No. 07-539

In The
Supreme Court of the United States

PROGRESS ENERGY, INC.
Petitioner,

v.

BARBARA TAYLOR,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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STATEMENT

The United States has now joined its voice with those of petitioner, *amicus* Chamber of Commerce, *amicus* Association of Corporate Counsel, *amicus* Equal Employment Advisory Council, *amicus* Society for Human Resource Management, and *amicus* North Carolina Retail Merchants Association in recognizing that the Fourth Circuit's decision in this case (i) is wrong (US Br. 8); (ii) creates a direct inter-circuit conflict with the Fifth Circuit, and substantial tension in the law generally (*id.* 9); (iii) is irreconcilable with this Court's precedent governing deference to agencies' interpretations of their own regulations, including this Court's recent decision in *Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147 (2008) (US Br. 9); and (iv) substantially and immediately impedes the ability of thousands of employees and employers within the Fourth Circuit (not to mention nationwide) to resolve the enormous volume of Family and Medical Leave Act (FMLA) claims that arise due to that statute's sweeping coverage, and thus to settle disputes, to execute binding severance agreements, and to implement early-out retirement programs *(id.* 18).

Having devoted 99% of his brief to advancing arguments in favor of review, the Solicitor General recommends that certiorari be denied for one reason only: the pendency of a Notice of Proposed Rulemaking. But the uncertain prospect of a regulatory amendment at some undefined, but almost assuredly far distant, time in the future (if ever) does nothing to change the need for this Court's intervention now. The Fourth Circuit's decision, after all, did not affect

only a narrowly cabined or infrequently recurring aspect of regulatory administration and enforcement, nor does it involve a peculiar problem arising under a statute the coverage of which is limited to a specialized area. Quite the opposite, the court held that *no claim* arising under *any* provision of the FMLA – a statute that governs virtually *every employer* in the Nation, public or private, with more than 50 employees, 29 U.S.C. 2611(4), and that applies to more than *76 million employees* (Pet. 20) – can *ever* be settled or resolved on *any* terms, for *any* reason, or in *any* way outside of a courtroom (or a non-existent Department of Labor review process).

As the government's own brief demonstrates, the sweep and implications of that ruling for both employees and private and governmental employers are breathtaking, especially as businesses struggling through an economic downturn search for ways to make their operations more streamlined and efficient and employees affected by economic downsizing become more heavily reliant on severance and early-out benefit packages. The potential of a purely prospective regulatory change at some undefined time in the future thus does nothing to alleviate the churning uncertainty and disruption that employers, employees, and courts face today and will continue to confront in the years to come absent this Court's intervention. Beyond that, the pendency of the proposed rulemaking is no answer at all to the Fourth Circuit's suggestion that the Department of Labor lacks the regulatory authority under any circumstances to permit the settlement of FMLA claims, because (in the court of appeals' view) Congress forbade settle-

ments under the FMLA just as it did under the Fair Labor Standards Act. Certiorari should accordingly be granted.

1. The brief of the United States largely reinforces the appropriateness of this Court's certiorari review. The government agrees with petitioner and the five *amici* that the Fourth Circuit's decision "creates a direct conflict" (US Br. 16) with the Fifth Circuit's ruling in *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (2003). As the United States further emphasizes, the Fourth Circuit's decision has also already led to "differing conclusions" by district courts in five different circuits across the Country. See US Br. 17-18. That disuniformity has no prospect of abating and, indeed, is guaranteed to grow should certiorari be denied and the Fourth Circuit decision be left standing as authority for plaintiffs to invoke nationwide.

The United States likewise concurs with petitioner and its *amici* that the Fourth Circuit's decision cannot be reconciled with this Court's "well-established precedent" – reconfirmed just three months ago – affording "controlling deference" to an agency's "permissible interpretation of its own regulation." US Br. 9 (citing, *inter alia*, *Holowecki*, *supra*). As the United States explains (Br. 9-10), the Department of Labor's considered determination that its regulation prohibits only the prospective waiver of rights, and not the retrospective settlement of claims, is longstanding, consistent, and "predicated on an important and well-understood dichotomy" between the settlement of past disputes, which is permitted, and a waiver of protection against future employer misconduct, which is not permitted. In addition, the United

States echoes petitioner's argument (Pet. 15-16) that the Fourth Circuit's decision contravenes the important policy and "longstanding judicial precedent encouraging the settlement of employment claims" (US Br. 12-13).

Finally, the United States joins petitioner (Pet. 20-25) and its *amici* in recognizing the substantial and ongoing "practical problems" caused by the Fourth Circuit's erroneous decision (US Br. 19). As the government notes, the court of appeals' decision "prevents employers from settling claims with finality," and likewise "prevents * * * employees from obtaining payments through such settlements." US Br. 18. The problems do not stop there, however. As the United States anticipates, the substantial "uncertainty created by the court's decision may discourage employers *nationwide* from offering settlement or severance agreements, thereby prompting increased litigation and reducing or eliminating the additional compensation employees often receive under such agreements." *Ibid.* (emphasis added). Beyond that, the brief for the United States (specifically joined by the Department of Labor) all but admits that the Department has no intention of establishing a settlement review mechanism (US Br. 18-19), leaving the full burden of approving every FMLA settlement, waiver, severance, and early-out retirement offer squarely on the shoulders of the federal judiciary. Of course, if federal courts conclude that Article III's prohibition on issuing advisory opinions forbids such open-ended rubber-stamping of private contracts, then there will be no mechanism available *at all* for resolving FMLA disputes outside of adversarial liti-

gation. That is an unendurable situation for employers and employees alike, which fully merits this Court's intervention.

2. The undeterminable prospect that the pending notice of proposed rulemaking might at some undefined time in the future clarify the regulatory text is no answer to that present and pressing need for this Court's review.

First, having analyzed at length the problems with the Fourth Circuit's decision and the immediate, continuing, and widespread impact of the decision, the government offers no assurance at all that any regulatory change will, in fact, *ever* materialize. This is not, after all, a case where a regulation is in the final stages of approval, or where regulatory problem can be resolved expeditiously through less formal agency action. All that has happened is that the Department of Labor issued a massive *notice* of *proposed* rulemaking, which included an amendment to 29 C.F.R. 825.220(d) as just one of 54 distinct and diverse proposed changes. This particular proposal, moreover, has already been greeted with direct and immediate resistance from the plaintiff's bar and labor organizations. See 73 Fed. Reg. 7876, 7901 (Feb. 11, 2008) (noting opposition of the National Employment Lawyers Association); http://www.aflcio.org/mediacenter/prsptm/pr04112008.cfm (AFL-CIO); http://www.nationalpartnership.org/site/DocServer/National_Partnership_DOL_NPRM_Comments.pdf?docID=3181 (National Partnership for Women and Families).

The most that the Department is willing to say about the amendments' prospects is that it is "in the

process of reviewing the submitted comments." US Br. 19. But that means that not even the Department of Labor has yet committed to making the proposed regulatory change. And that is why the brief for the United States offers this Court no assurance that any change will occur at all, let alone any timeframe for action and thus for relieving the constraints and legal uncertainty under which employers, employees, and courts continue to labor every day. Instead, the United States does nothing more than passively observe that "[i]f" the regulation is adopted, the regulation's ambiguity may be resolved prospectively. US Br. 19.

When, in the past, this Court has been faced with the indeterminacy of such a nascent regulatory process, it has frequently granted certiorari, notwithstanding the United States' contrary recommendation. See, *e.g.*, US Br. in Opp. at 5, No. 06-1286, *Knight v. Comm'r of Internal Revenue* ("That conflict, however, does not require resolution by this Court because it is likely to be resolved by new regulations interpreting Section 67(e)(1)."), cert. granted, 127 S. Ct. 3005 (June 25, 2007); US Br. in Opp. at 15, No. 06-1181, *Dada v. Mukasey*, ("Although the courts of appeals are divided on the question, review is not warranted in this case or at this time * * * in light of the judicial decisions and issues that have been raised, the Department of Justice has determined that it will promulgate regulations specifically regarding the tolling question presented by this case."), cert. granted, 128 S. Ct. 36 (Sept. 25, 2007); US Cert. Amicus Br. at 9, No. 00-952, *Wisconsin Dep't of Health and Family Servs. v. Blumer* ("Nonetheless,

we do not believe that review of the issue by this Court is warranted at this time. The United States Department of Health and Human Services has informed us that, in light of the Wisconsin Court of Appeals' invalidation of the income-first rule on a statewide basis, it plans promptly to promulgate regulations addressing the question presented here."), cert. granted, 531 U.S. 1141 (Feb. 20, 2001); cf. US Cert. Br., No. 00-6029 at 9, 20, *Ragsdale v. Wolverine World Wide, Inc.* (recommending against certiorari to review invalidation of FMLA regulation), cert. granted, 533 U.S. 928 (June 25, 2001).

Second, the government's conspicuous reticence is understandable. If past is prologue, then the proposed rulemaking has little realistic prospect of ever coming to fruition. The Department of Labor has been notoriously unsuccessful in promulgating timely regulatory changes. Indeed, in the entire time since the Department first adopted its FMLA regulations in 1995, it has never adopted a substantive amendment. For example, the regulation invalidated by this Court in 2002 in *Ragsdale* has never been amended, notwithstanding the Department's announcement in 2003 – fully *five years ago* – that a change would be forthcoming. See 68 Fed. Reg. 30559 (May 27, 2003). The current notice revives the *Ragsdale* proposal yet again, 73 Fed. Reg. at 7923 – now six years after this Court's invalidation of the original regulation.

The FMLA is not unique in that respect. For example, in 1982, the Department of Labor issued a notice of proposed rulemaking to amend its child labor regulations to address the hours and times children

can work, which "generated considerable public interest." 72 Fed. Reg. 19328, 19329 (Apr. 17, 2007). Twenty-five years later, the Department noted that it had suspended further consideration of that "proposal" and that no final rule was ever implemented. *Ibid.* In 1988, Labor similarly issued a notice of proposed rulemaking addressing "adequate consideration" for assessing the purchase of company stock by an employee stock ownership plan under the Employee Retirement Income Security Act. 53 Fed. Reg. 17,632, 17,633 (May 17, 1988). No final regulation has ever been promulgated. See *Henry v. Champlain Enterprises, Inc.*, 445 F.3d 610, 619 (2d Cir. 2006).

Even when Labor has succeeded in enacting final regulations, the process has been measured in years and even decades. An update of regulations governing overtime pay took 19 years. See 50 Fed. Reg. 47696 (Nov. 19, 1985); 69 Fed. Reg. 22122 (Apr. 23, 2004). The promulgation of child labor regulations involving "hazardous orders" spanned a decade. See 59 Fed. Reg. 25167 (May 13, 1994) (ANPRM); 64 Fed. Reg. 67130 (Nov. 30, 1999) (NPRM); 69 Fed. Reg. 75382 (Dec. 16, 2004) (final rule).

Given (i) the opposition that the proposal to amend 29 C.F.R. 825.220(d) in particular has already generated, (ii) the fact that it is only one small piece of a sweeping package of approximately 54 proposed regulatory changes spanning 125 pages of the Federal Register and inspiring more than 6,000 comments, along with significant opposition, and (iii) the impending change in Administrations and thus in the personnel responsible for final regulatory approval (and perhaps approach to FMLA's administration),

there is little realistic prospect that any amendment to Section 825.220(d) will be forthcoming in the foreseeable future and certainly not in a sufficiently timely manner to alleviate the substantial legal and practical problems inflicted on employers and employees daily by the Fourth Circuit's decision.

Third, even if Labor eventually chooses to go forward with a regulatory amendment and, contrary to history, experience, and politics, a new regulation is eventually promulgated, the government's prediction that the change would "effectively abrogate the Fourth Circuit's decision – at least on a going forward basis" (US Br. 19) is not well taken, as it fails to account for the inevitable challenges to the regulation.

The government's prediction thus overlooks that the Fourth Circuit not only rejected Labor's interpretation of its own regulation, but also strongly suggested that Labor has no statutory authority to adopt regulations permitting the prospective waiver of FMLA rights. The Fair Labor Standards Act prohibits all private settlements (see Pet. 16-17) and, in the Fourth Circuit's view, "[t]he reasons for the prohibition of private settlements of FLSA claims *apply with equal force* to FMLA claims" (Pet. App. 11a (emphasis added)). The court accordingly cautioned that "[t]he settlement or waiver of claims is not permitted when 'it would thwart the legislative policy which [the employment law] was designed to effectuate.'" *Id.* at 10a. In so doing, the Fourth Circuit suggested its *substantive* disapproval of *any* regulatory authorization for the settlement of FMLA claims, on the ground that it would conflict with the FLSA model that Congress intended to adopt. See also US Br. 7,

13 (noting the Fourth Circuit's equation of the FMLA and FLSA). There thus is a substantial question whether a regulatory amendment by itself will be sufficient to correct the Fourth Circuit's erroneous course and to bring desperately needed clarity and uniformity to this vital question. And even if it would, no such relief would arrive until the regulation not only has been promulgated by the Department of Labor, but also has run the gauntlet of litigation challenges to the regulation, the regulatory process, and the Department's statutory authority. The ability of employers and employees to settle or resolve informally disputes arising under a statute that employees invoke more than 10 million times a year (Pet. 20 & n.7) simply cannot be left hanging in such prolonged legal limbo.

Fourth, as the Solicitor General notes, even if Labor elects to pursue the regulatory amendment, succeeds in promulgating it, and prevails in litigation challenging the regulation, the change would protect settlements only "on a going forward basis." US Br. 19. The new regulation would do nothing to address the lawfulness of tens of thousands of settlements, severance agreements, and early-out retirement waivers will by that indeterminate date in the future have already been executed. As the *amicus* briefs submitted in support of the petition for certiorari demonstrate, the uncertainty over the lawfulness of FMLA releases is unsustainable for business today, let alone over an open-ended span of years. In addition, as the government notes (Br. 17-18), a number of district court decisions have already been forced to wrestle with the implications of the Fourth Circuit's

decision. That volume of litigation will multiply exponentially once the plaintiffs' bar, emboldened by a denial of certiorari, launches a much broader array of suits based on previously released FMLA claims.

The government, for its part, is noticeably silent not only about the prospect and timing of any regulatory change, but also about what exactly employers and employees are supposed to do in the lengthy interim with the tens of thousands of FMLA disputes that arise annually. Stalling – or, worse, litigating – every single FMLA dispute outside the Fifth Circuit pending a lengthy and profoundly uncertain regulatory process is simply not viable.

3. Given the government's acknowledgment (Br. 18-19) of the widespread and untenable legal and practical problems caused by the Fourth Circuit's decision, that ruling should not be left standing pending an uncertain regulatory process and, for all of the foregoing reasons and those stated in the petition, petition reply, and five *amicus* briefs, plenary review is warranted. Alternatively, the Court could hold the petition over its summer recess in order to better assess whether the notice of proposed rulemaking has any realistic prospect of materializing.

In addition, as the United States notes (Br. 9), the Fourth Circuit's decision squarely conflicts with this Court's recent decision in *Holowecki*, *supra*, which reaffirmed the rule of deference to agency interpretations of their own regulations even when expressed in litigation and even when (as the Fourth Circuit wrongly found here (compare Pet. App. 13a-16a, with US Br. 10-12)) an agency's position has been inconsistent. See 128 S. Ct. at 1156-1157. In so holding,

this Court stressed that an "agency is entitled to further deference when it adopts a reasonable interpretation of regulations it has put in force," and that, as a consequence, federal courts must "accept the agency's position unless it is plainly erroneous or inconsistent with the regulation." *Id.* at 1155 (citations omitted). As the United States explains (Br. 9-13), the Fourth Circuit's decision is contrary to *Holowecki* and the principles of agency deference it confirms. Accordingly, if the Court does not grant plenary review, the Court should grant the petition, vacate the judgment below, and remand for further consideration in light of *Holowecki*. Vacatur would also have the salutary effect of not permitting the Fourth Circuit's deeply flawed judgment to become final and the conflicting legal regime it creates to take firm root.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition and the petition reply brief, the petition for a writ of certiorari should be granted. In the alternative, the petition should be granted, the judgment below vacated, and the case remanded for further consideration in light of *Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147 (2008).

Respectfully Submitted,

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