No. 18-882

In the Supreme Court of the United States

NORIS BABB,

Petitioner,

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS,

Respondent.

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

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether the federal-sector provision of the Age Discrimination in Employment Act of 1967, which provides that personnel actions affecting agency employees aged 40 years or older "shall be made free from any discrimination based on age," 29 U.S.C. § 633a(a), requires a plaintiff to prove that age was a but-for cause of the challenged personnel action.

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OPINIONS BELOW

The amended opinion of the Eleventh Circuit (Pet. App. 1a-22a) is not published in the Federal Reporter but is reprinted at 743 F. App'x 280. The order of the district court (Pet. App. 23a-64a) is not published in the Federal Supplement but is available at 2016 WL 4441652.

JURISDICTION

The Eleventh Circuit entered its judgment on July 16, 2018, Pet. App. 1a, and it denied Petitioner Noris Babb's petition for rehearing on October 9, 2018, Pet. App. 65a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced in the addendum to this brief.

INTRODUCTION

The core question in this case is whether—and to what extent—the federal-sector provision of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 633a(a), allows the federal government to discriminate against its own employees on the basis of age. Section 633a(a) answers that question with straightforward language: *No* discrimination is permitted. Congress dictated that all personnel actions "shall be made" in a manner that is "free from any discrimination based on age." When age is a negative factor that a decision-maker takes into account against an employee when making a personnel action—even if it is not ultimately the dispositive factor—the action is not "made free from

discrimination." The plain language of the statute contains no additional causation requirement to establish a violation, and there is none.

The origins and history of the ADEA federal-sector provision only confirm that the provision renders unlawful any age discrimination in federal employment. Along with its identically worded Title VII counterpart, the provision sought to implement a longstanding policy of nondiscrimination by the federal government. Rooted in the equal protection guarantee of the Fifth Amendment, that policy had been given life over the preceding decades in various federal statutes, regulations, and executive orders. None of those sources of law allows the government to let discrimination play any role in the employment decision-making process, irrespective of whether that discrimination is the but-for cause of an ultimate personnel decision. The ADEA adopts the same kind of zero-tolerance approach to discrimination.

For decades, Equal Employment Opportunity Commission (EEOC) regulations carrying the force of law have recognized that the ADEA is violated whenever age discrimination plays any role in a federal-sector employment decision—and that individual victims of age discrimination can obtain relief even if they *cannot* prove that the discrimination was a but-for cause of an adverse personnel action. The EEOC has also taken the same view in adjudications. The EEOC's authoritative interpretation reflects the plain meaning of the statute, but in any event is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

In this case, the Eleventh Circuit appeared to agree that Section 633a(a) is best read to render

unlawful any unfavorable consideration of age as a factor in a personnel decision. But finding itself bound by unreasoned prior circuit precedent, it held that the provision also requires that discrimination be the but-for cause of the challenged personnel action. As the Eleventh Circuit tacitly admitted, that result is clearly wrong: Despite a circuit conflict, no court of appeals has ever provided a reasoned explanation for why such a but-for requirement should be implied into the statute. No such explanation is possible.

The Government has defended the additional requirement based on the "default rule" of but-for causation. But that is refuted by the unambiguous terms of the statute, which adopts an "equal treatment" rule that is violated any time the government holds employees to different standards based on the *consideration* of prohibited factors. In any event, the default rule would merely require a but-for causal relationship between the government's conduct and the employee's *injury*. And here, as in the constitutional context, the denial of equal consideration is itself a cognizable injury. *See Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). Infliction of that injury violates the statute, regardless of whether the discrimination is also a but-for cause of a particular adverse personnel action.

At bottom, this is a straightforward statutory interpretation case, where the text and every indicia of Congressional intent points the same way. And even if there were any lingering doubt, deference to the authoritative interpretation of the EEOC would resolve that doubt in petitioner's favor.

This Court should reverse the decision below.

STATEMENT OF THE CASE

Petitioner Noris Babb is a clinical pharmacist who has worked at the Department of Veterans Affairs (VA) for nearly two decades. Between 2011 and 2014, Babb was the victim of unlawful age discrimination when she was treated unequally, on the basis of age, in connection with various adverse personnel actions. She sued the VA for violating the ADEA. Both the district court and Eleventh Circuit ultimately rejected her claim based on their view that age discrimination does not violate the ADEA unless a plaintiff conclusively proves that such discrimination was the but-for cause of an adverse personnel action.

A. Legal Background

In 1974, Congress enacted the federal-sector provision of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 633a, in order to provide federal employees with statutory protection from age discrimination in the workplace. As relevant here, the provision states that "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . *shall be made free from any discrimination* based on age." 29 U.S.C. § 633a(a) (emphasis added).

1. Congress did not promulgate the ADEA's federal-sector provision in a vacuum. Section 633a(a)'s key language was directly modeled on—and is virtually identical to—the parallel federal-sector ban on race, sex, and religion discrimination enacted two years earlier in an amendment to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16. That nondiscrimination language has textual and historical roots in the United States Constitution and in various efforts by successive presidents and

Congresses to wipe out federal-sector discrimination using statutes and executive orders. This legal context bears directly on the question presented in this case.

a. The equal protection component of the Due Process Clause of the Constitution bars discrimination by the federal government based on various protected characteristics, most notably race. *Bolling v. Sharpe*, 347 U.S. 497, 498 (1954). That ban on discrimination extends to federal employment, *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 825 (1976), and it requires that individuals be allowed to compete "on an equal footing" with those who do not share a protected characteristic. *Northeastern Fla.*, 508 U.S. at 666. This Court has repeatedly indicated that the constitutional equal protection guarantee is violated whenever the federal government "erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group," even if that barrier is not ultimately a but-for cause of the final decision of how to allocate the benefit. *Id*. at 664-66; *infra* at 31-33.

b. Despite the Constitution's protections, the federal government has not always lived up to its anti-discrimination ideals—especially with respect to race. Beginning in the 1940s, successive presidents began to address this problem through a series of executive orders and federal statutes seeking to give effect to the Constitution's nondiscrimination mandate. *See generally* EEOC, Management Directive for 29 C.F.R. Part 1614 (EEO-MD-110) at Preamble (Aug. 5, 2015), https://www.eeoc.gov/federal/directives/upload/md-110.pdf; EEOC, *Legislative History of Titles VII and XI of Civil Rights Act of 1964*

at 1-5 (1964), https://babel.hathitrust.org/cgi/pt?id=uc1.32106006452418&view=1up&seq=9.

Presidents Roosevelt, Truman, Eisenhower, Kennedy, and Johnson all issued broad statements along the lines that there "*shall be no discrimination*" in federal employment "because of race, creed, color, or national origin." *See, e.g.*, Exec. Order No. 8802, 3 C.F.R. 234 (Supp. 1941) (emphasis added); *see also infra* at 33-35 & n.5; Add. 31-44 (reproducing executive orders). And in the 1960s, Presidents Kennedy and Johnson extended similar protections to federal workers on the basis of age. *See* Exec. Order No. 11141, 3 C.F.R. 117-18 (Supp. 1964). Throughout this period, these protections against discrimination were enforced by the Executive Branch itself, largely without recourse to the courts. *See Brown*, 425 U.S. at 825-28.

c. In July 1964, Congress enacted the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241. Title VII of that statute prohibited private-sector "employer[s]" from engaging in specific discriminatory employment practices, *id.* § 703, 78 Stat. at 255. Congress also established mechanisms for enforcing those private-sector provisions, including creating the EEOC and empowering it to receive charges of discrimination, as well as creating a private right of action for aggrieved individuals. *Id.* §§ 705, 706(a), (e), 78 Stat. at 258-60.

Notably, however, Congress specifically chose not to apply the new private-sector nondiscrimination requirements to the federal government, and so it excluded federal agencies and departments from Title VII's definition of "employer." *Id.* § 701(b), 78 Stat. at 253; 110 Cong. Rec. 8849-56 (1964). At the time, Senator Clifford Case explained that federal

employees were "already covered by an operating policy of nondiscrimination more effective than the bill." 110 Cong. Rec. at 8855. Congress reaffirmed that policy in the text of the Civil Rights Act itself, which proclaimed that

> [I]t shall be the policy of the United States to insure equal opportunities for Federal employees without discrimination because of race, color, religion, sex or national origin and the President shall utilize his existing authority to effectuate this policy.

Pub. L. No. 88-352, § 701(b), 78 Stat. at 254 (codified as amended at 5 U.S.C. § 7201(b)).

d. In 1967, Congress enacted the ADEA to ban certain types of age discrimination in private-sector employment. Pub. L. No. 90-202, 81 Stat. 602 (1967). Among other prohibitions, the private-sector provision states that "[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). Just as with the original Title VII, however, the statute's ban on age discrimination did not apply to federal employees, because they were "already covered by an Executive order" that more broadly prohibited such discrimination. *Age Discrimination in Employment: Hearings on H.R. 3651, H.R. 3768, and H.R. 4421 Before the General Subcomm. on Labor of the H. Comm. on Education and Labor*, 90th Cong. 40 (1967) (statement of Secretary William Wirtz); *see also* 113 Cong. Rec. 34,742 (1967).

e. Within a few years after enacting Title VII and the ADEA, Congress concluded that the Executive Branch's enforcement of the federal-sector nondiscrimination policy was inadequate. As this Court later explained, charges of discrimination were being "handled parochially within each federal agency," and "the effective availability of either administrative or judicial relief was far from sure." *Brown*, 425 U.S. at 825; *see also Morton v. Mancari*, 417 U.S. 535, 549 (1974) (noting "inadequate enforcement machinery"); S. Rep. No. 92-415, at 12-14 (1971) (describing the regime of executive orders and detailing inadequacies in the complaint process); H.R. Rep. No. 92-238, at 25 (1971) (noting that "[d]espite the series of executive and administrative directives on equal employment opportunities, Federal employees . . . face legal obstacles in obtaining meaningful remedies").

Accordingly, in 1972, Congress amended Title VII by adding a ban on race, sex, and religion discrimination in federal employment. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 717, 86 Stat. 103, 111 (1972). Title VII's federal-sector provision mandates that "[a]ll personnel actions affecting employees or applicants for employment" in certain parts of the federal government "shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a).

The 1972 amendment to Title VII empowered the Civil Service Commission to issue regulations implementing the federal-sector discrimination ban. Pub. L. No. 92-261, § 717(b), 86 Stat. at 111-12. It also created a private right of action allowing federal employees victimized by discrimination to bring suit

in federal court after exhausting administrative remedies. *Id.* § 717(c), 86 Stat. at 112.

In 1972, the Civil Service Commission exercised its statutory authority to issue regulations implementing Title VII's federal-sector discrimination ban. *See* 37 Fed. Reg. 22,717 (Oct. 21, 1972). Those regulations set forth a range of remedies for unlawful discrimination. Some of those remedies (such as retroactive promotion and backpay) expressly required the employee to establish that the unlawful discrimination was the but-for cause of an adverse personnel action. 5 C.F.R. § 713.271(a)(1), (b)(1) (1973). Others (such as priority consideration for vacant positions) were available for a Title VII federal-sector violation even *without* but-for causation. *Id.* § 713.271(a)(2), (b)(2).

2. In 1974, Congress amended the ADEA by enacting Section 633a, the federal-sector prohibition on age discrimination that is directly at issue in this case. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(a), 88 Stat. 55, 74 (1974). In doing so, Congress sought to eradicate the "cruel and self-defeating" practice of age discrimination in federal employment, recognizing that such discrimination "ignores a person's unique status as an individual" and "destroys the spirit of those who want to work." H.R. Rep. No. 93-913, at 40 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2849 (quoting statement of President Nixon).

Section 633a's ban on age discrimination was "patterned directly after" the Title VII federal-sector provision, *Lehman v. Nakshian*, 453 U.S. 156, 163-64, 167 n.15 (1981), and it contains virtually identical language. As relevant here, it states that

> All personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . shall be made free from any discrimination based on age.

29 U.S.C. § 633a(a).

As with its Title VII counterpart, Section 633a empowered the Civil Service Commission to enforce, and promulgate regulations under, the provision. *Id.* § 633a(b). And it likewise created a private right of action to sue the federal government for violations of the statute. *Id.* § 633a(c).

In 1975, the Civil Service Commission issued regulations extending Title VII's federal-sector regulations—including those establishing the remedies for unlawful discrimination—to the ADEA federal-sector provision. *See* 39 Fed. Reg. 24,351 (July 2, 1974); 5 C.F.R. § 713.511 (1975).

3. A few years later, regulatory authority over the ADEA was transferred to the EEOC, which subsequently adopted the existing Civil Service Commission regulations as its own. Reorganization Plan No. 1 of 1978, § 2, 43 Fed. Reg. 19,807, 92 Stat. 3781 (Feb. 23, 1978); 43 Fed. Reg. 60,900, 60,901 (Dec. 29, 1978). After further revisions adopted through notice-and-comment rulemaking, the EEOC regulations governing federal-sector Title VII and ADEA claims now appear at 29 C.F.R. pt. 1614 (2018).

As with the original Commission regulations, the EEOC's current regulations authorize relief for ADEA violations even when the discrimination at issue was not the but-for cause of an adverse employment action. *Id.* § 1614.501. The EEOC has taken the same approach when adjudicating individual enforcement actions. In recent years, it has

repeatedly held that the language of the ADEA's federal-sector provision requires proof that age was a factor in the challenged personnel action, rather than a but-for cause of the action. *See, e.g.*, *Brenton W. v. Chao*, Appeal No. 0120130554, 2017 WL 2953878, at *9 (E.E.O.C. June 29, 2017).

B. Factual And Procedural Background

1. Born in 1960, Dr. Noris Babb is a clinical pharmacist who works for the VA. In 2004, Babb was hired to work under the auspices of the Pharmacy Services division of the VA Medical Center in Bay Pines, Florida. Pet. App. 1a-3a. In 2006, she applied for and obtained a position in the Geriatric Primary Care Clinic. JA90 ¶ 3. Babb's scope of employment was governed by a service agreement between Pharmacy Services and the Geriatric Clinic. Pet. App. 3a.

For many years, Babb worked in her position as a successful member of the team. *See* JA92-93 ¶ 7; *see also* JA 87. From 2008 to 2012, Babb was given the highest rating—"outstanding"—in her annual performance appraisals. JA92-93 ¶ 7.

2. In 2009, Babb obtained approval for an "advanced scope of practice" designation, which allowed her to practice "disease state management" or "DSM." Pet. App. 3a. This designation permitted her to see patients and prescribe medication for certain conditions without consulting a physician. *Id.* at 3a-4a. The following year, the VA announced an initiative called "Patient Aligned Care Team" or "PACT," which allowed pharmacists spending at least 25% of their time practicing DSM to become "Clinical Pharmacy Specialists" (CPS) eligible for a promotion to GS-13 on the federal pay scale. *Id.* The VA Center

where Babb worked began implementing PACT in 2011. *Id.*

At the time, Babb was working as a GS-12 pharmacist. Pet. App. 24a. Because Babb had an advanced scope designation that allowed her to practice DSM, she sought a promotion under the new PACT initiative. *Id.* at 4a, 25a. But as Pharmacy Services began implementing PACT, it became increasingly clear that the VA was discriminating on the basis of age and gender when deciding who would be allowed to participate. In particular, none of the new CPS positions went to women over the age of 50 in the first three years of implementation. JA107 ¶ 36; *see also* Babb C.A. Br. 5 (CPS positions denied to all females over the age of 45 whose positions were reclassified as PACT positions). Instead, all of the advertised PACT positions were given to pharmacists in their 30s, most of whom were male. JA106 ¶ 31.

In September 2011, two other clinical pharmacists in their 50s filed Equal Employment Opportunity (EEO) complaints alleging age and gender discrimination. Pet. App. 4a. In the spring of 2012, Babb sent a series of emails supporting her colleagues to an EEOC investigator. *Id.* Babb also directly raised her concerns about age and gender discrimination in a 40-minute conversation with Dr. Keri Justice, the Associate Chief of Pharmacy Services, in February 2013. *Id.* at 42a. In 2014, Babb gave a deposition in support of her colleagues' lawsuit. *Id.* at 4a.

3. During the same time period, Babb was subject to several other adverse employment actions that lowered her standing at work and deprived her of the PACT promotion, despite her excellent performance ratings. Most importantly, in the fall of 2012,

Pharmacy Services and the Geriatric Clinic began renegotiating the service agreement governing Babb's responsibilities in light of the new PACT program. When Babb asked whether she could be involved in the negotiations, she was told by a supervisor that the Service Chiefs would handle the process. *Id.* at 5a. Babb later learned that two younger pharmacists (ages 30 and 32) were permitted to participate in the service-agreement negotiations, even though Babb had been denied the opportunity to do so. *Id.*; JA96 ¶ 12.

When the service agreement was finalized in December 2012, it contained terms that were highly unfavorable to Babb. Pet. App. 5a-6a. In particular, it provided that Babb would not perform any DSM, thus precluding her from taking advantage of the PACT promotion to GS-13. *Id.* Pharmacy Services then moved to eliminate Babb's advanced-scope designation, thereby rendering her ineligible for the GS-13 promotion in connection with the PACT program. JA98-99 ¶¶ 17-19. And on February 15, 2013—just a few days after Babb's lengthy encounter with Justice in which Babb had complained about discrimination—Pharmacy Services removed that designation. Pet. App. 42a.

Also during the same time period, Babb twice requested anticoagulation training so that she could work in the Medical Center's anticoagulation clinic, which was understaffed. Both times, Pharmacy Services denied her request for training. Pet. App. 6a. By contrast, a younger male employee was allowed to obtain anticoagulation training even though it was not required for his position. JA102 ¶ 23.

In April 2013, Babb applied for two open positions in the anticoagulation clinic. Pet. App. 6a. Well

before interviews for the position took place, one of the supervisors involved in the hiring process emailed Justice to inform her that Babb was interested in the position. Justice expressed exasperation at this development, commenting, "I feel a EEO [complaint] coming on…." JA53. Babb was ultimately rejected for the positions in favor of much younger pharmacists, ages 26 and 30. Pet. App. 6a; JA102 ¶ 23.

4. Throughout this period, Babb's supervisors repeatedly made other negative comments about Babb's age, as well as statements indicating that they viewed her as part of a group of older women pharmacists who frequently complained. For example, in March 2012, one of Babb's supervisors asked Babb when she planned to retire. Pet. App. 35a. A few months later, Justice asked Babb whether she "had gone to see the 'middle aged movie, Magic Mike.'" JA100 ¶ 20; *see also* Pet. App. 21a, 35a. And at staff meetings, Justice would make "condescending remarks . . . towards older female pharmacists which insinuated that they would not be able to transition to the new PACT models." JA105 ¶ 29.

In April 2013, shortly after Babb complained about the discriminatory treatment suffered by her colleagues, Justice described Babb as "part of a group of pharmacists known as 'mow-mows' or 'squeaky wheels' who were 'never happy, always complaining,'" and who believed "'they were [being] discriminated against because they were older and female.'" Pet. App. 7a (alteration in original). Babb understood the "mow mow" remark to be a way of calling her a grandmother. *Id.* at 35a. The Chief of Pharmacy Services, Dr. Gary Wilson, similarly stated that he viewed Babb as "part of a group of people that felt

they were being discriminated against on the basis of age and gender." *Id.* at 41a.

5. In August 2014, Babb was finally promoted to a PACT position, in which she worked nine-hour shifts from Tuesday through Friday, with a 4-hour shift on Saturday mornings. Pet. App. 8a. But when Babb started the new job, she was informed—for the first time—that she would be given only four hours of holiday pay for each of the five Monday federal holidays (unlike all other employees with more traditional schedules). *Id.*

C. Proceedings Below

1. In May 2013, Babb filed an informal EEOC complaint, and in July 2014, Babb filed suit against the VA in federal court. Pet. App. 31a, 36a. Among other things, Babb alleged that the VA had discriminated against her on the basis of age and gender, in violation of the federal-sector provisions of the ADEA and Title VII, by denying her equal treatment when it (1) removed her advanced-scope designation; (2) rejected her applications for the anticoagulation positions; (3) denied her training opportunities; and (4) gave her only four hours of holiday pay under her new schedule. Pet. App. 14a; *see also* JA15, 20-29, 32-33 ¶¶ 1, 10, 22-27. She also alleged that the VA had retaliated against her for supporting her colleagues' complaints of sex discrimination, and that the denial of equal employment opportunity was ongoing. JA29-33 ¶¶ 11-25. Babb sought an injunction, as well as monetary relief—including backpay and lost benefits—and attorneys' fees and costs. JA31-32, 33, 35-36 ¶¶ 20-21, 26-27, 33-37.

The VA moved for summary judgment, arguing, among other things, that Babb had failed to establish a sufficient causal link between the alleged discrimination and the challenged personnel actions. M.D. Fla. ECF No. 52 at 19-26. In response, Babb submitted considerable evidence showing that age, gender, and her protected EEO activity were factors in the challenged personnel actions. *See* Babb C.A. Br. 4-24; Gov't Cert. Response 2 (conceding that Babb had "presented enough evidence [at summary judgment] to permit an inference that age or retaliation had been considered as a factor").

The district court evaluated Babb's ADEA and Title VII retaliation claims under a but-for causation standard, applying the *McDonnell Douglas* framework. Under that framework, a plaintiff is first required to make a prima facie case of discrimination. The defendant then bears the burden of production to offer a nondiscriminatory explanation for its action, and finally, a plaintiff may challenge that explanation as pretextual. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). The court held that although Babb had established a prima facie case of age and gender discrimination and retaliation, Pet. App. 39a-41a, 54a, she could not show that her age, gender, or retaliation were the but-for causes of the challenged personnel actions, because the VA had offered alternative nondiscriminatory reasons for the personnel actions and Babb had not shown those reasons were pretextual, *id.* at 43a-52a, 54a-56a.

2. On appeal to the Eleventh Circuit, Babb argued that the district court erred in requiring her to prove that age and retaliation were but-for causes of the challenged personnel actions, rather than motivating factors in those actions. Babb explained

that such a but-for causation requirement is inconsistent with the plain language of Section 633a(a) and Title VII's federal-sector provision, both of which render unlawful *any* discrimination in the course of making a personnel decision.

At oral argument, Judge Newsom noted that the statutory interpretation question was "easy," recognizing that the language of Section 633a(a) strongly favors Babb's reading.[1] But the court ultimately held that it was bound by a prior circuit decision, *Trask v. Secretary, Department of Veterans Affairs*, 822 F.3d 1179 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 1133 (2017), which had applied a but-for causation standard to ADEA and Title VII federal-sector claims. Pet. App. 11a-20a. Accordingly, the court affirmed the district court's dismissal of Babb's ADEA and Title VII retaliation claims.[2] The court noted, however, that *Trask* had relied on case law developed under the ADEA and Title VII *private*-sector provisions even though they are "quite unlike" their federal-sector counterparts, Pet. App. 12a, and had done so without "analyz[ing] the linguistic differences between" them at all. *Id.* at 12a-13a, 18a-19a. The court stated that if it were "writing on a clean slate," it "might well agree" with Babb that federal-sector claims should be governed by a

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

[2] The Eleventh Circuit remanded Babb's gender-discrimination claim for application of a motivating factor standard in accordance with circuit precedent. Pet. App. 9a-11a.

"motivating-factor (rather than but-for) causation standard." *Id.* at 11a-13a; *see id.* at 18a.

In following *Trask* and holding that a but-for causation standard applies to ADEA federal-sector claims, the Eleventh Circuit parted ways with the D.C. Circuit. In *Ford v. Mabus*, 629 F.3d 198 (D.C. Cir. 2010), Judge Tatel, joined by Judge Sentelle, held that a plaintiff bringing a claim under the federal-sector provision of the ADEA need only prove that age was a "factor" in the challenged personnel action. *Id.* at 200. The court explained that a but-for causation standard would "divorce the phrase 'free from any discrimination' from its plain meaning," and emphasized that where Congress "uses different language in different provisions of the same statute, [the court] must give effect to those differences." *Id.* at 206.

SUMMARY OF ARGUMENT

Section 633a(a) of the ADEA categorically prohibits the federal government from allowing age discrimination to infect any decision-making process with respect to its own employees. A federal employee who proves that such discrimination was a factor in a personnel decision has thereby proven a violation of the statute. No further showing of but-for causation is required.

I. This case is resolved by a plain reading of the statutory text. Section 633a(a) dictates that "[a]ll personnel actions . . . shall be *made free from* any discrimination based on age." 29 U.S.C. § 633a(a) (emphasis added). By its terms, that provision entitles federal employees to a level playing field. When age is a negative factor that is considered in a decision-making process, the playing field is not level,

and the resulting decision is not "made free from any discrimination based on age." Congress's unequivocal and unambiguous language is the beginning and end of this case.

This interpretation is reinforced by the legal and historical context in which Section 633a was enacted. All agree that Congress modeled Section 633a on Title VII's virtually identical federal-sector provision. At the time of Section 633a's enactment, that provision had been definitively interpreted by the Civil Service Commission to provide a remedy for unequal treatment in the federal decision-making process—even when that discrimination was *not* the but-for cause of the ultimate decision. The Commission's interpretation reflected the Title VII provision's roots in both the Constitution's equal protection guarantee and a long string of executive orders—all of which prohibited discrimination in the employment decision-making process, regardless of outcome. There is no reason to assume that Congress intended Section 633a(a) to depart from these settled principles.

Finally, to the extent the Court finds any ambiguity in the statutory language, it should defer to the EEOC's reasonable construction under *Chevron*. This Court has expressly held that the EEOC is entitled to deference in interpreting the ADEA, and the agency has squarely interpreted Section 633a(a) as not requiring any but-for causation requirement.

In short, every indicator of statutory meaning counsels in favor of reversing the decision below.

II. Neither the Eleventh Circuit nor the Government has provided a plausible explanation for

implying a but-for causation requirement into the text of Section 633a(a). The Government's primary contention is that the phrase "based on" inevitably denotes but-for causation, and Section 633a(a) thus requires a but-for relationship between age discrimination and an ultimate personnel action. But that is a textual non-sequitur. As the D.C. Circuit has explained, the phrase ""based on' [in Section 633a(a)] modifies 'discrimination,'" *not* "personnel action." *See Ford*, 629 F.3d at 205. In context, the phrase "based on" simply identifies the *type* of discrimination—"age" as opposed to some other characteristic—that is prohibited by the statute.

Given the plain text, there is no basis to apply any "default rule" of but-for causation that would require a causal link between the discrimination and the outcome of a specific personnel action. The statutory ban on "discrimination" is broad and covers *any* unequal treatment or consideration inflicted upon an employee in the course of the government's decision-making process. That is similar to the no-discrimination standard under the Constitution's equal protection guarantee. It makes perfect sense to apply such a rule here, given the ADEA's textual and historical linkage to Title VII's federal-sector provision and, by extension, the Constitution.

Nor is there any basis to assume that Section 633a(a) embraced the same but-for-causation rule that governs the ADEA's private-sector provision, as interpreted by this Court in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009). This Court has repeatedly held that the private-sector provision differs from Section 633a(a) in its text, structure, and history. *See, e.g., Gomez-Perez v. Potter*, 553 U.S. 474, 486-88 (2008); *Lehman v. Nakshian*, 453 U.S. 156,

163-68 (1981). The Court's interpretation of the private-sector provision cannot simply be carried over into the federal-sector context. Indeed, Section 633a(a)'s legislative history is absolutely clear that Congress considered—and *rejected*—the notion that the same rules should govern federal- and private-sector claims. *See Lehman*, 453 U.S. at 166 n.14.

This Court should interpret Section 633a(a) as written, and reverse the decision below.

ARGUMENT

I. THE ADEA REQUIRES FEDERAL EMPLOYMENT DECISIONS TO BE MADE FREE FROM ANY AGE DISCRIMINATION

A. Section 633a(a)'s Plain Language Makes It Unlawful To Disfavor Employees On The Basis Of Their Age

"In determining the meaning of a statutory provision," this Court "'look[s] first to its language, giving the words used their ordinary meaning.'" *Artis v. District of Columbia*, 138 S. Ct. 594, 603 (2018) (citation omitted). Where "a careful examination of the ordinary meaning and structure of the law . . . yields a clear answer," the inquiry "must stop." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019); *see also Sebelius v. Cloer*, 569 U.S. 369, 380 (2013) (explaining that the inquiry ceases "if the statutory language is unambiguous and the statutory scheme is coherent and consistent" (citation omitted)).

Here, Section 633a(a)'s language makes it unlawful for the government to allow age discrimination to infect its deliberative process with respect to personnel decisions. And under this

Court's settled precedent, discrimination occurs whenever a person is subject to unequal consideration by a government decision-maker. Section 633a(a) makes such discrimination unlawful, full stop. The statute does not require a plaintiff who can prove such discrimination *also* to show that it was the but-for cause of an adverse personnel action.

1. Section 633a(a) regulates the "personnel actions" the federal government takes with respect to its employees. It requires that all such actions "shall be made" in a way that is "free from any" age discrimination. 29 U.S.C. § 633a(a).

The grammatical structure of the provision does not merely regulate the *outcome* of any employment decision. Nor is it framed as a simple prohibition on a certain type of conduct. Instead, the provision governs the decision-making *process*. Specifically, it creates an affirmative obligation on the part of the government to undertake one of its functions ("ma[king]" "personnel actions") in a certain manner ("free from any" age discrimination). *See Oxford English Dictionary* (online 3d ed., 2000) (defining "make" as "to bring into existence by construction or elaboration"); *Black's Law Dictionary* (11th ed. 2019) (defining "make" as "[t]o cause (something) to exist").[3]

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[3] Statutes throughout the U.S. Code use the phrase "shall be made" to set forth appropriate *processes* for taking particular actions. *See, e.g.*, 22 U.S.C. § 1626(a) (payments "shall be made in accordance with such regulations as the Secretary of the Treasury may prescribe"); 26 U.S.C. § 401(a)(27)(A) (determination of whether a plan is a profit-sharing plan "shall be made without regard to current or accumulated profits of the employer and without regard to whether the employer is a tax-exempt organization"); 42 U.S.C. § 9604(e)(7)(C) (confidentiality

2. In defining the requirements for that process, Congress used "sweeping language." *Ford v. Mabus*, 629 F.3d 198, 205 (D.C. Cir. 2010) (quoting *Forman v. Small*, 271 F.3d 285, 296 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 958 (2002)). Four features of that language are especially worth emphasizing, as they establish that the ADEA unequivocally bars the federal government from treating its employees unfavorably because of their age.

First, Section 633a(a)'s "free from" phrase indicates that personnel actions must be entirely "relieved from" or "clear" of discrimination—*i.e.* even the smallest amount of discrimination is prohibited. *See Oxford English Dictionary* (online 3d ed., 2008) (defining "free," when used with "from" as "[c]lear of something which is regarded as objectionable or problematic"); *Merriam-Webster Online*, https://www.merriam-webster.com/ (last visited Sept. 14, 2019) (defining "free" as "relieved from or lacking something and especially something unpleasant or burdensome," *e.g.* "free from pain"); *see also Webster's New Collegiate Dictionary* 457 (1977) ("exempt,

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designations "shall be made in writing and in such manner as the President may prescribe by regulation"); 43 U.S.C. § 618c(a) (adjustments with contractors "shall not be made in cash, but shall be made by means of credits extended"). Because of its broad focus on the decision-making *process*, Section 633a(a) is fundamentally different from other statutes—such as the ADEA or Title VII private-sector provisions and 42 U.S.C. § 1981(a)—that instead ban discrimination with respect to particular *outcomes*. *See infra* at 49-55; U.S. Amicus Br. 19, *Comcast Corp. v. Nat'l Ass'n of African American-Owned Media*, No. 18-1171, 2019 WL 3889653 (Aug. 15, 2019) (arguing that Section 1981's discrimination ban "guarantees . . . the right to a particular set of *outcomes* that a person could achieve if she were white" (emphasis added)).

relieved, or released esp. from a burdensome, noxious, or deplorable condition or obligation," *e.g.*, free "from pain"); *Webster's Third New International Dictionary* 905 (1976) (same). When discriminatory animus infects the decision-making process with respect to federal personnel, the resulting personnel action is not—as a matter of ordinary language—"made" in a way that is "free from" discrimination.

Second, the use of the word "any" ("free from *any* discrimination") further emphasizes that the process must be *entirely* without discrimination. *See Oxford English Dictionary* (online 3d ed., 2016) (defining "any" "[i]n negative contexts" as "even a single; the slightest"); *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (the word "any" has an "expansive meaning"). The word "any" is also important because it implies that a "personnel action" can be subject to different amounts or degrees of "discrimination." The word "any" thus distinguishes the decision-making process from one in which "some" discrimination may be allowed, such as a process where discrimination is present but does not directly cause an adverse outcome. As the D.C. Circuit has explained, Congress chose its words carefully to make clear that "any amount of discrimination tainting a personnel action" violates the statute. *Ford*, 629 F.3d at 206.

Third, the word "discrimination" is broad and connotes the denial of equal treatment, without regard to whether that unequal treatment is the cause of any particular adverse outcome. *See, e.g.*, *Oxford English Dictionary* (online 3d ed., 2013) ("Unjust or prejudicial treatment of a person or group, esp. on the grounds of race, gender, sexual orientation, etc."); *Cambridge Dictionary*, https://dictionary.cambridge.org/us/dictionary/ (last

visited Sept. 14, 2019) ("treating a person or a particular group of people differently, especially in a worse way from the way in which you treat other people, because of their skin colour, sex, sexuality, etc."); *Merriam-Webster Online* ("the act, practice, or an instance of discriminating categorically rather than individually"). This plain meaning of "discrimination" was equally valid in the 1970s, when the federal-sector provisions of Title VII and the ADEA were enacted. *See Webster's New Collegiate Dictionary* at 326 (defining "discrimination" as "the act, practice or an instance of discriminating categorically rather than individually"; "prejudiced or prejudicial outlook, action, or treatment"); *Webster's Third New International Dictionary* at 648 (defining "discrimination" as "the act, practice or an instance of discriminating categorically rather than individually"; "the according of differential treatment to persons of an alien race or religion").

This Court's cases confirm that the plain meaning of "discrimination" should be given effect here. As the Court has explained, "'Discrimination' is a term that covers a wide range of intentional unequal treatment; by using such a broad term, Congress gave the statute a broad reach." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) (interpreting Title IX). The Government has itself recognized that the "normal definition of discrimination" is simply "differential treatment, or more specifically, less favorable treatment." Gov't Cert. Response 13 (quoting *Jackson*, 544 U.S. at 174); *see also Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59 (2006).

In related contexts, the Court has often recognized that "discrimination" is not merely the loss of a particular benefit based on group status, but *also*

encompasses the denial of fair and equal consideration for such a benefit. As the Court has explained with respect to the Constitution's equal protection guarantee,

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993). The Court has thus recognized that unlawful discrimination may be present *regardless* of whether that discrimination leads to any particular result, such as the denial of a specific benefit.

This Court has repeatedly applied that equal treatment rule in seminal discrimination cases, going back decades. *See, e.g.*, *id.* at 664-66; *see also Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 718-19 (2007); *Gratz v. Bollinger*, 539 U.S. 244, 261-62 (2003); *Texas v. Lesage*, 528 U.S. 18, 20 (1999) (per curiam); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 280 n.14 (1978); *Turner v. Fouche*, 396 U.S. 346, 362-63 (1970). Without that equal treatment rule, historic plaintiffs such as Allan Bakke might never have made it through the courthouse door. As the Court explained, Bakke had

a viable race-discrimination claim, "even if [he was] unable to prove that he would have been admitted [to UCLA's law school] in the absence of the [challenged affirmative-action] program." *Bakke*, 438 U.S. at 280 n.14.

Finally, the last part of Section 633a(a) ("shall be made free from any discrimination *based on age*") simply refers to the *type* of discrimination prohibited. *Ford*, 629 F.3d at 205 ("'based on' modifies 'discrimination.'"). That is, it specifies the particular characteristic protected by the statute. In this context, "discrimination based on age" and "age discrimination" are synonymous. *See Black's Law Dictionary* (defining "age discrimination" as "[d]iscrimination based on age"). Indeed, if the statute were to read, "All personnel actions . . . shall be made free from any age discrimination," it would have precisely the same meaning it currently has. In either instance, the relevant language simply identifies the legally protected characteristic as age.

3. For the reasons above, Section 633a(a) is a broad command that any government personnel action must be made without taking age into account. When age is a factor that the government considers in the process of making a personnel decision—even when it is not the dispositive factor—that decision is not "made" in a way that is "free from any" unequal treatment based on age. Section 633a(a) thus prohibits all age discrimination in federal employment, not merely age discrimination that can be shown to have a but-for causal relationship with a particular personnel action.

That plain reading of the text is fully consistent with the ADEA's overriding goal of eliminating unfair bias against older federal employees. As the 1974

House Report on the federal-sector amendment made clear, "[d]iscrimination based on age" is "as great an evil in our society" as discrimination based on any other characteristic "which ignores a person's unique status as an individual and treats him or her as a member of some arbitrarily-defined group." H.R. Rep. No. 93-913, at 40 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2850 (quoting President Nixon's statement of March 23, 1972). Indeed, such discrimination in the employment field is "cruel," "self-defeating," and "destroys the spirit of those who want to work." *Id.*; *see also* S. Rep. No. 92-842 at 45-46 (1972); S. Rep. No. 93-300 at 56 (1973); S. Rep. No. 93-690, at 55 (1974).

Given these sentiments, Congress plainly aimed to eliminate *all* age discrimination in federal employment, not merely the subset of such discrimination that can be shown to have a dispositive (but-for) impact on particular employment decisions. After all, any measure of differential treatment that disfavors older employees discounts their "unique status as an individual" and instead treats them simply as members of an "arbitrarily defined group." H.R. Rep. No. 93-913, at 40 (citation omitted). Congress's desire to eliminate all such unfair treatment is reflected in Section 633a(a)'s command that government employment decisions "shall be made free from any discrimination based on age."

B. Section 633a(a)'s Link To The Title VII Federal-Sector Provision Confirms That But-For Causation Is Not Required

Section 633a(a)'s ordinary meaning is more than sufficient to resolve this case. But any doubt about that meaning is easily dispelled by the legal and

historical context in which Congress enacted that provision in 1974. That history confirms that the government violates the ADEA whenever it treats age as a negative factor when making an employment decision.

1. Congress Patterned Section 633a(a) On Title VII's Federal-Sector Provision

"Congress legislates against the backdrop of existing law." *McQuiggin v. Perkins*, 569 U.S. 383, 398 n.3 (2013); *see also Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 169 (2014) (courts presume that "Congress is aware of existing law when it passes legislation" (citation omitted)). And when statutory language "is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Sekhar v. United States*, 570 U.S. 729, 733 (2013) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)).

Here, as this Court has recognized, Congress "patterned" Section 633a(a) "directly after" Title VII's federal-sector provision, which it had enacted only two years earlier. *Lehman v. Nakshian*, 453 U.S. 156, 163, 167 n.15 (1981); *see also* 118 Cong. Rec. 24,397 (1972) (comments of Senator Bentsen that "[t]he measures used to protect Federal employees [from age discrimination] would be substantially similar to those incorporated" in the federal-sector amendments to Title VII). Indeed, Section 633a(a) is virtually identical to its Title VII precursor. Both mandate that "[a]ll personnel actions . . . shall be made free from any discrimination based on [a protected characteristic]." 29 U.S.C § 633a(a); 42 U.S.C. § 2000e-16(a).

That identical language carries the same meaning in both provisions. After all, "when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (plurality opinion); *see also United States v. Castleman*, 572 U.S. 157, 174 (2014) (Scalia, J., concurring in part and concurring in the judgment); *Northcross v. Bd. of Educ. of Memphis City Schs.*, 412 U.S. 427, 428 (1973). The Government itself concedes that the provisions are "materially identical" and that there is "no apparent reason why the Court should interpret [them] differently." Gov't Cert. Response 22.

2. Title VII's Federal-Sector Provision Has Never Required But-For Causation

All of the textual arguments presented above with respect to Section 633a(a), *supra* at 22-27, equally support the conclusion that Title VII's materially identical federal-sector provision also requires the federal government to refrain from any discriminatory treatment when making employment decisions. In addition, Title VII's roots in the Constitution's equal protection guarantee—and in the series of executive orders promulgated by President Roosevelt and his successors—further confirm that *both* federal-sector provisions make discriminatory treatment unlawful, even if such discrimination is not the but-for cause of an adverse personnel action.

a. Congress enacted Title VII's federal-sector provision in part to implement the Constitution's guarantee of equal protection for federal employees.

Both the House and Senate Reports addressing that provision emphasized that "[t]he prohibition against discrimination by the Federal Government" is "based upon the due process clause of the fifth amendment to the Constitution" and "was judicially recognized long before the enactment of the Civil Rights Act of 1964." H.R. Rep. No. 92-238, at 22 (1971); S. Rep. No. 92-415, at 12-13 (1971) (same). And both noted that despite the string of executive orders dating back to President Roosevelt—and the broad statement of federal nondiscrimination policy embodied in the 1964 Civil Rights Act—discrimination remained a significant problem in federal employment. *See* H.R. Rep. No. 92-238, at 22-25; S. Rep. No. 92-415, at 13-14. Congress thus viewed Title VII's federal-sector provision as a mechanism for vindicating the Constitution's ideal of equal treatment. *See* H.R. Rep. No. 92-238, at 22; S. Rep. No. 92-415, at 12-13.

This Court highlighted the link between Title VII's federal-sector provision and the Constitution's equal protection guarantee in *Brown v. General Services Administration*, 425 U.S. 820 (1976). In a lengthy discussion of the provision's history, the Court emphasized that the statute was needed because—even though "federal employment discrimination clearly violated . . . the Constitution [under *Bolling v. Sharpe*]"—the "effective availability of either administrative or judicial relief was far from sure" at the time the statute was enacted. *Id.* at 825. Based on this analysis, the Court ultimately held that Title VII's federal-sector provision "create[s] an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination." *Id.* at 828-29.

Title VII's roots in the Constitution's nondiscrimination guarantee bear directly on the question presented here. As noted above, the Constitution makes it unlawful for the government to discriminate by "erect[ing] a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group." *Northeastern Fla.*, 508 U.S. at 664-66 (1993) (citing *Turner*, 396 U.S. at 362, and *Clements v. Fashing*, 457 U.S. 957, 962 (1982)). This Court has therefore repeatedly indicated that discrimination violates the Constitution even if it is not proved to be the but-for cause of the denial of a particular benefit. *Id.*; *see also Parents Involved in Cmty. Schs.*, 551 U.S. at 718-19; *Gratz*, 539 U.S. at 261-62; *Texas v. Lesage*, 528 U.S. at 20; *Adarand Constructors*, 515 U.S. at 211; *Bakke*, 438 U.S. at 280 n.14; *cf. Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017).[4]

This Court's teaching thus makes clear that the Constitution protects against unequal treatment in the federal decision-making *process.* A person suffers a constitutional injury under the equal protection clause not only when discriminatory animus causes a particular adverse decision, but when he or she is

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[4] In *Lesage*, this Court held that the government can avoid liability for damages in a Section 1983 action by proving that the discrimination in question was not a but-for cause of the underlying decision. 528 U.S. at 20-21 (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)). But the Court nonetheless confirmed that such discriminatory conduct is unlawful—and can therefore be enjoined—without such a showing. *Id.* at 21 (further noting that "[t]he relevant injury in such cases is 'the inability to compete on an equal footing'" (quoting *Northeastern Fla.*, 508 U.S. at 666)).

denied consideration "on an equal footing" with other individuals who do not possess a protected characteristic. *Northeastern Fla.*, 508 U.S. at 666. An individual plaintiff can therefore establish a violation of the Constitution's equal protection guarantee *without* proving but-for causation.

Given its link to the equal protection guarantee, Title VII's federal-sector provision is at least as protective as the Constitution's "equal footing" rule. And so too is Section 633a(a).

b. Title VII's federal-sector provision was also intended to strengthen the federal government's prior efforts to ban discrimination in federal employment. *See* H.R. Rep. No. 92-238, at 22-25; S. Rep. No. 92-415, at 13-14. As this Court explained in *Morton v. Mancari*, the provision was "in large part merely a codification of prior anti-discrimination Executive Orders that had proved ineffective because of inadequate enforcement machinery." 417 U.S. 535, 549 (1974). It also sought to give effect to the Civil Rights Act's statement that it is "the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of race, color, religion, sex, or national origin." *See* H.R. Rep. No. 92-238, at 22 (quoting 5 U.S.C. § 7151 (Supp. II 1965, 1966)); S. Rep. No. 92-415, at 13 (same).

As noted above, every American president from Roosevelt to Nixon issued executive orders forbidding the federal government from engaging in discrimination on the basis of race, creed, color, or national origin. The language used in those executive orders was broad, categorical, and materially identical to the language Congress ultimately enacted in the Title VII and ADEA federal-sector provisions at

issue here. *See* Exec. Order No. 8802, 3 C.F.R. 234 (Supp. 1941) ("[T]here shall be no discrimination . . . because of race, creed, color, or national origin" in federal employment.).[5] And it too was intended to effectuate the Constitution's equal treatment rule.[6]

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[5] *See also, e.g.*, Exec. Order No. 8587, 3 C.F.R. 824 (Compilation 1938-1943) ("No discrimination shall be exercised, threatened, or promised . . . against or in favor of any applicant, eligible, or employee in the classified service because of race, or his political or religious opinions or affiliations . . . ."); Exec. Order No. 9346, 3 C.F.R. 1280 (Compilation 1938-1943) ("[T]here shall be no discrimination in employment of any person in war industries or in Government by reason of race, creed, color, or national origin . . . ."); Exec. Order. No. 9980, 3 C.F.R. 720 (Compilation 1943-1948) (requiring "fair employment . . . without discrimination because of race, color, religion, or national origin"); Exec. Order No. 10590, 3 C.F.R. 53 (Supp. 1955) (recognizing that policy of equal opportunity "necessarily excludes and prohibits discrimination against any employee or applicant for employment in the Federal Government because of race, color, religion, or national origin"); Exec. Order No. 10925, 3 C.F.R. 86 (Supp. 1961) ("[I]t is the plain and positive obligation of the United States Government to promote and ensure equal opportunity . . . without regard to race, creed, color, or national origin."); Exec. Order No. 11246, 3 C.F.R. 167 (Supp. 1965) ("It is the policy of the Government . . . to prohibit discrimination in employment because of race, creed, color, or national origin . . . ."); Exec. Order No. 11478, 3 C.F.R. 133 (Compilation 1969) ("It has long been the policy of the United States Government to provide equal opportunity in Federal employment on the basis of merit and fitness and without discrimination because of race, color, religion, sex, or national origin.").

[6] *See* H.R. Rep. No. 103-599, at 23 (1994) (noting that President Eisenhower issued Executive Order 10590 in response to the Court's decision in *Bolling v. Sharpe*, 347 U.S. 497 (1954)); Exec. Order No. 10925, 3 C.F.R. 86 (emphasizing that "discrimination because of race, creed, color, or national origin is contrary to Constitutional principles" and stating that the

Many of the Executive Orders emphasized that discrimination could play no role whatsoever in federal employment decisions. For example, President Truman's order coupled its unequivocal ban on discrimination with the statement that "*[a]ll* personnel actions taken by Federal appointing officers shall be based *solely* on merit and fitness." Exec. Order. No. 9980, 3 C.F.R. 720 (Compilation 1943-1948) (emphasis added). Presidents Kennedy and Johnson likewise reaffirmed the Executive Branch policy of "hiring and promoting employees on the basis of merit *alone*," and of granting older federal workers "fair and full consideration for employment and advancement in Federal employment." Exec. Order No. 11141, 3 C.F.R. 117-18 (Supp. 1964) (emphasis added). And President Nixon emphasized that "[d]iscrimination *of any kind* based on factors not relevant to job performance must be eradicated *completely* from Federal employment." President Richard M. Nixon, Memorandum on Equal Employment Opportunity in the Federal Government (Aug. 8, 1969), *in* Public Papers of the Presidents of the United States: Richard Nixon (1971), https://quod.lib.umich.edu/p/ppotpus/4731731.1969.001/695?q1=Memorandum+on+Equal+Employment+Opportunity+in+the+Federal+Government&view=image&size=100 (emphasis added).

None of those prior declarations of federal policy can sensibly be read to have allowed such discrimination, so long as the discrimination was not a but-for cause of a particular adverse employment action. Given that Title VII's federal-sector provision

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government thus has a "plain and positive obligation" to ensure nondiscrimination in employment).

was "in large part merely a codification of" the executive orders, *Morton*, 417 U.S. at 549, it should be interpreted—like those orders—to forbid any and all discrimination in the process of making employment decisions. And because all sides agree that Section 633a(a) should be interpreted in accord with Title VII's federal-sector ban, it too prohibits any discrimination in the federal decision-making process—irrespective of outcome.

3. Section 633a(a) Embodied The Prevailing Understanding Of Title VII's Federal-Sector Provision Set Forth In Binding Regulations

As explained above, the original public meaning of *both* the Title VII and ADEA federal-sector provisions was that the federal government was required to refrain from any discriminatory treatment based on the identified characteristics when making employment decisions. This original understanding was reflected in the binding regulations that the Civil Service Commission originally adopted to implement the Title VII provision in 1972. Congress legislated against the backdrop of those regulations and wanted the ADEA's identical federal-sector provision to carry the same meaning. And the Commission gave effect to that intent when it extended the Title VII federal-sector regulations to ADEA federal-sector claims in 1975.

a. In 1972, Congress authorized the Civil Service Commission to issue binding "rules, regulations, orders and instructions" to implement Title VII's new federal-sector ban on discrimination. Pub. L. No. 92-261, § 717(b), 86 Stat. at 111. Shortly after that ban became law, the Commission issued regulations to

fulfill its responsibilities. 37 Fed. Reg. 22,717 (Oct. 21, 1972). Notably, the regulations made absolutely clear that the Commission understood the federal-sector provision to prohibit *any* discrimination, regardless of whether that discrimination was the but-for cause of a personnel action.

The best indication to that effect appears in the original regulatory provisions governing "Remedial Actions" that should be imposed for a violation of the statute. 5 C.F.R. § 713.271 (1973). Those provisions stated that "[w]hen an agency, or the Commission finds that an applicant for employment has been discriminated against," two sets of remedies were possible. *Id.* § 713.271(a). The first such remedy was for cases where but-for causation was established: If the agency or Commission found that "except for that discrimination," the applicant would have been hired, the regulations required an offer of employment and backpay. *Id.* § 713.271(a)(1).

But the regulations also provided for remedial relief to complainants even *without* but-for causation. They stated that if the agency or Commission found that "discrimination existed at the time the applicant was considered for employment *but d[id] not find that the individual [wa]s the one who would have been hired except for discrimination*," the applicant should be given priority consideration for existing vacancies. *Id.* § 713.271(a)(2) (emphasis added); *see also id.* § 713.271(b)(1), (2) (creating similar remedial scheme for employees, with different remedies depending on whether or not the discrimination was found to be the but-for cause of an adverse personnel action).

The Commission's regulations thus reflected its contemporaneous view that but-for causation is not a baseline requirement for proving a violation of Title

VII's federal-sector provision. After all, the Commission had no legal authority to impose a "remedy" for discrimination unless that discrimination actually violated the statute in the first place. *See Black's Law Dictionary* (defining "remedy" as "[t]he means of enforcing a right or preventing or redressing a wrong; legal or equitable relief"). By creating remedies even in circumstances where but-for causation could not be shown, the Commission made clear that such causation is not required by the statute.

b. Congress ratified the Commission's prevailing understanding when it enacted Section 633a(a) in 1974. It is well-settled that "Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations." *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998); *see also, e.g.*, *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 437-38 (1986); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). That principle of construction is directly applicable here: When Congress adopted the Title VII federal-sector provision's precise formulation for purposes of Section 633a(a), it thereby ratified the meaning reflected in the Civil Service Commission regulations. Congress thus ensured that any discrimination in personnel actions is prohibited, whether or not that discrimination is the but-for cause of an adverse personnel action.

c. In 1975, the Civil Service Commission itself endorsed this interpretation of Section 633a(a), when it issued regulations implementing that provision. 39 Fed. Reg. 24,351 (July 2, 1974); *see also* Pub. L. No. 93-259, § 28, 88 Stat. 55, 75 (giving the Commission

authority to promulgate regulations implementing Section 633a(a)). Unsurprisingly, given the virtually identical statutory language, the Commission's regulations simply applied to Section 633a(a) the same remedial scheme it had created to implement the Title VII federal-sector provision a few years earlier. 5 C.F.R. § 713.511 (1975). By doing so, the agency Congress entrusted with enforcing the ADEA's ban on age discrimination again made clear that such discrimination is prohibited—and must be remedied—even if it is *not* the but-for cause of any particular adverse employment action. *See supra* at 37-38.

The regulations governing federal-sector ADEA claims have reflected this same understanding ever since. In 1978, regulatory authority over the Title VII and ADEA federal-sector provisions passed from the Civil Service Commission to the EEOC. Reorganization Plan No. 1 of 1978, § 2, 43 Fed. Reg. 19,807, 92 Stat. 3781 (Feb. 23, 1978). As part of that transition, the EEOC adopted the Civil Service Commission's existing regulations, and transferred them to 29 C.F.R. § 1613. *See* 43 Fed. Reg. 60,900, 60,901 (Dec. 29, 1978). In 1992, the EEOC restructured its nondiscrimination regulations using notice-and-comment rulemaking, and the remedial provision was relocated to 29 C.F.R. § 1614.501. *See* 57 Fed. Reg. 12,634, 12,646, 12,659-60 (Apr. 10, 1992); *see also* 54 Fed. Reg. 45,747 (Oct. 31, 1989) (notice of proposed rulemaking).

Like the original Civil Service Commission regulations, the current EEOC regulations provide remedies for statutory violations even where discrimination is not the but-for cause of a personnel action. In particular, when "discrimination existed at

the time [an] applicant was considered for employment"—but the applicant "would not have been hired even absent discrimination"—the agency must "nevertheless take all steps necessary to eliminate the discriminatory practice and ensure it does not recur." 29 C.F.R. § 1614.501(b)(2); *see also id.* § 1614.501(c)(2) (same with regard to employees). The regulation also states that "unless clear and convincing evidence indicates that the applicant would not have been selected even absent the discrimination," she is entitled to an offer of employment and backpay. *Id.* § 1614.501(b)(1); *see also id.* § 1614.501(c)(1) (similar for employees).

The EEOC's remedial regime reflects the agency's longstanding view (and that of its predecessor, the Civil Service Commission) that the federal-sector provisions prohibit *any* discrimination in federal employment decisions, regardless of whether that discrimination is the but-for cause of a particular personnel action.

C. The EEOC's Interpretation Is Entitled To *Chevron* Deference

For the reasons noted above, Section 633a(a)'s text and history easily resolve this case. But to the extent the Court finds any ambiguity in the statutory language, it should apply *Chevron* and defer to the EEOC's reasonable conclusion that Section 633a(a) does not require but-for causation.

The ADEA grants the EEOC the authority to "enforce the provisions of [Section 633a(a)] through appropriate remedies" and to "issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section." 29 U.S.C.

§ 633a(b). In light of that authority, this Court has held that EEOC interpretations set forth in the course of formal adjudication or through formal rulemaking are entitled to *Chevron* deference. *See Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 395 (2008); *United States v. Mead Corp.*, 533 U.S. 218, 230 & n.12 (2001) (explaining that *Chevron* deference applies to "the fruits of notice-and-comment rulemaking or formal adjudication" and collecting cases).

Here, as noted above, the EEOC has concluded that Section 633a(a) is violated if a victim of age discrimination can show that such discrimination was a factor in a federal-sector employment decision—even if it was not the but-for cause of the decision. And the current EEOC regulations expressly indicate that remedial action is appropriate even where "the personnel action would have been taken even absent discrimination." 29 C.F.R. § 1614.501(c)(2); *supra* at 39-40.

The EEOC has also repeatedly issued adjudicatory decisions holding that Section 633a(a) does not require but-for causation. In *Brenton W. v. Chao*, Appeal No. 0120130554, 2017 WL 2953878 (E.E.O.C. June 29, 2017), for example, the agency addressed whether the Department of Transportation had discriminated against the complainant, an air-traffic controller, when it refused to consider him for certain GS-12/13/14 positions and instead deemed him eligible only for positions at a lower pay grade. *Id.* at *1, 10-11. The EEOC concluded that the complainant had indeed proved an ADEA violation, citing (among other things) the Department of Transportation's own internal memorandum indicating that it would refuse to consider a class of former air-traffic controllers for a higher pay grade based on its general view that

"someone's ability to control traffic declines with age." *Id.* at *13-14.

In resolving *Brenton*, the EEOC expressly held that "[Section] 633a(a)'s broad requirement that 'all personnel actions . . . be made free from any [age] discrimination,' means that federal sector ADEA liability is established if age is a motivating factor for the disputed personnel action, even if the employer proves that it would have taken the same action absent the discrimination." *Id.* at *9 (alterations in original). And it recognized that the Department of Transportation's memorandum "glaringly contradicts the ADEA's mandate that all personnel action in the federal sector 'shall be free from any discrimination based on age.'" *Id.* at *13. The EEOC has repeatedly applied the same interpretation of Section 633a(a) in other adjudications, as well.[7]

The EEOC's interpretation of Section 633a(a) reflects the only plausible reading of the statute. At the very minimum, though, the agency's interpretation is reasonable—and thus must be upheld under *Chevron*. Either way, this Court should hold that the ADEA is violated whenever age discrimination infects a federal employment decision.

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[7] *See, e.g.*, *Chanelle B. v. Brennan*, Appeal No. 0120152401, 2017 WL 6422255, at *2 n.4 (E.E.O.C. Dec. 8, 2017); *Arroyo v. Shinseki*, Request No. 0520120563, 2013 WL 393575, at *2 (E.E.O.C. Jan. 25, 2013); *Henry v. McHugh*, Appeal No. 0120103221, 2010 WL 5551957, at *4 (E.E.O.C. Dec. 23, 2010).

II. THE GOVERNMENT'S DEFENSE OF A BUT-FOR CAUSATION REQUIREMENT LACKS MERIT

The Eleventh Circuit's decision below departed from Section 633a(a)'s plain language and held that a federal-sector ADEA plaintiff must prove that age discrimination was the but-for cause of an adverse personnel action. Pet. App. 11a-13a. The panel reached that conclusion without conducting any independent textual or historical analysis of its own. Instead, it simply applied the court's earlier ruling in *Trask v. Secretary, Department of Veterans Affairs*, 822 F.3d 1179 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 1133 (2017), which had assumed that the rule governing private-sector ADEA claims applies to federal-sector claims.

In responding to Babb's petition for certiorari, the Government sought to fill the gap in the Eleventh Circuit's analysis by contending that Section 633a(a)'s phrase "based on" necessarily requires a but-for causal connection between the challenged personnel action and age, and that Section 633a(a) should be read in the same way as the (completely differently-worded) private-sector provision of the ADEA. Gov't Cert. Response 13, 16-17. Those arguments disregard the plain, ordinary meaning of the language that Congress enacted, and they are inconsistent with both the history of the ADEA's federal-sector provision and the EEOC's binding regulations. There is simply no basis to imply the Government's but-for causation requirement into Section 633a(a).

A. The Text Does Not Contain A But-For Causation Requirement

1. The Government's textual defense of the Eleventh Circuit's ruling rests on the contention that the phrase "based on" inevitably denotes but-for causation, and that the relevant federal-sector provisions thus require a but-for relationship between the discrimination and the ultimate personnel action. Gov't Cert. Response 13-14. That analysis is mistaken.

For starters, "based on" does *not* invariably mean "but-for," regardless of context. While "based on" may connote but-for causation in some circumstances, the meaning of that phrase ultimately turns on the context in which it is used and its position within the provision as a whole. *See, e.g.*, *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 100-01 (2012).

Here, "based on" modifies only the word "discrimination." In context, the function of the phrase is to identify the type of discrimination prohibited by the provision—*i.e.*, discrimination based on age. The "based on" phrase does *not* directly modify the covered "personnel actions," and it therefore does not require a but-for causal nexus between the discriminatory treatment and the ultimate personnel decision. As noted above, Section 633a(a)'s key phrase—"shall be made free from any discrimination based on age"—would mean the exact same thing if it said "shall be made free from any age discrimination." *See supra* at 27. Congress's use of the words "based on" to communicate the same idea does not somehow create a requirement that the discrimination be the but-for cause of an ultimate personnel action.

In any event, even if the Government were right that the phrase "any discrimination based on age" inevitably connotes but-for causation, the causal relationship is different from the one the Government asserts. The text does not say that a "*personnel action*" cannot be taken "based on" discrimination. Rather, it says that such an action "shall be made free from any discrimination," so long as the *discrimination* is "based on" age. *See Ford*, 629 F.3d at 205 (explaining that the phrase "'based on' modifies 'discrimination,'" *not* "personnel action"). And here "discrimination" means a denial of "equal treatment" in the decision-making process, irrespective of the ultimate consequence of that treatment with respect to a particular personnel decision. *See supra* at 24-27 (citing cases and dictionary definitions).

2. The Government also asserts that Congress enacted Section 633a(a) against a "default" background rule of but-for causation, and that this background rule necessarily requires a but-for causal relationship between the discrimination and the adverse personnel action. Gov't Cert. Response 13-14 (citing *Univ. of Tex. Southwest Med. Ctr. v. Nassar*, 570 U.S. 338, 347 (2013)). That argument likewise misses the mark.

Congress is free to deviate from any "default rule[]" by including "an indication to the contrary in the statute." *Nassar*, 570 U.S. at 347. And in Section 633a(a), Congress adopted the deliberately expansive language "shall be made free from any discrimination." That language establishes an "equal treatment" rule that is violated any time the government holds employees to different standards based on the consideration of prohibited factors. No default rule requiring a but-for causal relationship

between discrimination and a specific adverse personnel action applies.

The Government's reliance on the default causation rule is misplaced for an even more fundamental reason. To determine whether an act is a but-for cause of an injury, one first must determine *what* the relevant injury is. *See Nassar*, 570 U.S. at 346 (noting that the default rule requires a causal relationship between the defendant's conduct and "the plaintiff's injury"). Here, the injury protected by the statute is not just being denied a particular benefit, but suffering "discrimination"—which, as this Court has recognized, encompasses being forced to surmount "barrier[s]" making it "more difficult" to obtain benefits as compared to younger counterparts. *Northeastern Fla.*, 508 U.S. at 666.

Section 633a(a) grants employees the right to be "free from" such "barriers," irrespective of the subsequent effects of those barriers on an ultimate personnel decision. As a result, any but-for causation requirement is satisfied when the government relies on an improper factor when making its decision—even if the factor is not outcome-determinative. In that circumstance, the reliance on the improper factor "causes" the relevant injury (unequal treatment), whether or not it *also* causes the subsequent loss of a particular benefit.[8]

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[8] The analysis above addresses the legal standard for proving a *violation* of the ADEA. But none of Babb's arguments preclude the possibility that a version of the Government's default but-for causation rule may be relevant at the *remedial* stage. For example, a showing of unlawful discrimination alone will typically suffice to obtain certain injunctive and declaratory relief, such as reconsideration of an application. But other

3. Any lingering doubt about the statutory text can be resolved by looking at the language Congress and successive presidents had used to bar federal-sector discrimination before the ADEA became law.

Like Section 633a(a), those formulations generally barred discrimination in employment "because of" or "on the basis of" a protected characteristic. *See supra* at 33-35 & n.5 (quoting language of executive orders and 5 U.S.C. § 7201(b)). Importantly, however, none of those formulations stated or implied that the discrimination at issue was only forbidden if it was outcome-determinative with respect to a particular personnel action. Indeed, none of the relevant formulations even mention personnel actions *at all*. Section 633a(a)'s linguistic predecessors thus confirm that Section 633a(a)'s comparable language prohibits all such discrimination, even when not linked to a specific personnel action.

4. Finally, the Government's departure from the statutory text becomes especially clear when

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remedies, such as reinstatement or backpay, might not be available if it is clear that the applicant would not have received those benefits anyway, regardless of the unlawful discrimination. *See, e.g.*, 29 C.F.R. § 1614.501(a)(3) (providing for reinstatement to "the position the person would have occupied but for the discrimination suffered by that person"); *Ford*, 629 F.3d at 207 (holding that plaintiffs may obtain declaratory and injunctive relief, but not reinstatement or backpay, by proving that age was a factor in a personnel decision). The relief available to ADEA federal-sector plaintiffs—and the causation standard and allocation of the burden of proof governing such relief—is outside the scope of the question presented, and would need to be addressed in light of the applicable statutory and regulatory provisions. *See* 29 U.S.C. § 633a(c); 29 C.F.R. § 1614.501; *see also Brenton W.*, 2017 WL 2953878, at *16.

considering how its position might apply in different scenarios. Two hypotheticals help illustrate the point.

Imagine a federal agency issues a formal personnel memorandum containing the following language:

> *"Younger Is Better" Hiring Directive*. Individuals over the age of 50 are generally less capable of performing challenging cognitive tasks, as compared to younger counterparts. Agency hiring officials are therefore hereby directed to take account of older age as a "minus factor" when conducting a holistic analysis of any job applicant's qualifications for a position at the agency.

Then imagine that a 52-year-old applicant seeks employment with the agency—and that the agency applies the policy, considers the applicant's age along with other factors in a holistic evaluation of his candidacy, and ultimately awards the position to a 34-year-old rival applicant instead. The rejected applicant sues and is able to prove only the undisputed facts set forth above.

Does the agency's conduct violate the ADEA's federal-sector provision? Under Section 633a(a)'s plain text, the answer obviously has to be *yes*. No reasonable person would say that the hiring decision in the hypothetical was "made free from any discrimination based on age." Far from it: The obvious age discrimination embodied in the "Younger Is Better" directive is deliberate and permeated the entire process. The agency's policy is unlawful.

And yet the Government's response is presumably *no*. On the Government's view, the agency's policy of

considering age as a "minus factor" is not itself unlawful, so long as that factor is not the but-for cause of any particular adverse employment action. Unless the applicant can disaggregate age from other factors and show that he—and not the 34-year-old—would have won the job absent the facially discriminatory policy, there is no violation of the ADEA. That result cannot be reconciled with the language Congress chose to enact. In requiring that all federal personnel actions be made entirely free from any discrimination, Congress could not have been clearer that a policy like the "Younger Is Better" policy is categorically prohibited.

Or take a second hypothetical: A federal agency requires employees over age 40 who seek certain promotions—but not younger employees—to take special tests to demonstrate their physical fitness as part of the application process. Section 633a(a)'s text prohibits this age-based testing policy, under which any promotion decision involving 40-and-older candidates is plainly *not* "made free from any discrimination based on age." And yet the Government apparently believes this policy does not violate Section 633a(a), unless and until the policy operates as the but-for cause of an older candidate's rejection for a promotion.

These hypotheticals help illustrate that the Government's interpretation cannot be squared with Congress's unambiguous command that all government personnel actions be made without any trace of age discrimination. The Government's interpretation must be rejected because it "divorce[s] the phrase 'free from any discrimination' from its plain meaning." *Ford*, 629 F.3d at 206.

B. The ADEA's Private-Sector Provision Has No Bearing On The Question Presented

The Government also contends that Section 633a(a) requires a but-for causal relationship between the age discrimination and an adverse personnel action by analogy to the ADEA's private-sector provision, 29 U.S.C. § 623(a). Gov't Cert. Response 14-17. In doing so, it relies heavily on this Court's decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176 (2009), which held that the private-sector provision requires such but-for causation. But as this Court has recognized, "the prohibitory language in the ADEA's federal-sector provision differs sharply from that in the corresponding ADEA provision relating to private-sector employment." *Gomez-Perez v. Potter*, 553 U.S. 474, 486 (2008). *Gross*'s construction of the private-sector's language thus has no bearing on the text at issue here.

1. The Government faces an insuperable obstacle at the outset: Its assertion that *Gross*'s interpretation of the ADEA private-sector provision should be carried over into Section 633a(a) directly violates 29 U.S.C. § 633a(f). That neighboring provision forbids courts from assuming that the ADEA's federal-sector provision should be interpreted in light of its private-sector provision. It states that "[a]ny personnel action[s] . . . referred to in subsection (a) of [Section 633a] shall not be subject to, or affected by, any [of the ADEA's private-sector] provisions." 29 U.S.C. § 633a(f).

As this Court explained in *Lehman*, Congress thus "clearly emphasized" that Section 633a is "self-

contained and unaffected by other sections . . . applicable in actions against private employers." 453 U.S. at 168. Section 633a(f) therefore refutes the Government's reliance on *Gross* and its interpretation of the ADEA's private-sector provision as a guide to Section 633a(a).

2. Even without Section 633(a)(f), the respective texts of the federal and private-sector provisions are materially different and cannot be interpreted to mean the same thing. As this Court has already held, Section 633a(a)'s "prohibitory language . . . differs sharply" from the previously-enacted private-sector provision, which is "couched in very different terms." *Gomez-Perez*, 553 U.S. at 486, 487. Reading the private-sector provision's but-for causation requirement into Section 633a(a) fails to give effect to the very different wording chosen by Congress.

Among other prohibitions, the ADEA's private-sector provision makes it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." *See* 29 U.S.C. § 623(a)(1). Thus, unlike Section 633a(a), the private-sector provision bars only the taking of specifically enumerated adverse actions—such as discharging or failing to hire a person—"because of age." As this Court explained in *Gross*, that provision "require[s] that an employer *took adverse action* 'because of' age." *Gross*, 557 U.S. at 176 (emphasis added). And the "ordinary meaning" of that requirement is "that age was the 'reason' that the employer decided to act." *Id.*

By contrast, the language of the ADEA federal-sector provision does not prohibit specific adverse

actions from being taken because of age. Rather, Section 633a(a) contains a broader command that all government personnel decisions "shall be made free from any discrimination based on age." The provision thus prohibits the unlawful consideration of age in the "ma[king]" of a "personnel action," without regard to the precise role that unlawful discrimination plays in the ultimate personnel decision at issue. *See supra* at 22-27. Section 633a(a) also uses maximalist language ("free from" and "any") that is notably absent from the private-sector provision. *Forman v. Small*, 271 F.3d 285, 296 (D.C. Cir. 2001) (noting the federal-sector provision uses "sweeping language").

This Court has recognized the "sharp" difference between these provisions: It has described Section 633a as a "broad, general ban on 'discrimination based on age," in contrast to the private-sector provision's "specific list of forbidden [age-based] employer practices." *Gomez-Perez*, 553 U.S. at 488, 486-87. For that reason, it has concluded that "[t]he ADEA federal-sector provision . . . was not modeled after [the private-sector provision]," but rather "was patterned 'directly after' Title VII's federal sector discrimination ban." *Id.* at 487 (quoting *Lehman*, 453 U.S. at 167 n.15).

Notably, Congress's specific choice of language in Section 633a(a)—"shall be made free from any discrimination"—is identical to the formulation Congress has repeatedly used in other provisions barring other types of federal-sector discrimination.[9]

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[9] *See* 3 U.S.C. § 411(a) (Executive Branch employees); 2 U.S.C. § 1311 (Legislative Branch employees); *see also* 42 U.S.C. § 2000e-16b (Presidential appointees), *repealed in part by* Pub. L. No. 104-331, § 5(a), 110 Stat. 4053, 4072 (1996).

By contrast, Congress has never used this formulation to ban private-sector discrimination. And when Congress *has* wanted to apply the same standards to private- and federal-sector discrimination claims, it has done so expressly.[10]

Congress's careful choice of language to distinguish the federal- and private-sector nondiscrimination regimes is meaningful and should be given effect. By choosing a very different construction for Section 633a(a)—one that is not tethered to any particular outcome or result, but rather to completely eliminating any and all discrimination in how the decision is "made"—Congress clearly intended it to have more expansive application than its private-sector counterpart. As the D.C. Circuit explained, "while a section 623 [private-sector] plaintiff must . . . show that the challenged personnel action was taken because of age, a section 633a [federal-sector] plaintiff must [only] show that the personnel action *involved* 'any discrimination based on age.'" *Ford,* 629 F.3d at 205 (emphasis added).

3. Beyond the text, the Government's analogy to the private-sector provision also ignores Section 633a(a)'s unique history, including both its distinct

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[10] *See, e.g.*, 38 U.S.C. §§ 4303(4), 4331(b) (defining "employer" to include both private-sector employers and the federal government, and requiring regulations "consistent with the regulations pertaining to the States as employers and private employers, except that employees of the Federal Government may be given greater or additional rights"); 29 U.S.C. § 791(f) (extending private-sector standards set forth in the Americans With Disabilities Act to federal employees); 29 U.S.C. § 2611(4) (defining "employer" to include both private-sector employers and much of the federal government).

roots in prior efforts to prohibit federal-sector employment discrimination, and its obvious link to the virtually identical federal-sector provision of Title VII. That history makes it especially inappropriate to assume that Congress wanted the rules governing ADEA private-sector claims to automatically carry over to ADEA federal-sector claims.

As noted above, Section 633a(a) was modeled on Title VII's federal-sector provision, which in turn sought to implement both the Constitution's equal protection guarantee and the long line of executive orders banning discrimination in federal employment decisions. Section 633a(a) thus reflects unique concerns about discrimination by the federal government, in the federal employment context. *See, e.g.*, 120 Cong. Rec. 4706-07 (1974) (remarks of Senator Church) (discussing the problem of age discrimination in the federal government); *see also* H.R. Rep. No. 92-238, at 25 (discussing, in Title VII context, the need for better remedial mechanisms for federal-sector discrimination). In that context, Congress and successive presidents repeatedly and categorically reiterated that discrimination cannot infect federal employment decisions in any way. Section 633a(a) was a direct outgrowth of these preexisting efforts. It was not simply an effort to carry over the same nondiscrimination regime governing private-sector claims.

In fact, Section 633a(a)'s legislative history shows that Congress deliberately chose *not* to carry over the ADEA's private-sector regime. Senator Lloyd Bentsen's original version of the Senate bill that ultimately banned federal-sector discrimination would have amended the ADEA's pre-existing definition of "employer" to cover the federal

government and state governments, both of which were excluded from coverage in the original ADEA. *See* 118 Cong. Rec. 7745 (1972) (S. 3318, 92d Cong., 2d Sess.); *Lehman*, 453 U.S. at 166 n.14. That bill would have protected federal employees using the same operative language—which now appears at Section 623—that this Court interpreted in *Gross*. *Id*. Crucially, however, that version of the bill never became law.

Instead, Senator Bentsen introduced a revised version of his proposal several months later. "In contrast to Senator Bentsen's original bill, [the new version] proposed the expansion of the term 'employer' only with respect to state and local governments," and "ADEA coverage of federal employees was to be accomplished by the addition of an entirely new and separate section to the Act [i.e., Section 633a]." *Lehman*, 453 U.S. at 166 n.14. Indeed, the bill expressly excluded the United States from the ADEA's definition of employer. 118 Cong. Rec. 15,895 (1972). Thus "Congress *deliberately* prescribed a *distinct* statutory scheme applicable *only* to the federal sector." *Lehman*, 453 U.S. at 166 (emphasis added).

Senator Bentsen's *later* version of the bill is what ultimately became law in 1974. *Id*. at 166 & n.14. Given the care with which Congress framed the federal-sector discrimination ban—and its "deliberate[]" choice not to apply the private-sector provision to the federal government—this Court should reject the Government's assertion that Section 633a(a) incorporates the private-sector causation standard adopted in *Gross*. *See generally Ford*, 629 F.3d at 205 (adopting same legislative history argument).

4. Finally, the Government's request to extend *Gross* to the ADEA's federal-sector provision should be rejected for an additional reason: It rests on the unsupportable view that Congress wanted the Title VII and ADEA federal-sector provisions (1) to be *less protective* of federal employees than their original private-sector counterparts, and (2) to *extinguish* the rights of such employees to obtain forward-looking injunctive relief, even without proof of but-for causation.

a. As explained above, Congress enacted Title VII's private-sector provision in 1964, and it then amended the statute to add the federal-sector provision in 1972. At the time, Congress understood the protections afforded by the federal-sector provision to be *at least* as protective of employees as its private-sector counterpart. *See* H.R. Rep. No. 92-238, at 22 ("The Federal service is an area where equal employment opportunity is of paramount significance."); *see also id.* at 23-25 ("[T]here can exist no justification for anything but a vigorous effort to accord Federal employees the same rights and impartial treatment which the law seeks to afford employees in the private sector. . . . Indeed, the government itself should set the example by permitting its conduct to be reviewed by an impartial tribunal."). In fact, for the reasons noted above, the language of the federal-sector ban is actually *more* protective of such employees than the original private-sector provision was. *Supra* at 30-38.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), a majority of this Court interpreted Title VII's original private-sector provision to allow a plaintiff to establish liability by showing that his employer's conduct was a "motivating" factor in a private-sector

employment decision. *Id.* at 258 (plurality); *id.* at 259-60 (White, J., concurring in the judgment); *id.* at 276 (O'Connor, J., concurring in the judgment). The Court also held that an employer had an affirmative defense: It could avoid liability by proving that "it would have made the same decision even if it had not taken [that factor] into account." *Id.* at 258.

The *Price Waterhouse* Court thus applied a type of but-for causation standard to the Title VII private-sector provision, but one in which—crucially—the *employer* bore the burden of establishing that the discrimination was *not* the but-for cause of the specific personnel action at issue. That but-for causation requirement is fundamentally different from the one this Court adopted in *Gross*, under which the *employee* bears the burden of proving that discrimination *was* the but-for cause of the adverse employment action. 557 U.S. at 174-75 & n.2.[11]

Babb and the Government agree that the original ADEA and Title VII federal-sector provisions are materially identical and should be interpreted the same way. Gov't Cert. Response 22. But the Government's interpretation creates the untenable result that those provisions offer less protection to employees than Title VII's original private-sector provision, as interpreted in *Price Waterhouse*. Indeed, the Government has never offered a textual or

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[11] In response to *Price Waterhouse*, Congress later amended Title VII's private-sector regime to make it even more protective of employees. After the Civil Rights Act of 1991, an employer who disproves but-for causation can no longer escape Title VII liability altogether, *see* 42 U.S.C. § 2000e-2(m), but instead can only avoid remedies of backpay and reinstatement, *id.* § 2000e-5(g)(2)(B).

historical reason to believe that Congress wanted to make it harder for federal-sector Title VII plaintiffs to bring claims, as compared to private-sector Title VII plaintiffs. No such reason exists.

b. The Government's interpretation also leads to the bizarre result that Title VII's federal-sector provision *eliminated* a pre-existing judicial remedy for unconstitutional employment discrimination. Before 1972, federal employees had the right to bring an action "seeking to enjoin unconstitutional agency conduct [based on race]," *Brown*, 425 U.S. at 826, and such an action would *not* have required the employee to prove but-for causation, *Lesage*, 528 U.S. at 21. But this Court has held that Title VII's federal-sector provision created an "exclusive" and "pre-emptive" scheme that replaced any pre-existing judicial remedies. *Brown*, 425 U.S. at 829. That means that the standalone extra-statutory action for injunctive relief no longer exists.

If the Government's but-for causation argument is correct, Title VII's federal-sector provision thus extinguished the right of federal employees to obtain injunctions simply by proving discriminatory treatment, in circumstances where they could not also prove but-for causation. That result makes no sense in light of the relevant history: Title VII's federal-sector provision was designed to *expand*—not contract—judicial remedies for federal employment discrimination. *See supra* at 7-8, 33. This anomalous result provides yet another reason to reject the Government's but-for causation argument.

* * *

In supporting Babb's petition for certiorari, the Government conceded that Babb had "presented

enough evidence to permit an inference that age or retaliation had been considered as a factor" in connection with the personnel decisions at issue. Gov't Cert. Response 2. At summary judgment, that's all Section 633a(a) requires. Congress directed that federal personnel decisions "shall be made free from any discrimination based on age"—and under that straightforward rule, Babb has a viable ADEA claim. This Court should let her case proceed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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ADDENDUM

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CHAPTER 14—AGE DISCRIMINATION IN EMPLOYMENT

29 U.S.C. § 623

§ 623. Prohibition of age discrimination

(a) Employer practices

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, because of such individual's age;

(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.

* * *

29 U.S.C. § 626

§ 626. Recordkeeping, investigation, and enforcement

* * *

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and

to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion..

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

* * *

29 U.S.C. § 630

§ 630. Definitions

For the purposes of this chapter—

* * *

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

* * *

29 U.S.C. § 633a

§ 633a. Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Publishing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Equal Employment Opportunity Commission and by Librarian of Congress in the Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions: bona fide occupational qualification

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is

authorized to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

> (1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a);
>
> (2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and
>
> (3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age

requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

* * *

(f) Applicability of statutory provisions to personnel action of Federal departments, etc.

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of sections 626(d)(3) and 631(b) of this title and the provisions of this section.

* * *

TITLE 42—THE PUBLIC HEALTH AND WELFARE

CHAPTER 21—CIVIL RIGHTS

SUBCHAPTER VI—EQUAL EMPLOYMENT OPPORTUNITIES

42 U.S.C. § 2000e

§ 2000e. Definitions

For the purposes of this subchapter—

* * *

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

* * *

42 U.S.C. § 2000e-2

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment 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 race, color, religion, sex, or national origin.

* * *

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

* * *

42 U.S.C. § 2000e-5

§ 2000e-5. Enforcement provisions

* * *

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than

discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

* * *

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000e-16

§ 2000e-16. Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Publishing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Equal Employment Opportunity Commission; enforcement powers; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.;

contents of national and regional equal employment opportunity plans; authority of Librarian of Congress

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and

instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a), or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to

subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e–5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

* * *

5 C.F.R. § 713.271 (1973)

PART 713—EQUAL OPPORTUNITY

Subpart B—Equal Opportunity Without Regard to Race, Color, Religion, Sex, or National Origin

REMEDIAL ACTIONS

§ 713.271 Remedial actions.

(a) *Remedial action involving an applicant.* (1) When an agency, or the Commission, finds that an applicant for employment has been discriminated against and except for that discrimination would have been hired, the agency shall offer the applicant employment of the type and grade denied him. The offer shall be made in writing. The individual shall have 15 calendar days from receipt of the offer within which to accept or decline the offer. Failure to notify the agency of his decision within the 15-day period will be considered a declination of the offer, unless the individual can show that circumstances beyond his control prevented him from responding within the time limit. If the offer is accepted, appointment shall be retroactive to the date the applicant would have been hired, subject to the limitation in subparagraph (4) of this paragraph. Backpay, computed in the same manner prescribed by § 550.804 of this chapter, shall be awarded from the beginning of the retroactive period, subject to the same limitation, until the date the individual actually enters on duty. The individual shall be deemed to have performed service for the agency during this period of retroactivity for all purposes except for meeting service requirements for completion of a probationary or trial period that is required. If the offer is declined, the agency shall award the individual a sum equal to the backpay he

would have received, computed in the same manner prescribed by § 550.804 of this chapter, from the date he would have been appointed until the date the offer was made, subject to the limitation of subparagraph (4) of this paragraph. The agency shall inform the applicant, in its offer, of his right to this award in the event he declines the offer.

(2) When an agency, or the Commission, finds that discrimination existed at the time the applicant was considered for employment but does not find that the individual is the one who would have been hired except for discrimination, the agency shall consider the individual for any existing vacancy of the type and grade for which he had been considered initially and for which he is qualified before consideration is given to other candidates. If the individual is not selected, the agency shall record the reasons for nonselection. If no vacancy exists, the agency shall give him this priority consideration for the next vacancy for which he is qualified. This priority shall take precedence over priorities provided under other regulations in this chapter.

(3) This paragraph shall be cited as the authority under which the above-described appointments or awards of backpay shall be made.

(4) A period of retroactivity or a period for which backpay is awarded under this paragraph may not extend from a date earlier than 2 years prior to the date on which the complaint was initially filed by the applicant. If a finding of discrimination was not based on a complaint, the period of retroactivity or period for which backpay is awarded this paragraph may not extend earlier than 2 years prior to the date the finding of discrimination was recorded.

(b) *Remedial action involving an employee.* When an agency, or the Commission, finds that an employee of the agency was discriminated against and as a result of that discrimination was denied an employment benefit, or an administrative decision adverse to him was made, the agency shall take remedial actions which shall include one or more of the following, but need not be limited to these actions:

(1) Retroactive promotion, with backpay computed in the same manner prescribed by § 550.804 of this chapter, when the record clearly shows that but for the discrimination the employee would have been promoted or would have been employed at a higher grade, except that the backpay liability may not accrue from a date earlier than 2 years prior to the date the discrimination complaint was filed, but, in any event, not to exceed the date he would have been promoted. If a finding of discrimination was not based on a complaint, the backpay liability may not accrue from a date earlier than 2 years prior to the date the finding of discrimination was recorded, but, in any event, not to exceed the date he would have been promoted.

(2) Consideration for promotion to a position for which he is qualified before consideration is given to other candidates when the record shows that discrimination existed at the time selection for promotion was made but it is not clear that except for the discrimination the employee would have been promoted. If the individual is not selected, the agency shall record the reasons for nonselection. This priority consideration shall take precedence over priorities under other regulations in this chapter.

(3) Cancellation of an unwarranted personnel action and restoration of the employee.

(4) Expunction from the agency's records of any reference to or any record of an unwarranted disciplinary action that is not a personnel action.

(5) Full opportunity to participate in the employee benefit denied him (e.g., training, preferential work assignments, overtime scheduling).

5 C.F.R. § 713.271 (1975)

PART 711—EQUAL OPPORTUNITY

Subpart B—Equal Opportunity Without Regard to Race, Color, Religion, Sex, or National Origin

REMEDIAL ACTIONS

§ 713.271 Remedial Actions.

(a) *Remedial action involving an applicant.* (1) When an agency, or the Commission, finds that an applicant for employment has been discriminated against and except for that discrimination would have been hired, the agency shall offer the applicant employment of the type and grade denied him. The offer shall be made in writing. The individual shall have 15 calendar days from receipt of the offer within which to accept or decline the offer. Failure to notify the agency of his decision within the 15-day period will be considered a declination of the offer, unless the individual can show that circumstances beyond his control prevented him from responding within the time limit. If the offer is accepted, appointment shall be retroactive to the date the applicant would have been hired, subject to the limitation in subparagraph (4) of this paragraph. Backpay, computed in the same manner prescribed by § 550.804 of this chapter, shall be awarded from the beginning of the retroactive period, subject to the same limitation, until the date the individual actually enters on duty. The individual shall be deemed to have performed service for the agency during this period of retroactivity for all purposes except for meeting service requirements for completion of a probationary or trial period that is required. If the offer is declined, the agency shall award the individual a sum equal to the backpay he

would have received, computed in the same manner prescribed by § 550.804 of this chapter, from the date he would have been appointed until the date the offer was made, subject to the limitation of subparagraph (4) of this paragraph. The agency shall inform the applicant, in its offer, of his right to this award in the event he declines the offer.

(2) When an agency, or the Commission, finds that discrimination existed at the time the applicant was considered for employment but does not find that the individual is the one who would have been hired except for discrimination, the agency shall consider the individual for any existing vacancy of the type and grade for which he had been considered initially and for which he is qualified before consideration is given to other candidates. If the individual is not selected, the agency shall record the reasons for nonselection. If no vacancy exists, the agency shall give him this priority consideration for the next vacancy for which he is qualified. This priority shall take precedence over priorities provided under other regulations in this chapter.

(3) This paragraph shall be cited as the authority under which the above-described appointments or awards of backpay shall be made.

(4) A period of retroactivity or a period for which backpay is awarded under this paragraph may not extend from a date earlier than 2 years prior to the date on which the complaint was initially filed by the applicant. If a finding of discrimination was not based on a complaint, the period of retroactivity or period for which backpay is awarded this paragraph may not extend earlier than 2 years prior to the date the finding of discrimination was recorded.

(b) *Remedial action involving an employee.* When an agency, or the Commission, finds that an employee of the agency was discriminated against and as a result of that discrimination was denied an employment benefit, or an administrative decision adverse to him was made, the agency shall take remedial actions which shall include one or more of the following, but need not be limited to these actions:

(1) Retroactive promotion, with backpay computed in the same manner prescribed by § 550.804 of this chapter, when the record clearly shows that but for the discrimination the employee would have been promoted or would have been employed at a higher grade, except that the backpay liability may not accrue from a date earlier than 2 years prior to the date the discrimination complaint was filed, but, in any event, not to exceed the date he would have been promoted. If a finding of discrimination was not based on a complaint, the backpay liability may not accrue from a date earlier than 2 years prior to the date the finding of discrimination was recorded, but, in any event, not to exceed the date he would have been promoted.

(2) Consideration for promotion to a position for which he is qualified before consideration is given to other candidates when the record shows that discrimination existed at the time selection for promotion was made but it is not clear that except for the discrimination the employee would have been promoted. If the individual is not selected, the agency shall record the reasons for nonselection. This priority consideration shall take precedence over priorities under other regulations in this chapter.

(3) Cancellation of an unwarranted personnel action and restoration of the employee.

(4) Expunction from the agency's records of any reference to or any record of an unwarranted disciplinary action that is not a personnel action.

(5) Full opportunity to participate in the employee benefit denied him (e.g., training, preferential work assignments, overtime scheduling).

5 C.F.R. § 713.511 (1975)

PART 711—EQUAL OPPORTUNITY

Subpart E—Nondiscrimination on Account of Age

AGENCY REGULATIONS FOR PROCESSING COMPLAINTS OF DISCRIMINATION

§ 713.511 General.

An Agency shall provide regulations governing the acceptance and processing of complaints of discrimination on account of age which, subject to § 713.514, comply with the principles and requirements in §§ 713.213 through 713.222, 713.241 and 713.261 through 713.271 of this part.

29 C.F.R. § 1614.501 (2018)

PART 1614—FEDERAL SECTOR EQUAL EMPLOYMENT OPPORTUNITY

Subpart E—Remedies and Enforcement

§ 1614.501 Remedies and Relief.

(a) When an agency, or the Commission, in an individual case of discrimination, finds that an applicant or an employee has been discriminated against, the agency shall provide full relief which shall include the following elements in appropriate circumstances:

(1) Notification to all employees of the agency in the affected facility of their right to be free of unlawful discrimination and assurance that the particular types of discrimination found will not recur;

(2) Commitment that corrective, curative or preventive action will be taken, or measures adopted, to ensure that violations of the law similar to those found will not recur;

(3) An unconditional offer to each identified victim of discrimination of placement in the position the person would have occupied but for the discrimination suffered by that person, or a substantially equivalent position;

(4) Payment to each identified victim of discrimination on a make whole basis for any loss of earnings the person may have suffered as a result of the discrimination; and

(5) Commitment that the agency shall cease from engaging in the specific unlawful employment practice found in the case.

(b) *Relief for an applicant.* (1)(i) When an agency, or the Commission, finds that an applicant for

employment has been discriminated against, the agency shall offer the applicant the position that the applicant would have occupied absent discrimination or, if justified by the circumstances, a substantially equivalent position unless clear and convincing evidence indicates that the applicant would not have been selected even absent the discrimination. The offer shall be made in writing. The individual shall have 15 days from receipt of the offer within which to accept or decline the offer. Failure to accept the offer within the 15-day period will be considered a declination of the offer, unless the individual can show that circumstances beyond his or her control prevented a response within the time limit.

(ii) If the offer is accepted, appointment shall be retroactive to the date the applicant would have been hired. Back pay, computed in the manner prescribed by 5 CFR 550.805, shall be awarded from the date the individual would have entered on duty until the date the individual actually enters on duty unless clear and convincing evidence indicates that the applicant would not have been selected even absent discrimination. Interest on back pay shall be included in the back pay computation where sovereign immunity has been waived. The individual shall be deemed to have performed service for the agency during this period for all purposes except for meeting service requirements for completion of a required probationary or trial period.

(iii) If the offer of employment is declined, the agency shall award the individual a sum equal to the back pay he or she would have received, computed in the manner prescribed by 5 CFR 550.805, from the date he or she would have been appointed until the date the offer was declined, subject to the limitation

of paragraph (b)(3) of this section. Interest on back pay shall be included in the back pay computation. The agency shall inform the applicant, in its offer of employment, of the right to this award in the event the offer is declined.

(2) When an agency, or the Commission, finds that discrimination existed at the time the applicant was considered for employment but also finds by clear and convincing evidence that the applicant would not have been hired even absent discrimination, the agency shall nevertheless take all steps necessary to eliminate the discriminatory practice and ensure it does not recur.

(3) Back pay under this paragraph (b) for complaints under title VII or the Rehabilitation Act may not extend from a date earlier than two years prior to the date on which the complaint was initially filed by the applicant.

(c) *Relief for an employee.* When an agency, or the Commission, finds that an employee of the agency was discriminated against, the agency shall provide relief, which shall include, but need not be limited to, one or more of the following actions:

(1) Nondiscriminatory placement, with back pay computed in the manner prescribed by 5 CFR 550.805, unless clear and convincing evidence contained in the record demonstrates that the personnel action would have been taken even absent the discrimination. Interest on back pay shall be included in the back pay computation where sovereign immunity has been waived. The back pay liability under title VII or the Rehabilitation Act is limited to two years prior to the date the discrimination complaint was filed.

(2) If clear and convincing evidence indicates that, although discrimination existed at the time the personnel action was taken, the personnel action would have been taken even absent discrimination, the agency shall nevertheless eliminate any discriminatory practice and ensure it does not recur.

(3) Cancellation of an unwarranted personnel action and restoration of the employee.

(4) Expunction from the agency's records of any adverse materials relating to the discriminatory employment practice.

(5) Full opportunity to participate in the employee benefit denied (e.g., training, preferential work assignments, overtime scheduling).

* * *

PUBLIC LAW 88-352, 78 STAT. 241—July 2, 1964

AN ACT

To enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Rights Act of 1964".

* * *

TITLE VII—EQUAL EMPLOYMENT OPPORTUNITY

DEFINITIONS

SEC. 701. For the purposes of this title—

* * *

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or a State or political subdivision thereof, (2) a bona fide

private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954: *Provided*, That during the first year after the effective date prescribed in subsection (a) of section 716, persons having fewer than one hundred employees (and their agents) shall not be considered employers, and, during the second year after such date, persons having fewer than seventy-five employees (and their agents) shall not be considered employers, and, during the third year after such date, persons having fewer than fifty employees (and their agents) shall not be considered employers: *Provided further*, That it shall be the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of race, color, religion, sex or national origin and the President shall utilize his existing authority to effectuate this policy.

* * *

EXECUTIVE ORDER 8587

AMENDING CERTAIN PROVISIONS OF THE CIVIL SERVICE RULES

By virtue of and pursuant to the authority vested in me by section 1753 of the Revised Statutes (U.S.C., title 5, sec. 631) and by the Civil Service Act (22 Stat. 403), the Civil Service Rules are hereby amended as follows:

Section 2 of Rule I is amended to read as follows:

2. *No disclosure or discriminations.* No question in any form of application or in any examination shall be so framed as to elicit information concerning the political or religious opinions or affiliations of any applicant, nor shall any inquiry be made concerning such opinions or affiliations, and all disclosures thereof shall be discountenanced, except as to such membership in political parties or organizations as constitutes by law a disqualification for Government employment. No discrimination shall be exercised, threatened, or promised by any person in the executive civil service against or in favor of any applicant, eligible, or employee in the classified service because of race, or his political or religious opinions or affiliations, except as may be authorized or required by law.

* * *

FRANKLIN D. ROOSEVELT

THE WHITE HOUSE,

November 7, 1940

EXECUTIVE ORDER 8802

REAFFIRMING POLICY OF FULL PARTICIPATION IN THE DEFENSE PROGRAM BY ALL PERSONS, REGARDLESS OF RACE, CREED, COLOR, OR NATIONAL ORIGIN, AND DIRECTING CERTAIN ACTION IN FURTHERANCE OF SAID POLICY

WHEREAS it is the policy of the United States to encourage full participation in the national defense program by all citizens of the United States, regardless of race, creed, color, or national origin, in the firm belief that the democratic way of life within the Nation can be defended successfully only with the help and support of all groups within its borders; and

WHEREAS there is evidence that available and needed workers have been barred from employment in industries engaged in defense production solely because of considerations of race, creed, color, or national origin, to the detriment of workers' morale and of national unity:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and the statutes, and as a prerequisite to the successful conduct of our national defense production effort, I do hereby reaffirm the policy of the United States that there shall be no discrimination in the employment of workers in defense industries or government because of race, creed, color, or national origin, and I do hereby declare that it is the duty of employers and of labor organizations, in furtherance of said policy and of this order, to provide for the full and equitable participation of all workers in defense industries, without discrimination because of race, creed, color, or national origin;

* * *

FRANKLIN D. ROOSEVELT

THE WHITE HOUSE,

June 25, 1941

EXECUTIVE ORDER 9346

FURTHER AMENDING EXECUTIVE ORDER NO. 8802 BY ESTABLISHING A NEW COMMITTEE ON FAIR EMPLOYMENT PRACTICE AND DEFINING ITS POWERS AND DUTIES

In order to establish a new Committee on Fair Employment Practice, to promote the fullest utilization of all available manpower, and to eliminate discriminatory employment practices, Executive Order No. 8802 of June 25, 1941, as amended by Executive Order No. 8823 of July 18, 1941, is hereby further amended to read as follows:

"WHEREAS the successful prosecution of the war demands the maximum employment of all available workers regardless of race, creed, color, or national origin; and

"WHEREAS it is the policy of the United States to encourage full participation in the war effort by all persons in the United States regardless of race, creed, color, or national origin, in the firm belief that the democratic way of life within the nation can be defended successfully only with the help and support of all groups within its borders; and

"WHEREAS there is evidence that available and needed workers have been barred from employment in industries engaged in war production solely by reason of their race, creed, color, or national origin, to the detriment of the prosecution of the war, the workers' morale, and national unity:

"NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes, and as President of the United States and Commander in Chief of the Army and Navy, I do hereby reaffirm the

policy of the United States that there shall be no discrimination in the employment of any person in war industries or in Government by reason of race, creed, color, or national origin, and I do hereby declare that it is the duty of all employers, including the several Federal departments and agencies, and all labor organizations, in furtherance of this policy and of this Order, to eliminate discrimination in regard to hire, tenure, terms or conditions of employment, or union membership because of race, creed, color, or national origin.

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FRANKLIN D. ROOSEVELT

THE WHITE HOUSE,

May 27, 1943

EXECUTIVE ORDER 9980

REGULATIONS GOVERNING FAIR EMPLOYMENT PRACTICE WITHIN THE FEDERAL ESTABLISHMENT

WHEREAS the principles on which our Government is based require a policy of fair employment throughout the Federal establishment, without discrimination because of race, color, religion, or national origin; and

WHEREAS it is desirable and in the public interest that all steps be taken necessary to insure that this long-established policy shall be more effectively carried out:

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States, by the Constitution and the laws of the United States, it is hereby ordered as follows:

1. All personnel actions taken by Federal appointing officers shall be based solely on merit and fitness; and such officers are authorized and directed to take appropriate steps to insure that in all such actions there shall be no discrimination because of race, color, religion, or national origin.

* * *

HARRY S. TRUMAN

THE WHITE HOUSE,

July 26, 1948

EXECUTIVE ORDER 10590

ESTABLISHING THE PRESIDENT'S COMMITTEE ON GOVERNMENT EMPLOYMENT POLICY

WHEREAS it is the policy of the United States Government that equal opportunity be afforded all qualified persons, consistent with law, for employment in the Federal Government; and

WHEREAS this policy necessarily excludes and prohibits discrimination against any employee or applicant for employment in the Federal Government because of race, color, religion, or national origin; and

WHEREAS it is essential to the effective application of this policy in all civilian personnel matters that all departments and agencies of the executive branch of the Government adhere to this policy in a fair, objective, and uniform manner:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes, and as President of the United States, and consistent with the provisions of section 214 of the act of May 3, 1945, 59 Stat. 134 (31 U. S. C. 691), it is hereby ordered as follows:

SECTION 1. There is hereby established the President's Committee on Government Employment Policy (hereinafter referred to as the Committee).

* * *

DWIGHT D. EISENHOWER

THE WHITE HOUSE,

January 18, 1955

EXECUTIVE ORDER 10925

ESTABLISHING THE PRESIDENT'S COMMITTEE ON EQUAL EMPLOYMENT OPPORTUNITY

WHEREAS discrimination because of race, creed, color, or national origin is contrary to the Constitutional principles and policies of the United States; and

WHEREAS it is the plain and positive obligation of the United States Government to promote and ensure equal opportunity for all qualified persons, without regard to race, creed, color, or national origin, employed or seeking employment with the Federal Government and on government contracts; and

* * *

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

* * *

PART II—NONDISCRIMINATION IN GOVERNMENT EMPLOYMENT

* * *

SEC. 203. The policy expressed in Executive Order No. 10590 of January 18, 1955 (20 F.R. 409), with respect to the exclusion and prohibition of discrimination against any employee or applicant for employment in the Federal Government because of race, color, religion, or national origin is hereby reaffirmed.

* * *

JOHN F. KENNEDY

THE WHITE HOUSE,

March 6, 1961

EXECUTIVE ORDER 11141

DECLARING A PUBLIC POLICY AGAINST DISCRIMINATION ON THE BASIS OF AGE

WHEREAS the principle of equal employment opportunity is now an established policy of our Government and applies equally to all who wish to work and are capable of doing so; and

WHEREAS discrimination in employment because of age, except upon the basis of a *bona fide* occupational qualification, retirement plan, or statutory requirement, is inconsistent with that principle and with the social and economic objectives of our society; and

WHEREAS older workers are an indispensable source of productivity and experience which our Nation can ill afford to lose; and

WHEREAS President Kennedy, mindful that maximum national growth depends on the utilization of all manpower resources, issued a memorandum on March 14, 1963 [footnote omitted] reaffirming the policy of the Executive Branch of the Government of hiring and promoting employees on the basis of merit alone and emphasizing the need to assure that older people are not discriminated against because of their age and receive fair and full consideration for employment and advancement in Federal employment; and

WHEREAS, to encourage and hasten the acceptance of the principle of equal employment opportunity for older persons by all sectors of the economy, private and public, the Federal Government can and should provide maximum leadership in this regard by adopting that principle as an express policy

of the Federal Government not only with respect to Federal employees but also with respect to persons employed by contractors and subcontractors engaged in the performance of Federal contracts:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States and as President of the United States, I hereby declare that it is the policy of the Executive Branch of the Government that (1) contractors and subcontractors engaged in the performance of Federal contracts shall not, in connection with the employment, advancement, or discharge of employees, or in connection with the terms, conditions, or privileges of their employment, discriminate against persons because of their age except upon the basis of a *bona fide* occupational qualification, retirement plan, or statutory requirement, ...

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LYNDON B. JOHNSON

THE WHITE HOUSE,

February 12, 1964

EXECUTIVE ORDER 11246—EQUAL EMPLOYMENT OPPORTUNITY

[SOURCE: Executive Order 11246 appears at 30 F.R. 12319, Sept. 28, 1965; 30 F.R. 12935, Oct. 12,1965.]

* * *

PART I—NONDISCRIMINATION IN GOVERNMENT EMPLOYMENT

SECTION 101. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all qualified persons, to prohibit discrimination in employment because of race, creed, color, or national origin, and to promote the full realization of equal employment opportunity through a positive, continuing program in each executive department and agency. The policy of equal opportunity applies to every aspect of Federal employment policy and practice.

* * *

LYNDON B. JOHNSON

THE WHITE HOUSE,

September 24, 1965

EXECUTIVE ORDER 11478

EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT

It has long been the policy of the United States Government to provide equal opportunity in Federal employment on the basis of merit and fitness and without discrimination because of race, color, religion, sex, or national origin. All recent Presidents have fully supported this policy, and have directed department and agency heads to adopt measures to make it a reality.

As a result, much has been accomplished through positive agency programs to assure equality of opportunity. Additional steps, however, are called for in order to strengthen and assure fully equal employment opportunity in the Federal Government.

NOW, THEREFORE, under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

SECTION 1. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency. This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government.

* * *

/s/ Richard Nixon

THE WHITE HOUSE,
August 8, 1969