

No. 23-6009

IN THE SUPREME COURT OF THE UNITED STATES

MARIO AUSTIN

Petitioner,

v.

AMERICAN BUILDINGS COMPANY

Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit**

BRIEF IN OPPOSITION

James C. Pennington
Counsel of Record
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
420 20TH Street North
Suite 1900
Birmingham, AL 35203
Telephone: 205.328.1900
james.pennington@ogletree.com

Counsel for Respondent

COUNTERSTATEMENT OF QUESTIONS PRESENTED

The questions presented are:

1. Whether Petitioner Mario Austin's failure to establish that Respondent American Buildings Company was a state actor when it employed him and terminated his employment precludes his argument that his United States Constitutional Fourteenth Amendment rights were violated.
2. Whether Petitioner Mario Austin's failure to establish any Circuit Court of Appeals split exists with respect to the basis for the Eleventh Circuit Court of Appeals' affirmance of the Middle District of Alabama's grant of summary judgment in Respondent's favor further precludes Petitioner's Petition for Writ of Certiorari.

**PARTIES TO THE PROCEEDING
AND RULE 29.6 STATEMENT**

Petitioner is Mario Austin.

Respondent is American Buildings Company. American Buildings Company is an indirect, wholly owned subsidiary of Nucor Corporation (NYSE: NUE), a publicly held corporation. There is no other publicly held corporation that owns 10% or more of American Buildings Company's stock.

CITATIONS TO OPINIONS AND ORDERS

Mathews v. Hines, No. 2:22-CV-00049-CWB, 2022 WL 14278241, *2 n. 1 (M.D. Ala. October 24, 2022), *citing Austin v. American Building Co.*, No. 2:19-cv-1059, 2021 WL 7450297, at *8 n. 3 (M.D. Ala. Dec. 6, 2021).

BASIS FOR JURISDICTION AND STATUTE INVOLVED

Petitioner Mario Austin requests via his Petition for Writ of Certiorari that the United States Supreme Court exercise its discretion to review the decision by the Eleventh Circuit Court of Appeals granting Respondent American Buildings Company's motion for summary judgment upon his claims arising under Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e, *et seq.*). Thus, Petitioner asserts jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On July 11, 2023, the Eleventh Circuit Court of Appeals affirmed the Middle District of Alabama’s grant of Respondent American Buildings Company’s motion for summary judgment upon Petitioner Mario Austin’s Title VII discrimination and retaliation claims. (App. 2-4) The district court granted Respondent’s motion for summary judgment, because it determined Austin failed to properly exhaust Title VII’s statutory prerequisites with respect to his color and national origin discrimination and retaliation claims, and because it determined he did not establish a *prima facie* case of race discrimination or prove that Respondent’s legitimate, non-discriminatory reasons for terminating his employment were pretextual. (*Id.* 2-3) The Eleventh Circuit affirmed the district court’s decision, because it determined Austin raised “no substantive argument challenging the district court’s grant of summary judgment[,]” since he did not in his appellate brief identify any issues on appeal, cite to any legal authority, or otherwise establish the court erred in making its decision. (*Id.* 4)

ARGUMENT

Respondent American Buildings Company (“ABC”), pursuant to Supreme Court Rules 15.1, 15.2, 33.2, and 39.5 and by and through its Counsel of Record, opposes the Petition for Writ of Certiorari filed by Mario Austin (“Austin”) upon the following grounds:

I. No Constitutional Fourteenth Amendment Due Process Claim is at Issue.

The Middle District of Alabama granted ABC’s motion for summary judgment because it determined Austin failed to exhaust Title VII’s statutory prerequisites with respect to his retaliation and color and national origin discrimination claims and did not establish a *prima facie* case of race discrimination based upon his termination or establish ABC’s legitimate, non-discriminatory reasons for terminating him, *i.e.*, Austin’s poor performance and attendance issues, were pretextual. (App. 2-3) Austin’s Petition for Writ of Certiorari requests this court to review the underlying judgment of the Eleventh Circuit Court of Appeals affirming the Middle District of Alabama’s grant of summary judgment in ABC’s favor to assess whether any violation of his U.S. Constitutional Fourteenth Amendment Due Process rights were violated by ABC. (Petition, pp. 2, 4-6) Austin’s request has no basis in law or fact because there is no record evidence, and Austin has not otherwise established, that ABC was a state actor. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974) (The Fourteenth Amendment offers no shield against “private conduct.”) quoting *Shelley v. Kraemer*, 335 U.S. 1, 13 (1948); *see also Nat’l Broad. Co., Inc. v. Commc’n Workers of Am.*, 860 F.2d 1022, 1024 (11th Cir. 1988). Austin’s Petition acknowledges the

Fourteenth Amendment only applies to “States.” (Petition, p. 4) Austin argues, however, that his Fourteenth Amendment rights were violated when ABC “discriminated against him based on his color, national origin and retaliation.” (*Id.*, p. 6) Such a claim is explicitly foreclosed by *Jackson* and *Shelley*. 419 U.S. at 349; 335 U.S. at 13.

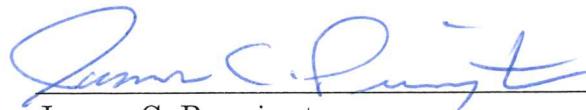
II. Austin has Stated No Other Sufficient Basis for Granting His Petition.

As set forth in the Appendix to Austin’s Petition, the Eleventh Circuit Court of Appeals affirmed the entry of summary judgment in ABC’s favor, because Austin’s appellate brief raised no substantive argument challenging that decision, identified no issues on appeal, and cited to no legal authority. (App. 4) While Austin’s Petition claims this case presents important “issues of arguable merits” and questions about the law, he has failed to establish any sufficient basis for reviewing the Eleventh Circuit’s decision. (Petition, p. 6) As demonstrated above, there is no Constitutional Fourteenth Amendment issue present in this case, and Austin has failed to establish any Circuit Court of Appeals split exists regarding the rationale of the Eleventh Circuit Court of Appeals’ holding that would warrant further review.

CONCLUSION

The Court should deny Austin's Petition for Writ of Certiorari.

Respectfully submitted, this the 18th day of December, 2023



James C. Pennington
Counsel of Record
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
420 20TH Street North
Suite 1900
Birmingham, AL 35203
Telephone: 205.328.1900
james.pennington@ogletree.com

Counsel for Respondent