No. 13-6765

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM HATCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

JOCELYN SAMUELS
Acting Assistant Attorney General

DENNIS J. DIMSEY
THOMAS E. CHANDLER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether Section 249(a)(1) of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, 18 U.S.C. 249(a)(1), which makes it a crime to willfully cause bodily injury "because of the actual or perceived race, color, religion, or national origin of any person," is a valid exercise of Congress's power under Section 2 of the Thirteenth Amendment.

IN THE SUPREME COURT OF THE UNITED STATES

_____

No. 13-6765

WILLIAM HATCH, PETITIONER

v.

UNITED STATES OF AMERICA

_____

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

_____

BRIEF FOR THE UNITED STATES IN OPPOSITION

_____

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 722 F.3d 1193. The opinion of the district court (Pet. App. B) is reported at 807 F. Supp. 2d 1045.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 2013. The petition for a writ of certiorari was filed on October 1, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of New Mexico, petitioner was convicted on one count of conspiring to violate 18 U.S.C. 249(a)(1), a provision of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (Shepard-Byrd Act or Act). Petitioner and two friends had conspired to use a heated wire hanger to brand a swastika on the arm of a 22-year-old man of Navajo descent with a developmental disability. Petitioner was sentenced to the lesser of 14 months' imprisonment or time served. The court of appeals affirmed. Pet. App. A3-A4.

1. Petitioner and two of his friends, Paul Beebe and Jesse Sanford, worked together at a restaurant in Farmington, New Mexico. Pet. App. A3. In April 2010, a man of Navajo descent, referred to as V.K. in the record, came to the restaurant. V.K. was born with a severe developmental disability and functioned at a diminished cognitive level. Ibid. Beebe convinced V.K. to come to Beebe's apartment, and petitioner and Sanford later met them there. Ibid. Beebe's apartment displayed a large swastika flag and other Nazi memorabilia symbolizing "white pride." Id. at B3.

At the apartment, petitioner, Beebe, and Sanford used markers to draw on V.K. Pet. App. A3. They told V.K. that they would draw "feathers" and "native pride" on his back. Ibid.

Instead, they drew "satanic and anti-homosexual images." Ibid. Next, they "shaved a swastika-shaped patch into V.K.'s hair" and wrote "KKK" and "White Power" within the swastika. Id. at A3, B3.

Petitioner, Beebe, and Sanford then told V.K. that they would "brand" him. Pet. App. B3. Beebe fashioned a wire hanger into the shape of half a swastika and used the stove to heat the hanger. Id. at A3. Petitioner, Beebe, and Sanford "twice pressed it into V.K.'s skin, searing a swastika into his right bicep. The branding caused pain and scarring." Id. at B3.

2. In May 2010, the State of New Mexico charged petitioner and his two friends under state law with first-degree kidnapping, aggravated battery involving great bodily harm, and conspiracy to commit these crimes. Pet. App. A3; Pet. C.A. Br. 3.

While the state prosecution was ongoing, a federal grand jury returned a two-count indictment in November 2010 charging the three men with violating and conspiring to violate the Shepard-Byrd Act, 18 U.S.C. 249(a)(1). That provision was enacted in 2009, pursuant to Congress's authority under Section 2 of the Thirteenth Amendment. Shepard-Byrd Act, Pub. L. No. 111-84, Div. E, § 4702(7), 123 Stat. 2836; H.R. Rep. No. 86, 111th Cong., 1st Sess. 15 (2009) (H.R. Rep. No. 86). Section 249(a)(1) of the Act makes it illegal to

> willfully cause[] bodily injury to any person or, through the use of fire, a firearm, a dangerous weap-

> on, or an explosive or incendiary device, attempt[] 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). Shortly after petitioner's indictment, the government filed a Certificate of the Assistant Attorney General, pursuant to 18 U.S.C. 249(b)(1), stating that prosecuting petitioner for violating Section 249 would be "in the public interest and necessary to secure substantial justice." Gov't C.A. Br. 3 n.2.

In May 2011, a New Mexico jury found petitioner guilty of conspiracy to commit the aggravated battery offense under state law. Shortly thereafter, petitioner moved to dismiss his federal indictment under the Shepard-Byrd Act, arguing that Congress lacked authority under the Thirteenth Amendment to enact Section 249(a)(1). Gov't C.A. Br. 3. Section 1 of the Amendment declares that "[n]either slavery nor involuntary servitude * * * shall exist within the United States," and Section 2 grants Congress the "power to enforce this article by appropriate legislation." While petitioner's motion was pending, in June 2011, petitioner entered a conditional guilty plea to the conspiracy count that preserved his right to challenge the constitutionality of Section 249(a)(1). Pet. App. A3.[1]

---

[1] As part of the plea agreement, the United States dismissed the substantive count. Beebe and Sanford entered similar plea agreements, but did not appeal their convictions and are not part of this case.

In August 2011, the district court denied petitioner's motion to dismiss the federal indictment. The court noted that in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), this Court explained that "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery" and to exercise its legislative authority under Section 2 of the Amendment to eradicate them. Pet. App. B4 (quoting 392 U.S. at 440); see also id. at B10-B11. It rejected petitioner's claim that this Court had "implicitly overruled" Jones in City of Boerne v. Flores, 521 U.S. 507 (1997). Pet. App. B4. In that case, this Court interpreted Congress's power to enact enforcement legislation under Section 5 of the Fourteenth Amendment to require "congruence and proportionality between the [constitutional] injury to be prevented or remedied and the means adopted to that end." City of Boerne, 521 U.S. at 520.

Applying Jones, the district court concluded that Congress had rationally determined that "racially motivated violence" is a badge of slavery. Pet. App. B7-B11. It accordingly upheld Section 249(a)(1) as a valid exercise of its authority under Section 2 of the Thirteenth Amendment. Ibid. The court also held that, in any event, Section 249(a)(1) would also pass muster under City of Boerne's more stringent congruence and proportionality test. Pet. App. B11 n.6.

In September 2011, the New Mexico court sentenced petitioner to 18 months' imprisonment for the state-law aggravated battery offense. Pet. App. A3-A4. In February 2012, the federal district court sentenced him to the lesser of 14 months' imprisonment or time served, ordering the sentence to run concurrently with his state sentence. Id. at A4.

3. The court of appeals affirmed petitioner's conviction under the Shepard-Byrd Act. Pet. App. A3. The court noted that decisions of this Court establish that, under Section 2 of the Thirteenth Amendment, Congress's enforcement power goes beyond simply abolishing slavery and includes the "power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." Id. at A5 (quoting Civil Rights Cases, 109 U.S. 3, 20 (1883)). The court also recognized that in Jones, supra, this Court gave "Congress relatively wide latitude both to determine what qualifies as a badge or incident of slavery and how to legislate against it." Pet. App. A6. It explained that "under Jones, if Congress rationally determines that something is a badge or incident of slavery, it may broadly legislate against it through Section 2 of the Thirteenth Amendment." Id. at A8.

The court of appeals then held that Congress validly exercised its Section 2 authority by enacting Section 249(a)(1) to prohibit race-based physical violence and thereby eradicate

badges and incidents of slavery. Pet. App. A7. The court emphasized that Congress had "explicitly justified the racial violence provision under its Thirteenth Amendment badges-and-incidents authority." Ibid. It also highlighted Congress's findings 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, "[a]ccordingly, eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude." Ibid. (quoting 18 U.S.C. 249(a)(1) note).

The court of appeals acknowledged that the Shepard-Byrd Act implicates federalism concerns, but noted that the "Thirteenth Amendment, enacted after the Tenth Amendment, explicitly gives Congress power to enforce its prohibitions." Pet. App. A8. It also rejected petitioner's argument that the court should apply City of Boerne's congruence and proportionality test. Id. at A9. The court stated that "City of Boerne nowhere mentions the Tenth Amendment, the Thirteenth Amendment, or Jones." Ibid. Although observing that City of Boerne and other recent federalism cases raise "worthwhile questions" about the scope of Congress's Thirteenth Amendment enforcement powers, it emphasized that Jones remains good law and applies in this case. Id. at A11.

Finally, the court of appeals concluded that "even under Jones we see limiting principles to congressional authority, and the racial violence provision [Section 249(a)(1)] respects those limits." Pet. App. A11. The court emphasized that Section 249(a)(1) applies only to "(a) actions that can rationally be considered to resemble an incident of slavery when (b) committed upon a victim who embodies a trait that equates to 'race' as that term was understood in the 1860's, and (c) motivated by an animus toward persons with that trait." Id. at A12. The court therefore concluded that "Congress met the Jones test in rationally determining racially motivated violence to be a badge or incident of slavery that it could prohibit under its Section 2 authority." Id. at A11. The court emphasized that while Jones's formulation of that authority may be "facially broad," Congress took a "narrow[] approach" in promulgating Section 249(a)(1). As a result, the court saw no need to "speculate on whether a broader criminalization of conduct under [the Jones] rationale would pass constitutional review." Id. at A12.

ARGUMENT

Petitioner asks (Pet. 9) this Court to grant review so that it can provide guidance about Congress's power to legislate under Section 2 of the Thirteenth Amendment. Petitioner urges (Pet. 11-21) the Court to overrule Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), and instead to adopt the congruence and

proportionality test that the Court applied to Section 5 of the Fourteenth Amendment in City of Boerne v. Flores, 521 U.S. 507 (1997). Petitioner also argues (Pet. 21-29) that even if Jones continues to govern the Thirteenth Amendment analysis, the Court should provide additional guidance on how federalism principles should constrain Congress's legislative authority under Section 2.

This case does not warrant further review. There is no split of authority among the lower courts, and the court of appeals here correctly upheld Section 249(a)(1) under Jones. Petitioner offers no persuasive reason to ignore stare decisis and replace Jones with City of Boerne's congruence and proportionality test, which reflects the different text, history, and purpose of the Fourteenth Amendment. Nor is there any reason to conclude that the court of appeals erred in applying Jones. Indeed, Congress had sufficient authority to enact Section 249(a)(1)'s ban on race-based violence under both Jones and City of Boerne, and so petitioner could not obtain relief even if he prevailed on the questions presented in his petition. The petition should be denied.[2]

---

[2] This case does not involve Congress's authority to enact the separate provision of the Shepard-Byrd Act, 18 U.S.C. 249(a)(2), that covers violent conduct targeting victims on the basis of gender, sexual orientation, gender identity, or disability. That provision was enacted pursuant to Congress's Commerce Clause authority, and it contains a jurisdictional element

1. This case does not implicate any of this Court's traditional criteria for certiorari. See Sup. Ct. R. 10. As petitioner acknowledges (Pet. 7, 16), the court of appeals below applied this Court's binding precedent in Jones, which recognized Congress's authority to legislate against the "badges and incidents" of slavery under Section 2 of the Thirteenth Amendment. 392 U.S. at 440. Petitioner does not assert any conflict with this Court's holding in Jones. See Sup. Ct. R. 10(c).

Nor does petitioner assert any conflict between the decision below and any decision of any other court of appeals on the scope of Congress's authority under Section 2. See Sup. Ct. R. 10(a). In fact, the only other court of appeals to have addressed the constitutionality of Section 249(a)(1) also upheld the provision under Jones's interpretation of Section 2. United States v. Maybee, 687 F.3d 1026, 1030-1031 (8th Cir.), cert. denied, 133 S. Ct. 556 (2012).[3]

Moreover, three circuits have applied Jones's holdings concerning Section 2 to uphold 18 U.S.C. 245(b)(2)(B) -- a similar

---

requiring proof that the crime was in or affecting interstate or foreign commerce.

[3] The United States District Court for the Southern District of Texas has also rejected a constitutional challenge to Section 249(a)(1), in an oral decision that is now on appeal to the Fifth Circuit. See United States v. Cannon, No. 12-20514 (argued Aug. 5, 2013).

statute that also prohibits certain forms of racially motivated violence. United States v. Allen, 341 F.3d 870 (9th Cir. 2003), cert. denied, 541 U.S. 975 (2004); United States v. Nelson, 277 F.3d 164, 173-191 (2d Cir.), cert. denied, 537 U.S. 835 (2002); United States v. Bledsoe, 728 F.2d 1094 (8th Cir.), cert. denied, 469 U.S. 838 (1984). In one of those cases, the Second Circuit expressly rejected the argument that City of Boerne applies to the Thirteenth Amendment. Nelson, 277 F.3d at 185 n.20. And the Eleventh Circuit has relied on Jones (in an unpublished opinion) to affirm a district court's decision upholding 18 U.S.C. 247(c), which criminalizes racially and religiously motivated violence against religious property. United States v. Franklin, 104 Fed. Appx. 150 (2004) (Table), cert. denied, 544 U.S. 923 (2005); see also Gov't Br. in Opp. at 2, 5-6, Franklin, 544 U.S. 923 (No. 04-5858) (describing district and circuit court opinions).

The decisions noted above establish the absence of any conflict or confusion in the lower courts about the proper application of Jones to statutes enacted under Section 2 of the Thirteenth Amendment. This Court denied certiorari in all of those cases, and it should do the same here as well.

2. Petitioner's principal argument for certiorari is that this Court's interpretation of Section 2 of the Thirteenth Amendment in Jones is inconsistent with its later interpretation

of Section 5 of the Fourteenth Amendment in City of Boerne. Petitioner and his amici urge this Court to grant review so that it can overrule Jones and apply City of Boerne's congruence and proportionality test to limit Congress's power to legislate under Section 2. But petitioner offers no valid reason for upending settled precedent, and nothing in City of Boerne undermines Jones's analysis of Congress's Thirteenth Amendment authority.

a. Section 2 of the Thirteenth Amendment grants Congress the "power to enforce" Section 1's categorical ban on slavery "by appropriate legislation." In the Civil Rights Cases, 109 U.S. 3 (1883), this Court first recognized that this provision grants Congress the "power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." Id. at 20.

In Jones, this Court upheld the constitutionality of 42 U.S.C. 1982, which prohibits racial discrimination in the sale of property. The Court reaffirmed that "the Enabling Clause [Section 2]" of the Thirteenth Amendment empowered Congress to do "much more" than abolish slavery, quoting the Civil Rights Cases' statement that it also authorizes laws "necessary and proper for abolishing all badges and incidents of slavery." Jones, 392 U.S. at 439 (quoting 109 U.S. at 20) (emphasis omitted). The Court also held that it is Congress that "deter-

mine[s] what are the badges and the incidents of slavery." Id. at 440.

The Court rooted its conclusion about Congress's authority in the particular text and history of the Thirteenth Amendment. It noted that the Amendment's supporters and opponents alike repeatedly emphasized that the Amendment would grant Congress broad power to enact positive legislation "for the protection of Negroes in every state." Jones, 392 U.S. at 439. The Court relied heavily on the views of Senator Lyman Trumbull, the Chairman of the Senate Judiciary Committee, who "had brought the Thirteenth Amendment to the floor of the Senate in 1864" and was the "chief spokesman" of "the authors of [that] Amendment." Id. at 439-440. As the Court noted, Senator Trumbull had defended the constitutionality of the Civil Rights Act of 1866 by explaining that Section 2 of the Thirteenth Amendment granted Congress broad power to identify the "badges and incidents of slavery." The Court quoted Senator Trumbull as follows:

> I have no doubt that under [Section 2] . . . we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing. It was for that purpose that the second clause of [the Thirteenth A]mendment was adopted, which says that Congress shall have authority, by appropriate legislation, to carry into effect the article prohibiting slavery. Who is to decide what that appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation as it may think proper, so that it be a means to accomplish the end.

Id. at 440 (quoting Cong. Globe, 39th Cong., 1st Sess. 322 (1866) (1866 Cong. Globe)) (emphasis added). The Court went on to declare that "[s]urely Senator Trumbull was right" and that "[s]urely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." Ibid.[4]

Jones went on to uphold 42 U.S.C. 1982 after concluding that Congress's determination that "the exclusion of Negroes from white communities" through restrictions on sales of property was among the "badges and incidents of slavery." 392 U.S. at 422, 441-442. It explained that "when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery" and that, "[a]t the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes

[4] In reaching this conclusion, the Court expressly overruled Hodges v. United States, 203 U.S. 1 (1906), an earlier case in which it had invalidated the conviction of "a group of white men [who] had terrorized several Negroes to prevent them from working in a sawmill." Jones, 392 U.S. at 441 n.78. The Court rejected its prior conclusion in Hodges that "only conduct which actually enslaves someone can be subjected to punishment under legislation enacted to enforce the Thirteenth Amendment." Ibid. The Court observed that Hodges's "concept of congressional power under the Thirteenth Amendment [is] irreconcilable with the position taken by every member of this Court in the Civil Rights Cases and incompatible with the history and purpose of the Amendment itself." Ibid.

the freedom to buy whatever a white man can buy, the right to live wherever a white man can live." Id. at 442-443. It concluded by quoting the statements of Representative James Wilson -- the floor manager of the Civil Rights Act of 1866 in the House of Representatives -- asserting that Congress had "ample authority" under Section 2 to pass the Act in accordance with the standard set forth by this Court in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819). Jones, 392 U.S. at 443.

Since Jones, this Court has repeatedly reaffirmed and applied its broad interpretation of Congress's Section 2 powers. For example, in Griffin v. Breckenridge, 403 U.S. 88, 105 (1971), the Court upheld the constitutionality of 42 U.S.C. 1985(3), which creates a cause of action for conspiracy to violate civil rights. The Court explained that under Section 2, "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." 403 U.S. at 105. The Court also reaffirmed Jones's statement that "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." Ibid. (quoting 392 U.S. at 440). The Court reached a similar conclusion in Runyon v. McCrary, 427 U.S. 160, 179 (1976), where it relied on Jones to uphold 42

U.S.C. 1981's prohibition of racial discrimination in the making and enforcement of private contracts. 427 U.S. at 168-169, 179.[5]

b. Petitioner argues that the Court should overrule Jones and limit Congress's legislative power under Section 2 by employing the more stringent congruence and proportionality test that it applied to Congress's authority to legislate under the Fourteenth Amendment in City of Boerne. But although stare decisis is not an "inexorable command," it plays an important role in "promot[ing] the evenhanded, predictable, and consistent development of legal principles, foster[ing] reliance on judicial decisions, and contribut[ing] to the actual and perceived integrity of the judicial process." Payne v. Tennessee, 501 U.S.

---

[5] See also, e.g., City of Memphis v. Greene, 451 U.S. 100, 119, 125 n.39 (1981) (quoting Jones, 392 U.S. at 439-440, for proposition that "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation"); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 302 n.41 (1978) (opinion of Powell, J.) (citing Jones and noting "the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures"); Palmer v. Thompson, 403 U.S. 217, 227 (1971) (noting that under Jones, Congress has broad power to outlaw the "badges of slavery"); Oregon v. Mitchell, 400 U.S. 112, 127-128 (1970) (opinion of Black, J.) (citing Jones for proposition that Thirteenth Amendment grants Congress the "power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States") (emphasis omitted); cf. United States v. Kozminski, 487 U.S. 931, 951 (1988) (noting that task of defining "involuntary servitude" under the Thirteenth Amendment and federal statute is an "inherently legislative" task).

808, 827-828, (1991). This Court has recognized that precedent should be overruled only if there is a "special justification" for doing so. Dickerson v. United States, 530 U.S. 428, 443 (2000).

Here, the only justification that petitioner cites for overturning Jones is this Court's decision in City of Boerne. In that case, the Court considered whether the Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488, was a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment.[6] Section 5 gives Congress the "power to enforce, by appropriate legislation" the substantive constitutional rights guaranteed by the Fourteenth Amendment, including those protected by the Due Process, Equal Protection, and Privileges and Immunities Clauses.

City of Boerne held that Congress has the power under Section 5 to enact legislation aimed at deterring or remedying violations of the core rights guaranteed by the Fourteenth Amendment's substantive clauses, "even if in the process it prohibits conduct which is not itself unconstitutional" and intrudes into traditional areas of state autonomy. 521 U.S. at 518. But it

---

[6] RFRA prohibited States and their political subdivisions from "substantially burden[ing]" a person's free exercise of religion unless the government could show that the burden serves a compelling state interest and is the least restrictive means of doing so. See City of Boerne, 521 U.S. at 515-516 (citation omitted).

made clear that this legislative power does not include the authority to expand or redefine the substantive scope of those rights. Id. at 519. The Court held that legislation enforcing Fourteenth Amendment guarantees must have "congruence and proportionality between the [constitutional] injury to be prevented or remedied and the means adopted to that end." Id. at 520. "Lacking such a connection, legislation may become substantive in operation and effect," thereby exceeding Congress's power and "contradict[ing] vital principles necessary to maintain separation of powers and the federal balance." Id. at 520, 536.

The Court supported its view that Section 5 gives Congress "remedial, rather than substantive" authority by carefully examining the drafting history of the Fourteenth Amendment. City of Boerne, 521 U.S. at 520-524. It emphasized that Congress had rejected an early draft of the Amendment -- proposed by Representative John Bingham -- that was seen as bestowing plenary authority to "legislate fully upon all subjects affecting life, liberty, and property," such that "there would not be much left for the State Legislatures." Id. at 520-521 (quoting statement of Senator William Stewart, 1866 Cong. Globe 1082). Unlike the Bingham proposal, the final version of the Amendment made Congress's legislative authority "no longer plenary but remedial" and "did not raise the concerns expressed earlier regarding

broad congressional power to prescribe uniform national laws with respect to life, liberty, and property." Id. at 522-523.

The Court further noted that whereas the Bingham proposal would have effectively empowered Congress to determine the scope of the Fourteenth Amendment's substantive prohibitions on state action, the revised proposal retained the Judiciary's "primary authority to interpret those prohibitions." City of Boerne, 521 U.S. at 524. It also emphasized that the Court's interpretation of Congress's authority was broadly consistent with its prior decisions stretching from the Civil Rights Cases through the twentieth century. Id. at 524-529 (noting its consistent view that the Section 5 power was "remedial," "corrective," and "preventive," but not "definitional").

The Court ultimately concluded that RFRA failed the congruence and proportionality test because it found little support in the legislative record for the concerns underlying the law, its provisions were out of proportion to its supposed remedial object, and it was "not designed to identify and counteract state laws likely to be unconstitutional." City of Boerne, 521 U.S. at 534. Because RFRA "appear[ed], instead, to attempt a substantive change in constitutional protections" -- by expanding the meaning of the Free Exercise Clause beyond the Court's prior interpretations -- the Court concluded that it exceeded Con-

gress's power under Section 5 of the Fourteenth Amendment. Id. at 532.

c. Nothing in City of Boerne undermines this Court's decision in Jones. City of Boerne did not cite Jones or mention the Thirteenth Amendment. Nor did it state or imply that its ruling would have any effect on the established line of cases recognizing Congress's power to rely on Section 2 of the Thirteenth Amendment to identify -- and legislate against -- the "badges and incidents of slavery." Indeed, City of Boerne emphasized that its holding was consistent with the Court's prior civil-rights decisions. 521 U.S. at 524-528.

Nor did City of Boerne undermine the historical analysis underpinning Jones. As discussed above, the Court's decision in that earlier case relied principally on its analysis of Congressional debates surrounding the enactment of the Thirteenth Amendment and the Civil Rights Act of 1866. The Court placed particular emphasis on Senator Trumbull's statements that the purpose of the Amendment was to empower Congress "to decide" what legislation would be "appropriate" to achieve its broad ends, and "to adopt such appropriate legislation as it may think proper." Jones, 392 U.S. at 440.

City of Boerne did not question Jones's analysis of the Thirteenth Amendment at all. Instead, it relied on the quite different history surrounding the passage of the Fourteenth

Amendment several years later. City of Boerne, 521 U.S. at 520-524. There, the Court explained that the critical events were (1) the rejection of Congressman Bingham's proposal to grant Congress "plenary" legislative authority and (2) the substitution of new language that was understood to restrain Congress's ability to intrude on States' rights or the traditional power of the Judiciary to determine the scope of substantive Constitutional rights. Ibid. Petitioner offers no reason why City of Boerne's Fourteenth Amendment analysis undermines Jones's review of the history and original understanding of the Thirteenth Amendment.

Important differences between the Thirteenth and Fourteenth Amendments confirm that City of Boerne leaves Jones undisturbed. While the parallel enforcement provisions in each Amendment each authorize Congress to "enforce" its other provisions "by appropriate legislation," those cross-referenced provisions in each Amendment are fundamentally different in nature. The Thirteenth Amendment's substantive ban on slavery has long been understood to allow Congress to legislate against "the badges and incidents of slavery" -- a flexible category that requires fact-specific determinations that are inherently legislative. By contrast, the Fourteenth Amendment's substantive protections against state action violating the Due Process, Equal Protection, and Privileges and Immunities Clauses all involve legal rights that have

always been the province of the Judiciary. City of Boerne, 521 U.S. at 520-524. City of Boerne recognized that Congress lacks authority to redefine these Fourteenth Amendment rights -- and that its legislative power thus extends only to preventive or remedial measures that are congruent and proportional to those rights as interpreted by the courts. But nothing in that conclusion is inconsistent with Jones's recognition that Congress has a broader role in determining what constitutes "the badges and the incidents of slavery" for purposes of the Thirteenth Amendment.

Petitioner's argument that the same standard should apply in the different contexts of the Thirteenth and Fourteenth Amendments thus ignores what the Second Circuit has called the "crucial disanalogy between the[se] Amendments as regards the scope of the congressional enforcement powers these amendments, respectively, create." Nelson, 277 F.3d at 185 n.20.

> Whereas there is a long, well-established * * * tradition of judicial interpretation of the substantive protections established by Section One of the Fourteenth Amendment, the meaning of Section One of the Thirteenth Amendment has almost never been addressed directly by the courts, in the absence of specific congressional legislation enacted. Indeed, the Supreme Court has expressly referred to "the inherently legislative task of defining 'involuntary servitude.'" [United States v.] Kozminski, 487 U.S. [931,] 951 [(1988)]. And the task of defining "badges and incidents" of servitude is by necessity even more inherently legislative.

Ibid. For this reason, among others, the Second Circuit correctly determined that City of Boerne does not apply to the Thirteenth Amendment. Ibid.

Moreover, as petitioner himself acknowledges (Pet. 13), the federalism concerns raised by Congress's distinct powers to enforce the Thirteenth and Fourteenth Amendments are also quite different. The Fourteenth Amendment applies only to state action, which means that legislation under Section 5 of the Amendment will necessarily have "a clear and direct impact on state sovereignty." Ibid. In City of Boerne, for example, the Court concluded that RFRA exacted "substantial costs" on States, "both in practical terms of imposing a heavy litigation burden on [them] and in terms of curtailing their traditional general regulatory power." 521 U.S. at 534.

By contrast, Congress typically relies on the Thirteenth Amendment to regulate private action by individuals. See City of Memphis v. Greene, 451 U.S. 100, 125 n.38 (1981) (listing statutes enacted under Thirteenth Amendment). The Shepard-Byrd Act, for example, does not subject the States to suits or otherwise directly interfere with their regulatory power in any way. Thus even if petitioner were correct (Pet. 13) that Thirteenth Amendment legislation itself raises a "separate" federalism concern -- insofar as it allows the Federal Government to exercise some concurrent police power over the badges and incidents of

slavery -- that concern would not involve the direct interference posed by legislation under the Fourteenth Amendment. City of Boerne addressed federalism only in the context of laws passed under the Fourteenth Amendment and directed at States; it had no occasion to address any "separate" federalism issue arising from Thirteenth Amendment legislation targeting individuals. Accordingly, nothing in its federalism analysis undermines Jones.

d. Even if City of Boerne applied to the Thirteenth Amendment context, Section 249(a)(1)'s prohibition on racially motivated violence would still pass constitutional muster. The provision is congruent and proportional to Congress's power to eradicate the badges and incidents of slavery.

City of Boerne itself emphasized Congress's "[b]road * * * power" to enforce the guarantees of the Fourteenth Amendment and the "wide latitude" it has to enact enforcement legislation. 521 U.S. at 520, 536. This enforcement power "is broadest when directed to the goal of eliminating discrimination on account of race." Tennessee v. Lane, 541 U.S. 509, 563 (2004) (Scalia, J., dissenting) (internal quotation marks and citation omitted). Indeed, when Congress "attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of

the Thirteenth, Fourteenth, and Fifteenth Amendments." Oregon v. Mitchell, 400 U.S. 112, 129 (1970) (opinion of Black, J.).

Here, Congress promulgated the Shepard-Byrd Act based on its finding that race-based violence was an intrinsic feature of slavery in the United States:

> For generations, the institutions of slavery and involuntary servitude were defined by the race, color, and ancestry of those held in bondage. Slavery and involuntary servitude were enforced, both prior to and after the adoption of the [Thirteenth] amendment to the Constitution of the United States, through widespread public and private violence directed at persons because of their race, color, or ancestry, or perceived race, color, or ancestry.

Shepard-Byrd Act § 4702(7), 123 Stat. 2836.

Congress's conclusion that race-based violence was a core feature of slavery is amply supported by historical evidence. See, e.g., Pet. App. A12 (citing various modern and antebellum sources discussing the issue); Nelson, 277 F.3d at 189. Such violence persisted following passage of the Thirteenth Amendment, when "a wave of brutal, racially motivated violence against African Americans swept the South" in an effort "to perpetuate African American slavery." Douglas L. Colbert, Liberating the Thirteenth Amendment, 30 Harv. C.R.-C.L. Rev. 1, 11-12 (1995) (footnotes omitted). This "post-Civil War violence," together with establishment of the Black Codes in southern States, "reflected whites' determined resistance to the establishment of freedom for African Americans." Ibid.

Race-based violence against African Americans continued into the twentieth century and intensified during the Civil Rights Movement of the 1950s and 1960s. For example, as this Court explained in Virginia v. Black, 538 U.S. 343 (2003), the Ku Klux Klan instituted a "reign of terror" in the South to thwart Reconstruction and maintain white supremacy. Id. at 353. The Court emphasized that "[v]iolence was * * * an elemental part" of the Ku Klux Klan, noting its use of "tactics such as whipping, threatening to burn people at the stake, and murder." Id. at 353-355 (also noting "the long history of Klan violence"). The Court further observed that its decision in Brown v. Board of Education, 347 U.S. 483 (1954), and the Civil Rights Movement of the 1950s and 1960s "sparked another outbreak of Klan violence," including "bombings, beatings, shootings, stabbings, and mutilations." Black, 538 U.S. at 355.

While considering the Shepard-Byrd Act, Congress weighed extensive evidence concerning the continued prevalence of hate crimes today. The House Report stated that "[b]ias crimes are disturbingly prevalent and pose a significant threat to the full participation of all Americans in our democratic society." H.R. Rep. No. 86, at 5. Specifically, it noted that "[s]ince 1991, the Federal Bureau of Investigation (FBI) has identified over 118,000 reported violent hate crimes," and that in 2007 alone the FBI documented more than 7600 hate crimes, including nearly

4900 (64%) motivated by bias based on race or national origin. Ibid. Further, a 2002 Senate Report, addressing proposed legislation that ultimately became Section 249, noted that "the number of reported hate crimes has grown by almost 90 percent over the past decade," averaging "20 hate crimes per day for 10 years straight." S. Rep. No. 147, 107th Cong., 2d Sess. 2 (2002).

In light of this evidence, Congress was well within its authority to conclude 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." Shepard-Byrd Act § 4702(7), 123 Stat. 2835; see also id. §§ 4702(1) and (8). It cannot be said that Section 249(a)(1) is so "[l]acking" in proportionality with the "injury to be prevented or remedied" that it is properly considered a substantive redefinition of the rights protected by the Thirteenth Amendment. City of Boerne, 521 U.S. at 520. On the contrary, Section 249(a)(1) is narrowly targeted to accomplish its constitutional end, as it prohibits only violence that involves (1) the "willful[]" commission of (or attempt to commit); (2) "bodily injury"; (3) using "fire, a firearm, a dangerous weapon, or an explosive or incendiary device"; (4) "because of the actual or perceived race, color, religion, or national origin of any person."

In short, Section 249(a)(1) is entirely reasonable when "judged with reference to the historical experience which it reflects." Lane, 541 U.S. at 523 (citation omitted). Indeed, it compares favorably with the types of legislation this Court has upheld under City of Boerne's analysis in other cases. [7] Petitioner's inability to prevail under his own preferred legal standard makes this case especially unworthy of further review.

3. Petitioner further asserts (Pet. 21-29) that this Court should grant review to address the application of federalism principles to the exercise of Congress's power under Section 2 of the Thirteenth Amendment. In particular, he argues that even if Jones continues to govern the analysis, Section 2 legislation should nonetheless be subject to the same federalism-based restraints that this Court has applied to Congress's legislative authority under the Commerce Clause, Necessary and Proper Clause, and the Fifteenth Amendment.[8] Petitioner asserts

---

[7] See, e.g., Lane, 541 U.S. at 533-534 (upholding Title II of the Americans with Disabilities Act of 1990 as appropriate enforcement of the Due Process Clause's protection against discrimination by providing access to the courts); Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 738 (2003) (upholding the Family and Medical Leave Act of 1993 as appropriate enforcement of the Equal Protection Clause's protection against gender discrimination in family leave benefits).

[8] Petitioner specifically invokes (Pet. 23-26) this Court's recent decisions in Shelby County v. Holder, 133 S. Ct. 2612 (2013); National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (2012); United States v. Comstock, 560 U.S. 126 (2010); Northwest Austin Municipal Utility District No. One v.

(Pet. 27) that these restraints are necessary to prevent Congress's Thirteenth Amendment authority from expanding into a general police power. None of these arguments supports further review of this case.

a. Petitioner is correct that Congress lacks a general police power allowing it to legislate on all manner of activities traditionally regulated by the States. But Congress's authority to enforce the Thirteenth Amendment poses no danger of creating a general police power, as it only authorizes legislation addressing slavery (and involuntary servitude) or the badges and incidents of slavery. This limit on Congress's authority ensures that federal intrusion on traditional areas of state power will be minimal. Even under Jones, courts retain full authority to invalidate Thirteenth Amendment legislation that lacks any reasonable relationship to slavery.

Nothing in the court of appeals' decision below suggests otherwise. Although the court declined petitioner's request to rely on City of Boerne and this Court's Commerce Clause precedents to limit Jones, it expressly recognized that "even under Jones we see limiting principles to congressional authority." Pet. App. A10-A11. Moreover, it declined to adopt an interpretation of Jones that would "giv[e] Congress authority to legis-

---

Holder, 557 U.S. 193 (2009); United States v. Morrison, 529 U.S. 598 (2000); Medina v. California, 505 U.S. 437 (1992).

late regarding nearly every social ill (because nearly all can be analogized to slavery or servitude)." Id. at A11. The court of appeals upheld Section 249(a)(1) of the Shepard-Byrd Act not because the Thirteenth Amendment provides Congress with expansive and unchecked power, but rather because that provision is closely tied to the Amendment's core purpose of combatting the "badges and incidents of slavery." Id. at A11-A12. The court expressly noted that Congress employed a "limited approach to badges-and-incidents" and, accordingly, it "need not speculate on whether a broader criminalization of conduct under this rationale would pass constitutional review." Id. at A12 (emphasis added). The court's narrow holding underscores the disconnect between this case and the broader and abstract federalism questions highlighted by petitioner.

b. In any event, Congress appropriately crafted the Shepard-Byrd Act to protect federalism interests. Congress made explicit findings that state and local governments "are now and will continue to be responsible for prosecuting the overwhelming majority" of such crimes. Shepard-Byrd Act § 4702(3), 123 Stat. 2835. They noted, however, that such authorities can "carry out their responsibilities more effectively with greater Federal assistance" and that federal jurisdiction over such crimes would "enable[] Federal, State, and local authorities to work together

as partners in the investigation and prosecution of such crimes." Id. §§ 4702(3) and (9), 123 Stat. 2835-2836.

Congress also found that that the problem of hate crimes was sufficiently serious and widespread "to warrant Federal assistance to States, local jurisdictions, and Indian tribes." Shepard-Byrd Act § 4702(10), 123 Stat. 2836. To that end, the Act provides the Attorney General with authority to provide financial and other support to state and local governments in their efforts to investigate and prosecute such crimes. 42 U.S.C. 3716, 3716a. And although the Act contemplates federal prosecutions of hate crimes, it mitigates the potential for federal-state friction by requiring the Attorney General or his designee personally to certify that such prosecution is appropriate because (1) the relevant State lacks jurisdiction; (2) the State "has requested that the Federal Government assume jurisdiction"; (3) the "verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence"; or (4) a prosecution by the United States "is in the public interest and necessary to secure substantial justice." 18 U.S.C. 249(b)(1).

c. Petitioner's federalism arguments appear to reflect a generalized opposition to federal criminal liability for conduct that may also be punished by States. If so, that objection is misplaced. It is well established that when Congress enacts a

criminal prohibition based on its enumerated constitutional powers, it does not impermissibly intrude on state sovereignty.[9]

Notably, petitioner does not even attempt to argue that the particular provision at issue here -- Section 249(a)(1)'s prohibition on racially motivated violence -- itself poses any significant threat to federalism. It plainly does not. As the court of appeals correctly held, that provision is narrowly targeted to "(a) actions that can rationally be considered to resemble an incident of slavery when (b) committed upon a victim who embodies a trait that equates to 'race' as that term was understood in the 1860s, and (c) motivated by animus toward persons with that trait." Pet. App. A12; see generally United States v. Comstock, 560 U.S. 126, 148 (2010) (rejecting similar

[9] See, e.g., United States v. Morrison, 529 U.S. 598, 619 (2000) (noting that Fourteenth Amendment "includes authority to prohibit conduct * * * and to intrude into legislative spheres of autonomy previously reserved to the States") (citation, internal quotation marks, and alterations omitted); Mitchell, 400 U.S. at 129 (opinion of Black, J.) (noting that the "division of power between state and national governments * * * was expressly qualified by the Civil War Amendments' ban on racial discrimination"); Gonzales v. Oregon, 546 U.S. 243, 298-299 (2006) (Scalia, J., dissenting) (noting the "long and well-established principle" that Federal Government may use enumerated powers to enact criminal prohibitions "traditionally addressed by the so-called police power of the States"); Gonzales v. Raich, 545 U.S. 1, 41 (2005) (Scalia, J., concurring in the judgment) (fact that enumerated powers legislation "regulates an area typically left to state regulation" is "not enough to render federal regulation an inappropriate means").

federalism argument based on narrow scope of statute). Petitioner offers no reason to doubt that the court of appeals' determination is correct.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

JOCELYN SAMUELS
Acting Assistant Attorney General

DENNIS J. DIMSEY
THOMAS E. CHANDLER
Attorneys

FEBRUARY 2014

---

[10] Some of petitioner's amici argue that the court of appeals' decision undermines the "dual-sovereignty" exception to the Fifth Amendment's Double Jeopardy Clause because it allows prosecutions under Section 249(a)(1) where there is not a "genuine federal interest." Cato Inst., Reason Found., and Individual Rights Found. Amicus Br. 11-12; see generally Heath v. Alabama, 474 U.S. 82, 89 (1985) (addressing dual sovereignty doctrine). But petitioner has not raised a Double Jeopardy Clause challenge in this case, and amici's argument is, in any event, simply another way of asserting that Section 249(a)(1) exceeds Congress's enforcement powers under the Thirteenth Amendment. That assertion is incorrect, for the reasons identified in the court of appeals and elsewhere in this brief.