IN THE SUPREME COURT OF THE UNITED STATES

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NEVADA DEPARTMENT OF HUMAN :

RESOURCES, ET AL. :

Petitioners :

v. : No. 01-1368

WILLIAM HIBBS, ET AL. :

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Washington, D.C.

Wednesday, January 15, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:15 a.m.

APPEARANCES:

PAUL G. TAGGART, ESQ., Deputy Attorney`General, Carson City, Nevada; on behalf of the Petitioners.

CORNELIA T. L. PILLARD, ESQ., Washington, D.C.; on behalf of the Respondent Hibbs.

VIET D. DINH, ESQ., Assistant Attorney General, Office of Legal Policy, Department of Justice, Washington, D.C.; on behalf of Respondent United States.

C O N T E N T S

P R O C E E D I N G S

(11:15 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 01-1368, the Nevada Department of Human Resources versus William Hibbs.

Mr. Taggart.

ORAL ARGUMENT OF PAUL G. TAGGART

ON BEHALF OF THE PETITIONERS

MR. TAGGART: Mr. Chief Justice, and may it please the Court:

There are three reasons Congress did not validly abrogate State immunity when it adopted the Family Medical Leave Act's family leave provision. First, the FMLA is everyday economic legislation, a national labor standard, not antidiscrimination legislation, sec̀ond, Congress was not responding to a discernible pattern of unconstitutional behavior, and third, even if such a pattern were discernible, the 12-week family leave mandate enforced by abrogating State immunity is not a proportional and congruent response.

The Family Medical Leave Act is no different than the minimum wage and other national labor standards. It is, in its operation and effect, it is simply Commerce Clause legislation.

QUESTION: Well, but now in the statute, the

findings, or the beginning, they refer to the Equal -- the Equal Protection Clause. They say it's consistent with the Equal Protection Clause of the Fourteenth Amendment, don't they?

MR. TAGGART: Yes, they do, but they do not -- Congress did not invoke Section 5 of the Fourteenth Amendment, as it did in the ADA and the ADEA statutes. It told us exactly why, in the House and Senate reports, it was mentioning the Fourteenth Amendment in the text of the statute.

QUESTION: Well, as applied to private employers, I suppose Congress had to rely on Commerce Clause powers, but as applied to States, there is specific reference in the statute, of course, to section 5 -- to equal protection.

MR. TAGGART: Yes, there is specific reference to equal protection --

QUESTION: Yes, right.

MR. TAGGART: -- but Congress told us why they mentioned equal protection in the House and the Senate report, where Congress stated that if --

QUESTION: Why do you need the House and Senate report? I mean, the very text of the statute doesn't say, in order to assure equal protection of the laws in the States. That's not what it says. It says that what we're

doing, what we're requiring, the leave that we're requiring, we are requiring in a manner that, consistent with the Equal Protection Clause, minimizes the protection, the potential for employment discrimination.

I read that as saying what we're doing here is being done with an eye to being sure that it's in conformance with the Equal Protection Clause. That's quite different from saying that we're doing it in order to enforce the Equal Protection Clause, which is being violated by the States.

MR. TAGGART: We agree with that position, Justice Scalia.

QUESTION: But Mr. Taggart, we --

QUESTION: But the statement in the text goes to the manner, goes to the manner, not to`the purpose at all.

QUESTION: The first rule of statutory construction is to read on, and if you read on with me --

(Laughter.)

QUESTION: -- you will find it said, to promote the role of equal employment opportunity for women and men pursuant to such clause, to promote the goal of equal opportunity for women and men.

Throughout your opening brief, you never referred to that statute. You told us there was only the (4), the one that Justice Scalia referred to, and it

wasn't until your reply brief that you even acknowledged that Congress has said, we're doing this to promote the goal of equal opportunity for men and women. Why didn't you mention (5) in your opening brief?

MR. TAGGART: Well, why we didn't mention (5), I -- I apologize if we did not -- if we did not mention it, but the -- the Senate report and the House report describe exactly why Congress was talking about equal protection.

QUESTION: Well, one would look to the statute before one looks to the House or the Senate report.

MR. TAGGART: Yes, that is correct, but the operation of the statute clearly shows that it is just everyday Commerce Clause legislation. Congress was deeply concerned that the Family Medical Leavè Act itself would be challenged on equal protection grounds, and that's why it said it was promoting the goal of equal employment opportunity. Everything else about the statute, the way it operates, the economic benefit that it provides, the fact that it doesn't prohibit discrimination at all, show that this is nothing different from the minimum wage, and that -- that is what -- that is what this -- this was adopted in the tradition of.

QUESTION: Mr. Taggart, I -- I thought the reason you didn't refer to the reference to equal

opportunity for men and women is that that is not a reference to the Equal Protection Clause.

QUESTION: Pursuant to such clause --

QUESTION: People -- people -- people -- individuals could fail to provide equal -- equal opportunity for men and women without violating the Equal Protection Clause.

MR. TAGGART: That's true, but the --

QUESTION: The -- the statute says, pursuant to the Equal Protection Clause.

MR. TAGGART: Well, it does say that, but in our view, it is more important to look at the operation and the text of the amendment, and how -- how the -- or of the act, and how the act works.

QUESTION: Why? If you're lòoking at the text, then just a few lines above, in the text, where it talks about findings, it says that, due to the nature of the roles of men and women, primary responsibility for family care-taking often falls on women, and then it says employment standards that apply to just one gender have serious potential for encouraging employers to discriminate against people of that gender. So what I take that to mean is that, without this, State employers as well as others tend to say to the woman, You go take care of your sick mother, and because employers know that,

they won't hire women. That's what it says in (5) and (6), and I would have thought that sounded like equal protection of the laws, as if this statute is designed to help remove one of the major reasons why employers discriminate against women. That's what (5) and (6) says, and then the -- 10 lines down it says, pursuant to the Fourteenth Amendment.

MR. TAGGART: Well, Justice Breyer, the statement here, in our view, indicates why Congress adopted a gender-neutral statute. If it adopted a gender-specific statute, the statute itself would have been subject to challenge under the Equal Protection Clause.

Our -- our concern here is that any everyday economic legislation that may have a disparate benefit to one suspect classification or another will all of a sudden be -- have the power to abrogate Eleventh Amendment immunity, and then State immunity will be subject to abrogation at -- at any expense where Congress deems that Commerce Clause legislation is appropriate. Congress should not be allowed to do indirectly what it's prohibited from doing directly.

QUESTION: Mr. Taggart, would you comment on this argument, which I think is really an elaboration on the findings in the purpose statement that Justice Breyer was referring to.

I think you can distill those statements down to something like this. We know for a fact historically that, whenever burdens of family responsibility are allocated, they are allocated to the woman, not to the man. If we do not have an employment standard that expressly says you have got to treat them exactly alike, the women will always get the short end, and that will be reflected in hiring decisions, among others.

Secondly, in order to make this determination a practical one, we can't simply leave it that whatever you do for men you should do for women, or vice versa. We've got to put some kind of a threshold there that will mean something, and so we've come up with a particular period, a particular number of weeks. That's the only way to make this work. I think that is the argument that is based, in effect, on these two sections. That doesn't sound to me like simply an end run, a phony Commerce Clause argument. Would you comment on that argument?

MR. TAGGART: Well, even if that were true, even if that effect occurred from the statute, the failure, the utter failure of the statute to satisfy this Court's City of Boerne test shows that it is purely economic legislation. There were absolutely no findings by Congress regarding State conduct, or whether State conduct was unconstitutional, and it's difficult to discern from

the record before this Court or --

QUESTION: Well, given the fact that we have accepted in prior cases the pervasiveness of the phenomenon that seems to be quite clearly reflected in the findings and purpose, is that necessary here to say, well, yeah, it -- we've already said, the Supreme Court has already accepted its pervasiveness, but we've got to go a step further and say, well, yeah, that pervasiveness even goes to States. Isn't there a point at which the point has been made?

MR. TAGGART: Well, first of all, if that were true, then any law that Congress passes that has any arguable fact on discrimination based on gender would be sufficient for satisfying an abrogation of State immunity. In 1993 --

QUESTION: Well, we can't -- what about the Fitzpatrick v. Bitzer decision, where the Court unanimously found Title VII was a valid abrogation of the Eleventh Amendment immunity, and there was no inquiry into the history of gender discrimination, it was just accepted? Do you think that that case would stand up under your analysis?

MR. TAGGART: Yes, it would. There -- or we would take the position that it would. There is --

QUESTION: Because this is rather similar.

MR. TAGGART: Well, there is no requirement, and we are not urging the Court to adopt a requirement that Congress make findings. Congress simply helps the Court when it makes findings about what it is -- whether there is unconstitutional State behavior that would justify a 12-week family leave benefit that's abrogated by State sovereign immunity. But Title VII is closely hewed to this Court's section 1 jurisprudence, and there's every reason to believe that Title VII would stand up to the City of Boerne test. So the difference with this statute is that there is absolutely --

QUESTION: Mr. Taggart, I thought that part of your argument was, if the discrimination doesn't exist anymore in the State, even if it did at one time, then the provision would have to sunset, and as`far as Title VII is concerned, many States, the vast majority of States have their own Title VII laws, so at this point in time I guess, under your reasoning, Fitzpatrick and Bitzer would have to go.

MR. TAGGART: Well, we are not arguing that position and, in fact, in our view Title VII is so closely hewed to this Court's section (1) jurisprudence that it -- it -- there's every reason to believe that it would satisfy this Court's test.

In -- in -- in this case, though, the question

is, in 1993 was there a pattern and practice of State behavior that would justify a 12-week mandatory family leave benefit for all State employees that's -- that's enforced through abrogating State immunity, and the standard --

QUESTION: What was the -- in the title of Title VII what was the pattern and practice that justified that result, because when the original Title VII was passed this Court had never declared any law that differentiated on the basis of gender unconstitutional, and when it was extended to public employees -- was it in '72? -- this Court had just begun to address the issue.

MR. TAGGART: Yes, that --

QUESTION: And yet the Court said Congress could do that in '72 with no special record òf any kind. The record, to the extent it existed, was made for race, not sex.

MR. TAGGART: Well, we're not challenging Title VII in this case. We're challenging that in 1993, when the --

QUESTION: But she's asking you to distinguish Title VII from this. We know you're not challenging it.

MR. TAGGART: Well, in our view --

QUESTION: What about the fact that Title VII goes to discrimination on the basis of sex in general, and

there was no doubt that States have engaged in that and were engaging in it at the time. You could have said it was -- it was general knowledge. But the statute we're construing here doesn't go to sex discrimination in general, it goes to a very particular type of sex discrimination, and that is in the granting of leave, and on that, at least I can't say as a matter of general knowledge that the States were in violation of provisions of leave. I've no idea what the state -- what the state was. Certainly you -- you need evidence to show that they were violating that particular aspect of -- of -- of equal protection.

MR. TAGGART: Well, in order to show a pattern and practice in 1993 it's this Court's section (1) jurisprudence on violations of the Equàl Protection Clause that governs, and Washington v. Davis, incorporated into the gender cases through State Administrators v. Feeney, is a test which requires purposeful and invidious discrimination. There's no showing that there was a pattern and practice of State managers in 1993 of using a gender stereotype when they granted leave.

QUESTION: Whoa, whoa, whoa, wait, because if you accept, I take it, you accept the proposition that Congress has sufficiently shown, as far as anyone need do, that State employers discriminated in their hiring against

women, the gener -- you accept that, is that right? That's your -- your -- your -- your, for -- because if that's not so, I guess goodbye to Title VII, a whole bunch of things, but is -- do you accept that?

MR. TAGGART: Well, Title VII, and the circuits have said this already, is that Title VII is so closely hewed to this Court's section (1) --

QUESTION: No, I'm not asking you to distinguish Title VII. I'm asking you if, for purposes of this case, you accept the proposition that it is adequately shown that State employers, like a lot of other employers, did discriminate against women in hiring people, in general.

MR. TAGGART: If --

QUESTION: I'd like a yes answer or a no answer, if I could.

MR. TAGGART: Well, a qualified yes if you're talking about 1972, when --

QUESTION: Okay, so at the time of this statute?

MR. TAGGART: Not at the time of this statute.

QUESTION: Oh, okay. You do not accept the proposition that it is adequately shown that State employers discriminated against women when they passed this law?

MR. TAGGART: No, and even if there was a --

QUESTION: Okay. No, then, I don't see the

distinction with Title VII. It's goodbye if I accept that argument, I think. It's just that it was earlier?

MR. TAGGART: No, it's that title -- it's unclear whether Title VII even prohibits things that this Court's section (1) jurisprudence wouldn't also prohibit.

Title VII basically codifies what this Court said in Washington v. Davis. It allows a give-and-take in the courtroom of the evidence to -- to flesh out the totality of facts that surround an employment activity, and at the end of the day in the Title VII lawsuit an inference can be made of whether purposeful discrimination actually occurred. It allows a defense not based upon heightened scrutiny or strict scrutiny. It allows just a simple defense by the employer.

Unlike the Family Medical Leave Act, which just takes away any defense at all for States to defend the policies that they have, that it doesn't even elevate State policies to a heightened scrutiny standard, but in 1993 State policies were gender neutral, and under this Court's section (1) jurisprudence those policies should be subject to a rational basis review. But instead, the FMLA just makes all of those policies unlawful. Any policy that doesn't have 12 weeks of leave is simply unlawful. It doesn't give the State the ability to come in and prove that that policy was -- was applied --

QUESTION: Suppose you have two statutes, one is a congressional statute that says, all States must have employment and pay policies that do not differentiate on the basis of gender, and the second is the FMLA. It seems to me that the FMLA is much more limited. It's just 12 weeks, the damages are capped, it's simple to operate --

MR. TAGGART: But --

QUESTION: I would think that that is much more proportional and congruent than the other statute that I described.

MR. TAGGART: Well, the -- this statute, in our -- our position is is not proportionally concurrent, because first, there's no pattern of State behavior that would justify a 12-week leave benefit. But to completely make unlawful any act, any State policy that's less than 12 weeks would require a substantial showing that States were engaged in discrimination in the employment, in employment practices.

QUESTION: Why? Why? Because if you imagined, and you won't concede this, but I think, take it as a hypothetical, then, if you imagined that State employers had been shown to discriminate against women in hiring, wouldn't Congress have quite a lot of leeway in choosing the remedy for that discrimination, and wouldn't this statute be part of the remedy?

MR. TAGGART: Absolutely. If your hypothetical --

QUESTION: So in other words, if it's absolutely, then the answer as far as you see it in this case is whether there has been an adequate showing that at the time of this statute State employers discriminated against women in hiring, and if the answer to that question in your view is, there was an adequate showing, this is an appropriate remedy, but if the answer in your view is, it wasn't an adequate showing, then, of course, you would win. That's how you're basically seeing the case.

MR. TAGGART: Well, I don't want to agree with you 100 percent, but -- but the --

(Laughter.)

QUESTION: I would think your-- your brief -- your brief agreed with him zero percent.

MR. TAGGART: Well --

(Laughter.)

QUESTION: Your -- your --

MR. TAGGART: We didn't --

QUESTION: Under your brief, the answer is quite clearly no, you don't think it's proportionate even if there had been a violation shown. Isn't that what your brief said?

MR. TAGGART: Well, the hypothetical was, if there was enough of a showing, and I think that's the question. We argue there was no showing, which would justify no remedy, but even if there was a showing, the remedy has to be proportional, and this 12-week leave benefit just goes far out of proportion of any discernible pattern of conduct by States which would justify it.

QUESTION: Mr. Taggart, there have been scores of Title VII cases where there's a nice, neutral standard, and then there's a decision maker, and the decision maker is exercising discretion under these general standards. And time after the time, the decision maker is duplicating himself, whether race, sex, and the people who don't look like the decision maker say, gee, we suspect discrimination.

There have been countless Title VII suits that have prevailed on that, that the standards are nice and neutral, but the discretion whether to hire is made by someone who is coming up with results that exclude these people.

Now, do you think that State employers, that the people who do hiring and promotions for States are so nonbiased, so unprejudiced that that doesn't affect the decision makers on the State level, as opposed to the municipal level, and in private employment?

MR. TAGGART: Our position is that the presumption has to be that States act in a constitutional manner, and I'm not going to stand here before the Court and say that States are perfect, but there's certainly no pattern which would justify a 12-week mandatory family leave benefit enforced through the abrogation of State immunity. This -- the FMLA is simply not based upon any -- any pattern of State conduct.

The Congress knew in 1993 that 30 States had laws just like the Family Medical Leave Act. Congress wasn't thinking about whether States were violating law and whether States needed to be corrected. Congress was trying to supplement what States were already doing with the leave benefit.

QUESTION: In Title VII, too, the lead was taken by the States. Several States had human rights laws long before there was any Federal law. At least as to those States Title VII should not have been valid legislation, should it?

MR. TAGGART: Well --

QUESTION: Because there was no sign that they were not at least as good as the Federal Government.

MR. TAGGART: Well, Title VII is, in our view, a -- a -- clearly, a law that's clearly antidiscriminatory. It doesn't -- it isn't -- wasn't adopted for Commerce

Clause purposes, and in our view in this -- the Family Medical Leave Act is just a round peg being forced into a square hole. It's not -- wasn't adopted with the operation -- with the idea of acting like antidiscrimination legislation. It, in fact, would completely allow for discrimination. It would -- and that wouldn't be prohibited by the law at all.

QUESTION: Okay, if they had passed this statute without the 12 weeks in it, and the statute had simply said, on family leave decisions, the decisions have got to be the same, the standard for making them has got to be the same, whether the employer, employee is a man or a woman, would that be constitutional?

MR. TAGGART: Well, that --

QUESTION: Under section (5)?

MR. TAGGART: Well, certainly that would sound more like an antidiscrimination law that would require leave, if it's granted --

QUESTION: Okay.

MR. TAGGART: -- to be granted on a gender neutral basis --

QUESTION: Now, the difference between that case and this -- I'm sorry. I didn't mean to interrupt you.

MR. TAGGART: I'm sorry, Your Honor.

QUESTION: I was trying to get in another

question before Justice Scalia did.

(Laughter.)

QUESTION: The difference between the case I just put to you and the case that we've got here is 12 weeks, and I suggested that one reason for the 12 weeks is a decision on the part of Congress that if we don't put some period of time, some threshold period of time, our nondiscrimination standard isn't going to be worth anything.

For example, just outside this case, the States could say, okay, we're going to give a 1-week maternity leave, men or women. Obviously, that isn't going to accomplish anything. So Congress says, we've got to have some kind of a threshold in order to make this requirement of neutrality really work. Why is that not a reasonable way to get to the point which I think we both agree would be a perfectly lawful exercise of power under section (5)?

MR. TAGGART: Well, first on the latter part, a prohibition or a requirement for gender-neutral leave would -- for -- if leave is allowed, it must be allowed on a gender-neutral basis, I would still argue that that would be, that would require some predicate of a pattern of unconstitutional behavior, but --

QUESTION: Okay. We'll take that as a given. You don't concede that.

MR. TAGGART: Okay, but on the 12 weeks point, this Court would have to assume, without any indication from Congress, that that's why it used 12 weeks, because that is not why it used 12 weeks. 12 weeks --

QUESTION: How many States are covered by the act?

MR. TAGGART: Well, at the time the act was adopted --

QUESTION: Yes.

MR. TAGGART: -- 30 States had family leave laws.

QUESTION: How many are covered by the act? To how many States does the act --

MR. TAGGART: Every State is covered by the act.

QUESTION: 50 of them. How many private employers are covered by the act?

MR. TAGGART: Every private employer.

QUESTION: Yeah, like how many do you think that is, hundreds of thousands?

MR. TAGGART: Yes. Yes, Your Honor.

QUESTION: And the 6 weeks was adopted with the 50 States in mind, is the argument that's being propounded. It's clear that the 6 weeks was designed for the 50 States, never mind the hundreds of thousands of private employers. Does that seem plausible?

MR. TAGGART: No, and it -- first it's --

QUESTION: Doesn't it seem plausible, however, that the period of time was designed in view of the pervasive history of discrimination in and out of Government, and that it is just as applicable when it is applied to the Government, just as reasonable or unreasonable, however you come out, as it is when it's applied to private industry? Isn't that a fair argument?

MR. TAGGART: No, because it's not so simple as to draw the conclusions about the society in general directly to States and impute States with unconstitutional behavior without presuming first that States act in a constitutional way.

QUESTION: No, I recognize that you're not conceding the -- the -- the point that`a predicate for applying it to the States, even a -- a -- a non-6-weeks antidiscrimination has been shown, but if we assume that point is past, then is the argument, is the appropriateness of the means somehow categorically different for States from the appropriate -- appropriateness of the means with respect to private employment?

MR. TAGGART: Well, it's our view that the two questions can't be split, that -- that the State conduct is so critical that -- that it -- the answer cannot be

derived from saying that if -- if there's this conduct in general, then 12 weeks fits both State and non-State actors. The -- the 12-week benefit was not designed at all by Congress to target unconstitutional conduct. It was designed to give children 12 weeks of child development time with their parents when they're born.

QUESTION: Insofar as the statute applied to private employers, could it possibly have been directed at unconstitutional conduct?

MR. TAGGART: It may be possible, but -- but any --

QUESTION: I presume --

QUESTION: But the real question is whether it's directed at discriminatory.

QUESTION: At discriminatory`conduct.

QUESTION: If it's private discrimination, it's not constitutional; if it's State discrimination, it is a constitutional question. Isn't the question whether it's directed at discriminatory conduct? Isn't that the basic question?

MR. TAGGART: Well --

QUESTION: Or do you concede it is directed at discriminatory conduct.

MR. TAGGART: No, we do not concede that it's directed at discriminatory conduct.

QUESTION: But if it were directed at discrimination, discriminatory conduct, that would embrace both the States and the private employers, wouldn't it?

MR. TAGGART: Well, that -- we do not concede that point, because Congress did not have any predicate on which to base the direction of this onto the States, and I'd like to reserve the remainder of my time for rebuttal, please.

QUESTION: Very well, Mr. Taggart.

Ms. Pillard.

ORAL ARGUMENT OF CORNELIA T. L. PILLARD

ON BEHALF OF THE RESPONDENT

MS. PILLARD: Thank you, Mr. Chief Justice, and may it please the Court:

The Family Medical Leave Act`is an appropriate response to enduring problems of State sex discrimination bias against women in hiring and promotion because employers assume that women are more likely than men to leave their jobs to go take care of their family members, and bias against men in the dispensing of family leave.

Congress gathered ample recent evidence of these mutually reinforcing problems, and Congress also built on a known foundation of State laws and decisions fostering different roles for men and women in work and family. Those different roles and beliefs about them persist.

Offering a threshold amount of leave to men and women alike is responsive to the problems. The act has successfully encouraged more men to take the leave, and in narrowing the gap between men's and women's leave rates, the act erodes the very basis of employers' bias against women. If you will, it makes men and women equally unattractive.

(Laughter.)

MS. PILLARD: The act also responds to discrimination against men in the dispensing of leave. A bare prohibition against discrimination doesn't do that and, in fact, the bare prohibition against discrimination in the dispensing of leave had been in place. That's Title VII, and that, for the generation during which Title VII applied to the States, that had not succeeded in eradicating sex-based dispensing of leave, and in the real world --

QUESTION: Sex-based dispensing of leave by the States?

MS. PILLARD: By the States.

QUESTION: Well, what statistics are there that support that statement?

MS. PILLARD: Mr. Chief Justice, I'd like to highlight four aspects of the evidence of sex-based discrimination in leave specifically about the States.

First, Congress learned of the pattern of State granting leave through the Bureau of Labor Statistics' figures. In 1987, 50 percent of women in State and local government, as compared to 30 percent of men in State and local government, were offered parenting leave. Yale also did a 50-State survey to which --

QUESTION: Excuse me, what --

QUESTION: You know, I presume to get parenting leave you have to be a parent, and it doesn't seem to me that that -- that is a terribly instructive statistic unless it -- it's shown that equal numbers were parents, or equal numbers applied.

MS. PILLARD: The statute --

QUESTION: Could you tell me what, before we go on with the discussion, what you mean by, were offered parenting leave?

MS. PILLARD: Parenting leave was available to them in their State --

QUESTION: Was available, whether they took it or not?

MS. PILLARD: Whether they took it or not. This is not rates of people taking. This is rates of people who had it available.

QUESTION: Who had the opportunity to take it?

MS. PILLARD: Should they choose, yes, and the

Bureau of Labor Statistics is very clear on that.

QUESTION: How -- how could that be? The States' laws were written in such a way that --

MS. PILLARD: The States' laws and the States' policies, and this is confirmed by other pieces of evidence. Yale did a 50-State survey to which 36 States responded, and 19 of those States themselves said they offered parenting leave to women and not to men under their policies.

QUESTION: Well, that's 19, 19 out of 50 States.

QUESTION: Excuse me, when you say parenting --

QUESTION: Let her respond to my question.

(Laughter.)

MS. PILLARD: That's 19 out of the 36 responded that themselves admitted that they -- they had these policies. The president of the labor union that represents State employees said, the vast majority of our contracts really cover maternity leave. They're not --

QUESTION: Exactly, and that explains the discrepancy. I'm trying to figure out -- what you're saying is that some States provided for maternity leave, but did not provide any leave for the father, but that's quite a different thing.

I mean, does one have to think that parenting leave, which is the ability to go home and take care of a

child, is the same as allowing a woman who's just gone through childbirth some leave to recuperate from the childbirth? I don't think that proves anything at all. It just proves that some States had a policy of maternity leave, and presumably if, you know, if one of their male employees gave birth they'd give him maternity leave, too.

(Laughter.)

MS. PILLARD: Justice Scalia, let me clarify, each of these studies and all the figures that I'm citing are not talking about pregnancy disability leave. We're talking about maternity leave over and above pregnancy disability leave, so we're talking about whether it's unconstitutional for a State to assume that women and not men can appropriately go home and take --

QUESTION: I thought we were`talking about the medical leave act here. We're not talking about parenting, are we?

MS. PILLARD: We're talking about both. Part of the medical leave provision allows parents to take care of their seriously ill children as well as their spouses or parents, and Congress saw these as part and parcel of the same phenomenon.

QUESTION: Did any State have parenting leave laws which say, we just want you to have time to take care of your family, which applied only to men -- only to women

and not to men?

MS. PILLARD: Yes, all --

QUESTION: I know plenty of States had maternity leave. I consider that a different category entirely. Were there any States that had parenting leave, time to take care of your family, that applied only to women and not to men?

MS. PILLARD: Justice Scalia, each of these States, when they called it maternity leave, the important distinction is that it encompassed but was not restricted to a period of pregnancy disability.

We're talking about, for example, in our lodging appendix at page 31, the Rhode Island agreement that applied from 1992 to 1995. In provision 13.7, maternity leave is available for up to a year, without regard to pregnancy disability. Another example at page 47, 48 of our lodging, maternity leaves not to exceed 6 months, but may be extended, and paternity leaves are available for 3 months, so someone -- a woman can take a maternity leave up to a year without a showing of maternity disability, and a man can take 3 months. And on page 40 of the lodging, again the Pennsylvania agreement says that women can take a period of 6 months, and it may be extended for 6 months, no provision for a man who is so inclined and who wishes to do so, to go take care of his infant child,

and I think these stereotypes are very alive and well today, and the act was --

QUESTION: Kind of the successor of the man going down with his babe in arms to ask for an excuse from jury duty and they said, would tell him no, you don't get any excuse, but you give excuses to women. Yes, because women take care of children. I take care of children. That's the same thing.

MS. PILLARD: It's precisely these assumptions that have caused State employers and other employers to discriminate against women in hiring, promotion, and retention, and against men in the dispensing of leave, and these are really two sides of the same coin. And the act is working. In the 5 years that were studied from 1995 to 2000, there was a jump from approximatèly 14 percent to 21 percent of the percentage of male --

QUESTION: Would the act be any less valid if we were to conclude it weren't working?

MS. PILLARD: No, but I think the point is that there's an ongoing problem, and that Congress was correct in discerning that this was really at the core of the problem.

QUESTION: And why couldn't Congress have solved that problem adequately by simply prescribing that no State shall discriminate in -- in the -- in the giving of

-- of family leave?

MS. PILLARD: Justice Scalia, Congress already --

QUESTION: No maternity leave, kind of no State can have maternity leave as a separate category, and all family care leave must be offered equally to men and women. Why -- why wouldn't that have been a proportionate response to -- to the defect that they had found? Why -- why did the Federal Government, in order to solve the problem, have to impose upon the States 12 weeks, just pulled out of the air, 12 weeks, this is the solution to this constitutional problem?

MS. PILLARD: Justice Scalia, that prohibition was already in place from 1972, and the problem also is that a bare prohibition against discrimination cannot respond to discrimination against men in the dispensing of leave, because in the real world a facially neutral policy without a threshold leave entitlement really equates to a discretionary practice of dispensing leave tainted by stereotypes about who should need it.

QUESTION: I don't understand what you said.

MS. PILLARD: Even if employers do not affirmatively provide for any leave, they equally have a no-leave policy for men and women that is formally equal. In the real world, some workers ask for leave and some do

get family leave, but by leaving it up to supervisor discretion we open the door --

QUESTION: But there's --

MS. PILLARD: -- to discrimination.

QUESTION: But where -- is it supervisor discretion? You -- the supervisor cannot discriminate on the basis of sex. I think what you're saying is that without this 12-week period, many men just wouldn't take the leave. That's probably right, but then many men wouldn't necessarily take the 12-week leave either, if it's available.

MS. PILLARD: Many men would be deterred, if they didn't have an affirmative right to take the leave, by the assumption that their employers would not grant them leave if they requested it, by thè assumption that they would be retaliated against in the employment process if they took it, because it is still much more unacceptable for men to take family leave than for women.

QUESTION: Let me ask this question about the operation of this law in light of our recent cases on the Eleventh Amendment. Is it your understanding that because of the exercise of the Commerce Clause power, that the States are bound by this law --

MS. PILLARD: That's right.

QUESTION: -- to grant the leave?

MS. PILLARD: That's right, Justice Kennedy.

QUESTION: So all we're talking -- and -- and do you think that State attorney generals like -- probably Mr. Taggart would be the better one to ask that question -- would tell their Governors and their officials you are bound, by law, to grant the family -- to follow the Family Medical Leave Act?

MS. PILLARD: So the question is, why damages? Once Congress has found a problem, a serious problem of unconstitutional discrimination, that we assert exists here, the standard remedy to enforce rights in the employment context is make whole monetary relief, the centerpiece of which is lost wages. Title VII uses damages, the Equal Pay Act uses damages, and here, in the Family Medical Leave Act, these are limited damages. Congress took great care to ensure that they wouldn't overburden the States --

QUESTION: I understand that, but it seems to me if there's a big problem you can have an Ex Parte Young suit or, if the Government just is -- the United States is concerned about this, the Government of the United States can intervene, and why isn't that wholly adequate --

MS. PILLARD: Congress determined --

QUESTION: -- to enforce this law?

MS. PILLARD: Congress considered very carefully

that damages were needed, and limited the damages. They're just enough to spur enforcement and not burden employers, including the States. You need money damages to make sure cases get the attention of higher-ups in State government as well as in private industry.

States at the highest levels may be fully responsive, but the application of stereotypes is typically at the lower level of the supervisor with hiring, promotion, and assignment discretion, the line supervisor in the State university, in the State hospital, in the State troopers, in the State human services agencies, like where Mr. Hibbs worked, and without the clear commitment by Congress that a threshold of family leave is going to be made available not on an ad hoc basis, not according to supervisor decisions about who really needs the leave, but because Federal law requires it as a remedy for past discrimination. Only then will that message really reach the line supervisors who are making these decisions.

So I would emphasize that the act is working, the damages are limited, and the problems at which it aims are clearly unconstitutional, and petitioners are just wrong that there was no evidence in the legislative record. Congress clearly identified the problems, the problems of the States as on a par with problems of other

sectors.

Congress was well aware of the body of recent judicial decisions, finding State sex discrimination in employment. We've included some illustrative examples in our brief at footnote 23. The United States has included some examples of the most recent cases in their brief at note 15 and, as I was discussing before, Congress learned of the patterns of States granting leave to women but not to men, and Congress saw the family medical issue as part and parcel of the parenting leave issue. These were all responsibilities, family care responsibilities traditionally performed by wives. And so Congress aimed in subsections (a), (b), and (c) at a common problem of employers' assumptions of women taking leave burdening their employment prospects, and employèrs' assumptions that men did not need the leave, hindering their ability to take it, which in turn exacerbates the discrimination problem against -- against women.

So denial of employment opportunity to women and of family leave to men are two sides of the same coin. Congress clearly identified the problems, had facts showing that they continued. Nearly every State, until a generation ago, overtly placed discriminatory restrictions on womens' workforce participation. That history --

QUESTION: A generation ago. How many years is

a generation?

MS. PILLARD: Well, when Congress was acting in 1993, it was only 20 years since Title VII had been extended to the States, and less than that since this Court had adopted heightened scrutiny of sex-based classifications based on the recognition that public agencies have a -- have a tendency to rely on overbroad sex-based generalizations, overbroad sex-based classifications, so it was -- it was only since the 1970's that we started to recognize that discrimination that we had previously seen as benign, as often intended to help women, was really hindering their advancement, and to -- and to seek to try to dismantle that system.

QUESTION: And the changes in the unemployment and Workers' Compensation laws, those persisted. Wasn't the Wengler decision in 1980?

MS. PILLARD: That's right. We have decisions --

QUESTION: And States all have that kind of one-way law, where the woman did not -- if the woman wage earner died, then her husband got nothing because she was not considered really an equal worker.

MS. PILLARD: Really her wages were supplemental.

QUESTION: And that went on till 1980.

MS. PILLARD: That's exactly right, and we have the beginning of a process of dismantling this discrimination.

QUESTION: Thank you, Ms. Pillard.

Mr. Dinh.

ORAL ARGUMENT OF VIET D. DINH

ON BEHALF OF THE RESPONDENT UNITED STATES

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

The Family and Medical Leave Act is just one part of a broader statutory scheme to eliminate sex-based employment discrimination in the hiring, retention, promotion, and granting of leave benefits for both men and women, and that's the key point to emphasize here. Congress was acting not simply to remedy discrimination in leave-granting policies, but more fundamentally Congress sought to remedy and prevent sex-based employment discrimination based on impermissible presumptions about the role of women in the home and the role of men in the office.

QUESTION: I --

QUESTION: In our cases, is there any difference between Congress' prohibiting something under its section 5 power and creating a substantive entitlement under that power?

MR. DINH: I have not seen a distinction in the cases, in the section 5 cases of this Court. They are few and far between, as you can --

QUESTION: Uh-huh, right.

MR. DINH: -- as you can appreciate, but the distinction is not readily made. One can characterize the entitlement here as simply a prohibition on discrimination for men and women who take leave. It is simply an --

QUESTION: No, it isn't, it's 12 weeks.

QUESTION: -- entitlement to come back to a job.

QUESTION: Well, it's a 12-week period.

QUESTION: It says you get 12 weeks, and if -- if we approve this, we are establishing the proposition that in order to eliminate, to enforce any of the provisions of the Fourteenth Amendment, but in particular equal protection, the Government may establish whatever substantive requirements might further equal protection, and I just don't know where the Government plucks 12 weeks from and says that it -- we have to stop discrimination, and therefore everybody's entitled to 12 weeks of leave, and it's an extraordinary leap.

MR. DINH: Your Honor, I disagree that there is no limiting principle here, and the limiting principle is precisely provided by this Court's jurisprudence in congruence and proportionality. That's precisely the

limiting principle as to what is the constitutional violation that Congress seeks to redress, and whether or not the remedy is congruent and proportional.

The constitutional violation here that Congress seeks to redress or to prevent is employment-based discrimination based upon presumptions about leave-taking habits of men and women.

QUESTION: And was that the big fight in the statute? Is that what was really going on when this 12-week -- I mean, I -- I was around at the time, and I remember the big -- the big discussion was whether there ought to be a Federal law that requires all employers, not States in particular, but all employers to give all workers 12 weeks of family leave if they wanted it. That was what all the discussion was. I didn't hear any discussion at the time of sex discrimination, and you present it to us as though this was the motivating factor of the legislation. I find that hard to believe.

MR. DINH: Your Honor, I was not there at the time, and I --

(Laughter.)

MR. DINH: But I will take your word for it, but more importantly, I think we should take Congress' word on its face. Congress says at 29 U.S.C. 2601(b)(5) that the purpose of the, one of the purpose of the statute is,

quote, to promote the goal of equal employment opportunity for women and men pursuant to the Equal Protection Clause, and the further evidence --

QUESTION: Justice Scalia is right, is he not, that it -- the bill that he's talking about was the '87 bill, and that didn't say anything about the Equal Protection Clause, and that's the startling difference between the bill that actually passed in 1993.

MR. DINH: That's precisely right, Justice O'Connor -- I mean, Justice Ginsburg. Justice Scalia was talking about S. 249, the 1987 bill. The first time that the section (5), the promotion goal that entered into the statute was in the next iteration, H.R. 925 in the House, in 1987, and concurrent with the insertion of the promotion of equal opportunity, Congress also included the provision for family leave for care of parent illnesses, as opposed to simple -- simply children illnesses. And so there is some concurrency with respect to Congress' reliance on, for the first time, section (5) authority and the grant of family leave, and that's consistent with the legislative record that was before Congress.

Congress was facing a situation where it was finding more two-worker families entering in the workforce and increased demand for family care in the workforce, and it said that, based upon the evidence, as Justice Souter

had summarized, that when push came to shove, women would be expected to take leave to take care of the family, and Congress was finding that push was, indeed, coming to shove, and was adopting a remedy that was directly proportional and congruent to the period of constitutional violation. It adopted a gender-neutral entitlement to leave so as to eliminate the underlying presumption that this Court has said is impermissible.

QUESTION: Would 24 weeks have been proportional?

MR. DINH: Your Honor, I'd -- that would be a more difficult case. I do not think that --

QUESTION: 6 weeks? Would 6 weeks be proportional?

MR. DINH: It would -- the -- the -- I do not think that this Court's jurisprudence on proportionality has fine -- is so finely tuned, and this Court's lack of --

QUESTION: Of course, that jurisprudence came after the statute was enacted anyway.

MR. DINH: And I do not think that this Court's evaluation of congressional enactments under section (5), the unique remedial powers of Congress under section (5), would turn on whether it's 10 weeks or 12 weeks or 13 weeks. Of course, if it is more an increase, then it

would be less proportional, if it is less, then it would be more proportional.

QUESTION: I agree that it shouldn't turn on the length. That's the point I was getting to. I can't imagine that it would turn on the length.

QUESTION: Perhaps Justice Scalia should ask this question, but I was just wondering --

(Laughter.)

QUESTION: -- if you have to get to the --

QUESTION: Pass it to me. I'll --

(Laughter.)

QUESTION: You have to get to the 1993 version of the statute to introduce the equal protection notion, and it's interesting to me that precisely the same remedy was provided after the equal protection became an ingredient of the problem as was provided before the equal protection rationale was introduced.

MR. DINH: You mean, that same remedy, you mean number of weeks?

QUESTION: The same 12-week period. Wasn't that true?

MR. DINH: Not exactly, Your Honor. H -- the first time that the family leave was introduced and the first time the section (5) authority was invoked was in H.R. 925, and there were differing leave times for

different provisions.

I believe there was one that for section (d), for the personal disability, it was 24 weeks. Some was at 6 weeks. It turns out that when Congress passed this statute, a prior version of which was 1990, 1991, and this version in 1993, it pretty much reached the equilibrium of 12 weeks. This is the normal give-and-take of the legislative process, and nowhere in this Court's jurisprudence --

QUESTION: And this was the statute that was repeatedly vetoed, as I remember it, the bill, by President Bush, and the basis for the veto had nothing to do with discrimination, that it really was based on the length of the provision.

MR. DINH: No, Your Honor, yòu are right, the -- I have reviewed the veto statements. They concern the imposition that these types of policies would have on small businesses and the economy of the United States, rather than on the discrimination provisions at issue. But it's clear that Congress, in passing the statute, was relying on the discrimination, discriminatory effects that these types of leave policies would have on women. And I think the crux of this case, if I may, turns exactly, Justice O'Connor, on your comparison with the evidence that was before Congress when it enacted Title VII, when

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

As you may recall, this Court in, I believe in Price Waterhouse v. Hopkins, recounted the legislative history of how gender entered into Title VII, and it was entered there as the legislative equivalent of the poison pill in order to attempt to kill Title VII, and so not much evidence was put into the record regarding gender discrimination, and yet, as you noted in 1976, in Fitzpatrick v. Bitzer, this Court assumed that that was adequate in order to invoke section (5) authority, or justify section (5) authority.

QUESTION: Do -- do you want us to say that before the Family Medical Leave Act was enacted there was a discernible pattern of intentional and purposeful discrimination by the States in violation of the Equal Protection Clause with reference to the granting of leave?

MR. DINH: There was evidence, with respect to the granting of leave, of such discrimination in the record before Congress, yes, Your Honor, but in addition to that, there was a discernible pattern of employment discrimination that this Court had taken judicial notice of and Congress had before it and, in particular, Congress has evidence of employment discrimination based on leave-taking presumptions that this Court has found to be illegal.

QUESTION: I guess you're thinking under this Court's cases, which we accept as a given, Congress would have more leeway to create a remedy for the general discrimination than it might have if the discrimination, that if the leave discrimination were at issue?

MR. DINH: It goes into both the --

QUESTION: You think there's enough for both, but the remedial power is greater, is that right?

MR. DINH: There's no question that under the -- under Kimel the Court has said that difficult, intractable problems often require more powerful remedies, and that would certainly be the, how the Court would evaluate --

QUESTION: It's hard for me to see there's a discernible pattern of intentional and purposeful discrimination when in the legislative`history of this act the States were cited as being in the forefront of enlightened policies. That's what the record shows, and you're up here arguing just the opposite.

MR. DINH: Your Honor, some States were in the vanguard, some States were laggards in the granting of leave policies.

QUESTION: But the latter was not mentioned.

MR. DINH: Yes, there -- yes, it was, Your Honor. I would refer Your Honor to the United States brief at pages 36 to 40, and also the brief for the

petitioner at pages 29 through 30, which recounts some of this -- some of this evidence.

The key here -- but nevertheless, the statement in the record that you noted was about States' leave policies, whether or not they had leave policies at all. We know 30 States had -- had leave policy. The position of the United States rests upon not whether States had leave policy, but the character of such leave policies.

QUESTION: Mr. Dinh, would it violate this statute for a State to provide the 12-week family leave to men and women both, but also to continue a policy of 6-week maternity leave? Would that violate the statute?

MR. DINH: In addition to a 12-week, Your Honor?

QUESTION: In addition to the 12 weeks.

MR. DINH: 6 weeks, if I can`characterize the 6 weeks not as maternity leave, but as pregnancy disability leave --

QUESTION: Call it pregnancy disability leave.

MR. DINH: Well, this is actually a matter of quite -- quite good -- quite --

QUESTION: What's in a name?

MR. DINH: No, no, it is a matter of substance, not form alone, because pregnancy disability, medically and in insurance terms --

QUESTION: No necessity to prove disability,

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

MR. DINH: If you are --

QUESTION: You don't have to prove that you can't walk, or anything else, just, if you have a child, you have 6 weeks off.

MR. DINH: If --

QUESTION: Would that violate this act?

MR. DINH: If the grant of the additional 6 weeks is on a sex-based basis --

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

(Laughter.)

MR. DINH: If that is the case, then that would -- that may very well violate Title VII. It would not violate this particular statute.

QUESTION: Would it violate the Equal Protection Clause?

MR. DINH: Yes, it may very well violate the Equal Protection Clause if it is above and beyond the pregnancy disability leave that this Court has recognized can be accommodated, unconstitutionally though --

QUESTION: That would solve the problem, unless your answer is categorically yes, it would violate it, because then the discrepancy, the 30 percent versus 80 percent that we're talking about would continue.

MR. DINH: Well, the -- the key here, Justice Scalia, is that after the period that is recognized as pregnancy disability, and therefore constitutional under Geduldig, beyond that, parental leave, infant care leave is simply parental leave, and there's no difference whether the mother or the father takes care of the child.

Indeed, the law would not countenance such a difference, because that would be relying on the very presumptions that the law condemns. And so the key here is that if there is an additional grant of leave to either sex beyond the period of pregnancy disability, that would constitute a violation of Title VII. It would not constitute a violation of the FMLA.

The reason for that is very simple. The FMLA was enacted as part of the overall antidiscrimination scheme. It supplements and does not supplant Title VII. It paints a little bit more broad -- more broadly than Title VII in the sense that it grants affirmative leave rights, but in one further, in one important respect it paints very much more narrowly, as your -- as your question to my colleague, Mr. Taggart, had indicated, Justice Kennedy. That is because it is very narrowly tailored to the particular problem that Congress was facing, which is the problem of employment discrimination based on leave-taking propensities. And so in that sense

it is perfectly congruent to the constitutional problem that Congress was addressing.

Congress could not very well have addressed the problem of gender-based differentials and the presumptions in law and in practice that arise from those differentials by granting additional leave rights only to women, or granting leave rights only to men that would perpetuate the discrimination and the presumptions, rather than eliminate it root and branch.

The key to the money damages is the same key as it is in our general antidiscrimination statutes. That should not be a surprising -- Title VII has the same type of damage remedies, and the reason for that is that discrimination, whether it be for race or for gender, is pervasive and pernicious and historically recognized by this Court, and so Congress has made a judgment that it needs as many hands on deck as possible in order to enforce the effort to eradicate discrimination, and money damages is part of the normal remedy in order to ensure that plaintiffs are made whole and State actors are deterred from acting unconstitutionally or, in this case, in violation of the section (5) legislation that is at the -- the -- at issue here.

The fact that -- if I may return to the point that the fact that it should not be surprising that this

Court assumed in Fitzpatrick v. Bitzer that the -- that Congress had authority under section (5) to include gender discrimination in Title VII, because in the same year was the year that the Court for the first time extended heightened scrutiny in Craig v. Boren, so --

QUESTION: Thank you, Mr. Dinh.

MR. DINH: Thank you.

QUESTION: Mr. Taggart, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF PAUL G. TAGGART

ON BEHALF OF THE PETITIONERS

MR. TAGGART: First, it's important to distinguish that paternity leave and leave for childbirth and when a child is adopted is not the question that was presented to this Court today.

The question presented to this Court is family leave, and there's certainly no record of family leave differentials, as has been argued with respect to parenting leave, and second, it is not possible under any jurisprudence of this Court to simply presume that State managers discriminate based upon some stereotype. Title VII doesn't do that, the Equal Protection Clause, this Court's section (1) jurisprudence that interprets the Equal Protection Clause doesn't do that, the heightened scrutiny test does not do that, it does not allow someone

to simply presume that State managers are using some -- some outdated stereotype in making their decisions.

The third point I want to make is, it's our position that one who reads the text and the history of the Family and Medical Leave Act would hardly recognize the statute that has been described here today. This was simply every-day economic legislation, and upholding the FMLA would simply tear section (5) from any remedial moorings by allowing a general legislative power of Congress to grant economic benefits so long as there is some incidental benefit to some suspect class.

QUESTION: You mean holding, upholding money damages under the FMLA, because I take it you concede, or don't you, that Nevada is bound to follow this law?

MR. TAGGART: Since -- I do concede that, and since 1993 Nevada has had a -- a State policy of giving our workers Federal family medical leave. We also have our own State medical leave laws, so States have joined, and have actually led the Federal Government in providing family leave for their employees, and to simply say, and ignore that -- that pattern and say instead that States are engaged in a pattern of discrimination, or were engaged in 1993 in a pattern of discrimination, in our view does not stand up to any of this Court's section (1) jurisprudence.

Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Taggart. The case is submitted.

(Whereupon, at 12:13 p.m., the case in the above-entitled matter was submitted.)