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IN THE SUPREME COURT OF THE UNITED STATES

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DANIEL COLEMAN, :

Petitioner :

v. : No. 10-1016

COURT OF APPEALS OF MARYLAND, :

ET AL. :

- - - - - x

Washington, D.C.

Wednesday, January 11, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:21 a.m.

APPEARANCES:

MICHAEL L. FOREMAN, ESQ., University Park, Pennsylvania; for Petitioner.

JOHN B. HOWARD, JR., ESQ., Deputy Attorney General, Baltimore, Maryland; for Respondents.

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P R O C E E D I N G S

(10:21 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 10-1016, Coleman v. The Court of Appeals of Maryland.

Mr. Foreman.

ORAL ARGUMENT OF MICHAEL L. FOREMAN

ON BEHALF OF THE PETITIONER

MR. FOREMAN: Thank you, Mr. Chief Justice, and may it please the Court:

The propriety of any section 5 legislation is judged by in reference to the historical perspective that it reflects, and that historical perspective is very clear in -- and it's set very clearly by Congress and by this Court. It -- it is an unfortunate, long history of State-sponsored gender discrimination. And those -- that discrimination embodies gender-based stereotypes that took a very firm hold in the employment area, where women had difficulty obtaining employment and holding employment. And this Court in a litany of cases recognized these gender-based stereotypes as -- as an improper assumption about women's abilities.

In *Frontiero v. Richardson*, it rejected this issue that women's mission were to be women -- to be wives and mothers; *Stanton v. Stanton*, that women were

1 to be the homemaker and men the breadwinner, and --

2 JUSTICE KAGAN: Well, Mr. Foreman, I guess
3 the question in this case is what this particular
4 statutory provision has to do with gender discrimination
5 and the history of gender discrimination, whether
6 Congress was aiming to eradicate gender discrimination
7 through this provision or whether it was trying to do
8 something else entirely.

9 MR. FOREMAN: And it was directly attempting
10 to address these gender-based stereotypes in a couple
11 different ways as a practical matter. At that time,
12 when an employer saw a woman, they didn't necessarily
13 just see a worker. They saw a person that could become
14 pregnant, and worked on these gender-based stereotypes,
15 that that woman would either become pregnant, would be
16 disabled because of pregnancy-related disabilities but,
17 in any event, was a least -- least attractive employee.

18 And the Family and Medical Leave Act
19 addresses that specifically in its purposes section. It
20 specifically says that is intended to promote the equal
21 opportunity for women and men pursuant to the Equal
22 Protection Clause.

23 But more specific to the self-care
24 provision, Congress made it very clear what they were
25 attempting to do. If you move to the "findings"

1 section, first, in finding number 6, they address --

2 CHIEF JUSTICE ROBERTS: Where -- where are
3 you reading from, counsel?

4 MR. FOREMAN: I am reading from Appendix A
5 to the brief, and it is -- that employment standards
6 that apply to one gender only have a serious potential
7 for encouraging employers to discriminate against
8 employees and applicants of employment who are of that
9 gender.

10 That's the negative inference argument that
11 we make in our brief. But even more to the point, if
12 you move to the purpose sections at appendix 2,
13 page appendix 2, it specifically is intended to minimize
14 the potential for employment discrimination on the basis
15 of sex by ensuring generally that leave is available for
16 eligible medical reasons, including maternity-related
17 disabilities and for compelling family reasons, and to
18 ensure equal protection under the law.

19 JUSTICE ALITO: Well, following up on
20 Justice Kagan's question, I have -- I have difficulty
21 seeing how providing 12 weeks of leave for self-care for
22 both men and women affects the incentive of an employer
23 who we will assume has an inclination to discriminate
24 against women based on the possibility that a woman
25 applicant for employment may become pregnant. I just

1 don't see how that would affect the incentives of -- of
2 an employer in that situation.

3 MR. FOREMAN: The rationale of Congress at
4 that point was that they could have addressed this issue
5 several different ways. They -- and they passed (A),
6 (B), and (C) -- the birth of the child, the adoption of
7 the child, and the Family and Medical Leave Act --
8 against -- again, addressing gender-based stereotypes.

9 JUSTICE ALITO: Well, (A) is not at issue,
10 right?

11 Okay. So, we're just dealing with (D),
12 which concerns a serious health condition. So, you have
13 an employer who is willing to discriminate on the basis
14 of gender. The employer has two applicants for
15 employment, a man and a woman, and the employer says,
16 well, if I hire the man, he might take 12 weeks of leave
17 for a serious medical condition, and if I hire the
18 woman, she might take 12 weeks of leave for a serious
19 medical condition which might be something that either
20 men or women could get, or it also could be a sickness
21 related to pregnancy.

22 So, there still is -- there still would be
23 an incentive for this hypothetical employer to
24 discriminate against the woman.

25 MR. FOREMAN: But one of the things Congress

1 tried to do is to take that incentive away.

2 JUSTICE ALITO: How does it do that? That's
3 what I'm -- I understand that, and it's a worthy
4 objective. I just don't understand how giving both men
5 and women 12 weeks of leave for self-care affects the
6 incentive.

7 MR. FOREMAN: It affects the incentive by
8 providing -- it becomes the equal opportunity employer.
9 It evens the -- the ground. And the way it would do it
10 is an employer, if you just have (A) through (C), can
11 look at an employee and, based upon gender stereotypes,
12 would make the assumption that the women, because of
13 historically the role they were required to play, would
14 be taking all the leave under (A) and (B) and (C). And
15 so, why would I even hire that woman in the first place?

16 JUSTICE KAGAN: But women don't get sick
17 less often than men, do they?

18 MR. FOREMAN: No, absolutely.

19 JUSTICE KAGAN: So, you're just adding
20 something to both sides of the balance, and it doesn't
21 affect the employer's incentive. The employer still --
22 the -- the hypothetical discriminatory employer would
23 still say, well, women are going to be caregivers more
24 often; so, I'm -- I'm going to not hire that person.

25 MR. FOREMAN: But under (A), (B), and (C)

1 after the Family and Medical Leave, an employer would
2 look and say both men can take these now. And I think
3 we need to step back --

4 JUSTICE KAGAN: And that's why (A), (B), and
5 (C) go to the problem, but what does (D) have to do with
6 it? If you assume that both men and women get sick at
7 an approximately equal rate -- maybe you don't assume
8 that -- but if you do, it doesn't seem to factor into
9 the employer's incentives in any way.

10 MR. FOREMAN: There is nothing in the record
11 that demonstrates that there's a differential rate
12 between the self-care rates for men and women. But the
13 perception was that women, because of pregnancy, because
14 of pregnancy-related disabilities, would in fact take
15 more leave. And so that I would look at a woman as an
16 employer and say she will become pregnant, she will take
17 leave, she will be disabled. However, with (D) now, but
18 the man can take a -- a disability leave on the same
19 basis.

20 And the hope of Congress was not that it
21 would happen immediately, but by the -- what would
22 happen is, with the application of family and medical
23 leave, at some point men would be taking (A), (B), and
24 (C), and, in fact, women and men would be taking family
25 and medical self-care leave. I just --

1 JUSTICE GINSBURG: Mr. Foreman, I think
2 everyone has been trying to get you to focus on the
3 health care sickness leave alone, and in the -- in the
4 portions of the Act that this Court upheld, the Congress
5 said there is this close association of women with
6 children; we think it's going to be good for everybody
7 if fathers recognize their responsibility for elderly
8 parents, sick children, sick spouse. So, we -- we can
9 see the rationale, trying to change the stereotype,
10 trying to open up caregiving for both sexes.

11 But you have answered the question that
12 women and men get sick; there's no -- there's no
13 disproportion. So, how do you tie that, just -- just
14 that part of the Act, where there -- there isn't the
15 obvious association of women with childbearing? So, we
16 extend the benefit to men so they'll be associated with
17 child care. There isn't that same link here, is there?

18 MR. FOREMAN: I think it is the same linkage
19 trying to address -- it's addressing a difference there,
20 but it's addressing the linkage that women will in fact
21 take pregnancy-based leave or pregnancy-based
22 disabilities and, therefore, are less attractive, less
23 -- employees, and that's what self-care was intended to
24 do.

25 JUSTICE KAGAN: So, you're saying -- let me

1 just make sure I understand. You're saying that the --
2 that Congress is thinking that an employer actually does
3 think that women take more sick leave because women get
4 pregnant. And just as Congress was thinking about the
5 employer who thought women are going to take more family
6 leave, you think Congress was thinking about the
7 employer who thinks women are also going to take more
8 sick leave because of pregnancy?

9 MR. FOREMAN: Absolutely, Your Honor. And
10 in response to Justice Alito's question -- and I'm sorry
11 if I gave a confusing response. There are two separate
12 ways of addressing that.

13 You can look at self-care as a stand-alone
14 provision, without (A), (B), and (C). Congress passed
15 just self-care. In that case it would be responding to
16 exactly that type of gender stereotype, and 12 weeks
17 would be a congruent and proportional response.

18 The other way to look at it is that's not
19 the way Congress passed the bill. They passed it as a
20 comprehensive response with (A), (B), and (C), and hence
21 (D) then becomes a bit of an equalizer to take away this
22 negative incentive that only women would take (A), (B),
23 and (C).

24 So, there's two separate ways that this
25 Court can get to the same conclusion, and that

1 conclusion is that this is a congruent and proportional
2 response to gender-based discrimination.

3 JUSTICE KAGAN: Do you have any evidence
4 that Congress in fact was thinking about either of these
5 two things? Is there anything in the record that
6 suggests either of those two theories?

7 MR. FOREMAN: Yes, there -- there is, Your
8 Honor, and let me -- let me take the negative inference
9 first, because I think looking at the statute as a
10 comprehensive makes sense -- is it was introduced -- and
11 I'm reading from page 43. It's referenced on page 43 of
12 our brief, that starting in 1987, National Women's
13 Political Caucus testified, quote: "My primary purpose
14 is to stress that parental and medical leave are
15 inseparable. In the words of the old song, 'You can't
16 have one without the other.'"

17 And the point she then later on to explain
18 was parental leave without medical leave would encourage
19 discrimination against women of child-bearing age, who
20 constitute approximately 73 percent of all women in the
21 workforce. Employers would tend to hire men, who are
22 much less likely to make this claim.

23 Fast forward to 1993 at the time of the
24 passage of -- and this would be on page 42 of our merits
25 brief: "A law providing special protection to women or

1 any defined group, in addition to being inequitable,
2 runs the risk of causing discrimination." The FML
3 addresses this by addressing the needs of all workers,
4 avoids this risk. The FMLA is based on the guarantees
5 of equal protection. So, it addresses that aspect of --
6 it addresses that aspect.

7 JUSTICE SOTOMAYOR: Counselor, I -- I take
8 your argument, but if you look at the legislative
9 record, the reports, the findings, et cetera, and the
10 statements repeatedly by many congresspeople, there
11 appears to be -- have been a dual motive for this
12 provision. They were, in fact, engaged in the question
13 of discrimination against pregnant women. That was
14 recognized in Hibbs, and that's clear.

15 But with respect to this particular
16 provision, they were also concerned about economic
17 effect that -- that happened to everyone, men and women,
18 who became disabled. And so, they appear to have had
19 dual motivation. Part of the bill was gender-related;
20 part of the bill seemed to be disability-related.

21 What do -- how do we judge that kind of
22 bill, where Congress may have been expanding the
23 benefits it's giving to people, not solely because of
24 gender discrimination, but because of this desire to
25 address disability discrimination?

1 MR. FOREMAN: Justice Sotomayor, I -- I
2 think the way you judge it is rely on what Congress's
3 expressed findings and provisions are. And to the
4 extent this Court makes a determination that the FMLA is
5 responsive to gender-based discrimination, then how
6 Congress chose to address that is congruent and
7 proportional.

8 The fact that Congress may also have had
9 other motives, that there was a concern with -- with
10 families and that families are -- benefit should not be
11 used to undermine the fact that Congress indeed was
12 acting pursuant to one of its broadest powers, section 5
13 of the Fourteenth Amendment, and, therefore, that their
14 -- their considered judgment is a congruent and
15 proportional response.

16 Part of -- part of the findings is clearly
17 reflective of a fact that this covered both governmental
18 employers and private industry. So, there was reference
19 to Commerce Clause type of -- of analysis, which my
20 colleagues raised repeatedly in their brief. But the
21 court -- the Congress needed to do that because they
22 were regulating private employment but, at the same
23 time, recognized to the extent that we are -- are going
24 to regulate State-based conduct.

25 JUSTICE ALITO: Well, with respect to the

1 Commerce Clause, could I ask you this: If we were to
2 disagree with you on the Fourteenth Amendment and hold
3 that it -- that Congress didn't validly abrogate State
4 sovereign immunity with respect to subsection (D), would
5 your client still be able to seek reinstatement or other
6 injunctive relief?

7 MR. FOREMAN: Justice Alito, I think what
8 you're -- and you'll clearly correct me if I am wrong,
9 but I think what you are responding to, is there an Ex
10 parte Young action here that would be made -- able to be
11 made consistent with the Commerce Clause, under the
12 Commerce Clause?

13 And the answer is -- and I know that both
14 Justice Kennedy and Justice Rehnquist, I think, in one
15 of his dissents, pointed out in the Family and Medical
16 Leave Act that the employee may not be left out in the
17 dark because there is an Ex parte Young claim.

18 A couple points on that --

19 JUSTICE ALITO: Here the district court
20 completely dismissed your FMLA claim, not just insofar
21 as you sought damages. I -- I think you also sought
22 reinstatement and other equitable relief, but the
23 district court dismissed it completely.

24 MR. FOREMAN: That's right.

25 JUSTICE ALITO: But you're not contesting

1 that, are you?

2 MR. FOREMAN: We're not contesting it
3 consistent with any Ex parte Young claim. What the
4 district court did was say the claim is totally
5 dismissed based upon Eleventh Amendment immunity.

6 But if I could try to respond to your
7 question more specifically, this Court has never as a
8 Court held that Ex parte Young type of action is
9 available in this type of claim. Assuming that it --

10 JUSTICE KENNEDY: Because this is for money
11 damages.

12 MR. FOREMAN: Pardon?

13 JUSTICE KENNEDY: Because this is for money
14 damages. Ex parte Young was just injunctive relief.
15 The Eleventh Amendment primarily protects the treasuries
16 of the State against money damages.

17 MR. FOREMAN: Correct.

18 JUSTICE KENNEDY: It's not Ex parte Young.

19 MR. FOREMAN: Correct. But as -- as you
20 pointed out in your dissent in Hibbs, that Ex parte
21 Young may be available, but one of the concerns we have
22 is, again, that the Court -- as a majority, the Court
23 has never held that. I believe that is in fact the
24 correct interpretation of the law, that it would be
25 available for injunctive relief. However, the Court has

1 never defined the parameters of what an Ex parte Young
2 action really gives a plaintiff, and that becomes very
3 important in this case.

4 JUSTICE ALITO: You said "in this case."
5 That's basically what I'm asking. If we were to
6 disagree with you on the Fourteenth Amendment, are you
7 asking us simply -- would we then simply affirm the
8 Fourth Circuit? Or would we have to -- would we have to
9 make some accommodation for the possibility that the
10 dismissal of your claim, insofar as you sought
11 injunctive relief, may have been improper?

12 MR. FOREMAN: I think you would have to make
13 that accommodation, but, with respect, Your Honor, I
14 think that would be an incorrect approach. And here's
15 -- here's the reason why in Ex parte Young, a perfect
16 example --

17 JUSTICE ALITO: I am really trying to be a
18 little bit helpful to you. And I --

19 (Laughter.)

20 MR. FOREMAN: And apparently I missed that,
21 and I apologize.

22 JUSTICE ALITO: Okay.

23 JUSTICE GINSBURG: What relief did you ask
24 for? Damages, we know, and the -- you have to overcome
25 the Eleventh Amendment. Injunctive relief, you don't,

1 but did you ask for it?

2 MR. FOREMAN: In the complaint itself, it
3 does not ask for injunctive relief pursuant to the
4 Family and Medical Leave Act.

5 JUSTICE ALITO: I thought you --

6 MR. FOREMAN: There were combined claims --

7 JUSTICE ALITO: I thought you did, but maybe
8 I'm reading your complaint more generously than you read
9 it yourself.

10 JUSTICE GINSBURG: Well, you --

11 JUSTICE KAGAN: I'd go with Justice Alito
12 here.

13 MR. FOREMAN: If that's your reading of it,
14 we will certainly accept your reading.

15 (Laughter.)

16 JUSTICE GINSBURG: You must have asked for
17 such other and further relief.

18 MR. FOREMAN: But, again, back to the Ex
19 parte Young, in the case Nelson v. The University of
20 Tennessee -- Texas, a -- the case that dealt with --
21 exactly with this issue of abrogation of Eleventh
22 Amendment immunity, and they found that there was valid
23 abrogation of Eleventh Amendment immunity, the State of
24 Texas -- then the court was required to address the Ex
25 parte Young issue. And the State of Texas argued that

1 reinstatement is not an appropriate remedy under Ex
2 parte Young and that -- while the Fifth Circuit
3 ultimately rejected that, that is an argument that
4 employees would have to face: What are the parameters
5 of Ex parte Young? And, more importantly, that is not
6 the remedy that Congress in their considered judgment
7 believed was the appropriate remedy to address
8 gender-based discrimination.

9 JUSTICE GINSBURG: Well, Congress must have
10 thought that giving the woman back her job was an
11 important part. I mean, I thought the whole idea is she
12 wasn't supposed to be fired. So, I think that the --
13 the relief, the non-monetary relief, is certainly
14 important.

15 MR. FOREMAN: It is extremely important, but
16 Congress did not stop there. Congress decided it needed
17 to take one step further and there needed to be monetary
18 relief. And I think Mr. Coleman's case illustrates
19 exactly why.

20 Here Mr. Coleman exercised his rights that
21 were supposedly guaranteed him under the Family and
22 Medical Leave Act, and indeed under a State law, and the
23 State of Maryland fired him, and he is out of work. And
24 what is the disincentive for the State to not do the
25 same thing the next time if the only thing that you can

1 get is possibly injunctive relief prohibiting them from
2 doing that in the future and maybe reinstatement 2 or 3
3 years down the line? Employees at that point cannot put
4 their lives on hold. They have a duty to go out and try
5 to mitigate, try to find another job.

6 What's an employer to do? And Congress said
7 there needs to be more. We passed Title VII to try to
8 address gender-based discrimination, the Pregnancy
9 Discrimination Act, but there were still voids. And the
10 Family and Medical Leave Act attempts to fill those
11 voids, and one of those voids is try to provide a
12 monetary incentive so that the State of Maryland and
13 private employers will in fact comply with the law.

14 JUSTICE GINSBURG: When you -- when you --

15 JUSTICE SOTOMAYOR: Can I go -- I'm sorry.

16 JUSTICE GINSBURG: When you say you're
17 concerned about a disincentive to hire women, but the
18 Pregnancy Discrimination Act makes that unlawful. So,
19 if an employer decides I don't want to hire women of
20 child-bearing age, that is an out-and-out violation of
21 the Pregnancy Discrimination Act, isn't it?

22 MR. FOREMAN: That is, Your Honor, but the
23 Pregnancy Discrimination Act did not fill the other gap
24 which the Family and Medical --

25 JUSTICE GINSBURG: But you're relying on the

1 incentive -- the disincentive to hire women of
2 child-bearing age. The law protects the woman of child-
3 bearing age by saying, Employer, you can't refuse to
4 hire her, promote her, and all the rest because of
5 pregnancy.

6 MR. FOREMAN: It -- well, what the Pregnancy
7 Discrimination Act provided was that you needed to treat
8 pregnancy-related disabilities as you would other
9 short-term disabilities. So, if an employer decided not
10 to provide --

11 JUSTICE GINSBURG: I'm just asking you
12 about -- your -- your argument rests on an employer
13 acting unlawfully, you see. He won't hire -- we have to
14 give them medical leave, to everyone, because otherwise
15 the employer won't hire women. And that's -- the
16 question I'm asking is, you are assuming that the
17 employer will break the law by refusing to hire women
18 that -- of child-bearing age?

19 MR. FOREMAN: I don't want to make that
20 assumption in my incentive argument. I was using Mr.
21 Coleman as an example of why Congress could have made a
22 determination that monetary relief would be appropriate
23 in the Family and Medical Leave Act.

24 JUSTICE GINSBURG: But I -- your argument to
25 a large extent depends -- or you say Congress did this

1 because they wanted to eliminate or at least reduce one
2 kind of discrimination against women in the job market.

3 MR. FOREMAN: Yes.

4 JUSTICE GINSBURG: And that -- that
5 discrimination was refusing to hire women of child-
6 bearing age. Well, they couldn't do it out and out
7 because that would be a violation of the law. So, is
8 Congress having in mind discrimination that is under --
9 under the radar screen, that it's going to go on even
10 though it's unlawful?

11 MR. FOREMAN: I -- I don't think that was
12 Congress's intent, and that that's not what was
13 reflected. I think, again, they were trying to address
14 it on two separate levels: one, the gender-based
15 discrimination, the gender stereotype that women simply
16 become less attractive; and in the broader statute, to
17 prevent the negative inference so that all -- that
18 ultimately where we would get in society is the ability
19 to take pregnancy-related leave, other leave, would not
20 be viewed as a negative inference running against women,
21 and, therefore, women ultimately would become a
22 nonissue.

23 And I see the light's on. So, if I could
24 reserve the balance of my time.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Howard.

2 ORAL ARGUMENT OF JOHN B. HOWARD, JR.,

3 ON BEHALF OF THE RESPONDENTS

4 MR. HOWARD: Thank you, Mr. Chief Justice,
5 and may it please the Court:

6 In order to affirm in this case, the Court
7 need go no further than to distinguish Hibbs, and we
8 think Hibbs is readily distinguishable. And I'd like to
9 highlight four principal --

10 JUSTICE GINSBURG: Need go no further? I'm
11 sorry. I -- I didn't --

12 MR. HOWARD: I'm sorry, Justice Ginsburg.
13 Need go no further than simply to distinguish Hibbs.
14 And we think there are at least four distinctions that
15 we'd like -- I'd like to highlight today. The first is
16 one that's -- Justice Kagan, your question goes to,
17 which is subsections (A), (B), and (C) are all related
18 in some fashion to women's roles with respect to work
19 and family. Subsection (D) really does not speak to
20 that purpose.

21 And I think my second sort of distinction I
22 would point to --

23 JUSTICE KAGAN: If I could just --

24 MR. HOWARD: Yes.

25 JUSTICE KAGAN: -- stop you there, Mr.

1 Howard, for a second, as I took from Mr. Foreman
2 something that I hadn't understood from his briefs --
3 maybe I just missed it -- which is that he's making a
4 kind of analogous argument, that, just as in the -- in
5 the prior provisions of the Act, employers thought of
6 women as caregivers and the response of Congress was to
7 provide a gender-neutral leave benefit that had both --
8 that both women and men were eligible for.

9 So here, employers think of women as needing
10 more medical leave because of pregnancy, and the
11 response of Congress is to provide gender-neutral sick
12 leave. So, what is your response to that argument?

13 MR. HOWARD: Congress, Justice Kagan, did
14 not I think take that stereotype or perception that Mr.
15 Foreman referred to into account. And I'd specifically
16 point the Court to page 21 of our brief, where we cite
17 some Bureau of Labor Statistics studies indicating that
18 men and women at the time took roughly the same amount
19 of sick leave. In fact, Mr. Foreman has conceded as
20 much. And that same study projects that men and women
21 will take roughly the same amount of time after the
22 enactment of the FMLA --

23 JUSTICE SOTOMAYOR: But there certainly
24 was -- there was certainly much conversation and
25 testimony that, whether they in fact took the same

1 amount of leave time or not, that women who were
2 pregnant or were perceived as capable of getting
3 pregnant were hired less frequently because,
4 subjectively, the employers thought that they were more
5 likely to take the time.

6 So, frankly, for years there was questions
7 about whether law firms were hiring young -- not hiring
8 young women because they feared they would leave in the
9 middle of a big case or something else. We all know
10 those stories. So, it is sort of common knowledge in
11 many ways, but there was plenty of testimony related to
12 that.

13 So, assume that that was Congress's
14 perception, because it was supported by the record or as
15 much of the record as Hibbs recognized as adequate.
16 Where does that leave your argument?

17 MR. HOWARD: Well, I would make a couple of
18 points in response to that, Justice Sotomayor. First,
19 the Pregnancy Discrimination Act was already in place.
20 And so, to the extent there were perceptions that
21 employers might discriminate based on pregnancy
22 disabilities, that would be unlawful under Title VII as
23 amended by the Pregnancy Discrimination Act.

24 And the fact that -- and you are quite right
25 that there is a fair amount of discussion in the

1 legislative record, although I think it's less of a
2 predominant theme than the concern for job security for
3 working families, but there certainly is discussion
4 about pregnancy discrimination and pregnancy disability
5 as a type of illness.

6 But we again would note that this is valid
7 Commerce Clause legislation. And so, to the extent that
8 kind of discrimination was occurring and leave was being
9 denied or women were suffering adverse consequences in
10 the workplace as a result of pregnancy discrimination,
11 they could enforce the 12 weeks through a Title VII
12 action.

13 JUSTICE GINSBURG: They couldn't -- the
14 Pregnancy Discrimination Act says that you have to treat
15 pregnancy like any other disability. So, if they're not
16 giving anybody any leave for anything, they don't have
17 to give any leave; not 12 weeks, not 1 day. And that's
18 what -- that's the gap that this legislation fills. It
19 says, yes, you do have to provide leave for women who
20 have disabling conditions, including pregnancy, but then
21 you have to give that to men as well. You can't reserve
22 that for the one sex. So, it was the gap in the
23 Pregnancy Discrimination Act that this -- this was
24 referring to.

25 MR. HOWARD: Yes, I agree, Justice Ginsburg,

1 but the gap that existed was the absence of a guaranteed
2 period of leave. In other words, it was the absence of
3 a substantive entitlement, and so -- to a certain amount
4 of leave. And, in effect, the gap that was being filled
5 served as prophylaxis for Title VII but not for
6 constitutional violations. Now --

7 JUSTICE ALITO: Assume for the sake of
8 argument that for the -- the applicants for particular
9 provisions -- particular positions, I should say --
10 where the applicants are typically of a certain age, men
11 tend to take less sick leave than women, because women
12 also take sick leave for pregnancy-related illnesses.
13 So, giving everybody 12 weeks eliminates the -- the
14 possibility that women -- women who will be -- want to
15 take additional -- will want to take more sick leave
16 will be fired because they exceed the amount of sick
17 leave allowed by the employer for everybody. Now, isn't
18 that connected to eliminating discrimination in
19 employment?

20 MR. HOWARD: Justice Alito, I think that one
21 could argue that that is connected with eliminating
22 pregnancy disability discrimination. It's also
23 connected to the purposes of (A), (B), and (C). I think
24 that the principal reason why employers do view
25 potential hires as -- when they're women, as likely to

1 take a lot of time off I think goes more to the family
2 caretaking provisions, and I think that's largely
3 reflected in the record.

4 JUSTICE ALITO: Well, I don't think -- I
5 have difficulty with the incentives argument either --
6 honestly, either as to (D) or as to (C). But I'm just
7 talking about the -- an argument based on consequences.
8 If an employer says you get 2 weeks of sick leave,
9 period; after that, if you can't come back, you're
10 fired -- that may -- at least for applicants within a
11 certain age range, that may have a much more severe or a
12 more severe impact on women than on men.

13 MR. HOWARD: Yes, Justice Alito, and I
14 think what --

15 JUSTICE ALITO: What would the answer to
16 that be, that that's not intentional discrimination?

17 MR. HOWARD: That would certainly be part of
18 the answer, and what I was going to say was that what
19 you are describing is a disproportionate impact on women
20 as a result of assumptions concerning pregnancy
21 disability. And, of course, if States were engaging in
22 this kind of conduct or if there were a disproportionate
23 impact, that would not state an equal protection
24 violation under Washington v. --

25 JUSTICE BREYER: Why are you separating four

1 things? I mean, I've heard, it seems to me, three
2 separate rationales. One, the easiest, is in (D)
3 itself. Sometimes a woman could have a miscarriage, and
4 of course she has to stay home. And that isn't covered
5 by (A), (B), or (C). So, we cover it in (D), you know.
6 And then we put the men in too because we don't want to
7 make this incentive just to not hire women. That's one.

8 The second one was the one Justice Ginsburg
9 brought up, that there is a gap in the pregnancy law
10 which won't work unless you have to give people some
11 medical leave. So, here it is, (D).

12 And the third one, which I think was related
13 to what Justice Alito just said, is when -- you have to
14 read it together to understand the third one. You get
15 12 weeks all together. All right? Now, that means,
16 once you put in (D), this Act will have less of a bad
17 effect. The bad effect of the Act is if you protect the
18 women, then the -- the employers say, well, we're not
19 going to hire women, perfect; we have to give them 12
20 leaves; we'd have to give the men -- terrible, it's a
21 terrible disincentive.

22 But then they worked out how to lessen the
23 disincentive. And the way you do that, you say 12 weeks
24 overall. And now look what happens. A woman wants to
25 take, say, 12 weeks to look after her family, and she

1 gets separately sick, 4 more weeks. But how many does
2 she get? Answer: Twelve, right? Twelve. You could
3 answer that part.

4 (Laughter.)

5 JUSTICE BREYER: Now let's think of the man.
6 Let's think of the man. The man would like to look
7 after the family, say, for 6 weeks. And he gets sick 4
8 weeks. How many weeks have we got?

9 MR. HOWARD: Ten.

10 JUSTICE BREYER: Ten. Thank you.

11 (Laughter.)

12 JUSTICE BREYER: All right.

13 MR. HOWARD: I like these questions.

14 JUSTICE BREYER: So -- perfect.

15 So, now the employer is sitting -- and it
16 will work with other numbers. I don't rely on those
17 alone.

18 (Laughter.)

19 MR. HOWARD: Right.

20 JUSTICE BREYER: But now look what happens.
21 Without this Act, he's got a woman who is going to be
22 out of there -- I mean, with the Act -- see, unless we
23 put in four -- unless we put in the fourth part of it,
24 we have a woman who's gone for 12 weeks and a man who's
25 gone maybe for 6 but maybe for zero, okay? Maybe for 6.

1 With the Act, the woman's gone for 12, the man's gone
2 for 10. You see?

3 And so, the comparison there -- and it will
4 work with whatever numbers you want. The comparison
5 there is very different. And the comparison doesn't --
6 doesn't totally erase the problem with the woman, but it
7 may reduce it to a size where the Act itself will no
8 longer act as such a disincentive to hiring a woman.

9 We have three different rationales. All of
10 them are related to a serious problem, which is the
11 problem of discrimination against women because the
12 employers think they'll be home more. And so, you see
13 the conclusion I'm drawing? Yes, okay. So -- so, where
14 are we?

15 MR. HOWARD: Well, let me speak first to the
16 second one, the concern about the gap. The gap that is
17 filled by the 12 weeks is -- is a -- is to provide a
18 substantive entitlement. And when it permits a claim, a
19 damages claim enforceable against a State treasury, it
20 provides an entirely -- it requires a different
21 justification than simply to fill a gap with a
22 substantive entitlement. It becomes --

23 JUSTICE GINSBURG: The idea is it's part of
24 one package. I think that's what Justice Breyer was
25 getting at. But just suppose that Congress wanted to

1 improve conditions for the -- in the job market for
2 women, which I think it's fair to say was the motivating
3 force behind this Act, and they also wanted to protect
4 families so that sick children, sick spouses are
5 attended to.

6 Now, what leave policy would say, okay, to
7 do that, we will have leave when a spouse is sick, a
8 child is sick, a parent is sick, but not when the worker
9 herself is sick? Without -- it's all part of one
10 package which is designed to increase job security for
11 women and increase protection for their families. So, I
12 don't think you can slice off (D) from the other three.

13 MR. HOWARD: Justice Ginsburg, I think you
14 can separate (D) on the same analysis that this Court
15 applied in Tennessee v. Lane, in contrast to the Garrett
16 case. In Lane, of course, different sections of the
17 same Antidiscrimination Act required different
18 analysis -- analyses and reference to different parts of
19 the record. There was a single over-arching purpose, to
20 prevent discrimination against persons with
21 disabilities, but the operation and effect of the
22 particular claim requires a different analysis. As
23 Justice Stevens said, the Court is not required to
24 evaluate statutes as an undifferentiated whole.

25 JUSTICE BREYER: No, it doesn't have to, of

1 course. But the whole point of the question that I was
2 asking was, sure, what helps you by doing it separately
3 is it helps your case. But if we look at what Congress
4 was trying to do, they were trying to do it as a whole.
5 That's my point that I want you to answer. And they're
6 trying to do it as a whole because, no matter what
7 numbers I use, if I look at it without (D) -- is it (D)?
8 Yes, (D). If I look at it without (D), the ratio will
9 disfavor the woman. And if I look at it with (D),
10 suddenly the ratio from the point of view of the
11 employer of the disadvantage of hiring a woman over --
12 over hiring a man -- it goes way down. And that helps
13 women.

14 And that is why, I think -- reading this and
15 listening, a major reason why they put in (D) as part of
16 the other, because working with that 12-week limitation
17 and the whole rest of the statute, we now have a statute
18 that doesn't defeat itself. We now have a statute that
19 actually can achieve the end of leading employers to not
20 discriminate against women. Not perfectly, but there's
21 a big improvement.

22 And that's the -- that's the argument I'm
23 making. You have to read it as a whole to see that.
24 And that's what I -- I wonder if there's an answer to
25 that. Of course, I'm at the moment thinking there isn't

1 an answer to it, but I asked the question because I want
2 to hear what you say.

3 MR. HOWARD: Well, with respect to the
4 ratio, I think the premise of that point is that women
5 will take more leave for serious health conditions than
6 men. And I don't think that's borne out. And, you
7 know, Mr. Foreman has recognized as much. So, I don't
8 think the ratio really changes.

9 JUSTICE ALITO: Well, what if Congress had
10 added three additional subsections here and said that an
11 employer has to provide 12 weeks of unpaid leave so that
12 an employee can go to a health spa, 12 weeks of unpaid
13 leave for -- so that the employee can travel, 12 weeks
14 of unpaid leave so that the employee can take an
15 educational course?

16 Now, that -- those could be taken advantage
17 of by either men and women. It makes both men and women
18 increasingly unattractive as employees and, therefore,
19 reduces the any special disincentive that might have
20 been created by (A), (B), and (C).

21 Now, on that same logic, would those be --
22 would those be provisions that further the elimination
23 of discrimination based on gender?

24 MR. HOWARD: I -- I think even if one
25 accepted the premise, and we don't, that women take more

1 leave for health conditions, that would further dilute
2 the ratio, to have available all those types of leave.
3 Now, I thought, for example, one could imagine --

4 JUSTICE SOTOMAYOR: I thought Justice Alito
5 was trying to help you.

6 JUSTICE BREYER: He was.

7 JUSTICE SOTOMAYOR: He was.

8 JUSTICE BREYER: He was -- he's absolutely
9 right, and that's why this isn't a health spa thing,
10 (D). This is -- in fact, has two independent reasons,
11 that all -- the miscarriage reason and the Pregnancy Act
12 reason. And so, it isn't just saying go to a health
13 spa.

14 But I mean, I don't want to put arguments in
15 your mouth, which I just have, which you wouldn't like
16 there anyway, because -- but I would appreciate your
17 going on with this discussion in respect to what
18 Justice Alito and I have been talking about, and I'd be
19 interested in what you think.

20 MR. HOWARD: Yes.

21 JUSTICE SOTOMAYOR: And I'm working from a
22 different proposition than you are in response to this
23 question. I don't think that the actual amount of time
24 that men and women take is relevant. The question is:
25 What is the employer's perception, and did Congress have

1 a valid basis, as Justice Kagan pointed out earlier, to
2 believe that employers thought women took more time?

3 MR. HOWARD: I -- I think that if -- even if
4 that were correct, and -- and I don't think it is
5 because I think the overwhelming themes in the
6 legislative record as a whole really were a concern for
7 working families, whether single-income, double-income,
8 and the concern that if a breadwinner falls ill, the
9 family's going to have severe financial insecurity. And
10 then there was also concern against discrimination
11 against persons with illness.

12 But I think that one thing I'd like to
13 emphasize is that your -- your suggestion, Justice
14 Sotomayor, and -- and really almost all of the
15 discussion here today, I think, explains why this is
16 good social policy. We support it. But I don't think
17 that we've really gotten anywhere near the necessary
18 predicate of unconstitutional State conduct when the
19 constitutional right is defined with some precision.

20 And I -- and I think one has to define this
21 right as -- as disability. And I think also the
22 protections that the Pregnancy Discrimination Act
23 already had in place, when added with the substantive --
24 to the substantive entitlement, as a matter of Commerce
25 Clause legislation, to this leave --

1 JUSTICE ALITO: Well, if the State of
2 Maryland thinks this is good social policy, why is it
3 asserting its sovereign immunity?

4 MR. HOWARD: Well, that's a good question,
5 and I think we're here mainly on -- we need to defend
6 this on principle.

7 As, Justice Kennedy, you've pointed out in a
8 number of your opinions, the exercise of the section 5
9 power alters the Federal-State --

10 JUSTICE ALITO: But you can waive. Can't
11 you waive your -- your Eleventh Amendment immunity?

12 MR. HOWARD: We could, I believe.
13 That's this Court's --

14 CHIEF JUSTICE ROBERTS: Well, you can
15 provide this, the kind of relief that's sought here,
16 without waiving immunity, right? It's a matter of
17 legislation.

18 MR. HOWARD: Yes, I think that's right, and
19 there --

20 CHIEF JUSTICE ROBERTS: Could I just get
21 back to the discussion before about how (D) relates to
22 the others?

23 MR. HOWARD: Yes.

24 CHIEF JUSTICE ROBERTS: Who do you think
25 benefits most from subsection (E), men or women? That's

1 the one about armed services obligations at the time the
2 law was passed.

3 MR. HOWARD: I assume -- and I haven't
4 studied the history of that, but I assume that, just
5 based on the demographics of the military, it's like --
6 likely that there are more men in -- in service deployed
7 and that more women and wives benefit from that
8 provision.

9 JUSTICE GINSBURG: Was that -- that wasn't
10 part of the original Act, was it?

11 MR. HOWARD: No, it was not.

12 JUSTICE GINSBURG: And so, it was -- that
13 was -- the concern was a discrete concern for veterans.

14 MR. HOWARD: Yes, and --

15 JUSTICE GINSBURG: In that part.

16 MR. HOWARD: And we have not --

17 JUSTICE GINSBURG: It wasn't part of the
18 package that was the Family/Medical Leave Act.

19 MR. HOWARD: No. And we are not suggesting
20 that. We haven't raised that as a point in our briefs
21 or here today.

22 JUSTICE KAGAN: And, Mr. Howard, I -- I do
23 think that the point about the package is that if you
24 look at (D) alone, when you abstract it from everything
25 else, you have a good point, that it seems to be related

1 to economic security, which is not a section 5 issue;
2 that it seems to be related to discrimination against
3 sick people, which would also put us in a different
4 legal universe.

5 But when you look at (D) as passed at the
6 same moment on the basis of the same record as (A), (B),
7 and (C), with the overwhelming purpose of Congress being
8 to protect women from discrimination in the workplace
9 because of unfair stereotypical -- views about what
10 women do as workers, then (D) assumes a different kind
11 of aura.

12 And you can talk about a number of theories
13 for that, but I guess I would just ask for your -- your
14 reaction to that, that (D) is just part of a package
15 which was about telling employers: Get rid of your old
16 stereotypes. Don't act on your old stereotypes. Employ
17 women.

18 MR. HOWARD: Well, I -- I would respond in
19 part -- and I'm going to accept your proposition that I
20 should discuss these provisions as part of a single
21 package. But from the standpoint of States, subsection
22 (D) provides a separate claim, a separate basis to sue
23 States, and we think that claim is incongruent and
24 disproportionate to any conceivable unconstitutional
25 conduct that it might prohibit.

1 And I think this is borne out in the case
2 law. We've surveyed the 40 Federal cases that we could
3 find under subsection (D). Only two involve
4 pregnancy-related disabilities. Only one of them
5 alludes in passing to headaches arising from pregnancy
6 along with other stress-related conditions. But -- but
7 all of the others really have to do with men and women
8 benefiting from this leave for -- to care for a serious
9 health condition.

10 So, I -- I would really emphasize, in
11 response to your question, that one could look at it as
12 a package, but from the standpoint of States, it's a
13 separate and independent claim, and it's an
14 extraordinarily broad one. And it is not necessary, not
15 simply because Pregnancy Discrimination Act claims are
16 available, but, Justice Alito, there are Ex parte Young
17 claims available.

18 In -- in response to your question, in this
19 case at the Joint Appendix pages 3 to 12, the amended
20 complaint reveals that injunctive relief was sought,
21 albeit -- and on page 12 is the prayer for relief.
22 It's -- it's not clear whether that relief is sought
23 under Title VII or FMLA or both. But the reason why I
24 don't think -- the claim fails separate and apart from
25 any sovereign immunity argument. Of course, Ex parte

1 Young is not -- does not protect on that ground.

2 JUSTICE GINSBURG: But there's some focus in
3 the legislative history particularly on the -- the
4 family that has a single parent -- much more often a
5 woman, not a man -- and the devastating impact on that
6 family of the woman getting sick, the sole breadwinner
7 getting sick. So, that was certainly an -- a problem
8 for families with -- with only one breadwinner. And
9 Congress was focusing on those women and wanting to have
10 job security for them. That wasn't the only group of
11 women, but certainly that -- that affected the -- this
12 Act as it came out, didn't it?

13 MR. HOWARD: Yes. There is discussion in
14 the record of the disproportionate impact that you say.
15 But what -- what is left out -- well, it -- it is found
16 in other parts of the record that -- the relevant --

17 JUSTICE SCALIA: You're talking about the
18 legislative record here?

19 MR. HOWARD: Yes. The -- I'm sorry, yes.
20 The record of -- before Congress.

21 The relevant comparison, we think, is not --

22 JUSTICE SCALIA: Is that a closed record?
23 Is that a closed record, the way a record of a case is?

24 MR. HOWARD: I -- I am not sure I understand
25 the question.

1 JUSTICE SCALIA: I just find it a strange
2 expression to talk about "in the record" --

3 MR. HOWARD: Oh, I --

4 JUSTICE SCALIA: -- when what you're talking
5 about is legislative history.

6 MR. HOWARD: I misspoke. I do mean the
7 legislative history.

8 The -- the relevant comparison we think is
9 not between single-parent families who were
10 predominantly women, but between working families where
11 it could be two parents with a single income, man or
12 woman; it could be a family with two incomes, but
13 neither one can be lost. So -- and in any event, I
14 think we're talking now about a disproportionate impact,
15 which -- which would not state a -- an Equal Protection
16 violation.

17 JUSTICE GINSBURG: There's a question of how
18 Congress would do it. If they -- if they provided only
19 for the woman who's the single head of the family, then
20 that would be vulnerable under equal protection because
21 they didn't provide it for men.

22 MR. HOWARD: I think one would need to find,
23 as this Court's cases have emphasized, a widespread
24 pattern of unconstitutional conduct in the part of
25 States. And I think the circumstances, Justice

1 Ginsburg, that you've described, do not flow from
2 unconstitutional State action. They have their roots in
3 other socioeconomic causes. So --

4 JUSTICE GINSBURG: So, the leave is a remedy
5 for the problem. I think there's really not much
6 disagreement about the problem, that there is gender
7 discrimination in the job market.

8 MR. HOWARD: Yes.

9 JUSTICE GINSBURG: And then the question is
10 how do we remedy that?

11 MR. HOWARD: Well, I -- I don't think by
12 providing the -- the very sweeping remedy of (D), which
13 -- I see that my light's on. May I --

14 CHIEF JUSTICE ROBERTS: You can finish your
15 sentence.

16 MR. HOWARD: We think that the remedy in (D)
17 may cover the types of concerns you referred to, but
18 I -- I would emphasize this is a disproportionate,
19 incongruent remedy. It subjects States to far more
20 suits for unrelated health conditions than the Eleventh
21 Amendment should permit.

22 Thank you, Mr. Chief Justice.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Foreman, you have 4 minutes remaining.

25 REBUTTAL ARGUMENT OF MICHAEL L. FOREMAN

1 ON BEHALF OF THE PETITIONER

2 MR. FOREMAN: This is not responsive to
3 disability-based discrimination. The findings and the
4 purpose of the Family/Medical Leave Act make it clear
5 that it is responsive to gender-based discrimination.

6 Hibbs, in fact, found that the FMLA was in
7 response to gender-based discrimination. In making that
8 finding, they did not differentiate between the
9 different leave provisions. And, indeed, if you move to
10 Tennessee v. Lane, where Justice Rehnquist dissented,
11 drawing distinctions between disability-based
12 discrimination and sex-based discrimination, stated that
13 the task of identifying the constitutional right at
14 issue in the Family and Medical Leave Act was an "easy"
15 one. And that was his word, "easy." It's responsive to
16 gender-based discrimination.

17 Chief Justice Roberts, I think your question
18 about the military leave portion of the FMLA illustrates
19 that -- what Congress was doing here when they added
20 that almost 10 years later, they did not simply try to
21 pigeonhole it into -- this is section 5 legislation. In
22 the circuits at that time, there was considerable debate
23 as to whether that could be justified as proper
24 abrogation of immunity --

25 CHIEF JUSTICE ROBERTS: Do you think it

1 would be --

2 MR. FOREMAN: I'm sorry.

3 CHIEF JUSTICE ROBERTS: Do you think it
4 would be -- how would this case come out if we were
5 dealing with -- with subsection (E)? Do you think that
6 should be treated separately than the prior ones?

7 MR. FOREMAN: Yes, it should, because --

8 CHIEF JUSTICE ROBERTS: How?

9 MR. FOREMAN: -- it was passed pursuant to a
10 different constitutional power, and they provided in
11 fact a different remedy, recognizing that the -- the
12 Commerce Clause could not -- that Commerce Clause was
13 the appropriate way to deal with this, and they provided
14 a right of action by the United States in order to
15 provide damages.

16 CHIEF JUSTICE ROBERTS: If -- if we think
17 that you should look at these provisions separately,
18 where with respect to (D) -- and I'm looking at one of
19 our prior precedents -- has Congress unequivocally
20 declared its intent to abrogate sovereign immunity?

21 MR. FOREMAN: As to --

22 CHIEF JUSTICE ROBERTS: Unequivocally. Not
23 on the basis of implications from -- from how the other
24 provisions work. But if you do look at (D), is there
25 any place where Congress unequivocally declared its

1 intent to abrogate State sovereign immunity?

2 MR. FOREMAN: Well, I -- I think it -- yes,
3 Your Honor. It's in -- they provide that the State is
4 an employer for purposes of coverage of the Family and
5 Medical Leave Act. And if you go to 29 U.S.C. 2005,
6 where it says a public entity is covered by the Family
7 and Medical Leave Act, then -- that damages are
8 available. It -- it specifically includes "State."

9 In terms of my colleague's attempt to
10 distance this case from Hibbs, in all due respect, we
11 think that Hibbs did the heavy lifting here. It is the
12 same legislative purpose. It is the same constitutional
13 right. It is the same statutory scheme. As this
14 Court --

15 CHIEF JUSTICE ROBERTS: Well, but your --
16 the answer you gave to my request depends entirely on a
17 conclusion that (D) is linked to (A), (B), and (C)
18 because, otherwise, you don't have the argument that
19 it's precisely relief with respect to a discrimination
20 under the Fourteenth Amendment.

21 MR. FOREMAN: But you do, Your Honor, and
22 that's the -- that's the discussions we had earlier,
23 that it's response to gender-based discrimination, the
24 stereotypes that pregnant women will take leave. And
25 so, we think (D) would stand alone. But as the

1 discussion today indicated, we think the appropriate way
2 is to treat this as a comprehensive whole responsive to
3 gender-based discrimination and do as you did in Hibbs,
4 find that it is a congruent, proportional response to
5 gender-based discrimination.

6 Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 The case is submitted.

9 (Whereupon, at 11:22 a.m., the case in the
10 above-entitled matter was submitted.)

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