No. 01–

IN THE

Supreme Court of the United States

DEPARTMENT OF HUMAN RESOURCES, *et al.*,

Petitioners,

v.

WILLIAM HIBBS

Respondent,

and

UNITED STATES OF AMERICA

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING

Petitioners are (1) the Nevada Department of Human Resources, (2) the Director of the Nevada Department of Human Resources, Charlotte Crawford, and (3) Nikki Firpo, a supervisor in the Nevada Department of Human Resources, Welfare Division. The Respondents are William Hibbs and the United States of America, which intervened below to defend the constitutionality of 29 U.S.C. § 2612(a)(1)(C).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–46a) is reported at 273 F.3d 844, and the district court's opinion (Pet. App. 48a–58a) is unreported.

JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides:

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

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

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> ***
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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

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

Additional provisions of the FMLA that may aid the Court are set forth in an appendix to this petition. Pet. App. 61a–65a.

STATEMENT

This case squarely presents a recurring constitutional question that is dividing the lower courts and has not been—but should be—resolved by this Court: whether § 2612(a)(1)(C) of the FMLA is a valid exercise of Congress's enforcement authority under Section 5 of the Fourteenth Amendment that abrogates state sovereign immunity.

1. Under Section 1 of the Fourteenth Amendment, States are prohibited from intentionally discriminating on the basis of gender unless such discrimination is substantially related to the achievement of an important governmental interest. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980). Under Section 5 of the Amendment, Congress is permitted to

enact "appropriate" legislation to "enforce" Section 1, but there must be "'a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).

2. In enacting the FMLA, Congress purported to be "minimiz[ing] the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons . . . on a gender-neutral basis." 29 U.S.C. § 2601(b)(4), Pet. App. 62a. To that end, it required all employers to provide every employee twelve weeks of leave (A) "[b]ecause of the birth of a son or daughter . . . . (B) [b]ecause of the placement of a son or daughter with the employee for adoption or foster care[;] (C) [i]n order to care for the spouse, or a son, daughter, or parent, of the employee . . . . [or] (D) [b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1).

3. This case concerns the FMLA's third leave provision, § 2612(a)(1)(C), which allows employees to take 12 weeks of leave to care for sick family members. It arises from the termination of Respondent, William Hibbs, from his employment at the Nevada Department of Human Resources, Welfare Division, after taking excessive and unauthorized leave.

Beginning in April 1997, Hibbs initiated a series of requests for leave under § 2612(a)(1)(C) to care for his ailing wife. At that time he asked for and received approval to take 480 hours (12 weeks) of leave pursuant to the Act. Pet. App. 2a. In June 1997, Hibbs requested an additional 379.8 hours of "catastrophic leave," leave donated by other employees. *Id.* He was initially granted only 200 hours of this leave, but in September was granted an additional 180 hours. *Id.*

In October 1997, well after Hibbs had exhausted his twelve-week leave under the FMLA, Nevada informed Hibbs that he could not take any additional time off under the Act. *Id.* Hibbs did not return to work, however, and on November 6, 1997, the State informed Hibbs by a hand-delivered letter that it would not approve further leave time and that he was required to return to work or face disciplinary action. *Id.* 2a–3a. Hibbs failed to return to work, failed to notify the Welfare Division that he would not be returning, and failed to explain his absence. Pet. App. 3a.

On December 8, 1997, Nevada served Hibbs with a written statement that described disciplinary charges pending against him and set a pre-disciplinary hearing for later that month. *Id.* At the hearing, Hibbs argued that Nevada was misapplying the FMLA and asserted that he had additional family-care leave remaining, but the hearing officer disagreed and recommended Hibbs' dismissal. *Id.* On December 22, 1997, pursuant to this recommendation, Hibbs was terminated from his position with the Nevada Department of Human Resources, Welfare Division. *Id.* Hibbs subsequently filed a grievance with the Welfare Division, but the grievance process was no longer available to him in light of his termination. *Id.* Accordingly, the Welfare Division construed the grievance as an appeal of the termination decision and forwarded it to the State Personnel Department, which rejected the "appeal" as untimely. *Id.*

4. Hibbs then sued the Nevada Department of Human Resources, its director, and his supervisor (collectively "Nevada") in the United States District Court for the District of Nevada, claiming, as is relevant here, that the State violated the FMLA by failing to approve his request for leave to care for his wife. Pet. App. 3a–4a. On June 3, 1999, the district court entered judgment in favor of Nevada on the ground that Hibbs' FMLA claim was barred by the Eleventh Amendment to the United States Constitution. *Id.* 59a–60a. The district court explained that in order to abrogate state sovereign

immunity the FMLA would have to be, but was not, appropriate remedial legislation under Section 5 of the Fourteenth Amendment. *Id.* 52a–56a.

5. On December 11, 2001, the United States Court of Appeals for the Ninth Circuit, in an opinion authored by Judge Tashima and joined by Judges Reinhardt and Berzon, reversed. The court observed initially that "[s]even other circuits have held that the FMLA was not enacted pursuant to a valid exercise of Congress'[s] [S]ection 5 power." *Id.* 5a. It distinguished six of these decisions, however, on the ground that they did not consider the particular provision of the FMLA at issue here, § 2612(a)(1)(C), but rather reviewed § 2612(a)(1)(D), which requires employers to grant leave so that employees may tend to their own illnesses. *See* Pet. App. 5a–6a. In the court's view this difference mattered "because § 2612(a)(1)(C) can more plausibly be defended as an attempt to remedy gender discrimination." *Id.* 6a. With respect to the seventh case, *Kazmier v. Widmann*, 225 F.3d 519 (5th Cir. 2000), the court acknowledged that it addressed "the FMLA provision at issue in Hibbs' case, namely § 2612(a)(1)(C)" (Pet. App. 5a), but found "*Kazmier*'s analysis unpersuasive" and "decline[d] to follow it." Pet. App. 19a.

Turning to this Court's precedent, the Ninth Circuit stated that the Court has traditionally required "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," for federal legislation to fall within the scope of Congress's Section 5 remedial authority. *Id.* 10a (internal quotations and citation omitted). Again, however, the Ninth Circuit distinguished this precedent, in particular *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), and *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), on the ground that the Court's cases "dealt with federal statutes that prohibit discrimination on the basis of age and disability" and "depended heavily upon the fact that age and disability

classifications are not subject to heightened scrutiny under the Equal Protection Clause." Pet. App. 11a. Accordingly, in the Ninth Circuit's view, the "recent Supreme Court cases" developing and applying Section 5 "offer[ed] limited guidance." *Id.*

After concluding that this Court's Section 5 jurisprudence was uninformative, the Ninth Circuit held that "[b]ecause state-sponsored gender discrimination is presumptively unconstitutional, [S]ection 5 legislation that is intended to remedy or prevent gender discrimination is presumptively constitutional. That is, the burden is on the challenger of the legislation to prove that [S]tates have *not* engaged in a pattern of unconstitutional conduct." *Id.* 18a (emphasis in original). Here, because Nevada had "failed to show that there is *not* a widespread pattern of gender discrimination by [S]tates regarding the granting of leave to employees to care for sick family members or a historical record of state enforcement of stereotypical family roles," the court had to conclude that § 2612(a)(1)(C) was appropriate and remedial under Section 5. *Id.* 19a (emphasis added).

In the alternative, the Ninth Circuit reasoned that the legislative history of the FMLA "contains substantial evidence of gender discrimination with respect to the granting of leave to state employees." *Id.* 20a. As its only example of this "substantial evidence," the Ninth Circuit pointed to a study demonstrating that private employers tend to provide inadequate paternity leave and further observed that a different study submitted to a congressional subcommittee suggested that state paternity leave policies were similar to the private sector's policies. *Id.* 20a–21a. Although it recognized that these studies said nothing about the leave States grant employees to tend to sick family members, the Ninth Circuit concluded that it had wide "latitude in drawing inferences from the legislative history of a federal statute aimed at remedying state-sponsored gender discrimination." Pet. App. 22a. In light of this latitude, the studies, taken together,

were "strong circumstantial evidence of state-sponsored gender discrimination in the granting of leave to care for a sick family member, because if [S]tates discriminate along gender lines regarding the one kind of leave, then they are likely to do so regarding the other." *Id.* 21a.

Finally, the Ninth Circuit identified a third rationale for upholding § 2612(a)(1)(C): according to the court, it sought to remedy the historical role States played in perpetuating the stereotype that women are family caregivers. According to the Ninth Circuit, every State prior to 1969 had "some form of labor legislation 'protective' of women only," such as laws limiting the hours women could work and prescribing their wages. Pet. App. 25a. These laws, the court of appeals reasoned, were based on and perpetuated "stereotypical beliefs about the appropriate roles of men and women." *Id.* 29a. Section 2612(a)(1)(C), the Ninth Circuit concluded, "by providing for family-care leave on a *gender neutral* basis, . . . counteracted any tendency by employers either to refuse to hire women because of their presumed higher need for family-care leave, or to afford such leave to women but not to men, thus reinforcing gender roles." *Id.* 36a (emphasis in original) (internal quotations and citation omitted).

REASONS FOR GRANTING THE WRIT

The Ninth Circuit concluded that § 2612(a)(1)(C) is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment based on three alternative rationales: (i) § 2612(a)(1)(C) is an appropriate remedy under Section 5 because States are *presumed* to unconstitutionally discriminate on the basis of gender, and the State of Nevada had failed to overcome this presumption (Pet. App. 12a–19a); (ii) even though the legislative history of the FMLA contains no evidence that Congress intended to remedy unconstitutional discriminatory practices in the granting of *family-care* leave, the history contained scant evidence about state *paternity* leave policies from which the court could *infer* a remedial

purpose (*id.* 20a–22a); and (iii) § 2612(a)(1)(C) is a response to the States' pre-1969 laws that were based on the stereotype that women are family caregivers (*id.* 23a–42a).

The result reached by the Ninth Circuit, that § 2612(a)(1)(C) is a valid exercise of Congress's authority under Section 5, and its reasons for decision conflict with the decisions of eight other circuit courts and one state court of last resort. In addition, this case raises important federal questions, namely the scope of Congress's authority under Section 5 and state sovereign immunity, that are recurring in nature. The Ninth Circuit's decision, moreover, is erroneous and contrary to the well-established precedent of this Court. Accordingly, every factor that the Court usually considers when deciding whether to grant a writ of certiorari applies here, and each demonstrates that the Ninth Circuit's decision plainly warrants review, if not summary reversal.

I. THE COURT SHOULD RESOLVE A LOWER-COURT SPLIT OVER WHETHER § 2612(a)(1)(C) IS APPROPRIATE ENFORCEMENT LEGISLATION UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT.

As acknowledged by the court of appeals (Pet. App. 5a–6a), the lower courts are divided over whether the FMLA is a valid exercise of Congress's Section 5 power. On the particular question whether § 2612(a)(1)(C) is appropriate remedial legislation, the Ninth Circuit's decision directly conflicts with decisions of the Fifth and Sixth Circuits. Moreover, on the question of how courts generally should test whether legislation purporting to remedy gender discrimination is appropriate under Section 5, the Ninth Circuit's decision further conflicts with decisions of the First, Second, Third, Fourth, Eighth, and Eleventh Circuits, as well as the Kansas Supreme Court.

As the Ninth Circuit candidly acknowledged (Pet. App. 19a), the decision below squarely conflicts with the Fifth

Circuit's decision in *Kazmier v. Widmann*, 225 F.3d 519 (2000). In *Kazmier*, the Fifth Circuit, like the Ninth Circuit, reviewed § 2612(a)(1)(C), but unlike the Ninth Circuit, it concluded that the provision was congressional overreaching that attempted to change the substance of the Equal Protection Clause rather than remedy a state constitutional violation.

In doing so, the Fifth Circuit applied a two-step test based on this Court's decision in *Kimel*: "At the first step, we begin our analysis by determining what type of constitutional violation the statute under review is designed to prevent . . . . [A]t *Kimel*'s second step, [we examine] the legislative record of the statute under review to see whether it contains evidence of *actual constitutional violations by the States* sufficient to justify the full scope of the statutes' provisions." 225 F.3d at 524 (emphasis in original). Applying this test, the Fifth Circuit observed initially that "[t]he mere invocation by Congress of the specter of sex discrimination . . . is insufficient to support the validity of legislation under Section 5." *Id.* at 526. In addition, the court held that no evidence supported the assertion that § 2612(a)(1)(C) remedies unconstitutional state conduct because "the legislative record for this provision is devoid of evidence of public sector discrimination." *Id.* In the Fifth Circuit's view, this lack of evidence, combined with the "broad swath" of constitutional conduct the section prohibits, meant that § 2612(a)(1)(C) is not appropriate remedial legislation. *Id.*

The Sixth Circuit in *Thomson v. Ohio State University Hospital*, 238 F.3d 424, 2000 WL 1721038 (6th Cir. 2000), likewise held that § 2612(a)(1)(C) is not a valid exercise of Congress's Section 5 authority but is "overbroad." *Id.* at *2. In reaching this decision, the Sixth Circuit relied exclusively on its earlier decision in *Sims v. University of Cincinnati*, 219 F.3d 559 (6th Cir. 2000). There, the court reasoned that the FMLA was "a piece of social legislation rather than a remedy for ongoing state violations of the Equal Protection Clause," *id.* at 564, because it "creates an affirmative obligation on the

part of the States to provide twelve weeks of leave. . . . [an obligation that] far outstrip[s] the requirements of the Fourteenth Amendment." *Id.* at 565. "In light of the broad scope of its substantive requirements, and the lack of evidence of widespread and unconstitutional gender discrimination by the States," the court concluded that the "FMLA is not a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment." *Id.* at 566.

In addition to departing from a majority of courts on the question whether § 2612(a)(1)(C) is appropriate remedial legislation under Section 5, the Ninth Circuit adopted a test to determine the section's validity that is flatly inconsistent with the standards applied by six other federal courts of appeal, the First, Second, Third, Fourth, Eighth, and Eleventh Circuits, and one state court of last resort, the Kansas Supreme Court, all of which have considered whether some provision of the FMLA that purports to remedy gender discrimination is appropriate remedial legislation under Section 5. *See Laro v. New Hampshire*, 259 F.3d 1, 13 (1st Cir. 2001); *Hale v. Mann*, 219 F.3d 61, 69 (2d Cir. 2000); *Chittister v. Dep't of Cmty. & Econ. Dev.*, 226 F.3d 223, 229 (3d Cir. 2000); *Montgomery v. Maryland*, 266 F.3d 334, 339-40 (4th Cir. 2001), *petition for cert. filed*, 70 U.S.L.W. 3475 (U.S. Jan. 18, 2002) (No. 01-1079) (raising only questions of waiver); *Lizzi v. Alexander*, 255 F.3d 128, 134-36 (4th Cir. 2001), *cert. denied*, 122 S. Ct. 812 (2002); *Townsel v. Missouri*, 233 F.3d 1094, 1095 (8th Cir. 2000); *Garrett v. Univ. of Ala. at Birmingham Bd. of Tr.*, 193 F.3d 1214, 1220 (11th Cir. 1999), *rev'd on other grounds*, 531 U.S. 356 (2001); *Schall v. Wichita State Univ.*, 7 P.3d 1144, 1160-62 (Kan. 2000). This judicial conflict over the proper standard to apply in determining whether legislation that concerns gender-based classifications is valid under Section 5 reinforces the need for review by this Court.

In *Hale v. Mann*, for example, the Second Circuit considered whether the leave provisions of the FMLA are a valid exercise of Congress's Section 5 authority and, like the

Ninth Circuit, agreed that the FMLA purports to remedy gender discrimination. But, unlike the Ninth Circuit, the court declined to accept the assertion that the FMLA is aimed at remedying unconstitutional state conduct because Congress "fail[ed] to specifically find that women are disproportionately affected by" conditions requiring leave. It ultimately concluded that the "grant of leave is overbroad." *Hale*, 219 F.3d at 68-69.

The Third Circuit likewise held in *Chittister v. Department of Community & Economic Development*, 226 F.3d at 228-29, that the FMLA is not appropriate remedial legislation. The circuit court framed the question before it as whether Congress had made "any finding concerning the existence" of leave practices "that amounted to intentional gender discrimination in violation of the Equal Protection Clause." *Id.* It noted that there is no "substantial evidence of such violations in the legislative record" and concluded that the FMLA's mandatory leave requirement could not be said "to be congruent or proportional to any identified constitutional harm, and it cannot be said to be tailored to preventing any such harm." *Id.* at 229.

The Fourth Circuit's analysis of the FMLA in *Lizzi v. Alexander* is nearly identical. There, the court refused to credit the FMLA as a remedy to unconstitutional gender discrimination because "Congress did not identify, as it is required to do, *any* pattern of gender discrimination by the [S]tates with respect to the granting of employment leave for the purpose of providing family or medical care." *Lizzi*, 255 F.3d at 135 (emphasis added). It concluded that with § 2612(a)(1)(D) "[i]nstead of attempting to remedy the identified [constitutional] violation, Congress attempted to redefine the right." *Id.*

The decisions of the First, Eighth and Eleventh Circuits, and the Kansas Supreme Court are no different in their reasoning and analysis. *See Laro*, 259 F.3d at 13 ("[W]here

the connection between the provision at issue and gender-based discrimination is indirect at best, it is incumbent on Congress either to establish a clear link to the prevention of unconstitutional gender discrimination or to identify problematic state practices to which the provision responds."); *Townsel*, 233 F.3d at 1096 ("The key point is that the FMLA makes illegal a great deal of conduct not even arguably prohibited by the Fourteenth Amendment, and provides for remedies a great deal more extensive than the Fourteenth Amendment could even arguably require."); *Garrett*, 193 F.3d at 1220 ("This type of anecdotal legislative history [as is found in the FMLA] is insufficient to indicate Congress had identified particular unconstitutional actions by the [S]tates involving serious health conditions irrespective of gender or family situations."); *Schall*, 7 P.3d at 1161 ("The FMLA does not merely make it illegal for employers to treat requests for leave differently on the basis of gender but instead mandates that employers provide employees with a new and valuable benefit.").

The decision below plainly conflicts with these FMLA cases. Like the Ninth Circuit, these courts considered provisions of the FMLA that purported to remedy gender discrimination in the workplace. But unlike the Ninth Circuit, no other court abandoned the requirement that Congress remedy "*actual constitutional violations by the States*" simply because Congress's findings mentioned the "specter of sex discrimination." *Kazmier*, 225 F.3d at 524, 526 (emphasis in original). They all applied this Court's Section 5 precedent and thoroughly examined the FMLA's legislative history for some evidence that Congress intended to remedy actual, existing unconstitutional state conduct. Finding none, each court held that the FMLA did not pass constitutional muster.

The Ninth Circuit nonetheless attempted to disclaim any division of authority except as between its decision and the Fifth Circuit's in *Kazmier* because, in its view, only *Kazmier* specifically discussed § 2612(a)(1)(C). Pet. App. 5a. Even if

the Ninth Circuit were correct, which it is not, the split of authority between it and the Fifth Circuit, when combined with the importance of the question presented and the Ninth Circuit's disregard for binding Supreme Court precedent, would be sufficient to support granting this writ. But the Ninth Circuit's attempt to insulate its decision is wrong.

The lower court failed to appreciate the decisions of the Sixth Circuit. That court *has* reviewed § 2612(a)(1)(C), and in *Thomson* held that the provision is not a valid exercise of Congress's Section 5 authority. In addition, because the Ninth Circuit did not issue a narrow decision concerning just § 2612(a)(1)(C) but, by its own admission, was attempting to determine generally "how legislation that is meant to prevent gender discrimination, but that sweeps substantially more broadly than the Equal Protection Clause, should be analyzed under [S]ection 5" (Pet. App. 12a), its decision must be judged against the tests employed by the other circuit courts in this larger context. In this respect, the Ninth Circuit's analysis also conflicts with the analysis adopted by the First, Second, Third, Fourth, Eighth and Tenth Circuits, and the Kansas Supreme Court in cases considering other FMLA provisions that purport to remedy gender discrimination.

II. THIS RECURRING FEDERAL QUESTION IS EXCEEDINGLY IMPORTANT.

Besides raising an issue that implicates a split of authority, the petition addresses a significant constitutional question that is of essential importance to every State and is frequently recurring, a fact that, by itself, supports this Court's review. The question here concerns Congress's authority to enact legislation under Section 5 of the Fourteenth Amendment and ultimately the sovereign immunity of States, both of which are issues this Court has recognized are sufficiently important to merit its review. *See Alden v. Maine*, 527 U.S. 706, 712 (1999) (granting certiorari to resolve a split between the Maine and Arkansas Supreme Courts concerning the "importan[t]"

question of state sovereign immunity); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 448 (1976) (granting certiorari absent a split of authority where the question presented concerned the "important constitutional question" of Congress's authority under Section 5). The sheer number of cases considering the validity of the FMLA as applied to States, moreover, confirms that the question whether it is appropriate enforcement legislation is frequently recurring in nature. In addition to the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits, and the Kansas Supreme Court, numerous district courts have been asked to consider the constitutionality of the FMLA's leave provisions: *Williamson v. Ga. Dep't of Human Res.*, 150 F. Supp. 2d 1375 (S.D. Ga. 2001); *Philbrick v. Univ. of Conn.*, 90 F. Supp. 2d 195 (D. Conn. 2000); *Cohen v. Neb. Dep't of Admin. Servs.*, 83 F. Supp. 2d 1042 (D. Neb. 2000); *Darby v. Hinds County Dep't of Human Servs.*, 83 F. Supp. 2d 754 (S. D. Miss. 1999); *Kilvitis v. County of Luzerne*, 52 F. Supp. 2d 403 (M.D. Pa. 1999); *Post v. Kansas*, No. 98-1238-JTM, 1998 WL 928677 (D. Kan. Dec. 10, 1998); *Driesse v. Fla. Bd. of Regents*, 26 F. Supp. 2d 1328 (M.D. Fla. 1998); *McGregor v. Goord*, 18 F. Supp. 2d 204 (N.D.N.Y. 1998); *Serafin v. Conn. Dep't of Mental Health & Addiction Servs.*, 118 F. Supp. 2d 274 (D. Conn. 2000); *Biddlecome v. Univ. of Tex.*, No. 96-1872, 1997 WL 124220 (S.D. Tex. Mar. 13, 1997); *Jolliffe v. Mitchell*, 986 F. Supp. 339 (W.D. Va. 1997); *Knussman v. Maryland*, 935 F. Supp. 659 (D. Md. 1996).

Aside from the importance of the legal question involved, the issue is significant to the States within the Ninth Circuit on a practical level as well. These States, which include Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, have *thousands* and *thousands* of employees who (under the Ninth Circuit's decision) may instigate litigation for money damages in federal court against their state employer to resolve disputes about excessive leave. Such a flood of litigation would both undercut the careful

balance between federal and state power established by the Constitution and unnecessarily drain these States' fisc. In addition, the uncertainty created by the Ninth Circuit's opinion is a hindrance to these States' hiring and firing practices. In light of the decision below, the States within the Ninth Circuit are no longer free to fire chronically-absent employees, or hire others to replace the absent employees, for fear that they will be required to defend their decisions in protracted federal court litigation. In light of the substantial practical costs the Ninth Circuit's decision imposes on these States, the Court should not delay in resolving the question presented.

III. THE NINTH CIRCUIT ERRED IN CONCLUDING THAT § 2612(a)(1)(C) IS A VALID EXERCISE OF CONGRESS'S POWER UNDER SECTION 5.

In holding that § 2612(a)(1)(C) is appropriate remedial legislation under Section 5, the Ninth Circuit erred. Indeed, each of its alternative rationales is incorrect and significantly departs from this Court's Section 5 jurisprudence. This, too, justifies review, if not summary reversal.

A. The Lower Court's Opinion Is Inconsistent With This Court's Section 5 Jurisprudence.

As a threshold matter, it is clear from this Court's prior decisions that § 2612(a)(1)(C) exceeds Congress's Section 5 remedial power. Under *City of Boerne v. Flores*, 521 U.S. 507 (1997), a federal statute is appropriate remedial legislation if it (i) is aimed at remedying state action that violates Section 1 of the Fourteenth Amendment, and (ii) is proportional and congruent to that purpose. *Id.* 529-34. A statute is *not* aimed at preventing unconstitutional state conduct, however, if Congress fails to identify a "pattern" of such conduct in the act's legislative history. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 640 (1999). And legislation is *not* congruent and proportional if it applies to all States instead of just those States acting

unconstitutionally, *see United States v. Morrison*, 529 U.S. 598, 626-27 (2000), or it "prohibits substantially more state" practices "than would likely be held unconstitutional." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 86 (2000). *See also Bd. of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 372-74 (2001).

Section 2612(a)(1)(C) fails to meet either requirement. There is *no* evidence in the FMLA's legislative history indicating that States grant leave to care for a sick family member in an intentionally discriminatory manner. The available evidence, moreover, indicates that States do *not* engage in such unconstitutional conduct. As even the Ninth Circuit acknowledged, the State of Nevada has enacted leave provisions that are "similar to the FMLA" (Pet. App. 7a; *see also id.* 55a–56a), and numerous other States provide their employees *on a gender neutral basis* the same amount of leave as, or *more* family-care leave than is required by, § 2612(a)(1)(C). *See* Alaska Stat. § 39.20.305 (Matthew Bender 2001) (allowing state employees 18 weeks of family-care leave); Cal. Gov't Code § 12945.2 (West 2002) (12 weeks); Conn. Gen. Stat. § 5-248a (West 2002) (24 weeks); Fla. Stat. Ann. § 110.221 (West 2001) (6 months); Miss. Code Ann. § 25-3-93 (2002) (18-27 days of accrued *paid* leave in addition to § 2612(a)(1)(C) leave); N.J. Stat. Ann. § 34:11B-4 (West 2002) (12 weeks); N.D. Cent. Code § 54-52.4-02 (West 2001) (4 months); R.I. Gen. Laws § 28-48-2 (2000) (13 weeks); Tex. Gov't Code Ann. §§ 661.202, 661.912 (Vernon 2002) (12 weeks under § 2612(a)(1)(C) plus accrued sick leave); Vt. Stat. Ann. tit. 21, § 472 (2001) (12 weeks); Va. Code Ann. § 51.1-1107 (West 2001) (32-40 hours of *paid* leave in addition to § 2612(a)(1)(C) leave); *see also* Haw. Rev. Stat. Ann. § 398-3 (West 2001) (four weeks of family-care leave); Me. Rev. Stat. Ann. tit. 26, § 844 (West 2002) (10 weeks); N.C. Gen. Stat. Ann. § 143-300.35 (West 2001) (waiving sovereign immunity of State with respect to disputes about the granting of leave time); Okla. Stat. Ann. tit. 74,

§ 840-2.22 (West 2001) (adopting rules to implement FMLA *and* rules in the event the FMLA is struck down as applied to States).

Even if there were some evidence of unconstitutional gender discrimination, § 2612(a)(1)(C) would not be a congruent and proportional response to that conduct. *See City of Boerne*, 521 U.S. at 530. Section 2612(a)(1)(C) is not a narrow remedy to discrimination: it does not prohibit gender discrimination in the granting of family-care leave or simply require that States grant leave in a gender-neutral manner. Rather, it attempts to create a substantial new federal benefit—an entitlement to twelve weeks of leave and the right to sue a State for money damages in federal court if it fails to provide this benefit. *See* 29 U.S.C. §§ 2615, 2617, Pet. App. 63a–65a. Although this Court has recognized that Section 5 allows Congress to remedy unconstitutional conduct "by *prohibiting* a somewhat broader swath of conduct" than is prohibited by the Constitution, *see Kimel*, 528 U.S. at 81 (emphasis added), it has not held that Congress can use its enforcement power to create an *entitlement*, and if it were to render such a holding, the Court would surely require Congress to identify clear and direct evidence of unconstitutional state conduct that is incurable by traditional prohibitions, which no one can contend is the case here.

In addition, § 2612(a)(1)(C) is not tailored to the States that supposedly grant family-care leave unconstitutionally but applies to all States across the board. Even when considering legislation aimed at remedying *racial* discrimination, the Court has required Congress to tailor its remedy to the States that have a history of discrimination. *See South Carolina v. Katzenbach*, 383 U.S. 301, 328-31 (1966). In light of the fact that numerous States, like Nevada, have enacted statutes "similar to the FMLA" (Pet. App. 7a) and thereby have a demonstrated practice of granting family-care leave in a gender-neutral manner, the FMLA's universal application is disproportionate to any supposed unconstitutional gender

discrimination in the granting of leave. *See supra* pp. 16–17. And there is no explanation by Congress or anyone else about why States should provide *twelve-weeks* of leave, as opposed to some greater or lesser amount of leave depending on each State's employment needs. In sum, "[t]he substantial costs" that § 2612(a)(1)(C) "exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct." *City of Boerne*, 521 U.S. at 534.

Instead of applying the straightforward test established in *City of Boerne*, the Ninth Circuit advanced three alternative rationales for decision that are plainly inconsistent with this Court's Section 5 jurisprudence:

First, the Ninth Circuit incorrectly held that the heightened scrutiny applied to suspect classes under the Court's equal protection jurisprudence required it to *presume* that States act unconstitutionally toward these groups and that, as a law directed at eliminating gender-based classifications, § 2612(a)(1)(C) is presumptively remedial. This analysis is directly contradicted by the Court's decisions in *United States v. Morrison*, 529 U.S. 598 (2000), *City of Boerne*, and *South Carolina v. Katzenbach*, all of which considered legislation that purported to remedy state conduct subject to heightened scrutiny.

In *Morrison*, a case decided nearly two years *before* the Ninth Circuit's decision below but not cited by the court of appeals, this Court invalidated a provision of the Violence Against Women Act ("VAWA") that the Federal Government defended as a remedy to unconstitutional gender discrimination. *See* 529 U.S. at 624-25. Applying its Section 5 jurisprudence, the Court held (in pertinent part) that the VAWA provision was not appropriate remedial legislation because it was not proportional to any alleged unconstitutional gender discrimination: VAWA "appli[ed] uniformly

throughout the Nation" even though "Congress'[s] findings indicate[d] that the problem of discrimination against the victims of gender-motivated crimes d[id] not exist in all States, or even most, States." *Id.* at 626. Importantly, even though VAWA concerned gender discrimination, the Court did not abandon its traditional Section 5 analysis (and certainly did not engage in any burden shifting) but, as it had done numerous times before, required evidence of unconstitutional state conduct and a "'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Id.* at 625-26 (quoting *Florida Prepaid*, 527 U.S. at 639; *City of Boerne*, 521 U.S. at 526).

The same is true of this Court's decision in *City of Boerne*. There, the Court considered whether legislation purporting to preserve religious freedom was appropriate remedial legislation under Section 5. *City of Boerne*, 521 U.S. at 529. Although state laws intentionally discriminating on the basis of religion are subject to a heightened level of scrutiny, the Court did not shift the burden to States to disprove such discrimination simply because the statute at issue raised the specter of religious persecution. Instead, it engaged in a searching and thorough review of actual state practice. *See id.* at 530-31.

Finally, in *South Carolina v. Katzenbach*, the Court upheld provisions of the Voting Rights Act as appropriate remedies to racial discrimination in state voting procedures. *See* 383 U.S. at 315. In concluding that these unconstitutional practices existed, the Court did *not* rely on the fact that discrimination was then common, and it did *not* presume the existence of such practices even though racial discrimination is subject to strict scrutiny. Instead, it reviewed the Act's extensive legislative history and concluded that the history adequately detailed unconstitutional state conduct. *See id*. at 310-15 (summarizing congressional reports based on nine days of testimony by 67 witnesses that described

unconstitutional racial discrimination in state voting procedures).

The Ninth Circuit's burden shifting simply cannot be squared with the Court's analysis in these cases.

Second, the Ninth Circuit held that, because Congress has great "leeway" in compiling evidence of unconstitutional state gender discrimination, the court could infer that States unconstitutionally discriminate when providing *family-care* leave from evidence that state *paternity* leave policies are similar in content to private-sector paternity leave policies and evidence that some private sector employers discriminate when granting paternity leave. Again, however, this sort of inferential leap—assuming unconstitutional state conduct in granting family-care leave from the content of unrelated leave policies—is foreclosed by the Court's prior decisions.

In *Morrison*, for example, the Court explained that it could not infer from evidence of discrimination against victims of gender-motivated crimes in *some* States that such discrimination occurred in *all* States. *See Morrison*, 529 U.S. at 626. Similarly, in *Garrett*, the Court concluded that the Americans with Disabilities Act did not remedy unconstitutional state conduct despite evidence of isolated discrimination by some state officers. *See Garrett* 531 U.S. at 369-72. And in *Kimel*, the Court rejected the idea that the actions of private citizens could be imputed to States. *See Kimel*, 528 U.S. at 89-90. In all cases, the Court refused to infer a statewide pattern of discrimination from some isolated discriminatory acts.

In their concurrence in *Garrett*, Justices Kennedy and O'Connor explained why: "It is *a most serious charge* to say a State has engaged in a pattern or practice designed to deny its citizens the equal protection of the laws. . . . States can, and do, stand apart from the citizenry." *Garrett*, 531 U.S. at 375 (emphasis added).

By accusing all States of intentional and unconstitutional gender discrimination in granting leave to care for sick family members when there is *no* evidence suggesting any such discrimination, the Ninth Circuit failed to appreciate the seriousness of its charge and failed to require the kind of detailed evidence of state discrimination that this Court's cases have repeatedly demanded.

Third, the Ninth Circuit concluded that § 2612(a)(1)(C) could be justified as a response to pre-1969 state laws that were supposedly based on then-prevailing stereotypes about women. This rationale is erroneous on a number of levels.

At the outset, this explanation of § 2612(a)(1)(C) does not appear to have been considered by Congress. As the Ninth Circuit acknowledged, Congress did not "specifically recount" the pre-1969 laws that troubled the lower court. Pet. App. 30a. This Court, however, requires that "*Congress* identif[y]," not that courts and parties supply, the unconstitutional conduct that remedial legislation seeks to redress. *Florida Prepaid*, 527 U.S. at 640 (emphasis added).

Putting aside the question whether the Ninth Circuit could create a rationale for § 2612(a)(1)(C) that is not reflected in its legislative history, the court's rationale is insufficient to justify the provision as remedial Section 5 legislation. This Court has repeatedly stressed that, in order to constitute a Section 5 remedy, Congress must cure *actual* unconstitutional conduct. *See City of Boerne*, 521 U.S. at 531-32; *see also Florida Prepaid*, 527 U.S. at 640-41. But the archaic and discredited gender-based laws that concerned the Ninth Circuit have been off the books since at least 1969, if not earlier. And since then, numerous States have enacted gender-neutral leave policies, which according to the Ninth Circuit cures whatever stereotype these laws may have created. *See* Pet. App. 39a–41a. Far from demonstrating continued state discrimination, this history shows that States have *not* allowed

laws based on stereotypes to remain. And, in the absence of a constitutional harm, there can be no remedy under Section 5.

Finally, if the Ninth Circuit were correct and Congress were permitted under Section 5 to require a *fixed gender-neutral benefit* (such as twelve-weeks of leave) to remedy a State's archaic practice of disseminating the benefit unequally, the scope of Section 5 would be substantially broadened. The Federal Government, for example, could require that all state employees work only from 8 a.m. to 3 p.m., because in the early 1900s, some States (apparently believing that women should be home when their children return from school) placed restrictions on the hours women could work (*see* Pet. App. 25a–27a), and this gender-neutral hour requirement would free men and women equally to greet their children. In addition, the Federal Government could require that all States provide a death benefit of $200,000 to their employees' spouses because, in the past, States have given death benefits to widows but not widowers (*see id.* 29a). The Court has never ascribed to such a view of Section 5, however, and to do so, would give it an incredibly broad reach.

B. The Ninth Circuit's Decision Is So Clearly Contrary To Law That It Merits Summary Reversal.

As the above discussion makes clear, the Ninth Circuit's decision abandons this Court's traditional test for determining whether federal legislation is a proper exercise of Congress's power under Section 5. Contrary to this Court's clear holdings in *City of Boerne*, *Florida Prepaid*, *Kimel*, *Garrett*, and *Morrison*, the Ninth Circuit failed to identify in the FMLA's history a pattern of unconstitutional state conduct that would justify characterizing § 2612(a)(1)(C) as remedial. The Ninth Circuit failed to question whether Congress's decision to require *all* States (rather than just those with a demonstrated practice of unconstitutionally discriminating when granting family-care leave) to provide a substantial new benefit to their

employees is congruent to any alleged unconstitutional conduct. Instead, it shifted burdens, made great inferential leaps from scant, unrelated bits of legislative history and attempted to supply a rationale where Congress had none.

The Ninth Circuit abandoned this Court's traditional Section 5 jurisprudence because the FMLA's findings raised the specter of *private* gender discrimination, and in the Ninth Circuit's view, the mere assertion of gender discrimination made this case different from all of this Court's prior decisions. This conclusion, however, is plainly inconsistent with the Court's decision in *Morrison*, which applied the very Section 5 precedent the Ninth Circuit disclaimed and held that federal legislation purportedly aimed at remedying state *gender* discrimination was not a valid exercise of Congress's Section 5 enforcement power. Even though *Morrison* was decided over a year before the decision below and is clearly relevant to this case, the Ninth Circuit *did not even cite it*, an omission that "is nothing short of baffling." *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 510 (2001). In light of these numerous and plain errors, summary reversal under Supreme Court Rule 16(1) is appropriate here. *See id.* at 511 (summary reversal appropriate where lower court's decision is "at odds with [the] governing law"); *Stewart v. LaGrand*, 526 U.S. 115, 118 (1999) (summarily reversing decision that enjoined all executions by lethal gas); *Pounders v. Watson*, 521 U.S. 982, 983 (1997) (summarily reversing court of appeals decision that "misinterpreted . . . constitutional requirements"); *Leavitt v. Jane L.*, 518 U.S. 137, 145 (1996) (summarily reversing decision that was a "blatant federal-court nullification of" the law).

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In the final analysis, this petition cleanly presents the question whether § 2612(a)(1)(C) is appropriate remedial legislation under Section 5 of the Fourteenth Amendment, and there is no reason to allow the "uncertainty" that the Ninth

Circuit has introduced into the "routine" employment decisions of "the many [States] within the Court of Appeals' large geographical jurisdiction" to persist. *Pounders*, 521 U.S. at 991.

CONCLUSION

The petition should be granted, and either the Ninth Circuit's decision should be summarily reversed or the Court should hear argument on the question presented.

Respectfully submitted,

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