No. 18-781

In the Supreme Court of the United States

BALTIMORE COUNTY, MARYLAND, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

JAMES L. LEE
Deputy General Counsel
JENNIFER S. GOLDSTEIN
Associate General Counsel
SYDNEY A.R. FOSTER
Assistant General Counsel
PAUL D. RAMSHAW
Attorney
U.S. Equal Employment Opportunity Commission
Washington, D.C. 20507

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether an award of back pay is mandatory upon a finding of liability under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes:

Statutes—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 904 F.3d 330. The opinion of the district court (Pet. App. 15-68) is reported at 202 F. Supp. 3d 499. A previous opinion of the court of appeals is reported at 747 F.3d 267, and another previous opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 385 Fed. Appx. 322.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 2018. The petition for a writ of certiorari was filed on December 13, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, protects workers and job applicants from "arbitrary age discrimination in

employment," 29 U.S.C. 621(b). The ADEA makes it "unlawful for an employer * * * [to] 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). The ADEA does not, however, prohibit the disparate treatment of older workers when the motivating factor is something other than age. See *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 609-612 (1993).

This case concerns the ADEA's enforcement provision, 29 U.S.C. 626(b). That provision states in relevant part:

> 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.

Ibid.

The first sentence of the enforcement provision instructs courts to enforce the ADEA "in accordance with the powers, remedies, and procedures" set forth in certain provisions of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, including Section 216. 29 U.S.C. 626(b). The third sentence then confirms that "[a]mounts owing" to an employee as a result of a violation of the ADEA "shall be deemed to be unpaid minimum wages or unpaid overtime compensation" under Section 216 (subject to a limitation on liquidated damages). *Ibid.* Section 216, in turn, provides that "[a]ny employer who violates" the FLSA's minimum-wage or overtime requirements "shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. 216(b).

2. a. In 1945, petitioner established a mandatory defined-benefit pension plan for many of its employees. 747 F.3d at 270 & n.2. To help fund the plan, petitioner requires covered employees to contribute a certain percentage of their salaries. *Id.* at 270. During the relevant period, that percentage varied based on the age of the employee at the time of hiring. *Id.* at 270-271. "For example, after 1977, employees who enrolled in the plan at age 20 contributed 4.42% of their annual salaries, while employees who enrolled in the plan at age 40 and 50 contributed 5.57% and 7.23% of their annual salaries, respectively." *Id.* at 271. Employees who were older when hired thus received less take-home pay than similarly situated employees who were younger when hired. See *ibid.* During the relevant period, petitioner allowed employees to retire—and to receive full pension benefits—whenever the employee reached a certain age

or achieved a specified number of years of service, regardless of age. See *id.* at 270-271.

b. In 1999 and 2000, two Baltimore County employees, ages 51 and 64, filed charges with the United States Equal Employment Opportunity Commission (EEOC) alleging that the disparate rates at which they were required to contribute to petitioner's pension plan constituted unlawful age discrimination. 747 F.3d at 271. In 2006, after conducting an investigation, the EEOC determined that petitioner's use of the age-based contribution rates violated the ADEA. Pet. App. 16.

In 2007, after conciliation attempts failed, the EEOC filed this action. Pet. App. 16. It alleged that, at least since 1996, petitioner had engaged in discriminatory conduct that violated the ADEA. *Ibid.* The EEOC sought injunctive relief and the "reimbursement of 'back' wages" for the two employees who had filed charges and for all other affected individuals within the protected age group. 747 F.3d at 271.

3. a. The district court initially granted summary judgment to petitioner. 593 F. Supp. 2d 797. The court believed that the different rates at which employees were required to contribute to petitioner's pension plan reflected the fact that older employees would reach the normal retirement age sooner than younger employees and thus would need to contribute a larger amount to fund their pension benefits. *Id.* at 801-802. In the court's view, the different rates were therefore permissibly motivated by "the time value of money," not by age. *Id.* at 798.

The court of appeals vacated and remanded. 385 Fed. Appx. 322. The court determined that the district court's time-value-of-money analysis was not valid for those employees who chose to retire based on their years of

service instead of their age. *Id.* at 325. The court of appeals explained, for example, that two hypothetical correctional officers hired at the ages of 20 and 40 would both become eligible to retire after 20 years of service. *Id.* at 324-325. Assuming that they were otherwise similarly situated and that they both retired at that point, they would receive the same pension benefits, yet the older correctional officer would have contributed more of her salary to the pension plan than the younger officer. See *id.* at 325; see also 747 F.3d at 274. The court explained that "[t]his disparity is not justified by the time value of money because both employees contribute for the same twenty years." 385 Fed. Appx. at 325. It accordingly remanded the case for the district court to determine whether any "permissible financial considerations" justified petitioner's unequal treatment of its older employees. *Ibid.*

b. On remand, the district court granted the EEOC summary judgment as to liability. 2012 WL 5077631. The court recognized that higher contribution rates for older employees could be permissible in certain circumstances. *Id.* at *3. But the court concluded that, on the facts of this case, petitioner had advanced no "non-age-related financial considerations that justify the disparity in contribution rates between older and younger workers." *Id.* at *4; see *id.* at *3-*5.

Petitioner filed an interlocutory appeal, and the court of appeals affirmed. 747 F.3d at 275. The court agreed with the district court that, on the particular facts here, the disparate employee contribution rates "were not motivated by either the 'time value of money' or other funding considerations." *Id.* at 274. The court remanded to the district court to address damages. *Id.* at 275. This Court denied certiorari. 135 S. Ct. 436.

c. When the case returned to the district court, the parties agreed to a strategy for the gradual equalization of contribution rates to petitioner's pension plan, and the district court entered a joint consent order regarding that injunctive relief. Pet. App. 104-122. Under that consent order, petitioner was required to equalize contribution rates to its pension plan—and thus to cease violating the ADEA—by July 2018. See, *e.g.*, *id.* at 109, 118-119; see also *id.* at 110-118. The consent order did not, however, resolve the EEOC's claim for monetary relief for employees harmed by petitioner's discriminatory contribution rates, including any such rates applicable through the July 2018 deadline. See *id.* at 109-110.

The EEOC moved for monetary relief, and the district court declined to award any back pay to affected employees. Pet. App. 15-68. The court first determined that awards of back pay are discretionary, not mandatory, under the ADEA's enforcement provision, 29 U.S.C. 626(b). Pet. App. 27-40. It next determined that back pay would be inappropriate in this case because, in the court's view, petitioner had reason to believe that the challenged contribution rates were lawful, the liability issue was novel, retroactive monetary relief would threaten the financial health of petitioner's pension plan, and the relevant employee unions had consented to the challenged contribution rates. *Id.* at 45-60. Finally, the court noted that, even if retroactive monetary relief were mandatory, it still would not award back pay because the EEOC had unreasonably delayed pursuing its claims. *Id.* at 61-67.

4. The court of appeals vacated and remanded. Pet. App. 1-12. The court concluded that, under the ADEA, an award of back pay is mandatory upon a finding of liability. *Id.* at 4-11.

The court of appeals began with the text of Section 626(b), which incorporates the FLSA's enforcement provision, Section 216. Pet. App. 4-7. The court explained that, "[b]ecause Congress adopted the enforcement procedures and remedies of the FLSA into the ADEA," the ADEA should be construed "consistent with the cited statutory language in and judicial interpretations of the FLSA." *Id.* at 8. The court then explained that "[b]ack pay is, and was at the time Congress passed the ADEA, a mandatory legal remedy under the FLSA." *Ibid.* (citing 29 U.S.C. 216(b) and *Brooklyn Sav. Bank* v. *O'Neil*, 324 U.S. 697, 711 (1945)). The court thus reasoned that "Congress would have been aware that retroactive monetary damages, such as back pay, were mandatory remedies under the FLSA, and intended to incorporate such mandatory remedies into the ADEA." *Ibid.*

The court of appeals acknowledged that the enforcement procedures of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000e-5, operate differently. Pet. App. 9-11. But the court explained that, rather than modeling the ADEA's enforcement provision on Title VII's, "Congress consciously chose to incorporate the powers, remedies, and procedures of the FLSA into the ADEA." *Id.* at 10. The court accordingly rejected petitioner's reliance on "a trilogy of Title VII pension decisions," in which this Court concluded that "retroactive monetary awards are discretionary under Title VII": *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978); *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans* v. *Norris*, 463 U.S. 1073 (1983) (per curiam); and *Florida* v. *Long*, 487 U.S. 223 (1988). Pet. App. 10; see *id.* at 10-11. The court of appeals explained that those decisions "do not govern [the] interpretation

of the ADEA" because "a back pay award under Title VII is a discretionary equitable remedy," whereas "back pay awards under the ADEA are mandatory legal remedies." *Id.* at 11 (emphases omitted).

Finally, the court of appeals determined that petitioner's alternative "contention that the EEOC unduly delayed in the investigation" did not undermine its conclusion. Pet. App. 12. The court noted that the EEOC had "[e]xercis[ed] its prosecutorial discretion" and had represented that it would not seek back pay for the period preceding the agency's 2006 determination that petitioner was violating the ADEA. *Ibid.* In light of that representation, the court did not reach the question whether courts can decline to require back pay under laches or similar equitable doctrines. *Id.* at 12 n.6.

ARGUMENT

Petitioner renews its contention (Pet. 13-24) that the ADEA makes an award of back pay discretionary upon a finding of liability. The court of appeals correctly rejected that contention. Its decision does not conflict with a trio of this Court's decisions recognizing that, under the differently worded enforcement provision in Title VII, back-pay awards are not always appropriate when a pension plan violates Title VII. Nor does its decision conflict with any decision of any other court of appeals. Further review is therefore unwarranted.

1. a. The court of appeals correctly concluded that when an employer violates the ADEA, the appropriate relief must include an award of back pay to injured employees. That conclusion follows directly from the statutory text.

The first sentence of the ADEA's enforcement provision, 29 U.S.C. 626(b), instructs that the ADEA "shall be enforced in accordance with the powers, remedies,

and procedures" set forth in certain provisions of the FLSA. *Ibid.*; see *Lorillard* v. *Pons*, 434 U.S. 575, 578 (1978) (explaining that "violations of the ADEA generally are to be treated as violations of the FLSA"). The cross-referenced FLSA provisions include Section 216(b). Section 216(b) makes back pay mandatory for FLSA violations: "Any employer who violates the [minimum-wage or overtime provisions] *shall be liable* to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. 216(b) (emphasis added); see *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969, 1977 (2016) ("When a statute distinguishes between 'may' and 'shall,' it is generally clear that 'shall' imposes a mandatory duty."). Accordingly, under the plain text of the ADEA, employers are liable for back pay where, as here, discrimination results in a loss of pay to which an employee was entitled.

The third sentence of Section 626(b) removes any doubt about the meaning of the first sentence. It reiterates that "[a]mounts owing to a person as a result of a violation of [the ADEA] shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217." 29 U.S.C. 626(b). In other words, it makes clear that lost pay resulting from age discrimination is to be treated as unpaid minimum wages or unpaid overtime pay, for which employers are always liable under the FLSA.

Moreover, at the time that Congress enacted the ADEA, it was well established that back-pay awards under Section 216(b) were mandatory. In *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1945), for example, the Court explained that Section 216(b) is "mandatory

in form" and that "upon violation of [the overtime-pay provision of the FLSA], the employer shall be liable for statutory wages." *Id.* at 710-711; see *id.* at 707 (noting that employees cannot waive their right to statutory wages, at least absent a bona fide dispute between the parties); see also, *e.g.*, *Addison* v. *Huron Stevedoring Corp.*, 204 F.2d 88, 95 (2d Cir.) (requiring compensation for even de minimis underpayments), cert. denied, 346 U.S. 877 (1953); *Missel* v. *Overnight Motor Transp. Co.*, 126 F.2d 98, 110-111 (4th Cir.) (explaining that additional liquidated damages were mandatory), aff'd, 316 U.S. 572 (1942). That history confirms that when Congress incorporated the FLSA's remedies into the ADEA, it provided for the same mandatory back pay. As the Court explained in *Lorillard*, "where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law." 434 U.S. at 581.

By contrast, where Congress did *not* wish to incorporate the FLSA's mandatory remedies into the ADEA, it specified as much. In particular, the FLSA makes an employer liable for both unpaid minimum wages or overtime pay and "an additional equal amount as liquidated damages." 29 U.S.C. 216(b). The ADEA, however, provides that any lost pay from age discrimination is to be treated as unpaid minimum wages or overtime pay, but "[t]hat liquidated damages shall be payable only in cases of willful violations." 29 U.S.C. 626(b). In other words, Congress did not borrow in full the liquidated-damages provision from the FLSA, which makes liquidated damages mandatory without regard to the employer's state of mind. See 29 U.S.C. 216(b); see also, *e.g.*, *Trans World Airlines, Inc.* v. *Thurston*,

469 U.S. 111, 128 n.22 (1985). Congress's decision not to do so further illustrates that it intentionally borrowed in full the mandatory back-pay component. See *Lorillard*, 434 U.S. at 582 ("This selectivity that Congress exhibited in incorporating [FLSA] provisions and in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA.").

b. Petitioner does not address Congress's directive in the first and third sentences of the ADEA's enforcement provision that the ADEA "shall be enforced" in accordance with the FLSA and that lost pay "shall be deemed to be unpaid minimum wages or unpaid overtime compensation." 29 U.S.C. 626(b). Instead, petitioner focuses (Pet. 18-21) on the fourth sentence, which provides that, "[i]n any action brought to enforce [the ADEA] 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." 29 U.S.C. 626(b). Petitioner contends that the authorization "to grant such legal or equitable relief as may be appropriate" means that all relief under the ADEA—including back pay—must be discretionary. Pet. 18 (emphasis omitted). That contention is incorrect.

Standing alone, the fourth sentence of Section 626(b) might be read solely to grant the authority to enter any appropriate relief, without addressing whether particular forms of relief are mandatory or discretionary; or it

might be read also to suggest that all legal and equitable remedies are discretionary. See 29 U.S.C. 626(b). But that latter reading would nullify the first and third sentences' command that back pay be ordered. And as a general matter, courts must "interpret [a] statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citations and internal quotation marks omitted); cf. *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.").

Taken in context, the natural reading is that the first and third sentences require back pay (and, for willful violations, liquidated damages), while the fourth sentence provides the discretionary authority to grant *additional* "legal or equitable relief as may be appropriate." 29 U.S.C. 626(b). Put differently, back pay will always be "appropriate," while the appropriateness of other forms of relief—reinstatement, front pay, and the like—will be determined on a case-by-case basis. See, *e.g.*, *Goldstein* v. *Manhattan Indus., Inc.*, 758 F.2d 1435, 1448 (11th Cir.) (reinstatement), cert. denied, 474 U.S. 1005 (1985); *Whittlesey* v. *Union Carbide Corp.*, 742 F.2d 724, 728 (2d Cir. 1984) (front pay). That construction also coheres with the remainder of the fourth sentence, which lists among the examples of relief "*enforcing the liability for* amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section." 29 U.S.C. 626(b) (emphasis added). The phrase "enforcing the liability for" takes as a given that back

pay will be ordered and provides courts additional flexibility to ensure that it is paid or to determine how to structure the payments.

Construing the fourth sentence to authorize additional relief is also consistent with this Court's decision in *Lorillard*, *supra*, which strongly suggests that back pay is mandatory under the ADEA. In that case, the Court explained that "the ADEA incorporates the FLSA provision that employers 'shall be liable' for amounts deemed unpaid minimum wages or overtime compensation, while under Title VII, the availability of backpay is a matter of discretion." 434 U.S. at 584. It also explained that Congress had added the fourth sentence of Section 626(b) primarily to authorize injunctive relief in suits by private individuals—a form of relief unavailable under the FLSA. See *id.* at 581.

In any event, if the different portions of Section 626(b) could not be harmonized, the first and third sentences would govern here. It is a "commonplace of statutory construction that the specific governs the general." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012) (citation omitted). The first and third sentences of Section 626(b), in conjunction with Section 216(b), specifically address the remedy of back pay for ADEA violations. The fourth sentence of Section 626(b), by contrast, generally addresses the jurisdiction of courts to award any type of relief in ADEA cases. If the two portions conflict, then the text that specifically addresses liability for back pay should control. See, *e.g.*, *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 758-761 (1961) (determining that the computation of interest on taxpayer's overpayment was governed by a provision specifically addressing

that type of overpayment rather than a provision generally governing interest on overpayments).

c. Apart from the text, petitioner advances (Pet. 17-21) two policy arguments. Neither has merit.

First, petitioner contends (Pet. 17-18) that determining the amount of back pay will entail extensive document review and complicated calculations. But the potential complexity of computing the relief has no bearing on whether Congress made it mandatory. By its plain terms, the ADEA requires an employer to compensate employees for any pay lost due to its discriminatory acts, regardless of whether that task demands "individualized actuarial calculations" for a large group. Pet. 18. And even in the Title VII context, in which back pay is discretionary, see pp. 16-17, *infra*, an employer's "'difficulty in calculating the backpay award'" does not alone "constitute[] a sufficient basis for withholding back pay." *Szeinbach* v. *Ohio State Univ.*, 820 F.3d 814, 821 (6th Cir.) (citation omitted), cert. denied, 137 S. Ct. 198 (2016).

Second, petitioner notes (Pet. 19-21) that the EEOC has represented that it would seek only a "reasonable" monetary award in this case and would request back pay limited to the period following its 2006 determination that petitioner was violating the ADEA. But that representation does not mean that a district court may choose whether to award back pay if a plaintiff proves an ADEA violation and the amount due. Rather, it illustrates that an enforcement agency like the EEOC may exercise its prosecutorial discretion to seek relief for certain ADEA violations, rather than pursuing the

maximum liability available under the law and facts.[1] As this Court has explained, "an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities," and "[t]hat discretion is at its height when the agency decides not to bring an enforcement action." *Massachusetts* v. *EPA*, 549 U.S. 497, 527 (2007); cf. 29 U.S.C. 626(b) (providing that, before bringing an enforcement action under the ADEA, the EEOC shall seek voluntary compliance through "informal methods of conciliation, conference, and persuasion"). Nothing prevents the EEOC from exercising its prosecutorial discretion to seek relief for less than the full period of potential ADEA violations.

2. Petitioner contends (Pet. 13-17) that the court of appeals' decision conflicts with three of this Court's decisions disapproving awards of back pay to employees harmed by a pension plan's Title VII violations. See *City of Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702 (1978); *Arizona Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans* v. *Norris*, 463 U.S. 1073 (1983) (per curiam); *Florida* v. *Long*, 487 U.S. 223 (1988). The court of appeals properly concluded that those Title VII decisions "do not govern [the] interpretation of the ADEA." Pet. App. 11; see *id.* at 10-11.

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[1] Petitioner also labels as a "concession" the EEOC's statement in its court of appeals brief that the "district court * * * had discretion under laches to deny back pay that accrued" before the EEOC's 2006 determination that petitioner had violated the ADEA. Pet. 20 (quoting Resp. C.A. Br. 38). That statement, however, appeared in a section of the brief addressing the agency's alternative arguments about how the case should be analyzed if the court *disagreed* with the agency's contention that back-pay awards are mandatory. See Resp. C.A. Br. 36-38.

Title VII makes back pay discretionary. It provides that, on finding an unlawful employment practice, a "court may * * * 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 * * * or any other equitable relief as the court deems appropriate." 42 U.S.C. 2000e-5(g)(1). Given that plain statutory language, this Court has explained that "Title VII does not require a district court to grant any retroactive relief," at least where declining to order back pay "'would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.'" *Manhart*, 435 U.S. at 718-719 (citation omitted). Rather, "[t]o the point of redundancy, the statute stresses that retroactive relief 'may' be awarded if it is 'appropriate.'" *Id.* at 719; see *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 415 (1975) (explaining that "backpay is not an automatic or mandatory remedy; like all other remedies under [Title VII], it is one which the courts 'may' invoke"). And under that statute, the Court has sometimes found that district courts abused their discretion in granting retroactive relief against pension plans that discriminated based on sex. See *Long*, 487 U.S. at 235-236; *Norris*, 463 U.S. at 1105-1107; *Manhart*, 435 U.S. at 719-721.

In contrast with Title VII, back pay under the ADEA (like the FLSA) is not discretionary. See pp. 8-11, *supra*. Indeed, this Court has already emphasized that critical difference between the two statutory schemes. In *Lorillard*, it observed that "the ADEA incorporates the FLSA provision that employers 'shall be liable' for amounts deemed unpaid minimum wages or overtime compensation, while under Title VII, the availability of

backpay is a matter of equitable discretion." 434 U.S. at 584. Moreover, as the Court also noted, Congress's decision to depart from the discretionary Title VII scheme was intentional: After "considerable attention during the legislative debates," Congress considered—but rejected—modeling the ADEA's enforcement provision after Title VII's. *Id.* at 577. Any "disparity" between the decision below and this Court's Title VII precedents is thus "a consequence of the different language Congress chose to employ." *Mount Lemmon Fire Dist.* v. *Guido*, 139 S. Ct. 22, 26 (2018).

3. Petitioner also contends (Pet. 22-24) that the court of appeals' decision conflicts with decisions from the Second, Eighth, and Eleventh Circuits. That is incorrect. To the extent the courts of appeals have squarely addressed the question presented here, they have determined that back pay is mandatory under the ADEA.

Petitioner relies on (Pet. 22-24) four circuit decisions that have characterized Section 626(b) as providing a broad grant of discretionary remedial authority to district courts. See *Castle* v. *Sangamo Weston, Inc.*, 837 F.2d 1550 (11th Cir. 1988); *Goldstein*, *supra* (11th Cir.); *Whittlesey*, *supra* (2d Cir.); *Leftwich* v. *Harris-Stowe State Coll.*, 702 F.2d 686 (8th Cir. 1983). But none of those decisions concluded that awards of back pay are discretionary under the ADEA. Rather, the language emphasizing district courts' broad remedial authority appeared in portions of those decisions addressing the availability of *additional* equitable remedies, not back pay or liquidated damages. See *Castle*, 837 F.2d at 1561-1562 (concluding that "liquidated damages at least equal to the amount of back pay" were mandatory, and addressing discretionary reinstatement); *Goldstein*,

758 F.2d at 1446-1448 (noting that plaintiff was entitled to recover certain lost earnings as part of his back-pay award, and addressing discretionary reinstatement); *Whittlesey*, 742 F.2d at 727-729 (explaining that "[C]ongress did more than merely incorporate [the FLSA's] back pay and limited injunctive remedies," and addressing discretionary award of front pay); *Leftwich*, 702 F.2d at 693 (determining proper calculation of plaintiff's "back pay entitlement," and addressing discretionary reinstatement).

At least two other courts of appeals have similarly indicated that back-pay awards are mandatory upon a finding of ADEA liability. See, *e.g.*, *Gaworski* v. *ITT Commercial Fin. Corp.*, 17 F.3d 1104, 1113 n.8 (9th Cir.) (noting that "backpay is discretionary under Title VII, while it is mandatory under the ADEA"), cert. denied, 513 U.S. 946 (1994); *Maxfield* v. *Sinclair Int'l*, 766 F.2d 788, 794 (3d Cir. 1985) (explaining that "backpay under the ADEA is not discretionary, since it incorporates the provision of the [FLSA] making backpay a mandatory element of damages") (citation and footnote omitted), cert. denied, 474 U.S. 1057 (1986); see generally 2 Barbara T. Lindemann, et al., *Employment Discrimination Law* 41-102 (5th ed. 2012) ("Lost wages * * * in ADEA cases are not subject to the equitable discretion of the court.").[2] In addition, several courts of appeals

[2] Some courts of appeals have determined that district courts have discretion to decide ancillary issues affecting the amount of back pay awarded under the ADEA. See, *e.g.*, *Syvock* v. *Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 161-162 (7th Cir. 1981) (concluding that district court did not abuse its discretion in omitting lost health-insurance benefits from back-pay award and in deducting unemployment compensation from award). But those decisions do not cast doubt on the widely accepted proposition that the back-pay award itself is required.

have determined that an award of liquidated damages is mandatory if an ADEA violation was willful. See, *e.g.*, *Tyler* v. *Union Oil Co. of Cal.*, 304 F.3d 379, 400-401 (5th Cir. 2002); *Greene* v. *Safeway Stores, Inc.*, 210 F.3d 1237, 1245-1246 (10th Cir. 2000); *Castle*, 837 F.2d at 1561. Because the ADEA incorporates the FLSA enforcement provision requiring both back pay and (as modified) liquidated damages, see 29 U.S.C. 216(b), those decisions further support the conclusion that back pay is mandatory. Petitioner is therefore incorrect that any conflict exists among the courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JAMES L. LEE
Deputy General Counsel
JENNIFER S. GOLDSTEIN
Associate General Counsel
SYDNEY A.R. FOSTER
Assistant General Counsel
PAUL D. RAMSHAW
Attorney
U.S. Equal Employment Opportunity Commission

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