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Supreme Court of Texas.
The University of Texas at El Paso, Petitioner,
v.
Alfredo Herrera, Respondent.
No. 08-1049.

March 25, 2010.

Appearances:

Sean D. Jordan, Office of the Texas Attorney General, Austin, TX, for petitioner.
John P. Mobbs, El Paso, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice Harriet O'Neill, Justice Dale Wainwright, Justice David M. Medina, Justice Paul W. Green, Justice Phil Johnson, Justice Don R. Willett, Justice Eva Guzman.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear argument in 08-1049, the University of Texas at El Paso v. Alfredo Herrera.

MARSHAL: May it please the Court. [inaudible]

ORAL ARGUMENT OF SEAN D. JORDAN ON BEHALF OF THE PETITIONER

ATTORNEY SEAN JORDAN: Mr. Chief Justice and may it please the Court. The United States Supreme Court has made clear that congressional legislation may validly abrogate the state's immunity from private suits only when the record establishes that Congress first has identified a widespread pattern of unconstitutional discrimination by the states and, second, that it has tailored its legislation to address that unconstitutional conduct. As nine Federal circuit courts have already correctly concluded that test is not met with regard to the self-care provision of the FMLA. The record underlying the act reveals that

Congress failed to identify any pattern of unconstitutional discrimination by the states with regard to personal medical leave policies. And absence such findings, the substantive requirements of the self-care provision mandating that state employees receive at least 12 weeks of personal medical leave per year cannot be construed as a congruent and proportional response to unconstitutional conduct on the part of the states. For these reasons, the overwhelming majority of federal and state appellate courts that have considered this question have concluded that the self-care provision does not validly abrogate state sovereign immunity. We urge that this court do the same. Now a useful starting point for this analysis is to review the limits on this Congressional power of abrogation. As the United States Supreme Court said in Alden v. Maine, the state's immunity from suit was a fundamental aspect of sovereignty enjoyed by the states before the ratification to constitution and retained by them to this day and as the court stated in that opinion, "The generation that designed and adopted our Federal system considered immunity from private suits central to the state's sovereign dignity." It is for that reason that Congress has limits on its power to abrogate. For example, we know from Seminole Tribe and related Supreme Court cases, that except in limited circumstances under bankruptcy proceedings, Congress may not use its Article 1 power to abrogate the state's immunity. We also know, however, that Congress does have power under Section 5 of the Fourteenth Amendment to abrogate state immunity in order to enforce the guarantees of Section 1 and that power is broad, but it has limits and those limits were defined by the Supreme Court in the City of Boerne case and its progeny. This is the so-called congruence in proportionality test and that test is designed to ensure that when Congress enacts this type of legislation, it is not redefining the meaning of the rights or defining what the substance of the rights are in the Fourteenth Amendment because that is the duty of the court, not Congress.

JUSTICE DAVID M. MEDINA: And if we agree with all that, how does the waiver issue come into effect here?

ATTORNEY SEAN JORDAN: The waiver issue under state law, Justice Medina?

JUSTICE DAVID M. MEDINA: Yes.

ATTORNEY SEAN JORDAN: We believe the waiver argument made by Mr. Herrera has no basis in this Court's precedent or in the statutory authority from the Texas legislature. This Court has consistently said that only the Texas legislature has the authority to waive by resolution or by statute the state's immunity and Mr. Herrera's theory is that UTEP has the authority to declare its immunity waived at any time that it wants. That's directly contradicted by this Court's case, numerous cases of this Court.

JUSTICE DON R. WILLETT: And your view is a governmental unit can never, never waive its own immunity by conducts.

ATTORNEY SEAN JORDAN: It cannot waive its own immunity, Justice Willett, by declaration. There have been limited instances, for example, in the Reata case where it wasn't a declaration. It was the fact that a government entity actually entered litigation and made affirmative claims. That's entirely different from what happened in this case. There's no dispute that in this case, UTEP has not made any affirmative claims. So Mr. Herrera's would invite this Court to make a revolutionary change in its jurisprudence in saying that any state entity is entitled at any time to waive its immunity for anything it likes and that would substantially infringe on the legislature's authority of the [inaudible].

JUSTICE EVA GUZMAN: Is it entitled to bargain, if you will, with its employees and a condition of employment as you comply with our handbook and our rules and in return you have the right to do, so they are negotiating for, not just a simple statement you could sue us, but is, in fact, sort of part of the bargain.

ATTORNEY SEAN JORDAN: Well, Justice Guzman, that particular scenario to start with is not what's happening here. In other words, this isn't even a situation where there's a contract between Mr. Herrera and UTEP. There's no bargain to start with. Again, it's undisputed that he was an at-will employee and this was a statement in a handbook that we're saying to the extent it attempts to waive immunity for self-care leave is not even authorized.

JUSTICE EVA GUZMAN: Even at-will employee whose conditions of employment include complying with [inaudible].

ATTORNEY SEAN JORDAN: That's correct. He is required to meet the policies and procedures in the handbook; however, there is no contract between Mr. Herrera and the University and I would add that in a similar situation, the Houston Court of Appeals, they dealt with in Slade v. Texas Southern, you had a university president who was fired for financial misconduct and said well that's a breach of my contract and that court noted that with regard to, this Court's well aware of its waiver by conduct jurisprudence that a Houston court said this Court has never recognized a waiver by conduct exemption and this Court, in a series of cases like IT-Davy and Pelzel and Castaneda has repeatedly looked at that issue and said we're not going to recognize a waiver by conduct even in cases where there is no doubt that there was a binding contract. This case does not even rise to that level.

JUSTICE HARRIET O'NEILL: Can you direct your attention for a minute to the self-care provision and talk a little bit about Congress' purpose in enacting that provision.

ATTORNEY SEAN JORDAN: Certainly, Justice O'Neill. Our position is that the primary motivation that Congress had in passing the self-care provision was twofold. Primarily, it was designed to address the economic dislocation to families and to workers who suffer temporary disability and, secondarily, to address discrimination suffered by those workers. For example, people who suffer from cancer or heart disease or any type of illness that could keep them out of work.

JUSTICE HARRIET O'NEILL: Or pregnancy. Wasn't one of the purposes behind the self-care provision to eliminate disparity among employers in treating sick leave?

ATTORNEY SEAN JORDAN: You're correct, Justice O'Neill that pregnancy disability associated with pregnancy is something that's covered under the Act, but there is not a reason to believe that the pregnancy disability was an overwhelming consideration. It was one of the many illnesses that Congress covered under the Act. In fact, if you look at the Senate report, this is 103-3; it's cited in our briefing and I believe the other side's briefing, Congress listed 13 separate conditions. It included pregnancy disability, but it included, as I've noted, cancer. It included stroke. It included pneumonia. It included all kinds of ailments suffered by employees of both sexes and it's important to note that the evidence before Congress, and again this is in another one of the reports that's actually cited at page 18 of our brief, said that recent studies indicate, I'm quoting, "that men and women are out on medical leave approximately equally. Men workers experience an average of 4.9 days of work loss due to illness or injury while women workers experience 5.1 days per year." And, importantly, the next sentence we think is crucially important. The same report says, "the evidence also suggests that the incidence of serious medical conditions that would be covered by medical leave under the Bill is virtually the same for men and women. Employers will find that women and men will take medical leave with equal frequency."

JUSTICE HARRIET O'NEILL: But pregnancy disability was covered separately before the self-care provision was enacted.

ATTORNEY SEAN JORDAN: Was covered separately?

JUSTICE HARRIET O'NEILL: I mean it wasn't included within the Family Leave Act.

ATTORNEY SEAN JORDAN: That's, yeah, that's right. Pregnancy disability is, would be covered by self-care whereas caring for newborn children is covered by, for example, there are specific provisions in the Act to provide for the care of newborns.

JUSTICE HARRIET O'NEILL: But wasn't it enough that Congress articulated that one of the reasons for folding this into the self-care provision was to eliminate disparity in the workforce. Why can't we give that consideration?

ATTORNEY SEAN JORDAN: Your Honor, you certainly can give it consideration as something that may have been a motivation with regard to the purpose of the Act, but I would say to you that I think it was not at all the primary motivation and let me give you another quote from a Senate report. The Senate report--
CHIEF JUSTICE WALLACE B. JEFFERSON: Is that the standard that it has to be the primary motivation or can any motivation suffice under the Fourteenth Amendment for to waive the state's immunity. What's the standard?

ATTORNEY SEAN JORDAN: Well, the standard would be that the Court would have to, in terms of purpose to the extent that the Court evaluated the purpose as addressing in part gender discrimination, it's a factor that the Court would have to take into account, but let me state this, Mr. Chief Justice. Even if this Court were to determine that this Act, this provision, I'm sorry, was solely directed at self-care leave, the answer in this case would remain the same because as nine federal courts of appeals and virtually every state appellate court that looked at this Act has said there is, Congress failed to identify any pattern of unconstitutional state discrimination both with regard to gender discrimination and with regard to disability. It's simply not there and I would like to give you, I think, then Judge Alito with regard to gender discrimination put this point aptly in his opinion for the 3rd Circuit in Chittister when he said, "notably absent is any finding concerning the existence much less the prevalence in public employment of personal sick leave practices that amounted to intentional gender discrimination in violation of the equal protection clause. Moreover, even if there were relevant findings or evidence, the FMLA provisions at issue here would not be congruent or proportional." There are, we've cited them in our brief, there are numerous quotes like that from the various circuits. The Utah Supreme Court, I would add, reached a similar conclusion when it said, "Congress addduced no evidence of a pattern of discrimination on the part of the states regarding leave for personal medical reasons." They went on to say, "Having as failed to establish the required relationship between the self-care provision and prevention of gender discrimination and also having failed to identify a widespread pattern of state discrimination against the disabled."

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, the court of appeals goes at great length into the context of the FMLA passage, including a history of gender discrimination 30 years after the passage of Title VII, so why is that not enough of a record for this?
ATTORNEY SEAN JORDAN: Mr. Chief Justice, we would submit that perhaps the best indication that there isn't really, there wasn't really any record before Congress of unconstitutional discrimination by the states is to look at what the court of appeals relied up on its opinion. Because when you read that opinion, you will see that it essentially relies on two items, neither of which prove that point. The first item that the court of appeals relied upon is the discussion in the Hibbs' case of pages 730 through 732 of the Hibbs' opinion about evidence regarding state maternity and paternity leave policies. All of the evidence that is discussed in Hibbs does not have anything to do with the self-care leave provision. It has to do with the other provisions of the FMLA regarding family care and childcare leave. So the court's reliance on that simply is irrelevant to the self-care leave provision.

JUSTICE HARRIET O'NEILL: But the court said there was a stereotype that even under that provision, the stereotype was that more women took advantage of that provision.

ATTORNEY SEAN JORDAN: You mean with regard to, stereotype with regard to self-care?

JUSTICE HARRIET O'NEILL: No, with regard to family leave?

ATTORNEY SEAN JORDAN: Yes, and there's no doubt that with regard to family leave, the Supreme Court's opinion makes clear that not only was there a stereotype, but critically, Justice O'Neill, in Hibbs, the Supreme Court goes through actual evidence, materials and evidence of what they say are discriminatory state policies with regard to maternity and paternity leave. That is conspicuously missing regarding the self-care leave provision.

JUSTICE HARRIET O'NEILL: But I thought what the court of appeals keyed off on was that the self-care provision was partially intended to remedy that stereotype in the family care provision.

ATTORNEY SEAN JORDAN: I didn't read the Court's opinion to say that, but if it did, I think it would have been misguided and the reason is that to the extent that the purpose being attributed to the self-care provision is to care for other family members and to care for children, that wouldn't make a lot of sense because those, there are other provisions of the FMLA that already provide for that in A, B and C. Self-care leave provision is meant to address a different problem and I would note that in addition to the, I'm sorry, in addition to the reference to Hibbs, the only other reference the court of appeals makes is to detect one sentence of the testimony of one witness at a 1987 hearing, Ms. Montes. Mind you, this is in the context of a congressional history that the court itself acknowledges goes back eight years and we've looked at this. We're talking about 18 House and Senate reports, 11 hearings before committees and subcommittees of Congress and substantial floor debate and what the court of appeals came up with was one sentence from one witness at a hearing in 1987 and that one sentence, by the way, is what's cited in Hibbs at Ms. Montes' testimony. In fact, even that single sentence does not actually reflect the substance of Ms. Montes' testimony.

JUSTICE DON R. WILLETT: Assuming just for argument that we disagree with you, that we believe gender bias, combating gender bias was the principal motivation here. Then what congressional remedy would be congruent, would be proportional to achieving that goal?

ATTORNEY SEAN JORDAN: Well, Justice Willett, I'm afraid the short answer is we don't know based on this record because simply having a purpose of meeting gender bias is insufficient. What you'd have to look at is if Congress had actually put together a pattern of unconstitutional state conduct, then you would look at how is the remedy meeting that unconstitutional state conduct that's been identified? Simply saying there's a purpose, which is part of what the lower court is saying, doesn't get you there and, in fact, the lower--is it okay?

CHIEF JUSTICE WALLACE B. JEFFERSON: Yes.

ATTORNEY SEAN JORDAN: The lower court obviously recognized that there was a problem with the evidence because the lower court made it a point of saying, "we're not persuaded that in order to uphold the self-care provision. It's necessary to have a congressional record replete with evidence showing a pattern of gender-based discrimination." But that is directly contrary to Supreme Court case after Supreme Court case, which say that Congress may only use it's Section 5 power when it has identified specific conduct by the states transgressing the Fourteenth Amendment. If can briefly quote the Garrett case, the Garrett case says, this is U.S. Supreme Court says, "Congress is the final authority as the desirable public policy. But in order to authorize private individuals to recover money damages against the states, there must be a pattern of discrimination by the states, which violates the Fourteenth Amendment and the remedy imposed by Congress must be congruent and proportional to the targeted violation." That simply isn't met here.

CHIEF JUSTICE WALLACE B. JEFFERSON: Additional questions? Thank you, Mr. Jordan. The Court is now ready to hear argument from the Respondent.

ORAL ARGUMENT OF JOHN P. MOBBS ON BEHALF OF THE RESPONDENT

ATTORNEY JOHN MOBBS: May it please the Court, good morning. The Family and Medical Leave Act is part of a larger legislative framework that's designed to remedy a persistent history of gender discrimination at work and to dismantle gender-based barriers to the hiring and the retention and the promotion of women in the workplace, including gender discrimination by the states in violation of the equal protection clause of the Constitution.

JUSTICE: Are the [inaudible].

ATTORNEY JOHN MOBBS: They are wrong and I think there are four big reasons and one smaller reason why they're wrong and let me just, I guess I'll list the reasons first before going into detail. I guess I would be remiss if I didn't point out at first that even prior to Hibbs, eight Federal circuits had erroneously held that Congress did not validly abrogate immunity with respect to the Family Care Clause of the FMLA.

So we know the Supreme Court said that part was wrong. I think the major flaws in the opinions going the other way are, first of all, a failure by the courts to recognize that the statute was designed to combat gender discrimination and, therefore, failure to apply the heightened standard of review that exists when courts reviewing decisions by the states to classify employees on the basis of gender as opposed to on the basis of age or disability where only a rational basis for you might apply. Secondly, I think the Court's overemphasize the Congressional Record to determine whether there's a pattern of unconstitutional action by the states as opposed to the historical record. Third, I think the Court--

JUSTICE NATHAN L. HECHT: Let me ask you about that. Isn't it important what they find? I mean, the Congress might not believe the historical record.

ATTORNEY JOHN MOBBS: It is important what they find, but what they find need not be based only on the Congressional Record. We can view Congress' findings, and in fact are required to review Congress' findings through the lens of the teachings of history, specifically the historical record as recognized by the courts of gender discrimination by the states.

JUSTICE DAVID M. MEDINA: Why does gender discrimination get a differ analysis than age discrimination?

ATTORNEY JOHN MOBBS: Constitutionally, states may classify employees on the basis of age and their decision to do so is subject to review only under a rational basis standard. That is their state's decisions will be upheld if there is a rational basis for the classifications they've made. By contrast, because of the existing history of gender discrimination in this country, courts subject gender classifications by states and local governments to a heightened standard of review. That standard of review requires the state to show that the classification serves important governmental objectives and that the discriminatory means employed by the state are substantially related to the achievement of those objectives.

CHIEF JUSTICE WALLACE B. JEFFERSON: Can you give me a concrete example of how the self-care provision combats gender discrimination?

ATTORNEY JOHN MOBBS: Sure. First of all, pregnancy disability leave is self-care. Employers deciding to whether to hire employees specifically, if they're looking to a potential employee who's a married woman of child-bearing age may assume and the courts recognize are likely to presume that those women are likely to take leave for pregnancy-related reasons and, therefore, based on that presumption, even if it's not a valid presumption, but based on the presumption that a woman will take more personal disability leave for self-care, employers are likelier to hire a male employee.

JUSTICE EVA GUZMAN: How is the disability that arises from postpartum [inaudible] different from another type of disability such that gender discrimination would be their rationale for [inaudible]?

ATTORNEY JOHN MOBBS: Because women get pregnant and men don't. I mean that's--

JUSTICE EVA GUZMAN: In, I guess, contemporary times, there are many men who are taking advantage of the provisions [inaudible] take time off to be with [inaudible].

ATTORNEY JOHN MOBBS: Sure and I think we need to distinguish between leave for medical purposes associated with pregnancy, which is self-care leave and leave to care for newborns, which is family care leave.

JUSTICE EVA GUZMAN: Is self-care leave limited to medical reasons associated with [inaudible]?

ATTORNEY JOHN MOBBS: No, no. And that's and that is, Congress recognized in its stating the purposes of the statute and its own findings that employment standards, this is in Section 2601(a)6 of the statute. Employment standards that apply to one gender only have a serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender. So Congress could have enacted a self-care statute that covered only pregnancy disability leave and, of course,

that would apply only to women who are pregnant and need leave for medical reasons associated with their pregnancy. Congress found--

JUSTICE EVA GUZMAN: And are those medical different reasons different than just I guess the common recovery period associated with [inaudible].

ATTORNEY JOHN MOBBS: Sure, sure. I mean it includes medical disability, medical inability to perform the duties of a position during the pregnancy and not just after the child is born. So, you know, morning sickness, back pain, those sorts of things can cause an employee to become physically unable to perform the duties of her position.

JUSTICE EVA GUZMAN: You could have that where you are [inaudible] not morning sickness, but the back pain and other types of illnesses [inaudible] are limited to women.

ATTORNEY JOHN MOBBS: Whether you're a woman or man, sure. And the Congressional Record as co-counsel pointed out, as opposing counsel pointed out, indicates that women and men take personal medical leave approximately in equal numbers. There's not a great difference between the numbers of days that men and women are out of work. But employers presume that women, particularly married women of a certain age, are likely to need leave if they become pregnant or likely to become pregnant and need to take that leave and so they are likelier to hire, promote or retain men than women based on a presumption.

JUSTICE EVA GUZMAN: Is that part of the Congressional Record [inaudible]?

ATTORNEY JOHN MOBBS: It's discussed in the Hibbs' opinion, Your Honor, that that based on both the Congressional Record and the historical record that the Act is designed to prevent hiring decisions based on these sorts of presumptions.

JUSTICE DON R. WILLETT: Why wouldn't employer reluctance to hire women, if anything, be magnified or exacerbated by requiring employers to then give women 12 weeks of leave and why wouldn't the reluctance be that much more enhanced if the cost of giving that leave goes up?

ATTORNEY JOHN MOBBS: Because the statute requires the employers to give the leave to everyone, men or women, and that was part of Congress' finding that we can't just grant pregnancy leave because that would encourage employers to discriminate against women. That's why we give leave to everyone. Now it's unpaid leave. So the cost of giving the leave is certainly there is a cost, but it's not an inordinate cost to employers, but Congress in its judgment decided that it would help prevent discrimination against female applicants and female employees if all employees were entitled to take leave up to 12 weeks of leave for medical reasons.

JUSTICE DALE WAINWRIGHT: Counsel, Justice Green pointed out that nine federal circuit courts have ruled contrary to your position and you were going through major flaws in those opinions. Your second point was those federal courts of appeals, you believe, overemphasized the Congressional as opposed to the historical record.

ATTORNEY JOHN MOBBS: That's correct.

JUSTICE DALE WAINWRIGHT: Are you suggesting that you don't think the Congressional Record is sufficient to support your position or do you think it is and what's the different, the significant differences between the Congressional and histor record?

ATTORNEY JOHN MOBBS: Well I think that the Congressional Record cannot be viewed in isolation. And I think that we have a tendency, perhaps, as appellate lawyers to look first to the paper record to see if it supports the decision that was made, but that's not the exclusive source for deciding whether Congress had the power to act under Section V of the Fourteenth Amendment to remedy a pattern of discrimination by the states. In City of Boerne, even the court wrote that judicial deference in most cases is based not on the state of the legislative record Congress compiles, but on due regard for the decision of the body

constitutionally appointed to decide and, therefore, as a general matter, it's for Congress to determine the method by which it will reach a decision. That language is echoed in the Florida prepaid post secondary education case where the court flat out said, lack of support in the legislative record is not determinative. And that's why Hibbs, in its analysis, didn't begin with the Congressional Record, but began with a historical record of discrimination by the states. It pointed out that there is a pervasive history of gender discrimination in employment.

CHIEF JUSTICE WALLACE B. JEFFERSON: But if there were better congressional record, then a court would better be able to evaluate whether the Act ameliorates the problem, right? Because there are hearings. There would be economists who come in and testify, labor experts to say this self-care provision will, indeed, reduce discrimination against women. We don't find that here. We don't find that in that context. How do we evaluate that?

ATTORNEY JOHN MOBBS: Of course, the larger the congressional record, the easier it is to tell that Congress was aiming to remedy or deter unconstitutional behavior and whether or not its chosen remedy is proportional and congruent to the unconstitutional behavior found. But, again, that's not the only source of information we have to look at and if we look at other gender-discrimination statutes like Title VII. Title VII as proposed was intended to remedy race discrimination. Gender discrimination was thrown in as an afterthought and really as part of an attempt to defeat Title VII.

CHIEF JUSTICE WALLACE B. JEFFERSON: But the question is how do we know that this, even assuming that this was intended to combat gender discrimination, how do we know without the record whether this does that? There ought to be hearings, it seems to me. There ought to be testimony, economists, some record to show that this Act, that this provision will actually cure that problem.

ATTORNEY JOHN MOBBS: Certainly, for any piece of legislation you can imagine, the more congressional hearings we have--

CHIEF JUSTICE WALLACE B. JEFFERSON: Or outside the record, what studies are there that show that this provision combats gender discrimination? What is the court to look to?
ATTORNEY JOHN MOBBS: Well, again, Judge, I think I can only point you to (a) the existing historical record. The court's recognition that the pattern of discrimination is based on certain presumptions about the role of men and women in the workplace, including presumptions about leave that may be taken by women as opposed to leave that may be taken by men [inaudible] findings.

JUSTICE NATHAN L. HECHT: But to return to your example though, the Fifth Circuit struggled with it because they couldn't it didn't make any logical sense. Historical record aside, that might help, but just logically, if you got to, if you're reluctant to hire women because you're afraid they're going to get pregnant, requiring you to give them time off if they get pregnant doesn't make you less reluctant to hire them. So the Fifth Circuit said well how could this possibly further the fight against gender discrimination?

ATTORNEY JOHN MOBBS: Well, it does if you think that men are not likely to take time off and women are. And what the Hibbs' court said is that by imposing an across-the-board entitlement to, well weeks of leave, you're less likely, employers are less likely to base their hiring decisions on the presumption that only the women will take the leave.

JUSTICE DAVID M. MEDINA: Mobbs, if we disagree with you and your analysis on these findings [inaudible] these other nine circuits, can you still prevail on this waiver issue?

ATTORNEY JOHN MOBBS: I think so. The UTEP's employee handbook, which, you know, Mr. Herrera's employment and relationship with UTEP is a contractual relationship even if it's at-will employment and UTEP's employee handbook advises employees that they have FMLA rights and that an eligible employee may bring a civil action against an employer for a violation of the Act. It's true that the majority of this Court's jurisprudence states that sovereign immunity can only be waived by the legislature, but there are exceptions and one of those exceptions in the Reata case was that a state can waive its immunity by going into court. Well, I think most--

JUSTICE DALE WAINWRIGHT: Well not going into court. Seeking affirmative relief in court.

ATTORNEY JOHN MOBBS: By going into the court for the suit, seeking affirmative relief in court.

JUSTICE DALE WAINWRIGHT: Obviously, the state gets sued a lot as a defendant and goes into court for that purpose, but that's not a waiver.

ATTORNEY JOHN MOBBS: Sure.

JUSTICE PHIL JOHNSON: And actually we didn't say it waived it. We said it was abrogated. It just did not have it anymore [inaudible]. It made a decision and once you made that decision the courts simply [inaudible] immunity at that point.

ATTORNEY JOHN MOBBS: And the question that Mr. Herrera would pose is, how is that decision to give up your immunity by filing a suit different from the considered decision to give up your immunity as part of a contract of employment?

JUSTICE PHIL JOHNSON: Didn't we cover that in Tooke though, where we said even if the city charter, the city had a charter saying sue and be sued, we could sue and people could sue us and that doesn't count?

ATTORNEY JOHN MOBBS: Well I think this Court held that the language sue and be sued by itself is not sufficient to waive immunity. Not that the city would not have the power to waive its immunity by saying something more specific like a citizen may bring a civil action against the city.

JUSTICE DON R. WILLETT: You said Mr. Herrera's employment was contractual even though it was at will? Or--

ATTORNEY JOHN MOBBS: An employment relationship is a contractual relationship, even an at-will employee.

JUSTICE DON R. WILLETT: Even in the absence of a contract?

ATTORNEY JOHN MOBBS: Well, it is a contract. I mean, a verbal--

JUSTICE DON R. WILLETT: At-will employment is contractual?

ATTORNEY JOHN MOBBS: It is a contractual relationship.

JUSTICE DON R. WILLETT: Even though either party at any time for any reason good or bad can walk away?

ATTORNEY JOHN MOBBS: Yes. Yes. I mean it's an exchange of benefits, an exchange of work for salary or wages and it's an agreed relationship with a mutual exchange of consideration. It's a contractual relationship. It's terminable at will by either party and UTEP, of course, could modify the terms of Mr. Herrera's employment contract by changing its manual or the terms of its contract with all of its employees by changing his manual to say we can violate the FMLA, but you can't sue us if we do.

JUSTICE DALE WAINWRIGHT: Counsel, does your argument mean that every subdivision of the state, every local governmental entity, every county entity, every city entity, water district, etc., and the contracts it enters, they enter with private entities can waive immunity so that there are thousands or hundreds of thousands of possible waivers out there in contracts. Is that where your argument takes us logically?

ATTORNEY JOHN MOBBS: If they do so--Yes, if they do so explicitly, I see no reason why a governmental entity cannot enter into a contract saying we're waiving our immunity from suit on this contract. And that's a decision that the governmental entity can make in the judgment of its board of

directors.

JUSTICE DALE WAINWRIGHT: That would be a major change in what we've seen with litigation with the state in the past wouldn't it? And in our jurisprudence.

ATTORNEY JOHN MOBBS: I respectfully disagree, Your Honor. I mean your case is--

JUSTICE PAUL W. GREEN: Where's the a case that says that?

ATTORNEY JOHN MOBBS: Your cases do not involve explicit waivers by governmental entities of the right to sue them on a contract.

JUSTICE DALE WAINWRIGHT: But you would agree that we've never held what you've just said?

ATTORNEY JOHN MOBBS: I would agree with that, yes.

JUSTICE DALE WAINWRIGHT: Let me take you back to the record questions. When I was asking about the extent of the Congressional versus the historical record and the Chief put a finer point on it asking about when the Court's trying to figure what the purpose was of an act and whether there's congruence with the action, the purpose of the harm to be addressed, whether the act congruently or appropriately addresses that harm?

ATTORNEY JOHN MOBBS: Yes.

JUSTICE DALE WAINWRIGHT: The Congressional Record tells us exactly what was brought up at least in the Congress. Maybe not everybody considered it, but it's in the record. And then there's historical documents, studies, state actions, articles, newspaper reports that are out there that may be beyond the Congressional Record. Do we assume that Congress knew all of that information, some of it? Where's the dividing line in determining how much of what you call the historical record we should presume Congress knew and acted on in FMLA provisions?

ATTORNEY JOHN MOBBS: I haven't seen a court articulate a dividing line like that, but since 1996 in South Carolina v. Hetzenbach and reiterated by the Supreme Court in Boerne and reiterated again in 2004 in Tennessee v. Lane, the Court has said that whether a statute validly enforces constitutional rights under the Fourteenth Amendment is a question that must be judged with reference to the historical experience that it reflects and that's why Hibbs began its analysis not with the Congressional Record, but with the historical record [inaudible].

JUSTICE DALE WAINWRIGHT: I can grant you that point. My question is how much of what you call the historical record should be presumed Congress knew and looked at?

ATTORNEY JOHN MOBBS: And I don't know that there's an answer to that in the jurisprudence. I think that if there's a series of cases from the Supreme Court, a series of cases from Federal appellate courts involving discrimination by state employers and that's something you can presume that Congress is aware of.

JUSTICE NATHAN L. HECHT: Well, but saying that you start with the historical record, all that means is that Congress can't make it up. It has to have facts to support its findings. It doesn't mean that if there is a record, it has to believe it. Congress can make another determination.

ATTORNEY JOHN MOBBS: But Congress did believe it and we know that because it said so in stating the purposes of the Act in Section 2601-(b). 2601-(a) has the congressional findings. Section 2601 (b) has the congressional purposes, including in its purposes are to entitle employees to take reasonable leave for medical reasons. In Section 2601-(b) 4, to accomplish that purpose, another purpose of the Act in a manner that's consistent with equal protection clause of the Fourteenth Amendment minimizes the potential for employment discrimination on the basis of sex, by ensuring generally the leave is available for eligible

medical reasons, including pregnancy-related disability on a gender-neutral basis and I see that my time has expired.

CHIEF JUSTICE WALLACE B. JEFFERSON: Continue. You can finish your thought.

ATTORNEY JOHN MOBBS: And subsection (b) 5 of the statute which goes on to state that another purpose of the Act is to promote the goal of Equal Employment Opportunity for women and men pursuant to such clause that is the equal protection clause.

CHIEF JUSTICE WALLACE B. JEFFERSON: Further questions? Thank you, Counsel.

ATTORNEY JOHN MOBBS: Thank you.

REBUTTAL ARGUMENT OF SEAN D. JORDAN ON BEHALF OF PETITIONER

ATTORNEY SEAN JORDAN: I have just a couple of points to make. The first is that it was stated that it is appellate lawyers that are looking to want to look to the Congressional Record and the fact is that this is not a standard that is created by lawyers. This is the United States Supreme Court's standard that it has stated repeatedly in the cases in City of Boerne and the Court has repeatedly said Congress must identify a pattern of unconstitutional state conduct and, again, that has not been met here. But, second, I'd like to talk a little bit about this notion of purpose. I think this goes partially to your questions, Justice Hecht, and partially yours, Justice Guzman, which is to the extent that it is being asserted or was asserted by the Court of Appeals that this statute was designed to address a stereotype that women take more leave than men regardless of even if they were provided equally. As Justice Hecht noted, there's there's it's hard to see how the self-care provision would help in that circumstance because presumably that stereotype assumes that even provided equal leave, women would take more leave than men and an employer who believed that would still discriminate, but more to the point, the record before Congress established precisely the opposite. The record before Congress, as I noted earlier, stated that the indications were men and women took leave equally and, indeed, that the expectation under the FMLA was that they would take leave equally. Now this question of the fact that pregnancy disability is covered by the Act is notable because when the Seventh Circuit considered this question in Toler v. Wisconsin Department of Corrections case, in the argument which the Court can hear, I would urge the Court to listen to if it wants, in that argument, Judge Wood and Judge Posner were asking questions about this notion of pregnancy disability versus all the other types of illnesses that are covered by the Act and the notion that they had was it would sort of be like the tail wagging the dog if you were to say that this was really all about pregnancy disability when, in fact, the vast majority of people who are going to be taking time off are not going to be taking it off for pregnancy disability leave. The cases that are cited in the briefs and in lower court opinion bear that out for what it's worth. Counting the nine circuit opinions and the other court opinions that are cited in the briefs, there are 25 court opinions here that have to do with the self-care leave provision, 25. One of those cases, one concerns pregnancy disability leave.

CHIEF JUSTICE WALLACE B. JEFFERSON: Out of those circuit opinions that are cited in the briefs, how many cases were presented to the Supreme Court by a cert petition, do you know?

ATTORNEY SEAN JORDAN: I'm not sure how many, Your Honor. I'm not sure how many of the circuit, have gone up on a cert petition.

CHIEF JUSTICE WALLACE B. JEFFERSON: But you would think that if they got it very wrong, then the Court would take one of those nine up if there were cert petitions filed and conversely, if we were to affirm the court of appeals, you two may need a ticket to DC, don't you think?

ATTORNEY SEAN JORDAN: Well, Your Honor, I believe my argument to the Supreme Court would be in my brief in opposition would be the argument I'm making today, which is, in fact, there is an overwhelming, there isn't really a meaningful split here and it goes to the reason you just stated, Mr. Chief Justice. There's not a reason for the Supreme Court to examine this question right now because the courts

are substantially unified. The only opinions out there are pretty much outliers. There's an unpublished Fourth Circuit opinion, the Montgomery case with no analysis whatsoever. There's a magistrate judge's opinion from the Western District of New York with no analysis whatsoever. All of the principal opinions that go through analysis of this reach the result that we're talking about.

CHIEF JUSTICE WALLACE B. JEFFERSON: Justice O'Neill.

JUSTICE HARRIET O'NEILL: You mentioned that the handbook cannot waive immunity because UTEP cannot decide to waive immunity. You have to go to the legislature. What would that look like? How would UTEP go to the legislature for that sort of waiver as a practical matter?

ATTORNEY SEAN JORDAN: How would you--how would-

JUSTICE HARRIET O'NEILL: I mean, would they have to run the handbook by the legislature and say we want to be able to, we want to allow these types of claims in court?

ATTORNEY SEAN JORDAN: I would presume, Justice O'Neill, that they would need to go to legislature to see if the legislature would not create something that I think would apply beyond UTEP, that would apply to state agencies generally that would say you can make self-care leave claims. It's worth noting, Justice O'Neill, that there is a companion Texas statute to FMLA. It's at government code 661.912 that says state employees get leave under as according to the FMLA. Presumably, UTEP or other state agencies could go to legislature and say can you add a provision on to that that says they also get to sue under the FMLA. That, of course, has not happened here. That's a decision for the legislature.

JUSTICE DON R. WILLETT: Of the nine Federal Courts of Appeal that go your way, remind me, what is the division? [Inaudible]

ATTORNEY SEAN JORDAN: Importantly there were five Courts of Appeals, Federal Courts of Appeals that decided this question before Hibbs and said that the self-care provision did not since Hibbs, I'm sorry, the self-care provision did not waive immunity. Since Hibbs, there are seven Federal Courts of Appeals that have decided that or reaffirmed that the self-care provision does not abrogate state and sovereign immunity and, I believe, all of the state opinions we rely on are all post Hibbs. So all of those courts have said Hibbs does not control the [inaudible] of self-care leave provision.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there further questions? Thank you, Mr. Jordan. The cause is submitted and the Court will take a brief recess.

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