1 IN THE SUPREME COURT OF THE UNITED STATES

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3 NEVADA DEPARTMENT OF HUMAN :

4 RESOURCES, ET AL. :

5 Petitioners :

6 v. : No. 01-1368

7 WILLIAM HIBBS, ET AL. :

8 - - - - - - - - - - - - - - - - -X

9 Washington, D.C.

10 Wednesday, January 15, 2003

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States at

13 11:15 a.m.

14 APPEARANCES:

15 PAUL G. TAGGART, ESQ., Deputy Attorney`General, Carson

16 City, Nevada; on behalf of the Petitioners.

17 CORNELIA T. L. PILLARD, ESQ., Washington, D.C.; on behalf

18 of the Respondent Hibbs.

19 VIET D. DINH, ESQ., Assistant Attorney General, Office of

20 Legal Policy, Department of Justice, Washington,

21 D.C.; on behalf of Respondent United States.

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1 P R O C E E D I N G S

2 (11:15 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument

4 next in Number 01-1368, the Nevada Department of Human

5 Resources versus William Hibbs.

6 Mr. Taggart.

7 ORAL ARGUMENT OF PAUL G. TAGGART

8 ON BEHALF OF THE PETITIONERS

9 MR. TAGGART: Mr. Chief Justice, and may it

10 please the Court:

11 There are three reasons Congress did not validly

12 abrogate State immunity when it adopted the Family Medical

13 Leave Act's family leave provision. First, the FMLA is

14 everyday economic legislation, a national labor standard,

15 not antidiscrimination legislation, second, Congress was

16 not responding to a discernible pattern of

17 unconstitutional behavior, and third, even if such a

18 pattern were discernible, the 12-week family leave mandate

19 enforced by abrogating State immunity is not a

20 proportional and congruent response.

21 The Family Medical Leave Act is no different

22 than the minimum wage and other national labor standards.

23 It is, in its operation and effect, it is simply Commerce

24 Clause legislation.

25 QUESTION: Well, but now in the statute, the

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1 findings, or the beginning, they refer to the Equal -- the
2 Equal Protection Clause. They say it's consistent with
3 the Equal Protection Clause of the Fourteenth Amendment,
4 don't they?
5 MR. TAGGART: Yes, they do, but they do not --
6 Congress did not invoke Section 5 of the Fourteenth
7 Amendment, as it did in the ADA and the ADEA statutes. It
8 told us exactly why, in the House and Senate reports, it
9 was mentioning the Fourteenth Amendment in the text of the
10 statute.
11 QUESTION: Well, as applied to private
12 employers, I suppose Congress had to rely on Commerce
13 Clause powers, but as applied to States, there is specific
14 reference in the statute, of course, to section 5 -- to
15 equal protection.
16 MR. TAGGART: Yes, there is specific reference
17 to equal protection --
18 QUESTION: Yes, right.
19 MR. TAGGART: -- but Congress told us why they
20 mentioned equal protection in the House and the Senate
21 report, where Congress stated that if --
22 QUESTION: Why do you need the House and Senate
23 report? I mean, the very text of the statute doesn't say,
24 in order to assure equal protection of the laws in the
25 States. That's not what it says. It says that what we're

1 doing, what we're requiring, the leave that we're
2 requiring, we are requiring in a manner that, consistent
3 with the Equal Protection Clause, minimizes the
4 protection, the potential for employment discrimination.
5 I read that as saying what we're doing here is
6 being done with an eye to being sure that it's in
7 conformance with the Equal Protection Clause. That's
8 quite different from saying that we're doing it in order
9 to enforce the Equal Protection Clause, which is being
10 violated by the States.
11 MR. TAGGART: We agree with that position,
12 Justice Scalia.
13 QUESTION: But Mr. Taggart, we --
14 QUESTION: But the statement in the text goes to
15 the manner, goes to the manner, not to`the purpose at all.
16 QUESTION: The first rule of statutory
17 construction is to read on, and if you read on with me --
18 (Laughter.)
19 QUESTION: -- you will find it said, to promote
20 the role of equal employment opportunity for women and men
21 pursuant to such clause, to promote the goal of equal
22 opportunity for women and men.
23 Throughout your opening brief, you never
24 referred to that statute. You told us there was only the
25 (4), the one that Justice Scalia referred to, and it

1 wasn't until your reply brief that you even acknowledged
2 that Congress has said, we're doing this to promote the
3 goal of equal opportunity for men and women. Why didn't
4 you mention (5) in your opening brief?
5 MR. TAGGART: Well, why we didn't mention (5),
6 I -- I apologize if we did not -- if we did not mention
7 it, but the -- the Senate report and the House report
8 describe exactly why Congress was talking about equal
9 protection.
10 QUESTION: Well, one would look to the statute
11 before one looks to the House or the Senate report.
12 MR. TAGGART: Yes, that is correct, but the
13 operation of the statute clearly shows that it is just
14 everyday Commerce Clause legislation. Congress was deeply
15 concerned that the Family Medical Leave Act itself would
16 be challenged on equal protection grounds, and that's why
17 it said it was promoting the goal of equal employment
18 opportunity. Everything else about the statute, the way
19 it operates, the economic benefit that it provides, the
20 fact that it doesn't prohibit discrimination at all, show
21 that this is nothing different from the minimum wage, and
22 that -- that is what -- that is what this -- this was
23 adopted in the tradition of.
24 QUESTION: Mr. Taggart, I -- I thought the
25 reason you didn't refer to the reference to equal

1 opportunity for men and women is that that is not a
2 reference to the Equal Protection Clause.
3 QUESTION: Pursuant to such clause --
4 QUESTION: People -- people -- people --
5 individuals could fail to provide equal -- equal
6 opportunity for men and women without violating the Equal
7 Protection Clause.
8 MR. TAGGART: That's true, but the --
9 QUESTION: The -- the statute says, pursuant to
10 the Equal Protection Clause.
11 MR. TAGGART: Well, it does say that, but in our
12 view, it is more important to look at the operation and
13 the text of the amendment, and how -- how the -- or of the
14 act, and how the act works.
15 QUESTION: Why? If you're looking at the text,
16 then just a few lines above, in the text, where it talks
17 about findings, it says that, due to the nature of the
18 roles of men and women, primary responsibility for family
19 care-taking often falls on women, and then it says
20 employment standards that apply to just one gender have
21 serious potential for encouraging employers to
22 discriminate against people of that gender. So what I
23 take that to mean is that, without this, State employers
24 as well as others tend to say to the woman, You go take
25 care of your sick mother, and because employers know that,

1 they won't hire women. That's what it says in (5) and
2 (6), and I would have thought that sounded like equal
3 protection of the laws, as if this statute is designed to
4 help remove one of the major reasons why employers
5 discriminate against women. That's what (5) and (6) says,
6 and then the -- 10 lines down it says, pursuant to the
7 Fourteenth Amendment.
8 MR. TAGGART: Well, Justice Breyer, the
9 statement here, in our view, indicates why Congress
10 adopted a gender-neutral statute. If it adopted a gender-
11 specific statute, the statute itself would have been
12 subject to challenge under the Equal Protection Clause.
13 Our -- our concern here is that any everyday
14 economic legislation that may have a disparate benefit to
15 one suspect classification or another will all of a sudden
16 be -- have the power to abrogate Eleventh Amendment
17 immunity, and then State immunity will be subject to
18 abrogation at -- at any expense where Congress deems that
19 Commerce Clause legislation is appropriate. Congress
20 should not be allowed to do indirectly what it's
21 prohibited from doing directly.
22 QUESTION: Mr. Taggart, would you comment on
23 this argument, which I think is really an elaboration on
24 the findings in the purpose statement that Justice Breyer
25 was referring to.

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1 I think you can distill those statements down to
2 something like this. We know for a fact historically
3 that, whenever burdens of family responsibility are
4 allocated, they are allocated to the woman, not to the
5 man. If we do not have an employment standard that
6 expressly says you have got to treat them exactly alike,
7 the women will always get the short end, and that will be
8 reflected in hiring decisions, among others.
9 Secondly, in order to make this determination a
10 practical one, we can't simply leave it that whatever you
11 do for men you should do for women, or vice versa. We've
12 got to put some kind of a threshold there that will mean
13 something, and so we've come up with a particular period,
14 a particular number of weeks. That's the only way to make
15 this work. I think that is the argument that is based, in
16 effect, on these two sections. That doesn't sound to me
17 like simply an end run, a phony Commerce Clause argument.
18 Would you comment on that argument?
19 MR. TAGGART: Well, even if that were true, even
20 if that effect occurred from the statute, the failure, the
21 utter failure of the statute to satisfy this Court's City
22 of Boerne test shows that it is purely economic
23 legislation. There were absolutely no findings by
24 Congress regarding State conduct, or whether State conduct
25 was unconstitutional, and it's difficult to discern from

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1 the record before this Court or --

2 QUESTION: Well, given the fact that we have

3 accepted in prior cases the pervasiveness of the

4 phenomenon that seems to be quite clearly reflected in the

5 findings and purpose, is that necessary here to say, well,

6 yeah, it -- we've already said, the Supreme Court has

7 already accepted its pervasiveness, but we've got to go a

8 step further and say, well, yeah, that pervasiveness even

9 goes to States. Isn't there a point at which the point

10 has been made?

11 MR. TAGGART: Well, first of all, if that were

12 true, then any law that Congress passes that has any

13 arguable fact on discrimination based on gender would be

14 sufficient for satisfying an abrogation of State immunity.

15 In 1993 --

16 QUESTION: Well, we can't -- what about the

17 Fitzpatrick v. Bitzer decision, where the Court

18 unanimously found Title VII was a valid abrogation of the

19 Eleventh Amendment immunity, and there was no inquiry into

20 the history of gender discrimination, it was just

21 accepted? Do you think that that case would stand up

22 under your analysis?

23 MR. TAGGART: Yes, it would. There -- or we

24 would take the position that it would. There is --

25 QUESTION: Because this is rather similar.

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1 MR. TAGGART: Well, there is no requirement, and
2 we are not urging the Court to adopt a requirement that
3 Congress make findings. Congress simply helps the Court
4 when it makes findings about what it is -- whether there
5 is unconstitutional State behavior that would justify a
6 12-week family leave benefit that's abrogated by State
7 sovereign immunity. But Title VII is closely hewed to
8 this Court's section 1 jurisprudence, and there's every
9 reason to believe that Title VII would stand up to the
10 City of Boerne test. So the difference with this statute
11 is that there is absolutely --
12 QUESTION: Mr. Taggart, I thought that part of
13 your argument was, if the discrimination doesn't exist
14 anymore in the State, even if it did at one time, then the
15 provision would have to sunset, and as`far as Title VII is
16 concerned, many States, the vast majority of States have
17 their own Title VII laws, so at this point in time I
18 guess, under your reasoning, Fitzpatrick and Bitzer would
19 have to go.
20 MR. TAGGART: Well, we are not arguing that
21 position and, in fact, in our view Title VII is so closely
22 hewed to this Court's section (1) jurisprudence that it --
23 it -- there's every reason to believe that it would
24 satisfy this Court's test.
25 In -- in -- in this case, though, the question

1 is, in 1993 was there a pattern and practice of State
2 behavior that would justify a 12-week mandatory family
3 leave benefit for all State employees that's -- that's
4 enforced through abrogating State immunity, and the
5 standard --
6 QUESTION: What was the -- in the title of Title
7 VII what was the pattern and practice that justified that
8 result, because when the original Title VII was passed
9 this Court had never declared any law that differentiated
10 on the basis of gender unconstitutional, and when it was
11 extended to public employees -- was it in '72? -- this
12 Court had just begun to address the issue.
13 MR. TAGGART: Yes, that --
14 QUESTION: And yet the Court said Congress could
15 do that in '72 with no special record of any kind. The
16 record, to the extent it existed, was made for race, not
17 sex.
18 MR. TAGGART: Well, we're not challenging Title
19 VII in this case. We're challenging that in 1993, when
20 the --
21 QUESTION: But she's asking you to distinguish
22 Title VII from this. We know you're not challenging it.
23 MR. TAGGART: Well, in our view --
24 QUESTION: What about the fact that Title VII
25 goes to discrimination on the basis of sex in general, and

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1 there was no doubt that States have engaged in that and
2 were engaging in it at the time. You could have said it
3 was -- it was general knowledge. But the statute we're
4 construing here doesn't go to sex discrimination in
5 general, it goes to a very particular type of sex
6 discrimination, and that is in the granting of leave, and
7 on that, at least I can't say as a matter of general
8 knowledge that the States were in violation of provisions
9 of leave. I've no idea what the state -- what the state
10 was. Certainly you -- you need evidence to show that they
11 were violating that particular aspect of -- of -- of equal
12 protection.
13 MR. TAGGART: Well, in order to show a pattern
14 and practice in 1993 it's this Court's section (1)
15 jurisprudence on violations of the Equàl Protection Clause
16 that governs, and Washington v. Davis, incorporated into
17 the gender cases through State Administrators v. Feeney,
18 is a test which requires purposeful and invidious
19 discrimination. There's no showing that there was a
20 pattern and practice of State managers in 1993 of using a
21 gender stereotype when they granted leave.
22 QUESTION: Whoa, whoa, whoa, wait, because if
23 you accept, I take it, you accept the proposition that
24 Congress has sufficiently shown, as far as anyone need do,
25 that State employers discriminated in their hiring against

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1 women, the gener -- you accept that, is that right?
2 That's your -- your -- your -- your, for -- because if
3 that's not so, I guess goodbye to Title VII, a whole bunch
4 of things, but is -- do you accept that?
5 MR. TAGGART: Well, Title VII, and the circuits
6 have said this already, is that Title VII is so closely
7 hewed to this Court's section (1) --
8 QUESTION: No, I'm not asking you to distinguish
9 Title VII. I'm asking you if, for purposes of this case,
10 you accept the proposition that it is adequately shown
11 that State employers, like a lot of other employers, did
12 discriminate against women in hiring people, in general.
13 MR. TAGGART: If --
14 QUESTION: I'd like a yes answer or a no answer,
15 if I could.
16 MR. TAGGART: Well, a qualified yes if you're
17 talking about 1972, when --
18 QUESTION: Okay, so at the time of this statute?
19 MR. TAGGART: Not at the time of this statute.
20 QUESTION: Oh, okay. You do not accept the
21 proposition that it is adequately shown that State
22 employers discriminated against women when they passed
23 this law?
24 MR. TAGGART: No, and even if there was a --
25 QUESTION: Okay. No, then, I don't see the

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1 distinction with Title VII. It's goodbye if I accept that
2 argument, I think. It's just that it was earlier?
3 MR. TAGGART: No, it's that title -- it's
4 unclear whether Title VII even prohibits things that this
5 Court's section (1) jurisprudence wouldn't also prohibit.
6 Title VII basically codifies what this Court
7 said in Washington v. Davis. It allows a give-and-take in
8 the courtroom of the evidence to -- to flesh out the
9 totality of facts that surround an employment activity,
10 and at the end of the day in the Title VII lawsuit an
11 inference can be made of whether purposeful discrimination
12 actually occurred. It allows a defense not based upon
13 heightened scrutiny or strict scrutiny. It allows just a
14 simple defense by the employer.
15 Unlike the Family Medical Leave Act, which just
16 takes away any defense at all for States to defend the
17 policies that they have, that it doesn't even elevate
18 State policies to a heightened scrutiny standard, but in
19 1993 State policies were gender neutral, and under this
20 Court's section (1) jurisprudence those policies should be
21 subject to a rational basis review. But instead, the FMLA
22 just makes all of those policies unlawful. Any policy
23 that doesn't have 12 weeks of leave is simply unlawful.
24 It doesn't give the State the ability to come in and prove
25 that that policy was -- was applied --

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1 QUESTION: Suppose you have two statutes, one is
2 a congressional statute that says, all States must have
3 employment and pay policies that do not differentiate on
4 the basis of gender, and the second is the FMLA. It seems
5 to me that the FMLA is much more limited. It's just 12
6 weeks, the damages are capped, it's simple to operate --
7 MR. TAGGART: But --
8 QUESTION: I would think that that is much more
9 proportional and congruent than the other statute that I
10 described.
11 MR. TAGGART: Well, the -- this statute, in
12 our -- our position is is not proportionally concurrent,
13 because first, there's no pattern of State behavior that
14 would justify a 12-week leave benefit. But to completely
15 make unlawful any act, any State policy that's less than
16 12 weeks would require a substantial showing that States
17 were engaged in discrimination in the employment, in
18 employment practices.
19 QUESTION: Why? Why? Because if you imagined,
20 and you won't concede this, but I think, take it as a
21 hypothetical, then, if you imagined that State employers
22 had been shown to discriminate against women in hiring,
23 wouldn't Congress have quite a lot of leeway in choosing
24 the remedy for that discrimination, and wouldn't this
25 statute be part of the remedy?

1 MR. TAGGART: Absolutely. If your
2 hypothetical --
3 QUESTION: So in other words, if it's
4 absolutely, then the answer as far as you see it in this
5 case is whether there has been an adequate showing that at
6 the time of this statute State employers discriminated
7 against women in hiring, and if the answer to that
8 question in your view is, there was an adequate showing,
9 this is an appropriate remedy, but if the answer in your
10 view is, it wasn't an adequate showing, then, of course,
11 you would win. That's how you're basically seeing the
12 case.
13 MR. TAGGART: Well, I don't want to agree with
14 you 100 percent, but -- but the --
15 (Laughter.)
16 QUESTION: I would think your-- your brief --
17 your brief agreed with him zero percent.
18 MR. TAGGART: Well --
19 (Laughter.)
20 QUESTION: Your -- your --
21 MR. TAGGART: We didn't --
22 QUESTION: Under your brief, the answer is quite
23 clearly no, you don't think it's proportionate even if
24 there had been a violation shown. Isn't that what your
25 brief said?

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1 MR. TAGGART: Well, the hypothetical was, if
2 there was enough of a showing, and I think that's the
3 question. We argue there was no showing, which would
4 justify no remedy, but even if there was a showing, the
5 remedy has to be proportional, and this 12-week leave
6 benefit just goes far out of proportion of any discernible
7 pattern of conduct by States which would justify it.
8 QUESTION: Mr. Taggart, there have been scores
9 of Title VII cases where there's a nice, neutral standard,
10 and then there's a decision maker, and the decision maker
11 is exercising discretion under these general standards.
12 And time after the time, the decision maker is duplicating
13 himself, whether race, sex, and the people who don't look
14 like the decision maker say, gee, we suspect
15 discrimination.
16 There have been countless Title VII suits that
17 have prevailed on that, that the standards are nice and
18 neutral, but the discretion whether to hire is made by
19 someone who is coming up with results that exclude these
20 people.
21 Now, do you think that State employers, that the
22 people who do hiring and promotions for States are so
23 nonbiased, so unprejudiced that that doesn't affect the
24 decision makers on the State level, as opposed to the
25 municipal level, and in private employment?

1 MR. TAGGART: Our position is that the
2 presumption has to be that States act in a constitutional
3 manner, and I'm not going to stand here before the Court
4 and say that States are perfect, but there's certainly no
5 pattern which would justify a 12-week mandatory family
6 leave benefit enforced through the abrogation of State
7 immunity. This -- the FMLA is simply not based upon
8 any -- any pattern of State conduct.
9 The Congress knew in 1993 that 30 States had
10 laws just like the Family Medical Leave Act. Congress
11 wasn't thinking about whether States were violating law
12 and whether States needed to be corrected. Congress was
13 trying to supplement what States were already doing with
14 the leave benefit.
15 QUESTION: In Title VII, too, the lead was taken
16 by the States. Several States had human rights laws long
17 before there was any Federal law. At least as to those
18 States Title VII should not have been valid legislation,
19 should it?
20 MR. TAGGART: Well --
21 QUESTION: Because there was no sign that they
22 were not at least as good as the Federal Government.
23 MR. TAGGART: Well, Title VII is, in our view, a
24 -- a -- clearly, a law that's clearly antidiscriminatory.
25 It doesn't -- it isn't -- wasn't adopted for Commerce

1 Clause purposes, and in our view in this -- the Family
2 Medical Leave Act is just a round peg being forced into a
3 square hole. It's not -- wasn't adopted with the
4 operation -- with the idea of acting like
5 antidiscrimination legislation. It, in fact, would
6 completely allow for discrimination. It would -- and that
7 wouldn't be prohibited by the law at all.
8 QUESTION: Okay, if they had passed this statute
9 without the 12 weeks in it, and the statute had simply
10 said, on family leave decisions, the decisions have got to
11 be the same, the standard for making them has got to be
12 the same, whether the employer, employee is a man or a
13 woman, would that be constitutional?
14 MR. TAGGART: Well, that --
15 QUESTION: Under section (5)?
16 MR. TAGGART: Well, certainly that would sound
17 more like an antidiscrimination law that would require
18 leave, if it's granted --
19 QUESTION: Okay.
20 MR. TAGGART: -- to be granted on a gender
21 neutral basis --
22 QUESTION: Now, the difference between that case
23 and this -- I'm sorry. I didn't mean to interrupt you.
24 MR. TAGGART: I'm sorry, Your Honor.
25 QUESTION: I was trying to get in another

1 question before Justice Scalia did.

2 (Laughter.)

3 QUESTION: The difference between the case I

4 just put to you and the case that we've got here is 12

5 weeks, and I suggested that one reason for the 12 weeks is

6 a decision on the part of Congress that if we don't put

7 some period of time, some threshold period of time, our

8 nondiscrimination standard isn't going to be worth

9 anything.

10 For example, just outside this case, the States

11 could say, okay, we're going to give a 1-week maternity

12 leave, men or women. Obviously, that isn't going to

13 accomplish anything. So Congress says, we've got to have

14 some kind of a threshold in order to make this requirement

15 of neutrality really work. Why is that not a reasonable

16 way to get to the point which I think we both agree would

17 be a perfectly lawful exercise of power under section (5)?

18 MR. TAGGART: Well, first on the latter part, a

19 prohibition or a requirement for gender-neutral leave

20 would -- for -- if leave is allowed, it must be allowed on

21 a gender-neutral basis, I would still argue that that

22 would be, that that would require some predicate of a pattern

23 of unconstitutional behavior, but --

24 QUESTION: Okay. We'll take that as a given.

25 You don't concede that.

1 MR. TAGGART: Okay, but on the 12 weeks point,
2 this Court would have to assume, without any indication
3 from Congress, that that's why it used 12 weeks, because
4 that is not why it used 12 weeks. 12 weeks --
5 QUESTION: How many States are covered by the
6 act?
7 MR. TAGGART: Well, at the time the act was
8 adopted --
9 QUESTION: Yes.
10 MR. TAGGART: -- 30 States had family leave
11 laws.
12 QUESTION: How many are covered by the act? To
13 how many States does the act --
14 MR. TAGGART: Every State is covered by the act.
15 QUESTION: 50 of them. How many private
16 employers are covered by the act?
17 MR. TAGGART: Every private employer.
18 QUESTION: Yeah, like how many do you think that
19 is, hundreds of thousands?
20 MR. TAGGART: Yes. Yes, Your Honor.
21 QUESTION: And the 6 weeks was adopted with the
22 50 States in mind, is the argument that's being
23 propounded. It's clear that the 6 weeks was designed for
24 the 50 States, never mind the hundreds of thousands of
25 private employers. Does that seem plausible?

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1 MR. TAGGART: No, and it -- first it's --
2 QUESTION: Doesn't it seem plausible, however,
3 that the period of time was designed in view of the
4 pervasive history of discrimination in and out of
5 Government, and that it is just as applicable when it is
6 applied to the Government, just as reasonable or
7 unreasonable, however you come out, as it is when it's
8 applied to private industry? Isn't that a fair argument?
9 MR. TAGGART: No, because it's not so simple as
10 to draw the conclusions about the society in general
11 directly to States and impute States with unconstitutional
12 behavior without presuming first that States act in a
13 constitutional way.
14 QUESTION: No, I recognize that you're not
15 conceding the -- the -- the point that`a predicate for
16 applying it to the States, even a -- a -- a non-6-weeks
17 antidiscrimination has been shown, but if we assume that
18 point is past, then is the argument, is the
19 appropriateness of the means somehow categorically
20 different for States from the appropriate --
21 appropriateness of the means with respect to private
22 employment?
23 MR. TAGGART: Well, it's our view that the two
24 questions can't be split, that -- that the State conduct
25 is so critical that -- that it -- the answer cannot be

1 derived from saying that if -- if there's this conduct in
2 general, then 12 weeks fits both State and non-State
3 actors. The -- the 12-week benefit was not designed at
4 all by Congress to target unconstitutional conduct. It
5 was designed to give children 12 weeks of child
6 development time with their parents when they're born.
7 QUESTION: Insofar as the statute applied to
8 private employers, could it possibly have been directed at
9 unconstitutional conduct?
10 MR. TAGGART: It may be possible, but -- but
11 any --
12 QUESTION: I presume --
13 QUESTION: But the real question is whether it's
14 directed at discriminatory.
15 QUESTION: At discriminatory`conduct.
16 QUESTION: If it's private discrimination, it's
17 not constitutional; if it's State discrimination, it is a
18 constitutional question. Isn't the question whether it's
19 directed at discriminatory conduct? Isn't that the basic
20 question?
21 MR. TAGGART: Well --
22 QUESTION: Or do you concede it is directed at
23 discriminatory conduct.
24 MR. TAGGART: No, we do not concede that it's
25 directed at discriminatory conduct.

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1 QUESTION: But if it were directed at
2 discrimination, discriminatory conduct, that would embrace
3 both the States and the private employers, wouldn't it?
4 MR. TAGGART: Well, that -- we do not concede
5 that point, because Congress did not have any predicate on
6 which to base the direction of this onto the States, and
7 I'd like to reserve the remainder of my time for rebuttal,
8 please.
9 QUESTION: Very well, Mr. Taggart.
10 Ms. Pillard.
11 ORAL ARGUMENT OF CORNELIA T. L. PILLARD
12 ON BEHALF OF THE RESPONDENT
13 MS. PILLARD: Thank you, Mr. Chief Justice, and
14 may it please the Court:
15 The Family Medical Leave Act`is an appropriate
16 response to enduring problems of State sex discrimination
17 bias against women in hiring and promotion because
18 employers assume that women are more likely than men to
19 leave their jobs to go take care of their family members,
20 and bias against men in the dispensing of family leave.
21 Congress gathered ample recent evidence of these
22 mutually reinforcing problems, and Congress also built on
23 a known foundation of State laws and decisions fostering
24 different roles for men and women in work and family.
25 Those different roles and beliefs about them persist.

1 Offering a threshold amount of leave to men and
2 women alike is responsive to the problems. The act has
3 successfully encouraged more men to take the leave, and in
4 narrowing the gap between men's and women's leave rates,
5 the act erodes the very basis of employers' bias against
6 women. If you will, it makes men and women equally
7 unattractive.
8 (Laughter.)
9 MS. PILLARD: The act also responds to
10 discrimination against men in the dispensing of leave. A
11 bare prohibition against discrimination doesn't do that
12 and, in fact, the bare prohibition against discrimination
13 in the dispensing of leave had been in place. That's
14 Title VII, and that, for the generation during which Title
15 VII applied to the States, that had not succeeded in
16 eradicating sex-based dispensing of leave, and in the real
17 world --
18 QUESTION: Sex-based dispensing of leave by the
19 States?
20 MS. PILLARD: By the States.
21 QUESTION: Well, what statistics are there that
22 support that statement?
23 MS. PILLARD: Mr. Chief Justice, I'd like to
24 highlight four aspects of the evidence of sex-based
25 discrimination in leave specifically about the States.

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1 First, Congress learned of the pattern of State
2 granting leave through the Bureau of Labor Statistics'
3 figures. In 1987, 50 percent of women in State and local
4 government, as compared to 30 percent of men in State and
5 local government, were offered parenting leave. Yale also
6 did a 50-State survey to which --
7 QUESTION: Excuse me, what --
8 QUESTION: You know, I presume to get parenting
9 leave you have to be a parent, and it doesn't seem to me
10 that that -- that is a terribly instructive statistic
11 unless it -- it's shown that equal numbers were parents,
12 or equal numbers applied.
13 MS. PILLARD: The statute --
14 QUESTION: Could you tell me what, before we go
15 on with the discussion, what you mean by, were offered
16 parenting leave?
17 MS. PILLARD: Parenting leave was available to
18 them in their State --
19 QUESTION: Was available, whether they took it
20 or not?
21 MS. PILLARD: Whether they took it or not. This
22 is not rates of people taking. This is rates of people
23 who had it available.
24 QUESTION: Who had the opportunity to take it?
25 MS. PILLARD: Should they choose, yes, and the

1 Bureau of Labor Statistics is very clear on that.
2 QUESTION: How -- how could that be? The
3 States' laws were written in such a way that --
4 MS. PILLARD: The States' laws and the States'
5 policies, and this is confirmed by other pieces of
6 evidence. Yale did a 50-State survey to which 36 States
7 responded, and 19 of those States themselves said they
8 offered parenting leave to women and not to men under
9 their policies.
10 QUESTION: Well, that's 19, 19 out of 50 States.
11 QUESTION: Excuse me, when you say parenting --
12 QUESTION: Let her respond to my question.
13 (Laughter.)
14 MS. PILLARD: That's 19 out of the 36 responded
15 that themselves admitted that they -- they had these
16 policies. The president of the labor union that
17 represents State employees said, the vast majority of our
18 contracts really cover maternity leave. They're not --
19 QUESTION: Exactly, and that explains the
20 discrepancy. I'm trying to figure out -- what you're
21 saying is that some States provided for maternity leave,
22 but did not provide any leave for the father, but that's
23 quite a different thing.
24 I mean, does one have to think that parenting
25 leave, which is the ability to go home and take care of a

1 child, is the same as allowing a woman who's just gone
2 through childbirth some leave to recuperate from the
3 childbirth? I don't think that proves anything at all.
4 It just proves that some States had a policy of maternity
5 leave, and presumably if, you know, if one of their male
6 employees gave birth they'd give him maternity leave, too.
7 (Laughter.)
8 MS. PILLARD: Justice Scalia, let me clarify,
9 each of these studies and all the figures that I'm citing
10 are not talking about pregnancy disability leave. We're
11 talking about maternity leave over and above pregnancy
12 disability leave, so we're talking about whether it's
13 unconstitutional for a State to assume that women and not
14 men can appropriately go home and take --
15 QUESTION: I thought we were`talking about the
16 medical leave act here. We're not talking about
17 parenting, are we?
18 MS. PILLARD: We're talking about both. Part of
19 the medical leave provision allows parents to take care of
20 their seriously ill children as well as their spouses or
21 parents, and Congress saw these as part and parcel of the
22 same phenomenon.
23 QUESTION: Did any State have parenting leave
24 laws which say, we just want you to have time to take care
25 of your family, which applied only to men -- only to women

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1 and not to men?

2 MS. PILLARD: Yes, all --

3 QUESTION: I know plenty of States had maternity

4 leave. I consider that a different category entirely.

5 Were there any States that had parenting leave, time to

6 take care of your family, that applied only to women and

7 not to men?

8 MS. PILLARD: Justice Scalia, each of these

9 States, when they called it maternity leave, the important

10 distinction is that it encompassed but was not restricted

11 to a period of pregnancy disability.

12 We're talking about, for example, in our lodging

13 appendix at page 31, the Rhode Island agreement that

14 applied from 1992 to 1995. In provision 13.7, maternity

15 leave is available for up to a year, without regard to

16 pregnancy disability. Another example at page 47, 48 of

17 our lodging, maternity leaves not to exceed 6 months, but

18 may be extended, and paternity leaves are available for 3

19 months, so someone -- a woman can take a maternity leave

20 up to a year without a showing of maternity disability,

21 and a man can take 3 months. And on page 40 of the

22 lodging, again the Pennsylvania agreement says that women

23 can take a period of 6 months, and it may be extended for

24 6 months, no provision for a man who is so inclined and

25 who wishes to do so, to go take care of his infant child,

1 and I think these stereotypes are very alive and well
2 today, and the act was --
3 QUESTION: Kind of the successor of the man
4 going down with his babe in arms to ask for an excuse from
5 jury duty and they said, would tell him no, you don't get
6 any excuse, but you give excuses to women. Yes, because
7 women take care of children. I take care of children.
8 That's the same thing.
9 MS. PILLARD: It's precisely these assumptions
10 that have caused State employers and other employers to
11 discriminate against women in hiring, promotion, and
12 retention, and against men in the dispensing of leave, and
13 these are really two sides of the same coin. And the act
14 is working. In the 5 years that were studied from 1995 to
15 2000, there was a jump from approximately 14 percent to 21
16 percent of the percentage of male --
17 QUESTION: Would the act be any less valid if we
18 were to conclude it weren't working?
19 MS. PILLARD: No, but I think the point is that
20 there's an ongoing problem, and that Congress was correct
21 in discerning that this was really at the core of the
22 problem.
23 QUESTION: And why couldn't Congress have solved
24 that problem adequately by simply prescribing that no
25 State shall discriminate in -- in the -- in the giving of

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1 -- of family leave?

2 MS. PILLARD: Justice Scalia, Congress

3 already --

4 QUESTION: No maternity leave, kind of no State

5 can have maternity leave as a separate category, and all

6 family care leave must be offered equally to men and

7 women. Why -- why wouldn't that have been a proportionate

8 response to -- to the defect that they had found? Why --

9 why did the Federal Government, in order to solve the

10 problem, have to impose upon the States 12 weeks, just

11 pulled out of the air, 12 weeks, this is the solution to

12 this constitutional problem?

13 MS. PILLARD: Justice Scalia, that prohibition

14 was already in place from 1972, and the problem also is

15 that a bare prohibition against discrimination cannot

16 respond to discrimination against men in the dispensing of

17 leave, because in the real world a facially neutral policy

18 without a threshold leave entitlement really equates to a

19 discretionary practice of dispensing leave tainted by

20 stereotypes about who should need it.

21 QUESTION: I don't understand what you said.

22 MS. PILLARD: Even if employers do not

23 affirmatively provide for any leave, they equally have a

24 no-leave policy for men and women that is formally equal.

25 In the real world, some workers ask for leave and some do

1 get family leave, but by leaving it up to supervisor
2 discretion we open the door --
3 QUESTION: But there's --
4 MS. PILLARD: -- to discrimination.
5 QUESTION: But where -- is it supervisor
6 discretion? You -- the supervisor cannot discriminate on
7 the basis of sex. I think what you're saying is that
8 without this 12-week period, many men just wouldn't take
9 the leave. That's probably right, but then many men
10 wouldn't necessarily take the 12-week leave either, if
11 it's available.
12 MS. PILLARD: Many men would be deterred, if
13 they didn't have an affirmative right to take the leave,
14 by the assumption that their employers would not grant
15 them leave if they requested it, by the assumption that
16 they would be retaliated against in the employment process
17 if they took it, because it is still much more
18 unacceptable for men to take family leave than for women.
19 QUESTION: Let me ask this question about the
20 operation of this law in light of our recent cases on the
21 Eleventh Amendment. Is it your understanding that because
22 of the exercise of the Commerce Clause power, that the
23 States are bound by this law --
24 MS. PILLARD: That's right.
25 QUESTION: -- to grant the leave?

1 MS. PILLARD: That's right, Justice Kennedy.
2 QUESTION: So all we're talking -- and -- and do
3 you think that State attorney generals like -- probably
4 Mr. Taggart would be the better one to ask that
5 question -- would tell their Governors and their officials
6 you are bound, by law, to grant the family -- to follow
7 the Family Medical Leave Act?
8 MS. PILLARD: So the question is, why damages?
9 Once Congress has found a problem, a serious problem of
10 unconstitutional discrimination, that we assert exists
11 here, the standard remedy to enforce rights in the
12 employment context is make whole monetary relief, the
13 centerpiece of which is lost wages. Title VII uses
14 damages, the Equal Pay Act uses damages, and here, in the
15 Family Medical Leave Act, these are limited damages.
16 Congress took great care to ensure that they wouldn't
17 overburden the States --
18 QUESTION: I understand that, but it seems to me
19 if there's a big problem you can have an Ex Parte Young
20 suit or, if the Government just is -- the United States is
21 concerned about this, the Government of the United States
22 can intervene, and why isn't that wholly adequate --
23 MS. PILLARD: Congress determined --
24 QUESTION: -- to enforce this law?
25 MS. PILLARD: Congress considered very carefully

1 that damages were needed, and limited the damages.
2 They're just enough to spur enforcement and not burden
3 employers, including the States. You need money damages
4 to make sure cases get the attention of higher-ups in
5 State government as well as in private industry.
6 States at the highest levels may be fully
7 responsive, but the application of stereotypes is
8 typically at the lower level of the supervisor with
9 hiring, promotion, and assignment discretion, the line
10 supervisor in the State university, in the State hospital,
11 in the State troopers, in the State human services
12 agencies, like where Mr. Hibbs worked, and without the
13 clear commitment by Congress that a threshold of family
14 leave is going to be made available not on an ad hoc
15 basis, not according to supervisor decisions about who
16 really needs the leave, but because Federal law requires
17 it as a remedy for past discrimination. Only then will
18 that message really reach the line supervisors who are
19 making these decisions.
20 So I would emphasize that the act is working,
21 the damages are limited, and the problems at which it aims
22 are clearly unconstitutional, and petitioners are just
23 wrong that there was no evidence in the legislative
24 record. Congress clearly identified the problems, the
25 problems of the States as on a par with problems of other

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1 sectors.

2 Congress was well aware of the body of recent

3 judicial decisions, finding State sex discrimination in

4 employment. We've included some illustrative examples in

5 our brief at footnote 23. The United States has included

6 some examples of the most recent cases in their brief at

7 note 15 and, as I was discussing before, Congress learned

8 of the patterns of States granting leave to women but not

9 to men, and Congress saw the family medical issue as part

10 and parcel of the parenting leave issue. These were all

11 responsibilities, family care responsibilities

12 traditionally performed by wives. And so Congress aimed

13 in subsections (a), (b), and (c) at a common problem of

14 employers' assumptions of women taking leave burdening

15 their employment prospects, and employèrs' assumptions

16 that men did not need the leave, hindering their ability

17 to take it, which in turn exacerbates the discrimination

18 problem against -- against women.

19 So denial of employment opportunity to women and

20 of family leave to men are two sides of the same coin.

21 Congress clearly identified the problems, had facts

22 showing that they continued. Nearly every State, until a

23 generation ago, overtly placed discriminatory restrictions

24 on womens' workforce participation. That history --

25 QUESTION: A generation ago. How many years is

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1 a generation?

2 MS. PILLARD: Well, when Congress was acting in

3 1993, it was only 20 years since Title VII had been

4 extended to the States, and less than that since this

5 Court had adopted heightened scrutiny of sex-based

6 classifications based on the recognition that public

7 agencies have a -- have a tendency to rely on overbroad

8 sex-based generalizations, overbroad sex-based

9 classifications, so it was -- it was only since the 1970's

10 that we started to recognize that discrimination that we

11 had previously seen as benign, as often intended to help

12 women, was really hindering their advancement, and to --

13 and to seek to try to dismantle that system.

14 QUESTION: And the changes in the unemployment

15 and Workers' Compensation laws, those persisted. Wasn't

16 the Wengler decision in 1980?

17 MS. PILLARD: That's right. We have

18 decisions --

19 QUESTION: And States all have that kind of one-

20 way law, where the woman did not -- if the woman wage

21 earner died, then her husband got nothing because she was

22 not considered really an equal worker.

23 MS. PILLARD: Really her wages were

24 supplemental.

25 QUESTION: And that went on till 1980.

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1 MS. PILLARD: That's exactly right, and we have
2 the beginning of a process of dismantling this
3 discrimination.
4 QUESTION: Thank you, Ms. Pillard.
5 Mr. Dinh.
6 ORAL ARGUMENT OF VIET D. DINH
7 ON BEHALF OF THE RESPONDENT UNITED STATES
8 MR. DINH: Thank you, Mr. Chief Justice, and may
9 it please the Court:
10 The Family and Medical Leave Act is just one
11 part of a broader statutory scheme to eliminate sex-based
12 employment discrimination in the hiring, retention,
13 promotion, and granting of leave benefits for both men and
14 women, and that's the key point to emphasize here.
15 Congress was acting not simply to remedy discrimination in
16 leave-granting policies, but more fundamentally Congress
17 sought to remedy and prevent sex-based employment
18 discrimination based on impermissible presumptions about
19 the role of women in the home and the role of men in the
20 office.
21 QUESTION: I --
22 QUESTION: In our cases, is there any difference
23 between Congress' prohibiting something under its section
24 5 power and creating a substantive entitlement under that
25 power?

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1 MR. DINH: I have not seen a distinction in the
2 cases, in the section 5 cases of this Court. They are few
3 and far between, as you can --
4 QUESTION: Uh-huh, right.
5 MR. DINH: -- as you can appreciate, but the
6 distinction is not readily made. One can characterize the
7 entitlement here as simply a prohibition on discrimination
8 for men and women who take leave. It is simply an --
9 QUESTION: No, it isn't, it's 12 weeks.
10 QUESTION: -- entitlement to come back to a job.
11 QUESTION: Well, it's a 12-week period.
12 QUESTION: It says you get 12 weeks, and if --
13 if we approve this, we are establishing the proposition
14 that in order to eliminate, to enforce any of the
15 provisions of the Fourteenth Amendment, but in particular
16 equal protection, the Government may establish whatever
17 substantive requirements might further equal protection,
18 and I just don't know where the Government plucks 12 weeks
19 from and says that it -- we have to stop discrimination,
20 and therefore everybody's entitled to 12 weeks of leave,
21 and it's an extraordinary leap.
22 MR. DINH: Your Honor, I disagree that there is
23 no limiting principle here, and the limiting principle is
24 precisely provided by this Court's jurisprudence in
25 congruence and proportionality. That's precisely the

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1 limiting principle as to what is the constitutional
2 violation that Congress seeks to redress, and whether or
3 not the remedy is congruent and proportional.
4 The constitutional violation here that Congress
5 seeks to redress or to prevent is employment-based
6 discrimination based upon presumptions about leave-taking
7 habits of men and women.
8 QUESTION: And was that the big fight in the
9 statute? Is that what was really going on when this 12-
10 week -- I mean, I -- I was around at the time, and I
11 remember the big -- the big discussion was whether there
12 ought to be a Federal law that requires all employers, not
13 States in particular, but all employers to give all
14 workers 12 weeks of family leave if they wanted it. That
15 was what all the discussion was. I didn't hear any
16 discussion at the time of sex discrimination, and you
17 present it to us as though this was the motivating factor
18 of the legislation. I find that hard to believe.
19 MR. DINH: Your Honor, I was not there at the
20 time, and I --
21 (Laughter.)
22 MR. DINH: But I will take your word for it, but
23 more importantly, I think we should take Congress' word on
24 its face. Congress says at 29 U.S.C. 2601(b)(5) that the
25 purpose of the, one of the purpose of the statute is,

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1 quote, to promote the goal of equal employment opportunity
2 for women and men pursuant to the Equal Protection Clause,
3 and the further evidence --
4 QUESTION: Justice Scalia is right, is he not,
5 that it -- the bill that he's talking about was the '87
6 bill, and that didn't say anything about the Equal
7 Protection Clause, and that's the startling difference
8 between the bill that actually passed in 1993.
9 MR. DINH: That's precisely right, Justice
10 O'Connor -- I mean, Justice Ginsburg. Justice Scalia was
11 talking about S. 249, the 1987 bill. The first time that
12 the section (5), the promotion goal that entered into the
13 statute was in the next iteration, H.R. 925 in the House,
14 in 1987, and concurrent with the insertion of the
15 promotion of equal opportunity, Congress also included the
16 provision for family leave for care of parent illnesses,
17 as opposed to simple -- simply children illnesses. And so
18 there is some concurrency with respect to Congress'
19 reliance on, for the first time, section (5) authority and
20 the grant of family leave, and that's consistent with the
21 legislative record that was before Congress.
22 Congress was facing a situation where it was
23 finding more two-worker families entering in the workforce
24 and increased demand for family care in the workforce, and
25 it said that, based upon the evidence, as Justice Souter

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1 had summarized, that when push came to shove, women would
2 be expected to take leave to take care of the family, and
3 Congress was finding that push was, indeed, coming to
4 shove, and was adopting a remedy that was directly
5 proportional and congruent to the period of constitutional
6 violation. It adopted a gender-neutral entitlement to
7 leave so as to eliminate the underlying presumption that
8 this Court has said is impermissible.
9 QUESTION: Would 24 weeks have been
10 proportional?
11 MR. DINH: Your Honor, I'd -- that would be a
12 more difficult case. I do not think that --
13 QUESTION: 6 weeks? Would 6 weeks be
14 proportional?
15 MR. DINH: It would -- the -- the -- I do not
16 think that this Court's jurisprudence on proportionality
17 has fine -- is so finely tuned, and this Court's lack
18 of --
19 QUESTION: Of course, that jurisprudence came
20 after the statute was enacted anyway.
21 MR. DINH: And I do not think that this Court's
22 evaluation of congressional enactments under section (5),
23 the unique remedial powers of Congress under section (5),
24 would turn on whether it's 10 weeks or 12 weeks or 13
25 weeks. Of course, if it is more an increase, then it

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1 would be less proportional, if it is less, then it would
2 be more proportional.
3 QUESTION: I agree that it shouldn't turn on the
4 length. That's the point I was getting to. I can't
5 imagine that it would turn on the length.
6 QUESTION: Perhaps Justice Scalia should ask
7 this question, but I was just wondering --
8 (Laughter.)
9 QUESTION: -- if you have to get to the --
10 QUESTION: Pass it to me. I'll --
11 (Laughter.)
12 QUESTION: You have to get to the 1993 version
13 of the statute to introduce the equal protection notion,
14 and it's interesting to me that precisely the same remedy
15 was provided after the equal protection became an
16 ingredient of the problem as was provided before the equal
17 protection rationale was introduced.
18 MR. DINH: You mean, that same remedy, you mean
19 number of weeks?
20 QUESTION: The same 12-week period. Wasn't that
21 true?
22 MR. DINH: Not exactly, Your Honor. H -- the
23 first time that the family leave was introduced and the
24 first time the section (5) authority was invoked was in
25 H.R. 925, and there were differing leave times for

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1 different provisions.

2 I believe there was one that for section (d),

3 for the personal disability, it was 24 weeks. Some was at

4 6 weeks. It turns out that when Congress passed this

5 statute, a prior version of which was 1990, 1991, and this

6 version in 1993, it pretty much reached the equilibrium of

7 12 weeks. This is the normal give-and-take of the

8 legislative process, and nowhere in this Court's

9 jurisprudence --

10 QUESTION: And this was the statute that was

11 repeatedly vetoed, as I remember it, the bill, by

12 President Bush, and the basis for the veto had nothing to

13 do with discrimination, that it really was based on the

14 length of the provision.

15 MR. DINH: No, Your Honor, you are right, the --

16 I have reviewed the veto statements. They concern the

17 imposition that these types of policies would have on

18 small businesses and the economy of the United States,

19 rather than on the discrimination provisions at issue.

20 But it's clear that Congress, in passing the statute, was

21 relying on the discrimination, discriminatory effects that

22 these types of leave policies would have on women. And I

23 think the crux of this case, if I may, turns exactly,

24 Justice O'Connor, on your comparison with the evidence

25 that was before Congress when it enacted Title VII, when

1 it extended that, when it included that into the gender.

2 As you may recall, this Court in, I believe in

3 Price Waterhouse v. Hopkins, recounted the legislative

4 history of how gender entered into Title VII, and it was

5 entered there as the legislative equivalent of the poison

6 pill in order to attempt to kill Title VII, and so not

7 much evidence was put into the record regarding gender

8 discrimination, and yet, as you noted in 1976, in

9 Fitzpatrick v. Bitzer, this Court assumed that that was

10 adequate in order to invoke section (5) authority, or

11 justify section (5) authority.

12 QUESTION: Do -- do you want us to say that

13 before the Family Medical Leave Act was enacted there was

14 a discernible pattern of intentional and purposeful

15 discrimination by the States in violation of the Equal

16 Protection Clause with reference to the granting of leave?

17 MR. DINH: There was evidence, with respect to

18 the granting of leave, of such discrimination in the

19 record before Congress, yes, Your Honor, but in addition

20 to that, there was a discernible pattern of employment

21 discrimination that this Court had taken judicial notice

22 of and Congress had before it and, in particular, Congress

23 has evidence of employment discrimination based on leave-

24 taking presumptions that this Court has found to be

25 illegal.

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1 QUESTION: I guess you're thinking under this
2 Court's cases, which we accept as a given, Congress would
3 have more leeway to create a remedy for the general
4 discrimination than it might have if the discrimination,
5 that if the leave discrimination were at issue?
6 MR. DINH: It goes into both the --
7 QUESTION: You think there's enough for both,
8 but the remedial power is greater, is that right?
9 MR. DINH: There's no question that under the --
10 under Kimel the Court has said that difficult, intractable
11 problems often require more powerful remedies, and that
12 would certainly be the, how the Court would evaluate --
13 QUESTION: It's hard for me to see there's a
14 discernible pattern of intentional and purposeful
15 discrimination when in the legislative`history of this act
16 the States were cited as being in the forefront of
17 enlightened policies. That's what the record shows, and
18 you're up here arguing just the opposite.
19 MR. DINH: Your Honor, some States were in the
20 vanguard, some States were laggards in the granting of
21 leave policies.
22 QUESTION: But the latter was not mentioned.
23 MR. DINH: Yes, there -- yes, it was, Your
24 Honor. I would refer Your Honor to the United States
25 brief at pages 36 to 40, and also the brief for the

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1 petitioner at pages 29 through 30, which recounts some of
2 this -- some of this evidence.
3 The key here -- but nevertheless, the statement
4 in the record that you noted was about States' leave
5 policies, whether or not they had leave policies at all.
6 We know 30 States had -- had leave policy. The position
7 of the United States rests upon not whether States had
8 leave policy, but the character of such leave policies.
9 QUESTION: Mr. Dinh, would it violate this
10 statute for a State to provide the 12-week family leave to
11 men and women both, but also to continue a policy of 6-
12 week maternity leave? Would that violate the statute?
13 MR. DINH: In addition to a 12-week, Your Honor?
14 QUESTION: In addition to the 12 weeks.
15 MR. DINH: 6 weeks, if I can`characterize the 6
16 weeks not as maternity leave, but as pregnancy disability
17 leave --
18 QUESTION: Call it pregnancy disability leave.
19 MR. DINH: Well, this is actually a matter of
20 quite -- quite good -- quite --
21 QUESTION: What's in a name?
22 MR. DINH: No, no, it is a matter of substance,
23 not form alone, because pregnancy disability, medically
24 and in insurance terms --
25 QUESTION: No necessity to prove disability,

1 just, if you have a child, you're entitled to 6 weeks off.

2 MR. DINH: If you are --

3 QUESTION: You don't have to prove that you

4 can't walk, or anything else, just, if you have a child,

5 you have 6 weeks off.

6 MR. DINH: If --

7 QUESTION: Would that violate this act?

8 MR. DINH: If the grant of the additional 6

9 weeks is on a sex-based basis --

10 QUESTION: Well, it is. It's maternity. I

11 mean --

12 (Laughter.)

13 MR. DINH: If that is the case, then that

14 would -- that may very well violate Title VII. It would

15 not violate this particular statute. `

16 QUESTION: Would it violate the Equal Protection

17 Clause?

18 MR. DINH: Yes, it may very well violate the

19 Equal Protection Clause if it is above and beyond the

20 pregnancy disability leave that this Court has recognized

21 can be accommodated, unconstitutionally though --

22 QUESTION: That would solve the problem, unless

23 your answer is categorically yes, it would violate it,

24 because then the discrepancy, the 30 percent versus 80

25 percent that we're talking about would continue.

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1 MR. DINH: Well, the -- the key here, Justice
2 Scalia, is that after the period that is recognized as
3 pregnancy disability, and therefore constitutional under
4 Geduldig, beyond that, parental leave, infant care leave
5 is simply parental leave, and there's no difference
6 whether the mother or the father takes care of the child.
7 Indeed, the law would not countenance such a
8 difference, because that would be relying on the very
9 presumptions that the law condemns. And so the key here
10 is that if there is an additional grant of leave to either
11 sex beyond the period of pregnancy disability, that would
12 constitute a violation of Title VII. It would not
13 constitute a violation of the FMLA.
14 The reason for that is very simple. The FMLA
15 was enacted as part of the overall antidiscrimination
16 scheme. It supplements and does not supplant Title VII.
17 It paints a little bit more broad -- more broadly than
18 Title VII in the sense that it grants affirmative leave
19 rights, but in one further, in one important respect it
20 paints very much more narrowly, as your -- as your
21 question to my colleague, Mr. Taggart, had indicated,
22 Justice Kennedy. That is because it is very narrowly
23 tailored to the particular problem that Congress was
24 facing, which is the problem of employment discrimination
25 based on leave-taking propensities. And so in that sense

1 it is perfectly congruent to the constitutional problem
2 that Congress was addressing.
3 Congress could not very well have addressed the
4 problem of gender-based differentials and the presumptions
5 in law and in practice that arise from those differentials
6 by granting additional leave rights only to women, or
7 granting leave rights only to men that would perpetuate
8 the discrimination and the presumptions, rather than
9 eliminate it root and branch.
10 The key to the money damages is the same key as
11 it is in our general antidiscrimination statutes. That
12 should not be a surprising -- Title VII has the same type
13 of damage remedies, and the reason for that is that
14 discrimination, whether it be for race or for gender, is
15 pervasive and pernicious and historically recognized by
16 this Court, and so Congress has made a judgment that it
17 needs as many hands on deck as possible in order to
18 enforce the effort to eradicate discrimination, and money
19 damages is part of the normal remedy in order to ensure
20 that plaintiffs are made whole and State actors are
21 deterred from acting unconstitutionally or, in this case,
22 in violation of the section (5) legislation that is at the
23 -- the -- at issue here.
24 The fact that -- if I may return to the point
25 that the fact that it should not be surprising that this

1 Court assumed in Fitzpatrick v. Bitzer that the -- that
2 Congress had authority under section (5) to include gender
3 discrimination in Title VII, because in the same year was
4 the year that the Court for the first time extended
5 heightened scrutiny in Craig v. Boren, so --
6 QUESTION: Thank you, Mr. Dinh.
7 MR. DINH: Thank you.
8 QUESTION: Mr. Taggart, you have 4 minutes
9 remaining.
10 REBUTTAL ARGUMENT OF PAUL G. TAGGART
11 ON BEHALF OF THE PETITIONERS
12 MR. TAGGART: First, it's important to
13 distinguish that paternity leave and leave for childbirth
14 and when a child is adopted is not the question that was
15 presented to this Court today.
16 The question presented to this Court is family
17 leave, and there's certainly no record of family leave
18 differentials, as has been argued with respect to
19 parenting leave, and second, it is not possible under any
20 jurisprudence of this Court to simply presume that State
21 managers discriminate based upon some stereotype. Title
22 VII doesn't do that, the Equal Protection Clause, this
23 Court's section (1) jurisprudence that interprets the
24 Equal Protection Clause doesn't do that, the heightened
25 scrutiny test does not do that, it does not allow someone

1 to simply presume that State managers are using some --
2 some outdated stereotype in making their decisions.
3 The third point I want to make is, it's our
4 position that one who reads the text and the history of
5 the Family and Medical Leave Act would hardly recognize
6 the statute that has been described here today. This was
7 simply every-day economic legislation, and upholding the
8 FMLA would simply tear section (5) from any remedial
9 moorings by allowing a general legislative power of
10 Congress to grant economic benefits so long as there is
11 some incidental benefit to some suspect class.
12 QUESTION: You mean holding, upholding money
13 damages under the FMLA, because I take it you concede, or
14 don't you, that Nevada is bound to follow this law?
15 MR. TAGGART: Since -- I do concede that, and
16 since 1993 Nevada has had a -- a State policy of giving
17 our workers Federal family medical leave. We also have
18 our own State medical leave laws, so States have joined,
19 and have actually led the Federal Government in providing
20 family leave for their employees, and to simply say, and
21 ignore that -- that pattern and say instead that States
22 are engaged in a pattern of discrimination, or were
23 engaged in 1993 in a pattern of discrimination, in our
24 view does not stand up to any of this Court's section (1)
25 jurisprudence.

1 Thank you, Your Honor.

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr.

3 Taggart. The case is submitted.

4 (Whereupon, at 12:13 p.m., the case in the

5 above-entitled matter was submitted.)

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