No. 10-1016

In The Supreme Court of the United States

DANIEL COLEMAN,

Petitioner,

v.

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

Respondents.

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTRODUCTION

The State of Maryland's Brief is written as if the Court never decided *Nev. Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003).[1] It also ignores the intent of Congress as expressed in both the language of the Family and Medical Leave Act (FMLA) and its legislative record.

For nearly a decade, Congress deliberated on how best to achieve gender equality in the granting of workplace leave. Throughout those deliberations, Congress believed that the guarantee of leave for the birth or adoption of a child coupled with the family-care provision was not enough to assure gender equality in leave benefits. Congress knew that those three provisions would not ensure leave for pregnancy-related issues and thus the FMLA needed to contain a self-care provision. Noting the common stereotype that women would be more likely to take leave for the birth or adoption of a child or to care for family members, Congress feared that if it were to create a self-care provision that applied only to women, the FMLA would promote discrimination in the workplace, not remedy it. Employers would perceive the FMLA as providing protection to women only, thereby creating an incentive not to hire women in the first place.

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[1] The Brief for Respondents will be referenced as "Resp. Br. at ___." The Brief for Petitioner will be referenced as "Pet. Br. at ___."

The self-care provision provides leave on a gender-neutral basis, making men just as likely as women to take the leave, and thereby ensuring leave for pregnancy-related medical issues while simultaneously avoiding the negative inferences that would inevitably follow if the statute were to apply to women only.

In enacting the FMLA, Congress drafted a very narrowly targeted statute and wanted to hold states accountable. In order to do so, Congress provided limited monetary damages, abrogating the states' immunity from suits for monetary relief under the Eleventh Amendment.

To validly authorize suits against state employers for damages, Congress must have "unequivocally expressed its intent to abrogate the immunity,"[2] and have acted "pursuant to a valid exercise of power." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55 (1996) (citing *Green v. Mansour*, 474 U.S. 64, 68 (1985)). Congress must also (1) be acting to defend a constitutional right; (2) examine evidence of actual or potential injury to that right; and (3) develop a remedy congruent and proportional to the injury identified. *City of Boerne v. Flores*, 521 U.S. 507, 530-32 (1997).

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[2] Respondent and its *amici* have conceded that Congress unequivocally expressed its intent to abrogate and, therefore, it is not at issue in this case. Resp. Br. at 3; Brief for Texas et al. as *Amici Curiae* for Respondent at 4 (citing *Hibbs*, 538 U.S. at 726), hereinafter referenced as "Texas et al. at ___."

In *Hibbs*, the Court confirmed that the FMLA is a congruent and proportional response to gender discrimination in the granting of workplace leave. As the State of Maryland correctly notes, the *Hibbs* Court found that the family-care 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.'" Resp. Br. at 8 (citing *Hibbs*, 538 U.S. at 738, 735). While the precise question in *Hibbs* addressed only the family-care provision, the Court's analysis compels the conclusion that its counterpart – the self-care provision – is likewise a valid abrogation of the States' Eleventh Amendment immunity.

Maryland and its *amici* concede that when Congress is legislating to achieve equal protection for a suspect classification like race or gender, Congress has more power and flexibility to legislate than when addressing discrimination based upon non-suspect classifications like age or disability. Resp. Br. at 18; Brief for Texas et al. as *Amici Curiae* for Respondent at 8-9. Despite the fact that Congress expressly stated that the FMLA was a response to gender discrimination in granting leave, which *Hibbs* confirmed, Maryland relies upon cases that assess Congress' power to abrogate immunity when addressing discrimination based on non-suspect classifications (age or disability) to argue that the FMLA's legislative record does not support abrogation.

The *Hibbs* Court reviewed the same legislative record that is before this Court. Based upon that

record, the *Hibbs* Court found that the family-care provision of the FMLA was Congress' remedy for unconstitutional sex discrimination in the granting of workplace leave. The FMLA, is a comprehensive response to sex discrimination; therefore, each individual provision should be viewed as an integral part of that response.

I. The Statutory Language, The Legislative Record, And *Hibbs* All Confirm That Congress Addressed Unconstitutional Gender Discrimination When It Enacted The FMLA.

Respondent and its *amici* attempt to misdirect the Court by mischaracterizing the self-care provision as "an equal protection right to be free from irrational state employment discrimination based on a medical condition." Resp. Br. at 14 (capitalization omitted); Texas et al. at 10-12. The constitutional right protected by the FMLA is the right to be free from gender discrimination in the workplace. This fact is abundantly clear from the statutory language, the legislative record, and the Court's interpretation in *Hibbs*.

Congress intended the FMLA to provide men and women equal protection of the law in the granting of employment leave. 29 U.S.C. § 2601(b)(4) and (5). Maryland initially recognizes this when it explains that "[Congress intended to act] 'in a manner that . . . , consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential

for employment discrimination on the basis of sex,' §2601(b)(4), and 'promote[s] the goal of equal employment opportunity for women and men.' . . . 29 U.S.C. §2601(b)(5)." Resp. Br. at 1. Despite this recognition, Respondent asserts that the FMLA's "self-care provision was not 'intended to remedy gender discrimination.'" Resp. Br. at 15 (citing *Touvell v. Ohio Dept. of Mental Retardation & Developmental Disabilities*, 422 F.3d 392, 401 (6th Cir. 2005)).[3]

Indeed, the sections of the statute cited by Respondent show that Congress was addressing gender discrimination:

> Congress . . . found that, "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men." 29 U.S.C. § 2601(a)(5).
>
> Congress . . . recognized that "employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees

[3] The Respondent's arguments rest on the lower court opinions, *Touvell* and *Brockman v. Wyoming Dep't of Family Services*, 342 F.3d 1159 (10th Cir. 2003). Resp. Br. at 15-17, 19-22, 25. This reliance, however, is misplaced. These cases, as discussed in the Petition for Certiorari at 14-16 and Pet. Br. at 60-63, undertake only a limited analysis of the FMLA's legislative history. Most importantly, they rely on rationale that was expressly rejected in *Hibbs*.

> and applicants for employment who are of that gender." 29 U.S.C. § 2601(a)(6).

Resp. Br. at 1-2. The very record relied upon by Respondent reflects that Congress sought to provide equal protection of the law based on gender in enacting the self-care provision, specifically with respect to childbirth and pregnancy.

Despite these express congressional findings, Respondent argues that the purpose of the self-care provision was (1) to alleviate "economic burdens of employees" and (2) to prevent "those with serious health conditions from being discriminated against by their employers." Resp. Br. at 15 (citing *Brockman*, 342 F.3d at 1164).

Hibbs rejected this argument, explaining the "FMLA aims to protect the right to be free from gender-based discrimination in the workplace." 538 U.S. at 728. Further, the Court noted "[t]he States' record of unconstitutional discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation." *Hibbs*, 538 U.S. at 735. The Court did not preface these statements by distinguishing among the various provisions of the FMLA. Likewise, Congress declined to make a distinction between family-care and self-care in the "Findings" and "Purposes" sections of the FMLA.

The family-care and self-care provisions are part of a unified approach taken by Congress to combat gender discrimination in the context of workplace

leave. As explained in Petitioner's Brief, just as a table has four legs, the four provisions of the FMLA work to support the statute as a whole. *See* Pet. Br. at 14-16.

II. Congress Had Sufficient Evidence Of Gender Discrimination By The States To Abrogate The States' Eleventh Amendment Immunity.

The FMLA's legislative history confirms that the purpose of the statute is to eliminate gender discrimination in the workplace. Pet. Br. at 36-40. Specifically, the legislative record reveals that the self-care provision of the FMLA was motivated, at least in part, by the following concerns, all of which are responsive to gender discrimination and the potential repercussions of sex-specific corrective action: (1) the need for protected pregnancy-related leave in the weeks and months prior to childbirth;[4] (2) the workplace hardship faced by single mothers required to take self-care leave; and (3) the fear that gender-specific legislation may unintentionally lead to the preemptive non-hiring of female employees.

First, the legislative record makes clear that the self-care provision of the FMLA was intended to remedy gender discrimination in the workplace by singling

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[4] This is covered in detail in the Brief for National Partnership for Women and Families et al. as *Amici Curiae* Supporting Petitioner at 12-22 (hereinafter cited as "National Partnership et al. at ___") and will not be repeated here.

out pregnancy-related illnesses that occur prior to childbirth and expressly recognizing that the FMLA applies to such conditions. By way of example, a relevant House report notes that the term "serious health condition" in the FMLA should be interpreted to include: "ongoing pregnancy, miscarriages, complications or illnesses related to pregnancy, such as severe morning sickness, the need for prenatal care, childbirth and recovery from childbirth" as well as illnesses that might affect men and women equally. H.R. REP. NO. 103-8, pt. 1, at 40 (1993).[5] By emphasizing the inclusion of morning sickness and similar conditions within the coverage of the statute, the FMLA's legislative history shows that the self-care provision was intended to protect pregnancy-related leave not otherwise covered by the other provisions of the FMLA. Moreover, while it is certainly true that the self-care provision of the FMLA was intended to – and does – "address the basic needs of all employees

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[5] The report continued,

> Section 102(a)(2) requires that leave provided under section 102(a)(1)(A) or (B) to care for a newborn child or a child newly placed with the employee for adoption or foster care be taken before the end of the first 12 months following the date of the birth or placement. Circumstances may, however, require that leave begin prior to the actual date of birth or placement. An expectant mother, for example, may take medical leave under section 102(a)(1)(D) prior to the birth of her child if her condition is such that she is unable to work right up to the birth.

H.R. REP. NO. 103-8, pt. 1, at 36 (1993).

. . . young and old, male and female, who suffer from a serious health condition," this same provision of the legislative record also demonstrates that Congress expected the self-care provision to prevent further inequality between the sexes. *See* H.R. REP. NO. 103-8, pt. 1, at 29 (1993) (explaining that "[a] law providing special protection to women or any defined group, in addition to being inequitable, runs the risk of causing discriminatory treatment. [The FMLA], by addressing the needs of all workers, avoids such a risk.").

Second, Congress heard cautionary tales of abuse by state employers that highlighted the importance of the self-care provision. For example, in a 1991 House hearing, Robert Dawkins, an employee of the state of Georgia, testified,

> [W]e have two types of unpaid leave in Georgia. One of them is regular leave without pay where they will give you your job back. And the other is contingency, and that really boils down to whether your supervisor wants you to come back or not. And often times, they may just say, "Well, we don't want you back."

Hearing on H.R. 2, The Family and Medical Leave Act of 1991: Hearing Before the Subcomm. on Labor-Mgmt. Relations of the H. Comm. on Educ. and Labor, 102d Cong. 33 (1991).[6] The FMLA's legislative

[6] Petitioner, in its brief, and its *amici* provide other examples as well. *See* Pet. Br. at 24-30; National Partnership et al. at 9-12.

history reveals that the self-care provision was intended to provide job security for working single mothers by ensuring that appropriate self-care medical leave will not result in undue job replacement or other debilitating economic consequences likely to affect working single mothers with particular force. As one House report explains,

> Workers and their families have always suffered when a family member loses a job for medical reasons. . . . But while [the] family has traditionally had a second parent available to help meet such emergencies, single heads of household, *who are predominantly women workers in low-paid jobs*, do not have such backup support. For these women and their children, *the loss of the woman's job when she is sick can have devastating consequences*. . . . Thus, providing job protection for workers who experience a serious medical condition is of increasing significance.

H.R. REP. NO. 102-135, pt. 1, at 20-21 (1991) (emphasis added).[7]

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[7] Furthermore, in drafting the FMLA, Congress on several occasions considered testimony of the American Federation of State, County and Municipal Employees (AFSCME). *The Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor-Mgmt. Relations and the Subcomm. on Labor Standards of the H. Comm. on Educ. and Labor*, 99th Cong. 82-86 (1986); *Hearing on H.R. 2, The Family and Medical Leave Act of 1991: Hearing Before the Subcomm. on Labor-Mgmt. Relations of the H. Comm. on Educ. and Labor*, 102d Cong. 152-56 (1991).

(Continued on following page)

Last, the statute makes clear that, in enacting the FMLA, Congress found that traditional gender stereotypes, such as those fashioning men as breadwinners and relegating women to the status of homemakers, had become deeply ingrained in the workplace, invariably leading to fewer opportunities for women. *See* 29 U.S.C. § 2601(a)(5); Pet. Br. at 14, 22-23, 25-26. Although Congress undoubtedly sought to rectify this disparity by passing the FMLA, the legislators likewise acknowledged 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). Congress addressed this problem by drafting the FMLA in gender-neutral terms, thereby "ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis." 29 U.S.C. § 2601(b)(4).

A. The *Hibbs* Court Determined That Congress Established A Sufficient Record Of Sex Discrimination By State Employers Before Enacting The FMLA.

Assessing the FMLA's legislative record in *Hibbs*, the Court noted significant evidence of an extensive

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AFSCME supported the FMLA because the union was having to negotiate piecemeal to get leave for state employees.

history of sex discrimination in the administration of leave benefits by the states. *Hibbs*, 538 U.S. at 722. The Court found that "testimony supported th[e] conclusion, explaining that '[t]he lack of uniform parental and *medical leave* policies in the work place has created an environment where [sex] discrimination is rampant.'" *Id*. at 732 (emphasis added, internal citations omitted).

Although the specific issue in *Hibbs* was the family-care provision of the FMLA, the Court's rationale was not so limited. Rather than focusing on evidence of the states' discrimination in family-care leave, the Court examined state-sponsored gender discrimination in the workplace as a whole. "States continue to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits." *Id.* at 730. The *Hibbs* Court made no meaningful distinction between family-care and self-care leave. The Court and Congress understood that the FMLA's leave provisions were interconnected and could no more be separated from one another than from this country's regrettable history of gender discrimination.

While the legislative record shows considerable evidence of unconstitutional state action, the legislative record need not carry the whole weight of justifying statutory abrogation of the states' immunity from suit. The Court has clarified the type of record Congress must compile when passing legislation that abrogates the States' Eleventh Amendment immunity. This record need not consist only of "evidence of

constitutional violations by the States themselves," and may be established through judicial findings, as well as statistical, legislative, and anecdotal evidence. *Tennessee v. Lane*, 541 U.S. 509, 527 n. 16, 529 (2004). Additionally, the Court is to consider Congress' findings that are "in the text of the [statute] itself." *Id.* at 529. Indeed, the Court has noted that the legislative branch is not held to the same standards of fact-finding as the judicial branch:

> [L]egislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. . . . Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.

F.C.C. v. Beach Comms., 508 U.S. 307, 315 (1993). The legislative record of the FMLA clearly meets that standard.

Congress had sufficient evidence of gender discrimination to validly abrogate the States' Eleventh Amendment Immunity when it passed the self-care provision and the FMLA.

B. Respondent Cites Fragments Of The Legislative Record Out Of Context To Diminish Its Significance.

Respondent mischaracterizes the legislative record in an attempt to camouflage evidence that the

self-care provision was meant to address gender discrimination. For example, Respondent quotes a 1989 House report to support its dubious assertion that the self-care provision has two purposes: (1) to alleviate the economic burden of job loss related to illness, and (2) to prevent discrimination against those with serious illnesses. Resp. Br. at 15. Respondent fails to mention that the same paragraph in the report explains that pregnancy and childbirth are covered by the provision. H.R. REP. NO. 101-28, pt. 1, at 23 (1989). These are, of course, gender-specific conditions. The same portion of the report goes on to say that the self-care provision is particularly beneficial for single-parent households because the loss of a job due to illness could be devastating. H.R. REP. NO. 101-28, pt. 1, at 23 (1989). As noted by the Senate report accompanying the FMLA in 1993, most of these single-parent households are led by women. S. REP. NO. 103-3, at 7 (1993).

Respondent also selectively quotes that same 1993 Senate Report to support its assertion that the self-care provision was meant to address only economic concerns. According to Respondent, the self-care provision was enacted 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." Resp. Br. at 15. The next paragraph in the report, which was omitted by Respondent, quotes Eleanor Holmes

Norton, who bluntly confronts Congress with how this adversely affects women.

> For the single parent, usually a woman, losing her job when she is unable to work during a time of serious health condition can often mean borrowing beyond prudence, going on welfare, or destitution for herself and her family. . . . The high rates of single parenthood among minority families and of labor force participation by minority single mothers make job-guaranteed leave especially critical[.]

S. REP. NO. 103-3, at 12 (1993). The legislative record that connects economic vulnerability with gender discrimination does not distinguish between family care and self care.

Similarly, Respondent selectively quotes the 1989 House Report to suggest that Congress lacked evidence of states' discriminating with 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.

Resp. Br. at 21 (citing H.R. REP. NO. 101-28, pt. 1, at 15 (1989)). But Maryland fails to mention that this portion of the Report is under a section titled "Equal Protection and Non-Discrimination." H.R. REP. NO.

101-28, pt. 1, at 14 (1989). Further, the Report explains how the FMLA responds to gender discrimination:

> A law providing special protection to women or any narrowly defined group, in addition to being inequitable, runs the risk of causing discriminatory treatment. Employers might be less inclined to hire women or some other category of worker provided special treatment. For example, legislation addressing the needs of pregnant women only would give employers an economic incentive to discriminate against women in hiring policies; legislation addressing the needs of all workers equally does not have this effect.

H.R. REP. NO. 101-28, pt. 1, at 14 (1989). Additionally, another paragraph omitted by Respondent makes the point that the FMLA attempts to provide gender equality in the granting of leave:

> The bill will provide no incentive to discriminate against women, because it addresses the leave needs of workers who are young and old, male and female, married and single. The legislation is based not only on the Commerce Clause, but also on the guarantees of equal protection and due process embodied in the Fourteenth Amendment.

H.R. REP. NO. 101-28, pt. 1, at 15 (1989).[8] This language highlights the possible negative inference that

[8] This is amplified in Pet. Br. at 47-48 and in National Partnership et al. at 9-10, 22-25.

could develop if Congress made the family-care and self-care provisions gender-specific. By making these provisions gender-neutral, Congress sought to provide equal protection, as the section title confirms.

III. The *Hibbs* Court Gave Practical Meaning To "Congruence And Proportionality."

The Court has long recognized that gender discrimination violates the Equal Protection clause of the Fourteenth Amendment. *Craig v. Boren*, 429 U.S. 190, 197 (1976); *see also United States v. Virginia*, 518 U.S. 515, 558-59 (1996) (Rehnquist, C.J., concurring) (illustrating the growth of the Court's consensus); Pet. Br. at 25-30. Gender is a quasi-suspect classification subject to intermediate scrutiny. *United States v. Virginia* (applying heightened scrutiny to determine that all-male admissions policy of a military college violated the Equal Protection Clause); *see also Hibbs*, 538 U.S. at 728. The states may treat the sexes differently only if gender classifications "serve important governmental objectives and [are] substantially related to achievement of those objectives." *Boren*, 429 U.S. at 197.

Hibbs clarified how *Boerne*'s congruence and proportionality applies when a suspect classification, like gender discrimination, is at issue. The *Hibbs* Court gave this concept concrete meaning: it recognized that Congress has considerable latitude and power when enacting legislation addressing sex discrimination, and required less of a legislative record to support

Congressional action. However, Maryland's response attempts to strip the Court's congruence and proportionality jurisprudence of its intended meaning.

A. Congress Has Broad Discretion When Legislating To Protect Members Of A Suspect Class.

As discussed in detail in Petitioner's Brief, Congress designed the FMLA to assure equal protection under law in the workplace. *See* Pet. Br. at 11-21. Congress' legislative design is presumptively constitutional because "Congress is a coequal branch of government whose Members take the same oath [as the Supreme Court Justices] do to uphold the Constitution of the United States." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S.Ct. 2504, 2513 (2009) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981)).[9]

The Court's application of congruence and proportionality demonstrates that Congress has more flexibility when legislating to remedy unconstitutional discrimination based upon gender, a quasi-suspect classification, than when enacting statutes to remedy unconstitutional age or disability discrimination. Just two years before the *Hibbs* decision, the same Court analyzed the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA). *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62

[9] *See* Pet. Br. at 30-31.

(2000); *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001). The Court determined that this country did not have an extensive history of unconstitutional discrimination based on age or disability as it did based on race or sex. *Id.* In *Kimel*, the Court applied a rational-basis review finding that "[a]ge classifications, unlike governmental conduct based on race or gender, cannot be characterized as so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy." 528 U.S. at 83 (internal quotation omitted).

In *Garrett*, the Court found that "[t]he legislative record of the ADA . . . simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled." 531 U.S. at 368. Thus, a state can justify a practice that discriminates by age or ability merely by showing a rational basis for it. Therefore, Congress must have extensive concrete evidence disproving the rationality of the practice before Congress can enact a remedy that will meet the "congruent and proportional" standard of *Boerne*. *See Kimel*, 528 U.S. at 81-82 (finding that Congress had "very little evidence" that the states were engaging in the prohibited conduct); *see also Garrett*, 531 U.S. at 368.

The Court's discussions in *Kimel*, *Garrett* and *Hibbs* affirm that an extensive legislative record detailing the states' unconstitutional discrimination is unnecessary when a suspect classification is at issue. *Kimel*, 528 U.S. at 89-91; *Garrett*, 531 U.S. at 368-72;

Hibbs, 538 U.S. at 729-35; *see also* Pet. Br. at 32-34. Both *Kimel* and *Garrett* required extensive proof in the legislative records. Pet. Br. at 32-34. In contrast, the "heightened scrutiny review, combined with the well-documented history of state gender discrimination in the employment context, alleviated the need for a microscopic review of the FMLA's legislative history in *Hibbs*." Pet. Br. at 34.

One year after the *Hibbs* decision, the Court revisited the issue of Congress' ability to abrogate the states' immunity in *Lane*, 541 U.S. 509 (2004). In *Lane*, the Court held that the fundamental right of access to the courts as protected by Title II of the ADA justified a valid exercise of Congress' section 5 power. *Id.* at 533-34.

Notably, in *Lane*, Justice Rehnquist, who wrote the *Hibbs* opinion, authored a dissent that was joined by Justices Kennedy and Thomas. This dissent is particularly telling as it repeatedly contrasted what the dissent viewed as the "nonexistent record of constitutional violations" adduced by Congress before enacting the ADA with that amassed for the FMLA, which "we have sustained as valid § 5 enforcement legislation." *Lane*, 541 U.S. at 547-48 (Rehnquist, C.J., dissenting). This dissent took judicial note of the fact that the *Hibbs* decision "trac[ed] the extensive legislative record documenting States' gender discrimination in employment leave policies." *Id.* at 548 (Rehnquist, C.J., dissenting).

In practical terms, as the Court did in *Hibbs*, the *Lane* dissent differentiates between the extensive power Congress has to address unconstitutional discrimination based upon classifications like race and gender, and Congress' reduced power when addressing non-suspect classifications. As recognized in *Hibbs*, because this country has a history of unconstitutional gender discrimination, Congress need not amass copious evidence of widespread gender discrimination by the states before it subjects the state to suits for violations of Equal Protection.[10]

B. The FMLA's Economic Impact Accomplishes The Statute's Fundamental Purpose, To Combat Gender Discrimination In The Granting Of Workplace Leave.

The State of Maryland's argument that the self-care provision responds only to economic injustice also misses the mark. Maryland's argument presupposes that the FMLA as a whole, and the self-care provision in particular, is not a response to gender discrimination. To support this mistaken proposition, the State

[10] Respondent makes much of the fact that the Solicitor General has not taken a position in this case. It is unfortunate that the United States has not offered its views, but the Solicitor General's reasoning for not participating is merely a matter of conjecture that has no relevancy to the issue presented. The previous positions taken by the United States on this issue are discussed in detail in Petitioner's brief. *See* Pet Br. at 22.

relies heavily on *Touvell*, *Laro v. New Hampshire*, 259 F.3d 1 (1st Cir. 2001), and other cases,[11] all of which are impliedly overruled or questioned by *Hibbs*. *See* Pet. Br. at 60-63.

While the *Hibbs* opinion addresses the family-care provision of the FMLA, much of Justice Rehnquist's language refers generally to the rationale behind the FMLA as a whole. "According to evidence that was before Congress when it enacted the FMLA, States continue to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits. Reliance on such stereotypes cannot justify the States' gender discrimination in this area." *Hibbs*, 538 U.S. at 730. Based on those findings in *Hibbs*, this Court should accept that the self-care provision, as part of the FMLA, is integral to Congress' response to sex discrimination by state employers.

The *Hibbs* Court went on to discuss the deference due to Congress in crafting a remedy once an actual or expected injury is shown. "By setting a minimum standard of family leave for all eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes." *Hibbs*, 538 U.S. at 737. This same rationale should be used to uphold the self-care provision as well.

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[11] Resp. Br. at 25.

As the Court pointed out in *Hibbs*, recognizing that the FMLA is responsive to gender discrimination gives Congress leeway to craft the appropriate remedy. In Maryland's view, in the face of evidence of gender-based discrimination by the States, Congress could do no more in exercising its section 5 power than simply proscribe such discrimination. Resp. Br. at 15. However, the *Hibbs* Court explained that this "position cannot be squared with our recognition that Congress 'is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment,' but may prohibit 'a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.'" *Hibbs*, 538 U.S. at 737 (quoting *Kimel*, 528 U.S. at 81).

C. Congress Tailored The FMLA Both To Prevent And To Remedy Violations Of A Constitutional Right That Other Statutes Fail To Correct.

The Court recognized that the FMLA was enacted because both Title VII and the Pregnancy Discrimination Act had failed to achieve the purpose of ending gender discrimination at the "faultline between work and family – precisely where sex-based overgeneralization has been and remains strongest." *Hibbs*, 538 U.S. at 737. The Court even addressed the shortcomings of these statutes. "[I]n light of the evidence before Congress, a statute mirroring Title VII, that simply mandated gender equality in the administration of leave benefits, would not have achieved

Congress' remedial object. Such a law would allow States to provide for no family leave at all." *Id.* at 738. To address this, Congress provided twelve weeks of unpaid leave.

The *Hibbs* Court used clear language to describe the right being protected and the appropriateness of the remedy. The leave is not a blanket entitlement, but in fact imposes a number of requirements on the employee. There can be little doubt that twelve weeks of unpaid leave is congruent and proportional. The Court confirmed: "We also find significant the many other limitations that Congress placed on the scope of this measure." *Hibbs*, 538 U.S. at 738. The Court then lists those limitations which are discussed in the Petitioner's brief. Pet. Br. at 56-57.

The *Hibbs* Court concluded that the family-care provision of the FMLA "is congruent and proportional to its remedial object, and can 'be understood as responsive to, or designed to prevent, unconstitutional behavior.'" *Id.* at 740 (quoting *Boerne*, 521 U.S. at 532). As self-care addresses the same Constitutional violation as family care, there is no reason for this Court to depart from that finding.

IV. The Provision Of Monetary Damages Is A Critical Component Of The Congruent And Proportional Remedial Scheme Crafted By Congress.

Monetary relief provides a disincentive for unlawful conduct that injunctive relief alone does not

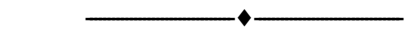
provide. Reinstatement without back pay or other monetary damages is one possible injunctive remedy authorized by *Ex parte Young*, 209 U.S. 123 (1908) as interpreted by *Edelman v. Jordan*, 415 U.S. 651, 677 (1974) (explaining that "a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . and may not include a retroactive award which requires the payment of funds from the state treasury"). But assuming reinstatement is available, it is not an adequate, congruent, or proportional remedy for the harm that a wrongfully terminated employee sustains. Were he to get his job back tomorrow, Mr. Coleman would still be out several years' salary, benefits, and the expenses of this litigation. That is why Congress found it necessary to hold the states liable to their employees for monetary damages. 29 U.S.C. § 2617(a). Shorn of its monetary damages provision, the FMLA would provide an employee some relief, as Respondent points out. Resp. Br. at 31. But that relief would be prospective injunctive relief under *Edelman*, that is, reinstatement without back pay. *Edelman*, 415 U.S. at 677. Practically speaking,

> denial of monetary relief means that a plaintiff who prevails on the merits of his claim that a State has [violated a right] will often be denied redress for the injury he has suffered, because in many instances "prospective relief accords . . . no remedy at all." . . . Injunctive relief from a federal court may address a violation going forward, but this fact will be of cold comfort to the victims of

> serious, non-recurring violations for which equitable relief may be inappropriate.

Sossamon v. Texas, 131 S.Ct. 1651, 1669 (2011) (Sotomayor, J. dissenting) (quoting *Franklin v. Gwinnett Co. Pub. Schs.*, 503 U.S. 60, 76 (1992)). Reinstatement is "cold comfort," and an impoverished worker might well give up before prevailing on a valid claim.

Respondent's *Ex parte Young* argument strips the FMLA of its deterrent power, contrary to Congress' intent. Congress believed that providing lost wages was an important component of the FMLA. *See* Pet. Br. at 18-21. Congress made the states, like other employers, liable for monetary damages if they refuse to let employees come back to work after less than 12 weeks of self-care or family-care leave. Without the sting of monetary damages, the FMLA carries almost no incentive to compel compliance by the states, as envisioned by Congress. Without monetary relief there is no salient cause of action.



CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court reverse the United States District Court for the District of Maryland as well as the Court of Appeals for the Fourth Circuit and remand for further proceedings.

Respectfully submitted on this 28th day of December, 2011.

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