No. _____

In The Supreme Court of the United States

MARY A. HARRIS,

Petitioner,

v.

MONROE COUNTY PUBLIC LIBRARY BOARD OF TRUSTEES, ET AL.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the Equal Protection Clause of the 14th Amendment of the United States Constitution permit race retaliation claims?

PARTIES TO THE PROCEEDING

MARY A. HARRIS,
Petitioner,

versus

MONROE COUNTY PUBLIC LIBRARY BOARD OF TRUSTEES, MONROE COUNTY COMMISSION, ANN PRIDGEN, In her Individual and Official Capacity, SHANNON POWELL, In her Individual and Official Capacity, JEROME SANDERS, In his Individual and Official Capacity, STEVE STACEY, In his Individual and Official Capacity,
Respondents.

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The opinion of the United States Court of Appeals for the Eleventh Circuit, Pet. App. A1, is available at No. 22-11236, 2023 WL 6866602. The opinion of the United States District Court for the Southern District of Alabama, Pet. App. A21. 2022 WL 814642

JURISDICTION

The Eleventh Circuit entered judgment on October 18, 2023. Pet. App. A1. On January 9, 2024 Justice Thomas extended the time to file this petition for a writ of certiorari to and including February 15, 2024. 23A634. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Equal Protection Clause, Section 1 of the Fourteenth Amendment, provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

2. Section 1983 of Title 42 of the United States Code provides, in pertinent part, that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Civil Rights Act of 1871, also known as the Ku Klux Klan Act codified at 42 § 1983.

STATEMENT OF THE CASE

A. Factual Background

After working over 30 years for the county library, Mary Harris, the Interim Librarian for Monroe County, Alabama, filed an EEOC charge which included objecting to a celebration of Confederate Memorial Day held at the county library.[1] Confederate Memorial Day is one of three statutory Alabama state holidays in commemoration of the Confederacy.

The event flier promoting Confederate History Month invited participants to, "Celebrate Confederate Memorial Day with the Sons of Confederate Veterans, Camp 1610, of Monroe County."

The event was organized by a newly appointed Monroeville County Library Board Member who was also a Past Commander in the Sons of the

[1] In the District Court, Harris challenged the Board's refusal to appoint Harris as the Librarian without the "Interim" designation. Harris served as the Interim Librarian for over 18 months and the Board would not promote her. Harris would have been the first Black Librarian in county history.

> Confederate Veterans. This was the first time a Confederate Memorial Day event was being held at the library. Membership in the Sons of the Confederate Veterans ["SCV"] is restricted to the direct male descendants of the Confederate States of America Army Members. The Board Member and former Commander explained, "Those are descendants of men who served in the Confederate Army". Pet. App. A4 The organization is divided into camps, has commanders, and holds regular meetings.

For the Monroeville Library Confederate Memorial Event, the public was invited to hear two lectures, one discussing the battle tactics of General Nathan Bedford Forest who later became the first Grand Wizard of the KKK.

The organizing Board Member and SCV Commander contended as a library event was held for Black History Month, a program dedicated to Confederate Memorial Day in conjunction with Confederate History Month was appropriate. Community members were offended by the celebration of Confederate Memorial Day event held at the library. The program was attended by approximately 70 people, there is a disagreement on how many attendees were men or women.

Harris's EEOC charge included her objections to the confederacy celebration held at the library. The Board received the charge, took offense to Harris's allegations, and promptly terminated her employment:

"Mrs. Harris when we received the EEOC complaint and read where you stated that there were 70 known affiliates of the KKK present, we were shocked. Women cannot be members of the KKK. The individuals that attended the program, mostly women, are upset and angry they are planning to seek legal recourse for defamation of character. A lot of these individuals are business owners in our community and some of them they were your friend. Therefore, we (the board) have no choice but to terminate your employment effective today. You will need to get your personal belongings before you leave along with your key. You will be paid for the month of September." Pet App. A25

Harris's 30 plus year career working at the Monroe County Public Library ended.

B. <u>Procedural History</u>

Following receipt of her Notice of Right to Sue from the EEOC Harris filed a lawsuit naming the Monroe County Commission (who appoints the library board), the Monroe County Public Library Board of Trustees , and the individual Board Members including claims pursuant to 42 U.S.C. § 1981, 14th Amendment, §1983, Age Discrimination in Employment Act and Title VII claims.

All defendants moved to dismiss.

The Monroe County Commission moved to dismiss based on respondent superior and that a single or joint employer doctrine did not apply. Without the County Commission, the library board

did not employ enough persons to satisfy the minimum number of employees for Title VII jurisdiction. The Magistrate's Report and Recommendation dismissed the §1981 claims and the County Commission as a defendant. After objections, the Magistrate R&R was affirmed. Following the filing of a Second Amended Complaint and resolving objections to that complaint, the case proceeded against the Library Board and the individual Board Members. After discovery, the remaining defendants moved for summary judgment.

The District Court granted summary judgment. Pet App. A17. The ruling reflected there was no discrimination as a matter of law in violation of the Due Process or the Equal Protection Clause which does not preclude retaliation.

In a per curium opinion the 11th Circuit Court of Appeals affirmed. Pet App. A1

With respect to the Equal Protection discrimination claim, the Court of Appeals found that Harris's argument that her termination letter qualified as "direct" evidence failed and that on appeal Harris failed to re-argue indirect evidence to establish a convincing mosaic of discrimination.

With respect to Equal Protection Retaliation, the Court of Appeals rejected that type of claim exists. Relying on *Watkins v. Bowden*, 105 F.3d 1344, 1354–55 (11th Cir. 1997), the Court held, "This claim fails because we have recognized that the Equal Protection Clause does not establish a

general right to be free from retaliation for making complaints of discrimination." Pet App. A15.

REASONS FOR GRANTING THE PETITION

I. Entrenched Circuit Split Whether Equal Protection Clause Permits Retaliation Claims

This case presents an excellent vehicle for resolving an open circuit fracture whether a retaliation remedy and in particular retaliation arising from race discrimination claims is permitted by the Equal Protection Clause found in Section 1 of the 14th Amendment. The Enforcement Act of 1871 (17 Stat. 13), also known as the Ku Klux Klan Act, Third Enforcement Act, codified as 42 USC § 1983 was to implement the promise of the 14th Amendment of the United States Constitution directed at the elimination of race discrimination following the Civil War.

Within the Eleventh Circuit, no Section 1983 retaliation protection exists for challenging race discrimination. Pet. App. A15. However, the Second Circuit provides robust Section 1983 retaliation protection stemming from prohibited discrimination. *Vega v. Hempstead Union Free School District,* 801 F.3d 72 (2015).

A Mason-Dixon line providing a Section 1983 federal retaliation remedy for those opposing race discrimination in Connecticut, New York, and Vermont while denying the same protection to

persons in Alabama, Georgia, Florida (and other states) cannot be read into the statute.

No reason exists to let the conflict ossify any further. According to Fourth Circuit's opinion in *Wilcox v. Lyons*, six other circuits read Equal Protection Clause in the same truncated manner:

"In reaching this conclusion, we join the vast majority of circuit courts to have considered the question. At least six of our sister circuits have held that the Equal Protection Clause cannot sustain a pure claim of retaliation. *See Thomas v. Indep. Twp.*, 463 F.3d 285, 298 n.6 (3d Cir. 2006) (retaliation for complaint of race discrimination); *Thompson v. City of Starkville*, 901 F.2d 456, 468 (5th Cir. 1990) (retaliation for complaints about improper promotions and misconduct by other police officers); *R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427, 439–440 (6th Cir. 2005) (retaliation for complaint of police harassment); *Boyd*, 384 F.3d at 898 (retaliation for filing charges of race discrimination); *Yatvin*, 840 F.2d at 418 (retaliation ***462** for filing charges of sex discrimination); *Maldonado v. City of Altus*, 433 F.3d 1294, 1308 (10th Cir. 2006) (retaliation for complaint of national origin discrimination); *Teigen v. Renfrow*, 511 F.3d 1072, 1084–1086 (10th Cir. 2007) (retaliation for complaints about violations of state employment laws); *Watkins*, 105 F.3d at 1354 (retaliation for complaints of sexual and racial harassment); *see also Burton v. Ark. Sec'y of State*, 737 F.3d 1219, 1237 (8th Cir. 2013) (observing that other courts have rejected equal protection retaliation claims and concluding that "no clearly

established right exists under the *equal protection* clause to be free from retaliation" (internal quotation marks omitted)). And a host of district courts—both within our circuit[7] and beyond (including in circuits that have not yet resolved this question)[8]—have reached the same conclusion." *Wilcox v. Lyons*, 970 F.3d 452, 461–62 (4th Cir. 2020).[2]

The 9th Circuit is split on whether retaliation is prohibited by the Equal Protection Clause:

"Second, *Wilcox* was decided by the Fourth Circuit and thus is not binding on this Court. Further, unlike the Fourth Circuit, the Ninth Circuit appears to have recognized that such a claim may in fact exist. *See Thomas v. City of Beaverton*, 379 F.3d 802, 812–13 (9th Cir. 2004) (affirming summary judgment in favor of defendants because, "although there is evidence that the defendants retaliated against Plaintiff for opposing retaliation ... [,] there is insufficient evidence that any of the retaliation ... was motivated by racial animus"); *contra Garrett v. Governing Bd. of Oakland Unified Sch. Dist.*, No. 21-CV-03323-HSG, 2022 WL 344971, at *7 (N.D. Cal. Feb. 4, 2022) ("[I]t is undisputed that neither the U.S. Supreme Court nor the Ninth Circuit has recognized an Equal Protection Claim as viable

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[2] The Court declined to grant certiorari in *Wilcox v. Lyons*, an Equal Protection Clause retaliation challenge originating from sex discrimination complaints. *Wilcox v. Lyons*, 141 S. Ct. 2754, (2021).

under a retaliation theory like the one in this case.")"

Lilly v. Univ. of California-San Diego, No. 21-CV-1703 TWR (MSB), 2022 WL 11337682, at *9 (S.D. Cal. Oct. 19, 2022)

Harris's EEOC charge protested the failure to designate her as the Librarian as opposed to the Interim Librarian which she had had been serving as for longer than one year. The charge also included a description of her working conditions and specifically protested the Confederate celebration at the library. The Library Board of Trustees acknowledged receipt of her EEOC charge. Taking offense to the suggestion that KKK associates attended the SCV event and noting that women cannot be KKK members, the Library Board of Trustees terminated Harris's employment.

Confederate Memorial Day is not a recognized federal holiday. However, the state of Alabama celebrates three Confederate holidays: Robert E. Lee's Birthday, Confederate Memorial Day, and Jefferson Davis's Birthday. Ala. Code §1-3-8. By proclamation April is recognized as Confederate History Month.
https://governor.alabama.gov/assets/2019/04/Confederate-History-and-Heritage-Month.pdf

The termination decision dives head first into the history of the Equal Protection Act and the implementing statute. The Fourteenth Amendment and it's enforcement mechanism of Section 1983 proposed to eliminate discrimination at the state and local level. Celebrating Confederate Memorial Day,

a state holiday, as part of Confederate History Month for the first time at the county library raised questions from community members. Pet App. A5. The Library Board Member who was the event organizer and Past SCV Commander was unsympathetic to any objection. Id. Justice Scalia's concurrence in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 523, (1989) recognized that local officials may be prone to discrimination that the 14th amendment seeks to remedy, "What the record shows, in other words, is that racial discrimination against any group finds a more ready expression at the state and local than at the federal level. To the children of the Founding Fathers, this should come as no surprise."

The scope of the Equal Protection Clause to protect against race discrimination is intended to give a broad remedy for violations of federally protected civil rights. See *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 685, 98 S. Ct. 2018, 2033, 56 L. Ed. 2d 611 (1978) discussing the enactment of the Civil Right Act of 1871 which is now Section 1983.

Last term in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206, (2023), the Court re-emphasized, "Eliminating racial discrimination means eliminating all of it." Whether the Confederate Memorial Day library lecture delivered by an SCV Commander on the battle tactics of the Nathan Bedford Forest, first KKK Grand Wizard, qualified as a benign academic event, it nevertheless was promoted as a celebration of Confederate Memorial

Day and Confederate History Month. Pet. App. A5. Previously, Confederate Memorial Day or Confederate History Month was not celebrated at the county library. Harris's county sanctioned termination ("we the board…) for opposing the celebration of the state authorized Confederate Memorial Day holiday runs afoul of the Equal Protection clause. Race discrimination dressed up as retaliation is still race discrimination.

Sections 1981 and 1982 Prohibit Retaliation

Other Civil Rights statutes passed to effectuate the constitutional amendments arising from the Reconstruction era provide redress for proven retaliatory behavior and Section 1983 should not be treated differently.

42 U.S.C. § 1981 passed as the Civil Rights Act of 1866 was designed to eliminate race discrimination in contracts.

"A longstanding civil rights law, first enacted just after the Civil War, provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts ... as is enjoyed by white citizens." *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 445, (2008).

To effectuate the statutory purpose, the Court held, "The basic question before us is whether the provision encompasses a complaint of retaliation against a person who has complained about a violation of another person's contract-related "right."

We conclude that it does.'" *Id*.

42 U.S.C. § 1982 gives effect to the 13th amendment prohibiting involuntary servitude. In *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 412, 88 S. Ct. 2186, 2188, 20 L. Ed. 2d 1189 (1968), the Court held that a private right of action exists to acquire, hold and sell property. To effectuate that purpose, retaliation associated with those transactions is also prohibited. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237, 90 S. Ct. 400, 404, 24 L. Ed. 2d 386 (1969)(A white individual's community privileges revoked for transferring his interest to a black individual.)

In *CBOCS W* at 447 further explains *Sullivan*,

"The Court noted that to permit the corporation to punish Sullivan "for trying to vindicate the rights of minorities protected by § 1982" would give "impetus to the perpetuation of racial restrictions on property." then Sullivan is punished for trying to vindicate the rights of minorities. *Sullivan v. Little Hunting Park, Inc.,* 396 U.S. 229, 237 (1969) And this Court has made clear that *Sullivan* stands for the proposition that § 1982 encompasses retaliation claims." (cleaned up)

Neither Section 1981 nor Section 1982's statutory text include the word "retaliation". In *Jackson v. Birmingham Bd. of Educ.,* 544 U.S. 167, 173–74 (2005), Justice O' Connor writing for the Court expressed that, "Retaliation is, by definition, an intentional *174 act. It is a form of

"discrimination" because the complainant is being subjected to differential treatment".

> "Retaliation for Jackson's advocacy of the rights of the girls' basketball team in this case is "discrimination" "on the basis of sex," just as retaliation for advocacy on behalf of a black lessee in *Sullivan* was discrimination on the basis of race." *Jackson v. Birmingham Bd. of Educ.* at 176–77).

In three different centuries the Supreme Court has not hesitated to enforce the broad reach of 14th Amendment's Equal Protection Clause to address race discrimination. See *Strauder v. State of W. Virginia*, 100 U.S. 303, 310, (1879), *abrogated by Taylor v. Louisiana*, 419 U.S. 522 (1975) "**The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible.**" (emphasis added); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 669, 86 S. Ct. 1079, 1083, 16 L. Ed. 2d 169 (1966)

"Likewise,the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights." (emphasis added) and most recently in *Students for Fair Admissions, Inc* at 206, "We have recognized that repeatedly. "The clear and central purpose of the Fourteenth

Amendment was to eliminate all official state sources of invidious racial discrimination in the States."

Capitalizing on Confederate History month and Alabama's statutory designation of Confederate Memorial Day, a celebration was held at the library to which Harris objected and was subsequently terminated by the Monroe County Public Library Board of Trustees. She should have an Equal Protection remedy.

Incorporating protection from retaliation undergirded by race discrimination claims into the Equal Protection clause is entirely consistent with the purpose and meaning of the 14th Amendment and the implementing statute. This Court should accept the petition and provide 11th Circuit residents the same constitutional protections and remedies as persons who live in the 2nd Circuit.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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