IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ONE FAIR WAGE, INC., Plaintiff-Appellant, *v.* DARDEN RESTAURANTS, INC. Defendant-Appellee.	Case No. 21-16691

On Appeal from the U.S. Dist. Ct. for the Northern District of California
No. 21-cv-2695, The Hon. Edward M. Chen, presiding

PLAINTIFF-APPELLANT'S OPENING BRIEF

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant One Fair Wage, Inc. is a non-profit corporation. It certifies that it has no parent corporation and that no publicly held corporation owns 10 percent or more of it.

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STATEMENT OF THE ISSUE FOR REVIEW

Title VII of the Civil Rights Act of 1964 provides a private right of action to any "person claiming to be aggrieved" by an unlawful employment practice, with "person" specifically defined to include corporations. 42 U.S.C. § 2000e-5(f)(1). Plaintiff-Appellant One Fair Wage, Inc. is a non-profit corporation that claims to have been aggrieved by the unlawful employment practices of Defendant-Appellee Darden Restaurants, Inc.

The question presented is whether the district court erred in holding that One Fair Wage lacks statutory standing to bring suit under Title VII on the grounds that only an employee can be a "person claiming to be aggrieved" under Title VII.

This issue is reviewable because the parties briefed and argued this issue in the district court, and the court dismissed the action after concluding Plaintiff lacked statutory standing under Title VII. ER-31.

RELEVANT STATUORY PROVISIONS

42 U.S.C. § 2000e-5(f)(1) provides, in relevant part, that "within ninety days after the giving of such notice [by the EEOC] a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved . . . ."

42 U.S.C. § 2000e provides, in relevant part, that "[f]or the purposes of this subchapter—

> (a) The term 'person' includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers."

STATEMENT OF JURISDICTION

(a) The complaint in this case was filed in the U.S. District Court for the Northern District of California. ER-3. The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because this action arises under the laws of the United States—that is, 42 U.S.C. § 2000e-2(a). ER-66, 90–93.

(b) This is an appeal from an order granting a motion to dismiss, which is appealable under 28 U.S.C. § 1291 because the district court issued a final decision. ER-31.

(c) The notice of appeal was filed on October 12, 2021, ER-95, which is within 30 days of the district court entering judgment on September 14, 2021, ER-102. Therefore, the notice of appeal was timely filed pursuant to 28 U.S.C. § 2107(a) and Fed. R. App. P. 4(a)(1).

PRELIMINARY STATEMENT

Title VII of the Civil Rights Act of 1964 permits any "person claiming to be aggrieved" by an employer's unlawful employment practices to bring suit in federal court to remedy those practices. 42 U.S.C. § 2000e-5(f)(1). Although most plaintiffs who invoke this provision are employees or job applicants alleging discrimination, Congress used language that permits a broader swath of aggrieved persons—including corporations, who are expressly included in the definition of "person," *see id.* § 2000e(a)—to sue.

Indeed, in its most recent encounter with the scope of Title VII's private right of action, the Supreme Court held that Title VII does not apply "only to the employee who engaged in the protected activity"; rather, "the term 'aggrieved' in Title VII . . . enabl[es] suit by any plaintiff with an interest *arguably* [sought] to be protected by the statute." *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 178 (2011) (emphasis added). Because Plaintiff One Fair Wage is such a party, and because the text of Title VII and the legislative history of statutes with similar language supports the same conclusion, the district court erred in dismissing this case for lack of statutory standing.

STATEMENT OF THE CASE

A. Case Background

Defendant Darden Restaurants is the largest owner and operator of full-service restaurants in the United States. ER-65–66. Its brands include the Olive Garden and the Capital Grille, among many others. *Id.* One Fair Wage challenged two policies that Darden applies to its restaurants nationwide. ER-66. Those policies help to put this case in context, but this appeal presents a question of statutory standing under Title VII only.

The first challenged policy is the Cash Wage Policy, according to which local managers must pay servers and bartenders the lowest cash wage that state or local law allows. ER-67–70. This wage can be as low as $2.13 per hour in states that lack a minimum wage. ER-68. Plaintiff has plausibly alleged that the Cash Wage Policy causes non-plaintiff employees at Darden to suffer disparate impact based on their sex by increasing the sexual harassment that they suffer. ER-6, 7, 72–80.

The second policy is the Tipping Policy, according to which local managers actively encourage and facilitate, and essentially tacitly require, its customers to tip its tipped employees, including all servers and bartenders at all of its restaurants, without mediating or guiding

that process in any way. ER-70–72. Based on both Darden-specific survey data and reliable academic research showing that such tipping policies lead to lower wages for employees of color, Plaintiff has plausibly alleged that the Tipping Policy causes non-plaintiff employees at Darden to suffer disparate impact based on their race by forcing them to take home lower wages than similarly situated white employees. ER-80–85.

Both policies injured Plaintiff, and they continue to frustrate its interest in improving working conditions for, and correcting discrimination against, restaurant workers. For instance, One Fair Wage created an Emergency Coronavirus Relief Fund that distributed money to restaurant workers, including current and former Darden employees. It paid more cash assistance from this fund to Darden employees subject to Darden's policies than One Fair Wage would have paid had Darden complied with the law. ER-65. It thus has a very strong, direct interest in seeing these illegal policies ended.

Further, Plaintiff is the leading non-profit corporation advocating for and providing support to tipped restaurant workers. ER-65. Its primary goal is to end subminimum wages for tipped employees and ensure that they are paid what it calls "one fair wage"—that is, the same

minimum wage as non-tipped employees with fair, non-discriminatory tips on top. *Id.* To achieve that purpose, legislators, employers, and restaurant industry groups *must* hear first-hand testimony from tipped employees who have suffered the negative impacts of subminimum wages, like increased sexual harassment and disparate impact in wages based on race, but the policies have frustrated that purpose by taking up Darden employees' time dealing with the consequences of those illegal policies—for instance, picking up more shifts to offset lesser wages, or seeking medical or psychological help after surviving harassment. ER-65, 72, 80, 85, 87–90.

B. This Appeal.

Before answering Plaintiff's complaint or engaging in any discovery, Darden filed three motions to dismiss. It argued primarily that the district court lacked personal jurisdiction over it, that venue was improper, that the complaint did not state a claim upon which relief can be granted, and that Article III standing (and therefore subject matter jurisdiction) was lacking. ER-18, 20, 25, 31. The district court held that it had personal jurisdiction over Darden and that venue was proper, so it denied Darden's motions in those regards. ER-18, 20.

Nonetheless, the district court granted one of Darden's motions under Fed. R. Civ. P. 12(b)(6), holding that a non-employee like Plaintiff can never be a "person claiming to be aggrieved" under 42 U.S.C. § 2000e-5(f)(1). ER-30–31. In so doing, the district court relied on a Fifth Circuit case, *Simmons v. UBS Fin. Servs., Inc.*, 972 F.3d 664, 668 (5th Cir. 2020), that incorrectly held that 42 U.S.C. § 2000e-5(f)(1) affords a cause of action only to employees of the employer alleged to have violated Title VII. ER-24–29. The district court recognized there was authority "inconsistent" with *Simmons*, such as *Tolar v. Cummings*, No. 2:13-CV-00132-JEO, 2014 WL 3974671 (N.D. Ala. Aug. 11, 2014), but found that case irrelevant. ER-29–31. Ultimately, because the court found there was "no case law establishing that a non-employee—here, an advocacy organization—has standing to challenge an employment practice," it held such a challenge was impermissible under the statute. ER-30. It thus dismissed the complaint with prejudice because, under the district court's bright-line rule, "any attempt to amend would be futile." ER-31. Given its holding on statutory standing, the district court declined to resolve the Article III standing issue. ER-25.

Plaintiff filed a timely appeal. The issue of statutory standing is the sole question presented.

SUMMARY OF ARGUMENT

This Court should hold that Plaintiff has statutory standing to bring suit under Title VII. The text provides a right of action to any "person claiming to be aggrieved" by Darden's unlawful employment practices, and "person" is expressly defined to include a corporation. 42 U.S.C. §§ 2000e(a), 2000e-5(f)(1). This affords Plaintiff a private right of action pursuant to the interpretation of that statutory text in *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170 (2011). Additional statutory text within Title VII and the legislative history of statutes using similar or identical language supports this conclusion.

In particular, *Thompson* held that a plaintiff whose interests are those are even "arguably" sought to be protected by Title VII has statutory standing to bring a private right of action under 42 U.S.C. § 2000e-5(f)(1). 562 U.S. at 178. Plaintiff has statutory standing here because its interests include "requir[ing] all employers to pay the full minimum wage as a cash wage with fair, non-discriminatory tips on top,"

ER-65, and that is at least "arguably" among the interests that Title VII sought to protect.

The text of Title VII supports this conclusion. The text of Title VII could have, but does not, limit actions for employment discrimination only to "employees," "job applicants," or any other class of "individuals" who have been injured by discriminatory policies. Instead, Title VII's private right of action extends broadly to "person[s] claiming to be aggrieved," 42 U.S.C. § 2000e-5(f)(1) where "person" is a term of art defined by Title VII to include "corporations," *id.* § 2000e(a). Corporations cannot be employees. And so non-employees like Plaintiff must have statutory standing, based on the plain text of Title VII, if they have interests that are frustrated by employer discrimination and arguably protected by Title VII. This broad right of action stands in contrast to Title VII's *substantive* provisions, which bar employers from discriminating against "individuals" and "employees" only. 42 U.S.C. § 2000e-2(a). Had Congress meant to cabin Title VII's private right of action to "individuals" and "employees," it would have done so.

The legislative history of statutes with materially identical private rights of action similarly supports the inference that Plaintiff has

statutory standing here. Congress uses the phrase "persons aggrieved" to facilitate private vindication of the public interest. The purpose fits this case to a tee: Plaintiff seeks to serve Congressional intent by vindicating the public interest here precisely because Darden has prevented its employees from doing so, meaning this claim would be literally impossible for any individual Darden employee to litigate.

The district court's conclusion to the contrary relied in part on a case from the Fifth Circuit that held that only employees could bring suit under Title VII. That conclusion was wrong and should be rejected. And the decades-old Ninth Circuit case that the district court discussed has been implicitly overruled by *Thompson*, so it does not bind this Court.

Finally, while a full reversal is proper because the Complaint here makes sufficiently clear that Plaintiff meets the "zone of interest" test, to the extent that is a close case, this Court should at minimum clarify the legal rule and remand so Plaintiff may amend its complaint. The district court incorrectly found amendment would be futile because it applied an incorrect bright-line rule under which an organizational plaintiff could *never* allege facts sufficient for statutory standing. At minimum, this Court should clarify that certain non-employees can have standing under

Title VII, and then Plaintiff should be given a chance to amend its complaint to clarify why it is such a plaintiff.

STANDARD OF REVIEW

This Court "review[s] de novo a district court's dismissal for failure to state a claim upon which relief can be granted." *Cohen v. ConAgra Brands, Inc.*, 16 F.4th 1283, 1287 (9th Cir. 2021). "At this stage, the Court must take all well-pleaded allegations of material fact as true and construe them in the light most favorable to the [plaintiff]." *Great Minds v. Office Depot, Inc.*, 945 F.3d 1106, 1109 (9th Cir. 2019).

ARGUMENT

I. THE ORDER GRANTING THE MOTION TO DISMISS SHOULD BE REVERSED BECAUSE PLAINTIFF HAS STATUTORY STANDING.

Title VII's private right of action authorizes suit by a "*person claiming to be aggrieved* . . . by the alleged unlawful employment practice," 42 U.S.C. § 2000e-5(f)(1) (emphasis added), and person is defined to include "corporations," *id.* § 2000e(a). Because Plaintiff is a "person claiming to be aggrieved," it has statutory standing to pursue the claims here against Darden.

A. Title VII's Cause of Action Is Not Limited Only To Injured Employees.

a. Under Title VII, a "person claiming to be aggrieved" is one whose interest is "arguably sought to be protected" by the statute.

Plaintiff is a "person" under Title VII, and it claims to be aggrieved by Darden's unlawful employment practices. ER-31–32. Under the plain text of Title VII, Plaintiff has a right of action.

Reading that plain text in context strengthens the conclusion. The most important articulation of that context comes from *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170 (2011), the Supreme Court's only direct encounter with the relevant language in Title VII. In that case, an employer fired Thompson, an employee, after his fiancée filed a charge of discrimination against their shared employer, and Thompson sued the employer for retaliation in violation of Title VII. *Id.* at 172. The employer argued that Title VII did not provide a private right of action to Thompson because *he* had not engaged in statutorily protected activity; his fiancée had. *Id.* at 172–73.

The Court held that Thompson was a person claiming to be aggrieved under the statute, *id.* at 178, reasoning that Title VII's private

right of action was not so "artificially narrow" that it applied "only to the employee who engaged in the protected activity." *Id.* at 177. "[I]f that is what Congress intended," the Court noted, "it would more naturally have said 'person claiming to have been discriminated against' rather than 'person claiming to be aggrieved.'" *Id.* at 177. Instead, borrowing a standard known as the "zone of interests" test from Administrative Procedure Act ("APA") caselaw, the Court held that "the term 'aggrieved' in Title VII . . . enabl[es] suit by any plaintiff with an interest arguably [sought] to be protected by the statute." *Id.* at 178.

Although the *Thompson* standard does not extend to the outer reaches of Article III—the Court said there is no right of action for a person who might "technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions in Title VII," *id.*—the private right of action is nonetheless quite broad. *Thompson* does not even limit Title VII's private right of action to plaintiffs whose interests *are* protected by Title VII. Rather, it extends Title VII's private right of action to plaintiffs whose interests are "*arguably*" protected by Title VII. *Id.* at 178 (emphasis added). Supreme Court precedent interpreting the APA's zone of interests test, which was specifically

incorporated in *Thompson*, have similarly concluded that the test "is not meant to be especially demanding." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (cleaned up); *see also Howard R.L. Cook & Tommy Shaw Found. ex rel. Black Emps. of Libr. of Cong., Inc. v. Billington*, 737 F.3d 767, 771 (D.C. Cir. 2013) ("[T]he zone of interests requirement poses a low bar."); *Fla. Transp. Servs., Inc. v. Miami-Dade Cty.*, 703 F.3d 1230, 1256 (11th Cir. 2012) (the zone of interests test "requires only that the relationship between the plaintiff's alleged interest and the purposes implicit in the [statute] be more than marginal").

b. The district court erred by relying on cases that do not properly apply *Thompson*.

The district court erred because it ignored *Thompson* and statutory text and instead applied a bright-line "employee-only" rule that departs from these lodestars. On that score, the district court found persuasive the Fifth Circuit's recent conclusion in *Simmons v. UBS Fin. Servs., Inc.*, 972 F.3d 664, 668 (5th Cir. 2020), that 42 U.S.C. § 2000e-5(f)(1) affords a cause of action only to employees of the employer alleged to have violated Title VII. *Simmons* drew the bright line that the district court found

appealing: "[b]ecause [the plaintiff] was not [an] employee [of the defendant employer]," the Fifth Circuit held, "[the plaintiff] lacks Title VII standing." *Id.* at 668. That holding conflicts with *Thompson*. As explained, *Thompson* said no such thing. *Simmons* misinterprets *Thompson* and, in so doing, ignores the text of Title VII.

The district court claimed that *Simmons* was persuasive because it "relied on *Thompson*, in concluding that the zone of interests that Title VII protects is limited to those in employment relationships with the defendant." ER-28. It is true that *Simmons* cited *Thompson* and purported to rely on it. But the "limitation" to employees that the district court described is the Fifth Circuit's own invention. That is so whether or not the limit purports to be derived from *Thompson*.

The district court also discussed this Court's decades-old decision in *Patee v. Pacific Northwest Bell Telephone Co.*, 803 F.2d 476, 477 (9th Cir. 1986), but *Thompson*'s rule supersedes that of *Patee*. In *Patee*, male employees sued their employer for sex discrimination under the theory that they would have been paid more if their duties weren't being performed by a cohort that included mostly female employees whose salaries were lower because of sex discrimination. *Id.* at 476–77. The

Patee court denied statutory standing after applying the now-defunct, narrow rule that "a male employee could not maintain a Title VII action as a person aggrieved because of sex-based wage discrimination against women." *Id.* at 479.

Patee is not good law. Most obviously, it does not purport to apply the current "zone of interests" test because it predated *Thompson* by several decades. Applying the zone of interests test to the facts in *Patee* shows that there would be statutory standing there if that case were decided today. The *Patee* plaintiffs, who alleged that they were paid less because their job classification was filled mostly be women, fall within Title VII's zone of interests. Just like *Thompson*, the plaintiffs in *Patee* were also employees of the same employer, and the plaintiffs in *Patee* were allegedly targeted by the employer. *Thompson*, 562 U.S. at 178; *Patee*, 803 F.2d at 476. Therefore, the *Patee* plaintiffs are well within Title VII's zone of interests, as *Thompson* requires.

Further, its holding was narrow even by its own terms; there was no suggestion that a corporation cannot be a "person aggrieved" under Title VII. To the contrary: the *Patee* court acknowledged that Title VII contains broad language that would permit a white person to be a "person

aggrieved" in a lawsuit based on discrimination against employees of color. *Patee*, 803 F.2d at 479 (citing *Waters v. Heublein, Inc.*, 547 F.2d 466, 469 (9th Cir. 1976)). But despite recognizing the breadth of Title VII's right of action, the *Patee* court was "compelled" to deny standing there based on dubious precedent governing the precise issue before it. *Id.* (citing *Spaulding v. Univ. of Wash.*, 740 F.2d 686 (9th Cir. 1984)). That narrow principle was inconsistent with prior circuit caselaw (like *Waters*) that had broadly interpreted Title VII's right of action, and *Spaulding* itself proved to be unsound and was overruled (on another issue) by an en banc court just one year after *Patee*, *see Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1479 (9th Cir. 1987) (overruling *Spaulding*), *rev'd on other grounds*, 490 U.S. 642 (1989). Though *Patee* would not govern the question presented here anyway, it is for the best that *Thompson* has overturned *Patee* and *Spaulding*. Thus, the only line of Ninth Circuit cases narrowly interpreting Title VII's right of action are not good law. The district court should not have relied on their reasoning.

In contrast to the bright line the district court adopted from the Fifth Circuit's decision in *Simmons*, the district court should have agreed with a court in the Northern District of Alabama that properly held that

non-employees can have a private right of action under Title VII under certain circumstances. *Tolar v. Cummings*, No. 13-cv-132, 2014 WL 3974671, at *11–*15 (N.D. Ala. Aug. 11, 2014). In *Tolar*, the court correctly held that Title VII's "zone of interests test applie[s] *broadly to reach beyond the confines of the employment relationship*." *Id.* (emphasis added). The Eleventh Circuit has held similarly with respect to the Americans with Disabilities Act of 1990, which similarly affords a private right of action to "aggrieved persons." *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1181 n.31 (11th Cir. 2003) (collecting cases).

Although the district court found *Tolar* both unpersuasive and irrelevant, in fact its broad interpretation that non-employees can have statutory standing under Title VII comports with the statutory text and *Thompson*. Decades ago, this Court expressly reserved judgment on this issue. *Foust v. Safeway Stores, Inc.*, 556 F.2d 946, 947 (9th Cir. 1977) (declining to determine "whether a corporation can be a 'person aggrieved' under Title VII"). It is now time to decide it. The answer is yes, corporations do meet the statutory definition and can fall arguably within the zone of interest of Title VII.

c. Title VII's text supports the conclusion that corporations can have statutory standing.

Title VII's provision prohibiting employers from causing disparate impact is limited only to "individuals" and "employees." It prohibits covered employers from "discriminat[ing] against any *individual* . . . because of such *individual's* [race or sex]" and from "limit[ing], segregate[ing], or classify[ing] his *employees* . . . in any way which would deprive or tend to deprive any *individual* of employment opportunities or otherwise adversely affect his status as an *employee*, because of such *individual's* [race or sex]." 42 U.S.C. § 2000e-2(a) (emphases added). Yet Title VII does not define "individual," so it must be given its plain meaning—that is, "a single human being as contrasted with a[n] . . . institution." *Individual*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/individual. Similarly, Title VII's definition of "employee" is "an *individual* employed by an employer." 42 U.S.C. § 2000e(f) (emphasis added). As such, 42 U.S.C. § 2000e-2(a) applies only to human beings.

However, the provision authorizing a right of action at 42 U.S.C. § 2000e-5(f)(1) is not so limited. Rather than limiting the private right of

action only to "individuals" or "employees," it provides that "a civil action may be brought . . . by the *person* claiming to be aggrieved . . . by the alleged unlawful employment practice." *Id.* § 2000e-5(f)(1) (emphasis added). And "person" is a term of art in Title VII. "[P]erson" includes not only "individuals," but also "corporations" and "legal representatives." *Id.* § 2000e(a). Title VII's private right of action, therefore, must extend to some "persons" who are not the individual "employees" of the employer or their representatives.

At oral argument, the district court suggested that "corporation," in Title VII's definition of "person" was meant to encompass corporations like a "medical corporation of doctors"—that is, a corporation that is serving as a legal representative of individual employees. ER-47. But the definition of "person" already also includes "legal representatives," 42 U.S.C. § 2000e(a), so the court's suggestion runs afoul of the canon against surplusage: if possible, courts should avoid an interpretation that "would render superfluous another part of the same statutory scheme." *City of Chicago, Ill. v. Fulton*, 141 S. Ct. 585, 591 (2021) (cleaned up). The only way a court can give meaning to all the words in 42 U.S.C. § 2000e(a), as the canon against surplusage insists that courts do when

possible, is to permit a corporation that is *not* acting as a legal representative of another party to have some means of suing under Title VII, lest the word "corporations" be rendered unnecessarily superfluous when applied to 42 U.S.C. § 2000e-5(f)(1). Plaintiff's position achieves that result.

Likewise, the word "aggrieved" is not narrow in its scope. The Supreme Court has recognized that "[h]istory associates the word 'aggrieved' with a congressional intent to cast the standing net broadly—beyond the common-law interests and substantive statutory rights upon which 'prudential' standing traditionally rested." *FEC v. Akins*, 524 U.S. 11, 19 (1998) (interpreting the word for purposes of standing in the Federal Election Campaign Act). Consistent with this interpretation, Congress legislated for decades against the backdrop that "person aggrieved" extended to the outer limits of Article III standing. *Dep't of Commerce v. U.S. House of Reps.*, 525 U.S. 316, 328–29 (1999) (provision authorizing suit by a "person aggrieved" by certain Census methodology confers standing as broadly as permitted by Article III); *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 103 n.9 (1979) ("[A]s long as the [Section 812 of the Fair Housing Act of 1968] plaintiff suffers actual

injury as a result of the defendant's conduct, he [or she] is permitted to prove that the rights of another were infringed."); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972) (same with regard to Section 810 of the Fair Housing Act of 1968). True, *Thompson* interpreted Title VII's standing provisions slightly more narrowly than those of these other enactments, but that does not change Congress's background default when it enacted and amended Title VII. The district court's decision thus took *Thompson*'s slight narrowing from the outer limits of Article III and incorrectly turned it into a bright-line, employee-only rule that is unsupported by the text and the Congressional intent that "person aggrieved" be interpreted as broadly as possible.

Congress, of course, could have adopted that bright line and decided to limit the private right of action in Title VII to "individuals" or "employees," as it did repeatedly in 42 U.S.C. § 2000e-2(a). But it did not. In fact, Congress has amended Title VII several times since enacting the "person . . . aggrieved" language in 1964, and it never once amended that language to apply only to individuals, even when it used such limiting language elsewhere. For instance, pursuant to the Civil Rights Act of 1991, Congress amended Title VII by authorizing punitive damages to

successful Title VII plaintiffs if an employer "engaged in a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights of an *aggrieved individual*." 42 U.S.C. § 1981a(b)(1) (emphasis added).[1]

In summary, Plaintiff is a "person" under Title VII; excluding Plaintiff from that definition would render the word "corporations" in Title VII unnecessarily superfluous when applied to 42 U.S.C. § 2000e-5(f)(1); the word "aggrieved" indicates congressional intent to confer standing broadly; and Congress' decision not to change the word "person" to "individual" when it used the word "individual" elsewhere in amending Title VII suggests Congressional intent to leave the word "person" just as broad as Congress originally defined it to be in 1964.

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[1] To be clear about the history: since its enactment in 1964, Title VII has always used the phrase "person claiming to be aggrieved" in its private right of action. Prior to 1972, that language was found at 42 U.S.C. § 2000e-5(e). *See* Civil Rights Act of 1964, tit. VII, § 706(e), Pub. L. 88-352, 78 Stat. 260 (1964). In 1972, Congress relocated that language to its current location at 42 U.S.C. § 2000e-5(f)(1) and amended Title VII in ways that are not relevant here. *See* Equal Employment Opportunity Act of 1972, § 4(a), Pub. L. 92-261, 86 Stat. 105-106 (1972).

d. The history of statutes that use materially identical language supports a broad congressional authorization.

The phrase "person aggrieved" came to prominence during the New Deal, including in its landmark labor and employment statutes. 29 U.S.C. § 210(a) (Fair Labor Standards Act of 1938); 29 U.S.C. § 160(f) (National Labor Relations Act of 1935); *see also* 15 U.S.C. § 717r(a) (Natural Gas Act of 1938); 15 U.S.C. § 836(b) (Bituminous Coal Act of 1937); 5 U.S.C. § 79x(a) (Public Utility Holding Company Act of 1935); 47 U.S.C. § 402(b)(6) (Communications Act of 1934). As such, it is no surprise that later landmark labor and employment statutes enacted by Congress, including Title VII, borrowed the phrase. 42 U.S.C. § 2000e-5(f)(1) (Title VII); *see also* 29 U.S.C. § 626(c)(1) (same language in Age Discrimination in Employment Act of 1967). Thus, although the legislative history of Title VII itself does not clarify the scope of its "person . . . aggrieved" language, *see* CONG. RSCH. SERV., HD6305, EQUAL EMPLOYMENT OPPORTUNITY: LEGISLATIVE HISTORY AND ANALYSIS OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (1965), this Court may look to the legislative history of the private rights of action in the New Deal statutes to discern the meaning of Title VII's private right of action because they

are "related statutes . . . dealing with similar subjects" and "should be interpreted harmoniously" with Title VII. *See Tides v. The Boeing Co.*, 644 F.3d 809, 814 (9th Cir. 2011).

A review of these New Deal statutes shows that courts read their private rights of action as broadly as possible to vindicate the public interest. For example, in *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 14 (1942), the Supreme Court held that "persons aggrieved" under the Communications Act of 1934 "have standing only as representatives of the public interest." *See also id.* at 20 ("Congress entrusted the vindication of the public interest to private litigants.") (Douglas, J., dissenting); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940) (explaining that Congress's purpose in enacting the private right of action in the Communications Act of 1934 was "to protect the public"); *Assoc. Indus. of N.Y. State v. Ickes*, 134 F.2d 694, 708 (2d Cir. 1943) ("Petitioner has a 'standing,' under the [Bituminous Coal Act of 1937], to vindicate the public interest."), *vacated on other grounds*, 320 U.S. 707 (1943). Because the Supreme Court confirmed repeatedly before 1964 (in *Sanders Bros.* and *Scripps-Howard Radio*) that Congress meant "person . . . aggrieved" to facilitate private vindication of the public

interest, the Congress that enacted Title VII must have used that same phrase intentionally to achieve the same result—that is, facilitating private vindication of the public interest. This Court, too, has noted that, "[i]n construing the term 'aggrieved person,' we have always looked to the general purpose of the act of which the statute is a part." *Stewart Title Guar. Co. v. Park*, 250 F.3d 1249, 1252 (9th Cir. 2001) (construing phrase under different state statute).

Here, the public's interest would be in broad, nationwide relief from Darden's unlawful employment practices, as opposed to a single Darden employee's private interest in individualized relief. However, without allowing One Fair Wage to sue Darden, this public interest would go unrealized because it is literally impossible for a single Darden employee to secure broad, nationwide relief enjoining Darden's unlawful employment practices. That is because Darden forces its employees to agree to an *individual* arbitration agreement as a condition of their employment,[2] as permitted by *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612,

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[2] Darden Restaurants, Inc., *Dispute Resolution Process* 3, https://media.olivegarden.com/en_us/pdf/DRP-Handbook-June-2021-ENGLISH-SPANISH-COMBINED.pdf. This Court can take judicial

(*continued on the next page*)

1632 (2018). Indeed, as far as counsel is aware, every time a Darden employee has sued Darden in the last decade, Darden has moved to compel *individual* arbitration.[3] As such, Darden has left its employees with no means of securing nationwide relief by challenging its unlawful employment practices on behalf of a nationwide class, despite the Congressionally recognized public interest that doing so would serve.

Without allowing a "person . . . aggrieved" like Plaintiff to vindicate the public interest, Darden would continue to get away with its classwide unlawful discrimination without any concern that a single employee

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notice of such facts "because they can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned and their authenticity is not disputed." *One Fair Wage, Inc. v. Darden Restaurants Inc.*, No. 21-CV-02695-EMC, 2021 WL 4170788, at *7 (N.D. Cal. Sept. 14, 2021) (citing FED. R. EVID. 201; *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998–99 (9th Cir. 2010)).

[3] *See, e.g.*, *Grzanecki v. Darden Rests.*, No. 19 C 05032, 2020 WL 1888917, at *1 (N.D. Ill. Apr. 16, 2020); *Silva v. Darden Rests., Inc.*, No. 217CV05663ODWE, 2018 WL 3533364, at *1 (C.D. Cal. July 20, 2018); *Darden Rests., Inc. v. Ostanne*, 255 So. 3d 382, 383 (Fla. Dist. Ct. App. 2018); *Reed v. Darden Rests., Inc.*, 213 F. Supp. 3d 813, 815 (S.D.W. Va. 2016); *Walker v. Red Lobster Rests., LLC*, No. 3:14-CV-449-CWR-FKB, 2015 WL 3970917, at *1 (S.D. Miss. June 30, 2015); *Baier v. Darden Rests.*, 420 S.W.3d 733, 735 (Mo. Ct. App. 2014); *Chambliss v. Darden Rests., Inc.*, No. 1:12-CV-485-SEB-MJD, 2012 WL 4936400, at *1 (S.D. Ind. Oct. 15, 2012); *Cody v. Darden Rests.*, No. CV 12-0484 SJF ETB, 2012 WL 6863922, at *1 (E.D.N.Y. Oct. 11, 2012).

might vindicate the public interest by securing broad injunctive relief. This Court should not let such a dereliction of Congressional intent stand. To be clear, Plaintiff is not saying that Darden's mandatory individual arbitration agreements are invalid or that the courts enforcing them were mistaken under current law. To the contrary: reading Title VII together with *Epic Systems* shows that organizations like Plaintiff play a vital role in Congress's statutory system of enforcing civil-rights laws against employers, even as those employers and their employees may agree to individually arbitrate any disputes between them. But this court should not read *Epic Systems* as employers' panacea to nationwide injunctions redressing nationwide harm.

B. Plaintiff Meets The Zone of Interest Test.

The district court applied a categorical rule that all "non-employee[s]" lack "standing to challenge an employment practice," ER-30, so it failed to analyze whether Plaintiff meets the zone of interest test from *Thompson*. This was error: the Supreme Court drew no such bright line and imposed no limit on applying that test to anyone claiming to be a "person aggrieved" and, thus, a proper plaintiff under Title VII. Plaintiff meets the test here.

Plaintiff's purpose includes "requiring all employers to pay the full minimum wage as a cash wage with fair, *non-discriminatory* tips on top." ER-65 (emphasis added). This purpose is much more than marginally related to, and at least arguably within, the interests that Title VII sought to protect. Title VII seeks "to protect employees from their employers' unlawful actions," *Thompson*, 562 U.S. at 178, and Plaintiff's purpose is to protect employees from their employers' unlawful actions. Plaintiff also has expressed a pecuniary interest in seeing this specific discrimination remedied, as it has paid out over $175,000 in relief directly to Darden employees who have been impacted by this policy. ER-65. As such, Plaintiff's interest—as demonstrated by its words and its deeds—falls squarely within the interests that Title VII sought to protect.

The *Thompson* Court also mentioned potential plaintiffs who might be excluded from the zone of interest test, and those examples are equally illuminating. The Court said that its interpretation of "person aggrieved" would "exclude[e] plaintiffs who might technically be injured in an Article III sense but whose interests are *unrelated* to the statutory prohibitions in Title VII" such as a shareholder suing a company for firing a valuable

employee for racially discriminatory reasons. *Thompson*, 562 U.S. at 869–70 (emphasis added). That test highlights why Plaintiff may proceed against Darden: a shareholder's raison d'être is to secure profits, so shareholders cannot maintain Title VII actions because their interests (and accompanying injury) are "unrelated to the statutory prohibitions in Title VII." By contrast, Plaintiff's raison d'être is to improve the working conditions of restaurant employees and protect them from discrimination. Plaintiff can maintain a Title VII action because its interests are at least arguably related to the statutory prohibitions in Title VII. Indeed, those interests go to the core of Title VII.

Cases outside the Title VII context also support the conclusion that Plaintiff falls well within Title VII's zone of interests. For example, this Court has held that non-profit organizations whose purpose includes helping individuals apply for and obtain asylum fell within the zone of interests of a statute that shapes asylum eligibility requirements. *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 667–68 (9th Cir. 2021). In that case, the panel reasoned that "the [o]rganizations' interests are 'marginally related to' and 'arguably within' the scope of the statute," which is all that is required by the "zone of interests" test. *Id.* at 668

(quoting *Patchak*, 567 U.S. at 224, 225). Applying *East Bay Sanctuary* here, Plaintiff's purpose includes protecting employees from discrimination, ER-65, which at least *arguably* falls within the zone of interests of a statute that shapes employment discrimination law.

At oral argument, the district court was concerned that reading *East Bay Sanctuary* in this manner might allow anyone to create an organization with the purpose of fighting discrimination and thereby manufacture statutory standing under Title VII. ER-45–48. That concern is misplaced for two reasons.

First, as the Supreme Court counseled in *Bostock v. Clayton Cty.*, courts must look at what the text of Title VII says, not whether it would be prudent or consistent with tradition to read Title VII otherwise: "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit." 140 S. Ct. 1731, 1737 (2020). Congress drafted a broad statute in Title VII which, to further the public interest, permits certain narrowly focused non-profit corporations whose purposes are at least arguably related to Title VII's purpose to litigate Title VII claims. The district court ought not permit agreement

or disagreement with Congress' policy choice or the tradition of employee plaintiffs under Title VII dictate the outcome of this suit. Further, as *Bostock* held, the "expected applications" of the Congress that enacted the statute are not relevant when the text of the statute is clear, *id.* at 1750, as Title VII is here. Indeed, a statute's application can "reach[] 'beyond the principal evil' legislators may have intended or expected to address." *Id.* at 1749 (quoting *Oncale v. Sundowner Offshore Srvs., Inc.*, 523 U.S. 75, 79–80 (1998)).

Second, as a practical matter, the court's concern is largely hypothetical because Article III and the zone of interests test provide discrete, sensible guardrails. Organizations that are not injured *in fact* lack Article III standing, so an organization could not simply charter itself one day and sue employers the next. Also, organizations whose interests are beyond those that Title VII protects, like investment companies or shareholders who might disagree with corporate decisions or policies, lack statutory standing under Title VII. But that is not this case. Plaintiff's purpose is to advance the rights of restaurant workers and protect them from discrimination, and it has paid hundreds of thousands of dollars to further that purpose at Darden. ER-65. That

purpose was actually and repeatedly frustrated when Darden's two discriminatory policies forced Darden employees (employees who told Plaintiff that they were otherwise ready, willing, and able to join Plaintiff in lobbying against the sexual harassment and race discrimination wrought by subminimum wages) to spend their precious non-work hours recovering from the increased sexual harassment and race-based monetary losses that they suffered at Darden, depriving Plaintiff of their voices at its lobbying events. ER-65, 72, 80, 85, 87–90. Thus, holding that Plaintiff has statutory standing under Title VII here would not open the floodgates to lawsuits from a variety of strangers to the practices being challenged.[4]

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[4] Plaintiff also wishes to preserve the argument that it need not even meet the zone of interest test because the "person aggrieved" language in Title VII reaches to the limit of Article III. That interpretation is supported by dicta in *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972), and other cases interpreting that same language cited above, but this interpretation was expressly rejected in *Thompson*. 562 U.S. at 176 (rejecting as "too expansive" *Trafficante*'s "dictum that the Title VII aggrievement requirement conferred a right to sue on all who satisfied Article III standing"). Plaintiff recognizes this Court cannot overrule *Thompson*, but it wishes to preserve the argument that this aspect of *Thompson* should be abandoned by the Supreme Court and the Court should return to the interpretation that "person aggrieved" authorizes statutory standing for all plaintiffs who would have standing under Article III.

II. AT MINIMUM, THE CASE SHOULD BE REMANDED WITH LEAVE TO AMEND TO MEET THE PROPER STANDARD.

If this Court disagrees with the district court and holds that corporations like Plaintiff can potentially have standing under Title VII because "person . . . aggrieved" is not narrowly limited to employees, this Court should, at minimum, clarify the standard, reverse the judgment, and remand with leave to amend.

"[L]eave to amend should be granted unless the district court determines that the pleading could not possibly be cured by the allegation of other facts." *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001). Here, the district court concluded that amendment would be futile. That conclusion was only correct if there is a bright legal line prohibiting any corporation from ever proceeding under Title VII. But if that is no bar (and it is not), then, at minimum, there may be other facts that Plaintiff can allege about its injuries, its connection to the challenged policies, and its shared interests with those who have suffered unlawful discrimination. Thus, to the extent this Court determines that some corporation possibly could proceed under Title VII, but the Court is unsure whether Plaintiff has met the zone of interest test here (or even

if it affirmatively concludes that the unamended complaint contains allegations insufficient to meet the zone of interests test), the remedy should be to reverse the judgment and remand with instructions to allow Plaintiff leave to amend its complaint. *See Stoyas v. Toshiba Corp.*, 896 F.3d 933, 952 (9th Cir. 2018) (remand with instructions to allow plaintiffs to amend appropriate where the district court "misapplied" precedent and, under the proper standard, "leave to amend would not be futile").

CONCLUSION

For all these reasons, Plaintiff has statutory standing under Title VII. The order and judgment of the district court should be reversed. In the alternative, the case should be remanded with instructions that Plaintiff be allowed to amend.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure and Circuit Rule 32 because this brief contains 7,090 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 365 in 14-point Century Schoolbook font.

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