No. 18-882

In the Supreme Court of the United States

NORIS BABB,

Petitioner,

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS,

Respondent.

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

REPLY BRIEF OF PETITIONER

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INTRODUCTION

Section 633a(a) dictates that "[a]ll personnel actions . . . shall be *made free from any* discrimination based on age." 29 U.S.C. § 633a(a) (emphasis added). Its Title VII predecessor says the same thing about race, sex, and religion. 42 U.S.C. § 2000e-16(a). Those unusually broad formulations, unique to the federal employment context, reflect Congress's intent to ensure the federal workplace is governed by merit principles and free of any unfair consideration of arbitrary personal characteristics.

Yet, remarkably, the Government appears to believe that a federal agency could adopt an overtly discriminatory "Younger is Better" or "Whiter is Better" policy that subjects every older or minority candidate to a minus factor in their job applications, and that the agency's actions could still be considered "free from any discrimination." *See* Gov't Br. 32-33. In the Government's view, such a candidate would have no recourse whatsoever under Section 633a(a), Title VII, or the Constitution. Indeed, the Government believes the federal-sector provisions actually *eliminated* pre-existing constitutional remedies for such discrimination.

That conclusion has no grounding in the statutory text, in its constitutional and historical antecedents, or in contemporaneous regulations promulgated by the Civil Service Commission (CSC). Those sources make clear that the ADEA and Title VII federal-sector provisions bar all discrimination in the *process* of making federal employment decisions, regardless of whether the discrimination is the but-for cause of any particular decision.

The Government's insistence otherwise rests on an anti-grammatical reading of the provision's text, as well as holdings from other cases involving private-sector discrimination. But those cases are not relevant here: They lack the crucial language unambiguously declaring that personnel decisions "shall be made free from any discrimination." And unlike their federal-sector counterparts, the private-sector provisions did not seek to implement the Constitution's equal protection guarantee.

The Government's policy arguments are equally flawed. The Government wrongly asserts that petitioner's interpretation of Section 633a(a) would give employees windfall entitlements to reinstatement and back pay. That argument conflates the existence of a statutory violation with the appropriate remedy. Under petitioner's rule, victims of discrimination will be able to obtain declaratory and other equitable relief designed to cleanse the workplace of discrimination, but will *not* be entitled to reinstatement or back pay if the evidence shows they would not have received the job or promotion but for the discrimination. That approach has governed federal employment discrimination actions for decades.

Finally, the Government ultimately concedes that the only way it can win this case is by showing its interpretation is unambiguously correct at *Chevron* Step One. But it isn't. Congress mandated that all such decisions "*shall be made free from any* discrimination." Reading that language to mean *no* discrimination—full stop—is the best interpretation of the statute, and is surely reasonable at the very minimum. Either way, this Court should reverse the decision below.

ARGUMENT

I. SECTION 633a(a) PROHIBITS "ANY DISCRIMINATION" IN THE PROCESS OF MAKING FEDERAL PERSONNEL DECISIONS

A. The Government's Textual Arguments Lack Merit

1. Section 633a(a) declares that "[a]ll personnel actions . . . shall be made free from any discrimination based on age." The key language—"free from any discrimination"—is an adverbial phrase modifying the word "made." It governs *how* the decision must be made—i.e., the decision-making *process*. By focusing broadly on the process, Section 633a(a) is not limited only to situations where the discrimination is a but-for cause of a particular decision.

The Government argues (at 29-30) that the word "made" does not invariably connote a process, and here refers only to the ultimate outcome of such a process. That interpretation is untenable. The statute does not govern *what* any particular outcome must be, but instead *how* that outcome must be reached. By placing restrictions on how the ultimate decision must be "made," Section 633a(a) uses classic process language.

2. The Government nonetheless insists that Section 633a(a) only bans discrimination that is the but-for cause of a specific personnel decision. But it never convincingly explains where that but-for requirement actually comes from—or why the statute does not prohibit discriminatory treatment in the process of making such decisions.

a. The Government's primary claim is that the phrase "based on" "'indicates a but-for causal relationship' between the factor considered (age) and the action taken (an adverse personnel action)." Gov't Br. 12 (citation omitted). But that re-writes Section 633a(a): As the D.C. Circuit has explained, the phrase "'based on' modifies 'discrimination,'" *not* "personnel action." *See Ford v. Mabus*, 629 F.3d 198, 205 (D.C. Cir. 2010).

And the parties *agree* that the word "discrimination" in Section 633a(a) should be given its "'normal definition,'" which is "'"less favorable" treatment' of similarly situated individuals." Gov't Br. 17 (quoting *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005)). That definition plainly encompasses unequal treatment in the process of making a personnel decision, even when that treatment is not the but-for cause of a particular adverse decision. Discrimination includes "not [only the] ultimate inability to obtain [a] benefit," but also "imposition of [a] barrier" "that makes it more difficult for members of one group to obtain [the] benefit than it is for members of another." *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jackson*, 508 U.S. 656, 666 (1993); *see also* Pet'r Br. 26 (citing cases).

Section 633a(a)'s bar on "discrimination based on age" therefore encompasses any barrier or unequal consideration imposed due to a person's age. To the extent the "based on" language imposes a but-for causation requirement, it simply indicates that age must be a but-for cause of the "discrimination" (i.e., of the unequal consideration).

This interpretation reflects the ordinary and commonsense understanding of what it is to be

discriminated against. When an older job applicant is told that younger candidates are given plus factors in their applications or when minority candidates are forced to undergo a test that white candidates are not, no reasonable observer would conclude that there was no discrimination. Indeed, erecting barriers for one race or group that do not apply to others has long been a quintessential form of discrimination. *See United States v. Raines*, 189 F. Supp. 121, 131 (M.D. Ga. 1960) (discussing stringent literacy tests that black voters were forced to take as a precondition for voting).

b. The Government also says that because Section 633a(a) applies "in the context of '*personnel actions*,'" this means "a federal employee must show that the policy was a but-for cause of an adverse personnel action." Gov't Br. 32 (emphasis added); *see also id.* at 25 (noting that the statute "ties th[e] differential treatment to an adverse 'personnel action[]'" (citation omitted)). But that simply doesn't follow. The fact that the unlawful discrimination must arise in the context of a personnel action does not mean it must be the but-for cause of an ultimate personnel decision. The Government is just begging the question.

Here, the relationship between the "discrimination" and the "personnel action" is explained by the surrounding language. Section 633a(a) expressly says that "all personnel actions shall be made free from any discrimination based on age." This prohibits discrimination that is part of the process of "ma[king]" the personnel action. The language is not limited to discrimination that is the but-for cause of the decision.

The word "any" ("free from *any* discrimination") further confirms this understanding. The concept of ridding a "personnel action" entirely of discrimination (i.e., making "free from any") necessarily contemplates different amounts or degrees of "discrimination"; a prohibition on "any discrimination" would make no sense unless it were possible to have a "personnel action" made with "some" discrimination. But an ultimate decision to hire, fire or promote is either discriminatory or it is not. The only referent that could be subject to a continuum of "discrimination" is the decision-making *process*. Indeed, the word "any" would be entirely superfluous if the object of the sentence were a binary decision.

c. Without any plausible textual theory, the Government also invokes common-law tort principles, which typically require "but-for causation" linking the plaintiff's conduct to the defendant's harm. Gov't Br. 17-18. That's a red herring too.

For one thing—as the Government concedes (at 17-18 n.4)—the common-law rule does not require but-for causation when there are "multiple sufficient causes," as is often the case in employment decisions. That makes perfect sense: If an older Asian-American woman is denied a promotion because a federal agency has separate policies of denying promotions to older employees and to Asian-Americans, it has violated *both* the ADEA and Title VII. The Government's view (*id.*) is that *neither* statute has been violated—a result that defies both common law and common sense.

More fundamentally, though, a but-for causation test simply requires a plaintiff to show that the defendant's conduct was a but-for cause of his *harm*.

Here, the relevant harm is "discrimination"—which encompasses unequal consideration in the process of making a decision, regardless of its ultimate impact on a particular personnel decision. *See supra* at 3-6. Indeed, this Court has long understood that the stigma of being categorized and considered differently on the basis of race or other group status itself constitutes an injury the law recognizes—irrespective of its subsequent effects. *See, e.g.*, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 718-19 (2007); *see also id.* at 795 (Kennedy, J., concurring in part and concurring in the judgment) ("Reduction of an individual to an assigned racial identity for differential treatment is among the most pernicious actions our government can undertake."); Pet'r Br. 26 (citing cases).

The Government devalues this type of harm, blithely declaring that process-based discrimination does not "actually matter[]" to its victims. Gov't Br. 34. But the Court has consistently rejected that view. As it explained in *Rice v. Cayetano*, "[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." 528 U.S. 495, 517 (2000). Or as it said in *Miller v. Johnson*, "[r]ace-based assignments 'embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.'" 515 U.S. 900, 912 (1995) (citation omitted); *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and in judgment) (explaining that race-conscious programs

"stamp minorities with a badge of inferiority" even when they obtain benefits from race-conscious policies).

3. To its credit, the Government freely concedes (at 32-33) that its position means that subjecting older or minority employees to "Younger Is Better" or "Whiter Is Better" hiring and promotion policies is perfectly lawful in and of itself. It never explains, however, how such a policy could possibly be consistent with the commonsense meaning of Section 633a(a)'s requirement that federal personnel decisions "shall be made free from any discrimination."[1]

The Government's concession underscores how far removed its interpretation is from the statute's plain meaning.

B. The Government Is Wrong About The Constitution And Executive Orders

Section 633a(a)'s text resolves this case in petitioner's favor. But the provision's roots in the Constitution and Executive Orders confirm that it prohibits discriminatory consideration of employees in federal personnel decisions.

1. This Court and Congress have made clear that Title VII's federal-sector provision implements the Constitution's equal protection guarantee and displaces a freestanding constitutional remedy for

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[1] The Government tries to deflect petitioner's fitness test hypothetical (Pet'r Br. 49) by suggesting that a test required of older employees seeking promotions might itself be a "personnel action" subject to challenge under Section 633a(a). Gov't Br. 33-34. That seems dubious, but in any event it would only protect existing employees—not applicants.

equal protection violations in the federal employment context. *See Brown v. General Servs. Admin.*, 425 U.S. 820, 825 (1976); Pet'r Br. 30-31 (citing legislative history). And as the Government concedes (at 35-36), Title VII's federal-sector discrimination ban is materially identical to Section 633a(a) in relevant respects. Constitutional principles therefore inform the proper construction of Section 633a(a).

The Government asserts (at 27) that the Constitution's causation standard has "no bearing" on the correct interpretation of Section 633a(a). But its only authority is a footnote in *Gross v. FBL Financial Services, Inc.*, holding that the constitutional test does not govern the ADEA's *private*-sector provision. *See* 557 U.S. 167, 179 n.6 (2009). That footnote is irrelevant to this case, which involves a *federal*-sector provision that indisputably seeks both (1) to implement constitutional equal protection principles, and (2) to displace any freestanding remedy under the Constitution itself.

In this context, it makes perfect sense to look to the constitutional test for the proper legal standard. That's the approach this Court has taken with respect to Title VI, 42 U.S.C. § 2000d, which likewise implicates federal action and seeks to implement constitutional equal protection. *See, e.g.*, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 284-86 (1978) (Powell, J.) (relying on legislative history to hold that Title VI embraces Equal Protection Clause standard); *id.* at 328-39 (plurality). And it also tracks *Fitzgerald v. Barnstable School Committee*, which recognized that when—as here—a statutory scheme creates an exclusive mechanism for vindicating equal protection rights, that scheme is unlikely to "diverge"

from the substantive scope of those rights. 555 U.S. 246, 256-58 (2009).

The Government's plea that this Court ignore the constitutional causation standard is ultimately an effort to distract from the absurd consequence of its position—that Congress sought to *reduce* the substantive scope of federal employees' rights by passing legislation demanding that all personnel actions "shall be made free from any discrimination."

2. On the substance of the constitutional standard, the Government invokes this Court's per curiam decision in *Texas v. Lesage*, 528 U.S. 18 (1999), for the proposition that when a discrimination plaintiff challenges a "discrete governmental decision[]" based on a prohibited characteristic, the Government "can avoid liability by proving that it would have made the same decision without the impermissible motive." Gov't Br. 28 (quoting 528 U.S. at 21). That holding provides the Government no help.

First, *Lesage* addressed the scope of liability *for damages* for discrete governmental decisions *under Section 1983*—not the scope of the Constitution's substantive protections. *See, e.g.*, *Thigpen v. Bibb Cty.*, 223 F.3d 1231, 1241-42 (11th Cir. 2000). The *Lesage* plaintiff had requested two forms of relief—"money damages" and an "injuncti[on]." 528 U.S. at 19. As to the first, the Court held that when a plaintiff raises a "[Section] 1983 action seeking damages" flowing from a "discrete governmental decision" and the government can prove it "would have made the same decision regardless [of the impermissible motive], there is no cognizable injury warranting relief under [Section] 1983" and "[t]he government can avoid liability" under that statute. *Id.* at 20-21.

The Court's statement about "avoid[ing] liability" is a reference to *damages* liability under Section 1983. *Id.* at 21. Indeed, the Court immediately clarified that when a plaintiff seeks "forward-looking relief" like an injunction, he "need not affirmatively establish that he would receive the benefit in question if race were not considered." *Id.* The Court thus recognized that considering race is unconstitutional and can be enjoined, even without any proof that such consideration was the but-for cause of the denial of any particular government benefit. Just as the Court had previously indicated in *Bakke*, the question whether the plaintiff would have obtained the benefit but for the discriminatory consideration is "merely one of *relief*." 438 U.S. at 280 n.14 (emphasis added). That is fully consistent with petitioner's approach. *See infra* at 23-24.

Second, the Government concedes that at least some "type[s] of claims" would violate the Equal Protection Clause, even without any showing that the challenged discrimination caused an adverse decision—but asserts that petitioner's case does not count because she only challenges a set of "discrete governmental decision[s]." Gov't Br. 28. That mischaracterizes petitioner's claims. Her complaint unambiguously alleges that she "ha[s] been *and continue[s] to be* denied [her] rights to equal opportunity," and is suffering from "*continu[ing]*" harm. JA33 ¶ 25 (emphasis added). Moreover, she is also seeking declaratory relief, as well as "prospective" and "injunctive relief" that would be available under *Lesage*. JA33-34, 35; *see also infra* at 23-24. This case thus falls squarely within the "types of claims" the Government agrees would be cognizable under the Constitution.

Finally, even if the Government's interpretation of *Lesage* were correct, it would still support petitioner's answer to the question presented in this case. On the Government's view (at 28), *Lesage* allows a plaintiff who can show unequal consideration to establish a violation—even without affirmative proof of but-for causation—unless the *Government* proves that the discrimination was *not* a but-for cause of the challenged decision. And in cases involving ongoing discrimination, *Lesage* allows the plaintiff to obtain forward-looking relief regardless of but-for causation. *See* Gov't Br. 27-28.

Applying that approach to Section 633a(a) would misunderstand *Lesage*'s holding. But at least it would recognize that the causation standard for federal-sector liability under Title VII and the ADEA tracks the constitutional test. By contrast, the Government's interpretation of Section 633a(a) denies the constitutional link and rests on the indefensible notion that Congress *diminished* the scope of federal employee rights when it passed civil rights legislation barring "any discrimination" from the federal workplace.

3. The Title VII and ADEA federal-sector provisions are also rooted in a long line of Executive Orders barring federal-sector employment discrimination. Pet'r Br. 33-36. Although the Government claims (at 40) that the Executive Orders are irrelevant and have nothing to do with "anti-discrimination law," this Court said otherwise in *Morton v. Mancari*, where it described Title VII's federal-sector provisions as a "codification of prior anti-discrimination Executive Orders." 417 U.S. 535, 549 (1974).

The Government is also wrong to assert (at 38-39) that the Executive Orders shed no light on the question presented. As the Government concedes (*id.*), many of the Executive Orders closely track the operative language of the Title VII and ADEA federal-sector provisions, and yet they also include additional language further confirming their goal of eradicating *all* discrimination in federal employment, not simply discrimination serving as the but-for cause of specific personnel decisions. *See* Pet'r Br. 35-36. The Government likewise ignores Congress's understanding that Title VII's federal-sector provision would ensure "equal employment opportunities for Federal employees" without discrimination. *Id.* at 33. Those statements are incompatible with the Government's but-for causation standard.

C. The Government Misconstrues The Regulations

When Congress enacted Section 633a(a), it ratified the prevailing understanding of Title VII's materially identical federal-sector provision, as already interpreted in binding CSC regulations. The Government concedes (at 41-42) that the CSC issued those regulations for the express purpose of "implement[ing]" the new federal-sector provision. 37 Fed. Reg. 22,717 (Oct. 21, 1972). Crucially, these regulations provided relief to complainants even *without* but-for causation as to a particular employment decision. *See* 5 C.F.R. § 713.271(a)(2), (b)(2) (1973); Pet'r Br. 36-40.

The Government kicks up confusion by noting that the new CSC remedies applied not only to "personnel actions" subject to Title VII and Section 633a(a), but

also to violations of pre-existing agency regulations which addressed workplace grievances "that did not rise to the level of a personnel action." Gov't Br. 42-43; *see also id.* at 34. But even if that's true, there's no question the regulations establish remedies for discrimination in the process of making "personnel actions" *expressly covered by Section 633a(a)*, even without proof that the discrimination was a but-for cause of a particular decision. *See* 5 C.F.R. § 713.271(a)(2) (1973) (hiring); *id.* § 713.271(b)(2) (promotion). They accordingly reflect the CSC's contemporaneous view that a plaintiff can establish a violation of the statute without such proof. The Government never actually denies this.

More generally, the Government asserts that the regulations have no bearing on "the causation standard for liability" because they only address "the proper determination of relief." Gov't Br. 45-46 (making this argument about later-enacted EEOC regulations). But while it's true that the regulations focus on remedies, those remedies reflect the CSC's understanding of the statute's substantive scope. The CSC would not have created a remedy for conduct that it did not believe was unlawful in the first place.

Finally, the Government denies that Congress ratified the CSC's construction of the Title VII provision by enacting Section 633a(a), noting that the regulations "were just two years old" at that point. But the prior-construction canon applies "whenever the judicial or administrative interpretation antedates the enactment," Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 323-24 (2012), and the Government cites no authority for its novel two-years-is-not-enough rule. If anything, Congress's promulgation of two federal-

sector discrimination bans in close succession shows it was keenly interested in the subject. It thus presumably knew about—and approved of—the CSC's construction of Title VII when it imported the same language into Section 633a(a).

D. *Gross*, *Safeco*, And *Nassar* Do Not Govern Here

Without a foothold in Section 633a(a)'s text or history, the Government instead relies heavily on a trilogy of cases—*Gross*, *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007), and *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013)—addressing the scope of private-sector statutory provisions very different from the federal-sector provisions at issue here. Gov't Br. 18-22. Its reliance on those cases is misplaced.

1. The Government cannot deny that Congress chose not to apply the statutory language governing private-sector provisions to the federal government, and instead created new provisions with broader language "differ[ing] sharply" from those provisions. *Gomez-Perez v. Potter*, 553 U.S. 474, 486 (2008); Pet'r Br. 51-53. It thus makes perfect sense to treat the federal-sector provisions differently from their private-sector counterparts: They contain different language ("shall be made free from any discrimination"), and were adopted for different reasons—to implement the Constitution's equal protection guarantee and Executive Orders applicable to federal employment. In that respect, the Title VII and ADEA federal-sector provisions are more closely akin to Title VI—which likewise implicates state action and implements constitutional equal protection, *see supra* at 9—than to the private-

sector provisions. The real oddity would be to adopt the Government's approach and pretend that the differences between the provisions do not exist.

The Government also points out (at 14, 32-33, 36-38, 53) that Congress subjected state and local governments to the prohibitions in the ADEA federal-sector provision, asserting that it seems "anomal[ous]" to provide greater protection to federal employees. But Congress quite appropriately took a lighter hand when regulating the internal affairs of other sovereigns, which raises obvious federalism concerns. *See generally Gregory v. Ashcroft*, 501 U.S. 452, 456-69 (1991). And whether or not the Government agrees with Congress's policy choice, it is undeniable that Congress *did* decide to treat federal employees differently from those of state and local governments: Whereas Congress added state and local governments to the ADEA's definition of "employer," it considered—and rejected—that approach for the federal government. Pet'r Br. 54-55.

2. The Government relies most heavily on *Gross* (at 16, 20-21). That case interpreted the ADEA's private-sector provision, which makes it unlawful for an employer

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

29 U.S.C. § 623(a)(1). *Gross* held that the phrase "*because of* such individual's age" requires a but-for causal link between the plaintiff's age and a specific listed adverse personnel decision. 557 U.S. at 176.

But the ADEA's private-sector provision "differs sharply" from Section 633a(a). *Gomez-Perez*, 553 U.S. at 486-87. Most importantly, the private-sector provision lacks the process-focused "shall be made free from" formulation. *Id.* at 487.

In addition, the private-sector provision applies to a series of particular adverse *decisions*—to "fail or refuse to hire or to discharge any individual"—which cannot be taken "because of age." The language indicates that the decisions themselves must be caused by the candidate's age. That language is fundamentally different from Section 633a(a), which does not ban discrimination as to specific personnel decisions, but instead broadly declares that personnel actions "shall be made free from any discrimination."

The Government stresses (at 26) that the private-sector provision also makes it unlawful to "otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." *See* 29 U.S.C. § 623(a)(1). But that language also directly requires "discriminat[ion]" as to specific *outcomes*: It covers not all discrimination in the "mak[ing]" of "personnel actions" but only discrimination "with respect to" specific decisions about the employee's "compensation, terms, conditions, or privileges of employment." *Id.*

The *ejusdem generis* canon supports reading the "otherwise discriminate" catch-all clause as covering "the same general kind" of conduct as the more outcome-based discrimination addressed by the "fail or refuse to hire or to discharge" clause. *See* Scalia & Garner, *supra*, at 199; *Yates v. United States*, 574 U.S. 528, 545 (2015) (plurality op.) (discussing application of *ejusdem generis* to "otherwise" clause). Just like

the rest of the ADEA federal-sector provision, the "otherwise discriminate" clause also requires "that an employer took adverse action 'because of' age." *Gross*, 557 U.S. at 176.

By contrast, there is simply no way to read Section 633a(a) in that way. While the private-sector provision ties the word "discriminate" to a "specific list" of employment decisions, Section 633a(a) is a "broad, general ban" on any "discrimination based on age" in the decision-making *process*. *Gomez-Perez*, 553 U.S. at 488, 486-87. Congress thus made clear that the word "discrimination" must be given its broadest possible meaning—and that all forms of discrimination, not merely those directly responsible for a specific adverse decision, are prohibited.

Congress would not have gone through the trouble of carefully choosing Section 633a(a)'s words—and creating a brand-new provision—if it had simply wanted to apply the private-sector rule to federal-sector employees.

3. The statutes at issue in *Safeco* and *Nassar* likewise do not contain language indicating that "any discrimination" is prohibited, or that the prohibition focuses on the decision-making process rather than specific outcomes.

Safeco concerned a provision of the Fair Credit Reporting Act (FCRA), requiring "any person [who] *takes any adverse action* with respect to any consumer that is based in whole or in part on any information contained in a consumer report" to notify the affected consumer. 15 U.S.C. § 1681m(a) (emphasis added). That language obviously limits the scope of prohibited conduct to the *outcome* of the "adverse action"—if no "action" is "take[n]" "based on" the information, there

is no statutory violation. That is the very opposite of the language here.

Nassar involved a Title VII provision making it unlawful "for an employer to discriminate against any of [its] employees . . . because [the employee] has opposed" an employer's discriminatory practices. 42 U.S.C. § 2000e-3(a). As with *Gross* and *Safeco*, the Government argues the provision in *Nassar* "addressed materially similar language" to that at issue here. Gov't Br. 13. But, again, that rests on the Government cherry-picking the language that is supposedly "material[]"—the words "because of"—while ignoring Section 633a(a)'s key phrase—"shall be made free from any." The latter phrase is what shifts the focus of the prohibition onto process rather than outcome.[2]

Moreover, Title VII's retaliation ban has no grounding in the constitutional context or the long history of efforts to rid the federal employment decision-making process of unequal consideration. As with *Gross* and *Safeco*, there is no reason to blindly import this Court's holding from a statute with materially different text, purpose, and history.

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[2] The Government does not contend that *Nassar* supports defining the word "discrimination" as itself carrying an implicit "adverse decision" requirement. Nor could it, given that this Court's precedent, dictionary definitions and common sense all indicate that "discrimination" can occur without any adverse decision. *See supra* at 3-7. Furthermore, *Nassar* did not address—and no party pressed—any argument relating to the scope of the word "discrimination," and the decision does not address the scope of that term outside of the specific statutory context at issue.

If anything, *Nassar*'s reasoning actually supports a more expansive interpretation of Section 633a(a). There, the Court rejected respondent's argument that retaliation falls within Title VII's ban on private-sector status discrimination. *Nassar*, 570 U.S. at 352. The Court stressed Congress's deliberate decision to prohibit retaliation in a separate provision from its status discrimination ban, using different language. *Id.* at 353-54. Here, those same considerations support petitioner: "Congress deliberately prescribed a distinct statutory scheme applicable only to the federal sector," and chose to use very different language. *Lehman v. Nakshian*, 453 U.S. 156, 166-67 (1981). Just like in *Nassar*, this Court "must give effect to Congress' choice." 570 U.S. at 354.

4. The Government also invokes (at 22-24) (1) this Court's interpretation of Title VII's private-sector provision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and (2) Congress's subsequent statutory amendments. But both support petitioner here, insofar as they allow a plaintiff to establish liability for discrimination without affirmatively proving but-for causation. *See id.* at 258 (plurality op.); *id.* at 276 (O'Connor, J., concurring in the judgment); 42 U.S.C. § 2000e-2(m).

The Government is wrong to argue that Congress's statutory codification of a "motivating factor" test in Title VII—without a corresponding amendment to Section 633a(a)—somehow implies that the latter provision requires a but-for causal link between the discrimination and an ultimate personnel decision. That simply does not follow: Congress had no need to modify Section 633a(a) because it already broadly prohibited "any discrimination" in the process of

making a federal personnel decision. Yet again, the Government is simply begging the question.

E. At A Minimum, The EEOC's Construction Of Section 633a(a) Is Entitled To *Chevron* Deference

For the same reasons described above, Section 633a(a) does not *unambiguously* require that a challenged act of discrimination be the but-for cause of a subsequent adverse decision. It is surely a reasonable construction of the statute to conclude, as the EEOC and the D.C. Circuit have already done, that Section 633a(a)'s broad language was intended to bar any improper consideration of age in the federal decision-making process. *See* Pet'r Br. 18, 40-42.

The Government effectively concedes that if that is so, the Court must rule in petitioner's favor. The Government does not dispute that when the EEOC interprets the ADEA in a "formal adjudication," that interpretation is owed *Chevron* deference. *See* Pet'r Br. 40-41. And the Government likewise concedes that the EEOC has interpreted the ADEA in formal adjudications as *not* requiring a but-for causal relationship between the discrimination and a specific personnel decision. Gov't Br. 49-50; *see* Pet'r Br. 41-42. There is accordingly no dispute that if the Court finds Section 633a(a) ambiguous, it must defer to the EEOC's construction.

The Government's *only* argument on this point (at 49-50) is that its own interpretation of the statute is unambiguously correct, and the Court should resolve the question at Step One. That argument fails for essentially the same reasons already discussed. But at the very least, the statute is ambiguous and the EEOC is entitled to deference.

II. SECTION 633a(a)'s DISCRIMINATION BAN IS WORKABLE AND RESULTS IN APPROPRIATE REMEDIES

A rule prohibiting consideration of age in the decision-making process for federal personnel actions results in appropriate liability, consistent with Section 633a(a)'s text and the merit-based principles that have governed federal employment for decades. While the Government repeatedly describes such a result as "anomalous," it fails to identify a single reason why such a rule would be impracticable or unadministrable. Nor could it. An unequal consideration rule presently governs Section 633a(a) actions before both the EEOC and the D.C. Circuit (where claims against the government typically arise), as well as constitutional equal protection claims—and that rule has proved workable for many years. The Government provides no reason to disrupt existing practice.

Rather, it is the Government's novel approach that would have harmful practical consequences, and risk leaving real victims of discrimination without relief. As this Court has recognized, it is notoriously difficult for an employee to prove that discrimination was the but-for cause of a decision. Many victims would find it impossible to "pinpoint discrimination as the precise cause of [their] injury, despite having shown that it played a significant role in the decisional process." *Price Waterhouse*, 490 U.S. at 273 (O'Connor, J., concurring in the judgment); *see also Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.8 (1981) (describing the "factual question of intentional discrimination" as "elusive"). These practical impediments would dissuade employees

from challenging unlawful practices and impede Congress's goal of cleansing the federal workplace of discrimination.

The Government's remaining gambit (at 51-52) is to assert that an unequal consideration rule may leave some employees over-compensated by providing back pay or reinstatement to individuals who would not have obtained those benefits absent the discrimination. That attacks a straw man. As petitioner has explained, a "but-for causation rule may [still] be relevant at the *remedial* stage," even if it is not essential to establishing a violation of the statute. Pet'r Br. 46 n.8.

Nothing in petitioner's rule implies or requires that a successful ADEA plaintiff will ever be entitled to an inequitable windfall. It is a foundational principle of law that "[r]emedies generally seek to place the victim of a legal wrong . . . in the position that person would have occupied if the wrong had not occurred." *See* Russell L. Weaver et al., *Principles of Remedies Law* 5 (3d ed. 2017). The ADEA is no exception. *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 795-96 (3d Cir. 1985). This well-settled remedial framework ensures that relief is carefully tailored to the precise injuries suffered.

Under petitioner's rule, a successful federal-sector ADEA plaintiff will be entitled to relief that is appropriate in light of the proof in the case. Reinstatement and back pay will not be available in cases where the evidence shows that the plaintiff would not have been hired but for the discrimination. *See Ford*, 629 F.3d at 207; Pet'r Br. 46 n.8. But other important ADEA remedies *will* potentially be available—including an injunction mandating EEO training, disciplinary action, reconsideration of an

application, and other means of cleansing the workplace of a discriminatory decision-making process. *See, e.g. Geraldine G. v. Brennan*, Appeal No. 0720140039, 2016 WL 3361226, at *6 (E.E.O.C. June 3, 2016) (requiring EEO training and disciplinary action); *Arroyo v. Shinseki*, Appeal No. 0120121771, 2013 WL 393575, at *3 (E.E.O.C. Jan. 25, 2013) (same).

Finally, the Government says allowing victims of discrimination to seek injunctive relief in the absence of but-for causation creates an "intractable problem"—apparently, because it would let a non-lawyer who is rejected for a Justice Department legal job under a "No Hispanics Need Apply" policy obtain injunctive relief under Title VII. *See* Gov't Br. 33.

But what exactly is the problem with that? Ending such blatantly discriminatory federal practices is precisely what Congress wanted Title VII and Section 633a(a) to accomplish. *See* Pet'r Br. 27-28, 31-33. The Government's hypothetical plaintiff would have had a valid constitutional claim before those statutes became law. It's absurd to think Congress wanted them to eliminate that protection.

The reality is that the federal-sector liability and remedial framework makes perfect sense: It permits individuals who have suffered dignitary harm to vindicate their rights; it increases the prospect that harmful and discriminatory policies will be challenged and enjoined; and it ensures that no plaintiff will achieve a windfall through the judicial system. That framework has governed federal employment discrimination actions for decades under both CSC and EEOC regulations, and a virtually identical scheme applies in constitutional and Title VI cases.

This Court should enforce the statutory text and vindicate Congress's goal of a federal workplace free from discrimination.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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ADDENDUM

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29 U.S.C. § 633a(a)

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ADEA Private-Sector Provision
29 U.S.C. § 623(a)(1) [interpreted in *Gross*]

It shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; . . . .

Title VII Private-Sector Retaliation Provision
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It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

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If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall . . . provide oral, written, or electronic notice of the adverse action to the consumer; . . . .