No. 18-882

In the Supreme Court of the United States

NORIS BABB, PETITIONER

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS

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

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. 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.

2. Whether the federal-sector provision of Title VII of the Civil Rights Act of 1964, which provides that personnel actions affecting agency employees shall be made free from any "discrimination based on * * * sex," 42 U.S.C. 2000e-16(a), requires a plaintiff to prove that retaliation for protected activity was a but-for cause of the challenged personnel action.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-22a) is not published in the Federal Reporter but is reprinted at 743 Fed. Appx. 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 judgment of the court of appeals was entered on July 16, 2018. A petition for rehearing was denied on October 9, 2018 (Pet. App. 65a). The petition for a writ of certiorari was filed on January 7, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the standard of causation that applies to federal-sector employment claims brought

under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The court of appeals correctly determined that those Acts' federal-sector provisions, 29 U.S.C. 633a(a) and 42 U.S.C. 2000e-16(a), both require proof that an agency's consideration of an impermissible factor was a "but-for" cause of the challenged personnel action. Pet. App. 11a-13a, 17a-18a. In the government's view, however, this Court should grant certiorari to resolve the proper standard of causation under both provisions.

1. Petitioner is a clinical pharmacist at a Department of Veterans Affairs (VA) facility in Bay Pines, Florida. As relevant here, petitioner alleges that the VA discriminated against her in two ways: first, on the basis of age, in violation of the ADEA's federal-sector provision, 29 U.S.C. 633a(a); and, second, as retaliation for supporting her colleagues' complaints of sex discrimination, in violation of Title VII's federal-sector provision, 42 U.S.C. 2000e-16(a). At summary judgment, petitioner failed to establish that age or retaliation was a but-for cause of any of the challenged acts, but she arguably presented enough evidence to permit an inference that age or retaliation had been considered as a factor. This case therefore presents the question whether the ADEA's and Title VII's federal-sector provisions require that an impermissible consideration be a but-for cause or merely a motivating factor in the challenged action.

a. *Private-sector provisions.* The ADEA's private-sector age-discrimination provision, 29 U.S.C. 623, and Title VII's private-sector retaliation provision, 42 U.S.C. 2000e-3, apply to state- and local-government employers as well as private employers. See 29 U.S.C. 630(b),

42 U.S.C. 2000e(b) and (f). This Court has held that those private-sector provisions require proof of but-for causation. Thus, if petitioner's claims had been brought against a state or local government, or a private employer, the governing standard would have been but-for causation. The Court's private-sector decisions set the stage for the federal-sector provisions now at issue.

i. To begin with Title VII, its private-sector discrimination provision makes it an "unlawful employment practice" for an employer to fail or refuse to hire or to discharge an individual, or "otherwise to discriminate against any individual" with respect to the terms and conditions of her employment, "*because of* such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1) (emphasis added).

In *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), a plurality of the Court and two Justices concurring in the judgment concluded that if a Title VII plaintiff proves that her membership in a protected class "played a motivating part" in the challenged personnel practice, the employer may avoid liability if it "prov[es] by a preponderance of evidence that it would have made the same decision even if [the employer] had not taken that factor into account." *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 173-174 (2009) (quoting *Price Waterhouse*'s plurality opinion and citing its concurring opinions) (brackets omitted). Thus, under *Price Waterhouse*, a plaintiff's lesser showing that discrimination was a "motivating" factor for a personnel practice triggered a "burden-shifting" framework that applied a "but-for caus[ation]" standard but imposed on the employer the burden of disproving such causation by "show-[ing] that a discriminatory motive was not the but-for cause of the adverse employment action." *University*

of Tex. Sw. Med. Ctr. v. *Nassar*, 570 U.S. 338, 348 (2013). An employer that disproved but-for causation would wholly "defeat liability," even though the "plaintiff [had] prove[n] the existence of an impermissible motivating factor." *Id.* at 349.

Two years later, in the Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1075-1076, Congress responded by enacting "a new burden-shifting framework" that "abrogated a portion of *Price Waterhouse*[]." *Nassar*, 570 U.S. at 349. Under that new framework, except as otherwise provided in Title VII, an "unlawful employment practice" by a private employer is established if the complainant demonstrates that her protected trait "was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. 2000e-2(m). The burden then shifts to the employer to demonstrate that it "would have taken the same action in the absence of the impermissible motivating factor." 42 U.S.C. 2000e-5(g)(2)(B). If the employer carries that burden, the employer does not wholly escape liability. Instead, a court may still grant declaratory relief and certain injunctive relief, but the court may "not award damages" or back pay or order that the complainant be "reinstate[d], hir[ed], [or] promote[d]." *Ibid.*

ii. The ADEA's private-sector discrimination 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 the terms and conditions of her employment, "*because of* such individual's age." 29 U.S.C. 623(a)(1) (emphasis added). Unlike Title VII, the ADEA does not provide that discrimination "because of" age may be shown by

establishing that age was a motivating factor in the challenged employment action.

In *Gross*, this Court held that it "must give effect to Congress's choice" in the Civil Rights Act of 1991 to amend Title VII to allow employer liability when discrimination is a "motivating factor" but to "not similarly amend the ADEA." 557 U.S. at 177 n.3 (citation and emphasis omitted). *Gross* accordingly concluded that the "burden-shifting framework" for Title VII discrimination claims does not "appl[y] to ADEA claims" and that the Court's "interpretation of the ADEA is not governed by Title VII decisions such as * * * *Price Waterhouse*." *Id.* at 174-175; see *id.* at 178-179. *Gross* instead held that the ADEA's private-sector provision prohibiting discrimination "'*because of* [an] individual's age,'" requires that a complainant prove that "age was the 'but-for' cause of the employer's adverse action." *Id.* at 176-177 (quoting 29 U.S.C. 623(a)(1)).

iii. Turning to the Acts' private-sector retaliation provisions, each uses the same operative causation language —the phrase "because"—as the ADEA's private-sector discrimination provision. Title VII makes it an "unlawful employment practice" for an employer to "discriminate against any of his employees or applicants for employment * * * *because* he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. 2000e-3(a) (emphasis added). The ADEA similarly makes it unlawful for an employer "to discriminate against any of his employees or applicants for employment * * * *because* such individual * * * has opposed any practice made unlawful by [the ADEA's private-sector provision], or *because* such individual * * * has made a charge, testified, assisted, or participated in any

manner in an investigation, proceeding, or litigation under [the ADEA]." 29 U.S.C. 623(d) (emphasis added).

In *Nassar*, this Court held that "Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action," because the Court found no "meaningful textual difference between the text in [Section 2000e-3(a)] and the [ADEA provision] in *Gross*." *Nassar*, 570 U.S. at 352; see *id.* at 360. The Court explained that "but for" causation is "the default rule[]" in tort law that Congress "is presumed to have incorporated" in a statute "absent an indication to the contrary in the statute itself," *id.* at 347; that the statutory phrase "'because of' means 'based on' and that '"based on" indicates a but-for causal relationship,'" *id.* at 350 (citation omitted); and that Congress did not apply Title VII's distinct motivating-factor provision in Section 2000e-2(m) to Title VII's separate retaliation provision in Section 2000e-3, *id.* at 352-357. That same reasoning applies to the ADEA's private-sector retaliation provision, which this Court has not yet addressed.

b. *Federal-sector provisions.* The federal-sector provisions at issue in this case prohibit discrimination "based on" certain protected traits. The ADEA's federal-sector provision provides that "[a]ll personnel actions" affecting employees or applicants for employment in executive agencies 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). And Title VII's federal-sector provision similarly provides that "[a]ll personnel actions" affecting employees or applicants for employment in executive agencies "shall be made free from any discrimination *based on* race, color, religion, sex, or national origin." 42 U.S.C. 2000e-16(a)

(emphasis added).[1] Both federal-sector provisions thus use the same phrase—"based on"—that the Court said in *Nassar* "'indicates a but-for causal relationship.'" 570 U.S. at 350 (citation omitted).

2. In 2004, the VA hired petitioner, a clinical pharmacist, to work at the VA Medical Center in Bay Pines, Florida, under the auspices of the Medical Center's Pharmacy Services Division. Pet. App. 2a-3a. Petitioner challenges four employment actions taken by the VA between 2012 and 2014: removing petitioner's "advanced scope" designation; denying certain of her training requests; selecting younger women over petitioner for anticoagulation-clinic positions; and providing petitioner only four hours of Monday holiday pay when petitioner worked in a permanent Tuesday-Saturday position. *Id.* at 14a. Petitioner contends that those four actions were sex and age discrimination, in violation of 29 U.S.C. 633a(a) and 42 U.S.C. 2000e-16(a); as well as retaliation for her support for colleagues' Title VII claims, in violation of 42 U.S.C. 2000e-16(a). Pet. App. 4a-8a, 20a.

a. *Advanced-Scope Designation.* In 2006, petitioner accepted a geriatric pharmacist position within an interdisciplinary team of caregivers in the Medical Center's Geriatric Clinic, the duties of which were governed by a service agreement between the Geriatric Clinic and

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[1] Although Section 2000e-16 "does not incorporate [Title VII's] provision prohibiting retaliation in the private sector," *Gomez-Perez* v. *Potter*, 553 U.S. 474, 487-488 & n.4 (2008), several courts of appeals have concluded that Section 2000e-16 prohibits retaliation for protected activity. See, *e.g.*, *Hale* v. *Marsh*, 808 F.2d 616, 619 (7th Cir. 1986); *Ayon* v. *Sampson*, 547 F.2d 446, 449-450 (9th Cir. 1976). This Court has yet to decide that question. See *Green* v. *Brennan*, 136 S. Ct. 1769, 1774 n.1 (2016).

Pharmacy Services and which resulted in petitioner's supervision by officials in both departments. Pet. App. 3a. In 2009, petitioner was designated for an "advanced scope" of practice, which authorized her to perform "disease state management" (DSM)—*i.e.*, to manage patients' medical conditions in her practice area and prescribe medications without consulting a physician. *Id.* at 3a-4a.

In 2010, the VA announced a nationwide Patient Aligned Care Team initiative, which resulted in staffing changes at the Medical Center. Pet. App. 4a. In connection with that initiative, pharmacists who spent at least 25% of their time practicing DSM became eligible for a promotion to GS-13. *Ibid.* Petitioner's "advanced scope" designation thus had the potential to lead to a promotion under that initiative.

In the fall of 2012, Pharmacy Services and the Geriatric Clinic began renegotiating the service agreement governing petitioner's position. Pet. App. 4a-5a. The Clinic's medical chief wanted to keep petitioner in the clinic, but he concluded that (1) the DSM model in which pharmacists can independently manage patient conditions without physician input was often not well suited to geriatric patients who present "complex medical cases" and would be best served by the Clinic's "interdisciplinary medical teams," and (2) the Clinic could afford to have petitioner dedicate only three scheduled "slots" per day (which was less than 25% of her time) to DSM activity. *Id.* at 5a, 14a. When it became clear that the Geriatric Clinic would not agree to a service agreement in which petitioner could perform DSM at least 25% of the time, the departments agreed that the geriatric pharmacist position would not have scheduled DSM responsibilities and would be scheduled only

for pharmacist duties within the Clinic's "integrated patient-care team." *Id.* at 5a-6a. Because petitioner would no longer have DSM responsibilities under the revised agreement, Pharmacy Services began the process of removing petitioner's "advanced-scope designation." *Id.* at 6a.

b. *Training Requests.* In fall 2012 and January 2013, petitioner requested anticoagulation training to be able to assist in the anticoagulation clinic. Pet. App. 6a. Pharmacy Services denied the requests because the training was unrelated to petitioner's work in the Geriatric Clinic and because the anticoagulation clinic was responsible for training medical residents and lacked staffing for training additional personnel. *Id.* at 6a, 16a.

c. *Anticoagulation-Clinic Positions.* In April 2013, petitioner applied for two open anticoagulation-clinic positions. Pet. App. 6a. The interview panel selected two younger female applicants because they had anticoagulation experience (petitioner had none) and because petitioner had offered "inadequate answers to medical questions," used unprofessional language, and made "disparaging remarks" about other Medical Center employees during her interview. *Id.* at 6a, 15a. Petitioner herself characterized the interview as the "worst" interview of her life. *Ibid.*

d. *Monday Holiday Pay.* In April 2013, petitioner requested to be transferred from the Geriatric Clinic to the "float pool," where she would cover for absent staff in a variety of areas. Pet. App. 7a, 30a. Her request was granted and implemented a few months later. *Id.* at 7a. Meanwhile, in May 2013, after petitioner learned that she had not been selected for the anticoagulant positions, she filed the equal-employment-opportunity (EEO) complaint that ultimately led to this case. *Ibid.*

In early 2014, petitioner applied for a promotion to a GS-13 position on a Patient Aligned Care Team, which had been advertised with an announcement stating that the position was for a Tuesday-Saturday work shift. Pet. App. 8a. Petitioner's second-line Pharmacy Service supervisor submitted paperwork to facilitate the promotion, rating petitioner as "excellent." *Ibid.*

In August 2014, petitioner was promoted to the GS-13 position but became "very upset" when she learned that her Tuesday-Saturday shift provided only four (not eight) hours of holiday pay for five federal Monday holidays. Pet. App. 8a, 16a. When petitioner complained, the Medical Center offered to change petitioner's schedule to a permanent Monday-Friday schedule (with full Monday holiday pay), but petitioner declined the offer. *Id.* at 8a, 16a-17a. Petitioner testified that she made more money on her Tuesday-Saturday schedule with four hours Monday holiday pay than she would make on a traditional Monday-Friday schedule. *Id.* at 8a, 16a.

e. *EEO Activity*. While the above employment actions were ongoing, in mid-2012, petitioner emailed an EEO investigator in support of two of her female colleagues who had filed EEO complaints alleging Title VII and ADEA violations. Pet. App. 4a; Third Am. Compl. ¶¶ 5-6. Later in March 2014, petitioner provided a deposition supporting those colleagues. Pet. App. 4a. Petitioner additionally alleges that her four challenged employment actions were retaliation for her EEO activity. *Id.* at 20a; cf. *Gomez-Perez* v. *Potter*, 553 U.S. 474, 479 (2008) ("discrimination based on age" under 29 U.S.C. 633a(a) includes retaliation for EEO activity concerning complaint of age discrimination).

3. After petitioner filed this ADEA and Title VII action, the district court granted summary judgment to the government. Pet. App. 23a-64a. Applying the framework from *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), Pet. App. 39a, 53a, the court determined that each of the challenged employment actions was "free of an illegal [discriminatory] motive," *id.* at 53a, and that petitioner had failed to identify "any weaknesses, implausibilities, or flaws" in the VA's articulated "legitimate and non-retaliatory reason for every employment action," *id.* at 43a. Although those determinations could have been read as indicating that petitioner's contentions "would fail even a motivating-factor analysis," the court of appeals later reasoned that, because the district court had analyzed whether the government's reasons for its actions were pretextual, it suggested that petitioner had established a prima facie case sufficient to show that age and retaliation was a motivating factor for the challenged actions. *Id.* at 11a n.3.

4. On that understanding, the court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 1a-22a. The court determined that the district court had erred in failing to apply a motivating-factor standard to analyze petitioner's Title VII sex-discrimination claim, which the court remanded for further proceedings. *Id.* at 9a-11a. As relevant here, however, the court of appeals affirmed the district court's application of a but-for causation standard under the *McDonnell Douglas* framework to petitioner's ADEA claim, *id.* at 11a-17a, and Title VII retaliation claim, *id.* at 17a-20a. The court stated that if it were "writing on a clean slate," it "might well agree" with petitioner that such claims should be governed by a "motivating-factor (rather than but-for) causation standard." *Id.* at 11a-

13a; see *id.* at 18a. But the court determined that under its binding precedent, the ADEA's and Title VII's federal-sector provisions required petitioner to establish but-for causation to support her claims. *Id.* at 12a-13a, 18a-19a.

ARGUMENT

Petitioner contends (Pet. 17-22) that the ADEA's and Title VII's federal-sector provisions, 29 U.S.C. 633a and 42 U.S.C. 2000e-16, prohibit personnel actions for which age (in the case of the ADEA) or retaliation for protected activity (in the case of Title VII) is a motivating factor. The court of appeals correctly held to the contrary that, because those provisions prohibit discrimination "based on" age or protected activity, a plaintiff must prove that age or retaliation was a but-for cause of the alleged discrimination. Further review is warranted, however, because courts of appeals have divided over whether the ADEA's federal-sector provision requires but-for causation, the text of the ADEA's and Title VII's federal-sector provisions are materially identical, and the Equal Employment Opportunity Commission (EEOC) and Merit Systems Protection Board (MSPB) reject a but-for causation standard in administrative EEO proceedings from which federal agencies cannot seek judicial review.

I. THE QUESTION WHETHER SECTION 633a(a) REQUIRES BUT-FOR CAUSATION WARRANTS REVIEW

The ADEA's federal-sector provision states that "[a]ll personnel actions" affecting employees or applicants for employment in executive agencies who are at least 40 years of age "shall be made free from any discrimination based on age." 29 U.S.C. 633a(a). The court of appeals correctly held that Section 633a(a) imposes a

but-for, not a motivating-factor, test for establishing that the agency's consideration of age resulted in the challenged personnel action. This Court's review is nonetheless warranted to resolve a division of authority on that issue.

A. Section 633a(a) Requires But-For Causation

1. Section 633a(a)'s prohibition against "discrimination based on age" in federal personnel actions, 29 U.S.C. 633a(a), requires that a plaintiff's age be a but-for cause of her asserted adverse treatment. The "'normal definition of discrimination' is 'differential treatment'" or, more specifically, "'less favorable' treatment." *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (citations omitted); accord *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 59 (2006) (explaining that "the term 'discriminate against' refers to distinctions or differences in treatment that injure protected individuals."). "[T]he phrase 'based on,'" in turn, "indicates a but-for causal relationship." *Safeco Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 63 (2007). Indeed, this Court has repeatedly concluded in the private-sector ADEA discrimination and Title VII retaliation contexts that the phrase "based on" carries the same but-for causation meaning as the phrase "because of." *University of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 350 (2013); see also *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) (same). It follows that Section 633a(a)'s prohibition against "discrimination based on age" covers personnel actions for which age was a but-for cause of the alleged discrimination.

Section 633a(a)'s textual adoption of that but-for-causation requirement reflects "the default rule[]" at common law, where a tort plaintiff must normally prove that her asserted "'harm would not have occurred' in

the absence of—that is, but for—the defendant's conduct." *Nassar*, 570 U.S. at 346-347 (citation omitted). Because the ADEA was enacted against that settled background principle, Congress "is presumed to have incorporated" that "default rule[]" in the ADEA, "absent an indication to the contrary in the statute itself." *Id.* at 347. Section 633a(a) contains no contrary textual indication. Quite the opposite, Section 633a(a)'s prohibition against "discrimination based on age" in federal personnel actions makes clear that age must be a but-for cause of the agency's allegedly harmful treatment of the plaintiff.

2. This Court's decisions in related contexts also demonstrate that Section 633a(a) is properly read to impose a but-for causation requirement.

First, in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), a majority of the Court interpreted Title VII's private-sector discrimination provision to require a but-for causation standard for liability. If a plaintiff showed that a protected trait was a "motivating" factor in a private-sector employment decision, the burden shifted to the employer to prove that "it would have made the same decision even if it had not taken [that factor] into account." *Id.* at 258 (plurality opinion); see *id.* at 259-260 (White, J., concurring in the judgment), *id.* at 276 (O'Connor, J., concurring in the judgment); see also *Gross*, 557 U.S. at 173-174 (discussing *Price Waterhouse*). The Court has accordingly recognized that *Price Waterhouse* applied a "but-for caus[ation]" standard: the employer had the burden of disproving causation by "show[ing] that a discriminatory motive was not the but-for cause of the adverse employment action." *Nassar*, 570 U.S. at 348.

This Court has, of course, stated that *Price Waterhouse*'s "burden-shifting framework [wa]s difficult to apply" in practice, that those problems "eliminated any perceivable benefit to extending its framework" to other contexts, and that it "is far from clear that the Court would have the same approach" in the private-sector Title VII context "were it to consider the question today in the first instance." *Gross*, 557 U.S. at 178-179. The Court has also determined that, "[g]iven the careful balance of lessened causation and reduced remedies Congress struck in the 1991 [Civil Rights] Act," "no reason [exists] to think that the different balance articulated by *Price Waterhouse* somehow survived that legislation's passage" so as to apply in other contexts. *Nassar*, 570 U.S. at 362. But even looking only to the *Price Waterhouse* framework as it applied to Title VII claims before 1991, *Price Waterhouse* ultimately applied a "but-for" causation standard for liability, *id.* at 348, not the motivating-factor test that petitioner advocates. See Pet. 18, 20.

Second, this Court's interpretation of the Civil Rights Act of 1991 demonstrates that the ADEA's federal-sector provisions apply a but-for, not motivating-factor, test for causation. The 1991 Act, which Congress enacted just two years after *Price Waterhouse*, "substituted a new burden-shifting framework" for the one developed by *Price Waterhouse*. *Nassar*, 570 U.S. at 349. Specifically, Congress amended Title VII's private-sector discrimination provision to prohibit employment practices for which a protected trait is a "motivating factor." 42 U.S.C. 2000e-2(m). But if that trait is not a but-for cause of the adverse action, Congress limited the scope of available relief. 42 U.S.C. 2000e-5(g)(2)(B). Congress thus adopted a motivating-factor standard for

causation in Title VII's private-sector discrimination provision, but it did not do so in other provisions of Title VII or any provisions of the ADEA.

In *Gross*, the Court determined that "Congress' careful tailoring of the 'motivating factor' claim in Title VII" and Congress's decision "not [to] make similar changes to the ADEA"—even though the 1991 Act "amended the ADEA in several [other] ways"—demonstrated that the Court could not properly "transfer the *Price Waterhouse* burden-shifting framework into the ADEA." *Gross*, 557 U.S. at 174, 178 n.5. And unlike Title VII's amended private-sector provisions, *Gross* concluded, "the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor." *Id.* at 174. Although *Gross* interpreted the ADEA's private-sector provision, 29 U.S.C. 623(a), the Court's rationale applies equally to the ADEA's federal-sector provision, 29 U.S.C. 633a(a). Congress likewise did not amend Section 633a to parallel Title VII's private-sector prohibition, and nothing in the text of the ADEA supports application of a motivating-factor test for causation.

Finally, *Nassar* extended *Gross*'s reasoning to Title VII's private-sector retaliation provision. *Nassar* emphasized that the 1991 Act showed that "the motivating-factor standard was not an organic part of Title VII." 570 U.S. at 351. And just as that standard "could not be read into the ADEA," *ibid.*, the Court concluded that it also could not be read into Title VII's private-sector retaliation provision (Section 2000e-3), because Congress had limited the application of the motivating-factor standard to Title VII's private-sector discrimination provision (Section 2000e-2). See *id.* at 352-354; see also *id.* at 357 ("Congress has in explicit terms altered the

standard of causation for one class of claims but not another, despite the obvious opportunity to do so in the 1991 Act."). Having declined in *Nassar* to import Section 2000e-2(m)'s motivating-factor test into an adjacent provision of Title VII, and having declined in *Gross* to import it into the ADEA's private-sector provision, there is no sound reason to import it into the ADEA's federal-sector provision.

3. Petitioner relies (Pet. 20) on language in Section 633a(a) requiring that federal personnel actions be free from "any discrimination based on age," 29 U.S.C. 633a(a), which she contends holds the government to a standard higher than that required of private-sector employers. Petitioner also relies (Pet. 20) on the D.C. Circuit's decision in *Ford* v. *Mabus*, 629 F.3d 198 (2010), which similarly focused on Section 633a(a)'s "broad, general ban on 'discrimination based on age,'" *Gomez-Perez* v. *Potter*, 553 U.S. 474, 488 (2008) (quoting 29 U.S.C. 633a(a)), and Congress's use of the term "any" to modify that phrase. See *Ford*, 629 F.3d at 205-206. That reasoning is flawed.

First, petitioner is correct that the ADEA's private-sector provision contains "a list of specific prohibited practices," whereas the Act's "federal-sector provision contains a broad prohibition on 'discrimination.'" *Gomez-Perez*, 553 U.S. at 487. The difference in wording reflects that the federal-sector provision, unlike its private-sector counterpart in Section 623(a), prohibits age-based discrimination in "[a]ll personnel actions," 29 U.S.C. 633a(a), not only in connection with specifically listed practices. But that goes to the breadth of Section 633a(a)'s prohibition on discrimination. It does not speak to causation—*i.e.*, when discrimination is "based on age." That phrase naturally means age must be a

but-for cause of the alleged discrimination in a personnel action.

Second, the word "any" does not affect Section 633a's standard of causation. *Ford* reasoned that Congress's use of the word "any" demonstrates that if "any amount of discrimination taint[s] a personnel action, * * * the action [i]s not 'free from any discrimination based on age.'" 629 F.3d at 206. Again, that rationale fails entirely to address the underlying meaning of "discrimination based on age." Although the word "any" can sometimes confer an "'expansive meaning,'" it never has a "transformative" effect and thus "never change[s] in the least" the phrase that follows it. *Freeman* v. *Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012) (citation omitted). Section 633a(a) simply states that any "discrimination based on age" in federal personnel actions is prohibited. But as explained above, the phrase "discrimination based on age" requires that age be a but-for cause of plaintiff's adverse treatment (discrimination) in a challenged personnel action.

B. The Courts Of Appeals And Federal Agencies Are Divided Over Section 633a(a)'s Causation Standard

Although the court of appeals correctly held that Section 633a(a) requires but-for causation, Pet. App. 12a-13a, the courts of appeals and relevant federal adjudicative agencies are divided on that important question.

1. Like the Eleventh Circuit in this case, the Ninth Circuit has determined, in light of *Gross*, that the ADEA's federal-sector provision requires but-for causation. See *Shelley* v. *Geren*, 666 F.3d 599, 607-608 (2012). Those decisions directly conflict with the D.C. Circuit's decision in *Ford*, which was decided after *Gross* but nevertheless rejected the but-for standard

and held that a federal-sector ADEA violation is established if "age was *a* factor in the employer's decision." 629 F.3d at 206. Other courts after *Ford* have noted the D.C. Circuit's ADEA causation holding but have declined to resolve the question. See, *e.g.*, *Reynolds* v. *Tangherlini*, 737 F.3d 1093, 1096 (7th Cir. 2013) (stating that *Nassar* and *Gross* "give us reason to question [the D.C. Circuit's] holding" in *Ford* but declining to reach the issue); *Leal* v. *McHugh*, 731 F.3d 405, 412, 414 n.8 (5th Cir. 2013); *Velazquez-Ortiz* v. *Vilsack*, 657 F.3d 64, 74 (1st Cir. 2011).

2. The importance of that circuit conflict is heightened by the fact that the EEOC and MSPB agree with the D.C. Circuit's reasoning in *Ford*. Federal agencies cannot seek judicial review from EEOC and MSPB decisions that apply the wrong causation standard, and those decisions therefore pretermit further consideration of the causation question for a meaningful set of discrimination claims that are not subject to judicial review.

A federal employee who claims that she was discriminated against in violation of the ADEA's (or Title VII's) federal-sector provision may present her discrimination claim to the EEOC. 29 U.S.C. 633a(b)(3) and (d); see 42 U.S.C. 2000e-16(b) and (c). Under the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*, the employee may also as an alternative seek MSPB review of certain more serious personnel actions allegedly violating those federal-sector provisions. 5 U.S.C. 7702(a)(1)(B)(i) and (iv); see *Kloeckner* v. *Solis*, 568 U.S. 41, 44 (2012). But in both contexts, if the EEOC or MSPB rules against the agency employer, the government cannot obtain judicial review of the decision, which then binds the government. See 5 U.S.C. 7703(b)(2) (providing that MSPB decisions on discrimination claims

are subject to the ADEA's and Title VII's federal-sector causes of action); 29 U.S.C. 630(a), 633a(c) (ADEA cause of action for aggrieved "person," which excludes the government); 42 U.S.C. 2000e-16(c) (Title VII federal-sector cause of action only for an aggrieved "employee or applicant for employment").[2]

Both the EEOC and MSPB have followed the D.C. Circuit's lead by rejecting the government's position that the ADEA's federal-sector provision requires that age be a but-for cause of the plaintiff's adverse treatment in the challenged personnel action. The EEOC holds that "federal sector ADEA liability is established if age is a motivating factor for the disputed personnel action," even if it is not "a 'but for' cause of [the] disparate treatment." *Brenton W.* v. *Chao*, Appeal No. 0120130554, 2017 WL 2953878, at *9 (EEOC June 29, 2017); see, *e.g.*, *Complainant* v. *Johnson*, Request No. 0520140014, 2015 WL 5530295, at *7 (EEOC Sept. 9, 2015) (denying agency request to reconsider standard of causation by discussing EEOC precedent rejecting

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[2] If the Office of Personnel Management (OPM) either intervenes in a proceeding before the MSPB or unsuccessfully petitions for reconsideration of an MSPB final decision, OPM may petition the Federal Circuit for discretionary review if OPM's Director determines that the MSPB "erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the [MSPB's] decision will have a substantial impact on a civil service law, rule, regulation, or policy directive." 5 U.S.C. 7703(d)(1). But because the Federal Circuit has held that OPM cannot seek judicial review under Section 7703(d) on the ground that the MSPB erroneously interpreted "statutes and regulations relating to employment discrimination as set forth in 5 U.S.C. § 7702(a)(1)(B)," *King* v. *Lynch*, 21 F.3d 1084, 1088 (1994), at present the government cannot obtain judicial review of MSPB decisions that erroneously interpret the ADEA.

"'but for' standard" for federal-sector ADEA and Title VII claims); *Complainant* v. *Johnson*, Appeal No. 0720140014, 2015 WL 5042782, at *4-*6 (EEOC Aug. 19, 2015) (underlying decision applying "motivating factor" test and rejecting "but for" causation standard). The MSPB is effectively bound by the EEOC's decisions on this issue, because a federal employee may obtain EEOC review of an MSPB decision concerning her discrimination claims. See 5 U.S.C. 7702(b)(1). The MSPB has accordingly determined that it "must defer to the EEOC concerning issues of substantive discrimination law," *Wingate* v. *USPS*, 118 M.S.P.R. 566, 571 (2012), and thus holds, like the EEOC, that "a federal employee may prove age discrimination by establishing that age was a factor in the challenged personnel action, even if it was not the 'but-for' cause of that action." *Ibid.* This Court's review is necessary to restore appropriate uniformity in the administration of the ADEA.

II. THE QUESTION WHETHER SECTION 2000e-16(a) REQUIRES BUT-FOR CAUSATION WARRANTS REVIEW

Title VII's federal-sector provision states that "[a]ll personnel actions" affecting employees or applicants for employment in executive agencies "shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. 2000e-16(a). To the extent Section 2000e-16(a) prohibits retaliation for protected EEO activity, the court of appeals correctly held that it imposes a but-for, not a motivating-factor, test for establishing that the challenged personnel action was the result of retaliation. Although every other court of appeals to consider the question has reached the same conclusion, the EEOC has rejected a but-for causation standard. And because the EEOC's decisions applying that standard against federal agencies are not

judicially reviewable and there is no circuit split, it is not apparent that there will be any better vehicle for this Court's review. Moreover, the language of Title VII's federal-sector provision is materially identical to that of the ADEA's federal-sector provision. There is no apparent reason why the Court should interpret those two provisions differently, and at the least it makes sense for the Court to consider them together.

A. Like the parallel text of the ADEA's federal-sector provision, Section 2000e-16(a) prohibits discrimination "based on" certain protected traits. For the same reasons that the phrase "discrimination based on age" requires but-for causation in the context of the ADEA, the phrase "discrimination based on [a protected trait]" imposes a but-for causation requirement in Title VII. See pp. 13-18, *supra*. Moreover, when Congress in the Civil Rights Act of 1991 added Section 2000e-2(m) to adopt the motivating-factor standard for private-sector Title VII discrimination claims, Congress did not expressly apply that standard to the private-sector retaliation claim in Section 2000e-3(a). *Nassar*, 570 U.S. at 352-357. There is accordingly no basis to conclude that the standard implicitly applies to any federal-sector retaliation claim that may be available under Section 2000e-16.

Even more fundamentally, this Court has not decided whether Section 2000e-16(a)'s prohibition on "discrimination based on race, color, religion, sex, or national origin" extends to retaliation for protected EEO activity. See *Green* v. *Brennan*, 136 S. Ct. 1769, 1774 n.1 (2016); *Gomez-Perez*, 553 U.S. at 488 n.4. But the Court has noted a possible basis for concluding that it does, and that basis would require applying a but-for causation standard. Although Section 2000e-16 does not directly

incorporate Title VII's private-sector retaliation prohibition in Section 2000e-3(a), it "does incorporate a remedial provision, [Section] 2000e-5(g)(2)(A), that [itself] authorizes relief for a violation of [Section] 2000e-3(a)." *Gomez-Perez*, 553 U.S. at 488 n.4; see 42 U.S.C. 2000e-16(d) (incorporating 42 U.S.C. 2000e-5(g)(2)(A)). This Court held in *Nassar* that Title VII's private-sector retaliation provision requires but-for causation. See 570 U.S. at 360 (holding that "Title VII retaliation claims [under Section 2000e-3(a)] must be proved according to traditional principles of but-for causation"). In short, the only apparent basis for concluding that the federal-sector provision extends to retaliation claims—*i.e.*, its indirect incorporation of the prohibition on private-sector retaliation—would equally bring with it the but-for standard that applies to retaliation claims against private employers and state and local governments.

B. Every court of appeals to consider the question has held that a but-for causation governs federal-sector Title VII retaliation claims. See, *e.g.*, *Bekkem* v. *Wilkie*, 915 F.3d 1258, 1271, 1273 (10th Cir. 2019) (but-for causation standard); *Anderson* v. *Brennan*, 911 F.3d 1, 11-12 (1st Cir. 2018) (same); *Blomker* v. *Jewell*, 831 F.3d 1051, 1059 (8th Cir. 2016) (same; applying Section 2000e-3 principles). But the EEOC has rejected a but-for causation test for such claims. See, *e.g.*, *Trina C.* v. *Sessions*, Appeal No. 0120131971, 2017 WL 2241342, at *3 & n.3 (EEOC May 12, 2017); *Miguel G.* v. *Donahoe*, Appeal No. 0720120041, 2015 WL 1635932, at *7 (EEOC Mar. 12, 2015); *Nita H.* v. *Jewell*, Pet. No. 0320110050, 2014 WL 3788011, at *10 n.6 (EEOC July 16, 2014). The EEOC's mistaken approach is effectively binding on federal-agency defendants. Such agencies are unable to seek judicial review of adverse EEOC decisions that

apply the wrong causation standard. See pp. 19-20 & n.2, *supra*. The Title VII issue thus has practical importance to the whole of the federal government, which must defend itself in administrative EEOC adjudications that apply the wrong causation standard, with no recourse to the courts. Given the uniformity in the circuits and the lack of judicial review of the EEOC's federal-sector decisions, there is no obvious route to a better vehicle for this Court's consideration.

Moreover, as petitioner recognizes (Pet. 9-10, 18), the relevant language of Title VII's federal-sector provision is materially identical to that in the ADEA's federal-sector provision. Both specify that "[a]ll personnel actions affecting employees or applicants for employment * * * in executive agencies * * * shall be made free from any discrimination based on [a protected trait]." 29 U.S.C. 633a(a); 42 U.S.C. 2000e-16(a). Petitioner identifies no reason why the Court should interpret those two provisions differently, and at a minimum it makes sense for the Court to consider the full range of arguments with respect to both provisions at the same time. The meaning of both provisions is properly presented here; and in light of the practical importance to the government, this Court should grant review of both the ADEA's and Title VII's federal-sector provisions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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