No. 18-1171

In the Supreme Court of the United States

COMCAST CORPORATION,

Petitioner,

v.

NATIONAL ASSOCIATION OF AFRICAN AMERICAN-OWNED MEDIA AND ENTERTAINMENT STUDIOS NETWORKS, INC.,

Respondents.

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

LAW AND HISTORY PROFESSORS' BRIEF AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI*[*]

The *amici* are professors of history and law who share a scholarly focus on the Reconstruction Era. They appear solely as individuals and not on behalf of any institution with which they are affiliated. They represent neither party.

IDENTITY OF THE *AMICI*

The *amici* are listed in the Appendix.

[*] The parties have consented to the filing of this brief. No counsel to a party in this case authored this brief in whole or in part. No party or party's counsel made any monetary contribution that was intended to or did fund the preparation or submission of this brief. No person or entity other than the *amici* and their counsel made any monetary contribution that was intended to or did fund the preparation or submission of this brief. This brief should not be interpreted as representing the views of Yale Law School or Yale University.

SUMMARY OF ARGUMENT

Through the Civil Rights Act of 1866, the 39th Congress established broad protection for former slaves. Section 1, which is now 42 U.S.C. section 1981, explicitly sought to eliminate racial discrimination in contracts, no matter what the possible motivation.

Congress, acutely aware of the stringent Black Codes and violent depredations that freedmen faced in the immediate wake of the Civil War, used the 1866 Act to afford new, direct federal protection for "all persons born in the United States and not subject to a foreign power, excluding Indians not taxed," whom it "declared to be citizens of the United States." After thus directly rejecting the despised *Dred Scott* decision, Section 1 proceeded to list the basic rights of all United States citizens to be guaranteed, free of racial discrimination. The first right listed was the right "to make and enforce contracts."

Based entirely on the Thirteenth Amendment—the Fourteenth Amendment had not yet been promulgated—Section 1 enumerated rights that would guarantee all citizens "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

This Court recognized the vital protections within the 1866 Act in *Jones v. Alfred H. Mayer Co.* and subsequent decisions, and Congress underscored

their importance in the Civil Rights Act of 1991. Though the 39th Congress's broad vision rejecting racism has not prevailed consistently throughout the Nation's history, it remains a vital promise, as Abraham Lincoln put it, of "a new birth of freedom."

ARGUMENT

I

THE 1866 CIVIL RIGHTS ACT ENTAILED AN UNPRECEDENTED EXPANSION OF FEDERAL AUTHORITY TO GUARANTEE BASIC CIVIL RIGHTS

The Civil Rights Act of 1866, enacted under Section 2 of the Thirteenth Amendment, was unprecedented in its expansion of federal authority. Not surprisingly, in the wake of the bloody Civil War, the 39th Congress determined that the millions of newly freed slaves clearly needed federal protection. There had been symbolic acts: President Lincoln made a point of welcoming Frederick Douglass to the White House and to his second Inauguration, the House had a black man give its opening prayer, and the Supreme Court admitted its first black lawyer, John Rock, in February, 1865. In the wake of Appomattox, however, the former Confederate states quickly demonstrated their recalcitrance and bitter resistance to change. They enacted starkly onerous "Black Codes" that formally restricted the rights of African Americans to own property and to obtain gainful employment. Indeed, there were countless incidents of shooting and otherwise using force to re-

strain freedmen who dared to try to leave the plantations on which they had toiled.

Professor Eric Foner, who is the preeminent historian of Reconstruction, summarized the situation as follows:

> During Presidential Reconstruction—the period from 1865 to 1867 when Lincoln's successor, Andrew Johnson, gave the white South a free hand in determining the contours of Reconstruction—southern state governments enforced this view of black freedom by enacting notorious Black Codes, which denied blacks equality before the law and political rights, and imposed on them mandatory year-long labor contracts, coercive apprenticeship regulations, and criminal penalties for breach of contract.[1]

Mixed motives and entangled reasons to act are commonplace in politics, business, and most other realms. The Southerners, who aggressively sought to retain control over former slaves, as well as the men of the 39th Congress, who reacted to widely reported outrages against freedmen, were hardly an exception.[2] Andrew Johnson's strikingly different plan for

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[1] ERIC FONER, THE STORY OF AMERICAN FREEDOM 104 (1998).

[2] "By 1865, virtually all northerners agreed that property rights in man must be abrogated, contractual relations substituted for the discipline of the lash, and the mas-

Reconstruction pushed most Moderate Republicans to support the legislative agenda of their more Radical Republican colleagues, led by Thaddeus Stevens of Pennsylvania in the House and Charles Sumner of Massachusetts in the Senate. In February 1866, President Johnson identified them and antislavery stalwart Wendell Phillips as examples of traitors as bad if not worse than any in the South. With the form of Reconstruction very much in flux, this and other blunders by President Johnson helped convince Congress of the pressing need for powerful federal protection of the full and equal rights of former slaves and their allies.

Numerous reports of extensive violence against African Americans had reached the newspapers and the Congress.[3] Yet President Johnson's veto mes-

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ter's patriarchal authority over the former slaves abolished." *Id.*

Widespread Northern outrage greeted Black Codes such as that of Mississippi, which "required all blacks to possess, each January, written evidence of employment for the coming year. Laborers leaving their jobs before the contract expired would forfeit wages already earned, and, as under slavery, be subject to arrest by any white citizen." ANNETTE GORDON-REED, ANDREW JOHNSON 116 (2011) (quoting HANS L. TREFOUSSE, ANDREW JOHNSON 199 (1989)). *See also* LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 366-71 (1979).

[3] The best known was a report by General Carl Schurz, who was sent by President Andrew Johnson to investigate conditions in the South in the summer of 1865. Splitting with the President, Schurz reported shocking violence against former slaves and identified as the primary problem the unwillingness of whites to grant blacks their rights. Congress printed and distributed Schurz's Report on the Conditions in the South. Report of C. Schurz, S. Exec. Doc. No. 2, 39th Cong., 1st Sess. 2, 17-25

sage of the Civil Rights Act of 1866 made it abundantly clear that he emphatically did not share the congressional majority's view that a major change in federalism was needed.[4] To assure that the federal government would protect equal rights and that litigants who were discriminated against could remove cases to federal courts if state judges failed them, Congress passed the sweeping Civil Rights Act of 1866[5] by overriding a presidential veto, for the first time in American history on any major legislation. This was the opportunity long sought by many Republicans to enact their free labor ideology across the entire nation,[6] now clearly needed by the freed-

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(1865). *See* KENNETH STAMPP, THE ERA OF RECONSTRUCTION 73-75 (1965).

[4] President Johnson's unexpected veto of the Freedmen's Bureau Bill in February 1866 and his message refusing to consider the national aspect of the treatment of former slaves had "climacteric effects" on Congress, and the Senate failed to override his veto by a single vote. WILLIAM BROCK, AN AMERICAN CRISIS 106 (1963). *See also* E. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION 290 (1960); William M. Wiecek, *Emancipation and Civic Status: The American Experience, 1865-1915*, *in* THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 84-88 (Alexander Tsesis ed. 2010) [hereinafter Tsesis, *Promises of Liberty*].

[5] Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (1866).

[6] ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN (1970); Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437 (1989). For a fine recent study of changes in the free labor thought of John Ashley, the Ohio Republican Congressman who first proposed the Thirteenth Amendment, see REBECCA E. ZIETLOW, THE FORGOTTEN EMANCIPATOR: JOHN MITCHELL ASHLEY AND THE IDEOLOGICAL ORIGINS OF RECONSTRUCTION (2018). *See also, e.g.*, WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA,

men, as slave owners and their allies utilized private violence and coercion as well as state laws to deprive them of their basic civil rights.

II

CONGRESS INTENDED THE 1866 CIVIL RIGHTS ACT TO UTILIZE THE AUTHORITY OF THE FEDERAL GOVERNMENT, WHICH HAD SUPPORTED SLAVERY, AND INSTEAD TO VINDICATE THE CIVIL WAR VICTORY BY SPECIFYING AND PROTECTING THE RIGHT OF FORMER SLAVES TO BE TREATED EQUALLY

To read the brief 1866 statute in its entirety is to grasp what a sea change it entailed. From its first words, for example, Section 1 directly rejected the *Dred Scott v. Sandford* decision[7] as it declared: "That all persons born in the United States and not subject to a foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States." Section 1 then went on to list the rights of "such citizens, of every race and color" that were to be protected "in every State and Territory of the United States." Its enumeration of basic rights remains in the language of 42 U.S.C. sections 1981 and 1982; that list includes a fundamental guarantee of "full

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1760-1848 (1977); JAMES M. MCPHERSON, THE STRUGGLE FOR EQUALITY (1976); JACOBUS TENBROEK, EQUAL UNDER LAW (1965).

[7] 60 U.S. (19 How.) 393 (1857).

and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other."

Equal treatment and the full benefit of all laws became and remains a vital, albeit unrealized, promise. In contrast to later civil rights laws, the 1866 Civil Rights Act contained neither time limits nor clearly cabined guarantees. Indeed, Sections 2 and 3 of the original 1866 Act emphasized Congress's intent to assure that no "law, statute, ordinance, regulation, or custom, to the contrary" should be a barrier. These sections embodied a remarkable expansion of federal court jurisdiction. Though not all of its provisions have survived legislative revisions, the language of Section 1 remains intact, and was resuscitated in *Jones v. Alfred H. Mayer Co.*[8] and decisions that followed

The 39th Congress decided to "turn the artillery of slavery upon itself,"[9] as chairman of the House Judiciary Committee Representative James F. Wilson of Iowa stated. Wilson added that the goal sought was a federal guarantee of "the holy cause of liberty and just government,"[10] which Congress explicitly aimed at racial discrimination, no matter the

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[8] 392 U.S. 409 (1968).

[9] Cong. Globe, 39th Cong., 1st Sess. 1118 (1866).

[10] *Id. See generally* Alexander Tsesis, *The Thirteenth Amendment's Revolutionary Aims*, *in* Tsesis, *Promises of Liberty, supra* note 4, at 1; Michael Vorenberg, *Citizenship and the Thirteenth Amendment: Understanding the Deafening Silence, in* Tsesis, *Promises of Liberty, supra* note 4, at 58.

complexity of its causes or motivation. Neither slavery itself nor the early, horrific abuse of the freedmen that was extensively documented before Congress acted in 1866 can be said to have been limited to cases of "but for" discrimination. The Reconstruction Congress sought to create a means by which freedmen would be able to advance in society as far as their effort and skills allowed. This meant that contracting had to be equally open to the freedmen.[11] A core issue was to assure that aspects of the legacy of racial slavery did not remain in the law of contracts. As V.J. Voegeli put it, "[I]dealistic concern for the Negro was not an insignificant impulse shared only by a few men of noble intellect; rather, it was a compulsive and complex force that powerfully shaped the minds and actions of the racial reformers and of the great body of Republicans."[12]

Senator Lyman Trumbull of Illinois, who introduced the Civil Rights Act of 1866 and became its lead sponsor, proclaimed that the statute would assure that "the trumpet of freedom that we have been blowing throughout the land" would in fact protect "such fundamental rights as belong to every free person."[13] This guarantee, he explained, was "a Constitutional obligation imposed on us as a Government."[14] Trumbull, joined in speeches during the

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[11] Aviam Soifer, *Protecting Full and Equal Rights: The Floor and More*, *in* Tsesis, *Promises of Liberty, supra* note 4, at 197-206.

[12] V.J. VOEGELI, FREE BUT NOT EQUAL 119-20 (1967).

[13] Cong. Globe, 39th Cong., 1st Sess. 474.

[14] *Id.* at 323.

39th Congress by numerous other supporters of the bill, repeatedly emphasized the link between allegiance and protection, which he and others illustrated by citing the courageous service of black troops during the Civil War. The text of the entire Civil Rights Act of 1866 proclaimed the duty of federal officials and federal judges to protect those rights it specified, including its explicit reference to an affirmative duty to protect the right to be free of discrimination in all of Section 1's specification of basic rights.[15]

The egalitarian passion of the 39th Congress, which soon sought to "constitutionalize" 1866 Civil Rights Act by adopting Section 1 of the Fourteenth Amendment, did not survive the end of Reconstruction, Jim Crow, and innumerable additional manifestations of racism. Nonetheless, the 1866 Act enacted Congress's duty, because of the Thirteenth Amendment, to fully guarantee the civil rights of all citizens. As Senator Trumbull summarized, "Congress is bound to see that freedom is in fact secured to every person throughout the land. . . . [H]e must be fully protected in all his rights of person and property" (emphasis added).[16] This widespread sense of obligation ought to be the lodestar in construing the 39th Congress's statutory commitment to realize what Lincoln had termed a "New Birth of Freedom." Thus, for example, Chief Justice Chase, sitting on the Circuit Court for the District of Maryland in

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[15] GEORGE RUTHERGLEN, CIVIL RIGHTS IN THE SHADOW OF SLAVERY 31-60 (2013).

[16] Cong. Globe, 39th Cong., 1st Sess. 599.

1867, held that to treat differently a former slave who was apprenticed to her former owner for training in "the art or calling of a house servant" violated the "full and equal benefit" clause of section one of the Civil Rights Act of 1866.[17]

III

IN 1991, CONGRESS EMBRACED THIS COURT'S READING OF SECTION 1981 IN *JONES V. ALFRED H. MAYER CO.*, INCLUDING ITS PROMISE OF FULL AS WELL AS EQUAL CONTRACT RIGHTS

Although the Nation all too quickly moved away from enforcing its post-Civil War promises, Congress accepted a broad understanding of the Civil Rights Act of 1866 when it passed the Civil Rights Act of 1991.[18] The title of the relevant section of the 1991 Act could hardly be clearer: "Prohibition Against All Racial Discrimination in the Making and Enforcement of Contracts."[19] In fact, Section 1981(c) codifies the very interpretation of the 1866 Act that the Court adopted in *Jones v. Alfred H. Mayer Co.*, when it declared that the 1866 Act "must encompass every racially motivated refusal to sell or rent."[20] *Runyon*

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[17] *In re Turner*, 24 F. Cas. 337 (C.C.D. Md. 1867) (No.14,247). *See generally* Aviam Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979).

[18] Pub. L. No. 102-166, 105 Stat. 1071 (1991).

[19] *Id.* § 101.

[20] 392 U.S. at 421-22.

v. McCrary[21] and subsequent decisions emphasized that Section 1981 should be read in the same way as Section 1982, and that both "must encompass" much more than refusals motivated solely by race.

As Justice Stewart explained in *Jones v. Alfred H. Mayer Co.*:

> Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom–freedom to 'go and come at pleasure' and to 'buy and sell when they please'–would be left with 'a mere paper guarantee' if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.[22]

Congress in 1991 reiterated the importance of this promise, though it has yet to be realized.[23]

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[21] 427 U.S. 160, 170 (1976).

[22] 392 U.S. at 443.

[23] Congress rejected six statutory interpretations by the Court that had narrowed the protections in Sections 1981 and 1982 as

When someone is denied employment because of race or is treated less well because of race, it is no defense that the employer also had non-racial reasons for its actions. A detour into requiring proof of "but for" causation does violence to the 39th Congress's words as well as to its explicit attempt to commit the nation to full and equal rights.

To rip statutory language out of its context and to replace clear legislative intent with a torts test derived in a much later era is to besmirch the original meaning of the words the 39th Congress. That Congress, through both the Civil Rights Act of 1866 and the Fourteenth Amendment, labored to address grievous wrongs of which its members were acutely aware, including vigilantism and countless efforts to retain the badges and incidents of slavery. Its member knew all too well that even those who wrote and adopted the Black Codes, as well as the nightriders and members of mobs who violently suppressed the rights of former slaves, had their own mixture of triggers and causes for the brutal discrimination they practiced. To the 39th Congress this did not excuse their conduct.

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it adopted Section 1981(c). The House Judiciary Committee specifically singled out *Runyon* as one of the reasons for amending § 1981. "This section [of the 1991 Act] amends 42 U.S.C. § 1981 (commonly referred to as 'Section 1981') to overturn *Patterson v. McLean Credit Union* and to codify *Runyon v. McCrary*, 427 U.S. 160 (1976)." H.R. Rep. 102-40, pt. 2, at 35 (1991). The 1991 Act therefore identifies as its purpose, among others, "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." Pub. L. No. 102-166 § 3(4).

In fact, a majority in that historic Congress perceived that discrimination based on race could easily taint ordinary contractual transactions, even when those contracts were partially motivated by economic rather than racial motives. Therefore, the Civil Rights Act of 1866 sweepingly guaranteed the "full" as well as the "equal benefit of all laws and proceedings." To ignore the tincture of racism, absent "but for causation," is directly to undermine the broad national commitment made over 150 years ago. To borrow limiting language from much more recent statutes and then to read Section 1981 through the narrow lens of "but for" causation is ahistorical in the extreme. It does violence to the bold congressional effort to confront blatant racial discrimination in the wake of the Civil War.

The lesson that flows from the history of the 1866 Civil Rights Act—considered as a whole, from its initial declaration to its most recent congressional embrace—is that Congress identified basic civil rights broadly and sought to make the remedies it established effective. That goal was not limited by artificial restrictions that excuse or ignore the very kind of longstanding, pervasive discrimination Congress sought to remedy.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted.

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