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

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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I. WHEN THE LOWER COURT HAS TAKEN THE GRAVE STEP OF DECLARING AN ACT OF CONGRESS UNCONSTITUTIONAL REVIEW BY THE COURT IS APPROPRIATE.

The State of Maryland's Brief in Opposition[1] ignores a core basis for Mr. Coleman's request that this Court grant review. The United States Court of Appeals for the Fourth Circuit has declared an act of Congress unconstitutional. The Court appropriately grants certiorari when "a United States Court of Appeals has decided an important question of federal law that has not been settled, but should be, by this Court."[2] This is particularly true when a court of appeals has taken the extraordinary step of declaring an act of Congress unconstitutional,[3] or as the Court framed it in *United States v. Gainey*, 380 U.S. 63 (1965) – "to review the exercise of the *grave* power of annulling an Act of Congress." *Id*. at 65 (*emphasis added*).

It is appropriate that the Court grant review in these situations because doing so respects the

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[1] The State of Maryland's Brief in Opposition to Petition for Writ of Certiorari will be referenced as "Br. Opp. at ___", the Petition for Writ of Certiorari will be referenced as "Pet. at ___."

[2] Sup. Ct. R. 10(c)

[3] *See United States v. Butler*, 297 U.S. 1 (1936) (standing for the general proposition that the Court will review a lower court decision when the lower court has declared an act of Congress unconstitutional).

separation of powers envisioned by our Constitution. The United States recently made this point in its defense of the Affordable Health Care Act. "The Supreme Court has repeatedly stressed that courts must accord great deference to the regulatory means Congress selects to accomplish its legitimate regulatory objectives. That deference reflects the constitutional authority and institutional capacity of the political branches to make such operational choices."[4] The constitutional challenges to the Affordable Health Care Act involve Congress' power to regulate commerce and Congress' power to tax, while here the issue is Congress' power to regulate under Section 5 of the Fourteenth Amendment. However both present the same fundamental issue: the degree of deference courts should accord the regulatory means Congress has selected to address significant issues presented in society. When, as here, the lower court has ruled that Congress has exceeded its authority, review by the Court is warranted.[5]

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[4] Brief of the United States in *Commonwealth of Virginia v. Sebelius* at page 19., United States Court of Appeals for the Fourth Circuit, Nos. 11-1057 & 11-1058 (filed February 28, 2011 by Acting Solicitor General Neal Kumar Katyal).

[5] Other examples where the Court has granted certiorari when a lower court has invalidated an act of Congress include *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), where the Court explained "[b]ecause the court below decided a federal statute unconstitutional and applied reasoning that was questionable under our cases relating to the regulation of commercial speech, we granted certiorari." *Id*. at 425. Similarly in *United States v. Bajakajian*, 524 U.S. 321 (1998), the Court

(Continued on following page)

Additionally, the State has also muddled a related issue in its Opposition – the issue that certiorari should be granted to clarify the United States' position on the self-care provision of the Family Medical Leave Act ("FMLA"). The State argues that it is not the role of the Court to "straighten out inconsistent positions taken by a litigant, even one as important as the United States." Br. Opp. at 17. However, it is the Court's role, as discussed supra at pages 1-2, to make the final determination when an appellate court has ruled that an act of Congress is unconstitutional.

Contrary to the State's contention, (Br. Opp. at 17-20), the United States has taken conflicting positions on the issue. Pet. at 25-28. The United States defended the constitutionality of the self-care provision in the face of *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), arguing that the provision not only served as an appropriate response to disability-based discrimination, but that it also 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. *See* Pet. at 25. The United States stressed: "*Garrett* did not alter the relevant inquiry for determining whether Congress has acted within

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heard the case "[b]ecause the Court of Appeals . . . invalidated a portion of an act of Congress." *Id*. at 327.

the scope of its Fourteenth Amendment power . . . [Congress'] attempt to remedy employment practices based on gender stereotypes falls within its Fourteenth Amendment powers." *Id*. The United States made similar arguments in *Bylsma v. Freeman,* 346 F.3d 1324 (11th Cir. 2003). *See* Brief of the United States as Intervenor-Appellant, *Bylsma v. Freeman*, No. 01-16102 AA, 2002 WL 32366215. Pet. at 25-26.[6]

At the time of briefing in *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003), the Office of the Solicitor General changed directions filing a Brief in Opposition, stating that it was "notifying Congress of [the Solicitor General's] 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, *Nev. Dep't of Human Res. v. Hibbs*, No. 01-1368, 2002 WL 32135355, at *8 n.2. The Solicitor General's Office offered two reasons for the decision:

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[6] The State argues that the Petition makes no argument that granting self-care leave furthers a "valid Fourteenth Amendment objective" and that the Petition does not cite to the legislative record showing "that the self-care provision was targeted at a constitutional violation that is examined under heightened scrutiny. . . ." Br. Opp. at 13. This merits argument is inappropriate in a petition for certiorari. There is, however, significant support in the legislative record showing that the self-care provision is part of Congress' congruent and proportional response to gender discrimination in the granting of workplace leave. Some of this history is discussed in the *Laro* and *Bylsma* briefs cited above.

frustration with contrary circuit court decisions and the *Garrett* decision itself. Pet. App. 22-23. The *Hibbs* decision undermined the rationale of many of the circuit court decisions referenced by the Solicitor General. In addition, the letter indicated that the Office would hold this position absent "changed circumstances." Pet. App. 22-23.

The Court's decision in *Hibbs* upholding the constitutionality of the family leave provision presents "changed circumstances." However, the United States has not articulated its current position on the self-care provision, or whether it should reevaluate its position as a result of *Hibbs*. It is on that point that the State makes the same mistake that many of the lower courts did when they found no valid abrogation of immunity. The State and these lower court decisions base their analysis on pre-*Hibbs'* analysis and on an assumption that *Garrett* required this finding. Br. Opp. at 17-19. As noted, (Pet. at 25-27), the United States had previously argued that *Garrett* did not alter the United States' view that the self-care provision of the FMLA was constitutional.

This case presents the ideal vehicle for resolving this issue. Because the Solicitor General is not currently defending the constitutionality of the self-care provision, this Court needs to provide guidance, clarity and finality. This Court should grant certiorari to resolve the issue, or at a minimum, request that the United States clarify its position.

II. THIS ISSUE HAS BEEN SUFFICIENTLY ANALYZED BY THE LOWER COURTS TO WARRANT A FINAL DETERMINATION BY THE COURT.

The State devotes part of its Opposition (Br. Opp. at 7-10) to arguing a point that the Petition acknowledged – that the courts of appeals that have spoken on this issue have found that Congress did not validly abrogate the states' Eleventh Amendment immunity when it enacted the self-care provision of the FMLA. Pet. at 8-9. Most circuits have spoken on this issue. There is no need for further percolation in the appellate courts. Pet. at 8-17. Many of the circuits finding no valid abrogation have relied upon pre-*Hibbs* analysis, which was rejected in part in *Hibbs*. Pet. at 14-17. The other circuits have echoed the holding of several of the initial cases. Pet. at 10-17.

Brockman v. Wyoming Department of Family Services, 342 F.3d 1159 (10th Cir. 2003) was the first post-*Hibbs* case that addressed the self-care provision of the FMLA. In *Brockman*, the court did not extend *Hibbs* to the self-care provision. Notwithstanding this holding, the Tenth Circuit 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.* at 1164. Soon after, the Seventh Circuit in *Toeller v. Wisconsin Department of Corrections,* 461 F.3d 871 (7th Cir. 2006), acknowledged that the issue presented a "close question." *Id.* at 873.

Despite both the Tenth and Seventh Circuits noting that the issue was open to debate or "close," other circuit courts have employed very little independent analysis of the issue in subsequent decisions and have often relied on pre-*Hibbs* analysis. This may have prompted Judge Bright 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 Supreme Court of the United States." *McKlintic v. 36th Judicial Circuit Court,* 508 F.3d 875, 878 (8th Cir. 2007).[7]

III. THE COURT SHOULD GRANT REVIEW TO ENSURE THAT CONGRESS AND THE COURTS UNDERSTAND THE NATURE OF THE RECORD THAT MUST BE CREATED TO WAIVE ELEVENTH AMENDMENT IMMUNITY.

Another reason this Court should grant certiorari is so that it can provide Congress with guidance regarding what it must do to create a sufficient legislative record to validly waive the states' Eleventh

[7] The State argues that there is not a current conflict which warrants resolution by the Court. However, it seems to imply that if the Iowa Supreme Court, in the possible review of the decision in *Lee v. State*, 765 N.W.2d 607 (2009) (table), would "depart [ ] from the consensus of the federal courts of appeal" on this issue then "that case may be a candidate for review by This Court." Br. Opp. at 17. It seems odd to argue that no real conflict on the issue currently exists but that one decision by a state appellate court may be sufficient to create this conflict.

Amendment immunity. Specifically, certiorari should be granted to determine whether Congress can consider subparts of a statute under one comprehensive legislative record or whether each individual subpart requires its own exhaustive legislative record. There has been confusion in the wake of *Hibbs* as some courts seem to read *Hibbs* to require a specific legislative record for each subpart. Pet. at 17-23.

In *Hibbs,* the Court noted that Congress enacted the FMLA as prophylactic Section 5 legislation to combat persistent unconstitutional gender discrimination by the states of which the Court found sufficient evidence in the legislative record. *Hibbs* at 729. Congress enacted all of the provisions in the FMLA, including the self-care provision, together as a part of the entire prophylactic scheme. The *Hibbs* Court found that the FMLA was a congruent and proportional response to the evidence of states' gender discrimination in the legislative record; it seems counterintuitive to find that the self-care provision is not part of this congruent and proportional response. *Id.* at 740.

The FMLA has been characterized as an example of a comprehensive response to gender discrimination in the granting of workplace leave, an important constitutional issue. *Id*. Congress must have the ability to effectively and efficiently enact legislation without questioning whether its methodology and legislative record will one day be found insufficient to

support all of the parts of legislation it passes.[8] This Court should clarify the question of whether, when the legislature, pursuant to powers granted under Section 5 of the Fourteenth Amendment, enacts a statute it can create one comprehensive legislative record to support all related subparts of that particular legislation, or whether it is required to create individual legislative histories for each subpart.

IV. THIS CASE IS A TIMELY AND APPROPRIATE ONE TO RESOLVE THIS IMPORTANT ISSUE.

The State also attempts to misdirect the Court by introducing an issue not raised before the District Court or the Court of Appeals. Br. Opp. at 20-22. The State claims that the Baltimore Circuit Court's dismissal of Mr. Coleman's state action may preclude consideration of his actions in federal court if this case is remanded. The State, however, waived this issue by failing to raise it in either court below.

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[8] Justice Sotomayor recently raised this very issue in analyzing a comparable issue in another federal statute. In her dissenting opinion in *Sossamon v. Texas*, 131 S.Ct. 1651 (2011) (Sotomayor, J., dissenting), Justice Sotomayor expressed concern that Congress, in an effort to secure a waiver of immunity under the majority's opinion in *Sossamon*, would be forced to "itemize in the statutory text every type of relief meant to be available against sovereign defendants." *Id.* at 670. She feared the prospect of unending challenges to "all manner of federal statutes, on the ground that Congress failed to predict that a laundry list of terms must be included to waive sovereign immunity. . . ." *Id.*

Neither the State's Motion to Dismiss in the District Court or its brief in the Fourth Circuit mentions the judgment of the Baltimore Circuit Court. Accordingly, it is not mentioned by the District Court or the Fourth Circuit. Pet. App. at 1-20.

The Supreme Court ordinarily considers only issues raised in the lower courts. *Adickes v. S.S. Kress, Inc.*, 398 U.S. 144, 147 n.2 (1970); George C. Pratt, *Moore's Federal Practice – Civil*, Vol. 19, § 205.05 (2011). The state court action was dismissed on January 13, 2009, and the United States District Court entered its order on May 7, 2009. The State had over three months to amend its motion to dismiss in the District Court to raise the preclusion issue and it failed to do so. Following the federal District Court's order, the State had another six months – until November 9, 2011 – to raise the issue before the Fourth Circuit and again, it failed to do so. To raise it now, almost two and one-half years after the state court's dismissal, shows the dilatory nature of this argument, and that it has been waived.

Moreover, because the Baltimore Circuit Court never considered the merits of Mr. Coleman's claim, there is no preclusion. An issue is precluded from separate litigation under principles of *res judicata* only if the issue was actually litigated and decided in the first action. Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure*, vol. 18, § 4416 (2d ed. West 2010). The Baltimore Circuit court dismissed Mr. Coleman's Complaint "for the reasons stated in the Defendants'

Memorandum," with the court noting that Mr. Coleman did not respond to Defendants' Motion to Dismiss. *Coleman v. Maryland Court of Appeals*, No. 24-C-08-005975 (D. Md. Jan. 13, 2009). With state and federal actions running concurrently, Mr. Coleman's abdication from the state proceedings, while the federal proceedings continued, did not constitute a "litigation of the issues."

If properly preserved and argued, the Eleventh Amendment provides a quasi-jurisdictional bar to federal court jurisdiction that may be first raised on appeal. *Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (*citing Ford Motor Company v. Department of Treasury*, 323 U.S. 459 (1945)). However, that is not the same issue as preclusion; the issue the State of Maryland seeks to raise at this late stage of the litigation. The issue of Eleventh Amendment sovereign immunity has been raised at every step of the litigation. What the State mistakenly attempts is not the introduction of the sovereign immunity defense, but the untimely introduction of a Maryland Court's judgment through *res judicata*. This has been waived by the State and has no impact upon whether the Court should grant certiorari in this case.

V. CONCLUSION

This Court should issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Fourth Circuit. Alternatively, this Court should invite the Solicitor General to file a

brief in this matter expressing the position of the United States.

Respectfully submitted this 3rd day of June, 2011.

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