No. 16-15628

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMILIA D. JONES,
Plaintiff-Appellant,

v.

ALLSTATE INSURANCE CO.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Alabama

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

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JONES V. ALLSTATE INSURANCE CO.
Case No. 16-15628

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Circuit Local Rules 26.1-1 and 29.2, counsel for the Secretary of Labor certifies that he believes the Certificate of Interested Persons filed by Appellant in her Initial Brief is complete, with the addition of the following persons that have or may have an interest in the outcome of this appeal:

1. Brand, Jennifer S. (Associate Solicitor, U.S. Dep't of Labor)
2. Department of Labor (amicus curiae)
3. Frieden, Paul L. (Counsel, U.S. Dep't of Labor)
4. Goldberg, Rachel (Senior Attorney, U.S. Dep't of Labor)
5. Secretary of Labor (amicus curiae)
6. Smith, M. Patricia (Solicitor, U.S. Dep't of Labor)

Date: November 10, 2016

s/ Rachel Goldberg
RACHEL GOLDBERG

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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 Jamilia D. Jones. For the reasons set forth below, the district court erred by concluding that a mixed-motive framework was not available for Jones' 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 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 Jones' claim of retaliation for exercising her FMLA rights.

SUMMARY OF ARGUMENT[1]

1. Several courts of appeals have recently noted that it is an open question whether a mixed-motive burden-shifting analysis is available under the FMLA for claims of retaliation for exercising FMLA rights in light of 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).

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

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); *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] This Court has not had occasion to comment on the issue.

2. Even after *Gross* and *Nassar*, however, 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

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[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 applies to FMLA retaliation claims), *appeal docketed*, No. 16-1351 (1st Cir. April 6, 2016), *with Jones. v. Allstate Ins. Co.*, No. 14-1640, 2016 WL 4259753, at *3-6 (N.D. Ala. Aug. 12, 2016) (concluding that a plaintiff must show but-for causation under the FMLA).

The issue is currently pending in the Second and Third Circuits. *See Woods v. Start Treatment & Recovery Ctrs., Inc.*, No. 13-4719, 2016 WL 590458 (E.D.N.Y. Feb. 11, 2016), *appeal docketed*, No. 16-1318 (2d Cir. April 27, 2016); *Egan v. Delaware River Port Auth.*, No. 15-3695 (E.D. Pa.), *appeal docketed*, No. 16-1471 (3d Cir. March 18, 2016). The Secretary filed an amicus brief in each case. *See* Brief for Sec'y of Labor as Amicus Curiae in Support of Plaintiff-Appellant, *Woods* (2d Cir. Oct. 25, 2016); Brief for Sec'y of Labor as Amicus Curiae in Support of Plaintiff-Appellant, *Egan* (3d Cir. July 29, 2016).

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*.

ARGUMENT

THE DEPARTMENT'S REGULATION AT 29 C.F.R. 825.220(C), PROHIBITING RETALIATION FOR AN EMPLOYEE'S EXERCISE OF FMLA RIGHTS AS PART OF THE STATUTORY PROHIBITION AGAINST INTERFERENCE AND PROVIDING FOR A MIXED-MOTIVE FRAMEWORK FOR SUCH RETALIATION CLAIMS, 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 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 … has filed any charge, …instituted any proceeding, …given …any information in connection with any inquiry or proceeding[,] …or …testified …in any inquiry or proceeding" related to the FMLA. 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). 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]

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

[3] Every circuit court, including this Court, that has addressed the issue has concluded that the FMLA prohibits retaliation against an employee for exercising the employee's FMLA rights. *See Brungart v. BellSouth Telecomms., Inc.*, 231 F.3d 791, 798 n.5 (11th Cir. 2000); *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).

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.

2. Indeed, the regulation at 29 C.F.R. 825.220(c) specifically identifies section 2615(a)(1) of the Act 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

[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).

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 prohibition against retaliation as well as a prohibition against discrimination." 73 Fed. Reg. at 67,986. The Department explained that "[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. *Id.* (citations omitted).

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 Heimmermann v. First Union Mortg. Corp.*, 305 F.3d 1257, 1263 (11th Cir. 2002) ("That we may prefer a different interpretation is not enough to deny deference to the agency interpretation."). 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. And 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.[5] 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 give effect to the broad statutory prohibition against interference and thereby fulfill the purposes of the Act. *Cf. Smith v. BellSouth Telecomms., Inc.*, 273 F.3d 1303, 1313 (11th Cir. 2001) (according *Chevron* deference to section 825.220(c)'s interpretation that former employees are protected against retaliation for exercising FMLA rights).

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. 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*.

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[5] "[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). Moreover, rulemaking authority that satisfies *Chevron*'s deference requirements "does not turn on whether Congress's delegation of authority was general or specific." *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 57 (2011).

3. Consistent with the regulation, this Court, in a recent decision, identified the prohibition against interference in section 2615(a)(1) as the source for the prohibition against retaliation for exercising FMLA rights. *See Surtain v. Hamlin Terrace Found.*, 789 F.3d 1239, 1247 & n.7 (11th Cir. 2015). This Court noted that there are three types of protected activities that can give rise to a retaliation claim under the FMLA and identified the statutory and regulatory source for each type: (1) opposing or complaining about any unlawful practice, which arises out of 29 U.S.C. 2615(a)(2) and 29 C.F.R. 825.220(a)(2); (2) filing a charge or participating in any inquiry or proceeding under the FMLA, which arises out of 29 U.S.C. 2615(b) and 29 C.F.R. 825.220(a)(3); and (3) exercising or attempting to exercise FMLA rights, which arises out of 29 C.F.R. 825.220(c). *See* 789 F.3d. at 1247 n.7. As to this last type of protected activity, this Court stated that the protection against retaliation for exercising or attempting to exercise FMLA rights is "not explicitly mentioned in the text of the statute," but noted that it "has been grounded in the Act's prohibition against interference with an employee's exercise or attempted exercise of rights provided by the Act" in section 2615(a)(1). *See* 789 F.3d. at 1247 n.7. (citing *Hodgens*, 144 F.3d at 160 n.4, and *Brungart*, 231 F.3d at 798 n.5). In *Brungart*, this Court explained:

> The statute itself uses the language of interference, restraint, denial, discharge, and discrimination, not retaliation. But nomenclature counts less than substance. And the substance of the FMLA provisions as they concern this case is that an employer may not do

> bad things to an employee who has exercised or attempted to exercise any rights under the statute.

231 F.3d at 798 n. 5; *see Pereda v. Brookdale Senior Living Communities, Inc.*, 666 F.3d 1269 (11th Cir. 2012) (quoting section 2615(a)(1) and section 825.220(c) as support for the conclusion that an employee need not be currently exercising her FMLA rights in order to be protected from retaliation).

While two earlier cases from this Court contain language suggesting that the Court looks to section 2615(a)(2) as the source for the prohibition against retaliation for exercising FMLA rights, *see Martin v. Brevard Cty. Pub. Schs.*, 543 F.3d 1261, 1267 (11th Cir. 2008); *O'Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349, 1352 (11th Cir. 2000), those cases did so only in passing and without explicitly addressing the issue as the Court did in *Surtain*. Given *Surtain*'s recent statement directly on point, it is reasonable to conclude that this Court looks to section 2615(a)(1) as the source for the prohibition against retaliation for an employee's exercise or attempt to exercise FMLA rights.[6]

[6] 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.*, *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).

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 the framework established in *McDonnell Douglass Corp. v. Green*, 411 U.S. 792 (1973), a plaintiff alleging retaliation for having exercised her FMLA rights must first establish a prima face case, which requires the plaintiff to establish, in relevant part, that the adverse action was causally related to the protected activity of exercising or attempting to exercise FMLA rights. *See Schaaf v. Smithkline Beecham Corp.*, 602 F.3d 1236, 1243 (11th Cir. 2010). 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.* at 1244. "[A]lthough the *McDonnell Douglas* presumption shifts the burden of production to the defendant, the ultimate burden of persuading the trier of fact that

2. Neither *Gross* nor *Nassar* undermines the regulation at section 825.220(c). 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,

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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.*, *Schaaf*, 602 F.3d at 1243-44, does not foreclose the possibility that a mixed-motive burden-shifting framework could apply instead.

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.

a. 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*. *See Smith*, 273 F.3d at 1310 ("While cases decided under other employment statutes prohibiting discrimination and retaliation may be instructive, we must be attentive to the way the statutes differ in their language, their purposes, and their scope of protection.").

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 Jones*, 2016 WL 4259753, at *4, *6. As this Court explained in *Surtain* and as 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*

Surtain, 789 F.3d at 1247 n.7; 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]

The district court also erroneously reasoned that because this Court has construed the FMLA's and Title VII's retaliation provisions together, the "but-for" principle in *Nassar* for Title VII "ought to similarly be applied to the FMLA." *Jones*, 2016 WL 4259753, at *5 (citing *Hyde v. K.B. Home, Inc.*, 355 Fed. App'x 266, 272-73 (11th Cir. 2009), and *Green v. MOBIS Alabama, LLC*, 613 Fed. App'x 788, 794-95 (11th Cir. 2015)). These cases, however, are inapposite. In *Hyde*, this Court concluded that the plaintiff's FMLA and Title VII retaliation claims failed for similar reasons, i.e., even if the employee's immediate supervisor wished to terminate the employee for using FMLA leave or because of her gender, respectively, the supervisor was not involved in the decision to terminate. *See*

[8] The district court similarly erred in its reliance on the legislative history of the FMLA. The court noted that, in enacting the FMLA, Congress commented that the FMLA's opposition clause in section 2615(a)(2) was derived from Title VII's anti-retaliation clause in 42 U.S.C. 2000e-3(a), as both provisions prohibit retaliation for opposing any practice unlawful under their respective statutes. *See Jones*, 2016 WL 4259753, at *4-5 (citing S. Rep. No. 103-3, at 34 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3; H.R. Rep. No. 103-8(I) (1993)). The model for the FMLA's opposition clause in section 2615(a)(2), however, is ultimately not relevant because the source of the prohibition against retaliation for exercising FMLA rights is the interference clause in section 2615(a)(1), not the opposition clause in (a)(2).

Hyde, 355 Fed. App'x at 273-74. In *Green*, this Court thoroughly examined whether there was sufficient evidence to support the employee's claim of retaliation under Title VII and, after concluding that there was not, summarily concluded that her FMLA retaliation claim failed because it was based on the same alleged facts. *See* 613 Fed. App'x at 794-95. Neither case contained any analysis comparing the actual provisions in the FMLA and Title VII. Thus, neither *Hyde* nor *Green* supports the conclusion that the language in Title VII's anti-retaliation provision that was dispositive in *Nassar* should have any bearing on the interpretation of entirely different language in the FMLA's interference provision.

b. The other reason that *Nassar* and *Gross* do not dictate the result here is that the Civil Rights Act of 1991, which 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 pre-*Gross* cases in which courts had applied a mixed-motive analysis to FMLA retaliation claims, *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); *King v. Preferred Tech. Grp.*, 166 F.3d 887, 891 (7th Cir. 1999), 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 Smith*, 273 F.3d at 1308 (citing *Lorillard* and reasoning that Congress was presumably aware of how broadly the courts have interpreted the definition of "employee" when it choose to incorporate the definition from the Fair Labor Standards Act into the FMLA).

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 case of the FMLA, that default "has been supervened" by the Department's regulation to which the court was "obligated to defer[.]" 149 F. Supp. 3d at 209.

4. While no court of appeals has yet 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 Sixth 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 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.

[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 address it in *Malin*).

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); *cf. Smith*, 273 F.3d at 1313 (according *Chevron* deference to section 825.220(c)). This Court should similarly defer to section 825.220(c)'s interpretation that an employer cannot use the exercise of FMLA rights as a negative factor in an employment decision and therefore that a mixed-motive framework is available under the FMLA.

6. By contrast, the district court here erred by dismissing the language in the regulation at section 825.220(c) as not warranting any deference. *See Jones*, 2016 WL 4259753, at *6. Based on its initial error of identifying section 2615(a)(2) as the source for the prohibition against retaliation for exercising FMLA rights, the court erroneously concluded that the language in section 2615(a)(2) left no room for the Department to interpret the causation required for a retaliation claim. *See* 2016 WL 4259753, at *6. The court further erred by dismissing the issue as not within the agency's expertise because, according to the court, "statutory

construction and determining levels of causation are decisively judicial functions appropriate for evaluation by courts rather than committed to the agency expertise of the Department of Labor." *Id.* Interpreting the prohibition against interference broadly to effectuate the purpose of the FMLA, however, is precisely the type of determination that is within the Department's expertise in administering and enforcing the Act.

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. Thus, in distinguishing the NLRB's application of a mixed-motive framework to the National Labor Relations Act, the Supreme Court in *Gross* implicitly accepted that the proper level of causation to effectuate the purpose of the statute is within

an agency's expertise and therefore deserving of *Chevron* deference, which directly contradicts the conclusion of the district court below.

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 that a mixed-motive analysis, with its burden-shifting framework, is appropriate in an FMLA case in which retaliation for exercising one's FMLA rights is alleged.

7. It bears noting that in declining to give any deference to the regulation at section 825.220(c), the district court erroneously concluded that the Department's interpretation applying a motivating factor framework contradicted the Department's prior position. *See Jones*, 2016 WL 4259753, at *6. The prior position to which the court referred was a statement in the preamble to the FMLA regulations promulgated in 1995. *See id.*; 60 Fed. Reg. 2180, 2218 (Jan. 6, 1995). There, the Department stated:

> [The FMLA's] opposition clause is derived from Title VII of the Civil Rights Act of 1964 and is intended, according to the legislative history, to be construed in the same manner. Thus, [the] FMLA provides the same sorts of protections to workers who oppose, protest, or attempt to correct alleged violations of the FMLA as are provided to workers under Title VII.

60 Fed. Reg. at 2218. Because the prohibition against retaliation for exercising FMLA rights derives from the interference clause in section 2615(a)(1), not the opposition clause in section 2615(a)(2), as explained above, there is nothing inconsistent between the Department's interpretation that a mixed-motive framework is available for such retaliation claims and the Department's earlier statement that the FMLA's opposition clause is derived from Title VII.

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 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.*, *Sch. Dist.* #70, 523 F.3d at 741-42 (applying a mixed-motive framework to FMLA retaliation claims); *Richardson*, 434 F.3d at 334 (same); *Conoshenti*, 364 F.3d at 147 (same); *Gibson*, 336 F.3d at 513 (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); *Ramos-Barrientos v. Bland*, 661 F.3d 587, 590 (11th Cir. 2011) (Secretary's amicus brief interpreting regulations under the

Fair Labor Standard Act entitled to controlling *Auer* deference). A mixed-motive analysis is entirely consistent with the language in section 825.220(c).[10]

[10] The issue addressed by the district court 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 district court nor the parties addressed whether a mixed-motive framework is available only when the employee has direct evidence of retaliatory motive. Therefore, the Secretary has not addressed that discrete issue in this brief. To the extent, however, that there is any such requirement under this Court's precedent, *see Hurlbert v. St. Mary's Health Care Sys., Inc.*, 439 F.3d 1286, 1297 (11th Cir. 2006) ("Where, as here, a plaintiff alleges an FMLA retaliation claim without direct evidence of the employer's retaliatory intent, we apply the burden shifting framework established by the Supreme Court in *McDonnell Douglas*[.]"), 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. 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*, No. 16-1471 (3d Cir. July 29, 2016).

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(c)(7) and 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 6,991 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: November 10, 2016

s/ Rachel Goldberg
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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 10th day of November, 2016:

s/ Rachel Goldberg
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