No. 18-882

In the Supreme Court of the United States

NORIS BABB,

Petitioner,

V.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS,

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Both parties agree that this Court should grant certiorari. As the Government acknowledges, the circuits are divided on the causation standard for claims under the federal-sector provision of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 633a(a). And the identical language of Title VII's federal-sector provision, 42 U.S.C. § 2000e-16, raises the same questions and should be considered in tandem with § 633a. Moreover, the Equal Employment Opportunity Commission (EEOC) and the Merit Systems Protection Board (MSPB)—the two agencies that adjudicate employment discrimination claims—have rejected the but-for standard the Eleventh Circuit applied here, and the Government has no right to obtain judicial review of those decisions. This Court's intervention is the only way to ensure that courts and agencies across the country apply a single, uniform standard when adjudicating ADEA and Title VII claims. And as the Government further agrees, this case presents an ideal opportunity to address these pressing questions, which have far-reaching importance. Immediate review is warranted.

Nevertheless, the Government is deeply mistaken as to the proper interpretation of the provisions at issue. As the D.C. Circuit explained, in an opinion written by Judge Tatel and joined by Judge Sentelle, a "but-for" causation standard is inconsistent with the plain language of § 633a(a) and fails to give effect to the clear textual differences between the private- and federal-sector provisions. *Ford v. Mabus*, 629 F.3d 198, 205-06 (D.C. Cir. 2010). Indeed, the Eleventh Circuit noted in this very case that, if it "were writing on a clean slate, [it] might well agree" with petitioner

that a motivating-factor test applies under the federal-sector provisions of the ADEA and Title VII—and Judge Newsom indicated that the statutory question would be "easy" as an original matter. Pet. App. 11a-12a, 17a; *infra* at 7 n.3. The court ruled for the Government only because a prior precedent—which contained no real textual analysis—tied its hands. Pet. App. 13a.

In fact, the statutory text unambiguously supports petitioner. The federal-sector provisions of the ADEA and Title VII instruct that "[a]ll personnel actions" affecting federal employees "shall *be made free from any discrimination* based on" the listed protected characteristics. 29 U.S.C. § 633a(a); 42 U.S.C. § 2000e-16(a) (emphasis added). The "shall be made free from" language—which the Government essentially ignores throughout its brief—is not present in the private-sector provisions. This language focuses on the *process* of making personnel decisions. It requires that process to be free from any discrimination, regardless of the outcome of any particular personnel action.

In short, the statutory text is incompatible with the Government's view that discriminatory animus can infect the decision-making process so long as it is not ultimately the but-for cause of the challenged action. The Eleventh Circuit's erroneous embrace of that view deepens an acknowledged split of authority on an indisputably important question for the Nation's roughly two million federal employees. Certiorari should be granted.

ARGUMENT

A. The Government Is Right About The Need For Review

As the Government notes (at 18-19), the circuits are divided on the frequently recurring question whether § 633a(a) requires but-for causation. The Eleventh and Ninth Circuits apply a but-for causation standard to claims under the ADEA's federal-sector provision. *See* Pet. 22; Pet. App. 12a-13a. By contrast, the D.C. Circuit has rejected the but-for test and held that an employee need only show that age was "a factor in the employer's decision." *Ford*, 629 F.3d at 206. District courts across the country are likewise divided on the applicable standards.[1] And the two agencies that adjudicate federal employee discrimination claims—the EEOC and the MSPB—have broken with the Eleventh and Ninth Circuits and adopted a version of the standard petitioner urges here, under both the ADEA and Title VII. *See* Pet. 2-3; U.S. Br. 20-21.

The result of all this confusion and disagreement is that millions of federal employees are subject to different degrees of protection against discrimination depending on where in the country they live, and in which forum they choose to pursue their claims. As the Government acknowledges, this circuit conflict on an issue of far-reaching importance is firmly

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[1] *Compare Logan v. Holder*, 2016 WL 2354846, at *5 (W.D. La. May 3, 2016) (motivating factor), *aff'd sub nom. Logan v. Sessions*, 690 F. App'x 176 (5th Cir. 2017), *Fuller v. Gates*, 2010 WL 774965, at *1 (E.D. Tex. Mar. 1, 2010) (same), *with Gordon v. Napolitano*, 863 F. Supp. 2d 541, 547-58 (E.D. Va. 2012) (but-for), *Murthy v. Shinseki*, 2010 WL 2178559, at *5 (C.D. Ill. May 28, 2010) (same).

entrenched and warrants review by this Court. Indeed, there is no realistic prospect that the disagreement will resolve itself: The D.C. and Eleventh Circuits have rejected petitions for en banc review seeking to overturn those courts' settled positions, and the Government has no procedural vehicle for obtaining judicial review of adverse EEOC and MSPB determinations. As the Seventh Circuit has emphasized, the "need for an authoritative decision on this issue" is clear. *Reynolds v. Tangherlini*, 737 F.3d 1093, 1104 (7th Cir. 2013). Such a decision can only be delivered by this Court.

This case is an ideal vehicle to address the questions presented. Both issues were squarely raised below and passed upon by the Eleventh Circuit in a published and reasoned opinion. And, as the Government candidly acknowledges (at 2), this is a case where the result in all likelihood will turn on resolution of the question presented. Furthermore, the presence of experienced Supreme Court counsel on both sides ensures the issues will be fully vetted.[2]

In short, both parties agree that this case meets all this Court's traditional criteria for certiorari. The petition should therefore be granted.

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[2] A grant of certiorari in *Comcast Corp. v. National Association of African American-Owned Media*, No. 18-1171, or *Charter Communications, Inc. v. National Association of African American-Owned Media*, No. 18-1185, would not affect the interpretation of the ADEA and Title VII provisions at issue here. Those cases implicate the proper causation standard for discrimination claims under 42 U.S.C. § 1981, which contains entirely different text (and has nothing close to the "shall be made free from any discrimination" language at issue here).

B. The Government's Interpretation Of The Relevant Provisions Is Mistaken

While the parties agree that certiorari is warranted in this case, they are deeply divided over the proper interpretation of the relevant ADEA and Title VII provisions. This certiorari-stage reply brief is not the place for a full discussion of the merits, but a few points are worth noting in response to the Government's statutory analysis.

1. The federal-sector provisions of the ADEA and Title VII provide that "[a]ll personnel actions" affecting certain federal employees "*shall be made free from any discrimination* based on" a protected characteristic. 29 U.S.C. § 633a(a) (emphasis added) (age); 42 U.S.C. § 2000e-16(a) (race, color, religion, sex, or national origin). By its terms, this language focuses on how those decisions are "*made*." Specifically, it requires that all personnel actions "shall be made free from any discrimination based on" the identified characteristics. The provisions thereby prohibit any discriminatory treatment in the employer's decision-making *process*.

This type of broad prohibition on discriminatory treatment is no stranger to American law. Indeed, the provisions at issue here are similar to the ban on discriminatory treatment embodied in the Constitution. The Equal Protection Clause makes it unlawful for the government to "erect[] a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group." *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 664-66 (1993). That is true *regardless* of whether that barrier ultimately is the but-for cause of the

denial of the benefit. *Id.*; *see also Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211 (1995); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 280 n.14 (1978).

The Government disputes petitioner's straightforward reading of the statutes. In the Government's telling, it is perfectly fine for discrimination to infect an employer's decision-making process, so long as it is not the but-for cause of the ultimate decision itself. But the Government fails to grapple with the critical "shall be made free from" language; indeed, it largely ignores that language. On the Government's view, a black candidate for promotion would apparently have no Title VII claim even if his employer *expressly stated* at the interview that white candidates were being held to lower standards—or that he would be penalized for having made a race discrimination complaint—so long as the employer could show the black candidate would not have obtained the promotion in any event. Or an employer could halve the job application scores of all candidates over age 40, and unless the corrected score would have been sufficient to obtain the job, the candidate would have no ADEA claim. These hypotheticals illustrate the flaws in the Government's theory: Such personnel actions are obviously not "made free from any discrimination based on" race or age.

The Government's atextual interpretation of the key statutory language has not gone unnoticed. In *Ford*, Judges Tatel and Sentelle recognized that holding an employee may only prove liability "by establishing that consideration of [a protected characteristic] was the but-for cause of the personnel action . . . would . . . divorce the phrase 'free from any

discrimination' from its plain meaning." 629 F.3d at 206. And in this case, Judge Newsom called the statutory interpretation question "easy," recognizing that the language of the relevant provisions strongly favors petitioner's reading (despite binding Eleventh Circuit precedent to the contrary).[3] The Government's unwillingness to even address the operative statutory language underscores the weakness of its own theory.

2. Congress's decision to provide a broad procedural protection to federal employees is also evident from the statutes' structure, and in particular the contrast between the respective bans on public and private-sector discrimination. As this Court has explained, Congress chose not to include the federal government in the ADEA and Title VII definitions of "employer," and instead "deliberately prescribed a distinct statutory scheme applicable only to the federal sector." *Lehman v. Nakshian*, 453 U.S. 156, 166 (1981); *see also Ford*, 629 F.3d at 205 (noting legislative history establishing that Congress rejected a draft bill that would have applied the pre-existing private-sector standards to the federal sector).

Indeed, the federal-sector provisions "differ[] sharply" from the previously-enacted private-sector provisions, *Gomez-Perez v. Potter*, 553 U.S. 474, 486 (2008). The private-sector provisions do not use the phrase "made free from any discrimination," but instead make it unlawful for an employer to "fail or

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[3] Oral Argument at 32:59 (Feb. 7, 2018), http://www.ca11.uscourts.gov/oral-argument-recordings?title=&field_oar_case_name_value=babb&field_oral_argument_date_value%5Bvalue%5D%5Byear%5D=&field_oral_argument_date_value%5Bvalue%5D%5Bmonth%5D=&=Search.

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 [a protected characteristic]." 29 U.S.C. § 623(a)(1) (ADEA); *see also* 42 U.S.C. § 2000e-3(a) (Title VII retaliation).

Those private-sector provisions are different from the broad federal-sector ban on "any" discrimination in the "ma[king]" of any personnel action. The private-sector provisions more narrowly ban discrimination as to the ultimate decision at issue (*i.e.*, the "fail[ing] or refus[ing] to hire or to discharge" an individual or the "discriminat[ing]" against the individual in connection with specific decisions as to "his compensation, terms, conditions, or privileges of employment"). Because the private-sector provisions prohibit discrimination as to the ultimate personnel action—but not as to the decision-making process more broadly—it makes sense to interpret them to require a "but-for" causal nexus between the discrimination and that action.

Congress's decision to enact substantially different language in the federal-sector provisions confirms that the protections for public and private employees are not identical. *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983). The "sweeping language" of the federal-sector provisions, *Forman v. Small*, 271 F.3d 285, 296 (D.C. Cir. 2001), makes clear that Congress wanted those protections to be more expansive than those in the private sector.[4]

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[4] The Government suggests (at 17-18) that the federal-sector provisions are only broader in that they cover "discrimination" generally, rather than specific personnel actions. But that is

3. The Government's textual argument (at 13-14) appears to rest almost entirely on two propositions: (1) that the phrase "based on" inevitably denotes but-for causation; and (2) that the relevant federal-sector provisions thus require a but-for relationship between the discrimination and the ultimate personnel action. Both propositions are mistaken, and each is a sufficient basis for rejecting the Government's argument.

First, "based on" does *not* invariably mean "but-for," regardless of context. While "based on" may connote but-for causation in some circumstances, the meaning of that phrase ultimately turns on the context in which it is used and its position within the provision as a whole. *See, e.g.*, *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012). Likewise, while Congress legislates against the backdrop of the general rule of but-for causation, *see University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 347 (2013), it obviously is free to *deviate* from that rule or adjust its application in light of the particular prohibited conduct at issue.

Here, "based on" modifies only the word "discrimination." In context, the function of the phrase is to identify the type of discrimination prohibited by the provision—*i.e.*, discrimination based on the identified protected characteristics. But the "based on" phrase does *not* directly modify the covered personnel actions, and it therefore does not require a but-for causal nexus between the discriminatory treatment and the ultimate personnel

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precisely the point. Unlike § 623(a), which is directed to the outcome of certain actions, § 633a(a) is directed to "discrimination" in employment processes regardless of outcome.

decision. On the contrary—and as explained above—the federal-sector discrimination ban creates a blanket prohibition on *any* discrimination in the *process* of making that decision.

The Government's authority is not to the contrary. The Government cites (at 13) *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009) and *Nassar*, in support of its claim that "based on" must mean but-for causation. But *Gross* and *Nassar* both addressed the private-sector anti-discrimination provisions. Neither of those provisions includes the phrase "based on" or broadly requires that the personnel decisions at issue "be made free from any discrimination." *Supra* at 7-8; *see also Ford*, 629 F.3d at 205 (explaining that "while a[n] [ADEA private-sector] plaintiff must . . . show that the challenged personnel action was taken because of age, a[n] [ADEA public-sector] plaintiff must show that the personnel action *involved* 'any discrimination based on age'" (emphasis added)).

Second, even if the Government were right that the phrase "any discrimination based on [a protected characteristic]" connotes but-for causation, the causal relationship is different from the one the Government asserts. The text does not say that a "personnel action" cannot be taken "based on" discrimination. Rather, it says that such an action "shall be made free from any discrimination," so long as the *discrimination* is "based on" a protected characteristic. Under the statute, even if a protected characteristic must be the but-for cause of the *discrimination*, it need not be a but-for cause of the ultimate personnel action.

As this Court's equal-protection cases have recognized, "discrimination based on" a protected

characteristic occurs whenever "the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group." *Associated Gen. Contractors*, 508 U.S. at 666. In those circumstances, the "denial of equal treatment resulting from the imposition of the barrier," equates to a constitutional injury, regardless of the plaintiff's "ultimate inability to obtain the benefit." *Id.; see also, e.g., Adarand*, 515 U.S. at 211; *Bakke*, 438 U.S. at 280 n.14.

Thus, even reading "based on" to mean "caused by," a federal employee suffers "discrimination based on" a protected characteristic whenever the Government fails to consider her eligibility for benefits "on an equal footing" with other employees who do not possess that characteristic. *Associated Gen. Contractors*, 508 U.S. at 666. Discrimination "based on" a protected characteristic exists if that characteristic is one motivating factor in an employment decision among others—even if the factor is not a but-for cause of the ultimate decision. *Id.* In such circumstances, the decision has not been "made free from any discrimination" based on the characteristic. Such a decision therefore violates the ADEA and Title VII provisions at issue here.[5]

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[5] The Government mistakenly asserts (at 23) that the "only apparent basis" for recognizing Title VII federal-sector retaliation claims is through the private-sector retaliation provision, 42 U.S.C. § 2000e-3(a), which requires but-for causation. On the contrary, Title VII's ban on federal-sector discrimination (which appears at 42 U.S.C. § 2000e-16(a)) *itself* makes retaliation unlawful. As the Government concedes (at 24), "the relevant language of Title VII's federal-sector provision is materially identical to that in the ADEA's federal-sector

* * *

There will be plenty of time later for the parties to hash out their robust dispute on the merits. For now, what matters is that the parties *agree* on the need for certiorari. Petitioner and the Government see eye-to-eye on the essential points: (1) the ADEA and Title VII questions presented are weighty and recurring; (2) the statutory language has spawned an entrenched split of authority among the courts of appeals and federal agencies; and (3) this case offers an ideal vehicle for resolving the confusion. The Government's willingness to support this Court's review—even though it prevailed below—confirms the importance of the issues and the need for this Court's intervention.

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provision [29 U.S.C. § 633a(a)]." *See also Lehman*, 453 U.S. at 167 n.15. This Court has already held that the ADEA federal-sector provision bars retaliation, *Gomez-Perez*, 553 U.S. at 492, and that holding applies equally to the mirror-image Title VII provision. Moreover, as explained above, *neither* of the federal-sector provisions at issue requires that discriminatory treatment be a but-for cause of the personnel action.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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