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

ALISON SCHMAUCH
19 N. Garfield Street
Arlington, VA, 22201
202-557-0202
Alison.somin@gmail.com

ATTORNEY FOR AMICI CURIAE

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

STATEMENT OF THE SUPPLEMENTAL ISSUE

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

REPLY ARGUMENT

1. Appellee Fails Even to Mention *McCulloch v. Maryland* and Instead Incorrectly Assumes that the Arguments of Amici Would Require this Court to Deviate from *Jones*.

Appellee fails even to mention *McCulloch v. Maryland*, 17 U.S. 159 (1819). And no wonder. *McCulloch* requires that legislation be adapted to some legitimate constitutional end. When it is, courts must defer as to the particular means of achieving that end. But when it is not, the legislation is unconstitutional. Ours is a government of limited and defined powers. Without the requirement that legislation be adapted to a legitimate constitutional end it would not be.

The *Civil Rights Cases*, 109 U.S. 3 (1883), stated in dictum that Congress has the authority to abolish the badges and incidents of slavery. And surely that is right. Congress is given the power to carry out the Thirteenth Amendment's prohibition on slavery and involuntary servitude. Prohibiting

the badges and incidents of slavery is simply one method by which Congress does this.[1] See Jennifer Mason McAward, Defining the Badges and Incidents of Slavery, 14 U. Pa. J. Const. L. 561 (2012). But while Congress surely has some measure of prophylactic power under Section 2, it is not given any power to do anything that is not aimed at eliminating slavery and involuntary servitude and preventing their return. The *Civil Rights Cases* never said that Congress may outlaw the badges or incidents of slavery as an end unto itself. The Thirteenth Amendment itself is plain: It bans slavery and involuntary servitude.

Jones disagreed with the *Civil Rights Cases* about what constitutes a badge or incident. And while Amici believe that the *Jones* Court misconstrued the statute at issue in that case, it doesn't matter one whit for the purposes of this case. *Jones* does not purport to hold that Congress may ban the badges and incidents of slavery as an end unto itself. We can argue until we are all blue in the face about the meaning of the Civil Rights Act of 1866 and similar Reconstruction Era statutes. What is much less subject to

1 The "badges and incidents" formulation is also somewhat under-inclusive. For example, suppose a drug were discovered that makes people who ingest it susceptible to becoming slaves. Congress could ban such a drug pursuant to its Section Two power, even though such drugs did not exist during the era of antebellum Southern slavery and are thus not a badge or incident of it.

debate is whether these statutes were aimed at effectuating the Thirteenth Amendment's prohibition on slavery and involuntary servitude. It is obvious they were. Policymakers were thinking of little else during that extremely significant era in our history.[2]

There is thus no need to deviate from *Jones* in order to find Section 249(a)(1) unconstitutional in this case. Congress did not even purport to be concerned over the re-establishment of slavery when it passed the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act ("HCPA") in 2009. It viewed the abolition of bias crimes as an end unto itself.

2. Appellee Simply Asserts that Shelby County is Unrelated to this Case, But the Parallels are in Fact Very Strong.

Appellee contends that *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), must have no implications for this case because it is about the Fifteenth Amendment and the instant case is about the Thirteenth. But the three Reconstruction Amendments share "a common unity of purpose, when taken in connection with the history of their times, which cannot fail to have an

2 *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), and *Runyon v. McCrary* 427 U.S. 160 (1976), which Appellee cites in its brief as examples of the deferential way in which the Supreme Court has applied the *Jones* standard, similarly deal with a Reconstruction Era statute—the Civil Rights Act of 1866. No one argues that at the time the statute was passed, Congress's aim was not to dismantle slavery. They therefore have limited bearing on how the Court should address the constitutionality of a 2009 statute that was not targeted at dismantling slavery.

important bearing on any question of doubt considering their true meaning."[3] Add to that the fact that the texts of the relevant enforcement provisions are nearly identical—along with the enforcement provisions of the 19th (women's suffrage), 23rd (District of Columbia), 24th (poll tax) and 26th (suffrage for 18 year olds) amendments. Moreover, the Supreme Court has interpreted the enforcement sections of the Thirteenth and Fifteenth amendments in the same way. See *Jones v. Alfred Mayer & Co*., 392 U.S. 409 (1968); *South Carolina v. Katzenbach*, 383 U.S. 301 (1965); Supplemental Brief of Amici at 4.

If the "rationality standard" applicable to the Fifteenth Amendment has teeth, as *Shelby County* unequivocally shows that it does, then the "rationality standard" applicable to the Thirteenth Amendment must have teeth too. Thus, even if Congress had claimed that in passing Section 249 it was motivated by a desire to prevent the return of slavery (which it did not), and even if the "congruence and proportionality" standard of *City of Boerne v. Flores,* 521 U.S. 507 (1997), were inapplicable (though we believe it is applicable), the result would still be the same—that Section 249(a)(1) is

3 *Slaughterhouse Cases*, 83 U.S. 36, 67 (1873).

unconstitutional.[4]

The Court in *Shelby County* makes clear that a statute that is passed decades after the Fifteenth Amendment threat has passed may be unconstitutional if the burdens it imposes are not justified by current needs. The same must go for the HCPA and the Thirteenth Amendment.

Appellee's brief overstates the importance of the "equal sovereignty" doctrine in determining the outcome of *Shelby County*. As Appellee notes, the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Reauthorization and Amendments Act ("VRARA")'s coverage formula imposed burdens on some states that it did not impose on others. Appellee's Supplemental Brief at 4. While the federalism cost here was significant, *Shelby County* also emphasizes that the current burdens of a statute must be justified by current needs.[5] There is nothing in the case to suggest that only

---

4 Unlike this case, *Shelby County* was not a case in which Congress's aim deviates from the core prohibition of the Fifteenth Amendment. No one argues that Congress imposed the preclearance system on the covered jurisdictions for the sake of having a preclearance system. Applying the "rationality standard" of *Katzenbach* rather than the "congruence and proportionality" of *City of Boerne* therefore makes sense in *Shelby County*. In contrast, in passing the HCPA, there is every reason to believe that Congress prohibited bias crimes for the sake of prohibiting bias crimes, not to prevent the return of slavery. While that is a perfectly reasonable goal, it is not a goal authorized to Congress by the Constitution. The "congruence and proportionality" test is therefore the proper standard. What *Shelby County* makes clear, however, is that in the end the choice of standards makes no difference in this case. Under either standard, Congress's action must be proportional to the threat.

5 Appellee's brief states that "prosecution under Section 249(a)(1) is not triggered by some long-ago event, but, as here, by specific, recent individual violent conduct. " But the same is true of civil lawsuits

burdens on "equal sovereignty" should count.

Contrary to Appellee's brief, the record before Congress in 2009 does not show that the current burdens imposed by the HCPA are justified by current needs. Congress does not even purport to relate the HCPA to the need to prevent the actual return of slavery. Even if eliminating the vestiges of slavery, untethered to eliminating slavery itself, were a legitimate end unto itself, the record is remarkably thin on this need too, especially given that the majority of race-based bias crimes do not fit the white-on-black paradigm.[6] The data collected by the FBI do not reveal how many bias crimes were appropriately dealt with at the state level. But the testimony presented at the Congressional hearings suggests that state and local government are hardly ignoring bias crimes or taking them less seriously than other crimes;

---

under the VRARA; a recent change to voting practices or procedures, not long-ago events, leads to VRARA litigation. In this regard, the two statutes are not dissimilar.

6 Appellee's brief notes that in 2007, the FBI documented more than 3800 race-based hate crimes. But African-Americans are actually disproportionately likely to commit a hate crime. African-Americans comprised 20.8% of the hate crime offenders reported to the FBI in 2007, but only about 13% of the general population. Caucasians were also under-represented in the pool of hate crime offenders, comprising 62.9% of hate crime offenders but about 78% of the general population—suggesting that forces other than biases traceable to the days of slavery drive the majority of hate crimes. See U.S.A. Quick Facts from the U.S. Census Bureau, available at http://quickfacts.census.gov/qfd/states/00000.html; FBI Hate Crimes Statistics 2007, available at http://www.fbi.gov/news/stories/2008/october/hatecrime_102708. See also Brief of Amici Curiae at 23-24 (surveying the HCPA's legislative record and finding it lacking in evidence that hate crime is largely traceable to slavery).

Attorney General Holder was hard-pressed to name even a single incident involving an African-American victim to which state authorities did not respond adequately. H.R. Rep. No. 111-86 pt. 1 at 42 (2009).

On the other hand, the HCPA imposes huge costs on the criminal justice system by creating opportunities for double jeopardy. Double jeopardy may be tolerable—although just barely so—in cases in which a true federal interest is at stake. Hence, despite its potential for double jeopardy, the HCPA's Section 249(a)(2) would very likely be viewed by the Supreme Court as constitutional since it is an exercise of Congress's authority over interstate commerce. It is intolerable in the case of Section 249(a)(1), because the connection to preventing slavery is so remote that Congress didn't even claim it.

3. The Three-Part Test That Is Supposed to Serve as a "Limiting Principle" Adopted in *Hatch* is No Limiting Principle at All and Should Not Be Adopted by This Court.

Appellee cites favorably in its Reply to *United States v. Hatch*, __ F. 3d __ (2013), which upholds 18 U.S.C. 249(a)(1) based on application of a three-part test that supposedly defines the outer limits of Congress's Section 2 power. This test is purportedly rooted in *Jones*, but is actually of the Tenth Circuit's own devising. It

finds that 18 U.S.C. 249(a)(1) is constitutional because it reaches only (a) actions that can rationally be considered to resemble an incident of slavery when (b) committed upon a victim who embodies a trait that equates to "race" as that term was understood in the 1860s, and (c) motivated by animus toward persons with that trait. *Id.* at 25.

There are several problems with this test. First, it is worth emphasizing that it is not articulated in *Jones* or in any other Supreme Court case that would be binding on this Court. Second, the *Hatch* test would essentially give Congress a general police power over all conduct concerning race. As Amici have noted in our original Supplemental Brief, such a power would be both sprawling and in tension with the Fifth Amendment's requirement of equal protection under the law. Supplemental Brief of Amici at 7. In short, such a limiting principle is not much of a limiting principle at all.

Regarding the first prong of the *Hatch* test, *Jones* requires courts only to defer to Congress's judgment of what constitutes a badge or incident of slavery. It does not require courts to go two steps beyond that and uphold legislation that does not reach slavery or the incidents of slavery but instead conduct that merely "can rationally be considered to resemble an incident of slavery" untethered to any

effort to effectuate the Thirteenth Amendment's ban on slavery. *Hatch* at 25.

The third prong of the *Hatch* test also appears to be based on a misinterpretation of 18 U.S.C. 249(a)(1), which prohibits all crimes that are committed "because of" some person's (not necessarily the victim's) race, and not merely those that are "motivated by animus toward persons with that trait." *Hatch* at 25. Suppose that an Asian-American mugger targets white victims, not because he feels any race-based animus toward them, but because his predominantly poor Asian-American neighborhood happens to be adjacent to a wealthy and predominantly white neighborhood. He may therefore target whites because they are more likely to be from the nearby wealthy neighborhood and thus to have expensive jewelry, purses, wristwatches or other such items worth stealing. Because his crimes are committed on the basis of race, even though they do not reflect racist animus, the Asian-American mugger's crimes are potentially prosecutable under 18 U.S.C. 249(a)(1).[7] Flawed as the *Hatch* test might be, the HCPA correctly interpreted should fail the third prong.

This Court should avoid repeating these errors and should decline to adopt

---

7 18 U.S.C. 249(a)(2) contains the same "because of" language as applied in religion cases. It has been used to prosecute members of a dissenting Amish sect who assaulted other Amish persons in an intra-religious dispute, even though this intra-Amish feud cannot really be said to be driven by "animus" against Amishness qua Amishness. See Erik Eckholm, Amish Sect Leader and Followers Guilty of Hate Crimes, N.Y. Times, Sept. 20, 2012.

the Tenth Circuit's construction of Congress's Section Two powers.

CONCLUSION

For these reasons and those submitted in their previous briefs, Amici respectfully request that this Court reverse the order of the district court.

Respectfully submitted,

Alison E. Schmauch
Attorney for Amici Curiae
19 N. Garfield Street
Arlington, VA, 22201

CERTIFICATE OF SERVICE

I, ALISON SCHMAUCH, certify that today, August 30, 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).

1. Exclusive of the portions exempted by 5TH CIR. R. 32.2.7(b)(3), this brief contains 1,674 words printed in a proportionally spaced typeface.

2. This brief is printed in a proportionally spaced, serif typeface using Times New Roman 12 point font in text and Times New Roman 10 point font in footnotes produced by Microsoft Word 2007 software.

3. Upon request, undersigned counsel will provide an electronic version of this brief and/or a copy of the word printout to the Court.

4. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5TH CIR. R. 32.2.7, may result in the Court's striking this brief and imposing sanctions against the person who signed it.

/S/ Alison E. Schmauch
ALISON SCHMAUCH