SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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MOUNT LEMMON FIRE DISTRICT,)

Petitioner,)

v.) No. 17-587

JOHN GUIDO, ET AL.,)

Respondents.)

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Washington, D.C.

Monday, October 1, 2018

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:09 a.m.

APPEARANCES:

E. JOSHUA ROSENKRANZ, ESQ., New York, New York; on behalf of the Petitioner.

JEFFREY L. FISHER, ESQ., Stanford, California; on behalf of the Respondents.

JONATHAN C. BOND, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting Respondents.

C O N T E N T S

P R O C E E D I N G S

(11:09 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 17-587, the Mount Lemmon Fire District versus Guido.

Mr. Rosenkranz.

ORAL ARGUMENT OF E. JOSHUA ROSENKRANZ

ON BEHALF OF THE PETITIONER

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

The Ninth Circuit fixated on two words in a two-sentence definition of "employer." It ignored how the second sentence relates back to the first. It jumped right to the second half of the second sentence without considering the first half. And it ignored how all of this relates to the foundational definition on which the definition of "employer" is built.

Now, predictably, that wreaks havoc with the statutory scheme, most notably, by stripping public employees of crucial protections like respondeat superior, and also by treating public employers worse than private ones in a statute whose purpose was to bring parity to the two.

Now, as our brief explains, the best way to read the statute is from beginning to end, but let me just start right in the middle, as my colleagues do, with the -- with the phrase that is causing all this mischief, "also means."

Respondents do not dispute that that term can have two alternative meanings. It could mean in addition, there's an additional universe beyond that which is defined in the first sentence. Or it could mean further elaboration of the preceding definition, along the lines of "moreover" or "incorporates."

So how do we know which one is intended?

The rest of the context makes clear, and in particular, there are five separate statutory signals, any one of which pushes the reading in the direction that we've proposed, aided by two canons of construction and the interest in making sense out of anti-discrimination law. So let me start with --

JUSTICE GINSBURG: Mr. Rosenkranz, what you -- what you say about making sense,

perhaps Congress should have used the formulation that was used in Title VII, where it's clear, Title VII is absolutely clear, the numerosity requirement goes to private and public employers.

But this statute, ADEA, picks up on the language of the Fair Labor Standards Act, which has no numerosity requirement. So perhaps Congress should have done what you -- you suggest, but by -- by using the Fair Labor Standards Act language, rather than Title VII language, because they wanted to do what Title VII had done in 1972, they wanted to do that in 1974, why didn't they use the Title VII language?

MR. ROSENKRANZ: Well, Your Honor, let me start with the premise and then turn to the ultimate question. The premise of is -- of the -- the -- of Your Honor's question is that Congress used the definition from the FLSA.

I urge the Court to look at the definition in the FLSA. It is on the first page of the government's statutory appendix. It is entirely different from this definition.

Why did Congress use a different

approach from Title VII when everyone understood, at least everyone who was talking about it understood, that the purpose was to mimic what Title VII did?

I am attributing rationality to someone who was obviously not doing his job very well, but Title VII began with different language, pre-amendment, from the language in the ADEA. Title VII began with language that was not as expansive about the definition of person, so here we have an extremely expansive definition in ADEA, or "any organized groups of persons."

It is the most expansive definition this Court has ever seen of "person."

JUSTICE SOTOMAYOR: Expansive in only one -- expansive in only one way. That entire list up to the disputed "any organized group of persons" all apply to private entities.

MR. ROSENKRANZ: No, not at --

JUSTICE SOTOMAYOR: So set that at --

MR. ROSENKRANZ: -- all, Your Honor. No, Justice Sotomayor. Corporations -- this Court has held in at least five cases that "corporations" includes municipal corporations.

This language in every statute -- put aside those last four words, corporations and associations, every time this Court has encountered that phraseology, it has concluded that -- that political subdivisions are persons. It did it in Ricketts. It did it in City of Chattanooga. It did it even without a definition in cases like Monell and in the federal -- in the False Claims Act --

CHIEF JUSTICE ROBERTS: Well, but here it's not just persons; it's organized groups of persons, and it's in a list of things that is partnerships, associations, labor organizations, corporations, and organized groups of persons.

I just don't think it's a natural reading to say, what, I belong to the City of Bethesda. List organizations you belong to. Well, there's this -- this partnership, this, and Bethesda.

MR. ROSENKRANZ: Well, so two answers to that, Your Honor. First, even without that language, this Court has found that -- that -- striking that out, this Court has found that the definition before that language covers

political subdivisions. City of Lafayette, Chattanooga Foundry, and Ricketts all found that. But, Mount Lemmon Fire District is most certainly an organized group of persons, land owners under statute who get together to find a common cause and collect taxes around --

JUSTICE SOTOMAYOR: Counselor, even if it's true in those cases, what's different from those cases and this one is that the original statute made clear that that definition was not going to include states or federal government.

So given the sort of private nature of most of the listing and the fact that the statute on its face says it -- no matter what you do, it's not states or government, I would read it in its natural form, and I wouldn't include it unless I'm told to include it otherwise.

MR. ROSENKRANZ: Your Honor, I beg to differ with how the statute is structured. So we start with the definition of "person" in subsection (a). That is broad and expansive.

Subsection (b) then subtracts. It says it's not the federal government, oh, and, by the way, it's not states -- that is,

employer -- let me back up. Employer then says it's any person and, you know, 20 or more people, 20 or more employees, and then it goes on and subtracts the federal government and states and local governments.

It makes no sense to subtract them unless they were included initially in the --

JUSTICE SOTOMAYOR: No, it makes no sense to subtract them unless you never intended to include them.

MR. ROSENKRANZ: Your Honor, that's -- that is certainly not the way this Court has read it. It's certainly not the way Title VII does it.

JUSTICE SOTOMAYOR: You assume an ambiguity, that the statute can be read in two ways. You're not saying the way this court below read it was not permissible. You're just saying a better reading is your way, correct?

MR. ROSENKRANZ: That is correct, Your Honor, but let me put it a slightly different way. I'm not just assuming the other side has not disputed that there are two possible ways to read it. Our position is that when you take these five statutory clues, which I've only

just begun to get to, the -- the only reasonable reading is our reading.

So we've already talked about the "persons" one, but there's more. I would have started with the very first signal. We know that "also means" does not signify an additional category of covered employers because that's --

JUSTICE GORSUCH: Mr. Rosenkranz, if -- if we disagree with you about the meaning of "also," do you have any other argument available to you, or is that the end of the case? If we -- if we adopt the normal meaning of "also," meaning in addition to, do you lose?

MR. ROSENKRANZ: No, Your Honor, but -- but let me just make sure, first, this Court has routinely adopted statutory constructions that defy the best dictionary definition.

JUSTICE GORSUCH: That wasn't my question. My question is, if we take the best dictionary definition, "in addition to," the normal meaning, do you lose, or do you have some other available argument? I'd be delighted to hear it if you do.

MR. ROSENKRANZ: So I think we have

another argument, Your Honor. So "also means" means in addition, and so it adds agents, which I'll get to in a moment, is completely implausible. And then what does it do in the next clause?

JUSTICE GORSUCH: You use those words a lot. And your reply brief use -- uses -- accuses the other side of illusions, distortions, disastrous and preposterous results, contradictions and anomalies, pretty strong language, and also contortions. That's in the first page and a half of the reply brief.

And I didn't see, though, and I guess I expected to see, some sort of absurd results argument, perhaps, then if we're going to use that kind of language, but I didn't see any. So it made me a little concerned.

MR. ROSENKRANZ: Well, Your Honor, let me tell you what the absurd result is. So let's start with the "agent" clause.

The government's position is that "also means" necessarily adds a category not otherwise covered. If that is true, who are the classic agents? Employees are the classic

agents.

That means employees are now directly liable under the statute for any cause of action on discrimination. Now that --

JUSTICE GORSUCH: Well, but that's --

JUSTICE GINSBURG: How likely is it --

CHIEF JUSTICE ROBERTS: Well, but that's --

JUSTICE GINSBURG: -- that anyone would sue an employee rather than the employer? I mean, the -- the -- Sue an employee, doesn't have much in her pocket. Sue the employer, it -- it seems to me most unlikely that, even if you could --

MR. ROSENKRANZ: Your Honor, I -- I disagree with you. It has happened in every circuit under Title VII. Employees have been sued, sometimes along with the employer. And that would be disastrous.

I mean, first of all, supervisor liability could stretch into the millions of dollars.

JUSTICE GINSBURG: Is it disastrous -- you said under Title VII employees can be sued. Is it disastrous under Title VII?

MR. ROSENKRANZ: No, sorry, Your Honor. I'm saying it has happened under Title VII, and every circuit has said no, no, no, you can't do it. Why? Because, as this Court found in Burlington, that is not what the "agent" clause does.

What the "agent" clause does is incorporate respondeat superior liability, which is to say --

JUSTICE SOTOMAYOR: That point was made by the majority of circuits who ruled in your favor. Those circuits still had to deal with the agent meaning and they've dealt with it by addressing respondeat superior liability, however they've dealt with it. Your meaning doesn't do away with that tension.

MR. ROSENKRANZ: Your Honor, our meaning most certainly does. We have a complete disagreement with the government and Respondents on what the "agent" clause does. We believe it incorporates respondeat superior liability, which make the employer liable for the agent's activities.

The government and Respondents say: No, no, no, it adds another category of people

who have not been previously identified as employers. Anyone who is now a new employer is subject to liability. And you can tell that the agent clause causes that mischief and that it's --

JUSTICE GINSBURG: There's no -- no agent involved in this case, so why should the Court address that language, that the term "also means" an agent of such person?

MR. ROSENKRANZ: Well, Your Honor, for the simple meaning that everyone has agreed, and the Respondents have conceded in their brief at page 32, that the phrase "also means" has to carry the same meaning with respect to both clauses. So you can't just jump over one and not ask what would "also means" produce if you apply that to the first clause.

CHIEF JUSTICE ROBERTS: Well, I --

JUSTICE KAGAN: Mr. Rosenkranz --

CHIEF JUSTICE ROBERTS: But I think you get -- your argument comes back and bites you, I think, because you just said they have to be treated the same, 1 and 2.

Your theory with respect to 2, a state or political subdivision, is that it's already

included in the first part of the statute.

So that would seem to be an argument you have to make with respect to 1, the agent, that the agent of such a person is already included in the first part.

So I don't see how your argument answers the problem that you use to undermine the other side's argument.

MR. ROSENKRANZ: Well, Mr. Chief Justice, it does for the following reason. What does the "also means" clause do? It's an avoidance of doubt clause. It avoids doubt in two different ways.

The first way is by adding that "agent" clause and saying employers, the aforementioned employers, that universe, are subject to respondeat superior liability.

The second clause also avoids doubt by making it clear that when you are talking about employers, those persons defined in the first sentence, you are including political subdivisions and states.

And I have to emphasize that you know that the "agent" clause is problematic because of the extremes to which Respondents go to

redefine "agent." They define "agent" to mean third-party independent subcontractor, because they cannot accept the possibility that, as is clear under the common law for hundreds of years, agents, the classic agent, are employees.

So without the "agent" clause -- excuse me, when you define the "agent" clause the way Respondents do, you do end up with a disaster.

JUSTICE KAGAN: Mr. Rosenkranz, if in the term "also means" in that sentence, you agree, don't you, that "the term" is the same term as in the first sentence? In other words, the term is employer, is that correct?

MR. ROSENKRANZ: The term is?

JUSTICE KAGAN: Employer, the term employer also means? I mean, here are your two choices --

MR. ROSENKRANZ: Yes, the antecedent --

JUSTICE KAGAN: -- the term employer or the term person.

MR. ROSENKRANZ: I'm sorry? The -- if you could just --

JUSTICE KAGAN: What is the term in the second sentence? Is it an employer?

MR. ROSENKRANZ: Oh. Yes, the term employer --

JUSTICE KAGAN: Okay.

MR. ROSENKRANZ: -- also means.

JUSTICE KAGAN: So it -- it's just odd because you say that what this clause is meant to do is to make clear that "person" is defined in such a way as to include subdivisions.

So what you're essentially doing is converting and -- the phrase which says the term "employer" also means, and converting that into the term "person," just to make clear, includes.

MR. ROSENKRANZ: No, Your Honor, no. What we are doing is referring back to employer. So, the first sentence says who is an employer. Who is an employer? An entity that has at least 20 employees and that affects commerce.

Now that is a universe. The term in our view also means clarifies that within that universe we're doing two things. We're applying agency liability to that universe of

aforementioned persons who are now labeled employers --

JUSTICE KAGAN: But the clarifying with respect to the subdivisions would not be necessary, except for the fact that there's doubt in the person definition. That's where your doubt comes from. It comes from the fact that the person definition is not unambiguous.

MR. ROSENKRANZ: That is one of the sources of the doubt, yes.

JUSTICE KAGAN: I don't -- I don't -- what is the other source of the doubt? It's all the source of the doubt, isn't it?

MR. ROSENKRANZ: Well, no, because there are other -- there are other statutory problems that get created completely apart from that. So, for --

JUSTICE KAGAN: No, I understand that you say that there are anomalies if done in a different way, but the doubt arises from the ambiguity of the term "person."

So that's why I'm suggesting that it would be a strange way to resolve that doubt, instead of to just say, by the way, a person includes a subdivision, instead of saying that,

to say the term "employer" also means a subdivision.

MR. ROSENKRANZ: Understood, Your Honor. This is a strange statute that was written in a strange way. There is a reason for that.

This -- this gets to one of my other statutory clues, and that is when you think about the -- the evolution of this statute, it was different from Title VII. This statute has two sentences within that definition, not one. And it then -- this statute always had "also means" within that definition.

So, if you think about what was going on, and we map it out on page 8 of our brief, what the editor was trying to do or, if you look at page N -- 8, there's a red line, the basic point is this: This statute always had the same structure.

The second sentence always had "also means" in it. But that second sentence had two parts. One was clearly a clarification and the second was an exclusion. The clarification was as to agency and then there was an exclusion.

What did the drafter do? They just

took part of the exclusion and moved it to the other side of the -- of the "also means" sentence so that now it is serving that clarifying purpose.

JUSTICE BREYER: And you ask -- tell me, if a -- a company, the XYZ Company, has 50 employees and one day they think: I have an idea, what we'll do is we'll set up five subsidiaries and they will hire the employees. Each will hire 10. And they will be our agent and do everything that we tell them.

Okay? Does the statute apply?

MR. ROSENKRANZ: Absolutely, Your Honor. XYZ --

JUSTICE BREYER: How?

MR. ROSENKRANZ: XYZ is liable for the acts of their agents. Under Respondents' position, XYZ --

JUSTICE BREYER: But wait. But is it -- the agency isn't -- isn't a -- the subsidiary is not an employer.

MR. ROSENKRANZ: Your Honor, so you've said --

JUSTICE BREYER: I said -- I said the XYZ Corporation sets up five subsidiaries, each

of which has 10 employees, and it's an agent, so, I mean, were they -- yes, it's an agent of -- the XYZ Corporation tells them what to do.

MR. ROSENKRANZ: Well, Your Honor --

JUSTICE BREYER: XYZ Corporation has no employees; it just has five subsidiaries.

MR. ROSENKRANZ: Okay. So there are two scenarios. One is that each of the subsidiaries is liable.

JUSTICE BREYER: Why? They each have 10 employees.

MR. ROSENKRANZ: Oh, I see what you're saying.

JUSTICE BREYER: Yeah.

MR. ROSENKRANZ: So -- so what -- so what this Court -- I would say Manhart kind of addresses that question, that you cannot avoid liability by turning yourself into subsidiaries who are all your agents.

JUSTICE BREYER: Where -- where does it say that?

MR. ROSENKRANZ: Where does Manhart say it?

JUSTICE BREYER: Yeah. I mean, where does it say that? I mean, where -- where does

the statute say that? Because it did occur to me that one purpose that (a) could serve is doing just what you said. You cannot turn yourself into five subsidiaries, and that's why the subsidiary part, namely the agent part, doesn't have a number attached, because they don't want a number attached.

MR. ROSENKRANZ: Well, we are going --

JUSTICE BREYER: They don't want you to set up 100 subsidiaries each with one employee and get out of the statute.

MR. ROSENKRANZ: So -- so let's just be clear --

JUSTICE BREYER: Is it possible?

MR. ROSENKRANZ: -- private entities are always covered under this -- under this statute.

JUSTICE BREYER: No, I'm not talking about public -- wait --

MR. ROSENKRANZ: Right.

JUSTICE BREYER: -- private entities, it says, the term employer is a person -- maybe I've just gotten mixed up. I don't think so.

It means a person engaged in an industry who has 20 or more employees. So what

I'm trying to imagine is through the use of subsidiaries there is no company that has more than 10 employees. And to avoid that, one thing they might have wanted to do is to use the word "agency" without a qualification that the agency has to have 20 employees.

MR. ROSENKRANZ: So, Your Honor, all I can say is there's no reason to believe Congress was ever focused on --

JUSTICE BREYER: On that problem?

MR. ROSENKRANZ: -- on that scenario. That was never before Congress. What was before Congress and what this Court held as to Title VII in Burlington is that that language is about respondeat superior.

But let me get -- I've already mentioned two clear signals. Let me get to the third one, which is a variation on the agent point.

While we disagree on what the agent clause does, everyone agrees that it does something important. At a minimum, according to Respondents, it protects employees from the independent -- from -- excuse me, from the discriminatory acts of independent contractors.

So the question arises: Why did Congress supply that important protection only to private employees and not to public ones? Because that is the consequence of Respondents' reading.

Fourth signal: Affecting commerce. And what Congress did with that phrase -- now, for now, I am not making a constitutional argument. I am making a drafting argument.

In every one of these discrimination statutes, Congress felt the need to provide an explicit Commerce Clause hook. It did so for private employers under the ADEA. It did so for all employers, public and private, under Title VII and the ADA.

Now one can have an interesting -- an interesting constitutional debate about whether that hook was constitutionally required, but my point here is simpler. Congress thought it was necessary in every other context, so why would Congress have left it out here?

And then the fifth statutory clue is the statutory history. And I've already described how the drafters got to where they got, but let's look at two things.

The first is how they got -- how they changed the language in -- in 630(b). So they took words that had a particular -- that were on the exclusion side, and they moved it to the inclusion side.

We've been accused of reading the statute in a way that makes that superfluous. It is not. It was absolutely essential to identify who is now in the ambit of this statute. It was essential because that was the major change.

Now look at 630(c). We don't have a red line in -- in our brief on this one, but you can see it in the government's statutory appendix at -- excuse me, you can see it in -- in our statutory appendix.

So the term "employment agency," it's defined there. It means anyone. Originally, it said "but shall not include any agency of the United States or any state or political subdivision of a state, except such term shall apply," and -- and so forth.

Congress crossed out everything after "the United States." The only reason to have done this would have been to now include states

and political subdivisions within the definition of employment agency.

The only way that could possibly happen is if they were persons to begin with; and, therefore, if they were persons to begin with, you flow them through a subdivision -- or a subsection (b) and they are subject to the same employee limit.

Now, if the purpose of that second sentence was to take entities that were already persons and, therefore, subject to that first sentence, encompassed by that first sentence, and make it clear that the proviso about the size no longer applies, this was a very strange way to do it.

If there are no further questions, I'd like to reserve the remainder of my time for rebuttal.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. ROSENKRANZ: Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Mr. Fisher.

ORAL ARGUMENT OF JEFFREY L. FISHER
ON BEHALF OF THE RESPONDENTS

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

The plain text of the ADEA makes absolutely clear that it covers political subdivisions regardless of size. And there's nothing odd, much less absurd, about that result.

And let me start with the text and clarify one thing for the Court. My friend says that we do not dispute that "also means," the key statutory phrase here, can mean different things. But the truth is we actually do dispute that.

The meaning of "also means" is additive. It adds something that wasn't there before. And the -- the confirmation of that is found throughout the U.S. Code. In our brief, we cite the 32 other instances in the U.S. Code where the phrase "also means" appears in a definitional statute. All 32 of those phrases -- of statutes use it in an additive manner. And I think perhaps the most telling one --

JUSTICE SOTOMAYOR: One doesn't. One

doesn't. And how do you deal with that one?

MR. FISHER: I -- if you're -- if you're speaking, Justice Sotomayor, of the consumer statute --

JUSTICE SOTOMAYOR: Uh-huh.

MR. FISHER: -- that my friend points to, I think it does use it in an additive manner, because that's a statute where it says "consumer" means an individual who does certain things or the person's legal representative.

And so that itself -- I'm sorry, also means the person's legal representative. That itself is additive. This is not a statute talking about, for example, a court of law where someone's legal representative is the alter ego of the person. That's a situation --

JUSTICE SOTOMAYOR: Well, you don't really --

MR. FISHER: -- where it's additive.

JUSTICE SOTOMAYOR: You don't really think that what the statute meant is that the legal representative was giving his or her private information. It's not additive in that sense. It's sort of that legal representative is giving the consumer's information to

someone. And so the legal -- that's the violation, isn't it?

MR. FISHER: I think that's right, Justice Sotomayor, but it's still talking about a different source than the previous part of the statute. And I think if there's one potentially ambiguous provision out of 33, we'll still take that, and I would turn the Court to the -- perhaps I think the most telling example, which is the one at pages 12 and 13 of our brief, about elderly families.

And I think the reason why that's so telling is because it gives a particular definition and then has a qualification at the end, "or is also handicapped." And then it says the -- the word "also" means such and such, and then it repeats that phrase, "or is also handicapped."

And so Congress, when it uses the word "also means," it did exactly the opposite of what my friend says you should read the statute here to do, which is to carry forth those -- carry down to after "also means" the original meaning --

JUSTICE SOTOMAYOR: Could you deal --

MR. FISHER: -- that had come before it.

JUSTICE SOTOMAYOR: -- with this last example, the federal -- the employment agency? It -- it is either superfluous or there's a question whether a state employment agency is still covered or not.

MR. FISHER: I think, Justice Sotomayor, the latter might be the case. But it's not --

JUSTICE SOTOMAYOR: Well, it is superfluous under your reading.

MR. FISHER: The -- the federal agency?

JUSTICE SOTOMAYOR: Yes.

MR. FISHER: Yes. And I think -- well, it's -- it's not superfluous in the sense that just as the key provision here, subsection B, the federal government is backed out at the end, in a situation where I think the better reading might have been to leave them out in the first place.

And I think the reason why you see explicit references to the federal government in both places is because -- for two things.

One is the Court itself has asked Congress in various ways to speak directly when it talks about federal government or states being on the hook for one form or another.

And -- and, secondly, the federal government is itself treated wholly separately in Section 633(a) under a different regime of the ADEA. So the federal government is just put aside in all these other provisions. And I think that's what Congress was doing there.

So we submit to the Court that "also means" is simply unambiguous. That's the end of the case, just as the Ninth Circuit said it was.

If the Court has any doubt about that, I would urge the Court to look, as my friend, I think, also urges, to the comparison between Title VII on the one hand and the FLSA on the other hand. And I think --

JUSTICE ALITO: But if -- if Congress had enacted the -- the ADEA provision and Title VII at the same time, do you think it's plausible that Congress would have said, you know, when it comes to racial discrimination, we're not going to allow a suit against a

government entity with fewer than 25 employees, but when it comes to age discrimination, we're going to include every government agency no matter how small?

MR. FISHER: I think absolutely, Justice Alito, and the reason why goes back to Lorillard versus Pons and the other cases where this Court has described the genesis of the ADEA.

So the word the Court has used is that the ADEA is a hybrid. It's a hybrid between a substantive anti-discrimination law on the one hand and a labor statute on the other. And that's borne out in the provisions of the ADEA which borrow the substantive anti-discrimination part from the Title VII language, but the rest of the statute is largely drawn from the FLSA.

JUSTICE ALITO: But that's quite --

MR. FISHER: And in --

JUSTICE ALITO: That's quite abstract. Do you really think as a policy matter Congress would say that age discrimination is more pernicious and more widespread, so, therefore, we have to have a tougher remedy there than we

do with respect to racial discrimination?

MR. FISHER: I think that's not exactly the way Congress would have thought of it. In the legislative history, you find elements -- and I am going to answer your question directly, I think -- you find in Title VII that Congress was concerned with associational interests, personal associations.

So one of the things behind the numerosity requirement in Title VII is a concern about forcing very, very small groups of people to associate with individuals they might not like. Now that might seem antiquated nowadays when we're talking about race relations and race discrimination, but it's directly in the legislative history of Title VII.

On the other hand, this goes back to the ADEA being partly a labor statute as well, the -- the purpose of the ADEA is to bring people into the workforce and keep them there and to achieve full employment of older individuals. And as the Secretary of Labor noted in the report this Court discussed in EEOC versus Wyoming, that was not to stamp out

animus-based discrimination like under Title VII but to achieve full employment.

And so the reason why Congress may have decided to have public agencies regardless of size on the hook on the -- on the age side and not on the race side is because of this associational interest.

JUSTICE KAGAN: Is this, Mr. Fisher, the only federal statute that you're aware of that imposes an obligation on a small political subdivision but not -- does not impose the corresponding obligation on a small private employer?

MR. FISHER: No. And let me point you to two things. First of all, the other component of the ADEA itself, which I think no one disputes, covers federal governmental employers regardless of size, so we find that in the ADEA itself.

And as to state and political subdivisions, you find a close analogy in the FLSA. Now my friend says in his reply brief the FLSA has no numerosity requirements at all on the private side in the FLSA. That's -- that's strictly speaking true, but enterprise

liability under the FLSA depends on -- which is the predominant form of liability -- depends on an employer having at least $500,000 of gross receipts per year.

So you have a kind of rough analogy in that -- in that statute to -- to a numerosity requirement. In other words, you have a firm that has to be of a certain size.

And I'd add, Justice Kagan, you asked me just about federal, but as we cite in our brief in a lengthy footnote, there are many, many states, the majority of states, in fact, that cover political subdivisions regardless of size. Of that group, about half of them cover political subdivisions regardless of size and, on the other hand, still have a numerosity requirement for private employers.

Now take that one step --

JUSTICE GINSBURG: How are -- how are those state statutes raised in comparison to this statute?

MR. FISHER: I didn't hear the beginning, Justice Ginsburg.

JUSTICE GINSBURG: The state statutes, you -- you say that most states include

political subdivisions without regard to size.

And do we have language in what -- the language that most states use? Is it similar to the language that's used in -- in the ADEA or --

MR. FISHER: Well, Justice Ginsburg, these citations are all collected in Footnote 6 on page 29 of our brief. And the answer to your question is, by and large, the state statutes actually use different language. So it's not a case where the states are merely parroting what the ADEA already says.

I think of our count there are only three states that have the exact same language as the ADEA. The vast majority have other language that makes it clear in other ways that they're distinguishing on numerosity terms between one and the other.

And the thing I would add to that, Justice Ginsburg, is that a handful of those states had that distinction even before the ADEA was passed.

So the thing that my friend says is ludicrous for Congress to have achieved actually was in state statutes already. Many

state legislatures across the country had already drafted statutes like this before the ADEA was passed.

And so I think, Justice Alito, to bring me back to the conversation that I was having with you about the reason why Congress might have done this to distinguish between race and age, I will grant that Congress could have reasonably made the other choice as well.

I think that Congress could have decided one or the other. But the proof is in what Congress actually did. And, as I said, it had the FLSA on the one hand and Title VII on the other hand. And the two statutes were identical in the sense that when you look to the definitional provisions of the Act, you found first a definition of the word "person" and then you found a definition of the word "employer."

And so what did Congress do in Title VII? It amended the -- it amended the definition of "person" to achieve, as Justice Ginsburg pointed out, a very easy solution where the numerosity requirement applied to political subdivisions.

When it amended the ADEA, in the exact same Act that it amended the FLSA, indisputably to cover political subdivisions regardless of size, it did the same thing it did in the FLSA, which is amend the definition of "employer" and not the definition of "person."

And I'd point this Court to its own decisions in cases like Gross and Nassar which say that we look to not just the language choices Congress made and assume it's intentional. We also look to structural choices that Congress makes and we assume those are intentional.

And so, even if I had nothing but the comparison between the ADEA and Title VII, under those cases, I think that would be enough to remove any doubt that the Court might have about what Congress was trying to achieve here.

But, actually, I have something more here. I have the FLSA, of which the ADEA is closely related. And the Court -- and the Congress made exactly the same decision in the FLSA.

JUSTICE ALITO: Would you say something about what your argument means for

the "agent" clause? If Congress wrote "also means" and didn't put "includes," had it written the term "employer includes any agent of such a person," I take it that one could not be an agent without having 25 employees.

But what -- where does your understanding of this sentence take us with respect to agents?

MR. FISHER: Justice Alito, let me answer that question, if I may, in two steps. I want to first start with my point of agreement with the other side, which is we agree that the key question is whether "also means" adds something even with respect to the agent clause. We think that's an important question for the Court to ask.

But this brings me back to Justice Breyer's question, which is I don't think there can be any reasonable dispute that the "agent" clause does add additional entities into the category of employer, and it's not just the below 20 thing.

More fundamentally, it's agents that would not otherwise be covered by respondeat superior. That's what the Court noted in

Manhart, and we explain in our brief in cases like Spirt, and there's also Footnote 1 in the Solicitor General's brief, that explain that some independent contractors, for example, and that's just to use one example, are agents of an employer but are not covered by respondeat superior.

JUSTICE KAGAN: But how --

JUSTICE BREYER: Where do I look on that? Because I was bothered exactly by the same thing that Justice Alito said, that if we're not going to have numbers with B, we're not going to have numbers with A.

And I think your colleague says, well, they didn't want -- they wanted numbers -- all that A does is just make sure it's principles of agency and he cites Burlington.

MR. FISHER: Uh-huh.

JUSTICE BREYER: So where would I look to see, no, they had another idea? They wanted some agents covered who had fewer than 20 or 25 employees?

MR. FISHER: Well, Justice Breyer, I don't think you'll find a sentence to that effect in the legislative history, but let me

-- let me make --

JUSTICE BREYER: Yeah.

MR. FISHER: -- clear on one thing, which is the 20 -- the 20 employee thing is just the very beginning of their problems.

The much bigger problem is an agent of any size would not be covered but for that clause that would not be under respondeat superior principles. Now my friend in the reply brief says that we distort the meaning of independent contractors, but I urge you to read the rest of the sentence that my friend quotes in the commentary to Section 14-N, and also to look at Section 2 of the restatement of agency called independent contractor.

And in both those places, the restatement makes clear that some independent contractors, for example, a company hired to do layoffs, choose who's going to be laid off, administer our benefits plan and decide what the criteria are for that, those kinds of people are agents, but they're not necessarily covered by respondeat superior.

So my friend, in his reading of the "agent" clause to do nothing but clarify what

has come before, leaves a gaping hole in the ADEA and also in Title VII.

JUSTICE KAGAN: But I guess I wonder, Mr. Fisher, how your reading of the agent clause allows us to make this distinction that both you suggest and the solicitor general suggests between entities and individuals?

I mean, it says "any agent of such a person" and it doesn't on its face make any such distinction. So how would we go about doing that?

MR. FISHER: So I think there's two questions you would ask if you had a case dealing with the "agent" clause, Justice Kagan. I think this is responsive to Justice Alito as well.

The first question you'd ask is whether any agent includes employees. Now, obviously, the word "any" might suggest that it does, but, on the other hand, employees are already covered under respondeat superior principles once you've already given the word "employer".

So it would be kind of a mystery and odd why Congress would have wanted agents to be

speaking about employees, especially when another provision of the statute defines the word "employee" and it's used other ways in the statute.

So the first question would be whether "any agent" means any agent whatsoever or just non-employee agents that aren't already covered.

If you answered that question against, you know, what I guess would be my position as I stand here, you'd -- you'd still have a second question, which is if individual supervisors, for example, were on the hook, the question would still be, how are they on the hook?

And as we note in the solicitor general notes as well, the Fourth and Fifth Circuits have held, yes, they're technically liable, but they're liable under something like official capacity principles. So they flow right back to the employer, as one would expect in any employment arrangement.

So you have two questions that would get you off the train to -- to where my friend would like you to lead you with that clause.

But I think the fundamental thing that I would urge to the Court is that you have before you in this case a simply unambiguous statute in terms of every word you need to decide this question presented. It says the term "employer" also means a state or political subdivision. That's all you need to decide this case. And it is absolutely clear.

I'd urge the Court to resist the temptation to go looking elsewhere in the statute for ambiguity as a reason why not to answer this case as to what the statute itself plainly says. And that's really, I think, the beginning and the end of it. And you can leave all that other stuff, if it ever comes back to the Court, for another day.

If there are no other questions, I'll -- I'll wrap up now.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Bond.

ORAL ARGUMENT OF JONATHAN C. BOND

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE, SUPPORTING THE RESPONDENTS

MR. BOND: Mr. Chief Justice, and may

it please the Court:

The Age Act expressly covers state and political subdivision employers regardless of their size. That is true for three reasons.

First, that is by far the most natural reading of the text, given its ordinary meaning and consistent usage across federal law.

Second, Congress rejected a ready template in Title VII adopted just two years earlier that did exclude small state and local government employers by putting the definition or by putting government employers in the definition of "person." Congress didn't do that and followed the FLSA template that it adopted at the same time in 1974.

And, third, Petitioner's contrary reading would leave a sizable loophole that would allow any employer to evade the Age Act by outsourcing discrimination to small agents. And in order to avoid that problem, Petitioner is forced ultimately to abandon the core theory they offer of the text that treats the two clauses the same way.

Now, in terms of the ordinary meaning, we agree with Respondent that the language

"also means" and its usage throughout federal statutes is clear, and it's clear that Congress used it in that ordinary way because it didn't follow the Title VII approach.

Now my friend on the other side suggests that the differences in the definitions of "person" in Title VII versus the Age Act precluded Congress from doing the same thing.

Now those differences are actually quite slight. You can see them at pages 6 and 15 of the blue brief appendix, but none of those differences prevented Congress in 1974 from doing the exact same thing in the Age Act that a different Congress had done two years earlier in Title VII if it had wished to do so.

There are slight differences, of course, with the FLSA, but what's common to them is that they address the problem in the same way. They put the definition -- or they put governments in the definition of employer, not subject to any numerosity requirement. And that's the common thread.

So, just to touch on the questions that have reached the "agent" clause, that's

where I think a real vulnerability for Petitioner's argument is. Now it's true the Court doesn't need to address any of the broader issues or resolve the outer limits of that clause because it's not implicated here and nothing in this case turns on it.

But I think it's important to bear in mind that whatever the "agent" clause means, it can't mean what Petitioner is offering here, because that interpretation, if you hold his interpretation to its logical conclusion, means that any employer could evade the Age Act by outsourcing to small agents.

The one thing we know the "agent" clause is supposed to do from Manhart and other cases in the Title VII context is to prevent what Manhart called delegating discrimination to corporate shells. But if you take Petitioner's reading seriously, it means that the second clause merely clarifies the first, so the 20-employee threshold reaches all the way to the government clause in the second sentence.

If that's true, it has to follow logically that the 20-employee threshold

reaches the "agent" clause in the middle. Now I realize the Petitioner in the reply brief and this morning disclaims that result, but there's no way to square that disclaimer with the text.

It would mean that the 20-employee threshold starts in the first sentence, skips over the "agent" clause, and lands on the government clause, and that's simply not a plausible way to read this statute. And it also is inconsistent with Petitioner's core theory that "also means" has to operate the same way across both clauses here.

So I think from the ordinary reading of the text and the way Congress has consistently used it in this statute, there's only one conclusion the Court can draw.

JUSTICE ALITO: Well, if we -- if we follow the same plain text theory of interpretation that you advocate with respect to the provision concerning political subdivisions, wouldn't that lead us to the conclusion that an agent of an employer includes the employer's employees? Aren't they agents of the employer?

MR. BOND: So, Your Honor, again, you

don't have to address that here, but no --

JUSTICE ALITO: I know we don't have to address it, but we have to have a theory, an understanding of the statute that makes sense, and you just made an argument based on the "agent" clause --

MR. BOND: Sure. And --

JUSTICE ALITO: -- did you not?

MR. BOND: Yes, Your Honor.

JUSTICE ALITO: Okay.

MR. BOND: And the answer to your question is we don't think that it would reach individual liability for the -- because of the two additional questions that Respondents' counsel just identified.

And just to -- to highlight those a little bit more, in the meaning of "agent," not only did Congress have no reason to use "agent" in its broadest sense, because employees would already trigger respondeat superior liability. In this statute, Congress didn't use language that it has used in other statutes like the FLSA that lower courts and the Department of Labor have read to include individual liability.

So if I can point you to one example. The FLSA, Section 203(d) at page 1-A of the appendix to our brief says that an employer includes any person who acts directly or indirectly in the interest of an employer with respect to an employee.

The FMLA, the Family Medical Leave Act, uses the same language. Lower courts and the Department of Labor have construed those statutes to impose individual liability in some circumstances.

You don't see that language in the Age Act. And I think it's a fair inference that Congress didn't intend to impose individual liability in that circumstance. Again, you don't need to resolve that, but that would be a strong contextual reason to reject that understanding.

And, in addition, even if you concluded that some subset of employees or supervisors were agents in some circumstances, I think you still would have to answer the question that the lower courts have consistently answered against individual liability by determining is this individual

employee personally liable or is instead he liable only in his official or representative capacity.

And the idea behind that is simple. If you are an employee and are counted as the employer only because you're acting as an agent, that is, only because you are exercising the authority of the employer in varying the terms and conditions of a particular employee's employment, liability naturally runs against the employer whose authority you are exercising.

And to resolve that question, you would need to consider a number of principles that govern remedies law, and you'd need to take cognizance of potential spillover effects for other federal statutes, which we think is yet another reason not to delve into those issues here, because the only question you need to answer is does the "agent" clause add some category of additional agents.

By its terms, it does. And it must do so to solve the problem that this Court identified in Manhart and Ellerth and other places.

JUSTICE KAGAN: Well, is that true, Mr. Bond? Because, on -- on Petitioner's theory, which is to say that this is just a reference to respondeat superior liability and basically says that the employer shall have such liability for any agent, wouldn't that include these corporate shells that you're talking about?

MR. BOND: So a few points on that, Your Honor. First, if -- if Respondent -- or if Petitioner is correct that the clause simply codifies existing principles of respondeat superior and agency liability, no, the employer would not face liability for acts of independent agents, at least in the ordinary course. The general rule is that, unlike respondeat superior liability, a principal is not responsible for acts of independent agents unless you specifically intend the result.

JUSTICE KAGAN: Independent contractors, is that what you meant?

MR. BOND: Well --

JUSTICE KAGAN: Or --

MR. BOND: -- independent agents, so agents that are not employees, non-employee

agents, which can include --

JUSTICE KAGAN: But even in the face --

MR. BOND: -- independent contractors.

JUSTICE KAGAN: -- of statutory language that says the agent of such a person?

MR. BOND: So --

JUSTICE KAGAN: I -- I mean, these corporate shells are acting as the agent of such a person.

MR. BOND: So let's distinguish two things. As I understand it, Petitioner is urging that the clause would incorporate respondeat superior and ordinary agency principles which, under Restatement Section 250 of Agency and 409 of Torts, would not pick up acts of agents who are not employees in the ordinary course.

Now, if what you're suggesting is that the language or the reference to agents here incorporates a broader theory of agency liability, that still leaves Petitioner with a difficulty of squaring how the two clauses work, because he says the "agent" clause and the government clause must operate in the same

way.

But you can't read the two clauses as doing those fundamentally different things, one creating a novel principle of agency law and the other incorporating an employee numerosity requirement that doesn't apply to agents in the middle. So --

CHIEF JUSTICE ROBERTS: Well, I'm not -- I'm not sure what's so bad about direct agent liability. I mean, let's say you have the manager who runs the -- the shop, the factory, and he decides, well, I'm going to fire everybody over 45, or whatever it is. And yeah maybe the person fired wants to sue the company; maybe the company's bankrupt. I mean, what -- what's the big deal about -- it would seem to me that that would allow you to sue the person responsible for the decision.

MR. BOND: So we agree that it's not so anomalous as Petitioner suggests. There are federal statutes that lower courts and agencies have construed as imposing that kind of liability. And that's, again, another reason why you don't need to delve into that here.

The answer is not clear. We think

that there are strong contextual indicators that, in this statute, Congress didn't intend to achieve that result. But you're right, if that's the conclusion at the end of the day in a case where it's properly presented, that there is some individual liability, that's much less anomalous than reading the text in a way that no dictionary or other statute uses it and creating a huge loophole for outsourcing to agents of any size under 20 employees.

If the Court have -- has no further questions, we ask that you affirm.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Rosenkranz, five minutes.

REBUTTAL ARGUMENT OF E. JOSHUA ROSENKRANZ
ON BEHALF OF THE PETITIONER

MR. ROSENKRANZ: Thank you, Your Honor. A few just brief points:

First, Mr. Fisher's explanation of "agency" is at war with Burlington. This Court said that the reason that there is respondeat superior in Title VII is because of the "agent" clause. Nothing else created that.

The difference between Title VII and

Title IX here is crucial. Gebser said Title IX has no respondeat superior liability. Why? Because it did not have an "agent" clause.

Now I'm not saying that there is no liability for that third-party agent. Of course, there's liability. The "agent" clause here doesn't just implement respondeat superior; it implements agency principles as to both employees and the -- the independent agent.

That doesn't mean that agents themselves have to have 20 employees. That's clear from the wording -- the wording of the statute. So you start with (b), it says, "The employer is anyone who has 20" -- "is a person who has 20 or more employees and also affects commerce."

Then it says, "That also means any agent of such person." The "such person" is the employer who needs 20 employees. The agent does not need 20 employees.

So let me just go to an observation about the relationship between the FLSA and Title VII. Mr. Fisher and Mr. Bond both point out that there's a distinction between the FLSA

and Title VII in this Court's jurisprudence.

It's a procedure/substance distinction, though. Anything that is substantive, this Court has typically referred to Title VII as the analog.

So I recognize, Your Honors, that neither reading is perfect, but it really comes down to a choice between a reading that is, at worst, mildly ungrammatical and one that is wildly untenable. Respondents are attributing to legislative drafters a level of grammatical sophistication that is unrealistic.

Meanwhile, the list of problems that Respondents are creating with their reading is really untenable. First, it is unfathomable that Congress would have singled out public entities for harsh treatment in a statute whose whole purpose was to bring public employees into the ambit that private employees occupied.

Second, Respondents rewrite the statute so that "agent" means independent third-party contractor and they say employees are not agents. You cannot just wave around -- wave away the problems that are created by that reading. It is not peripheral. Twelve

regional circuits all agree with our reading, and that is all moved away under Respondents' reading.

Third, Respondents have not explained why Congress would have stripped public employees of valuable rights such as respondeat superior liability that private employees have. The protection is not in the word "employer." It's in the agency clause. But, at a minimum, public employees under Respondents' reading lose all recourse for the acts of third-party contractors. That is at least clear.

So, since there's a reasonable reading of the statute that achieves Congress's stated goal without creating any of this mischief, that is the reading that this Court should adopt.

If there are no further questions, we respectfully request that the Court reverse.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 12:06 p.m., the case in the above-entitled matter was submitted.)

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