No. 18-882

In the Supreme Court of the United States

NORIS BABB, PETITIONER

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the federal-sector provision of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, which provides that personnel actions affecting agency employees aged 40 years or older shall be made free from any "discrimination based on age," 29 U.S.C. 633a(a), requires a plaintiff to prove that age was a but-for cause of the challenged personnel action.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-22a) is not published in the Federal Reporter but is reprinted at 743 Fed. Appx. 280. The order of the district court (Pet. App. 23a-64a) is not published in the Federal Supplement but is available at 2016 WL 4441652.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 2018. A petition for rehearing was denied on October 9, 2018 (Pet. App. 65a). The petition for a writ of certiorari was filed on January 7, 2019. The petition for a writ of certiorari was granted on June 28, 2019. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-10a.

STATEMENT

A. Legal Framework

This case concerns the causation standard that applies to federal-sector employment claims brought under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* Although this Court granted certiorari limited to the question whether the ADEA's federal-sector provision, 29 U.S.C. 633a(a), requires a plaintiff to prove that age was a but-for cause of the challenged personnel action, the federal- and private-sector provisions of both Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (42 U.S.C. 2000e *et seq.*), and the ADEA—and this Court's decisions interpreting them—provide relevant context.

1. *Private-sector provisions*. The ADEA's and Title VII's private-sector provisions apply to state- and local-government employers as well as private employers. See 29 U.S.C. 630(b); 42 U.S.C. 2000e(b). This Court has held that the ADEA's private-sector discrimination provision (like Title VII's private-sector retaliation provision) requires proof of but-for causation. Thus, if petitioner's age-discrimination claims had been brought against a state or local government, she would have been required to demonstrate but-for causation.

a. i. Title VII's private-sector discrimination provision makes it an "unlawful employment practice" for an employer to fail or refuse to hire or to discharge an individual, or "otherwise to discriminate against any individual" with respect to the terms and conditions of her employment, "*because of* such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1) (emphasis added). In *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), "a plurality of the Court and two Justices concurring in the judgment" concluded that if

a Title VII plaintiff proves that her membership in a protected class "played a motivating part" in the challenged personnel practice, the employer may avoid liability if it "prov[es] by a preponderance of the evidence that it would have made the same decision even if [the employer] had not taken that factor into account." *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 173-174 (2009) (quoting *Price Waterhouse*, 490 U.S. at 258, and citing *id.* at 259-260 (White, J., concurring in the judgment); *id.* at 276 (O'Connor, J., concurring in the judgment)) (brackets omitted). Thus, under *Price Waterhouse*, a plaintiff's lesser showing that discrimination was a "'motivating'" factor for a personnel practice triggered a "burden-shifting" framework that applied a "but-for caus[ation]" standard, but imposed on the employer the burden of disproving such causation by "show[ing] that a discriminatory motive was not [a] but-for cause of the adverse employment action." *University of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 348 (2013) (citation omitted). An employer that disproved but-for causation would wholly "defeat liability." *Id.* at 349.

Two years later, in the Civil Rights Act of 1991 (1991 Act), Pub. L. No. 102-166, § 107, 105 Stat. 1075-1076, Congress responded to *Price Waterhouse* by enacting "a new burden-shifting framework" that "abrogated a portion of" that decision. *Nassar*, 570 U.S. at 349. Under that new framework, except as otherwise provided in Title VII, a complainant establishes that her employer has engaged in an "unlawful employment practice" if she demonstrates that a protected trait "was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. 2000e-2(m). The burden then shifts to the employer to demonstrate that it "would have taken the same action

in the absence of the impermissible motivating factor." 42 U.S.C. 2000e-5(g)(2)(B). If the employer carries that burden, the employer does not wholly escape liability. Instead, a court "may grant declaratory relief" and certain injunctive relief, but the court may "not award damages" or back pay or order that the complainant be "reinstate[d], hir[ed], [or] promot[ed]." *Ibid.*

ii. The ADEA's private-sector discrimination provision makes it unlawful for an employer to fail or refuse to hire or to discharge an individual, or "otherwise [to] discriminate against any individual" with respect to the terms and conditions of her employment, "*because of* such individual's age." 29 U.S.C. 623(a)(1) (emphasis added). Unlike Title VII, however, the ADEA does not provide that discrimination "because of" age may be shown by establishing that age was a motivating factor in the challenged employment action.

In *Gross*, this Court held that it "must give effect to Congress' choice" in the 1991 Act to amend Title VII to allow employer liability when discrimination is a "'motivating factor'" but to "not similarly amend the ADEA." 557 U.S. at 177 n.3 (citation and emphasis omitted). *Gross* accordingly concluded that the "burden-shifting framework" for private-sector Title VII discrimination claims does not "appl[y] to ADEA claims" and that the Court's "interpretation of the ADEA is not governed by Title VII decisions such as * * * *Price Waterhouse*." *Id.* at 174-175; see *id.* at 178-179. *Gross* instead held that the text of the ADEA's private-sector provision prohibiting discrimination "'*because of* [an] individual's age'" requires that a complainant prove that "age was [a] 'but-for' cause of the employer's adverse action." *Id.* at 176-177 (quoting 29 U.S.C. 623(a)(1)); see *Burrage* v.

United States, 571 U.S. 204, 213 (2014) (recognizing that *Gross* did not require age to be the sole but-for factor).

b. Turning to the private-sector retaliation provisions, both Title VII and the ADEA use the same operative causation language—the word "because"—as the ADEA's private-sector discrimination provision. Title VII makes it an "unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment * * * *because* he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. 2000e-3(a) (emphasis added). The ADEA similarly makes it "unlawful for an employer to discriminate against any of his employees or applicants for employment * * * *because* such individual * * * has opposed any practice made unlawful by" the ADEA, or "*because* such individual * * * has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under th[e ADEA]." 29 U.S.C. 623(d) (emphases added).

In *Nassar*, this Court held that private-sector "Title VII retaliation claims require proof that the desire to retaliate was [a] but-for cause of the challenged employment action." 570 U.S. at 352. The Court explained that it found no "meaningful textual difference between the text in [Section 2000e-3(a)] and the [ADEA provision] in *Gross*." *Ibid.*; see *id.* at 360. The Court further observed that "but for" causation is "the default rule[]" in tort law that Congress "is presumed to have incorporated" in a statute "absent an indication to the contrary in the statute itself," *id.* at 347; the statutory phrase "'because of' means 'based on'" and "'based on' indicates a but-for causal relationship," *id.* at 350 (citation omitted); and Congress did not apply Title VII's distinct

motivating-factor provision in Section 2000e-2(m) to Title VII's separate retaliation provision in Section 2000e-3, *id.* at 351-357. That same reasoning applies to the ADEA's private-sector retaliation provision, which this Court has not yet addressed. See 29 U.S.C. 623(d).

2. *Federal-sector provisions*. In 1972, Congress amended Title VII to address discrimination in employment in the federal government. Equal Employment Opportunity Act of 1972 (EEO Act), Pub. L. No. 92-261, § 11, 86 Stat. 111. Title VII's federal-sector provision states that "[a]ll personnel actions affecting employees or applicants for employment" in executive agencies "shall be made free from any discrimination *based on* race, color, religion, sex, or national origin." 42 U.S.C. 2000e-16(a) (emphasis added).[1]

In 1974, Congress amended the ADEA to add the federal-sector provision at issue in this case. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(b)(2), 88 Stat. 74-75. The ADEA's federal-sector provision states that "[a]ll personnel actions affecting employees or applicants for employment" in executive agencies "who are at least 40 years of age * * * shall be made free from any discrimination *based on* age." 29 U.S.C. 633a(a) (emphasis added). The federal-sector provision of the ADEA (like that of Title VII) thus uses the same phrase—"based on"—that the Court said in

[1] Although Title VII's federal-sector provision "does not incorporate [Title VII's] provision prohibiting retaliation in the private sector," *Gomez-Perez* v. *Potter*, 553 U.S. 474, 487-488 (2008), some courts of appeals have determined that Section 2000e-16 prohibits retaliation for protected activity. See, *e.g.*, *Hale* v. *Marsh*, 808 F.2d 616, 619 (7th Cir. 1986); *Ayon* v. *Sampson*, 547 F.2d 446, 449-450 (9th Cir. 1976). This Court has not decided that question. See *Green* v. *Brennan*, 136 S. Ct. 1769, 1774 n.1 (2016).

Nassar "indicates a but-for causal relationship." 570 U.S. at 350 (citation omitted).

B. Factual Background

Petitioner is a clinical pharmacist at the U.S. Department of Veterans Affairs (VA) Medical Center in Bay Pines, Florida. Petitioner was hired in 2004 to work in the Pharmacy Services Division. Pet. App. 2a-3a. Petitioner challenges four employment actions taken by the VA between 2012 and 2014: removing petitioner's "advanced scope" designation; denying certain of her training requests; selecting younger women over petitioner for positions in the anticoagulation clinic; and providing petitioner four (rather than eight) hours of Monday holiday pay when petitioner worked in a permanent Tuesday-Saturday position. *Id.* at 14a; see *id.* at 4a-8a; see also Pet. 11-15.

1. *Advanced-Scope Designation.* In 2006, petitioner accepted a geriatric pharmacist position within an interdisciplinary team of caregivers in the Medical Center's Geriatric Clinic. Pet. App. 3a. Petitioner's duties were governed by a service agreement between the Geriatric Clinic and Pharmacy Services, and petitioner was supervised by officials in both departments. *Ibid.* In 2009, petitioner was designated for an "advanced scope of practice," which authorized her to perform "disease state management" (DSM)—*i.e.*, to manage patients' medical conditions in her practice area and prescribe medications without consulting a physician. *Id.* at 3a-4a.

In 2010, the VA announced a nationwide Patient Aligned Care Team initiative, which resulted in staffing changes at the Medical Center. Pet. App. 4a. In connection with that initiative, pharmacists who spent at least 25% of their time practicing DSM became eligible for a promotion to GS-13. *Ibid.* Petitioner's "advanced

scope" designation thus had the potential to lead to a promotion under the initiative. *Ibid.*

In the fall of 2012, Pharmacy Services and the Geriatric Clinic began renegotiating the service agreement governing petitioner's position. Pet. App. 4a-5a; see J.A. 62-63, 77-78. The Clinic's medical chief wanted to keep petitioner in the clinic, but he concluded that (1) the DSM model was often not well suited to geriatric patients who present "complex medical cases" and would be best served by the Clinic's "interdisciplinary medical teams," and (2) the Clinic could afford to have petitioner dedicate only three scheduled "slots" per day—less than 25% of her time—to DSM activity. Pet. App. 5a, 14a; see J.A. 80-81. When it became clear that the Geriatric Clinic would not agree to a service agreement in which petitioner could perform DSM at least 25% of the time, the departments agreed that the geriatric pharmacist position would not have scheduled DSM responsibilities and would be scheduled only for pharmacist duties within the Clinic's "integrated patient-care team." Pet. App. 5a-6a; see J.A. 51-52. Because petitioner would no longer have DSM responsibilities, Pharmacy Services began the process of removing her "advanced-scope designation." Pet. App. 6a; see J.A. 56-57, 65-66.

2. *Training Requests*. In late 2012 and early 2013, petitioner requested training to be able to assist in the anticoagulation clinic. Pet. App. 6a. Pharmacy Services denied the requests because the training was unrelated to petitioner's work in the Geriatric Clinic and because the anticoagulation clinic was responsible for training medical residents and lacked staffing to train additional personnel. *Id.* at 6a, 16a; see J.A. 61-62, 83-84.

3. *Anticoagulation-Clinic Positions*. In April 2013, petitioner applied for two open anticoagulation-clinic

positions. Pet. App. 6a. The interview panel selected two younger female applicants because, unlike petitioner, they had anticoagulation experience, and because petitioner had offered "inadequate answers to medical questions," used unprofessional language, and made "disparaging remarks" about other Medical Center employees during her interview. *Id.* at 6a, 15a; see J.A. 68-70. Petitioner characterized the interview as the "worst" of her life. Pet. App. 6a, 15a; see J.A. 101 ¶ 23 (petitioner described the interview as "terribly difficult").

4. *Monday Holiday Pay*. In April 2013, petitioner requested to be transferred from the Geriatric Clinic to the "'float pool,' where she would cover for absent staff in a variety of areas." Pet. App. 7a; see *id.* at 30a. Her request was granted and implemented a few months later. *Id.* at 7a.

In early 2014, petitioner applied for a promotion to a GS-13 position on a Patient Aligned Care Team, which had been advertised with a Tuesday-Saturday work shift. Pet. App. 8a. Petitioner's second-line Pharmacy Service supervisor submitted paperwork to facilitate the promotion, rating petitioner as "excellent." *Ibid.*

In August 2014, petitioner was promoted to the GS-13 position but became "very upset" when she learned that her Tuesday-Saturday shift provided four (rather than eight) hours of holiday pay for five Monday federal holidays. Pet. App. 8a, 16a. When petitioner complained, the Medical Center offered to change petitioner's schedule to a permanent Monday-Friday schedule, with full Monday holiday pay, but petitioner declined the offer. *Id.* at 8a, 16a-17a. Petitioner testified that she made more money on her Tuesday-Saturday schedule with four hours of Monday holiday pay than

she would make on a traditional Monday-Friday schedule. *Ibid.*

C. Procedural History

In May 2013, petitioner filed the equal-employment-opportunity (EEO) complaint that ultimately led to this case. Pet. App. 7a. In July 2014, she sued the Secretary of the Department of Veterans Affairs. *Id.* at 8a. Petitioner alleged that the four employment actions discussed above constituted age and gender discrimination in violation of the ADEA and Title VII, as well as retaliation for her previous support for two of her female colleagues' EEO complaints. See generally J.A. 29-34.[2]

1. The district court granted the government's motion for summary judgment. Pet. App. 23a-64a. Applying the framework from *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), Pet. App. 53a, the court determined that each of the challenged employment actions was "free of an illegal [discriminatory] motive," *ibid.*, and that petitioner had failed to identify "any weaknesses, implausibilities, or flaws" in the VA's articulated "legitimate and non-retaliatory reason for every employment action," *id.* at 43a.

2. The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 1a-22a. The court stated that the district court's determination that "'each [employment] action was free of an illegal motive'" could be

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[2] Petitioner also alleged that she was subjected to a hostile work environment based on the actions described above and certain comments she alleged her supervisors had made about her age. See J.A. 34-35. Although petitioner repeats (Br. 14-15) those allegations here, the lower courts determined that, assuming the comments were made, they were insufficient to raise a genuine issue of material fact on petitioner's hostile-work-environment claim, see Pet. App. 21a-22a & n.5, 59a-62a, which is not at issue here.

interpreted "[i]n isolation" to mean that petitioner's contentions "would fail even a motivating-factor analysis." *Id.* at 11a n.3. But the court of appeals construed the district court's decision, as a whole, to grant summary judgment to the VA after applying a but-for standard. *Ibid.*; see *id.* at 10a, 12a, 17a.

The court of appeals affirmed the district court's application of a but-for causation standard to petitioner's ADEA age-discrimination and Title VII retaliation claims. Pet. App. 11a-20a. The court of appeals stated that if it were "writing on a clean slate," it "might well agree" with petitioner that such claims should be governed by a "motivating-factor (rather than but-for) causation standard." *Id.* at 11a-13a; see *id.* at 18a. But the court determined that under its binding precedent, the federal-sector provisions of the ADEA and Title VII required petitioner to establish but-for causation to support her claims. *Id.* at 12a-13a, 18a-19a.[3]

3. Petitioner sought this Court's review of the proper causation standard under both the ADEA's federal-sector discrimination provision and Title VII's federal-sector retaliation provision. Pet. i. The government agreed that certiorari was warranted on both questions. Gov't Resp. 2. On June 28, 2019, this Court granted the petition for a writ of certiorari, limited to the question whether the federal-sector provision of the ADEA "requires a plaintiff to prove that age was a but-for cause

[3] The court of appeals also determined that under circuit precedent, the district court had erred in failing to apply a motivating-factor standard to petitioner's Title VII sex-discrimination claim, which the court of appeals remanded for further proceedings. Pet. App. 9a-11a.

of the challenged personnel action." 18-882 Order. Petitioner's Title VII retaliation claim therefore is no longer at issue here.

SUMMARY OF ARGUMENT

The federal-sector ADEA provision requires that "[a]ll personnel actions affecting employees or applicants for employment" in executive agencies "who are at least 40 years of age * * * shall be made free from any discrimination *based on* age." 29 U.S.C. 633a(a) (emphasis added). The text of Section 633a(a), common-law principles, and this Court's precedent all make clear that a plaintiff must prove that age was a but-for cause of the challenged personnel action.

I. A. Section 633a(a) prohibits federal agencies from engaging in "discrimination based on age" in the making of "personnel actions." 29 U.S.C. 633a(a). The plain meaning of those words requires but-for causation. "[T]he phrase 'based on' indicates a but-for causal relationship" between the factor considered (age) and the action taken (an adverse personnel action). *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) (quoting *Safeco Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 63 (2007)). And the "'normal definition of discrimination' is 'differential treatment'" or, more specifically, "'less favorable' treatment" of similarly situated individuals. *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (citations omitted). That Section 633a(a) requires but-for causation is bolstered by "the default rule[]" in tort law, which requires a plaintiff to prove that her asserted "'harm would not have occurred' in the absence of—that is, but for—the defendant's conduct." *University of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 346-347 (2013) (citation omitted). The ADEA's plain language

embraces, and at least does not clearly depart from, the common law's default rule.

That conclusion is confirmed by this Court's decisions in *Safeco*, *Gross*, and *Nassar* holding that statutory phrases like "based on" or "because of" require but-for causation. Indeed, the Court in *Gross* held that the ban on discrimination "because of" age in the ADEA's *private*-sector provision requires but-for causation, 29 U.S.C. 623(a)(1), and the ban on discrimination "based on" age in the Act's *federal*-sector provision should be read the same way, 29 U.S.C. 633a(a). Moreover, in both *Gross* and *Nassar*, the Court refused to read into anti-discrimination statutes the lower, "motivating factor" standard that Congress expressly applied to private-sector Title VII claims in the 1991 Act. Petitioner makes the same request for a lower causation standard in the absence of congressional action, although her "any consideration" standard may be even lower than Congress adopted for private-sector Title VII claims.

B. Petitioner's textual arguments for imposing a diminished causation standard lack merit. Petitioner contends that the word "discrimination" prohibits any consideration of a prohibited factor, whether or not it impacts an agency's decision. But discrimination involves treating similarly situated people differently—here, in the context of "personnel actions." 29 U.S.C. 633a(a). In any event, *Gross* and *Nassar* refute petitioner's assertion, because each addressed materially similar language and required but-for causation. In addition, petitioner's reliance on equal protection decisions is misplaced, both because those decisions "have no bearing on the correct interpretation of ADEA claims," *Gross*, 557 U.S. at 180 n.6, and because analogous constitutional cases *do* require but-for causation.

II. A. Petitioner incorrectly suggests that the ADEA's history supports a diminished causation standard. While the ADEA's federal-sector provision was patterned on Title VII's federal-sector provision, 42 U.S.C. 2000e-16(a), the plain text of both provisions demonstrates that, standing alone, they require but-for causation. And while petitioner contends that Congress intended Title VII (and thus the ADEA) to codify equal protection cases and prior executive orders, neither set of authorities suggests that Congress intended to impose liability in the absence of but-for causation.

B. Nor is petitioner correct that this Court should defer to the interpretation of the federal-sector ADEA provision by the U.S. Equal Employment Opportunity Commission (EEOC or Commission). Because the text of Section 633a(a) is clear, this case provides no occasion for the Court to consider whether or to what extent the EEOC's regulations or adjudications would merit deference. In any event, as both the Court and the EEOC have recognized, the regulations address remedies, not liability. And while the adjudications do address causation for purposes of liability, they rely on the same flawed textual arguments that petitioner advances here.

III. To the extent there is any ambiguity about the meaning of Section 633a(a), this Court should reject petitioner's diminished causation standard because it would create significant anomalies in federal anti-discrimination law. Petitioner's proposed standard would make the federal government liable under the ADEA in circumstances where state and local governments are not—even though nothing suggests that Congress was more concerned with discrimination by the federal government than discrimination by those other entities. And

it would mean that federal-sector ADEA claims are subject to the same or an even lower causation standard than private-sector Title VII claims—even though Congress expressly adopted a "motivating factor" standard for the latter, and it has done nothing similar in the ADEA's federal-sector provision.

ARGUMENT

The ADEA's federal-sector provision requires that federal personnel actions "shall be made free from any discrimination *based on* age," 29 U.S.C. 633a(a) (emphasis added), and this Court has repeatedly held that the phrase "based on" is causal language that adopts the default common-law rule of but-for causation. That straightforward textual analysis resolves this case: federal employees—like state- and local-government employees and private employees—can recover for age discrimination only if their age was dispositive to the personnel action at issue.

Petitioner, by contrast, advocates a novel and anomalous standard: liability for *any* consideration of age, even if it makes no difference to the ultimate personnel decision. Petitioner does not point to any other federal anti-discrimination statute with such a low causal bar. Indeed, her any-consideration standard seems lower than Title VII's private-sector provision (where Congress expressly adopted a motivating-factor test) and is certainly lower than the relevant constitutional context (where a defendant can avoid liability by showing an absence of but-for causation). Nothing in the text or history of the ADEA supports petitioner's approach, let alone clearly enough to depart from the common law and this Court's decisions interpreting materially identical statutes.

I. THE FEDERAL-SECTOR PROVISION OF THE ADEA REQUIRES BUT-FOR CAUSATION

A. Section 633a(a)'s Text Requires But-For Causation

1. The ADEA's federal-sector provision requires that "[a]ll personnel actions affecting employees or applicants for employment" in executive agencies "who are at least 40 years of age * * * shall be made free from any discrimination based on age." 29 U.S.C. 633a(a). Petitioner focuses (Br. 21-24) on the words "shall be made free from any." That language undoubtedly eliminates *something* in federal-sector personnel actions, but the key question is *what*. The plain text of Section 633a(a) supplies the answer, and in the process provides the causal standard for claims of age discrimination by federal employees and applicants for employment.

Section 633a(a) prohibits agencies from engaging in "discrimination *based on* age" in the making of personnel actions (emphasis added). That language plainly requires but-for causation. "[T]he phrase 'based on' indicates a but-for causal relationship." *Safeco Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 63 (2007). As this Court has repeatedly concluded, "based on" carries the same meaning as "because of." *University of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 350 (2013) (citation omitted); see *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) (same); *Safeco*, 551 U.S. at 63-64 & n.14. And the phrase "because of," in turn, means "by reason of: on account of." *Gross*, 557 U.S. at 176 (citation omitted). Thus, the ADEA's prohibition against "discrimination based on age," 29 U.S.C. 633a(a), applies only where "age was the 'reason' that the employer decided to act," *i.e.*, where "age was [a] 'but-for' cause of the employer's adverse decision." *Gross*, 557 U.S. at 176.

Moreover, the "'normal definition of discrimination' is 'differential treatment'" or, more specifically, "'less favorable' treatment" of similarly situated individuals. *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (citations omitted); see, *e.g.*, *Webster's New International Dictionary of the English Language* 745 (2d ed. 1958) (*Webster's*) (defining "discriminate" as "[t]o make a difference in treatment or favor (of one as compared with others)"). It is thus not enough for a federal employer merely to *consider* age (*e.g.*, Pet. Br. 2-3) when making a personnel action, if that consideration does not actually cause the employer to make a less favorable personnel action than it would have made for a similarly situated person who is younger.

2. Although the plain text of Section 633a(a) requires but-for causation, that conclusion becomes even clearer when measured against the default rule. At common law, "[c]ausation in fact—*i.e.*, proof that the defendant's conduct did in fact cause the plaintiff's injury—is a standard requirement of any tort claim." *Nassar*, 570 U.S. at 346. To meet that requirement, "the plaintiff [must] show 'that the harm would not have occurred' in the absence of—that is, but for—the defendant's conduct." *Id.* at 346-347 (quoting Restatement of Torts § 431 cmt. a, and citing *id.* § 432(1) & cmt. a (1934)). "It is thus textbook tort law that an action 'is not regarded as a cause of an event if the particular event would have occurred without it.'" *Id.* at 347 (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 41, at 265 (5th ed. 1984)); see *Gross*, 557 U.S. at 177.[4]

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[4] Modern tort law recognizes a rare exception to but-for causation for situations involving multiple sufficient causes. See Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 27

As this Court has explained, the default common-law rule applies to "federal statutory claims of workplace discrimination," including those under Title VII and the ADEA. *Nassar*, 570 U.S. at 346; see *Gross*, 557 U.S. at 177. Because but-for causation is "the background against which Congress legislated in enacting" the ADEA's federal-sector provision, Congress is "presumed to have incorporated" the "default rule[]" "absent an indication to the contrary in the statute itself." *Nassar*, 570 U.S. at 347 (discussing Title VII private-sector retaliation provision). Section 633a(a) includes no such contrary indication. Instead, it uses the phrase "discrimination *based on* age," which only confirms that a but-for causal relationship is required. At a minimum, Section 633a(a) is not sufficiently clear to depart from the common-law principle that a defendant should not be subject to liability when the harm would have occurred anyway.

3. This Court has considered these same basic arguments before, in a trilogy of cases—*Safeco*, *Gross*, and *Nassar*—that all but dispose of this one. Those decisions make clear that in prohibiting discrimination "based on age" in the federal sector, the ADEA requires that the employer's consideration of age be a but-for cause of the employer's adverse decision. That is, to be

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(2010). The exception acknowledges that "[w]hen there are multiple sufficient causes * * * , each of which is itself sufficient to cause the plaintiff's harm, supplementation of the but-for standard is appropriate." *Id.* § 26 cmt. c. Nonetheless, the Court in *Nassar* explained that but-for causation is the dominant test for factual causation and is thus the test that Congress "is presumed to have incorporated" in federal anti-discrimination statutes. 570 U.S. at 347; cf. *id.* at 383-384 (Ginsburg, J., dissenting) (contending that the statute should be read to incorporate other forms of factual causation, including the test for multiple sufficient causes).

actionable, age must "ha[ve] a determinative influence on the outcome" of the personnel action. *Gross*, 557 U.S. at 176 (quoting *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 610 (1993)) (emphasis omitted).

a. In both *Gross* and *Nassar*, this Court relied on its earlier decision in *Safeco*. See *Gross*, 557 U.S. at 176; *Nassar*, 570 U.S. at 350. *Safeco* concerned a provision of the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq.*, requiring "any person [who] takes any adverse action with respect to any consumer that is *based in whole or in part on any information* contained in a consumer report" to notify the affected consumer. 15 U.S.C. 1681m(a) (2000) (emphasis added); see *Safeco*, 551 U.S. at 52-53. The Court acknowledged that because of the words "'in part,'" the FCRA provision "could" be construed to "mean that adverse action is 'based on' a credit report whenever the report was considered in the rate-setting process, even without being a necessary condition"—*i.e.*, a "but-for caus[e]"—"for the rate increase." *Safeco*, 551 U.S. at 63.

The Court, however, rejected that construction because it was not the "most natural reading" of the statutory text. *Safeco*, 551 U.S. at 63. Instead, the Court explained, "[i]n common talk, the phrase 'based on' indicates a but-for causal relationship." *Ibid.* Thus, "an increased rate is not 'based in whole or in part on' the credit report unless the report was a necessary condition of the increase." *Ibid.* Put differently, if Congress had intended to require notice whenever a business considered a report that "ma[d]e no difference" to a rate increase, it would have said so expressly. *Id.* at 64. The same is true here: Congress could have prohibited federal agencies from *considering* age in the personnel process. But instead it prohibited "any discrimination based

on age" in the making of "personnel actions." 29 U.S.C. 633a(a). As in *Safeco*, here Congress specified that a consideration (age) may not actually make a difference to a set of decisions (personnel actions for employees or applicants who are 40 or older).

b. In *Gross*, this Court held that a plaintiff bringing a claim under the ADEA's private-sector provision—which applies to state and local governments, see 29 U.S.C. 630(b)—must prove that "age was [a] 'but-for' cause of the employer's adverse action." 557 U.S. at 177. The provision at issue in *Gross* states that "[i]t shall be unlawful for an employer * * * to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1). Examining that language, the Court explained that "the ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age is that age was the 'reason' that the employer decided to act." *Gross*, 557 U.S. at 176. And the Court further stated that "'based on,' has the same meaning as * * * 'because of'"—each "indicates a but-for causal relationship and thus a necessary logical condition." *Ibid.* (quoting *Safeco*, 551 U.S. at 63).

The private-sector ADEA provision at issue in *Gross* differs from the federal-sector ADEA provision at issue here in two primary respects. First, the private-sector provision is expressed negatively (as a prohibition), whereas the federal-sector provision is expressed in positive terms (as a command that federal agencies must follow). Second, the private-sector provision prohibits some specific employer practices—failing or refusing to hire or discharging an individual, or "otherwise

discriminat[ing]" against her "because of [her] age," 29 U.S.C. 623(a)(1)—whereas the federal-sector provision more generally prohibits "discrimination based on age" in the making of "personnel actions," 29 U.S.C. 633a(a); cf. *Gomez-Perez* v. *Potter*, 553 U.S. 447, 487-488 (2008); Pet. Br. 51-52. But neither difference relates to the causation standard. On that score, the private- and federal-sector prohibitions contain the same key language: Section 623(a)(1) prohibits "discriminat[ion] against any individual * * * because of such individual's age," 29 U.S.C. 623(a)(1), just as Section 633a(a) prohibits "discrimination" against individuals "based on age," 29 U.S.C. 633a(a). In either case, the causal language—whether "because of" or "based on"—requires a but-for relationship between the individual's age and the personnel action. See *Gross*, 557 U.S. at 176.[5]

c. *Nassar* similarly demonstrates that Section 633a(a) requires but-for causation. There, the Court considered Title VII's private-sector retaliation provision, which makes it unlawful "for an employer to discriminate against any of [its] employees * * * because he has" engaged in certain EEO activity. 42 U.S.C. 2000-3(a).

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[5] Petitioner suggests (Br. 50-51) that *Gross* is irrelevant because 29 U.S.C. 633a(f) provides, with limited exceptions, that "[a]ny personnel action * * * referred to in" the federal-sector provision "shall not be subject to, or affected by, any provision" governing private-sector claims. Section 633a(f) merely indicates that particular provisions of the ADEA do not apply of their own force to federal personnel actions. See *Gomez-Perez*, 553 U.S. at 489. It does not foreclose this Court from recognizing as an interpretive matter that the key language at issue here—"discrimination *based on* age," 29 U.S.C. 633a(a) (emphasis added)—is materially identical to the key language at issue in *Gross*—"discriminat[ion] * * * *because of* * * * age," 29 U.S.C. 623(a)(1) (emphasis added).

The Court found no "meaningful textual difference between the text in this statute and the one in *Gross*," and therefore held that "Title VII retaliation claims require proof that the desire to retaliate was [a] but-for cause of the challenged employment action." *Nassar*, 570 U.S. at 352; see *Burrage* v. *United States*, 571 U.S. 204, 212-213 (2014).

4. This Court's decision in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), and Congress's subsequent amendment of Title VII's private-sector discrimination provision, confirm that Section 633a(a) should be read to require but-for causation.

a. Title VII's discrimination provision makes it an "unlawful employment practice for an employer" to refuse to hire, to discharge, "or otherwise to discriminate against any individual with respect" to the terms and conditions of employment, "*because of*" certain characteristics. 42 U.S.C. 2000e-2(a)(1) (emphasis added). As discussed above, see pp. 2-3, *supra*, in *Price Waterhouse*, a plurality of the Court and two Justices concurring in the judgment interpreted this provision to mean that if a plaintiff showed that a protected trait was a "motivating" factor in a private-sector employment decision, the burden shifted to the employer to prove that "it would have made the same decision even if it had not taken th[at factor] into account." 490 U.S. at 258 (plurality opinion); see *id*. at 259-260 (White, J., concurring in the judgment); *id*. at 276 (O'Connor, J., concurring in the judgment). The Court has accordingly recognized that *Price Waterhouse* applied a "but-for caus[ation]" standard, though the employer had the burden of disproving causation by "show[ing] that a discriminatory motive was not [a] but-for cause of the adverse employment action." *Nassar*, 570 U.S. at 348. As Justice O'Connor

explained, "Congress clearly conditioned legal liability on a determination that the consideration of an illegitimate factor *caused* a tangible employment injury of some kind." *Price Waterhouse*, 490 U.S. at 265 (O'Connor, J., concurring in the judgment).[6]

b. Two years later, Congress responded by enacting Section 2000e-2(m), which "substituted a new burden-shifting framework" for the one developed by *Price Waterhouse*. *Nassar*, 570 U.S. at 349. Under that new framework, a private-sector plaintiff generally can establish a violation of Title VII by demonstrating that a protected trait "was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. 2000e-2(m). The burden then shifts to the employer to demonstrate that it "would have taken the same action in the absence of the impermissible motivating factor." 42 U.S.C. 2000e-5(g)(2)(B). An employer who carries that burden does not wholly escape liability for declaratory or certain injunctive relief, but a court may "not award damages" or back pay, or order the plaintiff's "reinstatement, hiring, [or] promotion." 42 U.S.C. 2000e-5(g)(2)(B)(ii). The text of Title VII's private-sector provisions thus specifically authorizes liability when a protected trait is a "motivating

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[6] This Court has since rejected *Price Waterhouse*'s "burden-shifting framework," explaining that "it [wa]s difficult to apply" in practice, those problems "eliminated any perceivable benefit to extending its framework" to other contexts, and it "is far from clear that the Court would have the same approach" in the private-sector Title VII context "were it to consider the question today in the first instance." *Gross*, 557 U.S. at 178-179. But looking only to the *Price Waterhouse* framework as it applied to Title VII claims before 1991, *Price Waterhouse* ultimately adopted a "but-for" causation standard for liability, *Nassar*, 570 U.S. at 348-349, not the lesser causation standard for which petitioner advocates.

factor" in a defendant's decision to treat similarly situated individuals differently—a textual command that departs from the default but-for rule. *Gross*, 557 U.S. at 174; see *Nassar*, 570 U.S. at 350-351.

In light of the tailored statutory amendment in the 1991 Act, and the Court's doubts about its earlier divided decision, see p. 23 n.6, *supra*, the Court recognized in *Gross* and *Nassar* that "the rule of *Price Waterhouse* is not controlling" elsewhere. *Nassar*, 570 U.S. at 362; see *Gross*, 557 U.S. at 178-179 & n.5. In *Gross*, the Court determined that "Congress' careful tailoring of the 'motivating factor' claim in Title VII"—and its decision "not [to] make similar changes to the ADEA"—meant that the Court could not properly "transfer the *Price Waterhouse* burden-shifting framework into the ADEA." *Gross*, 557 U.S. at 174, 178 n.5. And in *Nassar*, the Court emphasized that the 1991 Act showed that "the motivating-factor standard was not an organic part of Title VII," and the Court declined to read it into Title VII's private-sector retaliation provision. 570 U.S. at 351; see *id.* at 351-354, 357. Congress likewise has not amended the federal-sector provision of the ADEA to incorporate a motivating-factor standard. As in *Gross* and *Nassar*, there is no sound reason to import such a standard (or petitioner's any-consideration standard, see pp. 50-52, *infra*) into the ADEA's federal-sector provision.

B. Petitioner's Textual Arguments Are Unpersuasive

Notwithstanding the statutory text and common-law rule, this Court's decisions, and Congress's failure to amend the ADEA, petitioner argues that "Section 633a(a) is best read to render unlawful *any unfavorable consideration of age as a factor* in a personnel decision." Br. 2-3 (emphasis added); see Br. 22-28. Petitioner thus reads the ADEA's federal-sector provision to have a

lower causal requirement than (i) its private-sector provision, which also applies to state- and local-government employees; and (ii) other federal anti-discrimination statutes—perhaps even Title VII's private-sector provision, where Congress specifically codified a motivating-factor standard. Nothing in the text of Section 633a(a) supports that highly anomalous result.

1. Petitioner misreads Section 633a(a) in large part because she misunderstands the meaning of "discrimination" in that provision. Petitioner contends (Br. 24) that "'discrimination'" is "broad and connotes the denial of equal treatment, without regard to whether that unequal treatment is the cause of any particular adverse outcome." But discrimination requires differential treatment of similarly situated individuals—and here, the ADEA's text ties that differential treatment to an adverse "personnel action[]." 29 U.S.C. 633a(a). Indeed, faced with similar statutory language in *Gross* and *Nassar*, the Court rejected petitioner's effort to divorce "discrimination" from an adverse outcome. In each of those cases, the statute barred "discriminat[ion] * * * because" of a particular characteristic or action. 29 U.S.C. 623(a); 42 U.S.C. 2000e-3(a). And in each case, the Court held that the prohibited factor had to be a but-for cause of a particular adverse outcome, *i.e.*, the "challenged employment action." *Nassar*, 570 U.S. at 352; see *Gross*, 557 U.S. at 177.

Petitioner attempts (Br. 51) to distinguish the private-sector ADEA provision at issue in *Gross* (but not the Title VII provision at issue in *Nassar*) on the ground that it "bars only the taking of specifically enumerated adverse actions—such as discharging or failing to hire a person 'because of age.'" But Section 633a(a) likewise

bars discrimination only in the context of "personnel actions." 29 U.S.C. 633a(a). And in any event, Section 623(a) also prohibits an employer from "otherwise discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment." 29 U.S.C. 623(a)(1). If petitioner were correct, the private-sector ADEA provision would prohibit any *consideration* of age in the setting of "compensation, terms, conditions, or privileges of employment"—even if the employee's compensation, terms, conditions, and privileges of employment would have been the same absent such consideration. *Gross* rejects exactly that view, holding instead that a plaintiff suing under Section 623(a) must "establish that age was [a] 'but-for' cause of the employer's adverse action." 557 U.S. at 177.

Nor does it matter that the federal-sector provision bars age-based discrimination in "[a]ll personnel actions." 29 U.S.C. 633a(a). That language goes to the range of employment-related actions covered by Section 633a(a), not the distinct question whether consideration of age must be a but-for cause of the personnel action at issue. Petitioner's reliance (Br. 50-52) on *Gomez-Perez* is thus misplaced. There, this Court held that Section 633a(a)'s prohibition on "discrimination based on age" in all "personnel actions" includes age-based retaliation. 553 U.S. at 479 (citation omitted). But nothing in *Gomez-Perez* goes to the causation standard. See *Nassar*, 570 U.S. at 355 (stating that *Gomez-Perez* was of "limited relevance" to the "causation standard" under Title VII's retaliation provision). Certainly nothing in *Gomez-Perez* indicates that "discrimination based on age" includes an employer's consideration of age, even if it makes no difference to a personnel action.

Petitioner bypasses *Gross* and *Nassar*, urging this Court to look instead to constitutional equal protection cases. In that context, she asserts, the Court has defined "'discrimination'" to "encompass[] the denial of fair and equal consideration * * * for a [government] benefit." Br. 25-26. But as a threshold matter, this Court was explicit in *Gross* that "the constitutional [equal protection] cases * * * have no bearing on the correct interpretation of ADEA claims, which are governed by statutory text." 557 U.S. at 180 n.6. The question here is how best to interpret Section 633a(a), and the answer under *Gross* depends on the natural meaning of the statutory phrase "any discrimination *based on* age," read against the backdrop of the common-law default rule and Congress's failure to amend the ADEA to adopt a lesser causation standard. 29 U.S.C. 633a(a) (emphasis added). The Court should not adopt a watered-down causation standard even if the Equal Protection Clause would require less than but-for causation.

In fact, however, the Equal Protection Clause does *not* require less in the relevant context. Petitioner relies on cases in which a plaintiff challenged a governmental program and sought prospective injunctive relief on the theory that "the government erect[ed] a barrier that ma[de] it more difficult for members of one group" than another "to obtain a benefit." Br. 26 (quoting *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am.* v. *City of Jacksonville*, 508 U.S. 656, 666 (1993)). In that context, the Court has not necessarily required the plaintiff to show that, but for the barrier, she would have obtained the benefit. See, *e.g.*, *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 718-719 (2007); see also *Texas* v.

Lesage, 528 U.S. 18, 21 (1999) (per curiam) ("[A] plaintiff who challenges an ongoing race-conscious program and seeks forward-looking relief need not affirmatively establish that he would receive the benefit in question if race were not considered.").

That is not the type of claim petitioner brings here. Instead, petitioner alleges (Br. 4) that "[b]etween 2011 and 2014, [she] was * * * treated unequally, on the basis of age, in connection with various adverse personnel actions." See Br. 11-14. Petitioner thus "challenges" a set of "discrete governmental decision[s]" that she alleges were "based on an impermissible criterion." *Lesage*, 528 U.S. at 21. When a plaintiff raises *that type* of constitutional claim, the government "can avoid liability by proving that it would have made the same decision without the impermissible motive." *Ibid.*; see *id.* at 20-21 (citing *Mt. Healthy City Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 287 (1977)). That but-for causation requirement comports with "other areas of constitutional law," in which the Court has "distinguishe[d] between a result caused by a constitutional violation and one not so caused." *Mt. Healthy*, 429 U.S. at 286. To be sure, *Lesage* and *Mt. Healthy* apply to such constitutional claims a burden-shifting framework like that adopted in *Price Waterhouse*. See *ibid.*; see also *Lesage*, 528 U.S. at 20-21. But petitioner does not actually press any kind of burden shifting here. See Br. 46 n.8. The only question in this case is the causation requirement for federal-sector age-discrimination claims, and even *Lesage* and *Mt. Healthy* would not allow recovery without but-for causation in the constitutional context.

2. Petitioner also emphasizes (Br. 22-24) Section 633a(a)'s command that "personnel actions" "*shall be*

made free from any discrimination based on age" (emphasis added). But the phrase "shall be made free from" simply indicates that personnel actions must be made without "discrimination based on age." It does not change the causation standard. Nor does the term "any" have that effect. It captures an entire category of conduct—"discrimination based on age"—but does not change what that category is, *i.e.*, differential treatment because of age. See *Freeman* v. *Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012) (Although the word "'any'" can confer an "'expansive meaning,'" it never has a "transformative" effect and "never change[s] in the least" the phrase that follows it.) (citation omitted).

Petitioner's argument (Br. 22) that Section 633a(a) "governs the decision-making *process*," not just its "*outcome*," places more weight on the word "made" than it can bear. Petitioner's selected definitions of "make"—all of which post-date the ADEA's enactment—do not demonstrate that the "making" of a decision must refer to the process as a whole, rather than to the decision itself. In fact, contemporaneous definitions illustrate that the word "make" may refer to a particular point in time. See, *e.g.*, *Webster's* 1485 (defining "make" as, *inter alia*, "[t]o create; cause; perform"); *Black's Law Dictionary* 1107-1108 (rev. 4th ed. 1968) (defining "make" as, *inter alia*, "[t]o execute as one's act or obligation" or "[t]o conclude, determine upon, agree to, or execute"). The same is true for the statutes petitioner cites (Br. 22 n.3). Several of those provisions appear to refer to the precise moment when an event occurs—including when "a person * * * designate[s]" certain data that he believes should be treated as confidential, 42 U.S.C.

9604(e)(7)(C), or when "adjustments with contractors" are "made by means of credits" rather than cash, 43 U.S.C. 618c(a).

In any event, even if petitioner were correct about the word "made," that would not support her construction of the statute. Section 633a(a) states that "personnel actions" must be "made" without "discrimination based on age." Unless the employer uses age as a determinative factor in its decision-making process, the resulting personnel action would be "made free from any discrimination based on age." Section 633a(a) does not bar employers from *considering* age, nor does it impose liability where age is a *factor*; thus, it does not impose liability where age is considered in the decision-making process but the employer would have made the same personnel action absent consideration of age. See *Safeco*, 551 U.S. at 63-64.

A comparison to the ADEA's private-sector provision proves the point. To determine whether an employer discharged an individual or "otherwise discriminate[d] against" her with respect to the terms and conditions of her employment "because of such individual's age," 29 U.S.C. 623(a)(1), a court might examine the employer's decision-making process, including, for example, its consideration of the employee's performance and any comparison made with other similarly situated individuals. Nonetheless, as the Court held in *Gross*, a court still would have to determine whether the employee's age was a but-for cause of the employment action. The same is true of the statute at issue in *Safeco*: in determining whether an adverse action was "based in whole *or in part*" on a credit report, 15 U.S.C. 1681m(a) (2000) (emphasis added), a court likely would consider the rate-setter's process. But the plaintiff still would

have to demonstrate that the information in the credit report was a but-for cause of the rate increase (even if it was not the sole cause). *Safeco*, 551 U.S. at 63; see *Nassar*, 570 U.S. at 352.

3. Petitioner contends that the phrase "'discrimination *based on age*'" "simply refers to the *type* of discrimination prohibited." Br. 27 (quoting 29 U.S.C. 633a(a), and citing *Ford* v. *Mabus*, 629 F.3d 198, 205 (D.C. Cir. 2010)). But that is equally true of the private-sector ADEA provision at issue in *Gross*, which makes it unlawful to, *inter alia*, "discriminate against any individual * * * because of such individual's age." 29 U.S.C. 623(a). So too the Title VII retaliation provision at issue in *Nassar*, which prohibits "discriminat[ion] against" an employee or applicant "because" of the individual's EEO activity. 42 U.S.C. 2000e-3(a). In each of those statutes, the relevant phrase *both* describes the type of discrimination made unlawful *and* establishes the requisite causal connection between the employment action taken and the impermissible consideration. See *Nassar*, 570 U.S. at 350-352; *Gross*, 557 U.S. at 176; see also *Safeco*, 551 U.S. at 63 (the phrase "based in whole or in part on" both identifies the relevant source of information (the credit report) and requires but-for causation).

Petitioner argues (Br. 27) that the federal-sector provision would "have precisely the same meaning" if it stated that "[a]ll personnel actions . . . shall be made free from any age discrimination." See Br. 44. But that would not be because the phrase "based on" plays no causal role. Rather, it would be because the most natural meaning of the words "age discrimination" is discrimination *because of* age. And even if the phrase "age discrimination" were silent as to causation, the common-law "default rule[]" would require a plaintiff to show

that age was a but-for cause of an adverse personnel action. *Nassar*, 570 U.S. at 347. The statute here—like the statutes at issue in *Gross* and *Nassar*—simply removes any doubt by expressly adopting the default understanding with the words "based on age."

4. Finally, petitioner's hypotheticals (Br. 48-49) do not advance her textual argument. Petitioner first posits (Br. 48) a policy in which a federal agency considers older age as a " 'minus factor' when conducting a holistic analysis of" job applicants. An agency's use of that policy could violate Section 633a(a) if an otherwise qualified applicant for employment established that the policy was dispositive to the agency's decision not to hire her. And it might violate *other* federal statutes, such as the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*, for failing to comply with merit principles. See 5 U.S.C. 2301(b)(2) (establishing principle that "[a]ll employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to * * * age"). But because Section 633a(a) prohibits "discrimination based on age" only in the context of "personnel actions," a federal employee must show that the policy was a but-for cause of an adverse personnel action.

Petitioner muddies (Br. 48) the hypothetical by having the agency conduct a "holistic analysis," because that could make it difficult for a plaintiff to establish that age was actually decisive. But the potential for difficult factual questions is no reason to discard the appropriate but-for causation standard. If a state or local government had such a policy, petitioner does not dispute that under *Gross* a plaintiff would have to plead and prove but-for causation. The result should be no different here. And if such a policy existed in the real

world, there typically would be applicants who could plausibly plead (and then subsequently prove) that they were otherwise qualified and were harmed by consideration of age. Even under a holistic analysis, some older applicants will lose out on jobs that they otherwise would have obtained—and some will not. Only the former have been subject to "discrimination based on age" in the "personnel actions" that were "made." 29 U.S.C. 633a(a).

Petitioner's position, on the other hand, has a far more intractable problem. Suppose the same agency took account of older age in a less holistic, more numeric way. Even if an older applicant were manifestly unqualified for the position (for instance, the person applied to a legal position at the Department of Justice but was not a lawyer), and even if the agency's numeric metric made clear that the minus factor for age did not make a difference to the hiring decision, that still would be actionable "discrimination based on age" in petitioner's view. 29 U.S.C. 633a(a). Petitioner's position is thus that a federal employee who has suffered no adverse employment action on account of her age can sue under, and establish a violation of, the ADEA—with questions of injury relevant, at most, to what remedies a court should award. Br. 46 n.8. Moreover, petitioner does not dispute that, under *Gross*, a similarly situated state, local, or private employee could not demonstrate "discriminat[ion] * * * because of * * * age," 29 U.S.C. 623(a)(1), in the absence of but-for causation. So the net result would be that only a federal employee could bring the type of claim petitioner posits.

In petitioner's second hypothetical (Br. 49), an agency requires that as part of the application for a promotion, employees over 40 (but not younger employees) take a

physical fitness test. The requirement that the employee take the test might itself be a term or condition of employment that is subject to challenge as a "personnel action" under Section 633a(a). Cf. 5 U.S.C. 2302(a)(2)(A) (CSRA defines a "'personnel action'" to include, *inter alia*, certain "performance evaluation[s]" and "any * * * significant change in * * * working conditions"). If that were the case, then an employee who did not wish to take the test could challenge it on the ground that her age was a but-for cause of the requirement. And even if the test did not rise to the level of a "personnel action," an employee could challenge it if she could demonstrate that *either* her refusal to take the test *or* her test results were a but-for cause of the denial of a promotion. As with petitioner's first hypothetical, the key point is that the policy could be subject to challenge, but only by certain plaintiffs: those for whom the impermissible consideration of age actually mattered.

II. NEITHER THE HISTORY OF THE ADEA'S FEDERAL-SECTOR PROVISION NOR THE EEOC'S INTERPRETATION OF THE STATUTE SUPPORTS A DIMINISHED CAUSATION STANDARD

A. Petitioner's Historical Arguments Lack Merit

Petitioner contends (Br. 28-40, 54-55) that the ADEA's federal-sector provision prohibits any consideration of age in the making of personnel decisions because "Section 633a(a) was modeled on Title VII's federal-sector provision, which in turn sought to implement both the Constitution's equal protection guarantee and [a] long line of executive orders banning discrimination in federal employment decisions." Br. 54. To be sure, petitioner is correct that the federal-sector ADEA provi-

sion was modeled on the federal-sector Title VII provision, 42 U.S.C. 2000e-16(a). See *Gomez-Perez,* 553 U.S. at 487. But because Section 2000e-16(a) contains materially identical language to that at issue here, its plain text, common-law principles, and this Court's precedent make equally clear that, standing alone, that provision would require but-for causation. None of petitioner's historical sources suggests that the federal-sector provisions of Title VII and the ADEA should be read to disclaim the default rule of but-for causation.

1. a. Petitioner reframes (Br. 30) her textual argument that "discrimination" means the same thing in Section 633a(a) and the Equal Protection Clause, as a historical argument that "Congress enacted Title VII's federal-sector provision in part to implement the Constitution's guarantee of equal protection for federal employees." The argument is wrong for the same reasons. See pp. 27-28, *supra*. First, this Court's equal protection decisions have "no bearing" on the causation standard imposed by the ADEA, which is "governed by statutory text." *Gross*, 557 U.S. at 180 n.6. Second, the relevant equal protection context also requires but-for causation for liability. Third, petitioner's argument cannot be squared with *Gross* and *Nassar*. All but one of petitioner's cases (Br. 32) involve a challenge to the action of a state or local government, not a federal agency.[7] Yet state and local governments are subject to

[7] See *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2017 (2017); *Parents Involved*, 551 U.S. at 711, 715; *Gratz* v. *Bollinger*, 539 U.S. 244, 249 (2003); *Lesage*, 528 U.S. at 19; *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am.*, 508 U.S. at 658; *Clements* v. *Fashing*, 457 U.S. 957, 959-960 (1982); *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 269 (1978); *Turner* v. *Fouche*, 396 U.S. 346, 348 (1970).

the private-sector provisions of the ADEA and Title VII. See 29 U.S.C. 630(b); 42 U.S.C. 2000e(b). This Court held in *Gross* that the private-sector provision of the ADEA requires but-for causation. 557 U.S. at 176. And it stated in *Nassar* that, absent the enactment of Section 2000e-2(m), the private-sector provision of Title VII would be best read to require but-for causation. 570 U.S. at 351. *Gross* and *Nassar* thus confirm that Congress did *not* adopt petitioner's understanding of "the Constitution's guarantee of equal protection," Br. 30, when it prohibited state and local employers from engaging in "discrimination * * * *because of* * * * age." 29 U.S.C. 623(a)(1) (emphasis added). Petitioner offers no historical reason to assume that Congress required more of federal employers.

Indeed, petitioner's sole case involving the federal government suggests precisely the opposite. In *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995), this Court overruled a previous decision that had applied intermediate rather than strict scrutiny to certain "benign" federal racial classifications, because "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Id.* at 224, 226-227 (citation omitted); see *id.* at 231-232 (opinion of O'Connor, J.) ("[T]he Constitution imposes upon federal, state, and local governmental actors *the same obligation* to respect the personal right to equal protection of the laws.") (emphasis added). Thus, even if petitioner were correct that Congress extended Title VII and the ADEA to federal employers in order to protect federal employees' equal protection rights, there would be no reason for Congress to have imposed different causation standards for federal as opposed to state and local employees.

b. Petitioner nonetheless suggests (Br. 53-55) that because Congress separately codified the federal-sector provision, rather than including federal workers in the ADEA's private-sector provision, it must have intended to impose a lesser causation standard. But while Congress's decision to enact a separate federal provision has consequences for federal-sector ADEA claims, nothing suggests that Congress gave federal employees *greater* rights or intended differences specific to causation. See, *e.g.*, 120 Cong. Rec. 8768 (1974) (Senator Lloyd Bentsen, the principal proponent of extending the ADEA to federal employees, stated that "Government employees will be subject to the same protections against arbitrary employment based on age as are employees in the private sector.").

In fact, where the ADEA treats federal employees differently from private and state- and local-government employees, those differences generally *restrict* the rights and remedies available in the federal sector. For example, as the Court held in *Lehman* v. *Nakshian*, 453 U.S. 156 (1981), an employee covered by the private-sector ADEA provision has a right to a jury trial, while a federal employee does not. *Id.* at 165. And the courts of appeals have held that employees covered by the private-sector provision can recover reasonable attorney's fees directly under the ADEA, see 29 U.S.C. 626(b), while federal employees must rely on the Equal Access to Justice Act, 28 U.S.C. 2412(b). See *Boehms* v. *Crowell*, 139 F.3d 452, 462-463 (5th Cir. 1998), cert. denied, 525 U.S. 1102 (1999); *Nowd* v. *Rubin*, 76 F.3d 25, 27-28 (1st Cir. 1996). That Congress addressed federal employees in a different provision of the ADEA thus provides no basis for assuming that it intended for federal agencies to be liable for conduct that would not support

liability if engaged in by private employers or state or local governments.

2. Nor do prior executive orders support petitioner's argument for a lessened causation standard in the federal sector. See Br. 30, 33-36 & nn.5-6. As an initial matter, even if the executive orders petitioner cites imposed a motivating-factor or any-consideration standard, they would not supersede the statutory text Congress enacted, or overcome the common-law default rule of but-for causation.

a. In fact, the executive orders do not appear to impose a lessened causation standard. Each of those orders (Pet. Br. 34 & n.5) prohibits discrimination "because of" a protected trait—language that indicates but-for causation.[8] See *Nassar*, 570 U.S. at 350-352;

[8] See Exec. Order No. 8587, § 2, 3 C.F.R. 824 (1938-1943 comp.) ("[n]o discrimination * * * because of race"); Exec. Order No. 8802, 3 C.F.R. 957 (1938-1943 comp.) ("no discrimination * * * because of race, creed, color, or national origin"); Exec. Order No. 9346, 3 C.F.R. 1280 (1938-1943 comp.) (prohibiting "discrimination * * * because of race, creed, color, or national origin"); Exec. Order. No. 9980, § 1, 3 C.F.R. 721 (1943-1948 comp.) ("no discrimination because of race, color, religion, or national origin"); Exec. Order No. 10,590, 3 C.F.R. 237 (1954-1958 comp.) (prohibiting "discrimination * * * because of race, color, religion, or national origin"); Exec. Order No. 10,925 § 203, 3 C.F.R. 449 (1959-1963 comp.) ("prohibition of discrimination * * * because of race, color, religion, or national origin"); Exec. Order No. 11,141, 3 C.F.R. 180 (1964-1965 comp.) (federal contractors "shall not * * * discriminate against persons because of their age"); Exec. Order No. 11,246, § 101, 3 C.F.R. 339 (1964-1965 comp.) ("prohibit[ing] discrimination in employment because of race, creed, color, or national origin"); Exec. Order No. 11,375, § 1, 3 C.F.R. 685 (1966-1970 comp.) ("prohibit[ing] discrimination in employment because of race, color, religion, sex or national origin"); Exec. Order No. 11,478, § 1, 3 C.F.R. 804 (1966-1970 comp.) ("prohibit[ing] discrimination in employment because of race, color, religion, sex, or national origin").

Gross, 557 U.S. at 176-177; accord Civil Rights Act of 1964 § 701(b), 78 Stat. 254 ("[I]t shall be the policy of the United States to insure equal employment opportunities for Federal employees without discrimination *because of* race, color, religion, sex or national origin.") (emphasis added). Moreover, several of the executive orders and presidential memoranda expressly state that the relevant anti-discrimination policy sought to address the problem of "available and needed workers hav[ing] been barred from employment * * * *solely because of*" considerations like race or age. Exec. Order No. 8802, 3 C.F.R. 957 (1938-1943 comp.) (emphasis added); accord Exec. Order No. 9346, 3 C.F.R. 1280 (1938-1943 comp.) (similar); Age Discrimination in Federal Employment, 8 Weekly Comp. of Pres. Doc. 1376 (Sept. 18, 1972) ("reaffirm[ing] our commitment to the long-standing policy of the Federal Government that age, *by itself*, shall be no bar to a Federal job which an individual is otherwise qualified to perform") (emphasis added). Plainly, those statements do not support petitioner's lessened causation standard.

Petitioner also does not cite any interpretation of the executive orders applying a standard less than but-for causation. That is unsurprising: as this Court has emphasized, before Congress enacted Title VII's federal-sector provision, "the effective availability of either administrative or judicial relief [for federal employees] was far from sure." *Brown* v. *GSA*, 425 U.S. 820, 825 (1976); see *id.* at 828; accord *Morton* v. *Mancari*, 417 U.S. 535, 549 (1974). There is thus no basis for assuming that the executive orders imposed something less than but-for causation.

b. Petitioner also errs in relying (Br. 35) on excerpts of certain executive orders that she claims show that

"discrimination could play no role whatsoever in federal employment decisions." The portions of the orders that petitioner cites reflect general principles of the merit system of federal employment under the civil service laws—not anti-discrimination law. See Exec. Order No. 9980, § 1, 3 C.F.R. 720 (1943-1948 comp.) ("All personnel actions taken by Federal appointing officers shall be based solely on merit and fitness."); Exec. Order No. 11,141, 3 C.F.R. 180 (1964-1965 comp.) (policy of "hiring and promoting employees on the basis of merit alone"). Congress did not codify those broad, general statements of policy in Title VII or the ADEA, which are limited to discrimination based on particular characteristics. Instead, those principles are reflected in the CSRA, which both "establishes the principles of the merit system of employment" and prohibits federal agencies from engaging in a broader swath of " 'prohibited personnel practices,' including unlawful discrimination, coercion of political activity, nepotism, and reprisal against so-called whistleblowers." *United States* v. *Fausto*, 484 U.S. 439, 446 (1988) (quoting 5 U.S.C. 2302 (1982)); see 5 U.S.C. 2301(b).

c. More fundamentally, petitioner's reliance on general statements in executive orders and presidential memoranda highlights the problem with her argument. This Court need not determine the causation standard under executive orders or statements because they represent Executive Branch policy, not a federal anti-discrimination statute enacted by Congress. Indeed, executive orders often go beyond what is required by Title VII or the ADEA. For example, in 2000, President Clinton signed Executive Order No. 13,145, § 1, 3 C.F.R. 235 (2000 comp.), which "prohibit[s] discrimination

against employees based on protected genetic information, or information about a request for or the receipt of genetic services." *Ibid.* Although the order directed the head of each Executive department and agency to "extend the policy" of non-discrimination based on genetic information "to all its employees covered by" Title VII's federal-sector provision, *ibid.*, there is no question that Title VII *itself* does not cover discrimination based on genetic information. See also, *e.g.*, Exec. Order No. 13,152, 3 C.F.R. 264 (2000 comp.) ("prohibit[ing] discrimination based on an individual's status as a parent"). Thus, even if petitioner could show that the pre-Title VII executive orders imposed a lessened causation standard, that would not mean Congress adopted that standard in Title VII or the ADEA.

3. Petitioner's final historical argument (Br. 36) is that when Congress enacted the federal-sector ADEA provision in 1974, it "legislated against the backdrop" of Civil Service Commission (CSC) regulations that imposed a motivating-factor standard following enactment of Title VII's federal-sector provision in 1972. Once again, that contention fails at the outset because the plain language of the ADEA's federal-sector provision imposes a but-for standard (and at a minimum does not depart from the default common-law causation rule). But petitioner's assertion is incorrect for two additional reasons: the CSC regulations were not limited to implementing Title VII, and nothing suggests Congress sought to codify those still-recent regulations in the ADEA.

a. When Congress amended Title VII in 1972 to add the federal-sector provision, it authorized the CSC to issue regulations implementing the amendment, and the CSC did so. See EEO Act § 11, 86 Stat. 111. But the

CSC's regulations did not implement Section 2000e-16 alone. Rather, the CSC also sought "to strengthen the [existing] system of complaint processing" under executive orders and the agency's pre-existing statutory authority. 37 Fed. Reg. 22,717 (Oct. 21, 1972) (listing authority). Under that prior authority, the CSC had promulgated a two-tier process for addressing discrimination complaints. One set of administrative procedures governed "[m]ore serious personnel actions, known as 'adverse actions,'" *Gomez-Perez*, 553 U.S. at 501 (Roberts, C.J., dissenting), including removal, suspension, furlough without pay, and a reduction in rank or pay, see 5 C.F.R. 771.202 (1972); see also 5 C.F.R. 713.219(b) and (c) (1972). Another set of procedures governed "less serious personnel actions and 'any [other] matter of concern or dissatisfaction.'" *Gomez-Perez*, 553 U.S. at 501 (Roberts, C.J., dissenting) (quoting 5 C.F.R. 771.302(a) (1972)) (brackets in original).

Petitioner relies (Br. 37) on a remedial regulation adopted in 1973 that created "different remedies" depending on whether the CSC found that discrimination was a but-for cause of the action about which an applicant or employee complained. See 5 C.F.R. 713.271(a) (1973) (applicants); 5 C.F.R. 713.271(b) (1973) (employees). But the better reading of the regulation is that, like the prior two-tier system, it was not limited to the types of "personnel actions" covered by Title VII. 42 U.S.C. 2000e-16(a). Instead, the regulation applied more broadly to allegations that a federal employee "was denied an employment benefit, or an administrative decision adverse to him was made." 5 C.F.R. 713.271(b) (1973). And it expressly provided for "[e]xpunction from the agency's records of any reference to or any record of an unwarranted disciplinary action *that is not*

a personnel action." 5 C.F.R. 713.271(b)(4) (1973) (emphasis added). Under the CSC regulations, then, an employee could file a discrimination complaint challenging an agency decision that did not rise to the level of a personnel action and obtain administrative relief. See 5 C.F.R. 713.271(b) (1973). That complaint would be subject to dismissal in federal court, however, because the government's potential liability under Title VII (and its waiver of sovereign immunity, see *Nakshian*, 453 U.S. at 161-162) is limited to "personnel actions," 42 U.S.C. 2000e-16(a). Petitioner thus has not demonstrated that the CSC interpreted Title VII (as opposed to other sources of authority) to permit a remedy for cases in which but-for causation was not proven.

b. Nor has petitioner shown that Congress sought to codify any such understanding in the federal-sector provision of the ADEA, which—like the federal-sector provision of Title VII—applies only to "personnel actions." 29 U.S.C. 633a(a). Petitioner observes that "'Congress' repetition of a well-established term carries the implication that Congress intended that term to be construed in accordance with pre-existing regulatory interpretations.'" Br. 38 (quoting *Bragdon* v. *Abbott*, 524 U.S. 624, 631 (1998)). In the cases on which petitioner relies, this Court found congressional "ratification" of regulations or judicial decisions that were more than a decade old. See *Bragdon*, 524 U.S. at 631-632 (statute expressly incorporated regulatory interpretation, which had existed for 13 years); *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 437-438 (1986) (25-year gap between regulation and statutory amendment); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 & n.7 (1978) (construing statute based on 20 years of judicial decisions regarding similar provision). By contrast here, the CSC regulations were far from "well-

established" when Congress enacted the ADEA: they were just two years old, and petitioner points to no authority focusing on or interpreting their causal standard. Indeed, 15 years *after* the federal-sector ADEA provision was enacted, this Court observed in *Price Waterhouse* that the courts of appeals remained "in disarray" about the proper causation standard under Title VII's private-sector discrimination provision. 490 U.S. at 238 n.2 (plurality opinion). Petitioner's congressional "ratification" argument thus finds no real support in that interpretive canon.

B. Petitioner Misconstrues The EEOC's Regulations And Adjudications, Which Are Not In Any Event Entitled To Deference

Petitioner observes (Br. 39) that after passage of the ADEA's federal-sector provision, the CSC "simply applied" its preexisting regulations to the ADEA, and that the EEOC later "adopted" those same regulations without analysis or substantive amendment. See 43 Fed. Reg. 60,900 (Dec. 29, 1978). Today, the EEOC's regulations, entitled "Remedies and Relief," provide that if "discrimination existed at the time" an applicant was considered for employment or a personnel action involving an employee was taken, but the evidence indicates that "the applicant would not have been hired" or the "personnel action would have been taken even absent discrimination," the agency "shall nevertheless eliminate any discriminatory practice and ensure it does not recur." 29 C.F.R. 1614.501(b)(2) (applicants); 29 C.F.R. 1614.501(c)(2) (employees). Petitioner construes those regulations to mean that "Section 633a(a) is violated if a victim of age discrimination can show that such discrimination was *a factor* in a federal-sector employment

decision—even if it was not the but-for cause of the decision." Br. 41 (emphasis added). And even though petitioner does not ask this Court to impose the regulations' remedial limitations or burden-shifting scheme, she contends (Br. 40) that if this Court concludes that the statutory language is ambiguous, it should defer to the agency's interpretation in the regulations and in adjudications under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). That is incorrect.

1. The EEOC's regulations do not warrant deference for several reasons.

a. First, the text of Section 633a(a), background common-law principles, and this Court's precedent all make clear that Section 633a(a) requires but-for causation. Thus, even if the regulations concerned the causation standard for liability—and they do not, see pp. 45-47, *infra*—the Court would have no reason to consult them or to determine the level of deference, if any, that applies. Instead, the Court should resolve this case in the government's favor at *Chevron*'s first step. See *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 599-600 (2004) (declining to decide whether EEOC regulation for which the agency had given "no reasons" merited deference under *Chevron* or *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), because "regular interpretive method le[ft] no serious question" that the EEOC's interpretation was incorrect).

b. Second, even if Section 633a(a) were ambiguous as to the causation standard for liability, the EEOC regulations on which petitioner relies do not address that issue. This Court emphasized as much in *Price Waterhouse*, stating that the EEOC regulation, which was then codified at 29 C.F.R. 1613.271(c)(2) (1988), "deals

with the proper determination of relief rather than with the initial finding of liability." 490 U.S. at 254 (plurality opinion). The plurality continued that "[b]ecause [it] ha[d] held that, by proving that it would have made the same decision in the absence of discrimination, the employer may avoid a finding of liability altogether and not simply avoid certain equitable relief," the regulation did not support a heightened evidentiary standard for avoiding liability. *Ibid.*

The EEOC reiterated the point when, in 1992, it moved the regulation to 29 C.F.R. 1614.501, where it remains today. In its Final Rule, the Commission responded to comments that, based on *Price Waterhouse*, it should change the burden of proof under the regulations from clear and convincing evidence to a preponderance of the evidence. 57 Fed. Reg. 12,634, 12,641 (Apr. 10, 1992). The Commission agreed with some "agency commenters and most non-agency commenters" who "believe[d] that no change was necessary because [*Price Waterhouse*] concerned proof at the liability stage while the regulation concerns proof at the relief stage and because the [*Price Waterhouse*] decision itself cited and distinguished [the EEOC's] regulation on th[at] basis." *Ibid.* The EEOC went on to explain that the regulation might apply in individual-relief cases involving after-acquired evidence, *i.e.*, where an employer is held liable because, while it had a "legitimate reason for taking the action in question or not selecting the complainant," it "only discovered that reason after the actual decision was made"—and, presumably, after liability was determined. *Ibid.* In that instance, the employer could not retroactively "escape liability," but it might "succeed * * * in limiting the

amount of relief." *Ibid.* Notably, because the Commission considered the regulation to address relief, not liability, it did not attempt to square it with Section 633a(a)'s prohibition on "discrimination based on age." 29 U.S.C. 633a(a); see 57 Fed. Reg. at 12,641.

c. Third, and related, petitioner's deference argument depends on the premise that the regulations provide a remedy to individual complainants—and thus must be predicated on a finding of ADEA liability—even where discrimination "was not the but-for cause of the decision" rendered against the employee. Br. 41; see Br. 38. But while the CSC and early EEOC regulations provided for a complainant to receive priority consideration where the record showed that she would not have been hired or promoted absent discrimination, see 5 C.F.R. 713.271(a)(2) (1973); 29 C.F.R 1613.271(a) (1979), the EEOC eliminated that remedy in 1987. See 52 Fed. Reg. 41,920, 41,929 (Oct. 30, 1987).

In its place, the regulations now provide that where "discrimination existed at the time the applicant was considered" or the personnel action was taken, but "clear and convincing evidence" demonstrates that "the applicant would not have been hired" or "the personnel action would have been taken" "even absent discrimination," the agency must "eliminate the discriminatory practice and ensure it does not recur." 29 C.F.R. 1614.501(b)(2) and (c)(2). In proposing that change, the EEOC recognized that it would no longer "provid[e] a direct remedy to the complainant." 51 Fed. Reg. 29,482, 29,483 (Aug. 18, 1986). Particularly in light of the CSC's historical practice of issuing regulations that go beyond the terms of Title VII, the EEOC's instruction that agencies should eliminate problematic practices does not demonstrate

that individual litigants can make out a claim under the ADEA without showing but-for causation.

d. Finally, even if the regulations could be construed to address liability, they do not support petitioner's proposed standard. The regulations appear to impose a burden-shifting framework that this Court has rejected in the context of private-sector ADEA claims. Compare 29 C.F.R. 1614.501(b)(1) and (c)(1) (suggesting the agency must disprove causation), with *Gross*, 557 U.S. at 174, 178-179 (refusing to extend either *Price Waterhouse*'s burden-shifting framework, or that imposed in the private-sector Title VII context by the addition of 42 U.S.C. 2000e-(2)(m) and 2000e-5(g)(2)(B), to private-sector ADEA claims). And they appear to require that the government disprove but-for causation by clear and convincing evidence—even though this Court declined to impose that standard on plaintiffs seeking to prove private-sector ADEA claims, *Gross*, 557 U.S. at 177 n.3, 178 n.5, and even though it is more demanding than the standard imposed on the government in equal protection cases, see, *e.g.*, *Mt. Healthy*, 429 U.S. at 287.

Petitioner makes no effort to defend that approach. In fact, although she urges this Court to defer to the EEOC's regulations, the test she proposes does not mirror them. Instead, petitioner would hold the government liable whenever age is *considered* with respect to a personnel action—without any opportunity for a court to consider whether age played a but-for role in the decision (and thus without any need to decide whether the burden is a preponderance of the evidence or clear and convincing evidence). Because petitioner's proposed framework would make it even easier for

plaintiffs to obtain relief than would the EEOC regulations, deference would not advance her argument, even if it were warranted.

2. The EEOC adjudications upon which petitioner relies (Br. 41-42 & n.7) also are not entitled to deference. Notably, while those adjudications address the causation required for liability, they do *not* rely on the regulations petitioner cites—confirming that the regulations do not govern liability. And the adjudications' adoption of a motivating-factor standard is contrary to the text of the statute, common-law default rules, and this Court's precedent.

Petitioner focuses (Br. 41-42) on the EEOC's decision in *Brenton W.* v. *Chao*, Appeal No. 0120130554, 2017 WL 2953878 (June 29, 2017). There, the Commission relied on the same statutory language petitioner cites, concluding that Section 633a(a)'s "'broad'" statement that personnel actions affecting employees over 40 "'shall be made *free from any* discrimination based on age'" means that this Court's decision in *Gross* "does not apply to federal sector ADEA claims." *Id.* at *9 (quoting *Gomez-Perez*, 553 U.S. at 487, and 29 U.S.C. 633a(a)). But *Brenton W.* did not address the similarity between the private-sector provision's prohibition on "discriminat[ion] * * * because of * * * age," 29 U.S.C. 623(a), and the federal-sector provision's prohibition on "discrimination based on age," 29 U.S.C. 633a(a). 2017 WL 2953878, at *9. Nor did it address that the words "free from any" cannot change the scope of the prohibited conduct, *i.e.*, "discrimination based on age." *Ibid.* (citation omitted).

The Commission's decision in *Brenton W.* relied on its prior decision in *Nita H.* v. *Jewell*, Pet. No. 0320110050, 2014 WL 3788011 (July 16, 2014). *Nita H.*

distinguished *Gross* and *Nassar* on the ground that the federal-sector provisions of Title VII and the ADEA "do[] not employ the 'because of' language" that Congress used in the private-sector provisions, *id.* at *10 n.6 —a distinction between "because of" and "based on" that this Court has long rejected. See p. 16, *supra*.[9] Because the EEOC's adjudications misconstrue the plain language of the statute and do not convincingly distinguish this Court's cases, they do not warrant deference.

III. PETITIONER'S INTERPRETATION OF THE FEDERAL-SECTOR ADEA PROVISION WOULD CREATE SERIOUS ANOMALIES IN FEDERAL ANTI-DISCRIMINATION LAW

As discussed, petitioner's interpretation of Section 633a(a) contravenes the statute's plain language, the default rule of but-for causation, and this Court's cases. And it finds no support in the history of the ADEA, or in the EEOC's regulations and adjudications. Although all of that is surely enough to resolve the case in the government's favor, petitioner's interpretation should be rejected for the additional reason that it would introduce serious anomalies into federal anti-discrimination law.

A. Perhaps because Section 633a(a) provides no textual basis for imposing a motivating-factor standard,

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[9] The other EEOC decisions on which petitioner relies (Br. 42 n.7) are no more convincing. See *Chanelle B.* v. *Brennan*, Appeal No. 0120152401, 2017 WL 6422255, at *2 n.4 (Dec. 8, 2017) (stating in dicta that "motivating factor" rather than "but for" standard applies to federal-sector ADEA claims); *Arroyo* v. *Shinseki*, Request No. 0520120563, 2013 WL 393575, at *2 (Jan. 25, 2013) (relying on district court decision that had distinguished *Gross* on the basis of Section 633a(a)'s "free from any" language); *Henry* v. *McHugh*, Appeal No. 0120103221, 2010 WL 5551957, at *4 (Dec. 23, 2010) (same).

petitioner does not expressly propose one. Instead, petitioner contends (*e.g.*, Br. 2-3, 18, 20, 22, 25-26, 27, 32-33, 45, 48-49, 52) that the federal-sector ADEA provision is violated whenever an agency *considers* age as a factor—even if age is not a motivating or substantial factor in the agency's ultimate decision. Thus, petitioner appears to suggest that the federal-sector ADEA provision imposes a causation standard even lower than the "motivating factor" standard Congress expressly adopted for private-sector Title VII claims following this Court's decision in *Price Waterhouse*, 42 U.S.C. 2000e-2(m). And petitioner would impose that diminished causation standard in the absence of any statutory language suggesting such a deviation from the default rule of but-for causation.

Petitioner's position on remedies is similarly out of step with other federal anti-discrimination laws. Petitioner states in a footnote (Br. 46 n.8) that her argument is limited to "the legal standard for proving a *violation* of the ADEA," and does not necessarily foreclose "the possibility" that a "but-for causation rule may be relevant at the *remedial* stage." Yet if petitioner is correct that—despite Section 633a(a)'s textual similarities to the private-sector ADEA and Title VII retaliation provisions in *Gross* and *Nassar*—Section 633a(a) overcomes the default rule of but-for causation with respect to liability, she provides no textual basis for resurrecting it with respect to particular remedies.[10]

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[10] In *Ford*, the D.C. Circuit held that while a plaintiff may obtain "declaratory and possibly injunctive relief" under Section 633a(a) by "proving that age was a factor in the [agency's] decision," "a but-for standard of causation" applies to the remedies of "instatement and backpay." 629 F.3d at 207. *Ford* did not ground that distinction

Petitioner's position thus appears to be that federal-sector ADEA claimants may obtain relief, potentially including reinstatement or back pay, based solely on a showing that a federal agency considered age *at all*. That result goes well beyond the constitutional cases on which petitioner relies, this Court's decision in *Price Waterhouse*, Congress's abrogation of that decision in the 1991 Act, and the EEOC's remedial regulations. Although the details of those schemes vary, under each, there is *some* limitation on the plaintiff's ability to recover in the absence of but-for causation. Yet petitioner offers no similar limitation. This Court should not lightly infer that Congress intended such anomalous results, particularly given that to the extent the private- and federal-sector provisions differ, the latter generally impose greater restrictions on federal employees' rights. See pp. 37-38, *supra*.

B. Although petitioner's position would create significant asymmetries, she incorrectly contends (Br. 57) that the government's position is "untenable," because it interprets the federal-sector ADEA and Title VII provisions to "offer less protection to employees than Title VII's original private-sector provision, as interpreted in *Price Waterhouse*." First, under *Price Waterhouse*, a plaintiff's showing that a protected trait was a "'motivating'" factor for a personnel practice triggered

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in the language of Section 633a. Instead, *Ford* based its remedy-specific causation standard on the need to avoid placing a plaintiff "in a better position" than he would have been in absent the agency's non-determinative consideration of age. *Ibid.* (quoting *Mt. Healthy*, 429 U.S. at 285). But that principle suggests that there should be no *liability* under the ADEA in the absence of but-for causation—not that the relief for a violation should be limited.

a "burden-shifting" framework that required the employer to disprove "but-for caus[ation]." *Nassar*, 570 U.S. at 348. Petitioner here seeks a lower causation standard that eliminates any consideration of but-for causation for liability purposes. It is thus petitioner who wants *more* protection for federal employees than state, local, or private employees enjoyed under Title VII's original private-sector provision. Second, the Court recognized in *Nassar* that, absent the enactment of Section 2000e-2(m), the motivating-factor standard would not be "an organic part" of the materially identical text of Title VII's private-sector provision. *Id.* at 351. Third, the Court likewise recognized in *Gross* and *Nassar* that differences between Title VII's and the ADEA's various provisions must be driven by the statutory language. Here the plain language of the ADEA's federal-sector provision requires but-for causation.

Petitioner further asserts (Br. 58) that on the government's view, Title VII's federal-sector provision "extinguished the right of federal employees" under equal protection law "to obtain injunctions" in the absence of but-for causation. But as demonstrated above, see pp. 27-28, *supra*, in equal protection cases where a plaintiff challenges discrete employment actions, this Court requires but-for causation. See *Lesage*, 528 U.S. at 21. And when Congress first extended Title VII to state and local governments, it imposed that same but-for standard. See *Nassar*, 570 U.S. at 351 (1991 Act showed that "the motivating-factor standard was not an organic part of Title VII"). Although Congress subsequently amended Title VII's private-sector provision to permit claimants to obtain certain injunctive relief based on a showing that a prohibited characteristic was a "motivating factor" in an employment decision, 42 U.S.C.

2000e-2(m), 2000e-5(g)(2)(B), "[the Court] cannot ignore Congress' decision * * * not [to] make similar changes to the ADEA." *Gross*, 557 U.S. at 174. Thus, in the absence of express statutory language, this Court should not read into Section 633a(a) authority for courts to grant injunctive or any other type of relief where the plaintiff has not demonstrated that consideration of age was a but-for cause of an adverse personnel action.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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NOVEMBER 2019

APPENDIX

1. 29 U.S.C. 623 provides in pertinent part:

Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

* * * * *

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member

or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

* * * * *

2. 29 U.S.C. 630(b) provides:

Definitions

For the purposes of this chapter—

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided,* That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

3. 29 U.S.C. 633a provides in pertinent part:

Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed

outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Equal Employment Opportunity Commission and by Librarian of Congress in the Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions: bona fide occupational qualification

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Duty of Government agency or official

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Applicability of statutory provisions to personnel action of Federal departments, etc.

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of sections

626(d)(3) and 631(b) of this title and the provisions of this section.

* * * * *

4. 42 U.S.C. 2000e(b) provides:

Definitions

For the purposes of this subchapter—

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

5. 42 U.S.C. 2000e-2 provides in pertinent part:

Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * * *

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

* * * * *

6. 42 U.S.C. 2000e-3(a) provides:

Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees

or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

7. 42 U.S.C. 2000e-5(g) provides:

Enforcement provisions

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons

discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

8. 42 U.S.C. 2000e-16(a) provides:

Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.