No. 01-1368

IN THE

Supreme Court of the United States

NEVADA DEPARTMENT 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 *AMICI CURIAE* SENATORS CHRISTOPHER DODD AND EDWARD M. KENNEDY, AND REPRESENTATIVES PATRICIA SCHROEDER, MARGE ROUKEMA AND GEORGE MILLER IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

STATUTES

TABLE OF AUTHORITIES – continued

LEGISLATIVE HISTORY

TABLE OF AUTHORITIES – continued

TABLE OF AUTHORITIES – continued

OTHER AUTHORITY

INTEREST OF THE *AMICI CURIAE*[1]

Amici Senators and Representatives are forty-nine current and former Members of Congress, many of whom played leadership roles in the development and passage of the Family and Medical Leave Act ("FMLA"), and all of whom are committed to securing equal opportunity for women in the workplace. *Amici* have a strong interest in providing this Court with information regarding Congress's efforts to exercise its power, under § 5 of the Fourteenth Amendment, to remedy and deter gender discrimination by the States through enactment of the FMLA.

SUMMARY OF ARGUMENT

The FMLA is the culmination of eight years of congressional examination of the significance of employee leave policies and their impact on women, families, and employers. It reflects Congress's considered judgment that the anti-discrimination mandates of prior legislation had not fully remedied the effects of pervasive and longstanding employment discrimination against women, including discrimination by the States. Congress memorialized this determination in one of the five express purposes of the FMLA, "to promote the goal of equal employment opportunity for women and men, pursuant to [the Equal Protection] clause" of the Fourteenth Amendment. 29 U.S.C. § 2601(b)(5). Congress had authority to require State employers to provide leave to care for a family member with a serious health condition, as required by § 2612(a)(1)(C) of the Act ("family leave"), and to provide a damages remedy to enforce that requirement, because those measures serve to

[1] Counsel for the *amici curiae* authored this brief in its entirety. No person or entity other than *amici* and its counsel made a monetary contribution to the preparation of this brief. Letters of consent from all parties have been filed with the Clerk of the Court.

vindicate a core promise of the Equal Protection Clause that women and men have equal employment opportunity.

This Court consistently has recognized that § 5 of the Fourteenth Amendment "is an affirmative grant of power to Congress." *Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62, 80 (2000). Where, as here, Congress acts to remedy and deter state-sponsored gender discrimination that is unquestionably prohibited by the Fourteenth Amendment, "[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." *Id.* at 80-81 (internal quotations omitted). Indeed, this Court has repeatedly reaffirmed that Congress's "authority both to remedy and to deter violation of rights" guaranteed by the Equal Protection Clause confers upon Congress discretion to prohibit even conduct that "is not itself forbidden by the Amendment's text." *Id.* at 81; *see*, *e.g.*, *Oregon* v. *Mitchell*, 400 U.S. 112 (1970). Because the FMLA's leave requirement and damages enforcement provisions reasonably relate to Congress's goal of remedying and deterring gender-based employment discrimination, they fall well within the scope of Congress's authority under § 5.[2]

In arguing that Congress is powerless to impose a damages remedy against the States for failure to afford the family leave required by the Act, petitioners and those *amici* States that support them err in two fundamental respects. First, they misread the Court's precedents concerning Congress's § 5 authority. In the cases on which they principally rely, this Court determined that the legislation at issue did not attempt to remedy and deter discriminatory conduct that the Court had previously acknowledged to fall within the core of the Equal Protection Clause. The Court viewed the legislation instead as an attempt by Congress "to determine what constitutes a constitutional violation" in the first place, and thus to "effect[]

[2] We limit our views here to Congress's § 5 power to enact the FMLA. We express no position concerning Congress's other powers.

a substantive redefinition of the Fourteenth Amendment right at issue." *City of Boerne* v. *Flores*, 521 U.S. 507, 519 (1997); *Kimel*, 528 U.S. at 81. For that reason, the Court applied a searching "'congruence and proportionality' test" to determine whether the legislation fell within Congress' § 5 power. *Id.*; *see also Bd. of Trs.* v. *Garrett*, 531 U.S. 356 (2001); *Fla. Prepaid Postsecondary Educ. Expense Bd.* v. *Coll. Sav. Bank*, 527 U.S. 627 (1999).

Here, by contrast, this Court has long held that gender is a suspect classification requiring heightened judicial scrutiny, *Kirchberg* v. *Feenstra*, 450 U.S. 455, 461 (1981), and has repeatedly confirmed "a history and pattern of unconstitutional . . . discrimination by the States" on the basis of gender, including gender-based employment discrimination. *Garrett*, 531 U.S. at 368; *see also United States* v. *Virginia*, 518 U.S. 515, 531 (1996) ("volumes of history" document state action "denying rights or opportunities based on sex"); *Frontiero* v. *Richardson*, 411 U.S. 677, 685 (1973) (plurality opinion) ("statute books gradually became laden with gross, stereotyped distinctions between the sexes"); *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 193-94 n.7 (1974); *Goesaert* v. *Cleary,* 335 U.S. 412 (1908). Because remedying and deterring discrimination on the basis of gender is at the core of Congress's power under § 5, petitioners err in suggesting that Congress was required to develop the sort of detailed legislative record of state-sponsored discrimination that the Court has required when Congress has legislated in other areas not involving discrimination by the States against a suspect class.

Second, and in all events, petitioners and their *amici* err in arguing that the legislative record here is inadequate to support a damages remedy against the States for violating the family leave requirement. Congress's record here is consistent with its understanding of what is required for § 5 legislation and comparable to the record of prior enforcement legislation involving suspect classes. Even as against the

searching review that petitioners would have this Court apply, the record confirms that the FMLA is "appropriate legislation" under § 5. Congress enacted the FMLA against a backdrop not only of judicial precedent finding state responsibility for gender-based employment discrimination, but against its own decades-long efforts to remedy that discrimination. From the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964, through the Proposed Equal Rights Amendment, the Pregnancy Discrimination Act of 1978, and amendments to some of these laws, Congress has repeatedly attempted to remedy and deter state-sponsored gender discrimination. The legislative record of the FMLA reveals Congress's recognition that additional legislation was needed to bring about "equal employment opportunity for women and men," and illustrates why the FMLA is a congruent and proportional response to that need.

ARGUMENT

I. THE FMLA IS APPROPRIATE FOURTEENTH AMENDMENT LEGISLATION TO REMEDY AND DETER GENDER DISCRIMINATION.

Section 5 of the Fourteenth Amendment confers on Congress comprehensive remedial power to guarantee the equal protection of the laws. Congress acts within the core of this power when it creates remedies against the States for discrimination on the basis of classifications, like gender and race, that have long been used to perpetuate invidious discrimination. Congress permissibly exercised its core power in creating the FMLA's damages and leave provisions.

A. Congress Enacted The FMLA Pursuant To Its Fourteenth Amendment Power.

Petitioners argue that, in passing the FMLA, Congress acted pursuant to its Commerce Clause power alone. Pet. Br. at 17. Yet Congress explicitly acknowledged in the text of the statute that it also enacted the FMLA pursuant to its

Fourteenth Amendment power. In the Act's "Findings and Purposes" section, Congress set forth five distinct purposes. The final one – which petitioners notably fail to mention in their brief, *see id.* at 10-11, 22 (citing 29 U.S.C. § 2601(b)(1)-(4)) – was "to promote the goal of equal employment opportunity for women and men, *pursuant to* such clause [the Equal Protection Clause of the Fourteenth Amendment]." 29 U.S.C. § 2601(b)(5) (emphasis added). The legislative history confirms that purpose.[3] The fact that there were additional purposes, some of which may have been unrelated to enforcing the equal protection guarantee, in no way vitiates Congress's express reliance on the Fourteenth Amendment as a source of its power to enact the FMLA.

Petitioners raise four additional arguments to question Congress's intent. First, petitioners contend that, because Title VII and the PDA already forbid leave-based gender discrimination, Congress could not have been acting to remedy gender discrimination through the FMLA. Pet. Br. at 24. Yet the existence of those statutes demonstrates only that Congress had previously undertaken other measures to remedy leave-based discrimination. It does not show that those statutes exhausted the range of possible remedies. As the House Report makes explicit, Congress enacted the FMLA to supplement Title VII and the PDA. *See* H.R. Rep. No. 103-8, pt. 2, at 10-11 (1993). While acknowledging that the effects of those laws in remedying gender discrimination were "far-reaching," the Report explained that the FMLA was "designed to fill those gaps" that a formal "anti-discrimination law [or a law simply mandating equal treatment] by its nature cannot fill." *Id*.

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[3] *See*, *e.g.*, H.R. Rep. No. 103-8, pt. 2, at 10-11 (1993) (FMLA, like Title VII and the Pregnancy Discrimination Act, promotes the goal of equal employment opportunity); S. Rep. No. 103-3, at 16 (1993) (FMLA is based on Fourteenth Amendment equal protection guarantee); *see also supra* Part II.

Second, petitioners contend that Congress's efforts "to strike a balance between the benefits and costs of leave," establish that the FMLA is "social-policy legislation, not anti-discrimination legislation." Pet. Br. at 23-24. But whenever Congress considers new legislation, including anti-discrimination legislation, Congress attempts to strike a balance between expected costs and benefits. For example, Congress extensively debated the costs to employers of the Pregnancy Discrimination Act, *see*, *e.g.*, H.R. Rep. No. 95-948, at 9-10 (1978); *id.* at 16 (dissenting views); S. Rep. No. 95-331, at 9-11 (1977), yet no one could reasonably question that it was anti-discrimination legislation. That Congress considered the potential costs to employers of the leave requirement establishes only that Congress acted responsibly, not that it failed to enact an anti-discrimination law.

Third, petitioners assert that the FMLA was not aimed at remedying "bias with respect to women" because Congress was "equally concerned" about the impact of leave policies on men and women. Pet. Br. at 24-25. Yet petitioners overlook Congress's express recognition that those who suffered most from no-leave policies – and therefore those who would benefit most from the FMLA – were working women. *See* 29 U.S.C. § 2601(a)(5) ("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").[4] Petitioners also overlook Congress's awareness that leave requirements applicable only to women could perpetuate the very discriminatory stereotypes and practices that Congress sought to remedy and deter. *See*, *e.g.*, S. Rep. No. 103-3, at 16; H.R. Rep. No. 103-8, pt.1, at 29 (1993). That the FMLA provides

[4] *See*, *e.g.*, 139 Cong. Rec. H388 (1993) (statement of Rep. Mink) ("Women will be the greatest beneficiary of this bill."); 137 Cong. Rec. S502 (1991) (statement of Sen. Mitchell) ("[I]t is primarily women . . . who would reap the most benefit from enactment of a family leave policy.").

a gender-neutral remedy thus supports, rather than undermines, the legitimacy of Congress's reliance on its § 5 power.

Finally, petitioners contend that Congress's chief concern was with private sector leave policies, and thus "Congress needed only to apply the standard to private employers." Pet. Br. at 25. But that contention takes issue only with the wisdom of Congress's decision to apply the requirements to the States. It has no bearing on whether Congress was legislating pursuant to its § 5 power. Because, Congress clearly intended the FMLA to apply to the States, *see* Pet. Br. at 9 n. 2, petitioners' final contention is irrelevant.[5]

B. Congress Has Broad § 5 Power To Remedy And Deter Gender Discrimination By The States.

Petitioners concede Congress's power to create injunctive remedies against State employers for violation of § 2612(a)(1)(C), and thus effectively challenge only Congress's authority also to provide damages remedies against state employers. Pet. Br. at 3-4. This challenge fails. To remedy and deter gender discrimination, Congress has authority both to require the States, as employers, to provide job-protected leave to employees, and to provide a damages remedy for the enforcement of that requirement.

Gender discrimination, like race discrimination, is at the core of Congress's enforcement power under the Fourteenth Amendment. Congress acts within this core when it legislates to counteract those forms of discrimination that have long

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[5] Petitioners' reliance (Br. 21, 26) on *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981), is similarly misplaced because the question in *Pennhurst* was whether Congress intended a statute to apply to the States, not Congress's constitutional authority to enact a statute. *EEOC* v. *Wyoming*, 460 U.S. 226, 244 n. 18 (1983). Where, as here, there is no ambiguity about Congress's intent to make a statute applicable to the States, "the observations in *Pennhurst*" about not quickly attributing to Congress an unstated intention to enforce the Fourteenth Amendment "simply have no relevance." *Id.*

been used arbitrarily and invidiously to maintain certain groups in "condition[s] of inferiority." *Ex parte Virginia*, 100 U.S. 339, 344-45 (1879). This Court has concluded that there has been a history of such discrimination against suspect groups. Indeed, the Court's suspect class jurisprudence is premised on the fact that some groups, on the basis of characteristics like race and gender, have suffered a "'history of purposeful unequal treatment'" that is "'so seldom relevant to the achievement of any legitimate state interest.'" *Kimel*, 528 U.S. at 83 (citations omitted). When Congress creates remedies against the States to counter discrimination against suspect groups, it is acting within the core of its § 5 power.

This Court's foundational exposition of Congress's enforcement powers under the Civil Rights Amendments is set forth in *Ex parte Virginia*, which upheld, as appropriate § 5 legislation, federal criminal penalties against state officers who excluded jurors on the basis of race. Rejecting the dissent's objection, in part, to Congress's broad "exercise [of] coercive authority over judicial officers of the States in the discharge of their duties under State laws," 100 U.S. at 358 (Field, J., dissenting), the Court stated:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the [civil rights] amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Id. at 345-46.

In accordance with that standard, this Court consistently and frequently has recognized Congress's broad latitude to design powerful remedial and preventive measures to combat race discrimination. In *South Carolina* v. *Katzenbach*, for example, this Court upheld "stringent" federal remedies that

addressed racial discrimination in voting. 383 U.S. 301, 315 (1966). The remedies, *inter alia*, prohibited state conduct that was not itself unconstitutional, such as the use of literacy tests or any other voting qualifications, and placed affirmative obligations on States to secure federal preclearance review of any new voting rule, and to amend state voting lists at the instruction of federal examiners. *See id.* at 317-23.

As petitioners note, these remedies were not imposed nationwide or indefinitely. Pet. Br. at 36-37. Nevertheless, the Court did not hold that Congress was required to legislate in a targeted fashion. Expressly applying the *Ex parte Virginia* standard, the Court reiterated that, "[a]s against the reserved powers of the States, Congress may use *any rational means* to effectuate the constitutional prohibition of racial discrimination." *South Carolina*, 383 U.S. at 324 (emphasis added). In subsequent cases, the Court has confirmed that Congress is not limited to targeted remedies in combatting race discrimination.

In *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), for example, this Court unanimously upheld federal legislation that extended the ban on literacy tests approved in *South Carolina* to every State in the nation. *See id.* at 118 (op. of J. Black). The Court deferred to Congress's determination that a nationwide ban was appropriate, even though the tests themselves were not unconstitutional, and even though "most States d[id] not have literacy tests." *See id*. at 147 (Douglas, J., concurring in the judgment in part and dissenting in part). Because race discrimination is "a serious *national* dilemma that touches every corner of our land," *id.* at 133 (op. of J. Black), the Court held that Congress had authority to ban every State from using literacy tests in an effort to remedy and deter race discrimination.[6]

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[6] *See* 400 U.S. at 134-35; *id.* at 216 (Harlan, J., concurring in part and dissenting in part) ("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

Lopez v. *Monterey*, 525 U.S. 266 (1999), also undermines petitioners' narrow interpretation of Congress's § 5 power. There, the Court upheld the application of the federal preclearance review requirement to a new California voting law, as that law was to be implemented in a covered county, even though there was no indicia that the State had ever engaged in racial discrimination in voting. *See id.* at 282-85. In so holding, the Court acknowledged the "substantial" costs of permitting such intrusions into sensitive state policymaking, but explained that Congress's enforcement authority extends to prohibiting practices that have only a discriminatory effect. *Id.* at 282-83.[7]

Congress has similar authority to implement strong remedial and prophylactic measures against gender discrimination. This Court has repeatedly recognized that gender discrimination, like race discrimination, has been, and continues to be, a recurring basis for the denial of the Fourteenth Amendment's guarantee of equal protection. *See United States* v. *Virginia*, 518 U.S. at 531 ("[O]ur nation has had a long and unfortunate history of sex discrimination." (internal quotations omitted)). Indeed, this Court has recently struck down discriminatory state policies and practices that reflect and perpetuate misguided stereotypes about women's (and men's) abilities. *See*, *e.g.*, *id.* at 557; *J.E.B.* v. *Ala. ex rel. T.B.*, 511 U.S. 127, 138-46 (1994). And this Court has explicitly acknowledged that women have suffered harms comparable,

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unduly lend themselves to discriminatory application, either conscious or unconscious."); *id.* at 284 (Stewart, J., concurring in part and dissenting in part) (rejecting requirement of state-by-state findings and acknowledging that "nationwide application may be reasonably thought appropriate when Congress acts against an evil such as racial discrimination which in varying degrees manifests itself in every part of the country").

[7] *South Carolina* and *Lopez* involved Congress's power under the 15th Amendment. *Oregon* v. *Mitchell* considered Congress's power under the 14th and 15th Amendments. This Court has construed Congress's powers under the two Amendments as coextensive. *See City of Rome* v. *United States*, 446 U.S. 156, 176-77 (1980).

in significant ways, to those suffered by racial minorities at the hands of discriminatory state actors. *See id.* at 135-36.

Consistent with its power to remedy and deter race discrimination, therefore, Congress has broad power to remedy and deter gender discrimination. Its conclusion that job-protected leave and a damages remedy for the denial of that leave are appropriate to enforce the equal protection guarantee is thus "'entitled to much deference,'" *Kimel*, 528 U.S. at 81 (citation omitted), and should be upheld so long as it is a "rational means," *South Carolina*, 383 U.S. at 324, of achieving Congress's goal. Here, it is clear that the FMLA satisfies that standard. By requiring state employers to provide all of its employees with the same amount of leave and providing a damages remedy to enforce that requirement, the FMLA precludes the discriminatory allocation of leave based on gender, and deters state employers from making discriminatory hiring or promotion decisions on the assumption that only women, and not men, can or will take leave. Whether Congress could have chosen a more narrowly tailored means to remedy and deter state-sponsored gender discrimination is legally irrelevant. Because the FMLA rationally deters unconstitutional gender discrimination, it is "appropriate legislation" under § 5.

2. Petitioners primarily rely on the Court's more recent § 5 cases – *City of Boerne*, and its progeny – and their application of the congruence and proportionality test to argue that Congress may not authorize damages suits under the FMLA. Pet. Br. at 30-38. Yet those cases do not purport to limit Congress's broad remedial power recognized in the Court's earlier cases. This Court has applied the congruence and proportionality analysis to evaluate remedies targeted at problems that the Court has not previously recognized as matters of heightened Fourteenth Amendment concern. The Court has not employed it to evaluate the constitutionality of Congress's § 5 remedies against the States to combat race or gender discrimination. Nor has this Court previously required

Congress to compile a detailed record of a pattern or practice of gender or race discrimination by a State as a prerequisite to regulating that State's conduct under § 5.

The Court first set forth the congruence and proportionality analysis in *City of Boerne*, which struck down a law that heightened judicial scrutiny for laws incidentally burdening religion. 521 U.S. at 507, 515. The Court used that analysis to guide its evaluation of a law that it found redefined, or "alter[ed] the meaning of," rather than "enforce[d]," the Fourteenth Amendment's due process guarantee. *Id.* at 519. Acknowledging the difficulty of discerning whether a law actually redefined Fourteenth Amendment rights, the Court looked to whether there was a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520.

Each of the subsequent cases that has applied the congruence and proportionality analysis similarly involved legislation that sought to remedy constitutional problems that the Court had not previously identified to be of heightened § 5 concern. In *Florida Prepaid*, for example, Congress sought to enforce due process guarantees by remedying patent violations. 527 U.S. at 630. In *Kimel*, 528 U.S. at 66-67, and *Garrett*, 531 U.S. at 360-61, Congress sought to enforce equal protection guarantees by remedying age and disability discrimination, respectively. Here, by contrast, the congruence and proportionality analysis is unnecessary because there is no question that, in order to enforce the Equal Protection Clause, Congress may design strong remedial and preventive measures against the States to prevent discrimination against suspect classes. Indeed, consistent with this reasoning, *Lopez*, a post-*City of Boerne* case which upheld race discrimination legislation as an appropriate exercise of the § 5 power, did not even mention the congruence and proportionality analysis.

In any event, petitioners misread the Court's decisions when they argue for strict application of the congruence and

proportionality analysis here. When the Court has applied that analysis, it has made clear that the requisite "fit" between means and ends varies depending on "the evil presented." *City of Boerne*, 521 U.S. at 530; *see also id.* ("Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one."). "Difficult and intractable problems often require powerful remedies," even those that "prohibit[] very little conduct likely to be held unconstitutional." *Kimel*, 528 U.S. at 88; *see also City of Boerne*, 521 U.S. at 526-27 (acknowledging Congress's authority to enact "strong remedial and preventive measures" in response to the nation's history of race discrimination). As the targeted harm becomes increasingly difficult to prevent or remedy, the congruence and proportionality test establishes that the fit required between means and ends, and hence the deference accorded to Congress, correspondingly broadens.

Because gender discrimination is a "difficult and intractable" problem, Congress may create powerful prophylactic and remedial measures against the States pursuant to its § 5 power. It was thus unnecessary for Congress to compile the sort of legislative record that documents in detail a pattern or practice of intentional discrimination by the States of the precise conduct to be regulated. *See id*. at 531 ("Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but on due regard for the decision of the body constitutionally appointed to decide." (internal quotations omitted)); *Fla. Prepaid*, 527 U.S. at 646 ("lack of support in the legislative record is not determinative"); *Garrett*, 531 U.S. at 375-76 (Kennedy, J., concurring) (judicial opinions are indicia of the seriousness and extent of problem).

United States v. *Morrison*, 529 U.S. 598 (2000), is not to the contrary. The Court there held that legislation authorizing victims of gender-motivated violence to bring federal civil actions against their perpetrators as a means of remedying gender discrimination by the States, was inappropriate § 5

legislation. *See id.* at 605, 619-20. The basis for that holding was the Court's conclusion that § 5 authorizes remedies against only States or state actors, not private individuals. *See id.* at 625-26. Insofar as the Court applied the congruence and proportionality test, the Court stressed the lack of congruence: the challenged provision "is directed not at any State or state actor" and "visits no consequence whatever on any . . . public official." *Id.* at 626. Although the Court discussed the law's nationwide application, the question of the requisite degree of proportionality for gender discrimination remedies against the States was not at issue. *See id.* at 625-27.

Accordingly, because gender discrimination is already well-recognized as a difficult and intractable problem, Congress did not have to – though it did – compile a detailed legislative record of intentionally discriminatory policies and practices to justify its authority to create powerful remedial and preventive measures. In sum, the FMLA is a rational means of remedying and preventing gender discrimination, and is thus an appropriate exercise of Congress's § 5 power.

II. THE LEGISLATIVE RECORD CONFIRMS THAT THE FMLA IS APPROPRIATE LEGISLATION UNDER § 5.

The petitioners and their state *amici* are, in any event, incorrect in asserting that the legislative record of the FMLA does not demonstrate that the family leave and damages provisions are a congruent and proportional response to the continuing problem and effects of state-sponsored gender discrimination. The relevant record – which spans four decades of congressional effort to address and eliminate gender discrimination – confirms, even under petitioners' proposed legal standard, that the challenged provisions are "appropriate legislation" under § 5.

A. Congress Enacted The FMLA After Extensive Efforts To Remedy Gender Discrimination.

The "'constitutional propriety'" of the Family and Medical Leave Act of 1993 "'must be judged with reference to the historical experience . . . it reflects.'" *City of Boerne*, 521 U.S. at 525 (omission in original) (quoting *South Carolina*, 383 U.S. at 308); *see also Fla. Prepaid*, 527 U.S. at 640. Before enacting the FMLA, Congress had long explored the problem of unequal employment opportunities for women and men caused by this nation's long history of gender discrimination, and had undertaken substantial efforts to remedy this difficult and intractable problem. Indeed, only after 40 years of experience with other remedial measures, including measures targeting the States, did Congress determine it was necessary and appropriate to enact the FMLA. This extensive experience with the problem of gender discrimination, which informed Congress's decisions in crafting and passing the FMLA, is directly relevant to an assessment of whether the FMLA is a proper exercise of Congress's § 5 power.

1. Beginning in 1963, Congress enacted a series of statutes to combat widespread gender discrimination in the workplace. First, through the Equal Pay Act, Congress prohibited gender-based wage differentials for work that required "equal skill, effort, and responsibility." Pub. L. No. 88-38, § 3, 77 Stat. 56, 57 (1963). The basis for that legislation was Congress's determination that "[t]he wage structure of all too many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a women even though his duties are the same." S. Rep. No. 88-176, at 1 (1963). One year later, in Title VII of the Civil Rights Act of 1964, Congress expanded the prohibition on gender discrimination to apply more generally to all aspects of the employment relationship. *See* Pub. L. No. 88-352, § 703, 78 Stat. 253, 255 (1964) (prohibiting discrimination in hiring or discharging, or in the "terms, conditions, or privileges" of employment).

Nearly 15 years later, in response to this Court's decision in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), that Title VII does not cover pregnancy discrimination, Congress amended Title VII to clarify that "sex discrimination" includes discrimination on the basis of pregnancy or childbirth. Pregnancy Discrimination Act of 1978, § 1, Pub. L. No. 95-555, 92 Stat. 2076, 2076 ("PDA"). Through the PDA, Congress attempted to remedy the "persistent and harmful effect" on women's employment opportunities resulting from stereotypes that limited women to the roles of mother and caretaker, and not worker. H.R. Rep. No. 95-948, at 6; *id.* at 6-7 ("Women are still subject to the stereotype that all women are marginal workers. Until a woman passes the child-bearing age, she is viewed by employers as potentially pregnant."); *id.* at 3 ("[T]he assumption that women will become pregnant and leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low-paying and dead-end jobs."). Employers, for example, "forc[ed] women who bec[a]me pregnant to stop working regardless of their ability to continue," "set arbitrary time limits" before which women could "not return to work," and refused "to credit women with accumulated seniority after a pregnancy disability leave on the same terms applicable to other persons absent from work for other disabilities." S. Rep. No. 95-331, at 6.

Beyond enacting anti-discrimination legislation to prevent ongoing discrimination, Congress also instituted measures to remedy the persistent effects of historical discrimination. In as early as 1956, for example, Congress amended the Social Security Act to allow women to eliminate three more low-earning years from the computation of her "average monthly wage" than could a similarly situated man. *See* Social Security Amendments of 1956, Pub. L. No. 880, sec. 102(a), § 216(a), 70 Stat. 807, 809. The purpose of the provision, which remained in effect until 1972, was "to remedy

discrimination against women in the job market." *Califano* v. *Webster*, 430 U.S. 313, 319 (1977) (discussing legislative history). Such a purpose was legitimate, this Court explained, in light of "the disparity in economic condition between men and women caused by the long history of discrimination against women." *Id.* at 317.

2. In 1972, Congress undertook efforts to target the States directly for their long-standing role in denying women equal employment opportunities. First, Congress passed the Equal Rights Amendment, which provided, in relevant part, that "[e]quality of rights under the law shall not be denied or abridged . . . by any state on account of sex." Proposed Equal Rights Amendment, § 1, 86 Stat. 1523, 1523 (1972). Proposed in nearly every session of Congress since 1923, the Amendment was the subject of voluminous hearings, much of which focused on the States' "protective" labor laws.[8] Enacted in nearly every State in the nation, such laws regulated, *inter alia*, women's hours (*e.g.*, no overtime), schedules (*e.g.*, no working at night), and activities (*e.g.*, no heavy lifting) in the workplace. *See*, *e.g.*, *1971 Hearings*, at 192-93 (reprint of *Women's Legal Rights in 50 States*, McCall's). As the Senate Report explained, "[m]any of these laws are not protective at all, but are restrictive, and have been shown to have a discriminatory impact when applied only to women." S. Rep. No. 92-689, at 9 (1972). In addition, the Report pointed to laws restricting women's ability to contract and to enter certain professions as well as government employment practices as further evidence of "states discriminat[ing] invidiously against women." *Id.* at 8.

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[8] *See, e.g.*, *Equal Rights for Men and Women 1971: Hearings on H.J. Res. 35, 208, and Related Bills and H.R. 916 and Related Bills Before the House Comm. on the Judiciary,* 92d Cong. *passim* (1971) ("*1971 Hearings*"); *Equal Rights 1970: Hearings on S.J. Res. 61 and S.J. Res. 231 Before the Sen. Comm. on the Judiciary,* 91st Cong. *passim* (1970); *The "Equal Rights" Amendment: Hearings on S.J. Res. 61 Before the Subcomm. on Constitutional Amendments of the Sen. Comm. on the Judiciary,* 91st Cong. *passim* (1970).

Second, also in 1972, Congress amended Title VII to extend its prohibition on employment discrimination to the States. In discussing the need for the bill, the House and Senate Reports stressed the continuing "profound economic discrimination against women workers," as evidenced by, *inter alia*, striking income disparities between men and women and persistent gender segregation in job opportunities. H.R. Rep. No. 92-238, at 4-5 (1971); S. Rep. No. 92-415, at 7-8 (1971). While primarily recounting studies detailing State employment practices involving race discrimination, the Reports nonetheless emphasized Congress's duty under the Fourteenth Amendment "to insure that all citizens are treated equally" and to prohibit all unconstitutional forms of State employment discrimination, including discrimination "because of . . . sex." S. Rep. No. 92-415, at 9-11; H.R. Rep. No. 92-238, at 17-19. The Reports also pointed to the "pervasive" discrimination faced by women in educational institutions—many of which were under State and local control. H.R. Rep. No. 92-238, at 19; *see* S. Rep. No. 92-415, at 12 (noting, *inter alia*, underrepresentation of women as scholars in institutions of higher learning and as principals in elementary and secondary schools).

3. Over the next two decades, these legislative efforts led to significant improvements in women's employment opportunities. Yet, in 1991, after extensive hearings and debate, Congress concluded that "much remains to be done." H.R. Rep. No. 102-40, at 15 (1991). Congress had learned, for example, that women "still earn[ed] on average only *two-thirds* of what white males earn[ed]," and that "roughly half of this earnings gap may [have] be[en] attributable to discriminatory employment practices." *Id.* at 20 (emphasis in original). Not only was there "substantial sex segregation" between occupations or job titles, but "in nearly every occupation women earn[ed] less than men." *Id.* Accordingly, Congress again amended Title VII, *inter alia*, to extend its application to State employees appointed by elected officials,

Civil Rights Act of 1991, Pub. L. No. 102-166, § 321, 105 Stat. 1071, 1097, and to provide a damages remedy for intentional gender discrimination, *id.* sec. 102, § 1977, 105 Stat. at 1072.

B. The FMLA Is A Congruent And Proportional Response To Gender Discrimination By States.

The FMLA originated against this background of extensive legislative efforts to remedy and prevent gender discrimination. Congress had concluded that its prior and "far-reaching" legislative efforts had not been fully effective in remedying and preventing discrimination against women in the workplace. *See supra*, at 5. By mandating minimum employee leave, Congress sought to eradicate the remaining and persistent inequality in the workplace. To that end, as shown below, Congress carefully studied the significance of discretionary or no-leave policies for equal employment opportunity, and concluded that a minimum-leave obligation and a damages remedy for its enforcement was an appropriate response to the continuing denial of such opportunity. In reaching that conclusion, Congress had before it substantial evidence that the FMLA's leave requirements would enforce the Fourteenth Amendment's equal protection guarantee by remedying the persistent effects of prior state-sponsored gender discrimination, and remedying and deterring ongoing gender discrimination by the States.

The FMLA is the product of almost a decade of investigation and deliberation. The initial version of the FMLA was introduced in 1985. During the next eight years, Congress held extensive hearings and debates, issued numerous reports, and drafted numerous versions of the bill, all of which Congress relied upon when it finally enacted the FMLA in 1993. *See* H.R. Rep. No. 103-8, pt. 1 (referencing, throughout report, hearings from earlier Congresses); S. Rep. No. 103-3 (same). This legislative record confirms that the FMLA is a congruent and proportional response to past and ongoing state-sponsored gender discrimination

1. In enacting the FMLA, Congress had before it substantial evidence demonstrating that past state-sponsored gender discrimination accounted, in significant part, for the disproportionate adverse impact on women of employer policies denying family and medical leave. First, Congress had before it evidence of this nation's long history of mandating separate "work" and "home" spheres for men and women, respectively, and of denying women the choice to enter the workforce on a par with men. For example, Congress heard testimony that "[h]istorically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women's place is in the home"[9] and also "to the pervasive assumption that women are mothers first, and workers second."[10] "This prevailing ideology about women's roles," a witness explained, "has in turn justified discrimination against women when they are mothers or mothers-to-be."[11] The debates and reports also reveal that members of Congress were acutely aware that the viability of no-leave policies in the past depended on maintenance of separate spheres for men and women. *See*, *e.g.*, 137 Cong. Rec. H9714 (1991) (statement of Rep. Clay) (no-leave policies premised on "[t]he so-called traditional family, in which the father went to work while the

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[9] *See*, *e.g.*, *The Family and Medical Leave Act of 1987: Joint Hearings Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the Comm. on Education and Labor*, 100th Cong. 235 (1987) ("*1987 Labor Hrgs*") (statement of Women's Legal Defense Fund ("WLDF")).

[10] *The Parental and Medical Leave Act of 1986: Joint Hearings Before the Subcomm. on Labor Management Standards of the House Comm. on Education and Labor*, 99th Cong. 100 (1986) ("*1986 Labor Hrgs.*") (statement of WLDF).

[11] *1986 Labor Hrgs* at 100; *see also id.* at 36, 42 & n. 48 (statement of National Women's Political Caucus) (history of special legal protections that "put women, not on a pedestal, but in a cage" (internal quotations and citations omitted)).

wife stayed home to raise the kids").[12] On this basis, it was reasonable for Congress to conclude that the disproportionate impact of no-leave policies on women, who continue to assume most of a family's caretaking duties, reflects the continuing effect of past discriminatory policies by the States, and thus may be remedied through the Fourteenth Amendment.

Second, Congress had evidence that the continuing wage disparities between men and women, a result in part of this nation's long history of gender discrimination, also led to the disproportionate adverse effect of no-leave policies on women. As one hearing witness explained, "[t]he fact that women typically earn so much less than men contributes to the gender gap in caregiving. When work absences are required, it makes sense for the lower earner to take them."[13] Another witness confirmed, when there is a conflict between employment and caregiving, "the lowest paid earner in the two-earner family – usually the women – quits her job."[14] Thus, Congress had a reasonable basis to conclude that no-leave policies exacerbate the continuing effects of wage disparities attributable in significant part to decades of state-sponsored gender discrimination, and that a minimum leave requirement would help remedy those effects.

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[12] *See also*, *e.g.*, 139 Cong. Rec. S1000 (1993) (statement of Sen. Mikulski) (no-leave policies "pretend" we "still live in an Ozzie and Harriet world"); *id.* at S1139 (statement of Sen. Reigle) (no-leave policies based on circumstances "[e]arlier this century, [when] most families had one parent who went to work everyday to feed his – usually the primary income earner in a family was a male – wife and children); *id.* at H423 (statement of Rep. Mineta) (no-leave policies premised on "the idealized family paragons of Ward and June Cleaver" of "the 1950's"); H.R. Rep. 103-8, pt. 1, at 17; S. Rep. No. 103-3, at 7.

[13] *The Family and Medical Leave Act of 1991: Hearing on H.R. 2 Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 102d Cong. 128 (1991) ("*1991 Hrgs*") (statement of American Association of Retired Persons ("AARP"))

[14] *1991 Hrgs* at 219 (statement of Martha McSteen, National Committee to Preserve Social Security and Medicare).

Third, Congress had before it evidence that, in light of the continuing segregation of women into lower-paying jobs – another legacy of state-sponsored gender discrimination – allowing State employers to institute no-leave policies undermined women's equal protection guarantees. As the House Report explained, many women workers "remain in female intensive, relatively low paid jobs and are less likely than men to have adequate job protections and benefits." H.R. Rep. 101-28, pt. 1, at 6 (1989); *see also* S. Rep. No. 102-68, at 36 (1991) ("[T]he availability and scope of current family leave policies are severely limited for those in lower paying jobs."); *Parental and Medical Leave Act of 1987: Hearings Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Comm. on Labor and Human Resources* (pt. 2) 100th Cong. 314 (1987) ("*1987 Children Hrgs(2)*") (statement of Illinois Women's Agenda) ("[M]ost maternity leaves are individual arrangements made by women with enough clout to negotiate with their bosses. Lower-paid, less skilled employees – those most in need of economic protection at the time of childbirth – are the least likely to get it.").[15] On the basis of that evidence, it was reasonable for Congress to conclude that affirmative leave obligations would help remedy the disparity between female workers and male workers in access to job-protected leave, which in turn is

[15] *See also1987 Children Hrgs(2)* at 454 (statement of Edna Jackson, National Black Women's Health Project) (historically black and Hispanic women "have been concentrated in low skilled, poorly compensated and nonprofessional jobs such as sales, service, clerical, crafts or light manufacturing. Seldom are these jobs the jobs with adequate provisions for paid leave, family health conditions or child care"); *The Family and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Civil Serv. and Subcomm. on Compensation and Employee Benefits of the Comm. on Post Office and Civil Serv.*, 99th Cong. 34 (1986) ("*1986 Civil Serv. Hrg*") (statement of Meryl Frank, Yale-Bush Ctr. in Child Development and Social Policy) ("most women are employed by small employers and most women are not in management positions, so they are very often not given these sorts of benefits [flexible policy and parental leave]").

partly a consequence of previous governmental discrimination in employment.

Fourth, Congress had before it evidence that instituting affirmative leave obligations would remedy, in a gender-neutral manner, the suppression of women's earnings caused by the long history of governmental gender discrimination. Congress examined studies showing that "[i]n the absence of a family leave standard, childbirth and the need to care for a sick child or parent have an adverse impact on women's earnings," S. Rep. No. 102-68, at 28, and that working women without job-protected leave lost 86% of their pre-birth earnings after childbirth while women with leave lost only 51%. *See* S. Rep. No. 103-3, at 15-16. Congress also heard testimony that the absence of leave "worsens existing inequalities between male and female pay, and it raises the incidence of unemployment among women."[16] Such evidence amply supports Congress's conclusion that requiring States to provide job-protected leave would remedy the persistent adverse impact on women's wages caused by prior governmental discrimination, and would thereby promote women's equal employment opportunities.

In short, the foregoing evidence reveals that Congress had an adequate evidentiary basis for concluding that no-leave policies were a form of gender discrimination in that they had

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[16] *Parental and Medical Leave Act of 1987: Hearings Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Comm. on Labor and Human Resources* (pt. 1) 100th Cong. 81 (1987) ("*1987 Children Hrgs(1)*") (statement of Karen Nussbaum, Service Employees Int'l Union and 9 to 5, National Association of Working Women); *see also 1987 Children Hrgs(2)* at 638 (statement of Institute for Women's Policy Research) (proposed Family and Medical Leave Act "can be one small step in reducing inequity between the sexes"); *1986 Labor Hrgs*, at 61 (statement of Irma Finn Brosseau, National Federation of Business and Professional Women's Clubs, Inc.) (persistence of economic disparities between men and women results mainly from women's primary responsibility for child-rearing, and "society preclud[ing] men from sharing this obligation" (citing Stanford University study)).

the inevitable effect of denying women equal opportunities in the workforce, and that that effect was in significant part a direct consequence of previous state-sponsored gender discrimination. Accordingly, in light of the fact that nearly every State, until only a generation ago, placed discriminatory restrictions on women's ability to participate in the workplace, *see supra* at 17, the FMLA's minimum leave obligations are a congruent and proportional response to the continuing effects of past nationwide gender discrimination.

2. Congress also had before it substantial evidence to support the conclusion that the FMLA is a congruent and proportional response to ongoing gender discrimination by the States. Evidence showed that merely prohibiting employers from discriminating in the conditions and terms of employment, as Congress had done in Title VII and the PDA, was inadequate to prevent the "fairly flagrant" discrimination in the availability of leave. Such evidence was abundant with respect to the private sector.[17] Evidence of discriminatory leave policies and practices was also substantial with respect to the public sector, including the State employment sector.

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[17] *See*, *e.g.*, H.R. Rep. No. 100-511, pt. 2, at 24 (1988) ("[D]espite the apparent conflict with Title VII of the Civil Rights Act, only 37 percent of the[ ] companies extended parental leave to fathers and often on a different (and less extended) basis than to mothers"); *see also* S. Rep. No. 103-3, at 14-15 (noting 37% availability of "maternity" leave at businesses with more than 100 workers, compared to only 18% availability of "paternity" leave); *1987 Children Hrgs(2)* at 536 (1987) (statement of Prof. Susan Deller Ross, Georgetown University Law Center) ("[T]here are a number of studies . . . in which it's shown that employers in this country that are giving family leaves to their workers are not giving it non-discriminatorily, they are, by and large, giving it only to women, not to men. It's fairly flagrant discrimination"); *1986 Labor Hrgs* at 101 n. 2 (statement of WLDF) ("In a recent study by Catalyst, an independent research firm, 51.8% of companies surveyed reported that they give parental leave to mothers, but only 37% reported that they provide such leave to fathers—even though such a sex-based differential clearly violates existing law."); *id.* at 237 (Bureau of National Affairs Report) (case studies of gender discrimination in parental leave grants).

For example, States discriminated on the basis of gender in permitting family leave, with 13 States granting family leave to women and not to men.[18] Congress also had before it substantial evidence about the prevalence of discretionary leave policies that, while not discriminatory on their face, could be applied in a discriminatory manner.[19]

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[18] *See Family and Medical Leave Act of 1989: Hearings on H.R. 770 Before the Subcomm. on Labor-Management Relations*, 101st Cong. 271 (1989) (statement of the Concerned Alliance of Responsible Employers); *see also 1987 Children Hrgs(2)*, at 364-74 (testimony of Elaine Gordon, Member of the Florida House of Representatives) (leave is granted only to female public employees in Florida, and Florida rejected extending such leave to men); *1987 Children Hrgs(1)* at 385 (testimony of Gerald McEntee, International President, American Federation of State, County, and Municipal Employees) ("[T]he vast majority of our [public employment] contracts, even though we look upon them with great pride, really cover essentially maternity leave, and not paternity leave."); *Parental and Medical Leave Act of 1986: Hearings on H.R. 4300 Before the Subcomm. on Labor Management Standards*, 99th Cong. 30 (1986) (testimony of Meryl Frank, Yale Bush Center Infant Care Leave Project) ("We found that public sector leaves don't vary very much from private sector leaves" [expand]); *id.* at 90 (statement of Barbara Easterling, Communications Workers of America) (reaching same conclusion for their "public and private sector [union] members"); *id.* at 147 (statement of the Washington Council for Lawyers) ("[M]en, both in the public and private sectors, receive notoriously discriminatory treatment in their request for such leave."); 139 Cong. Rec. H399 (1993) (remarks of Rep. Bishop) (recounting receiving complaints from people "who were employed in State government and who were employed in the private sector").

[19] *See 1987 Children Hrgs(1)* at 35 (statement of James T. Bond, National Council of Jewish Women) (discretionary leave policies, unlike policies providing standard benefits, "introduce[] uncertainty and place[] some workers at considerable risk."); *1986 Civil Service Hrgs.*, at 85 (Staff Report, Subcommittee on Civil Service, Committee on Post Office and Civil Service) (same); *1986 Labor Hearings*, at 211 (Catalyst, Report on a National Study of Parental Leaves) ("Even among companies that currently offer unpaid leaves to men, many thought it unreasonable for men to take them. Fully 41% of companies with unpaid leave policies for men did not sanction their using the policy . . . .").

Most importantly, the evidence strongly demonstrated that the availability of gender-specific leave policies – and especially leave policies applicable only to women – could have the perverse and debilitating effect of exacerbating employment discrimination against women and reducing their job opportunities. The evidence showed that "it's particularly important that this medical leave would apply to both sexes for all medical conditions" because otherwise "you do give an employer an incentive not to hire those pregnant women."[20] Congress also found that employers were often unwilling to hire or promote women because of stereotypical conceptions about women's proper roles as caretakers, rather than workers.[21] In extending family leave to all eligible

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[20] *1987 Children Hrgs(2)*, at 535 (statement of Prof. Susan Deller Ross, Georgetown University Law Center); *see also* S. Rep. No. 102-68, at 35 ("Because the bill treats all employees who are temporarily unable to work due to serious health conditions in the same fashion, it does not create the risk of discrimination against pregnant women posed by legislation which provides job protection only for pregnancy related disability"); *1986 Labor Hrgs*, at 35 (statement of Irene Natividad, National Women's Political Caucus) ("[P]arental leave without medical leave would encourage discrimination against women of child-bearing age . . . . Employers would tend to hire men, who would have less legal protection."); *id.* at 108-09 (statement of WLDF) ("[B]ecause employers would be required to provide job-protected leaves for all employees in circumstances that affect them all approximately equally, they would have no incentive to discriminate against women.").

[21] *See*, *e.g.*, 138 Cong. Rec. H8227 (1992) (statement of Rep. Hayes) ("Too often women experience the nightmare of going in to their employer with the news that they are pregnant. Although they are valued employees, up to the moment they became pregnant, suddenly they find themselves unwanted."); *1987 Children Hrgs(2)*, at 173-74 (statement of Peggy Montes, Chicago Mayor's Commission on Women's Affairs) ("Job opportunities for [women with children] are limited, and they often miss pay increases and promotions. The lack of uniform parental and medical leave policies in the work place has created an environment where discrimination is rampant. Very often we are contacted by women workers who are at risk of losing their jobs or have lost them because they

employees, male and female, and therefore ensuring that men, too, can undertake caretaking roles, the FMLA counteracts those debilitating stereotypes that perpetuate job discrimination against women.[22]

Finally, Congress had before it evidence of the substantial burdens on litigants to bring suit. *See* 139 Cong. Rec. H387 (1993) (statement of Rep. Ackerman) (discussing difficulty of bringing suit to obtain leave). That evidence, combined with the evidence of persistent leave discrimination, provided a sufficient basis for Congress to conclude that the hurdles to bringing leave discrimination suits were too substantial, and that an across-the-board gender-neutral leave obligation was an appropriate supplement to Title VII and the PDA. *Cf. South Carolina*, 383 U.S. at 314 (upholding legislation requiring States to submit election law changes to federal review in light of, *inter alia*, "the ineffectiveness of the existing voting rights laws and the slow, costly character of case-by-case litigation") (citation omitted); *accord City of Boerne*, 521 U.S. at 526.

Petitioners contend that there was no pattern of unconstitutional conduct by the States because Congress knew that some States had adopted "innovative" family-care leave laws. Pet. Br. 32-34. Yet Congress also knew that most States had not done so. The House Report indicated that 29

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are pregnant, [or] gave birth to a child . . . ."); *1986 Labor Hrgs*, at 100 (statement of WLDF).

[22] *See*, *e.g.*, *1986 Labor Hrgs* at 147 (statement of Washington Council of Lawyers) (the FMLA "help[s] eliminate the stereotype—no longer valid in today's working world—that women are exclusively responsible for childcare"); *1987 Children Hrgs(1)*, at 468 (statement of Advisor to the [MA] Governor on Women's Issues) ("[B]y including fathers, you begin the process of making it so that employers won't really think, 'Oh, if I hire a woman, then I'm going to lose here [sic] when she has a baby.'"); *1987 Children Hrgs(2)*, at 194 (statement of Sen. Donna Peterson, Minnesota State Senate) ("[T]he likelihood of someone discriminating against the woman is reduced because the father is now also entitled [to leave]").

States had not enacted leave laws to care for a sick family member (as opposed to care for a new child only), and, of those 29, 14 had "no Family and Medical Leave Act whatsoever." *See* H.R. Rep. No. 103-8, pt. 1, at 66 (Minority Views). Congress also received testimony from various state representatives about the inadequacy of state leave policies and the need for federal legislation. *See 1987 Children Hrgs(2)* at 359 (statement of Rep. Nan Orrock, Georgia General Assembly) ("[S]tate-by-state efforts to achieve the same results would be at best uneven and very slow . . . . [I]n Georgia, I see no motion underway that could result in the establishment of such [parental leave] rights on the state level in the foreseeable future"); *id.* at 380-82 (statement of Kentucky Commission on Women) (noting absence of Kentucky leave law and supporting federal legislation).

Among the laws that did exist, moreover, their scope and coverage were "widely divergent." S. Rep. 102-68, at 40 ("Currently, the right to job protection related to pregnancy and childbirth could be a 'reasonable period of time' or six weeks or four months, depending on the state in which the mother works. The present system is a patchwork of widely divergent laws . . . ."); *see also* H.R. Rep. No. 103-8 pt. 1, at 32-33 (describing the leave policies of eight States, all of which differed from each other); S. Rep. No. 103-3, at 20-21 (same); H.R. Rep. No. 103-8, pt. 1, at 66-67, 78 (Minority Views) (cataloging the "[m]ajor differences" among state laws and regulations). In fact, as the FMLA's opponents pointed out, the only semblance of uniformity among those policies was that "all but a very few State laws" were more restrictive than the FMLA. *Id.* at 66. The Commission on Family and Medical Leave report cited by state *amici* confirms that point: prior to 1993, only a minority of States provided the kinds of leave or job protection required by the FMLA, and "[b]est estimates suggest that perhaps one-quarter

to one-third of full-time private and public sector employees had the kind of leave options provided by the FMLA."[23]

Petitioners further argue that, even if there was evidence of some unconstitutional conduct by the States, the FMLA was impermissibly disproportionate because it required States to provide leave "regardless of any particular State's historical or current conduct." Pet. Br. at 35. But, as explained above, the FMLA *is* responding to each State's historical conduct; it remedies the continuing effects of past discrimination against women workers, and there is simply no question that States throughout the nation has long acted discriminatorily. The FMLA also deters ongoing discrimination by the States. Because gender discrimination, like race discrimination, is a nationwide problem, Congress, pursuant to its § 5 power, may adopt nationwide remedies. *See Mitchell*, 400 U.S. at 134.

Finally, Congress had a reasonable basis to conclude that a damages remedy for the violation of the leave requirement was an appropriate measure to enforce the equal protection guarantee. *See Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976). Just as it had found for other employment-related civil rights statutes, *see*, *e.g.*, 42 U.S.C. § 2000e *et seq.*, Congress found that a damages provision served the remedial purpose of "ensuring that employees will be recompensed for their actual losses" and the deterrent purpose of "adding to employers' incentives to comply." H.R. Rep. No. 101-28, pt. 1, at 37; *see* S. Rep. No. 101-77, at 47-48 (1989); H.R. Rep. No. 100-511, pt. 2, at 44-45; S. Rep. No. 100-447, at 46-47 (1988). Congress recognized the importance of a damages remedy against not only private employers, but state employers too. *See id*. But in recognition of the States' unique concerns as sovereign, Congress enacted, beyond the general provisions accommodating the interests of all employers, *e.g.*, 29 U.S.C. § 2613 (certification requirement);

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[23] *See* Comm'n on Fam. & Med. Leave, U.S. Dep't of Labor, *A Workable Balance: Report to Congress on Family and Medical Leave Policies* 55 (1996); *see* State *Amici* Brief at 14.

id. § 2614(b) (high-level employee exemption); *id.* § 2617(a) (damages caps), additional provisions tailored to the interests of the States, *e.g.*, *id.* § 2618 (educational agencies); *id.* § 2611(3) (citing *id.* § 203(e)(2)(C)) (state political employee exemption).

Accordingly, the legislative record establishes that the FMLA is a congruent and proportional response to pervasive historical gender discrimination by the States, and to persistent ongoing gender discrimination in State employers' grants of leave. It confirms that the FMLA appropriately builds on prior legislative efforts to remedy and deter gender discrimination by supplementing the negative prohibitions in Title VII and the PDA with a measure that alleviates the adverse impact of no-leave policies caused by the long history of gender discrimination, remedies facially discriminatory leave policies, and prevents discrimination by minimizing the potential for employment decisions based on gender stereotyping.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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