No. 12-4285

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

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JOAN SHERFEL, BENEFITS ADMINISTRATIVE COMMITTEE, and NATIONWIDE MUTUAL INSURANCE COMPANY,

Plaintiffs-Appellees,

v.

REGGIE NEWSON, JOSEPH HANDRICK, and J. B. VAN HOLLEN,

Defendants-Appellants.

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Appeal from a Judgment entered September 28, 2012, and from an Order entered September 29, 2012, by the United States District Court for the Southern District of Ohio, in Case No. 2:09-cv-871, Honorable James L. Graham Presiding

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# Brief Amici Curiae of National Partnership for Women & Families, Legal Aid Society-Employment Law Center, Legal Momentum, National Women's Law Center and Service Employees International Union in Support of Defendants-Appellants' Argument for Reversal

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## RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1, the National Partnership for Women & Families, Legal Aid Society-Employment Law Center, Legal Momentum, National Women's Law Center and Service Employees International Union each states that it does not have a parent corporation and that no publicly-held corporation owns any stock in it.

/s/ Sarah Crawford
_____
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## STATEMENT OF INTEREST

The following amici submit this brief, with the consent of the parties, in support of Defendant-Appellant's argument that the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, does not preempt the substitution provision of the Wisconsin Family and Medical Leave Act ("WFMLA"), which enables employees to substitute "paid or unpaid leave of any other type provided by the employer" for portions of family leave or medical leave. Wis. Stat. § 103.10(5)(b) (1999). Amici are advocacy organizations with an abiding interest and considerable experience in promoting policies that make family and medical leave more affordable for working families.

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 federal Family and Medical Leave Act ("FMLA"). 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.

Legal Aid Society – Employment Law Center ("LAS-ELC") is a non-profit public interest law firm whose mission is to protect the workplace rights of individuals from traditionally under-represented communities. Since 1970, LAS-ELC has represented clients in cases involving a broad range of employment-related issues, including family and medical leave, and discrimination and harassment on the basis of race, gender, age, disability, sexual orientation, national origin, and pregnancy. Since 1983, LAS-ELC's Work and Family Project has advocated to protect the employment rights of pregnant women, new parents, and workers dealing with family and medical crises.

Legal Momentum, founded in 1970 as the NOW Legal Defense and Education Fund, advances the rights of women and girls through education, policy advocacy, and litigation. Throughout our history, we have advocated for policies to further women's equality in the workplace, such as family leave for new parents. Legal Momentum has participated as counsel and as amicus curiae in numerous cases, including *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003), upholding Congress' application of the family leave provisions of the Family and Medical Leave Act to state employers as a valid means of promoting women's equality in the workplace.

The National Women's Law Center ("NWLC") 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.

The Service Employees International Union ("SEIU") is labor organization that represents over two million men and women working in health care, property services and public services throughout the United States. Our eight affiliated local unions in the State of Wisconsin represent collectively over 15,000 members, working in both public and private sector jobs. SEIU has a longstanding commitment to supporting workers' need to balance the responsibilities of work and family. More than two decades ago, SEIU adopted a resolution calling for meaningful action to protect workers' right to family and medical leave. As such, SEIU has a strong interest in preserving the integrity of the Wisconsin Family and Medical Leave Act and similar state laws that extend to workers and their families wage replacement during family and medical leave.

Counsel for amici authored this brief in its entirety. No party, party's counsel, person or entity other than amici, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

The Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq*., does not preempt the substitution provision of the Wisconsin Family and Medical Leave Act, Wis. Stat. § 103.10(5)(b) (1999) ("WFMLA"). *Aurora Med. Grp. v. Dep't of Workforce Dev*., 612 N.W.2d 646 (Wis. 2000). In enacting the federal FMLA, 29 U.S.C. § 2611 *et seq*., Congress clearly intended to insulate from preemption those state laws that offered more generous family and medical leave protections, particularly those that, like the WFMLA, diminished the primary obstacle preventing workers from taking advantage of their legal rights to leave—namely, lost wages.

## ARGUMENT

The legislative history of the FMLA establishes that Congress intended to insulate state laws like the WFMLA's substitution provision from preemption by ERISA. Indeed, in enacting the FMLA, Congress intended to encourage states to exercise their right to fill the gaps left by national policy in the area of paid leave. By offering greater protections than the FMLA, the WFMLA's substitution provision advances the FMLA's goal of encouraging states to provide more

generous family and medical leave rights, especially wage replacement during leave—just as Wisconsin has done with the WFMLA.

## I. CONGRESS INTENDED TO INSULATE STATE LAWS LIKE THE WISCONSIN FMLA FROM FEDERAL PREEMPTION TO THE EXTENT THAT THEY PROVIDE GREATER FAMILY AND MEDICAL LEAVE RIGHTS THAN THE FMLA'S FLOOR.

The FMLA was designed to preserve the power of states to pass laws providing benefits that are more generous than those of FMLA itself. *See Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 740 n.12 (2003) (the FMLA "leav[es] States free to provide their employees with more family-leave time"); *Bellido-Sullivan v. Am. Int'l Grp.*, 123 F. Supp. 2d 161, 166 (S.D.N.Y. 2000) (the FMLA "will not curtail rights established by any state or local law"); *Findlay v. PHE, Inc.*, No. 1:99CV00054, 1999 U.S. Dist. LEXIS 9761 at *8 (M.D.N.C. Apr. 16, 1999) ("no part of the [FMLA] evinces an attempt by Congress to 'occupy the field"') (internal citations omitted). In relevant part, FMLA reads:

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

29 U.S.C. § 2651(b). Thus it is abundantly clear from the text of the statute that the FMLA intended for states to continue to exercise their powers to enact laws that provide greater protections for workers.

The legislative history of the FMLA makes clear the congressional intent

that state law provisions like the WFMLA, which provide greater rights than the FMLA, should not be preempted by ERISA. Both the Senate Report accompanying the FMLA, and floor statements made by the bill's sponsors on the day of the bill's final passage clearly demonstrate this legislative intent. S. Rep. No. 103-3, at 38 (1993); 139 Cong. Rec. 2254 (1993).

The Senate Report accompanying FMLA indicates that Congress intended for state laws that provide for greater leave to survive federal statutory preemption:

> Section 401(b) makes it clear that state and local laws providing greater leave rights than those provided in S. 5 are not preempted by the bill or any other federal law. This applies to state and local laws in effect at the time of enactment or laws enacted in the future. Thus, for example, state or local laws that provide greater employee coverage, longer leave periods or paid leave, are not preempted by this Act to the extent that they provide leave in a manner more inclusive or more generous than that provided in S. 5.

S. Rep. No. 103-3, at 38 (1993). Moreover, the Senate Report speaks directly to substitution provisions in state laws like the WFMLA that permit employees to extend their paid leave:

> Section 401(b) also clarifies that state family leave laws at least as generous as that provided in S. 5 (including leave laws that provide continuation of health insurance or other benefits, and paid leave), are not pre-empted by ERISA, or any other federal law.

*Id.*

Statements on the floor by Senator Dodd, a lead sponsor of the FMLA,

confirm that Congress intended to insulate the substitution provision of the WFMLA from all federal law preemption. Senator Dodd confirmed that the authors of FMLA intended to prevent ERISA and any other federal law from preempting state family and medical leave, and that

> [I]f Wisconsin law allows either an employer or an employee to substitute accrued paid leave to care for a newly born or adopted child on terms at least as generous as in this legislation, it is our intent that *no Federal law* prevent Wisconsin law from making that allowance.

139 Cong. Rec. 2254 (daily ed. Feb. 4, 1993) (statement of Sen. Dodd) (emphasis added). Along with the Senate Report, these statements confirm that the sponsors intended to shield state laws at least as generous as the FMLA from not only ERISA preemption, but from all federal preemption. In response to an inquiry from Senator Feingold to this effect, Senator Dodd responded:

> Yes, it is certainly our intent that, as Federal legislation enacted subsequent to ERISA, the Federal Family and Medical Leave Act supersedes ERISA to the extent ERISA preempts any State leave law provisions which are at least as generous as the provision of the Federal Family and Medical leave Act.

*Id.* Senator Dodd made these statements and this language was included in the Senate Report in order to make clear the intent of the statute.

The legislative history of an earlier version of the FMLA, which passed both houses of Congress but was vetoed by President Bush, provides additional authority from which to divine Congress' legislative intent. H.R. 2, 102d Cong. (1991). The 1991 bill contained the same provision ultimately enacted as 29 U.S.C.

§ 2651. Just as he would confirm again two years later, Senator Dodd noted that it was the intent of the FMLA's sponsors for state laws to be shielded from federal preemption. 137 Cong. Rec. 25019-25050 (1991).

## II. THE WISCONSIN FMLA REPRESENTS THE PROPER EXERCISE OF THE STATE'S RIGHT TO ENACT LAWS.

States are "independent sovereigns in our federal system," *Wyeth v. Levine*, 129 S. Ct. 1187, 1195 n.3 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). States, "by right of history and expertise," *U.S. v. Lopez*, 514 U.S. 568, 583 (1995) (Kennedy & O'Connor, concurring), have "broad latitude" to enact laws serving as "solutions to problems of vital local concern." *Whalen v. Roe*, 429 U.S. 589, 597 (1977).

Consistent with these principles, the text and legislative history of the FMLA together reflect the congressional intent that states would continue to exercise their rights to enact family and medical leave laws that offer greater protections than the FMLA. First, Congress specified that the FMLA would not supersede more generous state and local laws. *See* 29 U.S.C. § 2651(b). Second, although the FMLA itself does not require paid leave, Congress expressly tasked the Commission on Leave, which was created by the FMLA, with studying the impact of policies like the WFMLA's substitution provision that "provide temporary wage replacement during periods of family and medical leave." 29 U.S.C. § 2632(1)(H). Thus, the FMLA's text both removed any federal obstacle to

all state laws that were more generous than the FMLA and specifically signaled Congress' recognition of states' power to pass such laws.

The FMLA's legislative history abundantly confirms that Congress sought to encourage the states to function as "laboratories of democracy." *See Reeves. Inc. v. Stake*, 447 U.S. 429, 441 (1980). In fact, this federal-state partnership produced the FMLA itself; members of Congress and congressional witnesses alike repeatedly drew upon the success of state laws as a sound basis for enacting the FMLA. *See, e.g., The Family and Medical Leave Act: Hearing on H.R. 1 Before the Subcomm. on Labor-Management Relations of the H. Comm. on Education and Labor*, 103d Cong. 40 (1993) (statement of Robert Reich, U.S. Secretary of Labor) (citing evidence from "State experiments" with family leave laws to show that national leave law would not be burdensome); 138 Cong. Rec. S14841, S14845 (daily ed. Sept. 24, 1992) (statement of Sen. Packwood) (relying on passage of family leave laws in eleven states and District of Columbia to urge vote to override President Bush's veto of FMLA).

Even opponents of the FMLA shared this vision of state action as a precondition for federal legislation, merely arguing that state family and medical leave legislation had not yet become sufficiently widespread to justify national policy. *See, e.g.*, 137 Cong. Rec. H9722, H9734 (daily ed. Nov. 13, 1991) (statement of Rep. Petri) ("I have always believed that one of our Federal system's

greatest values is that the States serve as the laboratory of democracy. States often experiment with policy changes before Congress enacts Federal legislation. Since very few States have approved family and medical leave laws anywhere close to H.R. 2 in range and coverage, it seems premature for the Federal Government to be jumping out in front of the States . . . ."). Indeed, as Senator Dodd clarified, had Congress not believed in this characterization of states' function, the Commission on Leave would have been superfluous. *See* 139 Cong. Rec. 2254 (daily ed. Feb. 4, 1993) (statement of Sen. Dodd) ("If the study of the Commission on Leave which is being created by this Federal legislation is to be meaningful, it is vital for States to be experimenting, without Federal constraints, in their various efforts to provide leave on terms at least as generous as those provided by this Federal legislation."). Thus, even the FMLA's detractors recognized the importance of preserving states' rights to enact laws.

## III. LAWS LIKE THE WISCONSIN FMLA ARE VITAL TO ENABLE WORKERS TO EXERCISE THEIR LEGAL RIGHTS TO FAMILY AND MEDICAL LEAVE.

In 2011 alone, the federal FMLA helped 14 million workers[1] cope with family crises or their own serious medical conditions, without unduly burdening

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[1] National Partnership for Women & Families, *A Look at the U.S. Department of Labor's 2012 Family and Medical Leave Act Employee and Worksite Surveys*, February 2013, http://www.nationalpartnership.org/site/DocServer/DOL_FMLA_Survey_2012_Key_Findings.pdf?docID=11862.

employers.[2] Yet far too many American workers are still unable to take advantage of their FMLA rights because FMLA leave is unpaid. According to the U.S. Department of Labor's 2012 Family and Medical Leave Act Employee and Worksite Technical Survey, "[M]ost worksites allow employees to take leave for a range of reasons, but few worksites pay for that leave."[3]

The result is that when workers must take leave—including leave to care for a newborn child, as was the case with Katharina Gerum—middle and low income families are hurt the most, and the financial hit can be devastating. Inability to afford leave is the most common reason employees give for forgoing a needed leave.[4] Forty-six percent of those who needed leave but did not take it cited lost wages as the reason why they did not.[5] Fifty-four percent of workers in middle and lower income families do not receive pay while on leave.[6]

The majority of employees who take leave with partial or no pay are forced to make perilous economic choices, like putting off paying bills, borrowing money, and going on public assistance. More than six in ten employees said that making ends meet during their time away from work was difficult, including 30 percent

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[2] *See* Abt Associates Inc., *Family and Medical Leave in 2012: Technical Report*, ii-iii (September 7, 2012), http://www.dol.gov/asp/evaluation/fmla/FMLATechnicalReport.pdf
[3] *Id*. at 33.
[4] *See id*. at 128.
[5] *Id*.
[6] *Id*. at 99.

who said it was very difficult.[7] More than one third said they dipped into savings earmarked for another purpose, or put off paying bills.[8] Three in ten said they borrowed money.[9] Fifteen percent reported that they had to go on public assistance.[10]

Workers with partial or no pay also reported that they cut their leave short or decided to forgo medical treatment altogether.[11] Half of all workers who took leave said their leave ended and they returned to work because they could not afford to take more time off.[12] Nearly one-third of employees said they had to cut their leave time short because of the financial strain of reduced or no pay.[13] A majority of employees who needed leave but did not take it either deferred or forewent medical treatment altogether.[14]

To many middle and low-income families who cannot access paid leave, the FMLA represents a legal right that they can rarely exercise without economic hardship. Because the United States stands nearly alone among industrialized countries in lacking a national family leave benefit program, as Congress itself

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[7] *Id*. at 107.
[8] *Id*. at 106.
[9] *Id*.
[10] *Id*.
[11] *Id*.
[12] *Id*.
[13] *Id*.
[14] *Id*. at 132.

recognized in enacting the FMLA, *see* S. Rep. No. 103-3, at 21 (1993), and because the need for income during leave is so compelling, it is all the more important for states to be able to experiment with paid leave policies, as Wisconsin has chosen to do.

The substitution provision of the WFMLA provides the expanded protections that Congress sought to encourage with the FMLA. By enabling workers to substitute accrued paid sick leave for unpaid family leave, the WFMLA makes family and self-care leave more affordable—and therefore more accessible—for workers like Katharina Gerum, who sought to use employer-provided paid leave to take time off from work to care for her newborn child.

When urgent family or medical needs arise, workers must be able to meet those needs. New parents like Katharina Gerum need time off to recover from pregnancy and bond with their newborns without jeopardizing their economic security. Access to paid leave has a direct impact on the ability of new parents to support themselves and maintain employment. New mothers with access to paid leave are more likely than mothers who take no leave to be working nine to twelve months after childbirth.[15] They are also 54 percent more likely to report wage

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[15] *See* Linda Houser & Thomas P. Vartanian, *Pay Matters: The Positive Economic Impact of Paid Family Leave for Families, Businesses, and the Public*, Center for Women and Work at Rutgers, 2 (January 2012), http://smlr.rutgers.edu/paymatters-cwwreport-january2012.

increases and 39 percent less likely to receive public assistance in the year following the birth.[16]

Workers' ability to take leave also has a significant impact on their infants. Newborn babies' development hinges on a strong attachment to their parents, who exert a major influence on their baby's physical, cognitive and social development.[17] Infants exposed to stimulating settings experience an improvement in brain function that is both long-lasting and cumulative.[18] Ensuring that infants have a secure start in life greatly increases the likelihood of promoting learning and preventing damage.[19] Family leave enables biological and adoptive parents alike to develop stable child care arrangements and bond with their children, while reducing stress on both parents and children during this important period.[20]

Full-time parental involvement is also crucial to ensure the success of adopted children's transition into their new home, regardless of their age. *See, e.g.*, *The Family and Medical Leave Act of 1991: Hearing on H.R. 2 Before the Subcomm. on Labor-Management Relations of the H. Comm. on Education and Labor*, 102d Cong. 144-45 (1991) (statement of American Academy of Pediatrics);

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[16] *Id.*
[17] *See, e.g.*, Human Impact Partners. *Fact Sheet: Parental Leave and the Health of Infants, Children and Mothers*, 3 (November 2011), http://workfamilyca.org/resources/HIPFactSheet_2011.pdf.
[18] *Id.*
[19] *Id.*
[20] *Id*. at 1, 3.

*Family and Medical Leave Act of 1989: Hearing on S. 345 Before the Subcomm. on Children, Family, Drugs, and Alcoholism of the S. Comm. on Labor and Human Resource*s, 101st Cong. 22-25 (1989) (statement of Joe Kroll, Executive Director of North American Council on Adoptable Children) (characterizing adoptive leave as easing stress on families during initial adjustment after adoptive placement, and as important factor enabling additional families to consider adopting special-needs children).

Parental involvement is equally essential for seriously ill children. Indeed, sick children recover faster when cared for by their parents; the mere presence of a parent shortens a child's hospital stay by 31 percent.[21] For those illnesses that do not require hospitalization, the absence of adequate income during family leave forces workers to send sick children to school, leave them home alone or take unpaid leave—alternatives that deprive children of needed care, threaten to expose their peers to communicable diseases or risk dropping families' income below the poverty level.[22] Currently, fewer than half (48 percent) of working parents have

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[21] Jody Heymann, *The Widening Gap: Why America's Working Families Are in Jeopardy - and What Can Be Done About It*, 57 (2001).

[22] *See* Elise Gould, Kai Filion, & Andrew Green, *The Need for Paid Sick Days: The lack of a federal policy further erodes family economic security*, Economic Policy Institute Briefing Paper No. 319, 5-10 (June 29, 2011), http://www.epi.org/publication/the_need_for_paid_sick_days/.

access to enough time off they can use to care for a sick child.[23]

Similarly, working adults need income during leave to provide care to sick elderly relatives. In 2009, 43.5 million people provided unpaid care for a family member or friend over the age of 50.[24] Nearly three-quarters were employed while providing care and the majority of those were forced to make accommodations such as reducing their work hours or taking time off.[25] The financial costs of lack of access to paid leave are huge. Of caregivers of elders who were forced to take time off to fulfill their caregiving responsibilities, 48 percent lost income.[26] The average caregiver over 50 who leaves the workforce to care for a parent will lose $303,880 in wages, Social Security benefits and private pension income.[27]

By 2050, there will be 88.5 million older adults, accounting for more than 20

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[23] Kristin Smith & Andrew Schaefer, *Who Cares for the Sick Kids? Parents' Access to Paid Time to Care for a Sick Child*, Carsey Institute Issue Brief No.51, 2 (June 2012), http://www.carseyinstitute.unh.edu/publications/IB-Smith-Paid-Sick-Leave-2012.pdf.

[24] National Alliance for Caregiving & AARP, *Caregiving in the U.S.: A Focused Look at Those Caring for Someone Age 50 or Older*, 10 (November, 2009), http://assets.aarp.org/rgcenter/il/caregiving_09.pdf.

[25] *Id*. at 11.

[26] Kerstin Aumann et al., *The Elder Care Study: Everyday Realities and Wishes for Change*, Families and Work Institute, 8 (2010), http://familiesandwork.org/site/research/reports/elder_care.pdf.

[27] MetLife Mature Market Institute, *The MetLife Study of Caregiving Costs to Working Caregivers: Double Jeopardy for Baby Boomers Caring for Their Parents*, 2 (June 2001), http://www.metlife.com/assets/cao/mmi/publications/studies/2011/mmi-caregiving-costs-working-caregivers.pdf.

percent of the U.S. population.[28] Given this growing projected need for elder care, the potential costs of not making it more affordable for workers to take leave to provide elder care are staggering; if informal family caregiving for adults had to be replaced by paid workers, the national economic cost in 2009 would have been roughly $450 billion.[29]

Older adults are staying in the workforce until later in life, and they rely on their jobs to maintain their own economic stability. About 30 percent of adults over 65 are employed,[30] and over half of retirement-age workers stay in the workforce to ensure a more comfortable and stable life for themselves when they do stop working.[31] Access to leave is crucial for older workers to support themselves and their families while maintaining their health.

Older workers are not the only segment of the working population that must take leave for their own self-care. The most common reason workers of all ages

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[28] Robert Wood Johnson Foundation & Johns Hopkins University, *Chronic Care*: *Making the Case for Ongoing Care*, 9 (February 2010), http://www.rwjf.org/content/dam/web-assets/2010/01/chronic-care.

[29] Lynn Feinberg et al., *Valuing the Invaluable: 2011 Update. The Growing Contributions and Costs of Family Caregiving*, AARP Public Policy Institute, 1 (July 2011), http://assets.aarp.org/rgcenter/ppi/ltc/i51-caregiving.pdf.

[30] U.S. Department of Labor, Bureau of Labor Statistics, *Employment status of the civilian noninstitutional population by age, sex, and race* (Table 3) (2010).

[31] Melissa Brown et al., *Working in Retirement*: *A 21st Century Phenomenon*, Families and Work Institute, 4 (July 2010), http://familiesandwork.org/site/research/reports/working_in_retirement.pdf.

cite for taking leave is their own illness.[32] Of those who take leave for self-care, about half of the leave is due to a one-time health matter, such as appendicitis or an injury, but nearly 40 percent is due to either an ongoing health condition, such as chemotherapy, or an injury or illness, like diabetes or Multiple Sclerosis, that requires routine scheduled care.[33] Without the ability to take time off to care for serious medical needs, workers are forced to choose between their health and their livelihood.

However, leave remains out of reach for many. When workers do take FMLA leave, the lack of income can cause serious financial hardship. Ironically, the very workers who most need income during their leave are the least likely to receive it. Taking leave with partial pay or no pay is difficult for some and impossible for others. As a result, leaves are cut short, finances are stretched, and workers delay or forgo necessary health procedures.

Anticipating this nationwide problem of unpaid leave, Congress took a significant step toward crafting a national remedy by requiring the Commission on Leave to study policies providing wage replacement during leave. *See* 29 U.S.C. § 2632(1)(H). Because Congress singled out paid leave policies—including both state-sponsored and private policies—for the Commission's review, this provision

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[32] *See* Abt Associates Inc., *supra* note 2, at ii.
[33] *Id.* at 71.

places state paid-leave provisions squarely among the type of laws that Congress intended to encourage in enacting the FMLA.

ERISA preemption of the WFMLA's substitution provision would frustrate Congress' intent to encourage state laws that increase access to paid leave. ERISA preemption would rob Wisconsin workers of an important protection against having to choose between their income and their families. Rather than forcing workers into precisely the dilemma that Congress aimed to prevent through the FMLA, this Court should find that ERISA does not preempt the WFMLA's substitution provision.

## CONCLUSION

For the foregoing reasons, the injunction should be dissolved, the Judgment reversed and the case remanded with instructions to enter Judgment for Defendants. Respectfully submitted this 7th day of February, 2013.

/s/ Sarah Crawford

Sarah Crawford
Attorney for Amici Curiae

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the attached brief is proportionately spaced, has a typeface of 14 points or more and contains 5,556 words.

Dated this 7th day of February 2013.

/s/ Sarah Crawford

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Sarah Crawford
Attorney for Amici Curiae

## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 7th day of February 2013, I electronically filed the foregoing with the Clerk of the court for the United States Court of Appeals for the Sixth Circuit.

/s/ Sarah Crawford

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Sarah Crawford
Attorney for Amici Curiae