No. _____

IN THE

Supreme Court of the United States

OLE HOUGEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Title 18 U.S.C. § 249(a)(1), which was enacted as part of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, criminalizes the conduct of one who

> 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.

18 U.S.C. § 249(a)(1).

The question presented is:

Whether Congress's power to enforce the Thirteenth Amendment's prohibition on slavery and involuntary servitude authorizes Congress to criminalize assaults committed because of the victim's race, color, religion, or national origin, on grounds that such an assault is a "badge" or "incident" of slavery, regardless of whether there is any nexus to federally protected rights.

RELATED PROCEEDINGS

- *United States v. Hougen*, No. 20-cr-432, U.S. District Court for the Northern District of California. Judgment entered Dec. 6, 2021.
- *United States v. Hougen,* No. 21-10369, U.S. Court of Appeals for the Ninth Circuit. Judgment entered Aug. 1, 2023, and took effect Nov. 14, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ole Hougen respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals denying rehearing en banc is not reported. App.1.a.

The court of appeals affirmed the district court in both a published opinion and a separate memorandum disposition. The opinion is published in the Federal Reporter at 76 F.4th 805. App.2a. The memorandum disposition is available at 2023 WL 4887318. App.22a.

The district court issued a post-trial order which is available at 2021 WL 5630680. App.25a.

The district court issued a pretrial order which is published at 529 F.Supp.3d 1072. App.33a.

JURISDICTION

The court of appeals' denial of rehearing en banc issued on November 6, 2023. App.1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced in the appendix. App.42a-52a.

STATEMENT

1. This federal "hate crimes" prosecution under the Matthew Shepherd and James Byrd Hate Crimes Prevention Act of 2009 arises from a conflict between two strangers that occurred in Santa Cruz, California, on July 5, 2020. The conflict began when Hougen, a homeless and mentally ill white man, attempted to buy $2.00 of marijuana from S.B., a Black man who disparagingly rebuffed his offer. App.27a. According to the government's evidence at trial, Hougen then used a homophobic slur ("f*****"), followed by repeated utterances of a racist slur ("n*****"), while approaching S.B. and then slashing a knife toward him. App.4a. S.B. also possessed a knife, which he held at some point during the conflict. App.4a-5a. Neither man was injured. App.4a.

2. Hougen was initially prosecuted in Santa Cruz County Superior Court and charged with felony assault with a deadly weapon, and misdemeanor violation of civil rights by force. 4-ER-982. Those charges were dismissed in favor of federal prosecution. On November 17, 2020, a federal grand jury in the Northern District of California indicted Hougen on one count of attempting to commit racially motivated violence, in violation of 18 U.S.C. § 249(a)(1).

3. Prior to trial, Hougen moved to suppress pretrial witness statements or to dismiss the indictment on grounds of investigative bias. App.33a-41a. The district court denied the motion. *Id.*

4. At trial, Hougen argued that he had acted in self-defense, and that his prosecution was infected by investigative bias. App.5a.

5. Hougen was convicted on the single count of attempting to commit racially motivated violence. He moved for a new trial, and to dismiss the indictment for lack of jurisdiction under the Thirteenth Amendment, arguing that Congress lacked authority to criminalize an isolated, private act of racially motivated violence. The district court denied the motion. App. 25a-32a.

6. Hougen filed a timely appeal, again arguing that Congress lacks authority under the Thirteenth Amendment to criminalize an isolated, private act of racially motivated violence. In a published 2-1 decision, Circuit Judge Gould and District Judge Korman, sitting by designation, rejected his argument. The majority described Congress's authority under the Thirteenth Amendment as "broad," and stated that under *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968), Congress's exercise of its Thirteenth Amendment power is "subject only to a deferential test[,] . . . whether Congress could rationally have determined that the acts of violence covered by [the law] impose a badge or incident of servitude on their victims." App.9a (quotation marks omitted). The majority cited Congress's findings in support of § 249(a)(1) that "[s]lavery and involuntary servitude were enforced . . . through widespread public and private violence directed at persons because of their race, color, or ancestry," and that "eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude." 34 U.S.C. § 30501(7) (cited at App.9a). The majority also cited the holdings of other circuits to support its conclusion that "Congress rationally con-

cluded that racial violence imposes a badge and incident of slavery on its victims." App.9a-10a.[1]

7. Judge Ikuta issued a dissenting opinion, concluding that Congress lacks authority to enact § 249(a)(1) under the Thirteenth Amendment. App.11a-21a. Judge Ikuta found that Congress could not rationally conclude that violence motivated by discriminatory animus is a "badge" or "incident" of slavery, given the historical meaning of those terms, and in light of this Court's Thirteenth Amendment jurisprudence construing those terms to require interference with federally protected rights. *Id.*

8. Hougen moved for rehearing en banc regarding the Thirteenth Amendment issue. A majority of judges voted against rehearing en banc, with Judge Ikuta voting to rehear the matter en banc. App.1a.

Hougen now files this timely petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. Congress has limited authority under the Thirteenth Amendment to prohibit private violence.

The Constitution reserves general police powers to the States. *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995); *United States v. Morrison*, 529 U.S.

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[1] In its published decision, the full panel rejected Hougen's argument, on plain error review, that the district court's closure of the courtroom pursuant to COVID-era restrictions denied him his Sixth Amendment right to a public trial. App.6a-9a. In a separate memorandum disposition, the panel rejected his other arguments for reversal. App.22a-24a. Hougen does not raise those arguments here.

598, 605 (2000). In 2009, following years of debate in Congress regarding the propriety of a general federal "hate crimes" statute, Congress enacted 18 U.S.C. § 249(a)(1) as part of the Matthew Shepard and James Byrd Hate Crimes Prevention Act. Shepard-Byrd Act, Pub. L. No. 111-84, § 4701 et seq. (2009).

Congress passed § 249(a)(1) under § 2 of the Thirteenth Amendment. *See* National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111–84, § 4702, 123 Stat. 2190, 2836 (2009). To enact § 249(a)(1), Congress relied on its authority to outlaw the "badges and incidents" of slavery and involuntary servitude. 34 U.S.C. §§ 30501(a)(7)-(8) (Congressional findings); App.49a-50a.

The question presented here is whether Congress has authority to prohibit the conduct encompassed by § 249(a)(1) – private, isolated violence committed with discriminatory animus – as a "badge" or "incident" of slavery. This Court should grant certiorari because the lower courts, including the court of appeals here, have misapplied this Court's precedent involving the Thirteenth, Fourteenth, and Fifteenth Amendments, and have misread the text and history of the Thirteenth Amendment, to conclude that the conduct prohibited by § 249(a)(1) bears a rational relationship to Congress's authority to prohibit slavery and involuntary servitude when it does not.

Here, a divided panel of the Ninth Circuit, over a dissent by Judge Ikuta, relied on an expansive understanding of Congress's asserted "badges" and "incidents" authority, purportedly justified by this Court's holding in *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968), to conclude that § 249(a)(1) survives rational basis review. App.9a-10a. As Judge Ikuta

concluded, however, Congress's "badges and incidents" authority – while broad – does not extend so far as to authorize Congress to enact "a guarantee of protection against any private violence" committed "with discriminatory animus." App.19a (Ikuta, J., dissenting). Instead, as this Court's Thirteenth Amendment precedent makes clear, violence motivated by discriminatory animus can only constitute a "badge" or "incident" of slavery when it is "intended to deprive individuals of the rights of citizenship." App.16a. Federal legislation lacking that requirement fails rational basis review. App.16a-17a.

Additionally, as jurists in the Fifth and Tenth Circuits have suggested, the constitutionality of § 249(a)(1) should now be viewed through the lens of this Court's more recent precedent requiring meaningful means-ends tailoring in the context of the Fourteenth and Fifteenth Amendments. The Tenth Circuit, for example, has recognized "important federalism questions" regarding the reach of § 249(a)(1) in light of this Court's more recent precedent, but concluded that in light of *Jones*, "it will be up to the Supreme Court" to resolve those issues. *United States v. Hatch*, 722 F.3d 1193, 1201 (10th Cir. 2013). Similarly, in the Fifth Circuit, Judge Elrod issued a special concurrence noting pronounced "tension" between this Court's decisions, and observing that "we would benefit from additional guidance from the Supreme Court on how to harmonize these lines of precedent." *United States v. Cannon*, 750 F.3d 492, 509 (5th Cir. 2014) (Elrod, J., specially concurring); *compare United States v. Roof*, 10 F.4th 314, 394-95 (4th Cir. 2021) (rejecting application of this Court's Fourteenth and Fifteenth Amendment precedents in con-

text of § 249(a)(1), "absent clear direction from" this Court).

Finally, this Court's Thirteenth-Amendment analysis in *United States v. Kozminski*, 487 U.S. 931, 941 (1988), further demonstrates that § 249(a)(1) relies on an overbroad reading of Congress's Thirteenth Amendment authority. There, this Court viewed Congress's Thirteenth Amendment authority through a "narrow" window in the context of another federal criminal statute, and emphasized the requirements of fair notice, as well as the need "to maintain the proper balance between Congress, prosecutors, and courts." *Id.* at 944, 952-53.

The question presented is exceptionally important: whether Congress has the authority to promulgate a federal assault statute under the Thirteenth Amendment, predicated on discriminatory animus, without any nexus to the protection of federally protected rights. For this reason, and to secure and maintain uniformity of the Court's decisions, this Court should grant certiorari.

A. Statutory background of § 249(a)(1).

Section 249(a)(1) criminalizes the conduct of one who:

> 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.

18 U.S.C. § 249(a)(1).

The Shepard-Byrd Act is supported by ten congressional findings. Shepard-Byrd Act § 4702; App.48a-50a. In its findings in support of the racial violence prohibition, Congress stated that because

> [s]lavery and involuntary servitude were enforced . . . through widespread public and private violence directed at persons because of their race, color, or ancestry[,] . . . eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude.

34 U.S.C. § 30501(a)(7); App.49a.

In its findings with respect to religious and national origin groups, Congress stated that "members of certain religious and national origin groups were and are perceived to be distinct 'races.'" 34 U.S.C. § 30501(a)(8); App.49a. Thus, according to Congress, eliminating the badges and incidents of slavery renders it "necessary to prohibit assaults on the basis of real or perceived religions or national origins." *Id.* Congress also compiled statistics regarding the prevalence of hate crimes in American society and the need for expanded federal jurisdiction over the problem. *See* H.R.Rep. No. 111–86, Pt. 1, at 5–6 (2009).

The Report's Dissenting Views section drew attention to the lack of "any fact finding whatsoever" regarding the scope of hate crimes, their numbers, or their impact on the economy, and emphasized that 45 states and the District of Columbia already have laws punishing hate crimes, and Federal law already punishes violence motivated by race or religion in many

contexts. *See* H.R.Rep. No. 111-86, Pt. 1, at 39, 42, 44 (2009).

B. The Thirteenth Amendment's prohibition on slavery and involuntary servitude, and this Court's recognition of limitations on Congress's enforcement power.

The Thirteenth Amendment is one of three Reconstruction-era amendments ratified between 1865 and 1870 in the wake of the Civil War. It 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.

U.S. CONST. amend. XIII.

Section 1 of the Thirteenth Amendment provides the Amendment's substantive guarantee. The purpose, text and history of the Thirteenth Amendment, as construed by this Court, establish that the scope of this substantive guarantee was to "abolish[] slavery, and establish[] universal freedom" in the United States. *Civil Rights Cases*, 109 U.S. 3, 20 (1883). At the same time, as this Court emphasized in the *Civil Rights Cases*, "[t]he Thirteenth Amendment has respect, not to distinctions of race, or class, or color, but to *slavery*." *Id.* at 24 (emphasis added).

When the Thirteenth Amendment was ratified, "slavery" "referred to a specific and legally codified

'private economical relation' between a 'master' and a 'servant' . . . 'which had existed in certain states of the Union since the foundation of the government.'" App.13a (Ikuta, J., dissenting).

The phrase "involuntary servitude" referred to "those forms of compulsory labor akin to African slavery which, in practical operation, would tend to produce like undesirable results." *Butler v. Perry*, 240 U.S. 328, 332 (1916); *see also Kozminski*, 487 U.S. at 952 ("'[I]nvoluntary servitude' necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process.").

Section 2 of the Thirteenth Amendment provides its enforcement clause, and establishes Congress's authority to effectuate the substantive guarantee in Section 1. This Court's decisions shortly after ratification shed light on the scope of Congress's "power to enforce this article by appropriate legislation." U.S. Const. amend. XIII, § 2.

As the Court explained in 1883, Section 2 provides Congress with the authority to ensure that slavery was ended, along "with all its badges and incidents." *Civil Rights Cases*, 109 U.S. at 20-21. As the Court summarized,

> It is true that slavery cannot exist without law any more than property in lands and goods can exist without law, and therefore the Thirteenth Amendment may be regarded as nullifying all State laws which establish or uphold slavery. But it has a reflexive 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. at 16.

Thus, Congress's enforcement power under Section 2 extends beyond abolishing slavery itself. App.12a-16a (Ikuta, J., dissenting). But the scope of Congress's power to abolish the "badges and incidents" of slavery is set by the historical understanding of those terms, as described by this Court. Accordingly, "[i]n the context of Thirteenth Amendment jurisprudence, the phrase 'badges and incidents of slavery' has a specific meaning set by history and Supreme Court interpretation." App.14a.

"The term 'badge of slavery' . . . refers to indicators, physical or otherwise, of African Americans' slave or subordinate status." *Id.* (quoting Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. Pa. J. Const. L. 561, 575 (2012)). The term "badge" has a narrow meaning: as this Court recognized in the *Civil Rights Cases*, when the Thirteenth Amendment was ratified, "[m]ere discriminations on account of race or color were not regarded as badges of slavery." 109 U.S. at 25.[2] Indeed, as this

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[2] This aspect of the *Civil Rights Cases* "remains good law" after *Jones*. App.20a (Ikuta, J. dissenting). Indeed, this Court in *Jones* recognized this aspect of the *Civil Rights Cases*, and did not revisit "its present validity," describing that question as "largely academic." *Jones*, 392 U.S. at 441 n.78.

Court then observed, "[i]t would be running the slavery argument into the ground to make it apply to every act of discrimination" in "matters of intercourse or business." *Id.* at 24-25.

The term "incident" is also context-dependent, and historically referred to the legal aspects of the system of slavery. App.14a (Ikuta, J., dissenting). As this Court explained in the *Civil Rights Cases*, such legal aspects, comprising "the inseparable incidents of the institution" of slavery, included "[c]ompulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities." *Civil Rights Cases*, 109 U.S. at 22.

Building on this understanding in the *Civil Rights Cases*, this Court defined the badges and incidents of slavery as the denial of "those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery." *Id.* at 22; *see also Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971). "Such a denial of fundamental civil rights imposes on its victims a 'form of stigma so severe' that it is akin to marking them as a legally inferior group (i.e., a badge of slavery)." App.14a (Ikuta, J., dissenting) (quoting *City of Memphis v. Greene*, 451 U.S. 100, 128 (1981)).

This Court has most often characterized these fundamental rights in terms of equality in the economic and legal spheres, including "'the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and

convey property, as is enjoyed by white citizens.'" *Id.* (quoting *Civil Rights Cases*, 109 U.S. at 22). In the *Civil Rights Cases*, for example, the question presented was whether the Thirteenth Amendment authorized Congress to enact the Civil Rights Act of 1875, which required equal treatment in public accommodations. The Court concluded that the Civil Rights Act exceeded Congress's authority, reasoning that discrimination in public accommodations had "nothing to do with slavery or involuntary servitude." *Civil Rights Cases*, 109 U.S. at 24.

In contrast, the Court upheld a federal statute which outlawed peonage in *Bailey v. Alabama*, 219 U.S. 219, 240-43, 245 (1911). In finding that the anti-peonage statute was authorized by the Thirteenth Amendment, the Court emphasized, "[t]here is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based." *Id.* at 240-43, 245. As *Bailey* summarized, the "plain intention" of the Thirteenth Amendment was

> to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude.

Id. at 241.

Building on its decision in *Bailey* regarding freedom of labor, this Court again addressed economic freedoms and the Thirteenth Amendment in *Jones*. *See Jones*, 392 U.S. at 412-13. There, the Court considered the constitutionality of 42 U.S.C. § 1982,

which provides that all citizens have the same right "to inherit, purchase, lease, sell, hold, and convey real and personal property." The *Jones* Court found that § 1982 "bars all racial discrimination, private as well as public, in the sale or rental of property," and concluded that the statute was a valid exercise of Congress's power to enforce the Thirteenth Amendment. *Id.* at 412-13.

In support, the Court relied in part on the *Civil Rights Cases* to conclude that "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation." *Id.* at 440. At the same time, the *Jones* Court expressly relied on the statute's important role in protecting "fundamental rights," stating that whatever the badges and incidents of slavery may encompass, they include restraints on "those fundamental rights which are the essence of civil freedom," including the right "to inherit, purchase, lease, sell, and convey property." *Id.* at 441.

This Court's recognition in *Jones* that Congress has authority to protect "fundamental rights that are the essence of civil freedom" is fully consistent with its prior Thirteenth Amendment holdings in the *Civil Rights Cases* and *Bailey*. Indeed, the *Jones* Court repeatedly emphasized the economic nature of the harms targeted by the Thirteenth Amendment. *Id.* at 430 (noting intention to redress economic disparities); *id.* at 432-33 (citing comments of Sen. Trumbull stating that Civil Rights Act targeted economic discrimination).

As this history makes plain, *Jones* does not provide Congress with effectively boundless authority to pass antidiscrimination legislation, but instead requires Congress to demonstrate that there is a rational relationship between the legislation and the protection of fundamental rights of civil freedom. *Id.* at 441. Thus, as Judge Ikuta concluded, *Jones* cannot be viewed as "empower[ing] Congress to address all modern forms of injustice, or even all modern manifestations of racial bias" as "badges" or "incidents" of slavery. App.16a (Ikuta, J., dissenting) (citation omitted). Instead, as *Jones* itself recognized, Congress's determination that something is a badge or incident of slavery must bear a sufficient relationship to "the constitutional right at issue—the right to 'universal civil freedom,' via the eradication of slavery and involuntary servitude." *Id.* (quoting *Bailey*, 219 U.S. at 241). Indeed, this Court "has never considered that the 'badges or incidents' went beyond a lack of these fundamental rights." App.14a (citation and quotation marks omitted).

This Court again recognized this core aspect of Congress's "badges and incident" authority in *Griffin*, where the Court addressed the constitutionality of 42 U.S.C. § 1985(3). 403 U.S. at 90. That statute criminalizes conspiratorial, racially discriminatory private actions using "force, violence and intimidation" to deprive individuals of basic rights, "including but not limited to their rights to freedom of speech, movement, association and assembly; their right to petition their government for redress of their grievances; their rights to be secure in their persons and their homes; and their rights not to be enslaved nor deprived of life and liberty other than by due process of law." *Id.* The *Griffin* Court held

that such an action "is a badge or incident of slavery," while making clear that the purpose of the action must have been to "depriv[e] [citizens] of the basic rights that the law secures to all free men." *Id.* at 105; App.16a (Ikuta, J., dissenting).

Thus, while "the varieties of private conduct that [Congress] may make criminally punishable or civilly remediable extend far beyond the actual imposition of slavery or involuntary servitude," *Griffin*, 403 U.S. at 105, that power is not unlimited, because "not every act of private discrimination or violence—however ugly it might be—is a badge or incident of slavery," App.15a (Ikuta, J., dissenting).

II. Under this Court's precedent, § 249(a)(1) lacks a rational relationship to slavery, involuntary servitude, or the "badges and incidents" of slavery, because it has no nexus to federally protected rights.

A. This Court's Thirteenth Amendment precedent makes clear that § 249(a)(1) fails rational basis review.

"[A]ny legislation enacted by Congress [under the Thirteenth Amendment] must be at least rationally related to remedying a violation of the right to be free from slavery and involuntary servitude." App.13a (Ikuta, J., dissenting) (citing *Nw. Austin Mun. Util. Dist. v. Holder*, 557 U.S. 193, 204 (2009)). Section 249(a)(1) does not bear this rational relationship, because the statute prohibits private discriminatory violence committed without any intent to deprive individuals of the rights of citizenship or to interfere with economic freedoms. It thus exceeds Congress's prophylactic power. App.16a-19a.

The conduct criminalized by § 249(a)(1) is willfully causing or attempting to cause bodily injury to a person because of that person's protected characteristic (race, color, religion, or national origin). Thus, the question is whether Congress could rationally determine that an assault or battery is a badge or incident of slavery, "solely because the perpetrator committed the crime on account of the victim's protected characteristic." App.16a.

Applying this Court's precedent, "this type of conduct is not a badge or incident of slavery." *Id.* "Assault or battery that is carried out due to animus against persons with a protected characteristic is akin to mere private discrimination, which the Court has long made clear is not a badge or incident of slavery." *Id.* (citing *Civil Rights Cases*, 109 U.S. at 25). "Such a crime is unlike violence intended to deprive persons of their fundamental rights as citizens, which the Supreme Court held was a badge or incident of slavery in *Griffin*." *Id.* (citing *Griffin*, 403 U.S. at 105). As Judge Ikuta concluded, § 249(a)(1) "lacks the key element of § 1985(3)," the statute considered in *Griffin*, "in that it does not require the government to show that the purpose of the assault or battery was to deprive the victim of the fundamental civil rights of citizenship." *Id.*

This Court's Thirteenth Amendment jurisprudence makes clear that § 249(a)(1) "is not rationally related to . . . the eradication of slavery and involuntary servitude." *Id.* As Judge Ikuta noted, "[t]here is no constitutional right to be free from private acts of violence, even if they are committed due to a discriminatory motive." *Id.* To the contrary, Congress does not possess a general federal police power, and the

suppression of violent crime and vindication of its victims is a quintessential example of state police power. App.17a (citing *Lopez*, 514 U.S. at 564 and *Morrison*, 529 U.S. at 618).

Here, the court of appeals upheld the constitutionality of § 249(a)(1) based in part on congressional findings supporting the legislation. App.9a. As Judge Ikuta concluded, however, Congress's findings, codified at 34 U.S.C. § 30501, *see supra* p.8, do not provide a basis to conclude "that the conduct criminalized by § 249(a)(1) is rationally related to eradicating slavery or involuntary servitude as a badge or incident of slavery." App.17a.

As Judge Ikuta recognized, "[s]lavery was historically enforced through legally sanctioned violence by masters against slaves or—once the former slaves were freed—through violence that was intended to prevent them from exercising their fundamental rights as citizens." *Id.* But Congress's findings do not explain how a general criminal prohibition against "racially motivated violence," "without an element requiring the government to prove a connection between such violence and the deprivation of civil rights, is addressed to either eradicating slavery or its badges and incidents." App.17a-18a. Similarly, with respect to the other forms of animus included within § 249(a)(1), Congress's findings do not "explain why the identification of certain individuals as members of groups with the same religion or national origin gives rise to a rational inference that private violence against such individuals relates to eradicating slavery or involuntary servitude, or constitutes a badge or incident of slavery." App.18a (discussing 34 U.S.C. § 30501(a)(8)).

Additionally, § 249(a)(1) must be found unconstitutionally overbroad, because defendants have been charged and convicted under the statute even where the victims did not belong to any demographic group that had ever "experienced or been at risk of slavery in this country." App.17a (citing, *inter alia*, *Cannon*, 750 F.3d at 512 (Elrod, J., concurring)). In one pending appeal in the Ninth Circuit, for example, the defendants are native Hawaiians who were convicted of assaulting a white man. *See United States v. Alo-Kaonohi*, No. 23-373 (9th Cir.).

Against that backdrop, and in light of clear Supreme Court precedent, there is no rational basis for Congress to determine "that private violence, which is motivated by neither a master-servant relationship between the perpetrator and victim nor a desire to deprive the victim of the fundamental rights of a free citizen, is a badge or incident of slavery." App.16a-17a (Ikuta, J., dissenting). Indeed, as Judge Elrod cautioned in her concurrence in *Cannon*, "the plain language of § 249(a)(1) has the power to implicate vast swaths of activities that do not relate to removing the 'badges' and 'incidents' of slavery as the terms were originally understood." *Cannon*, 750 F.3d at 512 (Elrod, J., concurring).

The unwarranted incursion of § 249(a)(1) in the context of this traditional state power is all the more pronounced given that assaultive conduct is already a violation of state law. Moreover, when § 249(a)(1) was enacted, 45 states and the District of Columbia already had laws punishing hate crimes. *See* H.R.Rep.

No. 111-86, Pt. 1, at 39, 42, 44 (2009) (Dissenting Views).[3]

And the breadth of the federal government's new power is profound, encompassing even the power to put a man to death. Indeed, the government has used this new power to threaten or secure death sentences in numerous recent cases involving mass shootings. Significantly, defendants in two high-profile federal "hate crime" cases, Dylann Roof and Robert Bowers, received death sentences based in part on their convictions for murder with a firearm in violation of § 249(a)(1) and appurtenant gun crimes under 18 U.S.C. §§ 924(c) and(j).[4] The government is now seeking the death penalty for Payton Gendron on the same theory.[5] And Patrick Crusius pled guilty to federal hate crimes under § 249 in exchange for a life sentence, in order to avoid the death penalty.[6]

This troubling backdrop calls to mind this Court's cautionary observation in *Lopez*, that "[w]hen

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[3] Indeed, Hougen himself was initially charged in state court with misdemeanor interference with civil rights by force and felony assault with a deadly weapon, but those charges were dismissed in favor of federal prosecution.

[4] https://www.justice.gov/usao-sc/file/632581/download (Roof indictment) (visited Jan. 27, 2024); https://www.justice.gov/usao-wdpa/vw/us-v-bowers (Bowers press release and indictment) (visited Jan. 27, 2024).

[5] https://www.justice.gov/opa/pr/federal-grand-jury-indicts-accused-tops-shooter-federal-hate-crimes-and-firearms-charges (Gendron press release) (visited Jan. 27, 2024).

[6] https://www.justice.gov/opa/pr/texas-man-pleads-guilty-90-federal-hate-crimes-and-firearms-violations-august-2019-mass (Crusius press release) (visited Jan. 27, 2024).

Congress criminalizes conduct already denounced as criminal by the States, it effects a change in the sensitive relation between federal and state criminal jurisdiction." *Lopez*, 514 U.S. at 561 n.3 (quotation marks omitted). Indeed, as this Court emphasized in *Morrison*, "we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Morrison*, 529 U.S. at 661 n.8; *see also Cannon*, 750 F.3d at 512 (Elrod, J., concurring) ("The Supreme Court has cautioned against such expansions of federal law into areas, like police power, that are the historical prerogative of the states.").

Here, with limited analysis, the court of appeals upheld § 249(a)(1) under an expansive view of Congress's Thirteenth Amendment authority, relying in part on the holdings of other circuits citing *Jones*. App.9a-10a. But *Jones* itself recognized that Congress must seek to protect fundamental civil rights in order for Thirteenth Amendment legislation to pass constitutional muster. *Jones*, 392 U.S. at 441. The circuits upholding § 249(a)(1) have thus far ignored this core requirement.

The Tenth Circuit's decision in *Hatch*, for example, reflects this expansive view, stating that after *Jones*, "the Thirteenth Amendment can be seen as treating most forms of racial discrimination as badges and incidents of slavery," and concluding that "Congress not only has the power to enforce the amendment, but also to a certain extent to define its meaning." *Hatch*, 722 F.3d at 1200. *Hatch* then found federal authority to prohibit racial violence under the following reasoning:

> Just as master-on-slave violence was intended to enforce the social and racial superiority of the attacker and the relative powerlessness of the victim, Congress could conceive that modern racially motivated violence communicates to the victim that he or she must remain in a subservient position, unworthy of the decency afforded to other races.

Id. Thus, according to *Hatch*, "Congress could rationally conclude that physically attacking a person of a particular race because of animus toward or a desire to assert superiority over that race is a badge or incident of slavery." *Id.*

The Fifth Circuit's analysis in *Cannon* is similarly broad. There, the court of appeals observed that "racially motivated violence was essential to the enslavement of African–Americans and was widely employed after the Civil War in an attempt to return African–Americans to a position of de facto enslavement." *Cannon*, 750 F.3d at 502. The *Cannon* court then concluded that "[i]n light of these facts, we cannot say that Congress was irrational in determining that racially motivated violence is a badge or incident of slavery." *Id.*[7]

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[7] Other circuits have similarly upheld § 249(a)(1) on grounds that Congress has authority under *Jones* to rationally determine what are the badges and incidents of slavery, and rationally determined that racially motivated violence constitutes a badge and incident of slavery. *See, e.g., United States v. Metcalf*, 881 F.3d 641, 644-45 (8th Cir. 2018); *United States v. Roof*, 10 F.4th 314, 391-92 (4th Cir. 2021); *United States v. Diggins*, 36 F.4th 302, 306-11 (1st Cir. 2022).

Neither *Hatch* nor *Cannon*, or any of the circuits that have considered the issue, have required any nexus between the discriminatory violence prohibited by § 249(a)(1) and interference with federally protected rights. The frameworks endorsed by these courts of appeals cannot constitute meaningful tailoring under this Court's more limited understanding of the "badges" and "incidents" of slavery. *See, e.g., Griffin*, 403 U.S. at 90.

Notably, the Ninth Circuit here also appears to have misunderstood the elements of § 249(a)(1). In concluding that the statute satisfied rational basis review, the panel majority characterized § 249(a)(1) as "similar" to another federal criminal statute that the Ninth Circuit had previously upheld against another Thirteenth Amendment challenge, 18 U.S.C. § 245(b)(2)(B). App.10a. According to the panel majority, § 249(a)(1) "track[s]" § 245(b)(2)(B). App.11a.

Quite to the contrary, these statutes do *not* track each other in the key respect that matters here. Section 245(b)(2)(B), unlike § 249(a)(1), requires that the defendant's conduct occurred "because [the person] is or has been . . . participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof." Thus, as Judge Ikuta's dissent explains, App.18a, these statutes are not at all "similar" for purposes of this Court's Thirteenth Amendment jurisprudence: unlike § 249(a)(1), § 245(b)(2)(B) expressly "protect[s] against the interference with federally protected rights on the basis of race and religion." *United States v. Allen*, 341 F.3d 870, 873 (9th Cir. 2003). Section 249(a)(1), by contrast, lacks the "crucial component" found in § 245(b)(2)(B) that re-

quires interference with federally protected rights. App.18a (Ikuta, J., dissenting).

In sum, the lower courts have uniformly erred in taking broad language in *Jones* out of context to uphold § 249(a)(1) under an overly expansive view of Congress's Thirteenth Amendment authority. *Compare Lopez*, 514 U.S. at 567 (recognizing that the Court's prior Commerce Clause cases had "giv[en] great deference to congressional action," and that "[t]he broad language in these opinions has suggested the possibility of additional expansion," but declining "to proceed any further"). "Because § 249(a)(1) bears no rational relationship to any determination that the conduct it criminalizes is a badge or incident of slavery, the law fails to implement the 'substantive guarantee' of the Thirteenth Amendment." App.17a (Ikuta, J., dissenting) (quoting *Tennessee v. Lane*, 541 U.S. 509, 518 (2004)).

B. This Court's Thirteenth Amendment precedent must be read consistently with its Fourteenth and Fifteenth Amendment precedent.

This Court's holding *Jones* must also be read consistently with the Court's more recent holdings in the context of the Fourteenth and Fifteenth Amendments. The Tenth Circuit in *Hatch*, for example, noted that given the shared history and structure of all three Reconstruction Amendments, this Court's precedent regarding the Fourteenth and Fifteenth Amendments may require revisiting the approaches of the courts of appeals to *Jones*. *See Hatch*, 722 F.3d at 1204.

In the Court's recent cases, in light of principles of federalism and separation of powers, the Court has placed important limits on Congress's enforcement authority under the Fourteenth and Fifteenth Amendments. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 529 (1997), *superseded by statute as stated in Holt v. Hobbs*, 574 U.S. 352 (2015) (construing the Fourteenth Amendment); *Shelby County, Ala. v. Holder*, 570 U.S. 529 (2013) (construing the Fifteenth Amendment).

All three Amendments were ratified between 1865 and 1870 in the wake of the Civil War. Although each Amendment provides unique powers, they also share "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." *Slaughter–House Cases*, 83 U.S. 36, 67 (1872)). That "unity of purpose" was to confront slavery, and the atrocious practices associated with it. *Id.* at 67, 71-72.

Additionally, "[u]sing nearly identical language, each Amendment provides Congress with the power to enforce its provisions through appropriate legislation." *Cannon*, 750 F.3d at 510 (Elrod, J., concurring). As Judge Ikuta explained in her dissent, all three Amendments are subject to the same limiting principle that "'prophylactic legislation designed to enforce'" them must be an appropriate remedy for "'identified constitutional violations'" under their substantive provisions. App.12a (Ikuta, J., dissenting) (citations omitted). That prophylactic legislation may not "chang[e] what the right is." *Flores*, 521 U.S. at 519. In the context of the Fourteenth Amendment, the remedy must be "congruent and proportional" to

the harm, *id.* at 520; in the context of the Fifteenth Amendment, the remedy must be justified by evidence of current discrimination, *Shelby County*, 570 U.S. at 551-53.

As this Court held in *Shelby County*, statutes that impose "current burdens" "must be justified by current needs." *Shelby County*, 570 U.S. at 556 (quotation marks omitted). Thus, the Court held that Congress could not rely on "decades-old data and eradicated practices" to determine which jurisdictions are subject to the Voting Rights Act's preclearance requirement. *Id.* at 551. Instead, principles of federalism required proof of "current needs," both to "preserve the integrity, dignity, and residual sovereignty of the States," and to secure "liberties that derive from the diffusion of sovereign power." *Id.* at 553 (quotation marks omitted).

In light of *Shelby County*, courts and commentators have expressed concerns regarding the lack of sufficient findings by Congress in enacting the Shepard-Byrd Act. *See, e.g., Cannon*, 750 F.3d at 509-14 (Elrod, J., concurring) (discussing legislative history and noting tension between *Jones* and *Shelby County*). As Judge Elrod explained, "[i]n 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." *Id.* at 510. In *Shelby County*, this Court found similar congressional findings insufficient. *See* 570 U.S. at 547-49, 553-54.

Courts have also expressed concerns regarding § 249(a)(1) in light of *Flores*. In *Flores*, this Court addressed whether the Religious Freedom Restoration

Act of 1993 ("RFRA") was within the scope of Congress's power under the remedial language of the Fourteenth Amendment (which is identical to the Thirteenth's). In RFRA, Congress sought to abrogate a prior decision of this Court that allowed the government to regulate religious practices even where the governmental interest was not compelling. *Flores*, 521 U.S. at 514, 532. *Flores* found that RFRA exceeded Congress's remedial power because it "alter[ed] the meaning of the Free Exercise Clause." *Flores*, 521 U.S. at 519.

As the Court explained, Congress "has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." *Id.* Otherwise, "[s]hifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process" contained in the Constitution. *Id.* Accordingly, under the remedial provision of the Fourteenth Amendment, Congress's power is "corrective or preventive, not definitional." *Id.* at 525. *Flores* also addressed the relationship between the means and ends of remedial measures, holding that "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520.

Jurists in several courts have expressed concern that, in conflict with *Flores*, the jurisdictional basis for § 249(a)(1) depends upon Congress' interpretation of the scope of its own authority to enforce the Thirteenth Amendment. *See, e.g., Hatch*, 722 F.3d at 1200 ("this interpretation gives Congress the power to define the meaning of the Constitution—a rare power indeed"); *Cannon*, 750 F.3d at 505 (Elrod, J., concurring) (stating that *Jones* allows Congress to

follow a "self-imposed limit," and expressing concern that Congress's powers are constrained only by Congress).

Thus, as Judge Elrod summarized in her concurrence in *Cannon*,

> there is a growing tension between the Supreme Court's precedent regarding the scope of Congress's powers under § 2 of the Thirteenth Amendment 1 and the Supreme Court's subsequent decisions regarding the other Reconstruction Amendments and the Commerce Clause. . . . In my view, we 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); *compare Roof*, 10 F.4th at 392-93 (holding that *Flores* and *Shelby County* are not applicable to Thirteenth Amendment legislation "absent clear direction from the Supreme Court"); *Metcalf*, 881 F.3d at 645 (agreeing with *Hatch* and *Cannon* that "*Jones* remains binding precedent that we must follow"); *contra Diggins*, 36 F.4th at 312-17.

In sum, in order to harmonize this Court's precedent involving the three Reconstruction Amendments, this Court should grant certiorari and clarify that the Thirteenth Amendment also requires meaningful means-end testing.

III. *Kozminski* supports a narrowing view of Congress's "badges" and "incidents" authority.

In the criminal context, this Court has held that the Thirteenth Amendment should be viewed through a "narrow" lens. *See United States v. Kozminski*, 487 U.S. 931, 941 (1988). *Kozminski* provides further support for the conclusion that Congress's "badges" and "incidents" authority must be subject to meaningful limits, and tied to interference with federally protected rights.

In *Kozminski*, this Court considered two other criminal statutes enacted pursuant to the Thirteenth Amendment, 18 U.S.C. §§ 241 and 1584, which criminalized compulsion of labor. *Id.* at 934. In determining the scope of § 241, the Court viewed the Thirteenth Amendment through a "narrow" window. *Id.* at 944 ("[v]iewing the [Thirteenth] Amendment . . . through the narrow window that is appropriate in applying § 241"). The Court held that as a matter of statutory construction, those statutes did not prohibit compulsion of labor through psychological coercion, rather than physical or legal coercion. *Id.* at 941 The Court emphasized that a broader interpretation would risk "criminaliz[ing] a broad range of day-to-day activity," and lack objective standards for determining when enslavement has occurred. *Id.* at 949-50.

When read together, this Court's Thirteenth, Fourteenth, and Fifteenth Amendment precedents, together with the Court's "narrow" reading of the Thirteenth Amendment in *Kozminski*, demonstrate that Congress's "badges" and "incidents" authority must be tied to the protection of the fundamental rights of citizenship. An overly broad reading of Con-

gress's authority would impermissibly "delegate to prosecutors and juries the inherently legislative task of determining what type of . . . activities are so morally reprehensible that they should be punished as [federal hate] crimes." *Id.* at 949. Accordingly, the courts of appeals have uniformly erred in relying solely on this Court's isolated statement in *Jones* – that Congress has authority to determine what are the "badges" and "incidents" of slavery – to abandon the judiciary's role in interpreting the Constitution, and transfer that function to Congress and the government.

Here, the court of appeals addressed *Kozminski* using fundamentally flawed reasoning. The majority asserted that *Kozminski*, in dicta, "affirmed that *Jones* governs" the question before the court. App.10a. But *Kozminski* did no such thing. In fact, the majority cited Justice Brennan's *concurrence* in *Kozminski* as evidence for that claim. App.10a (citing *Kozminski*, 487 U.S. at 962 n.8) (Brennan J., concurring)). The opinion of the majority in *Kozminski*, by contrast, did not reference *Jones*. Moreover, even Justice Brennan's concurrence emphasized that *Jones* was a civil case, while criminal statutes "must be interpreted to conform with special doctrines concerning notice, vagueness, and the rule of lenity." *Kozminski*, 487 U.S. at 962 n.8 (Brennan, J., concurring).

Here, interpreting Congress's "badges" and "incidents" authority to require proof of interference with federally protected rights would serve an important narrowing function, as this Court required in *Kozminski*. Otherwise, a wide range of conduct that is already criminalized by the States – including

spontaneous fights and assaults involving the use of racial epithets – may be federally criminalized, and defendants convicted of murder under the statute may even be put to death, without any tie to Congress's authority to outlaw "slavery," and without objective standards for determining when the conduct constitutes a true "badge" or "incident" of slavery.

By drafting § 249(a)(1) to encompass isolated, private acts of racially motivated violence with no link to any condition of servitude or exercise of civil rights, Congress impermissibly "redefined the Thirteenth Amendment's substantive guarantee—to eradicate slavery and involuntary servitude—as a guarantee of protection against any private violence by a person with discriminatory animus." App.19a. As such, the statute is not "'appropriate prophylactic legislation.'" *Id.* (citing *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 728 (2003)). Accordingly, Hougen's "'conviction under this statute must be reversed as the statute is unconstitutional.'" *Id.* (quoting *Cox v. Louisiana*, 379 U.S. 536, 552 (1965)).

IV. This Court should review the decision below.

Judging the constitutionality of a federal statute is "the gravest and most delicate duty that this Court is called on to perform." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927). While the circuits have not yet split on the constitutionality of § 249(a)(1), jurists and commentators have called for this Court's intervention, and Judge Ikuta has now concluded in

a published dissent that the statute is unconstitutional.[8]

This Court's review is warranted because the courts of appeals have upheld § 249(a)(1) based on reasoning that fundamentally conflicts with this Court's authorities construing the Thirteenth Amendment, and which fails to account for this Court's recent pronouncements regarding the other two Reconstruction Amendments. Moreover, the question presented is exceptionally important: whether Congress has authority to displace the States' traditional exercise of their police power by criminalizing private, isolated "hate crimes" that have no demonstrated nexus to federally protected rights.

Hougen's case is also an excellent vehicle to address the questions presented. First, the question of § 249(a)(1)'s constitutionality is a matter of federal law that only this Court can finally resolve. Second, the facts are largely undisputed, involving a single defendant and a single victim. The evidence of animus in the charged conduct is also straightforward, arising solely from Hougen's repeated use of a racial slur during the charged offense. Third, the Ninth Circuit passed upon all the legal arguments at issue, so there are no questions of preservation. Finally,

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[8] In the context of federal criminal statutes, this Court has granted certiorari even in the absence of a circuit split, including in two cases now pending before the Court. *See, e.g., United States v. Rahimi*, No. 22-915 (constitutionality of 18 U.S.C. § 922(g)(8)); *Fischer v. United States*, No. 23-5572 (construction of 18 U.S.C. § 1512(c)).

Hougen's case also neatly presents the federalism question, given that he was initially charged in state court with interference with civil rights by force.

Certiorari is also warranted because the enforcement tool that § 249(a)(1) provides the government is both extremely broad and exceedingly powerful. With respect to its breadth, the government has even prosecuted assaults against white victims under § 249(a)(1). With respect to the statute's power, the federal government can now prosecute, convict, and execute a defendant on the theory that a murder motivated by discriminatory animus is a "badge" of slavery.

In conclusion, as this Court's precedent makes clear, Congress does not possess the authority to prohibit isolated, private acts of discriminatory violence in the absence of interference with federally protected rights. The novel theory that such violence is a "badge" or "incident" of slavery, which this Court has never approved, and which has no support in either the text or history of the Thirteenth Amendment, warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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