SUPREME COURT OF THE UNITED STATES

No. 01–1435

CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P. C., PETITIONER *v.* DEBORAH WELLS

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

[April 22, 2003]

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, dissenting.

"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 (1961). As doctors performing the everyday work of petitioner Clackamas Gastroenterology Associates, P. C., the physician-shareholders function in several respects as common-law employees, a designation they embrace for various purposes under federal and state law. Classifying as employees all doctors daily engaged as caregivers on Clackamas' premises, moreover, serves the animating purpose of the Americans With Disabilities Act of 1990 (ADA or Act). Seeing no cause to shelter Clackamas from the governance of the ADA, I would affirm the judgment of the Court of Appeals.

An "employee," the ADA provides, is "an individual employed by an employer." 42 U. S. C. §12111(4). Where, as here, a federal statute uses the word "employee" without explaining the term's intended scope, we ordinarily presume "Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mut. Ins. Co.* v. *Darden,* 503 U. S. 318, 322–323 (1992) (internal quotation marks and citation omitted). The Court today selects one of the com-

mon-law indicia of a master-servant relationship—control over the work of others engaged in the business of the enterprise—and accords that factor overriding significance. *Ante*, at 8. I would not so shrink the inquiry.

Are the physician-shareholders "servants" of Clackamas for the purpose relevant here? The Restatement defines "servant" to mean "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) (hereinafter Restatement). When acting as clinic doctors, the physician-shareholders appear to fit the Restatement definition. The doctors provide services on behalf of the corporation, in whose name the practice is conducted. See Ore. Rev. Stat. Ann. §58.185(1)(a) (1998 Supp.) (shareholders of a professional corporation "render the specified professional services *of the corporation*" (emphasis added)). The doctors have employment contracts with Clackamas, App. 71, under which they receive salaries and yearly bonuses, Tr. of Oral Arg. 8, and they work at facilities owned or leased by the corporation, App. 29, 71. In performing their duties, the doctors must "compl[y] with . . . standards [the organization has] established." App. 66; see Restatement, ch. 7, tit. B, Introductory Note, p. 479 ("[F]ully employed but highly placed employees of a corporation . . . are no less servants because they are not controlled in their day-to-day work by other human beings. Their physical activities are controlled by their sense of obligation to devote their time and energies to the interests of the enterprise.").

The physician-shareholders, it bears emphasis, invite the designation "employee" for various purposes under federal and state law. The Employee Retirement Income Security Act of 1974 (ERISA), much like the ADA, defines "employee" as "any individual employed by an employer." 29 U. S. C. §1002(6). Clackamas readily acknowledges

that the physician-shareholders are "employees" for ERISA purposes. Tr. of Oral Arg. 6–7. Indeed, gaining qualification as "employees" under ERISA was the prime reason the physician-shareholders chose the corporate form instead of a partnership. See *id.*, at 7. Further, Clackamas agrees, the physician-shareholders are covered by Oregon's workers' compensation law, *ibid.*, a statute applicable to "person[s] . . . who . . . furnish services for a remuneration, subject to the direction and control of an employer," Ore. Rev. Stat. Ann. §656.005(30) (1996 Supp.). Finally, by electing to organize their practice as a corporation, the physician-shareholders created an entity separate and distinct from themselves, one that would afford them limited liability for the debts of the enterprise. §§58.185(4), (5), (10), (11) (1998 Supp.). I see no reason to allow the doctors to escape from their choice of corporate form when the question becomes whether they are employees for purposes of federal antidiscrimination statutes.

Nothing in or about the ADA counsels otherwise. As the Court observes, the reason for exempting businesses with fewer than 15 employees from the Act, was "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." *Ante*, at 7 (quoting *Papa* v. *Katy Industries, Inc.*, 166 F. 3d 937, 940 (CA7 1999)). The inquiry the Court endorses to determine the physician-shareholders' qualification as employees asks whether they "ac[t] independently and participat[e] in managing the organization, or . . . [are] subject to the organization's control." *Ante*, at 9 (quoting 2 Equal Employment Opportunity Commission, Compliance Manual §605:0008, and n. 71 (2000)). Under the Court's approach, a firm's coverage by the ADA might sometimes turn on variations in ownership structure unrelated to the magnitude of the company's business or its capacity for comply-

ing with federal prescriptions.

This case is illustrative. In 1996, Clackamas had 4 physician-shareholders and at least 14 other employees for 28 full weeks; in 1997, it had 4 physician-shareholders and at least 14 other employees for 37 full weeks. App. 55–62; see 42 U. S. C. §12111(5) (to be covered by the Act, an employer must have the requisite number of employees "for each working day in each of 20 or more calendar weeks in the current or preceding calendar year"). Beyond question, the corporation would have been covered by the ADA had one of the physician-shareholders sold his stake in the business and become a "mere" employee. Yet such a change in ownership arrangements would not alter the magnitude of Clackamas' operation: In both circumstances, the corporation would have had at least 18 people on site doing the everyday work of the clinic for the requisite number of weeks.

The Equal Employment Opportunity Commission's approach, which the Court endorses, it is true, "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." Brief for United States et al. as *Amici Curiae* 11; see 42 U. S. C. §§12111(8), 12112(a) (only "employees" are protected by the ADA). As this dispute demonstrates, however, the determination whether the physician-shareholders are employees of Clackamas affects not only whether they may sue under the ADA, but also—and of far greater practical import—whether employees like bookkeeper Deborah Anne Wells are covered by the Act. Because the character of the relationship between Clackamas and the doctors supplies no justification for withholding from clerical worker Wells federal protection against discrimination in the workplace, I would affirm the judgment of the Court of Appeals.