SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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KARYN D. STANLEY,   )

        Petitioner,   )

           v.   ) No. 23-997

CITY OF SANFORD, FLORIDA,   )

        Respondent.   )

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Pages: 1 through 83

Place: Washington, D.C.

Date: January 13, 2025

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9   Washington, D.C.

10   Monday, January 13, 2025

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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:

17   DEEPAK GUPTA, ESQUIRE, Washington, D.C.; on behalf of

18   the Petitioner.

19   FREDERICK LIU, Assistant to the Solicitor General,

20   Department of Justice, Washington, D.C.; for the

21   United States, as amicus curiae, supporting the

22   Petitioner.

23   JESSICA C. CONNER, ESQUIRE, Orlando, Florida; on

24   behalf of the Respondent.

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1   C O N T E N T S

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

2   (11:36 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear

4   argument next in Case 23-997, Stanley versus the

5   City of Sanford.

6   Mr. Gupta.

7   ORAL ARGUMENT OF DEEPAK GUPTA

8   ON BEHALF OF THE PETITIONER

9   MR. GUPTA: Mr. Chief Justice, and may

10   it please the Court:

11   The ADA permits former employees in

12   Lieutenant Stanley's shoes to challenge

13   discrimination in post-employment benefits.

14   There are at least two paths to that conclusion

15   here.

16   First, the narrow path is to recognize

17   that former employees may sue when they allege

18   that they were discriminated against as

19   qualified individuals while still employed.

20   After she was diagnosed with Parkinson's in 2016

21   and before she retired as a firefighter in 2018,

22   Lieutenant Stanley was indisputably a qualified

23   individual. During that period, she was subject

24   to a policy that she alleges reduced her

25   compensation in a discriminatory manner. Under

1   the ADA, former employees may challenge such

2   discrimination even if they are no longer

3   employed by the time they bring suit.

4   If the Court adopts this rationale, it

5   should make clear that it is not foreclosing the

6   possibility that an employee may also challenge

7   discrimination that, unlike here, 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

3   play 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 --

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 this 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   aggrieve -- 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

 1   fact, to give her Article III standing. But

 2   that doesn't get you home because she didn't

 3   file on that claim within the prescribed time.

 4   So what you need is the Lilly -- Lilly

 5   Ledbetter Act to save you. And the outcome

 6   would depend on how you read the Lilly Ledbetter

 7   Act. It could be read as sort of an extension

 8   of the statute of limitations which would allow

 9   her to file -- to pursue that claim at any point

10   in the future when she is not getting the

11   benefits to which she thinks she's entitled.

12   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 Act hadn't been

16   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 to take a crack at

 8   the -- at the question itself because, you know,

 9   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: So it's a bit --

5   lacks intuity to think that every retired person

6   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 is 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 aggressed -- 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: Thank you. That's

9   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

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 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
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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: Would the 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

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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
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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.

11   And, in their view, if you subtract

12   disability from the equation, their client,

13   Stanley, would have worked more than 25 years

14   and, thus, been eligible for benefits until she

15   was 65.

16   Now the City responds and says: Well,

17   when you subtract disability from the equation,

18   that's all you subtract out, and you hold the

19   terms of service constant at 20 years.

20   They -- they would say that -- that

21   Petitioner is changing two variables, not only

22   the -- the disability but also the terms of

23   service.

24   And so the City says: A similarly

25   situated person with only 20 years of service

1 and no disability wouldn't have gotten benefits

2 in this case, so Stanley should lose.

3 I think that's the form of the

4 disparate treatment analysis that should occur

5 in the courts below. But, as my friend pointed

6 out, neither court analyzed the issue. It

7 doesn't affect this Court's consideration of the

8 qualified individual issue that is before it.

9 And so it can just be left --

10 JUSTICE ALITO: Well, if --

11 JUSTICE KAGAN: Do you --

12 JUSTICE ALITO: I'm sorry.

13 JUSTICE KAGAN: No, go ahead.

14 JUSTICE ALITO: I mean, it -- it -- it

15 affects at least my thinking because I want to

16 know where we're going with this.

17 MR. LIU: Right. And I -- I don't

18 think where we're going -- because -- because we

19 do not have a judgment on the ultimate merits of

20 the disability claim, it is not the case that

21 where we're going is that cities can't do

22 exactly what the City did here. I don't want to

23 give that impression.

24 I -- I think, for purposes of this

25 case, this Court can assume that this policy did

         1   discriminate on the basis of disability. And

         2   so, instead of treating some class of people

         3   with disabilities more favorably, I would just

         4   ask this Court to assume that it cut the

         5   benefits of people with disabilities and left

         6   them worse off.

         7   JUSTICE KAGAN: Do you see many claims

         8   like this under other discrimination laws? Why

         9   or why not?

        10   MR. LIU: Yeah, we -- we do. I mean,

        11   this Court has seen cases about post-retirement

        12   benefits in the Title VII context. There have

        13   been cases that have come to this Court about

        14   sex and race discrimination in post-retirement

        15   benefits.

        16   And I think that's one of the

        17   anomalies of the City's position, is that

        18   whereas Congress was trying to bridge the gap

        19   between the legal remedies available for people

        20   with disabilities vis-à-vis people who are

        21   discriminated based on race or sex or other

        22   things in Title VII, but the City's approach

        23   would broaden that gap.

        24   JUSTICE KAGAN: And is the way --

        25   again, you haven't taken a position on a lot of

 1   this, but is the fundamental way you understand

 2   these claims to work the same across

 3   discrimination statutes?

 4   You know, usually -- often, as Justice

 5   Alito points out, the ADA is kind of different.

 6   Would it be just the same here?

 7   MR. LIU: I think, in -- in terms of a

 8   disparate treatment claim, it would be the same.

 9   I think it's an open question that we haven't

10   addressed in our brief, whether something like a

11   reasonable accommodation claim would -- would --

12   would provide a different kind of preferential

13   treatment to people with disabilities in this

14   context.

15   JUSTICE ALITO: It's -- it's not the

16   same because, in a Title VII case based on race,

17   sex, whatever, you're asking: Are two people

18   treated differently? The -- people of different

19   races, they're -- are they treated differently?

20   People of different sexes, are they treated

21   differently?

22   Under the ADA, that's not what you ask

23   in most cases because they -- because what the

24   plaintiff wants is not exactly equal treatment.

25   That's the whole point. The plaintiff wants a

1   reasonable accommodation.

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

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

4   --

5   MR. LIU: Well --

6   JUSTICE ALITO: -- whatever has been

7   done under Title VII --

8   MR. LIU: I -- I -- I --

9   JUSTICE ALITO: -- sheds light into

10   the problem here.

11   MR. LIU: I think the main difference

12   between the ADA and Title VII is that -- I'm

13   sorry, yes, the ADA and Title VII is that the

14   ADA offers plaintiffs a reasonable -- may I

15   finish, Mr. Chief Justice?

16   CHIEF JUSTICE ROBERTS: Sure.

17   MR. LIU: Offers plaintiffs a

18   reasonable accommodation claim, but under both

19   statutes, plaintiffs can bring disparate

20   treatment claims.

21   And to just give an example of -- of

22   -- of some disparate treatment that could happen

23   here, imagine if there were policies, every --

24   everyone who has 20 years of service gets a

25   certain amount of benefits, except people with

1   disabilities. I think that's a clear disparate

2   treatment problem.

3   CHIEF JUSTICE ROBERTS: Thank you.

4   Justice Thomas?

5   Anything further, Justice Alito?

6   Justice Sotomayor?

7   JUSTICE SOTOMAYOR: If I'm

8   understanding your response right, there are

9   various kinds of claims under the ADA.

10   Reasonable accommodation is one, but there's

11   also disparate treatment.

12   MR. LIU: Correct.

13   JUSTICE SOTOMAYOR: And this is what's

14   being claimed here. Do you think that this is a

15   slightly different case also because they had

16   been extending a benefit that they then took

17   away?

18   MR. LIU: I think that goes to a

19   animus-based claim. I think if Petitioner could

20   show that the decision to reduce benefits was

21   made out of animus, then that might allow them

22   to satisfy the elements of a disparate treatment

23   claim even without pointing to the sort of

24   formal disparate -- the formal comparator

25   analysis.

1   JUSTICE SOTOMAYOR: But there're still

2   --

3   MR. LIU: Yeah.

4   JUSTICE SOTOMAYOR: And he mentioned

5   one defenses, that it's based on at risk

6   factors, which are a different thing, correct?

7   Or service?

8   MR. LIU: Right. There is also a safe

9   harbor in Section 12112(c) that provides a safe

10   harbor for certain insurance underwriting plans.

11   JUSTICE SOTOMAYOR: All right. Do you

12   have a different answer than Mr. Gupta as to the

13   questions of why the other statutes that are

14   pointed to by the other side are not effective

15   remedies or substitutes for the ADA?

16   MR. LIU: I don't have a different

17   answer. I would just boil it down to this,

18   which is those other sources of law may well be

19   useful in enforcing promises that an employer

20   makes. But the problem here, the alleged

21   problem here, is that the employer made one

22   promise to people without disabilities and a

23   different, worse promise to people with

24   disabilities. And simply enforcing that other

25   less good promise isn't going to remedy the

1   alleged discrimination in the complaint.

2   JUSTICE SOTOMAYOR: Thank you,

3   counsel.

4   CHIEF JUSTICE ROBERTS: Justice Kagan?

5   JUSTICE KAGAN: So, Mr. Liu, I'm -- I

6   just want to make sure that I understand what

7   you would like us to do.

8   MR. LIU: Yeah.

9   JUSTICE KAGAN: And as I understand

10   it, it's because Ms. Stanley was employed, was

11   holding a job, for a period of time that you

12   would like us to go off on -- on -- on that

13   basis and, you say, you know, you -- she sued

14   within the 300 days, and -- and -- and the

15   consequence of that is that we never have to

16   reach this qualified individual provision. Is

17   that -- is that correct?

18   MR. LIU: I -- I think because

19   everyone agrees she was a qualified --

20   JUSTICE KAGAN: At that point. Right.

21   MR. LIU: -- individual during that

22   time. Yes.

23   JUSTICE KAGAN: So we never have to

24   figure out what the qualified individual

25   provision means with respect to somebody who is

1   retired, not in a job --

2   MR. LIU: Right.

3   JUSTICE KAGAN: -- and, you know,

4   whether we should think of that as precluding a

5   suit for some later --

6   MR. LIU: Exactly.

7   JUSTICE KAGAN: -- person. And you

8   talked about why you shouldn't think of these as

9   forfeited. I mean, it's at least true that the

10   courts below did not address these.

11   And I'm not sure that we had it in our

12   minds when we took the case, that this was the

13   issue. So what, if anything, would you say to

14   that?

15   MR. LIU: I would say that the -- the

16   issue defined at the right level -- and I'm

17   defining it as the text of the statute defines

18   it -- is whether there was discrimination

19   against a qualified individual. I do understand

20   the Court to have granted cert on that question.

21   Then it's just a matter of the fact

22   that these arguments, while they were pressed

23   below, not only by us but -- but by Stanley,

24   weren't addressed below. But I've always

25   understood that pressed or passed-upon

1   requirement to -- to apply to issues and not

2   arguments, but also to be phrased in the

3   injunctive, such that if you did want to apply

4   that test to the precise arguments here, it

5   would be satisfied because these arguments were

6   pressed below.

7   JUSTICE KAGAN: Thank you.

8   CHIEF JUSTICE ROBERTS: Justice

9   Gorsuch?

10   Justice Kavanaugh?

11   JUSTICE KAVANAUGH: I thought we were

12   deciding whether the Eleventh Circuit's

13   understanding of the law was correct, given the

14   arguments that it considered. Is that not what

15   we -- you don't think that's what we should do?

16   MR. LIU: I think the Eleventh Circuit

17   found various ways to reject the arguments that

18   go to the overarching issue. Some of those ways

19   of rejecting those arguments did involve

20   addressing those arguments on the merits, and

21   others involved determining that they were

22   forfeited. But I think all of that is before

23   this Court.

24   JUSTICE KAVANAUGH: Okay.

25   CHIEF JUSTICE ROBERTS: Justice

1   Barrett?

2   Justice Jackson?

3   JUSTICE JACKSON: So I -- I just

4   wanted to clarify the conversation that you had

5   with Justice Alito about whether the elements of

6   disparate treatment have been plausibly alleged

7   here.

8   That -- you don't consider that to be

9   within the question presented in this case?

10   MR. LIU: We do not.

11   JUSTICE JACKSON: So it's more like

12   whether or not she -- her status as a former

13   employee precludes her from making this claim?

14   I mean, I thought at the bottom of all of this,

15   we're talking about a motion to dismiss in which

16   the City claimed that she was not allowed to go

17   forward because she was a former employee.

18   MR. LIU: Correct.

19   JUSTICE JACKSON: And you're saying

20   she is because there's evidence that she was

21   discriminated against, evidence, not -- it

22   hasn't -- whether it's proven or not, evidence

23   that she was discriminated against during the

24   period of her employment, and that should be

25   enough to allow for her case to go forward?

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 1                MR. LIU:  That should be enough.  We
 2      think even if she couldn't have pointed to that
 3      existence of discrimination while she was
 4      employed, that she would still have a claim,
 5      like many others do in other situations, where
 6      they cannot point to a precise moment in time in
 7      which they were both qualified and disabled.
 8      But I'll acknowledge that those are trickier
 9      issues, and this Court's usual practice is not
10      to decide issues more broadly than it needs to.
11                JUSTICE JACKSON:  Thank you.
12                CHIEF JUSTICE ROBERTS:  Thank you,
13      counsel.
14                Ms. Conner.
15                ORAL ARGUMENT OF JESSICA C. CONNER
16                   ON BEHALF OF THE RESPONDENT
17                MS. CONNER:  Mr. Chief Justice, and
18      may it please the Court:
19                Title I of the ADA prohibits employers
20      from discriminating on the basis of disability
21      only against an individual who can perform the
22      job she holds or desires, present tense.
23                This Court has explained in Robinson
24      that use of present tense verbs is an
25      unambiguous temporal qualifier limiting a
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 1   statute to reach to current employees only.

 2   Therefore, the Eleventh Circuit correctly held

 3   that because Stanley cannot establish that the

 4   City committed any discriminatory acts against

 5   her while she could perform the essential

 6   functions of a job that she held or desired to

 7   hold, her Title I claim fails.

 8   Indeed, the City's 24-month rule, on

 9   its face, is applicable only to unqualified

10   individuals who retire because they are unable

11   to perform their jobs. However, Petitioner

12   argues that the City subjected her to its policy

13   when she was a qualified individual during her

14   employment. But a qualified individual is not

15   subject to a policy that only applies to

16   unqualified individuals, just like a man is not

17   subject to a policy that applies only to women.

18   And a non-disabled employee is not subject to a

19   policy that only applies to disabled employees.

20   This proposition is so

21   well-established that the Petitioner did not

22   plead that the City's policy discriminated

23   against her as a qualified individual. Instead,

24   the district court, at 26a, held that her Title

25   I claim failed because her complaint alleged

1   that the discrimination did not occur until

2   plaintiff was no longer able to perform the

3   essential functions of her job.

4   This ruling should not be

5   controversial. Everyone agrees, for example,

6   that an employer does not violate Title I when

7   it fires an employee who can no longer perform

8   the essential functions of their job. The

9   outcome should be no different here simply

10   because retirees or post-employment benefits are

11   involved. This Court should affirm.

12   I welcome the Court's questions.

13   JUSTICE THOMAS: Would you spend a bit

14   of time on what you think we granted cert on and

15   what was decided below and what was not decided

16   below?

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

18   the Court certainly, I would assume, granted

19   cert to hear the question that is actually

20   splitting the circuit courts. And that question

21   is solely whether or not discrimination

22   occurring totally and entirely post-employment

23   against an unqualified individual is actionable

24   under Title I.

25   And, additionally, this Court could

1   consider whether or not discrimination occurring

2   during employment is actionable, but the problem

3   here is that the Eleventh Circuit never said

4   that employees who are qualified during their

5   employment, who are subject to discrimination

6   regarding post-employment benefits cannot sue.

7   It did not say that. It just said that the

8   Petitioner disclaimed that argument, that she

9   did not raise the argument that anything

10   happened to her during her employment that was

11   actionable.

12   And the Eleventh Circuit also did not

13   say that an employee must be qualified at the

14   time of a lawsuit. The Eleventh Circuit said

15   only that an employee must be qualified at the

16   time of the discriminatory act, but because she

17   alleged and also argued that she -- that the

18   discrimination only occurred post-employment,

19   when she was totally disabled and unable to

20   perform the essential functions of her job, that

21   she alleged discrimination against an

22   unqualified person only.

23   JUSTICE KAGAN: Well, I take your

24   point, Ms. Conner, that the Eleventh Circuit did

25   not address this, but Mr. Gupta and Mr. Liu have

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1    suggested that Ms. Stanley did point it out on
2    various occasions, that she was not somebody who
3    it was -- it was all post-retirement, but, in
4    fact, that there were a couple of years of her
5    employment where she had the exact same claim.
6              And it seems a little bit odd to
7    decide this bigger, broader question that you
8    would like us to decide when, as to this
9    particular per -- person, it's academic.
10             MS. CONNER:  Justice Kagan, I heard my
11   friend's point to paragraph 16 of her complaint
12   as where they claim she alleged discrimination
13   during employment, but paragraph 16 actually
14   does not contain any allegations.
15             JUSTICE SOTOMAYOR:  Where is that?
16             MS. CONNER:  That would be in Document
17   1 of the record at paragraph 16, which --
18             JUSTICE KAGAN:  I mean, I guess
19   another way of stating the question is we would
20   be deciding the question as if there were a set
21   of facts that are not true.
22             MS. CONNER:  Correct --
23             JUSTICE KAGAN:  I mean, she was
24   employed.
25             JUSTICE JACKSON:  Do you dispute that
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            1   she was disabled before she retired? Do you

            2   dispute that?

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

            4   dispute that she was disabled, but we dispute

            5   that any discrimination occurred while she was a

            6   disabled -- a qualified individual with a

            7   disability, because she took -- she became

            8   completely unqualified, meaning unable to

            9   perform the essential functions of her job, and

           10   then she took a disability retirement.

           11   And then the City applied its 24-month

           12   rule to her. So the only time that the alleged

           13   discrimination occurred was when she was an

           14   unqualified individual after she had --

           15   JUSTICE JACKSON: So -- so --

           16   MS. CONNER: -- taken her retirement.

           17   JUSTICE JACKSON: -- under that view a

           18   person cannot sue for retirement-related

           19   benefits discrimination because it seems to me

           20   that you're saying that if a person becomes

           21   disabled while they are still employed, to the

           22   extent that the policy has not yet been applied,

           23   the policy concerning the retirement of

           24   benefits, because they're still employed, they

           25   can't sue about it.

1   And then when they retire and the

2   policy is applied, they can't sue about it

3   because they become unqualified at that point in

4   your view.

5   So how do you ever challenge

6   discrimination concerning a policy that relates

7   to retirement benefits and disability?

8   MS. CONNER: Justice Jackson, neither

9   the City nor the Eleventh Circuit said that a

10   qualified individual could never sue over

11   discrimination in post-employment benefits. The

12   Eleventh Circuit, in fact, acknowledged that

13   that is a possible scenario.

14   There is a -- a possibility that

15   somebody who is qualified and has --

16   JUSTICE JACKSON: I guess has --

17   MS. CONNER: -- if they become subject

18   to the policy during their employment --

19   JUSTICE JACKSON: Can you help me

20   understand why the qualified individual

21   designation in the statute has anything to do

22   with this? My -- my instinct is sort of closer

23   to Justice Alito's in terms of qualified

24   individual coming up in the reasonable

25   accommodations context. This is not that

1   context.

2   So I don't even understand the work

3   that it is doing with respect to setting some

4   sort of temporal limit as to whether or not this

5   person can sue for retirement benefits. So I --

6   I didn't -- yeah.

7   MS. CONNER: Because -- it's because

8   the language in the anti-discrimination

9   provision expressly draws a line as to who it's

10   protecting. It says no employer shall

11   discriminate against a person who can perform

12   the job they hold or desire.

13   And no other person is protected that

14   you can only -- you're only prohibited from

15   discriminating against a person who presently

16   holds a job that you desire. And so --

17   JUSTICE JACKSON: Okay. And she says

18   at the time that I held the job, I became

19   disabled and that policy applied to me. It -- I

20   was subject to it, in that period of time.

21   So as Justice Kagan says, why would we

22   pretend as though that is not a fact in the

23   case, not here, and decide this on a broader

24   question that relates to people that did not

25   hold the job during the time that they were

1   qualified?

2   MS. CONNER: Because the policy that

3   she describes, that she claims is discriminatory

4   and she describes in her complaint, on its face

5   only applies to a person who becomes completely

6   unable to perform their job and is therefore

7   unqualified.

8   So it would be the same if the City

9   had a policy that said if you become completely

10   unqualified and unable to perform the essential

11   functions of your job, we will terminate your

12   employment. And that is perfectly -- that is

13   not unlawful under the ADA.

14   But what she's claiming is if you

15   wrote down something that is lawful, that is not

16   controversial at all, that if you become unable

17   to perform your job, we can terminate you

18   because you're no longer a qualified individual,

19   but she's saying I could sue to prevent you from

20   doing something to an unqualified individual

21   that the ADA does not prohibit.

22   She -- she's claiming that the

23   24-month rule only applies to a disability

24   retiree. And a disability retiree is not just

25   somebody with a disability. It is defined as

1   somebody who is -- who is permanently and

2   completely unable to do the job. That's why she

3   was awarded a disability retirement, because she

4   became an unqualified individual.

5   And only those who take the disability

6   retirement -- if she had been non-disabled and

7   retired with the 20 years that -- that she had

8   served, she would have received no subsidy,

9   health insurance subsidy whatsoever. The City

10   made an exception because of her disability, out

11   of compassion, that even though everybody else

12   who only serves for 20 years only receives --

13   receives no health insurance subsidy out of

14   compassion for those who retire because they are

15   completely disabled and unable to do the job, we

16   will give 24 months of the health insurance

17   subsidy.

18   JUSTICE JACKSON: So I understand that

19   argument, but that -- doesn't that just go to

20   the merits of her disability claim? Is she

21   stating -- this is Justice Alito's point -- a

22   claim for disability -- or, excuse me -- of --

23   for discrimination.

24   You've raised the objection, an

25   objection that has something to do with the fact

1   that she's post-retirement. And that's what's

2   confusing to me.

3   MS. CONNER: It's because when she was

4   post-retirement, she was an unqualified

5   individual. She was totally disabled and unable

6   to perform the essential functions of her job,

7   which takes you outside of the protections of

8   Title I because Title I only prohibits

9   discrimination against a person who can perform

10   a job they presently hold or desire.

11   So someone who neither holds a job,

12   desires a job, and is completely unable to

13   perform the job is -- does not fall --

14   JUSTICE JACKSON: Is that the --

15   MS. CONNER: -- under the same

16   protections.

17   JUSTICE JACKSON: -- same with respect

18   to Title VII?

19   MS. CONNER: Title VII does not use

20   the phrase "qualified individuals." It refers

21   broadly to the -- to individuals or employees,

22   which is why in Robinson this Court said that

23   under Title VII the -- the use of the word

24   "employees" in the anti-discrimination provision

25   of Title VII was ambiguous because employees was

 1   defined as a person employed, past tense. And

 2   that could be ambiguous, is employed or was

 3   employed.

 4   And so under Title VII, which does not

 5   refer to qualified individuals, there was an

 6   ambiguity in the use of the word "employees."

 7   But that is why Congress did not simply amend

 8   Title VII to add disability as a protected trait

 9   because disability is very different, in the ADA

10   structure, is very different from Title VII.

11   They share the same remedies, but they

12   do not share the same substantive positions.

13   JUSTICE SOTOMAYOR: Counsel, as I'm

14   hearing your answer to Justice Jackson, you are

15   taking the far extreme position that the SG is

16   not but at least two circuits have that a

17   retiree has no entitlement because at the moment

18   they're retired, they lose -- they're no longer

19   qualified, correct?

20   MS. CONNER: It's -- it's because at

21   the time of the discriminatory act that they

22   allege, they're no longer qualified.

23   JUSTICE SOTOMAYOR: I'm not sure.

24   That's because you're saying that at the moment

25   that the policy is changed, regardless of when

1   it's changed, they're no longer qualified?

2   MS. CONNER: It's, depending upon what

3   a particular plaintiff alleges, if they are

4   relying on an adverse employment action --

5   JUSTICE SOTOMAYOR: Mm-hmm.

6   MS. CONNER: -- that is taken solely

7   against an unqualified individual.

8   JUSTICE SOTOMAYOR: So are you --

9   MS. CONNER: It's not actionable.

10   JUSTICE SOTOMAYOR: -- implying that

11   if she had properly alleged that she was -- had

12   Parkinson's two years before she retired, that

13   she would be entitled to sue?

14   MS. CONNER: If she alleged that the

15   City had a policy that said if you get

16   Parkinson's -- if you have Parkinson's disease,

17   we're not going to pay you a pension, she would

18   have been subject to that policy during her

19   employment, as soon as she --

20   JUSTICE SOTOMAYOR: You're begging the

21   --

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

23   JUSTICE SOTOMAYOR: -- question --

24   you're trying to qualify in the ways you're not.

25   You're basically saying if you're retired,

1   you're not entitled to anything, even if you had

2   been made this promise during your time of

3   employment, because you're saying the promise

4   here she relies on, and it's specified in her

5   paragraph 19 was if -- we will pay you equally

6   to people who work 25 years or to people whose

7   25 years encompasses service in the military or

8   in other governments.

9   And she's saying, in whatever year it

10   was, 2010, we're going to change that policy.

11   MS. CONNER: If she's relying on the

12   discriminatory -- as the alleged discriminatory

13   act when we changed the policy in 2003, she

14   would not have been a qualified individual --

15   JUSTICE SOTOMAYOR: But she was --

16   MS. CONNER: -- with a disability at

17   that time.

18   JUSTICE SOTOMAYOR: -- and she does --

19   and she was in 2018 when she developed

20   Parkinson's.

21   MS. CONNER: In -- in 2018, she

22   certainly had a disability. She was not a

23   qualified individual because she's not --

24   JUSTICE SOTOMAYOR: Why? She worked

25   two years not being qualified?

1   JUSTICE JACKSON: Why was she not a

2   qualified individual in 2018?

3   MS. CONNER: Because that's -- well,

4   in November of 2018 is when she took her

5   retirement because she became an unqualified

6   individual, meaning somebody totally disabled.

7   JUSTICE JACKSON: Was she qualified at

8   the point at which she got the Parkinson's,

9   2016?

10   MS. CONNER: She would have been a

11   qualified individual at that time, but the

12   policy did not apply to qualified individuals

13   with disabilities. The policy would only be

14   applied to somebody who became unqualified,

15   because you have to take a disability

16   retirement, which means you are unable to

17   perform the essential functions of your job. At

18   that point, the 24-month subsidy policy would

19   apply to her. And she's no longer qualified at

20   the time the 24-month rule was applied to her.

21   And that's no different from an

22   employer terminating the employment of somebody.

23   They have a disability, but then they become

24   totally disabled. You can terminate their

25   employment because they're unqualified at that

1   point. And there's nothing controversial about

2   that. She's -- it's only made controversial

3   because it's -- for some reason, they're arguing

4   for an exception to the plain language, just for

5   retirees.

6   But there should be no exception. The

7   -- the language contains no exception. It is --

8   there is a very clear line drawn by Congress to

9   protect only those who can perform the jobs they

10   hold or desire. And, again, it's about when the

11   discrimination occurs. Nobody is arguing, and

12   the Eleventh Circuit certainly did not hold,

13   that she was required to be a qualified

14   individual at the time of her lawsuit.

15   She was required to allege that at the

16   time she was discriminated against, she was a

17   qualified individual with a disability. And she

18   is not able to allege, did not allege, and, in

19   fact, disclaimed any argument that she was a

20   qualified --

21   JUSTICE SOTOMAYOR: I just want to --

22   MS. CONNER: -- individual with a

23   disability.

24   JUSTICE KAGAN: -- make sure I

25   understand what you're saying, because there is

1   this two-year period where she is a qualified

2   individual, right? She has Parkinson's, but

3   she's able to hold a job. And you don't dispute

4   that.

5   MS. CONNER: Correct.

6   JUSTICE KAGAN: And she's a qualified

7   individual when the City adopts its policy.

8   That's correct, right? You don't dispute --

9   MS. CONNER: Yes.

10   JUSTICE SOTOMAYOR: -- that?

11   And she's a qualified individual when

12   she's earning her retirement benefits. You

13   don't dispute that?

14   MS. CONNER: No, no, she would not be

15   a qualified individual when she's earning the

16   retirement benefit.

17   JUSTICE KAGAN: Earning as opposed to

18   receiving them, right? Like, you know, an

19   employee earns retirement benefits by doing the

20   job.

21   MS. CONNER: We would only dispute as

22   a factual matter that she earned these benefits

23   because she did not satisfy the criteria to earn

24   them, which was 25 years of service.

25   JUSTICE KAGAN: I mean, she's just --

1   I guess what I -- maybe that answered my

2   question. I'm not sure. I mean, all I was

3   suggesting was that she's a qualified individual

4   doing the job, just like other people are

5   qualified individuals doing the job, such that

6   she's putting herself in line for a package of

7   retirement benefits, correct?

8   MS. CONNER: Yes.

9   JUSTICE KAGAN: And -- and the City

10   has passed this policy at the time that she's a

11   qualified individual. But you're saying that

12   because the policy addresses the retirement

13   period, all of a sudden then she's not a

14   qualified individual?

15   MS. CONNER: No. Our argument is just

16   slightly more nuanced. It's the fact that this

17   particular policy only applies to unqualified

18   individuals. So what she's saying is

19   discriminatory is the fact that she only

20   received the health insurance subsidy for 24

21   months after she retired and those who had 25

22   years of service read the -- received the health

23   insurance subsidy to age 65.

24   JUSTICE KAGAN: So you're not saying

25   that any retirement policy only applies to

    1   unqualified individuals. You're saying this

    2   particular retirement policy only applies to

    3   unqualified individuals. And -- and -- I'm

    4   sorry for being dense but tell me why?

    5   MS. CONNER: So this policy, what

    6   she's complaining about is that she only

    7   received 24 months of the subsidy, instead of

    8   receiving it to age 65 like 25-year retirees

    9   receive. So she's -- she's arguing that when we

   10   applied the 24-month rule to her and stopped

   11   paying at 24 months, that was the discriminatory

   12   act.

   13   And that was when she was unqualified.

   14   And the policy -- the 24-month rule only applies

   15   to disability retirees. And that has a very

   16   specific meaning. A -- a disability retiree is

   17   not just somebody who has a disability and

   18   retires. A disability retire -- retirement is

   19   awarded to people who become completely unable

   20   to perform the essential functions of their job,

   21   and because of that reason, they take a

   22   disability retirement. They retire early.

   23   So the 24-month subsidy policy only

   24   applies to those totally disabled. And it would

   25   -- they would only become subject to it once

1   they become totally disabled and accept a

2   disability retirement, which is what she did.

3   If she had not taken a disability

4   retirement, if she had continued to work for 25

5   years, she would have received the full subsidy

6   despite having a disability. So the policy was

7   only applied to her, the 24-month rule, because

8   she retired early with a disability that

9   rendered her an unqualified individual, and then

10   the City applied the 24-month rule to her.

11   JUSTICE ALITO: Well, let's say six

12   months before she retired, she says: Look, I've

13   got Parkinson's. It's getting progressively

14   worse. I can still do the job now, but I can

15   see that I'm not going to be able to do the job

16   for very much longer, and I look ahead to what's

17   going to happen after I retire, and I'm going to

18   be subjected to this retirement structure that

19   gives me only 24 months. And I think that's

20   discriminatory.

21   Putting aside the question of whether

22   that's a valid claim under the ADA, why could

23   she not sue at that point?

24   MS. CONNER: Because she would be

25   seeking to enjoin conduct that is not unlawful

1   under the ADA, because she would be seeking the

2   employer to not do something to an unqualified

3   individual which it otherwise would not be

4   prohibited by the ADA from doing. It might be

5   prohibited under another statute. It would be

6   no different than --

7   JUSTICE ALITO: Well, she claims it's

8   doing something -- she's qualified at that

9   point, and she's claimed -- she claims it's

10   doing something to her at that point. So is she

11   not aggrieved? Does she not have Article III

12   standing because there's a -- an imminent threat

13   of what she claims is unlawful conduct in the

14   future?

15   MS. CONNER: No. It would be no

16   different if she knew that her disease would

17   render her totally disabled and she wanted to

18   enjoin the City from terminating her employment

19   before it did so, when, of course, under Title

20   I, employers are allowed to terminate employees

21   the moment they become unqualified and they

22   can't do the job with or without a reasonable

23   accommodation.

24   She would be seeking to enjoin the

25   City from doing something that is not unlawful

 1   under the ADA. It might be an equal protection

 2   violation. It might be a breach of contract.

 3   It might be all of these other things, but it

 4   would not be a violation of Title I of the ADA.

 5   CHIEF JUSTICE ROBERTS: Well, given

 6   her allegations, do you think she has a facially

 7   valid breach-of-contract claim?

 8   MS. CONNER: Absolutely not. She --

 9   her -- the -- there is no breach of contract

10   because the policy was changed in 2003, 15 years

11   before she retired. And under Florida law,

12   governmental employees are permitted to change

13   retirement policies before the rights under them

14   vest.

15   So if we had changed -- we would not

16   have been allowed to change it after she

17   retired. She would have had a vested right.

18   But 15 years before she retired, we changed the

19   policy to not just -- to treat her worse but to

20   treat her slightly less preferentially than she

21   was already receiving.

22   Before the policy change, disability

23   retirees, even if they retired with five or 10

24   years, were given the same health insurance

25   subsidy as people who worked for 25 years. So

1   they were receiving preferential treatment over

2   similarly situated non-disabled employees who

3   had the same amount of years. And then the City

4   changed it to start treating disability retirees

5   more equally with everyone else and said you --

6   now you also have to work 25 years to get the

7   full subsidy, but out of compassion because you

8   were forced to retire due to a disability, we

9   would give you 24 months of the subsidy whereas

10   we would otherwise give you nothing if you were

11   a non-disabled person.

12   And, uncoincidentally, 24 is months is

13   exactly how long it takes for a totally disabled

14   person to then become Medicare-eligible and get

15   Medicare insurance. So the City bridged that

16   gap between when a disability retiree retires

17   early and the two years that it would take --

18   JUSTICE KAVANAUGH: Can -- can you

19   explain --

20   MS. CONNER: -- to start getting

21   health insurance under Medicare.

22   JUSTICE KAVANAUGH: -- the Medicare

23   insurance and -- and how that works? So, after

24   the two years, someone in this position gets the

25   health insurance benefits that you're giving

1   them for the two years in the interim, correct?

2   Or it's similar.

3   MS. CONNER: If they -- if they apply

4   -- if they --

5   JUSTICE KAVANAUGH: I mean, I don't

6   know how Medicare matches up with your health

7   insurance benefits.

8   MS. CONNER: So a person like the

9   Petitioner who -- who alleges they are totally

10   disabled --

11   JUSTICE KAVANAUGH: Or admitted.

12   MS. CONNER: -- could qualify under

13   Social Security disability. And the Medicare

14   Act says, once you become eligible for Social

15   Security disability because you're permanently

16   disabled, you then become eligible for Medicare

17   Parts A and B. So that bridges that gap. We

18   pay -- the City paid for her --

19   JUSTICE KAVANAUGH: And -- and --

20   MS. CONNER: -- health insurance

21   until --

22   JUSTICE KAVANAUGH: -- I think --

23   MS. CONNER: -- those 24 months.

24   JUSTICE KAVANAUGH: I'm sorry to

25   interrupt. I think you were saying the City did

 1   that precisely to bridge that gap so that

 2   someone who's totally disabled is not left

 3   without health insurance -- I'm not sure of the

 4   "because" here, but --

 5   MS. CONNER: Mm-hmm.

 6   JUSTICE KAVANAUGH: -- that's what

 7   you're representing, I think -- to bridge the

 8   gap so that someone's not left without health

 9   insurance in that two years.

10   MS. CONNER: Right. Because, if a

11   non-disabled person were in Petitioner's shoes

12   and retired with only 20 years, they would

13   receive absolutely no health insurance subsidy.

14   And they also, because they're not disabled or

15   totally disabled, would not be Medicare-eligible

16   if they weren't 65.

17   So the City continued to treat its

18   disability retirees with preferential treatment

19   over non-disabled employees who were similarly

20   situated with an equivalent amount of years of

21   service. So --

22   JUSTICE SOTOMAYOR: The problem with

23   this argument in my mind is who bears the cost.

24   You're saying the public fisc should bear the

25   cost because in two years Medicare will pay what

1   we used to pay, correct? Because, under the

2   Medicare Act, they don't -- they exhaust private

3   remedies first, and then the public fisc pays?

4   MS. CONNER: Well, there is no

5   requirement that any employer provide health

6   insurance subsidies.

7   JUSTICE SOTOMAYOR: That we're putting

8   aside. That's the nature of the claim here,

9   which is you promised me you would. And

10   assuming that were true, which I know you fight

11   on every level, but assuming you made an

12   explicit promise, I'm going to pay you this

13   amount of money and then took it away so the

14   public fisc could pick it up, that's what you're

15   doing, is you're saying we're -- this is just

16   always a matter of who's going to pay, us --

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

18   JUSTICE SOTOMAYOR: -- or -- or the

19   public?

20   MS. CONNER: -- if the City had

21   actually promised her this benefit and she had a

22   vested right, she would have a very clear

23   breach-of-contract claim and the City would be

24   liable.

25   JUSTICE SOTOMAYOR: My -- my --

1   you're -- you're not -- you're trying to avoid

2   my question. In that situation --

3   MS. CONNER: Maybe I'm not

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

5   JUSTICE SOTOMAYOR: -- in that

6   situation, then the issue becomes who pays, you

7   or the public, but somebody has to pay, right?

8   MS. CONNER: Certainly. She would

9   have a variety of remedies.

10   JUSTICE SOTOMAYOR: You hope.

11   MS. CONNER: She would like -- yeah,

12   likely have --

13   JUSTICE SOTOMAYOR: You hope.

14   MS. CONNER: -- a very strong case

15   against the City.

16   JUSTICE JACKSON: Isn't your argument

17   just basically that this isn't discriminatory,

18   when we took the case to say assuming there was

19   an allegation of discrimination, when did that

20   occur from the standpoint of whether or not she

21   can maintain this action?

22   That's the thing. I'm -- I'm worried

23   that we're getting sidetracked into the merits

24   of whether she was actually discriminated

25   against, whether this policy is a discriminatory

1   policy, when, really, the question is just is

2   her former status precluding her from continuing

3   this action or has she alleged, you know, right?

4   MS. CONNER: So -- so, if we assume

5   the City's policy is discriminatory, if we

6   were -- if the Court is going to --

7   JUSTICE JACKSON: Which I know you

8   don't believe, but let's start there.

9   MS. CONNER: Right.

10   JUSTICE JACKSON: Okay.

11   MS. CONNER: If we're going to start

12   there, we're just going to accept that

13   premise --

14   JUSTICE JACKSON: Yes, yes.

15   MS. CONNER: -- it still was not a

16   discriminatory policy that she became subject to

17   during her employment as a qualified individual

18   with a disability because the policy only

19   applies to unqualified individuals, those who

20   become totally disabled.

21   JUSTICE JACKSON: Right. But you're

22   saying it applies to people -- they become

23   totally disabled and they're -- they're

24   unqualified because they can't work anymore.

25   So you're essentially saying that if

1   it's about retirement benefits and you no longer

2   are working and you're complaining about that,

3   you're unqualified and, therefore, can't bring

4   this action, right?

5   MS. CONNER: Right, but I think there

6   could be a scenario where a qualified individual

7   with a disability could sue with regard to

8   discrimination in post-employment benefits if

9   they meet the criteria. So, if there was a

10   policy that said --

11   JUSTICE JACKSON: The criteria of

12   their working?

13   MS. CONNER: The criteria of the --

14   JUSTICE JACKSON: Then they're no

15   longer a former employee.

16   MS. CONNER: -- the criteria of the

17   discriminatory policy, who does it apply to?

18   You know, so that's why I was saying that a

19   policy that applies only to women, a man cannot

20   sue. He cannot say that I am subject to a

21   policy that discriminates against women. So she

22   would --

23   JUSTICE JACKSON: But why are you

24   saying that this policy does not apply to or it

25   only applies to unqualified -- I -- when -- when

1   you say that, I hear you're saying it only

2   applies to people who are still in the job or

3   who aren't in the job anymore --

4   MS. CONNER: It only --

5   JUSTICE JACKSON: -- who aren't in the

6   job anymore, right?

7   MS. CONNER: Because a qualified

8   individual is also some -- is somebody who can

9   perform a job they hold. So you also have to be

10   able to perform it. But, if you are totally

11   disabled and cannot perform the essential

12   functions of the job and that's why you retire,

13   you are not a qualified individual because you

14   cannot perform a job that you hold or desire.

15   An employer --

16   JUSTICE KAGAN: What -- what -- what

17   Justice Jackson was suggesting and maybe what I

18   was suggesting not so clearly before was that

19   all retirees are not qualified individuals

20   looked at at the time that they're require --

21   retirees because, whether or not they could

22   perform the job, they don't want to perform the

23   job. They've retired.

24   So any retiree is going to be not a

25   qualified individual at the time that they're a

1   retiree. So that would -- so that would suggest

2   that what you're saying is there's just no such

3   thing as being able to sue in the time when I

4   still am working about a retirement benefit

5   that's going to kick in when I'm no longer

6   working.

7   MS. CONNER: So I think there is a

8   scenario where a qualified individual with a

9   disability could be -- could be subjected to a

10   discriminatory policy regarding post-employment

11   benefits.

12   So, if, while she was working, while

13   the Petitioner was working and developed a

14   disability, the City had a policy that said if

15   you develop a disability, we will not pay you a

16   pension, and she was qualified at the time that

17   we adopted that policy, she would be subject to

18   a policy that says no disabled person gets a

19   pension because she has a disability. And now

20   she is subject to that policy now as a qualified

21   individual.

22   The difference is our policy is not no

23   disabled person gets a pension. It's a policy

24   that applies only to people who become unable to

25   do the job because they're totally disabled.

1   But, if she -- if it really truly were

2   discriminatory in that it said even if you get

3   disability, we're not -- and you work for 25

4   years, we're not going to give it to you, then

5   she could have sued over that.

6   CHIEF JUSTICE ROBERTS: Thank you,

7   counsel.

8   Justice Thomas? I'm sorry, anything

9   further?

10   JUSTICE KAVANAUGH: This might be more

11   merits, but I'm interested on who would pay the

12   question -- on Medicare. It's the federal

13   public as opposed to if it's the City, it's

14   either the City's taxpayers or maybe the State

15   of Florida. I don't know how that works, but

16   it's one set of the public versus another set of

17   the public.

18   MS. CONNER: That's correct, Your

19   Honor.

20   JUSTICE KAVANAUGH: Yeah. Thanks.

21   CHIEF JUSTICE ROBERTS: Justice

22   Barrett?

23   Justice Jackson?

24   Thank you, counsel.

25   Rebuttal, Mr. -- Mr. Gupta?

```
 1              REBUTTAL ARGUMENT OF DEEPAK GUPTA
 2                ON BEHALF OF THE PETITIONER
 3              MR. GUPTA:  Thank you.  Just a few
 4    quick points.
 5              Fist, I don't think you heard a -- a
 6    persuasive answer to why the Court shouldn't
 7    resolve this case on the narrow theory.  And I
 8    think we agree with the United States that's the
 9    most straightforward way to do -- to do it.
10              And I think the colloquy with Justice
11    Kagan and -- and Justice Alito shows that
12    it's -- it's the case that it's indisputable she
13    was a qualified individual subject to an
14    allegedly discriminatory policy that reduced
15    her -- her compensation.  The ADA allows her to
16    challenge that policy even after she leaves the
17    job.  And that answers the question and resolves
18    at least a chunk of the circuit split.
19              But the second point I want to make is
20    I think, while the case can be resolved on that
21    narrow ground, I do want to urge the Court in
22    its opinion to be careful not to foreclose other
23    scenarios that the City's reading would permit,
24    particularly given the City's failure to
25    identify any plausible reason why Congress would
```

1   have wanted to draw this arbitrary line.

2   A firefighter who becomes disabled

3   saving people from a burning building could be

4   discriminated against the next month. A retired

5   firefighter who develops a respiratory condition

6   from years of smoke exposure could lose health

7   coverage. And an employer could deny privileges

8   that are extended to all other former employees,

9   such as use of the company cafeteria or the

10   attendance at a company retreat based solely on

11   disability-based animus.

12   And the third and final point I want

13   to make is just on the broader question. The

14   City's position creates fundamental anomalies

15   that Congress couldn't have intended. The City

16   concedes that the ADA protects retirement

17   benefits but offers no coherent account of how

18   that protection could be vindicated, as I think

19   the -- the questions with Justice Jackson

20   showed.

21   The City's extreme position creates

22   perverse incentives for employers to hide

23   discrimination until after retirement, and it

24   would transform clearly unlawful discrimination

25   into perfectly lawful conduct based solely on

1   timing even though Congress expressly protected

2   these benefits and included a safe harbor

3   provision to address legitimate cost concerns.

4   For race or religion, we would never

5   tolerate a regime under which unlawful

6   discrimination suddenly becomes lawful a minute

7   later. The City can't explain why Congress

8   would have created such an arbitrary line for

9   disability discrimination alone.

10   Thank you.

11   CHIEF JUSTICE ROBERTS: Thank you,

12   counsel.

13   The case is submitted.

14   (Whereupon, at 12:56 p.m., the case

15   was submitted.)

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