

No. 10-1016

---

---

IN THE  
**Supreme Court of the United States**

---

DANIEL COLEMAN,  
*Petitioner,*

v.

MARYLAND COURT OF APPEALS *et al.*,  
*Respondents.*

---

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

---

**BRIEF OF AMICI CURIAE NATIONAL  
PARTNERSHIP FOR WOMEN & FAMILIES,  
AARP, AFSCME INTERNATIONAL, AMERICAN  
CIVIL LIBERTIES UNION, A BETTER  
BALANCE, NATIONAL EMPLOYMENT  
LAWYERS ASSOCIATION, NATIONAL SENIOR  
CITIZENS LAW CENTER, NATIONAL  
WOMEN'S LAW CENTER, 9TO5, NATIONAL  
ASSOCIATION OF WORKING WOMEN, AND  
SERVICE EMPLOYEES INTERNATIONAL  
UNION IN SUPPORT OF PETITIONER**

---

JONATHAN J. FRANKEL  
PHILLIP DOUGLASS  
STEVEN D. TIBBETS  
STEESE, EVANS  
& FRANKEL, P.C.  
1627 I Street, NW,  
Suite 850  
Washington, DC 20006  
(202) 293-6840

JUDITH L. LICHTMAN  
SARAH CRAWFORD  
*Counsel of Record*  
NATIONAL PARTNERSHIP  
FOR WOMEN & FAMILIES  
1875 Connecticut Ave. NW,  
Suite 650  
Washington, DC 20009  
(202) 986-2600  
scrawford@  
nationalpartnership.org

*Counsel for Amici Curiae*

September 27, 2011

---

---

TABLE OF CONTENTS

|  | Page |
|--|------|
| TABLE OF AUTHORITIES.....  | iii  |
| STATEMENT OF INTEREST .....  | 1    |
| SUMMARY OF ARGUMENT .....  | 6    |
| ARGUMENT.....  | 7    |
| I. A Primary Purpose of the FMLA’s Self-Care Provision Was to Eliminate Unconstitutional Sex Discrimination, Including Discrimination by the States...   | 8    |
| II. Congress Validly Abrogated State Immunity for FMLA Claims Regarding Self-Care Leave.....   | 12   |
| A. The Self-Care Provision is the Means by which Congress Provided Leave to Recover from Pregnancy and Childbirth, an Inherently Gendered Type of Leave.....                                       | 15   |
| B. The Self-Care Provision Was Central to Congress’s Response to Women Losing Their Jobs Because of the Need for Leave for Pregnancy and Recovery from Childbirth.....                             | 18   |
| C. A Key Reason Congress Included All Types of Self-Care Leave in the FMLA Was to Deter Ex Ante Employment Discrimination Based on Overbroad, Sex-Based Assumptions about Women’s Leave Needs..... | 22   |

TABLE OF CONTENTS—Continued

|   | Page |
|---|------|
| D. The FMLA’s Self-Care Provision Cannot be Divorced from the Family-Care Provision without Undermining the FMLA’s Protections Against Sex-Based Workplace Discrimination .....   | 25   |
| E. The Majority of State Laws at the Time of the Enactment of the FMLA Were Inadequate or Discriminatory ...  | 27   |
| III. The Remedies Provided in the FMLA for Self-Care Leave Fit the Injury the Statute Seeks to Prevent.....   | 28   |
| IV. The FMLA Provides Necessary Time Away From Work to Allow Workers to Recover from Serious Health Conditions and Provides Job Protection for Workers Who Would Otherwise Suffer the Economic Consequences of Discrimination ... | 30   |
| V. State Employees Who Exercise Their FMLA Right to Self-Care Leave Need and Deserve Protection from Retaliation...   | 32   |
| CONCLUSION .....  | 35   |

## TABLE OF AUTHORITIES

| CASES  | Page   |
|--|--------|
| <i>Brockman v. Wyo. Dep't. of Family Servs.</i> ,<br>342 F.3d 1159 (10th Cir. 2003), <i>cert.</i><br><i>denied</i> , 540 U.S. 1219 (2004)..... | 13     |
| <i>Bryant v. Miss. State Univ.</i> , 329 F. Supp.<br>2d 818 (N.D. Miss. 2004) .....  | 32     |
| <i>Burlington N. and Santa Fe Ry. Co. v.</i><br><i>White</i> , 548 U.S. 53 (2006) .....  | 34     |
| <i>Cleveland Bd. of Educ. v. LaFleur</i> , 414<br>U.S. 632 (1974).....   | 10, 18 |
| <i>Crawford v. Metro. Gov't of Nashville &amp;</i><br><i>Davidson County</i> , 129 S. Ct. 846 (2009) ..  | 34     |
| <i>Diaz v. Mich. Dep't of Corr.</i> , No. 1:09-cv-<br>1109, 2010 U.S. Dist. LEXIS 134743<br>(W.D. Mich. Dec. 21, 2010) .....                   | 33     |
| <i>Kasten v. Saint-Gobain Performance</i><br><i>Plastics Corp.</i> , 131 S. Ct. 1325 (2011).....   | 34     |
| <i>Kimel v. Fla. Bd. of Regents</i> , 528 U.S. 62<br>(2000).....   | 12     |
| <i>Lee v. State</i> , 2009 Iowa App. LEXIS 119<br>(Iowa Ct. App. 2009) .....   | 13     |
| <i>McKlintic v. 36th Judicial Circuit Court</i> ,<br>464 F. Supp. 2d 871 (E.D. Mo. 2006),<br><i>aff'd</i> , 508 F.3d 875 (8th Cir. 2007) ..... | 33     |
| <i>Miles v. Bellfontaine Habilitation Ctr.</i> , 481<br>F.3d 1106 (8th Cir. 2007).....   | 13     |
| <i>Montgomery v. Maryland</i> , 72 F. App'x 17,<br>19 (4th Cir. 2003).....   | 13     |

## TABLE OF AUTHORITIES—Continued

|  | Page               |
|--|--------------------|
| <i>Nashville Gas Co. v. Satty</i> , 434 U.S. 136<br>(1977).....  | 9, 10, 19          |
| <i>Nelson v. Univ. of Tex. at Dallas</i> , 535 F.3d<br>318 (5th Cir. 2008).....  | 13                 |
| <i>Nevada Dep’t of Human Resources v.<br/>Hibbs</i> , 538 U.S. 721 (2003).....   | <i>passim</i>      |
| <i>Orr v. Orr</i> , 440 U.S. 268 (1979).....   | 9                  |
| <i>Schattman v. Texas Empl. Comm’n</i> , 459<br>F.2d 32 (5th Cir. 1972).....   | 10                 |
| <i>Somers v. Aldine Indep. Sch. Dist.</i> , 464 F.<br>Supp. 900 (S.D. Tex. 1979).....  | 18                 |
| <i>Toeller v. Wis. Dep’t of Corr.</i> , 461 F.3d 871<br>(7th Cir. 2006).....   | 13                 |
| <i>Touvell v. Ohio Dep’t of Mental Retard-<br/>ation and Developmental Disabilities</i> ,<br>422 F.3d 392 (6th Cir. 2005), <i>cert.<br/>denied</i> , 546 U.S. 1173 (2006)..... | 13                 |
| <i>Women in City Gov’t United v. City of New<br/>York</i> , 563 F.2d 537 (2d Cir. 1977).....   | 18                 |
| <br>CONSTITUTION   |                    |
| U.S. Const. amend. XIV.....  | 8                  |
| U.S. Const. amend. XIV, § 5.....   | 12, 13, 14, 17, 26 |
| <br>STATUTES   |                    |
| 29 U.S.C. § 2601(b)(4).....  | 8, 15              |
| 29 U.S.C. § 2611(2)(A).....  | 29                 |

## TABLE OF AUTHORITIES—Continued

|   | Page |
|---|------|
| 29 U.S.C. § 2611(4)(A).....                                 | 29   |
| 29 U.S.C. § 2611(4)(B).....                                 | 8    |
| 29 U.S.C. § 2612(a)(1)(A).....                              | 8    |
| 29 U.S.C. § 2612(a)(1)(B).....                              | 8    |
| 29 U.S.C. § 2612(a)(1)(C).....                              | 8    |
| 29 U.S.C. § 2612(a)(1)(D) .....                             | 8    |
| 29 U.S.C. § 2612(a)(1)(E).....                              | 8    |
| 29 U.S.C. § 2612(a)(3).....                                 | 8    |
| 29 U.S.C. § 2617(a)(1)(A)(i)(I) .....                       | 30   |
| 29 U.S.C. § 2617(a)(1)(A)(i)(II).....                       | 30   |
| 29 U.S.C. § 2617 (a)(1)(A)(ii).....                         | 30   |
| 29 U.S.C. § 2617(1)(2).....                                 | 8    |
| 29 U.S.C. § 2617(a)(2).....                                 | 14   |
| Ariz. Rev. Stat. Ann. § 23-261.....                         | 18   |
| Conn. Gen. Stat. § 31-26 .....                              | 18   |
| Mass. Gen. Laws ch. 345 (1911) (repealed<br>1974).....      | 10   |
| N.Y. Lab. Law § 206-b (McKinney 1973).....                  | 10   |
| Ohio Rev. Code Ann. § 4107.43).....                         | 18   |
| Vt. Stat. Ann. tit. 21, § 444 (1947)(repealed<br>1969)..... | 10   |

## OTHER AUTHORITIES

|  |    |
|--|----|
| 73 Fed. Reg. 7877 (February 11, 2008)..... | 31 |
| 138 Cong. Rec. H8, 226-27 (1992).....      | 11 |
| 138 Cong. Rec. S12,096 (1992).....         | 14 |

## TABLE OF AUTHORITIES—Continued

|   | Page   |
|---|--------|
| Bureau of Labor Statistics, U.S. Dep't of Labor, Current Population Survey: Household Data Annual Averages (2010), <i>available at</i> <a href="http://www.bls.gov/cps/cpsa at2.pdf">http://www.bls.gov/cps/cpsa at2.pdf</a> .....                                | 31     |
| Bureau of Labor Statistics, U.S. Dep't. of Labor, Women in the Labor Force: A Databook (2010 Edition), Table 1 (2006), <i>available at</i> <a href="http://www.bls.gov/cps/wlf-table1-2006.pdf">http://www.bls.gov/cps/wlf-table1-2006.pdf</a> .....              | 15     |
| David Cantor et al., U.S. Dep't of Labor, Balancing the Needs of Families and Employers: The Family and Medical Leave Surveys (2000) ( <i>available at</i> <a href="http://www.dol.gov/whd/fmla/chapter2.pdf">http://www.dol.gov/whd/fmla/chapter2.pdf</a> )..... | 29, 30 |
| Deborah L. Brake, <i>Retaliation</i> , 90 Minn. L. Rev. 18 (2005).....  | 34     |
| Deborah Dinner, <i>The Costs of Reproduction: History and the Legal Construction of Sex Equality</i> , 46 Harv. C.R.-C.L. L. Rev. 415, 441-2 (2011) .....   | 26     |
| Edith L. Fisch & Mortimer D. Schwartz, <i>State Laws on the Employment of Women</i> (1953).....   | 10     |
| <i>Family and Medical Leave Act of 1987: Joint Hearing on H.R. 925 Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the H. Comm. on Education and Labor</i> , 100th Cong. (1987) .....                                    | 21, 23 |

## TABLE OF AUTHORITIES—Continued

|  | Page      |
|--|-----------|
| <i>Family and Medical Leave Act of 1991: Hearing on S. 5 Before the Subcomm. on Children, Family, Drugs and Alcoholism of the S. Comm. on Labor and Human Resources, 102d Cong. (1991) .....</i>   | 31        |
| H.R. Rep. No. 99-699 (1986).....   | 24        |
| H.R. Rep. No. 102-135, pt. 1 (1991) .....  | 16, 24    |
| H.R. Rep. No. 103-8, pt. 1 (1993) .....  | 8, 16, 24 |
| Jane Lawler Dye, U.S. Census Bureau, Current Population Reports: Fertility of American Women: 2008, Table 1 (2010), available at <a href="http://www.census.gov/prod/2010_pubs/p20-563.pdf">http://www.census.gov/prod/2010_pubs/p20-563.pdf</a> ..... | 15        |
| Jane Waldfogel, Family Leave Coverage in the 1990s (App.: The Role of States), Monthly Lab. Rev. 21 (Oct. 1999), available at <a href="http://www.bls.gov/opub/mlr/1999/10/art2full.pdf">http://www.bls.gov/opub/mlr/1999/10/art2full.pdf</a> . .....  | 27        |
| Naomi Gerstel & Amy Armenia, <i>Giving and Taking Family Leaves: Right or Privilege?</i> , 21 Yale J.L. & Feminism 161, 167 (2009).....  | 26        |



## TABLE OF AUTHORITIES—Continued

|  | Page           |
|--|----------------|
| <i>Parental and Disability Leave: Joint Hearing on H.R. 2020 Before the Subcomm. on Civil Serv. and the Subcomm. on Compensation and Employee Benefits of the H. Comm. on Post Office and Civil Serv. and the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the H. Comm. on Education and Labor, 99th Cong. (1985) .....</i> | 17, 19, 20     |
| <i>Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor-Mgmt. Rel. and the Subcomm. on Labor Standards of the House Comm. on Educ. &amp; Labor, 99th Cong. (1986) .....</i>  | 14             |
| <i>Parental and Medical Leave Act of 1987: Hearings on S. 249 Before the Subcomm. on Children, Family, Drugs &amp; Alcoholism of the Comm. on Labor &amp; Human Res., Parts 1 &amp; 2, 100th Cong. (1987).....</i>   | 11, 20, 21, 27 |
| S. Rep. No. 102-68 (1991).....   | 16-17, 25, 31  |
| S. Rep. No. 103-3 (1993).....  | 14, 24         |
| S. Rep. No. 331 (1977) .....   | 11             |
| U.S. Census Bureau, 2009 American Community Survey 1-Year Estimates (2009), available at <a href="http://factfinder.census.gov">http://factfinder.census.gov</a> ..  | 32             |

## TABLE OF AUTHORITIES—Continued

|  | Page   |
|--|--------|
| U.S. Census Bureau, State Government Employment Data: March 2009 – United States Totals (2011), <i>available at</i> <a href="http://www2.census.gov/govs/apes/09stus.txt">http://www2.census.gov/govs/apes/09stus.txt</a> .... | 30     |
| U.S. Dep’t of Health, Educ. and Welfare, Occupational Legislation: Health and Safety, Public Health Service Publication No. 357 (1970).....  | 18     |
| U.S. Dep’t of Labor, Wage and Hour Div., The 2000 Survey Report, <i>available at</i> <a href="http://www.dol.gov/whd/fmla/chapter4.htm">http://www.dol.gov/whd/fmla/chapter4.htm</a> .....                                     | 33     |
| U.S. Dep’t of Labor, Wage and Hour Div., 2008 Statistics Fact Sheet, <i>available at</i> <a href="http://www.dol.gov/whd/statistics/2008FiscalYear.htm">http://www.dol.gov/whd/statistics/2008FiscalYear.htm</a> .....         | 33     |
| U.S. Dep’t of Labor, Wage and Hour Div., Reasons for all leaves taken within demographic groups, found at <a href="http://www.dol.gov/whd/fmla/APPX-A-2-TABLES.htm">http://www.dol.gov/whd/fmla/APPX-A-2-TABLES.htm</a> .....  | 23     |
| Wendy S. Strimling, <i>Comment: The Constitutionality of State Laws Providing Employment Leave for Pregnancy: Rethinking Geduldig After Cal Fed.</i> , 77 Cal. L. Rev. 171 (1989).....   | 27, 28 |
| Women’s Bureau, U.S. Dep’t of Labor, State Maternity/Family Leave Law (1993).....  | 9      |

## STATEMENT OF INTEREST

The following *amici* submit this brief, with the consent of the parties,<sup>1</sup> in support of Petitioner's argument that the Family and Medical Leave Act, including the Act's self-care provision, validly abrogated state sovereign immunity. Specifically, the *amici* submit this brief to highlight the legislative intent of the self-care provision to address sex discrimination against women.

The National Partnership for Women & Families is a nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, quality health care for all, and policies that help women and men meet the dual demands of work and family. Founded in 1971 as the Women's Legal Defense Fund, the National Partnership has been instrumental in many of the major legal changes that have improved the lives of working women, including advancements in sexual harassment law and the passage of the Pregnancy Discrimination Act. In 1985, the Women's Legal Defense Fund drafted the original Family and Medical Leave Act. For the next eight years, the Women's Legal Defense Fund led the coalition working for the passage of this legislation, which finally occurred in 1993.

---

<sup>1</sup> Counsel for *amici* authored this brief in its entirety. No person or entity other than *amici*, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with Clerk of the Court pursuant to Supreme Court Rule 37.3.

Since the passage of the Family and Medical Leave Act (FMLA), the National Partnership has worked to defend the law and to ensure its full and intended application. In 2003, the National Partnership served as counsel to William Hibbs in *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003), in which the Supreme Court determined that the FMLA abrogated state sovereign immunity with regard to the family leave provision of the FMLA. The National Partnership remains a leader in the efforts to preserve FMLA leave.

AARP is a non-partisan, non-profit organization dedicated to addressing the needs and interests of people age 50+. AARP supports the rights of older workers and strives to preserve the legal means to enforce them. Approximately half of AARP's members are in the workforce and many more are seeking employment. Thus, they are protected by various federal employment laws, including the Family and Medical Leave Act of 1993, as amended (FMLA). AARP's working members benefit from the right to take unpaid FMLA leave and the security that comes with knowing such an option is available. AARP's members not in the workforce benefit from FMLA provisions assuring the rights of working children, spouses and other relatives, including members of the military, to take unpaid leave in order to care for their parents, spouses and other relatives with serious medical conditions. AARP played a significant role in securing enactment of the FMLA, and has continued to work to assure its vigorous and effective enforcement, including through *amicus curiae* briefs in important cases.

AFSCME International is an unincorporated labor union with more than 1.6 million active and retired members working in the public sector, child care, and health care. Many AFSCME employees work directly for state employers or subdivisions of states. AFSCME International is headquartered in Washington, D.C. and has approximately 3,400 local unions and fifty-nine council affiliates around the country. The majority of AFSCME members are women who work as secretaries, librarians, cafeteria workers, caseworkers, lab technicians, researchers, RNs and LPNs, bus drivers, heavy equipment operators, correctional officers, child care workers, home care workers and many more important state jobs. AFSCME has filed briefs as *amicus curiae* before state and federal courts in numerous cases in which the interests of its affiliates and/or working people are implicated. The matter of protecting workers who need time away from their jobs to recover from serious health conditions presents an important issue of health policy, labor policy and fundamental principles of equality and human rights. These issues impact the day to day lives of AFSCME's members and their families. AFSCME supports the policies of the Family Medical Leave Act and strongly supports full coverage under the law for state workers needing self-care leave.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Maryland is one of its state affiliates, with approximately 14,000 members statewide. The ACLU, through its Women's Rights Project, frequently litigates cases concerning sex discrimination

in the workplace, and has appeared before this Court in numerous cases involving women's equality, both as direct counsel and as *amicus curiae*. The ACLU and the ACLU of Maryland have participated in litigation concerning the proper interpretation of the Family and Medical Leave Act.

A Better Balance is a national legal advocacy organization dedicated to promoting fairness in the workplace and helping employees meet the conflicting demands of work and family. Through legislative advocacy, litigation, research, public education and technical assistance to state and local campaigns, A Better Balance is committed to helping workers care for their families without risking their economic security. A Better Balance has been actively involved in working for better leave policies, particularly paid sick leave and paid family leave throughout the country. The organization also runs a clinic in which the importance of the FMLA for workers with family care responsibilities and self-care needs can be seen first hand.

The National Employment Lawyers Association (NELA) advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Founded in 1985, NELA is the country's largest professional organization comprised exclusively of lawyers who represent individual employees in cases involving labor, employment and civil rights disputes. NELA and its 68 state and local affiliates have more than 3,000 members nationwide committed to working for those who have been illegally treated in the workplace. As part of its advocacy efforts, NELA supports precedent setting litigation and has filed dozens of *amicus curiae* briefs before the U.S. Supreme Court and federal appellate courts

to ensure that the goals of workplace statutes, including the Family and Medical Leave Act, are fully realized.

The National Senior Citizens Law Center (NSCLC) is a non-profit organization whose principal mission is to protect the rights of low income older adults. For more than 35 years, NSCLC has sought to ensure the health and economic security of older persons with limited income and resources, through advocacy, litigation, and the education and counseling of local advocates. NSCLC's *Federal Rights Project* works to ensure that people retain the right to enforce basic guarantees to health care, economic security and civil rights.

The National Women's Law Center is a nonprofit legal advocacy organization dedicated since 1972 to the advance and protection of women's legal rights and the corresponding elimination of sex discrimination from all facets of American life. Enactment and enforcement of effective family and medical leave laws and policies is central to NWLC's goal of securing equal opportunity for women in the workplace, and NWLC has been a strong supporter of the Family and Medical Leave Act since its conception. NWLC has prepared or participated in numerous *amicus* briefs filed with the Supreme Court and the courts of appeals in employment cases.

9to5, National Association of Working Women is a national membership-based organization of low-wage women working to achieve economic justice and end discrimination. Founded in 1973, 9to5 is one of the organizations that worked to pass the Family and Medical Leave Act. 9to5's members and constituents are directly affected by FMLA, by the lack of access to job-protected workplace leave, and by sex discrimi-

nation including pregnancy discrimination. The organization's toll-free Job Survival Helpline fields thousands of phone calls annually from women facing these and related problems in the workplace. The issues of this case are directly related to 9to5's work to end workplace discrimination and its work to promote policies that aid women in their efforts to achieve economic security. The outcome of this case will directly affect 9to5 members' and constituents' rights in the workplace and their long-term economic well-being and that of their families.

The Service Employees International Union (SEIU) is an organization of 2.2 million members. SEIU is the nation's second-largest public services union, with more than one million local and state government workers, public school employees, and child care providers among its members. The majority of SEIU members are women. SEIU is committed to the preservation and expansion of the FMLA because it helps secure the dignity and worth of all American workers, including SEIU and their families.

### **SUMMARY OF ARGUMENT**

Congress validly abrogated state sovereign immunity for Family and Medical Leave Act (FMLA) claims, and in particular claims for self-care leave, in response to unconstitutional sex discrimination. The self-care provision was intended to offer protection against sex discrimination by providing job-protected leave for women to recover from pregnancy and childbirth. The FMLA offered self-care leave on a gender-neutral basis to avoid the creation of special protections for women that could incentivize further, *ex ante* sex discrimination in employment. Protecting the leave rights of women only would have had the



perverse effect of fostering discrimination against the hiring of women because of their protected right to leave. By providing for self-care leave on a gender-neutral basis, Congress sought to counteract discrimination by employers who might otherwise refuse to hire women because of their presumed greater need for leave.

The plain language of the FMLA establishes that Congress sought to offer the protections of the FMLA to state employees. Chief Justice Rehnquist's decision in *Nevada Dep't of Human Resources v. Hibbs* concluded that Congress validly abrogated state sovereign immunity with respect to the FMLA's family-care provision. Under the analysis set out in *Hibbs*, the self-care provision also validly abrogated state sovereign immunity by offering a congruent and proportional response to unconstitutional sex discrimination.

The self-care provision offers critical rights to leave for millions of state employees. The job protections established by the FMLA enable workers to retain their jobs as they recover from serious medical conditions, including pregnancy-related disability and childbirth, so that they can continue to provide for themselves and their families. Consistent with the legislative intent and with established constitutional analysis, state employees should be entitled to the full range of remedies Congress provided for violations of the rights set out under the plain language of the FMLA.

## **ARGUMENT**

In this case, the Court is being asked to determine whether Congress validly abrogated state sovereign immunity for state workers' claims for damages for

violations of their rights to FMLA leave to care for their own serious health conditions. *Amici* respectfully request that the Court determine that Congress validly abrogated state immunity under the self-care provision of the FMLA as a congruent and proportional response to unconstitutional sex discrimination.

The FMLA guarantees eligible employees twelve weeks of unpaid leave each year to recover from their own serious health conditions, including pregnancy, or to care for a newborn, newly adopted child, or seriously ill family member, while ensuring job security. 29 U.S.C. § 2612(a)(1)(A-D). In 2008, the FMLA was amended to include additional leave and reasons for leave for military families. *Id.* at § 2612(a)(1)(E) & (a)(3). The plain language of the statute extended the FMLA’s protection to state employees. *See* 29 U.S.C. § 2611(4)(B) (including “public agency” within the definition of “employer” under the FMLA). Congress expressly stated in the statute that one purpose of the FMLA was to provide medical leave “in a manner that, consistent with 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) . . . on a gender-neutral basis.” 29 U.S.C. § 2601(b)(4). Congress recognized, with particular relevance to the self-care provision, that “A law providing special protection to women . . . , in addition to being inequitable, runs the risk of causing discriminatory treatment.” *See, e.g.*, H.R. Rep. No. 103-8, pt. 1, at 41 (1993).

**I. A Primary Purpose of the FMLA's Self-Care Provision Was to Eliminate Unconstitutional Sex Discrimination, Including Discrimination by the States.**

The FMLA's self-care provision was intended to offer protection against sex discrimination in two interrelated ways. First, the self-care provision sought to combat the documented problem of discrimination against women of child-bearing age by offering job-protected leave for pregnancy and childbirth, among other "serious medical condition[s]." Indeed, the very genesis of the Family and Medical Leave Act was to address the discrimination that women faced related to their unique need for disability leave while recovering from pregnancy and childbirth. Second, to counteract any tendency by employers to discriminate against women because of any presumed greater need for leave, Congress provided self-care leave on a gender-neutral basis. Protecting the leave rights of women only, as many state laws did at the time,<sup>2</sup> would have had the perverse effect of fostering discrimination in hiring women. The extensive legislative record makes clear congressional intent to combat sex discrimination with the self-care provision. Indeed, the Court has recognized that "legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection." *Orr v. Orr*, 440 U.S. 268, 283 (1979); *see also, Nashville*

---

<sup>2</sup> As of 1993, nine states and Puerto Rico offered leave to female employees only, restricting such leave to pregnancy, disabilities related to pregnancy, and maternity leave. *See Women's Bureau, U.S. Dep't of Labor, State Maternity/Family Leave Law* (1993).

*Gas Co. v. Satty*, 434 U.S. 136, 142 (1977) (employers are not permitted “to burden female employees in such a way as to deprive them of employment opportunities because of their different role”). Accordingly, the FMLA offered self-care leave on a gender-neutral basis to protect the jobs of women during childbirth and any associated physical disability, while avoiding the creation of special protections for women that would incentivize further discrimination.

This Nation has a lengthy and regrettable history of unconstitutional state-sponsored discrimination on the basis of sex. Congress enacted the Family and Medical Leave Act in 1993 on a record replete with such evidence of historical and ongoing sex discrimination against women of childbearing age. For generations, state laws and state action excluded women from many forms of employment, and women were often subjected to discriminatory terms, conditions, and benefits in many of the jobs they were allowed to hold.<sup>3</sup> A number of states had enacted

---

<sup>3</sup> See, e.g., 1927 N.Y.Laws, c. 453; 1930 N.Y.Laws, c. 868; Act of July 25, 1913; Act No. 466, Pa.Laws 1913 (prohibiting women from working between the hours of 10 p.m. and 6 a.m.); see also; *United States v. Virginia*, 518 U.S. 515 (1996) (Virginia state university refused to admit women); *Reed v. Reed*, 404 U.S. 71 (1971) (Idaho probate code preferred men over women for appointment as administrator of a decedent’s estate); *Goesart v. Cleary*, 335 U.S. 464 (1948) (state of Michigan banned female bartenders); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 395 (1937) (restrictions on hours for women); *Muller v. Oregon*, 208 U.S. 412, 421 (1908) (state law limited women’s work hours, emphasizing that reproduction necessitated that the state protect women from themselves by regulating their activities even prior to pregnancy); *Bradwell v. Illinois*, 83 U.S. 130 (1872) (state of Illinois prohibited women’s participation in the legal profession); *Grimison v. Board of Educ of City of Clay Ctr.*, 16 P.2d. 492, 493 (Kan. 1932) (state court held that cancellation of

laws that *required* women to take maternity leave during and after pregnancy, often without job security.<sup>4</sup> For example, New York's mandatory maternity leave law forbade the employment of women in factories or mercantile establishments within four weeks of childbearing. N.Y. Lab. Law § 206-b (McKinney 1973). In addition to state mandatory maternity leave laws applicable to private employers, state agencies had mandatory maternity leave policies for their own female employees. *See, e.g., Schattman v. Texas Empl. Comm'n*, 459 F.2d 32, 40-41 (5th Cir. 1972) (upholding mandatory maternity leave policy of Texas state agency and noting that other Texas agencies have similar policies). Those mandatory leave policies were unconstitutional. *See Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

The attitudes fostered by those discriminatory and invalid state laws continued, however, to affect behavior; indeed, those attitudes prompted another layer of state sex discrimination. Not only did such policies limit the workforce participation, including in state employment, of childbearing women, but they fostered sex discrimination against women more generally. Congress recognized that “the assumption

---

a female teacher's contract upon marriage is appropriate for the benefit of the “human race”).

<sup>4</sup> As of 1953, Connecticut, Massachusetts, Missouri, New York, and Vermont had statutes outright prohibiting the employment of women before and after childbirth. Edith L. Fisch & Mortimer D. Schwartz, *State Laws on the Employment of Women* 22 (1953). Vermont's law was not repealed until 1969, and Massachusetts' until 1974. Vt. Stat. Ann. tit. 21, § 444 (1947) (repealed 1969); Mass. Gen. Laws ch. 345 (1911) (repealed 1974).

that women will become pregnant and leave the labor market is at the core of the sex stereotyping resulting in unfavorable disparate treatment of women in the workplace.” S. Rep. No. 331, at 3 (1977).

Unfortunately, the legal protections provided by Title VII of the Civil Rights Act of 1964 and the Pregnancy Discrimination Act of 1978 did not suffice to remedy many outmoded and unconstitutionally discriminatory workplace policies. During congressional hearings for the Parental and Medical Leave Act, a precursor to the FMLA, one witness testified that “[j]ob opportunities for [women with families] are limited, and [women] often miss pay increases and promotions. The lack of uniform parental and medical leave policies in the workplace has created an environment where discrimination is rampant.” *Parental and Medical Leave Act of 1987: Hearings on S. 249 Before the Subcomm. on Children, Family, Drugs & Alcoholism of the Comm. on Labor & Human Res., Part 2*, 100th Cong. 170 (1987) (“1987 Hearings”) (testimony of Peggy Montes). Another witness testified that “[t]oo often women experience the nightmare of going in to their employer with the news that they are pregnant. Although they are valued employees, up to the moment they become pregnant, suddenly they find themselves unwanted.” 138 Cong. Rec. H8, 226-27 (1992) (remarks of Rep. Hayes).

## **II. Congress Validly Abrogated State Immunity for FMLA Claims Regarding Self-Care Leave.**

Congress may abrogate states’ sovereign immunity in federal court if it: (1) makes its intention to abrogate clear in the language of the statute; and

(2) acts pursuant to a valid exercise of its power under Section 5 of the Fourteenth Amendment. *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 726 (2003). An exercise of power under Section 5 is valid if it is congruent and proportional to the injury being prevented. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000).

Congress's intent to abrogate state immunity in the FMLA cannot be questioned. See 29 U.S.C. § 2617(a)(2) (enabling lawsuits against state employers); *Hibbs*, 538 U.S. at 726 (“The clarity of Congress’ intent here is not fairly debatable.”).

Congress also had sufficient evidence of state sex discrimination to enact the self-care provision under the authority of Section 5 of the Fourteenth Amendment. Congress relied on a record of discriminatory leave policies in both the public and private sectors. The legislative history incorporates several studies that document extensive sex discrimination in employer leave policies that distinguish the amount of leave available to women and men. See, e.g., *Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor-Mgmt. Rel. and the Subcomm. on Labor Standards of the House Comm. on Educ. & Labor*, 99th Cong. (1986) at 151-288 (reproducing Catalyst, Report on a National Study of Parental Leaves (1986); n4 S. Rep. No. 103-3, at 14-15 (1993) (1989 Bureau of Labor Statistics survey found that 37% of large employers offered maternity leave while only 18% offered paternity leave); 138 Cong. Rec. S12,096 (1992) (1990 Bureau of Labor Statistics study found same). Congress heard testimony about discriminatory treatment in public and private sector leave policies. See, e.g., *Hibbs*, 538 U.S. at 730-31 (citing statement of Meryl Frank,

Yale Bush Center) (“public sector leaves don’t vary much from private sector leaves”); *Id.* at 147 (statement of Washington Council of Lawyers referencing discriminatory treatment in both public and private sector leave policies).

Chief Justice Rehnquist’s decision in *Nevada Dep’t of Human Resources v. Hibbs* concluded that Congress validly abrogated state sovereign immunity in cases involving state employees and the subsections of the FMLA that cover leave by a worker to care for family members. 538 U.S. 721, 725 (2003). Although the Court did not directly address in *Hibbs* whether Congress validly abrogated state sovereign immunity in enacting the provision of the FMLA that allows a worker job-protected leave for her own serious health condition, the type of unconstitutional sex discrimination the Court *Hibbs* recognized as widespread also supports the self-care provision.

Following *Hibbs*, the majority of the courts to consider this issue have found, based upon incomplete consideration of the legislative record, that state sovereign immunity is not abrogated for self-care leave.<sup>5</sup> However, the briefs filed in those cases

---

<sup>5</sup> See, e.g., *Nelson v. Univ. of Tex. at Dallas*, 535 F.3d 318 (5th Cir. 2008); *Toeller v. Wis. Dep’t of Corr.*, 461 F.3d 871 (7th Cir. 2006); *Miles v. Bellfontaine Habilitation Ctr.*, 481 F.3d 1106 (8th Cir. 2007) (per curiam) (sovereign immunity not abrogated); *Touwell v. Ohio Dep’t of Mental Retardation and Developmental Disabilities*, 422 F.3d 392 (6th Cir. 2005), *cert. denied*, 546 U.S. 1173 (2006) (sovereign immunity not abrogated); *Brockman v. Wyo. Dep’t. of Family Servs.*, 342 F.3d 1159 (10th Cir. 2003), *cert. denied*, 540 U.S. 1219 (2004) (sovereign immunity not abrogated); *but see Montgomery v. Maryland*, 72 F. App’x 17, 19 (4th Cir. 2003) (per curiam) (sovereign immunity abrogated); *Lee v. State*, No. 07-1879, 2009 Iowa App. LEXIS 119 (Iowa Ct. App. Feb. 19, 2009).



failed to account for the full legislative record and did not appreciate the way in which Congress used the self-care as well as the family-care provisions to redress unconstitutional sex discrimination. Misled by the fact that self-care leave is available on a gender-neutral basis, those courts based their decisions on a flawed understanding of Congress's reasons for passing the self-care provision. They failed to give appropriate weight to or overlooked Congress's interest in stopping employment discrimination against women. *See, e.g., Brockman v. Wyo. Dep't. of Family Servs.*, 342 F.3d 1159 (10th Cir. 2003), *cert. denied*, 540 U.S. 1219 (2004). In fact, the record is overwhelmingly clear that Congress was motivated to address employers' overbroad, sex-based assumptions that women, due to pregnancy and recovery from childbirth, have needs for self-care leave that male employees lack.

**A. The Self-Care Provision is the Means by which Congress Provided Leave to Recover from Pregnancy and Childbirth, an Inherently Gendered Type of Leave.**

Congress enacted the self-care provision of the FMLA, in part, to help women workers overcome the gender discrimination they faced because women, and only women, experience maternity-related disability due to pregnancy and childbirth. The fact is that the majority of working women are likely to need time away from work for pregnancy and recovery from childbirth. Women's participation in the workforce is close to its highest during the years that women tend to be pregnant or give birth. Bureau of Labor Statistics, U.S. Dep't. of Labor, *Women in the Labor Force: A Databook* (2010

Edition), Table 1 (2006), *available at* <http://www.bls.gov/cps/wlf-table1-2006.pdf> (72 percent of women ages 20 to 34 are in the labor force); Jane Lawler Dye, U.S. Census Bureau, Current Population Reports: Fertility of American Women: 2008, Table 1 (2010), *available at* <http://www.census.gov/prod/2010pubs/p20-563.pdf> (by age 34, 73 percent of women have had at least one child).

Congress intended FMLA self-care leave as a response to the need of women to be absent from work because of pregnancy and to recover from childbirth without fear of discrimination based on pregnancy or childbearing capacity. The FMLA itself and its legislative history frequently explain that pregnancy and recovery from childbirth are self-care issues. *See, e.g.*, 29 U.S.C. § 2601(b)(4) (“eligible medical reasons” include “maternity related disability”). The 1991 House Report accompanying the FMLA states that “[i]mmediately following childbirth a mother is typically physically disabled, and therefore is eligible for leave under 102(a)(1)(D) [the self-care provision].” H.R. Rep. No. 102-135, pt. 1, at 43 (1991). The report also states that a “serious health condition” should be understood to include “ongoing pregnancy, miscarriages, complications or illness related to pregnancy, such as severe morning sickness, the need for prenatal care, childbirth and recovery from childbirth.” *Id.* at 45. According to both the 1991 report and a subsequent 1993 report:

A pregnant patient is generally under continuing medical supervision before childbirth, may require several days off for severe morning sickness or other complications, receives inpatient care for childbirth, and is under medical supervision requiring additional time off during

the recovery period from childbirth. The legislative history of the Pregnancy Discrimination Act established that the medical recovery period for a normal childbirth is 4 to 8 weeks, with a longer period where surgery or other complications develop.

*Id.* at 46; H.R. Rep. No. 103-8, pt. 1, at 41 (1993).

Similarly, the Senate report for the 1991 version of the bill states that the bill's "provision of temporary medical leave would ensure that new mothers don't lose their jobs when they temporarily cannot work due to pregnancy- and childbirth- related disability (as part of ensuring that employees in general do not lose their jobs when they are temporarily unable to work because of a serious health condition)." S. Rep. No. 102-68, at 23 (1991). Testimony at hearings held by the House of Representatives on earlier versions of the Act reinforces the Report. For example, in 1985, Congress heard testimony from Professor Wendy Williams that "the bill provides for leaves and the right to return for workers who are disabled for medical reasons and, in addition, for parental leave. The parental leave is solely for the purpose of childrearing. . . . The disability provision covers any kind of medical reason for not being able to work, including, of course, pregnancy-related matters such as childbirth." *Parental and Disability Leave: Joint Hearing on H.R. 2020 Before the Subcomm. on Civil Serv. and the Subcomm. on Compensation and Employee Benefits of the H. Comm. on Post Office and Civil Serv. and the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the H. Comm. on Education and Labor, 99th Cong.* 18 (1985). The provision of self-care leave, including but not limited to leave for sex-specific pregnancy-

related conditions, made self-care leave equally available to male and female workers and thus blunted the perception that women, because they bear children, are more likely than men to be absent from work. Because that overbroad perception led to employment discrimination against women, the FMLA provision seeking to blunt rests on a constitutional predicate appropriate to use of Congress's Section 5 power.

**B. The Self-Care Provision Was Central to Congress's Response to Women Losing Their Jobs Because of the Need for Leave for Pregnancy and Recovery from Childbirth.**

The passage of the FMLA was a step in the ongoing work of Congress to rid the workplace of sex discrimination. First, Congress passed statutes like Title VII of the Civil Rights Act of 1964 and the Pregnancy Discrimination Act of 1978 (PDA). Prior to the passage of Title VII and the PDA, entire occupations were foreclosed to women, and state statutes commonly limited their working hours and conditions. *Hibbs* at 729; U.S. Dep't of Health, Educ. and Welfare, Occupational Legislation: Health and Safety, Public Health Service Publication No. 357 (1970) (listing health and safety legislation by state, including prohibitions on the employment of women in or about any mine, quarry, or coal breaker, Ariz. Rev. Stat. Ann. § 23-261; (*repealed by* Laws 1973, ch. 133 § 35, eff. Aug. 8, 1973; Laws 1973 ch. 172 § 58 eff. Aug. 8, 1973); prohibitions on the employment of women four weeks before and four weeks after childbirth, Conn. Gen. Stat. § 31-26; (*repealed by* P.A. 53, § 1, eff. April 17, 1972)); and prohibitions on the employment of women in specific occupations that

require the routine lifting of more than 25 pounds, Ohio Rev. Code Ann. § 4107.43) (*repealed* 1982). Women also were commonly fired or forced to take leave when they became pregnant, regardless of their ability to work. *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 (1977) (public employer required pregnant employees to take leave of absence, during which they did not receive sick pay and lost job seniority, contrary to employer's disability leave policies). *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (striking down rules requiring leave after the fifth month of pregnancy until three months after birth); *Women in City Gov't United v. City of New York*, 563 F.2d 537 (2d Cir. 1977) (striking down a city rule that pregnant women stop working in their fifth month of pregnancy); *Somers v. Aldine Indep. Sch. Dist.*, 464 F. Supp. 900 (S.D. Tex. 1979) (striking down a requirement that pregnant women take an unpaid leave of absence in their third month or be terminated). Such regulations contributed to a long history of state-sponsored violations of the constitutional rights of women workers.

The protections of the anti-discrimination statutes, however, were insufficient because they only required employers to treat pregnancy like other disabilities—not to grant women job-protected time off from work for pregnancy or to recover from childbirth. In passing the self-care leave provision of the FMLA, Congress was keenly aware of the importance of job-protected self-care leave for women who were pregnant and needed leave to maintain their own health. As early as 1985, Congress heard testimony that:

We are especially concerned with the more than 6.4 million women who are single heads of

household for whom, along with their financially precarious families, lack of job protection renders illness a catastrophe. . . . The Parental Leave and Disability Act [a precursor to the FMLA] would fill that gap by creating a reasonable time period during which an absence from work for medical reasons cannot result in termination of an employee.

*Id.* at 8 (statement of Professor Wendy Williams).

Through the FMLA hearings, Congress heard testimony regarding how women, despite the protections of Title VII and the PDA, lost their jobs after becoming pregnant or after childbirth. *Parental and Medical Leave Act of 1987: Hearing on S. 249, Pt. 2, Before the Subcomm. on Children, Family, Drugs, and Alcoholism of the S. Comm. on Labor and Human Resources*, 100th Cong. 16, 19 (1987) (statement of Linda Pillsbury (despite being assured that she would have a job to return to, she was told three weeks after her child was born that her job no longer existed); statement of Rebecca Webb (despite a verbal agreement with her supervisor for three months of leave post-childbirth, she was told at seven months pregnant that she would not receive any leave and would have to renegotiate her contract immediately)). Eleanor Holmes Norton, then a law professor, testified that “women who are temporarily unable to work due to pregnancy, childbirth and related medical conditions such as morning sickness, threatened miscarriage, or complications arising from childbirth, often lose their jobs because of the inadequacy of their employer’s leave policy.” *Family and Medical Leave Act of 1987: Joint Hearing on H.R. 925 Before the Subcomm. on Civil Serv. and the Subcomm. on Compensation and Employee Benefits of*

*the H. Comm. on Post Office and Civil Serv.*, 100th Cong. 79 (1987).

Similarly, at another hearing in 1987, Congress heard testimony regarding a version of the FMLA from Donna Lenhoff, then the Associate Director for Legal Policy and Programs at the Women's Legal Defense Fund. Ms. Lenhoff testified that the job-protected leave provided by the bill

means security and certainty for the American family faced with the serious health problems of one of its breadwinners. This is an essential protection for single-parent and low-income families. It means that one of the risks that currently faces families planning to have children, the risk of job loss of the mother, is eliminated. . . . It means that women deciding whether to bear children can be secure in knowing that they can continue their incomes after childbirth and the attendant disability period is over.

*Family and Medical Leave Act of 1987: Joint Hearing on H.R. 925 Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the H. Comm. on Education and Labor*, 100th Cong. 157-63 (1987).

**C. A Key Reason Congress Included All Types of Self-Care Leave in the FMLA Was to Deter Ex Ante Employment Discrimination Based on Overbroad, Sex-Based Assumptions about Women's Leave Needs.**

By covering more than pregnancy and recovery from childbirth, Congress reduced any incentive employers had to discriminate against women for

their pregnancies or potential pregnancies, thereby acting to limit employment discrimination and stereotyping and increase opportunities for women. Congress was keenly aware that a provision granting medical leave solely to pregnant women could result in the unintended consequence of further discrimination, in violation of women's constitutional rights. As Eleanor Holmes Norton testified,

The bill's simple two-fold test for availability of leave means that employers will be required to treat employees affected by pregnancy, childbirth, and related medical conditions in the same manner as they treat other employees similar in their ability or inability to work—in harmony with their obligations under the Pregnancy Discrimination Act of 1978. Faced with the knowledge that job-protected leaves were required for working mothers and working mothers only, employers would very likely be reluctant to hire or promote women of child-bearing age. Under the proposed legislation, however, because employers would be required to provide job-protected leaves for all employees in circumstances *that affect them all approximately equally*, they would have no incentive to discriminate against women.

*Family and Medical Leave Act of 1987: Joint Hearing on H.R. 925 Before the Subcomm. on Civil Serv. and the Subcomm. on Compensation and Employee Benefits of the H. Comm. on Post Office and Civil Serv., 100th Cong. 29 (1987) [emphasis supplied].* The reality is that, when all types of serious medical conditions are considered together, men's and women's needs for self-care leave are not very



different.<sup>6</sup> The self-care provision, by allowing leave for all serious medical conditions, thus blunts assumptions – shared by state and private employers alike – that because women bear children and men do not, women have significantly greater leave needs. Those assumptions fuel the precise type of unconstitutional discrimination identified in *Hibbs* as so widespread, and it is that discrimination to which the self-care provision responds.

The House Report on the Parental and Medical Leave Act (another precursor of the FMLA), which provided federal employees with job-protected leave for medical reasons and to care for a new child, stated that leave for pregnancy and recovery from childbirth had to be covered as disability leave, rather than maternity leave, because “a special ‘maternity leave’ requirement could be used to deny women job opportunities. Faced with the knowledge that job-protected leaves were required for working mothers and working mothers only, hard-pressed employing agencies would be very likely to be reluctant to hire or promote women of child-bearing age.” H.R. Rep. No. 99-699, at 4 (1986).

Similarly, the 1991 House Report on the FMLA stated:

A law providing special protection to women, or any defined group, in addition to being

---

<sup>6</sup> Data collected by the Department of Labor reveals that 58% of self-care leave takers were men and 62% were women, including women who took leave for “maternity-disability.” See Table A2-2.6 U.S. Dep’t of Labor, Wage and Hour Div., Reasons for All Leaves Taken within Demographic Groups, found at <http://www.dol.gov/whd/fmla/APPX-A-2-TABLES.htm>.

inequitable, runs the risk of causing discriminatory treatment. Employers may be less inclined to hire women or members of any group provided special treatment. For example, legislation addressing the needs of pregnant women only might encourage discriminatory hiring practices against women of child bearing age. Legislation addressing the needs of all workers equally does not have this effect. By addressing the serious leave needs of all employees, the FMLA avoids providing employers the temptation to discriminate.

H.R. Rep. No. 102-135, pt. 1, at 27-28 (1991); *see also* S. Rep. No. 103-3, at 16 (1993) (explaining that the FMLA, by granting leave to all workers who suffer from a serious health condition, avoids the risk of causing discrimination against women, especially those of childbearing age); H.R. Rep. No. 103-8, pt. 1, at 29 (1993) (same).

Providing further proof that the self-care provision sought to prevent sex discrimination, the 1991 Senate Report on the FMLA declared:

[A] significant benefit of the temporary medical leave provided by this legislation is the form of protection it offers women workers who bear children. Because the bill treats all employees who are temporarily unable to work due to serious health conditions in the same fashion, it does not create the risk of discrimination against pregnant women posed by legislation which provides job protection only for pregnancy related disability. 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.

S. Rep. No. 102-68, at 30 (1991).

Congress was well aware that a law requiring employers to provide leave only for recovery from pregnancy and childbirth would reinforce gender stereotypes regarding women as unreliable workers and “mothers first.” Such a law could easily become an excuse for employers to discriminate against women because of their pregnancy or childbearing potential. Therefore, in the FMLA, Congress ensured that leave could be used for any self-care need that met the definition of serious health condition. The law allows for leave to be taken by men as well as women and for a wide variety of conditions. By covering more than pregnancy and recovery from childbirth, Congress reduced any incentive employers had to discriminate against women for their pregnancies or potential pregnancies, thereby acting to limit employment discrimination and stereotyping and increase opportunities for women.

**D. The FMLA’s Self-Care Provision Cannot be Divorced from the Family-Care Provision without Undermining the FMLA’s Protections Against Sex-Based Workplace Discrimination.**

A decision denying state employees the right to enforce the FMLA’s self-care provision would undermine the FMLA’s overall effectiveness and severely hamper efforts to equalize the treatment of men and women in the workplace. In *Hibbs*, the Court affirmed Congress’ abrogation of state sovereign immunity under the FMLA, holding that pursuant to Section 5 of the Fourteenth Amendment, Congress

could appropriately reduce workplace discrimination against women by requiring employers equally to grant female and male employees equal time off to care for others. *Hibbs* 538 U.S. at 740. The promises of the family-care provision and the FMLA's ability successfully to address gender-based discrimination depend, however, on the additional protections guaranteed by the statute's self-care mandate. Though the FMLA grants both men and women the right to take time off to care for a newborn, adopted child, or family member, traditional notions about the role of women as primary care providers suggest that women are more likely than men to take advantage of the FMLA's family-care provision. See Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 Harv. C.R.-C.L. L. Rev. 415, 441-2 (2011); Naomi Gerstel & Amy Armenia, *Giving and Taking Family Leaves: Right or Privilege?*, 21 Yale J.L. & Feminism 161, 167 (2009).

The self-care provision acts to counter employer assumptions that the rights granted by the FMLA would be invoked primarily by women and serves to make the statute as a whole more effective. The availability of self-care leave to men serves to blunt the force of stereotypes of women as primary caregivers by increasing the odds that men and women will invoke the FMLA's leave provisions in near-equal numbers. The FMLA's effectiveness in addressing gender discrimination in the workplace therefore depends upon understanding its provisions as reliant upon one another and reading the statute as a whole.

**E. The Majority of State Laws at the Time of the Enactment of the FMLA Were Inadequate or Discriminatory.**

When Congress passed the FMLA, it did so against a backdrop of states that failed to provide adequate leave for women for pregnancy and recovery from childbirth, or that provided leave in a way that reinforced gender stereotypes and encouraged discrimination against women workers. Prior to the passage of the FMLA, only twelve states and the District of Columbia provided women job-protected leave for pregnancy and recovery from childbirth. Jane Waldfogel, *Family Leave Coverage in the 1990s* (App.: The Role of States), *Monthly Lab. Rev.* 21 (Oct. 1999), available at <http://www.bls.gov/opub/mlr/1999/10/art2full.pdf>. As of 1989, in at least four states, women were entitled to pregnancy leave while men had no equivalent right to take time off to deal with their health conditions. See Wendy S. Strimling, *Comment: The Constitutionality of State Laws Providing Employment Leave for Pregnancy: Rethinking Geduldig After Cal Fed.*, 77 *Cal. L. Rev.* 171, 175-79 (1989); see also *Hibbs* at 733 n.6 (listing states that guaranteed leave only to female employees for pregnancy and childbirth).<sup>7</sup> Connecticut, for example, had a gender-neutral family leave law but

---

<sup>7</sup> Additionally, some state workers were covered by union contracts that provided for disability leave that could be used for pregnancy-related disability and recovery from childbirth. These contracts, however, covered only the employees in a specific bargaining unit. *Parental and Medical Leave Act of 1987: Hearing on S. 249, Pt. 1, Before the Subcomm. on Children, Family, Drugs and Alcoholism of the S. Comm. on Labor and Human Resources, 100th Cong.* 351, 358 (1987) (Report of Parental Leave in AFSCME Contracts).

made medical disability leave available to pregnant women alone. Strimling at 178.

Thus, in most states, at the time of the passage of the FMLA, women had no protection under Title VII and the Pregnancy Discrimination Act from being fired for taking leave for their own pregnancy-related disability. And in a significant number of states, women had some access to leave to address pregnancy-related disability, but these laws applied to women only, creating a situation that Congress believed could promulgate further employer discrimination and stereotyping.

### **III. The Remedies Provided in the FMLA for Self-Care Leave Fit the Injury the Statute Seeks to Prevent.**

The third part of the test for abrogation of state sovereign immunity under *Hibbs* is whether the means chosen by Congress “exhibit congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” *Hibbs*, 538 U.S. at 728 (internal citations and quotations omitted). In *Hibbs*, the Court found that the FMLA caregiving provision met this standard. Because Congress enacted the self-care provision of the FMLA—like the caregiving provision—in response to gender discrimination, the self-care provision meets the “congruent and proportional” standard as well.

In *Hibbs*, the Court ruled:

By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care 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. By setting a minimum standard of family leave for *all* eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.

*Hibbs*, 538 U.S. at 737.

In a similar manner, Congress in the self-care provision created an across-the-board right to leave that is open to both men and women for any serious health condition. In doing so, Congress sought to redress widespread sex discrimination by blunting incentives for employers to discriminate against women because of their pregnancies or childbearing potential. By allowing women and men to take leave for reasons not associated with childbirth, as Mr. Coleman sought to do in this case, Congress also ensured that the statute did not discriminate against women or place a higher value on their recovery from pregnancy and childbirth than on men's recovery from equally serious health conditions.

FMLA leave is only available to workers who have been with their employer for a specific length of time, and only employers with fifty or more employees are covered. 29 U.S.C. § 2611(2)(A) & (4)(A). Employees rarely take the full twelve weeks of leave authorized under the FMLA. Rather, the most frequent duration of leave is ten days. David Cantor et al., U.S. Dep't of Labor, *Balancing the Needs of Families and Employers: The Family and Medical Leave Surveys*, Ch. 2, 2-4 (2000) (*available at* <http://www.dol.gov/whd/fmla/chapter2.pdf>). Eighty percent of the leave taken is for forty days or less. *Id.* While helping

millions of employees, the FMLA's cost to businesses has been minimal. *Id.* at 6-9, 6-13.

The FMLA allows for limited monetary damages consisting of lost wages or salary and interest, or, if no compensation was lost, actual monetary losses (capped at an amount equal to twelve weeks of wages or salary). 29 U.S.C. § 2617(a)(1)(A)(i)(I)&(II) & (ii). All of the factors limiting relief under the FMLA that the Court found "significant" in reaching its conclusion that the caregiving provision of the FMLA was an appropriate response to gender discrimination exist for the self-care provision as well. *Id.* at 738-39 (noting that the FMLA provides only unpaid leave, requires employees to meet certain tenure requirements, requires notice and certification, limits damages, and makes certain high-level employees and elected officials ineligible for leave). Therefore, this Court should find that the self-care provision meets the third prong of the *Hibbs* test and that Congress validly abrogated state immunity in the self-care provision of the FMLA.

#### **IV. The FMLA Provides Necessary Time Away From Work to Allow Workers to Recover from Serious Health Conditions and Provides Job Protection for Workers Who Would Otherwise Suffer the Economic Consequences of Discrimination.**

The FMLA offers critical protections to workers across the country, including millions of state employees.<sup>8</sup> Since 1993, FMLA leave has been used

---

<sup>8</sup> Over 5.3 million Americans are employed by state governments. U.S. Census Bureau, State Government Employment Data: March 2009 – United States Totals (2011), *available at* <http://www2.census.gov/govs/apes/09stus.txt>.



over 100 million times to take job-protected leave. 73 Fed. Reg. 7877 (February 11, 2008). The Department of Labor estimates that each year, 6.1 million workers use FMLA leave. *Id.*

Congress was motivated to pass the FMLA to address a form of discrimination that can have dire economic consequences, particularly for families headed by single women. *See, e.g., Family and Medical Leave Act of 1991: Hearing on S. 5 Before the Subcomm. on Children, Family, Drugs and Alcoholism of the S. Comm. on Labor and Human Resources*, 102d Cong. 3 (1991) (statement of Sen. Christopher Dodd) (“Since 1970, there has been a 700 percent increase in the number of children who live with mothers who have never been married. . . . Typically, these families have the most tenuous ties to the labor force to begin with and have the least access to employer sponsored leave policies. . . . Very often, nothing stands between them and the welfare rolls if a job is lost due to a serious family crisis.”). The Senate report accompanying the 1991 version of the FMLA noted that “[w]omen are in the workforce out of economic necessity. Two out of every three women working outside the home today are either the sole providers for their children or have husbands who earn less than \$18,000 a year.” S. Rep. 102-68, at 22 (1991).

The concerns expressed by Congress are equally valid today. Nationally, 59 percent of women ages sixteen and over, and 71 percent of men in the same age group, were in the workforce in 2010. Bureau of Labor Statistics, U.S. Dep’t of Labor, Current Population Survey: Household Data Annual Averages, tbl. 2 (2010), *available at* <http://www.bls.gov/cps/cpsaat2.pdf>. Sixty-four percent of children under six years of age and 72 percent of children between

the ages of six and seventeen live in households where all available parents are in the labor force. U.S. Census Bureau, 2009 American Community Survey 1-Year Estimates, tbl. B23008 (2009), *available at* <http://factfinder.census.gov>. Nineteen percent of all family households are headed by a woman with no husband present. *Id.* at tbl. B11001. Thus, a woman's ability to work is often critical to her family's economic well-being. Without measures like the FMLA's self-care provision, many working women and their families would face unstable and potentially disastrous financial situations.

**V. State Employees Who Exercise Their FMLA Right to Self-Care Leave Need and Deserve Protection from Retaliation.**

In enacting the FMLA, Congress clearly intended to grant state employees access to job-protected leave to attend to their health needs. The FMLA's leave provisions and job protections would be rendered meaningless unless eligible employees – including those who work for state governments – can request and take leave without fear of reprisal.

Unfortunately, many state employees have suffered adverse consequences or even lost their jobs after seeking to exercise their FMLA rights to self-care leave for a serious illness. In this case, the Petitioner Daniel Coleman was fired within hours of requesting medical leave pursuant to his doctor's orders. Sadly, Mr. Coleman is not alone. Retaliation against employees who assert their entitlement to federally protected leave is woefully common. For instance, the State of Mississippi fired James Bryant while he recovered from injuries sustained in an automobile accident. *Bryant v. Miss. State Univ.*, 329 F. Supp. 2d 818 (N.D. Miss. 2004). The State of

Missouri fired Larry McKlentic after he requested time off for back surgery. *McKlentic v. 36th Judicial Circuit Court*, 464 F. Supp. 2d 871 (E.D. Mo. 2006), *aff'd*, 508 F.3d 875 (8th Cir. 2007). The State of Michigan discharged Ricardo Diaz following his request for intermittent FMLA leave so that he could obtain treatment for a hereditary chronic cardiac condition and diverticulitis. *Diaz v. Mich. Dep't of Corr.*, No. 1:09-cv-1109, 2010 U.S. Dist. LEXIS 134743, at \*1-2 (W.D. Mich. Dec. 21, 2010). The State gave him a written notice of discipline for missing work and, after Diaz was hospitalized for four days, the State terminated him for “time and attendance violations.” *Id.* at \*2-3.

All too frequently, workers suffer negative consequences after requesting or taking leave to address their medical needs. Indeed, fifty-three percent of the FMLA complaints filed between 2001 and 2008 involved a refusal to restore the employee to an equivalent position or termination in retaliation for requesting or taking FMLA leave. U.S. Dep't of Labor, Wage and Hour Div., 2008 Statistics Fact Sheet, *available at* <http://www.dol.gov/whd/statistics/2008FiscalYear.htm>. Survey data collected by the U.S. Department of Labor indicates that over 357,000 leave-takers were downgraded to a lower position at work after their leave in the first seven years after the FMLA was enacted. U.S. Dep't of Labor, Wage and Hour Div., The 2000 Survey Report ch. 4, *available at* <http://www.dol.gov/whd/fmla/chapter4.htm>.

Individuals who experience serious illness or injury, including state employees, should be able to assert their rights to self-care leave and deserve protection from retaliation, consistent with the plain language of the FMLA. The Court has long recog-

nized the importance of robust protection from workplace retaliation in other related contexts. Title VII, the Court has said, “depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. . . . Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act’s primary objective depends.” *Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) (internal quotation marks and citation omitted). This is because “[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination.” *Crawford v. Metro. Gov’t of Nashville & Davidson County*, 129 S. Ct. 846, 852 (2009) (quoting Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18, 20 (2005)). Most recently, the Court again reiterated the importance of protections from retaliation in *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1333 (2011). In that case, the Court noted:

[The Fair Labor Standards Act] relies for enforcement . . . upon information and complaints received from employees seeking to vindicate rights claimed to have been denied. And its antiretaliation provision makes this enforcement scheme effective by preventing fear of economic retaliation from inducing workers quietly to accept substandard conditions.

*Id.* (internal quotation marks and citations omitted).

If contrary to the plain language of the statute, states cannot be held liable for retaliating against employees who invoke their right to self-care leave, states will have little incentive to comply with the substantive requirements of the FMLA. The statu-

tory purpose cannot be fulfilled unless state employees can request leave without fear of retaliation.

### CONCLUSION

For the above reasons, Congress validly abrogated state sovereign immunity with respect to the FMLA's self-care provision. The judgment of the Fourth Circuit should be reversed and remanded.

Respectfully submitted,

JONATHAN J. FRANKEL  
PHILLIP DOUGLASS  
STEVEN D. TIBBETS  
STEESE, EVANS  
& FRANKEL, P.C.  
1627 I Street, NW,  
Suite 850  
Washington, DC 20006  
(202) 293-6840

JUDITH L. LICHTMAN  
SARAH CRAWFORD  
*Counsel of Record*  
NATIONAL PARTNERSHIP  
FOR WOMEN & FAMILIES  
1875 Connecticut Ave. NW,  
Suite 650  
Washington, DC 20009  
(202) 986-2600  
scrawford@  
nationalpartnership.org

*Counsel for Amici Curiae*

September 27, 2011