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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first today in Case No. 06-1321, Gomez-Perez v. Potter. Mr. Guerra.

ORAL ARGUMENT OF JOSEPH R. GUERRA
ON BEHALF OF THE PETITIONER

MR. GUERRA: Mr. Chief Justice, and may it please the Court:

The government claims in this case that Congress decided to treat retaliation against Federal workers who complain of age discrimination differently than every other species of retaliatory conduct, that for age-based retaliation alone Congress created a four-part patchwork scheme in which a small cadre of Federal employees have a full judicial remedy, but tens of thousands of others who suffer retaliatory conduct have absolutely no remedies at all.

This scheme is inconsistent with over three decades of administrative interpretations by the agencies charged with administering and enforcing the statute and it is flatly inconsistent, most importantly, with the plain language and historical origins of the statute itself. By its plain terms, Section 633a(a) bars retaliation against covered workers who have

1 complained that have they suffered age discrimination.
2 Such retaliation is directed at persons over --

3 JUSTICE SCALIA: Excuse me. By its plain
4 terms?

5 MR. GUERRA: Yes, Justice Scalia.

6 JUSTICE SCALIA: Read it to me, would you?

7 MR. GUERRA: The provision is: "All
8 personnel actions shall be made" -- "affecting covered
9 employees shall be made free from any discrimination
10 based on age."

11 JUSTICE SCALIA: Is retaliation
12 discrimination based on age? I can see your argument
13 that it ought to be covered, but to say that the plain
14 language covers it, I mean that's extraordinary. The
15 plain language doesn't cover it.

16 MR. GUERRA: With respect, Justice Scalia, I
17 submit it does cover it for at least three reasons.
18 First of all discrimination -- retaliatory conduct aimed
19 at a 40-year-old or someone over age 40 because he or
20 she is asserting rights she possesses by virtue of being
21 age 40 or older is discrimination based on age.

22 CHIEF JUSTICE ROBERTS: No, it's not. I
23 mean, a company could have a policy of firing everybody
24 who complains about anything and the fact that a worker
25 is over the age of 40 and is fired does not mean that he

1 is being fired because of age.

2 MR. GUERRA: Mr. Chief Justice, the issue in
3 this case is whether plaintiff is entitled to allege and
4 ultimately prove that she was -- she suffered adverse
5 personnel actions because she complained of age
6 discrimination. It may be that in some, that in a
7 certain case the employer could demonstrate that in fact
8 the retaliatory conduct was not triggered by the nature
9 of the complaint, and in fact there have been Title VII
10 cases where the courts have found that it was the manner
11 in which a complaint was lodged, that there was, that
12 there was false statements or it was too inflammatory,
13 and so the employer prevailed.

14 But if -- the issue here is whether, if
15 Ms. Gomez can prove ultimately that the retaliatory
16 conduct was a function of the fact that as a 40-year-old
17 she was asserting her rights to be free from age
18 discrimination, we submit that is covered by the plain
19 language of the statute. And that is confirmed by this
20 court's interpretation of Title IX in the Jackson case
21 because there the Court --

22 CHIEF JUSTICE ROBERTS: Of course the
23 statute that covers age discrimination in the private
24 sector does have an express provision addressing
25 retaliation. The one that governs Federal employees

1 does not, and that's the government's main argument,
2 that it's expressed in the private sector, it's not
3 there in the public sector and so you shouldn't imply
4 one. What's your answer to that?

5 MR. GUERRA: Mr. Chief Justice, three
6 responses to that. First of you, as this Court
7 explained in Jackson itself, it's improper to narrow the
8 scope of a stand-alone general discrimination ban that
9 does not identify any discriminatory practices based on
10 a comparison with an enumeration ban that sets forth a
11 detailed series of prohibitions. And that's precisely
12 the comparison that the Court rejected in Jackson and
13 the government is asking the court to draw here.

14 JUSTICE SCALIA: But in Jackson it was in a
15 different statute and here it's in the same statute.
16 Surely that makes a big difference.

17 MR. GUERRA: It doesn't in this case,
18 Justice Scalia, for two reasons. First of all,
19 subsection (f) of section 633a effectively deems the
20 private sector and the Federal sector provisions of the
21 Age Act to be the functional equivalents of two separate
22 statutes. So I think that distinction is refuted by
23 that provision. But more fundamentally, the
24 government's argument --

25 JUSTICE SCALIA: I'm not familiar with that

1 provision. What does that provision say?

2 MR. GUERRA: That is the provision that the
3 government cites in its brief and it provides that:
4 "Any personnel action of any department, agency, or
5 other entity referred to in subsection (a) of this
6 section shall not be subject to or affected by any
7 provision of this chapter other than the provisions of
8 Section 631b of this title." And the government's
9 position is that that provision makes these statutory
10 schemes utterly distinct from one another.

11 JUSTICE SCALIA: Well, no. I mean, they're
12 all in the same, in the same statute, and what that
13 provision says is that just because we give certain
14 relief in, in the portion applicable to private
15 discrimination, does not mean that we give that relief
16 in the section applicable to government discrimination,
17 where it is explicitly withheld -- it can't be
18 explicitly withheld -- where it is withheld, although
19 it's explicitly included for private discrimination. I
20 think that's the only sensible way to read that
21 provision. It surely doesn't make two statutes out of,
22 out of one. It is simply one statute.

23 MR. GUERRA: Justice Scalia, if I may, two
24 points. One is it's clear that the scope of the
25 language of 633a(a) is broader in its own right than

1 623a, which is the -- or 623a and 623b operate in
2 conjunction with each other. So we know that the
3 stand-alone prohibition in the Federal sector side is
4 intended to be broader than the -- the discrimination
5 ban of 623(a). So it's not anomalous at all to conclude
6 that because it sweeps more broadly and because it's not
7 limited by any other provision that operates in
8 conjunction with it, that there's no basis for drawing a
9 negative inference.

10 JUSTICE ALITO: Well, why would Congress
11 have taken this drafting approach? The private sector
12 provisions were already in existence when it made the
13 statute applicable to Federal workers and there was a
14 specific provision prohibiting retaliation in the
15 private sector. If Congress wanted to carry that over
16 to the Federal sector, why wouldn't they have either
17 copied that or incorporated it? And they did neither,
18 and in fact they enacted a provision that says that the
19 private sector provisions are not incorporated unless
20 they're specifically noted. And this isn't one of the
21 ones that's noted.

22 MR. GUERRA: Justice Alito, if I could --
23 the second point I was going to address to Justice
24 Scalia I think answers this, this point. Congress did
25 the exact same thing in Title VII two years earlier. It

1 could have added Federal employers to the definition of
2 employer and subjected them to the private sector regime
3 there, but instead it created a stand-alone prohibition.
4 If you take the government's logic in this case and
5 apply it to Title VII, it would lead to the conclusion
6 that the Federal sector ban in Title VII, which is
7 717(a), does not bar retaliation either, and yet we know
8 that's not true. Because --

9 JUSTICE GINSBURG: Why? This Court hasn't
10 so held. We haven't had that issue before us.

11 MR. GUERRA: You -- that's correct, Your
12 Honor. It's not true because of this Court's holdings,
13 but it's true because of the structure of the statute,
14 the consistent interpretations of the lower courts and
15 the administrative agency. The structure of the statute
16 is, in 717(a), the language, the prohibition there is
17 virtually identical to the prohibition here except it
18 proscribes race discrimination, et cetera, instead of
19 age discrimination.

20 Then, in the remedy section Congress
21 explicitly made a remedy for retaliation available for
22 violations of 717(a)'s substantive norm. The only
23 reason to do that was because Congress understood that
24 substantive norm to prohibit retaliation. Congress then
25 copied that very same language into 633a(a), thereby

1 giving it the same breadth.

2 And so the negative inference theory the
3 government puts forward with respect to Title VII fails
4 on that statute because of the incorporation of the
5 remedies, we know that that prohibition bars
6 retaliation. And because the norm at issue here was
7 copied from that Federal sector prohibition in Title
8 VII, the same reasoning dictates that the argument fail
9 here as well.

10 CHIEF JUSTICE ROBERTS: The Federal
11 employee, though, has all of the remedies under the
12 Civil Service Reform Act for any type of employment
13 practice. Those remedies are elaborately reticulated
14 and almost impenetrable, and yet this would add
15 complication. In other words, despite all the remedies
16 under the CSRA that says in some cases you go here, in
17 other cases you go here, and you get different types of
18 review depending on the facts, all of that would be
19 wiped away if you can bring a direct action under the
20 age discrimination statute.

21 MR. GUERRA: Three points, Mr. Chief
22 Justice: First of all, everything you just said would
23 be equally true of discrimination under Title VII, and
24 yet the government acknowledges that retaliatory conduct
25 for race discrimination claims, sex discrimination

1 claims, can all be brought directly in court,
2 notwithstanding the existence of the CSRA.

3 JUSTICE GINSBURG: Did the government --
4 well, we'll ask the government, but I thought they kind
5 of qualified that in their brief. The brief says that
6 the case -- this case presents no occasion to consider
7 whether Title VII's ban on discrimination against
8 Federal sector employees incorporates that Act's private
9 sector retaliation ban. So they haven't made a
10 concession.

11 MR. GUERRA: Well, I -- Justice Ginsburg, I
12 read them to be conceding for purposes of this case and
13 the analysis of this case, and if they're willing to
14 acknowledge, at least for purposes of this case, that
15 all these other retaliatory claims can be brought
16 outside of the CSRA regime, it makes no sense, I submit,
17 to single out retaliation based on age discrimination
18 claims. And, in fact, Congress --

19 JUSTICE SCALIA: I think you're saying even
20 if, even if that were the case, they would still urge
21 the Court to come out the way they do. I don't think
22 they're conceding that that's the case.

23 MR. GUERRA: But, Justice Scalia, even if --
24 if -- even if taken on the "even if" premise, you still
25 are in the situation where you have an irrational

1 distinction by saying the CSRA is the exclusive remedy
2 for retaliation for age complaints and yet not for
3 retaliation under Title VII.

4 Also, Mr. Chief Justice, the CSRA itself
5 explicitly carves out claims under the ADEA and Title
6 VII. So, Congress did not view it as the exclusive --

7 CHIEF JUSTICE ROBERTS: But not retaliation
8 claims. In other words, although the direct claims, as
9 you put it, may or may not be carved out, a retaliation
10 claim fits under the employment practices provisions of
11 the CSRA, regardless of the basis for retaliation. In
12 other words, you took personnel action against me for an
13 impermissible basis and therefore I'm entitled to the
14 various civil service remedies.

15 MR. GUERRA: That's -- that's correct,
16 Mr. Chief Justice. And of course, the CSRA covers
17 retaliation that has nothing to do with complaints of
18 employment discrimination as well. So it would not be
19 rendered a dead letter by recognizing our position.

20 JUSTICE SOUTER: Does it cover your client?

21 MR. GUERRA: I don't believe it would,
22 Justice Souter, because she did not suffer an adverse
23 action. No, and in fact putting that aside --

24 JUSTICE GINSBURG: She could complain; it's
25 just that she couldn't go very far with the complaint.

1 MR. GUERRA: Well, more fundamentally,
2 Justice Ginsburg, she's not covered at all by the CSRA.
3 And that was the third point I wanted to make. The CSRA
4 excludes thousands of employees.

5 CHIEF JUSTICE ROBERTS: But it does that for
6 a reason. We have a lot of cases in the Federal Circuit
7 and the D.C. Circuit that addresses a lot of these
8 problems say that when the CSRA excludes certain types
9 of claims of employees, they do it for a reason. In
10 other words, it's not simply that they didn't cover them
11 or inadvertence, but they make the decision that the
12 remedies that they've provided don't apply in a
13 particular case. And to say that those people who are
14 excluded under the CSRA nonetheless have remedies for
15 employment practices seems to me to undermine that --
16 that judgment.

17 MR. GUERRA: Mr. Chief Justice, with
18 respect, the problem with the government's reliance on
19 the statute is that it doesn't -- on their view, White
20 House employees and congressional employees have a full
21 judicial remedy for retaliation suffered for raising age
22 discrimination complaints. And our argument is it makes
23 no sense to permit that one band of employees, many
24 high-level policy employee -- policymakers, to bring
25 retaliation claims in Federal court, while excluding

1 Postal Service workers who have only collective
2 bargaining rights and tens of thousands of other
3 employees for --

4 JUSTICE BREYER: The answer is that it
5 doesn't exclude them, that they have all these
6 collective bargaining rights; they have the civil
7 service rights; they can go and bring their same claim
8 with other remedies. You could make the opposite claim:
9 Why should they have two rights? Everybody else has
10 one. I mean, that seems to me what they're argument is
11 underlying this.

12 Then when you go to Title VII -- and this I
13 don't understand fully. Look at Title VII and Title VII
14 in 16(e) has a basic ban. Is that right?

15 MR. GUERRA: That's correct, Justice Breyer.

16 JUSTICE BREYER: And then, in 16(d) it says
17 certain of those things govern Federal suits, suits
18 against the Federal Government. Then it incorporates
19 some provisions. And it says that you get that certain
20 relief against the Federal Government where there is
21 discrimination on account of race, color, religion, sex,
22 or national origin. Then it says "or in violation of
23 3(a)." And then 3(a) refers to retaliation.

24 So it looks like Title VII does give you a
25 remedy, in 3(a), for retaliation. And it's rather

1 specific, and that suggests that those other words don't
2 pick up retaliation. It's rather that specific thing.
3 Now, what have I missed?

4 MR. GUERRA: Justice Breyer, the -- you are
5 right to focus on these remedies, but the remedies
6 themselves are not incorporated as substantive bans.
7 They are simply remedies, and our point is by making a
8 retaliation remedy available for a violation of the ban
9 that you identified in subsection 717(a), Congress
10 necessarily understood that substantive ban, 717(a), to
11 prohibit retaliation. Otherwise there would be no
12 reason to provide a remedy for retaliation as one of the
13 remedies for a violation of --

14 JUSTICE BREYER: Well, you could say that,
15 but you could also say, well, look here in Title VII
16 Congress has some words, and these words give you a
17 specific -- if you're a Federal employee and somebody's
18 retaliating against you because you went and complained
19 about race or something, just read those words; you can
20 bring a lawsuit, right? Am I right about that?

21 MR. GUERRA: I don't think so --

22 JUSTICE BREYER: No?

23 MR. GUERRA: -- Justice Breyer. You can
24 bring a lawsuit under section --

25 JUSTICE BREYER: You go to the EEOC?

1 MR. GUERRA: Well, you can bring a lawsuit
2 under Title VII if you are a person, an employee or
3 applicant aggrieved.

4 JUSTICE SCALIA: Where is this stuff? Where
5 is this text that we're talking about?

6 MR. GUERRA: I apologize, Justice Scalia.
7 It is not in --

8 JUSTICE SCALIA: It's not in your brief.
9 It's not in the appendix. So I don't know what you're
10 talking about.

11 MR. GUERRA: I am talking about subsection
12 (c) of 717a, the Federal sector provisions of Title VII.

13 JUSTICE SCALIA: Which we don't have here
14 now. I guess I can ask --

15 JUSTICE BREYER: Well, I'm not totally
16 certain what I'm talking about either. So we could go
17 on.

18 (Laughter.)

19 MR. GUERRA: I'd like to think I -- I can
20 illuminate the -- the language that authorizes Federal
21 employees to bring suits for violations of Title VII
22 says that if they are aggrieved by final disposition of
23 the complaint, they may bring a civil action under Title
24 VII, and aggrieved -- they can bring complaints for
25 violations of subsection (a), which like subsection (a)

1 in our statute says "all personnel actions affecting
2 employees or applicants for employment shall be made
3 free from any discrimination based on race, color,
4 religion," et cetera.

5 JUSTICE BREYER: Or in violation of --

6 MR. GUERRA: No, it does not say that,
7 Justice Breyer. The prohibition of subsection (a) of
8 717a in substantive terms is identical, except it
9 specifies a different protected status. So this is a
10 ban on discrimination based on race, color, religion,
11 and you are authorized to bring a suit if you are
12 aggrieved by a violation of that provision, and one of
13 the remedies that's made available is a remedy that's
14 available for violations of the private sector provision
15 on retaliation.

16 JUSTICE GINSBURG: Why is that so clear,
17 because section 2000e, 16(d) says section, whatever it
18 is, f through k of this title, as applicable, shall
19 govern civil actions brought hereunder. And if there is
20 no right against retaliation, then the remedy wouldn't
21 be applicable.

22 MR. GUERRA: Justice Ginsburg, the language
23 "as applicable" I submit has to be referring to whether
24 the case itself would implicate the need for that
25 remedy. In other words, it would not be applicable to

1 have a reinstatement remedy in a case where there was no
2 discharge.

3 But the reading that you have suggested
4 assumes that Congress didn't know what it was -- the
5 scope of the prohibition it enacted in Section 717(a)
6 and was effectively saying: Here are some remedies; we
7 don't know whether they apply or not, but if they do, go
8 ahead and use them.

9 And I submit that is an improper assumption
10 about congressional understanding of its own
11 legislation. The proper assumption is that Congress
12 understood 717(a) to bar retaliation. That's why it
13 provided a retaliation remedy, and that assumption is
14 buttressed by the fact that, as this Court explained in
15 the *Brown v. GSA* case, Congress adopted Title VII
16 precisely because it found that fear of reprisal had
17 made the old scheme ineffective.

18 So it makes perfect sense that it would want
19 to prohibit retaliation under Title VII in the Federal
20 sector because reprisals had rendered the old
21 protections useless.

22 JUSTICE BREYER: Well, could you proceed
23 with that? That is, a very simple way of thinking of
24 this as one possible way of reading it is that Congress
25 says: When private employers discriminate, there can be

1 whistleblower's, and they need protection; so let's put
2 some in. When State officials discriminate, say, on the
3 basis of race, there can be some whistleblower's. Maybe
4 they protect them in some States; maybe they don't
5 protect them in others. We better put some in. When
6 Federal Government officials discriminate against on the
7 basis of race, whistleblower's should be protected.

8 But we have a whole system here to protect
9 them. And so let's just use that system and treat all
10 whistleblower's alike, and that's the end of the matter.
11 We don't need any special protection for whistleblower's
12 here.

13 Now, the answer to that is what?

14 MR. GUERRA: That is the very system that
15 Congress had deemed ineffective to prevent retaliation
16 for the very claims you're talking about in -- and
17 that's why it chose to adopt the amendments to Title VII
18 in 1972. That's what the Brown case canvasses; and, in
19 fact --

20 JUSTICE SCALIA: Well, that's sort of
21 begging the question. I mean, you're saying it's not
22 true because our interpretation of Title VII is true.
23 But the point goes to how you ought to interpret Title
24 VII. That is, it makes more sense to say when it's
25 retaliatory action you use your Federally prescribed

1 remedies within the agency.

2 I mean, it doesn't answer the point that
3 Justice Breyer made to say, because we want to interpret
4 Title VII the way we want to interpret it. His point
5 is: One reason to interpret it the way you do want to
6 interpret it is that it makes more sense to have all of
7 the Federal remedies applied through the agency, through
8 the agency mechanism, rather than in court.

9 MR. GUERRA: Justice Scalia, I apologize if
10 I wasn't clear in my response, but what I'm saying is
11 that in the Brown case this Court looked at the
12 legislative history of Title VII -- excuse me -- yes, in
13 1972 and 1977 -- and said that the reason Congress
14 adopted these, this new prohibition, was because the
15 very scheme that Justice Breyer is suggesting would have
16 been a fix for whistle blowing was ineffective. That --

17 JUSTICE SOUTER: Then it's ineffective here.

18 MR. GUERRA: And it is ineffective here.

19 JUSTICE SOUTER: And if it's ineffective
20 here and Congress has made it clear that the only way to
21 cure the ineffectiveness is with a separate provision
22 and you don't have a separate provision, you're out.

23 MR. GUERRA: That's correct. And the
24 ineffectiveness here is because of the extraordinarily
25 limited nature of the types of conduct that would

1 trigger any rights that the employee could control under
2 the CSRA. Retaliation rarely takes the form of a
3 removal from position or a suspension of more than 14
4 days. The most typical things are poor performance
5 evaluations, what we have in this case, allegations of
6 groundless charges of misconduct.

7 CHIEF JUSTICE ROBERTS: When you qualified
8 your answer by saying that the employee can control, was
9 that a way to dismiss the collective bargaining rights?

10 MR. GUERRA: Well, I was talking about
11 actually the -- the -- you can complain about
12 non-adverse actions under the CSRA, but all you can do
13 is ask the Office of Special Counsel to investigate.
14 And then you have no right to compel any further action
15 at any step of the process. So if the counsel decides
16 not to investigate, that's the end of the matter. If
17 they do and the agency refuses to take their advice,
18 that's the end of the matter. There's no judicial
19 remedy for the vast majority of retaliatory actions that
20 a Federal employee could suffer under the CSRA.

21 CHIEF JUSTICE ROBERTS: What about review
22 under -- by the Merit Systems Protection Board?

23 MR. GUERRA: That is the remedy under the
24 CSRA, Mr. Chief Justice.

25 CHIEF JUSTICE ROBERTS: So when you're

1 talking about the Office of Special Counsel --

2 MR. GUERRA: If the Office of Special
3 Counsel doesn't pursue the case -- and the statistics in
4 the NTEU brief suggest that it rarely -- out of
5 thousands and thousands of complaints, it pursued only
6 in a small handful. You have no right as the employee
7 to do anything, to go to the MSPB or to any Federal
8 court, if they decide not to pursue that claim. And so
9 that is -- and, again, both because Title VII, I submit,
10 clearly based on the remedial structure, would allow
11 employees to bring all types of retaliation claims
12 unrelated to age discrimination complaints in Federal
13 court, it doesn't make sense for Congress to have
14 relegated older workers who suffer age discrimination to
15 this one scheme, especially because it excludes --
16 Petitioner herself has no rights under the CSRA.

17 JUSTICE STEVENS: Mr. Guerra, can you help
18 me on a provision of the statute that I'm a little
19 puzzled about? Am I correct in believing that Section
20 2000e-16, which is the provision under Title -- 42
21 U.S.C. -- I'm using the code number -- that that is the
22 provision that makes the Federal Government liable for
23 retaliation based on sex and race?

24 MR. GUERRA: That is.

25 JUSTICE STEVENS: Is there another provision

1 that is necessary for there to be a remedy against the
2 Federal Government?

3 MR. GUERRA: For retaliation based on race
4 and sex?

5 JUSTICE STEVENS: Under Title VII.

6 MR. GUERRA: No. That's the remedy.

7 JUSTICE STEVENS: Then -- your argument, if
8 I understand it, is that precisely the same language
9 that's found in 2000-16e is found in 233a.

10 MR. GUERRA: 633a.

11 JUSTICE STEVENS: 633a.

12 MR. GUERRA: Yes, Justice Stevens.

13 JUSTICE STEVENS: And, therefore, the two
14 should be treated alike?

15 MR. GUERRA: Precisely. That is the -- that
16 is our -- one of our central arguments. Of course, we
17 also realize --

18 JUSTICE STEVENS: In other words, that the
19 language "shall be made free from any discrimination
20 based on race, color, or religion," and so forth, covers
21 retaliation. And when you use the same language based
22 on age it also would cover retaliation.

23 MR. GUERRA: Absolutely, Justice Stevens.

24 JUSTICE STEVENS: It's just as simple as
25 those two provisions being exactly --

1 JUSTICE GINSBURG: It isn't that simple
2 because the government hasn't conceded that, with
3 respect to Title VII, Federal employees are covered for
4 retaliation. If the Government -- we'll ask them --
5 will make that concession, then the argument is very
6 strong. The words are identical.

7 MR. GUERRA: Justice Ginsburg, even if, as I
8 anticipate, they will not make that concession, the fact
9 of the matter is that the remedial structure of Title
10 VII, the Federal sector provision, confirms that the
11 substantive ban that Justice Stevens read necessarily
12 covers retaliation. Otherwise, Congress wouldn't have
13 made a retaliation remedy available.

14 CHIEF JUSTICE ROBERTS: Well, another reason
15 it's not that simple is that under the Age
16 Discrimination Act you have a private remedy that
17 specifically provides for retaliation. And that is
18 noticeably absent from the Federal remedy. And I
19 thought that was the strongest argument on the
20 government's side.

21 MR. GUERRA: Well, Mr. Chief Justice, that
22 is precisely the same -- the same is precisely true of
23 Title VII. Section 704a of Title VII is the analog to
24 623(b) in our case.

25 CHIEF JUSTICE ROBERTS: I thought there was

1 a more express incorporation in Title VII of the private
2 anti-retaliation remedy, and you don't have that in this
3 case.

4 MR. GUERRA: That is true, but our position
5 --

6 CHIEF JUSTICE ROBERTS: So that makes it not
7 precisely the same situation.

8 MR. GUERRA: Not precisely the same,
9 Mr. Chief Justice, but this Court's -- in that case, for
10 example, this court said when you copy language verbatim
11 into another statute, there must be some compelling
12 evidence that you've intended to have given it a
13 different meaning.

14 If you look at the remedy section of Section
15 633a(c), all you see there is not some dramatic
16 difference, but what Congress did was it replicated the
17 civil action provisions of the private sector in the
18 Federal sector provision. So it's not as though there's
19 some stark evidence that Congress intended to have a
20 drastically different regime. It simply didn't --
21 rather than incorporate subsection (c) of the private
22 section, 626c, it simply replicated it.

23 I would like to reserve the balance of my
24 time.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Garre.

2 ORAL ARGUMENT OF GREGORY G. GARRE

3 ON BEHALF OF THE RESPONDENT

4 MR. GARRE: Thank you, Mr. Chief Justice,
5 and may it please the Court:

6 The Age Discrimination and Employment Act
7 does not expressly prohibit retaliation in the Federal
8 sector context and it should not be read to impliedly
9 prohibits such conduct either.

10 JUSTICE GINSBURG: Why not, given the
11 Jackson precedent, where there was a similarly general
12 ban on discrimination and we defined discrimination to
13 include retaliation for complaining about
14 discrimination?

15 MR. GARRE: Justice Ginsburg, the Court did
16 so very, very focused on Title IX, the Court's cases
17 interpreting the language of discrimination in Title IX
18 broadly. And it specifically distinguished statutes
19 like Title VII and the Age Discrimination Act which
20 delineate different types of discrimination.

21 In fact, on page 175 of the Court's decision
22 in Jackson, the Court said because Congress did not list
23 any specific discriminatory practices when it wrote
24 Title IX, its failure to mention one such practice does
25 not tell us anything. And then it pointed to the fact

1 that Title VII had delineated certain types of
2 practices.

3 JUSTICE ALITO: Would it be -- would it be
4 unkind to say that the government's position seems to be
5 that a general ban on discrimination includes a ban on
6 retaliation except when the government is being sued?
7 In Jackson the government argued that discrimination on
8 the basis of sex included retaliation. Tomorrow the
9 government is going to argue that the prohibition of
10 discrimination in section 1981 includes retaliation.
11 And yet here you're arguing exactly, what seems to me
12 exactly the opposite position.

13 MR. GARRE: I think that would be unfair,
14 Justice Alito. The government's position is that
15 statutory context matters. It made that clear in
16 footnote 1 of its Jackson brief before this Court. It's
17 made it clear in this case.

18 In this case, there are several indicia of
19 statutory intent that are lacking where you have a
20 general prohibition in the context of the inferred right
21 that has -- that this Court has treated differently, as
22 it did in Jackson and as it should in the did in the
23 CBOCS case that you'll hear about tomorrow.

24 In the Age Discrimination Act you have
25 separate provisions of the Act which explicitly

1 delineate different types of discrimination, including
2 retaliatory discrimination, and in the Federal sector
3 prohibition the Congress added in 1974, it added that at
4 a time where it decided to treat State employers like
5 Federal employers, specifically put the State employers
6 in the definition of employer for the Federal -- for the
7 private sector provision of the Age Discrimination Act,
8 and it created a stand-alone provision for Federal
9 employers.

10 And then it went even further. It
11 specifically said in subsection (f) of section 633a, the
12 Federal sector provision, that the Federal sector
13 provision should be unaffected by the private sector
14 provision, the bootstrap to make clear that courts
15 should not be reading into the Federal sector provision
16 the additional protections or other provisions in the
17 private sector provisions. And this Court recognized
18 the significance of that construction, that statutory
19 scheme in the Lehman v. Nakshian case.

20 In that case, the Court considered whether
21 Federal employees were entitled to a right to a jury
22 trial in an action for discrimination under the Federal
23 sector prohibition. Private sector employees were
24 entitled to that. And so the plaintiffs in that case
25 made an argument very much similar to the argument made

1 by Petitioners in this case: Well, the private sector
2 provisions covered a jury trial right; it would make no
3 sense not to have a jury trial --

4 JUSTICE GINSBURG: But that's -- Mr. Garre,
5 that's traditionally when you're suing the government,
6 you don't get a jury. And so that's on one side.

7 Here, as I think you would recognize,
8 retaliation claims go hand in hand with discrimination
9 claims. A person who is discriminated against will
10 quite commonly say: I was not promoted because that was
11 discrimination and then because I complained about it
12 all these bad things happened to me. It's very common
13 that those two go together.

14 And yet, without any indication that
15 Congress meant to send a Federal employee off to one
16 forum to argue discrimination and another forum to argue
17 retaliation, without any hint that that's what Congress
18 had in mind, it would be rather strange.

19 MR. GARRE: Well, let me try to answer that
20 question, Justice Ginsburg, but I just want to make one
21 final point on Lehman and the statutory construction in
22 that case. The Court specifically said on page 162 of
23 its decision that because Congress demonstrated that it
24 knew how to provide a statutory right to a jury trial
25 when it wished to do so elsewhere in the very

1 legislation cited, but in section 633a it explicitly
2 failed to do so, and it said that that was the
3 conclusive point of statutory construction in that case.
4 So we do think the Lehman case is very on point here.

5 With respect to the general notion that it's
6 uncommon to provide -- not to provide an
7 anti-retaliation right when you do have an underlying
8 anti-discrimination prohibition, certainly we would
9 agree with you that it is uncommon, but we don't think
10 that it is absurd. It's certainly not absurd where
11 Congress was aware that there was a separate set of
12 protections available for Federal workers --

13 JUSTICE GINSBURG: But you -- I recognize
14 it's not absurd. But if there is ambiguity and one
15 interpretation is, well, that in every other context
16 retaliation goes together with discrimination, why would
17 Congress leave out this one category of persons,
18 especially when it might have said, well, the Supreme
19 Court says discrimination includes retaliation?

20 MR. GARRE: Well, we know that Congress in
21 the Civil Service Reform Act, as the Chief Justice
22 noted, we know that it didn't think that additional
23 anti-retaliation protections were necessary for some
24 Federal employees. So the fact that Congress wouldn't
25 have a separate anti-retaliation -- anti-retaliation

1 right in some situation in itself is not unprecedented.

2 We do think that the statute has several
3 indicia that make clear that Congress did not intend to
4 provide an anti-retaliation right here. Not only the
5 contrast between the private sector and Federal sector
6 provisions, but look at what Congress expressed in
7 section 633a. In at least three respects this is
8 materially unlike the typical anti-retaliation right.

9 JUSTICE ALITO: Can you say what the
10 government's position is on Title VII, whether there is
11 a retaliation remedy against the Federal Government?

12 MR. GARRE: As we make clear in our brief,
13 we have not conceded that, Justice Alito. We don't
14 think it's necessary for the courts to decide that in
15 this case --

16 JUSTICE GINSBURG: What is the government's
17 position? What does, for example, EEOC or whoever
18 passes on these complaints, what is the government's
19 position in practice with respect to a Federal employee
20 who complains, A, I was discriminated against because of
21 my race and then they retaliated against me for
22 complaining?

23 MR. GARRE: I think in practice, Your Honor,
24 we have not challenged the interpretation of the Federal
25 courts that have found that Title VII does incorporate

1 an anti-retaliation right. But there are at least --

2 JUSTICE GINSBURG: Has any Federal court
3 found otherwise?

4 MR. GARRE: I'm not aware of a circuit court
5 that has gone the other way on Title VII. Certainly the
6 Age Discrimination Act is different. The First Circuit
7 in this case explicitly recognized that the textual
8 differences between Title VII and the Age Act call for a
9 different result. And there are at least two
10 differences that we do think call for a different result
11 under the Age Act.

12 The first is the fact that, whereas Title
13 VII expressly incorporates the private sector provisions
14 of the Act and by reference the anti-retaliation
15 provision of the Act --

16 JUSTICE GINSBURG: So you agree -- then you
17 agree with Mr. Garre about the meaning of those words
18 "as applicable"?

19 MR. GARRE: Well, this Court actually has
20 interpreted that phrase, "as applicable," in a case
21 called Chandler v. Radabush. It wasn't cited in the
22 brief, but it is directly responsive to that question.
23 And the cite there is 425 U.S. 840. And in that case
24 the Court said that the "as applicable" language just
25 means that there are certain provisions of the private

1 sector remedies that are inherently incompatible in the
2 Federal sector context. And it pointed to the
3 provisions in the private sector part of Title VII that
4 allowed EEOC or the attorney general to intervene in the
5 private action and take over the suit.

6 So the "as applicable" doesn't undermine the
7 express incorporation of private sector remedies and
8 anti-retaliation. And that's a critical difference
9 between Title VII and the Age Act. The Age Act not only
10 does not include that express incorporation, it goes in
11 just the opposite direction, and Congress went out of
12 its way to say don't import the private sector
13 provisions -- it did that in section 633a(f) -- don't
14 incorporate those provisions, and that's what this Court
15 recognized.

16 JUSTICE GINSBURG: Do we know what Congress
17 had in mind when it said don't incorporate private
18 sector?

19 MR. GARRE: Well, this Court in the --

20 JUSTICE GINSBURG: There must be an
21 explanation for that section.

22 MR. GARRE: I don't think there is any
23 legislative history on point. The Petitioners argue
24 that it meant don't incorporate the more restrictive
25 features. But that argument is directly contradicted by

1 this Court's decision in Lehman, where it pointed to
2 section, subsection (f) of that provision as a reason to
3 not import in the jury trial right that was not
4 recognized for private sector employees.

5 The other way --

6 CHIEF JUSTICE ROBERTS: Do you agree with
7 your friend that this employee has no remedy under the
8 Civil Service Reform Act?

9 MR. GARRE: Yes. She is a
10 nonpreference-eligible employee of the Postal Service.
11 That means that she has to pursue her remedies under the
12 collective bargaining arrangement, which gives her a
13 remedy to complain about reprisal. And it means that
14 the union representative would present that grievance on
15 her behalf. But it also means that if for some reason
16 she felt that her right of -- her obligation of fair
17 representation was not carried through, she could go to
18 court and complain about that.

19 This Court in a case called Bowen v. United
20 States Postal Service recognized that employees who
21 don't get fair representation can go into court and
22 complain about that. So she is protected --

23 JUSTICE GINSBURG: What could she get --
24 what could she get by way of remedy? And you recognize
25 that this employee is not covered by the Civil Service

1 Act, but does have collective bargaining rights.

2 Suppose there is a finding of reprisal in that forum.

3 MR. GARRE: I believe the remedies are
4 largely co-extensive in that the principal remedy that
5 you would get under the Age Act, under the Civil Service
6 Reform Act and I believe under the collective bargaining
7 agreements, although I frankly am not certain about
8 that --

9 JUSTICE GINSBURG: What about --

10 MR. GARRE -- is corrective -- is corrective
11 action, Justice Ginsburg. There is no right -- unlike
12 Title VII, there is no right to compensatory damages
13 under the Age Act for things like pain and suffering or
14 emotional distress; and so in that respect the Age Act
15 is quite different. What you typically get -- you get
16 this under the Civil Service Reform Act and under the
17 Age Act for discrimination claims -- is back pay, front
18 pay and corrective action to -- to address the
19 discrimination.

20 The other way in which the Age Act, section
21 663a, is different than Title VII -- and this is
22 actually another thing that makes it inherently
23 incompatible with an anti-retaliation right -- is that
24 the prohibition in section 663a, the Federal sector
25 provision of the Age Act, is limited to employees who

1 fit within the protected class, employees over the age
2 of 40.

3 CHIEF JUSTICE ROBERTS: Why is that? I
4 mean, if you have the private -- the private sector
5 remedy is not so limited, right?

6 MR. GARRE: Right.

7 CHIEF JUSTICE ROBERTS: Well, if we imply or
8 incorporate into the Federal anti-discrimination remedy
9 an anti-retaliation provision, I assume it would be in
10 the same scope as the private anti -- the private
11 anti-retaliation provision.

12 MR. GARRE: Well, then this Court would be
13 directly disregarding the express intent in section
14 663a, where it says affecting employees or applicants of
15 employees -- for employment who are at least 40 years of
16 age. And further, in section 633 --

17 JUSTICE SOUTER: Well, Mr. Garre isn't the
18 most that argument gets you that the only individuals
19 who could complain against retaliation are those over
20 40? It doesn't get you out -- it doesn't get you where
21 you want to go. It's not retaliation right at all.

22 MR. GARRE: I think that's right, but if
23 we're going to talk about anomalies then we have to
24 recognize that that is an anomalous grant of retaliation
25 protection right that only protects people within the

1 protected class with respect to discrimination.

2 JUSTICE SOUTER: Well, is it any more
3 anomalous than the fact that the only protection of the
4 age protection is simply for people over 40? In other
5 words, Congress didn't care whether there are employers
6 in the world who don't like youthful people.

7 MR. GARRE: If --

8 JUSTICE SOUTER: They're just worried about
9 the age. So if it's an anomaly it's an anomaly across
10 the board in the statute.

11 MR. GARRE: I think it's a great deal more
12 anomalous, with respect, Justice Souter. With both
13 anti-retaliation provisions, whistleblower provisions,
14 all the provisions that the government is aware of,
15 including all the ones cited in Petitioners in its
16 brief, protect all employees, all --

17 JUSTICE STEVENS: But the same anomaly
18 applies to the private sector, because section 631a
19 applies to the private sector and 631b to the public
20 sector.

21 MR. GARRE: Well, that's not the way the
22 courts have interpreted it, Justice --

23 JUSTICE STEVENS: The language is the same.
24 They both are limited to prohibitions to people who are
25 over 40.

1 MR. GARRE: What the courts have focused on
2 is the "any employee" language of section 623d of the
3 private sector provisions. And that's the way --

4 JUSTICE STEVENS: But that's no reason why
5 that trumps -- any more reason why that trumps 631a than
6 631b.

7 MR. GARRE: And that's the longstanding
8 interpretation of the EEOC and I don't think there's
9 been any doubt in the courts to date that under the
10 private sector provision you can bring claims for
11 retaliation if you're an employee, and of course that's
12 the way it is under Title VII.

13 We do think that it would be anomalous to
14 say that employees who complain about age discrimination
15 or who testify about age discrimination in a case are
16 not entitled to protection if there is an
17 anti-retaliation right, and if they are under the age of
18 40; and there is at least two other respects in which --

19 JUSTICE STEVENS: I don't think it says that
20 -- the protection doesn't apply. The word is
21 prohibition -- but that --

22 MR. GARRE: Well, I think that that's right.
23 But it's odd to say that this prohibition in 663a, which
24 is clearly limited to people -- and I think by --

25 JUSTICE STEVENS: That's the explanation why

1 the problem doesn't arise in the private sector. The
2 same explanation would apply to the public sector, if
3 you choose the word prohibition as talking about these
4 people who are protected by the --

5 MR. GARRE: That's not -- that's not the way
6 the courts have interpreted for more than 20 years under
7 the statute.

8 JUSTICE SCALIA: I though we are talking
9 here a prohibition against taking retaliatory action.
10 Isn't that a prohibition?

11 MR. GARRE: It is a prohibition.

12 JUSTICE SCALIA: Yes.

13 MR. GARRE: Right, and then that would be --
14 their argument is that 663a contains that prohibition,
15 and so therefore it is limited by 631b.

16 CHIEF JUSTICE ROBERTS: Isn't this an
17 unusual retaliation case in that the person allegedly
18 retaliated against also has substantive
19 anti-discrimination claims? And I gather -- I think it
20 would take a particularly incompetent lawyer that
21 couldn't phrase retaliation in those cases as underlying
22 discrimination.

23 MR. GARRE: I wouldn't disagree with that,
24 Mr. Chief Justice. I'm not sure it's unusual to have
25 retaliation claims piggyback on discrimination claims,

1 but I think you're right.

2 JUSTICE ALITO: Isn't it quite the contrary,
3 Mr. Garre, that most -- if you did a statistical
4 analysis of all the cases in which there was a
5 retaliation claim, you doubt that you would find that a
6 very high percentage of those are cases in which the
7 person claiming retaliation is also the person who
8 claimed the underlying discrimination?

9 MR. GARRE: I wouldn't doubt that. I think
10 in most cases you do have discrimination claims. I
11 would say, though, that our research indicated that in
12 the Age Discrimination Act context, at least the private
13 sector context, only 14 percent of the claims involve --
14 cases involve retaliation claims, which is lower than
15 other statutes.

16 I wanted to point out two respects --

17 CHIEF JUSTICE ROBERTS: Are those, are those
18 mostly witness cases?

19 MR. GARRE: I don't know.

20 CHIEF JUSTICE ROBERTS: In other words, it's
21 a witness saying I think so and so was fired because of
22 his age.

23 MR. GARRE: I don't know the answer to that
24 question.

25 JUSTICE GINSBURG: Isn't the typical

1 retaliations claim, though, like the one in this case,
2 whether it's under Title VII or the Age Discrimination
3 Act? That is, I think I have a solid claim of
4 discrimination, but maybe not. Nevertheless, once I
5 filed that complaint, this unit doesn't like people who
6 complain about sex discrimination, age discrimination.
7 Therefore, I was retaliated against.

8 In this case, isn't it the fact that the age
9 discrimination claim, the claim of direct
10 discrimination, was rejected and the question is but
11 nonetheless, was there a retaliation claim?

12 MR. GARRE: She abandoned that claim at the
13 summary judgment stage. That's my understanding,
14 Justice Ginsburg, and of course we are here today
15 because she is still pursuing her anti-retaliation
16 claim; and certainly if there is an anti-retaliation
17 right, we've agreed that you could pursue that
18 independent of whether you complained about the
19 underlying discrimination, but we do think that in at
20 least three respects the prohibition in 663a is
21 incompatible with an anti-retaliation right.

22 One, we think it is limited only to the
23 people within the protected class, people 40 years old.
24 Two, it's limited to personnel actions, which means if
25 you think about it in the context of this Court's

1 decision in the Burlington Northern case and the Oregon
2 case, it's limited to workplace-related things that
3 happened to you, and in Burlington Northern the Court
4 specifically said, in holding that Title VII's
5 anti-retaliatory provision was broader than that, was
6 that it would defeat or at least limit the purpose of
7 achieving the purpose of an anti-retaliation provision,
8 to limit it workplace-related harm.

9 And then third, of course, the
10 discrimination that's expressed in section 633 is
11 discrimination based on age, not discrimination based on
12 conduct -- the conduct of complaining about or
13 exercising your rights under Federal law. And that,
14 that --

15 CHIEF JUSTICE ROBERTS: That does bring up
16 Justice Alito's point. I mean, tomorrow you're going to
17 argue the exact opposite, right?

18 MR. GARRE: With respect --

19 CHIEF JUSTICE ROBERTS: Or else that
20 distinction between conduct and status would require you
21 to lose.

22 MR. GARRE: I think if we have the conduct
23 and status alone, then I think you're in the Jackson
24 box. But where you've got the three indicia that you
25 have here, which indicate that this provision is

1 incompatible with the typical anti-retaliatory
2 provision, and you couple that with other indicia of
3 statutory intent -- you have the competing schemes in
4 the statute between private sector where Congress
5 specifically delineated an anti-retaliation right, with
6 the fact that it didn't delineate that right in the
7 Federal sector scheme; the evolution of the statute --
8 where you have Congress specifically deciding not to put
9 in Federal employers with private employers, as it did
10 for States having the separate provision; and the
11 distinctions between 663a and 623 of the Act -- 623 of
12 the Act is the main private sector prohibition; 663a,
13 the Federal sector provision, doesn't have all the other
14 types of practices that are prohibited by 623.

15 For example, pensions -- pensions are
16 specifically addressed by 623. Congress didn't address
17 that in 663a of this Act. It presumably understood that
18 it either would address it through other means if there
19 were other protections out there.

20 Similarly we think with respect to
21 retaliation. Congress knew how to express an
22 anti-retaliation right. It did so forcibly in the
23 private sector provisions of the Act; and that language
24 which you find in 623d of the Act is simply completely
25 absent in 663a of the Act.

1 JUSTICE ALITO: Do you think it's plausible
2 that Congress intended to treat the issue of retaliation
3 in the Federal sector differently under the various
4 Federal anti-discrimination statutes?

5 MR. GARRE: I do think that, Justice Alito.
6 There certainly are several differences between Title
7 VII and the Age Act, and I'm not sure that Congress has
8 explained each difference, but nevertheless they exist
9 and this Court has recognized them, most recently in the
10 Smith v. City of Jackson case, where the Court noted
11 that because of textual differences between acts, there
12 is less protection with disparate impacts of
13 discrimination under the Age Act and Title VII.

14 It's also the case that Congress has
15 provided for compensatory damages in Title VII and not
16 in the Age Act. It's also the case that there is a
17 right, a Federal right to a jury trial in Federal sector
18 actions in Title VII but not in the age act. And this
19 Court has recognized, in Smith v. City of Jackson, that
20 Congress has treated age discrimination as if it's
21 qualitatively different and presumably accorded
22 different protections taking that into account.

23 So, the notion that this -- that the Age Act
24 is different than Title VII or different than other
25 Federal statutes in itself with respect to retaliation

1 in itself is not unusual, and it's especially not
2 unusual when you take into account that there is this
3 back-stop protection that's --

4 JUSTICE STEVENS: Mr. Garre, can I go back
5 to the authority you're pointing out for a moment? Is
6 it your reading of 631a, the private sector section,
7 that says "the prohibitions in this chapter shall be
8 limited to individuals who are at least 40 years of
9 age," that it's correctly read as the prohibitions in
10 this chapter, except those contained in 623a, shall be
11 limited? That's the way you read it?

12 MR. GARRE: Well, we -- no, Justice Stevens.
13 I think that the textual argument that the courts have
14 embraced with respect to 623d, the anti-retaliation
15 provision, is because in 623d the Congress specifically
16 said "with respect to any employees or applicants." It
17 couldn't have meant with respect to only 40, only
18 employees who are over 40. And, again, that's the way
19 it's been interpreted consistently for decades under the
20 statute. And we think, though, that giving effect to
21 the language in 633a, you have express prohibition
22 limited to people over 40 years old, and that it is
23 anomaly, and we're not aware of any other situation that
24 --

25 JUSTICE STEVENS: But the effect of giving

1 the effect to the word "any" in this section is in
2 effect to read in this exception.

3 MR. GARRE: I think --

4 JUSTICE STEVENS: Do you --

5 MR. GARRE: I think --

6 JUSTICE STEVENS: That's the practical
7 effect?

8 MR. GARRE: I think that is the practical
9 effect. This Court has recognized, in Bush -- in the
10 Bush v. Lucas case, which dealt with the question of
11 whether to infer a retaliation remedy for constitutional
12 claims by a Federal employee -- that Federal employment
13 practices present different questions. It's an area in
14 which this Court uniquely defers to the policy judgments
15 of Congress, recognizing that Congress has greater
16 resources to police Federal employment, that there are a
17 number of balances that have to be struck between
18 government efficiency and the rights of Federal
19 employees.

20 JUSTICE BREYER: Am I right now in thinking,
21 just as a matter of practice, where there is
22 retaliation, a claim of retaliation in respect to race
23 discrimination, Federal Government, that the person
24 making that claim can go to the EEOC and then to court?
25 That's right?

1 MR. GARRE: That's true --

2 JUSTICE BREYER: The same thing in respect
3 to age, they can't, and what they have to do is they go
4 through the civil service system or the collective
5 bargaining agreement; is that right?

6 MR. GARRE: Well, what would happen, if you
7 had an employee alleging discrimination on the basis of
8 age and retaliation, that would be a so-called mixed
9 complaint. They could bring that to the --

10 JUSTICE BREYER: No, not what they do if
11 their claim is a retaliation claim.

12 MR. GARRE: If it's purely --

13 JUSTICE BREYER: Yes.

14 MR. GARRE: -- a retaliation claim, they'd
15 have to bring it under the protections afforded by the
16 Civil Service Reform Act.

17 JUSTICE BREYER: Yes. And now, do you have
18 -- two things: A, do you have any evidence one way or
19 the other that one of these two systems -- the civil
20 service plus collective bargaining, on the other hand;
21 or EEOC plus the court, on the other -- works better,
22 works the same, works worse?

23 MR. GARRE: I don't have any evidence.

24 JUSTICE BREYER: No. So we don't know.

25 MR. GARRE: I wasn't --

1 JUSTICE BREYER: Yes. Now what reason --
2 okay. So we don't know.

3 MR. GARRE: Well, I guess, if I could just
4 add though, I don't think there's any reason to doubt
5 that certainly Congress had any concerns about whether
6 the system under the Civil Service Reform Act is working
7 properly.

8 JUSTICE BREYER: But that's drawing
9 something from where you don't know. Okay. So that's
10 fair enough.

11 But is there any -- what is the best reason,
12 in your opinion, that Congress would have wanted to make
13 this distinction? What are the best two or three
14 reasons? If you were just starting with a blank slate,
15 why would Congress have wanted to send the one to the
16 one route and the other to the other route.

17 MR. GARRE: My assumption is that Congress
18 felt that the back-stop protections that were available
19 for Federal workers at the time it passed the Age
20 Discrimination Act and that were subsequently codified
21 by Congress in the Civil Service Reform Act were
22 appropriate for people who complained about age. As I
23 mentioned earlier --

24 JUSTICE BREYER: For the people who
25 complained about race.

1 MR. GARRE: I don't know the -- Congress
2 didn't tell us the answer to that.

3 JUSTICE BREYER: But I'm asking you, and if
4 you were sitting there writing it, my -- my thought --
5 the conclusion that I would reach from what you're
6 saying is you can't think of any reason why you'd treat
7 them differently.

8 MR. GARRE: Well, I think the reason would
9 be that Congress viewed age discrimination as materially
10 different than other types of discrimination, and it --
11 either it felt that the risk of retaliation wasn't as
12 great or that the protections -- that it didn't need to
13 add protections. And as I mentioned --

14 JUSTICE SOUTER: But why would it have
15 thought that? In other words, if -- I can understand
16 why you say -- if you're going to put a rational gloss
17 on it, that must be what they were thinking, but why
18 would they think such a thing?

19 MR. GARRE: Your Honor, again, Congress
20 didn't say -- I'm not -- I think you can make the same
21 argument with respect to why it gave Federal employees a
22 jury trial right under Title VII but not under the Age
23 Act, why it gave Federal employees compensatory damages
24 under Title VII but not under the Age Act.

25 JUSTICE GINSBURG: Mr. Garre, I just want to

1 make sure I understood something you said before, rather
2 pleadingly. One is if one could imagine a claim just
3 for reprisal, but you called something a "mixed claim"
4 if you're suing, as she started out to sue, for both.
5 So if you're suing for both, on your theory you still
6 must split them up? You cannot bring the reprisal claim
7 together with the discrimination claim?

8 MR. GARRE: Well, you can bring them
9 together. What you would do is you would bring a
10 discrimination claim under the Age Act and you'd bring a
11 reprisal claim under the Civil Service Reform Act.

12 JUSTICE GINSBURG: But there's a different
13 administrative mechanism.

14 MR. GARRE: You can bring them both together
15 before the Merit Systems Protection Board, if you're --

16 JUSTICE GINSBURG: Oh, oh, but how about
17 court?

18 MR. GARRE: Well, in -- what would happen
19 there is you would have your proceeding in the Merit
20 Systems Protection Board, which would decide the
21 discrimination claim and the retaliation claim. At that
22 point, the employee could decide to go to the EEOC to
23 try to fight on discrimination, or the employee could go
24 to Federal court, and in Federal court he would get a de
25 novo trial on his -- on his discrimination claim and a

1 record review --

2 JUSTICE GINSBURG: But then you -- you would
3 be putting everything under the civil service umbrella
4 and nothing under the --

5 MR. GARRE: No, I don't think so. And it's
6 a clear difference. There are several types of mixed
7 claims that can be brought in this fashion. Once you
8 get to Federal court on your Age Act discrimination
9 claim, you get a trial de novo on that claim. You just
10 only get record review of the Civil Service Reform Act
11 claim because that's what Congress deemed appropriate.

12 JUSTICE GINSBURG: But if it didn't amount
13 to an adverse action under the Civil Service Act --

14 MR. GARRE: If it doesn't amount to an
15 adverse action, then you have to go the route that
16 Congress thought appropriate for --

17 JUSTICE GINSBURG: And you wouldn't get to
18 court.

19 MR. GARRE: Well, you would have -- you
20 would -- it would be investigated by the Office of
21 Special Counsel.

22 JUSTICE GINSBURG: Yes, but it would not be
23 within your control. It would not be up to the --

24 MR. GARRE: It would not, and that's what
25 Congress deemed appropriate for those types of actions.

1 JUSTICE STEVENS: But it seems to me,
2 Mr. Garre, that, following up on Justice Breyer's
3 question of what's the reason for it, the most striking
4 thing to me is that Congress used precisely the same
5 language in the two sections: "All personnel actions
6 shall be made free from any discrimination based on
7 race, color" and so forth. That clearly includes
8 retaliation. But "all personnel actions shall be made
9 free from discrimination on account of age" does not
10 include retaliation seems to me rather anomalous.

11 MR. GARRE: But there are at least two
12 material textual differences between Title VII and the
13 ADA -- and the Age Act. The first is that the Title --
14 the Title VII --

15 JUSTICE STEVENS: In the key section
16 describing the prohibition, the language is exactly the
17 same.

18 MR. GARRE: Well, to understand the meaning
19 of that section you have to understand the meaning of
20 the whole section itself including this express
21 incorporation. And, secondly --

22 JUSTICE SCALIA: Mr. Garre, are we going to
23 have to decide the Title VII question in this case? We
24 don't even have the materials in front of us. They
25 haven't been put in the appendix to the briefs. And in

1 order to decide this case, we're going to have to decide
2 a Title VII case that hasn't even been presented?

3 MR. GARRE: The Court does not have to
4 decide the --

5 CHIEF JUSTICE ROBERTS: Counsel, I would
6 have thought the answer to Justice Breyer's question
7 would be: This is an unusual situation where you have
8 the employer writing the law about what the employees
9 can do, and Congress realized, perhaps unlike the
10 situation in Title VII, everybody over 40 would be
11 covered; and every time somebody over 40 was fired or
12 disciplined or didn't get a raise, they could claim that
13 it was age discrimination; and Congress decided that
14 they as the employer didn't want to face that
15 disturbance, particularly since they have the Civil
16 Service Reform Act already.

17 MR. GARRE: I think that that's right,
18 Mr. Chief Justice, and I think this Court recognized
19 similar considerations in the Bush versus Lucas case.

20 JUSTICE GINSBURG: Wasn't there -- there was
21 something that was said about this -- that doesn't apply
22 to congressional employees or White House employees,
23 that they would have a claim of retaliation.

24 MR. GARRE: Well -- and that's because
25 Congress gave them one, and this is --

1 JUSTICE GINSBURG: So why would Congress say
2 when you -- when it's Congress that's doing the
3 reprisal, we're going to give you a suit, but not if
4 some other --

5 MR. GARRE: I think, at least with respect
6 to congressional employees, I'm not sure that they would
7 have been protected by the Civil Service Reform Act
8 protections that existed for executive agency employees,
9 but -- but look at the statutes -- and we cite them at
10 page 36 in the appendix and our brief -- in those two
11 statutes, Congress used the same substantive prohibition
12 that is in section 633(a): "All personnel actions
13 affecting these employees shall be made free from
14 discrimination based on age." But they explicitly
15 included a separate anti-retaliation provision, which,
16 again -- that's a subsequent statute, but that's --
17 again, that's another indication that Congress doesn't
18 think that this kind of general prohibition in section
19 633(a) covers discrimination. When it wants to cover
20 retaliation, it passes an express anti-retaliation
21 provision Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 Mr. Garre.

24 Mr. Guerra, you have four minutes remaining.

25 REBUTTAL ARGUMENT OF JOSEPH R. GUERRA

1 ON BEHALF OF THE PETITIONER

2 MR. GUERRA: I'd like to make three points.

3 First, I want to emphasize the practical reality that
4 there are thousands of employees who have no remedies
5 under any of the schemes we are talking about:

6 Employees of TVA, employees of the General Accounting
7 Office, these employees of the Transportation Security
8 Administration.

9 They have no collective bargaining remedies,
10 no CSR remedy, and, according to the Government, no
11 remedy under the ADEA.

12 Justice Ginsburg, on Title VII, not only has
13 the Government failed to challenge the lower --
14 consistent lower court interpretations. The EEOC's
15 interpretation of this provision is that it bars
16 retaliation in the Title VII sector -- Title VII bans.
17 And so when you --

18 JUSTICE SCALIA: Excuse me. Would you
19 clarify your earlier statement: These people have no
20 remedies just for retaliation? They do have remedies
21 for the age discrimination, but not for retaliation?

22 MR. GUERRA: They have no remedies for
23 retaliation under --

24 JUSTICE SCALIA: But they have remedies for
25 age discrimination?

1 MR. GUERRA: They do, Justice Scalia, but my
2 point is --

3 JUSTICE SCALIA: Okay.

4 MR. GUERRA: Our argument is that it makes
5 no sense to give some people remedies under one scheme
6 and leave some -- congressional employees getting full
7 remedial relief, people under the CSRA getting a limited
8 remedial relief, others getting remedies under the
9 collective bargaining rights and thousands of others
10 have no remedies only with respect --

11 CHIEF JUSTICE ROBERTS: Is that because they
12 may not engage in collective bargaining, or because they
13 have chosen not to?

14 MR. GUERRA: I believe they are not allowed
15 to. The entities I mentioned, I believe, are not
16 allowed to.

17 JUSTICE SCALIA: To have a remedy.

18 MR. GUERRA: Because they simply have none
19 of the remedies the Government has put before --

20 JUSTICE BREYER: Who -- who is such a
21 person?

22 MR. GUERRA: An employee of the
23 Transportation Security Administration.

24 JUSTICE BREYER: Why can't they -- why can't
25 they go to like the Merit System Protection Board?

1 MR. GUERRA: They are excluded from the
2 Civil Service Reform Act.

3 JUSTICE BREYER: So they are outside the
4 Civil Service, and they don't have unions?

5 MR. GUERRA: They don't have bargaining
6 rights.

7 JUSTICE BREYER: They don't have a union?

8 MR. GUERRA: Correct.

9 JUSTICE BREYER: So they could be fired for
10 anything.

11 MR. GUERRA: Well, they have claims for
12 discrimination if they suffer age discrimination
13 directly, but if they complain about age discrimination
14 and then get fired in retaliation, they have nothing.
15 And -- and just --

16 CHIEF JUSTICE ROBERTS: I suppose that's
17 consistent with whatever prohibition it is that
18 precludes them from engaging in collective bargaining.

19 MR. GUERRA: But it's not consistent with
20 their rights under Title VII, Mr. Chief Justice, because
21 as the EEOC has -- an -- is entitled to deference, it
22 has said, for three decades.

23 CHIEF JUSTICE ROBERTS: So you think we do
24 have to decide the Title VII question if you are to
25 prevail.

1 MR. GUERRA: I do. Well, I don't know that
2 you necessarily do, but I certainly think it compels the
3 conclusion I am advocating if you reach -- if you reach
4 the issue.

5 JUSTICE SCALIA: You should have given us
6 the statute to look at if that's the case.

7 MR. GUERRA: I recognize that, Justice
8 Scalia, and I apologize.

9 I would also like to note that there was a
10 suggestion that perhaps Congress didn't care as much
11 about age discrimination. That's refuted by the House
12 report that accompanied this very statute.

13 It's quoted at page 23 of the AARP brief
14 where the Congress said age is as great an evil in our
15 society as discrimination based on race and religion.
16 Whether or not this Court agrees with that assessment as
17 an objective matter, that's the view of the Congress
18 that adopted this statute.

19 And, as Justice Stevens noted, they have --
20 they adopted the statute by incorporating the language
21 from Title VII, the exact same language where Title
22 VII's remedial scheme makes clear, and the EEOC's
23 consistent interpretation confirms, that that then
24 prohibits retaliation for complaints of race or gender
25 discrimination.

1 By incorporating that same language in the
2 ADEA's federal sector provision, Congress necessarily
3 gave it the same scope; and, by doing so, eliminated the
4 various anomalies, to put it mildly, that the
5 Government's position leads to.

6 If the Court has no further questions --
7 CHIEF JUSTICE ROBERTS: Thank you counsel.
8 The case is submitted.

9 (Whereupon, at 11:03 a.m., the case in the
10 above-entitled matter was submitted.)

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