SUPREME COURT OF THE UNITED STATES

No. 06–1321

MYRNA GOMEZ-PEREZ, PETITIONER *v.* JOHN E. POTTER, POSTMASTER GENERAL

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

[May 27, 2008]

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA and JUSTICE THOMAS join as to all but Part I, dissenting.

The Court today holds that the federal-sector provision of the Age Discrimination in Employment Act encompasses not only claims of age discrimination—which its language expressly provides—but also claims of retaliation for complaining about age discrimination—which its language does not. Protection against discrimination may include protection against retaliation for complaining about discrimination, but that is not always the case. The separate treatment of each in the private-sector provision of the ADEA makes that clear. In my view, the statutory language and structure, as well as the fact that Congress has always protected federal employees from retaliation through the established civil service process, confirm that Congress did not intend those employees to have a separate judicial remedy for retaliation under the ADEA. I respectfully dissent.

I

Congress enacted the Age Discrimination in Employment Act of 1967, 81 Stat. 602, which at the time applied only to private employers, with the purpose of "promot[ing] employment of older persons based on their ability rather than age; . . . [of] prohibit[ing] arbitrary age

discrimination in employment; [and of] help[ing] employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U. S. C. §621(b). The 1967 Act implemented this purpose in two principal ways. First, the statute made it unlawful for an employer to "discriminate against any individual . . . because of such individual's age." §623(a)(1). Second, Congress enacted a specific antiretaliation provision, which made it "unlawful for an employer to discriminate against any of his employees or applicants for employment . . . 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" the ADEA. §623(d).

In the Fair Labor Standards Amendments of 1974 (FLSA Amendments), §28(b)(2), 88 Stat. 74, Congress (among other things) extended the ADEA to most Executive Branch employees by adopting 29 U. S. C. §633a. Like its private-sector counterpart, this federal-sector provision includes a ban on discrimination on the basis of age. Unlike its private-sector counterpart, the federal-sector provision does *not* include a separate ban on retaliation. The federal-sector provision specifies only that "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age [in various federal agencies] shall be made free from any discrimination based on age." §633a(a).

Despite the absence of an express retaliation provision in §633a(a), the Court finds that the statute encompasses both discrimination and retaliation claims. To support this proposition, the Court principally relies on our decisions in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229 (1969), and *Jackson* v. *Birmingham Bd. of Ed.*, 544 U. S. 167 (2005). In my view, the majority reads these cases for more than they are worth.

As the majority correctly states, we held in *Sullivan* that 42 U. S. C. §1982, which prohibits race discrimination in the sale or rental of property, also provides a cause of action for retaliation.[1] 396 U. S., at 237. More recently, we held in *Jackson* that Title IX of the Education Amendments of 1972, 86 Stat. 373—which provides in relevant part that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance," 20 U. S. C. §1681(a)—encompasses claims of retaliation for complaints about sex discrimination. 544 U. S., at 173–174.

To the extent the majority takes from these precedents the principle that broad antidiscrimination provisions may also encompass an antiretaliation component, I do not disagree. That is why I am able to join today's opinion in *CBOCS West, Inc.* v. *Humphries, ante*, at 14 (holding that a retaliation claim is cognizable under 42 U. S. C. §1981). But it cannot be—contrary to the majority's apparent view—that *any* time Congress proscribes "discrimination based on X," it means to proscribe retaliation as well. That is clear from the private-sector provision of the ADEA, which includes a ban on "discriminat[ion] against any individual . . . because of such individual's age," 29 U. S. C. §623(a)(1), but *also* includes a separate (and presumably not superfluous) ban on retaliation, §623(d).

Indeed, we made this precise observation in *Jackson*

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[1] To the extent there was any disagreement about whether *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229 (1969), was really a retaliation case, or whether it dealt only with third-party standing, the view put forth by the Court won the day in *Jackson* v. *Birmingham Bd. of Ed.*, 544 U. S. 167 (2005). Compare *id.*, at 176, and n. 1, with *id.*, at 194 (THOMAS, J., dissenting). Whatever the merits of this disagreement, I accept *Jackson*'s (and the Court's) interpretation as a matter of *stare decisis*. See *CBOCS West, Inc.* v. *Humphries, ante*, at 3.

itself. The respondent in that case argued that Title IX's ban on discrimination could not include a cause of action for retaliation because Title VII of the Civil Rights Act of 1964, like the private-sector provision of the ADEA, includes discrete discrimination and retaliation provisions. See 42 U. S. C. §§2000e–2 (discrimination), 2000e–3 (retaliation). We distinguished Title VII on the ground that "Title IX is a broadly written general prohibition on discrimination," while "Title VII spells out in greater detail the conduct that constitutes discrimination in violation of that statute." 544 U. S., at 175. Thus, while we distinguished Title VII from Title IX in *Jackson*, we also acknowledged that not every express ban on discrimination must be read as a ban on retaliation as well.

What is more, although the majority asserts that *Jackson* rejected the view that "a claim of retaliation is conceptually different from a claim of discrimination," *ante*, at 5, we have since explained that antidiscrimination and antiretaliation provisions are indeed conceptually distinct, and serve distinct purposes. In *Burlington N. & S. F. R. Co.* v. *White*, 548 U. S. 53 (2006), we considered whether the antiretaliation provision in the Title VII private-sector provision, 42 U. S. C. §2000e–3(a)—which is materially indistinguishable from that in the ADEA—applies "only [to] those employer actions and resulting harms that are related to employment or the workplace." 548 U. S., at 61. In answering that question in the negative, we explained:

> "The antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their [protected] status. The antiretaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. The substantive provision seeks to prevent injury to indi-

viduals based on who they are, *i.e.*, their status. The antiretaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct." *Id.*, at 63 (citation omitted).[2]

While I take from *Sullivan* and *Jackson* the proposition that broad bans on discrimination, standing alone, may be read to include a retaliation component, the provision at issue here does not stand alone. And, as *Jackson* itself makes clear, see 544 U. S., at 173, 175, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989). Here the text and structure of the statute, the broader statutory scheme of which it is a part, and distinctions between federal- and private-sector employment convince me that §633a(a) does not provide a cause of action for retaliation.

II

We have explained that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U. S. 16, 23 (1983) (internal quotation marks omitted). If, as the majority holds, the ban on "discrimina-

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[2]The Court views this discussion of *Burlington* as "[s]uggesting that [the Court has] retreated from the reasoning of *Sullivan* and *Jackson*." *Ante*, at 5, n. 1. Not a bit. The discussion simply points out what *Burlington* plainly said: that there is a distinction between discrimination and retaliation claims. That does not mean Congress cannot address both in the same provision, as we held it did in *Sullivan* and *Jackson* and as we hold today it did in *CBOCS West, Inc.*, *ante*, at 14. But it does confirm that Congress may choose to separate the two, as the private-sector provision of the ADEA, as well as the portion of Title VII interpreted in *Burlington*, makes clear.

tion based on age" in §633a(a) encompasses both discrimination and retaliation claims, it is difficult to understand why Congress would have felt the need to specify in §623 separate prohibitions against *both* "discriminat[ion]" "because of [an] individual's age," *and* retaliation.

The majority responds by noting that "'[n]egative implications raised by disparate provisions are strongest' in those instances in which the relevant statutory provisions were 'considered simultaneously when the language raising the implication was inserted.'" *Ante*, at 10 (quoting *Lindh* v. *Murphy*, 521 U. S. 320, 330 (1997)). Here, the majority notes that §623 was enacted in 1967, while §633a was not passed until 1974. *Ante*, at 10. Fair enough, but while I do not quarrel with this principle as a general matter, I do not think it does the work the majority thinks it does. Congress obviously had the private-sector ADEA provision prominently before it when it enacted §633a, because the same bill that included §633a also amended the private-sector provision. See, *e.g.,* §28(a)(2), 88 Stat. 74 (amending the definition of "employer" in 29 U. S. C. §630(b) to include States and their political subdivisions). Indeed, it is quite odd to assume, as the majority does, see *ante*, at 9, 12, that the Congress that enacted §633a was aware of and relied upon our decision in *Sullivan*—which interpreted 42 U. S. C. §1982, a wholly unrelated provision—but was not attuned to its own work reflected in the differences between 29 U. S. C. §§623 and 633a. Even if the negative implication to be drawn from those differences may not be at its "strongest" under these circumstances, it is certainly strong enough.

Moreover, and more to the point, we have relied on the differences in language between the federal- and private-sector provisions of the ADEA specifically in our interpretation of §633a. In *Lehman* v. *Nakshian*, 453 U. S. 156 (1981), we faced the question whether a person bringing an action under §633a(c), alleging a violation of §633a(a),

was entitled to a trial by jury. In holding that there was no jury-trial right available against the Federal Government, we relied on the fact that while the ADEA's federal-sector provision did not include a provision for a jury trial, the analogous grant of a right of action in the private-sector provision, §626(c), "*expressly* provides for jury trials." *Id.,* at 162. We reasoned that "Congress accordingly demonstrated that it knew how to provide a statutory right to a jury trial when it wished to do so elsewhere in the very 'legislation cited.' . . . But in [§633a(c)] it failed explicitly to do so." *Ibid.* (quoting *Galloway* v. *United States*, 319 U. S. 372, 389 (1943)). So too here. "Congress . . . demonstrated that it knew how to" provide a retaliation cause of action "when it wished to do so elsewhere in the very 'legislation cited,'" but "failed explicitly to do so" in §633a(a).

The majority argues that this inference is weakened by the fact that, in "the private-sector provision, Congress set out a specific list of forbidden employer practices," *ante*, at 11, while §633a(a) is a "broad, general ban on 'discrimination based on age,'" *ante*, at 12. This point cuts against the majority. Section 623 drew a distinction between prohibited "employer practices" that discriminate based on age, and retaliation. See §§623(a) (discriminatory "[e]mployer practices"), 623(d) (retaliation). Section 633a(a) phrased the prohibited discrimination in terms of "personnel actions." Just as Congress did not regard retaliation as included within "employer practices," but dealt with it separately in §623(d), the counterpart to "employer practices" in §633a—discriminatory "personnel actions"—should similarly not be read to include retaliation.

The argument that some meaning ought to attach to Congress's inclusion of an antiretaliation provision in §623 but not in §633a is further supported by several other factors. To begin with, Congress *expressly* made clear that the ADEA's private-sector provisions should not apply to

their federal-sector counterpart, by providing that "[a]ny personnel action . . . referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of" the ADEA, except for one provision not relevant here. §633a(f). The majority sees no "merit in respondent's reliance on 29 U. S. C. §633a(f)." *Ante*, at 13. But again, we relied on this very provision in *Lehman*. We explained that this subsection "clearly emphasize[s] that [§633a] was self-contained and unaffected by other sections" of the ADEA, 453 U. S., at 168, a fact that we used to support our holding that the federal-sector provision does not provide a right to a jury trial, even though the private-sector provision does. In short, Congress was aware that there were significant differences between the private- and federal-sector portions of the ADEA, and specified that no part of the former should be understood to have been implicitly imported into the latter.

Other actions Congress took at the same time that it enacted §633a in 1974 further underscore the point that Congress deliberately chose to exclude retaliation claims from the ADEA's federal-sector provision. The Fair Labor Standards Amendments of 1974, as the Act's name suggests, dealt for the most part not with the ADEA, but with the Fair Labor Standards Act of 1938, extending that statute's protections to federal employees. See FLSA Amendments, §6(a)(2), 88 Stat. 58. In doing so, Congress explicitly subjected federal employers to the FLSA's express antiretaliation provision, 29 U. S. C. §215(a)(3). Congress did *not* similarly subject the Federal Government to the express antiretaliation provision in the ADEA, strongly suggesting that this was a conscious choice.

The majority responds that this "inference . . . is unfounded" because "Congress had good reason to expect that this broad ban would be interpreted in the same way that *Sullivan* . . . had interpreted the broad ban on racial discrimination in 42 U. S. C. §1982." *Ante*, at 14, n. 6.

Anything is possible, but again, it seems far more likely that Congress had its eye on the private-sector provision of the ADEA in crafting the federal one, rather than on one of our precedents on a different statute. See *supra*, at 6.

But whatever the merits of this argument, it does not rebut the import of other probative provisions of the FLSA Amendments. In particular, Congress specifically chose in the FLSA Amendments to treat States and the Federal Government differently with respect to the ADEA itself. It subjected the former to the ADEA's private-sector provision, see FLSA Amendments, §28(a)(2), 88 Stat. 74—including the express prohibition against retaliation in §623(d)—while creating §633a as a stand-alone prohibition against discrimination in federal employment, without an antiretaliation provision, see §28(b)(2), *ibid.* This decision evinces a deliberate legislative choice *not* to extend those portions of the ADEA's private-sector provisions that are not expressly included in §633a, as of course Congress specified in §633a(f).

Given all this, it seems safe to say that the text and structure of the statute strongly support the proposition that Congress did not intend to include a cause of action for retaliation against federal employees in §633a(a).

III

But *why* would Congress allow retaliation suits against private-sector and state employers, but not against the Federal Government? The answer is that such retaliation was dealt with not through a judicial remedy, but rather the way retaliation in the federal workplace was typically addressed—through the established civil service system, with its comprehensive protection for Government workers. Congress was quite familiar with that detailed administrative system—one that already existed for most federal employees, but not for private ones. This approach, unlike the Court's, is consistent with the fact that

Congress has recognized that regulation of the civil service is a complex issue, requiring "careful attention to conflicting policy considerations" and "balancing governmental efficiency and the rights of employees," *Bush* v. *Lucas*, 462 U. S. 367, 388, 389 (1983). The resulting system often requires remedies different from those found to be appropriate for the private sector (or even for the States).

A

Before Title VII was extended to federal employees in 1972, discrimination in federal employment on the basis of race, color, religion, sex, or national origin was prohibited by executive order. See Exec. Order No. 11478, 34 Fed. Reg. 12985 (1969). Civil service regulations implemented this policy by authorizing Executive Branch employees to bring administrative complaints for allegedly discriminatory acts, including "personnel action[s]," 5 CFR §§713.211, 713.214(a)(1)(i) (1972). These regulations further provided that such complainants, their representatives, and witnesses "shall be free from restraint, interference, coercion, discrimination, or reprisal" for their involvement in the complaint process. §§713.214(b) (complainants and representatives), 713.218(e) (witnesses).

The Civil Service Commission (CSC) promulgated a detailed scheme through which federal employees could vindicate these rights, including the express antiretaliation protections. More serious personnel actions, known as "adverse actions," could be challenged before the employing agency and appealed to the CSC, see §§713.219(a) and (b), 752.203, 771.202, 771.208, 771.222, while less serious personnel actions and "any [other] matter of concern or dissatisfaction" could be challenged under alternative procedures that were also appealable to the CSC, see §§713.217(b), 713.218, 713.219(a) and (c), 713.231(a), 771.302(a). Retaliation was proscribed in all events. See,

e.g., §§713.219(a) and (c) (incorporating Part 771 antiretaliation provisions to complaint procedures except certain appeals to CSC); §§771.105(a)(1) and (b)(1), 771.211(e) (antiretaliation provisions for CSC appeals).

In 1972, Congress applied Title VII to the federal-sector, Equal Employment Opportunity Act of 1972 (EEO Act), §11, 86 Stat. 111, mandating that "[a]ll personnel actions" with respect to federal employees "shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U. S. C. §2000e–16(a). Congress empowered the CSC "to enforce the provisions of subsection (a) through appropriate remedies," and to "issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section." §2000e–16(b).

Under this grant of authority, as well as its prior authority under statute and executive order, the CSC revised its regulations both "to implement the [EEO Act] and to strengthen the system of complaint processing." 37 Fed. Reg. 22717 (1972) (Part 713 Subpart B). As with its prior system of administrative enforcement, the CSC distinguished between "complaints of discrimination on grounds of race, color, religion, sex, or national origin," 5 CFR §713.211 (1973), on the one hand, and charges by a "complainant, his representative, or a witness who alleges restraint, interference, coercion, discrimination, or reprisal in connection with the presentation of a complaint," §713.262(a), on the other. The regulations imposed upon employing agencies the obligation of "timely investigation and resolution of complaints including complaints of coercion and reprisal," 37 Fed. Reg. 22717; see also 5 CFR §713.220, and made clear the procedures for processing retaliation claims, §§713.261, 713.262. The regulations further mandated that the CSC "require the [employing] agency to take whatever action is appropriate" with respect to allegations of retaliation if the agency itself has

"not completed an appropriate inquiry," §713.262(b)(1).

Thus, leading up to the enactment of 29 U. S. C. §633a in 1974, the CSC's comprehensive regulatory scheme set forth a broadly applicable remedy for retaliation against federal employees for filing complaints or otherwise participating in the EEO process. And when Congress empowered the CSC in 1974 to "enforce the provisions of [§633a(a)] through appropriate remedies," and to "issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities" under that statute, §28(b)(2), 88 Stat. 75, the assumption that Congress expected the CSC to create an administrative antiretaliation remedy, just as it had for complaints of discrimination under Title VII, is compelling. And sure enough, the CSC did just that promptly after §633a was enacted. See 39 Fed. Reg. 24351 (1974); 5 CFR §713.511 (1975).

Given this history of addressing retaliation through administrative means, combined with the complicated nature (relative to the private sector) of federal personnel practices, it is therefore by no means anomalous that Congress would have dealt with the "primary objective" of combating age discrimination through a judicial remedy, *Burlington*, 548 U. S., at 63, but left it to expert administrators used to dealing with personnel matters in the federal work force to "secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees," *ibid.*

B

The majority discounts the above argument as "unsupported speculation." *Ante*, at 14. It seems to me that the fact that the Executive Branch had always treated discrimination and retaliation as distinct, and that it enacted administrative remedies for retaliation almost immedi-

ately after the passage of the Title VII and ADEA federal-sector provisions, provide plenty of support. But even if the majority is right, the view that Congress intended to treat retaliation for age discrimination complaints as a problem to be dealt with primarily through administrative procedures, rather than through the judicial process in the first instance, is confirmed by Congress's passage of the Civil Service Reform Act of 1978 (CSRA), 92 Stat. 1111.

The CSRA, as amended, has a detailed comprehensive antiretaliation provision, which generally makes it unlawful for Executive Branch employers 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 [or] (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).[3]

This antiretaliation provision, which plainly applies to retaliation for exercising rights under the civil rights statutes, including the ADEA, is supported by a host of administrative remedies. If the alleged retaliation results in adverse actions such as removal, suspension for more than 14 days, or reduction in pay, see §7512, an appeal can be taken directly to the Merit Systems Protection Board (MSPB), §§7513(d), 7701, with judicial review in the United States Court of Appeals for the Federal Circuit,

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[3] Neither 29 U. S. C. §633a nor the CSRA cover employees of Congress or of the Executive Office of the President and Executive Residence of the White House. See §633a(a); 5 U. S. C. §2302(a)(2)(B). But Congress has expressly extended the protections of the ADEA to such employees, 2 U. S. C. §1311(a)(2) (Congress); 3 U. S. C. §411(a)(2) (White House), and provided them with an express retaliation remedy, 2 U. S. C. §1317; 3 U. S. C. §417(a).

§7703(b)(1). Retaliation claims based on less serious allegations are first investigated by the Office of Special Counsel. If the Office finds that there are reasonable grounds supporting the retaliation charge, it must report its determination to, and may seek corrective action from, the MSPB. §§1214(a)(1)(A), (b)(2)(B), (C), and 1214(c). Again, judicial review in the Federal Circuit is available. §7703(b)(1). In all events, upon a finding that retaliation has in fact occurred, the MSPB has the authority to order corrective action, §§1214(b)(4), 7701(b)(2), to order attorney's fees on appeal, §7701(g), and to discipline federal employees responsible for retaliatory acts, §1215.[4]

To be sure, the CSRA was enacted after §633a. Nevertheless, we have explained, in the same context of federal employee remedies, that the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." *United States* v. *Fausto*, 484 U. S. 439, 453 (1988). That is precisely the situation here.

Indeed, this is particularly true with respect to Congress's regulation of federal employment. We have explained that the CSRA is an "integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *Id.*, at 445. Perhaps the CSRA's "civil service remedies [are] not as effective as an individual damages remedy" that can be obtained in federal court, *Bush*, 462 U. S., at 372, or perhaps a quicker and more familiar administrative remedy *is* more effective as a practical

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[4]The Postal Service—Gomez-Perez's employer—operates under its own personnel system. But the Postal Service's Employee and Labor Relations Manual (ELM) prohibits "any action, event, or course of conduct that . . . subjects any person to reprisal for prior involvement in EEO activity." ELM §665.23, pp. 681–682 (June 2007).

matter. That is not the issue. Cf. *id.*, at 388 (the question whether a judicial remedy against a federal employer for a First Amendment violation should be implied "obviously cannot be answered simply by noting that existing remedies do not provide complete relief for the plaintiff"). The CSRA establishes an "elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures—administrative and judicial—by which improper action may be redressed." *Id.*, at 385. Retaliation as a general matter was already addressed for federal employees. I would not read into §633a a judicial remedy for retaliation when Congress—which has "developed considerable familiarity with balancing governmental efficiency and the rights of employees," *id.*, at 389—chose to provide a detailed administrative one.

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The question whether a ban against "discrimination based on" a protected status such as age can also be read to encompass a ban on retaliation can be answered only after careful scrutiny of the particular provision in question. In this case, an analysis of the statutory language of §633a and the broader scheme of which it is a part confirms that Congress did not intend implicitly to create a judicial remedy for retaliation against federal employees, when it did so expressly for private-sector employees. Congress was not sloppy in creating this distinction; it did so for good reason: because the federal workplace is governed by comprehensive regulation, of which Congress was well aware, while the private sector is not.

For these reasons, I would affirm the judgment of the Court of Appeals.