

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	JOSEPH R. GUERRA, ESQ.	
4	On behalf of the Petitioner	3
5	GREGORY G. GARRE, ESQ.	
6	On behalf of the Respondent	26
7	REBUTTAL ARGUMENT OF	
8	JOSEPH R. GUERRA, ESQ.	
9	On behalf of the Petitioner	55
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
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22
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24
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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 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 complain

1 that have they suffered age discrimination.

2 Such retaliation is directed at persons over age 40 --

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 --
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 631(b) 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 623(a) and 623(d) 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 carved out --

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 an exclusive
7 remedy --

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

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

21 JUSTICE SOUTER: Does it cover your client?

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

25 JUSTICE GINSBURG: She could complain; it's

1 just that she couldn't go very far with the complaint.

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

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

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

1 retaliation claims in Federal court, while excluding
2 Postal Service workers who have only collective
3 bargaining rights and tens of thousands of other
4 employees for --

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

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

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

17 JUSTICE BREYER: And then, in 16(d) it says
18 certain of those things govern Federal suits, suits
19 against the Federal Government. Then it incorporates
20 some provisions. And it says that you get that certain
21 relief against the Federal Government where there is
22 discrimination on account of race, color, religion, sex,
23 or national origin. Then it says "or in violation of
24 3(a)." And then 3(a) refers to retaliation.

25 So it looks like Title VII does give you a

1 remedy, in 3(a), for retaliation. And it's rather
2 specific, and that suggests that those other words don't
3 pick up retaliation. It's rather that specific thing.
4 Now, what have I missed?

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

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

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

23 JUSTICE BREYER: No?

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

1 JUSTICE BREYER: You go to the EEOC?

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

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

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

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

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

15 JUSTICE SCALIA: Which we don't have here.
16 I guess I can ask for it.

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

20 (Laughter.)

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

1 VII, and aggrieved -- they can bring complaints for
2 violations of subsection (a), which like subsection (a)
3 in our statute says "all personnel actions affecting
4 employees or applicants for employment shall be made
5 free from any discrimination based on race, color,
6 religion," et cetera.

7 JUSTICE BREYER: Or in violation of --

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

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

24 MR. GUERRA: Justice Ginsburg, the language
25 "as applicable" I submit has to be referring to whether

1 the case itself would implicate the need for that
2 remedy. In other words, it would not be applicable to
3 have a reinstatement remedy in a case where there was no
4 discharge.

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

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

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

24 JUSTICE BREYER: Well, could you proceed
25 with that? That is, the very simple way I'm thinking of

1 this is one possible way of reading it is that Congress
2 says: When private employers discriminate, there can be
3 whistleblowers, and they need protection; so let's put
4 some in. When State officials discriminate, say, on the
5 basis of race, there can be some whistleblowers. Maybe
6 they protect them in some States; maybe they don't
7 protect them in others. We better put some in. When
8 Federal Government officials discriminate against on the
9 basis of race, whistleblowers should be protected.

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

15 Now, the answer to that is what?

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

22 JUSTICE SCALIA: Well, that's sort of
23 begging the question. I mean, you're saying it's not
24 true because our interpretation of Title VII is true.
25 But the point goes to how you ought to interpret Title

1 VII. That is, it makes more sense to say when it's
2 retaliatory action you use your federally prescribed
3 remedies within the agency.

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

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

20 JUSTICE SOUTER: Then it's ineffective here.

21 MR. GUERRA: And it is ineffective here.

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

1 MR. GUERRA: That's correct. And the
2 ineffectiveness here is because of the extraordinarily
3 limited nature of the types of conduct that would
4 trigger any rights that the employee could control under
5 the CSRA. Retaliation rarely takes the form of a
6 removal from position or a suspension of more than 14
7 days. The most typical things are poor performance
8 evaluations, what we have in this case, allegations of
9 groundless charges of misconduct.

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

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

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

1 MR. GUERRA: That is the remedy under the
2 CSRA, Mr. Chief Justice.

3 CHIEF JUSTICE ROBERTS: So when you're
4 talking about the Office of Special Counsel --

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

20 JUSTICE STEVENS: Mr. Guerra, can you help
21 me with a provision of the statute that I'm a little
22 puzzled about? Am I correct in believing that section
23 2000e-16, which is the provision under Title -- 42
24 U.S.C. -- I'm using the code number -- that that is the
25 provision that makes the Federal Government liable for

1 retaliation based on sex and race?

2 MR. GUERRA: That is.

3 JUSTICE STEVENS: Is there another provision
4 that is necessary for there to be a remedy against the
5 Federal Government?

6 MR. GUERRA: For retaliation based on race
7 and sex?

8 JUSTICE STEVENS: Under Title VII.

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

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

13 MR. GUERRA: 633a(a).

14 JUSTICE STEVENS: 633a.

15 MR. GUERRA: Yes, Justice Stevens.

16 JUSTICE STEVENS: And, therefore, the two
17 should be treated alike?

18 MR. GUERRA: Precisely. That is the -- that
19 is our -- one of our central arguments. Of course, we
20 also realize --

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

1 MR. GUERRA: Absolutely, Justice Stevens.

2 JUSTICE STEVENS: It's just as simple as
3 those two provisions being exactly parallel.

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

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

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

24 MR. GUERRA: But, Mr. Chief Justice, that
25 is precisely the same -- the same is precisely true of

1 Title VII. Section 704(a) of Title VII is the analog to
2 623(d) in our case.

3 CHIEF JUSTICE ROBERTS: I thought there was
4 a more express incorporation in Title VII of the private
5 anti-retaliation remedy, and you don't have that in this
6 case.

7 MR. GUERRA: That is true, but our position
8 --

9 CHIEF JUSTICE ROBERTS: So that makes it not
10 precisely the same situation.

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

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

1 I would like to reserve the balance of my
2 time.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.
4 Mr. Garre.

5 ORAL ARGUMENT OF GREGORY G. GARRE
6 ON BEHALF OF THE RESPONDENT

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

9 The Age Discrimination in Employment Act
10 does not expressly prohibit retaliation in the Federal-
11 sector context and it should not be read to impliedly
12 prohibit such conduct either.

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

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

24 In fact, on page 175 of the Court's decision
25 in Jackson, the Court said because Congress did not list

1 any specific discriminatory practices when it wrote
2 Title IX, its failure to mention one such practice does
3 not tell us anything. And then it pointed to the fact
4 that Title VII had delineated different types of
5 practices.

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

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

21 In this case, there are several indicia of
22 statutory intent that are lacking where you have a
23 general prohibition in the context of an inferred right
24 that has -- that this Court has treated differently, as
25 it did in Jackson and as it should in the CBOCS case

1 that you'll hear about tomorrow.

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

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

23 In that case, the Court considered whether
24 Federal employees were entitled to a right to a jury
25 trial in an action for discrimination under the Federal-

1 sector prohibition. Private-sector employees were
2 entitled to that. And so the plaintiffs in that case
3 made an argument very much similar to the argument made
4 by Petitioners in this case: Well, the private-sector
5 provisions covered a jury trial right; it would make no
6 sense not to have a jury trial --

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

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

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

22 MR. GARRE: Well, let me try to answer that
23 question, Justice Ginsburg, but I just want to make one
24 final point on Lehman and the statutory construction in
25 that case. The Court specifically said on page 162 of

1 its decision that because Congress demonstrated that it
2 knew how to provide a statutory right to a jury trial
3 when it wished to do so elsewhere in the very
4 legislation cited, but in section 633a it explicitly
5 failed to do so, and it said that that was the
6 conclusive point of statutory construction in that case.
7 So we do think the Lehman case is very on point here.

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

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

23 MR. GARRE: Well, we know that Congress in
24 the Civil Service Reform Act, as the Chief Justice
25 noted, we know that it didn't think that additional

1 anti-retaliation protections were necessary for some
2 Federal employees. So the fact that Congress wouldn't
3 have a separate anti-retaliation -- anti-retaliation
4 right in some situation in itself is not unprecedented.

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

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

15 MR. GARRE: As we make clear in our brief,
16 we have not conceded that, Justice Alito. We don't
17 think it's necessary for the Court to decide that in
18 this case.

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

1 MR. GARRE: I think in practice, Your Honor,
2 we have not challenged the interpretation of the Federal
3 courts that have found that Title VII does incorporate
4 an anti-retaliation right. But there are at least --

5 JUSTICE GINSBURG: Has any Federal court
6 found otherwise?

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

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

19 JUSTICE GINSBURG: So you agree -- then you
20 agree with Mr. Garre about the meaning of those words --
21 "as applicable"?

22 MR. GARRE: Well, this Court actually has
23 interpreted that phrase, "as applicable," in a case
24 called Chandler v. Roudebush. It wasn't cited in the
25 brief, but it is directly responsive to that question.

1 And the cite there is 425 U.S. 840. And in that case
2 the Court said that the "as applicable" language just
3 means that there are certain provisions of the private-
4 sector remedies that are inherently incompatible in the
5 Federal-sector context. And it pointed to the
6 provisions in the private-sector part of Title VII that
7 allowed EEOC or the Attorney General to intervene in the
8 private action and take over the suit.

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

19 JUSTICE GINSBURG: Do we know what Congress
20 had in mind when it said don't incorporate private
21 sector?

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

23 JUSTICE GINSBURG: There must be an
24 explanation for that section.

25 MR. GARRE: I don't think there is any

1 legislative history on point. The Petitioners argue
2 that it meant don't incorporate the more restrictive
3 features. But that argument is directly contradicted by
4 this Court's decision in Lehman, where it pointed to
5 section -- subsection (f) of that provision as a reason not
6 to import in the jury trial right that was recognized
7 for private-sector employees.

8 The other way --

9 CHIEF JUSTICE ROBERTS: Do you agree with
10 your friend that this employee has no remedy under the
11 Civil Service Reform Act?

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

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

1 JUSTICE GINSBURG: What could she get --
2 what could she get by way of remedy? And you recognize
3 that this employee is not covered by the Civil Service
4 Act, but does have collective bargaining rights.
5 Suppose there is a finding of reprisal in that forum.

6 MR. GARRE: I believe the remedies are
7 largely co-extensive in that the principal remedy that
8 you would get under the Age Act, under the Civil Service
9 Reform Act and I believe under the collective bargaining
10 agreements, although I frankly am less certain about
11 that --

12 JUSTICE GINSBURG: What about --

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

23 The other way in which the Age Act, section
24 633a, is different than Title VII -- and this is
25 actually another thing that makes it inherently

1 incompatible with an anti-retaliation right -- is that
2 the prohibition in section 633a, the Federal-sector
3 provision of the Age Act, is limited to employees who
4 fit within the protected class, employees over the age
5 of 40.

6 CHIEF JUSTICE ROBERTS: Why is that? I
7 mean, if you have the private -- the private-sector
8 remedy is not so limited, right?

9 MR. GARRE: Right.

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

15 MR. GARRE: Well, then this Court would be
16 directly disregarding the express intent in section
17 633a, where it says affecting employees or applicants of
18 employees -- for employment who are at least 40 years of
19 age. And further, in section 633 --

20 JUSTICE SOUTER: Well, Mr. Garre isn't the
21 most that argument gets you that the only individuals
22 who could complain against retaliation are those over
23 40? It doesn't get you out -- it doesn't get you where
24 you want to go. There's no retaliation right at all.

25 MR. GARRE: I think that's right, but if

1 we're going to talk about anomalies then we have to
2 recognize that that is an anomalous grant of retaliation
3 right that only protects people within the protected
4 class with respect to discrimination.

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

10 MR. GARRE: I think --

11 JUSTICE SOUTER: They're just worried about
12 the age. So if it's an anomaly it's an anomaly across
13 the board in the statute.

14 MR. GARRE: I think it's a great deal more
15 anomalous, with respect, Justice Souter. With
16 anti-retaliation provisions, whistleblower provisions,
17 all the provisions that the government is aware of,
18 including all the ones cited in Petitioner's addendum to
19 its brief, protect all employees, all --

20 JUSTICE STEVENS: But the same anomaly
21 applies to the private sector, because 631(a) applies
22 to the private sector and 631(b) to the public sector.

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

25 JUSTICE STEVENS: The language is the same.

1 They both are limited to prohibitions to people who are
2 over 40.

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

6 JUSTICE STEVENS: But that's no reason why
7 that trumps -- any more reason why that trumps 631a than
8 631b.

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

15 We do think that it would be anomalous to
16 say that employees who complain about age discrimination
17 or who testify about age discrimination in a case are
18 not entitled to protection if there is an
19 anti-retaliation right, if they are under the age of
20 40; and there is at least two other respects in which --

21 JUSTICE STEVENS: I don't think it says that
22 -- the protection doesn't apply. The word is
23 "prohibitions" in the section, not "protections."

24 MR. GARRE: Well, I think that that's right.
25 But it's odd to say that this prohibition in 633a, which

1 is clearly limited to people -- and I think by --

2 JUSTICE STEVENS: That's the explanation why
3 the problem doesn't arise in the private sector. The
4 same explanation would apply to the public sector, if
5 you take the word "prohibitions" as talking about
6 people who are protected by the --

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

10 JUSTICE SCALIA: I thought we are talking
11 here about a prohibition against taking retaliatory
12 action. Isn't that a prohibition?

13 MR. GARRE: It is a prohibition.

14 JUSTICE SCALIA: Yes.

15 MR. GARRE: Right, and then that would be --
16 their argument is that 633a contains that prohibition,
17 and so therefore it is limited by 631b.

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

25 MR. GARRE: I wouldn't disagree with that,

1 Mr. Chief Justice. I'm not sure it's unusual to have
2 retaliation claims piggyback on discrimination claims,
3 but I think you're right.

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

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

18 I wanted to point out two respects --

19 CHIEF JUSTICE ROBERTS: Are those, are those
20 mostly witness cases?

21 MR. GARRE: I don't know.

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

25 MR. GARRE: I don't know the answer to that

1 question.

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

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

14 MR. GARRE: She abandoned that claim at the
15 summary-judgment stage. That's my understanding,
16 Justice Ginsburg, and of course we are here today
17 because she is still pursuing her anti-retaliation
18 claim; and certainly if there is an anti-retaliation
19 right, we would agreed that you could pursue that
20 independent of whether you complained about the
21 underlying discrimination, but we do think that in at
22 least three respects the prohibition in 633a is
23 incompatible with an anti-retaliation right.

24 One, we think it is limited only to the
25 people within the protected class, people 40 years old.

1 Two, it's limited to personnel actions, which means if
2 you think about it in the context of this Court's
3 decision in the Burlington Northern case, it's limited
4 to workplace-related things that happened to you, and in
5 Burlington Northern the Court specifically said, in
6 holding that Title VII's anti-retaliation provision was
7 broader than that, was that it would defeat or at least
8 limit the purpose of achieving the purpose of an
9 anti-retaliation provision, to limit it to workplace-
10 related harm.

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

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

20 MR. GARRE: With respect --

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

23 MR. GARRE: I think if you have the conduct
24 and status alone, then I think you're in the Jackson
25 box. But where you've got the three indicia that you

1 have here, which indicate that this provision is
2 incompatible with the typical anti-retaliation
3 provision, and you couple that with other indicia of
4 statutory intent that you have, the competing schemes in
5 the statute between private sector where Congress
6 specifically delineated an anti-retaliation right, with
7 the fact that it didn't delineate that right in the
8 Federal-sector scheme; the evolution of the statute,
9 where you have Congress specifically deciding not to put
10 in Federal employers with private employers, as it did
11 for States having the separate provision; and the
12 distinctions between 633a and 623 of the Act -- 623 of
13 the Act is the main private-sector prohibition; 633a,
14 the Federal-sector provision, doesn't have all the other
15 types of practices that are prohibited by 623.

16 For example, pensions -- pensions are
17 specifically addressed by 623. Congress didn't address
18 that in 633a of this Act. It presumably understood that
19 it either would address it through other means if there
20 were other protections out there.

21 Same we think with respect to retaliation.
22 Congress knew how to express an anti-retaliation right.
23 It did so explicitly in the private-sector provisions of
24 the Act; and that language which you find in 623(d) of
25 the Act is simply completely absent in 633a 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 explicitly explained each difference, but nevertheless
9 they exist and this Court has recognized them, most
10 recently in the Smith v. City of Jackson case, where
11 the Court noted that because of textual differences
12 between Acts, there is less protection for disparate-
13 impact discrimination under the Age Act than 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 40-year point for a moment? Is it your reading
6 of 631a, the private-sector section, that says "the
7 prohibitions in this chapter shall be limited to
8 individuals who are at least 40 years of age," that it's
9 correctly read as the prohibitions in this chapter,
10 except those contained in 623(a), shall be limited?
11 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 623(d), the anti-retaliation
15 provision, is because in 623(d) 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 an
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 the other section is in
2 effect to read in this exception.

3 MR. GARRE: I think --

4 JUSTICE STEVENS: To read --

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 -- as a matter of practice
2 --

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

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

11 JUSTICE BREYER: No, no, what they do is
12 their claim is a retaliation claim.

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

14 JUSTICE BREYER: Yes.

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

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

24 MR. GARRE: I don't have any evidence --

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

1 MR. GARRE: -- in terms of how it works as
2 a practical matter, but I don't think --

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

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

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

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

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

1 JUSTICE BREYER: For the people who
2 complained about race.

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

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

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

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

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

1 under Title VII but not under the Age Act.

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

10 MR. GARRE: No, you can bring them
11 together. What you would do is you would bring a
12 discrimination claim under the Age Act and you'd bring a
13 reprisal claim under the Civil Service Reform Act.

14 JUSTICE GINSBURG: But there's a different
15 administrative mechanism.

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

18 JUSTICE GINSBURG: Oh, oh, but how about
19 court?

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

1 to Federal court, and in Federal court he would get a de
2 novo trial on his -- on his discrimination claim and a
3 record review --

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

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

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

16 MR. GARRE: If it doesn't amount to an
17 adverse action, then you have to go the route that
18 Congress thought appropriate for things that you --
19 would not be an adverse action.

20 JUSTICE GINSBURG: And you wouldn't get to
21 court.

22 MR. GARRE: Well, you would have -- you
23 would -- it would be investigated by the Office of
24 Special Counsel.

25 JUSTICE GINSBURG: Yes, but it would not be

1 within your control. It would be up to the --

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

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

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

18 JUSTICE STEVENS: In the key section
19 describing the prohibition, the language is exactly the
20 same.

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

25 JUSTICE SCALIA: Mr. Garre, are we going to

1 have to decide the Title VII question in this case? We
2 don't even have the materials in front of us. They
3 haven't even been put in the appendix to the briefs.
4 And in order to decide this case, we're going to have to
5 decide a Title VII case that hasn't even been presented?

6 MR. GARRE: The Court does not have to
7 decide the --

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

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

23 JUSTICE GINSBURG: Wasn't there -- there was
24 something that was said about this -- that doesn't apply
25 to congressional employees or White House employees,

1 that they would have a claim of retaliation.

2 MR. GARRE: Well -- and that's because
3 Congress gave them one, and this is a significant point.

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

8 MR. GARRE: I think, at least with respect
9 to congressional employees, I'm not sure that they would
10 have been protected by the Civil Service Reform Act
11 protections that existed for executive agency employees,
12 but -- but look at the statutes -- and we cite them at
13 page 36, note 10 of our brief -- in those two
14 statutes, Congress used the same substantive prohibition
15 that is in section 633a: "All personnel actions
16 affecting these employees shall be made free from
17 discrimination based on age." But they explicitly
18 included a separate anti-retaliation provision, which,
19 again -- that's a subsequent statute, but that's --
20 again, that's another indication that Congress doesn't
21 think that this kind of general prohibition in section
22 633a covers discrimination. When it wants to cover
23 retaliation, it passes an express anti-retaliation
24 provision Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 Mr. Garre.

2 Mr. Guerra, you have four minutes remaining.

3 REBUTTAL ARGUMENT OF JOSEPH R. GUERRA

4 ON BEHALF OF THE PETITIONER

5 MR. GUERRA: Thank you, Mr. Chief Justice.

6 I'd like to make three points. First, I want to
7 emphasize the practical reality that there are
8 thousands of employees who have no remedies under any
9 of the schemes we are talking about: Employees of TVA,
10 employees of the General Accounting Office, these
11 employees of the Transportation Security Administration.

12 They have no collective bargaining remedies,
13 no CSR remedy, and, according to the government, no
14 remedy under the ADEA.

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

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

25 MR. GUERRA: They have no remedies for

1 retaliation under --

2 JUSTICE SCALIA: But they have remedies for
3 age discrimination?

4 MR. GUERRA: They do, Justice Scalia, but
5 my -- the point is --

6 JUSTICE SCALIA: Okay.

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

14 CHIEF JUSTICE ROBERTS: Is that because they
15 may not engage in collective bargaining, or because they
16 have chosen not to?

17 MR. GUERRA: I believe they are not allowed
18 to. The entities I mentioned, I believe, are not
19 allowed to.

20 JUSTICE BREYER: Why -- have a remedy.

21 MR. GUERRA: Because they simply have none
22 of the remedies the government has put before --

23 JUSTICE BREYER: Who -- who is such a
24 person?

25 MR. GUERRA: An employee of the

1 Transportation Security Administration.

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

4 MR. GUERRA: They are excluded from the
5 Civil Service Reform Act.

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

8 MR. GUERRA: They don't have bargaining
9 rights.

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

11 MR. GUERRA: Correct. They have nothing.

12 JUSTICE BREYER: So they could be fired for
13 anything.

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

19 CHIEF JUSTICE ROBERTS: I suppose that's
20 consistent with whatever prohibition it is that
21 precludes them from engaging in collective bargaining.

22 MR. GUERRA: But it's not consistent with
23 their rights under Title VII, Mr. Chief Justice, because
24 as the EEOC has -- and its views are entitled to
25 deference -- as it has said, for three decades, you

1 have --

2 CHIEF JUSTICE ROBERTS: So you think we do
3 have to decide the Title VII question if you are to
4 prevail?

5 MR. GUERRA: I do. Well, I don't know that
6 you necessarily do, but I certainly think it compels the
7 conclusion I am advocating if you reach -- if you reach
8 the issue.

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

11 MR. GUERRA: I recognize that, Justice
12 Scalia, and I apologize.

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

17 It's quoted at page 23 of the AARP's brief
18 where the Congress said "ageism is as great an evil in our
19 society as discrimination based on race or religion."
20 Whether or not this Court agrees with that assessment as
21 an objective matter, that's the view of the Congress
22 that adopted this statute.

23 And, as Justice Stevens noted, they have --
24 they adopted the statute by incorporating the language
25 from Title VII, the exact same language where Title

1 VII's remedial scheme makes clear, and the EEOC's
2 consistent interpretation confirms, that that then
3 prohibits retaliation for complaints of race or gender
4 discrimination.

5 By incorporating that same language in the
6 ADEA's Federal-sector provision, Congress necessarily
7 gave it the same scope; and, by doing so, eliminated the
8 various anomalies, to put it mildly, that the
9 government's position leads to.

10 If the Court has no further questions --

11 CHIEF JUSTICE ROBERTS: Thank you counsel.

12 The case is submitted.

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

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AARP's 58:17	25:20 28:25	9:19 10:20	allege 5:3	applicable 7:14
abandoned	33:8 35:14,21	11:17 12:2	allegedly 39:19	7:16 8:13
41:14	39:12 51:15,17	13:22 22:15,17	alleging 47:8	17:20,23,25
above-entitled	51:19	23:25 24:18	allow 22:13	18:2 32:21,23
1:12 59:14	actions 4:8 5:5	26:9,22 28:2	allowed 33:7	33:2,9
absent 24:21	17:3,21 21:15	28:10 32:9,11	56:17,19	applicant 16:4
43:25	21:22 42:1	32:14 33:12,12	ambiguity 30:17	applicants 17:4
absolutely 3:18	44:18 52:3,8	35:8,16,17,20	amendments	36:17 45:16
24:1	52:11 54:15	35:23 36:3,4	19:19 20:15	applied 20:9
absurd 30:13,13	Acts 44:12	36:19 37:7,12	amount 51:14	applies 37:21,21
30:17	Act's 11:8	38:16,17,19	51:16	apply 9:5 13:13
accompanied	ADA 52:16	40:14,24 41:4	analog 25:1	18:9 38:22
58:16	add 10:14 48:6	41:8,10 42:13	analysis 11:13	39:4 53:24
accorded 44:21	49:15	44:7,13,16,18	40:6	approach 8:11
account 14:22	added 9:1 28:6,6	44:20,23 45:8	anomalies 37:1	appropriate
44:22 45:2	addendum	47:4,9 48:21	59:8	48:24 51:13,18
52:12	37:18	48:24 49:11,24	anomalous 8:5	52:3
Accounting	additional 28:19	50:1,12 51:10	37:2,6,15	area 46:13
55:10	30:25	52:12,16 53:16	38:15 52:13	argue 27:12
achieving 42:8	address 8:23	54:17 55:24	anomaly 37:12	29:19,19 34:1
acknowledge	35:21 43:17,19	56:3 57:15,16	37:12,20 45:23	42:19
11:14	addressed 43:17	58:15	answer 6:4 14:5	argued 27:10
acknowledges	addresses 13:8	ageism 58:18	19:15 20:4	arguing 27:14
10:24	addressing 5:24	agencies 3:21	21:11 29:22	argument 1:13
Act 6:21 10:12	ADEA 12:5	agency 7:4 9:15	40:25 49:4	2:2,7 3:3,6
24:19 26:9,22	55:14	20:3,9,10	53:9	4:12 6:1,24
28:2,3,10	ADEA's 59:6	21:20 54:11	answers 8:24	10:8 13:23
30:24 32:9,11	administering	age-based 3:14	anti 36:13	14:11 23:10
32:14,17,18	3:21	aggrieved 16:4	anticipate 24:11	24:8,22 26:5
33:12,12 34:11	Administration	16:24 17:1,14	anti-discrimin...	29:3,3 34:3
35:4,8,9,16,17	55:11 57:1	agree 30:12	30:11 36:11	36:21 39:16
35:19,20,23	administrative	32:19,20 34:9	39:21 44:4	45:13 49:23
36:3 40:14	3:20 9:15	agreed 41:19	anti-retaliation	55:3 56:7
41:5 43:12,13	50:15	agreement 47:6	25:5 30:10	arguments
43:18,24,25,25	adopt 19:19	agreements	31:1,3,3,7,11	23:19
44:7,13,16,18	adopted 18:17	35:10	32:4,17 33:11	arrangement
44:23 47:17	20:16 58:22,24	agrees 58:20	36:1,12 37:16	34:15
48:8,22,23	adverse 5:4	ahead 18:10	38:19 41:17,18	aside 12:24
49:25 50:1,12	12:23 51:15,17	aimed 4:18	41:23 42:6,9	asking 6:13 49:5
50:13 51:10,12	51:19	alike 19:12	43:2,6,22	asserting 4:20
51:15 52:16	advice 21:20	23:17	45:14 54:18,23	5:17
53:19 54:10	advocating 58:7	Alito 8:10,22	apologize 16:7	assessment
57:5	afforded 47:16	27:6,17 31:12	20:11 58:12	58:20
action 7:4 10:19	age 3:12 4:1,2	31:16 40:4	APPEARAN...	assume 36:12
12:13,24 16:25	4:10,12,19,21	44:1,5	1:15	assumes 18:6
20:2 21:17	4:21,25 5:1,5	Alito's 42:18	appendix 16:10	assumption
	5:17,23 6:21	allegations 21:8	53:3	18:11,13,15

48:19	12:14 19:5,9	38:12 42:17	44:10,14,16	32:7,9
Attorney 33:7	27:11 47:8	47:10,16 50:8	46:10 53:1,4,5	cite 33:1 54:12
authorized	begging 19:23	50:10,11,12,16	53:22 58:10	cited 30:4 32:24
17:13	behalf 1:16,19	broader 7:25	59:12,13	37:18
authorizes	2:4,6,9 3:7	8:4 42:7	cases 5:10 10:16	cites 7:3
16:22	26:6 34:18	broadly 8:6	10:17 13:7	City 44:10,19
available 9:21	55:4	26:21	26:19 39:23	civil 10:12 12:15
15:9 17:15,16	believe 12:22	brought 11:1,15	40:6,8,12,16	14:7 16:25
24:16 30:15	35:6,9 56:17	17:21 51:9	40:20	17:21 25:20
48:20	56:18	Brown 18:17	category 30:20	30:24 34:11
aware 30:14	believing 22:22	19:20 20:13	CBOCS 27:25	35:3,8,19 47:5
32:7 37:17	best 48:13,15	Burlington 42:3	central 23:19	47:17,20 48:8
45:23	better 19:7	42:5	certain 5:7 7:13	48:23 50:13
a.m 1:14 3:2	47:22	Bush 46:9,10	13:9 14:18,20	51:5,12,15
59:13	big 6:16	53:22	16:18 33:3	53:18 54:10
	blank 48:16	buttressed	35:10	57:5,7
B	blowing 20:18	18:16	certainly 30:11	claim 12:11 14:8
back 35:20 45:4	board 21:25	C	30:13 32:8	14:9 22:11
back-stop 45:3	37:13 50:17,22	c 2:1 3:1 16:13	41:18 44:6	40:7 41:3,5,11
48:20	57:3	25:24	48:7 58:6	41:11,13,14,18
bad 29:15	bootstrap 28:17	cadre 3:15	cetera 9:18 17:6	46:22,24 47:12
balance 26:1	Bowen 34:22	call 32:11,13	challenge 55:16	47:12,15 50:4
balances 46:17	box 42:25	called 32:24	challenged 32:2	50:5,8,9,12,13
ban 6:8,10 8:5	breadth 10:1	34:22 50:5	Chandler 32:24	50:23,23 51:2
9:6 11:7,9	Breyer 14:5,16	canvasses 19:20	chapter 7:7 45:7	51:11,11,13
14:15 15:9,11	14:17 15:5,15	care 37:8 58:14	45:9	53:15 54:1
17:12 24:14	15:23,24 16:1	carried 34:20	charged 3:21	claimed 40:10
26:15 27:8,8	16:17 17:7,9	carry 8:15	charges 21:9	claiming 40:9
band 13:24	18:24 20:5,17	carved 11:18	Chief 3:3,8 4:22	claims 3:10
bans 15:7 55:19	46:20 47:3,11	12:10	5:2,22 6:5	10:25 11:1,15
bar 9:7 18:14	47:14,18,25	carves 12:5	10:10,21 12:4	11:18 12:5,9,9
bargaining 14:3	48:3,10 49:1,5	case 3:4,10 5:3,7	12:8,17 13:6	13:10 14:1
14:7 21:12	56:20,23 57:2	5:20 6:17 9:4	13:18 21:10,24	19:18 22:14
34:15 35:4,9	57:6,10,12	11:6,6,12,13	22:2,3 24:17	29:11,12 35:20
47:6,21 55:12	Breyer's 52:5	11:14,20,22	24:24 25:3,9	38:12 39:21
56:12,15 57:8	53:9	13:14 18:1,3	25:12 26:3,7	40:2,2,12,15
57:21	brief 7:3 11:5,5	18:17 19:20	30:24 34:9	40:16 46:12
bars 3:25 10:5	16:9 22:7	20:13 21:8	36:6,10 39:18	51:9 57:14
55:18	27:19 31:15	22:6 25:2,6,12	40:1,19,22	clarify 55:22
based 4:10,12	32:25 37:19	27:20,21,25	42:17,21 53:8	class 36:4 37:4
4:21 6:9 11:17	54:13 58:17	28:22,23 29:2	53:21 54:25	41:25
17:5,12 22:13	briefs 53:3	29:4,25 30:6,7	55:5 56:14	clear 7:24 17:18
23:1,6,23,24	bring 10:19	31:18 32:10,23	57:19,23 58:2	20:12,23 27:18
42:13,13 52:9	13:25 14:8	33:1,18 34:22	59:11	27:20 28:17
54:17 58:19	15:21,25 16:2	38:17 39:19	chose 19:19	31:6,15 59:1
basic 14:15	16:23,25 17:1	41:3,10 42:3	chosen 56:16	clearly 22:13
basis 8:8 12:12	17:13 22:14		circuit 13:7,8	39:1 52:10

client 12:21	17:1 22:8,15	54:14,20 58:14	51:24 53:8	created 3:14 9:3
code 22:24	31:21 59:3	58:18,21 59:6	59:11	28:11
codified 48:22	completely	congressional	couple 43:3	critical 33:11
collective 14:2,7	43:25	13:21 18:12	course 5:22	CSR 55:13
21:12 34:15	complication	53:25 54:9	12:17 23:19	CSRA 10:16
35:4,9 47:5,21	10:15	56:9	38:13 41:16	11:2,16 12:1,4
55:12 56:12,15	conceded 24:5	conjunction 8:2	42:11	12:12,17 13:3
57:21	31:16	8:8	court 1:1,13 3:9	13:4,9,15 21:5
color 14:22 17:5	conceding 11:12	consider 11:6	5:21 6:6,12,13	21:15,23 22:2
17:12 23:23	11:22	considerations	9:9 11:1,21	22:19 56:11
52:10	concerns 48:7	53:22	14:1 18:16	cure 20:24
come 11:21	concession	considered	20:10,13 22:11	
common 29:15	11:10 24:8,11	28:23	22:16 25:13	D
commonly	conclude 8:5	consistent 9:14	26:8,18,25	D 3:1
29:13	conclusion 9:5	55:17 57:20,22	27:19,24 28:20	damages 35:15
company 4:23	49:7 58:7	59:2	28:23 29:25	44:15 49:25
comparison	conclusive 30:6	consistently	30:22 31:17	date 38:11
6:10,12	conduct 3:13,17	45:19	32:5,7,22 33:2	days 21:7
compel 21:17	4:18 5:8,16	constitutional	33:17,22 34:21	de 51:1,11
compelling	10:24 21:3	46:11	34:22,24 36:15	dead 12:20
25:14	26:12 42:14,14	construction	42:5 44:9,11	deal 37:14
compels 58:6	42:22,23	28:21 29:24	44:19 46:9,14	dealt 46:10
compensatory	confirmed 5:19	30:6	46:24 47:22	decades 3:20
35:15 44:15	confirms 24:13	contained 45:10	50:19 51:1,1	45:19 57:25
49:25	59:2	contains 39:16	51:10,21 53:6	decide 22:11
competing 43:4	Congress 3:11	context 26:11	53:21 58:20	31:17 50:22,24
complain 3:12	3:14 8:10,15	27:18,23 30:18	59:10	53:1,4,5,7 58:3
3:25 12:25	8:24 9:20,23	33:5 40:14,15	courts 5:10 9:14	decided 3:11
21:14 34:16,21	9:24 11:18	42:2	28:17 32:3	28:7 53:16
34:25 36:22	12:6 15:10,17	contradicted	37:24 38:3,11	decides 21:18
38:16 41:8	18:6,13,17	34:3	39:8 45:13	deciding 43:9
57:16	19:1,17 20:16	contrary 40:4	Court's 5:20	decision 13:12
complained 5:5	20:23 22:16	contrast 31:8	9:12 25:12	26:24 30:1
15:19 29:14	24:15 25:19,22	control 21:4,11	26:19,24 34:4	34:4 42:3
41:20 48:24	26:25 28:6	52:1	42:2	deemed 19:17
49:2	29:18,20 30:1	copied 8:17 9:25	cover 4:15,17	51:13 52:3
complaining	30:14,20,23	10:7	12:21 13:11	deems 6:19
26:16 31:25	31:2,6,9 33:14	copy 25:13	23:25 54:22	defeat 42:7
42:14	33:19 37:8	correct 9:11	covered 3:25 4:8	deference 57:25
complains 4:24	43:5,9,17,22	12:16 14:16	4:13 5:18 13:3	defers 46:14
31:23	44:2,7,14,20	21:1 22:22	24:6 29:5 35:3	defined 26:15
complaint 5:9	45:15 46:15,15	57:11	53:14	definition 9:1
5:11 13:1	48:7,14,17,19	corrective 35:13	covers 4:14 5:23	28:9
16:25 41:7	48:23 49:3,11	35:13,21	12:17 23:23	delineate 26:23
47:10	49:21 51:13,18	correctly 45:9	24:15 54:22	28:4 43:7
complaints 12:2	52:3,7 53:12	counsel 21:16,18	co-extensive	delineated 27:4
12:18 13:23	53:16 54:3,4,5	22:4,6 26:3	35:7	43:6

<p>demonstrate 5:7 demonstrated 30:1 department 1:19 7:4 depending 10:18 Deputy 1:18 describing 52:19 despite 10:15 detailed 6:11 dictates 10:8 difference 6:16 25:19 33:11 44:8 differences 32:11,13 44:6 44:11 52:15 different 6:15 10:17 17:11 25:16,23 26:23 27:4 28:4 32:9 32:12,13 35:18 35:24 44:21,22 44:24,24 46:13 49:12 50:14 51:8 differently 3:12 27:24 44:3 49:9 direct 10:19 12:9 41:11 directed 4:2 direction 33:14 directly 11:1 32:25 34:3 36:16 57:16 disagree 39:25 discharge 18:4 disciplined 53:15 discriminate 19:2,4,8 discriminated 29:12 31:23 discrimination</p>	<p>3:12 4:1,9,12 4:18,21 5:6,18 5:23 6:8 7:15 7:16,19 8:4 9:18,19 10:20 10:23,25,25 11:7,17 12:19 13:23 14:22 17:5,12 22:15 22:17 23:22 24:19 26:9,15 26:15,17,20,22 26:23 27:8,10 27:13 28:2,4,5 28:10,25 29:11 29:14,19 30:19 30:22 32:9 35:20,22 37:4 38:16,17 39:24 40:2,10,12,14 41:4,6,8,8,11 41:12,21 42:12 42:13,13 44:13 44:20 46:23 47:8 48:22 49:11,12 50:9 50:12,23,25 51:2,10 52:9 52:12 53:16 54:17,22 55:24 56:3 57:15,15 57:16 58:15,19 59:4 discriminatory 6:9 27:1 dismiss 21:12 disparate 44:12 disposition 16:24 disregarding 36:16 distinct 7:10 distinction 6:22 12:1 42:21 48:15 distinctions 43:12</p>	<p>distinguished 26:21 distress 35:17 disturbance 53:18 doing 54:5 59:7 doubt 38:11 40:7,11 48:6 drafting 8:11 dramatic 25:18 drastically 25:23 draw 6:13 drawing 8:8 48:10 D.C 1:9,16,19 13:8</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 1:6 2:1 3:1,1 earlier 8:25 48:25 55:22 EEOC 16:1 31:20 33:7 38:10 46:24 47:22 50:24 57:24 EEOC's 55:17 59:1 effect 45:20,25 46:1,2,7,9 effectively 6:19 18:8 efficiency 46:18 either 8:16 9:7 16:18 26:12 43:19 49:13 elaborately 10:13 eliminated 59:7 embraced 45:14 emotional 35:17 emphasize 55:7 employee 10:11 13:25 15:18 16:3 21:4,11 21:23 22:9</p>	<p>29:18 31:22 34:10,13 35:3 38:4,13 46:12 47:8 50:24,25 56:25 employees 3:16 4:9 5:25 11:8 13:5,10,21,21 13:24 14:4 16:23 17:4 22:14 24:6 28:24 29:1 31:2 34:7,23 36:3,4,17,18 37:19 38:16 45:16,18 46:19 49:23,25 53:11 53:25,25 54:9 54:11,16 55:8 55:9,10,11 56:10 employer 5:7,13 9:2 28:9 53:11 53:17 employers 9:1 19:2 28:7,8,8 28:12 37:8 43:10,10 employment 10:12 12:11,19 13:16 17:4 26:9 36:18 46:12,16 enacted 8:18 18:7 enforcing 3:21 engage 56:15 engaging 57:21 entities 56:18 entitled 5:3 12:14 28:24 29:2 38:18 57:24 entity 7:5 enumeration 6:10 equally 10:23</p>	<p>equivalents 6:21 especially 22:18 30:21 45:1 ESQ 1:16,18 2:3 2:5,8 et 9:18 17:6 evaluations 21:8 everybody 4:23 14:10 53:13 evidence 25:15 25:22 47:19,24 evil 58:18 evolution 43:8 exact 8:25 42:19 58:25 exactly 24:3 27:14,15 52:19 example 25:13 31:20 43:16 exception 46:2 exclude 14:6 excluded 13:15 57:4 excludes 13:5,9 22:18 excluding 14:1 exclusive 12:1,6 excuse 4:3 20:14 55:21 executive 54:11 exercising 42:15 exist 44:9 existed 54:11 existence 8:12 11:2 explained 6:7 18:16 44:8 explanation 33:24 39:2,4 explicitly 7:17 7:18,19 9:21 12:5 28:3 30:4 32:10 43:23 44:8 54:17 express 5:24 25:4 33:10,13 36:16 43:22</p>
--	--	--	---	--

45:21 52:23 54:23 expressed 6:2 31:9 42:12 expressly 26:10 32:16 extraordinarily 21:2 extraordinary 4:14	28:11,24,25 29:18 30:15 31:2,8,14,22 32:2,5 36:11 42:15 43:10 44:3,4,17,25 46:12,12,16,18 46:23 48:21 49:23,25 51:1 51:1,10 federally 20:2 Federal-sector 6:20 8:3 9:6 10:7 11:8 16:13 24:13 25:21 28:5,15 28:15,18 33:5 36:2 43:8,14 44:17 59:6 felt 34:19 48:20 49:13 fight 50:25 filed 41:7 final 16:24 29:24 find 40:7 43:24 finding 35:5 fired 4:25 5:1 40:23 53:14 57:12,17 firing 4:23 first 3:4 4:18 6:6 6:18 10:22 32:9,15 52:16 55:6 fit 36:4 fits 12:11 fix 20:18 flatly 3:22 fleetingly 50:4 focus 15:6 focused 26:19 38:3 following 52:5 footnote 27:19 form 21:5 forth 6:10 23:23	52:10 forum 29:19,19 35:5 forward 10:3 found 5:10 18:18 23:12,12 32:3,6 four 55:2 four-part 3:15 frankly 35:10 free 4:9 5:17 17:5 23:22 52:9,12 54:16 friend 34:10 front 35:20 53:2 full 3:16 13:21 56:10 fully 14:14 function 5:16 functional 6:21 fundamentally 6:23 13:2 further 21:17 28:13 36:19 59:10	50:10,16,20 51:7,16,22 52:2,5,14,21 52:25 53:6,20 54:2,8 55:1 gather 39:21 gender 59:3 general 1:7,18 6:8 26:14 27:8 27:23 30:8 33:7 54:21 55:10 getting 56:10,11 56:11 Ginsburg 9:9 11:3,11 12:25 13:3 17:18,24 24:4,10 26:13 26:18 29:7,23 30:16 31:19 32:5,19 33:19 33:23 35:1,12 35:14 41:2,16 50:2,14,18 51:4,14,20,25 53:23 54:4 55:15 give 7:13,15 14:25 15:17 54:6 56:8 given 25:15 26:13 58:9 gives 34:15 giving 10:1 45:20,25 gloss 49:18 go 10:16,17 13:1 14:8,13 16:1 16:18 18:9 22:10 29:11,16 34:20,24 36:24 45:4 46:24 47:4 50:24,25 51:17 57:3 goes 19:25 30:19 33:13 going 8:23 27:12	37:1 42:18 49:18 52:25 53:4 54:6 Gomez 5:15 Gomez-Perez 1:3 3:4 govern 14:18 17:21 government 3:10 6:13 7:3 7:16 10:3,24 11:3,4 14:19 14:21 19:8 22:25 23:5 24:5,7 27:9,10 27:12 29:8 31:14 37:17 46:18,23 55:13 55:16 56:22 government's 6:1,24 7:8 9:4 13:19 24:23 27:7,17 31:13 31:19,21 59:9 governs 5:25 grant 37:2 great 37:14 49:14 58:18 greater 46:15 GREGORY 1:18 2:5 26:5 grievance 34:17 groundless 21:9 GSA 18:17 Guerra 1:16 2:3 2:8 3:5,6,8 4:5 4:7,16 5:2 6:5 6:17 7:2,23 8:22 9:11 10:21 11:11,23 12:16,22 13:2 13:18 14:16 15:5,22,24 16:2,7,12,21 17:8,24 19:16 20:11,21 21:1 21:13 22:1,5	
F					
f 6:19 17:20 28:14 34:5 face 53:17 fact 4:24 5:7,9 5:16 8:18 11:18 12:24 18:16 19:21 24:11 26:24 27:3 31:2 32:15 37:6 41:10 43:7 facts 10:18 fail 10:8 failed 30:5 55:16 fails 10:3 failure 27:2 fair 34:19,24 48:12 false 5:12 familiar 6:25 far 13:1 fashion 51:9 fear 18:18 features 34:3 February 1:10 Federal 3:11,16 5:25 8:13,16 9:1 10:10 13:7 14:1,18,19,21 15:18 16:22 18:21 19:8 20:9 21:23 22:10,15,25 23:5 24:6,21 26:10 28:8,9					
		G			
		G 1:18 2:5 3:1 26:5 Garre 1:18 2:5 26:4,5,7,18 27:16 29:7,22 30:23 31:15 32:1,7,20,22 33:22,25 34:12 35:6,13 36:9 36:15,20,25 37:10,14,23 38:3,9,24 39:7 39:13,15,25 40:5,11,21,25 41:14 42:20,23 44:5 45:4,12 46:3,8 47:1,7 47:13,15,24 48:1,5,19 49:3 49:10,21 50:2			

22:20 23:2,6,9 23:13,15,18 24:1,10,24 25:7,11 55:2,3 55:5,25 56:4,7 56:17,21,25 57:4,8,11,14 57:22 58:5,11 guess 16:16 48:5	impermissible 12:14 implicate 18:1 impliedly 26:11 imply 6:3 36:10 import 33:15 34:6 importantly 3:22 improper 6:7 18:11 inadvertence 13:12 include 26:16 33:13 52:13 included 7:19 27:11 54:18 includes 27:8,13 30:22 52:10 including 28:4 37:18 52:23 incompatible 33:4 36:1 41:23 43:2 incompetent 39:22 inconsistent 3:19,22 incorporate 25:24 32:3 33:17,20 34:2 36:11 incorporated 8:17,19 15:7 incorporates 11:8 14:19 32:16 incorporating 58:24 59:5 incorporation 10:4 25:4 33:10,13 52:24 independent 41:20 indicate 43:1 indicated 40:13 indication 29:17	54:20 indicia 27:21 31:6 42:25 43:3 individuals 36:21 45:8 ineffective 18:19 19:17 20:18,20 20:21,22 ineffectiveness 20:24 21:2 infer 46:11 inference 8:9 10:2 inferred 27:23 inflammatory 5:12 inherently 33:4 35:25 intend 31:6 intended 8:4 25:15,22 44:2 intent 27:22 36:16 43:4 interpret 19:25 20:5,6,7,8 interpretation 5:20 19:24 30:18 32:2 38:10 55:18 59:2 interpretations 3:20 9:14 55:17 interpreted 32:23 37:24 39:8 45:19 interpreting 26:20 intervene 33:7 investigate 21:16,19 investigated 51:23 involve 40:15,16 irrational 11:25 issue 5:2,14 9:10	10:6 44:2 58:8 IX 5:20 26:19,20 27:2 <hr/> J <hr/> Jackson 5:20 6:7,12,14 26:14,25 27:10 27:19,25 42:24 44:10,19 JOHN 1:6 JOSEPH 1:16 2:3,8 3:6 55:3 judgment 13:17 judgments 46:14 judicial 3:16 13:22 21:21 jury 28:24 29:5 29:6,9 30:2 34:6 44:17 49:24 Justice 1:19 3:3 3:8 4:3,5,6,11 4:16,22 5:2,22 6:5,14,18,25 7:11,23 8:10 8:22,23 9:9 10:10,22 11:3 11:11,19,23 12:4,8,17,21 12:23,25 13:3 13:6,18 14:5 14:16,17 15:5 15:15,23,24 16:1,5,7,9,15 16:17 17:7,9 17:18,24 18:24 19:22 20:5,11 20:17,20,22 21:10,24 22:2 22:3,20 23:3,8 23:10,14,15,16 23:21 24:1,2,4 24:10,14,17,24 25:3,9,12 26:3 26:7,13,18	27:6,17 29:7 29:23 30:16,24 31:12,16,19 32:5,19 33:19 33:23 34:9 35:1,12,14 36:6,10,20 37:5,11,15,20 37:24,25 38:6 38:21 39:2,10 39:14,18 40:1 40:4,19,22 41:2,16 42:17 42:18,21 44:1 44:5 45:4,12 45:25 46:4,6 46:20 47:3,11 47:14,18,25 48:3,10 49:1,5 49:16 50:2,14 50:18 51:4,14 51:20,25 52:4 52:5,18,25 53:8,9,21,23 54:4,25 55:5 55:15,21 56:2 56:4,6,14,20 56:23 57:2,6 57:10,12,19,23 58:2,9,11,23 59:11 <hr/> K <hr/> k 17:20 key 52:18 kind 11:4 54:21 knew 30:2 43:22 know 8:2 9:7 10:5 16:10 18:6,9 30:23 30:25 33:19 40:21,25 47:25 48:4,11 49:3 58:5 <hr/> L <hr/> lacking 27:22
<hr/> H <hr/> hand 29:11,11 47:21 handful 22:9 happen 47:7 50:20 happened 29:15 42:4 harm 42:10 hear 3:3 28:1 held 9:10 help 22:20 hereunder 17:21 high 40:8 high-level 13:25 hint 29:20 historical 3:23 history 20:14 34:1 holding 42:6 holdings 9:12 Honor 9:12 32:1 49:21 House 13:21 53:25 58:15 <hr/> I <hr/> identical 9:17 17:10 24:9 identified 15:10 identify 6:9 illuminate 16:22 imagine 50:4 impact 44:13 impenetrable 10:14				

<p>language 3:23 4:14,15 5:19 7:25 9:16,25 16:22 17:24 23:11,22,24 25:13 26:20 33:2 37:25 38:4 43:24 45:21 52:8,19 58:24,25 59:5</p> <p>largely 35:7</p> <p>Laughter 16:20</p> <p>law 42:15 53:11</p> <p>lawsuit 15:21,25 16:2</p> <p>lawyer 39:22</p> <p>lead 9:5</p> <p>leads 59:9</p> <p>leave 30:20 56:8 56:9</p> <p>legislation 18:13 30:4</p> <p>legislative 20:14 34:1</p> <p>Lehman 28:22 29:24 30:7 34:4</p> <p>letter 12:20</p> <p>let's 19:3,11</p> <p>liable 22:25</p> <p>limit 42:8,9</p> <p>limited 8:7 21:3 36:3,8 38:1 39:1,17 41:24 42:1,3 45:7,10 45:22 56:11</p> <p>list 26:25</p> <p>little 22:21</p> <p>lodged 5:11</p> <p>logic 9:4</p> <p>longstanding 38:9</p> <p>look 14:14 15:16 25:17 31:9 54:12 58:10</p> <p>looked 20:13</p> <p>looks 14:25</p>	<p>lose 42:22</p> <p>lot 13:7,8</p> <p>lower 9:14 40:16 55:16</p> <p>lower-court 55:17</p> <p>Lucas 46:10 53:22</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>main 6:1 43:13</p> <p>majority 21:22</p> <p>makers 13:25</p> <p>making 15:8 46:24</p> <p>manner 5:10</p> <p>material 52:15</p> <p>materially 31:11 49:11</p> <p>materials 53:2</p> <p>matter 1:12 19:12 21:19,21 24:12 46:21 47:1 48:2 58:21 59:14</p> <p>matters 27:18</p> <p>mean 4:14,23,25 7:11,15 14:11 19:23 20:4 36:7 42:18</p> <p>meaning 25:16 32:20 52:21,22</p> <p>means 33:3 34:14,16,18 42:1 43:19</p> <p>meant 29:18 34:2 45:17</p> <p>mechanism 20:10 50:15</p> <p>mention 27:2</p> <p>mentioned 48:25 49:15 56:18</p> <p>Merit 21:25 50:17,21 57:3</p> <p>mildly 59:8</p> <p>mind 29:21</p>	<p>33:20</p> <p>minutes 55:2</p> <p>misconduct 21:9</p> <p>missed 15:4</p> <p>mixed 47:9 50:5 51:8</p> <p>moment 45:5</p> <p>MR.GARRE 46:5</p> <p>MSPB 22:10</p> <p>MYRNA 1:3</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 2:1,1 3:1</p> <p>Nakshian 28:22</p> <p>narrow 6:7</p> <p>national 14:23</p> <p>nature 5:8 21:3</p> <p>necessarily 15:11 24:14 58:6 59:6</p> <p>necessary 23:4 31:1,17</p> <p>need 18:1 19:3 19:13 49:14</p> <p>negative 8:9 10:2</p> <p>neither 8:17</p> <p>nevertheless 41:6 44:8</p> <p>new 20:16</p> <p>nonpreferenc... 34:13</p> <p>non-adverse 21:15</p> <p>norm 9:22,24 10:6</p> <p>Northern 42:3,5</p> <p>note 54:13 58:13</p> <p>noted 8:20,21 30:25 44:11 58:23</p> <p>noticeably 24:21</p> <p>notion 30:8 44:23</p> <p>notwithstandi... 11:2</p>	<p>novo 51:2,11</p> <p>NTEU 22:7</p> <p>number 22:24 46:17</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1</p> <p>objective 58:21</p> <p>obligation 34:19</p> <p>occasion 11:6</p> <p>odd 38:25</p> <p>Office 21:16 22:4,5 51:23 55:10</p> <p>officials 19:4,8</p> <p>oh 50:18,18</p> <p>okay 48:4,11 56:6</p> <p>old 18:19,22 41:25 45:22</p> <p>older 4:21 22:17</p> <p>once 41:6 51:9</p> <p>ones 8:21 37:18</p> <p>operate 8:1</p> <p>operates 8:7</p> <p>opinion 48:14</p> <p>opposite 14:9 27:15 33:14 42:19</p> <p>oral 1:12 2:2 3:6 26:5</p> <p>order 53:4</p> <p>origin 14:23</p> <p>origins 3:23</p> <p>ought 4:13 19:25</p> <p>outside 11:16 57:6</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1</p> <p>page 2:2 26:24 29:25 54:13 58:17</p> <p>pain 35:16</p> <p>parallel 24:3</p> <p>part 33:6</p>	<p>particular 13:14</p> <p>particularly 39:22 53:18</p> <p>passed 48:21</p> <p>passes 31:21 54:23</p> <p>patchwork 3:15</p> <p>pay 35:20,21</p> <p>pensions 43:16 43:16</p> <p>people 13:14 37:3,7,9 38:1 39:1,6 41:7,25 41:25 45:22 48:24 49:1 55:22 56:8,8 56:10</p> <p>percent 40:15</p> <p>percentage 40:8</p> <p>perfect 18:20</p> <p>performance 21:7</p> <p>permit 13:24</p> <p>person 16:3 29:12 39:19 40:9,9 46:23 56:24</p> <p>personnel 4:8 5:5 7:4 12:13 17:3 42:1 52:8 52:11 54:15</p> <p>persons 4:2 30:20</p> <p>Petitioner 1:4 1:17 2:4,9 3:7 22:19 55:4</p> <p>Petitioners 29:4 34:1</p> <p>Petitioner's 37:18</p> <p>phrase 32:23 39:23</p> <p>pick 15:3</p> <p>piggyback 40:2</p> <p>plain 3:23,24 4:3,13,15 5:18</p> <p>plaintiff 5:3</p>
---	---	--	---	---

plaintiffs 29:2	18:18 23:11,18	prohibition 8:3	provision 4:7	qualitatively
plausible 44:1	24:25,25 25:10	9:3,16,17 10:5	5:24 6:23 7:1,1	44:21
please 3:9 26:8	25:11 52:7	10:7 17:9 18:7	7:2,7,9,13,21	question 19:23
plus 47:21,22	precludes 57:21	20:16 27:12,23	8:7,14,18	29:23 32:25
point 8:23,24	premise 11:24	28:6 29:1	17:14,16 20:24	41:1,12 46:10
13:4 15:8	prescribed 20:2	30:11 36:2	20:25 22:21,23	52:6 53:1,9
19:25 20:4,6	present 34:17	38:25 39:11,12	22:25 23:3	58:3
29:24 30:6,7	46:13	39:13,16 41:22	24:13 25:21	questions 46:13
34:1 40:18	presented 53:5	43:13 45:21	28:11,15,16,18	59:10
42:18 45:5	presents 11:6	52:19 54:14,21	32:18 34:5	quite 29:13
50:24 54:3	presumably	57:20	36:3,12,14	35:18 40:4
56:5	43:18 44:21	prohibitions	38:12 42:6,9	quoted 58:17
pointed 27:3	prevail 58:4	6:11 31:9 38:1	43:1,3,11,14	
33:5 34:4	prevailed 5:13	38:23 39:5	45:15 54:18,24	R
points 7:24	prevent 19:17	45:7,9	55:18 59:6	R 1:16 2:3,8 3:1
10:21 55:6	principal 35:7	prohibits 59:3	provisions 6:20	3:6 55:3
police 46:16	private 5:23 6:2	promoted 29:13	7:7 8:12,19	race 9:18 10:25
policy 4:23	7:14,19 8:15	proper 18:13	12:11 14:20	14:22 15:20
13:25 46:14	11:8 19:2	properly 48:9	16:13 24:3	17:5,12 19:5,9
policymakers	24:19 25:4,20	proscribes 9:18	25:20 28:3,10	23:1,6,23
13:25	25:24 33:3,8	protect 19:6,7	28:17,19,20	31:24 46:22
poor 21:7	33:20 36:7,13	19:10 37:19	29:5 32:16	49:2 52:10
portion 7:14	36:13 37:21,22	protected 17:11	33:3,6,16,17	58:19 59:3
position 7:9	39:3 40:14	19:9 34:25	37:16,16,17	raise 53:15
12:20 21:6	43:5,10	36:4 37:3 39:6	38:5 43:23	raising 13:22
25:7 27:7,15	private-sector	41:25 54:10	public 6:3 37:22	rarely 21:5 22:7
27:17 31:13,20	6:20 8:11,19	protection 19:3	39:4	rational 49:18
31:22 59:9	9:2 17:16	19:13 21:25	purely 47:13	reach 49:7 58:7
possesses 4:20	28:10,16,20	37:6,7 38:18	purpose 42:8,8	58:7
possible 19:1	29:1,4 31:8	38:22 44:12	purposes 11:12	read 4:6 7:20
Postal 14:2	32:16 33:6,10	45:3 50:17,22	11:14	11:12 15:20
34:13,23	33:15 34:7	57:3	pursue 22:6,11	24:14 26:11
POSTMASTER	36:7 38:5,12	protections	34:14 41:19	45:9,11 46:2,4
1:6	43:13,23 45:6	18:23 28:19	pursued 22:8	reading 18:5
Potter 1:6 3:4	problem 13:19	30:15 31:1	pursuing 41:17	19:1 28:18
practical 46:6,8	39:3	38:23 43:20	put 12:10 19:3,7	45:5
48:2 55:7	problems 13:9	44:22 47:16	28:8 43:9	reality 55:7
practice 10:13	proceed 18:24	48:20 49:14,15	49:18 53:3	realize 23:20
27:2 31:22	proceeding	54:11	56:22 59:8	realized 53:12
32:1 46:21	50:21	protects 37:3	puts 10:3	reason 9:23 13:7
47:1	process 21:18	prove 5:4,15	putting 12:24	13:10 15:13
practices 6:9	prohibit 9:24	provide 15:13	51:5	20:7,15 24:17
12:11 13:16	15:12 18:21	30:2,9,9 31:7	puzzled 22:22	34:5,18 38:6,7
27:1,5 43:15	26:10,12	provided 13:13		48:3,6,13 49:8
46:13	prohibited	18:15 44:15	Q	49:10 52:6
precedent 26:14	43:15	provides 7:3	qualified 11:5	reasoning 10:8
precisely 6:11	prohibiting 8:14	24:20	21:10	reasons 4:17

6:18 48:16 REBUTTAL 2:7 55:3 recognize 29:10 30:16 35:2 37:2 58:11 recognized 28:20 32:10 33:18 34:6,23 44:9,19 46:9 53:21 recognizing 12:20 46:15 record 51:3,12 reference 32:17 referred 7:5 referring 17:25 refers 14:24 Reform 10:12 30:24 34:11 35:9,19 47:17 48:8,23 50:13 51:12 53:19 54:10 57:5 refuses 21:20 refuted 6:22 58:15 regardless 12:12 regime 9:2 11:16 25:23 reinstatement 18:3 rejected 6:12 41:12 related 42:10 relegated 22:17 reliance 13:19 relief 7:14,15 14:21 56:10,11 religion 14:22 17:6,12 23:23 58:19 remaining 55:2 remedial 22:13 24:12 56:10,11 59:1 remedies 3:18	10:5,11,13,15 12:15 13:13,15 14:9 15:6,6,8 15:14 17:15 18:8 20:3,9 33:4,10 34:14 35:6 55:8,12 55:23,23,25 56:2,9,12,13 56:22 remedy 3:16 9:20,21 12:1,7 13:22 15:1,9 15:13 17:15,22 18:2,3,15 21:22 22:1 23:4,9 24:16 24:19,21 25:5 25:17 31:14 34:10,16 35:2 35:7 36:8,11 46:11 55:13,14 56:20 removal 21:6 rendered 12:20 18:22 replicated 25:19 25:25 report 58:16 representation 34:20,24 representative 34:17 reprisal 18:18 34:16 35:5 50:5,8,13 54:6 reprisals 18:22 require 42:22 research 40:13 reserve 26:1 resources 46:16 respect 4:16 10:3 13:19 24:6 30:8 31:22 35:17 37:4,15 42:20 43:21 44:25	45:14,16,17 46:22 47:3 49:23 54:8 56:13 respects 31:10 38:20 40:18 41:22 Respondent 1:20 2:6 26:6 response 20:12 responses 6:6 responsive 32:25 restrictive 34:2 result 32:12,13 retaliated 31:24 39:20 41:9 retaliating 15:19 retaliation 3:11 3:14,25 4:2,11 5:25 8:14 9:7 9:21,24 10:6 11:9,17 12:2,3 12:8,10,12,18 13:22 14:1,24 15:1,3,9,12,13 17:17,22 18:14 18:15,21 19:17 21:5 22:14 23:1,6,24,25 24:7,15,16,20 26:10,16 27:9 27:11,13 29:11 29:20 30:19,22 31:14 36:14,22 36:24 37:2 38:13 39:19,23 40:2,7,9,16 41:13 43:21 44:2,25 46:11 46:22,22 47:9 47:12,15 49:13 50:23 52:11,13 54:1,23 55:19 55:23,24 56:1 57:17 59:3	retaliations 41:3 retaliatory 3:13 3:17 4:18 5:8 5:15 10:24 11:15 20:2 21:22 28:5 39:11 reticulated 10:13 review 10:18 21:24 51:3,12 right 7:25 14:15 15:6,21,21 17:22 21:17 22:9 27:23 28:24 29:5 30:2,10 31:4,7 31:11 32:4 34:6,19 35:14 35:15 36:1,8,9 36:24,25 37:3 38:19,24 39:15 40:3 41:19,23 42:19 43:6,7 43:22 44:17,17 46:20,25 47:6 49:24 53:20 rights 4:20 5:17 14:3,7,8,10 21:4,12 22:19 35:4 42:15 46:18 56:12 57:9,23 risk 49:13 ROBERTS 3:3 4:22 5:22 10:10 12:8 13:6 21:10,24 22:3 24:17 25:3,9 26:3 34:9 36:6,10 39:18 40:19,22 42:17,21 53:8 54:25 56:14 57:19 58:2 59:11 Roudebush	32:24 route 48:18,18 51:17 <hr/> S <hr/> S 2:1 3:1 saying 11:19 12:1 18:8 19:23 20:12 21:11 40:23 49:8 says 7:13 8:18 10:16 11:5 14:17,20,23 16:24 17:3,19 19:2 30:22 36:17 38:21 45:6 Scalia 4:3,5,6,11 4:16 6:14,18 6:25 7:11,23 8:24 11:19,23 16:5,7,9,15 19:22 20:11 39:10,14 52:25 55:21 56:2,4,6 58:9,12 scheme 3:15,19 18:19 20:17 22:18 28:22 43:8 56:9 59:1 schemes 7:10 43:4 55:9 scope 6:8 7:24 18:7 36:13 59:7 second 8:23 secondly 52:24 section 3:24 6:19 7:6,8,16 9:20 15:25 17:19,19 18:7 22:22 25:1,17 25:17,25 27:13 28:14 30:4 31:10 33:16,24 34:5 35:23
---	---	---	---	---

36:2,16,19 38:4,23 42:12 45:6 46:1 52:18,22,23 54:15,21 sections 52:8 sector 5:24 6:2,3 8:15,16 11:9 18:22 25:20 26:11 29:1 31:9 33:4,21 37:21,22,22 39:3,4 40:15 43:5 44:3 55:19 Security 55:11 57:1 see 4:12 25:18 send 29:18 48:17 sense 11:16 13:24 18:20 20:1,8 22:16 29:6 56:8 sensible 7:20 separate 6:21 20:24,25 28:3 30:14 31:3 43:11 54:18 series 6:11 service 10:12 12:15 14:2,8 30:24 34:11,13 34:23 35:3,8 35:19 47:5,17 47:21 48:8,23 50:13 51:5,12 51:15 53:19 54:10 57:5,7 set 30:14 sets 6:10 sex 10:25 14:22 23:1,7 27:11 41:8 side 8:3 24:23 29:9 significance	28:21 significant 54:3 similar 29:3 53:22 similarly 26:14 simple 18:25 24:2,4,18 simply 7:22 13:11 15:8 25:23,25 37:7 43:25 56:21 single 11:17 sitting 49:6 situation 11:25 25:10 31:4 45:23 53:10,13 slate 48:16 small 3:15 22:8 Smith 44:10,19 society 58:19 Solicitor 1:18 solid 41:5 somebody 53:14 somebody's 15:18 sort 19:22 Souter 12:21,23 20:20,22 36:20 37:5,11,15 49:16 so-called 47:9 special 19:13 21:16 22:4,5 51:24 species 3:13 specific 8:14 15:2,3,18 27:1 specifically 8:20 24:20 26:21 28:8,14 29:25 42:5 43:6,9,17 45:15 specifies 17:11 split 50:8 stage 41:15 stand-alone 6:8 8:3 9:3 28:11	stark 25:22 started 50:6 starting 48:16 State 19:4 28:7 28:8 statement 55:22 statements 5:12 States 1:1,13 19:6 34:23 43:11 statistical 40:5 statistics 22:6 status 17:11 42:22,24 statute 3:22,24 5:19,23 6:15 6:15 7:12,22 8:13 9:13,15 10:4,20 13:20 17:3 22:21 25:14 31:5 37:13 39:9 43:5,8 45:20 54:19 58:10,16 58:22,24 statutes 6:22 7:21 26:21 40:17 44:4,25 54:12,14 statutory 7:9 27:18,22 28:21 29:24 30:2,6 43:4 step 21:18 Stevens 22:20 23:3,8,10,14 23:15,16,21 24:1,2,14 37:20,25 38:6 38:21 39:2 45:4,12,25 46:4,6 52:4,18 58:23 strange 29:21 striking 52:6 strong 24:9 strongest 24:22	struck 46:17 structure 9:13 9:15 22:13 24:12 stuff 16:5 subject 7:6 subjected 9:2 submit 4:17 5:18 11:16 17:25 18:11 22:12 submitted 59:12 59:14 subsection 6:19 7:5 15:10 16:12 17:2,2,9 25:24 28:14 34:5 subsequent 54:19 subsequently 48:22 substantive 9:22 9:24 15:7,11 17:10 24:14 39:20 54:14 sue 50:6 sued 27:9 suffer 3:17 12:23 21:23 22:17 57:15 suffered 4:1 5:4 13:22 suffering 35:16 suggest 22:7 suggested 18:5 suggesting 20:17 suggestion 58:14 suggests 15:2 suing 29:8 50:6 50:7 suit 17:13 33:8 54:6 suits 14:18,18 16:23	summary-jud... 41:15 suppose 35:5 57:19 Supreme 1:1,13 30:21 sure 40:1 44:7 50:3 54:9 surely 6:16 7:21 suspension 21:6 sweeps 8:6 system 19:10,11 19:16 47:5 48:8 57:3 systems 21:25 47:20 50:17,22 <hr/> T <hr/> T 2:1,1 take 9:4 21:20 33:8 39:5,22 45:2 taken 8:11 11:24 takes 21:5 talk 37:1 talking 16:6,11 16:12,18 19:18 21:13 22:4 39:5,10 55:9 tell 27:3 49:4 tens 3:16 14:3 terms 3:24 4:4 17:10 48:1 testify 38:17 text 16:6 textual 32:10 44:11 45:13 52:15 Thank 26:3,7 54:24,25 55:5 59:11 theory 10:2 50:7 they'd 47:15 thing 8:25 15:3 35:25 47:3 49:20 52:7 things 14:18
---	--	--	---	--

21:7 29:15 35:16 42:4 47:19 51:18 think 6:22 7:20 8:24 11:19,21 15:22 16:21 27:16 29:10 30:7,12,25 31:5,17 32:1 32:13 33:25 36:25 37:10,14 38:10,15,21,24 39:1,21 40:3 40:11,23 41:5 41:21,24 42:2 42:23,24 43:21 44:1,5 45:13 45:20 46:3,5,8 48:2,6 49:8,10 49:20,22 51:7 53:20,21 54:8 54:21 58:2,6 thinking 18:25 46:20 49:19 third 13:4 42:11 thought 11:4 24:22 25:3 39:10 49:6,17 51:18 53:9 thousands 3:17 13:5 14:3 22:7 22:8 55:8 56:13 three 3:19 4:17 6:5 10:21 31:10 41:22 42:25 48:15 55:6 57:25 time 26:2 28:7 48:21 53:14 title 5:9,20 7:8 8:25 9:5,6 10:3 10:7,23 11:7 12:3,5 14:13 14:14,14,25 15:16 16:3,13 16:23,25 17:20	18:17,21 19:19 19:24,25 20:6 20:14,15 22:12 22:23 23:8 24:6,12 25:1,1 25:4 26:19,20 26:22 27:2,4 31:13 32:3,8 32:11,15 33:6 33:12 35:15,24 38:14 41:4 42:6 44:6,13 44:15,18,24 49:24 50:1 52:15,16,17 53:1,5,13 55:15,19,19 57:23 58:3,25 58:25 today 3:4 41:16 tomorrow 27:11 28:1 42:18 totally 16:17 traditionally 29:8 Transportation 55:11 57:1 treat 3:11 19:11 28:7 44:2 49:8 treated 23:17 27:24 44:20 trial 28:25 29:5 29:6 30:2 34:6 44:17 49:24 51:2,11 trigger 21:4 triggered 5:8 true 9:8,12,13 10:23 19:24,24 24:25 25:7 trumps 38:7,7 try 29:22 50:25 Tuesday 1:10 TVA 55:9 two 6:18,21 7:21 7:23 8:25 14:10 23:16	24:3 29:16 32:12 38:20 40:18 42:1 47:19,20 48:15 52:8,14 54:13 type 10:12 types 10:17 13:9 21:3 22:14 26:23 27:4 28:4 43:15 49:12 51:8 52:3 typical 21:7 31:11 41:2 43:2 typically 35:18 <hr/> U <hr/> ultimately 5:4 5:15 umbrella 51:5 unaffected 28:16 uncommon 30:9 30:12 underlying 14:12 30:10 39:23 40:10 41:21 undermine 13:16 33:9 understand 14:14 23:11 49:17 52:21,22 understanding 18:12 41:15 understood 9:23 15:11 18:14 43:18 50:3 unfair 27:16 union 34:17 57:10 unions 57:7 uniquely 46:14 unit 41:7 United 1:1,13 34:22	unkind 27:7 unprecedented 31:4 unrelated 22:15 unusual 39:19 40:1 45:1,2 53:10 urge 11:20 use 18:10 19:11 20:2 23:24 useless 18:23 utterly 7:10 U.S 33:1 U.S.C 22:24 <hr/> V <hr/> v 1:5 3:4 18:17 28:22 32:24 34:22 44:10,19 46:10 various 12:15 44:3 59:8 vast 21:22 verbatim 25:13 versus 53:22 view 12:6 13:20 58:21 viewed 49:11 views 57:24 VII 5:9 8:25 9:5 9:6 10:3,8,23 12:3,6 14:13 14:14,14,25 15:16 16:3,14 16:23 17:1 18:17,21 19:19 19:24 20:1,6 20:14,15 22:12 23:8 24:6,13 25:1,1,4 26:22 27:4 31:13 32:3,8,11,16 33:6,12 35:15 35:24 38:14 41:4 44:7,13 44:15,18,24 49:24 50:1	52:15,17 53:1 53:5,13 55:15 55:19,19 57:23 58:3,25 VII's 11:7 42:6 59:1 violation 14:23 15:9,14 17:7 17:14 violations 9:22 16:23 17:2,16 virtually 9:17 virtue 4:20 <hr/> W <hr/> want 18:20 20:5 20:6,7 29:23 36:24 50:2 53:17 55:6 wanted 8:15 13:4 40:18 48:14,17 wants 54:22 Washington 1:9 1:16,19 wasn't 20:12 32:24 49:13 53:23 way 7:20 11:21 18:25 19:1 20:6,7,23 21:12 32:8 33:15 34:8 35:2,23 37:23 38:5,14 39:7 45:11,18 47:19 went 15:19 28:13 33:14 we'll 3:3 11:4 24:7 we're 16:6 37:1 45:23 53:4 54:6 whistle 20:18 whistleblower 37:16 whistleblowers
--	---	---	--	---

19:3,5,9,12,13 White 13:20 53:25 willing 11:13 wiped 10:19 wished 30:3 withheld 7:17 7:18,18 witness 40:20,23 word 38:22 39:5 46:1 words 10:15 12:9,13 13:11 15:2,17,17,20 18:2 23:21 24:9 32:20 37:8 40:22 49:17 worker 4:24 workers 3:12,25 8:13 14:2 22:17 30:15 48:21 working 48:8 workplace 42:9 workplace-rel... 42:4 works 47:22,23 47:23 48:1 world 37:9 worried 37:11 worse 47:23 wouldn't 8:16 17:22 24:15 31:2 39:25 40:11 51:20 writing 49:6 53:11 wrote 27:1	youthful 37:9	42 22:23 425 33:1		
	<hr/> 0 <hr/> 06-1321 1:5 3:4	<hr/> 5 <hr/> 55 2:9		
	<hr/> 1 <hr/> 1 27:19 10 54:13 10:04 1:14 3:2 11:03 59:13 14 21:6 40:15 16(d) 14:17 16(e) 14:15 162 29:25 175 26:24 19 1:10 1972 19:20 20:15 1974 28:6 1981 27:13	<hr/> 6 <hr/> 623 43:12,12,15 43:17 623a 8:1 623(a) 8:1,5 45:10 623(d) 8:1 25:2 38:4 43:24 45:14,15 626c 25:25 631a 38:7 45:6 631b 38:8 39:17 631(a) 37:21 631(b) 7:8 37:22 633 36:19 42:12 633a 6:19 23:14 28:14 30:4 31:10 35:24 36:2,17 38:25 39:16 41:22 43:12,13,18,25 45:21 54:15,22		
	<hr/> 2 <hr/> 20 39:8 2000e-16 22:23 2000e-16(d) 17:19 2000-16e 23:12 2008 1:10 23 58:17 233a 23:12 26 2:6	633a(a) 3:24 7:25 9:25 23:13 633a(c) 25:18 633a(f) 33:16		
	<hr/> 3 <hr/> 3 2:4 3(a) 14:24,24 15:1 36 54:13	<hr/> 7 <hr/> 704(a) 25:1 717(a) 9:7,16 15:10,11,14 16:13 17:10 18:7,14 717(a)'s 9:22		
	<hr/> 4 <hr/> 40 4:2,19,21,25 36:5,18,23 37:7 38:2,20 41:25 45:8,17 45:18,22 53:13 53:14 40-year 45:5 40-year-old 4:19 5:16	<hr/> 8 <hr/> 840 33:1		
<hr/> X <hr/> x 1:2,8				
<hr/> Y <hr/> years 8:25 36:18 39:8 41:25 45:8,22				