No. 06-1321

In the Supreme Court of the United States

MYRNA GOMEZ-PEREZ, PETITIONER

v.

JOHN E. POTTER, POSTMASTER GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the federal sector prohibition against discrimination based on age in the Age Discrimination in Employment Act of 1967, 29 U.S.C. 633a (Supp. IV 2004), creates a cause of action that permits an employee to sue a federal employer for alleged retaliation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 476 F.3d 54. The opinion and order of the district court (Pet. App. 11a-32a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 2007. A petition for rehearing was denied on March 20, 2007 (Pet. App. 33a). The petition for a writ of certiorari was filed on March 30, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, provides that "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age" in speci-

fied federal departments and agencies, including the United States Postal Service, "shall be made free from any discrimination based on age." 29 U.S.C. 633a(a) (Supp. IV 2004). Any person aggrieved by such discrimination "may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." 29 U.S.C. 633a(c). With one exception not relevant here, personnel actions taken by federal departments and agencies covered by the ADEA are not "subject to" any other provision of the ADEA. 29 U.S.C. 633a(f).

b. The Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*, provides that it is unlawful to

> take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—
>
> > (A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;
> >
> > (B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A).

5 U.S.C. 2302(b)(9).

Many employees of the United States Postal Service (USPS) are excepted from the CSRA and are instead covered by collective bargaining agreements or a personnel system developed by the USPS. See 39 U.S.C. 410(a), 1001, 1206(b) (authorizing collective bargaining), 1209(a). In authorizing those alternative personnel systems, Congress required the USPS to "assure its officers and employees * * * full protection of their employment rights by guaranteeing them an opportunity

for a fair hearing on adverse actions." 39 U.S.C. 1001(b).

The USPS personnel system prohibits "any action, event, or course of conduct that * * * subjects any person to reprisal for prior involvement in EEO activity." USPS, *Employee and Labor Relations Manual* § 665.23, at 688 (Feb. 15, 2007) (*ELM*) <http://www.usps.com/cpim/manuals/elm/elm.htm>. All collective bargaining agreements incorporate that prohibition against retaliation. They also prohibit discipline that is "punitive" and not "for just cause."[1]

2. Petitioner was a window distribution clerk for the USPS. Pet. App. 1a. In November 2002, petitioner requested a transfer from a position at the Moca, Puerto Rico Post Office to a position at the Dorado, Puerto Rico Post Office. *Id.* at 2a. Petitioner's supervisor denied that request. *Ibid.* Petitioner filed an equal employment opportunity complaint with the USPS, alleging that she had been discriminated against on the basis of age. *Ibid.* Petitioner alleges that, after she filed that complaint, she was subjected to various forms of retaliation. *Ibid.*

In November 2003, petitioner filed suit in the United States District Court for the District of Puerto Rico, against the USPS, alleging, *inter alia*, that she had been subjected to retaliation for filing an age discrimination complaint and that this retaliation constitutes a violation

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[1] *Agreement Between the USPS and the National Postal Mail Handlers Union* arts. 16, 19 (2000) < http://www.npmhu.org/Resource/Agreement/USPSNPMHU2000NationalAgreement.pdf>; see USPS & American Postal Workers Union, *National Collective Bargaining Agreement* arts. II, XVI (July 20, 1971) <http://www.apwu.org/dept/ind-rel/sc/oldcbas/APWU%20Contract%201971-1973.pdf> (termination only "for just cause").

of the ADEA. Pet. App. 3a. The district court granted summary judgment to the government on petitioner's retaliation claim, holding that the United States had not waived its immunity from suit for retaliation claims. *Id.* at 21a-32a. The court reasoned that waivers of immunity must be express, and that the federal sector age discrimination prohibition does not contain an express waiver of immunity for retaliation claims. *Id.* at 29a-31a.

3. The court of appeals affirmed. Pet. App. 1a-10a. The court held that sovereign immunity does not preclude an ADEA suit against the USPS because the Postal Reorganization Act, 39 U.S.C. 101 *et seq.*, waived the USPS's sovereign immunity. Pet. App. at 4a. The court further held that the ADEA does not "allow a plaintiff to bring a cause of action against the federal government for retaliation." *Ibid.* The Court reasoned that the "text of § 633a clearly prohibits discrimination against federal employees (over forty years old) based on age, but says nothing that indicates that Congress meant for this provision to provide a cause of action for retaliation for filing an age-discrimination related complaint." *Id.* at 5a.

The court noted that this Court in *Burlington Northern & Santa Fe Railway* v. *White*, 126 S. Ct. 2405, 2412 (2006), had explained that the substantive prohibition against discrimination in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, seeks to prohibit injury to individuals based on their status, whereas Title VII's anti-retaliation provision seeks to prevent harm to individuals based on their conduct. Pet. App. 5a. The court concluded that this "clear difference between a cause of action for discrimination and a cause of action for retaliation leads to the conclusion that if Congress

had meant to provide for both causes of action, it would have said so explicitly." *Ibid.*

The court of appeals rejected on several grounds petitioner's reliance on the holding in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005), that the implied right of action in Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, for discrimination based on sex encompasses protection against retaliation. Pet. App. 6a-7a. First, the court noted that *Jackson* was "interpreting a judicially-created cause of action," giving the Court authority to define "the contours of that right of action." *Id.* at 6a (citation omitted). Second, the court observed that the *Jackson* Court had premised its holding in part on its conclusion that a retaliation remedy was necessary to further the statute's objectives because coaches and teachers, although not themselves the targets of sex discrimination, were often in the best position to identify such discrimination against students. *Id.* at 6a-7a. Third, the court noted that Title IX was enacted against the backdrop of *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), which had held that a statute barring discrimination based on race gave rise to a implied right of action to sue for retaliation. Pet. App. 7a. The court concluded that none of those rationales applies in the present context. *Id.* at 6a-7a.

In concluding that the ADEA federal sector prohibition does not encompass retaliation, the court of appeals also relied on the structure of the ADEA. In particular, the court noted that the ADEA provision governing private employers expressly provides a cause of action for retaliation, making the absence of such a parallel provision in the federal sector significant. Pet. App. 7a-8a. Moreover, the court noted, the federal sector ADEA

provision specifies that federal employers shall *not* be subject to the provisions that govern private employers. *Id.* at 9a (citing 29 U.S.C. 633a(f)).

The court of appeals noted that the D.C. Circuit had held in *Forman* v. *Small*, 271 F.3d 285 (2001), cert. denied, 536 U.S. 958 (2002), that the ADEA federal sector provision creates a cause of action for retaliation. Pet. App. 8a-9a. For the reasons discussed above, however, the court disagreed with the D.C. Circuit's conclusion. *Id.* at 8a-10a.

ARGUMENT

The court of appeals correctly held that the ADEA provision applicable to federal employers does not create a retaliation remedy, and that holding does not conflict with any decision of this Court. The decision below conflicts with the D.C. Circuit's decision in *Foreman*. Because those are the only two circuits that have addressed the issue, however, further ventilation of the issue may be appropriate and could eliminate the need for the Court's intervention to resolve the issue. Moreover, review is particularly unwarranted in the context of this case because, regardless of the scope of the ADEA, most USPS employees, including petitioner, are protected against retaliation under the terms of collective bargaining agreements. The petition for a writ of certiorari should therefore be denied.

1. The federal sector ADEA provision prohibits "discrimination *based on age*." 29 U.S.C. 633a(a) (Supp. IV 2004) (emphasis added). When viewed in the context of the ADEA as a whole, the term "based on age" limits the reach of the federal sector ADEA prohibition to discrimination based on the individual victim's age; it does

not cover retaliation against a person who has filed an age discrimination complaint.

A comparison between the ADEA's provisions governing private employers and the provision governing federal employers is particularly revealing. The provisions governing private employers separately prohibit *both* discrimination because of an individual's age, 29 U.S.C. 623(a)(1), and discrimination because an individual has filed an age discrimination complaint, 29 U.S.C. 623(d), while the ADEA provision governing federal employers prohibits *only* discrimination based on age. 29 U.S.C. 633a(a) (Supp. IV 2004). Equally important, the provision applicable to federal employers specifies that none of the provisions governing private employers shall apply to federal employers. 29 U.S.C. 633a(f). The overwhelming implication from that series of provisions is that while the ADEA's private sector provisions prohibit both discrimination based on a victim's age and retaliation based on a person's conduct in filing an age discrimination complaint, the federal sector provision reaches only discrimination based on the individual victim's age. See Pet. App. 9a-10a.

It is also significant that the federal sector provision constitutes a waiver of the United States' immunity from suit. It is an accepted principle of statutory construction that waivers of the United States' immunity from suit "must be construed strictly in favor of the sovereign." *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992) (citation and internal quotation marks omitted). That principle of strict construction leads to the conclusion that the federal sector ADEA provision prohibits only discrimination based on the individual victim's age, not

retaliation against a person for filing an age discrimination complaint.[2]

That understanding of the ADEA's federal sector prohibition is also consistent with the Court decision in *Burlington Northern & Santa Fe Railway* v. *White*, 126 S. Ct. 2405 (2006). In that case, the Court held that the provision in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, barring discrimination by private employers because of, *inter alia*, race or sex is "not coterminous" with a Title VII provision barring discrimination by private employers because a person has filed a Title VII complaint. *Burlington*, 126 S. Ct. at 2414. The Court explained that "[t]he substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct." *Id.* at 2412.

That analysis is equally applicable here. The federal sector prohibition against discrimination "based on age" seeks to prevent injury to individuals based on their status as persons who are more than 40 years of age; it does not seek to prevent harm to individuals based on their conduct in filing an age discrimination complaint.

That reading of the federal sector prohibition against discrimination based on age does not leave persons

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[2] As the court of appeals noted (Pet. App. 4a), the Postal Reorganization Act generally waives the USPS's immunity from suit. For most federal employers, however, the ADEA constitutes the sole waiver of immunity from ADEA claims. Because the ADEA cannot be interpreted one way for federal agencies and departments for which it constitutes the only waiver, and a different way for agencies for which Congress has generally waived immunity from suit, the principle that waivers of sovereign immunity must be strictly construed is applicable here. Cf. *Clark* v. *Martinez*, 543 U.S. 371, 380 (2005).

who complain of age discrimination without protection against retaliation. The CSRA makes it a prohibited personnel practice to "take or fail to take, or threaten to take or fail to take, any personnel action" because an employee has "exercise[d] * * * any appeal, complaint or grievance right granted by any law, rule, or regulation" or "testif[ied] for or otherwise lawfully assist[ed] any individual in the exercise of any [such] right." 5 U.S.C. 2302(b)(9). A federal employee claiming retaliation that results in removal, suspension of more than 14 days, or reduction in grade or pay may seek relief from the Merit Systems Protection Board (MSPB) with review by the Federal Circuit. 5 U.S.C. 7512, 7701-7703. An employee complaining of retaliation of a less serious nature may bring a complaint to the Office of Special Counsel, which is authorized to seek corrective action on the employee's behalf before the MSPB. 5 U.S.C. 1212.

The CSRA excludes many USPS employees from its protections. But those employees are protected against retaliation by USPS regulations and collective bargaining agreements. The Postal Service *ELM* prohibits "any action, event, or course of conduct that * * * subjects any person to reprisal for prior involvement in EEO activity." *ELM* § 665.23, at 688. That prohibition applies to employees who work under a collective bargaining agreement as well as those who do not. See, *e.g.*, *Agreement Between the USPS and the National Postal Mail Handlers Union* art. 19 (2000) (Mail Handlers Agreement) <http://www.npmhu.org/Resource/Agreement/USPSNPMHU2000NationalAgreement.pdf>; *Harrell* v. *USPS*, 445 F.3d 913, 922-923 (7th Cir), cert. denied, 127 S. Ct. 845 (2006). Employees who work under a collective bargaining agreement also are protected from discipline that is not "for just cause," and retaliation

for filing an ADEA claim would not constitute just cause. See Mail Handlers Agreement art. 16; USPS & American Postal Workers Union, *National Collective Bargaining Agreement* art. XVI (July 20, 1971) <http://www.apwu.org/dept/ind-rel/sc/oldcbas/APWU%20Contract%201971-1973.pdf>.

2. Petitioner errs in contending (Pet. 7-8) that the decision of the court below conflicts with this Court's decision in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005). In *Jackson*, the Court addressed the scope of the implied right of action in Title IX, which provides that "[n]o person * * * 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). The Court in *Jackson* held that retaliation against a person because that person has complained of sex discrimination gives rise to a private right of action under that provision. 544 U.S. at 173-174.

Petitioner seeks to extrapolate from *Jackson* the rule that any prohibition against discrimination based on a particular characteristic necessarily carries with it a prohibition against retaliation against a person who complains of that form of discrimination, regardless of the statutory scheme at issue. Pet. 8. *Jackson*, however, established no such sweeping principle. To the contrary, *Jackson* noted that Title VII's prohibition against discrimination by private employers based on race and sex does not encompass protection against retaliation, 544 U.S. at 175, a point this Court reaffirmed in *Burlington*. See 126 S. Ct. at 2412, 2414.

Moreover, rather than relying on statutory language in isolation, the Court in *Jackson* rested its decision on several key contextual factors, including that (1) Title

IX, in contrast to Title VII, creates an implied rather than an express cause of action, 544 U.S. at 175, (2) Title IX was enacted against the backdrop of the Court's holding in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), that a similar statute created an implied right of action for retaliation, *Jackson*, 544 U.S. at 176, and (3) Title IX's statutory purposes cannot be achieved without protection against retaliation. *Id.* at 180.

None of those factors is present here. First, the ADEA creates an express cause of action, not an implied right of action. Second, 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 the ADEA's express cause of action five years later. And third, because the CSRA, federal regulations, and collective bargaining agreements furnish protection against retaliation, an ADEA retaliation remedy is not needed to accomplish the ADEA's purposes.

Even more important, the provision at issue here is informed by at least two contextual factors that were not present in *Jackson*. As discussed above, the structure of the ADEA as a whole (especially its different treatment of private and federal employers) and the principle that waivers of sovereign immunity must be strictly construed lead to the conclusion that the provision at issue here does not afford protection against retaliation. Because the context of the provision at issue here differs so fundamentally from the context of the provision at issue in *Jackson*, petitioner's reliance on that decision is misplaced.

3. As petitioner notes (Pet. 7), the decision below conflicts with the D.C. Circuit's decision in *Forman* v. *Small*, 271 F.3d 285 (2001), cert. denied, 536 U.S. 958

(2002). Review of that conflict is not warranted at this time.

At present, there is only a one-to-one circuit split on the question presented, and that issue may benefit from further ventilation in the circuits. There will be ample opportunity for such ventilation in the near future because cases raising the issue are pending in at least two additional circuits. See *Whitman* v. *Mineta*, No. 05-36231 (9th Cir. filed Dec. 30, 2005); *Kuzdrowski* v. *Nicholson*, No. 06-4894 (3d Cir. Nov. 29, 2006); *Stremple* v. *Secretary Dep't of Veterans Affairs*, No. 06-3807 (3d Cir. filed Aug. 23, 2006).

Moreover, should those circuits agree with the court below, the conflict may ultimately resolve itself without the need for the Court's intervention. If three circuits should agree with the government's position in this case, the D.C. Circuit may well be willing to revisit its decision in *Forman*. That is particularly true because the D.C. Circuit decided *Forman* without the benefit of briefing on "whether § 633a prohibits retaliation." 271 F.3d at 295.

Furthermore, the *Forman* decision is premised in part on the court's view that, if there were no ADEA retaliation remedy, a federal employer could fire an employee who complained of age discrimination. 271 F.3d at 297. In the court's view, failing to recognize a retaliation remedy would therefore "produce absurd results." *Ibid.* As discussed above, however, independent of the ADEA, federal law prohibits federal employers from engaging in such retaliation. The D.C. Circuit's error on that component of its analysis provides yet another reason to conclude that the D.C. Circuit might be willing to revisit its decision in *Foreman*.

Finally, *Forman* was decided before this Court's decision in *Burlington*, a case on which the court below heavily relied. See Pet. App. 5a. It was also decided before this Court's decision in *Jackson*, a case on which petitioner primarily relies. Review of the question presented should await a conflict in circuit court decisions that take those two decisions into account.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2007

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