NO. 18-_____

In The

Supreme Court of the United States

NORIS BABB,

Petitioner,

v.

Secretary,
DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

JOSEPH D. MAGRI
Counsel of Record
SEAN M. MCFADDEN
MERKLE & MAGRI, P.A.
5601 Mariner St., Ste. 400
Tampa, Florida 33609
Telephone: (813) 281-9000
Email: jmagri@merklemagri.com

QUESTIONS PRESENTED

Federal employees' rights are determined under statutes which require that "all personnel actions effecting employees or applicants for employment . . . in executive agencies as defined in Title 5 . . . shall be made free from any discrimination . . ." *See* 42 U.S.C. § 2000e-16(a) (race, color, religion, sex, or national origin) (emphasis added); 29 U.S.C. § 633a(a) (age). This Court, in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013) and *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), interpreted the private-sector statutory language "because" in 42 U.S.C. § 2000e-3(a), and "because of" in 29 U.S.C. § 623(a)(1), respectively, as requiring a private-sector plaintiff to prove but-for causation.

The question presented is:

Whether "shall be made free from any discrimination" permits federal-sector personnel actions that are not made free from any discrimination or retaliation, as long as discrimination or retaliation is not the but-for cause of the personnel action, or rather prohibits personnel actions where discrimination and retaliation is a factor.

A subsidiary question is whether Title VII bans retaliation in federal employment.

PARTIES

The petitioner is Noris Babb.

The respondent is the Secretary, Department of Veterans Affairs.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Statutes

Cases

Other Authorities

PETITION FOR WRIT OF CERTIORARI

This case presents the Court with an opportunity to continue providing coherence and clarity to the statutory framework applicable to federal-sector discrimination and retaliation claims. According to this Court, "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Assn. v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (internal quotation marks omitted) *accord Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 168, 175 (2009). Federal employees' rights are determined under statutes which require that "all personnel actions effecting employees or applicants for employment . . . in executive agencies as defined in Title 5 . . . shall be made free from any discrimination . . ." *see* 42 U.S.C. § 2000e-16(a) (race, color, religion, sex, or national origin); 29 U.S.C. § 633a(a) (age).

At the current time, federal employees filing claims under Title VII and ADEA face inexplicably differing standards of proof depending on where they file. The only post-*Gross* federal court to consider and resolve the textual differences between the private- and federal-sector provisions of the statutes recognized that the "free from" language recognizes an actionable claim if age discrimination is "a factor" in the claim. *See Ford v. Mabus*, 629 F.3d 198, 206-07 (D.C. Cir. 2010) (discussing case-law interpretations

of similar language along with the fact that Congress deliberately prescribed a distinct statutory scheme applicable only to federal employees using "sweeping language"). When considering federal-sector discrimination claims, including retaliation claims, within their jurisdiction the Equal Employment Opportunity Commission (EEOC) and the Merit Systems Protection Board (MSPB) have come to the same conclusion. *See Complainant v. Dep't of Homeland Sec.*, EEOC DOC 0720140014, 2015 WL 5042782, at *5-6 (Aug. 19, 2015) (retaliation under Title VII or ADEA); *Complainant v. Dep't of Homeland Sec.*, EEOC DOC 0720140037, 2015 WL 3542586, at *4-5 (May 29, 2015) (retaliation under Title VII); *see also Petitioner v. Dep't of Interior*, EEOC DOC 0320110050, 2014 WL 3788011, at *10 n.6 (July 16, 2014) (holding that the "but-for" standard does not apply in federal-sector Title VII or ADEA cases); *Savage v. Dep't of Army*, 122 M.S.P.R. 612, 634 (Sept. 3, 2015) (retaliation under Title VII); *Wingate v. U.S. Postal Serv.*, 118 M.S.P.R. 566 (Sept. 27, 2012) (concluding that a Federal employee may prove age discrimination by showing that age was 'a factor" in the personnel action, even if it was not the "but for" cause).

The EEOC is the executive agency to which Congress gave enforcement authority on federal-sector EEO matters. 42 U.S.C. § 2000e-16(b); *see also* Exec. Order No. 12067, 43 Fed. Reg. 28967 (June 30, 1978). The EEOC has addressed the separate

standard for federal employees in its EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004 (Aug. 25, 2016) (available at www.EEOC.gov/laws/guidance/retaliation-guidance.cfm). In Section II.C, the guidelines address causation. Subsection II.C.1.b provides the following:

> By contrast, in federal sector Title VII and ADEA retaliation cases, the Commission has held that the "but for" standard does not apply because the relevant federal sector statutory provisions do not employ the same language on which the Court based its holding in *Nassar*. The federal sector provisions contain a "broad prohibition of 'discrimination' rather than a list of specific prohibited practices," requiring that employment "be made free from any discrimination," including retaliation. Therefore, in Title VII and ADEA cases against a federal employer, retaliation is prohibited if it was a motivating factor.

Given the broad, general, sweeping "free from" language, a federal employee should be able to establish a retaliation claim under 42 U.S.C. § 2000e-16 where a prohibited consideration was a factor or motivating factor in the contested personnel action, even if it was not the only reason. In making this statement, we recognize that this Court has not yet addressed the statutory basis for a federal-sector retaliation claim. The same broad, general, sweeping "free from" language of § 2000e-16 should form the

statutory basis for such a claim. *See Gómez-Pérez v. Potter*, 553 U.S. 474, 479, 487 (2008) (finding retaliation provisions embodied within the "free from any discrimination" language of 29 U.S.C. § 633a(a)).

In Petitioner's case, the panel of the Eleventh Circuit Court of Appeals recognized that it had not previously considered the textual differences between the private- and federal-sector provisions. Nevertheless, the panel determined that it is bound by a prior decision applying a *McDonnell Douglas* test and a but-for causation standard to a federal-sector retaliation case, while admitting the prior decision also did not consider said textual differences. App. 18a. A federal employee in the Eleventh Circuit now must bear a burden many other federal employees will not. They will also lose enforcement rights other federal employees will have.

Several other Circuits have had this issue presented to them by federal employees but have avoided deciding the issue.

As a result, federal employees face different burdens of proof depending on where they work and where they may file a claim. These are not statutory factors that should affect their rights. In many instances, federal employees do not know what that burden will be.

Petitioner Noris Babb respectfully prays that this Court grant a writ of certiorari to review the judgment and opinions of the United States Court of Appeals for

the Eleventh Circuit entered on July 16, 2018 and resolve these disparities.

OPINIONS AND ORDERS BELOW

The July 16, 2018 opinion of the court of appeals, which was not designated for publication, is set out at pp. 1a-22a of the Appendix. However, the decision it found to be binding precedent has been published. *See Trask v. Sec'y, Dep't of Veterans Affairs*, 822 F.3d 1179 (11th Cir. 2016), *cert denied*, 137 S. Ct. 1133 (2017). The August 23, 2016 order of the district court, which was also unreported, is set out at pp. 23a-64a of the Appendix. The October 9, 2018 order of the court of appeals is set out at p. 65a of the Appendix.

JURISDICTION

The decisions of the court of appeals were entered on July 16, 2018. A timely petition for rehearing and rehearing en banc was denied on October 9, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 15(a) of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 633a(a), provides in pertinent part: "All personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . in executive agencies as defined in section 105 of Title 5

. . . shall be made free from any discrimination based on age."

Section 717(a) of Title VII of the Civil Rights Act of 1964 (hereafter, "Title VII"), 42 U.S.C. § 2000e-16(a), provides in pertinent part: "All personnel actions affecting employees or applicants for employment . . . in executive agencies as defined in section 105 of Title 5 . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin."

STATEMENT OF THE CASE

This case presents questions of fundamental importance to the resolution of the Title VII (and ADEA) cases of thousands of federal employees.

The question presented in this petition is whether the Court's decisions in *University of Texas Southwestern Medical Center. v. Nassar,* 570 U.S. 338 (2013) and *Gross v. FBL Financial Services, Inc.*, 557 U.S 167 (2006) interpreting statutory language applicable to the private sector bars the use of the "a factor," "motivating factor," or "substantial factor" standard in Title VII and ADEA retaliation cases brought by federal-sector employees under different statutory language. Reasoning provided by this Court in prior cases suggests that the differing statutory language applicable to federal-sector and private-sector claims mandates differing approaches.

The only Court of Appeals decision that has actually addressed the statutory language, *Ford v.*

Mabus, 629 F.3d 198, 206-07 (D.C. Cir. 2010), determined that the much broader "free from" language applicable to federal-sector employees should be interpreted differently than the "because of" language applicable to private-sector employees. It was decided after *Gross,* but before *Nassar*. As such, only the Eleventh Circuit's decision "resolved" the statutory language difference since *Gross* and *Nassar*.

In the present case, the panel of the Eleventh Circuit Court of Appeals felt bound by a prior decision that did not address the textual differences between the private- and federal-sector provisions in holding that the *McDonnell Douglas* test and a "because of" or "but-for" standard governed the determination of federal sector employees' retaliation claims.

A. LEGAL BACKGROUND

In *Gross*, this Court held that the mixed-motive framework does not apply to discrimination claims brought by private-sector employees under the Age Discrimination in Employment Act (ADEA). 557 U.S. at 173-80. The Court focused on the statutory language of 29 U.S.C. § 623, specifically on the ordinary meaning of "because of" in § 623(a)(1), citing dictionary definitions and cases interpreting unrelated statutes. *Id.* at 175-77. The Court considered the standard of causation imposed by the text of § 623(a)(1) and pointed out that § 623(a)(1) prohibits personnel decisions made "because of" a person's age and explained that the "ordinary

meaning of . . . 'because of' is that age was the 'reason' that the employer decided to act." *Id.* Therefore, the Court held, § 623(a)(1) requires that "a plaintiff must prove that age was the but-for cause of the employer's adverse decision." *Id.* The Court then explained that "[w]here the statutory text is silent on the allocation of the burden of persuasion, we begin with the ordinary default rule that the plaintiffs bear the risk of failing to prove their claims." *Id* at 177. Nothing in § 623(a)(1)'s language, the Court concluded, gave "warrant to depart from the general rule in this setting." *Id.*

With regard to federal employees, 29 U.S.C. § 623 does not apply to claims of age discrimination. Rather, § 633a applies. *See* 29 U.S.C. § 633a. The section applicable to private-sector employees' discrimination claims, § 623(a), provides the following:

> It shall be unlawful for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, <u>because of such individual's age</u>;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his

status as an employee, because of such individual's age; or

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

On the other hand, 29 U.S.C. § 633a(a), applicable to Federal employees, contains different language: "All personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . in executive agencies as defined in section 105 of Title 5 . . . shall be made free from any discrimination based on age." .

In *Nassar*, this Court extended the rationale of *Gross* to private-sector retaliation claims under 42 U.S.C. § 2000e-3(a) of Title VII, primarily due to the "because" language in that section. 570 U.S. at 379-83 (extending the rationale of *Gross*, "[g]iven the lack of any meaningful textual difference between § 2000e-3(a) and § 623(a)(1)").

Like the statutory language regarding federal-sector ADEA claims, the statutory language prescribing the standard of causation applicable to federal employees in retaliation cases differs from the language applicable to private-sector employees. Section 2000e-3(a) of Title VII does not apply to federal employees; Section 2000e-16(a) applies.

The section of Title VII applicable to private-sector employees, 42 U.S.C. § 2000e-3(a), states the following:

> 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.

On the other hand, 42 U.S.C. § 2000e-16(a), applicable to federal employees, contains different language: "All personnel actions affecting employees or applicants for employment . . . in executive agencies as defined in section 105 of Title 5 . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." (emphasis added).

As noted by this Court, federal-sector retaliation claims under Title VII was unaddressed in *Gómez-Pérez*. 553 U.S. at 488 n.4. In that case, this Court found retaliation provisions embodied within the "free from any discrimination" language of 29 U.S.C. § 633a(a). *Id.* at 479, 487. However, the rationale of *Gómez-Pérez* requires that where, as in 42 U.S.C. § 2000e-16(a), when Congress uses the same broad, general language applicable to the federal-sector as in 29 U.S.C. § 633a(a), it bars retaliation in addition to status-based discrimination. *Id.*; *see also Nassar*, 570 U.S. at 356 (citing *Gómez-Pérez* for the proposition that, "when construing the broadly worded federal-sector provision of the ADEA, Court refused to draw

inferences from Congress's amendments to the detailed private-sector provisions").

B. FACTUAL BACKGROUND

Petitioner joined the Bay Pines VAMC in 2004 and helped to develop the Geriatric Pharmacotherapy Clinic (GPC), which serves older veterans living with disease states and disabilities common to individuals of advanced age with military service. Such individuals present special challenges when considering co-morbidities throughout the caregiving process including during the administration of medications.

Babb was a highly successful pharmacist. In 2009 Babb was given an advanced scope by prior Pharmacy Management, because the way GPC operated prior to 2012 necessitated that Babb have an advanced scope to prescribe medications without a physician present, as part of her disease state management (DSM) duties.

In 2010 the VA announced a nationwide treatment initiative called Patient Aligned Care Teams (PACT). The purpose of PACT was to provide veterans' healthcare through a team which follows a patient and takes care of their total aspects of health. In essence, it was similar to the way the GPC had been operating. Consistent with the purpose and aims of PACT, facilities throughout the VA made the existing primary care physicians, nurses, social workers,

clerks, and other staff, such as pharmacists, permanent members of their modules' PACT.

Pharmacy management at Bay Pines VAMC rejected HR's recommendation that module pharmacists be allowed to transition into the CPS positions, except in the case of two pharmacists under the age of 40. For all three females over 50 in the modules and both female pharmacists over 50 in the in-patient setting at Bay Pines, Pharmacy denied them the opportunity to transition into PACT positions where they were already working. As a result of these actions, the older females were denied career advancement to a GS-13 grade. Despite the fact that they were performing in their positions for years and the fact that the doctors where they were working wanted these individuals to remain in their positions doing their jobs, they were the only people denied raise and promotions. They were denied in favor of younger men and women and older men.

Drs. Trask and Truitt, two of the female clinical pharmacists above the age of 50 when the material events occurred, were working in the Primary Care Modules at Bay Pines when PACT was announced. They filed EEOs after being denied advanced scopes of practice. Petitioner opposed management's actions, provided statements, and testified in support of Drs. Trask and Truitt's claims. Drs. Truitt and Trask contended, *inter alia*, that the VA's justification for their non-selection — their lack of advance scopes of practice – was a pretext for discrimination. They

further contended, *inter alia*, that the VA's justification for denying their advance scopes and any training allegedly associated – their alleged lack of need for advanced scopes – was also a pretext for discrimination.[1]

As a result of her participation in the EEO process, Petitioner was denied the opportunity to participate in negotiations related to Geriatric's assimilation into the PACT program. Two other younger pharmacists, one male and one female, were permitted to negotiate with other services assimilating into PACT.[2]

---

[1] Until the case of Drs. Truitt and Trask, a pharmacist would receive an advance scope when any collaborating physician would sign the pharmacist's application. Multiple physicians supported Trask and Truitt. Other VA facilities granted advance scopes in the same way. In fact, Bay Pines had never previously denied an advance scope to a pharmacist with such an application. Nevertheless, Pharmacy management first obstructed and then denied the efforts of Drs. Trask and Truitt to obtain advanced scopes prior to the PACT selections. The Court of Appeals based its decision upon managements' asserted reason. *See Trask*, 822 F.3d at 1192-93. Drs. Truitt and Trask petitioned this Court for a writ of certiorari, not for the issues herein, but for issues related the prima facie burden under the *McDonnell Douglas* framework.

[2] Petitioner suffered discrimination, opposed discrimination against other older females, filed an EEO claim, suffered retaliation, and was specifically targeted for an AIB investigation in a facility with a history of retaliation from the Director's level down against numerous employees who filed EEO claims. The government only appealed two of the many cases filed by those employees in federal court. *See Gowski v. Peake*, 682 F.3d 1299 (11th Cir. 2012). There was direct evidence of a scheme to destroy the careers and reputations of employees who engaged in EEO activity. There was, however, no evidence

Without Petitioner's participation, Pharmacy management rejected Geriatrics' request for 3 appointment slots and maintained that the only way Petitioner could keep her advanced scope and advance (*i.e.*, to a GS-13) was if Geriatrics agreed to 6 appointment slots, which Pharmacy knew was unworkable for Geriatrics. Pharmacy management also falsely claimed that without her advanced scope, Petitioner would not want to work in the Geriatrics Clinic she helped to develop. Geriatrics wanted to maintain Petitioner's current schedule.

These actions by Pharmacy management prevented Petitioner from performing DSM, a necessary ingredient to maintaining her advanced scope, and led to the removal of her advanced scope. Like Drs. Truitt and Trask and all female pharmacists over 50, Petitioner was thereby prevented from a promotion to a GS-13 and an increase in pay. Interestingly, her efforts to obtain another CPS GS-13 position before she actually lost her advanced scope were unsuccessful when two under 30 female pharmacists without an advanced scope were rated above her and one was selected, notwithstanding the Agency's position in *Trask*.

---

directly linking Pharmacy management to that scheme. Based upon the *Trask and Truitt* decision, Petitioner's retaliation claim was not reversed. However, the Court of Appeals reversed the district court on the gender-plus claim in order for the court to consider the motivating-factor analysis it had failed to even make.

Petitioner lost an opportunity for career advancement and a salary increase; she also incurred substantial legal expenses.

C. PROCEEDINGS BELOW

Petitioner Babb commenced this action in the Middle District of Florida, alleging that she was subject to discrimination, retaliation, and a discriminatory and retaliatory hostile work environment in violation of Title VII of the Civil Rights Act and the Age Discrimination in Employment Act of 1967. Specifically, she alleged that she was the victim of gender-plus-age discrimination in violation of Title VII and the ADEA. Petitioners further alleged retaliation because of her protected EEO activity and a discriminatory and retaliatory hostile work environment, in violation of the same statutory law.

After a period of discovery, the district court granted the VA's motion for summary judgment on all of petitioner's claims.

On appeal, Petitioner argued that the district court erred in granting summary judgment in several respects. First, the district court erred in deciding there were no disputed issues of material fact presenting a triable issue on retaliation when it only made a *McDonnell Douglas* analysis that ignored circumstantial evidence of retaliatory intent and pretext. Second, the district court failed to permit the Petitioner to prove discrimination and retaliation

claims under the "motivating-factor" test under *Quigg v. Thomas Cnty. Sch. Dist.*, 814 F.3d 1227 (11th Cir. 2016); 42 U.S.C. § 2000e-2(m); 29 U.S.C. § 633a or 42 U.S.C. § 2000e-16. Third, the district court erred because the evidence was sufficient to raise a jury question of whether discrimination, retaliation, or both was a "motivating factor" for these actions. Fourth, the district court erred in dismissing the hostile work environment claim.

With respect to the issues presented by this petition, the panel for the Eleventh Circuit Court of Appeals felt that it was bound by a decision of a different panel who heard the Truitt and Trask case. App 18a (citing *Trask*, 822 F.3d at 1191). In that case, the retaliation claim arose after the gender-plus-age discrimination had already resulted in substantially all career affecting adverse employment actions, and that case did not address the textual differences between the private- and federal-sector statutory provisions of either the ADEA or Title VII. Nevertheless, despite never having directly addressed the issue, the panel held that they were bound by precedent to apply a "because of" or "but for" standard to federal-sector employees' ADEA and Title VII retaliation claims.

The Eleventh Circuit denied petitioners' timely petition for panel rehearing or rehearing en banc.

REASONS FOR GRANTING THE WRIT

At the current time, Federal employees filing retaliation claims under Title VII and ADEA face differing standards of proof. The only federal court to consider and resolve the textual differences under provisions of the ADEA recognized that "free from" language requires only that discrimination be "a factor" to be an actionable claim. In Petitioner's case, the panel of the Eleventh Circuit Court of Appeals recognized that it was not considering the textual differences between the private- and federal-sector provisions when making its decision. App. 18a Nevertheless, the panel determined that it was bound by a prior panel decision applying a *McDonnell Douglas* test and a "but-for" causation standard to a federal-sector retaliation case that also did not considered said textual differences. *Id.* The same precedent setting panel decision will require all federal employees to forego the benefits of the words Congress made applicable to them. They not only have a more difficult burden of proof, their employer does not have to prove a same decision defense and the employees have lost potential injunctive rights and attorneys' fees that would tend to lessen future retaliation.

Several other Circuits have had the issue presented to them by federal employees but have avoided resolving the textual difference. As such, they have, at best, left the issue open.

As a result, some federal employees are being treated differently than others. Many do not know what their burden of proof will be.

To add to this disparate treatment of federal sector employees, administrative agencies that oversee discrimination and retaliation claims have followed the D.C. Circuit in *Ford* and the practice of this Court of reading the language of a statute and concluded that federal employee's burden of proof should be "a factor" or "a motivating factor" in Title VII retaliation and ADEA discrimination cases.

Similar to the statutory language regarding federal-sector ADEA claims, the statutory language prescribing the standard of causation applicable to federal employees in retaliation cases is different from the language applicable to private-sector employees. In *Nassar*, this Court extended the rationale of *Gross* to private-sector retaliation claims under 42 U.S.C. § 2000e-3(a) of Title VII, primarily due to the "because of" language in that section. 570 U.S. at 352 (extending the rationale of *Gross*, "[g]iven the lack of any meaningful textual difference between § 2000e-3(a) and § 623(a)(1)"); *see also* 42 U.S.C. § 2000e-3(a). However, "EEO retaliation claims in the Federal sector do not implicate the statute at issue in Nassar." *Savage*, 122 M.S.P.R. at 633; *see also* EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004, § II.C.1.b. Rather, the statute applicable here, like the statute above regarding federal-sector ADEA claims, requires that personnel

actions by agencies "be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a).

Given this sweeping language, both the EEOC and MSPB have determined a federal employee should be able to establish a retaliation claim under 42 U.S.C § 2000e-16 where a prohibited consideration was a motivating factor in the contested personnel action, even if it was not the only reason. *See Savage*, 122 M.S.P.R. at 634; *Complainant v. Dep't of Homeland Sec.*, EEOC DOC 0720140014, 2015 WL 5042782, at *5-6 (Aug. 19, 2015) (retaliation under Title VII or ADEA); *Complainant v. Dep't of Homeland Sec.*, EEOC DOC 0720140037, 2015 WL 3542586, at *4-5 (May 29, 2015) (retaliation under Title VII).

The statutory-language difference is a problem critical to resolve. The provisions discussed above are applicable to a large segment of the workforce all over the country. As shown by various courts' willingness to sidestep the issue, as discussed below, this is a problem that will never be addressed if this Court waits for the Circuits to resolve the issue. All of the entities entrusted by Congress to address discrimination and retaliation at the administrative stage have disagreed with the Eleventh Circuit's conclusion.

1. The decision of the Eleventh Circuit conflicts with the only other Circuit to directly address the meaning of "free from any" language as well as the decisions of the EEOC, and MSPB when deciding federal-sector claims.

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs.*, 541 U.S. at 252 (internal quotation marks omitted), *accord Gross,* 557 U.S. at 175.

The pertinent section of the ADEA applicable to federal-sector employees' discrimination claims, 29 U.S.C. § 633a(a), provides that "[a]ll personnel actions . . . shall be made free from any discrimination based on age." The phrase "because of" does not appear in that section. *See id.* In fact, the language implies that the federal government is held to higher standard. As recognized by the D.C. Circuit, the more sweeping language of § 633a requires a different interpretation than § 623 —a federal-employee plaintiff's burden is to show that age was a factor in the challenged personnel action. *See Ford*, 629 F.3d at 206-07 (discussing the language and § 633a(a) of the ADEA and caselaw interpretations of similar language along with the fact that Congress deliberately prescribed a distinct statutory scheme applicable only to Federal employees using "sweeping language"). The EEOC and the MSPB have come to the same conclusion as

the D. C. Circuit. *See Petitioner v. Dep't of Interior,* EEOC DOC 0320110050, 2014 WL 3788011, at *10 n.6 (July 16, 2014) (holding that the "but for" standard does not apply in federal sector Title VII or ADEA cases); *Wingate v. U.S. Postal Serv.,* 118 M.S.P.R. 566 (Sept. 27, 2012) (concluding that a Federal employee may prove age discrimination by showing that age was "a factor" in the personnel action, even if it was not the "but for" cause).

In *Nassar*, this Court extended the rationale of *Gross* to private-sector retaliation claims under 42 U.S.C. § 2000e-3(a) of Title VII, primarily due to the "because" language in that section. 570 U.S. at 379-83 (extending the rationale of *Gross*, "[g]iven the lack of any meaningful textual difference between § 2000e-3(a) and § 623(a)(1)").

Like the statutory language regarding federal-sector ADEA claims, the statutory language prescribing the standard of causation applicable to federal employees in retaliation cases is different from the language applicable to private-sector employees. Section 2000e-3(a) of Title VII does not apply to federal employees; Section 2000e-16(a) applies. 42 U.S.C. § 2000e-16(a), applicable to Federal employees, contains different language: "All personnel actions affecting employees or applicants for employment . . . in executive agencies as defined in section 105 of Title 5 . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a) (emphasis added).

As noted by this Court, federal-sector retaliation claims under Title VII was unaddressed in *Gómez-Pérez*. 553 U.S. at 488 n.4. In that case, this Court found retaliation provisions embodied within the "free from any discrimination" language of 29 U.S.C. § 633a(a). *Id.* at 479, 487. However, the rationale of *Gómez-Pérez* requires that where, as in 42 U.S.C. § 2000e-16(a), When Congress uses the same broad, general language applicable to the federal-sector as in 29 U.S.C. § 633a(a), it bars retaliation in addition to status-based discrimination. *Id.*; *see also Nassar*, 570 U.S. at 356 (citing *Gómez-Pérez* for the proposition that, "when construing the broadly worded federal-sector provision of the ADEA, Court refused to draw inferences from Congress' amendments to the detailed private-sector provisions").

Other Circuits recognizing the statutory differences have largely chosen to side-step the issue. *See, e.g., Logan v. Sessions*, 690 Fed. App'x 176, 179-80 (5th Cir. 2017); *Reynolds v. Tangherlini*, 737 F.3d 1093, (7th Cir. 2013); *Leal v. McHugh*, 731 F.3d 405, (5th Cir. 2013); *Velazquez-Ortiz v. Vilsack*, 657 F.3d 64, 74 (1st Cir. 2011). Still other Circuits, like the Eleventh Circuit panel in *Trask*, assume without addressing the textual differences that *Gross* applies equally to federal employees. *See, e.g., Shelley v. Geren*, 666 F.3d 599, 606-07 (9th Cir. 2012). This Court has an obligation to step in and address the issue where the lower courts have refused to do so. Constitutional government requires applicable laws

written and enacted by Congress to be applied and enforced against the government itself.

2. The Eleventh Circuit's decision also conflicts with this Court's decisions related to principles of statutory construction.

In addition to the plain meaning of the words, "free from any," the laws of statutory construction also support the decisions by the D.C. Circuit, MSPB, and EEOC. "[W]here Congress includes particular language in one section of the statute, but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *see also Bailey v. United States*, 516 U.S. 137, 146 (1995) (distinction in provisions between "use" and "intended to be used" creates implication that related provisions relying on "use" alone refer to actual not intended use); *DIRECT TV, Inc. v. Brown*, 371 F.3d 814, 817-18 (11th Cir. 2004) ("[W]hen Congress uses different language in similar sections it intends different meanings.").

This Court has also reasoned that, although "Congress knew how to impose aiding and abetting liability when it chose to do so," it did not use the words "aid" and "abet" in the statute, and hence did not impose aiding and abetting liability. *Central Bank of Denver v. First Interstate Bank of Denver, N.A.*, 511

U.S. 164, 176-77 (1994). That same logic should apply equally to employment discrimination statutes. At the time Congress passed Title VII and later expanded the ADEA to the federal sector, the phrase "because of" or "because" was included in the private-sector provisions. Congress, therefore, knew how to impose a but-for causation standard when it chose "free from any". It did not use "because of" or "because", because it did not intend to impose a but-for standard for federal employees.

CONCLUSION

For the foregoing reasons, this Court should grant this petition and issue a writ of certiorari to review the judgment and opinion of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

JOSEPH D. MAGRI
Counsel of Record
SEAN M. MCFADDEN
MERKLE & MAGRI, P.A.
5601 Mariner St., Ste. 400
Tampa, Florida 33609
Telephone: 813-281-9000
Email:jmagri@merklemagri.com