No. 01-1368

IN THE

Supreme Court of the United States

DEPARTMENT OF HUMAN RESOURCES, ET AL.,
Petitioners,

v.

WILLIAM HIBBS AND UNITED STATES OF AMERICA,
Respondents.

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

BRIEF OF THE NATIONAL WOMEN'S LAW CENTER ET AL. AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

(Additional *Amici* Listed on Inside Cover)

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INTEREST OF AMICI CURIAE[1]

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated since 1972 to the advancement 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 is joined in filing this brief by 31 organizations that share a longstanding commitment to civil rights and equality in the workplace for all Americans, including policies that enable women and men to meet their family responsibilities without detriment to their job security. The individual organizations are described in the attached appendix.

SUMMARY OF ARGUMENT

Repeatedly over the past thirty years, this Court has held unconstitutional state laws and practices premised on archaic views of the proper roles and "natural" tendencies of men and women. As the Court has recognized, gender stereotypes and gender discrimination are tightly linked: gender stereotypes are both a result of historical discrimination and a source of continued discrimination. *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982). Using the judicial tools at its disposal, the Court has addressed this discriminatory dynamic by applying heightened scrutiny to ensure that state gender classifications do not reflect and reinforce sex-role stereotypes. *See United States v. Virginia*, 518 U.S. 515 (1996).

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[1] Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and nobody other than *amici*, their members, or their counsel contributed monetarily to the brief.

Congress has complemented the Court's effort with the legislative tools uniquely within its province, including most recently the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 ("FMLA" or "Act"). The FMLA is aimed at eliminating gender stereotypes and associated gender discrimination in a setting – the workplace – in which they are especially persistent and damaging. By requiring a minimum amount of unpaid family caretaking leave, the FMLA counteracts the tendency of employers to make employment and leave decisions based on traditional assumptions about the division of caretaking and workplace roles along gender lines. And by insisting that such leave be made available on a gender-neutral basis, the FMLA precludes discriminatory leave decisions premised on overgeneralizations about the natural caregiving proclivities of men and women.

Because it is targeted at gender stereotypes that are both a cause and a product of unconstitutional gender discrimination, the FMLA falls squarely within Congress' traditional authority under § 5 of the Fourteenth Amendment. *See, e.g.*, *Katzenbach v. Morgan*, 384 U.S. 641 (1966). Congress was not required to make extensive legislative findings in support of its § 5 authority. This Court's own extensive case law invalidating state practices because they rest on gender stereotypes provides an ample record here.

Congress' authority under § 5 extends to abrogating state sovereign immunity from monetary liability. The provisions of the FMLA allowing for back-pay and damages are both carefully limited and absolutely critical to the statute's effective enforcement. As with other civil rights statutes, only monetary relief can make employees whole who are injured by unlawful deprivations of their rights and provide employers with incentives to comply with the law.

Gender stereotypes and discrimination are as persistent as they are harmful. The Court should not have to take them

on alone. Through enactment of the FMLA, Congress, too, can help to "find new ways to balance family and professional responsibilities between men and women, recognizing gender differences in a way that promotes equality and frees both women and men from traditional role limitations." Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U.L. Rev. 1546, 1557 (1991).

ARGUMENT

I. THIS COURT HAS RECOGNIZED THE DIRECT LINK BETWEEN GENDER STEREOTYPES AND UNCONSTITUTIONAL GENDER DISCRIMINATION.

A. The Problem of Gender Stereotyping and Gender Discrimination.

1. The tendency to act on the basis of gender stereotypes is more than an unfortunate social phenomenon. It is also a legal problem. As this Court has recognized repeatedly over the past thirty years,[2] fixed notions regarding the "natural" roles of men and women – with women "destined solely for the home and the rearing of the family," *Stanton v. Stanton*, 421 U.S. 7, 14 (1975), and men's proper role "not that of homemaker but rather that of the family breadwinner,"

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[2] Before the 1970s, the Court itself routinely accepted and relied upon stereotypes regarding the proper roles of men and women in considering gender classifications. *See, e.g., Bradwell v. Illinois*, 83 U.S. (Wall. 16) 130, 141 (1873) (Bradley, J., concurring) ("The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother."); *Muller v. Oregon*, 208 U.S. 412, 421 (1908) ("That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious."); *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (concluding that "bartending by women," but not men, may "give rise to moral and social problems"); *Hoyt v. Florida*, 368 U.S. 57, 62 (1961) ("[W]oman is still regarded as the center of home and family life.").

Weinberger v. Wiesenfeld, 420 U.S. 636, 653 n.20 (1975) – are inextricably linked to our nation's "long and unfortunate history of sex discrimination." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994).

The relationship between gender stereotyping and unconstitutional gender discrimination is mutually reinforcing – which helps to explain why both the stereotyping and the discrimination have proven so durable. On the one hand, gender stereotypes lend support to unconstitutional gender classifications, as women and men are excluded from certain opportunities because of preconceived assumptions about their natural proclivities. At the same time, unconstitutional gender classifications help to keep stereotypes alive; the absence of men or women from a given field reinforces stereotypes about the innate abilities and preferences of men and women.

The Court addressed precisely this discriminatory dynamic in *Mississippi University for Women v. Hogan*. At issue in *Hogan* was a Mississippi law that expressly barred men from enrolling in its state-supported nursing school. The state defended its women-only policy as a form of "compensation" for prior discrimination against women. The Court, however, focused on references in the university's charter to training women in the "practical affairs of life," such as domestic and caretaking tasks, along with other traditionally "feminine" pursuits. 458 U.S. at 720 n.1 (quoting Miss. Code Ann. § 37-117-3 (1972); *id.* at 730 & n.16. According to the Court, the state's admissions policy impermissibly rested on traditional sex-role stereotypes – and, at the same time, gave "credibility to the old view that women, not men, should become nurses." *Id.* at 730. The vicious cycle, that is, worked just as described above: the women-only nursing school both derived from and helped to perpetuate gender stereotypes, "mak[ing] the assumption that nursing is a field for women a self-fulfilling prophecy." *Id.*

2. Gender discrimination linked to stereotypes arises in a number of contexts. *See infra* note 4. But the problem is especially acute in the workplace, where the archetypal "male" role of worker and breadwinner may come directly into conflict – or be perceived as in conflict – with the archetypal "female" role of childbearer and caretaker. Because those particular stereotypes are so deeply entrenched, *see Frontiero v. Richardson*, 411 U.S. 677, 684 (1973), there is a special risk that both men and women will find their workplace choices constrained by outmoded views of what is and is not gender appropriate.

More specifically, both men and women confront a strong if sometimes unspoken expectation that women should and will prioritize domestic over workplace responsibilities – and that men should not and will not. That expectation makes itself felt in a whole range of workplace decisions, including hiring, *see Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam) (refusal to hire women with children), and work assignments, *see International Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (refusal to assign certain work to women of child-bearing years). Most important here, it is reflected in decisions granting and withholding discretionary family and medical leave. *See Knussman v. Maryland*, 272 F.3d 625 (4th Cir. 2001) (refusal to grant parenting leave to male employee).

Workplace practices like these have an immediate and direct impact on the employment opportunities of women, as well as on the ability of men to serve a caretaking function. They also operate less directly – but no less importantly – to perpetuate both gender stereotypes and future gender discrimination. When women, or a subset of women, are excluded from certain fields, that reinforces the impression that those fields are inherently "male" and unsuited to the "female" nature. *Cf. Hogan*, 458 U.S. at 730 (exclusion of men from nursing school reinforces stereotype that women are

inherently better suited for nursing profession). If women with children are barred from, say, jobs that require travel, *cf. Phillips* (denying jobs to women with children), then the absence of women fosters the impression that those jobs are incompatible with an essentially female childrearing role. That impression, in turn, may make women less likely to pursue careers in those fields – and employers less likely to hire them even when they do, and even when they are equally or better qualified than male applicants. *See* John E. Williams & Deborah L. Best, *Measuring Sex Stereotypes: A Multination Study* 294 (1990) ("[S]ex stereotypes create a barrier whenever persons of one sex seek entry into an occupation that has traditionally been occupied primarily by members of the other sex."). Instead, women more often than men work in positions that seem compatible with caretaking responsibilities: jobs that give workers greater freedom to take time off for domestic responsibilities, and that pay less as a result. *See* Laura A. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. Mich. J.L. Reform 371, 385-86 (2001) ("Women are more likely than men either to accept voluntarily or to be funneled into lower paying 'mommy-track' professional jobs and noncommissioned retail work" and temporary workers are more likely to be women).[3]

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[3] *See also, e.g.*, Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* 81 (2000) ("Nearly 60 percent of women hold jobs in traditional women's work such as clerical, sales, and service occupations, which typically pay half to two-thirds of the wages in blue-collar craft work."); Eliza K. Pavalko & Julie E. Artis, *Women's Caregiving and Paid Work: Causal Relationships in Late Midlife*, 52B J. Gerontology: Soc. Sci. S170 (1997) (care of elderly, ill or disabled family members or friends is disproportionately done by women; care often coincides with peak of women's labor force participation, causing many women to reduce hours or stop working altogether).

Likewise, men may be discouraged from seeking jobs in these "women's" fields, even when they otherwise would be attracted to positions affording them flexibility to spend more time at home and with family. *See* Williams & Best, *supra*, at 294. In any job, they may be reluctant to request family leave time because of concerns, real or perceived, that transgressing traditional gender norms will have negative consequences for their careers. *See* Catalyst, *Report on a National Study of Parental Leaves* 65-66 (1986), *reprinted in The Parental & Med. Leave Act of 1986: Joint Hearing Before the House Subcomm. on Labor-Mgmt. Relations & the Subcomm. on Labor Standards of the Comm. on Educ. & Labor*, 99th Cong. 210-11 (1986) [hereinafter 1986 Catalyst Study] (41% of surveyed employers admitted that they believed it was unreasonable for men to use paternity leave offered them); U.S. Dep't of Labor, *A Workable Balance: Report to Congress on Family and Medical Leave Policies* 8 (1996) [hereinafter 1996 DOL Report] ("[M]en who do take substantial periods of leave often face significant negative consequences and stereotyping when they return to work."); *see also* Br. of *Amicus Curiae* Pacific Legal Found. 24 [hereinafter PLF Br.] ("[M]en are reluctant to take leave for family reasons because of the detrimental effect on their careers.").

As a result, working women, rather than their spouses or other male family members, more often assume primary or full responsibility for family tasks, as well as the associated burdens on their employment opportunities. This is true not only with respect to the care of young children, but also for care of ill or elderly family members. *See* 1996 DOL Report at 7; Angie Young, *Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children*, 5 Mich. J. Gender & L. 113, 151 (1998) (women disproportionately assume responsibility for caregiving of elderly parents and parents-in-law and "such

caregiving restricts women's employment opportunities just as child care does"); *Family Caregiving in the U.S.: Findings from a National Survey* 8, 11 (sponsored by AARP and National Alliance for Caregiving, 1997), *available at* http://www.caregiversmarketplace.com/articles.cfm (73% of those caring for elderly relatives and friends are female, and 61% of female caregivers are employed).

B. The Judicial Response to Stereotyping and Associated Gender Discrimination.

1. It is the connection between gender stereotypes and sex inequality that has led this Court to apply heightened scrutiny to gender classifications. Heightened scrutiny is necessary, the Court has explained, because there is such a strong likelihood that gender classifications are premised on "archaic and overbroad generalizations about gender or [are] based on outdated misconceptions concerning the role of females at home rather than in the marketplace and world of ideas." *J.E.B.*, 511 U.S. at 135 (internal quotations and citations omitted). And in part because gender classifications that reflect stereotypes also perpetuate them, such classifications are deemed unconstitutional gender discrimination. *Id.* at 131 (gender discrimination violates Equal Protection Clause "particularly where . . . the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women").

Heightened scrutiny is the tool the Court uses to identify those gender classifications that rest on gender stereotypes and are therefore unconstitutional. By requiring a direct and "substantial" link between the goal of a statute and the gender classification used to achieve that goal, *see Hogan*, 458 U.S. at 724, the Court assures "that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and

women," *id.* at 725-26. And by requiring that the classification advance an "important" state interest, the Court imposes on the State the burden of showing that the purpose behind a classification is not based on stereotypical notions regarding the proper roles of men and women. *See id.* at 730.

Under this searching scrutiny, a gender classification that rests on a sex-role stereotype is unconstitutional even when that stereotype is, as a general matter, factually supportable. That is, the harm done by gender stereotyping is so serious that even a statistically "true" generalization may not be the predicate for state action. *See, e.g., Craig v. Boren*, 429 U.S. 190, 201-02 (1976). Regardless of the general descriptive power of a stereotype, the failure to recognize individual identity over a person's status as a member of a gender group is constitutionally unacceptable. *See United States v. Virginia*, 518 U.S. at 532-33; *Nguyen v. INS*, 533 U.S. 53, 83 (2001) (O'Connor, J., dissenting); *J.E.B.*, 511 U.S. at 153 (Kennedy, J., concurring).

2. Since it began applying this heightened standard to gender classifications in the 1970s, the Court has invalidated a host of state laws on the grounds that they are premised on stereotypes about the natural proclivities of men and women. The propensity of States to act in reliance on gender-role stereotypes caused the "statute books gradually [to] be[come] laden with gross, stereotyped distinctions between the sexes." *Frontiero*, 411 U.S. at 685. Under the standard described above, those statutes and other state classifications based on stereotypes have been judged by this Court to constitute gender discrimination in violation of the Fourteenth Amendment.[4]

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[4] *See, e.g., J.E.B. v. Alabama*, 511 U.S. 127 (1994) (state attorney use of peremptory challenges to remove jurors on basis of sex); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (refusal to admit men to state nursing school); *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (Lou-

As the case load of the federal courts demonstrates, gender stereotyping by the States remains a problem today. *See, e.g., United States v. Virginia*, 518 U.S. 515 (1996) (Virginia state university's refusal to admit women); *Knussman v. Maryland*, 272 F.3d 625 (4th Cir. 2001) (Maryland troopers' denial of family leave to male employee on account of sex); *Arkin v. Oregon*, No. 6:96CV6327 (D. Or.) (filed Dec. 19, 1996) (female faculty member allegedly denied tenure because she had taken maternity leave); *Zimmerman v. Regents of the Univ. of Cal.*, No. 3:99CV4108 (N.D. Cal.) (filed Sept. 7, 1999) (business school's admissions policy challenged as discriminating against women with children). Indeed, the Court takes a kind of judicial notice of that fact when it continues to subject gender classifications to heightened scrutiny, *see, e.g., Nguyen*, 533 U.S. at 60.

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isiana statute giving husband but not wife unilateral right to dispose of jointly owned community property); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980) (Missouri workers' compensation laws denying widowers but not widows benefits unless they are mentally or physically incapacitated or dependent on spouse's earnings); *Caban v. Mohammed*, 441 U.S. 380 (1979) (New York domestic relations law permitting unwed mother but not unwed father to block adoption of their child); *Orr v. Orr*, 440 U.S. 268 (1979) (Alabama alimony statute requiring that men but not women pay alimony after divorcing); *Duren v. Missouri*, 439 U.S. 357 (1979) (Missouri law permitting automatic exemption from jury service for women requesting it); *Craig v. Boren*, 429 U.S. 190 (1976) (Oklahoma statute prohibiting sale of 3.2% beer to men under 21 and to women under 18); *Stanton v. Stanton*, 421 U.S. 7 (1975) (Utah statute extending period of minority to age 21 for males but only to age 18 for females); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (Louisiana state practice of permitting women to be called for jury service only if they previously file a written declaration of desire to serve); *Stanley v. Illinois*, 405 U.S. 645 (1972) (Illinois statute permitting State to assume custody of children of unwed fathers but not unwed mothers without hearing on parental fitness or proof of neglect); *Reed v. Reed*, 404 U.S. 71 (1971) (Idaho probate code preferring men over women for appointment as administrator of a decedent's estate).

II. THE FMLA REMEDIES GENDER DISCRIMINATION BY WORKING TO ERADICATE THE STEREOTYPES THAT ARE BOTH A CAUSE AND A RESULT OF THAT DISCRIMINATION.

The FMLA is but the most recent in a long line of congressional efforts[5] aimed at the "compelling purposes" of eliminating gender-role stereotyping and associated gender discrimination. *See Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (state interest in eradicating gender discrimination is "compelling"). The provisions of the FMLA work independently and in concert to achieve these purposes by undermining the most traditional and entrenched gender stereotypes in the context – the workplace – in which they are most likely to do harm.

Congress enacted the FMLA to "promote the goal of equal employment opportunity for women and men pursuant to [the Equal Protection Clause of the Fourteenth Amendment]." 29 U.S.C. § 2601(b)(5). Like this Court, Congress recognized that equal employment opportunity depends on elimination of gender stereotypes in the workplace, and understood that gender-based generalizations fuel gender discrimination. *See, e.g., id.* § 2601(a)(5) ("[D]ue to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women."); *id.* § 2601(a)(6) ("[E]mployment standards that apply to one gender only have serious potential to discriminate against employees and applicants for employment who are of that gender.").

Toward the end of eliminating gender stereotypes and associated gender discrimination, the FMLA operates, first, to

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[5] *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*; Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k); Equal Pay Act, 29 U.S.C. § 206(d)(1).

ensure that a minimally necessary amount of unpaid family caretaking leave is available. *See id.* § 2612(a)(1)(A)-(C).[6] As discussed below, that leave entitlement serves to counteract the tendency of employers to provide inadequate amounts of family leave in reliance on stereotypes regarding the gendered division of labor within families. Second, the FMLA ensures that such leave is provided to all employees on a gender-neutral basis. *See id.* §§ 2611, 2612. Providing gender-neutral leave further remedies the tendency of employers to make discriminatory leave decisions based on gender stereotypes. Finally, the FMLA provides employees with a monetary remedy, *see id.* § 2617(a), to ensure that its substantive provisions are effectuated.

A. Job-Protected Leave Is Necessary to Prevent Discrimination Based on Gender Stereotypes.

By mandating that some job-protected caretaking leave be made available to workers, the FMLA works to remedy the most traditional of all gender stereotypes: that domestic and workplace responsibilities are divided along gender lines. That stereotype – according to which (male) employees need no leave because their (female) spouses are at home full-time – is sharply out of step with present-day reality: a majority of households have no family member able to take care of domestic responsibilities full-time.[7] As Congress

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[6] Specifically, leave is guaranteed when necessary to care for a newborn, § 2612(a)(1)(A), adopted or foster child, § 2612 (a)(1)(B), or family member with a serious health condition, § 26(a)(1)(C). Because those provisions all serve the same sex-equality end and are all valid on the same rationale, this brief treats them together under the rubric of "caretaking" or "family" leave. To resolve this case, however, the Court need only decide whether § 2612(a)(1)(C) may be the basis for a damages action against a State.

[7] At the time the FMLA was enacted, both spouses worked outside the home in 60% of families. *See Family and Medical Leave Act Poster and Background Paper*, Daily Lab. Rep. (BNA), No. 141, at E-2 (July

found in connection with the Act, "[t]he typical worker is no longer a man supporting a wife who stays at home, with the woman caring for the children and tending to other family needs." H.R. Rep. No. 103-8, at 16 (1993). The FMLA's caretaking leave provisions amount to a statutory requirement that employers cease discriminating against both male and female workers by continuing to rely on outdated stereotypical notions about sex-based divisions of family labor. *Id.* at 17 ("our workplaces are still too often modeled on the unrealistic and outmoded idea of workers unencumbered by family responsibilities"); 137 Cong. Rec. H9714 (1991) (statement of Rep. Clay) (no-leave policies based on "so-called traditional family, in which the father went to work while the wife stayed home to raise the kids").

The denial of job-protected caretaking leave in reliance on this overgeneralization disproportionately burdens women. Women continue to bear more responsibility than men for domestic duties, in part because they continue to earn less than men in the workplace. Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 Geo. L.J. 1903, 1916 (1994) (because men generally earn more than women, often "the only rational economic decision" is for the mother to leave the workforce for reasons relating to parenthood); The FMLA of 1991: Hearing on H.R. 2 Before the Subcomm. On Labor-Management Relations of the House Comm. On Education and Labor, 102d Cong. 128 (1991) (statement of AARP) (same). As a result, when job-protected caretaking leave is not available, it is women more than men who must make adjustments that allow for their home responsibilities –

26, 1993). Moreover, "[a]pproximately 23 percent of all workers with families [had] no spouse in the household to share wage-earning or care-giving responsibilities – and women [] account[ed] for about 80 percent of that group." *See* 1996 DOL Report at 5.

either by moving to jobs that do offer leave, reducing their hours, or withdrawing from the paid workforce altogether. *See* Deborah Rhode, *Justice and Gender* 174 (1989) (at time FMLA was first considered, "[o]ver half of all working women, but only 1 percent of working men, ha[d] reported dropping out of the work force at least once for family reasons."); Pavalko & Artis, *supra*, S170.

Those adjustments have long-term financial consequences for both women and their families. Another stereotype behind the denial of job-protected leave is that women's income is merely "supplemental" to that of their husbands', and that job security is therefore less important to women than to men. In fact, women's employment income has become increasingly critical to family economic stability. And that income suffers dramatically when women are forced to leave their jobs altogether to care for children or other family members. When they finally return to the paid workforce, such women have "substantially lower annual earnings" and suffer greater long-term losses in their retirement income than women who can take job-protected leave. 1996 DOL Report at 52; Kessler, *supra*, at 387; Joyce P. Jacobsen & Laurence M. Levin, *Effects of Intermittent Labor Force Attachment on Women's Earnings*, Monthly Lab. Rev., Sept. 1995, at 15 (women who leave labor force for family responsibilities often return to "much lower" earnings than women who do not leave labor force and have comparable levels of work experience). Indeed, continuity in the paid workforce is so important to women's economic security that it is estimated that even unpaid job-protected maternity leave would close up to 43 percent of the salary gender gap for affected women. 1996 DOL Report at 53 (citing Jane Waldfogel, *The Family Gap for Young Women in the U.S. and UK: Can Maternity Leave Make a Difference* (Kennedy School of Gov't, Harvard University, May 1994)).

The fact that women are more often forced to leave work

in order to perform caretaking tasks is itself a product of gender stereotypes and associated discrimination. But the failure of employers to provide job-protected leave also causes the entrenchment and perpetuation of those same stereotypes. That women regularly must leave the workforce in order to fulfill caregiving responsibilities only enhances the impression that women are specially suited for the domestic role – and less suited than men to the paid workforce. In short, the full discriminatory dynamic that this Court has recognized and condemned, *see Hogan*, 458 U.S. at 730, plays out in connection with the denial of caregiving leave.

By providing a right to job-protected leave in situations where caretaking tasks arise, Congress combats that pernicious dynamic. Providing a minimum leave entitlement allows women to fulfill domestic duties without being forced to leave their jobs – and, at the same time, allows men to take on greater domestic duties. Only in that way can Congress interrupt the vicious cycle of stereotyping and discrimination that results when women, and not men, are forced to leave the workforce in order to assume the caretaking role they have historically been assigned.[8]

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[8] The personal disability, or pregnancy, provision of the FMLA, 29 U.S.C. § 2612(a)(1)(D), operates similarly, preventing employers from forcing women out of the workplace because of stereotypical notions about pregnancy. *Cf. Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 634 (1974) (evaluating constitutionality of policies mandating that expectant mothers cease working several months before their expected due dates). Though it is framed in terms of disability, this provision should not be confused with provisions of the Americans with Disabilities Act (ADA) considered in *Garrett v. University of Alabama Board of Trustees*, 531 U.S. 356 (2001). The fact that Congress used non-pregnancy specific language in the FMLA reflects a longstanding congressional commitment to treating all disabilities, including pregnancy, equally and in a gender-neutral manner. *See, e.g.*, Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k). Unlike the provisions of the ADA, the FMLA's pregnancy provision is directly motivated by and responsive to discrimi-

B. A Gender-Neutral Leave Entitlement Is Required to Prevent Discrimination Based on Gender Stereotypes.

The FMLA does more than guarantee job-protected caretaking leave; it guarantees that leave to men as well as women. As this Court has recognized, gender stereotypes harm both sexes. Such overgeneralizations can lead to discrimination against men or women or both. *See, e.g.*, *Orr*, 440 U.S. at 279 ("The fact that the classification expressly discriminates against men rather than women does not protect it from [heightened] scrutiny."). The gender-neutral requirement of the FMLA is essential to remedy such discrimination, both by making discriminatory leave practices illegal and by undermining the viability of the stereotypes that support them.

Men have long faced discrimination and unequal opportunities with respect to caretaking leave. *See* 1986 Catalyst Study at 210-11 (63% of companies do not believe it is reasonable for men to take any parental leave at all; among companies offering paternity leave, 41% believe it is unreasonable for men to use it); 1996 DOL Report at 171 (69% of worksites had to change their policies to provide family leave to male employees in order to comply with FMLA). The States are no exception. *See Knussman*, 272 F.3d at 630 (male state trooper told that child's mother would have to be "in a coma or dead" for him to be granted caretaking leave).

Making leave available in a gender-neutral manner directly addresses discrimination based on the stereotypical notion of women as "natural" caretakers. *See id.* at 629-30. At the same time, it works to undermine the stereotypes that underlie the discrimination, encouraging male employees to

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nation against women disabled by pregnancy. Of course, the pregnancy provision is not directly implicated by the facts of this case.

take leave and their employers to view male leave-taking as acceptable. As one of petitioners' own *amici* explains, "The gender-neutral language of the FMLA is intended to make it more acceptable for men to take family leave despite strong cultural (and many individual) preferences for women to assume caretaking roles in two-parent households." PLF Br. at 24. The FMLA has succeeded in enabling men to take family leave. *See* Rosemarie Feuerbach Twomey & Gwen E. Jones, *The Family and Medical Leave Act of 1993: A Longitudinal Study of Male and Female Perceptions*, 3 Employee Rts. & Emp. Pol'y J. 229, 240 (1999) (statistically significant increase in percentage of men who requested leave between 1992 and 1998). As even more men take advantage of the caretaking leave to which they are now entitled, the stigma of taking leave in order to do "women's work" will dissipate still further. *See* Donna Lenhoff & Claudia Withers, *Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace*, 3 Am. U. J. Gender & Law 39, 49-50 (1994) ("By granting both female and male employees the right to family and medical leave, the FMLA may help to change society's perception of child care, elder care, and other dependent care as 'women's work.'").

Providing that opportunity to men also works to remedy discrimination against women. When men take family leave, it helps to reduce women's disproportionate caretaking burden and thus enhances women's workplace options. Male leave-taking also combats the tendency of employers to presume that women are the primary caretakers and, as such, less likely than men to be dependable and responsible workers. Relatedly, providing men with an equal entitlement to leave minimizes the risk that employers will prefer male candidates on the assumption that men, unlike women, will not require or take leave for domestic caretaking tasks. *See* 29 U.S.C. § 2601(a)(6) ("[E]mployment standards that apply to one gender only have serious potential to discriminate

against employees and applicants for employment who are of that gender.").

None of these gains for workplace equality could be achieved with a gender-*specific* leave provision, one that applied to women but not men. Indeed, a women-only leave entitlement would be counter-productive in important ways, codifying and perpetuating the stereotype that women are specially suited for caretaking responsibilities. Only by providing the same leave entitlement to all workers could Congress give both men and women the opportunity and incentive to make decisions without regard to their gender or associated role-typing. This has the immediate effect of broadening the opportunities available to both men and women: when decisions may be based on an individual worker's particular situation and aptitudes, more men and fewer women will take leave in order to perform domestic tasks. *See* Twomey & Jones, *supra*, at 240 (statistically significant increase in percentage of men requesting caretaking leave after enactment of FMLA); *compare* 1996 DOL Report App. E, at 267 *with* David Cantor *et al.*, U.S. Dep't of Labor, *Balancing The Needs of Families and Employers* App. A-2, at A-2-5 (2000) (showing increase in percentage of male leavetakers taking paternity leave, from 14.5% in 1995 to 22.8% in 2000). It also provides a future benefit through the corresponding reduced propensity of employers to associate domestic tasks exclusively with women, and to make employment decisions based on that stereotype.

C. The Availability of Monetary Relief Is Crucial to Enforcement of the FMLA.

Contrary to the picture painted by petitioners, a ruling that the FMLA does not abrogate the States' immunity from monetary liability would have serious and dramatic consequences for enforcement of the statute. The monetary awards available under the FMLA are carefully circum-

scribed and consist mainly of equitable relief in the form of back-pay. That limited monetary relief is absolutely necessary to the effective operation of the Act.

The same is true of any number of other civil rights statutes. Indeed, Congress included a damages remedy in the FMLA for precisely the same reasons it allows back-pay awards under other employment-related civil rights statutes, such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* Congress included back-pay remedies in those laws to ensure both that employees injured by unlawful deprivations of their rights would be made whole, and that employers would have an incentive to comply with the law. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-19 (1975). Congress had in mind the same "twin statutory objectives" when it enacted the FMLA's monetary damages provision. *See* H.R. Rep. No. 100-511 pt. 2, at 44-45 (1988); S. Rep. No. 100-447, at 46-47 (1988); H.R. Rep. No. 101-28, pt. 1, at 37 (1989); S. Rep. No. 101-77, at 47-48 (1989).

Only monetary relief can make whole an employee who is deprived of FMLA-protected rights. The injunctions offered up by petitioners as a substitute, *see* Pet. Br. 20, are wholly inadequate. Imagine a state employee who asks for and is illegally denied job-protected leave to take care of an ailing parent. Her choices are two: she can leave her job to assume her caretaking responsibilities, or she can forgo her caretaking responsibilities in order to keep her job. In neither case can injunctive relief make her whole. If she leaves her job (or takes what she thinks is job-protected FMLA leave only to lose her job), an injunction reinstating her after lengthy litigation cannot compensate her for the salary she would have earned, or for other out-of-pocket expenses – for example, medical expenses – that she may incur while the judicial process runs its course. If she stays in her job – the

"choice" that will be forced on most employees by financial necessity – an injunction does no good at all. FMLA caretaking leave is by its nature time-sensitive, and court-ordered leave that comes only after an elderly parent has recovered – or perhaps died – is beside the point. The only meaningful remedy is reimbursement for the cost of hiring a caretaker during the time when the employee was entitled to be at home.

Nor can it be assumed that injunctive relief will be available whenever a state employee has been deprived of FMLA-protected rights. The individual circumstances of many such cases may preclude injunctive relief altogether. *See, e.g., Dawson v. Leewood Nursing Home, Inc.*, 14 F. Supp. 2d 828 (E.D. Va. 1998) (no reinstatement when wrongfully terminated employee has become incapacitated by illness and is unable to return to work); *Miller v. AT&T*, 83 F. Supp. 2d 700, 708 (S.D.W. Va. 2000) (reinstatement might be inappropriate in an FMLA case when the employer-employee relationship is so hostile that there is no longer any possibility of a productive and amicable relationship); *cf. Pollard v. E.I. DuPont de Nemours & Co.*, 532 U.S. 843 (2001) (same, in Title VII case). In short, injunctive relief falls far short of promising to make state employees whole when they are illegally denied FMLA leave.

Injunctive relief is similarly inadequate with respect to employer incentives. Without the prospect of monetary liability, States would have no real incentive to comply with the FMLA. For one thing, they would know that the absence of a monetary remedy makes it unlikely that employees will sue even if their rights are violated: very few employees will undertake the difficulties of litigation if they know that they cannot be made whole if they prevail, and still fewer if they cannot recover attorneys' fees and litigation costs. *Cf. Mitchell v. OsAir, Inc.*, 629 F. Supp. 636, 643 (N.D. Ohio 1986) ("There is little incentive for a plaintiff to bring a Title

VII suit when the best that she can hope for is an order to her supervisor and to her employer to treat her with the dignity she deserves . . . ."). And even if an aggrieved employee did sue for injunctive relief, the worst-case scenario for the employer would be an order of reinstatement – leaving the State no worse off than if it had complied in the first instance, and with a windfall equivalent to the wages and benefits it should have paid during the intervening time. This is all well-understood with respect to other civil rights statutes. *See, e.g., Albermarle Paper*, 422 U.S. at 417-18 ("If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that 'provide(s) the spur or catalyst which causes employers . . . to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible' [the unlawful conduct].") (citation omitted). The FMLA is no exception.

Contrary to petitioners' suggestion, Pet. Br. 4, 20, there are no other remedial alternatives that would fill the gap left by an absence of monetary damages. An *Ex Parte Young* action against state officials, for example, can provide only injunctive relief, and thus suffers from all of the same inadequacies as an FMLA action without a right to damages. It is not at all clear that employees whose FMLA rights are violated have a cause of action under § 1983. *See, e.g., Jolliffe v. Mitchell*, 971 F. Supp. 1039, 1045 (W.D. Va. 1997) (FMLA "provides a comprehensive enforcement scheme which forecloses a section 1983 claim").[9] And administra-

[9] Of course, a state employee could bring a § 1983 action for a denial of leave that violated the Constitution as well as the FMLA. But when a FMLA violation is coextensive with a constitutional violation, there is no question but that the FMLA itself, including its damages remedy, may be applied against the States. Nobody disputes that to the extent the Act proscribes and remedies conduct unconstitutional under the Fourteenth

tive enforcement of the Act is too limited to have much effect. The Department of Labor ("DOL") enforcement resources allow it to bring only a few cases each year; in the first six years of the FMLA's life, the DOL filed a total of 32 enforcement actions. *See* U.S. Dep't of Labor, *The Family and Medical Leave Act (FMLA): 74 Months of Enforcement and Outreach Activity* (Aug. 5, 1993 – Sept. 30, 1999) (DOL fact sheet on file with NWLC). The six million state employees nationwide cannot rely on the federal government to vindicate their FMLA rights, and States have little reason to fear a DOL enforcement action against them for noncompliance with the FMLA.

As a practical matter, only a monetary remedy can make the substantive provisions of the FMLA effective. In the real world, petitioners' challenge to the FMLA's back-pay and damages provisions amounts to a challenge to Congress' authority to regulate state employment practices at all. Indeed, petitioners themselves appear to understand that what is at issue here is nothing less than "Congress's authority to regulate the employment policies of sovereign States." Pet. Br. 3; *see also* Cert. Pet. 15, 23-24 (describing States' uncertainty about whether they are required to *comply* with the FMLA). This Court, of course, has made clear that Congress does have the authority to regulate the States as employers. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985). Congress should not be deprived of the practical tools it needs to make that authority meaningful – least of all with respect to a statute that seeks to remedy gender stereotyping and associated inequalities for which the States bear great responsibility.

Amendment, it is a valid exercise of § 5 authority to which the States are fully subject. In short, to the extent § 1983 provides a damages remedy under those circumstances, it is superfluous to the remedy already provided by a clearly valid application of the FMLA to state employers.

III. RESPONDING TO THE JUDICALLY RECORDED INJURY OF UNCONSTITUTIONAL GENDER DISCRIMINATION BY THE STATES, CONGRESS PROPERLY EXERCISED ITS POWER UNDER § 5 OF THE FOURTEENTH AMENDMENT.

Congress deliberately made the FMLA applicable to state employers. In so doing, it relied on its authority under § 5 of the Fourteenth Amendment, which allows it to abrogate state sovereign immunity. *See, e.g., Kimel v. Florida Board of Regents*, 528 U.S. 62, 80 (2000). While petitioners are wrong to assert that Congress was required to invoke its § 5 authority explicitly on the face of the statute, Pet. Br. 17, in fact Congress did do so in this particular instance, *see* 29 U.S.C. § 2601(b)(5). Congress clearly sought to promote equality by eradicating traditional barriers that limit opportunities for both men and women. And the FMLA clearly falls within Congress' § 5 power, as a statute targeted at stereotypes that both derive from unconstitutional gender discrimination and are a source of contemporary discrimination.

A. A Judicial Record of Unconstitutional Discrimination Is Sufficient to Support Remedial Legislation Under § 5.

This Court's own gender-discrimination case law, *see supra* Part I, does more than explain the discriminatory dynamic that the FMLA addresses. It also has independent legal significance in a case involving Congress' authority to enact remedial legislation under § 5. In this context, the Court's case law serves as a "judicial record" of unconstitutional gender discrimination by the States. The existence of that record makes parallel legislative findings of unconstitutional state practices unnecessary.

Petitioners argue that *Kimel* and *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), require that Congress compile a significant legislative record of unconstitutional state con-

duct before it may exercise its § 5 authority. Pet. Br. 31. Whether or not that is true in cases like *Kimel* and *Garrett*, *see, e.g.*, *Kimel*, 528 U.S. at 91 ("lack of support [in the legislative record] is not determinative of the § 5 inquiry"), it is not true here. No such requirement could sensibly apply when the statute in question is aimed at remedying discrimination against a class entitled to heightened scrutiny under the Court's own Fourteenth Amendment doctrine.[10]

Both *Kimel* and *Garrett* turn critically on the fact that the statutes at issue purported to remedy discrimination that is subject only to rational basis scrutiny. As the Court explained in *Kimel*, a classification based on age is "unlike governmental conduct based on race or gender." 528 U.S. at 83. Age classifications are not subject to heightened scrutiny because the Court has not been of the view that age classifications generally or often "reflect prejudice and antipathy." *Id.* Because the Court's Equal Protection jurisprudence holds that discrimination against the aged rarely rises to the level of unconstitutionality, the Court in *Kimel* put Congress to the burden of demonstrating through some alternate means that a constitutional problem did indeed exist. *Id.* at 91 (absence of legislative findings of unconstitutional age discrimination by the States "*confirms* that Congress had no reason to believe that broad prophylactic legislation was necessary in this field") (emphasis added). Congressional findings, that is, are but "[o]ne means" by which the Court may satisfy itself that discrimination against a given group is of constitutional concern when the Court's own case law is to the contrary. *Id.* at 88.

Garrett is consistent with *Kimel* in this respect. In a separate concurrence, Justices O'Connor and Kennedy – two

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[10] Though legislative findings are not necessary here, Congress did in fact make ample findings supporting its exercise of § 5 authority. *See* Brief of Respondent Hibbs Part I.D.

of the five Justices in the *Garrett* majority – agreed that there was not a sufficient showing of unconstitutional discrimination against persons with disabilities. That problem could have been cured, however, not only by congressional findings, but also by "confirming *judicial* documentation." 531 U.S. at 376 (emphasis added). "If the States had been transgressing the Fourteenth Amendment . . . one would have expected to find in decisions of the courts of the States and also the courts of the United States extensive litigation and discussion of the constitutional violations." *Id.* at 375-76.

That, of course, is precisely what we have here. The injury Congress seeks to remedy through the FMLA is the same evil that has compelled this Court to require heightened scrutiny of gender classifications. The Court's own case law serves as just what the Court found notably absent in *Kimel* and *Garrett* : a judicial record of unconstitutional State conduct. *Compare Kimel*, 528 U.S. at 82-83 (examining case law involving claims of unconstitutional age discrimination and finding it lacking) *with South Carolina v. Katzenbach*, 383 U.S. 301, 309-11 & n.5 (1966) (relying on case law documenting unconstitutional state voting practices to uphold validity of Voting Rights Act under § 5). Congress generally is presumed to legislate against the backdrop of this Court's case law, *see Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978), and it should be entitled to do so here.

In the § 5 context as in others, legislative findings may help the Court to understand facts and circumstances with which it would otherwise be unfamiliar. *See, e.g., United States v. Lopez*, 514 U.S. 549, 562 (1995) (formal congressional findings are not required but may be helpful to Court in evaluating legislative judgments that are not self-evidently correct). But here, the Court's own case law puts it in a perfectly good position to understand both the existence of unconstitutional state gender discrimination and the crucial link between that discrimination and the gender stereotypes at

which the FMLA is aimed. Given the Court's own judicial record, there is no reason to require that Congress make parallel, superfluous legislative findings. Nothing in *Kimel* or *Garrett* compels that result, and there is no reason to attribute such an irrational requirement to this Court.[11]

B. The FMLA Is a Permissible Exercise of § 5 Authority.

1. In some of its applications (*e.g.*, requiring that leave be made available to men as well as women), the FMLA prohibits only behavior that is unconstitutional, and thus raises no question as to validity under § 5. *See supra* n.9. At issue here are the respects in which the FMLA goes further, and regulates conduct (*e.g.*, denial of leave to men and women alike) that might be upheld as constitutional by the courts. Even those provisions of the FMLA that do not directly regulate unconstitutional behavior, however, do proscribe practices that reflect and perpetuate the stereotypes that are the root cause of unconstitutional gender discrimination. That is precisely the "'broader swath'" of conduct that Congress is permitted to make illegal pursuant to § 5. *Garrett*, 531 U.S. at 365.

Katzenbach v. Morgan, 384 U.S. 641 (1966), and *City of Rome v. United States*, 446 U.S. 156 (1980) – reaffirmed on several recent occasions, *see, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997) – prove the point. In *Morgan* and *City of Rome*, the Court established that Congress' § 5 authority extends to the prohibition of state practices that, though themselves constitutional, have a disparate impact on

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[11] This analysis applies fully to the FMLA's damages provisions. The Court has acknowledged repeatedly that Congress may make money damages available pursuant to its § 5 authority, especially when there is a "documentation of patterns of constitutional violations committed by the State." *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring). This should be no less true when the documentation is judicial rather than legislative.

protected classes and a clear link to entrenched unconstitutional behavior by the states. *Morgan* approves a congressional ban on the use of English literacy tests as a voting qualification. Though not unconstitutional, the tests had the effect of making it difficult or impossible for non-English speaking immigrants to vote, 384 U.S. at 652, and were linked, the Court was concerned, to prejudice against immigrants, *id.* at 654. That was enough to justify congressional action under § 5. *City of Rome* clarifies that Congress may ban electoral practices that are discriminatory in effect even if the Constitution reaches only intentional discrimination, at least so long as there is some connection to unconstitutional behavior. 446 U.S. at 175-77; *see also South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (same).[12]

Similarly, the FMLA prohibits a practice – the denial of caretaking leave – that disproportionately burdens women and is inextricably linked to unconstitutional gender discrimination. *See supra* Part II.A. Even if States do not intentionally discriminate against women by denying leave to all their employees, Congress reasonably could conclude that stereotypes about the gender-based division of labor – that is, a presumption that employees have spouses at home to attend to domestic duties – "play[] a prominent role" in adoption of such no-leave policies. *Morgan*, 384 U.S. at 654; *see supra* at 12-13 (supporting legislative history). And the connection works both ways. Just as denial of voting rights in *Morgan* was a result of historical discrimination and also a cause of continuing discrimination, *see id.* at 652 (denial of franchise makes it more difficult for Puerto Ricans to gain nondiscriminatory treatment in public services), so denial of

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[12] *City of Rome* and *South Carolina v. Katzenbach* involve Congress' power under the enforcement clause of the 15th Amendment, rather than the 14th. This Court has construed the two clauses as coextensive. *See City of Rome*, 446 U.S. at 176.

family leave reflects and also further entrenches stereotyped notions of proper sex roles, *see supra* Part II.A.

In *Kimel*, *Garrett*, and *City of Boerne*, the Court invalidated congressional legislation that it believed to be inconsistent with its own approach under the Equal Protection and Free Exercise Clauses. *Amici* believe that those cases are wrongly decided. What is important here, however, is that the concerns the Court expressed in those cases have no application to this one. The FMLA furthers principles established by this Court's Equal Protection jurisprudence, and supplements the judicial effort to dismantle the underpinnings and effects of unconstitutional gender discrimination. That congressional contribution, like those approved in *Morgan* and *City of Rome*, is well within the § 5 authority.

2. In more recent cases that do not involve efforts to address practices that have a disparate impact on classes specially protected under the Equal Protection Clause, this Court has applied a "congruence and proportionality" standard to purported § 5 legislation. *See, e.g.*, *Kimel*, 528 U.S. at 81. It is not at all clear that a statute like the FMLA – which does address practices with disproportionate effects on a specially protected class, and which is squarely governed by cases like *Morgan* and *City of Rome* – is properly reviewed under that standard. *See generally* Br. of *Amicus Curiae* Lawyers' Comm. for Civil Rights. But the Court need not decide that question here, for the provisions of the FMLA are "congruent and proportional" to the harm addressed.

Contrary to petitioners' argument, the fact that the FMLA specifies a twelve-week minimum for job-protected leave does not somehow take the leave provisions outside the scope of Congress' remedial authority. This Court itself is empowered to establish prophylactic rules that are not directly required by the Constitution, and also to specify the precise form that those prophylactic measures shall take. *See*

Dickerson v. United States, 530 U.S. 428 (2000) (*Miranda* warnings). Congress' remedial power, expressly granted by § 5 of the Fourteenth Amendment, is no more limited. *See Morgan*, 384 U.S. at 650 (broad scope of Congress' remedial power under § 5).

Twelve weeks represents Congress' assessment of the period of time that most fairly balances the needs of the many workers who wish to remain home to fulfill caretaking responsibilities with the needs of their employers. Striking that balance is peculiarly within the legislative expertise, and there is no reason for this Court to second-guess Congress' expert judgment here. *Cf. Morgan*, 384 U.S. at 656 ("Congress' prerogative to weigh [] competing considerations"); *id.* at 657-58 (under "familiar principle[] that a 'statute is not invalid under the Constitution because it might have gone farther than it did,'" limited measures chosen by Congress are valid under § 5) (citation omitted).

The FMLA's money damages provision is also entirely congruent and proportional to the economic injury it addresses. As discussed above, making monetary relief available is crucial to the FMLA's effectiveness. *See* Part II.C, *supra*. Exempting the States from exposure to monetary liability – and the incentive that remedy provides – will have the predictable effect of leaving state workers without any practical protection under the FMLA.

At the same time, subjecting the States to the FMLA's damages provisions does not expose them to unpredictable or open-ended damages liability. Because the Act's provisions are so specific and straightforward, States will have little difficulty assessing whether they are in compliance and need not fear unanticipated damages liability. And the monetary relief provided for by the FMLA is modest. State employees whose rights are violated may receive either back-pay awards or, if no back-pay is warranted, awards for

actual monetary losses capped at a sum equivalent to twelve weeks of wages. 29 U.S.C. § 2617(a)(1)(A)(i)(II). Liquidated damages are available only when a State has failed to act in good faith, and even then are limited to twice an employee's actual losses, 29 U.S.C. § 2617(a)(1)(A)(iii). Punitive damages and damages for emotional distress are not available at all. *See, e.g.*, *Settle v. S.W. Rodgers, Co.*, 998 F. Supp. 657, 666 (E.D. Va. 1998), *aff'd* 182 F.3d 909 (4th Cir. 1999) (no punitive damages); *Walker v. UPS*, 240 F.3d 1268, 1277 (10th Cir. 2001) (no emotional distress damages). In short, the damages provisions are carefully crafted to protect the legal rights of state workers without unduly intruding on the dignity of the sovereign States.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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APPENDIX A

INTEREST OF AMICI CURIAE

For over a century, the American Association of University Women (AAUW), an organization of 150,000 members, has been an advocate for the advancement of women in the workforce. AAUW members work to promote education and equity for all women and girls, lifelong learning, and positive societal change. AAUW was a leader in the enactment of the FMLA because we have long been committed to promoting policies that allow women to advance in the workplace. Therefore, we believe that any effort to weaken the FMLA will adversely impact women's opportunity in the workplace. AAUW plays a major role in advocating nationwide on issues to promote equity for women in the workplace, education, and civil rights.

* * *

AARP is a nonprofit membership organization serving more than thirty-five million persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. Approximately 45 percent of AARP's members are employed, most of whom are protected by the FMLA. One of AARP's primary objectives is to protect its members by removing barriers to employment such as the potential threat of losing one's job as a result of caring for an ill spouse or relative. In pursuit of this objective, AARP has since 1985 filed more than 200 *amicus* briefs before this Court and the federal appellate and district courts.

* * *

Founded in 1915, the American Association of University Professors (AAUP) is an organization of approximately 44,000 faculty members and research scholars in all academic disciplines. Among the AAUP's central functions is

the development of policy standards on a number of key issues in higher education, including academic freedom, tenure, and freedom from discrimination. *See, e.g., On Discrimination,* AAUP Policy Documents & Reports (2001 ed.). As this Court has recognized, AAUP's policies are widely respected and followed as models in American colleges and universities. *See, e.g., Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 579 n. 17 (1972); *Tilton v. Richardson,* 403 U.S. 672, 681-82 (1971). AAUP and its members are deeply concerned that holding public entities, such as state universities, immune from the FMLA will impair the ability of professors and other academic professionals to protect themselves from gender discrimination in the workplace based on family responsibilities. *Statement of Principles on Family Responsibilities and Academic Work* (2001) (www.aaup.org).

* * *

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, non-partisan organization of more than 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU Women's Rights Project (WRP), founded in 1971 by Ruth Bader Ginsburg, has been a leader in ensuring that employment environments support men and women as they balance work and family obligations. In its docket are cases that seek to ensure equal access to leave time under the FMLA, including *Knussman v. Maryland*, 272 F.3d 625 (4th Cir. 2001), in which a federal appeals court ruled that the Maryland State Police could not escape liability for their discriminatory treatment of a male state trooper who was denied leave to care for his newborn baby because of a policy that limited parental leaves of absence to "mothers only." The ACLU has appeared before this Court in numerous cases involving the proper interpretation of civil rights laws and has fought to ensure that all individuals, regardless of race, gender, or other protected characteristic,

have equal opportunities in the workplace. This case involving the scope of Congress' authority to enact the FMLA is a matter of significant concern to the ACLU.

* * *

The American Jewish Committee (AJC), a national human relations organization with over 115,000 members and supporters and 33 regional chapters, was founded in 1906 to protect the civil and religious rights of Jews. It is the conviction of AJC that those rights will be secure only when the civil and religious rights of all American are equally secure. Out of its historical commitment to a federal roles in the civil rights arena, AJC participated as *amicus* in *City of Boerne v. Flores* and *Morrison v. Brzonkala* and does so again here in support of Congress' use of its Fourteenth Amendment enforcement power to remedy constitutional deprivations.

* * *

The Anti-Defamation League (ADL) was founded in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment to all citizens alike. It has long been ADL's critical mission to combat all types of prejudice, discriminatory treatment, and hate. ADL has supported the enactment by Congress and the vigorous enforcement by the Executive Branch of our country's principal federal civil rights laws, and has consistently made its voice heard in the courts as an advocate fighting to guarantee equal treatment of all persons. In particular, ADL has filed *amicus* briefs in this Court in numerous cases urging the unconstitutionality or illegality of discriminatory practices or laws, or defending government enactments designed to prevent or punish discrimination and hate. These include many of the Court's landmark cases in the area of civil rights and equal protection, as well as several cases addressing Commerce Clause issues in connection with civil rights enactments.

* * *

Business and Professional Women/USA (BPW/USA) is a nonprofit membership organization comprised of 30,000 working women in 1,600 local organizations around the country. Founded in 1919 by suffragettes, BPW/USA's mission is to achieve equity for all women in the workplace through advocacy, education and information. BPW/USA's National Legislative Platform focuses on workplace equity and work-life balance, with the membership supporting programs, policies, and laws such as the FMLA that assist workers fulfill both their work and family responsibilities.

* * *

The Center for Constitutional Rights (Center) is a national, non-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution. Founded in 1966 during the Civil Rights Movement, the Center has a long-standing history of assisting those people who, as a result of discriminatory policies, practices and effects, have been denied the rights, benefits, and privileges attendant to living in the United States. As part of its advocacy and litigation on behalf of those whose rights have been violated, the Center has and continues to litigate cases under the civil rights laws of this country.

* * *

The Center for Women Policy Studies is a multiethnic and multicultural feminist research, policy analysis and advocacy organization which brings women's diverse voices to important debates – on women and AIDS, violence against women and girls, welfare reform, access to health care, educational equity, employers' work/family and workplace diversity policies, reproductive rights and health, and many other critical issues.

* * *

The Connecticut Women's Education and Legal Fund (CWEALF), founded in 1973, is a non-profit women's rights

organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF has spent much of its history defending the rights of individuals in the courts, workplaces and in their private lives. CWEALF joins this brief as *amicus curiae* because we believe the FMLA should provide essential protections for all workers as they care for family members and themselves. The broadest remedies will ensure that employers comply with the protections of the FMLA. The FMLA is an important remedy for sex discrimination and the Ninth Circuit decision should be affirmed.

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The Disability Rights Education and Defense Fund, Inc., (DREDF), based in Berkeley, California, is the nation's premier law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. Founded in 1979, DREDF pursues its mission through education, advocacy and law reform efforts. DREDF is nationally recognized for its expertise in the interpretation of disability rights laws, and its work related to a wide range of federal civil rights statutes.

* * *

The Epilepsy Foundation® is the sole national, nonprofit health organization dedicated to advancing the interests of the more than two million people with epilepsy and seizure disorders. The Foundation, along with its affiliates across the country, works to improve the quality of life and promote the rights of all people with epilepsy through education, research and advocacy. Epilepsy affects people of all ages, including children. Many parents and other family members need to take time off from work to care for a family member with a seizure disorder, either because of the seizures themselves or the side effects of the medical treatment. Fortunately, because of the federal FMLA and its remedies, these families are not forced to choose between their jobs and

families, or choose their family's economic security over its physical health.

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Equal Rights Advocates (ERA) is one of the oldest women's law centers in the country. Founded in 1974 as a teaching law firm, ERA's mission is to protect and secure equal rights and economic opportunities for women and girls through litigation and advocacy. ERA litigates high-impact cases on issues of gender discrimination in employment and education. ERA also provides legal advice and counseling to hundreds of individuals each year through a telephone hotline. Since its inception, ERA has focused much of its effort on ensuring that employees' rights related to pregnancy and family and medical leave are fully protected in the workplace. ERA represented plaintiffs in two of the first pregnancy discrimination cases heard by the Supreme Court, *Geduldig v. Aiello*, 417 U.S. 484 (1974), and *Richmond Unified School District v. Berg*, 434 U.S. 158 (1977). More recently, ERA has advised and represented individual employees on the application and interpretation of the FMLA. ERA believes that ensuring fundamental equality for women and men in the workplace requires that employees not be forced to choose between economic security and the physical well-being of themselves or their family members.

* * *

The Feminist Majority Foundation (FMF) is a non-profit organization with offices in Virginia and Los Angeles. FMF is dedicated to eliminating sex discrimination and to the promotion of equality, women's rights, and safe access to reproductive health care. FMF worked with other organizations to pass the FMLA. FMF strongly supports the FMLA because the act increases women's ability to participate in the workplace and helps remedy the discrimination women often face in the workplace because of their family obligations. Because of the FMLA's importance to women's equality and

full participation in the workplace, FMF urges this Court to affirm the Ninth Circuit's decision and continue to protect state employees under the FMLA.

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The Mexican American Legal Defense and Education Fund (MALDEF) is a national civil rights organization established in 1968. Its principal objective is to secure and protect, through litigation, advocacy, and education, the civil rights of Latinos living in the United States. MALDEF has litigated numerous cases in the area of employee rights since the organization's founding. Preserving the right of Latinos to be free of discrimination in all aspects of employment is a primary goal of MALDEF's Employment program. An equally important organizational goal is to preserve the right of Latinos in all sectors, including public employment, to access all of the benefits of employment provided by law.

* * *

The National Association of Protection and Advocacy Systems (NAPAS) is the membership organization for the nationwide system of protection and advocacy (P&A) agencies. Located in all 50 states, the District of Columbia, Puerto Rico, and the federal territories, P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all persons with disabilities in a variety of settings. The P&A system comprises the nation's largest coordination of P&A activities and provides training and technical assistance to the P&A network. This case is of particular interest to NAPAS because many state workers care for family members with disabilities. If the protections of the FMLA are not available to these workers, their family members will be deprived of needed care.

* * *

The NARAL Foundation's mission is "To support and protect, as a fundamental right and value, a woman's free-

dom to make personal decisions regarding the full range of reproductive choices through education, training, organizing, legal action, and public policy." In keeping with the "full range" part of our mission, the Foundation and our sister organization, NARAL, Inc., supported the FMLA, scoring it in NARAL's annual Congressional Record on Choice publication, and the NARAL Foundation/NARAL opposes narrow constructions of the Act that undermine its promise.

* * *

The National Council of Jewish Women (NCJW), Inc. is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy and community service to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1893, the National Council of Jewish Women has 90,000 members and supporters in over 500 communities nationwide. Given NCJW's early and active involvement in passage of the FMLA and NCJW's *National Resolutions*, which support "laws, policies and employment practices that allow workers to meet both family and work responsibilities," we join this brief.

* * *

The National Council of Negro Women (NCNW) is a voluntary nonprofit membership organization that works through advocacy and community programming at the local, national, and international level to help women of African descent to improve the quality of life for themselves, their families, and communities. Founded by Mary McLeod Bethune in 1935, NCNW is an "organization of organizations" which, through its affiliated constituency-based organizations and 250 community-based sections, reaches four million women. The NCNW is the founder of the annual Black Family Reunion Celebrations across the country, and consid-

ers the FMLA an important support for workers and their families.

* * *

The National Education Association (NEA) is a nationwide employee organization with approximately 2.7 million members, the vast majority of whom are employed by public school districts, colleges, and universities. NEA is strongly committed to ending gender discrimination by educational institutions and, to this end, firmly supports the vigorous enforcement of the FMLA.

* * *

The National Employment Lawyers Association (NELA) is a voluntary membership organization of more than 3,000 lawyers who regularly represent employees in labor, employment, and civil rights disputes. NELA is one of the largest organizations in the United States whose members litigate and counsel individuals, employees, and applicants on claims arising out of the workplace. As part of its advocacy efforts, NELA has filed numerous *amicus curiae* briefs before the U.S. Supreme Court, singly or jointly with other *amici.* Recent cases include *Ragsdale v. Wolverine,* 122 S.Ct. 1155 (2002); *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001); and *Reeves v. Sanderson Plumbing Products,* 530 U.S. 133 (2000). The interest of NELA in this case is to protect the rights of their members and members' clients, by ensuring that the FMLA's goal of providing designated leaves of absence is fully realized. This goal will be partially thwarted if the large number of state government employees in this country are excluded from the statute's protection. *Amicus* submits this brief because of the importance of the issues at bar to furthering its goals.

* * *

The National Employment Law Project (NELP) is a nonprofit legal organization that has advocated for the employment rights of low-wage and unemployed workers for over

27 years. NELP works in partnership with community-based and national advocacy organizations, with labor unions, academic institutions, policy makers and government agencies at all levels. NELP's areas of expertise include the family and medical leave laws, unemployment insurance, discrimination, immigrant worker issues, and economic justice issues generally, including the employment rights of workfare participants. NELP has a network of over 350 legal services and community-based organizations, and labor unions across the country that advocate for low-wage workers.

* * *

The National Health Law Program (NHeLP) is a national public interest law firm working to increase and improve access to quality health care on behalf of limited income people by providing legal and policy analysis, advocacy, information and education. NHeLP has also focused on the particular challenges that face families with children. Since its inception over thirty years ago, NHeLP has developed expertise on publicly funded health care and on enforcing civil rights in health care.

* * *

The National Organization for Women Foundation is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. NOW Foundation is affiliated with the National Organization for Women, the largest feminist organization in the United States, with over 500,000 contributing members in more than 500 chapters in all 50 states and the District of Columbia. Since its inception in 1986, NOW Foundation's goals have included assuring fair and equal treatment of women in the workplace. In particular, NOW Foundation has a strong interest in the full implementation of the FMLA.

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9to5, National Association of Working Women, is a national, grassroots organization that strengthens women's

ability to work for economic justice. For 29 years 9to5 has reached out to women in low-wage jobs, those in traditionally female jobs and women experiencing any form of discrimination. The organization was active in winning passage of the FMLA and similar measures in a number of states. Ellen Bravo, the organization's director, served on the bipartisan Commission on Leave appointed by Congress to study the impact of the FMLA. She is also the author of *The Job/Family Challenge: A 9to5 Guide (Not for Women Only).* 9to5 has 23 chapters, activists in 250 cities, and members in every state. The group's toll-free hotline receives thousands of calls every year. Questions about family leave and pregnancy discrimination make up the second largest category of calls. Members in a number of states are active in coalitions to expand access and affordability of family leave.

* * *

The Northwest Women's Law Center, based in Seattle, Washington, is a non-profit public interest legal organization that works to advance the legal rights of women through litigation, education, legislative advocacy and the provision of legal information and referral services. Since its founding in 1978, the Law Center has been dedicated to ending sex discrimination in the workplace. The Law Center has a long history of litigation and participation as amicus curiae in cases throughout the Northwest and country on behalf of individuals seeking remedies for unlawful sex discrimination in the workplace, in educational institutions and elsewhere.

* * *

The Older Women's League (OWL) is the only national grassroots membership organization to focus solely on issues unique to women as they age. OWL is a nonpartisan, nonprofit organization that accomplishes its work through research, education, and advocacy conducted through a nationwide chapter network. Now it its 22nd year, OWL takes positions on a wide variety of public policies affecting mid-

life and older women, from retirement security to health concerns, from caregiving to Social Security. OWL has a long history of interest in the FMLA, and supports its intention as well as its faithful and full implementation.

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People For the American Way Foundation (People For) is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For now has 500,000 members and activists nationwide. People For has been actively involved in litigation and other efforts to combat discrimination, including discrimination by state government agencies. People For has supported the FMLA, and joins this brief to help vindicate the important principles at stake in this case concerning that Act. People For also joins this brief because petitioner's attempt to limit the liability of states and state agencies in federal court severely threatens the ability to protect civil rights against infringement by states and state officials.

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Women Employed is a national association of working women based in Chicago with a membership of 2000. Since 1973, the organization has assisted thousands of working women with problems of discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed maintains that state employees should be permitted to sue for damages under the FMLA as it is an appropriate remedy for sex discrimination.

* * *

The Women's Law Project (WLP) is a nonprofit public interest legal advocacy organization located in Philadelphia, Pennsylvania dedicated to advancing the legal, social, and

economic status of women and their families. Since its founding in 1974, the WLP has worked to eliminate sex discrimination in our laws and institutions through litigation, public policy advocacy and individual counseling. WLP has a strong interest in the proper application of civil rights laws protecting women from employment discrimination.

* * *

Women Work! The National Network for Women's Employment is a national nonprofit organization dedicated to empowering women from diverse backgrounds and helping them achieve economic self-sufficiency through job readiness, education, training and employment. Women Work! strongly believes that workplace fairness and flexibility, such as that afforded by the FMLA, is critical to enabling women to achieve that self-sufficiency.