

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MOUNT LEMMON FIRE DISTRICT,)

4 Petitioner,)

5 v.) No. 17-587

6 JOHN GUIDO, ET AL.,)

7 Respondents.)

8 - - - - -

9 Washington, D.C.

10 Monday, October 1, 2018

11

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

15

16 APPEARANCES:

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18 behalf of the Petitioner.

19 JEFFREY L. FISHER, ESQ., Stanford, California; on
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21 JONATHAN C. BOND, Assistant to the Solicitor General,
22 Department of Justice, Washington, D.C.; for
23 the United States, as amicus curiae, supporting
24 Respondents.

25

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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 is -- of the
19 -- the -- of Your Honor's question is that
20 Congress used the 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 groups 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 --

21 JUSTICE SOTOMAYOR: So set that at --

22 MR. ROSENKRANZ: -- all, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. ROSENKRANZ: So I think we have

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

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

14 And I didn't see, though, and I guess
15 I expected to see, some sort of absurd results
16 argument, perhaps, then 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 CHIEF JUSTICE ROBERTS: Well, but
8 that's --

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

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

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

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

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

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

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

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

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

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

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

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

18 CHIEF JUSTICE ROBERTS: Well, I --

19 JUSTICE KAGAN: Mr. Rosenkranz --

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

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

1 included in the first part of the statute.

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

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

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

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

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

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

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

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

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

16 MR. ROSENKRANZ: The term is?

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

20 MR. ROSENKRANZ: Yes, the antecedent
21 --

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

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

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

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

5 JUSTICE KAGAN: Okay.

6 MR. ROSENKRANZ: -- also means.

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

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

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

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

1 aforementioned persons who are now labeled
2 employers --

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

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

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

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

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

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

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

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

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

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

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

25 What did the drafter do? They just

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

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

12 Okay? Does the statute apply?

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

15 JUSTICE BREYER: How?

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

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

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

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

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

4 MR. ROSENKRANZ: Well, Your Honor --

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

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

10 JUSTICE BREYER: Why? They each have
11 10 employees.

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

14 JUSTICE BREYER: Yeah.

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

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

22 MR. ROSENKRANZ: Where does Manhart
23 say it?

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

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

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

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

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

14 JUSTICE BREYER: Is it possible?

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

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

20 MR. ROSENKRANZ: Right.

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

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

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

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

10 JUSTICE BREYER: On that problem?

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

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

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

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

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

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

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

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

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

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

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

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

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

1 and political subdivisions within the
2 definition of employment agency.

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

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

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

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 MR. ROSENKRANZ: Thank you, Your
22 Honor.

23 CHIEF JUSTICE ROBERTS: Mr. Fisher.
24
25

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

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

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

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

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

25 JUSTICE SOTOMAYOR: One doesn't. One

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

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

5 JUSTICE SOTOMAYOR: Uh-huh.

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

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

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

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

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

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

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

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

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

25 JUSTICE SOTOMAYOR: Could you deal --

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

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

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

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

13 MR. FISHER: The -- the federal
14 agency?

15 JUSTICE SOTOMAYOR: Yes.

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

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

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

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

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

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

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

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

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

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

19 JUSTICE ALITO: But that's quite --

20 MR. FISHER: And in --

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

1 do with respect to racial discrimination?

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

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

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

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

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

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

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

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

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

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

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

18 Now take that one step --

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

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

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

1 political subdivisions without regard to size.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 JUSTICE KAGAN: But how --

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

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

18 MR. FISHER: Uh-huh.

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

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

1 -- let me make --

2 JUSTICE BREYER: Yeah.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Mr. Bond.

22 ORAL ARGUMENT OF JONATHAN C. BOND

23 ON BEHALF OF THE UNITED STATES,

24 AS AMICUS CURIAE, SUPPORTING THE RESPONDENTS

25 MR. BOND: Mr. Chief Justice, and may

1 it please the Court:

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

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

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

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

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

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

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

10 Now those differences are actually
11 quite slight. You can see them at pages 6 and
12 15 of the blue brief appendix, but none of
13 those differences prevented Congress in 1974
14 from doing the exact same thing in the Age Act
15 that a different Congress had done two years
16 earlier in Title VII if it had wished to do so.

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

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

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

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

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

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

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

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

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

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

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

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

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

7 MR. BOND: Sure. And --

8 JUSTICE ALITO: -- did you not?

9 MR. BOND: Yes, Your Honor.

10 JUSTICE ALITO: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

22 MR. BOND: Well --

23 JUSTICE KAGAN: Or --

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

1 agents, which can include --

2 JUSTICE KAGAN: But even in the face

3 --

4 MR. BOND: -- independent contractors.

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

7 MR. BOND: So --

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

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

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

1 way.

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

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

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

25 The answer is not clear. We think

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

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

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Rosenkranz, five minutes.

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

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

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

25 The difference between Title VII and

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

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

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

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

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

1 and Title VII in this Court's jurisprudence.

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

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

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

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

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

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

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

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

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 The case is submitted.

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

25

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