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 AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether 29 U.S.C. § 2612(a)(1)(C), the family medical care provision of the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, *et seq.*, is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the states' Eleventh Amendment immunity from suit by individuals.

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INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) was founded 29 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. PLF is an advocate for limited government, individual rights, and free enterprise and believes public officials must be respectful of the constitutional limitations on federal power.

This case presents another example of Congress's attempts to expand federal power beyond what is provided under the United States Constitution. PLF believes that the delicate balance the Founders instituted between congressional and judicial power would be rendered askew if Congress is allowed to expand its authority under Section 5 of the Fourteenth Amendment by permitting lawsuits against the states to enforce legislation that does not remedy a pattern of established, identified constitutional injuries. PLF previously participated as amicus curiae in this Court arguing that Congress's actions must not exceed its enumerated powers. For example, PLF filed briefs in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999).

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

STATEMENT OF THE CASE

William Hibbs, a former state employee, sued the Nevada Department of Human Resources, his supervisor, and the Department director alleging violations of the Family and Medical Leave Act of 1993 (FMLA) and due process violations. *Hibbs v. HDM Department of Human Resources*, 273 F.3d 844, 849 (9th Cir. 2001). In relevant part, the FMLA requires an employer to provide "12 workweeks of leave . . . in order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition." 29 U.S.C. § 2612(a)(1)(C). Hibbs had exhausted his twelve weeks of leave under the FMLA while caring for his sick wife and was not granted further leave time. Hibbs was dismissed after failing to report for work. Nevada responded to Hibbs's suit by asserting sovereign immunity. *Hibbs*, 273 F.3d at 849. Consequently, this case turns on the question of whether the FMLA was constitutionally enacted under Section 5 of the Fourteenth Amendment, thus abrogating the state's immunity under the Eleventh Amendment.

The District Court entered summary judgment for the defendants, concluding that the FMLA claim was barred by the Eleventh Amendment and the State had not violated Hibbs' due process rights. *Id.* The Ninth Circuit Court of Appeals reversed on the FMLA claim. *Id.* at 851. The Ninth Circuit distinguished other circuit court decisions holding that there was no valid abrogation on the grounds that this case involved leave to care for a sick family member (not "ordinary sick leave" due to the employee's own illness). *Id.* at 850. The purpose of the leave is important, the court said, because ensuring that leave to care for a family member is available on a gender-neutral basis furthers congressional efforts to remedy gender discrimination resulting from the traditional female role as caregiver. *Id.* at 855, 867-68. Because sex discrimination is subject to higher scrutiny under the Constitution than discrimination on the basis of age or disability, the Ninth

Circuit found the *Garrett* and *Kimel* decisions regarding the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA) to "offer limited guidance." *Id.* at 854. This Court granted certiorari on June 24, 2002.

SUMMARY OF ARGUMENT

Section 5 of the Fourteenth Amendment grants to Congress the power to enforce, by appropriate legislation, the rights guaranteed under that Amendment. U.S. Const. Amend. XIV, § 5; *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). Inherent within this grant is an affirmative limitation. Specifically, Congress lacks authority to define the substantive contours of Fourteenth Amendment rights; rather, its enactments may only enforce those rights which exist under the Constitution. *Id.* In *Boerne*, this Court explained that appropriate enforcement legislation is defined by whether the legislation in question is remedial and whether the remedy created by Congress is both congruent and proportional to the unconstitutional behavior sought to be arrested. *Id.* at 520. Requiring such a connection ensures that Congress's exercise of Section 5 power is grounded in the substance of the right enforced. Failing to require congruence and proportionality would improperly free Congress from the rights recognized in Section 1, and empower Congress to legislate generally upon nearly all aspects of life, liberty, and property.

The legislative history of the FMLA shows that, while Congress was conscious of the difficulties faced by the caretakers of sick loved ones, it identified no unconstitutional state action directed at those caretakers that demanded a federal remedy through Section 5. The Equal Protection Clause has never been construed to place an affirmative obligation upon states to compensate individuals for social or economic hardships faced as a consequence, however unfortunate, of their family members' illness. Notwithstanding the FMLA's

laudable intentions, it does not seek to remedy those instances where state laws or conduct can be said to irrationally or invidiously discriminate against caretakers. The rights the FMLA vests in caretakers of sick family members are entirely creatures of statute and bear little or no resemblance to constitutional rights recognized by this Court. Equating the goals of the FMLA with the constitutional principle of Equal Protection would work a substantial change in constitutional construction at odds with the Equal Protection precedents of this Court. Thus, the FMLA is not a valid enactment under Section 5 to enforce the provisions of the Fourteenth Amendment. The decision of the Ninth Circuit Court of Appeals should be reversed.

ARGUMENT

I

THE FMLA DOES NOT REMEDY SEX DISCRIMINATION; RATHER, IT MANDATES AN ECONOMIC BENEFIT FOR EVERY COVERED PERSON

Congress intended the FMLA in part to address sex discrimination, as evident from the preamble to the Act. 29 U.S.C. § 2601(a). Because women are regarded as having the primary responsibility for care of sick family members, men are often given less or no caretaker leave, throwing the caretaking burden on women. In addition, some employers gave no caretaker leave, forcing women to surrender their jobs to care for a relative. 29 U.S.C. § 2601(a)(5). However, the means by which Congress sought to prevent sex discrimination in the FMLA incorporates a profoundly different model of equality from that associated with traditional nondiscrimination statutes. As shown below, narrowly tailored antidiscrimination statutes such as Title VII (particularly the Pregnancy Discrimination Act amendment) and the Equal Pay Act are valid abrogations of states' sovereign immunity, while a wide-

ranging accommodation statute like the ADA is not. The FMLA, with its across-the-board mandate of unpaid leave for all state employees, is an accommodation statute in the mode of the ADA and, like that statute, cannot abrogate the states' sovereign immunity.

A. Antidiscrimination Statutes Promoting Equal Treatment of Similarly Situated Individuals Do Not Exceed the Section 5 Enforcement Provision

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of . . . sex." 42 U.S.C. § 2000e-2(a).[2] Under Title VII, plaintiffs can complain of discrimination against them, but they cannot insist upon discrimination in their favor. 42 U.S.C. § 2000e-2(j) ("Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group . . . ."). Absent a finding of ongoing or past unlawful discrimination, a plaintiff in a Title VII lawsuit is entitled to no relief at all, and certainly not to the imposition of an affirmative action plan. Karlan, Pamela S. & Rutherglen, George, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 Duke L.J. 1, 3 (1996) (*Reasonable Accommodation*).

For instance, Title VII essentially takes jobs as it finds them. It defines discrimination in a negative sense: employment practices are unlawful only if they prevent individuals from doing the job as the employer defines it. The failure to undertake positive steps to revamp the job or the environment does not constitute discrimination. Therefore, an

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[2] Congress extended the protection of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to e-17, to state employees in the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended in 42 U.S.C. § 2000e).

employer is not required to develop flexible work hours even though a rigid work schedule may disproportionately eliminate female workers who have child care responsibilities. *Reasonable Accommodation*, 46 Duke L.J. at 9; *see also* Williams, Joan C., *Restructuring Work and Family Entitlements Around Family Values*, 19 Harv. J.L. & Pub. Pol'y 753, 756 (1996).

In 1978, Congress passed the Pregnancy Discrimination Amendment to Title VII (PDA). 42 U.S.C. § 2000e(k). The PDA made explicit that discrimination based on pregnancy constitutes sex discrimination. *Id.* This expanded definition of discrimination on the basis of sex provides that

> [t]he terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment related purposes . . . as other persons not so affected but similar in their ability or inability to work.

42 U.S.C. § 2000e(k). Title VII principles govern the scope of the PDA's jurisdiction, as the PDA is merely an amendment to the broader legislation. Employers covered by Title VII must adhere to the PDA. *See, e.g., EEOC v. Dowd & Dowd, Ltd.*, 736 F.2d 1177, 1178 (7th Cir. 1984).

The PDA is not an affirmative action statute. Although this legislation entitles women to equal benefit coverage for pregnancy-related medical conditions, it does not mandate any particular coverage. 42 U.S.C. § 2000e(k) ("[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . ."). As this Court stated in *Wimberly v. Labor and Industrial Relations Commission*, 479 U.S. 511, 518 (1987), under the PDA, "the State cannot single out pregnancy for

disadvantageous treatment, but it is not compelled to afford preferential treatment." *See also Troupe v. May Department Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994) (holding that the PDA does not "require employers to offer maternity leave or take other steps to make it easier for pregnant women to work") (citations omitted).

The PDA does not provide for nonmedical leave related to child care. According to the Equal Employment Opportunity Commission, the PDA does not cover child care leave and employers should thus grant benefits only on the same basis as other nonmedical leave, to be consistent with Title VII. Questions and Answers on the Pregnancy Discrimination Act, 29 C.F.R. § 1604 app. (1986). Employers are required only to extend existing benefit coverage. If an employer does not offer leave for nonmedical purposes, or imposes severe limitations on this type of leave, it would be difficult for an employee to obtain leave for child care. Caplan-Cotenoff, Scott A., *Parental Leave: The Need for a National Policy to Foster Sexual Equality*, 13 Am. J.L. & Med. 71, 89 (1987) (*Parental Leave*). To prove that a neutral policy, such as across-the-board denial of child care leave, violates Title VII, a claimant must show that this plan has an adverse impact on a protected class. *Id.* (citing U.S. Commission on Civil Rights, Child Care and Equal Opportunity for Women 46 (1981)). Employers are not required to

> treat pregnant employees in any particular manner with respect to hiring, permitting them to continue working, providing sick leave, furnishing medical and hospital benefits, providing disability benefits or any other matter. [The PDA] in no way requires the institution of any new programs where none currently exist.

H.R. Rep. No. 948, 95th Cong., 2d Sess., at 4. Employers must treat their workers equally—well or badly—providing they do

so without regard to the employees' gender. *Parental Leave*, 18 Am. J.L. & Med. at 90.

The Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206(d), provides another example of a narrowly tailored statute intended to combat sex discrimination.[3] The EPA provides in relevant part:

> No employer having employees subject to any provisions of this section shall discriminate . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . .

29 U.S.C. § 206(d)(1). An employer may avoid liability once an employee has met her burden by showing that the disparity is "pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." *Id.* With the broad exception from liability for wage disparities due to "any other factor other than sex," 29 U.S.C. § 206(d)(1)(iv), it is apparent that Congress was targeting the same purposeful discrimination prohibited by the Constitution. Because the EPA is aimed at a classification that receives higher scrutiny, not one that is afforded rational basis review, the Constitution demands an "exceedingly persuasive justification" for gender-based discrimination. Falling well within this standard of review, the EPA requires only that the

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[3] The Equal Pay Act was applied to the states when the Fair Labor Standards Act was amended to extend its protections to state employees in 1974. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55, 58-62.

employer offer a legitimate reason other than sex to explain a wage disparity. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974).

Following *Kimel*, this Court vacated two cases, arising in the context of professors suing their state universities, which found that the EPA constituted appropriate legislation under Section 5. *See Anderson v. State University of New York*, 169 F.3d 117 (2d Cir. 1999) (per curiam), *cert. granted and judgment vacated*, 528 U.S. 1111 (2000), *on remand* 107 F. Supp. 2d 158 (N.D.N.Y. 2000); *Varner v. Illinois State University*, 150 F.3d 706 (7th Cir. 1998), *cert. granted and judgment vacated*, 528 U.S. 1110 (2000), *on remand* 226 F.3d 927 (7th Cir. 2000), *cert. denied*, 533 U.S. 902 (2001). On remand, both courts of appeals again found that Congress had validly abrogated the states' immunity in the EPA. *Varner*, 226 F.3d 927; *Anderson*, 107 F. Supp. 2d 158. Likewise, the Eighth Circuit found that the EPA is remedial and not substantive and, thus, validly abrogated Eleventh Amendment immunity. *See O'Sullivan v. Minnesota*, 191 F.3d 965, 968 (8th Cir. 1999); *accord, Ussery v. Louisiana*, 150 F.3d 431, 437 (5th Cir. 1998); *Timmer v. Michigan Department of Commerce*, 104 F.3d 833, 842 (6th Cir. 1997).

The *Varner* court provided the most detailed analysis. First, the court noted that, compared to the ADEA, the EPA was narrow in scope, *Varner*, 226 F.3d at 933-34, allowed employers a greater opportunity to escape liability, *id.* at 934, and targeted unconstitutional state action, *id.* at 934-35. The court thus found that in light of the prevalent problem of unconstitutional gender discrimination, the enacted remedial scheme was sufficiently congruent and proportional to the Fourteenth Amendment to be considered appropriate Section 5 legislation. *Id.* at 935-36.

Similarly, the Sixth Circuit in *Kovacevich v. Kent State University*, 224 F.3d 806, 821 (6th Cir. 2000), upheld the EPA

as appropriate Section 5 legislation. Relying heavily on *Kimel*, *id.* at 819, the court concluded that, unlike the ADEA, the EPA does not prohibit substantially more state employment decisions than would likely be held unconstitutional, *id.* at 819-20. The court emphasized that in the Sixth Circuit EPA liability is equated with intentional gender discrimination and also noted that the affirmative defenses available to employers reduce the possibility that constitutional conduct is held unlawful under the EPA. *Id.* at 820.

The EPA does not grant plaintiffs more substantive rights than the Constitution. The EPA also does not raise the level of scrutiny given to gender-based classifications, *Varner*, 226 F.3d at 935; *Kovacevich*, 224 F.3d at 820. Moreover, the EPA is congruent with the Equal Protection Clause even though a plaintiff need not prove discriminatory intent to prevail because the structure of EPA litigation ensures that employers will only be held liable when the court finds an impermissible motive of gender discrimination behind the pay structure. *See Varner*, 226 F.3d at 934. The EPA is focused on only one area of state responsibility: the relationship between state employer and employee. The EPA only regulates the compensation aspect of public employment. It does not deal with hiring, promotions, firing, or other wage discrimination issues relating to unequal or comparable work. It addresses only the rate of compensation between two employees who do equal work. Somerville, Thane, *The Equal Pay Act as Appropriate Legislation Under Section 5 of the Fourteenth Amendment: Can State Employers Be Sued?*, 76 Wash. L. Rev. 279, 306 (2001). This extremely narrow scope supports a finding that the EPA is a proportional response to gender-based wage discrimination. In addition, Congress made the EPA applicable to the states in response to substantial evidence that gender-based wage discrimination was a serious problem in *public* employment. *Id.* at 308-10 and nn.257-262 (identifying numerous congressional hearings and

specific testimony on the subject). Thus, the EPA was enacted for a remedial purpose and is valid Section 5 legislation.

These traditional antidiscrimination statutes seek to remedy the injuries that occur when similarly situated people are treated differently for unconstitutional reasons. Congress acts within its Section 5 enforcement power when it develops this type of remedy to counter a pattern of conduct that violates the Fourteenth Amendment prohibition against discrimination. As shown below, when Congress moves beyond this established role to "accommodation" statutes, it also moves beyond the enforcement power of Section 5.

B. Accommodation Statutes Mandating Preferential Treatment for Certain Individuals Based on Their Personal Circumstances Do Exceed the Section 5 Enforcement Provision

The ADA declares it illegal to deny an individual an employment opportunity by failing to change the job or physical environment of the workplace to enable him to do the work. 42 U.S.C. § 12112(b)(5). This is a far different definition of "discrimination" than the definition embraced in other areas of employment discrimination law. In effect, it requires not only that disabled individuals be treated no worse than nondisabled individuals with whom they were similarly situated, but also directs that in certain contexts they be treated differently, even better, to achieve an equal effect. *US Airways, Inc. v. Barnett*, 122 S. Ct. 1516, 1521 (2002) ("By definition any special 'accommodation' requires the employer to treat an employee with a disability differently, i.e., preferentially.").

"The ADA marks a . . . departure" from Title VII, even from Title VII's regulation of "facially-neutral criteria" under the disparate impact branch of the law. Issacharoff, Samuel & Nelson, Justin, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. Rev. 307, 315 (2001).

"Under the ADA . . . there is an intervening duty to alter the work environment, even if a disabled employee may never be as productive as a non-disabled potential employee." *Id.* at 315-16. The term "discriminate," which was not defined at all in the Civil Rights Act of 1964, is defined in a highly detailed and multi-faceted way in Section 102 of the ADA. With respect to reasonable accommodation, Section 102 provides that the term "discriminate" includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5)(A). The statute and its implementing regulations required covered employers to do something that no federal employment rights statute had ever done before: it required them to engage with a disabled employee or applicant in a good faith interactive process to find ways to accommodate the employee's disability and enable him to work. Krieger, Linda Hamilton, *Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 Berkeley J. Emp. & Lab. L. 1, 4 (2000). Thus, the ADA advances both formal and structural models of equality by imposing a duty of accommodation as well as a duty of formal nondiscrimination, regulating health and safety risk analysis in situations involving disabled employees or applicants, and extending these protections to an apparently wide class—a class ranging far beyond those traditionally viewed as "disabled" in legal and popular culture. *Id.* at 6 (citing Burgdorf, Robert, *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 Harv. C.R.-C.L. L. Rev. 413 (1991)).

In the state employment provisions of the ADA, Congress failed to meet the predicate requirement for enacting Section 5 remedial legislation in two ways. First, it failed to actually

identify the violation by making an express legislative finding or determination. *Garrett*, 531 U.S. at 369-70. Second, it failed to make sufficient findings addressing the specific problem of discrimination in state employment as opposed to general acts of discrimination by private employers and by states in other contexts. *Id.* at 371-72. Consequently, the Court held that the ADA provided protection above rational basis review and was, therefore, a substantive rewriting of the Fourteenth Amendment. *Id.* at 372-73. "Section 5 does not so broadly enlarge congressional authority." *Id.* at 374; *see also Kimel*, 528 U.S. at 81 ("Congress cannot 'decree the *substance* of the Fourteenth Amendment's restrictions on the States. . . . It has been given the power "to enforce" not the power to determine *what constitutes* a constitutional violation.' ") (quoting *Boerne*, 521 U.S. at 519).

C. The FMLA Is an Accommodation Statute That Exceeds Congress's Section 5 Enforcement Powers

The essence of the ADA's innovation was the departure from a finding of prior wrongful discrimination as the predicate for affirmative relief for identified individuals, and the imposition of a duty to accommodate without a prior finding of wrongdoing. *Reasonable Accommodation*, 46 Duke L.J. at 41. The FMLA follows this model. Like the ADA, and unlike traditional antidiscrimination laws, the FMLA sets a floor beneath which positive protection for family leave may not fall: covered employees are entitled to up to twelve weeks of aggregated annual leave, after which their jobs are guaranteed back to them. Moreover, the prefatory language to the Act states that it seeks protection of a broader range of interests than are recognized under Title VII. Eichner, Maxine, *Square Peg in a Round Hole: Parenting Policies and Liberal Theory*, 59 Ohio St. L.J. 133, 148 (1998). By its mode of operation, the FMLA more closely resembles an "accommodation" statute like

the ADA than an anti-discrimination statute like Title VII. The Seventh Circuit made this point:

> The question in a discrimination case is whether the employer treated one employee worse than another on account of something (race, religion, sex, age, etc.) that a statute makes irrelevant . . . . A statute such as the FMLA, however, creates substantive rights. A firm *must* honor statutory entitlements; when one employee sues, the firm may not defend by saying that it treated all employees identically. The FMLA requires an employer to accommodate rather than ignore particular circumstances.

Diaz v. Fort Wayne Foundry Corp., 131 F.3d 711, 712 (7th Cir. 1997). Like the ADA, the caretaker leave provision of the FMLA demands accommodation of employees' personal circumstances (i.e., a sick family member).

Congress's intention was not to prevent discrimination between genders in the work place, but rather to provide leave for all persons for family and medical needs. Congress passed the Family and Medical Leave Act because the public demanded leave so that women and men could meet the demands of work and home, a need businesses have not met on their own. H.R. Rep. No. 103-8, at 58 (1993), *cited in* Simmons, Elizabeth A., *The Family and Medical Leave Act: Well Meaning Legislation Meets the Strong Arm of the Constitution of the United States*, 17 J. Contemp. Health L. & Pol'y 349, 369 (2000) (*Well Meaning Legislation*). The FMLA's economic nature is clear because it establishes a minimum labor standard based on the same principles as other laws that establish minimum standards for employment, such as the child labor laws and safety laws. Joyce, Lisa, *The FMLA is a Great Benefit for Everyone but State Employees: Economic Nature of Federally Mandated Leave Fails to Defeat the States' Sovereign Immunity in Federal Court*, 68 UMKC L. Rev. 291,

309 (1999) (*Great Benefit*) (citing S. Rep. No. 103-3, at 5 (1993)).

This analysis has found favor in many lower courts. For example, in *Kilvitis v. County of Luzerne*, 52 F. Supp. 2d 403 (M.D. Pa. 1999), the court reasoned that the FMLA's grant of twelve weeks of leave creates an economic entitlement and is, therefore, a substantive alteration of the Fourteenth Amendment. *Id.* at 409-10. The court stated that "the FMLA does not add anything to the existing prohibitions against gender discrimination, except to the extent that it creates a statutory entitlement to 12 weeks of leave." *Id.* at 410. *See also Hale v. Mann*, 219 F.3d 61, 69 (2d Cir. 2000) (Congress created substantive right when mandating leave for personal illness because Congress failed to demonstrate that women are disproportionately affected); *Philbrick v. University of Connecticut*, 90 F. Supp. 2d 195, 201 (D. Conn. 2000) ("the legislative record of the FMLA does not clearly identify widespread and pervasive evidence of gender-based leave discrimination in the workplace") and at 200 (noting that FMLA eliminates state of mind element of intent to discriminate previously required under the Equal Protection Clause by mandating statutory entitlement to health leave without regard to employer's intent); *Thomson v. Ohio State University Hospital*, 5 F. Supp. 2d 574, 579 (S.D. Ohio 1998) ("The creation by statute of an affirmative entitlement to leave distinguishes the FMLA from other statutory provisions designed to combat discrimination . . . Congress . . . is attempting to dictate that the Equal Protection Clause of the Fourteenth Amendment requires that employees be furnished leave . . . . The FMLA does not merely make it illegal for employers to treat requests for leave differently on the basis of gender, but instead mandates that employers provide employees with a new and valuable benefit."), *aff'd without opinion*, 238 F.3d 424 (6th Cir. 2000). Americans are not guaranteed the right to take unpaid sick leave to care for their sick relatives

under the Fourteenth Amendment. Congress cannot abrogate a state's right to sovereign immunity to protect an employee's right to leave under these circumstances.

II

TWELVE WEEKS OF LEAVE TO CARE FOR AN ILL FAMILY MEMBER ENHANCES NO CONSTITUTIONAL RIGHT, BUT IS RATHER A METHOD OF SOCIAL ENGINEERING

A. Congress May Not Abrogate States' Immunity on the Basis of Speculative Harm

Congress's Section 5 enforcement powers extend only so far as the enforcement of constitutional rights protected by the Fourteenth Amendment, and do not extend to defining those rights. *Boerne*, 521 U.S. at 519. Accordingly, this Court looks at the scope of the constitutional right and compares that to what the federal legislation seeks to address. While there does not need to be an exact "fit" between the conduct the legislation reaches and what the Constitution protects to be valid under Section 5, *id.* at 518, the legislation must be directed at remedying or preventing a state's violation of constitutional rights, *id.* at 524-25. The Court chided Congress for producing a legislative record that "lacks examples of modern instances of generally applicable laws passed because of religious bigotry." *Id.* at 530.

In *Florida Prepaid*, this Court applied the *Boerne* analysis to the extension of the Patent Remedy Act to the states, focusing on whether the Patent Remedy Act was "remedial or preventative legislation aimed at securing the protections of the Fourteenth Amendment for patent owners." *Florida Prepaid*, 527 U.S. at 639. The Court rejected statements in the record indicating that Congress intended to prevent possible unconstitutional conduct by passing the Act and dismissed testimony indicating concern over potential future unconstitutional activity, saying, "[a]t most, Congress heard

testimony that patent infringement by States might increase in the future . . . and acted to head off this speculative harm." *Florida Prepaid*, 527 U.S. at 641.

> The legislative record thus suggests that the Patent Remedy Act does not respond to a history of "widespread and persisting deprivation of constitutional rights" of the sort Congress has faced in enacting proper prophylactic § 5 legislation.

Id. at 645 (quoting *Boerne*, 521 U.S. at 526). The dearth of constitutional violations rendered the provisions of the Patent Remedy Act "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* However desirable the policy embodied in the Patent Remedy Act may be, it was not founded upon a history that justified an invasion of the sovereign immunity of the states.

The FMLA, by mandating leave for all covered employees, displaces "substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection . . . standard." *See Kimel*, 528 U.S. at 86.

As the Minority stated in House Report 103-8 part 1, "[H.R. 1] is a legislative initiative in search of a problem to solve." H.R. Rep. No. 103-8, at 58, *cited in Well Meaning Legislation*, 17 J. Contemp. Health L. & Pol'y at 368-69. Congress never identified any pattern of unconstitutional gender discrimination by the States. *Id.* The FMLA requires states to provide a benefit to both men and women that they may or may not have been providing already. *See, e.g.*, *Great Benefit*, 68 UMKC L. Rev. at 311 (citing Faillace, Michael A., *Family and Medical Leave Act of 1992: Statutory Requirements, Regulations, Relevant Case Law, Illustrative Examples, and Practical Recommendations*, 592 PLI/LIT 303, 396-409 (providing a summary of the states' family and medical leave

statutes). Prior to the FMLA, thirty-four states, the District of Columbia, and Puerto Rico provided some form of maternity, family, or medical leave. Twenty-two of these jurisdictions covered both public and private sector employment. Of these, eleven states[4] and the District of Columbia provide leave comparable to the FMLA in the private sector. Daspit, Nancy R., *The Family and Medical Leave Act of 1993: A Great Idea but a "Rube Goldberg" Solution?*, 43 Emory L.J. 1351, 1405 (1994).[5]

The Court's consistent message to Congress from *Boerne* through *Garrett* has been that the preventive aspect of the Section 5 power cannot be exercised unless congressional fears are grounded in an existing trend of unconstitutional conduct by the states. Leonard, James, *A Damaged Remedy: Disability Discrimination Claims Against State Entities Under the Americans with Disabilities Act After Seminole Tribe and Flores*, 41 Ariz. L. Rev. 651, 682 (1999). Congress must document, not merely infer, specific constitutional harm, thus limiting Congress's power to speculate as to potential future harms. *See Garrett*, 531 U.S. at 374 ("[I]n order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy

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[4] These jurisdictions are California, Connecticut, the District of Columbia, Hawaii, Maine, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, Washington, and Wisconsin.

[5] Many states have laws that resemble or are analogous to the FMLA. Sherer, Christopher E., *The Resurgence of Federalism: State Employees and The Eleventh Amendment*, 23 Hamline J. Pub. L. & Pol'y 1, 32 (2001) (citing Ark. Code Ann. § 21-4-201, *et seq.* (Michie 2000); Iowa Code § 216.6 (2000); Minn. Stat. § 181.940, *et seq.* (2000); Mo. Rev. Stat. § 213.055 (2000); Neb. Rev. Stat. § 48-234 (2000); N.D. Cent. Code § 54-52.4-01, *et seq.* (2000); S.D. Codified Laws § 3-6-8.6 (Michie 2000)).

imposed by Congress must be congruent and proportional to the targeted violation."); and at 376 (Kennedy, J., concurring) ("The predicate for money damages against an unconsenting State in suits brought by private persons must be a federal statute enacted upon the documentation of patterns of constitutional violations committed by the State in its official capacity."); *see also* Jackson, Vicki C., *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 Harv. L. Rev. 2180, 2253 (1998) (arguing that courts should have the power to review congressional action).

Lacking such documentation, the Ninth Circuit's decision rests on circumstantial evidence and two layers of extrapolation. *Hibbs*, 873 F.3d at 859. First, the court below cites a study comparing parental leave in the private sector available to both men and women. *Id.* It then pulls out a single line of testimony given in support of an earlier incarnation of the FMLA suggesting that leave plans tend to be similar in the private and public sectors. Then the court extrapolates that the studies related to parental leave should apply to other types of family leave, assuming that if an employer discriminates in one instance it is likely to do so in the other. *Id.* By contrast, the Sixth Circuit in *Sims v. University of Cincinnati*, 219 F.3d 559, 563-64 (6th Cir. 2000), undertook a comprehensive review of the legislative history of the FMLA and concluded:

> The only direct statement that public employers have engaged in discrimination, the statement of the Washington Council of Lawyers, is indicative of the strength of the evidence relied on by the United States—it is the unsupported statement of an avowed advocacy group backing a bill that was never passed into law. Similarly, testimony that unspecified employers have engaged in discrimination, and the fact that the States have passed maternity disability leave laws, are largely beside the point; this evidence does not constitute a congressional finding of a

> pattern of unconstitutional discrimination on the part of the States.

The legislative record of the FMLA discloses no pattern of discrimination by the states, let alone a pattern of constitutional violations. In fact, the FMLA recognizes that employers voluntarily provided leave prior to its passage by specifying that it shall not be construed to supersede any state or local law (29 U.S.C. § 2651(b)) or collective bargaining agreement or other benefit program (29 U.S.C. § 2652(a)) that provides greater family or medical leave rights to employees. Thus, Congress was reduced to finding that employment standards which apply more to one gender over another "have serious *potential* for encouraging employers to discriminate against employees and applicants for employment who are of that gender" (29 U.S.C. § 2601(a)(6) (emphasis added)), and therefore Congress sought to "minimize[] the potential for employment discrimination on the basis of sex." 29 U.S.C. § 2601(b)(4). An action to "minimize the potential" is precisely the sort of speculative harm this Court rejected in *Florida Prepaid*, 527 U.S. at 644-45. *See also Sims*, 219 F.3d at 564. It should also be rejected here.

B. The FMLA Contains No Limits to Tailor It to the Alleged Constitutional Harm It Purports to Remedy

Legislation legitimately enforces the Equal Protection Clause only when there is "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne*, 521 U.S. at 520. *Boerne's* delineation of termination dates, geographical restrictions and egregious predicates suggests the legislation itself must contain limitations relevant to the identified constitutional violation. Kuerschner, Caroline E., *Our Vulnerable Constitutional Rights: The Supreme Court's Restriction of Congress' Enforcement Powers in City of Boerne v. Flores*, 78 Or. L. Rev. 551, 566-67 (1999) (*Vulnerable Constitutional*

Rights). Otherwise, Congress may do violence to the Court's interpretation of what "equal protection" means, and make the Constitution no different from any statute passed by Congress.

> If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it."

Boerne, 521 U.S. at 529 (citing *Marbury v. Madison*, 5 U.S. 137, 177 (1803)). Congress's use of its enforcement power must be tied to the constitutional rights enforced, and directed to unconstitutional state actions. Hamilton, Marci A., *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 Cardozo L. Rev. 469, 487-90 (1999) (without a limit on the scope of ancillary conduct that is properly prophylactic, Section 5 becomes a catchall power in direct contravention of the vertical federalism principles underlying Section 5). Thus, ancillary conduct can be brought within the purview of Congress's prophylactic remedy, only when the legislature first identifies and evidences its belief of a likely constitutional violation. Without that violation, the legislation is neither a reaction nor a response, but instead is an affirmative standard setting law that is impermissible under Section 5. Barrett, Jr., Edward L., *Congress' Section 5 Power and Remedial Rights*, 34 U.C. Davis L. Rev. 673, 720 (2001).

The FMLA creates an affirmative obligation on the part of the states to provide twelve weeks of leave. 29 U.S.C. § 2612(a)(1). Nothing in the Equal Protection Clause creates such an obligation. Instead, a state could constitutionally offer four or eight weeks of leave to all its employees—or deny it altogether. But were a state to do so, it would be liable under the FMLA. Thus, the FMLA's provisions far outstrip the

requirements of the Fourteenth Amendment, creating a substantive change in the nature of the right. Congress's purported remedy "is simply not 'corrective in its character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of state officers.'" *United States v. Morrison*, 529 U.S. 598, 625 (2000) (quoting *Civil Rights Cases*, 109 U.S. 3, 18 (1883)).

Although the stated aim was to eradicate gender discrimination, the FMLA, on its face, fails to remedy sufficient unconstitutional behavior to warrant the extreme action of abrogation. Congress made six findings and stated five purposes with regard to the FMLA. *See* 29 U.S.C. § 2601. Of the findings, just two mention differences between men and women, suggesting that Congress enacted the FMLA for the purpose of ensuring equal protection based on gender, 29 U.S.C. § 2601(a)(5)-(6), while two purposes of the FMLA recite that its goals should be accomplished consistent with the Equal Protection Clause, 29 U.S.C. § 2601(b)(4)-(5). While these recitations suggest that Congress intended the FMLA to be a valid exercise of congressional authority under Section 5, they are not persuasive. The main purpose and effect of the FMLA is to provide employees time away from work, under certain conditions, without fear of being replaced. The proportion of unconstitutional discrimination prevented by the FMLA is minuscule in proportion to the constitutional behavior prohibited by forcing employers to grant leave for employees in these situations. *Well Meaning Legislation*, 17 J. Contemp. Health L. & Pol'y at 374. Thus, despite congressional findings that men and women are treated differently when requesting leave, the effect of the FMLA is to confer a benefit on employees, not to protect them from disparate treatment. Rubenstein, Gregg A., *The Eleventh Amendment, Federal Employment Laws, and State Employees: Rights Without Remedies?*, 78 B.U. L. Rev. 621, 656 (1998).

If the purpose of the law were simply to ensure similar treatment, Congress could have required such without specifying a minimum leave period. The nature of this benefit more closely resembles an economic benefit such as that provided by a minimum wage law, not the protection afforded by an antidiscrimination law. *Compare* 29 U.S.C. § 206 (FLSA) ("Every employer shall pay to each of his employees . . . wages at the following rates . . . ."), and § 2612 (FMLA) ("[A]n eligible employee shall be entitled to a total of 12 workweeks of leave . . . ."), *with* § 623 (ADEA) ("It shall be unlawful for an employer to fail or refuse to hire . . . or otherwise discriminate against any individual . . . because of such individual's age.").

In *Kazmier v. Widmann*, 225 F.3d 519, 526 (5th Cir. 2000), the Fifth Circuit found that the legislative record did not reveal the "actual, identified constitutional violations by the States" that would support broad prophylactic legislation. Notably, the court concluded that findings of discrimination in granting family leave from the private sector could not be extrapolated to the public sector. *Id.* Moreover, evidence in the record regarding parental leave was "not in the least probative of the question before [the court]." *Id.* at 531. The FMLA, the court reasoned, was "broad, prophylactic legislation [because] . . . [t]here is nothing in the Constitution that even closely approximates either a duty to give all employees up to twelve weeks of leave per year to care for ailing family members or a right of an employee to take such leave." *Id.* at 526. The *Kazmier* court concluded that "the FMLA is not designed to prevent discrimination at all, but rather is crafted to provide employees throughout the nation with a substantive statutory right to take leave from work for family and medical reasons." *Id.* at 532.

The FMLA does not prevent potential discrimination so much as it engages in social engineering. If the statute is really about discrimination, then the unspoken assumption underyling

its provisions must be that the statute's purposes will not be met unless and until an equal number of men and women choose to take unpaid leave to care for their sick family members. This assumption seems to be a subversive attempt to sneak in a disparate impact theory to justify the prophylactic remedy. At what point does Congress find that sex discrimination related to family leave has been eradicated? Is there any room in Congress's scheme in which more women than men *choose* to care for their sick family members? Some commentators are quite straightforward about their vision of the future, *e.g.*:

> In order to achieve equal opportunity for women in the workplace, the perception that women are the caregivers in our society must be altered, and men should be given more support and encouragement to take on the caregiver function. As long as men are not viewed equal to women as caregivers, women will be disadvantaged in the workplace.

Twomey, Rosemarie Feuerbach & Jones, Gwen E., *The Family and Medical Leave Act of 1993: A Longitudinal Study of Male and Female Perceptions*, 3 Emp. Rts. & Emp. Pol'y J. 229, 248 (1999).

The gender-neutral language of the FMLA is intended to make it more acceptable for men to take family leave despite strong cultural (and many individual) preferences to women to assume caretaking roles in two-parent households. Reality, however, intrudes. Even though men are equally entitled to take leave of their jobs to care for family under the FMLA, they are far less likely to do so for at least three reasons: First, because men tend to have higher salaries, households will choose to forgo the woman's income. Second, society has traditionally viewed women as primary caretakers. Finally, men are reluctant to take leave for family reasons because of the detrimental effect on their careers. Bohrer, Jeremy I., *You, Me, and the Consequences of Family: How Federal Employment*

Law Prevents the Shattering of the "Glass Ceiling," 50 Wash. U. J. Urb. & Contemp. L. 401, 406 (1996).

The world Congress seems to envision—in which men and women avail themselves of family leave equally—has never existed in modern times, even in countries with so-called "progressive" leave. For example, as of 1994, Sweden was the only nation to have officially attempted to increase paternal involvement in child care through government planning. But despite the government's best efforts, fathers rarely take child care leave. Most professionals in Sweden are men. As in the United States, their advancement often depends on visibility and continued activity. Taking an extended leave causes work to pile up and may decrease opportunity for advancement. They fear stigmatization. They also fear employer sanctions and discrimination. Despite Sweden's attempts at legislating social values, the perception that men should be the main source of the family's income is still prevalent in Swedish society. *Parental Leave*, 13 Am. J.L. & Med. at 793-95.

The bottom line is that all employees, regardless of gender, may face difficulties in receiving leave for family medical purposes. By creating an entitlement to twelve weeks of caretaker leave, subsection (C) went far beyond anything necessary to protect gender inequality and is unconstitutional as it applies to the states as employers. While invalidation of subsection (C)'s enforcement against state employers limits plaintiffs' federal court remedies, it serves the more important purpose of limiting congressional power, preserving federalism, and maintaining a balance of power among the branches of federal government. Seegers, Katherine K., *Kimel and Beyond: Fifth Circuit Tackles Sovereign Immunity and the Family and Medical Leave Act in Kazmier v. Widmann*, 54 SMU L. Rev. 453, 459 (2001).

CONCLUSION

Section 5 of the Fourteenth Amendment to the United States Constitution grants Congress the power to *enforce* against the states the right to equal protection of the laws. This grant of power was neither a blank check for Congress to legislate generally upon life, liberty, or property, nor an authorization to decide what "equal protection of the laws" means. When Congress grants individuals greater rights against the states or imposes greater obligations on the states than the Fourteenth Amendment requires, Congress is no longer acting within its Section 5 power.

The FMLA advances a policy that Americans can be proud to espouse. It is indicative of the good will, optimism, and innovation of the American people, who have shown through the FMLA their willingness to help families balance work and family. But good will is not a constitutional entitlement and, as a matter of constitutional law, Congress has no power to make the states promote it under Section 5 of the Fourteenth Amendment. Permitting Congress to redefine constitutional protections in this fashion ignores the Founders' concern over an all too powerful federal government and empowers Congress to obliterate state sovereignty in all circumstances simply by asserting that it is "enforcing" the Equal Protection Clause. Because the FMLA purports to create a substantive constitutional right and because the legislation is neither

congruent nor proportional to existing constitutional rights, the judgment of the Ninth Circuit Court of Appeals should be reversed.

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Respectfully submitted,

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