No. 11-164

In the Supreme Court of the United States

WANDA J. HARLEY, PETITIONER

v.

PATRICK R. DONAHOE, POSTMASTER GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the federal-sector anti-discrimination provision of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 633a(a), requires an ADEA plaintiff challenging a federal personnel action to show that discrimination was the but-for cause of that action.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is not published in the *Federal Reporter* but is reprinted at 416 Fed. Appx. 748. The opinion of the district court (Pet. App. 16a-23a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 2011. A petition for rehearing was denied on May 13, 2011 (Pet. App. 14a-15a). The petition for a writ of certiorari was filed on August 5, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner filed this action under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, alleging that the United States Postal Ser-

vice (USPS) discriminated against her based on age when it terminated her employment as a probationary employee. The district court held a bench trial, found that petitioner failed to prove that her age was the but-for cause of her termination, and entered judgment against her. Pet. App. 21a-22a. The court of appeals affirmed. *Id.* at 1a-13a.

1. In April 2006, petitioner left her position as a substitute rural carrier in Blackwell, Oklahoma, to begin a 90-day probationary period for a career appointment as a city carrier in Fairfax, Oklahoma. Pet. App. 2a, 18a. Such a probationary period includes 30-, 60-, and 80-day performance reviews. *Id.* at 2a, 19a. Before petitioner's 30-day review, the Fairfax postmaster, Anthony Jansson, asked a supervisor at another post office, Scott Shepherd, to observe petitioner's work for one day. *Id.* at 2a. According to Shepherd, Jansson told him that he needed someone younger and faster in petitioner's position. *Id.* at 2a-3a. Petitioner was 46 years old at the time. *Id.* at 2a.

In the 30-day review, Jansson rated petitioner's dependability, work relations, and work methods "satisfactory" but rated her work quality, work quantity, and personal conduct "unacceptable." Pet. App. 3a. Shepherd agreed with those ratings. *Id.* at 20a. Jansson testified that he based the "unacceptable" ratings both on petitioner's speed in sorting and departing the office to deliver mail and on his perception that petitioner was inflexible when asked to fill in at another post office. *Id.* at 3a. Petitioner signed the evaluation form, indicating that she "accepted the review." *Id.* at 3a, 20a.

At the 60-day review, Jansson gave petitioner the same ratings as before but told petitioner that she was improving. Pet. App. 3a. Petitioner refused to sign the

review form based on her view that the ratings were inconsistent with Jansson's statement that she was improving. *Ibid.*

The trial testimony about what happened next is conflicting. According to petitioner, she left Jansson's office because she believed the evaluation meeting was over. Pet. App. 3a-4a. But according to Jansson, petitioner was "pretty upset" and hurriedly "stormed out of the office" while he was discussing "things we can do to help" petitioner. *Id.* at 4a. Jansson's former supervisor corroborated Jansson's recollection by explaining that Jansson consulted him about how to respond to the situation. *Id.* at 11a n.3. Another USPS employee who was outside Jansson's office at the time similarly corroborated Jansson's testimony by testifying that she heard the door slam shut and "got the impression that [petitioner] was upset" when petitioner exited past her. *Ibid.*

Three days later, Jansson terminated petitioner's employment on the ground that she had failed to achieve expectations during her probationary period. Pet. App. 4a. That decision was consistent with the testimony of five current and former supervisory- or managerial-level USPS employees who "testified that they would terminate * * * a probationary employee who walked out of a [performance] review." *Id.* at 11a n.3. The USPS subsequently filled the vacant carrier position with an employee who was 32 years old. *Id.* at 4a.

2. After holding a bench trial, the district court found that petitioner failed to carry her burden of proving age discrimination under the ADEA. Pet. App. 16a-23a. The ADEA includes separate provisions that prohibit age discrimination in private-sector positions, 29 U.S.C. 623(a)(1), and in federal-sector positions, 29 U.S.C. 633a(a). The federal-sector provision provides

that "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age" in certain federal government components, including the USPS, "shall be made free from any discrimination based on age." 29 U.S.C. 633a(a).[1]

The district court explained that a "plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the 'but for' cause of the challenged adverse employment action." Pet. App. 21a (quoting *Gross* v. *FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2352 (2009)). The court added that "[t]he ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age is that age was the 'reason' that the employer decided to act." *Id.* at 22a (quoting *Gross*, 129 S. Ct. at 2350).

The district court then held that petitioner failed to "prove[] by a preponderance of the evidence that her age was the 'but for' cause of her termination" because, the court found, the trial evidence showed that age "was one of many reasons" for petitioner's termination, "including the fact that [petitioner] left her sixty[-]day evaluation" and "was not fast enough" in performing her job. Pet. App. 22a. In other words, petitioner "simply has

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[1] The ADEA's private-sector provision makes it "unlawful for an employer" to take certain employment actions "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). Like its federal-sector counterpart, the private-sector prohibition is limited to age discrimination against individuals who are at least 40 years of age. 29 U.S.C. 631(a).

not shown that her age was *the* reason for her termination." *Ibid.*[2]

3. a. On appeal, petitioner argued that the district court erred in finding that she had failed to "prove by a preponderance of the evidence that her age was the 'but for' cause of her termination." Pet. C.A. Br. 26, 32; see *id.* at 3 (petitioner's statement of the issue for review). Petitioner argued that the but-for "standard announced in *Gross*" and in earlier Tenth Circuit opinions simply required that ADEA plaintiffs prove that "age was the factor that made a difference" in the disputed employment action. *Id.* at 27, 34 (quoting *Jones* v. *Oklahoma City Pub. Schs.*, 617 F.3d 1273, 1277 (10th Cir. 2010)); see also *id.* at 35 ("[T]he relevant inquiry is whether 'age tipped the balance in favor of discharge.'") (citation omitted). Petitioner thus argued that the district court's conclusion that she failed to prove that "her age was *the* reason [i.e., the *sole* reason] for her termination" "misapplied the standard announced in *Gross*." *Id.* at 34 (quoting Pet. App. 22a) (brackets in original). In petitioner's view, focusing on whether age discrimination was "the reason" for her termination was erroneous, because the applicable "'but-for' causal standard" did not require that she prove that "'age was the sole motivating factor in the employment decision.'" *Ibid.* (quoting *Jones*, 617 F.3d at 1277); see *id.* at 27.

Petitioner did not argue that *Gross*'s but-for standard was limited to the ADEA's private-sector prohibitions in Section 623, nor did she argue that the standard of causation under the ADEA's federal-sector provision (Section 633a) was different from the standard in the

[2] The district court underlined the word "the" in its decision as reflected in the text quoted above. The petition appendix mistakenly reproduces that text without that emphasis.

private-sector context. The government accordingly explained that "[b]oth parties agree that the 'but-for' standard, utilized consistently by the Tenth Circuit and recently reaffirmed in *Gross* * * * , is the appropriate standard." Gov't C.A. Br. 27-28. The government then argued that, under that standard, the district court properly found that petitioner failed to prove discrimination based on her age. *Id.* at 28-34. Cf. Pet. C.A. Reply Br. 9-10 (arguing that petitioner established that she was "fired because of her age" and therefore proved that "age was the 'but for' cause of her termination").

b. The court of appeals affirmed without oral argument in an unpublished opinion. Pet. App. 1a-13a.

First, the court of appeals rejected petitioner's contention that the district court erred in its application of "the teachings of *Gross*." Pet. App. 6a. The court of appeals noted that "*Gross* did not change [the court of appeals' earlier] approach in ADEA cases," which had employed a "'but-for' standard" of causation. *Id.* at 7a. The court agreed with petitioner that, under that but-for standard, a plaintiff must simply prove that "'age was the factor that made a difference'" in the challenged decision and need not "show that age was the employer's sole motivating factor." *Ibid.* (quoting *Jones*, 617 F.3d at 1277).

Although the court of appeals agreed with petitioner's understanding of the but-for standard, it concluded that the district court properly applied that standard. Pet. App. 7a-8a. The court of appeals rejected petitioner's contention that the district court's "emphasis on [the word] 'the'" in its statement that petitioner failed to prove "'that her age was *the* reason for her termination'" effectively "required [petitioner] to prove that her age was the sole motivating factor in the termi-

nation" rather than just "the but-for cause." *Id.* at 7a (quoting *id.* at 22a).[3] The court of appeals explained that the "district court properly identified *Gross* as the controlling legal standard" and, immediately before the sentence on which petitioner focused, stated that petitioner failed to prove that "'her age was the "but for" cause of her termination.'" *Id.* at 8a (quoting *id.* at 22a). The court of appeals concluded that "nothing" suggested that "the district court did not understand how to apply the 'but-for' standard" of causation. *Ibid.*

Second, the court of appeals held that the district court's but-for causation finding was not clearly erroneous. Pet. App. 8a-12a. The court agreed with petitioner that the trial record did not support the district court's finding that petitioner's speed in performing her job was one of the reasons for her termination. *Id.* at 10a. But the court of appeals concluded that the district court permissibly resolved the conflicting trial evidence in finding that petitioner's termination was based on her departure in the middle of her 60-day performance review. *Id.* at 10a-12a. In light of that finding, the court of appeals held that "it was not clearly erroneous for [the district court] to find that age was not the but-for cause of [petitioner's] termination." *Id.* at 12a.

c. Petitioner's rehearing petition renewed her contention that she satisfied the but-for causation standard in *Gross* because, in petitioner's view, her "age made the difference in the [challenged] decision." C.A. Reh'g Pet. 6-8. Petitioner thus argued that the district court's conclusion that she "failed to establish that her age was the 'but for' cause of her termination" was "contradicted by

[3] The court of appeals' quotation from the district court's opinion, like the district court opinion itself, underlined the word "the" in the text quoted above. C.A. slip op. 6-7. Cf. note 2, *supra*.

the evidence." *Id.* at 1. The court of appeals denied rehearing. Pet. App. 14a.

ARGUMENT

In *Gross* v. *FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), this Court held that the plaintiff in a private-sector claim under the ADEA must prove that age was the "but-for" cause of the challenged employment action. Petitioner contends (Pet. 2-3, 6-8) that the court of appeals erred by applying the "but for" causal requirement announced in *Gross* to this federal-sector ADEA action under Section 633a. Pet. 2. Petitioner further argues (Pet. 2, 5-8) that the court of appeals' opinion in this regard conflicts with the D.C. Circuit's decision in *Ford* v. *Mabus*, 629 F.3d 198 (2010), reh'g denied (Apr. 18, 2011). This Court's review is unwarranted.

The court of appeals did not decide whether the but-for standard applied to private-sector claims in *Gross* also applies to federal-sector claims under Section 633a. That question was neither pressed nor passed upon below because petitioner accepted on appeal that the but-for causation standard applies to this case. Indeed, petitioner's sole contention below was that she established but-for causation at trial. Although the United States disagrees with the D.C. Circuit's recent interpretation of Section 633a in *Ford*, that interpretation of the ADEA is not yet the subject of any square conflict of authority. This Court's review on the question presented therefore would be premature and, in any event, this case would be a poor vehicle to resolve that question.

1. Review is unwarranted because the question presented was neither pressed by petitioner nor passed upon by the court of appeals. Because this Court sits as

"a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005); see also, *e.g.*, *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009), its "traditional rule * * * precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted); see, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Petitioner provides no reason to depart from that settled practice here.

Before the court of appeals, petitioner accepted that she had the burden of establishing that her age was the "but-for" cause of her termination. She therefore argued on appeal that the district court simply misapplied that but-for standard by demanding that she show that age was the only factor that led to her termination. See pp. 5-6, *supra*. Petitioner made no argument below that the but-for standard of causation should not apply to her federal-sector ADEA claim. Indeed, petitioner failed to cite the ADEA's federal-sector provision in her appellate briefs, let alone argue that the text of Section 633a should be read to reject the but-for standard that applies to claims brought under its private-sector counterpart, see *Gross*, 129 S. Ct. at 2350-2351 (interpreting Section 623(a)(1)). In accordance with her failure to contest the applicability of the but-for standard, petitioner failed to note the D.C. Circuit's *Ford* decision in any post-briefing letter, cf. Fed. R. App. P. 28(j)—even though the decision in *Ford* predated the court of appeals' opinion below by more than three months—or in her subsequent petition for rehearing.

The court of appeals thus had no occasion to decide whether the but-for standard should apply to federal-

sector age-discrimination claims under Section 633a. It instead decided this case in light of the parties' agreement that the but-for standard applied, and it resolved petitioner's contentions under that standard by holding that (1) the district court's application of that standard did not erroneously require petitioner to prove that age was the only motivating factor for her termination, and (2) the district court's factual findings were not clearly erroneous. See pp. 6-7, *supra*; Pet. App. 6a-12a. The court resolved those fact-bound issues in an unpublished opinion, *id.* at 1a n.*, underscoring that it did not purport to resolve any enduring legal question that might bind a future appellate panel, 10th Cir. R. 32.1(A), or warrant this Court's review.[4]

2. Petitioner errs in contending (Pet. 2, 5-8) that the court of appeals' opinion conflicts with the D.C. Circuit's opinion in *Ford*. *Ford* held that a federal-sector ADEA plaintiff—unlike a private-sector ADEA plaintiff—can establish liability under Section 633a by showing that "age was *a* factor in the challenged personnel action," even if age is not the "but-for cause of [that] action." 629 F.3d at 206 ("emphasiz[ing] that the consideration of age must have some connection to the challenged personnel action"). But nothing in the court of appeals' decision in this case indicates that it considered that ques-

[4] In observing that "*Gross* did not change [the court of appeals' prior] approach in ADEA cases," the court of appeals cited a single ADEA decision in a private-sector lawsuit brought under 29 U.S.C. 623(a)(1). Pet. App. 7a (citing *Jones*, 617 F.3d at 1277). That citation reinforces that the court did not consider whether the same standard should apply under Section 633a. In fact, the court of appeals erroneously cited the ADEA's private-sector provision, 29 U.S.C. 623(a)(1), as the basis for petitioner's claim, Pet. App. 2a, highlighting that the court never focused on the unargued contention that ADEA claims under Section 633a should be governed by a different standard of causation.

tion, much less rendered a holding in conflict with *Ford* (which the court of appeals did not cite in its opinion below). See pp. 9-10 & n.4, *supra*.

The United States disagrees with *Ford*'s holding and it therefore has argued in other courts that the federal-sector ADEA plaintiffs, like private-sector plaintiffs, must prove that age was the but-for cause of a disputed employment decision. See, *e.g.*, Gov't C.A. Br. at 27-33, *Fuller* v. *Panetta*, No. 11-40013 (5th Cir. Mar. 21, 2011) (available at 2011 WL 2130022) (argued Nov. 8, 2011); cf. Gov't Pet. for Reh'g at 4-13, *Ford*, *supra*, No. 09-5041 (D.C. Cir. Feb. 14, 2011) (arguing that the panel decision was wrongly decided). But no other court of appeals has yet issued a post-*Gross* decision that addresses whether the but-for standard applied in *Gross* to private-sector ADEA claims also applies to federal-sector ADEA claims. Cf. *Velazquez-Ortiz* v. *Vilsack*, 657 F.3d 64, 74 (1st Cir. 2011) (noting that the government briefed that question but finding it unnecessary to resolve it in order to dispose of the appeal). This Court's review of the question presented by petitioner therefore would be premature.

3. Section 633a(a) is best read to require federal-employee plaintiffs to prove that age was the but-for cause of the challenged employment action. Section 633a(a) provides that "[a]ll personnel actions affecting [federal] 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). The phrase "discrimination based on age" itself contemplates that age be the but-for cause of the personnel action. In common parlance, "'based on' indicates a but-for causal relationship and thus a necessary logical condition." *Safeco Ins. Co. of Am.* v. *Burr*, 551

U.S. 47, 63 (2007) (*Safeco*). Although the ADEA's private-sector provision is framed in terms of prohibiting "discriminat[ion] * * * because of" age, 29 U.S.C. 623(a)(1), rather than "based on" age, 29 U.S.C. 633a(a), both "because of" and "based on" carry the same meaning in this context. See *Safeco*, 551 U.S. at 64 & n.14 (explaining that provision of Fair Credit Reporting Act continued to carry the same meaning even though its language changed from "because of" to "based on"); see also *Gross*, 129 S. Ct. at 2350 (citing *Safeco* for proposition that "the statutory phrase, 'based on,' has the same meaning as the phrase, 'because of'").

Petitioner's focus (Pet. 7-8) on the word "any" in the statutory phrase "free from any discrimination based on age," 29 U.S.C. 633a(a), does not undermine that conclusion. "Any" emphasizes that Congress proscribed all forms of "discrimination based on age" in federal personnel actions affecting employees older than 40. Section 633a(a), for instance, prohibits "retaliation for complaining about age discrimination" as one type of discrimination based on age. *Gomez-Perez* v. *Potter*, 553 U.S. 474, 487-488 (2008). The word "any" thus ensures Section 633a captures all forms of "discrimination based on age" without altering the meaning of "discrimination based on age."[5]

It would make little sense to read the ADEA as applying a different standard of causation for federal- and

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[5] Nothing in *Gomez-Perez* suggests that the requisite causal nexus under Section 633a differs from that under the ADEA's private-sector provision. *Gomez-Perez* described Section 633a(a) as "broad," but it did so because Section 633a(a), like the federal-sector provision of Title VII on which Section 633a(a) was modeled, contains a "broad prohibition of 'discrimination,' rather than a list of specific prohibited practices." 553 U.S. at 487.

private-sector plaintiffs. If a government agency would have taken the same personnel action regardless of a plaintiff's age, there is no sound reason for imposing liability simply because age might have been a non-determining factor in the decision. "[A]ge, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment," *Smith* v. *City of Jackson*, 544 U.S. 228, 240 (2005), and when Congress enacted the ADEA, it was well "aware that there were legitimate reasons as well as invidious ones for making employment decisions on age." *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 587 (2004). The contention that Congress intended to impose ADEA liability any time a decisionmaker considers age as a factor—even if that consideration has no effect on the ultimate employment decision—is inconsistent with that understanding. It is also inconsistent with Section 633a's legislative history, which reflects Congress's intent to provide "the same protections against arbitrary employment based on age" available to employees in the private sector. See, *e.g.*, 120 Cong. Rec. 8768 (1974) (statement of Sen. Bentsen).

Before *Ford*, the courts of appeals—including the D.C. Circuit—generally understood the substantive scope of the ADEA's private-sector and public-sector provisions to be essentially equivalent. See, *e.g.*, *Baqir* v. *Principi*, 434 F.3d 733, 744 (4th Cir.) ("[W]e have recognized that, in order to prove an ADEA illegal discharge claim against the federal government, a plaintiff must make the same showing as would be required against a private employer."), cert. denied, 549 U.S. 1051 (2006); *Cuddy* v. *Carmen*, 694 F.2d 853, 856 (D.C. Cir. 1982) (the federal-sector provision "did not change

the standard for establishing an ADEA violation, but simply extended the procedures and remedies available for vindicating age discrimination claims to employees of and applicants to the federal government"). If the courts of appeals adhere to that view in the wake of *Gross*—and notwithstanding the D.C. Circuit's contrary decision in *Ford*—this Court's review may become warranted in an appropriate case in the event of a square division of authority. There is no warrant for granting review at this time, however, particularly in a case in which the question raised by the petition was neither pressed nor passed upon below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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