No. 12-20514

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CHARLES CANNON,
BRIAN KERSTETTER,
MICHAEL MCLAUGHLIN,

Defendants-Appellants

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

---

# SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS APPELLEE

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JOCELYN SAMUELS
Acting Assistant Attorney General

JESSICA DUNSAY SILVER
THOMAS E. CHANDLER
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 307-3192

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## INTRODUCTION

On August 5, 2013, after oral argument, the Court directed the parties to file supplemental briefs addressing how, if at all, the Supreme Court's recent decision in *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013), affects this case. This supplemental brief responds to that question, as well as the supplemental briefs filed by the appellants and amici. In sum, the decision in *Shelby County* addressed the constitutionality of a portion of the Voting Rights Act (VRA) that has no

bearing on this case. The decision in no way disturbed or called into question the Supreme Court's longstanding line of cases addressing Congress's power under Section 2 of the Thirteenth Amendment to identify and proscribe badges and incidents of slavery, and its reasoning is inapplicable to the question before this Court. Moreover, even if this Court were not bound by *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (as well as the decisions of *this Court* applying *Jones*, see U.S. Br. 26-27), the rationale of *Shelby County* is inapplicable to the far more limited, and very different, legislation enforcing the Thirteenth Amendment. Neither the "equal sovereignty" concerns, nor any broader federalism concerns, expressed in *Shelby County* have relevance to legislation enforcing the Thirteenth Amendment that proscribes private, race-based violent conduct.

## ARGUMENT

### *A.* *The Decision In* Shelby County

*Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013), involved a constitutional challenge to two provisions of the Voting Rights Act (VRA): (1) Section 5, which prohibits covered jurisdictions from implementing changes in 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; and (2) Section 4(b), which prescribes a formula for identifying the jurisdictions covered by Section 5's preclearance requirement. See 42 U.S.C.

1973c & 1973b(b). The petitioner in *Shelby County* argued that both Section 5 and Section 4(b), as reauthorized in 2006, exceeded Congress's authority under the Fourteenth and Fifteenth Amendments. The Supreme Court held that it was unconstitutional to use the coverage formula in Section 4(b) "as a basis for subjecting jurisdictions to preclearance" under Section 5. *Shelby Cnty.*, 133 S. Ct. at 2631. At the same time, the Court emphasized that it was not invalidating Section 5 itself and that "Congress may draft another formula based on current conditions." *Ibid*.

As the Court noted, Section 4(b) differentiates between the States by subjecting some but not others to Section 5's preclearance requirement. *Shelby Cnty.*, 133 S. Ct. at 2623-2624. 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." *Id.* at 2629. The Court concluded, however, that the Section 4(b) formula was seriously outdated and thus failed to respond to "current" conditions. *Id.* at 2631. The Court noted that Section 4(b)'s formula is structured so that coverage is determined based on whether a jurisdiction used certain voting practices and had low voter registration and turnout rates in the 1960s and early 1970s. *Id.* at 2627. Therefore, the "fundamental problem" with Congress's reauthorization of the formula in 2006, according to the Court, 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.

*B. Even If This Court Were Not Bound By* Jones, *The Rationale Of* Shelby County *Is Inapplicable To Legislation Under Section 2 Of The Thirteenth Amendment*

Even if this Court were not bound by *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (see U.S. Br. 21-29), the decision in *Shelby County* is inapplicable to the far more limited, and very different, legislation enforcing the Thirteenth Amendment. First, neither the "equal sovereignty" concerns at issue in *Shelby County* (the VRA coverage formula differentiates between the States), nor any broader federalism concerns, have relevance to legislation enforcing the Thirteenth Amendment that proscribes private, race-based violent conduct. As a result, any tension in our federal system between the exercise of Congress's remedial power under the Fourteenth and Fifteenth Amendments and issues of state sovereignty is simply not present in the context of Thirteenth Amendment legislation addressing private actions and applying nationwide. Thirteenth Amendment enforcement legislation operates against the backdrop of a Constitution that enshrined slavery, the resulting Civil War, and the massive resistance to the enforcement of both the Civil War Amendments and the modern civil rights statutes. As such, it responds to the uniquely federal interest in eradicating the legacy of slavery, including race-based violence that has long been at the forefront of efforts to deny African

Americans (and others) their rights as free Americans. See U.S. Br. 30-32, 35-39, 43.

Moreover, even broader concepts of federalism that focus on the primacy of the States in protecting individual liberty, or federal encroachment into traditional areas of state governance, do not undermine Congress's power to enact Section 249(a)(1) to enforce the Thirteenth Amendment. In the context of race-based violence, the federal government, rather than the States, has often been the principal source of the protection of individual liberty. Moreover, Section 249 does not displace state law, prevent States from enforcing their laws, or require States to seek permission from the federal government before doing so. As we have noted, Section 249 was intended to *supplement* state authority; its legislative history and statutory findings reflect the intention that the States remain primarily responsible for prosecuting hate crimes. The statute allows the government to provide financial and non-financial assistance to state law enforcement authorities to that end. See U.S. Br. 50-52. This kind of "cooperative" federalism is fully consistent with the notion that, as a general matter, States take the lead in addressing ordinary street crime.[1] Further, as the Tenth Circuit in *Hatch*

[1] Sometimes, however, even where state criminal law includes a hate crime law, the state hate crime law may fail to vindicate fully federal interests. In this case, for example, even applying the applicable state hate crime enhancement, the maximum penalty would have been one year's imprisonment. See Texas Penal

(continued…)

recognized, Section 249(a)(1), by its terms, incorporates limiting principles that reflect that Congress has not used its Thirteenth Amendment enforcement power to "legislate regarding nearly every social ill." *United States* v. *Hatch*, No. 12-2040, 2013 WL 3336809, at *11 (10th Cir. July 3, 2013).[2]

Second, the concern in *Shelby County* – that, as reauthorized in 2006, the Section 4(b) formula was still tied to decades-old practices and data (from the 1960s and 1970s), and therefore did not account for current conditions – is not present here. In enacting Section 249 in 2009, Congress found that bias crimes continue to be "disturbingly prevalent"; for example, in 2007 alone, the FBI documented more than 3800 race-based hate crimes. H.R. Rep. No. 86, Pt. 1, 111th Cong., 1st Sess. 5 (2009); see generally U.S. Br. 35-37. Therefore, Congress legislated based on "current conditions." Moreover, prosecution under Section 249(a)(1) is not triggered by some long-ago event, but, as here, by specific, recent individual violent conduct.

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(…continued)
Code §12.47. Under Section 249(a)(1), the maximum sentence was 10 years. 18 U.S.C. 249(a)(1)(A).

[2] The court in *Hatch* concluded that "Congress employed a limited approach to badges-and-incidents, applying that concept to: (a) actions that can rationally be considered to resemble an incident of slavery [race-based physical attacks] 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 an animus toward persons with that trait." *Hatch*, 2013 WL 3336809, at *12.

*C. Longstanding Precedent Regarding Congress's Exercise Of Power Under Section 2 Of The Thirteenth Amendment Remains Controlling*

There is a well-established body of Supreme Court decisions directly addressing Congress's power under Section 2 of the Thirteenth Amendment, which unlike the Fourteenth and Fifteenth Amendments, operates on individuals as well as the States.[3] Nothing in *Shelby County* suggests that its rationale applies to legislation enacted pursuant to the Thirteenth Amendment, or that the Thirteenth Amendment cases are no longer good law.[4] Therefore, this Court remains bound by *Jones*, and the other cases we have cited upholding legislation adopted pursuant to Section 2 of the Thirteenth Amendment. See U.S. Br. 19-29; see generally *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)

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[3] Section 1 of the Fourteenth Amendment states, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. Section 1 of the Fifteenth Amendment states: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude." U.S. Const. Amend. XV, § 1. By contrast, Section 1 of the Thirteenth Amendment states: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. Amend. XIII, § 1.

[4] The same holds true with regard to *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), addressing Congress's power under Section 5 of the Fourteenth Amendment and adopting the "congruence and proportionality" test. See U.S. Br. 54-64. *Shelby County* neither cites nor addresses *Boerne*.

("the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); *Hatch*, 2013 WL 3336809 (applying *Jones* in rejecting a similar constitutional challenge to 18 U.S.C. 249(a)(1)).

Indeed, as we noted in our initial brief, the enduring force of *Jones*, as well as *Runyon* v. *McCrary*, 427 U.S. 160 (1976), is reflected in the more recent Supreme Court cases addressing 42 U.S.C. 1981, legislation enacted pursuant to Section 2 of the Thirteenth Amendment. See U.S. Br. 28-29 (addressing *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), and *CBOCS W., Inc.* v. *Humphries*, 553 U.S. 442 (2008)). In *Patterson*, the Supreme Court expressly reaffirmed *Runyon* and its holding that 42 U.S.C. 1981 prohibits racial discrimination in private contracts, emphasizing principles of *stare decisis* and rejecting the notion that, as precedent, *Runyon* was outdated or "inconsistent with the prevailing sense of justice in this country." *Patterson*, 491 U.S. at 172, 174. *Shelby County* does not cite or address these cases, or the other cases addressing Congress's power under Section 2 of the Thirteenth Amendment. Therefore, it does not affect the applicable standard of review of Thirteenth Amendment legislation. Indeed, the *Shelby County* decision did not purport to change the standard of review even for Fourteenth and Fifteenth Amendment legislation.

What these cases make clear is that, contrary to amici's contention (and those of appellants, adopting amici's arguments), Congress's power to enforce the Thirteenth Amendment is not limited to effectuating the ban on slavery and preventing its return. *Jones* and numerous other Supreme Court decisions uphold Thirteenth Amendment legislation that, *e.g.*, proscribes racial discrimination in employment (including retaliation), contracting, and real estate transactions. See U.S. Br. 20-25, 41-43. The law also makes clear that Congress's authority under Section 2 of the Thirteenth Amendment is not limited by the scope of Section 1. See U.S. Br. 20-25.

In short, amici argue as if the Supreme Court has never addressed the scope of Congress's power under Section 2 of the Thirteenth Amendment. They may wish that were true, but it is not.

In sum, under Section 2 Congress may rationally reach badges and incidents of slavery that thwart the rights of African Americans to full and equal freedom. See U.S. Br. 41-43. Nothing in *Shelby County* affects that conclusion. As a result, in addressing whether Section 249(a)(1) is beyond Congress's power under Section 2 of the Thirteenth Amendment, the *only* question for this Court under applicable law is: Was Congress's determination that race-based violence is a badge or incident of slavery rational? The answer to that question is inescapably "yes." See U.S. Br. 29-40.

## CONCLUSION

For the foregoing reasons, as well as those set forth in the Brief for the United States as Appellee, this Court should affirm defendants' convictions and sentences.

Respectfully submitted,

JOCELYN SAMUELS
Acting Assistant Attorney General

s/ Thomas E. Chandler
JESSICA DUNSAY SILVER
THOMAS E. CHANDLER
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 307-3192

## CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2013, I electronically filed the foregoing Supplemental Brief for the United States as Appellee with the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Thomas E. Chandler
THOMAS E. CHANDLER
Attorney

## CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached Supplemental Brief for the United States as Appellee:

(1) contains 2056 words (and does not exceed 10 pages, pursuant to this Court's August 5, 2013, order directing the filing of supplemental briefs);

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font; and,

(3) has been scanned for viruses using Trend Micro Office Scan (version 8.0) and is free from viruses.

s/ Thomas E. Chandler
THOMAS E. CHANDLER
Attorney

Date: August 26, 2013