No. 21-672

In the Supreme Court of the United States

STEVEN B. BARGER,
Petitioner,
v.
FIRST DATA CORPORATION,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

A statutory exception to the return-to-work entitlement of the Family and Medical Leave Act ("FMLA") provides that employees are not entitled to "any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave." 29 U.S.C. § 2614(a)(3); *see also, e.g.*, *Sista v. CDC Ixis N. Am., Inc.*, 445 F.3d 161, 174 (2d Cir. 2006); *Yashenko v. Harrah's NC Casino Co.*, 446 F.3d 541, 547 (4th Cir. 2006). The FMLA's implementing regulations similarly provide that an employee is entitled to no greater rights for taking FMLA leave than if they had never taken leave. 29 C.F.R. § 825.216.

At trial, First Data demonstrated that Petitioner Steven Barger's position would have been eliminated in a company-wide reduction-in-force regardless of his taking FMLA leave. The jury returned a complete defense verdict. The United States Court of Appeals for the Second Circuit affirmed in a non-precedential summary order after briefing and oral argument and then denied Barger's petition for panel rehearing and rehearing *en banc*.

The question presented is:

Whether this Court should fundamentally re-write the FMLA to create a strict-liability statute mandating restoration or reinstatement from leave even when an employee's position is eliminated as part of a legitimate company-wide reduction-in-force while they are on FMLA leave?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

First Data Corporation certifies that it is a wholly owned subsidiary of Fiserv, Inc., and that no other publicly held corporation owns more than 10 percent of its stock.

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INTRODUCTION

This case involves the application of non-controversial, well-established legal principles to a set of facts decided by a jury, and affirmed by the Second Circuit's decisions, following briefing and oral argument, to issue an affirming non-precedential summary order and to later deny requests for panel rehearing and rehearing *en banc*.

Disappointed with the jury's findings and the Second Circuit's summary order affirming the judgment, Petitioner Steven Barger invites this Court to re-weigh the evidence and second-guess the jury's well-supported finding that Barger's position was eliminated in a company-wide reduction-in-force ("RIF") irrespective of his status on leave under the FMLA. Barger asserts this case turns on the timing of his submission of a return-to-work note to First Data, and he misleads this Court by suggesting that First Data decided to include Barger in the company-wide RIF only *after* delivery of the note. The record evidence presented to the jury belies that suggestion – the decision to include Barger in the RIF occurred *before* he submitted a return-to-work note.

The jury heard evidence regarding the following key facts:

- First Data implemented a company-wide RIF while Barger was out on medical leave.
- First Data's CEO ordered the RIF because he believed First Data was too management-heavy.

- The RIF targeted 10% of the top 3,000 highest compensated management positions.

- Barger, with a base compensation of $480,000 and bonus potential of $250,000, was the 54th highest paid employee; well within the top 10%.

- Using objective criteria, the Executive Vice President ("EVP") in charge of Barger's business unit decided to eliminate Barger's position in the RIF because his pay was disproportionate to his duties, there was too large of a position gap between Barger and his direct reports, and the group he led did not require a Senior Vice President ("SVP") leader.

- That same EVP had discussed Barger's excessive salary with him ***over a year before the RIF***.

- Neither Barger's status on FMLA leave, nor his submission of a return-to-work note, had any influence on the elimination of his position.

- The decision to include Barger in the 10% of the top 3,000 RIF (along with other executives) was made ***before*** he presented First Data with a return-to-work authorization from his physician.

- The RIF affected 362 of the company's highest paid employees.

The jury trial lasted seven days. The jury heard testimony from 15 witnesses and 96 exhibits were admitted into evidence. After deliberating for half a day, the jury returned a complete defense verdict on Barger's claims.

Setting aside Barger's misguided invitation to second-guess the jury's findings that led to the verdict in First Data's favor, Barger's claims have no legal merit. The FMLA is not a strict liability statute. Yet Barger seeks to disregard the jury verdict and overturn the decision of the Second Circuit by having this Court create a new, unprecedented statutory right by fundamentally transforming the FMLA into a strict-liability statute that mandates an absolute right to reinstatement upon request – in effect, providing employees on leave with a "golden shield" from being laid off, even if everyone else in their department or position is laid off or is part of a company-wide RIF. While this strategy would render many of the facts meaningless (*i.e.*, when the decision was made to include Barger in the RIF), it has no basis in the FMLA or the FMLA's implementing regulations. To the contrary, Barger's legal theory, if accepted, would fundamentally rewrite the statute and regulations, and contradict the rulings of the lower federal courts.

Contrary to the petition's claims, no circuit split exists on the question presented and there is no conflict between the summary order below and this Court's decision in *Ragsdale v. Wolverine World Wide,*

Inc., 535 U.S. 81 (2002). Even if the decision below somehow conflicts with the holdings of other Courts of Appeals or this Court's decision in *Ragsdale* (and it does not), the summary order at issue here carries no precedential value and, as a result, is fundamentally incapable of creating a circuit split.

For these reasons, set forth more fully below, First Data respectfully requests the Court deny Barger's petition.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Family and Medical Leave Act (FMLA)
29 U.S.C. § 2611(2)(A), & (B)
Definitions
(in Relevant Part)

(2) Eligible Employee

(A) In general

The term "eligible employee" means an employee who has been employed—

(i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and

(ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

(B) Exclusions

The term "eligible employee" does not include—

(i) any Federal officer or employee covered under subchapter V of chapter 63 of title 5; or

(ii) any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50.

Family and Medical Leave Act (FMLA)
29 U.S.C. § 2612(a), (e), & (f)
Leave Requirement
(in Relevant Part)

(a) In General

(1) Entitlement to leave

Subject to section 2613 of this title and subsection (d)(3), an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

…

(e) Foreseeable Leave

(1) Requirement of notice

In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

…

(f) Spouses Employed By Same Employer

(1) In General

In any case in which a husband and wife entitled to leave under subsection (a) are

employed by the same employer, the aggregate number of workweeks of leave to which both may be entitled may be limited to 12 workweeks during any 12-month period, if such leave is taken—

(A) under subparagraph (A) or (B) of subsection (a)(1); or

(B) to care for a sick parent under subparagraph (C) of such subsection.

Family and Medical Leave Act (FMLA)
Employment and Benefits Protection
29 U.S.C. § 2614(a) & (b)
(in Relevant Part)

(a) Restoration to Position

(3) Limitations

Nothing in this section shall be construed to entitle any restored employee to—

(A) the accrual of any seniority or employment benefits during any period of leave; or

(B) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

(4) Certification

As a condition of restoration under paragraph (1) for an employee who has taken leave under section 2612(a)(1)(D) of this title, the employer may have a

uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

(5) Construction
Nothing in this subsection shall be construed to prohibit an employer from requiring an employee on leave under section 2612 of this title to report periodically to the employer on the status and intention of the employee to return to work.

(b) Exemption Concerning Certain Highly Compensated Employees

(1) Denial of restoration
An employer may deny restoration under subsection (a) to any eligible employee described in paragraph (2) if—

(A) such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;
(B) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time

the employer determines that such injury would occur; and

(C) in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.

(2) Affected employees

An eligible employee described in paragraph (1) is a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed.

Code of Federal Regulations
29 C.F.R. § 825.214
Employee Right to Reinstatement

General rule. On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. *See also* § 825.106(e) for the obligations of joint employers.

Code of Federal Regulations
29 C.F.R. § 825.216(a)
Limitations on an Employee's Right to Reinstatement

(a) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. For example:

> (1) If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee cease at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise. An employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration. Restoration to a job slated for lay-off when the employee's original position is not would not meet the requirements of an equivalent position.

(2) If a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon restoration. However, if a position on, for example, a night shift has been filled by another employee, the employee is entitled to return to the same shift on which employed before taking FMLA leave.

(3) If an employee was hired for a specific term or only to perform work on a discrete project, the employer has no obligation to restore the employee if the employment term or project is over and the employer would not otherwise have continued to employ the employee. On the other hand, if an employee was hired to perform work on a contract, and after that contract period the contract was awarded to another contractor, the successor contractor may be required to restore the employee if it is a successor employer. *See* § 825.107.

Code of Federal Regulations
29 C.F.R. § 825.220(c)
Protection for Employees Who Request Leave or Otherwise Assert FMLA Rights

(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* § 825.215.

STATEMENT OF THE CASE

I. First Data Hires Barger.

First Data[1] is the wholly-owned subsidiary of a publicly traded financial services company with over 25,000 employees that provides credit and electronic payment technology and solutions. (SA-164, 208.)[2] In June 2014, First Data hired Barger as SVP of Sales Transformation. (SA-91–92, 197.) Barger also led the Sales Training Group, which provided training programs to salespeople on First Data's financial products and services. (SA-167.) He was an at-will employee who could be terminated at any time for any reason. (SA-193; SA-91–92.)

Barger's base salary was $480,000, with up to $250,000 in variable bonus incentive compensation, for a total compensation opportunity of $730,000. (SA-91–92, 132.) First Data based his compensation on what Barger said he previously made as a consultant. (SA-122–25.) Barger's 2014 bonus was $250,000, his 2015 bonus was $174,000, and for 2016, he was paid a $250,000 bonus while on leave. (SA-113, 174, 220–21, 228–29.)

Barger's tenure at First Data was always intended to be short. (SA-25–27, 133–35, 231–32.) After a brief delay, First Data began again working to identify his successor in the fall of 2015. (SA-27, 134.)

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[1] On July 29, 2019, Fiserv, Inc. acquired First Data.

[2] "SA" refers to the Supplemental Appendix that First Data filed in the Second Circuit proceeding.

The successor search was also driven by the significant gap (or spans and layers) between Barger, a SVP, and his direct reports, who were multiple position levels below him. (SA-31, 146, 150–51.) Barger was apprised of these issues and even participated in his successor search. (SA-93-94, 144, 146-47.)

Barger reported to Jeff Hack, who in turn reported to Dan Charron, the EVP in charge of the Global Business Solutions ("GBS") division where Barger worked. (SA-165–66.) Among the reasons to find a successor was because it was difficult to justify paying $730,000 to an employee to lead sales training. (SA-132.) At $730,000, Barger's total compensation opportunity was among the highest of any employee in GBS and was over double the compensation rate competitors would pay for a similar position. (SA-28–30, 131, 168.) Charron informed Barger just how overpaid he was, given his position and responsibilities. (SA-168–70.) In that same conversation, Charron instructed Barger to find more duties to justify his compensation; Barger never did. (*Id.*)

II. Barger Takes Medical Leave Under the FMLA.

In late October 2016, approximately one year *after* his conversation with Charron that his job was in jeopardy, Barger took medical leave under the FMLA while undergoing cancer treatment. (SA-34, 170, 234–35.) His physician completed a Certification of Health Care Provider form, beginning his leave on

October 24, 2016, with an expected return to work date of March 1, 2017. (SA-32–34, 152–54.) Barger's 12 weeks of FMLA leave would expire on January 16, 2017. (SA-34.)

III. First Data Implements a Company-Wide Reduction-in-Force.

In late 2016, First Data's CEO Frank Bisignano believed First Data was too top-heavy, and he wanted management to be closer in position level to the employees they supervised. (SA-210–14.) Consequently, in November 2016, First Data began planning a RIF that focused on the 300 highest compensated managers in the company. (SA-128–29, 135, 148, 195.)

Criteria for determining who to include in the RIF included analysis of redundant roles, roles where groups could be consolidated, and unnecessary layers of management. (SA-171–72, 212–13.) The goal was for managers to have wider responsibility (*i.e.*, more direct reports) while also reducing the hierarchy spans between them (*i.e.*, closer position levels). (SA-212–13.)

From the outset, Barger was considered a candidate for the RIF given his excessive compensation and his existing issues related to succession planning. On November 30, 2016, Barger's name was added to an early RIF spreadsheet. (SA-78–90, 187–90.) Barger's name remained on the RIF list as the company worked toward finalizing the lists. A December 2016 internal report that focused on the operations and restructuring of the Sales Training

Group recommended that Barger's SVP level position should be eliminated. (SA-35, 73, 135–38, 180–85.)

On January 5, 2017, Anthony Marino (EVP, Human Resources) reported to members of the Management Committee that Bisignano had directed the expansion of the RIF to eliminate 10% of the top 3,000 highest compensated positions because the initial RIF projections had not achieved sufficient cost savings. (SA-74–75, 178, 191–92, 95, 210–14.)

On January 9, 2017, Hack, Barger's immediate supervisor, emailed Charron a final list of his direct reports to be included in the RIF. (SA-76, 137–40, 185–87.) Hack's RIF list included Barger. (*Id.*) On January 10, 2017, the day ***after*** the final decision had been made to eliminate his position in the RIF, Barger submitted a note that he would return from leave on January 17, 2017. (SA-95, 129–30.) On January 13, 2017, First Data notified Barger of his inclusion in the RIF. (SA-149.) He was placed on non-working notice and paid his salary through February 28, 2017. (SA-77, 155–56.)

The jury heard ample testimony and saw numerous documents demonstrating that the decision to eliminate Barger's position in the RIF was made before his submission of a return-to-work note on January 10, 2017. Neither Barger's taking of FMLA leave, nor his submission of a return-to-work note, had any impact on the decision to include him in the RIF. (SA-142, 156–58, 175–76, 196, 218.) Significantly, ***Barger admitted at his deposition, and affirmed***

at trial, that he does not believe he was terminated because of his FMLA leave:

> **Question**: Okay. You just said that you don't believe it was because you had cancer is the reason why you were terminated. Do you believe you were terminated because you had taken leave?
>
> **Answer**: No, because the leave was requested by Tony. I didn't want to go on leave.
>
> **The Court**: That's what you said in your deposition. Do you want to change any of that now? You did say that or not?
>
> **The Witness**: No. . . . .
>
> **The Court**: You can tell us now, do you disagree with that, I'll give you a chance to do that.
>
> **The Witness**: What you read is fine.

(SA-225–27.)

Ultimately, the RIF impacted 362 employees. (SA-193–94, 217.) Hack was also included in the RIF. (SA-216.) This RIF improved First Data's financial position and achieved its cost-savings goal by reducing annual compensation and associated benefits by $43 million. (SA-179, 209, 215.)

After Barger's position was eliminated as part of the RIF, the Corporate Training Group was combined with the Sales Training Group, with one person leading the consolidated group. (SA-173, 182–84.) Although Barger's position leading Sales Training had been a full time position, Robin Ording, a Vice President in Human Resources, took over the consolidated group, in addition to all of her other job duties. (SA-141, 180, 198.) At the time of trial in September 2019, a Director level employee (two levels below an SVP) was leading the Sales Training Group, and he was earning less than one-fourth of Barger's compensation. (SA-182–84.) The Sales Training Group had also been reduced from sixty employees during Barger's tenure to just eighteen employees. (*Id.*)

IV. First Data Prevails at Trial.

Barger filed this civil action in the United States District Court for the Eastern District of New York and moved for judgment on the pleadings, and later for summary judgment, arguing the FMLA is a strict-liability statute, and that because First Data admitted Barger's position was eliminated while he was on leave, he was entitled to judgment as a matter of law. The district court denied both motions.

Thereafter, a seven-day jury trial was held, during which the jury heard testimony from 12 live witnesses, with deposition testimony from three additional witnesses read into the record. (SA-121, 126, 145, 159, 162–63, 177, 204–05, 219, 232–33, 236, 238–39.) A total of ninety-six exhibits were admitted into evidence.

At trial, Barger continued arguing his erroneous strict-liability theory that First Data was absolutely required to reinstate Barger because he took FMLA leave. (SA-117-18, 268.) Despite Barger's counsel's repeated attempts to provide the jury with erroneous legal instructions, the district court properly instructed the jury as to the legal standards governing the FMLA, and the applicable exceptions in 29 C.F.R. § 825.216. The district court crafted concise instructions that explained Barger's retaliation and interference claims with verbiage that would not confuse the jury. (SA-260.)

The jury returned a complete defense verdict on all counts and entered judgment in First Data's favor. Barger filed a motion for a new trial, which the district court denied. Barger appealed.

V. The Second Circuit Affirms the Judgment.

Following briefing and oral argument, the Second Circuit issued a non-precedential summary order affirming the judgment and order denying a new trial. (App. 1a-8a.)[3] The Second Circuit rejected Barger's argument that, once he delivered his physician's return-to-work release, First Data had an absolute obligation to restore him to his position. (App. 4a-6a.) The Second Circuit ruled that Barger's argument ignored the plain language of the FMLA, 29 U.S.C. § 2614(a)(3)(B), and the holdings of the Second Circuit and other federal courts. (App. 4a-6a.)

[3] "App." citations refer to the appendix filed with Barger's petition for a writ of certiorari.

In upholding the jury verdict in favor of First Data, the Second Circuit noted that:

> The FMLA provides that restored employees are not entitled to "any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled *had the employee not taken the leave*." 29 U.S.C. § 2614(a)(3)(B) (emphasis added); *see also* 29 C.F.R. § 825.216(a) (providing that "[a]n employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment").

(App. 5a. (emphasis in original).) The Second Circuit also concluded "that a reasonable jury could determine that First Data would have eliminated Barger's position regardless of whether he was on FMLA leave," because, "[a]mong other things, the jury heard testimony that":

> (1) Barger's position was eliminated as part of a company-wide reduction in force ("RIF") that focused on the top 10% of the 3,000 most highly compensated employees in the company; (2) Barger's position was included in the RIF list before he submitted his return-to-work release; and (3) First Data executives expressed concerns within the company about Barger's high salary (more than

> $700,000 per annum) as early as 2015, before he took leave under the FMLA in October 2016.

(App. 6a-7a) (emphasis added.)

The Second Circuit likewise concluded that Barger failed to show reversible error in the district court's jury instructions because the instructions adequately described the relevant standards and First Data's burden of proof. (App. 7a-8a.)

Barger petitioned for panel rehearing, or, in the alternative, for rehearing *en banc*. (App. 9a.) The Second Circuit denied Barger's petition. (*Id.*) Barger now petitions this Court for a writ of certiorari.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CIRCUIT SPLIT BECAUSE THE THIRD, SIXTH, AND SEVENTH CIRCUITS ALL RECOGNIZE THAT THE RIGHT TO REINSTATEMENT FROM FMLA LEAVE IS NOT ABSOLUTE.

The Second Circuit's summary order does not merit this Court's review because, contrary to Barger's assertion, the summary order does not conflict with precedent from the Third, Sixth, and Seventh Circuits. The cases Barger cites do not hold that an employee has an absolute right to be reinstated upon timely delivery of a physician's certificate. Rather, they actually contradict Barger's contention that reinstatement rights are unequivocal. And, in any event, each of these courts has recognized in these cases and in other decisions that an employee's right to reinstatement is not absolute.

A. Barger Misrepresents the Cases From the Third, Sixth, and Seventh Circuits to Create the Illusion of a Circuit Split.

Barger erroneously argues that the Third, Sixth, and Seventh Circuits have held that "upon timely delivery of a physician's certificate, the employer is statutorily required to restore the employee," and then claims that the Second Circuit's non-precedential summary order creates a conflict among the circuits. (Petition at 22.) Barger cites four cases, none of which stand for the proposition he claims.

In *Brumbalough v. Camelot Care Centers, Inc.*, the Sixth Circuit addressed whether an "[employer] was entitled to terminate [an employee] because she did not submit a proper fitness-for-duty certification at the conclusion of her FMLA leave." 427 F.3d 996, 1002 (6th Cir. 2005). The court held that, to be sufficient, a fitness-for-duty certification need only state that the employee can return to work. *Id*. at 1003. *Brumbalough* did not address the FMLA limitation set forth in 29 U.S.C. § 2614(a)(3) at issue here because the employee's position was not eliminated and the employer did not institute a reduction in force.[4]

Similarly, in *James v. Hyatt Regency Chicago*, the Seventh Circuit held that an employer was under no obligation to reinstate an employee from FMLA leave when the employee was unable to perform the essential functions of the job. 707 F.3d 775, 781 (7th Cir. 2013). As with *Brumbalough*, this decision contradicts Barger's argument because it, too, shows that FMLA reinstatement rights are not absolute.

Barger also cites *Harrell v. U.S. Postal Service*, 415 F.3d 700, 713 (7th Cir. 2005) as standing in conflict with the Second Circuit's summary order. Curiously, Barger overlooks that the *Harrell* court

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[4] In *Brumbalough,* the Sixth Circuit recognized that an employee's right to reinstatement is *not* absolute, but for reasons that are not at issue here. "The FMLA also does not require the employer to reinstate an employee after her leave has ceased if the employee is unable to fulfill the essential functions of her job. 29 C.F.R. § 825.214(b)." *Id*. at 1001.

granted rehearing and then vacated the opinion that Barger cites. 415 F.3d 700, 707 (7th Cir. 2005), *reh'g granted and opinion vacated* (Nov. 1, 2005), *opinion modified on reh'g*, 445 F.3d 913 (7th Cir. 2006). The language upon which Barger relies does not appear in the modified opinion. Petition at 23; *Harrell*, 445 F.3d. 913.

In any event, *Harrell* is factually distinguishable, as the employee was not part of a reduction in force and his position was not eliminated. 445 F.3d at 915-18. As a result, *Harrell* did not reach any holding on the question presented here.

The modified *Harrell* opinion also undercuts Barger's position, as it recognizes that an employee on FMLA leave is not entitled to greater rights than s/he otherwise would have if not on leave:

> ***An employee's right to return to work after taking FMLA leave is not unlimited.*** The Act seeks to accomplish its purposes "in a manner that accommodates the legitimate interests of employers." 29 U.S.C. § 2601(b)(3); *see also* 29 C.F.R. § 825.101(b) ("The enactment of the FMLA was predicated on two fundamental concerns—the needs of the American workforce, and the development of high-performance organizations."). An employee is not entitled to "any right, benefit, or position of employment other than any right, benefit, or position to which the employee

> would have been entitled had the employee not taken the leave." 29 U.S.C. § 2614(a)(3)(B); *see also* 29 C.F.R. § 825.216(a) ("An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period."). An employee returning from FMLA leave also is not entitled to restoration if he cannot perform the essential functions of the position or an equivalent position. 29 C.F.R. § 825.214(b).

445 F.3d at 919 (emphases added).

Budhun v. Reading Hospital and Medical Center, 765 F.3d 245 (3d Cir. 2014) is similarly unhelpful to Barger. Unlike Barger, the plaintiff in *Budhun* was not subject to a position elimination or a RIF, so the court never addressed the limitation in Section 2614(a)(3). Moreover, the *Budhun* court never held that an employee on FMLA leave has an unbridled right to return to active employment, regardless of whether the employee's position still exists or not.[5]

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[5] Like the other cases Barger cites, *Budhun* recognized that an employee's right to reinstatement is limited, albeit for reasons not applicable here. *See* 765 F.3d at 254 ("The failure to restore an employee to her position at the conclusion of her leave does not violate the FMLA if the employee remains unable to perform

Lastly, Barger's reliance on this Court's decision in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002) is misplaced. (Petition at 21.) *Ragsdale* invalidated a regulation that had no bearing on the issues Barger presents here. In *Ragsdale*, the Court did not address Section 2614(a)(3), the employee was not subject to a RIF, and the Court did not hold that the right to reinstatement is absolute. 535 U.S. 81.

B. The Third, Sixth, and Seventh Circuits All Have Held That the Right to Reinstatement Is Not Absolute.

All three circuits upon which Barger relies to concoct a purported circuit split have explicitly held that an employee on FMLA leave is not entitled to reinstatement if his or her position is eliminated.

In *O'Donnell v. Passport Health Communications, Inc.*, the Third Circuit confirmed that, while "employees are also entitled to be reinstated to their former or an equivalent position when they return from leave, if an employee is discharged during or at the end of a protected leave for a reason unrelated to the leave, there is no right to reinstatement." 561 F. App'x 212, 217 (3d Cir. 2014) (internal quotations omitted).

Similarly, in *Madry v. Gibraltar National Corporation*, the Sixth Circuit held that an employer

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an 'essential function' of the position.") (citing 29 C.F.R. § 825.216(c)).

"offered a legitimate, nondiscriminatory reason for failing to restore the employment of [the plaintiff], an at-will employee, that indicates that her employment would not have continued even if she had not taken FMLA leave." 526 F. App'x 593, 596 (6th Cir. 2013) (citing *Hoge v. Honda of America Mfg., Inc.*, 384 F.3d 238, 245 (6th Cir. 2004) ("[A]n employer need not restore an employee who would have lost his job or been laid off even if he had not taken FMLA leave.")).

The Seventh Circuit recognized the same limitation in *Goelzer v. Sheboygan County, Wisconsin*:

> ***An employee's right to reinstatement is not absolute.*** The FMLA allows an employer to refuse to restore an employee to the "former position when restoration would confer a 'right, benefit, or position of employment' that the employee would not have been entitled to if the employee had never left the workplace." *Kohls v. Beverly Enters. Wisc., Inc.*, 259 F.3d 799, 805 (7th Cir. 2001) (citing 29 U.S.C. § 2614(a)(3)(B)); *see also* 29 C.F.R. § 825.216(a) ("An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee has been continuously employed during the FMLA leave period."). ***In other words, an employee is not entitled to return to her former position if she would have been fired regardless of whether she took the***

> ***leave.*** *See Breneisen v. Motorola, Inc.*, 512 F.3d 972, 978 (7th Cir. 2008).

604 F.3d 987, 993 (7th Cir. 2010) (emphases added); *Easley v. YMCA of Metro. Milwaukee, Inc.*, 335 F. App'x 626, 632 (7th Cir. 2009) ("[I]f an employee's position is eliminated for reasons unrelated to the leave, she has no right to reinstatement . . . .") (citing *Breneisen v. Motorola, Inc.*, 512 F.3d 972, 977-78 (7th Cir. 2008) ("The FMLA certainly does not give employees an unconditional right to reinstatement.")). Accordingly, there is no circuit split that requires resolution through a decision from this Court.

C. The Second Circuit's Summary Order Is Non-Precedential; As a Result, the Summary Order Is Incapable of Creating a Circuit Split.

Even if the Third, Sixth, and Seventh Circuits *did* absolutely require employers to reinstate an employee from FMLA leave notwithstanding the elimination of the employee's position for reasons unrelated to the taking of leave, which they do not, there still would be no need for this Court to take up the issue because the order that Barger seeks to have overturned was a non-precedential summary order. As the summary order plainly states – in bold, and at the very top of the page – "**RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT.**" (App. 1a) (emphasis in original). In the absence of any precedential effect, the summary order cannot create any split of authority that might

otherwise exist. Even if the summary order was a precedential decision of the Second Circuit, its holding is wholly consistent with the holdings of all the other Courts of Appeals that Barger cites. In either case, this Court's review of the summary order is not warranted.

II. THE SECOND CIRCUIT'S NON-PRECEDENTIAL SUMMARY ORDER IS CONSISTENT WITH CONGRESSIONAL INTENT AND THE TEXT OF THE FMLA.

There is no need for this Court to review the Second Circuit's summary order because the summary order follows the clear intent of Congress in passing the FMLA, as well as the plain, unambiguous text of the statute itself.

A. Congress Did Not Intend for the FMLA to Create a Golden Shield.

The summary order is consistent with the intent of Congress, as the FMLA was never meant to provide employees with a windfall by giving an employee on leave *greater* rights than s/he would otherwise have if not on leave. In drafting and passing Section 2614(a)(3)(b), Congress expressed a desire to limit an employee's rights to those which "the employee would have been entitled had the employee not taken the leave." 29 U.S.C. § 2614(a)(3)(b).

In a House of Representatives Committee Report issued days before the FMLA's enactment, the Committee analyzed Section 104(a)(3)(b), which would

be enacted as 29 U.S.C. § 2614(a)(3)(b). The Committee wrote:

> Section 104(a)(3)(B) states that nothing in section 104(a) should be construed to entitle a restored employee to any right, benefit, or position of employment other than any right, benefit or position to which the employee would have been entitled had the employee not taken leave. **This means, for example, that if, but for being on leave, an employee would have been laid off, the employee's right to reinstatement is whatever it would have been had the employee not been on leave when the layoff occurred.**

H.R. REP. 103-8, 42 (Feb. 2, 1993) (emphasis added). The Second Circuit's ruling in the summary order falls squarely within the scenario outlined in the Committee Report.

Moreover, Congress included several limitations throughout the FMLA demonstrating that it never intended for the statute to create an unbridled entitlement for employees. For example, under Section 2614(a)(4), Congress conditioned reinstatement upon an employer's receipt of a fit-for-duty certification from a health care provider. Likewise, under Section 2614(a)(5), Congress permitted employers to require an employee on FMLA leave to report periodically. Finally, under Section

2614(b), Congress excepted certain highly compensated employees from the right to reinstatement. The limitation at issue in Section 2614(a)(3) is consistent with the other limitations throughout the statute, which show that Congress did not intend the FMLA to serve as a golden shield, protecting employees from any adverse action whatsoever. Barger's argument – not the summary order below – contradicts Congress's intent in passing the FMLA.

B. The Second Circuit's Summary Order Did Not "Create" an Exception to the FMLA.

Barger argues that the Second Circuit improperly "created" a "business justification exception" to the FMLA. (Petition at 31.) This is a red herring. The Second Circuit did not "create" an exception; it applied a limitation that Congress explicitly enacted in Section 2614(a)(3).

Barger cites *United States v. Smith*, 499 U.S. 160, 166-67 (1991) for the proposition that courts and regulators may not create statutory exceptions beyond those specified by Congress. (Petition at 31.) The language Barger purportedly quotes does not appear in *Smith*, but the decision does state, "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, **additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.**" 499 U.S. at 167 (quoting *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616–17 (1980)) (emphasis added).

Here, the Second Circuit did not "impl[y]" an exception; it enforced a limitation that Congress expressly wrote into the statute and that the DOL implemented in a corresponding regulation. But even if the Second Circuit did imply an exception, as Barger incorrectly argues, the exception was consistent with Congress's plainly stated legislative intent of limiting the rights of an employee on FMLA leave to those "which the employee would have been entitled had the employee not taken leave." *See* H.R. REP. 103-8, 42 (Feb. 2, 1993). In short, the Second Circuit's summary order does not run afoul of *Smith*.

C. Barger's Statutory Interpretation Is Flawed.

The FMLA is clear and well-settled: an employee on leave receives no greater rights than if s/he had continuously remained on active employment. Yet, throughout the petition, Barger misapplies the rules of statutory interpretation.

1. Section 2614(a)(3) limits an employee's right to reinstatement.

Section 2614(b) sets forth an exemption whereby an employer may deny reinstatement to certain highly compensated employees. Barger argues that the exemption in Section 2614(b) is the only reinstatement "exception," because "[t]he general maxim of construction is the expression of one exception implies the exclusion of other exceptions." (Petition at 33.) This argument is another red herring.

Section 2614(a)(3) limits the scope of an employee's general rights under Section 2614 (including restoration rights). It is not an "exception" to the restoration entitlement. Congress used the subheading "Limitations" to signify this crucial distinction, which Barger fails to address. In other words, no "exception" is required here, because Barger's right to reinstatement did not cover his situation. An employee whose position is eliminated notwithstanding their FMLA leave does not have a right to reinstatement, so there is no need to carve out an "exception."

Barger further argues that the limitation in Section 2614(a)(3) is invalid because it is not cross-referenced in Section 2614(a)(1), whereas the "highly compensated" exception is referenced in Section 2614(a)(1). (Petition at 34.) Congress had no need to cross-reference Section 2614(a)(3) in Section 2614(a)(1) because it is a general limitation, not an "exception." Moreover, Section 2614(a) plainly says that it applies to the entirety of Section 2614 by stating "[n]othing in this section shall be construed to . . . ." Conversely, Section 2614(b) applies *only* to the restoration rights outlined in Section 2614(a). Because Subsection (a)(3) is broader than Subsection (b), it would not make sense to reference it within Subsection (a)(1).

Finally, Barger incorrectly asserts that he was entitled, at the very least, to be restored to an equivalent position pursuant to Section 2614(a)(1)(B). But again, the Second Circuit properly applied the statute. Under Section 2614(a)(1)(B), an employee on

FMLA leave has a right "to be restored to an equivalent position" upon return from leave. Yet, as discussed, Section 2614(a)(1)(B) is subject to the general limitation in 2614(a)(3), and providing Barger with an equivalent position would have conferred upon him a benefit or position that he would not have been entitled to had he not taken leave. *See* 29 U.S.C. § 2614(a)(3). The jury determined that Barger's position was eliminated for reasons unrelated to his FMLA leave. Therefore, under the plain language of Section 2614(a)(3), Barger was not entitled to reinstatement or any other equivalent position.

2. An employee's right "to be restored" applies only "on return from" FMLA leave.

Barger contends that Subsection (a)(1) and Subsection (a)(3) of 29 U.S.C. § 2614 use conflicting grammatical tenses, such that the limitation in Subsection (a)(3) applies only to employees who have already been restored. He argues that the limitation does not apply to him because he was never restored. (Petition at 34-35.) Barger's reading of the statute, however, "ignores the broad statutory command" that employees are not entitled to FMLA benefits they would not have had if they had not taken leave. *See Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541, 547 (4th Cir. 2006) (rejecting argument that the past tense in Section 2614(a)(3)(B) means it does not apply to employees on leave).

Indeed, Barger's interpretation would yield absurd results. For example, an employer that

eliminates an entire branch of business while an employee of that branch is on leave would be required to retain that employee and restore him or her to a non-existent position when s/he returns to work. *Id.* Such a result would undoubtedly conflict with Congress's stated intent of limiting employees' rights to those they would have if not on leave.

3. Neither the leave entitlement nor the right to reinstatement are absolute.

Barger next argues that, because the statutory clause granting employees the right to take FMLA leave uses "nearly identical" language[6] as the clause providing the right to reinstatement, both provisions should be read similarly, such that both entitlements are absolute. His fundamentally flawed argument presumes an incorrect starting premise; the right to take FMLA leave is *not* absolute (just like the right to reinstatement is not unlimited). Barger admits this by noting that an employee is entitled to leave only if s/he "satisfies the conditions to take FMLA leave, and properly requests leave." (Petition at 37.) For example, an employee seeking FMLA leave must provide 30 days' notice when the need for leave is foreseeable. 29 U.S.C. § 2612(e)(1). Likewise, spouses employed by the same employer are only entitled to an aggregate amount of 12 weeks of leave. *Id.* at § 2612(f)(1). Both sections – the leave entitlement under Section 2612(a)

[6] Barger fails to identify the language that he believes is "nearly identical" in the two sections.

and the reinstatement provision under Section 2614(a) – contain express limitations.

Barger's contention that an employer "cannot cite business reasons" as a basis for denying an FMLA leave request, such that it should not serve as the basis for a denial of reinstatement, incorrectly frames the issue. (Petition at 37-38.) If an employee's position is eliminated, the employee would no longer be employed and therefore also would not be entitled to FMLA leave. 29 U.S.C. § 2611(2) (defining "eligible employee"). A legitimate RIF (like the one the jury found occurred here) trumps a request for leave or reinstatement under the FMLA. Therefore, to the extent that Barger labels a RIF as "business reasons," he is wrong that it cannot serve as the basis for denying an FMLA leave request or a request for reinstatement.

III. THIS COURT'S REVIEW IS NOT WARRANTED BECAUSE THE SECOND CIRCUIT'S NON-PRECEDENTIAL SUMMARY ORDER IS CONSISTENT WITH THE DOL REGULATIONS.

This Court's review also is not warranted because the Second Circuit's non-precedential summary order is consistent with the implementing regulations promulgated by the Department of Labor.

A. The DOL Regulations Do Not Require Reinstatement.

In 29 C.F.R. § 825.214, the DOL provided the "General rule" for reinstatement. Barger claims that

this "General rule" guarantees him reinstatement to an equivalent position as the one he had before his leave because it provides that an employee "is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence." (Petition at 39 (quoting 29 C.F.R. § 825.214).) But Barger's position was not restructured and he was not replaced. The jury concluded that his position was eliminated. Therefore, 29 C.F.R. § 825.214 is inapplicable. And, in any event, Section 825.214 must be read in conjunction with Section 825.216, which expressly limits an employee's rights to those s/he would have if s/he had not gone on FMLA leave (since Congress did not intend for the FMLA to create strict liability requiring employers to reinstate employees on leave no matter the circumstances). The jury concluded that Barger's position would have been eliminated even if he had not been on FMLA leave. Therefore, the jury found that he was not entitled to reinstatement.

B. 29 C.F.R. § 825.220(c) Does Not Apply to Barger's Claim.

Next, Barger asserts that the Second Circuit's summary order ignored the FMLA's anti-retaliation provision, implemented through 29 C.F.R. § 825.220(c). (Petition at 41.) He argues that First Data retaliated against him by considering his "future compensation expense upon return" as a factor in his position elimination. (*Id.*) But the jury found that Barger's inclusion in the RIF was unrelated to his FMLA leave, which is the relevant inquiry. With this

factual issue resolved at trial, there is no retaliation issue to consider for this Court's review.

Moreover, all RIFs consider "future compensation expense." Even though Barger was on FMLA leave, the company still anticipated his return (until he was selected for inclusion in the RIF), so his salary was always on the company's books. The only way the company would not expect to pay his future salary would be if he quit or was unable to return from FMLA leave, in which case he would not have a right to reinstatement in any event. Barger fails to cite any authority supporting his belief that an employee's salary cannot be considered in a RIF; indeed, "future compensation expense," as Barger calls it, is the basis for any RIF. By insisting that his salary could not be considered in a RIF, Barger once again seeks *greater* rights than someone not on FMLA leave, which contradicts the plain language of the FMLA. Barger was not entitled to any rights he would not have had absent the leave. 29 U.S.C. § 2614(a)(3); 29 C.F.R. § 825.216(a).

C. Barger's Burden of Proof Argument Fails Because the Jury Determined That Barger's Position Was Eliminated Before He Submitted a Return-to-Work Note.

Barger contends that the Second Circuit failed to hold First Data to its burden of proof under 29 C.F.R. § 825.216(a) because "[t]he facts of this case" purportedly "do not meet [the regulation's] standard." (Petition at 40.) Not true. The Second Circuit correctly

identified the standard under the regulation – "that '[a]n employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment'" – and then proceeded to apply that standard to the facts found by the jury. (App. 5a. (quoting 29 C.F.R. § 825.216(a)).) In this regard, the Second Circuit concluded that First Data satisfied its burden of proof in light of the jury's findings that Barger's position was slated for elimination before he submitted a return-to-work-note and remained slated for elimination when Barger sought to return. (App. 5a, n.3.)

In a final attempt to advance a claim of error under 29 C.F.R. § 825.216(a), Barger argues in a footnote that First Data violated the regulation by purportedly placing Barger in a position slated for layoff. (Petition at 40, n.13.) The language of the regulation undermines this argument: "Restoration to a job slated for lay-off" violates the regulation *only* "when the employee's original position is not" slated for layoff. (29 C.F.R. § 825.216(a)(1); Petition at 40.) To the extent Barger argues that his placement on paid non-working notice violated the regulation, his argument fails because the jury found that Barger was never reinstated to any position because he was properly included in the 10% of the top 3,000 RIF that eliminated his position. 29 C.F.R. § 825.216(a)(1) is inapplicable to the facts in this case.

In short, the Second Circuit committed no error in performing its analysis and holding First Data to its burden of proof, let alone any error that would

warrant this Court's review of the non-precedential summary order entered below.

CONCLUSION

For each of the foregoing reasons, the Court should deny the petition.

Respectfully submitted,

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