Nos. 14-5356, 14-5423 and 14-5457

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES CANNON, PETITIONER
v.
UNITED STATES OF AMERICA

BRIAN KERSTETTER, PETITIONER
v.
UNITED STATES OF AMERICA

MICHAEL MCLAUGHLIN, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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

VANITA GUPTA
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. 14-5356

CHARLES CANNON, PETITIONER
v.
UNITED STATES OF AMERICA

No. 14-5423

MICHAEL MCLAUGHLIN, PETITIONER
v.
UNITED STATES OF AMERICA

No. 14-5457

BRIAN KERSTETTER, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A35) is reported at 750 F.3d 492. The district court denied petitioners' pre-trial motions to dismiss the indictment without issuing an opinion.[1]

---

[1] Citations to "Pet. App." are to the appendix to the petition for a writ of certiorari filed by Brian Kerstetter in No. 14-5457.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 2014. The petitions for writs of certiorari were filed on July 22, 2014 (Nos. 14-5356 and 14-5423) and on July 23, 2014 (No. 14-5457). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioners Charles Cannon, Michael McLaughlin, and Brian Kerstetter were convicted of violating 18 U.S.C. 249(a)(1), a provision of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (Shepard-Byrd Act). Pet. App. A1, A6. Petitioners had approached an African-American man at a bus stop in downtown Houston, repeatedly called him a "ni--er," and then physically assaulted him, causing bodily injury. Id. at A2-A5. Kerstetter was sentenced to 77 months of imprisonment, Cannon was sentenced to 37 months of imprisonment, and McLaughlin was sentenced to 30 months of imprisonment. Id. at A6. The court of appeals affirmed. Id. at A1-A25.

1. On the evening of August 13, 2011, petitioners met up on the streets of downtown Houston along with a fourth man, Joseph Staggs. Pet. App. A2. All three petitioners had similar tattoos bearing racist images. McLaughlin had tattoos of a

swastika and other Nazi insignia, a "bald man preparing to stab a head with the Star of David on it," a Ku Klux Klansman, and the words "white pride." Id. at A2. Cannon and Kerstetter both had tattoos of lightning bolts (known as "SS bolts") referring to the insignia adopted by the Schutzstaffel (SS) in Nazi Germany. Id. at A2-A3.

After consuming alcohol and wandering the streets, petitioners encountered an African-American man, Yondel Johnson, sitting alone on a bench at a bus stop. Pet. App. A2-A3. Johnson had just finished talking to his daughter on the phone when he heard and saw petitioners and Staggs "coming around the corner with their shirts off, bald heads, loud and rowdy." Id. at A3. Cannon stopped a few feet away from Johnson and said: "Yo, bro, do you have the time?" Ibid. Johnson looked up and recognized Cannon's tattoos of lightning bolts as white supremacist Nazi symbols. Ibid.

After Johnson responded that he did not have the time, one of the men asked Cannon "[w]hy did you call that ni--er a bro? You ain't supposed to call no ni--er a bro." Pet. App. A3 (internal quotation marks omitted). When Johnson asked the man to repeat himself, Cannon responded: "You heard him, ni--er. He called you a 'ni--er,' ni--er." Ibid. (internal quotation marks omitted).

The four men then surrounded Johnson and began to physically assault him. Pet. App. A4. Johnson, an amateur boxer, tried to defend himself, but one of the men grabbed his ankles and he fell to the ground. One of the men then got on top of Johnson while the others stomped on his head. Eventually, they stopped hitting Johnson and walked away. Johnson eventually picked himself off the ground, chased after his assailants, and reinitiated the altercation. Once again, the men ganged up on Johnson and knocked him to the ground. Id. at A4-A5.

After the men walked away a second time, Johnson spotted a police car coming down the street, waved it down, and pointed down the street towards the four assailants. Pet. App. A5; Gov't C.A. Br. 11. The police eventually detained petitioners and Staggs. Cannon and McLaughlin both used racial slurs when they were arrested, including referring to the African-American police officers as "ni--er[s]." Ibid.

As a result of the assault, Johnson was taken to a hospital emergency room by ambulance. Gov't C.A. Br. 11. His face was swollen, he was bleeding heavily, his body was bruised, and he staggered as he walked. Pet. App. A5.

2. Petitioners were initially charged in county court with misdemeanor assault. Pet. App. A5. Those charges were dropped after the federal government brought hate crime charges. A federal grand jury returned a one-count indictment charging peti-

tioners and Staggs with violating the Shepard-Byrd Act, 18 U.S.C. 249(a)(1). Pet. App. A6. That provision makes it illegal for any person to

> willfully cause[] bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, 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). Congress enacted the Shepard-Byrd Act in 2009, pursuant to its authority under Section 2 of the Thirteenth Amendment. Pub. L. No. 111-84, § 4702(7), 123 Stat. 2836; H.R. Rep. No. 86, 111th Cong., 1st Sess. 15 (2009) (House Report).

Shortly after petitioners' indictment, the government certified, pursuant to 18 U.S.C. 249(b)(1), that prosecuting petitioners for violating Section 249 "is in the public interest and is necessary to secure substantial justice." Gov't C.A. Br. 3 (citation omitted).

Cannon and McLaughlin filed pre-trial motions to dismiss the federal indictment, arguing that Congress lacked authority under the Thirteenth Amendment to enact Section 249(a)(1). Pet. App. A5. Section 1 of that 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." U.S. Const. Amend. XIII. The district court denied those motions. Pet.

App. A6. The government agreed to dismiss the charges against Staggs in exchange for his testimony against petitioners at trial. Id. at A4 n.1.

After a four-day trial, the jury found petitioners guilty. Gov't C.A. Br. 3. The district court sentenced Kerstetter to 77 months of imprisonment, Cannon to 37 months of imprisonment, and McLaughlin to 30 months of imprisonment. Pet. App. A6.

3. a. The court of appeals affirmed in an opinion by Judge Elrod. Pet. App. A1-A25. The court rejected petitioners' argument that Section 249(a)(1) exceeds Congress's power under Section 2 of the Thirteenth Amendment. Id. at A6-A19. The court noted that this Court's decisions establish that, under Section 2 of the Thirteenth Amendment, Congress's enforcement power is not limited to "to measures intended to end structures of slavery in a literal or a formal sense," but includes the authority to enact legislation necessary to abolish all "badges" and "incidents" of slavery. Id. at A8, A10. The court of appeals also recognized that in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), this Court held that Congress has the power to rationally determine what those "badges" and "incidents" of slavery are. Pet. App. A9-A10; see Jones, 392 U.S. at 439-443. The court of appeals explained that under Jones, "courts should only invalidate legislation enacted under the Thirteenth Amendment if they conclude that Congress made an irrational determi-

nation in deciding what constitutes 'badges' and 'incidents' of slavery in passing legislation to address them." Pet. App. A10.

The court of appeals then held that Section 249(a)(1) "is a valid exercise of congressional power because Congress could rationally determine that racially motivated violence is a badge or incident of slavery." Pet. App. A19. The court 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." Id. at A11 n.5 (citing Shepard-Byrd Act, Div. E., § 4702(7), 123 Stat. 2836,). The court also noted that Congress had acted on the basis of statistics "regarding the prevalence of hate crimes in American society and the need for expanded federal jurisdiction over the problem." Id. at A11-A12 (citing House Report 5-6).

The court of appeals also examined the historical meaning of "badges" and "incidents" of slavery. The court explained that those terms included both formal legal restrictions and "less formal but equally virulent means -- including widespread violence and discrimination" that were used "to keep the freed slaves in an inferior status." Pet. App. A13 (citation omit-

ted); see id. at A12-A13. After reviewing relevant judicial authority and scholarly analyses of the institution of slavery, the court concluded 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. In 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. at A14. The court further noted that its conclusion was consistent with the decisions of the two other federal courts of appeals that have addressed this issue. Id. at A14 n.7 (citing United States v. Hatch, 722 F.3d 1193, 1209 (10th Cir. 2013), cert. denied, 134 S. Ct. 1538 (2014); United States v. Maybee, 687 F.3d 1026, 1030-1031 (8th Cir.), cert. denied, 133 S. Ct. 556 (2012)).

The court of appeals also rejected petitioners' argument that more recent decisions of this Court "cast doubt[] on the continued viability of Jones, or show that Jones should be limited." Pet. App. A14. The court of appeals explained that neither this Court's decision in City of Boerne v. Flores, 521 U.S. 507 (1997), nor its decision in Shelby County v. Holder, 133 S. Ct. 2612 (2013), mentioned the Thirteenth Amendment or purported to overrule or retreat from Jones. Pet. App. A15-A18. Rather, the court explained, Shelby County "focused on the Fifteenth Amendment and the Voting Rights Act [of 1965 (VRA), 42 U.S.C.

1973 et seq.],” and Flores “did not hold that the ‘congruence and proportionality’ standard [announced in that case] was applicable beyond the Fourteenth Amendment.” Id. at A18.[2]

b. Judge Elrod filed a special concurrence. Pet. App. A26-A35. Her concurrence agreed with the opinion for the court that, “[u]nder binding precedent, [Section] 249(a)(1) is constitutionally valid.” Id. at A26. But she expressed “concern that there is a growing tension between [this] Court’s precedent regarding the scope of Congress’s power under [Section] 2 of the Thirteenth Amendment and [this] Court’s subsequent decisions regarding the other Reconstruction Amendments and the Commerce Clause.” Ibid. (footnote omitted). Her concurrence stated that the lower courts “would benefit from additional guidance from [this] Court on how to harmonize these lines of precedent.” Ibid.

ARGUMENT

Petitioners ask this Court to grant review so that it can provide guidance about Congress’s power to legislate under Section 2 of the Thirteenth Amendment. They urge the Court to limit or overrule Jones v. Alfred H. Mayer Co., 392 U.S. 409

[2] The court of appeals went on to hold that the evidence presented at trial was sufficient for the jury to conclude that petitioners had violated Section 249(a)(1). Pet. App. A19-A25. That fact-specific determination is not challenged in the petitions for certiorari.

(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). They also argue that the Court should provide additional guidance on how principles of federalism and the holding in Shelby County v. Holder, 133 S. Ct. 2612 (2013), should be interpreted to constrain Congress's legislative authority under Section 2. See generally Cannon Pet. 10-16; Kerstetter Pet. 10-35; McLaughlin Pet. 4-15, 19-25.

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. Petitioners offer no persuasive reason to ignore stare decisis and replace Jones with City of Boerne's congruence and proportionality test, Shelby County's current needs standard, or any other test. Although the Thirteenth, Fourteenth, and Fifteenth Amendments all respond to the aftermath of the Civil War, the Thirteenth Amendment has a different history and purpose, and it alone among those amendments applies to private conduct. Nor is there any reason to conclude that the court of appeals erred in applying Jones. Finally, because even under City of Boerne and Shelby County, Congress had sufficient authority to enact Section 249(a)(1)'s ban on race-based violence, petitioners could not obtain relief even if this Court were to adopt a similar

standard in the context of the Thirteenth Amendment. The petitions should be denied.[3]

1. This case does not implicate any of this Court's traditional criteria for certiorari. See Sup. Ct. R. 10. The court of appeals 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; see Pet. App. A19. Petitioners do not assert any conflict with this Court's holding or analysis in Jones. See Sup. Ct. R. 10(c).

Nor do petitioners 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). The two other courts of appeals to have addressed the constitutionality of Section 249(a)(1) also upheld that provision under Jones's interpretation of Section 2. United States v. Hatch, 722 F.3d 1193, 1200-1201, 1206, 1209 (10th Cir. 2013), cert. denied, 134 S. Ct. 1538 (2014); United States v. Maybee,

[3] 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 religion, gender, sexual orientation, gender identity, or disability. That provision was enacted pursuant to Congress's Commerce Clause authority, and it contains a jurisdictional element requiring proof that the crime was in or affecting interstate or foreign commerce.

687 F.3d 1026, 1030-1031 (8th Cir.), cert. denied, 133 S. Ct. 556 (2012). Notably, the petitioner in Hatch raised essentially the same arguments concerning the application of City of Boerne that petitioners raise here. See Hatch, 722 F.3d at 1202-1205.

Moreover, three circuits have applied Jones's analysis of Section 2 to uphold 18 U.S.C. 245(b)(2)(B) -- a similar statute that also prohibits certain forms of racially motivated violence. United States v. Allen, 341 F.3d 870, 883-884 (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, 1096-1097 (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 motivated violence against religious property. See United States v. Franklin, 104 Fed. Appx. 150 (2004) (per curiam), cert. denied, 544 U.S. 923 (2005); see also Gov't Br. in Opp. at 2-4, Franklin v. United States, 544 U.S. 923 (2005) (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 applica-

tion 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.

2. Petitioners' principal argument for certiorari is that this Court's interpretation of Section 2 of the Thirteenth Amendment in Jones is inconsistent with its later interpretations of Section 5 of the Fourteenth Amendment in City of Boerne. Petitioners 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. See Cannon Pet. 11; McLaughlin Pet. 10-15; Kerstetter Pet. 25-29. But petitioners offer no valid reason for upending settled precedent, and nothing in City of Boerne undermines Jones's analysis of Congress's authority under the Thirteenth Amendment.

a. Section 2 of the Thirteenth Amendment grants Congress the "power to enforce" Section 1's ban on slavery "by appropriate legislation." U.S. Const. Amend. XIII § 2. 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 empowers 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 (emphasis omitted) (quoting 109 U.S. at 20). The Court also held that it is Congress that "determine[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 on 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 (CRA), 14 Stat. 27, 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 (emphasis added) (quoting Cong. Globe, 39th Cong., 1st Sess., 322 (1866)). 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 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

---

[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." Id. at 442 n.78. 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." Id. at 442-443 n.78.

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 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 443-444.

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." Grif-

fin, 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 Jones, 392 U.S. at 440). The Court reached a similar conclusion in Runyon v. McCrary, 427 U.S. 160 (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. Id. at 168, 179.[5]

b. Petitioners argue that the Court should overrule Jones and limit Congress's legislative power under Section 2 by employing the more stringent congruence and proportionality test

[5] See, e.g., City of Memphis v. Greene, 451 U.S. 100, 125 n.39 (1981) (quoting Jones, 392 U.S. at 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 the 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 "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 Thirteenth Amendment and federal statute is an "inherently legislative" task).

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. 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 main justification that petitioners cite 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), 42 U.S.C. 2000bb et seq., was a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment. That provision 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 Privi-

leges and Immunities Clauses. City of Boerne, 521 U.S. at 516-517.[6]

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 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 exam-

[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. City of Boerne, 521 U.S. at 515-516 (brackets in original).

ining 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 [s]tate [l]egislatures." Id. at 521 (quoting statement of Senator William Stewart, Cong. Globe, 39th Cong., 1st Sess. 1082 (1866); see id. at 520-522). 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 523-524. 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 524-527 (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; see id. at 530-535. 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 Congress's power under Section 5 of the Fourteenth Amendment. Id. at 532, 536.

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 524-529.

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. See pp. 14-15, supra. 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. Instead, it relied on the quite different history surrounding the later passage of the Fourteenth Amendment. City of Boerne, 521 U.S. at 520-524. There, the Court explained that the critical events were (1) the rejection of Representative 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. Petitioners offer 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 both authorize Congress to pass "appropriate" legislation to "enforce this article," the underlying 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. Id. at 520, 524. But nothing in that conclusion is inconsistent with Jones's recognition that Congress has a broader role in determining what constitutes the "badges and incidents of slavery" for purposes of the Thirteenth Amendment.

Petitioners' 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, the federalism concerns raised by Congress's distinct powers to enforce the Thirteenth and Fourteenth Amendments are quite different. The Fourteenth Amendment applies only to state action, which means that legislation under Section 5 of the Amendment will often have a clear and direct impact on state sovereignty. 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 suit or otherwise directly interfere with their regulatory power in any way. Thus, even if Thirteenth Amendment legislation allows the United States 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 in 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) (citation and 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 enacted 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] [A]mendment 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., Hatch, 722 F.3d at 1205-1206; Nelson, 277 F.3d at

189-190; Pet. App. A12-A14 (citing various modern and antebellum sources discussing the issue). 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. L. Rev. 1, 11-12 (1995) (footnote 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. (footnote omitted); see generally Eric Foner, Reconstruction: America's Unfinished Revolution, 1863-1877 119-123 (1988).

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 352-353. The Court emphasized that "[v]iolence was * * * an elemental part" of the Klan, describing its "tactics such as whipping, threatening to burn people at the stake, and murder." Id. at 353-354; see id. at 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." House Report 5. Specifically, it noted that "[s]ince 1991, the 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 [ten] 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. 2836;

see id. § 4702(1) and (8), 123 Stat. 2835-2836. 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 "willfully" causing or attempting to commit bodily injury "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] Petitioners' inability to prevail under their own preferred legal standards makes this case especially unworthy of further review.

[7] See, e.g., Lane, 541 U.S. at 522, 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, 740 (2003) (upholding Family and Medical Leave Act of 1993 as appropriate enforcement of the Equal Protection Clause's protection against gender discrimination in family leave benefits).

3. Petitioners also argue that this Court should grant review to consider whether the Jones standard is consistent with this Court's analysis in Shelby County. See Cannon Pet. 11-13; McLaughlin Pet. 13-15; Kerstetter Pet. 11-12, 29-31. That argument lacks merit.

a. Shelby County involved a constitutional challenge to various provisions of the Voting Rights Act of 1965 (VRA), 52 U.S.C. 10301 et seq. (renumbered from 42 U.S.C. 1973 et seq.). Section 5 of the VRA prohibits certain covered jurisdictions from implementing changes to any voting standard, practice, or procedure without first obtaining preclearance either from the Attorney General or a three-judge panel of the United States District Court for the District of Columbia. 52 U.S.C. 10304(a) (renumbered from 52 U.S.C. 42 U.S.C. 1973c(a)). Section 4(b) of the Act prescribes a formula for identifying those covered jurisdictions. 52 U.S.C. 10303(b) (renumbered from 42 U.S.C. 1973b(b)). The petitioner in Shelby County argued that both Section 5 and Section 4(b), as reauthorized in 2006, exceed Congress's authority under the Fourteenth and Fifteenth Amendments. 133 S. Ct. at 2621-2622.

This Court agreed with that petitioner as to Section 4(b), holding that it was unconstitutional for Congress to continue to use the original coverage formula enacted in 1965, and as amended in 1970 and 1975, as a basis for subjecting jurisdictions to

the preclearance requirements of Section 5. Shelby Cnty., 133 S. Ct. at 2619-2620, 2631. The Court concluded that because those provisions of the VRA impose different requirements on different States, they "sharply depart[]" from the "fundamental principle of equal sovereignty" among the sovereign States. Id. at 2624. It cited its prior description of the VRA in Northwest Austin Municipal Utility District No. One v. Holder, 557 U.S. 193 (2009), as "'extraordinary legislation otherwise unfamiliar to our federal system,'" and it emphasized that "the principle of equal sovereignty" is "highly pertinent in assessing * * * disparate treatment of States" under the VRA. Id. at 2624, 2630 (quoting Northwest Austin, 557 U.S. at 211). The Court noted that in South Carolina v. Katzenbach, 383 U.S. 301 (1966), it had upheld the VRA's "departures from the basic features of our system of government justified" based on clear and pervasive evidence of voting discrimination in certain States. Shelby Cnty., 133 S. Ct. at 2624-2625, 2627.

This Court invalidated Section 4(b) after concluding that "[n]early 50 years later, things have changed dramatically" with respect to racial discrimination in voting. Shelby Cnty., 133 S. Ct. at 2625 (noting decline in racial disparities in voter turnout and registration rates and increases in the number of minority officeholders). It explained that the Section 4(b) formula that Congress reenacted in 2006 identifies covered ju-

risdictions based on whether they used certain voting practices and had low voter registration and turnout rates in the 1960s and early 1970s. Id. at 2626-2627. According to the Court, the "fundamental problem" with the 2006 reauthorization of the formula was that "Congress did not use the record it compiled [in 2006] to shape a coverage formula grounded in current conditions," but "instead reenacted a formula based on 40-year-old facts having no logical relation to the present day." Id. at 2629. The Court stated that "Congress -- if it is to divide the States -- must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions." Ibid. Although the Court declared Section 4(b) unconstitutional as a basis for requiring jurisdictions to seek preclearance under Section 5, it made clear that "Congress may draft another formula based on current conditions," and it "issue[d] no holding" with respect to Section 5's preclearance requirement. Id. at 2631.

b. Nothing in Shelby County undermines this Court's holding in Jones. Like City of Boerne, Shelby County did not cite Jones, mention the Thirteenth Amendment, or otherwise question Congress's authority to identify and proscribe the badges and incidents of slavery.

Nor did Shelby County announce a blanket rule -- even for purposes of the Fifteenth Amendment -- that any legislation en-

forcing that Amendment must necessarily be based on "current conditions." Rather, the Court's analysis was limited to the particular context of Sections 4(b) and 5 of the Voting Rights Act. See Shelby Cnty., 133 S. Ct. at 2622-2631; id. at 2631 (noting that "[o]ur decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in [Section] 2"). Sections 4(b) and 5 are "extraordinary" insofar as (1) they impose different obligations on different States, and (2) those obligations directly impinge on each State's core sovereign function of regulating elections. Id. at 2623-2624. The Court rejected Congress's 2006 decision to impose such differential burdens on the basis of what it concluded was stale data as part of Section 4(b)'s coverage formula, but it did not impose any affirmative requirement that Congress provide empirical justification for other Fifteenth Amendment legislation that does not raise the same federalism concerns. And those concerns are not implicated by the Shepard-Byrd Act, which does not impinge on core sovereign functions of the States or differentially burden the States.

c. Even if Shelby County's analysis were relevant to the Thirteenth Amendment, it would not undermine the validity of Section 249(a)(1). As explained above, Congress enacted the prohibition on racially motivated violence after considering extensive evidence concerning current conditions. See p. 28, su-

pra. For example, the House Report emphasized that "[b]ias crimes are disturbingly prevalent," and it noted that (1) "[s]ince 1991, the FBI has identified over 118,000 reported violent hate crimes," and (2) in 2007 alone the FBI documented more nearly 4900 hate crimes motivated by bias based on race or national origin. House Report 5; see p. 28, supra. That evidence establishes that Section 249(a)(1) responds to current conditions and is therefore "rational in both practice and theory." Shelby Cnty., 133 S. Ct. at 2627 (quoting Katzenbach, 383 U.S. at 330).

4. Petitioners also assert 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. See Cannon Pet. 14-16; McLaughlin Pet. 15-19; Kerstetter Pet. 31-35. In particular, they argue that Section 249(a)(1) is in tension with the federalism principles that bear on Congress's legislative authority under the Commerce Clause and the Tenth Amendment, and they cite this Court's decision in Bond v. United States, 134 S. Ct. 2077, 2083 (2014), which relied on principles of federalism to resolve an ambiguity in federal criminal law. Petitioners argue that this Court should similarly rely on federalism principles to prevent Congress's Thirteenth Amendment authority from expanding into a general po-

lice power. None of these arguments supports further review of this case.

a. Petitioners are 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), and 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.

This Court's Commerce Clause precedents do not suggest that Section 249(a)(1) exceeds Congress's power to enforce the Thirteenth Amendment. McLaughlin invokes (Pet. 15-17) this Court's decisions in United States v. Lopez, 514 U.S. 549, 551 (1995), and United States v. Morrison, 529 U.S. 598, 613, 617-619 (2000), both of which invalidated federal criminal statutes on the grounds that they lacked a sufficient connection to interstate commerce, thereby impinging on the traditional state police power. But neither case suggests that Congress lacks authority under other provisions of the Constitution apart from

the Commerce Clause -- such as the Thirteenth Amendment -- to address criminal conduct that could otherwise be addressed by the States. Indeed, Morrison itself noted that the Fourteenth Amendment "includes authority to prohibit conduct * * * and to intrude into legislative spheres of autonomy previously reserved to the States." 529 U.S. at 619 (citation, internal quotation marks, and brackets omitted).

Nor does Section 249(a)(1) run afoul of the Tenth Amendment. See Kerstetter Pet. 31-32. That Amendment reserves to the States only "th[ose] powers not delegated to the United States by the Constitution." U.S. Const. Amend. X. Here, the court of appeals correctly held that Congress was delegated authority to enact Section 249(a)(1) under the Thirteenth Amendment. Where, as here, "a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." New York v. United States, 505 U.S. 144, 156 (1992).

This Court's decision in Bond is likewise inapposite. That case addressed whether an individual who placed chemicals on the car door, mailbox, and door knob of her husband's lover violated the Chemical Weapons Convention Implementation Act of 1998, 18 U.S.C. 229(a)(1). Bond, 134 S. Ct. at 2083-2086. The Court reversed the conviction on statutory grounds, and it did not address whether that Act was valid under the Constitution. Id. at

2087-2094. Although the Court noted the longstanding principle that federal statutes are ordinarily construed in light of federalism principles, id. at 2089-2090, it did not limit Congress's legislative authority under any provision of the Constitution, and it made no mention of the Thirteenth Amendment.

Petitioners' federalism arguments ultimately 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.[8]

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

[8] See, e.g., Morrison, 529 U.S. at 619; 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) (noting that fact that enumerated powers legislation "regulates an area typically left to state regulation" is "not enough to render federal regulation an inappropriate means").

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 [f]ederal assistance" and that federal jurisdiction over such crimes would "enable[] [f]ederal, [s]tate, 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 the problem of hate crimes was sufficiently serious and widespread "to warrant [f]ederal assistance to States, local jurisdictions, and Indian tribes." Shepard-Byrd Act § 4702(10), 123 Stat. 2836. To that end, the Act granted the Attorney General the 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 [f]ederal [g]overnment assume jurisdiction"; (3) the "verdict or sentence obtained pursuant to [s]tate charges left demonstratively unvindicated the [f]ederal 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. Petitioners do 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 Tenth Circuit explained in Hatch, 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." 722 F.3d at 1206; see generally United States v. Comstock, 560 U.S. 126, 148-149 (2010) (rejecting similar federalism argument based on narrow scope of statute). Section 249(a)(1) does not undermine federalism, and no justification exists for this Court to grant review.[9]

[9] Some of petitioners' amici argue that Section 249(a)(1) undermines the "dual-sovereignty" exception to the Fifth Amendment's Double Jeopardy Clause because it allows prosecutions where there is not a genuine federal interest." Cato Inst., Reason Found., & Individual Rights Found. Amicus Br. 11; see generally Heath v. Alabama, 474 U.S. 82, 88-89 (1985) (addressing dual sovereignty doctrine). But petitioners have 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 by the court of appeals and elsewhere in this brief.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

VANITA GUPTA
Acting Assistant Attorney General

DENNIS J. DIMSEY
THOMAS E. CHANDLER
Attorneys

OCTOBER 2014