No. 06-1321

IN THE

# Supreme Court of the United States

MYRNA GOMEZ-PEREZ

*Petitioner,*

v.

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

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit**

## REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page



STATUTES



OTHER AUTHORITIES

## REPLY BRIEF OF PETITIONER

The ruling below cannot be reconciled with the decision in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005), and creates a square conflict in the circuits on an important and recurring question of federal law. The government essentially argues that this conflict should be allowed to fester because the First Circuit's interpretation of § 633a of the Age Discrimination in Employment Act ("ADEA") is so plainly correct that other circuits will adopt it, and the D.C. Circuit will, in turn, likely revisit and abandon its decision in *Forman* v. *Small*, 271 F.3d 285 (D.C. Cir. 2001). This prediction of a "self-healing" circuit conflict is utterly baseless.

The government identifies no flaws in *Forman*'s analysis of § 633a that would lead the D.C. Circuit to repudiate that decision. *Forman* did not ignore the ADEA's separate ban on reprisals by private employers, but instead recognized that § 623's fundamentally different structure provided no basis for narrowing § 633a's sweeping terms. The D.C. Circuit recently re-affirmed this reasoning, see *Rochon* v. *Gonzales*, 438 F.3d 1211, 1215 (D.C. Cir. 2006), and *Jackson* ratified it. Similarly, *Forman*'s conclusion that § 633a's ban was sufficiently clear to waive sovereign immunity for retaliation claims was ratified by *Jackson*'s construction of virtually identical language in Title IX, which was also subject to a "clear statement" rule. In claiming that the D.C. Circuit erred by failing to consider import of the Civil Service Reform Act ("CSRA"), the government ignores that Act's express proviso that its remedies cannot narrow § 633a. And the government ignores the Equal Employment Opportunity Commission regulations that bolster the D.C. Circuit's ruling.

The First Circuit's contrary interpretation of § 633a is not only wrong, it flouts the reasoning and holding of *Jackson*. No "contextual factors" can mask or excuse such disregard of this Court's precedent, which separately justifies review. Nor will this Court's consideration of the issue benefit from

further ventilation. The two conflicting decisions canvass the competing interpretive arguments that can be drawn from the ADEA's language, structure and history, from analogous provisions and from this Court's decisions. The government identifies no new evidence or arguments under consideration in the other cases it cites; indeed, those cases simply underscore that the issue is a frequently recurring one.

Finally, the suggestion that victims of retaliation will suffer no harm if the Court waits to hear from other circuits is false: the alternative remedies the government cites are inferior and in some cases wholly illusory. Delaying resolution of the clear conflict creates an unfair and untenable regime in which employees of the very same federal agency have different protections against reprisals for age discrimination complaints depending upon whether they work in Boston or Washington, D.C. Brief of *Amicus Curiae* AARP ("AARP Br.") at 3. The importance of uniform protections for millions of federal workers plainly outweighs the government's inchoate concern over whether the conflict is sufficiently mature.

1. Most of the government's opposition is devoted to arguing that § 633a does not prohibit reprisals against federal workers who complain of age discrimination. In light of the D.C. Circuit's contrary conclusion, these merits arguments militate in *favor* of review. Given the acknowledged conflict, there is no reason to await rulings by other courts: on the government's view, the circuit encompassing perhaps the largest number of the nation's 2.6 million federal workers has misread a statute governing its relationship with its workers.

The crux of the government's opposition, therefore, is that "the conflict may ultimately resolve itself without the need for the Court's intervention," because the First Circuit's interpretation is so plainly correct that other circuits are likely to adopt it, which will prompt the D.C. Circuit to "revisit its decision in *Forman*." Opp. at 12; see also *id.* at 6. This daisy-chain reasoning is wholly without merit. In making it, the government simply repeats the First Circuit's reasoning,

without even addressing the many flaws petitioner identified in the decision below.

The government claims that § 623 of the ADEA creates an "overwhelming implication" that § 633a does not permit retaliation claims because § 623 separately prohibits discrimination based on a charge of age discrimination, while § 633a does not. *Id.* at 7. But, as the D.C. Circuit explained, this comparison ignores the fundamental differences between the provisions. Section 633a is a broadly-worded, stand-alone ban, whereas § 623 "is narrowly drawn and sets forth specific prohibited forms of age discrimination in private employment." *Forman*, 271 F.3d at 296. The fact that Congress included retaliation in a list of discrete types of unlawful private-sector conduct does not demonstrate that discriminatory reprisals fall outside the scope of § 633a's sweeping requirement that "*[a]ll*" federal personnel actions "be made free of *any*" age discrimination, 29 U.S.C. § 633a(a) (emphases added). Indeed, the government's apples-to-oranges comparison creates the absurd implication that § 633a's sweeping terms do not bar age discriminatory job notices, because § 623(e) includes an express prohibition on such notices, while § 633a does not. See Pet. at 16 n.3.

*Forman*'s refusal to draw a negative inference based on a comparison of fundamentally different prohibitions is not only correct, it was ratified in *Jackson*. This Court explained that Congress's decision to prohibit retaliation in the private employer provisions of Title VII provided no basis for concluding that Title IX failed to prohibit retaliation, because Title VII's private employer provisions "spell[] out in greater detail the conduct that constitutes discrimination in violation of that statute," whereas Title IX "is a broadly written general prohibition on discrimination." *Jackson*, 544 U.S. at 175. The Court thus rejected the very reasoning the government employs to defend the decision below.

The government also argues, Opp. at 7, that its interpretation is buttressed by § 633a(f), which provides that

the ADEA's private sector provisions do not apply to federal employers. See 29 U.S.C. § 633a(f). As the D.C. Circuit explained, however, this argument is "a red herring." *Forman*, 271 F.3d at 298. A determination that § 633a(a) prohibits retaliation does "not incorporate the provisions of § 623(d) into § 633a"; it simply enforces the broad prohibition found in the plain language of § 633a itself. *Id.*

Nor does the fact that § 633a is a waiver of sovereign immunity justify narrowing its plain language. The D.C. Circuit recognized that such waivers are strictly construed and cannot be implied. *Id.* at 296. It found that § 633a's "sweeping" and "unqualified" language waived immunity for retaliation claims "because analytically a reprisal for an age discrimination charge is an action in which age bias is a substantial factor." *Id.* (internal quotation marks citation omitted).

*Jackson* also ratified this eminently correct reasoning. The Court held that "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." 544 U.S. at 174. The Court concluded, moreover, that the clarity of this prohibition—which is in all relevant respects identical to the prohibition in § 633a—was sufficient to satisfy a "clear statement" rule no less stringent than that governing waivers of sovereign immunity. See *id.* at 184 (Thomas, J., dissenting) (noting that Congress must "speak unambiguously in imposing conditions on funding recipients through its spending power"); *id.* at 183 (concluding that retaliation "violates 'the *clear terms of the statute*'") (emphasis added).

Remarkably, while it claims that *Forman* could soon be reconsidered, the government does not even mention, let alone challenge, *Forman*'s structural analysis of § 633a and § 623, its treatment of § 633a(f) or its sovereign immunity analysis. Instead, the government cites as "error" the D.C. Circuit's supposed failure to recognize that a narrow construction § 633a would not leave persons who complain of age discrimination unprotected from reprisals, because the

CSRA provides remedies for such conduct. Opp. at 9, 12. But the CSRA forecloses this argument. It expressly provides that it "shall not be construed to extinguish or lessen . . . any right or remedy available to any employee or applicant for employment in the civil service under . . . sections [631] and [633a] of the [ADEA]." 5 U.S.C. § 2302(d). Thus, Congress determined that the CSRA—which provides no right to judicial redress and only limited administrative remedies, see *infra*—was not an adequate substitute for the ADEA.[1]

Finally, *Burlington Northern & Santa Fe Railway* v. *White*, 126 S. Ct. 2405 (2006), casts no doubt on *Forman*'s reasoning, and provides no basis for its reconsideration. *Burlington* analyzed the wording of the private employer provisions of Title VII to determine if its proscription on retaliation reached employer actions outside the workplace. As part of this analysis, the Court observed that § 703(a) "seeks to prevent injury to individuals based who they are, *i.e.*, their status," while the anti-retaliation provision "seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct." *Id.* at 2412. Read in context, this statement simply notes that the different wording of these two provisions dictated correspondingly different purposes, and that the latter's objective of preventing employer interference with enforcement efforts would not be achieved if an employer could retaliate outside the workplace. *Id.* That observation was plainly not a repudiation of *Jackson*'s holding—issued only a year earlier—that reprisals against those who complain of unlawful discrimination is, analytically, a species of "discrimination" against the protected class.

In short, there is no merit to the government's suggestion that the split in the circuits will resolve itself. The D.C. Circuit only recently re-affirmed "the cogency of th[e]

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[1] It follows *a fortiori* that if the CSRA itself should not limit any rights or remedies under § 633a, agency regulations or bargaining agreements likewise provide no basis for limiting those rights and remedies.

reasoning" in *Forman*. See *Rochon*, 438 F.3d at 1215 (discussing *Forman*'s reliance on *Porter* v. *Adams*, 639 F.3d 273 (5th Cir. 1981)). *Jackson* ratified *Forman*'s interpretation of statutory text materially indistinguishable from Title IX, as well as the reasoning *Forman* used to analyze fundamentally different statutory prohibitions. Nothing in the CSRA or the *Burlington* decision casts any doubt on *Forman*'s holding or reasoning. And, in regulations entitled to *Chevron*-style deference, Pet. at 18-19 n.5, the EEOC has concluded that the ADEA's ban on age discrimination does encompass reprisals. Because the government has failed to identify any reason why the D.C. Circuit would revisit its careful, exhaustive and correct decision in *Forman*, the circuit split will not be resolved without this Court's intervention.

2. Review is also warranted because the First Circuit's interpretation of § 633a conflicts directly with this Court's interpretation of Title IX's essentially identical language in *Jackson*. *Id.* at 7-13. Unable to refute this showing, the government mischaracterizes it, claiming 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*." Opp. at 10 (emphases added). But the decision below conflicts with *Jackson* not because § 633a and Title IX both prohibit discrimination *vel non*, but because they do so in *virtually identical terms*. Indeed, the government does not, because it cannot, identify any difference between a provision that bars "discrimination based on" a protected status and one that proscribes "discrimination" "on the basis of" a protected status. Because this Court concluded that Title IX, by its plain terms, prohibits retaliation, it follows as a matter of course, not unreasonable extrapolation, that the materially identical language of § 633a also prohibits retaliation. Yet the First Circuit reached the opposite conclusion.

No "contextual factors," *id.* at 10-11, justify this failure to follow *Jackson*'s interpretation of a materially identical prohibition. The fact that Title IX's cause of action was implied, while § 633a creates an express cause of action, is utterly irrelevant. The government nowhere disputes that the substantive rights enforced in an implied cause of action are defined by the statutory text from which the right of action is implied, just as rights enforced through an express cause of action are defined by the statute that confers the right of action. Thus, any determination of the scope of Title IX's *substantive prohibition* depends "on the text of Title IX." 544 U.S. at 173; see *id.* at 175 ("Courts must accord Title IX a sweep as broad as its *language*") (emphasis added; internal quotation marks omitted). The scope of § 633a's prohibition also depends on its text. As that text is materially indistingushable from Title IX's, § 633a must likewise create a substantive ban on retaliation.

Similarly, there is no basis to the claim that, while it is reasonable to presume that the 1972 Congress that enacted Title IX knew of the decision in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), it is unreasonable to presume such knowledge by the 1974 Congress that enacted § 633a, because *Sullivan* involved an implied right of action. Opp. at 11. Contrary to the government's claim, *Sullivan* did not interpret "the scope of an implied right of action," *id.*, but rather "a general prohibition on racial discrimination" in the *text* of 42 U.S.C. § 1982. *Jackson*, 544 U.S. 176. In *Jackson*, this Court presumed that the 1972 Congress was aware of this ruling when it used the words "discrimination" "on the basis of sex" in Title IX. It is equally reasonable to presume that Congress was aware of this ruling when it used the materially identical phrase "discrimination based on age" in § 633a 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.

The government's remaining "contextual factors," Opp. at 11, are equally irrelevant. The CSRA provides that its remedies cannot limit the scope of § 633a. Congress's view that other *statutory* remedies are no substitute for the ADEA's protections forecloses any claim that agency regulations or collective bargaining agreements can limit § 633a's scope. Similarly, as the D.C. Circuit has cogently explained, the structure of the ADEA as a whole, and its different provisions for private and federal employers, provide no basis for giving § 633a a narrower scope than the materially identical language of Title IX. And, Title IX's language was subject to a clear statement rule no less stringent than that governing waivers of sovereign immunity.

In sum, the conflict between the First Circuit's construction of § 633a and *Jackson*'s interpretation of a virtually identical prohibition cannot be explained away. This conflict provides a further reason for review of the decision below.

3. Finally, further ventilation of the issue is neither necessary nor appropriate. There is no reason to allow other circuits to ignore or flout *Jackson*'s directly applicable textual analysis and reasoning. And, for the reasons discussed above, any suggestion that future circuit decisions will lead the D.C. Circuit to reconsider *Forman* is fanciful.[2]

Nor will future decisions shed new light on the meaning of § 633a. While the government disparages the adequacy of the advocacy in *Forman*, *id.* at 12, the decision itself thoroughly and carefully canvassed the arguments from the text, structure and history of the statute, as well as those that could be drawn

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[2] In fact, other circuits have expressed their agreement with the result in *Forman* and/or have employed similar reasoning in concluding that Title VII's highly analoguous ban on public employer discrimination encompasses retaliation. *See* Pet. at 13 n.1; *id.* at 18 n.4; AARP Br. at 7-8.

from analogous provisions and this Court's decisions. Aware of the D.C. Circuit's contrary ruling, the First Circuit also undertook a thorough examination of these same materials. Moreover, the government is the litigant in the pending cases it cites and, if the Court grants review, can be expected to identify all arguments for why it believes the D.C. Circuit's interpretation is erroneous. The government nowhere suggests that courts are currently considering any new arguments or evidence that were not considered in *Forman* or the decision below. The cases the government cites simply confirm that the proper interpretation of § 633a is a recurring question requiring this Court's attention.

Contrary to the government's claims, moreover, postponing resolution of this issue will significantly and unfairly prejudice petitioner and other federal workers. As the government concedes, many postal workers are not even covered by the CSRA. Its suggestion that these workers are protected by USPS regulations instead, *id.* at 9, is highly misleading. The government cites a USPS prohibition on reprisals, *id.* (quoting USPS, *Employee and Labor Relations Manual* § 665.23, at 688 (Feb. 15, 2007) ("*ELM*") *available at* http://www.usps.com/cpim/manuals/elm/elm.htm), but this prohibition is grounded in the ADEA, *ELM* § 672.1(d), and the remedy for its violation is the right to file a complaint with the EEOC, and/or a civil action under the ADEA. *Id.* § 666.22; USPS, Pub. 133, *What You Need to Know About EEO* 19 (May 2003), *available at* http://www.usps.com/cpim/ftp/pubs/pub133.pdf. Under the decision below, this "remedy" is a dead end: such a suit must be dismissed for want of a cause of action.

Nor has the government demonstrated that, where applicable, the CSRA or the collective bargaining agreements it cites provide the same scope of relief available under the ADEA. The CSRA provides no judicial remedy. *Schrachta* v. *Curtis*, 752 F.2d 1257, 1259 (7th Cir. 1985) (per curiam) (collecting cases). Instead, persons aggrieved by retaliatory

suspensions or removals of more than 14 days, or reductions in grade or pay, may seek relief from the Merit Systems Protection Board ("MSPB"), which *cannot* grant compensatory damages for age-based claims. *Currier* v. *USPS*, 72 M.S.P.R. 191, 195-96 & n.5 (M.S.P.B. 1996); see also *Bohac* v. *Dep't of Agric.*, 239 F.3d 1334, 1342-43 (Fed. Cir. 2001) (authority to grant "corrective action" does not allow recovery of such non-"out of pocket" damages as emotional suffering or reputational harm). Persons who, like petitioner, suffer retaliation in the form of a hostile work environment, are not even afforded this remedy; they can only complain to the Office of Special Counsel, which may bring a claim before the MSPB. See Opp. at 9. It is presumably because the CSRA's remedies are not coterminus with the protections afforded by § 633a that Congress expressly provided that those remedies do not limit the scope of § 633a.

Delaying resolution of the clear conflict, therefore, will force federal workers around the country to litigate for rights that workers in the nation's capital possess. And it creates an unfair and untenable regime in which employees of the same federal agency, such as the Justice Department, have different rights and remedies depending upon whether they work in Boston or Washington, D.C. AARP Br. at 3. Indeed, employees can gain or lose such rights simply by being transferred between offices. The importance of uniform protections for millions of federal workers more than justifies the far from unusual step of reviewing a 1-to-1 circuit split. See, *e.g.*, *Hincks* v. *United States*, 127 S. Ct. 2011, 2015 (2007) (granting review of such a split); *EC Term of Years Trust* v. *United States*, 127 S. Ct. 1763, 1767 (2007); *Spector* v. *Norwegian Cruise Line Ltd.*, 545 U.S. 119, 125 (2005).

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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