

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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Petitioner,)
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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.

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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.

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

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

14 So how do we know which one is
15 intended?

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

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

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

6 But this statute, ADEA, picks up on
7 the language of the Fair Labor Standards Act,
8 which has no numerosity requirement. So
9 perhaps Congress should have done what you --
10 you suggest, but by -- by using the Fair Labor
11 Standards Act language, rather than Title VII
12 language, because they wanted to do what Title
13 VII had done in 1972, they wanted to do that in
14 1974, why didn't they use the Title VII
15 language?

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

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

25 Why did Congress use a different

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

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

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

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

20 MR. ROSENKRANZ: No, not at all, Your
21 Honor.

22 JUSTICE SOTOMAYOR: So set that at --

23 MR. ROSENKRANZ: No, Justice
24 Sotomayor. Corporations -- this Court has held
25 in at least five cases that "corporations"

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

11 CHIEF JUSTICE ROBERTS: Well, but here
12 it's not just persons; it's organized groups of
13 persons, and it's in a list of things that says
14 partnerships, associations, labor
15 organizations, corporations, and organized
16 groups of persons.

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

22 MR. ROSENKRANZ: Well, so two answers
23 to that, Your Honor. First, even without that
24 language, this Court has found that -- that --
25 striking that out, this Court has found that

1 the definition before that language covers
2 political subdivisions. City of Lafayette,
3 Chattanooga Foundry, and Ricketts all found
4 that. But Mount Lemmon Fire District is most
5 certainly an organized group of persons, land
6 owners under statute who get together to find a
7 common cause and collect taxes around --

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

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

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

24 Subsection (b) then subtracts. It
25 says it's not the federal government, oh, and,

1 by the way, it's not states -- that is,
2 employer -- let me back up. Employer then says
3 it's any person and, you know, 20 or more
4 people, 20 or more employees, and then it goes
5 on and subtracts the federal government and
6 states and local governments.

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

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

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

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

21 MR. ROSENKRANZ: That is correct, Your
22 Honor, but let me put it a slightly different
23 way. I'm not just assuming the other side has
24 not disputed that there are two possible ways
25 to read it. Our position is that when you take

1 those five statutory clues, which I've only
2 just begun to get to, the -- the only
3 reasonable reading is our reading.

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

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

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

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

1 MR. ROSENKRANZ: So I think we have
2 another argument, Your Honor. So "also means"
3 means in addition, and so it adds agents, which
4 I'll get to in a moment, is completely
5 implausible. And then what does it do in the
6 next clause?

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

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

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

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

1 agents.

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

5 JUSTICE GORSUCH: Well, but that's --

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

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

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

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

23 MR. ROSENKRANZ: No, sorry, Your
24 Honor. I'm saying it has happened under Title
25 VII, and every circuit has said no, no, no, you

1 can't do it. Why? Because, as this Court
2 found in Burlington, that is not what the
3 "agent" clause does.

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

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

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

21 The government and Respondents say:
22 No, no, no, it adds another category of people
23 who have not been previously identified as
24 employers. Anyone who is now a new employer is
25 subject to liability. And you can tell that

1 the agent clause causes that mischief and that
2 it's --

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

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

15 CHIEF JUSTICE ROBERTS: Well, I --

16 JUSTICE KAGAN: Mr. Rosenkranz --

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

21 Your theory with respect to 2, a state
22 or political subdivision, is that it's already
23 included in the first part of the statute.

24 So that would seem to be an argument
25 you have to make with respect to 1, the agent,

1 that the agent of such a person is already
2 included in the first part.

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

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

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

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

20 And I have to emphasize that you know
21 that the "agent" clause is problematic because
22 of the extremes to which Respondents go to
23 redefine "agent." They define "agent" to mean
24 third-party independent subcontractor, because
25 they cannot accept the possibility that, as is

1 clear under the common law for hundreds of
2 years, agents, the classic agent, are
3 employees.

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

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

13 MR. ROSENKRANZ: The term is?

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

17 MR. ROSENKRANZ: Yes, the antecedent
18 --

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

21 MR. ROSENKRANZ: I'm sorry? If you
22 could just --

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

25 MR. ROSENKRANZ: Oh. Yes, the term

1 employer also means.

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

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

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

18 Now that is a universe. The term in
19 our view also means clarifies that within that
20 universe we're doing two things. We're
21 applying agency liability to that universe of
22 aforementioned persons who are now labeled
23 employers --

24 JUSTICE KAGAN: But the clarifying
25 with respect to the subdivisions would not be

1 necessary, except for the fact that there's
2 doubt in the person definition. That's where
3 your doubt comes from. It comes from the fact
4 that the person definition is not unambiguous.

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

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

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

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

18 So that's why I'm suggesting that it
19 would be a strange way to resolve that doubt,
20 instead of to just say, by the way, a person
21 includes a subdivision, instead of saying that,
22 to say the term "employer" also means a
23 subdivision.

24 MR. ROSENKRANZ: Understood, Your
25 Honor. This is a strange statute that was

1 written in a strange way. There is a reason
2 for that.

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

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

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

21 What did the drafter do? They just
22 took part of the exclusion and moved it to the
23 other side of the -- of the "also means"
24 sentence so that now it is serving that
25 clarifying purpose.

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

8 Okay? Does the statute apply?

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

11 JUSTICE BREYER: How?

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

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

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

20 JUSTICE BREYER: I said the XYZ
21 Corporation sets up five subsidiaries, each of
22 which has 10 employees, and it's an agent, so,
23 I mean, were they -- yes, it's an agent of --
24 the XYZ Corporation tells them what to do.

25 MR. ROSENKRANZ: Well, Your Honor --

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

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

6 JUSTICE BREYER: Why? They each have
7 10 employees.

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

10 JUSTICE BREYER: Yeah.

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

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

18 MR. ROSENKRANZ: Where does Manhart
19 say it?

20 JUSTICE BREYER: Yeah. I mean, where
21 does it say that? I mean, where -- where does
22 the statute say that? Because it did occur to
23 me that one purpose that (a) could serve is
24 doing just what you said. You cannot turn
25 yourself into five subsidiaries, and that's why

1 the subsidiary part, namely the agent part,
2 doesn't have a number attached, because they
3 don't want a number attached.

4 MR. ROSENKRANZ: Well, we are going --

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

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

10 JUSTICE BREYER: Is it possible?

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

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

16 MR. ROSENKRANZ: Right.

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

20 It means a person engaged in an
21 industry who has 20 or more employees. So what
22 I'm trying to imagine is through the use of
23 subsidiaries there is no company that has more
24 than 10 employees. And to avoid that, one
25 thing they might have wanted to do is to use

1 the word "agency" without a qualification that
2 the agency has to have 20 employees.

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

6 JUSTICE BREYER: On that problem?

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

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

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

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

1 reading.

2 Fourth signal: Affecting commerce.

3 And what Congress did with that phrase -- now,
4 for now, I am not making a constitutional
5 argument. I am making a drafting argument.

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

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

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

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

1 inclusion side.

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

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

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

19 Congress crossed out everything after
20 "the United States." The only reason to have
21 done this would have been to now include states
22 and political subdivisions within the
23 definition of employment agency.

24 The only way that could possibly
25 happen is if they were persons to begin with;

1 and, therefore, if they were persons to begin
2 with, you flow them through subdivision -- or
3 subsection (b) and they are subject to the same
4 employee limit.

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

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

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 MR. ROSENKRANZ: Thank you, Your
18 Honor.

19 CHIEF JUSTICE ROBERTS: Mr. Fisher.

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

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

24 The plain text of the ADEA makes
25 absolutely clear that it covers political

1 subdivisions regardless of size. And there's
2 nothing odd, much less absurd, about that
3 result.

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

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

19 JUSTICE SOTOMAYOR: One doesn't. One
20 doesn't. And how do you deal with that one?

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

24 JUSTICE SOTOMAYOR: Uh-huh.

25 MR. FISHER: -- that my friend points

1 to, I think it does use it in an additive
2 manner, because that's a statute where it says
3 "consumer" means an individual who does certain
4 things or the person's legal representative.

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

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

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

14 JUSTICE SOTOMAYOR: You don't really
15 think that what the statute meant is that the
16 legal representative was giving his or her
17 private information. It's not additive in that
18 sense. It's sort of that legal representative
19 is giving the consumer's information to
20 someone. And so the legal -- that's the
21 violation, isn't it?

22 MR. FISHER: I think that's right,
23 Justice Sotomayor, but it's still talking about
24 a different source than the previous part of
25 the statute. And I think if there's one

1 potentially ambiguous provision out of 33,
2 we'll still take that, and I would turn the
3 Court to the -- perhaps I think the most
4 telling example, which is the one at pages 12
5 and 13 of our brief, about elderly families.

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

13 And so Congress, when it uses the word
14 "also means," it did exactly the opposite of
15 what my friend says you should read the statute
16 here to do, which is to carry forth those --
17 carry down to after "also means" the original
18 meaning that had come before it.

19 JUSTICE SOTOMAYOR: Could you deal
20 with this last example, the federal -- the
21 employment agency? It -- it is either
22 superfluous or there's a question whether a
23 state employment agency is still covered or
24 not.

25 MR. FISHER: I think, Justice

1 Sotomayor, the latter might be the case. But
2 it's not --

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

5 MR. FISHER: The -- the federal
6 agency?

7 JUSTICE SOTOMAYOR: Yes.

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

15 And I think the reason why you see
16 explicit references to the federal government
17 in both places is because -- for two things.
18 One is the Court itself has asked Congress in
19 various ways to speak directly when it talks
20 about federal government or states being on the
21 hook for one form or another.

22 And -- and, secondly, the federal
23 government is itself treated wholly separately
24 in Section 633(a) under a different regime of
25 the ADEA. So the federal government is just

1 put aside in all these other provisions. And I
2 think that's what Congress was doing there.

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

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

12 JUSTICE ALITO: But if -- if Congress
13 had enacted the -- the ADEA provision and Title
14 VII at the same time, do you think it's
15 plausible that Congress would have said, you
16 know, when it comes to racial discrimination,
17 we're not going to allow a suit against a
18 government entity with fewer than 25 employees,
19 but when it comes to age discrimination, we're
20 going to include every government agency no
21 matter how small?

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

1 ADEA.

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

11 JUSTICE ALITO: But that's quite --
12 that's quite abstract. Do you really think as
13 a policy matter Congress would say that age
14 discrimination is more pernicious and more
15 widespread, so, therefore, we have to have a
16 tougher remedy there than we do with respect to
17 racial discrimination?

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

25 So one of the things behind the

1 numerosity requirement in Title VII is a
2 concern about forcing very, very small groups
3 of people to associate with individuals they
4 might not like. Now that might seem antiquated
5 nowadays when we're talking about race
6 relations and race discrimination, but it's
7 directly in the legislative history of Title
8 VII.

9 On the other hand, this goes back to
10 the ADEA being partly a labor statute as well,
11 the -- the purpose of the ADEA is to bring
12 people into the workforce and keep them there
13 and to achieve full employment of older
14 individuals. And as the Secretary of Labor
15 noted in the report this Court discussed in
16 EEOC versus Wyoming, that was not to stamp out
17 animus-based discrimination like under Title
18 VII but to achieve full employment.

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

24 JUSTICE KAGAN: Is this, Mr. Fisher,
25 the only federal statute that you're aware of

1 that imposes an obligation on a small political
2 subdivision but not -- does not impose the
3 corresponding obligation on a small private
4 employer?

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

11 And as to state and political
12 subdivisions, you find a close analogy in the
13 FLSA. Now my friend says in his reply brief
14 the FLSA has no numerosity requirements at all
15 on the private side in the FLSA. That's --
16 that's strictly speaking true, but enterprise
17 liability under the FLSA depends on -- which is
18 the predominant form of liability -- depends on
19 an employer having at least \$500,000 of gross
20 receipts per year.

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

25 And I'd add, Justice Kagan, you asked

1 me just about federal, but as we cite in our
2 brief in a lengthy footnote, there are many,
3 many states, the majority of states, in fact,
4 that cover political subdivisions regardless of
5 size. Of that group, about half of them cover
6 political subdivisions regardless of size and,
7 on the other hand, still have a numerosity
8 requirement for private employers.

9 Now take that one step --

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

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

15 JUSTICE GINSBURG: The state statutes,
16 you -- you say that most states include
17 political subdivisions without regard to size.

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

22 MR. FISHER: Well, Justice Ginsburg,
23 these citations are all collected in Footnote 6
24 on page 29 of our brief. And the answer to
25 your question is, by and large, the state

1 statutes actually use different language. So
2 it's not a case where the states are merely
3 parroting what the ADEA already says.

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

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

14 So the thing that my friend says is
15 ludicrous for Congress to have achieved
16 actually was in state statutes already. Many
17 state legislatures across the country had
18 already drafted statutes like this before the
19 ADEA was passed.

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

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

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

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

23 And I'd point this Court to its own
24 decisions in cases like Gross and Nassar which
25 say that we look to not just the language

1 choices Congress made and assume it's
2 intentional. We also look to structural
3 choices that Congress makes and we assume those
4 are intentional.

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

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

15 JUSTICE ALITO: Would you say
16 something about what your argument means for
17 the "agent" clause? If Congress wrote "also
18 means" and didn't put "includes," had it
19 written the term "employer includes any agent
20 of such a person," I take it that one could not
21 be an agent without having 25 employees.

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

25 MR. FISHER: Justice Alito, let me

1 answer that question, if I may, in two steps.
2 I want to first start with my point of
3 agreement with the other side, which is we
4 agree that the key question is whether "also
5 means" adds something even with respect to the
6 agent clause. We think that's an important
7 question for the Court to ask.

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

14 More fundamentally, it's agents that
15 would not otherwise be covered by respondeat
16 superior. That's what the Court noted in
17 *Manhart*, and we explain in our brief in cases
18 like *Spirt*, and there's also Footnote 1 in the
19 Solicitor General's brief, that explain that
20 some independent contractors, for example, and
21 that's just to use one example, are agents of
22 an employer but are not covered by respondeat
23 superior.

24 JUSTICE KAGAN: But how --

25 JUSTICE BREYER: Where do I look on

1 that? Because I was bothered exactly by the
2 same thing that Justice Alito said, that if
3 we're not going to have numbers with B, we're
4 not going to have numbers with A.

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

9 MR. FISHER: Uh-huh.

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

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

18 JUSTICE BREYER: Yeah.

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

22 The much bigger problem is an agent of
23 any size would not be covered but for that
24 clause that would not be under respondeat
25 superior principles. Now my friend in the

1 reply brief says that we distort the meaning of
2 independent contractors, but I'd urge you to
3 read the rest of the sentence that my friend
4 quotes in the commentary to Section 14-N, and
5 also to look at Section 2 of the restatement of
6 agency called independent contractor.

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

15 So my friend, in his reading of the
16 "agent" clause to do nothing but clarify what
17 has come before, leaves a gaping hole in the
18 ADEA and also in Title VII.

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

24 I mean, it says any agent of such a
25 person, and it doesn't on its face make any

1 such distinction. So how would we go about
2 doing that?

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

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

15 So it would be kind of a mystery and
16 odd why Congress would have wanted agents to be
17 speaking about employees, especially when
18 another provision of the statute defines the
19 word "employee" and it's used other ways in the
20 statute.

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

25 If you answered that question against,

1 you know, what I guess would be my position as
2 I stand here, you'd -- you'd still have a
3 second question, which is if individual
4 supervisors, for example, were on the hook, the
5 question would still be, how are they on the
6 hook?

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

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

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

25 I'd urge the Court to resist the

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

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

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Mr. Bond.

13 ORAL ARGUMENT OF JONATHAN C. BOND

14 ON BEHALF OF THE UNITED STATES,

15 AS AMICUS CURIAE, SUPPORTING THE RESPONDENTS

16 MR. BOND: Mr. Chief Justice, and may
17 it please the Court:

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

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

24 Second, Congress rejected the ready
25 template in Title VII adopted just two years

1 earlier that did exclude small state and local
2 government employers by putting the definition
3 or by putting government employers in the
4 definition of "person." Congress didn't do
5 that and followed the FLSA template that it
6 adopted at the same time in 1974.

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

15 Now, in terms of the ordinary meaning,
16 we agree with Respondent that the language
17 "also means" and its usage throughout federal
18 statutes is clear, and it's clear that Congress
19 used it in that ordinary way because it didn't
20 follow the Title VII approach.

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

1 Now those differences are actually
2 quite slight. You can see them at pages 6 and
3 15 of the blue brief appendix, but none of
4 those differences prevented Congress in 1974
5 from doing the exact same thing in the Age Act
6 that a different Congress had done two years
7 earlier in Title VII if it had wished to do so.

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

15 So, just to touch on the questions
16 that have reached the "agent" clause, that's
17 where I think a real vulnerability for
18 Petitioner's argument is. Now it's true the
19 Court doesn't need to address any of the
20 broader issues or resolve the outer limits of
21 that clause because it's not implicated here
22 and nothing in this case turns on it.

23 But I think it's important to bear in
24 mind that whatever the "agent" clause means, it
25 can't mean what Petitioner is offering here,

1 because that interpretation, if you hold his
2 interpretation to its logical conclusion, means
3 that any employer could evade the Age Act by
4 outsourcing to small agents.

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

15 If that's true, it has to follow
16 logically that the 20-employee threshold
17 reaches the "agent" clause in the middle. Now
18 I realize the Petitioner in the reply brief and
19 this morning disclaims that result, but there's
20 no way to square that disclaimer with the text.

21 It would mean that the 20-employee
22 threshold starts in the first sentence, skips
23 over the "agent" clause, and lands on the
24 government clause. And that's simply not a
25 plausible way to read this statute. And it

1 also is inconsistent with Petitioner's core
2 theory that "also means" has to operate the
3 same way across both clauses here.

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

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

16 MR. BOND: So, Your Honor, again, you
17 don't have to address that here, but no --

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

23 MR. BOND: Sure.

24 JUSTICE ALITO: -- did you not?

25 MR. BOND: Yes, Your Honor.

1 JUSTICE ALITO: Okay.

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

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

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

23 The FMLA, the Family Medical Leave
24 Act, uses the same language. Lower courts and
25 the Department of Labor have construed those

1 statutes to impose individual liability in some
2 circumstances.

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

10 And, in addition, even if you
11 concluded that some subset of employees or
12 supervisors were agents in some circumstances,
13 I think you still would have to answer the
14 question that the lower courts have
15 consistently answered against individual
16 liability by determining is this individual
17 employee personally liable or is instead he
18 liable only in his official or representative
19 capacity.

20 And the idea behind that is simple.
21 If you are an employee and are counted as the
22 employer only because you're acting as an
23 agent, that is, only because you are exercising
24 the authority of the employer in varying the
25 terms and conditions of a particular employee's

1 employment, liability naturally runs against
2 the employer whose authority you are
3 exercising.

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

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

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

25 MR. BOND: So a few points on that,

1 Your Honor. First, if -- if Respondent -- or
2 if Petitioner is correct that the clause simply
3 codifies existing principles of respondeat
4 superior and agency liability, no, the employer
5 would not face liability for acts of
6 independent agents, at least in the ordinary
7 course. The general rule is that, unlike
8 respondeat superior liability, a principal is
9 not responsible for acts of independent agents
10 unless you specifically intend the result.

11 JUSTICE KAGAN: Independent
12 contractors, is that what you meant? Or --

13 MR. BOND: Well, independent agents,
14 so agents that are not employees, non-employee
15 agents, which can include --

16 JUSTICE KAGAN: But even in the face
17 --

18 MR. BOND: -- independent contractors.

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

21 MR. BOND: So --

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

25 MR. BOND: So let's distinguish two

1 things. As I understand it, Petitioner is
2 urging that the clause would incorporate
3 respondeat superior and ordinary agency
4 principles which, under Restatement Section 250
5 of Agency and 409 of Torts, would not pick up
6 acts of agents who are not employees in the
7 ordinary course.

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

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

22 CHIEF JUSTICE ROBERTS: Well, I'm not
23 -- I'm not sure what's so bad about direct
24 agent liability. I mean, let's say you have
25 the manager who runs the -- the shop, the

1 factory, and he decides, well, I'm going to
2 fire everybody over 45, or whatever it is. And
3 maybe the person fired wants to sue the
4 company; maybe the company's bankrupt. I mean,
5 what -- what's the big deal about -- it would
6 seem to me that that would allow you to sue the
7 person responsible for the decision.

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

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

25 If the Court have -- has no further

1 questions, we ask that you affirm.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Mr. Rosenkranz, five minutes.

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

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

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

14 The difference between Title VII and
15 Title IX here is crucial. Gebser said Title IX
16 has no respondeat superior liability. Why?
17 Because it did not have an "agent" clause.

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

25 That doesn't mean that agents

1 themselves have to have 20 employees. That's
2 clear from the wording -- the wording of the
3 statute. So you start with (b), it says, "The
4 employer is anyone who has 20" -- "is a person
5 who has 20 or more employees and also affects
6 commerce."

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

11 So let me just go to an observation
12 about the relationship between the FLSA and
13 Title VII. Mr. Fisher and Mr. Bond both point
14 out that there's a distinction between the FLSA
15 and Title VII in this Court's jurisprudence.

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

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

1 sophistication that is unrealistic.

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

9 Second, Respondents rewrite the
10 statute so that "agent" means independent
11 third-party contractor and they say employees
12 are not agents. You cannot just wave around --
13 wave away the problems that are created by that
14 reading. It is not peripheral. Twelve
15 regional circuits all agree with our reading,
16 and that is all moved away under Respondents'
17 reading.

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

1 contractors. That is at least clear.

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

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

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 The case is submitted.

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

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