No. 06-

IN THE

Supreme Court of the United States

MYRNA GOMEZ-PEREZ,

Petitioner,

v.

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

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

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PETITION FOR A WRIT OF CERTIORARI

Myrna Gomez-Perez hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in *Gomez-Perez* v. *Potter*, 476 F.3d 54 (Feb. 9, 2007).

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the First Circuit is reported at 476 F.3d 54 and is reproduced at Petitioner's Appendix ("Pet. App.") 1a-10a. The opinion of the court of appeals denying the petition for rehearing and rehearing en banc, dated March 20, 2007, is reproduced at Appendix 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 Appendix 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. This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254. The district court had jurisdiction of this case pursuant to 28 U.S.C. § 1331. The First Circuit had jurisdiction of this case pursuant to 28 U.S.C. § 1291.

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 "shall be made free from any discrimination based on age." 29 U.S.C. § 633a(a). This provision is set forth in full at Appendix 34a-37a.

INTRODUCTION

This case presents the question whether the federal-sector provision of the Age Discrimination in Employment Act ("ADEA") prohibits retaliation against federal employees who complain of age discrimination. The court of appeals held that it does not. In so ruling, it disregarded this Court's decision in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005), and created a square and acknowledged conflict with the D.C. Circuit's decision in *Forman* v. *Small*, 271 F.3d 285 (D.C. Cir. 2001).

When it extended the ADEA to the federal sector, Congress did not simply subject federal agencies to the same provisions that govern private employers. Instead, Congress drafted a broad, stand-alone provision, which states 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).

In *Jackson*, this Court held that, as a matter of plain meaning, a virtually identical phrase in Title IX—"discrimination" "on the basis of" sex—encompasses retaliation against those who complain of sex discrimination. The Court explained that, even though Congress expressly barred retaliation in Title VII and did not mention it in Title IX, this discrepancy provided no basis for narrowing Title IX's plain meaning. Congress's decision to supplement detailed and differently worded proscriptions in Title VII's private employer provisions, the Court ruled, said nothing about the scope of Title IX's more broadly worded prohibition.

Jackson thus ratified the reasoning the D.C. Circuit had used in concluding that § 633a(a) bars retaliation. Like the *Jackson* Court, the D.C. Circuit recognized that, by its plain terms, a broadly worded prohibition on "any discrimination based on age" prohibits "a reprisal for an age discrimination

charge." *Forman*, 271 F.3d at 296 (internal quotation marks omitted). And, like the *Jackson* Court, the D.C. Circuit refused to limit § 633a(a)'s broad prohibition based on the express retaliation ban in the ADEA's private employer provisions. The latter provisions—which were modeled on Title VII's private employer provisions—were "narrowly drawn," and thus, unlike the sweeping language of § 633a(a), they would not bar retaliation without an express prohibition. *Id.*

Despite these precedents, the First Circuit ruled in this case that § 633a(a) does not prohibit retaliation. In so ruling, the First Circuit employed reasoning that is flatly inconsistent with this Court's decision in *Jackson*. The First Circuit's holding also creates a square and irreconcilable conflict with the D.C. Circuit's decision in *Forman*. This Court's intervention is necessary to bring the First Circuit into conformity with *Jackson*, to resolve the conflict between the circuits, to effectuate Congress' objective of eradicating age discrimination from the federal workplace, and to ensure that the thousands of federal employees working in the jurisdictions covered by the First Circuit enjoy the protection from retaliatory age discrimination that Congress provided for in § 633a and that federal employees working in the nation's capital possess.

STATEMENT OF THE CASE

On February 22, 2003, petitioner Myrna Gomez-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 ("USPS"). In that 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.

After filing her EEO complaint, petitioner, who previously had an exemplary 15-year record with the USPS, was subjected to a series of reprisals. She was called to meetings at which groundless charges of sexual harassment were leveled against her. She was harassed and mocked by co-workers. USPS posters concerning sexual harassment were defaced and her name was written on them. And her hours were drastically reduced.

On November 18, 2003, petitioner filed the instant case, alleging, *inter alia*, that respondent had violated § 633a(a) of the ADEA by retaliating against her for filing an age discrimination complaint. 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 USPS's sovereign immunity with respect to retaliation claims.

The court of appeals affirmed, though on different grounds. It held that the USPS's "sue and be sued clause," 39 U.S.C. § 401(1), waived the agency's sovereign immunity, but that § 633a(a) does not provide "a cause of action for retaliation as the result of having filed an age-discrimination related complaint." Pet. App. 10a.

In support of the latter conclusion, the court of appeals offered essentially three reasons. First, the court believed that "the plain text of § 633a" did not prohibit retaliation. Pet. App. 4a-5a. Disregarding *Jackson*'s analysis of virtually identical statutory language, the First Circuit reasoned that § 633a(a) "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 question, according to the court of appeals, is whether Congress meant "'discrimination *and retaliation*' when it said 'discrimination'?" *Id.*

Second, the court reasoned that a cause of action for retaliation is distinct from a cause of action for discrimination. "The 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 in § 633a." Pet. App. 5a.

Third, the court drew a negative inference from 29 U.S.C. § 623, the ADEA provision governing private employers. Because § 623(d) provides an explicit cause of action for retaliation, whereas § 633a(a) merely prohibits "any discrimination based on age," the court concluded that "Congress intended for the ADEA to prohibit retaliation by private employers, but not by federal employers." Pet. App. 7a-8a.

The court rejected petitioner's argument that this Court's decision in *Jackson* required a different result, deeming *Jackson* inapposite for three reasons. First, the court thought it significant that, "in *Jackson*, the Court was interpreting a judicially-created cause of action that was implied from Title IX," whereas here the court was "constrained by the fact that Congress explicitly created a statutory cause of action in § 633a, but did not include retaliation in that cause of action." Pet. App. 6a. In so reasoning, the First Circuit ignored *Jackson*'s express recognition that, even though the private right of action under Title IX had been judicially implied, the scope of the substantive prohibition that is enforced in such an action is defined by the statute's text.

Second, the court asserted that *Jackson* was premised in part on the fact that, in the Title IX context, a retaliation cause of action is necessary to protect teachers and coaches, who are often in the best position to identify and report discrimination. Pet. App. 6a-7a. Federal employees such as petitioner, the court surmised, "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 [their] supervisors." *Id.* at 7a. This distinction, however, addresses a

separate holding in *Jackson* that did not concern whether the phrase "discrimination" "on the basis of" a protected status prohibited retaliation, but rather whether such a prohibition extended to persons outside the protected class.

Third, the court claimed that Congress passed Title IX "in response to" *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), in which this Court upheld a cause of action for retaliation for speaking out against race discrimination. Pet. App. 7a. Here, the court of appeals 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." *Id.* *Jackson*, however, did not rely on Title IX's legislative history, but rather on a presumption of congressional intent that is no less applicable to § 633a than it was to Title IX.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition because the decision below conflicts with this Court's decision in *Jackson* and the D.C. Circuit's decision in *Forman* on an important issue of federal law.

In *Jackson*, this Court held that Title IX's broadly worded proscription of "discrimination" "on the basis of sex" encompasses retaliation against those who complain of sex discrimination, even though Title IX does not specifically refer to retaliation. This is so, the Court concluded, because retaliation against those who complain of sex discrimination is itself a form of sex discrimination and thus falls within the statute's general proscription of "discrimination" "on the basis of sex."

In this case, the court of appeals held that the ADEA's public-sector provision, which prohibits "discrimination based on age," does not encompass retaliation against those who complain of age discrimination. This is so, the court

concluded, because § 633a refers only to "discrimination," not to "retaliation," and discrimination and retaliation are distinct wrongs for which Congress must provide distinct causes of action. There is thus an unmistakable and inescapable conflict between this Court's interpretation of Title IX in *Jackson* and the court of appeals' interpretation of § 633a(a)'s essentially identical language. The various reasons the court of appeals gave for distinguishing *Jackson* are entirely without merit. This Court should grant the petition to rectify the court of appeals' disregard of *Jackson*.

The court below also refused to follow the D.C. Circuit's decision in *Forman*, thus creating a square conflict between the rule governing federal employees in the First Circuit and the rule governing federal employees in the nation's capital. Given the interest in uniform treatment of federal employees, as well as Congress' strong policy of eradicating age discrimination from the federal workplace, the Court should grant the petition to resolve the conflict among the circuits and announce a clear and uniform rule prohibiting the federal government from retaliating against those who complain of age discrimination.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *JACKSON* v. *BIRMINGHAM BOARD OF EDUCATION*.

The decision below cannot be reconciled with this Court's decision in *Jackson*. There, the Court held that Title IX of the Civil Rights Act of 1964, which prohibits recipients of federal education funding from engaging in "discrimination" "on the basis of sex," prohibits retaliation against those who complain of sex discrimination. The Court noted that Title IX does not contain a separate prohibition on retaliation, but concluded that an express reference to retaliation was unnecessary because *retaliation against those who complain of sex discrimination is itself a form of sex discrimination*:

> Retaliation 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. Retaliation 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.

544 U.S. at 173-74 (citations omitted).

The Court's interpretation of the words "discrimination" "on the basis of sex" in *Jackson* plainly controls here. The language of § 633a(a) is in all relevant respects identical to that of Title IX. There is no meaningful difference between a provision that bars "discrimination based on" a protected status and one that proscribes "discrimination" "on the basis of" a protected status.

Similarly, the absence of a separate and express prohibition on retaliation in § 633a(a) is no more reflective of a congressional intent not to prohibit retaliation than the absence of such an express prohibition was in Title IX. As in the case of Title IX, there was no need for Congress to prohibit retaliation expressly because *retaliation against those who complain of age discrimination is itself a form of age discrimination.* Retaliation against those who complain of age discrimination is "discrimination" because the complainant is being subjected to differential treatment. And retaliation is discrimination "based on age" because it is an intentional response to the nature of the complaint: an allegation of age discrimination. Thus, when an employer

retaliates against a person because she complains of age discrimination, this constitutes "discrimination based on age."

The court of appeals took no account of *Jackson*'s core holding that, as a matter of plain language, a prohibition on "discrimination" "on the basis of" a protected status prohibits retaliation against those who complain of such discrimination. Instead, the court began with precisely the opposite assumption—that retaliation is *not* a form of discrimination, but a separate and distinct wrong for which Congress must provide a separate and distinct cause of action. See Pet. App. 5a (§ 633a(a) "clearly prohibits discrimination" but "says nothing that indicates that Congress meant for this provision to provide a cause of action for retaliation"). This assumption reflects a fundamental misunderstanding of *Jackson* at best, and a flagrant disregard of *Jackson* at worst. After *Jackson*, it is simply not possible to maintain, as a matter of textual analysis, that a broad prohibition on discrimination "says nothing" about retaliation.

Instead of coming to terms with *Jackson*'s interpretation of the word "discrimination," the court of appeals brushed *Jackson* aside, arguing that *Jackson* is distinguishable on a variety of grounds. None of the lower court's purported distinctions, however, survives even cursory 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 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 twice flawed. As an initial matter, it begs the question at issue—whether the express cause of action Congress provided in § 633a includes a cause of action for retaliation. More fundamentally, the 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 courts that imply a private right of action exercise law-making power in the sense that they create 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 right that is enforced in a judicially-created cause of action is still defined by the statute itself. Determining the scope of that statutory 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*. *See id.* at 175 ("'Discrimination' is a term that covers a wide ride of intentional unequal treatment; by using such a broad term, *Congress* gave the statute a broad reach.") (emphasis added); *id.* at 178 ("We reach this result based on the statute's text."). 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 meaningful difference between a statute that prohibits "discrimination" "on the basis of" a protected status and one that prohibits "discrimination based on" a protected status.

The court of appeals' second reason for distinguishing *Jackson* is equally untenable. The lower court asserted that

> the Supreme Court premised its holding in *Jackson* partially on the fact that Title IX prohibits discrimination in educational institutions, and that a retaliation cause of action would protect "teachers and coaches," who themselves were not the targets of discrimination, but who "are often 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 court 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 of *Jackson* is demonstrably incorrect. Even accepting the court of appeals' assertion that the federal employees protected by § 633a(a) are in a better position to identify and report discrimination than students protected by Title IX, that fact provides no support for the court's distinction. *Jackson*'s discussion of teachers' and coaches' ability to identify and report discrimination was addressed to a *separate holding* in *Jackson*, a holding that is wholly irrelevant to the question presented here. In *Jackson*, the school board argued that, even if Title IX barred retaliation, that bar could not be invoked by a third-party, such as the male coach in that case, 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 a bar on such third-party actions would frustrate the statute's purpose because it would discourage those in the best position to identify and report discrimination from doing so.

Thus, the discussion in *Jackson* that the court of appeals relied upon to distinguish that case was addressed to the issue of *who* may bring a retaliation claim, not whether retaliation is actionable in the first place. In concluding that retaliation is actionable under Title IX, *Jackson* did not rely on the need for third-party complaints, but instead found that the statute's proscription of "discrimination" "on the basis of sex" prohibited retaliation by its "clear terms." *Id.* at 183. This is the relevant rationale from *Jackson*, and it is fully applicable

to § 633a(a)'s materially indistinguishable language. The question whether a third party can bring an action for retaliation under § 633a is not presented here 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. Accordingly, the court of appeals' second distinction, like its first, is utterly without merit.

The court's third ground for distinguishing *Jackson* fares no better. The court deemed *Jackson* inapposite because the Court stated in *Jackson* 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). 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.*

The fundamental flaw in this argument is that *Jackson* did not say that Title IX was adopted "in response to" *Sullivan*. It stated that Title IX was enacted "just three years after *Sullivan* was decided, and accordingly that decision provides a valuable *context* for understanding the statute." *Jackson*, 544 U.S. at 176 (emphasis added). This Court cited no evidence from Title IX's legislative history showing that Congress was actually aware of *Sullivan*; it simply cited an earlier decision for the proposition that it was "realistic to presume" that Congress was aware of the then three-year old *Sullivan* decision. *Jackson*, 544 U.S. at 176 (quoting *Cannon* v. *University of Chi.*, 441 U.S. 677, 699 (1979)). The absence of references in the ADEA's legislative history to retaliation against federal workers thus provides no basis for distinguishing *Jackson*. To the contrary, *Jackson*'s "contextual" analysis applies to § 633a. Just as it is reasonable to presume that the 1972 Congress that enacted

Title IX was aware of a 1969 Supreme Court decision holding that retaliation is a form of discrimination, it is reasonable to presume that the 1974 Congress that enacted § 633a had the same awareness, and that it used the phrase "discrimination based on" a protected status to encompass the same types of conduct (including retaliation) that are encompassed by the virtually identical language of Title IX.

In short, the lower court's various distinctions cannot blunt the precedential force of *Jackson* here. *Jackson* holds that, by its plain terms, a statute that prohibits "discrimination" "on the basis of" a protected status prohibits retaliation against those who complain of such discrimination. The court of appeals ignored this holding and papered over *Jackson* with illusory distinctions. This Court should grant the petition to compel compliance with *Jackson* and to ensure that petitioner and other federal employees in the First Circuit are afforded the full measure of protection from age discrimination that Congress both intended and provided for in § 633a.

II. THE DECISION BELOW CONFLICTS WITH THE RULING OF THE D.C. CIRCUIT.

In addition to conflicting with this Court's decision in *Jackson*, the decision below creates a square conflict with the D.C. Circuit's decision in *Forman* v. *Small*, 271 F.3d 285 (D.C. Cir. 2001). In *Forman*, the D.C. Circuit held that § 633a creates a cause of action for retaliation. *Id.* at 295-99. The court below expressly refused to follow *Forman*. Pet. App. at 8a ("We must respectfully disagree with our brethren on the D.C. Circuit").[1]

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[1] Four other circuits have recognized the question whether § 633a prohibits retaliation, and three have indicated their agreement with the result reached in *Forman*. The Second and Fourth Circuits have suggested in dicta that § 633a prohibits retaliation. *See Bornholdt* v. *Brady*, 869 F.2d 57, 62 (2d Cir. 1989) ("it may be inferred that the breadth of the language of § 633a . . . is sufficiently broad to prohibit age-related retaliation"); *Miller* v. *United States*, 813 F.2d 402 (4th Cir. 1986) (per

The core of the disagreement between the D.C. Circuit and the court below is the meaning of § 633a(a)'s mandate that personnel decisions affecting covered federal employees be made "free from any discrimination based on age." As discussed *supra*, the court below assumed, in defiance of *Jackson*, that retaliation for filing an age discrimination complaint is not itself a form of "discrimination based on age." Pet. App. 5a ("The question is, did Congress mean 'discrimination *and retaliation*, when it said 'discrimination'?"). The D.C. Circuit, by contrast, correctly concluded, in reasoning that would later be echoed in *Jackson*, that the "sweeping" and "unqualified" language Congress used in § 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 (quoting *Siegel* v. *Kreps*, 654 F.2d 773, 782 n.43 (D.C. Cir. 1981) (Robinson, J., concurring in part and dissenting in part)).

The courts also disagree about the inference to be drawn from the ADEA's private sector provision, 29 U.S.C. § 623, which provides a distinct cause of action for retaliation.[2] The

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curiam) (unpublished), *available at* 1986 WL 16231, at *2 ("it seems clear that analytically a reprisal for an age discrimination charge is an action in which age bias is a substantial factor"). The Tenth Circuit "has assumed the existence of . . . a cause of action" for retaliation under § 633a. *Villescas* v. *Abraham*, 311 F.3d 1253, 1258 (10th Cir. 2002). And the Sixth Circuit has noted both the question and the conflicting decisions it has produced. *See Scott* v. *Potter*, 182 F. App'x 521, 523 n.1 (6th Cir. 2006) ("There is a question . . . whether the federal government has waived sovereign immunity to claims of age-related retaliation by its employees. Courts have differed on the answer.").

[2] 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).

court below reasoned that "[t]he absence of statutory language providing a claim for retaliation in § 633a(a), 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. The D.C. Circuit, by contrast, found that "[n]othing in the plain language of § 633a suggests that Congress intended the federal workplace to be less free of age discrimination than the private workplace." *Forman*, 271 F.3d at 297. Instead, the D.C. Circuit concluded that the presence of a distinct cause of action for retaliation in the private-sector provision is not probative of the meaning of the federal-sector provision because the latter is a broadly-worded, stand-alone provision, whereas the former is a narrowly drawn provision that spells out the prohibited conduct in detail. See *id.* 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.").

Significantly, *Jackson* ratified the D.C. Circuit's reason for refusing to draw a negative inference from the presence of an express retaliation provision in the ADEA's private-sector provision. In *Jackson*, the Court refused to draw a negative inference from the presence of an express retaliation provision in Title VII. The Court explained that, while Title IX "is a broadly written general prohibition on discrimination," Title VII's private employer provisions "spell[] out in greater detail the conduct that constitutes discrimination in violation of that statute." *Jackson*, 544 U.S. at 175. Thus, the fact that Congress separately prohibited retaliation in the private employer provisions of Title VII did not show that Title IX's more broadly worded prohibition failed to prohibit retaliation. *Id.* ("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."). *Jackson* makes clear that negative inferences cannot be drawn based upon comparisons between substantive prohibitions of very different scope.

This reasoning applies with particular force here. The ADEA's prohibitions on private employers "were derived *in haec verba* from" the private employer provisions of Title VII, *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978), and spell out the prohibited conduct in detail. Section 633a(a), by contrast, contains a broad prohibition virtually identical to Title IX's. What was true in *Jackson* is no less true here—because Congress did not list any specific discriminatory practices when it wrote § 633a, its failure to mention one such practice does not imply anything about whether it intended that practice to be covered. The court of appeals' contrary conclusion is symptomatic of its pervasive failure to come to terms with *Jackson*.[3]

III. THE QUESTION PRESENTED IS AN IMPORTANT ISSUE OF FEDERAL LAW.

The question presented in this case involves an important issue of federal law. Congress has long recognized the importance of eliminating age discrimination in federal

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[3] The logical fallacy in the court of appeals' "negative inference" theory is further illustrated by § 623(e), which prohibits age 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 means that it does not bar the use of discriminatory notices or advertisements. But § 633a 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). Because a ban on discriminatory advertising is simply 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 somehow limits the scope of § 633a(a). The same is true for retaliation.

employment. When Congress expanded the ADEA to the federal government in 1974, it emphasized that age discrimination can be as invidious as any other form of discrimination, and that it is especially harmful in the workplace:

> "Discrimination based on age—what some people call 'age-ism'—can be as great an evil in our society as discrimination based on race or religion or any other characteristic which ignores a person's unique status as an individual and treats him or her as a member of some arbitrarily-defined group. Especially in the employment field, discrimination based on age is cruel and self-defeating; it destroys the spirit of those who want to work and denies the Nation[] the contribution they could make if they were working."

H.R. Rep. No. 93-913 (1974), *reprinted in* 1974 U.S.S.C.A.N. 2811, 2849.

Over the years, Congress has expanded the scope of § 633a. In 1978, for example, Congress eliminated the upper age limit for federal employees in order to end mandatory retirement in the federal sector. In so doing, Congress reiterated its strong policy that "as a matter of basic civil rights people should be treated in employment on the basis of their individual ability to perform a job rather than on the basis of stereotypes about race, sex, or age." S. Rep. No. 95-493, at 3 (1977), *reprinted in* 1978 U.S.C.C.A.N 504, 506.

Clearly, Congress views age discrimination in the federal workplace as an important issue of federal law. Just as clearly, a ban on retaliation is essential to accomplish Congress' objective of eradicating age discrimination from the federal workplace. If, as the court of appeals held, § 633a does not prohibit retaliation, then § 633a would not, for example, prevent an employer from adopting an overt policy of firing anyone who filed an age discrimination complaint. It is inconceivable that Congress intended to permit such an

evasion of § 633a. As the D.C. Circuit observed, "[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.

That Congress views a ban on retaliation as essential to its effort to eradicate invidious discrimination in all of its guises is confirmed by the fact that every major federal anti-discrimination statute prohibits retaliation. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a); National Labor Relations Act, 29 U.S.C. § 158(a)(1); Fair Labor Standards Act of 1938, 29 U.S.C. § 215(a)(3); Americans with Disabilities Act, 42 U.S.C. § 12203(a), (b); Family and Medical Leave Act, 29 U.S.C. § 2615(a); Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1140; Uniform Services Employment and Reemployment Rights Act, 38 U.S.C. § 4311(b); Occupational Safety and Health Act, 29 U.S.C. § 660(c)(1).[4] There is no apparent reason why Congress would permit discriminatory retaliation in federal employment while banning it in every other context. Certainly, the court of appeals did not provide one.

Moreover, the Equal Employment Opportunity Commission ("EEOC")—the entity Congress expressly charged with enforcing § 633a[5]—has issued regulations confirming

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[4] Like § 633a(a), not all of these statutes contain a distinct retaliation provision. The federal-sector provision of Title VII, for example, does not specifically refer to retaliation. But courts have had no trouble concluding that Title VII's cause of action for discrimination against federal employees includes retaliation. *See Porter* v. *Adams*, 639 F.2d 273, 277-78 (5th Cir. 1981); *White* v. *GSA*, 652 F.2d 913, 917 (9th Cir. 1981) (same); *Canino* v. *United States EEOC*, 707 F.2d 468, 471-72 (11th Cir. 1983) (same).

[5] *See* 29 U.S.C. § 633a(b) (authorizing the EEOC "to enforce the provisions of subsection (a)" and granting EEOC authority to "issue such

that § 633a prohibits retaliation. The EEOC's regulations affirm that "[i]t is the policy of the Government of the United States to provide equal opportunity in employment for all persons" and "to prohibit discrimination in employment because of . . . age." 29 C.F.R. § 1614.101(a). They also mandate that "[n]o person shall be subject to retaliation for opposing any practice made unlawful by . . . the Age Discrimination in Employment Act." *Id.* § 1614.101(b) (citing as authority § 633a). The court of appeals did not even mention 29 C.F.R. § 1614.101.

Finally, the question presented in this case is important because of the inequitable disparities it creates within the federal employment sector. With more than 2.6 million employees (not including military personnel), the federal government is by far the nation's largest employer.[6] See U.S. Census Bureau, *Compendium of Public Employment: 2002*, at 12 tbl.9 (Sept. 2004). The rights and remedies afforded a federal employee faced with retaliatory age discrimination should not depend on where she happens to work. Accordingly, the Court should grant the petition to ensure that all federal employees enjoy the full measure of protection Congress granted them in § 633a, and to ensure that federal employees in Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico possess the same rights and remedies as federal employees working in the nation's capital.

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rules, regulations, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section").

[6] By contrast, Wal-Mart, the nation's largest private employer, has 1.3 million employees in the United States. *See* Corporate Facts: Wal-Mart By the Numbers, *at* http://www.walmartfacts.com/FactSheets/3142007_Corporate_Facts.pdf (visited Mar. 29, 2007).

CONCLUSION

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

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