No. 17-9340

In The
Supreme Court of the United States

RANDY JOE METCALF,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* & BRIEF *AMICUS CURIAE* OF GAIL HERIOT & PETER KIRSANOW, MEMBERS OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2(b), Gail Heriot and Peter Kirsanow, members of the U.S. Commission on Civil Rights, respectfully request leave of the Court to file this brief *amicus curiae* in support of Petitioner. Ms. Heriot and Mr. Kirsanow timely sent letters indicating their intent to file an *amicus* brief to counsel of record pursuant to Rule 37.2(a). Petitioner granted consent. No response was received from Respondent.

Ms. Heriot and Mr. Kirsanow are two members of the eight-member U.S. Commission on Civil Rights, which advises the President, Congress, and the American people on civil rights issues. This brief is being filed solely in their capacity as private citizens and not as Commission representatives. Nevertheless, it is informed by their knowledge and experience in civil rights law and policy gained from their many years on the Commission, as well as the pursuits that led to their Commission appointments. *Amici* believe their knowledge can assist the Court in sorting through the Thirteenth Amendment's history and the fight to end slavery that is at the core of the issue in this case.

For all the forgoing reasons, the motion of Ms. Heriot and Mr. Kirsanow to file a brief *amicus curiae* should be granted.

Dated: July 16, 2018

Respectfully submitted,

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QUESTION PRESENTED

Does Congress have the power under Section 2 of the Thirteenth Amendment to federalize bias crimes when it does not even purport to have the purpose of effectuating the ban on slavery and involuntary servitude, and, if it did claim that purpose, its legislation is neither congruent and proportional nor rationally related to such a purpose?

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Gail Heriot and Peter Kirsanow ("*Amici*")[1] are two members of the eight-member U.S. Commission on Civil Rights, which advises the President, Congress, and the American people on civil rights issues. This brief is being filed solely in their capacity as private citizens and not as Commission representatives. Nevertheless, it is informed by their knowledge and experience in civil rights law and policy gained from their many years on the Commission, as well as the pursuits that led to their Commission appointments. *Amici* believe their knowledge can assist the Court in sorting through the Thirteenth Amendment's history and the fight to end slavery that is at the core of the issue in this case.

SUMMARY OF ARGUMENT

This case concerns Congressional power to effectuate the Thirteenth Amendment's ban on slavery and

[1] Pursuant to this Court's Rule 37.2(a), Petitioner granted consent. No response was received from Respondent. Counsel of record for all parties received notice at least 10 days prior to the due date of the *Amici Curiae*'s intention to file this brief.

Pursuant to Rule 37.6, *Amici Curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae* or their counsel made a monetary contribution to its preparation or submission.

involuntary servitude—and it cries out for this Court's review.

In *United States v. Cannon*, 750 F.3d 492 (5th Cir. 2014), cert. denied, 135 S. Ct. 709 (2014), a case concerning an identical issue, Judge Elrod (the panel opinion's author) took the extraordinary step of specially concurring with her own opinion to state, "[W]e would benefit from additional guidance from the Supreme Court on how to harmonize these lines of precedent."

In *United States v. Hatch*, 722 F.3d 1193 (10th Cir. 2013), cert. denied, 134 S. Ct. 1538 (2014), the Tenth Circuit expressed similar concerns. Judge Tymkovich, writing for the panel, stated, "[Petitioner's] arguments raise serious federalism questions." But both the Fifth and Tenth Circuits felt helpless to address those questions. The Tenth Circuit opinion stated that "in light of *Jones* [*v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968)] it will be up to the Supreme Court" to consider them. *Id.* at 1201.

Now the Eighth Circuit has followed them in holding (wrongly) that it is bound by *Jones*. But even if the panel is right, then this Court should grant the petition to overrule *Jones* and harmonize Thirteenth Amendment cases with this Court's other decisions. *See Shelby County v. Holder*, 570 U.S. 2 (2013); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

Section 1 of the Thirteenth Amendment bans slavery and involuntary servitude—period. Section 2 grants Congress the power to effectuate that ban. But, contrary to the Eighth Circuit's reading of *Jones*, while

Congress is given broad prophylactic power to ensure that slavery is indeed banished, it is not given the additional independent power to uproot the badges, incidents, and relics of slavery *untethered to the goal of banning slavery itself*.

The ramifications of the contrary view are extraordinary. Consider the Nineteenth and Twenty-Sixth Amendments. Since they contain essentially identical grants of power to Congress, they would have to be interpreted to allow Congress to uproot historical relics of women's and 18-year-olds' past disfranchisement. It is safe to say that the power to remake the country as Congress thinks it "would have been" is virtually an unlimited power.

A more reasonable interpretation of these Amendments is that they ban exactly what they say they ban. In the Thirteenth Amendment's case, that would be slavery and involuntary servitude. Congress's prophylactic power, although broad, must be focused on that end.

The Hate Crimes Prevention Act ("HCPA") was passed in 2009—144 years after the Thirteenth Amendment's enactment. One section of that act, codified at 18 U.S.C. § 249(a)(1), nevertheless relies on Congress's Section 2 power as authority for the creation of criminal penalties for crimes committed "because of the actual or perceived race, color, religion, or national origin of any person." (A different section, not at issue in this case, relies on the Commerce Clause to prohibit crimes occurring "because of" someone's religion,

national origin, gender, sexual orientation, gender identity and disability, 18 U.S.C. § 249(a)(2), and requires proof of an interstate commerce nexus.[2])

Congress did not claim that it passed Section 249(a)(1) to effectuate the Thirteenth Amendment's ban on slavery. Instead it stated that it was attempting to eliminate the "badges, incidents and relics of slavery." The provision is thus unconstitutional. *See McCulloch v. Maryland*, 17 U.S. 316, 421 (1819) (stating that Congress is due deference on the means by which it accomplishes legitimate ends, but not the ends themselves). *See infra* at Part A.

Even if Congress had claimed that it enacted Section 249(a)(1) to prevent slavery's return, the provision would still be unconstitutional. When Congress makes a dubious claim that it is motivated by a desire to effectuate the Constitution's ban on slavery, the applicable standard is the "congruence and proportionality" test of *City of Boerne v. Flores*, 521 U.S. 507 (1997). Such a standard sidesteps the need for the Court to directly address the issue of Congress's sincerity and instead applies an objective test of whether Congress's solution fits the problem it purports to address.

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[2] Note that this means Congress relied on both powers for bias crimes based on religion and national origin, but that it relied solely on its Thirteenth Amendment power for bias crimes based on race and color. The HCPA contains a severability clause. *See* National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, div. E, sec. 4709, 123 Stat. 281 (2009).

Section 249(a)(1) is in no way "congruent and proportional" to the problem of slavery. No one claims that slavery could return without Section 249(a)(1). Instead, it is clear that Congress is motivated by the desire to rid the nation of bias crimes—a perfectly understandable goal, but not a federal goal. In doing so, however, it imposes substantial costs on the criminal justice system, including double jeopardy concerns. When there is a real federal interest at stake, these costs may be tolerable—but not when there is not.

Even if the "rationality standard" of *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968), and *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), applies instead, Section 249(a)(1) would be unconstitutional. As *Shelby County* makes clear, such a standard requires that *current* burdens be justified by *current* needs. The threat of slavery today is a mere phantom; the threat of double prosecutions in emotionally-charged cases is all too real. *See infra* at Part B.

The Eighth Circuit erred in concluding that *Jones* is an obstacle to holding Section 249(a)(1) unconstitutional. *Jones* need not be overruled in order to conclude that Congress overreached in passing Section 249(a)(1). *Jones* was about a Reconstruction Era statute, which it interpreted to ban private discrimination in real estate sales. Whatever that statute's correct interpretation, there is no doubt that eliminating slavery and preventing its return was the first, second, and third thing on the minds of those who enacted it in 1866. That is in stark contrast to the HCPA more than a century later. *See infra* at C.

Section 249(a)(1) is unlikely to be the only statute in the near future premised on an expansive reading of Section 2. There has been a growing movement in both academia and Congress to use the Thirteenth Amendment to address a variety of social ills thought to be in some way traceable to, or aggravated by, slavery—ranging from payday lending to race-selective abortion to "hate speech." *See* Gail Heriot & Alison Somin, *Sleeping Giant? Section Two of the Thirteenth Amendment, Hate Crimes Legislation, and Academia's Favorite New Vehicle for the Expansion of Federal Power*, 13 Engage 31 (Dec. 2012) ("*Heriot-Somin*"). Granting certiorari in this case obviates the need for multiple constitutional challenges in the future. An ounce of Constitutional prevention is worth a pound of cure. *See infra* at Part D.

REASONS FOR GRANTING THE WRIT

THE THIRTEENTH AMENDMENT DOES NOT AUTHORIZE CONGRESS TO PROMULGATE A GENERAL PROHIBITION ON RACE-BASED BIAS CRIMES

A. The Thirteenth Amendment Bans Slavery and Gives Congress Discretion to Effectuate that Ban; It Was Not Intended as a Broad Grant of Power to Remedy All Social Ills Thought to be Traceable to, or Aggravated By, Slavery. Since Congress Does Not Purport to Be Motivated by a Desire to Prevent Slavery's Return, Section 249(a)(1) is Unconstitutional.

Section 1's straightforward text mostly speaks for itself. Modern scholars have sometimes quoted lofty rhetoric by contemporary orators about its purpose and likely consequences,[3] but in the end its legal significance is unusually clear for a Constitutional provision: It bans slavery and involuntary servitude. Its "undoubtedly self-executing" character limits the

[3] Jennifer Mason McAward, Congressional Authority to Interpret the Thirteenth Amendment: A Response to Professor Tsesis, 71 Md. L. Rev. 60, 64-68 (2011) (responding to Tsesis's argument in the same volume in the service of supporting broad readings of Section 2). For a more complete exposition of the Congressional debates and subsequent Thirteenth Amendment case law, *see* Jennifer Mason McAward, The Scope of Congress's Thirteenth Amendment Enforcement Power after *City of Boerne v. Flores*, 88 Wash. U.L. Rev. 77 (2010) ("McAward on Enforcement Power"); Jennifer Mason McAward, Defining the Badges and Incidents of Slavery, 14 U. Pa. J. Const. L. 561 (2012) ("McAward on Badges and Incidents").

extent to which it can or should be broadly or metaphorically construed. *See Civil Rights Cases*, 109 U.S. 3, 20 (1883).

As for Section 2, there was little discussion regarding its interpretation in the congressional debates. Amendment co-author Senator Lyman Trumbull and supporter Representative Chilton White both said that Congress's enforcement powers resembled those under the Necessary and Proper Clause.[4] Following *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819), their comments suggest that they agreed with Chief Justice Marshall's celebrated explication of that clause:

> 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 that constitution, are constitutional.

Put only slightly differently, Trumbull and White's comments suggest that courts should review deferentially the means Congress chooses to achieve a particular end, but they should not show such deference regarding the legitimacy of the ends.[5] Under that view, Section 2 legislation may be prophylactic in nature, but

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[4] Cong. Globe, 38th Cong., 1st Sess. 53, 1313 (1864) (Sen. Trumbull); Cong. Globe, 38th Cong., 2d Sess. 214 (1865) (Rep. White).

[5] *See* McAward on Enforcement Power.

it must have as its end Section 1's effectuation and not some other goal.[6]

The first Supreme Court cases interpreting Section 2 declined to read it expansively. *United States v. Harris*, 106 U.S. 329 (1883), concerned a provision of the Ku Klux Klan Act of 1871, 17 Stat. 13 (1871), which stated in part:

> If two or more persons . . . conspire to go in disguise upon the highway . . . for the purpose of depriving . . . any person . . . of the equal protection of the laws . . . each of said persons shall be punished by a fine . . . or by imprisonment . . .

The Court held that this was an impermissible exercise of Congress's Section 2 power because it covered conspiracies by white persons against a white person or by black persons against a black person who had never been enslaved.

Ten months later, in the *Civil Rights Cases*, 109 U.S. 3 (1883), the Court again held a federal statute to be an improper exercise of Congress's Section 2 power—this time the Civil Rights Act of 1875, 18 Stat.

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[6] More expansive views of Section 2's potential could be found in speeches made by the Amendment's opponents. But these speakers were not arguing that an expansive view was desirable, but that the Amendment should be rejected. *See* McAward on Enforcement Power, *supra* note 8, at 106-08. *See also* George Rutherglen, The Badges and Incidents of Slavery and the Power of Congress to Enforce the Thirteenth Amendment, in Alexander Tsesis, The Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment (2010) ("Rutherglen").

335 (1875), which had guaranteed "the full and equal enjoyment" of public accommodations. The *Civil Rights Cases* first established that unlike the Fourteenth Amendment, which governs only state action, the Thirteenth governs private conduct and thus permits Congress to regulate such conduct directly. *Id*. at 11. The Court nevertheless held that Section 2 did not permit Congress to prohibit race discrimination in public accommodations. While Congress had the power to "pass all laws necessary and proper for abolishing all badges and incidents of slavery," being refused service at a hotel or restaurant on account of one's race was not such a badge or incident. *Id*. at 20.

The phrase "badges and incidents of slavery" has endured in Thirteenth Amendment case law into modern times and thus demands this Court's attention. It was in widespread use before the Civil War. The "incidents" half of the phrase had a more determinate legal meaning. Bouvier's Law Dictionary (1857 ed.) defined an "incident" as a "thing depending upon, appertaining to, or following another, called the principal."[7] According to Professor Jennifer Mason McAward, a leading Thirteenth Amendment scholar, an "incident" of slavery was "an aspect of the law that was inherently tied to or that flowed directly from the institution of slavery—a legal restriction that applied to slaves *qua* slaves or a legal right that inhered in slave owners *qua*

[7] Bouvier's Law Dictionary 617 (7th ed. 1857), cited in McAward on Badges and Incidents at 570.

slave owners."[8] The clearest incident of slavery is compulsory service—since it is both necessary and arguably sufficient to create the master-slave relationship. But the inability to acquire property and the inability to sue in court could also arguably be described as incidents of antebellum slavery.[9]

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[8] McAward on Badges and Incidents, *supra* note 3 at 572. McAward gives additional examples of the ways in which antebellum and Civil War era courts and other legal actors used "incident" in this legal sense. *See also* McAward on Enforcement Power, *supra* note 3, at 126; Rutherglen, *supra* note 6, at 164-65.

[9] Trumbull's comments that the Amendment's effect was only to "rid the country of slavery" suggested that his conception of the Amendment's reach was narrow. Cong. Globe, 38th Cong., 1st Sess. 1314 (1864). Similarly, Senator John Brooks Henderson, another of the Amendment's co-authors, argued that it conferred or could confer only freedom upon the freed slave. *See* Cong. Globe, 38th Cong., 1st Sess. 1465 (1864). According to Senator James Harlan, however, it conferred rights such as "the right to acquir[e] and hol[d] property," the deprivation of which was a "necessary incident" to slavery. Cong. Globe, 38th Cong., 1st Sess. 1439-40 (1864). This issue became highly significant in the debates over the Civil Rights Act of 1866, 14 Stat. 27 (1866), which purported to confer those rights on all citizens regardless of race (and not simply regardless of former slave status) under the authority of the Thirteenth Amendment. *See* McAward on Enforcement Power, *supra* note 3, at 109-14.

President Andrew Johnson vetoed that legislation in part on the ground that the Thirteenth Amendment abolished slavery and did not authorize Congress to require states to confer upon freedmen or upon African Americans the legal capacity to buy, sell, or own property and that this was therefore a matter for the States. *See* Veto Message from President Andrew Johnson to Congress (Mar. 27, 1866), reprinted in Lillian Foster, Andrew Johnson: His Life and Speeches (1866). Congress overrode his veto. To be sure of its authority, however, Congress re-enacted those provisions after the ratification of the Fourteenth Amendment,

"Badges," by contrast, was a more open-ended term that did not have a precise legal meaning but that was nonetheless used widely in antebellum abolitionist popular writing. Mid-nineteenth-century dictionary definitions are not terribly different from modern ones; one dictionary defines "badge" as a "mark or sign worn by some persons, or placed upon certain things for the purpose of designation."[10] Some badges of slavery were literal. In antebellum Charleston, South Carolina, the city issued copper badges to all slaves-for-hire identifying the particular slave's trade and official number. *See* Harlan Greene et al., Slave Badges and the Slave-Hire System in Charleston, South Carolina 1783-1865 (2008). A legal requirement that slaves-for-hire be licensed was certainly an "incident of slavery-for-hire"; the badges were the clearest case of a "badge of slavery." But the term "badge of slavery" was also used metaphorically. "Badge of slavery" was sometimes used, for example, to refer to black skin.[11] It is fair to

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which, among other things, requires states to accord all persons the equal protection of the laws, in the Civil Rights Act of 1870, 16 Stat. 140 (1870).

This shows what was then considered to be a close Thirteenth Amendment question. There is no doubt that the legal incapacity to purchase, own, and convey property was an important (and according to some necessary) legal incident of a slave's status and that slavery was still in the process of being dismantled at the time. Yet it was controversial whether Congress had the power under Section 2 to confer the right to that legal capacity.

[10] Bouvier's Law Dictionary 151 (7th ed. 1857), cited in McAward on Badges and Incidents, *supra* note 3, at 575.

[11] McAward on Badges and Incidents, *supra* at note 3, at 576-78.

say, however, that "badge" was ordinarily used to describe a characteristic that was distinctively associated with slave status and not one that could be commonly associated with both slave and non-slave status.

After the Civil War, the distinction between badges and incidents appears to have been lost. The phrase "badge of slavery" was used only twice during the debates over the Civil Rights Act of 1866, 14 Stat. 27 (1866). There, Senator Trumbull appears to use it as a synonym for "incidents," as did this Court in the *Civil Rights Cases*, 109 U.S. at 20.

Congress's Section 2 power fell out of use following the *Civil Rights Cases*—likely because Congress thought that it had already erected the statutory framework needed to fulfill Section 1's promise. For about a century, most Thirteenth Amendment action involved the enforcement of the Peonage Abolition Act, 14 Stat. 546 (1867), which stated:

> The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited . . . and all acts, laws, resolutions, orders, regulations or usages . . . of any territory or state, . . . by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any person . . . in liquidation of any debt . . . are declared null and void.

Between the turn of the century and 1945, the federal government prosecuted over 100 peonage cases. In the years since emancipation, sharecroppers and agricultural laborers had come to be ensnared in cycles of debt that sometimes obliged them to remain on the plantations. A complex web of laws—criminal laws for breach of contract and for vagrancy, etc.—supported a system that approximated many of the attributes of antebellum slavery. *See* Benno Schmidt, Jr., Peonage in The Oxford Companion to the Supreme Court of the United States 729 (Kermit Hall, et al., eds., 2005). In order to abolish peonage, these laws had to be dismantled one by one—a task that involved multiple trips to this Court by both the United States and civil plaintiffs. *See Pollock v. Williams*, 322 U.S. 4 (1944) (and cases cited therein). It is fair to call such laws "incidents of the on-going practice of peonage." Removing them was not just removing the legal incidents of peonage for their own sake; it was dismantling peonage itself. As far as Congress and the courts were concerned, these legal incidents of peonage *were* peonage, and peonage *was* slavery.

The notable thing about the first century of the Thirteenth Amendment's history is that this Court never suggested that Section 2 authorized Congress to do anything other than effectuate Section 1's prohibition on slavery. When courts used the term "badges and incidents," it was in the context of dismantling actual slavery. By attacking the "badges and incidents" of slavery, they were attacking the institution of slavery

itself—one by one removing its legal supports until the institutional edifice came crashing to the ground.

This is not to say that Congress's authority under Section 2 does not permit it to attack the legal supports of slavery unless these supports have no other significance. The legal supports for peonage, which included laws with harsh penalties for vagrancy, had application outside the context of peonage too. But if Congress were to employ its Section 2 power to prohibit vagrancy laws of that type, its purpose must be to effectuate the ban on slavery and not some other goal. If Congress responds to a phantom problem, the lack of a true Thirteenth Amendment purpose is obvious.

Here Congress does not even purport to be motivated by the desire to prevent slavery's return. Instead it treats eliminating slavery's badges, incidents, and relics as an end unto itself. 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 their elimination will have value in reinforcing the ban on slavery itself. The law cannot therefore be justified by the Thirteenth Amendment.

B. Even if Congress Had Purported to Be Motivated By a Desire to Prevent Slavery's Return, Section 249(a)(1) Is Neither Congruent and Proportional Nor Rationally Related to that Aim.

If Congress had claimed to be motivated by a desire to prevent slavery's return, Section 249(a)(1) would still be unconstitutional.

Amici believe that the congruence and proportionality test of *City of Boerne v. Flores*, 521 U.S. 507 (1997), is the correct test. It should be used where Congress asserts that its "ends" are those laid out in the Thirteenth Amendment, but where that assertion is open to doubt. Rather than requiring courts to examine Congress's sincerity directly, the congruence and proportionality test offers an objective basis for determining a statute's constitutionality. If Congress's enactment is congruent and proportional to an end laid out in the Thirteenth Amendment, then courts should presume that end is in fact Congress's end.

Section 249(a)(1) fails under the congruence and proportionality standard. Slavery is dead. The threat of its return is so remote as to be practically non-existent. Legislation cannot be congruent and proportional to a non-existent threat. Only a naïf would believe Section 249(a)(1) is intended to prevent slavery's return. The deviation from our usual norm against double jeopardy that the HCPA inevitably creates cannot be justified by a non-existent federal interest.

What is clear is that Congress was motivated not by a desire to keep slavery at bay, but by a desire to prevent bias crimes, regardless of their connection to interstate commerce, as an end unto itself (although another goal may have been to appease activists who advocate federal penalties for bias crimes).[12] However desirable Congress's goal may be in the abstract, it is not a constitutionally authorized use of federal authority.[13]

The "rationality" test should be used when, unlike in this case, it is clear that Congress's end falls within those laid out in the Thirteenth Amendment and only its "means" are at issue. This is consistent with *McCulloch*'s required deference to Congress's means.

But even under the rationality test Section 249(a)(1) cannot survive. In *Shelby County v. Holder*, 570 U.S. 2 (2013), it was demonstrated that the rationality test of *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), and *Jones* is not toothless. In it, this Court held that a portion of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Re-Authorization Act ("VRARA"), 120 Stat. 577 (2006), re-authorizing the Voting Rights Act of 1965's pre-clearance provisions was not a valid exercise of Congress's Fifteenth Amendment authority.

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[12] *See* Thousands Protest Hate Crimes, CNN Newsroom, Nov. 16, 2007 (stating that "[t]housands . . . converg[ed] on the U.S. Justice Department" on November 16, 2007, "demanding more federal prosecutions of hate crimes").

[13] Given that the HCPA's double jeopardy aspects are not a bug but a central feature of the law, it raises concerns even apart from the Thirteenth Amendment issue.

The danger of re-disenfranchisement specifically in the covered jurisdictions was great in 1965. But by 2006, the danger was too remote to justify singling out jurisdictions on the basis of a decades-old formula.

The Court reasoned that VRARA "imposes current burdens and must be justified by current needs." If so, then the test has its own implicit proportionality requirement. An enactment is not rational unless the burdens it imposes are at least arguably proportional to its benefits.

The burdens imposed by Section 249(a)(1) are even greater and the needs more remote. On one hand, the danger of slavery's return is an ugly chimera; Congress did not even claim such a motivation. On the other, the HCPA is in tension with some of the most sacred principles of our criminal justice system—especially the ban on double jeopardy. Indeed, in *United States v. Hatch*, 722 F.3d. 1193 (10th Cir. 2013), petitioner's state trial was still in progress when he was indicted in federal court. In a federal system, the principle that no individual should have to answer twice for the same conduct must be weighed against the principle that both federal and state authorities must have the opportunity to vindicate their interests. The "dual sovereignty rule" is an unavoidable compromise of these conflicting principles. *See United States v. Lanza*, 260 U.S. 377 (1922). But it depends for its legitimacy on this Court's willingness to enforce the Constitution's framework of limited, enumerated Congressional powers. Congress cannot promulgate laws that have nothing to do with slavery and then recite a

concern for slavery as justification, thereby avoiding double jeopardy concerns.

Just as Congress would have been justified in subjecting the covered jurisdictions to the pain of preclearance if there were a real threat of re-disenfranchisement, it may have been justified in subjecting alleged perpetrators of bias crimes to double jeopardy if there were a real threat of slavery's return. But there is not.

C. Contrary to the Eighth Circuit's Decision in this Case, *Jones* Does Not Authorize Section 249(a)(1).

This case would not be before this Court today but for what has often been viewed as the expansive decision of *Jones v. Alfred H. Mayer & Co.*, 392 U.S. 409 (1968). Without *Jones*, it is unlikely that Congress would have regarded its Section 2 power as expansively as it did in passing Section 249(a)(1). Moreover, without *Jones*, the Eighth Circuit would not have considered itself obligated to find Section 249(a)(1) constitutional. In fact, however, *Jones* is distinguishable from this case and should not be read to authorize Section 249(a)(1).[14]

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[14] Only if this Court decides that the Thirteenth Amendment permits Congress to outlaw the badges or incidents of slavery independently from any purpose to outlaw slavery itself would the Court need to address *Jones*' continued viability. *Jones* held that it is up to Congress to define "badges and incidents" (though it never says they can be outlawed independently of a purpose to outlaw slavery itself), while *City of Boerne* holds that it is the

Jones concerned a suburban St. Louis real estate developer's policy of not selling homes to African Americans. Joseph & Barbara Jo Jones, an interracial couple, brought suit. Congress enacted the Fair Housing Act one week after their case was argued in this Court. Instead, they brought suit under a then obscure section of the Civil Rights Act of 1866, 14 Stat. 27 (1866). It read:

> All citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real . . . property.

Much of *Jones* deals with a question of statutory interpretation—whether these words amounted to a ban on race discrimination by private sellers in real estate transactions. The Court held that they did.[15] It

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Court's job to define violations of the Fourteenth Amendment, hence putting *Jones*' continued viability on that point in doubt. Unless the Court is required to rubber-stamp Congress's definitions of "badges" or "incidents," being victimized by a bias crime, even a race-based bias crime, is clearly neither. It is not a legal right accorded to slave owners or a legal disability imposed on slaves. It is not even one step removed from an incident of slavery in that it is not a legal right or disability imposed on former slaves or slave owners. It is also not a badge of slavery, given that it is hardly a characteristic indicative of slave status. No one is immune from such crimes. *See* James B. Jacobs & Kimberly Potter, Hate Crimes: Criminal Law & Identity Politics 143 (1998). They happen everywhere, not just in the states of the Old Confederacy. *See, e.g.*, Guy Raz & Sylvia Poggoli, Spate of Hate Crimes in Italy Sets Off Alarm Bells, NPR News, May 31, 2008.

[15] *Amici* submit that *Jones*' statutory interpretation aspects were not just wrong, but astonishingly wrong. The statute was about the legal capacity to inherit, purchase, etc., not about

further held that the Thirteenth Amendment's Section 2 authorized such a law. In analyzing this latter question, the Court again used the "badges and incidents" terminology to describe appropriate targets of Congress's power under Section 2. But the Court was more explicitly deferential than in the *Civil Rights Cases*, holding that Congress's determination that particular conduct is a badge or incident of slavery is subject only to rational basis review. It held Congress to be rational in viewing race discrimination by private sellers as a badge or incident of slavery. *Id.* at 439-40.

Jones did not, however, purport to overrule *McCulloch*. Indeed, it cited it prominently. *Jones* at 443. The requirement that the means must be "plainly adapted" to the only constitutional end authorized by the Thirteenth Amendment—effectuating the ban on slavery—appears intact.

Jones construed a statute passed in 1866, a time when the nation was still dismantling actual slavery, not in sorting out its vestiges and relics. Under the circumstances, giving Congress discretion in identifying the badges and incidents of slavery is best viewed as deferring to Congress on the means of exterminating slavery, not as allowing Congress to define its legitimate ends. Section 249(a)(1) would not be due the same deference, since dismantling slavery itself is no longer the aim.

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private discrimination. *See, e.g.*, Gerhard Casper, *Jones v. Mayer*: Clio, Bemused and Confused Muse, 1968 Sup. Ct. Rev. 89 (1968). But there is no need to revisit that issue now.

In dictum, *Jones* refers not just to "badges and incidents," but also "vestiges" and "relics" of slavery. Congress picked up on this language in its HCPA Findings, which call for eliminating the "relics of slavery." *Jones*' use of this language reinforces our point that it was about an 1866 statute about which there was no doubt of Congress's legitimate goal of dismantling slavery. If Congress has the power to uproot whatever it rationally regards as relics and vestiges of slavery and the relics and vestiges of racial disenfranchisement (Fifteenth Amendment), female disenfranchisement (Nineteenth Amendment), poll taxes (Twenty-Fourth Amendment), and disenfranchisement of eighteen year olds (Twenty-Sixth Amendment), then it has virtually unlimited power.[16]

D. The Authors of the Previous Two Decisions on the Constitutionality of Section 249(a)(1) Both Conceded that Important Federalism Questions Are Raised by that Section, But They Also (Erroneously) Concluded that *Jones* Required Them to Leave those Questions to this Court.

Professor Jennifer Mason McAward concluded in "Defining the Badges and Incidents of Slavery," 14 U. Pa. J. Const. L. 561, 627 (2012) that Section 249(a)(1) was an inappropriate exercise of Congress's Section 2 power. It may well be that the Fifth Circuit agreed. In

[16] All of these Amendments have Congressional enforcement clauses virtually identical to the Thirteenth Amendment's.

Cannon, it found that it was bound by its reading of *Jones*, but Judge Elrod's extraordinary special concurrence to her own opinion written for the panel falls just short of pleading with this Court to clarify the law: "[W]e would benefit from additional guidance from the Supreme Court on how to harmonize these lines of precedent." *Cannon* at 509 (Elrod, J., specially concurring).

The Tenth Circuit panel also conceded that "[petitioner's] arguments raise important federalism questions." But it was reluctant to act on those arguments, stating that "in light of *Jones* it will be up to the Supreme Court to choose whether to extend its more recent federalism cases to the Thirteenth Amendment." *Hatch* at 1201. (To be fair, the Tenth Circuit's decision came down only days after *Shelby County* and it does not appear to have had the opportunity to consider the striking parallels between that case's treatment of statutes passed long after the crisis was over and the situation here.)[17]

As discussed in Part C, the notion that *Jones* required those courts to uphold Section 249(a)(1) was erroneous, since *Jones* is distinguishable from this case. But if *Jones* needs to be overruled to restore the

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[17] *United States v. Maybee*, 687 F.3d 1026 (8th Cir. 2012), concerned a different issue. The appellant-defendant in that case argued that Congress's Thirteenth Amendment power did not extend to Section 249(a)(1), because, unlike 18 U.S.C. § 245(b)(2)(B), it does not contain a requirement of a "federal activity." The United States was correct in that case that the Thirteenth Amendment requires no proof of "federal activity."

principles of limited government and federalism to Thirteenth Amendment jurisprudence, then so be it.

This Court should grant certiorari to overturn this erroneous decision and to prevent other courts as well as Congress from accepting its flawed reasoning. The HCPA is not the only statute that Congress has recently considered pursuant to its power to enforce the Thirteenth Amendment. The proposed Prenatal Nondiscrimination Act, for example, would ban race-selective abortions and cites Sec. 2 of the Thirteenth Amendment as constitutional authority for this ban. *See* H.R. 447 (113th Cong.) The proposed End Racial Profiling Act of 2013 (S. 1038) does not cite a constitutional source of authority, but it could be cast as Thirteenth Amendment legislation if found unconstitutional as Fourteenth Amendment enforcement legislation. *See also Heriot-Somin* at 35-36 (cataloguing numerous legislative proposals based on unreasonably broad readings of the Thirteenth Amendment). This issue will only get thornier.

CONCLUSION

The conduct Petitioner was found to engage in was reprehensible. *Amici* note only that advocates for the Constitution's framework of limited government do not always get to choose their allies. Congress does not have the authority to base Section 249(a)(1) on the Thirteenth Amendment. Punishment for such conduct should therefore be based on state laws or federal

laws passed pursuant to Congress's other enumerated powers.

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Respectfully submitted,

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