RECORD NOS. 10-7073(L); 10-7078

ORAL ARGUMENT SCHEDULED FOR MAY 10, 2011

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARY KATE BREEDEN,
Plaintiff-Appellant/Cross-Appellee,

v.

NOVARTIS PHARMACEUTICALS CORPORATION,
Defendant-Appellee/Cross-Appellant.

On Appeal From The United States District Court
For The District Of Columbia

CORRECTED BRIEF OF *AMICI CURIAE* NELA AND AARP SUPPORTING CROSS-APPELLEE MARY KATE BREEDEN

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CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record for AARP certifies as follows:

A. PARTIES and *AMICI*

All parties and *amici* appearing before the District Court and in this court are listed in the Brief for Cross Appellee Mary Kate Breeden ("Breeden"). There are no intervenors.

B. RULINGS UNDER REVIEW

The rulings under review are a summary judgment by the District Court, the Honorable James Robertson, judge presiding, entered on February 16, 2010, and judgment notwithstanding the verdict entered on May 26, 2010.

C. RELATED CASES

NONE.

CORPORATE DISCLOSURE STATEMENT

NELA. The Internal Revenue Service has determined that the National Employment Lawyers Association (NELA) is organized and operated exclusively for advancing employee rights and serving lawyers who advocate for equality and justice in the American workplace pursuant to Section 501(c)(6) of the Internal Revenue Code and is exempt from income tax. NELA is also organized and operated as a not for profit corporation under the state laws of Ohio. The Employee Rights Advocacy Institute For Law & Policy is NELA's related charitable and educational organization under Section 501(c)(3) of the Internal Revenue Code.

NELA has no parent corporation, nor has it issued shares or securities.

AARP. The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) (1993) of the Internal Revenue code and is exempt from income tax. AARP is also organized and operated as a non-profit corporation pursuant to Title 29 of Chapter 6 of the District of Columbia code. 1951.

Other legal entities related to AARP include AARP Foundation, AARP Services, Inc., Legal counsel for the Elderly, AARP Financial, AARP Global Network, and Focalyst.

AARP has no parent corporation, nor has it issued shares or securities.

s/ Daniel B. Kohrman
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GLOSSARY OF ABBREVIATIONS

ADEA	Age Discrimination in Employment Act
ADA	Americans with Disabilities Act
DOL	Department of Labor
FMLA	Family Medical Leave Act
NLRA	National Labor Relations Act
NELA	National Employment Lawyers Association

INTERESTS OF *AMICI*[1]

The National Employment Lawyers Association (NELA) advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Founded in 1985, NELA is the country's largest professional organization comprised exclusively of lawyers who represent individual employees in cases involving labor, employment and civil rights disputes. NELA and its 68 state and local affiliates have more than 3,000 members nationwide committed to working for those who have been illegally treated in the workplace. As part of its advocacy efforts, NELA supports precedent setting litigation and has filed dozens of *amicus curiae* briefs before this Court, the U.S. Supreme Court and other federal appellate courts to ensure that the goals of workplace statutes are fully realized.

AARP is a non-partisan, non-profit organization dedicated to addressing the needs and interests of people age 50+. AARP supports the rights of older workers and strives to preserve the legal means to enforce them. More than half of AARP's

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[1] Pursuant to Fed. R. App. P. 29(c), *amici curiae* NELA and AARP certify: that all parties have consented to the filing of this brief; that no party or party's counsel authored this brief in whole or in part; and that no person other than *amici* contributed money intended to fund the brief's preparation or submission.

members are in the work force. Thus, they are protected by various federal employment laws, including the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, and the Family and Medical Leave Act (FMLA). AARP's working members benefit from the right to take unpaid FMLA leave. AARP's members not in the workforce benefit from FMLA provisions assuring the rights of working children, spouses and other relatives to take unpaid leave in order to care for their parents, spouses and other relatives with serious medical conditions. AARP played a significant role in securing enactment of the FMLA, and has continued to work to assure its vigorous and effective enforcement, including through *amicus curiae* briefs in important cases.

SUMMARY OF ARGUMENT

If this Court decides to reverse the JNOV against Mary Kate Breeden, the Court should reject Novartis' prayer to set aside the charge to the jury to use a "motivating factor" causation standard to resolve her FMLA retaliation claim. Novartis' ill-founded cross-appeal, based on the supposed routine application of *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343 (2009), ignores well-established principles of both deference to agency rulemaking and statutory construction. This Court should defer to the longstanding U.S. Department of Labor (DOL) regulation, 29 C.F.R. § 825.220(c), articulating a "motivating factor" standard in

cases of retaliation for taking FMLA leave, and recognize that the analogy to *Gross* is inapt.

Overwhelming precedent from this Court's sister circuits recognizes a right to sue over employer retribution for exercising the FMLA leave entitlement. These courts reason that construing FMLA to omit such a right would render the Act's leave entitlement a "nullity." This analysis parallels repeated recent Supreme Court rulings on retaliation claims under various employment and civil rights laws. Novartis also ignores a fundamental distinction between the FMLA and most anti-discrimination laws: Title VII (like other anti-discrimination laws such as the ADEA and the ADA) is primarily concerned with *who plaintiffs are*, while the FMLA is almost entirely concerned with *what employees do.* While employees cannot change their race or sex, they can decide whether to exercise their FMLA rights. This concept that the exercise of rights can be easily chilled has led the Supreme Court to afford broader protection to anti-retaliation provisions than substantive anti-discrimination statutes. *See, e.g., Burlington N. & S. F. R. Co. v. White*, 548 U.S. 53 (2006).

A persuasive share of decisions favoring Breeden's retaliation claim identify direct textual support for such a right in Section 2615(a)(1) of the FMLA. DOL, the agency designed by Congress to interpret FMLA, agrees. In contrast, that provision contains no statutory language justifying application of *Gross*'

supposedly analogous construction of the ADEA. Indeed, *Gross* relied on different statutory language and legislative history as well as a different legislative objective in rejecting a "motivating factor standard" under the ADEA.

In the alternative, this Court should adhere to the majority view that the FMLA's textual prohibitions – in Sections 2615(a)(1), 2615(a)(2) and 2615(b) – singly and together are ambiguous as to the statutory source of a right to challenge retaliation for taking leave. From this conclusion it follows that Novartis' bid to benefit from *Gross* is foreclosed by *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967 (2005), and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). These authorities mandate deference to any "reasonable" rule issued by a responsible agency to fill a gap in an ambiguous law under its purview, and squarely reject judicial second-guessing, even on grounds that a court believes it has reached a "better" interpretation of an ambiguous law.

The cross-appeal's invitation to extend *Gross* to the FMLA simply because it is another federal employment law must be rejected as overreaching. Novartis ignores fundamental facts that undermine its simplistic analysis. For instance, the FMLA did not exist in 1991, rendering inapt *Gross*' specific rationale for limiting the ADEA, namely that Congress considered amendments to the ADEA at the same time it added the motivating factor provision to Title VII. Likewise, while

Section 2615(b) of the FMLA employs the word “because” Section 2615(a)(2) does not; it uses the word “for.” This difference in statutory language in adjacent provisions substantially undermines Novartis' effort to transmute *Gross’* interpretation of the word "because" into a general purpose definition applicable to all manner of statutory prepositional phrases. Further, the origins of the FMLA’s prohibition against retaliation for taking leave derives from the National Labor Relations Act, not Title VII.

Strong reasons for upholding DOL’s “motivating factor” rule, and for distinguishing this case form *Gross*, warrant rejection of the cross-appeal and approval of the District Court’s jury charge.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff-Appellant/Cross-Appellee Mary Kate Breeden began work as a sales associate for Defendant-Appellee/Cross-Appellant Novartis in 2000. She told her supervisor in late 2004 that she was pregnant and so, would need to take FMLA leave. Soon thereafter, Novartis realigned sales territories, including Breeden’s. She alleged that her authority, responsibility, workload, and status all were drastically reduced. Breeden also asserted that after objecting to the realignment, her supervisor promised to make her “whole” after she returned from maternity leave, and that the changes affecting her job were not permanent.

In March 2005, Breeden began her maternity leave, and she returned to work in July 2005. She covered this time off with unpaid FMLA leave and accrued paid vacation days. Upon returning, Breeden learned that Novartis had not restored her pre-alignment territory. Breeden asserted that her post-leave territory provided her with much less work and deprived her of important clients. Novartis said the changes were permanent. Novartis later stated that Breeden's pay and performance increased handling the new territory. In January 2008, Novartis announced a further realignment of sales territories. It consolidated Breeden's territory with another and reduced its sales staff by one. Breeden was terminated.

Breeden sued Novartis in April 2008, asserting entitlement and retaliation claims under the FMLA. She premised the entitlement claim on Novartis' alleged failure to assign her a substantially equivalent position upon her return from FMLA leave. She based the retaliation claim on Novartis' alleged failure to make her "whole" following her return from leave. She also alleged that her 2008 termination constituted retaliation for her taking leave in 2005, because her smaller post-leave territory rendered her termination "inevitable."

The District Court granted Novartis summary judgment as to Breeden's entitlement claim. The retaliation claim went to trial. The District Court denied Novartis' motion to strike a charge to the jury to consider whether Breeden's FMLA leave was a "motivating factor" for Novartis not making her "whole" post-

leave and for terminating her. The jury ruled for Breeden and awarded her $289,669 in damages. However, the District Court granted Novartis' motion for judgment notwithstanding the verdict (JNOV).

Breeden appealed the summary judgment and the JNOV. Novartis filed a conditional cross-appeal in the event the Court reverses, vacates, or otherwise modifies the District Court JNOV in favor of Novartis on Breeden's retaliation claim. Novartis asserts that the "motivating factor" jury charge was legal error inconsistent with *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009).

ARGUMENT

I. THE FMLA'S ANTI-RETALIATION REGULATION ESTABLISHING A "MOTIVATING FACTOR" CAUSATION STANDARD IS REASONABLE AND THUS IS ENTITLED TO *CHEVRON* DEFERENCE.

The central issue in the cross-appeal in this case is whether and the extent to which the FMLA's anti-retaliation is entitled to deference. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984), the Court explained that when a question arises as to a federal agency's interpretation of a statute it administers, such as in a regulation, a reviewing court must apply a two-part test. The Department of Labor (DOL) is the agency Congress authorized to "prescribe such regulations as are necessary to carry out" the FMLA. 29 U.S.C. § 2654; *see Ragsdale v. Wolverine World Wide, Inc.,* 535 U.S. 81, 86 (2002) Thus,

in considering the validity of the FMLA rule that authorizes the "motivating factor" jury charge at issue in this cross-appeal, 29 C.F.R. § 825.220(c) ("[E]mployers cannot use the taking of FMLA leave as a negative factor in employment actions"), DOL's "judgment that [the] particular regulation fits within [the FMLA's] statutory [design] must be given considerable weight." *Ragsdale*, 535 U.S. at 86.

In determining the degree of deference appropriate here, this Court first must ask whether Congress has "directly addressed the precise question at issue." *Chevron, 467 U.S.* at 843. If the statute is unambiguous, then that is the end of the inquiry. *Id.* If the statute is ambiguous, however, then a court must defer to the agency's interpretation so long as it is "a reasonable policy choice for the agency to make." *Id.* at 845. This is true "even if the agency's reading differs from what the court believes is the best statutory interpretation." *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 980 (2005) (citing *Chevron*, 467 U.S. at 843-44).

The *Chevron/Brand X* framework applies to this case and supports deference to DOL's rule and the trial court's resulting use of a "motivating factor" jury charge. There is textual support for the proposition that the FMLA prohibits the kind of retaliation that Breeden challenged, but much stronger authority supports the proposition that the text of the Act leaves this question ambiguous, and DOL

has properly decided to approve such claims. In either instance, textual ambiguity remains as to whether the Act authorizes a "motivating factor" standard of proof for FMLA retaliation claims like Breeden's. Deference to DOL's judgment in the affirmative on that question surely was not "arbitrary, capricious, or manifestly contrary to the statute,'" and the rule should be upheld. *Chevron*, 467 U.S. at 844.

A. DOL's Rule Is a Reasonable Interpretation of the FMLA.

The crux of Novartis' cross-appeal on the "motivating factor" issue is the assertion that "*Gross* requires the conclusion that the 'negative factor' language in [29 C.F.R. § 825.220(c)] is not a reasonable interpretation of the FMLA." Brief for Appellee/Cross-Appellant Novartis Pharmaceuticals Corporation ("Br. Cr. Appellant") at 69. Novartis argues that the word "for" in Section 2615(a)(2) of the FMLA necessarily means precisely the same thing as the ADEA's words "because of," which the Court "looked to in *Gross*" and concluded required a "but-for" not a "motivating factor" standard of causation. *Id.* at 61-62. This simplistic reasoning falls apart on numerous grounds under careful scrutiny.

1. Section 2615(a)(1) of the FMLA, which has no words justifying application of *Gross,* is a highly plausible statutory source for DOL's "motivating factor" regulatory language.

An initial flaw in Novartis' reasoning is that Section 2615(a)(1), not just Section 2615(a)(2), is a plausible source for the FMLA's prohibition against retaliation for taking FMLA leave. Section 2615(a)(1), of course, contains no

language whatever comparable to the words "because of" that form the basis for the result in *Gross*. Rather, Section 2615(a) ("Interference with rights") (1) ("Exercise of rights") simply provides: "It shall be unlawful for any employer to interfere with, restrain, or deny the exercise or the attempt to exercise, any right provided under [the Act]." It follows, that if Section 2615(a)(1) is a valid basis for DOL's rule (as several U.S. Courts of Appeals have ruled), *Gross* does not apply.

The First Circuit has reasoned, in regard to the sort of retaliation alleged by Breeden –*i.e.*, "discharg[ing] or discriminat[ing] against an employee for exercising her rights under the Act" – that "such protection can be read into Section 2615(a)(1)" because "to discriminate against an employee for exercising h[er] rights under the Act would constitute an 'interference with' and a 'restraint' of h[er] exercise of those rights." *Hodgens v. General Dynamics Corp*., 144 F.3d 151, 160 n.4 (1st Cir. 1998).[2]

Likewise, the Ninth Circuit has stated:

> the particular provision of the regulations prohibiting the use of FMLA-protected leave as a negative factor in employment decisions, 29 C.F.R. § 825.220(c), refers to "discrimination," but actually pertains to the "interference with the exercise of rights" section of the statute, §2615(a)(1), not the anti-retaliation or anti-discrimination sections, §§ 2615(a)(2) and (b). . . . there is no doubt that 29 C.F.R. § 825.220(c) serves, at least in part,

[2] The same reasoning also would appear to cover a "den[ial] [of] the exercise of or the attempt to exercise" such rights. 29 U.S.C. 2615(a)(1).

> to implement the interference with the exercise of rights section of the statute.

Bachelder v. America West Airlines, Inc., 259 F.3d 1112, 1124-25 (9th Cir. 2001).

That court also ruled, based on similarities between the FMLA and the National Labor Relations Act, that

> the established understanding at the time the FMLA was enacted was that employer actions that deter employees' participation in protected activities constitute "interference" or "restraint" with the employees' exercise of their rights.

Id. at 1124. Thus, *Bachelder* upheld as "reasonable" DOL's "conclusion that employer use of 'the taking of FMLA leave as a negative factor in employment actions,' 29 C.F.R. § 825.220(c), violates . . . the Act." *Id. Accord Conoshenti v. Public Serv. Elec. & Gas Co.*, 364 F.3d 135, 146 n.9 (3rd Cir. 2004).

Indeed, this is the analysis the DOL itself has offered in its most recent regulations implementing the FMLA. *See* Final Rule, "The Family and Medical Leave Act of 1993," 73 Fed. Reg. 67934 (Nov. 17, 2008). There, DOL observed that it had modified the language of Section 825.220(c) slightly to "clarify that the prohibition against interference includes a prohibition against retaliation as well as a prohibition against discrimination." *Id.* at 68055. Further, both the most recent version of the regulations and the version in effect when Breeden's cause of action arose, in 2008, interpret language derived from Section 2615(a)(1) to include retaliatory employer conduct of the sort challenged by Breeden. That is:

> "Interfering with" the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave.

Id. at 68095 (29 C.F.R. § 825.220(b)); *accord Hodgens*, 144 F.3d at 160 n.4 (quoting 29 C.F.R. § 825.220(b) (1997). Moreover, emphasizing the breadth and catch-all nature of Section 2615(a)(1), DOL has declared:

> Any violations of the Act or of these regulations [including of 29 C.F.R. 825.220(c)'s "negative factor" provision] constitute interfering with, restraining, or denying the exercise of rights provided by the Act.

73 Fed. Reg. at 68095 (paraphrasing text of Section 2615(a)(1). *Accord Bachelder v. America West Airlines, Inc.*, 259 F.3d at 1224-25 (quoting 29 C.F.R. § 825.220(b)); *Hodgens v. General Dynamics Corp.*, 144 F.3d at 160 n.3 (quoting identical text of 29 C.F.R. § 825.220(b) (1997)). This is still further evidence that DOL's "motivating factor" regulatory language is authorized by the FMLA's text, thereby rendering *Gross* inapplicable.

2. Section 2615(a)(2) of the FMLA also is a plausible statutory basis for DOL's "motivating factor" regulation.

Many U.S. Courts of Appeals identify Section 2615(a)(2) as the source, either wholly or in part, for a cause of action for retaliation for invoking the substantive rights guaranteed by the FMLA. The Sixth Circuit, for instance, has identified this section as a basis sufficient on its own to justify such protection against retaliation. *See Hunter v. Valley View Local Schools*, 579 F.3d 688, 690

(6th Cir. 2009) (also affirming in a decision post-*Gross* that the "motivating factor" standard as applicable to cases of retaliation for taking FMLA leave, based on the FMLA's text and 29 C.F.R. § 825.220(c)'s prohibition of employers using FMLA leave as a "negative factor" in employment decisions); *see also Bryant v. Dollar General Corp.*, 538 F.3d 394, 401 (6th Cir. 2008), *cert. denied*, 129 S. Ct. 1006 (2009); *Arban v. West Publishing Corp.*, 345 F.3d 390, 403 (6th Cir. 2003).

Other federal appeals courts have reached similar conclusions. For instance the Eighth Circuit has ruled that "[t]he FMLA prohibits employers from discriminating against employees for asserting rights under [Section 2615(a)(2) of] the Act." *Darby v. Dratch*, 287 F.3d 673, 679 (8th Cir. 2002). *Darby* linked this statutory provision to the "motivating factor" language of DOL's rule, opining that Section 2615(a)(2) "necessarily includes consideration of an employee's use of FMLA leave as a negative factor in an employment action." *Id*.

In *Bryant v. Dollar General Corp.*, the Sixth Circuit described Section 2615(a)(1) as the source of the FMLA leave entitlement. By contrast, it identified Section 2615(a)(2)'s focus as discrimination undermining the entitlement. Hence, the *latter* provision forbids taking retribution for exercising rights within the scope of the *former*:

> Any "right" to take unpaid leave would be utterly meaningless if the statute's bar against discrimination failed

> to prohibit employers from considering an employee's FMLA leave as a negative factor in employment decisions.

538 F.3d at 401 (paraphrasing motivating factor standard in 29 C.F.R. § 825.220(c)).

Bryant further concluded that, given "the overwhelming consensus in the courts that the FMLA *does* prohibit such retaliation," and also in light of the law's text, "the structure and purpose of the Act, as well as its legislative history," Section 2615(a)(2) prohibits "retaliation for taking FMLA leave." 538 F.3d at 402; *see id.* at 401 (discussing court decisions, the FMLA's text, and "[t]he structure of the FMLA itself and its legislative history," and concluding these "strongly support interpreting §2615(a)(2) as prohibiting retaliation against employees who use FMLA leave").

Other Courts of Appeals "recognize a cause of action for [FMLA] retaliation" and "ground it in [both Sections] 2615 (a)(1) and (a)(2) and attendant regulations." *Colburn v. Parker Hannifin/Nichols Portland Division*, 429 F.3d 325, 331 n.2 (1st Cir. 2005) (citing *Strickland v. Water Works & Sewer Bd.*, 239 F.3d 1199, 1206-07 (11th Cir. 2001), and *King v. Preferred Tech. Group*, 166 F.3d 887, 891 (7th Cir. 1999)). *Colburn*, while noting "all circuits recognize a cause of action for retaliation," *id.*, remained agnostic as to its source, much like a panel of this Court did a decade ago. *See Gleklen v. Democratic Congresssional Campaign*

Comm., 199 F.3d 1365, 1368 (D.C. Cir. 2000) (considering FMLA retaliation claim alleged under §2615(a)(1) without opining on proper statutory basis for claim).

3. DOL's rule is a reasonable reading of ambiguous statutory text by the agency that Congress charged to interpret the law and to fill gaps in its express language.

Courts agree the FMLA forbids retaliation for taking leave, because without such a bar the law would be ineffective, contrary to Congress' intent; they also agree that the language of the Act supports this reading. But no consensus exists as to the precise textual source of this prohibition. This demonstrates that if the Court does not find sufficient direct textual support for such a bar in Section 2615(a)(1) , the only plausible alternative is to conclude the FMLA is ambiguous: not only as to the exact source of a right to be free from retaliation for taking unpaid leave, but also as to the precise nature and scope of that right. In short, the case is overwhelming for *Chevron* deference both to DOL's anti-retaliation rule generally, and in particular, to the "motivating factor" causation standard it adopts.

In *Hodgen*s, which identified Section 2615(a)(1) as the statutory source of the right to be free from retaliation for taking leave, the court observed:

> The statute itself does not explicitly make it unlawful to discharge or discriminate against an employee for exercising her rights under the Act (such as placing an employee in a less desirable job because she took medical leave for a serious health condition). Nevertheless, the Act was clearly

> intended to provide such protection. The Department of Labor regulations implementing the FMLA interpret the Act this way, see 29 C.F.R. § 825.220(c), . . . , and those regulations are entitled to deference. *See Chevron USA Inc., v.* [*NRDC*], *Inc.*, ...

144 F.3d at 160 n.4. *See Conoshenti v. Public Serv. Elec. & Gas Co.*, 364 F.3d at 146 n.9 (3rd Cir. 2004) (approving analysis in *Bachelder*, 259 F.3d at 1124, that Section 2615(a)(1) is a "reasonable" basis for 29 C.F.R. § 825.220(c), but also discussing merits of various other approaches to the task of identifying a statutory source for retaliation claims for taking FMLA leave).

Likewise, decisions of courts finding that Section 2615(a)(2) is the basis for DOL's anti-retaliation rule also indicate that the FMLA's text is ambiguous and creates gaps needing to be filled by the agency administering it. For example, *Bryant* rejected the employer's argument that reading Section 2615(a)(2) consistently with DOL's rule "would rewrite § 2615(a)(2) to proscribe retaliation for taking FMLA leave, even though § 2615(a)(2) only prohibits retaliation for opposing a practice made unlawful by the FMLA." 538 F.3d at 402 (internal quotations omitted). The Sixth Circuit found that the defendant's proffered interpretation was incompatible with "the clear, unambiguous *purpose* of the FMLA." *Id.* (emphasis supplied). The court construed the FMLA as a whole rather than its specific phrases, and thus relied heavily on the text of DOL's rule. It "conclude[d] that *the FMLA* itself prohibits employers from taking adverse

employment actions against employees based on the employee's exercise of FMLA leave," but also "that *the [DOL]'s interpretation of § 2615 in § 825.220* is *[ ] reasonable . . . and a valid exercise of agency authority*." *Id*. at 401 (emphasis supplied). In short, protection from retaliation for taking FMLA leave is so important to securing the entitlement to such leave that "Dollar General's reading of the statute would [ ] render the FMLA a nullity." *Id.* at 402.

Finally, the third judicial approach to FMLA retaliation for taking leave also recognizes the Act's ambiguity. In *Hunter*, for example the Sixth Circuit purportedly "beg[a]n by looking at the text of the statute," but said little about its specific terms. *See* 579 F.3d at 691 (citing §§ 2615(a)(1) and (a)(2) without construing either). Rather, the court went on to consider and rely on 29 C. F.R. § 825.220(c), which it said it Seemed "a reasonable interpretation of the FMLA entitled to deferential judicial review." 579 F.3d at 692 (relying on holding to such effect in *Bryant*, 538 F.3d at 401-02).

Similarly, *Colburn* declared that DOL's anti-retaliation rule "unambiguously interprets § 2615 as prohibiting retaliation," but "does not make any distinction among §§ 2615(a)(1), 2615(a)(2), or 2615(b) as the source of the prohibition." 429 F.3d at 331. The court also noted the confusion that "[t]his statutory and regulatory ambiguity" has caused as to FMLA nomenclature and the legal elements to be met in order to prove various kinds of FMLA causes of action. *Id.*

This extensive precedent – concluding that the FMLA is ambiguous in regard to retaliation claims for taking FMLA leave – imposes a huge barrier for Novartis to overcome in arguing that *Gross* nonetheless renders the FMLA unambiguous in precluding a "motivating factor" causation standard.

Given the FMLA's overall ambiguity as to retaliation claims for taking leave, it is implausible to argue that it is unambiguous as to a far more specific issue: the proper causation standard in such cases.

B. The "Motivating Factor" Standard Articulated in DOL's Anti-Retaliation Rule Is Not Precluded by Unambiguous Language in Section 2615(a)(2) of the FMLA.

Novartis' cross-appeal rests on a series of unwarranted assumptions: about the FMLA, about *Gross,* and about the DOL's anti-retaliation rule. When these are dismissed, the cross-appeal is shown to be baseless.

1. Novartis misconstrues the FMLA.

First, Novartis urges that this case and all others implicating a proposed "motivating factor" causation standard should be governed by *Gross* by claiming, wrongly, that the FMLA is simply a statute "[d]rawing on Title VII case law." Br. Cr. Appellant at 58 (discussing *Richardson v. Medtronics Int'l, Inc.*, 434 F.3d 327,333 (5th Cir. 2005)). But as *amici* have discussed above, several U.S. Courts of Appeals have concluded that the FMLA's anti-retaliation protections at issue here find their origins not in Title VII, but in the analogous context of union-

management relations under the NLRA.[3] *See* above, discussing *Hodgens* and *Conoshenti*.[4]

Likewise, Novartis treats as gospel that this Court must compare the text of the ADEA addressed in *Gross* ("because of") with the text of Section 2615(a)(2) ("for opposing any practice made unlawful by this subchapter"), because that is supposedly the precise "text of the FMLA" authorizing Breeden's retaliation claim. Br. Cr. Appellant at 62. Once again, however, *amici* have shown above that this premise is flawed. Section 2615(a)(1), for example, also is a plausible source for a retaliation claim for taking FMLA leave. Further, courts that have construed language of the FMLA are nearly unanimous in concluding that the statute overall, and specifically Sections 2615(a)(1) and 2615(a)(2), are ambiguous, and so, are not amenable to the simplistic textual comparison Novartis makes.

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[3] Novartis relies heavily on *Serafinn v. Int'l Brotherhood of Teamsters*, 597 F.3d 908 (7th Cir. 2010), which arose under another labor law statute, the Labor-Management Reporting and Disclosure Act. *See* Br. Cr. Appellant at 65. But *Serafinn*, unlike *Bachelder* and *Conoshenti*, does not include a comparable discussion of possible statutory models other than Title VII.

[4] These decisions and this approach is an answer to many other post-*Gross* decisions relied on by Novartis, which stand for the proposition that *Gross* "altered the easy interplay between Title VII cases and cases arising under other federal anti-discrimination statutes." Br. Cr. Appellant at 61 (citing *Gard v. U.S. Dep't of Education*, __ F. Supp. 2d __, 2010 WL 4780804, *4 (D.D.C., Nov. 23, 2010)). *See also id.* at 64-65 (discussing *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010) and other decisions under the Americans with Disabilities Act).

Thus, even if this Court concludes both that Breeden's FMLA retaliation claim derives *onl*y from Title VII, and that the *only* provision of the FMLA relevant to assessing the impact of *Gross* is Section 2615(a)(2), the Court would be required to find that, under *Gross,* the word "for" as used in Section 2615(a)(2), unambiguously indicates Congress' intent to preclude a "motivating factor" causation standard. This is so because, as *amici* have noted above, and as the Supreme Court declared in *Brand X*, when a statute is ambiguous, great deference is due any "reasonable" interpretation of that law by the agency charged with administering it "even if the agency's reading differs from what the court believes is the best statutory interpretation." *Brand X*, 545 U.S. at 980 (citing *Chevron*, 467 U.S. at 84-44).

If the text of the FMLA is ambiguous, this Court may not ignore DOL's rule in order to achieve consistency with *Gross*. Such an approach – like Novartis' brief – would contradict *Brand X*. So long as the "motivating factor" standard embraced by DOL is "reasonable" the standard in the rule must be upheld.

2. Novartis misconstrues *Gross.*

The cross-appeal also exaggerates the scope and specificity of the ruling in *Gross*. For instance, Novartis asserts, without foundation, that *Gross* established a new clear statement rule for "employment laws other than Title VII" in order to

incorporate the "motivating factor" standard of causation that is a feature of a "mixed-motive" liability scheme. *See* Br. Cr. Appellant at 59 ("In *Gross* the Court held that the mixed-motive theory – and correspondingly, a mixed-motive jury instruction – is improper absent statutory language expressly permitting mixed-motive liability."). *Gross*, however, contains no such language.

Gross articulated a specific rationale for declining to approve a mixed-motive claim under the ADEA, not a sweeping call to "change[] the landscape for plaintiffs." Br. Cr. Appellant at 59.[5] Congress amended Title VII in the 1991 Civil Rights Act to include such a claim without also amending the ADEA to do so. That is, "when it amended Title VII to add *§§ 2000e-2(m)* and *2000e-5(g)(2)(B)*," Congress "neglected to add such [language]" to the ADEA "even though it contemporaneously amended the ADEA in several ways." 129 S. Ct. at 2349. The

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[5] Novartis effectively acknowledges this by spending considerable space trying to explain this Court's ruling in *Ford v. Mabus*, ___ F.3d ___, 2010 WL 5060998 (D.C. Cir., Dec. 10, 2010), rejecting application of *Gross* to the federal sector provision of the ADEA. Br. Cr. Appellant at 63. Novartis strains to characterize it as applying a new approach rather than standard tools of statutory construction. This Court did not need a "directive in *Gross*" to know it should "beg[i]n its inquiry with the statutory language." *Id.* Much harder to explain, and ignored altogether by Novartis, is the Fifth Circuit's observation in *Smith v. Xerox*, 602 F.3d 320, 329-30 (5th Cir. 2010) (rejecting application of *Gross* and applying the *Price Waterhouse* burden-shifting framework, including a motivating factor causation standard, to a Title VII retaliation case), that *Gross*' application is limited because "[t]o state the obvious, *Gross* is an ADEA case, not a Title VII case." *Id.* at 329.

Court majority explained that "negative implications raised by disparate provisions are strongest' when the provisions were 'considered simultaneously when the language raising the implication was inserted." *Id.* (quoting *Lindh v. Murphy*, 521 U.S. 320, 330 (1997)). This rationale could not apply to the FMLA, because in 1991, the FMLA did not exist.

Moreover, *Gross* concerned statutes different in significant respects from the FMLA, at least enough so to raise the question whether *Gross* is readily applicable. *Gross* considered the ADEA's and Title VII's broad anti-discrimination prohibition. The FMLA – unlike other laws, such as the ADA – has no comparably broad anti-discrimination provision that requires proof of intent (or of disparate impact). The FMLA's two intent-based provisions, Sections 2615(a)(2) and 2615(b), are narrower in their focus and do not unambiguously address the precise form of retaliation at issue.

Another way of looking at the distinction between the FMLA and Title VII is that Title VII (like other anti-discrimination laws such as the ADEA and the ADA) is primarily concerned with *who plaintiffs are*, while the FMLA is almost entirely concerned with *what employees do.* That is, "[t]he substantive [anti-discrimination] provision [of Title VII] seeks to prevent injury to individuals based on who they are, i.e., their status. The anti-retaliation provision [of Title VII] seeks to prevent harm to individuals based on what they do., *i.e.*, their conduct."

Burlington N. & S. F. R. Co. v. White, 548 U.S. 53, 63 (2006). Based on this distinction, *Burlington* held that this fundamental difference between prohibitions against retaliation and other forms of discrimination leads to different legal consequences. *Id.* In particular, it requires protection against retaliation that "extends beyond" protection from other discriminatory conduct. *Id.* at 67. The Court has repeatedly taken a broad view of anti-retaliation prohibitions in recognition of how easy it is to chill the exercise of important employee rights, if the law is designed to encourage employees to act in a certain way, they must be able to do so without fear.[6]

These complexities caution against facile thinking of the sort that *Gross* itself sought to discourage: that is, this Court should "'be careful not to apply rules applicable under one statute to a different statute without careful and critical

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[6] *Id*. at 68 (ruling that Title VII's anti-retaliation provision must extend to all employer acts that might have dissuaded a reasonable worker from making or supporting a charge of discrimination). *See Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167 (2005) (extending anti-discrimination prohibitions of Title IX of the Education Act Amendments of 1972 to protect retaliation for opposing discrimination); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008) (extending coverage of 42 U.S.C. § 1981 to provide cause of action for retaliation against opposition activity); *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 129 S. Ct. 846 (2009) (extending Title VII's opposition clause to employees who do not "actively" oppose, but only answer questions in an employer-conducted interview); *Gomez-Perez v. Potter*, 553 U.S. 474 (2008) (extending anti-retaliation protection to federal employees who oppose discrimination prohibited by the ADEA).

examination.'" *Gross*, 129 S. Ct. at 2349 (quoting *Fed. Express Corp. v. Holowecki,* 552 U.S. 389, 393 (2008))

Still another problem for Novartis is the need to consult the dictionary to contend that *Gross* applies. Obviously, *Gross* did not construe a statute barring discrimination or retaliation or any other conduct "for" any particular reason. Presumably, *Gross* did not intend to alter the meaning of the word "for" every time it appears in the U.S. Code.[7] Thus, Novartis has failed to demonstrate that "for" means the same thing as "because of" or "on account of." Br. Cr. Appellant at 62. Novartis' argument is severely undermined by the fact that Congress declined to use "because" or "because of" in either Section 2615(a)(1) or Section 2615(a)(2), but did use "because" in Section 2615(b). It is illogical to conclude that Congress used two different words in the same statute, but intended that they mean the same

[7] Section 2615(a)(1) not only contains no language possibly meaning "because of" or "on account of," but Section 2615(b) forbids discriminating against any individual "because" he or she has engaged in certain protected activities. This suggests that Congress' consciously chose not to use "because" or "because of" in Section 2615(a)(2), and thus further justifies a reading different from the ruling in *Gross*. At the very least this adds to the ambiguity of FMLA provisions relevant to the validity of a "motivating factor" standard.

thing. If Congress believed that "for" meant the same thing as "because," it would have used "because" when it had the chance to do so.[8]

Further, the dictionary sources to which Novartis cites are at best inconclusive. For instance, the principal definition of "for" provided by The Merriam-Webster Online Dictionary is not "because of," but rather, "a function word to indicate purpose." "Purpose" is defined as "something set up as an object or end to be attained." *See http://www.merriam-webster.com.* This formulation is consistent with prohibiting employers from treating the taking of FMLA leave as a "negative factor" in their decisions, as DOL's rule provides. It clashes with Novartis's position that Breeden must prove "her taking of leave was *the* – not just *a* – motivating factor for its allegedly adverse action in connection with the 2005 realignment." Br. Cr. Appellant at 70 (emphasis in original).

II. THE TRIAL COURT PROPERLY DECLINED TO APPLY THE SUPREME COURT'S DECISION IN *GROSS* TO THE FMLA.

A fair reading of *Gross* and the FMLA leads to a single conclusion: neither is unambiguous so as to satisfy standards articulated in *Brand X* and *Chevron* restricting the power of courts to substitute their own judgment for that of an

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[8] "[N]egative implications raised by disparate provisions are strongest' when the provisions were 'considered simultaneously when the language raising the implication was inserted." *Gross*, 129 S. Ct. at 2349 (quoting *Lindh v. Murphy*, 521 U.S. 320, 330 (1997)). *Amici* do not express an opinion whether *Gross* applies to Section 2615(b) of the FMLA. Plainly, that issue is not presented in this case.

agency assigned by Congress to interpret and implement a statute. There is no plausible way for Novartis to show that *Gross* is so clear in its reasoning and so sweeping in its implications that it effectively "hold[s] that the statute [in question, the FMLA] unambiguously forecloses [the administering] agency's interpretation [here DOL's reading supporting a motivating factor standard] and therefore contains no gap for the agency to fill, [and so] displaces [the] conflicting agency construction." *Brand X,* 545 U.S. at 983. *Brand X* clearly imposes important limits on the potential reach of *Gross.* Novartis' failure to account for that precedent renders its reliance on *Gross* superficial and unconvincing.

This Court has previously rejected similar unfounded encouragement to ignore complexities underlying supposedly plain language and on that basis to ignore reasonable agency rules interpreting ambiguous statutory language. In *American Equity Investment Life Insurance Company v. SEC*, 613 F.3d 166, 713 (D.C. Cir. 2010), this Court found ambiguous the term "annuity contract" in the Securities Act of 1993 and upheld an SEC rule construing the term. The Court observed that "[h]ad the statute been unambiguous, the [Supreme] Court need not have undertaken such an exhaustive inquiry in determining whether the two products at issue in two prior cases were annuities under § 3(a)(8) of the [Securities] Act [of 1993]." *Id.* Similarly, if the FMLA were unambiguous with regard to retaliation for taking FMLA leave and the causation standard that applies

in such cases, so many federal appeals courts would not have had to spill so much ink on these subjects in the past eighteen years.

This Court's brethren in the highest court of the District of Columbia also have weighed in on the validity of DOL's rule at issue here. In *Teru Chang v. Institute For Public-Private Partnerships, Inc.*, 846 A.2d 318 (D.C. 2004), the D.C. Court of Appeals deferred to DOL's judgment. Although the court observed that FMLA does not "specifically" prohibit retaliation against employees for taking protected leave, the court saw "no reason to deviate from the regulations applied by a majority of courts that have considered this issue." *Id.* at 328-29 (citing 29 C.F.R. 825.220(c) (2003)). *Teru Chang* specifically approved and quoted the provision of DOL's rule at issue here, forbidding reliance on "the taking of FMLA leave as a negative factor in employment actions. *Id.* at 328.

With regard to the reasonableness of DOL's regulation at issue here, *Gross* likewise presents no serious barrier. For one thing, *Gross* does not justify ignoring the unanimous reasoning of federal appellate courts endorsing 29 C.F.R. § 825.220(c) as a reasonable exercise of DOL's regulatory authority, and the "motivating factor" provision of the rule as an important component of protecting workers' exercise of FMLA rights. Although *Gross* overruled the application of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), to the ADEA, *see Gross*, 129 S. Ct. at 2354-55 (dissent, collecting cases) (noting it had been applied

"unanimously" by at least nine federal Courts of Appeals), it did so because of Congress' different treatment of the ADEA and Title VII in the text of the 1991 Civil Rights Act, a rationale inapplicable here.

To be sure, the narrow *Gross* majority also criticized the *Price Waterhouse* "burden-shifting framework" as "difficult to apply." *Id.* at 2352. But it did not mandate elimination of judicial application of *Price Waterhouse* to any statute other than the ADEA. *See Smith v. Xerox*, 602 F.3d at 329-30. On the contrary, *Gross* noted that the Court previously had "applied a burden-shifting framework to certain claims brought in contexts other than pursuant to Title VII." *Gross*, 129 S. Ct. at 2352 n.6. Indeed, the Court acknowledged it had done so in circumstances analogous to those here. That is, *NLRB v. Transportation Management Corp*., 462 U.S. 393, 401-403 (1983) applied a burden-shifting framework to claims brought under the National Labor Relations Act, the very Act identified by *Hodgens* and *Conoshenti* as a principal basis for the FMLA's anti-retaliation protections implicit in Section 2615(a)(1). And the Supreme Court's explanation for its action favors this Court finding that the DOL acted reasonably in approving a burden-shifting framework for FMLA claims of retaliation for taking leave. The *Gross* Court explained:

> The case involving the NLRA did not require the Court to decide in the first instance whether burden shifting should apply as the Court instead deferred to the National Labor

> Relation Board's determination that such a framework was appropriate. See. . . .

129 S. Ct. at 2352 n.6 (citing *NLRB*, 462 U.S. at 400-403).

As the Supreme Court recognized in *Gross* itself, judicial deference is proper when an agency charged with administering a federal employment law determines – based on administrative experience, judicial rulings, and accumulated expertise in the relevant field – that working people are having a hard time enforcing their statutory rights and could benefit from a shift in the burden of proof, at least in a so-called "mixed-motives" case. Where, as here, such a determination is made, the resulting agency regulations are far more serious than mere "regulatory asides." Br. Cr. Appellant at 68.

In this instance, as in *NLRB v. Transportation Management Corp.*, such rules should carry the day.

CONCLUSION

For the reasons set forth above, and in section IV of the Reply Brief of Plaintiff-Appellant/Cross-Appellee Mary Kate Breeden, *amici* urge the Court to deny Novartis' cross-appeal, should the Court first reverse the District Court's JNOV in favor of Novartis on Breeden's retaliation claim.

Dated: April 8, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Corrected Brief of *Amici Curiae* AARP and NELA Supporting Cross-Appellee Mary Kate Breeden is in compliance.

Pursuant to Fed. R. App. P. 29(d) and D.C. Circuit Rule 32(a)(5), the attached *amici curiae* brief is proportionately spaced, has a typeface of 14 points Times New Roman and contains 6548 words. The word processing system software used to prepare this brief was Microsoft Word 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF uses and that service will be accomplished by the appellate CM/ECF system.

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