No. 04-944

IN THE
# Supreme Court of the United States

JENIFER ARBAUGH,
*Petitioner*,
v.
Y & H CORPORATION,
D/B/A THE MOONLIGHT CAFE,
*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF AMICI CURIAE FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF RESPONDENT

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## STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation.[1]

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amici curiae and their members, made a monetary contribution to the preparation or

It represents an underlying membership of more than three million businesses and organizations in every industrial sector and geographic region of the country.

The National Federation of Independent Business Legal Foundation ("NFIB Legal Foundation")—a nonprofit public interest law firm established to protect the rights of America's small business owners—is the legal arm of the National Federation of Independent Business ("NFIB"), the Nation's oldest and largest organization dedicated to representing the interests of small business owners throughout all 50 states. The 600,000 NFIB members own a wide variety of small businesses, including restaurants, family farms, neighborhood retailers, service companies, and technology manufacturers.

The Society for Human Resource Management ("SHRM") is the world's largest association devoted to human resource management. Representing more than 200,000 individual members, the Society's mission is to serve the needs of human resource ("HR") professionals by providing the most essential and comprehensive resources available. As an influential voice, the Society's mission is also to advance the human resource profession to ensure that HR is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters and members in more than 100 countries.

The resolution of the issue presented in this case will have a direct impact on hundreds of thousands of members of the Chamber, the NFIB, and the SHRM. The smallest of small businesses—those with 15 or fewer employees—include mom and pop stores, dry cleaners, landscaping companies,

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submission of this brief. S. Ct. Rule 37.6. The brief is filed with the consent of the parties, and copies of the consent letters have been filed with the Clerk.

barbershops, beauty salons, car washes, restaurants, and family farms, and Congress sought to categorically exempt such small concerns from Title VII regulation.[2]

Amici have collectively participated as *amici curiae* in many cases before this Court, including cases relating to the federal antidiscrimination laws and affecting the interests of small business owners. *See*, *e.g.*, *Ballard* v. *Commissioner*, 125 S. Ct. 1270 (2005); *McNab* v. *United States*, 540 U.S. 1177 (2004); *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526 (1999); *Walters* v. *Metropolitan Educ. Enters., Inc.*, 519 U.S. 202 (1997).

## SUMMARY OF ARGUMENT

This case asks whether Congress intended federal courts to exercise jurisdiction over Title VII claims against the smallest of employers—those who employ fewer than fifteen employees. The answer is no; Title VII's numerosity requirement is jurisdictional.

Congress may define through statute the boundaries of federal court jurisdiction. All of the parties to this case agree on that. The parties also agree that Congress has often acted to limit a federal court's jurisdiction to hear and enforce federal claims, and that jurisdictional limitations manifest themselves in a variety of ways. Title VII's numerosity requirement—which restricts the statute's definition of "employer" to those entities with fifteen or more employees—is one such jurisdictional limitation. The text of the statute supports the conclusion that the numerosity requirement is jurisdictional. Title VII's ample legislative history, which contains multiple

[2] "Small businesses" are frequently defined as having fewer than 500 employees. *See*, *e.g.*, United States Small Business Administration, Office of Advocacy, Frequently Asked Questions (Oct. 2005), *available at* http://www.sba.gov/advo/stats/sbfaq.pdf. The term is used in this brief, however, to describe the subset of businesses with fewer than 15 employees.

references to legislators' concerns about the great burdens on small employers if they were to be subjected to Title VII lawsuits, bears out that conclusion. And this Court's case law—including two cases in which the Court addressed Title VII numerosity issues that had led to dismissals *for lack of jurisdiction* below—substantiates that conclusion as well.

At a practical level, it makes plain sense that the numerosity requirement is jurisdictional. Many of the smallest companies—those on Title VII's numerosity "bubble"—live on the financial edge. They have little capital available to defend a costly federal discrimination lawsuit, and they have no legion of attorneys, in-house or otherwise, at their immediate command. Finding Title VII's numerosity requirement to be jurisdictional grants such companies the deserved opportunity to secure dismissal from a Title VII case at the earliest possible stage—before costly discovery, summary judgment motions, or trial—as well as the flexibility to seek and receive dismissal on jurisdictional grounds at a later stage of the proceedings if the numerosity issue manifests itself only then. And from the perspective of the Title VII plaintiff, deeming the requirement jurisdictional does not alter the outcome: if a plaintiff sues a company that does not employ fifteen employees, and thus is not deemed an "employer" under the Act, that plaintiff loses. Whether that plaintiff loses early—at a threshold, jurisdictional stage—or late, the result to the plaintiff is the same. The legislature intended to immunize small employers from Title VII suits when it set the statute's numerosity limit, and that limit should be given the significance Congress intended it to have.

All of the legal and practical inquiries therefore point the same way in this case: the Court should conclude that Title VII's numerosity requirement is jurisdictional.

## ARGUMENT

### I. CONGRESS HAS, AND REGULARLY EXERCISES, BROAD AUTHORITY TO LIMIT THE JURISDICTION OF THE FEDERAL COURTS.

The Constitution authorizes Congress to limit the subject matter jurisdiction of the federal courts as it sees fit. U.S. Const. art. I, § 8, cl. 9. "It is a fundamental precept that federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 374 (1978). As far back as 1807, Chief Justice Marshall explained that "courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807); *see also Mayor* v. *Cooper*, 73 U.S. (6 Wall.) 247, 252 (1868) (federal court jurisdiction can exist only if the Constitution permits it and an act of Congress supplies it). Congress thus controls if or when federal courts obtain subject matter jurisdiction over a dispute.

Congress has many times exercised its authority to limit the jurisdiction of the federal courts, and petitioner specifically acknowledges as much. Pet. Br. 20 & nn.25-30, 22-23 & nn.32-37 (citing multiple statutes imposing jurisdictional limits based on, *inter alia*, exhaustion, mediation, and amount-in-controversy requirements). The Solicitor General's amicus submission likewise recognizes that Congress has imposed jurisdictional limits in a multitude of statutes, including the admiralty statute, 46 U.S.C. App. § 740 (jurisdiction only when "a vessel" in "navigable water" is the "proximate cause" of alleged harm), *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 541 (1995); the Federal Tort Claims Act (jurisdiction only when the United States waived immunity and administrative claim was filed with appropriate government agency), *FDIC* v.

*Meyer*, 510 U.S. 471 (1994); 28 U.S.C. § 1343, providing for redress of the deprivation of federal rights under color of state law (jurisdiction only if a statutory action has been alleged, as held in *Mount Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 278-279 (1977)); and the Foreign Sovereign Immunities Act (jurisdiction only when facts meet specific immunity exception); and 28 U.S.C. § 1332 (jurisdiction only when parties are citizens of different states). *See* U.S. Br. 12, 22.

Additional examples abound—including, importantly, many statutes where a jurisdictional prerequisite exists elsewhere than the provision spelling out a federal court's enforcement authority. For instance, a court must determine whether an employee benefits plan meets the statutory definition of an "employee welfare benefit plan" governed by ERISA before it may exercise jurisdiction over an ERISA claim. *See, e.g.*, *Gualandi* v. *Adams*, 385 F.3d 236, 239 (2d Cir. 2004); *Xaros* v. *U.S. Fid. & Guar. Co.*, 820 F.2d 1176 (11th Cir. 1987). ERISA Section 1003(b) specifies that the statute does not apply to certain employee benefit plans, including governmental or church plans. ERISA's broad civil enforcement section itself, however, does not contain that limitation. *See* 29 U.S.C. § 1132. Nonetheless, courts recognize that if a plan is not a covered "employee welfare benefit plan" within the scope of Section 1003, they have no jurisdiction to adjudicate an alleged ERISA violation.

Another example appears in the antitrust laws. A defendant's conduct must have a "direct, substantial, and reasonably foreseeable effect" on interstate commerce before a federal court may exercise jurisdiction over a Sherman Act claim. 15 U.S.C. § 6a; *see, e.g.*, *United Phosphorous, Ltd.* v. *Angus Chem. Co.*, 322 F.3d 942, 945-952 (7th Cir.) (en banc), *cert. denied*, 540 U.S. 1003 (2003); *Save Our Cemeteries, Inc.* v. *Archdiocese of New Orleans*, 568 F.2d 1074 (5th Cir. 1978); *Diversified Brokerage Servs., Inc.* v. *Greater Des Moines Bd. of Realtors*, 521 F.2d 1343 (8th Cir. 1975).

Similarly to Title VII, the Sherman Act's jurisdictional provision is framed quite broadly: "The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title." 15 U.S.C. § 4. But, as with the interplay between provisions of the ERISA statute, another provision of the Sherman Act—here Section 6(a)—circumscribes a federal court's jurisdictional authority.

A third example appears in the copyright laws. The jurisdictional grant to federal courts—found in 28 U.S.C. § 1338—broadly states that "district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to * * * copyrights * * *." Another statutory provision, however, limits that broad jurisdictional grant. In 17 U.S.C. § 411(a), Congress limited the actions that can be adjudicated in federal court to those involving *registered* copyrights, even though "registration is not a condition of copyright protection." 17 U.S.C. § 408(a). An owner of an unregistered copyright may still suffer infringement, but it is not infringement that a district court has subject matter jurisdiction to adjudicate. *See La Resolana Architects, PA* v. *Clay Realtors Angel Fire*, 416 F.3d 1195, 1200-01 (10th Cir. 2005).

The sheer breadth and number of statutes in which Congress has limited jurisdiction—and the tremendous variety of ways in which Congress has limited jurisdiction in other statutory contexts—provide the necessary backdrop for the conclusion here: Title VII's numerosity requirement, like the (often fact-based) jurisdictional requirements in many other statutes, similarly limits federal court jurisdiction.

## II. CONGRESS INTENDED TITLE VII'S EMPLOYEE NUMEROSITY REQUIREMENT TO OPERATE AS A JURISDICTIONAL LIMITATION.

1. The Court may and should begin with a straightforward reading of the statute itself. The statutory language at issue in Title VII, including its definition of "employer," is that of limitation and exclusion. 42 U.S.C. § 2000e(b). The Act prohibits unlawful employment practices *by an employer*—no other—and specifically defines those considered to be "employers" under the statute. 42 U.S.C. § 2000e-2; *see also id.* § 2000e-3(a), (b). If an entity is not an "employer," then there is no claim for a federal court to adjudicate. Yet under petitioner's proffered jurisdictional reading, a court would have jurisdiction over any Title VII claim no matter how unlike an "employer" the defendant entity was. *Compare Woodard* v. *Virginia Bd. of Bar Examiners*, 598 F.2d 1345, 1346 (4th Cir. 1979) (no subject matter jurisdiction over Title VII discrimination claim against Virginia Board of Bar Examiners brought by student sitting for exam).

2. The legislative history of Title VII and the 1972 amendments to the Act confirm that Congress viewed the numerosity requirement as a fundamental limitation on the jurisdiction of the federal courts to entertain employment disputes. Title VII was enacted against a backdrop of the civil rights conflicts of the 1960s—including, importantly, fear of "the steady and deeper intrusion of the Federal power in fields where the problem is essentially State and local in character." 110 Cong. Rec. 8193 (Apr. 16, 1964) (Sen. Dirksen), cited in *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107, 116 (1988). In determining which employers would be categorically excluded from the Act—*i.e.*, where to draw the line beyond which "the Federal power" would not intrude on businesses' employment practices—Congress focused on two concerns: protecting small businesses from the financial burdens associated with regulation under the

Act, and avoiding encroachment on the relationship between a small business owner and his or her employees.

Members of Congress expressed grave concerns that including small businesses within Title VII's ambit would impose costs—both administrative and related to litigation—that small companies could and should not reasonably be forced to bear. *See*, *e.g.*, 110 Cong. Rec. 2708, 2711, 2712 (Feb. 10, 1964), 9594 (Apr. 29, 1964), 13087, 13092 (June 9, 1964); 118 Cong. Rec. 2388-90, 2391-94, 2409-11 (Feb. 2, 1972); Sen. Subcomm. on Labor of the Comm. on Labor and Public Welfare, 92d Cong., Legislative History of the Equal Employment Act of 1972, at 1010, 1375. As one Senator observed, "[H]ow many of these little fellows in business are able to get to court? Most of them cannot afford to pay the court cost, let alone the legal fees that would be necessary" to defend against a federal discrimination claim. 110 Cong. Rec. at 2711 (Sen. Rogers). Another emphasized that small businesses are "without the assets and capability to cope with the legal and administrative tangle" the Act would "thrust upon them." 118 Cong. Rec. 2389 (Sen. Stennis). *See also* *Tomka* v. *Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir. 1995) ("Congress decided to protect small employers 'in part because Congress did not want to burden small entities with the costs associated with litigating discrimination claims.' ") (quoting *Miller* v. *Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993)).

Members of Congress also expressed concern that including small businesses in Title VII would too deeply intrude into the culture of small businesses. Senator Fulbright, for example, observed that "[t]he matter of selection of employees goes to the very heart of the success of a small business * * *." 110 Cong. Rec. 9594 (Sen. Fulbright) (Apr. 29, 1964). *See also id.* at 13085 (Sen. Cotton) ("[W]hen a small businessman * * * selects an employee, he comes very close to selecting a partner * * *."); *id.* at 13088 (June 9, 1964); Sen. Subcomm. on Labor of the Comm. on Labor and Public

Welfare, 92d Cong., Legislative History of the Equal Employment Act of 1972, at 1010 (small business associates are in "almost a family relationship"); *id.* at 1283, 1375.

The extensive discussion preceding the initial passage of Title VII, including the repeated airing of the legislators' intent that small businesses be insulated from Title VII claims against them, was reprised in the 1972 Amendments to the Act. 118 Cong. Rec. 2388-94, 2409-11 (Feb. 2, 1972); Sen. Subcomm. on Labor of the Comm. on Labor and Public Welfare, 92d Cong., Legislative History of the Equal Employment Act of 1972, at 1010, 1283, 1375. Those amendments, among other things, lowered the numerosity requirement from 25 to 15. The Report accompanying the amendments specifically describes the change to the numerosity requirement as "*changing the jurisdictional reach of Title VII*." H.R. Rep. No. 92-238, at 20 (1971) (emphasis added). Congress plainly did not intend to subject small employers to Title VII enforcement and liability, and in sparing them the financial and other burdens related to that federal regulation, did not provide federal courts with adjudicative authority over these employers.

Congress amended Title VII again in 1991. *See* P.L. 102-166, 105 Stat. 1071 at §§ 2, 3. By that time, the First, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits *all* had held that Title VII's numerosity requirement was jurisdictional.[3] Congress is presumed to be aware of those cases.

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[3] *See Thurber* v. *Jack Reilly's, Inc*., 717 F.2d 633, 635 (1st Cir. 1983); *Woodard*, 598 F.2d at 1346; *Dumas* v. *Town of Mount Vernon*, 612 F.2d 974, 976-977 (5th Cir. 1980); *Armbruster* v. *Quinn*, 711 F.2d 1332, 1334 (6th Cir. 1983); *Hassell* v. *Harmon Foods, Inc*., 454 F.2d 199, 199 (6th Cir. 1972); *Zimmerman* v. *North Am. Signal Co*., 704 F.2d 347, 350 (7th Cir. 1983); *Childs* v. *Local 18, Int'l Bhd. of Elec. Workers*, 719 F.2d 1379, 1382 (9th Cir. 1983); *Owens* v. *Rush*, 636 F.2d 283, 285-286 (10th Cir. 1980); *McKenzie* v. *Davenport-Harris Funeral Home*, 834 F.2d

*Cannon* v. *University of Chicago*, 441 U.S. 677, 697 (1979) (the Court is "especially justified in presuming" that Congress is aware of judicial interpretations of an existing statute and adopts that interpretation when it enacts a new statute patterned after the existing one); *see also Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978). Congress's failure to indicate any contrary idea about the jurisdictional limits of the Title VII statute in its substantial 1991 amendments speaks volumes.[4]

Congress thus plainly was motivated in Title VII and in the later rounds of amendments to the statute to protect and preserve small employers' financial and associational interests. And Congress advanced that firmly stated purpose by expressly exempting those employers from Title VII scrutiny. The most natural reading of the statute coupled with its legislative history is that the exemption Congress crafted for

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930, 932-933 (11th Cir. 1987). Only the Third Circuit had ruled that the numerosity issue went to the merits. *See Martin* v. *United Way of Erie County*, 829 F.2d 445, 447 (3d Cir. 1987).

More recently, the Seventh Circuit abandoned its earlier view in favor of a merits-based reading. *See EEOC* v. *The Chicago Club*, 86 F.3d 1423, 1428-29 (7th Cir. 1996). And the Eleventh Circuit has issued conflicting opinions. *Compare Lyes* v. *City of Riviera Beach*, 166 F.3d 1332, 1340-41 (11th Cir. 1999) (en banc) (Title VII numerosity requirement is jurisdictional), *with Garcia* v. *Copenhaver, Bell & Assocs.*, 104 F.3d 1256, 1266 (11th Cir. 1997) (ADEA numerosity requirement is part of merits).

[4] Also against this backdrop, Congress included a nearly identical numerosity requirement in the Americans with Disabilities Act, 42 U.S.C. § 12111(5)(A) in 1990, and incorporated Title VII's remedial scheme, including the formal grant of federal-court jurisdiction in § 706(f)(3). *See* 42 U.S.C. §12117(a). Congress similarly described the effect of the Family Medical Leave Act's nearly identical numerosity requirement as "exempti[ng] * * * employers" below the requirement. H.R. Rep. 101-28, Part 1, at 24 (1989).

small businesses goes to the jurisdiction of the courts. For construing the numerosity issue as a jurisdictional prerequisite—not an element of a plaintiff's proof on the merits—confers on small businesses the opportunity to exit litigation early if no jurisdictional basis for the suit exists, and in addition (as is the situation here) the opportunity to obtain dismissal on jurisdictional grounds at a later stage. Reading Title VII to afford small employers opportunities for early dismissal from litigation, as well as the flexibility to raise the jurisdictional issue later if necessary, best comports with the legislators' desire to thoroughly and effectively insulate small businesses from the burdens of defending federal discrimination lawsuits. *See* Jeffrey A. Mandell, *The Procedural Posture of Minimum Employee Thresholds in Federal Antidiscrimination Statutes*, 72 U. Chi. L. Rev. 1047, 1064 (2005) ("A reading of Congress's intent as the protection of small business from federal regulation is consistent with interpreting the minimum employee threshold as establishing a jurisdictional prerequisite.").

3. It is also telling that Congress in the 1972 Amendments to Title VII viewed the change in the statute's definition of "employer"—dropping the numerosity requirement from 25 to 15—as expanding the *EEOC's* jurisdiction over Title VII discrimination claims. *See*, *e.g.*, S. Rep. No. 92-415, at 8-9 (1971); H. Rep. No. 92-238, at 1 (amendments would "broaden jurisdictional coverage"); *id.* at 64 ("if [EEOC] jurisdiction is thus extended"); *id.* at 70 (bill "expands the jurisdiction of the EEOC"). Given that a civil action can only follow an EEOC charge, 42 U.S.C. § 2000e-5(f)(2), the EEOC's jurisdiction to prevent unlawful employment practices is directly relevant to whether the federal courts in turn have jurisdiction over a civil action arising out of the EEOC charge.

The EEOC and this Court have both stated that the EEOC's jurisdiction to investigate complaints is limited to employers with greater than 15 employees. *See*, *e.g.*, *EEOC* v. *Com-*

*mercial Office Prods. Co.*, 486 U.S. at 119 n.5 ("Title VII does not give the EEOC jurisdiction to enforce the Act against employers of fewer than 15 employees * * *.") (citing 42 U.S.C. § 2000e(b)); EEOC Decision No. 77-32, 1977 WL 5352, at *1 (Aug. 16, 1977) (EEOC has jurisdiction because respondent "employs more than fifteen employees and affects interstate commerce").[5] The EEOC's jurisdiction plainly should be viewed as coextensive with the jurisdiction of the federal courts. It simply would make no sense for Congress to confer on the federal courts greater jurisdiction to hear discrimination claims than the jurisdiction of the EEOC—the required first stop for all Title VII litigants.

## III. THIS COURT'S PRECEDENTS SUPPORT THE CONCLUSION THAT TITLE VII'S EMPLOYEE NUMEROSITY REQUIREMENT IS A JURISDICTIONAL LIMITATION.

This Court has heard and resolved two separate cases in which a Title VII claim came before the Court after having been dismissed for lack of subject matter jurisdiction. And the Court resolved each without so much as raising an eyebrow on the jurisdictional issue. Although the Court did not directly address the jurisdictional issue presented here in either of those cases, "weighty inferences" are appropriately

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[5] *See also, e.g., Auld* v. *Law Offices of Cooper, Beckman & Tuerk*, 1992 WL 372949, at 1 (4th Cir. Dec. 18, 1992) (EEOC "denied jurisdiction because it found that [defendant] possessed fewer than 15 employees during the relevant time period."); *Mochelle* v. *J. Walter Inc.*, 823 F. Supp. 1302, 1307 (M.D. La. 1993) (EEOC found "no jurisdiction to hear the plaintiff's ADEA complaint because [defendant] did not have the requisite 20 employees required by 29 U.S.C. § 630(b)."), *aff'd*, 15 F.3d 1079 (5th Cir. 1994); *Fike* v. *Gold Kist, Inc.*, 514 F. Supp. 722, 725 (N.D. Ala.) (EEOC dismissed charge "for lack of jurisdiction" because defendant "did not have 15 or more employees."), *aff'd*, 664 F.2d 295 (11th Cir. 1981).

drawn from both decisions. *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 396 (1982).

In *Walters* v. *Metropolitan Educational Enterprises*, 519 U.S. 202 (1997), the district court dismissed a Title VII complaint *for lack of subject matter jurisdiction* because the employer did not satisfy the numerosity requirement. The Seventh Circuit affirmed. The Supreme Court granted certiorari to determine the meaning of the phrase "has fifteen or more employees for each working day in each of twenty or more weeks": Did an employer have an employee for any working day in which the employee maintains an employment relationship with the employer, or only on those days for which the employee received compensation from the employer? *Id.* at 204. The Court held the former, adopting what is known as the "payroll method" of determining how many employees an employer had. *Id.* at 207.

For present purposes, the Court's approach to the issue is more significant than its holding. The Court examined payroll receipts and other evidence in the record to determine the number of employees, ruled that the defendant was in fact an employer, and remanded the case for further proceedings. *Id.* at 212; *see also id.* at 205 (holding that "Metropolitan was subject to Title VII, however, only if, at the time of the alleged retaliation, it met the statutory definition of 'employer' "). Once the Court adopted the "payroll method" for counting employees, of course, it could have remanded the case to let the jury decide if the defendant was an "employer." But it did not; instead it undertook and resolved that threshold inquiry itself. The Court's approach therefore is consistent with the view that determining the number of employees is a threshold jurisdictional question appropriately resolved by a judge, not a substantive element to be decided by a jury. And of course, had the Court perceived the numerosity issue to involve one of the substantive elements of Title VII, it might have reversed the dismissal for lack of

jurisdiction on that basis—not because it found the defendant was an employer.

*EEOC* v. *Arabian American Oil Company*, 499 U.S. 244 (1991) (*Aramco*), similarly arrived at the Court after a district court dismissed the plaintiff's Title VII claim for lack of jurisdiction and the state law claims for lack of pendant jurisdiction. *Id.* at 247. The EEOC argued in this Court that "Title VII's 'broad jurisdictional language' reveals Congress' intent to extend the statute's protections to employment discrimination anywhere in the world." *Id.* at 249. This Court rejected that notion, and its rationale is telling. The Court looked to Title VII's definitional section—in particular, to the definition of "employer"—and concluded that Congress did not intend the EEOC's jurisdiction to extend to employers operating abroad. *Id.* at 252. The *Aramco* Court did not treat the statute's definition of "employer" as an element of a Title VII claim relevant only to the merits of the case; quite to the contrary, the definition formed a critical aspect of its jurisdictional inquiry.[6]

*Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982), on which petitioner and the United States so heavily rely, is not contrary to amici's position. *Zipes* examined whether the timely filing of an EEOC charge is a jurisdictional prerequisite, as opposed to a statute of limitations subject to waiver and estoppel. *Id.* at 392-393. The Court found the timely filing requirement non-jurisdictional for reasons particular to that case and that requirement. First, the legislative history of the timeliness requirement indicated that Congress viewed it as a statute of limitations. *Id.* at 394. Second, Congress modeled the timeliness requirement on the National Labor Relations Act, which contains a statute of limitations for

[6] The holding in *Aramco* was superseded by statute. *See* Pub. L. 102-166, 105 Stat. 1071, § 109(a) (adding provisions relating to employment in a foreign country, currently codified at 42 U.S.C. § 2000e(f)).

filing a charge rather than a jurisdictional restriction. *Id.* at 395 n.11. And third, Congress previously had stated that the EEOC filing requirement in the Age Discrimination in Employment Act—which in turn was modeled on Title VII's requirement—was "not a jurisdictional prerequisite" and was subject to "equitable modification." *Id.*

Here, as shown above, congressional intent cuts just the opposite way, and supports a finding that the numerosity requirement is a categorical exemption for small employers that prevents a district court from taking jurisdiction over a Title VII case against them.

## IV. PRACTICAL CONSIDERATIONS SUPPORT CONGRESS'S DECISION TO MAKE NUMEROSITY A JURISDICTIONAL LIMITATION.

1. It makes good sense to determine numerosity at the outset of Title VII litigation. Small businesses face unique and substantial challenges in defending federal discrimination lawsuits. Many small businesses on the Title VII numerosity "bubble" are truly hand-to-mouth operations; indeed, seven out of ten small business owners start their business with precious little capital—just over $18,000. William J. Dennis, Jr., *Business Starts and Stops*, Wells Fargo/NFIB Series on NFIB Education Foundation, at 3 (Nov. 1999), *available at* http://www.nfib.com/attach/2429. Compare that start-up money to the "average cost of defending an employment discrimination suit, from the EEOC investigation process through litigation," which "is estimated to be $130,000." Steven A. Brehm, *Note, Does* EEOC v. Frank's Nursery & Crafts, Inc. *Create an End Run Around Arbitration Agreements?: Whether an Employee's Binding Arbitration Agreement Precludes the EEOC from Seeking Back Pay and Damages on Behalf of the Employee*, 39 Brandeis L.J. 693, 696 (2001); *see also* Aimee Gourlay & Jenell Soderquist, *Mediation in Employment Cases is Too Little Too Late: An Organizational Conflict Management Perspective on Resolving*

*Disputes*, 21 Hamline L. Rev. 261, 286 (1998) ("the cost of taking a discrimination case from complaint to trial in California often reaches $300,000"). For a small enterprise, such a massive outlay—potentially hundreds of thousands of dollars to defend one case—threatens the business's very financial viability.

It also should go almost without saying that small businesses have far less access to legal resources than large employers equipped with a full complement of in-house counsel—not to mention outside counsel at their beck and call. Lacking ample legal resources, many small businesses are left to their own devices when navigating complex federal regulatory requirements and proscriptions. Many small business owners "report that it can take 40 or more hours to understand whether any given regulation applies to them." NFIB, *Small Business Problems & Priorities* at 6 (June 2004), *available at* http://www.nfib.com/attach/6155. NFIB also has found that it costs business owners with fewer than 20 employees "about 60 percent *more* per employee in [federal regulatory] compliance costs than experienced by larger firms." *Id.* at 9 (emphasis added). A similar recent study funded by the United States Small Business Administration found the same disproportionate impact. *See* W. Mark Crain, *The Impact of Regulatory Costs on Small Firms* (Sept. 2005) (concluding that it costs about 45 percent more for small firms to comply with federal regulations than their larger counterparts), *available at* http://www.sba.gov/advo/research/rs264.pdf. An earlier study conducted by the Small Business Administration in 2001, which had used a slightly different methodology, concluded that the disproportionality rate was even higher—nearly 60 percent. *Id.*; *see also* United States Small Business Administration, Office of Advocacy, Press Release: Small Business Hard Hit By Federal Regulatory Compliance Burden, New Study Shows Smallest Firms Bear Largest Per Employee Burden (Sept. 19, 2005) (noting that the 2005 study updated two earlier reports from 1995 and 2001, both of which also "showed similar patterns of

disproportionate regulatory burden borne by small businesses"), *available at* http://www.sba.gov/advo/press/05-43.html.

It therefore is plainly in a small employer's interest to have questions about its susceptibility to a Title VII suit decided at the threshold of federal litigation, thereby avoiding what might otherwise be protracted involvement in a lawsuit and its attendant legal and other costs. Treating numerosity as a jurisdictional factor serves this important purpose. It permits a court to inquire at the earliest possible stage into its jurisdiction over a Title VII dispute against a small employer and to terminate that litigation right then, without further ado, if the numerosity requirement is not met. And the numerosity question is not a messy qualitative inquiry: it is a simple, quantitative analysis, fully suitable for resolution before full-blown discovery and without empanelling a jury. *See Grubart*, 513 U.S. at 537-538 ("any litigation of a contested subject-matter jurisdiction fact issue [can] occur[] in comparatively summary procedure before a judge alone (as distinct from litigation of the same fact issue as an element of the cause of action, if the claim survives the jurisdictional objection)").

The alternative—a finding, as petitioner and the United States urge, that numerosity is relevant only to the merits of a Title VII claim—will subject small employers to extensive litigation and discovery on each and every facet of a case before the employers may be able to extricate themselves from litigation on the simple ground that they are not within the statute's reach. If numerosity is an element of plaintiff's proof rather than jurisdictional, and if some dispute exists over whether a small business satisfies that requirement, a judge alone may not preliminarily decide the issue.[7] Rather,

[7] If the numerosity requirement is jurisdictional, a court resolving that issue need not assume that a plaintiff's allegations as to the number of employees are true; it may permissibly inquire into the

any factual disputes relating to the number or kind of a small business's employees will be sent to a jury with the rest of the case—far later in the process, of course, than would otherwise apply if the requirement were a jurisdictional prerequisite. The very businesses who least can afford to litigate thus will expend more resources litigating, and will potentially be forced to litigate claims for far longer, than if the numerosity requirement were broached and resolved at the threshold of the suit.

2. Deeming the numerosity requirement to be a jurisdictional limit serves other important practical purposes as well. If the numerosity requirement is jurisdictional, Title VII plaintiffs will bear the burden of pleading that jurisdictional fact at the very outset of the litigation. *See FW/PBS, Inc.* v. *Dallas,* 493 U.S. 215, 231 (1990) ("[I]t is the burden of the 'party who seeks the exercise of jurisdiction in his favor,' 'clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.' ") (citations omitted). That threshold obligation will put small businesses sued under Title VII—many of whom, as earlier noted, may not be intimately or even superficially familiar with the statute's requirements—on notice that the number of employees is critical to whether the court may even hear the plaintiff's claims. Compare that to this case, where the petitioner simply pleaded that federal jurisdiction existed

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facts without viewing the evidence in a light favorable to either party. *See Nesbit* v. *Gears Unlimited, Inc.*, 347 F.3d 72, 77 (3d Cir. 2003). But if the inquiry is wrapped up with the merits, a plaintiff could survive a motion to dismiss—and thereby force a small employer to suffer the financial expense of full-blown discovery and a round of summary judgment motions—simply by alleging that there are more than 15 employees. *Id.* And even at the summary judgment stage, the court would have to view the evidence in the light most favorable to the plaintiff, causing a small employer to further endure the financial costs of a full-blown trial. *Id.*

without any reference to the number of respondent's employees.

3. Petitioner and the United States have raised various practical concerns that they argue counsel against finding that Title VII's numerosity requirement is jurisdictional. Some of their concerns are exaggerated; others simply are wrong.

a. Petitioner argues that Title VII's merits issues may sometimes be more easily resolved than the threshold numerosity issue. *See* Pet. Br. 32; *see also* U.S. Br. 17. That argument has two flaws, one factual and one legal. First, in most cases, the jurisdictional determination whether the numerosity requirement is met will be straightforward.[8] The vast majority of employers either clearly have or clearly lack 15 employees—making limited fact-finding and discovery on numerosity the exception, not the rule. The number of employees is an objectively verifiable fact.

Second, that a Title VII merits inquiry may appear "more easily" resolved, U.S. Br. 17, cannot confer federal jurisdiction where it does not exist. As this Court made clear in *Steel Company* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998), a court may not "assume" jurisdiction to reach and resolve the merits of a case. To do so "carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." *Id.* at 94. The requirement that jurisdiction be established as a threshold matter before turning to the merits of a case " 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without excep-

[8] The merits of a Title VII case also are rarely as straightforward as the petitioner and the Solicitor General suggest. A Title VII merits case generally involves the well-known and often complex *McDonnell Douglas* burden-shifting analysis, not to mention multiple credibility determinations. *See McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

tion.' " *Id.* (quoting *Mansfield, C.&L.M.R. Co.* v. *Swan*, 111 U.S. 379, 382 (1884)).

It also is in no way unique to Title VII that a case may occasionally require factfinding to determine whether the facts necessary to support jurisdiction exist. Other jurisdictional factors created by Congress also entail factfinding in certain cases—which is why the Courts of Appeals have unanimously concluded that it is proper to permit the limited discovery necessary to resolve such narrow factual questions. *See* Stefania A. Di Trolio, *Comments, Undermining and Unintwining: The Right to a Jury Trial and Rule 12(b)(1)*, 33 Seton Hall L. Rev. 1247, 1257-58 & n.80 (2003) (citing cases). This is true across the board, no matter what sort of jurisdictional fact is in dispute. *See, e.g.*, *Gualandi*, 385 F.3d at 244 (ERISA); *Laub* v. *United States Dep't of Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003) (standing under National Environmental Policy Act); *Cirino-Encarnacion* v. *Concilio De Salud Integral De Loiza, Inc.* 317 F.3d 69, 70 (1st Cir. 2003) (Emergency Medical Treatment and Active Labor Act and the Federal Tort Claims Act); *Valentin* v. *Hospital Bella Vista*, 254 F.3d 358, 363-364 (1st Cir. 2001) (diversity jurisdiction); *Goodman Holdings* v. *Rafidain Bank*, 26 F.3d 1143, 1147 (D.C. Cir. 1994) (Foreign Sovereign Immunity Act); *see also Oppenheimer Fund, Inc.* v. *Sanders*, 437 U.S. 340, 351 n.12 (1978) (noting the availability of discovery to ascertain jurisdictional facts) (citing 4 J. Moore, Federal Practice ¶ 26.56 [6] (2d ed. 1976); *Land* v. *Dollar*, 330 U.S. 731, 735 n.4 (1947) (court may inquire into jurisdictional facts whenever and however necessary); *Note, The Use of Discovery to Obtain Jurisdictional Facts*, 59 Va. L. Rev. 533 (1973)).[9] As these cases and numerous others like them demonstrate, that a particular fact may require preliminary discovery in no way

[9] The availability of limited jurisdictional discovery resolves petitioner's concern that a Title VII plaintiff may not have access to numerosity information before filing suit. Pet. Br. 27.

answers whether Congress intended that that factual dispute bear on jurisdiction or the merits.

b. Petitioner's and the government's second practical concern with deeming the numerosity requirement jurisdictional—that small-business defendants in Title VII cases have an incentive to "sandbag" plaintiffs by waiting until after trial to raise a jurisdictional defense—simply is not realistic. Pet. Br. 34; U.S. Br. 18. There is *no* incentive—none—for a small employer to wait to raise a jurisdictional defense. Small businesses have *every* incentive, including and especially a financial one, to curtail Title VII litigation at the earliest possible stage. A small business therefore will challenge numerosity at the earliest opportunity, except in the most unusual circumstances (such as where, as here, it is not apparent to the company at the pleading stage that it may not meet the numerosity requirement). And even the anomalous situation in which numerosity is not challenged at the first opportunity does not change the analysis. "The age-old rule that a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists has always worked injustice in particular cases. Parties often spend years litigating claims only to learn that their efforts and expense were wasted in a court that lacked jurisdiction." *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988).

c. The Solicitor General also suggests that if the numerosity requirement is jurisdictional, employers may fire employees to avoid Title VII litigation. That also is a hypothetical disconnected from reality. *See* U.S. Br. 19. The majority of circuits have viewed Title VII's numerosity requirement as jurisdictional for *decades*. *See supra* n.3 (citing cases). Yet there has been no years-long epidemic of 16-employee businesses firing two workers in order to slyly avoid defending a federal discrimination claim. And a small employer would have no reason to fire one of its few employees to stave off a federal claim when in most jurisdictions it would still be

subject to state claims. *See* Pet. Br. 36 (noting that many state numerosity requirements are lower).

d. Finally, the government is wrong to suggest that if the numerosity requirement is jurisdictional, every other definition and element of a Title VII claim would be "jurisdictional" as well. U.S. Br. 13. The numerosity requirement is unique within the statute; for whether an entity comes within the statute's definition of an "employer" determines whether Congress intended it to have "complete immunity" and be "expressly exempted" from the Act. *Hishon* v. *King & Spalding*, 467 U.S. 69, 78 & n.11 (1984). The term "employer," in contrast to the other definitions the statute sets forth, is crafted as a threshold and objectively verifiable prerequisite, quite distinct (for example) from messy inquiries into the motivation for a defendant's particular employment practices. And as previously noted, this bright-line fact is similar to the jurisdictional facts contained in numerous other statutes. *See supra* at 5-8.

## V. EVEN IF THE NUMEROSITY REQUIREMENT WERE DEEMED NON-JURISDICTIONAL, A DEFENDANT'S FAILURE TO CHALLENGE NUMEROSITY AT THE OUTSET DOES NOT NECESSARILY WAIVE THE ISSUE.

If the Court concludes—against Congressional intent and the weight of authority—that Title VII's numerosity requirement is relevant only to the merits of a plaintiff's Title VII claim, the Court should make clear that an employer's failure to raise numerosity at the very outset of the litigation does not necessarily preclude the employer from raising the issue later.

A Title VII plaintiff bears the burden of proving each and every element of his or her claim. *See, e.g.*, *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 358 (1977) (recognizing "the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to

create an inference that an employment decision was based on a discriminatory criterion illegal under the Act"). If numerosity is found to be an element of a plaintiff's Title VII claim—and not a jurisdictional predicate—then the plaintiff must prove numerosity to prevail.

In the District Court, Y & H Corporation denied plaintiff Arbaugh's allegations on the merits. *See* Pet. App. 46. To prevail on her claim, then, Arbaugh had to prove every element of her case—including numerosity. She presented no evidence that the defendant satisfied this requirement, and she therefore cannot prove her Title VII claim. *See* Mandell, *supra*, at 1072 ("If a Title VII claim is to have any chance of success, the number of employees must be determined, whether as a jurisdictional prerequisite or as one of the merits of the claim."). Respondent should be permitted to raise this deficiency in petitioner's proof if this case is remanded on grounds that the numerosity requirement goes not to jurisdiction, but to the merits.[10] A Title VII defendant cannot be said to have "waived" any argument that the requisite number of employees are lacking where the plaintiff has failed to put on such evidence in the first place.

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[10] A Title VII defendant in this situation should be permitted to avail itself of common law doctrines, such as excusable neglect, to raise the issue at a proceeding's later stage if that becomes necessary. *See generally, e.g.*, Charles Alan Wright, *et al.*, 11 Fed. Prac. & Proc. Civ. 2d § 2858 (2005).

## CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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