No. 01-1435

In the Supreme Court of the United States

CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P.C.,
PETITIONER

v.

DEBORAH WELLS

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

BRIEF FOR THE
UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE SUPPORTING PETITIONER IN PART

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QUESTION PRESENTED

An "employer" is covered by Title I of the Americans with Disabilities Act of 1990 when it has 15 or more "employees." 42 U.S.C. 12111(5)(A). The question presented is whether physicians who are shareholder-directors of a professional corporation are "employees" within the meaning of that provision when the physicians actively engage in the corporation's medical practice.

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INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

An employer is covered by Title I of the Americans with Disabilities Act of 1990 (ADA) when it has 15 or more employees. 42 U.S.C. 12111(5)(A). This case concerns the standards for determining whether shareholder-directors of a professional corporation are "employees" within the meaning of that coverage provision. The United States has a substantial interest in the resolution of that question. The Equal Employment Opportunity Commission (EEOC) has authority to enforce Title I of the ADA with respect to private employers, 42 U.S.C. 12117(a), and to issue regulations to carry out that title, 42 U.S.C. 12116. The EEOC also has authority to enforce Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 (ADEA), both of which contain similar minimum employee thresholds for coverage. 42 U.S.C. 2000e(b) (15-employee threshold for coverage under Title VII); 29 U.S.C. 630(b) (20-employee threshold for coverage under the ADEA). The EEOC has issued guidance on the factors that it considers in determining whether members of boards of directors and major shareholders are employees within the meaning of the nondiscrimination statutes that the EEOC enforces. See EEOC Compl. Man. (BNA) § 2, at 605:0009 (2002) (Threshold Issues). The EEOC applies that guidance not only in determining whether an employer has the minimum number of employees to be covered by the applicable nondiscrimination statutes, but also in determining whether a complaining party is an employee who may invoke the protections of those Acts. *Ibid.*

STATEMENT

1. In 1986, respondent Deborah Anne Wells began working for petitioner Clackamas, a medical practice organized as a professional corporation under Oregon law. Pet. App. 2a. Petitioner's sole shareholders and directors were four physicians who actively engaged in petitioner's medical practice. *Ibid.* In 1997, petitioner terminated respondent's employment. *Ibid.*

Following her termination, respondent brought suit against petitioner, alleging that petitioner illegally terminated her employment based on her disability, in violation of Title I of the ADA. Pet. App. 2a. Title I of the ADA makes it unlawful for a "covered entity" to "discriminate against a qualified individual with a disability * * * in regard to * * * discharge of employees." 42 U.S.C. 12112(a). A "covered entity" includes an "employer," 42 U.S.C. 12111(2), and an "employer" is defined as a "person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." 42 U.S.C. 12111(5)(A). An "employee" is defined as "an individual employed by an employer." 42 U.S.C. 12111(4).

Petitioner moved for summary judgment, arguing that it did not have the requisite number of employees to be covered by the ADA. Pet. App. 2a. It is undisputed that petitioner meets the ADA's 15-employee coverage threshold if its four physician shareholder-directors are counted as "employees." *Ibid.* Petitioner falls short of that threshold, however, if those physicians are not counted as employees. *Ibid.*

The district court granted summary judgment for petitioner. Pet. App. 18a-25a. Applying an "economic realities" test for determining whether an individual is an employee, the court concluded that the four physicians were not employees, but "employers who own and manage their own business." *Id.* at 23a. In reaching that conclusion, the court found it persuasive that the four physicians constitute the board of directors, own the corporation, control the management of the corporation, share in the corporation's profits, and remain personally liable for malpractice claims. *Ibid.*

2. A divided panel of the Ninth Circuit reversed. Pet. App. 1a-11a. The panel majority framed the issue as follows: "Whether shareholders of a professional corporation who are actively engaged in conducting the business of the corporation are 'employees' under the ADA." *Id.* at 3a. The majority noted that there was a conflict in the circuits relating to that issue. Applying an "economic realities" test, the Seventh Circuit had

held in *EEOC* v. *Dowd & Dowd, Ltd.*, 736 F.2d 1177 (1984), that shareholder-directors in a professional corporation are analogous to partners in a partnership, and therefore, like partners, should not be counted as employees. Pet. App. 4a. In contrast, the Second Circuit had held in *Hyland* v. *New Haven Radiology Associates*, 794 F.2d 793 (1986), that the use of a corporate form precludes any inquiry into whether an entity is in fact a partnership. Pet. App. 4a.

The majority found "*Hyland*'s reasoning to be considerably more persuasive than *Dowd*'s." Pet. App. 4a. The majority reasoned that "[b]ecause 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." *Ibid.*

The majority rejected petitioner's reliance on Ninth Circuit precedent that requires application of an "economic realities" test in determining whether an individual labeled a partner is an employee. Pet. App. 5a (citing *Strother* v. *Southern Cal. Permanente Med. Group*, 79 F.3d 859 (9th Cir. 1996)). The majority reasoned that, in that context, an economic realities test "prevent[s] a firm from labeling the bulk of its employees as partners simply to insulate itself from liability for discrimination." That rationale, the majority concluded, does not support the use of an "economic realities" test "in order to classify shareholder-employees of a corporate enterprise as partners." *Ibid.*

The majority next concluded that "the status of [petitioner's] four physician-shareholders as employees is clear." Pet. App. 5a. The majority noted that the four physicians "actively participated in the management and operation of the medical practice and literally were employees of the corporation under employment agreements." *Ibid.* Based on its determination that petitioner's physician-shareholders were "employees of the corporation, not partners in it," the court concluded that petitioner "had a sufficient number of employees to qualify as an 'employer' and as a 'covered entity' under the [ADA]." *Id.* at 5a-6a.

Judge Graber dissented. She would have adopted an "economic realities" test to determine whether a shareholder-director in a professional corporation is an employee within the meaning of the ADA. Pet. App. 6a. Judge Graber explained that Ninth Circuit precedent "caution[s] against being governed by labels, rather than realities," that "a physicians' professional corporation in Oregon has many attributes of a partnership," and that "the purpose of the numerical requirement in the ADA is to separate small from large enterprises, not to adhere to the vagaries of tax law or tort liability." *Ibid.* Applying an economic realities test, Judge Graber concluded that because petitioner's shareholder-directors exercise control over the medical practice, share profits, and remain personally liable to patients for malpractice claims, they should be classified as partners, rather than employees. *Id.* at 9a.

SUMMARY OF ARGUMENT

The court of appeals in this case erred in holding that shareholder-directors of a corporation are automatically "employees" just because they have elected to organize their business as a corporation and they engage in the business of the corporation. Consistent with the EEOC's guidance, the question whether shareholder-directors are "employees" depends on whether they operate independently and manage the business or instead are subject to the business's control.

The EEOC's approach furthers the ADA's protective function. By classifying as "employees" shareholder-directors who are subject to the business's control, the EEOC's approach ensures that the ADA's protections will extend to those, who despite their titles, remain vulnerable to unlawful discrimination. At the same time, by classifying as non-employee proprietors those who operate independently and manage the business, the EEOC's approach excludes from protection those who are least vulnerable to such discrimination.

The EEOC's approach is also consistent with the way in which courts of appeals have uniformly analyzed whether a partner is an employee. In that context, the courts have not allowed a person's designation as a partner to preclude an inquiry into whether that person owns and manages the business or is instead subject to the firm's control. The election to employ the corporate form does not obviate the need for that inquiry. Accordingly, the same legal standard is relevant in determining whether a shareholder-director is an employee.

The EEOC's standard is workable in practice and consistent with the common law. In accord with the EEOC's guidance, courts have examined a range of factors that distinguish between those who own and manage a business and those who are subject to that business's control. And like the common law test for determining whether a person is a servant, the EEOC's approach makes the extent of an organization's control over a person a crucial factor in determining whether that person is an employee.

While the court of appeals in this case erred in holding that shareholder-directors who perform services for the corporation are automatically employees, some courts applying a so-called "economic realities" test have departed from the correct analysis as well. The relevant inquiry is not whether shareholder-directors are partners, as some of those cases suggest. Instead, the relevant inquiry with respect to both shareholder-directors and partners is whether they operate independently and manage the business or instead are subject to the business's control. This case should be remanded to the court of appeals for application of that standard.

ARGUMENT

THE STATUS OF SHAREHOLDER-DIRECTORS DEPENDS ON WHETHER THEY OPERATE INDEPENDENTLY AND MANAGE THE BUSINESS OR ARE SUBJECT TO THE ORGANIZATION'S CONTROL

An employer is covered by the ADA when it has 15 or more employees. The question presented in this case is whether shareholder-directors of a professional corporation are employees within the meaning of that coverage provision when they actively participate in the operation of their firm's practice. That question of employee status arises not only under the ADA, but under Title VII of the Civil Rights Act of 1964, and the Age Discrimination in Employment Act, both of which contain similar minimum employee thresholds for coverage. 42 U.S.C. 2000e(b) (15-employee threshold for coverage under Title VII); 29 U.S.C. 630(b) (20-employee threshold for coverage under the ADEA).

In resolving the question whether petitioner's shareholder-directors are employees within the meaning of the ADA, the court of appeals placed dispositive weight on the physicians' choice of the corporate form and their decision to establish formal employment agreements between the corporation and themselves.

That was error. Under the ADA, in order to decide whether shareholder-directors are employees, a court should examine the actual relationship between those individuals and the corporation to determine whether they function more like proprietors than employees. In particular, a court should examine whether shareholder-directors operate independently and manage the business or instead are subject to the firm's control. If the shareholder-directors operate independently and manage the business, they are proprietors and not employees; if they are subject to the firm's control, they are employees.

A. Under The EEOC's Guidance, The Employment Status Of Shareholder-Directors Depends On Whether They Operate Independently And Manage The Business Or Whether They Are Subject To The Organization's Control

The text of the ADA does not specifically address whether, or to what extent, shareholder-directors of a corporation should be regarded as employees. Moreover, the ADA's definition of employee is unhelpful in resolving the question presented in this case. Title I of the ADA defines "employee" to mean "an individual employed by an employer." 42 U.S.C. 12111(4). As this Court explained in *Nationwide Mutual Insurance Co.* v. *Darden*, 503 U.S. 318, 322 (1992), that "definition is completely circular and explains nothing."

The EEOC, however, has issued guidance on when "partners, officers, members of boards of directors, and major shareholders" should be regarded as employees for purposes of the nondiscrimination statutes the EEOC enforces, including the ADA. See EEOC Compl. Man. (BNA) § 2, at 605:0009 (2002) (Threshold Issues). Under the EEOC's guidance "[a]n individual's title * * * does not determine whether the individual is a partner, officer, member of a board of directors, or major shareholder, as opposed to an employee." *Ibid.* The relevant question in each case is "whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control." *Ibid.* "If the individual is subject to the organization's control, s/he is an employee." *Ibid.*

The EEOC's guidance provides that the following factors are relevant in making that determination:

> * Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work
>
> * Whether and, if so, to what extent the organization supervises the individual's work
>
> * Whether the individual reports to someone higher in the organization
>
> * Whether and, if so, to what extent the individual is able to influence the organization
>
> * Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts
>
> * Whether the individual shares in the profits, losses, and liabilities of the organization

EEOC Compl. Man., *supra*, at 605:0009.

Those factors are not intended to be exhaustive. The EEOC's guidance cites with approval court of appeals decisions that share the EEOC's basic approach and elaborate and expand upon the EEOC's factors. EEOC

Compl. Man., *supra*, at 605:009 n. 78 (citing *Serapion* v. *Martinez*, 119 F.3d 982, 989-990 (1st Cir. 1997), cert. denied, 522 U.S. 1047 (1998), and *Devine* v. *Stone, Leyton & Gershman, P.C.*, 100 F.3d 78, 81-82 (8th Cir. 1996), cert. denied, 520 U.S. 1211 (1997)). For example, the First Circuit in *Serapion* focused on, *inter alia*, the individual's role in firm governance. The EEOC's guidance and those cases effectively draw a distinction between proprietors who own and manage a business and that business's employees.

Under this Court's decisions, the EEOC's guidance, while not controlling, reflects a body of experience and informed judgment upon which the Court may properly rely. *Meritor Sav. Bank* v. *Vinson*, 477 U.S. 57, 65 (1986); see *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). Because the standard reflected in the EEOC's guidance provides a sound and workable framework for resolving the question presented in this case, the Court should adopt that standard.

B. The EEOC's Approach Accords With The ADA's Protective Function

The question whether a person is an employee arises under Title I of the ADA not only because that title has a 15-employee threshold for coverage. That issue also arises, because Title I extends its nondiscrimination protections only to prospective, present, or former "employees." See 42 U.S.C. 12112(a) ("No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of emploment."). Under the terms of the ADA, the "employees" who may invoke the ADA's protections against discrimination in "hiring, advancement, or discharge," 42 U.S.C. 12112(a), are the same "employees" who count toward the 15-employee threshold for coverage. 42 U.S.C. 12111(5)(A). To decide who qualifies as an employee for purposes of satisfying the ADA's minimum coverage formula it is therefore necessary to decide to whom Congress intended to extend protection against discrimination in employment.

The EEOC's guidance sensibly captures the class of intended beneficiaries of the Act's protections. By refusing to allow labels such as partner, shareholder, and director, to take individuals out of the Act's coverage when those persons in reality are subject to the organization's control, the EEOC's approach ensures that the ADA's protections will extend to those who, despite their titles, remain vulnerable to the kinds of treatment prohibited by the Act. Conversely, by classifying as non-employees those shareholders, partners, officers, and directors who actually own and manage the business, the EEOC's guidance excludes from protection those who are most able to control the firm's practices and who, as a consequence, are least vulnerable to the discriminatory treatment prohibited by the Act.

For example, if a person is a shareholder-director, but in fact is supervised in his work, reports to someone higher in the organization, and has little influence on the terms and conditions under which he works, he would be vulnerable to the kinds of treatment prohibited by the ADA. On the other hand, if an individual is the president, sole director, and sole shareholder of a corporation, that individual would have the ability to control the firm's practices and would not be vulnerable to the kind of treatment prohibited by the ADA. The EEOC's guidance soundly treats the first person as an employee, and the second person as a non-employee proprietor. See *Drescher* v. *Shatkin*, 280 F.3d 201, 204 (2d Cir. 2002) (holding sole director and sole shareholder of a corporation is not an employee who may sue the corporation under Title VII "by reason of its rules, policies, or conduct, as they are within his power to change"). The Ninth Circuit's approach, in contrast, would treat the second person as an employee, if, but only if, the sole proprietor chose to incorporate.

In *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997), this Court interpreted the term "employee" in Title VII to include former employees, in part, because excluding that class of persons "would be destructive" of "a primary purpose of antiretaliation provisions: [m]aintaining unfettered access to statutory remedial mechanisms." For similar reasons, the EEOC's approach reflects an appropriate interpretation of the term "employee." The EEOC's distinction between proprietors who own and manage the business and the employees who are subject to that business's control accords with the Act's overriding protective function.

C. The EEOC's Guidance Accords With The Test That Courts Apply To Determine Whether A Partner Is An Employee

The EEOC's guidance is also consistent with the way the courts of appeals have, for the past 25 years, uniformly approached the question whether partners are employees within the meaning of nondiscrimination statutes, including the ADA. In resolving that question, the courts of appeals have not allowed an individual's formal designation as a partner to preclude an inquiry into whether that individual is an employee. Instead, consistent with the EEOC's guidance, courts have focused on the actual working relationship between the individual and the partnership.

For example, in *Serapion*, 119 F.3d at 987, one of the cases cited in the EEOC's guidance, the First Circuit held that "the Title VII question cannot be decided solely on the basis that a partnership calls—or declines to call—a person a partner." Instead, "[a] court must peer beneath the label and probe the actual circumstances of the person's relationship with the partnership." *Ibid*. In particular, the First Circuit held that a court must determine whether a person designated a partner is nonetheless an employee by considering such factors as whether (1) the individual has an investment in the firm, (2) the individual owns firm assets, (3) the individual is liable for firm debts, (4) compensation is based on a firm's profits, (5) the individual has a right to engage in policymaking, (6) the individual participates in, and has voting power with regard to firm governance, (7) the individual has the ability to assign work and to direct the activities of employees within the firm, and (8) the individual has the ability to act for the firm and its principals. *Id*. at 990.

Similarly, in *Simpson* v. *Ernst & Young*, 100 F.3d 436 (6th Cir. 1996), cert. denied, 520 U.S. 1248 (1997), the court rejected the contention that a person's designation as a partner foreclosed an inquiry into that person's status as an employee. The court instead held that a court should decide whether a person designated a partner is an employee by examining the same basic set of factors as that outlined in *Serapion* and the EEOC's guidance. *Id*. at 443-444.

The Ninth Circuit itself has adopted the same approach for evaluating a partner's employment status. In *Strother* v. *Southern California Permanente Medical Group*, 79 F.3d 859, 867 (1996), the Ninth Circuit held that "determining whether an individual is an employee typically requires a factual inquiry which goes beyond merely the partnership agreement and the partner label." Instead, "[c]ourts must analyze the true relationship among partners, including the method of compensation, the 'partner's' responsibility for partnership liabilities, and the management structure and the 'partner's' role in that management." *Ibid.* See *EEOC* v. *Sidley, Austin, Brown & Wood*, No. 02-1605, 2002 WL 31387525, at * 5 (7th Cir. Oct. 24, 2002) ("A firm that under pursuit by the EEOC on suspicion of discrimination redesignated its employees 'partners' without changing the preexisting employment relation an iota would not by doing this necessarily buy immunity, even if the redesignation sufficed to make them partners under state law."); *Wheeler* v. *Hurdman*, 825 F.2d 257, 277 (10th Cir.) ("an employer may not evade the strictures of Title VII simply by labeling its employees as 'partners'") (quoting *Hishon* v. *King & Spalding*, 467 U.S. 69, 79 n.2 (1984) (Powell, J., concurring)), cert. denied, 484 U.S. 986 (1987).

The Ninth Circuit in this case acknowledged that it is appropriate to look beyond the label and examine the actual relationship between the individual and the firm to decide whether a partner is an employee. Pet. App. 5a. It concluded, however, that the same approach is not warranted in the corporate context. *Ibid.* Nothing in the text of the ADA provides any support for the Ninth Circuit's bifurcated approach to the issue of employee status. In particular, nothing in the ADA suggests that a court should apply one legal standard to decide whether a partner is an employee and apply a completely different legal standard to decide whether a shareholder-director is an employee.

The Ninth Circuit concluded that it would be inequitable for a corporation "to reap the tax and civil liability advantages" of the corporate form and yet still benefit from the same basic economic realities test used in the partnership context. Pet. App. 4a. In the court's view, a corporation should not be able "to secure the 'best of both possible worlds.'" *Ibid.* That reasoning is flawed. The ADA is entirely neutral on questions of corporate organization. It governs "employers" without distinguishing among unincorporated proprietorships, partnerships, or corporations. The number of employees matters; the structure of the business does not. As a result, there is no justification for a court to interpret the ADA in a way that seeks to counterbalance the perceived advantages of the corporate form. There are sufficient means to combat abuses of the corporate form without allowing such concerns to influence the scope of the ADA. A business may not avoid coverage under the ADA simply by altering its business form, but likewise, the act of incorporation, without more, should not result in a *change* in a business's coverage status.

The Ninth Circuit also concluded that looking to the actual relationship between a partner and a firm is permissible because it leads to expanded coverage, while looking to the actual relationship between a shareholder-director and the corporation cannot be justified on that basis. Pet. App. 5a. But nothing in the ADA suggests that a court is free to pick and choose the legal standard to apply depending on whether it leads to expanded or reduced coverage. If, as the court of appeals acknowledged, a court should look to an individual's ownership, management, and control of an organization, rather than his formal designation, to decide whether a partner is an employee, the same inquiry should govern whether a shareholder-director is an employee.

Indeed, the court of appeals' application of different legal standards cannot be reconciled with the ADA's protective function. Shareholder-directors are not by virtue of their designations any more or less vulnerable than partners to the treatment prohibited by the ADA. Nor do partners become more vulnerable based on a decision to incorporate. The vulnerability of shareholder-directors turns on neither the corporate form nor on labels but, as with partners, on whether they own and manage the firm or on whether they are instead subject to the firm's control.

There is also no basis for distinguishing between shareholder-directors and partners based on the purposes of the 15-employee threshold for coverage under the ADA. The purpose of that minimum employee threshold is "to spare very small firms from the potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail." *Papa* v. *Katy Indus., Inc.*, 166 F.3d 937, 940 (7th Cir.), cert. denied, 528 U.S. 1019 (1999); see *Tomka* v. *Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir. 1995) (reviewing the legislative history applicable to the comparable provision in Title VII). In terms of those purposes, there is no logical reason to distinguish between partners who manage and control a business and shareholder-directors who play the same role.

To paraphrase Judge Graber's dissenting opinion, under the court of appeals' decision, a small clinic that has four physician shareholder-directors and 11 workers is automatically covered by the ADA, while an identical clinic next door is not a covered entity if the physicians are partners who own, manage, and control the business. As Judge Graber explained, "[b]ecause the very purpose of the 15-employee threshold is economic, it makes no sense to treat Clinic #1 and Clinic #2 differently." Pet. App. 9a.

D. The EEOC's Standard Is Workable

The EEOC's approach provides a workable standard for resolving an individual's employee status. Several examples help to illustrate how the standard should be applied. Under the EEOC's guidance, a corporate employer could not transform its employees into non-employee proprietors by providing them with stock in the corporation, but otherwise leaving their status unchanged. See *Goldberg* v. *Whitaker House Coop., Inc.*, 366 U.S. 28, 32 (1961). In that example, the employees would remain subject to the corporations's control notwithstanding their shareholder status.

Similarly, an employer's designation of an individual as a partner cannot deprive that individual of employee status when the individual lacks most of the traditional indicia of being a partner. The Sixth Circuit's decision in *Simpson* is illustrative. In that case, a management committee in the firm exercised exclusive control over the admission and discharge of all personnel, the management committee unilaterally determined compensation of all personnel, the nominal partner had no vote for members of the management committee, and the nominal partner did not share in the firm's profits and losses. 100 F.3d at 443-444. In those circumstances the court understandably agreed with the district court's conclusion that "for all practical purposes," the nominal partner "was an employee with the additional detriment of having promised to be liable for the firm's losses." *Id.* at 442.

In contrast, the First Circuit's decision in *Serapion* involved a partner who had such a pervasively proprietary role that she could not be regarded as an employee. 119 F.3d at 990-992. The partner at issue had an equity interest in the firm, her compensation was predicated to a significant extent on the firm's profits, she made substantial capital contributions to the firm, she had a vote on all matters brought before the policymaking body of the firm, and she served as one of five voting members of the committee that managed the firm's day-to-day affairs. *Ibid.* Although some other members of the firm wielded greater influence, that fact alone was insufficient to show that the partner at issue was an employee. *Id.* at 991-992.

Similarly, the Eighth Circuit's decision in *Devine* involved shareholder-directors who were so pervasively involved in the firm's management that they could not be viewed as employees. 100 F.3d at 81. The shareholder-directors participated in management decisions, set firm policy, hired new employees, admitted new shareholders, set billing rates, supervised the firm's work, made capital contributions, were responsible for firm debts, and were compensated based on the firm's profits. *Ibid.* While the plaintiff asserted that the corporation exercised control over the work of the shareholder-directors, the court concluded that "[t]his does not describe how the business was actually run." *Id.* at 82.

To be sure, other cases may not be as straightforward as those discussed above, and will require a court to make a "case-specific assessment of whether a particular situation is nearer to one end of the continuum or the other." *Serapion*, 119 F.3d at 990. But case-by-case development is a standard feature of common law efforts to define employees. It does not detract from the workability of the EEOC's standard.

Obviously, a rigid rule that stressed formality over substance and placed dispositive weight on the corporate form would be easier to administer. But ease of administration is not an end in itself, and such a rule would fail to implement the statutory directive faithfully. See *Serapion*, 119 F.3d at 990 ("[A]ny effort to formulate a hard-and-fast rule would likely result in a statement that was overly simplistic, or too general to be of any real help."); *Devine*, 100 F.3d at 81 ("A rigid per se rule that stresses organizational form over substance might be easier to apply, but it also might undermine the statutory purposes."). Moreover, whatever else can be said about the ADA's circular definition of employee, it hardly suggests that Congress perceived this to be an issue that lent itself to categorical rules.

E. The EEOC's Guidance Incorporates Common Law Principles

In interpreting the term "employee" in other federal statutes, this Court has frequently looked to the common law for guidance. For example, in *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739-740 (1989), the Court held that the term "employee" in the Copyright Act refers to common law servants and does not embrace independent contractors. Similarly, in *Darden*, 503 U.S. at 323, the Court held that the term employee in ERISA encompasses common law servants and not independent contractors. See *Kelley* v. *Southern Pac. Co.*, 419 U.S. 318, 322-323 (1974); *Baker* v. *Texas & Pacific Ry*. 359 U.S. 227, 228 (1959) (per curiam); *Robinson* v. *Baltimore & Ohio R.R.*, 237 U.S. 84, 94 (1915).

Under the common law, a servant is "an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master." Restatement (Second) of Agency § 2(2) (1958). Like that common law standard, the EEOC guidance makes the extent of an employer's control of a worker's performance a crucial consideration in its assessment of whether that person is an employee. EEOC Compl. Man., *supra*, at 605:0009.

At the same time, the EEOC's guidance does not purport to adopt in all its particulars the common law definition of a servant. *Meritor Sav.*, 477 U.S. at 72 ("common law principles may not be transferable in all their particulars" to federal statutes); *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 797 (1998) (federal statutes do not call for "mechanical application of [the] indefinite and malleable factors set forth in the Restatement"). The reason is that the common law standard is designed to distinguish between servants and independent contractors for the purpose of determining when an employer is subject to vicarious liability. Restatement (Second) of Agency, *supra*, §§ 2, 219, 220. The distinction in the present context is not between *independent contractors* and employees, but between *proprietors* and employees. And the purpose of the distinction is not to determine the scope of an employer's vicarious liability, but to determine who receives protection against discrimination based on a disability.

Consistent with that underlying difference, the EEOC's guidance sets forth a different set of factors for resolving the question of employee status from the ones that appear in *Darden* and *Reid*. See *Darden*, 503 U.S. at 323; *Reid*, 490 U.S. at 751-752.* Just as the factors

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* In *Darden*, the Court stated that "[a]mong the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has

set forth in *Darden* and *Reid* provide an appropriate framework for distinguishing between independent contractors and employees, the EEOC's factors provide an appropriate framework for distinguishing between proprietors and employees.

The Eighth Circuit decision in *Devine* v. *Stone, Leyton & Gershman, P.C.*, 100 F.3d 78 (1996), cert. denied, 520 U.S. 1211 (1997), is instructive on that point. In that case, the court addressed whether shareholder-directors of a professional corporation were employees within the meaning of Title VII. Relying on the "established meaning" of the term "employee," and this Court's decision in *Darden*, the Eighth Circuit adopted an approach that parallels the EEOC's guidance. *Devine*, 100 F.3d at 80. Specifically, that court held that the relevant inquiry is whether the shareholder-directors "manage and own" the business. *Ibid.* The court further held that the relevant factors to consider in making that determination include whether the shareholder-directors participate in setting firm policy, whether they contribute to the firm's capital, whether they are liable for the firm's debts, and whether their compensation is based on profits. *Ibid.*

While the *Devine* court based its analysis on the common law approach outlined in *Darden*, it rejected as unhelpful the particular factors set forth in *Darden* and *Reid* for determining employee status. The court explained that "[t]hose cases use agency principles to

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the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party." 503 U.S. at 323.

determine whether an individual is part of the enterprise," *Devine*, 100 F.3d at 81 n.4, "[t]he shareholder-directors [here] are clearly part of [the enterprise]," and "[t]he question is whether they manage and own the firm." *Ibid*. Other courts have similarly recognized that the factors used to distinguish between independent contractors and employees are not useful in distinguishing between proprietors and employees, and have looked to factors like those set forth in the EEOC's guidance instead. See *Serapion*, 119 F.3d at 986; *Wheeler*, 825 F.2d at 271- 272.

F. The Relevant Inquiry Is Not Whether Director-Shareholders Are Partners

As the previous discussion makes clear, the court of appeals did not conduct the correct legal inquiry in this case. In deciding that petitioner's four shareholder-directors are employees within the meaning of the ADA, the court of appeals relied on the physicians' creation of a corporate form, and their decision to establish employment agreements between themselves and the corporation. Pet. App. 4a-5a. The court of appeals failed to undertake the crucial inquiry into whether the physicians operate independently and manage the business or instead are subject to the corporation's control. The court also failed to examine many of the relevant factors found in the EEOC's guidance and the appellate cases that track the EEOC's approach.

Although the court of appeals failed to follow the correct approach, some cases purporting to apply the so-called "economic realities" test in the corporate context deviate from the correct analysis as well. In particular, the tendency in some of those cases is to ask only whether professional corporations are analogous to partnerships or whether shareholder-directors are analogous to partners as if the answer to those questions automatically resolves the question whether particular shareholder-directors are employees. See, *e.g.*, *EEOC* v. *Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984). The tendency of that approach is to transform every professional corporation, by operation of law, into a de facto partnership, and every shareholder, without regard to circumstance, into a non-employee partner.

That approach is no more consistent with the ADA than the approach adopted by the court of appeals in this case. Both have a common defect of deflecting attention from the core statutory concern of whether an individual is an employee. The heart of the matter is whether an individual exercises a degree of control inconsistent with employee status, not the individual's title or the use of the corporate form. The ADA does not exclude partners from its definition of employees, *Sidley, Austin*, 2002 WL 31387525, at *4, so a finding that a shareholder-director should be regarded as a partner does not answer the ultimate statutory question.

Thus, in resolving the status of shareholder-directors, the "economic reality" that matters for ADA purposes is not whether such persons are partners. Instead, the relevant question with respect to shareholder-directors, like the relevant question with respect to partners, is whether they operate independently and manage and control the business, or instead are subject to the organization's control.

G. The Case Should Be Remanded For A Determination Of The Status Of Petitioner's Physicians Under The Correct Legal Standard

The remaining question is whether, applying the correct legal standard, petitioner's shareholder-directors are employees. The district court found that the four physicians constitute the board of directors, own the professional corporation, control the management and operations of the medical practice, share in the profits of the professional corporation, and are personally liable for malpractice claims against them. Pet. App. 23a. Those findings suggest that petitioner's shareholder-directors may not be employees.

The court of appeals, however, has not yet addressed whether petitioner's shareholder-directors are employees under the correct legal standard. It also has not considered whether there is evidence in the record that might call into question any of the district court's findings. The Court should therefore remand for a determination whether, under the correct legal standard, petitioner's four shareholder-directors are employees. See *Darden*, 503 U.S. at 328 (remanding for determination of employee status under the correct legal standard).

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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