No. 10-1016

In The
# Supreme Court of the United States

DANIEL COLEMAN,

*Petitioner*,

v.

MARYLAND COURT OF APPEALS, *et al.*,

*Respondents.*

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

## BRIEF FOR THE RESPONDENTS


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## QUESTION PRESENTED

Do the states retain sovereign immunity from claims for money damages based on alleged violations of the "self-care" provision of the Family and Medical Leave Act, 29 U.S.C. § 2612(a)(1)(D)?

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## STATEMENT OF THE CASE

1. Congress enacted the Family and Medical Leave Act (FMLA) in 1993. Pub. L. No. 103-3, 107 Stat. 6. Congress stated several purposes to be accomplished by the Act, including "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity," 29 U.S.C. § 2601(b)(1), while doing so "in a manner that accommodates the legitimate interests of employers," § 2601(b)(3), and "that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex," § 2601(b)(4), and "promote[s] the goal of equal employment opportunity for women and men, pursuant to such clause," § 2601(b)(5).

Congress found that "the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting" and that there was "inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods." 29 U.S.C. § 2601(a)(2), (3). Congress also found that, "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men." 29 U.S.C. § 2601(a)(5).

Congress also recognized that "employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender." 29 U.S.C. § 2601(a)(6). Accordingly, in authorizing measures to address the economic insecurity created by inadequate leave policies, and to counteract gender stereotypes about the role of men and women as caregivers, Congress acted to regulate employee leave policies "in a manner that . . . minimizes the potential for employment discrimination on the basis of sex" by ensuring that leave is available "on a gender-neutral basis." 29 U.S.C. § 2601(b)(4).

As originally enacted, the FMLA authorized qualified employees to take up to 12 weeks of unpaid leave annually in four circumstances, three of which concern caring for family members: bearing and caring for a child, 29 U.S.C. § 2612(a)(1)(A), adopting or providing foster care for a child, § 2612(a)(1)(B), and caring for a spouse, child, or parent with a serious health condition, § 2612(a)(1)(C). The fourth circumstance, and the one at issue here, involves the employee's own health; leave is authorized under this "self-care" provision when "a serious health condition . . . makes the employee unable to perform the functions" of his or her job. § 2612(a)(1)(D). More recently, Congress has amended the FMLA to authorize leave because of an exigency arising from a relative's service in the military. *See* 29 U.S.C. § 2612(a)(1)(E); Pub. L. No. 110-181, § 585, 122 Stat. 33, 129 (2008).

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

2. Petitioner Daniel Coleman, an African-American male, was employed by the Administrative Office of the Courts for the Maryland judiciary, where he was responsible for matters related to contract administration and procurement. J.A. 5; Pet. App. 5. Respondents Frank Broccolina and Larry Jones are employees of the Administrative Office of the Courts. J.A. 5-6; Pet. App. 15. The third Respondent is Maryland's highest court, the Court of Appeals, whose Chief Judge is responsible for supervising the administrative operations of the State's court system. *See* Md. Code Ann., Cts. & Jud. Proc. § 13-101.

In August 2007, Mr. Coleman was terminated from his employment. J.A. 10; Pet. App. 3. According to his amended complaint, his termination was preceded by an internal investigation begun in 2005, a reprimand in April 2007, and the Chief Judge's rejection of Mr. Coleman's appeal of that reprimand. J.A. 5, 9-10; Pet. App. 17 n.2. Mr. Coleman alleges that, on August 2, 2007, he "sent a request for sick leave" to Mr. Broccolina for a "documented illness"

that would require him to miss work for ten days.[1] J.A. 10; Pet. App. 3, 16. He further alleges that, on August 3, Mr. Broccolina contacted Mr. Coleman to inform him that he was being offered the choice of being terminated immediately or taking 30 days administrative leave and then resigning. J.A. 10; Pet. App. 3, 16-17.[2]

3. On September 19, 2008, Mr. Coleman initiated this action in the United States District Court for the District of Maryland. Pet. App. 3.[3] His complaint, as later amended, named the respondents as defendants, and alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), and

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[1] In his brief, Mr. Coleman elaborates on the nature of this "documented illness" by asserting that it "appears to have been a 'serious health condition' as it is defined by the FMLA." Pet'r Brief 7. Nothing in the complaint or the other materials Mr. Coleman submitted to the district court substantiates this assertion. *See* 29 U.S.C. § 2611(11) (defining term); 29 C.F.R. §§ 825.113—825.115 (same).

[2] Mr. Coleman's original complaint and other documents submitted to the district court give August 2 as the date of his conversation with Mr. Broccolina, as well as the day when he allegedly was placed under a doctor's care. Dist. Ct. Docket, Paper No. 1 ¶¶ 30-32; Ct. App. J.A. 18, 38, 44, 51-52.

[3] As noted in the respondents' brief in opposition to Mr. Coleman's petition, Brief in Opp. 3-4 & n.2, 22-23 & n.7, Mr. Coleman also brought the same claims against the same respondents in State court, where they were resolved in the respondents' favor in a final judgment that would be given preclusive effect in any further proceedings in this case.

the FMLA; it also asserted a state-law defamation claim. J.A. 3-13; Pet. App. 3-4 & n.1. Mr. Coleman claimed that he was fired because of his race and, alternatively, because he had requested sick leave; he also alleged that Mr. Jones and Mr. Broccolina had falsely accused him of having abused his position to steer procurement contracts and that these accusations also played a role in his termination. J.A. 6-8; Pet. App. 3. The complaint also alleged that the letter of reprimand he had received in April 2007 was issued because of his race. J.A. 10; Pet. App. 7 n.2. The respondents moved to dismiss the complaint and amended complaint under Rule 12(b).

4. The district court granted the respondents' motion on May 7, 2009. Pet. App. 20. The court held that Mr. Coleman had failed to state a claim under Title VII, because his complaint was "devoid of any facts from which to infer race-based discrimination." *Id.* at 16. With respect to the FMLA claim, the court determined that the leave that Mr. Coleman had sought was "'self-care' because Mr. Coleman was seeking leave to care for his own illness, rather than 'family-care' to care for a family member." *Id.* The court held that this claim under the self-care provision of the FMLA, 29 U.S.C. § 2612(a)(1)(D), was barred by the State's sovereign immunity, and observed that this holding was in accord with the "universal agreement of the Federal Courts of Appeals that have considered the issue," all of which had concluded that Congress had not "abrogated state sovereign immunity with respect to the FMLA's self-care provision." Pet. App. 17. The district court

also dismissed Mr. Coleman's state-law defamation claim. *Id.* at 19-20.

5. Mr. Coleman appealed the district court's dismissal of his Title VII and FMLA claims, and the United States Court of Appeals for the Fourth Circuit affirmed. With respect to the Title VII claim, the court of appeals agreed with the district court that Mr. Coleman's complaint did not "establish a plausible basis for believing" that he had been treated differently from similarly situated employees or that race was the true basis for his termination. Pet. App. 6-7. The court therefore affirmed the dismissal of Mr. Coleman's Title VII claim.

The court of appeals also agreed that Mr. Coleman's self-care leave claim under the FMLA was barred by the State's sovereign immunity. In analyzing this issue, the court declined to rely on circuit precedent that had held that the Eleventh Amendment bar applies to all FMLA claims, *see Lizzi v. Alexander*, 255 F.3d 128 (4th Cir. 2001), because the court recognized that the reasoning of that decision is "no longer valid in light of" this Court's decision in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003). Pet. App. 11 n.4. Accordingly, the court of appeals proceeded to examine the Eleventh Amendment question by applying the *Hibbs* analytical framework to the FMLA's self-care provision. Pet. App. 8-14.

The court of appeals observed that "*Hibbs* concerned only [the FMLA's] family-care provision," 29 U.S.C. § 2612(a)(1)(C), and its "gender-related

nature," and therefore "did not discuss whether Congress validly abrogated states' immunity with regard to the self-care provision, § 2612(a)(1)(D)." Pet. App. 11. Examining the legislative history of the statute, the court of appeals concluded that "preventing gender discrimination was not a significant motivation for Congress in including the self-care provision"; rather, that provision had been enacted to "alleviate the economic effect" of job loss due to sickness and to "protect employees from being discriminated against because of their serious health problems." *Id.* at 12. The court of appeals also observed that the legislative record did not establish that "states as employers [had been] discriminating on the basis of gender in granting leave for personal reasons." *Id.* Based on these observations, the court held that the self-care provision "cannot pass the congruence-and-proportionality test" that this Court has articulated in its cases addressing congressional authority, under Section 5 of the Fourteenth Amendment, to abrogate the states' sovereign immunity. *Id.*

## SUMMARY OF THE ARGUMENT

In *Hibbs*, this Court addressed a single provision of the FMLA, relating to employee leave taken for the purpose of caring for a family member. Applying the analysis established in this Court's precedents, the Court determined that the family-care provision constituted "appropriate legislation" validly abrogating the states' sovereign immunity under

Section 5 of the Fourteenth Amendment, because that provision was Congress's "narrowly targeted" response to a record of states' "unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits." 538 U.S. at 738, 735. This case concerns a different provision of the FMLA, one that requires employers to provide a minimum amount of self-care leave to both men and women employees; as with the family-care provision, the FMLA purports to abrogate states' sovereign immunity from damages suits arising from violations of the self-care provision. The governing principles recognized by this Court's precedents demand that the self-care provision be examined separately, just as the Court did in examining the family-care provision in *Hibbs*, to determine if the self-care provision also constitutes "appropriate legislation" authorized by Section 5.

The legislative history demonstrates that, unlike the family-care provision reviewed in *Hibbs*, the self-care provision was not enacted in response to a record of gender discrimination by states, but was instead motivated by economic policy objectives that are distinct from the substantive rights guaranteed by Section 1 of the Fourteenth Amendment. The legislative record lacks the evidence of state constitutional violations with respect to the administration of self-care leave that is needed to justify the exercise of Congress's remedial powers under Section 5 of the Amendment. Absent that evidence, the self-care provision cannot satisfy the essential requirement that "appropriate legislation" be congruent and proportional to the harm that

Congress seeks to remedy. Consequently, Congress has not validly abrogated the states' sovereign immunity from damages claims based on the self-care provision.

## ARGUMENT

### I. THE FMLA'S SELF-CARE PROVISION DOES NOT SATISFY THIS COURT'S CONGRUENCE-AND-PROPORTIONALITY TEST FOR "APPROPRIATE" LEGISLATION UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT.

The court of appeals correctly dismissed Mr. Coleman's damages claim against the State of Maryland's highest court and two of its officers upon concluding—consistent with the unanimous view of the five other courts of appeals to consider the issue following this Court's decision in *Nevada Department of Human Resources v. Hibbs,* 538 U.S. 721 (2003)—that Congress's authorization of private suits for money damages against states for alleged violations of the FMLA's self-care provision does not satisfy this Court's established test for a valid abrogation of state sovereign immunity. Pet. App. 14; *accord Nelson v. University of Texas*, 535 F.3d 318, 321 (5th Cir. 2008); *Miles v. Bellfontaine Habilitation Ctr.*, 481 F.3d 1106 (8th Cir. 2007); *Toeller v. Wisconsin Dep't of Corr.*, 461 F.3d 871, 879 (7th Cir. 2006); *Touvell v. Ohio Dep't of Mental Retardation & Developmental Disabilities*, 422 F.3d 392, 402 (6th Cir. 2005); *Brockman v. Wyoming Dep't of Family Servs.*, 342 F.3d 1159, 1164-65 (10th Cir. 2003).

The test that this Court and the lower courts have consistently applied since *City of Boerne v. Flores*, 521 U.S. 507 (1997), rests on important limitations that this Court has discerned in the text and context of the Fourteenth Amendment. Though Section 5 of the Fourteenth Amendment authorizes Congress to enact "appropriate legislation" to "enforce" the due process and equal protection guarantees contained in Section 1 of the Amendment, this Court's precedent recognizes that the Section 5 authorization is limited by "vital principles" that are necessary to preserve "the federal balance" and "maintain separation of powers." *City of Boerne*, 521 U.S. at 536.

The first of these limiting principles "inherent in § 5's text and constitutional context" is "necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government." *United States v. Morrison*, 529 U.S. 598, 619, 620 (2000) (citing *City of Boerne*, 521 U.S. at 520-24). In preserving this federal balance, the states' sovereign immunity, as expressed in the Eleventh Amendment, continues to serve an essential role. Though "'necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment,'" the Eleventh Amendment still "'restricts the judicial power under Article III'" and precludes Congress from exercising its powers under Article I "'to circumvent the constitutional limitations placed upon federal jurisdiction.'" *Board of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 364 (2001) (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976);

*Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72-73 (1996)).

The second "vital principle" recognized in *City of Boerne* and cases following it emphasizes that Section 5 gives Congress only "the power 'to enforce,' not the power to determine what constitutes a constitutional violation." *City of Boerne*, 521 U.S. at 519. Instead, "it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees." *Garrett*, 531 U.S. at 365. Accordingly, to be "appropriate legislation" within the meaning of Section 5, measures adopted by Congress "may not work a 'substantive change in the governing law.' " *Tennessee v. Lane*, 541 U.S. 509, 520 (2004) (quoting *City of Boerne*, 521 U.S. at 519).

To safeguard these vital principles and prevent purportedly remedial legislation from "becom[ing] substantive in operation and effect," *City of Boerne*, 521 U.S. at 520, this Court has established a three-step test to determine whether a statutory provision enacted under Congress's Section 5 power is "appropriate" legislation to enforce the Fourteenth Amendment's provisions. *See Hibbs*, 538 U.S. at 728 ("We distinguish appropriate prophylactic legislation from 'substantive redefinition of the Fourteenth Amendment right at issue' by applying the test set forth in *City of Boerne*." (quoting *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000))).

"The first step in applying these now familiar principles is to identify with some precision the scope of the constitutional right at issue" to determine its

"metes and bounds." *Garrett*, 531 U.S. at 365, 368; *see also Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 639 (1999) ("[W]e must first identify the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy, guided by the principle that the propriety of § 5 legislation 'must be judged with reference to the historical experience . . . it reflects.' " (quoting *City of Boerne*, 521 U.S. at 525)); *see also Lane*, 541 U.S. at 522 ("The first step of the *Boerne* inquiry requires us to identify the constitutional right or rights that Congress sought to enforce when it enacted" the statutory provision.). To identify the precise scope of the constitutional right Congress was purporting to enforce in the statutory provision invoked by a plaintiff, the Court "looks to [its] prior decisions" to "examine the limitations that § 1 of the Fourteenth Amendment places upon States' treatment" of the classification of those who are covered by the provision. *Garrett*, 531 U.S. at 365.

Next, the Court will "examine whether Congress identified a history and pattern of unconstitutional [conduct] by the States" toward the specified classification of persons, *id.* at 368—that is, "evidence of a pattern of constitutional violations on the part of the States *in this area,*" as identified in the first step of the analysis, *Hibbs*, 538 U.S. at 729 (emphasis added). Because "Congress' § 5 authority is appropriately exercised only in response to state transgressions," *Garrett*, 531 U.S. at 365, this second step of the *City of Boerne* test demands evidence in the legislative record showing that the States engaged in a pattern of violating the specified

constitutional right. The need for "evidence of constitutional violations *by the States themselves* is particularly important when," as in this case, Section 5 legislation purports to abrogate sovereign immunity "to place the States on equal footing with private actors with respect to amenability to suit." *Lane*, 541 U.S. at 527 (emphasis added). "[I]n order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination *by the States* which violates the Fourteenth Amendment. . . ." *Garrett*, 531 U.S. at 374 (emphasis added); *see also id.* at 376 (Kennedy, J., concurring).

This Court's decisions further circumscribe the nature of evidence that may be deemed material in this part of the analysis. Thus, the second step of the *City of Boerne* test cannot be satisfied by evidence or assertions that State policies and actions have had a "disparate impact" on a particular class of persons, because "such evidence alone is insufficient" to establish a constitutional violation, "even where the Fourteenth Amendment subjects state action to strict scrutiny." *Garrett*, 531 U.S. at 373 (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976)). Moreover, if the constitutional right identified in the first step of the *City of Boerne* test is not one that implicates heightened scrutiny, then, "in order to impugn the constitutionality of state discrimination" or other state conduct, "Congress must identify, not just the existence of . . . state decisions [based on suspect criteria], but a 'wide-spread pattern' of *irrational* reliance on such criteria." *Hibbs*, 538 U.S.

at 735 (quoting *Kimel*, 528 U.S. at 90) (emphasis added).

Finally, in the third step of the *City of Boerne* test, the Court asks whether the statutory provision invoked by the plaintiff, and, more specifically, "the manner in which the legislation operates to enforce th[e] guarantee" identified in the first step of the analysis, constitute "an appropriate response to this history and pattern of [unconstitutional] treatment" by the States, as documented in the legislative record. *Lane*, 541 U.S. at 530 & n.18. That is, to satisfy the third part of the test, Congress "must tailor its legislative scheme to remedying or preventing" the identified pattern of State "conduct transgressing the Fourteenth Amendment's substantive provisions," to achieve " 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.' " *Florida Prepaid*, 527 U.S. at 639 (quoting *City of Boerne*, 521 U.S. at 520).

### A. The "Precise Scope of the Constitutional Right at Issue" Here Is an Equal Protection Right to Be Free from Irrational State Employment Discrimination Based on a Medical Condition.

In applying the first part of the *City of Boerne* test to the self-care provision of the FMLA on which Mr. Coleman bases his damages claim, federal appellate courts have identified two interests that Congress sought to address, neither of which implicates heightened scrutiny under this Court's Fourteenth Amendment jurisprudence. Unlike the FMLA family-

care provision reviewed in *Hibbs*, the self-care provision was not "intended to remedy gender-based discrimination. . . ." *Touvell*, 422 F.3d at 401; *see* Pet. App. 12 (same); *Brockman*, 342 F.3d at 1164 (same). Instead, "the legislative history accompanying the passage of the FMLA reveals two motivations for the inclusion of the self-care provision": (1) "Congress was attempting to alleviate the economic burdens to both the employee and . . . his or her family of illness-related job-loss," and (2) "Congress was attempting to prevent those with serious health problems from being discriminated against by their employers." *Brockman*, 342 F.3d at 1164 (citing S. Rep. No. 103-3, at 11, 12 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 13-14; H.R. Rep. No. 101-28(I), at 23 (1989)); *see* Pet. App. 13 (same); *Touvell*, 422 F.3d at 401 (same).

When examined in light of this Court's applicable decisions, these two expressed purposes themselves make it difficult to view the self-care provision as "appropriate legislation" under Section 5 of the Fourteenth Amendment. As to the first motivation for the self-care provision, members of Congress understood that the measure's "fundamental rationale" was to advance a quintessentially economic policy objective: to prevent "[j]ob loss because of illness," which "has a particularly devastating effect on workers who support themselves and on families where two incomes are necessary to make ends meet or where a single parent heads a household." S. Rep. No. 103-3, at 11; *see* H.R. Rep. No. 101-28(I), at 23 (1989) ("The temporary medical leave requirement is intended to provide basic, humane protection to the family unit when it is most in need of help" and to

"reduce the societal cost born[e] by government and private charity."). As the courts of appeals have observed, this intent to ameliorate the economic consequences of serious illness "clearly goes to Congress's power under the Commerce Clause and not Section 5" of the Fourteenth Amendment. *Touvell*, 422 F.3d at 401 (quoting *Laro v. New Hampshire*, 259 F.3d 1, 12 (1st Cir. 2001)). Unlike Section 5, neither the Commerce Clause nor any other provision of Article I authorizes Congress to abrogate the States' sovereign immunity. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Garrett*, 531 U.S. at 364; *Kimel*, 528 U.S. at 79.[4]

The second interest that motivated Congress in enacting the self-care provision—to prevent "discrimination against qualified employees" with serious health problems, S. Rep. No. 103-3, at 12—is one that falls within the purview of the Fourteenth Amendment and, thus, Congress's power to "enforce" the rights guaranteed by that Amendment. However, this Court has never subjected this form of "discrimination" to heightened scrutiny, but has determined instead that it should be evaluated under

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[4] In enacting the FMLA, Congress invoked its power under the Commerce Clause, as well as its enforcement power under the Fourteenth Amendment, but did not specify which provisions of the statute served merely to regulate interstate commerce and which provisions served the additional purpose of enforcing constitutional rights. *See* S. Rep. No. 103-3, at 16; H.R. Rep. No. 103-8(I), at 29.

rational-basis review. This Court has declined to treat "the disabled, the mentally ill, and the infirm" as "quasi-suspect" classifications, and has rejected equal protection challenges to government policies that discriminate on the basis of disability, unless that discrimination can be said to be irrational. *See Garrett*, 531 U.S. at 366-67 (quoting *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 445-46 (1985)). Under this precedent, "States are not required to make special accommodations for the disabled, so long as their actions towards such individuals are rational"; thus, "[i]f special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause." *Garrett*, 531 U.S. at 367-68; *see also id.* at 366-67 ("[W]here a group possesses 'distinguishing characteristics relevant to interests the State has the authority to implement,' a State's decision to act on the basis of those differences does not give rise to a constitutional violation." (quoting *Cleburne*, 473 U.S. at 441)).

Thus, the precise constitutional right that Congress purported to address in the self-care provision is the right to be free from *irrational* employment discrimination by states based on a serious medical condition.

### B. Congress Did Not Act on a Record of Unconstitutional Conduct by States in the Granting of Medical Leave, and the Self-Care Provision Was Adopted for Socioeconomic Reasons, Not to Combat Gender Stereotypes.

1. Because the right addressed by the self-care provision—to be free from irrational employment discrimination on the basis of a health condition—is not subject to heightened scrutiny, this Court's precedents applying the *City of Boerne* test insist that the legislative record supporting enactment of the self-care provision must satisfy a demanding standard: "Congress must identify, not just the existence of . . . state decisions [based on suspect criteria], but a '*wide-spread pattern*' of *irrational* reliance on such criteria." *Hibbs*, 538 U.S. at 735 (quoting *Kimel*, 528 U.S. at 90) (emphasis added). Yet the legislative record here contains no evidence of irrational discrimination by the states with respect to employees with medical conditions. *See Brockman*, 342 F.3d at 1164 ("The legislative history does not . . . identify as the basis for [the self-care provision] a link between these two motivations" expressed in the Senate and House reports, "and any pattern of discriminatory stereotyping on the part of the states as employers."). Mr. Coleman is unable to cite even one mention in the legislative record of irrational discrimination in the administration of state-employee medical-leave policies that would be addressed by the self-care provision.

Even if one were to assume, as Mr. Coleman contends,[5] that the self-care provision was intended to address gender discrimination, the courts of appeals that have considered the contention have unanimously found that "Congress did not adduce any evidence establishing a pattern of the states as employers discriminating on the basis of gender in granting leave for personal reasons." Pet. App. 12; *see Touvell*, 422 F.3d at 402 (finding "no evidence

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[5] Though Mr. Coleman attempts to characterize the self-care provision as a gender discrimination remedy based on its coverage of "female-specific" medical conditions, including "maternity related disability," Pet'r Brief 37 (quoting 29 U.S.C. § 2601(b)(4)), Congress merely made the rational choice to include pregnancy-related conditions among a number of health conditions that "meet the general test" and, therefore, merit protection against job loss, including some conditions that may be more likely to affect men:

> [S]erious health conditions include but are not limited to heart attacks, heart conditions . . . , most cancers, back conditions . . . , strokes, severe respiratory conditions, spinal injuries, appendicitis, pneumonia, emphysema, severe arthritis, severe nervous disorders, injuries caused by serious accidents on or off the job, ongoing pregnancy, miscarriages, complications or illnesses related to pregnancy, such as severe morning sickness, the need for prenatal care, childbirth and recovery from childbirth. *All of these conditions meet the general test* that either the underlying health condition or the treatment for it requires that the employee be absent from work on a recurring basis or for more than a few days for treatment or recovery.

H.R. Rep. No. 103-8(I), at 40 (1993) (emphasis added).

that the states engaged in . . . gender discrimination with regard to personal medical leave" and "no evidence that the self-care provision of the Act would have any remedial or prophylactic effect on the [gender] discrimination identified by Congress" with respect to the FMLA's family-care leave provision); *Nelson*, 535 F.3d at 321 (finding the self-care provision "does not appear to be in response to any nationwide history of gender discrimination that would permit Congress to act under § 5"). Like those appellate courts, Mr. Coleman cannot locate any evidence in the legislative record to suggest that the states have engaged in discrimination with regard to employee medical leave for self-care.

The lower courts' inability to find any evidence of a pattern of state employment discrimination with respect to self-care leave is consistent with this Court's own assessment of the FMLA's legislative record. *See Lane*, 541 U.S. at 527 n.16 (observing that the legislative history of the FMLA, including parts pertaining to the family-care provision reviewed in *Hibbs*, "in fact contained *little specific evidence of a pattern of unconstitutional discrimination on the part of the States*," and "the evidence before the Congress that enacted the FMLA related primarily to the practices of private-sector employers and the Federal Government" (emphasis added) (citing *Hibbs*, 538 U.S. at 745–50 (Kennedy, J., dissenting))).

Indeed, to the extent Congress had before it evidence of how personal medical leave policies affected women and men, that evidence tended to

show even-handedness rather than disparate treatment. For example, the FMLA's legislative history contains evidence that men and women took roughly equal amounts of self-care leave:

> Recent studies provided to the [House Education and Labor] Committee indicate that men and women are out on medical leave approximately equally. . . . The evidence also suggests that the incidence of serious medical conditions that would be covered by medical leave under the bill is *virtually the same for men and women.*

H.R. Rep. No. 101-28(I), at 15 (1989) (emphasis added).

2. Mr. Coleman also tries to generate a connection to gender discrimination by referring to testimony that focused on private-sector employers, rather than state governments, and that suggested a guaranteed period of pregnancy-disability leave was essential because the Pregnancy Discrimination Act had proved to be an inadequate remedy for the problems faced by pregnant women in the workplace. Pet'r Brief 39 ("Congress heard testimony from women who lost their jobs because of pregnancy and child-birth related leave, notwithstanding the protections provided by the Pregnancy Discrimination Act.").

In rejecting the same contention, the Sixth Circuit identified "several problems with this argument," including: (1) "there is no evidence that Congress was any more concerned when enacting the FMLA with providing leave benefits to pregnant women than with providing benefits for other seriously ill men and

women"; (2) "even if it was true that the self-care provision of the Act was necessary in order to ensure that women can take time off for pregnancy-related conditions without creating an incentive to hire and promote men, there is no evidence that such a goal . . . is designed to combat a pattern of discrimination by state employers"; (3) "even if the provision of leave for pregnancy-related conditions was designed to remedy or prevent discrimination by public employers, there is no reason to believe that the self-care provision of the FMLA would in fact remove any disincentive to hire women that might otherwise result from a pregnancy-specific provision"; (4) "[w]ith regard to self-care leave, . . . there is no evidence that women—either in fact or in stereotype—took more such leave prior to the enactment of the FMLA"; (5) "there is no evidence that personal medical leave had ever created a disincentive to hire women"; and (6) "if such beliefs and the consequent disincentives *had* existed pre-FMLA, the self-care provision of the Act would only make things worse," because, "if employers believe[d] that women were more likely to take personal leave than men, a law mandating the provision of such leave to all employees would create precisely the type of incentives to hire and promote men that the family-care provision of the Act was designed to prevent." *Touvell*, 422 F.3d at 404-05; *see Laro*, 259 F.3d at 13-16 (rejecting the same argument on similar grounds).

The record that Congress actually had before it shows that the perceived inadequacy of the Pregnancy Discrimination Act was *not* that it had failed to provide a meaningful remedy against

unlawful or unconstitutional discrimination, but that it did not contain an affirmative substantive entitlement to leave time. The legislative record explicitly identified the self-care provision's purpose to be affording a substantive entitlement to an employee benefit, rather than remedying unconstitutional discrimination. That is, Congress understood that the FMLA "is intended to fill those gaps" left by the Pregnancy Discrimination Act with respect to the provision of benefits *"which an anti-discrimination law by its nature cannot fill."* H.R. Rep. No. 103-8(II), at 11 (1993) (emphasis added).

The perceived shortcoming of the Pregnancy Discrimination Act was that an employer could deny leave for a pregnancy-related health condition without discriminating (and thus avoid violating Title VII, as amended by the Pregnancy Discrimination Act) *if that employer did not offer disability leave at all*. The legislative record did not demonstrate that states maintained such restrictive leave policies.

In any case, references in the legislative record suggesting that Congress found one of its previous enactments inadequate are a far cry from the requisite evidence of constitutional violations by states. Before the FMLA was enacted, it was well established that a state's refusal to provide pregnancy leave to its employees was not unconstitutional. *See Geduldig v. Aiello,* 417 U.S. 484, 495 (1974).

3. Nor is there any validity to Mr. Coleman's attempt to equate an alleged lack of progress in the

adoption of state legislation with a finding of constitutional violations by states. *See* Pet'r Brief 49 (quoting statement in a House report that purported to refute the suggestion "that many States have already passed such leave benefits as are contained in [the proposed legislation]").[6] Notably, one of the supposed deficiencies in state laws was that they did not impose requirements for particular forms of leave on private-sector employers, not that the states failed to provide those forms of leave to their own employees. Pet'r Brief 49; *see also id.* at 38 (quoting testimony about the leave provided by "companies"). As Justice Kennedy explained in *Garrett*, because "States act as neutral entities, ready to take instruction and to enact laws when their citizens so demand," the mere "failure of a State to revise policies now seen as incorrect" in light of "a new commitment to better treatment of those disadvantaged by mental or physical impairments does *not* establish that an absence of state statutory correctives was a constitutional violation." 531 U.S. at 375 (Kennedy, J., concurring).

Despite the voluminous legislative record amassed during the years leading to the passage of the FMLA, that record lacks the essential evidence of state

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[6] As Mr. Coleman acknowledges, the basis for the claim that state leave policies were inadequate was a study that expressly excluded from its scope "state civil service regulations [that] provide additional coverage for state employees." Pet'r Brief 50. The policies that this study ignored are the source of *most* benefits for state employees.

constitutional violations that is necessary for the FMLA's self-care provision to qualify as "appropriate legislation" under Section 5.

### C. A Substantive Entitlement to Take up to 12 Weeks of Self-Care Leave Annually Far Exceeds Any Congruent and Proportional Remedial Measure.

1. Because "Congress did not adduce any evidence establishing a pattern of the states as employers discriminating on the basis of gender in granting leave for personal reasons," the court of appeals below joined other Circuits in concluding that there has been no "showing that the self-care provision is congruent and proportional to a Fourteenth Amendment injury that Congress enacted the provision to remedy." Pet. App. 12; *see Touvell*, 422 F.3d at 403 ("In the absence of any evidence of discrimination relating to personal medical leave, the self-care provision of the FMLA cannot be justified as a remedy for that type of medical leave."); *Laro*, 259 F.3d at 16 ("Here, there is no identified link between this particular provision and any pattern of discriminatory stereotyping on the part of states as employers. On this record, the personal medical-leave provision of the FMLA does not exhibit a sufficient congruence to the prevention of unconstitutional state discrimination to validly abrogate the states' Eleventh Amendment immunity. Without more, then, these legislative responses are out of proportion to the preventive objective as to states as employers and cannot be understood to be designed to prevent unconstitutional behavior.").

These conclusions by the appellate courts are similar to those reached by this Court in *Florida Prepaid* and *Kimel*, where the second step of the *City of Boerne* analysis disclosed little or no evidence of state constitutional violations, and thereby effectively determined the outcome of the "congruence and proportionality" analysis in the third step of the test. *See Florida Prepaid*, 527 U.S. at 646 ("Because of this lack" of "a history of 'wide-spread and persisting deprivation of constitutional rights' of the sort Congress has faced in enacting proper prophylactic § 5 legislation," the "provisions of the Patent Remedy Act are 'so out of proportion to a supposed remedial or preventive object that [they] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.' " (quoting *City of Boerne*, 521 U.S. at 526, 532)); *Kimel*, 528 U.S. at 91 ("Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field.").

2. The attempt to abrogate state sovereign immunity through a damages action enforceable by a state employee who allegedly has been denied self-care leave is a quintessential example of Congress relying on Section 5 to advance a substantive policy, rather than a remedial purpose. *See City of Boerne*, 521 U.S. at 527 ("Any suggestion that Congress has a substantive, nonremedial power under the Fourteenth Amendment is not supported by our case law."). In providing for as much as 12 weeks of leave annually for a serious health condition to all employees, public and private, Congress was

conferring a substantive entitlement, and a sizeable one. Exposing state treasuries to liability for judgments based on claims of violations of the medical-leave requirement is a remedy that is grossly "disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act." *Kimel*, 528 U.S. at 83.

3. Mr. Coleman attempts to escape application of the congruence-and-proportionality test or to deny the unavoidable consequence of that test's application to the self-care provision, in two ways. Neither has merit.

a. First, Mr. Coleman seeks to paint the self-care provision as an integral component of a unitary remedial scheme—as one "leg" of a "four-legged" table. Pet'r Brief 10. Mr. Coleman asserts that the power to abrogate state sovereign immunity with respect to one provision of a statute must extend to the others. But while all four legs of Mr. Coleman's table (plus the fifth—the provision for leave based on a relative's military service, which Mr. Coleman apparently concedes cannot support abrogation of state sovereign immunity, Pet'r Brief 55)—involve workplace leave benefits, only three relate to the Section 5 objective of combating gender stereotypes about women's domestic roles, including the stereotype that only women were responsible for family caregiving. *See Hibbs,* 538 U.S. at 736-38; *see also id.* at 731 n.5 (recognizing "common foundation" for family-leave and parenting-leave provisions). By contrast, many—indeed most—instances of self-care leave do not implicate gender stereotypes at all.

Authorizing actions for money damages against state employers when an employee alleges he or she was wrongfully denied self-care leave for chronic migraine headaches, *see* 29 C.F.R. § 825.113(d), will not serve to deter sex discrimination or eliminate gender stereotypes.

Moreover, Mr. Coleman's all-or-nothing argument for abrogation depends on a conception of the FMLA "as a whole [that] is greater than the sum of its component parts." Pet'r Brief 10. But if congruence and proportionality are to mean anything, they must mean that the contours of the right being enforced bear some resemblance to the shape of the remedy, and the extent of the remedy must bear some reasonable relation to the degree of the right's infringement. This Court found that resemblance in shape and size when examining the remedy created by the family-leave provision. When, however, the remedy is broadened to include self-care leave, the resemblance is lost. To borrow a metaphor sometimes invoked in the legislative process, an ornament that exhibits congruence and proportionality will justify abrogation, whereas the Christmas tree on which it is hung will not. Congress should not be inhibited from including in the same enactment provisions that are authorized by one or more of the enumerated powers in Article I, together with provisions that are authorized by Congress's power under Section 5 of the Fourteenth Amendment. Yet Mr. Coleman's all-or-nothing approach to abrogation would either produce that result or render the *City of Boerne* test meaningless.

Finally, Mr. Coleman's aversion to "pars[ing]" provisions of the FMLA, Pet'r Brief 54, is inconsistent with this Court's jurisprudence and with the considered position of the United States Solicitor General. In both cases that have upheld abrogation and ones that have invalidated it, this Court has considered different parts of statutes separately in analyzing whether they constituted "appropriate" Section 5 legislation. Thus, in *Garrett*, this Court examined Title I of the ADA and found that it did not meet the *City of Boerne* test, whereas in *Lane,* this Court held that Title II of the same statute, at least in some of its applications, did support abrogation. *See also Lane,* 541 U.S. at 530-31 ("[N]othing in our case law requires us to consider Title II" of the ADA "as an undifferentiated whole."). Indeed, in *Hibbs,* this Court carefully (and appropriately) limited its analysis to a single provision of the FMLA, the family-care leave provision. In upholding abrogation with respect to that provision, this Court vindicated the position advanced by the United States, by recognizing that "the difference [between the family-care and self-care provisions] matters." Brief for the United States in Opposition (No. 01-1368) (May 2002), at 7-8. The Solicitor General had previously informed Congress that, in light of this Court's decision in *Garrett*, the United States no longer had any "sound basis to continue defending the abrogation of Eleventh Amendment immunity . . . in medical-leave cases" under the FMLA. Pet. App. 23. And, in its brief on the merits in *Hibbs,* the United States continued to observe this distinction, confining its arguments in defense of abrogation to the family-

care provision. *See* Brief for the United States (No. 01-1368) (Oct. 2002).

b. Mr. Coleman argues, alternatively, that the self-care provision, standing alone, is "appropriate" Section 5 legislation that supports abrogation. He bases this argument on the assertion that the self-care provision independently addresses the problem of gender discrimination. That assertion is based almost exclusively on his characterization of the provision as a broad prophylactic measure to address discrimination in the granting of pregnancy-related disability leave. This argument suffers from at least three flaws.

First, as discussed above, the legislative record does not demonstrate that *state* employers were discriminating in this regard. Second, the problem identified in the legislative record pertained only to employers who could deny pregnancy-related disability leave to women without violating the Pregnancy Discrimination Act and Title VII if those employers denied medical-leave across the board, to men and women employees alike. The self-care damages remedy sweeps much more broadly than necessary to address the need for self-care leave when there is a family-related need for the leave. Thus, as in *Kimel*, "the indiscriminate scope" of the remedy, together with the "lack of evidence of widespread and unconstitutional . . . discrimination by the States," renders the damages action afforded with respect to the self-care provision an impermissible exercise of Congress's power under

Section 5 of the Fourteenth Amendment. 528 U.S. at 91.

Third, the perceived gap in the Pregnancy Discrimination Act that the self-care leave provision ostensibly was designed to close has in fact been closed, even without a private right of action against state employers under the FMLA. By mandating that all employers, including state employers, provide self-care leave on a gender-neutral basis, there is no longer any employer (within the coverage of the FMLA) that can justify its refusal to grant pregnancy-related disability leave on the basis that it does not provide disability leave at all. Now, when an employee, including an employee of a state, is denied leave in connection with her pregnancy, her employer has treated her differently from similarly-situated employees who obtain leave for other serious health conditions, and her employer has violated Title VII, as amended by the Pregnancy Discrimination Act. Accordingly, she has a private right of action for money damages that is narrowly-tailored to the gender-related problem that Mr. Coleman identifies as having motivated Congress to enact the self-care provision.

For these reasons, the self-care provision of the FMLA does not constitute "appropriate legislation" under Section 5 of the Fourteenth Amendment, and does not validly abrogate the states' sovereign immunity.

## II. ABROGATION OF THE STATES' SOVEREIGN IMMUNITY IS UNNECESSARY TO ADVANCE CONGRESS'S OBJECTIVES IN REQUIRING EMPLOYERS TO GRANT SELF-CARE LEAVE.

Although Congress has not validly abrogated state sovereign immunity from claims under the self-care provision, state employers are not exempt from the provision's coverage. As Justice Kennedy has observed, "[w]hat is at issue is only whether the States can be subjected, without consent, to suits brought by private persons seeking to collect moneys from the state treasury." *Hibbs,* 538 U.S. at 759 (Kennedy, J., dissenting). The self-care provision of the FMLA does not provide a basis for abrogating state sovereign immunity and exposing state treasuries to such suits. Congress's attempt to do so crosses the line between enforcing a constitutional right and redefining the scope of constitutionally-guaranteed rights to encompass one that is far removed from the concerns of the Fourteenth Amendment. The absence of a congressionally-authorized right of action for money damages does not mean, however, that state employees will be denied the benefits of this legislatively-created substantive right, for several reasons.

First, as Congress recognized, many states, including Maryland, offer sick-leave benefits that go well beyond what the FMLA requires, and provide protections against the denial of that leave in their civil-service laws. Second, the FMLA was enacted under both Congress's Section 5 power and its Commerce Clause power. Because enactment of the

self-care provision is a valid exercise of Congress's power to regulate interstate commerce, states are bound to comply with the FMLA's self-care provisions, just as they are bound to comply with its family-care provisions. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554-56 (1985). Third, if a state agency wrongfully denies self-care leave under the FMLA, the employee may sue the responsible state official for injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908). *See, e.g.*, *Nelson*, 535 F.3d 318, 321-22 (5th Cir. 2008) (dismissing damages claims under self-care provision as barred by the Eleventh Amendment but permitting employee to proceed with *Ex parte Young* claim for reinstatement). Moreover, as discussed above, a damages action will lie to redress violations of the FMLA where self-care leave has been denied as the result of sex discrimination or other unconstitutional action. Finally, the United States Department of Labor may bring an action against a state for violating the self-care provision and may obtain both injunctive and monetary relief on an employee's behalf. 29 U.S.C. § 2617(b)(2)-(3), (d); *see Employees of the Dep't of Health & Welfare v. Missouri Pub. Health Dep't*, 411 U.S. 279, 286 (1973).

A suit for damages in each and every instance in which a state employee's request for self-care leave under the FMLA has been denied is not a congruent or proportional remedy for that denial. These other forms of relief, on the other hand, are appropriate and adequate remedies, and there is thus no basis for Congress to disturb "the usual constitutional balance between the States and the Federal Government,"

*Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985), in order to create a workplace entitlement to self-care leave.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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