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January 23, 2020

Scott S. Harris
Clerk of Court
Supreme Court of the United States
One First Street, NE
Washington, DC 20543

Re: *Noris Babb v. Robert Wilkie, Secretary of Veterans Affairs*, No. 18-882

Dear Mr. Harris:

The question presented in this case is whether 29 U.S.C. § 633a(a)'s broad command that federal personnel actions "shall be made free from any discrimination based on age" is limited to only those actions where discrimination is the but-for cause of a particular employment decision. In its brief and at oral argument, the Government has confirmed that, on its view of Section 633a(a), even if an applicant is subjected to a facially discriminatory hiring policy, a personnel action made pursuant to that policy could still be "made free from any discrimination." *See* Gov't Br. 32-33; Tr. 38-39; *see generally* Pet'r Br. 48-49. That argument violates the plain statutory text.

When pressed on the practical consequences of its argument that Section 633a(a) does not provide a remedy in such circumstances, the Government stated that such victims *would* have a remedy under "a whole host of laws, wholly apart from Section 633a." Tr. 56-57. The Government pointed specifically to 5 U.S.C. § 2301(b)(2) of the Civil Service Reform Act (CSRA), which states that federal employees and applicants "should receive fair and equitable treatment in all aspects of personnel management without regard to age," and to the civil service laws more generally. Tr. 38, 54-55, 62. As to relief, the Government indicated that civil service protections could be enforced through "injunctive relief" awarded through unspecified administrative mechanisms. *Id.* at 55-56, 62. The Government indicated that such mechanisms would provide meaningful prospective remedies to individuals who had suffered age discrimination, even if they could not prove that discrimination was the but-for cause of an adverse decision. *Id.*

We do not yet know exactly what administrative mechanisms the Government has in mind. But the civil service laws do not entitle an individual employee to any form of judicial or administrative process in which an impartial adjudicator can order injunctive relief in response to a particular adverse employment action, *except* by relying on Section 633a. Section 2301(b)(2) is a non-self-executing and unenforceable "Merit System Principle" that confers no substantive rights on federal employees or applicants. It is not enforceable by a lawsuit and cannot provide any form of injunctive relief, either in court or in a formal administrative proceeding. Indeed, Section 2301

has repeatedly been declared unenforceable by federal courts, the Merit Systems Protection Board (MSPB), the Government Accountability Office (GAO), and the Comptroller General.

Nor is there a viable path to obtaining such relief under other civil service laws or regulations, without relying on Section 633a. The CSRA protects against age discrimination in the federal civil service by setting forth a specific list of "prohibited personnel practices" in 5 U.S.C. § 2302, and it establishes various administrative remedies for such discrimination. But those remedies are ultimately grounded on a violation of the substantive rights established by Section 633a. Indeed, Section 2302(b)(1) expressly cross-references Section 633a and states that the relevant "prohibited personnel practice" is for an agency to "discriminate for or against any employee or applicant for employment . . . on the basis of age, *as prohibited under sections 12 and 15 of the [ADEA] (29 U.S.C. 631, 633a)*." 5 U.S.C. § 2302(b)(1)(B) (emphasis added). Section 633a is thus the only substantive legal basis for enforcing protections against age discrimination under the civil service laws. And because the ADEA otherwise precludes any other remedies for age discrimination, neither the Constitution nor any other statute grants federal employees rights or relief against such discrimination.

Congress enacted Section 633a to strengthen employee rights and supplant the patchwork of unreliable administrative remedies that existed before 1974. It wanted to give victims of age discrimination the right to pursue claims before impartial administrative and (if necessary) judicial adjudicators. And it wanted those adjudicators to apply Section 633a(a)'s broad and unequivocal discrimination ban. This Court should give that ban its full effect.[1]

I. SECTION 2301 IS NOT SELF-EXECUTING AND IS NOT A BASIS FOR RELIEF IN JUDICIAL OR AGENCY PROCEEDINGS

1. Until now, Section 2301(b)(2) is the only provision of law the Government has identified under which a federal employee, in its view, may obtain prospective administrative or judicial relief against age discrimination that was not the but-for cause of an adverse employment decision. In its merits brief, the Government suggested that an agency's facially discriminatory policy "might" violate Section 2301(b)(2), even when not the but-for cause of a particular decision. Govt. Br. 32. At oral argument, the Government affirmatively stated that such a policy "clearly would be a violation of [this] civil service provision," and it later indicated that Section 2301 would give rise to "injunctive relief," albeit through administrative mechanisms. Tr. 39, 54-57.

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[1] In preparing this response, petitioner's counsel consulted with a range of experts in the federal discrimination and civil service laws, from former government service, private practice, and academia—including a former Executive Director and General Counsel of the MSPB, a former Associate Special Counsel in the Office of Special Counsel (OSC), in-house counsel for amicus the National Treasury Employees Union (which represents 150,000 federal employees), and private practitioners with decades of experience. When asked about the question posed in the Court's Supplemental Briefing Order, none was aware of any "administrative or judicial relief" that is available to a federal employee "under laws other than the ADEA . . . against age-related policies, practices, actions, or statements that were not the but-for cause of an adverse employment action against [that] employee."

Petitioner respectfully disagrees with any suggestion that an aggrieved employee can invoke Section 2301 to obtain prospective relief for age discrimination in connection with a particular adverse personnel decision. Section 2301 is a *non-enforceable* statement of "merit system principles" intended to guide how federal "personnel management should be implemented." 5 U.S.C. § 2301(b). Those principles "are merely hortatory and provide no independent basis for action by either the agency or an employee." *Middleton v. Dep't of Justice*, 23 M.S.P.R. 223, 227 n.6 (1984), *aff'd*, 776 F.2d 1060 (Fed. Cir. 1985). Section 2301 does not establish substantive legal rights; nor does it create enforceable remedies, judicial or administrative, for federal employees. As the Seventh Circuit has concluded, Congress deliberately chose not to "provide for administrative or judicial review of violations of § 2301's principles." *Schrachta v. Curtis*, 752 F.2d 1257, 1260 (7th Cir. 1985).

This conclusion has been repeatedly embraced by other federal courts, the MSPB, the GAO, and the Comptroller General. As the GAO has emphasized, both the "courts and the MSPB have uniformly ruled that [the Section 2301] principles *are not legally enforceable prohibitions*." GAO, Legal Principles Applicable to Selection of Federal Advisory Committee Members at 8 (Oct. 18, 2018), https://www.gao.gov/decisions/other/303767.pdf (emphasis added).[2] Indeed, the

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[2] *See, e.g.*, *Lien v. MSPB*, 152 F.3d 948, 1998 WL 171407, at *2 (Fed. Cir. 1998) ("The merit systems principles set forth in section 2301 are only intended to furnish guidance to federal agencies and do not constitute an independent source of Board jurisdiction."); *Miller v. MSPB*, 198 F. App'x 943, 945 (Fed. Cir. 2006) ("Likewise, the merit systems principles set forth in 5 U.S.C. § 2301 do not create a cause of action or establish Board jurisdiction."); *Phillips v. Gen. Servs. Admin.*, 917 F.2d 1297, 1298 (Fed. Cir. 1990) (stating that violations of the merit system principles do not create cause of action); *Dep't of Treasury v. Fed. Labor Relations Auth.*, 837 F.2d 1163, 1167-68 (D.C. Cir. 1988) (holding that the "vague principles" contained in 5 U.S.C. § 2301 do not provide an "operative basis for claims"); *Schrachta*, 752 F.2d at 1260 ("There is no implied right of action under § 2301 to remedy alleged violations of the section's principles."); *Ebron v. Dep't of Def.*, 2015 WL 66568, at *2 n.3 (M.S.P.B. Jan. 6, 2015) (stating that "a claimed violation of the merit systems principles under 5 U.S.C. § 2301 does not alone serve as a basis for Board jurisdiction"); *Neal v. Dep't of Health & Human Servs.*, 46 M.S.P.R. 26, 28 (1990) ("The merit systems principles are intended to furnish guidance to Federal agencies and do not constitute an independent basis for legal action."); *Wells v. Harris*, 1 M.S.P.R. 208, 214-15 (1979) (explaining that the merit system principles merely "furnish guidance to Federal agencies" and "are not self-executing"); *Hicks v. Dep't of Army*, 2012 WL 11893832, at *3 (M.S.P.B. Dec. 26, 2012) ("The Board has long held that the merit systems principles set forth in 5 U.S.C. § 2301 are not self-executing."); *LeBlanc v. Dep't of Transp.*, 60 M.S.P.R. 405, 417 (1994) ("[T]he merit system principles set forth at 5 U.S.C. § 2301(b) are not self-executing . . . ."), *aff'd,* 53 F.3d 346 (Fed. Cir. 1995); *D'Leo v. Dep't of Navy*, 53 M.S.P.R. 44, 48 (MSPB 1992) ("[W]hile section 2301(b)(8)(A) of title 5 provides, *inter alia*, that employees should be protected against arbitrary actions, such section is only a merit system principle. It is not self-executing and does not provide an independent source of Board jurisdiction."); *Shelnutt v. Dep't of Justice*, 2011 WL 12516569, at *3 n.3 (M.S.P.B. Nov. 25, 2011) (stating that "the merit system principles are not self-executing" and "a prohibited personnel practice is not established under § 2302(b)(12) merely by showing that an action violated the merit system principles"); *Brown v. Dep't of Def.*, 12 M.S.P.R. 343, 346

MSPB has repeatedly rejected the argument that an employee claiming age discrimination can invoke Section 2301 as an "independent basis for legal action." *Ebron v. Dep't of Def.*, 2015 WL 66568, at *2 n.3 (M.S.P.B. Jan. 6, 2015); *see also Pyo, Becky T. v. Navy*, 2013 WL 3224247 (M.S.P.B. Jan. 28, 2013).

This settled understanding tracks the legislative history: The CSRA's Conference Report states that the "principles" set forth in Section 2301 "themselves may not be made the basis of a legal action by an employee or agency." H.R. Rep. No. 95-1717, at 128 (1978) (Conf. Rep.); *see also Schrachta*, 752 F.2d at 1260 (citing legislative history); *Wells v. Harris*, 1 M.S.P.R. 208, 214-15 (1979) (same). Indeed, the Government has itself recognized "that alleged violations of the merit systems principles set forth in 5 U.S.C. § 2301 cannot create an individual cause of action or an independent basis for the jurisdiction of the [MSPB]." *Waters v. MSPB*, 101 F.3d 716, 1996 WL 663313, at *1-2 (Fed. Cir. 1996) (agreeing with Government's position); *see also* U.S. Br. 33-34, *Peagle v. Dep't of the Interior*, No. 93-5112, 1994 WL 16776900 (D.C. Cir. Apr. 6, 1994).

2. The CSRA's structure confirms that Section 2301 is not itself directly enforceable, judicially or administratively. Whereas Section 2301 merely states that federal agencies "should" implement federal personnel management in a way that is "consistent with the [merit system] principles," Section 2302 operationalizes those principles by establishing a list of specific "prohibited personnel practice[s]" that federal employees may not commit. Section 2302(b)(1) generally covers discrimination claims, and Section 2302(b)(1)(B) addresses age discrimination. But Section 2302(b)(1)(B) directly incorporates the liability standard set forth in Section 633a:

> (b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—(1) discriminate for or against any employee or applicant for employment . . . (B) on the basis of age, *as prohibited under sections 12 and 15 of the [ADEA] (29 U.S.C. 631, 633a)*.

5 U.S.C. § 2302(b) (emphasis added).[3]

(1982) (same); *In re Antonio O. Lee—Reconsideration*, 1989 WL 241535, at *1 (Comp. Gen. Dec. 6, 1989) (explaining that "the principles themselves may not be made the basis of a legal action by an employee or agency"); *Letter to The Honorable Alan Cranston of the United States Senate*, B-217675, 1986 WL 63967, at *11-12 (Comp. Gen. July 29, 1986) (explaining that Section 2301 "does not, in itself, confer any substantive rights on individual employees").

[3] Section 2302(b) also creates a more general "prohibited personnel practice" barring an employer from "tak[ing] or fail[ing] to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title." 5 U.S.C. § 2302(b)(12). But as the text makes clear, that provision does not make Section 2301's principles directly enforceable, except to the extent a *separate* "law, rule, or regulation" "implement[s]" or "directly concern[s]" them. *Id.*; *see also, e.g.*, *Shelnutt*, 2011 WL 12516569, at *3 n.3. The only arguable candidate appears to be 5 C.F.R. § 300.103(c)—containing OPM's general ban on age discrimination—but

The MSPB website confirms the structural relationship between Section 2301's hortatory principles and Section 2302(b)(1)'s legally effective discrimination ban:

> The first prohibited personnel practice (PPP), 5 U.S.C. § 2302(b)(1), is very similar to the second merit system principle [Section 2301(b)(2)], but the biggest difference between the two is that all of the merit system principles represent ideals for the way the Federal government should be run *but they are not enforceable, standing alone*. Thus, many of the principles have a similar PPP that serves to enforce the ideals represented by the principle.

Prohibited Personnel Practices, https://www.mspb.gov/ppp/ppp.htm (last visited Jan. 22, 2020) (emphasis added). As the website also emphasizes, "*[u]nlike the merit system principles*, Congress made the prohibition of these personnel practices enforceable, so that employees would know of them and could be disciplined for committing a PPP." *Id*. (emphasis added).[4]

All this makes clear that an aggrieved employee *cannot* obtain injunctive relief—or indeed, *any* judicial or administrative remedy—under Section 2301 of the CSRA. Instead, the employee must pursue any civil service remedy through Section 2302, which, as noted above, only bars discrimination "prohibited under" Section 633a(a).

II. THERE IS NO OTHER JUDICIAL OR ADMINISTRATIVE REMEDY FOR AGE DISCRIMINATION BEYOND THAT PROVIDED IN SECTION 633a(a)

At oral argument, the Government also asserted that meaningful relief for age discrimination—without proof of but-for causation—would also be available under the civil service laws, "wholly apart from Section 633a." Tr. 56-57, 62. Again, petitioner respectfully disagrees. As best we can tell, there is no real-world judicial or administrative process that could provide relief to a victim of age discrimination in circumstances where Section 633a(a) cannot. Any relief available obtainable by such victims under the CSRA is limited to conduct that otherwise violates Section 633a(a). And Section 633a itself preempts any claim for judicial relief under other statutes or the Constitution.

A. Section 633a Governs "Prospective Administrative Or Judicial Relief" For Federal Employees Under The Civil Service Laws

There is no independent administrative scheme that provides remedies for age discrimination when such discrimination does not substantively violate Section 633a(a). Rather, administrative remedies for federal employees simply provide—at most—alternative *procedural*

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that provision merely "reflect[s] the statutory prohibition[]"in Section 633a. *See* 79 Fed. Reg. 43,919 (July 29, 2014). In any event, it would be strange for age discrimination to be covered by Section 2302(b)(12)'s catchall when it is more specifically addressed by Section 2302(b)(1)(B).

[4] The Office of Personnel Management (OPM) has a role in ensuring that federal agencies implement Section 2301's merit system principles, including by "assessing the management of human capital" to take account of merit system principles under 5 U.S.C. § 1103(c)(1), (2)(F). But Section 1103(c) "does not create a substantive right" to judicial or administrative relief for a Section 2301 violation. *See Burch v. United States*, 99 Fed. Cl. 377, 383 (2011).

pathways for obtaining relief for violations of the substantive standard established in Section 633a(a). Thus, the apparent premise of the Government's position—that Section 633a(a) is merely "an additional avenue" for relief that provides victims of age discrimination "nothing more" than the CSRA, *see* Tr. 56-57—is mistaken. To the contrary, the remedial scheme for federal-sector age discrimination rests almost entirely upon the substantive legal foundation of Section 633a(a).

To see how this is so, it is useful to consider the various procedural options that the hypothetical federal employee posited in this Court's supplemental briefing order might have to challenge "age-related policies, practices, actions, or statements that were not the but-for cause of an adverse employment action against [that] employee." As shown below, each of the viable options is firmly rooted in the substantive law of the ADEA.

First, that federal employee would have the option of bypassing administrative remedies and filing an age discrimination complaint directly in federal court, under the ADEA. *See* 29 U.S.C. § 633a(c); 29 C.F.R. § 1614.201(a). The employee could do so after first giving the EEOC 30 days' advance notice of his intent to file the case. 29 U.S.C. § 633a(d); 29 C.F.R. § 1614.201(a). Of course, under this option, the substantive law that the court would apply is Section 633a(a). This is the *only* direct judicial remedy available, as the CSRA provides no such remedy.

Second, the employee could instead file an administrative complaint and exhaust administrative remedies through the agency's internal EEO process, 29 C.F.R. § 1614.201(c). If the agency prevails, the employee could seek further administrative review at the EEOC, and could eventually appeal an adverse EEOC decision to federal court. 29 U.S.C. § 633a(b); 29 C.F.R. §§ 1614.401, 1614.407. Just as with the first option, however, Section 633a provides the substantive legal standards that would govern any adjudication. *See* 29 C.F.R. § 1614.103(a) (limiting EEOC complaints to violations of specific civil rights statutes, such as the ADEA).

Third, if an employee wished to pursue his age discrimination claim through the civil service process, he could try to file a "mixed case appeal" directly with the MSPB (with a potential subsequent appeal to district court or the EEOC). *See* 5 U.S.C. § 7702(a), (b), (e); 5 C.F.R. §§ 1201.151, 1201.157; 29 C.F.R. § 1614.302. But the MSPB's jurisdiction is sharply limited and covers only a narrow set of serious "adverse action[s]"—such as removals, reductions in grade or pay, and longer-term suspensions, *see* 5 U.S.C. § 7512; 5 C.F.R. § 1201.3. Accordingly, an employee has no direct administrative recourse to the MSPB for many of the most common age discrimination claims. For example, it is well-settled that "an unsuccessful candidate for a federal civil service position has no right to appeal his nonselection." *Alvarez v. Dep't of Homeland Sec.*, 112 M.S.P.R. 434, 436 (2009).

More fundamentally, though, the MSPB would only consider the discrimination claim to the extent that it qualifies as a "prohibited personnel practice" under Section 2302(b) and is raised as an affirmative defense in such a mixed case appeal. *See, e.g.*, *Hicks v. Dep't of Army*, 2012 WL 11893832, at *3 (M.S.P.B. Dec. 26, 2012) (rejecting appeal based on Section 2301 for failure to state prohibited personnel practice under Section 2302); 5 U.S.C. § 7701(c)(2). And as explained above, Section 2302(b) prohibits age discrimination *only* to the extent such discrimination violates Section 633a. *See supra* at 4-5. Hence, if, as the Government asserts, a victim of age discrimination cannot establish a violation of Section 633a(a) without showing but-for causation as to an adverse decision, the same will be true before the MSPB under Section 2302(b).

Fourth, an employee who has not suffered a serious "adverse action" appealable to the MSPB could try to complain to the Office of Special Counsel (OSC). As an initial matter, OSC is *not* an adjudicative body akin to the EEOC or MSPB. Its role is investigative and prosecutorial, and it does not itself provide an aggrieved employee with any process remotely akin to a court or agency adjudication. *See* 5 U.S.C. §§ 1212, 1214. Moreover, because OSC's relevant authority extends only to "prohibited personnel practices," the substantive law that OSC would use to examine the complaint is Section 2302(b), which, as noted above, simply incorporates the liability standard from Section 633a. 5 U.S.C. §§ 1212(a), 1214(a); 5 C.F.R. § 1800.1(a).

The OSC remedy is inadequate for other reasons too. As a matter of policy, OSC's standard practice is to send employees alleging discrimination claims to the EEOC, instead of investigating such cases itself.[5] At that point, the EEOC would adjudicate the employee's claim by applying Section 633a(a). Moreover, although OSC has authority to request corrective action from the agency or bring an administrative claim on the employee's behalf in the MSPB, that authority is *discretionary*. *See* 5 U.S.C. § 1214(b)(2)(B), (C). If OSC chooses not to bring such a claim, the employee is "out of luck" and has no ability to initiate a formal proceeding for administrative or judicial relief on his own. *Krafsur v. Davenport*, 736 F.3d 1032, 1034 (6th Cir. 2013).

Fifth, an employee covered by a collective bargaining agreement (CBA) could also file a grievance through the CBA's procedures to the extent the CBA allows for complaints of discrimination. *See* 5 U.S.C. § 7121(d); 29 C.F.R. § 1614.301(a). But that option would only be available to those employees subject to a CBA, which is not true of much of the federal workforce. And the scope of relief would be governed by the terms of the bargaining agreement, which do not generally create substantive prohibitions on discrimination ranging beyond Section 633a(a), Title VII and other applicable statutes.

Sixth, an employee could theoretically seek assistance from OPM. OPM is required "to maintain an oversight program to ensure that [agencies] are in accordance with the merit system principles." 5 U.S.C. § 1104(b)(2). OPM's role in this regard is to act as a kind of watchdog over agencies' self-regulation under the civil service laws. Accordingly, it may require individual agencies to establish a system of accountability for merit system principles and may review HR management programs and practices of any agency and report to the head of the agency and the President on the effectiveness of those programs. 5 C.F.R. §§ 10.2, 10.3. OPM is also authorized to require agencies to take corrective action when they have acted "contrary to any law, rule, or regulation" that OPM administers. 5 U.S.C. § 1104(c); *see* 5 C.F.R. § 250.103. But OPM has made clear that its regulation prohibiting age discrimination—5 C.F.R. § 300.103(c)—itself merely "reflect[s] the statutory prohibition[]" embodied in Section 633a, not any independent

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[5] *See* 5 C.F.R. § 1810.1 (authorizing the Special Counsel to "investigate allegations of discrimination prohibited by law, as defined in 5 U.S.C. 2302(b)(1)," but explaining that the Special Counsel will generally "defer" to EEOC procedures); U.S. OSC, Prohibited Personnel Practices FAQ re discrimination complaint policy, https://osc.gov/Services/Pages/PPP-FAQ.aspx (explaining that OSC "generally defers discrimination complaints" to the EEO process, because "it was not intended that OSC duplicate or bypass" the EEO process); *see also* 5 U.S.C. § 1216(b).

prohibition arising from the civil service laws. *See* 79 Fed. Reg. 43,919-20 (July 29, 2014) (also noting that OPM "lacks the authority to revise the statutory elements for the ADEA").

Moreover, OPM is *not* an adjudicative forum where individual employees obtain prospective relief for individual adverse employment actions. We are unaware of any existing mechanism for an individual employee to bring his claim before OPM, or of real-world instances where OPM has ever used its authority in individual cases on behalf of aggrieved employees. Indeed, OPM's own website directs victims of "unlawful discrimination on the basis of age" in the hiring process to "either contact an EEO counselor . . . or give notice of intent to sue to the Equal Employment Opportunity Commission (EEOC)." OPM, Frequently Asked Questions, https://www.opm.gov/faqs/QA.aspx?fid=a9a3f49e-901d-42e1-a720-442a0393c6df&pid=60184 72a-8a1b-4e47-a48a-3125540dac75 (last visited Jan. 23, 2020). And on a page setting forth "employee rights," OPM states "[f]ederal employees have a variety of appeal and grievance rights. Depending on the issues involved, they may pursue the matter within their agency, appeal to the Merit Systems Protection Board (MSPB) or file a complaint with the Equal Employment Opportunity Commission (EEOC) or the Office of Special Counsel (OSC)"—i.e., *not* with OPM. OPM, Employee Relations, https://www.opm.gov/policy-data-oversight/employee-relations/employee-rights-appeals/#url=Appeals (last visited Jan. 23, 2020); see also 5 C.F.R. § 300.104. OPM itself thus recognizes that aggrieved employees should look elsewhere for relief.

Finally, an employee could also file an administrative grievance with his employer or an appropriate human resources official, depending on his agency's own particular set of practices. But any relief would be dependent on the grace of the agency itself, with no option of independent judicial or administrative review by impartial adjudicators. That does not provide an aggrieved employee with any neutral forum to adjudicate or even investigate his claim. Moreover, there is no reason to believe federal agencies would voluntarily issue prospective relief for age discrimination that is *not* unlawful under Section 633a. Although many agencies presumably have their own anti-discrimination personnel policies, nothing prevents such agencies from interpreting such policies to require a but-for causal relationship between age and a particular adverse decision. After all, that is the approach that—in the Government's view—reflects the only reasonable meaning of the phrase "discrimination based on age" and protects employees against the only injuries that "actually matter[]." Gov't Br. 15-18, 34, 45; *see also id.* at 38-39 (explaining that because pre-ADEA anti-discrimination Executive Orders use "because of" language, they "do not appear to impose . . . something less than but-for causation"). Until oral argument, the Government was not even willing to concede that Section 2301(b)(2)—the hortatory merit system principle condemning age discrimination—would implicate discrimination that is not the but-for cause of a specific personnel decision. *Id.* at 34 (saying only that such discrimination "might" violate Section 2301(b)(2)). There is no reason to think other agencies would be more generous.

The CSRA and its associated administrative schemes thus do not provide an alternative remedial framework to Section 633a(a)—they simply apply the same standard in a different procedural posture. Any suggestion that the civil service laws establish a shadow anti-discrimination regime available to federal employees—with comparable prospective remedies and a *more* lenient liability standard—lacks merit. All meaningful federal-sector remedies for age discrimination ultimately depend on Section 633a(a). And narrowing the scope of that provision would thus leave a gaping hole in the existing federal-sector anti-discrimination framework.

B. Section 633a(a) Preempts Any Other Alternative Remedies

Other than Section 633a and the CSRA, there is no other law that can provide "prospective administrative or judicial relief" to federal employees alleging age discrimination. Suppl. Briefing Order. The ADEA and the CSRA, which operate in tandem, both have preemptive effect and together occupy the field of age-related federal workplace grievances.

This Court has made clear that the CSRA's "statutory review scheme is exclusive," and the statute's "comprehensive" framework reflects Congress's intent to deny covered employees additional avenues of review for any constitutional and statutory claims involving adverse personnel actions. *See Elgin v. Dep't of Treasury*, 567 U.S. 1, 10-13 (2012); *see also Grosdidier v. Chairman, Broad. Bd. of Governor*, 560 F.3d 495, 497 (D.C. Cir. 2009) (Kavanaugh, J.). The CSRA, however, expressly exempts claims under the ADEA's federal-sector provision from its otherwise-exclusive remedial scheme. *See* 5 U.S.C. § 7703(b)(2); *Elgin*, 567 U.S. at 13.

Section 633a—like its Title VII counterpart—is in turn the "exclusive, pre-emptive" "scheme for the redress of federal employment [age] discrimination." *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 828-29 (1976) (holding that Title VII's federal-sector provision preempts constitutional claims over the same subject matter). Following the logic of this Court's decision in *Brown*, courts have consistently read Section 633a as preempting constitutional and statutory discrimination claims. *See Tapia-Tapia v. Potter*, 322 F.3d 742, 745 (1st Cir. 2003); *Chennareddy v. Bowsher*, 935 F.2d 315, 318 (D.C. Cir. 1991); *Purtill v. Harris*, 658 F.2d 134, 137 (3d Cir. 1981); *Paterson v. Weinberger*, 644 F.2d 521, 524 (5th Cir. 1981).

The combined effect of these two statutes is therefore to produce an exclusive, comprehensive, and integrated remedial system for federal employees—one that is *grounded in* Section 633a's substantive liability standard. No constitutional or other statutory remedies exist.

III. CONGRESS WANTED SECTION 633a(a) TO PROVIDE A JUDICIAL REMEDY FOR DISCRIMINATION, REGARDLESS OF ADMINISTRATIVE REMEDIES

As explained above, there are *no* mechanisms—"other than the ADEA"—for reliably obtaining "prospective administrative or judicial relief" from "age-related policies, practices, actions, or statements that were not the but-for cause of an adverse employment action." Suppl. Briefing Order. But even if some form of administrative remedy somehow existed, that would have no impact on the proper interpretation of Section 633a, for at least two reasons.

First, the very purpose of Section 633a was to provide aggrieved individuals a *judicial* forum for adjudication of their age discrimination claims, because the administrative remedies available at that time had proven ineffective. *See* 29 U.S.C. § 633a(c); Pet'r Br. 33.

As this Court explained in *Brown*, Congress enacted Title VII's federal-sector provision because it concluded that administrative remedies, often "handled parochially within each federal agency," were insufficient to provide federal workers with "just resolutions of complaints and adequate remedies." 425 U.S. at 825. That same concern animated passage of Section 633a two years later. *See Bunch v. United States*, 548 F.2d 336, 339 (9th Cir. 1977) ("The age discrimination policy, like the antidiscrimination policy of Title VII, was seriously hampered by the lack of any

effective enforcement machinery prior to the amendments in issue."). As Congress recognized, "[w]hile it is the *policy* of the Federal Government to oppose age discrimination, there is no mechanism to root it out." Senate Special Comm. on Aging, 93d Cong., *Improving the Age Discrimination Law*, 14 (Comm. Print 1973). The existing regime—under which federal employees were protected from age discrimination only through executive orders and a haphazard agency enforcement mechanism—was plainly inadequate. *Id.*; *see also Bunch*, 548 F.2d at 339 (noting that Section 633a's primary purpose was to "create[] new procedures and remedies for the vindication of pre-existing discrimination claims").

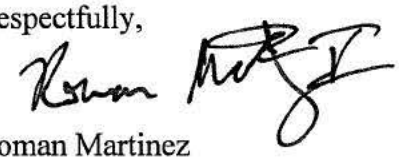
Second, even if the availability of an administrative remedy could be a basis for reading Section 633a(a) more narrowly, that remedy would at least need to provide individual victims of discrimination with equivalent or similar protections to the judicial remedy available under the ADEA. At a minimum, that would require a forum in which (1) a victim would have the right to have his claim meaningfully heard by an independent adjudicator; (2) the adjudicator would take evidence and apply clear and uniform legal standards prohibiting discrimination; and (3) the adjudicator would be empowered to grant a full range of prospective relief, including injunctions, priority reconsideration, EEO training, disciplinary action, and the like. The Government has never identified any alternative, non-ADEA-based remedy that comes close to this.

Most importantly, there is no reason to think that any administrative body would provide relief for age discrimination in adverse employment actions where Section 633a has *not* been violated. The ADEA is the flagship age discrimination statute governing workplace conduct. The Government's position in this case is that an employee who cannot show age was the but-for cause of an adverse decision has not suffered "any discrimination based on age." Gov't Br. 15-18, 34. It is highly improbable that any executive branch entity would choose to take a contrary position in some administrative proceeding and provide meaningful relief in circumstances *not* covered by Section 633a(a). Any notion that Section 633a(a) should be read narrowly because the Government—which strenuously urges that narrow reading—will itself voluntarily provide *other broader* avenues for relief stretches credulity.

* * *

Adopting the Government's but-for causation test would undermine federal-sector protections against age discrimination, leaving victims without prospective judicial *or* administrative relief unless they can prove that the outcome of the challenged personnel action would necessarily have been different but for their age. That is not what Congress intended when it declared that all personnel actions "shall be made free from any discrimination based on age." 29 U.S.C. § 633a(a). The Court should reverse the decision below.

Respectfully,



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