

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

Pages: 1 through 83
Place: Washington, D.C.
Date: January 13, 2025

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6 CITY OF SANFORD, FLORIDA,)

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9 Washington, D.C.

10 Monday, January 13, 2025

11

12 The above-entitled matter came on for
13 oral argument before the Supreme Court of the
14 United States at 11:36 a.m.

15

16 APPEARANCES:

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18 the Petitioner.

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21 United States, as amicus curiae, supporting the
22 Petitioner.

23 JESSICA C. CONNER, ESQUIRE, Orlando, Florida; on
24 behalf of the Respondent.

25

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P R O C E E D I N G S

(11:36 a.m.)

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

Mr. Gupta.

ORAL ARGUMENT OF DEEPAK GUPTA

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

25 Yet, under the City's reading, the

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

4 I welcome the Court's questions.

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

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

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

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

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

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

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

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

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

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

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

11 CHIEF JUSTICE ROBERTS: No, go ahead.

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

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

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

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

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

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

17 MR. GUPTA: Right.

18 JUSTICE JACKSON: -- below, right?

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

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

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

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

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

15 JUSTICE JACKSON: What are those
16 ingredients?

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

25 And so the factual ingredients for the

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

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

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

22 JUSTICE JACKSON: So you're saying
23 it's not post-employment discrimination just
24 because it concerns benefits that would be given
25 after her employment?

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

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

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

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

24 And I think there was a sufficient
25 injury -- a sufficient threat of injury in fact

1 to give her Article III standing. But that
2 doesn't get you home because she didn't file on
3 that claim within the prescribed time.

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

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

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

1 benefits that occurs after the end of
2 employment?

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

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

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

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

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

1 described.

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

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

5 JUSTICE ALITO: -- an interesting
6 response.

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

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

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

23 CHIEF JUSTICE ROBERTS: Counsel, you
24 say in your brief as part of your argument that
25 if the retirees are not unable to perform, they

1 are able to perform?

2 MR. GUPTA: Yes.

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

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

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

16 CHIEF JUSTICE ROBERTS: Well, no, I
17 understand the -- the plain language. I just --

18 MR. GUPTA: Right.

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

25 MR. GUPTA: Right. I mean, another

1 way to take a crack at this is just to say that
2 it's a question that's sort of a non sequitur
3 because what you have here is a sentence that
4 has an embedded premise, right?

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

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

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

22 And so the thing you have to be able
23 to perform is the essential functions of the job
24 that you hold or desire to the extent that you
25 hold or desire a job.

1 CHIEF JUSTICE ROBERTS: Okay.

2 MR. GUPTA: Now I don't think you need
3 to reach --

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

13 Your reading would permit them to sue
14 still, correct?

15 MR. GUPTA: Well, I think they
16 would -- that suit would fail.

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

22 JUSTICE SOTOMAYOR: That's exactly my
23 question.

24 MR. GUPTA: And -- and, you know, I
25 will note that the -- the other side hasn't

1 identified that category, nor did the amici, but
2 I can -- I can see where that concern comes
3 from.

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

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

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

22 So I don't think our argument opens up
23 some broad category of claims. You still have
24 to have that -- the discrimination has to
25 concern the terms and conditions or compensation

1 of employment.

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

7 MR. GUPTA: Right.

8 JUSTICE SOTOMAYOR: Why don't you --
9 why haven't you adopted that?

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

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

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

24 MR. GUPTA: It -- it could. Not in
25 this case for the reasons I was discussing with

1 Justice Alito, but, in other cases, yes.

2 And I think there are a number of --
3 if I may complete?

4 CHIEF JUSTICE ROBERTS: Sure. Yeah.
5 Please do.

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

15 CHIEF JUSTICE ROBERTS: Thank you.

16 Justice Thomas?

17 Justice Alito?

18 JUSTICE ALITO: I am interested in
19 what the implications of adopting -- what the
20 consequences of adopting your argument would be.

21 And this is what I -- I would really
22 appreciate some enlightenment on this because I
23 assume that you're more -- you're familiar with
24 how this has worked out in those circuits that
25 have adopted something like your argument or how

1 it might work out nationwide in the future.

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

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

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

20 MR. GUPTA: Okay. So let me -- there
21 are two questions in there. Let me take both of
22 them. So I quite agree that the reasonable
23 accommodation concept is not really going to do
24 much work in this scenario, and one way you know
25 that is, if you look at the construction

1 provision, (b)(5), when it's describing the
2 reasonable accommodation requirement, it
3 actually adds on this language. It says
4 "qualified individual who is an applicant or
5 employee."

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

10 JUSTICE ALITO: Yeah.

11 MR. GUPTA: -- on employers the
12 obligation --

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

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

21 JUSTICE ALITO: No, I -- I understand
22 that.

23 MR. GUPTA: And --

24 JUSTICE ALITO: I'm just -- I'm just
25 trying to understand how this would work -- how

1 this is going to work --

2 MR. GUPTA: Right.

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

10 How is a court supposed to determine
11 whether this distinction between somebody who
12 works 25 years and somebody who works a shorter
13 period and retires based on disability is
14 unlawful? What is the test for determining
15 that?

16 MR. GUPTA: Yeah. I mean, I think it
17 will -- it will turn a lot on the claim. Let me
18 try to describe what I think is going on here,
19 which is that before this policy was put into
20 place, the City was treating three groups of
21 people as equally deserving of the subsidy, so
22 people who had completed 25 years of service,
23 people who had completed a combined year -- 25
24 years of service when taking into account
25 military service and other firefighting

1 positions, and then people who retired with --
2 with a disability. That's the third category.

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

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

22 Of course, the City will have the
23 opportunity on remand to show why we're wrong
24 and -- in their view. And whether you think the
25 underlying claim is doomed to fail or destined

1 to succeed, the -- the question presented is the
2 same. And I do think these are difficult claims
3 to succeed on.

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

11 MR. GUPTA: Right.

12 JUSTICE ALITO: So part of what you
13 said seems to me -- seems to be that the City
14 just had irrational bias against people with a
15 disability, okay? That would be one -- one
16 argument that might be made.

17 Another part of what you seem to have
18 said is that they didn't really have a -- an
19 economy -- a valid economy rationale. By not
20 extending the benefits to people who retire with
21 disability, they really weren't going to save
22 any money.

23 But suppose there's no evidence of --
24 of bias and, presumably, they will save some
25 money and they say, look, we need to cut -- we

1 needed to cut back, so we cut -- this is where
2 we cut back and we have a reason for it. The
3 reason is that we want to reward people who work
4 for us for 25 years. How -- how is a court
5 going to approach this kind of issue?

6 MR. GUPTA: Well --

7 JUSTICE ALITO: Because, if you take
8 out the reasonable accommodation question, I
9 just don't know how this is going to be -- how
10 it's going to be approached by courts in the
11 future.

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

25 And I think that actually, to the

1 extent that the amici on the other side are
2 hypothesizing a flood of claims, the reason you
3 haven't seen that in the Second and Third
4 Circuits is because that safe harbor provision
5 takes care of and immunizes defendants from --
6 from the large, you know, majority of those
7 kinds of claims.

8 JUSTICE ALITO: All right. Thank you.
9 That's helpful.

10 CHIEF JUSTICE ROBERTS: Justice
11 Sotomayor?

12 JUSTICE SOTOMAYOR: The other side
13 argues that the ADA is only about bringing
14 workers into the workforce and keeping them
15 there. It seems to me that part of the ADA's
16 goal is to encourage people with disability to
17 go into the workforce, and that includes how
18 much benefits they're going to get, right?

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

20 JUSTICE SOTOMAYOR: And -- and to the
21 extent that people with disabilities, whether
22 before they enter the workforce or they retire,
23 if the health insurance plan or the benefit they
24 thought they had isn't there, or they're afraid
25 it won't be there, that will be --

1 disincentivize them from going into the
2 workforce, correct?

3 MR. GUPTA: Correct.

4 JUSTICE SOTOMAYOR: All right. Now
5 the other side argues that there are a whole
6 plethora of remedies besides this one, besides
7 the ADA, to vindicate retirees' rights.

8 Could you go through them --

9 MR. GUPTA: Sure.

10 JUSTICE SOTOMAYOR: -- and tell me why
11 you think they're not -- besides the fact that
12 the ADA has different -- different damages
13 scope, I'm not sure that they would qualify,
14 that retirees would qualify for many of these
15 alternatives that they raise. Is that correct?

16 MR. GUPTA: Yeah. I think that's
17 right. I mean, the other sources of law are not
18 a substitute, and, certainly, they're not
19 trained directly on discrimination on the basis
20 of disability.

21 So my friends on the other side
22 mentioned contract law. If you just take
23 Florida contract law, which would apply here,
24 there would be no claim. Public employers can
25 change their plans prospectively at any time

1 before the benefits are paid out. And so
2 there's -- the Florida Supreme Court has said --

3 JUSTICE SOTOMAYOR: So the only thing
4 that permits them or stops them from
5 discriminating against retirees is the ADA,
6 correct, not for --

7 MR. GUPTA: I think the ADA is the
8 principal tool, and it is the -- the tool that
9 Congress chose. There are protections --

10 JUSTICE SOTOMAYOR: All right. Go
11 through the others.

12 MR. GUPTA: And -- and then the other
13 candidate they mention is ERISA. So I'll
14 mention that, you know, first of all, when the
15 ADA was enacted in 1990, there was no
16 possibility that ERISA would reach this
17 scenario.

18 ERISA also doesn't apply to public
19 employers, like the one here, at all. And under
20 ERISA, private employers can -- can generally
21 terminate or amend retirement plans so long as
22 they -- they don't reduce or eliminate accrued
23 benefits, the same thing as under contract law.

24 So the problem here that the ADA is
25 trying to reach is a different one, which is not

1 just a contractual promise; it's the idea that
2 you made -- maybe you could think of it as a
3 less good promise to people who had a protected
4 characteristic.

5 And if -- and if an employer did that
6 on the basis of race or religion or sex, of
7 course, there would be a claim, and Congress
8 wanted to have parallel coverage for disability
9 as well.

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

13 MR. GUPTA: They would not apply.

14 JUSTICE SOTOMAYOR: -- at all to --

15 MR. GUPTA: Right.

16 JUSTICE SOTOMAYOR: -- just the
17 question of retirees. Thank you, counsel.

18 CHIEF JUSTICE ROBERTS: Justice Kagan?

19 Justice Gorsuch, anything?

20 Justice Kavanaugh?

21 Justice Barrett?

22 Justice Jackson?

23 JUSTICE JACKSON: So is the linchpin
24 of this really just focusing on when the
25 discrimination occurred and you say that there

1 are sufficient facts and it should not have been
2 dismissed because this doesn't necessarily
3 involve just post-employment discrimination?

4 MR. GUPTA: Yeah. I think that's
5 right. I mean, I think there are three points
6 in time that -- that matter at least: when you
7 have to be able to perform the essential
8 functions; when the discrimination must occur to
9 be actionable; and then when you can sue.

10 And what we're saying is, at least on
11 the facts of this case, where the discrimination
12 as we've been discussing did, indeed, occur when
13 she was able to perform the functions of her job
14 as a firefighter, then the question is when you
15 can sue.

16 And if you answer the -- the question
17 on the narrow ground, what you would be
18 resolving is you'd be saying you can sue even
19 if, at the point that you sue, you're -- you're
20 no longer in the job.

21 And if you do that, that would be
22 resolving a chunk of the circuit split because
23 the Sixth and the Ninth Circuits have held
24 otherwise, as the -- as the court of appeals
25 recognized at page 17A of the -- of the decision

1 below.

2 JUSTICE JACKSON: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 MR. GUPTA: Thank you.

6 CHIEF JUSTICE ROBERTS: Mr. Liu.

7 ORAL ARGUMENT OF FREDERICK LIU FOR
8 THE UNITED STATES, AS AMICUS CURIAE,
9 SUPPORTING THE PETITIONER

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

12 The only question presented is whether
13 Stanley has alleged discrimination against the
14 qualified individual under the ADA. The answer
15 to that question is yes.

16 We agree with Stanley that the most
17 straightforward path to that conclusion lies in
18 the period after she was diagnosed with
19 Parkinson's disease but before she retired. In
20 that period, Stanley was a qualified individual
21 with a disability.

22 And there's no dispute that if the
23 alleged discrimination occurred while Stanley
24 was both qualified and disabled, the alleged
25 discrimination was against a qualified

1 individual.

2 The Court can, and should, decide this
3 case on that narrow basis, but, in doing so, it
4 shouldn't foreclose the possibility of relief in
5 other cases involving plaintiffs who were not
6 both qualified and disabled when the disability
7 discrimination occurred.

8 We believe the ADA also protects the
9 benefits those plaintiffs earned as qualified
10 individuals, but, because the alleged
11 discrimination here occurred while Stanley was
12 both qualified and disabled, this Court need not
13 address any broader arguments to vacate the
14 decision below.

15 I welcome the Court's questions.

16 JUSTICE THOMAS: Where did Petitioner
17 make those arguments in the district court and
18 in the court of appeals?

19 MR. LIU: Yeah. So, in the district
20 court, we think this -- this argument is
21 supported in paragraph 16 of the complaint.
22 That paragraph of the complaint alleges that she
23 became disabled before she retired and also
24 alleges that she continued to work until she
25 retired.

1 We think it's a plausible inference
2 from that paragraph that she was a qualified
3 individual with a disability at some point
4 before she retired.

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

12 And then, in this Court, I would -- I
13 would cite the same pages my friend cited in the
14 petition, particularly pages 7, 11, 24, and 25.
15 I would note that the City argued forfeiture in
16 its brief in opposition. Presumably, this Court
17 considered and rejected that forfeiture
18 contention as a basis for denying review and for
19 good reason, because this Court has said time
20 and again that once a party has preserved an
21 issue for this Court's consideration, that party
22 can make any argument in support of that issue.

23 And the issue here is whether Stanley
24 satisfies the qualified individual requirement.

25 I want to emphasize why we think it's

1 a good idea to decide this case narrowly.

2 First, we think it answers the
3 question presented.

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

12 And so, if this Court were to hold
13 that at least someone in Stanley's circumstances
14 can sue even though she was a former employee
15 when she brought the suit, that would resolve
16 that question that's divided the circuits.

17 JUSTICE ALITO: Could she sue if she
18 had not filed within 300 days?

19 MR. LIU: I do, Justice Alito, I -- I
20 have the same two responses my friend did. I
21 think it's unnecessary to reach that -- that
22 interpretation of the Fair Pay Act because there
23 are 86 days in the 300-day limitation period
24 that fall during the period after she was
25 diagnosed but before she was disabled, and those

1 may well be days that support her claim here.

2 But, to get to the interpretation of
3 the Fair Pay Act, we understand the Fair Pay Act
4 as saying that you can identify a discriminatory
5 decision that falls outside the limitations
6 period, that is, a decision that satisfies all
7 the elements of discrimination under 12112(a).
8 And so long as you can point to effects from
9 that decision that do fall within the limitation
10 period, then you can challenge that decision.

11 We -- we understand that to be the
12 force of the Fair Pay Act in a context like
13 this.

14 JUSTICE ALITO: I don't want to take
15 up too much time, but I am interested in the
16 last questions -- the last series of questions I
17 asked Mr. Gupta.

18 So, in this case -- because I want to
19 understand where this leads. In -- in this
20 case, Lieutenant Stanley is actually treated
21 more favorably than someone who retires after 20
22 years without a -- for a reason other than
23 disability. She is treated less favorably than
24 someone who retires after working for 25 years.

25 So how is a court -- put aside --

1 there's no question of -- of bias, and the --
2 the -- the employer puts that -- puts forward
3 information that this is based on cost saving
4 and incentivizing working until 25.

5 How is a -- what is the test for
6 determining whether something like that is valid
7 or not?

8 The reasonable accommodation concept
9 would work in the employment context, but it
10 doesn't work here. So what's the answer?

11 MR. LIU: Yeah, I don't think this is
12 a reasonable accommodation claim. I don't think
13 Stanley has ever brought a reasonable
14 accommodation claim.

15 JUSTICE ALITO: Okay. It's not
16 reasonable accommodation.

17 MR. LIU: Right.

18 JUSTICE ALITO: So how do you
19 determine whether this kind of a structure is --
20 is discriminatory?

21 MR. LIU: So we understand this to be
22 a disparate treatment claim, and we understand
23 that the right way to go about analyzing a
24 disparate treatment claim is to ask how a
25 similarly situated person without disabilities

1 would be treated.

2 And, as you know, the United States
3 hasn't taken a position on this issue, but I --
4 I understand the parties to have staked out two
5 different ways of identifying the relevant
6 similarly situated comparator.

7 I think, if you ask Petitioner, what
8 they would say is: What you do is you subtract
9 disability from the equation and you see what
10 would have happened then. And, in their view,
11 if you subtract disability from the equation,
12 their client, Stanley, would have worked more
13 than 25 years and, thus, been eligible for
14 benefits until she was 65.

15 Now the City responds and says: Well,
16 when you subtract disability from the equation,
17 that's all you subtract out, and you hold the
18 terms of service constant at 20 years. They --
19 they would say that -- that Petitioner is
20 changing two variables, not only the -- the
21 disability but also the terms of service.

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

1 I think that's the form of the
2 disparate treatment analysis that should occur
3 in the courts below. But, as my friend pointed
4 out, neither court analyzed the issue. It
5 doesn't affect this Court's consideration of the
6 qualified individual issue that is before it.
7 And so it can just be left --

8 JUSTICE ALITO: Well, if --

9 JUSTICE KAGAN: Do you --

10 JUSTICE ALITO: I'm sorry.

11 JUSTICE KAGAN: No, go ahead.

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

15 MR. LIU: Right. And I -- I don't
16 think where we're going -- because -- because we
17 do not have a judgment on the ultimate merits of
18 the disability claim, it is not the case that
19 where we're going is that cities can't do
20 exactly what the City did here. I don't want to
21 give that impression.

22 I -- I think, for purposes of this
23 case, this Court can assume that this policy did
24 discriminate on the basis of disability. And
25 so, instead of treating some class of people

1 with disabilities more favorably, I would just
2 ask this Court to assume that it cut the
3 benefits of people with disabilities and left
4 them worse off.

5 JUSTICE KAGAN: Do you see many claims
6 like this under other discrimination laws? Why
7 or why not?

8 MR. LIU: Yeah, we -- we do. I mean,
9 this Court has seen cases about post-retirement
10 benefits in the Title VII context. There have
11 been cases that have come to this Court about
12 sex and race discrimination in post-retirement
13 benefits.

14 And I think that's one of the
15 anomalies of the City's position, is that
16 whereas Congress was trying to bridge the gap
17 between the legal remedies available for people
18 with disabilities vis-à-vis people who are
19 discriminated based on race or sex or other
20 things in Title VII, the -- the City's approach
21 would broaden that gap.

22 JUSTICE KAGAN: And is the way --
23 again, you haven't taken a position on a lot of
24 this, but is the fundamental way you understand
25 these claims to work the same across

1 discrimination statutes?

2 You know, usually -- often, as Justice
3 Alito points out, the ADA is kind of different.
4 Would it be just the same here?

5 MR. LIU: I think, in -- in terms of a
6 disparate treatment claim, it would be the same.
7 I think it's an open question that we haven't
8 addressed in our brief whether something like a
9 reasonable accommodation claim would -- would --
10 would provide a different kind of preferential
11 treatment to people with disabilities in this
12 context.

13 JUSTICE ALITO: It's -- it's not the
14 same because, in a Title VII case based on race,
15 sex, whatever, you're asking: Are two people
16 treated differently? The -- people of different
17 races, they're -- are they treated differently?
18 People of different sexes, are they treated
19 differently?

20 Under the ADA, that's not what you ask
21 in most cases because they -- because what the
22 plaintiff wants is not exactly equal treatment.
23 That's the whole point. The plaintiff wants a
24 reasonable accommodation.

25 If you take away -- so if you're -- if

1 what you're saying is that -- so I don't see
2 how --

3 MR. LIU: Well --

4 JUSTICE ALITO: -- whatever's been
5 done under Title VII --

6 MR. LIU: -- I -- I -- I --

7 JUSTICE ALITO: -- sheds light into
8 the problem here.

9 MR. LIU: I think the main difference
10 between the ADA and Title VII is that -- I'm
11 sorry, yes, the ADA and Title VII is that the
12 ADA offers plaintiffs a reasonable -- may I
13 finish, Mr. Chief Justice?

14 CHIEF JUSTICE ROBERTS: Sure.

15 MR. LIU: Offers plaintiffs a
16 reasonable accommodation claim, but under both
17 statutes, plaintiffs can bring disparate
18 treatment claims.

19 And to just give an example of --
20 of -- of -- of some disparate treatment that
21 could happen here, imagine if there were
22 policies, every -- everyone who has 20 years of
23 service gets a certain amount of benefits,
24 except people with disabilities. I think that's
25 a clear disparate treatment problem.

1 CHIEF JUSTICE ROBERTS: Thank you.

2 Justice Thomas?

3 Anything further, Justice Alito?

4 Justice Sotomayor?

5 JUSTICE SOTOMAYOR: If I'm
6 understanding your response right, there are
7 various kinds of claims under the ADA.
8 Reasonable accommodation is one, but there's
9 also disparate treatment.

10 MR. LIU: Correct.

11 JUSTICE SOTOMAYOR: And this is what's
12 being claimed here. Do you think that this is a
13 slightly different case also because they had
14 been extending a benefit that they then took
15 away?

16 MR. LIU: I think that goes to a
17 animus-based claim. I think, if Petitioner
18 could show that the decision to reduce benefits
19 was made out of animus, then that might allow
20 them to satisfy the elements of a disparate
21 treatment claim even without pointing to the
22 sort of formal disparate -- the formal
23 comparator analysis.

24 JUSTICE SOTOMAYOR: But there's
25 still --

1 MR. LIU: Yeah.

2 JUSTICE SOTOMAYOR: And he mentioned
3 one defense is that it's based on at risk
4 factors, which are a different thing, correct?
5 Or service?

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

9 JUSTICE SOTOMAYOR: All right. Do you
10 have a different answer than Mr. Gupta as to the
11 questions of why the other statutes that are
12 pointed to by the other side are not effective
13 remedies or substitutes for the ADA?

14 MR. LIU: I don't have a different
15 answer. I would just boil it down to this,
16 which is those other sources of law may well be
17 useful in enforcing promises that an employer
18 makes. But the problem here, the alleged
19 problem here, is that the employer made one
20 promise to people without disabilities and a
21 different, worse promise to people with
22 disabilities. And simply enforcing that other
23 less good promise isn't going to remedy the
24 alleged discrimination in the complaint.

25 JUSTICE SOTOMAYOR: Thank you,

1 counsel.

2 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

6 MR. LIU: Yeah.

7 JUSTICE KAGAN: And, as I understand
8 it, it's because Ms. Stanley was employed, was
9 holding a job, for a period of time that you
10 would like us to go off on -- on -- on that
11 basis and, you say, you know, you -- she sued
12 within the 300 days, and -- and -- and the
13 consequence of that is that we never have to
14 reach this qualified individual provision. Is
15 that -- is that correct?

16 MR. LIU: I -- I think because
17 everyone agrees she was a qualified --

18 JUSTICE KAGAN: At that point. Right.

19 MR. LIU: -- individual during that
20 time.

21 JUSTICE KAGAN: So we never have to
22 figure out what the qualified individual
23 provision means with respect to somebody who is
24 retired, not in a job --

25 MR. LIU: Right.

1 JUSTICE KAGAN: -- and, you know,
2 whether we should think of that as precluding a
3 suit for some later --

4 MR. LIU: Exactly.

5 JUSTICE KAGAN: -- person.

6 And you talked about why you shouldn't
7 think of these as forfeited. I mean, it's at
8 least true that the courts below did not address
9 these. And I'm not sure that we had it in our
10 minds when we took the case that this was the
11 issue. So what, if anything, would you say to
12 that?

13 MR. LIU: I would say that the -- the
14 issue defined at the right level -- and I'm
15 defining it as the text of the statute defines
16 it -- is whether there was discrimination
17 against a qualified individual. I do understand
18 the Court to have granted cert on that question.

19 Then it's just a matter of the fact
20 that these arguments, while they were pressed
21 below not only by us but -- but by Stanley,
22 weren't addressed below. But I've always
23 understood that pressed or passed-upon
24 requirement to -- to apply to issues and not
25 arguments but also to be phrased in the

1 injunctive such that if you did want to apply
2 that test to the precise arguments here, it
3 would be satisfied because these arguments were
4 pressed below.

5 JUSTICE KAGAN: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Gorsuch?

8 Justice Kavanaugh?

9 JUSTICE KAVANAUGH: Well, I thought we
10 were deciding whether the Eleventh Circuit's
11 understanding of the law was correct given the
12 arguments that it considered. Is that not what
13 we -- you don't think that's what we should do?

14 MR. LIU: I think the Eleventh Circuit
15 found various ways to reject the arguments that
16 go to the overarching issue. Some of those ways
17 of rejecting those arguments did involve
18 addressing those arguments on the merits, and
19 others involved determining that they were
20 forfeited. But I think all of that is before
21 this Court.

22 JUSTICE KAVANAUGH: Okay.

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett?

25 Justice Jackson?

1 JUSTICE JACKSON: So I -- I just
2 wanted to clarify the conversation that you had
3 with Justice Alito about whether the elements of
4 disparate treatment have been plausibly alleged
5 here. That -- you don't consider that to be
6 within the question presented in this case?

7 MR. LIU: We do not.

8 JUSTICE JACKSON: So it's more like
9 whether or not she -- her status as a former
10 employee precludes her from making this claim?
11 I mean, I thought at the bottom of all of this
12 we're talking about a motion to dismiss in which
13 the City claimed that she was not allowed to go
14 forward because she was a former employee.

15 MR. LIU: Correct.

16 JUSTICE JACKSON: And you're saying
17 she is because there's evidence that she was
18 discriminated against, evidence, not -- it
19 hasn't -- whether it's proven or not, evidence
20 that she was discriminated against during the
21 period of her employment, and that should be
22 enough to allow for her case to go forward?

23 MR. LIU: That should be enough. We
24 think even if she couldn't have pointed to that
25 existence of discrimination while she was

1 employed that she would still have a claim, like
2 many others do in other situations, where they
3 cannot point to a precise moment in time in
4 which they were both qualified and disabled.
5 But I'll acknowledge that those are trickier
6 issues, and this Court's usual practice is not
7 to decide issues more broadly than it needs to.

8 JUSTICE JACKSON: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Ms. Conner.

12 ORAL ARGUMENT OF JESSICA C. CONNER

13 ON BEHALF OF THE RESPONDENT

14 MS. CONNER: Mr. Chief Justice, and
15 may it please the Court:

16 Title I of the ADA prohibits employers
17 from discriminating on the basis of disability
18 only against an individual who can perform the
19 job she holds or desires, present tense.

20 This Court has explained in *Robinson*
21 that use of present tense verbs is an
22 unambiguous temporal qualifier limiting a
23 statute to reach to current employees only.
24 Therefore, the Eleventh Circuit correctly held
25 that because Stanley cannot establish that the

1 City committed any discriminatory acts against
2 her while she could perform the essential
3 functions of a job that she held or desired to
4 hold, her Title I claim fails.

5 Indeed, the City's 24-month rule on
6 its face is applicable only to unqualified
7 individuals who retire because they are unable
8 to perform their jobs. However, Petitioner
9 argues that the City subjected her to its policy
10 when she was a qualified individual during her
11 employment. But a qualified individual is not
12 subject to a policy that only applies to
13 unqualified individuals, just like a man is not
14 subject to a policy that applies only to women,
15 and a non-disabled employee is not subject to a
16 policy that only applies to disabled employees.

17 This proposition is so
18 well-established that the Petitioner did not
19 plead that the City's policy discriminated
20 against her as a qualified individual. Instead,
21 the district court, at 26a, held that her Title
22 I claim failed because her complaint alleged
23 that the discrimination did not occur until
24 plaintiff was no longer able to perform the
25 essential functions of her job.

1 This ruling should not be
2 controversial. Everyone agrees, for example,
3 that an employer does not violate Title I when
4 it fires an employee who can no longer perform
5 the essential functions of their job. The
6 outcome should be no different here simply
7 because retirees or post-employment benefits are
8 involved. This Court should affirm.

9 I welcome the Court's questions.

10 JUSTICE THOMAS: Would you spend a bit
11 of time on what you think we granted cert on and
12 what was decided below and what was not decided
13 below?

14 MS. CONNER: Yes, Your Honor. The --
15 the Court certainly, I would assume, granted
16 cert to hear the question that is actually
17 splitting the circuit courts, and that question
18 is solely whether or not discrimination
19 occurring totally and entirely post-employment
20 against an unqualified individual is actionable
21 under Title I.

22 And, additionally, this Court could
23 consider whether or not discrimination occurring
24 during employment is actionable. But the
25 problem here is that the Eleventh Circuit never

1 said that employees who are qualified during
2 their employment, who are subject to
3 discrimination regarding post-employment
4 benefits cannot sue. It did not say that. It
5 just said that the Petitioner disclaimed that
6 argument, that she did not raise the argument
7 that anything happened to her during her
8 employment that was actionable.

9 And the Eleventh Circuit also did not
10 say that an employee must be qualified at the
11 time of a lawsuit. The Eleventh Circuit said
12 only that an employee must be qualified at the
13 time of the discriminatory act, but, because she
14 alleged and also argued that she -- that the
15 discrimination only occurred post-employment,
16 when she was totally disabled and unable to
17 perform the essential functions of her job, that
18 she alleged discrimination against an
19 unqualified person only and that --

20 JUSTICE KAGAN: Well, I take your
21 point, Ms. Conner, that the Eleventh Circuit did
22 not address this, but Mr. Gupta and Mr. Liu have
23 suggested that Ms. Stanley did point it out on
24 various occasions, that she was not somebody who
25 it was -- it was all post-retirement, but, in

1 fact, that there were a couple of years of her
2 employment where she had the exact same claim.

3 And it seems a little bit odd to
4 decide this bigger, broader question that you
5 would like us to decide when, as to this
6 particular per -- person, it's academic.

7 MS. CONNER: Justice Kagan, I heard my
8 friends point to paragraph 16 of her complaint
9 as where they claim she alleged discrimination
10 during employment, but paragraph 16 actually
11 does not contain any allegations.

12 JUSTICE SOTOMAYOR: Where is that?

13 MS. CONNER: That would be in Document
14 1 of the record at paragraph 16, which --

15 JUSTICE KAGAN: I mean, I guess
16 another way of stating the question is we would
17 be deciding the question as if there were a set
18 of facts that are not true.

19 MS. CONNER: Correct --

20 JUSTICE KAGAN: I mean, she was
21 employed.

22 JUSTICE JACKSON: Do you dispute that
23 she was disabled before she retired? Do you
24 dispute that?

25 MS. CONNER: No, we do -- we do not

1 dispute that she was disabled, but we dispute
2 that any discrimination occurred while she was a
3 disabled -- a qualified individual with a
4 disability because she took -- she became
5 completely unqualified, meaning unable to
6 perform the essential functions of her job, and
7 then she took a disability retirement, and then
8 the City applied its 24-month rule to her.

9 So the only time that the alleged
10 discrimination occurred was when she was an
11 unqualified individual after she had --

12 JUSTICE JACKSON: So -- so --

13 MS. CONNER: -- taken her retirement.

14 JUSTICE JACKSON: -- under that view,
15 a person cannot sue for retirement-related
16 benefits discrimination because it seems to me
17 that you're saying that if a person becomes
18 disabled while they are still employed, to the
19 extent that the policy has not yet been applied,
20 the policy concerning the retirement benefits,
21 because they're still employed, they can't sue
22 about it.

23 And then, when they retire and the
24 policy is applied, they can't sue about it
25 because they become unqualified at that point in

1 your view.

2 So how do you ever challenge
3 discrimination concerning a policy that relates
4 to retirement benefits and disability?

5 MS. CONNER: Justice Jackson, neither
6 the City nor the Eleventh Circuit said that a
7 qualified individual could never sue over
8 discrimination in post-employment benefits. The
9 Eleventh Circuit, in fact, acknowledged that
10 that is a possible scenario.

11 There is a -- a possibility that
12 somebody who is qualified and has --

13 JUSTICE JACKSON: I guess I --

14 MS. CONNER: -- if they become subject
15 to the policy during their employment --

16 JUSTICE JACKSON: Can -- can you help
17 me understand why the qualified individual
18 designation in the statute has anything to do
19 with this? My -- my instinct is sort of closer
20 to Justice Alito's in terms of qualified
21 individual coming up in the reasonable
22 accommodations context. This is not that
23 context.

24 So I don't even understand the work
25 that it is doing with respect to setting some

1 sort of temporal limit as to whether or not this
2 person can sue for retirement benefits. So I --
3 I didn't -- yeah.

4 MS. CONNER: Because -- it's because
5 the language in the anti-discrimination
6 provision expressly draws a line as to who it's
7 protecting. It says no employer shall
8 discriminate against a person who can perform
9 the job they hold or desire.

10 And no other person is protected that
11 you can only -- you're only prohibited from
12 discriminating against a person who presently
13 holds a job that they desire. So --

14 JUSTICE JACKSON: Okay. And she says,
15 at the time that I held the job, I became
16 disabled and that policy applied to me. It -- I
17 was subject to it in that period of time.

18 So, as Justice Kagan says, why would
19 we pretend as though that is not a fact in the
20 case, not here, and decide this on a broader
21 question that relates to people who did not hold
22 the job during the time that they were
23 qualified?

24 MS. CONNER: Because the policy that
25 she describes, that she claims is discriminatory

1 and she describes in her complaint, on its face
2 only applies to a person who becomes completely
3 unable to perform their job and is, therefore,
4 unqualified.

5 So it would be the same if the City
6 had a policy that said, if you become completely
7 unqualified and unable to perform the essential
8 functions of your job, we will terminate your
9 employment. And that is perfectly -- that is
10 not unlawful under the ADA.

11 But what she's claiming is, if you
12 wrote down something that is lawful, that is not
13 controversial at all, that if you become unable
14 to perform your job, we can terminate you
15 because you're no longer a qualified individual,
16 but she's saying, I could sue to prevent you
17 from doing something to an unqualified
18 individual that the ADA does not prohibit.

19 She -- she's claiming that the
20 24-month rule only applies to a disability
21 retiree. And a disability retiree is not just
22 somebody with a disability. It is defined as
23 somebody who is -- who is permanently and
24 completely unable to do the job. That's why she
25 was awarded a disability retirement, because she

1 became an unqualified individual.

2 And only those who take the disability
3 retirement -- if she had been non-disabled and
4 retired with the 20 years that -- that she had
5 served, she would have received no subsidy,
6 health insurance subsidy, whatsoever. The City
7 made an exception because of her disability, out
8 of compassion, that even though everybody else
9 who only serves for 20 years only receives --
10 receives no health insurance subsidy, out of
11 compassion, for those who retire because they
12 are completely disabled and unable to do the
13 job, we will give 24 months of the health
14 insurance subsidy.

15 JUSTICE JACKSON: So I understand that
16 argument, but that -- doesn't that just go to
17 the merits of her disability claim? Is she
18 stating -- this is Justice Alito's point -- a
19 claim for disability -- or, excuse me, of -- for
20 discrimination.

21 You -- you've raised the objection, an
22 objection that has something to do with the fact
23 that she's post-retirement, and that's what's
24 confusing to me.

25 MS. CONNER: It's because, when she

1 was post-retirement, she was an unqualified
2 individual. She was totally disabled and unable
3 to perform the essential functions of her job,
4 which takes you outside of the protections of
5 Title I because Title I only prohibits
6 discrimination against a person who can perform
7 a job they presently hold or desire.

8 So someone who neither holds a job,
9 desires a job, and is completely unable to
10 perform the job is -- does not fall --

11 JUSTICE JACKSON: Is that the --

12 MS. CONNER: -- under the protections.

13 JUSTICE JACKSON: -- same with respect
14 to Title VII?

15 MS. CONNER: Title VII does not use
16 the phrase "qualified individuals." It refers
17 broadly to the -- to individuals or employees,
18 which is why, in Robinson, this Court said that
19 under Title VII, the -- the use of the word
20 "employees" in the anti-discrimination provision
21 of Title VII was ambiguous because "employee"
22 was defined as a person employed, past tense.
23 And that could be ambiguous, is employed or was
24 employed.

25 And so, under Title VII, which does

1 not refer to qualified individuals, there was an
2 ambiguity in the use of the word "employees."
3 But that is why Congress did not simply amend
4 Title VII to add disability as a protected trait
5 because disability is very different, in the ADA
6 structure, is very different from Title VII.

7 They share the same remedies, but they
8 do not share the same substantive provisions.

9 JUSTICE SOTOMAYOR: Counsel, as I'm
10 hearing your answer to Justice Jackson, you are
11 taking the far extreme position that the SG is
12 not but that at least two circuits have that a
13 retiree has no entitlement because, at the
14 moment they're retired, they lose -- they're no
15 longer qualified, correct?

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

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

23 MS. CONNER: It's, depending upon what
24 a particular plaintiff alleges, if they're
25 relying on an adverse employment action --

1 JUSTICE SOTOMAYOR: Mm-hmm.

2 MS. CONNER: -- that is taken solely
3 against an unqualified individual --

4 JUSTICE SOTOMAYOR: So are you --

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

6 JUSTICE SOTOMAYOR: -- citing that if
7 she had properly alleged that she was -- had
8 Parkinson's two years before she retired, that
9 she would be entitled to sue?

10 MS. CONNER: If she alleged that the
11 City had a policy that said, if you get
12 Parkinson's -- if you have Parkinson's disease,
13 we're not going to pay you a pension, she would
14 have been subject to that policy during her
15 employment as soon as she --

16 JUSTICE SOTOMAYOR: You're begging
17 the --

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

19 JUSTICE SOTOMAYOR: -- question --
20 you're trying to qualify in the ways you're not.
21 You're basically saying, if you're retired,
22 you're not entitled to anything, even if you had
23 been made this promise during your time of
24 employment, because you're saying the promise
25 here she relies on, and it's specified in her

1 paragraph 19, was if -- we will pay you equally
2 to people who work 25 years or to people whose
3 25 years encompasses service in the military or
4 in other governments.

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

7 MS. CONNER: If she's relying on the
8 discriminatory -- as the alleged discriminatory
9 act when we changed the policy in 2003, she
10 would not have been a qualified individual --

11 JUSTICE SOTOMAYOR: But she was --

12 MS. CONNER: -- with a disability at
13 that time.

14 JUSTICE SOTOMAYOR: -- and she does --
15 and she was in 2000 -- 2018 when she developed
16 Parkinson's.

17 MS. CONNER: In -- in 2018, she
18 certainly had a disability. She was not a
19 qualified individual because she's not --

20 JUSTICE SOTOMAYOR: Why? She worked
21 two years not being qualified?

22 JUSTICE JACKSON: Why was she not a
23 qualified individual in 2018?

24 MS. CONNER: Because that's -- well,
25 in November of 2018 is when she took her

1 retirement because she became an unqualified
2 individual, meaning somebody totally disabled.

3 JUSTICE JACKSON: Was she qualified at
4 the point at which she got the Parkinson's,
5 2016?

6 MS. CONNER: She would have been a
7 qualified individual at that time, but the
8 policy did not apply to qualified individuals
9 with disabilities. The policy would only be
10 applied to somebody who became unqualified,
11 because you have to take a disability
12 retirement, which means you are unable to
13 perform the essential functions of your job. At
14 that point, the 24-month subsidy policy would
15 apply to her, and she's no longer qualified at
16 the time the 24-month rule was applied to her.

17 And that's no different from an
18 employer terminating the employment of somebody.
19 They have a disability, but then they become
20 totally disabled. You can terminate their
21 employment because they're unqualified at that
22 point. And there's nothing controversial about
23 that. She's -- it's only made controversial
24 because it's -- for some reason, they're arguing
25 for an exception to the plain language just for

1 retirees.

2 But there should be no exception.
3 The -- the language contains no exception. It
4 is -- there is a very clear line drawn by
5 Congress to protect only those who can perform
6 the jobs they hold or desire. And, again, it's
7 about when the discrimination occurs. Nobody is
8 arguing, and the Eleventh Circuit certainly did
9 not hold, that she was required to be a
10 qualified individual at the time of her lawsuit.

11 She was required to allege that at the
12 time she was discriminated against, she was a
13 qualified individual with a disability. And she
14 is not able to allege, did not allege, and, in
15 fact, disclaimed any argument that she was a
16 qualified --

17 JUSTICE KAGAN: I just want to --

18 MS. CONNER: -- individual with a
19 disability.

20 JUSTICE KAGAN: -- make sure I
21 understand what you're saying because there is
22 this two-year period where she is a qualified
23 individual, right? She has Parkinson's, but
24 she's able to hold a job. And you don't dispute
25 that.

1 MS. CONNER: Correct.

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

5 MS. CONNER: Yes.

6 JUSTICE SOTOMAYOR: -- that?

7 And she's a qualified individual when
8 she's earning her retirement benefits. You
9 don't dispute that?

10 MS. CONNER: No, no, she would not be
11 a qualified individual when she's earning the
12 retirement benefit.

13 JUSTICE KAGAN: Earning as opposed to
14 receiving them, right? Like, you know, an
15 employee earns retirement benefits by doing the
16 job.

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

21 JUSTICE KAGAN: I mean, she's just --
22 I guess what I -- maybe that answered my
23 question. I'm not sure. I mean, all I was
24 suggesting was that she's a qualified individual
25 doing the job, just like other people are

1 qualified individuals doing the job, such that
2 she's putting herself in line for a package of
3 retirement benefits, correct?

4 MS. CONNER: Yes.

5 JUSTICE KAGAN: And -- and the City
6 has passed this policy at the time that she's a
7 qualified individual. But you're saying that
8 because the policy addresses the retirement
9 period, all of a sudden, then she's not a
10 qualified individual?

11 MS. CONNER: No. Our argument is just
12 slightly more nuanced. It's the fact that this
13 particular policy only applies to unqualified
14 individuals. So what she's saying is
15 discriminatory is the fact that she only
16 received the health insurance subsidy for 24
17 months after she retired and those who had 25
18 years of service read the -- received the health
19 insurance subsidy to age 65.

20 JUSTICE KAGAN: So you're not saying
21 that any retirement policy only applies to
22 unqualified individuals. You're saying this
23 particular retirement policy only applies to
24 unqualified individuals. And -- and -- I'm
25 sorry for being dense, but tell me why.

1 MS. CONNER: So this policy, what
2 she's complaining about is that she only
3 received 24 months of the subsidy instead of
4 receiving it to age 65 like 25-year retirees
5 receive. So she's -- she's arguing that when we
6 applied the 24-month rule to her and stopped
7 paying at 24 months, that was the discriminatory
8 act.

9 And that was when she was unqualified.
10 And the policy -- the 24-month rule only applies
11 to disability retirees. And that has a very
12 specific meaning. A -- a disability retiree is
13 not just somebody who has a disability and
14 retires. A disability retire -- retirement is
15 awarded to people who become completely unable
16 to perform the essential functions of their job,
17 and because of that reason, they take a
18 disability retirement. They retire early.

19 So the 24-month subsidy policy only
20 applies to those totally disabled. And it
21 would -- they would only become subject to it
22 once they become totally disabled and accept a
23 disability retirement, which is what she did.

24 If she had not taken a disability
25 retirement, if she had continued to work for 25

1 years, she would have received the full subsidy
2 despite having a disability. So the policy was
3 only applied to her, the 24-month rule, because
4 she retired early with a disability that
5 rendered her an unqualified individual, and then
6 the City applied the 24-month rule to her.

7 JUSTICE ALITO: Well, let's say six
8 months before she retired, she says: Look, I've
9 got Parkinson's. It's getting progressively
10 worse. I can still do the job now, but I can
11 see that I'm not going to be able to do the job
12 for very much longer, and I look ahead to what's
13 going to happen after I retire, and I'm going to
14 be subjected to this retirement structure that
15 gives me only 24 months, and I think that's
16 discriminatory.

17 Putting aside the question of whether
18 that's a valid claim under the ADA, why could
19 she not sue at that point?

20 MS. CONNER: Because she would be
21 seeking to enjoin conduct that is not unlawful
22 under the ADA, because she would be seeking the
23 employer to not do something to an unqualified
24 individual which it otherwise would not be
25 prohibited by the ADA from doing. It might be

1 prohibited under another statute. It would be
2 no different if --

3 JUSTICE ALITO: Well, she claims it's
4 doing some -- she's qualified at that point, and
5 she's claimed -- she claims it's doing something
6 to her at that point. So is she not aggrieved?
7 Does she not have Article III standing because
8 there's a -- an imminent threat of what she
9 claims is unlawful conduct in the future?

10 MS. CONNER: No. It would be no
11 different if she knew that her disease would
12 render her totally disabled and she wanted to
13 enjoin the City from terminating her employment
14 before it did so, when, of course, under Title
15 I, employers are allowed to terminate employees
16 the moment they become unqualified and they
17 can't do the job with or without a reasonable
18 accommodation.

19 She would be seeking to enjoin the
20 City from doing something that is not unlawful
21 under the ADA. It might be an equal protection
22 violation. It might be a breach of contract.
23 It might be all of these other things, but it
24 would not be a violation of Title I of the ADA.

25 CHIEF JUSTICE ROBERTS: Well, given

1 her allegations, do you think she has a facially
2 valid breach-of-contract claim?

3 MS. CONNER: Absolutely not. She --
4 her -- the -- there is no breach of contract
5 because the policy was changed in 2003, 15 years
6 before she retired. And, under Florida law,
7 governmental employees are permitted to change
8 retirement policies before the rights under them
9 vest.

10 So, if we had changed -- we would not
11 have been allowed to change it after she
12 retired. She would have had a vested right.
13 But 15 years before she retired, we changed the
14 policy to not treat her worse but to treat her
15 slightly less preferentially than she was
16 already receiving.

17 Before the policy change, disability
18 retirees, even if they retired with five or 10
19 years, were given the same health insurance
20 subsidy as people who worked for 25 years. So
21 they were receiving preferential treatment over
22 similarly situated non-disabled employees who
23 had the same amount of years. And then the City
24 changed it to start treating disability retirees
25 more equally with everyone else and said you --

1 now you also have to work 25 years to get the
2 full subsidy, but, out of compassion, because
3 you were forced to retire due to a disability,
4 we will give you 24 months of the subsidy,
5 whereas we would otherwise give you nothing if
6 you were a non-disabled person.

7 And, uncoincidentally, 24 months is
8 exactly how long it takes for a totally disabled
9 person to then become Medicare-eligible and get
10 Medicare insurance. So the City bridged that
11 gap between when a disability retiree retires
12 early and the two years that it would take to
13 start getting --

14 JUSTICE KAVANAUGH: Can -- can you
15 explain --

16 MS. CONNER: -- health insurance under
17 Medicare.

18 JUSTICE KAVANAUGH: -- the Medicare
19 insurance and -- and how that works? So, after
20 the two years, someone in this position gets the
21 health insurance benefits that you're giving
22 them for the two years in the interim, correct?
23 Or it's similar.

24 MS. CONNER: If they -- if they
25 apply -- if they --

1 JUSTICE KAVANAUGH: I mean, I don't
2 know how Medicare matches up with your health
3 insurance benefits.

4 MS. CONNER: So a person like the
5 Petitioner who -- who alleges they are totally
6 disabled --

7 JUSTICE KAVANAUGH: Or admitted.

8 MS. CONNER: -- could qualify under
9 Social Security disability. And the Medicare
10 Act says, once you become eligible for Social
11 Security disability because you're permanently
12 disabled, you then become eligible for Medicare
13 Parts A and B. So that bridges that gap. We
14 pay -- the City paid for her --

15 JUSTICE KAVANAUGH: And -- and --

16 MS. CONNER: -- health insurance
17 until --

18 JUSTICE KAVANAUGH: -- I think --

19 MS. CONNER: -- those 24 months.

20 JUSTICE KAVANAUGH: I'm sorry to
21 interrupt. I think you were saying the City did
22 that precisely to bridge that gap so that
23 someone who's totally disabled is not left
24 without health insurance -- I'm not sure of the
25 "because" here, but --

1 MS. CONNER: Mm-hmm.

2 JUSTICE KAVANAUGH: -- that's what
3 you're representing, I think -- to bridge the
4 gap so that someone's not left without health
5 insurance in that two years.

6 MS. CONNER: Right. Because, if a
7 non-disabled person were in Petitioner's shoes
8 and retired with only 20 years, they would
9 receive absolutely no health insurance subsidy.
10 And they also, because they're not disabled or
11 totally disabled, would not be Medicare-eligible
12 if they weren't 65.

13 So the City continued to treat its
14 disability retirees with preferential treatment
15 over non-disabled employees who were similarly
16 situated with an equivalent amount of years of
17 service. So --

18 JUSTICE SOTOMAYOR: The problem with
19 this argument in my mind is who bears the cost.
20 You're saying the public fisc should bear the
21 cost because, in two years, Medicare will pay
22 what we used to pay, correct? Because, under
23 the Medicare Act, they don't -- they exhaust
24 private remedies first, and then the public fisc
25 pays?

1 MS. CONNER: Well, there is no
2 requirement that any employer provide health
3 insurance subsidies.

4 JUSTICE SOTOMAYOR: That we're putting
5 aside. That's the nature of the claim here,
6 which is you promised me you would. And
7 assuming that were true, which I know you fight
8 on every level, but assuming you made an
9 explicit promise, I'm going to pay you this
10 amount of money, and then took it away so the
11 public fisc could pick it up, that's what you're
12 doing, is you're saying we're -- this is just
13 always a matter of who's going to pay, us --

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

15 JUSTICE SOTOMAYOR: -- or -- or the
16 public?

17 MS. CONNER: -- if the City had
18 actually promised her this benefit and she had a
19 vested right, she would have a very clear
20 breach-of-contract claim and the City would be
21 liable.

22 JUSTICE SOTOMAYOR: My -- my --
23 you're -- you're not -- you're trying to avoid
24 my question. In that situation --

25 MS. CONNER: Maybe I'm not

1 understanding it. I'm sorry, Your Honor.

2 JUSTICE SOTOMAYOR: -- in that
3 situation, then the issue becomes who pays, you
4 or the public, but somebody has to pay, right?

5 MS. CONNER: Certainly. She would
6 have a variety of remedies.

7 JUSTICE SOTOMAYOR: You hope.

8 MS. CONNER: She would like -- yeah,
9 likely have --

10 JUSTICE SOTOMAYOR: You hope.

11 MS. CONNER: -- a very strong case
12 against the City.

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

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

1 MS. CONNER: So -- so, if we assume
2 the City's policy is discriminatory, if we
3 were -- if the Court is going to --

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

6 MS. CONNER: Right.

7 JUSTICE JACKSON: Okay.

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

10 JUSTICE JACKSON: Yes, yes.

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

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

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

1 MS. CONNER: Right, but I think there
2 could be a scenario where a qualified individual
3 with a disability could sue with regard to
4 discrimination in post-employment benefits if
5 they meet the criteria. So, if there was a
6 policy that said --

7 JUSTICE JACKSON: The criteria of
8 their working?

9 MS. CONNER: The criteria of the --

10 JUSTICE JACKSON: Then they're no
11 longer a former employee.

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

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

25 MS. CONNER: It only --

1 JUSTICE JACKSON: -- who aren't in the
2 job anymore, right?

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

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

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

1 that's going to kick in when I'm no longer
2 working.

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

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

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

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

1 she could have sued over that.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

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

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

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

16 JUSTICE KAVANAUGH: Yeah. Thanks.

17 CHIEF JUSTICE ROBERTS: Justice
18 Barrett?

19 Justice Jackson?

20 Thank you, counsel.

21 Rebuttal, Mr. -- Mr. Gupta?

22 REBUTTAL ARGUMENT OF DEEPAK GUPTA

23 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

25 For race or religion, we would never

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

6 Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 The case is submitted.

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

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