No. 20-861

In The
Supreme Court of the United States

ARLENE FRY,

Petitioner,

v.

RAND CONSTRUCTION CORPORATION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the court of appeals properly held that no reasonable jury could conclude that retaliatory animus for taking medical leave was a but-for cause of Petitioner's termination, given the lack of record evidence showing that her employer's proffered nondiscriminatory reason—Petitioner's longstanding, unrebutted, and extensively documented performance problems—was pretextual.

II. Whether, given Petitioner's undisputed reliance on the *McDonnell Douglas* burden-shifting framework to establish her FMLA retaliation claim through circumstantial evidence, this Court should decide whether a "motivating factor" standard of causation could apply to an FMLA retaliation claim litigated outside of that burden-shifting framework.

RULE 29.6 DISCLOSURE

Rand Construction Corporation is a privately held company and has no parent corporation. No public corporation owns 10% or more of Rand Construction Corporation's stock.

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INTRODUCTION

This case presents no question worthy of the Court's review. Petitioner Arlene Fry's first question, which does not allege a circuit split, simply asks this Court to correct a purportedly erroneous application of the causation standard on which both parties agree. And her contradictory second question—whether a *different* legal standard might apply instead—is waived, involves no circuit conflict, and turns on multiple predicate questions that (due to Petitioner's waivers) the lower courts had no occasion to decide.

In actuality, the decision below involves nothing more than a straightforward application of Federal Rule of Civil Procedure 50 to a voluminous trial record. The Fourth Circuit held that, even reviewing that record in the light most favorable to Petitioner, Respondent Rand Construction Corporation's proffered "poor performance" reason for Petitioner's termination—supported not only by extensive, contemporaneous, and uncontradicted documents, but also by Petitioner's own testimony—was neither false nor pretextual. Because FMLA leave-taking played no role in her termination (which was already a foregone conclusion by the time she took leave), both lower courts agreed that the jury's contrary verdict could not stand. This Court should not grant review merely to decide anew whether the trial record supported the jury verdict under the but-for causation standard. Nor should the Court issue an advisory opinion on whether a different causation standard might apply in another case (unlike this one) in which that issue was properly presented—especially where Petitioner never disputes that but-for causation is the proper standard.

For these reasons, and because this case otherwise is a poor vehicle for further review, the Petition should be denied.

STATEMENT

A. Legal Framework

The FMLA provides employees certain rights and protections, including guaranteed leave for serious medical conditions that render employees unable to do their jobs. Pet. App. 10a. To help effectuate those rights, the FMLA prohibits two kinds of conduct: "(1) an employer cannot 'interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter,' [29 U.S.C.] § 2615(a)(1); and (2) an employer cannot 'discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter,' *id.* § 2615(a)(2)." *Id.* The Department of Labor has issued regulations "suggest[ing] that claims for retaliation for taking leave arise under § 2615(a)(1)." Pet. App. 12a; *see* 29 C.F.R. § 825.220(c).

"In both contexts"—*i.e.*, for claims arising under (a)(1) or (a)(2)—"a plaintiff can either (1) produce direct and indirect evidence of retaliatory animus or (2) demonstrate intent by circumstantial evidence *** under the framework established *** in *McDonnell Douglas* [*Corp. v. Green*, 411 U.S. 792 (1973)]." Pet. App. 11a (internal quotation marks omitted). "The *McDonnell Douglas* framework requires the plaintiff first to establish a prima facie case of FMLA retaliation. *** Then, the burden shifts to the defendant to produce a legitimate, nonretaliatory

reason for taking the employment action at issue. Lastly, the plaintiff is given a chance to prove that the employer's explanation was false and a pretext for retaliation." Pet. App. 11a (citations and quotation marks omitted). Thus, to prevail on an FMLA retaliation claim under the *McDonnell Douglas* pretext framework, a plaintiff must ultimately demonstrate "*both* that the [employer's] reason [for terminating the employee] was false, *and* that [retaliation] was the real reason." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993).

Where available, the "mixed-motive" framework offers plaintiffs an alternative scheme to establish discrimination claims. Under that approach, if the plaintiff "present[s] 'direct evidence that an illegitimate criterion was a substantial factor in the [employment] decision,'" then "the burden of persuasion should shift to the employer to show that it would have taken the same action regardless of that impermissible consideration." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 171-172 (2009) (second alteration in original) (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 276 (1989) (O'Connor, J., concurring)).

B. Factual Background

1. Petitioner Arlene Fry served as an administrative assistant to Linda Rabbitt, founder and Chief Executive Officer of Respondent Rand Construction Corporation, for several years. Pet. App. 3a. By 2016, Rabbitt had grown increasingly frustrated and "repeated[ly] concern[ed]" with Fry's frequent performance issues, which included "fail[ing] to inform Rabbitt about a change in the schedule for a

delivery, fail[ing] to check Rabbitt's emails, fail[ing] to coordinate with Rabbitt's driver so that he could pick Rabbitt up, and fail[ing] to complete an assigned task." *Id.* These performance deficiencies were extensively documented, including in contemporaneous emails sent to Fry stating that Rabbitt was "very concerned" that Fry's mistakes had been "building up," to the point of making Rabbitt "hugely embarrassed" and placing Fry's job "in jeopardy." Pet. App. 15a-17a. Those problems "boiled over" in November 2016, when Fry almost caused Rabbitt to miss a meeting with Rand's largest client. Pet. App. 3a. Less than two weeks later, Rabbitt frantically traveled through rush-hour traffic to attend a meeting, only to learn that Fry had failed to communicate that the meeting had been changed to a conference call. *Id.* at 4a.

Even in Fry's own recollection, Rabbit was "furious" about the mounting performance issues. Pet. App. 4a. In early November, Rabbitt sent an email to Rand's Chief Operating Officer stating that Fry was "making too many mistakes" on "critical" tasks and that, if she had made a mistake on a recent assignment—as indeed she had—Rabbit would "need to replace her." *Id.* at 3a. Rabbitt also assessed Fry's performance in a written list that she gave to Rand's Human Resources Director, "and the negatives outnumbered the positives." *Id.* at 4a. After the mistakes continued, Rabbitt "reconfirmed" with the Human Resources Director that Fry's "[e]mployment will be terminated." *Id.* at 4a-5a.

2. Fry viewed and printed Rabbitt's email to the Chief Operating Officer, Pet. App. 3a-4a, recognized

"this is serious" because Rabbitt was directing him to "replace her" for "making too many mistakes," J.A. 442, and understood that (in Fry's own words) Rabbitt had become "chronically unhappy" with her performance, J.A. 511-512.

Shortly thereafter, Fry scheduled an appointment with her doctor to find out if she qualified for disability, based on a multiple sclerosis diagnosis she had received several years earlier. Pet. App. 5a. The doctor responded that "she lacked the necessary 'objective limitation' to be considered disabled," and instead discussed "changing jobs" and "stress management." *Id.* Fry returned to work, informed Rabbitt and Rand's Human Resources Director for the first time about her multiple sclerosis diagnosis, and requested FMLA leave. *Id.*

According to Fry, Rand "[c]ouldn't have been more gracious or concerned," with Rabbitt and other managers telling Fry that they were "sorry to hear" about her diagnosis, that it was "not a problem" for her to schedule the leave whenever best suited her, and that she should take "[w]hatever [she] need[ed]." Pet. App. 18a-19a (alterations in original). Rand and Fry agreed that she would take two weeks of FMLA leave beginning on November 28, 2016. *Id.* at 5a.

3. Unsurprisingly, Fry's leave did not alter the dynamic between Fry and Rabbitt, which Rand's Human Resources Director described as "toxic." Pet. App. 5a. "[C]onfrontations between Fry and Rabbitt about Fry's performance continued" immediately upon her mid-December return. Pet. App. 17a. "For instance, on December 23, 2016, Rabbitt called Fry about an issue with a food delivery, blaming Fry for

the problem." *Id.* In Fry's own judgment, Rabbitt came to believe that Fry "cannot do anything right" and was purposefully erring in the job "to make [Rabbitt] angry." *Id.* By early January 2017, Rand's Chief Operating Officer had sent Fry a formal letter to explain the need for her "departure from the Company" and to propose a "transition plan." Pet App. 6a.

A few weeks after the "transition plan" email, Fry responded by "complain[ing]—for the first time—about 'the discrimination and retaliation' that she had suffered at Rand." Pet. App. 6a. In her email, Fry stated that she "reject[ed] the company's request [to end her employment] because it is retaliation for my protected leave-taking and my revealing to the company my disability and serious health condition." *Id.* (alterations in original).

Rand's Chief Operating Officer rebutted Fry's allegations and stated that her performance "was not satisfactory." Pet. App. 7a. On February 2, 2017—the deadline for Fry to accept Rand's transition proposal—Fry sent an email conceding that Rabbitt "was upset *** for something [Fry] allegedly did incorrectly," but disagreeing with Rand's assessment of her performance. *Id.* As Fry later admitted, her email contained several demonstrably false statements. Pet. App. 42a. Rand officially terminated Fry's employment the following day. Pet. App. 7a.

C. Procedural History

1. Fry sued Rand in August 2017, and proceeded to a four-day trial on two claims under the Americans with Disabilities Act ("ADA") and one claim of

retaliation for taking FMLA leave. Despite the "very substantial issue as to the adequacy of the evidence" Fry introduced, the district court reserved its ruling on Rand's motion for judgment as a matter of law, deciding that the "better course [was] to submit the case to the jury." Pet. App. 8a (alteration in original). The jury returned a divided verdict, finding in Rand's favor on all claims but the FMLA claim. *Id.* Fry was awarded $50,555 in back pay. *Id.*

The district court granted Rand's renewed motion for judgment as a matter of law. "Applying the burden-shifting framework of *McDonnell Douglas* ***, 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[.]'" Pet. App. 8a (quoting Pet. App. 50a-51a). Because Fry "failed to introduce evidence from which a jury could reasonably find that Rand's proffered reason was untrue or a pretext"—particularly given the "uncontradicted evidence that Rabbitt had made the decision to terminate [Fry] *** before Fry requested FMLA leave or disclosed her MS"—the district court set aside the jury's FMLA verdict. *Id.* at 51a. The court also conditionally ordered a new trial "because the weight of the evidence is so heavily in favor of Rand." *Id.* at 53a.

2. On appeal, "both parties agree[d] that the district court properly proceeded" under the *McDonnell Douglas* framework, given that Fry sought to "demonstrate intent by circumstantial evidence." Pet. App. 11a; *see id.* at 13a & n.4. At the pretext stage

of that framework, "establishing that retaliation was the 'real reason' is 'functionally equivalent' to showing that Fry would have not been terminated 'but for her employer's retaliatory animus,'" regardless of "which subsection of § 2615(a) [Fry's] claim arises under." *Id.* at 14a. Accordingly, although "it is unclear as a textual matter which subsection of § 2615—if either—provides the basis for [Fry's] claim," the court found that it "need not resolve" that issue, or the interrelated question of which causation standards may apply when a plaintiff (unlike Fry) does not "rel[y] on the *McDonnell Douglas* framework to establish her claim." *Id.* at 11a, 13a.

After reviewing the trial record, the court of appeals affirmed the district court's judgment. "Extensive evidence showed that Fry failed to meet expectations—both before and after her FMLA leave," whereas "Fry's evidence—taken in the light most favorable to her—was not enough to permit a reasonable jury to conclude that Rand's proffered rationale was false and merely a pretext for FMLA retaliation." Pet. App. 15a, 17a-18a. "If anything," Fry's leave, which Rand "readily approved *** with no indication of hostility," "just delayed the inevitable,'" *i.e.*, "that Rabbitt would terminate Fry's employment because of her performance issues." *Id.* at 18a-19a (citation omitted).

Judge Motz dissented. "Central to [her] disagreement" with the majority was her conclusion that the trial court confused its "role as finder of fact" with "its role in deciding a motion for judgment as a matter of law." Pet App. 24a. Although "the evidence introduced at trial would have *permitted* the jury to

believe" that Rand terminated Fry for poor performance, Judge Motz concluded that "the evidence as a whole is susceptible of more than one reasonable inference." *Id.* at 25a, 28a. The dissent did not otherwise quarrel with the majority's legal framework.

The Fourth Circuit denied Fry's petition for rehearing and rehearing en banc. Pet. App. 63a. No judge requested a poll. *Id.*

REASONS FOR DENYING THE PETITION

Neither question presented warrants this Court's review. Petitioner's first question amounts to a misplaced request for error correction. Although Petitioner contends (incorrectly) that the Fourth Circuit misapplied the well-settled "but for" causation standard, she does not allege any conflict with any circuit's precedents, and she cannot demonstrate any conflict with this Court's decisions. On the contrary, the language she criticizes from the Fourth Circuit's opinion—that she failed to show that retaliatory animus was the "real reason" for her termination—is drawn *verbatim* from this Court's cases applying the *McDonnell Douglas* burden-shifting framework. She expressly agreed with the application of that framework below, given her reliance on circumstantial evidence of animus.

Petitioner's second question is not even presented by this case. The Fourth Circuit expressly found that it "need not resolve" which standard of causation the FMLA permits for retaliation claims, because Petitioner "relies on the *McDonnell Douglas* framework to establish her claim." Petitioner does not even address, let alone dispute, the application of that

framework—and her first question concedes that but-for causation was the proper causation standard. In any event, there is no circuit split: The Fourth Circuit has assumed on multiple occasions that a "negative factor" standard may apply to FMLA retaliation claims outside of the *McDonnell Douglas* framework, while other circuits have applied *McDonnell Douglas* to FMLA retaliation claims in appropriate cases.

Finally, this case offers an exceptionally poor vehicle for further review. Ruling in Petitioner's favor would cast doubt on the applicability of the *McDonnell Douglas* burden-shifting approach she invoked (and that her Petition hardly mentions). Even ignoring her waiver of that dispositive issue, the Court still would have to confront various threshold questions without any guidance from the courts below. And given the well-supported findings that Petitioner introduced no evidence of pretext, resolving the questions presented would have no effect on this case or on FMLA cases more broadly.

I. THIS COURT SHOULD NOT REVIEW THE FOURTH CIRCUIT'S FACT-BOUND APPLICATION OF THE "BUT FOR" CAUSATION STANDARD

A. Petitioner Merely Alleges Misapplication Of Settled Law To An Extensive Record.

There is no conflict among the courts of appeals on the first question presented, and Petitioner does not contend otherwise. On the contrary, Petitioner acknowledges "the general acceptance among the circuit courts" of the standard that governs but-for

causation. Pet. 20. She further acknowledges that "the Fourth Circuit purported to apply a 'but-for' causation standard" to her FMLA retaliation claim. Pet. i.

Her Petition thus boils down to a contention that the "Fourth Circuit misapplied" that settled law to the voluminous trial record in this case because, in her view, "[t]hese facts" (as she presents them) "satisf[y] the but-for causation standard set forth by this Court" to prove retaliation. Pet. 20, 23. But "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10; *see, e.g.*, *City & Cnty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1780 (2015) (J.J. Scalia & Kagan, concurring in part and dissenting in part) ("[W]e are not, and for well over a century have not been, a court of error correction.").

Error correction is all Petitioner seeks. She charges that, in affirming the district court, the Fourth Circuit "dismissed a wealth of evidence in Fry's favor," "ignored many facts favorable to Fry and gave great weight to Rand's disputed evidence." Pet. 14, 20. She further faults the majority with "dr[awing] its own inferences from the disputed facts and f[inding] those favoring Rand to be more credible than the inferences the jury drew on behalf of Fry." Pet. 14. Those criticisms track the dissenting opinion, which also contended that the majority misinterpreted its "role in deciding a motion for judgment as a matter of law." Pet. App. 24a. In other words, neither the majority nor the dissent takes issue with the possibility that an adverse employment action may have more than one

but-for cause, *contra* Pet. 18-24; rather, they diverge only in their evaluation of whether the evidence presented in this case is "susceptible of more than one reasonable inference," so as to create "a jury issue" on but-for causation. Pet. App. 9a, 25a.

Petitioner's criticisms of the lower courts' careful record analyses are misplaced. But even if otherwise, there would be no warrant for this Court to review the trial record itself to decide whether the evidence satisfies the Rule 50 standard. Especially because "[s]orting out the true reasons for an adverse employment decision is often a hard business," *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1744 (2020), this Court should decline to reevalute the "concurrent findings" under Rule 50 "by two courts below," *Exxon Co., USA v. Sofec, Inc.*, 517 U.S. 830, 841 (1996).

B. The Decision Below Fully Accords With This Court's Precedents.

1. In an attempt to contrive a legal issue, Petitioner argues that the Fourth Circuit (and the district court) acted "in direct contradiction of this Court's established causation standard" "when it stated that Fry must show that 'the employer's reason [for her termination] was false *and* that [retaliation] was the *real reason* for the challenged conduct.'" Pet. 20, 23 (second alteration in original) (emphases by Petitioner) (quoting Pet. App. 13a-14a); *see also id.* at 23 (arguing that the "panel majority incorrectly articulated the but-for standard" by equating it with a "real reason" standard).

But the Fourth Circuit drew its standard *verbatim* from this Court's cases regarding what a

plaintiff must show to prevail under the *McDonnell Douglas* framework: "that the [employer's] reason was false, *and* that discrimination was the real reason." *St. Mary's Honor Center*, 509 U.S. at 515 (1993); *see, e.g.*, *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153 (2000) (upholding verdict where jury was properly instructed that plaintiff had to show "discrimination was the real reason" for discharge). Not only did Petitioner indisputably "rel[y] on the *McDonnell Douglas* framework to establish her claim," Pet. App. 13a, but she acknowledges that *Reeves* articulates the proper standard under that framework, *see* Pet. 14-15 n.4, 16 n.5; *see also* Pet. App. 15a & n.6, 19a (majority citing *Reeves*); *id.* at 25a (dissent citing *Reeves*). Her burden to prove that discrimination was the "real reason" is merely a consequence of the burden-shifting framework she invoked.

Petitioner nevertheless attempts to equate the "real reason" standard with a "sole cause" standard. Pet. 23. That characterization is incorrect. At the pretext stage, a plaintiff is not required to prove *sole* causation, but "[c]ausation *in fact*"—*i.e.*, she must "show that the harm would not have occurred in the absence of—that is, but for—the defendant's [alleged unlawful] conduct." *University of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 346-347 (2013) (emphasis added) (internal quotation marks omitted). Far from the "heighted causation standard" Petitioner describes, "the statements 'the real reason for [plaintiff's] termination was her employer's retaliation' and '[plaintiff] would not have been terminated but for her employer's retaliatory animus'

are functionally equivalent." *Foster v. University of Md.-E. Shore*, 787 F.3d 243, 252 (4th Cir. 2015); *see id.* at 254 (explaining that plaintiff must show "that the [employer's] actual reason for firing [plaintiff] was to retaliate against her," "as required by *Reeves* and *Nassar*").

Accordingly, the *McDonnell Douglas* framework contemplates that an adverse employment action "may have multiple but-for causes," Pet. 21, but also facilitates "judgment as a matter of law if the record conclusively reveal[s] some other, nondiscriminatory reason" for the action that is independent of the alleged discrimination or retaliation. *Reeves*, 530 U.S. at 148. By failing to show that the employer's lawful reason for the termination was false and a pretext for retaliation, the plaintiff necessarily fails to present proof that her termination "would not have occurred in the absence of the alleged [retaliation]." *Nassar*, 570 U.S. at 360; *see NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 400 n.5 (1983) (explaining that in a "pretext case," "the issue is whether either illegal or legal motives, but not both, were the 'true' motives behind the decision"). That is what the Fourth Circuit held below: "Fry did not provide sufficient evidence to show Rand's proffered nonretaliatory reason for terminating Fry's employment—poor performance—was false and a pretext for retaliation." Pet. App. 20a-21a. In other words, the record showed Rand "would terminate Fry's employment because of her performance issues," regardless of her FMLA leave-taking. Pet. App. 19a.

2. The Fourth Circuit's holding is also fully consistent with *Burrage v. United States* and *Bostock*

v. Clayton County—neither of which even involved the *McDonnell Douglas* burden-shifting framework. While admitting that *Burrage* is a "criminal case *** most often cited by courts in criminal contexts," Pet. 18 n.6, Petitioner nevertheless casts it as a "precedent directly on point" that she faults the Fourth Circuit for "fail[ing] to acknowledge," Pet. 20. Petitioner relies on *Burrage*'s articulation that an act is a but-for cause if it was the "straw that broke the camel's back." *Id.* (quoting 571 U.S. 204, 211 (2014)). But *Burrage* also cautioned that this "conclusion follows if the predicate act combines with other factors to produce the result, *so long as the other factors alone would not have done so*." 571 U.S. at 211 (emphasis added). *Burrage* thus acknowledges that "it makes little sense to say that an event resulted from or was the outcome of some earlier action if the action merely played a nonessential contributing role in producing the event" or otherwise had a "non-dispositive" effect. *Id.* at 212.[1]

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[1] *Nassar*—which Petitioner notes applies "the same standard" of causation articulated in *Burrage*, *see* Pet. 18 n.6—provides an on-point hypothetical: Retaliation is not a but-for cause when "an employee who knows that he or she is about to be fired for poor performance" attempts "[t]o forestall that lawful action" by exercising a statutory right, so that "when the unrelated employment action comes, the employee could allege that it is retaliation." 570 U.S. at 358. Here, it is undisputed that Petitioner informed Respondent of her medical condition and requested FMLA leave only *after* she viewed her boss's email regarding the need to "replace" her because of repeated performance issues. *See* Pet. 6-7; *see also id.* at 18a ("[P]roceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality." (quoting *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001)).

Bostock—which was decided after oral argument but before the Fourth Circuit's decision below—did not alter that feature of the "traditional and simple but-for causation test." 140 S. Ct. at 1747. Even though events may "have multiple but-for causes," *Bostock* explains that the test for determining whether an alleged cause is in fact a but-for cause "directs us to change one thing at a time and see if the outcome changes." *Id.* at 1739. Thus, sex is a but-for cause of termination when "an employer *** fires a female employee for tardiness or incompetence" but would have tolerated the same traits in a male employee. *Id.* at 1742. Conversely, when an employer's decision to terminate an employee for performance issues is not "bound up with" retaliatory animus, *id.*—*i.e.*, when it is not a pretext for unlawful retaliation under the *McDonnell Douglas* framework—retaliation cannot be a but-for cause of the termination. The decision below is in complete accord.

II. PETITIONER'S SECOND QUESTION IS NOT PRESENTED BY THIS CASE AND DOES NOT INVOLVE A CIRCUIT CONFLICT

A. The Standard Of Causation Applicable To FMLA Retaliation Claims Is Not Presented.

Petitioner's first question presented (regarding *how* to apply the "but for" causation standard) demonstrates that her second question (regarding *whether* the but-for causation standard should apply) is not presented by this case. The tension between those two questions might explain why, despite urging this Court to "clarify the proper causation standard to

be used in FMLA retaliation cases," Pet. 31, Petitioner never actually alleges that but-for causation is the wrong standard.

In fact, the Fourth Circuit held that it "need not resolve th[e] issue" of which standard of causation the FMLA permits for retaliation claims "because Fry relies on the *McDonnell Douglas* framework to establish her claim." Pet. App. 13a; *see id.* at 11a ("[B]oth parties agree that the district court properly proceeded under the [*McDonnell Douglas*] approach," given petitioner's reliance on "circumstantial evidence."). And because, as discussed above, "the *McDonnell Douglas* framework has long demanded proof at the pretext stage that retaliation was a but-for cause," "it does not matter" whether a different standard of causation may be available outside of that framework. *Id.* at 14a.

As this Court explained last term, "*McDonnell Douglas* arose in a context where but-for causation was the undisputed test," and thus "did not address causation standards" that may apply under specific statutory provisions. *Comcast Corp. v. National Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1019 (2020). Because both courts below relied on the *McDonnell Douglas* framework (as Petitioner requested), they had no occasion to "interpret the statutory language and articulate the proper causation standard that applies in FMLA retaliation claims" *outside* that framework, Pet. 26—and this Court has no occasion to do so either. *See Reeves*, 530 U.S. at 142 ("Because the parties do not dispute the issue, we shall assume, *arguendo*, that the *McDonnell Douglas* framework is fully applicable here."). This

Court should decline Petitioner's request to issue an advisory opinion as to what the law should be in cases other than hers.

B. The Circuits Are Not "In Disarray" Over The Causation Standard That Applies To FMLA Retaliation Claims.

1. In any event, there is no circuit conflict. Petitioner contends that "the Fourth Circuit is the *only* appellate court to explicitly apply the 'but-for' causation standard to an FMLA retaliation claim." Pet. 29 (emphasis added); *see id.* (stating Fourth Circuit is "[a]lone"). As explained above, however, the decision below applies the but-for causation standard only "[b]ecause Fry relie[d] on the *McDonnell Douglas* framework and its pretext stage requires but-for causation," Pet. App. 14a—not because but-for causation is always "the proper causation standard in an FMLA retaliation claim," Pet. 29 (capitalization omitted). There is no tension between the decision below and the decisions of circuits "apply[ing] a motivating or negative factor causation standard to FMLA retaliation claims" *outside* the *McDonnell Douglas* framework. Pet. 27.[2]

Proving the point, the Fourth Circuit has assumed on at least four occasions that "employers cannot use the taking of FMLA leave as a *negative*

[2] Although Petitioner's formulation of the second question presented suggests that there may be some difference between a "motivating factor" and "negative factor" standard, *see* Pet. i, Petitioner concedes that courts "use these terms ('motivating factor' and 'negative factor') interchangeably and as synonyms," Pet. 27 n.12.

factor in employment actions." *Hannah P. v. Coats*, 916 F.3d 327, 347 (4th Cir. 2019) (emphasis added) (quoting 29 C.F.R. § 825.220(c)); *see also Adams v. Anne Arundel Cnty. Pub. Schs.*, 789 F.3d 422, 430 (4th Cir. 2015); *Laing v. Federal Express Corp.*, 703 F.3d 713, 717 (4th Cir. 2013); *Perry v. Computer Scis. Corp.*, 429 F. App'x 218, 221 (4th Cir. 2011). In each case, the court nevertheless affirmed judgment for the employer based on the employee's failure, under a *McDonnell Douglas* pretext analysis, to point to "evidence that adequately undermines [the employer's] proffered nonretaliatory reason" for the adverse decision. *Hannah P.*, 916 F.3d at 347-348; *see Adams*, 789 F.3d at 430; *Laing*, 703 F.3d at 717; *Perry*, 429 F. App'x at 221. As the decision below explains, although "the 'negative factor' regulation" may be "relevant" to an FMLA retaliation claim (and applicable at the *prima facie* stage), "any plaintiff relying on burden shifting to establish an FMLA retaliation claim must establish pretext." Pet. App. 14a n.5.

To the extent these Fourth Circuit decisions "produc[e] varied" results relative to other circuit decisions applying a negative factor or motivating factor standard, it is because of the plaintiffs' varied reliance on *McDonnell Douglas*'s burden-shifting framework—not because the circuits "apply different causation standards to FMLA retaliation claims." Pet. 25-26.

2. Despite Petitioner's contention that some circuits apply different causation standards, all but one (addressed below) apply the *McDonnell Douglas* burden-shifting framework to FMLA retaliation claims in the same manner as the decision below.

For example, in *Hodgens v General Dynamics Corp.*, 144 F.3d 151 (1st Cir. 1998), the First Circuit observed that employers may not "use the taking of FMLA leave as a negative factor in employment actions," before asking, under *McDonnell Douglas*, "whether [plaintiff] has produced sufficient evidence for a rational jury to conclude that those reasons were a pretext for discrimination." *Id.* at 160, 169. The court of appeals held that the plaintiff could not establish her FMLA retaliation claim where, as in this case, "a number of [plaintiff's] problems on the job took place long before he took his first medical leave." *Id.* at 169. Similarly, in *Smith v. Allen Health Sys., Inc.*, 302 F.3d 827 (8th Cir. 2002), the Eighth Circuit held that while a plaintiff's *prima facie* case can be met by showing that retaliation was a motivating factor, the plaintiff ultimately "has not carried the burden of showing that [her employer's] proffered reason for her discharge was pretext and the real reason was retaliation for her exercise of Leave Act rights." *Id.* at 836. And the Tenth and D.C. Circuits are in accord. *See Twigg v. Hawker Beechcraft Corp.*, 659 F.3d 987, 998-999 (10th Cir. 2011) (noting that if plaintiff relies on "the *McDonnell Douglas*/indirect framework," she must persuade the factfinder that "the employer's reason is unworthy of belief," and affirming district court finding that she failed to meet burden); *Gleklen v. Democratic Cong. Campaign Comm., Inc.*, 199 F.3d 1365, 1367-1368 (D.C. Cir. 2000) (observing that, plaintiff "cannot prevail" under *McDonnell Douglas* because "she fell far short of rebutting [her employer's] more plausible explanation for its actions").

Even the circuits actually applying the motivating factor causation standard to an FMLA retaliation claim nevertheless recognize that, *had* the plaintiffs (like Petitioner here) relied on the *McDonnell Douglas* framework, each *would have been* required to prove that the employer's proffered reason for her termination was pretextual. *See, e.g.*, *Egan v. Delaware River Port Auth.*, 851 F.3d 263, 268 n.1, 274 (3d Cir. 2017) (although "a mixed-motive instruction is *available* for FMLA retaliation claims," "[a] plaintiff who proceeds to trial under a pretext theory must prove that a protected characteristic or the exercise of a protected right was a *determinative factor* and therefore had a *determinative effect* on the decision such that in the absence of the characteristic or protected conduct, the adverse employment action would not have occurred") (emphases added)); *Richardson v. Monitronics Int'l, Inc.*, 434 F.3d 327, 333 (5th Cir. 2005) (while "[t]he traditional *McDonnell Douglas* framework does not *always* apply in FMLA retaliatory discharge cases," when a plaintiff relies on that framework, she must "show by a preponderance of the evidence that the employer's articulated reason is a pretext for discrimination") (emphasis added).[3]

[3] Indeed, the Third Circuit's model jury instructions—published after *Egan*—make clear that a plaintiff can elect either a "motivating factor" instruction or a pretext/"determinative factor" instruction. *Compare* 3d Cir. Model Civil Jury Instructions § 10.1.2 ("Elements of an FMLA Claim—Discrimination—Mixed-Motive), *with id.* § 10.1.3 ("Elements of an FMLA Claim—Discrimination—Pretext"), *available at* https://www.ca3.uscourts.gov/sites/ca3/files/10_Chap_10_2019_July.pdf (last updated July 2019).

Petitioner's cited cases from the Second, Sixth, and Seventh Circuits simply do not address the *McDonnell Douglas* framework. *See Woods v. START Treatment & Recovery Ctrs., Inc.*, 864 F.3d 158 (2d Cir. 2017); *Hunter v. Valley View Local Schs.*, 579 F.3d 688 (6th Cir. 2009); *Goelzer v. Sheboygan Cnty.*, 604 F.3d 987 (7th Cir. 2010). But other decisions from those circuits *do* apply that burden-shifting framework to FMLA retaliation claims. *See, e.g.*, *Graziadio v. Culinary Inst. of Am.*, 817 F.3d 415, 429 & n.7 (2d Cir. 2016) (applying *McDonnell Douglas* to FMLA retaliation claim where "the district court and both parties assumed its application"); *Skrjanc v. Great Lakes Power Serv. Co.*, 272 F.3d 309, 315 (6th Cir. 2001) ("In an FMLA case relying upon indirect evidence, we will apply the three-step process delineated in *McDonnell Douglas*[.]"); *King v. Preferred Tech. Grp.*, 166 F.3d 887, 892 (7th Cir. 1999) (same).

The only decision to indicate that "there is no room for a *McDonnell Douglas* type of pretext analysis" comes from the Ninth Circuit, which analyzed a claim that an employer unlawfully terminated an employee because of her leave-taking as "one of *interference* with the exercise of FMLA rights ***, not retaliation *or* discrimination." *Bachelder v. America W. Airlines, Inc.*, 259 F.3d 1112, 1124, 1131 (9th Cir. 2001). As the Ninth Circuit explained, however, the FMLA covers interference and retaliation claims under different provisions—namely, subsections 2615(a)(1) and (a)(2). *Id.* at 1124. Because the Ninth Circuit dealt with a claim arising under (a)(1), it found that it "need not consider" "[w]hether

or not the *McDonnell Douglas* anti-discrimination approach is applicable in cases involving" claims (like Petitioner's) arising from (a)(2). *Id.* at 1125 n.11. In any event, Petitioner has waived any challenge to the application of the *McDonnell Douglas* approach here. *See* Pet. App. 13a & n.4.

III. THIS CASE IS A POOR VEHICLE FOR ADDRESSING THE QUESTIONS PRESENTED

A. Petitioner's Waivers Foreclose Review.

Petitioner argues that review is appropriate for both questions presented because "the lower courts have struggled with which causation standard to apply to [Petitioner's] FMLA claim, and with how to apply it properly." Pet. 33. That premise is wrong: The Fourth Circuit repeatedly and expressly noted that it "need not resolve" the causation issue "because [Petitioner] relies on the *McDonnell Douglas* framework to establish her claim," and "does not contend that the district court erred in using the *McDonnell Douglas* framework." Pet. App. 13a & n.4. Although Petitioner barely mentions *McDonnell Douglas*, her argument amounts to an indirect attack on the approach that "both parties agree[d]" was proper below. Pet. App. 11a. That challenge is waived.

In fact, Petitioner does not dispute (and did not dispute below) that she sought to demonstrate Respondent's allegedly retaliatory intent by "circumstantial evidence." Pet. App. 11a. Even if a motivating-factor standard were *available* for FMLA retaliation claims, a plaintiff like Petitioner may only

invoke the mixed-motive framework when she seeks to prove her claim through "the submission of *direct* evidence of retaliatory animus." Pet. App. 49a (emphasis added). That "threshold showing" "requires 'evidence of conduct or statements that both reflect directly the alleged [retaliatory] attitude and that bear directly on the contested employment decision.'" *Kubicko v. Ogden Logistics Servs.*, 181 F.3d 544, 553 (4th Cir. 1999) (quoting *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995)). "If the plaintiff cannot directly establish that retaliation played a motivating part in the employment decision, she may instead rely on the three-part framework established in *McDonnell Douglas*[.]" *Twigg*, 659 F.3d at 998; *see, e.g.*, *Hodgens*, 144 F.3d at 160 (similar).

Here, the reason Petitioner invoked *McDonnell Douglas* was because she could not produce "direct" evidence of retaliation—making her ineligible to request a "mixed-motive" instruction. Given the Court's longstanding "practice [of] declin[ing] to review those issues neither pressed nor passed upon below," *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224 (1990), Petitioner's undisputed reliance on indirect evidence—like her undisputed reliance on the burden-shifting framework more generally—further counsels against this Court's review.

B. The Petition Does Not Address, And The Decision Below Does Not Resolve, Several Predicate And Dispositive Issues.

The Petition's blatant omission of any discussion of the *McDonnell Douglas* framework is compounded by the Petition's failure to address, and the (proper)

refusal by the court below to resolve, several predicate and dispositive questions that this Court would necessarily confront were it to consider whether a "motivating factor" standard is available to FMLA retaliation claims. But it is "not the Court's usual practice to adjudicate either legal or predicate factual questions in the first instance." *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1009 (2017); *see Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (discussing "the 'heavy presumption' against reaching threshold questions not presented in the petition for certiorari"). Even beyond Petitioner's reliance on *McDonnell Douglas*, resolving the questions presented would require the Court to address at least three predicate legal issues that were not addressed or resolved below.

First, this Court would have to determine in the first instance whether and how intervening precedent affects FMLA retaliation claims. In *Nassar*, this Court held that, under the plain text of 42 U.S.C. § 2000e-3(a), "Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action." 570 U.S. at 352. And when enacting the FMLA, Congress made clear that its retaliation provision "is derived from title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-3(a)) and is intended to be construed in the same manner." S. REP. NO. 103-3, at 34 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 36. Thus, as the Petition repeatedly points out, courts have "questioned" the "continued viability [of the motivating-factor standard] in an FMLA retaliation suit in light of this Court's decision in *Nassar*." Pet. 27 n.13; *see* Pet. 28 n.14, 29 n.15, 30.

But in each of those cases, as in this case, the court of appeals was not "presented with the opportunity to *** determine the impact of [*Nassar*] on the FMLA retaliation causation standard." Pet. 27 n.13. This Court should not be the first to do so.

Second, this Court would have to determine whether FMLA retaliation claims arise from 29 U.S.C. §§ 2615(a)(1) (the "interference" provision) or (a)(2) (the "discrimination" provision). The decision below notes that "[s]ection 2615 prohibits two kinds of conduct" under distinctly worded subsections, and "it is unclear as a textual matter which subsection of § 2615—if either—provides the basis for [Petitioner's] claim that she was retaliated against for taking leave." Pet. 10a-11a. The court ultimately determined that "it does not matter which subsection of § 2615(a) the claim arises under" in this case only "because Fry relies on the *McDonnell Douglas* framework." Pet. 11a, 13a-14a. Yet the cases Petitioner relies on make clear that whether retaliation claims arise under (a)(1) or (a)(2) dictates the causation standard outside the *McDonnell Douglas* framework. *See Woods*, 864 F.3d at 168 (motivating factor standard applied because "retaliation claims like [plaintiff's] are *** rooted in § 2615(a)(1)" rather than (a)(2)); *Bachelder*, 259 F.3d at 1124 & n.11 ("negative factor" standard applies because claim "does not fall under *** § 2615(a)(2)," but "is, instead, covered under § 2615(a)(1)"). This Court would thus have to determine which provision of the FMLA gives rise to retaliation claims in the first instance.

Third, this Court would also have to determine the meaning and validity of the Department of Labor

regulation that includes the phrase "negative factor." 29 C.F.R. § 825.220(c). That regulation is critical to the second question Petitioner presents: she claims the agency's interpretation "deepened" the purported "confusion" over the correct causation standard, and that several circuits "rely[]" on it. Pet. i, 27-28. But once again, this issue was not addressed by the court of appeals. Although the Fourth Circuit noted that the "regulation *might* require *** find[ing] that retaliation-for-exercise claims fall under subsection (a)(1)" and are thus subject to the agency's negative-factor interpretation, it found that it "need not resolve this issue here because [Petitioner] relies on" *McDonnell Douglas*. Pet. App. 13a (emphasis added). This Court should not be the first to wade into thorny questions about *Chevron* deference or whether preexisting circuit precedent "displace[d] [the] conflicting agency construction." *See id.* (quoting *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-983 (2005)); *see also Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (This Court is "a court of review, not of first view.").

C. Answering The Questions Presented Would Make No Difference In This Case Or For FMLA Litigation.

Petitioner stresses the "importance of providing adequate leave" under the FMLA. Pet. 32. But no one disputes the significance of FMLA leave. *See* Pet. App. 18a-19a (reciting Petitioner's testimony that Respondent "[c]ouldn't have been more gracious or concerned" and gave her "[w]hatever [she] need[ed]" for her leave) (alterations in original)). Nor are "the FMLA's protections against retaliation" threatened by

courts' current approach to these types of claims. Pet. 32. If anything, it is accepting *Petitioner's* arguments—which would cast doubt on whether the *McDonnell Douglas* framework applies in FMLA retaliation cases—that could threaten FMLA protections. The *McDonnell Douglas* framework has long been a beneficial "tool" for plaintiffs who "rel[y] on indirect proof of discrimination." *Comcast Corp.*, 140 S. Ct. at 1019. The burden-shifting approach, whereby a plaintiff is only required to make out a *prima facie* case before the burden shifts to the defendant, "compensate[s] for the fact that direct evidence of intentional discrimination is hard to come by." *Price Waterhouse*, 490 U.S. at 271 (O'Connor, J., concurring). Holding that the Fourth Circuit should not have applied that accepted framework—notwithstanding Petitioner's undisputed reliance on it—would deprive future plaintiffs of its benefits.

Regardless, Petitioner points to no error that would affect the outcome of this case. To the extent Petitioner only had to show that retaliatory animus "was a 'motivating' or 'substantial' factor in [Respondent's] decision" to terminate her, Respondent still would "escape liability if it could prove that it would have taken the same employment action in the absence of all [retaliatory] animus." *Nassar*, 570 U.S. at 348. That approach is consistent with the cases Petitioner cites for the "motivating factor" standard. *See, e.g., Hunter*, 579 F.3d at 693 ("Because [plaintiff] has presented evidence of improper motive, the burden shifts to [defendant] to prove by a preponderance of the evidence that it would have placed her on involuntary leave regardless of her use

of FMLA leave."); *Richardson*, 434 F.3d at 336 ("Even under the mixed-motive framework that we today hold to be applicable in FMLA retaliation claims, [defendant] has carried its burden of proving that it would have fired [plaintiff] despite any retaliatory motive.").[4]

Here, three of the four judges to review the record agreed that, even viewing all evidence in Petitioner's favor, her FMLA "leave 'just delayed the inevitable,'" as Respondent was going to "terminate Fry's employment because of her performance issues" alone. Pet. App. 19a; *see* Pet. App. 51a ("Fry failed to present evidence sufficient to allow a reasonable juror to essentially ignore Rand's uncontradicted evidence that [Rand] had made the decision to terminate her after the performance issues that occurred in November, 2016—before Fry requested FMLA leave or disclosed her MS[.]"). Because the district court found, and the Fourth Circuit affirmed, that retaliatory animus played *no* role in Petitioner's termination, her claim would fail regardless of what causation standard applied. Thus, even if other cases "beg[] for the Court to determine the proper causation standard in an FMLA retaliation case," Pet. 32, resolution of that question "can await a day when the issue is posed less abstractly," *i.e.*, in a case in which the issue matters, *Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

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[4] Although Congress limited this full affirmative defense with respect to status-based claims under Title VII, that 1991 amendment does not affect retaliation claims under Title VII, or their counterparts under the FMLA. *See Nassar*, 570 U.S. at 353.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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