No. 06-1431

IN THE

Supreme Court of the United States

CBOCS WEST, INC.,
Petitioner,
v.
HEDRICK G. HUMPHRIES,
Respondent.

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

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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The Equal Employment Advisory Council and the National Federation of Independent Business Legal Foundation respectfully submit this brief as *amici curiae*. The brief urges reversal of the decision below and thus supports the position of Petitioner CBOCS West, Inc. before this Court.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and practices. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The National Federation of Independent Business Legal Foundation (NFIB Legal Foundation), a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's leading small-business advocacy association, with offices in Washington, DC and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. To fulfill this role as the voice for small business, the NFIB Legal Foundation frequently files *amicus* briefs in cases that will impact small businesses nationwide.

Amici's members are employers or representatives of employers that are subject to Section 1981 of the

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other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Civil Rights Act of 1866 (Section 1981), as amended, 42 U.S.C. § 1981; Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. §§ 2000e *et seq.*; and other federal employment-related laws and regulations. As potential defendants to claims under these laws, *amici's* members have a direct and ongoing interest in the issue presented before this Court regarding whether a cause of action for retaliation is available under 42 U.S.C. § 1981. A divided panel of the Seventh Circuit erroneously found that Section 1981's plain language and legislative history compel the conclusion that Congress intended to prohibit retaliation under the statute, even though it did not include any language to that effect in Section 1981's actual text.

The issue of whether retaliation claims are available under Section 1981 is of great importance to the constituency *amici* represents. While a substantial segment of EEAC's members are large corporations with tens of thousands of employees, NFIB is comprised of many small businesses for whom the cost of defending even a single lawsuit would be devastating. Creating a cause of action for retaliation under Section 1981 would greatly expand the number and scope of claims brought under the law and would undermine Title VII's well-established administrative enforcement scheme designed to resolve workplace disputes in a timely manner and without unnecessary resort to protracted litigation.

Because of their interest in matters of this nature, EEAC and/or NFIB have filed *amicus curiae* briefs in a number of cases involving § 1981 before this Court, including *Domino's Pizza, LLC v. McDonald,* 546 U.S. 470 (2006), *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994), *Patterson v. McLean Credit Union,*

491 U.S. 164 (1989), and *Goodman v. Lukens Steel Co.,* 482 U.S. 656 (1987). Given their significant experience in these matters, *amici* are well-situated to brief the Court on the ramifications of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Respondent Hedrick Humphries (Humphries) worked for Petitioner CBOCS West (hereinafter referred to as Cracker Barrel) as an associate manager in its Bradley, Illinois store. Jt. App. 118. In the last several months of his employment, Humphries received nine written and verbal warnings regarding deficient work performance, the last three of which, issued in September 2001, indicated they were "final" warnings. *Id.* at 109.

In November 2001, Humphries, who is African-American, complained to William Christensen, the Bradley store's district manager, about discriminatory employment practices. *Id.* Specifically, Humphries complained that he and Venus Green, an African-American employee who recently had been terminated by Joe Stinnett, another associate manager, were treated unfairly on the basis of race. *Id.* Christensen received the complaint, but evidently failed to conduct an investigation in accordance with Cracker Barrel's company policies. *Id.* at 119.

On December 3, Stinnett reported finding the store safe unlocked. *Id.* at 120. Humphries was on duty on December 2, and it was his responsibility pursuant to company policy to ensure the safe was closed and locked before leaving the store. *Id.* On December 5, the company terminated Humphries' employment based on his violation of company policies in failing to ensure the store safe was closed and locked on

December 2. *Id.* Humphries denied that it was he who left the store safe unlocked on December 2. *Id.*

Humphries filed an action in the United States District Court for the Northern District of Illinois, alleging he was subjected to race discrimination and retaliation, in violation of Title VII of the Civil Rights Act (Title VII), 42 U.S.C. §§ 2000e *et seq.,* and 42 U.S.C. § 1981 (Section 1981). *Id.* at 117. The district court dismissed the Title VII race and retaliation claims based on Humphries' failure to timely file an action within 90 days of receiving a Notice of Right to Sue from the U.S. Equal Employment Opportunity Commission (EEOC), and subsequently dismissed his Section 1981 claims, concluding he failed to establish a prima facie case of retaliation or race discrimination. *Id.* at 91.

Humphries appealed to the Seventh Circuit, which in a 2-1 decision reversed the district court's ruling in part. The panel majority reasoned Section 1981's plain language, coupled with the legislative history of the Civil Rights Act of 1991—which among other things amended Section 1981 to extend a race discrimination prohibition to post-formation conduct—"confirms that Congress intended retaliation to be included under this provision." *Id.* at 138. Conceding that "strictly speaking, a discriminatory 'termination of contract' is not the same thing as a retaliatory discharge—for instance, analytically, retaliation need not have a discriminatory intent behind it," the panel majority nevertheless determined, "the Civil Rights Act of 1991 dispensed with this heightened degree of formalism." *Id.*

In finding that a cause of action for retaliation exists under Section 1981, the panel majority relied heavily on this Court's holding in *Jackson v.*

Birmingham Board of Education, 544 U.S. 167 (2005), which addressed whether Title IX of the Education Act Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, prohibits retaliation for opposing alleged workplace discrimination. *Id.* at 138-144. The panel majority concluded that this Court's rationale for reading a retaliation cause of action in Title IX's definition of "to discriminate" supports a similarly broad reading of Section 1981—even though neither Title IX nor Section 1981 contain anti-retaliation provisions. *Id*.

Chief Judge Easterbrook dissented in part.[2] He took issue with the panel majority's reliance on *Jackson*, lamenting, "[t]oday this court attributes to *Jackson* the conclusion that *all* federal statutes dealing with the employment relation prohibit retaliation." *Id.* at 159. He observed, "[t]he question at issue today is not whether an employer may fire a worker who protested discrimination, but whether an employee may present a claim of retaliation even though he failed to file a timely charge under Title VII and engage in conciliation before turning to court." *Id.* at 160. Noting, "[t]his is not the first time that a disgruntled employee has turned to § 1981 after missing the deadline for litigation under Title VII," *id.,* Judge Easterbrook concluded the panel majority's action in manufacturing a cause of action for retaliation under Section 1981 effectively "demolishes components of Title VII that Congress thought necessary to expedite the resolution of disputes and resolve many of them out of court." *Id.*

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[2] Judge Easterbrook joined the majority in affirming the district court's dismissal of Humphries' race discrimination claim.

Cracker Barrel filed a petition for certiorari, which this Court granted on September 25, 2007.

SUMMARY OF ARGUMENT

Unlike Title VII, Section 1981 is not a comprehensive nondiscrimination law, but a narrow statutory provision that prohibits *only* intentional race discrimination in the making and enforcement of contracts. *Domino's, Inc. v. McDonald*, 546 U.S. 470, 474 (2006). Although Congress in 1991 extended Section 1981's scope to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship," 42 U.S.C. § 1981(b), as Judge Easterbrook in his dissenting opinion below observed, neither the original text of Section 1981 nor its 1991 amendment contains the term "retaliation." Jt. App. 161.

The panel majority below thus read into Section 1981 a protection that simply is not contained in the actual text of the law. Retaliation, *i.e.*, being subjected to an adverse employment action for having opposed a discriminatory act, is not the same as being subjected to an adverse employment action on the basis of race. Section 1981 prohibits treating individuals differently on the basis of race, and should not be read to extend to retaliation in the absence of an act of Congress expressly providing such protection.

Virtually every other federal nondiscrimination law—including Title VII, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), the Fair Labor Standards Act (FLSA), the Equal Pay Act (EPA) and the Family and Medical Leave Act (FMLA)—contains specific

language that makes it unlawful for employers to discharge or otherwise discriminate against someone who has opposed some conduct made unlawful by the law. The fact that Congress chose not to include an anti-retaliation provision in either the initial version of the statute or the 1991 amendments to the Act further demonstrates such claims are not available under Section 1981.

By recognizing a cause of action for retaliation under Section 1981—particularly in a case in which the plaintiff was barred from proceeding on identical claims under Title VII for failure to timely file an action in federal court—the Seventh Circuit has expanded the law's reach beyond that which was contemplated by Congress. Under this rule, employees essentially are given a choice between filing a retaliation claim under Title VII—which imposes, for good reason, strict timeframes on the filing of such claims, requires administrative exhaustion as a precondition to filing suit, and places statutory caps on punitive and compensatory damages—and Section 1981, which does not. As a practical matter, such a result will force employers to defend stale claims—notice of which may never be provided until a federal complaint actually has been served—and will deprive them of the benefit of the informal conciliation and settlement mechanisms contained in Title VII's administrative enforcement procedures.

ARGUMENT

I. THE PANEL MAJORITY BELOW IMPROPERLY READ INTO SECTION 1981 A PROTECTION THAT SIMPLY IS NOT CONTAINED IN THE ACT

A. Neither the Original Text of Section 1981 Nor Its 1991 Amendment Contains the Term "Retaliation"

Section 1981 of the Civil Rights Act of 1866 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

42 U.S.C. § 1981(a). "Among the many statutes that combat racial discrimination, § 1981, originally § 1 of the Civil Rights Act of 1866, 14 Stat. 27 (1866), has a specific function: It protects the equal right of 'all persons within the jurisdiction of the United States' to 'make and enforce contracts' without respect to race." *Domino's, Inc. v. McDonald*, 546 U.S. 470, 474 (2006).

In 1991, Congress amended Section 1981 to specify that "the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). Although this new language expanded the definition of "to make

and enforce contracts" to encompass post-formation conduct previously rejected by this Court in *Patterson* as not actionable under Section 1981, the 1991 amendment did not include any language creating a cause of action for retaliation. Indeed, as Chief Judge Easterbrook observed in his dissenting opinion below, nowhere in the original text of Section 1981 or its 1991 amendment is the term "retaliation" even mentioned.

The panel majority below determined, "[t]he plain text of the statute, as amended in 1991, makes clear that section 1981 encompasses the 'termination of contracts,' and there can be no doubt that a retaliatory discharge is indeed a termination of the employment contract." Jt. App. 137. While acknowledging, as it must, that "strictly speaking, a discriminatory 'termination of contract' is not the same thing as a retaliatory discharge—for instance, analytically, retaliation need not have a discriminatory intent behind it," *id.* at 138, the panel majority nonetheless went on to conclude that "the Civil Rights Act of 1991 dispensed with this heightened degree of formalism, and the legislative history confirms that Congress intended retaliation to be included within section 1981." *Id.*

While a House Report on the 1991 amendments makes passing reference to the term "retaliation" in the context of workplace discrimination, its importance in establishing Congress' intent to create a retaliation cause of action under Section 1981 is very much overstated by the panel majority below. A careful review of the legislative history confirms unequivocally that Congress' clear intent in amending Section 1981 was to ensure that employees who suffer intentional workplace discrimination *on the*

basis of race are afforded the statute's full protections. Indeed, the term "retaliation" is discussed in every instance in the context of intentional race discrimination; there is no mention at all of any need to provide substantive rights for employees who are subjected to retribution by their employers for engaging in what amounts to whistleblower activity.

In its Report accompanying the House version of the proposed amendments to Section 1981, for instance, the Education and Labor Committee explained:

> Section 210 would overrule *Patterson* by adding at the conclusion of section 1981 a new subsection (b). This subsection would clarify that the right to "make and enforce contracts" *free from race discrimination* includes "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." The Committee intends this provision *to bar all race discrimination* in contractual relations. The list set forth in subsection (b) is intended to be illustrative rather than exhaustive. In the context of employment discrimination, for example, this would include, but not be limited to, claims of harassment, discharge, demotion, promotion, transfer, retaliation, and hiring.

H.R. Rep. No. 102-40, pt. 1, at 92 (1991) (emphasis added). Nothing contained in the legislative history of the 1991 amendments suggests Congress in any way intended to fundamentally alter the nature and purpose of the statute by extending protection to those who are retaliated against by their employers for having "blown the whistle" on alleged employer

misconduct, whether or not they can state an actual claim of intentional discrimination based on *race*.

"Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity, but in the absence of a clearly expressed legislative intention to the contrary, the language of the statute itself must ordinarily be regarded as conclusive." *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) (internal quotations and citations omitted). The text of Section 1981 plainly contains *no* provision making retaliation a prohibited act, and the passing references to the term "retaliation" in the legislative history of the 1991 amendments can hardly be said to evince "a clearly expressed legislative intent to the contrary." *Id.* In other words, "[t]he short answer is that Congress did not write the statute that way." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotations and citations omitted).

A further indication of Congress' intent to exclude retaliation claims from coverage under Section 1981 is the fact that every other major federal law prohibiting workplace discrimination contains specific language, separate and apart from the actual nondiscrimination provision, that makes it unlawful for employers to discharge or otherwise discriminate against someone who has opposed some conduct made unlawful by the statute. In addition to expressly prohibiting discrimination in the terms, conditions and privileges of employment on account of race, color, religion, sex, or national origin, for instance, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, contains a separate anti-retaliation provision, which makes it unlawful for an employer to discriminate against an employee (or applicant for employment) "because he has

opposed any practice made an unlawful employment practice" or "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under the Act. 42 U.S.C. § 2000e-3(a).[3]

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[3] Specifically, § 2000e-2(a) of Title VII, captioned, "**Unlawful employment practices**," provides:

> (a) **Employer Practices**
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C.§ 2000e-2(a) (emphasis added).

Title VII's anti-retaliation provision is found separately in § 2000e-3, **Other unlawful employment practices**, which provides:

> (a) **Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings.**
>
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this [subchapter], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceedings, or hearing under this [subchapter].

42 U.S.C.§ 2000e-3(a) (emphasis added).

Other nondiscrimination laws contain similar anti-retaliation provisions. *See* the Americans with Disabilities Act (ADA), 42 U.S.C. § 12203(a); the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(d); the Fair Labor Standards Act (FLSA), 29 U.S.C. § 215(a)(3); and the Family and Medical Leave Act (FMLA), 29 U.S.C § 2615(a). The fact that Congress chose not to include any anti-retaliation provision in the 1991 amendments to the Act further demonstrates such claims are not available under Section 1981. *See Jackson,* 544 U.S. at 190 ("If a prohibition on 'discrimination' plainly encompasses retaliation, the explicit reference to it in these statutes, as well as in Title VII, would be superfluous—a result we eschew in statutory interpretation. The better explanation is that when Congress intends to include a prohibition against retaliation in a statute, it does so.") (Thomas, J., dissenting).

Neither a plain reading of Section 1981's text nor its legislative history supports the panel majority's conclusion that retaliation claims are viable under the statute. Furthermore, "[l]ack of an anti-retaliation norm in § 1981 would not hinder enforcement of civil rights laws, because there is a *real* anti-retaliation rule in Title VII of the Civil Rights Act of 1964." Jt. App. 160. Accordingly, the panel majority's decision below is erroneous and thus should be reversed by this Court.

B. Retaliation Is Not Discrimination Because of Race

Section 1981 prohibits intentional race discrimination in the contractual relationship. *Domino's Pizza, LLC v. McDonald,* 546 U.S. 470, 476 (2006). "The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category

of rights, specifically defined in terms of racial equality." *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 384 (1982) (citation omitted). Retaliation is not discrimination "because of race." Rather, it is retribution or punishment for having engaged in some type of activity, such as blowing the whistle on alleged employer misconduct. *See, e.g.* Title VII, 42 U.S.C. § 2000e-3(a), ADA, 42 U.S.C. § 12203(a); ADEA, 29 U.S.C. § 623(d); FLSA, 29 U.S.C. § 215(a)(3); FMLA, 29 U.S.C § 2615(a). As the panel majority admitted below, retaliation need not be—and, indeed, often is not—related to actual, intentional discrimination of *any* kind, much less that which is based on race.

The crux of Respondent's claim below is that he was discharged in retaliation for having "blown the whistle" on alleged discriminatory employment practices. Yet, as the district court found and the Seventh Circuit below affirmed, Respondent failed to show that his termination was motivated by intentional racial animus, a required element of a Section 1981 claim. *See* Jt. App. 115 ("Although Humphries' complaint contends that his termination was motivated both by racial animus and by retaliation for his prior complaints, it is apparent from the presentation he makes in his opposition papers that only the retaliation claim has any vitality"). As Chief Judge Easterbrook observed, "[f]or all this record shows, Cracker Barrel fires every complainer, without regard to the subject of the complaint. An employer that treats everyone the same in this respect complies with § 1981." Jt. App. 166.

Since the plain text of Section 1981—both in its original and amended forms—does not create a cause of action for retaliation, the panel majority below was wrong to allow Respondent's claim to proceed under

Section 1981. To do so improperly reads into the statute a prohibition that simply does not exist, and diminishes Congress' singular purpose in enacting the law—to eradicate impermissible considerations of race in the making and enforcement of contracts. As this Court explained in *Patterson*:

> The law now reflects society's consensus that discrimination based on the color of one's skin is a profound wrong of tragic dimension. Neither our words nor our decisions should be interpreted as signaling one inch of retreat from Congress' policy to forbid discrimination in the private, as well as the public, sphere. Nevertheless, in the area of private discrimination, to which the ordinance of the Constitution does not directly extend, our role is limited to interpreting what Congress may do and has done.

Patterson v. McLean Credit Union, 491 U.S. 164, 188 (1989), *superceded in part by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074 (1991); *see also Domino's Pizza,* 546 U.S. at 479 ("Trying to make [Section 1981] a cure-all not only goes beyond any expression of congressional intent, but would produce satellite § 1981 litigation of immense scope").

II. RECOGNIZING A CAUSE OF ACTION FOR RETALIATION UNDER SECTION 1981 WILL ENCOURAGE PLAINTIFFS TO BYPASS TITLE VII'S WELL-ESTABLISHED ENFORCEMENT MECHANISM, THUS DEPRIVING EMPLOYERS OF THE BENEFIT OF TIMELY NOTICE AND EXPEDITIOUS RESOLUTION OF RETALIATION CLAIMS

Both Section 1981 and Title VII prohibit intentional race discrimination. Unlike Title VII, however,

Section 1981 contains no enforcement mechanism other than private suits in federal court. Title VII, by contrast, contains detailed procedures for correcting suspected workplace discrimination. Whenever a complainant files a charge of discrimination or retaliation under Title VII, for instance, the EEOC statutorily is required to provide the employer-respondent with notice of the charge and to investigate the allegations. 42 U.S.C. § 2000e-5(b). The purpose of this administrative scheme is to allow the EEOC "to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

As this Court observed in *Patterson*, "[w]here conduct is covered by both § 1981 and Title VII, the detailed procedures of Title VII are rendered a dead letter, as the plaintiff is free to pursue a claim by bringing suit under § 1981 without resort to these statutory prerequisites." 491 U.S. at 181. This Court thus "should be reluctant . . . to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute." *Id.*

Permitting retaliation causes of action to proceed under Section 1981 invariably will encourage workers to bypass Title VII's detailed, administrative enforcement procedures entirely. This is especially true of those, like Respondent, who sit on their rights by failing to file timely Title VII actions within the prescribed limitations period. Chief Judge Easterbrook made a similar observation in his dissent below, pointing out that permitting retaliation claims under Section 1981 "demolishes components of Title VII that Congress thought necessary to expedite the

resolution of disputes and resolve many of them out of court . . . such as short periods of limitations that employees find inconvenient." Jt. App. 160.

Depriving employers of prompt notice of workplace claims prevents early detection and correction of potentially discriminatory employment practices. More importantly, however, it eliminates the opportunity for informal resolution of disputes without resort to protracted litigation.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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