

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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NORIS BABB, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) No. 18-882  
 )  
ROBERT WILKIE, SECRETARY OF )  
 )  
VETERANS AFFAIRS, )  
 )  
 ) Respondent. )  
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Pages: 1 through 69  
Place: Washington, D.C.  
Date: January 15, 2020

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Petitioner, )

v. ) No. 18-882

ROBERT WILKIE, SECRETARY OF )

VETERANS AFFAIRS, )

Respondent. )

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Washington, D.C.

Wednesday, January 15, 2020

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

ROMAN MARTINEZ, ESQ., Washington, D.C.;

on behalf of the Petitioner.

GEN. NOEL J. FRANCISCO; Solicitor General,

Department of Justice, Washington, D.C.;

on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument this morning in Case 18-882, Babb  
5 versus Wilkie.

6 Mr. Martinez.

7 ORAL ARGUMENT OF ROMAN MARTINEZ

8 ON BEHALF OF THE PETITIONER

9 MR. MARTINEZ: Mr. Chief Justice, and  
10 may it please the Court:

11 Section 633a states that all federal  
12 personnel actions shall be made free from any  
13 discrimination based on age. Both parties agree  
14 that that language tracks the text and meaning  
15 of Title VII's identical federal sector  
16 provision covering race, sex, and religion.

17 Together the two provisions bar  
18 discrimination not only in the ultimate outcome  
19 of a personnel decision but also in the process  
20 of making that decision. That's true regardless  
21 of whether the prohibited characteristic at  
22 issue is a but-for cause of the final decision.  
23 That's the rule that the MSPB and the EEOC have  
24 applied in countless cases for many years, but  
25 more importantly it flows directly from the

1 statutory text.

2           The phrase "free from any  
3 discrimination" governs how the decision shall  
4 be made. In other words, the process for making  
5 that decision. If that process uses age or race  
6 as a negative factor, it's not made free from  
7 any discrimination.

8           Congress chose those words carefully  
9 rejecting the private sector language later  
10 addressed in Gross and Nassar. It did so in the  
11 unique federal sector context to create a remedy  
12 for violating constitutional equal protection  
13 rights. This Court has said that when a  
14 plaintiff is subjected to discrimination in the  
15 process of being considered for a government  
16 benefit, he necessarily suffers a redressable  
17 equal protection injury even if he can't prove  
18 he otherwise would have received a benefit.

19           That same injury rule governs 633a and  
20 Title VII. That rule is fully consistent with  
21 common law principles and this Court's but-for  
22 causation analysis in other cases.

23           The government, in this case,  
24 apparently believes it's perfectly lawful for  
25 federal agencies to apply "younger is better" or

1 "whiter is better" hiring policies to  
2 individuals who can't prove that they would have  
3 been hired but for those policies. That's  
4 anti-textual and it's wrong.

5 Decisions applying such blatantly  
6 discriminatory policies are obviously not made  
7 free from any discrimination. The government's  
8 theory contradicts the plain statutory language.

9 JUSTICE KAVANAUGH: But you say that  
10 the but-for causation is not required for  
11 liability, but then at the relief stage, as I  
12 understand your briefs, you say that but-for  
13 causation is required for reinstatement or back  
14 pay. And where is that in the statutory text?

15 MR. MARTINEZ: So we would say that --  
16 that at the -- at the remedial stage, ordinary  
17 remedial principles would apply, and those  
18 principles would require that the victim, the --  
19 the plaintiff, be made whole for the violation.  
20 And under those ordinary principles that I think  
21 are undisputed on both sides, if the evidence  
22 shows that the -- the person, the plaintiff,  
23 couldn't -- wouldn't have gotten hired anyway,  
24 they shouldn't get remedies that are  
25 specifically and logically tied to that -- that

1 thing that they -- they weren't -- wouldn't have  
2 been entitled to the in first place.

3 But that doesn't mean that they  
4 shouldn't get the kinds of prospective relief  
5 that are available in a wide array of other  
6 cases. For example --

7 JUSTICE KAVANAUGH: And why -- why  
8 would we go all the way up the hill and then  
9 come all the way back down at the relief stage  
10 and just say, oh, well, you really do need  
11 but-for causation because, as you rightly say,  
12 if you haven't suffered a -- an action because  
13 of age, you're not entitled to reinstatement --

14 MR. MARTINEZ: You -- Your Honor, with  
15 respect, you wouldn't be coming all the way down  
16 the hill because there would be a wide range of  
17 other types of remedies that would be available  
18 other than reinstatement and back pay. For  
19 example, you might be entitled to -- to an  
20 injunction telling the government to stop  
21 discriminating.

22 JUSTICE GINSBURG: This case --

23 JUSTICE GORSUCH: What would you --

24 JUSTICE GINSBURG: This -- this case,  
25 because there is -- at least one of her

1 allegations is that she was passed over and  
2 younger people were selected for the coagulation  
3 unit. Now, suppose that's true, younger women  
4 were selected, but they were better qualified.  
5 They had experience and training that she  
6 lacked.

7 So what would be the remedy? You --  
8 you would say there is a violation because age  
9 was taken into account. What -- what relief --  
10 you said it wouldn't be going all the way back  
11 down the hill in answer --

12 MR. MARTINEZ: Sure.

13 JUSTICE GINSBURG: -- to Justice  
14 Kavanaugh. What would the relief be?

15 MR. MARTINEZ: So, first of all,  
16 assuming that the government could show that --  
17 that she wouldn't have gotten the job -- we'll  
18 just take that as a given I think implicit in  
19 the question -- then she wouldn't be entitled to  
20 reinstatement or back pay, but she would be  
21 entitled to remedies like EEO training so that  
22 this kind of discrimination wouldn't happen to  
23 her next time she applies for a promotion or  
24 next time she seeks an opportunity. That kind  
25 of training is -- is a classic remedial relief



1 that's available in these types of cases. In  
2 some --

3 JUSTICE GINSBURG: Do -- who would get  
4 the training?

5 MR. MARTINEZ: The training we be the  
6 -- the supervisors and perhaps the -- the -- you  
7 know, the -- the others within the Bay Pines  
8 medical center who had contributed to the  
9 discriminatory treatment in the first place. I  
10 think if the -- if a court -- you know, we're  
11 here at summary judgment, but if the court -- if  
12 the proof at trial showed that there was some  
13 sort of more generalized policy of  
14 discriminating against people because they were  
15 older, the court could also issue some  
16 prospective relief that would say that those  
17 policies are unlawful.

18 In a lot of these cases, what a court  
19 does is -- is requires the entity to post a  
20 notice saying here's the finding of  
21 discrimination against us, so that people can  
22 read that notice, understand what went wrong  
23 last time, and not do it again in the future.

24 CHIEF JUSTICE ROBERTS: Would --

25 JUSTICE GORSUCH: Would that remedy --

1 CHIEF JUSTICE ROBERTS: -- that  
2 require --

3 JUSTICE GORSUCH: Oh, I'm sorry.

4 CHIEF JUSTICE ROBERTS: So no  
5 particular relief directly benefiting her?

6 MR. MARTINEZ: No, Your Honor.  
7 That's --

8 CHIEF JUSTICE ROBERTS: Or atmospheric  
9 relief, institutional relief, but she herself  
10 gets nothing tangible?

11 MR. MARTINEZ: I think those things  
12 would be very tangle for her, Your Honor,  
13 because she's still an employee there, she's  
14 still operating day to day in that environment,  
15 and she still wants to take advantage of future  
16 opportunities for training. And so if -- if the  
17 -- if she gets these kinds of corrective  
18 remedies, it's going to make it better for her  
19 and easier for her next time, when she wants to  
20 apply for the opportunity, to be treated fairly  
21 without regard to age.

22 And this is the kind of  
23 forward-looking relief that this Court has often  
24 recognized is appropriate, even without but-for  
25 causation, for example, in the constitutional

1 cases that we've talked about. So in cases --

2 JUSTICE GORSUCH: Would -- would the  
3 remedy be any different than might be obtained  
4 under the civil service laws?

5 MR. MARTINEZ: Well, under the civil  
6 service laws, Your Honor, the -- the way the  
7 civil service laws work is Section 2302 of the  
8 CSRA says that the way you bring a  
9 discrimination claim is to sue under the statute  
10 that we're currently talking about.

11 JUSTICE GORSUCH: There are -- there  
12 are other remedies available though, right?

13 MR. MARTINEZ: I -- I -- I guess I'd  
14 have to focus specifically -- I'm not sure  
15 specifically what you'd be asking for, but the  
16 way I read the civil service laws is that --  
17 that these types of claims need to be brought  
18 under this particular statute.

19 JUSTICE SOTOMAYOR: Mr. Martinez --

20 MR. MARTINEZ: Now --

21 JUSTICE SOTOMAYOR: -- we're assuming  
22 the worst for your client, that the government  
23 is right that she would not have been hired  
24 but-for. But as I understand the equal  
25 protection claim, it's that the process would be

1 free from discrimination.

2 MR. MARTINEZ: Right.

3 JUSTICE SOTOMAYOR: So that even if  
4 she can't prove she would have gotten the job,  
5 she still has an opportunity to prove, qua a  
6 remedy, that age was considered and considered  
7 inappropriately.

8 MR. MARTINEZ: Correct.

9 JUSTICE SOTOMAYOR: So, for example --  
10 give me an example of a defense to one of the  
11 government's allegations, because there were  
12 four allegations, four or five, of different  
13 employment scenarios that she didn't qualify  
14 for.

15 MR. MARTINEZ: Right.

16 JUSTICE SOTOMAYOR: But give me an  
17 example in those four or five of a process that  
18 could have -- that she might have won on, that  
19 she might have prevailed in showing that that  
20 process was corrupted because of her age.

21 MR. MARTINEZ: Sure. So for -- one  
22 example is she sought certain training  
23 opportunities. And I think if -- if in the  
24 course of -- if the Court concluded after  
25 looking at all the evidence that the reason that

1 she was denied those training opportunities was  
2 partly because they thought there were other  
3 candidates who were good, but partly because  
4 they had -- they had a conversation around a  
5 table and said, you know, Ms. Babb, she's --  
6 she's -- she's really kind of old, we don't  
7 really like her, she keeps filing these EEO  
8 claims, she keeps asserting her rights in this  
9 way. Let's not give her the training  
10 opportunities in part for that reason.

11 It may be that the government  
12 hypothetically could come back and prove that  
13 there were other more qualified candidates, but  
14 that process has been infected by the  
15 consideration of those very significant factors  
16 of -- of pure age discrimination.

17 I think if we look at --

18 CHIEF JUSTICE ROBERTS: Usually --  
19 usually when we have -- conclude that there's a  
20 tainted process, we make the decisionmaker go  
21 back and do it over without the taint, don't we?

22 MR. MARTINEZ: I think you do in a  
23 circumstances, Your Honor, and in a circumstance  
24 which that was possible, that might well be  
25 the -- an available remedy as well.

1           I think we -- we are several years  
2 past the -- you know, the particular promotion  
3 decision and the particular role. I don't know  
4 if those roles even currently exist in the same  
5 way they did several years ago. But I think  
6 that's yet another example of the kind of  
7 equitable remedy that could be awarded if the  
8 process was determined to be tainted.

9           JUSTICE KAGAN: Mr. Martinez, you  
10 started by saying that this was a process  
11 statute. And I guess I want to press you on why  
12 you think that is.

13           If I understood your brief, it was  
14 about the word "made," but, I mean, that's a  
15 possible interpretation of this language, but  
16 another interpretation is that when you say that  
17 a personnel action should be made free from any  
18 discrimination, you're talking about the actual  
19 action, the discharge, the failure to promote,  
20 whatever, and saying that that action -- at the  
21 moment in time when it occurs, that action has  
22 to be free from discrimination rather than  
23 saying that the entire process leading up to it,  
24 including all the irrelevant things that  
25 happened that played no role in the action, has

1 to be free from discrimination.

2 So why do you read this as a process  
3 statute?

4 MR. MARTINEZ: I -- I think that's a  
5 helpful way. Maybe I could just walk you  
6 through my interpretation of the statute. And  
7 then we have it reproduced here at page 5 of the  
8 blue brief.

9 And so 633a(a), I think they're sort  
10 of three big chunks to the statute that are  
11 relevant here. First is the subject of the --  
12 of the sentence, "all personnel actions." Then  
13 there's the verb, "shall" be made. And then  
14 finally there's an adverbial phrase, "free from  
15 any discrimination based on age."

16 And we think the real work here is  
17 being done by the combination of the adverbial  
18 phrase, "free from any discrimination" that  
19 modifies the verb "shall" be made. It's not  
20 made on its own, it's the combination of those  
21 things.

22 And we think that in context, that  
23 adverbial phrase answers the question of how the  
24 decision shall be made. It's not saying what's  
25 the decision. It's not saying when does the

1 decision have to happen. It's talking about how  
2 that decision shall be made. That's a -- that's  
3 process language.

4 I think the second thing is, once you  
5 look within the adverbial phrase, within the  
6 free from any discrimination based on any age  
7 phrase, you should ask yourself, okay, well,  
8 what does this process have to be free from?

9 The next part of the statute is "any  
10 discrimination." And the word "discrimination"  
11 has been interpreted under its plain meaning and  
12 this -- and in this Court's decision in Jackson  
13 just to mean unequal differential or less  
14 favorable treatment.

15 And we think that that is -- we accept  
16 that, I think the Solicitor General has conceded  
17 that that's the understanding of discrimination.

18 JUSTICE KAGAN: So I think what the  
19 Solicitor General would say is, sure, it's  
20 unequal treatment but a person is only subject  
21 to unequally treatment if he or she doesn't get  
22 the outcome that he would otherwise have gotten.

23 MR. MARTINEZ: Well --

24 JUSTICE KAGAN: And if everything ends  
25 up the same, then there's been no unequal



1 treatment.

2 MR. MARTINEZ: Well, I think -- I  
3 think, Your Honor, that's why the first part,  
4 the free from language and the fact that it's an  
5 adverbial phrase modifying the verb, and that  
6 that language is talking -- signals that we're  
7 talking about process.

8 Once you know that we've got this --  
9 we've got this modifier that's a process  
10 modifier, that's talking about the process, I  
11 think that then sheds light on what we mean by  
12 discrimination.

13 JUSTICE KAVANAUGH: Well, what -- what  
14 about the subject, "actions"?

15 MR. MARTINEZ: Right.

16 JUSTICE KAVANAUGH: And that's a term  
17 that's used in Nassar, a term that used in  
18 Gross, the word action, and the action is  
19 usually referred to as an adverse employment  
20 action, namely as Justice Kagan says, the  
21 decision. And your brief uses the word  
22 "process" over and over, and the CS -- civil  
23 service laws that Justice Gorsuch referenced do  
24 say that the process has to be free of any --  
25 you have to be treated fair and equitably

1 throughout the -- the process but this doesn't  
2 say that. It says "actions."

3 So how do we deal with the word  
4 "action"?

5 MR. MARTINEZ: Well, I think you need  
6 to read it again in -- in the context of the  
7 whole sentence. And it -- and it doesn't say  
8 actions shall be -- can't be based on age. It  
9 says, actions shall be made free from any  
10 discrimination based on age.

11 And so that -- that phrase, we agree  
12 with the Solicitor General. I think they say  
13 this -- I think they say this on -- in their --  
14 in their own brief. They -- they -- they say  
15 that the -- the -- the work that's done by the  
16 phrase "personnel action" is simply to explain  
17 the range of employment-related actions  
18 that's -- that's covered by the statute  
19 generally. It doesn't bear on the but-for  
20 causation question.

21 JUSTICE KAVANAUGH: I don't know --  
22 I'm sorry.

23 MR. MARTINEZ: Sorry, just to -- to  
24 answer the question about action, I think the  
25 key point here is, if you look at -- if you look

1 at this page 5 of our blue brief, it -- what  
2 strikes me is the phrase that the Solicitor  
3 General relies on, "based on age," that's what  
4 they're getting -- where they're getting their  
5 but-for causation textual argument. It's all  
6 the way down at the bottom of the -- at the end  
7 of that paragraph.

8 And if you look at it, it modifies the  
9 word "discrimination," which is immediately to  
10 the left. What the Solicitor General is asking  
11 you to do is take that based on age -- age  
12 phrase, walk up 17 lines of text, turn left and  
13 have it modify "personnel actions." That's just  
14 not how the statute reads.

15 And I think what -- what this Court  
16 has always done and -- and needs to do is look  
17 very carefully at the wording of the statute.  
18 This is the same point that Judges Tatel  
19 and Sentelle made in the DC Circuit that this  
20 statute --

21 JUSTICE KAVANAUGH: Judge Henderson  
22 disagreed.

23 MR. MARTINEZ: Judge -- you know,  
24 Judge Henderson concurred, Your Honor, so she  
25 agreed with the remand. She -- she expressed

1 some doubts about maybe the -- the -- the  
2 clarity or the -- the force of the particular  
3 arguments that Judges Tatel and Sentelle made.  
4 But the bottom line here is I think  
5 grammatically there's no question that "based on  
6 age" modifies "discrimination."

7 JUSTICE ALITO: But what happens if  
8 age plays no role whatsoever in the actual  
9 decision but at some prior point in the process,  
10 age was considered. I don't know that  
11 anything -- I don't think your argument depends  
12 on whether we look just at the final decision or  
13 we look at the whole process. But what would  
14 happen in that situation?

15 MR. MARTINEZ: I think it would -- it  
16 would depend. So maybe I'd have to understand  
17 the hypothetical a little bit more.

18 I think if -- if -- if someone could  
19 look at the entire -- at the -- the  
20 decisionmaking process and say that age was not  
21 a factor at all, then I think we would not -- a  
22 -- a -- a -- a plaintiff would not prevail. But  
23 if age played a significant role at the  
24 beginning of the process in some way, then I  
25 think it -- it would not be made free from

1 discrimination under the plain language of the  
2 statute.

3 CHIEF JUSTICE ROBERTS: Well, but  
4 if -- if the statute prohibits any  
5 discrimination, I don't know where you get your  
6 qualification that it has to be a significant  
7 factor. It doesn't to have affect the final  
8 action. So what type of discrimination, any  
9 type -- let's say in the course of the, you  
10 know, weeks' long process, you know, one comment  
11 about age, you know, the hiring person is  
12 younger, says, you know, okay, boomer, you know  
13 --

14 (Laughter.)

15 CHIEF JUSTICE ROBERTS: -- once to  
16 the -- to the applicant. Now, you're only  
17 concerned about process. You're not concerned  
18 about but-for causation. It doesn't have to  
19 have played a role in the actual decision. So  
20 is that actionable?

21 MR. MARTINEZ: I -- I think we would  
22 say that it does have to play a role in the  
23 decisionmaking process that -- that leads to the  
24 decision. And I think in that particular case,  
25 if -- if it really had no role, if it was just

1 sort of, you know, a -- a stray comment in the  
2 air, I think that on the facts of that, I think  
3 a -- a court could conclude --

4 CHIEF JUSTICE ROBERTS: So how do  
5 you -- how do you tell what's a significant  
6 factor in the decision?

7 MR. MARTINEZ: We're not saying it has  
8 to be a --

9 CHIEF JUSTICE ROBERTS: No.

10 MR. MARTINEZ: We're not using the  
11 term --

12 CHIEF JUSTICE ROBERTS: Some factor.

13 MR. MARTINEZ: -- "significant."  
14 We're saying that -- ultimately, we're saying  
15 what the statute says, which is that the -- that  
16 it needs to be made free from discrimination.  
17 We think that applies to the process as a whole.

18 CHIEF JUSTICE ROBERTS: Well, you say  
19 free from any discrimination --

20 MR. MARTINEZ: Even better.

21 CHIEF JUSTICE ROBERTS: -- it doesn't  
22 have to result in the final decision. I'm just  
23 trying to see how many stray comments do you  
24 need and who has to make them before you decide  
25 that, although it says "any," we don't really

1 mean any. We mean some discrimination that has  
2 a particular effect, even if it's not but-for.

3 I'm just wondering if --

4 MR. MARTINEZ: Yeah.

5 CHIEF JUSTICE ROBERTS: -- your  
6 position is going to become a -- a -- a --  
7 really just a regulation of speech in the  
8 workplace.

9 MR. MARTINEZ: Of course not, Your  
10 Honor.

11 CHIEF JUSTICE ROBERTS: Well, of  
12 course -- well, then explain how not.

13 MR. MARTINEZ: Well, if -- if -- if  
14 the speech in the workplace is, you know, using  
15 ethnic slurs or -- or, you know, calling people  
16 "boomer" or saying unflattering things about  
17 them in age when considering them for a  
18 position, then, yes, of course.

19 CHIEF JUSTICE ROBERTS: So calling  
20 somebody a "boomer" and considering them for a  
21 position would be actionable?

22 MR. MARTINEZ: I think if -- if -- if  
23 -- if the decisionmakers are sitting around the  
24 table and they say, we've got Candidate A who's  
25 35 and we've got Candidate B who's 55 and is a

1 boomer and is probably tired and -- and, you  
2 know, doesn't know -- have a lot of computer  
3 skills, I think that absolutely would be  
4 actionable.

5 CHIEF JUSTICE ROBERTS: Well, what if  
6 he just calls him a "boomer." I mean that --  
7 I'm just trying to --

8 MR. MARTINEZ: I think that -- I --  
9 I -- it -- it seems to me like that would be a  
10 classic question for the fact finder. But if  
11 the fact finder were to conclude that that  
12 statement reflected, was one of the factors  
13 going into this decision, I think it absolutely  
14 would be covered.

15 JUSTICE BREYER: Is -- is -- when you  
16 answered that question, I had thought you would  
17 say, and you didn't, and -- and so this is why I  
18 have a question. There is another statute,  
19 Title VII, and what it says is when the  
20 discrimination is a motivating factor, but even  
21 though other factors also motivated that  
22 practice.

23 MR. MARTINEZ: Right.

24 JUSTICE BREYER: Now -- now, I thought  
25 you were going to pick up the same standard.



1                   MR. MARTINEZ: We -- we think that our  
2 standard is essentially the same standard. We  
3 just --

4                   JUSTICE BREYER: Right.

5                   MR. MARTINEZ: We just haven't --

6                   JUSTICE BREYER: So we could say in  
7 the opinion what this means, to be free, is the  
8 same thing that Congress said when it amended  
9 Title VII, that it isn't enough to show -- if  
10 you just show -- you don't have to show,  
11 plaintiff, that it is but-for, but you do have  
12 to show it was a motivating factor even though  
13 there may have been other "motivating factors."

14                  MR. MARTINEZ: Right.

15                  JUSTICE BREYER: And, therefore, there  
16 is no more administrative problem in this than  
17 there is anyway under Title VII. Now, that's  
18 what I'd thought you -- but you didn't say that.  
19 So I don't --

20                  MR. MARTINEZ: Let me -- let me  
21 just --

22                  JUSTICE BREYER: You disagree with me  
23 because you --

24                  MR. MARTINEZ: No, no, no. Let me  
25 explain. The --

1 JUSTICE BREYER: -- think it -- yeah,  
2 go ahead.

3 MR. MARTINEZ: The reason we had -- we  
4 didn't do that is because, I think as everyone  
5 would agree, by its terms, that provision does  
6 not directly apply to this statute.

7 JUSTICE BREYER: No, I know it  
8 doesn't.

9 MR. MARTINEZ: I'm just explaining --

10 JUSTICE BREYER: Yeah.

11 MR. MARTINEZ: -- why I didn't say it.  
12 But I think the substance of the point is  
13 exactly right. I think that -- that -- that  
14 this would not create administrability problems.  
15 You would actually be clarifying the law and  
16 creating a --

17 JUSTICE KAVANAUGH: Well, wait a  
18 second --

19 CHIEF JUSTICE ROBERTS: Well, another  
20 reason -- another reason you may not have said  
21 it is because it comes with another flip side,  
22 right? It was a motivating factor, but then the  
23 defendant gets to show it wasn't -- the decision  
24 would have been made without regard to it.

25 MR. MARTINEZ: Yeah, but, Your Honor,

1 that would -- that happens at the remedial  
2 stage, at the relief stage. And that's exactly  
3 our point, is that, at the relief stage, the  
4 defendant does get to show --

5 JUSTICE KAVANAUGH: But in those  
6 statutes, in that statute, it happens at the  
7 liability stage, and I read your briefs --

8 MR. MARTINEZ: No, Your Honor --

9 JUSTICE KAVANAUGH: And I -- I read  
10 your briefs -- yeah, in the statute, I  
11 understand -- I read your briefs to reject the  
12 motivating factor or not adopt the motivating  
13 factor standard.

14 MR. MARTINEZ: No. Let -- let me be  
15 clear because this is -- this is an important  
16 point.

17 JUSTICE KAVANAUGH: The Price  
18 Waterhouse-type standard that Justice Breyer  
19 brought up.

20 MR. MARTINEZ: I think Justice Breyer  
21 was talking about what Congress did to fix the  
22 problem of Price Waterhouse. So Price  
23 Waterhouse happens. Congress decides that the  
24 Price Waterhouse test is insufficiently  
25 protective of victims. So Congress makes very

1 clear in the statute that there is a violation  
2 of the statute, there is liability with  
3 motivating factor, but if the employer can show  
4 that -- that it wasn't a but-for cause, that  
5 shrinks the number of remedies that are  
6 available to you.

7 And that's essentially -- we're not  
8 saying that -- we're not trying to like apply  
9 different statutory language here, but we're  
10 saying that our rule, the statutory language  
11 that we have, essentially has that same test --

12 JUSTICE KAVANAUGH: But you're not  
13 asking --

14 MR. MARTINEZ: -- test --

15 JUSTICE KAVANAUGH: Sorry to  
16 interrupt.

17 MR. MARTINEZ: Right.

18 JUSTICE KAVANAUGH: You're not asking  
19 for "motivating factor;" you're saying "any  
20 factor."

21 MR. MARTINEZ: Right, but I think the  
22 way that --

23 JUSTICE KAVANAUGH: Is that correct?

24 MR. MARTINEZ: We -- we -- we -- we  
25 don't think it makes a difference, frankly, Your

1 Honor. We --

2 JUSTICE KAVANAUGH: And so, yes,  
3 you're asking for any factor?

4 MR. MARTINEZ: We think "any factor"  
5 and "motivating factor" essentially mean the  
6 same thing because they play -- the -- the  
7 factor plays into the decision. And so in that  
8 sense, it's motivating.

9 JUSTICE GORSUCH: Counsel, I wanted to  
10 give you an opportunity to respond to another  
11 argument that concerned me.

12 MR. MARTINEZ: Sure.

13 JUSTICE GORSUCH: The Solicitor  
14 General suggests that if we were to adopt your  
15 view, we'd have to do the same thing with  
16 respect to private discrimination under, what is  
17 it, the 623 --

18 MR. MARTINEZ: Right.

19 JUSTICE GORSUCH: -- which, of course,  
20 we can't do because of Gross, and point  
21 specifically to the language saying, you know,  
22 you can't discriminate in hiring or otherwise,  
23 right, discriminate --

24 MR. MARTINEZ: Right.

25 JUSTICE GORSUCH: -- with respect to

1 terms and conditions of -- of -- of employment.  
2 And if we were to adopt your broad reading here  
3 of "discriminate," why wouldn't we do the same  
4 thing there?

5 MR. MARTINEZ: So I think Gross is  
6 totally different, and just a couple points on  
7 this because it's very important. Number one,  
8 Congress looked at that exact language when it  
9 was legislating the statute that's at issue in  
10 this case. Congress rejected applying the  
11 private sector language from the ADEA to ADEA  
12 federal sector claims. We know that from the  
13 drafting history. We know that from --

14 JUSTICE GORSUCH: I -- I understand  
15 that --

16 MR. MARTINEZ: So -- so --

17 JUSTICE GORSUCH: -- but that's not  
18 responsive. So --

19 MR. MARTINEZ: Right. So, instead, it  
20 chose different language which is fundamentally  
21 different from the language in Gross. I'm going  
22 to get to the "discriminate" point.

23 JUSTICE GORSUCH: I wish you would.

24 MR. MARTINEZ: Okay. I'll -- I'll --  
25 I'll go to the "discriminate" point. If you

1 look at the language in Gross, and we've  
2 reproduced it in the addendum to our reply  
3 brief, what it has is it talks about four  
4 different specific types of adverse actions:  
5 Failing to hire, refusing to -- failing to hire,  
6 refusing to hire, discharging any individual;  
7 and then, the fourth one, otherwise discriminate  
8 with respect to terms --

9 JUSTICE GORSUCH: Conditions.

10 MR. MARTINEZ: -- compensation,  
11 conditions.

12 JUSTICE GORSUCH: Yeah. Yeah.

13 MR. MARTINEZ: The first three of  
14 those things are all outcome-based. The first  
15 three items in the list. The fourth item in the  
16 list is an "otherwise" clause, an "otherwise"  
17 sort of catch-all clause.

18 JUSTICE GORSUCH: Why wouldn't that be  
19 process too, is the Solicitor General's  
20 question?

21 MR. MARTINEZ: Well -- well, the first  
22 three things are all -- the first three in that  
23 list are all outcome-based. And so what this  
24 Court has said when looking at very similar  
25 "otherwise" catch-all clauses, it's applied the

1 ejusdem generis canon and said that when you  
2 have things in a list like that, the last item  
3 with the "otherwise" --

4 JUSTICE GORSUCH: So -- so the word  
5 "discriminate" here means something different  
6 than the word "discriminate" there.

7 MR. MARTINEZ: I think the word  
8 "discriminate" here needs to be read in the  
9 context of the broader phrase. The other  
10 contextual difference is that our statute,  
11 unlike the statute in Gross, has the most  
12 important textual indicator that comes -- makes  
13 this case come out our way, which is the "shall  
14 be made free from" language.

15 JUSTICE GORSUCH: No, I understand  
16 that. But the "otherwise discriminate," what --  
17 you've got the ejusdem generis canon. Excellent  
18 canon, good canon. The other -- the other kind  
19 of general rule is, when Congress makes a  
20 distinction, we should attend to the -- in  
21 language, we should attend to it. And -- and --

22 MR. MARTINEZ: We couldn't agree -- we  
23 couldn't agree more.

24 JUSTICE GORSUCH: And I understand --  
25 I know where you're going with that, and that's



1 good, that's a good point --

2 (Laughter.)

3 JUSTICE GORSUCH: -- but "otherwise  
4 discriminate" --

5 MR. MARTINEZ: Yeah.

6 JUSTICE GORSUCH: -- is -- is very --  
7 I mean, that -- that seems to be a catch-all.  
8 That seems to be anything.

9 MR. MARTINEZ: I think I would resist  
10 that one because of ejusdem generis. The second  
11 point, textually --

12 JUSTICE GORSUCH: You think you would  
13 have resisted that before Gross?

14 MR. MARTINEZ: I -- you know, Your  
15 Honor, we're not here to relitigate Gross.

16 JUSTICE GORSUCH: No.

17 MR. MARTINEZ: I -- I think this --  
18 Gross was a very closely decided decision. You  
19 know, it was -- it was a very closely divided  
20 Court on Gross. We're not here -- we're here to  
21 make the point that what Gross said was that you  
22 need to look at the statutory language with  
23 careful attention -- careful and critical  
24 examination. And this is -- this is a quote  
25 from Gross, you can't apply rules applicable

1 under one statute to a different statute without  
2 really looking carefully --

3 JUSTICE KAVANAUGH: But the --

4 MR. MARTINEZ: -- and here the  
5 "otherwise discriminate" clause is limited by  
6 "with respect to terms, conditions," et cetera.

7 JUSTICE KAVANAUGH: That's not --

8 MR. MARTINEZ: So it's very narrow.

9 JUSTICE KAVANAUGH: -- limiting;  
10 that's broadening language. That's -- that's  
11 supposed to be a catch-all phrase at the end  
12 that will cover anything. "Otherwise  
13 discriminate against anything dealing with  
14 compensation terms or conditions." The word  
15 "conditions," in particular, in the lower courts  
16 has been interpreted very broadly to cover all  
17 sorts of --

18 MR. MARTINEZ: Right.

19 JUSTICE KAVANAUGH: -- aspects,  
20 whereas here you just have "actions," so if  
21 you're comparing the two statutes, to pick up on  
22 Justice Gorsuch's point, I would have thought a  
23 broader scope, if anything, was in that  
24 language --

25 MR. MARTINEZ: I --

1 JUSTICE KAVANAUGH: -- in terms of --  
2 MR. MARTINEZ: I think the word  
3 "discrimination" sometimes can take on different  
4 meanings depending on the context. The most  
5 important textual -- the textual clue is the  
6 absence of the key phrase "shall be made free  
7 from discrimination." The most important  
8 historical clue is that, unlike the statute in  
9 Gross, this statute arises in a context in which  
10 Congress wanted to address the constitutional  
11 rule, wanted to plug the gap in remedies, and --  
12 and make sure that -- that victims of  
13 unconstitutional discrimination had a viable  
14 remedy.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17 General Francisco.

18 ORAL ARGUMENT OF GEN. NOEL J. FRANCISCO  
19 ON BEHALF OF THE RESPONDENT

20 GENERAL FRANCISCO: Mr. Chief Justice,  
21 and may it please the Court:

22 The federal sector ADEA adopts the  
23 same causation standard applicable to state and  
24 local governments and private companies, but-for  
25 causation.

1           Three basic points make this clear.  
2       First, Section 633 -- 633a prohibits the Federal  
3       Government from making a personnel action based  
4       on age. But you don't make a personnel action  
5       based on age if you make the same decision that  
6       you would have made for a similarly situated  
7       younger person since any consideration of age  
8       has not affected the decision that you have  
9       made. At the very least, as in Gross and  
10      Nassar, nothing in 633a clearly overrides the  
11      common law default rule of but-for causation.

12           Second, Congress easily could have  
13      overridden the common law default rule if it  
14      wanted to. It could have applied the motivating  
15      factor standard to the ADEA, or it could have  
16      gone further and prohibited any consideration of  
17      age no matter how fleeting. But it didn't do  
18      that. Instead, it adopted language that this  
19      Court has interpreted as incorporating the  
20      common law default rule.

21           Finally, our rule makes perfect sense.  
22      There's no reason why Congress would have  
23      created a lower causation standard for the  
24      federal government than for state and local  
25      governments. After all, there's no evidence

1 that Congress was more concerned about  
2 discrimination by the federal government.  
3 That's why Senator Bentsen, Section 633a's  
4 principal sponsor, said that under 633a,  
5 "government employees will be subject to the  
6 same protections against arbitrary employment  
7 based on age as are employees in the private  
8 sector."

9 Now, we've had some discussion about  
10 the Civil Service Reform Act, and I actually  
11 think it's very instructive here to the  
12 interpretive question. I'd like to point out  
13 two specific provisions in that, I think, that  
14 are relevant. The first one actually isn't in  
15 our briefs, so I'm going to take a minute here  
16 to describe it because it's a provision of the  
17 CSRA that specifically cross-references,  
18 incorporates, and describes Section 633a in the  
19 text of the statute. And what you'll see in  
20 that provision is that it uses language to  
21 describe 633a that is parallel to the language  
22 that you find in the private sector provisions.  
23 So I think it underscores that these are just  
24 different ways of seeing the same thing.

25 And I'm referring to 5 U.S.C.

1 2302(b)(1)(B), and here's what it says: "Any  
2 employee who has authority to take, direct  
3 others to take, recommend or approve any  
4 personnel action, shall not, with respect to  
5 such authority, discriminate for or against any  
6 employee or applicant for employment on the  
7 basis of age, as prohibited under 633a.

8 So it doesn't have any of the language  
9 that my friends on the other side rely on.  
10 Textually, this is a statute that Congress has  
11 enacted that in its text is describing 633a and  
12 it uses language that's parallel to the private  
13 sector provisions.

14 And I think it's highly relevant to  
15 interpreting 633a because as Justice Scalia  
16 explained is in -- in his opinion in Branch  
17 against Smith, it is "of course the most  
18 rudimentary rule of statutory construction, that  
19 courts do not interpret statutes in isolation  
20 but in the context of the corpus juris of which  
21 they are a part, including later enacted  
22 statutes."

23 JUSTICE KAVANAUGH: So -- so -- so if  
24 an employer has an explicit younger-is-better  
25 policy, Mr. Martinez says, your position would

1 allow that to stand for an -- an employee could  
2 not get injunctive relief against that.

3 What's -- what's your answer to that?

4 GENERAL FRANCISCO: So a couple  
5 responses, Your Honor:

6 First, that employee would be treated  
7 exactly the same as if he or she worked for a  
8 state or local government or a private employer.  
9 No different than anyone else covered by Title  
10 VII.

11 Secondly, that actually goes to the  
12 other provision of the Civil Service Reform Act  
13 that I was going to refer the Court to, which is  
14 cited in our brief, and that's 5 U.S.C.  
15 2301(b)(2) which says that "all employees and  
16 applicants for employment should receive fair  
17 and equitable treatment in all aspects of  
18 personnel management without regard to age.

19 It underscores that 633a --

20 JUSTICE KAVANAUGH: So just to be  
21 clear, would that policy be a violation of that  
22 civil service provision?

23 GENERAL FRANCISCO: If -- yeah, I  
24 think it clearly would be a -- a violation of  
25 the civil service provision.

1 JUSTICE KAVANAUGH: And would there be  
2 any impediments to suing under that civil  
3 service provision?

4 GENERAL FRANCISCO: Your Honor, there  
5 is a very comprehensive scream for bringing  
6 these types of complaints in the federal  
7 government. I am quite confident that there is  
8 an avenue in which you could challenge a -- oh,  
9 a younger-is-better policy where a federal  
10 governmental agency --

11 JUSTICE SOTOMAYOR: So for a --

12 GENERAL FRANCISCO: -- could adopt  
13 such a policy.

14 JUSTICE SOTOMAYOR: -- a statute that  
15 intended to reflect the equal protection clause  
16 of the Constitution, which would have covered  
17 this on its own prior to the enactment of the  
18 statute, you're now saying Congress intended  
19 instead to give litigants less Constitutional  
20 protection, less protection, not more, or equal.

21 GENERAL FRANCISCO: No -- no, Your  
22 Honor, not --

23 JUSTICE SOTOMAYOR: And second, you  
24 intend on the -- like private sector  
25 discrimination or unlike private sector



1 discrimination under be Title VII, Congress  
2 intended to give federal employees when it used  
3 the phrase "free from any discrimination," it  
4 decided to say this kind of discrimination's  
5 okay under this provision.

6 GENERAL FRANCISCO: So, Your Honor, I  
7 think I disagree with that for a couple of  
8 reasons.

9 First, I think I disagree with the  
10 premise. If Congress had in fact intended to  
11 apply equal protection principles, it presumably  
12 would have applied the same standard to state  
13 governments since they're subject to the same  
14 equal protection principles that the federal  
15 government is.

16 There's no evidence that Congress was  
17 more concerned about the federal government than  
18 the state government. Quite to the contrary.

19 JUSTICE SOTOMAYOR: Unfortunately --

20 GENERAL FRANCISCO: And here everyone  
21 agrees the states are subject to the same --

22 JUSTICE SOTOMAYOR: General,  
23 unfortunately you're wrong because the EEOC and  
24 the civil service agency have been reading that  
25 equal procession principle even before this

1 provision into federal decisionmaking.

2 So I think --

3 GENERAL FRANCISCO: And I --

4 JUSTICE SOTOMAYOR: I'm not sure how I  
5 understand your point.

6 GENERAL FRANCISCO: Well, I think that  
7 --

8 JUSTICE SOTOMAYOR: I don't think they  
9 were -- if they wanted to follow the state and  
10 local provision they would have followed it.

11 GENERAL FRANCISCO: Right. I  
12 think that --

13 JUSTICE SOTOMAYOR: But they created a  
14 different and totally separate provision, and on  
15 top of it they said: That language and our --  
16 that language of the private and state  
17 government should not be used to interpret this  
18 language that affects the federal government.

19 GENERAL FRANCISCO: Well, Your Honor,  
20 I think the reason why my answer is fully  
21 responsive is because the suggestion by my  
22 friend on the other side is that somehow when  
23 Congress extended Title VII and the ADEA to  
24 governmental entities -- and remember, they did  
25 it at the same time. They went from private to

1 private and federal and state governments at the  
2 same time. And when Congress made that step,  
3 the argument is that somehow it was meant to  
4 embody equal protection principles.

5 Well, if that were the case, one would  
6 have fully expected that they would apply the  
7 same equal protection principles to both the  
8 federal government and the state governments but  
9 everyone here agrees that with respect to state  
10 governments, it's the but-for causation standard  
11 that applies.

12 JUSTICE GINSBURG: There is a  
13 federalism concern, when you're dealing with  
14 state and local governments, which you don't  
15 have when you're dealing with the federal  
16 government alone, and why wouldn't -- the  
17 language as Mr. Martinez pointed out is  
18 different. You're treating all those extra  
19 words as just a meaningless surplus.

20 If they wanted to -- to -- to -- be  
21 the same standard as for private sector  
22 employment, state and local government  
23 employment, they would have used the same  
24 language, but they didn't. They said all --

25 GENERAL FRANCISCO: Right.

1 JUSTICE GINSBURG: -- and they said,  
2 what were the words?

3 GENERAL FRANCISCO: "Free from any."

4 JUSTICE GINSBURG: "Free from any,"  
5 yes.

6 So if Congress uses those different --  
7 different, more encompassing language, all free  
8 from any, I would think that the standard that's  
9 before us, applicable to federal employment, is  
10 a more plaintiff-friendly standard.

11 GENERAL FRANCISCO: So, Your Honor,  
12 two responses on the textual issue, but I'd also  
13 like to address the federalism issue as well.

14 On the textual question, the first is  
15 I'd simply point back to that provision of the  
16 Civil Service Reform Act that I was referring to  
17 earlier, 2302(a)(1)(B).

18 JUSTICE KAGAN: Well, call me old  
19 fashioned, General, but it seems to me that the  
20 first and clearly the most important place to go  
21 in thinking about what 633 means, is to go to  
22 633 --

23 GENERAL FRANCISCO: Right.

24 JUSTICE KAGAN: -- and not to go to  
25 some later enacted statute in a completely

1 different set of provisions.

2           So I think, you know, Justice  
3 Ginsburg's question holds. It would have been  
4 perfectly easy for Congress to have written the  
5 same kind of statute that it wrote in Gross or  
6 in Nassar. Indeed they didn't even have to  
7 write a statute. They could have just put the  
8 U.S. Government in with the state and locals in  
9 the private sector provision. And they did none  
10 of that.

11           They -- they enacted a very different  
12 kind of statute which puts the -- the language  
13 that your brief primarily relies on, which is  
14 based on or because of, in a completely  
15 different place in the statute modifying a  
16 completely different noun.

17           So why would they have done that if  
18 they just meant to write a Gross/Nassar statute?

19           GENERAL FRANCISCO: Yeah, I -- I'd  
20 like to straight on address the textual argument  
21 first and then the why question second.

22           The textual argument first is suppose  
23 you had a statute that said all cakes shall be  
24 made free from the use of any eggs. In the  
25 course of the cake baking process, I whisk up a

1 bowl of eggs, I think about dumping it into the  
2 batter, but then I say, oh, I beat -- supposed  
3 to me making a -- a cake without eggs, so I  
4 throw it in the trash.

5 I have made a cake free from the use  
6 of any eggs, notwithstanding my use of eggs in  
7 the cake baking process because the final cake  
8 that I have baked is free from the use of eggs.

9 JUSTICE ALITO: Well, that -- I -- I  
10 mean, that gets to the point I -- I asked Mr.  
11 Martinez about. But what if there is a little  
12 bit of egg that's put in the final batter?  
13 That's the problem.

14 So even if we focus right on -- just  
15 on the actual decisionmaking process, the moment  
16 of the decisionmaking process, I don't know  
17 about the why, and I'm not sure I care about the  
18 why here, but I have a terrible time fitting  
19 your argument into the statutory language.

20 Can you explain how you can do that?

21 GENERAL FRANCISCO: Sure.

22 JUSTICE ALITO: If -- if -- if age is  
23 considered, is a factor in the -- in making  
24 the decision, there's discrimination based on  
25 age and the -- the -- the action is not done

1 free from discrimination based on age.

2 GENERAL FRANCISCO: For -- for two  
3 reasons, Your Honor. First, I'm focusing on the  
4 word "made" and "made" refers to the point at  
5 which the action is taken. Was the personnel  
6 action that you ultimately took made without  
7 discrimination based on age.

8 And it is if it's exactly the same as  
9 you would have made without any consideration of  
10 age. But on my second point I think is just as  
11 important and it refers to a very important  
12 canon of construction, that statutory text does  
13 not override common law rules unless it does so  
14 explicitly.

15 And I think what my cake baking  
16 hypothetical does is that it shows that at the  
17 very least there's nothing in this text that  
18 explicitly overrides the common law default  
19 rule.

20 JUSTICE KAVANAUGH: Why --

21 GENERAL FRANCISCO: And if that's the  
22 case, you're governed --

23 JUSTICE KAVANAUGH: Why -- keep going.

24 GENERAL FRANCISCO: -- you're governed  
25 by the common default rule.

1 JUSTICE KAVANAUGH: The why question  
2 is still hanging, which is why would Congress  
3 use this different language which is  
4 significantly different from the other language.

5 GENERAL FRANCISCO: Sure. And I think  
6 one answer is -- and, look, I've scoured the  
7 legislative history and I haven't found anything  
8 that specifically addresses it one way or the  
9 other. But I think the most obvious reason is  
10 that there is a long and preexisting separate  
11 federal process governing federal employment.  
12 And the reason they didn't just amend "employer"  
13 to include the federal government is because  
14 they wanted to -- to preserve that preexisting  
15 separate federal process that applies to federal  
16 employees but doesn't apply to private  
17 employees --

18 JUSTICE BREYER: I -- I --

19 GENERAL FRANCISCO: -- for state and  
20 local governments.

21 JUSTICE BREYER: I can -- I have to  
22 read that one, which I will. Look, I'm trying  
23 to think of where could this come up. A  
24 promotion, the promoting person --

25 GENERAL FRANCISCO: Um-hum.



1 JUSTICE BREYER: -- thinks I see her  
2 result on this test. It's highly subjective.  
3 I'm not sure, but I certainly don't want people  
4 who are over the age of 82, et cetera.

5 (Laughter.)

6 JUSTICE BREYER: You say okay. So --

7 GENERAL FRANCISCO: Nobody here, Your  
8 Honor.

9 JUSTICE BREYER: There he is. It's  
10 flashing around in his mind. And -- and so he  
11 ends up -- yeah, no, the answer is no. Okay?  
12 That's the possible real-world situation. But,  
13 more likely, it's also a question of lawyers and  
14 burdens of proof. And -- and under the Title  
15 VII, you know, what they ended up saying is,  
16 hey, lawyer, you show discrimination is really  
17 around here, and you will win unless they come  
18 in and show no but-for, no but-for, in which  
19 case you still win something.

20 All right. Now, the language here  
21 seems designed to do just that, to deal with  
22 that real-world situation where we don't  
23 understand, as a lawyer, what that real-world  
24 situation -- it's in his head, you know, and --  
25 and just prove that. And now I'll tell you what

1 happens.

2 GENERAL FRANCISCO: Right.

3 JUSTICE BREYER: He can come back and  
4 say, no, not a but-for. And then you limit the  
5 remedies.

6 GENERAL FRANCISCO: Um-hum.

7 JUSTICE BREYER: What word does that?  
8 There is a statutory word that does that. It's  
9 in 33 (a). It's called appropriate remedies.

10 GENERAL FRANCISCO: Mm-hmm.

11 JUSTICE BREYER: And so if it really  
12 is a but-for, as shown by the lawyer, hey,  
13 they're not going to reinstate, they're not  
14 going to give her the promotion because, by the  
15 way, she comes in very late. Okay?

16 So now we've got the language. That's  
17 what they're arguing. And you say why would  
18 Congress do that? Why would it make the Feds  
19 have to do this? For the same reason they  
20 passed that statute. The feds should be the  
21 leader in this. It's not enough. The federal  
22 government should be the leader. So we have  
23 states, private, not just federalism, but who  
24 fought more than any group of people for freedom  
25 from discrimination? Look at history. It was

1 the federal government, and they should be  
2 holier than, okay?

3 GENERAL FRANCISCO: Right.

4 JUSTICE BREYER: So we have a reason.  
5 We have an interpretation of the statute. Now,  
6 that in my mind is what you're up against.

7 GENERAL FRANCISCO: And -- and I fully  
8 understand that, Your Honor, and I think it  
9 actually illustrates what I think is one of the  
10 more troubling parts of the argument of my  
11 friends on the other side --

12 JUSTICE BREYER: Um-hum.

13 GENERAL FRANCISCO: -- because their  
14 argument really boils down to the notion that,  
15 in 1974, Congress somehow predicted the 1991  
16 civil rights amendments, not just the motivating  
17 factor standard or potentially something  
18 significantly broader, any consideration, but  
19 the limitation on remedies and the burden  
20 shifting. And it did all of that 20 years  
21 earlier when it used the "free from any"  
22 language.

23 With all respect I find that simply  
24 implausible, given that it took us Price  
25 Waterhouse, Congress's reaction to that, and a

1 whole bunch of other decisions in order to come  
2 up with the motivating factor test. So I think,  
3 Your Honor, what you laid out makes perfectly  
4 sensible policy. I don't think it makes any  
5 sense in interpreting --

6 JUSTICE KAGAN: I think, General, that  
7 overstates what a complicated concept this is.  
8 I mean, there are two kinds of concepts you can  
9 use. There are: Did this thing actually cause  
10 the firing or the lack of promotion? Or was  
11 this thing around when they made that decision?  
12 And, you know, those are the two basic choices,  
13 and some statutes make one choice and some  
14 statutes make another choice. So it's not a  
15 whole lot to predict or anticipate.

16 GENERAL FRANCISCO: Right.

17 JUSTICE KAGAN: It's just those are  
18 your two choices, and you look to the language  
19 of the statute to decide which kind of statute  
20 we're talking about.

21 GENERAL FRANCISCO: Yeah, and I guess  
22 I'd add to the mix a third choice, which is the  
23 motivating factor test. I can sort of see how,  
24 textually, you could get to the "any  
25 consideration" test. I disagree with it, but I

1 can understand how you can get there textually.  
2 I think there's no way that you can get from  
3 this text to the motivating factor text. And  
4 under the "any consideration" test --

5 JUSTICE BREYER: No way. No way. We  
6 --

7 GENERAL FRANCISCO: And if Your  
8 Honor --

9 JUSTICE BREYER: The personnel action,  
10 the personnel action shall be made free from  
11 something, free from something. Hey, from what?  
12 From discrimination based on age. So "free  
13 from" means that that bad thing had to play a  
14 role, and that role could either be a motivating  
15 factor role in which there were a lot of things  
16 in that decisionmaker's head, and -- or it could  
17 be you have to show but-for. See?

18 So which is it?

19 GENERAL FRANCISCO: Well --

20 JUSTICE BREYER: It says "free from."

21 GENERAL FRANCISCO: So, obviously, my  
22 answer is but-for, but the point that I was  
23 trying to make was that under the "any  
24 consideration" test, which is my friend's test  
25 and focuses solely on process, suppose you've

1 got some low-level hiring official that says to  
2 his boss: I don't think we should hire this  
3 person for 10 reasons, one of which is I just  
4 think this person is too old. The boss then  
5 says: You knucklehead, we never consider age.  
6 By the way, you're fired for making such a  
7 rookie error. Takes over the file, reviews it,  
8 says, well, he was actually right on the bottom  
9 line; this person isn't qualified, so we don't  
10 hire them. Age has clearly played a role in the  
11 process for making that decision. And under --

12 JUSTICE ALITO: In the process, but  
13 not in the actual decision. So if you focus  
14 just on the decision -- this comes back to your  
15 egg hypothetical. If there's a little bit of  
16 egg in the actual decision, that's one thing.  
17 But in you threw out the egg before you ever got  
18 to that point --

19 GENERAL FRANCISCO: Right.

20 JUSTICE ALITO: -- then that's a  
21 different situation.

22 GENERAL FRANCISCO: What I would say  
23 is if there's a little bit of egg in it, then it  
24 would be a but-for cause but maybe not the sole  
25 but-for cause. But if there is -- if you make

1 the exact same cake you would have made, that is  
2 the cake that you would have made if you  
3 hadn't whisked up the eggs and held it in the  
4 first place, you have made a cake free from the  
5 use of eggs even though it's been part of the  
6 process; it's not found its way into the final  
7 cake.

8 JUSTICE KAVANAUGH: Can I -- can I ask  
9 about the practicalities of this case and how  
10 it's going to apply --

11 GENERAL FRANCISCO: Sure.

12 JUSTICE KAVANAUGH: -- in the real  
13 world? Because I'm not sure there's really much  
14 difference. They agree that you can't -- that  
15 an employee can't get reinstatement or back pay  
16 without showing but-for cause. So you obviously  
17 agree with that as well.

18 GENERAL FRANCISCO: Yes.

19 JUSTICE KAVANAUGH: They would say you  
20 can get injunctive relief, however, against  
21 practices, policies, things, statements,  
22 conditions, even if they weren't a but-for cause  
23 of a particular action.

24 You, too, agree with that, albeit  
25 under the civil surface -- civil service

1 statutes.

2 GENERAL FRANCISCO: Yeah.

3 JUSTICE KAVANAUGH: Right?

4 GENERAL FRANCISCO: Basically, yeah.

5 JUSTICE KAVANAUGH: So there's no  
6 disagreement, as I understand it, between the  
7 two parties about how this is really going to  
8 work in the real world going forward. The only  
9 disagreement is about which statute is cited  
10 when injunctive relief is sought.

11 GENERAL FRANCISCO: Well, I think  
12 there are a couple of big differences. One, it  
13 is done administratively. One, it's being done  
14 by hauled into court. And I think that's a  
15 pretty big difference. Secondly, in the  
16 hypothetical that you're spinning out, you're  
17 essentially entitled to judicial relief in the  
18 absence of an adverse personnel action that was  
19 actually caused by --

20 JUSTICE KAVANAUGH: Would --

21 GENERAL FRANCISCO: -- the thing that  
22 you're complaining about. So --

23 JUSTICE KAVANAUGH: But you would say,  
24 under the civil service statutes, that fair and  
25 equity provision that we've gone over --



1                   GENERAL FRANCISCO: Yeah.

2                   JUSTICE KAVANAUGH: -- for the same  
3 kinds of employment condition issues, you could  
4 get injunctive relief, which is exactly what  
5 Mr. Martinez is seeking here --

6                   GENERAL FRANCISCO: Um-hum.

7                   JUSTICE KAVANAUGH: -- albeit under a  
8 different statute. And maybe you're right,  
9 there's some --

10                  GENERAL FRANCISCO: Yeah. That's --

11                  JUSTICE KAVANAUGH: -- different  
12 hurdles you have to go through, but in terms of  
13 employees, the real world of employees and the  
14 real world -- world of employers, I think  
15 there's a lot of agreement between the two.

16                  GENERAL FRANCISCO: I think that's  
17 basically right because the things that he is  
18 concerned about, the types of policies that he's  
19 concerned about, couldn't happen within the  
20 federal government because of a whole host of  
21 laws, wholly apart from Section 633a. But I  
22 think that the critical issue is whether -- does  
23 -- does 633a provide yet an additional avenue  
24 where the federal government can be hauled into  
25 court for a judicial remedy?

1 JUSTICE KAVANAUGH: An additional  
2 avenue --

3 GENERAL FRANCISCO: And that's the  
4 point where we disagree.

5 JUSTICE KAVANAUGH: Sorry to  
6 interrupt, but an additional avenue that would  
7 get you nothing more, though.

8 GENERAL FRANCISCO: Exactly, an  
9 additional avenue --

10 JUSTICE KAVANAUGH: Yeah.

11 GENERAL FRANCISCO: -- that would get  
12 you nothing more for the plaintiff, but that  
13 does create a significant headache for the  
14 federal government --

15 JUSTICE SOTOMAYOR: Mr. General, the  
16 problem is, even though there was no  
17 anticipating Price Waterhouse and the 1991  
18 litigation, it would also be much more  
19 consistent with the statute as a whole, because  
20 public sector, state, and federal government  
21 employees are ending up essentially with the  
22 same remedy for all the reasons that Justice  
23 Breyer said, which is even though we can't read  
24 motivating factor, it's really the same as a  
25 part of the decisionmaking, and private sector

1 and state government claimants under Title VII  
2 are entitled to injunctive relief, et cetera, if  
3 they prove it was a motivating factor.

4 GENERAL FRANCISCO: Not under the  
5 ADEA, Your Honor. The Court held in Nassar --

6 JUSTICE SOTOMAYOR: And I do -- and I  
7 do --

8 GENERAL FRANCISCO: -- that --

9 JUSTICE SOTOMAYOR: But under Title  
10 VII, yes --

11 GENERAL FRANCISCO: Well, Your Honor,  
12 under Title VII and -- and I'd like to clarify  
13 this because our position on Title VII is a  
14 little bit more nuanced than that. Under the  
15 Title VII federal sector sex discrimination or  
16 race discrimination provisions, as distinct from  
17 the Title VII federal sector retaliation  
18 provision, which we sought cert on and this  
19 Court denied cert on. If you look at  
20 the federal sector sex race provision, arguably  
21 that does incorporate the motivating factor  
22 standard because there is a provision in the  
23 federal sector Title VII that specifically  
24 cross-references portions of the '91 civil  
25 rights amendments that apply the motivating

1 factor test.

2           And if that's right, Your Honor, this  
3 Court has never addressed it. We haven't -- we  
4 did not contest that below. But if that's  
5 right, then everybody that -- under Title VII  
6 gets treated by the same motivating factor  
7 standard under Title VII. So that takes --  
8 would take care of all of the race and sex  
9 hypotheticals that my friend is troubled by.

10           But critically, 633a doesn't  
11 cross-reference any portion of the 1991 civil  
12 rights amendments at all. So I think that  
13 further confirms that the text of 633a is not  
14 meant to adopt the motivating factor standard  
15 but is something different. And the different  
16 things is, is the common law default rule,  
17 unless there's something in the statutory text  
18 that clearly abrogates the common law default  
19 rule.

20           I'm not going to say that they don't  
21 have any textual argument. I think they have  
22 a -- a decent textual argument. The question  
23 is: Do they have a textual argument that is  
24 sufficiently strong to override the common law  
25 default rule of but-for causation?

1           And the reason why I lean heavily on  
2 my cake baking eggs hypothetical is because I  
3 think that at the very least shows that this  
4 statutory language is easily susceptible to my  
5 interpretation. And once I've met that  
6 standard, it's governed by the common law  
7 default rule of but-for causation.

8           Now, I think that my friend may get up  
9 on rebuttal and point to Chevron and so I would  
10 like to take one moment to address the Chevron  
11 issue in -- in advance. I think Chevron would  
12 be completely inapplicable here for three  
13 different reasons:

14           The first is, before you ever get to  
15 Chevron, you apply the canons of construction.  
16 And here the canon of construction is that you  
17 interpret language to be governed by the common  
18 law default rule if there is any ambiguity. So  
19 if there were ambiguity, we win under the  
20 default rule, not Chevron.

21           Let's say you completely disagree with  
22 that. Chevron doesn't apply for two additional  
23 reasons. First, as this Court held in Epic  
24 Systems, Chevron doesn't apply where two  
25 Executive Branch agencies disagree on the

1 meaning of a statute, since it's inconsistent  
2 with Chevron's political accountability  
3 rationale. And here we have such a  
4 disagreement.

5           Secondly, as the Court held in the  
6 Ledbetter decision, Chevron doesn't apply where  
7 the Executive -- where the agency is simply  
8 interpreting this Court's decisions, since this  
9 Court is the expert at interpreting its  
10 decisions.

11           And if you look at the EEOC  
12 adjudications in this area, the analysis tends  
13 to be quite short, it's usually about a  
14 paragraph, and all it's doing is interpreting  
15 this Court's decisions.

16           So I think we win under the text,  
17 regardless of Chevron, but even if you think  
18 that Chevron in theory might apply here, there  
19 are two additional reasons it couldn't apply in  
20 this particular case.

21           JUSTICE GINSBURG: Mr. -- Mr. Martinez  
22 is making a distinction that -- between  
23 liability and remedy. And he said, the bottom  
24 line, you don't get the job if somebody else was  
25 better qualified. Nonetheless, you do get some

1 kind of remedy so that the workplace will be  
2 free from all discrimination, any  
3 discrimination.

4 So one possibility is injunctive  
5 relief. We will not take age into account. And  
6 there are other possibilities. So -- but you  
7 seem to think everything is driven by the end  
8 result that you are not entitled to the job if,  
9 even though the age was taken into account, the  
10 person who got the job was better qualified.

11 GENERAL FRANCISCO: Your Honor, I  
12 think you're fairly characterizing my position  
13 and I'd say a couple of things on remedy.

14 If you disagree with me on liability,  
15 I agree with them on remedy, but I also think  
16 that his position on remedy is unnecessary for  
17 the reasons of -- of my exchange with Justice  
18 Kavanaugh.

19 You can -- you -- you essentially  
20 already have a civil -- civil service system  
21 that provides the type of relief that my friend  
22 on the other side would seek since there are a  
23 host of civil service regulations that would  
24 prohibit the types of policies that he's  
25 concerned about, even if there wasn't

1 somebody -- a particular person in court that  
2 was challenging it under Section 633a.

3 But our bottom line position here is  
4 that Congress added the federal and state sector  
5 extension of 633 in the Title VII at the same  
6 time. It meant to apply the same standard to  
7 the federal government that applies to state and  
8 local governments and it applies to private  
9 employers.

10 That standard is but-for causation.  
11 It results in treating all employees under the  
12 ADEA the same regardless of who you work for,  
13 since everybody agrees if you work for a private  
14 company or a state and local government, the  
15 standard is but-for causation and, respectfully,  
16 that's the thing -- the standard that we think  
17 should apply to the federal government as well.

18 Unless the Court has further  
19 questions, Your Honor.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 Counsel.

22 Five minutes, Mr. Martinez.

23 REBUTTAL ARGUMENT OF ROMAN MARTINEZ

24 ON BEHALF OF THE PETITIONER

25 MR. MARTINEZ: Just a few points, Your



1 Honor. Let me start with the text.

2 I think it's very notable that when  
3 the Solicitor General stood up here, he began in  
4 one of the first -- few sentences of his  
5 presentation by misquoting the text. He said  
6 this statute covers "personnel actions based on  
7 age." He made exactly the mistake that we  
8 pointed out -- I pointed out in my initial  
9 presentation.

10 That's not what the statute says. It  
11 requires careful attention. It says, "shall be  
12 made free from any discrimination based on age."

13 The Solicitor General as to the text  
14 says that Congress intended to apply the exact  
15 same rules that -- that are applied to private  
16 sector employees as under the statute  
17 interpreted in Gross.

18 Well, with respect, whatever we know  
19 about the text is that Congress did not intend  
20 to apply that regime. Congress specifically  
21 considered that regime. It was -- it was going  
22 to do what the Solicitor General wanted in the  
23 first draft of the statute. Congress then  
24 amended that draft and passed a different  
25 statute. You just can't -- you can't just apply

1 a different statute that Congress expressly  
2 rejected.

3           Secondly, Your Honor, with respect to  
4 the constitutional rule, I think if you look at  
5 the legislative history of -- of this provision  
6 and if you look at the Brown versus GSA decision  
7 that we talk about in our brief, it's very clear  
8 that Congress when it enacted Title VII,  
9 which -- which uses the same causation language  
10 to apply to the federal sector, it was focused  
11 on the equal protection problem in the federal  
12 sector context.

13           They cite Bolling versus Sharpe. Both  
14 the legislative history and this Court's  
15 decision in Brown, it makes clear -- both of  
16 them make clear that the purpose of this statute  
17 was to -- was to capture the same kind of  
18 constitutional equal protection injuries that  
19 were at stake in the long line of cases that  
20 we've cited in our brief.

21           Now, the Solicitor General says  
22 there's no reason states should be treated any  
23 differently. Well, again, one thing we know  
24 from the text of the statute and from the  
25 legislative history is that Congress expressly

1 decided to treat states differently. They  
2 treated states by -- by amending the employer  
3 definition. They treated states like private  
4 sector actors. They did something something  
5 totally different by creating a unique federal  
6 sector provision to govern the federal  
7 government. You can't just pull that language  
8 that applies to states and say it must apply to  
9 the federal government.

10           And Justice Breyer, you're absolutely  
11 right, the legislative history shows that  
12 Congress thought of the federal government's  
13 being especially important in this context.

14           The Solicitor General -- this is my  
15 third point -- talks about the common law injury  
16 rule. We are -- our rule is fully consistent  
17 with the common law rule. If you look at the --  
18 the restatement, the common law third  
19 restatement, Section 26, what it says in comment  
20 D is that the first thing you need to do when  
21 you're addressing the common law rule of  
22 causation is figure out what the injury is.

23           What we've argued is that the injury  
24 at stake in this case is the same kind of  
25 process-based equal protection type injury that

1 this Court has repeatedly identified in cases  
2 from Bakke up through Parents Involved. Once  
3 you get the injury right, we are completely  
4 consistent with the common law rule.

5 Finally, Your Honor, younger is  
6 better. I think it's striking that the  
7 Solicitor General doubled down on his position  
8 that a younger-is-better policy does not violate  
9 this statute. His deus ex machina here is  
10 Section 2301 of the CSRA. That's a cruel joke  
11 that will be played on -- on this Court if you  
12 accept that rationale.

13 Section 2301 is unenforceable.  
14 Unenforceable. I think the Solicitor General  
15 said, Justice Kavanaugh, in response to your  
16 question, that it would give rise to a remedy of  
17 an injunction in court. That is not accurate.

18 If you look at the MSPB website, it  
19 specifically says that -- that this provision is  
20 not enforceable and that's the rule that courts  
21 across the country have applied.

22 The Solicitor General has had months  
23 to come up with a solution to this hypothetical,  
24 and the best the Solicitor General can do is  
25 come up with a statutory provision that's

1 unenforceable.

2 That puts victims of discrimination in  
3 exactly the same position they were in before  
4 this statute was enacted, where they had  
5 remedies that were not enforceable. Congress  
6 stepped in here. It passed a broad statute  
7 because it wanted to protect these people.

8 Your Honor, I leave you with the  
9 statutory text which says very clearly that all  
10 federal personnel actions shall be made free  
11 from any discrimination based on age. A  
12 decision that's made by applying a  
13 younger-is-better policy, contrary to the  
14 Solicitor General, is not made free from any  
15 discrimination based on age.

16 JUSTICE ALITO: You know, I -- I  
17 assume and I hope that we would not see within  
18 any federal agency any sort of policy like  
19 younger is -- is better. And so I'm not sure  
20 what practical benefit you are going to provide  
21 for in the typical individual age discrimination  
22 employment case if you say that the person can't  
23 get reinstatement or whatever, absent but-for  
24 causation, but there are going to be these other  
25 equitable remedies available. I don't know what

1 kind of injunction would be available -- would  
2 be of practical benefit in a case like that.

3 MR. MARTINEZ: If I may answer, two  
4 quick points, Your Honor. First of all, I think  
5 -- I agree with you, we would not like to see  
6 agencies doing these sorts of things. If you  
7 look at the Brenton case that we cite at pages  
8 41 to 42 of our brief, that case involved a -- a  
9 written memorandum. The policy said that  
10 someone's ability to control traffic declines  
11 with age, and they were treating applicants for  
12 those positions badly for that reason.

13 I think -- more broadly, Your Honor, I  
14 think the injunctive relief and the prospective  
15 remedies that are available are extremely  
16 important in -- in the real world, which is  
17 precisely why, in the equal protection context,  
18 you've recognized the importance of that kind of  
19 injunctive relief, and we think that relief is  
20 just as important here. We ask you reverse.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel, General.

23 The case is submitted.

24 (Whereupon, at 11:03 a.m., the case was  
25 submitted.)

## Official - Subject to Final Review

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