No. 01-1435

IN THE
# Supreme Court of the United States

CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P.C.,

*Petitioner,*

*v.*

DEBORAH WELLS,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Respondent Debra Wells objects to the preliminary statement in petitioner's statement of the Question Presented. Though admitting that petitioner Clackamas Gastroenterology Associates, P.C. is a corporation, it claims the corporation "has legal attributes of a partnership." The corporate entity selected by petitioner in all respects is a corporation and has the legal attributes of a corporation. It is not a partnership.

The more appropriate question is the following:

> Whether the incorporators and directors of a professional corporation should be held to their selection of a corporate form of business structure, thereby making clear their legal obligations and responsibilities under the ADA and other federal anti-discrimination statutes.

In this case, the Ninth Circuit concluded that the physicians who elected the corporate form of business structure, wherein they were employees of the corporation, should be held to that decision, with its attendant responsibilities, adopting the bright line test set out by the Second Circuit.

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## STATEMENT OF THE CASE

Respondent Wells was employed by petitioner medical clinic starting in 1986 and continuing until her termination in May 1997. Wells suffers from mixed connective tissue disorder, a debilitating and life-threatening disorder.

Respondent made several requests for reasonable accommodation. In April 1997 petitioner medical clinic demoted respondent to a receptionist position, at a location petitioner clinic knew respondent could not perform.

When respondent protested the discriminatory transfer, petitioner suggested respondent wells voluntarily quit by saying at least twice: "So, are you quitting then?" Because of petitioner's discriminatory treatment, respondent suffered an exacerbation of her medical condition and became unable to work. She consulted her physician, who took her off work until May 13, 1997. Respondent provided a copy of the medical release to respondent.

Despite the medical release extending to May 13, 1997, respondent clinic communicated to petitioner by letter dated May 6, 1997 that she would be terminated if she did not return to work by May 12, 1997, and further provided COBRA forms to petitioner containing a termination date of May 12, 1997.

On May 12, 1997, petitioner provided respondent with an extended medical authorization to be off work. Despite such notice, respondent terminated petitioner's employment, purportedly for her failure to report to work. Petitioner Wells could have continued to work with respondent medical clinic if it had provided the reasonable accommodations sought by

petitioner and had her condition not exacerbated due to the conduct of respondent. Petitioner's Statement of the Case contains the assertion that respondent Wells "voluntarily terminated" her employment. Respondent Wells considers that assertion to be factually inaccurate.

Petitioner is a professional corporation. The five physician shareholders are employees of the corporation, working under employment agreements. When added to the 13 to 14 employees regularly employed by petitioner other than physicians, the number of employees readily exceeds that required to bring petitioner under coverage of the ADA.

## REASONS FOR DENYING THE WRIT

The Ninth Circuit correctly determined that when an employing entity elects the corporate form of organization, and the shareholders are employed by the corporation pursuant to written employment agreements, the shareholder-employees should be considered employees for purposes of determining the number of employees under the ADA.

When a business entity elects to take the corporate form, it undertakes certain obligations. The duty to observe corporate formalities, file corporate income taxes, and otherwise act as a corporation attends the corporate election. Having elected to exist as a corporation, with corporate employees rather than partners, petitioner should be held to that election.



### A. Petitioner's Shareholder-Employees are Employees, Not Partners

The question of law presented in this case is narrow: When an employing entity elects the corporate form of organization, and the shareholders are employed by the corporation pursuant to written employment agreements, are the shareholder-employees considered employees for purposes of determining the number of employees under the ADA?

The plain text of the ADA imposes jurisdiction over employers with 15 or more *employees*. 42 U.S.C. § 12111(5)(A). The Ninth Circuit properly concluded that the statutory language requires consideration of the number of *employees*, not whether or not those employees might have some attributes of partners. The shareholder employees are not properly excluded from consideration in determining whether this corporate employer employs 15 or more persons.

In *Hyland, M.D. v. New Haven Radiology Associates, P.C.*, 794 F.2d 793 (2d Cir. 1986) (ADEA case), the court wrote:

> The fact that certain modern partnerships and corporations are practically indistinguishable in structure and operation, however, is not reason for ignoring a form of business organization freely chosen and established. * * * Having made the election to incorporate, [the physician members of NHRA] should not now be heard to say that their corporation is "essentially a medical partnership among co-equal radiologists."

> It is one thing to apply an economic realities test to distinguish an employee from an independent contractor or partner, but it is quite another to apply the test in an attempt to identify as partner one associated with a corporate enterprise. While those who own shares in a corporation may or may not be employees, they cannot under any circumstances be partners in the same enterprise because the roles are mutually exclusive.

*Id.* 794 F.2d at 798. In *Gorman v. North Pittsburgh Oral Surgery Associates, Ltd.*, 664 F. Supp. 212, 214 (W.D. Pa. 1987), the court explained:

> The professional corporation enjoys a unique existence among business combines, being a corporation for liability and tax purposes but a partnership in other respects. It enables a professional to employ him or herself and that is the only economic reality with which we need be concerned. We hold that the shareholders of NPOSA are employees of the professional corporation for ADEA purposes.

*See also EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529 (2d Cir. 1996).

It is undisputed that the five physicians associated with petitioner are employees, working under employment agreements. When added to the 13 to 14 employees otherwise admitted by the medical clinic, the number of employees readily exceeds that required to bring petitioner under coverage of the ADA.



**B. Petitioner Should be Held to its Election to Incorporate**

Some courts have focused upon the conflict that arises when shareholders or partners bring a claim against their employer — *i.e.*, against themselves. *E.g.*, *Devine v. Stone, Leyton & Gershman, P.C.*, 100 F.3d 78 (8th Cir. 1996); *Fountain v. Metcalf, Zima & Co.*, 925 F.2d 1398 (11th Cir. 1991) (both cited by petitioner). Those cases raise different analytical problems, as do cases involving the distinction between employees and independent contractors. It is one thing to determine that an owner of a business entity should be precluded from suing the entity he or she owns. It is yet another to determine that a lower level employee should be deprived the protection of employment discrimination laws by excluding shareholders who have elected to be employees of their professional corporation.

When a business entity elects the corporate form, it undertakes certain obligations. The duty to observe corporate formalities, file corporate income taxes, and otherwise act as a corporation attends the corporate election. Having elected to exist as a corporation, with corporate employees rather than partners, an entity such as this petitioner medical clinic should be held to that election. As the Ninth Circuit's Opinion below stated:

> Given the broad purpose of the ADA, see 42 U.S.C. § 12101, we find Hyland's reasoning to be considerably more persuasive than Dowd's. Because the decision to incorporate is presumably a voluntary one, there is no reason to permit a professional corporation to secure the "best of both possible worlds" by allowing it both to assert its corporate status in order to reap the tax and civil liability advantages and to argue that it is like a partnership in order to avoid liability for unlawful employment discrimination.

*Wells v. Clackamas Gastroenterology Associates, P.C.*, 271 F.3d 903, 905 (9th Cir. 2001).

Indeed, "There is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship." *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 32, 81 S. Ct. 933, 936, 6 L. Ed. 2d 100 (1961) (shareholders in knitwear cooperative held to be employees under FLSA). In a variety of situations applying a remedial statute calling for the interpretation of the term "employee," an individual's status as a major stockholder, officer or director of a corporation has been found to be compatible with his or her status as an employee. *See, e.g., Zimmerman v. North American Signal Co.*, 704 F.2d 347, 350-54 (7th Cir. 1983). (ADEA respondent, a corporate vice president and one-third shareholder, considered as employee); *E.E.O.C. v. First Catholic Slovak Ladies Association*, 694 F.2d 1068, 1070 (6th Cir. 1982) (officer- directors held entitled to ADEA protections); *Novotny v. Great American Federal Savings & Loan Association*, 584 F.2d 1235, 1261 (3d Cir. 1978) (person holding positions of secretary and director held an employee for Title VII purposes), *vacated on other grounds*, 442 U.S. 366, 99 S. Ct. 2345, 60 L. Ed. 2d 957 (1979); *Hoy v. Progress Pattern Co.*, 217 F.2d 701, 704 (6th Cir. 1954) (one-eighth shareholder, vice president, director and chairman of board may be employee within purview of FLSA).

### C. The Form of Business Structure Selected by Petitioner Should Not be Ignored

Petitioner medical clinic urges this Court to ignore the form of business selected by petitioner and its shareholders. This is not a "form over substance" problem. The corporate form of enterprise selected by petitioner is a very real



substantive matter. The petitioner incorporators could have selected a number of other forms of business structure, but elected to form a corporation. The substance of that election is that the corporation's shareholders are employees. Petitioner should be held to that election. *Hyland, M.D. v. New Haven Radiology Associates, P.C., supra*; *Gorman v. North Pittsburgh Oral Surgery Associates, Ltd., supra*; *EEOC v. Johnson & Higgins, Inc., supra.*

The Ninth Circuit was correct in deciding that a corporation is a corporation. The statutory language does not speak to "economic realities" but rather to "employees." Corporate employees are just that, not partners.

## CONCLUSION

Respondent respectfully requests the Court to deny the Petition for Writ of Certiorari. If it does accept Certiorari to resolve a conflict among the circuits, the Court should use the opportunity to adopt a bright line test to guide those persons forming business entities as to their rights and responsibilities attendant to the election to incorporate, including that its employees will be counted for purposes of coverage of the ADA and similar anti-discrimination statutes.

Respectfully submitted,

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