No. 16-1318

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CASSANDRA WOODS,
Plaintiff-Appellant,

TINA HINTON,
Plaintiff,

v.

START TREATMENT & RECOVERY CENTERS, INC.,
Defendant-Appellee,

ADDICTION RESEARCH AND TREATMENT CORPORATION,
Defendant.

On Appeal from the United States District Court
for the Eastern District of New York

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 Cassandra Woods. For the reasons set forth below, the district court erred by concluding that a mixed-motive framework was not available for Woods' 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 ISSUE

Whether the district court erred in not applying a mixed-motive analysis to Woods' claim of retaliation for exercising her FMLA rights.

SUMMARY OF ARGUMENT[1]

1. This Court recently noted that it is an open question whether a mixed-motive burden-shifting analysis is available under the FMLA in light of the Supreme Court's decision in *University of Texas Southwest Medical Center v. Nassar*, 133 S. Ct. 2517 (2013). *See Graziadio v. Culinary Inst. of Am.*, 817 F.3d 415, 429 n.6 (2d Cir. 2016). Several other courts of appeals have similarly noted that this is an unresolved issue in light of *Nassar* and *Nassar*'s antecedent *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009). *See, e.g.*, *Wheat v. Fla. Par. Juvenile Justice Comm'n*, 811 F.3d 702, 706 (5th Cir. 2016); *Lichtenstein v. Univ. of Pittsburgh Med. Ctr.* ("*Lichtenstein I*"), 691 F.3d 294, 302 (3d Cir. 2012); *Twigg v. Hawker Beechcraft Corp.*, 659 F.3d 987, 1004 (10th Cir. 2011).[2]

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

[2] District courts that have decided the issue, such as the district court below, have reached conflicting conclusions. *Compare, e.g.*, *Chase v. U.S. Postal Serv.*, 149 F. Supp. 3d 195, 209-10 (D. Mass. 2016) (collecting cases and concluding that a mixed-motive framework applied to FMLA retaliation claims), *appeal docketed*, No. 16-1351 (1st Cir. April 6, 2016), *and Matye v. City of New York*, No. 12-5534, 2015 WL 1476839, at *18 (E.D.N.Y. March 31, 2015) (same), *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).

The issue is currently pending in the Third and Eleventh Circuits. *See Egan v. Delaware River Port Auth.*, No. 15-3695 (E.D. Pa.), *appeal docketed*, No. 16-1471 (3d Cir. March 18, 2016); *Jones v. Allstate Ins. Co.*, No. 14-1640, 2016 WL 4259753 (N.D. Ala. Aug. 12, 2016), *appeal docketed*, No. 16-15628 (11th Cir.

2. Even after *Gross* and *Nassar*, a mixed-motive analysis should be applied to an employee's claim of retaliation for exercising her 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 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

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Aug. 24, 2016). The Secretary filed an amicus brief in *Egan*, *see* Brief for Sec'y of Labor as Amicus Curiae in Support of Plaintiff-Appellant (3d Cir. July 29, 2016); briefing has not yet begun in *Jones* (Appellant's brief is due November 3, 2016).

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*.

ARGUMENT

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 Her FMLA Rights and This Interpretation Is Thus Entitled to Controlling *Chevron* Deference.

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 some way 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. For the reasons set out below, this Court should defer to the Department's regulation.

1. 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). "[T]he FMLA does not provide leave for leave's sake, but instead provides leave with an expectation an employee will return to work after the leave ends." *Throneberry v. McGehee Desha Cty. Hosp.*, 403 F.3d 972, 978 (8th Cir. 2005). The right to take job-protected FMLA leave would be meaningless if an employee were not protected from retaliation upon returning to work from such 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).[3]

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) to include 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 clarify that the prohibition against interference includes a

[3] Every circuit court that has addressed the issue has concluded that the FMLA prohibits retaliation against an employee for exercising the employee's FMLA rights. *See, e.g.*, *Dotson v. Phizer, Inc.*, 558 F.3d 284, 294-95 (4th Cir. 2009); *Bryant*, 538 F.3d at 400-02; *Colburn v. Parker Hannifin*, 429 F.3d 325, 331 (1st Cir. 2005); *Conoshenti v. Pub. Serv. Elec. & Gas Co.*, 364 F.3d 135, 146 n.9 (3d Cir. 2004).

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

[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*, 429 F.3d at 331 (internal quotation marks omitted).

statutory basis for § 825.220(c)'s prohibition of discrimination and retaliation" for exercising FMLA rights. 73 Fed. Reg. at 67,986 (citations omitted).

While this Court has not definitively identified which section of the FMLA serves as the source for the prohibition against retaliation for an employee's exercising of her FMLA rights, it has implicitly identified section 2615(a)(1) as that source, by virtue of linking that section to the language in the regulation at section 825.220(c) prohibiting such retaliation. *See Potenza v. City of New York*, 365 F.3d 165, 167-68 (2d Cir. 2004). In *Potenza*, this Court noted that other courts of appeals had adopted different approaches when evaluating claims under section 2615(a)(1) that employees had been punished for exercising their FMLA rights. *See id.* at 167. These approaches ranged from the Eleventh Circuit applying a burden-shifting framework under *McDonnell Douglass Corp. v. Green*, 411 U.S. 792 (1973), to a claim under section 2615(a)(1), to the Ninth Circuit treating such a claim as an interference claim rather than a retaliation claim, to the Seventh Circuit using a combined approach depending on the relevance of the employer's intent, which might involve a *McDonnell Douglass* burden-shifting framework for claims involving retaliation but not for claims involving interference. *See id.* at 167-68 (citing *Brungart v. BellSouth Telecomms., Inc.*, 231 F.3d 791 (11th Cir. 2000); *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112 (9th Cir. 2001); *King v. Preferred Tech. Grp.*, 166 F.3d 887 (7th Cir. 1999)). Although this Court

concluded that it need not decide which approach to adopt because the case before it involved only retaliation, not interference, the Court implicitly identified section 2615(a)(1) as the source for such retaliation claims. *See id.*

While this Court in *Millea v. Metro-North Railroad Co.*, 658 F.3d 154, 164 (2d Cir. 2011), pointed to section 2615(a)(2) as the FMLA's anti-retaliation provision, it did so without any reference to *Potenza* or any discussion of whether the specific language in section 2615(a)(2) encompasses a prohibition against retaliation for exercising or attempting to exercise FMLA rights. Indeed, the issue in *Millea* did not call upon the Court to address this specific issue. Rather, the issue in *Millea* was whether the standard that the Supreme Court announced in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), for what constitutes a materially adverse action under Title VII (i.e., a materially adverse action is one that would have dissuaded a reasonable worker from engaging in the protected activity) applies to FMLA retaliation claims. *See* 658 F.3d at 164. This Court concluded that it did. *See id.* Because *Millea* addressed a distinct issue from identifying the source of the prohibition against retaliation for exercising FMLA rights, it should not be read as concluding that this Court looks to section 2615(a)(2), rather than (a)(1), as that source.[5]

[5] While, as noted above, every circuit that has addressed the issue has concluded that the FMLA prohibits retaliation for the exercise of FMLA rights, the circuit courts are divided in identifying the basis for such prohibition. *See, e.g.*,

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 are entitled to controlling deference 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, courts 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 Mugalli v. Ashcroft*, 258 F.3d 52, 55 (2d Cir. 2001) ("[I]t is not necessary that we conclude that the agency's interpretation of the statute is the only permissible interpretation, nor that we believe it to be the

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Lichtenstein I, 691 F.3d at 301 n.10 (section 825.220(c) of the regulations); *Bryant*, 538 F.3d at 400-02 (section 2615(a)(2) of the FMLA); *Richardson v. Monitronics Int'l, Inc.*, 434 F.3d 327, 332, 334 (5th Cir. 2005) (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).

best interpretation of the statute.") (internal quotation marks omitted). Courts are "obliged to defer to the agency's interpretation if it is 'based on a permissible construction of the statute.'" *Menkes v. Dep't of Homeland Sec.*, 637 F.3d 319, 333 (D.C. Cir. 2011) (quoting *Chevron*, 467 U.S. at 843).

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

[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").

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. Section 825.220(c)'s statement that the statutory prohibition against interference in section 2615(a)(1) includes a prohibition against retaliation is a reasonable construction of the statute, and therefore is entitled to controlling deference under *Chevron*.

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

1. Section 825.220(c) states that "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 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.[7]

[7] Under a mixed-motive framework, a plaintiff alleging retaliation for having exercised her FMLA rights is required to prove that the exercise of her 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.

By contrast, under a *McDonnell Douglas* framework, a plaintiff alleging retaliation for having exercised her FMLA rights must first establish a prima face case, which

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

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requires the plaintiff to establish, in relevant part, that "the adverse action occurred under circumstances giving rise to an inference of retaliatory intent." *Graziadio*, 817 F.3d at 429. If the plaintiff establishes a prima facie case and thereby creates a presumption that the employer retaliated based on the employee's exercise of her FMLA rights, the employer has the burden of producing a legitimate, non-retaliatory reason for the employment decision. *See id.* If the employer carries this burden, which is merely a burden of production, not persuasion, the burden returns to the plaintiff to show that the employer's proffered reason was merely pretext for retaliation. *See id.* "[A]lthough the *McDonnell Douglas* presumption shifts the burden of *production* to the defendant, the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993) (emphasis in original) (internal quotation marks omitted).

The fact that this Court has applied the *McDonnell Douglas* framework to claims of retaliation for exercising FMLA rights, *see, e.g.*, *Sista v. CDC Ixis N. Am., Inc.*, 445 F.3d 161, 176 (2d Cir. 2006), does not foreclose the possibility that a mixed-motive burden-shifting framework could apply instead. Indeed, in applying the *McDonnell Douglas* framework in *Graziadio*, this Court explicitly noted that it was not deciding whether a mixed-motive framework applies in the context of FMLA retaliation claims. *See* 817 F.3d at 429 & n.6.

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 any 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).

In the instant case, the district court erroneously identified section 2615(a)(2) as the basis for the prohibition against retaliation for exercising FMLA rights and, based on that initial error, concluded that the language in section 2615(a)(2) was similar to the "because" language that the Supreme Court found

dispositive in the statutes at issue in *Gross* and *Nassar*. *See Woods*, 2016 WL 590458, at *2. As framed by this Court in *Potenza* and as clearly articulated in the regulation at section 825.220(c), however, the source of the prohibition against retaliation for exercising FMLA rights is section 2615(a)(1), not (a)(2). *See Potenza*, 365 F.3d at 167-68; 29 C.F.R. 825.220(c); 73 Fed. Reg. at 67,986. Therefore, the language in section 2615(a)(2) does not determine whether a mixed-motive framework is available for claims of retaliation for exercising FMLA rights.[8]

[8] The district court also noted that while this Court has not opined on the specific issue of whether a mixed-motive framework is available under the FMLA, it has observed that the FMLA's anti-retaliation provision has the same underlying purpose and nearly identical language as Title VII and, for that reason, has applied Title VII standards to FMLA retaliation cases in other contexts. *See Woods*, 2016 WL 590458, at *3 (citing *Millea*, 658 F.3d at 164). *Millea*, however, presented a distinct issue and has no bearing on the issue presented in the instant case. As discussed above, the issue in *Millea* was whether the standard that the Supreme Court announced in *Burlington Northern & Santa Fe Railway* for what constitutes a materially adverse action under Title VII applies to FMLA retaliation claims. *See* 658 F.3d at 164. In concluding that it did, the Court reasoned that the rationale in *Burlington Northern* – that a broad standard was necessary to fulfill the purpose of Title VII's prohibition against retaliation – applies with "comparable force" to the FMLA's prohibition against retaliation. *Id.* While the Court also commented that the language in Title VII's anti-retaliation provision and the FMLA's anti-retaliation provision at section 2615(a)(2) contain similar wording, the Court's decision did not hinge on that language. Moreover, nothing in *Millea* stands for the proposition that the Supreme Court's textual analysis of language in Title VII's anti-retaliation provision in *Nassar* applies to entirely different language in section 2615(a)(1) of the FMLA.

Additionally, the Civil Rights Act of 1991, which, as noted above, 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 in June 2009. *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); *Gross*, 557 U.S. 167. 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 Lander v.*

Hartford Life & Annuity Ins. Co., 251 F.3d 101, 113-14 (2d Cir. 2001) (citing *Lorillard*).

3. To the extent that *Gross* and *Nassar* were based on a "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." 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 *Gross* and *Nassar*, the Third Circuit has 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 v. Valley View Local Schs.*, 579 F.3d 688, 692 (6th Cir. 2009). 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 *S*ixth Circuit in *Lewis v. Humboldt Acquisition Corp.* distinguished the FMLA from the Americans with Disabilities Act ("ADA"), reasoning that section 825.220(c)'s interpretation of 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).[9]

5. 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 her 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

[9] 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*).

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 New York v. F.E.R.C.*, 783 F.3d 946, 954–55 (2d Cir. 2015) (when a statute is silent or ambiguous regarding a specific issue and an agency is delegated authority to administer the statute, the court's task is only to determine whether the agency's interpretation of the statute is reasonable "while respecting [the agency's] legitimate policy choices") (citing *Chevron*, 467 U.S. at 843-44).

6. By contrast, the district court below erred by dismissing the language in the regulation at section 825.220(c) as not warranting any deference (this error was in addition to its initial error, discussed above, of identifying section 2615(a)(2) as

the source for the prohibition against retaliation for exercising FMLA rights). *See Woods*, 2016 WL 590458, at *2. The court noted that the Supreme Court in *Nassar* declined to defer to the Equal Employment Opportunity Commission's ("EEOC") interpretive guidance on Title VII. *See id.* (citing *Nassar*, 133 S. Ct. at 2533). The district court erroneously equated the EEOC's interpretation set out in a guidance manual, which, if persuasive, would have been entitled to deference under *Skidmore v. Swift*, 323 U.S. 134 (1944), with the Department's FMLA regulation at section 825.220(c), which 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*. *See 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.*

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*, 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.

7. 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 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) (applying a mixed-motive framework to FMLA retaliation claims); *Richardson*, 434 F.3d at 334 (same);

Conoshenti, 364 F.3d at 147 (same); *Gibson v. City of Louisville*, 336 F.3d 511, 513 (6th Cir. 2003) (same); *Smith v. BellSouth Telecomms., Inc.*, 273 F.3d 1303, 1314 (11th Cir. 2001) (same); *King*, 166 F.3d at 891 (same).

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," 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 employee's 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[.]" *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) (FCC's interpretation of ambiguous regulation set out in an amicus brief entitled to *Auer* deference); *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*); *Mullins v. City of New York*, 653 F.3d 104, 114 (2d Cir. 2011) (Secretary's amicus brief interpreting FLSA regulations entitled to controlling *Auer* deference). A mixed-motive analysis is entirely consistent with the language in section 825.220(c).[10]

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[10] The issue addressed by the district court below and presented on appeal is whether, in light of *Nassar* and *Gross*, a mixed-motive framework is available for claims of retaliation for exercising or attempting to exercise FMLA rights. Neither the court below nor the parties addressed whether a mixed-motive framework is available only where the employee has direct evidence of retaliatory motive. Therefore, the Secretary has not addressed this secondary issue in this brief. To the extent, however, that there is any such requirement under this Court's precedent, *see Serby v. NYC Dep't of Educ.*, 526 F. App'x 132, 135 (2d Cir. 2013) (unpublished) ("To satisfy her initial burden in a mixed-motive case, a plaintiff must 'produce a smoking gun or at least a thick cloud of smoke to support her allegations of discriminatory intent.'") (quoting *Raskin v. Wyatt Co.*, 125 F.3d 55, 61 (2d Cir. 1997)), the Secretary urges this Court to reconsider this issue in light of *Nassar* and *Gross*. As explained more fully in the Secretary's amicus brief in *Egan*, 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 her case with direct or circumstantial evidence. *Desert Palace, Inc. v.*

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's conclusion that a mixed-motive burden-shifting framework was unavailable for Woods' FMLA retaliation claim.

Respectfully submitted,

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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. *See* Brief for Sec'y of Labor as Amicus Curiae in Support of Plaintiff-Appellant, *Egan v. Delaware River Port Auth.*, No. 16-1471 (3d Cir. July 29, 2016).

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Pursuant to Federal Rule of Appellate Procedure 32(a), the undersigned certifies that this brief complies with the applicable type-volume limitation, typeface requirements, and type-style requirements.

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because the brief contains 6,637 words, excluding exempt portions.

2. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief was prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14-point Times New Roman font in text and footnotes.

Dated: October 25, 2016

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CERTIFICATE OF SERVICE

I certify that the Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiff-Appellant was served electronically through this Court's CM/ECF filing system to all counsel of record on this 25th day of October, 2016:

s/ Rachel Goldberg_____
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