No. 18-882

IN THE
Supreme Court of the United States

NORIS BABB,
Petitioner,
v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMICI CURIAE AARP, AARP FOUNDATION, LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, NATIONAL WOMEN'S LAW CENTER, NELA, AND EMPLOYEE RIGHTS ADVOCACY INSTITUTE FOR LAW AND POLICY, SUPPORTING PETITIONER AND URGING REVERSAL

Daniel B. Kohrman*
Laurie A. McCann
William Alvarado Rivera
AARP FOUNDATION
601 E Street, NW
Washington, DC 20049
Tel.: (202) 434-2064
dkohrman@aarp.org
Counsel for Amici Curiae
*Counsel of Record

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENTS OF INTEREST 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 8

I. THE STARTING POINT FOR ANALYSIS IN THIS CASE SHOULD BE THE PLAIN MEANING OF SECTION 633a(a) 8

A. Section 633a(f) and this Court's decisions interpreting it make clear that the text of section 633a(a) is "complete in itself" 9

B. The language of section 633a(a) unambiguously calls for a "motivating factor" causation standard 13

C. All decisional authorities that have grappled with the text of section 633a(a) have concluded it establishes a "motivating factor" causation standard 17

II. CONGRESS MEANT WHAT IT SAID IN REQUIRING FEDERAL EMPLOYMENT TO "BE MADE FREE FROM ANY" AGE DISCRIMINATION 22

III. THE GOVERNMENT'S PLEAS TO INTERPRET SECTION 633a BY RELYING ON INAPT STATUTORY ANALOGIES, NON-BINDING DICTA, AND GENERAL "DEFAULT RULES" ARE LEGALLY UNPERSUASIVE 27

A. This case is not governed by the decisions in *Gross* and *Nassar* construing the private-sector provisions of the ADEA and Title VII 27

B. This case is not governed by the Court's *Safeco* decision construing the Federal Credit Reporting Act 29

C. This case is not governed by "default rules" favoring a "but for" causation standard in some federal statutes 33

CONCLUSION 35

APPENDIX (listing other amici)

TABLE OF AUTHORITIES

Page

CASES

Alt. Coast Line R.R. Co. v. Locomotive Eng'rs,
398 U.S. 281 (1970).....15

Babb v. Wilkie, No.,
18-882, U.S. *petition for cert. filed*
Jan 7, 2019. 8

Beasley v. Dep't of Defense,
No. DC-0752-15-1025-I-1, 2016
M.S.P.B. 4220 (M.S.P.B. July 20, 2016).....29

Bornholdt v. Brady,
869 F.2d 57 (2d Cir. 1989). 23

Brown v. General Services Admin.,
425 U.S. 820 (1976).....12

Burton v. Freeman,
504 U.S. 191 (1992).....15

Byrd v. United States,
138 S. Ct. 1518 (2018).....14

Caminetti v. United States,
242 U.S. 470 (1917).....13

Carcieri v. *Salazar,*
555 U.S. 379 (2009).....13

Chin v. Schapiro,
App. Cal. No. 0120110292, 2011 WL 1210668 (EEOC Mar. 24, 2011) 20

Complainant v. Johnson,
Appeal No. 0720140037, 2015 WL 3542586 (EEOC May 29, 2015) 20, 29

Eisenstadt v. Baird,
405 U.S. 438 (1972)..... 15-16

Florida v. Jardines,
569 U.S. 1 (2013)..... 14-15

Ford v. Mabus,
629 F.3d 198 (D.C. Cir. 2010)..... 2, 8, 12, 14, 18, 19, 29

Forman v. Small,
271 F.3d 285 (D.C. Cir. 2001)..... 10

Fuller v. Gates,
No. 5:06CV91, 2010 U.S. Dist. LEXIS 17987 (E.D. Tex., Mar. 1, 2010)..... 2, 20-21

Fuller v. Panetta,
No. 11-40013, 2012 U.S. App. LEXIS 1841 (5th Cir. Jan. 31, 2012)..... 2, 21

Geraldine G. v. Brennan,
Appeal No. 0720140039, 2016 WL 3361226 (EEOC June 3, 2016) 21

Glaxo Group Ltd. v. Ranbaxy Pharms., Inc.,
262 F.3d 1333 (Fed. Cir. 2001) 16

Gomez-Perez v. Potter,
553 U.S. 474 (2008)..... 2, 6, 8-9, 11-12, 27-29

Gross v. FBL Fin. Servs., Inc.,
557 U.S. 167 (2009).... 1, 7, 10, 18, 22, 27-30, 34

Nita H. v. Jewell,
No. 0320110050, 2014 WL 3788011
(EEOC July 16, 2014) 29

Harte v. Bd. of Comm'rs,
864 F.3d 1154 (10th Cir. 2017)..... 14

Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.,
530 U.S. 1 (2000)..... 13

Henry v. McHugh,
Appeal No. 0120103221, 2010 WL
5551957 (EEOC Dec. 23, 2010) 21

Jimenez v. Quarterman,
555 U.S. 113 (2009)..... 8

Lamie v. *United States Tr.*,
540 U.S. 526 (2009)..... 13

Lehman v. Nakshian,
453 U.S. 156 (1981)..... 6, 9-12, 25-29

Lindh v. Murphy
521 U.S. 320 (1997).....28

Lorillard v. Pons,
434 U.S. 575 (1978).....10

Millbrook v. *United States,*
569 U.S. 50 (2013).....8

Nevada v. Hibbs,
538 U.S. 721 (2003).....16

Police Dep't of Chi. v. Mosley,
408 U.S. 92 (1992).....15

Safeco Ins. Co. v. Burr,
551 U.S. 47 (2007).....7, 29-33

Shelley v. Geren,
666 F.3d 599 (9th Cir. 2012).....19

Smith v. Bayer Corp.,
564 U.S. 299 (2011).....15

Smith v. City of Jackson,
544 U.S. 228 (2005).....25

Staub v. City of Baxley,
350 U.S. 313 (1958).....15

Trask v. Sec' y, Dep't of Veterans Affairs,
822 F.3d 1179 (11th Cir. 2016).....18, 19

United States v. Gonzales,
520 U.S. 1 (1997)..... 19

United States v. Ron Pair Enter., Inc.,
489 U.S. 235 (1989)..... 13

Univ. of Tex. Sw. Med. Ctr. v. *Nassar*,
570 U.S. 338 (2013)..... 7, 20, 27-31, 33, 34

Wingate v. U.S. Postal Serv.,
118 M.S.P.R. 566 (M.S.P.B. Sept. 27,
2012)..... 20

Ziglar v. Abbasi,
137 S. Ct. 1843 (2017)..... 14

U.S. CONSTITUTION PROVISIONS

Amend. I..... 15

Amend. IV..... 14

Amend. VIII..... 14

Amend. XIV..... 15

STATUTES AND COURT RULES

Age Discrimination in Employment Act ("ADEA"),
29 U.S.C. §§ 621-34..... passim

29 U.S.C. § 623..... 10, 11, 19-22, 27
29 U.S.C. § 623(a)..... 10, 18, 21, 29, 30
29 U.S.C. § 623(d)..... 11

29 U.S.C. § 630(a) 10
29 U.S.C. § 630(b) 10
29 U.S.C. § 633a ..... passim
29 U.S.C. § 633a(a) ..... passim
29 U.S.C. § 633a(b) 12
29 U.S.C. § 633a(b)(3) 20
29 U.S.C. § 633a(d) 20
29 U.S.C. § 633a(f) 6, 9-11, 19, 26, 27

ADEA Amendments of 1978, Pub. L. No. 95-526, 92 Stat. 189, reprinted in 1978 U.S.C.A.A.N. 528 25

Anti-Injunction Act, 28 U.S.C. § 2283 15

Civil Rights Act of 1991, Pub. L. No. 102-66, 105 Stat. 1079 (1991) 28

Civil Service Reform Act of 1978, 5 U.S.C. § 1101, et seq. 20

Fair Credit Reporting Act ("FCRA"), § 1681m(a) 30-33

Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, et seq. 10, 11

Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1974), §§ 15, 28(b)(2) (codified as amended at 29 U.S.C. § 633a) 24

Family and Medical Leave Act of 1993 (FMLA), 42 U.S.C. §§ 2601, *et seq.* 16

Title VII of the Civil Rights Act of 1964, as Amended, 42 U.S.C. §§ 2000e, et seq. ("Title VII") ..... passim

42 U.S.C. § 2000e(a) 10
42 U.S.C. § 2000e(b) 10
42 U.S.C. § 2000e-2(a) 10
42 U.S.C. § 2000e-16 ..... 5, 12
42 U.S.C. § 2000e-16(a) 5, 12, 20, 28, 29
42 U.S.C. § 2000e-16(b) 12, 20

S. Ct. R. 37.2(a) 1

S. Ct. R. 37.6 1

LEGISLATIVE HISTORY

118 Cong. Rec. 7744 (1972) 22

118 Cong. Rec. 7745 (1972) 22

119 Cong. Rec. 2648 (1973) 23

ELIZABETH M. HEIDBREDER, NAT'L COUNCIL ON THE AGING'S INST. OF INDUS. GERONTOLOGY, 92D CONG., CANCELLED CAREERS, THE IMPACT OF REDUCTION-IN-FORCE POLICIES ON MIDDLE-AGED FEDERAL EMPLOYEES at III (Comm. Print 1972) 23, 24

H.R. 5383 (1977) 25

H.R. Rep. No. 95-527 (1977) 25, 26, 28

S. 635 (1973) 23

S. 3318 (1972) 22

S. 2747, Fair Labor Standards Amendments, 93rd Cong., introduced Nov. 27, 1973.....

OTHER AUTHORITIES

Keith R. Fentonmiller, *The Continuing Validity of Disparate Impact Analysis for Federal-Sector Age Discrimination Claims*, 47 AM. U. L. REV. 1071 (1998) 23, 24, 33

U.S. EQUAL EMP. OPPORTUNITY COMM'N, *Form 462 and MD-715 Data Tables for FY 2017 and FY 2018*, EEOC.GOV, https://www.eeoc.gov/federal/reports/tables.cfm (last visited Sept. 20, 2019)..... 4, 5

U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ANNUAL REPORT OF THE FEDERAL WORKFORCE, FISCAL YEAR 2016 (2016), *available at* https://www.eeoc.gov/federal/reports/fsp2016/upload/fsp2016.pdf..... 3

U.S. OFFICE OF PERS. MGMT., *FedScope*, OPM.GOV, https://www.fedscope.opm.gov/ibmcognos/cgi-bin/cognosisapi.dll (last visited Sept. 19, 2019). 3

STATEMENTS OF INTEREST[1]

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on financial stability, health security, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness.

AARP and AARP Foundation litigate and file amicus briefs to address employment practices and other conduct that threaten the financial security and well-being of older Americans. In particular, they are active in trial and appellate matters nationwide seeking vigorous enforcement and proper interpretation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 ("ADEA"), including its federal-sector provision, 29 U.S.C. § 633a. *See, e.g., Gross v. FBL Fin. Servs., Inc.,* 557 U.S. 167 (2009) (in case involving ADEA's private-

---

[1] Pursuant to the Court's Rule 37.6, amici state that this brief was not authored in whole or in part by any party or their counsel, and that no person other than amici, their members, or their counsel contributed any money that was intended to fund the preparation and submission of this brief. Pursuant to this Court's Rule 37.2(a), a letter from Petitioner consenting to the filing of amicus briefs is on file with the Court. Respondent United States also has consented to the filing of this brief.

sector provision, AARP amicus brief supporting petitioner and urging reversal); *Gomez-Perez v. Potter,* 553 U.S. 474 (2008) (same, in case construing § 633a(a)); *Fuller v. Gates*, No. 5:06CV91, 2010 U.S. Dist. LEXIS 17987 (E.D. Tex., Mar. 1, 2010) (upholding motivating factor causation standard under 29 U.S.C. § 633a(a)), *rev'd on other grounds sub. nom. Fuller v. Panetta*, No. 11-40013, 2012 U.S. App. LEXIS 1841 (5th Cir. Jan. 31, 2012) (AARP amicus brief supporting plaintiff-appellee and urging affirmance); *Ford v. Mabus*, 629 F.3d 198 (D.C. Cir. 2010) (AARP amicus brief supporting plaintiff-appellant and urging reversal in case construing § 633a(a)).[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

This case—in which the Court is asked to identify the standard for determining how significant an act of age discrimination in the federal sector must be in order to violate the ADEA—poses an issue of enormous importance to amici and millions of members of the U.S. workforce, who are either employed by an entity of the federal government or may apply for such employment in the future, and who now qualify as "older" workers—by virtue of being at

---

[2] Statements of interest of the other amici—the Leadership Conference on Civil and Human Rights, the National Women's Law Center, the National Employment Lawyers Association (NELA), and the Employee Rights Advocacy Institute for Law and Policy— are set forth in an appendix hereto.

or over age 40—or who may reach age 40 while employed or seeking employment by the United States. Together, federal agencies subject to the ADEA's federal-sector provision effectively constitute "the largest employer in the United States," with "close to 3 million employees."[3] Nearly two million of these individuals are full-time employees, and over 70% of them are at or over age 40.[4] All such persons and their comparably aged counterparts employed by the United States part-time or on a temporary basis are protected by the ADEA. And the most current data on federal-sector charges of discrimination show that age bias is the greatest concern.[5]

In the early 1970s, just prior to enacting § 633a, Congress worried about older employees in higher pay grades unfairly bearing the brunt of efforts to cut federal agency payrolls. *See below,* Section II. Women and minority federal employees in upper pay grades,

---

[3] U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ANNUAL REPORT OF THE FEDERAL WORKFORCE, FISCAL YEAR 2016 11 (2016), *available at* https://www.eeoc.gov/federal/reports/fsp2016/upload/fsp2016.pdf.

[4] As of September 2017, 1,345,079, or 71.04%, of a total of 1,893,447 "Full-Time Permanent" federal employees were age 40 or over. U.S. OFFICE OF PERS. MGMT., *FedScope*, OPM.GOV, https://www.fedscope.opm.gov/ibmcognos/cgi-bin/cognosisapi.dll (last visited Sept. 19, 2019).

[5] After "Reprisal/Retaliation," "Age" is the most numerous category of complaints. U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 2, at 37.

who are disproportionally over age 40, shared and still share such challenges with male, non-minority colleagues. Yet, older female, African-American, and Hispanic Federal workers also now face (and have faced) other adversity, including meagre representation in senior service levels, evidencing the influence of sex and racial bias.[6]

That age discrimination can be compounded for women over the age of 40, no less in federal service than elsewhere in the workforce, is illustrated by the case of Dr. Noris Babb, the Petitioner in this case. Dr. Babb sued the U.S. Secretary of Veterans Affairs (also known as the "VA" Secretary), on grounds of age- and sex-based bias when, among other inequities the VA allegedly imposed, the agency denied her several promotions from paygrade GS-12 to GS-13, and then granted her such a promotion on discriminatory terms. *See* Brief of Petitioner ("Br. Pet.") at 11-15. Dr. Babb further alleged that she endured retaliation for supporting sex discrimination claims by older female colleagues who believed the VA excluded them from

---

[6] *See, e.g.*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, *Form 462 and MD-715 Data Tables for FY 2017 and FY 2018*, EEOC.GOV, https://www.eeoc.gov/federal/reports/tables.cfm (last visited Sept. 20, 2019). The MD-715 Workforce Tables, Table A-2a, "FY 2017 Federal Workforce Participation Rates by Race/National Origin, Sex, GS-Grade, Senior Level Pay, and Agency (Cabinet-Level Departments and Subcomponents with 500 or More Employees)," show: the share of women in grades at or above GS-12 to be below 42%; the share of African-Americans at or above GS-12 to be below 9.8% for women and 6.4% for men; and the share of Hispanics at or above GS-12 to be below 6.6% for men and 3.3% for women.

.

programs relevant to promotion opportunities. *Id.* at 12. Dr. Babb also reported that supervisors made negative remarks about her age and that of other older female staff, and failed to promote these similarly situated colleagues due to age (and sex) bias. *Id.* at 14.

Dr. Babb's story linking age and other forms of discrimination in federal service highlights a key connection between the ADEA and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq*., whose federal-sector provision, including 42 U.S.C. § 2000e-16(a), was Congress's model for the § 633a(a)'s broadly-worded mandate to "make" federal workplaces "free from any discrimination" due to age.

The plain meaning of § 633a(a), the textual linkage between the ADEA's and Title VII's federal-sector provisions, and the parallel history of these statutes stressing enforcement of expansive civil rights protections in federal workplaces, favor a construction of § 633a(a) prohibiting any consideration of age as a factor in federal employment, as well as a similarly broad construction of § 2000e-16(a). Regrettably, the United States seemingly elevates its narrow interests as an employer above its duty to see that the laws are faithfully executed, by declining to defend § 633a(a)'s plainly-stated call for the Government to ensure that it creates workplaces where "all personnel actions [are] made free from any discrimination." The Government's contrary claim that § 633a(a) permits *some* age discrimination is a flatly implausible construction. This Court's decisions in constitutional and other cases employing the words "free from"

likewise support an expansive reading of § 633a(a)'s use of that phrasing to prohibit "any discrimination" influenced by considerations of age.

The Government's cramped interpretation of § 633a(a) ignores rulings of all tribunals to have grappled with its text, including this Court, the D.C. Circuit, and federal entities responsible for implementing § 633a(a), the U.S. Equal Employment Opportunity Commission ("EEOC") and the Merit Systems Protection Board ("MSPB"). These authorities, especially *Gomez-Perez v. Potter*, 553 U.S. 474 (2008), and *Lehman v. Nakshian*, 453 U.S. 156 (1981), also agree that the enactment record of § 633a supports a literal reading of text barring "any discrimination" related to age and requiring federal employment "free from" such bias. Section 633a's legislative history precludes application of a "but for" causation standard founded on the private-sector provisions of the ADEA and Title VII. As this Court and others have found, Congress established § 633a as "a distinct statutory scheme applicable only to the federal sector." Moreover, Congress later added § 633a(f), which confirmed that § 633a is to be construed in a manner "self-contained and unaffected" by other provisions of the ADEA.

The record of § 633a's genesis includes evidence that Congress had strong reasons for a "sweeping" federal-sector age discrimination ban. Reports authored by Congress and one commissioned by it, entitled "Cancelled Careers," identified serious age discrimination problems across the federal government. Legislators worried that "arbitrary

actions" infected with age bias "pose[d] a serious threat to . . . the entire civil service system."

Finally, the decisional consensus on the plain meaning of § 633a and the clear legislative record supporting that view render wholly unpersuasive the Government's reliance on *Gross* and *Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338 (2013). This stance founders on a flatly inapt statutory analogy between the ADEA's federal- and private-sector provisions, only the latter of which contains the words "because of." Nor does the Court's decision in a very different context, in *Safeco Ins. Co. v. Burr*, 551 U.S. 47 (2007), mean, as the Government contends, that the words "based on" in § 633a(a) are synonymous with "because of." And the Government's invocation of a "default rule[]" favoring a "but for" standard is no more effective, given *Nassar*'s caveat that such a card cannot be played where, as here, there is "an indication to the contrary in the statute itself." 570 U.S. at 347.

The Court should reverse the Eleventh Circuit's ruling on § 633a(a)'s causation standard.

ARGUMENT

I. THE STARTING POINT FOR ANALYSIS IN THIS CASE SHOULD BE THE PLAIN MEANING OF SECTION 633a(a).

In its brief supporting certiorari,[7] the United States framed the Court's task here as untangling interwoven strands of intricate reasoning, yet the question at hand is relatively straightforward: construing § 633a(a) so as to identify its standard for proving causation. The Court should focus on the text of § 633a(a), for "when the statutory language is plain," this Court "must enforce it according to its terms." *Millbrook* v. *United States,* 569 U.S. 50, 57 (2013) (quoting *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009)). Thus, there is no need to engage in distractions founded on inapt statutory analogies, judicial dicta, or so-called "default rules."

In comparison to many federal laws whose meaning vexes this Court, the ADEA's federal-sector provision is a model of clarity and simplicity. In particular, its core language is unmistakably a "broad prohibition" of discrimination. *Gomez-Perez v. Potter*, 553 U.S. 474, 487, 490 n.6 (2008). It declares, in terms aptly described as "sweeping," *Ford v. Mabus*, 629 F.3d 198, 205 (D.C. Cir. 2010) (quoting *Forman v. Small*, 271 F.3d 285, 296 (D.C. Cir. 2001) ("Congress

---

[7] *See* Brief for the Respondent, ("Br. Resp."), *Babb v. Wilkie*, No., 18-882, U.S. *petition for cert. filed* Jan 7, 2019.

used sweeping language when it . . . extended the ADEA to cover federal agency employees.")):

> All personnel actions affecting [federal] employees or applicants for [federal] employment . . . who are at least 40 years of age . . . shall be made free from any discrimination based on age.

29 U.S.C. § 633a(a). This Court's decisions demand a focus on the text of § 633a(a). That text, in turn, requires a "broad" reading, taking seriously Congress's choice to make "any discrimination" a cause sufficient to support a finding of ADEA liability against a federal employer for failure to make its facilities "free from" age-based bias.

A. Section 633a(f) and this Court's decisions interpreting it make clear that the text of section 633a(a) is "complete in itself."

This Court's decisions have made plain that Congress, in amending § 633a in 1976, by adding § 633a(f), "'clearly emphasized that [§ 633a] [i]s self-contained and unaffected by other sections' of the ADEA." *Lehman v. Nakshian*, 453 U.S. 156, 168 (1981)).[8] *See Gomez-Perez*, 553 U.S. at 498 (same,

---

[8] Section 633a(f), entitled "Applicability of statutory provisions to personnel action of Federal departments, etc.," states, in pertinent part: "Any personnel action of any department, agency, or any other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this Act . . . ." 29 U.S.C. § 633a(f).

quoting *Lehman*, 453 U.S. at 168). Moreover, in *Lehma*n, this Court noted that Congress declared, in enacting § 633a(f), that § 633a "is complete in itself." 453 U.S. at 168.

Thus, any reliance on ADEA provisions that govern the private sector, in a manner that limits protections for federal workers, must be rejected. It follows that *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009), which declared that § 623 of the ADEA, its private-sector provision, imposes a "but for" causation standard, does not apply here.

Both *Gomez-Perez* and *Lehman* explicitly affirmed that § 633a(a) is not linked to—i.e., is not limited or otherwise affected by—the private-sector provision of the ADEA, § 623.[9] In *Lehman*, the Court held that its prior determination that claimants under the ADEA's private-sector provision were entitled to jury trials, *see Lorillard v. Pons*, 434 U.S. 575, 585 (1978), did not require a finding that § 633a likewise provides for jury trials. 453 U.S. at 163-64. Based on § 633a(f), the Court reasoned that *Lorillard*'s conclusion that the ADEA's private-sector provision incorporated the enforcement scheme of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq*., "has no relevance to this case, because Congress

---

[9] Section 623(a), which amici call the ADEA's "private-sector provision," actually also applies to state and local government employers by virtue of the definitions of "person" and "employer" in sections 630(a) and (b), in a manner similar to the corresponding "private-sector" provision of Title VII, 42 U.S.C. § 2000e-2(a), by virtue of the definitions of "person" and "employer" in sections 2000e(a) and (b) of Title VII.

did not incorporate the FLSA enforcement scheme into § [633a]"). *Id.* at 163 (citing 29 U.S.C. § 633a(f) (Supp. III 1976)). Similarly, in *Gomez-Perez*, the Court rejected the Government's contention that "recognizing federal-sector retaliation claims would be tantamount to making § 623(d) applicable to federal-sector employers and would thus contravene § 633a(f)." 553 U.S. at 489. The Court termed this assertion "unsound" and thereby set an example to be followed in this case: it ruled "'based squarely on § 633a(a) itself," *id.*, and disavowed the legitimacy of § 633a being "'[]affected by other sections' of the ADEA." *Id. (*quoting *Lehman*, 453 U.S. at 168*).*[10]

Gomez-Perez could not have been clearer in disavowing a connection between sections 633a and 623. "[O]ur holding that the ADEA prohibits retaliation against federal-sector employees," it said, "is not in any way based on § 623(d)." 553 U.S. at 489. Likewise, in *Lehman*, the Court contrasted Congress's expansion of the ADEA's private-sector provision, adding "[s]tate and local governments . . . as . . . defendants by a simple expansion of the term 'employer,'" with "Congress['s] adding an entirely new section" constituting "a distinct statutory scheme

---

[10] In doing so, the *Gomez-Perez* majority also flatly rejected the dissent's interpretation of § 633a(f), that it reflects "a deliberate legislative choice *not* to extend those portions of the ADEA's private-sector provisions that are not expressly included in § 633a . . . ." 553 U.S. at 499. In any event, even the dissent acknowledged that Congress "creat[ed] § 633a 'as a stand-alone prohibition against discrimination in federal employment.'" *Id.*

applicable only to the federal sector." 453 U.S. at 166; a*ccord Ford*, 629 F.3d at 205.

On the other hand, this Court has recognized linkage relevant to statutory construction between § 633a and Title VII's federal-sector provision. After all, "[s]ections 15(a) and 15(b) of the ADEA, [29 U.S.C. §633a(a), (b),] as finally enacted, are patterned directly after §§ 717(a) and (b) of the Civil Rights Act of 1964, as amended in 1972 [42 U.S.C. § 2000e-16(a), (b)]." *Lehman*, 453 U.S. at 167 n.15. *Accord Gomez-Perez*, 553 U.S. at 487 ("The ADEA federal-sector provision was patterned 'directly after' Title VII's federal-sector discrimination ban.") (quoting *Lehman*, 453 U.S. at 167 at 15).

Petitioner has ably demonstrated why § 633a's origins in § 2000e-16 reinforce the conclusion that Congress intended "that [age] discrimination could play no role whatsoever in federal employment decisions[.]" Br. Pet. at 35; *see also id.* at 29-42. As a result, it is ironic that, in this case, the Eleventh Circuit found itself bound to embrace a "motivating factor" standard for § 2000e-16(a), yet did not extend the logic of such a finding, based on *Gomez-Perez* and *Lehman*—as well as *Brown v. General Services Admin.*, 425 U.S. 820, 825-29 (1976), and other authorities cited by Petitioner—to conclude that the same standard should apply to § 633a(a).

B. The language of section 633a(a) unambiguously calls for a "motivating factor" causation standard.

It is settled that if "statutory text is plain and unambiguous[,]" courts "must apply the statute according to its terms." *Carcieri* v. *Salazar,* 555 U.S. 379, 387 (2009). Indeed, for over a century, this Court has adhered to the maxim that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms," *Lamie* v. *United States Tr.*, 540 U.S. 526, 534 (2009) (first quoting *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N. A.,* 530 U.S. 1, 6 (2000) (internal quotation marks omitted); then quoting *United States* v. *Ron Pair Enter., Inc.,* 489 U.S. 235, 241 (1989); and then quoting *Caminetti* v. *United States,* 242 U.S. 470, 485 (1917)); *accord Millbrook,* 569 U.S. at 57.

Petitioner's parsing of § 633a(a) shows that the ADEA is clear and unambiguous "in requiring that federal personnel actions be made entirely free from" age bias and, likewise, in prohibiting "any" consideration of age as a factor in employer conduct detrimental to employees in federal service or those seeking such employment. *See* Br. Pet. at 49. Amici agree with Petitioner that § 633a(a)'s mandate that agency employment decisions affecting certain federal workers "be *made* free from any discrimination based on age" (emphasis supplied) prohibits any discriminatory treatment in a federal employment decision-making *process*." *Id.* at 2, 19, 27-28, 44. And

amici concur that, in contrast, the Government's view that it is perfectly fine for age discrimination to "infect federal employment decisions in any way," so long as it is not the but-for cause of an ultimate adverse decision, "fails to give effect to the very different wording chosen by Congress" in drafting § 633a. *Id.* at 51, 54; *see Ford*, 629 F.3d at 206 (holding that imposing a but-for causation standard on § 633a(a) "would . . . divorce the phrase 'free from any discrimination' from its plain meaning").

A broad reading of "free from any discrimination" is consistent with this Court's use of "free from" in other constitutional and civil rights contexts. Indeed, such use strongly supports a literal reading of § 633a(a) that prohibits *any* consideration of age in federal personnel decision-making. In other words, this body of precedent favors a "motivating factor" causation standard for § 633a(a).

The Court has repeatedly employed the term "free from . . ." to describe the expansive protections afforded by the Constitution, including the Fourth Amendment right to be "free from unreasonable searches and seizures" and the Eighth Amendment right to be "free from cruel and unusual punishments." *See, e.g., Byrd v. United States*, 138 S. Ct. 1518, 1526 (2018) ("Few protections are as essential to individual liberty as the right to be free from unreasonable searches and seizures."); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1859 (2017) (discussing "the Eighth Amendment right to be free from cruel and unusual punishment"); *see also Harte v. Bd. of Comm'rs*, 864 F.3d 1154, 1158-59 (10th Cir. 2017) (quoting *Florida v. Jardines*, 569

U.S. 1, 6 (2013) ("At the [4th] Amendment's very core stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion.")).

The Court has applied similar wording to emphasize the vital importance of First Amendment protections. *See Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95-96 (1992) ("To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship."); *Staub v. City of Baxley*, 350 U.S. 313, 325 (1958) ("enjoyment of speech[, a] fundamental right[,] is made free from congressional abridgment by the First Amendment"); *see also Burton v. Freeman,* 504 U.S. 191, 211 (1992) (in a "rare case in which . . . a [state] law survive[d] strict scrutiny" under the First and Fourteenth Amendments, the Court upheld a voting restriction, recognizing "the right to cast a ballot in an election free from the taint of intimidation and fraud").

Another example of the Court's use of the phrase "free from" to communicate the intensity of its commitment to protect interests it considers fundamental originates from a dispute concerning the degree of federal judicial deference owed to state courts. *Smith v. Bayer Corp.*, 564 U.S. 299, 306 (2011) (quoting *Alt. Coast Line R.R. Co. v. Locomotive Eng'rs*, 398 U.S. 281, 282 (1970)) (explaining that the Anti-Injunction Act, 28 U.S.C. § 2283, "broadly commands that [state courts] 'shall remain free from interference by federal courts.'"); *see also Eisenstadt v. Baird*, 405

U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

The context of federal statutory protection against employment bias also has led the Court to invoke the term "free from" to articulate the seriousness of Congress's concerns in enacting the Family and Medical Leave Act of 1993 (FMLA), 42 U.S.C. §§ 2601, *et seq*. that "States continue[d] to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits." *Nevada v. Hibbs*, 538 U.S. 721, 730 (2003). In *Hibbs*, the Court declared: "The FMLA aims to protect the right to be free from gender-based discrimination in the workplace." *Id*. at 729.

These various contexts in which the Court and lower federal courts have characterized the words "free from" in terms consistent with a very high degree of protection from intrusions on rights (or other forms of adulteration of a preferred condition),[11] further support the thesis that this Court should interpret Congress's use of "free from" to signify intent to create liability for an expansive class of discriminatory acts taking into account age. These decisions also undermine the Government's case that § 633a(a)'s

---

[11] *See, e.g., Glaxo Group Ltd. v. Ranbaxy Pharms., Inc.*, 262 F.3d 1333, 1336 (Fed. Cir. 2001) (patent case, declaring "'[f]ree from' means without.").

plain language only gives rise to federal employer liability for acts constituting a "but for" cause of an adverse workplace action due to a complainant's age.

The Court should construe § 633a(a) according to its terms and reject the Government's arguments calling for the Court, in effect, to do otherwise.

C. All decisional authorities that have grappled with the text of section 633a(a) have concluded it establishes a "motivating factor" causation standard.

It is unsurprising that the text of § 633a(a) supports a construction encompassing a "motivating factor" causation standard, given that every decisional authority to actually engage with the words of that provision has reached such a result. The only authorities to reach a contrary result have relied on superficial analysis, inapt statutory analogies, non-binding judicial dicta, or presumptions untethered from the exact text. The Eleventh Circuit in this case[12] relied on binding Circuit precedent that the Court of Appeals expressly acknowledged "did not analyze the linguistic differences between the ADEA's private-

---

[12] The amended opinion of the Eleventh Circuit (Joint Appendix ("JA") 1a-22a) is not published in the Federal Reporter, but is reprinted at 743 F. App'x 280 (11th Cir. 2018).

and federal-sector provisions." *Babb*, 743 Fed. App'x at 288; JA 13a.[13]

Only one federal appellate ruling has analyzed in depth the text of § 633a(a) in reaching the issue of its proper causation standard. In *Ford*, the D.C. Circuit upheld a "motivating factor" standard for § 633a(a) one year after the Supreme Court upheld a "but-for" standard under the ADEA's private-sector provision in *Gross*. The *Ford* court relied on its prior decision in *Forman v. Small*, in which the D.C. Circuit also examined § 633a(a)'s text and declared it "sweeping." 271 F.3d at 298. *Ford* said that broad textual scope "require[d]" sections 633a(a) and 623(a) to be "interpret[ed] differently," 629 F.3d at 205:

> Were the Secretary correct—that section 633a requires a but-for test—then a plaintiff who fails to demonstrate that age was a determining factor but nonetheless shows that it was one of several factors would lose even though the challenged personnel action in that scenario was not "free from any discrimination."

Id. at 205-06. *Ford* also carefully weighed the word "any" in § 633a(a) and concluded that:

> courts must look not for a particular quantum of influence, as the district court appeared to do

---

[13] The Eleventh Circuit ruled that it was bound to uphold a "but-for" standard based on "prior-panel-precedent" in *Trask v. Sec'y, Dep't of Veterans Affairs,* 822 F.3d 1179, 1191 (11th Cir. 2016). JA 13a.

> through use of the word "substantial," but for the existence of influence at all. Why? Because any amount of discrimination tainting a personnel action, even if not substantial, means that the action was not "free from any discrimination based on age." "Any," after all, means any. *See, e.g., United States v. Gonzales*, 520 U.S. 1, 5 . . . (1997) (explaining that "any" has "expansive meaning" . . .).

Id. at 206.

In this case, the Eleventh Circuit observed that were it not bound to uphold a "but-for" standard based on "prior-panel-precedent," it might have upheld Dr. Babb's prayer for a "motivating factor" standard. JA 11a-12a (discussing the "sweeping" language of § 633a(a) and concluding that "[i]f we were writing on a clean slate, we might agree" with Dr. Babb). The only other federal appellate decision on the issue of § 633a(a), *Shelley v. Geren*, 666 F.3d 599 (9th Cir. 2012), suffers from the same flaw as the *Trask* decision, which bound the Eleventh Circuit. The Ninth Circuit ruled, in a conclusory, single-sentence analysis, that *Gross*—a decision under § 623 of the ADEA—compels a "but-for" causation standard under § 633a(a). *Id.* at 607-08. As noted above, such a conclusion is precluded by § 633a(f).

The two federal agencies with responsibility for adjudicating federal-sector ADEA cases, the EEOC and the MSPB, also have consistently ruled that the distinctive language of § 633a(a) justifies a

"motivating factor" causation standard.[14] *See, e.g.*, *Chin v. Schapiro,* App. Cal. No. 0120110292, 2011 WL 1210668, at *4 (EEOC Mar. 24, 2011) ("Under [section 633a(a)'s] broad prohibition, liability is established where older age is a motivating factor for the agency's decision"); *Complainant v. Johnson,* Appeal No. 0720140037, 2015 WL 3542586, at *4 (EEOC May 29, 2015) (finding that the "but for" standard does not apply to retaliation claims by federal sector applicants or employees under Title VII or the ADEA because the federal-sector provisions of those laws do not contain the "because of" language on which *Gross* and *Nassar* relied) (citing *Petitioner v. Jewell*, No. 0320110050 (EEOC July 16, 2014)); *Wingate v. U.S. Postal Serv.*, 118 M.S.P.R. 566, at *7 (M.S.P.B. Sept. 27, 2012) (a federal employee may prove a violation of § 633a(a) by proof that age was "a factor" in a challenged personnel action, even though it was not a "but for" cause of the action).

One trial court decision applying a "motivating factor" causation standard to a § 633a(a) claim has proven notably influential in post-*Gross* EEOC federal-sector ADEA cases. *Fuller v. Gates*, No. 5:06-CV-091, 2010 U.S. Dist. LEXIS 17987 (E.D. Tex.

---

[14] "A federal employee who claims that she was discriminated against in violation of the ADEA's (or Title VII's) federal-sector provision may present her . . . claim to the EEOC. 29 U.S.C. § 633a(b)(3) and (d); *see* 42 U.S.C. § 2000e-16(b) and (c). Under the Civil Service Reform Act of 1978 . . . , 5 U.S.C. § 1101, et seq., the employee may also as an alternative seek MSPB review of certain more serious personnel actions allegedly violating those . . . provisions." Br. Resp. at 19.

Mar. 1, 2010) (denying defense reconsideration motion based on *Gross* and leaving in place ADEA verdict for plaintiff in bench trial), *rev'd on other grounds sub. nom. Fuller v. Panetta*, 459 Fed. App'x. 439 (5th Cir. 2012). Several EEOC decisions have followed the *Fuller* district court's reasoning (at *3-4) "that *Gross* applied to private employment, and not employment by the federal government" and, further, "that the different language in the two sections of the ADEA [i.e., sections 633a(a) and 623(a)] demonstrated that Congress intended different meanings." *Geraldine G. v. Brennan,* Appeal No. 0720140039, 2016 WL 3361226, at *5 (EEOC June 3, 2016) (citing *Fuller*, 2010 U.S. Dist. Lexis 17987); *Henry v. McHugh,* Appeal No. 0120103221, 2010 WL 5551957, at *3 (EEOC Dec. 23, 2010) (same).

These decisions also cited *Fuller* in reasoning that the "plain meaning" of "free from any" in § 633a(a) "must be construed as being broader than 'because of'" in § 623. *Geraldine G.*, 2016 WL 3361226, at *5; *Henry*, 2010 WL 5551957, at *4. And both specifically rejected a "but for" causation standard in favor of a motivating factor standard. *Geraldine G.*, 2016 WL 3361226, at *2 (noting whether the agency considered age "as a factor"), *4 (rejecting "but for"); *Henry*, 2010 WL 5551957, at *4 (rejecting "but for" and concluding "Complainant has not shown that age played any factor in his non-selection").

II. CONGRESS MEANT WHAT IT SAID IN REQUIRING FEDERAL EMPLOYMENT TO "BE MADE FREE FROM ANY" AGE DISCRIMINATION.

The legislative record of § 633(a) also compels the conclusion that it is irrelevant to refer to other ADEA provisions, such as § 623, or cases construing such provisions, such as *Gross*, to ascertain if § 633a supports a motivating factor standard. Congress enacted § 633a based on compelling grounds unique to legislators' concerns about age discrimination in federal service and about the inadequacy of other protections against discrimination in the civil service.

When the ADEA was enacted in 1967, it did not apply to the Federal government. In 1972, Senator Lloyd Bentsen introduced S. 3318 in order to subject federal, state, and local governments to the ADEA.[15] The impetus for the bill was a bout of federal agency reductions-in-force ("RIFs") causing older employees to be "transferred repeatedly, denied their right to [be retained in place of] employees with less experience, or subject to veiled hints that their usefulness [was] at an end." 118 Cong. Rec. 7744-45 (1972) (statement of Sen. Bentsen). As originally introduced, "the bill did not propose a new section for claims against government employers; it simply proposed to expand the definition of employer, which would have made existing provisions of the [ADEA] applicable to claims

---

[15] *See* S. 3318 (1972); 118 Cong. Rec. 7745 (1972).

against the government." *Bornholdt v. Brady*, 869 F.2d 57, 66 (2d Cir. 1989).

A bill covering federal employees did not pass in 1972, but on January 31, 1973, Senator Bentsen reintroduced his bill,[16] citing a special study by the Senate Select Committee on Aging, "Cancelled Careers,"[17] which documented serious problems of age discrimination in Federal agencies and serious dysfunction of civil service protections against such discrimination.[18] Such problems included some blatant forms of intentional age bias, such as express "age limitations on training programs and agencies' [stated] desire[s] to have a younger work force." Fentonmiller, 47 AM. U. L. REV. at 1091. They also included "significant evidence" of subtler forms of age bias: "certain ostensibly-neutral policies, such as targeting higher grade levels" for elimination. *Id.*[19]

---

[16] Senator Bentsen introduced this bill, S. 635 (1973), on January 31, 1973, 119 Cong. Rec. 2648 (1973).

[17] ELIZABETH M. HEIDBREDER, NAT'L COUNCIL ON THE AGING'S INST. OF INDUS. GERONTOLOGY, 92D CONG., CANCELLED CAREERS, THE IMPACT OF REDUCTION-IN-FORCE POLICIES ON MIDDLE-AGED FEDERAL EMPLOYEES at III (Comm. Print 1972) (hereinafter "Cancelled Careers").

[18] S*ee* Keith R. Fentonmiller, *The Continuing Validity of Disparate Impact Analysis for Federal-Sector Age Discrimination Claims*, 47 AM. U. L. REV. 1071, 1089–91, 1089–1091 n.103–24 (1998) (hereinafter "Fentonmiller").

[19] Yet another serious age bias issue noted in the report was "hyper-definition of competitive areas": the designating of very limited job categories in which highly-qualified, highly-tenured—i.e., mostly older—federal workers could compete to retain

These practices, according to Cancelled Careers, were "'arbitrary actions' that amounted to subtle discrimination having 'dire consequences' for older workers." *Id.* In short, Congress, at the time of the enactment of the ADEA's federal-sector provision, had powerful reasons to craft strong protections against age discrimination in federal employment capable of reaching myriad forms of age bias, subtle and not so subtle, due to evidence before it that personnel actions unfair to older workers were widespread and deeply embedded in federal agency practices. *Id.* [20]

Congress enacted the new bill expanding coverage of the ADEA in 1974; it required "[a]ll [federal government] personnel actions" to be "made free from any discrimination based on age." Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, §§ 15, 28(b)(2), 88 Stat. 55, 79-80 (1974) (codified as amended at 29 U.S.C. § 633a). In effect, Cancelled Careers, in sounding an alarm that vigorous efforts were needed to root out age discrimination in federal

---

employment. Fentonmiller at 1091. "Competitive areas may be so narrowly defined that in effect employees have no one against whom they can compete and their rights to jobs held by employees with lower retention ratings evaporate." *Id.* at 1090 n.115 (quoting Cancelled Careers at 1).

[20] Indeed, the preface to Cancelled Careers, authored by the Chairman of the Special Committee on Aging, Senator Frank Church, as well as Senators Jennings Randolph and Walter Mondale, said the report identified "disturbing evidence" that federal government reduction-in-force programs were producing "dire consequences" for older workers and "pose[d] a serious threat to well-trained and conscientious employees and the entire civil service system." *Id.* at 1089-90.

employment, played a role in guiding Congress's drafting of the text of the ADEA's federal-sector protections akin to the role the "Wirtz Report"—issued by the U.S. Department of Labor in 1965—played in inspiring and guiding Congress in drafting the ADEA of 1967. *See Smith v. City of Jackson*, 544 U.S. 228, 232-33, 235 n.5, 240-41 (2005) (discussing the importance of the "Wirtz Report" in construing the ADEA as enacted).

In 1977, H.R. REP. No. 95-527, a committee report accompanying H.R. 5383, which, with limited amendments, became the ADEA Amendments of 1978, Pub. L. No. 95-526, 92 Stat. 189, reprinted in 1978 U.S.C.A.A.N. 528,[21] similarly identified serious defects in federal-sector age discrimination protections. Congress determined that these defects warranted extending the coverage of the "free from any discrimination" language to otherwise exempt "personnel actions." House Report 95-527 declared: "These amendments . . . would eliminate mandatory retirement and other age discrimination in Federal employment including job advancement and hiring." H.R. REP. No. 95-527 at p.11. Elsewhere, the report confirmed the need for § 633a to be especially broad in scope due to the inadequacy of other mechanisms for policing age-discriminatory personnel actions; that is, one stated purpose of amending the ADEA's federal-sector provision was "to restrict the Civil Service Commission's freedom to grant exemptions from

---

[21] *See Lehman*, 453 U.S. at 167-68 (citing and quoting H.R. REP. No. 95-527, at 11 (1977)).

compliance with the [ADEA] to Federal agencies, departments, etc." *Id.* at 13.

This history of Congress's deliberate actions to provide expansive ADEA protection to federal workers—in particular, the dramatic pivot from merely expanding the definition of "employer" to include federal employers to crafting an entirely separate provision with very distinct statutory language—cannot be ignored. As summarized in *Lehman*:

> The ADEA originally applied only to actions against private employers . . . State and local governments were added as potential defendants by a simple expansion of the term "employer" in the ADEA. . . . In contrast, Congress added an entirely new section, § 15, to address the problems of age discrimination in federal employment.

453 U.S. at 166. Thus, the evolution of § 633a in the 1970s, from its enactment to its amendments, including § 633a(f), clearly show that Congress meant for the federal-sector provision to be fully capable of addressing "any" age bias in federal service and did not intend for any other section of the ADEA to be used to limit § 633a(a) in providing enforcement capacity "complete in itself." *Lehman*, 453 U.S. at 168 (quoting H.R. REP. No. 95-527, at 11 (1977)).

III. THE GOVERNMENT'S PLEAS TO INTERPRET SECTION 633a BY RELYING ON INAPT STATUTORY ANALOGIES, NON-BINDING DICTA, AND GENERAL "DEFAULT RULES" ARE LEGALLY UNPERSUASIVE.

A. This case is not governed by the decisions in *Gross* and *Nassar* construing the private-sector provisions of the ADEA and Title VII.

Any reasonable survey of applicable authorities reveals the Government's principal reliance on *Gross* and *Nassar* as requiring a "but for" causation standard under § 633a(a)[22] to be weak. This Court made plain in *Gomez-Perez* and *Lehman* that any construction of § 633a(a) must be "unaffected by" the ADEA's private-sector provision, § 623—the subject of *Gross*. This is so both because Congress enacted § 633a(f) to that effect, *Gomez-Perez*, 553 U.S. at 489 (quoting *Lehman*, 453 U.S. at 168), and because Congress otherwise indicated—and this Court has concluded—that § 633a constitutes "a distinct statutory scheme applicable only to the federal sector." *Lehman*, 453 U.S. at 166; *see also Gomez-Perez,* 553 U.S. at 486, 488 (recognizing the "sharp[]" difference between sections 633a and 623 and describing the former as a 'broad, general ban on 'discrimination based on age.'").

---

[22] *See* Br. Resp. at 2-6, 13-17, 23.

Nassar, after all, involved a retaliation claim by a claimant under Title VII's "private-sector" provision.

Furthermore, *Gomez-Perez* points out the flaw in the Government's argument that *Gross*'s analysis of the 1991 Civil Rights Act[23] "applies equally" to § 633a(a). Congress subsequently amended Title VII (its private-sector provision) to codify a "motivating factor" standard and also amended the ADEA, without likewise codifying a "motivating factor" standard for any portion of the ADEA. *See* Br. Resp. at 16. In *Gomez-Perez,* this Court observed:

> "[N]egative implications raised by disparate provisions are strongest" in those instances in which the relevant statutory provisions were "considered simultaneously when the language raising the implication was inserted." *Lindh v. Murphy*, 521 U.S. 320, 330 . . . (1997).

553 U.S. at 487. And here, as in *Gomez-Perez*, the Government has presented no evidence that "the two relevant provisions were not considered or enacted together." *Id.* That is, there is nothing to indicate that Congress considered § 633a (or identical language in § 2000e-16(a) of Title VII, for that matter) in enacting the 1991 Act. In any event, *Gross*'s reasoning in this regard is totally inapplicable to a portion of the ADEA that this Court, for nearly four decades, has recognized to be "complete in itself," *Lehman*, 453 U.S. at 168 (quoting H.R. REP. No. 95-527, at 11 (1977)), "a distinct statutory scheme," *id.* at 166, and "unaffected"

---

[23] *See Gross*, 557 U.S. at 174, 178 n.5.

by interpretive principles applied to other portions of the ADEA. *Gomez-Perez*, 553 U.S. at 189 (quoting *Lehman*, 453 U.S. at 168).

At bottom, in construing § 633a(a), the most significant factor differentiating it (as well as 42 U.S.C. § 2000e-16(a)) from the private-sector provisions addressed in *Gross* and *Nassar* is that it does not contain the words "because of" that this Court read to require "but for" causation in section 623(a) of the ADEA and in private-sector retaliation cases under Title VII. *See Ford*, 629 F.3d at 205; *Complainant v. Johnson,* 2015 WL 3542586, at *4); *Nita H. v. Jewell*, No. 0320110050, 2014 WL 3788011, at *10 n.6 (EEOC July 16, 2014); *Beasley v. Dep't of Defense*, No. DC-0752-15-1025-I-1, 2016 M.S.P.B. 4220, at *24-27 (M.S.P.B. July 20, 2016). Thus, based on the factual differences between these statutory provisions, the but-for for causation requirement in ADEA private-sector cases does not apply in the federal sector.

B. This case is not governed by the Court's *Safeco* decision construing the Federal Credit Reporting Act.

The Government's maneuvers to surmount the formidable barriers imposed by this Court's § 633a decisions and by stark language differences between § 633a and statutory text at issue in *Gross* and *Nassar,* also are unavailing. The first of these is to invoke dicta in both *Gross* and *Nassar, see* Br. Resp. at 13. The Government suggests that *Safeco Ins. Co. v. Burr*, 551 U.S 47 (2007), in which the Court considered the term,

"based on"—words appearing in § 633a(a) but not in § 623(a)—somehow controls this case. It does not. *Safeco*'s observation that "in common talk, the phrase 'based on' indicates a but-for causal relationship," 551 U.S. at 63 (quoted in *Gross*, 557 U.S. at 176), was self-evidently a mere preliminary step in construing the particular statutory text at issue.

The further assertion in *Gross (*and *Nassar*) that *Safeco* stands for the proposition "that the statutory phrase 'based on,' has the same meaning as 'because of,'" *Gross*, 557 U.S. at 176*; see also Nassar*, 570 U.S. at 350, stretches *Safeco* past the breaking point. *Safeco* merely explained that "[t]he originally enacted version of the notice requirement" in question used the words "because of." 551 U.S. at 64 n.14. Not so here.

The focus of *Safeco* was § 1681m(a) of the Fair Credit Reporting Act ("FCRA"), which "requires notice to a consumer subjected to 'adverse action . . . based in whole or in part on any information contained in a consumer [credit] report.'" 551 U.S. at 525 (quoting 15 U.S.C. § 1681m(a)). The Court's discussion of "based on" turned on whether Congress intended to establish a violation "whenever [a] credit report was considered in the rate-setting process, even without [the report] being a necessary condition for the rate increase." *Id.* at 63.

In *Safeco*, this Court announced no broadly applicable rule of "but for" causation. Rather, the Court stressed the narrow context dictated by the FCRA's legislative history:

> The "because of" language in the original statute emphasized that the consumer report must actually have caused the adverse action for the notice requirement to apply. When Congress amended the FCRA in 1996, it sought to define "adverse action" with greater particularity . . . . In the revised version of § 1681m(a)), the original "because of" phrasing changed to "based . . . on," but there was no indication that this change was meant to be a substantive alteration of the statute's scope.

551 U.S. at 64 n.14.

Thus, the Government's characterization of *Safeco* is overblown. Especially overreaching, as applied to this case, is its contention that this Court "has repeatedly concluded"—as if by way of a holding or a binding rule of statutory construction—"that the phrase 'based on' carries the same but-for causation meaning as the phrase 'because of.'" Resp. Br. at 13. (quoting *Nassar*, 570 U.S. at 350).

Moreover, § 633a(a)'s expansive wording distinguishes this case from *Safeco*. In contrast to FCRA, the words "based on" in § 633a(a) appear in tandem with text—requiring Federal employers to make workplaces "free from any discrimination"—that *is* seemingly concerned with "adverse[]" actions taken "merely after consulting" (or taking into account) age. Or put another way, the phrasing of § 633a(a), unlike the FCRA, as read by the Court, seems to presume that "mere[]" considerations of age require action because such conduct qualifies as that

which is the target of the law—"discrimination." In contrast, as the *Safeco* Court explained, taking into account credit reports is not the target of the FCRA; rather, "Congress was . . . concerned with practical consequences[.]" 551 U.S. at 65.

Finally, *Safeco* concerns not only a unique enactment history and statutory text, unlike that of § 633a, but also a much different policy context. In age discrimination in employment cases, the issue of an employer's motives—whether age itself or related considerations causing harm to older workers—is central. However, in *Safeco*, the challenged "basis" for the FCRA claim was an insurer's review of a certain type of *document*. The issue of an insurer's motives was not central. Rather, the key question was whether a credit report had an undesired harmful consequence. That is,

> Since [the FCRA] does not explicitly call for notice when a business acts adversely merely after consulting a report, [it] suggests that the duty to report arises from some *practical consequence* of reading the report, not merely some subsequent adverse occurrence that would have happened anyway. . . . [I]t makes more sense to suspect that Congress meant to require notice and prompt a challenge by the consumer only when the consumer would gain something if the challenge succeeded.

Id. at 64 (emphasis supplied). Once again, this context is much different from that of § 633a(a).

The Congress that enacted § 633a(a) surely also sought practical results; yet, legislators also worried that rampant age bias "pose[d] a serious threat to . . . the entire civil service system."[24] In response, they created a powerful, new tool to banish widespread age-biased employment practices from Federal agency corridors. Thus, it seems implausible that Congress intended to oblige older Federal workers, like FCRA claimants, to first demonstrate that they "would gain something if the[ir] challenge succeeded," *Safeco*, 551 U.S. at 64—i.e., to surmount a significant causation hurdle—before permitting them to assert a claim.

C. This case is not governed by "default rules" favoring a "but for" causation standard in some federal statutes.

In a vein similar to its undue elevation of *Safeco* to a source of authority far beyond its actual reach, the Government ascribes to Congress an intent—presumably in 1974-78—to embrace "default rules" of "textbook tort law" identified by this Court in *Nassar* as "the background to which Congress legislated in enacting Title VII [and, presumably, the ADEA], and [which] it is presumed to have incorporated, absent an indication to the contrary in the statute itself." *Nassar*, 570 U.S. at 347. The Government goes beyond the *Nassar* Court's identification of "the background against which Congress legislated" and declares that "[s]ection 633a(a)'s textual adoption of . . . but-for-causation reflects 'the default rules at common law'" noted by the Court, Br. Resp. at 13, thereby avoiding

---

[24] *See supra* Note 20, citing Fentonmiller at 1089-90.

altogether the key question posed by *Nassar*: whether there is "an indication to the contrary in the statute itself." 570 U.S. at 347. Amici submit that there is.

Indeed, amici have shown herein, and Petitioner has likewise demonstrated, multiple reasons for the Court to conclude that § 633a(a)'s text requires a causation standard whereby age may not be a factor taken into account in carrying out Federal personnel actions. The textual and other grounds for recognizing a "motivating factor" causation standard for claims under § 633a(a) are nothing short of compelling. In such instances, the Court "must give effect to Congress'[s] choice." *Gross*, 557 U.S. at 177 n.3.

CONCLUSION

For all these reasons, amici urge the Court to reverse the Eleventh Circuit's decision in this case.

Respectfully Submitted,

DANIEL B. KOHRMAN *
LAURIE A. MCCANN
WILLIAM ALVARADO RIVERA
**Counsel of Record*
AARP FOUNDATION
601 E Street, NW
Washington, DC 20049
Tel. (202) 434-2064
dkohrman@aarp.org

Counsel for Amici Curiae

September 24, 2019

APPENDIX

***Babb v. Wilkie*, No. 18-882 (U.S.)**

APPENDIX to

BRIEF OF AMICI CURIAE AARP, AARP FOUNDATION, LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, NATIONAL WOMEN'S LAW CENTER NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, AND EMPLOYEE RIGHTS ADVOCACY INSTITUTE FOR LAW AND POLICY, SUPPORTING PETITIONER AND URGING REVERSAL

Statements of Interest of the Other Amici

The Leadership Conference on Civil and Human Rights ("The Leadership Conference") is a diverse coalition of more than 200 national organizations charged with promoting and protecting the civil and human rights of all persons in the United States, including those who face discrimination in the workplace. It is the nation's largest and most diverse civil and human rights coalition. For more than half a century, The Leadership Conference, based in Washington, D.C., has led the fight for civil and human rights by advocating for federal legislation and policy, securing passage of every major civil rights statute since the Civil Rights Act of 1957. The Leadership Conference works to build an America that is inclusive and as good as its ideals. Towards that end, we have participated as an amicus party in cases of great public importance that will affect many individuals other than the parties before the court

and, in particular, the interests of constituencies in The Leadership Conference coalition.

The National Women's Law Center is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights and the rights of all people to be free from sex discrimination. Since its founding in 1972, the Center has focused on issues of key importance to women and their families, including economic security, employment, education, and health, with special attention to the needs of low-income women and those who face multiple and intersecting forms of discrimination. The Center has participated as counsel or amicus curiae in a range of cases before the Supreme Court and the federal Courts of Appeals to secure equal treatment and opportunity in all aspects of society including numerous cases addressing sex discrimination in the workplace. The Center seeks to ensure that all individuals enjoy the full protection against sex discrimination promised by federal law.

The National Employment Lawyers Association ("NELA") is the largest professional membership organization in the country comprising lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been treated unlawfully in the workplace. NELA's members litigate daily in every circuit,

affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

The Employee Rights Advocacy Institute for Law & Policy ("The Institute") advances workers' rights through research and advocacy to achieve equality and justice in the American workplace. The Institute works hand-in-hand with the National Employment Lawyers Association to create workplaces in which there is mutual respect between employers and workers, and workplaces are free of discrimination, harassment, and retaliation.

September 24, 2019