NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

Randy Joe Metcalf, a/k/a Randy Joe Weyker - Petitioner,

vs.

United States of America - Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the Thirteenth Amendment provides Congress with unlimited power to enact hate-crimes legislation encompassing acts entirely unrelated to the "badges and incidences of slavery."

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The petitioner, Randy Metcalf, through counsel, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in case No. 16-4006, entered on February 2, 2018. Mr. Metcalf's petition for rehearing en banc and petition for rehearing by the panel were denied on March 19, 2018.

OPINION BELOW

On February 2, 2018, a panel of the Court of Appeals entered its ruling affirming the judgment of the United States District Court for the Northern District of Iowa. The decision is published and available at 881 F.3d 641.

JURISDICTION

The Court of Appeals entered its judgment on February 2, 2018, and denied Mr. Metcalf's petition for rehearing en banc and petition for rehearing by the panel on March 19, 2018. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 249(a)(1) (2012)

> **(1) Offenses involving actual or perceived race, color, religion, or national origin.**—Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person . . . [shall be subject to penalties].

U.S. CONST. AMEND. XIII

> **Section 1.** Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> **Section 2.** Congress shall have power to enforce this article by appropriate legislation.

STATEMENT OF THE CASE

Mr. Metcalf was indicted in the Northern District of Iowa on one count of committing a federal hate crime, in violation of 18 U.S.C. § 249(a)(1). (DCD 2).[1]

[1] In this petition, the following abbreviations will be used:
"DCD" - district court clerk's record, followed by docket entry and page number, where noted;
"PSR" - presentence report, followed by the page number of the originating document and paragraph number, where noted; and
"Sent. Tr." – Sentencing hearing transcript, followed by page number.

The indictment alleged that Mr. Metcalf "willfully caused bodily injury to [Lamarr Sandridge] who is African American, because of [Lamarr Sandridge's] actual or perceived race, color, and national origin." (DCD 2).

Mr. Metcalf filed a motion to dismiss the indictment, arguing that Congress lacked constitutional authority to enact the hate crimes statute. (DCD 15). Mr. Metcalf argued that § 249(a)(1) is an invalid exercise of Congress's power to enforce the Thirteenth Amendment. (DCD 15). The district court denied Mr. Metcalf's motion to dismiss. (DCD 21).

The case proceeded to jury trial. Below is a summary of the facts presented at trial.

On the night of January 11, 2015, Lamarr Sandridge was assaulted at a bar, by Mr. Metcalf, Jeremy Saunders, and Joseph Saunders. The trial revolved around the interactions between two groups throughout the evening. The first group included Lamarr, Katie Flores, and Sarah Kiene. The second group included Mr. Metcalf, his fiancée Noelle Weyker, Jeremy, and Joseph. Becky Burks was bartending that night. (Trial Tr. Vol. I p. 58). Ted Stackis owned the bar and was also present for the first part of that evening. (Trial Tr. Vol. I p. 28).

Around 10:00 p.m., a dispute arose between the two groups over the jukebox at the bar. (Trial Tr. Vol. I. p. 107, 305-06). Katie and Sarah testified that Mr. Metcalf used derogatory language, while Becky testified that Mr. Metcalf used

racial slurs against Katie and Sarah. (Trial Tr. Vol. I p. 64-65, 69, Vol. II p. 194). Lamarr did not remember anyone using racial slurs. (Trial Tr. Vol. I p. 112).

Lamarr asked Mr. Metcalf to stop using this language towards the women. (Trial Tr. Vol. II pp. 194-95). Mr. Metcalf shoved Lamarr. (Def. Ex. B, Video 1, 11:00 p.m.). The back and forth briefly continued between the groups, but eventually they were separated. (Def. Ex. B, Video 1, 11:01 p.m.). Soon after, Mr. Metcalf walked over to Lamarr. (Def. Ex. B, Video 1, 11:04 p.m.). The two talked, shook hands and hugged, and went their separate ways. (Trial Tr. Vol. I p. 110; Def. Ex. B, Video 1, 11:04 p.m.).

Ted claimed that after this incident Mr. Metcalf started talking about how he "burned crosses with the McDermotts." (Trial Tr. Vol. I p. 35). Ted claimed that Metcalf also stated "I hate fucking niggers" and "you got any you want taken care of." (Trial Tr. Vol. I pp. 35-36, 38). John Lugrain, who was seated nearby this conversation, did not hear any racial slurs used. (Trial Tr. Vol. II pp. 289-92).

After the first incident, Ted testified he went outside to smoke pot with Mr. Metcalf. (Trial Tr. Vol. I pp. 39-40). Ted testified that Mr. Metcalf lifted up his t-shirt to reveal a swastika tattoo and that Mr. Metcalf stated "I hate them fuckers." (Trial Tr. Vol. I p. 40).

Tensions increased between the two parties as the night progressed. (Trial Tr. Vol. II p. 196). Katie and Sarah were both intoxicated by the end of the evening. (Trial Tr. Vol. II pp. 171-72). Katie and Sarah were yelling and swearing at Mr.

Metcalf. (Trial Tr. Vol. I p. 145). Sarah, Katie, Jeremy, and Ted testified that Mr. Metcalf used derogatory language and racial slurs towards Katie and Sarah. (Trial Tr. Vol. I p. 33, 123, 145-46, Vol II p. 196). Jeremy testified that Mr. Metcalf was calling Lamarr a "stupid nigger" and Katie and Sarah "nigger-loving cunts." (Trial Tr. Vol. I pp. 143-44). Jeremy also testified that Mr. Metcalf mentioned cross burnings and showed his swastika tattoo. (Trial Tr. Vol. I p. 144, 147).

Eventually, Sarah shoved Mr. Metcalf and told him to "shut the fuck up." (Trial Tr. Vol. II p. 196-97). Noelle was recording Sarah with her cellphone. (Trial Tr. Vol. II p. 196-97). Katie came up behind Noelle and knocked the phone out of her hand. (Trial Tr. Vol. I p. 84). After this, a fight broke out. (Trial Tr. Vol. II p. 197).

Mr. Metcalf charged Katie and grabbed her by the hair. (Def. Ex. B., Video 7, 1:19 a.m.). Lamarr ran over and punched Mr. Metcalf two or three times in the head. (Def. Ex. B, Video 7, 1:19 a.m.). Jeremy put Lamarr in a headlock. (Trial Tr. Vol. I p. 150, Def. Ex. B, Video 7, 1:19 a.m.). Joseph then punched Lamarr in the face until he was unconscious. (Trial Tr. Vol. I p.150-51, Def. Ex. B, Video 7, 1:19 a.m.). Mr. Metcalf stood up and repeatedly kicked Lamarr in the head. (Def. Ex. B, Video 7, 1:19 a.m.). Becky called 911. (Trial Tr. Vol. I pp. 87-88).

Mr. Metcalf, Jeremy, and Joseph started to leave the bar. (Def. Ex. B, Video 7, 1:20 a.m.). Mr. Metcalf returned to get his coat, and then kicked Lamarr in the head again. (Def. Ex. B, Video 7, 1:20 a.m.). Becky claims Mr. Metcalf stated "die

nigger die." (Trial Tr. Vol. I p. 73). Mr. Metcalf, Jeremy, Joseph, and Noelle then left the bar. (Def. Ex. B, Video 7, 1:20 a.m.). The jury convicted Mr. Metcalf. (DCD 101).

On appeal before the Eighth Circuit, Mr. Metcalf asserted that the district court erred in denying his motion to dismiss, because 18 U.S.C. § 249(a)(1) is an unconstitutional exercise of Congress's lawmaking authority under the Thirteenth Amendment. First, Mr. Metcalf argued that *Shelby County v. Holder,* 133 S. Ct. 2612 (2013), and *City of Boerne v. Flores,* 521 U.S. 507 (1997), applied to the Thirteenth Amendment analysis, and that *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968), was no longer the correct standard. *City of Boerne* requires that a statute be "congruent and proportional," while *Shelby County* requires that the statute be justified by "current conditions." In the alternative, Mr. Metcalf argued that the statute was unconstitutional under the *Jones* "rationality" standard.

The Eighth Circuit Court of Appeals affirmed the district court's denial of his motion to dismiss, finding the Hate Crimes Act constitutional. *United States v. Metcalf*, 881 F.3d 641, 644-46 (8th Cir. 2018). The Court determined *City of Boerne* and *Shelby County* did not apply to the constitutionality analysis under the Thirteenth Amendment. *Id*. Under the standard in *Jones*, the Court held "that Congress rationally determined that racially motivated violence constitutes a badge and incident of slavery." *Id*. Mr. Metcalf filed a petition for rehearing en banc and petition for rehearing by the panel, which were denied.

REASONS FOR GRANTING THE WRIT

This Court should grant the petition for writ of certiorari to address a growing tension between *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) and this Court's later cases addressing Congress's power to legislate under the other Reconstruction Amendments. The Fifth, Eighth, and Tenth Circuits have all held that the Hate Crimes Act, which prohibits causing bodily injury to another person because of his or her race, color, religion, or national origin, is a constitutional exercise of Congress's lawmaking power under the Thirteenth Amendment. *Metcalf*, 881 F.3d at 644-46; *United States v. Cannon,* 750 F.3d 492, 497-98 (5th Cir. 2014); *United States v. Hatch*, 722 F.3d 1193 (10th Cir. 2013) [2]. These Courts reasoned that under *Jones*, Congress could determine the scope of its own power and further that Congress rationally determined that race-based violence is a badge and incidence of slavery—even though the Hate Crimes Act is not limited to violence committed against races previously subject to enslavement.

The Courts rejected that the principles in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), and *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997), applied to the analysis under the Thirteenth Amendment. Instead, these Circuits held that *Jones* was the only relevant guidance on interpreting the breadth of Congress's power under the Thirteenth Amendment—which is essentially limitless. For example, with the Hate Crimes Act, Congress used the Thirteenth Amendment to exercise a federal police power against bias offenses.

[2] *Hatch* does not discuss *Shelby County*.

While these circuits upheld the constitutionality of the statute, they did so with skepticism. *Hatch,* 722 F.3d at 1204; *Cannon,* 750 F.3d at 509-11 (Elrod, J., concurring). As Judge Elrod noted, courts "would benefit from additional guidance from the Supreme Court on how to harmonize these lines of precedent." *Cannon*, 750 F.3d at 509 (Elrod, J., concurring). This Court should grant this petition and provide that guidance.

A. History of the federal Hate Crimes Act and Thirteenth Amendment case law.

In 2009, Congress enacted the Hate Crimes Act, 18 U.S.C. § 249. Section 249(a)(1) states:

> **(1) Offenses involving actual or perceived race, color, religion, or national origin.**—Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person . . . [shall be subject to penalties].

In passing 18 U.S.C. § 249(a)(1), Congress expressly relied on the Thirteenth Amendment for its authority. *Cannon*, 750 F.3d at 497-98. The Thirteenth Amendment states:

> **Section 1.** Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> **Section 2.** Congress shall have power to enforce this article by appropriate legislation.

The Supreme Court's interpretation of the scope of § 2—the enforcement provision—has changed over time. The Court first analyzed § 2 in *The Civil Rights Cases, United States v. Stanley,* 109 U.S. 3, 20 (1883). The Court stated:

> [T]he Thirteenth Amendment may be regarded as nullifying all State laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed, that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.

Id. (emphasis added). The Court then rejected the argument that Congress could rely on § 2 of the Thirteenth Amendment to outlaw discrimination in public accommodations. *Id.* In doing so, the Court reasoned that discrimination in public accommodations had "nothing to do with slavery or involuntary servitude." *Id.* at 24.

Consistent with *The Civil Rights Cases*, in *Hodges v. United States,* 203 U.S. 1, 27 (1906), this Court determined that the scope of the enforcement provision was "as clear as language can make it. The things denounced are slavery and involuntary servitude, and Congress is given power to enforce that denunciation. All understand by these terms a condition of enforced compulsory service of one to another." *Id.* at 16.

The Supreme Court's interpretation of the breadth of § 2 changed in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). In *Jones*, the Court relied on the "badges and incidents of slavery" language from *The Civil Rights Cases* and held that

Congress had the authority to abolish the "badges and incidents of slavery." *Id.* at 440. However, the Court went further, and determined Congress also had the power to "rationally determine" what *are* the badges and incidents of slavery. *Id.*

B. Recent Supreme Court case law on the scope of the Reconstruction Amendments and the need for uniformity.

In the time since *Jones*, this Court has pulled back on Congress's power to legislate under the other "Reconstruction Amendments," specifically the Fourteenth and Fifteenth Amendments. First, in *City of Boerne,* 521 U.S. at 517, the Court interpreted the scope of Congress's enforcement powers under § 5 of the Fourteenth Amendment, which is almost identical to § 2 of the Thirteenth Amendment. The Court determined that the enforcement provision was clearly only remedial, and "that [t]here must be congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520, 528. The Court stated:

> If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it." *Marbury v. Madison*, 5 U.S. 137 (1803). Under this approach, it is difficult to conceive of a principle that would limit congressional power.

Id. at 529. This directly conflicts with *Jones's* holding that Congress can determine what are the badges and incidents of slavery—essentially allowing it to define its own power—and legislate accordingly.

More recently, this Court decided *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). *Shelby County* involved various challenges to the Voting Rights Act of 1965 and required the Court to analyze the scope of the enforcement provision of the Fifteenth Amendment (which again, is almost identical to § 2 of the Thirteenth Amendment). *Id.* The Court held that to justify use of the enforcement provision of the Fifteenth Amendment, any legislation must be based on current, not past, conditions. *Id.* The Court stated:

> Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an extraordinary departure from the traditional course of relations between the States and the Federal Government. Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.

Id.

First, *City of Boerne* has limited the scope of *Jones*, which allowed Congress to unilaterally determine the scope of § 2 of the Thirteenth Amendment and legislate as it saw fit. Although *City of Boerne* does not explicitly discuss the Thirteenth Amendment or *Jones*, it clearly pulls back on the scope of the enforcement provision under an almost identical constitutional provision. After *City of Boerne*, Congress no longer has the ability to determine the scope of its constitutional authority. If *City of Boerne* did not overrule *Jones*, this Court should overrule *Jones*, to ensure consistency of interpretation.

Section 249(a)(1) does not pass the congruence and proportionality test from *City of Boerne*. Hate crimes are far removed from the purpose of the Thirteenth Amendment – eliminating slavery and involuntary servitude. If the Thirteenth Amendment can be used to outlaw hate crimes—even those against Caucasian persons—because this is somehow tied to eliminating slavery and involuntary servitude, it is unclear where Congress's power would end. The legislation is not congruent and proportional because it does not apply to just preventing crimes against African Americans. Under the statute, an African American individual can be prosecuted for assaulting a Caucasian individual.

Second, *Shelby County* requires a finding that § 249(a)(1) was justified by current conditions. Congress did not present *current* findings that § 249(a)(1) is necessary to enforce the Thirteenth Amendment. "In passing § 249(a)(1), Congress focused on past conditions and did not make any findings that current state laws, or the individuals charged with enforcing them, were failing to adequately protect victims from racially-motivated crimes." *Cannon*, 750 F.3d at 510 (Elrod, J., concurring). Then Attorney General Eric Holder's testimony before the Senate Committee on the Judiciary indicates that Congress failed to provide this evidence because it did not exist:

> Senator Sessions: I would just note that perhaps the authorization of funding to create tasks forces and studies of these kind of crimes would be an appropriate role for the Federal Government. But with regard to the soldier that Senator Coburn asked you about, he's not covered, Mr. Attorney General, by the Act. He's not one of these groups, unless he was a homo-sexual advocating that and that caused the attack. So he

wouldn't be covered. There are lots of other groups, people, decent people, that might need additional Federal protection if the Federal Government had all the money in the world and all the time to investigate this. The Matthew Shepard case, I would just note, the individual was prosecuted in Wyoming, two life sentences were obtained, and they didn't have a hate crimes act. It was the kind of crime that should have been vigorously prosecuted, and it was. Perhaps we could consider an option to allow more severe sentencing guidelines for people who do just mindless, hateful acts. Maybe you could word that in a way that would be sufficient. I'll ask you again: cite me some cases of significance that have not been properly prosecuted in the last 5 years.

Attorney General Holder: Well, as I said, I think there are statutes—there are cases that are noted in my written testimony. But here's the way that I would view it.

Senator Sessions: Well, no, no, no. I think this is important. You cited a California case. I understand that defendant was convicted of an assault. But every day crimes are prosecuted in State court that may not result in a conviction which the prosecutor or I would like, but we don't pick that up in Federal court with double jeopardy principles and just prosecute them again in Federal court. But it doesn't seem to me—you say you mentioned three cases. I'll look at those and review those. But frankly, that's not a very big number. And isn't it true that the vast majority of these crimes that you cite as hate crimes, which have dropped, according to the statistics, from 1998 to 2007, that the vast majority of those are defacement or vandalism, or those kind of crimes?

Attorney General Holder: The reality is that we have had, over the last decade, 80,000 crimes directed against people because of their race, color, religion, or national origin. That, it seems to me, is a serious problem. The vast majority of those cases will be handled by the States and by our local partners. What we're looking for is an ability to backstop their efforts and come up with a way in which we assist them. It seems to me that this is a question, in a lot of ways, of conscience. What is it that we consider important? How are we going to use Federal resources, the limited Federal resources that we have? It seems to me that to protect groups of people who are the objects, the subjects of violence simply because of who they are, simply because of the color of their skin, simply because of their ethnicity, simply because of their sexual orientation, their gender, their disability, those

> kinds of crimes are worthy of consideration, examination by the Federal Government. We should have an ability to become involved in those cases. We don't seek to replace our State and local counterparts.
>
> Senator Sessions: I would just ask you this: why don't we make all crimes Federal crimes then?
>
> Attorney General Holder: There are a substantial number——
>
> Senator Sessions: I mean, seriously?
>
> Attorney General Holder: No. And seriously, there are substantial numbers of crimes that can be brought, as you know, you're a prosecutor, Federal prosecutor, in the Federal courts, as well as the State courts and it doesn't happen.
>
> Senator Sessions: Well, I think you argued your case, and I'll listen to it. I'm not persuaded. I want to look at the numbers of prosecutions not occurring in an effective way. I think that's the fundamental test as to whether or not we should go forward with this legislation. In the past, I have not concluded it was. I find it odd that Senator Hatch's proposal for years to do a study of this has not been accepted.

The Matthew Shepard Hate Crimes Prevention Act of 2009: *S. Hrg. 111-464 Before the S. Comm. On the Judiciary*, 111th Cong., First Session 19-20 (June 25, 2009). Because the Hate Crimes Act is not justified by current findings, this Court must find it is an unconstitutional exercise of Congress's lawmaking authority. The failure to provide this kind of evidence also supports that § 249(a)(1) does not meet the congruence and proportionality standard of *City of Boerne*. 521 U.S. at 531-32; *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81-83 (2000) (discussing case law where the Court had reasoned that Congress's failure to produce evidence of a need for the legislation supported that it was not "congruent and proportional").

While *City of Boerne* and *Shelby County* are not explicitly interpreting the Thirteenth Amendment, their analysis still applies to the amendment. The Reconstruction Amendments all have "a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning." *Id.* at 509 (Elrod, J., concurring).

As discussed, even the circuits to uphold the statute under constitutional attack note the weakness of the argument that Congress had the authority to pass § 249(a)(1) under the Thirteenth Amendment. For example, in response to the defendant's arguments that *Jones's* interpretation of the Thirteenth Amendment violated basic federalism principles, the Tenth Circuit stated:

> "Badges and incidents of slavery," taken at face value, puts emphasis solely on the conduct Congress seeks to prohibit, and it seems to place few limits on what that conduct might be. Given slaves' intensely deplorable treatment and slavery's lasting effects, nearly every hurtful thing one human could do to another and nearly every disadvantaged state of being might be analogized to slavery—and thereby labeled a badge or incident of slavery under *Jones's* rational determination test. In effect, this interpretation gives Congress the power to define the meaning of the Constitution—a rare power indeed. *See City of Boerne*, 521 U.S. at 529.

Hatch, 722 F.3d at 1204.

Additionally, the majority opinion in *Cannon* recognized that the "legal landscape regarding the Reconstruction Amendments" has changed since *Jones*. *Cannon*, 750 F.3d at 505. The concurring opinion went farther, noting the strength of the argument that *Jones's* expansive view of § 2 of the Thirteenth Amendment may no longer be good law. *Id. a*t 509 (Elrod, J., concurring) ("I write separately to

express my concern that there is a growing tension between the Supreme Court's precedent regarding the scope of Congress's powers under § 2 of the Thirteenth Amendment and the Supreme Court's subsequent decisions regarding the other Reconstruction Amendments and the Commerce Clause."); *see also* Jennifer Mason McAward, *Congressional Authority to Interpret the Thirteenth Amendment: A Response to Professor Tsesis*, 71 Md. L. Rev. 60, 61 (2011) ([T]he viability of *Jones* is questionable in light of *City of Boerne v. Flores*."). The concurrence recognized that *Jones's* holding that Congress can determine the "badges and incidents of slavery" is inconsistent with later Supreme Court case law. *Cannon*, 750 F.3d at 499 (Elrod, J., concurring) ("Under our existing Thirteenth Amendment jurisprudence, it has indeed become difficult to conceive of a principle that would limit congressional power."). Additionally, the concurrence noted that because the Hate Crimes Act "'imposes current burdens,' perhaps, like the Voting Rights Act, it too 'must be justified' with congressional findings regarding 'current needs.'" *Cannon*, 750 F.3d at 511 (Elrod, J., concurring) (quoting *Shelby County*, 133 S. Ct. at 2619).

Even if *Jones* is still good law and *City of Boerne* and *Shelby County* do not apply, § 249(a)(1) is not a badge and incident of slavery and therefore not a valid exercise of the Thirteenth Amendment. Section 249(a)(1) is not written so as to limit protections to those individuals previously subject to slavery in the United States, specifically African-Americans. Under this statute, an African American individual can be convicted for an assault against a Caucasian individual. Clearly

such a prosecution would have no connection whatsoever to the goal of eliminating the "badges and incidences of slavery."

C. Section 249(a)(1) is an impermissible attempt to exercise a federal police power and violates fundamental principles of federalism.

Because this constitutional challenge involves a question of "division of authority between federal and state governments," the analysis should also consider whether § 249(a)(1) is consistent with the Tenth Amendment and federalism principles. *New York v. United States*, 505 U.S. 144, 155-56 (1992) ("The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States."). The Tenth Amendment "is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the [C]onstitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to state authorities." *Id.*

"For nearly two centuries it has been 'clear' that, lacking a police power, 'Congress cannot punish felonies generally.'" *Bond v. United States,* 134 S. Ct. 2077, 2086 (2014)(quoting *Cohens v. Virginia*, 6 Wheat. 264, 428, 5 L. Ed. 257 (U.S. 1821)). "Congress does not normally intrude upon the police power of the States." *Bond*, 134 S. Ct. at 2086. "'When Congress criminalizes conduct already denounced as criminal by the States, it effects a change in the sensitive relation between

federal and state criminal jurisdiction.'" *United States v. Lopez,* 514 U.S. 549, 561 n.3 (1995) (quoting *United States v. Enmons,* 410 U.S. 396, 411-12 (1973)). Federal encroachment on a state's police power implicates the fundamental principles of the Tenth Amendment. *United States v. Tom*, 565 F.3d 497, 506-07 (8th Cir. 2009). This Court has recently reaffirmed this principle, and rejected Congress's attempts to impose a federal police power in *United States v. Morrison*, 529 U.S. 598 (2000) and *United States v. Lopez*, 514 U.S. 549 (1995).

A review of the legislative history of § 249(a)(1) makes clear that Congress is attempting to use a police power and is thereby infringing on a power reserved to the states. When recommending that the statute be passed, the House of Representatives Committee on the Judiciary noted that "[w]here State and local prosecutors fail to bring appropriate State charges, or where State laws or State prosecutions are inadequate to vindicate the Federal interest, it is imperative that the Federal Government be able to step in and bring effective Federal prosecutions to 'backstop' State and local law enforcement." H.R. Rep. No. 111-86, pt. 1 at 8 (2009), *available at* https://www.congress.gov/congressional-report/111th-congress/house-report/86/1. Congress cannot create a police power simply because it has concerns with how the states are using that power.

Further, a main motivation for passing § 249(a)(1) was to avoid a federal nexus requirement. Congress was frustrated with the "limited reach of section 245(b)" which requires that a victim be engaged in a "federally protected activity."

H.R. Rep. No. 111-86, pt. 1 at 7 (2009). Congress noted that this requirement made the statute difficult to prosecute. *Id.* Therefore, § 249(a)(1) removes the requirement of a federal nexus in order to make prosecution in federal court easier. This is improper.

In short, "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison,* 1 Cranch 137, 176, 2 L. Ed. 60 (U.S. 1803) (Marshall, C.J)." Because the Thirteenth Amendment does not provide Congress with authority to pass § 249(a)(1), the statute is unconstitutional. This Court should grant the writ, and Mr. Metcalf's conviction should be reversed.

CONCLUSION

For the foregoing reasons, Mr. Metcalf respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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