No. 20-861

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

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTION

Respondent's Opposition to Question I is based on three fundamentally faulty, self-defeating, "Catch-22"[1] premises:

(1) Although a case involving multiple but-for causes will have nondiscriminatory reasons that might not have caused the employee's termination in the absence of her protected status or activity, the employee must still prove that these other causes are false.[2] This premise directly contradicts *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1739-40 (2020).

(2) That an employer with a history of threatening to fire an employee for "poor performance" problems but not doing so prior to protected activity merely has to refer to the earlier unacted-upon threats to justify firing her after protected activity, and has no need to show whether the underlying problems would have caused the termination in the absence of protected activity.[3] This premise directly contradicts *Bostock*, 140 S. Ct. at 1739 ("[Title VII's] adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment

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[1] Joseph Heller, CATCH-22 (1961).

[2] Respondent's Opposition to Certiorari ("Opp.") (i), 3, 8, 12-14, and 20.

[3] Opp. (i), 1-7, 10, 12, and 13-16.

decision. So long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law.") (emphasis provided).

(3) Petitioner's mere reliance on pretext analysis[4] or circumstantial evidence[5] precludes reliance on mixed-motives liability. This premise contradicts *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2451 (2013) (recognizing alternative theories of liability); and *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148, 2154 (2003) (allowing circumstantial evidence to support mixed-motives liability).

Each of these premises has already been rejected by this Court, but their assertion here and the decisions below show that this Court's decisions are not being followed.

ARGUMENT

I. THE SOLE CAUSE STANDARD USED BY THE FOURTH CIRCUIT IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS IN *BOSTOCK* AND *BURRAGE*.

Rand Construction Corporation ("Rand" or Respondent) argues "Petitioner's first question amounts to a misplaced request for error correction." Opp. 9. However, Supreme Court Rule 10(c) provides that this Court will consider granting certiorari when

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[4] Opp. (i), 1, 2, 8-10, 16-18, and 19.

[5] Opp. (i), 9, 17, and 23-24.

"a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. Rule Proc. 10(c). Correcting an improper application of a standard that directly conflicts with this Court's relevant precedent is more than mere error correction. Determining the correct causation standard in FMLA retaliation cases is fundamental to the protections provided by the statute and warrants the granting of certiorari.

The essence of Rand's argument is that, both the way in which the lower courts articulated the but-for standard and the language used by this Court in *Bostock* explaining but-for cause, are irrelevant. *See Bostock*, 140 S. Ct. at 1739-40 (explaining that events may have multiple causes that can each constitute but-for cause). When the Supreme Court repeatedly uses precise language to explain but-for causation, lower courts must rely on that language or this Court's articulation of the standard becomes meaningless.

Both the split Fourth Circuit panel and the District Court required Arlene Fry ("Fry") to demonstrate that her taking FMLA leave, and her subsequent adverse treatment, were the sole or primary reasons for her termination. Throughout its opinion, the Fourth Circuit stressed that Fry must show that retaliation "was the real reason" for her termination. Pet. App. 14a, 15a, 18a, 20a. In Rand's response, it agrees that but-for causation requires Fry to show that unlawful retaliation was "the" reason for her termination. Opp. 12-13.

The standard applied by the Fourth Circuit, and supported by Rand, directly contradicts what this Court has said constitutes but-for cause. In both *Burrage* and *Bostock*, this Court repeated that but-for causation does not require discrimination to be "**the**" but-for cause but rather "**a**" but-for cause. *Bostock*, 140 S. Ct. at 1739, 1744; *see also Burrage v. United States*, 134 S. Ct. 881, 888-89 (2014) (emphasis added). In *Burrage*, relying on this Court's earlier analysis of but-for cause in *Nassar*, this Court explained that proving retaliation under Title VII "'require[s] proof that the desire to retaliate was [a] but for cause of the challenged employment action.'" *Id*. (citing *Univ. of Tx. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2528 (2013)). Significantly, this Court changed the language originally used in *Nassar* from requiring retaliation to be "the" but-for cause to "a" but-for cause. *Id*.

Replacing "the" with "a" is not semantics. This Court used the same language in *Gross* and changed the applicable standard from requiring discrimination to be "the" but-for cause to "a" but-for cause. *Burrage*, 134 S. Ct. at 889 (citing *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2345 (2009)). This Court explained that "'a plaintiff must prove that age was a 'but for' cause of the employer's adverse decision.'" *Id*. (brackets omitted). Additionally, this Court in *Burrage* discussed other cases that held but-for cause only requires that it be "a" but-for cause, not "the" but-for cause. *See id*. at 889.

Despite *Bostock* being decided prior to the Fourth Circuit's decision, notably, the Fourth Circuit failed to cite it. This Court in *Bostock* provided a detailed discussion of what but-for causation means

and how it applies in employment cases — under a but-for standard, the alleged discrimination need only be "a" but-for cause, and does not need to be "the" but-for cause of the termination.

Stating that but-for cause is "a sweeping standard," this Court explained that "[s]o long as plaintiff's [discrimination] was one but-for cause of [the employment] decision, that is enough to trigger the law." *Bostock*, 140 S. Ct. at 1739 (emphasis in original). This Court repeatedly noted: "[a]n employer violates [the law] when it intentionally fires an employee *based in part* on [discrimination]." *Id*. at 1741. (emphasis added). "If the employer intentionally *relies in part* on [the protected activity] when deciding to discharge the employee . . . a statutory violation has occurred." *Id.* (emphasis added).

At the district-court level, the jury found that Fry was discharged because she took FMLA leave and challenged her abusive treatment after she returned from leave. Pet. App. 8a. The district court, however, stripped Fry's jury verdict, and a split panel decision of the Fourth Circuit upheld the district court, reasoning that Fry had not shown that the employer's reasons were false,[6] and that retaliation was "the real"[7] reason for her termination. Pet. App. 13a-14a.

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[6] Petition at 15.

[7] In *Bostock*, this Court reasoned that by adopting a but-for causation standard, Congress did not intend to adopt a sole-cause or even a primary or main-cause standard. Had Congress wanted to adopt that standard, it could have, but it did not. *Bostock*, 140 S. Ct. at 1739-40.

This standard applied by the Fourth Circuit directly conflicts with precedent from this Court.

Respondent, in recognizing that the standard applied by the Fourth Circuit is inconsistent with the standard articulated in *Burrage* and *Bostock*, attempts to distract this Court by arguing that the actual causation standard applied by the Fourth Circuit is irrelevant because the lower court applied the *McDonnell-Douglas* burden-shifting framework. Opp. 9. *McDonnell-Douglas*, however, is only "a tool for assessing claims, typically at summary judgment, when the plaintiff relies on indirect proof of discrimination." *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1019 (2020). *McDonnell-Douglas* is merely a "sensible orderly way to evaluate evidence" in a discrimination case that gives both parties the fair opportunity to make their claims "in light of common experience as it bears on the critical question of discrimination." *Furnco Constr. Corp. v. Waters*, 98 S. Ct. 2943, 2949 (1978). In employment cases, "the ultimate question [is] discrimination *vel non*." *United States Postal Serv. Bd. of Governors v. Aikens*, 103 S. Ct. 1478, 1480 (1983).

Here, Fry does not challenge the process used to weigh the evidence. Rather, Fry challenges the Fourth Circuit's complete disregard of the but-for standard articulated in *Bostock*. When this Court takes time to articulate a causation standard in detail, that standard must be applied by the lower courts. If this Court does not immediately correct the Fourth Circuit's failure to follow this Court's rule as to but-for cause, other courts will hold similarly, *Bostock* will be ignored utterly, and victims of

unlawful retaliation will suffer. This Court should grant the Petition, reverse and remand, with instructions to apply the standard as articulated by the Court in *Burrage* and *Bostock*.[8]

II. THERE IS A CIRCUIT SPLIT OVER WHICH CAUSATION STANDARD APPLIES IN FMLA RETALIATION CLAIMS.

As with the first question, Rand attempts to confuse the issue presented in the second question, again with irrelevant discussion on how *McDonnell-Douglas* may apply in an FMLA retaliation context. However, Fry raises the fundamental question of which causation standard applies in FMLA retaliation claims—not the process for when mixed motive must be raised.[9] Regardless of Rand's attempts, it cannot credibly claim that "there is no circuit split." Opp. 10. District courts and circuit courts continue to apply inconsistent causation

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[8] Rand suggests that even if Fry's taking FMLA leave was the straw that broke the camel's back, this would not necessarily constitute but-for cause. Opp. 15. However, this Court in *Burrage* used that exact language to describe but-for cause. *Burrage*, 134 S. Ct. at 888. Rand makes this argument for obvious reasons, since Rand's own COO, Mr. Haglund, testified that Fry's complaints of retaliation suffered after her leave taking were "the straw[s] that broke the camel's back." Pet. App. 29a.

[9] Other petitions have asked this Court to address underlying issues of the "procedural preconditions for relying on the motivating factor causation standard." Reply to Response in Opposition to Petition for Writ of Certiorari at 9, *Smith v. Vestavia Hills Bd. of Educ.*, 2020 WL 6044637 (2020) (No. 20-58). This is not Fry's petition. Fry simply asks the Court to clarify what the correct causation standard is.

standards to FMLA retaliation claims, putting the issue squarely within this Court's purview.[10]

As demonstrated in the Petition, the circuit courts are in disarray over what the appropriate causation standard is for FMLA retaliation claims. Pet. 24-31. Eight circuit courts, with five of those circuits deferring to Department of Labor ("DOL") regulations, apply a motivating factor standard. *See* Pet. 27-29. By contrast, the Fourth Circuit has applied but-for causation to FMLA retaliation claims. *See Fry v. Rand Constr. Corp.*, 964 F.3d 239, 246 (4th Cir. 2020); *see also* Pet. 29-30. Additionally, three other circuit courts have expressed uncertainty or have not addressed which causation standard should apply.[11]

The Fourth Circuit's decision has only deepened the confusion over what standard courts should be applying. Since this petition was filed, courts continue to apply inconsistent standards. *Compare Dela Cruz v. Brennan*, No. 19-cv-01140-

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[10] The legal community continues to struggle to discern the appropriate standard, recognizing that guidance from this Court is necessary. *See* Miriam F. Clark, *Does Univ. of Texas Southwest Med. Ctr. v. Nassar, 570 U.S. 338 (2013) Apply to FMLA Retaliation Claims?*, VCCU0722 ALI-CLE 619 (July 22, 2020) (emphasizing circuit split and attempting to reconcile this Court's precedent); *see also* Kaitlin Picco, *The Mixed-Motive Mess: Defining and Applying a Mixed-Motive Framework*, 26 A.B.A. J. of Lab. & Emp. 461 (2011) (analyzing "chaotic state of the mixed-motive mess" as it relates to *McDonnell Douglas* framework in employment discrimination cases).

[11] *See Twigg v. Hawker Beechcraft Corp.*, 659 F.3d 987, 1004 (10th Cir. 2011) (there is "substantial question [as to] whether a mixed motive would apply in a retaliation claim under the FMLA"); *see also* Pet. 30-31.

DMR, 2021 WL 23295, at *9 (N.D. Cal. Jan. 4, 2021) (applying negative factor test), *with Desai v. Invesco Group Servs.*, No. CV H-19-2842, 2021 WL 742889, at *6-7 (S.D. Tex. 2021) (acknowledging discrepancies in applications and adopting but-for test).

Rand suggests that resolving the questions presented would not make a difference in FMLA litigation. Opp. 27. This ignores the fact that courts are grappling with the unsettled causation issue and asking for guidance. *See Gourdeau v. City of Newton*, 238 F. Supp. 3d 179, 183 (D. Mass. 2017) (revisiting causation standard after court considered "delay[ing] jury deliberations until [the] [c]ourt decided the issue of the appropriate causation standard" which would have caused "burdensome delays"); *Kirkland v. Southern Co. Servs.*, No. 2:15-cv-1500-WMA, 2016 WL 880200, at *4 (N.D. Ala. March 8, 2016) (noting that within Eleventh Circuit there "is still a toss-up" but that court "[h]ope[d], by the summary judgment deadline, the FMLA 'but-for' issue [would] have been definitively resolved by . . . the Supreme Court.").

This Court has made it clear that the appropriate causation standard in employment laws is a statute specific analysis. Over the past terms the Court has addressed causation in *Gross, Nassar*, *Comcast*, and *Babb*. *See Babb v. Wilkie*, 140 S. Ct. 1168 (2020); *Comcast*, 140 S. Ct. at 1009; *Nassar*, 133 S. Ct. at 2517; *Gross*, 129 S. Ct. at 2343. This Court should continue to provide guidance. Thus, Fry asks this Court to resolve the ambiguity in lower courts and articulate the proper causation standard that applies to FMLA retaliation claims.

III. THIS CASE IS THE RIGHT VEHICLE FOR THE ISSUE AND THE RIGHT TIME TO RESOLVE THE CAUSATION STANDARD QUESTION.

Fry presents an appropriate case to decide what the causation standard is for FMLA retaliation. Rand's unsupported assertion that Fry cannot invoke the mixed-motive framework when using circumstantial evidence, Opp. 23-24, ignores this Court's clear statement in *Desert Palace*, 123 S. Ct. at 2154 ("Title VII's silence with respect to the type of evidence required in mixed-motive cases also suggests that we should not depart from . . . requir[ing] a plaintiff to prove his case 'by a preponderance of the evidence,' using 'direct or circumstantial evidence . . . .'") (citations omitted); *see also Vance*, 133 S. Ct. at 2451.

Contrary to Rand's assertion, the "predicate legal issues" Rand discussed weigh in favor of this Court granting certiorari. *See* Opp. 25. The fundamental issue presented is what the correct standard of causation is. It is entirely appropriate for this Court to decide "whether and how intervening precedent affects FMLA retaliation claims." Opp. 25. Further, because the DOL regulation has exacerbated the confusion over the appropriate causation standard, this Court is in the best position to determine the regulation's applicability to FMLA retaliation claims.

Rand's assertion that "Petitioner points to no error that would affect the outcome of this case[,]" Opp. 28, ignores the jury's finding that Fry met the but-for standard. *See Fry*, 964 F.3d at 243. If the jury

already found that Fry met the but-for standard, then the jury could certainly find that Fry met the motivating factor standard. The Court's answer on both questions presented would directly affect the outcome of this case.

Rand concedes that "no one disputes the significance of FMLA leave." Opp. 27. Likewise, no one should dispute the importance of having a consistent causation standard for FMLA retaliation claims. The U.S. is approaching a major surge in COVID-related litigation. More than 30.5 million persons in the U.S. have been infected with COVID-19.[12] New COVID-related case filings started slowly because, as the Administrative Office of the U.S. Courts recognized: "Many persons who otherwise would have become involved in litigation or other proceedings during this fiscal year likely were unable or unwilling to do so."[13] Apart from one anomaly, civil filings would have gone down 10% in FY 2020. *Id.* However, there was a surge in COVID-related employment-case filings throughout 2020. Lex Machina[14] reported that in the first quarter of 2020, only 2 COVID-related FMLA cases were filed in

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[12] *See* Centers for Disease Control, *Trends in Numbers of COVID-19 Cases and Deaths in the US Reported to CDC by State/Territory*, CDC, https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases (last visited April 5, 2021).

[13] *See Judicial Business 2020*, United States Courts, https://www.uscourts.gov/statistics-reports/judicial-business-2020#covid (last visited April 5, 2021).

[14] *See* Lex Machina Blog, "Recent Impact of the Pandemic on Employment Litigation (Nov-Dec 2020)," https://lexmachina.com/blog/recent-impact-of-the-pandemic-on-employment-litigation-nov-dec-2020/, last visited April 5, 2021. Lex Machina is a publication/division of Lexis-Nexis.

district courts. By the fourth quarter, there were 137 cases filed. Similarly, COVID-related retaliation claims, which are closely interrelated with FMLA and ADA claims, *id*., rose from 9 cases in the first quarter of 2020 to 269 cases in the fourth quarter. *Id*.

It is critical for employees, employers, and courts to have a clear causation standard to analyze these claims. Otherwise, it needlessly consumes the time of Federal courts, practitioners, and their clients at a time when the litigation system is severely stressed.

CONCLUSION

Due to the confusion across and within the circuits, this Court should grant certiorari to resolve whether FMLA retaliation claims are proven under a but-for or a motivating-factor standard. Alternatively, given the importance of the issue presented, the Court should ask for the views of the Solicitor General.

However, should this Court determine this is not the appropriate time to resolve the deepening circuit split, this Court should nonetheless grant certiorari, reverse the lower court's decision, and remand with instructions to apply the but-for standard articulated in both *Burrage* and *Bostock*. Without correcting this error, lower courts will continue to apply what is, essentially, a sole-cause standard, thereby depriving victims of unlawful retaliation the rights provided to them by Congress.

Respectfully submitted,

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