U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

January 23, 2020

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Babb v. Wilkie, No. 18-882

Dear Mr. Harris:

On January 17, 2020, this Court ordered the parties to file a supplemental letter brief addressing the prospective relief a federal employee may obtain under laws other than the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, against age-related policies, practices, actions, or statements that were not a but-for cause of an adverse employment action against the complaining employee. Although the government is not aware of any judicially enforceable relief, "there are a host of civil service regulations that would prohibit the types of policies that [petitioner is] concerned about, even if there wasn't * * * a particular person in court that was challenging it under Section 633a." 1/15/20 Oral. Arg. Tr. (Tr.) 63; see *id.* at 39, 54-57. These policies are often broader than the federal-sector ADEA, insofar as they do not require an adverse personnel action, are aimed at stopping problematic actions or practices before they give rise to a legal violation, or reflect broader merit-system principles and standards. And the policies may be enforced in a number of ways, including internal enforcement by the relevant agency and, in the unlikely event that an agency refuses to honor federal merit-system principles, an order from the Office of Personnel Management (OPM) requiring the agency to take corrective action. Although these procedures are not the same as a court-ordered injunction, they provide the same basic prospective relief by preventing agencies from adopting or continuing impermissible age-based policies.

1. The federal government has long adhered to anti-discrimination policies that are more expansive than those required by laws like Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the ADEA. For decades, it has been "the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment" on certain bases, including age, "and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency." Exec. Order No. 11,478, § 1, 3 C.F.R. 804 (1966-1970 comp.); see Exec. Order No. 12,106, § 1-102, 3 C.F.R. 263 (1978 comp.) (amending Executive Order No. 11,478 to include discrimination on the basis of age); see also, *e.g.*, Exec. Order No. 10,590, 3 C.F.R. 237 (1954-1958 comp.) ("[I]t is the policy of the United States Government that equal opportunity be afforded all qualified persons, consistent with law, for

employment in the Federal Government."). Likewise, the government has prohibited discrimination based on traits that are not, were not at the time, or were not considered to be protected by federal anti-discrimination statutes, such as parental status, genetic makeup, and sexual orientation. See Exec. Order No. 13,087, 3 C.F.R. 191 (1998 comp.); Exec. Order No. 13,145, 3 C.F.R. 235 (2000 comp.); Exec. Order No. 13,152, 3 C.F.R. 264 (2000 comp.). These principles are reflected in the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*, which provides, among other things, that "[a]ll employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management." 5 U.S.C. 2301(b)(2). These basic principles guide Executive Branch personnel practices and policies, which aim to ferret out and prohibit discriminatory policies and practices regardless of whether they ripen into a but-for cause of a particular personnel action. Below, we provide a non-exhaustive discussion of available mechanisms to identify and redress improper age-related policies, practices, actions, or statements.

a. *Agency Anti-Harassment Policies and Grievance Procedures.* Agencies have no interest in maintaining, and every incentive to eliminate, age-discriminatory policies, practices, actions, or statements before they become a but-for cause of an adverse personnel action and expose the agency to litigation and liability under the ADEA. To that end, agencies generally have robust anti-harassment and grievance procedures aimed at early and relatively informal resolution of these issues.

i. Anti-Harassment Procedures. Under the U.S. Equal Employment Opportunity Commission's (EEOC) Management Directive 715 (MD-715), model equal employment opportunity (EEO) programs must include policies and procedures for addressing all forms of harassment. See EEOC, *Instructions to Federal Agencies for MD-715: Section I: The Model EEO Program* § III(B), https://www.eeoc.gov/federal/directives/md715/section1.cfm (last visited Jan. 23, 2020). The EEOC has explained that internal anti-harassment programs are "intended to take immediate and appropriate corrective action, including the use of disciplinary actions, to eliminate harassing conduct *regardless of whether the conduct violated the law*." EEOC, *Model EEO Programs Must Have an Effective Anti-Harassment Program*, https://www.eeoc.gov/federal/model_eeo_programs.cfm (last visited Jan. 23, 2020) (emphasis added).

While the precise details of agency programs vary, they generally cover age-based harassment that does not rise to the level of violating the ADEA. For example, the State Department's anti-harassment policy prohibits employees from engaging in harassment based on age and other protected characteristics; explains that "[e]mployees who believe they are being harassed" on that basis "or who witness potential harassment are encouraged to report the offending conduct so that it can be stopped *before it becomes severe or pervasive and rises to a possible violation of law*"; and states that "[i]f the Department receives an allegation of discriminatory harassment, or has reason to believe such harassment is occurring, it will take the steps necessary to ensure that the matter is promptly investigated and addressed." U.S. Dep't of State, *3 Foreign Affairs Manual* § 1526, 1526.2(a) (2010) (emphasis added). The State Department's policy provides as an example of prohibited harassment "[v]erbal * * * abuse, 'jokes,' or offensive comments based on an individual's age." *Id.* § 1526.2.1(b)(3). It further explains that employees who discriminatorily harass others may be subject to discipline. *Id.* § 1526.2(f). Other agencies have in place similar policies.[1]

[1] See, *e.g.*, U.S. Dep't of the Interior, *Personnel Bulletin No. 18-01*, § 5 (Mar. 2018), https://www.doi.gov/sites/doi.gov/files/pb-18-01-prevention-and-elimination-of-harassing-conduct.pdf; U.S. Dep't of Veterans

ii. Grievance Procedures. Agencies also have grievance procedures designed to address lower-level "matter[s] of concern or dissatisfaction relating to the employment of an employee." U.S. Office of Personnel Mgmt., *Personnel Manual: Administrative Grievance System* 771-4 (Mar. 1986); accord, *e.g.*, U.S. Dep't of the Interior, *Departmental Manual*, 370 DM 771, at 1.1 (Apr. 2015) (*DOI Manual*) (grievance procedures "provide[] a fair, efficient, and orderly process for the review and resolution of disputes on employment-related and workplace matters"); see generally 5 C.F.R. 771.101 (requiring continuation of grievance procedures in effect as of October 11, 1995, until modified or replaced with another dispute resolution process). Grievance procedures generally provide an informal but structured means of addressing complaints regarding workplace conditions and other matters. See, *e.g.*, *DOI Manual* § 1.7(A) (grievance procedures "appl[y] to any matter of concern or dissatisfaction relating to the employment or conditions of an employment * * * of an employee or employees," unless specifically excluded). Although some grievance procedures exclude discriminatory harassment, others provide that harassment may be challenged by grievance. See, *e.g.*, U.S. Dep't of the Interior, *Personnel Bulletin No. 18-01*, § 9 (Mar. 2018), https://www.doi.gov/sites/doi.gov/files/pb-18-01-prevention-and-elimination-of-harassing-conduct.pdf; U.S. Dep't of Commerce, *Administrative Grievance Procedure: DAO 202-771*, §§ 4.02, 6.02 (June 2011), http://www.osec.doc.gov/opog/dmp/daos/dao202_771.html. Grievance procedures also may be used to address alleged violations of the OPM standards for employment practices, discussed below. See p. 6, *infra*.

b. *Agency EEO Processes*. Agency EEO processes also would provide relief regardless of whether a particular employee or applicant could demonstrate that an age-related practice, policy, action, or statement was a but-for cause of a personnel action.

i. Affirmative Programs. As noted above, it has long been "the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons." Exec. Order No. 11,478, § 1, 3 C.F.R. 804 (1966-1970 comp.). To that end, Executive Order No. 11,478 required each agency to "establish and maintain an affirmative program of equal employment opportunity for all civilian employees and applicants"; empowered the Civil Service Commission (CSC) to provide for the consideration of certain discrimination complaints; and authorized the CSC to issue regulations to "assure that the executive branch of the Government leads the way as an equal opportunity employer." *Id.* §§ 2, 4-5, 3 C.F.R. 804-805 (1966-1970 comp.).

Before enactment of the Title VII and ADEA federal-sector provisions, the CSC implemented that directive by issuing regulations specifying requirements for agencies' "continuing affirmative" EEO programs. 5 C.F.R. 713.201(a) (1971); see 5 C.F.R. 713.202 (1971). Those regulations required that agencies, *inter alia*, "[c]onduct a continuing campaign to eradicate every form of prejudice" on the covered bases "from the agency's personnel policies and practices and working conditions;" "[r]eview, evaluate and control managerial and supervisory performance" to ensure "vigorous enforcement of the policy of equal opportunity"; and "provide orientation, training, and advice to managers and supervisors" regarding implementation of the EEO policy. 5 C.F.R. 713.203(b) and (g) (1971). The CSC's regulations were premised on its authority under various civil service laws, as well as three executive orders, including Executive Order No. 11,478, discussed above. See 5 C.F.R. Pt. 713, at 217 (1971).

Affairs, *Harassment Prevention Program*, https://www.va.gov/ORM/HPP.asp (last updated Nov. 18, 2019); Nat'l Aeronautics & Space Admin., *Anti-Harassment Policy and Procedures Implementation Guide* 4 (2d ed. Dec. 2016), https://www.nasa.gov/sites/default/files/atoms/files/implementation_guide_tagged.pdf.

As the government has explained (Br. 41-43), even after Title VII's federal-sector provision was enacted in 1972, the CSC regulations continued to rely on and implement the government's broader EEO policy. When the CSC adopted a remedial regulation in 1972, it 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); see 37 Fed. Reg. 22,717, 22,723 (Oct. 21, 1972), even though Title VII's federal-sector provision—like that later added to the ADEA—is limited to "personnel actions," 42 U.S.C. 2000e-16(a). And the CSC regulations continued to require affirmative EEO programs, and to rely on the civil service laws and executive orders as sources of authority. See 5 C.F.R. 713.201(a), 713.203 (1973); 37 Fed. Reg. at 22,717-22,718; see also 5 C.F.R. Pt. 713, at 225 (1973).

The same remained true following enactment of the ADEA's federal-sector provision in 1974. The CSC added a parallel provision to its regulations "set[ting] forth the policy under which an agency shall establish a continuing program to assure nondiscrimination on account of age," 5 C.F.R. 713.501(a) (1975), and requiring the processing of age discrimination complaints largely under the procedures applicable to other forms of discrimination, 5 C.F.R. 713.511 (1975). The CSC continued to rely in part on the civil service laws and three executive orders as the source of its authority for these regulations. See 39 Fed. Reg. 24,351, 24,351-24,352 (July 2, 1974); see also 5 C.F.R. Pt. 713, at 233 (1975). In 1978, Executive Order No. 11,478 was amended to extend the EEO policy to cover age and to transfer authority from the CSC to the EEOC. Exec. Order No. 12,106, §§ 1-101, 1-102, 3 C.F.R. 263 (1978 comp.).

Today, EEOC regulations continue to implement the government's longstanding EEO policy by requiring that agencies have their own EEO programs, see 29 C.F.R. 1614.101-1614.102, which provide relief in the absence of any complaint or showing of a but-for relationship between conduct and a particular personnel action. That makes sense, both because the government's more general EEO policies remain in place, and because age-discriminatory policies and practices are likely to lead to violations of the federal-sector ADEA. For example, the regulations require that agencies "[c]onduct a continuing campaign to eradicate every form of prejudice or discrimination from the agency's personnel policies, practices, and working conditions," 29 C.F.R. 1614.102(a)(3), without any limitation to the "personnel actions" covered by 29 U.S.C. 633a(a). They likewise require that agencies "[r]eview, evaluate and control managerial and supervisory performance in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal opportunity, and provide orientation, training and advice to managers and supervisors to assure their understanding and implementation of the equal employment opportunity policy and program." 29 C.F.R. 1614.102(a)(5). Agencies must "[t]ake appropriate disciplinary action against employees who engage in discriminatory practices." 29 C.F.R. 1614.102(a)(6). And they must "[e]stablish a system for periodically evaluating the effectiveness of the agency's overall equal employment opportunity effort." 29 C.F.R. 1614.102(a)(10). The EEOC, in turn, "will review agency programs" to ensure "compliance" with its Management Directives and Bulletins. 29 C.F.R. 1614.102(e). Consistent with their broader application, the current regulations cite as sources of authority the relevant preexisting executive orders, in addition to anti-discrimination statutes. See 29 C.F.R. Pt. 1614, at 277 (citing Exec. Order No. 11,478, 3 C.F.R. 803 (1966-1970 comp.) (amended by Exec. Order No. 12,106, 3 C.F.R. 263 (1978 comp.)); Exec. Order No. 11,222, 3 C.F.R. 306 (1964-1965 comp.); Exec. Order No. 10,577, 3 C.F.R. 218 (1954-1958 comp.)).

ii. Complaint Processing. Even before the enactment of Title VII's federal-sector provision, the CSC's regulations required that agencies "[p]rovide for the prompt, fair, and impartial consideration and disposition of complaints involving issues of discrimination" as part of their affirmative EEO

programs. 5 C.F.R. 713.203(k) (1971). In line with their broad focus, the regulations applied to complaints involving all "personnel matters," not merely the "personnel action[s]" that would later be covered by Title VII and the ADEA. 5 C.F.R. 713.204(d)(5), 713.214(a)(1)(i) (1971). Today, "complaints of employment discrimination and retaliation prohibited by" Title VII, the ADEA, and various other anti-discrimination statutes are processed by agencies in accordance with EEOC regulations. 29 C.F.R. 1614.103(a); see 29 C.F.R. 1614.104-1614.110. But consistent with the broader history and sources of authority for the regulations, the EEOC's regulations provide multiple avenues for prospective relief absent a showing of but-for causation.

To begin, the EEOC regulations provide agencies with many opportunities to voluntarily eliminate discriminatory practices. For example, they require that agencies "make reasonable efforts to voluntarily settle complaints of discrimination as early as possible in, and throughout" the administrative process—and long before it is determined whether a complainant could show but-for causation. 29 C.F.R. 1614.603; see 29 C.F.R. 1614.104(b) (similar). Thus, "[a]ggrieved persons who believe they have been discriminated against on the basis of * * * age * * * must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter." 29 C.F.R. 1614.105(a). If counseling does not resolve the issue, the employee may file a complaint, which can lead to a more formal investigation and hearing. See 29 C.F.R. 1614.106-1614.109. At certain points in the process (generally up until 30 days before a hearing), the agency may make "an offer of resolution" to the complainant, which "to be effective, must * * * specify any non-monetary relief" that the agency will provide. 29 C.F.R. 1614.109(c)(3). In addition, the regulations require that agencies make alternative dispute resolution available to employees as part of both the pre-complaint and complaint process. 29 C.F.R. 1614.102(b)(2); see 29 C.F.R. 1614.105(b)(2), 1614.108(b); see also, *e.g.*, U.S. Dep't of Justice, *HR Order DOJ1200.1: Part 4. Equal Employment Opportunity Commission* § (C)(11) (Sept. 2013), https://www.justice.gov/jmd/hr-order-doj12001-part-4-equal-employment-opportunity.

If the agency does not voluntarily provide relief, and discrimination is found, the regulations could be read to mandate that the agency "eliminate any discriminatory practice" even absent but-for causation. 29 C.F.R. 1614.501(c)(2) (If "clear and convincing evidence indicates that, although discrimination existed at the time the personnel action was taken, the personnel action would have been taken even absent discrimination, the agency shall nevertheless eliminate any discriminatory practice and ensure it does not occur."); see 29 C.F.R. 1614.501(b)(2) (similar for applicant); see also 29 C.F.R. 1614.501(c)(4) (providing for "[e]xpunction from the agency's records of any adverse materials relating to the discriminatory employment practice"). That would make sense, because discriminatory practices themselves violate the government's EEO policies, and will likely lead to violations of the ADEA, even if a particular individual is not able to demonstrate but-for causation. That said, the EEOC has informed this Office that it views the remedies in Section 1614.501 as available only if the agency (or the EEOC) finds a violation of Section 633a, which the EEOC interprets to impose a motivating-factor standard, but the government believes requires but-for causation. But even if the EEOC's interpretation of the regulation is correct, the complaint process would still serve an important purpose: it would reveal a discriminatory practice that would in turn trigger the agency's responsibility to eliminate the practice under the affirmative program discussed above. See pp. 3-4, *supra*.

c. *Relief Through OPM.* OPM "serves as the chief human resources agency and personnel policy manager for the Federal Government." OPM, *Our Agency*, https://www.opm.gov/about-us/ (last visited Jan. 23, 2020). Among other functions, OPM has authority to "review the human resources

management programs and practices of any agency" to ensure that they "are consistent with the merit system principles," 5 C.F.R. 10.3, which include the requirement that "[a]ll employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to * * * age," 5 U.S.C. 2301(b)(2); see OPM, *Our Mission, Role & History: What We Do: Human Capital Management Leadership*, https://www.opm.gov/about-us/our-mission-role-history/what-we-do/#url=Human-CapitalManagement-Leadership (last visited Jan. 23, 2020). OPM is thus charged with identifying and eliminating employment policies that violate merit system principles. Two avenues for relief through OPM are most relevant here.

i. Challenges To Employment Practices. OPM regulations "establish principles to govern * * * the employment practices of the Federal Government generally, and of individual agencies, that affect the recruitment, measurement, ranking, and selection of individuals for initial appointment and competitive promotion in the competitive service." 5 C.F.R. 300.101. The regulations define "'employment practices'" to "include[] the development and use of examinations, qualification standards, tests, and other measurement instruments." *Ibid.*

OPM regulations provide two mechanisms for challenging impermissible age-based employment practices. First, "[a] candidate may file a complaint with an agency when he or she believes that an employment practice that was applied to him or her and that is administered by the agency discriminates against him or her on the basis of * * * age (as defined by the [ADEA], as amended)." 5 C.F.R. 300.104(c)(1). Notably, that language requires that the employment practice be *applied* to the candidate, but does not state that the application of such policy must cause an adverse personnel action. "The complaint must be filed and processed in accordance with the agency EEO procedures, as appropriate." *Ibid.* Second, even if Section 300.104(c)(1) were unavailable, where an employee "believes that an employment practice which was applied to him or her and which is administered or required by the agency violates a basic requirement in § 300.103," the "employee may file a grievance with [the] agency." 5 C.F.R. 300.104(c)(2). Section 300.103, in turn, sets out certain basic requirements for federal employment practices, including, *inter alia*, that they "not discriminate on the basis of * * * any * * * non-merit-based factor," and that there exist a "rational relationship between performance in the position to be filled * * * and the employment practice used." 5 C.F.R. 300.103(b)-(c). Again, this provision is triggered when the practice has been applied to the individual; it does not require that the complainant prove a but-for causal relationship to an adverse personnel action before filing a grievance.

ii. Review Of Personnel Management Functions By OPM's Merit System Accountability And Compliance Division. OPM has statutory authority to oversee personnel management functions and to delegate such functions to agencies. See 5 U.S.C. 1103(a)(5)(A), 1104(b), 1303. Pursuant to that authority, OPM establishes standards for personnel management and "maintain[s] an oversight program to ensure that activities under any authority delegated" to the agencies "are in accordance with" OPM standards and "the merit system principles," 5 U.S.C. 1104(b)(2)—including the 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," 5 U.S.C. 2301(b)(2); see 5 C.F.R. 10.1(b) (defining "'[m]erit system principles'" as "the principles for Federal personnel management that are set forth in section 2301(b) of title 5, United States Code"); see also 5 C.F.R. 10.2, 10.3, 250.102. If OPM finds that an agency to which it has delegated authority has taken action "contrary to any law, rule, or regulation, or * * * any standard" OPM has established—including the merit principles set forth in 5 U.S.C. 2301(b)—"the agency involved *shall* take any corrective action that [OPM] may require." 5 U.S.C. 1104(c)

(emphasis added); see 5 C.F.R. 10.3, 250.103. OPM also may suspend or revoke the agency's authority over personnel management functions if it fails to take the corrective action as directed. 5 C.F.R. 250.103.

All of this makes good sense. Where an employment practice is likely to lead to violations of the ADEA and violates merit principles, the government is empowered to proactively redress and eliminate it before it results in a but-for causal connection to an adverse personnel action.

d. *Relief Through The Office Of Special Counsel (OSC).* OSC possesses investigative and prosecutorial powers and is tasked with "safeguard[ing] the merit system by protecting federal employees and applicants from prohibited personnel practices." OSC, *About OSC*, https://osc.gov/Agency (last visited Jan. 23, 2020); see 5 U.S.C. 1211. OSC also may provide an avenue for relief regardless of whether a particular employee can show but-for causation.

i. Disclosures To OSC. Any "employee, former employee, or applicant for employment" may disclose to OSC (or an agency Inspector General or other employee designated to receive such disclosures) information that the individual "reasonably believes evidences" "a violation of any law, rule, or regulation; or * * * gross mismanagement * * * [or] an abuse of authority." 5 U.S.C. 1213(a). OSC "shall review such information" and "determine whether there is a substantial likelihood that the information discloses" a violation. 5 U.S.C. 1213(b). If that standard is met, OSC "shall promptly transmit the information * * * to the appropriate agency head," who must "conduct an investigation" and "submit a written report setting forth" the agency's findings. 5 U.S.C. 1213(c)(1)(A)-(B). The resulting report "shall include," *inter alia*, "a description of any action taken or planned as a result of the investigation, such as * * * changes in agency rules, regulations, or practices." 5 U.S.C. 1213(d)(5)(A).[2]

If OSC were to receive an allegation of an age-related practice, it likely would consider whether that practice resulted in a substantial likelihood of a violation of the ADEA. But if the Court agrees with the government that the ADEA requires but-for causation, OSC's analysis would not require determining that a specific individual could demonstrate that the practice was a but-for cause of a personnel action. Instead, because any employee, former employee, or applicant may make a disclosure—and because the threshold for referral is lower than the finding of a legal violation—it would be sufficient that the alleged policy created a substantial likelihood of a violation. For example, the credible disclosure by a human resources employee of an age-discriminatory policy likely would meet that standard, and thus likely would be referred to the agency for investigation and a written report on the agency's findings and corrective action.

ii. Allegations Of Violations Of Prohibited Personnel Practices. The CSRA makes it a "'prohibited personnel practice'" for "[a]ny employee who has authority to take, direct others to take, recommend, or approve any personnel action," to engage in certain actions "with respect to such authority." 5 U.S.C. 2302(a)(1) and (b). OSC has the authority to investigate allegations of "prohibited personnel practices," as defined by the CSRA. 5 U.S.C. 1212(a); 5 C.F.R. 1800.1(a); see generally 5 U.S.C. 1214; 5 C.F.R. 1800.1(c). While an age-based policy or practice could yield several types of "prohibited personnel practices," see, *e.g.*, 5 U.S.C. 2302(b)(1)(B), (10), and (12), OSC generally would defer the age-related allegation to the EEO process. See 5 C.F.R. 1810.1. In other instances, OSC might itself conduct the investigation. See OSC, *Prohibited Personnel Practices FAQs*,

[2] Indeed, even if OSC does *not* make a "positive determination" of a substantial likelihood of a violation, it may, with the complainant's consent, "transmit the information to the head of the agency," who "shall * * * inform the Special Counsel in writing of what action has been or is being taken and when such action will be completed." 5 U.S.C. 1213(g)(2).

https://www.osc.gov/Services/Pages/PPP-FAQ.aspx (last visited Jan. 23, 2020) (noting that OSC will "generally defer[] discrimination complaints" based on age "to the EEO process," but "[a]t its discretion, * * * OSC may investigate discrimination complaints on these bases, particularly where allegations include discrimination as well as other [prohibited personnel practices]").

To the extent that OSC reviewed an allegation of an age-related prohibited personnel practice, OSC likely would analyze the policy under 5 U.S.C. 2302(b)(1)(B), which makes it a prohibited personnel practice for an authorized employee to "discriminate for or against any employee or applicant for employment" "on the basis of age, as prohibited under" the federal-sector provision of the ADEA, and thus, on the government's view, incorporates a but-for standard. However, OSC's standard for investigations (like its standard for disclosures) does not require the finding of a legal violation. Instead, if OSC "determines that there are *reasonable grounds* to believe that a prohibited personnel practice has occurred, exists, or is to be taken which requires corrective action," OSC is required to report that determination to the Merit Systems Protection Board (MSPB), OPM, and the relevant agency. 5 U.S.C. 1214(b)(2)(B) (emphasis added). OSC "may include in the report recommendations for corrective action to be taken." *Ibid.* At that point, the agency is likely to correct the issue, based on its need to comply with merit principles and to avoid potential legal liability. In addition, if "the Special Counsel determines that there is reasonable cause to believe that any violation of any law, rule, or regulation has occurred *other than*" (as relevant here) a prohibited personnel practice, the Special Counsel "shall report such violation to the head of the agency involved" and "shall require, within 30 days * * * a certification by the head of the agency which states * * * what action has or is to be taken" to eliminate the violation. 5 U.S.C. 1214(e) (emphasis added).

e. *Constitutional Claims For Prospective Relief*. The equal protection component of the Fifth Amendment also provides a potential avenue for prospective relief (though in cases in which the CSRA provides administrative and judicial review, federal employees must channel constitutional claims through any applicable CSRA administrative process before proceeding in court, see *Elgin* v. *Department of the Treasury*, 567 U.S. 1, 11-15 (2012)).

Petitioner has pointed out (Br. 58) that in *Brown* v. *GSA*, 425 U.S. 820 (1976), this Court held that Title VII's federal-sector provision, 42 U.S.C. 2000e-16 (Supp. IV 1974), provides the "exclusive and pre-emptive" remedy for claims of federal employment discrimination, and thus that the district court lacked jurisdiction over claims brought by a plaintiff who failed to file a timely complaint under Title VII. 425 U.S. at 829; see *id.* at 822-824. *Brown,* however, addressed claims that could have been brought under Title VII, but were not. It thus expressed concern that if Title VII were not considered exclusive, plaintiffs could "circumvent[] by artful pleading" Title VII's "careful and thorough remedial scheme." *Id.* at 833; see generally *id.* at 832-835. But nothing in *Brown* suggests that Title VII somehow extinguished preexisting constitutional claims the substance of which could *not* be brought under Title VII.

To be sure, if Title VII's federal-sector provision incorporates by cross-reference the motivating-factor standard, as the lower courts have generally assumed,[3] then there is little substantive daylight

[3] See Tr. 58-59; 42 U.S.C. 2000e-16(d) ("The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder."); see also 42 U.S.C. 2000e-5(g)(2)(B) (providing for limited relief where "an individual proves a violation under section 2000e-2(m)"—which imposes a motivating-factor standard—"and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating

between a constitutional claim for race- or sex-based discrimination and a claim under Title VII. But that is not true for the federal-sector ADEA. No portion of the federal-sector ADEA cross-references the motivating-factor provisions of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, see 29 U.S.C. 633a; instead, as the government has explained, the ADEA's federal-sector provision requires but-for causation. Thus, even if the federal-sector ADEA provides the exclusive remedial mechanism for claims covered by the statute—an issue this Court has not addressed—to the extent an applicant or employee would have had a valid constitutional claim in the absence of a showing of but-for causation before the ADEA's enactment, but see *Gregory* v. *Ashcroft*, 501 U.S. 452, 470 (1991) (noting that age-discrimination claims are subject to rational-basis review), *Brown* would not foreclose that claim.

2. Two hypothetical scenarios help illustrate how the administrative processes discussed above would redress age-related policies, practices, actions, or statements regardless of whether they have ripened into a but-for cause of an adverse personnel action.

a. *"Younger Is Better" Policy*. Petitioner has relied upon (Br. 48) a hypothetical agency policy that requires hiring officials to "take account of older age as a 'minus factor' when conducting a holistic analysis of any job applicant's qualifications for a position at the agency." See Tr. 4-5, 67-69. Of course, in most instances, agencies have no incentive to impose such policies, which violate the government's EEO policies and merit principles, and which would invariably lead to violations of the federal-sector ADEA. Cf. 5 U.S.C. 8425 (providing mandatory separation ages for certain positions, including air traffic controllers and certain law enforcement officers). But if such a policy existed, any individual who was actually harmed by the policy—that is, who suffered an adverse personnel action because of it—would have a valid claim under Section 633a(a). The government's submission in this case is simply that—in light of Section 633a(a)'s plain text, the default rule of but-for causation, and this Court's decisions—an applicant who would not have been hired (or an employee who would not have been promoted) absent the policy cannot obtain judicial relief under the ADEA.

In any event, if such a policy existed, a number of mechanisms exist for eliminating it, regardless of whether a particular individual could show but-for causation. In the first instance, under the EEOC's agency affirmative program requirements, the agency would be required to "identify and eliminate discriminatory practices and policies," "[e]stablish a system for periodically evaluating the effectiveness of the agency's overall equal employment opportunity effort," "[r]eview, evaluate and control managerial and supervisory performance," and "[t]ake appropriate disciplinary action against employees who engage in discriminatory practices," even in the absence of a particular complaint. 29 C.F.R. 1614.102(a)(5), (6), and (10). If the policy was not eliminated through the affirmative program, an employee or applicant for employment could raise the issue with the agency through its pre-complaint and complaint-processing systems, which provide several opportunities for the agency to voluntarily remedy the issue before a formal decision is reached. And the formal complaint process provides an additional mechanism for identifying and eliminating the policy—if not directly, then by identifying a policy that, in turn, violates the affirmative program requirements. Under OPM regulations, the employee or applicant could file a

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factor"). Courts of appeals have applied Section 2000e-2(m) in federal-sector Title VII cases based on the view that Congress intended to provide "essentially the same guarantees against . . . discrimination that previously it had afforded private employees." *Ponce* v. *Billington*, 679 F.3d 840, 844 (D.C. Cir. 2012) (citation omitted); see Pet. App. 9a-11a; see also *Burns* v. *Johnson*, 829 F.3d 1, 9 (1st Cir. 2016); *Makky* v. *Chertoff*, 541 F.3d 205, 213-214 (3d Cir. 2008); *Galdamez* v. *Potter*, 415 F.3d 1015, 1021 (9th Cir. 2005); *Wolff* v. *Brown*, 128 F.3d 682, 683-684 (8th Cir. 1997). In this case, for example, the government did not challenge the court of appeals' conclusion that petitioner's Title VII federal-sector sex discrimination claim was subject to the motivating-factor standard. Pet. App. 10a.

complaint with the agency if the "employment practice" was "applied" to him, even if it did not result in a particular personnel action. 5 C.F.R. 300.104(c). Alternatively, the employee or applicant could allege to OSC that application of the policy to him constituted a prohibited personnel practice, and OSC could then conduct an investigation, or defer the issue to the EEOC. See 5 U.S.C. 1214; 5 C.F.R. 1800.1, 1810.1.

Moreover, even an individual to whom the "Younger Is Better" policy was *not* applied could obtain its elimination. The individual could inform OPM of the policy, which would in turn investigate the policy for compliance with merit system principles and OPM standards. If OPM found that such allegations were true, it would then order the agency to "take any corrective action that [OPM] may require," 5 U.S.C. 1104(c), and could suspend or revoke the agency's hiring authority if it failed to do so. Alternatively, the individual could disclose the policy to OSC, which could in turn require that the agency investigate and respond with the resulting "changes in agency rules, regulations, or practices" taken, 5 U.S.C. 1213(d)(5)(A). As the foregoing demonstrates, the notion that such a policy would survive these multiple administrative processes is simply implausible.

b. *Age-Related Statements.* This Court's order also noted the possibility of "age-related * * * statements that were not the but-for cause of an adverse employment action." 1/17/20 Order; see Tr. 20-23. An employee who wished to obtain prospective relief against such statements could raise the issue through the agency's anti-harassment policy. As discussed above, such policies are required for model EEO programs, and generally seek to stop unwelcome comments long before they rise to the level of a legal violation. Through the anti-harassment program, the agency likely would provide prospective relief and perhaps discipline the offending employee. Alternatively, the employee might seek relief through the agency's grievance procedure, since the harassment would affect the employee's working conditions. In addition, the employee could seek relief under the agency's EEO procedures discussed above.

* * * * *

In sum, the federal government has a web of mechanisms for identifying and redressing impermissible age-related policies, practices, actions, or statements, regardless of whether a particular federal employee or applicant can show a but-for relationship between that conduct and an adverse personnel action. Those mechanisms reflect the federal government's longstanding commitment to equal employment opportunity and merit principles. While the federal-sector ADEA serves an important role in that framework, it applies to a narrower set of actions, provides for a different procedural path, and makes available different remedies, including judicial relief, see 29 U.S.C. 633a(c). The statute should be construed consistent with its text, the default rule of but-for causation, this Court's precedent, and the statute's place in the broader regulatory framework, to provide a judicial remedy only where an employee or applicant can demonstrate that age was a but-for cause of an adverse personnel action.

Sincerely,

/s/ Noel J. Francisco

Noel J. Francisco
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cc: See Attached Service List

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