

**In the**  
**Supreme Court of the United States**

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COOPERATIVE EDUCATIONAL SERVICE AGENCY #5,

*Petitioner,*

v.

SARAH SIMON,

*Respondent.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTION PRESENTED

This Court's decision in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 122 S. Ct. 1155, 152 L. Ed. 2d 167 (2002), requires that a Federal Family Medical Leave Act, 29 U.S.C. § 2601, *et. seq.* ("FMLA") claimant must show that she was prejudiced by the FMLA violation, and that without "prejudice", a violation is a "technical violation" that is not actionable. *Ragsdale* established that there are two ways to show "prejudice": proving the existence of harm that can be remedied by an award of monetary damages or that an award of equitable relief can remediate the harm. In this case, however, the Seventh Circuit created a third pathway to establish prejudice, a standard not found in *Ragsdale*, that a plaintiff can show prejudice under the FMLA if a district court "declares" that the FMLA was violated, and the violation results in a subjective loss of status that cannot be remedied by monetary damages or appropriate equitable relief.

The Question Presented is:

1. Does an employee's subjective loss of status that cannot be remedied by monetary damages or appropriate equitable relief constitute prejudice that would make an FMLA violation actionable and not a technical violation?

## **PARTIES TO THE PROCEEDINGS**

### **Petitioner and Defendant-Appellant Below**

- Cooperative Educational Service Agency #5  
A governmental entity created by the State of Wisconsin (“CESA 5”)

### **Respondent and Plaintiff-Appellee Below**

- Sarah Simon (“Simon”)  
A former CESA 5 employee

**RULE 29.6**  
**CORPORATE DISCLOSURE STATEMENT**

Petitioner, Cooperative Educational Service Agency #5, is a public entity created by the State of Wisconsin, and has no corporate ownership.

## **LIST OF PROCEEDINGS**

United States Court of Appeals for the Seventh Circuit  
Nos. 21-2139 & 22-1035

Sarah Simon, *Plaintiff-Appellee*, v. Cooperative  
Educational Service Agency #5, *Defendant-Appellant*

Date of Final Opinion: August 16, 2022

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United States District Court  
Western District of Wisconsin

No. 18-cv-909-wmc

Sarah Simon, *Plaintiff*, v. Cooperative Educational  
Service Agency #5, *Defendant*

Date of Final Opinion: December 17, 2021

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## **DECISIONS BELOW**

The panel opinion of the Court of Appeals is reported in *Simon v. Coop. Educ. Serv. Agency #5*, 46 F.4th 602 (7th Cir. 2022), and reprinted in the Appendix (“App.”) at App.1a-22a. The relevant District Court opinions are not reported but are available at: *Simon v. Coop. Educ. Serv. Agency #5*, No. 18-cv-909-wmc, 2019 U.S. Dist. 223495 (W.D. Wis. Dec. 30, 2019) (summary judgment) and reprinted at App.55a-84a; *Simon v. Coop. Educational Serv. Agency #5*, No. 18-cv-909-wmc, 2021 U.S. Dist. LEXIS 96402 (W.D. Wis. May 21, 2021) (bench trial), and reprinted at App.35a-54a; and *Simon v. Coop. Educ. Servs. Agency No. 5*, No. 18-cv-909-wmc, 2021 U.S. Dist. 241083 (W.D. Wis. Dec. 17, 2021) (attorney’s fees) and reprinted in App.24a-34a.



## **STATEMENT OF JURISDICTION**

The court of appeals issued an opinion on August 16, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).



## **PERTINENT STATUTES**

### **29 U.S.C. § 2615(a)(1)**

The FMLA's prohibited acts provision states in relevant part that: "It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this title [29 USCS §§ 2611 et seq.]."

### **29 U.S.C. § 2614(a)(1)**

The FMLA also provides that: any eligible employee who takes leave . . . shall be entitled, on return from such leave—(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or (B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

### **29 U.S.C. § 2617(a)(1)(A)(i), (ii)**

The FMLA's enforcement provision states in relevant part that an employer who is found to have violated the statute "shall be liable to any eligible employee affected for damages equal to the amount of any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation," plus interest.

**29 U.S.C. § 2617(a)(1)(B)**

A plaintiff may also receive “such equitable relief as may be appropriate, including employment, reinstatement, and promotion.”

**29 U.S.C. § 2617(a)(3)**

Finally, a “court in such an action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney’s fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant.”

The above-stated statutes are reprinted in their entirety in App.85a-96a.



## INTRODUCTION

This case is about whether a technical violation of the FMLA that does not result in the award of any definitive relief to the plaintiff is actionable. Also, this case addresses whether a plaintiff can recover attorney’s fees under the FMLA without receiving definitive relief authorized under the FMLA. This Court held in *Ragsdale* that a violation of the FMLA that does not prejudice the employee is a “technical violation” that is not actionable. The Court identified that “prejudice” means harm remediable by monetary damages or appropriate equitable relief. Various circuit courts of appeal and district courts have followed that interpretation and have dismissed FMLA cases where an employee has suffered no monetary damages and was not awarded equitable relief that remediated the harm. The Seventh Circuit’s decision in the instant case vastly

expands the definition of “prejudice” and creates a third category of “prejudice” that encompasses a subjective, amorphous, circular “harm” that is premised on the mere fact that the FMLA was violated. The Seventh Circuit’s standard breathes life back into almost every technical violation of the FMLA that would otherwise be dismissed under *Ragsdale*.

Simon was injured at work and was placed on leave. When she returned, CESA 5 placed her in a position that carried less risk of re-injury. Despite the fact that Simon’s wages and benefits were not changed, the District Court determined that the new position was not of equivalent status, and that this constituted FMLA interference. Simon admitted that she sustained no monetary damages as a result of this violation, and she failed to show that she was entitled to any injunctive relief to remediate any harm caused by the violation. Nonetheless, the District Court found that placing Simon in a position that was not “equivalent” was “prejudice” to her, and it entered a “declaration” that the FMLA was violated. The District Court held that Simon’s claim was therefore actionable, and she was entitled to an award of attorney’s fees.

The Seventh Circuit agreed that a district court can enter a declaration that the FMLA was violated and that this is sufficient “prejudice” to make the claim actionable even if the employee has not sustained monetary damages and has failed to show that any equitable relief could remedy the harm. App.17a. The Seventh Circuit has effectively created a new standard—a third pathway that allows a plaintiff to establish “prejudice” from a violation of the FMLA by showing that the law was violated, and that the violation caused some sort of subjective loss

of status, even in the absence of monetary damages or equitable relief that could remediate the harm. *Id.* The Seventh Circuit became the first circuit to adopt this pathway. The Seventh Circuit’s reasoning is circular because all “technical violations” involve a violation of the FMLA, and therefore under the Seventh Circuit’s standard, nearly all technical violations have now become actionable.

This is a matter of national importance. Employers nationwide are entitled to and need guidance as to how to respond to situations where they have committed technical violations of the FMLA. If technical violations of the FMLA that do not result in monetary harm and cannot be remedied through an award of equitable relief are now actionable, it opens a whole new level of exposure to employers attempting to administer FMLA leave programs and procedures. Such a view of the law opens up an entirely new source of claims where the plaintiff receives no actual relief, but attorneys receive a windfall of fees that benefit no one other than the attorney. This Court should grant review to resolve a circuit split as to what constitutes prejudice and an actionable claim under the FMLA.

This case is a clean vehicle for the Court to definitively rule on what constitutes “prejudice” and whether a violation becomes actionable under the FMLA simply because a statutory violation occurred. The Court’s guidance on these issues is critical to employers, employees, and courts across the Seventh Circuit and the country.



## STATEMENT OF THE CASE

### I. Factual Background

CESA 5 is a governmental entity based in Portage, Wisconsin, that provides services to thirty-five surrounding public-school districts. In July of 2014, Simon was hired by CESA 5 as an “alternative program lead teacher” at REACH Academy, a school for elementary students with emotional and/or behavioral disabilities.

Simon performed satisfactorily during her first year, and CESA 5 renewed her contract for the 2015-16 school year, and then again for the 2016-17 school year. On October 17, 2016, Simon suffered a concussion during a physical altercation with a student. On October 19, 2016, Simon provided CESA 5 with a formal note from her doctor stating that she was unable to work due to her injury and she was then placed on paid workers’ compensation leave. Simon’s absence due to her work-related injury was excused and she was compensated pursuant to Wisconsin’s Worker’s Compensation Act, Wis. Stat. § 102.01 *et. seq.* Simon never requested FMLA leave and CESA 5 never designated or considered her leave to be FMLA leave.

By October 31, Simon’s doctor permitted her to return to part-time, light duty work and on November 24, she was cleared to return to a full work schedule. CESA 5 determined that returning Simon to her position at REACH would be an “unreasonable risk.” As a result, Simon was assigned as a special education teacher at Rusch Elementary School in the Portage School District, and then later under a split assignment

at Rusch and Woodridge Primary Schools. Her salary and benefits never changed.

No one was hired to replace Simon at REACH Academy after her absence in October 2016. Rather, an existing teacher, Elizabeth Arnold, the lead teacher for a related program, the Columbia Marquette Adolescent Needs School (COMAN), served as lead teacher for both programs. COMAN is located in the same building as REACH and serves middle and high school students with similar emotional and/or behavior disabilities as the students at REACH.

CESA 5 received feedback that with Arnold administering the combined position there was a much smoother workflow for the programs and that student growth was greater. Arnold's success in administering both the REACH and COMAN programs lead CESA 5 to determine that it could combine the REACH/ COMAN position and eliminate the need for one position. Arnold was selected for that position for the Spring semester in 2017. Arnold has continuously served as the lead teacher for both programs since that time.

In February of 2017, Simon was informed that her former position at REACH was being eliminated and would not exist in the 2017-18 school year. In April of 2017, pursuant to Wis. Stat. § 118.22, Simon received a final notice of contract nonrenewal from CESA 5 because her position had been eliminated. The District Court found that Simon's nonrenewal was not retaliatory and did not interfere with her FMLA rights.

Later in 2017, CESA 5 advertised that it had two special education teaching positions available,

but Simon consciously chose to not to apply for them. Instead, she applied for, and was ultimately hired to work full-time for the Portage School District as a special education teacher, where she continued to work through the date of the trial in this case. Her salary and benefits with the Portage School District were comparable or better than what she had received at CESA 5.

## **II. Statutory Background**

The FMLA's stated purpose is:

- (1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;
- (2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;
- (3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;
- (4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment [USCS, Constitution, Amendment 14, § 1] minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical

reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

29 U.S.C. § 2601(b).

In other words, “Congress enacted the FMLA to assist employees in balancing the demands of their jobs with their own medical needs and those of their families.” *Valdivia v. Twp. High Sch. Dist.* 214, 942 F.3d 395, 398 (7th Cir. 2019).

To carry out these goals, the FMLA provides eligible employees certain rights:

The FMLA’s central provision guarantees eligible employees 12 weeks of leave in a 1-year period following certain events: a disabling health problem; a family member’s serious illness; or the arrival of a new son or daughter. 29 U.S.C. § 2612(a)(1). During the mandatory 12 weeks, the employer must maintain the employee’s group health coverage. § 2614(c)(1). Leave must be granted, when ‘medically necessary,’ on an intermittent or part-time basis. § 2612(b)(1). Upon the employee’s timely return, the employer must reinstate the employee to his or her former position or an equivalent. § 2614(a)(1). The Act makes it unlawful for an employer to ‘interfere with, restrain, or deny the exercise of these rights, § 2615(a)(1), and violators are subject to consequential damages and appropriate equitable relief, § 2617(a)(1).

*Ragsdale*, 535 U.S. at 86-87.

### **III. Proceedings Below**

Simon filed her lawsuit against CESA 5 on November 2, 2018. Simon asserted four claims in this case: (1) FMLA interference related to the failure to return her to an equivalent position following her leave; (2) FMLA interference related to not considering her for REACH/COMAN combined lead teacher position or renewing her contract for the 2017-2018 school year; (3) FMLA retaliation related to her post-leave placement; and (4) FMLA retaliation related to not considering her for the combined lead teacher position or renewing her contract for the 2017-2018 school year. App.97a-106a. CESA 5 filed its answer and affirmative defenses on December 10, 2018.

CESA 5 moved for summary judgment on December 18, 2020. After the motion for summary judgment was fully briefed, the District Court granted CESA 5's motion in-part and denied it in-part on May 3, 2021. App.84a. The District Court granted summary judgement as to Simon's FMLA interference claim in which she claimed that not considering her for the REACH/COMAN combined lead teacher position and not renewing her contract for the 2017-2018 school year interfered with her rights under the FMLA. App.68a. The District Court also granted summary judgment as to both of Simon's retaliation claims. App.80a. This ruling was never appealed.

The District Court denied summary judgment as to Simon's FMLA interference claim related to the failure to return her to an equivalent position following her leave. App.66a. More specifically, the District Court concluded that material issues of disputed fact

remained as to whether Simon was returned to an equivalent position following her return to work, as well as what remedy, if any, would be appropriate. App.66a, 83a-84a. The District Court also *sua sponte* ordered further briefing as to whether Simon could be entitled to any equitable relief such as requiring CESA 5 to provide FMLA training. App.84a.

The parties briefed the issue of the propriety of granting equitable relief. The parties consented to a bench trial on the remaining issues in the case, including equivalency, prejudice, and whether equitable remedies were available to Simon. The District Court held a bench trial on March 2, 2020. After the bench trial, the District Court again ordered further briefing on the issue of equitable relief. Briefing was completed on March 9, 2020.

On May 21, 2021, the District Court issued an Opinion and Order finding that Simon’s assignment from December 2016 through June 2017 was not an equivalent position in terms of “status”, but that equitable relief was not appropriate. App.36a. The District Court specifically found that Simon was not entitled to any remedy under the FMLA. *Id.* Despite these two findings, the District Court crafted what it termed a declaratory judgment that CESA 5 “violated the FMLA” and directed Simon to move for an award of attorney’s fees under 29 U.S.C. § 2617(a)(3). *Id.* Specifically, the District Court found:

CESA 5 violated the FMLA by failing to return plaintiff to an equivalent position after her FMLA leave . . . Notwithstanding this finding of liability, however, plaintiff has not shown that there exists a remedy under the FMLA. In particular, having

disclaimed a right to monetary relief, neither of plaintiff's requests for equitable relief are available under the circumstances here.

*Id.* (emphasis added).

The District Court set a briefing schedule for Simon to submit a request for attorney's fees and costs. In stating that Simon could submit a petition for her fees, it appeared that the District Court concluded that she was entitled to fees, leaving only a determination of what fees were reasonable.

Simon filed a motion for attorney's fees on June 20, 2021. CESA 5 filed a Notice of Appeal for this order on June 21, 2021 (Case No. 21-2139). CESA 5 also filed its brief in opposition to the motion for attorney's fees on July 12, 2021.

On December 17, 2021, the District Court issued an Order granting Simon's motion for attorney's fees and costs but reducing the requested amount from \$99,622.71 to \$59,773.62. App.33a. The District Court clarified that it believed that a nominal declaratory judgment, even in the absence of any tangible relief, was a judgment that triggered an award of attorney's fees under the FMLA. App.28a. The District Court held that the entry of its "declaratory judgment" mandates an award of attorney's fees and that the test from Justice O'Connor's concurrence in *Farrar v. Hobby*, 506 U.S. 103, 113 S. Ct. 566, 121 L.Ed.2d 494 (1992), particularly its guidance on receiving only nominal declaratory relief, was inapplicable. *Id.* CESA 5 filed its Notice of Appeal of this Order on December 22, 2021 (Case No. 21-3367). The District Court entered judgment in this case on December 23, 2021.

A panel of the Seventh Circuit affirmed the District Court's declaratory judgment that there was a violation of the FMLA and its holding that a declaratory ruling that does not change the legal relationship of the parties is sufficient to show prejudice and trigger a mandatory attorney's fees award under the FMLA. The Seventh Circuit held that "the FMLA's use of equitable relief encompasses declaratory relief." App.16a. The Seventh Circuit then went on to explain its view that even a technical violation of the FMLA was sufficient to support an award of attorney's fees. Specifically, the Seventh Circuit affirmed that the District Court's finding—"that Simon suffered prejudice because Cooperative 'parked her in a back-water position with materially fewer responsibilities until her contract ran out' and assigned her a new position resembling that of a paraprofessional, which was 'below her professional capacity'"—qualified as prejudice. App.17a. The Seventh Circuit characterized the District Court's finding that the technical violation of not restoring Simon to an equivalent position as "a factual finding that Simon suffered actual harm from Cooperative's FMLA violation," even though Simon suffered no monetary loss and equitable relief would not remediate the alleged harm. App.19a. The Seventh Circuit stated that its ruling was consistent with *Ragsdale* because "[a]n employee that must give up her fulfilling job for one in which she is overqualified suffers a 'real impairment of [her] rights and resulting prejudice,' as required by the FMLA." App.17a. The Seventh Circuit entered a final judgment on August 16, 2022. App.23a.

This petition follows.



## REASONS FOR GRANTING THE PETITION

Review should be granted because the Seventh Circuit created an additional pathway to establish *Ragsdale*'s "prejudice" requirement. The Seventh Circuit's decision is inconsistent with *Ragsdale*'s definition of prejudice and conflicts with other circuits' recognition that under *Ragsdale*, an FMLA claim is only actionable where the employee has incurred monetary damages or been awarded equitable relief that can remediate the harm caused by the violation. The Seventh Circuit has created a new pathway to show "prejudice" that only requires a plaintiff to obtain a declaration that the FMLA has been violated. In effect, the Seventh Circuit's third pathway undermines *Ragsdale*'s holding. Every technical violation of the FMLA involves a violation of the FMLA. To hold that a district court awards "equitable relief" by simply "declaring" that a statutory violation occurred, now means that nearly every technical violation of the FMLA is actionable despite the fact that *Ragsdale* limited claims to those that result in monetary harm or harm that can be remedied by equitable relief.

Not only does the Seventh Circuit's new pathway depart from (and undermines) this Court's established precedent in *Ragsdale*, but it also conflicts with the Fourth and Eleventh Circuits' interpretation that "prejudice" cannot exist where a plaintiff has sustained no monetary damage and is not entitled to injunctive relief that can remediate the harm.

Guidance from this Court is necessary because employers need to be aware of their potential exposure

when faced with technical violation of the FMLA that did not result in any harm that can be remediated. The *Ragsdale* Court’s recognition that technical violations that cannot be remediated are not actionable supports the purpose of the FMLA and prevents litigation that serves as only a windfall for attorneys. This Court needs to clarify that “prejudice” cannot encompass amorphous and subjective impairments of FMLA rights that cannot be remedied by money damages or equitable relief.

This case is a clean vehicle for reviewing this issue: the relevant facts are undisputed, and the legal issues were briefed, argued, and squarely ruled on below. Review by this Court is warranted and compelling.

## **I. THE SEVENTH CIRCUIT’S DECISION UNDERMINES *RAGSDALE*’S DISTINCTION BETWEEN TECHNICAL AND NON-TECHNICAL VIOLATIONS OF THE FMLA.**

When there is a violation of the FMLA but the employee suffers no monetary harm and there is no equitable relief that can remediate the harm, that violation is commonly referred to as a “technical violation” of the FMLA. In every technical violation case there is a violation of law. Thus, here, when the District Court determined that there had been a violation of the FMLA, but that Simon was not entitled to any remedy, it was required to dismiss Simon’s claim regardless of the District Court’s “declaration” that Simon was “prejudiced” by violation. The Seventh Circuit’s holding that a mere declaration that the FMLA was violated coupled with a loss of status (without monetary harm or the ability to remediate the harm through equitable relief), constitutes prejudice sufficient to make the violation

actionable deviates from this Court's established precedent, and in fact disembowels it.

This Court explained in *Ragsdale* that:

To prevail under the cause of action set out in § 2617, an employee must prove, as a threshold matter, that the employer violated § 2615 by interfering with, restraining, or denying his or her exercise of FMLA rights. Even then, § 2617 provides no relief unless the employee has been prejudiced by the violation: The employer is liable only for compensation and benefits lost 'by reason of the violation,' § 2617(a)(1)(A)(i)(I), for other monetary losses sustained 'as a direct result of the violation,' § 2617(a)(1)(A)(i)(II), and for 'appropriate' equitable relief, including employment, reinstatement, and promotion, § 2617(a)(1)(B). The remedy is tailored to the harm suffered. Cf. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 122 S. Ct. 754, 763, 151 L. Ed. 2d 755 (2002) (provisions in Title VII stating that plaintiffs 'may recover' damages and 'appropriate' equitable relief 'refer to the trial judge's discretion in a particular case to order reinstatement and award damages in an amount warranted by the facts of that case').

535 U.S. at 89 (emphasis added).

Courts have labeled an FMLA violation that does not result in monetary damages or an award of equitable relief as a "technical violation" that does not give rise to liability. *See, e.g., Purvis v. Wal-Mart Stores E., LP*, No. 1:17-CV-102-TLS, 2019 U.S. Dist.

LEXIS 50252, at \*8 (N.D. Ind. Mar. 26, 2019) (“In this context, ‘prejudice’ means compensation or benefits lost ‘by reason of the violation,’ other monetary losses sustained ‘as a direct result of the violation,’ and appropriate equitable relief, including employment, reinstatement, and promotion.”); *Sons v. Henry Cty.*, No. 1:05-cv-0516-DFH-TAB, 2007 U.S. Dist. LEXIS 20574, at \*5-6 (S.D. Ind. Mar. 13, 2007) (“[T]o pursue her FMLA claim at trial, Sons must allege something more than just a technical violation of the FMLA. She must come forward with some evidence that she suffered a harm that can be remedied by the statute.”); *Dawson v. Leewood Nursing Home*, 14 F. Supp. 2d 828, 832 (E.D. Va. 1998) (holding that “once it becomes clear that a plaintiff can recover nothing but a symbolic victory in that the defendant violated a statute, the lawsuit should be terminated” and that if Congress intended the FMLA to encompass a symbolic victory it would have included such language); *Lapham v. Vanguard Cellular Sys.*, 102 F. Supp. 2d 266, 270 (M.D. Pa. 2000); *Coleman v. Potomac Elec. Power Co.*, 281 F. Supp. 2d 250, 254 (D.D.C. 2003); *Sarno v. Douglas Elliman-Gibbons & Ives, Inc.*, 17 F. Supp. 2d 271, 275 (S.D.N.Y. 1998).

Although the Seventh Circuit found that Simon suffered “prejudice” (as amorphous as the prejudice was), it ignored that Simon failed to prove that she lost compensation, benefits, or other monetary losses “by reason of the violation,” and she failed to prove that she was entitled to any equitable relief (e.g., the District Court denied her requested injunctive relief of reinstatement or mandatory FMLA training for CESA 5). Those two categories are essential requirements to finding prejudice under *Ragsdale*.

The Seventh Circuit’s decision creates a standard that harm resulting from an FMLA violation can be something intangible (*i.e.*, something other than monetary damages or a loss in employment status that can be remediated by equitable relief). The Seventh Circuit’s holding “that Simon suffered prejudice because Cooperative ‘parked her in a backwater position with materially fewer responsibilities until her contract ran out’ and assigned her a new position resembling that of a paraprofessional, which was ‘below her professional capacity’”, is contrary to the definitions of prejudice required by *Ragsdale* and is circular. The violation of the FMLA—being returned to a position of lesser status—becomes the harm. Under the Seventh Circuit’s holding, the violation of the law itself can be the prejudice. Therefore, in direct contradiction to *Ragsdale*, the Seventh Circuit’s holding creates a standard under which nearly every technical violation of the FMLA is actionable.

The Seventh Circuit’s ruling that “[a]n employee that must give up her fulfilling job for one in which she is overqualified suffers a ‘real impairment of [her] rights and resulting prejudice,’ as required by the FMLA”, *see App.17a*, expands the concept of prejudice, moving way beyond those recognized in *Ragsdale*: monetary losses incurred and appropriate equitable relief that remediates the harm. In this sense, a declaration, like the one in this case, that simply declares a violation but fails to remedy any impairment of rights or otherwise changes the legal relationship of the parties is not a “remedy[] tailored to the harm suffered.” *Ragsdale*, 535 U.S. at 89; *see also Harcourt v. Cincinnati Bell Tel. Co.*, 383 F. Supp. 2d 944, 962 (S.D. Ohio 2005) (“This Court recognizes that under

the FMLA, plaintiffs are not entitled to symbolic victories for technical violations of the Act.”); *Davis v. Federated Retail Holdings*, No. 4:04CV1519-DJS, 2006 U.S. Dist. LEXIS 108858, at \*3 (E.D. Mo. Jan. 18, 2006) (same). A declaration of a violation of the FMLA does not change the parties’ legal relationship and is not a remedy provided for by the FMLA. A mere declaration of a violation does not remedy the fact that Simon temporarily worked in a position she was overqualified for.

This type of subjective, intangible harm (Simon being assigned to a position “below her professional capacity”) cannot be considered prejudice under the FMLA. Failing to be returned to a position of equivalent status is merely a technical violation where no tangible monetary harm flows from the placement and no injunctive relief is appropriate to remedy the harm. The technical violation itself cannot be prejudice.

As explained above, in the context of the FMLA, “prejudice” is a finite concept that refers to tangible monetary damages or harm that can be remedied through equitable relief. The non-tangible harm that the Seventh Circuit identified cannot be remedied under the FMLA and was not remedied in this case. *See Sons*, 2007 U.S. Dist. LEXIS 20574, at \*5 (“Other kinds of damages, including punitive damages, nominal damages, or damages for emotional distress, are not recoverable under the FMLA.”); *Graham v. State Farm Mut. Ins. Co.*, 193 F.3d 1274, 1284 (11th Cir. 1999) (holding that “the FMLA does not allow recovery for mental distress or the loss of job security”). Additionally, the FMLA’s allowance for “such equitable relief as may be appropriate” does not encompass relief for an alleged “damaged reputation.” *Lufkin v.*

*E. Me. Med. Ctr.*, 401 F. Supp. 2d 145, 145-46 (D. Me. 2005). Finally, conclusory claims of lost future promotional opportunities or speculative future economic harm are not prejudice. *See Trupp v. Roche Diagnostics Corp.*, 440 F. Supp. 3d 990, 1003 (S.D. Ind. 2020) (maintaining that plaintiff's hypothetical claim for "lost promotional opportunities and/or lost future earning capacity" is not supported by even a scintilla of specific, concrete facts or evidence and must be disregarded"); *see also Tedesco v. L. Knife & Son, Inc.*, Civil Action No. 06-10213-JLT, 2008 U.S. Dist. LEXIS 133349, at \*8 (D. Mass. Mar. 18, 2008) (dismissing the plaintiff's FMLA claim because "after raising the possibility of equitable relief, Plaintiff theorizes that her stressful work environment may have occasioned economic loss, but fails to specify how or what that loss may be").

A declaration that there has been a violation of the law is insufficient to create "prejudice" and maintain an FMLA claim. Once a court rules that a plaintiff has sustained no monetary damages and that no equitable relief is appropriate, the only permissible result is that the case must be dismissed. *See Trupp*, 440 F. Supp. 3d at 1001 ("Even if a court finds that a violation of the FMLA has occurred, summary judgment should be granted for the employer when the plaintiff cannot show she is entitled to any relief contemplated by the FMLA."); *Arrigo v. Link Stop, Inc.*, No. 12-cv-700-bbc, 2014 U.S. Dist. LEXIS 137101, at \*3-4 (W.D. Wis. Sep. 29, 2014) (holding that a plaintiff "cannot sustain an FMLA claim if she cannot tie the claim to particular relief authorized by the statute.").

In sum, this Court should grant review because the Seventh Circuit's holding creates a new standard

for showing prejudice and makes claims actionable under the FMLA in a way that undermines the specific perimeters laid out in *Ragsdale*.

## **II. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE FOURTH AND ELEVENTH CIRCUITS' INTERPRETATION OF PREJUDICE UNDER THE FMLA.**

The issue raised in this petition is not just the correction of an erroneous application of *Ragsdale*. Rather, the Seventh Circuit has created a new standard that “prejudice” can be shown by subjective discomfort or distress over a violation of the FMLA. This standard will allow an entirely new class of cases within the Seventh Circuit to arise where a plaintiff who has not sustained any type of impairment or harm that can be remediated by the explicit means articulated in the statute can still maintain an actionable claim.

The Seventh Circuit’s new standard that prejudice can be established without proof of tangible harm that can be remedied by monetary damages or equitable relief conflicts with how the Fourth and Eleventh Circuits interpret prejudice under the FMLA. More specifically, under the Fourth and Eleventh Circuits’ precedent, Simon’s case would have been dismissed following the bench trial when it was found that she sustained no monetary damages and that she was not entitled to any injunctive relief. This conflict cannot be allowed to stand.

The Fourth Circuit has applied *Ragsdale* to mean that “prejudice” requires that one has been harmed and the harm is remediable by monetary damages or equitable relief:

An employer who prevents or impedes an employee from exercising his or her FMLA rights is liable to the employee for, as appropriate, damages and equitable relief. 29 U.S.C. §§ 2615(a), 2617(a). To state such a claim, the employee must prove that the employer: (1) interfered with his or her exercise of FMLA rights; and (2) caused prejudice thereby. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89, 122 S. Ct. 1155, 152 L. Ed. 2d 167 (2002). Actionable interference exists where the employer impedes, restrains, or denies the exercise of any rights protected the FMLA. 29 C.F.R. § 825.220(a). Prejudice exists where an employee loses compensation or benefits 'by reason of the violation,' 29 U.S.C. § 2617(a)(1)(A)(i)(I); sustains other monetary losses 'as a direct result of the violation,' § 2617(a)(1)(A)(i)(II); or suffers some loss in employment status remediable through 'appropriate' equitable relief, § 2617 (a)(1)(B).

*Reed v. Buckeye Fire Equip.*, 241 F. App'x 917, 924 (4th Cir. 2007); *see also Anderson v. Discovery Communs.*, 517 F. App'x 190, 198 (4th Cir. 2013) (“Such prejudice can be proven by showing that the employee lost compensation or benefits by reason of the violation; sustains other monetary losses as a direct result of the violation; or suffers some loss in employment status remediable through appropriate equitable relief, such as employment, reinstatement, or promotion.”) (internal citations omitted).

The Fourth Circuit’s precedent is explicitly clear, and contrary to the Seventh Circuit’s standard, that

to maintain an actionable claim, an FMLA claimant must show that there was a violation of law and that they have suffered prejudice that can be remedied through monetary damages or through equitable relief.

The Eleventh Circuit's precedent aligns with the Fourth Circuit's. It has held that in order to suffer prejudice one must prove that they lost compensation, benefits, or other monetary losses, or suffered a loss in employment status that is remediable through equitable relief. For example, the Eleventh Circuit has held:

The FMLA's '§ 2617 provides no relief unless the employee has been prejudiced by the violation' in some way. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89, 122 S. Ct. 1155, 152 L. Ed. 2d 167 (2002). The district court did not hold that Demers had to prove monetary damages, but rather that she had to prove some damages. Adams Homes violated the FMLA by denying her leave, but Demers cannot articulate any harm suffered from this denial. Plaintiffs may not recover for 'technical infractions under the FMLA . . . in the absence of damages.' *Graham v. State Farm Mut. Ins. Co.*, 193 F.3d 1274, 1284 (11th Cir. 1999). The judgment was appropriate.

The district court had discretion to deny equitable relief. Under the applicable language of the FMLA, '[a]ny employer who violates section 2615 of this title *shall* be liable to any eligible employee affected for such equitable relief as *may* be appropriate.' 29 U.S.C. § 2617(a)(1)(B) (emphasis added).

Demers argues that the ‘shall’ indicates that equitable relief was not discretionary. However, the ‘may’ clause indicates the contrary; equitable relief may or may not be appropriate. As the Supreme Court has explained, ‘[t]he remedy is tailored to the harm suffered.’ *Ragsdale*, 535 U.S. at 89. The question of appropriateness is left to the trial court’s discretion.

*Demers v. Adams Homes of Nw. Fla., Inc.*, 321 F. App’x 847, 849 (11th Cir. 2009) (emphasis added).

The Eleventh Circuit further elaborated that in the absence of actual monetary losses, a plaintiff can only show prejudice by proving that he or she suffered a harm that can be fixed by equitable relief:

The magistrate judge appears to have based his conclusion that, absent damages for unpaid salary, Evans could not state an FMLA claim given this Court’s unpublished decision in *Demers*. But *Demers* does not hold that an FMLA plaintiff must demonstrate that she is entitled to traditional damages (as opposed to equitable relief) to survive summary judgment. Such a requirement would render meaningless the plain language of the FMLA, which makes clear that equitable relief may be available, separate and apart from legal damages. 29 U.S.C. § 2617(a)(1)(B). In *Demers*, we held (only) that the plaintiff failed ‘to articulate any harm suffered’ from the denial of his FMLA rights, *Demers*, 321 F. App’x at 849, relying upon the Supreme Court’s language in *Ragsdale*, that an FMLA plaintiff must

show that she ‘has been prejudiced by the violation in some way.’ *Ragsdale*, 535 U.S. at 89. The Supreme Court in *Ragsdale* did not suggest, much less conclude, that ‘prejudice’ in the FMLA context is synonymous with ‘legal damages.’

It is clear to us that, in order to prove that she was ‘prejudiced’ by an FMLA violation, a plaintiff such as Evans need only demonstrate some harm remediable by either ‘damages’ or ‘equitable relief.’ See *id.* (‘The remedy is tailored to the harm suffered.’); *Anderson v. Discovery Cmmc’ns, LLC*, 517 F. App’x 190, 198 (4th Cir. 2013) (‘Such prejudice can be proven by showing that the employee . . . suffers some loss in employment status remediable through ‘appropriate’ equitable relief. . . .’).

*Evans v. Books-A-Million*, 762 F.3d 1288, 1296, 25 Fla. L. Weekly Fed. C 263 (11th Cir. 2014) (emphasis added).

The Eleventh Circuit has consistently adhered to the requirement that a plaintiff must be able to prove the existence of a harm that can be remediated by the relief authorized by the FMLA:

To establish an FMLA interference claim, an employee must show she was entitled to a benefit under the FMLA and her employer denied her that benefit. *Munoz v. Selig Enterprises, Inc.*, 981 F.3d 1265, 1274 (11th Cir. 2020) (citing *Batson v. Salvation Army*, 897 F.3d 1320, 1328 (11th Cir. 2018)). But a technical FMLA violation alone is not

enough. Rather, the employee must also ‘demonstrate some harm’ from the alleged interference, and that harm must be ‘remediable by either ‘damages’ or ‘equitable relief.’ *Evans v. Books-A-Million*, 762 F.3d 1288, 1296 (11th Cir. 2014) (quoting *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89, 122 S. Ct. 1155, 152 L. Ed. 2d 167 (2002)).

\* \* \*

Finally, we must determine whether Ramji can demonstrate harm, or prejudice, resulting from the employer’s interference with her exercise (or attempted exercise) of an FMLA benefit to which she is entitled. *White*, 789 F.3d at 1191. An employee may obtain relief for interference with an FMLA right only if she ‘has been prejudiced by the violation.’ *Ragsdale*, 535 U.S. at 89 (citing 29 U.S.C. §§ 2615 and 2617). So an employee must show that the FMLA violation caused her to suffer injury that could be remedied in a way that the FMLA allows: damages or equitable relief. See *id.*

*Ramji v. Hosp. Housekeeping Sys., LLC*, 992 F.3d 1233, 1241, 1245, 28 Fla. L. Weekly Fed. C 2657 (11th Cir. 2021) (emphasis added).

A number of district courts throughout the circuits have also held that a party is not entitled to recover under the FMLA unless the harm can be remediated by damages or equitable relief. For example, in *Dawson*, the court explained:

Because the FMLA clearly provides that employees have a right of action only to

recover damages or to seek equitable relief for violations of the Act, and not to act as a private attorney general in enforcing the provisions of the Act, we find that a plaintiff must be able to show a reasonable likelihood that a rational trier of fact would award her damages or find that she is entitled to injunctive relief to avoid the entry of summary judgment in defendants' favor.

14 F. Supp. 2d at 832.

The court further explained that: "Thus, once it becomes clear that a plaintiff can recover nothing but a symbolic victory in that the defendant violated a statute, the lawsuit should be terminated." *Id.*

In *Reyes v. N.Y.C. Health & Hosps. Corp.*, No. 10-CV-1606 (WFK) (JMA), 2012 U.S. Dist. LEXIS 123117, at \*13-14 (E.D.N.Y. Aug. 29, 2012), the court found no prejudice because "Plaintiff did not lose her job, a promotion, or any other employment opportunity as a result of the alleged violation, and therefore is not entitled to any equitable relief."

The D.C. Circuit District Court has followed this reasoning as well:

The FMLA affords relief only for actual damages, however. Prejudice to the employee is a necessary element because 'the statutory cause of action for FMLA violations, provides only for compensatory — and not punitive — damages.' *Roseboro v. Billington*, 606 F. Supp. 2d 104, 108 (D.D.C. 2009) (citation and footnote omitted). Thus, '[a]n FMLA violation prejudices an employee only when the 'employee loses compensation or benefits

by reason of the violation, sustains other monetary losses as a direct result of the violation, or suffers some loss in employment status remediable through appropriate equitable relief.” *Id. (quoting Reed v. Buckeye Fire Equip.*, 241 F. App’x 917, 924 (4th Cir. 2007)) (citations omitted).

*Hodges v. District of Columbia*, 172 F. Supp. 3d 271, 284 (D.D.C. 2016); *see also Roseboro v. Billington*, 606 F. Supp. 2d 104, 108 (D.D.C. 2009) (“An FMLA violation prejudices an employee only when the ‘employee loses compensation or benefits by reason of the violation, sustains other monetary losses as a direct result of the violation, or suffers some loss in employment status remediable through appropriate equitable relief.’”).

The Eastern District of North Carolina’s analysis is also consistent with this approach: “Harm or prejudice exists when an employee loses compensation or benefits by reason of the violation, sustains other monetary loses as a direct result of the violation, or suffers some loss in employment status remediable through appropriate equitable relief.” *Lackie v. CA N.C. Holdings, Inc.*, No. 4:20-CV-00072-M, 2021 U.S. Dist. LEXIS 253906, at \*43 (E.D.N.C. Dec. 16, 2021).

Similarly, the District of Maryland explained that in the absence monetary damages, prejudice means the loss of a benefit that can be remedied by equitable relief:

Allegations of interference are not sufficient in and of themselves, however, to state a claim for which relief could be granted. Even if the defendants could be found to have

interfered with Ms. Kent's rights, the FMLA 'provides no relief unless the employee has been prejudiced by the violation.' *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 88-89, 122 S. Ct. 1155, 152 L. Ed. 2d 167 (2002). *See also Reed v. Buckeye Fire Equip. Co.*, 422 F. Supp. 2d 570, 576-77 (W.D.N.C. 2006) (explaining that 'in order for a plaintiff to maintain an FMLA claim, he must establish both an interference, restraint, or denial of his FMLA rights *and* a resulting prejudice.') (italics in original). Ms. Kent does not allege any actual damages resulting from the length of time it took the defendants to inform her of the status of her leave request. *See* Defs.' Mot. Dismiss at 6. She does not allege that she was in any way prejudiced; that is to say, that she suffered a loss of compensation or other monetary loss, or a loss of her position or other benefit that equity could restore. *See Ragsdale*, 535 U.S. at 89. Rather, she alleges just that she was inconvenienced, confused, and upset. These grievances may reflect Ms. Kent's personal experiences, but they do not state a claim under which the law could grant relief. *See also Dodgens v. Kent Mfg. Co.*, 955 F. Supp. 560, 564-65 (D.S.C. 1997) (granting summary judgment for defendant employer despite clear violation of notice requirements of FMLA because 'the court would be elevating form over substance to permit this claim to go forward in light of the fact that Dodgens received all of the leave benefits

that he was guaranteed pursuant to the FMLA.’).

*Kent v. Md. Transp. Auth.*, No. CCB-06-2351, 2006 U.S. Dist. LEXIS 94832, at \*10-12 (D. Md. Dec. 21, 2006) *aff’d*, 232 F. App’x 290 (4th Cir. 2007) (emphasis added).

Finally, the Western District of Texas follows this reasoning:

Additionally, Burnette has failed to plead any facts that would demonstrate that he was prejudiced by any interference, had any occurred. Prejudice to the employee is a necessary element because “the statutory cause of action for FMLA violations, provides only for compensatory—and not punitive—damages.’ *Roseboro v. Billington*, 606 F. Supp. 2d 104, 108 (D.D.C. 2009) (citation and footnote omitted). Thus, ‘[a]n FMLA violation prejudices an employee only when the ‘employee loses compensation or benefits by reason of the violation, sustains other monetary losses as a direct result of the violation, or suffers some loss in employment status remediable through appropriate equitable relief.’”

*Burnette v. Rategenius Loan Servs.*, No. A-16-CV-577-SS, 2016 U.S. Dist. LEXIS 67677, at \*7-8 (W.D. Tex. May 23, 2016).

The Seventh Circuit’s holding in this case is in direct conflict with the law laid out in these cases. These courts interpret *Ragsdale* to mean that a plaintiff is not prejudiced by a violation of the FMLA when the alleged harm did not cause monetary

damages and cannot be remedied by appropriate equitable relief, which in all practical respects must be through an injunction. The lost “status” identified by the Seventh Circuit—temporarily working in a position one was overqualified for—could not be remedied by any equitable relief. By the time Simon finally brought suit, her assignment to that position was over and she was no longer employed by CESA 5. Certainly, the District Court’s declaration that Simon’s FMLA rights were interfered with, without more, did nothing to remedy the violation.

This Court should accept review to resolve this conflict and to hold, once again, that one can be “prejudiced” if they can prove that their harm can be remedied by an award of monetary damages or through injunctive relief. While employment, reinstatement, and promotion are tangible forms of injunctive relief that could remedy a violation, a declaration that the FMLA has been violated does nothing to remedy the violation. The declaration in this case did not remedy Simon’s temporary placement in a position she was overqualified for. Her case should have been dismissed and would have been in the Fourth and Eleventh Circuits.

### **III. THIS CASE IS AN IDEAL VEHICLE FOR THIS COURT’S REVIEW.**

This case presents an ideal vehicle for resolving the questions presented. The relevant facts are not disputed by either side, and no judge below suggested any deficiencies in the record. This case presents a pure question of law applied to undisputed facts. CESA 5 does not dispute that its placement of Simon after her return from leave was a technical violation of the FMLA. This Court only needs to evaluate whether

based on the undisputed facts Simon established that she was prejudiced by the technical violation.

These issues were thoroughly briefed and argued below, including whether prejudice can exist under the FMLA when a plaintiff sustains no monetary damages and was awarded no injunctive relief. The Seventh Circuit made a merits-based determination that a declaration that the law was violated, even without any affirmative monetary or injunctive relief, is prejudice under the FMLA.

Finally, the parties are ideally suited to bring this case. CESA 5 is an employer covered by the FMLA and Simon was an eligible employee under the FMLA. These same classes of parties will benefit from this Court's guidance on this issue moving forward. This case presents an opportunity for this Court to make one ruling that will definitively settle this issue for all similarly situated parties across the country.



## CONCLUSION

For the foregoing reasons, CESA 5 respectfully requests that this Court grant review to provide definitive guidance to all such affected individuals and entities across the country.

Respectfully submitted,

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