No. 04-944

In the Supreme Court of the United States

JENIFER ARBAUGH, PETITIONER

v.

Y & H CORPORATION, D/B/A THE MOONLIGHT CAFE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits employment discrimination by an "employer," and defines an "employer" for that purpose to be a person who, *inter alia*, had 15 or more employees for each working day during 20 or more weeks in the current or preceding year. The question is whether the 15-employee requirement limits the courts' subject matter jurisdiction, or instead is relevant only to the merits of a Title VII claim.

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INTEREST OF THE UNITED STATES

This case presents the question whether Congress's exclusion of persons with fewer than 15 employees from the definition of the term "employer" in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, limits the courts' subject matter jurisdiction, or instead relates only to the merits of claims brought under Title VII. The Equal Employment Opportunity Commission (Commission or EEOC) administers Title VII and brings civil actions against private employers to enforce its requirements. 42 U.S.C. 2000e-5(f)(1). The Attorney General has authority to bring such actions against public employers. *Ibid.* In addition to bringing actions under Title VII, the United States is also subject to suit under that statute. 42 U.S.C. 2000e-16(c). The Department of

Labor, the EEOC, and the Attorney General administer and enforce a number of other statutes, including the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*, the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, and the Family and Medical Leave Act, 29 U.S.C. 2601 *et seq.*, that contain similar provisions restricting the definition of affected "employer[s]" to those with a minimum number of employees. 42 U.S.C. 12111(5)(A), 12117(a); 29 U.S.C. 626(b), 630(b); 29 U.S.C. 2611(4)(A), 2617(b) and (d). The United States therefore has a substantial interest in this case.

STATEMENT

1. Under Title VII, it is generally an "unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1). Title VII also prohibits other specified "unlawful employment practice[s]" by an "employer" or other covered entity, including an "employment agency" or "labor organization." 42 U.S.C. 2000e-2, 2000e-3. For purposes of Title VII:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or

> agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26.

42 U.S.C. 2000e(b).

Any person claiming to be aggrieved by an unlawful employment practice may file a charge with the EEOC. 42 U.S.C. 2000e-5(b). If the Commission determines that there is reasonable cause to believe that an employer or other covered entity engaged in such a practice, it shall "endeavor to eliminate * * * [the] practice by informal methods of conference, conciliation, and persuasion." *Ibid.* If such informal methods do not succeed, the Commission may bring a civil action against the respondent, unless the respondent is a government, governmental agency, or political subdivision, in which case the Attorney General may bring such an action. 42 U.S.C. 2000e-5(f)(1). If neither the Commission nor the Attorney General brings a civil action, the aggrieved person or persons may do so. *Ibid.*

Congress granted the federal courts jurisdiction over all such actions: "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 subchapter." 42 U.S.C. 2000e-5(f)(3).

2. In November 2001, petitioner Jenifer Arbaugh brought this lawsuit against respondent Y&H Corporation, d/b/a The Moonlight Cafe, in the United States District Court for the District of Louisiana. Pet. App. 1-2. Petitioner alleged that she had been subjected to sexual harassment and constructively discharged from her em-

ployment as a waitress and bartender at the Moonlight Cafe, in violation of Title VII and Louisiana state law. *Id.* at 2. Respondent "admitted [petitioner's] allegations as to jurisdiction but denied her allegations on the merits." *Id.* at 46.

After the parties completed discovery, the district court held a trial on the merits of petitioner's claims. See Pet. App. 3. A jury returned a verdict in favor of petitioner and awarded her $5000 in back pay, $5000 in compensatory damages, and $30,000 in punitive damages. *Ibid.* The district court entered judgment for petitioner based on the jury verdict. *Ibid.*

3. Two weeks later, respondent moved to dismiss the action for lack of subject matter jurisdiction. Pet. App. 3. Respondent argued in that post-verdict motion, for the first time, that it did not have 15 employees when it employed petitioner, and therefore was not an "employer" under 42 U.S.C. 2000e(b). Pet. App. 3.

The district court directed another round of discovery and briefing. Pet. App. 45-49. The court emphasized that it is "unfair and a waste of judicial resources to permit the [respondent] to admit [petitioner'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." *Id.* at 47. "Unfortunately," the court concluded, "none of these considerations are sufficient to confer subject matter jurisdiction [where] it is lacking." *Ibid.*

After the parties completed additional discovery and briefing, the district court requested further evidence regarding the compensation received by two of respondent's alleged owners. Pet. App. 25. The court ultimately concluded that it lacked subject matter jurisdiction because respondent's delivery drivers and owners

were not "employees" for purposes of Title VII, and when those persons are excluded from consideration, respondent had fewer than 15 employees during the relevant time period. *Id.* at 32-43. The court therefore dismissed petitioner's Title VII claim with prejudice, and her state-law claims without prejudice. *Id.* at 23.

4. The court of appeals affirmed. Pet. App. 1-22. The court determined that it was bound by Fifth Circuit precedents holding that a defendant's "failure to qualify as an 'employer' under Title VII deprives a district court of jurisdiction." *Id.* at 7 (citing, *e.g.*, *Dumas* v. *Town of Mt. Vernon*, 612 F.2d 974, 980 (1980)); see *id.* at 8-9.

After noting that "whether an individual is an 'employee' for Title VII purposes is a fact-intensive inquiry, and as with most employee-status cases, there are facts pointing in both directions" (Pet. App. 17), the court of appeals agreed with the district court that the delivery drivers and owners were not employees. *Id.* at 17-18, 20-21. Moreover, "[b]ecause it is undisputed that [respondent] did not employ the requisite 15 employees without the inclusion of" those persons, the court concluded that respondent is "not subject to liability under Title VII, and thus the district court properly dismissed [petitioner's] suit for lack of subject matter jurisdiction." *Id.* at 22.

SUMMARY OF ARGUMENT

A. The court of appeals erred by conflating the distinct questions whether a claim is meritorious and whether the courts have subject matter jurisdiction to adjudicate the claim. "It is firmly established * * * that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter juris-

diction." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998).

Instead, "where the complaint, as here, is drawn so as to seek recovery directly under the Constitution or laws of the United States, [a] federal court * * * must entertain the suit" unless the federal 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." *Bell* v. *Hood*, 327 U.S. 678, 681-682, 682-683 (1946). Petitioner's Title VII claim is by no means immaterial or frivolous.

B. Although Congress may limit the courts' subject matter jurisdiction based on facts that are also relevant to the merits of a case, nothing in Title VII evinces an intent to do so. To the contrary, Title VII expressly provides that "[e]ach United States district court * * * shall have jurisdiction of actions brought under [Title VII]." 42 U.S.C. 2000e-5(f)(3). That jurisdictional provision does not turn in any way on whether the defendant employs 15 or more employees. Instead, the 15-employee requirement is found in Title VII's definition of the term "employer," a term that is used in the provisions of Title VII that establish the *substantive rights and obligations* of the parties, but not in Title VII's *jurisdictional* provision.

That makes this case closely analogous to *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393-394 (1982), which held Title VII's timely-filing requirement to be non-jurisdictional, in large part because Title VII's jurisdictional provision "contains no reference" to the timely-filing requirement, and the separate provision containing that requirement "does not * * * refer in any way to the jurisdiction of the district courts." Here, too, the definition of "employer" is structurally separate

from the jurisdictional provision, which makes no reference to that definition.

The non-jurisdictional character of the 15-employee requirement reflects not only the best reading of the statute, but common sense as well. Determining whether a defendant had 15 workers who qualified as "employees" for purposes of Title VII during the relevant time period can require extensive discovery and factual analysis. As such, it would make little sense to treat the issue as jurisdictional, with the consequence that appellate courts would have to identify and resolve the complex factual issue *sua sponte*, and district courts would have to resolve the issue at the threshold of a case, instead of considering it in connection with other merits issues. Moreover, if the 15-employee requirement were jurisdictional, the relevant time period for measuring the defendant's workforce would be the time when the case was filed, as opposed to the time when the allegedly unlawful conduct occurred. It would make little sense, however, to permit employers to shed liability for past unlawful discrimination by firing employees, and thereby reducing their workforce below the 15-employee level.

C. The courts of appeals that have held the 15-employee requirement to be jurisdictional have provided little reasoning supporting that result. Some courts have suggested that the issue is jurisdictional because it relates to whether Title VII applies in a particular case, or to a particular defendant. As this Court has explained, however, "whether Congress intended to allow a certain cause of action against [a particular defendant]" is "not a question of jurisdiction." *Air Courier Conf. of Am.* v. *American Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991). Instead, it is a merits inquiry.

Although respondent has argued that this Court already determined that the 15-employee limitation is jurisdictional, this Court has never squarely faced that question, much less decided it. As this Court recently observed, jurisdiction is a term of many meanings and is often used imprecisely. See *Kontrick* v. *Ryan*, 540 U.S. 443, 454 (2004). "[S]cattered references to [a] requirement as jurisdictional" lack precedential effect where, as here, "the legal character of the requirement was not at issue in those cases." *Zipes*, 455 U.S. at 395.

ARGUMENT

THE 15-EMPLOYEE REQUIREMENT IS RELEVANT TO WHETHER A PLAINTIFF CAN STATE A VALID CLAIM, BUT NOT TO THE COURTS' JURISDICTION TO ADJUDICATE THE CLAIM

A. Whether A Plaintiff Can State A Valid Claim Is Ordinarily Relevant Only To The Merits Of The Case, Not To The Courts' Jurisdiction Over The Subject Matter

1. "As frequently happens where jurisdiction depends on subject matter, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action." *Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 249 (1951). While "*jurisdiction* is a question of whether a federal court has the power, under the Constitution or laws of the United States, to hear a case * * * *cause of action* is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court." *Davis* v. *Passman*, 442 U.S. 228, 239 n.18 (1979); see *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 274 (1994) ("jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the par-

ties") (internal quotation marks omitted); *United States* v. *Cotton*, 535 U.S. 625, 630 (2002) ("subject matter jurisdiction" refers only to a court's "power to hear a case").

The court of appeals erroneously conflated those inquiries by concluding that petitioner "is not subject to liability under Title VII, and *thus* the district court properly dismissed [petitioner's] suit for lack of subject matter jurisdiction." Pet. App. 22 (emphasis added). "It is firmly established * * * that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998); accord *Verizon Md., Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 642-643 (2002); *Duke Power Co.* v. *Carolina Envt'l Study Group, Inc.*, 438 U.S. 59, 70-71 (1978); *Baker* v. *Carr*, 369 U.S. 186, 199-200 (1962); *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 359 (1959); *Lauritzen* v. *Larsen*, 345 U.S. 571, 574-575 (1953); *Montana-Dakota Utils.*, 341 U.S. at 249; *Bell* v. *Hood*, 327 U.S. 678, 685 (1946); *Binderup* v. *Pathe Exch. Inc.*, 263 U.S. 291, 305-306 (1923); *Swafford* v. *Templeton*, 185 U.S. 487, 493 (1902). "Jurisdiction is authority to decide the case either way. Unsuccessful as well as successful suits may be brought." *Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) (Holmes, J.); accord *Geneva Furniture Mfg. Co.* v. *S. Karpen & Bros.*, 238 U.S. 254, 258-259 (1915).

2. In 28 U.S.C. 1331, Congress broadly granted the federal district courts "jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Under that statute, "jurisdiction is sufficiently established by *allegation* of a claim under the Constitution or federal statutes." *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 279 (1977) (em-

phasis added); see *Duke Power*, 438 U.S. at 70-71. "If the complaint raises a federal question, the mere claim confers power to decide that it has no merit, as well as to decide that it has." *Montana-Dakota Utils.*, 341 U.S. at 249.

Thus, "where the complaint, as here, is drawn so as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions * * *, must entertain the suit." *Bell*, 327 U.S. at 681-682. Those "exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes 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 682-683. Unless one of those exceptions applies, a district court has jurisdiction if "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." *Id.* at 685; accord *Verizon*, 535 U.S. at 643; *Steel Co.*, 523 U.S. at 89.

3. Under that standard, the district court had subject matter jurisdiction to adjudicate petitioner's Title VII claim. Petitioner alleged a claim under a federal statute (Title VII) by claiming that respondent violated that statute and seeking relief under it. See Pet. App. 1, 2. The lower courts recognized that if respondent's delivery drivers or owners were considered "employees" under Title VII, respondent would be an "employer" under that statute, and petitioner would be entitled to judgment in her favor. See, *e.g.*, *id.* at 4. Because, as in *Steel Co.*, petitioner "wins under one construction of [a federal statute] and loses under another," the district

court had subject matter jurisdiction to consider her claim. 523 U.S. at 89; accord *Verizon*, 535 U.S. at 643; *Bell*, 327 U.S. at 684-685.

Nor is petitioner's federal claim so insubstantial or frivolous as to warrant dismissal for lack of subject matter jurisdiction. "Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" *Steel Co.*, 523 U.S. at 89 (quoting *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 666 (1974)); accord *Duke Power*, 438 U.S. at 70; *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 285 (1993). That standard is not remotely satisfied here. As the court of appeals noted, "whether an individual is an 'employee' for Title VII purposes is a fact-intensive inquiry, and as with most employee-status cases, there are facts pointing in both directions." Pet. App. 17.[1]

B. The Text, Structure, And Context Of Title VII And The 15-Employee Requirement Demonstrate That The Requirement Is Not Jurisdictional

To be sure, Congress's constitutional authority to "constitute Tribunals inferior to the supreme Court" (U.S. Const. Art. I, § 8, Cl. 9) authorizes it to restrict the lower courts' subject matter jurisdiction based on a wide

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[1] Although this Court has held that a suit may be dismissed for lack of subject matter jurisdiction when the federal claims are immaterial or frivolous, it has also questioned the accuracy of calling such dismissals jurisdictional. See, *e.g.*, *Bell*, 327 U.S. at 683 (citing *Fair*, 228 U.S. at 25). Because petitioner's Title VII claim is neither immaterial nor frivolous, this Court need not consider in this case whether or under what circumstances such dismissals are truly jurisdictional.

variety of factors, some of which might also be relevant to the merits of a case. See generally *Palmore* v. *United States*, 411 U.S. 389, 400-401 (1973). For example, Congress has provided that "the admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, *caused by* a vessel on navigable water." 46 U.S.C. App. 740 (emphasis added). Under that unusual provision, the proximate cause of the damage or injury is relevant both to the federal courts' jurisdiction and to the merits of a plaintiff's claim. *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 536-537 (1995). See *Mt. Healthy*, 429 U.S. at 278-279 (holding that 28 U.S.C. 1343, which grants federal courts jurisdiction over actions brought to redress the deprivation of federal rights under color of state law, requires an inquiry into "whether a statutory action had in fact been alleged"); *FDIC* v. *Meyer*, 510 U.S. 471, 479 (1994) (noting that the Federal Tort Claims Act, 28 U.S.C. 1346(b), "describes the scope of jurisdiction by reference to claims for which the United States has waived its immunity and rendered itself liable").

1. Nothing in Title VII, however, reflects an intent to impose any limitations on Section 1331's broad grant of subject matter jurisdiction. Quite to the contrary, Congress confirmed that "[e]ach 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 subchapter [Title VII]." 42 U.S.C. 2000e-5(f)(3). While that provision is phrased slightly differently than Section 1331—it applies to actions "brought under" Title VII, while Section 1331 applies to actions "arising under" federal law—the difference in phrasing is immaterial. As this Court ex-

plained in construing an analogous jurisdictional provision, the phrase "actions 'brought under'" a federal statute encompasses all "suits *contending* that [the statute] contains a certain requirement." *Steel Co.*, 523 U.S. at 93 (quoting 42 U.S.C. 11046(c)). "Surely [petitioner] has 'brought' her action under Title VII, in the sense that she has endeavored to plead that an employer covered by Title VII has violated its prohibition." *Da Silva* v. *Kinsho Int'l Corp.*, 229 F.3d 358, 365 (2d Cir. 2000).

That is not to say that Section 2000e-5(f)(3) is surplusage. When Congress enacted that provision in 1964, Section 1331 conferred jurisdiction over claims arising under federal law only when the amount in controversy exceeded $10,000. 28 U.S.C. 1331(a) (1964). Section 2000e-5(f)(3) therefore *expanded* the federal courts' jurisdiction to include all Title VII claims, without regard to the amount in controversy. Now that Section 1331 no longer contains an amount in controversy requirement, the remaining effect of Section 2000e-5(f)(3) is to confirm that Congress intended the federal courts to have subject matter jurisdiction over *all* Title VII claims, without limitation.

A contrary interpretation would be illogical. Every action "brought under" Title VII necessarily alleges that an employer (or other covered entity, such as a union or employment agency) engaged in an unlawful employment practice. If the 15-employee requirement were jurisdictional, then every other required element of the plaintiff's case would presumably be jurisdictional as well, including the other limitations on the definition of employer, see 42 U.S.C. 2000e(b), all of the limitations on the definitions of other covered entities, see 42 U.S.C. 2000e(c) and (d), proof that the employer or other covered entity engaged in an unlawful employment prac-

tice, see 42 U.S.C. 2000e-2, 2000e-3, and numerous other matters. But just as in *Steel Co.*, it would be "unreasonable to read [the statute's jurisdictional provision] as making all the elements of the cause of action * * * jurisdictional," and thereby "turn every statutory question * * * into a question of jurisdiction." 523 U.S. at 90, 92.

This Court recognized as much in *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982), when it held that another of Title VII's statutory requirements, the filing of a timely charge of discrimination with the EEOC, "is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." This Court relied primarily on the absence of any relevant limitation in the text of Title VII's jurisdictional provision:

> The provision granting district courts jurisdiction under Title VII, 42 U.S.C. §§ 2000e-5(e) and (f), 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 separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.

Id. at 393-394 (footnote omitted). In *Yellow Freight Systems, Inc.* v. *Donnelly*, 494 U.S. 820, 823-824 (1990), this Court similarly noted that the "plain text" of 42 U.S.C. 2000e-5(f)(3) "affirmatively describes the jurisdiction of the federal courts," and the Court relied primarily on the absence of any limiting language in that provision in holding that state courts have concurrent

jurisdiction with federal courts over Title VII claims. So too here, nothing in Title VII's broad jurisdictional provision limits the courts' subject matter jurisdiction based on *any* element of the cause of action, much less the number of a defendant's employees.

2. It would be especially unreasonable to treat the 15-employee requirement as a question of subject matter jurisdiction in light of the structure of the relevant provisions of Title VII. The 15-employee requirement is set forth as one of several elements of the definition of "employer," which is included in the section of Title VII entitled "Definitions." 42 U.S.C. 2000e(b). Nothing in the definition of "employer" refers in any way to the "jurisdiction" of the courts, see *ibid.*; nor does Title VII's jurisdictional provision make any reference to the term "employer," see 42 U.S.C. 2000e-5(f)(3). Instead, that term is relevant in this case because it is used in the provisions of the statute defining "unlawful employment practices" (42 U.S.C. 2000e-2, 2000e-3)—*i.e.*, the substantive "rights or obligations of the parties," which are precisely what this Court has held to be non-jurisdictional, *Landgraf*, 511 U.S. at 274; see pp 8-9, *supra*.

More generally, a definitional section would be an unlikely place to find a limitation on the courts' subject matter jurisdiction. That is particularly true in the case of a statute that contains an express jurisdictional provision that does not use the defined word. See *Kontrick* v. *Ryan*, 540 U.S. 443, 453 (2004) (holding that statutory requirement was not jurisdictional, in part because "[t]he provision conferring jurisdiction" made no reference to it); *Verizon*, 535 U.S. at 643 (holding that statu-

tory provision that did "not even mention subject-matter jurisdiction" did not limit such jurisdiction).[2]

3. Treating the 15-employee requirement as non-jurisdictional not only represents the best reading of the text, it also best accommodates the fact-intensive nature of the inquiry. "[I]n most instances subject-matter jurisdiction will involve no arduous inquiry." *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 587 (1999). The definition of "employer," however, refers in relevant part to a person 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." 42 U.S.C. 2000e(b). As this case illustrates, that inquiry can be factually complex. A court must decide not only how many people worked at a company for 20 or more weeks during a year, but also how many of those people are considered "employees" under the act. See, *e.g.*, *Clackamas Gastroenterology Assocs., P.C.* v. *Wells*, 538 U.S. 440, 449-451 & n.10 (2003) (explaining how to determine whether shareholders and directors are employees). Resolution of those issues in this case required an additional round of discovery, additional briefing, and a further request by the district court for more information. See p. 4, *supra*. The lower courts then applied multiple multi-part tests to determine whether respondent's delivery drivers and owners were "employees,"

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[2] Title VII contains a separate jurisdictional provision for suits brought by the government to enjoin a pattern or practice of discrimination. 42 U.S.C. 2000e-6(b). Like 42 U.S.C. 2000e-5(f)(3), that provision does not refer in any way to the definition of "employer." Instead, it broadly confers jurisdiction over all pattern-or-practice suits, without limitation, by stating that "[d]istrict courts shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section." 42 U.S.C. 2000e-6(b).

and there was even a dispute about whether two of the owners were in fact owners. See, *e.g.*, Pet. App. 12, 16, 18-19.

It would make little sense to base the courts' subject matter jurisdiction on such complex factual issues. "[S]ubject matter delineations must be policed by the courts on their own initiative even at the highest level." *Ruhrgas*, 526 U.S. at 583. Thus, treating the question as jurisdictional "might in some cases require a federal appellate court to dig through an extensive record, including pay stubs and time sheets." *Nesbit* v. *Gears Unlimited, Inc.*, 347 F.3d 72, 83 (3d Cir. 2003), cert. denied, 541 U.S. 959 (2004). As Judge Easterbrook noted for the Seventh Circuit, the question whether a company had 15 or more workers who qualified as "employees" for each working day in 20 or more weeks in a calendar year is "not the sort of question a court (including appellate court) must raise on its own" when the parties have not raised or disputed the issue, "which a 'jurisdictional' characterization would entail." *Sharpe* v. *Jefferson Distrib. Co.*, 148 F.3d 676, 678 (7th Cir. 1998).

Even in cases where the parties raise the 15-employee issue at the outset, it is far more practical for courts to consider that issue along with the other factual issues in the case, instead of as a threshold jurisdictional matter. Because courts must address their subject matter jurisdiction before turning to the merits of a claim, *Steel Co.*, 523 U.S. at 94-95, "[t]o hold the requirement jurisdictional * * * implies that a court would need to decide whether 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*, 347 F.3d at 83. Moreover, consolidated discovery and fact-finding on all

issues is far more efficient than threshold jurisdictional proceedings on the 15-employee requirement, in part because it would not necessitate successive rounds of potentially duplicative discovery. That approach is also more consistent with Congress's conferral of the right to a jury trial in Title VII cases, see 42 U.S.C. 1981a(c), because jurisdictional facts are typically found by courts, not juries, see *Grubart*, 513 U.S. at 537-538.

Treating the requirement as non-jurisdictional would also prevent parties from belatedly raising the 15-employee requirement in response to an adverse decision. That point is especially important in cases, like this one, where the plaintiff alleged state law claims as well as a Title VII claim, and the district court took supplemental jurisdiction over the state law claims under 28 U.S.C. 1367. Based on its dismissal of the federal claim for lack of jurisdiction, the district court vacated its judgment not only on petitioner's Title VII claim, but also on her state law claims. Pet. App. 23; see 16 *James Wm. Moore's Federal Practice* § 106.66[1], at 106-86 to 106-87 (3d ed. 1997). As the district court recognized, that outcome is "unfair" to the prevailing party and a "waste of judicial resources." Pet. App. 47. It also creates odd incentives. In *Da Silva*, after the defendant unsuccessfully challenged the district court's jurisdiction based on the 15-employee requirement but ultimately prevailed on the merits for other reasons, *both* parties switched positions on appeal, with the *plaintiff* arguing that the district court lacked jurisdiction and that the court's judgment on the state law claims should therefore be vacated so that she could re-litigate them in state court. 229 F.3d at 361.

If the 15-employee requirement were truly jurisdictional, it would also follow that the relevant time period

for measuring the defendant's workforce would be the time when jurisdiction is invoked, *i.e.*, the filing of the suit, rather than the time period of the underlying conduct. See, *e.g.*, *Keene Corp.* v. *United States*, 508 U.S. 200, 207 (1993); *Minneapolis & St. Louis R.R.* v. *Peoria & Pekin Union Ry.*, 270 U.S. 580, 586 (1926). But such a rule would make little sense, and "[c]ourts consistently have held that" the definition of employer "refers to the year in which the alleged discrimination occurred." *Komorowski* v. *Townline Mini-Mart & Rest.*, 162 F.3d 962, 965 (7th Cir. 1998); accord Barbara Lindemann & Paul Grossman, *Employment Discrimination Law* 1307 (3d ed. 1996). If the 15-employee requirement were jurisdictional, and thus measured at the time of a suit's filing, employers could eliminate potential liabilities simply by reducing their workforce. Indeed, the very act of firing the fifteenth employee for an unlawful reason could exempt the employer from liability if it did not fill the position before a suit was filed.

It would have been quite strange for Congress to have created such a scheme in the context of a statute designed to provide a remedy for aggrieved employees. "Congress of course did not create such a strange scheme." *Steel Co.*, 523 U.S. at 93. To the contrary, Congress required that Title VII cases be "in every way *expedited*," not *hampered* with cumbersome jurisdictional rules. 42 U.S.C. 2000e-5(f)(5) (emphasis added). The statutory text, structure, and context make clear that the 15-employee requirement does not limit the courts' subject matter jurisdiction.

C. Neither Respondent Nor The Courts Of Appeals That Have Held The Issue To Be Jurisdictional Have Advanced A Persuasive Reason For Their Conclusion

The court of appeals did not provide any reasoning in support of its contrary conclusion. Instead, it considered itself bound by circuit precedents that themselves lacked any reasoning on the relevant point. See Pet. App. 7-9 (citing *Greenlees* v. *Eidenmuller Enters., Inc.*, 32 F.3d 197, 198 (5th Cir. 1994); *Womble* v. *Bhangu*, 864 F.2d 1212, 1213 (5th Cir. 1989); *Dumas* v. *Town of Mt. Vernon*, 612 F.2d 975, 980 (5th Cir. 1980)).

Nor have the decisions of the other courts of appeals that have held the requirement to be jurisdictional been long on analysis—a point frequently noted by the courts of appeals that have held the requirement not to be jurisdictional. See, *e.g.*, *EEOC* v. *St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997) (noting that "none of the courts has explained *why* the question is jurisdictional," and holding that it is not jurisdictional); *Nesbit*, 347 F.3d at 80-81 (same); *Da Silva*, 229 F.3d at 364 (same). What little reasoning those courts have provided is unpersuasive.

1. The Eleventh Circuit stated that the 15-employee limitation is jurisdictional because it "addresses whether Title VII applies in this case." *Scarfo* v. *Ginsberg*, 175 F.3d 957, 961 (1999), cert. denied, 529 U.S. 1003 (2000). The Tenth Circuit similarly held that a comparable requirement in the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, is jurisdictional because it "is directed to whether the defendant falls within the statute." *Trainor* v. *Apollo Metal Specialties, Inc.*, 318 F.3d 976, 978 n.2 (2002). Those rationales are unavailing because whether a statute applies to a particular case or defendant turns on the scope of conduct the statute pro-

hibits and the scope of the private right of action it authorizes—considerations that are generally part and parcel of whether the plaintiff can state a valid cause of action, *not* whether the courts have subject matter jurisdiction.

"[T]he scope of the * * * right of action * * * goes to the merits" of a claim, not the courts' jurisdiction to adjudicate it. *Steel Co.*, 523 U.S. at 92; see *id.* at 96; pp. 8-10, *supra*. In keeping with that principle, this Court has held that a variety of issues relevant to the "applicability" of a statute do not affect the courts' subject matter jurisdiction, including: whether the Jones Act applies to actions by alien seamen against foreign defendants, *Romero*, 358 U.S. at 357-359; *Lauritzen*, 345 U.S. at 573-575; whether a crime occurred on Indian land, *Louie* v. *United States*, 254 U.S. 548, 550-551 (1921); and whether transactions occurred in interstate commerce, *Binderup*, 263 U.S. at 305-306, 309.

Just as subject matter jurisdiction does not ordinarily turn on the "applicability" of a statute to a particular case, so too it does not ordinarily turn on whether a defendant is subject to suit. This Court has held, for example, that whether a defendant is a "person" subject to suit under 42 U.S.C. 1983 is not a question of subject matter jurisdiction under 28 U.S.C. 1331. *Mt. Healthy*, 429 U.S. at 277-279. Similarly, "[w]hether [a statute] exempts the Postal Service from [judicial] review" is non-jurisdictional, because it is "in essence a question whether Congress intended to allow a certain cause of action against the Postal Service," and "[w]hether a cause of action exists is not a question of jurisdiction." *Air Courier Conf. of Am.* v. *American Postal Workers*

Union, 498 U.S. 517, 523 n.3 (1991).[3] See 2 *James Wm. Moore's Federal Practice* § 12.30[2], at 12-36 (3d ed. 1997) ("Subject matter jurisdiction in federal-question cases is sometimes erroneously conflated with a plaintiff's need and ability to prove the defendant bound by the federal law asserted as the predicate for relief—a merits related determination.") (citing *St. Francis Xavier*, 117 F.3d at 622-624).

That is not to say that Congress lacks authority to base a grant of subject matter jurisdiction on such factors. Subject matter jurisdiction can and does turn in appropriate cases on whether the United States is a party, see, *e.g.*, 28 U.S.C. 1345, 1346; whether the defendant is a foreign state or member of a foreign mission, see 28 U.S.C. 1330(a), 1351; or whether the parties are citizens of different States, see 28 U.S.C. 1332(a). Moreover, "[w]hen the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction." *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986).

But the Tenth and Eleventh Circuits erred to the extent that they suggested that questions regarding the "applicability" of statutes or the classes of people who may be sued under them are *necessarily* jurisdictional, and nothing in Title VII expresses an intent to limit the courts' subject matter jurisdiction on that basis. See pp. 12-16, *supra*. Under Title VII, "[a] plaintiff's inability to demonstrate that the defendant has 15 employees is just

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[3] This Court has repeatedly held that whether a statute creates a private right of action is a merits, not a jurisdictional, inquiry. *E.g.*, *Verizon*, 535 U.S. at 642-643; *Owasso Indep. Sch. Dist.* v. *Falvo*, 534 U.S. 426, 430-431 (2002); *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 365 (1994); *Burks* v. *Lasker*, 441 U.S. 471, 476 n.5 (1979); *Duke Power*, 438 U.S. at 71.

like any other failure to meet a statutory requirement." *Sharpe*, 148 F.3d at 677.

2. Although the D.C. Circuit held an analogous provision of the ADA to be non-jurisdictional, *St. Francis Xavier*, 117 F.3d at 623-624, one judge disagreed with that conclusion and stated, in a separate concurring opinion, that "[w]hile it is true * * * that nothing in Title VII (or the ADA) expressly limits the district court's subject matter jurisdiction, to me it is more important that nothing in Title VII or the ADA *extends* the district court's jurisdiction to cases not involving the requisite number of employees," *id.* at 626.

However, 42 U.S.C. 2000e-5(f), like 28 U.S.C. 1331, expressly extends the federal courts' subject matter jurisdiction to include *all* Title VII claims. See pp. 12-14, *supra*. Absent some basis for limiting that express grant of subject matter jurisdiction (and there is none here), the federal courts have jurisdiction to adjudicate all such claims, including claims that lack merit under the 15-employee requirement.

3. In the course of holding that the 15-employee requirement is *not* jurisdictional, the Third Circuit stated that "[p]erhaps the most plausible reason for finding that the * * * requirement is jurisdictional is that it concerns a 'dispute[] as to the existence of a fact that is essential to a constitutional exercise of Congress's power to regulate.'" *Nesbit*, 347 F.3d at 81 (quoting *Da Silva*, 229 F.3d at 363). As the Third Circuit recognized, however, that argument is "unconvincing" for two independently sufficient reasons. *Id.* at 82.

First, Congress did not base its authority to enact Title VII on the 15-employee requirement. Instead, the definition of "employer" also requires that the defendant be "in an industry affecting commerce." 42 U.S.C.

2000e(b). *That* requirement invokes Congress's constitutional authority under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3, without regard to whether an employer has 14, 15, or 16 employees. See generally *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 253 (1991) (recognizing that Title VII is one of "[m]any acts of Congress [that] are based on the authority of that body to regulate commerce among the several States").[4]

Second, even those matters that are essential to Congress's authority to enact legislation speak only to Congress's legislative jurisdiction, not the courts' subject matter jurisdiction. "'[T]he authority of a state to make its law applicable to persons or activities,' * * * is

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[4] Two House members stated, in the course of opposing the entire Civil Rights Act of 1964, that "[t]he bill proceeds upon a theory * * * that the quantum of employees is a rational yardstick by which the interstate commerce concept can be measured." H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963) (separate minority views of Reps. Poff and Cramer). Taken as a whole, the legislative history does not support that statement. Instead, the floor debate that preceded the enactment of Title VII, as well as the floor debate that preceded Congress's reduction of the employee minimum from 25 to 15 in the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103, suggests that some Members were concerned that including all small businesses in the scope of Title VII would impose bureaucratic and litigation costs that small companies could not bear, would unfairly intrude in the culture of small businesses, especially ethnic businesses, and would make full enforcement of the bill impractical. See, *e.g.*, 110 Cong. Rec. 13,085, 13,092 (1964) (Cotton); 118 Cong. Rec. 2388-2390 (1972) (Stennis); *id*. at 2391-2394 (Cotton); *id*. at 2409-2411 (Fannin). "Thus, the fifteen-employee threshold appears to be motivated by policy—to spare small companies the expense of complying with Title VII—rather than Commerce Clause considerations." *Nesbit*, 347 F.3d at 82; cf. *Clackamas*, 538 U.S. at 447 (explaining that the comparable employee threshold in the ADA was intended to "eas[e] entry into the market and preserv[e] the competitive position of smaller firms").

quite a separate matter from 'jurisdiction to adjudicate.'" *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting) (quoting 1 Restatement (Third) of Foreign Relations Law of the United States 231 (1987)); see generally Restatement (First) Conflict of Laws § 60 (1934) (discussing legislative jurisdiction). Such matters "raise a question, not of the jurisdiction of th[e] court, but of the jurisdiction of the United States." *Louie*, 254 U.S. at 550; see *Nesbit*, 347 F.3d at 82 ("Elements of a claim that are called jurisdictional because they relate to Congress's jurisdiction remain questions of the merits.") (quoting *Kulick* v. *Pocono Downs Racing Ass'n*, 816 F.2d 895, 898 (3d Cir. 1987)).

Thus, this Court has treated as non-jurisdictional the interstate commerce element of a federal cause of action, *Binderup*, 263 U.S. at 305-306, 309, and a statutorily-required nexus to Indian land, *Louie*, 254 U.S. at 550-551. In criminal cases, the interstate commerce element is routinely determined by juries, not judges, precisely because it is not jurisdictional. See, *e.g.*, *Martin* v. *United States*, 333 F.3d 819, 820 n.2 (7th Cir.), cert. denied, 540 U.S. 1083 (2003); *United States* v. *Ryan*, 41 F.3d 361, 363 (8th Cir. 1994) (en banc), cert. denied, 514 U.S. 1082 (1995). Thus, even if (contrary to fact) Congress had rested its authority to enact Title VII on whether a defendant had a particular number of qualifying employees, that question of *legislative* authority would not be relevant to the *courts'* subject matter jurisdiction.

4. Respondent has argued (Br. in Opp. 1) that "this Court has already indicated that [the 15-employee] limitation is a jurisdictional requirement." Although this Court's precedents contain scattered references to the

term "jurisdiction" in connection with Title VII's definition of "employer," this Court has never held that the definition limits the courts' subject matter jurisdiction. See *Nesbit*, 347 F.3d at 82-83.

"'Jurisdiction,' the Court has aptly observed, 'is a word of many, too many, meanings.'" *Kontrick*, 540 U.S. at 454 (quoting *Steel Co.*, 523 U.S. at 90); see *ibid.* ("Courts, including this Court * * * have been less than meticulous" in their use of "the term 'jurisdictional.'"). At times, the courts have engaged in "profligate use" of that term. *Carlisle* v. *United States*, 517 U.S. 416, 435 (1996) (Ginsburg, J., concurring) (quoting *Center for Nuclear Responsibility, Inc.* v. *United States Nuclear Regulatory Comm'n*, 781 F.2d 935, 945 n.4 (D.C. Cir. 1986) (Ginsburg, J., dissenting)).

Moreover, this Court has "often said that drive-by jurisdictional rulings * * * have no precedential effect." *Steel Co.*, 523 U.S. at 91. That follows *a fortiori* for offhand characterizations of an issue in *dictum*. Only when a court squarely confronts and decides a jurisdictional question does its decision have precedential effect on the jurisdictional question. See, *e.g.*, *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 97 (1994). In *Zipes*, this Court therefore declined to follow its previous decisions referring to Title VII's timely-filing requirement as "jurisdictional," in part because "the legal character of the requirement was not at issue in those cases." 435 U.S. at 395.

This Court's cases discussing the definition of "employer" are even less relevant than those the Court held not to be controlling in *Zipes*. In *Walters* v. *Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202, 204 (1997), this Court considered the question whether "an employer 'has' an employee on any working day on

which the employer maintains an employment relationship with the employee." The Court never stated that the issue was jurisdictional, or even considered whether it was jurisdictional. Respondent is correct (Br. in Opp. 2) that the Court reversed a decision of the court of appeals that had affirmed a decision of the district court dismissing for lack of subject matter jurisdiction. 519 U.S. at 204-205, 212. But the Court's tacit acceptance of the procedural posture had no effect on the proceedings, and thus cannot be considered a precedent on that point. See *Steel Co.*, 523 U.S. at 91 (declining to follow case treating issue as jurisdictional because nothing "*turned upon* whether [the issue] was technically jurisdictional" in that case).[5]

Respondent argues (Br. in Opp. 2-3) that the *Walters* Court must have concluded that the requirement is jurisdictional because it held that the defendant had more than 15 employees under the correct legal standard, instead of remanding for consideration by the trier-of-fact. But the parties to that case apparently stipulated to all relevant facts, leaving no factual disputes for a trier-of-fact to resolve on remand, regardless of whether the question was jurisdictional. See 519 U.S. at 212.

In *EEOC* v. *Commercial Office Products Co.*, 486 U.S. 107, 119 n.5 (1988), a case that did *not* involve the 15-employer requirement, a plurality of this Court remarked that "[r]eactivation of state proceedings after the conclusion of federal proceedings serves [a] useful

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[5] In *Hishon* v. *King & Spalding*, 467 U.S. 69, 73 n.2 (1984), the Court expressly found it unnecessary to decide whether a Title VII claim should have been dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), instead of for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1), because, as in *Walters*, nothing turned on the distinction in that case.

purpose," in part because "Title VII does not give the EEOC jurisdiction to enforce the Act against employers of fewer than 15 employees." That offhand reference to "jurisdiction" is not only passing *dictum* in a footnote of a plurality opinion, it addresses only the relative *administrative* jurisdictions of the EEOC and the state agencies. It says nothing about the courts' subject matter jurisdiction, which was not at issue in that case.

Finally, this Court's decision in *EEOC* v. *Arabian American Oil Co.*, *supra*, describes as "jurisdictional" the portion of the definition of "employer" that requires that the defendant be "engaged in an industry affecting commerce." 499 U.S. at 249, 253. The Court's opinion makes clear, however, that it was referring to Congress's "legislative jurisdiction" to regulate interstate commerce under the Commerce Clause (*id.* at 253), not the courts' subject matter jurisdiction to entertain Title VII claims. See *Hartford Fire*, 509 U.S. at 813 (Scalia, J., dissenting). As explained above, those are distinct inquiries (see pp. 24-25, *supra*), and nothing in *Arabian American Oil Co.* even addresses the courts' subject matter jurisdiction, let alone holds that the 15-employee requirement limits that jurisdiction.[6]

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[6] The committee reports accompanying the 1972 amendments to Title VII, which reduced the required number of employees from 25 to 15 (see p. 24 note 4, *supra*), sometimes refer to that change as an expansion of "jurisdiction." See, *e.g.*, H.R. Rep. No. 238, 92d Cong., 1st Sess., 7, 20 (1971); S. Rep. No. 415, 92d Cong., 1st Sess., 9, 32 (1971). The reports are not clear as to whether the references are to legislative or subject matter jurisdiction. Those same reports and the conference report also refer, however, to the amendment as an expansion of Title VII's "coverage," which seems inconsistent with the latter view. See, *e.g.*, H.R. Rep. No. 238, *supra*, at 1; S. Rep. No. 415, *supra*, at 2, 8, 35; S. Rep. No. 681, 92d Cong., 2d Sess., 15 (1972) (conference report). In any event, just as passing statements by this Court referring to an issue

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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as "jurisdictional" do not have precedential significance (see p. 26, *supra*), so too Congress's passing use of that term in legislative history does not govern the question, especially given the inconsistent treatment of the provision in the legislative history.