No. _____

In The
Supreme Court of the United States

ARLENE FRY,

Petitioner,

v.

RAND CONSTRUCTION CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. In *Burrage v. United States*, 571 U.S. 204 (2014), this Court explained that a "but-for" cause is merely one cause, perhaps among several, which is "the straw that broke the camel's back" and, in June, this Court reiterated in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), that "but-for" cause is not sole cause and may be one of many causes for an adverse employment action. Here, the question presented to the Court is whether the lower court erred in adopting what is, in essence, a "sole cause" standard, in direct conflict with the Court's holdings in *Burrage* and *Bostock*.

II. Although the Fourth Circuit purported to apply a "but-for" causation standard to Petitioner's FMLA claim, there is clear disarray among circuit courts regarding the correct standard. Because of confusion within the circuits, deepened by the Department of Labor's adoption of a "negative factor" regulation, the question presented is whether the correct causation standard is but-for, motivating factor, or negative factor.

PARTIES TO THE PROCEEDING

Petitioner in this Court is Arlene Fry who was plaintiff in the district court and plaintiff-appellant in the court of appeals.

Respondent in this Court is Rand Construction Corporation, which was the defendant in the district court and defendant-appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Arlene Fry is an individual.

STATEMENT OF RELATED CASES

This case arises from the following proceedings: *Fry v. Rand Constr. Corp.*, 2018 U.S. Dist. LEXIS 143886 (E.D. Va. Aug. 22, 2018), decided by the Honorable Anthony J. Trenga, Civil Action Number 1:17-cv-0878 (AJT/TCB); *Fry v. Rand Constr. Corp.*, 964 F.3d 239 (4th Cir. 2020), opinion for the majority issued by the Honorable Julius N. Richardson, and dissenting opinion by the Honorable Diana Gribbon Motz, Docket Number 18-2083. There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.l(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Arlene Fry respectfully requests this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit, entered in this case on July 1, 2020.

OPINIONS BELOW

The August 22, 2018, unreported order of the United States District Court for the Eastern District of Virginia is reproduced at Pet. App. 31a of the Appendix. The July 1, 2020, majority opinion of the Fourth Circuit is reproduced at Pet. App. 1a. The dissenting opinion is reproduced at Pet. App. 24a. The July 28, 2020, denial of rehearing and rehearing en banc of the Fourth Circuit is reproduced at Pet. App. 55a.

STATEMENT OF JURISDICTION

The Fourth Circuit entered its final judgment on July 1, 2020. On July 28, 2020, the Fourth Circuit denied the petition for rehearing *en banc*. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves claims of unlawful retaliation under the Family and Medical Leave Act ("FMLA"), specifically 29 U.S.C. § 2615, Prohibited acts (Pub. L. 103–3, title I, § 105, Feb. 5, 1993, 107 Stat. 14).

29 U.S.C. § 2615. Prohibited acts (Pub. L. 103–3, title I, § 105, Feb. 5, 1993, 107 Stat. 14.)

(a) Interference with rights

(1) Exercise of rights

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this title.

(2) Discrimination

It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this title.

(b) Interference with proceedings or inquiries It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual—

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this title;

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this title; or

> **(3)** has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this title.

29 C.F.R. § 825.220(c), 78 Fed. Reg. 8834-01 (Feb. 6, 2013), provides:

> (c) The Act's prohibition against "interference" prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies. *See* § 825.21.

STATEMENT OF THE CASE

A. Overview

In 1993, Congress enacted the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601 *et seq*., granting employees temporary leave to attend to family and medical circumstances. However, the "Interference" provision of the FMLA, 29 U.S.C. §§ 2615(a)(1), does not identify the specific causation standard to be applied in instances where employees allege that their employers took retaliatory action against them for exercising their rights under the FMLA.

This case arises from allegations of FMLA retaliation by Respondent Rand Construction Corp ("Rand"). Petitioner Arlene Fry ("Fry") alleged retaliation on account of Rand's abusive treatment towards her upon her return to work after going out on FMLA leave for her multiple sclerosis, and Rand's termination of her employment shortly after she complained of the retaliation she suffered.

Following a four-day trial, a jury found in favor of Fry that her taking FMLA leave due to her multiple sclerosis flare up, and then raising complaints of retaliation with how she was treated when she did, was a "but for" cause of her termination. However, the trial judge set aside the jury's verdict. The trial judge's decision was upheld by a 2-1 panel decision in the Fourth Circuit requiring Fry to show that exercising her rights under the FMLA was "the" reason for termination under a "but-for" causation standard. The but-for standard applied by the district court and the Fourth Circuit is in direct conflict with

this Court's articulation of the but-for standard in *Bostock* and *Burrage*. The Court should grant certiorari to correct this error and remand. Further, because the circuit courts are in disarray over the proper causation standard in FMLA retaliation cases, the Court should grant certiorari and resolve this issue.

B. Factual History

Fry was hired by Rand to work as the Executive Assistant for Rand's owner and CEO, Linda Rabbitt ("Rabbitt") beginning on June 30, 2008. *See* J.A. 426, 580, 1015.[1] In 2010, Fry was diagnosed with multiple sclerosis. J.A. 642. Fry did not tell Rabbitt or Rand about her medical condition until November 2016 when she requested FMLA because her multiple sclerosis had gotten worse. Despite her medical condition, Fry continued to work for Rand until February 3, 2017, when Rand terminated Fry. J.A. 212. This termination occurred just eleven (11) weeks after she revealed she had MS and requested FMLA leave, a mere eleven (11) days after Fry's first complaint of retaliation, and the very next day following her second such complaint. J.A. 38, 155, 169-70.

Rabbitt described Fry as an "excellent performer" in evaluations and confirmed that Fry consistently met her expectations. J.A. 165, 1018-26. Rabbitt gave Fry a raise in the summer of 2016. J.A. 566. In November 2016, Rabbitt awarded Fry a $1,500 bonus. J.A. 568, 1162-68. In over eight and

[1] Citations to the Joint Appendix filed in the Fourth Circuit below are "J.A." followed by the page number.

one-half years, neither Rabbitt, nor any other Rand executive, ever disciplined Fry or put Fry on a performance improvement plan. J.A. 157-58, 360-61. Rand's Human Resources ("HR") Director Violetta Bazyluk ("Bazyluk") testified that prior to November 3, 2016, Bazyluk was unaware of any purported deficiencies in Fry's performance. J.A. 141. Fry testified, without contradiction that, prior to her taking FMLA leave, Rabbitt and Fry had a close personal relationship. J.A. 544-45.

Despite being a consistently diligent and hardworking assistant to Rabbitt, Fry and Rabbitt's employment relationship had its typical workplace problems. Even Rand's Director of Recruiting Dawn Sheridan testified that Rabbitt's management style consisted of blow-ups over minor issues that never resulted in any disciplinary action. *E.g.*, J.A. 376-77.

On November 3, 2016, in response to an email about a business call, Rabbitt emailed Fry referring to the call and stated: "if you screwed this up I will be really really angry." J.A. 616, 935. That day, Rabbitt also emailed COO Kurt Haglund ("Haglund") musing that "I think Arlene blew it. If he [sic] did, I need to replace her. She's making too many mistakes." J.A. 1127. During a routine check of Rabbitt's email at work, Fry saw Rabbitt's email to Haglund. J.A. 442. Trying to figure out what happened, Fry asked Haglund if she was being replaced. J.A. 442. Haglund replied: "No. No, I do not want to replace you. Linda is just angry. She's just upset." *Id.* In November of 2016 when a last-minute change was made to one of Rabbitt's meetings, Fry ran after Rabbitt to notify her

of this change; Rabbitt walked away from Fry and said: "I don't give a fuck."[2] J.A. 447-49.

Prior to Fry taking FMLA leave, neither Rabbitt nor Bazyluk had taken any affirmative step to terminate Fry's employment. J.A. 308. Rand had a progressive disciplinary policy that did not allow for immediate firing except in cases of gross misconduct; in firing Fry, Rand did not follow that policy. J.A. 156. Upon an employee's termination, Haglund is required to "look at all of the factors . . . and issues" to "make sure everything is kind of kosher" after Rabbitt decides to terminate and before the employee is actually terminated; Haglund testified that he did not undertake this process in connection with Fry's termination. J.A. 328.

On November 21, 2016, Fry requested FMLA leave (from 11/21/16 to 12/12/16) due to increased symptoms caused by her multiple sclerosis. J.A. 169, 449-54, 650-51, 172-73, 1137. This was also the first time Fry notified Rabbitt and Rand that she had multiple sclerosis. *See, e.g.,* J.A. 159-60, 169-70, 205-06, 208, 267, 287, 327-28, 380, 454, 504, 506, 570, 669.

Fry's doctor instructed her on the risk that stress could cause a worsening of her disease. J.A. 452. Fry provided Rand with documentation from her doctor supporting her FMLA leave. J.A. 650, 1181, 1184. At Rabbitt's request, Fry delayed taking FMLA leave until November 28, 2016 to complete tasks

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[2] While some of Rabbitt's language used in this petition is crude and offensive, such language allows this Court to better understand Fry's experience by viewing the actual text of the language Rabbitt used in her interactions with Fry.

before going on leave, for which Rabbitt expressed her appreciation. J.A. 388-94, 457, 1179.

However, when Fry returned to work on December 12, 2016, Rabbitt immediately subjected Fry to vitriolic attacks. J.A. 176, 404, 1137, 1182, 1273. Rabbitt began characterizing Fry's attendance as "unpredictable" although this was the first time Fry had missed work. J.A. 569-70. Rabbitt also repeatedly accused Fry about lying about the nature of Fry's leave and falsely claimed that Fry had been on a "God damn cruise" for two weeks. J.A. 404-05, 411-12, 561. Bazyluk conceded that Rabbitt's accusing Fry of being on a two-week cruise was "tied to [Fry's] leave taking." J.A. 292. On the day Fry returned from her FMLA leave, Rabbitt chastised Fry, saying: "I have been so busy. You left me during the busiest time of the year. I have been sick. I have been stressed. Look at me. Look at my eye. I don't take time off. I don't go away. I stay here and I work." J.A. 403. Rabbitt falsely accused Fry of promising not to return from leave and called her a liar. J.A. 404. Fry reminded Rabbitt that they had agreed on a documented return-to-work date. J.A. 404.

Fry further described Rabbitt's actions in her trial testimony: "And now Linda [Rabbitt] is really angry, because she is pounding her fist on the table. Pounding them. 'You God damn liar. You God damn liar.' . . . 'You told me you're not coming back. You said you were not coming back.' " J.A. 404. Rabbitt demanded to know how Fry's sickness and leave-taking would affect her own life, telling Fry: "I want to know what this God damn thing means. I want to know what it means. I want to know how it is going to affect my life. I want to know what the fuck this

means." J.A. 404-05. Rabbitt's abusive behaviors did not cease. On either December 14th or 15th, 2016, Fry completed editing a speech for Rabbitt and Rabbitt threw the speech back at Fry saying: "you are so god damn useless," and continued to say: "I don't know why I pay you a god damn cent. You -- are a fucking waste of oxygen," and asked Fry "to give [her] one, one god damn reason why [Rabbitt] pay[s] her anything." J.A. 408-11. Rabbitt then told Fry, "just because you breathed another year, doesn't make you more valuable." J.A. 322, 1125. On December 19, 2016, Rabbitt again doubted the legitimacy of Fry's medical leave, saying: "You are too god damn rested. I know you were on a cruise." J.A. 412.

On December 22, 2016, Rabbitt wrongly accused Fry of making a mistake on a personal Christmas Eve catering order. J.A. 41, 62. Rabbitt approached Fry, leaned over her desk, and told her: "You're fucking up on purpose. Fucking up on purpose. I don't care what you say, you are doing it on purpose." J.A. 413-14. Rabbitt proceeded to call Fry a "fuck-up" and stormed out of the office. J.A. 414.

Fry, recognizing that Rabbitt's animosity towards her had become more apparent since returning from her FMLA leave, decided to discuss this incident with Bazyluk. J.A. 304. Bazyluk reviewed the catering contract and determined that Rabbitt must have been confused. J.A. 413-15. During the meeting with Bazyluk, Bazyluk told Fry: "we know this relationship is toxic . . . we are aware of what's going on." J.A. 415. Bazyluk then asked Fry if she was willing to work for Haglund; after Fry said yes, Bazyluk said that the three of them (Fry, Bazyluk, and Haglund) would discuss a transition

plan when Haglund was back in the office. *See id*. Bazyluk told Fry that she would have to train a replacement to be Rabbitt's assistant, which Fry agreed to do. J.A. 416. On December 27, 2016, the three of them met to discuss Fry working as Haglund's assistant. J.A. 308-09, 418-20.

The next day, on December 28, 2016, Fry left for a dental appointment during her lunch break and told Haglund, Bazyluk, and the receptionist where she would be. Upon Fry's return, Rabbitt ordered all three (Fry, Haglund and Bazyluk) into a conference room and reprimanded Fry for leaving the office without talking to Rabbitt and getting permission. J.A. 43, 64, 421-23. There is no evidence that prior to Fry taking FMLA leave that she was ever required to get Rabbitt's permission to leave the office. Rabbitt began pounding her fists on the table stating: "Arlene works for me. She works for me. Do you understand?" J.A. 40, 61, 423-24, 714, 940. Rabbitt demanded Haglund, Bazyluk, and Fry — each in turn — to recite back to Rabbitt: "Arlene works for you." J.A. 310, 421–24.

On December 29, 2016, Bazyluk proposed that Fry work for Rabbitt until Rand could hire Fry's replacement, and then Fry would move into a part-time position until June 30, 2017 when Fry's employment would end. J.A. 426. Haglund testified that following December 29, 2016, the only available option was for Fry to continue to work as Rabbitt's assistant until Rand found a new assistant for Rabbitt. J.A. 347.

On January 12, 2017, Haglund emailed Fry a letter dated January 6, detailing the "transition

plan." J.A, 185, 187, 189. That same day, Bazyluk sent a release and waiver agreement to Fry as part of the transition plan, which included a release of Fry's ADA and FMLA claims against Rand. J.A. 187-89, 316, 318, 1134-35, 1144-45, 1148-52, 1294.

On January 23, 2017, Fry emailed Haglund and Bazyluk complaining that Rand discriminated and retaliated against her for taking FMLA leave. J.A. 1067. Fry "reject[ed] the company's request" to end her employment, viewing it as "retaliation for [her] protected leave-taking and [her] revealing to the company [her] disability and serious health condition." J.A. 1067.

On January 24, 2017, Bazyluk, at Haglund's direction, met with Fry questioning whether Fry had emails and other documentation to prove that Rabbitt had retaliated against Fry. J.A. 147-48, 1131. Fry described the meeting as hostile and threatening. J.A. 942. Fry reminded Bazyluk that after Fry took and returned from FMLA leave, that Rand had proposed changing her job. J.A. 43. Fry also pointed out that Rand cut off Fry's access to Rabbitt's emails, making it difficult for Fry to perform her duties, and that Rabbitt's abusive language and harassment towards Fry increased upon Fry's return from FMLA leave. J.A. 278.

Haglund responded to Fry's January 23 email on January 27, 2017, disagreeing with Fry's allegations of discrimination and retaliation. J.A. 1381. Haglund insisted that the concerns regarding Fry's performance were not motivated by her disability or her FMLA leave and instead were made because her performance was "not satisfactory to

Linda." J.A. 1382. On February 2, 2017, Fry replied to Haglund and disagreed "with the vast majority of [his] comments." J.A. 1154. She pointed out that Haglund's January 27 email was the first time Fry had learned of the specific issues he referenced; issues which were only brought to her attention after she raised her concerns of discrimination. J.A. 1154. Fry also reminded Haglund that, since returning from leave, she had been "met with screaming accusations from [Rabbitt] that [Fry] was lying about [her] leave." J.A. 1155.

On February 2, 2017, Fry complained of discrimination and retaliation again, including in an email to Haglund that "since returning from my leave on December 12, 2016, [Rabbitt] has been non-stop abusive toward me, and I feel that she is treating me this way because of my medical leave. Further, since returning from my leave, you and Violetta [Bazyluk] have attempted to force me from my position." J.A. 1154-55. After Fry complained of discrimination and retaliation, Haglund assumed that Fry "was going to fight Rand every step of the way." J.A. 306.

On February 3, 2017, just eleven days after sending her initial email to Haglund and one day after re-asserting her complaint, Rand officially terminated Fry's employment. Haglund explicitly admitted in his testimony that Fry's February 2 email concerning the retaliation she endured after taking FMLA leave was "the straw that broke the camel's back." J.A. 306-07.

C. Proceedings Below

Fry sued Rand alleging, *inter alia*, retaliation for taking FMLA leave. A jury trial began in April 2018. At the end of Fry's case-in-chief, Rand moved for judgment as a matter of law. The district court decided that "the better course [was] to submit the case to the jury," despite having some reservations about the evidence. J.A. 718. The district court determined it could "actually decide those issues, if necessary, after the verdict." J.A. 718. The jury rejected Fry's other claims but returned a verdict for Fry on her FMLA claim, awarding her $50,555.[3] Rand renewed its motion for judgment as a matter of law and moved for a new trial.

The district court granted Rand's motion for judgment as a matter of law. Applying the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the district court found that "Fry met her initial burden of making out a *prima facie* case of retaliation," but that, Rand established a legitimate nondiscriminatory reason for terminating Fry: "problems with her job performance that predated her FMLA leave." J.A. 948-49. Finally, the district court held that Fry "failed to introduce evidence from which a jury could reasonably find that Rand's proffered reason was untrue or a pretext" and that [retaliation] was *the real reason* for the challenged conduct," J.A. 949 (emphasis added). The district court also conditionally granted Rand's motion for a new trial.

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[3] The jury returned a verdict in favor of Rand on Fry's Americans with Disabilities Act claims.

The court of appeals affirmed in a divided opinion. The majority discussed the facts, but ignored many facts favorable to Fry and gave great weight to Rand's disputed evidence. Pet. App. 3a-5a, 15a-18a. The majority drew its own inferences from the disputed facts and found those favoring Rand to be more credible than the inferences the jury drew on behalf of Fry. Pet. App. 18a-20a. The majority ignored undisputed evidence that Rabbitt reacted with great hostility to Fry's having taken FMLA leave and drew conclusive inferences on behalf of Rand merely because Rand initially tolerated Fry's medical leave and other officials were nice to Fry. Pet. App 18a-19a.

The majority defined "but-for" causation in terms familiar to an outdated (and now overruled) concept known as "pretext plus."[4] The majority

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[4] Some Circuits previously required not only that an employment discrimination plaintiff prove that the defendant's asserted nondiscriminatory explanation was false, but also produce in every case additional evidence showing that the employer acted for a forbidden discriminatory or retaliatory purpose. In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511–12 (1993), the Court overruled such "pretext-plus" requirements, holding that they were not necessary in every case. This Court stated:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of

repeatedly stated that Fry was required to show that Rand's proffered reason was both false and a pretext for retaliation. Pet. App. 2a, 11a, 13a,14a, 15a, 18a & 21a. The majority also treated "but-for" causation as though it required plaintiffs to prove that the unlawful motive was the sole cause of the challenged action. Throughout its opinion, the majority continually referred to a plaintiff's obligation to show that the employer's stated explanation was "false." Pet. App. 2a, 11a, 13a, 14a, 15a, 18a & 21a. It stated that Fry was required to show that "Rand's reliance on Fry's performance problems was merely pretext." Pet. App. 23a. It referred to whether "Rand's assessment of Fry's performance issues … 'truly was the reason for [her] termination.'" Pet. App. 20a.

In dissent, Judge Motz highlighted the error of the trial court's decision stating that a reasonable jury could find that Fry's termination was "*more likely* the result of retaliation." Pet. App. 26a (emphasis in original). Judge Motz determined the majority had disregarded its role in overturning the jury verdict in

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> discrimination is *required,*" 970 F.2d at 493 (emphasis added).

(Footnote omitted.) Similarly, in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the Court stated:

> It suffices to say that, because a prima facie case and sufficient evidence to reject the employer's explanation may permit a finding of liability, the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination.

Id. at 149.

Fry's favor, instead acting as a finder of fact.[5] Judge Motz noted that Rabbitt complained about Fry's performance only after Fry took her leave, calling Fry's attendance "unpredictable" although Fry never missed a day of work from 2009 until November 2016. Pet. App. 27a. Judge Motz elaborated that Rand terminated Fry's employment only after Fry raised objections and voiced her belief that Rand was retaliating against her for exercising her rights under the FMLA. Pet. App. 27a. Judge Motz relied on Haglund's testimony that Fry's complaint "was the straw that broke the camel's back" and noted that this testimony suggests that Rand management viewed

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[5] In reaching this conclusion, Judge Motz relied on this Court's instruction in *Reeves v. Sanderson Plumbing Prods.* There, this Court directed that, in Rule 50 motions:

> [T]he court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe.

530 U.S. 133, 150-51 (2000) (citations omitted).

Judge Motz found that "the evidence introduced at trial would have permitted the jury to believe that in terminating Fry, [Rand] was 'proceeding along lines previously contemplated.' *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001). But judgment as a matter of law is not warranted unless the only conclusion a reasonable jury could have reached is one in favor of the moving party." Pet. App. 28a (J. Motz, dissenting) (internal quotations omitted).

the February 2 complaint as crucial to the decision to fire Fry, and that the close temporal proximity between her complaint and Fry's termination the following day buttressed this inference. Pet. App. 27a-28a. Judge Motz expressed that, viewing all of the evidence in the light most favorable to Fry and drawing every legitimate inference in her favor, a reasonable jury "was entitled to believe that Fry's protected activity was the straw that broke the camel's back — the extra push that moved the Corporation from its claimed dissatisfaction with Fry to a decision to terminate" her employment. Pet. App. 28a.

Fry requested a panel rehearing and rehearing en banc of this decision rendered by the divided panel of the Fourth Circuit. The Fourth Circuit denied Fry's petition on July 28, 2020.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S APPLICATION OF THE "BUT-FOR" CAUSATION STANDARD DIRECTLY CONTRADICTS THIS COURT'S GUIDANCE IN *BURRAGE* AND *BOSTOCK*.

a. The lower courts ignored this Court's guidance in *Burrage v. United States* and *Bostock v. Clayton County* that but-for causation does not mean "sole cause" and only requires that a plaintiff show that the protected activity was "the straw that broke the camel's back."

In *Burrage v. United States*, 571 U.S. 204 (2014), this Court explained that but-for causation requires a plaintiff to show only that the alleged discrimination was the "straw that broke the camel's back." [6] *Id.* at 211. Expanding on this standard, the Court analogized: "[I]f poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived." *Id.*

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[6] Though *Burrage* was a criminal case and is most often cited by courts in criminal contexts, the standard of but-for causation articulated in *Burrage* is the same standard applied in most employment discrimination contexts. *See Burrage*, 571 U.S. at 212–13 (citing both *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013), and *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009), in explaining but-for causation).

Under the but-for standard articulated in *Burrage*, Fry was not required to eliminate and discredit every other possible reason that could have contributed to her termination. Rather, Fry was required to show only that her taking of FMLA leave — or her written complaints about Rand's ensuing retaliatory actions — was the "straw that broke the camel's back." *Id.* at 211. In this case, testimony from the COO of Rand, Kurt Haglund, mirrors the Court's exact language in *Burrage*. Haglund testified that Fry's raising her concerns about the adverse treatment she endured because she took FMLA leave was the "straw that broke the camel's back" in Rand's decision to terminate her. J.A. 306–07. Based upon this evidence alone, the Fourth Circuit's application of but-for causation squarely contradicts this Court's explicit directive on the meaning of but-for cause.

Circuit courts applying this Court's standard of but-for causation have recognized that an occurrence may have multiple but-for causes. In *Perrone v. United States*, 889 F.3d 898 (7th Cir. 2018), the Seventh Circuit cited *Burrage* in recognizing that "strict 'but-for' causation might not be required when 'multiple sufficient causes independently, but concurrently, produce a result.' " *Id.* at 906 (citing *Burrage*, 571 U.S. at 211). The Seventh Circuit explained that contributing factors may all be at play, but it is the one that pushes the result over the edge that is the but-for cause. *Id.* Similarly, the Fifth Circuit in *United States v. Salinas*, 918 F.3d 463 (5th Cir. 2019), noted that but-for causation is distinct from proximate cause and is "not a difficult burden to meet" because events can have "many but-for causes." *Id.* at 466 (citing *Ramos v. Delgado*, 763 F.3d 398 (5th Cir. 2014)). Other circuits have come to a similar

conclusion. *See, e.g.*, *United States v. Feldman*, 936 F.3d 1288, 1311 (11th Cir. 2019) ("The [*Burrage*] Court made clear, though, that but-for causality does not require that a single factor alone produce the particular result."); *United States v. Coll*, 762 F. App'x 56, 59 (2d Cir. 2019) ("[A]n act is the but-for cause . . . when it 'combines with other factors to produce the result, so long as the other factors alone would not have done so.' " (citing *Burrage*, 571 U.S. at 211)); *United States v. Ortiz-Carrasco*, 863 F.3d 1, 5 (1st Cir. 2017) (stating that, in light of *Burrage*, defendant's conduct was but-for cause of another's death even if actions of third party contributed to occurrence).

Despite the general acceptance among the circuit courts of the breadth of but-for causation, the Fourth Circuit below erroneously constricted this standard. In its discussion of but-for causation, the Fourth Circuit did not cite to either *Burrage* or *Bostock* — Supreme Court precedent directly on point. The panel decision failed to acknowledge the *Burrage* Court's guidance when it stated that Fry must show that " 'the employer's reason was false *and* that [retaliation] was *the real reason* for the challenged conduct.' " *Fry v. Rand Constr. Corp.*, 964 F.3d 239, 246 (4th Cir. 2020) (quoting *Foster v. Univ. of Md.-E. Shore*, 787 F.3d 243 (4th Cir. 2015)) (emphasis added). The Fourth Circuit's articulation required that Fry prove that her taking of FMLA leave was the sole cause of her termination rather than merely the "straw that broke the camel's back." Moreover, the panel dismissed a wealth of evidence in Fry's favor, including language by Rand's own COO identical to the causation standard set forth by this Court in *Burrage*. *Id.* at 252 (Motz, J., dissenting). The Fourth Circuit misapplied the but-for causation standard,

squarely conflicting with this Court's guidance in *Burrage*. Therefore, this Court should grant certiorari and correct this error.

b. The Fourth Circuit's ruling also ignored this Court's recent holding in *Bostock v. Clayton County*.

To the extent that there remained any confusion about what a showing of but-for cause requires, this Court's recent decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), left no room for doubt. But-for is not a rigorous, sole-cause standard. Rather, as *Bostock* reinforced, it "can be a sweeping standard" that recognizes that an event may have multiple but-for causes. *Id.* at 1739. In *Bostock*, the Court explained: "[A] but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." *Id.* The Court further articulated that an unlawful employment practice "need not be the sole or primary cause of the employer's adverse action." *Id.* at 1744. A defendant cannot "avoid liability just by citing some *other* factor that contributed to its challenged employment decision." *Id.* at 1739. The employer can "point[] to some other, nonprotected [activity] and insist[] it was the more important factor in the adverse employment outcome." *Id.* at 1744. However, "it has no significance . . . if another factor . . . might also be at work, or even play a more important role in the employer's decision." *Id.* The Court elaborated: "Often, events have multiple but-for causes. So, for example, if a car accident occurred *both* because the defendant ran a red light *and* because the plaintiff failed to signal his turn at the intersection, we might

call each a but-for cause of the collision." *Bostock*, 140 S. Ct. at 1739 (citing *Burrage*, 571 U.S. at 211–12).[7]

Here, it is possible for Fry's termination to have had multiple but-for causes. Rand argued that Rabbitt's dissatisfaction with Fry's performance was the real reason for her termination and claimed that Rand had already planned to terminate Fry when it proposed the sixth-month plan to transition Fry into retirement. J.A. 426. However, prior to Fry's FMLA leave, Rabbitt's alleged dissatisfaction with Fry never resulted in an adverse employment action. J.A. 308.

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[7] This Court has long recognized that but-for causation is a more flexible standard than sole causation. *See, e.g.*, *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n.10 (1976) (clarifying that, in order for Title VII plaintiff to show that his employer's stated reasons for making decision are pretext for discrimination, plaintiff need not show that decision was made "solely on the basis" of his protected trait, and instead "no more is required to be shown than that [the trait] was a 'but for cause' "). In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), Justice Kennedy wrote in dissent that the plurality, while denouncing the but-for causation standard, had actually incorporated it into their mixed-motive standard. *See id.* at 281 (Kennedy, J., dissenting). Justice Kennedy pointed out that but-for causation is the "least rigorous standard that is consistent with the approach to causation" described in Court precedent, *id.* at 282 (Kennedy, J., dissenting), and clarified that "[d]iscrimination need not be the sole cause in order for liability to arise, but merely a necessary element of the set of factors that caused the decision, *i.e.,* a but-for cause." *id.* at 284 (Kennedy, J., dissenting) (citing *McDonald*, 427 U.S. at 282 n.10). This Court would later adopt Justice Kennedy's but-for causation standard for Title VII retaliation claims and for claims brought under the Age Discrimination in Employment Act (ADEA). *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013) (applying standard to Title VII retaliation claims); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) (applying standard to ADEA claims).

In fact, Fry received consistently high marks from supervisors in evaluations and even received her largest bonus from Rabbitt and Rand just before Fry exercised her statutory right to FMLA leave. J.A. 165, 1018-26, 566-67, 568, 1162-68. Fry presented evidence showing that it was only after she returned from her leave and complained about subsequent abusive treatment that Rand chose to terminate her. *See* J.A. 147–48, 306–07, 1067, 1131, 1154–55, 1381–82. These facts, coupled with the disparaging comments Rabbitt made to Fry about her taking leave and Haglund's testimony, satisfies the but-for causation standard set forth by this Court in *Burrage* and *Bostock*. Significantly, the jury found that Fry carried her burden that her protected activities under the FMLA were a but-for cause of her termination. *Fry,* 964 F.3d at 243.

However, in direct contradiction of this Court's established causation standard, both the district court and Fourth Circuit failed to apply the but-for standard articulated in *Burrage* and *Bostock*, instead requiring Fry to show that Rand's retaliation was the sole cause for her termination. The Fourth Circuit's panel majority incorrectly articulated the but-for standard when it stated that "establishing that retaliation was the '*real reason*' [for the challenged conduct] is 'functionally equivalent' to showing that Fry would not have been terminated 'but for her employer's retaliatory animus.' " *Fry*, 964 F.3d at 246 (quoting *Foster v. Univ. of Md.-E. Shore*, 787 F.3d 243, 250 (4th Cir. 2015)) (emphasis added). The panel then expanded on this incorrect articulation: "[I]t is not the courts' place to determine whether Rand's assessment of Fry's performance issues was 'wise, fair, or even correct so long as it truly

was *the reason* for [her] termination.' " *Id.* at 249 (quoting *Laing v. Fed. Express Corp.*, 703 F.3d 713, 722 (4th Cir. 2013)) (emphasis added).

The record is clear that Rabbitt was an explosive, abusive, and vulgar boss. However, the record is also clear that Fry's taking of FMLA leave, and her challenging the abusive treatment she received for doing so, were, in the words of Rand's COO, "the straw that broke the camel's back" in the decision to terminate her. Fry's protected actions were but-for causes of her termination under consistent Supreme Court authority. Indeed, the jury found as much when it returned its verdict. Therefore, this Court should grant certiorari to correct the Fourth Circuit's disregard for established precedent, reverse the decision, and remand for the application of the correct standard.

II. THE COURTS ARE IN DISARRAY OVER WHETHER BUT-FOR CAUSATION OR ANOTHER CAUSATION STANDARD APPLIES IN FMLA RETALIATION CLAIMS AND THE COURT SHOULD RESOLVE THIS ISSUE.

This Court has repeatedly clarified the standards of causation to be applied by the lower courts in deciding civil-rights claims.[8] This has been a valuable use of this Court's time, both because of the lower courts' confusion in articulating the correct

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[8] *See, e.g., Babb v. Wilkie*, 140 S. Ct. 1168, 1173-1174 (2020); *Comcast Corp. v. Nat'l Ass'n of African American-Owned Media*, 140 S. Ct. 1009, 1013-19 (2020); *Nassar*, 570 U.S. at 360; *Gross*, 557 U.S. at 167; *Price Waterhouse*, 490 U.S. at 246.

standard in civil-rights cases and because of the need to apply a consistent national standard in over 16,000 employment FMLA and ADA cases per year.[9] Failing to apply a consistent national standard for FMLA cases depletes the resources of the appellate courts in potentially more than 1,800 cases a year and defeats the strong remedial purposes of the civil-rights laws.[10] Accordingly, the Court should grant certiorari and clarify the correct causation standard to apply in an FMLA retaliation claim, reverse, and remand this case because the Fourth Circuit's misapplied "but-for" in direct violation of Supreme Court Rule 10(c).

Circuit courts across the United States apply different causation standards to FMLA retaliation

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[9] According to the Administrative Office of the U.S. Courts, in the twelve months ending on June 30, 2020, a total of 16,118 new employment cases were filed in the categories of "Civil Rights / Employment," "Civil Rights / ADA-Employment" and "FMLA." *See* Table C-2—U.S. District Courts–Civil Statistical Tables For The Federal Judiciary (June 30, 2020) / U.S. District Courts—Civil Cases Filed, by Jurisdiction and Nature of Suit—During the 12-Month Periods Ending June 30, 2019 and 2020, https://www.uscourts.gov/statistics/table/c-2/statistical-tables-federal-judiciary/2020/06/30 (last visited Dec. 20, 2020).

[10] According to the Administrative Office of the U.S. Courts, in the twelve months ending June 30, 2020, a total of 1,822 new appeals were taken in employment cases, in the categories of "U.S. Plaintiff / Civil Rights / Employment," "U.S. Defendant / Civil Rights / Employment," and "Total Private Appeals / Federal Question / Civil Rights / Employment." *See* Table B-7—U.S. Courts of Appeals Statistical Tables For The Federal Judiciary (June 30, 2020) / U.S. Courts of Appeals—Civil and Criminal Cases Filed, by Circuit and Nature of Suit or Offense—During the 12-Month Period Ending June 30, 2020, https://www.uscourts.gov/statistics/table/b-7/statistical-tables-federal-judiciary/2020/06/30 (last visited Dec. 20, 2020).

claims, producing varied and inconsistent results and negatively affecting both employers and employees, as discussed in Part III, *infra*. To remedy this inconsistency, this Court should interpret the statutory language and articulate the proper causation standard that applies in FMLA retaliation claims,[11] settling the matter so that the appellate and district courts can apply a consistent standard to the matters before them.

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[11] There is a debate among the circuits as to whether FMLA retaliation claims for exercising rights to take FMLA leave arise under either 29 U.S.C. § 2615(a)(1) or 29 U.S.C. § 2615(a)(2). Regardless of that debate, courts uniformly recognize the validity of an FMLA retaliation claim and the debate on which statutory provision the claim arises under does not seem to affect the courts' reasoning on which causation standard applies. *See, e.g.*, *Fry v. Rand Const. Corp*., 964 F.3d 239, 245 (4th Cir. 2020) (recognizing that "it is unclear as a textual matter" under which section of 2615 a retaliation claim arises under, but following circuit precedent, found that retaliation claims arise under § 2615(a)(2) which addresses opposing unlawful practices). *But see Woods v. START,* 864 F.3d 158, 166-67 (2d Cir. 2017) (discussing the confusion of which statutory provision retaliation claims arise under and holding that employers taking "adverse employment action in the face of a lawful exercise of FMLA rights fits comfortably within § 2615(a)(1)'s 'interfere with, restrain, or deny' language."); *accord Hodgens v. Gen. Dynamics Corp.,* 144 F.3d 151, 160 n.4 (1st Cir. 1998) (concluding that 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 'interfer[ence] with' and a 'restrain[t]' of his exercise of those rights").

a. Five Circuits Apply a Motivating or Negative Factor Causation Standard in Reliance on the Department of Labor's Regulation.

Five circuits, relying on the Department of Labor's regulation, apply a motivating or negative factor causation standard to FMLA retaliation claims,[12] deeming that causation standard to be a reasonable interpretation of the FMLA. *See Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 160 (1st Cir. 1998) (reasoning that, in reliance on Department of Labor's regulations, employers are prohibited from "us[ing] the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions");[13] *Woods v. START*, 864 F.3d 158, 169 (2d Cir. 2017) (deferring to "the Labor Department's regulation implementing a 'negative factor' causation standard for FMLA retaliation claims"); *Egan v. Delaware River Auth.*, 851 F.3d 263, 272 (3d Cir. 2017) (reasoning that "under the regulation, an employee who claims retaliation and

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[12] Courts seem to use these terms ("motivating factor" and "negative factor") interchangeably and as synonyms.

[13] The First Circuit, while applying a negative factor causation standard in reliance on the DOL regulation, has questioned its continued viability in an FMLA retaliation suit in light of this Court's decision in *Nassar*, but has not been presented with the opportunity to revisit the issue and determine the impact of that decision on the FMLA retaliation causation standard. *See Chase v. United States Postal Serv.*, 843 F.3d 553, 559 n. 2 (1st Cir. 2016) (noting that "there is some tension in the case law as to the appropriate causation standard to apply in FMLA retaliation cases" but "sav[ing] for another day the question of *Nassar's* impact on FMLA jurisprudence with respect to the required causation standard").

seeks to proceed under a mixed-motive approach must show that his or her use of FMLA leave was 'a negative factor' in the employer's adverse employment action"); *Hunter v. Valley View Local Sch.*, 579 F.3d 688, 692-93 (6th Cir. 2009) (relying on "negative factor" language of Department of Labor's regulation to hold that mixed-motive framework applies to FMLA retaliation claims); *Bachelder v. Am. W. Airlines*, 259 F.3d 1112, 1125 (9th Cir. 2001) (employee "need only prove by a preponderance of the evidence that her taking of FMLA-protected leave constituted a negative factor in the decision to terminate her").

b. Three Circuits Continue to Apply a Motivating Factor Causation Standard to an FMLA Retaliation Claim Without Reliance on the DOL Regulation.

Three circuits have determined that a motivating factor standard is the proper causation standard to be applied to an FMLA retaliation claim by relying on this Court's precedent. *See Richardson v. Monitronics Int'l, Inc.*, 434 F.3d 327, 333 (5th Cir. 2005) (applying "[t]he mixed-motive framework . . . to cases in which the employee concedes that discrimination was not the sole reason for her discharge, but argues that discrimination was a motivating factor in her termination");[14] *Goelzer v.*

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[14] The Fifth Circuit, while applying a motivating factor causation standard, has questioned its continued viability in an FMLA retaliation suit in light of this Court's decisions in *Gross* and *Nassar*, but has not been asked to revisit the issue. *See Ion v. Chevron, USA, Inc.*, 731 F.3d 379, 390 (5th Cir. 2013) ("We emphasize that we need not, and do not, decide whether *Nassar's*

Sheboygan Cty., 604 F.3d 987, 995 (7th Cir. 2010) (finding that plaintiff may "establish an FMLA retaliation claim by showing that the protected conduct was a substantial or motivating factor in the employer's decision");[15] *Smith v. Allen Health Sys.*, 302 F.3d 827, 833 n.6 (8th Cir. 2002) (finding that "causal connection required for a prima facie case is not 'but for' causation, but rather, a showing that an employer's 'retaliatory motive played a part in the adverse employment action' ").[16]

c. The Fourth Circuit Alone Applies But-For Cause as the Proper Causation Standard in an FMLA Retaliation Claim.

The Fourth Circuit is the only appellate court to explicitly apply the "but-for" causation standard to

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analytical approach applies to FMLA-retaliation claims and, if so, whether it requires a plaintiff to prove but-for causation.").

[15] The Seventh Circuit, while applying a motivating factor causation standard, has questioned its continued viability in an FMLA retaliation suit in light of this Court's decisions in *Gross* and *Nassar*. *See Malin v. Hospira, Inc.*, 762 F.3d 552, 562 n.3 (7th Cir. 2014) (questioning whether motivating factor causation standard is properly applied in FMLA retaliation claim, noting that "[a]lthough Title VII retaliation claims formerly were evaluated using this same motivating factor test, the Supreme Court has recently interpreted Title VII's retaliation provision to require proof of but-for causation instead.").

[16] A later Eighth Circuit decision, while affirming the circuit's application of motivating factor as the applicable causation standard to an FMLA retaliation claim, acknowledged the Department of Labor regulation disallowing an employee's use of FMLA leave as a negative factor in an employment action. *See Hite v. Vermeer Mfg. Co.*, 446 F.3d 858, 865 (8th Cir. 2006).

an FMLA retaliation claim — although some circuits, as discussed above, have questioned whether this Court's decisions in *Gross* and *Nassar* have necessitated a shift away from analyzing the claims under a motivating factor standard to the "but-for" standard. *See Fry v. Rand Constr. Corp.,* 964 F.3d 239, 245 (4th Cir. 2020) (citing *Yashenko v. Harrah's NC Casino, LLC,* 446 F.3d 541, 546 (4th Cir. 2006) (reasoning that FMLA retaliation claims are analogous to those brought under Title VII and must be analyzed under *McDonnell Douglas* framework)).

d. Three Circuits Have Left the Questioned Unanswered or Refused to Address the Issue.

Other circuits have left the question of causation standard unanswered or have refused to address it. The Tenth Circuit has not addressed the FMLA retaliation standard in a published opinion, but, similar to the Seventh Circuit, has questioned whether a mixed-motive standard is the correct standard to apply in light of *Gross* and *Nassar*. *See Twigg v. Hawker Beechcraft Corp.,* 659 F.3d 987, 1004 (10th Cir. 2011) (noting that there is "substantial question [as to] whether a mixed motive would apply in a retaliation claim under the FMLA" in light of *Gross* decision). *Contra Egan v. Delaware River Auth.,* 851 F.3d 263, 272 (3d Cir. 2017) (distinguishing statutory language in FMLA from those in ADEA and Title VII to determine that but-for causation does not apply to FMLA retaliation claims).

The Eleventh Circuit appears to have left the question unanswered and refused to address whether a district court erred in applying the but-for standard

of causation to an FMLA retaliation claim because the court determined that the plaintiff failed to prove an adverse employment action. *See Jones v. Allstate Ins. Co.*, 707 F. App'x 641, 646 (11th Cir. 2017). *But see Herren v. La Petite Academy, Inc.*, No. 2:16-cv-01308-LSC, 2019 WL 2161250, at *5 (N.D. Ala. May 17, 2019) (determining that plaintiff bringing FMLA retaliation claim must "show that [her] employer's actions were motivated by an impermissible retaliatory or discriminatory animus") (internal citations removed), *aff'd on other grounds, Herren v. La Petite Academy, Inc.,* 920 F. App'x 900, 904 (11th Cir. 2020).

The United States Court of Appeals for the District of Columbia Circuit has not directly addressed the proper causation standard for FMLA retaliation, yet its district courts consistently require that the plaintiff show that retaliation was the sole cause for their termination. *See Breeden v. Novartis Pharmaceuticals Corp.,* 714 F. Supp. 2d 33, 35-36 (D.D.C. 2010) (holding that FMLA's text of "by reason of" indicate[s] that adverse action must be principal cause — *the* reason — for loss of compensation), *aff'd* 646 F.3d 43 (D.C. Cir. 2011); *see also Coulibaly v. Tillerson,* 273 F. Supp. 3d 16, 40 (D.D.C. 2017) (holding that plaintiff must show that "that retaliation was not just a mere factor among many, but the determinative factor or real and true reason behind the adverse action." (citing *Roseboro v. Billington*, 606 F. Supp. 2d 104, 110 (D.D.C. 2009) (internal quotation marks omitted)).

This case presents the Court with the opportunity to clarify the proper causation standard to be used in FMLA retaliation cases.

III. THIS CASE IS A PERFECT VEHICLE FOR ADDRESSING THESE ISSUES NOW BECAUSE THE COUNTRY IS GRAPPLING WITH THE DEVASTATING IMPACT COVID-19 HAS HAD ON WORKERS AND EMPLOYERS.

As this Court has recognized, the FMLA is a remedial statute. *See Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 734 (2003) ("Congress was justified in enacting the FMLA as remedial legislation."). "[R]emedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). But achieving the FMLA's congressional purpose is difficult if the standard for proving a violation of the statute is unclear. The confusion in the courts over the causation standard, coupled with the importance of the FMLA's protections against retaliation, particularly as our Nation grapples with the devastating impact of COVID-19, begs for the Court to determine the proper causation standard in an FMLA retaliation case.

a. Employees are now more than ever relying on the FMLA to help them and their families deal with the impact of COVID-19.

When employees or their family members experience COVID-19, they need the FMLA to give themselves adequate time to seek or provide proper care or to quarantine. Congress recognized the importance of providing adequate leave during these dire times, as evidenced by the expansion of family and medical leave under the Families First

Coronavirus Response Act. *See* Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178, 189–92 (2020).

One of the FMLA's goals is to "provide[ ] leave for uncommon and often stressful events" involving the health of oneself or their family members. *Scamihorn v. Gen. Truck Drivers*, Local 952, 282 F.3d 1078, 1082 (9th Cir. 2002) (citing *Price v. City of Fort Wayne*, 117 F.3d 1022, 1023 (7th Cir. 1997) (summarizing goals of FMLA)). The onset of a global pandemic in March 2020 affected nearly every person in our nation. The FMLA, with the Families First Coronavirus Response Act, provides employees with the opportunity to deal with the stress of caring for themselves or a loved one if they fall ill to the coronavirus.

b. A consistently applied national standard benefits employers, employees, the enforcement agencies, and the courts by avoiding unnecessary and costly litigation and promoting other important national policies.

A consistently applied causation standard provides benefits to employers, employees, federal agencies charged with enforcement, and the courts with a predictable standard with which to judge an FMLA retaliation charge. In the instant case, the lower courts have struggled with which causation standard to apply to Fry's FMLA claim, and with how to apply it properly. With 1,040 FMLA claims filed with the Department of Labor, Wage and Hour Division in 2019, having to litigate the proper

causation standard in each of these cases would lead to needless expenses for litigants, their attorneys, and for federal enforcement agencies and the courts, because this Court has not yet settled the matter.[17]

Congress intended that this remedial statute be applied consistently across the circuits by setting a minimum standard of employment for the United States' workforce. *See Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 159 n.2 (1st Cir. 1998) (citing S. Rep. No. 3, 103d Cong., 1st Sess. 4 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 6-7) ("The FMLA's legislative history reveals that it is based on the same principle as the child labor laws, the minimum wage, Social Security, the safety and health laws, the pension and welfare benefit laws, and other labor laws that establish minimum standards for employment."). It is well settled that where Congress enacts a federal statute codifying minimum standards and extending protections to employees in the workplace, it intends for those standards to be uniform across the nation. *See, e.g.*, *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 602 (1944) (explaining that, in enacting minimum wage standards under the Fair Labor Standards Act, "Congress intended . . . to achieve a uniform national policy"). Thus, this Court must articulate the proper causation standard to give effect to workers' minimum rights granted by Congress.

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[17] *Family and Medical Leave Act*, U.S. Dept. of Labor, Wage & Hour Div., https://www.dol.gov/agencies/whd/data/charts/fmla (last visited Dec. 20, 2020).

CONCLUSION

For the foregoing reasons, Fry respectfully requests that this Court issue a writ of certiorari to review the judgment of the Fourth Circuit's application of the "but-for" causation standard as set out in *Burrage* and clarified in *Bostock*, reverse the decision of the lower courts, and remand.

Respectfully submitted this 23rd day of December, 2020.

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