

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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KARYN D. STANLEY,)
Petitioner,)
v.) No. 23-997
CITY OF SANFORD, FLORIDA,)
Respondent.)
- - - - -

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1 P R O C E E D I N G S

2 (11:36 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 23-997, Stanley versus the
5 City of Sanford.

6 Mr. Gupta.

7 ORAL ARGUMENT OF DEEPAK GUPTA

8 ON BEHALF OF THE PETITIONER

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

11 The ADA permits former employees in
12 Lieutenant Stanley's shoes to challenge
13 discrimination in post-employment benefits.
14 There are at least two paths to that conclusion
15 here.

16 First, the narrow path is to recognize
17 that former employees may sue when they allege
18 that they were discriminated against as
19 qualified individuals while still employed.
20 After she was diagnosed with Parkinson's in 2016
21 and before she retired as a firefighter in 2018,
22 Lieutenant Stanley was indisputably a qualified
23 individual. During that period, she was subject
24 to a policy that she alleges reduced her
25 compensation in a discriminatory manner. Under

1 the ADA, former employees may challenge such
2 discrimination even if they are no longer
3 employed by the time they bring suit.

4 If the Court adopts this rationale, it
5 should make clear that it is not foreclosing the
6 possibility that an employee may also challenge
7 discrimination that, unlike here, incurs
8 entirely after their last day on the job.

9 Second, if the Court chooses to
10 resolve this case on a broader rationale, it
11 should hold that former employees may challenge
12 post-employment discrimination. Read in
13 context, as the City rightly concedes it must
14 be, the "qualified individual" definition
15 ensures that employers can make necessary
16 job-related decisions, but it doesn't license
17 discrimination unrelated to job performance or
18 impose a temporal limitation on the ADA's
19 protections.

20 Congress made a choice to prohibit
21 discrimination in post-employment benefits,
22 benefits that are crucial to recruiting people
23 to take on dangerous jobs like firefighting and
24 policing.

25 Yet, under the City's reading, the

1 ADA's protections for these benefits mean the
2 least precisely when they matter most. Congress
3 did not enact such a self-defeating scheme.

4 I welcome the Court's questions.

5 JUSTICE THOMAS: Did the courts below
6 decide your first point?

7 MR. GUPTA: The Eleventh Circuit
8 discussed this argument but did not reach it.
9 The Eleventh Circuit, erroneous in our --
10 erroneously in our view, believed that the
11 argument hadn't been properly presented because
12 it appeared in an amicus brief by the United
13 States. But that brief by the United States was
14 filed two days before Lieutenant Stanley filed
15 her opening brief, and her opening brief fully
16 incorporated that argument. In fact, the first
17 page of the brief was a statement of adoption,
18 adoption -- adopting the -- the government's
19 arguments. And then Lieutenant Stanley referred
20 to that in her summary of argument and argument.
21 And it was a focus of the oral argument below.

22 JUSTICE THOMAS: Do courts normally
23 adopt the -- the positions of amicus to fill in
24 gaps in the parties' briefs?

25 MR. GUPTA: No, I think -- well, I

1 think in the lower courts at least. As we just
2 saw in -- in this Court, sometimes -- an amicus
3 does play that role. But, in the lower courts,
4 conventionally, no. The -- the Eleventh Circuit
5 was applying a rule that simply because
6 something is presented as -- in an amicus brief
7 doesn't mean the court has to reach it.

8 But this is a different scenario, as I
9 just described, because the amicus brief was
10 filed first, the position was fully adopted in
11 the opening brief, and it was discussed at oral
12 argument. So I think, under this Court's
13 formulation of pressed or passed below, it was
14 pressed and it is available to this Court to
15 reissue.

16 JUSTICE THOMAS: When you sought cert
17 here, did you make that argument, or did you
18 simply point out the split between the circuits
19 as to whether former employees can bring an
20 action under the ADA?

21 MR. GUPTA: Your Honor, this issue was
22 ventilated in the cert papers. I think, if you
23 look at the brief in opposition at page 30
24 through 31, there's an extensive discussion of
25 this. We discussed it at pages 24 through 25 of

1 the petition and also in the certiorari reply at
2 page 9.

3 So I think we understood the Court in
4 granting the case to be -- to be granting the
5 case including that argument. And it is an
6 answer to the question presented that would
7 resolve at least part of the circuit split
8 below.

9 JUSTICE JACKSON: Counsel, isn't --
10 oh.

11 CHIEF JUSTICE ROBERTS: No, go ahead.

12 JUSTICE JACKSON: Okay. Isn't this a
13 different scenario as well -- you said this was
14 a different scenario in terms of the Eleventh
15 Circuit's waiver argument -- because we're
16 talking about fundamentally a motion to dismiss
17 and whether or not Ms. Stanley plausibly alleged
18 discrimination.

19 And so I guess I'm a little confused
20 by the Eleventh Circuit's waiver analysis in
21 that context. I don't know what they mean that
22 she waived her ability to make this argument by
23 not raising it before the district court,
24 because the district court's task was just to
25 determine whether or not she had plausibly

1 alleged facts that would support a theory of
2 discrimination under the ADA, right?

3 MR. GUPTA: Yeah, and I think that's
4 another way that this Court can approach this
5 issue -- issue which you often say, which is
6 that as long as a party has preserved a claim,
7 the party can make legal arguments in support of
8 that claim.

9 And that's true in this Court even
10 when the refinements happen here. But, in this
11 case, the -- the legal argument was presented to
12 the court of appeals. And -- and so I think it
13 is --

14 JUSTICE JACKSON: And they somehow
15 suggested that -- that it was not available to
16 her in that way because she had not made that
17 particular argument in support of her claim --

18 MR. GUPTA: Right.

19 JUSTICE JACKSON: -- below, right?

20 MR. GUPTA: Yeah, and they -- and
21 the -- and the rule that they invoked, as I --
22 as I said in my answer to Justice Thomas, was
23 this rule that, you know, we don't reach an
24 argument simply because it's in the amicus
25 brief. But -- but I think that doesn't

1 accurately described what happened here because
2 Lieutenant Stanley was, in fact, pressing the
3 argument. And -- and, as I -- I said, it was
4 also, you know, fleshed out at the certiorari
5 stage.

6 JUSTICE JACKSON: So can you speak to
7 the question of the facts here and whether or
8 not she has plausibly alleged discrimination,
9 you know, while she was employed?

10 MR. GUPTA: Right. So, of course,
11 complaints plead facts, not law. And so the
12 question is, are the factual ingredients for
13 that complaint -- for that -- for that argument
14 present in the complaint? And I think they are.

15 And I think, first, I'd --

16 JUSTICE JACKSON: What are those
17 ingredients?

18 MR. GUPTA: I -- I'd first point you
19 to paragraph 16 of the complaint, and there,
20 Lieutenant Stanley alleged that there came a
21 point where she had no choice but to retire
22 while she was employed by the City of Sanford
23 and she was subject to the policy -- that's also
24 at paragraph 26 -- she was subject to this
25 policy.

1 And so the factual ingredients for the
2 argument are there. She was -- she was employed
3 by the City. She was able to do her job, but
4 she recognized that she was inevitably going to
5 have to retire because of a disability that had
6 arose. And so all of those factual ingredients
7 for the argument we're presenting here were
8 there.

9 The argument is where -- at least
10 where, as here, someone is employed and is a
11 qualified individual indisputably and they are
12 subject to a policy that affects their
13 compensation and that they allege -- allege
14 diminishes their compensation, they are
15 discriminated against.

16 And that's not new. In fact, the ADA
17 was mapping onto an understanding from Title VII
18 where suits like that had been brought by
19 employees who were current employees who were
20 suing with respect to post-employment benefits.
21 There were several cases that reached this Court
22 involving sex classifications.

23 JUSTICE JACKSON: So you're --
24 you're -- you're saying it's not post-employment
25 discrimination just because it concerns benefits

1 that would be given after her employment?

2 MR. GUPTA: Exactly. And -- and I
3 think this Court repeatedly had recognized that
4 in the Title VII context before the ADA's
5 enactment.

6 If you look, for example, at the
7 Hishon versus King & Spalding case, the Court
8 described this scenario where there are benefits
9 that are paid out after employment ends, but
10 there is still a claim with respect to those
11 benefits while the employment is ongoing. And
12 there were also, as I said, several cases
13 involving pension benefits where that was the
14 fact pattern.

15 JUSTICE ALITO: Mr. Gupta, I -- I
16 think that all of what you said makes sense.

17 There was a period during her
18 employment when she had a claim for disability
19 discrimination. The period between the onset of
20 her disability and her retirement, at least
21 toward the end of that period, she was
22 aggrieve -- I think it was predictable that she
23 might face this situation after she retired and
24 so that she was aggrieved.

25 And I think there was a -- a

1 sufficient injury -- a sufficient threat of
2 injury in fact to give her Article III standing.
3 But that doesn't get you home because she didn't
4 file on that claim within the prescribed time.

5 So what you need is the Lilly Lid --
6 Lilly Ledbetter Act to save you. And the
7 outcome would depend on how you read the Lilly
8 Ledbetter Act. It could be read as sort of an
9 extension of the statute of limitations which
10 would allow her to file -- to pursue that claim
11 at any point in the future when she is not
12 getting the benefits to which she thinks she's
13 entitled. That's one way to read it.

14 But another way to read it, which does
15 have support in the statutory language, is that
16 the Act does not extend to the statute of
17 limitations. It says that an unlawful
18 employment practice occurs when an individual is
19 affected by application of a discriminatory
20 compensation decision or other practice.

21 So a new claim occurs every time in
22 the future when she doesn't get the benefits
23 that she thinks she's entitled to. And if that
24 is the -- if that is what it means, then don't
25 you run into the same statutory language problem

1 that you have with respect to a change in
2 benefits that occurs after the end of
3 employment?

4 Because, if she's bringing a new
5 claim, she has to be a -- an otherwise qualified
6 individual. And it's not that easy to fit her
7 situation at that time into the statutory
8 language.

9 So that's what concerns me about your
10 argument. And could you answer -- could you say
11 why that is not fatal to your position?

12 MR. GUPTA: Sure. So I think I have
13 at least three responses.

14 First -- my first response is to
15 answer the question without resort to the Fair
16 Pay Act. Imagine the Fair Pay -- Pay Act hadn't
17 been enacted.

18 Lieutenant Stanley's claim was subject
19 to the 300-day requirement to file the claim,
20 and she filed within 214 days of the retirement.
21 So, even if you are just, you know, focusing on
22 that period before she retired, in that period,
23 she was indisputably a qualified individual.
24 She was subject to the policy, all the things I
25 said before. And so that would, I think, get

1 you out of this -- this problem that you've
2 described.

3 JUSTICE ALITO: Oh, all right. Well,
4 that's an -- that's -- that's a --

5 MR. GUPTA: But I'm also happy to --

6 JUSTICE ALITO: -- an interesting
7 response.

8 MR. GUPTA: -- try -- try to take a
9 crack at the -- at the question itself because,
10 you know, it may come up in other cases.

11 And -- and I think what the statute
12 says is that the -- the unlawful practice occurs
13 at three points: the adoption, when the person
14 is subject to the policy, and then where the
15 effects are felt.

16 And Congress was specifically focused
17 on claims with respect to compensation and
18 amended the ADA to make clear that -- that this
19 applied to the ADA. And so I think that is
20 Congress telling us that at this very kind of
21 situation where somebody is subject to the
22 policy, that the -- the unlawful practice occurs
23 there.

24 CHIEF JUSTICE ROBERTS: Counsel, you
25 say in your brief as part of your argument that

1 if the retirees are not unable to perform, they
2 are able to perform?

3 MR. GUPTA: Yes.

4 CHIEF JUSTICE ROBERTS: You smile. I
5 don't think that follows at all.

6 MR. GUPTA: It's not the most
7 intuitive thing, and, you know, I -- I'll admit
8 that when I first read the statute, that wasn't
9 the first thing that jumped out.

10 But I do think -- and -- and we have
11 lots of other ways to approach the problem, from
12 common usage and grammar and examples that we've
13 given. But I do think, if you're just thinking
14 about it in terms of formal logic, you know,
15 those are opposites. And -- and so the idea is,
16 if you take a sentence and you negate the
17 sentence --

18 CHIEF JUSTICE ROBERTS: Well, no, I
19 understand the -- the plain language. I just --

20 MR. GUPTA: Right.

21 CHIEF JUSTICE ROBERTS: -- don't think
22 it makes any sense in a situation where, most
23 likely, because you're in a different factual
24 context, you don't know whether they're able or
25 unable. So you wouldn't choose one or the

1 other.

2 MR. GUPTA: Right. I mean, another
3 way to take a crack at this is just to say that
4 it's a question that's sort of a non sequitur
5 because what you have here is a sentence that
6 has an embedded premise, right?

7 The -- the -- whoever drafted this
8 sentence was not -- was not very precisely
9 speaking to the question of: Do you have to
10 have this position at the time or not? They
11 were sort of assuming that.

12 And it says, you know, "can perform
13 the essential functions of the person that such
14 individual holds or desires." And then the
15 question is: Do you have to hold or desire the
16 position?

17 And I think the best way grammatically
18 to understand that is that there are
19 present-tense verbs. You have to be able to
20 perform the function. But then the rest of
21 the -- the part of the sentence after -- with
22 the word "that" and after "that," is a
23 restrictive clause, modifying the position.

24 And so the thing you have to be able
25 to perform is the essential functions of the job

1 that you hold or desire to the extent that you
2 hold or desire a job.

3 CHIEF JUSTICE ROBERTS: Okay.

4 MR. GUPTA: Now I don't think you need
5 to reach --

6 JUSTICE SOTOMAYOR: Counsel, it's a
7 bit -- lacks intuition to think that every retired
8 person who's not seeking a job or holding it is
9 entitled to sue for disability, particularly --
10 for example, let's give you that while they were
11 employed, they weren't entitled to disability
12 benefits. After they retired, the company
13 started giving it to retirees, to employees and
14 retirees, and then took it away.

15 Your reading would permit them to sue
16 still, correct?

17 MR. GUPTA: Well, I think they
18 would -- that suit would fail.

19 I -- I understand the intuition of the
20 question, which is: Have we opened some, you
21 know, big trap door that expands the reach of
22 the statute in -- in -- in a way that we should
23 be worried about?

24 JUSTICE SOTOMAYOR: That's exactly my
25 question.

1 MR. GUPTA: And -- and, you know, I
2 will note that the -- the other side hasn't
3 identified that category, nor did the amici, but
4 I can -- I can see where that concern comes
5 from.

6 And I think one way to answer the
7 question is to look at the discrimination rule
8 and notice that it still requires that any claim
9 be in regard to employee compensation or the
10 terms, privileges, or conditions of employment.

11 And that -- that's the same language
12 in Title VII. So Title VII makes unlawful a --
13 an act of discrimination with respect to those
14 same nouns.

15 And we're not concerned in the Title
16 VII context that there's some, you know, trap
17 door that opens up a large category of claims.
18 And the reason why is you don't have a claim of
19 that kind unless there is either a prospective
20 employment relationship or some employment
21 relationship that is the locus of that
22 discrimination. The same thing is true with
23 respect to the ADA.

24 So I don't think our argument opens up
25 some broad category of claims. You still have

1 to have that -- the discrimination has to
2 concern the terms and conditions or compensation
3 of employment.

4 JUSTICE SOTOMAYOR: I have one other
5 question. The SG, I believe, takes the position
6 that an employer discriminates against a retiree
7 as to employment benefits that she earned while
8 she was a qualified individual.

9 MR. GUPTA: Right.

10 JUSTICE SOTOMAYOR: Why don't you --
11 why haven't you adopted that?

12 MR. GUPTA: Well, we do endorse the --
13 the SG's theory. That's what we meant to do in
14 our reply. And -- and, if that wasn't clear,
15 I -- I -- I -- I, you know, endorse the -- the
16 SG's theory, and I think it is an alternative
17 textual pathway that gets you to basically the
18 same result. And you can get there --

19 JUSTICE SOTOMAYOR: Does that then
20 take us to Justice Alito's question of if the
21 discriminatory effect is felt after retirement?

22 If someone didn't have Parkinson's or
23 a condition before retirement, while they were
24 still performing, would that then lead us to
25 Justice Alito's question?

1 MR. GUPTA: It -- it could. Not in
2 this case for the reasons I was discussing with
3 Justice Alito, but, in other cases, yes.

4 And I think there are a number of --
5 if I may complete?

6 CHIEF JUSTICE ROBERTS: Sure. Yeah.
7 Please do.

8 MR. GUPTA: There are a number of
9 hypothetical scenarios that I think the Court
10 should be concerned about, for example, somebody
11 who runs into a burning building and is in --
12 instantly rendered unqualified or somebody who
13 develops a disability later. And those -- those
14 cases would be captured by the Solicitor
15 General's alternative theory and also by our
16 part two arguments but -- but not by the narrow
17 theory.

18 CHIEF JUSTICE ROBERTS: Thank you.

19 Justice Thomas?

20 Justice Alito?

21 JUSTICE ALITO: I -- I am interested
22 in what the implications of adopting -- what the
23 consequences of adopting your argument would be.

24 And this is what I -- I would really
25 appreciate some enlightenment on this because I

1 assume that you're more -- you're familiar with
2 how this has worked out in those circuits that
3 have adopted something like your argument or how
4 it might work out nationwide in the future.

5 In the great many -- in my -- in -- in
6 a prior life, I saw a lot of ADA cases and they
7 almost always concerned the question of
8 reasonable accommodation. And I'm hard-pressed
9 to see how the reasonable accommodation concept
10 can be applied to retirement benefits or -- and
11 the facts of this case highlight it.

12 So I know we're -- the validity of
13 your theory of -- of -- you know, that there was
14 a violation is not before us.

15 But what -- what would be your -- how
16 would a court go about -- what is the
17 discrimination here? Is it the disparate
18 treatment between employees who work 25 years
19 and then retire and those who work a -- a
20 shorter period of time and retire on disability?
21 Is that it? Or does it have something to do
22 with the change in the -- in the scheme?

23 MR. GUPTA: Okay. So let me -- there
24 are two questions in there. Let me take both of
25 them. So I quite agree that the reasonable

1 accommodation concept is not really going to do
2 much work in this scenario, and one way you know
3 that is, if you look at the construction
4 provision, (b)(5), when it's describing the
5 reasonable accommodation requirement, it
6 actually adds on this language. It says
7 "qualified individual who is an applicant or
8 employee."

9 And so I think that is how Congress
10 cabined the provision just to applicants or
11 employees. And that makes sense because it
12 doesn't make sense to impose --

13 JUSTICE ALITO: Yeah.

14 MR. GUPTA: -- on employers the
15 obligation --

16 JUSTICE ALITO: I don't see how it
17 could work. So, if it's -- which is it? Is it
18 the change, or is it the current status?

19 MR. GUPTA: I -- I think it's both.
20 It is an ongoing discrimination. Let me -- so,
21 first of all, I'd just emphasize that neither of
22 the courts below aggressed -- addressed the
23 actual merits of the -- of the discrimination
24 claim.

25 JUSTICE ALITO: No, I -- I understand

1 that.

2 MR. GUPTA: And --

3 JUSTICE ALITO: I'm just -- I'm just
4 trying to understand how this would work -- how
5 this is going to work --

6 MR. GUPTA: Right.

7 JUSTICE ALITO: -- out if you -- if
8 you prevail. So you have a situation where
9 your -- your client says -- let's just take the
10 ongoing status. Your client says that I'm
11 being -- I -- I -- I'm a victim of
12 discrimination based on disability because I
13 should be treated the same way as somebody who
14 worked 25 years.

15 How is a court supposed to determine
16 whether this distinction between somebody who
17 works 25 years and somebody who works a shorter
18 period and retires based on disability is
19 unlawful? What is the test for determining
20 that?

21 MR. GUPTA: Yeah. I mean, I think it
22 will -- it will turn a lot on the claim. Let me
23 try to describe what I think is going on here,
24 which is that before this policy was put into
25 place, the City was treating three groups of

1 people as equally deserving of the subsidy, so
2 people who had completed 25 years of service,
3 people who had completed a combined year -- 25
4 years of service when taking into account
5 military service and other firefighting
6 positions, and then people who retired with --
7 with a disability. That's the third category.

8 And when faced with a budget
9 shortfall, the City chose to only exclude that
10 third group, people with disabilities, from the
11 subsidy despite the absence of any evidence that
12 it would ameliorate the shortfall. So the City
13 singled out people with disabilities solely
14 because of their disabilities. And, in fact, we
15 know that the City has told a disabled retiree
16 who did have 25 years of service that he still
17 could not have the subsidy because he had, after
18 25 years, become disabled.

19 So what -- what we would, I think,
20 want the opportunity to do on remand is to show
21 that the City treated Lieutenant Stanley
22 differently because of her disability. If she
23 weren't disabled, she would have made it to 25
24 years and gotten the subsidy. And if the City
25 didn't singled out -- single out disabled

1 people, she would have gotten the subsidy.

2 Of course, the City will have the
3 opportunity on remand to show why we're wrong
4 and -- in their view. And whether you think the
5 underlying claim is doomed to fail or destined
6 to succeed, the -- the question presented is the
7 same. And I do think these are difficult claims
8 to succeed on.

9 JUSTICE ALITO: Well, you've said --
10 you've said a lot. And I -- I -- I'm not
11 asking -- I -- I -- I'm not talking about the
12 validity of this particular claim. I just don't
13 know how this is going to be approached. When
14 you have -- you have structured retirement
15 benefits, distinctions are going to be made.

16 MR. GUPTA: Right.

17 JUSTICE ALITO: So part of what you
18 said seems to me -- seems to be that the City
19 just had irrational bias against people with a
20 disability, okay? That would be one -- one
21 argument that might be made.

22 Another part of what you seem to have
23 said is that they didn't really have a -- an
24 economy -- a valid economy rationale. By not
25 extending the benefits to people who retire with

1 disability, they really weren't going to save
2 any money.

3 But suppose there's no evidence of --
4 of bias and, presumably, they will save some
5 money and they say, look, we need to cut -- we
6 needed to cut back, so we cut -- this is where
7 we cut back and we have a reason for it. The
8 reason is that we want to reward people who work
9 for us for 25 years. How -- how is a court
10 going to approach this kind of issue?

11 MR. GUPTA: Well --

12 JUSTICE ALITO: Because, if you take
13 out the reasonable accommodation question, I
14 just don't know how this is going to be -- how
15 it's going to be approached by courts in the
16 future.

17 MR. GUPTA: Well, Justice Alito, you
18 mentioned, you know, a structured benefit plan
19 and the ability to make sort of actuarial sorts
20 of decisions. And Congress actually did focus
21 on this precise problem when it drafted the ADA,
22 and it included a safe harbor provision. That's
23 Section 12201(c). And that immunizes plan
24 sponsors, plan administrators, insurance
25 companies, from these kinds of risk-based

1 decisions. And, in fact, your opinion in the
2 Ford case, your concurring opinion in -- in one
3 of these decisions comprising the circuit split,
4 mentioned that safe harbor.

5 And I think that actually, to the
6 extent that the amici on the other side are
7 hypothesizing a flood of claims, the reason you
8 haven't seen that in the Second and Third
9 Circuits is because that safe harbor provision
10 takes care of and immunizes defendants from --
11 from the large, you know, majority of those
12 kinds of claims.

13 JUSTICE ALITO: All right. Thank you.
14 That's helpful.

15 CHIEF JUSTICE ROBERTS: Justice
16 Sotomayor?

17 JUSTICE SOTOMAYOR: The other side
18 argues that the ADA is only about bringing
19 workers into the workforce and keeping them
20 there. It -- it seems to me that part of the
21 ADA's goal is to encourage people with
22 disability to go into the workforce, and that
23 includes how much benefits they're going to get,
24 right?

25 MR. GUPTA: Exactly, yeah. I --

1 JUSTICE SOTOMAYOR: And -- and to the
2 extent that people with disabilities, whether
3 before they enter the workforce or they retire,
4 if the health insurance plan or the benefit they
5 thought they had isn't there, or they're afraid
6 it won't be there, that will be --
7 disincentivize them from going into the
8 workforce, correct?

9 MR. GUPTA: Correct.

10 JUSTICE SOTOMAYOR: All right. Now
11 the other side argues that there are a whole
12 plethora of remedies besides this one, besides
13 the ADA, to vindicate retirees' rights.

14 Could you go through them --

15 MR. GUPTA: Sure.

16 JUSTICE SOTOMAYOR: -- and tell me why
17 you think they're not -- besides the fact that
18 the ADA has different -- different damages
19 scope, I'm not sure that they would qualify,
20 that retirees would qualify for many of these
21 alternatives that they raise. Is that correct?

22 MR. GUPTA: Yeah. I think that's
23 right. I mean, the other sources of law are not
24 a substitute, and, certainly, they're not
25 trained directly on discrimination on the basis

1 of disability.

2 So my friends on the other side
3 mentioned contract law. If you just take
4 Florida contract law, which would apply here,
5 there would be no claim. Public employers can
6 change their plans prospectively at any time
7 before the benefits are paid out. And so
8 there's -- the Florida Supreme Court has said --

9 JUSTICE SOTOMAYOR: So the only thing
10 that permits them or stops them from
11 discriminating against retirees is the ADA,
12 correct, not for --

13 MR. GUPTA: I -- I think the ADA is
14 the principal tool, and it is the -- the tool
15 that Congress chose. There are protections --

16 JUSTICE SOTOMAYOR: All right. Go
17 through the others.

18 MR. GUPTA: And -- and -- and then the
19 other candidate they mention is ERISA. So I'll
20 mention that, you know, first of all, when the
21 ADA was enacted in 1990, there was no
22 possibility that ERISA would reach this
23 scenario.

24 ERISA also doesn't apply to public
25 employers, like the one here, at all. And under

1 ERISA, private employers can -- can generally
2 terminate or amend retirement plans so long as
3 they -- they don't reduce or eliminate accrued
4 benefits, the same thing as under contract law.

5 So the problem here that the ADA is
6 trying to reach is a different one, which is not
7 just a contractual promise; it's the idea that
8 you made -- maybe you could think of it as a
9 less good promise to people who had a protected
10 characteristic.

11 And if -- and if an employer did that
12 on the basis of race or religion or sex, of
13 course, there would be a claim, and Congress
14 wanted to have parallel coverage for disability
15 as well.

16 JUSTICE SOTOMAYOR: The third they
17 mentioned was the Social Security Act or
18 Medicare Act, but I don't see how those apply --

19 MR. GUPTA: -- they would not apply.

20 JUSTICE SOTOMAYOR: -- at all to --

21 MR. GUPTA: Right.

22 JUSTICE SOTOMAYOR: -- just the
23 question of retirees. Thank you, counsel.

24 CHIEF JUSTICE ROBERTS: Justice Kagan?
25 Justice Gorsuch, anything?

1 Justice Kavanaugh?

2 Justice Barrett?

3 Justice Jackson?

4 JUSTICE JACKSON: So is the linchpin
5 of this really just focusing on when the
6 discrimination occurred and you say that there
7 are sufficient facts and it should not have been
8 dismissed because this doesn't necessarily
9 involve just post-employment discrimination?

10 MR. GUPTA: Yeah. I think that's
11 right. I mean, I think there are three points
12 in time that -- that matter at least: when you
13 have to be able to perform the essential
14 functions; when the discrimination must occur to
15 be actionable; and then when you can sue.

16 And what we're saying is, at least on
17 the facts of this case, where the discrimination
18 as we've been discussing did, indeed, occur when
19 she was able to perform the functions of her job
20 as a firefighter, then the question is when you
21 can sue.

22 And if you answer the -- the question
23 on the narrow ground, what you would be
24 resolving is you'd be saying you can sue even
25 if, at the point that you sue, you're -- you're

1 no longer in the job.

2 And if you do that, that would be
3 resolving a chunk of the circuit split because
4 the Sixth and the Ninth Circuits have held
5 otherwise, as the -- as the court of appeals
6 recognized at -- at page 17A of the -- of the
7 decision below.

8 JUSTICE JACKSON: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 MR. GUPTA: Thank you.

12 CHIEF JUSTICE ROBERTS: Mr. Liu.

13 ORAL ARGUMENT OF FREDERICK LIU FOR
14 THE UNITED STATES, AS AMICUS CURIAE,
15 SUPPORTING THE PETITIONER

16 MR. LIU: Thank you, Mr. Chief
17 Justice, and may it please the Court:

18 The only question presented is whether
19 Stanley has alleged discrimination against the
20 qualified individual under the ADA. The answer
21 to that question is yes.

22 We agree with Stanley that the most
23 straightforward path to that conclusion lies in
24 the period after she was diagnosed with
25 Parkinson's disease but before she retired. In

1 that period, Stanley was a qualified individual
2 with a disability.

3 And there's no dispute that if the
4 alleged discrimination occurred while Stanley
5 was both qualified and disabled, the alleged
6 discrimination was against a qualified
7 individual.

8 The Court can, and should, decide this
9 case on that narrow basis, but, in doing so, it
10 shouldn't foreclose the possibility of relief in
11 other cases involving plaintiffs who were not
12 both qualified and disabled when the disability
13 discrimination occurred.

14 We believe the ADA also protects the
15 benefits those plaintiffs earned as qualified
16 individuals, but, because the alleged
17 discrimination here occurred while Stanley was
18 both qualified and disabled, this Court need not
19 address any broader arguments to vacate the
20 decision below.

21 I welcome the Court's questions.

22 JUSTICE THOMAS: Where -- did
23 Petitioner make those arguments in the district
24 court and in the court of appeals?

25 MR. LIU: Yeah. So, in the district

1 court, we think this -- this argument is
2 supported in paragraph 16 of the complaint.
3 That paragraph of the complaint alleges that she
4 became disabled before she retired and also
5 alleges that she continued to work until she
6 retired.

7 We think it's a plausible inference
8 from that paragraph that she was a qualified
9 individual with a disability at some point
10 before she retired.

11 In the court of appeals, I would look
12 at Romanette 8 and page 10 of her opening brief,
13 pages 4 to 13 of her reply brief, and I would
14 listen to the first five minutes of the oral
15 argument below, in which Stanley herself
16 described the path I'm identifying here as "the
17 narrowest path to a decision in her favor."

18 And then, in this Court, I would -- I
19 would cite the same pages my friend cited in the
20 petition, particularly pages 7, 11, 24, and 25.
21 I would note that the City argued forfeiture in
22 its brief in opposition. Presumably, this Court
23 considered and rejected that forfeiture
24 contention as a basis for denying review and for
25 good reason, because this Court has said time

1 and again that once a -- a party has preserved
2 an issue for this Court's consideration, that
3 party can make any argument in support of that
4 issue.

5 And the issue here is whether Stanley
6 satisfies the qualified individual requirement.

7 I want to emphasize why we think it's
8 a good idea to decide this case narrowly.

9 First, we think it answers the
10 question presented.

11 Second, we do think it would go a long
12 way to resolving the circuit split. That's
13 identified at page 17A of the petition appendix.
14 And the split implicates two decisions from the
15 Sixth Circuit and the Ninth Circuit, the
16 McKnight decision and the Weyer decision, which
17 both held that former employees categorically
18 cannot sue to enforce Title I.

19 And so, if this Court were to hold
20 that at least someone in Stanley's circumstances
21 can sue even though she was a former employee
22 when she brought the suit, that would resolve
23 that question that's divided the circuits.

24 JUSTICE ALITO: Could she sue if she
25 had not filed within 300 days?

1 MR. LIU: I do, Justice Alito, I -- I
2 have the same two responses my friend did. I
3 think it's unnecessary to reach that -- that
4 interpretation of the Fair Pay Act because there
5 are 86 days in the 300-day limitation period
6 that fall during the period after she was
7 diagnosed but before she was disabled, and those
8 may well be days that support her claim here.

9 But, to get to the interpretation of
10 the Fair Pay Act, we understand the Fair Pay Act
11 as saying that you can identify a discriminatory
12 decision that falls outside the limitations
13 period, that is, a -- a decision that satisfies
14 all the elements of discrimination under
15 12112(a). And so long as you can point to
16 effects from that decision that do fall within
17 the limitation period, then you can challenge
18 that decision.

19 We -- we -- we understand that to be
20 the force of the Fair Pay Act in a context like
21 this.

22 JUSTICE ALITO: I don't want to take
23 up too much time, but I am interested in the
24 last questions -- the last series of questions I
25 asked Mr. Gupta.

1 So, in this case -- because I want to
2 understand where this leads. In -- in this
3 case, Lieutenant Stanley is actually treated
4 more favorably than someone who retires after 20
5 years without a -- for a reason other than
6 disability. She is treated less favorably than
7 someone who retires after working for 25 years.

8 So how is a court -- put aside --
9 there's no question of -- of bias, and the --
10 the -- the employer puts that -- puts forward
11 information that this is based on cost saving
12 and incentivizing working until 25.

13 How is a -- what is the test for
14 determining whether something like that is valid
15 or not?

16 The reasonable accommodation concept
17 would work in the employment context, but it
18 doesn't work here. So what's the answer?

19 MR. LIU: Yeah, I don't think this is
20 a reasonable accommodation claim. I don't think
21 Stanley has ever brought a reasonable
22 accommodation claim.

23 JUSTICE ALITO: Okay. It's not
24 reasonable accommodation.

25 MR. LIU: Right.

1 JUSTICE ALITO: So how do you
2 determine whether this kind of a structure is --
3 is discriminatory?

4 MR. LIU: So we understand this to be
5 a disparate treatment claim, and we understand
6 that the right way to go about analyzing a
7 disparate treatment claim is to ask how a
8 similarly situated person without disabilities
9 would be treated.

10 And, as you know, the United States
11 hasn't taken a position on this issue, but I --
12 I understand the parties to have staked out two
13 different ways of identifying the relevant
14 similarly situated comparator.

15 I think, if you ask Petitioner, what
16 they would say is: What you do is you subtract
17 disability from the equation and you see what
18 would have happened then. And, in their view,
19 if you subtract disability from the equation,
20 their client, Stanley, would have worked more
21 than 25 years and, thus, been eligible for
22 benefits until she was 65.

23 Now the City responds and says: Well,
24 when you subtract disability from the equation,
25 that's all you subtract out, and you hold the

1 terms of service constant at 20 years. They --
2 they would say that -- that Petitioner is
3 changing two variables, not only the -- the
4 disability but also the terms of service.

5 And so the City says: A similarly
6 situated person with only 20 years of service
7 and no disability wouldn't have gotten benefits
8 in this case, so Stanley should lose.

9 I think that's the form of the
10 disparate treatment analysis that should occur
11 in the courts below. But, as my friend pointed
12 out, neither court analyzed the issue. It
13 doesn't affect this Court's consideration of the
14 qualified individual issue that is before it.
15 And so it can just be left --

16 JUSTICE ALITO: Well, if --

17 JUSTICE KAGAN: Do you --

18 JUSTICE ALITO: I'm sorry.

19 JUSTICE KAGAN: No, go ahead.

20 JUSTICE ALITO: I mean, it -- it -- it
21 affects at least my thinking because I want to
22 know where we're going with this.

23 MR. LIU: Right. And I -- I don't
24 think where we're going -- because -- because we
25 do not have a judgment on the ultimate merits of

1 the disability claim, it is not the case that
2 where we're going is that cities can't do
3 exactly what the City did here. I don't want to
4 give that impression.

5 I -- I think, for purposes of this
6 case, this Court can assume that this policy did
7 discriminate on the basis of disability. And
8 so, instead of treating some class of people
9 with disabilities more favorably, I would just
10 ask this Court to assume that it cut the
11 benefits of people with disabilities and left
12 them worse off.

13 JUSTICE KAGAN: Do you see many claims
14 like this under other discrimination laws? Why
15 or why not?

16 MR. LIU: Yeah, we -- we do. I mean,
17 this Court has seen cases about post-retirement
18 benefits in the Title VII context. There have
19 been cases that have come to this Court about
20 sex and race discrimination in post-retirement
21 benefits.

22 And I think that's one of the
23 anomalies of the City's position, is that
24 whereas Congress was trying to bridge the gap
25 between the legal remedies available for people

1 with disabilities vis-à-vis people who are
2 discriminated based on race or sex or other
3 things in Title VII, the -- the City's approach
4 would broaden that gap.

5 JUSTICE KAGAN: And is the way --
6 again, you haven't taken a position on a lot of
7 this, but is the fundamental way you understand
8 these claims to work the same across
9 discrimination statutes?

10 You know, often, as Justice Alito
11 points out, the ADA is kind of different. Would
12 it be just the same here?

13 MR. LIU: I -- I think, in -- in terms
14 of a disparate treatment claim, it would be the
15 same. I think it's an open question that we
16 haven't addressed in our brief whether something
17 like a reasonable accommodation claim would --
18 would -- would provide a different kind of
19 preferential treatment to people with
20 disabilities in this context.

21 JUSTICE ALITO: It's -- it's not the
22 same because, in a Title VII case based on race,
23 sex, whatever, you're asking: Are two people
24 treated differently? The -- people of different
25 races, they're -- are they treated differently?

1 People of different sexes, are they treated
2 differently?

3 Under the ADA, that's not what you ask
4 in most cases because they -- because what the
5 plaintiff wants is not exactly equal treatment.
6 That's the whole point. The plaintiff wants a
7 reasonable accommodation.

8 If you take away -- so if you're -- if
9 what you're saying is that -- so I don't see
10 how --

11 MR. LIU: Well --

12 JUSTICE ALITO: -- whatever's been
13 done under Title VII --

14 MR. LIU: -- I -- I -- I --

15 JUSTICE ALITO: -- sheds light into
16 the problem here.

17 MR. LIU: I think the -- the main
18 difference between the ADA and Title VII is
19 that -- I'm sorry, yes, the ADA and Title VII is
20 that the ADA offers plaintiffs a reasonable --
21 may I finish, Mr. Chief Justice?

22 CHIEF JUSTICE ROBERTS: Sure.

23 MR. LIU: Offers plaintiffs a
24 reasonable accommodation claim, but under both
25 statutes, plaintiffs can bring disparate

1 treatment claims.

2 And to just give an example of --
3 of -- of -- of some disparate treatment that
4 could happen here, imagine if there were
5 policies, every -- everyone who has 20 years of
6 service gets a certain amount of benefits,
7 except people with disabilities. I think that's
8 a clear disparate treatment problem.

9 CHIEF JUSTICE ROBERTS: Thank you.

10 Justice Thomas?

11 Anything further, Justice Alito?

12 Justice Sotomayor?

13 JUSTICE SOTOMAYOR: If I'm
14 understanding your response right, there are
15 various kinds of claims under the ADA.
16 Reasonable accommodation is one, but there's
17 also disparate treatment.

18 MR. LIU: Correct.

19 JUSTICE SOTOMAYOR: And this is what's
20 being claimed here. Do you think that this is
21 slightly different case also because they had
22 been extending a benefit that they then took
23 away?

24 MR. LIU: I think that goes to a
25 animus-based claim. I think, if Petitioner

1 could show that the decision to reduce benefits
2 was made out of animus, then that might allow
3 them to satisfy the elements of a disparate
4 treatment claim even without pointing to the --
5 the sort of formal disparate -- the formal
6 comparator analysis.

7 JUSTICE SOTOMAYOR: But there's
8 still --

9 MR. LIU: Yeah.

10 JUSTICE SOTOMAYOR: And he mentioned
11 one defense is that it's based on -- at risk
12 factors, which are a different thing, correct?
13 Or service?

14 MR. LIU: Right. There is also a safe
15 harbor in Section 12112(c) that provides a safe
16 harbor for certain insurance underwriting plans.

17 JUSTICE SOTOMAYOR: All right. Do you
18 have a different answer than Mr. Gupta as to the
19 questions of why the other statutes that are
20 pointed to by the other side are not effective
21 remedies or substitutes for the ADA?

22 MR. LIU: I don't have a different
23 answer. I would just boil it down to this,
24 which is those other sources of law may well be
25 useful in enforcing promises that an employer

1 makes. But the problem here, the alleged
2 problem here, is that the employer made one
3 promise to people without disabilities and a
4 different, worse promise to people with
5 disabilities. And simply enforcing that other
6 less good promise isn't going to remedy the
7 alleged discrimination in the complaint.

8 JUSTICE SOTOMAYOR: Thank you,
9 counsel.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?

11 JUSTICE KAGAN: So, Mr. Liu, I'm -- I
12 just want to make sure that I understand what
13 you would like us to do.

14 MR. LIU: Yeah.

15 JUSTICE KAGAN: And, as I understand
16 it, it's because Ms. Stanley was employed, was
17 holding a job, for a period of time that you
18 would like us to go off on -- on -- on that
19 basis and, you say, you know, you -- she sued
20 within the 300 days, and -- and -- and the
21 consequence of that is that we never have to
22 reach this qualified individual provision. Is
23 that -- is that correct?

24 MR. LIU: I -- I think because
25 everyone agrees she was a qualified --

1 JUSTICE KAGAN: At that point. Right.

2 MR. LIU: -- individual during that
3 time. Yes.

4 JUSTICE KAGAN: So we never have to
5 figure out what the qualified individual
6 provision means with respect to somebody who is
7 retired, not in a job --

8 MR. LIU: Right.

9 JUSTICE KAGAN: -- and, you know,
10 whether we should think of that as precluding a
11 suit for some later --

12 MR. LIU: Exactly.

13 JUSTICE KAGAN: -- person.

14 And you talked about why you shouldn't
15 think of these as forfeited. I mean, it's at
16 least true that the courts below did not address
17 these. And I'm not sure that we had it in our
18 minds when we took the case that this was the
19 issue. So what, if anything, would you say to
20 that?

21 MR. LIU: I would say that the -- the
22 issue defined at the right level -- and I'm
23 defining it as the text of the statute defines
24 it -- is whether there was discrimination
25 against a qualified individual. I do understand

1 the Court to have granted cert on that question.

2 Then it's just a matter of the fact
3 that these arguments, while they were pressed
4 below not only by us but -- but -- but -- but by
5 Stanley, weren't addressed below. But I've
6 always understood that pressed or passed-upon
7 requirement to -- to apply to issues and not
8 arguments but also to be phrased in the
9 injunctive such that if you did want to apply
10 that test to the precise arguments here, it
11 would be satisfied because these arguments were
12 pressed below.

13 JUSTICE KAGAN: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch?

16 Justice Kavanaugh?

17 JUSTICE KAVANAUGH: Well, I thought we
18 were deciding whether the Eleventh Circuit's
19 understanding of the law was correct given the
20 arguments that it considered. Is that not what
21 we -- you -- you don't think that's what we
22 should do?

23 MR. LIU: I think the Eleventh Circuit
24 found various ways to reject the arguments that
25 go to the overarching issue. Some of those ways

1 of rejecting those arguments did involve
2 addressing those arguments on the merits, and
3 others involved determining that they were
4 forfeited. But I think all of that is before
5 this Court.

6 JUSTICE KAVANAUGH: Okay.

7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett?

9 Justice Jackson?

10 JUSTICE JACKSON: So I -- I just
11 wanted to clarify the conversation that you had
12 with Justice Alito about whether the elements
13 of -- disparate treatment have been plausibly
14 alleged here. That -- you don't consider that
15 to be within the question presented in this
16 case?

17 MR. LIU: We do not.

18 JUSTICE JACKSON: So it's more like
19 whether or not she -- her status as a former
20 employee precludes her from making this claim?
21 I mean, I thought at the bottom of all of this
22 we're talking about a motion to dismiss in which
23 the City claimed that she was not allowed to go
24 forward because she was a former employee.

25 MR. LIU: Correct.

1 JUSTICE JACKSON: And you're saying
2 she is because there's evidence that she was
3 discriminated against, evidence, not -- it
4 hasn't -- whether it's proven or not, evidence
5 that she was discriminated against during the
6 period of her employment, and that should be
7 enough to allow for her case to go forward?

8 MR. LIU: That should be enough. We
9 think even if she couldn't have pointed to that
10 existence of discrimination while she was
11 employed that she would still have a claim, like
12 many others do in other situations, where they
13 cannot point to a precise moment -- moment in
14 time in which they were both qualified and
15 disabled. But I'll acknowledge that those are
16 trickier issues, and this Court's usual practice
17 is not to decide issues more broadly than it
18 needs to.

19 JUSTICE JACKSON: Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Ms. Conner.

23 ORAL ARGUMENT OF JESSICA C. CONNER
24 ON BEHALF OF THE RESPONDENT

25 MS. CONNER: Mr. Chief Justice, and

1 may it please the Court:

2 Title I of the ADA prohibits employers
3 from discriminating on the basis of disability
4 only against an individual who can perform the
5 job she holds or desires, present tense.

6 This Court has explained in Robinson
7 that use of present tense verbs is an
8 unambiguous temporal qualifier limiting a
9 statute to reach to current employees only.
10 Therefore, the Eleventh Circuit correctly held
11 that because Stanley cannot establish that the
12 City committed any discriminatory acts against
13 her while she could perform the essential
14 functions of a job that she held or desired to
15 hold, her Title I claim fails.

16 Indeed, the City's 24-month rule on
17 its face is applicable only to unqualified
18 individuals who retire because they are unable
19 to perform their jobs. However, Petitioner
20 argues that the City subjected her to its policy
21 when she was a qualified individual during her
22 employment. But a qualified individual is not
23 subject to a policy that only applies to
24 unqualified individuals, just like a man is not
25 subject to a policy that applies only to women,

1 and a non-disabled employee is not subject to a
2 policy that only applies to disabled employees.

3 This proposition is so
4 well-established that the Petitioner did not
5 plead that the City's policy discriminated
6 against her as a qualified individual. Instead,
7 the district court, at 26a, held that her Title
8 I claim failed because her complaint alleged
9 that the discrimination did not occur until
10 plaintiff was no longer able to perform the
11 essential functions of her job.

12 This ruling should not be
13 controversial. Everyone agrees, for example,
14 that an employer does not violate Title I when
15 it fires an employee who can no longer perform
16 the essential functions of their job. The
17 outcome should be no different here simply
18 because retirees or post-employment benefits are
19 involved. This Court should affirm.

20 I welcome the Court's questions.

21 JUSTICE THOMAS: Would you spend a --
22 a bit of time on what you think we granted cert
23 on and what was decided below and what was not
24 decided below?

25 MS. CONNER: Yes, Your Honor. The --

1 the Court certainly, I would assume, granted
2 cert to hear the question that is actually
3 splitting the circuit courts, and that question
4 is solely whether or not discrimination
5 occurring totally and entirely post-employment
6 against an unqualified individual is actionable
7 under Title I.

8 And, additionally, this Court could
9 consider whether or not discrimination occurring
10 during employment is actionable. But the
11 problem here is that the Eleventh Circuit never
12 said that employees who are qualified during
13 their employment, who are subject to
14 discrimination regarding post-employment
15 benefits cannot sue. It did not say that. It
16 just said that the Petitioner disclaimed that
17 argument, that she did not raise the argument
18 that anything happened to her during her
19 employment that was actionable.

20 And the Eleventh Circuit also did not
21 say that an employee must be qualified at the
22 time of a lawsuit. The Eleventh Circuit said
23 only that an employee must be qualified at the
24 time of the discriminatory act, but, because she
25 alleged and also argued that she -- that the

1 discrimination only occurred post-employment,
2 when she was totally disabled and unable to
3 perform the essential functions of her job, that
4 she alleged discrimination against an
5 unqualified person only and that --

6 JUSTICE KAGAN: Well, I -- I take your
7 point, Ms. Conner, that the Eleventh Circuit did
8 not address this, but Mr. Gupta and Mr. Liu have
9 suggested that Ms. Stanley did point it out on
10 various occasions, that she was not somebody who
11 it was -- it was all post-retirement, but, in
12 fact, that there were a couple of years of her
13 employment where she had the exact same claim.

14 And it seems a little bit odd to
15 decide this bigger, broader question that you
16 would like us to decide when, as to this
17 particular per -- person, it's academic.

18 MS. CONNER: Justice Kagan, I -- I
19 heard my friends point to paragraph 16 of her
20 complaint as where they claim she alleged
21 discrimination during employment, but paragraph
22 16 actually does not contain any allegations.

23 JUSTICE SOTOMAYOR: Where is that?

24 MS. CONNER: That would be in Document
25 1 of the record at paragraph 16, which --

1 JUSTICE KAGAN: I mean, I guess
2 another way of stating the question is we would
3 be deciding the question as if there were a set
4 of facts that are not true.

5 MS. CONNER: Correct --

6 JUSTICE KAGAN: I mean, she was
7 employed.

8 JUSTICE JACKSON: Do you dispute that
9 she was disabled before she retired? Do you
10 dispute that?

11 MS. CONNER: No, we do -- we do not
12 dispute that she was disabled, but we dispute
13 that any discrimination occurred while she was a
14 disabled -- a qualified individual with a
15 disability because she took -- she became
16 completely unqualified, meaning unable to
17 perform the essential functions of her job, and
18 then she took a disability retirement, and then
19 the City applied its 24-month rule to her.

20 So the only time that the alleged
21 discrimination occurred was when she was an
22 unqualified individual after she had --

23 JUSTICE JACKSON: So -- so --

24 MS. CONNER: -- taken her retirement.

25 JUSTICE JACKSON: -- under that view,

1 a person cannot sue for retirement-related
2 benefits discrimination because it seems to me
3 that you're saying that if a person becomes
4 disabled while they are still employed, to the
5 extent that the policy has not yet been applied,
6 the policy concerning the retirement benefits,
7 because they're still employed, they can't sue
8 about it.

9 And then, when they retire and the
10 policy is applied, they can't sue about it
11 because they become unqualified at that point in
12 your view.

13 So how do you ever challenge --

14 MS. CONNER: Mm-hmm.

15 JUSTICE JACKSON: -- discrimination
16 concerning a policy that relates to retirement
17 benefits and disability?

18 MS. CONNER: Justice Jackson, neither
19 the City nor the Eleventh Circuit said that a
20 qualified individual could never sue over
21 discrimination in post-employment benefits. The
22 Eleventh Circuit, in fact, acknowledged that
23 that is a possible scenario.

24 There is a -- a possibility that
25 somebody who is qualified and has --

1 JUSTICE JACKSON: I guess I --

2 MS. CONNER: -- if they become subject
3 to the policy during their employment --

4 JUSTICE JACKSON: Can -- can you help
5 me understand why the qualified individual
6 designation in the statute has anything to do
7 with this? My -- my instinct is sort of closer
8 to Justice Alito's in terms of qualified
9 individual coming up in the reasonable
10 accommodations context. This is not that
11 context.

12 So I don't even understand the work
13 that it is doing with respect to setting some
14 sort of temporal limit as to whether or not this
15 person can sue for retirement benefits. So I --
16 I didn't -- yeah.

17 MS. CONNER: Because -- it's because
18 the language in the anti-discrimination
19 provision expressly draws a line as to who it's
20 protecting. It says no employer shall
21 discriminate against a person who can perform
22 the job they hold or desire.

23 And no other person is protected that
24 you can only -- you're only prohibited from
25 discriminating against a person who presently

1 holds a job that they desire. So --

2 JUSTICE JACKSON: Okay. And she says,
3 at the time that I held the job, I became
4 disabled and that policy applied to me. It -- I
5 was subject to it in that period of time.

6 So, as Justice Kagan says, why would
7 we pretend as though that is not a fact in the
8 case, not here, and decide this on a broader
9 question that relates to people who did not hold
10 the job during the time that they were
11 qualified?

12 MS. CONNER: Because the policy that
13 she describes, that she claims is discriminatory
14 and she describes in her complaint, on its face
15 only applies to a person who becomes completely
16 unable to perform their job and is, therefore,
17 unqualified.

18 So it would be the same if the City
19 had a policy that said, if you become completely
20 unqualified and unable to perform the essential
21 functions of your job, we will terminate your
22 employment. And that is perfectly -- that is
23 not unlawful under the ADA.

24 But what she's claiming is, if you
25 wrote down something that is lawful, that is not

1 controversial at all, that if you become unable
2 to perform your job, we can terminate you
3 because you're no longer a qualified individual,
4 but she's saying, I could sue to prevent you
5 from doing something to an unqualified
6 individual that the ADA does not prohibit.

7 She -- she's claiming that the
8 24-month rule only applies to a disability
9 retiree. And a disability retiree is not just
10 somebody with a disability. It is defined as
11 somebody who is -- who is permanently and
12 completely unable to do the job. That's why she
13 was awarded a disability retirement, because she
14 became an unqualified individual.

15 And only those who take the disability
16 retirement -- if she had been non-disabled and
17 retired with the 20 years that -- that she had
18 served, she would have received no subsidy,
19 health insurance subsidy, whatsoever. The City
20 made an exception because of her disability, out
21 of compassion, that even though everybody else
22 who only serves for 20 years only receives --
23 receives no health insurance subsidy, out of
24 compassion, for those who retire because they
25 are completely disabled and unable to do the

1 job, we will give 24 months of the health
2 insurance subsidy.

3 JUSTICE JACKSON: So I understand that
4 argument, but that -- doesn't that just go to
5 the merits of her disability claim? Is she
6 stating -- this is Justice Alito's point -- a
7 claim for disability -- or, excuse me, of --
8 for -- for discrimination.

9 You -- you've raised the objection, an
10 objection that has something to do with the fact
11 that she's post-retirement, and that's what's
12 confusing to me.

13 MS. CONNER: It's because, when she
14 was post-retirement, she was an unqualified
15 individual. She was totally disabled and unable
16 to perform the essential functions of her job,
17 which takes you outside of the protections of
18 Title I because Title I only prohibits
19 discrimination against a person who can perform
20 a job they presently hold or desire.

21 So someone who neither holds a job,
22 desires a job, and is completely unable to
23 perform the job is -- does not fall --

24 JUSTICE JACKSON: Is that the --

25 MS. CONNER: -- under the protections.

1 JUSTICE JACKSON: -- same with respect
2 to Title VII?

3 MS. CONNER: Title VII does not use
4 the phrase "qualified individuals." It refers
5 broadly to the -- to individuals or employees,
6 which is why, in Robinson, this Court said that
7 under Title VII, the -- the use of the word
8 "employees" in the anti-discrimination provision
9 of Title VII was ambiguous because "employees"
10 was defined as a person employed, past tense.
11 And that could be ambiguous, is employed or was
12 employed.

13 And so, under Title VII, which does
14 not refer to qualified individuals, there was an
15 ambiguity in the use of the word "employees."
16 But that is why Congress did not simply amend
17 Title VII to add disability as a protected trait
18 because disability is very different, in the ADA
19 structure, is very different from Title VII.

20 They share the same remedies, but they
21 do not share the same substantive provisions.

22 JUSTICE SOTOMAYOR: Counsel, as I'm
23 hearing your answer to Justice Jackson, you are
24 taking the far extreme position that the SG is
25 not but that at least two circuits have that a

1 retiree has no entitlement because, at the
2 moment they're retired, they lose -- they're --
3 they're no longer qualified, correct?

4 MS. CONNER: It's -- it's because, at
5 the time of the discriminatory act that they
6 allege, they're no longer qualified.

7 JUSTICE SOTOMAYOR: I'm not sure.
8 That's because you're saying that at the moment
9 that the policy is changed, regardless of when
10 it's changed, they're no longer qualified?

11 MS. CONNER: It's, depending upon what
12 a particular plaintiff alleges, if they're
13 relying on a adverse employment action --

14 JUSTICE SOTOMAYOR: Mm-hmm.

15 MS. CONNER: -- that is taken solely
16 against an unqualified individual --

17 JUSTICE SOTOMAYOR: So are you --

18 MS. CONNER: -- it's not actionable.

19 JUSTICE SOTOMAYOR: -- fighting that
20 if she had properly alleged that she was -- had
21 Parkinson's two years before she retired, that
22 she would be entitled to sue?

23 MS. CONNER: If she alleged that the
24 City had a policy that said, if you get
25 Parkinson's -- if you have Parkinson's disease,

1 we're not going to pay you a pension, she would
2 have been subject to that policy during her
3 employment as soon as she --

4 JUSTICE SOTOMAYOR: You're begging
5 the --

6 MS. CONNER: -- got Parkinson's.

7 JUSTICE SOTOMAYOR: -- you're trying
8 to qualify in the ways you're not. You're
9 basically saying, if you're retired, you're not
10 entitled to anything, even if you had been made
11 this promise during your time of employment,
12 because you're saying the promise here she
13 relies on, and it's specified in her paragraph
14 19, was if -- we will pay you equally to people
15 who work 25 years or to people whose 25 years
16 encompasses service in the military or in other
17 governments.

18 And she's saying, in whatever year it
19 was, 2010, we're going to change that policy.

20 MS. CONNER: If she's relying on the
21 discriminatory -- as the alleged discriminatory
22 act when we changed the policy in 2003, she
23 would not have been a qualified individual --

24 JUSTICE SOTOMAYOR: Because she
25 wasn't --

1 MS. CONNER: -- with a disability at
2 that time.

3 JUSTICE SOTOMAYOR: -- and she does --
4 and she was in 2000 -- 2018 when she developed
5 Parkinson's.

6 MS. CONNER: In -- in 2018, she
7 certainly had a disability. She was not a
8 qualified individual because she's not --

9 JUSTICE SOTOMAYOR: Why? She worked
10 two years not being qualified?

11 JUSTICE JACKSON: Why was she not a
12 qualified individual in 2018?

13 MS. CONNER: Because that's -- well,
14 in November of 2018 is when she took her
15 retirement because she became an unqualified
16 individual, meaning somebody totally disabled.

17 JUSTICE JACKSON: Was she qualified at
18 the point at which she got the Parkinson's,
19 2016?

20 MS. CONNER: She would have been a
21 qualified individual at that time, but the
22 policy did not apply to qualified individuals
23 with disabilities. The policy would only be
24 applied to somebody who became unqualified,
25 because you have to take a disability

1 retirement, which means you are unable to
2 perform the essential functions of your job. At
3 that point, the 24-month subsidy policy would
4 apply to her, and she's no longer qualified at
5 the time the 24-month rule was applied to her.

6 And that's no different from an
7 employer terminating the employment of somebody.
8 They have a disability, but then they become
9 totally disabled. You can terminate their
10 employment because they're unqualified at that
11 point. And there's nothing controversial about
12 that. She's -- it's -- it's only made
13 controversial because it's -- for some reason,
14 they're arguing for an exception to the plain
15 language just for retirees.

16 But there should be no exception.
17 The -- the language contains no exception. It
18 is -- there is a very clear line drawn by
19 Congress to protect only those who can perform
20 the jobs they hold or desire. And, again, it's
21 about when the discrimination occurs. Nobody is
22 arguing, and the Eleventh Circuit certainly did
23 not hold, that she was required to be a
24 qualified individual at the time of her lawsuit.

25 She was required to allege that at the

1 time she was discriminated against, she was a
2 qualified individual with a disability. And she
3 is not able to allege, did not allege, and, in
4 fact, disclaimed any argument that she was a
5 qualified --

6 JUSTICE KAGAN: I just want to --

7 MS. CONNER: -- individual with a
8 disability.

9 JUSTICE KAGAN: -- make sure I
10 understand what you're saying because there is
11 this two-year period where she is a qualified
12 individual, right? She has Parkinson's, but
13 she's able to hold a job. And you don't dispute
14 that.

15 MS. CONNER: Correct.

16 JUSTICE KAGAN: And she's a qualified
17 individual when the City adopts its policy.
18 That's correct, right? You don't dispute --

19 MS. CONNER: Yes.

20 JUSTICE SOTOMAYOR: -- that?

21 And she's a qualified individual when
22 she's earning her retirement benefits. You
23 don't dispute that?

24 MS. CONNER: No, no, she would not be
25 a qualified individual when she's earning the

1 retirement benefit.

2 JUSTICE KAGAN: Earning as opposed to
3 receiving them, right? Like, you know, an
4 employee earns retirement benefits by doing the
5 job.

6 MS. CONNER: We would only dispute as
7 a factual matter that she earned these benefits
8 because she did not satisfy the criteria to earn
9 them, which was 25 years of service.

10 JUSTICE KAGAN: I mean, she's just --
11 I -- I guess what I -- maybe that answered my
12 question. I'm not sure. I mean, all I was
13 suggesting was that she's a qualified individual
14 doing the job, just like other people are
15 qualified individuals doing the job, such that
16 she's putting herself in line for a package of
17 retirement benefits, correct?

18 MS. CONNER: Yes.

19 JUSTICE KAGAN: And -- and the City
20 has passed this policy at the time that she's a
21 qualified individual. But you're saying that
22 because the policy addresses the retirement
23 period, all of a sudden, then she's not a
24 qualified individual?

25 MS. CONNER: No. Our argument is just

1 slightly more nuanced. It's the fact that this
2 particular policy only applies to unqualified
3 individuals. So what she's saying is
4 discriminatory is the fact that she only
5 received the health insurance subsidy for 24
6 months after she retired and those who had 25
7 years of service read the -- received the health
8 insurance subsidy to age 65.

9 JUSTICE KAGAN: So you're not saying
10 that any retirement policy only applies to
11 unqualified individuals. You're saying this
12 particular retirement policy --

13 MS. CONNER: Right.

14 JUSTICE KAGAN: -- only applies to
15 unqualified individuals. And -- and -- I'm
16 sorry for being dense, but tell me why.

17 MS. CONNER: So this policy, what
18 she's complaining about is that she only
19 received 24 months of the subsidy instead of
20 receiving it to age 65 like 25-year retirees
21 receive. So she's -- she's arguing that when we
22 applied the 24-month rule to her and stopped
23 paying at 24 months, that was the discriminatory
24 act.

25 And that was when she was unqualified.

1 And the policy -- the 24-month rule only applies
2 to disability retirees. And that has a very
3 specific meaning. A -- a disability retiree is
4 not just somebody who has a disability and
5 retires. A disability retire -- retirement is
6 awarded to people who become completely unable
7 to perform the essential functions of their job,
8 and because of that reason, they take a
9 disability retirement. They retire early.

10 So the 24-month subsidy policy only
11 applies to those totally disabled. And it
12 would -- they would only become subject to it
13 once they become totally disabled and accept
14 a -- a disability retirement, which is what she
15 did.

16 If she had not taken a disability
17 retirement, if she had continued to work for 25
18 years, she would have received the full subsidy
19 despite having a disability. So the policy was
20 only applied to her, the 24-month rule, because
21 she retired early with a disability that
22 rendered her an unqualified individual, and then
23 the City applied the 24-month rule to her.

24 JUSTICE ALITO: Well, let's say six
25 months before she retired, she says: Look, I've

1 got Parkinson's. It's getting progressively
2 worse. I can still do the job now, but I can
3 see that I'm not going to be able to do the job
4 for very much longer, and I look ahead to what's
5 going to happen after I retire, and I'm going to
6 be subjected to this retirement structure that
7 gives me only 24 months, and I think that's
8 discriminatory.

9 Putting aside the question of whether
10 that's a valid claim under the ADA, why could
11 she not sue at that point?

12 MS. CONNER: Because she would be
13 seeking to enjoin conduct that is not unlawful
14 under the ADA, because she would be seeking the
15 employer to not do something to an unqualified
16 individual which it otherwise would not be
17 prohibited by the ADA from doing. It might be
18 prohibited under another statute. It would be
19 no different if --

20 JUSTICE ALITO: Well, she claims it's
21 doing some -- she's qualified at that point, and
22 she's claimed -- she claims it's doing something
23 to her at that point. So is she not aggrieved?
24 Does she not have Article III standing because
25 there's a -- an imminent threat of what she

1 claims is unlawful conduct in the future?

2 MS. CONNER: No. It would be no
3 different if she knew that her disease would
4 render her totally disabled and she wanted to
5 enjoin the City from terminating her employment
6 before it did so, when, of course, under Title
7 I, employers are allowed to terminate employees
8 the moment they become unqualified and they
9 can't do the job with or without a reasonable
10 accommodation.

11 She would be seeking to enjoin the
12 City from doing something that is not unlawful
13 under the ADA. It might be an equal protection
14 violation. It might be a breach of contract.
15 It might be all of these other things, but it
16 would not be a violation of Title I of the ADA.

17 CHIEF JUSTICE ROBERTS: Well, given
18 her allegations, do you think she has a facially
19 valid breach-of-contract claim?

20 MS. CONNER: Absolutely not. She --
21 her -- the -- there is no breach of contract
22 because the policy was changed in 2003, 15 years
23 before she retired. And, under Florida law,
24 governmental employees are permitted to change
25 retirement policies before the rights under them

1 vest.

2 So, if we had changed -- we would not
3 have been allowed to change it after she
4 retired. She would have had a vested right.
5 But 15 years before she retired, we changed the
6 policy to not treat her worse but to treat her
7 slightly less preferentially than she was
8 already receiving.

9 Before the policy change, disability
10 retirees, even if they retired with five or 10
11 years, were given the same health insurance
12 subsidy as people who worked for 25 years. So
13 they were receiving preferential treatment over
14 similarly situated non-disabled employees who
15 had the same amount of years. And then the City
16 changed it to start treating disability retirees
17 more equally with everyone else and said you --
18 now you also have to work 25 years to get the
19 full subsidy, but, out of compassion, because
20 you were forced to retire due to a disability,
21 we will give you 24 months of the subsidy,
22 whereas we would otherwise give you nothing if
23 you were a non-disabled person.

24 And, uncoincidentally, 24 months is
25 exactly how long it takes for a totally disabled

1 person to then become Medicare-eligible and get
2 Medicare insurance. So the City bridged that
3 gap between when a disability retiree retires
4 early and the two years that it would take to
5 start getting --

6 JUSTICE KAVANAUGH: Can -- can you
7 explain --

8 MS. CONNER: -- health insurance under
9 Medicare.

10 JUSTICE KAVANAUGH: -- the Medicare
11 insurance and -- and how that works? So, after
12 the two years, someone in this position gets the
13 health insurance benefits that you're giving
14 them for the two years in the interim, correct?
15 Or it's similar.

16 MS. CONNER: If they -- if they
17 apply -- if they --

18 JUSTICE KAVANAUGH: I mean, I don't
19 know how Medicare matches up with your health
20 insurance benefits.

21 MS. CONNER: So a person like the
22 Petitioner who -- who alleges they are totally
23 disabled --

24 JUSTICE KAVANAUGH: Or admitted.

25 MS. CONNER: -- could qualify under

1 Social Security disability. And the Medicare
2 Act says, once you become eligible for Social
3 Security disability because you're permanently
4 disabled, you then become eligible for Medicare
5 Parts A and B. So that bridges that gap. We
6 pay -- the City paid for her --

7 JUSTICE KAVANAUGH: And -- and --

8 MS. CONNER: -- health insurance
9 until --

10 JUSTICE KAVANAUGH: -- I think --

11 MS. CONNER: -- those 24 months.

12 JUSTICE KAVANAUGH: I'm sorry to
13 interrupt. I think you were saying the City did
14 that precisely to bridge that gap so that
15 someone who's totally disabled is not left
16 without health insurance -- I'm not sure of the
17 "because" here, but --

18 MS. CONNER: Mm-hmm.

19 JUSTICE KAVANAUGH: -- that's what
20 you're representing, I think -- to bridge the
21 gap so that someone's not left without health
22 insurance in that two years.

23 MS. CONNER: Right. Because, if a
24 non-disabled person were in Petitioner's shoes
25 and retired with only 20 years, they would

1 receive absolutely no health insurance subsidy.
2 And they also, because they're not disabled or
3 totally disabled, would not be Medicare-eligible
4 if they weren't 65.

5 So the City continued to treat its
6 disability retirees with preferential treatment
7 over non-disabled employees who were similarly
8 situated with an equivalent amount of years of
9 service. So --

10 JUSTICE SOTOMAYOR: The problem with
11 this argument in my mind is who bears the cost.
12 You're saying the public fisc should bear the
13 cost because, in two years, Medicare will pay
14 what we used to pay, correct? Because, under
15 the Medicare Act, they don't -- they exhaust
16 private remedies first, and then the public fisc
17 pays?

18 MS. CONNER: Well, there is no
19 requirement that any employer provide health
20 insurance subsidies.

21 JUSTICE SOTOMAYOR: I -- that -- that
22 we're putting aside. That's the nature of the
23 claim here, which is you promised me you would.
24 And assuming that were true, which I know you
25 fight on every level, but assuming you made an

1 explicit promise, I'm going to pay you this
 2 amount of money, and then took it away so the
 3 public fisc could pick it up, that's what you're
 4 doing, is you're saying we're -- this is just
 5 always a matter of who's going to pay, us --

6 MS. CONNER: No, because, if -- if --

7 JUSTICE SOTOMAYOR: -- or -- or the
 8 public?

9 MS. CONNER: -- if the City had
 10 actually promised her this benefit and she had a
 11 vested right, she would have a very clear
 12 breach-of-contract claim and the City would be
 13 liable.

14 JUSTICE SOTOMAYOR: My -- my -- I --
 15 you're -- you're --

16 MS. CONNER: Mm-hmm.

17 JUSTICE SOTOMAYOR: -- you're trying
 18 to avoid my question. In that situation --

19 MS. CONNER: Maybe I'm not
 20 understanding it. I'm sorry, Your Honor.

21 JUSTICE SOTOMAYOR: -- in that
 22 situation, then the issue becomes who pays, you
 23 or the public --

24 MS. CONNER: The --

25 JUSTICE SOTOMAYOR: -- but somebody

1 has to pay, right?

2 MS. CONNER: Certainly. She would
3 have a variety of remedies.

4 JUSTICE SOTOMAYOR: You hope.

5 MS. CONNER: She would like -- yeah,
6 likely have --

7 JUSTICE SOTOMAYOR: You hope.

8 MS. CONNER: -- a very strong case
9 against the City.

10 JUSTICE JACKSON: Isn't your argument
11 just basically that this isn't discriminatory,
12 when we took the case to say assuming there was
13 an allegation of discrimination, when did that
14 occur from the standpoint of whether or not she
15 can maintain this action?

16 That's the thing. I'm -- I'm -- I'm
17 worried that we're getting sidetracked into the
18 merits of whether she was actually discriminated
19 against, whether this policy is a discriminatory
20 policy, when, really, the question is just is
21 her former status precluding her from continuing
22 this action or has she alleged, you know, right?

23 MS. CONNER: So -- so, if we assume
24 the City's policy is discriminatory, if we
25 were -- if the Court is going to --

1 JUSTICE JACKSON: Which I know you
2 don't believe, but let's just start there.

3 MS. CONNER: Right.

4 JUSTICE JACKSON: Okay.

5 MS. CONNER: If we're going to start
6 that we're just going to accept that premise --

7 JUSTICE JACKSON: Yes, yes.

8 MS. CONNER: -- it still was not a
9 discriminatory policy that she became subject to
10 during her employment as a qualified individual
11 with a disability because the policy only
12 applies to unqualified individuals, those who
13 become totally disabled.

14 JUSTICE JACKSON: Right. But you're
15 saying it applies to people -- they become
16 totally disabled and they're -- they're
17 unqualified because they can't work anymore.

18 So you're essentially saying that if
19 it's about retirement benefits and you no longer
20 are working and you're complaining about that,
21 you're unqualified and, therefore, can't bring
22 this action, right?

23 MS. CONNER: Right, but I think there
24 could be a scenario where a -- a qualified
25 individual with a disability could sue with

1 regard to discrimination in post-employment
2 benefits if they meet the criteria. So, if
3 there was a policy that said --

4 JUSTICE JACKSON: The criteria of
5 their working?

6 MS. CONNER: The criteria of the --

7 JUSTICE JACKSON: Then they're no
8 longer a former employee.

9 MS. CONNER: -- the criteria of the
10 discriminatory policy, who does it apply to.
11 You know, so if -- that's why I was saying that
12 a policy that applies only to women, a man
13 cannot sue. He cannot say that I am subject to
14 a policy that discriminates against women. So
15 she would --

16 JUSTICE JACKSON: But why are you
17 saying that this policy does not apply to or it
18 only applies to unqualified -- I -- when -- when
19 you say that, I hear you're saying it only
20 applies to people who are still in the job or
21 who aren't in the job anymore --

22 MS. CONNER: It only --

23 JUSTICE JACKSON: -- who aren't in the
24 job anymore, right?

25 MS. CONNER: Because a qualified

1 individual is also some -- is somebody who can
2 perform a job they hold. So you also have to be
3 able to perform it. But, if you are totally
4 disabled and cannot perform the essential
5 functions of the job and that's why you retire,
6 you are not a qualified individual because you
7 cannot perform a job that you hold or desire.
8 An employer --

9 JUSTICE KAGAN: I think what --
10 what -- what --

11 MS. CONNER: Mm-hmm.

12 JUSTICE KAGAN: -- Justice Jackson was
13 suggesting and maybe what I was suggesting not
14 so clearly before was that all retirees are not
15 qualified individuals looked at at the time that
16 they're require -- retirees because, whether or
17 not they could perform the job, they don't want
18 to perform the job. They've retired.

19 So any retiree is going to be not a
20 qualified individual at the time that they're a
21 retiree. So that would -- so that would suggest
22 that what you're saying is there's just no such
23 thing as being able to sue in the time when I
24 still am working about a retirement benefit
25 that's going to kick in when I'm no longer

1 working.

2 MS. CONNER: So I think there is a
3 scenario where a qualified individual with a
4 disability could be -- could be subjected to a
5 discriminatory policy regarding post-employment
6 benefits.

7 So, if, while she was working, if
8 the -- while the Petitioner was working and
9 developed a disability, the City had a policy
10 that said, if you develop a disability, we will
11 not pay you a pension, and she was qualified at
12 the time that we adopted that policy, she would
13 be subject to a policy that says no disabled
14 person gets a pension because she has a
15 disability. And now she is subject to that
16 policy now as a qualified individual.

17 The difference is our policy is not no
18 disabled person gets a pension. It's a policy
19 that applies only to people who become unable to
20 do the job because they're totally disabled.

21 But, if she -- if -- if it really
22 truly were discriminatory in that it said, even
23 if you get a disability, we're not -- and you
24 work for 25 years, we're not going to give it to
25 you, then she could have sued over that.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Justice Thomas? I'm sorry, anything
4 further?

5 JUSTICE KAVANAUGH: This might be more
6 merits, but I'm interested on who would pay, the
7 question on Medicare. It's the federal public
8 as opposed to if it's the City, it's the --
9 either the City's taxpayers or the -- maybe the
10 State of Florida. I don't know how that works,
11 but it's one set of the public versus another
12 set of the public.

13 MS. CONNER: That's correct, Your
14 Honor.

15 JUSTICE KAVANAUGH: Yeah. Thanks.

16 CHIEF JUSTICE ROBERTS: Justice
17 Barrett?

18 Justice Jackson?

19 Thank you, counsel.

20 Rebuttal, Mr. -- Mr. Gupta?

21 REBUTTAL ARGUMENT OF DEEPAK GUPTA

22 ON BEHALF OF THE PETITIONER

23 MR. GUPTA: Thank you. Just a few
24 quick points.

25 First, I don't think you heard a -- a

1 persuasive answer to why the Court shouldn't
2 resolve this case on the narrow theory. And I
3 think we agree with the United States that's the
4 most straightforward way to do -- to do it.

5 And I think the colloquy with Justice
6 Kagan and -- and Justice Alito shows that
7 it's -- it's the case that it's indisputable
8 that she was a qualified individual subject to
9 an allegedly discriminatory policy that reduced
10 her -- her compensation. The ADA allows her to
11 challenge that policy even after she leaves the
12 job. And that answers the question and resolves
13 at least a chunk of the circuit split.

14 But the second point I want to make is
15 I think, while the case can be resolved on that
16 narrow ground, I do want to urge the Court in
17 its opinion to be careful not to foreclose other
18 scenarios that the City's reading would permit,
19 particularly given the City's failure to
20 identify any plausible reason why Congress would
21 have wanted to draw this arbitrary line.

22 A firefighter who becomes disabled
23 saving people from a burning building could be
24 discriminated against the next month. A retired
25 firefighter who develops a respiratory condition

1 from years of smoke exposure could lose health
2 coverage. And an employer could deny privileges
3 that are extended to all other former employees,
4 such as use of the company cafeteria or the
5 attendance at a company retreat, based solely on
6 disability-based animus.

7 And the third and final point I want
8 to make is just on the broader question. The
9 City's position creates fundamental anomalies
10 that Congress couldn't have intended. The City
11 concedes that the ADA protects retirement
12 benefits but offers no coherent account of how
13 that protection could be vindicated, as I think
14 the -- the questions with Justice Jackson
15 showed.

16 The City's extreme position creates
17 perverse incentives for employers to hide
18 discrimination until after retirement, and it
19 would transform clearly unlawful discrimination
20 into perfectly lawful conduct based solely on
21 timing even though Congress expressly protected
22 these benefits and included a safe harbor
23 provision to address legitimate cost concerns.

24 For race or religion, we would never
25 tolerate a regime under which unlawful

1 discrimination suddenly becomes lawful a minute
2 later. The City can't explain why Congress
3 would have created such an arbitrary line for
4 disability discrimination alone.

5 Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 The case is submitted.

9 (Whereupon, at 12:56 p.m., the case
10 was submitted.)

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