

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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NORIS BABB, )  
 )  
Petitioner, )  
 )  
v. ) No. 18-882  
 )  
ROBERT WILKIE, SECRETARY OF )  
 )  
VETERANS AFFAIRS, )  
 )  
Respondent. )  
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Pages: 1 through 70  
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ROBERT WILKIE, SECRETARY OF )

VETERANS AFFAIRS, )

Respondent. )

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Washington, D.C.

Wednesday, January 15, 2020

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

ROMAN MARTINEZ, ESQ., Washington, D.C.;

on behalf of the Petitioner.

GEN. NOEL J. FRANCISCO; Solicitor General,

Department of Justice, Washington, D.C.;

on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument this morning in Case 18-882, Babb  
5 versus Wilkie.

6 Mr. Martinez.

7 ORAL ARGUMENT OF ROMAN MARTINEZ

8 ON BEHALF OF THE PETITIONER

9 MR. MARTINEZ: Mr. Chief Justice, and  
10 may it please the Court:

11 Section 633a states that all federal  
12 personnel actions shall be made free from any  
13 discrimination based on age. Both parties agree  
14 that that language tracks the text and meaning  
15 of Title VII's identical federal sector  
16 provision covering race, sex, and religion.

17 Together the two provisions bar  
18 discrimination not only in the ultimate outcome  
19 of a personnel decision but also in the process  
20 of making that decision. That's true regardless  
21 of whether the prohibited characteristic at  
22 issue is a but-for cause of the final decision.  
23 That's the rule that the MSPB and the EEOC have  
24 applied in countless cases for many years, but  
25 more importantly it flows directly from the

1 statutory text.

2           The phrase "free from any  
3 discrimination" governs how the decision shall  
4 be made. In other words, the process for making  
5 that decision. If that process uses age or race  
6 as a negative factor, it's not made free from  
7 any discrimination.

8           Congress chose those words carefully  
9 rejecting the private sector language later  
10 addressed in Gross and Nassar. It did so in the  
11 unique federal sector context to create a remedy  
12 for violating constitutional equal protection  
13 rights. This Court has said that when a  
14 plaintiff is subjected to discrimination in the  
15 process of being considered for a government  
16 benefit, he necessarily suffers a redressable  
17 equal protection injury even if he can't prove  
18 he otherwise would have received a benefit.

19           That same injury rule governs 633a and  
20 Title VII. That rule is fully consistent with  
21 common law principles and this Court's but-for  
22 causation analysis in other cases.

23           The government, in this case,  
24 apparently believes it's perfectly lawful for  
25 federal agencies to apply younger-is-better or

1 whiter-is-better hiring policies to individuals  
2 who can't prove that they would have been hired  
3 but for those policies. That's anti-textual and  
4 it's wrong.

5 Decisions applying such blatantly  
6 discriminatory policies are obviously not made  
7 free from any discrimination. The government's  
8 theory contradicts the plain statutory language.

9 JUSTICE KAVANAUGH: But you say that  
10 the but-for causation is not required for  
11 liability, but then at the relief stage, as I  
12 understand your briefs, you say that but-for  
13 causation is required for reinstatement or back  
14 pay. And where is that in the statutory text?

15 MR. MARTINEZ: So we would say that --  
16 that at the -- at the remedial stage, ordinary  
17 remedial principles would apply, and those  
18 principles would require that the victim, the --  
19 the plaintiff, be made whole for the violation.  
20 And under those ordinary principles that I think  
21 are undisputed on both sides, if the evidence  
22 shows that the -- the person, the plaintiff,  
23 couldn't -- wouldn't have gotten hired anyway,  
24 they shouldn't get remedies that are  
25 specifically and logically tied to that -- that

1 thing that they -- they weren't -- wouldn't have  
2 been entitled to the in first place.

3 But that doesn't mean that they  
4 shouldn't get the kinds of prospective relief  
5 that are available in a wide array of other  
6 cases. For example --

7 JUSTICE KAVANAUGH: And why -- why  
8 would we go all the way up the hill and then  
9 come all the way back down at the relief stage  
10 and just say, oh, well, you really do need  
11 but-for causation because, as you rightly say,  
12 if you haven't suffered a -- an action because  
13 of age, you're not entitled to reinstatement --

14 MR. MARTINEZ: You -- Your Honor, with  
15 respect, you wouldn't be coming all the way down  
16 the hill because there would be a wide range of  
17 other types of remedies that would be available  
18 other than reinstatement and back pay. For  
19 example, you might be entitled to -- to an  
20 injunction telling the government to stop  
21 discriminating.

22 JUSTICE GINSBURG: This case --

23 JUSTICE GORSUCH: What would you --

24 JUSTICE GINSBURG: This -- this case,  
25 because there is -- at least one of her

1 allegations is that she was passed over and  
2 younger people were selected for the coagulation  
3 unit. Now, suppose that's true, younger women  
4 were selected, but they were better qualified;  
5 they had experience and training that she  
6 lacked.

7 So what would be the remedy? You --  
8 you would say there is a violation because age  
9 was taken into account. What -- what relief --  
10 you said it wouldn't be going all the way back  
11 down the hill in answer to --

12 MR. MARTINEZ: Sure.

13 JUSTICE GINSBURG: -- Justice  
14 Kavanaugh. What would the relief be?

15 MR. MARTINEZ: So, first of all,  
16 assuming that the government could show that --  
17 that she wouldn't have gotten the job -- we'll  
18 just take that as a given I think implicit in  
19 the question -- then she wouldn't be entitled to  
20 reinstatement or back pay, but she would be  
21 entitled to remedies like EEO training so that  
22 this kind of discrimination wouldn't happen to  
23 her next time she applies for a promotion or  
24 next time she seeks an opportunity. That kind  
25 of training is -- is a classic remedial relief



1 that's available in these types of cases. In  
2 some --

3 JUSTICE GINSBURG: Do -- who would get  
4 the training?

5 MR. MARTINEZ: The training we be the  
6 -- the supervisors and perhaps the -- the -- you  
7 know, the -- the others within the Bay Pines  
8 Medical Center who had contributed to the  
9 discriminatory treatment in the first place. I  
10 think if the -- if a court -- you know, we're  
11 here at summary judgment, but if the court -- if  
12 the proof at trial showed that there was some  
13 sort of more generalized policy of  
14 discriminating against people because they were  
15 older, the court could also issue some  
16 prospective relief that would say that those  
17 policies are unlawful.

18 In a lot of these cases, what a court  
19 does is -- is requires the entity to post a  
20 notice saying here's the finding of  
21 discrimination against us, so that people can  
22 read that notice, understand what went wrong  
23 last time, and not do it again in the future.

24 CHIEF JUSTICE ROBERTS: Would --

25 JUSTICE GORSUCH: Would that remedy --

1 CHIEF JUSTICE ROBERTS: -- that  
2 require --

3 JUSTICE GORSUCH: Oh, I'm sorry.

4 CHIEF JUSTICE ROBERTS: So no  
5 particular relief directly benefiting her?

6 MR. MARTINEZ: No, Your Honor.  
7 That's --

8 CHIEF JUSTICE ROBERTS: Or atmospheric  
9 relief, institutional relief, but she herself  
10 gets nothing tangible?

11 MR. MARTINEZ: I think those things  
12 would be very tangible for her, Your Honor,  
13 because she's still an employee there, she's  
14 still operating day to day in that environment,  
15 and she still wants to take advantage of future  
16 opportunities for training. And so if -- if the  
17 -- if she gets these kinds of corrective  
18 remedies, it's going to make it better for her  
19 and easier for her next time when she wants to  
20 apply for the opportunity, to be treated fairly  
21 without regard to age.

22 And this is the kind of  
23 forward-looking relief that this Court has often  
24 recognized is appropriate, even without but-for  
25 causation, for example, in the constitutional

1 cases that we've talked about. So in cases --

2 JUSTICE GORSUCH: Would -- would the  
3 remedy be any different than might be obtained  
4 under the civil service laws?

5 MR. MARTINEZ: Well, under the civil  
6 service laws, Your Honor, the -- the way the  
7 civil service laws work is Section 2302 of the  
8 CSRA says that the way you bring a  
9 discrimination claim is to sue under this  
10 statute that we're currently talking about.

11 JUSTICE GORSUCH: There are -- there  
12 are other remedies available though, right?

13 MR. MARTINEZ: I -- I -- I guess I'd  
14 have to focus specifically -- I'm not sure  
15 specifically what you'd be asking for, but the  
16 way I read the civil service laws is that --  
17 that these types of claims need to be brought  
18 under this particular statute.

19 JUSTICE SOTOMAYOR: Mr. Martinez --

20 MR. MARTINEZ: Now --

21 JUSTICE SOTOMAYOR: -- we're assuming  
22 the worst for your client, that the government  
23 is right that she would not have been hired  
24 but-for. But as I understand the equal  
25 protection claim, it's that the process would be

1 free from discrimination.

2 MR. MARTINEZ: Right.

3 JUSTICE SOTOMAYOR: So that even if  
4 she can't prove she would have gotten the job,  
5 she still has an opportunity to prove, qua a  
6 remedy, that age was considered and considered  
7 inappropriately.

8 MR. MARTINEZ: Correct.

9 JUSTICE SOTOMAYOR: So, for example --  
10 give me an example of a defense to one of the  
11 government's allegations, because there were  
12 four allegations, four or five, of different  
13 employment scenarios that she didn't qualify  
14 for.

15 MR. MARTINEZ: Right.

16 JUSTICE SOTOMAYOR: But give me an  
17 example in those four or five of a process that  
18 could have -- that she might have won on, that  
19 she might have prevailed in showing that that  
20 process was corrupted because of her age.

21 MR. MARTINEZ: Sure. So for -- one  
22 example is she sought certain training  
23 opportunities. And I think if -- if in the  
24 course of -- if the Court concluded after  
25 looking at all the evidence that the reason that

1 she was denied those training opportunities was  
2 partly because they thought there were other  
3 candidates who were good, but partly because  
4 they had -- they had a conversation around a  
5 table and said, you know, Ms. Babb, she's --  
6 she's -- she's really kind of old, we don't  
7 really like her, she keeps filing these EEO  
8 claims, she keeps asserting her rights in this  
9 way. Let's not give her the training  
10 opportunities in part for that reason.

11           It may be that the government,  
12 hypothetically, could come back and prove that  
13 there were other more qualified candidates, but  
14 that process has been infected by the  
15 consideration of those very significant factors  
16 of -- of pure age discrimination.

17           I think if we look at --

18           CHIEF JUSTICE ROBERTS: Usually --  
19 usually when we have -- conclude that there's a  
20 tainted process, we make the decisionmaker go  
21 back and do it over without the taint, don't we?

22           MR. MARTINEZ: I think you do in a  
23 circumstances, Your Honor, and in a circumstance  
24 which that was possible, that might well be  
25 the -- an available remedy as well.

1           I think we -- we are several years  
2 past the -- you know, the particular promotion  
3 decision and the particular role. I don't know  
4 if those roles even currently exist in the same  
5 way they did several years ago. But I think  
6 that's yet another example of the kind of  
7 equitable remedy that could be awarded if the  
8 process was determined to be tainted.

9           JUSTICE KAGAN: Mr. Martinez, you  
10 started by saying that this was a process  
11 statute. And I guess I want to press you on why  
12 you think that is.

13           If I understood your brief, it was  
14 about the word "made," but, I mean, that's a  
15 possible interpretation of this language, but  
16 another interpretation is that when you say that  
17 a personnel action should be made free from any  
18 discrimination, you're talking about the actual  
19 action, the discharge, the failure to promote,  
20 whatever, and saying that that action -- at the  
21 moment in time when it occurs, that action has  
22 to be free from discrimination rather than  
23 saying that the entire process leading up to it,  
24 including all the irrelevant things that  
25 happened that played no role in the action, has

1 to be free from discrimination.

2 So why do you read this as a process  
3 statute?

4 MR. MARTINEZ: I -- I think that's a  
5 helpful way. Maybe I could just walk you  
6 through my interpretation of the statute. And  
7 then we have it reproduced here at page 5 of the  
8 blue brief.

9 And so 633a(a), I think they're sort  
10 of three big chunks to the statute that are  
11 relevant here. First is the subject of the --  
12 of the sentence, "all personnel actions." Then  
13 there's the verb, "shall be made." And then  
14 finally there's an adverbial phrase, "free from  
15 any discrimination based on age."

16 And we think the real work here is  
17 being done by the combination of the adverbial  
18 phrase, "free from any discrimination" that  
19 modifies the verb "shall be made." It's not  
20 made on its own, it's the combination of those  
21 things.

22 And we think that in context, that  
23 adverbial phrase answers the question of how the  
24 decision shall be made. It's not saying what's  
25 the decision. It's not saying when does the

1 decision have to happen. It's talking about how  
2 that decision shall be made. That's a -- that's  
3 process language.

4 I think the second thing is, once you  
5 look within the adverbial phrase, within the  
6 "free from any discrimination based on any age"  
7 phrase, you should ask yourself, okay, well,  
8 what does this process have to be free from?

9 The next part of the statute is "any  
10 discrimination." And the word "discrimination"  
11 has been interpreted under its plain meaning and  
12 this -- and in this Court's decision in Jackson  
13 just to mean unequal differential or less  
14 favorable treatment.

15 And we think that that is -- we accept  
16 that, I think the Solicitor General has conceded  
17 that that's the understanding of discrimination.

18 JUSTICE KAGAN: So I think what the  
19 Solicitor General would say is, sure, it's  
20 unequal treatment but a person is only subject  
21 to unequal treatment if he or she doesn't get  
22 the outcome that he would otherwise have gotten.

23 MR. MARTINEZ: Well --

24 JUSTICE KAGAN: And if everything ends  
25 up the same, then there's been no unequal



1 treatment.

2 MR. MARTINEZ: Well, I think -- I  
3 think, Your Honor, that's why the first part,  
4 the "free from" language and the fact that it's  
5 an adverbial phrase modifying the verb, and that  
6 that language is talking -- signals that we're  
7 talking about process.

8 Once you know that we've got this --  
9 we've got this modifier that's a process  
10 modifier, that's talking about the process, I  
11 think that then sheds light on what we mean by  
12 discrimination.

13 JUSTICE KAVANAUGH: Well, what -- what  
14 about the subject, "actions"?

15 MR. MARTINEZ: Right.

16 JUSTICE KAVANAUGH: And that's a term  
17 that's used in Nassar, a term that used in  
18 Gross, the word "action," and the action is  
19 usually referred to as an adverse employment  
20 action, namely as Justice Kagan says, the  
21 decision. And your brief uses the word  
22 "process" over and over, and the CS -- civil  
23 service laws that Justice Gorsuch referenced do  
24 say that the process has to be free of any --  
25 you have to be treated fair and equitably

1 throughout the -- the process but this doesn't  
2 say that. It says "action."

3 So how do we deal with the word  
4 "action"?

5 MR. MARTINEZ: Well, I think you need  
6 to read it again in -- in the context of the  
7 whole sentence. And it -- and it doesn't say  
8 actions shall be -- can't be based on age. It  
9 says, "actions shall be made free from any  
10 discrimination based on age."

11 And so that -- that phrase, we agree  
12 with the Solicitor General. I think they say  
13 this -- I think they say this on -- in their --  
14 in their own brief. They -- they -- they say  
15 that the -- the -- the work that's done by the  
16 phrase "personnel action" is simply to explain  
17 the range of employment-related actions  
18 that's -- that's covered by the statute  
19 generally. It doesn't bear on the but-for  
20 causation question.

21 JUSTICE ALITO: I don't know -- I'm --  
22 I'm sorry.

23 MR. MARTINEZ: I'm sorry. Just to --  
24 to answer the question about action, I think the  
25 key point here is, if you look at -- if you look

1 at this page 5 of our blue brief, it -- what  
2 strikes me is the phrase that the Solicitor  
3 General relies on, "based on age," that's what  
4 they're getting -- where they're getting their  
5 but-for causation textual argument. It's all  
6 the way down at the bottom of the -- at the end  
7 of that paragraph.

8 And if you look at it, it modifies the  
9 word "discrimination," which is immediately to  
10 the left. But what the Solicitor General is  
11 asking you to do is take that based on age --  
12 age phrase, walk up 17 lines of text, turn left  
13 and have it modify "personnel actions." That's  
14 just not how the -- the statute reads.

15 And I think what -- what this Court  
16 has always done and -- and needs to do is look  
17 very carefully at the wording of the statute.  
18 This is the same point that Judges Tatel  
19 and Sentelle made in the DC Circuit that this  
20 statute --

21 JUSTICE KAVANAUGH: Judge Henderson  
22 disagreed.

23 MR. MARTINEZ: Judge -- you know,  
24 Judge Henderson concurred, Your Honor, so she  
25 agreed with the remand. She -- she expressed

1 some doubts about maybe the -- the -- the  
2 clarity or the -- the force of the particular  
3 arguments that Judges Tatel and Sentelle made.  
4 But the bottom line here is I think  
5 grammatically there's no question that "based on  
6 age" modifies "discrimination."

7 JUSTICE ALITO: But what happens if  
8 age plays no role whatsoever in the actual  
9 decision but at some prior point in the process,  
10 age was considered. I don't know that  
11 anything -- I don't think your argument depends  
12 on whether we look just at the final decision or  
13 we look at the whole process. But what would  
14 happen in that situation?

15 MR. MARTINEZ: I think it would -- it  
16 would depend. So maybe I'd have to understand  
17 the hypothetical a little bit more.

18 I think if -- if -- if someone could  
19 look at the entire -- at the -- the  
20 decisionmaking process and say that age was not  
21 a factor at all, then I think we would not -- a  
22 -- a -- a -- a plaintiff would not prevail. But  
23 if age played a significant role at the  
24 beginning of the process in some way, then I  
25 think it -- it would not be made free from

1 discrimination under the plain language of the  
2 statute.

3 CHIEF JUSTICE ROBERTS: Well, but  
4 if -- if the statute prohibits any  
5 discrimination, I don't know where you get your  
6 qualification that it has to be a significant  
7 factor. It doesn't to have affect the final  
8 action. So what type of discrimination, any  
9 type -- let's say in the course of the, you  
10 know, weeks' long process, you know, one comment  
11 about age, you know, the hiring person is  
12 younger, says, you know, "OK Boomer," you know  
13 --

14 (Laughter.)

15 CHIEF JUSTICE ROBERTS: -- once to  
16 the -- to the applicant. Now, you're only  
17 concerned about process. You're not concerned  
18 about but-for causation. It doesn't have to  
19 have played a role in the actual decision. So  
20 is that actionable?

21 MR. MARTINEZ: I -- I think we would  
22 say that it does have to play a role in the  
23 decisionmaking process that -- that leads to the  
24 decision. And I think in that particular case,  
25 if -- if it really had no role, if it was just

1 sort of, you know, a -- a stray comment in the  
2 air, I think that on the facts of that, I think  
3 a -- a court could conclude --

4 CHIEF JUSTICE ROBERTS: So how do  
5 you -- how do you tell what's a significant  
6 factor in the decision?

7 MR. MARTINEZ: We're not saying it has  
8 to be a --

9 CHIEF JUSTICE ROBERTS: No.

10 MR. MARTINEZ: We're not using the  
11 term --

12 CHIEF JUSTICE ROBERTS: Some factor.

13 MR. MARTINEZ: -- "significant."  
14 We're saying that -- ultimately, we're saying  
15 what the statute says, which is that the -- that  
16 it needs to be made free from discrimination.  
17 We think that applies to the process as a whole.

18 CHIEF JUSTICE ROBERTS: Well, you say  
19 free from any discrimination --

20 MR. MARTINEZ: Even better.

21 CHIEF JUSTICE ROBERTS: -- it doesn't  
22 have to result in the final decision. I'm just  
23 trying to see how many stray comments do you  
24 need and who has to make them before you decide  
25 that, although it says "any," we don't really

1 mean any. We mean some discrimination that has  
2 a particular effect, even if it's not but-for.

3 I'm just wondering if --

4 MR. MARTINEZ: Yeah.

5 CHIEF JUSTICE ROBERTS: -- your  
6 position is going to become a -- a -- a --  
7 really just a regulation of speech in the  
8 workplace.

9 MR. MARTINEZ: Oh, of course not, Your  
10 Honor.

11 CHIEF JUSTICE ROBERTS: Well, of  
12 course -- well, then explain how not.

13 MR. MARTINEZ: Well, if -- if -- if  
14 the speech in the workplace is, you know, using  
15 ethnic slurs or -- or, you know, calling people  
16 "Boomer" or saying unflattering things about  
17 them in age when considering them for a  
18 position, then, yes, of course.

19 CHIEF JUSTICE ROBERTS: So calling  
20 somebody a "Boomer" and considering them for a  
21 position would be actionable?

22 MR. MARTINEZ: I think if -- if -- if  
23 -- if the decisionmakers are sitting around the  
24 table and they say, we've got Candidate A who's  
25 35 and we've got Candidate B who's 55 and is a

1 boomer and is probably tired and -- and, you  
2 know, doesn't know -- have a lot of computer  
3 skills, I think that absolutely would be  
4 actionable.

5 CHIEF JUSTICE ROBERTS: Well, what if  
6 he just calls him a "Boomer." I mean that --  
7 I'm just trying to --

8 MR. MARTINEZ: I think that -- I --  
9 I -- it -- it seems to me like that would be a  
10 classic question for the fact finder. But if  
11 the fact finder were to conclude that that  
12 statement reflected, was one of the factors  
13 going into this decision, I think it absolutely  
14 would be covered.

15 JUSTICE BREYER: But the key --

16 MR. MARTINEZ: I think it absolutely  
17 would be covered.

18 JUSTICE BREYER: Is -- is -- when you  
19 answered that question, I had thought you would  
20 say, and you didn't, and -- and so this is why I  
21 have a question. There is another statute,  
22 Title VII, and what it says is when the  
23 discrimination is a motivating factor, but even  
24 though other factors also motivated that  
25 practice.



1 MR. MARTINEZ: Right.

2 JUSTICE BREYER: Now -- now, I thought  
3 you were going to pick up the same standard.

4 MR. MARTINEZ: We -- we think that our  
5 standard is essentially the same standard. We  
6 just --

7 JUSTICE BREYER: Right.

8 MR. MARTINEZ: We just haven't --

9 JUSTICE BREYER: So we could say in  
10 the opinion what this means, to be free, is the  
11 same thing that Congress said when it amended  
12 Title VII, that it isn't enough to show -- if  
13 you just show -- you don't have to show,  
14 plaintiff, that it is but-for, but you do have  
15 to show it was a motivating factor even though  
16 there may have been other "motivating factors."

17 MR. MARTINEZ: Right.

18 JUSTICE BREYER: And, therefore, there  
19 is no more administrative problem in this than  
20 there is anyway under Title VII. Now, that's  
21 what I'd thought you'd -- but you didn't say  
22 that. So now I don't --

23 MR. MARTINEZ: Let me -- let me  
24 just --

25 JUSTICE BREYER: You disagree with me

1 because you --

2 MR. MARTINEZ: No, no, no.

3 JUSTICE BREYER: -- think it --

4 MR. MARTINEZ: -- let me explain. The  
5 --

6 JUSTICE BREYER: Yeah, go ahead.

7 MR. MARTINEZ: The reason we had -- we  
8 didn't do that is because, I think as everyone  
9 would agree, by its terms, that provision does  
10 not directly apply to this statute.

11 JUSTICE BREYER: No, I know it  
12 doesn't.

13 MR. MARTINEZ: I'm just explaining --

14 JUSTICE BREYER: Yeah.

15 MR. MARTINEZ: -- why I didn't say it.  
16 But I think the substance of the point is  
17 exactly right. I think that -- that -- that  
18 this would not create administrability problems.  
19 You would actually be clarifying the law and  
20 creating a --

21 JUSTICE KAVANAUGH: Well, wait a  
22 second --

23 CHIEF JUSTICE ROBERTS: Well, another  
24 reason -- another reason you may not have said  
25 it is because it comes with another flip side,

1 right? It was a motivating factor, but then the  
2 defendant gets to show it wasn't -- the decision  
3 would have been made without regard to it.

4 MR. MARTINEZ: Yeah, but, Your Honor,  
5 that would -- that happens at the remedial  
6 stage, at the relief stage. And that's exactly  
7 our point, is that, at the relief stage, the  
8 defendant does get to show --

9 JUSTICE KAVANAUGH: But in those  
10 statutes, in that statute, it happens at the  
11 liability stage, and I read your briefs --

12 MR. MARTINEZ: No -- no, Your Honor  
13 --

14 JUSTICE KAVANAUGH: And I -- I read  
15 your briefs -- yeah, in the statute, I  
16 understand -- I read your briefs to reject the  
17 motivating factor or not adopt the motivating  
18 factor standard.

19 MR. MARTINEZ: No. Let -- let me be  
20 clear because this is -- this is an important  
21 point.

22 JUSTICE KAVANAUGH: The Price  
23 Waterhouse-type standard that Justice Breyer  
24 brought up.

25 MR. MARTINEZ: I think Justice Breyer

1 was talking about what Congress did to fix the  
2 problem of Price Waterhouse. So Price  
3 Waterhouse happens. Congress decides that the  
4 Price Waterhouse test is insufficiently  
5 protective of victims. So Congress makes very  
6 clear in the statute that there is a violation  
7 of the statute, there is liability with  
8 motivating factor, but if the employer can show  
9 that -- that it wasn't a but-for cause, that  
10 shrinks the number of remedies that are  
11 available to you.

12 And that's essentially -- we're not  
13 saying that -- we're not trying to, like, apply  
14 different statutory language here, but we're  
15 saying that our rule, the statutory language  
16 that we have, essentially has that same test --

17 JUSTICE KAVANAUGH: But you're not  
18 asking --

19 MR. MARTINEZ: -- test --

20 JUSTICE KAVANAUGH: Sorry to  
21 interrupt.

22 MR. MARTINEZ: Right.

23 JUSTICE KAVANAUGH: You're not asking  
24 for "motivating factor;" you're saying "any  
25 factor."

1                   MR. MARTINEZ: Right, but I think the  
2 way that --

3                   JUSTICE KAVANAUGH: Is that correct?

4                   MR. MARTINEZ: We -- we -- we -- we  
5 don't think it makes a difference, frankly, Your  
6 Honor. We --

7                   JUSTICE KAVANAUGH: And so, yes,  
8 you're asking for any factor?

9                   MR. MARTINEZ: We think "any factor"  
10 and "motivating factor" essentially mean the  
11 same thing because they play -- the -- the  
12 factor plays into the decision. And so in that  
13 sense, it's motivating.

14                   JUSTICE GORSUCH: Counsel, I wanted to  
15 give you an opportunity to respond to another  
16 argument that concerned me.

17                   MR. MARTINEZ: Sure.

18                   JUSTICE GORSUCH: The Solicitor  
19 General suggests that if we were to adopt your  
20 view, we'd have to do the same thing with  
21 respect to private discrimination under, what is  
22 it, the 623 --

23                   MR. MARTINEZ: Right.

24                   JUSTICE GORSUCH: -- which, of course,  
25 we can't do because of Gross, and point

1 specifically to the language saying, you know,  
2 you can't discriminate in hiring or otherwise,  
3 right, discriminate --

4 MR. MARTINEZ: Right.

5 JUSTICE GORSUCH: -- with respect to  
6 terms and conditions of -- of -- of employment.  
7 And if we were to adopt your broad reading here  
8 of "discriminate," why wouldn't we do the same  
9 thing there?

10 MR. MARTINEZ: So I think Gross is  
11 totally different, and just a couple points on  
12 this because it's very important. Number one,  
13 Congress looked at that exact language when it  
14 was legislating the statute that's at issue in  
15 this case. Congress rejected applying the  
16 private sector language from the ADEA to ADEA  
17 federal sector claims. We know that from the  
18 drafting history. We know that from --

19 JUSTICE GORSUCH: I -- I understand  
20 that --

21 MR. MARTINEZ: So -- so --

22 JUSTICE GORSUCH: -- but that's not  
23 responsive. So --

24 MR. MARTINEZ: Right. So, instead, it  
25 chose different language which is fundamentally

1 different from the language in Gross. I'm going  
2 to get to the discriminate point.

3 JUSTICE GORSUCH: I wish you would.

4 MR. MARTINEZ: Okay. I'll -- I'll --  
5 I'll go to the discriminate point. If you look  
6 at the language in Gross, and we've reproduced  
7 it in the addendum to our reply brief, what it  
8 has is it talks about four different specific  
9 types of adverse actions: Failing to hire,  
10 refusing to -- failing to hire, refusing to  
11 hire, discharging any individual; and then, the  
12 fourth one, otherwise discriminate with respect  
13 to terms --

14 JUSTICE GORSUCH: Conditions.

15 MR. MARTINEZ: -- compensation,  
16 conditions.

17 JUSTICE GORSUCH: Yeah. Yeah.

18 MR. MARTINEZ: The first three of  
19 those things are all outcome-based. The first  
20 three items in the list. The fourth item in the  
21 list is an "otherwise" clause, an "otherwise"  
22 sort of catch-all clause.

23 JUSTICE GORSUCH: Why wouldn't that be  
24 process too, is the Solicitor General's  
25 question?

1           MR. MARTINEZ: Well -- well, the first  
2 three things are all -- the first three in that  
3 list are all outcome-based. And so what this  
4 Court has said when looking at very similar  
5 "otherwise" catch-all clauses, it's applied the  
6 ejusdem generis canon and said that when you  
7 have things in a list like that, the last item  
8 with the "otherwise" --

9           JUSTICE GORSUCH: So -- so the word  
10 "discriminate" here means something different  
11 than the word "discriminate" there.

12           MR. MARTINEZ: I think the word  
13 "discriminate" here needs to be read in the  
14 context of the broader phrase. The other  
15 contextual difference is that our statute,  
16 unlike the statute in Gross, has the most  
17 important textual indicator that comes -- makes  
18 this case come out our way, which is the "shall  
19 be made free from" language.

20           JUSTICE GORSUCH: No, I understand  
21 that. But the "otherwise discriminate," what --  
22 you've got the ejusdem generis canon. Excellent  
23 canon, good canon. The other -- the other kind  
24 of general rule is when Congress makes a  
25 distinction, we should attend to the -- in



1 language, we should attend to it. And -- and --

2 MR. MARTINEZ: We couldn't agree -- we  
3 couldn't agree more.

4 JUSTICE GORSUCH: And I understand --  
5 I know where you're going with that, and that's  
6 good, that's a good point --

7 (Laughter.)

8 JUSTICE GORSUCH: -- but "or otherwise  
9 discriminate" --

10 MR. MARTINEZ: Yeah.

11 JUSTICE GORSUCH: -- is -- is very --  
12 I mean, that -- that seems to be a catch-all.  
13 That seems to be anything.

14 MR. MARTINEZ: I think I would resist  
15 that one because of ejusdem generis. The second  
16 point, textually --

17 JUSTICE GORSUCH: You think you would  
18 have resisted that before Gross?

19 MR. MARTINEZ: I -- you know, Your  
20 Honor, we're not here to relitigate Gross.

21 JUSTICE GORSUCH: No.

22 MR. MARTINEZ: I -- I think this --  
23 Gross was a very closely decided decision. You  
24 know, it was -- it was a very closely divided  
25 Court on Gross. We're not here to -- we're --

1 we're here to make the point that what Gross  
2 said was that you need to look at the statutory  
3 language with careful attention -- careful and  
4 critical examination. And this is -- this is a  
5 quote from Gross, you can't apply rules  
6 applicable under one statute to a different  
7 statute without really looking carefully --

8 JUSTICE KAVANAUGH: But the --

9 MR. MARTINEZ: -- and here the  
10 "otherwise discriminate" clause is limited by  
11 "with respect to terms, conditions," et cetera.

12 JUSTICE KAVANAUGH: That's not --

13 MR. MARTINEZ: So it's very narrow.

14 JUSTICE KAVANAUGH: -- limiting;  
15 that's broadening language. That's -- that's  
16 supposed to be a catch-all phrase at the end  
17 that will cover anything. "Otherwise  
18 discriminate against anything dealing with  
19 compensation terms or conditions." The word  
20 "conditions," in particular, in the lower courts  
21 has been interpreted very broadly to cover all  
22 sorts of --

23 MR. MARTINEZ: Right.

24 JUSTICE KAVANAUGH: -- aspects,  
25 whereas here you just have "actions," so if

1 you're comparing the two statutes, to pick up on  
2 Justice Gorsuch's point, I would have thought a  
3 broader scope, if anything, was in that  
4 language --

5 MR. MARTINEZ: I --

6 JUSTICE KAVANAUGH: -- in terms of --

7 MR. MARTINEZ: I think the word  
8 "discrimination" sometimes can take on different  
9 meanings depending on the context. The most  
10 important textual -- the textual clue is the  
11 absence of the key phrase "shall be made free  
12 from discrimination." The most important  
13 historical clue is that, unlike the statute in  
14 Gross, this statute arises in a context in which  
15 Congress wanted to address the constitutional  
16 rule, wanted to plug the gap in remedies, and --  
17 and make sure that -- that victims of  
18 unconstitutional discrimination had a viable  
19 remedy.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel.

22 General Francisco.

23 ORAL ARGUMENT OF GEN. NOEL J. FRANCISCO

24 ON BEHALF OF THE RESPONDENT

25 GENERAL FRANCISCO: Mr. Chief Justice,

1 and may it please the Court:

2 The federal sector ADEA adopts the  
3 same causation standard applicable to state and  
4 local governments and private companies, but-for  
5 causation.

6 Three basic points make this clear.  
7 First, Section 633 -- 633a prohibits the Federal  
8 Government from making a personnel action based  
9 on age. But you don't make a personnel action  
10 based on age if you make the same decision that  
11 you would have made for a similarly situated  
12 younger person since any consideration of age  
13 has not affected the decision that you have  
14 made. At the very least, as in Gross and  
15 Nassar, nothing in 633a clearly overrides the  
16 common law default rule of but-for causation.

17 Second, Congress easily could have  
18 overridden the common law default rule if it  
19 wanted to. It could have applied the motivating  
20 factor standard to the ADEA, or it could have  
21 gone further and prohibited any consideration of  
22 age no matter how fleeting. But it didn't do  
23 that. Instead, it adopted language that this  
24 Court has interpreted as incorporating the  
25 common law default rule.

1                   Finally, our rule makes perfect sense.  
2           There's no reason why Congress would have  
3           created a lower causation standard for the  
4           Federal Government than for state and local  
5           governments. After all, there's no evidence  
6           that Congress was more concerned about  
7           discrimination by the Federal Government.  
8           That's why Senator Bentsen, Section 633a's  
9           principal sponsor, said that under 633a,  
10          "government employees will be subject to the  
11          same protections against arbitrary employment  
12          based on age as are employees in the private  
13          sector."

14                   Now, we've had some discussion about  
15          the Civil Service Reform Act, and I actually  
16          think it's very instructive here to the  
17          interpretive question. I'd like to point out  
18          two specific provisions in that, I think, that  
19          are relevant.

20                   The first one actually isn't in our  
21          briefs, so I'm going to take a minute here to  
22          describe it because it's a provision of the CSRA  
23          that specifically cross-references,  
24          incorporates, and describes Section 633a in the  
25          text of the statute. And what you'll see in

1 that provision is that it uses language to  
2 describe 633a that is parallel to the language  
3 that you find in the private sector provisions.  
4 So I think it underscores that these are just  
5 different ways of seeing the same thing.

6 And I'm referring to 5 U.S.C.  
7 2302(b)(1)(B), and here's what it says: "Any  
8 employee who has authority to take, direct  
9 others to take, recommend or approve any  
10 personnel action, shall not, with respect to  
11 such authority, discriminate for or against any  
12 employee or applicant for employment on the  
13 basis of age, as prohibited under 633a."

14 So it doesn't have any of the language  
15 that my friends on the other side rely on.  
16 Textually, this is a statute that Congress has  
17 enacted that in its text is describing 633a and  
18 it uses language that's parallel to the private  
19 sector provisions.

20 And I think it's highly relevant to  
21 interpreting 633a because as Justice Scalia  
22 explained is in -- in his opinion in Branch  
23 against Smith, it is "of course the most  
24 rudimentary rule of statutory construction, that  
25 courts do not interpret statutes in isolation

1 but in the context of the corpus juris of which  
2 they are a part, including later enacted  
3 statutes."

4 JUSTICE KAVANAUGH: So -- so -- so if  
5 an employer has an explicit younger-is-better  
6 policy, Mr. Martinez says your position would  
7 allow that to stand for an -- an employee could  
8 not get injunctive relief against that.

9 What's -- what's your answer to that?

10 GENERAL FRANCISCO: So a couple  
11 responses, Your Honor. First, that employee  
12 would be treated exactly the same as if he or  
13 she worked for a state or local government or a  
14 private employer. No different than anyone else  
15 covered by Title VII.

16 Secondly, that actually goes to the  
17 other provision of the Civil Service Reform Act  
18 that I was going to refer the Court to, which is  
19 cited in our brief, and that's 5 U.S.C.  
20 2301(b)(2) which says that: "All employees and  
21 applicants for employment should receive fair  
22 and equitable treatment in all aspects of  
23 personnel management without regard to age."

24 It underscores that 633a --

25 JUSTICE KAVANAUGH: So just to be

1 clear, would that policy be a violation of that  
2 civil service provision?

3 GENERAL FRANCISCO: If -- yeah, I  
4 think it clearly would be a -- a violation of  
5 the civil service provision.

6 JUSTICE KAVANAUGH: And would there be  
7 any impediments to suing under that civil  
8 service provision?

9 GENERAL FRANCISCO: Your Honor, there  
10 is a very comprehensive scheme for bringing  
11 these types of complaints in the Federal  
12 Government. I am quite confident that there is  
13 an avenue in which you could challenge a -- oh,  
14 a younger-is-better policy were a federal  
15 governmental agency --

16 JUSTICE SOTOMAYOR: So for a --

17 GENERAL FRANCISCO: -- should adopt  
18 such a policy.

19 JUSTICE SOTOMAYOR: -- a statute that  
20 intended to reflect the equal protection clause  
21 of the Constitution, which would have covered  
22 this on its own prior to the enactment of the  
23 statute, you're now saying Congress intended  
24 instead to give litigants less Constitutional  
25 protection, less protection, not more, or equal.



1                   GENERAL FRANCISCO:  No -- no, Your  
2 Honor, not --

3                   JUSTICE SOTOMAYOR:  And second, you  
4 intend on the -- like private sector  
5 discrimination or unlike private sector  
6 discrimination under be Title VII, Congress  
7 intended to give federal employees when it used  
8 the phrase "free from any discrimination," it  
9 decided to say this kind of discrimination's  
10 okay under this provision.

11                   GENERAL FRANCISCO:  So, Your Honor, I  
12 think I disagree with that for a couple of  
13 reasons.

14                   First, I think I disagree with the  
15 premise.  If Congress had in fact intended to  
16 apply equal protection principles, it presumably  
17 would have applied the same standard to state  
18 governments since they're subject to the same  
19 equal protection principles that the Federal  
20 Government is.

21                   There's no evidence that Congress was  
22 more concerned about the Federal Government than  
23 the state governments.  Quite to the contrary.

24                   JUSTICE SOTOMAYOR:  Unfortunately --

25                   GENERAL FRANCISCO:  And here everyone

1 agrees the states are subject to the same --

2 JUSTICE SOTOMAYOR: General,  
3 unfortunately you're wrong because the EEOC and  
4 the civil service agency have been reading that  
5 equal procession principle even before this  
6 provision into federal decisionmaking.

7 So I think --

8 GENERAL FRANCISCO: And I --

9 JUSTICE SOTOMAYOR: I'm not sure how I  
10 understand your point.

11 GENERAL FRANCISCO: Well, I think that  
12 --

13 JUSTICE SOTOMAYOR: I don't think they  
14 were -- if they wanted to follow the state and  
15 local provision they would have followed it.

16 GENERAL FRANCISCO: Right. I  
17 think that --

18 JUSTICE SOTOMAYOR: But they created a  
19 different and totally separate provision, and on  
20 top of it they said: That language and our --  
21 that language of the private and state  
22 government should not be used to interpret this  
23 language that affects the Federal Government.

24 GENERAL FRANCISCO: Well, Your Honor,  
25 I think the reason why my answer is fully

1 responsive is because the suggestion by my  
2 friend on the other side is that somehow when  
3 Congress extended Title VII and the ADEA to  
4 governmental entities -- and remember, they did  
5 it at the same time. They went from private to  
6 private and federal and state governments at the  
7 same time. And when Congress made that step,  
8 the argument is that somehow it was meant to  
9 embody equal-protection principles.

10 Well, if that were the case, one would  
11 have fully expected that they would apply the  
12 same equal-protection principles to both the  
13 Federal Government and the state governments but  
14 everyone here agrees that with respect to state  
15 governments, it's the but-for causation standard  
16 that applies.

17 JUSTICE GINSBURG: Isn't there a --  
18 there is a federalism concern, when you're  
19 dealing with state and local governments, which  
20 you don't have when you're dealing with the  
21 Federal Government alone, and why wouldn't --  
22 the language as Mr. Martinez pointed out is  
23 different. You're treating all those extra  
24 words as just a meaningless surplus.

25 If they wanted to -- to -- to -- be

1 the same standard as for private sector  
2 employment, state and local government  
3 employment, they would have used the same  
4 language, but they didn't. They said all --

5 GENERAL FRANCISCO: Right.

6 JUSTICE GINSBURG: -- and they said,  
7 what were the words?

8 GENERAL FRANCISCO: "Free from any."

9 JUSTICE GINSBURG: "Free from any,"  
10 yes.

11 So if Congress uses those different --  
12 different, more encompassing language, all free  
13 from any, I would think that the standard that's  
14 before us, applicable to federal employment, is  
15 a more plaintiff-friendly standard.

16 GENERAL FRANCISCO: So, Your Honor,  
17 two responses on the textual issue, but I'd also  
18 like to address the federal -- federalism issue  
19 as well.

20 On the textual question, the first is  
21 I'd simply point back to that provision of the  
22 Civil Service Reform Act that I was referring to  
23 earlier, 2302(b) --

24 JUSTICE SOTOMAYOR: Well, call me --

25 GENERAL FRANCISCO: -- (1)(B).

1 JUSTICE KAGAN: -- old fashioned,  
2 General, but it seems to me that the first and  
3 clearly the most important place to go in  
4 thinking about what 633 means, is to go to 633  
5 --

6 GENERAL FRANCISCO: Right.

7 JUSTICE KAGAN: -- and not to go to  
8 some later enacted statute in a completely  
9 different set of provisions.

10 So I think, you know, Justice  
11 Ginsburg's question holds. It would have been  
12 perfectly easy for Congress to have written the  
13 same kind of statute that it wrote in Gross or  
14 in Nassar. Indeed they didn't even have to  
15 write a statute. They could have just put the  
16 U.S. Government in with the state and locals in  
17 the private sector provision. And they did none  
18 of that.

19 They -- they enacted a very different  
20 kind of statute which puts the -- the language  
21 that your brief primarily relies on, which is  
22 based on or because of, in a completely  
23 different place in the statute modifying a  
24 completely different noun.

25 So why would they have done that if

1 they just meant to write a Gross/Nassar statute?

2 GENERAL FRANCISCO: Yeah, I -- I'd  
3 like to straight on address the textual argument  
4 first and then the why question second.

5 The textual argument first is suppose  
6 you had a statute that said: All cakes shall be  
7 made free from the use of any eggs. In the  
8 course of the cake baking process, I whisk up a  
9 bowl of eggs, I think about dumping it into the  
10 batter, but then I say, oh, I'm beat -- supposed  
11 to me making a -- a cake without eggs, so I  
12 throw it in the trash.

13 I have made a cake free from the use  
14 of any eggs, notwithstanding my use of eggs in  
15 the cake baking process because the final cake  
16 that I have baked is free from the use of eggs.

17 JUSTICE ALITO: Well, that -- I -- I  
18 mean, that gets to the point I -- I asked Mr.  
19 Martinez about. But what if there is a little  
20 bit of egg that's put in the final batter?  
21 That's the problem.

22 So even if we focus right on -- just  
23 on the actual decisionmaking process, the moment  
24 of the decisionmaking process, I don't know  
25 about the why, and I'm not sure I care about the

1 why here, but I have a terrible time fitting  
2 your argument into the statutory language.

3 Can you explain how you can do that?

4 GENERAL FRANCISCO: Sure.

5 JUSTICE ALITO: If -- if -- if age is  
6 considered, is a factor in the -- in making  
7 the decision, there's discrimination based on  
8 age and the -- the -- the action is not done  
9 free from discrimination based on age.

10 GENERAL FRANCISCO: For -- for two  
11 reasons, Your Honor. First, I'm focusing on the  
12 word "made" and "made" refers to the point at  
13 which the action is taken. Was the personnel  
14 action that you ultimately took made without  
15 discrimination based on age.

16 And it is if it's exactly the same as  
17 you would have made without any consideration of  
18 age. But I'm -- my second point I think is just  
19 as important and it refers to a very important  
20 canon of construction, that statutory text does  
21 not override common law rules unless it does so  
22 explicitly.

23 And I think what my cake baking  
24 hypothetical does is that it shows that at the  
25 very least there's nothing in this text that

1 explicitly overrides the common law default  
2 rule.

3 JUSTICE KAVANAUGH: Why --

4 GENERAL FRANCISCO: And if that's the  
5 case, you're governed --

6 JUSTICE KAVANAUGH: Why -- keep going.

7 GENERAL FRANCISCO: -- you're governed  
8 by the common default rule.

9 JUSTICE KAVANAUGH: The why question  
10 is still hanging, which is why --

11 GENERAL FRANCISCO: Yes.

12 JUSTICE KAVANAUGH: -- would Congress  
13 use this different language which is  
14 significantly different from the other languages  
15 --

16 GENERAL FRANCISCO: Sure. And I think  
17 one answer is -- and, look, I've scoured the  
18 legislative history and I haven't found anything  
19 that specifically addresses it one way or the  
20 other. But I think the most obvious reason is  
21 that there is a long and preexisting separate  
22 federal process governing federal employment.  
23 And the reason they didn't just amend "employer"  
24 to include the Federal Government is because  
25 they wanted to -- to preserve that preexisting



1 separate federal process that applies to federal  
2 employees but doesn't apply to private  
3 employees --

4 JUSTICE BREYER: I -- I --

5 GENERAL FRANCISCO: -- for state and  
6 local governments.

7 JUSTICE BREYER: I can -- I better  
8 read that one, which I will. Look, I'm trying  
9 to think of where could this come up. A  
10 promotion, the promoting person thinks I see her  
11 result on this test. It's highly subjective.  
12 I'm not sure, but I certainly don't want people  
13 who are over the age of 82, et cetera.

14 (Laughter.)

15 JUSTICE BREYER: You say okay. So --

16 GENERAL FRANCISCO: Nobody here --

17 JUSTICE BREYER: -- There he is.

18 GENERAL FRANCISCO: -- thinks that,  
19 Your Honor.

20 JUSTICE BREYER: It's flashing around  
21 in his mind. And -- and so he ends up -- yeah,  
22 no, the answer is no. Okay? That's the  
23 possible real-world situation. But, more  
24 likely, it's also a question of lawyers and  
25 burdens of proof. And -- and under the Title

1 VII, you know, what they ended up saying is,  
2 hey, lawyer, you show discrimination is really  
3 around here, and you will win unless they come  
4 in and show no but-for, no but-for, in which  
5 case you still win something.

6 All right. Now, the language here  
7 seems designed to do just that, to deal with  
8 that real-world situation where we don't  
9 understand, as a lawyer, what that real-world  
10 situation -- because it's in his head, you know,  
11 and -- and just prove that. And now I'll tell  
12 you what happens.

13 GENERAL FRANCISCO: Right.

14 JUSTICE BREYER: He can come back and  
15 say, no, not a but-for. And then you limit the  
16 remedies. What word does that? There is a  
17 statutory word that does that. It's in 33 (a).  
18 It's called appropriate remedies. And so if it  
19 really is a but-for, as shown by the lawyer, Ah  
20 hey, they're not going to reinstate, they're not  
21 going to give her the promotion because, by the  
22 way, she comes in very late. Okay?

23 So now we've got the language. That's  
24 what they're arguing. And you say why would  
25 Congress do that? Why would it make the Feds

1 have to do this? For the same reason they  
2 passed that statute. The feds should be the  
3 leader in this. It's not enough. The Federal  
4 Government should be the leader. So we have  
5 states, private, not just federalism, but who  
6 fought more than any group of people for freedom  
7 from discrimination? Look at history. It was  
8 the Federal Government, and they should be  
9 holier than, okay?

10 GENERAL FRANCISCO: Right.

11 JUSTICE BREYER: So we have a reason.  
12 We have an interpretation of the statute. Now,  
13 that in my mind is what you're up against.

14 GENERAL FRANCISCO: And -- and I fully  
15 understand that, Your Honor, and I think it  
16 actually illustrates what I think is one of the  
17 more troubling parts of the argument of my  
18 friends on the other side, because their  
19 argument really boils down to the notion that,  
20 in 1974, Congress somehow predicted the 1991  
21 civil rights amendments, not just the motivating  
22 factor standard or potentially something  
23 significantly broader, any consideration, but  
24 the limitation on remedies and the burden  
25 shifting. And it did all of that 20 years

1 earlier when it used the "free from any"  
2 language.

3 With all respect I find that simply  
4 implausible, given that it took us Price  
5 Waterhouse, Congress's reaction to that, and a  
6 whole bunch of other decisions in order to come  
7 up with the motivating factor test. So I think,  
8 Your Honor, what you laid out makes perfectly  
9 sensible policy. I don't think it makes any  
10 sense in interpreting --

11 JUSTICE KAGAN: I think, General, that  
12 overstates what a complicated concept this is.  
13 I mean, there are two kinds of concepts you can  
14 use. There are: Did this thing actually cause  
15 the firing or the lack of promotion? Or was  
16 this thing around when they made that decision?  
17 And, you know, those are the two basic choices,  
18 and some statutes make one choice and some  
19 statutes make another choice. So it's not a  
20 whole lot to predict or anticipate.

21 GENERAL FRANCISCO: Right.

22 JUSTICE KAGAN: It's just those are  
23 your two choices, and you look to the language  
24 of the statute to decide which kind of statute  
25 we're talking about.

1                   GENERAL FRANCISCO: Yeah, and I guess  
2 I'd add to the mix a third choice, which is the  
3 "motivating factor" test. I can sort of see  
4 how, textually, you could get to the "any  
5 consideration" test. I disagree with it, but I  
6 can understand how you can get there textually.  
7 I think there's no way that you can get from  
8 this text to the "motivating factor" text. And  
9 under the "any consideration" test --

10                   JUSTICE BREYER: No way. No way.  
11 Linguistically --

12                   GENERAL FRANCISCO: And -- and if Your  
13 Honor --

14                   JUSTICE BREYER: -- the personnel  
15 action, the personnel action shall be made "free  
16 from" something, "free from" something. Hey,  
17 from what? From discrimination based on age.  
18 So "free from" means that that bad thing had to  
19 play a role, and that role could either be a  
20 motivating factor role in which there were a lot  
21 of things in that decisionmaker's head, and --  
22 or it could be you have to show but-for. See?

23                   So which is it?

24                   GENERAL FRANCISCO: Well --

25                   JUSTICE BREYER: It says "free from."

1           GENERAL FRANCISCO: So, obviously, my  
2 answer is but-for, but the point that I was  
3 trying to make was that under the "any  
4 consideration" test, which is my friend's test  
5 and focuses solely on process, suppose you've  
6 got some low-level hiring official that says to  
7 his boss: I don't think we should hire this  
8 person for 10 reasons, one of which is I just  
9 think this person is too old. The boss then  
10 says: You knucklehead, we never consider age.  
11 By the way, you're fired for making such a  
12 rookie error. Takes over the file, reviews it,  
13 says, well, he was actually right on the bottom  
14 line; this person isn't qualified, so we don't  
15 hire them. Age has clearly played a role in the  
16 process for making that decision.

17           And under their --

18           JUSTICE ALITO: Well -- -

19           GENERAL FRANCISCO: -- standard --

20           JUSTICE ALITO: -- in the process, but  
21 not in the actual decision. So if you focus  
22 just on the decision -- this comes back to your  
23 egg hypothetical. If there's a little bit of  
24 egg in the actual decision, that's one thing.  
25 But in you threw out the egg before you ever got

1 to that point --

2 GENERAL FRANCISCO: Right.

3 JUSTICE ALITO: -- then that's a  
4 different situation.

5 GENERAL FRANCISCO: What I would say  
6 is if there's a little bit of egg in it, then it  
7 would be a but-for cause but maybe not the sole  
8 but-for cause. But if there is -- if you make  
9 the exact same cake you would have made, that is  
10 the cake that you would have made if you  
11 hadn't whisked up the eggs and held it in the  
12 first place, you have made a cake free from the  
13 use of eggs even though it's been part of the  
14 process; it's not found its way into the final  
15 cake.

16 JUSTICE KAVANAUGH: Can I -- can I ask  
17 about the practicalities of this case and how  
18 it's going to apply --

19 GENERAL FRANCISCO: Sure.

20 JUSTICE KAVANAUGH: -- in the real  
21 world? Because I'm not sure there's really much  
22 difference. They agree that you can't -- that  
23 an employee can't get reinstatement or back pay  
24 without showing but-for cause. So you obviously  
25 agree with that as well.

1                   GENERAL FRANCISCO: Yes.

2                   JUSTICE KAVANAUGH: They would say you  
3 can get injunctive relief, however, against  
4 practices, policies, things, statements,  
5 conditions, even if they weren't a but-for cause  
6 of a particular action.

7                   You, too, agree with that, albeit  
8 under the civil surface -- civil service  
9 statutes.

10                  GENERAL FRANCISCO: Yeah.

11                  JUSTICE KAVANAUGH: Right?

12                  GENERAL FRANCISCO: Basically, yeah.

13                  JUSTICE KAVANAUGH: So there's no  
14 disagreement, as I understand it, between the  
15 two parties about how this is really going to  
16 work in the real world going forward. The only  
17 disagreement is about which statute is cited  
18 when injunctive relief is sought.

19                  GENERAL FRANCISCO: Well, I think  
20 there are a couple of big differences. One, it  
21 is done administratively. One, it's being done  
22 by hauled into court. And I think that's a  
23 pretty big difference. Secondly, in the  
24 hypothetical that you're spinning out, you're  
25 essentially entitled to judicial relief in the



1 absence of an adverse personnel action that was  
2 actually caused by --

3 JUSTICE KAVANAUGH: Would --

4 GENERAL FRANCISCO: -- the thing that  
5 you're complaining about. So --

6 JUSTICE KAVANAUGH: But you would say,  
7 under the civil service statutes, that fair and  
8 equity provision that we've gone over --

9 GENERAL FRANCISCO: Yeah.

10 JUSTICE KAVANAUGH: -- for the same  
11 kinds of employment condition issues, you could  
12 get injunctive relief, which is exactly what  
13 Mr. Martinez is seeking here --

14 GENERAL FRANCISCO: Um-hum.

15 JUSTICE KAVANAUGH: -- albeit under a  
16 different statute. And maybe you're right,  
17 there's some --

18 GENERAL FRANCISCO: Yeah. That's a --

19 JUSTICE KAVANAUGH: -- different  
20 hurdles you have to go through, but in terms of  
21 employees, the real world of employees and the  
22 real world -- world of employers, I think  
23 there's a lot of agreement between the two.

24 GENERAL FRANCISCO: I think that's  
25 basically right because the things that he is

1 concerned about, the types of policies that he's  
2 concerned about, couldn't happen within the  
3 Federal Government because of a whole host of  
4 laws, wholly apart from Section 633a. But I  
5 think that the critical issue is whether -- does  
6 -- does 633a provide yet an additional avenue  
7 where the Federal Government can be hauled into  
8 court for a judicial remedy?

9 JUSTICE KAVANAUGH: An additional  
10 avenue --

11 GENERAL FRANCISCO: And that's the  
12 point where we disagree.

13 JUSTICE KAVANAUGH: Sorry to  
14 interrupt, but an additional avenue that would  
15 get you nothing more, though.

16 GENERAL FRANCISCO: Exactly, an  
17 additional avenue --

18 JUSTICE KAVANAUGH: Yeah.

19 GENERAL FRANCISCO: -- that would get  
20 you nothing more for the plaintiff, but that  
21 does create a significant headache for the  
22 Federal Government --

23 JUSTICE SOTOMAYOR: Mr. General, the  
24 problem is, even though there was no  
25 anticipating Price Waterhouse and the 1991

1 litigation, it would also be much more  
2 consistent with the statute as the whole,  
3 because public sector, state, and Federal  
4 Government employees are ending up essentially  
5 with the same remedy for all the reasons that  
6 Justice Breyer said, which is even though we  
7 can't read motivating factor, it's really the  
8 same as a part of the decisionmaking, and  
9 private sector and state government claimants  
10 under Title VII are entitled to injunctive  
11 relief, et cetera, if they prove it was a  
12 motivating factor.

13 GENERAL FRANCISCO: Not under the  
14 ADEA, Your Honor. The Court held in Nassar --

15 JUSTICE SOTOMAYOR: And I do -- and I  
16 do --

17 GENERAL FRANCISCO: -- that --

18 JUSTICE SOTOMAYOR: But under Title  
19 VII, yes --

20 GENERAL FRANCISCO: Well, Your Honor,  
21 under Title VII and -- and I'd like to clarify  
22 this because our position on Title VII is a  
23 little bit more nuanced than that. Under the  
24 Title VII federal sector sex discrimination or  
25 race discrimination provisions, as distinct from

1 the Title VII federal sector retaliation  
2 provision, which we sought cert on and this  
3 Court denied cert on. If you look at  
4 the federal sector sex, race provision, arguably  
5 that does incorporate the motivating factor  
6 standard because there is a provision in the  
7 federal sector Title VII that specifically  
8 cross-references portions of the '91 civil  
9 rights amendments that apply the "motivating  
10 factor" test.

11 And if that's right, Your Honor, this  
12 Court has never addressed it. We haven't -- we  
13 did not contest that below. But if that's  
14 right, then everybody that -- under Title VII  
15 gets treated by the same motivating factor  
16 standard under Title VII. So that takes --  
17 would take care of all of the race and sex  
18 hypotheticals that my friend is troubled by.

19 But critically, 633a doesn't  
20 cross-reference any portion of the 1991 civil  
21 rights amendments at all. So I think that  
22 further confirms that the text of 633a is not  
23 meant to adopt the "motivating factor" standard  
24 but is something different. And the different  
25 things is, is the common law default rule,

1 unless there's something in the statutory text  
2 that clearly abrogates the common law default  
3 rule.

4 I'm not going to say that they don't  
5 have any textual argument. I think they have  
6 a -- a decent textual argument. The question  
7 is: Do they have a textual argument that is  
8 sufficiently strong to override the common law  
9 default rule of but-for causation?

10 And the reason why I lean heavily on  
11 my cake baking eggs hypothetical is because I  
12 think that at the very least shows that this  
13 statutory language is easily susceptible to my  
14 interpretation. And once I've met that  
15 standard, it's governed by the common law  
16 default rule of but-for causation.

17 Now, I think that my friend may get up  
18 on rebuttal and point to Chevron and so I would  
19 like to take one moment to address the Chevron  
20 issue in -- in advance. I think Chevron would  
21 be completely inapplicable here for three  
22 different reasons:

23 The first is, before you ever get to  
24 Chevron, you apply the canons of construction.  
25 And here the canon of construction is that you

1 interpret language to be governed by the common  
2 law default rule if there is any ambiguity. So  
3 if there were ambiguity, we win under the  
4 default rule, not Chevron.

5 Let's say you completely disagree with  
6 that. Chevron doesn't apply for two additional  
7 reasons. First, as this Court held in Epic  
8 Systems, Chevron doesn't apply where two  
9 Executive Branch agencies disagree on the  
10 meaning of a statute, since it's inconsistent  
11 with Chevron's political accountability  
12 rationale. And here we have such a -- a  
13 disagreement.

14 Secondly, as the Court held in the  
15 Ledbetter decision, Chevron doesn't apply where  
16 the Executive -- where the agency is simply  
17 interpreting this Court's decisions, since this  
18 Court is the expert at interpreting its  
19 decisions.

20 And if you look at the EEOC  
21 adjudications in this area, the analysis tends  
22 to be quite short, it's usually about a  
23 paragraph, and all it's doing is interpreting  
24 this Court's decisions.

25 So I think we win under the text,

1 regardless of Chevron, but even if you think  
2 that Chevron in theory might apply here, there  
3 are two additional reasons it couldn't apply in  
4 this particular case.

5 JUSTICE GINSBURG: Mr. -- Mr. Martinez  
6 is making a distinction that -- between  
7 liability and remedy. And he said, the bottom  
8 line, you don't get the job if somebody else was  
9 better qualified. Nonetheless, you do get some  
10 kind of remedy so that the workplace will be  
11 free from all discrimination, any  
12 discrimination.

13 So one possibility is injunctive  
14 relief. We will not take age into account. And  
15 there are other possibilities. So -- but you  
16 seem to think everything is driven by the end  
17 result that you are not entitled to the job if,  
18 even though the age was taken into account, the  
19 person who got the job was better qualified.

20 GENERAL FRANCISCO: Your Honor, I  
21 think you're fairly characterizing my position  
22 and I'd say a couple of things on remedy.

23 If you disagree with me on liability,  
24 I agree with them on remedy, but I also think  
25 that his position on remedy is unnecessary for

1 the reasons of -- of my exchange with Justice  
2 Kavanaugh.

3           You can -- you -- you essentially  
4 already have a civil -- civil service system  
5 that provides the type of relief that my friend  
6 on the other side would seek since there are a  
7 host of civil service regulations that would  
8 prohibit the types of policies that he's  
9 concerned about, even if there wasn't  
10 somebody -- a particular person in court that  
11 was challenging it under Section 633a.

12           But our bottom line position here is  
13 that Congress added the federal and state sector  
14 extension of 633 in the Title VII at the same  
15 time. It meant to apply the same standard to  
16 the Federal Government that applies to state and  
17 local governments and it applies to private  
18 employers.

19           That standard is but-for causation.  
20 It results in treating all employees under the  
21 ADEA the same regardless of who you work for,  
22 since everybody agrees if you work for a private  
23 company or a state and local government, the  
24 standard is but-for causation and, respectfully,  
25 that's the thing -- the standard that we think



1 should apply to the Federal Government as well.

2 Unless the Court has further  
3 questions, Your Honor.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 Counsel.

6 Five minutes, Mr. Martinez.

7 REBUTTAL ARGUMENT OF ROMAN MARTINEZ

8 ON BEHALF OF THE PETITIONER

9 MR. MARTINEZ: Just a few points, Your  
10 Honor. Let me start with the text.

11 I think it's very notable that when  
12 the Solicitor General stood up here, he began in  
13 one of the first sentence -- few sentences of  
14 his presentation by misquoting the text. He  
15 said this statute covers "personnel actions  
16 based on age." He made exactly the mistake that  
17 we pointed out -- I pointed out in my initial  
18 presentation.

19 That's not what the statute says. It  
20 requires careful attention. It says, "shall be  
21 made free from any discrimination based on age."

22 The Solicitor General as to the text  
23 says that Congress intended to apply the exact  
24 same rules that -- that are applied to private  
25 sector employees as under the statute

1 interpreted in Gross.

2 Well, with respect, whatever we know  
3 about the text is that Congress did not intend  
4 to apply that regime. Congress specifically  
5 considered that regime. It was -- it was going  
6 to do what the Solicitor General wanted in the  
7 first draft of the statute. Congress then  
8 amended that draft and passed a different  
9 statute. You just can't -- you can't just apply  
10 a different statute that Congress expressly  
11 rejected.

12 Secondly, Your Honor, with respect to  
13 the constitutional rule, I think if you look at  
14 the legislative history of -- of this provision  
15 and if you look at the Brown versus GSA decision  
16 that we talk about in our brief, it's very clear  
17 that Congress, when it enacted Title VII,  
18 which -- which uses the same causation language  
19 to apply to the federal sector, it was focused  
20 on the equal protection problem in the federal  
21 sector context.

22 They cite *Bolling versus Sharpe*. Both  
23 the legislative history and this Court's  
24 decision in *Brown* and makes clear -- both of  
25 them make clear that the purpose of this statute

1 was to -- was to capture the same kind of  
2 constitutional equal protection injuries that  
3 were at stake in the long line of cases that  
4 we've cited in our brief.

5 Now, the Solicitor General says  
6 there's no reason states should be treated any  
7 differently. Well, again, one thing we know  
8 from the text of the statute and from the  
9 legislative history is that Congress expressly  
10 decided to treat states differently. They  
11 treated states by -- by amending the employer  
12 definition. They treated states like private  
13 sector actors. They did something something  
14 totally different by creating a unique federal  
15 sector provision to govern the Federal  
16 Government. You can't just pull that language  
17 that applies to states and say it must apply to  
18 the Federal Government.

19 And Justice Breyer, you're absolutely  
20 right, the legislative history shows that  
21 Congress thought of the Federal Government's  
22 being especially important in this context.

23 The Solicitor General -- this is my  
24 third point -- talks about the common law injury  
25 rule. We are -- our rule is fully consistent

1 with the common law rule. If you look at the --  
2 the Restatement, the common law third  
3 Restatement, Section 26, what it says in comment  
4 D is that the first thing you need to do when  
5 you're addressing the common law rule of  
6 causation is figure out what the injury is.

7 What we've argued is that the injury  
8 at stake in this case is the same kind of  
9 process-based equal protection type injury that  
10 this Court has repeatedly identified in cases  
11 from Bakke up through Parents Involved. Once  
12 you get the injury right, we are completely  
13 consistent with the common law rule.

14 Finally, Your Honor, younger is  
15 better. I think it's striking that the  
16 Solicitor General doubled down on his position  
17 that a younger-is-better policy does not violate  
18 this statute. His deus ex machina here is  
19 Section 2301 of the CSRA. That's a cruel joke  
20 that will be played on -- on this Court if you  
21 accept that rationale.

22 Section 2301 is unenforceable.  
23 Unenforceable. I think the Solicitor General  
24 said, Justice Kavanaugh, in response to your  
25 question, that it would give rise to a remedy of

1 an injunction in court. That is not accurate.

2 If you look at the MSPB website, it  
3 specifically says that -- that this provision is  
4 not enforceable and that's the rule that courts  
5 across the country have applied.

6 The Solicitor General has had months  
7 to come up with a solution to this hypothetical,  
8 and the best the Solicitor General can do is  
9 come up with a statutory provision that's  
10 unenforceable.

11 That puts victims of discrimination in  
12 exactly the same position they were in before  
13 this statute was enacted, where they had  
14 remedies that were not enforceable. Congress  
15 stepped in here. It passed a broad statute  
16 because it wanted to protect these people.

17 Your Honor, I leave you with the  
18 statutory text which says very clearly that all  
19 federal personnel actions shall be made free  
20 from any discrimination based on age. A  
21 decision that's made by applying a  
22 younger-is-better policy, contrary to the  
23 Solicitor General, is not made free from any  
24 discrimination based on age.

25 JUSTICE ALITO: You know, I -- I

1     assume, and I hope, that we would not see within  
2     any federal agency any sort of policy like  
3     younger is -- is better. And so I'm not sure  
4     what practical benefit you are going to provide  
5     for in the typical individual age discrimination  
6     employment case if you say that the person can't  
7     get reinstatement or whatever, absent but-for  
8     causation, but there are going to be these other  
9     equitable remedies available. I don't know what  
10    kind of injunction would be available -- would  
11    be of practical benefit in a case like that.

12                 MR. MARTINEZ: May -- if I may answer?  
13    Two quick points, Your Honor. First of all, I  
14    think -- I agree with you, we would not like to  
15    see agencies doing these sorts of things. If  
16    you look at the Brenton case that we cite at  
17    pages 41 to 42 of our brief, that case involved  
18    a -- a written memorandum. The policy said that  
19    someone's ability to control traffic declines  
20    with age, and they were treating applicants for  
21    those positions badly for that reason.

22                 I think -- more broadly, Your Honor, I  
23    think the injunctive relief and the prospective  
24    remedies that are available are extremely  
25    important in -- in the real world, which is

1 precisely why, in the equal protection context,  
2 you've recognized the importance of that kind of  
3 injunctive relief, and we think that relief is  
4 just as important here. We ask you reverse.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel, General.

7 The case is submitted.

8 (Whereupon, at 11:03 a.m., the case  
9 was submitted.)

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## Official - Subject to Final Review

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