No. 17-587

IN THE

Supreme Court of the United States

MOUNT LEMMON FIRE DISTRICT,
Petitioner,

v.

JOHN GUIDO AND DENNIS RANKIN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

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INTRODUCTION

Respondents concede that the ADEA now means different things in different circuits. In the Sixth, Seventh, Eighth, and Tenth Circuits, the statute covers both private employers and State political subdivisions only if they have twenty or more employees. In the Ninth Circuit, however, the statute sweeps far more broadly, covering State political subdivisions of *any* size. Only this Court can resolve that real and consequential fissure in federal age discrimination law.

Respondents offer no reason for the Court to stay its hand. Much of their brief contends that the Ninth Circuit's side of the split should prevail on the merits. Those arguments are unconvincing on their own terms, but in any event they confirm that the division of authority is clearly defined and warrants certiorari. Respondents' efforts to minimize the significance of the circuit split are similarly unpersuasive. State political subdivisions now face dramatically different ADEA liability based solely on geographic happenstance. That is an important issue worthy of this Court's immediate review.

ARGUMENT

I. The Circuit Split Regarding § 630(b)'s Meaning Is Clear And Firmly Entrenched.

The division of authority on § 630(b)'s meaning is acknowledged and irreconcilable. The Ninth Circuit recognized that "four other circuits"—the Sixth, Seventh, Eighth, and Tenth—"all have declared § 630(b)

to be ambiguous" regarding coverage of State political subdivisions. Pet. App. 11a. Those four circuits unanimously construe the statute to exempt State political subdivisions with fewer than twenty employees. *See Cink v. Grant Cty.*, 635 F. App'x 470, 474 n.5 (10th Cir. 2015); *Palmer v. Ark. Council on Econ. Educ.*, 154 F.3d 892, 896 (8th Cir. 1998); *EEOC v. Monclova Twp.*, 920 F.2d 360, 362-63 (6th Cir. 1990); *Kelly v. Wauconda Park Dist.*, 801 F.2d 269, 270-73 (7th Cir. 1986). The Ninth Circuit disagreed. Rejecting the reasoning of its sister circuits as "underwhelming," it held instead that the ADEA is unambiguous—and covers political subdivisions of *any* size. Pet. App. 13a-15a. The circuit split could not be clearer.

Nonetheless, respondents insist that the division of authority is "overblown." Opp. 6-7. Their arguments are meritless. And several actually bolster the case for certiorari.

A. Respondents first belittle the circuit split because the Sixth, Seventh, Eighth, and Tenth Circuits purportedly used an outmoded method of statutory interpretation that "cannot be reconciled" with this Court's more recent jurisprudence. Opp. 7-10. According to respondents, those circuits arrived at an erroneous interpretation by focusing insufficiently on § 630's text and improperly analogizing to Title VII. *See id.* The Ninth Circuit, in contrast, employed what respondents consider the correct statutory "approach." *Id.* at 9.

As a critique of the circuit split, this argument backfires. Respondents suggest only that one side of a

well-defined disagreement among the circuits is erroneous, while the other side is correct. That is a feature, not a bug, of disputes that warrant this Court's attention. And it confirms that the split regarding § 630(b)'s meaning is ripe for certiorari—however the merits ultimately play out. (As a separate matter, respondents' methodological critique is unpersuasive: The Sixth, Seventh, Eighth, and Tenth Circuits looked "beyond" the "plain language" of § 630 only after determining it was "ambiguous," as this Court requires. *Kelly*, 801 F.2d at 270; *see Monclova*, 920 F.2d at 362.)

B. Next, respondents summarily assert—without authority—that the Tenth Circuit's recent decision in *Cink* "cannot be part of any split" because it is unpublished. Opp. 7. But this Court does not simply turn a blind eye to unpublished decisions. To the contrary: "[T]he Court grants certiorari to review unpublished and summary decisions with some frequency." Stephen M. Shapiro et al., *Supreme Court Practice* 264 (10th ed. 2013) (citing examples). Even if unpublished, *Cink* is part of the division of authority over § 630(b)'s meaning. *Id.* (unpublished decisions can "signal[] a persistent conflict" among circuits). And it directly disproves respondents' assertion that "[n]o court today would analyze" § 630(b) the way *Kelly* did. Opp. 10.

Moreover, even putting *Cink* aside, the circuit split remains real and deep. In applying the ADEA to small State political subdivisions, the Ninth Circuit squarely rejected the longstanding consensus of the Sixth, Seventh, and Eighth Circuits. That disagreement over the statute's scope warrants this Court's

review, even apart from the fact that the Tenth Circuit has now endorsed the majority position.

C. In a final bid to undermine the circuit split, respondents suggest that further percolation is warranted because "*no* court has yet considered, much less adopted," the petition's arguments regarding § 630(b)'s meaning. Opp. 7. In particular, respondents claim that petitioner "presented none of these arguments to the Ninth Circuit." *Id.* at 10. That is wrong. The petition argues that "[t]wo features of § 630" undercut the Ninth Circuit's expansive construction: the "agent" clause in the statute's second sentence, and the definition of "person" in the first sentence. Pet. 22, 25. The courts of appeals—including the Ninth Circuit—have had a full opportunity to consider the interpretive significance of both features.

First, the "agent" clause provides that an "employer" under the ADEA includes "any agent" of a "person" covered by § 630(b)'s first sentence. Every court of appeals to consider the issue—including the Ninth Circuit in a prior decision—has construed the "agent" clause merely to codify respondeat superior liability for "persons," without rendering agents independently liable under the statute. Pet. 23. That directly contradicts the Ninth Circuit's flawed interpretation of § 630(b) in this case, which requires the "agent" clause—along with the neighboring "political subdivisions" clause—to create a "distinct categor[y]" of liable employers. *Id.* at 22-25.

Petitioner raised this very issue below. Its answering brief explained that the "agent" clause merely "incorporate[s] respondeat superior liability

into the statute." Ans. Br. at 10, *Guido v. Mount Lemmon Fire Dist.,* No. 15-15030 (9th Cir. July 1, 2015), ECF No. 18. On that basis, the brief concluded that the "agent" clause is "related to the first sentence" of § 630(b), including its "twenty-employee threshold." *Id.* at 9. The brief then argued that the neighboring "political subdivisions" clause must be read in parallel with the "agent" clause, and therefore must also relate to the statute's first sentence. Any other approach, the brief explained, would be "illogical." *Id.* The Ninth Circuit therefore had ample opportunity to consider how the "agent" clause's limited scope shapes the meaning of § 630(b) as a whole.

The same is true for the term "person" in § 630(b)'s first sentence. A person is defined to include a broad range of entities, including "any organized groups of persons." 29 U.S.C. § 630(a). As the petition explains, that sweeping catch-all is best read to encompass State political subdivisions. Pet. 26-27. Accordingly, § 630(b)'s first sentence defines political subdivisions as employers if they (like other "persons") have twenty or more employees. It would thus be strangely redundant for § 630(b)'s *second* sentence to separately cover *all* political subdivisions—the Ninth Circuit's interpretation. *Id.* at 25-27. But it would be entirely coherent for that second sentence merely to *clarify* that political subdivisions are no longer categorically exempt from statutory coverage, as they were in earlier versions of the ADEA. *Id.*

Far from raising a novel argument, petitioner's reading of "person" is fundamental to the decisions of the Sixth, Seventh, Eighth, and Tenth Circuits. Those courts have concluded that the mention of political

subdivisions in § 630(b)'s second sentence does not offer "a separate definition of employer," but merely "make[s] it clear that states and their political subdivisions are to be included in the definition of 'employer'" offered in preceding clauses—a definition that centers on "persons." *Kelly*, 801 F.2d at 271. As the Tenth Circuit confirmed in *Cink*, that means the term "person" has been "specified, or judicially interpreted, to include political subdivisions." 635 F. App'x at 472 n.4.

The Ninth Circuit considered this issue too. It simply disagreed with its sister courts of appeals, holding instead that "political subdivisions are not defined as persons in § 630(a), thus explaining why they have to be included as separate definitions of employers in § 630(b)." Pet. App. 7a n.3. As respondents note, the Ninth Circuit separately suggested that the parties "agree[d] … that the term 'person' does not include a political subdivision of a State." Pet. App. 5a; *see* Opp. 18. But that was incorrect: Far from conceding the point, petitioner urged the Ninth Circuit to adopt the competing reasoning of *Cink* and related decisions. *See* Suppl. Br., *Guido v. Mount Lemmon Fire Dist.,* No. 15-15030 (9th Cir. Dec. 5, 2016), ECF No. 34.

In sum, respondents' attacks on the circuit split are unavailing. The division of authority regarding § 630(b)'s meaning is acknowledged and entrenched. And the petition raises arguments previously presented to, and considered by, the courts of appeals—including in this case.

II. The Ninth Circuit's Interpretation Of The ADEA Is Incorrect.

Respondents fare no better on the merits. They fail to reconcile the Ninth Circuit's unprecedented interpretation of § 630(b) with either the "agent" clause or the definition of "person"—the two textual features that the decision below seriously misapprehends. Pet. 22-30.

A. To begin with, respondents do not dispute that the "agent" clause merely codifies respondeat superior liability for any "person" covered by § 630(b)'s first sentence, without rendering agents independently liable. Opp. 17. Respondents also do not dispute that the Ninth Circuit's interpretation requires the "agent" clause to create a "distinct category of employer" liable under the statute. *Id.* That is a critical flaw in the court's analysis. The ADEA provides that every "employer" who violates the statute's prohibitions "shall be liable to the employee or employees affected" for backpay, damages, and equitable relief. Pet. 23 (quoting 29 U.S.C. § 216(b)). The "agent" clause does not define such an "employer." It merely provides an alternative mechanism for imposing liability on the "persons" already covered by § 630(b)'s first sentence. Pet. 23-25.

Respondents offer no explanation for this error in the Ninth Circuit's reasoning. They simply note that the "agent" clause permits suits against agents only in their "representative or official capacities." Opp. 17. But that is precisely the problem. Official-capacity suits "generally represent only another way of pleading an action against an entity of which an officer is

an agent." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). "Thus, … a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself." *Id.* at 166. That means there is no new type of liable employer under § 630(b)'s "agent" clause—directly contrary to the Ninth Circuit's reading.[1]

B. Separately, respondents agree that the statutory definition of "person" encompasses "any organized groups of persons"—an ambiguously circular phrase that uses the very word ("person") it purports to define. Pet. 26. Respondents also never dispute that prior versions of § 630(b) used "person" to encompass State political subdivisions. Pet. 27. In light of those textual considerations, "person" must be read to include political subdivisions. *Id.* Thus, contrary to the Ninth Circuit's construction, § 630(b)'s first sentence—which provides that certain "persons" qualify as employers—already defines the scope of liability for State political subdivisions. Pet. 25-27.

Respondents attempt to contest this conclusion by distorting the interpretive canon that "[t]he specific governs the general." Opp. 19. They first note that political subdivisions are "specifically" mentioned in § 630(b)'s second sentence. On that basis alone, respondents contend that political subdivisions cannot be "encompassed" by the more general term "person"

[1] Respondents mistakenly suggest that petitioner's reading of § 630(b) requires agents to have twenty or more employees. Opp. 18. In fact, petitioner reads the "agent" clause to cover agents of any size serving a "person," including a State political subdivision, with twenty or more employees.

in the statute's first sentence. But specific clauses govern general ones only when giving full effect to both would create a "contradiction" or "superfluity." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). As the petition explains, there is no such tension here. Section 630(b)'s first sentence provides that any "person" with twenty or more employees is an employer under the ADEA. Section 630(b)'s second sentence then clarifies that State political subdivisions are subject to that type of liability—a critical change from the original statute. Pet. 27. The provisions operate as an integrated whole, without contradiction or superfluity.

Respondents also reiterate the Ninth Circuit's mistaken view that because Congress used different language when it amended Title VII in 1972 and the ADEA in 1974, only one of those statutes—Title VII—can be read to impose an employee threshold on State political subdivisions. Opp. 16. As the petition explains, there is no such interpretive rule. The statutes were differently worded to begin with; thus, when Congress amended them, it was not required to harmonize their language in order to accomplish similar legislative ends. Pet. 34-36.

By overlooking these critical features of § 630(b)'s text, the Ninth Circuit failed to interpret the statute's words "in their context and with a view to their place in the overall statutory scheme." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016); *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012). When the ADEA is instead construed holistically, as this Court requires, it covers State political subdivisions only if they have twenty or more employees.

III. The Question Presented Is Important.

Respondents maintain that even if the circuit split is clear—and even if the Ninth Circuit is wrong—the dispute over § 630(b)'s meaning is not "significant enough to merit review." Opp. 11. Respondents do not dispute that the split has created competing federal age discrimination regimes: one that permits States to judge how best to regulate their small political subdivisions, and another that displaces those sensitive State judgments in favor of a one-size-fits-all federal policy. Pet. 19-20. In an effort to minimize that fundamental rift, respondents suggest that there is no practical difference between the two regimes. Again, their arguments are unpersuasive.

A. Respondents first contend that inter-circuit differences in the ADEA's scope lack "any real import" because state age discrimination laws "typically forbid all political subdivisions—regardless of size—from discriminating against employees on the basis of age." Opp. 11. Thus, in respondents' view, small political subdivisions already face the type of liability that the ADEA would impose—and the Ninth Circuit's expansion of ADEA coverage will have negligible practical effect.

In fact, however, the Ninth Circuit's expansion of the ADEA has imposed substantial new burdens on small political subdivisions in *the majority* of affected States. Two out of nine States in the Ninth Circuit exempt small political subdivisions from their age discrimination laws. *See* Ariz.Rev.Stat. Ann. §§ 41-1461(6), 41-1463(B); Nev.Rev.Stat. §§ 613.310,

613.330(1). In those States, small political subdivisions are now subject to age discrimination liability for the first time. Further, at least three additional States prohibit or significantly limit non-compensatory damages for age discrimination. *See* Cal. Gov't Code § 818 (exempting public entities from punitive damages); *Dailey v. N. Coast Life Ins. Co.*, 919 P.2d 589, 590 (Wash. 1996) (en banc) (prohibiting punitive damages under state employment discrimination statute); Idaho Code § 67-5908(3)(e) (capping punitive damages at $1,000 per willful violation). In those States, expanded ADEA coverage adds a new potential liability: non-compensatory "liquidated damages" as high as the backpay award in cases of willful discrimination. 29 U.S.C. § 626(b); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125-26 (1985).

B. Perhaps recognizing as much, respondents suggest that the additional costs imposed by ADEA liability will have no meaningful impact on small State political subdivisions because they "participate in insurance pools." Opp. 13. But insurance does not make new legal expenses disappear; it simply packages them as premiums. A spike in such premiums would impose exactly the type of financial burden that might compel small political subdivisions with limited budgets to cut services. Indeed, the very publication cited by respondents warns that as "[b]udgets continue to tighten," public entities "are asking for premium reductions"—even as a "[l]itigious environment" increases the "cost of handling claims." Karen Nixon, *Public Entity Pooling—Built to Last* 9 (Dec. 16, 2011), https://tinyurl.com/8ahkpl8.

C. Finally, respondents suggest that the ADEA's employee threshold will "often be immaterial"—and thus seldom litigated—because plaintiffs can usually hold "related" or "integrated" entities liable for the employment practices of small State political subdivisions. Opp. 14. That is unfounded conjecture. Special districts like Mount Lemmon operate with independent budgets under the governance of a dedicated board. Pet. 6-7; Ariz.Rev.Stat. Ann. § 48-803. No larger or coordinate entity plays a significant role in their administration. Not surprisingly, respondents cite no case in which another entity has been held liable for a special district's conduct—even though there were *38,266* special districts nationwide as of 2012. Pet. 7.

Respondents also suggest that small political subdivisions are too leanly staffed to "generate many ADEA claims." Opp. 14. But with *thousands* of those entities in the Ninth Circuit alone, Pet. 20, ADEA claims are now sure to recur.

IV. This Case Is An Ideal Vehicle For Review.

This case presents an excellent vehicle to decide the meaning of § 630(b). The issue was comprehensively briefed before the Ninth Circuit, including by the EEOC as amicus curiae. Pet. 36-37. And the court's unprecedented interpretation of § 630(b)—which expressly split from the other courts of appeals—was the sole basis for its decision. Pet. 37.

Respondents argue that this Court's initial denial of certiorari in *Virginia Military Institute v. United*

States counsels against review. Opp. 22. There, however, this Court sensibly declined to consider an issue—the appropriate remedy for VMI's unconstitutional admissions policy—that the lower courts had not yet decided. *See Va. Military Inst. v. United States*, 508 U.S. 946 (1993). Here, in contrast, the Ninth Circuit has conclusively resolved the meaning of § 630(b), and there will be no further proceedings on the issue. The question presented is thus ripe for this Court's review.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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