) (quoting *Ex parte Com. of Virginia*, 100 U.S. at 345); see also *Lopez v. Monterey Cnty.*, 525 U.S. 266, 282 (1999) (the Civil War Amendments “by their nature contemplate some intrusion into areas traditionally reserved to the States”). In fact, Section 5 was included in the Fourteenth Amendment to grant Congress the broad powers expressed in the Necessary and Proper Clause. See *Katzenbach v. Morgan*, 384 U.S. 641, 650 n. 9, (1966) (further explaining that earlier drafts of the Fourteenth Amendment employed “necessary and proper” terminology to describe the scope of Congressional power under the Amendment).

Consistent with Congress’ ability to protect against state intrusion on the rights protected by the Civil War Amendments, this Court has long held that state sovereign immunity can be validly abrogated by Congress under the “appropriate legislation” provision of Section 5 of the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. at 456 (“Congress may, in determining what is ‘appropriate legislation’ for the purposes of enforcing the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.”).

Congress may do so when it both “unequivocally intends to do so and acts pursuant to a valid grant of constitutional authority.” *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001) (internal quotation and citation omitted). Indeed, “the Eleventh Amendment, and the principle of state sovereignty which it embodies. . . , are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.” *Fitzpatrick* 427 U.S. at 456 (citation omitted).

Nor is Congress limited to abrogating the Eleventh Amendment only when it seeks to make activity prohibited by the Fourteenth Amendment illegal. As the Court has repeatedly reasoned, Congress has the authority both to remedy and to deter violation of rights guaranteed under the Fourteenth Amendment by “prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment’s text.” *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000) (reviewing the extent of Congress’ powers under Section 5 of the Fourteenth Amendment); *see also Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (same); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (same); *Katzenback v. Morgan*, 384 U.S. at 658, (same). Thus, by enacting “appropriate legislation,” Congress may protect the substantive guarantees of the Fourteenth Amendment and enact forward-looking legislation to prevent violations of the rights guaranteed by the Fourteenth Amendment. *See Boerne*, 521 U.S. at 518 (affirming Congress’ Section 5 powers).

**II. THE COURT MUST EXAMINE THE RIGHT AT ISSUE, THE HISTORY OF STATE UNCONSTITUTIONAL CONDUCT, AND DECIDE IF THE CONGRESSIONAL LEGISLATION IS CONGRUENT AND PROPORTIONAL.**

It is well-established that Congressional power under Section 5 of the Fourteenth Amendment is broad in scope:

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, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

*Ex parte Com. of Virginia*, 100 U.S. 339, 345-46 (1879). In fact, because Section 5 is a “positive grant” of legislative power to Congress “[i]t is for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment [such that] its conclusions are entitled to much deference.” *Boerne*, 521 U.S. at 517, 536, (citing *Katzenback v. Morgan*, 384 U.S. at 651) (internal quotation marks omitted); *see also Tennessee v. Lane*, 541 U.S. 509, 518-20 (2004) (“This enforcement power, as we have often acknowledged, is a broad power indeed. . . . When Congress seeks to remedy or prevent unconstitutional discrimination, Section 5 authorizes it to enact prophylactic

legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause.”) (internal citation and quotation omitted).

But there are limits to that enforcement power. When a Congressional act redefines the Constitution, as opposed to enforcing it, Congress has overstepped its bounds: “Congress does not enforce a constitutional right by changing what the right is. It has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.” *Boerne*, 521 U.S. at 519. The Supreme Court has given Congress “wide latitude” in determining “the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law.” *Id.* at 519-20.

In reviewing whether Congress has exceeded its wide latitude in drawing the line between enforcement and substantive redefinition, the Court’s *Boerne* decision and its progeny have set forth a three-step inquiry: (1) the Court must identify the right at issue, (2) examine whether Congress has identified a history of unconstitutional conduct by the States that justifies the remedial measure, and (3) finally decide whether or not the challenged legislation is congruent and proportional to the targeted violation. *See Boerne*, 521 U.S. 507; *see also Lane*, 541 U.S. at 522-530; *Garrett* 531 U.S. at 365-374.

As compared to the Thirteenth (abolition of slavery) and Fifteenth Amendments (elimination of racial discrimination in voting), both of which involve narrowly defined rights, the Fourteenth

Amendment protection of equal protection and due process is more general in nature. The Court, in its Fourteenth Amendment jurisprudence, has recognized that a handful of core Fourteenth Amendment rights such as the right to be free from racial and gender discrimination and the right of access to the courts, are entitled to heightened protection from discriminatory state action. In contrast, the Court has been deferential to state actors—applying a rational basis test—regarding a host of other alleged rights that the Court has found are not subject to heightened scrutiny.

The Court has applied this distinction between core Fourteenth Amendment rights and other rights in the *Boerne* line of cases: the Court has shown substantial deference to Congress when Congress is enforcing a core Fourteenth Amendment right and little deference when it has not. The distinction is entirely logical because Congress is more likely to be appropriately exercising its Fourteenth Amendment authority when it is protecting a core Fourteenth Amendment right, and more likely to be redefining the Fourteenth Amendment when it is not.

**A. Deference to Congress is Appropriate Where the Right At Issue Is Subject to Heightened Scrutiny Review.**

The Court was clear in *Boerne* that “[t]he appropriateness of remedial measures must be considered in light of the evil presented.” 521 U.S. at 530. Consequently, the first step the Court takes when reviewing Congress’ enactment of remedial, prophylactic legislation requires the Court to “identify the constitutional right or rights that

Congress sought to enforce” when it enacted the challenged legislation. *Lane*, 541 U.S. at 522; see also *Garrett*, 531 U.S. at 365 (explaining that the court must “identify with some precision the scope of the constitutional right at issue”); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 652 (1999) (noting that “the first step of the inquiry . . . is to determine what injury Congress sought to prevent or remedy with the relevant legislation”). In fact, in both of the post-*Boerne* cases to consider a right subject to heightened scrutiny, the Court deferred to Congress’ findings and upheld the law in question.<sup>2</sup> See *Hibbs*, 538 U.S. 721 (upholding the family care provision of the FMLA as a measure to prevent gender discrimination in the workplace); *Lane*, 541 U.S. 509 (upholding the right of access to the courts requirement under Title II of the Americans with Disabilities Act).<sup>3</sup>

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<sup>2</sup> Even prior to *Boerne*, the Court consistently upheld legislation intended to protect a right subject to heightened scrutiny review. See *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (upholding suspension of literacy tests and similar voting requirements under Congress’ parallel power to enforce the provisions of the Fifteenth Amendment as a measure to combat racial discrimination in voting); *Katzenbach v. Morgan*, 384 U.S. 641, 643-47 (1966) (upholding ban on literacy tests that prohibited certain people schooled in Puerto Rico from voting); *Oregon v. Mitchell*, 400 U.S. 112, 117-18 (1970) (upholding 5-year nationwide ban on literacy tests and similar voting requirements for registering to vote); *City of Rome v. U.S.*, 446 U.S. 156, 161 (1980) (upholding 7-year extension of the Voting Rights Act’s requirement that certain jurisdictions preclear any change to a “standard, practice, or procedure with respect to voting.”).

<sup>3</sup> The *Lane* court explained that the Court has upheld Title II as it applies to the fundamental right of access to the

In *Hibbs*, the Court upheld the constitutionality of the family-care provision of the FMLA. The Court recognized that in enacting the FMLA, Congress was attempting to prevent gender discrimination, thereby triggering a heightened level of scrutiny. *See Hibbs*, 538 U.S. at 736.<sup>4</sup> The Court reached a similar conclusion in *Tennessee v. Lane* when it upheld Title II of the Americans with Disabilities Act. There, the Court considered whether or not Title II of the Americans with Disabilities Act was a proper exercise of Congress' Section 5 power. The *Lane* Court observed that Title II "is aimed at the enforcement of a variety of basic rights . . . that call for a standard of judicial review at least as searching, and in some cases

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courts, which has been recognized, as set forth below, as calling for a "standard of judicial review at least as searching, and in some cases more searching, than the standard that applies to sex-based classifications" which call for a heightened level of scrutiny. *See Lane*, 541 U.S. at 529.

<sup>4</sup> States may not use gender-based classifications unless the classification both "serves important governmental objectives" and is "substantially related to the achievement of those objectives." *Hibbs*, 538 U.S. at 736 (internal quotation and citation omitted). Requiring a heightened level of review for gender-based classifications prohibits States from employing gender "as an inaccurate proxy for other, more germane bases of classification." *Craig v. Boren*, 429 U.S. 190, 198 (1976). Significantly, prior to the recognition that the right to be free from gender discrimination is subject to a heightened level of review, States were able to use "archaic and overbroad generalizations," such as the stereotype that women belonged in the home, to justify legislation. *Id.* Now, and as a result of heightened scrutiny review, a proponent of gender discrimination must establish an "exceedingly persuasive justification" for sex-based classification to be valid. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

more searching, than the standard that applies to sex-based classifications.” *Lane*, 541 U.S. at 529. Indeed, the Court placed emphasis on the nature of the right that Congress sought to protect, ultimately finding it “clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation.” *Id.*; see also *South Carolina v. Katzenbach*, 383 U.S. at 308-313 (upholding the Voting Rights Act of 1965 and deferring to Congress because racial classifications are presumptively invalid).

Notably, where the Court has struck down Section 5 legislation post-*Boerne*, the legislation at issue did not seek to protect rights subject to heightened scrutiny. For instance, in *Garrett* and *Kimel*, the Court reviewed legislation targeted toward age- and disability-based discrimination, both of which are only subject to rational basis review. See *Garrett*, 531 U.S. at 366-67; *Kimel*, 528 U.S. at 86; see also *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (striking down legislation intended to protect against patent infringements). Classifications protected only by rational basis review are permissible “if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.” *Heller v. Doe*, 509 U.S. 312, 320 (1993) (citation omitted). While never suggesting that Congress is not entitled to deference when it enacts legislation pursuant to Section 5 of the Fourteenth Amendment, the Court explained that where a right is only subject to rational basis review, a States’ legislation concerning that right need only be justified by a

rational explanation, forcing changes to such statutes to “come from positive law and not through the Equal Protection Clause.” *Garrett*, 531 U.S. at 368.

In sum, the Court has made clear that when Congress seeks to protect a right subject to heightened scrutiny, and consequently enacts legislation pursuant to Section 5 of the Fourteenth Amendment, it is entitled to substantial deference from the Court under step one of the Court’s three-part test.

**B. When The Protected Right Is A Core Fourteenth Amendment Right, It Is Easier To Show A Pattern Of Unconstitutional Conduct By The States.**

Second, the Court must “examine whether Congress identified a history and pattern of unconstitutional [conduct] by the States” that justified the enactment of the remedial measure. *Garrett*, 531 U.S. at 368. Legislation that “pervasively prohibits *constitutional* state action in an effort to remedy or to prevent *unconstitutional* state action,” and which does not seek to protect a right subject to heightened scrutiny, will not survive the Court’s review if there is no pattern or history of the States acting unconstitutionally. *See Boerne*, 521 U.S. at 532-33 (striking down the Religious Freedom and Restoration Act due in part to the absence of any documented instances of State constitutional violations) (emphasis added); *see also Fla. Prepaid*, 527 U.S. at 640 (striking down the Patent and Plant Variety Protection Remedy Clarification Act because Congress failed to identify any “pattern of patent

infringement by the States, let alone a pattern of constitutional violations” that justified the Act’s broad coverage); *Kimel*, 528 U.S. at 89 (striking down the Age Discrimination in Employment Act and holding that Congress failed to identify “any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation.”). Indeed, if the right at issue is not subject to heightened scrutiny, the Court will strike down legislation where the record falls “far short of even suggesting the pattern of unconstitutional discrimination on which Section 5 legislation must be based.” *Garrett*, 531 U.S. at 370.

Where, however, the Court has already found under step one of its three-part test that Congress’ legislation seeks to protect a right subject to heightened scrutiny, the Court has not been as demanding on Congress in determining whether there is a history and pattern of unconstitutional conduct by the States. In *Hibbs*, the Court stated that “[b]ecause the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test . . . it was easier for Congress to show a pattern of state constitutional violations.” *Hibbs*, 538 U.S. at 736. In *Lane*, the Court explained that Congress’ enactment of the family-leave provision of the FMLA was upheld in *Hibbs* “as a valid exercise of Congress’ § 5 power to combat unconstitutional sex discrimination, even though there was no suggestion that the State’s leave policy was adopted or applied with a discriminatory purpose that would render it unconstitutional. . . .” *Lane*, 541 U.S. at 519. Similarly, in *Lane*, the Court

upheld Title II of the ADA because it sought to protect the fundamental right of access to the courts with persons with disabilities where the evidence relating to that specific issue consisted of a report from the United States Commission on Civil Rights, a report from a Congressionally appointed task force, and anecdotal evidence provided at a Congressional hearing. *Lane*, 541 U.S. at 527. These determinations in *Hibbs* and *Lane* are consistent with the well-established principle that “[i]n identifying past evils, Congress obviously may avail itself of information from any probative source,” *Katzenbach*, 383 U.S. at 330, including “statistical, legislative, and anecdotal evidence,” *Lane*, 541 U.S. at 529, as well as evidence of discriminatory effects. Put simply, when Congress legislates to protect rights subject to heightened scrutiny review, the Court has been deferential in evaluating whether Congress has established a pattern of unconstitutional conduct.

**C. Legislation Is Congruent and Proportional Where There Is A Need To Protect Rights Subject To Heightened Scrutiny Review.**

Once the Court has determined the right at issue and examined the pattern and history of constitutional violations, the court concludes its inquiry by deciding whether the challenged legislation constitutes “an appropriate response” to the identified “history and pattern” of unconstitutional conduct and resolving whether or not the legislation is “congruent and proportional to the targeted violation.” *Lane*, 541 U.S. at 530; *see also Garrett*, 531 U.S. at 374; *Hibbs*, 538 U.S. at 737. Put another way, when Congress adopts legisla-

tion to enforce rights guaranteed by the Fourteenth Amendment, “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted [by Congress] to that end.” *Boerne*, 521 U.S. at 520.

The Supreme Court applied the congruence and proportionality test for the first time in *City of Boerne*. In *Boerne*, Congress made clear its intention to legislatively overrule a constitutional interpretation of the Supreme Court and the Court found that Congress exceeded its powers. In *Employment Div., Department of Human Resources v. Smith*, 494 U.S. 872 (1990), a divided Supreme Court had held that the Free Exercise Clause did not protect members of a Native American church who lost their jobs and denied unemployment benefits because they had used peyote. Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA) as a “direct response” to the *Smith* decision, and in its findings, stated that the *Smith* decision changed the standard for interpreting the Free Exercise Clause and that Congress was restoring the pre-*Smith* standard. *Boerne*, 521 U.S. at 515. The Supreme Court found that in enacting RFRA, Congress was essentially trying to usurp the role of the Court as constitutional interpreter:

Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces

the duty to say what the law is. *Marbury v. Madison*, 1 Cranch, at 177. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.

*Id.* at 535-36; *Lane*, 541 U.S. at 520 (describing that Congress' "very purpose" in enacting RFRA was to work a substantive change in the Constitution).

*Boerne* emphasized, however, that Congress may act within its powers when it enacts remedial legislation under Section 5 to prevent "the mischief and wrong which the Fourteenth Amendment was intended to provide against." *Boerne*, 521 U.S. at 532 (internal quotation and citation omitted). Nowhere is Congress' power to legislate stronger than when it legislates to protect rights that are subject to heightened scrutiny review. Congress may, for instance, use Section 5 to enact "strong remedial and preventative measures to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination." *See id.* at 526.

Consequently, it is not surprising that the two statutes the Court has upheld under the congruence and proportionality test both sought to protect a class or right that, like racial classifications, is subject to heightened judicial scrutiny. *See Hibbs*, 538 U.S. at 724 (suspect gender classifications); *Lane*, 541 U.S. at 533-34 (fundamental right of access to the courts). In fact, since *Boerne*, the only statutes that the Court has found to be disproportionate to the harms they sought to redress were statutes that sought to protect rights subject only to rational basis review. *See, e.g., Garrett*, 531 U.S. at 367 (holding that the Fourteenth Amendment itself does not require “special accommodations for the disabled, so long as [States’] actions towards such individuals are rational”); *Kimel*, 528 U.S. at 83-84 (holding that the Fourteenth Amendment allows the States to discriminate on the basis of age where the age classification is rational). Thus, the Court has deferred to Congress’ decision to legislate in order to protect rights subject to heightened scrutiny review, and has found that the legislation was “congruent and proportional” to the harm it sought to redress.

**III. CONGRESS PROPERLY EMPLOYED ITS POWER UNDER THE FOURTEENTH AMENDMENT WHEN IT ENACTED THE SELF-CARE PROVISION OF THE FMLA IN ORDER TO PROTECT AGAINST GENDER DISCRIMINATION.**

As set forth above, Congress may enforce rights protected by the Fourteenth Amendment and in so doing, may abrogate the States' Eleventh Amendment immunity. To accomplish this, Congress must (1) make its intention to abrogate unmistakably clear in the language of the statute, and (2) act pursuant to a valid exercise of its power under Section 5 of the Fourteenth Amendment. *See Hibbs*, 538 U.S. at 726. The Court has already held that Congress' intent to abrogate the States' Eleventh Amendment immunity in enacting the FMLA is "not fairly debatable" because the FMLA enables employees to seek damages "against any employer (including a public agency) in any Federal or State court of competent jurisdiction." *Id.* (quoting 29 U.S.C. § 2617(a)(2)).<sup>5</sup> The ability of employees to seek damages also applies to the Act's self-care provision. *See* 29 U.S.C. § 2617(a)(2). The only question before the Court, therefore, is whether Congress acted appropriately pursuant to its Fourteenth Amendment powers when it passed the self-care leave provision of the FMLA.

The Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, *et seq.* provides employees up to

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<sup>5</sup> The Court previously held that the use of identical language in the Age Discrimination in Employment Act of 1967 ("ADEA") satisfied the clear statement requirement. *See Kimel v. Fl. Bd. of Regents*, 528 U.S. 62, 73-78 (2000).

twelve weeks of unpaid leave for medical reasons or other qualifying exigencies. 29 U.S.C. § 2612(a)(1). In enacting the FMLA, Congress sought to minimize “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. . . .” 29 U.S.C. §§ 2601(b)(4) and (5). As the Court recognized in *Hibbs*, “[t]he FMLA aims to protect the right to be free from gender based discrimination in the workplace.” 538 U.S. at 728. To that end, the family-leave provision of the FMLA at issue in *Hibbs* sought to eliminate gender discrimination by providing that both men and women were entitled to take a leave of absence for qualifying family reasons, as defined in the Act. *See* 29 U.S.C. 2612(a)(1)(C) (referring to care of a gender-neutral “spouse.”) By requiring family leave for both genders, the Court protected women (who are traditionally more likely to take family leave than men) from discrimination, while preventing a situation where employers would simply eliminate family leave entirely. *See Hibbs*, 538 U.S. at 728-35.

Applying the three-part standard of review to the family-care leave provision of the FMLA, the Court has already concluded that the family-care leave provision is a valid exercise of Congress’ Section 5 powers. *Hibbs*, 538 U.S. at 737 (“Congress’ chosen remedy, the family-care leave provision of the FMLA, is congruent and proportional to the targeted violation.”). In so doing, the Court was deferential to Congress’ decision to enact legislation pursuant to Section 5 of the

Fourteenth Amendment, particularly in light of the fact that “the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test.” *Id.* at 736. Ultimately, *Hibbs* recognized that in enacting the family-care provision of the FMLA, Congress sought to protect against gender discrimination by creating “an across-the-board, routine employment benefit for all eligible employees,” thereby ensuring “that family-care 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.* at 737.

The right to be free from gender discrimination, a right unquestionably subject to heightened scrutiny review, is likewise at issue here. *See Craig*, 429 U.S. at 197. The FMLA’s self-care provision seeks to prevent the very same problem that the FMLA’s family leave provision sought to prevent: gender discrimination by employers against women, including women who are forced to avail themselves of self-care leave due to pregnancy and recovery from childbirth. Prior legislation, including the Pregnancy Discrimination Act (“PDA”), did not guarantee job-protected leave during pregnancy. The PDA mandated that pregnancy was to be treated the same as all other temporary disabilities. Thus, if an employer did not provide any temporary disability leave the employer was not required to provide pregnancy leave. Therefore, before the passage of the FMLA, a pregnant woman who needed to take pregnancy-related leave was not guaranteed that her job would still be there upon her return. One solution

might have been to provide in the FMLA for pregnancy-specific leave, but as the legislative record clearly demonstrates, Congress was concerned that creating a leave requirement that covered pregnancy only, and not other forms of self-care, would create an incentive for employers to discriminate against women, particularly women who were pregnant or of child-bearing age. *See, e.g.*, 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.”). Instead, by allowing self-care leave for both men and women, the FMLA reduces the incentive—at the hiring stage—to discriminate against women who may one day need to take leave during pregnancy.<sup>6</sup> Thus, the FMLA’s self-care provision prevents the gender discrimination that would result if the law only allowed women to take self-care recovery for pregnancy and childbirth.<sup>7</sup>

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<sup>6</sup> Similarly, in the passage of the PDA, Congress chose to treat pregnancy the same as all other temporary disabilities rather than provide specifically for pregnancy leave. *See* Rep. No. 95-331, p. 4 (1977); Legislative History of the Pregnancy Discrimination Act of 1978, p. 41 (1980) (Committee Print prepared for the Senate Committee on Labor and Human Resources).

<sup>7</sup> The *amicus* brief submitted by the National Partnership for Women & Families further articulates the evidence necessitating Congress’ enactment of the self-care provision of the FMLA in order to prevent gender discrimination. The Lawyers’ Committee supports and endorses the position taken by the National Partnership for Women & Families and their fellow *amici*.

In light of the right at issue, the application of the *Boerne* three-part test yields the inevitable conclusion that Congress properly abrogated the States' sovereign immunity when it passed the self-care provision of the FMLA. First, it is clear that the right at issue, the right to be free from gender discrimination, is subject to heightened scrutiny. *See Craig*, 429 U.S. at 197. Congress' decision to enact the self-care provision of the FMLA is therefore entitled to deference from the Court. *See, e.g., Hibbs*, 538 U.S. 721 (deferring to Congress where Congress sought to protect against gender discrimination); *Lane*, 541 U.S. 509 (deferring to Congress where Congress sought to ensure the fundamental right of access to the courts). Second, because Congress enacted this provision to protect against gender discrimination, it is easier for Congress to demonstrate a history and pattern of State constitutional violations. *See, e.g., Hibbs*, 538 U.S. at 736. Here, the legislative record contains ample examples of employers discriminating against pregnant women. *See, e.g.,* 100 Cong. 16, 19 (1987) (testimony regarding how women lost their jobs after becoming pregnant or after childbirth despite the passage of the PDA). Third, there can be no doubt that the self-care provision of the FMLA is an "appropriate response" to unconstitutional gender discrimination, and is congruent and proportional to the targeted violation: where Congress legislates to protect a right subject to heightened scrutiny, the Court should defer to Congress' decision to use its Section 5 powers to enforce the guarantees of the Fourteenth Amendment. *See, e.g., Lane*, 541 U.S. at 530-31.

The Lawyers' Committee thus respectfully submits that the Court should defer to Congress' decision to pass the self-care provision of the FMLA through its powers under Section 5 of the Fourteenth Amendment, and hold that, in light of the heightened scrutiny implicated by the right at issue, Congress properly abrogated the States' Eleventh Amendment sovereign immunity.

### CONCLUSION

For all the foregoing reasons, the Lawyers' Committee respectfully requests that the Court reverse the judgment of the Fourth Circuit, and hold that Congress validly exercised its Fourteenth Amendment powers when it enacted the self-care provision of the Family and Medical Leave Act.

Respectfully Submitted,

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