No. 06-1321

IN THE
Supreme Court of the United States

MYRNA GÓMEZ-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

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QUESTION PRESENTED

Whether the federal-sector provision of the Age Discrimination in Employment Act, 29 U.S.C. § 633a(a), prohibits retaliation against employees who complain of age discrimination.

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The opinion of the United States Court of Appeals for the First Circuit is reported at 476 F.3d 54 and is reproduced in the appendix to the petition for a writ of certiorari ("Pet. App.") 1a-10a. The opinion denying the petition for rehearing and rehearing en banc, dated March 20, 2007, is reproduced at Pet. App. 33a. The opinion of the United States District Court for the District of Puerto Rico, dated Feb. 28, 2006, is unreported and is reproduced at Pet. App. 11a-32a.

JURISDICTION

The opinion and judgment of the court of appeals were issued on February 9, 2007. A timely petition for rehearing and rehearing en banc was denied on March 20, 2007. The petition for a writ of certiorari was filed on March 30, 2007. This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

The federal-sector provision of the Age Discrimination in Employment Act mandates that "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age" in specified departments and agencies of the Federal Government, including the United States Postal Service, "shall be made free from any discrimination based on age." 29 U.S.C. § 633a(a). The full text of § 633a is set forth at Pet. App. 34a-37a.

INTRODUCTION

In 1974, Congress extended the protections of the Age Discrimination in Employment Act ("ADEA") to

federal workers by adopting a sweeping, stand-alone age-discrimination ban. This provision requires that "*[a]ll* personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . shall be made free from *any* discrimination based on age." 29 U.S.C. § 633a(a) (emphases added). This broad and unqualified language bars retaliation against protected workers who bring charges of age discrimination. This Court recently concluded that the less sweeping discrimination ban in Title IX clearly bars retaliation, *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005), and the government itself endorsed that plain language reading. Congress necessarily understood the even broader language of § 633a(a) to prohibit retaliation. It not only adopted this provision a mere five years after this Court construed a general discrimination ban to prohibit retaliation, but also modeled § 633a(a) directly on Title VII's federal-sector discrimination ban, a provision Congress would have understood, based on its structure and recent administrative interpretations, to proscribe retaliation as a form of unlawful discrimination.

In the decision below, however, the First Circuit concluded that § 633a(a) permits federal employers to retaliate against older workers who bring charges of age discrimination. The lower court acknowledged the D.C. Circuit's contrary decision in *Forman* v. *Small*, 271 F.3d 285 (D.C. Cir. 2001), and did not dispute that court's observation that a workplace cannot be "'free from *any* discrimination based on age' if, in response to an age discrimination claim, a federal employer c[an] fire or take other action that [i]s adverse to an employee." *Id.* at 297. Nevertheless, the First Circuit inferred that Congress intended to leave workers unprotected from such

conduct because the ADEA's private-sector provisions expressly use the word "retaliation," while § 633a(a) does not. This reasoning is flatly inconsistent with *Jackson*'s textual analysis of the stand-alone discrimination ban in Title IX. Indeed, the First Circuit drew precisely the type of apples-to-oranges comparison between different statutory structures that this Court (at the government's urging) rejected in *Jackson*. The lower court nowhere explained, moreover, why Congress would permit federal employers to engage in retaliation, or how § 633a(a) could achieve its purpose if employers are free to engage in such conduct.

As petitioner explains in detail below, the language of § 633a(a), the relevant legal background that informed Congress's use of that language, and the purpose, legislative history and regulatory interpretation of the provision all confirm that its sweeping and unqualified prohibition of age discrimination encompasses retaliation against a protected employee because that employee complains of discrimination based on age. The First Circuit's contrary interpretation should be reversed.

STATEMENT OF THE CASE

A. Statutory Background

As enacted in 1967, the ADEA applied only to private employers. Its procedural and enforcement mechanisms were an amalgam of provisions drawn from several other statutes, *Lorillard* v. *Pons*, 434 U.S. 575, 578 (1978), but the ADEA's substantive prohibitions "were derived *in haec verba* from Title VII." *Id.* at 584. At the time, Title VII also applied only to private employers.

In 1972, Congress extended Title VII to federal employers. Although regulations issued by the Civil Service Commission ("CSC") already barred discrimination in federal employment based on race, color, religion, sex, or national origin, see 5 C.F.R. § 713.201 *et seq.* (1968), Congress believed these regulations "were ineffective." *Brown* v. *GSA*, 425 U.S. 820, 826 (1976). Accordingly, it broadly required that "[a]ll personnel actions affecting employees or applicants for employment" in various parts of the federal government "shall be made *free from any discrimination based on* race, color, religion, sex, or national origin." Equal Employment Opportunity Act of 1972 ("EEO Act"), Pub. L. No. 92-261, § 717(a), 86 Stat. 103, 111 (codified at 42 U.S.C. § 2000e-16(a)) (emphasis added).

The structure of the EEO Act confirms that Title VII's new federal-sector prohibition barred retaliation. Congress provided that several of Title VII's private-sector remedial provisions would apply to violations of the federal-sector discrimination ban. See *id.* § 717(d), 86 Stat. at 111-12 (codified as amended at 42 U.S.C. § 2000e-16(d)). One of these incorporated provisions provides a remedy for retaliation. See 42 U.S.C. § 2000e-5(g)(2)(A) (providing a remedy for violations of § 2000e-3(a), which prohibits reprisals). Shortly after Congress extended Title VII to federal employers, moreover, the CSC, which had been given broad power to enforce the new federal-sector discrimination ban, interpreted it to proscribe retaliation against those who bring charges of discrimination. See 37 Fed. Reg. 22,717, 22,723 (Oct. 21, 1972) (§ 713.262(a)).

It was against this backdrop that Congress amended the ADEA to extend it to federal employers. Congress modeled § 633a(a) directly on Title VII's

federal-sector discrimination ban, *Lehman* v. *Nakshian*, 453 U.S. 156, 163-64, 167 n.15 (1981), providing in virtually identical terms that "[a]ll personnel actions affecting employees or applicants for employment" in various parts of the federal government "shall be made free from any discrimination based on age." Pub. L. No. 93-259, § 15(a), 88 Stat. 55, 74-75 (1974) (codified at 29 U.S.C. § 633a(a)). Shortly thereafter, the CSC, which had been given the same broad authority to enforce § 633a(a) that it had been given to enforce Title VII's federal-sector prohibition, issued regulations interpreting the new provision to prohibit retaliation. See 39 Fed. Reg. 24,351 (July 2, 1974).

In 1978, Congress amended the ADEA in several respects. Most notably, Congress subjected federal employers to more stringent requirements: it eliminated the upper age limit for federal employees, thereby eliminating mandatory retirement in the federal sector in most instances; by contrast, it merely increased the coverage of the private-sector provisions from age 65 to age 70. See Pub. L. No. 95-256, §§ 3, 5, 92 Stat. 189, 189, 192 (1978). Congress also added subsection (f), which provides that personnel actions covered by § 633a(a) "shall not be subject to, or affected by, any provision of this [chapter], other than the provisions of section [631(b)] of this [title] and the provisions of this section." *Id.* § 5(e), 92 Stat. at 191-92 (codified at 29 U.S.C. § 633a(f)). The accompanying House Report explained that subsection (f) ensured that restrictions and limitations in the private-sector provisions of the Act "do not apply to [§ 633a(a)]." H.R. Rep. No. 95-527, pt. 1, at 11 (1977), *reprinted in Legislative History of the Age Discrimination in Employment Act* 361, 371 (EEOC 1981) ("ADEA Leg. Hist.").

B. Factual And Procedural Background

On February 22, 2003, petitioner Myrna Gómez-Perez, a 45-year-old window distribution clerk in the Moca, Puerto Rico Post Office, filed an equal employment opportunity ("EEO") complaint against the United States Postal Service ("Postal Service"). JA 31-32. In her EEO complaint, petitioner alleged that she had been discriminated against on the basis of her age when her supervisor denied her request for a transfer from her part-time position in the Moca Post Office to the full-time position she previously held in the Dorado Post Office. *Id* at 32.

After filing her EEO complaint, petitioner was subjected to a series of reprisals. *Id*. She was called to meetings at which groundless charges of sexual harassment were leveled against her. *Id.* She was harassed and mocked by co-workers. *Id.* Postal Service posters concerning sexual harassment were defaced and her name was written on them. *Id.* And her hours were drastically reduced. *Id.*

On November 18, 2003, petitioner filed this suit, alleging, *inter alia*, that respondent had violated § 633a(a) of the ADEA by retaliating against her for filing an age discrimination complaint. *Id.* at 1, 33-34. Respondent moved for summary judgment. The district court, adopting the report and recommendation of a magistrate judge, granted respondent's motion on the ground that the ADEA did not waive the Postal Service's sovereign immunity with respect to retaliation claims. Pet. App. 11a-32a.

The court of appeals affirmed on different grounds. It held that the Postal Service's "sue and be sued" clause, 39 U.S.C. § 401(1), waived the agency's sovereign immunity. Pet. App. 3a-4a. It concluded,

however, that § 633a(a) does not provide "a cause of action for retaliation as the result of having filed an age-discrimination related complaint." *Id.* at 10a.

The court of appeals believed that § 633a(a) does not prohibit reprisals because the word "retaliation" is not used in the text of the statute. Pet. App. 4a-5a. Although this Court had recently concluded that, as a matter of plain language, a statute barring "discrimination" "on the basis of sex" prohibits retaliation against persons because they complain about sex discrimination, *Jackson*, 544 U.S. at 173-74, the First Circuit deemed *Jackson* inapposite. It concluded that this Court's textual analysis of Title IX had no bearing here, because Title IX, unlike § 633a(a), is enforced through an implied cause of action, and because *Jackson* had emphasized the important role third-party complaints play in the enforcement of Title IX. Pet. App. 6a-7a. In addition, *Jackson* presumed, see 544 U.S. at 176, that the Congress that enacted Title IX was aware of the decision in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (holding that a general race-discrimination ban barred retaliation against those who speak out against such discrimination). But the court of appeals deemed this presumption inapplicable here, because it found "no evidence in the legislative history that the ADEA's federal sector provisions were adopted in a similar context of claims by federal employees for retaliation for speaking out against age discrimination." Pet. App. 7a.

The First Circuit also believed that, because § 623(d) expressly bars retaliation, while § 633a(a) does not, "Congress intended for the ADEA to prohibit retaliation by private employers, but not by federal employers." Pet. App. 7a-8a. The First Circuit rejected the reasoning of the D.C. Circuit, *id.*

at 8a, which had concluded that § 633a(a)'s sweeping language could not be narrowed based on a comparison with the ADEA's private-sector prohibition, "which is narrowly drawn and sets forth specific prohibited forms of age discrimination," rather than a single, comprehensive ban. *Forman*, 271 F.3d at 296. The First Circuit also believed that subsection (f) of § 633a was intended to ensure that the "expansive private-sector provisions of the ADEA" are not extended to federal employees. Pet. App. 10a.

SUMMARY OF ARGUMENT

I. By its plain terms, § 633a(a)'s categorical requirement that "[a]ll personnel actions affecting" older workers "shall be made free from *any* discrimination based on age" prohibits retaliation against an older worker for bringing an age-discrimination charge. When an employer punishes employees *because* they exercise their protected-status right, animus towards their protected status (and the rights that go with that status) is a substantial motivating factor for the punishment. Moreover, because retaliation facilitates discrimination, § 633a(a) must prohibit such conduct to ensure that *all* personnel actions are free from *any* age discrimination. In *Jackson*, the government itself argued—and this Court held—that, by its plain terms, Title IX's prohibition on "discrimination" "on the basis of sex" bars retaliation against a non-class member because he complained about unlawful sex discrimination. Because § 633a(a)'s proscription is even broader, and because petitioner is a member of the protected class, it is clearer here than it was in *Jackson* that the statutory language prohibits the retaliation alleged.

Three relevant background principles confirm that the enacting Congress would have understood the language of § 633a(a) to prohibit retaliation. First, Congress legislated only a few years after this Court had construed a general antidiscrimination provision to bar retaliation against those who advocate the rights of persons protected by that ban. *Sullivan*, 396 U.S. at 237. Congress would have expected § 633a(a)'s sweeping discrimination ban to be construed in this same manner. Second, it modeled § 633a(a) on Title VII's federal-sector discrimination ban, which prohibits retaliation against those who bring discrimination charges. Thus, Congress must have intended the federal age-discrimination ban to have the same scope. Third, by 1974, the agency charged with enforcing Title VII's federal-sector discrimination ban had construed it to bar retaliation. Congress is properly presumed to have been aware of that interpretation, and to have intended to incorporate the same meaning, when it used Title VII's federal-sector ban as the model for § 633a(a). *Lorillard*, 434 U.S. at 585.

Section 633a(a)'s purpose confirms that Congress intended it to encompass retaliation. Numerous statutes reflect Congress's recognition that discrimination bans cannot achieve their goals if employers are free to retaliate against those who bring discrimination charges. Contrary to the government's claims below, Congress could not have thought federal workers were already protected from reprisals for bringing charges of age discrimination. Age discrimination was not prohibited prior to 1974, and it was only after the enactment of § 633a(a) that federal regulations were amended to prohibit reprisals against those who complained of such discrimination.

The legislative history, moreover, is devoid of any evidence that Congress intended to leave federal workers unprotected from reprisals if they challenged unlawful age discrimination, or that Congress thought workers already enjoyed such protections. To the contrary, numerous statements in the legislative record make clear that Congress intended to give federal workers the same substantive rights that private-sector workers had. Shortly after Congress enacted § 633a(a), the CSC, which had been given broad authority to enforce the provision, construed it to bar retaliation; after enforcement authority was transferred to the Equal Employment Opportunity Commission ("EEOC"), the latter agency issued regulations affirming that interpretation.

II. The First Circuit's contrary interpretation is incorrect. The lower court improperly assumed that, because § 633a(a) does not mention retaliation, it cannot prohibit such conduct. The lower court then relied on irrelevant distinctions to dismiss this Court's contrary textual analysis in *Jackson*. While Title IX is enforced through an implied cause of action, this Court relied on the *text* of Title IX to determine that it prohibited retaliation. The importance of third-party complaints to enforcement of Title IX had no bearing on the Court's conclusion that the statute's text barred retaliation. And *Jackson*'s presumption that the 1972 Congress adopted that text with an knowledge of this Court's ruling in *Sullivan* is fully applicable to the 1974 Congress that enacted § 633a(a).

The lower court's structural analysis was equally flawed. In *Jackson*, both the government itself and this Court rejected precisely the type of inapposite comparison the First Circuit relied on to narrow § 633a(a)'s scope. Just as Title VII's private-employer

provision, which sets forth a series of narrow proscriptions, provided no basis for narrowing Title IX's broad, stand-alone ban, so too here, the ADEA's private-employer provisions (which were derived *in haec verba* from Title VII's private-sector provision) provide no basis for narrowing § 633a(a)'s even broader, stand-alone prohibition. Nor does subsection (f) demonstrate that Congress intended to leave federal workers without protection from retaliation. By providing that federal personnel actions "shall not be subject to" the ADEA's private-sector provisions, 29 U.S.C. § 633a(f), this provision ensures that the *limitations* of the private-sector provisions are not applied to actions under § 633a.

Finally, principles of sovereign immunity do not justify the conclusion that Congress left federal workers without protection from retaliation. Because Congress waived the Postal Service's immunity through a broad sue-and-be-sued clause, and because § 633a(a) indisputably applies to the Service, the First Circuit correctly ruled that sovereign immunity is irrelevant here. Even without this waiver, however, the government's invocation of immunity principles is unavailing. The rule requiring strict construction of immunity waivers applies to provisions governing the government's amenability to suit, the incidents of such suits (*e.g.*, the right to a jury trial), and the relief available in such suits; that rule is not properly used to narrow substantive norms that might be judicially enforced as a result of a waiver. But even if the rule applies to such norms, § 633a(a) clearly proscribes retaliation—particularly when read in light of the background principles that informed Congress's understanding of its language—and thus satisfies the clear statement requirement for waiving sovereign immunity.

ARGUMENT

The text, relevant legal background, purpose, legislative history and regulatory interpretation of § 633a all confirm that its sweeping and unqualified requirement that "[a]ll personnel actions affecting" older workers "shall be made free from *any* discrimination based on age," *id.* § 633a(a) (emphasis added), bars retaliation against a protected employee because that employee complains of discrimination based on age. The contrary reading that the First Circuit and the government advanced below is demonstrably incorrect.

I. SECTION 633a(a) BARS RETALIATION AGAINST A PROTECTED EMPLOYEE BECAUSE THAT EMPLOYEE COMPLAINS OF DISCRIMINATION BASED ON AGE.

A. The Text Of Section 633a(a) Bars Reprisals Against Protected Workers Because They Complain About Age Discrimination.

By its plain terms, § 633a(a) proscribes retaliation against a protected older employee because that employee complains about being subjected to age discrimination. Indeed, the requirement that "*[a]ll personnel actions* affecting employees or applicants for employment who are at least 40 years of age . . . *shall be made free from any* discrimination based on age," *id.* § 633a(a) (emphases added), is even broader and more categorical than the language of Title IX, which prohibits retaliation. See *Jackson*, 544 U.S. at 173-74. The text of § 633a(a) prohibits retaliation in two distinct ways.

First, when a federal employer retaliates against a protected older employee *because* the employee complains about age discrimination, the employer's

actions are motivated not merely by the employee's conduct (complaining) but also by the content of the complaint (an allegation of age discrimination). The employee suffers retaliation not because he is an older worker who complains too much, or complains about things unrelated to his age (*e.g.*, substandard working conditions), but because he complains that he has been denied rights to which he is entitled *only by virtue of his protected status*. Thus, when an employer retaliates against a worker for seeking to vindicate protected-status rights, animus towards that protected status (and the rights that go with that status) is a substantial motivating factor for the retaliation. Cf. *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) (where activities "are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed"). Section 633a(a) "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." *Forman*, 271 F.3d at 296 (internal quotation marks omitted).

Second, § 633a(a) necessarily prohibits retaliation, because such conduct is inimical to the statute's requirement that *all* personnel actions be made free from *any* discrimination based on age. Retaliation has "a symbiotic and inseparable relationship to intentional . . . discrimination"; it "serves as a means of implementing or actually engaging in intentional discrimination by encouraging such discrimination and removing or punishing those who oppose it." *Peters* v. *Jenney*, 327 F.3d 307, 318 (4th Cir. 2003). Retaliation thus fosters the "perpetuation of [discrimination]." *Sullivan*, 396 U.S. at 237. Accordingly, where an employer can retaliate against

older workers who challenge age discrimination, *all* personnel actions affecting protected workers cannot be made free from *any* age discrimination: the existence of retaliation encourages and perpetuates other acts of age discrimination. Thus, the federal age discrimination ban must bar retaliation in order to ensure other personnel actions are not infected with unlawful bias against older workers.

In *Jackson*, both the government itself and, more importantly, this Court read a less sweeping discrimination ban in Title IX to encompass retaliation against those who complain of intentional discrimination against protected persons, even if the victim of the retaliation is not a member of the protected class. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be . . . subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). In *Jackson*, this Court held that "[r]etaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action." 544 U.S. at 173. This is so, the Court explained, because

> [r]etaliation is, by definition, an intentional act. It is a form of "discrimination" because the complainant is being subjected to differential treatment. Moreover, retaliation is discrimination "on the basis of sex" because it is an intentional response to the nature of the complaint: an allegation of sex discrimination. We conclude that when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional

> "discrimination" "on the basis of sex," in violation of Title IX.

Id. at 173-74 (citations omitted).

In its *amicus* filing in *Jackson*, the United States had urged the Court to adopt this plain-language reading. It argued that a Title IX recipient that

> purposefully retaliates against a complainant because the complaint is about intentional sex discrimination, as opposed to some other matter, subjects the complainant to intentional "discrimination" "on the basis of sex."

Brief of the United States as *Amicus Curiae* Supporting Petitioner at 5, in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005) ("U.S. *Jackson* Br.") at 5.[1] The government explained that Title IX's "on the basis of sex" limitation requires that "'sex' must have 'actually played a role in th[e] [decision-making] process and had a determinative influence on the outcome.'" *Id.* at 10 (alterations in original) (quoting *Hazen Paper* v. *Biggins*, 507 U.S. 604, 610 (1993)). This requirement is not met if a recipient simply "retaliates against all complainers as a class, without taking into account the subject matter of the complaint." *Id.* But the statutory requirement is satisfied when the recipient "retaliates against [the] complainant because the complaint is about intentional sex discrimination." *Id.*

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[1] *See also* U.S. *Jackson* Br. at 8 ("retaliation against a person because that person has filed a sex discrimination complaint is a form of intentional sex discrimination"); *id.* at 9 ("[w]hen a recipient purposefully retaliates against an individual because that individual has complained about intentional sex discrimination . . . the recipient can readily be viewed as having subjected the person to 'discrimination' 'on the basis of sex'").

The Court's interpretation of "discrimination" "on the basis of sex" in *Jackson* controls here. The language of § 633a(a) is even broader than that of Title IX. While Title IX provides that no person shall be "subjected to discrimination" "on the basis of" a protected status, § 633a(a) provides that "*[a]ll* personnel actions affecting" protected persons "shall be made free from *any* discrimination based on" their protected status. 29 U.S.C. § 633a(a) (emphases added). As the D.C. Circuit recognized, this prohibition is "sweeping," "comprehensive," and "unqualified." *Forman*, 271 F.3d at 296-97. It follows *a fortiori* from *Jackson*, therefore, that this categorical mandate proscribes retaliation against a protected older worker because that worker complains of being discriminated against based on age. Indeed, the retaliation in this case falls even more squarely within the discrimination ban than the conduct at issue in *Jackson* did, as petitioner is a member of the protected group and alleges that she suffered retaliation because she sought to vindicate her own right to be free of age discrimination.

B. The Background Against Which Section 633a(a) Was Enacted Confirms That It Bars Retaliation.

The plain meaning of § 633a(a)'s sweeping ban is confirmed by several background legal principles that informed Congress's understanding of the language it used to extend the ADEA to federal workers. Indeed, Congress had at least three reasons to believe that the language of § 633a(a) encompassed retaliation. First, Congress was legislating only five years after this Court had interpreted a general discrimination ban to prohibit retaliation against those who advocate the rights of persons protected by that ban. Second, Congress modeled the ADEA's federal age-

discrimination ban on the federal-sector provision of Title VII, and the structure of Title VII makes clear that its federal-sector discrimination ban prohibits retaliation. Third, Congress modeled § 633a(a) on Title VII's federal-sector provision after that Title VII provision had been interpreted by the administering agency to encompass reprisals.

1. In light of *Sullivan*, Congress understood that § 633a(a)'s language would bar retaliation.

This Court's decision in *Sullivan* is an essential part of the relevant legal context that informed Congress's understanding of the language it used in § 633a(a). Sullivan, a white man, rented a house to Freeman, a black man, and assigned him a membership share that permitted him to use a private park. The corporation that owned the park refused to accept the assignment because of Freeman's race. When Sullivan protested that refusal, he was expelled from the corporation. He and Freeman both sued under 42 U.S.C. § 1982, which provides that "[a]ll citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property," *id.*, and thus prohibits "racial discrimination . . . in the sale and rental of property." *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968).

The Court held that Sullivan could sue under § 1982 not only because he had been denied the right to complete his transaction, but also for the retaliatory expulsion he had suffered for advocating Freeman's rights. The Court explained that, "[i]f that sanction . . . can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction

would give impetus to the perpetuation of racial restrictions on property." 396 U.S. at 237.

In *Jackson*, the government argued that the Congress that enacted Title IX in 1972 was properly presumed to have been aware of *Sullivan* and "would have seen no need to enact a prohibition that specifically referred to retaliation." U.S. *Jackson* Br. at 11-12. This Court agreed. It was "'not only appropriate but also realistic to presume that Congress was thoroughly familiar with [*Sullivan*] and that it expected its enactment [Title IX] to be interpreted in conformity with [it].'" *Jackson*, 544 U.S. at 176 (alterations in original) (quoting *Cannon* v. *University of Chi.*, 441 U.S. 677, 699 (1979)). Thus, "discrimination" "on the basis of sex" in Title IX was properly interpreted to encompass retaliation against a male coach because of his "advocacy of the rights of the girls' basketball team." *Id.*

This reasoning applies with equal, if not greater, force here. The bill that ultimately became § 633a was introduced in 1972, see *Lehman* v. *Nakshian*, 453 U.S. 156, 166 n.14 (1981), the same year Congress adopted Title IX. Section 633a was enacted just two years later. The 1974 Congress is properly presumed to have had the same "thorough[] familiar[ity] with" *Sullivan* that the 1972 Congress was presumed to have had. See *Cannon*, 441 U.S. at 698 n.23 (upholding an implied right of action in part because "[i]n the decade preceding the enactment of Title IX," this Court had found implied rights of action in several cases); *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60, 77 (1992) (Scalia, J., concurring) (proper to presume congressional awareness in 1972 of the 1946 decision in *Bell* v. *Hood*, 327 U.S. 678 (1946)).

Moreover, this presumed familiarity with *Sullivan* provides an *a fortiori* basis for concluding that § 633a(a) proscribes the retaliation at issue here. A Congress that expected a general discrimination ban to cover retaliation against persons *outside* the protected class when they advocate the rights of persons within that class would necessarily expect that same prohibition to protect persons *within* the class who suffer retaliation because they seek to vindicate their own right to be free from discrimination.

2. Section 633a(a) was modeled on Title VII's federal-sector discrimination ban, which bars retaliation.

Congress's understanding of § 633a(a)'s sweeping language was also informed by Title VII's federal-sector discrimination ban, which Congress used as the model for extending the ADEA to federal workers. The structure of Title VII makes clear that its federal-sector discrimination ban encompasses retaliation. Congress is properly presumed to have understood this when it incorporated the language of that Title VII ban in § 633a(a).

In 1972, Congress amended Title VII to extend its protections to most federal employees. In words virtually identical to those it would use two years later in § 633a(a), Congress provided that "[a]ll personnel actions affecting employees or applicants for employment" in various parts of the federal government "shall be made *free from any discrimination based on* race, color, religion, sex, or national origin." EEO Act, Pub. L. No. 92-261, § 717(a), 86 Stat. at 111 (codified at 42 U.S.C. § 2000e-16(a)) (emphasis added). Congress further provided that certain of Title VII's private-sector remedial provisions would apply in suits by federal

employees. See *id.* § 717(d), 86 Stat. at 111-12 (codified as amended at 42 U.S.C. § 2000e-16(d)).

Significantly, one of the incorporated remedial provisions is § 706(g). See 42 U.S.C. § 2000e-16(d) (incorporating § 2000e-5(f) through (k)). Section 706(g) provides, among other things, that a court may order the hiring, reinstatement or promotion of a plaintiff, and an award of backpay, only if the plaintiff was refused employment or advancement or suspended or discharged due to proscribed discrimination or a "violation of section 2000e-3(a) [§ 704(a)]." *Id.* § 2000e-5(g)(2)(A). Section 704(a), in turn, prohibits discrimination against employees who oppose any unlawful practice or bring charges of unlawful discrimination. *Id.* § 2000e-3(a).

Thus, Congress expressly included a provision authorizing relief for victims of retaliation among the remedies for violations of Title VII's sweeping federal-sector discrimination ban. There would have been no reason to include such a remedy if Title VII's federal-sector discrimination ban did not prohibit such retaliation in the first place. The inclusion of this remedy therefore confirms that Title VII's requirement that "all personnel actions affecting" certain federal employees "shall be made free from any discrimination based on race, color, religion, sex, or national origin" bars retaliation against protected class members who complain about being subjected to such discrimination.[2]

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[2] The First Circuit misconstrued the import of Title VII's federal-sector scheme. Congress did not incorporate into that scheme the *substantive* retaliation ban of Title VII's private-sector provisions, as the First Circuit believed. *See* Pet. App. 9a. Congress incorporated only "[t]he provisions of 2000e-5(f) through (k)," 42 U.S.C. § 2000e-16(d), and Title VII's private-sector retaliation ban is set forth in § 2000e-3(a). Nor is it

Two years later, Congress patterned § 633a(a) "directly after" Title VII's federal-sector discrimination ban. *Lehman*, 453 U.S. at 167 n.15. In doing so, Congress is properly presumed to have understood the scope of that Title VII provision, including the fact that it prohibited retaliatory discrimination. The 1974 Congress, therefore, is properly presumed to have intended § 633a(a) to achieve the same prohibition with respect to age discrimination.

3. Congress intended to adopt the administrative interpretation of Title VII's federal-sector discrimination ban when it used that ban as the model for § 633a(a).

Finally, Congress is properly presumed to have banned retaliation against protected older workers who complain of age discrimination because the Title VII federal-sector discrimination ban that served as the model for § 633a(a) had previously been construed to bar retaliation. Congress is presumed to have been aware of this administrative interpretation, and to have incorporated this meaning in § 633a(a).

When Congress extended Title VII's protections to federal workers in 1972, it also authorized the Civil Service Commission to enforce this prohibition through appropriate regulations. EEO Act, Pub. L. No. 92-261, § 717(b), 86 Stat. at 111 (codified at 42 U.S.C. § 2000e-16(b)). Within months, the CSC

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relevant that § 633a does not incorporate the ADEA's private-sector remedies. What matters is that § 633a(a) was modeled on Title VII's federal-sector discrimination ban, and the remedial provisions associated with the latter ban confirm that its language prohibits retaliation.

issued implementing regulations providing that an employee's claim that he or she had suffered retaliation for complaining about unlawful discrimination could be treated as a "complaint of discrimination." See 37 Fed. Reg. 22,717, 22,723 (Oct. 21, 1972); *id.* at 22,717 (§ 713.262(a), added "to implement the [EEO Act]"). Thus, the CSC interpreted Title VII's federal-sector discrimination ban to prohibit retaliation against protected employees because they brought discrimination complaints. "Congress is presumed to be aware of an administrative . . . interpretation of a statute and to adopt that interpretation" when it "adopts a new law incorporating sections of [the] prior law." *Lorillard*, 434 U.S. at 580. Accordingly, when it used the phrase "any discrimination based on age" in § 633a(a), Congress is properly presumed (1) to have known that the CSC had construed the materially identical language of Title VII's federal-sector discrimination ban to include reprisals as a form of prohibited "discrimination," and (2) to have incorporated this same meaning in § 633a(a).

That presumption is particularly powerful here. Before Congress extended Title VII's protections to federal workers, CSC regulations already barred discrimination in federal employment based on race, color, religion, sex, or national origin.[3] The major impetus behind the EEO Act of 1972 was Congress's belief that these regulations "were ineffective."

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[3] A series of Executive Orders dating back to at least 1948, *see* Exec. Order No. 9980, 13 Fed. Reg. 4311 (July 28, 1948), had set forth a policy of nondiscrimination in federal employment, and the CSC had, prior to 1972, issued regulations to implement this policy. *See* 5 C.F.R. § 713.201 *et seq.* (1968). As of 1971, these regulations were implementing the policy set forth in Executive Order 11478. *See* 34 Fed. Reg. 12,985 (Aug. 12, 1969).

Brown v. *GSA*, 425 U.S. at 826. "Congress found 'skepticism' among federal employees 'regarding the Commission's record in obtaining just resolutions of complaints and adequate remedies,'" which "'discouraged persons from filing complaints with the Commission.'" *Id.* at 825-26 (quoting S. Rep. No. 92-415, at 14 (1971)). These deficiencies led the House to pass a bill that would have transferred authority for preventing discrimination from the CSC to the Equal Employment Opportunity Commission ("EEOC"). See H.R. Rep. No. 92-238, at 56-57 (1971) (quoting § 717(e) of the House bill). The Senate also recognized the "defects" in the CSC's enforcement efforts, but chose to respond by *enhancing* the Commission's authority based on the "expectation that the Commission will take those further steps which are necessary in order to satisfy the goals of Executive Order 11478." S. Rep. No. 92-415, at 15. Ultimately, the House acceded to the Senate approach, and § 717(b) of the EEO Act empowered the CSC to "issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities." Pub. L. No. 92-261, 86 Stat. at 111-12. This authority is far broader than the EEOC's authority under the private employer provisions of Title VII to adopt "suitable procedural regulations." See 42 U.S.C. § 2000e-12(a).

Shortly after passage of the EEO Act, the CSC issued new regulations, which as just noted, included a provision treating reprisals against those who complain of prohibited discrimination as a form of the same prohibited discrimination. See 37 Fed. Reg. at 22,723. Less than 18 months later, Congress not only modeled § 633a(a) on Title VII's federal-sector discrimination ban, but gave the CSC precisely the same authority to enforce the new age-discrimination

ban that it had given the CSC to enforce Title VII's federal-sector ban. See Pub. L. No. 93-259, § 15(b), 88 Stat. at 75. It is implausible that, just two years after it scrutinized the CSC's efforts to prevent other types of employment discrimination and resolved a stark disagreement over how best to reform those efforts, Congress replicated the CSC's enhanced enforcement authority in the ADEA with no appreciation or awareness of how the Commission had exercised that authority under Title VII. This Court should assume that Congress knew and approved of how the CSC had exercised its authority under § 717(b) when Congress extended the ADEA to federal employment.

C. Section 633a(a)'s Purpose Confirms That Its Sweeping Antidiscrimination Mandate Bars Retaliation.

Section 633a(a)'s purpose also confirms that its sweeping discrimination ban prohibits retaliation against protected persons because they complain that they have been subjected to age discrimination. Both this Court and the government have consistently recognized that protection from retaliation is essential to any discrimination ban. Because Congress plainly shares this understanding, it necessarily expected that a provision requiring that "*[a]ll* personnel actions affecting" certain federal workers "shall be made free from *any* discrimination based on age" would prohibit retaliation against protected workers who complain that they have been subjected to age discrimination.

As this Court has recognized, "it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept" denials of their rights. *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

Retaliation "deter[s] victims of discrimination from complaining," *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997); restricts "access to statutory remedial mechanisms," *id.*, and thus "give[s] impetus to the perpetuation of [discrimination]," *Sullivan*, 396 U.S. at 237. Accordingly, where Congress relies on complaints from employees "to vindicate rights claimed to have been denied," effective enforcement can "only be expected if employees f[eel] free to approach officials with their grievances." *Mitchell*, 361 U.S. at 292.

The government itself has conceded that the objectives of an antidiscrimination provision "would be difficult, if not impossible, to achieve if persons who complain about . . . discrimination lacked adequate protection against retaliation." U.S. *Jackson* Br. at 5. Without such protection, "persons are likely to be reluctant to bring discrimination to light. And, absent a sufficient deterrent against retaliation, entities that are practicing discrimination . . . are likely to be emboldened to continue that discrimination." *Id.* at 13. See *Jackson*, 544 U.S. at 180 (endorsing this analysis).

Congress indisputably shares this understanding. No fewer than 43 federal statutes afford protection from retaliation to those who disclose violations of federal laws or exercise rights granted to them by federal law.[4] In virtually every instance where federal workers could require such protection—*i.e.*, where they could be the subject of retaliation—Congress has afforded them such protection.[5] Thus,

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[4] A list of these statutes is set forth in appendix A to this brief.

[5] A list of these statutes is set forth in appendix B to this brief.

Congress harbors no illusions that federal employers are different from private employers and will not retaliate against those who complain of wrongdoing. And Congress could not have believed that retaliation is less destructive of an age-discrimination ban than it is of prohibitions on other types of discrimination. Indeed, "[i]t is difficult to imagine how a workplace could be 'free from *any* discrimination based on age' if, in response to an age discrimination claim, a federal employer could fire or take other action that was adverse to an employee." *Forman*, 271 F.3d at 297.

Nor could Congress have thought such protection was unnecessary because it already existed. When § 633a(a) was adopted, CSC regulations authorized the processing of complaints of discrimination in federal employment based only on "race, color, religion, sex, or national origin," 5 C.F.R. § 713.211 (1974), and afforded complainants a remedy for reprisals only in connection with these types of discrimination complaints. *Id.* §§ 713.261-.262. As the government conceded below, "[a]ge discrimination in federal employment . . . was not barred by executive order or regulations prior to the 1970s, but was first prohibited when Congress expanded the ADEA to cover federal employees in 1974." *See* Br. for Appellee, at 5, *Gomez-Perez* v. *Potter*, No. 06-1614 (1st Cir. Aug. 14, 2006) ("U.S. Appeal Br."); see also 5 C.F.R. § 713.215 (1974) (complaint could be rejected if allegations of discrimination were "not within the purview of § 713.212").

It was only *after* the enactment of § 633a that the CSC added "[a] new Subpart E" to its antidiscrimination regulations "to carry out the policy of nondiscrimination based on age in [§ 633a]." 39 Fed. Reg. at 24,351. This new subpart provided that

age discrimination complaints would be governed by the same procedures and afforded the same protection from reprisal that had previously applied to complaints of other types of proscribed discrimination. See *id.* (under § 713.511, age discrimination complaints would be subject to requirements of § 713.213 through § 713.222 and § 713.261 through § 713.271). This post-enactment adoption of new regulations barring reprisals against those who complain of age discrimination confirms that Congress could not have thought that pre-ADEA mechanisms already provided such protection.

In particular, the adoption of these regulations belies the government's claim below that the anti-retaliation provision in the general administrative personnel regulations provided such protection prior to passage of § 633a. U.S. Appeal Br. at 20-21 (citing 5 C.F.R. § 771.211(a) (1965)). If the latter regulation had already barred reprisals for age-discrimination complaints, the CSC would not have needed to expressly incorporate such a prohibition in the new age-discrimination regulations. In fact, when § 633a was adopted, the general personnel regulations provided that discrimination claims were to be processed under the antidiscrimination regulations. See 5 C.F.R. § 771.216 (1974). Moreover, the general personnel regulations were far narrower than the antidiscrimination regulations. The former permitted appeals only of "adverse actions" (defined as removal, suspension of more than 30 days, unpaid furlough or a reduction in pay or grade), not all complaints of discrimination. Compare *id.* § 771.202(a), with *id.* §§ 713.211-.212. And, unlike the antidiscrimination regulations, the general personnel regulations provided only an "assur[ance]" against reprisals, but no remedy (unless the reprisal

took the form of another "adverse action"). Compare *id.* § 771.105(a)(1), with *id.* §§ 713.261-.262.[6]

In short, when Congress enacted § 633a, it plainly understood that protection from retaliation is indispensable to a prohibition on age discrimination in federal employment, and it had no reason to believe that federal workers already enjoyed such protection. Thus, its failure to include an express ban on retaliation in § 633a(a) necessarily reflects its view that the statute's comprehensive requirement that "*all* personnel actions affecting" covered older workers "shall be made free from *any* discrimination based on age" barred retaliation against protected workers who complain that they have been subjected to age discrimination. This is especially so given the background principles that would have informed its use of this language in 1974. By contrast, if Congress did not believe that the language it used would bar

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[6] The government also suggested that Congress would have thought protection against retaliation was unnecessary for postal workers because they were protected by the Postal Service Manual or collective bargaining agreements. U.S. Appeal Br. at 7-10. Given the lack of administrative protections against retaliation for all other federal workers, Congress would not have excluded retaliation from § 633a(a) simply because it believed postal workers were protected. In all events, there was no basis for such a belief. Virtually all of the limitations of the general personnel regulations were replicated in the Postal Service Manual, which permitted appeals only for the same set of "adverse actions" (except that suspensions of less than 30 days were included), and provided only an assurance of "freedom from . . . reprisal," without any remedy. U.S. Postal Serv., *Postal Service Manual*, pt. 444, §§ 241, 341 (Aug. 30, 1973). As for collective bargaining agreements, many postal workers were not covered by such agreements; there is no requirement that such agreements bar retaliation; and even when they do, the decision to grieve such complaints rests with the union, not the worker.

such retaliation, it inexplicably enacted a law that it knew would fail to achieve its goal. See U.S. *Jackson* Br. at 5 (objectives of an antidiscrimination provision "would be difficult, if not impossible, to achieve if persons who complain about . . . discrimination lacked adequate protection against retaliation"). Congress does not engage in such legislative futility.[7]

D. The Legislative History Confirms That Section 633a(a) Bars Retaliation.

In view of § 633a(a)'s sweeping and categorical ban, there is no need to consider its legislative history. That history, however, confirms that Congress intended to proscribe retaliation against protected persons who complain that they have been subjected to unlawful age discrimination.

Given the statute's purpose and the background understandings that informed Congress's use of § 633a(a)'s broad language, the legislative history is as revealing for what it does not say as for what it does. There are no statements in the legislative record suggesting that Congress affirmatively intended to deprive protected older workers of the type of protection from retaliation that Congress had included in dozens of other statutes, including those provisions of the ADEA that prohibit retaliation against private-sector employees who complain that they have been subjected to age discrimination. Tellingly, there is no mention of the CSC's general personnel regulations, the Postal Service Manual or

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[7] As petitioner demonstrates below, the ADEA's private-employer provisions do not justify the conclusion that Congress did so in the case of § 633a(a). Because the ADEA's private employer provisions proscribe age discrimination in narrower terms, Congress had to include an express ban on retaliation by private employers. *See infra* at § II.B.

any collective bargaining agreement, let alone any suggestion that members of Congress thought an "assurance" of freedom from reprisals set forth in such regulations or agreements would provide adequate protection against retaliation for complaints of age discrimination.

By contrast, there is ample evidence that Congress intended to extend to federal workers the same safeguards enjoyed by private-sector workers, who are protected from retaliation. See 29 U.S.C. § 623(d). The Senate Special Committee on Aging supported extending the ADEA to the federal sector because "it is difficult to see why one set of rules should apply to private industry and varying standards to government." See Special Committee on Aging, U.S. Senate, *Improving the Age Discrimination Law* 17 (Comm. Print 1973), *reprinted in* ADEA Leg. Hist. at 234. Similarly, the Senate Committee on Labor and Public Welfare endorsed extending the ADEA so that it could "remove discriminatory barriers against employment of older workers in government jobs at the Federal and local government levels as it has and continues to do in private employment." S. Rep. No. 93-690, at 56 (1974), *reprinted in* ADEA Leg. Hist. at 252. And Senator Bentsen, the principal proponent of the 1974 amendments, explained that extending the ADEA to the federal sector would ensure that federal employees enjoy "the *same protections* against arbitrary employment based on age as . . . employees in the private sector," 120 Cong. Rec. 8768 (1974) (emphasis added), and that private employers would not be "subject to restrictions that are not applicable to the Federal Government," 120 Cong. Rec. 5741

(1974).[8] This repeatedly stated desire to ensure parity in the federal and private employment sectors confirms that Congress intended § 633a's sweeping language to provide the same protections from, and restrictions on, retaliation that apply in the private employment context.

E. Consistent And Binding Interpretations By The Responsible Agencies Confirm That Section 633a Bars Retaliation.

Although the text, background understanding and purpose of § 633a also make it unnecessary to rely on agency regulations or principles of deference to determine the statute's scope, the consistent and binding interpretations by the agencies charged with enforcing § 633a(a) confirm that it bars retaliation against protected workers because those workers complain that they have been subjected to age discrimination.

First, as noted above, the CSC was originally given the authority to issue rules and regulations necessary to enforce § 633a(a), Pub. L. No. 93-259, § 15(b), 88 Stat. at 75, and it responded by immediately adopting a new subpart that extended existing antidiscrimination regulations and requirements to age discrimination complaints. See 39 Fed. Reg. at 24,351 (under new § 713.511, age discrimination complaints would be subject to requirements of § 713.213 through § 713.222 and § 713.261 through § 713.271). One such regulation treated allegations of "reprisal in connection with the presentation of a complaint" of proscribed discrimination as "an individual complaint of discrimination." 5 C.F.R.

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[8] In construing the ADEA, this Court has given weight to the views of other sponsors. *See*, *e.g.*, *Public Employees Ret. Sys.* v. *Betts*, 492 U.S. 158, 179 (1989).

§ 713.262(a) (1974). Thus, from the very first, the agency charged with enforcing § 633a(a) interpreted its categorical ban to prohibit retaliation against a protected person because that person brought a complaint alleging he had been subject to unlawful age discrimination.

Second, after the EEOC assumed enforcement authority for the ADEA in 1978,[9] it left these CSC regulations in place until 1992, when it issued regulations of its own.[10] These regulations likewise provided that it was "unlawful to restrain, interfere, coerce or discriminate against [a] complainant[] . . . because [he or she] filed a charge of discrimination," and that an allegation of such unlawful reprisal is reviewable "as an individual complaint of discrimination." 29 C.F.R. §§ 1613.261-.262(a) (1994). The current EEOC regulations similarly provide that "[c]omplaints alleging retaliation prohibited by these statutes [including the ADEA] are considered to be complaints of discrimination." 29 C.F.R. § 1614.103. And the EEOC Compliance Manual states that "[f]ederal employees are also

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[9] Enforcement authority was transferred from the CSC to the EEOC by Reorganization Plan No. 1 of 1978, § 2, 43 Fed. Reg. 19,807, 19,807 (May 9, 1978).

[10] As noted earlier, the EEOC's authority to enforce the ADEA through "rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities," 29 U.S.C. § 633a(b), is much broader than its authority under the private-employer provisions of Title VII to adopt "suitable procedural regulations." 42 U.S.C. § 2000e-12(a). Thus, while the Court has interpreted the latter provision to exclude the power to make substantive interpretations of the statute, *see EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991); *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 141 (1976), no such limitation is applicable to the EEOC's interpretive authority under § 633a(b).

protected against retaliation under each of the employment discrimination statutes." *EEOC Compliance Manual* § 8, at 8-1 n.5 (May 1998).[11]

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In sum, the plain language of § 633a(a), the background understandings that informed Congress's use of that language, the statute's purpose and legislative history, and the administrative interpretations of § 633a(a) all make clear that it bars the retaliation at issue in this case.

II. THE FIRST CIRCUIT'S CONTRARY INTERPRETATION OF SECTION 633a(a) IS ERRONEOUS.

In the decision below, the First Circuit offered a series of reasons why this Court's decision in *Jackson* does not dictate the proper interpretation of § 633a(a)'s broad language, and why the D.C. Circuit's interpretation of that language should not be followed. All of these reasons are mistaken.

A. The First Circuit Failed To Analyze The Text Of § 633a(a) Properly.

The First Circuit began its analysis of § 633a(a)'s text by improperly assuming the answer to the question raised by this case. It reasoned that § 633a(a) "clearly prohibits" discrimination based on age, "but says nothing that indicates that Congress

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[11] Although the Postal Service does not possess the same authority as the EEOC to enforce § 633a(a), and its regulations implementing that provision are thus not entitled to *Chevron* deference, it is noteworthy that the Service itself has issued regulations acknowledging that § 633a(a) "forbid[s] reprisal for participating in protected EEO activity." U.S. Postal Serv., *Employee Labor Relations Manual* § 672.1(d) (June 2007).

meant for this provision to provide a cause of action for retaliation for filing an age-discrimination related complaint." Pet. App. 5a. After *Jackson*, however, it is not possible to conclude that a sweeping prohibition on discrimination based on protected status "says nothing" about retaliation. Rather than grapple with *Jackson*'s textual analysis, the court of appeals brushed the decision aside, reasoning that *Jackson* is distinguishable on a variety of grounds. None of the lower court's purported distinctions, however, withstands scrutiny.

First, the court of appeals found it significant that "in *Jackson*, the Court was interpreting a judicially-created cause of action that was implied from Title IX," and that "[t]he Court is the primary entity involved in defining the contours of that right of action." Pet. App. 6a (internal quotation marks and alterations in original omitted). Here, however, "Congress explicitly created a statutory cause of action in § 633a, but did not include retaliation in that cause of action." *Id.* This reasoning is doubly flawed.

As just noted, it once again assumes the answer to the critical question—*i.e.*, whether § 633a(a)'s comprehensive and unqualified discrimination ban prohibits retaliation against older workers because they seek to vindicate their right to be free from age discrimination. More fundamentally, the lower court's distinction rests on the erroneous notion that the scope of a statute's substantive prohibition depends on whether the cause of action for its enforcement is express or implied. While implication of a private right of action is an exercise of law-making power in the sense that the Court creates the right "to invoke the power of the court" to enforce that right, *Davis* v. *Passman*, 442 U.S. 228, 239 n.18

(1979) (defining a "cause of action"), the scope of the substantive right enforced in a judicially-created cause of action is still defined by the statute itself. Determining the scope of that substantive right is thus an exercise in statutory interpretation—not an exercise of the judiciary's limited lawmaking power.

Accordingly, the Court explained in *Jackson* that, in "all of" the cases in which it has determined the scope of Title IX's prohibition, it "relied on the text of Title IX." 544 U.S. at 173. And that is what the Court did in *Jackson*.[12] Thus, any distinction between § 633a(a) and Title IX must rest on the *language* that defines the statutes' substantive prohibitions, not on the express or implied nature of the causes of action that can be invoked to enforce those prohibitions. The lower court did not, because it could not, identify any basis for concluding that a statute prohibiting "discrimination" "on the basis of" a protected status bars retaliation against those who complain of the proscribed discrimination, while a statute that requires "all personnel actions" to be made "free from any discrimination based on" protected status does not.

Second, the court of appeals sought to distinguish *Jackson* on the ground that it was premised, in part, on the fact that "a retaliation cause of action would protect 'teachers and coaches,' who themselves were not the targets of discrimination, but who 'are often

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[12] *See* 544 U.S. at 175 (by using the broad term "discrimination," "*Congress* gave the statute a broad reach") (emphasis added); *id.* ("Courts must accord Title IX a sweep as broad as its *language*") (emphasis added; internal quotation marks omitted). *id.* at 178 ("We reach this result based on the *statute's text*") (emphasis added); *id.* at 178 n.2 ("We interpret *Title IX's text* to clearly prohibit retaliation for complaints about sex discrimination") (emphasis added).

in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators.'" Pet. App. 6a-7a (quoting *Jackson*, 544 U.S. at 181). This rationale, the First Circuit concluded, does not apply here, because "employees such as Gómez can hardly argue that their co-workers are often in the best position to identify instances of age discrimination and bring it to the attention of supervisors." *Id.* at 7a.

This purported distinction is demonstrably incorrect. *Jackson*'s discussion of the ability of teachers and coaches to identify and report discrimination against others was addressed to a *separate holding* that is irrelevant here. In *Jackson*, the school board argued that, even if Title IX barred retaliation, that prohibition could not be invoked by a third party, such as a male coach, who was not the "victim of the discrimination that [was] the subject of the original complaint." 544 U.S. at 179. The Court rejected this argument, concluding that such third-party actions were essential to achievement of the statute's purpose because third parties were often in the best position to identify and report discrimination against students. *Id.* at 180.

This discussion thus addressed the issue of *who* may bring a retaliation claim, not whether retaliation is actionable at all. In concluding that retaliation is actionable under Title IX, the Court did not rely on the need for third-party complaints, but instead found that Title IX's proscription of "discrimination" "on the basis of sex" prohibited retaliation. *Id.* at 173-74. This textual analysis is fully applicable to § 633a(a)'s even broader language. Indeed, the question whether a third party can bring an action for retaliation under § 633a is not presented because,

unlike the complainant in *Jackson*, petitioner is a member of the protected class and was the victim of the discrimination that was the subject of the original complaint.

Third, the lower court believed that *Jackson* had relied on the fact that Title IX was adopted "in response to the Court's holding in *Sullivan* . . . in which the Court upheld a cause of action for retaliating for speaking out against race discrimination." Pet. App. 7a (citation omitted). The First Circuit concluded that here, by contrast, "there is no evidence in the legislative history that the ADEA's federal sector provisions were adopted in a similar context of claims by federal employees for retaliation for speaking out against age discrimination." *Id.* Contrary to the lower court's belief, however, this Court did not say in *Jackson* that Title IX was adopted "in response to" *Sullivan*, but rather that it was realistic to presume that the 1972 Congress was aware of the *Sullivan* decision. *Jackson*, 544 U.S. at 176 (because Title IX was enacted three years prior to *Sullivan*, "that decision provides a valuable context for understanding" Title IX). As petitioner has shown, *supra* at § I.B.1, it is realistic to presume that the 1974 Congress was equally familiar with *Sullivan*, and expected the term "discrimination" in § 633a(a) to be interpreted in the same broad manner that the Court had construed 42 U.S.C. § 1982 in *Sullivan*.[13]

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[13] There is no merit to the suggestion that, "because *Sullivan*, like *Jackson*, interpreted the scope of an implied right of action, it cannot be presumed that Congress was seeking to incorporate *Sullivan*'s holding when it enacted" § 633a(a). Br. for the Resp. in Opp. at 11. *Sullivan* did not interpret "the scope of an implied right of action," but rather "a general prohibition on racial discrimination" in the *text* of 42 U.S.C. § 1982. *Jackson*,

B. The First Circuit's Structural Analysis Of The ADEA Is Mistaken.

The First Circuit believed two other provisions of the ADEA buttressed its reading of § 633a(a). First, it reasoned that, because § 623(d) prohibits retaliatory discrimination by private employers,[14] "[t]he absence of statutory language providing a claim for retaliation in § 633a, when compared with the explicit prohibition on retaliation in § 623(d), further supports the conclusion that Congress intended for the ADEA to prohibit retaliation by private employers, but not by federal employers." Pet. App. 8a. In addition, the First Circuit believed that § 633a(f), which provides that the ADEA's private sector provisions do not apply to federal employers, 29 U.S.C. § 633a(f), confirmed that Congress did not want the "expansive private-sector provisions of the ADEA extended to federal employees." Pet. App. 9a-10a. Both conclusions are wrong.

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544 U.S. at 176. In *Jackson*, this Court presumed the 1972 Congress was aware of this ruling when it banned "discrimination" "on the basis of sex" in Title IX, and it is equally reasonable to presume that Congress was aware of this ruling when it used the even broader language of § 633a(a) just two years later. The presumption, in other words, concerns how Congress expected this Court to interpret a *substantive prohibition*; the manner in which that prohibition is judicially enforced (*i.e.*, through an implied or express cause of action) has no bearing on whether Congress expected the word "discrimination" to be construed to encompass retaliation.

[14] Section 623(d) provides that

> It shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

29 U.S.C. § 623(d).

1. Section 623(d) of the ADEA does not demonstrate that Congress intended to leave federal employees with no protection from retaliation.

In *Jackson*, both the government and this Court rejected the very same type of apples-to-oranges comparison that the lower court used to narrow the scope of § 633a(a)'s sweeping and comprehensive prohibition. The court of appeals in *Jackson* had relied on § 704(a) of Title VII to conclude that Title IX's broadly worded prohibition did not proscribe retaliation against those who oppose discrimination against women, reasoning that, "when Congress wished to prohibit retaliation against individuals who complain about . . . discrimination . . . it did so explicitly." *Jackson* v. *Birmingham Bd. of Educ.*, 309 F.3d 1333, 1344 n.12 (11th Cir. 2002) (citation omitted). In this Court, the government criticized this reasoning. It noted that Title VII's proscription of retaliation "is one in a series of prohibitions against discrimination in employment that specify in great detail the kind of discrimination prohibited," whereas Title IX's prohibition against discrimination "is contained in a single general prohibition." U.S. *Jackson* Br. at 21.

> The appropriate comparison for Title IX is therefore not Title VII, but 42 U.S.C. 1982 and Title VI, both of which contain a single general prohibition against discrimination, and both of which had been authoritatively construed to encompass protection against retaliation before Title IX was enacted.

Id.

This Court endorsed this reasoning. Noting the difference between Title IX's "broadly written general

prohibition on discrimination," and Title VII's detailed specification of proscribed conduct, the Court concluded that no negative inference could be drawn from a comparison of such disparate provisions. *Jackson*, 544 U.S. at 175. "Because Congress did not list *any* specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered." *Id.*

This reasoning is fully applicable here. Just as Title VII's private-sector provisions provided no basis for narrowing Title IX's broad prohibition, the ADEA private-employer provisions, which "were derived *in haec verba* from" Title VII's private-employer provisions, *Lorillard*, 434 U.S. at 584, provide no basis for narrowing § 633a(a)'s even broader, stand-alone prohibition. Where Congress lists a series of discrete types of prohibited conduct, as it did in the private-employer provisions of Title VII and the ADEA, and fails to mention one such type of conduct, it is reasonable to infer that the omission was intentional. But the fact that Congress included retaliation in the ADEA's list of discrete types of unlawful private-sector conduct does not demonstrate that reprisals fall outside the scope of § 633a(a)'s fundamentally different prohibition, which does not specify *any* proscribed acts and instead requires that "*[a]ll* personnel actions . . . shall be made free from *any discrimination*." Indeed, *Jackson* ratified the very reasoning the D.C. Circuit employed in concluding that § 623(d) provided no basis for narrowing the reach of § 633a(a). See *Forman*, 271 F.3d at 296 ("Unlike § 623, which is narrowly drawn and sets forth specific prohibited forms of age discrimination in private employment, Congress used

sweeping language when it subsequently extended the ADEA to cover federal agency employees.").[15]

The First Circuit also wrongly believed that its "negative inference" theory was supported by the decision in *Lehman*, Pet. App. 9a. In that case, this Court held that § 633a(c) did not afford federal employees the same right to a jury trial that private employees have under the ADEA. Critically, however, in *Lehman*, this Court compared § 15(c) of the ADEA's federal-sector provision (§ 633a(c)) with § 7(c) of the private-employer provisions (§ 626(c)). Except for the right to a jury trial (and a proviso concerning the impact of EEOC suits), these two provisions are *identical*, unlike the fundamentally different private- and federal-employer provisions of the ADEA. Indeed, this Court emphasized that its conclusion that the federal-sector provision did not

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[15] This same reasoning underscores the impropriety of the First Circuit's reliance on *Burlington Northern & Santa Fe Railway* v. *White*, 126 S. Ct. 2405 (2006). *See* Pet. App. 5a. In examining Title VII's *private employer* provisions, the Court observed that § 703(a) (which it designated the "core antidiscrimination provision") seeks to prevent injury to individuals "based on who they are, *i.e.*, their status," while § 704(a) (which it labeled Title VII's "anti-retaliation provision") "seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct." 126 S. Ct. at 2411-12. Contrary to the First Circuit's view, however, this is plainly not a ruling that "discrimination" and "retaliation" are, as a matter of law, distinct and mutually exclusive wrongs. The Court's observation was simply descriptive of Title VII's differently worded, and differently structured, private-employer provisions, which, as this Court explained just the year before in *Jackson*, set forth a series of narrow prohibitions, and provide no basis for narrowing a broadly worded, stand-alone antidiscrimination provision. Thus, *Burlington* does not repudiate *Jackson*'s reasoning, let alone overrule its holding without hinting it was doing so.

confer a right to jury trial was the direct result of the fact that, "[w]ith the exception of the express right to jury trial conferred by § 7(c)(2) and of the proviso in § 7(c)(1), *§ 7(c) is identical to § 15(c)*." *Lehman*, 453 U.S. at 158 n.6 (emphasis added). It was the disparity in otherwise identical provisions that demonstrated that Congress did not intend to authorize jury trials in cases involving federal employers. *Id.* at 162-63. Thus, *Lehman* involved precisely the type of apples-to-apples comparison that can give rise to a negative inference—and that cannot be made in the case of the differently-structured § 623 and § 633a(a).

The logical fallacy in the court of appeals' "negative inference" theory is illustrated by § 623(e), which prohibits discriminatory advertisements and notices for private employment. See 29 U.S.C. § 623(e). Under the lower court's theory, the lack of such an express prohibition in § 633a(a) means that it does not bar the use of discriminatory notices or advertisements. But § 633a(a) plainly *does* prohibit such practices: they are "personnel actions" that (1) "affect[] . . . applicants for employment" over 40 and (2) are not "free from any discrimination based on age." *Id.* § 633a(a). And, because a ban on discriminatory advertising is superfluous in light of § 633a(a)'s broad scope, it would be improper to conclude that the inclusion of such an express prohibition in the ADEA's private employer provisions but not in § 633a(a) somehow limits the scope of § 633a(a). The same is true for retaliation, which is also encompassed by the comprehensive and unqualified language of § 633a(a).

2. Section 633a(f) provides no support for the conclusion that Congress intended to leave federal employees with no protection from retaliation.

The First Circuit's reliance on § 633a(f) is equally misplaced. This provision states that any personnel action covered by § 633a(a) "shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section." *Id.* § 633a(f).[16] This provision does not limit § 633a(a)'s broad prohibition, or demonstrate that it is narrower in scope than § 623. In fact, its purpose is just the opposite: to ensure that limitations and restrictions found in the ADEA's private-sector provisions are not incorporated into the federal-sector provision.

Contrary to the First Circuit's view, construing § 633a(a)'s broad language to prohibit retaliation against protected older workers because they complain of being subjected to age discrimination does not extend the private-sector provisions of the ADEA to federal employees. Pet. App. 10a. Such an interpretation simply enforces the broad prohibition found in the plain language of § 633a(a) itself. The flaw in the First Circuit's contrary reasoning can once again be illustrated by considering § 623(e). As just noted, § 633a(a)'s plain language prohibits the same types of discriminatory advertising that § 623(e) bans. This does not mean that federal personnel actions are "subject to, or affected by," § 623(e). It simply means that § 633a(a)'s sweeping language proscribes the same types of conduct by federal

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[16] Section 631(b) limits the protections of § 633a to "individuals who are at least 40 years of age." 29 U.S.C. § 631(b).

employers that the various subsections of § 623 make unlawful for private employers.

Nor is it true that according § 633a(a) its plain meaning renders § 633a(f) "surplusage." Pet. App. 9a. The latter provision ensures, for example, that certain defenses available to private employers, see 29 U.S.C. § 623(f), do not apply in a federal age discrimination case. Similarly, it ensured that the permissible mandatory retirement age of 70 that applied in the private sector in 1978 (when § 633a(f) was adopted) would not apply to the federal sector. See Pub. L. No. 95-256, §§ 3, 5, 92 Stat. at 189, 192.[17]

In fact, Congress adopted § 633a(f) for these very reasons. The House Report accompanying the provision explained that § 633a(a) "is complete in itself. Restrictions and limitations in other parts of the act, such as paragraph (a) of section 12 [former § 631, which set forth the upper age limit] and paragraph (f) of section 4 [§ 623(f), which sets forth statutory defenses available to private employers] do not apply to section 15 [§ 633a(a)]." H.R. Rep. No. 95-527, pt. 1, at 11 (1977), *reprinted in* ADEA Leg. Hist., at 371. Thus, § 633a(f) had, and still has, independent meaning and purpose when the broad and sweeping language of § 633a(a) is given its full scope. Indeed, § 633a(f)'s purpose was to ensure that the breadth of the federal age-discrimination ban is not narrowed by any of the ADEA's private-sector provisions. The First Circuit's reliance on § 633a(f), therefore, completely frustrated its purpose.

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[17] Congress removed the upper age limit for the private sector in 1986. *See* Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 2, 100 Stat. 3342, 3342.

III. SOVEREIGN IMMUNITY PRINCIPLES PROVIDE NO BASIS FOR NARROWING SECTION 633a(a)'s BROAD LANGUAGE.

Finally, the government argued below that principles of sovereign immunity require that § 633a(a) be narrowly construed. But, as the First Circuit correctly ruled, sovereign immunity is irrelevant here, because Congress waived the Postal Service's immunity to suits such as this. Indeed, even if the rule of strict construction that governs waivers of sovereign immunity applied here, § 633a(a)'s sweeping language clearly waives the government's immunity to retaliation claims. The government's reliance on that rule of construction, however, reflects an unwarranted attempt to expand sovereign immunity principles: the strict construction rule applies to the government's amenability to suit and the incidents and relief available when it is amenable to suit, not to the substantive norms that become judicially enforceable as a result of the waiver.

A. Sovereign Immunity Principles Are Inapplicable To Section 633a(a).

The Postal Reorganization Act "waives the immunity of the Postal Service from suit by giving it the power 'to sue and be sued' in its official name." *United States Postal Serv.* v. *Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 744 (2004) (quoting 39 U.S.C. § 401(1)). This Court has ruled that the "absence of immunity does not result in liability if the substantive law in question is not intended to reach the federal entity." *Id.* at 744 (citing *FDIC* v. *Meyer*, 510 U.S. 471 (1994)). But there is no dispute that the substantive law here applies to the Postal Service: § 633a(a) expressly bars any age discrimination in personnel actions affecting employees "in the United

States Postal Service." 29 U.S.C. § 633a(a). See also *Loeffler* v. *Frank*, 486 U.S. 549, 558-61 (1988) (essentially identical language of § 717(a) of Title VII satisfies *Meyer*'s second step as to Postal Service). Accordingly, principles of sovereign immunity are wholly inapposite here. Indeed, because Congress waived the Postal Service's immunity against a longstanding background rule that "sue-and-be-sued" clauses are construed broadly, *FHA* v. *Burr*, 309 U.S. 242, 245 (1940), and made clear that the Service is subject to § 633a(a)'s substantive prohibition, Congress plainly did not intend courts to narrow that prohibition in suits involving the Postal Service based on sovereign immunity concerns.

Nevertheless, the government argued below that, because § 633a(a)'s substantive ban applies to other federal employers, it must "be narrowly construed irrespective of the Postal Service's status as a federal entity that may sue and be sued." U.S. Appeal Br. at 45-46. And, according to the government, § 633a(a) does not proscribe retaliation with the clarity necessary to waive sovereign immunity. Neither of the premises to this argument is correct.

B. Even If Immunity Principles Apply, Section 633a(a) Provides The Necessary Clear Statement.

If sovereign immunity principles were applicable to § 633a(a)'s substantive norm, the plain language of the statute would clearly and unambiguously waive immunity for claims of retaliation.

The D.C. Circuit reached precisely this conclusion in *Forman*, explaining that the "sweeping," "unqualified," and "comprehensive" language of § 633a(a) provided the "unequivocal[ ] express[ion]" of intent necessary to waive sovereign immunity for

retaliation claims. 271 F.3d at 296-97. This Court effectively ratified that conclusion in *Jackson*. It found that Title IX's prohibition on "discrimination" "on the basis of sex"—which is less sweeping than § 633a(a)'s age discrimination ban—was sufficiently clear to satisfy a "clear statement" rule no less stringent than that governing waivers of sovereign immunity. See *Jackson*, 544 U.S. at 184 (Thomas, J., dissenting) (noting that Congress must "speak unambiguously in imposing conditions on funding recipients through its spending power"). In fact, *Jackson* repeatedly stated that Title IX's text *clearly* barred retaliation against individuals because they complain about proscribed discrimination.[18] Moreover, as petitioner has shown, the language of § 633a(a) is even clearer, since it requires that "*[a]ll* personnel actions affecting" protected federal workers "shall be made free from *any* discrimination based on age," 29 U.S.C. § 633a(a) (emphases added), and the retaliation here falls even more squarely within the discrimination ban than the conduct at issue in *Jackson* did.

Indeed, the clarity of the text is confirmed by the background principles that informed Congress's use of the phrase "discrimination based on" age. As petitioner has shown, Congress is properly presumed to have expected, when it legislated in 1974, that this phrase would capture retaliation against those who complain of being subjected to discrimination. See

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[18] *See* 544 U.S. at 178 n.2 ("We interpret Title IX's text to *clearly* prohibit retaliation for complaints about sex discrimination") (emphasis added); *id.* at 182 (retaliation "*clearly* violate[s] Title IX") (emphasis added); *id.* at 183 (retaliation "violates the *clear terms of the statute*") (emphasis added; internal quotation marks omitted).

supra § I.B.[19] In light of these background understandings, the language Congress chose to use in § 633a(a) reflects an unequivocal expression of its intent to permit suits for such retaliation. See U.S. *Jackson* Br. at 11-12 (in light of *Sullivan* alone, Congress "would have seen no need to enact a prohibition that specifically referred to retaliation").

C. In Seeking To Narrow Section 633a(a)'s Substantive Norm, The Government Seeks An Unwarranted Expansion Of The Rule Of Strict Construction.

Section 633a(a) satisfies the clear statement requirement for waivers of sovereign immunity, but that requirement does not apply for yet another reason. Use the rule of strict construction here would work an unwarranted expansion of this interpretive principle. Sovereign immunity applies to the federal government's amenability to suit, the conditions governing its amenability to suit,[20] and the relief available in such suits.[21] The rule of strict

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[19] Use of such background principles is consistent with the rule that the unequivocal intent to waive immunity must appear in statutory text. *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 37 (1992). Deriving Congress's understanding of the terms it used from contemporaneous usage in judicial and regulatory interpretations and related statutes is no different than deriving that understanding from contemporaneous dictionaries. *See*, *e.g.*, *Utah* v. *Evans*, 536 U.S. 452, 475 (2002) (deriving meaning of "enumeration" from contemporaneous dictionaries); *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 759 (1980) (in construing a word in a statute, "we may look to the contemporaneous understanding of the term").

[20] *See Lehman*, 453 U.S. at 162-69 (waiver in ADEA conditioned on lack of right to jury trial).

[21] *See Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 262-63 (1999) (waiver in § 702 of the Administrative Procdure

construction, therefore, applies to those aspects of a statute that govern these subjects.[22]

The substantive norm set forth in § 633a(a), however, involves none of these subjects. It is a rule of conduct that governs covered personnel actions year in and year out, regardless of whether any federal entity is sued for violating that norm. What the government seeks, therefore, is an improper "double-narrowing" of § 633a—the use of sovereign immunity principles to limit not only the types of relief and the incidents of suit available under subsection (c), but also the substantive protection afforded by subsection (a). This Court has rejected this type of "double-narrowing" elsewhere. See *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) (a statute gives rise to claim within the Indian Tucker Act's waiver of sovereign immunity if "it 'can fairly be interpreted as mandating compensation by the Federal government,'" a standard that requires "a showing demonstrably lower than the standard for the initial

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Act does not extend to claims for money damages, including claims to enforce equitable liens, which are simply a type of substitute remedy like money damages); *Lane* v. *Pena*, 518 U.S. 187, 192-94 (1996) (Rehabilitation Act does not waive immunity for monetary damages).

[22] *See Lehman*, 453 U.S. at 160-65 (applying rules of strict construction to subsection (c) of § 633a in determining that federal employees are not entitled to a jury trial); *Nowd* v. *Rubin*, 76 F.3d 25, 27 (1st Cir. 1996) (strictly construing subsection (c) of § 633a in concluding that it does not waive immunity for attorneys' fees); *Villescas* v. *Abraham*, 311 F.3d 1253, 1256-59 (10th Cir. 2002) (applying rules of strict construction in holding that subsection (c) of § 633a does not waive immunity for compensatory damages for emotional distress).

waiver of sovereign immunity" itself). The Court should reject that approach here as well.

Indeed, the "double-narrowing" the government seeks would lead to untenable anomalies. The ADEA grants the EEOC precisely the type of broad rule-making and interpretive powers that, under *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and *United States* v. *Mead Corp.*, 533 U.S. 218 (2001), allow the agency to speak with the force of law when addressing ambiguities in the statute, or issues as to which the statute is silent. See 29 U.S.C. § 633a(b) (authorizing the EEOC "to enforce the provisions of subsection (a)" and empowering it to "issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities"). But, if sovereign immunity principles apply to the substantive norm, this interpretive authority is illusory. The agency can enforce only those prohibitions clearly stated in the text of subsection (a). If that text is silent or ambiguous, the agency cannot exercise its lawmaking power, lest it expand the scope of the waiver.[23]

Moreover, applying rules of strict construction to § 633a(a)'s substantive prohibition is inconsistent with Congress's intent here. As noted above, § 633a(a) was modeled on § 717(a) of Title VII, which replaced a regulatory ban on discrimination based on race, color, religion, sex, or national origin. Compare

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[23] In fact, the government has recognized that sovereign immunity principles do not apply to § 633a(a)'s substantive norm for this very reason. In *Villescas*, the government argued that sovereign immunity barred the relief of compensatory damages for emotional distress, but it "accept[ed] the existence of such a cause of action [*i.e.*, for retaliation] pursuant to regulations issued by the EEOC." 311 F.3d at 1258.

5 C.F.R. § 713.201 *et seq.* (1968), with EEO Act, Pub. L. No. 92-261, § 717(a), 86 Stat. at 111 (codified at 42 U.S.C. §§ 2000e-16(a)). Section 717(c) subjected the government to suit for various forms of relief for violations of the statutory ban, and the government's amenability to such suit is subject to the rule of strict construction. See, *e.g.*, *Library of Congress* v. *Shaw*, 478 U.S. 310, 323 (1986) (Title VII does not waive the United States' immunity for interest), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. But Congress could not have intended the substantive ban of § 717(a) itself to be strictly construed. To the contrary, Congress adopted that ban because it believed the pre-existing regulatory prohibition had been "ineffective." *Brown* v. *GSA*, 425 U.S. at 826. Yet, under the government's "double-narrowing" approach, Title VII's statutory ban would have to be interpreted more strictly than the ineffective regulatory ban it was designed to replace. Because it would be improper to use sovereign immunity principles to narrow the scope of § 717(a) of Title VII, it is equally improper to use those principles to narrow the protections of § 633a(a), which Congress modeled on § 717(a).

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the decision below be reversed.

Respectfully submitted,

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APPENDIX A

FEDERAL STATUTES CONTAINING ANTI-RETALIATION PROVISIONS

2 U.S.C. § 1317(a)	(various rights of congressional employees)
3 U.S.C. § 417(a)	(various rights of certain employees in the office of the President)
5 U.S.C. § 7116	(unfair labor practices by federal agencies)
10 U.S.C. § 2409(a)	(reporting violations of the law by federal contractors)
12 U.S.C. § 1441a(q)(1)	(reporting possible violations of the law to the Thrift Depositor Protection Oversight Board)
12 U.S.C. § 1790b	(reporting possible violations of the law by credit unions or supervising federal officials)
12 U.S.C. § 1831j	(reporting possible violations of the law or gross mismanagement by banks or federal agencies overseeing banks)
15 U.S.C. § 2622	(control of toxic substances)
15 U.S.C. § 2651(a)	(asbestos hazard)

18 U.S.C. § 1514A	(employees of publicly traded corporations who disclose information to the SEC, Members of Congress, or federal regulatory agencies)
20 U.S.C. § 3608	(disclosure of asbestos hazard in school)
20 U.S.C. § 4018	(disclosure of asbestos hazard in school)
22 U.S.C. § 4115	(rights of Department of State employees to join, or refrain from joining, union)
29 U.S.C. § 158(a)(3)-(4)	(National Labor Relations Act)
29 U.S.C. § 215(a)(3)	(Fair Labor Standards Act)
29 U.S.C. § 623(d)	(Age Discrimination in Employment Act)
29 U.S.C. § 660(c)(1)	(Occupational Safety and Health Act)
29 U.S.C. § 1140	(ERISA)
29 U.S.C. § 1855(a)	(Migrant and Seasonal Agricultural Worker Protection Act)
29 U.S.C. § 2002	(Employee Polygraph Protection Act)
29 U.S.C. § 2615(a)	(Family and Medical Leave Act)
30 U.S.C. § 815(c)(1)	(mine safety)
30 U.S.C. § 1293(a)	(surface mining control and reclamation)

31 U.S.C. § 3730(h)	(false claims against the United States)
31 U.S.C. § 5328(a)	(disclosure to federal officials of violations of laws regarding reports of monetary transactions)
33 U.S.C. § 948a	(longshore and harbor workers' compensation)
33 U.S.C. § 1367(a)	(water pollution prevention and control)
38 U.S.C. § 4311(b)	(rights of members of the armed services to reemployment)
41 U.S.C. § 265(a)	(violations of the law by federal contractors)
42 U.S.C. § 300j-9(i)(1)	(safety of public water systems)
42 U.S.C. § 2000e-3(a)	(Title VII)
42 U.S.C. § 5851(a)(1)	(nuclear whistleblower protection)
42 U.S.C. § 6971(a)	(solid waste disposal)
42 U.S.C. § 7622(a)	(air pollution)
42 U.S.C. § 9610(a)	(CERCLA)
42 U.S.C. § 12203(a)	(Americans with Disabilities Act)
46 U.S.C. § 2114(a)	(maritime safety)
46 U.S.C. § 80507(a)	(unsafe cargo containers)
49 U.S.C. § 20109	(railway safety)
49 U.S.C. § 31105(a)	(commercial motor vehicle safety)

49 U.S.C. § 42121(a)	(whistleblowing by employees of air carriers or contractors or subcontractors of air carriers)
49 U.S.C. § 60129(a)	(pipeline safety)
50 U.S.C. § 2702(c), (i)	(whistleblowing related to military atomic energy facilities)

APPENDIX B

FEDERAL STATUTES CONTAINING ANTI-RETALIATION PROVISIONS THAT COVER FEDERAL EMPLOYEES

2 U.S.C. § 1317(a)	(various rights of congressional employees)
3 U.S.C. § 417(a)	(various rights of certain employees in the office of the President)
5 U.S.C. § 7116	(unfair labor practices by federal agencies)
12 U.S.C. § 1441a(q)(1)	(reporting possible violations of the law to the Thrift Depositor Protection Oversight Board)
12 U.S.C. § 1790b	(reporting possible violations of the law by credit unions or supervising federal officials)
12 U.S.C. § 1831j	(reporting possible violations of the law or gross mismanagement by banks or federal agencies overseeing banks)
15 U.S.C. § 2622	(control of toxic substances)
22 U.S.C. § 4115	(rights of Department of State employees to join, or refrain from joining, union)
29 U.S.C. § 215(a)(3)	(Fair Labor Standards Act)
29 U.S.C. § 2615(a)	(Family and Medical Leave Act)

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42 U.S.C. § 12203(a)	(Americans with Disabilities Act)
50 U.S.C. § 2702(c), (i)	(whistleblowing related to military atomic energy facilities)