

No. 08-1049

**In the
Supreme Court of Texas**

THE UNIVERSITY OF TEXAS AT EL PASO,
Petitioner,

v.

ALFREDO HERRERA,
Respondent.

On Petition for Review from the
Eighth Court of Appeals at El Paso, Texas

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITIONER’S REPLY BRIEF ON THE MERITS

TO THE HONORABLE SUPREME COURT OF TEXAS:

In respondent’s brief, Herrera admits that this case presents an issue of first impression in Texas: whether the self-care provision of the federal Family Medical Leave Act of 1993 (“FMLA”) validly abrogates the State’s immunity from suit. Resp. Br. 4. He also concedes that the court of appeals’s decision that the self-care provision abrogates the States’ immunity directly conflicts with the decisions of nine federal circuit courts of appeals and the highest courts of two States. *Id.* at 18-20. Finally, Herrera acknowledges that there is a split between and among federal and state courts on this state sovereign-immunity issue. *Id.* at 4.

In the face of these concessions, Herrera suggests two reasons why the Court should nonetheless deny the petition, neither of which have merit. First, Herrera argues that this case presents a poor vehicle for considering whether the self-care provision of the FMLA validly abrogates the State's immunity because UTEP itself has already waived its immunity for any such claims through a sentence in its Handbook of Operating Procedures. But because this argument turns on Herrera's belief that state agencies share authority with the Legislature to waive the State's immunity—a proposition that is expressly refuted by both statute and this Court's precedent—it fails to present a legitimate reason to deny the petition.

Second, Herrera misreads the United States Supreme Court's opinion in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 726-27 (2003), a case that concerned the family-care provision of the FMLA rather than the self-care provision, to control the result in this case. But because *Hibbs's* holding, as well as its underlying conclusions and rationale, were limited to the family-care provision of the FMLA, it does not undermine the well-reasoned conclusion of nine federal circuit courts of appeals that the self-care provision cannot validly abrogate the States' immunity from suit. Accordingly, because the question whether Congress validly abrogated its immunity in enacting the FMLA's self-care provision is of great importance to the State of Texas, and because the court of appeals's erroneous decision is currently the only state precedent available to guide Texas courts, the Court should grant the petition and reverse the court of appeals's judgment.

ARGUMENT

I. THE UTEP HANDBOOK CANNOT WAIVE SOVEREIGN IMMUNITY.

Herrera argues that this case is a “particularly poor” vehicle to decide the novel issue whether the self-care provision of the FMLA validly abrogates state sovereign immunity because UTEP itself already waived the State’s immunity from such FMLA claims in a single sentence in its Handbook of Operating Procedures. Resp. Br. 4-6. But this argument is expressly refuted by statute and this Court’s precedent.

The Court has long recognized that, unless waived by statute, sovereign immunity protects the State of Texas from suits for damages. *See, e.g., Tex. Dep’t of Transp. v. York*, 284 S.W.3d 844, 846 (Tex. 2009) (per curiam); *Gen. Servs. Comm’n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 594 (Tex. 2001); *Tex. Dep’t of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999) (per curiam). Likewise, the Legislature has made clear that its consent to waive sovereign immunity by statute must be by “clear and unambiguous consent,” TEX. GOV’T CODE § 311.034, and suit can then be brought “only in the manner indicated by that consent,” *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 (Tex. 2003) (quoting *Hosner v. De Young*, 1 Tex. 764, 769 1847 WL 3503, at *5 (1847)).

Herrera can point to no statute that waives sovereign immunity for his FMLA self-care claim. Instead, he claims that Chapter 17 of UTEP’s Handbook of Operating Procedures waives the State’s immunity. Resp. Br. 5-6. But that claim must fail because the handbook is neither a statute nor a constitutional provision and, therefore, cannot waive the State’s

immunity. *See Wells v. Tex. A&M Univ. Sys.*, No. 06-04-00001-CV, 2004 WL 2114438, at *1–2 (Tex. App.—Texarkana, Sept. 24, 2004, pet. denied) (mem. op.) (holding that a university’s policy manual cannot waive sovereign immunity). Indeed, because “‘it is the Legislature’s sole province to waive or abrogate sovereign immunity,’” *Tex. Natural Res. Conservation Comm’n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002) (quoting *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 409 (Tex. 1997)), UTEP, a subdivision of the State, necessarily lacks authority to declare a waiver of sovereign immunity through its operating procedures, rules, or regulations.

And Herrera’s suggestion that the Legislature somehow delegated to UTEP’s board of regents its exclusive authority to waive the State’s immunity also cannot withstand scrutiny. Resp. Br. 5-6. Absent a waiver in the Constitution itself, the State’s immunity can be waived only by statute or legislative resolution, *IT-Davy*, 74 S.W.3d at 853-54; that is, through powers the Constitution vests solely in the Legislature, TEX. CONST. art. III, § 1. UTEP is unaware of any basis in Texas law for the proposition that the Legislature may delegate these powers to a state agency, and Herrera cites no authority supporting this argument.

Further, even assuming that the Legislature could delegate its authority to waive immunity, none of the statutes that Herrera relies upon reflects its intention to do so. Indeed, the statutes Herrera references, *see* Resp. Br. 5-6, merely authorize UTEP’s board of regents to promulgate rules necessary for the day-to-day operation of UTEP, such as prescribing

courses and programs leading to degrees and the number of students that may be admitted to an institution under its governance. *See, e.g.*, TEX. EDUC. CODE § 65.31. None of the statutes Herrera cites contains any language specifying that the board is authorized to waive UTEP's immunity. *See id.* §§ 65.11, 65.31, 69.02.

Because UTEP has no authority to waive the State's immunity for claims made under the self-care provision of the FMLA, Herrera's reliance on this purported waiver is misplaced. The Court still has before it a court of appeals decision, concerning an issue of first impression regarding sovereign immunity, that cannot be reconciled with the contrary decisions of the overwhelming majority of federal circuit courts of appeals and state courts that have considered the issue.¹

¹ In his response brief, Herrera reiterates the argument that the statement in UTEP's handbook should also be considered a waiver of immunity under the Court's decision in *Reata Construction Corporation v. City of Dallas*, 197 S.W.3d 371, 375 (Tex. 2006). Resp. Br. 6-9. In so doing, Herrera continues to conflate and misconstrue two separate lines of Texas case law addressing: (1) the principle explained by the Court in *Reata* regarding the partial absence of immunity when a governmental unit voluntarily joins the litigation process by filing its own affirmative claims; and (2) the possibility that circumstances might arise in a particular case supporting an equitable waiver by conduct of a governmental entity's immunity.

Contrary to Herrera's assertion, *Reata* is not applicable to this case because it is undisputed that UTEP did not voluntarily join this litigation, nor has it asserted any affirmative claims in this suit. In regard to implied waiver-by-conduct as a possible grounds for waiver of immunity, this Court has never upheld such a waiver claim. *See Catalina Dev., Inc. v. County of El Paso*, 121 S.W.3d 704, 705 (Tex. 2003). Rather, the Court has only acknowledged that, in theory, a circumstance might exist in which the State could waive its immunity by conduct, *see id.*, and all of the cases in which the Court has even considered whether a waiver by conduct occurred involved situations — unlike this case — wherein a state entity had entered into a contractual arrangement and subsequently was alleged to have reneged on its obligations under the agreement. *See* UTEP's Br. 36-38. Accordingly, this case does not present facts that even rise to the level of the waiver-by-conduct claims previously considered — and consistently rejected — by the Court.

II. HIBBS DOES NOT UNDERMINE THE HOLDINGS OF NINE FEDERAL COURTS OF APPEALS THAT THE SELF-CARE PROVISION DOES NOT VALIDLY ABROGATE STATE SOVEREIGN IMMUNITY.

In its opening brief, UTEP explained that Congress also did not validly abrogate the State's immunity from Herrera's suit under the self-care provision of the FMLA. *See* UTEP Br. 10-30. UTEP observed that, although Congress may abrogate state sovereign immunity through its enforcement power under § 5 of the Fourteenth Amendment, as the federal courts of appeals have overwhelmingly held, the portion of the FMLA invoked by Herrera (the so-called "self-care" leave provision, which requires leave for an employee's own medical condition), fails to meet the United States Supreme Court's standard for a valid use of the § 5 power. *See id.*

Herrera argues in his response, however, that at least the rationale of *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), controls this case, and impliedly upholds Congress's abrogation of state immunity under the self-care provision of the FMLA. *See* Resp. Br. 10-19. *Hibbs*, however, is only about *the family-care provision* of the FMLA. *Hibbs* neither addresses nor supports Congress's purported abrogation of state sovereign immunity under *the self-care provision*. Accordingly, *Hibbs* does not undermine the well-reasoned conclusion of nine federal circuit courts of appeals that this provision cannot validly abrogate the States' immunity from suit. This Court should reach the same conclusion.

A. Congress Has Limited Power To Abrogate State Sovereign Immunity Under § 5 of the Fourteenth Amendment.

Congress can abrogate state sovereign immunity so long as: (1) it unequivocally expresses its intent to abrogate the immunity; and (2) it acts “pursuant to a constitutional provision granting Congress the power to abrogate.” *Seminole Tribe v. Florida*, 517 U.S. 44, 55 (1996). The parties agree that the FMLA satisfies the first requirement. Therefore, the dispute in this case turns on whether Congress acted within its constitutional authority when it sought to abrogate the States’ immunity for purposes of the FMLA’s self-care provision.

Section 1 of the Fourteenth Amendment provides that no State may “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1. Section 5 of the Amendment grants Congress the power “to enforce” the substantive guarantees of § 1 of the Amendment by enacting “appropriate legislation.” U.S. CONST. amend. XIV, § 5; *see also City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

Because its enforcement authority under § 5 is both remedial and preventative, the Supreme Court has recognized that “Congress may, in the exercise of its § 5 power, do more than simply proscribe conduct that [the Court has] held unconstitutional.” *Hibbs*, 538 U.S. at 727. “Rather, Congress’ power ‘to enforce’ the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment’s text.” *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000).

Nonetheless, although state sovereign immunity is subject to Congress's enforcement power under § 5 of the Fourteenth Amendment, that power is limited. As the Court confirmed in *City of Boerne* and its progeny, it is the responsibility of the Court, not Congress, to determine the Fourteenth Amendment's substantive meaning and define the substance of its constitutional guarantees. See *Hibbs*, 538 U.S. at 728; *Kimel*, 528 U.S. at 81; *City of Boerne*, 521 U.S. at 519-24. And § 5 legislation that reaches beyond the scope of § 1's specific guarantees must be an appropriate remedy for identified constitutional violations, not an "attempt to substantively redefine the States' legal obligations." *Kimel*, 528 U.S. at 88.

The Court has likewise made clear that, "[I]n order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001). Thus, in order to validly exercise its § 5 authority to abrogate state immunity, Congress must identify unconstitutional conduct by States and enact an appropriate remedy for those violations. *Hibbs*, 538 U.S. at 728-29.

B. *Hibbs* Does Not Establish That Congress Validly Abrogated State Sovereign Immunity in the Self-Care Provision of the FMLA.

As UTEP explained in its opening brief, the court of appeals mistakenly concluded that Congress validly abrogated the States' sovereign immunity for claims made under the self-care provision of the FMLA. See UTEP Br. 10-30. Specifically, UTEP demonstrated

that the congressional record concerning the self-care provision contained no evidence of a pattern of unconstitutional conduct by the States regarding personal medical leave, and that the legislative means adopted by Congress in this provision are neither congruent nor proportional to any constitutional injury to be prevented or remedied by the statute. *See id.* 15-24. Accordingly, UTEP concluded that the self-care provision of the FMLA cannot validly abrogate state sovereign immunity.

In his response, Herrera maintains that, based on the Supreme Court’s decision in *Hibbs*, this Court should arrive at a conclusion opposite to that reached in virtually every federal court-of-appeals decision addressing the issue whether the self-care provision of the FMLA abrogates state sovereign immunity. *See* Resp. Br. 10-19. But contrary to Herrera’s assertions, *Hibbs* does not undermine the holdings of those courts. *Hibbs* addressed only the specific question whether an individual could sue a State for damages in federal court for violation of § 2612(a)(1)(C) of the Act, a family-care provision regarding leave taken to care for a parent, child, or spouse with a serious health condition. *See Hibbs*, 538 U.S. at 725. The Court narrowly held that suits could proceed against States for such claims. *Id.* at 726, 737 (“This case turns, then, on whether Congress acted within its constitutional authority when it sought to abrogate the States’ immunity *for purposes of the FMLA’s family-leave provision* . . . We believe that Congress’ chosen remedy, *the family-care leave provision of the FMLA*, is congruent and proportional to the targeted violation.” (emphasis added) (citation and internal quotation marks omitted)). The Court simply did not consider or

uphold the validity of the FMLA's self-care provision's abrogation of state sovereign immunity. Moreover, the holding in *Hibbs* that suits could proceed against States under §2612(a)(1)(C) of the FMLA was premised on two distinct conclusions about the FMLA's family-care provision at issue, neither of which applies to the FMLA's self-care provision.

First, the Court concluded that “the States’ record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation.” *Id.* at 735. But all of the evidence of discrimination cited by the Court in *Hibbs* concerned discrimination based on the belief that women are more likely than men to take leave to care for other family members. The Court initially observed that “Congress found that, due to the nature of the roles of men and women in our society, the primary responsibility for *family caretaking* often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men.” *See id.* at 729 n.2 (emphasis added) (citation and internal quotation marks omitted).

The Court then cited evidence of overt discrimination in the maternity and paternity leave benefits offered by private and public employers, *id.* at 730-31, as well as evidence that even facially neutral policies were applied in a discriminatory way, namely “serious problems with the discretionary nature of *family leave*,” *id.* at 732 (emphasis added). For example, 37% of private-sector employees were covered by maternity-leave policies, compared to only 18% for paternity-leave policies. *Id.* at 730. Similar statistics existed for employees of

States. *Id.* n.3. Moreover, Congress heard evidence that men received “notoriously discriminatory treatment in their requests for such leave,” such that they rarely received it. *Id.* at 731 (citation and internal quotation marks omitted).

Finally, the Court identified the “impact of the discrimination targeted by the FMLA” as the “denial or curtailment of women’s employment opportunities [due to] the pervasive presumption that women are mothers first, and workers second.” *Id.* at 736 (citation and internal quotation marks omitted). The Court cited no evidence, however, that the States engaged in similar gender discrimination regarding personal medical leave.

Second, the Court concluded that, given the heightened scrutiny to which gender discrimination is subject, the family-care leave provision at issue in *Hibbs* is congruent and proportional to the targeted violation — *i.e.*, gender discrimination by the States regarding family-care leave. *Id.* at 737. Thus, the Court made clear that the remedy it found congruent and proportional to that type of discrimination was “the family-care leave provision of the FMLA.” *Id.* (“By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees”). Because both the holding of *Hibbs* and its underlying rationales are limited to the family-care provision of the FMLA at issue in the case, Herrera’s assertion that it answers the question whether the self-care provision validly abrogates state sovereign immunity is without merit.

C. An Overwhelming Majority of Federal and State Appellate Courts Has Concluded That the Self-Care Provision Cannot Validly Abrogate the States' Immunity.

In its opening brief, UTEP further described how nine federal circuit courts of appeals and four state appellate courts reached the conclusion that the self-care provision of the FMLA could not validly abrogate state sovereign immunity. UTEP Br. 26-30. On the other hand, UTEP is aware of only three cases that reached a contrary conclusion: an unpublished opinion from the Fourth Circuit,² a decision of a federal Magistrate Judge in the Western District of New York,³ and a decision from an intermediate appellate court in Iowa.⁴

Herrera attempts to minimize the significance of this “mountain of [] persuasive legal authority” contrary to the decision of the court of appeals, *Univ. of Tex. at El Paso v. Herrera*, 281 S.W.3d 575, 592 (Tex. App.—El Paso 2008, pet. filed) (Carr, J., dissenting), by suggesting that very few of these courts performed a thorough analysis of the issue. Resp. Br. 18-20. But this is simply untrue. For example, a review of the following federal appellate decisions, which both pre-date and post-date *Hibbs*, establishes that these courts

²*Montgomery v. Maryland*, 72 Fed. App'x 17, 19 (4th Cir. 2003) (per curiam) (unpublished). Under the Fourth Circuit's rules, citation of its unpublished opinions issued prior to January 1, 2007, is “disfavored, except for the purpose of establishing *res judicata*, estoppel, or the law of the case.” 4TH CIR. R. 32.1. The circuit's rules further provide that, “If a party believes, nevertheless, that an unpublished disposition of this court issued prior to January 1, 2007, has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited . . .” *id.*

³*Hamilton v. Niagara Frontier Transp. Auth.*, Nos. 00-CV-300SR, 00-CV-863SR, 2007 WL 2241794, at *13 (W.D.N.Y. July 31, 2007) (Schroeder, Mag. J.).

⁴*Lee v. State*, 765 N.W.2d 607, 2009 WL 398330, at *2-8 (Iowa Ct. App. 2009). The *Lee* decision is referenced in a “Decisions Without Published Opinions” table in the North Western Reporter. Under Iowa Supreme Court Rule 6.14(5), an unpublished opinion of the Iowa Court of Appeals may be cited in a brief; however, unpublished opinions shall not constitute controlling legal authority.

gave very careful consideration to the issue of whether the self-care provision of the FMLA validly abrogates the States' immunity, and concluded that it does not do so:

- **First Circuit:** *Laro v. New Hampshire*, 259 F.3d 1, 16 (1st Cir. 2001) (“[T]he personal medical leave provision of the FMLA does not exhibit a sufficient congruence to the prevention of unconstitutional state discrimination to validly abrogate the states’ Eleventh Amendment immunity.”).
- **Second Circuit:** *Hale v. Mann*, 219 F.3d 61, 69 (2d Cir. 2000) (“There is no evidence that this conferment of federally protected [self-care] leave is tailored to remedy sex-based employment discrimination. . . . Thus, we find that Congress did not have the authority to abrogate the sovereign immunity of the states on claims arising under the [self-care provision] at issue here. Its attempt to do so was not congruent or proportional to the harms targeted by the Fourteenth Amendment.”).
- **Third Circuit:** *Chittister v. Dep’t of Cmty. & Econ. Dev.*, 226 F.3d 223, 228-29 (3d Cir. 2000) (In an opinion by then-Judge Alito, the Third Circuit concluded that “Notably absent is any finding concerning the existence, much less the prevalence, in public employment of personal sick leave practices that amounted to intentional gender discrimination in violation of the Equal Protection Clause. . . . Moreover, even if there were relevant findings or evidence, the FMLA provisions at issue here would not be congruent or proportional.”).
- **Third Circuit:** *Banks v. Court of Common Pleas FJD.*, No. 09-1145, 2009 WL 2488941, at *2 (3d Cir. Aug. 17, 2009) (per curiam) (“In [*Chittister*] we ruled that Congress did not validly abrogate the states’ Eleventh Amendment immunity when it enacted provisions of the FMLA. Although the ‘family-care’ provisions of the FMLA were upheld by the Supreme Court in [*Hibbs*], private suits still may not be brought against states where the self-care provisions of the Act are implicated.”).⁵

⁵ Under the Third Circuit’s rules, “The court by tradition does not cite to its not precedential opinions as authority. Such opinions are not regarded as precedents that bind the court because they do not circulate to the full court before filing.” 3d CIR. I.O.P. 5.7.

- **Fifth Circuit:** *Kazmier v. Widmann*, 225 F.3d 519, 528-29 (5th Cir. 2000), *overruled in part by Hibbs*, 538 U.S.721 (“In sum, subsection (D) prohibits the States from engaging in such a wide array of perfectly constitutional practices that we have difficulty conjuring up *any* unconstitutional conduct by the States to which that subsection’s proscriptions might possibly be proportional and congruent. . . . Without direct evidence of substantial unconstitutional discrimination by the States, there simply is no ‘Fourteenth Amendment evil’ to which subsection (D) could possibly be congruent and proportional.” (footnotes omitted)).
- **Fifth Circuit:** *Nelson v. Univ. of Tex. at Dallas*, 535 F.3d 318, 321 (5th Cir. 2008) (“[W]e agree with the rationale of the Sixth, Seventh, and Tenth Circuits that the Supreme Court’s ruling in *Hibbs* applies only to [the family-care provision]. Therefore, this Court’s decision in *Kazmier* still remains the law of this circuit with respect to [the self-care provision].”).
- **Sixth Circuit:** *Touvell v. Ohio Dep’t of Mental Retardation & Developmental Disabilities*, 422 F.3d 392, 402 (6th Cir. 2005) (“Congress adduced no evidence of a pattern of discrimination on the part of the states regarding leave for personal medical reasons sufficient to permit the abrogation of state sovereign immunity.”).
- **Seventh Circuit:** *Toeller v. Wis. Dep’t of Corr.*, 461 F.3d 871, 879 (7th Cir. 2006) (“We know of no reason why women would be more likely to have [a short-term] medical problem than men. Furthermore, whether we know about it is not the point in the end: what counts is that we see nothing in either the text or the legislative history of the FMLA to indicate that Congress found this to be the case.”).
- **Eighth Circuit:** *Miles v. Bellfontaine Habilitation Ctr.*, 481 F.3d 1106, 1107 (8th Cir. 2007) (per curiam) (“The district court properly dismissed with prejudice Miles’s FMLA claim, which was brought under FMLA’s self-care provisions. As an agency of the state of Missouri, the Center is entitled to Eleventh Amendment immunity from the claim.” (citations omitted)).
- **Tenth Circuit:** *Brockman v. Wyo. Dep’t of Family Servs.*, 342 F.3d 1159, 1164-65 (10th Cir. 2003) (“The legislative history does not,

however, identify as the basis for subsection (D) a link [to] any pattern of discriminatory stereotyping on the part of the states as employers.”).

- **Eleventh Circuit:** *Garrett v. Univ. of Ala. Bd. of Trs.*, 193 F.3d 1214, 1219 (11th Cir. 1999), *rev’d on other grounds*, 531 U.S. 356 (2001) (“[W]e hold in this case that Congress did not have the authority to abrogate the sovereign immunity of the states on claims arising under the [self-care] provision at issue here.”).
- **Eleventh Circuit:** *Batchelor v. S. Fla. Water Mgmt. Dist.*, 242 Fed. App’x 652, 653 (11th Cir. 2007) (per curiam) (unpublished) (“Our holding in *Garrett* that Congress is without authority to abrogate state sovereign immunity for claims arising under the self-care provision of the FMLA remains the law of this Circuit.”)⁶.

Notwithstanding his objections to the holdings of these courts, Herrera does not dispute that the weight of authority on this issue decisively—though not unanimously⁷—favors the conclusion that the FMLA’s self-care provision did not validly abrogate state sovereign immunity. Yet, the court of appeals’s contrary, erroneous decision provides the first and only guidance from a Texas appellate court on this important sovereign-immunity issue. The Court should grant the petition.

PRAYER

The Court should grant the petition for review, reverse the court of appeals’s judgment, and dismiss Plaintiff-Respondent Alfredo Herrera’s FMLA claim with prejudice for lack of jurisdiction.

⁶ As described in UTEP’s opening brief, at least four state appellate courts have reached the same conclusion as these federal circuits courts of appeals. UTEP Br. 29-30.

⁷ *See supra* at 12 n.2-4.

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CERTIFICATE OF SERVICE

I certify that on January 11, 2010, a true and correct copy of this Reply Brief on the Merits was served by certified U.S. mail, return receipt requested, on all counsel of record in this proceeding as listed below:

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