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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

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

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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. This Court's jurisdiction is invoked under 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), in the discharge of competing family care obligations, 29 U.S.C. 2612(a)(1). 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 further found that "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 accordingly determined that, to avoid entrenching and reinforcing those sex roles and their impact on equal employment opportunities, employers must be required to provide family care leave on a sex-neutral basis.

To counteract the effects of past gender discrimination and stereotyping in employment, Congress, in the FMLA, entitled public and private employees "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 medical care provision, which is at issue here, entitles eligible employees to take up to twelve workweeks of unpaid leave per year 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 em-

ployees who have worked for the employer for at least one year and who provided at least 1,250 hours of service within the last twelve months. 29 U.S.C. 2611(2)(A). Covered employers include federal and state governments, 29 U.S.C. 2611(4)(A)(iii), 203(x), but the FMLA excludes from eligibility for leave government employees who hold certain high-ranking or sensitive positions, 29 U.S.C. 2611(2)(B)(i) and (3), 203(e)(2)(C). 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 (and second and third opinions) of the need for leave. See 29 U.S.C. 2613.

The FMLA encourages employers to adopt more generous leave policies than its provisions mandate. *Ragsdale* v. *Wolverine World Wide, Inc.*, 122 S. Ct. 1155, 1159, 1160 (2002). To that end, Congress provided that "[n]othing in 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." 29 U.S.C. 2651(b).

The FMLA makes it unlawful for employers to "interfere with, restrain or deny the exercise of" FMLA rights, 29 U.S.C. 2615(a)(1), and prohibits retaliation against any individual for "opposing any practice made unlawful by this subchapter," 29 U.S.C. 2615(a)(2). The FMLA authorizes employees to bring a civil action against employers who violate the Act. 29 U.S.C. 2617(a). The FMLA's provisions also may be enforced by the Secretary of Labor. 29 U.S.C. 2617(b).

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 between May and December 1997. *Ibid.* In June and September 1997, the Department granted Hibbs a special benefit available under state law known as "catastrophic leave"—paid leave donated by other employees. *Ibid.*; Pet. 3. According to the court of appeals, the Department informed Hibbs that the catastrophic leave would count against his annual 12-week FMLA leave entitlement. Pet. App. 2a. 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 12 weeks of leave available under the FMLA. Pet. App. 2a. Although Hibbs requested an additional 200 hours of catastrophic leave, the Department informed him that no further leave would be granted and directed him to report to work by November 12, 1997. *Id.* at 2a-3a. When Hibbs did not report to work on that date or after a second direction to report, the Department recommended that Hibbs be dismissed and scheduled a pre-disciplinary hearing. *Id.* at 3a. At the hearing, Hibbs argued that his FMLA leave should have begun only after his catastrophic leave ended. *Ibid.* The hearing officer recommended dismissal and Hibbs was dismissed, effective December 22, 1997. *Ibid.*

After an unsuccessful administrative appeal, Hibbs filed suit in federal district court under the FMLA against the Department and two officials, who were sued in their official capacities. Pet. App. 3a. Hibbs alleged, in relevant part, that petitioners violated the FMLA by failing to designate his catastrophic leave as FMLA leave, by failing to give him additional leave, and by retaliating against him for taking FMLA leave.

Complaint 8. 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.

3. Hibbs appealed, and the United States intervened, under 28 U.S.C. 2403, to defend the constitutionality of Congress's abrogation of state sovereign immunity. Pet. App. 4a. The court of appeals reversed. *Id.* at 1a-46a. The court held that the family medical care provision of the FMLA, 29 U.S.C. 2612(a)(1)(C), was validly enacted pursuant to Congress's power under Section 5 of the Fourteenth Amendment and, accordingly, that the abrogation of Eleventh Amendment immunity was constitutional. Pet. App. 9a-42a. The court ruled that the FMLA "is expressly aimed at preventing gender discrimination," *id.* at 18a n.9, which is subject to heightened scrutiny under the Constitution due to the pervasive history of gender discrimination in the country. The court accordingly reasoned that the FMLA's family care provision should be analyzed somewhat differently from the provisions at issue in this Court's prior decisions that addressed Congress's Section 5 power to enforce rights subject only to rational basis review. *Id.* at 18a (citing *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62 (2000) (age discrimination), and *Board of Trustees of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356 (2001) (disability discrimination)). "[T]he kind of history of invidious gender discrimination by states that [the Court] was unable to find, in *Kimel* and *Garrett*, with respect to age and disability," the court explained, requires sustaining the exercise of Section 5 power unless those attacking the constitutionality of the Act demonstrate that the pervasive history of discrimination did not extend to employment

leave practices or to "state enforcement of stereotypical family roles." *Id.* at 18a-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 noted 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. In upholding such laws, state courts "made clear that the basis, and validity, of such laws lay in stereotypical beliefs about the appropriate roles of men and women." *Id.* at 29a.

The court also held that the remedy that the family care provision of the FMLA provides 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. The court stressed that the FMLA "impacts only the states' public employee leave plans, and does so in a limited way," because the Act guarantees only unpaid leave and thus "protects job security, not wage continuation." *Id.* at 40a. In short, the court concluded that the family medical care provision of the Act is valid Fourteenth Amendment legislation because it "enact[s] modest pro-

visions, proportional in their sweep to Congress' important goal of counteracting the impact of stereotypes regarding the family and workplace roles of men and women fostered by unconstitutional state legislation." *Id.* at 42a.

Finally, the court ruled that, even if the Eleventh Amendment barred Hibbs' suit against the Department, he might be able to sue the individual petitioners for prospective injunctive relief pursuant to *Ex parte Young*, 209 U.S. 123 (1908), if he could show that the individual petitioners had the requisite supervisory authority to qualify as employers under the Act. Pet. App. 42a-43a.

ARGUMENT

Because the narrow conflict on the question presented by the petition is nascent and because, in any event, there are significant barriers to granting plenary review in this case, the petition should be denied.

1. a. Petitioners argue (Pet. 8-13) that this Court should grant review to resolve a conflict in the circuits over whether the FMLA is valid Section 5 legislation. Petitioners greatly exaggerate the scope of that conflict, however. The only question decided by the court of appeals (Pet. App. 5a-6a) and the only question presented in the petition (Pet. i) is whether the FMLA's *family medical care provision*, 29 U.S.C. 2612(a)(1)(C), is valid Section 5 legislation. While petitioners cite numerous court of appeals decisions (Pet. 10-12) as evidence of a purported conflict, virtually all of those cases involved the FMLA's *individual sick leave provision*, 29 U.S.C. 2612(a)(1)(D).[1] That provision,

[1] See *Montgomery* v. *Maryland*, 266 F.3d 334, 336 (4th Cir. 2001), petition for cert. pending on other grounds, No. 01-1079 (filed Jan. 18, 2002); *Laro* v. *New Hampshire*, 259 F.3d 1, 4 & n.1

which guarantees unpaid leave for an employee's own "serious health condition that makes the employee unable to perform the functions of the position of such employee," is not at issue here.

As the court of appeals explained, "[t]he difference matters." Pet. App. 6a. Prior to this Court's decision in *Board of Trustees of the Univ. of Alabama* v. *Garrett*, 531 U.S. 356 (2001), the government defended the individual sick leave provision primarily as Section 5 legislation aimed at protecting against discrimination on the basis of temporary disability (a classification subject only to rational basis review). This Court's holding in *Garrett* that Title I of the Americans with Disabilities Act, which generally protects against employment discrimination on the basis of long-term or permanent disabilities, is not valid Section 5 legislation essentially foreclosed that line of defense. Indeed, the Solicitor General determined, in the wake of *Garrett*, to take the extraordinary step of abandoning further constitutional defense of the abrogation of Eleventh Amendment immunity for the individual sick leave provision.[2]

(1st Cir. 2001); *Lizzi* v. *Alexander*, 255 F.3d 128, 131 (4th Cir. 2001), cert. denied, 122 S. Ct. 812 (2002); *Townsel* v. *Missouri*, 233 F.3d 1094, 1095 & n.2 (8th Cir. 2000); *Chittister* v. *Department of Cmty. & Econ. Dev.*, 226 F.3d 223, 225 (3d Cir. 2000); *Sims* v. *University of Cincinnati*, 219 F.3d 559, 561 (6th Cir. 2000); *Hale* v. *Mann*, 219 F.3d 61, 69 (2d Cir. 2000); *Garrett* v. *University of Ala. at Birmingham Bd. of Trustees*, 193 F.3d 1214, 1219 (11th Cir. 1999), rev'd on other grounds, 531 U.S. 356 (2001); *Schall* v. *Wichita State Univ.*, 7 P.3d 1144, 1149-1151 (Kan. 2000).

[2] We are lodging with the Court copies of letters from the Solicitor General notifying Congress of his decision to decline further defense of the abrogation of Eleventh Amendment immunity for claims brought under 29 U.S.C. 2612(a)(1)(D).

The family care provision at issue here stands on a distinct constitutional footing—it remedies and directly responds to the continuing effects of well-documented, historic gender discrimination in employment and employment policies. Accordingly, the courts of appeals' dispositions of the individual sick leave provision (which does not significantly implicate gender discrimination) suggest little, if anything, about how those courts would resolve the gender discrimination question presented by the family care provision at issue here. A number of courts of appeals have said as much. See *Laro* v. *New Hampshire*, 259 F.3d 1, 9 n.6 (1st Cir. 2001) (expressly limiting holding to individual sick leave provision, because "[t]he constitutional arguments in support of the remaining provisions have greater strength and raise issues (for instance, their implications for family roles) not at stake here"); *Garrett* v. *University of Ala. at Birmingham Bd. of Trustees*, 193 F.3d 1214, 1216, 1220 (11th Cir. 1999) (although "state is immune from suit under the [medical leave provision]," "it might well not be immune from suit under certain other provisions of the Act"), rev'd on other grounds, 531 U.S. 356 (2001); see also *Chittister* v. *Department of Community & Econ. Dev.*, 226 F.3d 223, 225, 229 (3d Cir. 2000) (holding expressly limited to provisions at issue); *Hale* v *Mann*, 216 F.3d 61, 69 (2d Cir. 2000) (same).

Only one circuit, besides the court of appeals here, has established precedent addressing the abrogation of Eleventh Amendment immunity for the FMLA's family medical care provision. In *Kazmier* v. *Widmann*, 225 F.3d 519 (2000), a divided panel of the Fifth Circuit held that the abrogation of Eleventh Amendment immunity was not valid because the family medical care provision

was not appropriate Section 5 legislation.[3] That narrow conflict, however, does not merit this Court's review at this time. In neither *Kazmier* nor the case at hand did the parties seek rehearing en banc —despite the strong dissent by Judge Dennis in *Kazmier*, 225 F.3d at 533-549. In light of the nascency of the circuit conflict, the division within the Fifth Circuit panel, and petitioners' failure to file a petition for rehearing en banc, the courts of appeals still retain the ability to bring the case precedent into harmony and eliminate the conflict by sitting en banc. In addition, the issue is pending in the Eleventh Circuit. See *Bylsma* v. *Davis*, No. 01-16102-A. Resolution of this important constitutional question —going to the heart of Congress's Section 5 power to enforce the rights of individuals long subjected to a well-documented history of unconstitutional discrimination and thus potentially implicating numerous other civil rights statutes—should be undertaken only after

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[3] Prior to this Court's decision in *Garrett*, the Sixth Circuit sustained a claim of Eleventh Amendment immunity in a case arising under the family medical care provision in an unpublished decision. See *Thomson* v. *Ohio State Univ. Hosp.*, 238 F.3d 424 (2000) (Table). The *Thomson* court (with the acquiescence of the parties, including the United States) simply applied *Sims*' individual sick leave holding without analysis or discussion of the distinctive legal and empirical questions presented by the record of employment gender discrimination underlying the family care provision. It is the considered position of the United States, however, that, in light of this Court's decision in *Garrett*, the question of Congress's authority to enact the family medical leave provision and the sick leave provision present distinct constitutional questions, the analysis of which should not be intertwined. The *Thomson* decision, in any event, is non-precedential. See 6th Cir. R. 28(g), 206(c). As such, *Thomson* does not reflect the Sixth Circuit's final and binding resolution of the question presented here.

due deliberation and thoroughgoing consideration by the lower courts.

b. Petitioners posit (Pet. 10-13) a disparity in the "standards applied" (Pet. 10) by courts of appeals in Section 5 cases. Petitioners overstate the difference. If the analyses are different, it is because the cases are different. The court of appeals here approached the gender discrimination relevant to the family medical leave provision with a different presumption about the history of discrimination to which Congress responded than have those courts addressing the distinct rational-basis right that underlies the statutory right to sick leave. But the court of appeals did so because this Court's heightened scrutiny and Section 5 cases have recognized that gender discrimination is different. See, *e.g.*, *United States* v. *Virginia*, 518 U.S. 515, 533 (1996); see also *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 83 (2000).

Indeed, with respect to cases involving gender discrimination, it is not clear that the legal standards applied by the courts diverge in any significant respect. In the one other published court of appeals case to address the family medical care provision, the Fifth Circuit, like the court of appeals here, acknowledged that, because of the heightened scrutiny accorded gender discrimination, "Congress *potentially* has wide latitude under Section 5 to enact broad prophylactic legislation designed to prevent the States from discriminating on the basis of sex." *Kazmier*, 225 F.3d at 526; see *ibid.* (if the family care provision were understood as designed to remedy past discrimination,

"the absence of evidence of constitutional violations might not present a problem").[4]

2. This Court's recent, intervening decision in *Ragsdale* v. *Wolverine World Wide, Inc.*, 122 S. Ct. 1155 (2002), counsels against using this case as a vehicle to analyze the appropriateness of the family medical care provision as Section 5 legislation. With the exception of a retaliation complaint that the court of appeals did not address and for which petitioners have not sought this Court's review, the complaint (at 8) and the court of appeals' decision (Pet. App. 3a) identify Hibbs' FMLA claim as limited to petitioners' failure (i) to have his FMLA leave run consecutively to his state-law catastrophic leave benefits and (ii) to notify him that the catastrophic leave would serve as his FMLA leave.

In *Ragsdale*, however, this Court made clear that leave taken under an employer's more generous policies (like catastrophic leave) "may be counted toward the 12 weeks guaranteed by the FMLA." 122 S. Ct. at 1160; see *id.* at 1159 ("Ragsdale was entitled to no more leave"); *id.* at 1164 (employees have no right "to more than 12 weeks of FMLA-compliant leave in a given 1-year period"). The Court also held that the remedy for a failure to give notice generally is not the additional leave that Hibbs sought. *Id.* at 1162-1165. Nor has Hibbs alleged in his complaint or shown at this stage that he "would have taken less leave or intermittent leave if []he had received the required notice." *Id.* at

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[4] In any event, the court of appeals expressly ruled in the alternative that the family medical care provision satisfied the legal standards laid down for Section 5 legislation enforcing rights subject only to rational-basis review. See Pet. App. 20a. The supposed conflict in analysis thus ultimately did not alter the outcome of this case.

1162. To the contrary, the complaint (at 3) alleges that his wife would require his full time care until surgery in November—which apparently required Hibbs to take leave well in excess of that allotted by the FMLA. See Pet. App. 56a (on summary judgment, district court notes that "there seems to be some fairly compelling documents in the record that would suggest that there was time taken in excess of that permitted under the FMLA").

While the United States takes no position on the ultimate question of whether *Ragsdale* disposes of Hibbs' claim, this Court's intervening precedent casts such significant doubt on the validity of his underlying claim—and, indeed, on whether the complaint even states a legally cognizable claim—that the case is an unsuitable vehicle for resolution of the important constitutional question presented here. "It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Yet, in light of the apparent weaknesses in Hibbs' underlying claim for relief, the petition asks this Court to "anticipate a question of constitutional law in advance of the necessity of deciding it" *id.* at 346—and, indeed, in the face of precedent from this Court casting palpable doubt on the viability of the underlying claim. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable." *Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944).

Petitioners' litigation conduct below reflected that appropriate reluctance to have courts address constitu-

tional issues unnecessarily. Petitioners initially moved the district court to dismiss the case on the ground, *inter alia*, that Hibbs had received all the leave he was entitled to under the FMLA. See Def. Mot. to Dismiss 3-4. Although the Eleventh Amendment was raised in petitioners' answer (at 9), petitioners did not move to dismiss the case on that ground. It was not until nearly a year after the motion to dismiss was filed that petitioners sought, on summary judgment, to have the case dismissed on Eleventh Amendment grounds.

Furthermore, those general rules of constitutional avoidance apply with special force in the context of reviewing Section 5 legislation. See *Metro Broad., Inc.* v. *FCC*, 497 U.S. 547, 605 (1990) (O'Connor, J., dissenting) (legislation enacted pursuant to Congress's power under Section 5 of the Fourteenth Amendment "present[s] special concerns for judicial review"). In particular, application of this Court's "now familiar principles," *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 365 (2001), for evaluating the propriety of such legislation requires evaluation of the "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end" by the legislation. *Ibid.* (quoting *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997)). A case in which the application of the FMLA is so questionable (*i.e.*, the complaint may fail to state a cognizable claim under the statute) provides a distinctly awkward vehicle in which fairly to assess congruence and proportionality, or otherwise to evaluate the practical scope and operation of the FMLA.

Indeed, this Court has applied similar principles to avoid premature or unnecessary consideration of constitutional issues in the context of Section 5 legislation. In *Garrett*, for example, this Court dismissed as improvi-

dently granted the constitutional question of whether Title II of the Disabilities Act's abrogation of Eleventh Amendment immunity was valid Section 5 legislation precisely because the parties had not briefed the statutory question of whether Title II was applicable to the claims at issue in that case. "We are not disposed to decide the constitutional issue whether Title II * * * is appropriate legislation under § 5 of the Fourteenth Amendment when the parties have not favored us with briefing on the statutory question." *Garrett*, 531 U.S. at 360 n.1. That same principle should be applied here.[5]

3. This case also presents an inappropriate vehicle for certiorari because of its interlocutory character, such that this Court's review may ultimately be unable to provide the petitioners with meaningful, practical relief. This Court's usual practice is not to grant review

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[5] While the Court traditionally favors the resolution of jurisdictional questions before the merits of parties' claims are addressed, see *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89-102 (1998), that precept does not translate readily to jurisdictional objections based on the Eleventh Amendment, which does not operate like a traditional limitation on subject matter jurisdiction:

> The Eleventh Amendment * * * does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. * * * Nor need a court raise the defect on its own.

Wisconsin Dep't of Corrs. v. *Schacht*, 524 U.S. 381, 389 (1998) (citations omitted); see also *id.* at 394-395 (Kennedy, J., concurring); *Lapides* v. *Board of Regents of Univ. Sys. of Ga.*, No. 01-298 (May 13, 2002); *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 267 (1997) (Eleventh Amendment "enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary's subject-matter jurisdiction").

when cases are in an interlocutory posture because the relief sought from this Court ultimately might prove unnecessary or be rendered ineffectual. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); compare *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., on denial of certiorari, noting the interlocutory posture of the litigation), with *United States* v. *Virginia*, 518 U.S. at 526, 530 (review granted after final judgment). While the claim of Eleventh Amendment immunity ordinarily would warrant a departure from that practice, see *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993), the procedural posture in which this case arises and the narrow focus of the petition indicate that the Eleventh Amendment immunity might not insulate petitioners from either further litigation on the merits or damages.

First, the court of appeals held that, even if the family care provision is not appropriate Section 5 legislation, *Ex parte Young* suits seeking prospective injunctive relief would remain available for individuals to enforce the provision. Pet. App. 42a-43a; cf. *Garrett*, 531 U.S. at 374 n.9 (noting that *Ex parte Young* relief remains available for employment discrimination, even if the statutory provision is not appropriate Section 5 legislation). The petition does not seek review of that aspect of the court of appeals' opinion. Thus, assuming that Hibbs can make the appropriate showing of supervisory authority on remand (see Pet. App. 43a), then he may be able to obtain much of the declaratory and equitable relief that he seeks regardless of this Court's constitutional ruling.

In addition, as a practical matter, the availability of proceedings on remand under *Ex parte Young*, will impose the very litigation burdens and compliance

obligations on petitioners that they ask this Court to relieve. See Pet. 14-15 (arguing that certiorari is appropriate because of the potential flood of litigation "about excessive leave"; the statute's perceived "hindrance to these States' hiring and firing practices"; and because the FMLA's substantive provisions allegedly leave States "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"). Because those complaints about the purported statutory burden apply equally to aspects of the court of appeals' judgment from which petitioners have not sought review, they provide no sound basis for an exercise of the Court's certiorari jurisdiction.

Second, this Court's review will not necessarily insulate petitioners from liability for money damages. In addition to his core FMLA claim, Hibbs raised a retaliation claim. See Complaint 8. The FMLA separately prohibits retaliation against any individual for "opposing any practice made unlawful by this subchapter," 29 U.S.C. 2615(a)(2). Petitioners' summary judgment motion, however, did not assert Eleventh Amendment immunity with respect to the retaliation claim (see Def. Mot. for Summ. J. 13-19) (addressing solely the leave provisions of the FMLA)); the court of appeals did not address the question; and petitioners have not sought such a ruling from this Court.[6] The question presented is specifically confined to the abrogation effected by the family medical care leave

[6] Petitioners' supplemental brief to the court of appeals likewise confirmed "that only the provision of the FMLA that allows for leave to care for a family member with a serious medical condition is actually in dispute herein." Def. Supp. C.A. Br. 10.

provision. See Pet. i. It thus is uncertain whether, in the context of this particular litigation, this Court's ruling on the single abrogation question presented will offer a practical litigation benefit to the State.[7]

4. The court of appeals' decision is correct. Four fundamental and well-established constitutional propositions lay the foundation for Congress's appropriate exercise of its Section 5 powers in the family medical care provision of the FMLA. First, 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 provision in Title VII validly abrogates Eleventh Amendment immunity as Section 5 legislation).

Second, this country "has had a long and unfortunate history of sex discrimination." *Frontiero* v. *Richardson*, 411 U.S. 677, 684 (1973) (plurality). Indeed, the history of state action "denying rights or opportunities based on sex" is recorded in "volumes of history." *United States* v. *Virginia*, 518 U.S. at 531. Gender classifications have long been used to "create or perpetuate the legal, social, and economic inferiority of women." *Id.* at 534. State laws pertaining to employment were not immune from those discriminatory attitudes; to the contrary, they fueled and perpetuated

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[7] Cf. *Rhode Island Dep't of Envtl. Mgmt.* v. *United States*, 286 F.3d 27, 42 (1st Cir. 2002) ("the individual appellants have a colorable argument that the [environmental law's] whistleblower provisions were enacted to safeguard First Amendment rights that have long been made applicable to states through the Fourteenth Amendment"); *Roberts* v. *Pennsylvania Dep't of Pub. Welf.*, No. Civ. A. 99-3836, 2002 WL 253945, at *2 (E.D. Pa. Feb. 20, 2002) (holding, post-*Garrett*, that anti-retaliation provision of Americans with Disabilities Act is valid Section 5 legislation).

the stereotypes of women's appropriate roles as homemakers and caregivers. See, *e.g.*, *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 193 n.7 (1974); *Goesaert* v. *Cleary*, 335 U.S. 464 (1948); *Muller* v. *Oregon*, 208 U.S. 412 (1908); *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130 (1872).

Third, the Section 5 power allows Congress to prohibit and eliminate the lingering effects of past discrimination, as well as to take prophylactic measures designed to prevent their recurrence. See, *e.g.*, *Garrett*, 531 U.S. at 365 ("Congress' power to enforce the [Fourteenth] Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.") (internal quotation marks omitted); *Gaston County* v. *United States*, 395 U.S. 285 (1969) (constitutionally valid literacy tests may be proscribed to combat the ripple effects of past discrimination).

Fourth, Section 5 legislation designed to combat historic and entrenched discrimination—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 a legislative record documenting a history of constitutional violations by the States. See *Oregon* v. *Mitchell*, 400 U.S. 112, 133-134 (1970) (Black, J.); *id.* at 147 (Douglas, J.); *id.* at 216 (Harlan, J.); *id.* at 233-236 (Brennan, White & Marshall, JJ.); *id.* at 283-284 (Stewart, J., joined by Blackmun, J., & Burger, C.J.) (nationwide ban on literacy tests upheld, despite geographically limited evidence of abuse); *Katzenbach* v. *Morgan*, 384 U.S. 641, 669 & n.9 (1966) (Harlan, J., dissenting) (literacy test ban added to statute on the

floor of Congress); see also *City of Rome* v. *United States*, 446 U.S. 156, 172 (1980).

Against those background principles, Congress made clear its intent that the family medical care provision was designed "to 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). The provision "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)(4).

The FMLA's legislative history demonstrates that Congress both sought to address the type of discrimination based on gender stereotypes that the Fourteenth Amendment condemns and acted against a documented history of discrimination in employment hiring and benefits decisions by States. Testimony before Congress showed that, because employers assume, based on stereotypical views of the woman's role as a caregiver, that women will require greater accommodations at work to meet family-care obligations, employers are more reluctant to hire women or to promote them to positions of responsibility equal to men. See, *e.g.*, *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. & Labor*, 99th Cong., 2d Sess. 100 (1986) ("[h]istorically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second"). The evidence before Congress demonstrated that these forms of gender discrimination are pervasive not just in the private sector, but in the public sector as well. See, *e.g.*, *id.* at 147. The FMLA's family care provision thus

targets the lingering and hard to root out effects of manifold state statutes and practices that limited women's opportunities to participate in the workforce on equal terms and that perpetuated the stereotypical employer view of women workers as less reliable employees because they are presumed to be the family caregivers.

The FMLA leave provision, moreover, is an appropriate and congruent means of combating the problems Congress identified. 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). By setting a minimum standard for family leave for all eligible employees, the FMLA extends to men the types of leave benefits more often available to women and, at the same time, helps to eliminate the stereotype that only women are responsible for family caregiving, while deterring employers from making hiring and promotion decisions based on stereotypes about how family responsibilities should be allocated.

The FMLA is narrowly targeted—it affects only one aspect of the employment relationship, and it accomplishes its purposes "in a manner that accommodates the legitimate interests of employers," 29 U.S.C. 2601(b)(3). For example, 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).

Finally, 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, 103d Cong., 1st Sess. 12 (1993). 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*, 122 S. Ct. at 1164 (quoting 29 U.S.C. 2601(b)). The FMLA's family medical care provision, in short, is tailored to enforcing, remedying, and preventing a documented history of discrimination and unconstitutional stereotyping of workers based on gender.

Lastly, petitioners repeatedly request (Pet. 8, 15, 24) summary reversal of the court of appeals' decision. We are aware of no case in which this Court has ever summarily reversed a decision *sustaining* the constitutionality of an Act of Congress, and petitioners' request that this Court do so fails to accord the Congress and the President—coordinate branches of government—the respect due to their exercise of their constitutional duties and their independent constitutional judgments on legislation. *Rostker* v. *Goldberg*, 453 U.S.

57, 64 (1981) (adjudicating the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called upon to perform").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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