No. 01-1368

IN THE
Supreme Court of the United States

NEVADA DEPARTMENT OF
HUMAN RESOURCES, et al.,

Petitioners,

v.

WILLIAM HIBBS, et al.,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

FRANKIE SUE DEL PAPA
Attorney General of the
State of Nevada
*PAUL G. TAGGART
Deputy Attorney General
100 North Carson Street
Carson City, NV 89701-4717
(775) 684-1232

TRACI L. LOVITT
JONES, DAY, REAVIS & POGUE
222 East 41st Street
New York, NY 10017
(212) 326-3939
Counsel for Petitioners
**Counsel of Record*

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The power of Congress to address family, work, and gender issues through national policy is not at issue in this case. The only power challenged is Congress's ability to reallocate the peoples' money, collected and held by States in trust for their citizens, through the judicial power of federal courts.

Because Congress had authority under the Commerce Clause to enact the FMLA, the Act creates a valid right for public and private employees to take leave from their jobs to care for their families. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *EEOC v. Wyoming*, 460 U.S. 226, 243 (1983). The Commerce Clause also empowers Congress to guarantee that the family leave right is enforceable by public and private employees against their employers. Private employees and non-state public employees may seek all the retroactive and prospective remedies described in the FMLA. The FMLA leave rights of state employees may be enforced against their state employers through actions filed by the United States, actions seeking prospective injunctive relief, and actions filed against state managers in their individual capacity. Pet. Br. 4. Abrogating state immunity is not necessary for the FMLA to succeed.

While the Commerce Clause power is not broad enough to abrogate state immunity, Congress may abrogate immunity to enforce the Equal Protection Clause. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). But that power, because it fundamentally alters the constitutional balance between States and the Federal Government, may only be exercised to correct unconstitutional state conduct. *Civil Rights Cases*, 109 U.S. 3, 11-12 (1883).

The core question in this case is *how* the FMLA's abrogation of state immunity corrects alleged unconstitutional state conduct. Even with their immunity intact, States will remain compliant with the FMLA because their employees have a federal right to leave. In addition,

state leave policies have already corrected alleged unconstitutional state conduct and also provide leave rights that are enforceable in state courts. The presence of corrective state action, without an abrogation of state immunity by Congress, demonstrates that the FMLA's abrogation is redundant and therefore invalid.

Faithful to the purpose of Section 5 and cognizant of the Section's impact on the State-Federal balance, this Court has recognized the validity of an exercise of power under Section 5 in only two instances: Congress exercises its Section 5 power by prohibiting unconstitutional conduct directly or by banning constitutional conduct that, itself, causes a constitutional violation. The FMLA does neither. It does not prohibit the unconstitutional granting or denial of leave or ban unconstitutional gender-based leave policies. It requires employers to provide a set leave benefit. But an employer's failure to provide leave is not itself unconstitutional and does not cause an unconstitutional effect. After all, States would not violate the Constitution if they denied their employees leave under § 2612(a)(1)(C).

The Court in the *Civil Rights Cases*, while invalidating Section 5 legislation that was not remedial, aptly described this weakness of the FMLA:

> An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the States. It is not predicated on any such view. It proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offences, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the States; it does not make its operation to depend upon any such wrong committed. It applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those

> which arise in States that may have violated the prohibition of the amendment. In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the State or its authorities.
>
> If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop.

109 U.S. at 14.

For Respondent to prevail, this Court must adopt at least four novel principles that will leave Section 5 power completely unlimited. First, the Court must characterize the FMLA as valid remedial legislation even though Congress did not investigate or make any findings related to alleged unconstitutional state conduct. To do so, however, would mark the first time this Court has upheld, as Section 5 legislation, a law that prohibits constitutional state conduct without identifying any unconstitutional conduct to justify the ban. Second, the Court must adopt a new "sliding scale" of review—unsupported by any case law—that is driven by the type of discrimination at issue. Third, it would have to embrace the unprecedented theory that constitutional state conduct may be prohibited if the conduct is based on "lingering," "underground" or "second-generation" discrimination. Fourth, the Court must uphold a substantive benefit like twelve weeks of leave without pay under the guise of Section 5. The fact that Respondent and the United States are driven to such extreme positions that deviate from settled Section 5 principles illustrates why the FMLA is not valid Section 5 legislation.

1. Congress did not indicate in the purposes or findings of the FMLA that it intended the FMLA to combat state gender discrimination. In passing the FMLA, Congress never purported to address

unconstitutional state conduct. To be sure, Congress found that the responsibility for family care falls more often on, and most affects the working lives of, women, concluding that this societal reality was the result of "the nature of the roles of men and women in our society." 29 U.S.C. § 2601(a)(5). Congress further found that "employment standards that apply to one gender only have serious potential for encouraging employers to discriminate," *Id.* § 2601(a)(6), and consequently provided leave benefits equally to men and women. *See* S. REP. No. 103-3 at 16; H.R. REP No. 103-8 at 29. Congress thus intended to accomplish its social policy objectives, 29 U.S.C. § 2601(b)(1)-(2), in a manner *consistent* with the Equal Protection Clause and intended to *promote* equal employment opportunities. *Id.* § 2601(b)(4)-(5).

These findings do not reflect, however, a judgment by Congress about whether these "roles," or the impact of family care responsibility on women, were the result of unconstitutional state discrimination. In stark contrast to valid Section 5 legislation, neither the Act's text nor its supporting reports mentions Section 5, an intent to *enforce* the Equal Protection Clause, or state discrimination. *South Carolina v. Katzenbach*, 383 U.S. 301, 309, 337-38 (1966) (referencing text and committee reports that explicitly evidence Congress's intent).

The contrary conclusion drawn by Respondent and the United States (Resp. Br. 20-22; U.S. Br. 8-11) is simply conjecture that is not reflected in the actual terms of the FMLA's "Findings and Purposes" section. What individual *amici* may have thought when they were testifying about or voting on the FMLA, moreover, is irrelevant. *See generally* Br. *Amici* Senators and Representatives. Congress, when it spoke through the legislation, did not adopt the view that the FMLA was intended to combat state discrimination, and after-the-fact rationalizations cannot alter this reality.

This is not to say that the FMLA does not clearly state Congress's intent to apply the FMLA to States. Pet. Br. 9 n.2. Nor is it Nevada's contention that Congress must state with particularity the exact constitutional power it intends to exercise. But when an act of Congress is alleged to constitute a valid abrogation of state immunity, one would expect *some* discussion by Congress of the specific unconstitutional state conduct it intends to remedy or some textual signal from Congress that it intended to wield its coercive Section 5 power. In the FMLA, however, there is none.

One explanation for this void is that Congress believed it could abrogate state immunity through its Commerce Clause power. *See Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), *overruled by Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66 (1996). Since the overwhelming evidence indicates Congress intended to enact social policy, not Section 5 legislation, this explanation is the only plausible one. As mere social policy enacted under the Commerce Clause, the FMLA cannot validly abrogate state immunity.

2. The legislative history of the FMLA does not reveal any unconstitutional state conduct. In all the volumes of legislative history concerning the FMLA, Congress *never* held a single hearing or considered a single report focusing on alleged unconstitutional state conduct. Respondent cannot escape this conclusion by elevating isolated sentences scattered throughout the FMLA's voluminous history into proof of state misconduct. Resp. Br. 29-30. Nor can evidence concerning private sector discrimination fill this gap. This Court has repeatedly recognized—but Respondent and the United States ignore—that the public sector and private sector simply are not equivalent. *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., and O'Connor, J., concurring). Indeed, most public employees accept less pay than their private colleagues because government jobs give *more* leave.

The Yale Bush study, relied upon so heavily by the Ninth Circuit and Respondent (Pet. App. 20a; Resp. Br. 29-30) is equally unavailing. The study was not commissioned to investigate state constitutional violations. When the study discussed the States' role in leave policy, it turned to the Governor of New Jersey for input. The study did not even imply constitutional issues were involved in the leave crisis. Edward F. Zigler and Meryl Frank, THE PARENTAL LEAVE CRISIS, TOWARD A NATIONAL POLICY 333-40 (1988). As with the ADA and ADEA, Congress simply failed to focus on state conduct, not to mention identify widespread and persistent constitutional violations.

3. This Court should not hold Congress to some lower standard for identifying unconstitutional state conduct. Implicitly acknowledging that the family leave provision of the FMLA would fail under this Court's analysis in *Garrett* and *Kimel*, the Respondent advocates applying a new standard. Resp. Br. 15. According to him, so long as this Court can perceive *any* basis to conclude, even though Congress itself did not, that States persistently and pervasively violate their citizens' constitutional rights, it should uphold the FMLA.

Under this rule, the Court must engage in the type of investigation Congress typically completes before it enforces the Equal Protection Clause. Such a practice, however, flies in the face of the usual assignment of constitutional duties. Congress should identify the pattern of unconstitutional state conduct it intends to correct with Section 5 legislation, because "it is a most serious charge to say a State has engaged in a pattern or practice designed to deny its citizens the equal protection of the laws." *Garrett*, 531 U.S. at 375 (Kennedy, J., and O'Connor, J., concurring); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89-91 (2000); *City of Boerne v. Flores*, 521 U.S. 507, 530-31 (1997); *see Oregon v. Mitchell*, 400 U.S. 112, 130 (1970) (Black, J.). Given the unique nature of Section 5 power and its requisite encroachment on

state power, this Court tends to require Congress at least to identify its reasons for exercising Section 5 power. *See Ex parte Virginia*, 100 U.S. 339, 346-48 (1880) (Section 5 is "carved out" of retained state powers). An exhaustive review of history is not required, only some suggestion that the existing state practice requires a Section 5 remedy. The dignity that States maintain as an attribute of their sovereignty merits no less. *Alden v. Maine*, 527 U.S. 706, 715 (1999).

Even when Section 5 legislation involves discrimination that receives heightened review, this Court has required Congress to identify existing unconstitutional state conduct. In the Voting Rights Act cases, for example, the Court reviewed the state conduct Congress identified as unconstitutional in order to judge the propriety of the Act. *South Carolina v. Katzenbach*, 383 U.S. at 308-309, 315; *Oregon v. Mitchell*, 400 U.S. at 132 (Opinion of Black, J.). Despite the judicially documented history of racial discrimination in America, moreover, Congress exhaustively detailed the exact type of unconstitutional conduct it sought to correct. *South Carolina v. Katzenbach*, 383 U.S. at 308-09. Similarly, in *City of Boerne*, the Court sifted through Congress's record in search of unconstitutional state conduct when it reviewed legislation that protected the free exercise of religion—a fundamental right. *City of Boerne*, 521 U.S. at 530-32. Even though discrimination based on a fundamental right merits heightened scrutiny, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966), a review of the congressional record was critical to the *City of Boerne's* Section 5 review. In *Morrison*, a Section 5 case involving gender discrimination, this Court also reviewed congressional conclusions about discrimination. *United States v. Morrison*, 529 U.S. 598, 619-20 (2000). Thus, in all of this Court's Section 5 jurisprudence, Congress has been held to the same standard regardless of the nature of the unconstitutional conduct it intended to remedy.

No one—not Respondent, his *Amici*, or the United States—can point to a single case in which legislation was held to validly prohibit constitutional state action without any indication from Congress of its Section 5 ends. *Fitzpatrick* is not to the contrary. The reason a showing of unconstitutional state conduct was not required in *Fitzpatrick* is that each money damages lawsuit authorized by the statute at issue *necessarily* involved a violation of the Constitution. *Fitzpatrick v. Bitzer*, 427 U.S. at 447, 456 n.11. A sovereign that violates the constitutional rights of a citizen can hardly expect to retain its immunity, and the Fourteenth Amendment stands for as much. *South Carolina v. Katzenbach*, 383 U.S. at 325 (citations omitted).

4. Presuming that States engage in pervasive and widespread violations of the Constitution is contrary to the deference and respect owed to States under our system of dual sovereignty. The respect due States as sovereigns mandates the presumption that state conduct is consistent with the Constitution unless proven otherwise. States are politically accountable to their citizens, and state officials "are bound by obligations imposed by the Constitution." *Alden*, 527 U.S. at 755. In Eleventh Amendment cases, courts should be "unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States." *Id.*

Following the Ninth Circuit, Respondent and the United States rely heavily on the history of repealed state laws to conclude that States currently engage in pervasive unconstitutional gender discrimination. Since the repealed laws alone can hardly justify the FMLA as valid Section 5 legislation, *Garrett*, 531 U.S. at 369 n.6, they ask the Court to presume, based on this history, that States still hold to outdated notions about women and make widespread gender-based employment decisions. Resp. Br. 26-28; U.S. Br. 12.

Nevada does not contest that application of heightened scrutiny in gender cases "responds to volumes of history"

that includes repealed gender-based state laws. *United States v. Virginia*, 518 U.S. 515, 531 (1996). But that history, without more, has never been sufficient to presume that a State's conduct is unconstitutional. Rather, in light of that history, courts can presume unconstitutional conduct when the State *classifies* individuals based on their gender. *Id.* Requiring a State to present a persuasive justification for a particular gender classification in light of its history—which, incidentally, no one claims is occurring here—is a far cry from presuming that States engage in a widespread pattern of gender discrimination against their employees because of their historical, outdated laws.

South Carolina v. Katzenbach is not contrary. In that case, Congress did not simply rely on the history of racial discrimination to conclude that States engage in widespread discrimination. Congress determined that the then-existing state literacy tests were intended to perpetuate the disenfranchisement of minority voters. *South Carolina v. Katzenbach*, 383 U.S. at 333. In *City of Rome*, the Court ruled that literacy tests in jurisdictions with a history of purposeful discrimination through the use of such tests could be prohibited. *City of Rome v. United States*, 446 U.S. 156, 177 (1980). By contrast, here, the FMLA does not ban the States' repackaging of old, discriminatory laws. Current state laws bear no resemblance to those of the past. Rather, they resemble the FMLA itself. Thus, unlike the "unremitting and ingenious defiance" of States in *South Carolina v. Katzenbach*, 383 U.S. at 309, here States have been progressive.

If this Court were to use solely our Nation's "long and unfortunate history of sex discrimination" to justify a Section 5 response, States would never be credited for their reforms. No state action could erase the stigma of the past. State managers, male or female, would be presumed to act with the purposeful intent to discriminate based on gender when making discretionary employment decisions.

This is exactly the view of Respondent and the United States. Each alleges, based mainly on the existence of repealed laws, that current state decision makers still adhere to outdated notions about the role of women. Resp. Br. 33; U.S. Br. 34-35, 39-40. These unsupported assertions are an affront to States and are entirely insufficient to indict sovereigns with the animus of discrimination.

Indeed, if Respondent were correct and the mere specter of past discrimination justified the abrogation of state immunity regardless of current state practices, all current gender-neutral state laws would be presumed unconstitutional. States would have to prove an absence of discrimination in order to protect their immunity, a much more difficult task than proving a particular gender-based classification is substantially related to the achievement of an important state interest. Stripped of its intended limitations, Fourteenth Amendment power would obliterate the "Framer's carefully crafted balance of power between the States and National Government." *Morrison*, 529 U.S. at 620.

5. Equally troubling is Respondent's request that the Court peruse the "public record" for any state action that may justify the FMLA family leave provision. Resort to the "public record" is unprecedented and ill-advised. While precedent may not bar such a search, forcing this Court to conduct the type of exhaustive analysis Congress should undertake when it enacts legislation is simply impractical and inconsistent with this Court's role as a reviewer of legislation, not a policy maker. Given the significant impact of divesting state immunity involuntarily, it is hardly burdensome to expect Congress, after investigating family leave issues for eight years and considering thousands of pages of testimony, to identify the state conduct it seeks to correct. This Court should not now do Congress's job.

6. The fact that family leave duties fall disproportionately on women is insufficient to demonstrate unconstitutional conduct. Respondent, his *Amici*, and the United States claim that the FMLA must address unconstitutional conduct because family care falls disproportionately on women. But they fail to point to any proof that States *intentionally* design family leave policies to cause this disparate impact, as they must in order to demonstrate a constitutional violation. *Washington v. Davis*, 426 U.S. 229, 242 (1976). In other words, disproportionate gender impact alone does not trigger heightened scrutiny. *Id.*; *see also Personnel Adm'r v. Feeney*, 442 U.S. 256, 274-76 (1979). In the absence of gender-based family leave classifications or intentional discrimination, state conduct is presumed to be constitutional.

7. The alleged "lingering effects" of past discrimination and "hidden" discrimination do not amount to unconstitutional state conduct sufficient to justify an exercise of Section 5 power. Lacking any argument that the family leave provision of the FMLA addresses unconstitutional conduct, Respondent and the United States assert that the FMLA addresses the "lingering effects" of past discrimination (that is, stereotypes about men and women) and secret discrimination.

To the extent the FMLA is intended to address the lingering effects of repealed state laws on the private sector, it is not an appropriate Section 5 remedy because it is not directed at the acts of state officials. *Morrison*, 529 U.S. at 626. Indeed, this Court has never recognized that a stereotype, even those held by state employees, violates the Constitution. So long as stereotypes are not the basis for state conduct, they are merely private (albeit offensive) beliefs.

Respondent and the United States have no evidence that States hold, or act upon, stereotypical beliefs about men and women. They merely assert that state employers must be using gender-neutral policies to discriminate against women because "old habits die hard." Resp. Br. 28; U.S. Br. 34-35. In addition, Respondent attempts to rely (Resp. Br. 28 & n.12) on public opinion polls to impute to state employers the belief that "a woman's place is in the home." These arguments ignore, however, that States "stand apart from the citizenry"; they should not "be held in violation of the Constitution on the assumption they embody the misconceived or malicious perceptions of some of their citizens." *Garrett*, 531 U.S. at 375 (Kennedy, J., and O'Connor, J., concurring).

The United States further asserts that unconstitutional state conduct has gone "underground" and that the cause of this lack of evidence is discrimination itself. U.S. Br. 34-36. The assertion that unconstitutional conduct is "underground"

is simply another way of saying there is no evidence of such conduct. Such assertions have never been sufficient to justify abrogating state immunity.

Nor should they be. States maintain the dignity of a co-equal in our system of dual sovereignty, and immunity is central to that dignity. *Alden*, 527 U.S. at 715. Without it, the Constitution would not have been ratified. The Civil War Amendments altered this federalism balance by authorizing Congress, "only when certain specific conditions are met," to strip a State of its immunity. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238-39 (1985). Those conditions are not met with speculation about "hidden" actions. Holding otherwise would impermissibly allow Section 5 to "work an entire change to our form of government," *City of Boerne*, 521 U.S. at 521 (quoting Nevada Senator William Stewart), instead of merely allowing Congress to enforce the Equal Protection Clause.

For this reason, States tend to uniformly assert their immunity in FMLA actions. Before the Court granted *certiorari* in this case, both New York and Connecticut successfully argued that the FMLA's family leave provision does not validly abrogate state immunity—the reverse of their position here. *Compare Serafin v. Conn. Dep't of Mental Health & Addiction Services*, 118 F. Supp. 2d 274 (D. Conn. 2000); *McGregor v. Goord*, 18 F. Supp. 2d 204 (N.D.N.Y. 1998); *McGregor v. Goord*, 691 N.Y.S.2d 875 (N.Y. Sup. Ct. 1999) *with* Br. of New York. *See also Hale v. Mann*, 219 F.3d 61, 66 (2d Cir. 2000) (observing that New York asserted immunity to defend against action under FMLA's personal leave provision).

8. References to maternity and paternity leave policies are irrelevant. *Certiorari* was granted in this case to review the FMLA's family leave provision, § 2612(a)(1)(C), not the parenting leave provisions, §§ 2612(a)(1)(A)-(B). Save one footnote, Respondent confuses family leave with parenting leave. Resp. Br. 25

n.11. Reference to state maternity or paternity leave policies is of little aid here because even if state unconstitutional discrimination in maternity and paternity leave were shown, such transgressions would justify only the FMLA's parenting leave policies. *See South Carolina v. Katzenbach*, 383 U.S. at 329-36 (reviewing validity of Voting Rights Act on a provision-by-provision basis).

Indeed, Respondent's attempt to use maternity leave policies to justify family leave is inconsistent with the United States' historical treatment of the FMLA's leave provisions as independent and requiring separate justification. *See* Lodging by United States filed May 20, 2002 (Letters from Solicitor General Theodore B. Olson to the House and Senate) (conceding that personal leave provision is unconstitutional despite maternity leave provisions); *but see* Pet. Br. App. C (United States explaining to Congress that the FMLA would violate Eleventh Amendment).

Even if maternity policies were relevant, their scarcity among States would fail to show a pattern of unconstitutional state conduct. In addition, no court has found discretionary or gender-based maternity leave policies to be *per se* unconstitutional. While leave granted to one gender may be subject to heightened scrutiny, this Court indicated in *California Federal Saving & Loan Association v. Guerra*, 479 U.S. 272, 291 (1987), that a pregnancy leave policy may withstand constitutional scrutiny. As even Respondent acknowledges (Resp. Br. 30), leave taken after the first 4-8 weeks of childbirth is usually related to the effects of pregnancy—a gender-specific effect. Accordingly, state maternity leave policies that allow only women to take 4-8 weeks leave after childbirth may be constitutional. In any event, Respondent's characterization of current family leave policies and collective bargaining agreements is incorrect; the institutions Respondent cites (Resp. Br. 31

n.19, 32 n.20), have recently adopted FMLA-like benefits. Reply App. A and B.

9. Isolated lawsuits involving States are also not proof of a pattern of unconstitutional discrimination. Pointing to a series of cases, *none* of which involves Nevada, Respondent attempts to find a pattern of state constitutional violations. Resp. Br. 35 n.23. Many of the cases involve the Federal Government and private entities. Others involve local governments, consideration of which "make[s] no sense" in Section 5 analysis. *Garrett*, 531 U.S. at 369. The few remaining cases that involve state actors "fall far short of even suggesting [a] pattern" of state conduct that can justify Section 5 legislation. *Id.* at 370.

10. Whenever Congress uses Section 5 to prohibit constitutional state activity and abrogate Eleventh Amendment immunity, its means must be congruent and proportional to the unconstitutional conduct it seeks to correct. Even when Congress reasonably concludes a measure will combat discrimination, it is incumbent on the Court to review whether the measure overshoots the mark. Misuse of Section 5 power, after all, alters the guarantees of the Equal Protection Clause and infringes on state sovereignty.

Urging a sharp break from Section 5 precedent, Respondent and the United States advocate a sliding scale congruence and proportionality test that is driven by the type of right Congress is enforcing. Indeed, Respondent and his *Amici* seek to limit the test used in *City of Boerne*, *Kimel*, and *Garrett*, arguing that Congress may legislate with little or no limitation when a right is entitled to heightened protection under the Constitution. This misses the point of the congruence and proportionality test entirely. Section 5 "is a limited authority," that extends "only to a single class of cases," and the requirement of congruence and proportionality guarantees the power is used within its limits. *Ex parte Virginia*, 100 U.S. at 348.

For this reason, this Court has required that Congress exercise its Section 5 power congruently and proportionally even when seeking to remedy racial discrimination. For example, in *South Carolina v. Katzenbach*, 383 U.S. at 308, the Court upheld Section 5 legislation only after it thoroughly evaluated the nature of the state action which violated the Constitution and Congress's means to redress the state action. *Id*. at 328, 331. Similarly, when Congress used Section 5 to remedy alleged violations of freedom of expression, a right subject to heightened constitutional protection, the Court reviewed whether the remedy was congruent and proportional to alleged state violations. *City of Boerne*, 521 U.S. at 530. In *City of Boerne*, the Court, indeed, derived its analysis from the Voting Rights Act decisions, *id*. at 533, and the *Civil Rights Cases*, which established that the judiciary should exercise its "responsibility of an independent judgment," and ascertain the ultimate appropriateness of Congress's exercise of Section 5 power, no matter the right involved. *Civil Rights Cases*, 109 U.S. at 10. Thus, *City of Boerne* accurately articulated the method of review that is constitutionally required whenever Congress exercises Section 5 power.

11. Uncritical deference to Congress's selection of its Section 5 means in this case would turn Section 5 into an unlimited power. Upholding the FMLA's abrogation of immunity despite the lack of congruence between the FMLA and unconstitutional state conduct would transform the *City of Boerne* test to a statistical determination. As long as statistics show some disproportionate societal burden on women, Congress could abrogate state sovereign immunity through any legislation that has a potential to reverse that statistical disparity, even if the States had already taken steps to eliminate the impact. Under this approach, it would be difficult to see where Section 5 authority "is to stop." *Civil Rights Cases*, 109 U.S. at 14. For example, because child care falls disproportionately on women, under Respondent's

logic, Congress might mandate that the work and school day end at the same time, that employers provide a stipend for child care, or that all employees receive a 30-minute daily "child-care" break. One can hardly contend, however, that such requirements address a constitutional concern.

12. The FMLA's abrogation of state immunity is not congruent and proportional because existing laws are sufficient to correct any alleged pattern of unconstitutional state conduct. The Commerce Clause assures that States will comply with the FMLA or be subject to enforcement actions by the United States, § 1983 actions, or *Ex parte Young* actions. States, moreover, are adhering to the FMLA's mandate. Reply App. C. Even Respondent acknowledges that Nevada posts FMLA posters and teaches FMLA seminars to its employees. Pet. App. 7a. State gender-neutral leave policies also assure that States do not unconstitutionally discriminate based on gender.

Given the effectiveness of other measures to correct any minimal state misconduct, Congress overstepped its bounds by abrogating state immunity in the FMLA. Indeed, Congress never concluded that direct constitutional challenges to state employment policies, or Title VII and Pregnancy Discrimination Act actions, were insufficient to enforce the Equal Protection Clause. *Compare South Carolina v. Katzenbach*, 383 U.S. at 328 (remarking that Congress found case-by-case enforcement inadequate). Congress did not consider that state statutes prohibit discrimination in nearly every State. Reply App. C. It ignored, moreover, that § 1983 is effective to remedy isolated occurrences of gender discrimination. *See Knussman v. Maryland*, 272 F.3d 625 (4th Cir. 2001). In this way, the FMLA is further distinguishable from the Voting Rights Act, which was passed after Congress concluded that traditional measures were failing. Accordingly, the threat of a money judgment is not

necessary to achieve compliance with the FMLA, as Nevada's experience attests.

That money damages awards under the FMLA may be limited is irrelevant. *Seminole*, 517 U.S. at 58. The Eleventh Amendment does not exist solely to prevent large money judgments; it also avoids "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). The relatively meritless claim Respondent filed demonstrates the danger of unlimited Section 5 power. U.S. Br. 4 n.2.

13. The twelve-week leave provision is not congruent or proportional. The FMLA award of a substantive benefit of twelve weeks of leave is unlike any Section 5 prohibition this Court has upheld. Congress could have provided far less, moreover, to prevent alleged discrimination. It could have prohibited gender-specific or discretionary leave or required that leave policies include the right of job protection and extend for a reasonable period of leave. By drawing the line at twelve weeks for child development purposes, Congress clearly abandoned corrective goals and adopted social policy. *Civil Rights Cases*, 109 U.S. at 11-13, 19.

14. Congress could not properly abrogate state immunity without investigating the corrective power of state family leave policies. Even if, as Respondent claims, the family leave provision remedies unconstitutional state conduct, state family leave policies accomplish the same goal. Nothing is magic about whether a policy is federal or state. In States, like Nevada, that adopted the FMLA's twelve week gender-neutral family leave policy, state policy is as corrective as the FMLA. In fact, Nevada's policies are superior to the FMLA because they also provide paid family leave through accrued sick leave and catastrophic leave programs. That state policies may be repealed does not discount their value. States should be presumed to act

constitutionally, without the will to repeal laws that strengthen constitutional principles. *Alden*, 527 U.S. at 755.

This case demonstrates Nevada's more generous leave. Respondent spent over 900 hours away from work in 1997, R. Doc. D. Nev., Nev.'s Summ J. Mot. at Exhibit N. Nevada never disputed that Respondent was entitled to leave, only that he needed to return to work after exhausting his leave. While Respondent still debates his notice argument, a point even the United States admits is without merit (U.S. Br. 4 n.2), he cannot dispute that Nevada's leave policies provided him with ample leave to care for his family.

Even more remarkable is California's example. In 2002, California adopted a *paid* family leave program that guarantees twelve weeks of family leave, six of which must be paid. S.B. 1661, 2001-2002 Leg. (Ca. 2002). The extraordinary step of subjecting California to money damages for engaging in *constitutional* conduct cannot be remedial. In States like Nevada and California that have voluntarily adopted generous family leave policies, the abrogation of immunity in the FMLA remedies nothing.

Numerous other States have family leave policies that are gender-neutral, include job protection and correct the same state conduct the FMLA was designed to remedy. Today at least 38 States are in this category. Reply App. C. The length of leave provided in those policies should not govern whether the FMLA applies, as Congress did not decide on the twelve week benefit based on constitutional requirements. Since the FMLA is not a congruent and proportional remedy to these States' conduct, the FMLA's general abrogation of state immunity is not valid.

Congress should have included a provision exempting States that voluntarily adopt equivalent leave benefits. The goal of the FMLA as Section 5 legislation must be to correct state action, not to punish the States. *Civil Rights Cases*, 109 U.S. at 11-12. If a State voluntarily corrects its action, the remedial function of the FMLA disappears. It should not

matter whether the corrective action is State-developed or if it is adopted after the FMLA. Once the state misconduct is corrected, Section 5 legislation is no longer valid.

Congress was aware that state family leave programs had been enacted or were being debated by state governments across America. Even so, it did not investigate whether state policies had fully, or in part, corrected any asserted discrimination. Congress could have directed the United States Department of Labor to monitor whether state benefit plans are as generous as the FMLA. *See South Carolina v. Katzenbach*, 383 U.S. at 352 (listing VRA provision providing termination of VRA based on Attorney General review). If Congress had, the States' adoption of leave policies, as well as state FMLA policies, would cause nearly every State in the Union to be excluded from the FMLA's coverage. Reply App. C.

Instead, Congress applied the FMLA to every State, not based on a deliberate review of individual state conduct, but to adopt a national labor standard. In this respect, the FMLA "applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment." *Civil Rights Case*, 109 U.S. at 14. Yet since Congress had no basis to conclude a broad prophylactic remedy was necessary, *Kimel*, 528 U.S. at 91, it painted with too broad a brush, and the FMLA's abrogation of immunity cannot be valid. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 647 (1999).

CONCLUSION

For the reasons stated above, this Court should reverse.

Respectfully submitted,

FRANKIE SUE DEL PAPA
Attorney General of the
State of Nevada
*PAUL G. TAGGART
Deputy Attorney General
100 North Carson Street
Carson City, NV 89701-4717
(775) 684-1232

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TRACI L. LOVITT
JONES, DAY, REAVIS & POGUE
222 East 41st Street
New York, NY 10017
(212) 326-3939

Counsel for Petitioners

**Counsel of Record*