No. 16-1471

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOSEPH EGAN,

Plaintiff-Appellant,

v.

DELAWARE RIVER PORT AUTHORITY,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of Plaintiff-Appellant Joseph Egan. For the reasons set forth below, the district court erred by concluding that a mixed-motive jury instruction was not warranted for Egan's claim of retaliation under the Family and Medical Leave Act ("FMLA" or "the Act"), 29 U.S.C. 2601 *et seq.*

STATEMENT OF IDENTITY, INTEREST, AND SOURCE OF AUTHORITY TO FILE

The Secretary has a strong interest in the interpretation of the FMLA because he administers and enforces the Act. *See* 29 U.S.C. 2616(a); 2617(b) and (d). Pursuant to congressional authorization in the FMLA, *see* 29 U.S.C. 2654, the Department of Labor ("Department") issued notice and comment regulations, one of which is central to the issue presented in this appeal. *See* 29 C.F.R. 825.220(c) (prohibiting retaliation for an employee's exercise of FMLA rights, including when the exercise of FMLA rights is a motivating factor in the retaliation). The Secretary has a strong interest in ensuring that this regulation is accorded appropriate deference.

This brief is filed in accordance with Federal Rule of Appellate Procedure 29(a), which permits an agency of the United States to file an *amicus curiae* brief without the consent of the parties or leave of the court.

STATEMENT OF THE ISSUES

1. Whether the district court erred in not giving a mixed-motive jury instruction for Egan's claim of retaliation for exercising his FMLA rights.

2. Whether the district court erred in requiring that Egan have direct evidence of the Delaware River Port Authority's retaliatory motive in order to use a mixed-motive framework under the FMLA.

SUMMARY OF ARGUMENT[1]

1. This Court, as well as other courts of appeals, had long permitted retaliation claims based on a mixed-motive analysis under the FMLA. *See Conoshenti v. Pub. Serv. Elec. & Gas Co.*, 364 F.3d 135, 147 (3d Cir. 2004); *see, e.g.*, *Richardson v. Monitronics Int'l, Inc.*, 434 F.3d 327, 334 (5th Cir. 2005); *Gibson v. City of Louisville*, 336 F.3d 511, 513 (6th Cir. 2003); *Smith v. BellSouth Telecomms., Inc.*, 273 F.3d 1303, 1313-14 (11th Cir. 2001); *King v. Preferred Tech. Grp.*, 166 F.3d 887, 891 (7th Cir. 1999).[2] After the Supreme Court's decisions in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), and *University of Texas Southwest Medical Center v. Nassar*, 133 S. Ct. 2517 (2013), however, this Court commented that it is an open question whether a mixed-motive burden-shifting analysis continues to be available under the FMLA in light of those decisions. *See Henson v. U.S. Foodservice, Inc.*, 588 F. App'x 121, 125 n.2 (3d Cir. 2014) (unpublished); *Lichtenstein v. Univ. of Pittsburgh Med. Ctr.* ("*Lichtenstein I*"), 691 F.3d 294, 302 (3d Cir. 2012) (leaving "for another day our

[1] Because the Secretary's arguments are purely legal, the Secretary does not provide in this brief any factual or procedural background.

[2] Under a mixed-motive framework, a plaintiff alleging retaliation for having exercised his FMLA rights is required to prove that the exercise of his FMLA rights was a motivating factor in the employer's adverse employment decision, at which point the burden shifts to the employer to show that it would have taken the same action absent consideration of the plaintiff's exercise of FMLA rights. *See, e.g.*, *Conoshenti*, 364 F.3d at 147.

resolution of whether the FMLA continues to allow mixed-motive claims in the wake of *Gross*").[3]

2. As explained below, even after *Gross* and *Nassar*, a mixed-motive analysis should be applied to an employee's claim of retaliation for exercising his rights under the FMLA. The FMLA is ambiguous regarding protection from retaliation for exercising FMLA rights. The Department, though, has promulgated a notice and comment regulation at 29 C.F.R. 825.220(c) explaining that the broad statutory prohibition against interference with an employee's FMLA rights set out in 29 U.S.C. 2615(a)(1) includes a prohibition against retaliation for exercising

[3] Several other courts of appeals have similarly noted that the applicability of a mixed-motive analysis to FMLA retaliation claims in light of *Gross* and *Nassar* is an unresolved issue. *See, e.g.*, *Graziadio v. Culinary Inst. of Am.*, 817 F.3d 415, 429 n.6 (2d Cir. 2016); *Wheat v. Fla. Par. Juvenile Justice Comm'n*, 811 F.3d 702, 706 (5th Cir. 2016); *Twigg v. Hawker Beechcraft Corp.*, 659 F.3d 987, 1004 (10th Cir. 2011). The Sixth Circuit has applied a mixed-motive analysis to the FMLA in a case decided after *Gross* but before *Nassar*. *See Hunter v. Valley View Local Schs.*, 579 F.3d 688, 692 (6th Cir. 2009). The Seventh Circuit has given mixed guidance. In *Goelzer v. Sheboygan County*, 604 F.3d 987, 995 (7th Cir. 2010), the court reaffirmed the applicability of a mixed-motive theory of retaliation for FMLA claims, albeit without citing or discussing *Gross*. In *Malin v. Hospira, Inc.*, 762 F.3d 552, 562 n. 3 (7th Cir. 2014), the court cited *Goelzer*'s use of a mixed-motive standard for an FMLA retaliation claim but then said that the circuit had not addressed whether but-for causation should apply to FMLA retaliation claims in light of *Gross* and *Nassar* (and declined to do so in *Malin*). District courts that have decided the issue have reached conflicting conclusions. *Compare, e.g.*, *Chase v. U.S. Postal Serv.*, 149 F. Supp. 3d 195, 209-10 (D. Mass. 2016), *appeal docketed*, No. 16-1351 (1st Cir. April 6, 2016) (collecting cases and concluding that a mixed-motive framework applied to FMLA retaliation claims), *with Woods v. Start Treatment & Recovery Ctrs., Inc.*, No. 13-4719, 2016 WL 590458, at *2-3 (E.D.N.Y. Feb. 11, 2016) (collecting cases and concluding that a plaintiff must show but-for causation under the FMLA).

those rights. Furthermore, specific language in the regulation prohibits an employer from considering an employee's FMLA leave as "a negative factor" in an employment decision and thereby provides for a mixed-motive framework for claims of retaliation for exercising FMLA rights. 29 C.F.R. 825.220(c) (emphasis added). This regulation was promulgated pursuant to congressional authorization, *see* 29 U.S.C. 2654, and is a reasonable interpretation of the statute; it therefore should be accorded controlling deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

Nothing in the Supreme Court's decisions in *Gross* or *Nassar* that a mixed-motive analysis is not available for Age Discrimination in Employment Act ("ADEA") discrimination or Title VII retaliation claims, respectively, precludes a mixed-motive analysis from applying to claims of retaliation for exercising FMLA rights. The ambiguous language in the FMLA, combined with the notice and comment regulation at section 825.220(c), distinguish the FMLA from the ADEA and Title VII's anti-retaliation provision, and therefore distinguish this case from *Gross* and *Nassar*.

3. Further, there is no requirement that an employee have direct evidence of the employer's retaliatory motive as a precondition to applying a mixed-motive analysis under the FMLA. Nothing in the FMLA imposes a heightened evidentiary standard on employees for certain types of claims. Absent such language, this

Court should apply "the conventional rules of civil litigation" that permit a plaintiff to prove his case with direct or circumstantial evidence. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003) (internal quotation marks omitted) (concluding that direct evidence is not required to apply a mixed-motive analysis to a Title VII discrimination claim). Moreover, *Gross* and *Nassar* undermine any direct evidence requirement derived from Justice O'Connor's concurrence in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 261-79 (1989) (O'Connor, J., concurring), as those decisions stand for the proposition that it is the plain language of the statute rather than the nature of the plaintiff's evidence that determines the availability of a mixed-motive analysis, and there is nothing in the FMLA that precludes such a mixed-motive analysis; in fact the applicable regulation specifically allows for it.

ARGUMENT

I. THE DEPARTMENT'S REGULATION AT 29 C.F.R. 825.220(c) PROHIBITS RETALIATION FOR AN EMPLOYEE'S EXERCISE OF FMLA RIGHTS AS PART OF THE STATUTORY PROHIBITION AGAINST INTERFERENCE, PROVIDES FOR A MIXED-MOTIVE FRAMEWORK FOR SUCH RETALIATION CLAIMS, AND IS ENTITLED TO CONTROLLING DEFERENCE UNDER *CHEVRON*

A. The FMLA Regulation at Section 825.220(c) Reasonably Interprets the Act's Prohibition Against Interference to Prohibit Retaliation Against an Employee for Exercising His FMLA Rights and Is Entitled to Controlling *Chevron* Deference.

1. Section 2615(a)(1) of the FMLA makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise" an FMLA right. 29 U.S.C. 2615(a)(1). Section 2615(a)(2) in turn makes it "unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful" by the FMLA. 29 U.S.C. 2615(a)(2). And section 2615(b) makes it "unlawful for any person to discharge or in any other manner discriminate against any individual because such individual" participated in an FMLA-related proceeding. 29 U.S.C. 2615(b). While these provisions do not explicitly prohibit retaliation for exercising or attempting to exercise FMLA rights, the Department has explained in its notice and comment regulation at 29 C.F.R. 825.220(c) that such retaliation is prohibited.

It is reasonable to interpret the FMLA as prohibiting retaliation against an employee for the exercise or attempted exercise of the employee's FMLA rights

because the purpose of the FMLA would be undermined if such retaliation were not prohibited. The purpose of the FMLA is to permit employees to take leave from work for certain family and medical reasons and to return to the same or equivalent job at the conclusion of that leave. *See* 29 U.S.C. 2601(b)(2). The right to take job-protected FMLA leave would be meaningless if an employee were not protected from retaliation upon returning to work from FMLA leave or otherwise attempting to exercise FMLA rights. Interpreting the FMLA "in a manner that would permit employers to fire employees for exercising FMLA leave would undoubtedly run contrary to Congress's purpose in passing the FMLA." *Bryant v. Dollar Gen. Corp.*, 538 F.3d 394, 401 (6th Cir. 2008) (citing legislative history). Thus, this Court has "predicated liability for retaliation based on an employee's exercise of FMLA rights on the regulation [at section 825.220(c)] itself." *Lichtenstein I*, 691 F.3d at 301 n.10; *see Budhun v. Reading Hosp. & Med. Ctr.*, 765 F.3d 245, 256 (3d Cir. 2014) ("FMLA retaliation claims are rooted in the FMLA regulations.").

2. The regulation specifically identifies section 2615(a)(1) of the Act, which prohibits interference with FMLA rights, as the source for the prohibition against retaliation for the exercise or attempted exercise of FMLA rights: "The Act's prohibition against 'interference' [in section 2615(a)(1)] prohibits an employer from discriminating or retaliating against an employee or prospective employee for

having exercised or attempted to exercise FMLA rights." 29 C.F.R. 825.220(c). The preamble to the regulation, which was revised in 2008, further shows that the Department interprets the Act's prohibition against interference in 29 U.S.C. 2615(a)(1) as including a prohibition against retaliation for exercising FMLA rights. *See* 73 Fed. Reg. 67,934 (Nov. 17, 2008) ("2008 Final Rule"). The earlier version of this regulation stated: "An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave." 29 C.F.R. 825.220(c) (2007), *amended by* 29 C.F.R. 825.220(c) (2008). The Department revised the regulation to its present language "to clarify that the prohibition against interference includes a prohibition against retaliation as well as a prohibition against discrimination." 73 Fed. Reg. at 67,986.

Indeed, the broad language of section 2615(a)(1) prohibiting an employer from interfering with, restraining, or denying the exercise of or the attempt to exercise any FMLA right can reasonably be read to encompass a prohibition against retaliation for exercising one's FMLA rights. As the First Circuit stated in *Hodgens v. General Dynamics Corp.*, a protection against retaliation for exercising FMLA rights "can be read into § 2615(a)(1): to discriminate against an employee for exercising his rights under the Act would constitute an 'interference with' and a

'restrain[t]' of his exercise of those rights." 144 F.3d 151, 160 n.4 (1st Cir. 1998).[4] In fact, section 2615(a)(1) is the more natural basis for the prohibition against retaliation for exercising one's FMLA rights given the literal language in section 2615(a)(2) prohibiting retaliation for opposing any practice made unlawful under the FMLA, and in section 2615(b) prohibiting retaliation because the employee filed a charge, gave information related to an FMLA proceeding, or testified in an FMLA proceeding. As the Department explained in the preamble to the 2008 Final Rule, "[a]lthough section 2615(a)(2) of the Act also may be read to bar retaliation, the Department believes that section 2615(a)(1) provides a clearer statutory basis for § 825.220(c)'s prohibition of discrimination and retaliation" for exercising FMLA rights. 73 Fed. Reg. at 67,986 (citations omitted).[5]

3. Section 825.220(c)'s prohibition against retaliation for exercising FMLA rights and its language locating the source of that prohibition in 29 U.S.C. 2615(a)(1)'s prohibition against interference is entitled to controlling deference

[4] Thus, as the First Circuit recognized, this means that "[t]he term interference may, depending on the facts, cover both retaliation claims and non-retaliation claims." *Colburn v. Parker Hannifin Corp.*, 429 F.3d 325, 331 (1st Cir. 2005) (internal quotation marks omitted).

[5] As this Court noted in *Conoshenti*, 364 F.3d at 146 n.9, the circuit courts are divided in identifying the basis for the prohibition against retaliation for exercising FMLA rights. *See, e.g.*, *Bryant*, 538 F.3d at 400-02 (section 2615(a)(2) of the FMLA); *Richardson*, 434 F.3d at 332, 334 (section 2615(a)(1) and (a)(2) of the FMLA and section 825.220(c) of the regulations); *Hodgens*, 144 F.3d at 159-60 & n.4 (section 2615(a)(1) of the FMLA).

under *Chevron*. *Chevron* provides that an agency's notice and comment regulation interpreting a statute is entitled to controlling deference if (1) the statute is ambiguous or silent as to the specific question at issue and Congress has delegated rulemaking authority to the agency, and (2) the agency's interpretation is a reasonable construction of the statute. *See* 467 U.S. at 843-44. If a statute is ambiguous and the agency administering that statue has interpreted that ambiguity, a court's task is not to construe the statue anew, but to determine whether the agency's interpretation is a permissible construction of the statute. *See id.* at 843. If the agency's interpretation of the statute is reasonable, the Court must defer to it "whether or not it is the only possible interpretation or even the one a court might think best." *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011, 2017 (2012) (citing *Chevron*, 467 U.S. at 843-44 & n.11); *see Pa., Dep't of Pub. Welfare v. U.S. Dep't of Health & Human Servs.*, 647 F.3d 506, 512 (3d Cir. 2011) (if an agency's interpretation is reasonable, "we must allow it to stand").

Controlling *Chevron* deference is warranted here because the FMLA is ambiguous regarding the scope of actions that an employer is prohibited from taking in relation to an employee's FMLA rights. Congress explicitly provided the Department with the authority to issue regulations to administer and interpret the statute: "The Secretary of Labor shall prescribe such regulations as are necessary

to carry out" the FMLA. 29 U.S.C. 2654.[6] Section 825.220(c) is in keeping with Congress's directive to issue regulations "as are necessary to carry out" the FMLA, *see* 29 U.S.C. 2654, because protecting employees against retaliation for exercising their FMLA rights is necessary to fulfill the purposes of the Act.

To the extent that section 2615(a)(2) of the statute could also reasonably be read to include a prohibition against retaliation for exercising FMLA rights, principles of deference require that, where there are two opposing but equally reasonable statutory interpretations, courts are to defer to the agency's choice among those reasonable interpretations. *See Chevron*, 467 U.S. at 843 & n.11. Therefore, section 825.220(c)'s statement that the statutory prohibition against interference includes a prohibition against retaliation is a reasonable construction of the statute and is entitled to controlling deference under *Chevron*.

B. Section 825.220(c) Reasonably Provides for Retaliation Claims Based on a Mixed-Motive Analysis and Is Entitled to Controlling *Chevron* Deference.

1. Section 825.220(c) states "employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions[.]" 29 C.F.R. 825.220(c). The regulation refers to a factor, not

[6] "[E]xpress congressional authorization[] to engage in the process of rulemaking" is "a very good indicator of delegation meriting *Chevron* treatment[.]" *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); *see Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 57 (2011) (noting that the rulemaking authority that satisfies *Chevron*'s deference requirements "does not turn on whether Congress's delegation of authority was general or specific").

the factor. This language indicates that an employer may not retaliate against an employee when the employee's exercise of her FMLA rights is a motivating factor. Thus, section 825.220(c) provides for a mixed-motive theory of liability for such retaliation claims.

2. Neither *Gross* nor *Nassar* undermines this regulation. In *Gross*, the Supreme Court concluded that language in the ADEA prohibiting discrimination "because of" age, 29 U.S.C. 623(a)(1), requires a plaintiff to prove that age was the "but-for" cause of the employer's adverse action rather than a motivating factor among other legitimate motives. 557 U.S. at 176. Four years later, in *Nassar*, the Court similarly concluded that the "because" language in the anti-retaliation provision in Title VII, 42 U.S.C. 2000e-3(a), requires a plaintiff to prove that the plaintiff's protected activity was the "but-for" cause of the adverse action. 133 S. Ct. at 2528. Therefore, in ADEA and Title VII retaliation cases, the plaintiff retains the burden of persuasion to show that age or a Title VII protected activity, respectively, was the but-for cause of the adverse action. *See Gross*, 557 U.S. at 177; *Nassar*, 133 S. Ct. at 2534.

The Supreme Court's reasoning in *Nassar*, specifically its reliance on *Gross*, highlights why *Nassar* and *Gross* do not dictate the same result under the FMLA. In *Nassar*, the Court explained that, although *Gross* cautioned against automatically applying an interpretation of one statute to a different statute,

Gross's analysis of the ADEA was relevant to Title VII's anti-retaliation provision in two ways. *See* 133 S. Ct. at 2527-28. First, Title VII's anti-retaliation provision uses the same "because" language that is used in the ADEA. *See id.* Second, in the Civil Rights Act of 1991, which amended both Title VII and the ADEA, Congress specifically added the mixed-motive framework to Title VII's anti-discrimination provision and notably did not add it to Title VII's anti-retaliation provision, just as Congress did not add it to the ADEA. *See id.* at 2528.

Neither of those considerations applies to the FMLA. There is no "because" language in section 2615(a)(1), the statutory provision from which the prohibition against retaliation for exercising FMLA rights derives. Rather, section 2615(a)(1) states that it is "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise" any FMLA right. 29 U.S.C. 2615(a)(1). This language is markedly different from the statutory language that was determinative in *Gross* and *Nassar*.

In *Ford v. Mabus*, 629 F.3d 198, 205-06 (D.C. Cir. 2010), the D.C. Circuit interpreted the federal-sector provision of the ADEA, which states that all personnel actions "shall be made free from <u>any</u> discrimination based on age[,]" 29 U.S.C. 633a(a) (emphasis added), as having "more sweeping language" than the private sector ADEA provision at issue in *Gross* and, in keeping with that broadly protective language, concluded that federal employees need prove only that age

was a factor motivating the employer's adverse action. Thus, the D.C. Circuit in *Ford* found it significant that Congress used different language in the ADEA's federal provision than it did in the private sector provision: "[W]here [Congress] uses different language in different provisions of the same statute, [the court] must give effect to those differences." 629 F.3d at 206. Similarly, there is no reason to interpret the arguably more limiting language in section 2615(a)(2) and (b) as dictating the standard for a retaliation claim for the exercise of FMLA rights that is based on the broadly protective language in section 2615(a)(1).[7]

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[7] In concluding that the FMLA does not permit a mixed-motive analysis, the district court in *Woods* based its decision on the language in section 2615(a)(2), which it viewed as similar to the "because" language that the Supreme Court found dispositive in *Gross* and *Nassar*. *See* 2016 WL 590458, at *2. The court acknowledged the language in the regulation at section 825.220(c) prohibiting an employer from using the taking of FMLA as a negative factor in employment actions but concluded that the regulation did not warrant any deference just as the Supreme Court in *Nassar* declined to defer to the Equal Employment Opportunity Commission's ("EEOC") interpretive guidance on Title VII. *Id.*

The analysis in *Woods* is flawed. First, the source of the prohibition against retaliation for exercising FMLA rights is section 2615(a)(1), not (a)(2). *See* 29 C.F.R. 825.220(c); 73 Fed. Reg. at 67,986. Therefore, the district court's reliance on the language in paragraph (a)(2) was error. Second, as discussed below, the regulation at issue here, section 825.220(c), is a notice and comment regulation promulgated pursuant to congressionally delegated authority, *see* 29 U.S.C. 2654, that interprets ambiguous statutory language, and therefore is entitled to controlling deference under *Chevron*. It is not like the EEOC's interpretation set out in a guidance manual that was at issue in *Nassar*, which would have been entitled to only *Skidmore*-level deference. *See* 133 S. Ct. 2533; *see also Chase*, 149 F. Supp. 3d at 209 (distinguishing the Department's regulation at section 825.220(c) from the EEOC's guidance manual at issue in *Nassar*). As the *Chase* district court correctly pointed out, "*Chevron* deference was not at issue in *Nassar*." *Id.*

Additionally, the Civil Rights Act of 1991, which, as noted *supra*, amended Title VII's anti-discrimination provision to provide for a mixed-motive analysis but notably did not do so for Title VII's anti-retaliation provision or the ADEA, has no bearing on the enactment of the FMLA in 1993. Moreover, Congress has amended the FMLA three times since 1993, two of which were after the Department revised the regulations in 2008 and after the Supreme Court's *Gross* decision. *See* Airline Flight Crew Technical Corrections Act, Pub. L. No. 111-119, 123 Stat. 3476 (Dec. 21, 2009); National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 565(a), 123 Stat. 2190 (Oct. 28, 2009); National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 585(a), 122 Stat. 3 (Jan. 28, 2008). Yet Congress did not modify any part of section 2615 in any of these statutory amendments. Given the *Gross* decision, the regulation's language, and the cases in which courts had applied a mixed-motive analysis to FMLA retaliation claims, the fact that Congress amended various parts of the FMLA but did not amend section 2615 in any way is significant. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . [or] adopts a new law incorporating sections of a prior law[.]"); *see also Si Min Cen v. Att'y Gen.*, -- F.3d --, No. 14-4831, 2016 WL 3166013, at *12 (3d Cir. June 6, 2016) (citing *Lorillard*).

3. To the extent that *Gross* and *Nassar* were based on the "default rule" that a plaintiff carries the burden of proof of causation, that default rule does not apply under the FMLA. In *Gross*, the Court reasoned that "[w]here the statutory text is silent on the allocation of the burden of persuasion, we begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims." *Gross*, 557 U.S. at 177 (internal quotation marks omitted); *see Nassar*, 133 S. Ct. at 2525 (explaining that traditional causation principles are the background against which Congress legislated when enacting Title VII and, absent an indication to the contrary in the statute itself, Congress presumably incorporated these default rules into the statute). The default rule relied upon in *Gross* and *Nassar* is inapplicable here because the FMLA's prohibition on interference with FMLA rights in section 2615(a)(1) is ambiguous and the Department has, through notice and comment rulemaking done pursuant to congressional authorization, *see* 29 U.S.C. 2654, indicated in 29 C.F.R. 825.220(c) that a mixed-motive standard applies. The district court in *Chase* addressed this precise argument and reasoned that *Nassar*'s "but-for causation is merely a default, and in the FMLA it has been supervened by action to which [the court is] obligated to defer by the agency delegated authority over the statute by Congress." 149 F. Supp. 3d at 209.

4. While no court of appeals has reached the issue of whether a mixed-motive theory of liability is available under the FMLA subsequent to the Supreme

Court's decisions in both *Gross* and *Nassar*, this Court suggested that such a conclusion is not, on its face, inconsistent with *Gross* and *Nassar*. *See Lichtenstein v. Univ. of Pittsburgh Med. Ctr.* ("*Lichtenstein II*"), 598 F. App'x 109, 112 n.4 (3d Cir. 2015) (unpublished) (commenting that the Court was "satisfied for now that giving a mixed-motive instruction in an FMLA case is not clearly contrary to the Supreme Court's rulings" in *Gross* and *Nassar*).

The Sixth Circuit addressed this issue after *Gross*, but before *Nassar*, and concluded that section 825.220(c) contemplates a mixed-motive framework for retaliation claims and that this regulation is entitled to *Chevron* deference. *See Hunter*, 579 F.3d at 692. The court analyzed section 825.220(c) as "explicitly forbid[ing] an employer from considering an employee's use of FMLA leave when making an employment decision. The phrase 'a negative factor' envisions that the challenged employment decision might also rest on other, permissible factors." *Id.* (quoting 29 C.F.R. 825.220(c)). The court noted that it had found this regulation to be reasonable and entitled to deference in an earlier case. *See id.* at 692 (citing *Bryant*, 538 F.3d at 401-02). Consistent with this conclusion, the Sixth Circuit in *Lewis v. Humboldt Acquisition Corp.* distinguished the FMLA from the Americans with Disabilities Act ("ADA"), reasoning that section 825.220(c) interpreting the FMLA "required" the conclusion that a mixed-motive analysis applies, whereas the

ADA does not permit a mixed-motive analysis in light of *Gross*. 681 F.3d 312, 318-19, 321 (6th Cir. 2012) (en banc) (citing *Hunter*, 579 F.3d at 692).

5. Additionally, section 825.220(c)'s mixed-motive framework regarding retaliation is, as a matter of policy, a reasonable interpretation of the statutory prohibition against interference with an employee's exercise of FMLA rights, and therefore is entitled to *Chevron* deference. Specifically, section 2615(a)(1) provides broad protection to employees by prohibiting interference with the exercise of, or the attempt to exercise, any FMLA right. In accordance with section 2615(a)(1)'s broad protection, it should not matter whether the employee's exercise of his FMLA rights was the but-for reason for the adverse action or part of the reason for the adverse action. Indeed, where the exercise of FMLA rights causes an adverse action, interference occurs regardless of whether the adverse action is due in whole or in part to that exercise of FMLA rights. To give effect to the broad protection in section 2615(a)(1), it is appropriate to defer to section 825.220(c)'s permitting of mixed-motive retaliation claims.

The district court in *Chase* recently concluded that section 825.220(c)'s mixed-motive language warranted *Chevron* deference. *See* 149 F. Supp. 3d at 209-10. It stated that "the FMLA leaves ambiguous what causal standard governs in retaliation actions and . . . the Department of Labor has supplied one reasonable answer." *Id.* at 210. The court explained that "[t]he relaxed causation standard

provided by the Department of Labor [in section 825.220(c)] is precisely the sort of 'legitimate policy choice []' that *Chevron* empowers a properly delegated agency to make." *Id.* (quoting *Chevron*, 467 U.S. at 865); *see Swallows Holding, Ltd. v. Commissioner*, 515 F.3d 162, 171 (3d Cir. 2008) ("[A] promulgated rule . . . represent[s] important policy decisions, and should not be disturbed if 'this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute[.]'") (quoting *Chevron*, 467 U.S. at 845).[8]

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[8] That there is no language in the regulation or the 2008 preamble specifying that a mixed-motive analysis is proper is not surprising given the fact that, at the time the Department promulgated the revised regulations in 2008, the Supreme Court had not yet issued the *Gross* decision and, prior to *Gross*, several courts, including this Court, had interpreted the FMLA to permit retaliation claims based on a mixed-motive analysis, and no court had concluded to the contrary. *See, e.g.*, *Lewis v. Sch. Dist. #*70, 523 F.3d 730, 741-42 (7th Cir. 2008); *Richardson*, 434 F.3d at 334; *Conoshenti*, 364 F.3d at 147; *Gibson*, 336 F.3d at 513.

To the extent that the language in the regulation at 29 C.F.R. 825.220(c) prohibiting an employer from using the taking of FMLA leave as a negative factor in employment decisions is somehow deemed ambiguous because it does not explicitly use the term "mixed-motive analysis," this brief makes clear that the language in section 825.220(c) reflects a mixed-motive theory of liability for retaliation claims arising out of an employees' exercise of her FMLA rights. The Department's interpretation of its own regulation is entitled to controlling deference under *Auer v. Robbins*, 519 U.S. 452 (1997). *Auer* provides that an agency's interpretation of its own ambiguous regulation is "controlling unless plainly erroneous or inconsistent with the regulation." 519 U.S. at 461 (internal quotation marks omitted); *see Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000) (*Auer* deference is appropriate when the regulation is ambiguous). Such deference is appropriate where the agency puts forth its interpretation of the regulation in an amicus brief, as long as the interpretation reflects "the agency's fair and considered judgment on the matter in question," and is not "a *post hoc* rationalizatio[n] advanced by an agency seeking to defend past agency action against attack[.]"

Indeed, the Supreme Court in *Gross* seemed to recognize the importance of an agency's determination in this analysis when it distinguished *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400-03 (1983), *overruled in part on other grounds by Office of Workers' Comp. Programs v. Greenwich Collieries,* 512 U.S. 267 (1994). The Court explained that, unlike the issue in *Gross*, *Transportation Management*'s approval of a mixed-motive burden-shifting framework for claims under the National Labor Relations Act "did not require the [Supreme] Court to decide in the first instance whether burden shifting should apply as the Court instead deferred to the National Labor Relations Board's determination that such a framework was appropriate." *Gross*, 557 U.S. at 179 n.6.

Similarly here, the Department, through its regulation at 29 C.F.R. 825.220(c), has stated that an employer is prohibited from considering an employee's exercise of her FMLA rights as a motivating factor (i.e., "a negative factor") in employment decisions. Therefore, as in *Transportation Management*,

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Auer, 519 U.S. at 462 (internal quotation marks omitted) (amicus brief interpreting ambiguous legislative rule entitled to controlling deference); *see Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 59-64 (2011) (granting *Auer* deference to FCC's interpretation of ambiguous regulation set out in an amicus brief); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007) (internal Department Advisory Memorandum interpreting regulations that was issued during litigation was entitled to controlling deference under *Auer*); *Verizon Pa. Inc. v. Pa. Pub. Util. Comm'n*, 484 F. App'x 735, 739 (3d Cir. 2012) (unpublished) (FCC's interpretation of regulation set out in an amicus brief entitled to *Auer* deference). A mixed-motive analysis is entirely consistent with the language in section 825.220(c).

this Court should defer to the Department's determination as set out in the regulation, and as made explicit in this brief, that a mixed-motive analysis, with its burden-shifting framework, is appropriate in an FMLA case alleging retaliation for exercising FMLA rights.

II. THERE IS NO REQUIREMENT THAT AN EMPLOYEE HAVE DIRECT EVIDENCE OF RETALIATORY MOTIVE TO USE A MIXED-MOTIVE BURDEN-SHFITING FRAMEWORK FOR AN FMLA RETALIATION CLAIM

1. Moreover, there is no requirement that an employee have direct evidence in order to apply a mixed-motive burden-shifting framework under the FMLA. In *Desert Palace*, 539 U.S. at 92, the Supreme Court unanimously rejected the requirement that an employee have direct evidence of discriminatory motive under Title VII's mixed-motive framework. The basis of the Court's decision was that there was no language in the relevant section of Title VII imposing a heightened evidentiary burden on employees and, in the absence of such language, there was no reason to depart from the conventional rules of civil litigation that permit a plaintiff to prove his case using direct or circumstantial evidence. *See* 539 U.S. at 98-99. Indeed, the Supreme Court noted that "[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Id.* at 100 (internal quotation marks omitted).

This reasoning applies with equal force to the FMLA. Nothing in the FMLA places a higher evidentiary burden on plaintiffs for certain types of claims. Absent

such language, there is no reason to depart from the conventional rule permitting an employee to prove, through direct or circumstantial evidence, that his employer unlawfully considered his exercise of FMLA rights as a negative factor in an employment decision.

2. While this Court has implied that direct evidence might be required for a mixed-motive standard to apply to FMLA retaliation claims, it has not squarely addressed the issue. In *Conoshenti*, 364 F.3d at 147, this Court noted that the district court had concluded, and the employer had not contested, that there was sufficient direct evidence in the record that the employee's FMLA leave was a factor in the termination so as merit the mixed-motive burden-shifting framework set out in Justice O'Connor's concurrence in *Price Waterhouse*. (This Court has identified Justice O'Connor's concurrence as the holding of *Price Waterhouse*. *See id.* at 148 n.11.) This Court did not directly address, however, whether direct evidence is a prerequisite to the mixed-motive framework. Indeed, this Court commented that "[b]ecause there is such direct evidence here and *Price Waterhouse* accordingly places the burden of showing the absence of but-for cause on the employer, we have no occasion to consider whether the reference in 29 C.F.R. § 825.220(c) . . . to 'a negative factor' makes it unnecessary for the plaintiff to prove but-for causation in FMLA retaliatory-discharge cases unaffected by *Price Waterhouse*." *Conoshenti*, 364 F.3d at 147 n.10. Thus, this Court in

Conoshenti expressly recognized that it had not decided whether direct evidence is required to use a mixed-motive framework under the FMLA and, in fact, suggested that section 825.220(c)'s mixed-motive language might relieve an employee of the direct evidence requirement of *Price Waterhouse*.

In *Lichtenstein I*, this Court observed that, consistent with employment discrimination law generally, FMLA claims based on circumstantial evidence have been assessed under the burden-shifting framework in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), while claims based on direct evidence have been assessed under the mixed-motive framework set out in Justice O'Connor's concurrence in *Price Waterhouse*. *See* 691 F.3d at 302. The Court said that "[a]lthough this Court has not specifically ruled that *McDonnell Douglas* applies to FMLA-retaliation claims based on circumstantial evidence, this is implied by our application of *Price Waterhouse* to claims based on direct evidence, *Conoshenti*, 364 F.3d at 147[.]" 691 F.3d at 302 n.11; *see Budhun*, 765 F.3d at 256 ("FMLA retaliation claims based on circumstantial evidence are governed by the burden-shifting framework established by *McDonnell Douglas*.") (citing *Lichtenstein I*); *Henson*, 588 F. App'x at 125 & n.2 (citing *Lichtenstein I* for the proposition that a mixed-motive framework is available only if the employee has direct evidence of a retaliatory motive).

However, because this Court in *Conoshenti* expressly noted that it had no occasion to consider whether the regulatory language in section 825.220(c) might permit a mixed-motive burden-shifting framework independent of *Price Waterhouse*, *Lichtenstein I*'s reference to *Conoshenti* should not be read to conclusively establish a direct evidence prerequisite to using a mixed-motive analysis under the FMLA.[9]

3. To the extent it can be argued that this Court has, in fact, required direct evidence as a precondition to applying a mixed-motive framework, not only is that inconsistent with *Desert Palace* as discussed above, but *Gross* and *Nassar* have further undermined the basis for any such requirement. Justice O'Connor concluded in her concurrence in *Price Waterhouse* that "in order to justify shifting the burden on the issue of causation to the defendant, [an employee] . . . must show by direct evidence that an illegitimate criterion was a substantial factor in the decision." 490 U.S. at 276 (O'Connor, J., concurring). She commented that the evidentiary framework she proposed "should be available to all [employees] . . . where an illegitimate consideration played a substantial role in the adverse employment decision." *Id.* at 279. Thus, under Justice O'Connor's reasoning, the

[9] Additionally, because the Court in *Lichtenstein I* ultimately concluded that the employee presented sufficient evidence to survive summary judgment under the more taxing *McDonnell Douglas* standard, *see* 691 F.3d at 302, any conclusion in *Lichtenstein I* that direct evidence is a prerequisite to a mixed-motive framework is dictum.

type of evidence (i.e., circumstantial versus direct) determines whether a mixed-motive burden-shifting framework applies. Consequently, Justice O'Connor's framework is not limited to Title VII discrimination claims; the mixed-motive framework could apply to any employment discrimination statute as long as the employee has direct evidence of discriminatory or retaliatory motive.

Gross and *Nassar*, however, implicitly repudiated the notion that the type of evidence determines whether a mixed-motive standard applies. *Gross* and *Nassar* teach that the language in the statute at issue determines whether a mixed-motive burden-shifting framework is available. *See Gross*, 557 U.S. at 175 ("Our inquiry . . . must focus on the text of the ADEA to decide whether it authorizes a mixed-motives age discrimination claim."); *Nassar*, 133 S. Ct. at 2528 ("Given the lack of any meaningful textual difference between the text in this statute [Title VII's anti-retaliation provision] and the one in *Gross*, the proper conclusion here, as in *Gross*, is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action."). The basis for the Supreme Court's decisions in *Gross* and *Nassar*, i.e., that the language in the statute at issue determines whether a mixed-motive framework is available, implicitly rejected Justice O'Connor's reasoning in *Price Waterhouse* that the type of evidence of retaliatory motive that the employee has determines whether a mixed-motive framework is available. As the Supreme Court said in *Gross*, a mixed-motive jury

instruction "is never proper in an ADEA case." 557 U.S. at 170 (emphasis added). Because *Gross* and *Nassar* undermine Justice O'Connor's *Price Waterhouse* concurrence, they also undermine any possible reliance by this Court on that concurrence for any requirement that an employee have direct evidence in order to use a mixed-motive standard.

4. The Fifth and Sixth Circuits have concluded, citing *Desert Palace*, that there is no requirement that a plaintiff have direct evidence in order to use a mixed-motive framework under the FMLA. *See Wallner v. J.J.B. Hilliard*, 590 F. App'x 546 (6th Cir. 2014) (unpublished); *Richardson*, 434 F.3d at 334. Other circuits have effectively accepted this position by permitting direct or circumstantial evidence to prove FMLA retaliation under a mixed-motive framework. *See, e.g.*, *Twigg*, 659 F.3d at 1004-05 (10th Cir.); *Sch. Dist.* #70, 523 F.3d at 741-42 (7th Cir.); *Bell v. Kaiser Found. Hosps.*, 122 F. App'x 880, 882 (9th Cir. 2004) (unpublished); *Hillstrom v. Best Western TLC Hotel*, 354 F.3d 27, 31 (1st Cir. 2003); *but see Serby v. NYC Dep't of Educ.*, 526 F. App'x 132, 135 (2d Cir. 2013) (unpublished) (requiring that an employee produce direct evidence of retaliatory motive in order to apply a mixed-motive framework to FMLA claims). Thus, a conclusion by this Court in the instant case that direct evidence is not a prerequisite to using a mixed-motive analysis under the FMLA would bring the Court's law in

line not only with Supreme Court precedent and fundamental principles of civil litigation, but also with the majority of other courts of appeals.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's jury instruction and remand for a jury trial using a mixed-motive jury instruction for the FMLA retaliation claim.

Respectfully submitted,

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(5) and (7). This document is proportionally spaced in 14-point font, and contains 6,707 words, based on the word count provided by my word processor and Microsoft software.

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Dated: July 29, 2016

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CERTIFICATION OF BAR MEMBERSHIP

The undersigned counsel certifies that she is a member in good standing of the District of Columbia Bar, No. 53351. As an attorney representing an agency of the United States, I am not required to be a member of the bar of this Court. *See* 3d Cir. L.A.R. 28.3, Committee Comments.

Dated: July 29, 2016

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CERTIFICATE OF SERVICE AND ECF COMPLIANCE

I hereby certify that on July 29, 2016, a true and correct copy of the foregoing Brief for the Secretary of Labor as *Amici Curiae* in Support of Plaintiff-Appellant was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system, and that service on the following counsel of record will be accomplished by this system.

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