No. 01-1368

IN THE

Supreme Court of the United States

NEVADA DEPT. OF HUMAN RESOURCES, *et al.*,
Petitioners,

v.

WILLIAM HIBBS, *et al.*
Respondents.

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

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 65 national and international labor organizations with a total membership of approximately 13 million working men and women, files this brief *amicus curiae* in support of respondents with the consent of the parties as provided for in the Rules of this Court.[1]

SUMMARY OF ARGUMENT

In this case, the Petitioners challenge Congress' Fourteenth Amendment § 5 authority to enact §102(a)(1)(C) of the Family and Medical Leave Act of 1993 (FMLA), which requires employers—including State employers—to grant workers 12 weeks of annual leave to care for a seriously ill family member. That challenge rests on *City of Boerne v. Flores*, 521 U.S. 507 (1997), and on the claim that in this instance Congress has gone beyond the limit stated there on its § 5 power to enforce the provisions of the Fourteenth Amendment.

The basic *City of Boerne* question is whether Congress' enactment is addressed to a class of behavior made unconstitutional by Fourteenth Amendment § 1 or to a class of behavior made unlawful by Congress that is different in kind and in its dimensions from the behavior made unconstitutional by the Fourteenth Amendment. In *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000), and *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001), this Court undertook this Fourteenth Amendment § 5 inquiry with

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[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

regard to the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA) and concluded that that in both instances the enactment was not proper § 5 legislation.

The Petitioners rely upon *Kimel* and *Garrett* here, but those decisions provide no support for their challenge to FMLA § 102(a)(1)(C). *Kimel* and *Garrett* hold that the ADEA and the ADA were not appropriate Fourteenth Amendment § 5 enactments because both were addressed not to elaborating a Fourteenth Amendment prohibition but to defining a new, distinct, statutory prohibition. The *Kimel* and *Garrett* Courts, after reviewing the relevant Fourteenth § 1 precedents, concluded that, on a correct understanding of the Fourteenth Amendment law, the ADEA and the ADA, in their terms and in their likely applications, were not directed against a class of behavior made unconstitutional by the Fourteenth Amendment but rather against classes of behavior made unlawful by Congress that are not unlawful under the Fourteenth Amendment.

While the ADEA and the ADA were addressed to age and disability discrimination, FMLA § 102(a)(1)(C) is addressed to the very different matter in Fourteenth Amendment § 1 terms of "remedy[ing] and prevent[ing] unconstitutional *gender* discrimination," in particular gender discrimination that rests on the stereotype that "women . . . hav[e] the primary responsibility for family caretaking" and are, for that reason, "less attractive job candidates than men." Pet. App. 13a (emphasis added). And, while there is no Fourteenth Amendment § 1 prohibition on age and disability discrimination, as such, under this Court's interpretation of the Fourteenth Amendment, government actions that rest on gender stereotypes, like those that rest on racial stereotypes, are unconstitutional, as such.

That this Court has so construed Fourteenth Amendment § 1 goes to the essence of the *City of Boerne* question presented here. Given the scope and nature of the Fourteenth Amendment prohibition on gender stereotype discrimination, congressional enactments aimed at remedying or preventing such discrimination are most certainly *not* enactments that "effect a substantive redefinition of the Fourteenth Amendment," *Kimel*, 528 U.S. at 81, but rather enactments that, under this Court's interpretation of the Fourteenth Amendment, effectuate "the heart of the Constitution's guarantee of equal protection," *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 136, 152-153 (1994) (Kennedy, J., concurring), quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting).

That conclusion brings into play the well-settled rule that Congress has Fourteenth Amendment § 5 authority to effectuate the Fourteenth Amendment § 1 guarantees against racial or gender discrimination through a legislative "approach to the problem [that] is a rational one." *Oregon v. Mitchell*, 400 U.S. 112, 284 (1971) (Opinion of Stewart, J.). And, as this Court has recognized, one such rational approach is to "adopt prophylactic rules to deal with . . . situations" that "threaten [Fourteenth Amendment] principles of equality." *Richmond v. J.A. Croson Co.*, 499 U.S. 469, 490 (1989). FMLA § 102(a)(1)(C) is just such legislation in that it "counteract[s] the various problems for gender equality in public and private workplaces created by workplace policies that reflect traditional, formerly state-supported assumptions about gender roles in the domestic and public spheres" and "deter[s] future intentional discrimination against women based on those same stereotypes." Pet. App. 38a.

ARGUMENT

The conflicting opinions of the Fifth Circuit in *Kazmier v. Widmann*, 225 F.3d 519 (2000), and of the Ninth Circuit in this case frame the question presented here, *viz*., whether

Congress has Fourteenth Amendment § 5 authority to enact §102(a)(1)(C) of the Family and Medical Leave Act of 1993 (FMLA), which requires employers—including State employers—to grant workers 12 weeks of annual leave to care for a seriously ill family member. We, therefore, begin by outlining first the Fifth Circuit's—and then the Ninth Circuit's—analysis of this question. We then go on to show that it is the Ninth Circuit decision holding that FMLA § 102(a)(1)(C) is a proper Fourteenth Amendment § 5 enactment—and the dissent from the Fifth Circuit's *Kazmier* decision—that rest on a correct understanding of this Court's Fourteenth Amendment § 5 jurisprudence.

1. (a) The Fifth Circuit's *Kazmier* analysis rests on the proposition that a showing that the FMLA is "rationally related to deterring sex discrimination" is not sufficient to establish "the validity of its purported abrogation of State sovereign immunity." 225 F.3d at 530. Indeed, the *Kazmier* court could not see any relevant distinction in terms of Congress' § 5 authority between legislation addressed to gender discrimination and legislation addressed to age discrimination. *Id*. In the Fifth Circuit's view, what is required to sustain the Fourteenth Amendment § 5 validity of any and all kinds of anti-discrimination legislation is a "legislative record" that "contains evidence of *actual constitutional violations by the States* sufficient to justify the full scope of the statute's provisions." *Id*. at 524 (emphasis in original).

Applying this "stringent standard of review," the Fifth Circuit held that "[t]he mere invocation by Congress of the specter of sex discrimination . . . is insufficient to support the validity of legislation under Section 5, at least when the statute at issue prohibits the States from engaging in a significant amount of conduct that is constitutional." 225 F3d. at 526. It is dispositive, said the *Kazmier* majority, that "in enacting the FMLA, Congress identified no pattern

of discrimination by the States with respect to the granting of employment leave for the purpose of providing family care." *Id*.

(b) By contrast, in the Ninth Circuit's view, the FMLA § 102(a)(1)(C)'s focus on "remedy[ing] and prevent[ing] unconstitutional gender discrimination," Pet. App. 13a—as opposed to remedying and preventing age or disability discrimination—is the key to assessing its validity under the Fourteenth Amendment § 5.[2] That is so, because "state-sponsored gender discrimination [as opposed, for example, to age or disability discrimination] is presumptively unconstitutional." *Id*. at 18a.

As the court below pointed out, the "rebuttable presumption of unconstitutionality for state-sponsored gender discrimination . . . contrasts sharply with the treatment of age and disability classifications, which are subject to rational

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[2] The Ninth Circuit found that FMLA § 102(a)(1)(C) addresses the problem that "women are regarded as having the primary responsibility for family caretaking" and, for that reason, are regarded by employers as "less attractive job candidates than men." Pet. App. 13a (internal quotation marks omitted). This form of gender discrimination in employment has a basis in "a long history of unconstitutional legislation mandating stereotypical family roles." *Id.* Thus, "by setting a gender-neutral minimum standard for the granting of caretaking leave," *id.,* in the FMLA, "Congress appropriately sought to counteract the various problems for gender equality in public and private workplaces created by workplace policies that reflect traditional, formerly state-supported assumptions about gender roles in the domestic and public spheres" and "to deter future intentional discrimination against women based on those same stereotypes," *id*. at 38a.

We believe that the Ninth Circuit's characterization of FMLA § 102(a)(1)(C) as gender discrimination legislation is eminently correct and, in order to concentrate on the proper analysis of the general Fourteenth Amendment § 5 question presented by legislation addressed to gender discrimination, rather than making our own presentation on FMLA § 102(a)(1)(C) we merely associate ourselves with the presentations of the Respondent and of the United States on that point.

basis review." Pet. App.14a. And, as is true of the related area of race discrimination, "the heightened scrutiny applied to state-sponsored gender discrimination reflects judicial recognition of the fact that persons who suffer discrimination on the basis of gender have been 'subjected to a history of purposeful unequal treatment.'" *Id.* at 18a, quoting *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83 (2000).

Given the scope and nature of the Fourteenth Amendment § 1 guarantees against gender discrimination and race discrimination and the "history of purposeful unequal treatment" in violation of those guarantees, the Ninth Circuit concluded that Congress has Fourteenth Amendment § 5 authority to address the "'[d]ifficult and intractable problems'" gender discrimination poses by implementing "'powerful remedies,' which may include 'reasonably prophylactic legislation.'" Pet. App. 15a, quoting *Kimel*, 528 U.S. at 88. Thus, in contrast to legislation that is aimed at remedying or preventing age or disability discrimination, "section 5 legislation that is intended to remedy or prevent gender discrimination [like FMLA § 102(a)(1)(C)] is presumptively constitutional." Pet. App.18a.

2. The Fifth and Ninth Circuits' wholly different analytic approaches lead us back to the language and structure of the Fourteenth Amendment and to a direct consideration of this Court's Fourteenth Amendment decisions.

Section 1 of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." And, § 5 provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this [Amendment]." As this Court read those provisions in *City of Boerne v. Flores*, 521 U.S. 507, 522 (1997), § 1 of the Fourteenth Amendment "impose[s] self-executing limits on the States," while in § 5, "Congress [i]s granted the power to make the substantive constitutional prohibitions against the States effective."

By its terms, "§ 5 is an affirmative grant of power to Congress," *Kimel*, 528 U.S. at 80, of a protean nature that the Court has "equated . . . with the broad powers expressed in the Necessary and Proper Clause, U.S. Const., Art. I, § 8, cl. 19," *Fullilove v. Klutznick*, 448 U.S. 448, 476 (1980). As the Court added, "in no organ of government, state or federal, does there repose a more comprehensive remedial power than the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." *Id*. at 483. Thus, "[i]t is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference. *Katzenbach v. Morgan*, 384 U.S., at 651." *City of Boerne*, 521 U.S. at 536.

At the same time—and this is the primary concern here—"[a]s broad as congressional enforcement power is, it is not unlimited." *City of Boerne*, 521 U.S. at 518 (internal quotation marks and citation omitted). The critical limit, said the *City of Boerne* Court, is that "Congress' power under § 5 . . . extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment," and "Congress does not enforce a constitutional right by changing what the right is." *Id.* at 519. In other words, Congress "has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." *Id*. While Congress has the § 5 power to enact "appropriate remedial legislation," Congress does not have a § 5 power to enact legislation that "effects a substantive redefinition of the Fourteenth Amendment." *Kimel*, 528 U.S. at 81.

The limit of Congress' Fourteenth Amendment § 5 authority and the logic of the resulting "appropriate remedial legislation"/"substantive redefinition of the Fourteenth Amendment" dichotomy lead to the conclusion that the basic *City of Boerne* question is whether Congress' enactment is addressed to a class of behavior made unconstitutional by

Fourteenth Amendment § 1 or to a class of behavior made unlawful by Congress that is different in kind and in its dimensions from the behavior made unconstitutional by the Fourteenth Amendment.

If there is congruence between the class of behavior addressed by a congressional enactment and a class of unconstitutional behavior under Fourteenth Amendment § 1—if the legislation can be "understood as responsive to, or designed to prevent . . . behavior" that this Court has identified as "unconstitutional behavior" under the Fourteenth Amendment, *Kimel*, 528 U.S. at 86—then the answer to the *City of Boerne* question is that the enactment is, indeed, "appropriate [§ 5] remedial legislation." Where that is true, what remains, giving Congress the deference it is due in exercising its comprehensive remedial power, is whether the legislation is a "rational means to effectuate the constitutional prohibition." *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966).

If, however, the legislation is addressed to a class of behavior that is both different in kind and significantly broader than any this Court has identified as an unconstitutional class of behavior under the Fourteenth Amendment, that lack of congruence generates a second step inquiry into whether "the substantive requirements the [enactment] imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the [statute]." *Kimel*, 528 U.S. at 83. This second step empirical inquiry considers whether the statute is *in fact* focused on a demonstrated pattern of unconstitutional behavior by the States.

In ultimate terms, if this two step analysis shows that the enactment is addressed to a class of behavior that is neither congruent to a class of behavior made unconstitutional by the Fourteenth Amendment nor proportional to a pattern of unconstitutional behavior by the States, the conclusion that

follows is that the enactment is legislation that effects a substantive redefinition of the Fourteenth Amendment's prohibitions and, as such, is beyond Congress' § 5 authority.

3. *Kimel v. Florida Bd. of Regents, supra*, and *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001), essay this Fourteenth Amendment § 5 inquiry with regard to the Age Discrimination in Employment Act and the Americans with Disabilities Act.

In *Kimel*, the Court considered whether Congress' extension of the Age Discrimination in Employment Act (ADEA) to the States—thereby "mak[ing] it unlawful for an employer, including a State 'to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age.' 29 U.S.C. § 623 (a)(1)"—"exceeded Congress' authority under § 5 of the Fourteenth Amendment." 528 U.S. at 66 & 67. As the Court emphasized, "The ADEA makes unlawful, in the employment context, all 'discriminat[ion] against any individual . . . because of such individual's age.' 29 U.S.C. § 623(a)(1)." *Id*. at 86. In other words, the ADEA is addressed to age discrimination as a class of behavior.

That being so, in determining whether the ADEA was "'appropriate legislation' under § 5 of the Fourteenth Amendment," the *Kimel* Court focused on the question of whether Fourteenth Amendment § 1 prohibits age discrimination, as such. The Court began by reviewing three cases that "considered claims of unconstitutional age discrimination under the Equal Protection Clause," each of which "held that the age classification at issue did not violate the Equal Protection Clause." 528 U.S. at 82-83. Those case demonstrate, said the Court, that "age is *not* a suspect classification under the Equal Protection Clause," and that the "States *may* discriminate on the basis of age without offending the

Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest." *Id*. at 83 (emphasis added).

Under Fourteenth Amendment § 1, then, "an age classification is presumptively rational," and "a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests," even if "age proves to be an inaccurate proxy in any individual case." 528 U.S. at 84. Indeed, the "Constitution permits States to draw lines on the basis of age when they have a rational basis for doing so at a class-based level, even if it 'is probably not true' that those reasons are valid in the majority of cases." *Id*.

The ADEA, in contrast, treats employment differentiations on the basis of age—differentiations that § 1 of the Fourteenth Amendment treats as presumptively constitutional—as categorically unlawful.[3] Given that disparity, the Court

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[3] Indeed, the *Kimel* petitioners attempted, without any success, to defend the ADEA's application to States on the ground "that the Act's prohibition, considered together with its exceptions, applies only to arbitrary age discrimination, which in the majority of cases corresponds to conduct that violates the Equal Protection Clause." 528 U.S. at 86. In this regard, the petitioners relied upon the ADEA's "bona fide occupational qualification" (BFOQ) defense and on the provision "permit[ting] employers to engage in conduct otherwise prohibited by the Act 'where the differentiation is based on reasonable factors other than age.'" *Id*. at 88 & 89.

As to the first of these exceptions, the *Kimel* Court noted that "the [ADEA's BFOQ] defense is a far cry from the rational basis standard . . . appl[ied] to age discrimination under the Equal Protection Clause," because "[t]he BFOQ standard adopted in the statute is one of 'reasonable necessity,' not reasonableness." 528 U.S. at 86-87. Thus, "[u]nder the ADEA, even with its BFOQ defense, the State's use of age is prima facie unlawful." *Id*. at 87. And, "[a]lthough it is true that the existence of the BFOQ defense makes the ADEA's prohibition of age discrimination less than absolute, the Act's substantive requirements nevertheless remain at a

concluded that "the ADEA prohibits very little conduct likely to be held unconstitutional." *Id*. at 88. And, given that conclusion it followed that the ADEA in its own terms makes unlawful a class of behavior—age discrimination, as such—that is different in kind and in dimension from the class of behavior—irrational age discrimination—made unconstitutional by the Fourteenth Amendment.

To be sure, the ADEA's age discrimination prohibition does encompass the Fourteenth Amendment § 1 prohibition on *irrational* age discrimination. And, the *Kimel* Court regarded that conjunction as one that called for an inquiry into whether the ADEA was so focused on vindicating the latter right that the Act was, in practical terms, "reasonably prophylactic legislation" addressed to a "[d]ifficult and intractable [Fourteenth Amendment] problem[]." 528 U.S. at 88. The *Kimel* Court treated that question as one that necessitated an empirical investigation. And, the Court found that "Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age." *Id*. at 91. While noting that "lack of support [in the legislative record] is not determinative," the Court then reached the ultimate conclusion that "Congress' failure to uncover any significant

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level akin to [the] heightened scrutiny cases under the Equal Protection Clause." *Id.* at 87-88.

The Court next turned to the ADEA's permission to engage in otherwise prohibited conduct on the basis of "factors other than age." Far from saving the statute, the Court found that "[t]his exception confirms . . ., rather than disproves, the conclusion that the ADEA's protection extends beyond the requirements of the Equal Protection Clause." 528 U.S. at 88. This so, the Court explained, because "[t]he exception simply makes clear that the employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly," while "[u]nder the Constitution, in contrast, States may rely on age as a proxy for other characteristics." *Id.* (internal brackets, quotations marks and citation omitted).

pattern of unconstitutional [age] discrimination confirms that Congress had no reason to believe that broad prophylactic legislation was necessary *in this field*." *Id*. (emphasis added).

The *Kimel* Court's holding, therefore, was two-fold: first, "[i]n light of the indiscriminate scope of the Act's substantive requirements, and [second, in light of] the lack of evidence of widespread and unconstitutional age discrimination by the States, . . . the ADEA is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment." 528 U.S. at 91.

Board of Trustees v. Garrett, *supra*, treats with an enactment that parallels the ADEA—the Americans with Disabilities Act (ADA)—and does so in a decision that parallels the *Kimel* decision. In *Garrett*, the Court considered Congress' Fourteenth Amendment § 5 authority to extend to the States the ADA's categorical prohibition on "[employment] discriminat[ion] against a qualified individual with a disability," including the failure to "mak[]e reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability." 531 U.S. at 360-361. Thus, just as the ADEA is addressed to age discrimination as a class of behavior, the ADA is addressed to disability discrimination as a class.

As in *Kimel*, the *Garrett* Court's "first step" was "to examine the limitations § 1 of the Fourteenth Amendment places upon States' treatment of the disabled," relying upon "prior decisions under the Equal Protection Clause dealing with this issue." 531 U.S. at 365. These prior decisions had rejected the contention that disability "qualified as a 'quasi-suspect' classification." *Id.* at 366. Instead, governmental action on the basis of disability "incurs only the minimum 'rational-basis' review applicable to general social and economic legislation." *Id*. And, "[u]nder rationalbasis review, where 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." *Id*. at 366-367, quoting *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 441 (1985).

Thus, "the States are not required by the Fourteenth Amendment [§ 1] to make special accommodations for the disabled, so long as their actions toward such individuals are rational." 531 U.S. at 367. And, a decision to "hold to job-qualification requirements which do not make allowance for the disabled" is, in these terms, "rational," even if "hardhearted[]." *Id*. at 368. Given this disparity between the class of behavior—irrational disability discrimination—that Fourteenth Amendment § 1 renders unconstitutional and the class of behavior—disability discrimination, as such—that the ADA renders unlawful, the ADA, like the ADEA, enacts a congressionally established prohibition that is different in kind and in its dimensions than the Fourteenth Amendment § 1 prohibition.

That being so, the *Garrett* Court, following the lead of *Kimel*, went on to consider whether the statute was, in fact, so focused on unconstitutional disability discrimination as to make it "reasonably prophylactic legislation" addressed to a "[d]ifficult and intractable [Fourteenth Amendment] problem[]." *Kimel*, 528 U.S. at 88. As was the case with the ADEA, the *Garrett* Court concluded that the ADA was not supported by evidence of a pattern of unconstitutional disability discrimination by the States. 531 U.S. at 369-372.

On the basis of the foregoing, the *Garrett* Court concluded that "to uphold the Act's application to the States would allow Congress to rewrite the Fourteenth Amendment law laid down by th[e] Court['s prior decisions]." 531 U.S. at 374.

In sum, the ADEA and the ADA were not appropriate Fourteenth Amendment § 5 enactments because both were addressed not to elaborating a Fourteenth Amendment

prohibition but to defining a new, distinct statutory prohibition. The *Kimel* and *Garrett* Courts concluded that, on a correct understanding of the Fourteenth Amendment § 1 law, the ADEA and the ADA, in their terms and in their likely applications, were not directed against a class of behavior made unconstitutional by the Fourteenth Amendment but rather against classes of behavior made unlawful by Congress that are not unlawful under the Fourteenth Amendment.

4. While the ADEA and the ADA were addressed to age and disability discrimination, FMLA § 102(a)(1)(C) is addressed to the very different matter in Fourteenth Amendment § 1 terms of "remedy[ing] and prevent[ing] unconstitutional *gender* discrimination," in particular gender discrimination that rests on the stereotype that "women . . . hav[e] the primary responsibility for family caretaking" and are, for that reason, "less attractive job candidates than men." Pet. App. 13a (emphasis added). And, as we now show, while there is no Fourteenth Amendment § 1 prohibition on age and disability discrimination, as such, there is a well-established Fourteenth Amendment § 1 prohibition on gender stereotype discrimination, as such.

The historical circumstances that led to the enactment of the Fourteenth Amendment make it plain that "[r]ace is the paradigm." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979). And, history demonstrates that gender is also a salient Fourteenth Amendment equal protection category.

"[T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994), quoting *Frontiero v. Richardson*, 511 U.S. 677, 685 (1973). "[N]ot until 1920 did women gain a constitutional right to the franchise," and "for a half century thereafter, it remained the prevailing doctrine that government, both federal and state,

could withhold from women opportunities accorded men so long as any 'basis in reason' could be conceived for the discrimination." *United States v. Virginia*, 518 U.S. 515, 531 (1996). And, "women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and perhaps most conspicuously in the political arena." *Frontiero*, 411 U.S. at 686.

Taking into account this "long and unfortunate history of sex discrimination," this Court has "conclude[d] that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect," *Frontiero*, 411 U.S. at 686 & 688, and require "an 'exceedingly persuasive justification'" to pass muster under the Fourteenth Amendment, *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982).

Under this Court's interpretation of the Fourteenth Amendment, government actions that rest on gender stereotypes, like those that rest on racial stereotypes—and in contrast to government actions that rest on age or disability stereotypes—are unconstitutional, as such. "[I]f the [state actor's] objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate." *Mississippi University for Women*, 458 U.S. at 725. *See, e.g., id.* at 726 n. 11("gender-based classification . . . based upon traditional assumptions that 'the female [is] destined solely for the home and the rearing of the family'" is invalid).

Simply stated, "[s]tate actors controlling gates to opportunity . . . may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females,'" even notions that reflect the "average capacities or preferences of men and women." *U.S. v. Virginia*, 518 U.S. at 541, quoting *Mississippi University for Women*, 458 U.S. at 725. This rule against gender stereotype discrimination is

"a special rule of relevance, a statement about what this Nation stands for, rather than a statement of fact." *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. at 149 (O'Connor, J., concurring). *See Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting) ("a criterion barred to the Government by history and the Constitution").

That this Court has so construed the Fourteenth Amendment goes to the essence of the *City of Boerne* question presented here. Given the scope and nature of the Fourteenth Amendment prohibition on gender stereotype discrimination, congressional enactments aimed at remedying or preventing such discrimination are most certainly *not* enactments that "effect a substantive redefinition of the Fourteenth Amendment," *Kimel*, 528 U.S. at 81, but rather enactments that, under this Court's interpretation of the Fourteenth Amendment, effectuate "the heart of the Constitution's guarantee of equal protection," *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. at 152-153 (Kennedy, J., concurring), quoting *Metro Broadcasting, Inc.*, 497 U.S. at 602 (O'Connor, J., dissenting).

5. That conclusion brings into play the well-settled rule that Congress has Fourteenth Amendment § 5 authority to effectuate the Fourteenth Amendment § 1 guarantees against racial or gender discrimination through a legislative "approach to the problem [that] is a rational one." *Oregon v. Mitchell*, 400 U.S. 112, 284 (1971) (Opinion of Stewart, J.). *See id.* at 217 (Opinion of Harlan, J.) ("the choice which Congress made was within the range of the reasonable"). The scope and nature of Congress' § 5 power to "identify and redress the effects of [these forms of] society-wide discrimination," *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (opinion of O'Connor, J.), is illustrated by this Court's decision in *Fullilove v. Klutznick, supra*.

In *Fullilove*, the Court reviewed a federal "minority business enterprise" (MBE) program that granted preferences for "members of statutorily identified minority groups" in

obtaining contracts to provide services or supplies to federally funded state and local projects. 448 U.S. at 453-454. The Court's "analysis proceed[ed] in two steps." *Id*. at 473. The first step of that analysis, which is the one pertinent here, "inquire[d] whether the *objectives* of this legislation are within the power of Congress." *Id*. (emphasis in original).[4]

The *Fullilove* Court determined "that the objectives of the MBE program are within the power of Congress under § 5 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment." 448 U.S. at 476. In so holding, the Court recognized that the MBE program was *not* directly addressed to "any intentional discrimination or other unlawful conduct" in the letting of public contracts, *id.* at 478, but rather went "beyond the prohibition of purposeful discrimination to encompass state action that has discriminatory impact perpetuating the effects of past discrimination," *id*. at 477. The MBE program did so by altering "traditional procurement practices [that], when applied to minority businesses, could perpetuate the effects of prior discrimination" in order "to ensure that [minority] businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection of laws." *Id*.

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[4] The second step in the *Fullilove* analysis addressed "whether the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible *means* for achieving the congressional objectives." 448 U.S. at 473. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995). This aspect of *Fullilove* is not implicated by the FMLA, because that statute addresses the problem of gender stereotyping in a manner that avoids employing any suspect classifications. *See Adarand*, 515 U.S. at 212-213 (program that attempts to overcome disadvantages without using classifications such as race is subject to "the most relaxed judicial scrutiny"). *See also id.* at 230-231 (reserving the question of whether § 5 grants Congress broader authority to employ racial classifications when it is enforcing the Fourteenth Amendment).

Fullilove underscores two points that are highly pertinent here:

First, where Congress is acting to vindicate the Fourteenth Amendment § 1 guarantees against racial or gender discrimination, "Congress[] need *not* make specific findings of discrimination" as a predicate for exercising its Fourteenth Amendment § 5 enforcement authority but may act on the basis of "a nationwide history of past discrimination." *Richmond v. J.A. Croson Co.*, 488 U.S. at 489 & 488 (emphasis added). *See also Oregon v. Mitchell*, 400 U.S. at 216 (Opinion of Harlan, J.) ("Despite the lack of evidence of specific instances of discriminatory application or effect, congress could have determined that racial prejudice is prevalent throughout the Nation, and that literacy tests unduly lend themselves to discriminatory application, either conscious or unconscious.") & 284 (Opinion of Stewart, J.) ("Congress was not required to make state-by-state findings concerning either the equality of educational opportunity or actual impact of literacy requirements on the Negro citizen's access to the ballot box."). Thus, the Fifth Circuit could not have been more wrong when it said in *Kazmier* that legislation addressed to remedying and preventing gender stereotype discrimination can be sustained as proper Fourteenth Amendment § 5 legislation only where there is a "legislative record . . . contain[ing] evidence of *actual constitutional violations by the States* sufficient to justify the full scope of the statute's provisions." 225 F.3d at 524 (emphasis in original).

Second, "where Congress has authority to declare certain conduct unlawful, it may . . . authorize and induce state action to avoid such conduct." *Fullilove*, 448 U.S. at 484. This enforcement authority "include[s] the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those

situations." *Richmond v. J.A. Croson Co.*, 488 U.S. at 490 (emphasis in original). *See Katzenbach v. Morgan*, 384 U.S. 641 (1966).[5]

Given the well-established equal protection jurisprudence regarding gender discrimination, there is no doubt whatsoever that Congress' Fourteenth Amendment enforcement authority extends to enacting legislation that categorically prohibits states from making employment decisions on the basis of "archaic and stereotyped notions" concerning "the roles of males and females." *Mississippi University for Women*, 458 U.S. at 724-725. Congress has done so by the 1972 amendments extending the coverage of the Title VII of the Civil Rights Act of 1964 to the States. And, "in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), . . . [t]he Court held that this extension of Title VII was an appropriate method of enforcing the Fourteenth Amendment." *City of Rome v. United States*, 446 U.S. 156, 179 (1980).

That being so, as *Fullilove* makes clear, Congress has the additional authority to "adopt prophylactic rules to deal with . . . situations" that "threaten [Fourteenth Amendment] principles of equality." *Richmond v. J.A. Croson Co.*, 499 U.S. at 490. FMLA § 102(a)(1)(C) is just such legislation in that it "counteract[s] the various problems for gender equality in public and private workplaces created by workplace policies that reflect traditional, formerly state-supported assumptions about gender roles in the domestic and public

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[5] In *Katzenbach v. Morgan*, the Court approved a provision of the Voting Rights Act mandating that graduates of "American-flag schools in which the predominant language was other than English" be exempted from the otherwise valid English-language preconditions for registering as a voter. 384 U.S. at 652. The Court sustained this provision on the grounds that it could be seen as a reasonable method of forestalling discrimination against Puerto Ricans in the provision of social services by the State of New York. *Id.* at 652-653.

spheres" and "deter[s] future intentional discrimination against women based on those same stereotypes." Pet. App. 38a.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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