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

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

ARGUMENT

I. INTRODUCTION

This case is controlled by the plain language of section 1331 of the Judicial Code and of section 706(f)(3) of Title VII.

The instant lawsuit presents a classic example of section 1331 federal question jurisdiction. The complaint asserts that there has been a violation of federal law (Title VII), and there is a federal cause of action to enforce the prohibitions of Title VII. 42 U.S.C. § 2000e-5(f)(1). Thus this case is a "civil actio[n] arising under the . . . laws . . . of the United States." 28 U.S.C. § 1331.

Section 1331 is entirely sufficient to establish federal jurisdiction over the instant case unless the jurisdictional grant in section 1331 has been limited by some other provision of federal law. When Congress has wanted to restrict the general grant of federal question jurisdiction in section 1331, it has done so expressly. For example, 42 U.S.C. § 405(h) specifically bars the exercise of jurisdiction under section 1331 over certain claims under the Social Security Act.[1] Some sixty federal statutes more broadly forbid in specified instances the exercise of *any* federal jurisdiction that would otherwise exist under section 1331 or other jurisdictional provisions.[2] See, e.g., 29 U.S.C.

[1] "No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 . . . of title 28 to recover any claim arising under this subchapter."

Another example of a limitation of jurisdiction under section 1331 is to be found in 49 U.S.C. § 10709.

[2] We set forth a list of those statutes in an appendix to this brief.

§ 101 ("No court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute. . . . ").[3]

The expressly jurisdictional provision in Title VII, section 706(f)(3), in no way restricts the jurisdictional grant in section 1331. To the contrary, the terms of section 706(f)(3), creating federal jurisdiction over actions "brought under" Title VII, are as broad as those of section 1331, which encompasses actions "arising under" Title VII. As the government explains, section 706(f)(3) was included in Title VII to *broaden* the jurisdiction of federal courts by removing the $10,000 jurisdictional amount requirement that was contained in section 1331 in 1964. (United States Br. 13).

This statutory language is dispositive. Respondent's brief contains no reference to sections 1331 and 706(f)(3) other than a single sentence objecting that reliance on the actual text of these applicable statutes would be unduly "formalistic." (R. Br. 6). In order to prevail, respondent must overcome the clear language of sections 1331 and 706(f)(3) by demonstrating *both* that Title VII repealed by implication part of the general grant of federal question jurisdiction that was already contained in section 1331, *and* that some non-jurisdictional provision in Title VII tacitly overrides the broad and unambiguous grant of

[3] 29 U.S.C. § 252(d) provides that federal courts may not exercise jurisdiction over wage claims under the Fair Labor Standards Act, the Davis-Bacon Act or Walsh-Healey Act unless the work was done under a contract or pursuant to established local practice. The requirement expressly made jurisdictional by section 252(d) would normally be simply an element of the merits of a wage claim.

jurisdiction in section 706(f)(3). This Court's jurisprudence strongly disfavors repeals by implication and efforts to disregard the plain language of statutory text. Respondent's arguments fall far short of making the extraordinarily compelling showing that would be needed to overcome the express jurisdictional provisions of sections 1331 and 706(f)(3).

II. THE STATUTORY PROVISIONS WHICH LIMIT THE ENTITIES, PLAINTIFFS AND CLAIMS COVERED BY TITLE VII DO NOT RESTRICT THE SUBJECT MATTER JURISDICTION OF THE FEDERAL COURTS

Respondent contends that certain elements of a Title VII claim are inherently jurisdictional in nature. According to respondent, those elements include (a) restrictions on which entities are "subject to Title VII" (R. Br. 16), (b) limitations on which potential plaintiffs are "entitled to the protection" of the law (R. Br. 15), and (c) other elements which concern "the very reach" (R. Br. 18) or "the very scope of coverage" (R. Br. 5) of Title VII. The mere inclusion of such coverage limitations in Title VII, respondent suggests, implicitly narrowed the express and broad grant of jurisdiction in section 706(f)(3) and repealed by implication the otherwise applicable grant of jurisdiction in section 1331.

This contention is entirely insufficient to overcome the actual terms of section 706(f)(3) and section 1331. Respondent asks this Court to read section 706(f)(3) as if it restricted federal jurisdiction to "actions brought under this title *against an employer*," "actions brought under this title *by an employee,*" or "actions brought under *and within the scope of coverage* of this title." Respondent offers a

variety of arguments as to why these proposed limitations on section 706(f)(3) would further the purposes of Title VII. The conclusive answer to these contentions is a simple one; Congress emphatically did not include any such restrictive language in the actual provisions of section 706(f)(3). The absence of such restrictions in the terms of section 706(f)(3) is all the more telling because Congress has chosen to include limitations of this sort in other statutes. (Pet. Br. 19-22). Its failure to do so here is dispositive.

Federal statutes frequently contain definitions of (and thus limitations on) the persons or entities to which those laws apply. But whether the commands of a statute cover a particular defendant is assuredly a different question than whether a federal court has subject matter jurisdiction to decide the merits of a claim against that defendant. This Court has repeatedly held that federal courts have jurisdiction over actions against defendants which assert, and may ultimately be able to establish, that they are not "subject to" the statute in question.

In *Louie v. United States*, 254 U.S. 548 (1921), the defendant had been indicted for murder under a statute which applied only to individuals who committed crimes on Indian reservations. The defendant asserted that the crime with which he had been charged had not occurred on a reservation, and that he therefore "was with respect to the acts complained of *subject to* the laws of the state of Idaho and not to the laws of the United States." 254 U.S. at 550 (emphasis added); see R. Br. 16 (respondent assertedly not "subject to" Title VII). The court of appeals in *Louie* had held that such a contention concerned the subject matter jurisdiction of the district court, and for

that reason could be reviewed on appeal only by a writ of error to this Court. 254 U.S. at 549. This Court reversed:

> Since defendant's motions in the District Court did not raise a question properly of the jurisdiction of the court, but went to the merits, there was no basis for a direct writ of error from this court.

254 U.S. at 551.

In *Lauritzen v. Larsen*, 345 U.S. 571 (1953), the defendant ship owner in a Jones Act case contended, and this Court agreed, that the ship owner was not covered by that statute because the Jones Act "would not *reach* a [ship owner or its agent] performing the proscribed acts aboard the ship of a foreign state on the high seas." 345 U.S. at 578 (emphasis added); see R. Br. 18 (defendant assertedly outside "the very reach" of Title VII). But while holding that the Jones Act did not apply to the defendant, this Court emphatically rejected the defendant's suggestion that the absence of such coverage meant the federal courts had no subject matter jurisdiction over the claim.

> The question of jurisdiction is shortly answered. . . . As frequently happens, a contention that there is some barrier to granting plaintiff's claim is cast in terms of an exception to jurisdiction of subject matter. A cause of action under our law was asserted here, and the court had power to determine whether it was or was not well founded in law and in fact.

345 U.S. at 574-75.

If, as respondent suggests, the limitations on the coverage of a statute are now to be read to restrict the broad language of express jurisdictional provisions such as

sections 1331 and 706(f)(3), a very large number of new subject matter jurisdiction issues would be created. Title VII itself, in addition to the fifteen-employee requirement, has ten other restrictions on which entities are "subject to" Title VII,[4] and five limitations on which potential plaintiffs are "entitled to the protection" of that statute.[5] Title VII also contains eight statutory provisions expressly placing certain discriminatory practices outside the prohibitions of the law;[6] any of these might fairly be

[4] A defendant would not be "subject to" Title VII if it were (1) the United States (42 U.S.C. § 2000e(b)(1)), (2) a corporation wholly owned by the government of the United States (*id.*), (3) an Indian tribe (*id.*), (4) a department or agency of the District of Columbia subject by statute to the procedures of the competitive service (*id.*), (5) a bona fide private membership club (42 U.S.C. § 2000e(b)(2)), (6) not in an industry affecting commerce (42 U.S.C. § 2000e(h)), (7) an employer with respect to the employment of aliens outside any state (42 U.S.C. 2000e-1(a)), (8) a religious organization with respect to the employment of individuals to perform work connected with the carrying on of its activities (*id.*), (9) a foreign person not controlled by an American employer (42 U.S.C. § 2000e-1(c)(2)), or (10) a business or enterprise on or near an Indian reservation with respect to certain publicly announced preferential practices (42 U.S.C. § 2000e-2(i)).

[5] A plaintiff is not subject to the protections of the act if he or she is (1) an independent contractor, rather than an employee or applicant for employment (see 42 U.S.C. § 2000e(f)), (2) a state or local elected official (*id.*), (3) on the personal staff of such an elected official (*id.*), (4) an appointee of such an official at the policy making level (*id.*), or (5) an appointee of such an official with respect to the exercise of constitutional or legal powers (*id.*).

[6] The practices expressly placed outside the coverage of Title VII include: (1) failure to pay for certain abortion related health benefits (42 U.S.C. § 2000e(k)), (2) actions taken outside the United States required by foreign law (42 U.S.C. § 2000e-1(b)), (3) discrimination on the basis of religion, sex or national origin that is a bona fide occupational qualification (42 U.S.C. § 2000e-2(e)(1)), (4) certain employment practices by schools connected with religious organizations or whose curriculum is directed to propagating a particular religion (42 U.S.C. § 2000e-2(e)(2)), (5) refusal to hire or employ individuals who fail to

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characterized as constituting limitations on "the very reach" of the law. On respondent's view, all of these provisions would restrict the subject matter jurisdiction of the federal courts. Rule 8(a)(1) would presumably require every Title VII plaintiff to allege, not merely that his or her claim arose under Title VII, but also that all of these other restrictions had been satisfied. If these statutory provisions were held to limit subject matter jurisdiction, any factual disputes bearing on their application would have to be resolved by the court rather than a jury.

If coverage restrictions were generally deemed to limit subject matter jurisdiction, a very large number of other statutes would be affected in addition to Title VII. Such a view of subject matter jurisdiction would have a substantial impact, for example, on the enforcement of the Americans With Disabilities Act. The ADA only covers discrimination against a "qualified individual with a disability." 42 U.S.C. § 12112(a). The statute spells out the definition of "disability" (42 U.S.C. § 12102(2)) and "qualified individual" (42 U.S.C. § 12111(8)). Disputes about whether a plaintiff had a disability, or was qualified, are often at the very heart of ADA cases, and raise complex factual disputes and fact-bound issues. The ADA expressly incorporates by reference the broad jurisdictional provision of section 706(f)(3) of Title VII. 42 U.S.C. § 12117(a). But if, despite the terms of section 706(f)(3), ADA coverage issues are now deemed to limit subject matter jurisdiction,

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satisfy certain requirements imposed in the interest of national security (42 U.S.C. § 2000e-2(g)), (6) the utilization of a bona fide seniority system (42 U.S.C. § 2000e-2(h)), (7) the utilization of certain validated tests (*id.*), and (8) practices authorized by certain provisions of the Fair Labor Standards Act (*id.*).

a substantial portion of all ADA cases would be transformed into disputes about subject matter jurisdiction.

III. THE DECISIONS OF THIS COURT DO NOT HOLD THAT THE TITLE VII EMPLOYEE-NUMEROSITY REQUIREMENT IS JURISDICTIONAL

Respondent insists that on repeated occasions this Court, implicitly rejecting a literal reading of sections 1331 and 706(f)(3), has agreed that the employee-numerosity requirement limits the subject matter jurisdiction of the federal courts. The previous decisions of this Court, respondent contends, have already "demonstrated a recognition by this Court that Congress did not intend for the federal courts to have jurisdiction over the small businesses." (R. Br. 5). "[T]his Court consistently has addressed § 701(b) in jurisdictional terms." (R. Br. 7).

This Court, however, has emphatically cautioned that no conclusion regarding subject matter jurisdiction can be drawn from decisions of this Court in which the existence vel non of subject matter jurisdiction was not the specific issue before the Court, even though this Court itself there characterized some provision before it as "jurisdictional." In a number of past decisions

> the jurisdictional character of [an issue] made no substantive difference (nor even any procedural difference that the Court seemed aware of), had been assumed by the parties, and was assumed without discussion by the Court. We have often said that drive-by jurisdictional rulings of this sort . . . have no precedential effect.

Steel Co. v. Citizens for A Better Environment, 523 U.S. 83, 91 (1998). Moreover, courts, litigants and federal agencies at times have used the term "jurisdiction" to refer to things other than subject matter jurisdiction. "'Jurisdiction,' it has been observed, 'is a word of many, too many, meanings.'" *Id*. at 90 (*quoting United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C.Cir. 1996)). This Court has admonished that

> [c]larity would be facilitated if courts and litigants used the label 'jurisdictional' . . . only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.

Kontrick v. Ryan, 540 U.S. 443, 455 (2004). But "[c]ourts, including this Court, it is true, have been less than meticulous in this regard." *Id*. at 454.

This Court has repeatedly applied this admonition, declining to attribute significance to the use of the term "jurisdiction" (or "jurisdictional") in prior decisions where the existence of subject matter jurisdiction was not squarely disputed. E.g., *Steel Co. v. Citizens for A Better Environment*, 523 U.S. at 91-92 (rejecting reliance on reference to "federal jurisdiction" in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 52 (1987)). Most recently in *Eberhart v. United States*, 126 S.Ct. 403 (2005), this Court unanimously held that the deadline established by Federal Rule of Criminal Procedure 33(a) does not limit the subject matter jurisdiction of the district courts, despite the fact that this Court in five previous decisions had described that very time limitation as "jurisdictional." 126 S.Ct. at 406. Those earlier decisions, this Court explained, had used the adjective "jurisdictional"

only to explain that the limitation in Rule 33(a) was "emphatic." *Id*. "Those cases . . . do not hold the limits of the Rules to be jurisdictional in the proper [subject matter jurisdiction] sense that *Kontrick* describes." 126 S.Ct. at 405.

Steel Co., *Kontrick*, and *Eberhart* are fatal to respondent's effort to rely on past decisions of this Court to establish that the employee-numerosity requirement limits the subject matter jurisdiction of the federal courts. This Court's decision in *EEOC v. Arabian American Oil Co.* (*Aramco*), 499 U.S. 244 (1991), is a quintessential example of the many meanings of "jurisdiction." The majority opinion in *Aramco* at various points uses the term "jurisdiction" with four quite different meanings: (1) the acts within the coverage of a statute (e.g., "Congress knows how to place the high seas within the jurisdictional reach of a statute,"[7] 499 U.S. at 258 (*quoting Argentine Republic v. Amaerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989)),[8] (2) conduct which Congress has the

[7] In a footnote to this statement, the Court in *Argentine Republic* cited two examples of legislation that placed action on the high seas "within the jurisdictional reach of a statute": 14 U.S.C. § 89(a) (empowering the Coast Guard to search and seize vessels "upon the high seas and waters over which the United States has jurisdiction") and 19 U.S.C. § 1701 (permitting the President to declare portions of the high seas as customs enforcement areas.) 488 U.S. at 440 n.7. Neither of these provisions had anything to do with subject matter jurisdiction.

[8] This is the most frequent sense with which the term jurisdiction is utilized in *Aramco*. See 499 U.S. at 248, 249, 251, 252, 258.

The EEOC relied on the decision in *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952), in which this Court had held that the Lanham Act applied to actions outside the United States because of the "broad jurisdictional grant in the Lanham Act." 344 U.S. at 286. In *Steele* "jurisdiction" was used to denote the scope of activities covered by the

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constitutional authority to regulate (e.g., "the legislative basis for jurisdiction," 488 U.S. at 253), (3) the geographical areas in which the United States is sovereign, and in which the application of federal law would thus not be extraterritorial (e.g., 488 U.S. at 248 "the territorial jurisdiction of the United States" (*quoting Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)), and (4) the subject matter jurisdiction of the federal courts (e.g., "Respondent filed a motion for summary judgment on the ground that the District Court lacked subject-matter jurisdiction," 488 U.S. at 247.)).

The EEOC and the Court in *Aramco* used "jurisdiction" in the first sense when they characterized the Title VII definition of employer as "jurisdictional." The question presented in *Aramco* concerned not subject matter jurisdiction but coverage, whether "Congress has in fact exercised" its "authority to enforce its laws beyond the territorial boundaries of the United States." 499 U.S. at 248. The scope of the definition of employer was only relevant to the issue in *Aramco* insofar as that definition delineated the employers to whom the prohibitions of Title VII applied. Referring to that definition and others, the government argued that "[t]he statute's jurisdictional provisions cannot possibly be read to confer coverage only upon aliens employed outside the United States." 499 U.S. at 253. Only provisions that are jurisdictional in the sense of coverage, not provisions regarding the subject matter jurisdiction of the courts, can "confer coverage" on groups of employees. (Provisions regarding subject matter jurisdiction confer subject matter jurisdiction, not coverage, and do so on federal courts, not on employees.)

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statute; this Court concluded that "the petitioner's activities . . . fall within the jurisdictional scope of the Lanham Act." 344 U.S. at 285.

This was clearly the meaning of jurisdiction as that term was used during the oral argument in *Aramco*.[9]

Respondent relies on a footnote in *EEOC v. Commercial Office Products Co.*, 486 U.S. 107 (1988), which observed that in some circumstances

> Stat[e] . . . laws are more protective that Title VII. For example, Title VII does not give the EEOC jurisdiction to enforce the Act against employers of fewer than 15 employees. . . .

486 U.S. at 120 n.5. This passage involves yet a fifth usage of the term jurisdiction. An agency has jurisdiction over a claim or defendant if the underlying dispute and parties are within the coverage of the statute the agency administers and the matter has been brought (and remains) before the agency in the proper manner. EEOC jurisdiction under section 706(b) of Title VII is thus distinct from the subject matter jurisdiction of a federal court under section 706(f)(3). With regard to the agency's jurisdiction, Title VII has no provision comparable to section 706(f)(3) conferring jurisdiction on the EEOC over any charge "brought under"

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[9] For example, one member of this Court noted that "when Congress means to *apply* laws of the United States abroad, it must be clear about it . . . we will accept strained readings . . . in order to defeat extraterritorial *jurisdiction*, unless Congress has been clear about it." 1991 WL 636297 at *7 (emphasis added). Another member of this Court contrasted "a statute that confers *jurisdiction* over all companies involved in interstate or foreign commerce" with a statute "*applying* only to United States companies involved in interstate or foreign commerce on the shores of this country." *Id*. (emphasis added).

The Solicitor General referred to the Title VII definitions of employer and coverage both as a "broad grant of coverage," 1991 WL 636297 at *5, and as giving the statute "broad jurisdictional reach." 1991 WL 636297 at *43.

Title VII. The prevailing usage of the concept of agency jurisdiction was long reflected in the EEOC's Compliance Manual. For example, in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), this Court held that the failure of a plaintiff to file a timely charge with EEOC does not limit the subject matter jurisdiction of a federal court. Yet a year after *Zipes*, the EEOC issued a section of its Compliance Manual stating that the lack of such a timely charge deprived the Commission itself of jurisdiction. EEOC Compliance Manual § 605.5 (2000) ("In order for the Commission to have jurisdiction over a charge, the charge must be filed within a certain period after the date that the alleged discriminatory act occurred.")[10]

The absence of agency jurisdiction over a controversy cannot ipso facto mean that the federal courts themselves would have not subject matter jurisdiction over the same matter. If the absence of agency jurisdiction were synonymous with the absence of subject matter jurisdiction, then there would be no way in which an aggrieved party could obtain judicial relief from an adverse agency action on the ground that that agency lacked jurisdiction. Section 709(c), for example, authorizes an employer to seek judicial relief from certain orders by the EEOC. 42 U.S.C. § 2000e-8(c). But if agency and subject matter jurisdiction were the same, then whenever an employer opposed an EEOC order on the ground that the Commission had no jurisdiction to issue the order because that employer had less than fifteen employees, it would follow that the federal court from which relief was sought would itself lack jurisdiction to consider that claim. Because agency

[10] This portion of the Compliance Manual was promulgated in October 1983.

jurisdiction and subject matter jurisdiction are indeed distinct, federal courts routinely entertain claims that agency action exceeded the agency's own jurisdiction. E.g. *Solid Waste Agency of North Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *McCulloch v. Socieded Nacional de Marineros de Honduras*, 372 U.S. 10, 16 (finding district court had jurisdiction over the action attacking an order of the NLRB), 22 (concluding that the board was without jurisdiction to issue the order in question) (1963).

Finally, respondent insists that this Court's decision in *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202 (1998), regarding the employee-numerosity requirement, demonstrates "that this Court viewed the issue as one of subject matter jurisdiction." (R. Br. 10). Respondent imputes this holding to *Walters* because the Court, having determined the correct method for calculating whether an employer had fifteen employees, proceeded to apply that methodology to the record in *Walters* and held that the requisite fifteen employees were present. If the employee-numerosity requirement were an element of the plaintiff's claim, respondent argues, this Court would have remanded that issue for a jury trial. As the government points out, however, there were no disputes of historical fact regarding how many employees were on the defendant's payroll during the time period in question (U.S.Br. 27);[11]

[11] The record in *Walters* consisted largely of stipulations and joint exhibits. Brief for the EEOC, *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202, at 5-6; Brief for Respondent, *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202, at 7.

there were thus no factual issues for a jury or a court to resolve.[12]

Several amici argue that the EEOC itself has in the past referred to the employee-numerosity requirement as jurisdictional.[13] But the documents to which they refer merely demonstrate that the EEOC, like this Court, has used the term "jurisdictional" with several different meanings. In some cited instances, for example, the EEOC characterized the fifteen-employee requirements as "a jurisdictional prerequisite to Title VII *coverage,*"[14] the meaning with which this Court in *Aramco* used the term jurisdictional to refer to that requirement. In other instances the EEOC has noted that the fifteen-employee requirement is relevant to whether "the Commission lacks jurisdiction,"[15] the same reference to agency jurisdiction found in this Court's decision in *Commercial Office Products*.

One amicus notes that the pre-2000 version of EEOC's Compliance Manual "devoted an entire section to the subject of 'Title VII Jurisdiction' "[16] including a subsection regarding the fifteen-employee requirement. But that

[12] If there had been such factual disputes, and the employee-numerosity requirement was a limit on subject matter jurisdiction, this Court would not itself have resolved those disputes, but would instead have remanded those issues for an evidentiary hearing before the district judge.

[13] Brief of the States of Alabama, et al., pp. 20, 22, 23-25; Brief Amicus Curiae for the Chamber of Commerce, et al., p. 15.

[14] Policy Guidance: Whether Part-Time Employees are Employees Within the Meaning of § 701(b) of Title VII and § 11(b) of the ADEA, 1990 WL 1104704 at *1 (1990) (emphasis added).

[15] Brief for Petitioner at 26-27, *EEOC v. Commercial Office Products Co.*, 488 U.S. 107 (No. 86-1696).

[16] Br. of the States of Alabama, et al., at 22.

section concerns, not the subject matter jurisdiction of the courts, but "the range and extent of the Commission's authority to accept, investigate, and resolve charges of employment discrimination,"[17] i.e., agency jurisdiction. The section in question, approximately one hundred pages in length, encompasses a wide range of considerations that neither respondent nor any amicus contends limit the subject matter jurisdiction of the federal courts, such as the timeliness of Title VII charges,[18] the types of discrimination forbidden by Title VII,[19] whether particular discriminatory practices are exempted from the provisions of Title VII,[20] successor liability,[21] charges filed by minors,[22] the res judicata effect of state administrative determinations,[23] the immunity from suit of certain international organizations under international law and United States domestic law,[24] and whether employers can bring a charge against labor organizations.[25] In the spring of 2000 the EEOC largely rewrote this section, now characterizing its contents as "Threshold Issues" rather than jurisdiction.[26] This is not, as one amicus would have it, a "new found

[17] EEOC Compliance Manual § 605.1 (2000).

[18] *Id.* §§ 605.5-605.7.

[19] *Id.* §§ 605.2, 605.17(a).

[20] E.g., Policy Guidance: Religious Organizations That Pay Women Less Than Men in Accordance with Religious Beliefs (included in section 605.16 after page 605-38).

[21] *Id.* § 605.17(b).

[22] *Id.* § 605.17(e).

[23] *Id.* § 605.17(f) and Appendices 605-J and 605-K.

[24] *Id.* Appendix 605-B.

[25] *Id.* Appendix 605-L.

[26] EEOC Compliance Manual § 2 (2005).

position"[27] regarding the subject matter of the federal courts, an issue that was never within the scope of the earlier version of the Compliance Manual. Rather, the EEOC has laudably taken the very action urged by this Court in *Steel Company*, now using the term jurisdiction in a more circumspect manner.

IV. NO COMPELLING CIRCUMSTANCES WARRANT DISREGARDING THE PLAIN TEXT OF SECTIONS 1331 AND 706(f)(3)

If the employee-numerosity requirement is not treated as limiting the subject matter of the courts, respondent and several amici argue, small employers will invariably and unfairly be forced to bear the expense of full discovery and trial on the merits. Even if the problem posited by this argument actually existed, it would be insufficient to overcome the plain language of sections 1331 and 706(f)(3).

That problem, moreover, is chimerical. In many instances where a dispute arises regarding whether an employer had the requisite fifteen employees, the underlying facts (although initially controverted) will often be established by relevant business and tax records.[28] Rule 56 of the Federal Rules of Civil Procedure provides an expeditious manner of resolving many such disputes: summary judgment. Neither respondent nor any amici offer any reason why summary judgment would be inapplicable to

[27] Brief of the States of Alabama, et al. at 25.

[28] Brief Amicus Curiae of the Chamber of Commerce, et al., at 20; Brief of the International Municipal Lawyers Association, p. 10; Brief of the States of Alabama, et al., at 2.

controversies regarding whether an employer had fifteen employees during the relevant period of time. Of course, regardless of whether a defendant moves to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), or moves for summary judgment under Rule 56, some discovery will usually be necessary to unearth and verify the relevant documents. But once those materials are in the record, summary judgment for the defendant, or partial summary judgment for the plaintiff, will often be appropriate.[29]

In actual practice today, most employer motions regarding the employee-numerosity requirement already are either filed as summary judgment motions, or treated by the district courts as a request for summary judgment. Summary judgment has proved an expeditious procedure for resolving these issues; in most cases in which summary judgment is awarded to employers with fewer than fifteen employees, that motion is granted within about a year of the commencement of the action. Dismissals under Rule 12(b)(1) do not appear to occur with any greater speed. In about a third of all such cases the motion is denied, or deferred, because of the need for discovery, a consideration equally applicable to motions under Rule 12(b)(1) and those under Rule 56. We set forth in an appendix to this brief a summary of district court decisions since January 1, 2005, involving such motions.

[29] An evidentiary hearing would be necessary, for example, if there were a dispute as to the accuracy or completeness of business records. That might occur if a plaintiff alleged that several workers were employed off the books. In addition, the factors relevant to whether an individual was an independent contractor, rather than an employee, would often involve facts (such as the degree of day-to-day supervision) not reflected in business records. See Pet. Br. 30 n.48.

Small employers which may be outside the coverage of Title VII will often have good reason to pursue that issue at the outset of a lawsuit through a motion for summary judgment. Other facets of the case may be more expensive and time consuming to resolve. As several amici properly note, the question of whether an employer acted with a discriminatory motive is often unsuited to resolution by summary judgment. "A Title VII merits case generally involves . . . multiple credibility determinations."[30] Determination of whether an employer had such an unlawful purpose "is almost always based on circumstantial evidence, requiring inferential arguments and substantial discovery."[31] Summary judgment on the elusive issue of intent may be difficult to obtain once a plaintiff has established a prima facie case.[32] See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). Rule 56 permits an employer to seek resolution of a case on the ground that it lacks the requisite fifteen employees without awaiting trial on the other issues in the case.

The snippets of legislative history invoked by respondent and several amici are entirely insufficient to overcome the plain language of sections 1331 and 706(f)(3). The fact that Congress intended to exempt certain small business from coverage by Title VII in no way supports the very different assertion that Congress intended that coverage restriction to operate as well as a limitation on subject matter jurisdiction. Certainly no member of Congress said any such thing when Title VII was first enacted in 1964. Language in 1972 committee reports

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[30] Brief Amici Curiae for the Chamber of Commerce, et al., at 20 n.8.

[31] Brief of the International Municipal Lawyers Association, at 20.

[32] *Id.* at 21.

cannot alter the meaning of a statute that was enacted eight years earlier. A careful reading of the reports in question, moreover, makes clear that Congress was using the term "jurisdiction" to refer (as in *Aramco*) to the coverage of Title VII[33] or (as in *Commercial Office Products*) to the types of cases which the EEOC was authorized to investigate and conciliate.[34]

CONCLUSION

For the above reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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[33] H.R.Rep. 92-238 at 1 (amendments would "broaden jurisdictional coverage"), 20 ("changing the jurisdictional reach of Title VII").

[34] H.R.Rep. 92-238 at 64 (EEOC jurisdiction expanded), 70 (bill "expands the jurisdiction of the EEOC").

District Court Decisions
Regarding Title VII
Employee-Numerosity Requirement
January 1, 2005 to November 21, 2005

Burkhard v. Henry Soil and Water Conservation Dist., 2005 WL 1863828 (N.D.Ohio)

Suit commenced: 2002
Date of decision: August 3, 2005
Basis of motion and decision: motion for summary judgment
Disposition: motion denied because evidence established employer had more than fifteen employees

Christaldi-Smith v. JDJ, Inc., 367 F.Supp. 2d 756 (E.D.Pa. 2005)

Suit commenced: September 20, 2004
Date of decision: April 26, 2005
Basis of motion and decision: motion to dismiss under F.R.Civ.P. 12(b)(6); treated as a motion for summary judgment
Disposition: motion denied because of need for discovery

De Jesus v. LLT Card Services, Inc., 2005 WL 1881482 (D.P.R.)

Suit commenced: December 14, 2004
Date of decision: August 9, 2005
Basis of motion and decision: motion for summary judgment
Disposition: motion denied because of need for discovery

Doughty v. Regional Aids Interfaith Network, 2005 WL 1862014 (W.D.Mo.)

Suit commenced: August 18, 2004
Date of decision: August 4, 2005
Basis of motion and decision: motion for summary judgment or to dismiss; resolved as a motion to dismiss

Disposition: motion granted (motion earlier denied on April 20, 2005, pending further discovery)

Flowers v. Memphis Sleep Labs, Inc., 2005 WL 1719768 (W.D.Tenn.)
Suit commenced: October 28, 2004
Date of decision: July 21, 2005
Basis of motion and decision: motion for summary judgment
Disposition: motion granted

Harper v. PCA Security, 2005 WL 2291226 (W.D.Tenn.)
Date filed: November 14, 2003
Date of decision: September 20, 2005
Basis of motion and decision: court raised question regarding existence of subject matter jurisdiction;
Disposition: case dismissed for want of jurisdiction and for lack of prosecution after pro se plaintiff failed to pursue discovery

Harris v. Community Resources Council of Shawnee County, 2005 WL 3050149 (D.Kan.)
Suit commenced: November 11, 2004
Date of decision: November 15, 2005
Basis of motion and decision: motion for partial summary judgment
Disposition: motion granted

Hiltebrand v. Lynn's Hallmark Card Shop, 2005 WL 2387611 (M.D.Ga.)
Suit commenced: December 18, 2003
Date of decision: September 28, 2005
Basis of motion and decision: motion for summary judgment
Disposition: motion denied because of unresolved disputes of fact

Jackson v. NEXT Financial Group, Inc., 2005 WL 1630532 (D.Minn.)
Suit commenced: October 29, 2004
Date of decision: July 11, 2005

Basis of motion and decision: motion for summary judgment
Disposition: motion granted

Matthews v. American Psychological Society, 2005 WL 555413 (D.D.C.)
Suit commenced: February 17, 2004
Date of decision: March 7, 2005
Basis of motion and decision: motion to dismiss for lack of subject matter jurisdiction, to dismiss under F.R.Civ.P. 12(b)(6), or for summary judgment
Disposition: motions to dismiss for lack of subject matter jurisdiction and to dismiss under Rule 12(b)(6) denied; motion for summary judgment denied because of unresolved disputes of fact

Pavel v. Plymouth Management Group, 2005 WL 2659089 (E.D.N.Y.)
Suit commenced: November 18, 2002
Date of decision: October 18, 2005
Basis of motion and decision: motion for summary judgment or to dismiss for want of subject matter jurisdiction; treated as a motion for summary judgment
Disposition: motion granted

Persaud v. Ash & Peterkin Cent. Lock, 2005 WL 100711 (S.D.N.Y.)
Suit commenced: June 17, 2004
Date of decision: January 19, 2005
Basis of motion and decision: motion to dismiss; treated as a motion for summary judgment
Disposition: motion granted

Scott v. City of Minco, 393 F. Supp. 2d 1180 (W.D.Okl.)
Suit commenced: 2004 (answer filed on August 19, 2004)
Date of decision: May 25, 2005
Basis of motion and decision: motion for summary judgment
Disposition: motion granted

Smith v. Castaways Family Diner, 2005 WL 1431894 (N.D.Ind.)
Suit commenced: July 30, 2004
Date of decision: June 16, 2005
Basis of motion and decision: motion for partial summary judgment
Disposition: motion granted

Stone v. Indiana Postal and Federal Employees Credit Union, 2005 WL 2347226 (N.D.Ind.)
Suit commenced: March 21, 2004
Date of decision: January 26, 2005
Basis of motion and decision: motion for summary judgment
Disposition: motion granted

Tawes v. Frankford Volunteer Fire Co., 2005 WL 83784 (D.Del.)
Suit commenced: August 28, 2003
Date of decision: January 13, 2005
Basis of motion and decision: motion to dismiss; treated as motion for summary judgment
Disposition: motion granted

Thomason v. Maui Tacos/Tiki Takez LLC, 2005 WL 2002079 (M.D.Ala. 2005)
Suit commenced: February 23, 2005
Date of decision: August 17, 2005
Basis of motion and decision: motion for summary judgment
Disposition: motion denied because of need for discovery

Walls v. Avpro, Inc., 2005 WL 855931 (D.Md.)
Suit commenced: September 23, 2004
Date of decision: April 14, 2005
Basis of motion and decision: motion to dismiss; treated as a motion for summary judgment
Disposition: motion granted

Express Limitations on the Jurisdiction of Federal Courts

2 U.S.C. § 501(g)

2 U.S.C. § 502(c)

7 U.S.C. § 1367

8 U.S.C. § 1158(c)

8 U.S.C. § 1182(a)(9)(B)(iii)(v)

8 U.S.C. § 1182(h)

8 U.S.C. § 1182(i)(2)

8 U.S.C. § 1187(c)(1)(6)

8 U.S.C. § 1187(g)

8 U.S.C. § 1126a(b)(1)

8 U.S.C. § 1227(a)(3)(C)(ii)

8 U.S.C. § 1229c(f)

8 U.S.C. § 1252(a)(2)(A)

8 U.S.C. § 122(a)(2)(B)

8 U.S.C. § 1252(a)(2)(C)

8 U.S.C. § 1252(b)(9)

8 U.S.C. § 1252(g)

8 U.S.C. § 1255a(f)(4)(C)

12 U.S.C. § 1467a(f)(5)(B)

12 U.S.C. § 1786(k)(1)

12 U.S.C. § 1787(b)(13)

12 U.S.C. § 1818(i)(1)

12 U.S.C. § 1821(d)(13)(D)

12 U.S.C. § 1844(e)(2)

12 U.S.C. § 2267
12 U.S.C. § 4208
12 U.S.C. § 4228
12 U.S.C. § 4242
12 U.S.C. § 4584(b)
12 U.S.C. § 4623(d)
12 U.S.C. § 4635(b)
15 U.S.C. § 717z(g)(1)
15 U.S.C. § 719h(c)
15 U.S.C. § 2703(f)(3)
15 U.S.C. § 3207(a)(1)
15 U.S.C. § 3416(c)
15 U.S.C. § 3803(d)(3)
15 U.S.C. § 6712(b)(2)
16 U.S.C. § 824k(f)(3)
16 U.S.C. § 2633(c)
16 U.S.C. § 3168
19 U.S.C. § 1516a(g)(2)(B)
19 U.S.C. § 1516a(g)(5)(C)(iv)
19 U.S.C. § 1516a(g)(7)(A)
19 U.S.C. § 1516a(g)(7)(B)
19 U.S.C. § 1677f(f)(1)(C)
22 U.S.C. § 6450
25 U.S.C. § 1775h(b)
26 U.S.C. § 6305(b)
26 U.S.C. § 6402(f)

29 U.S.C. § 101

29 U.S.C. § 104

29 U.S.C. § 105

29 U.S.C. § 107

29 U.S.C. § 252(d)

31 U.S.C. § 3730(e)(1)

31 U.S.C. § 3730(e)(2)(A)

31 U.S.C. § 3730(e)(4)(A)

42 U.S.C. § 239a(f)(2)

42 U.S.C. § 1973l(b)

42 U.S.C. § 2160a

42 U.S.C. § 2184

42 U.S.C. § 9622(e)(3)(C)

43 U.S.C. § 2011(c)

50 U.S.C. § 47d(b)