No. 25-209

In the Supreme Court of the United States

ELIZABETH SPOKOINY, PETITIONER

v.

UNIVERSITY OF WASHINGTON MEDICAL CENTER.

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

PETITION FOR A WRIT OF CERTIORARI

ELIZABETH SPOKOINY
Pro Se

4306 245th Avenue SE
Sammamish, WA 98029
(425) 503-3949
larryspo@yahoo.com

QUESTIONS PRESENTED

1. Should sexual discrimination claims under Title VII and Title IX be analyzed under the traditional *McDonnell Douglas* "but-for" test as the Sixth, Eight and Ninth Circuits have held, or under the broader "reasonable calculation" test as the Second and Fourth Circuits have held, or under the even broader "increased likelihood" / "convincing mosaic" tests as the First, Tenth and Eleventh Circuits have held?

2. Should disability discrimination claims under the FMLA require an actual denial of leave by the employer as the Second, Third, Sixth, Eighth, Ninth and Eleventh Circuits have held, or is mere discouragement of leave enough to sustain a claim as the Seventh Circuit has held; and should such claims be analyzed under the traditional *McDonnell Douglas* "but-for" test as the Fourth, Ninth and Eleventh Circuits have held, or the broader "motivating factor" test as the Second and Third Circuits have held?

3. Should the employer's failure to prove that "just cause" exists for discipline of an employee subject to a collective bargaining agreement constitute pretext under *McDonnell Douglas*?

DISCLOSURE STATEMENT

This document was drafted in whole, or substantial part, by an attorney.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes:

Regulations:

Miscellaneous:

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully requests that this Court grant a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit has not been published but is reprinted at App. 3a-8a.

The opinion of the District Court has not been published but is reprinted at App. 9a-32a.

JURISDICTION

The judgment of the Ninth Circuit was entered on March 10, 2025 (App. 3a-8a). A petition for panel rehearing and rehearing *en banc* was denied on May 14, 2025 (App. 1a-2a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS

42 U.S.C. § 2000e-2(a)(1):

"It shall be an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

[Title VII of the Civil Rights Act of 1964]

20 U.S.C. § 1681(a):

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ...".

[Title IX of the Education Amendments of 1972]

29 U.S.C. § 2615(a)(1):

"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 subchapter."

[Family and Medical Leave Act (FMLA) of 1993]

29 U.S.C. § 2615(a)(2):

"It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter." [Family and Medical Leave Act (FMLA) of 1993]

STATEMENT OF THE CASE

1. Factual Background

Elizabeth Spokoiny was hired by UWMC in August 2015 to work as Registered Nurse in the Center for Pain Relief. R. 2-ER-72.

On January 11, 2019, Spokoiny suffered a workplace shoulder injury. R. 3-ER-298. Her doctor prescribed a reduced work schedule of 30 hours per week, for which Spokoiny applied for FMLA coverage. R. 2-ER-92.

Spokoiny provided documentation of over 20 incidents where her managers questioned, denied or otherwise interfered with her FMLA protected leave. R. 2-ER-195-205; R. 2-ER-225; R. 2-ER-245-248; R. 2-ER-251-271; R. 3-ER-280; R. 3-ER-285; R. 3-ER-288-290.

UWMC was well aware of the ongoing sexual harassment Spokoiny faced in the workplace. She was first sexually harassed by fellow nurse Ed Enright in May-June 2018. R. 2-ER-300-304. Enright struck Spokoiny's breasts with coned-up papers. R. 2-ER-81. He frequently complimented Spokoiny on her appearance, left notes on her computer screen, and teased that the "(medical director) really likes you". Ultimately, Enright resigned without discipline. R. 2-ER-81.

From early 2019, Spokoiny complained for months about persistent sexual harassment from radiologic technologist Cooper Wilhelm. R. 2-ER-43. When Spokoiny was working with headphones on, Wilhelm approached. Spokoiny removed her headphones and asked if he needed help. Wilhelm gestured toward his penis and responded "I don't know? Do you want to hold it?" on his way to the bathroom. R. 2-ER-75. Wilhelm confined Spokoiny to tight spaces

during procedures, roped off by x-ray equipment, oxygen tubing and cords. R. 2-ER-75.

Wilhelm created a climate of fear by routinely slamming down equipment and supplies when Spokoiny was present to express his anger towards her. R. 2-ER-76. Wilhelm, a professional wrestler, regularly aired his violent wrestling videos at work and invited staff to watch. R. 3-ER-279. Images were shown of Wilhelm fighting women. R. 2-ER-102-104.

On April 30, 2019, Wilhelm emailed his manifesto to staff: "Bras and underwear have been an issue lately. ... Simply having the patient remove these items while they are changing would be beneficial." R. 3-ER-287.

When Spokoiny complained about Wilhelm's ongoing sexual harassment and demand for nurses to instruct female patients to remove undergarments, she was compelled against objection to attend a mandatory mediation meeting with Wilhelm on July 12, 2019. R. 2-ER-78. Spokoiny was frightened for her safety, mentioning significant height and size differences. R. 2-ER-76-77. Her manager Julie Waldhausen wrote: "The issue of proximity was mentioned so it is the expectation that all communications will be delivered in a non-threatening way that allows for sufficient physical space between the parties." R. 3-ER-282.

Wilhelm's sexually harassing behavior continued after mediation. On August 29, 2019, Wilhelm leaned over Spokoiny while she was seated, touched her back and stated "I can see through your clothes. Don't you care?" R. 2-ER-79.

When Spokoiny reported Wilhelm's actions to interim manager Margarita Sarabia on September 3, 2019, Wilhelm resigned without discipline. R. 2-ER-273. Within hours, Sarabia scheduled a secret meeting including ambulatory director Richelle Bagdasarian and other nurses but excluding Spokoiny. R. 2-ER-43. Bagdasarian's handwritten meeting notes accused Spokoiny of "false

statements" and victim blamed her, and "[a]sked all to please document all examples of behavior in violation of Service Culture Guidelines and send to me." R. 2-ER-272.

In the weeks after Wilhelm resigned, Sarabia micromanaged Spokoiny, questioned her use of medical leave for appointments, denied her access to workspace accommodations, and disciplined her for being several minutes late on a handful of days while suffering from debilitating migraines that caused her to vomit while driving to work. R. 2-ER-81-82. Every iteration of Spokoiny's FMLA approvals covered late arrivals. R. 2-ER-192-193.

On November 4, 2019, Sarabia wrote: "I spoke with Elizabeth ... Regarding her attendance/tardiness, from here I'd like to move forward with formal counseling. It is my understanding she went to her PCP today to try to sort out her intermittently FMLA which does not currently have half days or late starts." R. 2-ER-259.

On November 7, 2019, Sarabia sent Spokoiny notice about an investigatory meeting against her regarding "potential work performance issues". R. 2-ER-249. The investigatory meeting was scheduled the day after Spokoiny's FMLA was updated. R. 2-ER-82.

On December 5, 2019, Sarabia wrote to Bagdasarian that Spokoiny's forthcoming negative performance review was due to "health issues". R. 2-ER-240.

Although her prior annual performance review scores were 2.75 or greater (Distinguished), R. 2-ER-322-338, Spokoiny's review score for 2018-2019 was 1.5 (Needs Improvement). R. 2-ER-311-321. No other nurse in the department from 2017-2023 ever received a score lower than 2.25. R. 3-ER-339-563. Per the review, a formal action plan with counseling is required "for all pillar goals receiving a score of 1 - Needs Improvement on the Annual Performance Review." R. 3-ER-319.

UWMC uses a progressive corrective action process. R. 2-ER-54. Even informal counseling requires just cause under the Collective Bargaining Agreement and Corrective Action policy guide. R. 2-ER-306-307; R. 2-ER-54-57. "Corrective action for classified non-union and contract classified staff must meet the 'just cause' standard." R. 2-ER-55.

Spokoiny identified six distinct adverse employment actions where she was treated differently in direct retaliation against protected activity:

1. Secret meeting, the same day after reporting sexual harassment (R. 2-ER-272);
2. Investigatory meeting, the day after using FMLA leave for migraines (R. 2-ER-249);
3. Formal action plan, under collective bargaining agreement (R. 2-ER-237-238);
4. Formal counseling, under collective bargaining agreement (R. 2-ER-234-236);
5. Negative performance review (R. 3-ER-311-321); and
6. Reemployment block from 2020-2023 (R. 2-ER-97-98).

Bagdasarian acknowledged the adverse employment actions when advising Spokoiny on January 6, 2020 that she could avoid the forthcoming negative performance review, Formal Action Plan and Formal Counseling by resigning. R. 2-ER-222. As further humiliation, Spokoiny was threatened with assignment to the COVID-19 housekeeping team. R. 2-ER-194. Despite obtaining her doctorate degree, Spokoiny left UWMC on December 4, 2020 after being unable to secure a Nurse Practitioner position there. R. 2-ER-98.

Out of over two dozen applications for positions she applied for between May 2020 to September 2023 (i.e. 3-½ years), Spokoiny was interviewed for only two positions. R. 2-ER-97-98. Although Spokoiny eventually was hired by UWMC Department of Neurology as Nurse Practitioner

and Teaching Associate in September 2023, the negative review and formal action plan remain in her personnel file. R. 2-ER-42; R. Dkt. 8.1:14.

2. Proceedings Below

Prior to this lawsuit, Spokoiny exhausted her available union remedies through the internal grievance process. R. 2-ER-38. She also unsuccessfully pursued her claim through the University Complaint Investigation and Resolution Office (UCIRO). R. 2-ER-90.

On December 29, 2021, Spokoiny commenced her state court lawsuit against UWMC: King County (Washington) Superior Court No. 21-2-16948-8.

On April 21, 2022, UWMC removed the Washington lawsuit to federal court: United States District Court, Western District of Washington, No. 2:22-cv-00536-JLR.

On January 26, 2024, Spokoiny appealed the District Court decision: Ninth Circuit Court of Appeals No. 24-550.

REASONS FOR GRANTING THE PETITION

I. The federal courts of appeal are sharply divided on the question of sexual harassment and retaliation under Title VII and Title IX, requiring Supreme Court intervention to ensure uniformity and clarity on this issue of national importance.

According to a recent article in the Florida Bar Journal, attorneys and judges have wrestled for over 50 years with the legal framework established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) for analyzing employment discrimination claims. James Poindexter, *McDonnell Douglas – The "Interloper" on the Ropes*, 99 FLA. B. J. 4 (July/August 2025), https://www.floridabar.org/the-florida-bar-journal/mcdonnell-douglas-the-interloper-on-the-ropes. What began as a flexible and practical evidentiary tool that could be used by plaintiffs to prove discrimination has ossified into a rigid procedural doctrine. *Id.*

Discrimination exists in the modern workforce, but often manifests itself in subtle, systemic ways that do not fit neatly into the framework's structured approach. Microaggressions, unconscious bias, and disparate impacts can all contribute to a discriminatory environment, yet may be difficult to prove using the formalistic steps laid out in *McDonnell Douglas*. *Id.*

"Discriminatory behavior comes in all shapes and sizes, and what might be an innocuous occurrence in some circumstances may, in the context of a pattern of discriminatory harassment, take on an altogether different character, causing a worker to feel demeaned, humiliated, or intimidated on account of her gender." *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1109 (9th Cir. 1998).

To establish a prima facie case of disparate treatment under Title VII, a plaintiff must show "(1) [s]he is a member of a protected class; (2) [s]he was qualified for his position; (3) [s]he experienced an adverse employment action; and (4) similarly situated individuals outside [her] protected class were treated more favorably." *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 656 (9th Cir. 2006).

Informal as well as formal complaints or demands are protected activities under Title VII. *See Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 506 (9th Cir. 2000). Opposition can be protected even if it is informal or does not include the words "harassment," "discrimination," or other legal terminology. A communication or act is protected opposition as long as the circumstances show that the individual is conveying resistance to a perceived potential EEO violation. Thus, "an ostensibly disapproving account of sexually obnoxious behavior toward [Plaintiff] by a fellow employee" qualifies as opposition. *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271, 276 (2009).

"It is enough if such hostile conduct pollutes the victim's workplace, making it more difficult for her to do her job, to take pride in her work, and to desire to stay on in her

position." *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463 (9th Cir. 1994). "When the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

In *Sharp v. S&S Activewear, LLC*, 69 F.4th 974 (9th Cir. 2023), the Ninth Circuit ruled that "sexually graphic, violently misogynistic music" creates a hostile work environment and grounds for a Title VII claim. "[S]ights and sounds that pervade the work environment may constitute sex discrimination under Title VII." *Id.* at 980. "Whether sung, shouted, or whispered, blasted over speakers or relayed face-to-face, sexist epithets can offend and may transform a workplace into a hostile work environment that violates Title VII." *Id.* at 981.

Retaliation is, by definition, an intentional act. It is a form of "discrimination" because the complainant is being subjected to differential treatment. Moreover, retaliation is discrimination "on the basis of sex" because it is an intentional response to the nature of the complaint: an allegation of sex discrimination. ... [W]hen a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional "discrimination" "on the basis of sex," in violation of Title IX. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-174 (2005).

This Court's standard for retaliation against a sexual harassment complainant includes any adverse employment decision that "could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006).

Retaliation is a deliberate action used to send a clear message that complaining is unwelcome and risky. It is employed to instill fear in others who might consider

making a complaint in the future. Those with cause for complaining are frequently among the most vulnerable in an institution. Once they complain, they are labeled "troublemakers." Ivan E. Bodensteiner, *The Risk of Complaining – Retaliation*, 38 J. C. & U. L. 1 (2011), https://www.nacua.org/docs/default-source/jcul-articles/jcul-articles/volume-38/38_jcul_1.pdf?sfvrsn=7dba89bf_8.

It is well-settled that neither an agency nor a court need find that the underlying conduct about which the individual complained is discriminatory in order for the retaliation protection to attach. *Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994).

"It shall be an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

This Court explained in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983) that the ultimate issue is "whether the defendant intentionally discriminated against the plaintiff." "*McDonnell Douglas* is 'only one method by which the plaintiff can prove discrimination by circumstantial evidence.' " *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 768 n.3 (11th Cir. 2005).

Tynes v. Florida Department of Juvenile Justice, 88 F.4th 939, 955 (11th Cir. 2023), marked a significant deviation from the strict application of *McDonnell Douglas*' burden-shifting framework in employment discrimination cases within the Eleventh Circuit. "*McDonnell Douglas* is an evidentiary framework that shifts the burden of production between the parties to figure out ... the true reason for an adverse employment action ... . It is not a set of elements that the employee must prove – either to survive summary judgment or prevail at trial." *Tynes* at 941. "A plaintiff who cannot satisfy this framework may still be able to prove her case with what we have sometimes

called a 'convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker.' " *Id.* at 946.

As noted in the concurring opinion: "I fear that our increasingly rigid application of *McDonnell Douglas* may actually be causing us to get cases *wrong* — in particular, to reject cases at summary judgment that should, under a straightforward application of Rule 56, probably proceed to trial." *Tynes* at 955 (J. Newsom concurring) (emphasis in original).

In *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1112 (9th Cir. 2004), the Ninth Circuit noted that "[i]n evaluating motions for summary judgment in the context of employment discrimination, we have emphasized the importance of zealously guarding an employee's right to a full trial, since discrimination claims are frequently difficult to prove without a full airing of the evidence ... ."

This standard means an employee need only produce "very little evidence to survive summary judgment" in a discrimination case "because the ultimate question is one that can only be resolved through a 'searching inquiry' — one that is most appropriately conducted by the factfinder, upon a full record." *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1410 (9th Cir. 1996). *See also Humphries v. CBOCS W., Inc.*, 474 F.3d 387, 405 (7th Cir. 2007), *aff'd on other grounds*, 553 U.S. 442 (2008), noting that "[e]stablishing a prima facie case" is "not . . . an onerous requirement".

On June 5, 2025, Justice Thomas authored a concurring opinion in the case of *Ames v. Ohio Dep't of Youth Servs.*, No. 23-1039, 605 U.S. ___ (2025), in which he criticized the majority opinion for "assum[ing] without deciding that the *McDonnell Douglas* framework is an appropriate tool for making [a summary judgment] determination."

While on the D.C. Circuit, Justice Kavanaugh described the fixation on the plaintiff's prima facie case as "a largely unnecessary sideshow" that "has not benefited employees or

employers," has not "simplified or expedited court proceedings," and, in fact, "has done exactly the opposite, spawning enormous confusion and wasting litigant and judicial resources." *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008).

This Court should resolve the significant circuit split regarding the concept of deliberate indifference under Title IX. Circuit splits lead to alternative applications of federal law across the country, with similarly situated parties receiving different treatment depending on where they are located. Cornell L. Sch., *circuit split*, LII WEX (Jul. 2022), https://www.law.cornell.edu/wex/circuit_split.

The Sixth, Eight and Ninth Circuits use the more restrictive *McDonnell Douglas* "but-for" test, where the claimant must show that the school's deliberate indifference led to further harassment, not that it only made such harassment more likely. *See, e.g., Kollaritsch v. Michigan State Univ. Bd. of Trs.*, 944 F.3d 613 (6th Cir. 2019); *K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054 (8th Cir. 2017); *Reese v. Jefferson Sch. Dist. No. 14J*, 45 F.3d 736 (9th Cir. 2000). Conversely, the First, Tenth and Eleventh Circuits have adopted an "increased likelihood" test whereby the school's deliberate indifference need not directly lead to further harassment to invoke Title IX liability. *See, e.g., Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165 (1st Cir. 2007), *rev'd on other grounds*, 555 U.S. 246 (2009); *Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1103 (10th Cir. 2019); *Williams v. Board of Regents of University System of Georgia*, 477 F.3d 1282 (11th Cir. 2007). The Second and Fourth Circuits have fashioned yet a third approach known as the "reasonable calculation" test, which evaluates the school's deliberate indifference based on the reasonableness of their response to an incident of misconduct. *See, e.g., Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655 (2d Cir. 2012); *Feminist Majority Found. v. Hurley*, 911 F.3d 674 (4th Cir. 2018).

An employer creates a hostile work environment by failing to take immediate corrective action in response to sexual harassment they knew or should have known about. *Fried v. Wynn Las Vegas*, 18 F.4th 643 (9th Cir. 2021). A single incident "can support a claim of hostile work environment because the frequency of the discriminatory conduct is only one factor". *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 967 (9th Cir. 2002).

When evaluating whether the workplace environment is sufficiently hostile or abusive to violate Title VII, the decisionmaker should consider "all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Christian v. Umpqua Bank*, 984 F.3d 801, 809 (9th Cir. 2020). Whether the employer's response to a harassment complaint was prompt, appropriate, and effective presents a genuine issue of material fact. *Id.* at 812. Responding in a clearly unreasonable manner constitutes deliberate indifference. *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629, 648-649 (1999).

The Ninth Circuit disregarded *Okonowsky v. Garland*, 109 F.4th 1166 (9th Cir. 2024), where they had previously confirmed "the totality of the circumstances" in Title VII "includes evidence of sexually harassing conduct, even if it does not expressly target the plaintiff, as well as evidence of non-sexual conduct directed at the plaintiff that a jury could find retaliatory or intimidating." *Id.* at 1171.

Spokoiny's 2018-2019 annual performance review score was 46% less than the previous year. R. 2-ER-311-329. In *Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1137 (9th Cir. 2003), the Ninth Circuit held "[t]he 19% drop in overall score from her former employee evaluation may also create an inference of impermissible motivation." "[U]ndeserved performance ratings, if proven, would constitute 'adverse employment decisions' cognizable under this section."

Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987). *See also Winarto v. Toshiba Am. Elecs. Components, Inc.*, 274 F.3d 1276, 1286 (9th Cir. 2001) ("[a]n unwarranted reduction in performance review scores can constitute evidence of pretext in retaliation cases").

"A plaintiff may prove that retaliation was a but-for cause of an adverse employment action by demonstrating weaknesses, implausibilities, inconsistencies, or contradictions in the employer's proffered legitimate, nonretaliatory reasons for its action. From such discrepancies, a reasonable juror could conclude that the explanations were a pretext for a prohibited reason." *Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 846 (2nd Cir. 2013).

Just weeks before Spokoiny's case was decided, the Ninth Circuit published an opinion in *Lui v. DeJoy*, No. 23-35378 (9th Cir. February 26, 2025), holding that a prima facie case of disparate treatment under *McDonnell-Douglas* requires only "an inference of discrimination". Judge Fletcher's *Lui* decision acknowledged the split between the circuits and the Ninth Circuit's overly restrictive interpretation. "Many of our sister circuits have articulated the fourth element of the *McDonnell-Douglas* prima facie test as a catch-all requiring only that the adverse action 'occurred under circumstances giving rise to an inference of [] discrimination.' " *Lui* at 13 (citing *Montana v. First Fed. Sav. & Loan Ass'n of Rochester*, 869 F.2d 100, 104 (2d Cir. 1989); *see, e.g.*, *Mauter v. Hardy Corp.*, 825 F.2d 1554, 1557 (11th Cir. 1987); *Wierman v. Casey's Gen. Stores*, 638 F.3d 984, 993 (8th Cir. 2011); *McNellis v. Douglas Cnty. Sch. Dist.*, 116 F.4th 1122, 1139 (10th Cir. 2024)).

The difference in tests was outcome-determinative here. Petitioner's case presents an ideal vehicle for this Court to finally resolve these conflicts.

II. The federal courts of appeal are sharply divided on the question of disability discrimination and retaliation under FMLA, requiring Supreme Court intervention to ensure uniformity and clarity on this issue of national importance.

This Court should resolve the significant circuit split regarding interference claims under FMLA. "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 subchapter." 29 U.S.C. § 2615(a)(1).

FMLA is a remedial statute. *Nev. Dep't Hum. Res. v. Hibbs*, 538 U.S. 721 (2003). 29 C.F.R. § 825.220(c) prohibits "discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights. ... [E]mployers cannot use the taking of FMLA leave as a negative factor in employment actions ... ; nor can FMLA leave be counted under no fault attendance policies."

The FMLA prohibits employers from denying or interfering with an employee's entitlement to FMLA benefits (29 U.S.C. § 2615(a)(1)), and also prohibits employers from discriminating or retaliating against employees for requesting or taking FMLA leave (29 U.S.C. § 2615(a)(2)).

In *Ziccarelli v. Dart*, 35 F.4th 1079 (7th Cir. 2022), *cert. denied*, 143 S. Ct. 309 (2022), the Seventh Circuit indicated that merely discouraging the use of FMLA leave is enough to sustain a Section § 2615(a)(1) interference claim – actual denial of a leave request is not necessary. To the contrary, the Second, Third, Sixth, Eighth, Ninth and Eleventh Circuits require a showing that an employer actually denied the employee benefits to which they are entitled. *See, e.g., Kovaco v. Rockbestos-Suprenant Cable Corp.*, 979 F. Supp. 2d 252 (D. Conn. 2013), *aff'd*, 834 F.3d 128 (2d Cir. 2016); *Canada v. Samuel Grossi & Sons, Inc.*, 476 F. Supp. 3d 42 (E.D. Pa. 2020), *rev'd and remanded*, 49 F.4th 340 (3d Cir. 2022); *Edgar v. JAC Prods., Inc.*, 443 F.3d 501 (6th

Cir. 2006); *Quinn v. St. Louis County*, 653 F.3d 745 (8th Cir. 2011); *Xin Liu* at 1125; *Diamond v. Hospice of Fla. Keys, Inc.*, 677 F. App'x 586 (11th Cir. 2017).

To make out a prima facie case of FMLA interference, an employee must establish that (1) [s]he was eligible for the FMLA's protections, (2) [her] employer was covered by the FMLA, (3) [s]he was entitled to leave under the FMLA, (4) [s]he provided sufficient notice of [her] intent to take leave, and (5) [her] employer denied [her] FMLA benefits to which [s]he was entitled. *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1243 (9th Cir. 2014).

Per the FMLA regulations: "Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act." 29 CFR § 825.220(b).

"[T]he mischaracterization of ... FMLA leave as personal leave qualifies as 'interference' with her leave. A violation of the FMLA simply requires that the employer deny the employee's entitlement to FMLA leave. 29 C.F.R. § 825.220(a)(1)(b)." *Xin Liu*, 347 F.3d at 1135. Under FMLA, employer actions deterring participation in protected activities constitute "interference" or "restraint" with employees' exercise of their rights. *Bachelder v. America West Airlines*, 259 F.3d 1112 (9th Cir. 2001). "[T]here is no room for a *McDonnell Douglas* type of pretext analysis when evaluating an 'interference' claim under this statute. ... [T]he regulations clearly prohibit the use of FMLA-protected leave as a negative factor *at all*." *Id.* at 1131 (emphasis in decision).

This Court should further resolve the significant circuit split regarding retaliation claims under FMLA. "It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter." 29 U.S.C. § 2615(a)(2).

"[A]n employee who is incapacitated due to a serious medical condition ... has the right to take protected leave

from work ... even when an episode of incapacitation is unforeseeable. ...[A]n employer cannot use the employee's actions as a negative factor in a subsequent employment decision. Doing so would constitute retaliation ... ." *Espindola v. Apple King, LLC*, 430 P.3d 663, 664 (Wn. App. 2018).

Examples of actionable retaliation under the FMLA include considering an employee's requesting for or taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions. 29 C.F.R. § 825.220(c).

In evaluating FMLA retaliation claims, the Second and Third Circuits apply the "motivating factor" causation standard. *See, e.g., Woods v. START Treatment & Recovery Ctrs., Inc.*, 864 F.3d 158 (2nd Cir. 2017); *Egan v. Del. River Port Auth.*, 851 F.3d 263 (3rd Cir. 2017). However, the Fourth, Ninth and Eleventh Circuits use the more restrictive *McDonnell Douglas* "but-for" standard. *See, e.g., Fry v. Rand Construction Corp.*, 964 F.3d 239 (4th Cir. 2020); *Murray v. Mayo Clinic*, 934 F.3d 1101 (9th Cir. 2019); *Lapham v. Walgreen Co.*, 88 F.4th 879 (11th Cir. 2023).

The "but-for" standard is more onerous for the plaintiff, who must demonstrate that discrimination or retaliation was the determining factor for the adverse employment action, not just one reason among others. The less burdensome "motivating factor" causation standard requires the plaintiff to show only that the action was motivated at least in part by discriminatory or retaliatory animus. Nathaniel M. Glasser, *Second Circuit Adopts "Motivating Factor" Causation Standard for FMLA Retaliation Claims*, Health Law Advisor (July 24, 2017), https://www.healthlawadvisor.com/second-circuit-adopts-motivating-factor-causation-standard-for-fmla-retaliation-claims.

While all U.S. Courts of Appeals agree that Section 2615(a) governs retaliation claims, they tend to disagree

over whether these claims arise under Section 2615(a)(1) or Section 2615(a)(2). Some courts treat FMLA discrimination and retaliation claims interchangeably. *Seeger v. Cincinnati Bell Telephone Co.*, 681 F.3d 274, 282 (6th Cir. 2012). This distinction is important, as it impacts which causation standard will apply when plaintiffs attempt to prove their claims – the crux of the ongoing circuit split. Megan VanGilder, *In Search of a Standard: Unraveling the Emerging Circuit Split over the Proper Causation Standard for Retaliation Claims under the FMLA*, U.C.L.R. (August 7, 2024), https://uclawreview.org/2024/08/07/in-search-of-a-standard-unraveling-the-emerging-circuit-split-over-the-proper-causation-standard-for-retaliation-claims-under-the-fmla.

UWMC scheduled a secret meeting to investigate Spokoiny the same day her sexual harasser resigned (R. 2-ER-272) and scheduled an investigatory meeting the day after Spokoiny asserted her FMLA leave rights (R. 2-ER-259). The proximity in time between Spokoiny's protected activity and the resulting adverse actions are strong circumstantial evidence of causation. *See Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1035 (9th Cir. 2006). "[C]ausation can be inferred from timing alone where an adverse employment action follows on the heels of protected activity." *Villiarimo v. Aloha Island Air*, 281 F.3d 1054, 1065 (9th Cir. 2002). In *Emeldi v. Univ. of Or.*, 698 F.3d 715 (9th Cir. 2012), the plaintiff established pretext due to the proximity between protected activity and adverse action.

When medical or family leave is unforeseeable, no advance notice is required. 29 C.F.R. §§ 825.303(a), .305(b); *Lichtenstein v. Univ. of Pittsburgh*, 691 F.3d 294, 301 (3d Cir. 2012); *Kauffman v. Fed. Express Corp.*, 426 F.3d 880, 885-86 (7th Cir. 2005).

Spokoiny documented at least 20 different instances where UWMC questioned, delayed or denied use of FMLA leave benefits. R. 2-ER-196; R. 2-ER-198; R. 2-ER-202-203;

R. 2-ER-209; R. 2-ER-228-229; R. 2-ER-260; R. 2-ER-262-264; R. 2-ER-271; R. 3-ER-290.

The difference in tests was outcome-determinative here. Petitioner's case presents an ideal vehicle for this Court to finally resolve these conflicts.

III. The treatment of "just cause" in collective bargaining agreements is a novel and unsettled issue of exceptional legal and national importance affecting 16 million union workers.

Spokoiny timely raised the issue that discipline without just cause under a collective bargaining agreement is per se pretextual, which the Ninth Circuit declined to address.

Per official government data, 16 million workers were unionized in 2024, representing 11.1% of all workers. U.S. Department of Labor, *Union Members - 2024*, BUR. OF LABOR STAT. (January 28, 2025), https://www.bls.gov/news.release/pdf/union2.pdf.

For procedural reasons, certain issues rarely make it to appellate courts. Often, claims under collective bargaining agreements are resolved through private arbitration. Just cause is of exceptional importance to unionized workers throughout the nation for which there does not appear to be any case law guidance.

The most often cited theory of "just cause" is Carroll R. Daugherty's formulation, which has come to be called the "Seven Tests of Just Cause." *See* Adolph M. Koven & Susan L. Smith, *Just Cause: The Seven Tests* (revised by Donald F. Farwell, 3d ed. 2006). Daugherty's theory attempts to classify a "common law" built upon traditional causes of discharge and discipline in a given trade or industry, the practices established between management and labor, and past decisions of courts and arbitrators — into seven independent inquiries. *See* Laura J. Cooper, Dennis R. Nolan, Richard A. Bales, Stephen F. Befort, Lise Gelernter & Michael Z. Green, *ADR in the Workplace* 305-306 (4th ed. 2020).

According to Daugherty, a "no" in response to any one or more of the following questions signifies that "just cause" for discipline does not exist:

1. Notice. Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

2. Reasonable Rule or Order. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?

3. Investigation. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

4. Fair Investigation. Was the company's investigation conducted fairly and objectively?

5. Proof. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

6. Equal Treatment. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

7. Appropriate Discipline/Penalty. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?

Id. at 309. *See Enter. Wire Co.*, 46 LA 359 (1966) (Carroll R. Daugherty, Arb.).

IV. The decision below directly conflicts with Supreme Court precedent.

In addition to ignoring *Jackson v. Birmingham* and its progeny, the Ninth Circuit entirely disregarded *Muldrow v. City of St. Louis*, 601 U.S. 346 (2024), where this Court

found that only "some 'disadvantageous' change in an employment term or condition" is required to constitute adverse employment action.

V. The decision below is incorrect.

The Ninth Circuit's conclusions were clearly erroneous and contradicted by the record.

Furthermore, the decision in this case shows apparent bias against straight white women, given that the Ninth Circuit's dismissive attitude towards Spokoiny starkly contrasts with the opposite results received by minority plaintiffs facing far less oppressive conduct in *Okonowsky*, *Lui*, etc.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be GRANTED and the judgment of the Ninth Circuit should be REVERSED and REMANDED.

Respectfully submitted on August 12, 2025.

s/ Elizabeth Spokoiny

ELIZABETH SPOKOINY