No. 18-882

IN THE

Supreme Court of the United States

NORIS BABB,

Petitioner,

v.

ROBERT WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE NATIONAL TREASURY EMPLOYEES UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS[1]

The National Treasury Employees Union (NTEU) is a federal sector labor organization that represents the interests of approximately 150,000 employees of the federal government nationwide. Reflecting its strong interest in protecting employee rights, NTEU has been before this Court frequently, both as a party, *see*, *e.g.*, *United States v. NTEU*, 513 U.S. 454 (1995); *NTEU v. Von Raab*, 489 U.S. 656 (1989), and as an *amicus*. *See*, *e.g.*, *Whitman v. Dep't of Transp.*, 547 U.S. 512 (2006); *Gilbert v. Homar*, 520 U.S. 924 (1997).

NTEU has previously participated in litigation in this Court with respect to the federal sector provision of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 633a(a). *Gomez-Perez v. Potter*, 553 U.S. 474 (2008). NTEU and the employees it represents have a substantial interest in the resolution of the issue presented by this case, which will determine the standard for proving a discrimination claim under Section 633a(a). NTEU has used Section 633a(a) to challenge discriminatory agency actions on behalf of its employees. NTEU submits this brief to highlight how adoption of the Eleventh Circuit's incorrect standard would elide Congress's determination that the federal workplace be free from age discrimination.

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[1] Pursuant to Supreme Court Rule 37.3(a), *amicus* states that all parties consent to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amicus* or its counsel made a monetary contribution to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In the federal sector provision of the ADEA, Congress declared 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). The Eleventh Circuit, in the decision below, nonetheless concluded that the government could indeed discriminate based upon age, so long as that discrimination was not the determinative factor in the personnel action. That conclusion is incompatible with Congress's plain instruction. *See Ford v. Mabus*, 629 F.3d 198, 205-07 (D.C. Cir. 2010).

This Court should reverse the Eleventh Circuit's decision and adopt the D.C. Circuit's textual interpretation of Section 633a(a). That interpretation, true to Section 633a(a)'s words, calls for employer liability when the plaintiff carries his or her burden of showing that age is a factor in the personnel action.

NTEU has successfully fought agency actions that discriminated against federal employees based upon age. If this Court embraces the Eleventh Circuit's standard, Section 633a(a)'s unique and plainly stated objective—a federal workplace free from age discrimination—would be jeopardized.

ARGUMENT

I. Section 633a(a)'s Plain Text Compels Reversal.

Through Section 633a(a) of the ADEA, Congress created a "broad, general ban" on age discrimination in the federal sector. *Gomez-Perez v. Potter*, 553 U.S. 474, 488 (2008). It did so by proclaiming, in "sweeping language" (*Forman v. Small*, 271 F.3d 285, 296 (D.C.

Cir. 2001)), 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) (emphasis added).

Section 633a(a)'s far-reaching language is textually distinct from the private sector provision of the ADEA. The private sector provision prohibits an employer from taking certain actions against an individual "*because of* such individual's age." 29 U.S.C. § 623(a) (emphasis added). This Court has interpreted Section 623(a)'s "because of" clause to mean that "a plaintiff must prove that age was the 'but-for' cause of the employer's" action—i.e., "*the 'reason'* that the employer decided to act." *Gross v. FBL Fin. Servs. Inc.*, 557 U.S. 167, 176 (2009) (emphasis added).

The D.C. Circuit has properly recognized that the "Act's protections for employees of the federal government are, if anything, even more expansive than those for workers employed in the private sector. . . ." *Miller v. Clinton*, 687 F.3d 1332, 1336-37 (D.C. Cir. 2012). It has thus given the "'distinct statutory scheme'" that Congress "'deliberately prescribed'" in the public sector provision of the ADEA the meaning that its plain language demands—instead of conflating the public and private sector ADEA schemes despite their textual differences. *Ford v. Mabus*, 629 F.3d 198, 205 (D.C. Cir. 2010) (quoting *Lehman v. Nakshian*, 453 U.S. 156, 166 (1981)). In doing so, it has rejected the very government argument that the Eleventh Circuit endorsed in the decision below.

Specifically, the D.C. Circuit has concluded that Section 633a(a)'s "more sweeping" language is incompatible with the "but-for test" used in Section 623(a) private sector cases. *Id.* (internal quotation omitted). Instead,

consistent with the unambiguous statutory text, an employee proceeding under Section 633a(a) need only "show that the personnel action involved 'any discrimination based on age'"—i.e., "that age was *a* factor in the challenged personnel action." *Id.* at 205-06.

The Equal Opportunity Commission (EEOC), which is charged with administering Section 633a(a), has taken the same view as the D.C. Circuit. As the government has acknowledged, the EEOC has likewise rejected the but-for causation test. *See* Br. for Resp. at 20-21 (citing decisions). The same is true for the Merit Systems Protection Board. *Id.*

The Eleventh Circuit itself seemed to question its decision to depart from Section 633a(a)'s plain text. It noted that the Supreme Court's application of the but-for standard in *Gross* hinged on Section 623(a)'s "because of" language. 743 F. App'x 280, 287 (11th Cir. 2018). As the Eleventh Circuit conceded, Section 633a(a) simply "reads differently." *Id.* But, in that Court's view, it was bound by its prior precedent to apply the but-for standard. *Id.* That was so, even though that prior precedent "did not analyze the linguistic differences between the ADEA's private and federal-sector provisions—differences that [Petitioner Babb] claims make all the difference." *Id.* at 287-88.

This Court is not so constrained. It should thus go no farther than Section 633a(a)'s unambiguous text. That text squarely answers the question presented, ending the inquiry. *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). And even if the text were somehow ambiguous, the EEOC's interpretation is reasonable and therefore entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 395 (2008) (explain-

ing that EEOC's interpretations of the ADEA qualify for *Chevron* deference); *see also United States v. Mead Corp.*, 533 U.S. 218, 230 & n.12 (2001) (explaining that *Chevron* deference applies to agency adjudications).

II. Adopting the Eleventh Circuit's Extratextual Interpretation Would Likely Lead to Discrimination By the Government Going Uncorrected.

Adoption of a but-for standard for proving age discrimination under Section 633a(a) would almost certainly lead to discrimination going unremedied. As Judge Tatel has explained, if a "but-for causation" standard is used, "a plaintiff who fails to demonstrate that age was a determining factor but nonetheless shows that it was one of several factors would lose even though the challenged personnel action in that scenario was not 'free from any discrimination.'" *Mabus*, 629 F.3d at 205-06.

The existence of age discrimination in government workplaces is an unfortunate reality. NTEU has vigorously litigated ADEA claims against federal agencies on behalf of the employees that it represents.[2] That includes individual age discrimination claims that NTEU has brought against agencies through a negotiated grievance procedure.

In one instance, NTEU fought the removal of a United States Department of Agriculture employee with over twenty years of federal service—a removal

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[2] *See, e.g.*, Press Release, NTEU Secures $2.7 Million Settlement and Pay Adjustments For SEC Employees Subject to Illegal Pay System (Oct. 7, 2008), https://www.nteu.org/media-center/news-releases/2016/04/13/nteu-secures-27-million-settlement-and-p.

that NTEU alleged was motivated by the employee's age. The employee made the difficult decision to retire prior to the effective date of the discriminatory removal. NTEU pursued an ADEA claim, among others, on the employee's behalf and obtained a favorable monetary settlement. In another instance, NTEU challenged an annual performance appraisal of an Internal Revenue Service (IRS) employee. NTEU alleged that the IRS had improperly lowered the employee's annual performance rating in violation of the ADEA. NTEU was able to settle the dispute and secure an appropriate rating for the employee.

Application of the Eleventh Circuit's legal standard would obstruct Section 633a(a)'s mandate. Agencies would be emboldened to resist all discrimination allegations, confident that an employee would be hard pressed to adduce evidence proving that age discrimination was the *determinative* factor in a removal or performance rating. Such a showing would require some sort of smoking gun documentary evidence that is unlikely to exist; an agency admission that would never be obtained; or some other method of disproving whatever bases that the government might offer for its action. Congress could not have envisioned such an employer-friendly process when, unlike the approach it took in Section 623(a), it outlawed "any" age discrimination in Section 633a(a).

In sum, if the Eleventh Circuit's ruling stands, the burden on employees to show that the alleged discrimination was the dispositive factor in the agency action—as opposed to part of the agency's calculus—would likely be an insurmountable hurdle. The Congress that declared agency actions would be "free from any discrimination based on age" (29 U.S.C. § 633a(a)), thus enacting a "broad, general ban" (*Go-*

mez-Perez, 553 U.S. at 488) on such discrimination, could not have intended such a result.

CONCLUSION

For the foregoing reasons and for those set forth in the petitioner's brief, NTEU respectfully requests that this Court reverse the Eleventh Circuit's decision below.

Respectfully submitted,

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