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IN THE SUPREME COURT OF THE UNITED STATES

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JENIFER ARBAUGH, :

Petitioner, :

v. : No. 04-944

Y & H CORPORATION, DBA :

THE MOONLIGHT CAFE. :

- - - - -X

Washington, D.C.

Wednesday, January 11, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:10 a.m.

APPEARANCES:

JEFFREY A. SCHWARTZ, ESQ., New Orleans, Louisiana; on behalf of the Petitioner.

DARYL JOSEFFER, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

BRETT D. PRENDERGAST, ESQ., New Orleans, Louisiana; on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:10 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first today in Arbaugh v. Y & H Corporation.

5 Mr. Joseffer.

6 MR. SCHWARTZ: Mr. Schwartz.

7 CHIEF JUSTICE ROBERTS: Mr. Schwartz. Excuse
8 me. Mr. Schwartz.

9 ORAL ARGUMENT OF JEFFREY A. SCHWARTZ

10 ON BEHALF OF THE PETITIONER

11 MR. SCHWARTZ: Mr. Chief Justice, and may it
12 please the Court:

13 A Federal court has subject matter
14 jurisdiction over a claim brought under title VII
15 regardless of whether an employer has 15 employees.
16 This is so because when Congress enacted title VII, it
17 included a specific jurisdictional grant and that grant
18 provides that jurisdiction will exist in the Federal
19 courts over all claims brought under the act.

20 This specific grant of jurisdiction is
21 consistent with the more general grant of jurisdiction
22 contained in 28 U.S.C. 1331 wherein Federal question
23 jurisdiction exists over all claims that arise under a
24 Federal law. Title VII is a Federal law.

25 The Fifth Circuit erred when it -- when it

1 determined that the employer numerosity issue went to
2 the subject matter jurisdiction of the court.

3 Indeed, when title VII was passed, Congress
4 actually expanded jurisdiction, the Federal question
5 issue of title VII, because at that time 28 U.S.C. 1331
6 had a \$10,000 amount in controversy requirement that
7 Congress did away with because the jurisdictional grant
8 contained within title VII made no mention of the
9 \$10,000 requirement.

10 JUSTICE GINSBURG: So you say -- so now it's
11 essentially redundant. Now that 1331 has no
12 jurisdictional amount, no amount in controversy, the
13 jurisdictional provision in title VII is just going
14 over the same territory. It doesn't add or detract.
15 Is that so?

16 MR. SCHWARTZ: I would agree with that.

17 Indeed, the question --

18 JUSTICE KENNEDY: In the first sentence, but
19 not in the venue part.

20 MR. SCHWARTZ: Not in the venue part and --
21 and certainly -- because it does apply to which
22 district court a case should be brought. I would say
23 it -- it's redundant to the extent of conferring
24 jurisdiction to a Federal court, but not on the venue
25 provision --

1 JUSTICE GINSBURG: Which is not subject
2 matter jurisdiction, which is what we're concerned with
3 here.

4 MR. SCHWARTZ: Right. It's not an issue in
5 this case.

6 CHIEF JUSTICE ROBERTS: What about the
7 argument, though, that when you're talking about a
8 threshold question like coverage, who the statute
9 covers, and it's quite different from the cause of
10 action cases, many of which you rely on in your brief?

11 MR. SCHWARTZ: Well, we're talking here about
12 a question of whether or not coverage is subject matter
13 jurisdiction, and it's our position that once you go
14 beyond the text and you start evaluating the various
15 aspects of title VII, Mr. Chief Justice, you are going
16 down a -- a slippery slope.

17 An example would be a case perhaps where a --
18 in fact, a case that I'm currently involved in where a
19 plaintiff is alleging that they were discharged
20 discriminatorily. And the reality is from the
21 employer's perspective, that that person was never
22 terminated. They're still an active employee. That is
23 an essential issue of a cause of action. The coverage
24 of title VII --

25 CHIEF JUSTICE ROBERTS: It's more a question

1 of -- of whether or not the -- there's been a violation
2 of title VII. It seems to me that the number of
3 employee issue is whether you're covered at all,
4 whether you have to conform your conduct to that law.
5 Your question -- your -- your case of whether someone
6 has been discharged or not just goes to whether there's
7 been a violation.

8 MR. SCHWARTZ: That's correct, Mr. Chief
9 Justice, but I believe that the analogy applies because
10 it still goes to whether or not you start reading the
11 act beyond the jurisdictional grant. It's unnecessary
12 to go beyond the jurisdictional grant because --

13 CHIEF JUSTICE ROBERTS: But in City of -- in
14 City of Kenosha, of course, the Court went beyond the
15 jurisdictional grant and it said that the definition of
16 the term person in 1983 raised a jurisdictional
17 question.

18 MR. SCHWARTZ: Well, I -- I would not
19 necessarily agree that that goes beyond the
20 jurisdictional grant because the jurisdictional grant
21 of -- contained in 1334 -- 1343 requires that -- that
22 jurisdiction apply against a person acting under color
23 of State law. And that's an example which Congress has
24 done many times of putting qualifiers within a
25 jurisdictional grant.

1 An example of -- of that we have -- we attached
2 60 such statutes to our appendix in our reply brief, but
3 a specific example, which I think is applicable here, is
4 the Uniformed Service Employee Reemployment Rights Act
5 wherein Congress put in that the act would only apply
6 jurisdictionally, subject matter jurisdictionally,
7 against employers. And then there's a subsequent
8 definition of employer further on in -- in the statute
9 which is missing here because title --

10 JUSTICE SCALIA: What's the practical
11 consequence of the one or the other? Number one, if
12 you don't raise it below, you can still raise it on
13 appeal if it's jurisdictional. Right?

14 MR. SCHWARTZ: That's correct.

15 JUSTICE SCALIA: And number two, the -- if
16 it's a jurisdictional question, it would be decided by
17 the -- by the judge rather than by the jury?

18 MR. SCHWARTZ: That's correct as well. And I
19 would go further that the practical problem is what
20 happened in our case where it wasn't raised in the
21 trial -- in -- in the case until after a trial on the
22 merits and after the jury returned the verdict, and we
23 wasted a lot of time. It -- it could have been brought
24 up beforehand as a -- a substantive motion for summary
25 judgment or a 12(b)(6) motion if the pleadings resolved

1 the issue.

2 JUSTICE SCALIA: But that's always the case.

3 I mean, why -- you know, if those disadvantages --
4 those disadvantages will always exist. So why would
5 Congress ever make something jurisdictional rather than
6 simply making it an element of the cause of action?
7 You understand what I'm saying? I mean, that's always
8 a consequence.

9 MR. SCHWARTZ: Well, I -- I think the --

10 JUSTICE SCALIA: And yet, you -- you
11 acknowledge that some things are jurisdictional.

12 MR. SCHWARTZ: Well, I -- I think if I'm --
13 if I'm an attorney representing a plaintiff and I want
14 to make an evaluation of whether or not I have a claim,
15 I want to first evaluate do I pass a jurisdictional
16 threshold. If a come -- a person comes into my office
17 and says, look, this happened to me, I want to bring a
18 cause of action, and I know that they employ less than
19 15 people, then I'm not going to waste my time.

20 JUSTICE O'CONNOR: Well, but what's the rule
21 that you suggest we look to in deciding whether a
22 provision is jurisdictional? Because, as the Chief
23 Justice pointed out, in 1983 cases where the question
24 is whether the defendant is a person, we've held that
25 is jurisdictional. So what is the rule in telling us

1 when we should treat something as jurisdictional?

2 MR. SCHWARTZ: Well, the rule that has
3 existed for some time now, going back to Bell v. Hood,
4 is a -- a fair way to look at this. If a statute, a
5 Federal law, creates a cause of action, then a cause --
6 a cause of action lies absent Congress expressly
7 limiting or qualifying an -- a jurisdictional element
8 within its grant contained within that law, which is --
9 which is missing completely in title VII.

10 JUSTICE GINSBURG: What would you call this?
11 Would you call 15 or more employees an element of your
12 claim that you must prove?

13 MR. SCHWARTZ: Yes.

14 JUSTICE GINSBURG: Or there could be an
15 affirmative defense and you're not claiming the latter.

16 MR. SCHWARTZ: It could be an affirmative
17 defense.

18 JUSTICE GINSBURG: But you're -- you're
19 accepting that it is your burden rather than the
20 employer's to show that the employer had fewer than 15
21 employees.

22 MR. SCHWARTZ: More than 15, yes, Your Honor.

23 JUSTICE O'CONNOR: More than.

24 MR. SCHWARTZ: Yes. That -- that's the
25 plaintiff's burden just like it's the plaintiff's

1 burden to prove that they were terminated --

2 JUSTICE O'CONNOR: Did you establish that in
3 the course of the proceedings?

4 MR. SCHWARTZ: We did not plead it with
5 particularity. We pled that the employer sexually
6 harassed the plaintiff, and then thereafter in the
7 pretrial order, it was not raised as a contested issue
8 of fact. And I believe the law of the case doctrine
9 would control in that instance because the --

10 JUSTICE KENNEDY: I was going to ask what --
11 how does the waiver work? Suppose the judge pre-
12 verdict says, you know, I'm concerned that there are
13 less than 15 employees. Can the plaintiff say, oh,
14 well, now, Your Honor, you can't get into that? They
15 waived that. They didn't raise it. I mean, how does
16 that work?

17 MR. SCHWARTZ: If it's -- if it doesn't go to
18 the subject matter jurisdiction --

19 JUSTICE KENNEDY: Under your theory of the
20 case?

21 MR. SCHWARTZ: -- then I would say that it is
22 waived, if it's been answered --

23 JUSTICE O'CONNOR: Well, but if it's your
24 burden to prove it, how can it be waived by the
25 defendant? I don't understand your theory.

1 JUSTICE KENNEDY: You mean the judge just has
2 to watch the case sail over the waterfall and --

3 MR. SCHWARTZ: Well, let's talk about two
4 different examples. If we have pled with particularity
5 that the employer has 15 or more employees and is
6 subject to title VII for liability purposes and the
7 defendant in their answer admits that fact, then that
8 becomes a -- a admission --

9 JUSTICE KENNEDY: Well, in my case nobody
10 mentions it but the judge.

11 MR. SCHWARTZ: All right. So we have alleged
12 in our lawsuit that the employer terminated or sexually
13 harassed the plaintiff and the -- there is not -- it's
14 not particularly pled. Is that the hypothetical,
15 Justice Kennedy?

16 JUSTICE KENNEDY: Yes, and the -- and the
17 judge calls it sua sponte to the attention of the
18 parties.

19 MR. SCHWARTZ: I would think that if the
20 judge in a -- in a Federal cause of action was troubled
21 by any element of the claim, based upon his or her own
22 review of the factual setting, it's conceivable that --
23 that the court then could entertain motions on that
24 particular issue.

25 JUSTICE SCALIA: Well, wait. You -- you

1 pleaded -- you pleaded that -- that the defendant was
2 -- was an employer under the act. Right?

3 MR. SCHWARTZ: Yes.

4 JUSTICE SCALIA: And it's the definition of
5 employer that says he has to have more than -- more
6 than 15 employees. So, in effect, you -- in making
7 your complaint, you -- you at least implied and maybe
8 said that this person is an employer under the act. So
9 it seems to me at that point the -- the burden shifts
10 to the other side to say -- the burden of going forward
11 of saying no, this person isn't an employer under the
12 act, and if they say nothing, then they've accepted
13 what -- what your complaint on its face says.

14 MR. SCHWARTZ: I agree with you, Justice
15 Scalia.

16 JUSTICE SCALIA: I knew you would.

17 (Laughter.)

18 CHIEF JUSTICE ROBERTS: But -- but maybe --
19 but that doesn't sound like a reasonable agreement.
20 All you -- so you file one sentence saying this person
21 violated title VII. Are you impliedly including all of
22 the allegations of what constitutes a violation of
23 title VII because if you didn't allege every particular
24 element, it wouldn't be a violation of title VII?
25 That's not how pleading works.

1 MR. SCHWARTZ: No. And -- and I can -- I can
2 tell you, Mr. Chief Justice, I have probably handled
3 500 causes of action for discrimination cases, and I've
4 never seen anybody plead the issue of whether or not
5 somebody has 15 employees. It's just not done.

6 JUSTICE SOUTER: In your pleadings, did you
7 say he's an employer?

8 MR. SCHWARTZ: Yes.

9 JUSTICE SOUTER: Did you use the term
10 employer?

11 MR. SCHWARTZ: Yes, Justice Souter.

12 JUSTICE SOUTER: Okay.

13 MR. SCHWARTZ: And -- and it was admitted and
14 then it was never challenged thereafter until after the
15 verdict.

16 JUSTICE GINSBURG: How does it -- you -- you
17 told us of your extensive experience. How does the
18 numerosity requirement usually come up? You've
19 accepted that it's an element of your claim rather than
20 an affirmative defense the defendant must plead and
21 prove. So how does it ordinarily come up? Does it --
22 because defendant answers and asserts that it has fewer
23 than 15 employees?

24 MR. SCHWARTZ: I can give you one real-world
25 example, Justice Ginsburg. I represented a defendant

1 in a case that didn't employ 15 people, and when I
2 attempted to convince the plaintiff -- plaintiff's
3 lawyer of that fact after the litigation commenced and
4 they weren't willing to -- to go ahead and voluntarily
5 dismiss, I simply filed a motion for summary judgment
6 attaching affidavit material, including payroll
7 records. And then once the plaintiff's attorney
8 reviewed that, they voluntarily gave up and the case
9 was dismissed. That would be the way it would normally
10 play out, provided it's not held to be an issue of
11 subject matter jurisdiction.

12 Another reason why this should not be a
13 subject matter jurisdiction goes to the practical
14 elements of the way this would progress in litigation
15 and title VII's admonition, which is a rare admonition
16 in legislation, that title VII cases be heard in an --
17 is in an expedited way. In enacting that particular
18 language, it appears to me that Congress was
19 acknowledging that this is a very important law. We're
20 trying to remediate a terrible wrong, that is,
21 employment discrimination. So we don't want these
22 cases to languish. It's almost as though it's being
23 processed like a Federal Rule of Civil Procedure
24 injunction proceeding, that this is a case that should
25 move very quickly.

1 And many courts, like the one across the
2 river in Virginia that are known as so-called rocket
3 dockets, process these cases on a very fast track. I
4 know that -- that court does it. Other courts that I
5 practice in do it as well where it is not uncommon that
6 from the pleading that a trial is set as quickly as
7 6 months thereafter. If this was to be subject matter
8 jurisdiction and we had to initially litigate the
9 question of whether or not the person is an employer
10 and putting aside all other issues in the case, it
11 would invariably result in a dragged-out process.

12 In our case, as we -- as we noted --

13 CHIEF JUSTICE ROBERTS: That's true in a lot
14 of areas. I think of admiralty. If there's an issue
15 of admiralty jurisdiction that questions whether an
16 injury is caused by a vessel in navigable water, you
17 often have extended litigation over that jurisdictional
18 question.

19 MR. SCHWARTZ: And -- and in those cases, the
20 jurisdictional grant in the Jones Act does include
21 elements of jurisdiction. So it's -- it's required.

22 But I don't -- I don't believe that the Jones
23 Act has the same type of language, Mr. Chief Justice,
24 that title VII has, requiring that these cases be heard
25 expeditiously. So --

1 JUSTICE SCALIA: Does it -- does it have to
2 be resolved preliminarily? Why can't you leave the
3 jurisdictional question to be decided at the conclusion
4 of the trial with all the other questions? Is there
5 some rule of law that says that a jurisdictional
6 question must be confronted before the trial and before
7 the merits?

8 Indeed, most jurisdictional questions are
9 reexamined as the trial proceeds. That is, you know,
10 initially the court will say, yes, there appears to be
11 jurisdiction on the basis of the pleading. Then if
12 there's a motion to dismiss, yes, there -- there
13 appears to be jurisdiction on the basis of the
14 affidavits. But then if the trial proceeds and it
15 turns out that, in fact, there isn't jurisdiction, the
16 court dismisses. So why couldn't this jurisdictional
17 question always be handled that way? Just -- just
18 leave it to be resolved during the trial. It wouldn't
19 slow anything up.

20 MR. SCHWARTZ: There -- there's a few
21 problems with that. One is that it is not uncommon in
22 title VII cases that there are supplemental State
23 claims brought in the cause of action, and so we would
24 have a situation where there would be a lot of wasted
25 effort on the pending claim if, at some point, Justice

1 Scalia, at the end of the day the case was dismissed on
2 subject matter jurisdiction.

3 That was s situation in our case where we
4 had a pendant tort claim for battery, and we also had a
5 pendant claim under the ancillary Louisiana
6 discrimination statute.

7 JUSTICE SCALIA: Okay. So this is a third
8 consequence of the jurisdictional issue.

9 MR. SCHWARTZ: Yes.

10 JUSTICE SCALIA: If the issue is
11 jurisdictional, all the pendant State claims don't
12 belong there and they've got to be chucked out;
13 whereas, if it just goes to the merits, the pendant
14 claims are properly before the court.

15 MR. SCHWARTZ: That's right, Your Honor.

16 JUSTICE SCALIA: That's an important
17 consequence.

18 MR. SCHWARTZ: In addition, the Court's
19 recent opinions addressing subject matter jurisdiction
20 have all gone back, it seems to me, to this question of
21 what does the text say. The -- the issue of not
22 conflating the use of the word jurisdiction, which has
23 been referenced in a number of the Court's opinions,
24 Steel Company, Kontrick, Eberhart, Scarborough, all
25 point to the fact that where the text is clear, as it

1 is in this case, and there is no ambiguity, then
2 subject matter jurisdiction lies if a claim is brought
3 under a Federal act.

4 If there's no further questions, I'd like
5 to reserve the balance of my time for rebuttal.

6 CHIEF JUSTICE ROBERTS: Thank you, Mr.
7 Schwartz.

8 Now Mr. Joseffer.

9 ORAL ARGUMENT OF DARYL JOSEFFER
10 ON BEHALF OF THE UNITED STATES,
11 AS AMICUS CURIAE, SUPPORTING THE PLAINTIFF

12 MR. JOSEFFER: Mr. Chief Justice, and may it
13 please the Court:

14 Justice O'Connor, we think the rule here,
15 because it's a question of congressional intent, is
16 simply how to best interpret the relevant statutes.
17 Here, Congress twice unambiguously conferred
18 jurisdiction over all title VII claims, at least twice:
19 first in section 1331 and again in the title VII
20 jurisdictional provision which confers jurisdiction
21 over all claims brought under title VII.

22 JUSTICE GINSBURG: Mr. Joseffer, maybe you
23 can raise the podium a bit so the microphone works
24 better. The other way.

25 MR. JOSEFFER: Sorry. Is that better? Thank

1 you.

2 As I was saying, the question is -- is --
3 because it's a question of congressional intent, we
4 think normal rules of construction apply.

5 And, Justice Ginsburg, you asked about
6 whether the title VII subject matter jurisdictional
7 provision is now redundant in light of the reduction of
8 the amount of controversy from section 1331.
9 Technically we think the answer is yes, but it still
10 has great interpretive value because it shows that when
11 Congress meant to address the jurisdictional question
12 in title VII, it expressly said so and it did so by
13 conferring jurisdiction over all title VII claims.

14 The definition of employer, which is the
15 relevant issue here, does not itself speak in
16 jurisdictional terms and does not modify in any way
17 title VII's broad jurisdictional provision.

18 JUSTICE GINSBURG: What -- what about the
19 EEOC having typed the question jurisdictional for
20 administrative processing purposes?

21 MR. JOSEFFER: Right. Well, as the Court has
22 remarked on multiple occasions, the word jurisdiction
23 is a word of many, many meanings, and the EEOC has
24 never said that it's a question of the subject matter
25 jurisdiction of the Federal courts. It was -- until

1 about 5 or 6 years ago, EEOC in an administrative
2 context used the word jurisdiction to refer to the
3 definition of employer, statutes of limitations, and a
4 variety of other matters that are clearly not subject
5 matter jurisdictional.

6 But after this Court held in Zipes that
7 another provision of title VII is not one of subject
8 matter jurisdiction, EEOC realized that its
9 administrative use of the broad term jurisdiction was
10 confusing. So 5 or 6 years ago, EEOC amended its
11 compliance manual and no longer refers to any of these
12 questions as jurisdictional. But I guess the key point
13 is it never said it was on subject matter jurisdiction.

14 And Mr. Chief Justice, you asked about
15 whether a threshold question of coverage could be
16 considered different than another element of the cause
17 of action. I think the important thing here is that
18 the place where Congress used the term person is in
19 setting forth what conduct is unlawful. Title VII says
20 that it shall be an unlawful employment practice for a
21 person to discriminate in various ways. So the way the
22 definition is irrelevant is in setting forth the scope
23 of unlawful conduct which is a quintessential merits or
24 cause of action inquiry as opposed to a jurisdictional
25 one.

1 The City of Kenosha is different because, as
2 petitioner's counsel recognized, that interpreted not
3 section 1331 but section 1343 which --

4 CHIEF JUSTICE ROBERTS: Interpreted section
5 -- the use of the word person in section 1983.

6 MR. JOSEFFER: Interpreted the word person in
7 section 1983 not to apply to municipal corporations,
8 but with respect to the jurisdictional inquiry, it said
9 that the -- that 1343 did not confer jurisdiction.

10 In Mt. Healthy several years later, the Court
11 held that although section 1343 was narrowly limited to
12 actions that are quote, authorized by law, which
13 connoted somewhat of a merits inquiry, section 1331's
14 jurisdictional provision is not so limited and is not
15 limited by the definition of person, which is what the
16 Court held in section 1331.

17 CHIEF JUSTICE ROBERTS: So City of Kenosha
18 was just kind of a silly waste of time.

19 MR. JOSEFFER: Well --

20 CHIEF JUSTICE ROBERTS: 1331 was applicable
21 there as well. Right?

22 MR. JOSEFFER: At the time section 1331 had
23 the amount in controversy requirement, and I think
24 that's why now that section 1331 no longer has the
25 amount in controversy requirement, this Court's section

1 1343 cases have more or less petered out because
2 plaintiffs can now just go under section 1331.

3 And Justice Scalia, you asked about the --
4 the practical consequences. I agree there are three
5 practical consequences, and from that perspective, it
6 makes little sense to believe that Congress would have
7 thought that this requirement should be jurisdictional.

8 The first is whether the issue can be raised at any
9 point in the litigation. The second is who decides the
10 issue, and the third is whether, after dismissal of the
11 Federal claims, the State law claims must be dismissed
12 for lack of jurisdiction.

13 And given that this is just one of many facts
14 that arises in determining whether a plaintiff can
15 state a valid title VII claim, it's hard to believe
16 that Congress would have thought that this is the one
17 fact that should be raised at the end of the case
18 instead of at the outset where it can be adjudicated in
19 an orderly manner with all of the other facts.

20 Also, common law juries have been deciding
21 for centuries whether a worker is an employee or an
22 independent contractor for purposes of agency and tort
23 law. And since that is the ultimate dispute here, it
24 seems remarkable to think that that's the one fact that
25 Congress would say should not go to a jury.

1 And similarly --

2 CHIEF JUSTICE ROBERTS: I'm sorry. What have
3 juries been determining?

4 MR. JOSEFFER: Well, the question as to
5 whether there are 15 employees here --

6 CHIEF JUSTICE ROBERTS: Right.

7 MR. JOSEFFER: -- turns on whether some
8 workers are independent contractors or employees. And
9 for agency law purposes, which becomes relevant in tort
10 law in terms of vicarious liability, the question
11 whether someone is an employee or an independent
12 contractor is a -- is a longstanding jury question.

13 JUSTICE GINSBURG: The -- the question was
14 whether the truck drivers counted as employees because
15 if they did, they'd have enough?

16 MR. JOSEFFER: Right. If the -- if the -- if
17 those -- if the delivery drivers were workers -- were
18 employees, there's no question there were 15 employees.

19 So the question was whether some workers count as
20 employees and whether a worker is an employee or an
21 independent contractor is -- is a longstanding question
22 for a jury when there's a disputed issue of -- of fact.

23 And then the third consequence -- I mean,
24 here, there -- the jury rendered a verdict on the State
25 law claims, found in favor of respondent on one,

1 petitioner on the other. And it seems highly unlikely
2 that Congress would think that that jury verdict should
3 be vacated and the case retried in State court because
4 the defendant has 14 instead of 15 employees.

5 CHIEF JUSTICE ROBERTS: But that's the --
6 that's a consequence of a determination that it's
7 jurisdictional in any case. Right?

8 MR. JOSEFFER: That's correct, and there --
9 there are circumstances --

10 CHIEF JUSTICE ROBERTS: I mean, if you had a
11 case where you didn't dispute that the issue was
12 jurisdictional and there had been a jury trial on the
13 pendant State law claims, we'd still have to throw that
14 out. Right?

15 MR. JOSEFFER: Yes, but I think that's one
16 reason that Congress does not ordinarily make
17 jurisdiction turn on those types of facts. In the
18 admiralty concept -- context that you recognized, it's
19 necessary to distinguish between admiralty jurisdiction
20 and general Federal question jurisdiction. So Congress
21 had to distinguish in some way, and the way it did was
22 by saying, well, is the alleged injury caused by a
23 vessel in navigable waters or elsewhere.

24 But ordinarily when -- a distinction does not
25 have to be drawn like that. In section 1343, it was

1 the same because Congress didn't want that to be
2 conflated with section 1331 at the time. When
3 jurisdiction does not necessarily turn on contextual
4 factors, Congress ordinarily just lets the broad
5 jurisdictional ground of section 1331 be a clear,
6 simple threshold inquiry so parties can determine
7 they're in the right court, and then the case can be
8 proceeded -- can be litigated on the merits from there.

9 Justice Kennedy asked whether a court could
10 raise the issue on its own, even assuming that it's a
11 merits issue. And I think the answer is that although
12 the defendant waived the issue here and therefore has
13 no right to insist that it be raised, most waiver
14 doctrines are discretionary, and therefore, courts
15 retain some inherent discretion to overlook waivers in
16 some circumstances. That discretion would be greater
17 at the outset of a case where a Federal court decided
18 it should not be deciding a case than it would be once
19 a jury had already decided the case, which is what
20 happened here.

21 Finally, respondent relies on a number of
22 this Court's title VII decisions for the proposition
23 that this requirement is one of subject matter
24 jurisdiction. The basic point is that this Court has
25 never opined in dicta or in holding on whether this

1 requirement is one of subject matter jurisdiction of
2 the courts. This Court's only title VII subject matter
3 jurisdiction case is Zipes which held that a
4 requirement was not jurisdictional because it was not
5 -- did not textually modify title VII's broad
6 jurisdictional provision and in light of other relevant
7 canons of construction. And for precisely the same
8 reasons, the definition of employer does not textually
9 modify the definitional provision and therefore it does
10 not limit the court's subject matter jurisdiction to
11 adjudicate this claim either up or down based on its
12 merits.

13 If the Court has no further questions, I have
14 nothing further.

15 CHIEF JUSTICE ROBERTS: Thank you, Mr.
16 Joseffer.

17 Mr. Prendergast, we'll now hear from you.

18 ORAL ARGUMENT OF BRETT D. PRENDERGAST

19 ON BEHALF OF THE RESPONDENT

20 MR. PRENDERGAST: Mr. Chief Justice, may it
21 please the Court:

22 I have to start off by disagreeing with my
23 learned colleagues on at least three areas.

24 First of all, Mr. Schwartz indicated that the
25 plaintiff pled that the defendant Y & H was an employer

1 in this matter. That is inaccurate. What the
2 defendant actually pled and which became the subject of
3 the subsequent post-trial motions was that the court
4 had jurisdiction, and when the matter of the number of
5 employees was raised, that was the pleading -- the
6 allegation in the complaint that the plaintiff raised
7 to say this issue has been waived. There was no
8 specific pleading in the complaint that said that Y & H
9 qualified for the definition of an employer under title
10 VII. There was no pleading that Y & H had 15 or more
11 employees for the 20 or more weeks that were necessary.

12 JUSTICE GINSBURG: There was no -- there was
13 no allegation that the plaintiff was employed by your
14 client?

15 MR. PRENDERGAST: There was an allegation,
16 Your Honor, that the plaintiff was employed by the
17 company, but there was no allegation that Y & H was an
18 employer as the term is defined in title VII.

19 JUSTICE O'CONNOR: Was the --

20 JUSTICE SOUTER: Was the word employer used
21 in the pleadings?

22 MR. PRENDERGAST: I don't recall, Your Honor,
23 whether or not the word employer was used. I think it
24 was clearly stated that -- and -- and there's no doubt
25 Ms. Arbaugh was, in fact, employed by Y & H.

1 JUSTICE SOUTER: No. I'm just asking the
2 really formal question. Was the word employer used to
3 refer to your client at any point in the pleadings?

4 MR. PRENDERGAST: I'm -- I'm not sure, Your
5 Honor.

6 JUSTICE GINSBURG: Do we have the complaint
7 in --

8 MR. PRENDERGAST: In the record, yes, Your
9 Honor.

10 JUSTICE BREYER: Was there an allegation that
11 the company, petitioner, or whatever it was -- that
12 they violated the act?

13 MR. PRENDERGAST: There was an allegation,
14 Your Honor, that --

15 JUSTICE BREYER: All right -- I guess that --
16 they must have thought that there were 15 or more
17 employees because otherwise you wouldn't have.

18 MR. PRENDERGAST: Right. And -- and
19 naturally, though, Your Honor, that was denied.

20 The -- the admission that the plaintiff
21 relied upon in the post-trial motions was the
22 allegation that this Court has jurisdiction under title
23 VII, under the relevant provision.

24 JUSTICE BREYER: Was that denied?

25 MR. PRENDERGAST: That was admitted. The

1 jurisdiction was admitted, and -- and in the post-trial
2 motions, that was the issue that the plaintiff hung
3 their hat on to come back and say this issue is -- is
4 established and stipulated. There was clearly no
5 admission that the --

6 JUSTICE BREYER: You denied it. Then they
7 presented evidence, and their evidence was A, B, C, D,
8 E. And I guess then you presented some contrary
9 evidence, and you didn't present any evidence that he
10 wasn't an employer. So I guess the odds are he was.

11 MR. PRENDERGAST: Well, there was -- but --

12 JUSTICE BREYER: And if the odds are he was,
13 they win in the absence of any evidence.

14 MR. PRENDERGAST: Justice Breyer, if an
15 employer -- and -- and I disagree with the position
16 that it's -- I -- I think it is an element of the
17 merits in addition to being an element of jurisdiction.

18 But if a plaintiff has that as part of their burden of
19 proof, then the plaintiff naturally has to introduce
20 evidence --

21 JUSTICE BREYER: Then I guess maybe you could
22 have appealed on that point. So did you?

23 MR. PRENDERGAST: No, Your Honor, because --

24 JUSTICE BREYER: Then I guess it's waived
25 unless it's jurisdictional. So we're back to the

1 jurisdictional question.

2 MR. PRENDERGAST: And which we maintain that
3 it is jurisdictional. I'm not sure, Your Honor,
4 whether or not there is, in fact, any waiver because --

5 JUSTICE BREYER: I never heard of a point on
6 the merits that if you -- you think you're right. It's
7 right on the merits, the element of the offense. You
8 don't think they proved it, but unfortunately, you
9 don't raise that in the appeal.

10 MR. PRENDERGAST: No, Your Honor, we didn't
11 raise it in the appeal, the reason being that while the
12 matter was still pending in the trial court, in
13 addition to the motion to dismiss for jurisdiction,
14 which was granted, there was a motion for a renewed
15 judgment as a matter of law, which included the
16 plaintiff's failure to maintain their burden of proof.

17 JUSTICE BREYER: And did you win or lose on
18 that?

19 MR. PRENDERGAST: That was dismissed as moot
20 because of the jurisdictional issue, Your Honor. So
21 whether or not that is waived or not -- I agree with
22 you. It's not before this Court today, but I don't
23 think it's a matter that can be decided by this Court
24 either. It's a matter, if this Court should decide
25 that it is a merits issue, that goes back to the trial

1 court on remand.

2 CHIEF JUSTICE ROBERTS: What other aspects of
3 title VII do you think are jurisdictional?

4 MR. PRENDERGAST: I think the other aspects
5 -- and clearly, this has not been the subject of as
6 great a research -- would be the other ones that
7 designate the scope or the coverage of the act, for
8 example, especially as it relates to employer.

9 At least three circuit -- and in addition to
10 excluding small companies as employers, the act also
11 includes as -- excludes as employers private membership
12 clubs, the Government, the United States, agencies of
13 the United States, wholly owned corporations of the
14 United States, and also Indian tribes. At least three
15 circuit courts have held that Indian tribes and their
16 status is a matter of subject matter jurisdiction.
17 That's the Fifth Circuit in *Thomas v. Choctaw*, the
18 Tenth Circuit in *Duke v. Absentee Shawnee Tribe*, and
19 the Ninth Circuit in --

20 JUSTICE STEVENS: Do they hold that the
21 plaintiff must allege the employer is not an Indian
22 tribe? I'm over here.

23 MR. PRENDERGAST: I'm sorry.

24 JUSTICE STEVENS: Over here.

25 (Laughter.)

1 JUSTICE STEVENS: I say in -- in those case
2 that you just cited, did they hold that the plaintiff
3 must allege that the employer is not an Indian tribe?

4 MR. PRENDERGAST: I don't think they got into
5 that matter, Justice Stevens. Instead, what they
6 simply decided was whether or not the -- the employer
7 was an Indian tribe. There was a question concerning
8 some of the structures and just the business
9 organizations that the Indian tribes were using and --

10 JUSTICE STEVENS: Do you interpret those
11 cases as, in fact, holding that if there was a trial
12 and a judgment in favor of the plaintiff against what
13 turns out later to be an Indian tribe, that after the
14 case is taken up on appeal, the Indian tribe can have
15 the judgment set aside?

16 MR. PRENDERGAST: Yes, Your Honor, because
17 the -- the cases did clearly hold that the matter of --
18 as an Indian tribe was a matter of subject matter
19 jurisdiction. And as a matter of subject matter
20 jurisdiction, it is completely established law that
21 that may not be waived. It may be raised at any time.

22 So --

23 JUSTICE GINSBURG: Did it, in fact, come up
24 in that posture in the case? It has already been
25 mentioned that the word jurisdiction has many, too many

1 uses. Did it -- did the question come up in the Indian
2 tribe cases as it did here after the case was fully
3 tried and after there was a jury verdict for the
4 plaintiff?

5 MR. PRENDERGAST: No, Your Honor. Those were
6 cases where there were motions to dismiss based upon
7 lack of subject matter jurisdiction.

8 JUSTICE GINSBURG: When -- if -- if it's
9 brought up promptly, it really doesn't matter, does it,
10 whether you label it 12(b)(1) jurisdiction or 12(b)(6),
11 failure to state a claim? It goes out either way.
12 When it is consequential is when you bring it up, as
13 you did here, after you lose on -- at the trial.

14 MR. PRENDERGAST: I -- I think the effect
15 could be different when you raise it. I think there
16 can also be a difference in effect in how it will be
17 treated, even if it was promptly raised. I think, for
18 example, on a 12(b)(1) motion, I don't believe the --
19 the court is obligated to accept all the plaintiff's
20 pleadings. It's allowed to look outside the pleadings
21 to actually determine the jurisdiction. Whereas, in a
22 12(b)(6) motion, if the plaintiff says it's an Indian
23 tribe, it's an Indian tribe.

24 JUSTICE SCALIA: Mr. Prendergast --

25 MR. PRENDERGAST: Yes.

1 JUSTICE SCALIA: -- my problem with -- with
2 your -- your contention is that I don't know how it is
3 that you -- that you intuit that this one definition is
4 jurisdictional. I mean, the definition -- the -- the
5 15 employee limit is -- is part of the definition of
6 employer in section 701.

7 MR. PRENDERGAST: Yes, Your Honor.

8 JUSTICE SCALIA: There are 13 other
9 definitions in section 1701. For example, it defines
10 on the basis of sex. Now, if -- if you contest whether
11 a particular remark or a particular practice of the
12 employer was -- fell within that definition, was on the
13 basis of sex or not, would you say that the court had
14 no jurisdiction?

15 MR. PRENDERGAST: No, Your Honor.

16 JUSTICE SCALIA: Will you challenge -- well,
17 why are you challenging jurisdiction when you're --
18 when you're saying the -- the definition of -- of
19 employer has not been met, but you are not challenging
20 jurisdiction when you say the definition of on the
21 basis of sex has not been met. Why -- why pick on one
22 rather than the other?

23 MR. PRENDERGAST: I think the distinction is
24 similar to an Aldinger/Kenosha type distinction. And I
25 think the question goes back to it requires an

1 interpretation of whether or not Congress wanted to
2 give the lower Federal courts the type of jurisdiction
3 being discussed.

4 JUSTICE SCALIA: Yes, I -- I understand that.

5 MR. PRENDERGAST: And -- and --

6 JUSTICE SCALIA: That -- that's what it comes
7 down to.

8 MR. PRENDERGAST: And -- and --

9 JUSTICE SCALIA: But how do you know --

10 MR. PRENDERGAST: Well, how --

11 JUSTICE SCALIA: If both definitions in
12 section 701 --

13 MR. PRENDERGAST: How -- how do you know --

14 JUSTICE SCALIA: -- why does one of them
15 express one thing and another not express --

16 MR. PRENDERGAST: Justice Scalia, the way you
17 know is because you look at the logical deductions that
18 can be drawn from the congressional statutes, as this
19 Court suggested in *Aldinger*.

20 And with respect to the other definitions, I
21 cannot speak categorically with respect to those other
22 definitions because that's not the matter before this
23 Court. I can't suggest to this Court a wholesale
24 general policy of these definitions are jurisdictional
25 and these definitions are not jurisdictional.

1 JUSTICE O'CONNOR: But the practical
2 consequences of affirming here are severe in terms of
3 handling these cases. And we've pointed out in some
4 recent cases of ours that we've been a little sloppy in
5 the past in using the word jurisdiction. So it looks
6 to me like there are many indicators that would point
7 to not treating the 15 employee requirement as one of
8 subject matter jurisdiction.

9 MR. PRENDERGAST: Justice O'Connor, I would
10 say the -- the consequences of not affirming are even
11 more severe. Congress, in 1964, made a clear decision
12 that it wanted small businesses not to be burdened with
13 --

14 JUSTICE O'CONNOR: Yes, but it's entirely in
15 the hands of the defendant to raise some objection.
16 Who knows better than the employer how many employees
17 the employer has had? I mean, it's totally within your
18 capacity to say, wait a minute --

19 MR. PRENDERGAST: But one --

20 JUSTICE O'CONNOR: -- we didn't have 15.

21 MR. PRENDERGAST: -- one -- one of the -- one
22 of the concerns, I believe, that Congress did have with
23 respect to small employers was the fact that in the
24 terms of small employers, you are dealing with less
25 sophisticated litigants, less sophisticated litigants

1 with less access to legal resources that bigger
2 companies have.

3 JUSTICE O'CONNOR: Were you representing this
4 employer at the time?

5 MR. PRENDERGAST: No, Your Honor. I handled
6 this matter only post-trial.

7 CHIEF JUSTICE ROBERTS: What's -- what's
8 wrong with the rule? We're not dealing with article
9 III here. What's wrong with the rule that if Congress
10 doesn't put it in the jurisdictional section, it's not
11 jurisdictional?

12 MR. PRENDERGAST: I think --

13 CHIEF JUSTICE ROBERTS: It would make the
14 future cases a lot easier to decide.

15 MR. PRENDERGAST: I think that would be
16 contrary, however, Mr. Chief Justice, to the previous
17 holdings of this Court where they say you do look to
18 the logical deductions --

19 CHIEF JUSTICE ROBERTS: Well, it's --

20 MR. PRENDERGAST: -- and you look to all the
21 statutes. For example, petitioner makes note of Zipes,
22 but if -- if the jurisdictional statute is going to be
23 the be all and end all of -- of the analysis and the
24 discussion, then Zipes would have merely looked and
25 said, oh, well, the statute of limitations is not in

1 the jurisdictional provision. End of discussion.

2 But Zipes didn't do that. Zipes said we need
3 to look at the -- the jurisdictional statute, the way
4 it's structured. We need to look at congressional
5 intent and the legislative history, how they referred
6 to this matter. We need to look at our prior cases how
7 we referred to this matter.

8 So I think to say just, okay, let's look at
9 the jurisdictional statute -- one, I think there are
10 two problems with it. One --

11 JUSTICE GINSBURG: May I go back to Zipes?
12 In Zipes, the Court was faced with the -- the word
13 jurisdictional had been appended to the statute of
14 limitations. I think that was true of the way the EEOC
15 spoke of the rigid time limit, that it was mandatory
16 and jurisdictional. And then the Court explained in
17 Zipes that a strict time line doesn't mean that it's
18 jurisdictional. You can have a rule that's rigid, but
19 it doesn't determine subject matter jurisdiction. And
20 that's what Zipes tried to explain. The Court in Zipes
21 was faced with a number of cases that had used that
22 term to describe the time in which you must bring the
23 action, mandatory and jurisdictional.

24 MR. PRENDERGAST: Yes, Justice Ginsburg. But
25 Zipes also dealt with a legislative history where they

1 referred to it as a statute of limitations period.
2 Zipes also said, okay, we have other cases where we
3 have used the term jurisdictional, but more often than
4 not, we've referred to this as a limitations period.
5 Zipes looked at the whole context and said, yes, we're
6 not going to be held by a few random, maybe casual or
7 careless uses of the term jurisdictional, but we are
8 going to look at the whole thing.

9 Here, the legislative history has
10 traditionally referred to this as a jurisdictional
11 provision. The '72 amendments, which increase --
12 decrease the number of employees necessary from 25 to
13 15, referred to it as an expansion of jurisdiction.
14 This Court has had the matter come up before it always
15 in jurisdictional terms. This Court has referred to
16 this. EEOC has referred to it as jurisdictional.

17 JUSTICE GINSBURG: Yes, but now we know it's
18 -- EEOC has changed.

19 MR. PRENDERGAST: Seeing the errors of their
20 ways, I guess.

21 JUSTICE GINSBURG: But why -- now that we do
22 have Zipes, why should the number of employees be
23 treated any differently than that rigid time line in --
24 in Zipes?

25 MR. PRENDERGAST: Your Honor, I think the

1 reason that the number of employees should be different
2 -- treated differently is because we go back to the
3 Aldinger question, and the Aldinger question is this
4 Court has to decide did Congress want to give this type
5 of jurisdiction to the lower Federal courts.

6 JUSTICE GINSBURG: But that was a pendant
7 jurisdiction case. Wasn't Aldinger --

8 MR. PRENDERGAST: Aldinger dealt with a
9 pendant party issue, yes, Your Honor.

10 Kenosha, however, dealt with -- as the Chief
11 Justice has indicated, Kenosha dealt with a definition
12 that excluded counties from section 1983 and that was
13 found to be implicitly brought into the -- the
14 jurisdictional grant for civil rights actions.

15 So I think the mere fact that something is or
16 is not in the jurisdictional statute cannot be
17 determinative because ultimately you do need to go back
18 to the question of did Congress want to give this type
19 of jurisdiction to the lower Federal courts.

20 My question would be why would Congress seek
21 to give this type of jurisdiction to the lower Federal
22 courts for a whole category of cases where, in the
23 words of this Court in Hishon, it has granted these
24 businesses complete immunity from title VII?

25 JUSTICE GINSBURG: Well, you just used an

1 interesting word because there are litigants who can
2 claim complete immunity from liability, but that
3 immunity, whether it's absolute or qualified, doesn't
4 go to the court's subject matter jurisdiction. It has
5 to be raised in those cases as a defense.

6 MR. PRENDERGAST: True, Justice Ginsburg.
7 The difference, however, between the immunity in those
8 cases and the type of immunity here that the Court
9 talked about in Hishon -- immunity for a police officer
10 in a civil rights case with qualified immunity will
11 depend upon a police officer's particular actions in
12 that particular case. The police officer, in general,
13 can be sued under section 1983.

14 The immunity that's present here, with
15 respect to small employers, has no relationship
16 whatsoever to the actions of that employer. An
17 employer who employs 12 people at most can engage in
18 the most egregious employment discrimination and
19 harassment possible, and the Congress of the United
20 States has said, as a policy matter, on balance we
21 would rather accept that kind of awful conduct because
22 we don't want to impose these burdens on small
23 businesses.

24 JUSTICE GINSBURG: Or leave it to the States
25 that often do cover smaller shops.

1 MR. PRENDERGAST: Yes, Your Honor, or leave
2 it to the States and let the States do it. But we
3 don't want the Federal Government to be intruding into
4 the operations -- into the culture of these small
5 businesses, and that I believe is the difference
6 between the immunity that you mentioned, the qualified
7 or prosecutorial type immunity, which depends upon
8 actions, and this immunity here which depends upon
9 simply the status of the defendant, the whole class --

10 JUSTICE SOUTER: Well, that -- that argument
11 doesn't apply to absolute immunity cases, and yet in
12 absolute immunity cases, once again, it's clear there's
13 jurisdiction. There's simply immunity. The immunity
14 doesn't depend on any particular facts.

15 MR. PRENDERGAST: The absolute immunity,
16 Justice Souter, that I'm most familiar with would be
17 prosecutorial immunity. I think there can still be
18 exceptions for prosecutorial immunity. I think a
19 prosecutor, depending upon the type of actions he's
20 engaged in, can still be subject to liability.

21 JUSTICE SOUTER: But we have to determine
22 whether he's acting as a prosecutor. Sure. We have to
23 determine whether the President was acting in a
24 presidential capacity, but that's not the kind of fact
25 inquiry that you were talking about with respect to the

1 qualified immunity.

2 MR. PRENDERGAST: It certainly -- yes, Your
3 Honor, I will concede it's a different kind of inquiry.

4 But I -- I do think, though, here the categorical
5 exclusion of small businesses is a clear indication of
6 congressional intent of what Congress wanted to have
7 happen.

8 JUSTICE SOUTER: But I -- I don't see why the
9 same argument can't be made with respect to
10 prosecutors. It is clear that if -- if an individual
11 is acting in a prosecutorial capacity and enjoys the
12 appointment as a prosecutor, that at least the -- the
13 system -- we're not necessarily talking about Congress
14 here. The system says there -- there should be, as a
15 categorical matter, an -- an immunity from prosecution.

16 And yet, that does not go to subject matter
17 jurisdiction. And it seems to me that that is
18 essentially the exact argument that you're making here,
19 and I don't see why it should be any more sound here
20 than it would be in the absolute immunity case.

21 MR. PRENDERGAST: Another -- well, Your
22 Honor, I'll offer another distinction then. The other
23 distinction is prosecutorial immunity and qualified
24 immunity, for that matter, are court-created entities
25 --

1 JUSTICE SOUTER: That's right.

2 MR. PRENDERGAST: -- court-created defenses.

3 And as this Court is well aware, this Court nor any
4 other court has the power to define subject matter
5 jurisdiction. That is Congress' purview and power.
6 Only Congress can limit the court's jurisdiction and
7 define the court's jurisdiction for the lower Federal
8 courts.

9 Here, Congress has spoken with respect to
10 small businesses. It's a different matter, I would
11 suggest, with respect to prosecutors, which is an
12 immunity that is -- is a product of common law and --
13 and a judicial creation.

14 I would also want to point out that --
15 another thing. The Solicitor General indicated that if
16 you look at the structure of the -- the liability
17 section, he implied that it just imposes the employer
18 definition into the -- all the other causes of action.

19 In fact, it does not. It says, it -- it shall be
20 unlawful for an employer to, and then it defines what
21 is unlawful. So I think there again it's indicating a
22 difference between other elements of the cause of
23 action and the employer relationship and the employer
24 existence under title VII.

25 Ultimately, what this boils down to is

1 whether or not small businesses are going to continue
2 to receive the protection that Congress has indicated
3 that it wanted them to have.

4 JUSTICE SOUTER: Well, why can't get they get
5 the protections through summary judgment?

6 MR. PRENDERGAST: I think they would be
7 offered some level of protection, Justice Souter,
8 through summary judgment. The problem is summary
9 judgment offers its own unique hurdles to a defendant.
10 And again, it's a difference --

11 JUSTICE SOUTER: Among other things, you --
12 you've got to do it up front.

13 MR. PRENDERGAST: It's -- it's a different
14 standard as well, Your Honor, because under summary
15 judgment, a plaintiff has it within their capability --
16 have to view all the inferences in the light most
17 favorable to the plaintiff, and -- and the small
18 business could end up being dragged into the litigation
19 further and further than I think Congress intended.

20 JUSTICE SOUTER: Well, if -- if we're worried
21 about dragging people into litigation, I presume
22 Congress didn't intend, as a -- as a general matter, to
23 allow the -- the situation that we've got here. One
24 party has been dragged through a piece of litigation
25 and, having lost, has decided it wants to take another

1 shot at getting out of the case. Surely you can't say
2 that was within the contemplation of Congress' intent.

3 MR. PRENDERGAST: Your Honor, actually I -- I
4 would not have viewed it as outside of Congress'
5 contemplation or intent because Congress -- and I think
6 this is an important part of legislative history.
7 Congress in 1990 enacted the ADA, and they adopted the
8 employer definition from title VII. And at the time
9 that Congress adopted title VII's employer definition
10 for the ADA, all but one circuit court had decided that
11 this was a matter of subject matter jurisdiction. And
12 if you decide something is a matter of subject matter
13 jurisdiction, you take with it the unfairness. And I'm
14 not going to contend that it's not sometimes unfair to
15 parties, some of the consequences of subject matter
16 jurisdiction. But you take that with it when you
17 decide that it's a matter of subject matter
18 jurisdiction. And Congress in 1990 adopted for the ADA
19 the title VII definition. So it's implied that they
20 understood what was going on.

21 In 1991, they -- they had the Civil Rights
22 Act and amended and provided for jury trials in these
23 types of matters. And again, Congress was aware of the
24 state of the law.

25 JUSTICE SOUTER: My -- my point --

1 MR. PRENDERGAST: And Congress did not --

2 JUSTICE SOUTER: -- my point is not --

3 MR. PRENDERGAST: -- seek a change.

4 JUSTICE SOUTER: -- my point is not that
5 Congress in some specific sense, when it establishes a
6 jurisdictional requirement, does not intend the
7 occasional costs that the system has to bear by virtue
8 of treating that requirement as jurisdictional.

9 My point simply is that if we are in -- in a
10 situation in which it is not clear whether it's
11 jurisdictional or not, and the issue can be raised, in
12 effect, up front effectively through summary judgment,
13 and in the alternative, can be treated -- and -- as --
14 as an ineffective fact element, and in the alternative,
15 can be left, in effect, forever to be raised as a
16 jurisdictional element. The fact that it can be
17 treated effectively up front is one reason to think
18 that Congress would probably have wanted that fact
19 issue to be regarded not as jurisdictional but as
20 elemental so that it can be gotten out of the way and
21 the parties are not going to go through entire trials
22 only to have the whole thing upset by a belated
23 jurisdictional argument. That's my only point.

24 MR. PRENDERGAST: And -- and, Justice Souter,
25 I understand that point. However, I -- I tend to

1 believe that this is, after all, an aberration case.
2 Petitioner has suggested and the Solicitor General has
3 suggested that businesses may tend to sandbag this
4 issue. I simply do not believe that that is a
5 realistic danger at all. In this case, quite frankly,
6 the matter was overlooked, and that's how we ended up
7 here. But in most cases, these small businesses are
8 not going to be looking to spend a lot of money and go
9 through a whole trial and then say, oh, well, I had my
10 shot at it. Let me see. If -- if it doesn't work out
11 now, I'll get out as a matter of subject matter
12 jurisdiction. Most cases, small businesses are going
13 to say, make this case go away from me as fast as you
14 can. And so I don't think that that's really much of a
15 danger to suggest that this is a pattern that's going
16 to be repeated, especially after a decision from this
17 Court. If this Court, as we believe that it should,
18 comes down and holds that this is a matter of subject
19 matter jurisdiction, I think parties will raise the
20 matter and get it disposed of.

21 JUSTICE SCALIA: In other words, it doesn't
22 make a whole lot of difference.

23 MR. PRENDERGAST: I think --

24 JUSTICE SCALIA: I'm not sure that helps your
25 case.

1 (Laughter.)

2 CHIEF JUSTICE ROBERTS: Does it make a
3 difference on the -- the -- does the categorization
4 make a difference on the relevant time of the inquiry
5 for the 15 employees? You have 16 employees when the
6 discrimination takes place. By the time the lawsuit is
7 filed, you've only got 14. Does it matter whether
8 that's called jurisdiction or going to the merits?

9 MR. PRENDERGAST: I -- I believe that the --
10 the case law has uniformly held that you look at the
11 time of the discrimination to determine the number of
12 employees.

13 CHIEF JUSTICE ROBERTS: Even -- even if it's
14 a question of jurisdiction.

15 MR. PRENDERGAST: Even if it's a question of
16 jurisdiction, yes, Your Honor.

17 And I do think ultimately, though, it does
18 matter because it does become a matter -- it doesn't
19 matter for the plaintiff. It doesn't matter for the
20 plaintiff whether or not it's a matter of subject
21 matter jurisdiction or a matter of the merits because
22 the bottom line is they're going to lose in either
23 event.

24 JUSTICE GINSBURG: It certainly matters for
25 plaintiffs in this situation.

1 MR. PRENDERGAST: In this particular --

2 JUSTICE GINSBURG: It certainly matters from
3 the defendant's point of view too. In many of these
4 cases, it's not clear whether the number 15 has been --
5 as in this case, you have delivery drivers. You have
6 owners whose wives are employed in the business.

7 MR. PRENDERGAST: And, Your Honor, and I
8 would urge that those kind of matters that need to be
9 addressed are best addressed by the court as opposed to
10 by a jury. I think to the matter of determining
11 whether or not someone is a -- is an independent
12 contractor --

13 JUSTICE GINSBURG: From the -- from the point
14 of view of a defendant who thinks I'm going to fight
15 this case on the merits, but if I lose, I still have
16 this ace up my sleeve.

17 MR. PRENDERGAST: I just -- Your Honor, I
18 simply do not believe a defendant would generally do
19 that because, as I pointed out in my brief, the problem
20 with that is if I'm representing the defendant, all
21 right, and I'm going to defend my case on the merits
22 and I know I got this 15 employee question here, I go
23 to trial, let's suppose I win. I win at trial in
24 Federal court. Subject matter jurisdiction can be
25 raised by the plaintiff. Now, after I've won at trial,

1 the plaintiff stands up and says, oh, this court didn't
2 have subject matter jurisdiction. I get a do-over.

3 JUSTICE GINSBURG: That sounds like a good
4 reason why a court should think long and hard about
5 categorizing this as a question of subject matter
6 jurisdiction.

7 MR. PRENDERGAST: Your Honor, but again, I --
8 I simply don't believe that that's going to be a
9 problem that's going to come up. I think the
10 importance of -- of categorizing this as subject matter
11 jurisdiction is to avoid -- among other things, is
12 adding another complicating factor to a jury trial
13 because, if you make this a matter of the merits now --
14 counsel for petitioner describes in his brief extended
15 hearings to determine the number of employees. We're
16 now -- if you make it part -- just a part of the
17 merits, now before you can get to the actual issue of
18 discrimination, a jury is going to have to sit through
19 and try to decide how many employees there were.

20 JUSTICE GINSBURG: Well, it would be
21 simultaneous. The jury -- the jury would have that
22 question. Didn't I understand the attorney for the
23 United States to say this is typical of what juries
24 decide, was this person an independent contractor or an
25 employee?

1 MR. PRENDERGAST: Your Honor, I -- I heard
2 that argument as well. All I can say is given the
3 number of factors that are laid out under, for example,
4 the Fifth Circuit law to determine whether or not
5 somebody is an independent contractor or an employee,
6 that seems to me to be more like the function of a
7 judge than a jury because it's a matter of balancing of
8 the relevant factors.

9 CHIEF JUSTICE ROBERTS: Thank you, Mr.
10 Prendergast.

11 MR. PRENDERGAST: Thank you.

12 CHIEF JUSTICE ROBERTS: Mr. Schwartz, you
13 have 3 minutes remaining.

14 REBUTTAL ARGUMENT OF JEFFREY A. SCHWARTZ
15 ON BEHALF OF THE PETITIONER

16 MR. SCHWARTZ: If there are no additional
17 questions, I -- I have nothing further.

18 JUSTICE SCALIA: Do you think -- do you think
19 it's possible that -- that Indian tribes could be
20 jurisdictional but an employer couldn't? I mean, it
21 seems to me the two the questions are quite different.

22 An Indian tribe is always an Indian tribe. Right?
23 And you're -- you're excluding -- just as a prosecutor
24 is always a prosecutor. You're excluding a whole
25 category of people. But you're -- you're not excluding

1 a category of employers here, are you? Because it's a
2 -- it's a factual question, whether at the time of the
3 alleged offense, the particular company was employing
4 more than 15 people. It isn't that this company
5 forever has immunity.

6 MR. SCHWARTZ: Yes, I agree with that.

7 JUSTICE SCALIA: So you're -- you're not
8 arguing for the Indian tribes here.

9 MR. SCHWARTZ: As -- well, my -- I leave that
10 to other people.

11 (Laughter.)

12 MR. SCHWARTZ: But the -- I could -- in
13 answer to that question, I can see an interesting
14 scenario where a plaintiff working for a casino on an
15 Indian tribe, there might be a question of who the
16 actual employer is. And -- and that could come up and
17 that would certainly involve some litigation.

18 JUSTICE STEVENS: May I ask you if the
19 practice of law has returned to normal in New Orleans?

20 MR. SCHWARTZ: No. It's -- it's a struggle
21 somewhat for jury pools. The State court in
22 particular, because it only covers Orleans Parish, is
23 -- is really struggling with pulling in jurors. The
24 Federal courts have a larger number of parishes to draw
25 from.

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I'm actually still living in Atlanta.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 11:07 a.m., the case in the
above-entitled matter was submitted.)