No. 01-1368

In the Supreme Court of the United States

NEVADA DEPARTMENT OF HUMAN RESOURCES, ET AL.,
PETITIONERS

v.

WILLIAM HIBBS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

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

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 273 F.3d 844. The ruling of the district court (Pet. App. 48a-60a) is unreported.

JURISDICTION

The court of appeals entered its judgment on December 11, 2001. The petition for a writ of certiorari was filed on March 11, 2002, and granted on June 24, 2002. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 *et seq.*, "to promote" the Equal Protection Clause's guarantee "of equal employment opportunity for women and men," 29 U.S.C. 2601(b)(5). After eight years of study, Congress found 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). Congress determined that, to counteract those sex roles and to diminish their impact on equal employment opportunities, employers must be required to provide family-care leave on a gender-neutral basis, because "employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender." 29 U.S.C. 2601(a)(6).

In response to the effects of past gender discrimination and stereotyping in employment that it had found, Congress, in the FMLA, gave public and private employees the right, *inter alia*, "to take reasonable leave * * * for the care of a child, spouse, or parent who has a serious health condition" 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 * * * compelling family reasons, on a gender-neutral basis." 29 U.S.C. 2601(b)(2) and (4).

The FMLA's family-care provision entitles eligible employees to take up to twelve workweeks of unpaid leave annually to care for a parent, child, or spouse with a serious health condition. 29 U.S.C. 2612(a)(1)(C). The FMLA applies only to employees who have worked for the employer for at least one year and who provided 1250 hours of service within the last twelve months. 29 U.S.C. 2611(2)(A). Covered employers include state governments, 29 U.S.C. 2611(4)(A)(iii), 203(x), but the FMLA excludes from eligibility government employees who hold high-ranking or sensi-

tive positions, 29 U.S.C. 2611(2)(B)(i) and (3), 203(e)(2)(C).[1] The FMLA requires employees to give advance notice of foreseeable leave, 29 U.S.C. 2612(e), and permits employers to require certification by a health care provider of the need for leave, 29 U.S.C. 2613.

The FMLA gives employees a private right of action "against any employer (including a public agency) in any Federal or State court of competent jurisdiction," 29 U.S.C. 2617(a)(2), if they "interfere with, restrain or deny the exercise of" FMLA rights. 29 U.S.C. 2615(a)(1). The employee may obtain equitable relief, such as employment, reinstatement, or promotion, 29 U.S.C. 2617(a)(1)(B), and either lost pay and benefits, or actual monetary losses up to a sum equal to twelve weeks of wages, with interest. 29 U.S.C. 2617(a)(1)(A)(i) and (ii). If the employer fails to act in good faith, the employee may receive an equal amount as liquidated damages. 29 U.S.C. 2617(a)(1)(A)(iii). The accrual period for back pay is limited by the Act's two-year statute of limitations (which is extended to three years for willful violations). 29 U.S.C. 2617(c)(1) and (2). The Secretary of Labor may also conduct investigations and bring civil actions to enforce the FMLA. 29 U.S.C. 2617(b) and (d).

2. In April and May 1997, respondent Hibbs sought leave under the FMLA to care for his ailing wife. Pet. App. 2a. Petitioner, the Nevada Department of Human Resources, granted his request for the full twelve weeks of FMLA leave and authorized him to use the leave intermittently as needed

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[1] The FMLA's protections also apply to federal civil service employees and certain employees of Congress. See 5 U.S.C. 6381-6387; 2 U.S.C. 1312; 5 C.F.R. Subpt. L, §§ 630.1201-630.1211. Indeed, the protections for federal employees are even more robust, because, unlike petitioners and other state governments, the federal government cannot compel an employee to substitute paid leave for unpaid FMLA leave. Compare 29 U.S.C. 2612(d)(2), with 5 U.S.C. 6382(d), and 5 C.F.R. Subpt. L, § 630.1205(d).

between May and December of 1997. *Ibid.* Hibbs used his leave intermittently until August 5, 1997, after which he did not return to work. *Ibid.* In October 1997, the Department notified Hibbs that he had exhausted his FMLA leave, that no further leave would be granted, and that he must report to work by November 12, 1997. *Id.* at 2a-3a. When Hibbs failed to report to work, he was dismissed. *Id.* at 3a.[2]

Hibbs filed suit in federal district court under the FMLA against petitioners. Pet. App. 3a. Petitioners moved for summary judgment on the ground that the Eleventh Amendment barred Hibbs' federal court action under the FMLA. The district court agreed and granted summary judgment for petitioners. *Id.* at 48a-60a.

3. Hibbs appealed, and the United States intervened, under 28 U.S.C. 2403, to defend the constitutionality of Congress's abrogation of Eleventh Amendment immunity. Pet. App. 4a. The court of appeals reversed. *Id.* at 1a-46a. The court held that the family-care provision of the FMLA was valid legislation under Section 5 of the Fourteenth Amendment because the FMLA "is aimed at remedying gender discrimination," *id.* at 18a, which is subject to heightened scrutiny under the Constitution. The court reasoned that the FMLA's family-care provision should be analyzed differently from this Court's decisions addressing Congress's Section 5 power to enforce rights subject only to rational basis review. *Ibid.* The "history of invidious gender discrimination by states," the court explained, requires sustaining the exercise of Section 5 power unless those attacking the constitutionality of the Act demonstrate that "there is not a widespread pattern of gender discrimination by states regarding the

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[2] As noted in the United States' brief in opposition, this Court's decision in *Ragsdale* v. *Wolverine World Wide, Inc.*, 122 S. Ct. 1155 (2002), casts significant doubt on the validity of Hibbs' FMLA claim. Br. in Opp. 13.

granting of leave to employees to care for sick family members or a historical record of state enforcement of stereotypical family roles." *Id.* at 19a.

The court further ruled, in the alternative, that the family-care provision could be sustained even under the analysis applied to rights subject to rational basis review, because the legislative history "justifies the enactment of the FMLA as a prophylactic measure." Pet. App. 20a. The court cited to "substantial evidence of gender discrimination with respect to the granting of leave to state employees," *ibid.*, and declared that Congress "was acting against a background of state-imposed systemic barriers to women's equality in the workplace that, under recent constitutional doctrine, were undoubtedly unconstitutional." *Id.* at 23a.

The court also held that the family-care provision of the FMLA is congruent and proportional to the gender discrimination that Congress intended to prevent. Pet. App. 36a-42a. The court explained that the family-care provision "focuses only on one type of policy of public and private employers, one that quite directly reflects the interaction between workplace and domestic duties at the core of the unconstitutional state legislation" that restricted women's hours and occupations. *Id.* at 39a.

SUMMARY OF ARGUMENT

Application of the family-leave provision of the Family and Medical Leave Act to States falls squarely within Congress's comprehensive legislative power under Section 5 of the Fourteenth Amendment to prohibit, remedy, and prevent violations of the rights secured by that Amendment. First, Congress made its intent to invoke that power clear in the statute's text and legislative history, both of which refer expressly to the Equal Protection Clause and the Fourteenth Amendment.

Second, the FMLA's family-leave provision enforces the Equal Protection Clause's prohibition on gender discrimination. As this Court's cases have found, this Nation has a lengthy and regrettable history of discrimination on the basis of gender. For generations, state laws and conduct relegated women to a position of social, cultural, economic, and political inferiority. Women were excluded from many forms of employment, and were subjected to discriminatory terms, conditions, and benefits in many of the jobs they were allowed to hold. Unconstitutional employment discrimination by the States perpetuated and reinforced the societal assumption that women were most suited for domestic life, while men were to dominate the commercial sphere. Those laws, which this Court only *began* to strike down a generation ago, reinforced entrenched and persistent stereotypes about the proper roles of women and men in the workforce. Congress considered evidence that, while overt discrimination has diminished, subtle discrimination and the historic structuring of the workplace continue to deny women equal economic opportunity.

The FMLA's family-leave provision is intended to prevent and remedy the enduring effects of unconstitutional discrimination in employment. By establishing a gender-neutral, uniform family-leave floor, Congress sought to erode sex-based employer presumptions that women employees will be less committed to work and absent more because of a need to discharge domestic responsibilities, and thereby to attack discrimination against women in hiring and promotions and against men seeking family-care leave. By equalizing male and female employees' entitlement to family leave, moreover, Congress aimed to transform family leave from its historic genesis as a "women's issue," into a routinized, across-the-board employment benefit. In so doing, Congress intended to deter more subtle forms of discrimination and to

eradicate invidious stereotypes that would otherwise freeze into place the effects of past discrimination.

Third, the family-leave provision is reasonably tailored to advancing those anti-discrimination goals. The statute is narrow in scope and targeted to one particular component of the employment relationship. The establishment of a uniform leave floor, moreover, was designed to prevent discretionary supervisory judgments from perpetuating stereotypical assumptions and to overcome the impracticability of combating covert discrimination on a case-by-case basis. In short, the FMLA's family-leave provision is carefully calibrated to root out the enduring effects of decades of unconstitutional gender discrimination and to force employers to balance the needs of home and worklife as a matter of economic reality, rather than treating family leave as a "problem" attributed to the presence of women in the workforce.

ARGUMENT

THE FAMILY-CARE PROVISION OF THE FAMILY AND MEDICAL LEAVE ACT IS APPROPRIATE SECTION 5 LEGISLATION BECAUSE IT IS A CALIBRATED RESPONSE TO THE ENDURING EFFECTS OF UNCONSTITUTIONAL GENDER DISCRIMINATION

Section 5 of the Fourteenth Amendment is an affirmative grant of legislative power to Congress, see *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 80 (2000), that encompasses all legislation reasonably designed to enforce the Fourteenth Amendment's guarantees, *Ex parte Virginia*, 100 U.S. 339, 345-346 (1880). Congress's power "includes the authority both to remedy and to deter violation of [Fourteenth Amendment] rights * * * by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Board of Trustees of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 365 (2001); see also

City of Richmond v. *J.A. Croson Co.*, 488 U.S. 469, 488 (1989) (opinion of O'Connor, J.) ("[I]n no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress" when enforcing the Fourteenth Amendment.) (citation and emphasis omitted). Section 5 thus "gives Congress broad power indeed," *Saenz* v. *Roe*, 526 U.S. 489, 508 (1999) (citation omitted), including the power to abrogate the States' Eleventh Amendment immunity, see, *e.g.*, *Garrett*, 531 U.S. at 364.

Although Section 5 empowers Congress to enact prophylactic and remedial legislation designed to enforce Fourteenth Amendment rights, 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* v. *Flores*, 521 U.S. 507, 520 (1997). The FMLA's family-leave provision is appropriate Section 5 legislation because it is a reasonable remedy for ongoing gender discrimination, stereotyping, and the enduring effects of decades of unconstitutional gender discrimination by the States. The FMLA does so by attacking one particular aspect of unconstitutional employment discrimination: the disparate treatment of male and female workers in employment decisions and the allocation of family-care leave, based on stereotypes about domestic roles created by past discrimination.

A. Congress Enacted The Family-Care Provision Of The Family And Medical Leave Act Pursuant To Its Section 5 Power

In enacting the FMLA, Congress made clear its intent to enforce the Fourteenth Amendment. The statute's purposes expressly include "promot[ing] the goal of equal employment opportunity for women and men," and, "consistent with the Equal Protection Clause of the Fourteenth Amendment, minimiz[ing] the potential for employment discrimination on

the basis of sex." 29 U.S.C. 2601(b)(4) and (5). The legislative history confirms what the statute's text says. Under the heading "EQUAL PROTECTION AND NON-DISCRIMINATION," both the Senate and House Reports explained that the FMLA "is based not only on the Commerce Clause, but also on the guarantees of equal protection and due process embodied in the Fourteenth Amendment."[3]

Petitioners' argument (Br. 21-27) that Congress did not invoke Section 5 with sufficient clarity erroneously presupposes some obligation on the part of Congress to identify the source of authority for its legislation. Nothing in the text of the Constitution or this Court's decisions requires that. See *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948) ("The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise."). To the contrary, this Court has squarely held that Congress need not "anywhere recite the words 'section 5' or 'Fourteenth Amendment' or 'equal protection.'" *EEOC* v. *Wyoming*, 460 U.S. 226, 243 n.18 (1983). Rather, "congressional legislation [may be] defended on the basis of Congress' powers under § 5 of the Fourteenth Amendment" if the Court is "able to discern some legislative purpose or factual predicate that supports the exercise of that power." *Ibid.*[4]

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[3] S. Rep. No. 3, 103d Cong., 1st Sess. 16 (1993); H.R. Rep. No. 8, 103d Cong., 1st Sess. Pt. 1, at 29 (1993); see also S. Rep. No. 68, 102d Cong., 1st Sess. 25, 40 (1991); H.R. Rep. No. 28, 101st Cong., 1st Sess. Pt. 1, at 15 (1989).

[4] Petitioners' effort (Br. 22-25) to demonstrate that, despite Congress's express textual reference to the Fourteenth Amendment, Congress relied exclusively on the Commerce Clause underscores the dangers of a legal test that declines to take Congress at its word. Petitioners suggest (Br. 24), for example, that the FMLA is "social-policy," rather than Section 5, legislation because there was "wrangling over terms and costs." But petitioners offer no support for the notion that Congress

Congress's express reference to the Equal Protection Clause of the Fourteenth Amendment in the text of the statute and the legislative history provide an ample predicate "to discern" congressional reliance on its Section 5 authority. Indeed, petitioners previously had no difficulty "discern[ing]" that "legislative purpose or factual predicate" (*EEOC*, 460 U.S. at 243 n.18). See Pet. C.A. Br. 24-27; Pet. Second Supp. C.A. Br. 8. Nor did their amicus, the courts below, or any other court of appeals to address the issue.[5]

While petitioners object (Br. 21) to such "*post hoc*" judicial inquiries into the source of congressional authority to legislate, separation of powers principles compel such an undertaking. Courts may assume the constitutionally sensitive task of invalidating legislation that is duly enacted by Congress and the President only where the legislation in fact is beyond Congress's power; courts may not strike down valid legislation simply because petitioners deem the accompanying legislative history to be insufficiently explicit or exhaustive. Indeed, when the power of Congress to enact a civil rights law is questioned, it is "necessary to *search* the Constitution to ascertain whether or not the power is

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refrains from "wrangling" (a pejorative for the normal give-and-take of the legislative process) when it legislates under Section 5. Likewise, petitioners contend (*ibid.*) that Congress could not have been remedying discrimination based on gender because it "had *already* remedied leave-based gender discrimination generally through Title VII." However, the existence of other, valid Section 5 legislation addressing the problem of gender discrimination strengthens, rather than weakens, the inference that legislation addressing the same problem with greater particularity is also Section 5 legislation.

[5] See Pacific Legal Found. Br. 4, 22; *Kazmier* v. *Widmann*, 225 F.3d 519 (5th Cir. 2000); *Thomson* v. *Ohio State Univ. Hosp.*, 238 F.3d 424 (6th Cir. 2000) (Table); see also *Kimel*, *supra* (Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, reviewed as Section 5 legislation, although lacking any textual reference to the Fourteenth Amendment, Section 5, or equal protection).

conferred," and to consider even those sources of power that only "in the remotest degree" have potential application to the statute at issue. *United States* v. *Harris*, 106 U.S. 629, 636 (1883).[6]

Petitioners' reliance (Br. 17, 26) on *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981), is misplaced. "*Pennhurst* established a rule of statutory construction to be applied where statutory intent" to reach the States as defendants "is ambiguous," *Gregory* v. *Ashcroft*, 501 U.S. 452, 470 (1991), not a rule that requires Congress to invoke its Section 5 power expressly. *Pennhurst*'s interpretive canon "simply ha[s] no relevance to the question of whether, in this case, Congress acted pursuant to its powers under § 5" because "there is no doubt" that Congress intended to extend the FMLA to the States. *EEOC*, 460 U.S. at 244 n.18.[7]

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[6] See also *United States* v. *Butler*, 297 U.S. 1, 61 (1936); *Keller* v. *United States*, 213 U.S. 138, 147 (1909); cf. *Fullilove* v. *Klutznick*, 448 U.S. 448, 476-478 (1980) (opinion of Burger, C.J.) (statute sustained under Section 5 even though Congress never referenced that power); *id.* at 500-502 (Powell, J., concurring).

[7] Petitioners' reliance (Br. 25-26) on *Florida Prepaid Postsecondary Educational Expense Board* v. *College Savings Bank*, 527 U.S. 627, 640 (1999), is likewise mistaken. In that case, this Court declined to consider whether the Patent Remedy Act could be considered appropriate Section 5 legislation to enforce the Just Compensation Clause. This Court explained that, although Congress had been explicit about its intent to enforce the right of procedural due process under the Fourteenth Amendment, the statute and legislative history were devoid of any "suggestion * * * that Congress had in mind the Just Compensation Clause." *Id.* at 642 n.7. But a requirement that Congress identify the constitutional problem to be remedied is different from a requirement that Congress invoke the source of its authority to legislate.

B. The Family And Medical Leave Act Responds To A Long History And Continuing Problem Of Unconstitutional Gender Discrimination By The States

1. *Historic Discrimination By The States*

The "propriety of any § 5 legislation 'must be judged with reference to the historical experience * * * it reflects.'" *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 640 (1999). While petitioners and their amici largely ignore it, Congress and this Court have repeatedly acknowledged the Nation's "long and unfortunate history of sex discrimination." *Frontiero* v. *Richardson*, 411 U.S. 677, 684 (1973) (plurality).

> Through a century plus three decades and more of [the Nation's] history, women did not count among voters composing "We the People" * * *. And for a half century thereafter, it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any "basis in reason" could be conceived for the discrimination.

United States v. *Virginia*, 518 U.S. 515, 531 (1996).

State-sanctioned discrimination pervaded virtually every aspect of women's lives. See *Virginia*, 518 U.S. at 536-537 & n.9 (discussing history of discrimination against women seeking higher education); *J.E.B.* v. *Alabama*, 511 U.S. 127, 131 (1994) ("until the 20th century, women were completely excluded from jury service"); *Frontiero*, 411 U.S. at 685 (women could not "hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children.").[8] State

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[8] See also *United States* v. *Yazell*, 382 U.S. 341, 348-358 (1966) (enforcing state coverture law); see also *id.* at 361 (Black, J., dissenting) (the law of coverture "rests on the old common-law fiction that the husband and

"statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes." *Ibid.* As this Court found, those laws relegated women to a position of "legal, social, and economic inferiority," *Virginia*, 518 U.S. at 534, and created a "Cult of Domesticity" where women were "fitted for motherhood and homelife." Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. Rev. 1546, 1547 (Dec. 1991).

Gender discrimination, related stereotypes, and the resulting relegation of women to domestic roles took strong hold in matters of employment. State laws prohibiting women from engaging in broad categories of jobs or imposing special conditions on their employment reinforced the stereotypes of women's appropriate role as homemaker and caregiver. In an oft-cited example, *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130 (1872), this Court upheld an Illinois law that prohibited women from practicing law. *Id.* at 138-139. Justice Bradley asserted that "the civil law, as well as nature herself," required "wide difference in the respective spheres and destinies of man and woman," *id.* at 141 (Bradley, J., concurring):

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic

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wife are one" and that "one is the husband"); *Minor* v. *Happersett*, 88 U.S. (21 Wall.) 162 (1875) (denial of the franchise); *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring) ("a woman had no legal existence separate from her husband").

> sphere as that which properly belongs to the domain and functions of womanhood.

Ibid.

Seven decades later, this Court sustained Michigan's prohibition on female bartenders because of the "allowable legislative judgment" that female bartending might "give rise to moral and social problems." *Goesaert* v. *Cleary*, 335 U.S. 464, 466 (1948). The law permitted women to work in bars owned by their husbands or fathers, however, because they would work subject to the men's "protecting oversight." *Ibid.*[9] Other laws excluded women from mining jobs, manufacturing and mechanical positions, construction work, teaching (at least after marriage), and occupations deemed to involve physically strenuous or hazardous work.[10] "History

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[9] See also *Cronin* v. *Adams*, 192 U.S. 108 (1904); *Anderson* v. *City of St. Paul*, 32 N.W.2d 538, 544 (Minn. 1948) ("Just as legislation for the protection of women is permissible * * * likewise, legislation may exclude women from certain employments."); *State* v. *Baker*, 92 P. 1076, 1078 (Or. 1907) ("By nature citizens are divided into the two great classes of men and women, and the recognition of this classification by laws having for their object the promoting of the general welfare and good morals does not constitute an unjust discrimination."); *Sherlock* v. *Stuart*, 55 N.W. 845, 847 (Mich. 1893) ("Some employments, for example, may be admissible for males, and improper for females; and regulations recognizing the impropriety, and forbidding women engaging in them, would be open to no reasonable objection.").

[10] See Women's Bureau, U.S. Dep't of Labor, *Summary of State Labor Laws for Women* 17 (1969) (17 States prohibited women from mining); *Holden* v. *Hardy*, 169 U.S. 366 (1898) (discussing Utah constitutional provision on mining); *Commonwealth* v. *Riley*, 97 N.E. 367, 368 (Mass. 1912) (restriction on work necessary "that the health and endurance of the individual may be insured and the ultimate strength and virility of the race be preserved"); *Board of Rev.* v. *Johnson*, 76 So. 859 (Ala. 1917) (construction); *Grimison* v. *Board of Educ. of City of Clay Ctr.*, 16 P.2d 492, 493 (Kan. 1932) ("[R]eproduction is indispensable to continued existence of the human race, and if, following marriage of a female under

[thus] provides numerous examples of legislative attempts to exclude women from particular areas [of employment] simply because legislators believed women were less able than men to perform a particular function." *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 725 n.10 (1982).

State-sponsored gender discrimination not only significantly limited the employment options and opportunities available to women, but also subjected women to distinctive restrictions, terms, conditions, and benefits for those jobs they were permitted to perform. See, *e.g.*, *Frontiero*, 411 U.S. at 679-680 (discrimination in employment benefits). Until 1969, every State had labor laws imposing "protective" restrictions on the employment of women. Pet. App. 25a. The majority of States limited the hours that women could work, on the ground that such laws "tend[] to preserve the health, strength, and vigor of women * * *, thereby conserving the vitality necessary to the proper discharge of their maternal functions, the rearing and education of children, and the maintenance of the home." *People* v. *Elerding*, 98 N.E. 982, 984 (Ill. 1912). In *Muller* v. *Oregon*, 208 U.S. 412 (1908), this Court sustained the constitutionality of such laws. In so holding, the Court noted that at least 19 States "impose[d] restrictions in some form or another upon the

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contract to teach, the reproductive function should become operative, and should progress to fruition within the period of employment, successful performance of the contract on the teacher's part might be interfered with or prevented."); *Backie* v. *Cromwell Consol. Sch. Dist. No. 13*, 242 N.W. 389, 390 (Minn. 1932) ("[M]arital duties interfere with that degree of regularity and devotion that is required of teachers."); *Ansorge* v. *City of Green Bay*, 224 N.W. 119, 121 (Wis. 1929) ("Many circumstances * * * might lead to the belief that a male teacher would be more suitable for employment than a female teacher" and "the same may be said with respect to married and unmarried teachers."); *Jones Metal Prods.* v. *Walker*, 281 N.E.2d 1, 6 n.4 (Ohio 1972) (prohibiting the employment of women for jobs such as crossing watchman, gas or electric meter reader, baggage or freight handling, trucking, and jobs requiring heavy lifting).

hours of labor that may be required of women." *Id.* at 419 n.1. Those laws, the Court explained, reflected the widespread assumption that "a proper discharge of [women's] maternal functions—having in view not merely her own health, but the well-being of the race—justif[ies] legislation to protect her from the greed as well as the passion of man." *Id.* at 422; see also *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 395 (1937) (special wage law upheld by refusing to "creat[e] a 'fictitious equality'" between men and women under the Fourteenth Amendment).[11]

Those laws fueled employers' perceptions that women—unlike men—were less desirable, efficient, and economically valuable employees because their work had to be accommodated to competing domestic duties. Indeed, "[c]oncern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment

[11] See also *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 193 & n.7 (1974) (citing statutes restricting night work); *Radice* v. *New York*, 264 U.S. 292, 294-297 (1924) (upholding limit on night work for women "considering their more delicate organism"); *Bosley* v. *McLaughlin*, 236 U.S. 385, 393-396 (1915) (upholding California law restricting work hours); *Miller* v. *Wilson*, 236 U.S. 373 (1915) (same); *W.W. Mac Co.* v. *Teague*, 180 S.W.2d 387, 389-390 (Ky. 1944) (upholding "special working conditions and protective provisions"); *Martinez* v. *Johnson*, 119 P.2d 880 (Nev. 1941); *People* v. *Charles Schweinler Press*, 108 N.E. 639, 640 (N.Y. 1915) (limiting hours because "healthy mothers are essential to vigorous offspring," so "the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race"), error dismissed, 242 U.S. 618 (1916); *id.* at 641 (such protection is necessary "not only for their own sakes but, as is and ought to be constantly and legitimately emphasized, for the sake of the children whom a great majority of them will be called on to bear and who will almost inevitably display in their deficiencies the unfortunate inheritance conferred upon them by physically broken down mothers"); *W.C. Ritchie & Co.* v. *Wayman*, 91 N.E. 695, 698 (Ill. 1910) ("the physical structure and maternal functions of women place them at such a disadvantage in the struggle for existence as to form a substantial difference between the sexes").

opportunities." *International Union, United Auto. Workers* v. *Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991).

Moreover, employers routinely discriminated against women by paying them less than men for comparable work. See, *e.g.*, *Hogan*, 458 U.S. at 728-729 & n.15; *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 206 (1974); cf. *City of Chicago* v. *Illinois Fair Employment Practices Comm'n*, 410 N.E.2d 136 (Ill. 1980) (janitors paid more than "janitresses" for performing same cleaning tasks).[12]

While discriminatory laws aimed at women ossified society's perceptions about women's capabilities and inexorable domestic responsibilities, other laws impaired men's opportunities to share in the domestic role. See *Stanley* v. *Illinois*, 405 U.S. 645, 646 (1972) (state automatically deprived father of custody of children upon death of unwed mother).[13]

2. *Enduring Unconstitutional Discrimination*

While state action "denying rights or opportunities based on sex" is recorded in "volumes of history," *Virginia*, 518 U.S. at 531, unconstitutional discrimination by state actors

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[12] See also Women's Bureau, U.S. Dep't of Labor, *Fact Sheet on the Earnings Gap* (Feb. 1970); *Equal Employment Opportunity Enforcement Procedures: Hearings Before the General Subcomm. on Labor of the House Comm. on Educ. and Labor*, 92d Cong., 1st Sess. 486, 489 (1971) (Modern Language Ass'n) (surveying public and private schools, "salary differences between men and women full-time faculty members are substantial," even "at equivalent ranks in the same departments"); *id.* at 510 (Dr. Ann Scott, Nat'l Org. for Women) (women in state employment "suffer some of the worst [pay] discrimination").

[13] See also *Wengler* v. *Druggists Mut. Ins. Co.*, 446 U.S. 142, 144-146 (1980) (wives automatically granted benefits upon work-related death of spouse; men denied such benefits upon death of wife unless dependency is proven); *Caban* v. *Mohammed*, 441 U.S. 380 (1979) (unwed mother, but not unwed father, may block adoption); *Orr* v. *Orr*, 440 U.S. 268 (1979) (Alabama statute requiring men, but not women, to pay alimony upon divorce).

on the basis of gender remains a contemporary problem. Indeed, it was not until 1971—well within the professional lifetime of many current state officials and employers—that, "for the first time in our Nation's history, this Court ruled in favor of a woman who complained that her State had denied her the equal protection of its laws." *Id.* at 532 (citing *Reed* v. *Reed*, 404 U.S. 71 (1971)). And it was not until five years later that a majority of this Court ruled that gender discrimination warrants heightened scrutiny. *Craig* v. *Boren*, 429 U.S. 190, 197-199 (1976).

This Court has explained that a principal basis for the application of heightened scrutiny to state action is the pervasiveness of gender discrimination in state laws, policies, and conduct.[14] In 1973, this Court acknowledged that "it can hardly be doubted that * * * women *still* face *pervasive*, although at times more subtle, discrimination in our educational institutions [and] in the job market." *Frontiero*, 411 U.S. at 686 (emphasis added). In 1994—a year *after* Congress enacted the FMLA—this Court again explained that women have "suffered * * * at the hands of discriminatory state actors during the decades of our Nation's history." *J.E.B.*, 511 U.S. at 136. Two years later, the Court discussed "recent[]" discrimination against women pursuing specialized careers. *Virginia*, 518 U.S. at 544.

Petitioners insist (Br. 48), however, that Congress's legislative hands are tied when it comes to combating gender discrimination in employment because there is no "*current* unconstitutional conduct." That is simply wrong. In addition to *J.E.B.* and *Virginia*, ample lower court decisions attest

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[14] See, *e.g.*, *Craig*, 429 U.S. at 218 (Rehnquist, J., dissenting) (heightened scrutiny is triggered by the "pervasive and persistent nature of the discrimination experienced by women"); *Mathews* v. *Lucas*, 427 U.S. 495, 506 (1976) (heightened scrutiny based upon the "severity or pervasiveness of the historic legal and political discrimination against women").

that discriminatory attitudes and stereotypical assumptions continue to infect the employment conduct of state actors, including petitioners' amici.[15]

The argument also defies common sense. "Prejudice, once let loose, is not easily cabined," nor easily remedied. *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 464 (1985) (Marshall, J., concurring in the judgment in part). Contrary to petitioners' argument (Br. 47-48), over a century of unconstitutional policies, practices, stereotypes, and assumptions about women's roles and abilities did not suddenly vanish "four decades ago" (Pet. Br. 48). Quite the opposite, this Court's adoption just 26 years ago of heightened scrutiny for distinctions based on gender marked the *beginning*, not the end, of the process of dismantling deeply rooted, unconstitutional governmental practices.[16]

That process is ongoing today, as reflected by this Court's continued application of heightened scrutiny to state action

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[15] Most recently: see, *e.g.*, *Warren* v. *Prejean*, 301 F.3d 893, 899-903 (8th Cir. 2002); *Knussman* v. *Maryland*, 272 F.3d 625, 634-649 (4th Cir. 2001) (unconstitutional presumption that only a woman could qualify as a "primary care giver" under a facially neutral state statute); *Siler-Khodr* v. *University of Tex. Health Sci. Ctr.*, 261 F.3d 542, 544, 547 (5th Cir. 2001) (wage discrimination), petition for cert. pending (filed Aug. 14, 2002) (No. 02-253); *Kovacevich* v. *Kent State Univ.*, 224 F.3d 806, 826-828 (6th Cir. 2000) (same); *White* v. *New Hampshire Dep't of Corrs.*, 221 F.3d 254 (1st Cir. 2000); *Thomas* v. *Texas Dep't of Criminal Justice*, 220 F.3d 389 (5th Cir. 2000); *Lathem* v. *Department of Children & Youth Servs.*, 172 F.3d 786, 791-793 (11th Cir. 1999) (disparate discipline).

[16] "[F]our decades ago" (Pet. Br. 48), this Court observed that "woman is still regarded as the center of home and family life." *Hoyt* v. *Florida*, 368 U.S. 57, 62 (1961). Fourteen years *later*, Louisiana reiterated the point. *Taylor* v. *Louisiana*, 419 U.S. 522, 534 n.15, 535 n.17 (1975). And nearly two decades *after Hoyt*, amicus Alabama maintained an alimony law that "announc[ed] the State's preference for an allocation of family responsibilities under which the wife plays a dependent role." *Orr*, 440 U.S. at 279.

based on gender. And the fact that the judiciary only recently came to apply heightened scrutiny underscores the futility of employing the historic record of judicial decisions to limit the scope of Congress's power to remedy discrimination at the core of the Fourteenth Amendment's equal protection guarantee. Together, the searching and the evolving character of judicial review of discrimination on the basis of gender materially undermines any basis for arguing that Congress must stay its remedial legislative hand: "It is not * * * the *judicial power*" but "the power of Congress which has been enlarged" by Section 5. *Ex parte Virginia*, 100 U.S. at 345.

3. *The Congressional Response*

Congress has taken an active lead in combating gender discrimination in this Nation. Indeed, in the 1960s—before this Court ever struck down a gender-based law as unconstitutional—Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Equal Pay Act of 1963, 29 U.S.C. 206(d)(1). Congress also extended both Title VII's ban on gender discrimination and the Equal Pay Act's prohibition on wage discrimination to the States years before a majority of the Court concluded that gender discrimination warrants heightened scrutiny. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103 (Title VII); Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (Equal Pay Act). In the ensuing years, Congress repeatedly enacted laws to eliminate unconstitutional discrimination in employment and the lingering effects of past discrimination and entrenched stereotypes.[17]

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[17] See, *e.g.*, Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a); Pregnancy Discrimination Act, 42 U.S.C. 2000e(k); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1072.

The FMLA's family-care provision is one component of that interlocking statutory scheme, designed to eliminate workplace discrimination based on "archaic, and overbroad stereotypes about the relative abilities of men and women," *J.E.B.*, 511 U.S. at 131, and to remedy the enduring effects of past discrimination. Congress made clear its intent that the family-care provision would "promote the goal of equal employment opportunity for women and men, pursuant to [the Equal Protection] [C]lause," 29 U.S.C. 2601(b)(5), and "minimize[] the potential for employment discrimination on the basis of sex by ensuring generally that leave is available * * * on a gender-neutral basis," 29 U.S.C. 2601(b)(4). The FMLA's family-care provision does so in three distinct ways.

First, Congress determined that stereotypical views of the woman's role as a caregiver—the outgrowth of decades of unconstitutional discrimination by States—made employers more reluctant to hire women or promote them to positions of responsibility because employers assume that women will require greater accommodations at work to meet family-care obligations.

> Historically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers-to-be.[18]

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[18] *The Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the House Comm. on Educ. and Labor*, 99th Cong., 2d Sess. 100 (1986) (*Joint Hearing*). See also 139 Cong. Rec. 2262 (1993) (Sen. Mitchell) ("This legislation is as much about giving women an equal economic opportunity as it is about providing a national policy to protect jobs during times of family crises."); 137 Cong. Rec. 25,014 (1991) (Sen. Akaka) ("The [FMLA] will also advance the goal of equal employment

Testimony before Congress thus echoed this Court's view in *Kahn* v. *Shevin*, 416 U.S. 351, 353 (1974), that, "[w]hether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to [women]."

Second, Congress heard evidence that stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic, family-care responsibilities for male employees. Because employers continue to regard the family as the woman's domain, those who offer family leave to women often deny men similar accommodations or discourage them from taking leave. Indeed, petitioners acknowledge as much. Pet. Br. 24 ("Numerous *men* testified that they had suffered due to inadequate family-care leave."). In fact, Congress found that, "[d]espite the apparent conflict with Title VII of the Civil Rights Act, only 37 percent of the[] companies extended parental leave rights to fathers and often on a different (and less extended) basis than to mothers." H.R. Rep. No. 511, 100th Cong., 2d Sess. Pt. 2, at 24 (1988). "It's fairly flagrant discrimination," Congress was told.[19]

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opportunity for men and women. Due to the nature of the roles of men and women in our society, primary responsibility for family caretaking often falls upon women, and historically affects their careers considerably more than those of men. This reality of life has created the serious possibility that employers may discriminate against employees and job applicants who are women. This legislation will serve to minimize the potential for job discrimination on the basis of sex by ensuring that leave is available on a gender-neutral basis.").

[19] *The Parental and Medical Leave Act of 1987: Hearings Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources*, 100th Cong., 1st Sess. Pt. 2, at 536 (1987) (*1987 Senate Hearing*) (Prof. Ross); see also *ibid.* ("[T]here are a number of studies * * * in which it's shown that employers in this country that are giving family leaves to their workers are * * * by and

Third, Congress was concerned that those two mutually reinforcing stereotypes create a self-fulfilling cycle of discrimination that forces women to continue to assume the role of primary family caregiver, 29 U.S.C. 2601(a)(5), which feeds employers' stereotypical views about women's commitment to work and their efficiency or value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination in the hiring and promotion of women that may be difficult to detect on a case-by-case basis. A prophylactic rule that levels the playing field by providing all employees with gender-neutral leave thus directly attacks that subtle, but destructive, discrimination.[20]

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large, giving it only to women, not to men."); *id.* Pt. 1, at 440-441 (Richard Last, Mass. Public School Teacher) ("Our maternity leave provision is typical of many across the state. * * * [It] gives women State-mandated, pay-eligible, disability time off related to child-birth and the other provides for unpaid time off for child-rearing. It is the latter which I feel is discriminatory. There is no reason why this provision should be differentiated on the basis of sex. Not only does this rob the baby of a father's nurturing influence, but it is oppressive to women in that it perpetuates the stereotype that it is the mother's sole responsibility to raise the child.); S. Rep. No. 3, *supra*, at 14-15 (Bureau of Labor Statistics study showing that, while 37% of female private-sector employees were allowed maternity leave, only 18% of male private-sector employees were allowed paternity leave); *Joint Hearing* at 147 (Washington Council of Lawyers) ("[p]arental leave for fathers * * * is rare"; "[w]here child-care leave policies do exist, men, both in the *public* and private sectors, receive notoriously discriminatory treatment in their requests for such leave") (emphasis added); 137 Cong. Rec. at 24,959 (Sen. Bond) ("Paternity leave is extremely scarce.").

[20] See *The Family and Medical Leave Act of 1993: Hearing Before the Subcomm. on Children, Family, Drugs, and Alcoholism of the Senate Comm. on Labor and Human Resources*, 103d Cong., 1st Sess. 50 (1993) (Judith Lichtman) ("But for legislation like this, women's opportunities are truly artificially limited and barred."); *The Family and Medical Leave Act of 1991: Hearing Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources*,

Contrary to petitioners' argument (Br. 30-35), the evidence before Congress demonstrated that those stereotypes and their enduring effects operate in the public, as well as the private, sector. In fact, at the time Congress enacted the FMLA, seven States still had childcare leave or "maternity" laws that applied exclusively to women. See pp. 37-38 & n.31, *infra*.

> [M]en, both in the public and private sectors, receive notoriously discriminatory treatment in their requests for [child-care] leave. * * * * * [B]y providing male workers with the opportunity for parental leave, H.R. 4300 will help eliminate the stereotype—no longer valid in today's working world—that women are exclusively responsible for childcare. By refusing to tie the concept of "pregnancy" to "childcare," this Bill also eliminates the discriminatory problems caused by state "maternity leave" laws.[21]

102d Cong., 1st Sess. 10 (1991) ("the reality today is that women are the primary caregivers for elderly parents"; "[i]t is the daughters, whether biological or through marriage, that account for the majority of caregivers"). Indeed, Congress cited evidence that "[t]wo-thirds of the nonprofessional caregivers for older, chronically ill, or disabled persons are working women, the most common caregiver being a child or spouse." H.R. Rep. No. 8, *supra*, Pt. 1, at 24; S. Rep. No. 3, *supra*, at 7.

[21] *Joint Hearing* 147; see also *id.* at 29-30 (Meryl Frank) (finding that "public sector leaves don't vary very much from private sector leaves"); *1987 Senate Hearing* Pt. 2, at 364-374 (Fla. State Rep. Elaine Gordon) (leave is only granted to women; Florida rejected extending leave to men); *id.* Pt. 2, at 29 (Tom Bates, Calif. State Assemblyman) ("[W]hen we examine our laws in California, we come up with the notion that they are really based on the 1950s notion of a sort of Ozzie and Harriet type of family * * * where the man is working and the woman is staying home taking care of the kids."); *id.* Pt. 2, at 33 (Joy Picus, Los Angeles City Councilwoman) ("[O]ur institutions * * * are still delivering services as if the recipients were the stereotypical families."); *id.* Pt. 1, at 385 (testimony of Gerald McEntee, Int'l Pres., AFSCME) ("[T]he vast

Furthermore, Congress acted reasonably in including public employers because much of the discrimination being remedied has its foundation in state law and other state conduct.

Congress adopted the FMLA's gender-neutral family-leave provision to combat the gender-based stereotypes and employment discrimination it had identified. By protecting men and women equally, Congress designed the FMLA to reduce the viability of gender as a proxy for leave entitlement, job commitment, or familial caregiving. By creating an across-the-board, routine employment benefit for all eligible employees, moreover, Congress sought to ensure that family-care and parental leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men.[22] Furthermore, because individual applications of unspoken stereotypes and unrecorded employer assumptions could be very difficult to litigate under pre-existing anti-discrimination laws, Con-

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majority of [public employment] contracts, even though we look upon them with great pride, really cover essentially maternity leave, and not paternity leave."); *The Family and Medical Leave Act of 1989: Hearing on H.R. 770 Before the Subcomm. on Labor-Management Relations of the House Comm. on Educ. and Labor*, 101st Cong., 1st Sess. 271 (1989) (Concerned Alliance of Responsible Employers) (thirteen States grant family leave to women but not men).

[22] See H.R. Rep. No. 135, 102d Cong., 1st Sess., Pt. 1, at 28 (1991) ("[T]he FMLA avoids providing employers the temptation to discriminate."); H.R. Rep. No. 28, *supra*, Pt. 1, at 15 ("The bill will provide no incentive to discriminate against women, because it addresses the leave needs of workers who are young and old, male and female, married and single."); *The Family and Medical Leave Act of 1989: Hearing Before the Subcomm. on Children Family, Drugs, and Alcoholism of the Senate Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. 235 (1989) *(1989 Senate Hearing)* ("[I]n order to remove any incentive to discriminate against women," law must "provide job protection for family leave for all workers.").

gress concluded that the FMLA's family-leave provision fills a gap in the legal regime opposing unconstitutional gender discrimination and stereotypes.[23]

4. *The FMLA Family-Care Provision Is Proper Section 5 Legislation*

a. Congress can legislate against overt and subtle gender discrimination

The FMLA's family-care provision reflects an appropriate exercise of Congress's Section 5 power to combat gender discrimination and stereotypes in the workplace. As an initial matter, there can be no serious question that the Section 5 power to abrogate Eleventh Amendment immunity extends to legislation combating gender discrimination. See *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 452-456 (1976) (gender discrimination claim under Title VII validly abrogates Eleventh Amendment immunity). Congress's interest in eradicating gender discrimination is "compelling," *Roberts* v.

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[23] See S. Rep. No. 68, *supra*, 35 ("Legislation solely protecting pregnant women gives employers an economic incentive to discriminate against women in hiring policies; legislation helping all workers equally does not have this effect."); H.R. Rep. No. 8, *supra*, Pt. 2, at 11 ("If an employer denies benefits to its work force, it is in full compliance with anti-discrimination laws because it treats all employees equally. Thus, while Title VII, as amended by the Pregnancy Discrimination Act, has required that benefits and protection be provided to millions of previously unprotected women wage earners, it leaves gaps which an anti-discrimination law by its nature cannot fill."); H.R. Rep. No. 135, *supra*, Pt. 2, at 5 (same); *1989 Senate Hearing*, at 232 (discussing deficiencies of anti-discrimination law); *1987 Senate Hearing* Pt. 1, at 257 (AFSCME) ("This legislation is necessary to fill gaps in previously passed anti-discrimination laws."); *id.* Pt. 2, at 171 (Peggy Montes, Chicago Mayor's Comm'n on Women's Affairs) ("[I]t is not enough to have abstract antidiscrimination policies. We also have to provide employers with a 'threshold' from which they can start to build employee policies to meet the needs of men and women."); cf. *Kahn*, 416 U.S. at 353 ("firmly entrenched practices are resistant to such pressures" as Title VII).

United States Jaycees, 468 U.S. 609, 623 (1984), and "[r]eduction of the disparity in economic condition between men and women caused by the long history of discrimination against women [is] * * * an important governmental objective," *Califano* v. *Webster*, 430 U.S. 313, 317 (1977).

Petitioners' argument (Br. 28-30) that Congress was only legislating with respect to leave benefits mistakes the remedy for the problem. Congress did not design the FMLA's adjustment of leave benefits as an end in itself; it is the means Congress chose to the end of eliminating gender discrimination and stereotyping against both women in hiring and promotions and men in obtaining family-care leave.

b. Congress passed the FMLA to combat unconstitutional discrimination and gender-based stereotypes

Like other Section 5 legislation, the FMLA's family-care provision targets the enduring, yet hard-to-detect, effects of manifold state statutes and practices that, for generations, have limited women's opportunities to participate in the workforce on equal terms. This Court's cases now make clear that state action denying women or men equal employment opportunities based on "overbroad generalizations about the different talents, capacities, or preferences of males and females" violates the Fourteenth Amendment. *Virginia*, 518 U.S. at 533; *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 643 (1975); *id.* at 652 ("a father, no less than a mother, has a constitutionally protected right" to care for his children). It follows that Congress's Section 5 authority may displace such invidious generalizations directly.

Congress, moreover, could reasonably infer that the disproportionate burden of family-care responsibilities that women continue to shoulder, and the attendant limitations on their employment and advancement that Congress found, were the outgrowth of decades of unconstitutional state

action restricting women to domestic roles, and thus reinforced and "reflect[ed] archaic and stereotypic notions." *Hogan*, 458 U.S. at 725; cf. *Washington* v. *Davis*, 426 U.S. 229, 242 (1976) ("an invidious discriminatory purpose may often be inferred from * * * the fact, if it is true, that the law bears more heavily on one [gender] than another").

Indeed, the nexus between past discrimination and current stereotypes about family leave is illustrated by petitioner's own amicus. The Pacific Legal Foundation objects (Br. 24) that "[r]eality * * * intrudes" to make the FMLA unnecessary. But it is precisely the Pacific Legal Foundation's "reality" of gender-based salary differentials, "society['s] traditional[] view[]" of "women as primary caretakers," and male employees' concerns about "the detrimental effect on their careers" of caring for their family (concerns that women workers are assumed not to share), *ibid.*, that the FMLA combats. Leave policies that "freeze the effect[s] of past discrimination," *South Carolina* v. *Katzenbach*, 383 U.S. 301, 334 (1966), and outdated stereotypes fall squarely within Congress's Section 5 authority; Congress need not tolerate "the very stereotype the law condemns." *J.E.B.*, 511 U.S. at 138.

c. The FMLA rests on an established record of gender-based discrimination by the States

Section 5 legislation, like the FMLA, that Congress designed to combat employment discrimination, "outdated misconceptions," *J.E.B.*, 511 U.S. at 135, and entrenched stereotypes—discrimination that has triggered and continues to trigger the application of heightened scrutiny by this Court —has been sustained as appropriate Section 5 legislation without determining whether the legislative record documented a history of constitutional violations by the States.[24]

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[24] See *Oregon* v. *Mitchell*, 400 U.S. 112 (1970) (nationwide ban on literacy tests upheld, despite geographically limited evidence of abuse);

Furthermore, petitioners' argument is in substantial tension with *Fitzpatrick*, *supra*, where this Court sustained the abrogation of Eleventh Amendment immunity for gender discrimination under Title VII. The Court did so without inquiring into the extent of evidence before Congress in 1972 of a history of unconstitutional gender discrimination by the States. Indeed, while the legislative record supporting the extension of Title VII to the States in 1972 contains specific evidence and findings of race discrimination by state and local government employers, that record contains no specific data or findings regarding women employees in state or local governments.[25]

Katzenbach v. *Morgan*, 384 U.S. 641, 649 (1966) (Harlan, J., dissenting) (literacy test ban added to statute on the floor of Congress); cf. *Lopez* v. *Monterey County*, 525 U.S. 266 (1999) (deterrent provision of the Voting Rights Act sustained without examination of the legislative record); *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 67 (1986) (Title VII's ban on religious discrimination was added "on the floor of the Senate with little discussion").

[25] See H.R. Rep. No. 238, 92d Cong., 1st Sess. (1971); S. Rep. No. 415, 92d Cong., 1st Sess. (1971); 118 Cong. Rec. 1840 (1972) (Sen. Javits) (specifically citing evidence of racial discrimination by state and local governments, but referring only to "overall figures" for sex discrimination); *id.* at 1816-1819, Exh. 1 (findings only as to racial discrimination); *id.* at 4935 (Tables). The isolated references made to the Constitution in the context of gender discrimination noted only the unremarkable propositions that the Constitution prohibits discrimination by State and local governments, S. Rep. No. 415, *supra*, at 10; 118 Cong. Rec. at 1816 (Sen. Williams), and that race- or sex-based discrimination can violate the Constitution, *id.* at 1412 (Sen. Byrd). Congressional hearings on the 1972 amendments also were silent on the subject of unconstitutional gender discrimination by state governments. See *Equal Employment Opportunities Enforcement Act of 1971: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare*, 92d Cong., 1st Sess. (1971); *Equal Employment Opportunity Enforcement Procedures: Hearings Before the General Subcomm. on Labor of the House Comm. on Educ. and Labor*, 92d Cong., 1st Sess. (1971); *Equal Employment Opportunity*

Those cases recognize the commonsense proposition that, where the courts already have acknowledged that the States have engaged in a long-term and widespread pattern of unconstitutional conduct such that heightened scrutiny is appropriate—as for racial and gender discrimination—little would be gained by having Congress belabor the obvious in legislative history that it has no constitutional obligation to create in the first place. Cf. *Kimel*, 528 U.S. at 91 (noting that an examination of the legislative record is not necessary in all circumstances).[26]

Petitioner's reliance (Br. 30-35) on the Court's discussion of legislative history in *Kimel*, 528 U.S. at 68-69; and *Garrett*, 531 U.S. at 368-372, is misplaced. Those cases involved exercises of the Section 5 power that pertained to state conduct subject only to rational basis review—that is, state conduct that, by definition, lacked any comparable judicially recognized history of pervasive discrimination. See *Garrett*, 531 U.S. at 366 (disability discrimination); *Kimel*, 528 U.S. at 83 (age discrimination); see also *Flores*, 521 U.S. at 512-514

Enforcement Procedures: Hearings Before the General Subcomm. on Labor of the House Comm. on Educ. & Labor, 91st Cong., 1st & 2d Sess. (1969-1970); *Equal Employment Opportunities Enforcement Act: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare*, 91st Cong., 1st Sess. (1969).

[26] See, *e.g.*, *United States* v. *Morrison*, 529 U.S. 598, 612 (2000); *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 213 (1997) ("Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review."); *United States* v. *Lopez*, 514 U.S. 549, 562-563 (1995) ("We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce."); *Mansell* v. *Mansell*, 490 U.S. 581, 592 (1989) ("Congress is not required to build a record in the legislative history to defend its policy choices.").

(neutral laws affecting religious exercise).[27] In the absence of any "extensive litigation and discussion of the constitutional violations" in judicial decisions, *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring), the Court was forced to resort to the legislative record to determine whether there was, in fact, a pattern of unconstitutional conduct for Congress to remedy. This Court has already answered that question with respect to gender discrimination.

By studiously avoiding any discussion of that well-documented history of unconstitutional gender discrimination by the States in employment, petitioners ask this Court to ignore the unconstitutional genesis of the problem Congress addressed, and instead look exclusively for a lengthy history of unconstitutional administration of leave policies. But in light of the long history of state laws restricting the ability of women to work in the first place, it is not surprising that there is not an equally lengthy history of discrimination in administering one particular type of employment benefit.

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[27] Petitioners' characterization (Br. 43) of *Flores* as involving the application of Section 5 jurisprudence to state conduct subject to heightened scrutiny is baffling. As this Court explained in *Flores*, the entire point of the Religious Freedom Restoration Act was to impose a standard of heightened scrutiny on conduct that this Court held, in *Employment Division, Department of Human Resources* v. *Smith*, 494 U.S. 872 (1990), did not warrant such scrutiny. *Flores*, 521 U.S. at 512-514. And it was the Act's across-the-board imposition of such heightened scrutiny that, in large part, rendered it an incongruent and disproportionate legislative remedy. *Id.* at 532-535. *United States* v. *Morrison*, *supra* (cited at Pet. Br. 43), likewise, is of no help to petitioners. The Court had no occasion in that case to address what type of legislative record, if any, would be necessary to sustain Section 5 legislation remedying unconstitutional gender discrimination, because the relevant provision of the Violence Against Women Act of 1994 regulated only private conduct and thus independently ran afoul of the "time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action." 529 U.S. at 621.

Cf. *J.E.B.*, 511 U.S. at 131 (applying heightened scrutiny to gender-based peremptory challenges despite their being "a relatively recent phenomenon").

More fundamentally, petitioners ask the Court to focus on the wrong question. Congress enacted the FMLA's family-care provision to combat gender discrimination and stereotypes in hiring and promotion—an area where the record of unconstitutional conduct by state employers is well-documented in court decisions and the legislative history of numerous federal anti-discrimination laws.[28] The FMLA does so by equalizing the opportunity of all employees—regardless of gender—to obtain family leave. That remedy directly counteracts subtle discrimination in the hiring and promotion of women based on stereotypes about their relative needs and desire to take leave. By guaranteeing equal leave opportunities for all employees—not just for female employees or "working mothers"—Congress sought to take considerations concerning family leave out of the hiring and promotion equation for women. The FMLA thus attacks the foundation of employer stereotypes that Congress found historically have produced discrimination in the hiring and promotion of female employees. More specifically, in order to eliminate barriers to the employment and advancement of women grounded in long-held stereotypes about the allocation of domestic responsibilities, Congress passed the FMLA to transform family leave from a women's issue into an across-the-board employment benefit or, as petitioners repeatedly interject (Br. 23-25), a gender-neutral "labor standard." The FMLA thus pretermits employers' "[s]ex-based

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[28] "After Congress has legislated repeatedly in an area of national concern," such as combating gender discrimination in employment, "its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area." *Fullilove*, 448 U.S. at 503 (Powell, J., concurring).

generalizations [that] both reflect and reinforce 'fixed notions concerning the roles and abilities of males and females.'" *Nguyen* v. *INS*, 533 U.S. 53, 74 (2001) (O'Connor, J., dissenting) (quoting *Hogan*, 458 U.S. at 725).

In any event, petitioners' cramped vision of the constitutional foundation for congressional action cannot be reconciled with this Court's Section 5 precedents, which give Congress a dynamic and robust role in deterring current and remedying past discrimination. For example, in upholding literacy test bans under the Voting Rights Act (see *Oregon* v. *Mitchell*, 400 U.S. 112 (1970); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966)), this Court has never limited Congress's legislative authority to circumstances where extensive court decisions or a lengthy legislative history specifically demonstrates the unconstitutionality of such tests. See *Lassiter* v. *Northampton County Bd. of Elections*, 360 U.S. 45 (1959) (Court unanimously sustains the facial constitutionality of literacy tests); *Morgan*, 384 U.S. at 669 & n.9 (Harlan, J., dissenting) (literacy test ban added to the Voting Rights Act on the floor of Congress). Similarly, in *Oregon* v. *Mitchell*, *supra*, this Court upheld Congress's ban on durational residency requirements for voting, 42 U.S.C. 1973aa-1(a)(5), without separately deciding that the residency requirement was unconstitutional or that the States had engaged in a long pattern of unconstitutional discrimination in imposing such residency requirements. 400 U.S. at 285-287 (Stewart, J., joined by Burger, C.J., & Blackmun, J.), 236-239 (Brennan, White, Marshall, JJ.), 147-150 (Douglas, J.). In fact, a year earlier, the Court had upheld a similar residency requirement against constitutional challenge. *Drueding* v. *Devlin*, 380 U.S. 125 (1965) (mem.); see also *Carrington* v. *Rash*, 380 U.S. 89, 91 (1965).[29]

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[29] Likewise, the Court has sustained the constitutionality of preclearance requirements for changes in States' voting procedures despite argu-

Those decisions demonstrate that the absence of substantial judicial precedent invalidating subtle forms of discrimination, which are difficult to prove on a case-by-case basis, does not signify either the absence of a problem for Congress to remedy or a lack of congressional authority. Quite the opposite, such silence may simply indicate that the historical permissibility of widespread, pervasive, and stubborn overt forms of discrimination, already documented in the Court's decisions, previously had made resort to subtle, facially neutral forms of discrimination unnecessary.

This Court's consistent application of heightened judicial scrutiny to state conduct reinforces the point. The longstanding judicial recognition of widespread, pervasive, and deeply rooted unconstitutional gender discrimination has been deemed sufficient to justify such probing judicial oversight, even if the particular form the discrimination has assumed is new. See, *e.g.*, *J.E.B.*, 511 U.S. at 131.

Moreover, petitioners' narrow analysis ignores the broader reality of the workplace. Petitioners do not and cannot contest the Nation's long history of gender discrimination, the pervasiveness of discriminatory laws and attitudes, or the stereotypes about male and female roles that those discriminatory laws and practices reinforced. Nor can petitioners deny that gender discrimination took firm root in matters of state employment, that law after law intentionally limited women's employment opportunities based on stereotypical assumptions about their primary responsibility for family caretaking, and that discriminatory attitudes pervaded the workplace, affecting not just hiring and promotions, but also employee compensation, working conditions, and benefits. Unable to dispute that background,

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ments that a particular jurisdiction is innocent of unconstitutional discrimination. See *Lopez* v. *Monterey County*, *supra*; *City of Rome* v. *United States*, 446 U.S. 156 (1980).

petitioners instead ask this Court to ignore it and to pretend that all of those pervasive discriminatory attitudes and stereotypes suddenly disappeared when it came to making hiring and promotion decisions for women and family-leave decisions for men. Nothing in Section 5 jurisprudence requires Congress or this Court to accept such a counterfactual assumption.

Finally, petitioners' approach depreciates congressional resourcefulness in combating deeply rooted and entrenched forms of discrimination. Less than twenty years elapsed between *Craig* v. *Boren*, when this Court *commenced* a concerted judicial process of dismantling decades of unconstitutional gender discrimination, and Congress's enactment of the FMLA. During that period, Congress perceived the battle shifting from prohibiting outright gender discrimination in employment to removing the subtle, yet enduring effects of entrenched stereotypes and recently repealed discriminatory laws. Indeed, this Court's decision in *Hogan*, *supra*, invalidating "the stereotyped view of nursing as an exclusively woman's job," 458 U.S. at 729, predated Congress's initial consideration of a family leave law by only a few years. Accordingly, as with congressional bans on literacy tests, which combat the enduring effects of past racial discrimination in education and voting (see *Gaston County* v. *United States*, 395 U.S. 285 (1969)), and Title VII's disparate impact test, which attacks more subtle and covert forms of racial and gender discrimination in employment (see *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431, 432 (1971)), legislation aimed at more subtle, second-generation forms of discrimination is unlikely to rest upon the type of lengthy and particularized history of constitutional violations that petitioners seek.

Indeed, Congress could reasonably conclude that it is precisely the judicial condemnation of the most overt and deeply entrenched forms of discrimination that often gives

rise to more subtle forms of second-generation discrimination, which are often facially neutral, but keyed to stereotypes resulting from the history of more overt discrimination. See *Hogan*, 458 U.S. at 726 (noting employers' "mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women" in the workplace). The shortage of judicial precedent condemning such second-generation discrimination accordingly should not disable Congress from responding. Insistence on well-documented proof of particularized constitutional violations is "hardly practicable" if, "during most of our country's existence * * * women were completely excluded" from many employment opportunities. *J.E.B.*, 511 U.S. at 131. In short, it is the fact of enduring discrimination, not a judicial pedigree for its manifestation in a particular form, that triggers Congress's Section 5 power; Section 5 empowers Congress to eliminate unconstitutional racial and gender discrimination, not merely push it underground.

d. The existence of state leave laws and policies does not diminish Congress's Section 5 power

Petitioners and amicus Alabama place great emphasis (Br. 32-35; Alabama Br. 5-14, 18-22) on the existence of state leave laws and policies at the time the FMLA was enacted. Again, petitioners and Alabama misunderstand the purpose of the FMLA's family-leave provision. Congress was not merely concerned with the creation of leave policies for their own sake. Congress's goal was to adjust family leave policies in order to eliminate their perpetuation of "the role-typing society has long imposed" on male and female workers, *Stanton* v. *Stanton*, 421 U.S. 7, 15 (1975), and thereby dismantle gender-based barriers to the hiring, retention, and promotion of women in the workplace. In pursuing that goal,

Congress could reasonably conclude that existing state leave laws fell short of the mark.[30]

Petitioners and Alabama, moreover, significantly overstate the coverage of pre-FMLA state laws. Alabama contends that, at the time of the FMLA's passage, "34 States * * * had adopted statutes authorizing varying forms of family and medical leave for public or private employees." Amicus Br. 14 (citing Comm'n on Family & Med. Leave, U.S. Dep't of Labor, *A Workable Balance: Report to Congress on Family and Medical Leave Policies* 45 (1996) (citing Women's Bureau, U.S. Dep't of Labor, *State Maternity/Family Leave Law* (1993))). But Alabama's resort to the phrase "varying forms" robs the argument of analytical force.

First, seven of those 34 States had childcare leave provisions that applied to *women only*. Indeed, Massachusetts required that notice of its leave provision be posted only in "establishment[s] in which females are employed."[31] In

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[30] See *1987 Senate Hearing* Pt. 1, at 470 (Richard Licht, Lt. Gov. of Rhode Island) ("But ultimately it makes sense to have a national policy. It's fair to all the States as they are * * * on the same level playing field, and that we don't have that patchwork."); *id.* Pt. 2, at 380 (Debra Merchant, Ky. Comm'n on Women) ("[P]rovisions for additional leave and benefits are inadequate and inconsistent from state to state."); 136 Cong. Rec. 9963 (1990) (Rep. Miller) ("States have not picked up the gauntlet either. * * * [L]ess than half the States have some type of parental leave policy."); 137 Cong. Rec. at 24,975 (Sen. Kennedy) ("reforms vary widely from State to State" and are "far from enough").

[31] Mass. Gen. Laws Ann. ch. 149, § 105D (West 1999) (providing leave to "female employee[s]" for childbirth or adoption); see also 3 Colo. Code Regs. § 708-1, R. 80.8 (2002) (pregnancy disability leave only); Iowa Code Ann. § 216.6(2) (West 2000) (former § 601A.6(2)) (same); Kan. Admin. Regs. 21-32-6(d); La. Rev. Stat. Ann. § 23:1008(A)(2) (West Supp. 1993) (repealed 1997) (pregnancy disability leave only); N.H. Rev. Stat. Ann. § 354-A:7(VI)(b) (1995 & Supp. 2000) (pregnancy disability leave only);

addition, petitioner Nevada—whose policies fell so short that it is excluded from Alabama's list—allowed its employees to use accrued sick leave "for adoption purposes or as *maternity* leave," Pet. Br. App. A-3 (emphasis added), but not for paternity leave. Those States' practices thus illustrate, rather than counteract, the very problem that Congress designed the FMLA to remedy: the state laws reinforced employers' stereotypes of men as valuable workers freed from familial responsibilities. See 29 U.S.C. 2601(a)(6); *Schafer* v. *Board of Pub. Educ.*, 903 F.2d 243 (3d Cir. 1990) (public school board denied male teacher child-rearing leave that was available to female employees).

Second, thirteen of Alabama's 34 States provided their employees no family leave, beyond an initial childbirth or adoption, to care for a seriously ill child or family member.[32] Nor did petitioner or amici Alabama, Indiana, Nebraska, Ohio, or Utah. See *State Maternity/Family Leave Law*, *supra*, at 3, 6, 8, 10, 12. Those States thus did nothing to combat the particular, more subtle forms of gender discrimination targeted by the FMLA's family-leave provision.

Third, many States provided no statutorily guaranteed right to family leave, offering instead only voluntary or discretionary leave programs. Three States left the amount of leave time primarily in employers' hands. See 3 Colo. Code

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Tenn. Code Ann. § 4-21-408(a) (1998) (four-month maternity leave for female employees only).

[32] See 3 Colo. Code Regs. § 708-1, R. 80.8 (2002); Del. Code Ann., title 29, § 5116 (1997); Iowa Code Ann. § 216.6(2) (West 2000); Kan. Admin. Regs. 21-32-6; Ky. Rev. Stat. Ann. § 337.015 (Michie 2001); La. Rev. Stat. Ann. § 23:1008(A)(2 (West Supp. 1993); Mass. Gen. Laws Ann. ch. 149, § 105D (West 1999); Mo. Ann. Stat. § 105.271 (West 1997 & Supp. 2002); N.H. Rev. Stat. Ann. § 354-A:7(VI)(b) (1995 & Supp. 2000); N.Y. Lab. Law § 201-c (McKinney's 2002); Tenn. Code Ann. § 4-21-408(a) (1998); *State Maternity/ Family Leave Law*, *supra*, at 12 (citing a Texas appropriations rider and a Virginia personnel policy).

Regs. § 708-1, R. 80.8 (2002); Kan. Admin. Regs. 21-32-6; N.H. Rev. Stat. Ann. § 354-A:7(VI)(b) (1995 & Supp. 2000). Amicus Oklahoma offered only a system by which employees could voluntarily donate leave time for colleagues' family emergencies. Okla. Stat. Ann. title 74, § 840-2.22 (historical note) (West 1995 & Supp. 2002). Congress could reasonably conclude that such discretionary family-leave programs would do nothing to combat, and could give free rein to, the very stereotypes about the roles of male and female employees that Congress sought to eliminate:

> [I]n the absence of a national minimum standard for granting leave for parental purposes, the authority to grant leave and to arrange the length of that leave rests with individual supervisors, leaving * * * employees open to discretionary and possibly unequal treatment. The lack of consistency also leads to differences between how men and women are treated in the case of maternity and paternity leaves.

H.R. Rep. No. 135, *supra*, Pt. 2, at 4-5; cf. *Knussman* v. *Maryland*, 272 F.3d 625, 634-649 (4th Cir. 2001) (State personnel director applied an irrebuttable presumption that only a woman could qualify as a "primary care giver"). In addition, four States provided leave only through administrative regulations or personnel policies, which Congress could reasonably conclude offered significantly less firm protection than a federal law. See 3 Colo. Code Regs. § 708-1, R. 80.8 (2002); Kan. Admin. Regs. 21-32-6; Wis. Admin. Code § DWD 225 (2002) (former § IND 86); *State Maternity/Family Leave Law*, *supra*, at 12 (Virginia).[33]

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[33] Other states may have had such policies on a formal or informal basis, although the Department of Labor's report did not reflect them. Because such policies are readily subject to change and may not even be legally enforceable against the State, Congress could reasonably consider them insufficient protection against gender discrimination and stereo-

In sum, just as state laws against race discrimination have neither eradicated the problem nor undermined the basis for subjecting state employers to federal prohibitions,[34] Congress could reasonably conclude that the wide variety of state leave policies did not effectively combat—and in many cases perpetuated—stereotypical employer assumptions about the respective domestic responsibilities of male and female employees, and thus were generally ineffective in combating the lingering effects of prior official discrimination in employment policies and practices.

C. The Family And Medical Leave Act's Family-Leave Provision Is Reasonably Tailored To Remedying And Preventing Unconstitutional Gender Discrimination In Employment

When enacting Section 5 legislation, Congress "must tailor its legislative scheme to remedying or preventing" the unconstitutional conduct it has identified. *Florida Prepaid*, 527 U.S. at 639. Congress, however, may "paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and con-

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typing. Alabama also relies on the statement that, in 1993, 48 states had policies permitting state employees to use sick leave to care for ill family members. Br. 9 (citing Workplace Economics, Inc., *1993 State Employee Benefits Survey* 19). That argument overlooks the rate at which state employees accrue and use sick leave for their own illnesses. See *1993 State Employee Benefits Survey*, *supra*, at 20-21 tbl. 3 (rate of accrual). Congress could reasonably conclude that employees would not generally have sufficient sick leave left over to make those programs an adequate, gender-neutral bulwark against the perpetuation of family-care stereotypes.

[34] See, *e.g.*, S. Rep. No. 415, *supra*, at 19 (37 States had equal employment laws at the time Title VII was extended to the States). Virtually all States had such laws by the time of the 1991 Civil Rights Act. W. Holloway & M. Leech, *Employment Termination: Rights & Remedies* App. A (1993).

troversies upon individual records." *Fullilove* v. *Klutznick*, 448 U.S. 448, 501-502 n.3 (1980). Accordingly, "Congress' § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment." *Kimel*, 528 U.S. at 81. Rather, "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *Lopez* v. *Monterey County*, 525 U.S. 266, 282-283 (1999). The FMLA's family-leave provision is a congruent and proportional means of combating the gender-discrimination problems Congress identified.

First, because "employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender," 29 U.S.C. 2601(a)(6), Congress ensured that "leave is available * * * on a gender-neutral basis." 29 U.S.C. 2601(b)(4). Congress thus directly overrode the discriminatory, gender-specific leave laws of a number of States. See pp. 37-38 & note 31, *supra*. By setting a minimum standard of family leave for *all* eligible employees, the FMLA addresses facially discriminatory state laws and, more broadly, combats the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in subtle discrimination by basing hiring and promotion decisions on stereotypes about the allocation of family caregiving responsibilities. "[T]he avoidance of [such] sex-based distinctions is the hallmark of equal protection." *Nguyen*, 533 U.S. at 82 (O'Connor, J., dissenting). The FMLA pursues that equal protection goal by transforming family leave from an ad hoc burden on employers, reflexively attributed to the presence of women in the workforce, into an across-the-board employee entitlement and a routine, unavoidable cost of doing business. In Congress's judgment, it

was only by altering employers' perceptions of the appropriate relationship between employees and domestic responsibilities in that manner that less overt forms of discrimination could be deterred and the enduring effects of stereotypical assumptions about female workers and "fixed notions concerning the roles and abilities of males and females" could be eliminated. *Hogan*, 458 U.S. at 725.

This Court has held that a proper "remedial decree" for unconstitutional gender discrimination is to put women "in the position they would have occupied in the absence of [discrimination]." *Virginia*, 518 U.S. at 547 (brackets in original; internal quotation marks omitted); see also *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965) ("[T]he court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."). Congress could reasonably conclude that, in the absence of gender discrimination in employment, employers long ago would have structured the workplace to accommodate the competing domestic responsibilities of both male and female employees on a gender-neutral basis. Indeed, Congress found that "our workplaces are still too often modeled on the unrealistic and outmoded idea of workers unencumbered by family responsibilities"—a structuring of workplaces that reflected an assumption that women would assume those domestic responsibilities. H.R. Rep. No. 8, *supra*, Pt. 1, at 17; see also Pet. App. 31a ("State support for stereotypical gender roles had allowed American employers —including the [S]tates—to develop and function without accommodating workers' home responsibilities during emergencies."). By refocusing employers' approach to family leave and making it a standard employment benefit, rather than a "women's issue," the FMLA thus "aims to 'eliminate so far as possible the discriminatory effects of the past' and to 'bar like discrimination in the future.'" *Virginia*, 518 U.S.

at 547 (brackets and citation omitted); see *id.* at 550 n.19 (Equal Protection Clause can require modification of facilities and programs to ensure equal access).

Second, in addition to remedying continuing and past acts of discrimination, Congress may regulate facially constitutional practices that impermissibly carry forward the effects of state-sponsored discrimination and sex-based stereotypes, and may adopt prophylactic rules designed to counteract subtle discrimination. In *Gaston County*, *supra*, this Court held that Congress's Section 5 authority includes the power to prohibit apparently valid literacy tests because they would perpetuate "inequities" arising from past discrimination in voting and education that "systematically deprived [Gaston County's] black citizens of the educational opportunities it granted to its white citizens." 395 U.S. at 297. In so holding, the Court "accept[ed] * * * as true" the County's assertions that "it has made significant strides toward equalizing and integrating its school system" and that it administered its literacy test "in a fair and impartial manner." *Id.* at 296. The Court nevertheless concluded that those claims "fall wide of the mark" because, after years of discrimination, "'[i]mpartial' administration of the literacy test today would serve only to perpetuate these inequities in a different form." *Id.* at 296-297; see *Lopez*, 525 U.S. at 282 (preclearance procedures of Voting Right Act can be applied to "States that have not been designated as historical wrongdoers").[35]

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[35] See also *Morrison*, 529 U.S. at 619; *J.A. Croson Co.*, 488 U.S. at 490 (opinion of O'Connor, J.) (Congress's Section 5 power "include[s] the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations"); *Fullilove*, 448 U.S. at 477 (opinion of Burger, C.J.) ("[C]ongressional authority [under Section 5] extends beyond the prohibition of purposeful discrimination to encompass state action that has discriminatory impact perpetuating the effects of past discrimination."); *id.* at 502 (Powell, J.,

The propriety of the FMLA as Section 5 legislation thus does not, as petitioners suppose (Br. 32-35), turn upon whether the States have in recent years "made significant strides toward equalizing" employment opportunities for women, *Gaston County*, 395 U.S. at 296; but see pp. 17-20 & note 15, *supra* (documenting continuing discrimination). Nor does it turn on whether the States' current leave policies operate in a facially "fair and impartial manner," *Gaston County*, 395 U.S. at 296; but see pp. 24-25 & note 21, *supra*. Rather, the FMLA is appropriate Section 5 legislation because Congress concluded that, absent uniform leave policies, even seemingly neutral employment practices would reflect lingering stereotypes about the domestic responsibilities of men and women, and "would serve only to perpetuate the[] inequities" arising from decades of unconstitutional state discrimination in employment "in a different form." *Gaston County*, 395 U.S. at 297.[36] Section 5, in short, permits Congress not just to prohibit States from engaging in future discrimination; Congress also may compel States to repair the enduring effects of past unconstitutional conduct and to prevent the perpetuation of more "subtle," *Frontiero*, 411 U.S. at 686, and "covert[]," *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 273 (1979), forms of gender discrimination. "Difficult and intractable problems often require powerful remedies." *Kimel*, 528 U.S. at 88; see also *South*

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concurring) ("It is beyond question * * * that Congress has the authority to identify unlawful discriminatory practices, to prohibit those practices, and to prescribe remedies to eradicate their continuing effects."); *City of Rome*, 446 U.S. at 176-177 (under its Civil War Amendment powers, Congress may prohibit conduct that is constitutional if it perpetuates the effects of past discrimination); *South Carolina*, 383 U.S. at 325-333.

[36] See also *1987 Senate Hearing* Pt. 1, at 15 (Jim Weeks, United Mine Workers) ("[I]f we just leave things to their course, this might replicate existing patterns of inequality.").

Carolina, 383 U.S. at 334 ("exceptional conditions can justify legislative measures not otherwise appropriate").

Third, unlike the statutes at issue in *Flores*, *Kimel*, and *Garrett*, which applied broadly to every aspect of state employers' operations, the FMLA is narrowly targeted—it affects only one aspect of the employment relationship. And in so doing, the FMLA does not leave employers grappling to comply with variable or generalized standards of conduct. The FMLA's leave requirements are specific and straightforward. In addition, the FMLA requires only unpaid leave, 29 U.S.C. 2612(a)(1), and excludes certain employees, including state employees, who hold high-ranking or sensitive positions, 29 U.S.C. 2611(2), 2611(3), 203(e)(2)(C). The Act requires employees to give notice of foreseeable leave, 29 U.S.C. 2612(e), and permits employers to require certification by one or more health care providers of the need for leave, 29 U.S.C. 2613. The relevant provisions of the Act apply only to employees who have been employed for at least twelve months and who have performed "at least 1,250 hours of service with [the] employer during the previous 12-month period." 29 U.S.C. 2611(2)(A)(ii).

Fourth, Congress calibrated the FMLA's provisions based on extensive testimony from "a wide range of employers that already provide family and medical leave." See S. Rep. No. 3, *supra*, at 12. From "this testimony, and from a wide body of study and research data," Congress concluded that "family and medical leave is cost-effective in terms of reduced hiring and training costs, turnover, and absenteeism." *Id.* at 12-13. In choosing twelve weeks as the appropriate leave floor, moreover, Congress chose "a middle ground, a period considered long enough to serve 'the needs of families' but not so long that it would upset 'the legitimate interests of employers.'" *Ragsdale* v. *Wolverine World Wide, Inc.*, 122 S. Ct. 1155, 1164 (2002) (quoting 29 U.S.C. 2601(b)).

Fifth, Congress created a narrow cause of action to encourage employers' compliance with the law. The damages recoverable are strictly defined and measured by actual monetary losses. 29 U.S.C. 2617(a)(1)(A)(i)-(iii).[37] The damages action does no more than put the employee in the position he or she would have occupied had the employer complied with the terms of federal law. See *Ragsdale*, 122 S. Ct. at 1162 (discussing the "important limitations of the [FMLA's] remedial scheme"). Congress could reasonably conclude that such a cause of action is particularly necessary in remedying employment discrimination, because it ensures that employers do not deem non-compliance to be cost-effective, and it provides a practical incentive for individuals to exercise their FMLA rights without imperiling their livelihood.[38]

Moreover, in a context where, unlike *Flores*, *Kimel*, or *Garrett*, Congress enacts remedial legislation under Section 5 to address a form of discrimination to which this Court applies heightened scrutiny, Congress should have greater latitude to fashion a remedy. As noted, judicial prohibitions of overt discrimination may give rise to more subtle forms of second-generation discrimination. Identifying and fashioning prophylactic rules to prevent such discrimination are

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[37] Courts generally have held that the FMLA does not authorize punitive damages, nominal damages, or damages for emotional distress. See, *e.g.*, *Walker* v. *United Parcel Serv., Inc.*, 240 F.3d 1268, 1277-1278 (10th Cir. 2001); *Settle* v. *S.W. Rodgers, Co.*, 998 F. Supp. 657, 666 (E.D. Va. 1998), aff'd, 182 F.3d 909 (4th Cir. 1999) (Table); but see *Duty* v. *Norton-Alcoa Proppants*, 293 F.3d 481 (8th Cir. 2002) (allowing damages for emotional distress).

[38] Petitioners' insistence (Br. 36-37) that Section 5 legislation must include termination dates overlooks that Title VII contains no such provision. Petitioners' argument (Br. 36) that Section 5 legislation must have geographic restrictions ignores the fact that the existence of gender discrimination does not vary from region to region.

tasks particularly well suited for Congress. Furthermore, where state-sponsored gender or racial discrimination has infected the workplace for generations, determinations concerning the proper means to combat continuing stereotypes and assessments of what measures would restore a hypothetical status quo *ante*, where no discrimination occurred, see *Virginia*, 518 U.S. at 547, uniquely call for comprehensive legislative study, with nationwide input, and complex empirical and experiential judgments.

Accordingly, petitioners' argument (Br. 37) that Congress cannot create new "entitlements" under Section 5 is wide of the mark. Creating new prophylactic rules to address the lingering effects of past discrimination is a classic exercise of the Section 5 power. Congress has imposed functionally analogous remedial requirements on States as a means of enforcing Fourteenth Amendment rights in other contexts, such as through preclearance requirements for States' voting practices, *South Carolina* v. *Katzenbach*, *supra*. Title VII's disparate impact doctrine similarly can require adjustments of state employment policies and practices.[39]

Finally, Congress could conclude that enacting a neutral, across-the-board leave standard would relieve plaintiffs of the exceedingly difficult task of proving unconstitutional discrimination on a case-by-case basis. In the modern era, false and discriminatory stereotypes are rarely articulated in public. Proving that an invidious mindset animated a particular discretionary employment decision in an individual case likewise could prove to be beyond the capabilities and wherewithal of many employees, whose livelihood is in the

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[39] Courts, likewise, have imposed affirmative requirements on States and localities as a means of remedying Fourteenth Amendment violations. See, *e.g.*, *Dickerson* v. *United States*, 530 U.S. 428 (2000). Congress, which the Constitution expressly charges with enforcing the Fourteenth Amendment, can have no narrower remedial power.

hands of their employer. This Court has upheld Section 5 legislation designed to eliminate such heavy burdens of proof.[40]

In sum, the FMLA's family leave provision is an "appropriate method" of remedying unconstitutional discrimination based on stereotypical assumptions spawned by generations of unconstitutional state conduct, and "of attacking the perpetuation of earlier, purposeful [gender] discrimination, regardless of whether the practices [it] prohibit[s] were discriminatory only in effect," *City of Rome* v. *United States*, 446 U.S. 156, 177 (1980). The FMLA family-leave provision responds to a well-documented history of unconstitutional discrimination in employment and it does so in a narrowly targeted fashion, designed to put male and female employees in the place they would have been absent such discrimination. The FMLA thus promotes the "perfect equality of civil rights and the equal protection of the laws" that lies at the heart of Congress's Section 5 power. *Ex parte Virginia*, 100 U.S. at 345-346.

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[40] See *City of Rome*, 446 U.S. at 174; *South Carolina*, 383 U.S. at 328 ("Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting."); see also *Mississippi Republican Executive Comm.* v. *Brooks*, 469 U.S. 1002 (1984) (mem.) (summarily affirming constitutionality of Voting Rights Act Amendments of 1982).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

STATUTORY APPENDIX

§ 2601. Findings and purposes

(a) Findings

Congress finds that—

(1) the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly;

(2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early child-rearing and the care of family members who have serious health conditions;

(3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;

(4) there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods;

(5) 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; and

(6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.

(b) Purpose

It is the purpose of this Act—

(1) to balance the demands of the workplace with needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take 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;

(3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;

(4) to accomplish the purposes described in paragraph (1) and (2) 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; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

§ 2611. Definitions

As used in this subchapter:

(1) Commerce

The terms "commerce" and "industry or activity affecting commerce" mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include "commerce" and any "industry affecting commerce", as defined in paragraphs (1) and (3) of section 142 of this title.

(2) Eligible employee

(A) In General

The term "eligible employee" means an employee who has been employed—

(i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and

(ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

(B) Exclusions

The term "eligible employee" does not include—

(i) any Federal officer or employee covered under subchapter V of chapter 63 of Title 5; or

(ii) any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50.

(C) Determination

For purposes of determining whether an employee meets the hours of service requirement specified in

subparagraph (A)(ii), the legal standards established under section 207 of this title shall apply.

(3) Employ; employee; State

The terms "employ", "employee", and "State" have the same meanings given such terms in subsections (c), (e), and (g) of section 203 of this title.

(4) Employer

(A) In general

The term "employer"—

(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(ii) includes—

(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(II) any successor in interest of an employer;

(iii) includes any "public agency", as defined in section 203(x) of this title; and

(iv) includes the General Accounting Office and the Library of Congress.

(B) Public agency

For purposes of subparagraph (A)(iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

(5) Employment benefits

The term "employment benefits" means all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer or through an "employee benefit plan", as defined in section 1002(3) of this title.

(6) Health care provider

The term "health care provider" means—

(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(B) any other person determined by the Secretary to be capable of providing health care services.

(7) Parent

The term "parent" means the biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a son or daughter.

(8) Person

The term "person" has the same meaning given such term in section 203(a) of this title.

(9) Reduced leave schedule

The term "reduced leave schedule" means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.

(10) Secretary

The term "Secretary" means the Secretary of Labor.

(11) Serious health condition

The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves—

(A) inpatient care in a hospital, hospice, or residential medical care facility; or

(B) continuing treatment by a health care provider.

(12) Son or daughter

The term "son or daughter" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is—

(A) under 18 years of age; or

(B) 18 years of age or older and incapable of self-care because of a mental or physical disability.

(13) Spouse

The term "spouse" means a husband or wife, as the case may be.

§ 2612. Leave requirement

(a) In general

(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.

(2) Expiration of entitlement

The entitlement to leave under subparagraphs (A) and (B) of paragraph (1) for a birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

(b) Leave taken intermittently or on reduced leave schedule

(1) In general

Leave under subparagraph (A) or (B) of subsection (a)(1) of this section shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise. Subject to paragraph (2), subsection (e)(2) of this section, and section 2613(b)(5) of this title, leave under subparagraph (C) or (D) of subsection (a)(1) of this section may be taken intermittently or on a reduced leave schedule when medically necessary. The taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a) of this section beyond the amount of leave actually taken.

(2) Alternative position

If an employee requests intermittent leave, or leave on a reduced leave schedule, under subparagraph (C) or (D) of subsection (a)(1) of this section, that is foreseeable based on planned medical treatment, the employer may require such employee to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified and that—

(A) has equivalent pay and benefits; and

(B) better accommodates recurring periods of leave than the regular employment position of the employee.

(c) Unpaid leave permitted

Except as provided in subsection (d) of this section, leave granted under subsection (a) may consist of unpaid leave. Where an employee is otherwise exempt under regulations issued by the Secretary pursuant to section 213(a)(1) of this title, the compliance of an employer with this subchapter by providing unpaid leave shall not affect the exempt status of the employee under such section.

(d) Relationship to paid leave

(1) Unpaid leave

If an employer provides paid leave for fewer than 12 workweeks, the additional weeks of leave necessary to attain the 12 workweeks of leave required under this subchapter may be provided without compensation.

(2) Substitution of paid leave

(A) In general

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued

paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), or (C) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection.

(B) Serious health condition

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection, except that nothing in this subchapter shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

(e) Foreseeable leave

(1) Requirement of notice

In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) of this section is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(2) Duties of employee

In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) of this section

is foreseeable based on planned medical treatment, the employee—

(A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate; and

(B) shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(f) Spouses employed by same employer

In any case in which a husband and wife entitled to leave under subsection (a) of this section are employed by the same employer, the aggregate number of workweeks of leave to which both may be entitled may be limited to 12 workweeks during any 12-month period, if such leave is taken—

(1) under subparagraph (A) or (B) of subsection (a)(1) of this section; or

(2) to care for a sick parent under subparagraph (C) of such subsection.

§ 2613. Certification

(a) In general

An employer may require that a request for leave under subparagraph (C) or (D) of section 2612(a)(1) of this title be supported by a certification issued by the health care pro-

vider of the eligible employee or of the son, daughter, spouse, or parent of the employee, as appropriate. The employee shall provide, in a timely manner, a copy of such certification to the employer.

(b) Sufficient certification

Certification provided under subsection (a) of this section shall be sufficient if it states—

(1) the date on which the serious health condition commenced;

(2) the probable duration of the condition;

(3) the appropriate medical facts within the knowledge of the health care provider regarding the condition;

(4)(A) for purposes of leave under section 2612(a)(1)(C) of this title, a statement that the eligible employee is needed to care for the son, daughter, spouse, or parent and an estimate of the amount of time that such employee is needed to care for the son, daughter, spouse, or parent; and

(B) for purposes of leave under section 2612(a)(1)(D) of this title, a statement that the employee is unable to perform the functions of the position of the employee;

(5) in the case of certification for intermittent leave, or leave on a reduced leave schedule, for planned medical treatment, the dates on which such treatment is expected to be given and the duration of such treatment;

(6) in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 2612(a)(1)(D) of this title, a statement of the medical necessity for the intermittent leave or leave on a reduced

leave schedule, and the expected duration of the intermittent leave or reduced leave schedule; and

(7) in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 2612(a)(1)(C) of this title, a statement that the employee's intermittent leave or leave on a reduced leave schedule is necessary for the care of the son, daughter, parent, or spouse who has a serious health condition, or will assist in their recovery, and the expected duration and schedule of the intermittent leave or reduced leave schedule.

(c) Second opinion

(1) In general

In any case in which the employer has reason to doubt the validity of the certification provided under subsection (a) of this section for leave under subparagraph (C) or (D) of section 2612(a)(1) of this title, the employer may require, at the expense of the employer, that the eligible employee obtain the opinion of a second health care provider designated or approved by the employer concerning any information certified under subsection (b) of this section for such leave.

(2) Limitation

A health care provider designated or approved under paragraph (1) shall not be employed on a regular basis by the employer.

(d) Resolution of conflicting opinions

(1) In general

In any case in which the second opinion described in subsection (c) of this section differs from the opinion in the original certification provided under subsection (a) of

this section, the employer may require, at the expense of the employer, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employer and the employee concerning the information certified under subsection (b) of this section.

(2) Finality

The opinion of the third health care provider concerning the information certified under subsection (b) of this section shall be considered to be final and shall be binding on the employer and the employee.

(e) Subsequent recertification

The employer may require that the eligible employee obtain subsequent recertifications on a reasonable basis.

§ 2614. Employment and benefits protection

(a) Restoration to position

(1) In general

Except as provided in subsection (b) of this section, any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave—

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(2) Loss of benefits

The taking of leave under section 2612 of this title shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

(3) Limitations

Nothing in this section shall be construed to entitle any restored employee to—

(A) the accrual of any seniority or employment benefits during any period of leave; or

(B) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

(4) Certification

As a condition of restoration under paragraph (1) for an employee who has taken leave under section 2612(a)(1)(D) of this title, the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

(5) Construction

Nothing in this subsection shall be construed to prohibit an employer from requiring an employee on leave under section 2612 of this title to report periodically to the employer on the status and intention of the employee to return to work.

(b) Exemption concerning certain highly compensated employees

(1) Denial of restoration

An employer may deny restoration under subsection (a) of this section to any eligible employee described in paragraph (2) if—

(A) such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;

(B) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury would occur; and

(C) in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.

(2) Affected employees

An eligible employee described in paragraph (1) is a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed.

(c) Maintenance of health benefits

(1) Coverage

Except as provided in paragraph (2), during any period that an eligible employee takes leave under section 2612 of this title, the employer shall maintain coverage under any "group health plan" (as defined in section 5000(b)(1) of Title 26) for the duration of such leave at the level and under the conditions coverage would have been

provided if the employee had continued in employment continuously for the duration of such leave.

(2) Failure to return from leave

The employer may recover the premium that the employer paid for maintaining coverage for the employee under such group health plan during any period of unpaid leave under section 2612 of this title if—

(A) the employee fails to return from leave under section 2612 of this title after the period of leave to which the employee is entitled has expired; and

(B) the employee fails to return to work for a reason other than—

(i) the continuation, recurrence, or onset of a serious health condition that entitles the employee to leave under subparagraph (C) or (D) of section 2612(a)(1) of this title; or

(ii) other circumstances beyond the control of the employee.

(3) Certification

(A) Issuance

An employer may require that a claim that an employee is unable to return to work because of the continuation, recurrence, or onset of the serious health condition described in paragraph (2)(B)(i) be supported by—

(i) a certification issued by the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(1)(C) of this title; or

(ii) a certification issued by the health care provider of the eligible employee, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(1)(D) of this title.

(B) Copy

The employee shall provide, in a timely manner, a copy of such certification to the employer.

(C) Sufficiency of certification

(i) Leave due to serious health condition of employee

The certification described in subparagraph (A)(ii) shall be sufficient if the certification states that a serious health condition prevented the employee from being able to perform the functions of the position of the employee on the date that the leave of the employee expired.

(ii) Leave due to serious health condition of family member

The certification described in subparagraph (A)(i) shall be sufficient if the certification states that the employee is needed to care for the son, daughter, spouse, or parent who has a serious health condition on the date that the leave of the employee expired.

§ 2615. Prohibited acts

(a) Interference with rights

(1) Exercise of rights

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

(2) Discrimination

It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

(b) Interference with proceedings or inquiries

It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual—

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter;

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.

§ 2616. Investigative Authority

(a) In general

To ensure compliance with the provisions of this subchapter, or any regulation or order issued under this subchapter, the Secretary shall have, subject to subsection (c) of this section, the investigative authority provided under section 211(a) of this title.

(b) Obligation to keep and preserve records

Any employer shall make, keep, and preserve records pertaining to compliance with this subchapter in accordance with section 211(c) of this title and in accordance with regulations issued by the Secretary.

(c) Required submissions generally limited to annual basis

The Secretary shall not under the authority of this section require any employer or any plan, fund, or program to submit to the Secretary any books or records more than once during any 12-month period, unless the Secretary has reasonable cause to believe there may exist a violation of this subchapter or any regulation or order issued pursuant to this subchapter, or is investigating a charge pursuant to section 2617(b) of this title.

(d) Subpoena powers

For the purposes of any investigation provided for in this section, the Secretary shall have the subpoena authority provided for under section 209 of this title.

§ 2617. Enforcement

(a) Civil action by employees

(1) Liability

Any employer who violates section 2615 of this title shall be liable to any eligible employee affected—

(A) for damages equal to—

(i) the amount of—

(I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or

(II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages or salary for the employee;

(ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and

(iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer who has violated section 2615 of this title proves to the satisfaction of the court that the act or omission which violated section 2615 of this title was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 2615 of this title, such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively; and

(B) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(2) Right of action

An action to recover the damages or equitable relief prescribed in paragraph (1) may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of—

(A) the employees; or

(B) the employees and other employees similarly situated.

(3) Fees and costs

The court in such an action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant.

(4) Limitations

The right provided by paragraph (2) to bring an action by or on behalf of any employee shall terminate—

(A) on the filing of a complaint by the Secretary in an action under subsection (d) of this section in which restraint is sought of any further delay in the payment of the amount described in paragraph (1)(A) to such employee by an employer responsible under paragraph (1) for the payment; or

(B) on the filing of a complaint by the Secretary in an action under subsection (b) of this section in which a recovery is sought of the damages described in paragraph (1)(A) owing to an eligible employee by an employer liable under paragraph (1),

unless the action described in subparagraph (A) or (B) is dismissed without prejudice on motion of the Secretary.

(b) Action by Secretary

(1) Administrative action

The Secretary shall receive, investigate, and attempt to resolve complaints of violations of section 2615 of this title in the same manner that the Secretary receives, investigates, and attempts to resolve complaints of violations of sections 206 and 207 of this title.

(2) Civil action

The Secretary may bring an action in any court of competent jurisdiction to recover the damages described in subsection (a)(1)(A) of this section.

(3) Sums recovered

Any sums recovered by the Secretary pursuant to paragraph (2) shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to

each employee affected. Any such sums not paid to an employee because of inability to do so within a period of 3 years shall be deposited into the Treasury of the United States as miscellaneous receipts.

(c) Limitation

(1) In general

Except as provided in paragraph (2), an action may be brought under this section not later than 2 years after the date of the last event constituting the alleged violation for which the action is brought.

(2) Willful violation

In the case of such action brought for a willful violation of section 2615 of this title, such action may be brought within 3 years of the date of the last event constituting the alleged violation for which such action is brought.

(3) Commencement

In determining when an action is commenced by the Secretary under this section for the purposes of this subsection, it shall be considered to be commenced on the date when the complaint is filed.

(d) Action for injunction by Secretary

The district courts of the United States shall have jurisdiction, for cause shown, in an action brought by the Secretary—

(1) to restrain violations of section 2615 of this title, including the restraint of any withholding of payment of wages, salary, employment benefits, or other compensation, plus interest, found by the court to be due to eligible employees; or

(2) to award such other equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(e) Solicitor of Labor

The Solicitor of Labor may appear for and represent the Secretary on any litigation brought under this section.

(f) General Accounting Office and Library of Congress

In the case of the General Accounting Office and the Library of Congress, the authority of the Secretary of Labor under this subchapter shall be exercised respectively by the Comptroller General of the United States and the Librarian of Congress.

§ 2618. Special rules concerning employees of local educational agencies

(a) Application

(1) In general

Except as otherwise provided in this section, the rights (including the rights under section 2614 of this title, which shall extend throughout the period of leave of any employee under this section), remedies, and procedures under this subchapter shall apply to—

(A) any "local educational agency" (as defined in section 7801 of Title 20) and an eligible employee of the agency; and

(B) any private elementary or secondary school and an eligible employee of the school.

(2) Definitions

For purposes of the application described in paragraph (1):

(A) Eligible employee

The term "eligible employee" means an eligible employee of an agency or school described in paragraph (1).

(B) Employer

The term "employer" means an agency or school described in paragraph (1).

(b) Leave does not violate certain other Federal laws

A local educational agency and a private elementary or secondary school shall not be in violation of the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.), section 794 of this title or title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), solely as a result of an eligible employee of such agency or school exercising the rights of such employee under this subchapter.

(c) Intermittent leave or leave on reduced schedule for instructional employees

(1) In general

Subject to paragraph (2), in any case in which an eligible employee employed principally in an instructional capacity by any such educational agency or school requests leave under subparagraph (C) or (D) of section 2612(a)(1) of this title that is foreseeable based on planned medical treatment and the employee would be on leave for greater than 20 percent of the total number of working days in the period during which the leave would extend, the agency or school may require that such employee elect either—

(A) to take leave for periods of a particular duration, not to exceed the duration of the planned medical treatment; or

(B) to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified, and that—

(i) has equivalent pay and benefits; and

(ii) better accommodates recurring periods of leave than the regular employment position of the employee.

(2) Application

The elections described in subparagraphs (A) and (B) of paragraph (1) shall apply only with respect to an eligible employee who complies with section 2612(e)(2) of this title.

(d) Rules applicable to periods near conclusion of academic term

The following rules shall apply with respect to periods of leave near the conclusion of an academic term in the case of any eligible employee employed principally in an instructional capacity by any such educational agency or school:

(1) Leave more than 5 weeks prior to end of term

If the eligible employee begins leave under section 2612 of this title more than 5 weeks prior to the end of the academic term, the agency or school may require the employee to continue taking leave until the end of such term, if—

(A) the leave is of at least 3 weeks duration; and

(B) the return to employment would occur during the 3-week period before the end of such term.

(2) Leave less than 5 weeks prior to end of term

If the eligible employee begins leave under subparagraph (A), (B), or (C) of section 2612(a)(1) of this title

during the period that commences 5 weeks prior to the end of the academic term, the agency or school may require the employee to continue taking leave until the end of such term, if—

(A) the leave is of greater than 2 weeks duration; and

(B) the return to employment would occur during the 2-week period before the end of such term.

(3) Leave less than 3 weeks prior to end of term

If the eligible employee begins leave under subparagraph (A), (B), or (C) of section 2612(a)(1) of this title during the period that commences 3 weeks prior to the end of the academic term and the duration of the leave is greater than 5 working days, the agency or school may require the employee to continue to take leave until the end of such term.

(e) Restoration to equivalent employment position

For purposes of determinations under section 2614(a)(1)(B) of this title (relating to the restoration of an eligible employee to an equivalent position), in the case of a local educational agency or a private elementary or secondary school, such determination shall be made on the basis of established school board policies and practices, private school policies and practices, and collective bargaining agreements.

(f) Reduction of amount of liability

If a local educational agency or a private elementary or secondary school that has violated this subchapter proves to the satisfaction of the court that the agency, school, or department had reasonable grounds for believing that the underlying act or omission was not a violation of this subchapter, such court may, in the discretion of the court,

reduce the amount of the liability provided for under section 2617(a)(1)(A) of this title to the amount and interest determined under clauses (i) and (ii), respectively, of such section.

§ 2619. Notice

(a) In general

Each employer shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees and applicants for employment are customarily posted, a notice, to be prepared or approved by the Secretary, setting forth excerpts from, or summaries of, the pertinent provisions of this subchapter and information pertaining to the filing of a charge.

(b) Penalty

Any employer that willfully violates this section may be assessed a civil money penalty not to exceed $100 for each separate offense.

§ 2631. Establishment

There is established a commission to be known as the Commission on Leave (referred to in this subchapter as the "Commission").

§ 2632. Duties

The Commission shall—

(1) conduct a comprehensive study of—

(A) existing and proposed mandatory and voluntary policies relating to family and temporary medical leave, including policies provided by employers not covered under this Act;

(B) the potential costs, benefits, and impact on productivity, job creation and business growth of such policies on employers and employees;

(C) possible differences in costs, benefits, and impact on productivity, job creation and business growth of such policies on employers based on business type and size;

(D) the impact of family and medical leave policies on the availability of employee benefits provided by employers, including employers not covered under this Act;

(E) alternate and equivalent State enforcement of subchapter I of this chapter with respect to employees described in section 2618(a) of this title;

(F) methods used by employers to reduce administrative costs of implementing family and medical leave policies;

(G) the ability of the employers to recover, under section 2614(c)(2) of this title, the premiums described in such section; and

(H) the impact on employers and employees of policies that provide temporary wage replacement during periods of family and medical leave.

(2) not later than 2 years after the date on which the Commission first meets, prepare and submit, to the appropriate Committees of Congress, a report concerning the subjects listed in paragraph (1).

§ 2633. Membership

(a) Composition

(1) Appointments

The Commission shall be composed of 12 voting members and 4 ex officio members to be appointed not later than 60 days after February 5, 1993, as follows:

(A) Senators

One Senator shall be appointed by the Majority Leader of the Senate, and one Senator shall be appointed by the Minority Leader of the Senate.

(B) Members of House of Representatives

One Member of the House of Representatives shall be appointed by the Speaker of the House of Representatives, and one Member of the House of Representatives shall be appointed by the Minority Leader of the House of Representatives.

(C) Additional members

(i) Appointment

Two members each shall be appointed by—

(I) the Speaker of the House of Representatives;

(II) the Majority Leader of the Senate;

(III) the Minority Leader of the House of Representatives; and

(IV) the Minority Leader of the Senate.

(ii) Expertise

Such members shall be appointed by virtue of demonstrated expertise in relevant family, temporary disability, and labor management issues. Such members shall include representatives of employers, including employers from large businesses and from small businesses.

(2) Ex officio members

The Secretary of Health and Human Services, the Secretary of Labor, the Secretary of Commerce, and the Administrator of the Small Business Administration

shall serve on the Commission as nonvoting ex officio members.

(b) Vacancies

Any vacancy on the Commission shall be filled in the manner in which the original appointment was made. The vacancy shall not affect the power of the remaining members to execute the duties of the Commission.

(c) Chairperson and vice chairperson

The Commission shall elect a chairperson and a vice chairperson from among the members of the Commission.

(d) Quorum

Eight members of the Commission shall constitute a quorum for all purposes, except that a lesser number may constitute a quorum for the purpose of holding hearings.

§ 2634. Compensation

(a) Pay

Members of the Commission shall serve without compensation.

(b) Travel expenses

Members of the Commission shall be allowed reasonable travel expenses, including a per diem allowance, in accordance with section 5703 of Title 5 when performing duties of the Commission.

§ 2635. Powers

(a) Meetings

The Commission shall first meet not later than 30 days after the date on which all members are appointed, and the Commission shall meet thereafter on the call of the chairperson or a majority of the members.

(b) Hearings and sessions

The Commission may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission considers appropriate. The Commission may administer oaths or affirmations to witnesses appearing before it.

(c) Access to information

The Commission may secure directly from any Federal agency information necessary to enable it to carry out this subchapter, if the information may be disclosed under section 552 of Title 5. Subject to the previous sentence, on the request of the chairperson or vice chairperson of the Commission, the head of such agency shall furnish such information to the Commission.

(d) Use of facilities and services

Upon the request of the Commission, the head of any Federal agency may make available to the Commission any of the facilities and services of such agency.

(e) Personnel from other agencies

On the request of the Commission, the head of any Federal agency may detail any of the personnel of such agency to serve as an Executive Director of the Commission or assist the Commission in carrying out the duties of the Commission. Any detail shall not interrupt or otherwise affect the civil service status or privileges of the Federal employee.

(f) Voluntary service

Notwithstanding section 1342 of Title 31, the chairperson of the Commission may accept for the Commission voluntary services provided by a member of the Commission.

§ 2636. Termination

The Commission shall terminate 30 days after the date of the submission of the report of the Commission to Congress.

§ 2651. Effect on other laws

(a) Federal and State antidiscrimination laws

Nothing in this Act or any amendment made by this Act shall be construed to modify or affect any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability.

(b) State and local laws

Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act.

§ 2652. Effect on existing employment benefits

(a) More protective

Nothing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act or any amendment made by this Act.

(b) Less protective

The rights established for employees under this Act or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan.

§ 2653. Encouragement of more generous leave policies

Nothing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act.

§ 2654. Regulations

The Secretary of Labor shall prescribe such regulations as are necessary to carry out subchapter I of this chapter and this subchapter not later than 120 days after February 5, 1993.