

IN THE
SUPREME COURT
OF TEXAS

NO. 08-1049

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

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF FACTS

This is a suit for retaliation in violation of the Family and Medical Leave Act (FMLA) and retaliation for the exercise of first amendment rights. Alfredo Herrera, Respondent, went to work for Petitioner the University of Texas at El Paso (UTEP) in November 2002. (CR 24). In March 2005, he began medical leave for an injury. (CR 24). He returned to work on January 4, 2006, but he faced negative comments about his condition and other discriminatory treatment. (CR 24). He was terminated less than a month after his return from medical leave. (CR 25).

UTEP's handbook of operating procedures guarantees employees' rights under the FMLA. (CR 31). It recognizes that the FMLA makes it unlawful to discharge or discriminate against any person for involvement in any proceeding under the FMLA. (CR 32). UTEP's handbook specifically provides that "An eligible employee may also bring a civil action against an employer for violations" of the Act. (CR 32).

Because he believes he was terminated in retaliation for his exercise of FMLA rights and for exercising his first amendment rights by complaining about being required to work unsafely, Herrera brought this suit against UTEP. (CR 23-26). UTEP filed a plea to the jurisdiction as to Herrera's FMLA claim only. (CR 16). It alleges that this claim is barred by sovereign immunity. (CR 17). It did not claim that the trial court lacked jurisdiction over Herrera's first amendment retaliation claim. (CR 16-21). The trial court denied the plea to the jurisdiction. (CR 33). UTEP appealed. (CR 37). The Eighth Court of Appeals affirmed, and UTEP seeks review.

SUMMARY OF ARGUMENT

The case is not worthy of this Court's review. The issue decided by the Court of Appeals is not "important" to Texas jurisprudence because it is one of federal law, not State law; this is the only Texas case to have faced the question in the sixteen years since the FMLA was adopted. Moreover, Petitioner's employment manual represented to employees that they retained the right to bring civil suits, reflecting its own belief that it was not important to retain any immunity over this type of claim. The Court should deny review.

A State's immunity from suit under federal law can be waived either by a State itself, or by Congress in the exercise of its authority under the Fourteenth Amendment to prevent and deter violations of the constitutional right to equal protection. Both occurred here.

UTEP waived sovereign immunity by its handbook of operating procedures, which expressly promised employees that they could "bring a civil action" for violation of the FMLA. The Legislature has delegated to the UT system the power to enact regulations which have the force of law. In addition, a governmental body may waive its own immunity by its conduct. UTEP's publication of the policy stating that employees have the right to bring suit helps it to recruit and retain those employees, by leading them to believe that they will possess the same rights that they would have if employed by the private sector. Its conduct in doing so is a clearer waiver of immunity than the conduct found to have waived immunity in other cases, since it reflects an express decision by Petitioner to permit employees to bring a civil action. The trial court correctly found that UTEP has waived any immunity from suit for violation of the FMLA by this conduct.

Congress also validly waived States' immunity from suit under the FMLA. Congress' findings and purpose clearly express its intent to prevent gender discrimination in violation of the Equal Protection clause of the Fourteenth Amendment. The Congressional record reveals that Congress heard evidence that the inability to take leave for medical care has a discriminatory impact on women, because of its particularly devastating effect on households headed by single parents – who are usually women. Congress also heard testimony that the lack of uniform medical leave policies has created an environment where sex discrimination is rampant. The stereotypical ideology that women are mothers first, and workers second, creates an environment in which men are held to higher standards at work, and thus are denied accommodations or discouraged from taking leave when necessary for medical care. Congress' findings, stated purposes, and the Congressional record establish that Congress did identify a pattern of gender discrimination in the application and effect of medical leave policies. Its chosen remedy, the self-care provisions of the FMLA, was a valid exercise of its authority under the Fourteenth Amendment. The trial court properly denied the plea to the jurisdiction, and review should be denied or the Court of Appeals' judgment should be affirmed.

ARGUMENT AND AUTHORITIES

I. The petition does not presents grounds justifying review by this Court.

The Court has recognized two circumstances in which an individual may sue a State. *See Hoff v. Nueces County*, 153 S.W.2d 45, 48 (Tex. 2004). First, Congress may abrogate a State's sovereign immunity from suit by appropriate legislation under the Fourteenth Amendment. *Hoff*, 153 S.W.3d at 48; *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 119 S.Ct. 2199, 2205-06, 144 L.Ed.2d 575 (1999). A State may also waive its sovereign immunity. *Hoff*, 153 S.W.3d at 48; *College Savings Bank*, 119 S.Ct. at 2223. Both occurred here.

The Family and Medical Leave Act was enacted in 1993. During the ensuing sixteen years, this is the first Texas State case to have presented the issue raised by Petitioner, i.e., whether Congress validly abrogated States' immunity under the self-care provision of the FMLA, as opposed to merely the family-care provision of that Act. The issue presented is a narrow issue of federal law, on which federal courts are divided. There is little reason for this Court to add its voice to the federal-law controversy.

This case would be a particularly poor one in which to reach the issue, because Petitioner represents to its employees that "An eligible employee may also bring a civil action against an employer for violations" of the FMLA. (CR 32). The adoption of this handbook provision reflects that in its dealings with employees, Petitioner did not consider it significant to retain immunity, but was content with Congress' abrogation of that immunity. The case simply is not worthy of this Court's review, and the Court should deny review.

II. The trial court did not err in denying the plea to the jurisdiction because UTEP explicitly waived any immunity from suit.

The Texas Legislature has instructed that State employees are entitled to the leave provided by the FMLA. Tex.Gov't Code § 661.912. Consistent with this directive, UTEP's handbook of operating procedures guarantees employees their FMLA rights. (CR 31). It recognizes that the FMLA makes it unlawful to discharge or discriminate against any person for involvement in any proceeding under the FMLA. (CR 32). UTEP's handbook goes further, by specifically providing that "An eligible employee may also bring a civil action against an employer for violations" of the Act. (CR 32). This language unambiguously waived any immunity UTEP may possess from a civil suit for FMLA violations.

UTEP has not argued that the language of its policy is insufficient to waive its immunity; instead, it claims that the policy is ineffective because it lacks legal authority to waive its own immunity. This argument should be rejected for two reasons: First, the Texas Legislature has authorized the University of Texas system to enact regulations with the force of law; and second, a unit of government possesses the inherent ability to waive immunity.

A. The Legislature granted the UT system the authority to waive its own immunity.

UTEP is part of the University of Texas System, under the management and control of its board of regents. Tex.Educ.Code § 69.02. The board of regents governs the University of Texas System. Tex.Educ.Code § 65.11. The Legislature has granted to the board of regents broad authority. Tex.Educ.Code § 65.31. Specifically, the board is authorized to govern, operate, and maintain each of the institutions within the system; and has the authority

to promulgate any rules and regulations for the operation, management, and control of the system and its institutions “as it may deem either necessary or advisable.” Tex.Educ.Code § 65.31(a), (c). This Court established long ago that when the board of regents exercises these delegated powers, its rules have the same force and effect as legislative enactments. *Foley v. Benedict*, 122 Tex. 193, 55 S.W.2d 805, 808 (1932) (interpreting the predecessor statute to Education Code section 65.31). UTEP cites no authority limiting the power of the board of regents under these statutes, or holding that the Legislature may not delegate authority to waive immunity, or otherwise supporting its argument that the Legislature’s delegation of law-making authority was somehow insufficient to allow the board to waive its immunity, if it deemed it “necessary or advisable” to do so.

Furthermore, the board is statutorily empowered to delegate its powers to committees or agents. Tex.Educ.Code § 65.31(g). The UTEP handbook of operating procedures, which includes its waiver of immunity from FMLA claims, reflects that its provisions were adopted pursuant to rules and regulations of the board of regents. (CR 30). UTEP’s waiver of sovereign immunity thus represents a valid exercise of delegated legislative authority. Because UTEP was delegated the legislative authority to waive its immunity, and it did so, the trial court properly denied the plea to the jurisdiction, and review should be denied.

B. A governmental body possesses the ability to waive its own immunity.

Petitioner also had the inherent ability to waive immunity, and did so in enacting the policy advising employees of their right to bring a civil action. In *Reata Construction Corp. v. City of Dallas*, the Court pointed out that although it has “generally deferred to the

Legislature to waive immunity,” it “remains the judiciary’s responsibility to define the boundaries of the common-law doctrine and to determine under what circumstances sovereign immunity exists in the first instance.” *Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 371, 375 (Tex. 2006). The Court recognized a “tension” between the concept of a governmental entity waiving its immunity from suit independent from legislative action, and previous statements that only the Legislature can waive immunity. *Id.* Nonetheless, the Court rejected a conclusion that immunity could never be waived without action by the Legislature, and instead determined that a governmental entity could waive its own immunity by voluntarily becoming a party to a suit. *Id.*

Thus, governmental bodies have waived their own immunity without an express waiver by the Legislature in numerous recent cases. In *Reata Construction*, the City of Dallas waived immunity from a contractor’s claims by suing the contractor for damages (at least to the extent the contractor’s claims were connected to and properly defensive to the City’s claims). *Reata Const. Corp.*, 197 S.W.3d at 377. Likewise, the Texas Commission on Human Rights waived immunity from suit by filing an action for violation of the Fair Housing Act in *Kinnear v. Texas Commission on Human Rights*, 14 S.W.3d 299, 300 (Tex. 2000). In a case more closely on point, Texas Southern University was found to have waived its sovereign immunity for a breach of contract claim by accepting the benefits of a contract, particularly because it had assured the contracting party that the contract would be valid, binding, and enforceable. *Texas Southern University v. State Street Bank and Trust Co.*, 212 S.W.3d 893, 898, 908 (Tex.App.–Houston [1st Dist.] 2007, pet. denied).

The waiver of immunity is even clearer in this case than the waivers found *Reata Construction* and *Kinnear*, because UTEP's policy reflects an intentional decision to subject itself to suit for FMLA violations. Waiver is "an intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right." *Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex. 2003). A party's express renunciation of a known right can establish waiver. *Motor Vehicle Bd. v. El Paso Indep. Auto Dealers Ass'n*, 1 S.W.3d 108, 111 (Tex. 1999). It would be a strange rule of law which would permit a governmental body to accidentally waive its immunity by its conduct in filing a lawsuit, but prohibit it from doing so intentionally by its conduct in adopting a policy granting employees the right to bring a civil action.

UTEP's conduct in adopting and publishing a policy assuring employees that they may pursue a civil action in the event of an FMLA violation is comparable to the conduct of Texas Southern University in *State Street Bank and Trust*; it helps UTEP to recruit and retain those employees, by leading them to believe that they will have the same legal remedies that they would possess if employed in the private sector. This is not merely a case of government acceptance of the benefits of a contract; UTEP accepted the benefits of its employees' services while also assuring those employees that they could bring suit if it failed to respect their legal rights. This action by UTEP waived its immunity from suit.

UTEP points out that the Court rejected claims that governmental entities waived immunity by their conduct in *Catalina Development v. County of El Paso* and earlier cases. However, these cases do not support its argument; the holdings that immunity was not

waived in the specific factual circumstances of those cases make it clear that governmental entities do possess the ability to waive their immunity by their acts in appropriate circumstances, despite concluding that the circumstances of each of those cases were insufficient to establish waiver. None of the cases involved express statements by the governmental party that the plaintiff possessed the right to bring a civil action if his rights were violated. This line of authority reflects that waiver by conduct will rarely occur; but provides no reason to believe that UTEP's conduct in this case does not rise to the level of a waiver of immunity.

It would be "fundamentally unfair" to allow UTEP to disavow its policy assuring employees that they could sue for FMLA violations and assert immunity from such a suit, after enjoying the benefits of those employees' services. *See Reata Const. Corp.*, 197 S.W.3d at 375 (waiver of immunity mandated by fundamental fairness). UTEP's conduct is inconsistent with a claim of immunity, and sufficed to waive immunity for FMLA claims. The trial court properly denied the plea to the jurisdiction, and review should be denied or the Court of Appeals' judgment should be affirmed.

III. The trial court did not err in denying the plea to the jurisdiction because the United States Congress validly abrogated States' immunity from suit under the FMLA.

A. The Fourteenth Amendment allows Congress to abrogate States' immunity from suit in order to remedy and deter violations of the right to equal protection.

Additionally, Petitioner does not possess sovereign immunity because it has been explicitly waived by Congress in its enactment of the FMLA. The FMLA creates a private right of action “against any employer (including a public agency)” which violates an employee’s FMLA rights. 29 U.S.C. § 2617(a)(2). A “public agency” is defined to include “the government of a State or political subdivision thereof” and “any agency of . . . a State, or a political subdivision of a State . . .” 29 U.S.C. §§ 203(x), 2611(4)(A)(iii).

Prior to 2003, eight federal appellate circuits held that although Congress had intended by the FMLA to abrogate the states’ immunity from suit for money damages, it did not validly do so. *See generally Sharp v. Illinois Dept. of Corrections*, 2002 WL 441320 *1 (N.D. Ill. 2002) (collecting cases). However, the Supreme Court reversed these decisions in 2003, holding that the FMLA validly abrogated immunity, in *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003). *Hibbs* was decided in the context of the family-care provision of the FMLA, but it does not necessarily follow that the analysis is inapplicable to claims for retaliation based on exercise of self-care leave. As UTEP recognizes, federal courts have divided on the question, though most find no valid abrogation of immunity.

Section 1 of the Fourteenth Amendment guarantees equal protection of the laws. U.S. CONST. AMD. XIV, § 1. Section 5 of the Fourteenth Amendment grants Congress the power to enforce section 1 by appropriate legislation. *Id.* § 5. Congress may abrogate the States' sovereign immunity through a valid exercise of its authority under the Fourteenth Amendment, because "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), *quoted in Hibbs*, 123 S.Ct. at 1977. Moreover, Congressional authority under section 5 is not limited to proscribing unconstitutional conduct. *Hibbs*, 123 S.Ct. at 1977. Instead, it may also act to remedy and deter violations of the right to equal protection by prohibiting a broader swath of conduct, including that which is not itself forbidden by the text of the Fourteenth Amendment. *Id.* In other words, Congress may enact prophylactic legislation that proscribes constitutional conduct, in order to prevent and deter unconstitutional conduct. *Id.*

B. Congress intended to remedy gender discrimination in the workplace.

The first question is whether Congress intended to exercise its authority to abrogate States' immunity under Section 5 of the Fourteenth Amendment. In *Hibbs*, the Court found that Congress' intent to do so was not fairly debatable. *Hibbs*, 123 S.Ct. at 1976-77. In enacting the FMLA, Congress did rely partially on its power under section 5 of the Fourteenth Amendment to enforce that Amendment's guarantees. *Id.* at 1977. The statute's creation of a right of action against an employer "including a public agency" and the

definition of a public agency to include States, political subdivisions, and agencies thereof made Congress' intent to abrogate immunity unmistakably clear. *Id.* at 1976-77.

Petitioner argues that Congress did not intend to provide a remedy for gender discrimination in connection with the self-care clause of the FMLA. The Act itself rebuts this contention. The text of the Act makes clear that the FMLA aims to protect the right to be free from gender-based discrimination in the workplace. *Hibbs*, 123 S.Ct. at 1978 & n.

2. Congress found that “employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.” 29 U.S.C. § 2601(a)(6). The Act specifies that

It is the purpose of this Act—

* * *

- (4) to accomplish the purposes described in paragraphs (1) [balancing workplace demands with family needs] and (2) [entitling employees to take reasonable leave for **medical reasons**, childbirth or adoption, and family care] in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, **minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons** (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and
- (5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

29 U.S.C. § 2601(b)(4), (5). The inclusion in the Act's stated purposes of an intent to permit employees to take reasonable leave for medical reasons; to accomplish this purpose in a manner that, consistent with the Equal Protection Clause, minimizes the potential for employment discrimination on the basis of sex by ensuring that medical leave is available on a gender-neutral basis; and to promote the goal of equal employment opportunity for women

and men, pursuant to the Equal Protection Clause; reflect that Congress intended to secure equal protection in the administration of self-care leave.

Petitioner complains that the language of the self-care subsection alone does not suggest that its purpose was to combat gender-based discrimination, and that the types of medical conditions for which FMLA leave is allowed are not limited to those predominantly affecting workers of either gender. But the same is true of the family-care subsection. 29 U.S.C. § 2612(a)(1)(C). The text of that section allows an employee to take necessary leave in order to care for that person’s “spouse;” it is not limited to caring for a wife or husband. *Id.* This did not prevent the Supreme Court from holding that Congress validly waived immunity in the family-care context. *Hibbs*, 123 S.Ct. at 1981. The subsection referring to self-care leave can not be divorced from the legislation as a whole in determining whether Congress intended to waive States’ immunity from suit, or whether it intended to do so in order to remedy and deter violations of the right to equal protection. Congress’ intent to do so is unmistakable. *Hibbs*, 123 S.Ct. at 1976-77.

C. Congress acted to remedy gender discrimination that was identified in the Congressional record.

In order to validly legislate away States’ sovereign immunity under section 5, however, Congress must be acting to remedy identified constitutional violations – not attempting to substantively redefine the States’ legal obligations. *Hibbs*, 123 S.Ct. at 1977; *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 2164-68, 138 L.Ed.2d 624 (1997). Legislation is valid under section 5 if it exhibits congruence and proportionality between the injury to be prevented or remedied, and the means adopted to that end. *Hibbs*, 123 S.Ct. at

1978, *citing City of Boerne*, 117 S.Ct. at 2157. “It is for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference.” *City of Boerne*, 117 S.Ct. at 2172.

Petitioner’s contention that the FMLA is not congruent and proportional to the injury sought to be remedied is based on its position that Congress did not identify discrimination by the States in connection with the FMLA’s self-care clause. The heightened scrutiny to which gender-based decisions are subject is important to analyzing the record before Congress; it makes it easier for Congress to show a pattern of State constitutional violations which would justify its abrogation of States’ immunity. *Hibbs*, 123 S.Ct. at 1982. As explained in *Hibbs*, gender-based classifications are subjected to heightened scrutiny: they will be permitted only if they serve important governmental objectives, and the discriminatory means employed are substantially related to the achievement of those objectives. *Hibbs*, 123 S.Ct. at 1978, *citing United States v. Virginia*, 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996). Because of this heightened level of scrutiny, it is easier for Congress to show a pattern of constitutional violations to justify abrogation of immunity than it would be if States’ discriminatory acts were only subject to rational-basis review. *Hibbs*, 123 S.Ct. at 1982. This makes the FMLA distinct from Congressional abrogation of immunity in statutes not directed towards gender discrimination. For example, in *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, the legislation in question subjected states to suits for patent infringement; there was no suspect classification

at issue. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 119 S.Ct. 2199, 2205-06, 144 L.Ed.2d 575. In *Kimel* and *Garrett*, the legislation under review responded to a purported tendency of State officials to make age- and disability-based distinctions; discrimination on the basis of such characteristics is reviewed by the rational basis standard rather than the heightened scrutiny governing review of gender discrimination. See *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 121 S.Ct. 955, 963-64, 148 L.Ed.2d 866 (2001); *Kimel v. Florida Board of Regents*, 528 U.S. 62, 120 S.Ct. 631, 646-47, 145 L.Ed.2d 522 (2000). *Hibbs* expressly distinguished *Kimel* and *Garrett* on this basis. *Hibbs*, 123 S.Ct. at 1981-82. Based on the congressional findings and record, the Supreme Court in *Hibbs* determined that the enactment of the FMLA as prophylactic legislation was valid. *Id.* at 1981.

Petitioner argues that the legislative history does not tie the self-care leave provision to the prevention of discrimination. However, the evidence before Congress *did* establish the discriminatory impact on men and women of the inability to take leave for personal medical care. “According to the evidence that was before Congress when it enacted the FMLA, [after the enactment of Title VII] States continue to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits.” *Hibbs*, 123 S.Ct. at 1979.

The Senate Report on the FMLA indicates in its examination of leave for an employee’s own serious illness, that “Job loss because of illness has a particularly devastating effect . . . where a single parent heads the household.” S.Rep. no. 103-3, pp. 11

(1993), U.S.Code Cong. & Admin. News 1993, p.13-14. The Senate quoted testimony that “For the single parent, *usually a woman*, losing her job *when she is unable to work* during a time of serious health condition can often mean borrowing beyond prudence, going on welfare, or destitution for herself and her family.” *Id.*, U.S.C.C.A.N. p. 14 (emphasis added).

Hibbs also pointed out that

Congress had evidence that, even where state laws and policies were not facially discriminatory, they were applied in discriminatory ways. It was aware of the ‘serious problems with the discretionary nature of family leave,’ because when ‘the authority to grant leave and to arrange the length of that leave rests with individual supervisors,’ it leaves ‘employees open to discretionary and possibly unequal treatment.’ H.R.Rep. No. 103-8, pt. 2, pp. 10-11 (1993). Testimony supported that conclusion, explaining that ‘[t]he lack of uniform parental *and medical* leave policies in the work place has created an environment where [sex] discrimination is rampant.’ 1987 Senate Labor Hearings, pt. 2, at 170 (testimony of Peggy Montes, Mayor's Commission on Women's Affairs, City of Chicago).

Hibbs, 123 S.Ct. at 1980 (emphasis added).

Congress also recognized the prevailing ideology that women are “mothers first, and workers second.” *Hibbs*, 123 S.Ct. at 1982. The corollary to this stereotype is that male employees belong in the workplace, even if suffering from a medical condition for which female employees would be permitted to take self-care leave. As the Supreme Court pointed out, employers holding this stereotype “often denied men similar accommodations or discouraged them from taking leave.” *Hibbs*, 123 S.Ct. at 1982. This perception can also “lead to subtle discrimination that may be difficult to detect on a case-by-case basis.” *Id.* Congress accordingly found that “employment standards that apply to one gender only have

serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.” 29 U.S.C. § 2601(a)(6). Thus, the evidence before Congress was not limited to the discriminatory application and effect of family-care leave policies, but also reflected discrimination in the application and effect of self-care leave.

Petitioner’s brief emphasizes that some of the testimony was not directed particularly to public-sector employment; however, *Hibbs* approved application of private-sector evidence to government employment in analyzing the FMLA, based on the evidence before Congress that the “proportion and construction of leave policies available to public sector employees differs little from those offered private sector employees.” *Hibbs*, 123 S.Ct. at 1979 & n. 3. In fact, much of the evidence *Hibbs* pointed to as supporting the FMLA’s abrogation of immunity was not restricted to discrimination in employment by the States, but reflected unequal treatment and stereotypical beliefs in the workforce generally. *Id.* at 1979-80, 1982.

The Congressional record of gender discrimination and purpose to eliminate that discrimination distinguishes this case (like *Hibbs*) from those in which Congressional waivers of sovereign immunity were invalidated due to the absence of an identified pattern of constitutional violations. Congress identified a pattern of gender discrimination in the application and effect of leave policies which related to leave for medical care as well as family care, which was sufficient to permit it to exercise its Fourteenth Amendment power to remedy and deter such discrimination, at least in the context of gender-based distinctions which are subject to heightened scrutiny.

As with the family-care leave provision, Congress' chosen remedy for this pattern was congruent and proportional to the violation. It created "an across-the-board, routine employment benefit for all eligible employees" to ensure that employers "could not evade leave obligations simply by hiring men." *See Hibbs*, 123 S.Ct. at 1982. By entitling all employees to the same benefit regardless of gender, Congress reduced employers' incentive to engage in hiring and promotion decisions on the basis of stereotypes. *Id.* at 1982-83. The self-care leave provision of the FMLA therefore represents a valid exercise of Congress' authority under section 5 of the Fourteenth Amendment to enact prophylactic legislation proscribing State conduct which would discriminate between men and women in the workplace.

The post-*Hibbs* federal appellate decisions cited by Petitioner do not provide a persuasive reason to conclude otherwise:

Touvell v. Ohio Department of Mental Retardation and Developmental Disabilities, 422 F.3d 392, 402 (6th Cir. 2005) quoted the Senate Report indicating that part of the Congressional purpose was to alleviate the economic burden of illness-related job loss – but the Court inexplicably ignored the subsequent statement of the same report pointing out that the burden is particularly heavy on single parents, who are usually women. Moreover, while *Touvell* agreed with Petitioner's assertion that the Congressional record of discrimination must specifically relate to the State as an employer, it ignored the Supreme Court's finding in *Hibbs* that private-sector employment data was equally relevant in this context, due to the evidence before Congress that public and private sector policies did not differ. *Hibbs*, 123

S.Ct. at 1979 & n. 3. *Brockman*'s analysis is similar to *Touvell*'s and fallacious for the same reasons. *Brockman v. Wyoming Dept. of Family Services*, 342 F.3d 1159, 1164-65 (10th Cir. 2003).

Toeller v. Wisconsin Dept. of Corrections, 461 F.3d 871, 879 (7th Cir. 2006) points to the absence of a Congressional finding that “women would be more likely to have [a short-term] medical problem than men.” But the absence of such a finding is irrelevant to whether men and women faced with these medical problems were subjected to disparate treatment; this was the violation of equal protection sought to be remedied by Congress. *See* 29 U.S.C. § 2601(b)(4), (5).

Nelson, *Miles*, and *Batchelor* did not analyze the issue at all, but merely followed *Toeller*, *Touvell*, *Brockman*, and/or pre-*Hibbs* authority found not to have been overturned by *Hibbs*. *Nelson v. University of Texas at Dallas*, 535 F.3d 318, 321 (5th Cir. 2008); *Miles v. Bellfontaine Habilitation Center*, 481 F.3d 1106, 1107 (8th Cir. 2007) (per curiam); *Batchelor v. S. Fla. Water Mgmt. Dist.*, 242 Fed.Appx. 652, 653 (11th Cir. 2007) (per curiam) (unpublished). In fact, it appears that the issue was not even argued by the parties in *Nelson*. *Nelson*, 535 F.3d at 321 (“neither party to this appeal challenges whether sovereign immunity still protects states from liability for suits brought under subsection D”). The decisions in these cases simply failed to thoroughly analyze the Congressional record or to apply the lessons of *Hibbs*, and should not be followed by this Court.

The post-*Hibbs* decisions from other State Courts cited by Petitioner are similarly unpersuasive. *Matthews* falls within the same category of cases following the authorities

finding no valid abrogation of immunity, without analyzing the issue. *Matthews v. Military Dept. ex rel. State*, 970 So.2d 1089, 1090 (La. App. 2007). *Nicholas* discusses the issue in more detail, but also relies on *Touvell*, *Toeller*, and *Brockman*, adding nothing to the rationale of those cases. *Nicholas v. Attorney General*, 168 P.3d 809, 812 (Utah 2007). *Lizzi* actually based its decision on res judicata, not immunity; the Court reviewed *Brockman* only to explain that *Hibbs* had not altered the res judicata effect of the Fourth Circuit's pre-*Hibbs* opinion in the same underlying dispute. *Lizzi v. Washington Metro. Area Transit Auth.*, 862 A.2d 1017, 1024 (Md. 2004). The Court should decline to follow these unpersuasive authorities.

Congress acted within its power under the Fourteenth Amendment when it abrogated the States' immunity from suit under the FMLA. The trial court properly denied Petitioner's plea to the jurisdiction, and review should be denied, or the Court of Appeals' judgment should be affirmed.

FOR THESE REASONS, Respondent prays that review be denied, or in the alternative, that the Court of Appeals' judgment be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served by first-class U.S. mail to **Sean Jordan**, Attorney for Petitioner, Assistant Solicitor General, Texas Attorney General's Office, PO Box 12548, Capitol Station, Austin, TX 78711-2548, on December 8, 2009.

John P. Mobbs