

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MCLANE COMPANY, INC., :

4 Petitioner : No. 15-1248

5 v. :

6 EQUAL EMPLOYMENT OPPORTUNITY :

7 COMMISSION, :

8 Respondent. :

9 - - - - - x

10 Washington, D.C.

11 Tuesday, February 21, 2017

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 11:07 a.m.

16 APPEARANCES:

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18 Petitioner.

19 RACHEL P. KOVNER, ESQ., Assistant to the Solicitor
20 General, Department of Justice, Washington, D.C.;;
21 on behalf of the Respondent.

22 STEPHEN B. KINNAIRD, ESQ., Washington, D.C.; for
23 Court-appointed amicus curiae defending the
24 judgment below.

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P R O C E E D I N G S

(11:07 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next this morning in Case No. 15-1248, McLane Company v. the -- excuse me -- EEOC.

Ms. Ho.

ORAL ARGUMENT OF ALLYSON N. HO
ON BEHALF OF THE PETITIONER

MS. HO: Mr. Chief Justice, and may it please the Court:

The language and structure of the statutory scheme, the tradition of appellate review, and the sound administration of justice all counsel in favor of reviewing EEOC's subpoena enforcement decisions for abuse of discretion.

First, under the statutory scheme, the EEOC's investigative authority is not plenary, like other agencies, but is cabined by the statutory limit of relevance to the charge under investigation, as this Court said in *Shell Oil*.

Because this inquiry is extraordinarily contextualized, the district court's fact-intensive determination should be reviewed under a unitary abuse-of-discretion standard, as this Court has held.

Second, the tradition of deferential

1 appellate review is robust, not only for administrative
2 subpoenas, but also for close analogs, such as search
3 warrants and grand jury subpoenas.

4 Third, the district court is the judicial
5 actor best positioned to decide the issue for any number
6 of reasons that this Court articulated in *Pierce* and is
7 applied in subsequent cases. The fact-intensive and
8 context-sensitive --

9 JUSTICE GINSBURG: *Pierce* you --

10 MS. HO: -- natures.

11 JUSTICE GINSBURG: *Pierce* you mentioned.
12 Rule 11 is another. A district -- a proceeding is going
13 on in the district court. The district court judge is
14 intimately familiar with -- with the case.

15 But a subpoena enforcement is different. It
16 comes to the district court cold. He knows nothing
17 about the case. He's not, as he -- in *Pierce* and in
18 Rule 11, thoroughly familiar with the parties and the
19 controversy. It just -- it's an application to enforce
20 a subpoena.

21 MS. HO: I think, your Honor, in -- I think
22 this case shows that an action to enforce a subpoena is
23 more like those. And this Court in *Highmark* talked
24 about the district court living with a case.

25 In -- in our case, the district court had

1 experience, not only with the parties in the context of
2 the subpoena at issue, but also with a parallel
3 proceeding that the agency brought under the ADEA, and
4 had experience in that. So I think this case shows that
5 there are instances where the district court does live
6 with a case longer.

7 But even if that were not so, Justice
8 Ginsburg, I think the other factors in *Pierce*, and *Koon*,
9 and *Cooter & Gell*, and the other cases that this Court
10 has articulated and given, put meat on the -- on the
11 *Pierce* factors.

12 I think perhaps the most important is the
13 fact-sensitive, context-sensitive nature which I think
14 is very much like the other inquiries that -- that Your
15 Honor --

16 JUSTICE GINSBURG: But why -- why was the
17 way with a fact sensitive, fleeting facts, multifarious
18 facts, according to Judge Watford, the pivotal issue is
19 a legal one; that is, what does relevance mean within
20 the context of the EEOC's investigatory authority? He
21 treated that as a question of law. What -- what is the
22 scope of relevance?

23 MS. HO: Your Honor, I think the answer to
24 that question lies in what is, I think, critical here,
25 both with respect to the proper standard of -- of review

1 and the ultimate resolution. And that is, in this case,
2 relevance is determined not in the abstract, but in
3 relation to the charge under investigation.

4 So the district court in this circumstance,
5 just like district courts do when they are determining
6 relevance in the Federal rules context, is looking at
7 the language of the charge in the context of the facts
8 before the district court and the universe of the
9 investigation as a whole. And I think that's -- that's
10 likely why, Your Honor, every -- every court of appeals,
11 save the Ninth, has reviewed subpoena enforcement
12 decisions for abuse of -- of discretion, because there's
13 a close --

14 JUSTICE GINSBURG: But they would say, if
15 it's a question of law, if the district court got the
16 law wrong, that is ipso facto an abuse of discretion
17 because he has no discretion to misapply the law.

18 MS. HO: Absolutely, Your Honor. And I
19 believe that is one reason, perhaps the most important
20 reason, why this Court, I think most clearly in *Cooter &*
21 *Gell*, but also in *Koon* and other cases, embraced a
22 unitary standard of review for abuse of discretion,
23 because an abuse of discretion standard does allow a
24 reviewing court to correct errors of law and errors of
25 fact while still affording appropriate discretion to --

1 JUSTICE SOTOMAYOR: So --

2 MS. HO: -- the district court.

3 JUSTICE SOTOMAYOR: Can you clarify for me
4 exactly what's on appeal? There are essentially two
5 rulings by the district court, one on the pedigree
6 information sought -- the name, address, Social Security
7 number, et cetera, of the people who had taken the
8 strength test at issue -- and a second part, a
9 disclosure of the reasons for the termination of the
10 employees who had failed the test.

11 As I read the record below, the district
12 court did not give a reason for denying the second
13 request. And the court of appeals basically said, we
14 can't under any standard of review credit a non-reason
15 for denying something, so we reverse the district court
16 on that.

17 Are you challenging that particular ruling,
18 that reversal of that part of the request?

19 MS. HO: Well, what the -- what the Ninth
20 Circuit did -- and thank you for the opportunity for the
21 clarification -- is it -- it reversed and it actually
22 remanded for the district court to make that
23 determination in the first instance. And I think the --

24 JUSTICE SOTOMAYOR: So are you reversing
25 that? Are you -- are you appealing that part of the

1 remand?

2 MS. HO: No, Your Honor. Because we -- we
3 did not -- we did not advance an argument for
4 relevance -- or for irrelevance as -- as to -- as to
5 that. That was an undue burden -- an undue burden --

6 JUSTICE SOTOMAYOR: All right. So the only
7 thing that's at issue here is the district court's
8 failure to order the release of the pedigree, what I'm
9 calling the pedigree information.

10 MS. HO: That's correct. Because the Ninth
11 Circuit has already reversed and remanded at -- for the
12 district court to make a proper factfinding in the first
13 instance. And --

14 JUSTICE SOTOMAYOR: On the second question.

15 MS. HO: On the second.

16 And -- and our -- our position is that one
17 difference that an abuse of discretion standard makes is
18 that under an abuse of discretion standard, as opposed
19 to the de novo standard that the Ninth Circuit applied,
20 the proper course for a holding that the district court
21 did not apply the correct legal standard as the Ninth
22 Circuit held here. We disagree. But even if that
23 were -- that were the case, the proper resolution is to
24 reverse and remand for the district court to either
25 clarify what it did and explain, no, that wasn't what I

1 was -- I was doing, I did apply the proper standard, or
2 to apply the proper standard in the first -- in the
3 first instance.

4 JUSTICE GINSBURG: Why would you remand it
5 to the district court? Because if it went back to the
6 Ninth Circuit, the Ninth Circuit could very well say,
7 we -- we decided a question of law, the scope of what's
8 relevant. We had a footnote that says we -- we applied
9 de -- de novo review. That's our -- that's our
10 precedent.

11 But nothing in the rest of the opinion seems
12 to turn on that. It seems that the Ninth Circuit has
13 made a ruling of law. If you remand it to the Ninth
14 Circuit, they might -- I expect they would say, we made
15 a ruling of law. And whether it's abuse of discretion
16 is the same result because the district court made an
17 error of law.

18 MS. HO: They might say two things, Your
19 Honor, and we -- we don't know. In the footnote, I
20 think it's -- it's certainly not dispositive, but I
21 think it is telling that the Ninth Circuit did not go on
22 to say, well, we would have reached the same result
23 under either standard. But, again, under the de novo
24 standard that the Ninth Circuit applied, it was stepping
25 into the shoes of the district court and making a

1 determination of relevance in the first instance.

2 Our position is that even if -- under an
3 abuse of discretion standard, even if the Ninth Circuit
4 believed that the district court made an error of law,
5 the proper course under the Ninth Circuit's own
6 precedent would be to reverse and remand for the
7 district court to apply the proper legal standard in the
8 first instance.

9 JUSTICE BREYER: That, I -- I -- I'm -- I've
10 always been somewhat uncertain about that. You used the
11 word "relevance," but a fact is relevant if its
12 existence makes the conclusion more likely than if it
13 didn't exist.

14 Now, under that standard, I guess the EEOC
15 or any other agency could require any company, no matter
16 how big or how small, to turn over everything that it's
17 ever had because they might find something in there that
18 would make a discrimination or failure to pay taxes or
19 some other thing more likely than not. So we find that
20 language, and we also find language that say of course
21 they can't authorize a fishing expedition.

22 Well, what's the right standard? What
23 happens, for example, in the subpoena? What happens?
24 What is the standard?

25 MS. HO: Well --

1 JUSTICE BREYER: Anything? They can just go
2 into your house and -- I mean, you know, absent the
3 Fourth Amendment protection -- go to a business and say,
4 we want every document you've ever had. What stops
5 that?

6 MS. HO: This -- what stops that, I think,
7 are two features of the statutory scheme here. And the
8 first feature is that the standard of relevance is not
9 free-floating. It is relevant to the charge --

10 JUSTICE BREYER: Well --

11 MS. HO: -- under investigation --

12 JUSTICE BREYER: -- relevant to the charge
13 that a person has already brought. I mean, can the EEOC
14 say, you know, we have an idea there are companies in
15 the United States that are violating -- and there
16 could -- probably are -- they are violating various
17 antidiscrimination things. So what we want to do is
18 just go to every company in alphabetical order and
19 interview every employee. Can they do that?

20 MS. HO: No, Your Honor.

21 JUSTICE BREYER: Because?

22 MS. HO: Because -- and I think what Your --
23 what Your Honor is posing is a commissioner's -- is a
24 commissioner's charge.

25 JUSTICE BREYER: Yes.

1 MS. HO: And the -- the EEOC has its own
2 regulations which govern what must be in a
3 commissioner's charge. And that was actually at issue
4 in the seminal Shell Oil case that this Court decided
5 and interpreted.

6 JUSTICE BREYER: So there has to be enough
7 information --

8 MS. HO: So the language -- the language
9 that this Court used in Shell Oil --

10 JUSTICE BREYER: Well --

11 MS. HO: -- was relevant to the charge under
12 investigation and what "relevance" means in this
13 context. And I don't know that the language is -- is --
14 is much more clear, but it said that it tends to shed --
15 can reasonably be expected to shed light on the charge
16 under investigation.

17 JUSTICE BREYER: Where does that come from?

18 MS. HO: That comes from Shell Oil. And
19 that's the language that courts have -- have used.

20 JUSTICE BREYER: Reasonably expected to shed
21 light on the charge under investigation.

22 MS. HO: Yes, Your Honor.

23 JUSTICE BREYER: So the law is fairly clear
24 that when the EEOC asks for a piece of information, they
25 have to be able to meet that standard.

1 MS. HO: Yes, Your Honor. And it's the
2 EEOC's burden to meet that -- to meet that standard.
3 And, again, Your Honor, I think that line -- that line
4 of questioning demonstrates how contextualized the
5 inquiry is in this context.

6 JUSTICE ALITO: Could you briefly explain
7 what you understand to be the charge here, and why the
8 so-called pedigree information is not relevant to the
9 charge?

10 MS. HO: Certainly, Your Honor.

11 And the charge here, we don't think -- and
12 to use the language that I was using with Justice
13 Breyer, we don't think that anything the
14 evaluation-taker knows or has experienced in this case
15 can shed light on the charge under investigation for two
16 reasons.

17 First, the evaluation itself does not mimic
18 job duties. It was developed, administered, and scored
19 by third parties using computer modeling and Labor
20 Department job classifications.

21 And second -- and, again, I think this goes
22 to the very fact-specific nature of the examination --
23 this is an isokinetic evaluation. It's taken on a
24 machine, like an exercise machine, that measures
25 resistance, range of motion and speed, and it provides

1 resistance equal to the force that you generate. So --

2 JUSTICE GINSBURG: That may be so, but how
3 do you answer Judge Watford's simple point, that if
4 you're dealing with a test and in -- both men and women
5 have failed it, when you want to ask the test-taker what
6 happened after you -- you failed the test. Were you
7 kept on the job? And the same question to -- to -- put
8 that question to men and women. If it turns out that
9 the men who failed the test are sometimes kept on, but
10 all the women who failed the test are discharged, that
11 would certainly support the claim of gender-based
12 discrimination.

13 MS. HO: And, Your Honor, in this case,
14 McLane voluntarily provided all of the information with
15 respect to, at that time, the over 14,000 evaluation
16 takers.

17 JUSTICE GINSBURG: Except number one --

18 MS. HO: To the --

19 JUSTICE GINSBURG: So -- so there's no way
20 that the -- that the EEOC could contact these people and
21 ask the question that Judge Watford posed.

22 So you flunked the test, what happened to
23 you after?

24 MS. HO: Your Honor, the -- the information
25 did include gender and it also included the -- the --

1 the passing scores and the scores that did not meet the
2 requirement and whether any adverse employment action
3 took place with respect to that individual.

4 So to answer that question, Your Honor,
5 which we -- we don't disagree would be relevant, that
6 information has already been -- been provided to the
7 agency. So the only sort of remaining question on that,
8 and I think this is what -- what my friend from -- from
9 the government presses on, is well, we need to talk to
10 them to find out whether the test serves a legitimate
11 business purpose.

12 And I would share your --

13 JUSTICE SOTOMAYOR: I'm -- I'm sorry. I --
14 I thought I understood that you disclosed who took the
15 test, who failed it, and whether someone was later
16 terminated. But not the reason for the termination.

17 MS. HO: That's correct. And that -- that
18 is the term --

19 JUSTICE SOTOMAYOR: And so --

20 MS. HO: -- termination that is back --

21 JUSTICE SOTOMAYOR: So why isn't the reason
22 for termination relevant to the charge? If your
23 terminating keeps only women for failing the test, but
24 keeping men and maybe some terminating later for some
25 other reason, doesn't that show that there's a problem?

1 MS. HO: The -- Your Honor, we haven't
2 advanced a relevance argument with respect to the
3 reasons for termination. Our argument as to that is --
4 is -- is undue burden.

5 And if I may reserve the rest of my time?

6 JUSTICE SOTOMAYOR: Now, where do you --
7 I'll allow on rebuttal.

8 My question was where do you get the undue
9 burden? But you can answer on rebuttal.

10 MS. HO: Thank you, Your Honor.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 Ms. Kovner.

13 ORAL ARGUMENT OF RACHEL P. KOVNER

14 ON BEHALF OF THE RESPONDENT

15 MS. KOVNER: Mr. Chief Justice, and may it
16 please the Court:

17 Historical and functional considerations
18 strongly support an abuse of discretion standard of
19 review here. And with respect to the functional
20 considerations, if I could turn to Justice Ginsburg's
21 question about why district courts are better situated
22 to address this question even though it comes to them on
23 a largely documentary record, we think there are a
24 couple reasons.

25 The first is that this Court indicated in

1 Buford that when a district court just sees a lot more
2 of a fact-specific question, the district court is often
3 going to have more expertise in answering that question.

4 And this Court has also indicated that when
5 a determination is very case specific, the costs of
6 appellate review are unlikely to justify the benefits
7 of -- of -- are unlikely to justify the added time and
8 expense that appellate review takes because a decision
9 on case-specific facts is unlikely to yield substantial
10 benefits -- substantial guidance for future cases.

11 And we think those concerns are really
12 accentuated here under administrative subpoena
13 enforcement schemes, because a central purpose of those
14 schemes is to get a quick disposition so that the
15 investigation can move forward. And that's particularly
16 true under Title VII where this Court has repeatedly
17 emphasized in *Shell Oil* and in the *University of*
18 *Pennsylvania* case that delay frustrates the objectives
19 in the statute.

20 JUSTICE KAGAN: But, Ms. Kovner, here the
21 question whether to enforce the subpoena is the whole
22 ball of wax, right? This is an action to enforce the
23 subpoena. So that question is the end-all and be-all of
24 the case.

25 Are there any other contexts in which we use

1 an abuse of discretion standard for not a subsidiary or
2 an ancillary finding or, you know, a partial finding,
3 but for the finding that decides the case?

4 MS. KOVNER: Yes, there are. I mean, so we
5 think the most analogous context to the administer of
6 subpoena contexts is other subpoena contexts. There
7 you're deciding the whole ball of wax, but the decision
8 of the district court has reviewed for abuse of
9 discretion.

10 So, example, this Court's decision in Nixon
11 says trial subpoenas -- pretrial subpoenas under Rule 17
12 for information duces tecum, that's reviewed abuse --
13 for abuse of discretion. Grand jury subpoenas, courts
14 of appeals, you know, formally review for abuse of
15 discretion.

16 With respect to other types of
17 determinations, under the Fourth Amendment consent
18 decisions, whether somebody consented to a search is
19 going to be dispositive, but that's reviewed
20 deferentially for clear error.

21 With respect to abuse of discretion, courts
22 of appeals apply abuse of discretion to, as Petitioner
23 points out, venue decisions, going to be dispositive of
24 the case if there's not venue. So there are a number of
25 decisions that decide the case, but they're reviewed for

1 abuse of discretion.

2 As Justice Ginsburg observes, it's true that
3 legal questions may come up and may be what the actual
4 dispute is about in a subpoena enforcement case, but
5 even under an abuse of discretion standard, that piece
6 of the inquiry is going to be reviewed.

7 JUSTICE SOTOMAYOR: Could you please tell
8 me -- walk me through exactly what you think, the
9 government thinks, is what the court, district court is
10 doing when it makes a decision to enforce a subpoena?
11 What are the legal steps? What are the factual steps?
12 I'm not quite sure. And -- and then embodied in that is
13 your -- Petitioner says there's an undue burden part of
14 this test as well. I don't know where that comes from
15 because it certainly doesn't come from Morton Salt or
16 Shell Oil.

17 So you tell me what you think is at issue.

18 MS. KOVNER: Yes, Your Honor. We think
19 there are five questions that the Court is answering
20 when it decides --

21 JUSTICE SOTOMAYOR: And -- and tell me where
22 you're getting that from. I mean your standard. Okay?

23 MS. KOVNER: Yes. So four pieces of it come
24 from Shell Oil, and they are that the charge is valid,
25 that the information that's being sought is relevant to

1 the charge, that the subpoena is not too indefinite, and
2 that there's no improper purpose.

3 Now, the Court in Shell Oil didn't mention
4 this unduly burdensome piece of the inquiry, but the
5 Court relied on the Morton Salt standard, and Morton
6 Salt suggests that that unduly burdensome inquiry
7 exists. So courts of appeals have uniformly said
8 there's an unduly burdensome overlay on that as well.
9 So they are the five pieces.

10 We think that all five of them involve the
11 application of law to particular facts. They involve
12 case-specific determinations that involve looking at a
13 particular charge, a particular subpoena, considering
14 the relationship between those things, and then
15 considering any submissions of that burden that a
16 company makes. So we think these are all the kind of
17 case-specific determinations that are particularly
18 well-suited to district courts.

19 If I could turn to the second piece of the
20 case. The Court certainly has discretion to just
21 address the standard of review question and then remand.
22 But we think it's entirely appropriate here to simply
23 affirm the decision of the court of appeals, because we
24 think this is a relatively straightforward relevance
25 question where the district court just made a legal

1 error in not applying the test that Justice Breyer is a
2 question of could this information shed light on the
3 charge, but instead demanding more. Demanding that
4 essentially there be a necessity for the information and
5 that's just not the right legal test.

6 As the court of appeals indicated --

7 JUSTICE GINSBURG: Could you explain to us
8 your view of how -- how this information, the names of
9 the test-takers, would shed -- shed light on the -- the
10 charge?

11 MS. KOVNER: Yes. So we think there are
12 two -- two ways. The first has to do with disparate
13 impact, and the second has to do with disparate
14 treatment. May I take the second one first?

15 As -- as Your Honor observed, as Judge
16 Watford said, in order to figure out whether disparate
17 treatment occurred here, you need to talk to test-takers
18 and see whether male and female test-takers were treated
19 the same.

20 And if I could just clarify why the existing
21 record doesn't shed light on that. You can see at
22 page 33A of the petition appendix, what the district
23 court ordered to be turned over, and it's whether an
24 adverse employment action was taken within 60 days.

25 Well, what we don't have is, was that action

1 termination, which is the action that occurred here, and
2 what was the reasons for the termination, and the
3 company's -- there's obviously litigation ongoing, but
4 the company says that turning that over would be an
5 undue burden. So in order to figure out what happened
6 with these applicants, we really do need to talk to the
7 applicants and the test-takers.

8 JUSTICE BREYER: Why? That's the part I
9 don't understand. I mean, it's -- there's a woman who
10 says, I took a test, physical, and I failed it. Period.
11 And she was terminated. She doesn't say that they are
12 treating women more harshly. She doesn't say that this
13 isn't a qualified reason.

14 MS. KOVNER: Well, she's --

15 JUSTICE BREYER: Saying so -- you could have
16 that every day of the week. People are terminated for
17 failing tests, and they can come in and complain. Now
18 at that point, the agency doesn't just say, let's find
19 some samples, let's do a little sampling here and see
20 how this is being applied. Let's go invite -- let's
21 interview a few people at random and see what these
22 tests are about. Rather, they say we want to talk to
23 every single employee in the company.

24 I mean, hey. What's the basis for that on
25 the basis of that information? Why isn't that an undue

1 burden?

2 MS. KOVNER: Well --

3 JUSTICE BREYER: Yeah.

4 MS. KOVNER: So I think there are two
5 pieces; one is, is it relevant, and the second is, is it
6 an undue burden.

7 With respect to whether it's relevant, I
8 think if you look at page 39 of our brief, this Court
9 has said time and again --

10 JUSTICE BREYER: Of course it's always
11 relevant when anyone complains about anything to go and
12 see if really there's something suspicious going on by
13 interviewing every single employee, even if there are
14 500,000 employees. You can't say that an answer might
15 not make it more likely. That's why I was looking at
16 undue burden.

17 And I would think maybe you have to do
18 something before you would decide to spend -- require
19 the company to spend millions of dollars to get every
20 single employee on tape or something. I mean, something
21 more than that. That -- that's what I want to know.
22 How does -- what about that?

23 MS. KOVNER: That's right. So I think
24 whenever the information is relevant, and I think, as
25 your Honor alludes to, it's clearly relevant to

1 interview other employees and see if this policy is
2 being administered the same. The overlay that Congress
3 created is that overlay of is it burdensome to the
4 company to give you that information. And here, I think
5 it's pretty clear why Petitioner abandoned the argument
6 that it's an undue burden to produce the pedigree
7 information. The names and the Social Security numbers
8 of these individuals were already in the records that
9 the company had of the tests. The company stripped out
10 that information. It went to added burden to not
11 provide us with the information to identify these people
12 by name and Social Security numbers.

13 Additional information like addresses was
14 also already in company databases with respect to all
15 the people who were employed by the company. So --

16 CHIEF JUSTICE ROBERTS: As you say, Counsel,
17 there is a bit of tension between your position that
18 abuse-of-discretion is the appropriate standard because
19 the district court is more familiar with the proceedings
20 and all that, and that we should make a ruling on
21 whether there was an abuse of discretion as a matter of
22 law without any intervening review.

23 MS. KOVNER: Well, we think that in the
24 narrow class of cases where the decision rested on an
25 actual legal error, and where it's clear what the

1 appropriate relevance determination is, it's
2 appropriate, then, for a court of appeals, or in this
3 case, this Court --

4 CHIEF JUSTICE ROBERTS: Well, relevance
5 determination is something that is pretty
6 fact-intensive.

7 MS. KOVNER: That -- that's right. But we
8 think that this is actually a relatively clear case for
9 the reasons that the court of appeals set out. We're
10 seeking the basic --

11 JUSTICE BREYER: It was -- I'm left at the
12 moment -- I'll go back and read it. I just don't know.
13 It's simply when I read this, it struck me as I haven't
14 seen something like this where all that happened was
15 somebody come -- came in in one place and says, I took a
16 test and failed it, and then they start to interview
17 everybody in the whole company. I mean, that --
18 hundreds, thousands. I mean, something struck me as odd
19 about that.

20 So when the district judge then said this is
21 an undue burden or they can't do it, they have to have
22 more than this, I was reluctant to say this is an abuse
23 of discretion, even though he thinks, you know, it's the
24 right thing to do. I mean, that's what judges are there
25 for in the district courts.

1 MS. KOVNER: So -- so with respect to the
2 geographic scope, Your Honor, I think it's really
3 important that we didn't initially seek this information
4 with respect to the entire company. We sought
5 information that was limited to information about the
6 test that was complained about at the particular
7 facility in question, in Goodyear, Arizona, where this
8 person was employed.

9 It's only when the company came in and said
10 our defense here, our explanation is we have a
11 nationwide policy, and we are using this test in all of
12 our facilities that we sought information in a broader
13 geographic scope.

14 And if we could just touch on one other
15 reason why this information is relevant. It's with
16 respect to a disparate impact theory. The crucial
17 question under a disparate impact theory in this case is
18 likely to be is this practice justified by business
19 necessity. And in order to know that, you have to know
20 whether this strength test, which seems to be exerting a
21 substantial disparate impact on male and female
22 employees, is actually representing the skills that you
23 need in order to -- to perform these jobs. Because if
24 this is a strength test that doesn't correlate to the
25 work that you have to perform as an employee, then it's

1 not justified by business necessity. And interviewing
2 people who actually do this job is a way to determine
3 that.

4 JUSTICE KAGAN: Could you say a little bit,
5 Ms. Kovner, about how it is that you're persuaded that
6 this Court did make a legal determination that was
7 affecting its judgment, as opposed to maybe using some
8 careless words, but was really making a relevancy
9 determination?

10 MS. KOVNER: Yes, your Honor. So I think
11 the key portion of the district court's opinion is on
12 page 29 to 30 of the petition appendix. And what the
13 court says is, I'm not persuaded that this is relevant.
14 And the reason why I'm not persuaded this is relevant is
15 because there's an additional step that the agency could
16 take to investigate whether this charge of
17 discriminatory first, and that's to conduct a
18 statistical analysis and use statistical information to
19 shed light on the charge. So we think that's just an
20 incorrect understanding of relevance. It's a necessity
21 test. And this Court has pretty clearly rejected the
22 necessity test. It's not the test in Shell Oil. It's a
23 test that this Court rejected in University of
24 Pennsylvania, where the petitioner there was looking for
25 a much narrower necessity test, and the Court said

1 that's not just what the statute authorizes.

2 If there are no further questions. Thank
3 you.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Mr. Kinnaird.

6 ORAL ARGUMENT OF STEPHEN B. KINNAIRD
7 FOR COURT-APPOINTED AMICUS CURIAE
8 DEFENDING THE JUDGMENT BELOW

9 MR. KINNAIRD: Mr. Chief Justice, and may it
10 please the Court:

11 There can be no abuse-of-discretion review
12 if the district court has no discretion. Congress
13 vested the EEOC, not the district court, with the
14 discretion to determine if particular relevance --
15 particular evidence is relevant to the charge. That
16 discretion cannot reside in two places.

17 The D.C. circuit said it best: Where
18 deference is owed to the agency, including in the
19 application of law to fact, it is, quote, "analytically
20 impossible," unquote, for the court of appeals to defer
21 to the district court if the district court disagrees
22 with the agency.

23 That case is -- that's not in our brief. I
24 did supply the parties with a copy. It's *Novicki v.*
25 *Cook*, 946 F.2d 938 1991.

1 And why is the party's double-discretion
2 theory analytically impossible? So the government says
3 with regard to relevance, that the district court must
4 enforce the subpoena unless the EEOC is obviously wrong,
5 and the court of appeals must uphold that determination
6 absent an abuse of discretion, i.e., the district court
7 must be obviously wrong in holding that the EEOC is or
8 is not obviously wrong.

9 That framework is not only illogical, it's
10 unworkable. If the district court disagrees with the
11 EEOC, and the court of appeals must defer to the
12 district court's putative discretion, than the court of
13 appeals denies the EEOC the full measure of its
14 discretion.

15 Conversely, if the district court upholds
16 the subpoena, then the court of appeals gives excessive
17 deference to the EEOC. It cannot reverse simply because
18 the EEOC is obviously wrong. It's only if both the EEOC
19 and the -- and the district court are obviously wrong.

20 Congress did not adopt that scheme.
21 Instead, Congress prescribed the standard that denies
22 discretion to the district court. Section 6 of the APA
23 provides that the district court shall sustain an agency
24 subpoena if it is in accordance with law. That is
25 typical judicial review where the courts, district and

1 appellate, police the lines in which the agency must
2 operate.

3 JUSTICE KENNEDY: I'll -- I'll look up the
4 cases, but in an evidentiary case, civil case or a
5 criminal case, the question of relevance, I suppose at
6 the end of the day, relevance is a legal matter. But
7 don't we give substantial deference to the trial court
8 in order to administer the trial in an orderly way? And
9 so don't we give substantial deference to their
10 relevance ruling? And how is that applicable here or
11 inapplicable?

12 MR. KINNAIRD: It's applicable, and it
13 supports my position about double discretion.

14 Relevance is a judgment about the
15 relationship of certain evidence to a claim. And
16 because it's a judgment of relationship, there always
17 is, in the primary decision maker, some discretionary
18 judgment about how to apply the legal -- the legal
19 standard. In discovery and trial evidence, that primary
20 decision maker is the trial court, and therefore, its
21 determinations of relevance are -- are reviewed for
22 abuse of discretion.

23 In this context, the primary decision maker,
24 the one with discretion, is the EEOC. And so it is its
25 discretion that is reviewed simply for whether or not it

1 has crossed the legal lines. A district court does not
2 have discretion to tell an independent branch of
3 government conducting an investigation, you can't have
4 that evidence. It can simply refuse to enforce in a
5 legal subpoena.

6 And -- and two-stage review under the APA --

7 CHIEF JUSTICE ROBERTS: I'm sorry. Why
8 isn't that telling them they can't have that evidence?

9 MR. KINNAIRD: It's telling them because
10 they're drawing the legal line and saying, you can't
11 cross that line. That's different from exercising
12 discretion about whether evidence is relevant. That
13 discretion belongs wholly to the EEOC.

14 CHIEF JUSTICE ROBERTS: Well, if the line
15 depends on relevance, it's exactly the same thing: It's
16 telling them whether it's relevant or not.

17 MR. KINNAIRD: Well, that's why the courts
18 have adopted a standard of "obviously wrong."
19 "Obviously wrong" is not a discretionary determination.
20 So the district court really has no discretion. And in
21 two-stage review under the APA, it is always the case
22 that the district court and the appellate courts apply
23 the same standard of review to agency action, whether
24 deferential or not.

25 But here, under the in-accordance-with-law

1 theory, that means this is illegal or not, that should
2 be the same standard applied in the district court and
3 in the -- in the court of appeals. It's a legal line, a
4 legal determination. And nothing in Title VII departs
5 from that.

6 Now, the parties have said that this is a
7 factual determination, fact-intensive determination of
8 relevance. It is not. The EEOC has submitted here no
9 declarations on relevance. It was all attorney argument
10 in a motion. And the reason is that relevance is a
11 conceptual -- especially in the agency subpoena
12 context -- is a conceptual determination of the
13 relationship to the charge of a category of evidence of
14 unknown content. And so it is not making a factual
15 determination from evidence; it's a legal theory of the
16 potential value of the evidence to the EEOC.

17 JUSTICE ALITO: What about the nature of the
18 charge, the contours of the charge? Isn't that factual?

19 MR. KINNAIRD: No, that's legal. I think
20 that it's --

21 JUSTICE ALITO: Contours of the charge in a
22 particular case is a legal question?

23 MR. KINNAIRD: Absolutely. You cannot look
24 at extrinsic evidence. It's just analyzing the text of
25 the charge. And I think that courts are fairly

1 consistent on that.

2 CHIEF JUSTICE ROBERTS: What about the
3 burden on the other party? It would seem to me that the
4 district court would have a considerable degree of
5 familiarity with the nature of the -- the defendant's
6 operations, how burdensome it is in light of what
7 they've produced so far.

8 MR. KINNAIRD: And that's an analytically
9 separate inquiry. That's a Fourth Amendment inquiry.
10 Justice Sotomayor, earlier you asked, and we quote --
11 it's the Donovan case says that the undue burden is part
12 of the Fourth Amendment requirement --

13 JUSTICE BREYER: I think she said Morton
14 Salt and --

15 MR. KINNAIRD: Morton Salt is --

16 JUSTICE BREYER: Yeah. And I -- it doesn't
17 have to be constitutional, I -- I would think. Let's --
18 regardless, I think that's something of a red herring.
19 I don't think an agency, even if it's constitutional,
20 can impose undue burdens. I can't imagine law to the
21 contrary.

22 MR. KINNAIRD: Well --

23 JUSTICE BREYER: So isn't that -- what about
24 the question was asked?

25 MR. KINNAIRD: Well, respectfully, Your

1 Honor, I think that's not true.

2 JUSTICE BREYER: Oh, okay. Is the answer
3 just, well, that's constitutional; therefore, it doesn't
4 count, or whatever?

5 MR. KINNAIRD: Well --

6 JUSTICE BREYER: The other --

7 MR. KINNAIRD: Well, it's constitutional,
8 and constitutional should be de novo. But my -- my
9 point is that Congress has said the EEOC shall have
10 access to this evidence on two conditions, neither of
11 which have anything to do with burden.

12 JUSTICE BREYER: All right. So in other
13 words, in your view, the law is that the -- an agency,
14 when somebody complains about anything, can go and ask
15 if that's anywhere in the agency -- anywhere in the
16 company and ask every single employee and require them
17 to spend millions of dollars because, after all, it is
18 relevant. Is that the -- your --

19 MR. KINNAIRD: No, there's a Fourth
20 Amendment limitation on that, Your Honor.

21 JUSTICE BREYER: Fourth Amendment, let's --
22 let's take -- I mean, there's some places don't --
23 Fourth Amendment. And, therefore, the Court has to
24 review it.

25 MR. KINNAIRD: Well, that's right. And

1 Fourth Amendment determinations are de novo --

2 JUSTICE BREYER: I don't see how we'd do it,
3 frankly. I mean, you know, there are thousands of
4 district courts. They -- they hear these things at
5 length. We don't have the time to do all that. We're
6 looking at a cold record. They have the lawyers in
7 front of them. The lawyers can explain what went on in
8 the agency and they can take their time.

9 MR. KINNAIRD: Well --

10 JUSTICE BREYER: You, unfortunately for us,
11 because you wrote an excellent brief, only have about
12 20 -- 20 minutes or so.

13 (Laughter.)

14 JUSTICE BREYER: So -- so do you see the
15 difference?

16 MR. KINNAIRD: Well, to be clear, Your
17 Honor, the fact question of what the burden is, is
18 reviewed for clear error, just like in the Ornelas
19 historical fact questions. And by the way, that's
20 minimal proof. It's just the cost in terms of staff or
21 resources to produce the information and what's the
22 effect on operations or finances of the company.

23 My point there is that the Court will take
24 the finding as given for clear error. The -- the
25 constitutional rule is, is this excessive? Is it

1 constitutionally excessive relevant to the public
2 purpose? And like all constitutional excessiveness
3 determinations, under Bajakajian or Cooper Industries,
4 that's de novo.

5 The other element of the Fourth Amendment
6 claim in proper purpose, this Court said in Clark,
7 that's a question of law. And then specificity of the
8 subpoena, that's a question of law. There is no
9 constitutional issue decided here, but relevance has
10 been decided.

11 And I would only point out --

12 JUSTICE SOTOMAYOR: I'm sorry. I -- I --
13 under 401, which is a discovery rule, we review that for
14 relevance for abuse of discretion.

15 MR. KINNAIRD: Yes.

16 JUSTICE SOTOMAYOR: Why is that any
17 different here than it is under Rule 401?

18 MR. KINNAIRD: Because the -- the district
19 court is -- has the -- is the initial decision-maker in
20 determining relevance, because relevance is inherently a
21 discretionary judgment about the relationship of
22 evidence to a claim. There always will, be with the
23 primary decision-maker, discretion. It's the EEOC that
24 has that discretion here.

25 JUSTICE SOTOMAYOR: So if we take the -- so

1 you don't have a problem in saying that it's within the
2 discretion of the district court reviewing the EEOC --

3 MR. KINNAIRD: No.

4 JUSTICE SOTOMAYOR: -- to decide relevancy?

5 MR. KINNAIRD: No. I'm saying --

6 JUSTICE SOTOMAYOR: And -- and it's only the
7 court of appeals, then, who has to review it as a matter
8 of law? I'm a little --

9 MR. KINNAIRD: No, I'm sorry.

10 JUSTICE SOTOMAYOR: I'm a little --

11 MR. KINNAIRD: I'm sorry that I wasn't
12 clear. The -- the EEOC makes the initial determination
13 of whether particular evidence, such as pedigree
14 information, is relevant to a charge. They're the ones
15 that make that discretionary determination. When it --
16 but the discretion can only reside in one place. And
17 when it comes up --

18 JUSTICE SOTOMAYOR: It doesn't under 401.
19 Under 401, it resides both in the district court and
20 in -- on the -- in the court of appeals as an
21 abuse-of-discretion standard of review.

22 MR. KINNAIRD: No. The court of appeals --
23 as I understand it, the district court has discretion,
24 will rule it relevant or not, and the court of appeals
25 will say, is that an abuse of discretion, right? And

1 it's notable here that Congress actually denied
2 abuse-of-discretion review to the district court. It
3 didn't use the Section 10(e) arbitrary and
4 capriciousness abuse of discretion or
5 in-accordance-with-law. It limited the district court's
6 inquiry for subpoena enforcement to whether it was in
7 accordance with law. And the legislative history is
8 quite clear that they did it so that they wouldn't
9 revisit the discretionary determinations of the district
10 court. You're only preventing illegal action.

11 And that's why in two-stage review, a
12 district court always applies the same standard as the
13 court of appeals in review of agency action.

14 JUSTICE KAGAN: But, Mr. Kinnaird, do you
15 think that your whole argument might be taking the words
16 "abuse of discretion" a bit too literally? In other
17 words, your idea is that you can never use that term
18 unless there is some discretion, some real choice.

19 MR. KINNAIRD: Right.

20 JUSTICE KAGAN: And, you know, it might be
21 that sometimes we use that term when that's not really
22 true, but what we just mean to say is that a certain
23 amount of deference should be given because the --
24 because we're at the right institution to make a -- to
25 make a particular kind of judgment.

1 MR. KINNAIRD: Right. Well, I think if
2 you're looking to institution -- first of all, I think
3 there has to be discretion to be abuse of discretion. I
4 think there has to be. But if you're looking just at a
5 functional analysis of, you know, how you draw the line
6 to cabin the -- the EEOC's discretion, there's no
7 institutional advantage. This appellate court can
8 construe the charge, construe the subpoena, and resolve
9 the legal claims of the potential value of unknown
10 evidence just as well as a district court. These are
11 simply not factual determinations.

12 Pedigree information is a perfect example of
13 that. And -- because there should be -- pedigree
14 information is basically saying it's relevant to be
15 interviewed, test taking if you're investigating --
16 excuse me, and interview test-takers if you're
17 investigating a charge of discriminatory testing. That
18 is not a determination that should vary from district
19 judge to district judge. There really is no
20 discretionary determination, and the APA forecloses it.

21 I would also point out there is real no
22 argument in terms of practical considerations about
23 inducing additional appeals by adopting de novo review.

24 First of all, as a practical matter, in the
25 last 25 years, our research discloses only 6 Ninth

1 Circuit EEOC subpoena enforcement decisions out of 37
2 total. So that's only 16 percent, less than its
3 normal -- normal 20 percent share of appeals. And one
4 would not expect otherwise. Standard review is not
5 going to deter an appeal. It's going to shift the
6 battleground, as it did here, from fights about whether
7 this is discretionary to whether it's an implied use
8 of -- of an erroneous legal concept, and the problem is,
9 is that because relevance is a question of law and not
10 one of discretion, for the appellate courts to be
11 inquiring into whether there was abuse of discretion
12 simply distorts appellate decision making.

13 This should be -- this is about vindicating
14 the congressional scheme for the balance of power
15 between agencies and courts, and courts police the legal
16 limits on agency action. That's something that
17 appellate courts are just as capable of doing and they
18 have to respect discretion, because if you recognize
19 discretion in the district court you ipso facto diminish
20 the discretion of the EEOC.

21 I'd also like to address one point on the
22 Fourth Amendment. Both parties say it's not *Ornelas*.
23 It's the *de novo* review that applies, but rather
24 *Illinois v. Gates*, where this Court held that courts
25 reviewing a magistrate's decision to issue a warrant

1 should review that decision deferentially.

2 Gates supports our position, and the reason
3 is that the analogue to the magistrate issuing the
4 subpoena is -- or issuing the warrant is the EEOC
5 issuing the subpoena. The district court reviews the
6 magistrate's decision deferentially, just as it reviews
7 the EEOC's decision deferentially.

8 But on appeal, the court of appeals applies
9 the same deferential Gates standard to the magistrate as
10 the district court, meaning that it engages in de novo
11 review of the district courts's decision.

12 So I am aware of no -- no support, either in
13 the Fourth Amendment, I don't -- or in administrative
14 law for this idea of double discretion or double
15 deference. This would be the first time that a district
16 court has been -- would be given deference over Fourth
17 Amendment considerations and where the -- the -- the
18 court of appeals is enjoined to give deference both to
19 the district court and the court of appeals. I think
20 that simply destroys appellate decision making, deprives
21 it of any coherence, and this Court should affirm the
22 district -- affirm the court of appeals.

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 Mr. Kinnaird.

1 Ms. Ho, you have three minutes remaining.

2 REBUTTAL ARGUMENT OF ALLYSON N. HO

3 ON BEHALF OF THE PETITIONER

4 MS. HO: Thank you, Mr. Chief Justice.

5 Let me make one point and then, Justice
6 Sotomayor, respond to your -- your questions.

7 I heard both my friend Mr. Kinnaird and --
8 and my friend from the government make very categorical
9 absolutist statements about a case -- about cases that
10 involve testing, and the cases that involve testing
11 pedigree information will always be relevant.

12 This is a case that shows that facts matter.
13 And we don't dispute that in a case where you have a
14 test that mimics job duties or involves subjectivity,
15 perhaps talking to people would shed light on the charge
16 under investigation.

17 But in this case, this evaluation that is at
18 issue, talking to people simply can't shed light on it
19 because it doesn't mimic job duties and everyone
20 experiences the test the same way, so I think that
21 underscores the importance --

22 JUSTICE GINSBURG: I don't -- I don't follow
23 that. I still -- going back to what Judge Watford said,
24 he said we don't know why these people were terminated.
25 Just the information given was maybe they were

1 terminated for a reason having nothing to do with
2 flunking the test.

3 But what the Ninth Circuit said is -- is --
4 must be responded to is, were the men and women who
5 flunk the test treated the same. And we can't know that
6 without talking to the people, finding out whether they
7 were discharged because of the test or for some other
8 reason.

9 MS. HO: Two responses to that, Your Honor.
10 But first, I think it's important to underscore that the
11 data that McLane voluntarily provided to the agency, the
12 data does disclose whether -- it discloses the -- the
13 gender, men or women, it discloses who passed or who
14 failed, and it also discloses whether any adverse
15 employment action was taken within 90 days. So the
16 agency --

17 JUSTICE GINSBURG: Yes, but adverse --
18 adverse employment action can cover a wide range. It
19 doesn't necessarily mean discharge.

20 MS. HO: And -- and, Your Honor, perhaps --
21 perhaps that is why the district court in our said -- in
22 our case did not -- did not -- said information
23 depending on what the data shows may -- may be relevant
24 depending on the facts that are uncovered.

25 The government's argument is not one based

1 on the facts that have been uncovered. It's been
2 seeking the pedigree information for the 14,000
3 individuals from -- from the very beginning.

4 JUSTICE SOTOMAYOR: I'm having a very hard
5 time with your answer. I've never heard of any test
6 that's given that's not in some way job-related. I mean
7 --

8 MS. HO: And I apologize for being --

9 JUSTICE SOTOMAYOR: You can -- you can
10 basically give a test that says is your hair true blonde
11 or not?

12 MS. HO: No -- no, Your Honor.

13 JUSTICE SOTOMAYOR: And even though it has
14 no relationship to the job, you can give that test and
15 fire people basically because they are not true blonds?

16 MS. HO: May I respond --

17 CHIEF JUSTICE ROBERTS: Sure.

18 MS. HO: Mr. Chief Justice?

19 No. That's not our position. And I think
20 the distinction we're drawing, we -- we absolutely
21 maintain that there is a business purpose. There's a
22 business necessity for the evaluation.

23 That is a separate question from how the
24 evaluation operates, and the evaluation here does not
25 mimic job duties, which in a line of cases courts have

1 had -- had concern with subjectivity in those cases, and
2 what have you.

3 This case -- this evaluation, it does
4 measure. We use it to measure the match between an
5 employee's physical capability and the physical demands
6 of the job. It's how that examination operates. It's
7 how the evaluation operates, the facts on the ground
8 that affects whether talking to people who have taken
9 the evaluation can say something that will shed light on
10 that question.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 MS. HO: Thank you.

13 CHIEF JUSTICE ROBERTS: Mr. Kinnaird, this
14 Court appointed you to brief and argue this case as an
15 amicus curiae in support of the judgment below. You
16 have ably discharged that responsibility for which we
17 are grateful.

18 The case is submitted.

19 (Whereupon, at 11:57 a.m., the case in the
20 above-entitled matter was submitted.)

21

22

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