No. 06-1321

IN THE
SUPREME COURT OF THE UNITED STATES

MYRNA GOMEZ-PEREZ,
Petitioner,

v.

JOHN E. POTTER, POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE,
Respondent.

On Writ of Certiorari To The
United States Court of Appeals
For the First Circuit

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1/]

AARP is a nonpartisan, nonprofit membership organization of people age 50 or older dedicated to addressing the needs and interests of older Americans. AARP supports the rights of older workers and strives to preserve the legal means to enforce such rights. Almost half of AARP's more than 39 million members are in the work force, and many of them work in various states across the nation as federal employees. AARP's working members, including those in the federal work force, are protected by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, by Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, *et seq.*, and as well as by other federal and state employee rights laws. Vigorous enforcement of the ADEA, Title VII and other workplace civil rights laws is of paramount importance to AARP, its working members, and millions of other workers of all ages who rely on such laws to deter and remedy illegal employment discrimination, including discriminatory retaliation against older workers who file ADEA claims.

SUMMARY OF ARGUMENT

The decision of the First Circuit that the ADEA does not protect federal employees from "discrimination" in the form of retaliation, and affirming summary judgment against Petitioner-Plaintiff Myrna Gomez-Perez, should be reversed because that ruling cannot be reconciled with multiple

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[1/] This Brief of *Amicus Curiae* AARP in Support of Petitioner is filed with the consent of both parties. In compliance with Rule 37.6 of this Court, *amicus curiae* AARP states that no counsel for any party authored this brief in whole or in part, and further, that no party or entity other than AARP made a monetary contribution to the preparation or submission of this brief.

decisions of this Court, with the text or legislative history of the ADEA's federal-sector provision, 29 U.S.C. § 633a, or with numerous federal appellate decisions under § 633a and the federal-sector provision of Title VII, 42 U.S.C. § 2000e-16(a). Affirming the decision below would deny the federal workforce effective recourse against age discrimination, contrary to the intent of Congress.

The decision below is inconsistent with at least four decisions of this Court. In the first, *Lehman v. Nakshian*, 453 U.S. 156 (1981), the Court recognized that § 633a was modeled on § 2000e-16(a) of Title VII, which uniformly has been recognized to include a cause of action for retaliation. The second, *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), in which the Court found retaliation to be encompassed within the broad prohibition of discrimination in Title IX of the Education Amendments of 1972, is discussed in detail in Petitioner's Brief, and that discussion will not be repeated here. Third, the First Circuit's decision defies the Court's unanimous finding in *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006), that a robust retaliation remedy is essential to effective implementation of federal employment bias laws. The last of the four decisions, like the first, deals specifically with the rights of federal employees. This Court's ruling in *Brown v. GSA*, 425 U.S. 820 (1976), belies the Government's contention that it is sensible to conclude that Congress intended federal employees only to have a limited remedy for retaliation related to challenging age discrimination, and further, that Congress meant for federal workers only to seek such relief in proceedings separate from those available under the ADEA.

Section 2000e-16(a) of Title VII contains a broad discrimination ban, nearly identical to the ADEA's federal sector provision, § 633a, that also was enacted close in time to § 633a, as well as to Title IX. As found by the Court in *Jackson*, at that time

Congress understood that its general prohibition against discrimination included, and indeed, its effectiveness depended on, a cause of action for retaliation because of the decision establishing this principle in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). Thus, in 1972, Congress embraced this approach when it enacted Title IX and § 2000e-16(a), and began work on legislation that became § 633a in 1974, based on parallel language in § 2000e-16(a).

The Court of Appeals erred in systematically undervaluing the correspondence, identified in *Lehman*, between the federal-sector provisions of the ADEA and Title VII. The court below concluded incorrectly that *Lehman's* refusal to recognize a right to trial by jury for federal employees likewise requires denying their retaliation claim. But different considerations are relevant to a right to trial by jury than are germane to the retaliation remedy Petitioner rightly claims. Similarly, the First Circuit misconstrued § 633a(f) of the ADEA as disfavoring a retaliation claim under § 633a(a). Properly understood, that provision precludes the Government's argument, also embraced by the Court of Appeals, that the private-sector provisions of the ADEA, which specifically authorize relief from discrimination in the form of reprisal, demonstrate that Congress intended to exclude such a claim from § 633a, simply because the latter only generally prohibits all discrimination on the basis of age.

This Court's decisions, as well as the text and history of Title VII and the ADEA, support the proposition that Congress intended to prohibit retaliation when it mandated that federal employees "be free from *any discrimination*" in both § 633a and § 2000e-16(a) (emphasis supplied). Federal regulations and longstanding EEOC enforcement efforts, as well as prior litigation positions of the Government itself, all confirm this view.

Stripping a retaliation claim from § 633a would cause that law to fail its broadly-worded purpose: to protect federal workers against age discrimination in all its forms. The potential adverse impact throughout the federal work force of a decision forbidding federal-sector ADEA retaliation claims is enormous. The decision below should be reversed.

ARGUMENT

I. INTERPRETING SECTION 633a OF THE ADEA TO EXCLUDE A CLAIM FOR RETALIATION IS FUNDAMENTALLY INCONSISTENT WITH *LEHMAN V. NAKSHIAN,* WHICH IDENTIFIED THE FEDERAL SECTOR PROVISION OF TITLE VII AS THE MODEL FOR PROTECTION OF FEDERAL EMPLOYEES FROM AGE BIAS.

As originally enacted in 1967, the ADEA barred discrimination against older workers in private employment only. Then in 1974 Congress amended the definitions section of the ADEA, § 630, to include state and local government employees under the protections of § 623,[2/] and also added § 633 to extend the ADEA's substantive provisions to federal employees.[3/] Section 623 lists several specific forms of workplace discrimination, including discrimination against employees who oppose unlawful practices or participate in anti-discrimination proceedings; Section

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[2/] *See* Nondiscrimination on Account of Age in Federal Government Employment, Pub. L. No. 93-259, § 28(a)(2), 88 Stat. 55, 78 (1974) (codified in 29 U.S.C. § 633a (2000)).

[3/] *See id.* § 28(b)(2).

633a simply provides that federal employees "shall be made free from any discrimination based on age."[4/]

At the Government's urging, the First Circuit found that "[t]he absence of statutory language providing a claim for retaliation in § 633a, when compared with the explicit prohibition on retaliation in § 623(d)," inexorably "leads to the conclusion that if Congress had meant to provide for both [*i.e.*, separate discrimination and retaliation] causes of action, it would have said so explicitly in § 633a." Pet. App. 5a, 8a. *See also, e.g.*, Brief for the Respondent in Opposition, *Gomez-Perez v. Potter*, No. 06-1321 (U.S. July 24, 2007) ("Opp'n Cert."), 2007 WL 2126023, at *7 (asserting that "while the ADEA's private sector provisions prohibit both discrimination ... and retaliation ..., the federal sector provision reaches only discrimination ...").

This superficial reading of § 633a relies on inapt comparisons of that law with other civil rights statutes and is at odds with multiple decisions of this Court. In particular, it clashes with key portions of *Lehman v. Nakshian*, 453 U.S. 156 (1981), the Court's most informative ruling construing § 633a, in which the Court explained that § 633a was modeled on 42 U.S.C. § 2000e-16, a nearly identical, broadly-worded

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[4/] Section 633a(a) of the ADEA states, in pertinent part:

> All personnel actions affecting employees or applicants for employment who are at least 40 years of age … in executive agencies, … in the United States Postal Service …, [and in various other Federal military and civilian services], shall be made free from any discrimination based on age.

29 U.S.C. § 633a(a) (2000).

statute protecting federal employees from "any discrimination" in the workplace.

The principal effect of the Government's and court below's employment of misconceived analogies between § 633a and other laws is to unfairly diminish the relevance of this Court's two recent decisions discussing retaliation remedies. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005), and *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006). Finally, the Government's approach to interpreting § 633a clashes with *Brown v. GSA*, 425 U.S. 820 (1976), a major decision of this Court under § 2000e-16 of Title VII and thus, directly relevant to this case under the Court's analysis in *Lehman*. In *Brown*, the Court held that the federal-sector provision of Title VII, the model for § 633a, is a comprehensive remedial regime, not to be limited by other, parallel, federally-created avenues for relief. *Id.* at 835. It follows that § 633a is similarly comprehensive and encompasses a cause of action for retaliatory discrimination[5/].

[5/] The Government also argues that, due to remedies created by other laws, § 633a "does not leave [federal employees] who complain of age discrimination without protection against retaliation." Opp'n Cert., 2007 WL 2126023, at ** 8-9. On this key point, Petitioner supplies a strong rebuttal, demonstrating the United States' failure to account for serious flaws inherent in such alternative remedies, and Congress' intent to preserve access to a retaliation claim under § 633a. *See* Brief of Petitioner at 22-28, *Gomez-Perez v. Potter*, No. 06-1321 (U.S. Nov.13, 2007) ("Br. Pet'r"). *Amicus Curiae* AARP thus does not address this issue.

A. This Court Already Has Recognized that Title VII's Federal Sector Provision, 42 U.S.C. § 2000e-16, Not the Private Sector Provisions of Either the ADEA or Title VII, Is the Proper Model for Interpreting ADEA's Federal Sector Provision, § 633a.

The First Circuit's fundamental error in this case appears in its faulty framing of the question presented: "Did Congress mean 'discrimination' and 'retaliation' when it said 'discrimination'" in § 633a of the ADEA?" Pet. App. 5a. Based on its conception of "retaliation" as distinct from "discrimination," the Court of Appeals never adequately considered the weight of authority treating "retaliation" as one of many forms of "discrimination,"and thus, as encompassed within the term "any discrimination" in § 633a. Rather, the First Circuit focused on inapt comparisons between § 633a and the private sector provisions of the ADEA and Title VII, and gave short shrift to this Court's conclusion, in *Lehman v. Nakshian*, 453 U.S. 156 (1981), that a different initial guidepost is appropriate for interpreting the meaning of § 633a: the federal-sector provision of Title VII, 42 U.S.C. § 2000e-16.

In *Lehman*, this Court considered employment discrimination claims by Alice Nakshian, "a 62-year-old civilian employee of the United States Department of the Navy," under § 633a of the ADEA. *Id.* at 158. In construing § 633a the *Lehman* Court examined the text and legislative history of the federal sector provisions of the ADEA and Title VII, and held that §§ 633a(a) and (b) of the ADEA "are patterned directly after" 42 U.S.C. §§ 2000e-16(a) and (b), "which extend Title VII protections to federal employees." 453 U.S. at 167 n.15. The *Lehman* Court specifically recognized that this correspondence extends to the substantive scope of the anti-discrimination guarantees of the two

laws.[6/] Indeed, the Court acknowledged that Section 717(a) of Title VII, 42 U.S.C. § 2000e-16(a), mandates protection from employment discrimination for most federal workers in terms nearly identical to that of § 633a of the ADEA.[7/]

Remarkably, the First Circuit cited this critical passage in *Lehman*, acknowledging that § 633a was modeled on § 2000e-16. The Court of Appeals also conceded that Congress intended for 42 U.S.C. § 2000e-16, the provision applicable to federal employees, to prohibit retaliation. Pet. App. 9a (citing, *e.g.*, *Ayon v. Sampson*, 547 F.2d 446, 450 (9th Cir. 1976)). Yet in doing so, the Court of Appeals failed to fully account for the weight of authority it went on to ignore. That is, the First Circuit declined to address the clear implications for § 633a of "well-settled" precedent that Title VII provides a retaliation claim for federal employees. *Rochon v. Gonzales*, 438 F.3d 1211, 1215 (D.C. Cir. 2006) (reaffirming the longstanding view[8/] of the appeals court most familiar with federal employee rights litigation that Title VII

[6/] "Senator Bentsen acknowledged that '*[t]he measures used to protect Federal employees [from age discrimination]* would be substantially similar to those incorporated' in recently enacted amendments to Title VII." *Lehman*, 453 U.S. at 167 n.15 (citing 118 Cong. Rec. 24397 (1972)) (emphasis supplied).

[7/] It mandates that "[a]ll personnel actions affecting employees [in most entities of the federal government] shall be made free of any discrimination" on the basis of the protected characteristics generally regulated by Title VII: race, color, religion, sex and national origin. 42. U.S.C. § 2000e-16(a). *Compare supra* n. 4.

[8/] *Barnes v. Small*, 840 F.2d 972, 976 (D.C. Cir. 1988); *Ethnic Employees of the Library of Congress v. Boorstin,* 751 F.2d 1405, 1415 & n.13 (D.C. Cir. 1985)*; Clark v. Marsh*, 665 F.2d 1168, 1171 n. 1 (D.C. Cir. 1981).

protection for federal employees against "any discrimination" includes a cause of action for retaliation) (citing *Bd. of County Comm'rs*, *Fremont County, Colo. v. EEOC,* 405 F.3d 840, 845 (10th Cir. 2005)); *accord Afanador v. U.S. Postal Serv.*, 787 F. Supp. 261, 267 & n.11 (D. P.R. 1991), *aff'd*, 976 F.2d 724 (1st Cir. 1992); *Hale v. Marsh*, 808 F.2d 616, 619-20 (7th Cir. 1986)*; Porter v. Adams*, 639 F.2d 273, 277-78 (5th Cir. Unit A 1981); *White v. GSA*, 652 F.2d 913, 917 (9th Cir. 1981).[9/]

The Court of Appeals also discussed briefly *Forman v. Small*, 271 F.3d 285 (D.C Cir. 2001). *See* Pet. App. 8a, 9a. But it failed to engage *Forman*'s explicit reasoning that *Lehman*'s analysis of the historical link between § 633a and § 2000e-16, and of their "identical language," dictates that they "should be interpreted consistently." 271 F.3d. at 297. Nor did the court below confront *Forman*'s conclusion that § 633a should be read to include a cause of action for retaliation given consistent rulings that the "sweeping language" prohibiting "any discrimination" in § 2000e-16 means that the latter "includes a claim for retaliation." *Id.* Yet that result is the logical endpoint in this case of the Court's construction of § 633a in *Lehman*.[10/]

[9/] *See also Bornholdt v. Brady*, 869 F.2d 57, 62 (2d Cir. 1989) (declining to reach issue, yet "inferr[ing]" from broad language of § 633a, requiring federal workers to "be free from any discrimination based on age," and corresponding text in Title VII, that retaliation is discrimination barred by § 633a).

[10/] *Lehman* also supports Petitioner's assertion that "the logic th[is] Court used in *Jackson* [*v. Birmingham Board of Education*, 544 U.S. 156 (2004)] to find ... a retaliation cause of action ... [in] a statute [that] prohibit[s] only 'discrimination' [*i.e.*, Title IX] is equally applicable to the ADEA." Pet. App. 6a.

Instead of following the logic of *Lehman* in construing § 633a, however, the Court of Appeals instead embarked on a seemingly random stroll through several of this Court's decisions regarding other civil rights laws. The court considered significant certain contrasts between § 633a and the private sector-provision of Title VII. Pet. App. 5a-6a (discussing *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. at 2412, and *Jackson*, 544 U.S. at 173 ("The Court specially noted this difference [between Title IX and the private sector provision of Title VII] in rejecting comparisons between Title IX and Title VII")). The First Circuit also discussed distinctions between § 633a and § 623. Pet. App. 7a-8a. And it suggested divergence between the means of enforcing Title IX and § 633a, *id.* 6a-7a, as well as § 633a and § 2000e-16 of Title VII, *id.* 9a-10a. Yet the Court of Appeals never squarely assessed the implications of *Lehman*'s analysis of the important *parallels* between the latter two statutes, or of other evidence of *correspondence* between § 633a and § 2000e-16(a). Nor did the court carefully examine *convergence* between § 633a and Title IX, strongly supported by the language of *Jackson*.[11/] This Court should avoid the unwarranted detours taken by the Court of Appeals, follow *Lehman* to its natural end, and reverse the decision below.

[11/] While the First Circuit strained to discern esoteric "contrast" between § 633a and Title IX, it dismissed offhandedly that § 633a bars "any discrimination" on the basis of age, much like Title IX bars "discrimination" based on sex.

B. Parallel Interpretation of the Federal Sector Provisions of the ADEA and Title VII Strongly Favors Recognizing that Protection from "Any Discrimination" in § 633a Includes a Cause of Action for Retaliation.

At least two important propositions flow from the close connections between the federal sector provisions of the ADEA and Title VII identified in *Lehman*. First, linkage between the two statutes, both textually and temporally, powerfully reinforces Petitioner's contention that the *Jackson* Court's conclusions regarding a Title IX retaliation claim apply with still greater force to § 633a. Second, the affinities between the statutes should dispel confusion sown by efforts of the Government and the First Circuit to compare § 633a with dissimilar, more distant relatives, such as the private-sector provisions of the ADEA and Title VII.

1. *Lehman* and *Jackson*

Lehman recounts how in 1972, during the period Congress undertook to extend Title VII to federal employees, it also began working to broaden the ADEA to cover federal workers.[12/] Later the same year, following on the heels of final enactment of a federal sector Title VII law, Congress first considered proposed revised ADEA legislation, specifically based on the Title VII amendments. In 1974, this revised

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[12/] "[The] bill introduced by Senator Bentsen on March 9, 1972, S.3318, 92d Cong., 2d Sess., 118 Cong. Rec. 7745 (1972), represented the first attempt to prohibit age discrimination in federal employment." 453 U.S. at 166 n.14.

federal-sector ADEA proposal ultimately became law as § 633a.[13/]

During this same fertile period for civil rights legislation, as this Court recounted in *Jackson*, Congress enacted Title IX. It follows from the nearly contemporaneous consideration and enactment of Title IX, § 633a of the ADEA and § 717(a) of Title VII, in the wake of *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), that the Court here should apply *Jackson*'s conclusion that the similar "context" of the early 1970's demands recognition of retaliation as part of § 633a's broadly-worded congressional prohibition of "discrimination." 544 U.S. at 176-77.

Taken together, *Lehman* and *Jackson* present a far more powerful case than either does individually that § 633a of the ADEA should be read to encompass a cause of action for retaliation. This Court's acknowledgment of an unusually clear record of congressional purpose in these decisions more than two decades apart should weigh strongly in favor of the Court ruling for Petitioner.

[13/] "Senator Bentsen subsequently submitted a revised version of his bill in the form of an amendment to pending FLSA amendments. See 188 Cong. Rec. 15894 (1972). In contrast to [his] original bill, this amendment to the ADEA proposed ... coverage of federal employees ... by the addition of an entirely new and separate section to the Act (presently § 15). [This] amendment was included in the FLSA bill reported by the Committee on Labor and Public Welfare, S.Rep. No. 92-842, pp. 93-94 (1972), and it remained in this form when the bill was enacted into law in 1974." *Lehman*, 453 U.S. at 166 n.14. *See id.* at 167 n.15 ("Sections 15(a) and 15(b) of the ADEA, as offered by Senator Bentsen and as finally enacted, are patterned directly after §§ 717 (a) and (b) of the Civil Rights Act of 1964, as amended in March 1972, see Pub. L. 92-261, 86 Stat. 111-112, which extend Title VII protections to federal employees.").

Parallels between the federal sector provisions of the ADEA and Title VII also answer misguided suggestions by the Government, and to a lesser degree the First Circuit, that *Jackson*'s comparison of Title IX and the *private sector* provisions of Title VII renders *Jackson* inapplicable to § 633a. At the Petition stage, the Government argued

> Petitioner seeks to extrapolate from *Jackson* the rule that any prohibition against discrimination based on a particular characteristic necessarily carries with it a prohibition against retaliation against a person who complains of that ... discrimination, regardless of the statutory scheme at issue ... *Jackson*, however, ... noted that Title VII's prohibition against discrimination by private employers ... does not encompass protection against retaliation, ... a point this Court reaffirmed in *Burlington* [*Northern v. White*, 126 S. Ct. 2405 (2006)].

Opp'n Cert., 2007 WL 2126023, at *10. Yet Petitioner neither initially, nor at the merits stage, has argued for such a rule.

2. *Lehman* and *Burlington Northern*

The *Lehman* principle, that § 633a is best viewed through the lens of § 2000e-16 of Title VII, likewise refutes the First Circuit's reliance on *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006), for the proposition that retaliation and discrimination are two distinct creatures, only the latter of which is prohibited by § 633a. *See* Pet. App. 5a (citing *Burlington Northern*, 126 S. Ct. at 2412). That is, there is no reason to believe Congress intended to restrict federal employees encountering retaliatory age discrimination from pursuing an ADEA claim based simply on a negative inference founded on the private sector provisions of the ADEA, much less based on such an inference

deriving from *Burlington Northern*'s analysis of the private sector provisions of Title VII. In any event, the Court of Appeals' reliance on *Burlington Northern* is especially odd given its recognition that Congress intended Title VII's federal sector provision to protect federal workers from retaliation to the same extent as Title VII's private sector provisions protect private employees. Pet. App. 9a (quoting *Ayon v. Sampson*, 547 F.2d at 450).[14/]

C. Judicial Recognition of a Retaliation Claim under GERA, Another Federal Statute Protecting Federal Employees from "Any Discrimination," Favors this Court's Recognition of a Retaliation Claim under Section 633a.

The Government Employee Rights Act of 1991, or "GERA," *see* Pub. L. No. 102-66, §§ 301 *et seq.,* 105 Stat. 1088, is another law like § 633a, modeled on the federal sector provision of Title VII, and further demonstrates that the Government's cramped approach to protection from retaliation for federal employees under the ADEA threatens to disturb settled legal principles, defy Congress' intent, and disrupt sensible reliance on Title VII as a guide for interpreting federal employment bias laws.

GERA added to Title VII coverage for certain previously exempt presidential appointees, congressional staff and state employees. *See Bd. of County Comm'rs*, *Fremont County, Colo. v. EEOC,* 405 F.3d at 844 & n.2. Like § 633a of the ADEA and §

[14/] *Accord Hale v. Marsh,* 808 F.2d at 619; *White v. GSA*, 652 F.2d at 913. This authority further undermines drawing a negative inference regarding a § 633a retaliation claim based on § 623. If anything, Title VII precedent supports an opposite inference, that § 633a was intended to include key protections afforded by § 623, including a cause of action for retaliation.

717(a) of Title VII, GERA simply declares that "[a]ll personnel actions" affecting covered employees "shall be made free from any discrimination," without separately addressing discrimination in the form of retaliation. 42 U.S.C. § 2000e-16b(a). GERA adds, like this Court declared of § 633 in *Lehman*, that such protection shall be undertaken "within the meaning of section 2000e-16 of [Title VII]." *Freemont County*, 405 F.3d at 844. (quoting 42 U.S.C. § 2000e-16b(a)(1)). *Fremont County* upheld an EEOC rule, 29 C.F.R. § 1603.102(a), establishing that GERA encompasses a cause of action for retaliation, in furtherance of its broadly-worded purpose to protect covered employees from discrimination. *Id.* at 845. The Tenth Circuit deferred to EEOC's interpretation, *see id.* at 846-47 (applying *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)), in an analysis that calls out for reversal of the First Circuit in this case.

Fremont County found persuasive legislative record evidence that GERA, like § 633a, was "modeled after the language of [§ 2000e-16(a) of] Title VII." *Id.* at 846. Thus, the Tenth Circuit concluded, like the *Forman* court, that "to include prohibitions against retaliatory discrimination is consistent with judicial interpretations of Title VII." *Id.* The Court of Appeals cited *Jackson*, in which, it noted, this Court "interpret[ed] similar language under Title IX [and] held that because retaliation is 'intentional discrimination' ... 'retaliation falls within the statute's prohibition of intentional discrimination ... .'" *Id.* at 845 (citing *Jackson*, 544 U.S. at 167). *Fremont County* also relied on lower court rulings embracing an approach directly applicable to § 633a. *See id.* (citing *Brazoria County v. EEOC*, 391 F.3d 685 (5th Cir. 2004) for the proposition that "because § 2000e-16 bars retaliation and § 2000e-16b(a)(1) incorporates § 2000e-16, GERA makes retaliation, within the meaning of [§ 2000e-16], unlawful"); *Haddon v. Executive Residence at the White House*, 313 F.3d 1352, 1356-57 (Fed. Cir.

2002) ("It is quite sensible to conclude that Congress intended for GERA's § 2000e-16b ... to include reprisal").

Recognition of a retaliation claim under GERA further supports an inference that *Lehman* - *i.e.*, its holding that § 633a is modeled on Title VII protections for federal employees - calls for the Court to approve a federal-sector retaliation claim under the ADEA.

D. Requiring Federal Employees to Rely on Non-ADEA Retaliation Remedies Is Inconsistent with the Federal Sector Provision of Title VII, and thus, with Section 633a.

In *Brown v. GSA*, 425 U.S. 820 (1976), this Court determined that § 717 of Title VII (42 U.S.C. § 2000e-16) established an "exclusive judicial remedy for claims of discrimination in federal employment" based on protected employee characteristics covered by Title VII. *Id.* at 835. The majority opinion recounted at length Congress' conclusions that prior to the 1972 Title VII amendments, for federal employees, "administrative remedies [for workplace discrimination] were ineffective" and "judicial relief ... was even more problematic." *Id.* at 826; *see id.* at 828 ("federal employees who were treated discriminatorily had no effective judicial remedy"). *Brown* specifically noted defects in remedial efforts by the Civil Service Commission, and impediments to effective relief via causes of action "under the Administrative Procedure Act and the Mandamus Act." Id. at 826.[15/] As a result,

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[15/] *See Bunch v. United States*, 548 F.2d 336, 339 (9th Cir. 1977) (citing Senate Special Comm. on Aging, "Improving the Age Discrimination Law" 93d Cong., 1st Sess. 14, 17-18 (Comm. Print. 1973)) (stressing that "[t]he [federal government's] age discrimination policy like the antidiscrimination policy of Title VII, was seriously hampered

the Court held that "congressional intent in 1972 was to create an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination." *Id.* at 829.[16/]

While this Court need not address the issue of the ADEA's exclusivity, and its preclusion of federal employees' access to other federal statutory remedies, *Brown* supports the proposition that § 633a of the ADEA, which this Court has deemed to be based on § 717(a) of Title VII, is likewise "comprehensive" and premised on the inadequacy of remedies for employment discrimination enforced by such entities as the Civil Service Commission. It follows that like § 717(a), §633a of the ADEA should be read to encompass a cause of action for retaliation in cases of age discrimination in federal employment. *Accord Davis v. Passman*, 442 U.S. 228, 247 n.26 (1979); *Kotarski v. Cooper*, 799 F.3d 1342, 1345 (9th Cir. 1986) (Title VII retaliation claim); *White v. GSA*, 652 F.2d 913, 917 (9th Cir. 1981) (same).

E. The Government's Efforts to Diminish the Significance of the *Lehman* Principle Are Without Merit.

While *Lehman* provides critical guidance for interpreting § 633a in this case, *Lehman* is not controlling in all respects. In addition to establishing

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by the lack of any effective enforcement machinery prior to the [1974 addition of § 633]").

[16/] The dissent in *Brown* challenged the notion that § 717 created an "exclusive" remedial scheme, *id.* at 838, but agreed that Congress in 1972 "enacted a comprehensive remedial statute," which, they argued, "was supplementary to [and not pre-empted by] whatever remedies might exist" under other federal or state laws, *id.* at 835.

the importance of § 2000e-16 of Title VII to construing § 633a, *Lehman* provides insight as to the meaning of § 633a(f), which the Government and the court below misread as favoring the Postal Service in this case. *See* Pet. App. 9a-10a. On the other hand, *Lehman*'s specific holding, denying federal employees' right to a trial by jury, does not assist the Court in resolving this case, notwithstanding the Government's contentions to the contrary.

In *Lehman,* the D.C. Circuit held that Alice Nakshian was entitled to a jury trial, as she would have been under the ADEA's private sector provisions. This Court then reversed. *See* 453 U.S. 18-60, 169. The Government asserts, and the court below opined, that *Lehman*'s ruling on the jury trial question should lead the Court to conclude that a retaliation remedy - which likewise is expressly referenced in ADEA's private sector provision - should not be recognized under § 663a for federal employees. This is unfounded hyperbole.

This Court concluded in *Lehman* that the jury trial entitlement afforded by the ADEA's private sector provision is not available to federal workers. But in reaching this result, the Court stressed particular considerations applicable to congressional creation of a right to a jury trial.[17/] In addition, the *Lehman* Court

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[17/] *See Lehman*, 453 U.S. at 161 ("When Congress has waived the sovereign immunity of the United States, it has almost always conditioned that waiver upon a plaintiff's relinquishing any claim to a jury trial"); *id.* at 162 ("The appropriate inquiry, therefore, is whether Congress clearly and unequivocally departed from its usual practice in this area, and granted a right to trial by jury when it amended the ADEA"); *accord id.* at 166-67 ("Congress deliberately prescribed a distinct statutory scheme applicable only to the federal sector, and one based not on the FLSA but as already indicated, on Title VII, where,

disavowed the reasoning advanced by the Government and the First Circuit in this case. That is, based on § 633a(f)[18] the Court declined to rule that a right to jury trial cannot be based on § 633a simply because such a right is explicitly granted by the ADEA's private sector provision, but is not mentioned in § 633a. *Lehman*, 453 U.S. at 168.

The court below concluded, and the Government here argues, that § 633a(f) precludes federal workers from asserting a retaliation claim under § 633a(a), and thus, that in this respect, the federal-sector provisions of the ADEA and Title VII many not be applied in parallel fashion as *Lehman* found to be appropriate. *See* Opp'n Cert., 2007 WL 2126023, **2, 7. This contention likewise lacks persuasive force or authoritative support.

The First Circuit erred in declaring Congress' purpose in enacting Section 633a(f) was to prevent the Act's "e*xpansive* private-sector provisions" from being "extended to federal employees." Pet. App. 10a (emphasis supplied). This Court said no such thing in *Lehman*. Indeed, the legislative report relied on by the *Lehman* Court, in discussing § 633a(f), indicates the opposite is true: that is, Congress intended to make sure protections for federal employees against age discrimination were not eroded by "[r]estrictions and limitations" set forth elsewhere in the ADEA, including in its provisions governing actions against private

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unlike the FLSA, there was no right to trial by jury" (citations omitted)).

[18]"Any personnel action of any department, agency, or other entity referred to in subsection (a) of the section shall not be subject to or affected by, any provision of this Chapter." 29 U.S.C. § 633a(f).

employers. H.R. Rep. No. 95-527, pt 1. at 11, (1977);[19] *see Lehman*, 453 U.S. at 168 (citing same).

The D.C. Circuit has correctly observed that Congress enacted § 633a(f) in 1978, under circumstances that in no way "suggest[] that it was intended to limit the broad coverage of § 633a that was originally intended." *Forman*, 271 F.3d at 298. When Congress created § 633a(a) in 1974, it "used unqualified language that encompasses a claim of retaliation because 'analytically a reprisal for an age discrimination charge is an action in which age bias is a substantial factor.'" *Id.* at 296 (quoting *Siegel v. Kreps*, 654 F.2d 773, 782 n.43 (D.C. Cir. 1981)). And "the 1978 amendments imposed *more stringent* requirements upon the federal sector than the private sector," not less. *Id.* at 298 (emphasis supplied). That is, for example, "[i]n amending the ADEA in 1978, Congress eliminated the upper age limit for federal employees in order to *effectively end* mandatory retirement in the federal sector in most instances, whereas it merely increased the coverage from 65 to 70 for private employers, [thereby merely] *limiting* the protection from mandatory retirement in the private sector." *Id.* at 297 (emphasis supplied).[20]

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[19] *Accord* Keith R. Fentonmiller, *The Continuing Validity of Disparate Impact Analysis for Federal-Sector Age Discrimination Claims*, 47 AM. U. L. REV. 1071, 1085 n.84 (1998).

[20] The *Forman* Court likewise noted a plethora of evidence that Congress in 1974 intended to "remove discriminatory barriers" to federal employment based on age, as the ADEA "has [done] and continues to do in private employment." *Id.* at 297. Further, *Forman* explained that Congress' intent to such effect applied "the same reasoning" federal appeals courts had "relied upon in holding that [42 U.S.C. §] 2000e-16, in which Congress waived sovereign immunity for claims under Title VII, includes a claim for retaliation." *Id.* (citations omitted).

Section 633a(f) neither contains nor implies by its presence anything that would preclude recognition of a federal-sector retaliation claim under the ADA. If anything it strongly favors this Court's approval of such a cause of action.[21/]

II. THIS COURT'S RECOGNITION THAT A REMEDY FOR REPRISAL IS INTEGRAL TO EFFECTIVE PROTECTION FROM EMPLOYMENT DISCRIMINATION STRONGLY FAVORS PETITIONER'S RETALIATION CLAIM.

In Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (2006), the Court made clear in numerous ways that a cause of action for retaliation is essential to effective enforcement of an employment discrimination statute. Its reasoning applies to all employees covered by Title VII, including both private and federal (as well as other non-federal) workers.

In particular, the *Burlington* Court explained that "broad protection from retaliation helps assure the cooperation" of employees "willing to file complaints and act as witnesses," and it is this "cooperation upon which accomplishment of [Title VII's] primary objective depends." *Id.* at 2414. Further, this Court *unanimously* stressed the importance of retaliation claims to "'unfettered access' to Title VII's remedial mechanisms."

[21/] The Government also asserts that § 633a(f) "specifies that none of the provisions governing private employers shall apply to federal employers." Opp'n Cert., 2007 WL 2126023, at *7. Obviously, Congress could not have intended that federal and non-federal employees would be governed by completely different - as opposed to separate - anti-discrimination regimes. Thus, for example, the Government surely does not dispute that the federal-sector provision of the ADEA bans "discrimination" on the basis of age in "hir[ing]" and "discharg[ing" older federal workers, even though such forms of bias only are specifically prohibited by § 623 and not § 633.

Id. at 2415 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)). The Court ruled that Title VII's private-sector retaliation provision covers conduct other than "employment-related" actions constituting independent Title VII violations because – in words equally applicable to § 633a of the ADEA – "Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. 'Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances.'" 126 S. Ct. at 2414 (quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)). The *Burlington* Court also explained that "[a] reasonable employee facing the choice between retaining her job (and paycheck) and filing a discrimination complaint might well choose the former," and that, absent effective protection, "fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions." *Id.* at 2417-18.

It is inconceivable that Congress did not believe that such considerations were equally applicable to the federal workforce. Thus, the decision below cannot be reconciled with *Burlington*'s consensus that an anti-retaliation claim serves a vital purpose in giving effect to anti-discrimination laws such as the ADEA.

The *Jackson* Court also recognized that "effective protection" from discrimination requires protection from retaliation, because "without protection against retaliation, the underlying discrimination is

perpetuated." 544 U.S. at 180 (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979)).[22/] This ruling approved the reasoning relied on by the D.C. Circuit in *Forman v. Small*: that unless retaliation is prohibited, federal employees remain vulnerable to retribution for voicing concerns about workplace bias. 271 F.3d at 297. The First Circuit's contrary view would vitiate the ADEA's purpose to "remove discriminatory barriers against employment of older workers in government jobs." *Id.* (quoting S. Rep. No. 93-690, at 56 (1974)). The First Circuit rashly discounted this critical aspect of § 633a, and thereby left federal employees vulnerable to age bias at work.

Congress enacted § 633a of the ADEA as a bulwark against "'age-ism'. . . as great an evil in our society as discrimination based on race or religion[. . .]." H.R. Rep. 93-913, at 2850 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 2811. A claim for retaliation is not only an *inherent* part of § 633a's general ban on "discrimination," but also an *essential* component of Congress' plan to create fully effective recourse against age bias in federal employment. Eliminating retaliation from § 633a would thwart Congressional intent to provide protection from age bias for federal employees as effective as the safeguards afforded under § 623 and both the private-sector and federal-sector provisions of Title VII.

[22/] This Court further explained: "if retaliation were not prohibited, Title IX's enforcement scheme would unravel" because "[w]ithout protection from retaliation, individuals who witness discrimination would likely not report it, [deliberate] indifference claims would be short-circuited, and the underlying discrimination would go unremedied." *Id.* at 180-81.

III. THE GOVERNMENT'S OWN POLICIES, PRACTICES AND POSITIONS CONTRADICT THE ASSERTION THAT FEDERAL EMPLOYEES LACK A RETALIATION CLAIM UNDER THE ADEA.

It is incomprehensible that the United States can embrace a consistent policy, for over three decades, authorizing federal employees to sue for retaliation in violation of § 633a's pledge of protection against "any discrimination," and then suddenly discover, based on no apparent intervening change in law or fact of any consequence, a hole in the same statute precluding such a remedy. It simply defies understanding that such an about face can be undertaken consistent with the Government's duty to enforce in good faith laws enacted by Congress. Yet that is what the Government has done and proposes this Court to ratify. Given the scope and variety of the Government's legal pronouncements articulating and ratifying its view that § 633a encompasses a cause of action for retaliation, this Court should treat with great skepticism the newly minted rationales presented by the Government in this case.[23/] Instead, the Court should defer to the EEOC's longstanding position that § 633a encompasses a cause of action for retaliation.

Petitioner has ably documented "consistent and binding interpretations by the agencies charged with enforcing [§] 633a(a) ... that it bars retaliation against protected [federal] workers because those workers complain that they have been subjected to age discrimination." Pet'r Br. 31; *see id.* 31-32 ("from the

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[23/] A skeptical perspective also is justified by the United States' apparent abandonment of a 30-year-plus practice of litigating § 633a retaliation claims, seemingly reflecting a longstanding view that such claims are valid. *See, e.g.*, *Villescas v. Abraham*, 311 F.3d 1253, 1258 (10th Cir. 2002) (noting that "[t]he government accepts the existence of such a cause of action").

very first, the agency charged with enforcing § 633a(a)," the Civil Service Commission, "treated allegations of 'reprisal in connection with the presentation of a complaint' of ... discrimination as 'an individual complaint of discrimination'"); 32 (explaining that "after the EEOC assumed enforcement authority for the ADEA in 1978, it left these CSC regulations in place until 1992, when it issued regulations of its own," 29 C.F.R. §§ 1613.261-262(a) (1994), which once again deemed allegations of "unlawful reprisal [to be] reviewable as an individual complaint of discrimination'"); 32-33 (citing "current EEOC regulations," and the EEOC Compliance Manual as providing that "[c]omplaints alleging retaliation prohibited by [statutes including the ADEA] are considered to be complaints of discrimination").

Indeed, EEOC regulations enforcing § 633a now provide: "No person shall be subject to retaliation for opposing any practice made unlawful by title VII of the Civil Rights Act . . . [or] the Age Discrimination in Employment Act . . . or for participating in any stage of administrative or judicial proceedings under those statutes." 29 C.F.R. § 1614.101(b) (2007). Such rules explicitly state that Title VII and the ADEA both should be interpreted to afford a retaliation remedy to federal employees. *See id.* §1614.103(a) ("Complaints alleging retaliation prohibited by [title VII and the ADEA] are considered to be complaints of discrimination for purposes of this part."). Adopted in part pursuant to § 633a, these rules are entitled to deference by this Court. *See* Pet'r Br. 32 n.10. But the Government abruptly and inexplicably supports a different rule in this case, affording lesser protection for federal employees.[24/]

[24/] Even in this case, the Government apparently at first conceded the existence of a cause of action for retaliation, and defended the U.S. Postal Service against Petitioner's claims by contending she had failed to present a prima facie case of age

The Government has a long record of administrative enforcement activity built on the premise that § 633a of the ADEA prohibits retaliation. As the enforcer of federal sector anti-discrimination statutes, EEOC's Office of Federal Operations ("OFO") routinely adjudicates federal employee retaliation claims based on § 633a, pursuant to 29 C.F.R. 1614.101(b).[25/] *See, e.g.*, *Muller v. Caldera*, EEOC Doc. 019724325, 1998 WL 938245, at *4 (Dec. 30, 1998) (holding that "[i]t is well-recognized by the Commission that reprisal claims based solely on an underlying age discrimination claim falls under the Commission's jurisdiction"); *Habek v. Caldera*, EEOC Doc. 01990755, 1999 WL 909899, at *3 (Oct. 6, 1999) (reversing agency's dismissal of reprisal claim based on an underlying complaint of age discrimination pursuant to § 633a). Indeed, the OFO has established that the broad language of § 633a creates a statutory foundation for such claims. *See Gorman v. Chater*, EEOC Doc. 01966769, 1997 WL 73404, at *3 (Feb. 13, 1997) (finding that "the breadth of language of section 633a … is sufficiently broad to prohibit age-related retaliation"). OFO consistently has entertained ADEA retaliation claims by federal employees against the U.S. Postal Service, among other federal entities. *See*, *e.g.*, *Avalos v. Potter*, EEOC Doc. 01A10765, 2002 WL 1212267, at

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discrimination. *See* Motion for Summary Judgment and Memorandum of Law In Support Thereof (CM ECF Docket No. 43) at 7-22, *Gomez-Perez v. Potter* (D. P.R. July 7, 2005) (No. 03-2236). In its reply brief supporting summary judgment, the Government changed course, adding a new argument that § 633a does not encompass a claim for retaliation. *See* Reply to Plaintiff's Opposition to Motion for Summary Judgment (CM ECF Docket No. 56) at 1-4, *Gomez-Perez v. Potter* (D. P.R. Aug. 30, 2005) (No. 03-2236).

[25/] *See* 29 C.F.R. § 1614.109 (2007) (EEOC-administered hearing process for federal employees alleging employment discrimination).

*2 (May 21, 2002); *Pryor v. Runyon*, EEOC. Doc. 01931333, 1993 WL 1506760, at *2 (July 9, 1993).

The OFO not only has acknowledged that federal employees may bring retaliation claims under Title VII and the ADEA, but also has repeatedly reaffirmed its policy of liberally applying these protections. *See Encinas v. Potter*, EEOC Doc. 0120071981, 2007 WL 2470062, at *4 (Aug. 22, 2007) (noting, in case against the U.S. Postal Service, that "the Commission has a policy of considering reprisal claims with a broad view of coverage"); *Vincent v. Potter*, EEOC Doc. 01A61619, 2006 WL 2332500, at *1 (Aug. 3, 2006) (holding, in a case raising both ADEA and Title VII claims, that "under the Commission's broad view of reprisal" a complainant who had previously provided a statement to support a co-worker's claim and whose supervisor had merely threatened retaliation had set forth a valid retaliation claim); *Koch v. Pitt*, EEOC Doc. 01A03888, 2001 WL 1691867, at *8 (Dec. 21, 2001) (noting, in a case raising ADEA and Title VII claims, the Commission's "proclivity for generous dispensation of reprisal protection"). These decisions make clear EEOC's view that broad protection against retaliation is fundamental to eliminating age discrimination in the federal workplace. *See Gorman*, 1997 WL 73404, at *3 ("[A]n interpretation of § 633a that would merely recognize freedom from discrimination based on age, but does not provide for freedom from retaliatory measures taken for opposing any practice made unlawful by the ADEA, would be contrary to the mission of the Commission"); *Koch*, 2001 WL 1691867, at *8 (stating that a liberal application of the reprisal provision is necessary "if employees are to exercise their right to a workplace free from discrimination").[26/]

[26/] EEOC plainly has operated according to the same view of discrimination prohibited by Title VII. *See Rubio v. Henderson*, EEOC Doc. 01A02860, 2000 WL 1141228, at **2-3 (Aug. 1, 2000) (holding that broad interpretation of anti-reprisal

Finally, the Government vigorously urged this Court to recognize a retaliation claim under Title IX in *Jackson,* asserting, as Petitioner does here, that retaliation is an inherent component of intentional "discrimination." Brief for United States as *Amicus Curiae* Supporting Petitioner, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (No. 02-1672) [hereinafter *Jackson* Brief], 2004 WL 1900496, at *6. Yet roughly a year later, the United States argued below that "any discrimination based on age," in § 633a, must be "strictly construed" due to sovereign immunity law, and so, "simply cannot be read to cover retaliation." Brief for Appellee United States, *Gomez-Perez v. Potter*, 476 F.3d 54 (1st Cir. Aug. 14, 2006) (No. 06-1614) [hereinafter Brief for the Appellee], 2006 WL 4116684 at **23-24. The United States previously told this Court that Title IX's anti-bias goals "would be difficult, if not impossible, to achieve, if persons who complain about ... discrimination lacked adequate protection against retaliation." *Jackson* Brief, 2004 WL 1900496, at **12-13 (quoting *Cannon*, 441 U.S. at 704). And the United States persuaded the Court that the legislative context in which Title IX was enacted indicates that the law's general nondiscrimination language encompasses a retaliation claim. *Id. at* **10-12. These rationales apply with equal force to federal-sector age bias cases and strongly suggest § 633a contains a cause of action for retaliation.

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protection is essential "because the enforcement of Title VII depends on the willingness of employees to oppose unlawful employment practices"); *Whipple v. Derwinski*, EEOC Doc. 05910784, 1992 WL 1374312, at *5 (Feb. 21, 1992) ("[b]ecause the enforcement of Title VII depends on the willingness of employees to oppose unlawful employment practices or policies, courts have interpreted ... Title VII as intending to provide 'exceptionally broad protection' to those who oppose such practices").

Eliminating a claim for retaliation under § 633a by allowing the First Circuit's ruling to stand would seriously undermine effective protection from discrimination at work for older federal employees. In addition, it would endanger effective redress for workers of all ages protected by laws with broadly-worded prohibitions against "discrimination" in employment, that long have been understood and applied against retaliatory discrimination without specific text forbidding such retaliation. Without a right to challenge retaliation, many federal employees will be deterred from bringing age bias complaints for fear of reprisal. Still others, whose claims principally concern injuries related to retaliatory bias, will be completely denied the protection of § 633a. In short, "[i]f retaliation were not prohibited, [§ 633a's] enforcement scheme would unravel." *Jackson*, 544 U.S. at 180. This Court should not countenance such an unacceptable result.

CONCLUSION

For the reasons set forth above, the decision of the First Circuit should be reversed.

November 20, 2007 Respectfully submitted,

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