No. 26–436

In The
Supreme Court of the United States

RADIALL USA, INC.,

Petitioner,

V.

GARY T. RAMADEI,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF CENTER FOR WORKPLACE COMPLIANCE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Founded in 1976, the Center for Workplace Compliance (CWC) (formerly the Equal Employment Advisory Council (EEAC)) is the nation's leading nonprofit association of employers dedicated exclusively to helping its members develop practical and effective programs for ensuring compliance with fair employment and other workplace requirements. Its membership includes U.S. employers from nearly every major industry sector and geographic region, collectively providing employment to millions of workers. CWC's directors and officers include many of the industry's leading experts in the field of equal employment opportunity and workplace compliance. Their combined experience gives CWC a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of employment-related requirements.

All of CWC's members are employers subject to the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601–2654 and other federal employment laws. As employers—and potential defendants to claims under those laws—CWC's members have a substantial

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[1] Pursuant to Supreme Court Rule 37.2, amicus certifies that counsel of record for all parties received notice of the intent to file this brief at least ten days before it was due. Under Supreme Court Rule 37.6, amicus states that (a) no counsel for any party authored this brief in whole or in part; and (b) aside from amicus, its members, and its counsel, no entity or person made any monetary contribution toward the preparation or submission of this brief.

interest in what an employee must establish to show that an employer retaliated against them for exercising FMLA rights. Many of CWC's members operate in multiple States and federal circuits. They administer leave for large workforces under uniform policies, and they make employment decisions every day that inevitably affect employees who have recently taken leave. For those employers, a causation standard that changes depending on geographical location is a concrete and recurring problem that requires attention from this Court.

Because of its interest in the application of the nation's employment laws, CWC has participated as amicus curiae in many cases before this Court involving the proper interpretation of federal employment and civil rights laws, including the causation standards that govern them. *See, e.g.*, *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 589 U.S. 327 (2020); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009); *CBOCS W., Inc. v. Humphries*, 553 U.S. 442 (2008). And at the certiorari stage in *Nassar*, CWC—then EEAC—urged this Court to resolve a conflict over whether Title VII retaliation claims were subject to a lessened causation standard. The Court granted review and held that Title VII retaliation claims require but-for causation. 570 U.S. at 360 ("Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in [42 U.S.C.] § 2000e–2(m).").

The same question now arises under the FMLA, and the courts of appeals are again divided. Drawing on its members' experience administering leave and making employment decisions nationwide, CWC is well situated to explain why the question presented has consequences beyond the parties.

SUMMARY OF ARGUMENT

The question presented is whether an FMLA plaintiff must prove that the exercise of FMLA rights was the but-for cause of an adverse employment action, or merely a "negative" or "motivating" factor in it. Pet. 12–20. That question arises in every FMLA retaliation case, and the courts of appeals have answered it in irreconcilable ways. CWC agrees with Petitioner that the question warrants review and that the Second Circuit answered it wrongly. CWC submits this brief to emphasize two points from the perspective of the employers who must comply with the statute.

First, the decision below cannot be reconciled with how Congress legislates on causation. Congress is presumed to incorporate but-for causation unless the statute says otherwise. And when Congress means to depart from that default, it says so in plain terms—as it did in amending Title VII in 1991, in the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4311(c)(1), and in a long line of whistleblower statutes adopting a "contributing factor" test. The FMLA contains no such language. The lesser standard applied below derives solely from a Department of Labor (DOL) regulation, which the Second Circuit embraced through *Chevron* deference that this Court has since repudiated.

Second, the circuit conflict imposes real and recurring costs on employers that operate across jurisdictions. A single restructuring decision, made under a single set of policies and applied to identically

situated employees, can be judged under different liability standards depending only on where each employee works. And the lessened standard makes summary judgment far harder to obtain, rewarding claims built on little more than temporal proximity to a period of leave. Employers are thus drawn into protracted litigation and inflated settlements over legitimate business decisions.

This case illustrates the problem. As the petition explains, Respondent's age discrimination claims failed at summary judgment under the Age Discrimination in Employment Act's (ADEA) but-for standard, yet his FMLA claim, tried under a motivating-factor standard, yielded a $770,006.06 judgment—despite the jury's finding that Petitioner acted in good faith. Pet. 3, 25.

Employers need a single, nationwide causation standard for FMLA retaliation claims. Only this Court can supply it.



ARGUMENT

I. The decision below rests on a causation standard Congress never enacted, and only this Court can correct it.

A. Congress has repeatedly enacted lessened causation standards in express statutory terms.

As the petition explains, the courts of appeals are divided, and the majority rule rests on *Chevron* deference to a DOL regulation, 29 C.F.R. § 825.220(c), rather than on the statute. Pet. 12–20. That rule cannot be reconciled with this Court's instruction that Congress is "presumed to have incorporated" but-for causation "absent an indication to the contrary in the statute itself," *Nassar*, 570 U.S. at 347, or with the FMLA's text, which speaks in the classic but-for terms "for," "because," and "by reason of," 29 U.S.C. §§ 2615(a)(2), (b), 2617(a)(1)(A)(i)(I). The statutes in which Congress *has* lowered the causation bar confirm the point.

Congress knows how to lower a plaintiff's causation burden, and it has done so repeatedly in express terms. Many federal employment statutes—whistleblower laws in particular—adopt a standard less demanding than but-for causation. The Whistleblower Protection Act of 1989, 5 U.S.C. § 1221(e)(1), for example, affords relief when a federal employee's protected disclosure was "a *contributing factor* in the personnel action." (emphasis added). That enactment "substantially reduc[ed] a

whistleblower's burden" relative to prior law. *Marano v. Dep't of Just.*, 2 F.3d 1137, 1140 (Fed. Cir. 1993). Congress adopted a contributing-factor standard in the whistleblower provisions of the Sarbanes-Oxley Act of 2002 and the Dodd-Frank Wall Street Reform and Consumer Protection Act. 18 U.S.C. § 1514A; 12 U.S.C. § 5567. And when Congress chose to lower the causation burden under the Surface Transportation Assistance Act, it amended that statute in 2007 to say so. *See Formella v. U.S. Dep't of Lab.*, 628 F.3d 381, 389 (7th Cir. 2010).

Congress likewise uses the words "motivating factor" when it means to adopt that standard. The Uniformed Services Employment and Reemployment Rights Act, for example, makes an employer liable when an employee's military service "is a motivating factor in the employer's action." 38 U.S.C. § 4311(c)(1). Courts have recognized that Congress adopts such frameworks deliberately because it "intended to be protective of plaintiff-employees" in particular settings. *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 160 (3d Cir. 2013). The statutes illustrate that when Congress wants to lower a plaintiff's causation burden, it says so in the text.

The FMLA contains nothing comparable. It does not use the words "motivating factor," "negative factor," or "contributing factor"; the "negative factor" standard appears only in DOL's regulation. 29 C.F.R. § 825.220(c). Even the courts that adopted the lesser standard acknowledged that the statute "makes no mention of a motivating factor test." *Woods v. START*

Treatment & Recovery Ctrs., Inc., 864 F.3d 158, 168 (2d Cir. 2017); *see also Egan v. Del. River Port Auth.*, 851 F.3d 263, 273 (3d Cir. 2017) ("The FMLA interference provision on which the regulation is based does not provide a causation standard.").

Under *Nassar*, that silence should have ended the inquiry in favor of the default rule. The Second Circuit instead treated silence as a gap for the DOL to fill. *Woods*, 864 F.3d at 168–69. As the petition explains, that reasoning inverts the presumption, Pet. 21–22, and *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412–13 (2024), has removed whatever support *Chevron* once supplied.

B. Title VII's motivating-factor standard rests on a specific statutory amendment that has no FMLA counterpart.

Title VII is the exception that proves the rule. In *Price Waterhouse v. Hopkins*, a plurality of this Court concluded that a plaintiff who proves that sex played "a motivating part" in an employment decision has shown discrimination "because of" sex, subject to the employer's showing that it would have made the same decision anyway. 490 U.S. 228, 249–50 (1989) (plurality opinion). Congress responded in 1991 by adding § 2000e-2(m), which provides that an unlawful employment practice is established when race, color, religion, sex, or national origin "was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). "This, of course, is a lessened causation standard." *Nassar*, 570 U.S. at 349. Congress paired

it with a limitation on remedies when the employer proves it would have taken the same action anyway. 42 U.S.C. § 2000e-5(g)(2)(B). The result was a "careful balance of lessened causation and reduced remedies." *Nassar*, 570 U.S. at 362. The FMLA contains neither half of that bargain—no lessened causation standard and no corresponding limit on remedies—which confirms that Congress left the default rule in place.

But even within Title VII, Congress confined that standard to status-based discrimination claims. This Court therefore held in *Nassar* that Title VII retaliation claims require but-for causation, as the default rule mandates. 570 U.S. at 347, 352–53, 360. It reached the same conclusion for the ADEA in *Gross*, emphasizing that Congress "neglected to add" a motivating-factor provision to the ADEA even though it "contemporaneously amended the ADEA in several ways." 557 U.S. at 174. Lower courts have applied the same reasoning to other statutes that lack motivating-factor text. *See Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 321 (6th Cir. 2012) (en banc) ("For the same reasons the Supreme Court opted *not* to construe the 'because of' language in the ADEA to incorporate [the motivating-factor standard] from Title VII, we must do the same here" for the Americans with Disabilities Act); *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 961–62 (7th Cir. 2010) ("There is no provision in the governing version of the ADA akin to Title VII's mixed-motive provision."); *Palmquist v. Shinseki*, 689 F.3d 66, 73 (1st Cir. 2012) ("Let us be perfectly clear. The Rehabilitation Act borrows its remedial scheme from

Title VII, but it does not borrow the causation standard set out in section 2000e–2(m).”). As the Seventh Circuit explained, the importance this Court “attached to the express incorporation of the mixed-motive framework into Title VII suggests that when another anti-discrimination statute lacks comparable language, a mixed-motive claim will not be viable under that statute.” *Serwatka*, 591 F.3d at 961.

The case for but-for causation is stronger here than it was in *Nassar*. Title VII contains a motivating-factor provision; the only question in *Nassar* was whether that provision reached retaliation claims. The FMLA contains no such provision at all. Yet under the decision below, an employee in the Second Circuit who claims retaliation for taking FMLA leave bears a lighter causation burden than an employee who claims retaliation for complaining of race or sex discrimination under Title VII. Congress could not have intended that anomaly, and this Court should not leave it in place.

II. A causation standard that changes across circuit lines makes uniform leave administration impossible.

The petition explains why the causation standard matters to FMLA litigation generally. Pet. 3, 23–24. CWC’s members experience that importance concretely, and the conflict’s costs fall hardest on employers like them that operate nationwide. A 2018 survey found that “15 percent of U.S. employees report[ed] taking leave for a qualifying FMLA reason in the past 12 months.” Abt

Associates, *Employee and Worksite Perspectives of the Family and Medical Leave Act: Results from the 2018 Surveys* iii (2020), https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHD_FMLA2018SurveyResults_FinalReport_Aug2020.pdf [https://perma.cc/4PXH-F93S]. As a result, employers administer leave for large workforces under uniform policies and end up making employment decisions daily that inevitably affect employees who have recently taken leave. Yet for those employers the governing standard turns on geography—and, in the Sixth and Seventh Circuits, on the panel. *See* Pet. 13–20.

The practical consequences are significant. National corporations already have to defend against FMLA retaliation claims across circuits with differing causation standards, which complicates employment policies and procedures. For example, the same nationwide employer has defended FMLA retaliation claims in the First, Sixth, and Eleventh Circuits, which have articulated materially different causation standards. *See, e.g.*, *Clark v. Walgreen Co.*, 424 F. App'x 467, 472 (6th Cir. 2011) (explaining that a FMLA retaliation claim requires, at minimum, evidence that unlawful discrimination was a motivating factor in employer's actions); *Pagan-Colon v. Walgreens of San Patricio, Inc.*, 697 F.3d 1, 8 (1st Cir. 2012) ("[A] crucial component of an FMLA retaliation claim is some animus or retaliatory motive on the part of the plaintiff's employer that is connected to protected conduct."); *Lapham v. Walgreen Co.*, 88 F.4th 879, 893 (11th Cir. 2023) ("[W]e hold that the proper causation standard for

FMLA and FWA retaliation claims is but-for causation."). Those cases confirm that a liability standard confronting a nationwide employer may vary from one jurisdiction to another.

The lack of consistency is starker still when a single employment decision spans several circuits. Consider a national employer that eliminates positions in Connecticut, Georgia, and Virginia under a single restructuring plan, and suppose each affected employee recently took FMLA leave. The Connecticut employee can reach a jury by showing that leave was one motivating factor among many. The Georgia and Virginia employees must prove that their positions would not have been eliminated *but for* their leave. One decision, made under one set of policies, is thus judged under different liability rules depending solely on the state in which each employee happens to work. Employers cannot design uniform leave-administration practices around a standard that changes at state lines.

As this Court recognized in *Nassar*, the causation standard for retaliation claims has "central importance to the fair and responsible allocation of resources in the judicial and litigation systems," particularly because such claims "are being made with ever-increasing frequency." 570 U.S. at 358. Those concerns apply with special force under the FMLA. Employees take FMLA leave for their own serious health conditions, to care for family members, to care for new children, or for several other reasons. 29 U.S.C. § 2612(a)(1). Because leave is so common, virtually every significant workforce decision is likely

to affect an employee who recently took or requested leave. Under a lessened causation standard, a coincidental temporal proximity between leave and an employment decision can be enough to send a claim to a jury.

A lessened standard also invites claims of doubtful merit. *Nassar* warned that relaxing the causation requirement "could also contribute to the filing of frivolous claims" and would "make it far more difficult to dismiss dubious claims at the summary judgment stage." 570 U.S. at 358. The Court offered the example of an employee who, knowing that he or she is about to be fired for poor performance, makes an unfounded charge of discrimination and then attributes the termination to retaliation. *Id.* The FMLA offers an even easier path to the same result: an employee who anticipates a lawful adverse action need only take leave and then attribute the later decision to it. Employment decisions "are almost always mixed-motive decisions turning on many factors," and under a motivating-factor standard, "[s]ummary judgment will be less frequent because the plaintiff's threshold burden is so light." David A. Cathcart & Mark Snyderman, *The Civil Rights Act of 1991*, 8 Lab. Law. 849, 874–75 (1992). And following the COVID-19 pandemic, FMLA cases have surged, further exacerbating this issue. The predictable result of all these factors is pressure on employers to settle weak claims rather than bear the cost and risk of trial.

And these costs reach beyond the litigation itself. Time and resources spent defending claims

premised on temporal proximity prevent employers from investing in their businesses and employees. As *Nassar* explained, it is inconsistent with the statutory design to "so raise the costs, both financial and reputational, on an employer whose actions were not in fact the result of any discriminatory or retaliatory intent." 570 U.S. at 358–59.

Nor will the conflict resolve itself. As the petition explains, the Second Circuit declined to revisit its precedent even after *Loper Bright* removed its foundation, other courts have flagged the question without resolving it, and ending the conflict without this Court would require multiple circuits to sit en banc and break the same way. Pet. App. 3a–5a; Pet. 24–25. Until this Court intervenes, employers will face a causation standard that varies by circuit—and sometimes by panel—for claims under a single federal statute.

Holding that the FMLA, like the ADEA and Title VII's retaliation provision, requires but-for causation would not diminish the statute's protections. Employees would still prevail whenever their exercise of FMLA rights was the reason for an adverse action. The Court would simply ensure that employers are liable for retaliation only when retaliation actually caused the decision—and that the same rule applies nationwide.



CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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