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 FOR THE PETITIONER

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QUESTION PRESENTED

Whether 29 U.S.C. § 2612(a)(1)(C) exceeds Congress's enforcement authority under Section 5 of the Fourteenth Amendment.

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JURISDICTION

The district court exercised jurisdiction under 28 U.S.C. § 1331. The court of appeals asserted jurisdiction pursuant to 28 U.S.C. § 1291 and entered judgment on December 11, 2001. Petitioners filed their petition for writ of certiorari on March 11, 2002. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The relevant provisions of the Fourteenth Amendment to the United States Constitution provide:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The pertinent provision of the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2612(a)(1), is as follows:

> (1) Entitlement to leave
>
> Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:
>
> > (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.
> >
> > (B) Because of the placement of a son or daughter with the employee for adoption or foster care.
> >
> > (C) 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.
> >
> > (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

Additional provisions of the FMLA that may aid the Court are set forth in the appendix to the petition for writ of certiorari. Pet. App. 61a-65a.

STATEMENT

Section 2612(a)(1)(C) of the FMLA does not validly abrogate the States' Eleventh Amendment immunity for at least two reasons. First, Congress was not legislating to remedy unconstitutional state conduct when it enacted the provision, and second, the provision does not remedy any

asserted unconstitutional conduct in a congruent and proportional manner.

In asserting its position, Nevada does not challenge the soundness of § 2612(a)(1)(C) or the FMLA generally. To the contrary, it embraces this labor standard as a means to strengthen families and the economy. Nevada does not stand alone in this regard. As Congress has recognized, at least thirty States had adopted family-care or medical leave policies by the time the FMLA was enacted. H.R. REP. NO. 103-8, at 32-33 (1993); S. REP. NO. 103-3, at 20-21 (1993).

The focus of this dispute is Congress's authority to regulate the employment policies of sovereign States, specifically whether Congress may authorize private suits for money damages against States that do not comply with federal leave policies. Under the American system of dual sovereignty, Congress's ability to exercise its constitutional powers is limited by the Tenth and Eleventh Amendments, which together preserve the inherent powers and dignity of the States. *See Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). The Eleventh Amendment, in particular, guarantees that Congress cannot subject States to private suits for money damages except as part of a scheme enacted under Section 5 of the Fourteenth Amendment to remedy unconstitutional conduct. U.S. CONST. amend XI; U.S. CONST. amend XIV; *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996). When it legislates under this Section 5 power, Congress can enact only those remedies that are congruent and proportional to the asserted unconstitutional conduct. *See City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

Section 2612(a)(1)(C) cannot be justified as a remedy to unconstitutional discrimination. The States do not engage, and Congress has never suggested that they engage, in unconstitutional discrimination when granting family-care

leave to their employees. Therefore, regardless of the FMLA's value as a social policy, § 2612(a)(1)(C) is unconstitutional to the extent it authorizes suits against States in violation of the Eleventh Amendment.

This is not to say that state employees have no remedy if they are wrongly denied § 2612(a)(1)(C) leave. If States improperly deny FMLA leave, a state employee's rights can be vindicated through § 1983 and *Ex parte Young* suits, and actions may be filed against States by the Federal Government. *See* 29 U.S.C. §§ 2617(b)(2)-(3), (d); 42 U.S.C. § 1983; *Monroe v. Pape*, 365 U.S. 167, 171-85 (1961), *overruled in part by Monell v. Dep't of Soc. Serv.*, 436 U.S. 658 (1978); *Ex parte Young*, 209 U.S. 123 (1908). Finally, in some States, the employees may have a remedy under state law. Most States have family-care leave policies similar, if not superior, to the FMLA.

A. History Of State Leave Policies.

Demonstrating Justice Brandeis' belief that States serve as laboratories for social policy, the States have developed and implemented innovative family-care leave policies for over half a century. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

As documented by the State *amici*, States have long led the way in establishing gender-neutral family-care leave. Br. for *Amici* States 5-14. In 1945, at least sixteen States had sick leave policies pursuant to which employees could take paid sick leave to care for ill family members. *See Nelson v. Dean*, 168 P.2d 16, 20 (Cal. 1946); Br. for *Amici* States 6 n.3 (citing sixteen state policies discussed in

Nelson). By 1991, two years before § 2612(a)(1)(C) was enacted, these leave policies were so prevalent "the Office of Personnel Management (OPM) found that 46 State governments . . . allow[ed] use of sick leave for family illnesses." H.R. REP. NO. 103-722, at 2.

In addition, States have a history of establishing experimental leave programs like "catastrophic leave"—a leave donation program under which employees with unused paid leave may donate their leave entitlements to other employees. In 1989, Nevada adopted a catastrophic leave system. NEV. REV. STAT. 284.262. Numerous other States, including Alabama, Alaska, Kansas, Ohio and Oklahoma, have similar programs.[1]

Without a doubt, States have outperformed the Federal Government in providing family-care leave. Federal employees were authorized to use accrued sick leave as paid family-care leave only *after* the FMLA was passed. *See* Federal Employees Family Friendly Leave Act, Pub. L. No. 103-388, 108 Stat. 4079 (1994) (codified at 5 U.S.C. § 6307(e) (2000)). Federally-mandated leave, moreover, tends to be less generous than state family-care leave. The FMLA, for example, provides leave without pay for the care of a child, spouse, or parent, but many state policies provide *paid* leave for the care of *extended* family members. 29 U.S.C. § 2612(a)(1)(C); Br. for *Amici* States 7-8.

B. History Of Nevada's Leave Policies.

Like the majority of States, Nevada provides its employees the same, and in some instances more, leave than is required by § 2612(a)(1)(C). Like the FMLA, Nevada's

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[1] *See, e.g.*, ALA. ADMIN. CODE R 670-X-14-.04 (1991); ALASKA STAT. § 39.20.245 (2001); KAN. STAT. ANN. § 75-5549 (2001); OHIO ADMIN. CODE § 123:1-46-05 (2002); OKLA. STAT. tit. 74, § 840-2.23 (2002).

family-care leave policies have always been, and continue to be, gender neutral.

Nevada was one of the first States to provide the kind of leave at issue here—family-care leave. Since 1953, forty years before the FMLA was passed, Nevada public employees have been authorized to request leave without pay in order to care for a sick family member. *See* NEV. REV. STAT. 284.360(1). By 1973, a state employee could request from thirty days to one year of unpaid leave "for any satisfactory reason," including family-member care. Br. App. A-4-A-5. This provision, unlike the FMLA, defines "family" broadly to include extended family. *Id*. A-1-A-3. In 1984, these policies were codified in the Nevada Administrative Code at NEV. ADMIN. CODE § 284.578. Br. App. B-2-B-4. After the FMLA was enacted, Nevada adopted laws identical to the FMLA, thereby entitling state employees, as a matter of state law, to the benefits established in § 2612(a)(1)(C). NEV. ADMIN. CODE §§ 284.5234, 284.5811; NEV. REV. STAT. 284.360(5). Br. App. B-5-B-6. For the Court's convenience, these Nevada code provisions are set forth in the appendix to this Brief. *See* Br. App. A & B.

By 1973, Nevada's public employees were also authorized to use five days of *paid* sick leave per year to care for a sick family member or to cope with a death in the family. Br. App. A-1-A-3; *see* NEV. REV. STAT. 284.345(1) (authorizing Nevada's director of personnel to adopt regulations governing use of leave, with and without pay, by state employees). State employees could take paid leave *in excess* of five days "where an employee's attendance is required to provide, participate in or arrange for intensive care and/or treatment or receive extensive training in the proper utilization of equipment, techniques and supplies essential for continuous maintenance of good health." Br. App. A-2.

Since this time, the amount of paid family-care leave awarded to state employees has only increased. In 1984, the entitlement to paid family-care leave doubled from five to ten days. Br. App. B-2-B-3. In 2000, the entitlement was increased to 120 hours, but the 120-hour limitation does not apply if the employee's leave is authorized under the FMLA. Br. App. B-4.

Beyond this standard unpaid and paid leave, Nevada has, since 1989, allowed state employees to request special "catastrophic leave" after an employee exhausts his or her accrued sick and annual leave. Act of June 15, 1989, ch. 334, §§ 2-4, 1989 Nev. Stat. 693. Under this program, state employees may donate their accrued sick leave to a specific employee with unusual needs or to a general catastrophic leave fund administered by each state department. NEV. REV. STAT. 284.362(1). An employee can use catastrophic leave to aid a member of "the employee's immediate family" who has "a serious illness" or has been in an "accident which is life threatening or which will require a lengthy convalescence." NEV. REV. STAT. 284.362(1)(a)(2). This provision, moreover, defines "family" more broadly than the FMLA. Br. App. B-5-B-6.

Finally, Nevada has authorized state employees to enforce these statutory leave benefits through civil actions in state court. Specifically, under Nevada Revised Statutes 41.031(1), Nevada has waived its immunity to suits of this kind. *But see* NEV. REV. STAT. 41.031(3) (preserving Nevada's Eleventh Amendment immunity in federal court).

C. History Of The Family Medical Leave Act.

Long after Nevada implemented its comprehensive family-care leave policy, Congress initiated debate on a national leave program. *See* H.R. REP. 103-8 at 18. In April 1985, Representative Patricia Schroeder introduced

the first national leave bill, H.R. 2020 or the Parental and Disability Leave Act of 1985, in the House of Representatives. H.R. REP. 103-8 at 18. Under this bill, employers were required to provide eighteen weeks of unpaid leave over a twenty-four month period for the birth, adoption, or serious illness of a child. H.R. 2020, 98th Cong. § 103(a) (1985).

After the House failed to take action on H.R. 2020, Representative Clay sponsored a similar bill the following year. This bill, H.R. 4300, had the same leave provisions as H.R. 2020 but applied only to employers with five or more employees. H.R. 4300, 99th Cong. §§ 102(3), 103(a) (1986). Around the same time, Senator Christopher Dodd introduced a similar bill in the Senate, S. 2278. S. 2278, 99th Cong. §§ 103, 104 (1985). The 99th Congress adjourned, however, before final action was taken on either S. 2278 or H.R. 4300. H.R. REP. 103-8 at 19.

In 1987, Representative Clay and Senator Dodd introduced national leave legislation for a third time. H.R. 925, 100th Cong. (1987) (Family and Medical Leave Act); S. 249, 100th Cong. (1987) (Parental and Temporary Medical Leave Act). These bills were the first to include a provision for family-care leave. *See* H.R. 925 § 103(a)(1)(C); S. 249 § 103. Like their predecessors, however, these bills were not passed by Congress.

Representative Clay and Senator Dodd introduced the fourth national leave bills, H.R. 770 and S. 345, in 1989. S. 345, which applied to employers with twenty or more employees, required employers to provide ten weeks of family-care leave and thirteen weeks of personal medical leave. S. 345, 101st Cong. §§ 102(4), 103(a)(1), 104(a)(1) (1989). H.R. 770, in contrast, required ten weeks of family-care leave and fifteen weeks of personal medical leave, and it applied to employers with fifty or more employees for

three years after the legislation's enactment, and to employers with thirty-five or more employees thereafter. H.R. 770, 101st Cong. §§ 101(5), 103(a), 104(a) (1989). H.R. 770 was subsequently amended to provide twelve weeks of leave in all circumstances, *see* H. Amdt. 442, 101st Cong. (1990) (Gordon Amendment), and as amended, was adopted by both Houses of Congress. The bill was vetoed, however, by President George H.W. Bush. H.R. REP. 103-8 at 19-20.

In 1991, the Family and Medical Leave Act of 1991 was introduced as H.R. 2 and S. 5. H.R. 2, 102d Cong. (1991); S. 5, 102d Cong. (1991) H.R. REP. 103-8 at 20. Both bills were identical to the 1989 legislation vetoed by President Bush. The 1991 legislation was also vetoed by President Bush. H.R. REP. 103-8 at 20.

In 1993, after years of debate and extensive negotiation, Congress again passed a national leave bill identical to the 1989 and 1991 legislation vetoed by President Bush. *See* Family And Medical Leave Act, H.R. 1, 103rd Cong. (1993). In the same year, this legislation was signed into law by President Clinton. That law, the FMLA, is at issue here.

By its terms, the FMLA grants public-sector[2] and private-sector employees the right to take twelve weeks of leave for

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[2] Nevada does not dispute that Congress intended the FMLA to apply to state governments. The FMLA expressly provides that the kind of employer required to comply with the Act includes "public agencies," as that term is defined in the Fair Labor Standards Act ("FLSA"). 29 U.S.C. § 2611(4)(A)(iii). The FLSA definition of public agencies includes state governments. 29 U.S.C. § 203(x). This Court ruled in *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67-68 (2000), that a similar reference to state governments in another federal statute clearly expressed Congress's intent to include states within the legislation's scope.

the birth or adoption of a child, or to care for a family member's (or the employee's own) serious health condition. 29 U.S.C. § 2612(a)(1). Employees may take the leave intermittently, but employers may require employees to substitute accrued paid leave for FMLA leave. *Id.* § 2612(b), (d)(2). The FMLA also guarantees, in most cases, that an employee will retain his or her job and benefits during and after the leave period. *Id.* § 2614.

The FMLA contains specific enforcement provisions that authorize employees, whose rights under the Act have been violated, to file civil actions for money damages, liquidated damages, equitable relief, and attorneys' fees. *Id.* § 2617(a)(1)-(3). The Secretary of the United States Department of Labor may also file civil actions against employers for money damages or injunctive relief. *Id.* § 2617(b)(2)-(3), (d).

The purpose of the FMLA is clearly stated in 29 U.S.C. § 2601. In this section, Congress provides that the FMLA is a response to the changing demographics of the American workforce, a change that has seriously impacted family care. Congress observed that "the number of single-parent households and two parent households in which the single parent or both parents work is increasing significantly." *Id.* § 2601(a)(1). The "lack of employment policies to accommodate working parents," however, was forcing "individuals to choose between job security and parenting." *Id*. § 2601(a)(3).

In light of these new pressures on families, Congress enacted the FMLA to "balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity." 29 U.S.C. § 2601(b)(1). To that end, Congress required employers to grant "reasonable leave for medical reasons, for the birth or

adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition." *Id.* § 2601(b)(2). The leave was intended not only to help employees but also "[to] accommodat[e] the legitimate interests of employers." *Id*. § 2601(b)(3). Finally, Congress required employers to grant FMLA benefits "on a gender-neutral basis" so that the FMLA would be "consistent with the Equal Protection Clause." *Id.* § 2601(b)(4).

Although Congress cited the Equal Protection Clause in support of its decision to create gender-neutral leave benefits, it did not invoke Section 5 of the Fourteenth Amendment as a basis for its authority to enact the FMLA. Nor did Congress mention in any finding that States were engaging in unconstitutional conduct.

The FMLA's legislative history confirms that Congress's goal in enacting a national leave policy was to begin to define a balance between family care and productivity by establishing a minimum labor standard.

Emphasizing that her leave bill was intended to address a family-care crisis, Representative Schroeder stated: "I think one of the problems we have had . . . in America is that we have viewed it as a male versus female problem and it is really a child's problem, the future's problem, the family's problem." *Parental and Medical Leave Act of 1986: Joint Hearing on H.R. 4300 Before the Subcomm. On Civil Service and the Subcomm. On Compensation and Employee Benefits*, 99th Cong. 33 (1986).

Echoing Representative Schroeder's view, Senator Dodd urged passage of a national leave policy because "we ought to at least help guarantee that parents who already have jobs do not lose them because they have to spend unpaid time at home upon the birth, adoption or serious illness of a child." *Parental and Medical Leave Act of 1987: Hearings on S.*

249 Before the Subcomm. On Children, Family, Drugs and Alcoholism, Part I, 100th Cong. 6-7 (1987) ("*Part I, 1987 Hearings*").

Like Representative Schroeder and Senator Dodd, the House and Senate Reports state that the FMLA's benefits were needed because employers had failed to respond to three demographic changes: (i) the dramatic increase in the female civilian labor force and the necessity that households have two wage earners; (ii) the "equally dramatic" increase in single-parent homes; and (iii) the aging of the American population. H.R. REP. 103-8 at 22-24; S. REP. 103-3 at 5-6. These demographic shifts both "intensified the tensions between work and family," H.R. REP. 103-8 at 21; S. REP. 103-3 at 4, and acted as a "substantial drag on national productivity." S. REP. 103-3 at 7. Because the FMLA responds to changes in the labor market, the House and Senate Reports refer to the Act as a minimum labor standard, similar to the minimum wage. H.R. REP. 103-8 at 21; S. REP. 103-3 at 4.

The testimony underlying these reports similarly identifies the need for balance between family care and economic productivity as the impetus for the FMLA. The Senate committee overseeing the FMLA held ten hearings between 1987 and 1993 to consider the FMLA and its predecessor acts. S. REP. 103-3 at 7. The House committee conducted similar hearings over the same period. H.R. REP. 103-8 at 18-21.

Most of this testimony concerned FMLA provisions that are not at issue here, such as maternity and paternity leave. With respect to family-care leave, the relevant leave provision, the Senate and House committees heard a wide array of testimony. Many men and women testified that they had compromised their job security by taking leave to care for an ill child or parent. H.R. REP. 103-8 at 25-26;

S. REP. 103-3 at 9-11. In the same vein, Dr. Robyn Stone of the National Center for Health Services Research and Health Care Technology Assessment, testified that eleven percent of individuals requiring leave to care for an ailing spouse or family member had to quit their jobs. *Id.* at 11. According to a survey for the American Association of Retired Persons, thirty-eight percent of working caregivers had to change from full-time to part-time employment, and twenty percent had their health benefits reduced. *Id.* In addition, pediatricians testified that a seriously ill child's recovery is greatly enhanced by parental care but that a parent's job security is important to ensure that a sick family member has uninterrupted insurance coverage. *Id.* at 10.

The United States Department of Justice ("DOJ") offered extensive testimony about federally-mandated leave. In 1987, then-Assistant Attorney General Stephen Markman testified on behalf of DOJ about the constitutionality of Congress's proposed nationally-mandated leave and concluded that such leave would likely violate the Tenth and Eleventh Amendments of the United States Constitution. *Parental and Medical Leave Act of 1987: Hearings on S. 249 Before the Subcomm. On Children, Family, Drugs and Alcoholism*, *Part II*, 100th Cong. 508 (1987) ("*Part II, 1987 Hearings*"). Specifically, Assistant Attorney General Markman observed that the proposed leave legislation "purports to authorize actions for damages against state governments in federal court. In all likelihood, such damage actions would be prohibited by the Eleventh Amendment." Br. App. C-13 (written testimony of Assistant Attorney General Markman). The full text of Assistant Attorney General's prepared testimony is set forth in the appendix to this Brief. *See* Br. App. C.

Consistent with its 1987 position, DOJ currently refuses to defend the FMLA's personal leave provision, 29 U.S.C.

§ 2612(a)(1)(D), as a valid abrogation of sovereign immunity. Lodging by United States, filed May 20, 2002 (Letters from Solicitor General Theodore B. Olson to the House and Senate).

D. History Of The Case.

This case concerns the leave request of a former Nevada public employee, William Hibbs ("Hibbs"). Hibbs began working for the Nevada Department of Human Resources on February 6, 1995. R. Doc. 8, D. Nev., Nev.'s Summ. J. Mot. at 2-4. In October 1996, Hibbs made his first request for leave under § 2612(a)(1)(C) of the FMLA to care for his ailing wife. *Id.* In April and May 1997, Hibbs again requested FMLA leave, as his wife recovered from an accident and neck surgery. *Id.* Hibbs was subsequently authorized to take twelve weeks of § 2612(a)(1)(C) leave intermittently between May 1, 1997, and December 31, 1997, but was required to substitute appropriate types of paid leave (*i.e.*, annual, sick, and catastrophic paid leave) for unpaid FMLA leave. Pet. App. 2a; R. Doc. 8, D. Nev., Nev.'s Summ. J. Mot. at 3-4; *see also* 29 U.S.C. § 2612(d)(2) (allowing employers to require substitution of paid leave). Between June and September 1997, Hibbs requested nearly 560 hours of catastrophic leave. Pet. App. 2a. In all, during 1997, Hibbs received twelve weeks of § 2612(a)(1)(C) leave and over 500 hours of paid leave through Nevada's personal and family-care leave programs. R. Doc. 8, D. Nev., Nev.'s Summ. J. Mot. at Exhibit N; *see* NEV. REV. STAT. 284.362; NEV. ADMIN. CODE § 284.558.

As a result of his numerous leave requests, Hibbs failed to appear for work for nearly half the year and at no time after August 5, 1997. Pet. App. 2a. By October 1, 1997, Hibbs had exhausted his twelve weeks of § 2612(a)(1)(C) leave and all the paid leave available through his sick, annual, and catastrophic leave accounts. R. Doc. 8, D. Nev.,

Nev.'s Summ. J. Mot. at 5. Nonetheless, Hibbs failed to return to work. Pet. App. 3a. Eventually, Nevada informed Hibbs that if he did not return he would be subject to disciplinary action. *Id.* Hibbs continued to miss work and was terminated after a disciplinary hearing. *Id.*

On April 20, 1998, Hibbs filed this action against Nevada in the United States District Court for the District of Nevada. J.A. 6. He sought money damages, injunctive relief, declaratory relief, and attorneys' fees, asserting both state and federal claims. J.A. 12-18. With respect to the federal claims, Hibbs alleged that the State had violated both the FMLA by failing to properly account for his leave time and the Due Process Clause of the United States Constitution by failing to conduct a proper pre-termination hearing. J.A. 12-14. The state law claims were based on asserted violations of state personnel statutes, the Due Process Clause of the Nevada Constitution and other state law causes of action. Pet. App. 3a; J.A. 14-16. Hibbs did not allege that Nevada discriminated against him based on his gender when considering his leave requests.

On June 4, 1999, the district court granted summary judgment in favor of Nevada primarily on the ground that the Eleventh Amendment barred Hibbs' FMLA claim. Pet. App. 59a-60a. In relevant part, the court reasoned that the FMLA is not a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment (and thus does not validly abrogate sovereign immunity) because the Act establishes an economic benefit instead of a remedy to discrimination. *Id.* at 54a-55a.

Hibbs timely appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit, and the United States intervened to defend the constitutionality of § 2612(a)(1)(C). Pet. App. 4a. The Ninth Circuit reversed the district court's dismissal of Hibbs' FMLA

claims on the ground that § 2612(a)(1)(C) is a valid exercise of Congress's Section 5 power. Pet. App. 6a.

At the outset of its opinion, the Ninth Circuit stated that this Court's decisions in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), and *Kimel v. Florida Board of Regent*s, 528 U.S. 62 (2000), "offer[ed] limited guidance" because those cases "depended heavily upon the fact that age and disability classifications are not subject to heightened scrutiny under the Equal Protection Clause." Pet. App. 11a. The circuit court also distinguished the decisions of seven other federal circuit courts, all of which had held that the FMLA does not validly abrogate sovereign immunity.[3] *Id.* at 5a.

The Ninth Circuit next outlined three independent rationales for its decision. *First*, the Ninth Circuit held that the FMLA is presumptively constitutional. *Id.* at 17a-19a. The court reasoned that the Act was designed to remedy gender discrimination. Because state-sponsored gender discrimination is presumptively unconstitutional, "Section 5 legislation that is intended to remedy or prevent gender discrimination is *presumptively constitutional*. That is, the burden is on the challenger of the legislation to prove that [s]tates have *not* engaged in a pattern of unconstitutional conduct." *Id.* at 18a (emphasis added). *Second*, the Ninth Circuit held that the FMLA's (and the predecessor acts') legislative history contained sufficient evidence of gender discrimination to justify Congress's exercise of Section 5

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[3] *See Laro v. New Hampshire*, 259 F.3d 1 (1st Cir. 2001); *Lizzi v. Alexander*, 255 F.3d 128 (4th Cir. 2001), *cert. denied*, 122 S. Ct. 812 (2002); *Townsel v. Missouri*, 233 F.3d 1094 (8th Cir. 2000); *Chittister v. Dep't of Cmty. & Econ. Dev.*, 226 F.3d 223 (3d Cir. 2000); *Kazmier v. Widmann*, 225 F.3d 519 (5th Cir. 2000); *Sims v. Univ. of Cincinnati*, 219 F.3d 559 (6th Cir. 2000); *Hale v. Mann*, 219 F.3d 61 (2d Cir. 2000); *Garrett v. Univ. of Ala. Bd. of Tr.*, 193 F.3d 1214 (11th Cir. 1999), *rev'd on other grounds*, 531 U.S. 356 (2001).

power. *Id.* at 20a-22a. *Third*, the court held that Congress properly sought to remedy the effect of historical state conduct that perpetuated the stereotype that women are family caregivers. Pet. App. 23a-36a. Considering this historical evidence, the Ninth Circuit concluded that the FMLA is an "appropriately limited scheme designed to undo the impact of that history of state-supported and mandated sex discrimination as it continues to affect private and public employment." Pet. App. 23a.

SUMMARY OF ARGUMENT

I. The FMLA's text and history fail to indicate that § 2612(a)(1)(C) is an exercise of Congress's authority under Section 5 of the Fourteenth Amendment. There is no express reference to Section 5 in the Act itself, and the FMLA's legislative history fails to demonstrate that Congress intended to exercise its remedial authority. The circumstances surrounding the FMLA's enactment, moreover, indicate that the Act is an exercise of Congress's power under the Commerce Clause. Section 2612(a)(1)(C) creates a minimum labor standard that was meant to aid workers, not to remedy perceived discrimination. In this way, § 2612(a)(1)(C) is markedly differently from the other federal statutes this Court has previously reviewed. Here, the intent of Congress to exercise its Fourteenth Amendment power cannot be inferred, *Pennhurst State Hosp. v. Halderman*, 451 U.S. 1, 16 (1980), and no "legislative purpose or factual predicate" for such intent can be discerned from the FMLA's history. *EEOC v. Wyoming*, 460 U.S. 226, 244 n.18 (1983). Because remedying discrimination was not the actual purpose of § 2612(a)(1)(C), any *post hoc* rationalization of the law as remedial must be rejected. *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982). § 2612(a)(1)(C).

II. Even if § 2612(a)(1)(C) were intended to remedy past discrimination, the section would not be valid Section 5 legislation because it is not congruent and proportional to any alleged unconstitutional conduct. Section 2612(a)(1)(C) is not anti-discrimination legislation. It does not ban discrimination in the granting of leave or prohibit non-gender-neutral leave policies. Instead, § 2612(a)(1)(C) requires States to provide an extra-constitutional benefit of twelve weeks of family-care leave.

A. As a threshold matter, States may, consistent with the Constitution, deny or require a benefit so long as their benefits policies have a rational basis and are not intentionally discriminatory. *Danridge v. Williams*, 397 U.S. 471, 485 (1970); *Washington v. Davis*, 426 U.S. 229, 242 (1976). Accordingly, Congress may prohibit only a narrow range of state conduct pertaining to the administration of benefits.

B. Congress's exercise of Section 5 authority is congruent to unconstitutional conduct only if it responds to a pattern or practice of state discrimination. *Garrett*, 531 U.S. at 368. When Congress enacted the FMLA, it did not refer to any pattern or practice in the administration of state leave benefits that was unconstitutional. To the contrary, the legislative history demonstrates that Congress looked to the States for guidance. Congress recognized the States' innovative family-care leave policies and relied on the States' experience with those policies to conclude that the FMLA would not be costly or cause discrimination. Accordingly, "Congress had no reason to believe that broad prophylactic legislation was necessary in this field." *Kimel*, 528 U.S. at 91; *see Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. at 627, 644 (1999) (referring to primary point of legislative history).

C. The substantive benefit established in § 2612(a)(1)(C) is not proportionate to any alleged unconstitutional state conduct. It applies to all fifty States even though numerous States have a long history of providing gender-neutral family-care leave. In addition, the statute has no termination provision. In this way, § 2612(a)(1)(C) is distinguishable from the Voting Rights Act the Court upheld in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). Finally, the twelve-week leave period established in § 2612(a)(1)(C) is disproportionate to any unconstitutional denial of family-care leave. The twelve-week period is based on child development needs, not family needs or discrimination. Because § 2612(a)(1)(C) amounts to a substantive change of the Fourteenth Amendment's guarantees, it cannot be construed as valid Section 5 legislation or result in the abrogation of Eleventh Amendment immunity.

III. The Ninth Circuit's contrary analysis is incorrect. First, the Ninth Circuit wrongly presumed that § 2612(a)(1)(C) remedies gender discrimination and erroneously required Nevada to prove that it had *not* engaged in unconstitutional conduct. In adopting this presumption, the Ninth Circuit misread the FMLA and this Court's Section 5 jurisprudence. Second, the Ninth Circuit cobbled together and misinterpreted snippets of evidence about leave benefits in the FMLA's legislative history and, as a result, wrongly concluded that the history demonstrates a pattern of state discrimination. Finally, the Ninth Circuit erred by relying on archaic state laws to conclude that § 2612(a)(1)(C) is an appropriate remedy to past state discrimination.

ARGUMENT

Nevada does not contest the FMLA's importance as social policy or Congress's power to authorize suits against

private employers for violating § 2612(a)(1)(C). No one disputes that States have immunity from lawsuits by private citizens for money damages. *See* U.S. CONST. amend. XI; *Alden v. Maine*, 527 U.S. 706, 727 (1999). For over a century, moreover, this Court has held that Congress may not abrogate a State's immunity from private damages suits through the exercise of its Article I power. *Hans v. Louisiana*, 134 U.S. 1, 16 (1890); *Seminole Tribe*, 517 U.S. at 72-73. The narrow issue here is simply whether § 2612(a)(1)(C) is a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment that abrogates the States' immunity. It is not.

Like the legal question presented, the effect of holding § 2612(a)(1)(C) unconstitutional would be limited. To be sure, such a holding would preserve the States' sovereign powers, protect their fisc, and thus have tremendous importance to the States. *See* THE FEDERALIST NO. 81, at 487-88 (Alexander Hamilton). But the holding would not eliminate all remedies against States for violating state and federal leave provisions. If, for example, state officers were to violate the Equal Protection Clause by granting leave in an intentionally discriminatory manner, state employees could commence actions for money damages under 42 U.S.C. § 1983. Prospective relief against state officers may also be available under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). In addition, States would not be immune from claims filed by the Federal Government in federal court. *See* 29 U.S.C. § 2617(b)(2); *Employees of the Dep't of Pub. Health & Welfare v. Missouri Pub. Health Dep't*, 411 U.S. 279, 286 (1973). Finally, States like Nevada, which have waived their immunity from suit in state court, may be sued in state court if they violate state leave laws.

I. SECTION 2612(a)(1)(C) IS NOT AN EXERCISE OF CONGRESS'S AUTHORITY UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT.

When determining whether a statute is a valid exercise of Congress's power under the Fourteenth Amendment, this Court examines, as a threshold matter, whether Congress intended to enforce the Amendment's guarantees. *Pennhurst*, 451 U.S. at 16 ("The case for inferring [Congress's] intent is at its weakest where, as here, the rights asserted impose *affirmative* obligations on the States. . . ."); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 321-23 (1934) (States retain immunity except where surrendered in the Constitutional Convention.). This inquiry follows from the Court's recognition that legislation should not be characterized as an exercise of Section 5 power unless the actual purpose of the law is to remedy past discrimination. Otherwise, parties to litigation could offer *post hoc* rationalizations of a law that are unrelated to congressional intent simply to further their damage claims. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982).

Any attempt to characterize § 2612(a)(1)(C) as Section 5 legislation is a *post hoc* rationalization of the provision that is unsupported by the FMLA's text or history. The FMLA's text fails to mention Section 5 of the Fourteenth Amendment, and nowhere indicates that § 2612(a)(1)(C) was intended to address unconstitutional gender discrimination. The FMLA's history is likewise silent on this point. In all the thousands of pages of congressional reports, hearing transcripts and floor debate about leave, Congress never suggested that § 2612(a)(1)(C) was intended to address unconstitutional state discrimination.

The fairest reading of the FMLA's text and history is that Congress was exercising its power under the Commerce Clause to create a minimum labor standard, similar to the minimum wage, when it enacted § 2612(a)(1)(C). No doubt, the provision was intended as a workplace regulation. Its express purpose is to "balance the *demands of the workplace* with the needs of families, to *promote the stability and economic security* of families, and to promote national interests in preserving family integrity." 29 U.S.C. § 2601(b)(1) (emphasis added); Pet. App. 62a.

The FMLA's history confirms that this was Congress's intent. For example, in 1987, Senator Christopher Dodd stated that national leave was necessary because "[w]e must no longer force parents to choose between caring for a new or sick child and their jobs." *Part I, 1987 Hearings*, *supra*, at 277. He hoped the Act would "promote the economic security of families by providing for job protected leave for parents." *Part II, 1987 Hearings*, *supra*, at 459.

In addition, the Senate Report summarized the impetus for the FMLA as follows:

> With men and women alike as wage earners, the crucial unpaid caretaking services traditionally performed by wives—care of young children, ill family members, aging parents—has become increasingly difficult for families to fulfill. When there is no one to provide such care, individuals can be permanently scarred as basic needs go unfulfilled. Families unable to perform their essential function are seriously undermined and weakened. Finally, when families fail, the community is left to grapple with the tragic consequences of emotionally and physically deprived children and adults.

S. REP. 103-3 at 7; *see also* H.R. REP. 103-8 at 24 (stating same). The House and Senate Reports further indicate that

the FMLA is "based on the same principle as the child labor laws, the minimum wage, Social Security, the safety and health laws, the pension and welfare benefit laws, and other labor laws that establish minimum standards for employment." H.R. REP. 103-8 at 21-22; S. REP. 103-3 at 4. In the "tradition of labor standards" the Act purported to address "significant new developments in today's workplace." S. REP. 103-3 at 5.

Contrary to its position in the Ninth Circuit and before this Court, DOJ represented to Congress that the goal of federally-mandated leave was simply "to enable employees to attend to family needs and at the same time continue with their jobs and careers." Br. App. C-2. Indeed, DOJ, like Nevada and the State *amici* here, characterized such leave as a standard employment "benefit like health insurance, pension plans, or paid vacation" that was best created through "[c]ollective bargaining agreements" instead of national legislation. *Id.*

Beyond characterizing federally-required leave as a labor standard, DOJ testified that federal leave legislation would be an exercise of Congress's "Commerce Clause . . . not [S]ection 5" power. *Id.* C-13 n.4. For this reason, DOJ concluded that the FMLA's authorization of private actions for damages against States "[i]n all likelihood . . . would be prohibited by the Eleventh Amendment." *Id.* C-13.

The reality that Congress was not legislating under Section 5 when it enacted § 2612(a)(1)(C) is clear not only from the FMLA's text and history but also from the circumstances surrounding its enactment. Since the first leave bill was introduced in 1985, Congress's primary concern has been to strike a balance between the benefits and costs of leave. H.R. REP. 103-8 at 29; S. REP. 103-3 at 12. Presumably to strike the proper balance (and secure the votes to pass the Act), the terms of the numerous leave

bills introduced in the House and Senate were varied. They required different amounts of leave, different types of leave—providing initially for child-care leave and only later for family-care leave—and applied to employers of varying sizes. *See supra* pp. 7-9. This wrangling over terms and costs is the hallmark of social-policy legislation, not anti-discrimination legislation. Congress ultimately determined the appropriate length and type of leave based on evidence of family needs and employer costs, not discrimination. *Parental Leave Act of 1987: Joint Hearing on H.R. 925 Before the Subcomm. On Labor Management Relations and the Subcomm. On Labor Standards*, 100th Cong. 206-207 (1987) (Representative Schroeder explaining the twelve-week time period in the Act is based on pediatric needs).

In addition, when the FMLA was enacted, Congress had *already* remedied leave-based gender discrimination generally through Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of gender, and through the Pregnancy Disability Act of 1978, which prohibits employers from discriminating on the basis of pregnancy and requires employers to grant pregnancy leave in the same manner that disability leave is granted. *Newport News v. EEOC*, 462 U.S. 669, 684 (1983); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 451-56 (1976). Most States, moreover, had already adopted gender-neutral family-care leave policies. *See supra* pp. 4-5; Br. for *Amici* States 5-14.

Congress viewed the FMLA as addressing social concerns that are not necessarily gender specific. Numerous *men* testified that they had suffered due to inadequate family-care leave and stressed the need to remedy *family* pressures, not pressures on women. *See supra* pp. 10-14. Because Congress was equally concerned with the leave demands of men *and* women, § 2612(a)(1)(C) cannot be

understood as legislation remedying a bias with respect to women.

Finally, Congress was chiefly concerned with leave policies in the private sector. As a cursory review of the legislative history demonstrates, the vast majority of testimony before Congress concerned the inadequacies of private-employer leave policies. To achieve its goal of creating a nationwide labor standard, moreover, Congress needed only to apply the standard to private employers. Because the Eleventh Amendment does not prohibit Congress from enacting legislation directed at private parties, Congress's failure to detail gender discrimination in the granting of leave is understandable: it did not need to identify discrimination to justify the Act's application to private parties. *United States v. Morrison*, 529 U.S. 598, 626-27 (2000).

Congress's failure to rely on, indeed mention, its Fourteenth Amendment power distinguishes this case from the Court's earlier Section 5 cases. *See Pennhurst*, 451 U.S. at 16 (observing that Congress's intent to remedy discrimination was clearly shown in the statutes at issue in *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1975); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)).

For instance, in *City of Boerne*, the Court reviewed the Religious Freedom Restoration Act, an act that contained an express provision that it was intended to protect religious freedom from substantially burdensome laws. *City of Boerne*, 521 U.S. at 515 (citing to 42 U.S.C. § 2000bb(b)). In *Florida Prepaid*, the Court considered the Patent Remedy Act, which Congress "justified as an acceptable method of enforcing the provisions of the Fourteenth Amendment." *Florida Prepaid*, 527 U.S. at 637 (citing to a Senate report

on the Patent Remedy Act). Moreover, in *Kimel*, Congress's intent to address discrimination was clear from the title of the Age Discrimination in Employment Act, the Act under review. *Kimel*, 528 U.S. at 66 (referring to 29 U.S.C. § 623(a)(1), which prohibits age discrimination). In *Morrison*, Congress's intent to address discrimination against women through the Violence Against Women Act was obvious from the Act's history. *Morrison*, 529 U.S. at 605-07 (describing the provision of the Act that heightens the punishment for gender-based crimes). Finally, in *Garrett*, the Court recognized that Congress intended to exercise its Section 5 power when it enacted the Americans with Disabilities Act because the Act expressly prohibited employers from "discriminating against a qualified individual with a disability because of the disability." *Garrett*, 531 U.S. at 360-61 (citing to 42 U.S.C. § 12112(a)).

Where, as here, Congress fails to identify Section 5 of the Fourteenth Amendment as the basis for legislation in the statute's text or legislative history and does not directly prohibit discrimination, the Court has refused to "quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." *Pennhurst*, 451 U.S. at 16; *see EEOC v. Wyoming*, 460 U.S. 226, 244 n.18 (1983) (Court should be able to "discern some legislative purpose or factual predicate that supports the exercise of [Fourteenth Amendment] power," even if Congress does not need to use magic words to invoke that power). In *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), for example, the Court, in an opinion authored by Justice O'Connor, rejected the argument that the "actual purpose" of a law was to remedy past discrimination absent evidence that Congress intended to exercise its Section 5 power. *Id.* at 730; *see also Florida Prepaid*, 527 U.S. at 642 (similarly noting legislative record

"provides little support for the proposition" Congress was actually seeking to remedy a Fourteenth Amendment violation).

Because Congress meant only to exercise its Commerce Clause powers when it adopted § 2612(a)(1)(C), the provision cannot now be rationalized as Section 5 legislation to circumvent the Eleventh Amendment. *Mississippi Univ. for Women*, 458 U.S. at 730; *Seminole Tribe*, 517 U.S. at 72-73.

II. SECTION 2612(a)(1)(C) IS NOT APPROPRIATE SECTION 5 LEGISLATION.

A. Scope Of The Right Protected By The FMLA.

Even if § 2612(a)(1)(C) were an exercise of Congress's Section 5 power, the provision would still be inappropriate remedial legislation (and thus would fail to validly abrogate the States' immunity) because it is not a congruent and proportional response to any alleged unconstitutional conduct. Section 5 of the Fourteenth Amendment empowers Congress to prohibit state conduct that violates the Equal Protection Clause. It also, in some instances, empowers Congress to prohibit a "somewhat broader swath of conduct" than is forbidden by the Constitution in order to remedy an unconstitutional practice. *Kimel*, 528 U.S. at 81; *see Garrett*, 531 U.S. at 365; *Fla. Prepaid*, 527 U.S. at 638. When Congress exercises this latter, broader authority, there must be a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520.

No one contends that § 2612(a)(1)(C) simply prohibits unconstitutional conduct. It does not ban discrimination in the granting of leave or prohibit non-gender-neutral leave policies. Section 2612(a)(1)(C) requires States to provide the substantive benefit of twelve weeks of family-care

leave. The question here is thus whether the FMLA's extra-constitutional benefit is a congruent and proportional remedy to some asserted unconstitutional practice.

To determine whether legislation is an appropriate exercise of Congress's power under Section 5, this Court begins by "identify[ing] with some precision the scope of the constitutional right at issue." *Garrett*, 531 U.S. at 366; *see College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 672-73 (1999). If the right at issue is narrow, Congress's authority to remedy violations of the right is correspondingly narrow. *Kimel*, 528 U.S. at 86 (judging proportionality against backdrop of how Constitution protects a particular right); *see South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (observing that Congress has wide latitude to adopt anti-discrimination policies in voting context because Constitution strictly prohibits such discrimination).

In *Garrett*, for example, this Court identified the constitutional right at issue in the Americans with Disabilities Act as the right of the disabled to be free from unconstitutional state discrimination. *Garrett*, 531 U.S. at 366. Similarly, in *Kimel*, the Court concluded that Congress was acting to prohibit unconstitutional discrimination against the elderly when it enacted the Age Discrimination in Employment Act. *See Kimel*, 528 U.S. at 82-86. The Court observed that the States could permissibly classify individuals based on their disability or age so long as the classification was reasonably related to a legitimate state interest. Thus, the range of unconstitutional conduct that Congress could "remedy" under Section 5 was fairly narrow. *See id.*; *Garrett*, 531 U.S. at 367-68.

Here, the range of conduct that Congress may prohibit is similarly narrow. A State may constitutionally provide or deny any benefit unless the State's benefits policy lacks a

rational basis or is intentionally discriminatory. "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Danridge v. Williams*, 397 U.S. 471, 485 (1970). "So long as its judgments are rational, and not invidious, the legislature's efforts . . . are not subject to a constitutional straitjacket." *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972). The basic principle governing a challenge to a state benefits policy is that the state legislature's discretion will not be disturbed by the courts "unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." *Mathews v. de Castro*, 429 U.S. 181, 185 (1976) (citing *Helvering v. Davis*, 301 U.S. 619, 640 (1937)).

Applying these principles, this Court has upheld statutes withholding benefits under a social welfare program because "the Due Process Clause can be thought to interpose a bar *only* if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." *Flemming v. Nestor*, 363 U.S. 603, 611 (1960) (emphasis added). Statutes granting new benefits have been similarly upheld because "only where there is manifest and unreasonable discrimination in fixing the benefits . . . can the legislative determination be said to contravene the [E]qual [P]rotection [C]lause." *Kansas City Southern Ry. Co. v. Road Imp. Dist. No. 3 of Sevier County*, 266 U.S. 379, 386-87 (1924).

Even if a State fails to provide a benefit and the denial disproportionately burdens one gender, the benefits policy is constitutional so long as it is not motivated by some discriminatory purpose. *See Washington v. Davis*, 426 U.S. 229, 242 (1976) (even if a neutral law has a disproportionately adverse affect on a racial minority, it is unconstitutional only if that impact can be traced to a discriminatory purpose). That is, to be unconstitutional the

State's decision to withhold a benefit must be "shaped" by a "gender-based discriminatory purpose." *Personnel Adm'r v. Feeney*, 442 U.S. 256, 276 (1979). "[P]urposeful discrimination is the condition that offends the Constitution." *Id.* at 274 (citations omitted).

Accordingly, there are very few instances in which a State's decision to deny a leave benefit altogether would be unconstitutional. Only if the State's denial has no rational basis or is shaped by a particular discriminatory animus would the State act unconstitutionally.

B. Congress Failed To Identify Any History Or Pattern Of Unconstitutional Discrimination In The States' Administration Of Leave.

Assuming § 2612(a)(1)(C) were intended to remedy some unconstitutional administration of family-care leave, the provision would be an appropriate remedy only if the States had engaged in a *pattern* or *practice* of this unconstitutional conduct. *Garrett*, 531 U.S. at 370. "Just as § 1 of the Fourteenth Amendment applies only to actions committed 'under color of state law,' Congress's § 5 authority is appropriately exercised only in response to state transgressions." *Id.* at 368 (emphasis added) (citations omitted); *Fla. Prepaid*, 527 U.S. at 640 ("It is this conduct then—unremedied patent infringement by the States—that must give rise to the Fourteenth Amendment violation that Congress sought to redress in the Patent Remedy Act."); *Katzenbach*, 383 U.S. at 308 ("The constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects."). "It is a most serious charge to say a State has engaged in a pattern and practice designed to deny its citizens the equal protection of the laws." *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring). The respect due to States and the structural limits on Congress's Section 5 power thus require actual

evidence of a pattern of unconstitutional state discrimination before Congress may validly abrogate sovereign immunity.

The legislative history of the FMLA is devoid of any evidence of unconstitutional state conduct in the granting of leave, let alone "a pattern of irrational state discrimination" or purposeful discrimination sufficient to support an exercise of Section 5 power. *Garrett*, 531 U.S. at 368; *see Fla. Prepaid*, 527 U.S. at 645. The Senate and House Reports mention no state misconduct. The FMLA's history is indeed so lacking in this regard that seven separate circuit courts have held the FMLA unconstitutional. *See supra* note 3. The only reference to the Fourteenth Amendment in the entire Act, moreover, is in a provision explaining Congress's decision to extend leave benefits to both men and women. 29 U.S.C. § 2601(b)(4).

Congress's failure to even mention unconstitutional state conduct, itself, is sufficient to demonstrate that § 2612(a)(1)(C) is not a valid Section 5 remedy. Where, as here, Congress is supposed to be enacting anti-discrimination legislation, one would expect "some mention" of unconstitutional state behavior. *Garrett*, 531 U.S. at 371.

The mention of unconstitutional conduct, indeed, should be significant. As the Court's decisions in *Garrett*, *Kimel*, and *Florida Prepaid* demonstrate, a disjointed or insignificant mention of general discrimination is insufficient to support Congress's exercise of Section 5 authority. *See Garrett*, 531 U.S. at 369-70 (holding the Americans with Disabilities Act was not appropriate Section 5 legislation even though the Act contained congressional finding regarding disability discrimination in society); *Kimel*, 528 U.S. at 90 (acknowledging Congress found widespread age discrimination present in the private sector); *Florida Prepaid*, 527 U.S. at 640-41 (holding that

pattern of unconstitutional state takings could not be inferred from only "two examples of patent infringement suits" against States).

Far from documenting a pattern of unconstitutional conduct, the FMLA's history demonstrates that Congress looked to the States for guidance. Congress was fully aware that States had adopted innovative family-care leave policies. Both the House and Senate Reports acknowledge that thirty States, the District of Columbia, and Puerto Rico had adopted some form of family-care leave in the years preceding the FMLA's enactment. H.R. REP. 103-8 at 32-33; S. REP. 103-3 at 20-21. Congress was told by Gerald McEntee, International President of the American Federation of State, County and Municipal Employees, that the National Conference of State Legislators endorsed family-care leave. *Part I, 1987 Hearings*, *supra*, at 384.

In a hearing before the Labor-Management Relations Subcommittee, Congresswoman Roukema observed that "[t]here can be no question but that this is an issue which has picked up tremendous momentum in the States." *The Family and Medical Leave Act of 1991: Hearing on H.R. 2 Before the Subcomm. on Labor-Management Relations*, 102d Cong. 4 (1991). In an earlier hearing on similar legislation, the Congresswoman stated that leave concerns "could be handled by the [S]tates, and indeed it is moving ahead rapidly in State legislatures." *Parental Leave Hearing on H.R. 925 Before the Committee on Small Business*, 100th Cong. 22 (1987). The former Governor of the State of New Jersey, Thomas Kean, testified that, "the States, as they have in so many areas, have been in the laboratories in the sense they've forged a path" with leave policy. *Hearing on H.R.2*, *supra*, at 40. *See Part I, 1987 Hearings*, *supra*, at 469-70 (Lieutenant Governor Richard Licht of Rhode Island stating that, as Justice Brandeis

foretold, States have acted as a series of family-care leave laboratories from which the federal government can learn).

Most telling, DOJ opposed the FMLA because it believed the States were enacting adequate family-care leave laws. In his testimony before a Senate subcommittee, then-Assistant Attorney General Markman observed that States were well ahead of the Federal Government in implementing leave:

> Already this year, more than half of the States have seen the introduction of parental leave proposals in their legislatures. Indeed, six of them have approved specific measures this year on the subject, while an additional 11 States already have in place similar enactments. In other words, more than one-third of the States already have in place some form of parental leave policy.

Part II, 1987 Hearings, *supra*, at 508 (statement of Stephen J. Markman, Assistant Attorney General, U.S. Department of Justice). In the Assistant Attorney General's opinion, state legislatures are better at creating leave policies because States "serve as laboratories of public policy experimentation [,and] [s]uch experimentation ultimately is likely to result in superior and in some instances naturally uniform policies." Br. App. C-10.

Congress relied on the States' experiences to determine whether a national leave policy would be cost effective. Legislators who had introduced state family-care leave laws in Wisconsin and South Carolina testified at hearings, and Senator Dodd questioned the Massachusetts Governor's advisor on women's issues about the State's experience with FMLA-like leave. *See Part II, 1987 Hearings*, *supra*, at 180, 361. Relying on testimony from Ellen Galinsky of the Families and Work Institute regarding family-care leave policies in Minnesota, Oregon, Rhode Island, and

Wisconsin, Congress concluded that such policies are cost effective. S. REP. 103-3 at 14-17; H.R. REP. 103-8 at 30.

Congress also relied on the States to conclude that a national leave policy would not *cause* gender discrimination. Senator Dodd lauded state leave plans as being non-discriminatory. He challenged arguments that the FMLA would lead to discrimination by citing the experiences of California, Colorado, and Montana, where female unemployment had decreased since the enactment of state-mandated leave policies. *See Part II, 1987 Hearings*, *supra*, at 194-95. When DOJ took the position the FMLA would lead to discrimination, Senator Dodd disagreed, citing the experiences of Massachusetts, Washington, and Connecticut. *Id.* at 533-34.

Congress, indeed, *complimented* the States' innovative approaches to family-care leave. It acknowledged in the legislative history not only that States had innovated in the field of employee leave but also that many States had implemented more generous leave policies than the FMLA. H.R. REP. 103-8 at 50; S. REP. 103-3 at 38. The FMLA expressly recognized the existence of more generous state leave policies by stating that nothing in the Act "shall be construed to supercede any provision of any State or local law that provides greater family or medical leave rights . . . ." 29 U.S.C. § 2651(b). To accommodate state innovation in the future, the FMLA further provides that it shall not "be construed to discourage employers from adopting or retaining leave policies more generous" than those in the Act. 29 U.S.C. § 2653.

Beyond the FMLA's legislative history, the States' actual practice demonstrates that state leave policies have not administered benefits in a discriminatory fashion. As the State *amici* powerfully demonstrate, many States have enacted gender-neutral leave policies since 1945. Br. for

Amici States 5-14; *see supra* pp. 4-5. Numerous States, including Nevada, provide not only unpaid leave but also paid catastrophic leave and paid sick leave to employees with sick family members. *See supra* pp. 4-8; Br. for *Amici* States 5-14. Finally, although paternity and maternity leave policies are not at issue here, since at least 1973, Nevada has provided that "pregnancy shall not jeopardize an employee's job or seniority." Br. App. A-4.

In sum, the FMLA's legislative history and the actual history of state leave policies demonstrate that Congress was not remedying a pattern of unconstitutional discrimination when it enacted § 2612(a)(1)(C). The reality is that States are, and have long been, the innovative force behind progressive and constitutional leave policies, not an obstacle to their development. Accordingly, "Congress had no reason to believe that broad prophylactic legislation was necessary in this field." *Kimel*, 528 U.S. at 91; *see Fla. Prepaid*, 527 U.S. at 644 (referring to primary point of legislative history).

C. Section 2612(a)(1)(C) Independently Fails The Proportionality Requirement Of Section 5.

Even if the Court were to find some evidence suggesting that States had, in the past, irrationally failed to provide leave or denied leave because of some discriminatory animus, § 2612(a)(1)(C) would still be unconstitutional because it is a disproportionate remedy to such conduct. The section requires States to provide twelve weeks of family-care leave without pay regardless of any particular State's historical or current conduct.

The inappropriateness of this sweeping remedy is apparent when § 2612(a)(1)(C) is compared to the Voting Rights Act. *See South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Garrett*, 531 U.S. at 373 (comparing ADA to

Voting Rights Act); *City of Boerne*, 521 U.S. at 530, 532-33 (comparing the Religious Freedom and Restoration Act to Voting Rights Act). In *Katzenbach*, the Court upheld the Voting Rights Act as appropriate remedial legislation partly because the Act was tailored to specific unconstitutional policies. *Katzenbach*, 383 U.S. at 330-32, 337.

In designing the Voting Rights Act as a remedy to racial discrimination in voting, Congress studied the instances of discrimination and determined that previous anti-discrimination legislation had failed. In addition, it found that unconstitutional conduct was most prevalent in areas that used literacy tests and had a low number of registered voters relative to the national average. *Id.* at 330-32. Congress developed a formula under which the Voting Rights Act restrictions would apply only in locations where indicia of discrimination, such as literacy tests and low voter registration, were present. *Id.*; *City of Boerne*, 521 U.S. at 533 (presence of literacy tests reflects history of discrimination). As the Court observed in *Katzenbach*, this formula guaranteed that the Voting Rights Act's most sweeping provisions would apply only to locations that had the greatest likelihood of a prevalent practice of racial discrimination. *Katzenbach*, 383 U.S. at 330-32. Similarly, in *City of Rome*, the Court allowed remedial measures that precluded literacy tests only in areas with a history of intentional discrimination. *City of Rome v. United States*, 446 U.S. 156, 177 (1980); *City of Boerne*, 521 U.S. at 533.

Congress also created a termination procedure whereby the Voting Rights Act's restrictions could be lifted if a State complied with the Act. *Katzenbach*, 383 U.S. at 331-33. The termination period ensured that only States that had a continuing practice of discrimination would remain under the Act's strict requirements year after year.

When Congress enacted the FMLA, however, it did not conclude that earlier attempts to remedy discrimination had failed, and it did not identify a pattern of purposeful discrimination. Section 2612(a)(1)(C) is, nonetheless, *broader* than the Voting Rights Act. Most notably, § 2612(a)(1)(C) applies to all fifty States, even though some, like Nevada, have been granting its employees gender-neutral family-care leave for over fifty years. *Morrison*, 529 U.S. at 626-27 (discrimination against victims of gender-motivated crimes in some States did not justify assumption that discrimination occurred nationally). The disproportionate nature of this response is surprising given that Congress never found gender discrimination in the granting of leave to be a problem of national import, either in the private or public sectors.

In addition, unlike the Voting Rights Act, § 2612(a)(1)(C) does not include a termination provision but applies in perpetuity. The absence of a sunset provision leads to the absurd result that States, like Nevada, that provide FMLA-type family-care leave as a matter of state law are treated as if they purposefully engage in a pattern of unconstitutional conduct or irrationally deny leave. *See* NEV. REV. STAT. 284.360(5), Br. App. B-5-B-6. The Act's indiscriminate scope confirms that Congress made no attempt to confine § 2612(a)(1)(C) to a specific remedial purpose. *Kimel*, 528 U.S. at 91; *Fla. Prepaid*, 527 U.S. at 647; *City of Boerne*, 521 U.S. at 532.

The specific entitlement to twelve weeks of leave is similarly disproportionate to any unconstitutional denial of family-care leave. While Congress is not limited under Section 5 to *prohibiting* violations of the Fourteenth Amendment, it cannot *create* new entitlements under this provision. *See Kimel*, 528 U.S. at 81 (observing that Congress can only "prohibi[t] a somewhat broader swath of conduct . . . [than] that which is not itself forbidden by the

Amendment's text") Granting Congress this authority would indeed be a novel interpretation of Section 5.

The particular substantive benefit at issue here is completely unrelated to any Fourteenth Amendment guarantee. The twelve-week family-care leave period is based on the development needs of young children. Congress apparently believed that, after three months, infants can be more easily separated from their parents. S. REP. 103-3 at 9. This leave period is not related to family care or, more importantly, to unconstitutional discrimination.

The substantive benefit provided by § 2612(a)(1)(C) is, indeed, so disproportionate to any alleged unconstitutional conduct that it can be understood only "as a substantive change in constitutional protections." *City of Boerne*, 521 U.S. at 532; *see Kimel*, 528 U.S. at 88-89 (Age Discrimination in Employment Act should not substantively redefine State's legal obligations). Although the States may, consistent with the Constitution, deny *all* leave, Congress has mandated that States provide twelve weeks of family-care leave to their employees absent any evidence that the employees' constitutional rights have been violated as a result of state leave policies. While Congress has the right to decide that requiring family-care leave is good social policy, it may not authorize the recovery of money damages from States for denying family-care leave without substantially rewriting the Fourteenth Amendment's guarantee. *Garrett*, 531 U.S. at 374.

III. THE NINTH CIRCUIT'S CONTRARY ANALYSIS IS WRONG.

Despite Congress's failure to identify any basis for characterizing § 2612(a)(1)(C) as Section 5 legislation, the Ninth Circuit held the provision validly abrogates sovereign

immunity. The court reasoned, first, that § 2612(a)(1)(C) is presumptively constitutional because Congress intended the provision to address gender discrimination. Nevada, moreover, had failed in the court's view to prove that it did *not* discriminate in the administration of family-care leave. Second, the Ninth Circuit held that the legislative history of the FMLA contained sufficient evidence of unconstitutional gender discrimination. Finally, the court reasoned that § 2612(a)(1)(C) is an appropriate remedy to historical state discrimination. All three rationales are erroneous.

A. The Ninth Circuit Erred By Requiring Nevada To Disprove The Existence Of Discrimination.

1. The Ninth Circuit Wrongly Held That § 2612(a)(1)(C) Is A Remedy To Gender Discrimination.

The Ninth Circuit concluded that § 2612(a)(1)(C) remedies gender discrimination based on a provision in the FMLA's "Findings and purposes" section. This provision reads:

> It is the purpose of this Act—to accomplish the purposes described in paragraphs (1) and (2) [balancing the demands of workplace and family and entitling employees to take reasonable leave] in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis.

29 U.S.C. § 2601(b)(4). Far from suggesting that Congress was exercising its Section 5 power, this provision indicates that the FMLA's benefits are gender-neutral

because gender-specific benefits would have offended the Equal Protection Clause.

The Ninth Circuit avoided the clear meaning of this provision by conveniently omitting the majority of its text. Specifically, the Court characterized this provision as stating that "It is the purpose of this Act—. . . (4) to[,] . . . consistent with Equal Protection Clause of the Fourteen Amendment, minimize[ ] the potential for employment discrimination." Pet. App. 34a. By rewriting this provision, the Ninth Circuit made it seem that the FMLA's purpose is to minimize discrimination consistent with Equal Protection Clause when its real purpose is to accomplish certain other goals in a manner consistent with that Clause.

That Congress intended to explain its own conduct, rather than state conduct, is supported by the House and Senate Reports. They clearly state that Congress included a reference to the Equal Protection Clause in the FMLA to protect the Act *itself* from constitutional attack.

> The FMLA addresses the basic leave needs of all employees. It covers not only women of childbearing age, but all employees, young and old, male and female, who suffer from a serious health condition, or who have a family member with such a condition.
>
> A law providing special protection to women or any defined group, in addition to being inequitable, runs the risk of causing discriminatory treatment. S. 5, by addressing the needs of all workers, avoids such a risk.
>
> Thus S. 5 is based not only on the Commerce Clause, but also on the guarantees of equal protection and due process embodied in the 14th Amendment.

S. REP. 103-3 at 16; *See also* H.R. REP. 103-8 at 29 (same).

The Ninth Circuit's reliance on § 2601(a)(5) is equally misplaced. *See* Pet. App. 12a-13a. This section provides that "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men." 29 U.S.C. § 2601(a)(5). The Ninth Circuit presumed that this phenomenon had been caused by state conduct. Nothing in that finding, and nothing in the congressional record, however, indicates that Congress believed the phenomenon was the result of unconstitutional discrimination, particularly by States. It simply observed a social reality without attributing blame.

For the same reason, the Ninth Circuit erred in adopting the United States' argument that gender discrimination can be extrapolated from the fact that women are regarded as having "the primary responsibility for family caregiving." Pet. App. 13a. Again, nothing in the legislative history of the FMLA supports the conclusion that Congress equated this responsibility with discrimination. Similarly, nothing in the legislative history, or history generally, suggests that women have tended to assume the role of family caregiver because of unconstitutional gender discrimination by States in the granting of family-care leave.

2. The Ninth Circuit Misread This Court's Equal Protection Jurisprudence.

After concluding that Congress intended § 2612(a)(1)(C) to remedy gender discrimination, the Ninth Circuit held that the provision was entitled to a presumption of constitutionality, and required Nevada to prove that it had *not* engaged in any unconstitutional conduct when granting family-care leave. Pet. App. 13a-15a.

The Ninth Circuit's decision to shift the burden of proof to Nevada was based on its reading of this Court's gender

discrimination cases. *Id.* 13a-14a. Under this precedent, "the burden remains on the party seeking to uphold a statute that expressly discriminates on the basis of sex to advance an exceedingly persuasive justification for the challenged classification." *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981). Interpreting this precedent, the Ninth Circuit held that "[b]ecause state-sponsored gender discrimination is presumptively unconstitutional, [S]ection 5 legislation that is intended to remedy or prevent gender discrimination is presumptively constitutional." Pet. App. 18a.

To be sure, if this Court were reviewing a state law that "expressly discriminates on the basis of sex," *Kirchberg*, 450 U.S. at 461, it would require the State to prove that the discriminatory provision is substantially related to an important governmental objective. But the Court is not reviewing *state* law. It is reviewing *Congress's* exercise of power. When Congress intends to exercise its Section 5 power, moreover, this Court's precedents indicate that *Congress*, not the *States*, must demonstrate that the exercise is necessary to remedy a pattern or practice of unconstitutional conduct. This is true even if Congress is purporting to remedy discrimination against a suspect class.

In *Katzenbach*, for example, the Court observed that Congress's Fifteenth Amendment power, like its Fourteenth Amendment power, "is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States." 383 U.S. at 326. "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819). Applying this test, the Court identified the exact constitutional prohibition that Congress intended to correct and considered whether the Act remedied that

discrimination. *Katzenbach*, 383 U.S. at 308-10, 328. Even though the act under review combated discrimination subject to strict scrutiny—racial discrimination in voting—the Court never mentioned, or applied, any shifting burden.

Similarly, in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Court upheld the validity of Section 5 legislation that protected minority voting rights. The Court stressed that Congress had identified ample evidence of discrimination by the States. The congressional record, moreover, indicated that Congress had intended to "eliminat[e] . . . an invidious discrimination." *Id.* at 654-56. Again, although Congress was enforcing voting rights, a fundamental right strictly protected by the Constitution, the Court never relieved the Federal Government of its burden to identify some "invidious discrimination," *id.* at 654, before abrogating the States' sovereign immunity.

In *Oregon v. Mitchell*, the Court upheld a federal ban on literacy tests and similar requirements for voter registration. 400 U.S. 112 (1970) (overruled by the 26th Amendment to the Constitution establishing the right to vote at age 18). Here, too, the Court examined whether Congress had a basis for the exercise of its Section 5 power. The Court did so, moreover, even though Congress was legislating in an area subject to heightened scrutiny.

Finally, in *Morrison* and *City of Boerne*, the Court considered federal statutes that purported to remedy state discrimination subject to heightened scrutiny, specifically gender discrimination and freedom of expression, respectively. *Morrison*, 529 U.S. 598 (gender discrimination); *City of Boerne*, 521 U.S. 507 (freedom of expression). In both cases, the Court looked to Congress, not the States, to identify and substantiate its reasons for abrogating the Eleventh Amendment immunity. This

precedent demonstrates that the Ninth Circuit's analytical approach is inconsistent with Section 5 jurisprudence.

The same precedent demonstrates that the Ninth Circuit's burden shifting would undermine the limits on Congress's Section 5 power. Courts would not be able to determine whether remedial legislation is proportional and congruent unless Congress were required to identify some backdrop of unconstitutional state conduct. In addition, if Congress could simply mention discrimination against a protected class and invoke its enforcement power, the Eleventh Amendment immunity would pose no limit on Congress whatsoever. Including the magic words "gender" and "Equal Protection Clause" in the "purposes" section of legislation would be enough to subject States to suit unless they could establish a negative fact: that they have never engaged in unconstitutional conduct. Given the difficulties inherent in proving a negative, States would frequently be subject to broad remedial legislation absent any indication that they have acted unconstitutionally. This would conflict with the system of dual sovereignty established by the Constitution and reduce the States from sovereigns to ordinary defendants, without immunity, in civil litigation.

Finally, burden shifting fundamentally alters the Fourteenth Amendment's guarantees. In the particular context of leave, this Court has recognized that States can deny benefits to specific classes of individuals without violating the constitution so long as the classification has a rational basis. *Nashville Gas Co. v. Satty*, 434 U.S. 136, 143-44 (1977). In *Satty*, for example, the Court upheld the constitutionality of a policy that excluded pregnancy as a basis for sick leave. The Court stated that where a leave plan is a facially neutral plan and its only fault is underinclusiveness, the burden is on the plaintiff to show that the plan discriminates. *Id.* at 144.

Similarly, in *Geduldig v. Aiello*, 417 U.S. 484 (1974), the Court held that States could constitutionally deny pregnant women the benefit of disability insurance so long as the exclusion has a rational basis. In *General Electric v. Gilbert*, 429 U.S. 125 (1976), *superseded by statute*, 42 U.S.C. § 2000e, the Court affirmed that "an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all." *Id.* at 136.

Under the Ninth Circuit's rationale, however, States may no longer create merely rational benefits classifications. They must prove that any classification lacks a discriminatory motive. *See Garrett*, 531 U.S. at 372 (ADA would have changed where constitution places burden); *Kimel*, 528 U.S. at 88 (ADEA would have redefined the States' constitutional obligations); *City of Boerne*, 521 U.S. at 534 (RFRA would have made substantive alteration to Constitution). This would clearly redefine the parameters of the Fourteenth Amendment. *See Garrett*, 531 U.S. at 374; *City of Boerne*, 521 U.S. at 529.

B. The Ninth Circuit Erroneously Concluded That The FMLA's Legislative History Establishes A Pattern Of Unconstitutional State Conduct.

In the alternative, the Ninth Circuit held, contrary to seven other circuits, *see supra* note 3, that the FMLA's legislative history contains sufficient evidence of a pattern of unconstitutional state conduct in the granting of leave. Specifically, the Ninth Circuit cited two pieces of evidence to conclude that States have unconstitutional family leave policies: (i) private sector data indicating that private employers appear to have maternity leave policies but not paternity leave policies; and (ii) the testimony of one witness that public and private sector paternity and maternity policies differ little. Pet. App. 20a. Although the

Court acknowledged that these two pieces of evidence did not, alone, document a widespread pattern of state discrimination, the Ninth Circuit held that, when combined, the evidence was circumstantial proof of state discrimination in family leave policies. *Id.*

The Ninth Circuit's analysis is fundamentally flawed. First, the Ninth Circuit's conclusion that private-sector leave policies are similar to state leave policies is wrong as a matter of fact. State leave is different and far more generous than private leave. As the Bureau of Labor Statistics has indicated, "unpaid maternity leave was more prevalent in State and local governments, where 59 [percent] of employees were offered this benefit. Thirty-seven percent of employees in medium private establishments were offered this benefit." UNITED STATES DEP'T OF LABOR, EMPLOYEE BENEFITS SURVEY BULL. NO. 2444, EMPLOYEE BENEFITS OF STATE AND LOCAL GOVERNMENTS (1992).

Unlike the Bureau of Labor Statistics study, the private sector data on which the Ninth Circuit relied, specifically the Yale Bush study, is irrelevant to the issues here. The latter study says nothing about state leave policies (indeed was unrelated to state policies), does not mention discrimination by States, and was not relied upon by Congress to demonstrate unconstitutional conduct. *See Garrett*, 531 U.S. at 371 (accounts of disability discrimination not part of study to determine presence state discrimination); *Kimel*, 528 U.S. at 90 (discounting reliance on study of age discrimination because it did not indicate States had engaged in discrimination). The study concerned infant care generally and concluded that a lack of adequate infant care is a national problem. H.R. REP. 103-8 at 27; S. REP. 103-3 at 9.

The Ninth Circuit also erred in presuming that some alleged state discrimination in the granting of paternity leave translates into discrimination in granting family-care leave. Pet. App. 21a. There is no evidence in the FMLA's legislative history indicating that these two types of leave overlap. In the absence of such evidence, the Ninth Circuit's presumption of state discrimination is untenable. *See Garrett*, 531 U.S. at 375 (Kennedy, J., concurring).

In any event, the scant evidence cobbled together by the Ninth Circuit falls well short of the evidence of unconstitutional conduct in *Garrett*, *Kimel* and *Florida Prepaid*, and even that history was insufficient to establish a pattern of state discrimination. *See Garrett*, 531 U.S. at 371-72; *Kimel*, 528 U.S. at 89; *Fla. Prepaid*, 527 U.S. at 647.

C. The Ninth Circuit Wrongly Justified § 2612(a)(1)(C) As A Response To Archaic State Laws.

Finally, the Ninth Circuit upheld § 2612(a)(1)(C) based on archaic state laws and judicial decisions. The Ninth Circuit's reliance on these laws, not the substantial, modern effort by States to correct gender discrimination, is inappropriate. Similarly, the Ninth Circuit erred by supplying a rationale for § 2612(a)(1)(C) that is absent from the FMLA's history.

This Court has clearly recognized that out-of-date laws and archaic practices cannot justify current remedial legislation. In *Garrett*, for example, the Court held that, although old state laws relating to the treatment of the disabled would be objectionable today, those archaic laws could not support an exercise of Section 5 power unless a "State had persisted in" those historic practices. *Garrett*, 531 U.S. at 356 n.6. Similarly, in *City of Boerne*, the Court

refused to uphold Congress's exercise of Section 5 power to remedy religious persecution because there had been "no episodes [of persecution] occurring in the last 40 years." *City of Boerne*, 521 U.S. at 530.

Like *Garrett* and *City of Boerne*, this case does not concern *current* unconstitutional conduct. At best, the state laws and judicial decisions that concerned the Ninth Circuit were repealed or overruled at least four decades ago. Forty years ago, however, even *federal* statutes and *federal* courts discriminated on the basis of gender. *See* Pet. App. 29a n.25. Since then both state governments and the Federal Government have enacted laws that prohibit private and public discrimination based on gender. Where gender discrimination exists, States seek to correct it.

The Ninth Circuit's conclusion that § 2612(a)(1)(C) is a response to outdated state laws suffers from a more fundamental flaw. Namely, the holding is inconsistent with congressional intent. The touchstone of all Section 5 analysis is congressional intent. The FMLA's history contains *no* indication, however, that Congress was concerned about archaic state practices when it created family-care leave. Such practices are not even mentioned. By attributing to Congress a concern it did not have, the Ninth Circuit wrongly substituted its view of the FMLA for Congress's intent. Pet. App. 28a-38a.

Finally, even if archaic laws contribute to gender discrimination and societal stereotypes, and misperceptions about gender roles persist, the States have taken such significant steps to undermine these prejudices that § 2612(a)(1)(C) will have little, if any, impact on them.

CONCLUSION

For the reasons stated above, the Ninth Circuit's decision should be reversed.

Respectfully submitted,

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