No. 26-482

IN THE

Supreme Court of the United States

MAURA A. JENKINS,

Petitioner,

v.

HARRISBURG ROTARY CLUB, AKA ROTARY CLUB OF HARRISBURG, *et al.*,

Respondents.

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

RESPONDENT ROTARY CLUB OF HARRISBURG'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000, *et seq* ("Title VII") prohibits and makes unlawful discrimination by an employer, employment agency or labor union against an employee on the basis of race, color, sex, religion or national origin. 42 U.S.C. § 2000e-2(a), (b), (c).

The statutory definition of employer under Title VII requires the employer to have a minimum of fifteen (15) employees. 42 U.S.C.A. § 2000e(b). An "employer" is defined as a "person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or proceeding calendar year, and any agent of such a person." *Id*.

Petitioner's question is improper because it does not relate to the lower courts' decisions. The appropriate question presented is whether the Third Circuit and the Middle District of Pennsylvania erred when applying the test established in *Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 85 (3d Cir. 2003), cert. denied 541 U.S. 959, 124 S. Ct. 1714 (2004) to determine whether Rotary International and the Rotary Club of Harrisburg should be treated as a single employer in order to meet the numerosity requirement under Title VII. Petitioner did not argue that the courts' use of the *Nesbit* test was improper, did not suggest what Circuit test should have been applied, and did not identify that the application of a different test would yield a different result.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 DISCLOSURE STATEMENT

Rotary International ("RI") is a registered non-profit organization pursuant to the Illinois Not-for-Profit Corporation Act. RI has no parent company and no publicly held corporation owns 10% or more of its stock.

Rotary Club of Harrisburg ("RCH") is a local, independent, not-for-profit, autonomous Rotary club in Harrisburg, Pennsylvania. RCH is registered as a non-for-profit in Pennsylvania. RCH is a non-religious, non-political volunteer service club. RCH, like all other Rotary clubs, is a separate legal entity with its own directors, officers and in this case, one employee. There are over 45,000 local, independent Rotary clubs worldwide.

Petitioner, Maura Jenkins, was hired by RCH as a part-time Club Administrator in 2023 and she was RCH's only employee.

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SUMMARY OF REASONS WHY THE PETITION SHOULD BE DENIED

This is a religious discrimination claim asserted under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e, *et seq.* ("Title VII"). The statutory definition of employer under Title VII requires the employer to have a minimum of fifteen (15) employees. 42 U.S.C.A. § 2000e(b). Petitioner was employed by RCH as its only employee and argues that RCH and RI should be treated as a "single employer" for purposes of Title VII. The District Court determined, and the Third Circuit upheld, that RI and RCH are separate and distinct entities and are not a single employer under Title VII.

The issue that Petitioner seeks review of was not raised by Petitioner in the courts below. Petitioner never argued that the *Nesbit* test was the wrong test to be applied, what test was to be applied, or that the application of any other test would have changed that outcome – i.e., that RI and RCH cannot be considered as one employer to meet Title VII's numerosity requirement.

Petitioner fails to provide this Court a compelling reason to grant the Petition as required under U.S. Supreme Ct. R 10, as Petitioner's entire argument relies on the assertion that there is a circuit split as to the test to be used to treat two entities as a single employer under Title VII. However, there is no such split, and regardless of the test used, Petitioner fails to show that RI and RCH have a parent-subsidiary relationship or that these separate entities share in the determination of the essential terms and conditions of employment sufficient to establish single employer status for purposes of Title

VII. While each circuit's test may vary slightly, they each share a common element, which is that the parent company has control over the subsidiary's decision making for the terms and conditions of employment. Petitioner also proposed no standard that she believes should be used, or demonstrated that she would be successful under any other standard.

Petitioner also relies on this High Court's decision in a distinguishable case, *Board of Dirs. Of Rotary Int'l v. Rotary Club of Duarte*, which required local California Rotary clubs to allow women to join because failure to do so would violate the *Unruh Act*, a California state law. *See*, *Board of Dirs. Of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987). The *Duarte* case is distinct from the facts of this matter because the issue here is not about membership, but is about employment at a local Rotary club. RI may provide local clubs with guidelines to follow for its members such as the Code of Conduct, but RI does not have control over who local Rotary clubs employ. RI had no such control over RCH. Petitioner's reliance on *Duarte* is thus misplaced for two reasons. First, the *Duarte* case involved California's *Unruh Act* which is a state statute and this Court's decision only impacted California local clubs. *Id.* at 549. It did not even remotely address whether the local California clubs, which are separate entities, should be combined with RI in a Title VII context. Second, the *Duarte* case discussed discrimination related to membership of Rotary clubs, whereas here the issue is related to employment and what it means to be an employer under Title VII.

INTRODUCTION

Petitioner asserts that the Third Circuit Court of Appeals' decision to uphold the Middle District of Pennsylvania's decision conflicts with this High Court's decision in *Duarte*. However, Petitioner's assertion is made based on her reliance on a case that is distinguishable from this matter because *Duarte* involved a state statute regarding discrimination within California. It did not even remotely address whether the local California clubs, which are separate entities, should be combined with RI in a Title VII context. Here, Petitioner's original claim is that she was discriminated against by RI and the RCH under Title VII due to her religious beliefs. Petitioner also argues that in its decision the Third Circuit added an element to the *Nesbit* test by requiring "a parent-subsidiary relationship among the corporations as well as direction by the parent corporation." The Third Circuit, therefore, determined that Petitioner did not produce any evidence that RI is the parent corporation of the RCH or that it has any control over RCH's employment decisions. (App. A at 8a). Petitioner argues that the Third Circuit's assessment of the *Nesbit* test is incorrect because a party is not required to prove both that a parent-subsidiary relationship exists and that the parent corporation directs the subsidiary's discriminatory conduct; rather, Petitioner argues that she only has to prove that there was direction, however indirect or loose, by one entity for another entity to engage in discriminatory conduct.

Petitioner fails to properly analyze the *Nesbit* test. While *Nesbit* establishes there are three situations in which the Court may deem two entities as a single employer, the focus is on *Nesbit's* second scenario which

provides that a single employer exists "when a ***parent*** company has directed the subsidiary's discriminatory act of which the plaintiff is complaining." *Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 85. Petitioner fails to acknowledge that in order to be deemed a single employer the parent-subsidiary relationship must exist. Such a relationship is consistent with the type of control over the subsidiary that *Nesbit* requires.

Accordingly, the Third Circuit's decision was appropriate based upon the arguments Petitioner herself made, which focused on the assertion that RI (alleged parent company) had directed RCH's (alleged subsidiary company) discriminatory conduct. Furthermore, regardless of which Circuit's decision is used to determine a single employer under Title VII, Petitioner's argument fails.

Petitioner also never argued that the *Nesbit* test was the wrong test to be applied, what test was to be applied, or that the application of any other test would have changed that outcome – that RI and RCH cannot be considered as one employer to meet Title VII's numerosity requirement.

COUNTER STATEMENT OF THE CASE AND PROCEEDINGS BELOW

Upon the start of her employment, Petitioner made RCH aware of her strong religious beliefs. Petitioner was informed that her supervisor was RCH's elected volunteer President. Petitioner was paid solely by RCH. RI did not direct RCH's internal activities involving the supervision, hiring, or firing of any employee. RI did not pay Petitioner and did not even know of Petitioner's hiring or firing until

its receipt of the charge of discrimination filed with the Equal Employment Opportunity Commission.

The only asserted connection that RI and RCH have is that RCH uses RI's Code of Conduct in order to determine *membership* and to determine whether members are upholding the purpose of RCH. However, in terms of employees, each local club has its own process for determining an employee's terms and conditions of employment. Each individual Rotary club hires, terminates, pays, and disciplines its own employees based upon its own processes and procedures, not RI.

As a result of an August 17, 2023, Facebook post made by Petitioner on her Facebook page (which was seen by another RCH member) which RCH viewed as making fun of transgender persons, RCH terminated Petitioner's employment on August 21, 2023.

After filing a Charge of Discrimination and a *pro se* complaint, Petitioner filed her Amended Complaint on or around December 18, 2024 in the Middle District of Pennsylvania. Her Amended Complaint alleged two almost identical counts of discrimination and retaliation under Title VII, one against RI and one against RCH. Petitioner argued that her Facebook post was protected speech based upon her religious beliefs and as a result, both RI and RCH had discriminated and retaliated against her by terminating her employment.

Both RI and RCH filed motions to dismiss in the Middle District of Pennsylvania, which were originally denied without prejudice. The District Court directed the parties to conduct discovery on the single employer issue,

and after the discovery was conducted by the parties, both RI and RCH filed motions for summary judgment. The District Court granted summary judgment for both defendants. Despite Petitioner's "muddled, confusing and ineffectual" (App. D at 25a n.5) responses to the defendants' statements of uncontested material facts, the District Court deciphered and discerned "no genuine issues of material fact in dispute as to the essential elements . . ." (App. D at 26a). The District Court's judgment was clear that Petitioner not only failed to prove that RI and RCH maintain a parent-subsidiary relationship, but Petitioner admitted that the two entities are separate and distinct. The District Court's specific findings of fact include that RCH had only one employee (App. D at 16a, 21a); that RI exerted no control over RCH and its operations (App. D at 24a); that RI plays no role in the firing, hiring, training and/or supervision of RCH employees (App. D at 24a); that Una Martone (who reported Petitioner's Facebook post to RCH Directors) did not include any officer or director of RI on her communications to RCH (App. D at 16a); that RI and RCH share no common officers or directors (App. D at 25a); and that after receiving the Facebook post from Ms. Martone, RCH's Board of Directors convened a meeting and voted by a majority to terminate Petitioner's employment. (App. D at 16a). Therefore, based on Petitioner's own assertions and admissions, the District Court rejected Petitioner's claim that RI and RCH should effectively be merged for purposes of Title VII's definition of an employer and found that there is not a "single piece of evidence to support that claim" (App. D at 26a). The District Court, applying the single employer test established under *Nesbit*, concluded that RI and RCH "cannot be viewed as a single employer to meet Title VII's

numerosity requirement" and granted the motions for summary judgment. (App. D at 27a).

The Third Circuit upheld the District Court's summary judgment decision, as Petitioner was required to establish that RCH and RI were her employers as defined under Title VII, and Petitioner wholly failed to do so. Under Title VII, an "employer" is a "person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or proceeding calendar year, and any agent of such a person." 42 U.S.C. § 2000e(b). The Third Circuit held that Petitioner failed to show how RI is the parent corporation of RCH and Petitioner failed to advocate for a variation of the *Nesbit* test that would apply to voluntary membership organizations outside of the corporate context.

While Petitioner attempts to frame the issue as a request for this High Court to resolve the circuit split by determining the appropriate test for single-employer status under Title VII, her request in reality seeks something far more expansive. Petitioner is asking this Court to ignore the federal circuit tests and develop some different doctrine and a test that would find a single employer exists here. However, Petitioner fails to propose a test that the Court should adopt. At the most, she asserts the view that any degree of direction or influence from another entity is somehow pertinent. This application would abandon limitations long recognized by the circuit courts and expand Title VII liability beyond its long-established boundaries. Moreover, Petitioner failed to raise this issue below and failed to argue that the *Nesbit* test was the wrong test to apply.

REASONS FOR DENYING CERTIORARI

While the Court has discretion to determine whether certiorari will be granted, Supreme Court Rule 10 provides guidelines for making such a determination. These require compelling reasons. The following is not controlling nor fully measuring the Court's discretion, but provides the character of reasons which the Court has indicated that it considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Here, none of the above reasons exist for this Court to consider granting certiorari. Plaintiff has not argued that the Third Circuit's decision is in conflict with the decision of another United States Court of Appeal, this does not involve a state court decision, and the Third Circuit's decision is not a decision that conflicts with any relevant decision of this Court.

I. THE ISSUE OF WHICH PETITIONER SEEKS REVIEW WAS NOT RAISED BY PETITIONER IN THE COURTS BELOW

In the District Court and the Third Circuit Court of Appeals, all parties referenced *Nesbit* as the applicable test for determining whether two separate entities should be combined to be considered one employer for purposes of Title VII's numerosity requirement. No party, and certainly not the Petitioner, ever raised an issue about whether *Nesbit* was the wrong test to use or that another test should be used. Noteworthy is that The Third Circuit specifically acknowledged that Petitioner did not propose any standard different than *Nesbit.* (App. A at 8a-9a).

It is well established that this Court does not normally reach issues that were not raised or briefed below. *TRW, Inc. v. Andrews,* 534 U.S. 19, 34 (2001). "[T]he traditional rule . . . precludes a grant of certiorari when 'the question presented was not pressed or passed below." *United States v. Williams*, 504 U.S. 36, 41 (1992). This is certainly not an exceptional case that would warrant straying from this Court's longstanding practices. *Youakin v. Miller,* 425 U.S. 231. Petitioner does not argue that the wrong test was applied, what Circuit test should have been applied, nor that the application of a different Circuit's test would yield a different result.

II. THE THIRD CIRCUIT'S JUDGMENT DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *DUARTE*.

Petitioner asserts that certiorari should be granted because the Third Circuit's decision allegedly conflicts with this Court's decision in *Duarte*, which established "that both RI and the Duarte Rotary Club are business establishments subject to the provisions of the Unruh Act." *Duarte*, 481 U.S. at 542. However, Petitioner is misapplying this Court's decision in her application of the issue in this case.

In *Duarte*, the determination of what it means to be a "business" was for the purpose of California's *Unruh Act* only. *Id*. This Court specifically ruled, "for purposes of the [Unruh] Act, a "business" embraces everything about which one can be employed, and an "establishment" includes "not only a fixed location, . . . but also a permanent 'commercial force or organization' or a 'permanent settled position." *Id*. Even if both RI and the RCH are considered "businesses", they still remain separate and distinct legal entities, and *Duarte* does not suggest otherwise. Further, being considered a business under the *Unruh Act* does not equal employer status under Title VII, which is clear that 15 employees are required in order for Title VII to apply.

Therefore, the Third Circuit's decision does not at all conflict with this Court's decision in *Duarte*. Respondent never argued that RI or that RCH were not businesses under the *Unruh Act*, and it would not because the argument and issue in this matter is that they cannot be considered a single employer under Title VII.

III. REGARDLESS OF WHICH CIRCUIT COURT'S TEST IS USED, PETITIONER FAILS TO MEET THE NUMEROSITY REQUIREMENT OF TITLE VII.

This Court has set forth a four-factor test to determine whether separate entities constitute an integrated enterprise: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership. *Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Serv. of Mobile Inc.*, 380 U.S. 255 (1965). All circuits require one entity to posses control over another. Therefore, no matter which test is used, Petitioner's claims against Respondents fail because a parent-subsidiary relationship does not exist between RI and RCH, and there is no evidence of any indicia of control or involvement in RCH's operations, much less the employment and termination of Petitioner, by RI. Therefore, the Respondents are not a single employer.

In *Romano v. U-Haul Int'l*, the two entities involved were clearly an integrated enterprise because the international company owned the subsidiary entity located in Maine; the two entities shared directors; U-Haul International and the Maine entity shared employees; and U-Haul International set the human resource and personnel policies, wage scale, pay day, approved rehires, maintained duplicates of personnel records; among additional shared employer duties. *Romano v. U-Haul Int'l*, 233 F.3d 655, 667-68 (1st Cir. 2000). The integrated-enterprise test applied in *Romano*

is for all purposes the same as the *Nesbit* test used by the Third Circuit in this matter – in that two companies will be considered integrated when (1) their operations are interrelated; (2) they share a common management; (3) they have centralized control of labor relations; and (4) they share a common ownership. *Id.* at 662. Under the integrated enterprise test, Petitioner's assertion that there was a single employer fails because she has admitted that RI and RCH are two separate entities. Further, discovery established that RI and RCH do not share a common management, and do not have interrelated operations when it comes to employees, or centralized control over labor.

The Second, Fifth, Sixth, Eighth, and Ninth Circuits use a test similar to that applied in *Romano*. *See*, *Trevino v. Celanese Corp.*, 701 F.2d 397, 404 (5th Cir. App. 1983) *Swallows v. Barnes & Noble Book Stores*, 128 F.3d 990, 994 (6th Cir. App. 1997); *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 392 (8th Cir. App. 1977); *Childs v. Local 18, International Brotherhood of Electrical Workers*, 719 F.2d 1379, 1382 (9th Cir. 1983). The Second Circuit has held that two companies cannot be found to represent a single, integrated enterprise in the absence of these four factors: (1) operations are interrelated; (2) have centralized control of labor relations; (3) they share a common management; and (4) share a common ownership and financial control. *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1240 (2nd Cir. App. 1995). The Second Circuit noted that the Fifth, Sixth, and Eighth circuits use the same test and have focused on the second factor – centralized control of labor relations. *Id.* In *Cook*, ASI was a clearly owned subsidiary of KDT. KDT had a direct and hands-on approach in establishing the operating and management

practices of ADI. Applications for employment with ADI went through KDT; status reports were approved by KDT; and ASI had to clear all major employment decisions with KDT. Therefore, summary judgment to the effect that their number of employees could not be combined was not warranted in that case. *Id.* at 1241.

Here, RI does not have direct hands-on control in establishing RCH's operating and management practices; RCH's applications of employment are not shared much less approved with RI; RCH made its own employment decisions; Petitioner did not perform any work for RI; and RCH alone terminated Petitioner's employment.

While most Circuits focus on the second *Radio and Television Broadcast* factor, the Tenth Circuit focuses on the third factor – the entities must share a common management. *Sandoval v. Bounder Reg'l Communs. Ctr.*, 388 F.3d 1312, 1322 (10th Cir. 2004). In *Sandoval*, the Tenth Circuit ruled that the alleged parent company did not have influence over the general operations of the subsidiary and that there was no centralized control of the labor relations. *Id.* The Tenth Circuit has held that the most important aspect that shows control is who has the right to terminate and who has control over the terms and conditions of an employee's employment. *Id.* Therefore, in order to establish a single employer, a parent company must have the ability to control an employee's terms and conditions and have the right to terminate the employee. RI did not have control over Petitioner's employment and did not have a right to or determine her termination, only RCH did. RI knew absolutely nothing about Petitioner, her employment by RCH, or her termination until receipt of the EEOC's Charge of Discrimination. Therefore,

Petitioner fails to demonstrate that RCH and RI share common management.

The Eleventh Circuit puts emphasis on the element that a single employer is found when the entities are "highly integrated with respect to ownership and operations." *McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 933 (11th Cir. App. 1987).

The Third and Seventh Circuit focus on which entity actually made the alleged discriminatory employment decision. *Nesbit*, 347 F.3d at 84-85. Therefore, the Third and Seventh Circuit use the following test to determine a single employer: (1) where a company has split itself into entities with less than fifteen employees with the intent to evade Title VII's reach; (2) when a parent company has directed the subsidiary's discriminatory act of which the plaintiff is complaining; or (3) the Seventh Circuit's third factor is when a court would otherwise pierce the corporate veil. *Id.*

Here, the Third Circuit has already ruled that the *Nesbit* test is applied in terms of corporate companies and since Petitioner's reliance is on the second test, when a parent company has directed the subsidiary's discriminatory act of which she is complaining, a parent- subsidiary relationship is required. Petitioner has failed to show how RI and RCH share a parent-subsidiary relationship because she cannot, as she has admitted that the two are separate and distinct entities.

Therefore, Petitioner continues to fail to meet the Third and Seventh circuit tests for single employer.

The Fourth Circuit has determined that a parent company will be considered an employer of the subsidiary's worker under two scenarios. First, if a parent company hires and fires the subsidiary's employees, shifts the employees between the two companies, and supervises the employees' daily operations then the parent company practices control over the subsidiary's employment practices. *Johnson v. Flowers Industries, Inc.*, 814 F.2d 978, 981 (4th Cir. App. 1987). Second, the parent company may dominate the subsidiary's operations to make the two a single entity, creating a single employer.

Again, RI has shown and the Third Circuit agreed that Petitioner did not produce any evidence showing that RI is the parent corporation of RCH. Using the Fourth Circuit's test, the Third Circuit's decision would remain the same because RI does not and has never controlled RCH's employment practices and does not control any employees' daily operations.

Petitioner fails to show that RI and RCH maintain a parent-subsidiary relationship or are so integrated that they could be considered a single employer under Title VII. Petitioner agreed that RCH had only one employee when Petitioner was terminated and that RCH and RI were separate and distinct legal entities. There is not a shred of evidence that RI played or plays any roll whatsoever in hiring and firing decisions made by any local Rotary club, and certainly not RCH.

(App. at 24a, 25a). This fact exemplifies how there is no conflict among the Circuits regarding the combination of entities' employees to establish Title VII's numerosity requirement.

Petitioner also failed to show that RI exercised control over RCH's decision to terminate her. Rather, she argues that RI had in theory controlled RCH's decision through its Code of Conduct. However, the Code of Conduct refers to club *members.* The decision of whether to apply the Code of Conduct in making employment decisions was RCH's decision. At no point did RI require RCH to use the Code for employment decisions.

Regardless, Petitioner cannot overcome the District Court's conclusive finding that RI plays no role ". . . in the hiring, firing or training of employees – of RCH." (App. D at 24a). Given the uncontested and unrefuted facts, Petitioner did not, and cannot, demonstrate that RI and RCH, two separate legal non-profit entities, should be considered as a single employer for the purposes of Title VII's numerosity requirement.

CONCLUSION

For all the above reasons set forth above, the Petition for Certiorari should be denied.

Respectfully submitted,

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