

## EMPLOYERS BEWARE! THE SUPREME COURT'S INTERPRETATION OF TITLE VII'S EMPLOYEE NUMEROSITY REQUIREMENT DISADVANTAGES SMALL BUSINESSES

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### I. INTRODUCTION

In *Arbaugh v. Y&H Corp.*,<sup>1</sup> the United States Supreme Court held that the fifteen-employee prerequisite to qualify as an “employer” under Title VII<sup>2</sup> was a “substantive ingredient of a Title VII claim for relief” and not a jurisdictional requirement.<sup>3</sup> The Court thus resolved a conflict among the circuits over whether courts should employ a jurisdictional or merits-based approach to Title VII’s employee numerosity requirement.<sup>4</sup>

Part II of this comment discusses the facts and procedural issues that led to the Supreme Court’s decision in *Arbaugh*. Part III examines the Court’s reasoning in deciding that Title VII’s employee numerosity requirement is part of the plaintiff’s substantive claim for relief. Part IV analyzes the Court’s reasoning and then explains why the fifteen-employee requirement is better classified as jurisdictional. Part V then discusses the negative implications of the *Arbaugh*

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1. *Arbaugh II*, 126 S. Ct. 1235 (2006).

2. 42 U.S.C. § 2000e(b) (2000).

3. *Arbaugh II*, 126 S. Ct. at 1238–39.

4. Some circuits have held that the employee requirement is jurisdictional. *See, e.g.*, *Arbaugh v. Y&H Corp. (Arbaugh I)*, 380 F.3d 219, 224–25 (5th Cir. 2004); *Armbruster v. Quinn*, 711 F.2d 1332, 1335 (6th Cir. 1983). Others have come to the opposite conclusion. *See, e.g.*, *Da Silva v. Kinsho Int’l Corp.*, 229 F.3d 358, 366 (2d Cir. 2000); *Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 83 (3d Cir. 2003).

Court's holding and advocates the adoption of a proposed bright line rule.

## II. FACTUAL AND PROCEDURAL HISTORY

From May 2000 until February 2001, Jenifer Arbaugh worked at the Moonlight Cafe in New Orleans, a restaurant owned by the defendant, Y&H Corporation (Y&H).<sup>5</sup> In November 2001, Arbaugh filed suit in federal district court asserting violations of Title VII and Louisiana law by Y&H.<sup>6</sup> Arbaugh alleged that she was constructively discharged after being sexually harassed by Yalcin Hatipoglu, an owner of Y&H.<sup>7</sup> Arbaugh's complaint contended that the federal court had jurisdiction over her Title VII claim under 28 U.S.C. § 1331 and supplemental jurisdiction over her state law claims under 28 U.S.C. § 1367.<sup>8</sup>

After a two-day trial, the jury found that Arbaugh was constructively discharged from her job as a result of the sexually-hostile atmosphere.<sup>9</sup> Subsequently, Y&H filed a motion to dismiss the complaint for lack of subject-matter jurisdiction.<sup>10</sup> Y&H argued that it did not qualify as an "employer" under Title VII because the restaurant did not have fifteen or more employees at the time Arbaugh was discharged.<sup>11</sup> Prior to the motion to dismiss, Y&H did not contest its status as an employer under Title VII. Y&H also did not list in its "Contested Issues of Fact" whether it met the required number of employees.<sup>12</sup>

After reviewing the motion to dismiss, the district court found that Y&H did not, in fact, employ the prerequisite number of employees.<sup>13</sup> The court, as a result, then vacated its prior judgment in favor of Arbaugh on the Title VII claim.<sup>14</sup> The court also

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5. *Arbaugh II*, 126 S. Ct. at 1240.

6. *Id.*

7. *Id.*

8. See Complaint at 1, *Arbaugh v. Y&H Corp.*, 444 F. Supp. 2d 693 (E.D. La. 2003) (No. 01-3376).

9. *Arbaugh II*, 126 S. Ct. at 1241.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

dismissed Arbaugh's pendent state law claims for lack of subject-matter jurisdiction.<sup>15</sup>

On appeal, the Fifth Circuit affirmed the district court's holding.<sup>16</sup> Relying on its prior decision in *Dumas v. Mount Vernon*,<sup>17</sup> the court held that failure to qualify as an "employer" under Title VII deprives a district court of subject-matter jurisdiction.<sup>18</sup> The United States Supreme Court granted certiorari to address the circuit split over whether the employee numerosity requirement in "Title VII was jurisdictional or simply an element of a plaintiff's claim for relief."<sup>19</sup>

### III. REASONING OF THE SUPREME COURT

The Court recognized that broad application of the term "jurisdiction" results in federal court opinions that do not thoroughly articulate whether a dismissal is for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), or for failure to state a claim upon which relief can be granted under Rule 12(b)(6).<sup>20</sup> When a case is dismissed for failure to establish a preliminary fact, such as the fifteen-employee requirement, this distinction can be critical. An objection to subject-matter jurisdiction may be raised at any time, by any party, or by the court.<sup>21</sup> In contrast, a party cannot raise an objection for failure to state a claim upon which relief can be granted after completion of the trial.<sup>22</sup> In *Arbaugh*, if the fifteen-employee threshold was classified as a "jurisdictional element," then the Court must vacate the judgment for Arbaugh due to lack of subject-matter jurisdiction.<sup>23</sup> However, if the numerosity requirement is "merits-based"—merely an element of the plaintiff's claim for relief—then defendant, Y&H, waived any objection by failing to raise the issue prior to the district court's judgment.<sup>24</sup>

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15. *Id.*

16. *Arbaugh v. Y&H Corp. (Arbaugh I)*, 380 F.3d 219, 230–31 (5th Cir. 2004).

17. 612 F.2d 974 (5th Cir. 1980).

18. *Arbaugh I*, 380 F.3d at 224.

19. *Arbaugh II*, 126 S. Ct. at 1242 (citation omitted).

20. *Id.*

21. *See* FED. R. CIV. P. 12(h)(3).

22. *Id.* R. 12(h)(2).

23. *Arbaugh II*, 126 S. Ct. at 1242.

24. *Id.*

A. *A Matter of First Impression for the Supreme Court*

The Court began with a discussion of two potentially precedent-setting cases, with particular focus on their lower court “drive-by jurisdictional rulings.”<sup>25</sup> First, in *Hishon v. King & Spalding*,<sup>26</sup> the Supreme Court reversed the lower court’s decision and held that Title VII applied to a law firm’s partnership decisions.<sup>27</sup> The district court dismissed the Title VII claim under Rule 12(b)(1) for lack of subject-matter jurisdiction, holding that Title VII was inapplicable to the selection of partners by a partnership.<sup>28</sup> In its opinion, the Supreme Court noted that the reversal “[made] it unnecessary to consider the wisdom of the District Court’s invocation of Rule 12(b)(1), as opposed to Rule 12(b)(6).”<sup>29</sup> Thus, in *Arbaugh*, the Court noted that the *Hishon* opinion raised, but did not resolve, the issue of whether the district court’s dismissal under Rule 12(b)(1) for lack of subject-matter jurisdiction was correct.<sup>30</sup>

Second, in *Equal Employment Opportunity Commission (EEOC) vs. Arabian American Oil Co.*,<sup>31</sup> the Court affirmed the lower court’s dismissal under Rule 12(b)(1) for lack of subject-matter jurisdiction.<sup>32</sup> Here, the Court held that the plaintiff’s claim could not be heard in federal court because Title VII did not apply to a U.S. citizen working abroad for a U.S. company.<sup>33</sup> In its opinion, the Court confirmed the petitioner’s characterization of the terms listed in Title VII’s “Definitions” section<sup>34</sup> as “jurisdictional.”<sup>35</sup> In *Arbaugh*, the Court reasoned that *Arabian American Oil Co.* is not precedent because the “decision did not turn on [the dismissal’s]

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25. *Id.* at 1242–43. The court coined the phrase “drive-by jurisdictional rulings” to refer to “unrefined” judicial opinions which dismissed cases for lack of jurisdiction without explicitly considering whether the dismissal was for lack of subject matter jurisdiction or for failure to state a claim. *Id.* The court noted that such dispositions should be accorded “no precedential effect” as to whether the federal court had authority to adjudicate the claim. *Id.*

26. 467 U.S. 69 (1984).

27. *Id.* at 72–73.

28. *Id.* at 73 n.2.

29. *Id.*

30. *Arbaugh II*, 126 S. Ct. at 1243.

31. 499 U.S. 244 (1991).

32. *Id.* at 246–47.

33. *Id.* at 249.

34. 42 U.S.C. § 2000e(b) (defining “employer” as requiring fifteen or more employees).

35. *Arabian Am. Oil Co.*, 499 U.S. at 251, 253.

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characterization, and the parties did not cross swords over it.”<sup>36</sup> Thus, the Court was not prompted to address whether the lower court’s dismissal was correctly based on lack of subject-matter jurisdiction.<sup>37</sup>

Next, the Court addressed two cases that Y&H relied on to support its claim that the fifteen-employee requirement is jurisdictional. First, Y&H alleged that the Court categorized the employee requirement as jurisdictional when it ruled that the defendant met the fifteen-employee prerequisite<sup>38</sup> in *Walters v. Metropolitan Educational Enterprises, Inc.*<sup>39</sup> Y&H asserted that if the Court considered the fifteen-employee requirement a “merits issue,” then it would have remanded the employee calculation to the district court.<sup>40</sup> The Supreme Court dismissed this argument because the parties in *Walters* stipulated to all relevant facts, thus leaving nothing for a trier of fact to determine on remand.<sup>41</sup>

Second, Y&H referenced a footnote from *EEOC vs. Commercial Office Products Co.*,<sup>42</sup> in which the Court held that the EEOC did not have the right to enforce Title VII against employers with less than fifteen employees.<sup>43</sup> In *Arbaugh* the Court explained that the footnote in *Commercial Office Products Co.* did not address the issue of subject-matter jurisdiction; rather it defined the “administrative provinces of the EEOC and state agencies.”<sup>44</sup>

*B. Three Reasons Why the Employee Numerosity Requirement Should Be an Element of the Claim for Relief*

The *Arbaugh* court focused on three reasons why the fifteen-employee requirement is an element of the plaintiff’s claim for relief, rather than a jurisdictional element. First, the Court stated that labeling the employee requirement “jurisdictional” goes against

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36. *Arbaugh v. Y&H Corp. (Arbaugh II)*, 126 S. Ct. 1235, 1243 (2006).

37. *Id.*

38. Brief of Respondent at 8–10, *Arbaugh v. Y&H Corp.*, 126 S. Ct. 1235 (2006) (No. 04-944).

39. 519 U.S. 202 (1997).

40. *Id.*

41. *Arbaugh II*, 126 S. Ct. at 1243 n.7.

42. 486 U.S. 107 (1988).

43. *Id.* at 119 n.5; *see also* Brief of Respondent, *supra* note 38, at 12.

44. *Arbaugh II*, 126 S. Ct. at 1243 n.9.

congressional intent.<sup>45</sup> If the employee requirement is a threshold to establishing subject-matter jurisdiction, then federal courts are obligated to establish the requirement even without objection from the parties to the case.<sup>46</sup> The *Arbaugh* Court reasoned that there is no evidence in the text of Title VII that Congress intended federal courts, on their own, to establish the number of employees.<sup>47</sup> The fifteen-employee requirement appears in a section, entitled “Definitions,”<sup>48</sup> that does not refer to the jurisdiction of federal courts.<sup>49</sup> Thus, the Court concluded that Congress did not intend for the fifteen-employee threshold to be a jurisdictional element.<sup>50</sup>

Second, the Court stated that the requirement is not jurisdictional because a jury, not a judge, should establish the number of employees.<sup>51</sup> The jury is always the proper reviewer of fact when a preliminary element of a claim for relief is at issue.<sup>52</sup> The Court noted, however, that if the employee requirement is jurisdictional, then there are some cases where the trial judge would be allowed to resolve the dispute.<sup>53</sup> Specifically, the Court pointed to cases like *Arbaugh* where subject-matter jurisdiction relies on a disputed fact such as the number of employees.<sup>54</sup> In these cases, the Court expressed concern that if the fact at issue is labeled jurisdictional, then the trial judge may have discretion to evaluate the evidence rather than the jury, which is the proper reviewer in these cases.<sup>55</sup>

Third, the Court said that classifying the number of employees as jurisdictional requires the dismissal of pendent state law claims already tried on the merits, resulting in a “waste of judicial resources.”<sup>56</sup> When a federal claim is dismissed under Rule 12(b)(1) for lack of subject-matter jurisdiction, the federal court has no

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45. *See id.* at 1244.

46. *See* FED. R. CIV. P. 12(h)(3).

47. *Arbaugh II*, 126 S. Ct. at 1244.

48. 42 U.S.C. § 2000e(b).

49. *Arbaugh II*, 126 S. Ct. at 1245.

50. *See id.* at 1244.

51. *See id.*

52. *Id.*

53. *Id.*

54. *See id.*

55. *Id.*

56. *Id.* at 1245 (citation omitted).

discretion to apply supplemental jurisdiction over the remaining state law claims and, therefore, must dismiss them.<sup>57</sup> In contrast, a court retains discretion to adjudicate any pendent state law claims if it dismisses the federal claims under Rule 12(b)(6).<sup>58</sup> Since *Arbaugh*'s state law claims were already tried and judged on the merits in federal court, the Court held that the fifteen-employee requirement is an element of the plaintiff's claim for relief.<sup>59</sup>

*C. Result: A Bright Line Rule For  
Employee Numerosity Requirements*

The *Arbaugh* Court identified Congress' power to state that a threshold requirement in a statute is jurisdictional.<sup>60</sup> The Court cited 28 U.S.C. § 1332 as an example. There, Congress made a \$75,000 amount-in-controversy a threshold prerequisite of subject-matter jurisdiction in defining diversity jurisdiction.<sup>61</sup>

In *Arbaugh*, the Court determined that Congress did not clearly indicate whether Title VII's employee threshold is jurisdictional.<sup>62</sup> In *Arbaugh*, the plaintiff brought her claims into federal court under 28 U.S.C. § 1331, the federal question jurisdiction statute,<sup>63</sup> and Title VII's jurisdiction-conferring provision.<sup>64</sup> According to the Court, neither 28 U.S.C. § 1331 nor Title VII's jurisdiction-conferring provision specifies a requirement analogous to section 1332's monetary prerequisite.<sup>65</sup> Instead, the fifteen-employee threshold is contained in a separate section of Title VII that does not refer to subject-matter jurisdiction.<sup>66</sup>

Next, the *Arbaugh* opinion focused on the unjust outcome and excessive use of judicial resources that would result if the fifteen-

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57. 16 JAMES WM MOORE ET AL., MOORE'S FEDERAL PRACTICE § 106.66[1] (3d ed. 2006).

58. 28 U.S.C. § 1367(c)(3) (2000); 16 MOORE ET AL., *supra* note 57.

59. *Arbaugh II*, 126 S. Ct. at 1245.

60. *Id.*

61. *Id.* at 1244.

62. *Id.* at 1245.

63. *Id.* at 1240.

64. See 42 U.S.C. § 2000e-5(f)(3); see also *Arbaugh II*, 126 S. Ct. at 1239 (“[W]hen Title VII was enacted, § 1331’s umbrella provision for federal-question jurisdiction contained an amount-in-controversy limitation . . . . Title VII, framed in that light, assured that the amount-in-controversy limitation would not impede an employment-discrimination complainant’s access to a federal forum.”).

65. *Arbaugh II*, 126 S. Ct. at 1245.

66. *Id.*

employee threshold was considered jurisdictional.<sup>67</sup> Due to these factors, the Court decided to “leave the ball in Congress’ court.”<sup>68</sup> It created a bright line rule: “[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.”<sup>69</sup> Applying the rule, the Court held that the fifteen-employee requirement is an element of a plaintiff’s claim for relief and cannot be raised post-trial in order to challenge a federal court’s subject-matter jurisdiction.<sup>70</sup>

#### IV. ANALYSIS

The *Arbaugh* Court’s holding that Title VII’s fifteen-employee prerequisite is an element of the plaintiff’s claim for relief is based on (1) a presumption of congressional intent, (2) a belief that the jury is the proper trier of fact, and (3) a desire to prevent the dismissal of pendent state law claims already tried on the merits. Despite this, Title VII’s employee threshold is better categorized as a jurisdictional element. The evidence of congressional intent regarding Title VII is inconclusive and actually favors the jurisdictional approach.<sup>71</sup> Additionally, to conserve judicial resources, a judge should decide before trial whether the employer has less than fifteen employees unless that issue is closely tied to the merits of the case.<sup>72</sup>

##### A. Evidence of Congressional Intent is Not Conclusive

Until the Supreme Court’s decision in *Arbaugh*, the circuit courts were split on the issue of whether the fifteen-employee requirement was a jurisdictional or merits-based issue.<sup>73</sup> This is because there is little evidence of the purpose of Title VII’s

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67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *See infra* Part IV.A.

72. *See infra* Part IV.B.

73. *See supra* note 4 and accompanying text; *see also* EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 623 n.2 (D.C. Cir. 1997) (holding that the Americans with Disabilities Act’s employee requirement, 42 U.S.C. § 12111(5)(A), which is almost identical to Title VII’s requirement, is not jurisdictional).

employee requirement.<sup>74</sup> However, several conclusions may be drawn about Congress' intent by studying the structure and language of Title VII, as well as the status of this issue in relevant case law during the time that Congress was amending Title VII.

Arguably, the structure of Title VII is an indication of Congress' intent to make the fifteen-employee threshold a jurisdictional element. The definition of "employer" is located in the "Definitions" section at the beginning of the statute and all successive sections are labeled as "subsections" of the definitional section.<sup>75</sup> A natural reading of the statute incorporates the definitions into all of the subsections, including the jurisdictional provision.<sup>76</sup> In *Nesbit v. Gears Unlimited, Inc.*, however, followed by the Supreme Court in *Arbaugh*, the Third Circuit dismissed this argument.<sup>77</sup> The *Nesbit* court held that Congress would have clearly stated its intent if it meant for Title VII's definitional section to confer jurisdiction.<sup>78</sup>

Congress' intent is clarified further by comparing Title VII with similar antidiscrimination statutes. For example, the Americans with Disabilities Act (ADA)<sup>79</sup> contains definitional sections like Title VII,<sup>80</sup> but the statute does not discuss substantive law in the "subsections" of its definitional section.<sup>81</sup> Unlike Title VII, the structure of the ADA does not indicate that Congress intended the definition sections to carry over into any of the substantive sections.<sup>82</sup>

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74. See, e.g., 137 CONG. REC. H9525 (daily ed. Nov. 7, 1991) (statement of Rep. Brooks) ("[W]hen a company has less than 15 employees, there are no damages available whatsoever because there is no cause of action under our current antidiscrimination statutes."). The Third Circuit quoted Rep. Brooks in *Nesbit v. Gears Unlimited* to support the merits-based approach by implication. 347 F.3d 72, 81 (3d. Cir. 2003). In light of the relevant case law at the time, however, this statement could support the jurisdictional approach as well. See Jeffrey A. Mandell, *The Procedural Posture of Minimum Employee Thresholds in Federal Antidiscrimination Statutes*, 72 U. CHI. L. REV. 1047, 1063 n.92 (2005) (arguing that the speaker may have meant that there was no cause of action because courts lack authority to hear cases where the minimum employee threshold is not met).

75. Compare 42 U.S.C. § 2000e ("Definitions" section of Title VII containing the fifteen-employee requirement), with 42 U.S.C. § 2000e-2 (unlawful employment practices), and 42 U.S.C. § 2000e-5 (enforcement powers of the EEOC).

76. Mandell, *supra* note 74, at 1057–58.

77. *Nesbit*, 347 F.3d at 72.

78. *Id.* at 81 (noting that the "Definitions" section, § 2000e(b), does not contain the word "jurisdiction" like 28 U.S.C. §§ 1331 & 1332).

79. 42 U.S.C. § 12101 et seq. (2000).

80. See, e.g., 42 U.S.C. §§ 12102, 12111, 12131, 12161, 12181 (containing definitions).

81. See, e.g., 42 U.S.C. § 12132.

82. *Id.*

It is not entirely apparent, however, whether this difference in statute structure is significant enough to show Congress' intent to make the fifteen-employee requirement jurisdictional.<sup>83</sup>

A second possibility is that Congress intended to make the employee requirement jurisdictional based on the language of Title VII's definition of "employer." The term "employer" is defined by the statute as "a person engaged in an *industry affecting commerce* who has fifteen or more employees."<sup>84</sup> Congress enacted Title VII under its Commerce Clause power.<sup>85</sup> Arguably then, Title VII's employee minimum is jurisdictional because establishing the threshold is essential to Congress' constitutional power to pass and enforce the statute.<sup>86</sup> It is possible that Congress determined that a minimum of fifteen employees is the threshold requirement for when an employer affects commerce.<sup>87</sup> The Supreme Court held that for Congress to regulate under its Commerce Clause power, the regulated activity must have a "substantial relation" to, or "substantially affect[]," interstate commerce.<sup>88</sup> The employee requirement, thus, is arguably intended to ensure that the employer has enough of an effect on interstate commerce to be subject to federal regulation. Unfortunately, there is no definitive legislative history on this issue.<sup>89</sup>

Finally, Congress' intent may be inferred by analyzing the relevant case law at the time Congress amended Title VII. Although the *Arbaugh* Court claims the jurisdictional versus merits-based issue is a matter of first impression, the federal courts' prior "drive-by jurisdictional rulings" may have some non-precedential value.<sup>90</sup> In *Arabian American Oil Co.*, for example, the Supreme Court affirmed

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83. See Mandell, *supra* note 74, at 1057 n.61 (noting that the structure of Title VII may not have been intended by Congress).

84. 42 U.S.C. § 2000e(b) (emphasis added).

85. See *EEOC v. Ratliff*, 906 F.2d 1314, 1315–16 (9th Cir. 1990).

86. *Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 81–82 (3d Cir. 2003).

87. *Id.* at 81 ("[O]ne might read the fifteen-employee threshold as reflecting Congress's determination that only those companies with fifteen or more employees have the requisite substantial effect on interstate commerce to permit Congress to enact the statute.").

88. See *United States v. Lopez*, 514 U.S. 549, 559 (1995).

89. See Mandell, *supra* note 74, at 1060 (noting that the "legislative history contains evidence substantiating this perspective"). *But see Nesbit*, 347 F.3d at 82 (finding that "while the preceding *Commerce Clause*-based justification for Title VII's fifteen-employee requirement makes intuitive sense, it finds little support in the legislative history") (emphasis added).

90. See *supra* note 25 and accompanying text.

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the district court's Rule 12(b)(1) dismissal for lack of subject-matter jurisdiction when it held that Title VII did not apply to a U.S. citizen working abroad for a U.S. company.<sup>91</sup> The Court copied "*en passant*" the plaintiff's description of the terms in Title VII's "Definitions" section as "jurisdictional."<sup>92</sup> As a result of the decision in *Arabian American Oil Co.*, Congress amended the definition of "employee" in Title VII to include U.S. citizens working abroad.<sup>93</sup>

During this time, Congress arguably believed that the Supreme Court considered the terms in Title VII's "Definitions" section to be jurisdictional, and Congress made no objection to this categorization. This leaves open the possibility that Congress did in fact intend for Title VII's definitions to confer subject-matter jurisdiction on the federal courts.

*B. Procedural Issues: The Proper Trier of Fact and the Dismissal of Pendent State Law Claims*

The *Arbaugh* Court miscalculates the effect that a "jurisdictional" employee numerosity requirement will have on the trier of fact and the dismissal of a plaintiff's pendant state law claims. In cases where the fifteen-employee requirement is closely tied to the merits of the case, a federal court requires that a jury decide the issue.<sup>94</sup> Otherwise, when the employee requirement is not intertwined with the merits, the judge should decide whether the fifteen-employee requirement is met before trial to preserve judicial resources.

Judges should only admit evidence and make findings of fact when the jurisdictional facts do not overlap with the merits of the claim.<sup>95</sup> When the court decides that the employee threshold is not at issue, the judge is the most expedient trier of fact. The judge determines both whether the court has subject-matter jurisdiction and the number of employees before trial.

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91. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 246–47 (1991).

92. *Id.* at 249, 251, 253.

93. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 109(a), 105 Stat. 1071, 1077 (1991) (codified as amended at 42 U.S.C. § 2000e(f)).

94. *See* 2 JAMES WM MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 12.30[3] (3d ed. 2006).

95. *Id.*

The question of whether an employer has fifteen or more employees usually arises in one of two ways: (1) the plaintiff believes that employees from other parent or subsidiary companies should be counted, or (2) the status of an individual as an “employee” or an “independent contractor” is in question.<sup>96</sup> Since both of these questions involve applying legal principles, a judge is arguably the better trier of fact.<sup>97</sup> Rarely do these issues involve solely questions for a jury, for example, whether a certain person was actually employed by the company.<sup>98</sup> In cases where the employee requirement does turn upon an issue for the jury, then the judge can decide whether to also hold an evidentiary hearing before trial to determine whether the defendant has the requisite number of employees.<sup>99</sup> If the employer fails to meet the threshold, then the parties to the case avoid the expense of discovery and the trial costs of litigating in federal court. Similarly, the federal court can further prevent the waste of judicial and economic resources by dismissing pendent state law claims before any discovery has taken place.

#### V. IMPLICATIONS

The Court’s holding in *Arbaugh* raises a constitutional question about Congress’ power to regulate, and it negatively impacts small businesses by increasing costs and creating uncertainty about the outcome of Title VII claims.<sup>100</sup> Because federal courts have limited jurisdiction,<sup>101</sup> as a general rule, the Court should limit federal subject-matter jurisdiction over Title VII claims to employers with fifteen or more employees until Congress expressly extends the statute to include employers with fewer employees.

##### A. A Proposed Bright Line Rule

In *EEOC v. St. Francis Xavier Parochial School*,<sup>102</sup> the D.C. Circuit Court, relying on its prior decisions, held that a fifteen-employee requirement was a merits-based element of a federal

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96. See Mandell, *supra* note 74, at 1064.

97. *Id.*

98. *Id.*

99. See 2 MOORE ET AL., *supra* note 94.

100. See *infra* Part V.B–C.

101. U.S. CONST. art. III, § 2.

102. 117 F.3d 621 (D.C. Cir. 1997).

antidiscrimination statute.<sup>103</sup> The court's decision hinged on the wording of Title VII. Ultimately, the court determined that the language did not expressly limit subject-matter jurisdiction to employers with fifteen or more employees.<sup>104</sup> Similarly, the *Arbaugh* Court analyzes the language and structure of Title VII for evidence of Congress' intent to *expressly limit* the subject-matter jurisdiction of the federal court.<sup>105</sup>

Notably, one D.C. Circuit judge, in his concurrence in *St. Francis*, altered his prior merits-based approach in favor of the jurisdictional approach.<sup>106</sup> He argued that a better standard for determining Congressional intent in antidiscrimination statutes was to look to whether anything in the statute *expressly extends* federal court jurisdiction to cases without the requisite number of employees.<sup>107</sup> This proposed bright line rule is justified because federal courts are courts of *limited* jurisdiction.<sup>108</sup> Under this rationale, the Supreme Court should restrict federal jurisdiction to only those cases where employers have fifteen or more employees and "leave the ball in Congress' court"<sup>109</sup> to clearly and explicitly state that the employee threshold is *not* jurisdictional.

#### *B. Implications of Not Adopting the Proposed Bright Line Rule*

The Court's decision in *Arbaugh* means that juries will decide on a case by case basis whether a small business meets the requirements of an "employer" under Title VII.<sup>110</sup> This places a substantial burden on the small business owner because it results in less certainty about the outcomes of Title VII claims as well as higher litigation costs.<sup>111</sup> In addition, if the numerosity issue is decided at trial, there is a risk that the jury's deliberation could be prejudiced by the merits of the case.<sup>112</sup> Since courts currently have

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103. *Id.* (relying on its prior decision in *Haddon v. Walters*, 43 F.3d 1488 (D.C. Cir. 1995)).

104. *Id.* at 624.

105. *Arbaugh v. Y&H Corp. (Arbaugh II)*, 126 S. Ct. 1235, 1244 (2006).

106. *St. Francis*, 117 F.3d at 626 (Sentelle, J., concurring).

107. *Id.*

108. U.S. CONST. art. III, § 2.

109. *Arbaugh II*, 126 S. Ct. at 1245.

110. *See id.*

111. *See id.*

112. David S. Warner & Kristine A. Sova, *Small Employers Beware: The U.S. Supreme Court Has Ruled that Title VII's Employee-Numerosity Requirement Does Not Determine Jurisdiction*,

discretion to exercise jurisdiction over a plaintiff's pendent state law claims, even if the employer does not have fifteen employees,<sup>113</sup> the small business owner may be burdened with litigating state claims in the federal court system.

These consequences work directly against the overall purpose of Title VII's employee threshold requirement. Congress designed the requirement with "an eye toward reigning in federal intervention."<sup>114</sup> It established the minimum employee threshold in part because it did not want to burden small businesses with the cost of litigating federal antidiscrimination claims.<sup>115</sup> The Supreme Court should not require small business owners to incur the heightened cost and uncertainty that results from classifying the employee threshold as a merits-based element of the plaintiff's claim for relief.

The Supreme Court's holding in *Arbaugh* also raises a constitutional question as to whether Congress has the ability to regulate small business owners with fewer than fifteen employees. Congress passed Title VII under its Commerce Clause power.<sup>116</sup> In the last decade, the Supreme Court has reined in Congress' power under the Commerce Clause to include only those activities that "substantially affect" interstate commerce.<sup>117</sup> Even if Congress did not originally intend for the employee threshold to be a "constitutional anchor,"<sup>118</sup> an employer with fewer than fifteen employees may not have a "substantial relation" to, or "substantial [e]ffect" on interstate commerce.

### C. *The Proposed Bright Line Rule's Effect on the Arbaugh Decision*

If the Supreme Court adopts the proposed bright line rule, it avoids the negative implications of the *Arbaugh* decision. The Court's presumption of employee requirements as a jurisdictional

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ASAP (Littler Mendelson, New York, N.Y.), Mar. 2006, at 2, <http://www.littler.com/collateral/13661.pdf>.

113. 28 U.S.C. § 1367(c)(3) (2000); 16 MOORE ET AL., *supra* note 57.

114. Mandell, *supra* note 74, at 1063.

115. See Tomka v. Seiler Corp., 66 F.3d 1295, 1314 (2d Cir. 1995); Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993).

116. See EEOC v. Ratliff, 906 F.2d 1314, 1315-16 (9th Cir. 1990).

117. See United States v. Lopez, 514 U.S. 549, 559 (1995).

118. See Mandell, *supra* note 74, at 1062 (noting that, at the time Congress enacted Title VII, the Supreme Court's "affecting commerce" threshold was a much lower standard than it is today under *Lopez*).

element accomplishes Congress' goal of protecting small businesses by "reigning in federal intervention"<sup>119</sup> and minimizing the costly burden of federal antidiscrimination litigation.<sup>120</sup> The proposed rule also delays the constitutional question of whether a business with less than fifteen employees has the required "substantial relation" to interstate commerce. As long as the employee threshold is jurisdictional, federal courts cannot hear Title VII claims against employers with fewer than fifteen employees.<sup>121</sup>

The proposed rule gives Congress an opportunity to expressly extend Title VII jurisdiction to employers with fewer than fifteen employees if it chooses. Congress could extend jurisdiction if its interest in providing the plaintiff a federal forum for relief in antidiscrimination cases outweighs its goal of protecting small businesses from federal intervention. However, if Congress does expressly extend Title VII jurisdiction to include smaller employers, then the amendment might get invalidated under *U.S. v. Lopez*,<sup>122</sup> where the Court significantly reined in legislative Commerce Clause power.<sup>123</sup>

## VI. CONCLUSION

The *Arbaugh* Court's decision to make Title VII's fifteen-employee requirement an element of the plaintiff's claim for relief disadvantages the same small businesses that Congress intended to protect from the burden of litigating discrimination claims in federal court. The Court's rationale is misguided. The evidence of whether Congress intended to make the employee threshold a merits-based or jurisdictional element is inconclusive. The Court's main goal—conservation of judicial resources—is better served by allowing the trier of fact (judge or jury depending on the particular facts at issue) to establish the threshold *before* commencing a trial on the merits. This result allows for a more timely dismissal of pendent state law claims. Finally, in light of the limited jurisdiction of federal courts and Congress' limited power to regulate under the Commerce Clause, the Court should have left the "ball in Congress' court" to

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119. *Id.* at 1063.

120. *Tomka*, 66 F.3d at 1314; *Miller*, 991 F.2d at 587.

121. *See* FED. R. CIV. P. 12(b)(1).

122. 514 U.S. 549 (1995).

123. *Id.* at 559.

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*expressly extend* Title VII to employers with fewer than fifteen employees.