No. 04-944

In The Supreme Court of the United States

JENIFER ARBAUGH,

Petitioner,

v.

Y & H CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Section 701(b) of Title VII of the 1964 Civil Rights Act limits the Title VII prohibition against employment discrimination to employers with fifteen or more employees. Does this provision limit the subject matter jurisdiction of the federal courts, or does it only raise an issue going to the merits of a Title VII claim?

PARTIES

The petitioner is Jenifer Arbaugh. The respondent is Y & H Corporation, doing business as The Moonlight Cafe.

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The August 2, 2004, decision of the Court of Appeals, which is reported at 380 F.3d 219 (5th Cir. 2004), is reprinted in the Appendix to the petition. (App. 1-22). The October 13, 2004, decision of the Court of Appeals, denying the petition for rehearing en banc, which is not officially reported, is reprinted in the Appendix to the petition. (App. 50-51). The April 3, 2003 decision of the District Court, 2003 WL 1797893 (E.D.La.), which is not officially reported, is reprinted in the Appendix to the petition. (App. 24-44). The December 27, 2002 order of the District Court, which is not officially reported, is reprinted in the Appendix to the petition. (App. 45-49).

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on August 2, 2004. A timely petition for rehearing en banc was denied on October 13, 2004. Certiorari was granted on May 16, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 701(b) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e(b), provides in pertinent part:

> The term "employer" means an employer 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 a person. . . .

Section 706(f)(3) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(f)(3), provides in pertinent part:

> Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title.

Section 1331 of 28 U.S.C. provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

STATEMENT OF THE CASE

In November 2001 petitioner Jenifer Arbaugh commenced this action in federal district court against her former employer, Y & H Corporation.[1] The plaintiff alleged that she had been sexually harassed, that a co-owner of the firm had assaulted her while at work, and these actions resulted in her constructive discharge.[2] Plaintiff sought relief under Title VII of the Civil Rights Act of 1964 and under Louisiana anti-discrimination[3] and tort law.[4]

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[1] Petitioner also sued one of the owners of the corporation for battery. The jury returned a verdict in favor of that defendant on that claim.

[2] At trial petitioner offered evidence that she had been subject to a series of sexually abusive remarks, which culminated in an incident in which one of the employer's owners reached under petitioner's dress and grabbed her genital area. Petitioner resigned after that last incident.

[3] La. Rev. Stat. §§ 23:301 *et seq*.

[4] La. Civil Code art. § 3215.

For more than a year of litigation the defendant[5] did not dispute either the applicability of Title VII or the subject matter jurisdiction of the court. Part I of the complaint asserted that federal jurisdiction existed under 28 U.S.C. §§ 1331 and 1367.[6] Defendant's answer stated that those jurisdictional allegations "are admitted."[7] Following the completion of pleading, the court entered a minute order noting that "[j]urisdiction and venue are established."[8] The court provided the parties with a detailed Pre-Trial Notice, which included an admonition to counsel to raise any possible problems regarding jurisdiction.[9] In August 2002 counsel for the parties signed a proposed Pre-Trial Order, later signed by the court, which stated that the court had jurisdiction over the federal and state claims under sections 1331 and 1367 respectively.[10]

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[5] Because the individual defendant is no longer a party to this litigation, we refer to the defendant in the singular.

[6] Complaint, p. 1 ("This Court is vested with jurisdiction over Plaintiff's federal claims pursuant to 28 U.S.C. § 1331 and is vested with supplemental jurisdiction over Plaintiff's state law claims pursuant to 28 U.S.C. § 1367.")

[7] Answer to Complaint, p. 1.

[8] Minute entry, January 28, 2002.

[9] Pre-Trial Notice, p. 2 ("At the [required pre-trial meeting of counsel], counsel **must** consider the following:

> A. **Jurisdiction**. Since jurisdiction may not ever be conferred by consent and since prescription or statutes of limitations may bar a new action if the case or any ancillary demand is dismissed for lack of jurisdiction, counsel should make reasonable effort to ascertain that the Court has jurisdiction.") (Emphasis in original).

[10] Pre-Trial Order, P. 2 ("The Court is vested with jurisdiction over Plaintiff's federal claims pursuant to 28 U.S.C. § 1331. The Court has supplemental jurisdiction over Plaintiff's state law claims pursuant to 28 U.S.C. § 1367.")

After a jury trial conducted before a Magistrate Judge,[11] the jury found that plaintiff had been sexually harassed and constructively discharged in violation of federal and state anti-discrimination law. The jury awarded her $5,000 in back pay, $5,000 in compensatory damages, and $30,000 in punitive damages. The trial court entered judgment for plaintiff on November 5, 2002.

Seventeen days following trial, on November 19, 2002, the defendant filed a post-trial Motion to Dismiss for Lack of Subject Matter Jurisdiction. Section 701(b) of Title VII defines an "employer" subject to Title VII title as an employer with fifteen or more employees during certain periods of time. The defendant contended that during the relevant time period it had fewer than fifteen employees. The defendant included with the post-verdict motion a detailed analysis of its payroll records, two affidavits, and 76 pages of payroll records.

Because the defendant had not raised this contention prior to or at trial, it would ordinarily have been waived. However, the defendant contended that the lack of the requisite fifteen or more employees did not go to the merits of the claim, but instead deprived the district court of subject matter jurisdiction over the Title VII claim. In its supporting Memorandum the defendant emphasized that "as this Court is well aware, subject matter jurisdiction can neither be waived nor created by consent and may be raised at any time."[12]

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[11] The proceedings in the district court had, with the consent of the parties, been referred to the Magistrate Judge.

[12] Memorandum in Support of Rule 12(h)(3) Motion to Dismiss for Lack of Subject Matter Jurisdiction, p. 1.

The Magistrate Judge held that the fifteen-employee requirement in section 701(b) is indeed jurisdictional, and that the defendant could therefore raise this objection at any time in the proceedings, including after entry of judgment. (App. 45-49). The Magistrate Judge commented:

> It is unfair and a waste of judicial resources to permit the defendan[t] to admit Arbaugh's allegations of jurisdiction, try the case for two days and then assert a lack of subject matter jurisdiction in response to an adverse jury verdict. The unfairness is compounded by the likelihood that Arbaugh's state law claims are prescribed. Unfortunately none of these considerations are sufficient to confer subject matter jurisdiction where it is lacking.

(App. 47).[13]

The court did not initially rule on the merits of the motion. Rather, "[i]n light of the factual issues raised by the parties," the court deferred any ruling pending discovery, and ordered that the parties then file additional memoranda. (App. 48). After reviewing the results of that discovery and briefing, the court ordered yet further discovery on certain specific issues, and directed the parties to file still more briefs. (App. 25). The discovery ultimately included two depositions, ten affidavits and a substantial number of documents, including payroll and tax records.

Finally, on April 4, 2003, five months after the original jury verdict and entry of final judgment, the Magistrate

[13] Under Louisiana law a cause of action outside the applicable period of limitations is characterized as prescribed.

Judge concluded that the defendant had fewer than fifteen employees. There were usually more than fifteen workers being paid by the defendant during the relevant time period.[14] But the district court concluded, after a detailed analysis of the disputed and undisputed facts, that a number of those workers were not "employees" within the meaning of Title VII. The court held that the drivers who delivered food for the restaurant, although working full time, were independent contractors rather than employees. (App. 32-37). It further reasoned that two part-time female employees who did advertising and promotional work, and who were married to the co-owners, were passive partners rather than employees. (App. 42-43). The district court vacated the jury verdict in favor of plaintiff, dismissed the federal claim for lack of subject matter jurisdiction, and dismissed the state law claims without prejudice. (App. 23).

On appeal the threshold question raised by the parties was whether the fifteen-employee requirement in section 701(b) limits the subject matter jurisdiction of the federal courts. In its opinion of August 2, 2004, the Fifth Circuit panel held that that employee-numerosity requirement is jurisdictional. (App. 5-9). The court of appeals affirmed as not clearly erroneous the district court's finding that the defendant in fact had fewer than fifteen employees. (App. 10-21).

Plaintiff filed a timely petition for rehearing en banc, asking the Fifth Circuit to reconsider the panel's holding

[14] Title VII requires that an employer have at least 15 workers during at least twenty weeks of the year. There were 12 admitted employees for more than the required twenty weeks. There were in addition approximately 8 full time drivers whose status was in dispute.

that the requirement of section 701(b) is jurisdictional. On October 13, 2004, the Fifth Circuit denied the petition for rehearing en banc. (App. 50). On May 16, 2005 this Court granted certiorari.

SUMMARY OF ARGUMENT

(1) Section 701(b) of Title VII defines the employers subject to the requirements of Title VII as those employers which have 15 or more employees during certain specified periods. Whether a defendant is an employer within the scope of Title VII is an element of the merits of a Title VII claim. Such merits issues, unlike jurisdictional issues, can be waived. In the instant case the defendant waived the employee-numerosity issue by failing to raise it until after trial.

The language of section 701(b) does not refer in any way to federal jurisdiction over Title VII claims, or contain any reference to the separate statutory provisions which create that jurisdiction. Rather, section 701(b) is merely one of thirteen definitions in section 701 of the terms used in the text of Title VII. The court below did not suggest that any of the other definitions in section 701 are jurisdictional.

Jurisdiction over Title VII is established, not by section 701(b), but by section 706(f)(3) and by 28 U.S.C. § 1331. Neither of those jurisdictional provisions contains any requirement that the defendant meet the section 701(b) definition of an employer; neither provision limits jurisdiction to actions against employers or any other type of defendant. Sections 706(f)(3) and 1331 demand only that the complaint assert that the plaintiff was injured by

a violation of Title VII. Section 701(b) does not modify section 706(f)(3) or repeal by implication section 1331.

When Congress has wanted to limit the scope of a statutory grant of jurisdiction, it has done so expressly, either by including that limitation in the jurisdictional provision itself, or by adopting a separate provision that refers expressly either to the jurisdictional provision or to jurisdiction. A statute should not be construed to affect the jurisdiction of the courts where, as here, that statute "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393-94 (1982).

(2) A jurisdictional requirement that turns on complex factual issues would impose serious burdens on the courts and federal claimants.

Administration of the employee-numerosity requirement requires precisely the sort of fact-bound inquiries that are inappropriate for a jurisdictional rule. Disputes about employee-numerosity require detailed factual information regarding one or more of several issues:

(a) The employer's payroll records for a two year period, including resolution of any disputes regarding the accuracy of those records.

(b) A determination of whether some workers were independent contractors rather than employees, a problem which the court below correctly observed requires "a fact-intensive inquiry." (App. 17).

(c) A resolution of whether some workers should be deemed owners rather than employees, applying the six part standard of *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003).

(d) A decision as to whether two or more related employers should be treated as a single entity.

Although the courts are obligated to raise jurisdictional issues sua sponte, they would be unable to do so regarding such a fact-bound jurisdictional rule unless one of the parties had already offered substantial relevant evidence. In the instant case the district court understandably had no idea there was a possible problem regarding the employee-numerosity requirement until the defendant raised that issue after trial. If the employee-numerosity requirement were jurisdictional, courts would also be obligated to reach that jurisdictional issue first, and to resolve all of the related factual questions, even though a simpler non-jurisdictional basis was available for resolution of the case.

If the employee-numerosity requirement were jurisdictional, a defendant could fail to raise this issue until after trial, as occurred in this case. The district court correctly observed that "[i]t is unfair and a waste of judicial resources to permit the defendan[t] to admit Arbaugh's allegations of jurisdiction, try the case for two days and then assert a lack of subject matter jurisdiction in response to an adverse jury verdict." (App. 47). In the instant case the defendant's delay in raising employee-numerosity may have been merely an oversight of counsel. But if the jury had returned a verdict for the defendant on all claims, counsel for defendant assuredly would not have come forward after trial to object to a lack of jurisdiction and suggest that petitioner's state claims be dismissed without prejudice.

ARGUMENT

I. INTRODUCTION

This is a case about the fundamental distinction between the merits of a claim and the subject matter jurisdiction of a federal court to decide that claim. In order to obtain relief, a plaintiff must prevail both with regard to the merits and concerning the existence of jurisdiction. But there are important practical and procedural differences between disputes related to the merits and questions regarding subject matter jurisdiction. "There is a gulf between defeat on the merits and a lack of jurisdiction." *Sharpe v. Jefferson Distributing Co.*, 148 F.3d 676, 677 (7th Cir. 1998).

Subject matter jurisdiction delineates the class of cases that the court "is competent to adjudicate." *Scarborough v. Principi*, 541 U.S. 401, 414 (2004). "[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court." *United States v. Cotton*, 535 U.S. 615, 630 (2002). A litigant which has a colorable basis for challenging subject matter jurisdiction can withhold that objection, try the case on the merits, and raise that jurisdictional objection only if and after it has lost on the merits. Even if no party questions the existence of jurisdiction, the court itself – including this Court – is required to raise on its own a possible lack of subject matter jurisdiction. *Johnson v. California*, 541 U.S. 428 (2004); *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908). Unlike a rejection on the merits of a federal claim, a holding that there is no jurisdiction over a federal claim requires dismissal without prejudice of any supplemental state-law claims, even if

those state claims have been fully tried and determined on the merits.

The existence of subject matter jurisdiction confers on the court authority to decide the case, not merely authority to decide the case favorably to the plaintiff. Neither the failure of a plaintiff to establish some element of his or her claim, nor the success of an affirmative defense, call into question the court's jurisdiction.

> [I]t is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.

Bell v. Hood, 327 U.S. 678, 682 (1946).

A court has subject matter jurisdiction over a federal claim, despite the ultimate failure on the merits of the asserted claim, except in the extreme case in which that claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Id*. at 682-83. The complaint in this case asserted a cause of action under Title VII of the 1964 Civil Rights Act; such an action falls easily within the district court's federal question jurisdiction. Respondent has never contended that the Title VII

claim in the instant case is so patently groundless as to provide no basis for federal jurisdiction.

The question here is whether Title VII itself contains a distinct type of jurisdictional limitation, stripping the federal courts of jurisdiction to hear certain complaints asserting Title VII claims. In a few instances Congress has chosen with regard to a particular type of federal claim to impose such a specific limitation on the subject-matter jurisdiction of the federal courts. (Prior to 1976, for example, federal question jurisdiction under section 1331 was limited to cases in which the amount in controversy exceeded $10,000). Section 701(b) of Title VII defines "employer" to mean an employer "who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year." The court below held that section 701(b) limits subject matter jurisdiction over Title VII actions to claims against those employers which in fact have the required fifteen employees.[15]

As we explain below, however, nothing in the language or purpose of Title VII remotely suggests that Congress intended the definition in section 701(b) to affect the subject matter jurisdiction of the federal courts. To the contrary, the employee-numerosity requirement of Title VII manifestly is merely one of several elements of the merits of a Title VII claim, not a restriction on the subject matter jurisdiction of the courts.

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[15] Similar questions have arisen regarding the employee-numerosity requirements of the Americans With Disabilities Act, the Age Discrimination in Employment Act, and the Family and Medical Leave Act. See Petition, p. 7 and nn.9, 10, and 11.

II. THE TEXT OF TITLE VII MAKES CLEAR THAT THE EMPLOYEE-NUMEROSITY REQUIREMENT IS NOT JURISDICTIONAL

The determination of whether the section 701(b) employee numerosity requirement is jurisdictional[16] necessarily begins with the language of Title VII itself. The inquiry ends there as well, because the statutory text is entirely clear. Section 701(b) has nothing to do with subject matter jurisdiction; it is simply one of thirteen definitions of the terms used in Title VII.

A. Section 706(f)(3) Of Title VII, Which Confers Jurisdiction Over Claims Arising Under That Title, Contains No Limitation Based On The Number Of A Defendant's Employees

Title VII contains express language governing the subject-matter jurisdiction of the federal courts. That jurisdictional provision, however, is not in section 701(b), but in section 706(f)(3).[17] "Each United States district court and each United States court of a place subject to the

[16] In this brief we use the terms jurisdiction and jurisdictional to refer to whether a particular claim is within the subject matter jurisdiction of the courts. In other contexts "jurisdiction" is used to refer (a) to in personam jurisdiction over a particular defendant, or (b) to legislative jurisdiction, whether a specific subject matter is within the authority of Congress to restrict or regulate. Jurisdiction, this Court has observed, "is a word of many, too many meanings." *Steel Company v. Citizens for A Better Environment*, 523 U.S. 83, 90 (1998) (*quoting United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C.Cir. 1996)).

[17] There is also a jurisdictional provision in section 709(d). *See* p. 21, *infra*.

jurisdiction of the United States shall have jurisdiction of actions brought under this title." 42 U.S.C. § 2000e-5(f)(3). The broad language of section 706(f) ("brought under") is similar to the inclusive language of section 1331 ("arising under.")[18] An action is "brought under" Title VII, and thus within the court's jurisdiction under section 706(f)(3), if the complaint *asserts* that Title VII forbade the action of the defendant and provides a cause of action for that violation. Whether or not the plaintiff ultimately succeeds in establishing those assertions is irrelevant to the court's jurisdiction. "Jurisdiction is authority to decide the case either way. Unsuccessful as well as successful suits may be brought." *The Fair v. Kohler Die & Specialty*, 228 U.S. 22, 25 (1913).

This Court construed a similarly phrased statute in *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998). A provision of the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11046(c), conferred on district courts "jurisdiction in actions *brought under* subsection (a) of this section." (Emphasis added).

[18] Section 706(f)(3) appears to have been included in Title VII because in 1964 claims under section 1331 were subject to a jurisdictional amount requirement that Congress did not want to apply to Title VII claims. Although there was then (as now) no jurisdictional amount requirement for civil rights claims under section 1343(4), Congress had emphatically based Title VII on its power under the Commerce Clause, and could have doubted whether claims under Commerce Clause legislation would be deemed civil rights legislation under section 1343(4).

In addition to "each United States district court" section 706(f)(3) also confers jurisdiction on "each United States court of a place subject to the jurisdiction of the United States." This was necessary because district courts for Guam and the Virgin Islands are not denoted United States district courts. *Guam v. Olsen*, 431 U.S. 195, 196 n.1 (1977).

The Court rejected the suggestion that there would be no jurisdiction under section 11046(c) if the conduct complained of did not actually violate section 11046(a). "It is unreasonable to read [subsection (c)] as making all the elements of the cause of action under subsection (a) jurisdictional." 523 U.S. at 90. "In referring to actions 'brought under' § 11046(a), § 11046(c) means suits *contending* that § 11046(a) contains a certain requirement." 523 U.S. at 93 (Emphasis in original).

In the instant case respondent objects that it had too few employees to be subject to the Title VII prohibition against sexual harassment. But even if the court or a jury, as appropriate, were to determine (for that or any other reason) that respondent had not violated Title VII, the underlying action – asserting that Title VII *had* been violated – would still be one "brought under" Title VII. In those instances in which this Court has determined that the alleged actions of the employer were not forbidden by Title VII at all, it has treated that decision as going to the merits of the case, rather than as a finding that the federal courts had never had jurisdiction over the cause of action in the first place. *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976); *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973). Whether the actions of a defendant actually violated federal law – unlike whether the complaint in an action can fairly be said to encompass an allegation that federal law was violated – goes to the very essence of the merits of a case.

B. The Definition Of "Employer" In Section 701(b) Does Not Limit Federal Subject Matter Jurisdiction

The court below understandably did not hold that the instant action was not "brought under" Title VII as required

by section 706(f)(3). It relied instead on section 701(b), which defines the "employer[s]" subject to the commands of Title VII. But nothing in section 701(b) purports to limit or affect the subject-matter jurisdiction conferred by section 706(f)(3). Far from in any way relating to jurisdiction, section 701(b) is merely one of thirteen definitions in section 701.[19] The court of appeals did not suggest that any of the other twelve definitions – such as the definitions of "employee" or "labor organization" – would also be jurisdictional in nature.

Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982), rejected a similar effort to import into the broad jurisdictional provision of section 706(f)(3) a limitation found instead in another provision of Title VII. In *Zipes*, the employer contended that section 706(e) of Title VII, which requires complaining parties to file a timely charge with EEOC, restricted the subject matter jurisdiction of the district courts. In rejecting that contention, this Court emphasized that the actual jurisdictional provision of Title VII, section 706(f)(3), is distinct from the other procedural and substantive provisions of the statute.

> The provision granting district courts jurisdiction under Title VII, [section 706(f)(3)], does not limit jurisdiction to those cases in which there has been a timely filing with the EEOC. It contains no reference to the timely-filing requirement. The provision specifying the time for filing charges with the EEOC appears as an entirely

[19] Section 701 also provides definitions of "person," "employment agency," "labor organization," employee, commerce, industry affecting commerce, state, religion, because of sex, complaining party, demonstrates, and respondent.

> separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.

455 U.S. at 393-94 (footnote omitted). Precisely the same is true of the relationship between section 706(f)(3) and 701(b). Section 706(f)(3) confers jurisdiction over all actions brought under Title VII; it contains no reference to the Title VII definition of an employer, and is not limited to cases in which the plaintiff successfully meets that or any other statutory requirement. Conversely, the definition of employer is in an entirely separate section, which "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." 455 U.S. at 394.

The decision of Congress to limit coverage of Title VII to entities with fifteen or more employees does not by any stretch of the imagination imply that Congress intended that the issue of *whether* an entity had fifteen or more employees should be treated as a matter of subject matter jurisdiction. Title VII contains eight other limitations on which entities are subject to Title VII in the treatment of their employees.[20] For example, a bona fide private membership club is not an employer within the section 701(b) definition; similarly, Title VII is expressly inapplicable to

[20] Section 701(b), 42 U.S.C. § 2000e(b), excludes from the definition of employer firms with fewer than 15 employees, federal agencies, corporations wholly owned by the United States, Indian tribes, certain agencies of the District of Columbia, and bona fide membership clubs. Section 702(a), 42 U.S.C. § 2000e-1(a), excludes employers insofar as they employ aliens outside the United States, and certain religious entities insofar as they have a preference for members of a particular religion. Section 702(c)(1), 42 U.S.C. § 2000e-1(c)(1), excludes from coverage by Title VII the foreign operations of a non-American employer not controlled by an American employer.

the employment of aliens outside the United States. The court below did not suggest that any of these restrictions on which employers are subject to Title VII affected subject matter jurisdiction. The employee-numerosity rule should not be treated differently from the other limitations on the coverage of employers.

Neither does the language of Title VII provide any Principled basis for treating the employee-numerosity requirement differently from any of the other restrictions on the scope and commands of the statute. Title VII, for example, only applies to "employees," a term limited both by its ordinary meaning and by the definition in section 701(f). The courts below assumed that definition of employer and employee are inextricably connected, reasoning that the determination of whether a defendant had fifteen employees should turn on whether particular workers are covered employees (rather than independent contractors or owners) within the meaning of the statute.[21] In the instant case, for example, the district court's finding that the defendant did not have the requisite fifteen employees

[21] There is some disagreement among the lower courts as to whether the only workers to be considered in determining employee-numerosity are individuals who are employees protected *by* Title VII. 2 B. Lindemann and P. Grossman, *Employment Discrimination Law*, p. 1307 nn.162-63 (1996). Because the purpose of the employee-numerosity requirement is to protect small firms from the cost of litigation, it might well make sense to include for purposes of section 701(b) independent contractors, partners, and other owner-workers who might not be protected employees, since the existence of those non-protected workers would clearly bear on the economic resources of the defendant. In the instant case, for example, the workers disregarded by the lower courts because they were not protected employees actually constituted about half of the defendant's entire workforce.

The Question Presented in this case does not, however, encompass this issue.

rested entirely on its holding that many of the workers paid by respondent were technically not employees within the meaning of Title VII. (App. 32-43). If the definition of employer is jurisdictional, it is difficult to see why that would not also be true of the definition of employee.[22]

Treating a statutory requirement as a limitation on the jurisdiction of the federal courts imposes on courts and litigants alike a number of significant and potentially harsh burdens; in the absence of clear language to the contrary, Congress can ordinarily be assumed not to have wished to create those problems.[23] In *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 91 (1998), this Court warned the courts to avoid "drive-by jurisdictional rulings." Similar caution should be exercised before construing the requirements of federal statutes as imposing limitations on the subject matter jurisdiction of the court.

When Congress has wanted to establish a specific limitation on the subject matter jurisdiction of the federal courts, it has deliberately used the term "jurisdiction" to make clear that such a limitation was being imposed. Congress has usually done so by including such limitations in the very provision which affirmatively grants the federal courts jurisdiction over the type of claim involved.[24]

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[22] In *Wheeler v. Hurdman*, 825 F.2d 257, 259 (10th Cir. 1987), the court of appeals held that whether a plaintiff was an employee within the meaning of Title VII was a jurisdictional issue.

[23] "[J]urisdiction-stripping rules must be expressed clearly." *United Phosphorous, Ltd v. Angus Chemical Co.*, 322 F.3d 942, 954 (7th Cir. 2003) (en banc) (Wood, J., dissenting).

[24] *See*, *e.g.*, 2 U.S.C. § 1408(a) ("The district courts . . . shall have jurisdiction over any civil action commenced under section 1404 of this title and this section by a covered employee who has completed counseling under section 1402 of this title and mediation under section

(Continued on following page)

In this manner Congress in a number of statutes has expressly limited federal jurisdiction to actions brought by certain plaintiffs,[25] or by plaintiffs who have exhausted administrative remedies[26] or engaged in mediation,[27] to actions in which the amount in controversy exceeds[28] or is smaller than[29] a given value, or to actions which have been filed within a specified period.[30] These statutes emphatically

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1403 of this title."); 5 U.S.C. § 8961 ("The district courts . . . have original jurisdiction . . . of a civil action or claim against the United States under this chapter after such administrative remedies as required under section 8953(d) have been exhausted."); 15 U.S.C. § 814 ("*provided*, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3000.") (Emphasis in original).

In a few instances Congress has limited the grant of jurisdiction by enacting a separate provision which expressly refers to or restricts application of the jurisdictional provision. *See*, *e.g.*, *Weinberger v. Salfi*, 422 U.S. 749, 756-61 (1975).

[25] *E.g.*, 15 U.S.C. § 1339 (action brought by the Attorney General), 470ff(c) (action by the United States), 49 U.S.C. § 24301(m)(2) (actions by Amtrak).

[26] 5 U.S.C. §§ 8961, 8991, 9007.

[27] 2 U.S.C. § 1408(a).

[28] *E.g.*, 15 U.S.C. § 814 (jurisdiction over certain condemnation proceedings limited to cases in which the amount claimed exceeds $3000); 28 U.S.C. § 1332 (diversity jurisdiction limited to cases in which the amount in controversy exceeds $75,000).

[29] 22 U.S.C. § 6713(1), 28 U.S.C. § 1346(a)(2).

[30] *E.g.*, 7 U.S.C. §§ 808c(15)(B), 2111(b), 2713(b), 3409, 4313(b), 4509(b), 4609(b), 4814(b)(1), 4909(b), 6008(b)(1), 6106(b)(1), 6202(b)(1), 6306(b)(1), 6410(b)(1), 7106(b)(1), 7418(b)(1), 7447(b)(1), 7467(b)(1), 7486(b)(1).

For examples of other limitations on statutory grants of jurisdiction, *see* 21 U.S.C. § 332(a) (no jurisdiction over certain claims), 28 U.S.C. § 1330(a) (no jurisdiction if sovereign immunity exists), 28 U.S.C. §§ 1333 (jurisdiction if prize ship is in the United States), 1338(b) (jurisdiction over unfair competition claim only if related to a patent claim), 1340 (no jurisdiction if claim is within the jurisdiction of

(Continued on following page)

demonstrate – if indeed such demonstration were needed – that Congress understands that "jurisdiction" is the term of art to be used when limiting the types of cases which a federal court is authorized to hear.[31] No such reference to the jurisdiction of the federal courts is to be found in section 701(b).

That omission is all the more telling because elsewhere in Title VII Congress did impose express limitations on federal jurisdiction in a particular type of case. Section 709 requires employers, employment agencies and labor organizations to maintain and provide to the EEOC certain specified records. Under section 709(d) the EEOC or the Attorney General may bring an action to compel compliance with section 709. But section 709(d) is written in such a manner that two limitations on such actions – the district in which they can be brought (usually a matter of venue) and the plaintiffs which can bring them (ordinarily a matter of prudential standing) – are expressly part of the jurisdictional grant.

> If any person required to comply with the provision of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

42 U.S.C. § 2000e-8(d).

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the Court of International Trade), 1347 (jurisdiction if United States is a tenant), 1350 (jurisdiction only over tort claims).

[31] *See Shendock v. Director, Office of Workers' Compensation Programs*, 893 F.2d 1458, 1462-64 (3d Cir. 1990).

The specific issue in the instant case is whether jurisdiction to hear Title VII claims is limited to actions against particular defendants, those with the requisite fifteen or more employees. The grant of jurisdiction in section 706(f)(3), of course, contains no defendant-specific restriction. But in other statutes Congress has expressly confined the creation of federal jurisdiction to actions against particular defendants. A large number of federal statutes establish jurisdiction if the defendant is the United States;[32] other provisions create jurisdiction over claims against a variety of specified officials,[33] certain private individuals or entities,[34] and particular agencies.[35] Jurisdiction under the Uniformed Services Employment and Reemployment Rights Act is expressly limited to

[32] *E.g.*, 5 U.S.C. §§ 8715, 8912, 8961, 8991.

[33] 25 U.S.C. §§ 450m-1(a) (certain cabinet secretaries), 715(d)(9)(A) (Secretary of the Interior); 28 U.S.C. § 1351 (consular officials); 42 U.S.C. § 4072 (Director of Federal Emergency Management Agency); 49 U.S.C. § 49110 (officials of the Washington Airports Authority).

[34] *E.g.*, 15 U.S.C. § 2707(g) (persons subject to orders of the Egg Board); 28 U.S.C. §§ 1348 (national banking associations), 1364(a) (insurers of foreign consular officials).

[35] *E.g.*, 7 U.S.C. §§ 1506(d) (Federal Crop Insurance Corporation), 2106(g)(6) (Cotton Assessment Board), 3405(g) (Wheat Board); 15 U.S.C. § 714b(c) (Commodity Credit Corporation); 16 U.S.C. § 450ss-4(f) (Oklahoma City National Memorial Trust); 22 U.S.C. §§ 282f (International Finance Corporation), 283f (Inter-American Development Bank), 283gg (Inter-American Investment Corp.), 284f (International Development Association), 285f (Asian Development Bank), 286g (International Monetary Fund), 290g-6 (African Development Fund), 290i-7 (African Development Bank), 290k-9 (Multilateral Investment Guarantee Agency), 2901-5(a) (European Bank for Reconstruction and Development), 290m(g) (North American Development Bank), 290o-5(a) (Middle East Development Bank); 28 U.S.C. § 1330(a) (a foreign state); 39 U.S.C. § 409(a) (Postal Service).

"employers" and "States" as employers,[36] both terms having specific statutory definitions.[37] In these cases the failure of a plaintiff to name the requisite type of entity as a defendant would (at least presumptively) be a jurisdictional defect. But Congress included no such defendant-specific restriction in section 706(f)(3).

Federal jurisdiction over Title VII claims is established not only by section 706(f)(3), but also by the general grant of federal question jurisdiction under 28 U.S.C. § 1331. A case such as this clearly "arises under" federal law within the meaning of section 1331, since the complaint asserts that federal law, specifically Title VII, creates both the prohibition allegedly violated and the cause of action to enforce that prohibition. Title VII did not repeal in this respect the broad grant of jurisdiction in section 1331.[38] The express jurisdictional provision in section 706(f)(3) is entirely consistent with section 1331. The non-jurisdictional terms of section 701(b) cannot be relied on to modify the plain language of section 1331;

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[36] 38 U.S.C. §§ 4323(b)(1) ("In the case of an action against a State (as an employer) or a private employer commenced by the United States, the district courts of the United States shall have jurisdiction over the action"), 4323(b)(3) ("In the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action.") (2005 Supp.).

[37] 38 U.S.C. §§ 4303(4) (definition of employer), 14 (definition of a state). The statutory grant of jurisdiction would not encompass an action against the federal government or a foreign government, or against a private entity all of whose workers were independent contractors.

[38] This case provides no occasion to address whether the far more specific terms of section 709(d) may have limited the grant of jurisdiction in section 1331.

repeals by implication are not favored. *Cook County, Ill. v. U.S. ex rel. Chandler*, 538 U.S. 119, 132 (2003).

Treating the employee numerosity-requirement as jurisdictional would raise problems under the 1991 Civil Right Act, which established a right to jury trials in any Title VII case in which a plaintiff (as in this case) sought compensatory or punitive damages for intentional discrimination. 42 U.S.C. § 1981a(c)(1). The 1991 Act did not merely incorporate the Seventh Amendment right to jury trial, but expressly created a statutory right whose scope is not necessarily limited by the constitutional right to a jury trial. It is unclear how factual questions raised by the application of any jurisdictional requirement could be resolved in light of that jury trial right.[39] Referring to a judge factual disputes regarding the employee-numerosity requirement would derogate the statutory right to a jury trial in a manner Congress is unlikely to have foreseen or intended. On the other hand, if because of section 1981a(c)(1) a jury's resolution of those factual issues *were* needed to resolve the jurisdiction of the court, the court would be required either to empanel at the outset of the case a special jury for the sole purpose of resolving those jurisdictional issues, or to postpone resolving that jurisdictional issue until after the trial on the merits. Factual issues regarding whether a particular plaintiff is a Title

[39] The appropriate role of juries in determining factual issues related to jurisdiction is unsettled. *See* C. Wright and M. Kane, *Law of Federal Courts*, pp. 164-65 and n.12, 198-99 and n.7, 483 and n.26 (6th ed. 2002); *Gilbert v. David*, 235 U.S. 561, 568 (1915); *Note, Trial By Jury of Jurisdictional Facts in Federal Courts*, 48 Iowa L. Rev. 471 (1963); Comment, "The Right to A Jury Trial For Jurisdictional Issues", 6 Cardozo L. Rev. 149 (1984); S DiTrolio, "Undermining and Unintwining: The Right to A Jury Trial and Rule 12(b)(1)", 33 Seton Hall L. Rev. 1247 (2003).

VII employee, and thus protected by the statute, are clearly matters for determination by a jury; it would be incongruous if the identical factual issues were instead to be resolved by a judge because they affected how many employees the defendant employed. A constitutional problem would arise if a defendant asserted both that a category of workers that included the plaintiff were not employees protected by Title VII, and that – excluding those workers – the employer did not have the requisite fifteen employees. If that contention rested on disputed issues of fact, judicial determination of those facts would impermissibly preclude a jury determination of those issues. *See Beacon Theaters v. Westover*, 359 U.S. 500 (1959). Treating the employee-numerosity requirement as non-jurisdictional avoids all of these problems.[40]

If the employee-numerosity requirement in section 701(b) itself imposes a limitation on subject matter jurisdiction, that limitation (like the substantive requirement itself) would be applicable to Title VII claims brought in state as well as federal court. Plaintiffs with Title VII claims may opt to proceed in state court if they think that forum more advantageous;[41] Title VII suits are authorized

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[40] *Morrison v. Amway Corp.*, 323 F.3d 920 (11th Cir. 2003) (because FMLA employee-numerosity requirement is not jurisdictional, district court erred in deciding disputed facts rather than permitting jury to do so); *Garcia v. Copenhaver, Bell & Associates*, 104 F.3d 1256 (11th Cir. 1997) (because ADEA employee-numerosity requirement is not jurisdictional, district court erred in deciding disputed facts rather than permitting jury to do so); *Martin v. United Way of Erie County*, 829 F.2d 445, 451 (3d Cir. 1987) (because Title VII employee-numerosity requirement is not jurisdictional, district court erred in deciding disputed facts rather than permitting jury to do so).

[41] *See*, *e.g.*, *Alcorn v. City of Baton Rouge*, 898 So. 2d 385 (La. App. 1 Cir. 2004) (Title VII claim); *Taylor v. L.S.U. Medical Center*, 892 So. 2d 581 (La. App. 2d Cir. 2004) (Title VII claim).

in state courts because of "the presumption of concurrent jurisdiction that lies at the core of our federal system." *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820, 826 (1990). If, however, the section 701(b) employee-numerosity requirement were jurisdictional, state courts hearing Title VII claims would themselves have to follow in this regard the often wasteful and burdensome procedures applicable to federal jurisdictional rules. Those state courts, for example, would be obligated to disregard state procedural rules regarding deadlines for and waivers of objections to the allegations of a complaint. It is exceedingly unlikely that Congress intended to interfere in this manner with the internal operations of state courts, and equally unlikely that Congress would have wanted to impose on federal courts procedural burdens from which state courts had been spared.

III. TREATING THE EMPLOYEE-NUMEROSITY REQUIREMENT AS JURISDICTIONAL WOULD BE INCONSISTENT WITH THE EFFECTIVE ADMINISTRATION OF TITLE VII

When Congress has imposed limitations on subject matter jurisdiction, it generally has utilized restrictions unlikely to raise factual issues; the most common such limitations appear to be actions brought within a specified period of time and to actions commenced by the United States. This Court has avoided factual disputes about jurisdictional amount requirements, such as the $75,000 requirement for diversity cases, by insisting that jurisdiction can be defeated only by showing that it is a legal certainty that the plaintiff cannot recover that amount. *Mt. Healthy City School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 276 (1977). Litigation regarding whether an employer has a particular number of employees, on the other hand,

frequently turns on the results of a complex and detailed factual inquiry. Judicial administration of such an unusual fact-bound jurisdictional requirement would interfere with the efficient administration of the law to a degree that Congress is unlikely to have intended.

A. Litigation Of The Employee-Numerosity Requirements Frequently Turns On Complex Factual Determinations

Litigation under Title VII and other statutes with employee-numerosity requirements frequently gives rise to detailed discovery and fact-finding, driven by several complex sets of applicable legal standards.

Section 701(b) on its face requires a review of employment records for two entire calendar years, both the year in which the discrimination allegedly occurred and the prior year.[42] This Court's decision in *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202 (1997), although somewhat simplifying that process, nonetheless requires access to and a review of an employer's payroll records. Neither the plaintiff prior to filing suit and taking discovery, nor the court required to assure itself of subject matter jurisdiction, would ordinarily have such information.

[42] There will, of course, be instances in which there could be no serious dispute that the employer did not have the requisite fifteen employees, such as an employer which had never had that many workers at any time during the relevant two year period. Such easy cases, however, are unlikely ever to reach court. The EEOC regulations require a charging party to state the number of employees who worked for the employer. 29 C.F.R. § 1601.12(a)(4). The model Charge Questionnaire issued by the Commission asks the charging party to state the "approx[imate] no. employed by this employer." EEOC Form 283, Charge Questionnaire (12/93).

Even after discovery, factual disputes could exist regarding the number of employees working in the years in question.[43]

Actual litigation regarding section 701(b) usually turns on additional, even more complex factual issues. Frequently a defendant contends that some of its workers are not "employees" within the meaning of Title VII, but instead only independent contractors.[44] That was one of the central issues in the lower courts in this case.[45] In determining whether a worker is an employee or an independent contractor, the Fifth Circuit applies a legal standard that encompasses *nineteen* different factual factors.[46] In *Nationwide Mutual Insurance Co. v. Darden*,

[43] *E.g.*, *Burdett v. Abrasive Engineering & Technology, Inc.*, 989 F.Supp. 1107, 110-12 (D.Kan. 1997) (summary judgment denied because of the existence of questions of fact regarding the accuracy of the employer's records); *Guadagno v. Wallack Ader Levithan Assoc.*, 932 F.Supp. 94, 96-98 (S.D.N.Y. 1996) (same).

[44] The lower courts are in disagreement regarding whether, or when, unpaid volunteers should count as employees. 2 B. Lindeman and P. Grossman, *Employment Discrimination Law*, p. 1306 n.161 (1996).

[45] App. 10-18, 32-38.

[46] The Fifth Circuit considers 8 factors bearing on "the extent of the employer's right to control the 'means and manner' of the workers' performance" (App. 12):

> The factors pertinent to this inquiry include:
>
> (1) ownership of the equipment necessary to perform the job; (2) responsibility for costs associated with operating that equipment and for license fees and taxes; (3) responsibility for obtaining insurance; (4) responsibility for maintenance and operating supplies; (5) ability to influence profits; (6) length of job commitment; (7) form of payment; and (8) directions on schedules and on performing work.

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503 U.S. 318, 323-24 (1992), this Court announced a fourteen part test for determining who is an "employee" under ERISA. *See* 503 U.S. at 324 (noting Revenue Ruling identifying twenty factors for deciding whether an individual is an employee in certain tax law contexts). Whatever the precise standard, the court below was assuredly correct in observing that "determining whether an individual is an 'employee' for Title VII purposes is a fact-intensive inquiry," one in which ordinarily "there are facts pointing in both directions." (App. 17).

Whether an employer has the requisite fifteen employees may also turn, as it did in the instant case,[47] on whether some of the individuals who performed services and received payment should be considered as the employer itself, rather than as employees. That question arises in a wide variety of factual and legal settings. In *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538

(App. 12). That circuit also evaluates 11 other "additional factors":

> "(1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; i.e., by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer;" (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.

(App. 16) (*quoting Broussard v. L.J. Bossier, Inc.*, 789 F.2d 1158, 1160 (5th Cir. 1986)).

[47] App. 18-21, 38-44.

U.S. 440, 450 (2003), this Court identified six specific factors that bear on that determination,[48] and added that the list was not exhaustive[49] and that the answer depends on "all of the incidents of the relationship . . . with no one factor being decisive." 538 U.S. at 451 (*quoting Darden*, 503 U.S. at 324).

The application of Title VII may also be governed by whether an employer with less than fifteen employees is so inter-related with another employer that they should be treated as a single entity, and the number of their employees aggregated. This issue arises with regard to multiple small offices (e.g., travel agencies, funeral homes) and with regard to a smaller entity affiliated with a larger employer (e.g., a local union and the international union with which it is connected.)[50] The EEOC has proposed a

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[48] 538 U.S. at 449-450:

> "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."

(*quoting* EEOC Compliance Manual § 605.0009).

[49] 538 U.S. at 450 n.10.

[50] For examples of such cases, *see* 150 A.L.R. Fed. 441 (Propriety of Treating Separate Entities As One For Determining Number of Employees Required by Title VII of Civil Rights Act of 1964).

fourteen part test for determining whether such an arrangement constitutes an integrated enterprise.[51]

The resolution of such issues will normally require, at the least, considerable discovery. In the instant case five months of discovery, analysis and briefing were required before the district court could reach a decision.[52] In *Doe v. Goldstein's Deli*, 82 Fed. Appx. 773 (3d Cir. 2003), litigation over the employee-numerosity issue involved extensive discovery and briefing and a four day evidentiary hearing with fourteen witnesses. 82 Fed. Appx. at 774. In a number of cases, motions to dismiss Title VII claims for lack of employee-numerosity have taken more than a year to resolve.[53]

B. Treating The Employee-Numerosity Requirement As Jurisdictional Would Interfere With The Efficient Administration Of Title VII

Treating the fact-bound employee-numerosity requirement as jurisdictional would impose undue burdens on both federal courts and Title VII claimants.

If the employee-numerosity requirement limits the subject matter jurisdiction of the court, the court itself

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[51] EEOC Compliance Manual, part 2-III(B)(a)(iii)(a). This part of the Compliance Manual is available at http://eeoc/gov/policy/docs/threshold.html.

[52] The motion to dismiss was filed on November 19, 2002, and decided on April 4, 2003.

[53] *Da Silva v. Kinsho International Corp.*, 210 F.Supp. 241, 242 (S.D.N.Y. 2000) (motion filed February 17, 1998; motion granted January 4, 2000); *Scarfo v. Ginsberg*, 175 F.3d 957, 959-60 (11th Cir. 1999) (motion filed January 23, 1995; motion granted June 17, 1997).

would be obligated to inquire into that issue to assure that it had jurisdiction. But in cases in which the requisite fifteen employees might be lacking, courts would rarely have available the detailed information needed to ascertain whether that requirement was met, or even that a problem might exist. Absent a motion by the defendant, a federal judge would ordinarily know little if anything about the approximate number of employees who worked for a defendant, and could not identify those cases in which section 701(b) might not be satisfied.

> Such a holding would require a federal court to determine whether a company had fifteen employees during the relevant period, even if the parties so stipulated. To require a federal court to engage in such a fact-intensive inquiry *sua sponte* – which might in some cases require a federal appellate court to dig through an extensive record, including pay stubs and time sheets – appears to be a waste of scarce judicial resources. . . .

Nesbit v. Gears Unlimited, Inc., 347 F.3d 72, 83 (3d Cir. 2003), *cert. denied*, 541 U.S. 959 (2004).[54]

Similarly, if the employee-numerosity requirement were indeed jurisdictional, courts would be obligated to address first this often factually complex issue, even though other, less difficult grounds for a decision on the merits might be evident.

> To hold the requirement jurisdictional also implies that a court would need to decide whether

[54] *Sharpe v. Jefferson Distributing Co.*, 148 F.3d 676, 677 (7th Cir. 1998) ("Surely the number of employees is not the sort of question a court (including appellate court) must raise on its own, which a 'jurisdictional' characterization would entail.").

> an entity employed more than fifteen individuals before reaching a Title VII action's merits – even if the merits were more easily resolved than the "jurisdictional" question.

Nesbit v. Gears Unlimited, Inc., 347 F.3d at 83. The detailed discovery and complex legal and factual issues involved in the instant case regarding the employee-numerosity requirement assuredly consumed far more litigant and judicial resources than would at least usually be needed to determine, for example, whether an administrative charge had been filed within the applicable deadline following the alleged discriminatory act.

Were the employee-numerosity requirement jurisdictional, the courts would be obligated, once it was raised, to resolve that jurisdictional issue before proceeding further with the case. The litigation would in effect be bifurcated, with discovery, motions and a hearing (if appropriate) regarding employee-numerosity first, followed (if the requisite fifteen employees were present) by a separate round of discovery, motions and trial on the merits. The inevitable delays that would occur by proceeding in that awkward manner would be inconsistent with the statutory direction that Title VII actions "be in every way expedited." 42 U.S.C. § 2000e-5(f)(5).

The employee-numerosity requirement, if jurisdictional, could be raised at any time, including after the merits of the Title VII claim have been tried to judgment. That is precisely what occurred in the instant case. The district court correctly observed that "It is unfair and a waste of judicial resources to permit the defendan[t] to admit Arbaugh's allegations of jurisdiction, try the case for two days and then assert a lack of subject matter jurisdiction in response to an adverse jury verdict." (App. 47). In

the instant case the delay in raising the employee-numerosity issue may have been merely an oversight of counsel. But if the jury had returned a verdict for the defendant on all the claims, counsel for defendant assuredly would not have come forward after trial to object to a lack of jurisdiction and suggest a dismissal of the state claims without prejudice.[55] There are, moreover, some circumstances in which a defendant might conclude it was tactically desirable to postpone raising a non-waivable jurisdictional issue until after trial.[56]

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[55] In *Da Silva v. Kinsho Intern. Corp.*, 229 F.3d 353, 360 (2d Cir. 2000), the defendant prior to trial moved to dismiss, urging that the employee-numerosity requirement was jurisdictional. On the day of trial, the court concluded that the requisite fifteen employees were not present, but permitted the supplemental state law claim to proceed to trial. The jury found for the defendant on that state law claim. On appeal, the defendant reversed its earlier position and argued that the employee-numerosity requirement was *not* jurisdictional, in order to preserve the victory it had won at trial on the merits of that state law claim.

[56] *See*, *e.g.*, *Westphal v. Catch Ball Products Corp.*, 953 F.Supp. 475, 477 (S.D.N.Y. 1997) (motion to dismiss for lack of jurisdiction based on number of employees filed during trial).

Federal Title VII claimants frequently raise supplemental state law claims; many of those claims provide remedies at least as desirable as Title VII and most are not subject to a fifteen-employee requirement. If such a case were dismissed in federal court because of the absence of the requisite fifteen employees, the plaintiff (relying on the tolling provision in 28 U.S.C. § 1367(d)) could simply refile the case in state court. Thus asserting this issue at the outset of the litigation may achieve little other than a change of forum. By delaying raising a jurisdictional issue until after trial, a defendant would get two bites of the apple. It could first seek to win a decision on the merits of both the federal and state claims; if, however, the jury returned a verdict for the plaintiff, the defendant could then raise a jurisdictional issue, force dismissal of the entire federal proceeding, and (if the plaintiff had the resources to start all over in state court) have a second opportunity in state court to try the merits of the controversy.

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It is important that a plaintiff be able to assess prior to filing suit whether his or her claim might face a serious jurisdictional problem in federal court. Many potential federal plaintiffs have viable state claims over which the state courts themselves would clearly have jurisdiction. If serious jurisdictional problems were likely in federal court, a plaintiff might well prefer to initiate his or her claim in state court, rather than risk additional delays and costs involved in federal litigation. But the facts bearing on whether an employer has the requisite fifteen employees will often turn on evidence that a plaintiff could only learn through discovery after filing the complaint. The disposition of the employee-numerosity question in the instant case rested on such confidential information as the tax records of fellow employees and the extent to which wives of the owners, who worked at home for the corporation, were supervised there by their husbands.

Treating the Title VII employee-numerosity requirement as jurisdictional would create additional problems where a plaintiff also asserts related state law claims. Plaintiffs bringing Title VII claims in federal court often include such state law claims. Those state claims may be

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If a plaintiff brought suit in federal court only under Title VII, claim preclusion would usually bar that employee from subsequently bringing in state court a state law claim arising out of the same employment actions. Restatement of the Law (Second) Judgments, § 24 (1982). Claim preclusion, however, would not apply if the earlier federal action were dismissed for lack of subject matter jurisdiction. *Id*., § 26. Thus a defendant wishing to take advantage of claim preclusion would have a significant incentive to refrain at least initially from disputing the existence of employee numerosity, and to rely instead only on non-jurisdictional defenses; the court, on the other hand, would be obligated to raise first on its own the very jurisdictional bar that the defendant preferred not to assert.

important because, in comparison with Title VII, state law frequently provides more expansive remedies, involves less demanding standards of proof, or imposes less stringent procedural barriers. Claims under Louisiana's anti-discrimination law, for example, are not subject to the caps applicable to compensatory and punitive damages under Title VII.[57]

Such state claims would not fail on the merits merely because a related Title VII claim was rejected on the ground that the supplemental employer did not have the requisite fifteen employees. Most state law claims are not themselves dependent on a showing that the employer has fifteen employees; thirty-five states and the District of Columbia have enacted anti-discrimination laws applicable to smaller employers.[58] In determining whether state employee-numerosity requirements are met, individual states may follow their own common law (or, in this case, civil law) definition of "employee." In addition, the conduct giving rise to a Title VII claim may also constitute a tort under state law; Title VII sexual harassment claims, for example, are frequently joined with state law claims for intentional infliction of emotional distress.[59]

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[57] 42 U.S.C. § 1981a; La. Rev. Stat. § 23:303(A) (no limit on compensatory, but the statute does not authorize punitive damages).

[58] A list of those statutes is set forth in an Appendix to this brief.

At the time this action arose, the Louisiana anti-discrimination law was applicable to employers with twenty or more employees. La. Rev. Stat. § 23:302(2) (1998).

[59] *Clinton v. Jones*, 520 U.S. 681, 685 (1997); *Pollard v. E.J. du Pont de Numours & Co.*, 213 F.3d 933, 937 (6th Cir. 2000), *rev'd*, 532 U.S. 843 (2001); P. Lindemann and D. Kadue, *Sexual Harassment in Employment Law*, pp. 138 *et seq.* (1992); P. Lindemann and D. Kadue,

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If a plaintiff asserting both a Title VII and a state law claim were to prevail on the latter at trial, the subsequent rejection of the federal claim *after* trial for lack of employee-numerosity would leave the state law verdict unaffected so long as the defect in the federal claim was non-jurisdictional. *See, e.g., Da Silva v. Kinsho International Corp.*, 229 F.3d 358 (2d Cir. 2000).[60] But if the employee-numerosity requirement is jurisdictional, then the court in such a case would also lack subject matter jurisdiction over the supplemental state law claim, no matter how closely related to the original federal claim, and any verdict on the state law claim – which itself might have had no fifteen employee requirement – would also have to be set aside.[61] In the instant case, the jury which

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1999 *Cumulative Supplement, Sexual Harassment in Employment Law*, pp. 138-46.

[60] If both the Title VII and state law claims were tried on the merits, the decision on the merits of the state law claim would be unaffected by a determination that the employer did not have the requisite fifteen employees. If prior to trial the Title VII claim were dismissed on that ground, the district court would have discretion to dismiss the state law claim or to resolve it on the merits. If the state law claim were dismissed because of the failure of the Title VII claim, the state law claim could be filed in state court under the tolling provision of 28 U.S.C. § 1367(d).

[61] *See Nowak v. Iron Workers Local 6 Pension Fund*, 81 F.3d 1182, 1186 (2d Cir. 1996) ("Insofar as the district court previously determined that there was no original federal subject matter jurisdiction over the suit, it could not exercise supplemental jurisdiction over Nowak's state claims.") In *Nowak*, the court of appeals concluded that the defect in the plaintiff's underlying ERISA claim was not jurisdictional, and that the exercise of supplemental jurisdiction was therefore permissible.

Conversely, in *Douglas v. E.G. Baldwin & Associates, Inc.*, 150 F.3d 604 (6th Cir. 1998) the Sixth Circuit held that a district judge could not exercise supplemental jurisdiction over such a state claim because the lack of the requisite number of employees to support the federal FMLA claim deprived the court of subject matter jurisdiction.

upheld petitioner's Title VII and state anti-discrimination claim rejected her state tort claim. The district court, believing that the lack of employee-numerosity meant there was no federal jurisdiction, set aside the verdicts on both those state law claims and dismissed them without prejudice. (App. 23). If the dismissal of the Title VII claim were upheld by this Court, the tolling provision of 28 U.S.C. § 1367(d) would then apply, and petitioner could refile her state anti-discrimination and tort claims in Louisiana court, and would there be required to relitigate her state discrimination claim and be permitted to relitigate her state tort claim without regard to the 2002 federal jury verdict in this case.

If a Title VII claim were dismissed *prior* to trial for some reason related to the merits, that would not require that the state law claim be dismissed. The federal court would retain discretion to resolve that state law claim on the merits, and might well do so, for example, if the discovery was largely complete. The longer the federal claim had been pending before it was dismissed, the greater the likelihood that the court would retain jurisdiction over and resolve the related state law claim.[62] If, however, the underlying federal claim were dismissed for lack of subject matter jurisdiction, the related state claim would have to be dismissed, no matter how great the resulting delay and waste of judicial resources.

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[62] *Da Silva v. Kinsho Intern. Corp.*, 229 F.3d 358, 364 (2d Cir. 2000); *Dody v. Oxy US, Inc.*, 101 F.3d 448, 456 (5th Cir. 1996); *Timm v. Mead Corp.*, 32 F.3d 273, 277 (7th Cir. 1994); *Imagineering, Inc. v. Kiewit, Pacific Co.*, 976 F.2d 1303, 1309 (9th Cir. 1992), *cert. denied*, 507 U.S. 1004 (1992).

In construing the statute in *Steel Company v. Citizens for a Better Environment*, this Court refused to conclude that Congress intended the statutory requirements there in question to be jurisdictional because the result would be "such a strange scheme." 523 U.S. at 93. Construing section 701(b) to limit subject matter jurisdiction would be equally inconsistent with the effective administration of Title VII.

CONCLUSION

For the above reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

ANTI-DISCRIMINATION STATUTES APPLICABLE TO EMPLOYERS WITH FEWER THAN 15 EMPLOYEES

ALASKA STAT. § 18.80.220 (2004) (1 employee)

ARK. CODE ANN. § 16-123-102(5) (2005) (9 employees)

CAL. GOV. CODE § 12926(d) (2005) (5 employees)

COLO. REV. STAT. ANN. § 24-34-401(3) (2005) (1 employee)

CONN. GEN. STAT. § 46a-51(10) (2005) (3 employees)

DEL. CODE ANN. tit. 19 § 710(6) (2005) (4 employees)

D.C. CODE ANN. § 2-1401.02(10) (2005) (1 employee)

HAW. REV. STAT. § 378-1 (2004) (1 employee)

IDAHO CODE § 67-5902(6) (2005) (5 employees)

ILL. ANN. STAT. ch. 775, para. 5/2-101(B)(1)(b) (2005) (1 employee if discrimination involves sexual harassment)

IND. CODE § 22-9-1-3 (2005) (6 employees)

IOWA CODE § 216.7(6)(a) (2005) (4 employees)

KAN STAT. ANN. § 44-1002(b) (2004) (4 employees)

KY. REV. STAT. ANN. § 344.030(2) (2004) (8 employees)

ME. REV. STAT. ANN. tit. 5, § 4553(4) (2005) (1 employee)

MASS. GEN. LAWS ANN. ch. 151B § 1(5) (2005) (6 employees)

MICH. COMP. LAWS ANN. § 37.2201(a) (2005) (1 employee)

MINN. STAT. § 363A.03, subd. 16 (2005) (1 employee)

MO. ANN. STAT. § 213.010(7) (2005) (6 employees)

MONT. CODE ANN. § 49-2-101(11) (2003) (1 employee)

N. H. REV. STAT. ANN. § 354-A:2 (2004) (6 employees)

N. J. STAT. ANN. § 10:5-5(e) (2005) (1 employee)

N. M. STAT. ANN. § 28-1-2(B) (2005) (4 employees)

N. Y. EXEC. LAW § 292(5) (2005) (4 employees)

N. D. CENT. CODE § 14-02.4-02(7) (2003) (1 employee)

OHIO REV. CODE ANN. § 4112.01(A)(2) (2005) (4 employees)

OR. REV. STAT. § 659A.001(4) (2003) (1 employee)

PA. STAT. ANN. tit. 43, § 954(b) (2005) (4 employees)

R.I. GEN. LAWS § 28-5-6(7)(i) (2004) (4 employees)

S. D. CODIFIED LAWS ANN. § 20-13-1(7) (2005) (1 employee)

TENN. CODE ANN. § 4-21-102(4) (2005) (8 employees)

VT. STAT. ANN. tit. 21, § 495 (2004) (1 employee)

WASH. REV. CODE ANN. § 49.60.040(3) (2005) (8 employees)

W. VA. CODE § 5-11-3(d) (2005) (12 employees)

WIS. STAT. § 111.32(6)(B) (2005) (1 employee)

WYO. STAT. § 27-9-102(b) (2004) (2 employees)