
CONCURRENCE

JANE B. STRANCH, Circuit Judge, concurring. I agree with Judge Thapar's concurrence that we need look no further when statutory text is clear. That is what the majority opinion does—first by recognizing ERISA's statutory framework and purpose as expressed by Congress in 29 U.S.C. § 1001(b) and then by examining the statutory definition in § 1002(2)(A)(ii). I write separately to express some concerns about the concurrence's endorsement of "corpus linguistics," a proposed method of statutory interpretation described in a handful of recent state court opinions.[1] This tool invites judges to perform the same kind of subjective decision making that the concurrence otherwise cautions us to avoid. There are several reasons why we should decline this invitation.

The first is a practical problem. A keyword search using a corpus linguistics database will likely result in dozens, if not hundreds or thousands, of examples of a term's usage. How should courts make sense of all this information? First, we could count the number of times a term is used in the database (assuming appropriately selected parameters) and then decide that the most frequently used meaning is the ordinary meaning. But that approach would risk privileging the most newsworthy connotations of a term over its ordinary meaning. *See, e.g.*, Carissa Byrne Hessick, *Corpus Linguistics and the Criminal Law*, 2017 B.Y.U. L. Rev. 1503, 1509 ("[A] corpus analysis may demonstrate that seventy percent of all mentions of the word 'flood' occur in the context of [] superstorms. But that does not tell us whether the average American would understand the statutory term 'flood' to include three inches of water in a homeowner's basement after a neighboring water main burst."). It would also fail to cull irrelevant results. If we use the database to determine the meaning of "results in" during the 1960s and 1970s (the era closest to when ERISA was drafted), we find examples of this term's usage in contexts that bear no relationship to our own. Does it matter, for purposes of deciding whether ERISA applies to Wilson's deferred compensation plan, how "results in" was used in a

[1]The vast majority of these opinions were authored by courts in Utah, the state where the database cited by the concurrence is compiled. *See, e.g.*, *Fire Ins. Exch. v. Oltmanns*, 416 P.3d 1148, 1163 n.9 (Utah 2018).

book about farm animal management in 1976, or in an article from *Sports Illustrated* about New York's cool spring weather in 1964?[2] I think it does not. And even if consulting this overinclusive data set might help judges "to avoid basing conclusions on a few speakers' idiosyncrasies," it is "the 'idiosyncrasies' of [Congress that] constitute the rule of law in this [country]. And the only way to identify those idiosyncrasies is through the text of the [U.S.] Code, which is wholly absent from [the corpus linguistics] data set." *State v. Rasabout*, 356 P.3d 1258, 1266 (Utah 2015) (call numbers and internal quotation marks omitted)). This suggests to me a disconnect between corpus linguistics and the judicial work of statutory interpretation.

Another approach would require the court to perform this culling process itself. For example, we could assume that the drafters employed popular, as opposed to technical or legal, language and decide which uses of "results in" during the 1960s and 1970s should be included in our analysis and which should not. But by what metric would we make that choice? Perhaps most could agree that a book about farm animal management is not relevant here. But what about an article reporting a union strike? Or one about federal tax penalties?[3] Such choices would require highly subjective, case-by-case determinations about the import and relevance of a given source. Textualists have long advised us to forgo that interpretive method. *See, e.g.*, *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) ("The legislative history of [this] Act contains a variety of diverse personages, a selected few of whom—its 'friends'—the Court has introduced to us in support of its result. But there are many other faces in the crowd, most of which, I think, are set against today's result."). Legislative history tells us, at a minimum, how some of the statute's authors understood a term; corpus linguistics does not offer even that insight.

In part because of these practical problems, the use of corpus linguistics is a difficult and complex exercise. That is why, for centuries, we have left this task to the trained lexicographers

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[2]Consider (i) result number 37 after searching for examples of "results in" from the 1960s and (ii) result numbers 66-70 after searching for examples of "results in" from the 1970s. *Corpus of Historical American English*, BYU, http://www.english-corpora.org/coha (last visited June 17, 2019) (search for "results in"; then follow the "152" hyperlink beneath the "1960" column and the "132" hyperlink beneath the "1970" column).

[3]Consider result numbers 40 and 52 after searching for examples of "results in" from the 1970s. *See Corpus of Historical American English*, *supra* note 2.

who author the tool we already employ—a dictionary. The concurrence describes much of what lexicographers do every day. *See, e.g.*, Phillip A. Rubin, *War of the Words: How Courts Can Use Dictionaries Consistent with Textualist Principles*, 60 Duke L.J. 167, 179 (2010) ("Nowadays, most dictionary authors create a 'corpus,' which is a collection of whole or partial texts or recorded speech stored and indexed electronically so that individual words can be found quickly."); *How Our Dictionaries Are Created*, Oxford Dictionaries, https://www.oxforddictionaries.com/our-story/creating-dictionaries (last visited June 17, 2019) (noting that a dictionary's "team of expert lexicographers . . . are constantly researching, analysing, and documenting languages as they change and develop").

Lexicographers engage in "research, but also decisionmaking: the primary job of the lexicographer in creating a dictionary is to determine meanings of words, and to determine what different meanings a word might have." Rubin, *supra* at 181. And because "[t]he line between one meaning and another is seldom clear," this process "leaves much of the final determination to the experienced judgment of the editorial staff." *Id*. The other concurrence argues that, notwithstanding their training, these experts sometimes select outdated or otherwise unreliable meanings for disputed terms. But I would not substitute the ad hoc selection process of individual judges for the "experienced judgment" of these trained scholars. Doing so would convert judges into armchair lexicographers, attempting the same work that dictionary authors have been performing for centuries. But unlike those experts, judges would shoulder this task without the specialized training necessary to make a reliable and neutral judgment call. Encouraging litigants to take on that same role would make the problem worse, not better.

I do not suggest that corpus linguistics can never assist judges in the difficult project of statutory interpretation. But, in the unusual case where such a tool might prove useful, I would leave this task to qualified experts, not to untrained judges and lawyers. *See, e.g., Brief for Professor Clark D. Cunningham, et al. as Amicus Curiae on Behalf of Neither Party, In Re: Donald J. Trump, President of the United States of America*, No. 18-2486 (4th Cir. Jan. 29, 2019) (discussing use of corpus linguistics by professor of applied linguistics to help determine the meaning of "emoluments" during the founding era). And before we add corpus linguistics to our judicial toolkit, we should first remind ourselves what our toolkit is for. I agree with the

concurrence that statutes ought to give "ordinary people fair warning about what the law demands of them." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019). But that is the responsibility of legislators, not judges. Once the torch passes from Congress to the courts, our duty as judges is simply to determine what our elected members of Congress meant when they passed the statute—even if that is not the meaning we or the public might routinely employ. In most cases, adding corpus linguistics to our judicial toolkit would make it harder to focus on that narrow duty. This case underscores why. Our task here is to decide what Congress meant by "results in" and "extending to" when it defined the universe of employee pension benefit plans covered by ERISA. The other concurrence proposes that we divine that meaning not by considering ERISA's statutory framework or legislative history, but by looking to the language of an article from *Sports Illustrated* and a book about farm animal management. I struggle to see why those sources would tell us as much as, for example, what the legislature told us about the structure and purpose of ERISA when it drafted the statute.

Underlying these practical usage issues is my concern with the implicit suggestion that corpus linguistics is a simple, objective tool capable of providing answers to the puzzle of statutory interpretation. The use of corpus linguistics brings us no closer to an objective method of statutory interpretation. Instead, it encourages judges to stray even further from our historic and common-sense considerations—including the "text, structure, history, and purpose" of a statute, *Maracich v. Spears*, 570 U.S. 48, 76 (2013) (citation omitted)—that ought to guide our analysis.