

**SUPREME COURT
OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES

MOUNT LEMMON FIRE DISTRICT,)	
Petitioner,)	
v.)	No. 17-587
JOHN GUIDO, ET AL.,)	
Respondents.)	

Pages: 1 through 58
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MOUNT LEMMON FIRE DISTRICT,)
 Petitioner,)
 v.) No. 17-587
 JOHN GUIDO, ET AL.,)
 Respondents.)

Washington, D.C.

Monday, October 1, 2018

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

APPEARANCES:

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

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

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

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P R O C E E D I N G S

(11:09 a.m.)

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

Mr. Rosenkranz.

ORAL ARGUMENT OF E. JOSHUA ROSENKRANZ

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

25 Why did Congress use a different

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

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

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

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

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

22 JUSTICE SOTOMAYOR: So set that at --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 agents.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 CHIEF JUSTICE ROBERTS: Well, I --

16 JUSTICE KAGAN: Mr. Rosenkranz --

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

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

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

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

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

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

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

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

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

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

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

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

12 MR. ROSENKRANZ: The term is?

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

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

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

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

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

24 MR. ROSENKRANZ: Oh. Yes, the term
25 employer also means.

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

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

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

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

23 JUSTICE KAGAN: But the clarifying
24 with respect to the subdivisions would not be
25 necessary, except for the fact that there's

1 doubt in the person definition. That's where
2 your doubt comes from. It comes from the fact
3 that the person definition is not unambiguous.

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

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

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

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

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

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

1 for that.

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

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

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

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

25 JUSTICE BREYER: And you ask -- tell

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

7 Okay? Does the statute apply?

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

10 JUSTICE BREYER: How?

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

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

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

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

24 MR. ROSENKRANZ: Well, Your Honor --

25 JUSTICE BREYER: XYZ Corporation has

1 no employees; it just has five subsidiaries.

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

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

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

9 JUSTICE BREYER: Yeah.

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

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

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

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

1 doesn't have a number attached, because they
2 don't want a number attached.

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

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

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

9 JUSTICE BREYER: Is it possible?

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

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

15 MR. ROSENKRANZ: Right.

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

19 It means a person engaged in an
20 industry who has 20 or more employees. So what
21 I'm trying to imagine is through the use of
22 subsidiaries there is no company that has more
23 than 10 employees. And to avoid that, one
24 thing they might have wanted to do is to use
25 the word "agency" without a qualification that

1 the agency has to have 20 employees.

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

5 JUSTICE BREYER: On that problem?

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

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

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

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

1 Fourth signal: Affecting commerce.

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

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

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

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

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

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

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

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

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

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

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

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

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

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

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

18 CHIEF JUSTICE ROBERTS: Mr. Fisher.

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

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

23 The plain text of the ADEA makes
24 absolutely clear that it covers political
25 subdivisions regardless of size. And there's

1 nothing odd, much less absurd, about that
2 result.

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

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

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

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

23 JUSTICE SOTOMAYOR: Uh-huh.

24 MR. FISHER: -- that my friend points
25 to, I think it does use it in an additive

1 manner, because that's a statute where it says
2 consumer means an individual who does certain
3 things or the person's legal representative.

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

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

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

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

21 MR. FISHER: I think that's right,
22 Justice Sotomayor, but it's still talking about
23 a different source than the previous part of
24 the statute. And I think if there's one
25 potentially ambiguous provision out of 33,

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

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

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

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

24 MR. FISHER: I think, Justice
25 Sotomayor, the latter might be the case. But

1 it's not --

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

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

6 JUSTICE SOTOMAYOR: Yes.

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

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

21 And -- and, secondly, the federal
22 government is itself treated wholly separately
23 in Section 633(a) under a different regime of
24 the ADEA. So the federal government is just
25 put aside in all these other provisions. And I

1 think that's what Congress was doing there.

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

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

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

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

25 So the word the Court has used is that

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

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

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

23 So one of the things behind the
24 numerosity requirement in Title VII is a
25 concern about forcing very, very small groups

1 of people to associate with individuals they
2 might not like. Now that might seem antiquated
3 nowadays when we're talking about race
4 relations and race discrimination, but it's
5 directly in the legislative history of Title
6 VII.

7 On the other hand, this goes back to
8 the ADEA being partly a labor statute as well,
9 the -- the purpose of the ADEA is to bring
10 people into the workforce and keep them there
11 and to achieve full employment of older
12 individuals.

13 And as the Secretary of Labor noted in
14 the report this Court discussed in EEOC versus
15 Wyoming, that was not to stamp out animus-based
16 discrimination like under Title VII but to
17 achieve full employment.

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

23 JUSTICE KAGAN: Is this, Mr. Fisher,
24 the only federal statute that you're aware of
25 that imposes an obligation on a small political

1 subdivision but not -- does not impose the
2 corresponding obligation on a small private
3 employer?

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

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

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

24 And I'd add, Justice Kagan, you asked
25 me just about federal, but as we cite in our

1 brief in a lengthy footnote, there are many,
2 many states, the majority of states, in fact,
3 that cover political subdivisions regardless of
4 size.

5 Of that group, about half of them
6 cover political subdivisions regardless of size
7 and, on the other hand, still have a numerosity
8 requirement for private employers.

9 Now take that one step --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. FISHER: Justice Alito, let me

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

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

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

24 JUSTICE KAGAN: But how --

25 JUSTICE BREYER: Where do I look on

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

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

9 MR. FISHER: Uh-huh.

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

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

18 JUSTICE BREYER: Yeah.

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

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

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

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

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

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

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

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

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

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

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

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

25 If you answered that question against,

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

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

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

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

24 I'd urge the Court to resist the
25 temptation to go looking elsewhere in the

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

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

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Mr. Bond.

12 ORAL ARGUMENT OF JONATHAN C. BOND

13 ON BEHALF OF THE UNITED STATES,

14 AS AMICUS CURIAE, SUPPORTING THE RESPONDENTS

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

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

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

23 Second, Congress rejected the ready
24 template in Title VII adopted just two years
25 earlier that did exclude small state and local

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

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

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

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

25 Now those differences are actually

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

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

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

22 But I think it's important to bear in
23 mind that whatever the agent clause means, it
24 can't mean what Petitioner is offering here,
25 because that interpretation, if you hold his

1 interpretation to its logical conclusion, means
2 that any employer could evade the Age Act by
3 outsourcing to small agents.

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

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

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

1 same way across both clauses here.

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

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

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

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

21 MR. BOND: Sure.

22 JUSTICE ALITO: -- did you not?

23 MR. BOND: Yes, Your Honor.

24 JUSTICE ALITO: Okay.

25 MR. BOND: And the answer to your

1 question is we don't think that it would reach
2 individual liability for the -- because of the
3 two additional questions that Respondents'
4 counsel just identified.

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

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

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

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

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

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

1 exercising.

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

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

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

23 MR. BOND: So a few points on that,
24 Your Honor. First, if -- if Respondent -- or
25 if Petitioner is correct that the clause simply

1 codifies existing principles of respondeat
2 superior and agency liability, no, the employer
3 would not face liability for acts of
4 independent agents, at least in the ordinary
5 course. The general rule is that, unlike
6 respondeat superior liability, a principal is
7 not responsible for acts of independent agents
8 unless you specifically intend the result.

9 JUSTICE KAGAN: Independent
10 contractors; is that what you meant? Or --

11 MR. BOND: Well, independent agents,
12 so agents that not employees, non-employee
13 agents, which can include --

14 JUSTICE KAGAN: But even in the face
15 of --

16 MR. BOND: -- independent contractors.

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

19 MR. BOND: So --

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

23 MR. BOND: So let's distinguish two
24 things. As I understand, it Petitioner is
25 urging that the clause would incorporate

1 respondeat superior and ordinary agency
2 principles which, under Restatement Section 250
3 of agency and 409 of torts, would not pick up
4 acts of agents who are not employees in the
5 ordinary course.

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

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

19 CHIEF JUSTICE ROBERTS: Well, I'm not
20 -- I'm not sure what's so bad about direct
21 agent liability. I mean, let's say you have
22 the manager who runs the -- the shop, the
23 factory, and he decides, well, I'm going to
24 fire everybody over 45, or whatever it is. And
25 maybe the person fired wants to sue the

1 company; maybe the company's bankrupt. I mean,
2 what -- what's the big deal about -- it would
3 seem to me that that would allow you to sue the
4 person responsible for the decision.

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

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

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

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Mr. Rosenkranz, five minutes.

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

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

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

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

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

22 That doesn't mean that agents
23 themselves have to have 20 employees. That's
24 clear from the wording -- the wording of the
25 statute. So you start with (b), it says, "The

1 employer is anyone who has 20" -- "is a person
2 who has 20 or more employees and also affects
3 commerce."

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

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

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

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

24 Meanwhile, the list of problems that
25 Respondents are creating with their reading is

1 really untenable. First, it is unfathomable
2 that Congress would have singled out public
3 entities for harsh treatment in a statute whose
4 whole purpose was to bring public employees
5 into the ambit that private employees occupied.

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

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

24 So since there's a reasonable reading
25 of the statute that achieves Congress's stated

1 goal without creating any of this mischief,
2 that is the reading that this Court should
3 adopt.

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

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 The case is submitted.

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

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