IN THE SUPREME COURT OF THE UNITED STATES

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EDITH JONES, ET AL., ON BEHALF :
OF HERSELF AND A CLASS OF :
OTHERS SIMILARLY SITUATED, :
Petitioners :
v. : No. 02-1205
R.R. DONNELLEY & SONS CO. :

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Washington, D.C.

Tuesday, February 24, 2004

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:24 a.m.

APPEARANCES:

H. CANDACE GORMAN, ESQ., Chicago, Illinois; on behalf of the Petitioners.

GREGORY G. GARRE, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioners.

CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of the Respondent.

KEVIN C. NEWSOM, ESQ., Solicitor General, Montgomery, Alabama; on behalf of Alabama, et al., as amici

curiae, supporting the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:24 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 02-1205, Edith Jones v. R.R. Donnelley & Sons.

Ms. Gorman.

ORAL ARGUMENT OF H. CANDACE GORMAN

ON BEHALF OF THE PETITIONERS

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

Congress answered the call of the judiciary by enacting section 1658, a bright line rule that provides a default statute of limitations of 4 years for any civil action arising under an act of Congress after December 1st, 1990.

Section 1658 applies to plaintiff's claims because this Court said in Patterson that plaintiff did not have claims of racial harassment and -- and termination and discharge claims.

Plaintiff's claims arise under the 1991 Civil Rights Act because that is the act that created the cause of action that plaintiff has filed under.

In Rivers, this Court held that the 1991 act, as amended by the 1991 Civil Rights Act, was a new cause of action that created new liabilities and a new standard of conduct. Therefore, under section 1658, under the plain

meaning of that statute, the 1991 Civil Rights Act applies.

The simple one-sentence statute has been interpreted in such a way as to give it no meaning. The terms, arising under, and the term, civil action, are simple terms used by this Court repeatedly to describe the statute's reach and that reach includes all civil actions arising under an act of Congress after December 1st, 1990, whether it has roots in or references preexisting law.

QUESTION: Ms. Gorman, one of the anomalies that if -- if you are complaining about a refusal to hire, a discriminatory refusal to hire, the limitation would be 2 years, but if you're complaining about a discriminatory firing, it would be 4 years. Does that make sense to -- to have those two claims both stemming from the original 1981, but one having extended it?

MS. GORMAN: Yes. I -- I believe it does, Your Honor, and the reason is that the purpose of section 1658 is to cut down on borrowing and State limitations periods that have been used for the borrowing purposes, and anything that cuts down on those purposes of borrowing is going to be going to the effect of that statute.

Now, the fact that there are two statutes of limitations is not unusual in -- in the discrimination cases that I file. There are often many statutes of

limitations that someone has to look at. For example, in the Age Discrimination Act, there are two statutes of limitations for willful and not willful. Often claims are filed under section -- under title VII, as well as under section 1981, and we have various statutes of limitations that we deal with in those claims as well.

QUESTION: But one can see some rhyme or reason to those differences. Here it seems that -- that one claim is -- is no more deserving of a longer time than the other.

MS. GORMAN: Well, we have to look at the plain meaning of the statute, Your Honor. And it is a default statute of limitations, so Congress has the option at any time of creating a -- a statute of limitations going back to 1981 if it thinks that this is not the way it wanted it to work out. But it -- the statute is clear that it's for all new causes of action or for all causes of action that arise under acts of Congress after December 1st, 1990, and I think it's very clear that plaintiffs' claims did not arise until the 1991 Civil Rights Act. Plaintiffs could not file a cause of action until that 1991 Civil Rights Act.

QUESTION: Do you want us to interpret this section (b) as a new cause of action, in other words?

MS. GORMAN: The 1991 act. The claims -- I'm

only addressing the narrow issue --

QUESTION: Yes.

MS. GORMAN: -- of the claims that plaintiff could not file prior to --

QUESTION: Section (b). You -- you want us to interpret section (b) as a new cause of action?

MS. GORMAN: Correct. And I believe that follows from the Court's decisions both in Patterson and in Rivers.

QUESTION: If -- if you completely untie section (b) from section (a), number one, it doesn't make any sense, and number two, the -- the implied cause of action that we have found might disappear because we have told Congress, when you enact a new cause of action -- or a new statute, you have to say explicitly if it creates a private cause of action.

MS. GORMAN: I believe Congress addressed that in the 1991 Civil Rights Act, codifying that this was a -- that there was a private right of action involved. But this Court had already --

QUESTION: Where -- does it say that in 1981?

MS. GORMAN: In 1981(c).

QUESTION: Well, I -- I'm not sure I read it that way.

MS. GORMAN: The rights protected by this

section are protected against impairment by nongovernment discrimination and impairment under color of law.

QUESTION: That doesn't sound like an explicit creation of a cause of action to me.

MS. GORMAN: Well, Your Honor, this Court had also said in Patterson that 1981 did create a private right of action.

QUESTION: Well, that's what -- but that was under 1981. You're saying it's a new cause of action, and I'm saying that if it's a new cause of action, then Congress has to be explicit that there's a private cause of action.

MS. GORMAN: I believe the language in section (c) was put in there just to confirm that what the Court said in Patterson, that this was a private right of action, was going forward with the new statute.

And to the point that this is definitional, which I think was what you were also raising, Justice Kennedy, the fact that Congress adds definitions to create causes of action was recognized by this Court in Rivers as a way that Congress often creates causes of action. So I believe that that's very consistent with how this -- how Congress enacts causes of action.

QUESTION: Your -- your argument really rests on the proposition that arising under has a -- a uniform

meaning, that it doesn't acquire different meanings in different contexts, doesn't it?

MS. GORMAN: I believe it rests on the proposition that the most common way of meaning -- using arising under is the way Justice Holmes described it and that's that a suit arises under the law that creates the cause of action. And that's what we're saying here, that this suit relies on the 1991 law. That's what created plaintiff's cause of action.

QUESTION: Well, we've -- we've also held that -- that arising under embraces not just a -- a Federal cause of action but even State causes of action that require determination of a Federal question for which the Federal question is -- is sort of essential. Now, how could you possibly apply that meaning to this statute? It would mean that the Federal Government would be establishing statutes of limitation for State causes of action.

MS. GORMAN: I don't believe that's how the statute was -- was drafted, Your Honor. The Eleventh Amendment does not place any limitation on Congress' ability to establish a Federal statute of limitations for a Federal claim, and I believe section 1658 is clearly directed to Federal causes of action, Federal civil actions, not to State civil actions.

QUESTION: Not if you use arising under the way we use it in other contexts where -- where it -- a claim can -- can be thought to arise under, for purposes of -- of Federal court jurisdiction, even though the cause of action is -- is a State cause of action.

MS. GORMAN: Your Honor, I believe arising under in this sense should be used in the way that it's most used by this Court and in the way that it's used in title 28, which is where this statute was -- is codified. As Justice Frankfurter said, you -- you take the soil along with it, that goes along with the other statutes. So the fact that this Court has repeatedly and consistently said in title 28 that a cause of action arises under the law that creates the cause of action or if it depends -- depends on that cause of action. I believe that's the -- the way arising under should be used in this case as well.

QUESTION: All right. So you're picking one of various -- various meanings, but that's all that the other side is doing too.

MS. GORMAN: But I believe this is the more consistent approach with how this Court has looked at arising under in the -- in the jurisdictional context because that is where this Court -- that is where Congress has placed this definition in the statute.

QUESTION: I don't think so. I think in cases

such as Smith v. Kansas City Title & Trust Company, we've -- we've said that arising under jurisdiction includes where the cause of action is based on State law, but relief necessarily depends on resolution of a substantial question of Federal law. We say that Federal courts can take jurisdiction in that situation.

And as I say, if you apply that meaning here, it -- it means that you're -- you're setting a Federal statute of limitations for State causes of action unless you want to disown Smith v. Kansas City and that line of cases.

MS. GORMAN: Your Honor, what I'm suggesting is that the -- the reasoning of this Court has been consistently that under title 28, arising under has been used as Justice Holmes has suggested it, and that's what I'm suggesting is the -- is the bright line rule that this Court should follow in this case.

QUESTION: I'm suggesting that's wrong.

MS. GORMAN: I understand, Your Honor.

QUESTION: What do you do with the hypothetical that was raised in -- in the briefs on the other side that suppose Congress shrinks the people who are exempt from title VII, say, and makes it 15 or more employees instead of 25 or more employees? Then what do you do with the people who are newly included? Do they get a longer

statute than the ones who were there before?

MS. GORMAN: Yes, Your Honor, I believe they do. And again, I want to point out that this is a default statute of limitations, so Congress would always have the ability to affix a statute of limitations.

QUESTION: But -- but in -- in determining what Congress meant, is it -- wouldn't it be relevant that that seems something no legislature would want to have happen, that people who are newly covered by the same prescription get more time to sue than people who have always been covered?

MS. GORMAN: Your Honor, first that example comes from title VII which does have its own --

QUESTION: I know. I know. So we had to pick one that comes under 1981 or 1982.

MS. GORMAN: I still think we have to give the plain meaning of the -- of the statute its effect, and Congress -- we have to understand that Congress set this as a default and if Congress does not want to have this anomaly where people who are between 15 and 25 employees in a -- in an employment relationship where it's under 25 employees and now a cause of action has been created for them -- if Congress does not want to have that situation, then Congress is going to have to draft a statute of limitations which that -- with that law, which Congress

has shown under the Sarbanes-Oxley Act that it is more than willing and able to do.

When Congress adopted -- when Congress amended the Telecommunications Act of 1936 to add the Sarbanes-Oxley amendment, it put in the statute of limitations that it knew it wanted to have so it would be consistent with other statute of limitations within that statute. And it is clear from the reading of that statute, that if Congress -- that Congress thought if they had not put in that amendment, that the 4-year statute of -- of limitations would apply even though that was an amendment to a preexisting statute.

QUESTION: Another problem that was raised in the brief on the other side was what would you do with a circuit that had a law -- that it had interpreted the law as allowing no claim and there's a circuit where other circuits have -- have allowed a claim in the -- and we haven't spoken. In the circuit that said there was no claim and then -- so that people are newly covered -- suppose Congress eliminates that circuit split and it makes it clear that everybody is covered. Then what happens in the circuit where people were not covered until Congress clarified the law? Do they get the 4 years?

MS. GORMAN: I believe in most cases I think everyone will get 4 years, and the reason I say that is

because section 1658 does not address the circuit -- circuit split. It addresses the statute that's enacted by Congress. So if Congress enacts the statute setting forth a cause of action that was not codified before, then I believe that that 4-year statute of limitations would apply.

QUESTION: Well, but that -- that's the issue, whether it was codified before. Some circuits say it was already there. Other circuits say it wasn't there. For the latter circuits, this would be a new creation of a cause of action. For the former, it would not. Now, I agree there's only one right answer; either -- either it existed under the old law or it didn't exist under the old law.

But frankly, I don't want to have to sit here and resolve -- resolve questions of whether something existed under an old law for no purpose except to decide whether -- whether this statute of limitations provision cuts in or not. I mean, it's a weird thing to have us doing, deciding whether a statute was really merely reaffirming an old law or whether it was enacting a new cause of action. I --

MS. GORMAN: I -- I think one thing that we would always be able to do is to look at these statutes. Since we're looking at this in the abstract, it's hard to

say. But -- but taking the -- the 1991 statute, for example, where Congress defines it in the purpose as expanding the rights, then I think it's clear that this is something new that did not exist before. So I think --

QUESTION: But in -- in --

MS. GORMAN: I'm sorry.

QUESTION: I'm sorry. I didn't mean to cut you off.

I was -- in the case of the circuit split, I thought the statute that broke -- that -- that resolved the circuit split and confirmed that there was a cause of action would -- would qualify on your theory of arising under because your -- your cause of action would, in part, be based upon the amending statute. Am I wrong?

MS. GORMAN: No. That's correct, Your Honor.

QUESTION: Okay.

MS. GORMAN: That is what I'm suggesting.

QUESTION: Well -- well, it has to --

QUESTION: But what about the circuit that already recognized the cause of action? May I repeat my question?

Say that -- prior to the statutory amendment, the Seventh Circuit had already recognized the cause of action that the amendment confirmed. Now, would it be a new cause of action in the Seventh Circuit?

MS. GORMAN: I don't think it would be a new cause of action but it would now be arising under an act of Congress that was enacted after 1990, and I think --

QUESTION: But the Seventh Circuit thought it arose under an act of Congress even before the amendment.

MS. GORMAN: I understand, Your Honor, but I think if you look at the purpose of the statute and if we use Patterson as an example, in Patterson the Court said there was no claim under 1981 for post-contract claims. And then when Congress enacted the 1991 act, if -- if -- I'm sorry. Patterson had not been decided by this Court, but we had circuits in a disarray on this issue and then Congress enacted the 1991 act and said in there we are expanding --

QUESTION: Oh, I see.

MS. GORMAN: -- and defining. Then I believe that the 4-year statute would apply.

And if I may, Your Honor, I'd like to reserve the remainder of my time.

QUESTION: Very well, Ms. Gorman.

MS. GORMAN: Thank you.

QUESTION: Mr. Garre, we'll hear from you.

ORAL ARGUMENT OF GREGORY G. GARRE

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

MR. GARRE: Thank you, Mr. Chief Justice, and may it please the Court:

Petitioners' claims for racial discrimination in the terms and condition of employment are subject to the uniform statute of limitations set forth in 28 U.S.C. 1658 because those claims were created by and therefore arise under the Civil Rights Act of 1991, an act of Congress enacted after December 1 --

QUESTION: Mr. Garre, as has already been pointed out, the interpretation does give rise to some anomalies and interpreting it the other way might as well. What could Congress have provided in section 1658(a) to avoid some of these questions?

MR. GARRE: Well --

QUESTION: How could it have been written --

MR. GARRE: Justice --

QUESTION: -- so we wouldn't be in this mess?

MR. GARRE: Justice O'Connor, I think some of the -- the issues that have been identified to the Court are a direct product of the compromise that Congress struck in 1990. Originally the act, as proposed by the Federal Courts Study Committee, would have applied a uniform statute of limitations to all existing causes of action. And some Members of Congress and groups believed that that would create retroactivity concerns. So the --

the compromise that was adopted was that the uniform statute of limitations would apply on a going-forward basis with respect to causes of actions that were created by acts of Congress enacted after December 1990.

This case involves precisely such a cause of action. Petitioners' claims we know from the Patterson case were not actionable under statute 1981 prior to the 1991 Civil Rights Act. The only reason petitioners are in Court today and have viable claims is because of the 1991 Civil Rights Act. Therefore, we think that respondent's position which results in the conclusion that petitioners' claims arise under the -- the same statute at issue in Patterson, the statute that we know does not create those claims, is an absurd conclusion that we think counsels against their position.

QUESTION: What if the statute did create those claims? I mean, I'm getting back to the circuit split question.

MR. GARRE: We --

QUESTION: It seems to me you don't give the same answer that -- that the petitioner does.

MR. GARRE: Justice Scalia, we think that the circuit split problem would be resolved for purposes of section 1658 the same way it would be resolved for retroactivity purposes. Anytime Congress creates a new

cause of actions, there -- there are going to be questions that arise from the creation of that cause of action.

The Court considered the same question in Hughes Aircraft v. United States ex rel. Schumer where Congress amended the False Claims Act to eliminate a jurisdictional defense, and this Court said, on pages 949 and 950 of its opinion, created a new cause of action. And therefore, the Court held that cause of action cannot be retroactively applied.

QUESTION: So you're saying we -- we will have to resolve these -- these circuit splits for no purpose whatever except to decide whether the statute of limitations applies. Right? We'll have to --

MR. GARRE: No, Justice Scalia. In the sense that the same issue would -- would arise for retroactivity purpose, whether or not Congress has created a new cause of action which would apply retroactivity -- retroactively or not. And even if the retroactivity question didn't arise, that's a product of the statute that Congress has drawn.

Another -- another problem with respondent's construction --

QUESTION: As you interpret it.

MR. GARRE: As we interpret it, and we think that that is the plain meaning of Congress' use of both

the -- the all-inclusive term, the traditionally inclusive term, arising under, as well as Congress' reference to an act of Congress.

QUESTION: What -- what is your position as to whether the statute of limitations applies to State causes of action?

MR. GARRE: We don't think it applies to State causes of action at all.

QUESTION: Then you're not using the all-inclusive term, arising under.

MR. GARRE: Well, that's not a product that Congress has used of arising under. It's a question of whether Congress intended to supply a Federal statute of limitations for State claims.

QUESTION: Well, and -- and you say they didn't because -- so your -- since it's absurd to think they did that, you're -- you're giving arising under a narrower interpretation than -- than we give it for --

MR. GARRE: Well --

QUESTION: -- for purposes of -- of Federal jurisdiction.

MR. GARRE: In the first place, we think that plaintiffs' claims arise under the 1991 Civil Rights Act under any definition of arising under, dictionary definition, the statutory definition, and 28 U.S.C.

1331 --

QUESTION: But -- but that contradicts your other position that -- that we're going to have to resolve this question in order to determine the circuit splits because if you believe that, your -- your answer would be the same as -- as the petitioners. You don't have to resolve those circuit splits so long as there's a later statute. It arises under the State -- under the later statute. Whether it arises under both, who cares?

MR. GARRE: No.

QUESTION: That's not your position.

MR. GARRE: The question would be the same question that this Court considered in the Rivers case which was whether or not Congress created new causes of action in the 1991 Civil Rights Act, and the Court analyzed that question by looking to Congress' intent enacting that act. Some parties argued that Congress had simply clarified and continued into effect old rights. Other parties argued that Congress had created new rights, and this Court agreed with that interpretation. And we think that that interpretation requires the conclusion in this case that petitioners' claims are governed by the statute of limitations in section 1658.

If I could refer to another problem with respondent's construction and that is it -- it essentially

renders inoperative the default rule established by Congress in section 1658 in the vast majority of cases, and that's because Congress rarely creates the kind of wholly new and self-contained cause of action that has no reference to or roots in Federal law. And that's the only time that the default rule, which Congress thought was a significant improvement to the prior practice of State -- borrowing State statute of limitations would apply under -- under respondent's -- under respondent's interpretation.

QUESTION: Well, it did so in the Truth in Lending Act and -- and the Clean Air Act and the Clean Water Act. Those are all new enactments.

MR. GARRE: But -- but, Justice Kennedy, Congress often chooses to -- to build upon existing Federal law in creating causes of action.

QUESTION: Well, in this case, what about the problem with the implied cause of action? I don't read section (c) as explicitly granting a -- a private cause of action.

MR. GARRE: We think -- from our understanding of section (c), it was intended to clarify that section 1981 does create a private right of action, which -- which this Court had held in Runyan and reaffirmed in Patterson.

But we don't think it's a problem if the Court

concludes that petitioners' claims depend on both subsection (a) of 1981 and subsection (b) of 1981 because petitioners' claims only exist today because of the 1991 act, in that respect, arise under that act, under the dictionary definition of arising under and under the settled definition of arising under that Congress uses in title 28 of the United States Code.

Petitioner seems to read the statute's reference to an act of Congress to refer only to an act of Congress that creates the kind of wholly new self-contained cause of action I mentioned.

QUESTION: You mean respondent, yes.

MR. GARRE: Respondent. You're right, Mr. Chief Justice.

But we think, as -- as Judge Alito concluded in his dissenting opinion in the Zubi case, that an act of Congress is just as naturally read and has to be read to include an act of Congress that creates a cause of action by amending an existing cause of action.

And all of respondent's objections about the practicality of our position, which we think is -- is the plain-meaning position of what Congress -- the statute that Congress wrote, have to be weighed against the intractable problems that this Court and the Federal Courts Study Committee identified with respect to the past

practice of borrowing State statutes of limitations.

Our inquiry focuses the analysis exclusively on Congress' actions and Federal law, and we think that that's where Congress wanted the courts to focus. The prior practice focused the inquiry on State law. It required Federal courts to canvas State law, to identify an analogous State cause of action, and then to try to identify the statute of limitations that would apply in the State to that cause of action, and then to make a separate determination whether that State statute of limitations could appropriately be applied to Federal law. And that had created great uncertainty and great disparity in the application of Federal law. Indeed, under the old practice, a single Federal claim could be subjected to 50 different State statutes of limitations.

And that was the problem that Congress was addressing at the -- the recommendation of the Federal Courts Study Committee in enacting section 1658. And it decided, as a result of the compromise, to apply it only on a going-forward basis with respect to new claims that were created by Congress after 1990.

Petitioners' claims only exist today as a result of Congress' action in the 1991 act, and we think they're clearly governed by the default statute of limitations established by section 1658.

As petitioners' counsel made clear, section 1658 is only a default rule. Congress can always specify a different rule and it has done so several times since 1990. It did so in the Sarbanes-Oxley Act of -- of 2002, and that's significant because that act, Sarbanes-Oxley, amending an existing cause of action under the Securities and Exchange Act -- so if -- if Congress had in mind the interpretation of section 1658 that respondent proposes, it's certainly odd that Congress felt obliged to amend 1658 to put in the special statute of limitations for securities laws claims.

QUESTION: What was the period prescribed in the Sarbanes-Oxley statute?

MR. GARRE: It's 2 years after the discovery of facts and 5 years after the violation, which is different than the 4-year rule established by Congress in section 1658(a).

We think the court of appeals in this case erred in subjecting petitioners' section 1981 claims, which only exist because of the 1991 Civil Rights Act, to the old borrowing practice that Congress sought to put an end to in 1990, and we think that this Court should hold that those claims are governed by the uniform statute of limitations established by section 1658.

QUESTION: Will there be some retroactivity

problems if some States have 6-year statute of limitations and this reduces that period?

MR. GARRE: No. As -- as Judge Alito explained in his -- may I answer that question?

QUESTION: Yes.

MR. GARRE: As Judge Alito explained in the Zubi dissent, there's no retroactivity problems because the only expectation that a plaintiff could have after Congress created the new causes of action in 1991 is if those causes of actions would be subject to the default statute of limitations specified.

QUESTION: Thank you, Mr. Garre.

MR. GARRE: Thank you.

QUESTION: We'll hear now from Mr. Phillips.

ORAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF THE RESPONDENT

MR. PHILLIPS: Thank you, Mr. Chief Justice, and may it please the Court:

It seems to me that there are two propositions that arise out of the conversation of the past 25 minutes.

First of all, there is no single uniform meaning of the -- of the expression, arising under. It is not a term of art. It is a term of chaos. It is a -- it is a phrase that is used repeatedly in different contexts, routinely used with a very pragmatic -- in a very

pragmatic fashion and does not answer the question whether or not Congress, when it adopted 1658, or Congress, when it amended section 1981, really envisioned this kind of expansive interpretation that would allow an argument to be made that State laws are suddenly subject to statutes of limitations. As Justice Scalia asked, when you make other kinds of adjustments in these schemes, are you going to have to resolve every -- every one of these issues?

I mean, the question with respect to the split in the circuits. There is currently pending a proposed change to the Air Carriers Access Act that specifically resolves the conflict in the circuits between the Eleventh Circuit which says there is no cause of action and other circuits that says there is a cause of action.

These aren't hypotheticals. These are real issues and if this Court is not careful in how it tries to confine the interpretation of section 1658, it's going to be interpreting the statute for the better part of the next 10 years, which may be good news for me as a practitioner before the Court. But I'm quite certain that it's not good news either for my clients, for the lower courts that are going to have to adjudicate these problems or for --

QUESTION: The solution to the last problem you raised offered by the petitioner is simply you use the

newer statute, and you don't have to look into the question of -- of which side of the circuit conflict was correct. If the right is created by the new statute, it didn't matter whether it -- if it's affirmed by the new statute, you're suing under the new statute, it doesn't matter whether it existed before or not. Why isn't that an adequate solution?

MR. PHILLIPS: Well, it might be an adequate solution, Justice Scalia, except that it's not self-evident from the language, arising under. The question is what -- what is the use of arising under that you're going to try to apply in a more or less uniform fashion.

QUESTION: But I think isn't her answer to the -- to the fact that it isn't self-evident from the language alone an answer she gave to a separate question, and that is that it's the policy of Congress to apply the -- the 4-year rule when it can so that if in doubt -- if the language allows but doesn't compel, then the answer would be apply the new statute because that is going to get to the congressional objective of getting the 4-year statute as broad --

MR. PHILLIPS: And there -- and I don't think there's support for that objective in -- in this particular statute because if Congress really meant --

QUESTION: Well, isn't the -- isn't the support

that they started out by intending to -- to apply the 4-year period, I mean, across the board and they -- they only fell back out of fear of -- of violating reliance interests which would say the -- the objective is still to get the broadest possible application?

MR. PHILLIPS: Well, no. It's a question of -- I mean, they -- they obviously made a -- a compromise, but the question is why isn't it as reasonable a compromise to say, look, we're going to deal with this in the truly classic sense of the word prospective. Every new self-contained statute that goes into effect is now subject to this rule. And -- and literally, as Justice Kennedy said --

QUESTION: They could --

MR. PHILLIPS: -- they do that every day.

QUESTION: -- they could have said that, but the -- the counter-argument to -- to what you've just said is -- and -- and maybe this is -- I hope you'll comment on this, that on your reading, the 4-year statute is -- is rarely going to be applied simply because there -- there aren't very many sort of absolutely brand-new, freestanding, self-contained causes of action. Most of them are -- are subjects of tinkering from time to time.

MR. PHILLIPS: Well, Justice Souter, the -- the reality is that this is far more common than you think.

The anti-terrorism statute has specific standalone causes of action. The Muhammad Ali Reform -- Boxing Reform Act has a standalone cause of action. I mean, there are, in fact a host of statutes in which Congress does precisely what the other side claims it rarely does. I mean, this -- if -- if the Court would like us to provide a list, we'd be happy to do it.

QUESTION: Yes, but the argument is the other way. I mean, it's that very often major pieces of legislation are enacted in the form of what looks like an amendment of a current statute. I think of the Celler-Kefauver Act. I mean, on your theory, all of merger law would really be viewed as not a new statute when it was totally new. There were no merger cases to speak of prior to Celler-Kefauver. And then they come in and section 7 applies to assets and all of a sudden you have merger law. Well, on your view that would be just viewed as -- as if it were some kind of trivial amendment when it created half of anti-trust law. I mean, you see, that's the kind of problem I think --

MR. PHILLIPS: Well, no, I understand that, but the problem you still have, Justice Breyer, is that you've got to figure out how do you try to reconcile --

QUESTION: Well, we reconcile it by saying if it's a new -- you look at the act of Congress. An act of

Congress is called Public Law 3278 or whatever it is, and if prior to that act of Congress, you didn't have the cause of action, and if after you did, well, that's what they mean. It arises under a new act of Congress. That seems pretty simple.

MR. PHILLIPS: That's -- that's pretty simple, Justice Breyer, but it doesn't answer Justice Kennedy's question which is if you look at this particular act of Congress, which is codified in subsection (b), it doesn't give you any basis for a right of action. The infrastructure --

QUESTION: It doesn't give you any -- oh, now, now, all right --

MR. PHILLIPS: That definitional provision doesn't remotely --

QUESTION: -- that -- that -- if you're asking me the question, I'd answer that question by saying, of course, they intended a private right of action to apply. I mean, now let's go into the history of it and see whether they did or not.

MR. PHILLIPS: But, Justice Breyer, that's --

QUESTION: And I think -- I think that by the -- but that's a different issue.

But in my way of thinking, that doesn't raise a serious question because I don't believe that they didn't

intend to raise -- to have this as a private right of action.

MR. PHILLIPS: But I still -- but that still doesn't answer what -- what strikes me as the fundamental question which is when Congress approached section 1981, did it think that it was, in fact, creating a whole new infrastructure cause of action or was it basically simply engrafting it back onto what section 1981 has been since 1866.

QUESTION: It was engrafting it on and before they passed the act of Congress, you did not have this kind of cause of action, and after they wrote the new act, you did have it. Therefore --

MR. PHILLIPS: But -- but you -- but, Justice Breyer, you only have this cause of action because four -- three of the four elements arise and existed long before 1991, and those -- and that -- and it clearly has to arise under that portion of it as well. So the question is, if it arises under both, what's the right resolution of the question?

And the point that, it seems to me, that the petitioner and the United States have never responded to is why is it you would adopt a rule that carries with it as much complication and complexity as the rule that they propose when you don't have to come out that --

QUESTION: I think their answer is, as I understand it, that is the approach that gives maximum effect to the new statutes of limitation that -- that Congress has enacted. Now, what -- what evidence is there that Congress wanted it to have maximum effect?

MR. PHILLIPS: There is no evidence that Congress wanted it to have maximum effect.

QUESTION: Well, except the fact they enacted the statute.

MR. PHILLIPS: The statute applies on a regular basis to almost everyday acts that Congress adopts in which they provide a cause of action and do not provide a statute of limitations. And that spares this Court and every other court the burden of having to borrow from State law, trying to figure out what analogous State law claims would be used as the basis for a statute of limitations.

QUESTION: One of the problems that troubles me about borrowing State law -- I've had a lot of experience in these cases -- that if you look at this statute under State law, I think the old cause of action that Patterson recognized would be a contract cause of action. And arguably, the one before us today is a tort action. So you'd probably have to follow the State tort law statute of limitations for half the case and the contract statute

of limitations for the other half of the case, after you figure out which State law applies. So you have this problem, even if you're referring back to State law, of maybe coming out with two different results.

MR. PHILLIPS: Except that I think, for the most part, the courts have pretty well resolved what they were going to do with respect to section 1981. I would have thought the problem --

QUESTION: Well, the section 1981 as construed in Patterson is clearly a contract claim.

MR. PHILLIPS: Right.

QUESTION: But as -- but this cause of action I don't think is clearly a contract claim.

MR. PHILLIPS: Well, it's difficult to know whether Congress meant to change that. I -- I don't disagree with that.

But I -- but it still seems to me the more fundamental problem in trying to sort out what Congress did with respect to section 1981 is that it never intended to make this into a brand new infrastructure. It took the existing four elements. It didn't change a single word in section 1981 when it implemented this cause of action. So the notion that this is a cause of action that arises only under the 1990 act is clearly -- under the 1991 act is clearly --

QUESTION: How much -- how much trouble are we going to have in the future if -- if we adopted your -- your theory? How -- you know, how am I to decide in the future whether a new cause of action arises all by itself or whether it -- it attaches to a greater or lesser degree to a preexisting statute? What's -- is it an easy test?

MR. PHILLIPS: I -- I think every court that has adopted that test -- certainly the Seventh Circuit in this case and other courts of appeals have recognized that it is an infinitely simpler test than trying to figure out what arising under will mean in all of its various permutations and new statutes. All you have to look at is to see whether or not the cause -- the elements -- all the elements of the cause of action are newly created. That may be embodied in a -- in an amendment to an existing statute. It may be on a stand alone basis. But I -- I submit to you that is a significantly simpler course to follow.

And, indeed, I don't --

QUESTION: But one thing that isn't simpler about it, Mr. Phillips, is the problem that Congress sought to cure with 1658, that is, you can have amazing diversity across the country if you're borrowing States' limits. For the same claim, it could be 2 years in one State, 3 years in another, 6 in another. Congress surely

wanted to cut out that disparity so that similarly situated people would have the same right to sue.

MR. PHILLIPS: On a prospective basis, there's no question about that, that the Congress had passed the Anti-terrorism Act that created a new cause of action, did not want the kind of inherent inequalities that arise under borrowing to go forward.

QUESTION: And that's suggesting that --

MR. PHILLIPS: It says nothing about what the Congress did retroactively.

QUESTION: -- that the old way is inherently complex because you have to figure out which would be the closest State limitation. And Congress just wanted to get away from that complexity. I don't know that that's -- that that what was introduced is -- is more complex. It seems to me less so.

MR. PHILLIPS: Well, I -- Justice Ginsburg, your own hypotheticals suppose exactly how many complexities are going to arise, and I -- I can assure you that as -- as much imagination as we've put into this, plaintiffs' counsels and defense counsel going forward will try even harder to end up fighting these issues in terms of the -- in terms of how complex this is.

All you have to do is look at the second certified class in this case. The district judge in this

case thought this was an easy statute to interpret and applied it to classes 1 and 3. When he got to class 2, what did he say? He said, with respect to those claims with regard to part-time employment, the parties are going to have to sort that out themselves. He made no attempt to sort -- to resolve that issue because it is a completely imponderable question under their interpretation of section 1658.

QUESTION: All right. Look -- look at your own interpretation. Answer this one if you can. I mean, I don't know. I'm just thinking about it. But Congress passes a new statute. It's called New, New, New.

(Laughter.)

QUESTION: And it's in a special code, title 78, just to be new. And it says this -- and this is total new and here is what it is. We have a Federal cause of action and a claim for double damages for anyone who has been injured by a robbery committed with a gun. And then it says, robbery shall be defined as it is defined in title 18, section 391. And now, a gun -- that's new here, but we define that -- you see what I'm doing?

MR. PHILLIPS: Of course.

QUESTION: I'm just reproducing.

Now, how are you going to take that? Is that new, new, new?

MR. PHILLIPS: Of course, that's a new, new, new cause of action.

QUESTION: All right. Of course, it is.

MR. PHILLIPS: But --

QUESTION: Well, but it refers to the old one, you see.

MR. PHILLIPS: But, of course, that doesn't change --

QUESTION: We get three of the elements from -- what?

MR. PHILLIPS: But that doesn't change anything, Justice Breyer. Of course, you can refer back to it. The question is are all of the elements of the cause of action independently provided for in the New, New, New statute, and the answer is yes.

QUESTION: But you can do it by a cross reference. In other words, in your view, if it's done to -- through a cross reference, they are still new, new, new, but it's done by a physical placement, it's old, old, old.

MR. PHILLIPS: No, I don't think it's that simple, Justice Breyer. If it's done where Congress means to create a new infrastructure and a new cause of action, it's new, new, new. When Congress does nothing more than engraft and doesn't even remotely modify the existing

infrastructure, it doesn't even so much as change the words of a statute that's been here from 1866, to suggest that this is a -- a suit that arises solely under -- under a 1991 amendment seems to me wrong.

The -- the other point I think it's important to make in this connection -- and -- and it's the rule of construction that seems to get lost sight of -- is -- and -- and it's the one this Court adopted in Wilson v. Garcia -- is that there is no reason to assume that Congress would mean for the -- to have two causes -- two statutes of limitation apply to the same cause of action when it was interpreting section 1983.

And here we have a situation where you will have two -- two statutes of limitation applying to the same words in the same subsection of a statute. And we raised the issue in our -- in our brief for the respondent saying, find us a statute where Congress has ever allowed that kind of morass to exist, and -- and the reply brief is utterly silent on that. And for good cause, because there is no reason to assume that Congress would have adopted that interpretation. And therefore, if you follow the rule of construction from Wilson v. Garcia and if you accept what I think you cannot help but except, which is that arising under is not an unambiguous line --

QUESTION: Do you think there may be an equal

protection problem there?

MR. PHILLIPS: Well --

QUESTION: When a person says, you know, I -- I can sue within 4 years. Somebody else can only sue within 2 because I am -- I am an employee above 25 and -- and I only got my cause of action later. And -- and the one reason for the difference is my statute was enacted later than yours.

MR. PHILLIPS: Is it irrational? Yes. Is it unconstitutional? Probably not under the standards that loosely govern these kinds of issues unless somebody can attach it to some kind of --

QUESTION: Mr. Phillips, would this be a different case if instead of enacting the statute it did in 1991, they -- they simply had an amendment that said in addition to the coverage of the preexisting 1981, we will add the additional brand new cause of action which will allow recovery for what happens after you get on the job?

MR. PHILLIPS: I think if there were a 1981(d) that was -- that was separately contained and that expressed a clear indication from Congress that it really meant to create a new cause of action, that it would make sense under those circumstances for 1658 to apply to that particular situation.

But I think what we're talking about here is

simply trying to ascertain Congress' intent, and I think whether you look at it under section 1981's lens or if you look at it under section 1658's lens, you end up at exactly the same point.

QUESTION: But -- but your answer seems to me to suggest that if the statute has the same substantive effect, you get one result in one form of -- type of drafting and a different result with a different type of drafting.

MR. PHILLIPS: That's -- to be sure. And it goes back, I suppose, to the argument that was made by the other side which is that there's a default rule and Congress can always change it. The core of this is Congress can always make its intent more explicit in terms of how it deals with the problem. The question is, do you want to create a regime in which this Court is going to have to be resolving questions involving the meaning of section 1658 for the foreseeable future?

Or doesn't it make sense to recognize that there is, in fact, a -- a complete set of causes of action to which 1658 will routinely apply and that it will be spared -- the courts will be spared and the litigants will be spared the burden of having to sort out these kinds of issues on a going-forward basis and recognize that we're not going to pick up everything in the interim?

But as Congress wants to go forward and create new causes of action, the opportunity will arise, and it can do so. But if it chooses to engraft it on an existing infrastructure, then it seems to me under those circumstances, what the Court should do is say these cause of action arises at this point in time. It doesn't arise because of the new statute. It's a much simpler, much cleaner way of dealing with the issue.

And -- and that's the one point I did want to make. I don't -- I have not heard the other side remotely complain that our approach has any of the kinds of complications. I'm not saying it's without issues, but it's nowhere near the complications --

QUESTION: No, but it has the -- it has the complications that -- that preexisted in trying to figure out which State law applies and so forth and so on. It says that regime still survives in a lot of areas that it would not survive if you take their side.

MR. PHILLIPS: But -- but Congress clearly recognized that it was not prepared to eliminate that regime because -- because it would --

QUESTION: It seems to me that --

MR. PHILLIPS: -- would have created all kinds of problems on a retroactive basis. It didn't want to -- it didn't want to unsettle expectations.

QUESTION: But it seems to me that to the extent you are changing that regime, you're -- you're bringing more certainty to the law because that is an inherently confusing regime.

MR. PHILLIPS: Well you bring one form of -- of complication and one form of -- of clarity to it. But at least the -- it's the clarity you know rather than the clarity you don't know -- or the confusion that you don't know at this point. Courts have been dealing with the question of how to borrow for a long time. The question of how you're going to deal with section 1658 and what conflicts in the circuits you're going to have to resolve and what happens when Congress makes minor modifications -- Congress makes lots of minor modifications in every --

QUESTION: Why -- why wouldn't all these problems exist with your system just as much if all that has to happen to make it valid under your system is we take these same words, making appropriate modification, stick them in title 75 and call it New, New, New? I mean, at that point we're going to have the same problem with the 15 versus the 25, wouldn't we? I mean --

MR. PHILLIPS: No, I don't -- I don't think so, Justice Breyer, because --

QUESTION: Why not? Because it would only apply to the 25, you see -- or the 15. It wouldn't apply to the

25.

MR. PHILLIPS: It will -- whatever the New, New, New statute is, that will be subject to the -- to the statute of -- the 4-year statute of limitations.

QUESTION: That's right.

MR. PHILLIPS: There's no retroactivity issue you need to worry about in that --

QUESTION: No, but since it's the same language, you see we discover that small industry would be subject to the 4-year statute, but the larger firm would be subject to the old statute, just exactly what you're complaining about under their interpretation.

MR. PHILLIPS: But -- but if --

QUESTION: Am I wrong about that?

MR. PHILLIPS: I think you are wrong about that. I think all -- if Congress has created a new statute, it -- it has told you that this is one that's subject to -- to the 4-year statute of limitations period on a going-forward basis, and I think it's eliminated any of the confusion.

And certainly Congress knows -- would know how to do that if the Court were very clear in saying what we're going to apply 1658 to is to new causes of action that are specifically stated with an entire infrastructure created to provide for them. I don't think they have to

do it in a new title 79 or whatever, but they clearly have to do it by doing more than simply changing the definition of a single set of terms in a statute that is otherwise left utterly unchanged under these circumstances.

If there are no other questions, Your Honors, I'd urge you to affirm.

QUESTION: Thank you, Mr. Phillips.

Mr. Newsom, we'll hear from you.

ORAL ARGUMENT OF KEVIN C. NEWSOM

ON BEHALF OF THE FOR ALABAMA, ET AL.,

AS AMICI CURIAE, SUPPORTING THE RESPONDENT

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

As perhaps the most frequent litigants in suits alleging violations of Federal law, the States and their officers have an overriding interest in this case in ensuring that section 1658 is construed to establish a clear and easily discernible rule.

That in my mind leaves two options. There are effectively two clear options on the table. One is to apply section 1658 to all section 1981 claims and the other is to -- is to continue the practice of applying State borrowed statutes of limitations to all of those claims.

Both of those rules create the same level of

certainty, but one of those rules, namely the -- the rule that would apply section 1658 to all section 1981 claims, is plainly inconsistent with Congress' intent and indeed with the language of section 1658 itself in that it would apply to claims that on any understanding arose under preexisting law. Accordingly, the State submits that the respondent's position here is the best among the available alternatives.

QUESTION: But, Mr. Newsom, the reason that Congress grandfathered the claims that already existed, as Mr. Phillips said, was because of expectations that I'm off the hook after 2 years, say. That -- that doesn't exist when a right is created, a right to relief, that didn't exist before.

MR. NEWSOM: Well, I think the -- the expectations that Congress sought to protect in -- in section 1658 were expectations with respect to certain categories of claims. In enacting section 1658 Congress recognized that there were certain categories of claims that had developed established limitations rules. For instance, under this Court's then-recent decisions in Wilson v. Garcia and Goodman v. Lukens Steel, section 1983 claims as a -- as a category and section 1981 claims as a category were both subject to single borrowed State statutes of limitations. So I think the expectation that

Congress sought to protect was the expectation of a litigant that I have a 1981 claim and it will be subject to the following statute of limitations.

So I think the -- that -- I mean, it sounds to me that there is agreement this morning that -- that the appropriate test to apply is the test whether or not Congress has created a new cause of action. I think the clearest evidence that Congress has done that, that Congress has created a new cause of action, is where Congress creates and enacts an entirely new, separate statutory section. And again, contrary to petitioners' suggestions -- and Justice Kennedy is quite right -- there are numerous times that Congress has, since December 1 of 1990, created an entirely new and freestanding causes of action to which section 1658 would certainly apply.

Now, Congress' choice in the 1991 Civil Rights Act not to create a new statutory section and instead to -- to work within the four corners of section 1981 and to -- to fine tune the existing cause of action that already existed in section 1981 is a strong indication --

QUESTION: How can you say it's fine tuning an existing cause of action if the plaintiff couldn't have recovered before the 1991 amendment?

MR. NEWSOM: Well, I think the -- the key consideration here is that Congress had a choice in the

1991 act how it would respond to this Court's decision in Patterson. It was acting against a very specific backdrop.

QUESTION: Would you agree with Mr. Phillips if they'd written a different statute that came out with exactly the same result, but they just said -- it would not -- not redefine words but simply said, in addition to what you can already do you, you may also recover for what happens on the job?

MR. NEWSOM: I agree with Mr. Phillips, and having -- having just said that the strongest indication of Congress' intent to create a new cause of action would be its creation of an entirely new statutory scheme, I do agree that as -- as Congress moves away from that paradigm, that it may, for instance, in a freestanding section 1981(d), if it enacts all of the elements of a new -- of a new claim, that yes, indeed, that would create a new cause of action within -- within the meaning of section 1658.

QUESTION: But if it had done that, then we'd still have the same problems of deciding whether the -- a particular -- like class 2 in this case, whether they come under one section rather than the other. You'd have that problem then.

MR. NEWSOM: I'm not -- I'm not sure that that's

exactly right. The problem with class 2 -- and tell me if I'm misunderstanding. The problem with class 2 is that class 2 rises or falls on a given set of -- on a given set of facts. The district court did not conclude whether this class of -- this class of plaintiffs' promotion and assignment claims would succeed on a specific set of facts. The problem -- and that we think is the -- the problem inherent in petitioners' position that ties the question of whether a new cause of action has been created to the viability of a given claim rather than looking, as section -- as section 1658 directs the Court to do, what -- to -- to whether or not a civil action is created. A civil action in my mind speaks to your ticket into court, not so much with respect to what happens to you once you get there. So --

QUESTION: I -- I suppose any suggestion that we would be creating a -- a problem for Congress in giving it -- in posing a dilemma for it is that they can provide, number one, a new statute and have the statute of limitations set forth specifically.

MR. NEWSOM: Well, that's certainly true. Any -- I -- I certainly agree that any rule this Court adopts could be superseded by a subsequent amendment of -- of an enactment by Congress. But in the meantime, this Court we think ought to adopt a rule that minimizes confusion and

-- and maximizes certainty. That, in essence, is -- is the -- is the -- the proposition coming out of this Court's decision in Wilson v. Garcia, as Mr. Phillips said, which is that in that case, Justice O'Connor, for instance, made a very good point in her dissent that -- in that 1983 claims run the gamut from police brutality claims on the one hand to -- to school desegregation cases on the other and thought that it just didn't make sense to apply a single statute of limitations to such a wide variety of claims.

And this Court held -- and I submit correctly -- that the practical considerations, those of maximizing certainty and minimizing litigation, required the enactment -- or the -- the imposition of a single categorical, some would surely say formalistic, statute of limitations. And the same practical considerations obtained here at least --

QUESTION: It's also true, is it not, that this is one of those unique cases in which the -- the 4-year rule will help some plaintiffs and help defendants in other cases because some of the State statutes for certain causes are actually longer than 4 years? So sometimes it's cutting it down and sometimes it's expanding it.

MR. NEWSOM: That's certainly right.

And the State's principal interest here is in --

is in a -- a clear statute of limitations, not necessarily the shortest statute of limitations. Our interest here is -- is principally in clarity.

So again, if I can just emphasize, Congress -- Congress acted in section -- or rather in the 1991 act against a very specific backdrop, namely this Court's then-recent decision in Goodman v. Lukens Steel, which held that a -- that a single borrowed State statute of limitations would apply to all section 1981 claims. Now, if Congress wanted to walk away from Goodman and create a new cause of action so as to trigger section 1658's 4-year statute, then our submission is then it had to be clear about what it was doing. It had to -- in the paradigmatic example, it had to create a new standalone section. At the very least, it had to create a -- a self-contained and freestanding civil action within the confines of section 1681. But where it merely defined the term in a preexisting cause of action, we submit that that is simply not clear enough to -- to apply the -- the 4-year statute.

If there are no further questions.

QUESTION: One other question, if I may. Are there other statutes like -- that have just made a substantive amendment merely by redefining a term? I think this is kind of a -- this is kind of an unusual

statute and it may be a very unusual problem we've got.

MR. NEWSOM: There may well be Justice Stevens. not that I'm aware of off the top of my head.

QUESTION: Thank you, Mr. Newsom.

Ms. Gorman, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF H. CANDACE GORMAN

ON BEHALF OF THE PETITIONERS

MS. GORMAN: Thank you, Mr. Chief Justice.

Justice Stevens, if I can answer your last question. Yes, there was another statute that I can think of and that's the Pregnancy Discrimination Act although this is before 1990. So the 1658 question doesn't come into play. But title VII was amended just to add that cause of action for pregnancy discrimination --

QUESTION: And did they do it -- did that statute do it just by redefining a term, redefining --

MS. GORMAN: Correct, Your Honor, by redefining discrimination based on sex to also include discrimination in pregnancy.

QUESTION: Yes. That was in response to our Gilbert case.

MS. GORMAN: Correct.

Your Honor, defendant raised two statutes that they -- that they could now point to that they said would benefit from section 1658. They pointed to the Muhammad

Ali Boxing Act and the anti-discrimination law. And I submit to this Court, as Justice Breyer said, those aren't going to be new acts either because if you look at those acts, they're actually amending previous acts, and they pull definitional terms out of previous acts from before 1990.

If defendant's interpretation is accepted by this Court, then we are basically saying section 1658 is a nullity because we have scoured the statutes enacted by Congress after December 1st, 1990 and we could not find one statute that would benefit from section 1658, because Congress often takes terms or definitions or causes of action from previous statutes and amends, even when it thinks it's creating or it looks like it's creating something brand new.

QUESTION: I -- I don't know what you're saying when you say it takes it from them. Do you mean it just copies them in the new act? Are you counting situations in which they recite it in the new legislation?

MS. GORMAN: Correct, Your Honor, where they take --

QUESTION: Well, I don't think --

MS. GORMAN: -- terms out of the new -- out of old legislation.

QUESTION: I don't think your opponent would --

would count them. I -- I think only if -- if you rely upon the earlier statute for the definition, not if you simply copy that definition in the new statute, I don't think he would consider that to be covered.

MS. GORMAN: Well, Your Honor, if that's the case, then I think what respondent must be suggesting then is that section 1658 would only come into play if the new statute was the only statute you were relying on. And I don't think that's what section 1658 is stating. I think if -- even if this Court says, we're relying on old section 1981, as well as 1981 as amended by the Civil Rights -- Civil Rights Act, clearly our claim is still dependent on the 1991 act and therefore section 1658 would still come into play.

And as far as confusion, defendant suggested that there was even confusion in this case because the judge in our case did not know if class 2 claims were covered by this section 1658. There is no confusion with the court. It just wasn't briefed before the court. There was no record before the court because we had asked for a slightly different definition in our class certification, and the judge went beyond that definition and established a different class for the class 2. So the judge just didn't have the record and he thought we could figure that, which I think we probably could. And I think

the answer is going to be that the class 2 claims also fall under the 1658 statute.

The question before this Court is a narrow one: does section 1658 apply to plaintiffs' cause of action for racial discrimination and termination? Those claims were not created until the 1991 Civil Rights Act, and I submit to the Court that section 1658 should apply to those claims.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Gorman.

The case is submitted.

(Whereupon, at 11:23 a.m., the case in the above-entitled matter was submitted.)