No. 17-208

# In The
# Supreme Court of the United States

RICHARD DUANE BARTELS,

*Petitioner,*

v.

402 EAST BROUGHTON STREET, INC.
D/B/A SOUTHERN MOTORS ACURA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the lower courts correctly held the only reasonable conclusion supported by the record is that Respondent (402 East Broughton Street, Inc. D/B/A Southern Motors Acura) ("SMA") would have terminated Bartels because of Bartels' undisputed use of offensive profanity and conduct toward a volunteer who was chairing a community fund-raising event at SMA's business regardless of whether Bartels indicated a need for Federal Medical and Leave Act of 1993 ("FMLA") using this Court's analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

*Although Petitioner, Richard Duane Bartels ("Bartels") did not raise either issues of requesting his FMLA interference or retaliation claims be analyzed under a "mixed motives" factor at any time before the district court, and although the lower courts found – based on the facts – that Petitioner was terminated from his job after using highly offensive language and behavior toward a community volunteer hosting a fund-raising event at his employer's business location, Bartels now requests this Court to consider*:

2. Whether the Court below, after noting for the first time on appeal that Bartels argued his FMLA retaliation claim should have been analyzed under a mixed-motives theory of discrimination, correctly rejected that request, and even assuming arguendo that a mixed motives approach was appropriate in the

**QUESTIONS PRESENTED** – Continued

context of FMLA retaliation claims (which it did not need to consider) that the only reasonable conclusion supported by the record was that SMA would have terminated Bartels because of his undisputed offensive conduct to a community volunteer.

3. Whether this Court should consider Bartels' argument, raised now for the *first* time in his Petition to this Court, as to whether the United States Department of Labor ("DOL") regulations are to be given controlling deference to support a "mixed motive" analysis of Bartels' claims when ordinary rules of statutory construction support the analysis used by the lower courts to grant summary judgment to SMA on Bartels' FMLA claim where Bartels' termination occurred following Bartels' highly inappropriate behavior toward a community volunteer hosting a fund-raising event at SMA's premises.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to United State Supreme Court Rule 29.6, SMA makes the following corporate disclosures:

> 402 East Broughton Street, Inc., d/b/a Southern Motors Acura is not a publicly held company and there is no parent or publicly held company that owns 10% or more of this corporate entity's stock. In full disclosure, JK Holdings, Inc., a privately held holding company affiliated with SMA, has no parent or publicly held company that owns 10% of its stock.

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## INTRODUCTION

This case involves the termination of Bartels, who was a General Manager of SMA, a car dealership owned and operated by the Kaminsky family for over 80 years in historic downtown Savannah, Georgia, after Bartels used profanity and offensive conduct toward a volunteer hosting a prominent fund-raising event for the Historic Savannah Foundation ("HSF") at SMA's location, which involved attendance of SMA's actual and potential customers. SMA did not retaliate or interfere with Bartels' anticipated FMLA rights, but fired him after HSF complained to SMA about Bartels' offensive conduct.

For the first time on appeal to the Eleventh Circuit Court of Appeals, Bartels argued his FMLA interference and/or retaliation claims should have been evaluated under a "motivating factor" standard (specifically contradicting his previous request that his claims were governed by the framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). Now, for the first time in this Petition to this Court, Bartels raises the issue that this Court should apply the motivating factor analysis by giving deference to DOL regulations. Where Bartels did not raise any of these arguments at the district court level (or even his second argument before the Eleventh Circuit), this Court should deny certiorari where questions now presented were never timely presented. *Ford Motor Co. v. United States*, 134 S. Ct. 510 (2013), *U.S. v. Ortiz*, 422 U.S. 891, 898, 95 S. Ct. 2585, 45 L. Ed. 2d 623 (1975) (where this

Court found the party did not raise the issue in its briefs and declined to hear the issue.).

The Petition for Certiorari essentially raises none of the issues Bartels actually litigated and presented to the district court (or even an issue presented to the Eleventh Circuit – i.e. – that deference be given to DOL regulations), but instead presents issues that would not change the outcome of this case even if Bartels was correct, which he is not. Bartels argues the lower courts erroneously held that the only reasonable conclusion supported by the record is that SMA terminated Bartels because of his undisputed use of profanity and offensive behavior to a community volunteer, regardless of whether Bartels indicated any possible need for FMLA leave. After the district court granted summary judgment to SMA, Bartels appealed to the Eleventh Circuit, and contended, for the first time there, that his FMLA claims should be analyzed under the "mixed-motives" theory. Specifically, Bartels asks this Court to ignore the analysis set forth in the burden shifting framework established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). Bartels' theory, if now adopted when considered for the first time, here would provide the same result. The Petition should be denied.

*First*, Bartels specifically questions whether the lower courts were correct to apply the Court's decision in *University of Texas Southwest Medical Center v. Nassau*, 133 S. Ct. 2517 (2013) to require Bartels to prove his FMLA claims for interference and retaliation

under "but-for causation," rather than motivating factor causation. Under the *McDonnell Douglas* approach, Bartels must first establish a *prima facie* case retaliation by showing: (1) that he engaged in statutory protected activity, (2) that he experienced an adverse employment action, and (3) that there is a causal connection between the protected activity and the adverse employment action. *Hurlbert v. St. Mary's Healthcare System*, *Inc.*, 439 F.3d 1286, 1293 (11th Cir. 2006). The burden then shifted to SMA to articulate a legitimate, non-retaliatory reason for its decision to fire Bartels, and Bartels then bore the burden of showing that SMA's reason was a pretext for unlawful retaliation. *Hurlbert*, 439 F.3d at 297. To meet his burden of pretext, Bartels was to produce evidence from which a reasonable jury could find (1) that SMA's reason for firing Bartels due to his profanity and offensive behavior to a HSF volunteer was not the true reason for his termination, and (2) that SMA's decision was motivated by an illegal purpose. *Springer v. Convergys Customer Management Group, Inc*., 509 F.3d 1344, 1348-49 (11th Cir. 2007). Here, SMA's legitimate, non-retaliatory reason for firing Bartels was because of his inappropriate conduct to a community volunteer. The lower courts found evidence was insufficient to support a jury finding that this was not the true reason for Bartels' termination or that SMA's decision was motivated by some illegal purpose. Although Bartels quibbles with these findings by the lower courts, he does not assert that HSF's reported complaints about his use of offensive language or conduct were in dispute – and this Court does not review such factual disagreements in

any event. Because the questions presented have no impact effecting the outcome, there is no basis for granting review.

*Second*, Petitioner never before requested from any lower court what he now asks this Court to address – whether the regulations of the United States Department of Labor provide are entitled to "controlling deference" under this Court's decision in *Chevron v. National Resources Defense Council*, 467 U.S. 837 (1984) to support a "mixed-motive" or "motivating factor" analysis for FMLA claims. Again, Bartels never argued this issue at district court. Nor in his appeal to the Eleventh Circuit Court of Appeal, nor in his Petition for Rehearing En Banc to the Eleventh Circuit Court of Appeal. This is not a court of first resort; it should pass on questions that the Eleventh Circuit or the lower court were never even asked to address.

*Third*, there is no division of authority warranting this Court's review in these circumstances. Bartels' single-motive theory of retaliation was properly analyzed under *McDonnell* (*see also Quigg v. Thomas County School District*, 814 F.3d 1227, 1238 (11th Cir. 2014) (concluding *McDonnell* framework as appropriate for single-motive claims). Given Bartels' offensive conduct to a community volunteer, Bartels was not denied a jury trial on his FMLA claims where the courts concluded no reasonable fact finder could not find that Bartels' disgraceful conduct to a HSF volunteer was not the legitimate reason for his termination.

In short, nothing about this case warrants further review. This Court should deny the Petition.

## COUNTER STATEMENT OF THE CASE

The relevant background is explained in the decisions of the lower courts below. (Pet. Appx. 24-41, *see also* Pet. Appx. 1-5, 16-23 – *Bartels v. Southern Motors of Savannah, Inc. a/k/a Southern Motors Acura*, unpublished opinion, Docket # 4:14-cv-00075-JRH-BKE (decided March 7, 2017); 2-5).

On October 19, 2012, Bartels, then General Manager of SMA's automobile dealership in historic downtown Savannah, Georgia, used profanity and exhibited highly inappropriate behavior to a Historic Savannah Foundation ("HSF") volunteer, Katherine Albert, who was chairing a prominent community fund-raising event at SMA's business. (Pet. Appx. 1-3, 19-21). As a result of HSF's complaints about Bartels' highly offensive language and conduct, SMA promptly terminated Bartels. (Pet. App 1-2; 20-21).

SMA hosted this prominent event because its business was located in Savanah's historic district and HSF's members included SMA's actual and prospective customers. (Pet. Appx. 1-2, 19). Months prior to the event, Mrs. Albert had met both Bartels and SMA owner, Myron Kaminsky, and was informed another long time SMA employee would serve as her liaison in coordinating the event. (Pet. Appx. 19). Yet, on the eve of the event, Bartels told Mrs. Albert he "had a bone to

pick with her" – that only he should have been contacted (and no other SMA employee); he had no idea of any of the plans; he used profanity when angered at not being given a ticket to attend the event; he said he and his guests used flowerpots in his backyard to relieve themselves at his social events; he continued to use profanity and criticized, demeaned and belittled Mrs. Albert in front of assembled employees, neighbors and volunteers, prompting another SMA employee to apologize for Bartels' actions, – all behaviors which lead to the volunteer refusing to continue with the event. (Pet. Appx. 3, 19-20).

After leaving SMA, Mrs. Albert promptly notified HSF's Development Director, Terri O'Neil ("HSF Director"), of her resignation as chair of the event and her refusal to return to SMA because of Bartels' offensive conduct. (Pet. Appx. 3, 20). The HSF Director immediately informed SMA's owner, Myron Kaminsky, that Bartels had been verbally abusive, used profanity and had been so offensive that the chair had resigned and refused to return to SMA. (Pet. Appx. 3, 20). Never as embarrassed or as disappointed or as angry as he was then, Myron immediately called Bartels about HSF's complaints; instructed Bartels to apologize to HSF, and then promptly notified his sons/fellow co-owners, Adam and Ross Kaminsky, that he was firing Bartels. (Pet. Appx. 20-21). Having previously expressed concerns over Bartels' effectiveness as General Manager, the sons were content with their father's decision, and

as a result, Bartels was terminated when he returned to SMA on October 23, 2012. (Pet. Appx. 3, 21).[1]

Following Myron's decision to terminate Bartels, Ross Kaminsky completed a separation notice to the Georgia Department of Labor, which listed reasons for Bartels' termination, including "**cursing and upsetting a member of Historical Savannah during fund-raising event**."[2] (Pet. Appx. 4, 22).

Prior to Bartels' offensive conduct to the HSF chair, Bartels had attended pre-natal visits/tests with his wife on October 12, 14-16, 2012, without any reduction in pay or leave days. (Pet. Appx. 2, 18-19). With the pre-natal testing completed by 10/17/12, Bartels' wife

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[1] On pages 10-11 of his Petition, Bartels broadly mischaracterizes that Myron, Adam and Ross, always jointly make decisions about firing people at SMA; however, each can fire an employee without the others' approval, and Myron's now deceased brother (Jay Kaminsky) handled all termination/disciplinary decisions for SMA prior to 2008. (*See* Pet. Appx. 21, 33 – Myron decided to terminate Bartels after receiving HSF's complaints. (Court of Appeals Appx. Vol. VIII, Doc. 56-17, p. 35-36; Vol. VII, Doc. 56-15, pp. 23, 28, 91-92, 118-119, 127-128)).

[2] Prior to Bartels' attendance at the pre-natal tests, Adam and Ross Kaminsky had become dissatisfied with Bartels' handling of expected sales growth, reporting of Acura's incentive program, and dealings with Acura representatives and others. (*See* Pet. Appx. 22-23, 33; *see also* Court of Appeals Appx. Vol. VII, Doc. 56-17, pp. 95-98, 107-108, 110, 119-122, 122-125, 137-139; Vol. IX, Doc. 56-19 pp. 103-104, 156-157, 159-160). However, their father, Myron, continued to support retaining Bartels as GM. (Pet. Appx. 22-23, 32-33).

returned to her job without any limitations and Bartels did not request leave.[3] (Pet. Appx. 19.) Despite alleging SMA "failed to provide him FMLA paperwork," as General Manager, Bartels admitted his own familiarity with FMLA's notice provisions and paperwork, but decided not to inform SMA's comptroller of any need for FMLA leave until receipt of the test results which would be expected in six (6) weeks, at which time he would know whether he needed FMLA leave. (Pet. Appx. 28-29.) On October 19, 2012, Bartels' offensive conduct to HSF volunteer resulted in his termination. (Pet. Appx. 21, 2-4.)

Nearly 1 1/2 years after his termination, Bartels sued SMA for FMLA interference and/or retaliation, specifically contending SMA "terminated him one day following his absence for a doctor's appointment that should have been covered by intermittent FMLA leave" even though Bartels was paid for this absence and his absence did not result in the loss of any paid leave time. (Pet. Appx. 28-29.) Without refuting his despicable conduct to the HSF volunteer, Bartels claims he was unjustifiably terminated due to his FMLA request and claimed FMLA interference. (*See generally* Pet. Appx. 2, 4-5, 16-20, 23).

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[3] SMA disputed Bartels provided any information to any SMA owners other than the testing had been completed by October 17, 2012. (*See* Court of Appeals Appx. Vol. VII, Doc. 56-15, p. 155; Vol. VIII, Doc. 56-17, p. 119-20; Vol. IX, Doc. 56-19, p. 18, 120-21, 134).

SMA moved for summary judgment on all claims, which were granted where Bartels failed to present a *prima facie* case for FMLA interference and/or retaliation. (Pet. Appx. 1, generally 16-41).[4] The lower courts

[4] Bartels presents several factual inaccuracies in his Petition. This footnote attempts to summarize these mischaracterizations. *On page 4*, Bartels claims there is no difference between SMA positions of "sales managers, General Manager and general sales manager"; however a General Manager oversees all departments, including supervision of sales, service, finance, and personnel whereas a "general sales manager" is in charge of only sales. (Court of Appeals Appx. Vol. VII, Doc. 56-15, pp. 27-29).

*On page 7*, Bartels broadly asserts his job was excellent (i.e.-he sold 16 more vehicles; however, Bartels' sales growth was essentially flat when he was expected to have 20% growth, and after Bartels' termination, sales increased 150%. (Court of Appeals Appx. Vol. VIII, Doc. 56-17, pp. 96-97; Vol. IX, Doc. 56-19, p. 81).

*On pages 8-9*, Bartels mischaracterizes SMA's knowledge of Bartels' wife's pregnancy on October 17, 2012 (other than knowing the testing was completed). Bartels did not inform SMA of any specific health condition; request future leave; or the results of testing, childbirth, etc., that occurred months after Bartels' termination.) (Court of Appeals Appx. Vol. VII, Doc. 56-15, p. 55; Vol. VIII, Doc. 56-17, pp. 119-122; Vol. IX, Doc. 56-19, pp. 118-120-121, 134). Additionally, SMA disputes Ross ever told Bartels on 10/17/12 that "life goes on, we have a business to run, you need to get back to work." (Court of Appeals Appx. Vol. I, Doc. I, ¶ 22; Vol. I, Doc. 9, ¶ 22). On pages 8-9, SMA disputes all Adam Kaminsky's statements allegedly made at Bartels' termination. (Court of Appeals Appx. Vol. VIII, Doc. 56-17, pp. 133-134).

*On page 10*, Bartels contends he was never "told he was failing to perform in his job" (i.e. – failing to meet minimum production requirements) but Bartels would have seen the lack of sales growth in the financial reports discussed at multiple weekly meetings. (Court of Appeals Appx. Vol. IX, Doc. 56-19, pp. 66-69, 83-84).

*On page 10*, Bartels contends "Myron changed course at this deposition," and claimed Bartels was fired only because of the

properly granted summary judgment on Bartels' FMLA claims, effectively finding the evidence amply supported a reasonable fact finder's conclusion that Bartels' offensive behavior to the HSF volunteer on the very eve of a high-profile fund-raiser event was the legitimate reason for Bartels' termination. (Pet. Appx. 1-40).



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HSF complaints; however, Myron's decision to terminate Bartels never changed after learning of Bartels' egregious conduct to the HSF chair. (Pet. Appx. 33, 34-35; Court of Appeals Appx. Vol. XI, Doc. 67, p. 18; Vol. VII, Doc. 56-15, p. 157-59; Vol. VIII, Doc. 56-17, pp. 55-56; Vol. IX, Doc. 56-19, pp. 147-148).

*On page 11*, Bartels contends HSF only reported to Myron Kaminsky that Bartels had used profanity and upset the volunteer, and that Bartels' subsequent apology prompted a "positive" reaction from Myron; however, HSF Director informed Myron: (1) Bartels told HSF chair that "he was the boss" and she should be talking to him; (2) Bartels used the "f" word in speaking with HSF chair, and (3) Bartels was otherwise "cursing at her and – [being] inappropriate." (Pet. Appx. 34; Court of Appeals Appx. Vol. X, Doc. 67, p. 20; Vol. VII, Doc. 56-15, pp. 167-168; Vol. X, Doc. 56-23, pp. 40-42). Likewise, Myron Kaminsky never wavered in his decision to terminate Bartels. (Pet. Appx. 20-21, 34; Court of Appeals Appx. Vol. VII, Doc. 56-15, p. 167; Vol. XI Doc. 67, pp. 20-21).

*On pages 11-12*, Bartels misconstrues that SMA owners (Myron, Adam and Ross) fired others because of their needs for leave or medical treatment; one employee admitted he was fired for failing to meet sales production and the hearsay evidence of another was properly struck from consideration. (Pet. Appx. 36-38; Court of Appeals Appx. Vol. IV, Doc. 56-5, ¶ 4; Vol. XI Doc. 67, pp. 23-24).

## REASONS FOR DENYING THE WRIT

### I. THIS COURT IS UNABLE TO REACH THE MERITS OF ISSUES NOT RAISED BY BARTELS IN THE LOWER COURTS

The Court should deny certiorari because the primary question presented by Bartels was not preserved. Essentially, at the trial court level, Bartels introduced a single-motive theory of FMLA retaliation and relied on indirect evidence to prove SMA's retaliatory intent so that analysis of his claim was proper under *McDonnell Douglas*, 411 U.S. 792 (Pet. Appx. 11.). Yet, for the first time on appeal to the Eleventh Circuit, Bartels argued his FMLA retaliation claim should be analyzed under a "mixed motive" theory of discrimination. *Id.* Further, for the first time here in his Petition, Bartels now requests that deference be given to DOL standards in support of applying an erroneous "mixed motive" standard to FMLA claims. As this Court has repeatedly admonished: "This Court is one of final review, not of first review," *Ford Motor Co. v. United States*, 134 S. Ct. 510 (2013); *United States v. Ortiz*, 422 U.S. 891, 898 (1975); *Tacon v. Arizona*, 410 U.S. 351, 351 (1973). For this reason alone, Bartels' Petition should be denied.

Appellate courts have "repeatedly held that an issue not raised in the district court and raised for the first time in appeal will not be considered." *Access Now, Inc. v. S.W. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004). Appellate courts prudently "cannot allow a plaintiff to argue a different case from the case presented to the district court, when the plaintiff had

every opportunity to raise a new theory in district court." *Irving v. Mazda Motor Corp*., 136 F.3d 764, 769 (11th Cir. 1998).

When on the first time on appeal to the Eleventh Circuit, Bartels contended the district court should have used the "motivating factor" standard, Bartels essentially argued he was "without the guidance" of the *Quigg v. Thomas County* decision, 814 F.3d 1227 (11th Cir. 2016), but the *Quigg* decision was decided one (1) month before the district court's order in this case, and even in his multiple pleadings to the district court, Bartels referenced cases referencing the "motivating factor" standard, which predated Bartels' filing of his Complaint and his briefs.[5] Bartels simply never requested the trial court to use a "motivating factor"

[5] After admitting he did not raise the argument of mixed motives standard until his appeal to the Eleventh Circuit, Bartels erroneously relies on cases which he characterizes as "consistently [holding] that new issues are properly raised for the first time on appeal where there is an intervening change in the law" (Pet. for Writ, p. 16, fn. 8). However, this characterization is not supported by the facts nor the law. *First*, Bartels was aware of the "motivating standard" at the time he filed his action as evidenced by pleadings he filed in the district court which cited cases which referenced the "motivating factor." Moreover, the *Quigg* case he relies on as a "new change" was rendered at least one (1) month prior to the district court's order, and even then, the *Quigg* case (as noted by the lower court below) did not apply based on the factual record in this case. (Pet. Appx. 16-41). Finally, his cited cases on whether he can raise issues for the first time are not legally supportive of this case. *Cotton States Mot. Ins. Co. v. Anderson*, 749 F.2d 663 (11th Cir. 1984) (involved issues of claim preclusion and collateral estoppel which are not relative to Bartels' failure to timely raise existing arguments before the district

standard; more importantly, Bartels never presented direct evidence that the decision to terminate him following his offensive conduct was motivated by Bartels' time off or the possibility of any future leave. (Pet. Appx. 6, fn. 3 – the Eleventh Circuit noted "Bartels does not agree he presented direct evidence.") As a result, Bartels' Petition should be denied where these issues were not properly presented. Further, as shown below, this Court cannot dismiss the lower courts' findings that the record failed to support Bartels' FMLA claim where SMA terminated him after receiving HSF's complaints about his offensive language and conduct.

## II. SMA TERMINATED BARTELS AFTER HE USED PROFANITY AND INAPPROPRIATE CONDUCT TOWARD A HISTORIC SAVANNAH FOUNDATION VOLUNTEER

### A. Bartels' Untoward Conduct to a HSF Volunteer Was the Reason for Bartels' Termination

SMA did not interfere with Bartels' FMLA rights or retaliate against him. Regardless of any request for FMLA leave, SMA fired Bartels because of his egregious conduct to the HSF chair. As a result, SMA filed a motion for summary judgment on Bartels' claims of FMLA interference and retaliation, which the district

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court) and; *Sure-Tan Inc. v. NLRB*, 467 U.S. 883, 897 (1984) (also inapplicable to the facts here).

court properly granted and the Eleventh Circuit upheld.

Noting that Bartels set forth a single-motive theory of FMLA retaliation and relied on indirect evidence, the Eleventh Circuit analyzed Bartels' claims under *McDonnell Douglas*, finding the evidence insufficient to support a jury finding that Bartels' offensive conduct and language to HSF volunteer was not the true reason for Bartels' termination.[6]

Bartels quibbles with the lower courts' reasoning, arguing that SMA's decision to terminate him after his conduct to the HSF volunteer was false and that discrimination was SMA's real reason. Yet, both courts analyzed the record, construing every inference in Bartels' favor, and concluded the real reason for Bartels' termination was his undisputed offensive conduct to a volunteer hosting a prominent fund-raising event at

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[6] In *Chapman v. Al Transport*, 229 F.3d at 103 (11th Cir. 2012), this Court held:

> **[F]ederal courts "do not sit as a super-personnel department that reexamines an entity's business decisions no matter how medieval the firm's practices, no matter how high handed its decisional process, no matter how mistaken the firm's managers . . . Rather our inquiry is limited to whether the employer gave an honest explanation for its behavior** (cites omitted) . . . An employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason . . .

SMA's premises and that no reasonable fact finder would find otherwise.

Bartels argues the lower courts erred in finding no dispute of material facts as to whether SMA's proffered reason was pre-textual and this should have defeated SMA's request for summary judgment.

*First*, Bartels argues although the employers' expressions of sympathy for his personal situation at the time they told him he was terminated were pretextual, expressions of sympathy do not overcome an employer's legitimate reason for termination. *Wascura v. City of South Miami*, 257 F.3d 1238, 1243, 1246 (11th Cir. 2001); *see also Alvarez v. Royal Atl. Developers*, 610 F.3d 1253, 1256 (11th Cir. 2010). Bartels additionally criticized the lower courts' analysis of Myron's reason for terminating him after the HSF incident, arguing this was inconsistent with the other reasons included on his DOL separation; namely, the Kaminsky sons' expressions of prior dissatisfaction with Bartels' effectiveness as a manager which predated the HSF incident. Here, Myron terminated Bartels after receiving the HSF Director's report of Bartels' inexcusable behavior. Moreover, the Notice *clearly* indicated Bartels' offensive behavior to the HSF volunteer as a reason for termination. Other reasons on the Notice were not inconsistent, but rather supplementary ones, offered by one of Myron's sons, when both his sons had expressed earlier concerns to their father, but were not the *ultimate* decision maker on this issue. (Pet. Appx. 8.)

### B. There was No Evidence Myron Kaminsky Wavered from His Decision to Fire Bartels

Bartels contends his apology to HSF Director had a "positive response" because it showed Myron's decision to fire him was not an honest explanation, alleging SMA's "standard practice" was to "eat crow" or "smooth things." Yet, the lower courts correctly found Bartels' subsequent apology for his conduct did not create a dispute of material fact. Myron Kaminsky testified he had never been "more professionally embarrassed as he was" after receiving HSF Director's report; he immediately instructed Bartels to apologize to HSF, and he never wavered from his decision to fire Bartels. Bartels' disagreement with SMA's resolution of the conflict Bartels created with HSF is legally insufficient to create a genuine issue of fact. *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1088 (11th Cir. 2004) ("A plaintiff cannot recast the reason but must meet it head on and rebut it. Quarreling with a (legitimate, non-retaliatory) reason is not sufficient.").

### C. The Lower Courts Did Not Overlook Bartels' Proffered Evidence of Dissimilar Misconduct of Other SMA Managers Allegedly Occurring Years Prior to Bartels' Offensive Behavior

Bartels argues the lower courts failed to consider that his termination was "pretextual" because other non-General Manager's misconduct had been treated differently by SMA in the past (i.e. – (1) an employee

had either gotten into a fist fight or altercation with a coworker; (2) another employee was rumored to be "intoxicated," and (3) a sales manager was reported to have possibly mislead third parties to believe that they are getting a more favorable deal than they were). As the lower courts noted, the evidence pertaining to these managers did not constitute comparator evidence because the other managers' conduct was not sufficiently similar to Bartels' disgraceful conduct to a community volunteer. *Silvera v. Orange Cty. Sch. Board*, 244 F.3d 1253, 1259 (11th Cir. 2011). In determining whether a comparator is similarly situated, it is required that the employees are involved in or accused of the same or similar conduct and are disciplined in different ways, and that the "quantity and quality of the comparator's misconduct be nearly identical to prevent courts from second-guessing employers' reasonable decisions." *Burke-Fowler v. Orange Cnty.*, 447 F.3d 1319, 1323 (11th Cir. 2006).

The lower courts held the record established that two of the alleged comparators did not engage in behavior that could be construed as mistreatment of a potential customer or third party and this proffered evidence was not probative because it was not identical to Bartels' mistreatment of a HSF volunteer. Finally, where the last employee was simply asked to "smooth things over" with customers who believed they had not received a favorable deal, the lower courts correctly held this evidence is not conduct sufficiently similar to the profanity and offensive behavior Bartels directed to the HSF volunteer. *Id*.

### D. The Lower Courts Correctly Determined Bartels' Proffered "Me Too" Evidence Failed to Show SMA Had Previously Interfered or Retaliated Against Other Employees for Use of Any Leave When the Actual Evidence Showed One SMA Former Employee Was Terminated For Failing to Meet Sales Production (and Not Because of Any Request To Leave), and The Courts Correctly Excluded Inadmissible Hearsay of a Witness Alleging Bartels Told Him Many Years Ago that Bartels Had Been Instructed To Fire An Employee One Year After Experiencing a Medical Condition

Bartels next claimed SMA's alleged "dismissals" of two (2) other employees due to medical needs years prior to Bartels' termination showed evidence to support his claims. Specifically, Bartels argued that many *years* prior to his termination, two employees were fired following leaves; however, in reviewing the record, the lower courts found that one employee actually admitted he was fired for not meeting his sales goals and there was no evidence to indicate his wife's condition qualified (or that even he would have requested) protected leave (Pet. Appx. 37-38). Additionally, the lower courts correctly did not consider inadmissible hearsay evidence from a witness who last worked at SMA five (5) years *before* Bartels' termination, who merely recalled an employee left SMA one year *after* his heart attack and he "later heard" from Bartels that SMA supposedly ordered Bartels to fire an employee

because of his medical condition. [*See* Fed. R. Evid. 801, 805. *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1293 (11th Cir. 2010). (Pet. Appx. 10-11, 36-39.)]

### E. SMA Owners' Disputed Statements At Bartels' Termination Meeting Did Not Show Intentional Discrimination

At his termination meeting, Bartels contended Adam Kaminsky told Bartels he had "done nothing wrong" and it was "purely a business decision" for Bartels' dismissal and that the lower courts failed to find these statements were inconsistent with SMA's reason for terminating him. Yet, in considering Bartels' argument, the lower courts did not limit its inquiry to simply the alleged bare bones contents of Adam's statements, but considered the totality of their context. The courts specifically considered evidence indicating that: (1) Adam began the termination meeting by telling Bartels that he was going to think [they were] "the biggest 'xxxxbags' in the world"; (2) Myron told Bartels that "he knew what [Bartels] was going through because Adam . . . had had a miscarriage"; (3) Bartels was offered a three (3) month's severance package; (4) Bartels' statement that "Adam Kaminsky and Ross Kaminsky sent me text messages with prayers for my baby"; (5) Bartels' statement that, at his termination meeting, both Adam and Myron expressed that they "felt bad for me"; and (6) Bartels' own characterization that some of Myron's statements on the day of his termination were expressions of sympathy. (Pet. Appx. 39-41.) Evaluating the evidence in the context of all

evidence presented on the issue of Bartels' termination, the lower courts found that no reasonable jury could conclude that Adam's initial termination rationale was given to conceal a discriminatory intent; rather, the initial termination explanation was indisputably given to further the feelings of sympathy that both Myron and Adam carried, and consequently a fact finder would only be left with the close temporal proximity between Bartels' notice for possible FMLA leave and his termination on which to base its pretext determination. (Pet. Appx. 40-41, 1-13.) Without more, no genuine dispute existed as to whether SMA's legitimate termination rationale in firing Bartels for his offensive conduct and language to a community volunteer was pretextual. Summary judgment was thus proper as on both Plaintiff's interference claim and his retaliation claims.

Bartels also argued the lower courts failed to consider that Myron's statements about his own son's miscarriage or offering severance at Bartels' termination meeting showed intentional discrimination. Yet, the lower courts properly found Bartels' admission that the Kaminskys had previously sent him text messages with prayers for his family during the prenatal testing was consistent with their sympathy, and both statements at his termination were expressions of sympathy. (*See Wascura*, 257 F.3d at 1241, 1244-49 – summary judgment upheld where employer's expression of sympathy for employee's son being diagnosed with AIDS was not pretextual). (Pet. Appx. 40-41, 8.)

## III. ALTHOUGH THE COURT DOES NOT CONSIDER ISSUES FIRST RAISED ON APPEAL, THE "MOTIVATING FACTOR" STANDARD DOES NOT APPLY NOR OVERTURN JUDGMENT ON BARTELS' FMLA CLAIMS

### A. Even if this Court Reaches the Merits of Bartels' Newly Raised Issue of "Motivating Factor" Standard, SMA Did Not Interfere With Bartels' FMLA Rights

Assuming arguendo that this Court rejects its *McDonnell Douglas* framework as to FMLA claims in favor of applying the decision in *Quigg v. Thomas County School District*, 814 F.3d 1227 (11th Cir. 2016), it has no effect here. *First*, Bartels asserted SMA acted solely from an improper motive: discrimination for his leave. However, his claim is not a mixed-motive case. (Pet. Appx. 12; *Quigg v. Thomas County School District*, 814 F.3d at 1227, note 1.) *Second*, under *Quigg*, just as under *McDonnell Douglas*, the dispositive question is whether a reasonable jury would find Bartels' termination arose from his offensive conduct, and not because of his leave. Likewise, Bartels' argument that he is no longer required to show pretext is incorrect. In *Chavez v. Credit Nation Auto Sales, LLC*, 641 Fed. Appx. 883, p. 5 (11th Cir. 2016); this case held Title VII *discrimination* action still requires a plaintiff "to demonstrate *a reason is not pretextual* ***unless shown both that the given reason was false and discrimination was the real reason***, and to survive summary judgment, the plaintiff must meet the employer's reasons "head on" and rebut it. *Chapman v. AI Transp.*,

229 F.3d 1012, 1030. As General Manager, Bartels was expected to be professional in his dealings, particularly with a volunteer chairing SMA's high-profile event for HSF, whose members were its actual and prospective customers. Bartels' offensive conduct to the HSF chair would motivate any reasonable employer to terminate their General Manager. "Consequently, [where a] court is left only with the close temporal proximity between Bartels' FMLA notice and his termination on which to base its pretext determination [and] for that reason, summary judgment is proper." (Pet. Appx. 12, 15).

### B. Even if This Court Should Now Consider Bartels' Newly Raised Argument that the "Motivating Factor" Standard Applies to FMLA Claims, This Court Should Follow Its Prior Cases Rejecting a Mixed Motive Standard in Similar Employment Discrimination Cases

For the first time on appeal to this Court, Bartels argued that the lower courts improperly relied upon the appropriate causation standard for setting forth ADEA claims and Title VII retaliation claims, and insists a plaintiff should not meet a "but-for" causation standard to prevail on claims provided by those statutes. Bartels now argues his FMLA claims require an analysis by "motivating factor" standard, rather than the *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973) framework. However, this Court has held a "mixed motive" standard is *never* proper in an ADEA case. *Gross v. FBL Financial Services*, 557 U.S. 167, 129

S. Ct. 234, 2349-51, 174 L. Ed. 2d 119 (2009) (emphasis added). (As shown below, substantial legislative interpretation and the text of ADEA is similar to FMLA claims.). (*Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013)).

Here, Bartels' new argument is premised on whether FMLA retaliation claims are sufficiently similar to ADEA claims and Title VII retaliation claims, or more like Title VII discrimination claims such that a "mixed motive" or "motivating factor" causation is required. In presenting these arguments, Bartels now argues for the first time here that mandatory deference should be given to DOL regulations. *First*, even assuming that Bartels can now present these arguments (which is denied as these issues were never properly raised in the lower courts), neither argument is correct, and even if Bartels' initial argument is correct (which it is not), the outcome here would not change as shown above.

### C. FMLA Claims are Governed by a "But-For" Standard In Accordance with Statutory and Judicial History

When an employee sues under a FMLA retaliation theory, the employer's motive is key, and the specific issue becomes "whether the employer took the adverse action because of a prohibited reason or for a legitimate, nondiscriminatory reason. Here, the Eleventh Circuit relied on the familiar framework established in

*McDonnell Douglas Corp.* to analyze the issue of motivation in employment discrimination cases, lacking direct evidence of discrimination, brought under Title VII of the Civil Rights Act of 1964 ("Title VII"). Under the *McDonnell Douglas* framework, if a plaintiff establishes a prima facie case of discrimination or retaliation, the burden of production then shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's [termination]" that is "legally sufficient to justify a judgment for the [employer]." *McDonnell Douglas*, 411 U.S. at 802 and *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). If the employer produces such evidence, "the presumption of discrimination drops from the case, and the plaintiff retains the ultimate burden of showing that the employer's stated reason for terminating him was in fact a pretext for retaliating against him for having taken protected FMLA leave."

Here, despite Bartels' newly raised arguments on appeal, several factors strongly support the conclusion that "but-for" is the appropriate causation standard for FMLA retaliation cases under rules of statutory construction. The first factor concerns the importance of Congress's choices in purposely designing and drafting statutes that regulate wrongful retaliation and other forms of status-based discrimination. The second factor references the proper interpretation of FMLA's text. Both factors adhere to this Court's decisions on employment discrimination and retaliation. The third factor relates to important policy considerations for a

"but-for" test.[7] Finally, where ordinary rules of statutory construction suffice at this point to support a "but-for" analysis, Bartels' suggestion that a Department of Labor regulation deserve controlling deference is misplaced.

### 1. This Court's Employment Discrimination Jurisprudence

In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), this Court held that an employee who alleges employment discrimination under Title VII could prevail if she showed that the motive to discriminate was one of the elements of the employer's decision, even if the employer also had other, lawful motives. If the plaintiff made that showing, the burden of proof then shifted to the employer, who could escape liability by showing it would have taken the same action in the absence of all discriminatory animus. *Id*. at 244-45 (concluding that, under 42 U.S.C. § 2000e-2(a)(1), an employer could "avoid a finding of liability . . . by proving that it would have made the same decision even if it had not allowed gender to play such a role"). In other words, employers have to show that a discriminatory motive was not the but-for cause of the adverse employment action.

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[7] Much of the following arguments summarizing the legislative history, jurisprudence of employment decisions are found in *Gourdeau v. City of Newton*, 283 F. Supp. 3d 179 (U.S.D.C. Mass. 2017).

In 1991, partially in response to *Price Waterhouse*, Congress purposefully changed Title VII to codify in part (and abrogate in part) its holding. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 250, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994) ("The 1991 Act is in large part a response to a series of decisions of this Court interpreting the Civil Rights Acts of 1866 and 1964."). In the Civil Rights Act of 1991, (codified as amended at 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B)) ("1991 Amendment"), Congress authorized discrimination claims where an improper consideration was only "a motivating factor" in the adverse action. Simply put, Congress explicitly established a lessened causation standard for discrimination claims brought under Title VII than the one created in *Price Waterhouse*. The 1991 Amendment also substituted a new burden-shifting framework for the one endorsed in *Price Waterhouse*. 42 U.S.C. § 2000e-5(g)(2)(B). Under that new framework, a plaintiff could prevail in Title VII discrimination claims by showing that race, color, religion, sex, or nationality was a motivating factor in the adverse employment action, unless the employer could show that it would have taken the same action absent that factor. *See University of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2526, 186 L. Ed. 2d 503 (2013) (emphasis added) (describing effect of 1991 Amendment on causation standard).

In 2009, this Court then held a plaintiff bringing a claim under the Age Discrimination in Employment Act ("ADEA") must prove that "but-for" the employer discriminating on the basis of age, the plaintiff would

not have been subject to an adverse employment action. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176, 129 S. Ct. 2343, 174 L. Ed. 2d 119 (2009). In *Gross*, this Court reviewed the contrasting statutory histories of ADEA and Title VII, placing importance on the fact that, while the 1991 amendments to Title VII "explicitly [authorized] discrimination claims [where] an improper consideration was [only] 'a motivating factor' for an adverse employment decision," Congress *did not* similarly amend the ADEA, even though Congress amended both statutes contemporaneously. *Id* at 164-75 (emphasis added). ("When Congress amends one statutory provision but not another, it is presumed to have acted intentionally. . . . As a result, the Court's interpretation of the ADEA was not governed by Title VII decision[s] such as [*Desert Palace*] and *Price Waterhouse*." (citing *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991))).

In 2013, in *Nassar*, 133 S. Ct. at 2528, this Court then rejected the argument that the 1991 amendments which established a "motivating factor" test for Title VII *discrimination* claims were applicable to Title VII *retaliation* claims. *Id*. at 2528, 2533. (emphasis added.) This Court noted that "[w]hen Congress wrote the motivating-factor provision in 1991, it chose to insert it as a subsection within section 2000e-2, which contains Title VII's ban on status-based discrimination, § 2000e-2(a) to (d), (l), and says nothing about retaliation." *Id.* at 2529. This Court concluded that the appropriate causation standard for Title VII retaliation claims is a "but-for" standard, and to find otherwise would go

against Title VII's statutory history as well as its "design and structure." *Id*. at 2533, 2529.

### 2. FMLA's Structure and Legislative History

The same legal rationale used above by this Court also applies to FMLA, which was enacted in 1993, two years after the 1991 amendments to Title VII and the enactment of ADEA. When drafting the FMLA, Congress did not authorize retaliation claims where an improper consideration, an employee's protected leave, was a motivating factor for an adverse employment action. *See* 29 U.S.C. § 2615(a). Like the ADEA and Title VII's retaliation provisions, the FMLA contains no language allowing for a negative-factor standard. (Compare 29 U.S.C. § 2615(a), with 29 U.S.C. § 623(a)(1), 42 U.S.C. § 2000e-3(a).) Following this Court's legal reasoning in *Nassar*, this omission indicates Congress's intention that FMLA retaliation cases *are subject to a but-for causation standard*.

In fact, Congress explicitly modeled the FMLA's retaliation provision after Title VII's Section 105(a)(2) which makes it unlawful for an employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this title.[8] Accordingly, many courts have analyzed FMLA

[8] This "opposition" clause is derived from Title VII (42 U.S.C. § 2000e-3(a)) and is intended to be construed in the same manner. Under Title VII and under section 105(a), an employee is protected against employer retaliation for opposing any practice that

and Title VII retaliation claims similarly. (*See Hodgens v. General Dynamics*, 144 F.3d 151, 160 (1st Cir. 1998); *Adams v. Anne Arundel Cnty. Pub. Sch.*, 789 F.3d 422, 429 (4th Cir. 2015); *McFadden v. Ballard Spahr Andrews & Ingersoll, LLP*, 611 F.3d 1, 6, 391 U.S. App. D.C. 371 (D.C. Cir. 2010); *Hyde v. K.B. Home, Inc.*, 355 Fed. Appx. 266, 272-73 (11th Cir. 2009) (applying the *McDonnell Douglas* framework to plaintiff's Title VII and FMLA retaliation claims).

Therefore, based on its own legislative history and statutory structure, FMLA retaliation cases are subject to a "but-for" causation standard.

### 3. FMLA Textual Analysis

In addition to the legislative intent, textual interpretation of FMLA also requires a "but-for" causation standard. This conclusion is supported by this Court's reasoning in *Gross* when it considered the ADEA (which states "[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age"). 29 U.S.C. § 623(a)(1) (emphasis added). This Court concluded that the ordinary meaning attributable to when an employer takes adverse action "because of" age is that age was the reason that the employer decided to act. 557 U.S. at 176 ("[T]he words 'because

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he or she reasonably believes to be a violation of this title. (H.R. Rep. No. 103-8(I), at 46 (1993).).

of' mean 'by reason of – on account of.' ") (citing 1 Webster's Third New International Dictionary 194 (1966)). Simply put, ADEA claims require proof that "*but-for*" the employee's age, the employer would not have taken the challenged employment action. *Id.*

Title VII's anti-retaliation provision (which was the statute considered in *Nassar*) uses the same expression as the ADEA statute considered in *Gross*. Section 2000e-3(a) of Title VII, like § 623(a)(1) under the ADEA, makes it unlawful for an employer to retaliate against an employee "because of" certain criteria. *Nassar*, 133 S. Ct. at 2528. In *Nassar*, this Court held that "[g]iven the lack of any meaningful textual difference between [§§ 2000e-3(a) and 623(a)(1)], the proper conclusion . . . *is that Title VII retaliation claims require proof that the desire to retaliate was the "**but-for**" cause of the challenged employment action*." *Id.* (emphasis added.).

The FMLA's relevant provision of the statute uses the word "for" in lieu of the phrase "because of." (Compare 29 U.S.C. § 2615(a), with 29 U.S.C. § 623(a)(1), and 42 U.S.C. § 2000e-3(a).) The ordinary meaning of the word "for" is synonymous with "because of." *See* Merriam-Webster, https://www.merriam-webster.com/dictionary/for (last visited September 5, 2017) (listing "because of" among definitions).[9]

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[9] Most pertinently, this Court has never restricted "but-for" causation tests only to statutes using the term "because of," but has used the same closely related terms such as "results from," *Burrage v. United States*, 134 S. Ct. 881, 889, 187 L. Ed. 2d 715

Consistent with this reading of the FMLA's text, other courts have conflated the language in § 2615(a) with that of Title VII. (*See Olson v. Penske Logistics*, *LLC*, 835 F.3d 1189, 1195 (10th Cir. 2016) ("[Defendants] affirm that [plaintiff] was not terminated *because of* his leave . . . " in FMLA interference claim (emphasis added)); *Jones v. Allstate Ins. Co.*, No. 2:14-CV-1640-WMA, 2016 U.S. Dist. LEXIS 106865, 2016 WL 4259753, at *4 (N.D. Ala. Aug. 12, 2016) ("While the FMLA does not use the precise phrase 'because of,' its use of the word 'for' is within the range of phrases whose ordinary meaning indicates a 'but-for' causal relationship."); *Kauffman v. Federal Express Corp.*, 426 F.3d 880, 885 (7th Cir. 2005) (observing that retaliation applies where a company seeks to punish an employee because he asserted his FMLA rights); *Joyce v. Office of Architect of Capitol*, 966 F. Supp. 2d 15, 23 (D.D.C. 2013) ("As in Title VII, to prove FMLA retaliation, a plaintiff must show that . . . the employer took the action *because of* his protected activity." (emphasis added)); *Sparks v. Sunshine Mills, Inc.*, No. 3:12-CV-025440-IPJ, 2013 U.S. Dist. LEXIS 125756, 2013 WL 4760964, at *17 n.4 (N.D. Ala. Sept. 4, 2013) ("Thus, the Supreme Court's determination that the

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(2014), "based on," *Safeco Insurance Company of America v. Burr*, 551 U.S. 47, 63, 127 S. Ct. 2201, 167 L. Ed. 2d 1045 (2007), and "by reason of," *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 653-54, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 (2008); (*Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265-68, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992), have also been read to require "but-for" causation).

'but-for' causation standard applies where an employee alleges discrimination because he engaged in some protected activity also applies in the FMLA context." (emphasis added)).

#### 4. Public Policy Considerations Support a But-For Causation

Two public policy considerations support a "but-for" causation standard.

*First*, a "but-for" causation standard for FMLA retaliation claims is consistent with how both courts *and* Congress have addressed the issue in other antidiscrimination statutes. For example, Title VII protects workers from "having opposed, complained of, or sought remedies for, unlawful workplace discrimination," such as those motivated by "race, color, religion, sex, or national origin." *Nassar*, 133 S. Ct. at 2522; 42 U.S.C. §2000e-2(a). Protection against retaliation based on these factors stand on equal – if not higher – footing than the values the anti-discrimination provisions of the FMLA protects. *See Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728, 123 S. Ct. 1972, 155 L. Ed. 2d 953 (2003) ("The FMLA aims to protect the right to be free from gender-based discrimination in the workplace."). It is highly inconsistent and illogical to treat the values protected by the FMLA as more important than the values protected by Title VII. Yet, inconsistency will result if this Court should now adopt a motivating-factor causation standard, rather than the but-for standard on FMLA claims.

*Second*, the *Nassar* majority expressed concern about the fact that "claims of retaliation are being made with ever-increasing frequency" and that increasing the number of claims "siphon[s] resources from efforts by employers, administrative agencies, and courts to combat workplace harassment." *Nassar*, 133 S. Ct. at 2531-32. (Changing to a lessened causation standard, a potential plaintiff would expect her chances of success in a lawsuit to increase, since, for instance, courts might find it more difficult to dismiss claims at a pre-trial stage, which would lead more plaintiffs to file lawsuits than would normally be the case.)

### 5. Where Ordinary Rules of Statutory Construction Establish the "But-For" Standard for FMLA Cases, There is No Justification to Defer to any Agency Regulations for Interpretation

Despite the strong statutory and judicial precedents for using a "but-for" causation standard, a small number of courts have considered that FMLA retaliation cases could be proven by a motivating factor (also referred to as a "negative-factor" standard). (*See Chase v. U.S. Postal Serv.*, 149 F. Supp. 3d 195, 209 (D. Mass. 2016) aff'd on other grounds, *Chase v. U.S. Postal Serv*., 843 F.3d 553 (1st Cir. 2016); *Hunter v. Valley View Local Sch*., 579 F.3d 688, 692-93 (6th Cir. 2009); *Gonzalez v. Carestream Health, Inc*., No. 12-CV-6151-CJS, 2016 U.S. Dist. LEXIS 60317, 2016 WL 2609808, at *12

(W.D.N.Y. May 6, 2016). In reaching their conclusion, these courts ignored ordinary rules of statutory construction, and instead, (like Bartels' request here) yielded deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), to a Department of Labor regulation, which prohibits employers from "us[ing] the taking of FMLA leave as a negative factor in employment actions. . . ." 29 C.F.R. § 825.220(c). However, *Chevron* deference *is unnecessary (nor justified) when a court can apply ordinary tools of statutory construction – i.e. – it can determine that "Congress has directly spoken to the precise question at issue." "If the intent of Congress is clear, that is the end of the matter*; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. (emphasis added.)

As discussed above, the ordinary meaning of the word "for" in 29 U.S.C. § 2615(a)(2) leaves no room for the DOL to interpret the FMLA as requiring a lessened causation standard and so there is no justification for deferring to any DOL regulations in light of the legislative history and the text of the FMLA.

In the unlikely event this Court should disregard its prior decisions which analyzed ADEA and Title VII retaliation claims in a similar manner (without deference to agency regulations) and somehow conclude that FMLA is "silent or ambiguous" with respect to the causation standard in retaliation claims, *Chevron* first requires this Court to inquire "whether the agency's

answer is based on a permissible construction of the statute." 467 U.S. at 843. Here, the DOL's regulation is an impermissible construction of the FMLA, given its structure, text and legislative history. (In fact, the DOL's official comment on the FMLA fundamentally contradicts its "negative factor" regulation. (*See Jones*, 2016 U.S. Dist. LEXIS 106865, 2016 WL 4259753, at *6 observing that the agency explicitly acknowledges that since the FMLA followed Title VII, both should be "construed in the same manner." The Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2218 (Jan. 6, 1995) (codified at 29 C.F.R. § 825.220) ("This . . . clause is *derived from Title VII* . . . and is intended, according to the legislative history, to be *construed in the same manner*. Thus, FMLA provides the same sorts of protections to workers who oppose . . . violations of the FMLA as are provided to workers under Title VII." (emphasis added)).

**Finally, this Court has already held in *Nassar* that the causation standard for Title VII retaliation claims is "but-for."** If the FMLA is meant to provide workers with the same protections as Title VII, (but no more), then the causation standard for retaliation claims under both statutes is the same. Otherwise, workers would enjoy greater protections under one statute than under the other and this would clearly contradict Congress's intent when it enacted the FMLA. Additionally, the holdings would result in inconsistent standards for courts attempting to determine a case involving both ADEA, Title VII retaliation

claims and/or FMLA claims. Therefore, the DOL regulation is not entitled to *Chevron* deference.

As such, FMLA retaliation claims must be proved according to a "but-for" causation standard.



## CONCLUSION

For the reasons stated, the Petition should be denied.

Dated September 7, 2017.

Respectfully submitted,

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