No. 21-30694

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REBECCA DAVIS; RONNIE DAVIS,

Plaintiffs-Appellants

v.

PARISH OF CADDO, on behalf of CADDO PARISH COMMISSION,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL AND REMAND

CHRISTOPHER LAGE
Deputy General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel
ELIZABETH E. THERAN
Assistant General Counsel
JAMES M. TUCKER
Attorney
Equal Employment
Opportunity Commission
Office of the General Counsel
131 M Street NE, Fifth Floor
Washington, D.C. 20507
(202) 921-2554

KRISTEN CLARKE
Assistant Attorney General

TOVAH R. CALDERON
NATASHA N. BABAZADEH
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 598-1008

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

RULES:

MISCELLANEOUS:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-30694

REBECCA DAVIS; RONNIE DAVIS,

Plaintiffs-Appellants

v.

PARISH OF CADDO, on behalf of CADDO PARISH COMMISSION,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL AND REMAND

INTEREST OF THE UNITED STATES

The United States has a significant interest in the proper interpretation and application of Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits discrimination in employment. 42 U.S.C. 2000e *et seq.* The Attorney General and the Equal Employment Opportunity Commission (EEOC) share responsibility for enforcing Title VII. See 42 U.S.C. 2000e-5(a) and (f)(1).

At issue in this case is whether a particular worker's "employer" under Title VII may include more than one governmental entity. In enforcing Title VII, the Department of Justice has taken a fact-intensive approach to this question, relying at times on the joint employer and integrated enterprise (or single employer) theories. See, *e.g.*, U.S. Mem. of Law in Opp'n to State Defs.' Mot. to Dismiss the Intervenor Compl., or for Summ. J. at 22, *Savage* v. *Maryland*, No. 1:16-cv-00201-JFM (D. Md. Feb. 2, 2017) (arguing that dismissal is inappropriate because the joint employer theory applied to state defendants and required a fact-intensive inquiry); Compl. at 1-2, *United States* v. *Southeastern Okla. State Univ.*, No. 5:15-cv-00324-C (W.D. Okla. Mar. 30, 2015) (suing two governmental entities—a state university and a regional university system—and explaining that they constitute "a single employer" under Title VII); see also *Murphy-Taylor* v. *Hofmann*, 968 F. Supp. 2d 693, 725-727 (D. Md. 2013) (accepting United States' argument and finding applicable joint employer and integrated enterprise theories to determine employer status of sheriff, county, and state). The Department's approach is consistent with EEOC guidance addressing who is a covered "employer" under Title VII. See EEOC Compliance Manual on Threshold Issues § 2-III(B)(1)(a)(i) (May 12, 2000) (Compliance Manual), available at www.eeoc.gov/policy/docs/threshold.html.

The United States files this brief under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE

This case presents the following question:

Whether more than one governmental entity can qualify as a particular worker's "employer" under Title VII.[1]

STATEMENT OF THE CASE

1. Plaintiff Rebecca Davis previously worked as an office manager for the Caddo Parish Sewerage District No. 2.[2] ROA.7739. During Davis's time there, James Gavin, the former Chairman of the Sewerage District Board and Davis's supervisor, repeatedly harassed her. ROA.7739-7740. Gavin used sexually offensive terms, engaged in unsolicited sexual touching, invited Davis to a motel, stalked her, and requested that she perform his personal errands. ROA.7740. Davis reported Gavin's behavior to both the Sewerage District Board and the Parish, to no avail. ROA.7740. In response, Gavin retaliated against Davis by alleging that she performed poor work, by installing security cameras to monitor

[1] The United States takes no position on the merits of plaintiffs' discrimination claim or on any other issues presented in this appeal.

[2] The facts are taken from the district court's opinion, which relies on the Second Amended Complaint.

her at work, and by making false criminal complaints against her for theft and malfeasance. ROA.7740. The Sewerage District ultimately fired her. ROA.7740.

2. Davis and her husband Ronnie Davis filed suit against the Sewerage District, the Parish acting through the Caddo Parish Commission, former Sewerage District Board Chairman Gavin, and various other Board members. ROA.7740. Rebecca Davis asserted numerous federal and state claims against defendants, including sexual harassment and retaliation under Title VII. ROA.7740. Following mediation, the Sewerage District and the individually named Board members reached a settlement agreement with the Davises. ROA.7739. The Parish, the sole defendant left in the case, proceeded to summary judgment. See ROA.7739.

The district court granted the Parish's motion for summary judgment and denied the Davises' motion for partial summary judgment. ROA.7739. In relevant part, the court first discussed the relationship between the Parish, the Sewerage District, and the Commission. ROA.7742. It explained that the Parish, through its legislative body (the Commission), established the Sewerage District. ROA.7742. And, relying on the Louisiana Constitution, state revised statutes, and state court rulings, the court found that the Parish and the Sewerage District are legally distinct entities. ROA.7742-7745. The court then held that the Parish could not be held liable as Rebecca Davis's "employer" under Title VII because the Sewerage

District was Davis's direct employer and had control over Davis's conduct, including the right to hire, fire, supervise, and schedule her. ROA.7745-7746. The court explained that, under Title VII, "there are certain instances where a plaintiff may impose liability on an entity other than her direct employer, whose employees may also be counted to reach the fifteen-employee minimum." ROA.7746. The court mentioned the joint employer, integrated enterprise, and agency theories, but concluded that, as a matter of law, these theories do not apply to governmental subdivisions under this Court's precedent. See ROA.7746-7751.

The Davises filed a motion for reconsideration, arguing that the court failed to consider whether either Gavin or the Sewerage District was an agent of the Parish for purposes of Title VII liability. ROA.8462. The district court rejected both arguments, explaining that it already addressed them. ROA.8462. It also reiterated its view that this Court's precedent precludes applying an agency theory to multiple governmental entities in Title VII cases. ROA.8462.

3. The Davises timely appealed. ROA.8467.

SUMMARY OF ARGUMENT

As this Court has recognized, whether more than one entity can qualify as a particular worker's "employer" under Title VII is a question of fact that is analyzed using various tests. The district court erred in concluding, as a matter of law, that these tests never apply in Title VII cases brought against governmental entities.

This Court and other circuits have used various doctrines—including the joint employer, the integrated enterprise (or single employer), and agency theories—to determine whether more than one private entity can be held liable as an "employer" under Title VII. Most courts have also applied these theories or some variation of them in Title VII cases brought against public employers. This approach is consistent with Title VII's text, which does not distinguish between public and private employers, and which defines "employer" to include an "agent." See 42 U.S.C. 2000e(a)-(b). It also is consistent with EEOC guidance, which similarly does not distinguish between public and private employers in discussing who is covered as an "employer." See Compliance Manual § 2-III(B)(1)(a)(i). Regardless of the theory used, the inquiry always requires careful consideration of the totality of the circumstances to determine the nature of the employment relationship.

This Court should follow the lead of other circuits and expressly clarify that more than one governmental entity can qualify as a plaintiff's "employer" in a Title VII suit, and that a court can rely on the various theories in making that determination. First, and at a minimum, this Court should reaffirm its precedent applying the joint employer theory to public entities. Second, this Court should clarify that its precedent does not preclude applying the integrated enterprise theory to public entities. Even if the Court concludes that it is constrained to some

extent by its precedent or by federalism and comity concerns, it could adopt a variation of the integrated enterprise test, like that used by the Eleventh Circuit, to determine whether two governmental entities may be considered a single employer. And, third, contrary to the district court's conclusion, and consistent with Title VII's text, this Court can apply an agency theory to public entities; nothing in this Court's precedent holds otherwise. Finally, the Court should remand this case so that the district court can conduct the proper fact-intensive analysis.

ARGUMENT

THIS COURT SHOULD EXPRESSLY CLARIFY THAT, UNDER TITLE VII, A PLAINTIFF'S "EMPLOYER" CAN INCLUDE MORE THAN ONE GOVERNMENTAL ENTITY

A. Title VII Prohibits Discrimination By "Employers"

Title VII prohibits discriminatory employment practices by "an employer," an "employment agency," or a "labor organization." 42 U.S.C. 2000e-2(a)-(c). Unlike definitional provisions in some other civil rights statutes, see, *e.g.*, 29 U.S.C. 630(b) (Age Discrimination in Employment Act), Title VII does not distinguish between private and governmental employers. Instead, it defines "employer" 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 preceding calendar year, and any agent of such

person." 42 U.S.C. 2000e(b). And it defines "person" to include "individuals, governments, governmental agencies, [and] political subdivisions," in addition to private corporations, associations, and other organizations. 42 U.S.C. 2000e(a). The term "employer" under Title VII is "liberally construed." *Trevino* v. *Celanese Corp.*, 701 F.2d 397, 403 (5th Cir. 1983). Whether an entity qualifies as an employer "requires consideration of the totality of the employment relationship." *Peppers* v. *Cobb Cnty.*, 835 F.3d 1289, 1297 (11th Cir. 2016).

B. More Than One Governmental Entity Can Qualify As A Particular Worker's "Employer" Under Title VII

1. This Court has used various doctrines to determine whether more than one entity can be held liable as an individual plaintiff's "employer" under Title VII. These doctrines include the joint employer, integrated enterprise (or single employer), and agency theories.

First, this Court has long recognized that more than one private corporation can be liable when they are found to be joint employers of the plaintiff. "The term 'joint employer' refers to two or more employers that are unrelated or that are not sufficiently related to qualify as [a single employer], but that each exercise sufficient control of an individual to qualify as his employer." *Perry* v. *VHS San Antonio Partners, L.L.C.*, 990 F.3d 918, 928 (5th Cir.) (alteration omitted) (quoting Compliance Manual § 2-III(B)(1)(a)(iii)(b)), cert. denied, 142 S. Ct. 563 (2021). This Court applies a "hybrid economic realities/common law control test" to

determine whether an entity exercises enough control over an employee to qualify as his or her employer. *Id.* at 928-929 (quoting *Deal* v. *State Farm Cnty. Mut. Ins. Co.*, 5 F.3d 117, 118-119 (5th Cir. 1993)). "The right to control the employee's conduct is the most important component of determining a joint employer." *Id.* at 929. "When examining the control component, [this Court] focus[es] on the right to hire and fire, the right to supervise, and the right to set the employee's work schedule." *Ibid.* It further "focuses on who paid the employee's salary, withheld taxes, provided benefits, and set the terms and conditions of employment." *Ibid.*

Second, this Court has also held that "superficially distinct entities may be exposed to liability upon a finding that they represent a single, integrated enterprise: a single employer." *Trevino*, 701 F.2d at 404. In making that determination, this Court considers the following factors: "(1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control." *Ibid.* "The second factor, centralized control of labor relations, 'has been called the most important one,'" and often boils down to the question: "[Which] entity made the final decisions on employment matters regarding the person claiming discrimination?" *Perry*, 990 F.3d at 927 (quoting *Johnson* v. *Crown Enters., Inc.*, 398 F.3d 339, 343 (5th Cir. 2005)). But "no single factor is dispositive of the integrated-enterprise analysis." *Id.* at 928 (citing Compliance Manual § 2-III(B)(1)(a)(iii)(a)).

Third, as required by Title VII's text, this Court permits a finding of liability against more than one entity when one defendant is found to be an agent of the other. It has explained that for Title VII liability to attach, the second entity "must be an agent with respect to employment practices," (as opposed to other operations of the first entity). *Deal*, 5 F.3d at 119 (citing cases) (explaining that if one entity is "solely and independently responsible for all employment related decisions," it is not the agent of the other entity).

2. Congress intended that "Title VII principles be applied to governmental and private employers alike." *Dothard* v. *Rawlinson*, 433 U.S. 321, 332 n.14 (1977); see also *Moore* v. *City of San Jose*, 615 F.2d 1265, 1272-1273 (9th Cir. 1980); *Owens* v. *Rush*, 636 F.2d 283, 287 (10th Cir. 1980). Most courts, consistent with Congress's intent, have accordingly applied these theories of "employer" liability or some variation of them in Title VII cases brought against public employers. And regardless of which particular theories these courts use, their inquiries are always fact-dependent.

Many courts—for example, the Eighth, Tenth, and Eleventh Circuits—have relied on the joint employer and integrated enterprise tests to determine the employer status of multiple public entities in a Title VII case. See, *e.g.*, *Peppers*, 835 F.3d at 1299 (examining the totality of the circumstances to determine whether both the county and the district attorney's office could be held liable as joint

employers); *Sandoval* v. *City of Boulder*, 388 F.3d 1312, 1322-1323 (10th Cir. 2004) (applying the joint employer and integrated enterprise theories to determine whether a city and the city's regional communications center could constitute the plaintiff's "employer" under Title VII); *Artis* v. *Francis Howell N. Band Booster Ass'n*, 161 F.3d 1178, 1184 (8th Cir. 1998) (applying four-factor integrated enterprise test to consider whether a private association and a public school district could "be consolidated to meet the Title VII employee numerosity requirement"). And some courts—for example, the Third and Seventh Circuits—although not having occasion to apply the joint employer theory, have recognized that the theory applies to governmental entities. See *Whitaker* v. *Milwaukee Cnty.*, 772 F.3d 802, 810-812 (7th Cir. 2014) (assuming that joint employer theory applies to governmental subdivisions); *Graves* v. *Lowery*, 117 F.3d 723, 727-729 (3d Cir. 1997) (explaining that two governmental entities may share joint employer status under Title VII).

Consistent with Title VII's definition of "employer" as including "any agent of such person," and its definition of "person" as including governmental entities, courts like the Tenth and Eleventh Circuits have also applied (or assumed applicable) the agency theory in cases brought against public employers. See *Owens*, 636 F.2d at 287 (applying agency theory and concluding that, based on the facts, "an elected county sheriff is an agent of the county for all matters properly

committed to his discretion—including the hiring and firing of employees"); see also *Rogero* v. *Noone*, 704 F.2d 518, 521 (11th Cir. 1983) (assuming agency theory applies to multiple governmental entities but holding that both the agent and the employer must be named in the suit for liability to attach in Title VII case).[3]

And some courts—for example, the Sixth and Ninth Circuits—have articulated their own fact-intensive tests for determining when more than one governmental entity may be held liable as a particular worker's "employer" under Title VII. See, *e.g.*, *Christopher* v. *Stouder Mem'l Hosp.*, 936 F.2d 870, 875-877 (6th Cir.) (examining the facts and finding liability when a governmental entity interferes with a plaintiff's employment with another governmental entity), cert. denied, 502 U.S. 1013 (1991); *Association of Mexican-Am. Educators* v.

[3] Many district courts, including courts in the Second and Fourth Circuits as well as at least one within this circuit, have also applied the various theories to governmental entities. See, *e.g.*, *Satterwhite* v. *Ashtabula Cnty. Metroparks*, 514 F. Supp. 3d 1014, 1031-1034 (N.D. Ohio 2021) (applying integrated enterprise theory to the county and the county's metroparks to determine if they both constituted the employer in a Title VII action); *Murphy-Taylor* v. *Hofmann*, 968 F. Supp. 2d 693, 725-727 (D. Md. 2013) (finding applicable joint employer and integrated enterprise theories to county, in addition to the sheriff and state); *Patterson* v. *Yazoo City*, 847 F. Supp. 2d 924, 934-939 (S.D. Miss. 2012) (recognizing that this Court's precedent is unclear as to whether joint employer and integrated enterprise theories apply to governmental entities under Title VII, and, after finding no alternative test, applying those theories to conclude that multiple governmental entities could be held liable as plaintiff's employer under the Americans with Disabilities Act and Age Discrimination in Employment Act); *Vulcan Soc'y of Westchester Cnty.* v. *Fire Dep't of White Plains*, 82 F.R.D. 379, 395-396 (S.D.N.Y. 1979) (holding that a district fire commission was an agent of the city for Title VII purposes).

California, 231 F.3d 572, 581-583 (9th Cir. 2000) (same). The Eleventh Circuit, in particular, addressed concerns about comity and federalism in applying the integrated enterprise theory to governmental entities and articulated instead the following standard:

> [W]hen assessing whether multiple governmental entities are a single "employer" under Title VII, we begin with the presumption that governmental subdivisions denominated as separate and distinct under state law should not be aggregated for purposes of Title VII. That presumption may be rebutted by evidence establishing that a governmental entity was structured with the purpose of evading the reach of federal employment discrimination law. Absent an evasive purpose, the presumption against aggregating separate public entities will control the inquiry, unless it is clearly outweighed by factors manifestly indicating that the public entities are so closely interrelated with respect to control of the fundamental aspects of the employment relationship that they should be counted together under Title VII.

Lyes v. *City of Riviera Beach*, 166 F.3d 1332, 1345 (11th Cir. 1999).

In sum, although the law and the names of the theories may differ from circuit to circuit, the heart of the inquiry is always fact-intensive. Courts carefully consider the totality of the circumstances to determine the nature of the employment relationship under Title VII, including in public-employer cases. See, *e.g.*, *Peppers*, 835 F.3d at 1297.

3. This approach is consistent with EEOC guidance, which does not distinguish between public and private employers when explaining who is covered as an "employer" under Title VII. To the contrary: the guidance explains that "'[e]mployers' include private sector and state and local government entities."

Compliance Manual § 2-III(B)(1)(a)(i). The guidance embraces all three theories for determining whether more than one entity qualifies as an employer. Two entities can qualify when they constitute an "integrated enterprise"—that is when "the operations of two or more employers are considered so intertwined that they can be considered the single employer of the charging party." Compliance Manual § 2-III(B)(1)(a)(iii)(a). Two entities qualify as a "joint employer" when, although they are "not sufficiently related to qualify as an integrated enterprise," they each nevertheless "exercise sufficient control of an individual to qualify as his/her employer." Compliance Manual § 2-III(B)(1)(a)(iii)(b). Finally, for the agency theory, the guidance provides that "[a] covered entity is as liable for the actions of its agents as it would be for actions taken by itself." Compliance Manual § 2-III(B)(2)(a). Nothing in the guidance suggests that these theories should be limited to only the private-employer context.

C. The District Court Erred In Concluding That, As A Matter Of Law, A Plaintiff's "Employer" Under Title VII Could Never Include More Than One Governmental Entity

1. The district court misconstrued this Court's precedent in concluding that, as a matter of law, a Title VII plaintiff's "employer" cannot include more than one governmental entity.

In *Oden* v. *Oktibbeha County*, for example, this Court undertook an appropriate factual analysis to determine whether the two governmental entities

sued there—the sheriff in his official capacity and the county—could be joint employers under Title VII. 246 F.3d 458, 462, 465 (5th Cir.), cert. denied, 534 U.S. 948, and 534 U.S. 949 (2001). The *Oden* court looked to the relevant state laws and found that the sheriff was solely responsible for hiring, promoting, and establishing the deputies' wages. *Ibid.* And the court found that the county's only responsibility was to approve the sheriff's budget and allocate the necessary funds. *Ibid.* The court thus held that the county was not the plaintiff's employer. But its analysis assumed that, under the proper facts, it could have been. See *ibid.*

This assumption is reinforced by *Oden*'s uncritical citation of three cases in which courts stated or held that two governmental entities *can* be held liable as joint employers under Title VII. See *Oden*, 246 F.3d at 465 n.7. In the first case, *Ryals* v. *Mobile County Sheriff's Department*, the court applied the joint employer theory to determine whether the county, separate from the sheriff, could be treated as the plaintiff's employer. 839 F. Supp. 25, 26-27 (S.D. Ala. 1993). In the second case, *Spencer* v. *Byrd*, a district court held that "[u]nder Title VII, the County and the Sheriff were economically linked such that the County was an employer of Plaintiff." 899 F. Supp. 1439, 1441 (M.D.N.C. 1995). And in the third cited case, *Johnson* v. *Board of County Commissioners*, the district court held that the Board of County Commissioners had "necessary authority to fulfill its responsibility to these employees" and was thus an employer, in addition to the

sheriff, under Title VII. 859 F. Supp. 438, 442 (D. Colo. 1994), aff'd, 85 F.3d 489 (10th Cir.), cert. denied, 519 U.S. 1042 (1996).

The district court in this case failed to cite *Oden* and instead incorrectly relied on *Karagounis* v. *University of Texas Health Science Center at San Antonio*, 168 F.3d 485, 1999 WL 25015, at *2 (5th Cir.) (unpublished), cert. denied, 528 U.S. 986 (1999), to reject applying the joint employer theory to governmental subdivisions. ROA.7747-7748. To begin, *Karagounis* is an unpublished and non-precedential opinion, see 5th Cir. R. 47.5.4, that mischaracterizes this Court's precedent. The *Karagounis* court refused to apply the joint employer theory because it found that the theory was "very closely related" to the integrated enterprise theory, and that this Court's precedent precluded applying the integrated enterprise theory to governmental entities. *Karagounis*, 1999 WL 25015, at *2 (citing *Trevino*, 701 F.2d at 404 n.10, and *Dumas* v. *Town of Mount Vernon*, 612 F.2d 974, 979 n.9 (5th Cir. 1980)). But the theories are fundamentally different: an integrated enterprise treats two (or more) nominally separate entities as one, whereas the joint employer concerns two separate entities that *share* control over an employee. This Court explained those differences in a more recent case. See *Perry*, 990 F.3d at 928-929; see also pp. 8-9, *supra*. The joint employer theory requires applying a "hybrid economic realities/common law control test," *Perry*, 990 F.3d at 928-929, which the *Karagounis* court failed to do.

As for the integrated enterprise theory, the district court and *Karagounis* incorrectly relied on a single footnote in *Trevino*, a case involving a private employer, to support the view that this Court's precedent precludes applying that theory to governmental entities. The *Trevino* court applied the integrated enterprise theory to the private entities at issue in that case and explained that the record was insufficient to determine whether they were both the plaintiff's employer. *Trevino*, 701 F.2d at 404-405. In a footnote, the *Trevino* court distinguished *Dumas*, 612 F.2d at 979 n.9—which declined to apply the integrated enterprise theory in a public employer case—observing that the theory was "not readily applicable to governmental subdivisions." *Trevino*, 701 F.2d at 404 n.10; see *Dumas*, 612 F.2d at 980 n.9 (stating, without explanation, "[w]e decline to apply [the integrated enterprise] theory to hold that the Town and the state or county, or all three, are a 'single employer'"). But *Dumas* did not express a categorical rule that the integrated enterprise theory cannot apply to governmental subdivisions. Nor did it address at all the joint employer or agency theories for holding two entities liable.

Trevino's citation to *Owens* also undercuts the district court's view that two governmental entities both cannot be a plaintiff's employer under Title VII. *Trevino*, 701 F.2d at 404 n.10 (quoting *Owens*, 636 F.2d at 286 n.2). In *Owens*, the Tenth Circuit declined to apply the integrated enterprise standard, not because the

defendants were public entities, but rather because "[t]he sheriff and the county in this case [were] more analogous to a department and the corporation it operates within than to separate corporate entities." *Owens*, 636 F.2d at 286 n.2. The *Owens* court found more appropriate an agency theory of liability due to the factual circumstances surrounding the relationship between the two governmental entities. *Id.* at 286. The Tenth Circuit has also previously applied the joint employer and integrated enterprise theories to governmental entities. See *Sandoval*, 388 F.3d at 1322-1324.

The district court also overlooked *Turner* v. *Baylor Richardson Med. Ctr.*, where this Court later relied on *Trevino*'s articulation of the integrated enterprise doctrine to determine whether two separate governmental entities could be considered the plaintiff's employer. 476 F.3d 337, 344 (5th Cir. 2007) (rejecting plaintiff's argument that the Richardson Medical Center Foundation—a nonprofit Texas corporation—and the Richardson Hospital Authority—a governmental subunit of the State of Texas—were an integrated enterprise under Title VII). Only after *concluding* its analysis did this Court mention that "prior case law suggests that a government employer * * * may not be considered part of an integrated enterprise under the *Trevino* framework." *Ibid.*[4]

[4] The Court also has made this observation in an unpublished, non-precedential opinion. See *Garrett-Woodberry* v. *Mississippi Bd. of Pharmacy*, 300

(continued…)

Finally, relying on the above precedent, the district court incorrectly held that an agency theory of liability cannot apply to public entities, overlooking Title VII's plain text and rejecting the Tenth Circuit's analysis in *Owens*. It reasoned that "[t]he Fifth Circuit is clearly aware of the *Owens* case because it was cited in the *Trevino* opinion" and thus "declined to adopt the reasoning set forth in *Owens* when examining governmental entities." ROA.7750. But this Court in *Trevino* cited *Owens* in a footnote to discuss the integrated enterprise theory and governmental entities, not to determine whether an agency theory may apply. Again, *Owens* did not hold that the integrated enterprise theory does not apply to governmental entities, but only that an agency theory proved more appropriate based on the facts of that case.

2. This Court, though having already done so implicitly, should expressly clarify that more than one governmental entity can qualify as a plaintiff's "employer" under Title VII, and that it can rely on various theories in making that determination. First, and at a minimum, this Court should reaffirm based on *Oden* that the joint employer theory applies in public-employer cases. See pp. 15-16, *supra*. Second, this Court should make clear that its precedent does not preclude

---

(… continued)
F. App'x 289, 291 (5th Cir. 2008) (unpublished) ("Thus, it seems clear that the 'single employer' test should not be applied here, as the Board is a state agency and is thus a governmental subdivision."), cert. denied, 556 U.S. 1238 (2009).

application of the integrated enterprise theory to public employers. Despite some confusion in dicta in past opinions, including an unpublished decision, this Court has never squarely held that the integrated enterprise theory is inapplicable to public employers. On the contrary, and as already explained, the Court applied this theory in *Turner*, a public employer case. See pp. 18-19, *supra*. Even if the Court concludes that it is constrained by its precedent or by federalism and comity concerns, it could adopt a different test, as the Eleventh Circuit has done, for determining when two governmental entities may be considered a single employer. See p. 13, *supra*. Finally, contrary to the district court's conclusion, Title VII's plain text supports applying an agency theory to public employers and nothing in this Court's precedent holds otherwise.

Regardless of which tests are used, courts must conduct a fact-intensive analysis into the totality of the relationship between the governmental entities and the employee. The district court in this case failed to do that. It ended the inquiry after holding that the Parish was a separate legal entity from the Sewerage District and thus could not constitute Rebecca Davis's employer under Title VII. In doing so, the court effectively insulated from Title VII liability any governmental entity that is legally distinct from an employee's direct employer, regardless of facts supporting an employer-employee relationship. That holding cannot stand.

CONCLUSION

The United States respectfully urges this Court to clarify that more than one governmental entity can qualify as a plaintiff's "employer" in a Title VII suit and to reverse and remand this case so that the district court can conduct the proper fact-intensive analysis to determine whether both the Sewerage District and the Parish constitute Rebecca Davis's "employer" under Title VII.

Respectfully submitted,

CHRISTOPHER LAGE
Deputy General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel
ELIZABETH E. THERAN
Assistant General Counsel
JAMES M. TUCKER
Attorney
Equal Employment
Opportunity Commission
Office of the General Counsel
131 M Street NE, Fifth Floor
Washington, D.C. 20507
(202) 921-2554

KRISTEN CLARKE
Assistant Attorney General

s/ Natasha N. Babazadeh
TOVAH R. CALDERON
NATASHA N. BABAZADEH
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 598-1008

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Natasha N. Babazadeh
NATASHA N. BABAZADEH
Attorney

CERTIFICATE OF COMPLIANCE

This brief complies with the length limitation of Federal Rule of Appellate Procedure 29(a)(5) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 4632 words according to the word processing program used to prepare the brief.

This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2019 in Times New Roman 14-point font, a proportionally spaced typeface.

s/ Natasha N. Babazadeh
NATASHA N. BABAZADEH
Attorney

Date: January 25, 2022