No. 12-20514

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHARLES CANNON,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

SUPPLEMENTAL BRIEF FOR AMICI CURIAE TODD GAZIANO, GAIL HERIOT, AND PETER KIRSANOW

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STATEMENT OF THE SUPPLEMENTAL ISSUE

How does new case law, especially *Shelby County v. Holder*, 133 S.Ct. 2612 (2013), affect this case?

ARGUMENT

At issue is the scope of Congress's power under Section 2 of the 13th Amendment, which grants Congress the power to pass "appropriate legislation" enforcing Section 1. The recent Supreme Court decision *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), addresses the scope of Congress's power under Section 2 of the 15th Amendment to pass "appropriate legislation" enforcing that Amendment's Section 1. Because the text of the two enforcement sections is nearly identical, *Shelby County* is crucial to understanding the Supreme Court's likely approach to this case.[1] That approach is heavily influenced by *McCulloch v.*

[1] The Tenth Circuit issued an opinion in another case involving the constitutionality of Section 249(a)(1) just eight days after *Shelby County*. *United States v. Hatch*, __ F. 3d. __ (10th Cir. 2013). The Tenth Circuit did not cite *Shelby County* or discuss how its analysis should affect Thirteenth Amendment decisions. It assumed that the rationality standard in Jones v. Alfred H. Mayer & Co., 392 U.S. 409 (1968), is a fairly toothless one and that for it to hold that Section 249(a)(1) is unconstitutional would require it to ignore *Jones*. But *Jones* is distinguishable (since no one questions that the 1866 statute at issue in that case was meant to help dismantle slavery) and *Shelby County* shows that its rationality standard is not so toothless after all. Significantly, the court admitted in that case that "Hatch's arguments raise important federalism questions." It

Maryland, 17 U.S. 316 (1819). See *infra* at Part 1.

There are also striking parallels between *Shelby County* and the case at bar. Both involve long time lags between their respective Section 1 "problem" and the Section 2 "solution" enacted by Congress. In *Shelby County*, the Supreme Court held that a portion of the Fannie Lou Hamer, Rosa Parks and Coretta Scott King Voting Rights Act Re-Authorization and Amendments Act ("VRARA"), 120 Stat. 577 (2006), which re-authorized the pre-clearance provisions of the Voting Rights Act of 1965, was not a valid exercise of Congress's 15th Amendment authority. By 2006, the danger of disfranchisement in the covered jurisdictions, which had been great in 1965, was too remote to justify the burdens of pre-clearance. This case involves the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act ("HCPA"), 123 Stat. 2835 (2009). By 2009, the danger of a re-emergence of slavery was much more remote. In light of *Shelby County*, it is difficult to see how Section 249(a)(1) can be upheld. See *infra* at Part 2.

One important aspect of *Shelby County* is that it holds that **even under a *rationality standard*** VRARA failed to pass constitutional muster. That makes this case easy, since this Court need not decide what standard to apply to any professed intent by Congress to effectuate the ban on slavery—the rationality standard of

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simply considered itself hemmed in by *Jones*.

Jones v. Alfred H. Mayer & Co., 392 U.S. 409 (1968), or the congruence and proportionality standard of *City of Boerne v. Flores*, 521 U.S. 507 (1997). Under ***any*** standard, Section 249(a)(1) is unconstitutional. See *infra* at Part 2.

1. *Shelby County* re-affirms that Congress's goal in passing enforcement legislation pursuant to a Reconstruction Amendment must be the effectuation of that amendment's core prohibition and not some other goal. In this case, since Congress does not even purport to be motivated by the need to keep slavery and involuntary servitude at bay, Section 249(a)(1) is unconstitutional.

Constitutional law courses often begin with *McCulloch* for good reason. Chief Justice John Marshall's classic formulation of the scope of Congress's powers states a fundamental constitutional principle:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

Marshall's two-step approach is clear: The determination of whether the end if legitimate or "within the scope of the constitution" is distinct from the determination of whether the means are "plainly adapted" to that end. The courts must be deferential as to means, but not ends, which courts have always ascertained by traditional methods of judicial interpretation/construction. *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

In this case, Congress does not even purport to be motivated by the need to

end slavery or prevent its return. Instead it treats eliminating the badges, incidents and vestiges of slavery as an end unto itself.[2] It is therefore unconstitutional under the first part of *McCulloch*'s test without applying any test to Congress's motives.

The Warren Court cases interpreting Section 2 of the 13th and 15th Amendments—*Jones* and *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)—are both consistent with the requirement that Congress's goal in legislating must be to effectuate the core prohibition of the relevant Reconstruction Amendment and not some other goal. Indeed, in *Katzenbach*, the Court was explicit, stating that "Congress may use any rational means *to effectuate the constitutional prohibition of racial discrimination in voting.*" 383 U.S. 301, 324 (1966)(emphasis added). Both prominently cite Justice Marshall's famous statement in *McCulloch.* But in both of these cases, there was little controversy as to whether the end of the challenged legislation was legitimate. *Jones* dealt with the constitutionality of the Civil Rights Act of 1866, which was intended to dismantle Black Codes that had saddled African-Americans with "onerous disabilities and burdens, and curtailed

[2] The Findings section of the HCPA states in relevant part that "[E]liminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude" and "[I]n order to eliminate, to the extent possible, the badges, incidents, and relics of slavery, it is necessary to prohibit assaults on the basis of real or perceived religions or national origins." Nowhere does it state that eliminating the badges, incidents, and relics of slavery will have any value in reinforcing the ban on slavery.

their rights . . . to such an extent that their freedom was of little value." *Jones* at 426.[3] These codes applied to former slaves the same disabilities applied to them during slavery. There can be no doubt that Congress intended to effectuate the ban on slavery and to prevent its return. In 1866, ending slavery and preventing its return was Job 1 for Congress—and also Jobs 2, 3, 4, and 5. Members of Congress were appropriately fixated on that goal. Similarly, *Katzenbach* clearly meant to enforce the 15th Amendment's ban on racial discrimination in voting with the Voting Rights Act of 1965. At that time, African-American disfranchisement in the South was perhaps the nation's most pressing problem. The Court therefore devoted little analysis to whether each of these statutes' purpose was truly enforcement of its corresponding Reconstruction Amendment.

Shelby County re-iterates the continued importance of the *McCulloch* principle for understanding Congress's powers under the Reconstruction Amendments. 133 S. Ct. at 2630. Like the cases discussed above, *Shelby County* is a case that is primarily about means rather than ends—a point that the Court

[3] The fact that *Jones* added in dictum the terms "vestiges" and "relics" to the older "badges and incidents" formulation reinforces the conclusion that Section 2 authorizes only laws in which Congress's ultimate goal is the elimination of slavery and the prevention of its return. Otherwise, there would be no limit to the powers of Congress. Since nearly everything bears a causal connection to slavery, such an open-ended claim would not have been made without some limiting principle. If Congress acts to eradicate some vestige of slavery because it believes doing so will keep slavery at bay, it acts on firm ground. If it does so for some other reason, it cannot look to the 13th Amendment for support.

carefully emphasizes. *Id*. (stating that the portion of Chief Justice Marshall's *McCulloch* principle that requires the means be "plainly adapted" to a legitimate end was not the portion at issue in *Shelby County*). But the re-iteration of the entire *McCulloch* principle shows its continued vitality and importance.

Neither the 13th Amendment nor *Jones* was an effort to overrule *McCulloch*. The amendment gives Congress no independent power to legislate against slavery's badges or incidents; it can only do so if such legislation is tethered to the goal of enforcing the Section 1 ban on slavery (as all race-related laws passed during the Reconstruction Era arguably were). Given the HCPA's lack of such tethering to effectuating the goals of the 13th Amendment's Section 1, Section 249(a)(1) is unconstitutional.

At oral argument, counsel for the United States was asked what Section 2's limiting principle could be if it is not that Congress can only enact prophylactic measures intended to assist in eliminating slavery and preventing its return. No satisfactory answer was or can be offered. If the answer is that Congress is limited to prohibiting the badges, incidents, vestiges and relics of slavery (per counsel's erroneous interpretation of the *Jones* dictum), that is no limitation at all.[4] Almost

[4] Since the enforcement provisions of the 19th (women's suffrage), 23rd(District of Columbia), 24th (poll tax) and 26th (suffrage for 18 year olds) Amendments contain essentially identical

everything—from streets named for Robert E. Lee to jazz—is causally connected to slavery. If the answer is that Congress has plenary authority in the area of race relations, this is both sprawling and structured to put the 13th Amendment in tension with the Fifth Amendment's requirements of equal protection. See, e.g., *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

2. *Shelby County* holds that even the "rationality" standard used in *Katzenbach* requires judicial engagement with the legislative record. Applying the Court's standard to either VRARA or Section 249(a)(1) results in a finding of unconstitutionality.

Amici continue to believe that, if Congress had purported to pass Section 249(a)(1) in order to prevent the return of slavery, the correct standard to apply to this case would have been the congruence and proportionality test of *City of Boerne*. Rationality standards like those applied in *Jones* and *Katzenbach* are best applied when everyone agrees the end is legitimate and the argument is about means. Such a standard comports with *McCulloch*'s principle. An ill-fitting legislative solution to a problem is often ill-fitting precisely because it was never

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language, Amici wonder whether the United States would take the position that Congress has the authority to eradicate the badges, incidents, vestiges and relics of those amendments' core provisions untethered to any prophylactic purpose. It is Amici's view that Congress has considerable discretion to enact prophylactic legislation intended to effectuate the textual prohibition in each amendment. But it does not permit Congress to remake the nation in the image of what it would have looked like if, for example, women had always had the vote.

intended to solve the problem it purports to solve. A congruence and proportionality standard therefore gives courts an objective standard to ferret out whether Congress is pursuing an authorized goal or some other goal. Looking for congruence and proportionality is an alternative to questioning Congressional motives outright.

Application of the congruence and proportionality test requires this Court to hold Section 249(a)(1) unconstitutional. No one regards that section as congruent and proportional to the problem of slavery today.[5] It would be dishonest to assert otherwise and Congress did not do so.

Shelby County indicates, however, that the choice of standards is not crucial. Under *any* standard used to determine the constitutionality of enactments pursuant to Reconstruction Amendments, the VRARA failed. So does Section 249(a)(1).

Shelby County makes clear that even the rationality standard has teeth. In applying it, the Court stated that the statute "imposes current burdens and must be justified by current needs." 133 S. Ct. at 2619 (quoting *Northwest Austin*

[5] Even if one were to take the elimination of the badges and incidents of slavery as a permissible goal of 13th Amendment legislation, the HCPA cannot survive application of the congruence and proportionality test. A careful analysis of the HCPA legislative record indicates that the evidence showing that states are failing to prosecute hate crimes against the descendants of African-American slaves is lacking. Attorney General Eric Holder was unable to point to a single case during the hearings of a racially motivated hate crime against an African-American in which the state had failed to act appropriately. H.R. Rep. No. 111-86 pt. 1 at 42 (2009).

Municipal Utility District No. One v. Holder, 557 U.S. 193, 203 (2009). Such an approach does much to close whatever gap might otherwise be said to exist between the rationality test of *Jones* and *Katzenbach* and the congruence and proportionality test of *City of Boerne* . If "current burdens" "must be justified by current needs" then the test has an implicit proportionality standard. An enactment is not "rational" according to *Shelby County* unless the burdens it currently imposes are at least arguably proportional to the benefits it currently brings.

At issue specifically in *Shelby County* was the coverage formula determining which state and local governments were singled out for federal pre-clearance. The *Shelby County* court did not simply take as given Congressional assertions that the VRARA's coverage formula, unchanged since the 1970s, was a rational response to the problem of discrimination against African-American voters. Instead, the Court carefully examined the legislative record before it. It looked at data showing declining disparities between black and white voter registrations in covered states and at the rising numbers of African-Americans holding political office. 133 S. Ct. 2625-7. It gave great weight to the long passage of time between the enactment of the original coverage formula and the present day. 133 S. Ct. at 2627.

This is a much easier case. If the threat of African American

disfranchisement has declined greatly between 1965 and 2006, the threat of slavery has fallen off the map in the last century and a half. It is not rational to think otherwise (and, again, Congress does not purport to). Instead, Congress appears to be motivated by a desire to eliminate violent bias crimes. Eliminating violent crime, including crimes that occur "because of" somebody's race or color, is certainly a good cause. But unless those crimes have an interstate commerce nexus or are linked to some other federal interest, it is not a federal cause. The powers accorded Congress by the Constitution are limited and defined.

When Congress is acting pursuant to its legitimate powers, concurrent federal and state criminal jurisdiction and the resulting potential for double jeopardy is tolerable (just as the burden on covered jurisdictions created by preclearance is tolerable when disfranchisement is a real threat). See *United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 499 (2d Cir. 1995) (discussing the dual sovereignty rule in double jeopardy and then-recent politically-charged re-prosecutions in race-related cases). When Congress is acting to exercise a general police power (a power not accorded it by the Constitution), no federal interest is served and the potential for double jeopardy created by the statute is intolerable.

CONCLUSION

For these reasons and the ones previously submitted in their original brief, Amici respectfully request that this Court reverse the order of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, ALISON SCHMAUCH, certify that today, August 15, 2013, a copy of the supplemental brief for amici curiae, was served upon all parties by electronic case filing and by e-mail per prior agreement of the parties.

/s/ Alison E. Schmauch
ALISON SCHMAUCH

CERTIFICATE OF COMPLIANCE

Pursuant to 5TH CIR. R. 32.2.7(c), undersigned counsel certifies that this supplemental brief complies with the type-volume limitations of 5TH CIR. R. 32.2.7(b).

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/S/ Alison E. Schmauch
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