No. 10-1016

In The Supreme Court of the United States

DANIEL COLEMAN,

Petitioner,

v.

MARYLAND COURT OF APPEALS; FRANK BROCCOLINA, STATE COURT ADMINISTRATOR; LARRY JONES, CONTRACT ADMINISTRATOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In passing the Family and Medical Leave Act, as the Court recognized in *Nevada Department of Human Resources v. Hibbs,* Congress intended to eliminate gender discrimination in the granting of sick leave. Its purpose and findings are supported by the legislative record. The question presented for review is:

Whether Congress constitutionally abrogated states' Eleventh Amendment immunity when it passed the self-care leave provision of the Family and Medical Leave Act.

PARTIES TO THE PROCEEDING

All parties to this action are set forth in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Daniel Coleman, respectfully requests that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit, entered in this case on November 10, 2010.

OPINIONS BELOW

The November 10, 2010, opinion of the United States Court of Appeals for the Fourth Circuit is published at *Coleman v. Maryland Court of Appeals*, 626 F.3d 187 (4th Cir. 2010); App. 1-14. The May 7, 2009, order granting Maryland Court of Appeals' Motion to Dismiss Plaintiff's Amended Complaint is unpublished. App. 15-20.

STATEMENT OF JURISDICTION

The Fourth Circuit Court of Appeals entered its final judgment on November 10, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Fourteenth Amendment provides, in pertinent part:

> Section 1. No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, *et seq.* provides employees up to twelve weeks of unpaid leave for medical reasons or other qualifying exigencies. 29 U.S.C. § 2612(a)(1). The pertinent provisions provide:

> (1) Entitlement to leave
>
> Subject to section 103 [29 U.S.C. § 2613] of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(E) Because of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.

STATEMENT UNDER SUP. CT. R. 29.4(b)

Because this proceeding draws into question the constitutionality of the self-care provision of the Family and Medical Leave Act of 1993, 29 U.S.C. § 2612(a)(1)(D), an Act of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. § 2403(a) may be applicable.

The record in this case does not reflect that either the United States District Court for the District of Maryland or the United States Court of Appeals for the Fourth Circuit certified to the Attorney General the fact that the constitutionality of such an Act of Congress has been drawn into question.

In *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), the Solicitor General's office filed a Brief in Opposition stating that it was "lodging with the Court copies of letters from the Solicitor General notifying Congress of his decision to decline further defense of the abrogation of Eleventh Amendment immunity for claims brought under 29 U.S.C. 2612(a)(1)(D)." Brief for the United States in Opposition, *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (No. 01-1368), 2002 WL 32135355, at *8 n.2. The letters attached to this lodging explained that this would continue to be the Solicitor General's position "absent changed circumstances." This issue is discussed in more detail at pages 24 to 27 of the Petition.

STATEMENT OF THE CASE

I. Overview

The United States Court of Appeals for the Fourth Circuit held that the self-care provision of the Family and Medical Leave Act (FMLA) does not validly abrogate Eleventh Amendment immunity. This decision directly contradicts Congress' expressed

purpose. In the FMLA, Congress intended to act in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment to "minimize[] the potential for employment discrimination on the basis of sex by ensuring that leave is available for eligible health reasons (including maternity-related disability) . . . on a gender-neutral basis; and to promote the goal of equal opportunity for women and men." 29 U.S.C. § 2601(b)(4)-(5).

II. Mr. Coleman's Termination

Daniel Coleman was an employee of the Maryland Court of Appeals for six years. He served as the executive director of procurement and contract administration for four of the six years. App. 2. Mr. Coleman satisfied all performance standards and received every incremental raise to which he was entitled during his time at the court. App. 3. Mr. Coleman received no reprimands or negative reviews in his six years of employment, except for an unexplained letter of reprimand discussed in more detail below, which he received for performing his assigned duties. *Id.*

In October 2005, as part of his job duties, Mr. Coleman initiated an investigation of two employees under his supervision. One of these employees, Larry Jones, was related to one of Mr. Coleman's supervisors, Faye Gaskins. App. 2-3. Mr. Coleman found evidence of misconduct on Mr. Jones' part, resulting in a five-day suspension of Mr. Jones. App. 3. Ms.

Gaskins and Frank Broccolina, another one of Mr. Coleman's supervisors, intervened in the investigation and reduced Mr. Jones' suspension to only one day. *Id.* "In retaliation for Coleman's investigation, Jones falsely alleged that Coleman had steered contracts to vendors in which Coleman had an interest." *Id.* Mr. Broccolina investigated the accusations against Mr. Coleman. App. 3. Despite finding no evidence of wrongdoing, Mr. Broccolina perpetuated the accusations against Mr. Coleman with knowledge that they were false. *Id.*

Following the suspension of Mr. Jones and despite the fact that Mr. Broccolina could find no wrongdoing by Mr. Coleman, Ms. Gaskins then issued Mr. Coleman a reprimand. *Id.* In April 2007, Mr. Coleman unsuccessfully appealed the reprimand. *Id.* In August 2007, Mr. Coleman sent a letter to Mr. Broccolina requesting sick-leave for a documented medical condition. *Id.* This request was not only denied, but Mr. Broccolina replied with an ultimatum for Mr. Coleman: resign or be terminated. *Id.* Mr. Coleman was then fired. *Id.*

III. Proceedings Below

After exhausting his administrative remedies, Mr. Coleman filed suit against the Maryland Court of Appeals, Mr. Broccolina, and Mr. Jones. App. 3. Mr. Coleman alleged race discrimination in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2(a)), unlawful retaliation in violation of 42

U.S.C. § 2000e-3(a), and a violation of the FMLA's self-care provision, 29 U.S.C. § 2612(a)(1)(D). App. 4. The District Court granted the defendants' Rule 12(b)(6) motion to dismiss as to the Title VII claims for failure to state a claim upon which relief can be granted. The District Court also dismissed Mr. Coleman's FMLA claim, holding that the FMLA's self-care provisions did not validly abrogate Eleventh Amendment immunity. App. 17.

The Fourth Circuit affirmed the District Court on all counts. App. 14. The court affirmed the Title VII dismissals because, in the Fourth Circuit's opinion, Mr. Coleman's complaint did not sufficiently allege race discrimination, or any protected Title VII activity for purposes of retaliation. App. 6-7.

In addressing the Eleventh Amendment immunity issue, the Fourth Circuit affirmed the dismissal of Mr. Coleman's claim, finding that Congress failed to validly abrogate Eleventh Amendment immunity for the FMLA's self-care provision. The Fourth Circuit noted that in a prior case it had held that "Congress exceeded its authority in applying the FMLA to the States." App. 11. In light of *Hibbs*, the court in *Coleman* went on to recognize that its prior "analysis [was] no longer valid." App. 12. Despite this acknowledgment, the Fourth Circuit again determined that the self-care provision of the FMLA was not a valid exercise of Congress' power under section 5 of the Fourteenth Amendment. The Fourth Circuit primarily relied on cases from other circuits. These

decisions had characterized the issue as "close" or presenting a "colorable" claim for abrogation of the States' Eleventh Amendment immunity. App. 13.

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS FOLLOWING *HIBBS* DEMONSTRATE THAT THE ISSUE OF WHETHER THE SELF-CARE PROVISION IS A VALID ABROGATION OF ELEVENTH AMENDMENT IMMUNITY IS ONE THIS COURT SHOULD RESOLVE.

A. Introduction.

Congress enacted the FMLA, at least in part, to combat gender-related discrimination in the workplace. 29 U.S.C. § 2601(b); *Hibbs,* 538 U.S. at 728. The FMLA enables employees to take twelve weeks of unpaid leave "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). In *Hibbs,* the Court held that Congress validly abrogated Eleventh Amendment immunity with regard to the FMLA's family-care provision (29 U.S.C. § 2612(a)(1)(C)). The Court reasoned that the purpose of the FMLA is to prevent gender-based discrimination in the workplace, and the family-care provision is both "congruent and proportional" to this end. *Hibbs*, 538 U.S. at 728. The *Hibbs* Court found that Congress effectively utilized its powers under the Fourteenth Amendment to abrogate Eleventh

Amendment immunity. *Id.* at 735. *Hibbs*, however, did not directly address whether the self-care provision was a valid abrogation of the states' Eleventh Amendment immunity.

Since *Hibbs*, six circuits have held that Congress exceeded its authority under the Fourteenth Amendment when it passed the self-care provision of the FMLA.[1] This appearance of unanimity, however, masks the closeness and importance of the issue.[2] The Court has repeatedly demonstrated that the decision to grant certiorari is not merely a mathematic exercise of counting the number of circuits on one side of

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[1] *Coleman v. Maryland Court of Appeals*, 626 F.3d 187 (4th Cir. 2010); *Nelson v. Univ. of Tex. at Dallas*, 535 F.3d 318 (5th Cir. 2008); *Touvell v. Ohio Dep't of Mental Retardation & Dev. Disabilities*, 422 F.3d 392 (6th Cir. 2005); *Toeller v. Wisc. Dep't of Corr.*, 461 F.3d 871 (7th Cir. 2006); *Miles v. Bellfontaine Habilitation Ctr.*, 481 F.3d 1106 (8th Cir. 2007); *Brockman v. Wyo. Dep't of Family Servs.*, 342 F.3d 1159 (10th Cir. 2003). Additionally, three state courts have found no valid abrogation of sovereign immunity. *See, e.g.*, *UTEP v. Herrera*, 322 S.W.3d 192 (Tex. 2010); *Nicholas v. Att'y Gen.*, 168 P.3d 809 (Utah 2007); *Lizzi v. Wash. Metro. Area Transit Auth.*, 862 A.2d 1017 (Md. 2004).

[2] *See Montgomery v. Maryland*, 72 F. App'x. 17, 19 (4th Cir. 2003) (per curiam) (reasoning that sovereign immunity is waived in FMLA actions); *McKlintic v. 36th Judicial Circuit Court*, 508 F.3d 875, 878 (8th Cir. 2007) (Bright J., concurring) (reasoning that an argument can be made that the self-care provision validly waives sovereign immunity). *Lee v. State*, 765 N.W.2d 607 (table decision), *appeal docketed*, No. 07-1879 (Iowa Ct. App. 2009) (holding that the self-care provision was a valid abrogation of sovereign immunity).

an issue.[3] In *Hibbs*, the Court granted certiorari despite the fact that seven circuits had already held the FMLA was not enacted pursuant to a valid exercise of Congress' power. One of the specified considerations of whether a grant of certiorari is appropriate is where "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). This is especially true when a court of appeals has invalidated an act of Congress, as the Fourth Circuit has done here.[4] This case presents a fundamental issue of constitutional law that warrants this Court's resolution.

B. Some of the leading cases post-*Hibbs* recognize that the issue presents a "close question" or that there is a "colorable claim" of valid abrogation.

In *Brockman v. Wyoming Department of Family Services*, the first post-*Hibbs* case to address the self-care issue, the Tenth Circuit held that *Hibbs* did not extend to the FMLA's self-care provision and was

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[3] *See, e.g.*, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 448 (1976) (certiorari granted "to resolve this important constitutional question").

[4] *See Adkins v. Children's Hosp.*, 261 U.S. 525, 544 (1923) (holding that the "judicial duty of passing upon the constitutionality of an act of Congress is one of great gravity and delicacy"); *United States v. Gainey*, 380 U.S. 63, 65 (1965) (certiorari granted "to review the grave act of annulling an Act of Congress").

limited in its applicability to the family-care provision. 342 F.3d 1159, 1164. Despite this ruling, the court recognized that there is a "colorable argument to the effect that the self-care provision of the FMLA must be viewed as part of the Act as a whole, and that it would therefore be a valid abrogation of states' sovereign immunity." *Id.*

In *Toeller v. Wisconsin Department of Corrections*, the Seventh Circuit relied on *Brockman* to find that *Hibbs* did not extend to the FMLA's self-care provision. 461 F.3d at 873. Like *Brockman*, however, *Toeller* described the issue of whether Congress abrogated Eleventh Amendment immunity with respect to the self-care provision as a "close question." *Id.*

Others to address the issue have been more explicit. In *McKlintic v. 36th Judicial Circuit Court*, Judge Bright wrote separately "to observe that an argument can be made that the self-care provision of the FMLA permits a suit against the State. This issue therefore needs resolution by the United States Supreme Court." 508 F.3d at 878 (8th Cir. 2007) (Bright J., concurring). As discussed below, *Brockman* and *Toeller* are the foundation upon which many of the other circuits' decisions are built. These foundational cases recognize that the question of whether the self-care provision is a valid abrogation of Eleventh Amendment immunity is an issue subject to differing interpretations. This Court should grant certiorari to definitively resolve the question.

C. Other circuits have relied upon *Brockman* and *Toeller* with limited analysis.

Following the Tenth Circuit's decision in *Brockman*, several other circuits found that Congress did not abrogate Eleventh Amendment immunity with respect to the self-care provision. However, their analysis was based in large part on *Brockman* and *Toeller*.

In *Touvell v. Ohio Department of Mental Retardation,* the Sixth Circuit relied heavily on the reasoning in *Brockman*. 422 F.3d at 399. The court stated, "we agree with the Tenth Circuit that the Supreme Court's holding in *Hibbs* does not apply to the self-care provision of the FMLA, and that private suits for damages may not be brought against states for alleged violations of the Act arising from claimed entitlement to leave under § 2612(a)(1)(D)." 422 F.3d at 400.

Similarly in *Toeller*, the Seventh Circuit relied on the reasoning of *Brockman* and *Touvell*, noting "[w]e are not the first to be asked to decide, in the light of *Hibbs*, whether the self-care provision of the FMLA is another valid abrogation of the State's sovereign immunity." 461 F.3d at 878. The Seventh Circuit ultimately held that "[w]hile we consider the question a close one . . . [we agree] with our sister circuits that [*Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001)] controls the self-care

provision, and thus that the State is entitled to immunity here."[5] *Id.* at 873.

In *Nelson v. University of Texas at Dallas*, the Fifth Circuit failed to provide any independent analysis of the issue. 535 F.3d 318, 321 (5th Cir. 2008). The court stated that since *Hibbs*, "the Sixth, Seventh, and Tenth Circuits have recognized that . . . states may still assert an Eleventh Amendment immunity defense to claims brought pursuant to subsection D." *Id.* After discussing *Brockman* and *Touvell*, the court simply held that "we agree with the rationale . . . that the Supreme Court's ruling in *Hibbs* only applies to subsection C." *Id.* This is the extent of the analysis employed by the Fifth Circuit.

In *Coleman*, the Fourth Circuit observed that "since *Hibbs* was decided, each of the four circuits to consider the issue has concluded Congress did not validly abrogate sovereign immunity as to the FMLA's self-care provision." App. 13-14. The Fourth Circuit did not provide any new or independent analysis. It simply decided to "join [the other] circuits" in holding that Congress did not abrogate Eleventh Amendment immunity with regard to the self-care provision. App. 14.

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[5] *See* note 10 and accompanying text in Section II, *infra*, which addresses the issue of why *Garrett* is not the controlling authority.

D. The other circuits, finding no valid abrogation, have simply relied on their pre-*Hibbs* cases.

Despite the Court's ruling in *Hibbs*, circuits continue to rely on pre-*Hibbs* rationale. A number of these courts have reasoned that their own pre-*Hibbs* case law was controlling because *Hibbs* was limited to the family-care provision. Without Supreme Court guidance, courts will continue to employ this potentially misplaced reliance.

No better example of this reliance can be found than in the Eighth Circuit. In *Townsel v. Missouri*, 233 F.3d 1094 (8th Cir. 2000), the Eighth Circuit first struck down the entire FMLA as applied to the states on Eleventh Amendment grounds. In *Townsel*, the court had explained that "the FMLA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 1096 (internal quotations omitted). This decision was, at least in part, subsequently overruled by *Hibbs*.

The Eighth Circuit had its first opportunity to address the FMLA's self-care provision in light of the *Hibbs* decision in *Miles v. Bellfontaine Habilitation Center*, 481 F.3d 1106 (8th Cir. 2007) (per curiam). In *Miles*, the Eighth Circuit, in a four paragraph opinion, noted that its previous decision in *Townsel* was "overruled in part" by *Hibbs*. 481 F.3d at 1106. However, the Eighth Circuit then relied on this partially overruled pre-*Hibbs* analysis noting, "[t]he district court

properly dismissed with prejudice Miles's FMLA claim" because "[a]s an agency of the state of Missouri, the Center is entitled to Eleventh Amendment immunity." 481 F.3d at 1107 (citing *Townsel*, 233 F.3d at 1094). Although the court did mention that *Hibbs* overruled *Townsel* in part, it did not say which part was overruled, nor did it address the fact that *Townsel*'s holding on the validity of the entire FMLA was explicitly overruled in *Hibbs*. *Id.* In the one sentence of its opinion dedicated to this issue, the court accepted the *Brockman* decision that the self-care provision was not a valid abrogation of Eleventh Amendment immunity. *Id.*

When the *McKlintic* case came before the Eighth Circuit, the court stated that it was "bound by the earlier decision of a [different] panel of [that] court." 508 F.3d at 877 (citing *Miles*, 481 F.3d at 1107 (8th Cir. 2007) (per curiam)). Constrained by its earlier decision, the court was prevented from "reconsidering the question of whether the Eleventh Amendment bars a suit against a state for violation of the self-care provisions of the FMLA." *Id.* The fact that the court in *McKlintic* felt compelled to follow its own circuit precedent, which relied on pre-*Hibbs* analysis, no doubt explains Judge Bright's concurrence noting that the Supreme Court needs to resolve the issue. *See id.* at 878 (Bright J., concurring).

Similarly, in *Touvell,* the Sixth Circuit focused its analysis on its own pre-*Hibbs* precedent. Prior to *Hibbs*, the Sixth Circuit in *Sims v. University of Cincinnati*, had reasoned that Congress was "crafting

a piece of social legislation rather than a remedy for ongoing state violations of the Equal Protection Clause." 219 F.3d 559, 564 (6th Cir. 2000). The *Touvell* court relied upon pre-*Hibbs* analysis stating, "[w]e do not believe that *Hibbs* undermines the holdings of the First, Second, Fourth, Tenth, and Eleventh Circuits that the self-care provision of the FMLA is unconstitutional insofar as it purports to abrogate state sovereign immunity."[6] 422 F.3d at 400.

Likewise, the Fifth Circuit in *Nelson* merely relied on its pre-*Hibbs* precedent. 535 F.3d 318. Prior to *Nelson*, the Fifth Circuit in *Kazmier v. Widmann*, had "declared that the Eleventh Amendment immunized states from suits for money damages brought under subsection C and D of § 2612(a)(1)." *Id.* at 321 (citing *Kazmier v. Widmann*, 225 F.3d 519, 526-29 (5th Cir. 2000)). The Fifth Circuit observed that, since *Hibbs*, three other circuits have found no valid abrogation of Eleventh Amendment immunity. Without further analysis, the court found that the "decision in *Kazmier* still remains the law of this circuit with respect to subsection D." *Id.*

Given the analysis employed by the circuits, it is doubtful that a more defined split will develop. Several circuits have indicated that this issue warrants further review. Others simply adopt the holdings used

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[6] Even *Coleman* acknowledged that its pre-*Hibbs* precedent was subsequently overruled and no longer good law. This is directly in conflict with the Sixth Circuit's findings in *Touvell*.

by fellow circuits, employing limited independent analysis. Still others feel constrained by their own pre-*Hibbs* resolutions of the issue. Without the guidance of this Court, this pattern may continue for years to come. This Court should grant review in order to definitively resolve this important constitutional issue.

II. THIS COURT SHOULD PROVIDE GUIDANCE AND CERTAINTY TO CONGRESS, THE COURTS, AND THE STATES REGARDING THE NATURE OF THE LEGISLATIVE RECORD REQUIRED TO VALIDLY ABROGATE ELEVENTH AMENDMENT IMMUNITY UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT.

The Court in *Hibbs* seemed to answer the question of what type of legislative record Congress must develop when legislating pursuant to its powers under section 5 of the Fourteenth Amendment to effect a valid abrogation of Eleventh Amendment immunity. The Court required that "Congress [have] evidence of a pattern of constitutional violations on the part of the states in [the relevant area]." *Hibbs*, 538 U.S. at 729. The Court considered the legislative record, particularly testimony and reports that indicated Congress' general intent to prevent gender-discrimination in the workplace. *Id.* Its examination of the legislative record led the Court to find that even after Congress enacted Title VII, "[s]tates continue[d] to rely on invalid gender stereotypes in the

employment context, specifically in the administration of leave benefits." *Id.* According to the Court, this was precisely the evidence Congress relied on in enacting the FMLA.

In light of this legislative record, the Court found that "[t]he persistence of such unconstitutional discrimination by the States justifies Congress' passage of prophylactic § 5 legislation." *Id.* at 730. "Congress' chosen remedy, the family-care leave provision of the FMLA, is congruent and proportional to the targeted violation." *Id.* at 737 (internal quotations omitted). The Court did not offer an opinion as to whether this legislative history supports abrogation of the states' Eleventh Amendment immunity as to the entire FMLA. However, the Court seemed to have found sufficient evidence in the legislative record to support Congress' enactment of the FMLA as a comprehensive prophylactic legislative scheme that is congruent and proportional.

Following *Hibbs*, confusion has developed over exactly what type of legislative record Congress must develop to sufficiently abrogate Eleventh Amendment immunity, and whether there must be a sufficient record created for each individual subpart of the relevant provisions. Some courts have required a very specific record for all parts of the statute. These courts do not read the FMLA as a whole and seem to require a sufficient legislative record to support each subpart. Conversely, other courts, parties, and even the United States Government have reasoned that the FMLA as a whole was congruent and proportional

to what Congress identified as the potential for gender-based discrimination. This theory rests on the notion that the FMLA's subparts should be viewed as part of the FMLA's comprehensive scheme.

The ensuing confusion has resulted in Congress legislating without guidance, hoping that in the end, it will have provided an adequate record to accomplish a valid abrogation of Eleventh Amendment immunity. This issue is especially relevant where, as here, Congress promulgates legislation with provisions that have directly related subparts, which Congress included as integral parts of its comprehensive response to an important constitutional issue (i.e., states engaging in gender discrimination and stereotyping).

Some courts seem to read *Hibbs* to require a specific legislative record for each individual subpart. Because the question in *Hibbs* concerned the FMLA's family-care provision, these courts reason that the *Hibbs* Court's finding of congruence and proportionality is not relevant to whether the next clause of the same section, the self-care provision, is congruent and proportional. For example, in *Brockman*, the Tenth Circuit believed that the legislative history revealed that the self-care provision's purpose was to alleviate economic burdens on employees and to avoid discrimination against those with serious health problems. 342 F.3d at 1164. The *Brockman* court analyzed the FMLA's legislative history and applied it on a section-by-section basis.

Relying heavily on *Brockman* and *Laro*, the *Touvell* court agreed that *Hibbs* did not apply to the self-care provision. *Touvell*, 422 F.3d 392; *see Laro v. New Hampshire*, 259 F.3d 1 (1st Cir. 2001). The Sixth Circuit seemed to rely solely on the legislative record enunciated in *Hibbs*. It found that the legislative record did not "sufficiently tie[ ] the [self-care] provision to the prevention of gender-based discrimination." *Touvell*, 422 F.3d at 400 (quoting *Brockman*, 342 F.3d at 1164) (internal quotation marks omitted). The court viewed the Act's subparts separately and disagreed with the argument that the self-care provision "[was] a prophylactic measure necessary to effectuate the broader anti-discriminatory purpose of the FMLA as a whole." *Id.* at 403-05.

Additionally, in *Toeller*, the Seventh Circuit believed that the FMLA's subparts should be viewed separately and determined that it had to find "comparable justification in the statute for self-care to that which persuaded the [*Hibbs*] Court for family-care." 461 F.3d at 879. The *Toeller* court did not engage in an extensive analysis of the legislative record, but simply stated that "what counts is that we see nothing in either the text or the legislative history of the FMLA to indicate that Congress found" that women would be more likely than men to have the need for short-term medical needs unrelated to pregnancy. *Id.* at 879.

Conversely, other courts, parties and the United States Government[7] have recognized that if the legislative record supports abrogation generally, then it applies to the statute as a whole and does not require an explanation supporting each individual subpart.[8] In *Montgomery*, for example, the Fourth Circuit read *Hibbs* as an affirmation of Congress' complete abrogation of Eleventh Amendment immunity against actions brought under the FMLA. 72 F. App'x. at 19. Likewise, in *Lee v. State*, the Iowa Court of Appeals chose to read the legislative history as generally

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[7] *See* discussion of the United States' position in *Bylsma v. Freeman*, 346 F.3d 1324 (11th Cir. 2003), Section III, *infra*.

[8] We recognize that some courts have reasoned that *Garrett* controls the issue of whether the FMLA's individual subsections should be parsed. *Garrett*, however, is distinguishable because the court was wrestling with Title I and Title II of the Americans with Disabilities Act. Whereas the FMLA's leave provisions are subparts of the same statutory provision, Title I and Title II are separate and distinct provisions of the ADA. Specifically, Title I applies to states and private entities as employers and was designed to prevent discrimination in employment regarding disabilities. *See generally* 42 U.S.C. § 12112. Conversely, Title II applies only to public entities, protecting qualified disabled individuals from being excluded from "participation in or [from being] denied the benefits of services, programs, or activities of a public entity, or [from being] subjected to discrimination by any such entity." *See generally* 42 U.S.C. § 12132. Interestingly, even the Court in *Toeller* noted the potential distinction between *Garrett's* treatment of Titles I and II of the ADA and the FMLA in reasoning that the courts in *Brockman* and *Touvell* "implicitly decided that the Supreme Court would be willing to evaluate the statute not only on a title by title basis, as the court had done with the ADA in *Garrett* . . . , but on a subsection by subsection basis." *Toeller*, 461 F.3d at 878.

applicable to the entire Act and held that "neither the language of the FMLA nor the legislative record provides an indication that the self-care provision should be treated differently from the family-care provision at issue in *Hibbs*." 765 N.W.2d 607, *appeal docketed,* No. 07-1879 (Iowa Ct. App. 2009).[9]

A dissenting judge in *Laro* made a similar argument. 259 F.3d at 17 (1st Cir. 2001) (Lipez, J., dissenting). Because Congress enacted the FMLA as a prophylactic measure against gender discrimination, it is "inappropriate to evaluate in isolation a personal medical leave provision that supplements the caretaking provisions of the FMLA with an important protection for women against gender discrimination in employment." *Id.* at 17-18.

The proper method for analyzing the FMLA's legislative history to determine whether Congress validly abrogated Eleventh Amendment immunity in the self-care provision remains unclear. Specifically, what the legislative history needs to contain to clearly abrogate Eleventh Amendment immunity and whether that history applies to the statute as a whole or in part are important questions that this Court needs to resolve.[10] The answer to these questions

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[9] *Lee* is a table decision and its opinion is available on Westlaw. The appeal is currently pending before the Iowa Supreme Court.

[10] *See Maitland v. Univ. of Minn.*, 260 F.3d 959, 965 (8th Cir. 2001) (stating the Constitution does not require point-by-point

(Continued on following page)

affects Congress' ability to legislate effectively, states' Eleventh Amendment immunity interests, and federal interests in ensuring qualified employees' right to protected leave from work under the FMLA.

III. GIVEN THE CONFLICTING POSITIONS TAKEN BY THE UNITED STATES ON THIS ISSUE AND BECAUSE IT PRESENTS AN IMPORTANT AND RECURRING CONSTITUTIONAL ISSUE, IT WARRANTS THIS COURT'S RESOLUTION.

The Court has repeatedly recognized the need to resolve issues of Eleventh Amendment immunity by granting review in controversies involving other sections of the FMLA and other employment statutes.[11] Additionally, the volume of cases addressing whether the FMLA's self-care provision is a valid exercise of congressional power under the Fourteenth Amendment

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parsing of the legislative history to determine whether section 5 statutes are congruent and proportional).

[11] *See Hibbs*, 538 U.S. 721 (granting certiorari and holding that Congress validly abrogated Eleventh Amendment immunity as to the FMLA's family-care leave provision); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (granting certiorari and holding the Age Discrimination in Employment Act (ADEA) did not abrogate states' Eleventh Amendment immunity because age was a non-suspect class, and therefore, the ADEA failed the congruence and proportionality test); *Garrett*, 531 U.S. 356 (granting certiorari and holding that the rights and remedies created by the ADA against the states raised concerns as to congruence and proportionality, supporting a determination that Congress did not validly abrogate Eleventh Amendment immunity).

demonstrates the importance of this issue. Including both pre-*Hibbs* and post-*Hibbs* cases, the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits,[12] and numerous district courts[13] and state courts[14] have been asked to consider the constitutionality of the FMLA's self-care provision.

Since *Hibbs*, the issue has been the subject of at least three petitions for certiorari.[15] In light of the

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[12] *See, e.g.*, *Laro*, 259 F.3d 1; *Hale v. Mann*, 219 F.3d 61 (2d Cir. 2000); *Chittister v. Dep't of Cmty. & Econ. Dev.*, 226 F.3d 223 (3d Cir. 2000); *Coleman v. Maryland Court of Appeals*, 626 F.3d 187 (4th Cir. 2010); *Nelson*, 535 F.3d 318; *Touvell*, 422 F.3d 392; *Toeller*, 461 F.3d 871; *Miles*, 481 F.2d 1106; *Hibbs v. Nevada Department of Human Resources*, 273 F.3d 844 (9th Cir. 2001), *aff'd*, 538 U.S. 721 (2003); *Brockman*, 342 F.3d 1159; *Garrett v. University of Alabama at Birmingham Board of Trustees*, 193 F.3d 1214 (11th Cir. 1999), *rev'd sub nom., Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001).

[13] *Darby v. Hinds County Dep't of Human Servs.*, 83 F. Supp. 2d 754 (S.D. Miss. 1999); *Williamson v. Ga. Dep't of Human Res.*, 150 F. Supp. 2d 1375 (S.D. Ga. 2001); *Livitis v. County of Luzerne*, 52 F. Supp. 2d 403 (M.D. Pa. 1999); *Serafin v. Conn. Dep't of Mental Health & Addiction Servs.*, 118 F. Supp. 2d 274 (D. Conn. 2000); *Knussman v. Maryland*, 935 F. Supp. 659 (D. Md. 1996); *Jolliffe v. Mitchell*, 986 F. Supp. 339 (W.D. Va. 1997).

[14] *See, e.g.*, *UTEP v. Herrera*, 322 S.W.3d 192 (Tex. 2010); *Lee v. State*, 765 N.W.2d 607 (Iowa Ct. App. 2009), *appeal docketed*, No. 07-1879 (Iowa Sup. Ct. 2008); *Nicholas v. Att'y Gen.*, 168 P.3d 809 (Utah 2007); *Lizzi v. Wash. Metro. Area Transit Auth.*, 862 A.2d 1017 (Md. 2004).

[15] *See, e.g.*, Petition for Writ of Certiorari, *Touvell v. Ohio Dep't of Mental Retardation & Dev. Disabilities*, 546 U.S. 1173 (2006) (No. 05-752); Petition for Writ of Certiorari, *Matthews v. Military Dept., State of Louisiana*, 129 S.Ct. 82 (2008) (No. 07-1435); Petition for Writ of Certiorari, *Montgomery v. Maryland*, 535 U.S. 1075 (2002) (No. 01-1079).

significant and recurring nature of the question presented, this Court should not delay in resolving the issue.

Furthermore, the fact that the United States has taken inconsistent positions on the issue indicates that this Court should provide guidance and clarity. At the very least, this Court should request that the United States clarify its position. In *Laro,* the United States vigorously defended the constitutionality of the self-care provision on the ground that it was enacted to prevent gender discrimination against both men and women. Supplemental Brief of Intervenor United States of America, *Laro v. New Hampshire*, 259 F.3d 1 (1st Cir. 2001) (No. 00-1581), 2001 WL 36019418. In a supplemental brief filed to address the Supreme Court's then-recent decision in *Garrett*, the United States was very specific: "*Garrett* did not alter the relevant inquiry for determining whether Congress has acted within the scope of its Fourteenth Amendment power . . . [Congress'] attempt to remedy employment practices based on gender stereotypes falls within its Fourteenth Amendment powers." *Id.*

In 2002, consistent with its position in *Laro*, the United States filed a brief in *Bylsma v. Freeman* supporting the constitutionality of the FMLA, including the self-care provision. Brief of the United States as Intervenor-Appellant, *Bylsma v. Freeman*, 346 F.3d 1324 (11th Cir. 2003) (No. 01-16102 AA), 2002 WL 32366215. The United States emphatically argued that the FMLA abrogated Eleventh Amendment immunity through a proper exercise of section 5 authority. *Id.* at

*9-11. While the controversy in *Bylsma* focused on the family-leave provision of the FMLA, much of the government's brief was non-specific, indicating that "[t]he FMLA directly remedies discrimination against men, by affording men the leave that they are often denied." *Id.* at *9.

Despite its defense of the self-care provision's constitutionality in *Bylsma* and *Laro*, the Office of the Solicitor General filed a Brief in Opposition in *Hibbs*, stating that it was "lodging with the Court copies of letters from the Solicitor General notifying Congress of his decision to decline further defense of the abrogation of Eleventh Amendment immunity for claims brought under 29 U.S.C. 2612(a)(1)(D)." Brief for the United States in Opposition, *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (No. 01-1368), 2002 WL 32135355, at *8 n.2. The government further explained that in light of the Supreme Court's decision in *Garrett,* the Solicitor General would "take the extraordinary step of abandoning further constitutional defense of the abrogation of Eleventh Amendment immunity for the individual sick leave provision." *Id.* at *8.

The Solicitor General's letters to Congress gave two reasons for the Office's refusal to defend the self-care provision. First, the letter indicated frustration with the eight circuit court decisions rendered before *Hibbs* that had rejected the Solicitor General's

arguments in defense of the provision. App. 22.[16] Second, the Solicitor General relied on the reasoning in the *Garrett* decision. The letter reasoned that while the *Garrett* decision was only aimed at the ADA, the decision "effectively eliminated [its] ability to defend the medical-leave provision as protecting against discrimination on the basis of temporary disability." App. 23. Finally, the letter indicated that this position will only be held by the Office "absent changed circumstances." App. 22.

The *Hibbs* decision undermined the rationale of many of the circuit court decisions referenced in the Solicitor General's letter. Further, as discussed above, the United States Government had vigorously defended Congress' abrogation of Eleventh Amendment immunity, not only as an appropriate response to disability-based discrimination, but also to address gender-based discrimination perpetrated by the states.

Hibbs represents a change in circumstances substantial enough to warrant a policy review by the United States. The United States has not taken any clear position on this issue in the Court since *Hibbs*, and the very text of the letter begs the question as to what the United States' position is in light of *Hibbs*. Because the Government's defense of the constitutionality of the self-care provision has been inconsistent,

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[16] Letter from Theodore Olson, Solicitor General, to Richard Cheney, President of the Senate (Dec. 20, 2001) (on file with the Supreme Court of the United States). The letter is attached as an appendix. App. 21. A similar letter was sent to J. Dennis Hastert, Speaker of the House. We have not reproduced it.

this Court should grant certiorari, and resolve this important question.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Fourth Circuit. Additionally, this Court should invite the Solicitor General to file a brief in this matter expressing the position of the United States.

Respectfully submitted this 8th day of February, 2011.

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626 F.3d 187
United States Court of Appeals, Fourth Circuit.

Daniel COLEMAN, Plaintiff-Appellant,
v.
MARYLAND COURT OF APPEALS; Frank Broccolina, State Court Administrator; Larry Jones, Contract Administrator, Defendants-Appellees.

No. 09-1582.Argued: Sept. 23, 2010.
Decided: Nov. 10, 2010.

Attorneys and Law Firms

ARGUED: Edward Smith, Jr., Law Office of Edward Smith, Jr., Baltimore, Maryland, for Appellant. Hugh Scott Curtis, Office of the Attorney General of Maryland, Baltimore, Maryland, for Appellees. **ON BRIEF:** Douglas F. Gansler, Attorney General, Kendra Y. Ausby, Assistant Attorney General, Office of the Attorney General of Maryland, Baltimore, Maryland, for Appellees.

Before TRAXLER, Chief Judge, SHEDD, Circuit Judge, and James C. DEVER III, United States District Judge for the Eastern District of North Carolina, sitting by designation.

Opinion

Affirmed by published opinion. Chief Judge TRAXLER wrote the opinion, in which Judge SHEDD and Judge DEVER joined.

OPINION

TRAXLER, Chief Judge:

Daniel Coleman appeals the dismissal of his amended complaint in this suit alleging, as is relevant here, violations of Title VII of the Civil Rights Act of 1964 ("Title VII"), *see* 42 U.S.C.A. §§ 2000e to 2000e-17 (West 2003 & Supp.2010), and of the Family and Medical Leave Act of 1993 ("FMLA"), *see* 29 U.S.C.A. §§ 2601-54 (West 2009 & Supp.2010). Finding no error, we affirm.

I.

Coleman's Title VII claim was dismissed for failure to state a claim upon which relief can be granted. *See* Fed.R.Civ.P. 12(b)(6). In reviewing such a dismissal, we accept the facts alleged in the complaint as true and construe them in the light most favorable to the plaintiff. *See Flood v. New Hanover Cnty.*, 125 F.3d 249, 251 (4th Cir.1997). Viewed through that lens, the facts for purposes of this appeal are as follows.

Coleman, an African-American male, was employed by the Maryland Court of Appeals from March 2001 to August 2007 and served as executive director of procurement and contract administration since early 2003. Coleman was supervised by Frank Broccolina, a white male, and Faye Gaskins, whose race is not specified. Larry Jones, whose race also is not specified, was a member of Coleman's staff and

was related to Gaskins. In October 2005, Coleman investigated a matter involving Jones and Joyce Shue, a white female. Coleman's investigation "resulted in a five (5) day suspension" for Jones. J.A. 21. After Broccolina and Gaskins intervened, however, Jones's suspension was reduced to only one day. In retaliation for Coleman's investigation, Jones falsely alleged that Coleman had steered contracts to vendors in which Coleman had an interest, and Jones encouraged Broccolina to investigate. Broccolina, in turn, shared the allegations with others despite knowing that they were false.

During his employment, Coleman satisfied the performance standards of his position and received all applicable "raises and increments." J.A. 26. However, in early April 2007, he received a letter of reprimand from Gaskins concerning "a communication protocol." J.A. 25. Coleman's appeal of the reprimand was unsuccessful. Then, on August 2, 2007, Coleman sent Broccolina a sick-leave request "based upon a documented medical condition." J.A. 26. Broccolina contacted Coleman the next day and informed him that he would be terminated if he did not resign. Coleman alleges that he was fired for requesting sick leave and because he is black. He also alleges that the contract-steering charge played a role in his termination.

After exhausting his administrative remedies, Coleman initiated the present action. The complaint before us names Broccolina, Jones, and the Maryland Court of Appeals as defendants and alleges violations

of Title VII and the FMLA.[1] On defendants' motion, the district court dismissed the Title VII claim on the grounds that Coleman failed to state a claim for which relief could be granted, *see* Fed.R.Civ.P. 12(b)(6), and dismissed the FMLA claim on the basis that it was barred by Eleventh Amendment immunity, *see* Fed.R.Civ.P. 12(b)(1).

II.

Arguing that the complaint properly alleged both a claim for disparate treatment and a claim for retaliation, Coleman maintains that the district court erred in dismissing his Title VII cause of action. We disagree.

We review de novo the grant of a motion to dismiss under Rule 12(b)(6). *See Sucampo Pharm., Inc. v. Astellas Pharma, Inc.*, 471 F.3d 544, 550 (4th Cir.2006). When ruling on such a motion, "a judge must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus,* 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (per curiam) (citations omitted). A complaint "need

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[1] The district court construed Coleman's complaint as asserting the FMLA claim against Broccolina and Jones in their official capacities only. Coleman does not challenge that interpretation on appeal.

Coleman's complaint also includes a state-law claim for defamation. The district court dismissed that claim as barred by the Eleventh Amendment and the Maryland Tort Claims Act. Coleman does not challenge the dismissal of that claim.

only give the defendant fair notice of what the claim is and the grounds upon which it rests." *Id.* at 93, 127 S.Ct. 2197 (alteration and internal quotation marks omitted). However, to survive a motion to dismiss, the complaint must "state[ ] a plausible claim for relief" that "permit[s] the court to infer more than the mere possibility of misconduct" based upon "its judicial experience and common sense." *Ashcroft v. Iqbal,* ___ U.S. ___, 129 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009). In this regard, while a plaintiff is not required to plead facts that constitute a prima facie case in order to survive a motion to dismiss, *see Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 510-15, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), "[f]actual allegations must be enough to raise a right to relief above the speculative level," *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). *See also Francis v. Giacomelli,* 588 F.3d 186, 193 (4th Cir.2009).

Title VII prohibits an employer from "discharg[ing] any individual, or otherwise . . . discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C.A. § 2000e-2(a). Absent direct evidence, the elements of a prima facie case of discrimination under Title VII are: (1) membership in a protected class; (2) satisfactory job performance; (3) adverse employment action; and (4) different treatment from similarly situated employees outside the protected class. *See White v. BFI Waste Servs., LLC,* 375 F.3d 288, 295 (4th

Cir.2004). Title VII also prohibits employers from "discriminat[ing] against any of [their] employees . . . because [the employees] ha[ve] opposed any practice made an unlawful employment practice by [Title VII], or because [the employees] ha[ve] . . . participated in any manner in an investigation" under Title VII. 42 U.S.C.A. § 2000e-3(a). The elements of a prima facie retaliation claim under Title VII are: (1) engagement in a protected activity; (2) adverse employment action; and (3) a causal link between the protected activity and the employment action. *See Mackey v. Shalala,* 360 F.3d 463, 469 (4th Cir.2004).

Here, although Coleman's complaint conclusorily alleges that Coleman was terminated based on his race, it does not assert facts establishing the plausibility of that allegation. The complaint alleges that Jones and Broccolina began their campaign against Coleman in retaliation for his investigation of Jones's conflict with Shue. The complaint further alleges that Coleman "was treated differently as a result of his race than whites" and specifically identifies Broccolina as a white person who was not disciplined despite having "outside business involvements." J.A. 21-22, 25 (emphasis omitted). However, the complaint fails to establish a plausible basis for believing Broccolina and Coleman were actually similarly situated or that race was the true basis for Coleman's

termination.[2] The complaint does not even allege that Broccolina's "outside business involvements" were improper, let alone that any impropriety was comparable to the acts Coleman was alleged to have committed.[3] Absent such support, the complaint's allegations of race discrimination do not rise above speculation. Thus, the district court correctly concluded that the complaint failed to state a Title VII race discrimination claim. *See Iqbal,* 129 S.Ct. at 1949 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

The district court also correctly ruled that Coleman failed to state a Title VII retaliation claim. No facts in the complaint identify any protected activity by Coleman that prompted the retaliation of which he complains. Coleman maintains that his protected activity was his intervention in the conflict between Jones and Shue. However, the complaint does not explain why Coleman's investigation would be considered protected activity. We therefore affirm the dismissal of the Title VII claim.

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[2] The complaint also conclusorily alleges that Coleman was given his letter of reprimand because of his race, but no factual allegations lend any plausibility to this claim either.

[3] The notion that Broccolina's "outside business interests" might make him similarly situated to Coleman is also muddled by Coleman's allegation that Broccolina and Jones knew that the allegations of contract steering against Coleman were false.

III.

Coleman next contends that the district court erred in dismissing his FMLA claim on the basis of Eleventh Amendment immunity. Specifically, he argues that the district court erred in concluding that Congress unconstitutionally abrogated the states' Eleventh Amendment immunity with respect to the FMLA's self-care provision. We disagree.

The Eleventh Amendment bars suit in federal court against an unconsenting state and any governmental units that are arms of the state unless Congress has abrogated the immunity. *See Alden v. Maine,* 527 U.S. 706, 755-57, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999). In order to do so, Congress must unequivocally declare its intent to abrogate and must act pursuant to a valid exercise of its power. *See Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 55, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). The first prong of this test is clearly satisfied here. *See Nevada Dep't of Human Res. v. Hibbs,* 538 U.S. 721, 726, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003) (explaining that "[t]he clarity of Congress' intent" to abrogate the states' immunity to FMLA suits "is not fairly debatable"). It is the second requirement that is at issue.

The Supreme Court has held that while Congress cannot validly abrogate a state's immunity from private suit under its Article I powers, it can do so under its Fourteenth Amendment, § 5 authority. *See Bd. of Trs. of Univ. of Ala. v. Garrett,* 531 U.S. 356, 364, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001). The

Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Section 5 authorizes Congress to enact "appropriate legislation" to enforce these substantive guarantees. *Id.* § 5. This section authorizes Congress not only to codify the Supreme Court's holdings regarding the rights established by the Fourteenth Amendment, but also to prevent future violations of those rights. *See City of Boerne v. Flores,* 521 U.S. 507, 518, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). Although Congress may "enact prophylactic legislation prohibiting conduct that is 'not itself unconstitutional,' it may not substantively redefine Fourteenth Amendment protections." *Constantine v. Rectors & Visitors of George Mason Univ.,* 411 F.3d 474, 484-85 (4th Cir.2005) (citing *City of Boerne,* 521 U.S. at 519, 117 S.Ct. 2157). The Supreme Court has held that to ensure Congress abides by this distinction, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne,* 521 U.S. at 520, 117 S.Ct. 2157.

As originally enacted, the FMLA authorized qualified employees to take up to 12 weeks of unpaid leave annually in four circumstances, three of which concern caring for family members: bearing and

caring for a child, *see* 29 U.S.C.A. § 2612(a)(1)(A), adopting or providing foster care for a child, *see id.* § 2612(a)(1)(B), and caring for a spouse, child, or parent with a serious health condition, *see id.* § 2612(a)(1)(C). The fourth circumstance is when "a serious health condition ... makes the employee unable to perform the functions of [his] position." *Id.* § 2612(a)(1)(D). Congress has subsequently amended the FMLA to also authorize leave because of an exigency arising out of the fact that an employee's spouse, child, or parent is on covered active duty, or has been notified of an impending call to such duty in the armed forces. *See* National Defense Authorization Act for Fiscal Year 2008, Pub.L. No. 110-181, § 585, 122 Stat. 3 (2008) (codified at 29 U.S.C.A. § 2612(a)(1)(E)). The FMLA creates a private right of action for equitable relief or money damages against any employer that denies its employee his FMLA rights. *See id.* §§ 2615(a), 2617(a).

In *Nevada Department of Human Resources v. Hibbs,* 538 U.S. 721, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003), on which Coleman relies, the Supreme Court addressed whether the FMLA's third provision, relating to caring for a family member with a serious health condition, constituted a valid abrogation of the states' sovereign immunity. In concluding that it was, the Court determined that Congress had enacted the FMLA in response to "the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits." *Hibbs,* 538 U.S. at 735, 123 S.Ct. 1972; *see*

also id. at 731, 123 S.Ct. 1972 (describing the gender gap in state leave policies as being the result of "the pervasive sex-role stereotype that caring for family members is women's work"). The Court confirmed that a "heightened level of scrutiny" applied to gender discrimination, *id.* at 736, 123 S.Ct. 1972, which requires that classifications distinguishing between different genders be substantially related to the achievement of important governmental objectives. *See id.* at 728, 123 S.Ct. 1972. The Court held that the test was satisfied in the case of § 2612(a)(1)(C) because it was "narrowly targeted at the fault-line between work and family – precisely where sex-based overgeneralization has been and remains strongest." *Id.* at 738, 123 S.Ct. 1972. As *Hibbs* concerned only this family-care provision, § 2612(a)(1)(C), the Court did not discuss whether Congress validly abrogated states' immunity with regard to the self-care provision, § 2612(a)(1)(D).

The Court's analysis, focused as it is on the gender-related nature of § 2612(a)(1)(C), does not support the validity of Congress's abrogation of sovereign immunity for violations of § 2612(a)(1)(D).[4]

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[4] Before *Hibbs* was decided, we held that Congress exceeded its authority in applying the FMLA to the States. *See Lizzi v. Alexander,* 255 F.3d 128, 134-36 (4th Cir.2001). Although *Lizzi* involved self-care leave, and thus would seem to be on point, the opinion's rationale was not specific to the self-care provision. Instead, it addressed congressional authority in more general terms, concluding that Congress "does not have the constitutional power to pass such a sweeping statute on the basis of

(Continued on following page)

And, the legislative history accompanying the FMLA shows that preventing gender discrimination was not a significant motivation for Congress in including the self-care provision; rather, Congress included that provision to attempt to alleviate the economic effect on employees and their families of job loss due to sickness and also to protect employees from being discriminated against because of their serious health problems. *See Brockman v. Wyoming Dep't of Family Servs.,* 342 F.3d 1159, 1164 (10th Cir.2003); S.Rep. No. 103-3, at 11-12 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 13-14; H.R.Rep. No. 101-28(I), at 23 (1990). Moreover, even had Congress *intended* the self-care provision to be protection against gender discrimination, Congress did not adduce any evidence establishing a pattern of the states as employers discriminating on the basis of gender in granting leave for personal reasons. *See Touvell v. Ohio Dep't of Mental Retardation & Developmental Disabilities,* 422 F.3d 392, 402 (6th Cir.2005); *Laro v. New Hampshire,* 259 F.3d 1, 10-11 (1st Cir.2001). Without such evidence, the self-care provision cannot pass the congruence-and-proportionality test. *See Touvell,* 422 F.3d at 402; *Laro,* 259 F.3d at 10-11.

Absent a showing that the self-care provision is congruent and proportional to a Fourteenth Amendment injury that Congress enacted the provision to

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[gender discrimination]." *Id.* at 135. That analysis is no longer valid in light of *Hibbs.*

remedy, Coleman is left to argue that we should simply evaluate the FMLA's immunity abrogation as a whole rather than considering the self-care provision individually. But we know of no basis for adopting such an undifferentiated analysis or concluding that the *Hibbs* Court did so. *See Tennessee v. Lane,* 541 U.S. 509, 530-31, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004) ("[N]othing in our case law requires us to consider Title II [of the Americans with Disabilities Act], with its wide variety of applications, as an undifferentiated whole."); *Toeller v. Wisconsin Dep't of Corr.,* 461 F.3d 871, 879 (7th Cir.2006) ("[W]e should – indeed must – look at each provision of the [FMLA] separately, even though we should also evaluate each provision in context."). Indeed, the *Hibbs* Court took pains throughout its opinion to make clear that the case it was deciding concerned only the family-leave portion of the FMLA. *See, e.g., Hibbs,* 538 U.S. at 725, 123 S.Ct. 1972 ("We hold that employees of the State of Nevada may recover money damages in the event of the State's failure to comply with the family-care provision of the Act."); *id.* at 737, 123 S.Ct. 1972 ("We believe that Congress' chosen remedy, the family-care leave provision of the FMLA, is congruent and proportional to the targeted violation." (internal quotation marks omitted)); *id.* at 740, 123 S.Ct. 1972 ("[W]e conclude that § 2612(a)(1)(C) is congruent and proportional to its remedial object.").

We note that since *Hibbs* was decided, each of the four circuit courts to consider the issue has concluded that Congress did not validly abrogate sovereign

immunity as to the FMLA's self-care provision. *See Nelson v. Univ. of Tex. at Dallas,* 535 F.3d 318, 321 (5th Cir.2008); *Toeller,* 461 F.3d at 877-79; *Touvell,* 422 F.3d at 398-405; *Brockman,* 342 F.3d at 1164-65. We now join these circuits. Because we hold that Congress did not validly abrogate the states' immunity, we conclude that the district court properly dismissed Coleman's FMLA claim as barred by the Eleventh Amendment.

IV.

In sum, holding that Coleman's complaint fails to state a Title VII claim for which relief could be granted and that his FMLA claim is barred by sovereign immunity, we affirm the district court's dismissal of Coleman's action.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DANIEL COLEMAN, Plaintiff	*	
v.	*	
MARYLAND COURT OF APPEALS, FRANK BROCCOLINA, and LARRY JONES, Defendants	*	Civil No. L-08-2464 (Filed May 7, 2009)

****

ORDER

Plaintiff Daniel Coleman was an employee at the Maryland Court of Appeals from 2001 until he was terminated in 2007. Mr. Coleman, an African American, claims race-based employment discrimination under Title VII (Count I), violation of the Family Medical Leave Act ("FMLA") (Count II), and defamation (Count III) against the Maryland Court of Appeals and two of its employees, his supervisor, Frank Broccolina, and a co-worker, Larry Jones.[1]

Now pending is Defendants' Motion to Dismiss the Amended Complaint (Docket No. 8). No hearing is necessary as the motions have been fully briefed. *See*

[1] The Amended Complaint does not present formally numbered Courts.

Local Rule 105.6 (D. Md. 2008). For the reasons set forth below, Defendants' Motion must be GRANTED.

Count I: Title VII

Plaintiff's Amended Complaint is devoid of any facts from which to infer race-based discrimination, a pleading requirement of a Title VII claim. Plaintiff does not even claim his termination was race-related. Instead, Plaintiff repeats throughout his complaint the same conclusory allegation: "he was treated differently as a result of his race than white employees who were similarly situated." Without a factual basis to support such an allegation, it is insufficient to state a claim under Title VII. *Luy v. Baltimore Police Dep't*, 326 F. Supp. 2d 682, 689 (D. Md. 2004); *see also Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). Accordingly, Plaintiff's Title VII claim (Count I) must be dismissed.

Count II: FMLA

Mr. Coleman's FMLA claim is barred by the Eleventh Amendment. Mr. Coleman alleges he sought sick leave on August 2, 2007 for a personal illness and was placed under a doctor's care for ten days. Amend. Compl. ¶ 30-31. Under the terminology of the FMLA, this is considered "self-care" because Mr. Coleman was seeking leave to care for his own illness, rather than "family-care" to care for a family member. Mr. Coleman further alleges that Mr. Broccolina, his supervisor, retaliated against him on August 3, 2007

by forcing him to choose between being terminated immediately or taking 30 days administrative leave and then resigning. Amend. Compl. ¶ 32.[2] Thus, Mr. Coleman's FMLA retaliation claim is pursuant to that statute's "self-care" provision. *See* 29 U.S.C. § 2612(a)(1)(D).

Nevertheless, Plaintiff's claim against the state must fail because, according to the universal agreement of the Federal Courts of Appeals that have considered the issue, Congress unconstitutionally abrogated state sovereign immunity with respect to the FMLA's self-care provision. *Toeller v. Wisconsin Dep't of Corrections*, 461 F.3d 871, 879-880 (7th Cir. 2006); *Touvell v. Ohio Dep't of Mental Retardation and Dev. Disabilities*, 422 F.3d 392, 400 (6th Cir. 2005); *Brockman v. Wyoming Dep't of Family Servs.*, 342 F.3d 1159, 1165 (10th Cir. 2003). The Court sees no reason to depart from the reasoning or holding of those cases here.

Further, in 2001, the Fourth Circuit held that the FMLA, in its entirety, unconstitutionally abrogated state sovereign immunity. *Lizzi v. Alexander*, 255 F.3d 128 (4th Cir. 2001). That holding was overruled in

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[2] His termination, Plaintiff Coleman explains, was preceded by a long internal investigation of Coleman begun in 2005, a formal reprimand on April 10, 2007, and his unsuccessful appeal of that reprimand to the Chief Judge of the Maryland Court of Appeals, which was denied on June 22, 2007. Five weeks later, on August 3, 2007, Plaintiff alleges he was offered the choice to resign or be terminated.

part by *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003), but only as it pertained to the family-care provisions of FMLA. *Hibbs* did not address the FMLA's self-care provision. After reviewing *Hibbs*, *Lizzi*, and similar cases, the Sixth Circuit held: "We do not believe that *Hibbs* undermines the holdings of the First, Second, Fourth [*Lizzi v. Alexander*], Tenth, and Eleventh Circuits that the self-care provision of the FMLA is unconstitutional insofar as it purports to abrogate state sovereign immunity." *Touvell*, 422 F.3d at 400; *cf. Lizzi v. Washington Metropolitan Area Transit Authority*, 862 A.2d 1017 (Md. 2004) (concurring with *Brockman* that the self-care provision unconstitutionally abrogates state sovereign immunity). Accordingly, Plaintiff's FMLA claim must be dismissed.

The Amended Complaint does not state whether the FMLA claim is brought against Messrs. Broccolina and Jones in their official or personal capacities. Unlike claims brought under the "broad enforcement vehicle" of 42 U.S.C. § 1983 for constitutional or federal torts, the Fourth Circuit construes FMLA claims against individual state defendants as official capacity claims absent clear facts to the contrary that would expose them to personal liability. *Lizzi v. Alexander*, 255 F.3d 128, 136-138 (4th Cir. 2001) *overruled in part on other grounds by, Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003). Mr. Coleman alleges no such facts.

Further, Messrs. Broccolina and Jones are immune from suit. *See* MD. CODE ANN., CTS. & JUD.

PROC. ART. § 5-522(b). The Complaint is again devoid of factual allegations that suggest Mr. Broccolina acted outside the scope of his public duties and/or with malice or gross negligence in terminating Mr. Coleman. Accordingly, Mr. Broccolina must be afforded immunity. *See* § 5-522(b). As for Mr. Jones, he was former co-worker of Mr. Coleman's and had no supervisory role over him. Without a supervisory role over Mr. Coleman, Mr. Jones cannot be held individually liable for any purported FMLA violation arising from Mr. Coleman's termination. In sum, the facts alleged by Mr. Coleman's FMLA claim, coupled with the relief he seeks (reinstatement, back pay, etc.), makes it clear that Defendants are sued in their official capacities for their alleged conduct as a single entity.

Count III: Defamation

Plaintiffs defamation claim is likewise barred by the Eleventh Amendment and procedurally deficient under the Maryland Tort Claims Act. Congress has not abrogated Maryland's sovereign immunity to tort suits in federal court. Rather, Mr. Coleman may only sue the state pursuant to the Maryland Tort Claims Act ("MTCA"). *See* MD. CODE ANN., STATE GOV'T ART. § 12-101 *et seq*. The MTCA prohibits suit against the state unless a claimant satisfies a non-discretionary condition precedent: he must first submit the claim to the State Treasurer and the State Treasurer must deny the claim. § 12-106(b); *Simpson v. Moore*, 592 A.2d 1090, 1097 (Md. 1991). Mr. Coleman's defamation claim must be dismissed as it is incurably

procedurally deficient because he failed to first file his claim with the State Treasurer within the allotted timeframe.[3]

Therefore, for the reasons stated above, the Court will (i) GRANT Defendants' Motion to Dismiss the Amended Complaint (Docket No. 8), (ii) DISMISS the case, and (iii) DIRECT the Clerk to CLOSE the case.

It is so ordered this 7th day of May, 2009

/s/
Benson Everett Legg
Chief Judge
United States District Court

[3] To the extent that Plaintiff states a claim for defamation under Maryland law against Broccolina and Jones individually and in their personal capacities, the Court declines to exercise pendant jurisdiction over such claims. *See* 28 U.S.C. § 1367(c)(3).

[SEAL] **U. S. Department of Justice**
Office of the Solicitor General

Solicitor General *Washington, D.C. 20530*

December 20, 2001

The Honorable Richard B. Cheney
President of the Senate
United States Senate
Washington, DC 20510

RE: Bates v. Indiana Dep't of Corrections, No. IP01-1159-C-H/G (S. D. Ind.)

Dear Mr. President:

I am writing to advise you that, after extensive consideration, I have determined that the Department of Justice will not continue to intervene in cases to defend the abrogation of Eleventh Amendment immunity effected by the medical leave provision of the Family and Medical Leave Act, 29 U.S.C. 2612(a)(1)(D), as appropriate legislation under Section 5 of the Fourteenth Amendment. The medical leave provision, among other things, requires state employers to provide twelve weeks of leave a year to eligible employees if needed "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." The Act further authorizes aggrieved employees to file suit against state employers to enforce the medical leave provisions for damages and equitable relief. 29 U.S.C. 2617(a).

The present case involves a suit against the Indiana Department of Corrections. The State has defended, in part, on the ground that the Eleventh Amendment bars the suit. The district court notified the Attorney General that the constitutionality of the abrogation had been drawn into question in the litigation, pursuant to 28 U.S.C. 2403, and invited the Department to intervene.

I have determined not to intervene in this case or, absent changed circumstances, in any future medical-leave case where the constitutionality of the Family and Medical Leave Act's abrogation of Eleventh Amendment immunity is drawn into question. The Department has attempted to defend the abrogation in eight courts of appeals, all of which have flatly rejected our arguments. See *Laro* v. *New Hampshire,* 259 F.3d 1 (1st Cir. 2001); *Hale* v. *Mann*, 219 F.3d 61 (2d Cir. 2000); *Chittister* v. *Department of Comm. & Econ. Development,* 226 F.3d 223 (3d Cir. 2000); *Lizzi* v. *Alexander,* 255 F.3d 128 (4th Cir. 2001); *Kazmier* v. *Widmann,* 225 F.3d 519 (5th Cir. 2000); *Sims* v. *University of Cincinnati,* 219 F.3d 559 (6th Cir. 2000); *Townsel* v. *Missouri,* 233 F.3d 1094 (8th Cir. 2000); *Garrett* v. *University of Alabama Bd. of Trustees,* 193 F.3d 1214 (11th Cir. 1999), rev'd on other grounds, 531 U.S. 356 (2001). Moreover, the Supreme Court's decision last term in *Board of Trustees of the Univ. of Ala.* v. *Garrett,* 531 U.S. 356 (2001), which held that Title I of the Americans with Disabilities Act, 42 U.S.C. 12111 to 12117, is not appropriate Section 5 legislation, effectively eliminated our ability to defend

the medical-leave provision as protecting against discrimination on the basis of temporary disability. The Supreme Court's analysis and holding in *Garrett* has left the Department with no sound basis to continue defending the abrogation of Eleventh Amendment immunity in this or other medical-leave cases under the Family and Medical Leave Act.

I wish to emphasize that this decision is confined to the medical-leave provision of the Act; no corresponding decision has been made to discontinue defense of the abrogation of Eleventh Amendment immunity for cases arising under the parental and family leave provisions of the Act. Further, this decision is limited to the constitutional question of abrogating Eleventh Amendment immunity. We will defend the substantive medical-leave provision, as applied to private employers, as an appropriate exercise of Congress's Commerce Clause power. Likewise, we continue to believe that state employees may enforce the substantive medical-leave provision through actions for equitable relief (but not monetary damages) if suit is brought against a state official under *Ex parte Young,* 209 U.S. 123 (1908).

If your office wishes to participate in this litigation, we will be happy to notify the district court and

seek an appropriate extension of time to accommodate your filing.

Very truly yours,

/s/ Theodore B. Olson
Theodore B. Olson

Enclosure

cc: The Honorable Patricia Mack Bryan
Senate Legal Counsel