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 FOR THE RESPONDENT

ERIC SCHNAPPER
SCHOOL OF LAW
UNIVERSITY OF WASHINGTON
P.O. Box 353020
Seattle, Washington 98185
(206) 616-3167

CAROLYN SHAPIRO
CHICAGO-KENT COLLEGE OF LAW
ILLINOIS INSTITUTE OF TECHNOLOGY
565 West Adams Street
Chicago, Illinois 60661
(312) 906-5392

CYNTHIA H. HYNDMAN
Counsel of Record
ALEEZA M. STRUBEL
ROBINSON CURLEY &
CLAYTON, P.C.
300 South Wacker Drive,
Suite 1700
Chicago, Illinois 60606
(312) 663-3100

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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QUESTION PRESENTED

Is a race retaliation claim cognizable under 42 U.S.C. § 1981?

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This case involves 42 U.S.C. § 1981, originally enacted as § 1 of the Civil Rights Act of 1866, 14 Stat. 27, and amended by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, to read as follows:

> (a) 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 benefit 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.
>
> (b) For the purposes of this section, 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.
>
> (c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

STATEMENT OF THE CASE

A. Statutory Background.

Congress first enacted what later became section 1981(a) as part of § 1 of the Civil Rights Act of 1866 (the "1866 Act"), pursuant to its broad authority "to enforce [the Thirteenth Amendment] by appropriate legislation." U.S. CONST. amend. XIII, § 2. *See also* JA 124 ("The Civil Rights Act of 1866 was passed pursuant to section 2 of the Thirteenth Amendment, which provided Congress with the legislative power to enforce the Thirteenth Amendment's prohibition on slavery."). At the time the legislation was first passed, the states had recently ratified the Thirteenth Amendment, but Congress faced overwhelming evidence that the Amendment's promise to end slavery would be hollow if steps were not taken to eliminate widespread efforts to obstruct the participation of freed slaves in economic life. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 427-28 (1968) ("The congressional debates are replete with references to private injustices against Negroes – references to white employers who refused to pay their Negro workers, white planters who agreed among themselves not to hire freed slaves without the permission of their former masters, white citizens who assaulted Negroes or who combined to drive them out of their communities.").

In 1991, Congress enacted the Civil Rights Act of 1991 (the "1991 Act"), partly in response to the narrow construction of section 1981 announced by the Court in *Patterson v. McLean Credit Union*, 491 U.S.

164 (1989). The 1991 Act amended section 1981 by adding two sub-sections, 1981(b) and 1981(c), to clarify the scope of the original text. Congress did not alter the original text of section 1981, but simply renamed it section 1981(a). Section 1981(b) explains that the term "to make and enforce contracts" includes not only "the making, performance, modification, and termination of contracts," but also "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). Section 1981(c) codifies the holding in *Runyon v. McCrary*, 427 U.S. 160 (1976), that section 1981 protects against private acts of discrimination.

B. Factual And Procedural Background.

Petitioner, Cracker Barrel Old Country Stores, Inc. ("Cracker Barrel"), operates a chain of restaurants and retail stores in Illinois and throughout parts of the United States. R. 53 at 1, ¶ 2 ("Plaintiff's Local Rule 56.1 Statement of Material Facts" or "Plaintiff's Stmt. of Facts"). In keeping with its motto of "pleasing people," *see, e.g.*, JA 93, Cracker Barrel has adopted and implemented an Open Door Policy that invites employees to take up with management any kind of suggestions, complaints or problems affecting their jobs. JA 97. The policy also makes clear that "Cracker Barrel will not tolerate any form of discrimination, harassment or retaliation of its employees due to race," *id.* at 95, and "[t]he company values and respects all employees." *Id.* at 96. The Open Door Policy aims to advance the "welfare, work,

working conditions, and satisfaction [of] an employee of Cracker Barrel," *see* JA 97, by creating mandatory procedures for reporting, investigating, and resolving employee complaints of race discrimination and harassment. *Id.* at 93-101.

Respondent Hedrick Humphries, an African-American, was an associate manager at a Cracker Barrel restaurant in Bradley, Illinois for three years. JA 45 at ¶ 6; JA 49 at ¶ 19. During his tenure at Cracker Barrel, Humphries was directly supervised by three different general managers: Don Sessions, Steve Cardin, and Ken Dowd. JA 118. Each of these general managers, in turn, reported to William Christensen, the district manager responsible for several Cracker Barrel stores in the area. JA 119; R. 53 at 5, ¶ 17 (Plaintiff's Stmt. of Facts). Sessions, who was Humphries supervisor for two and a half years, "testified that he considered Humphries to be his best associate manager," and Humphries received annual merit raises and bonuses. JA 118.

In July 2001, Cardin became the acting general manager in the Bradley store. *Id.* Cardin "routinely made racially derogatory remarks," not only in Humphries' presence, but also in the presence of his coworkers. JA 119. Cardin was also forthright about the fact that "he was there 'for the white people' and was 'going to take care of the white people.'" *Id.* Cardin's racial animus went beyond his insensitive comments; he promptly issued five disciplinary reports against Humphries covering alleged misconduct such as bank deposit shortages, failing to secure

the store's front door, and inappropriately crediting meals to customers who complained. *Id. See also* R. 53 at 29-32, ¶¶ 99-121 (Plaintiff's Stmt. of Facts). Humphries believed these disciplinary reports were groundless and racially motivated. JA 119. *See also* R. 53 at 29-33, ¶¶ 99-121 (Plaintiff's Stmt. of Facts). In August and October, 2001, Humphries invoked Cracker Barrel's Open Door Policy and complained to Christensen about Cardin's racially offensive remarks in the workplace and about the racially-motivated discipline to which Cardin subjected him. JA 46 at ¶ 11; JA 48 at ¶ 16. Christensen took no action. JA 46 at ¶ 11; *see also* R. 53 at 33-35, ¶¶ 130, 132-33, 136, 138, 140, 142-43, 145.

In November 2001, Joe Stinnett, one of Humphries' fellow associate managers, fired an African-American food server, Venis Green. JA 119. Humphries thought Green's termination was motivated by race because a white Cracker Barrel employee had not been terminated for engaging in the same behavior as Green, *id.*, and because Stinnett did not have the authority to fire Green under Cracker Barrel's policies. JA 48-49 at ¶ 17. Humphries complained to general manager Dowd (in Stinnett's presence) that Green's termination was racially discriminatory. R. 53 at 36, ¶ 159 (Plaintiff's Stmt. of Facts). Dowd took no action on Humphries' complaint. *Id.* at 37, ¶ 162.

Shortly after Green's termination, Christensen was at the Bradley store and invited employees to raise with him any concerns or problems they had. *Id.* at ¶ 163. Humphries used this opportunity to complain to Christensen that Green's termination was

racially-motivated; he also reminded Christensen of his earlier complaints about Cardin. *Id.* at 33, ¶ 132, 37, ¶¶ 163-64. *See also* JA 119-20. Christensen berated Humphries for "going outside the management group" in making this complaint and advised him to set up a meeting with Dowd to discuss Green's termination. JA 120. The day before that meeting was to occur, Christensen fired Humphries. *Id.* The ostensible reason for his termination was that Stinnett claimed that Humphries had left the store safe open overnight – a charge that Humphries denies. *Id.* Prior to firing Humphries, Christensen did not discuss Stinnett's accusation with him or conduct any investigation into the truth of Stinnett's story. *Id.*

On August 5, 2002, Humphries timely filed a charge with the Equal Employment Opportunity Commission ("EEOC"). JA 36-39; JA 54-57. The EEOC conducted an investigation and issued Humphries a right-to-sue letter dated March 3, 2003. JA 34-35; JA 58-59. On June 2, 2003, Humphries timely filed a *pro se* complaint against Cracker Barrel, alleging race discrimination and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. ("Title VII"), and 42 U.S.C. § 1981. JA 29-42.

At the same time he filed his *pro se* complaint, Humphries filed an application to proceed *in forma pauperis*. JA 83. *See also* R. 3 (6/2/03 Application by Plaintiff to Proceed *In Forma Pauperis* and Financial Aid Affidavit, or "IFP Application."). The district court denied the IFP Application because of questions

regarding Humphries' finances, but did not direct Humphries to pay the filing fee. R. 5 (Minute Order of 6/25/03). Humphries filed two amended IFP Applications in an effort to address the court's questions, and the district court denied them both. JA 83-84. *See also* R. 8 (10/14/03 IFP Application); R. 10 (Minute Order of 10/22/03); R. 11 (12/2/03 IFP Application); and R. 13 (Minute Order of 12/8/03). It was not until the denial of the final IFP Application, that the court ordered Humphries to pay the filing fee, which he did on January 12, 2004. JA 84; R. 13 (Minute Order of 12/8/03); R. 17 (1/12/04 Receipt of Payment of Filing Fee). Humphries then retained counsel and filed a First Amended Complaint on July 27, 2004. JA 43-53; R. 27 (First Amended Complaint).

Cracker Barrel moved to dismiss Humphries' Title VII claims arguing that because Humphries did not pay his filing fee within ninety days after receiving his right-to-sue letter, they were not timely filed. JA 84. The district court agreed, based upon a local rule the court had never cited to the *pro se* Humphries that required him to pay his statutory filing fee within, at most, fifteen days after the court denied his first IFP Application. JA 86-87; *see also* R. 5 (Minute Order of 6/25/03); R. 10 (Minute Order of 10/22/03); and R. 13 (Minute Order of 12/8/03).

Humphries proceeded on his section 1981 claims. Cracker Barrel moved for summary judgment on those claims in June 2005, contending that Humphries lacked sufficient evidence. JA 113-14. The district court granted summary judgment solely on those grounds. JA 114-16. In seeking summary judgment,

Cracker Barrel never argued that Humphries' retaliation claim was not cognizable under section 1981. JA 121. *See also* R. 47 (6/7/05 Memorandum of Law in Support of Defendant's Motion for Summary Judgment); and R. 56 (7/14/05 Reply By Defendant In Support of Its Motion for Summary Judgment).

On appeal, Cracker Barrel argued for the first time that section 1981 does not protect against retaliation. JA 121; *see also* 1/18/06 Appellee's Reply Brief at 13-15.[1] In making its argument, Cracker Barrel relied solely on the Seventh Circuit's opinion in *Hart v. Transit Management of Racine, Inc.*, 426 F.3d 863 (7th Cir. 2005). *See* 1/18/06 Appellee's Reply Brief at 13-15. In *Hart*, the court dismissed a section 1981 retaliation claim brought by a white employee who had opposed racial discrimination against black employees and in so holding stated, without analysis,

[1] Because Cracker Barrel had not previously challenged the viability of his claims under section 1981, when Humphries appealed the dismissal of those claims, he did not appeal the dismissal of his Title VII claims. The Seventh Circuit acknowledged that Cracker Barrel forfeited its argument about the viability of Humphries' section 1981 retaliation claim, but nevertheless chose to resolve the question "in the interests of justice," in part because of concerns that the lower courts were misapplying its holding in *Hart*, and because at the time it believed that Humphries would not be harmed if the court resolved Cracker Barrel's forfeited argument. JA 122. Petitioner's failure to raise this issue below makes this case an inappropriate vehicle for consideration of the question presented. Therefore, if the Court were to reverse, Humphries would revisit petitioner's waiver on remand.

that section 1981 "does not include a prohibition against retaliation for opposing racial discrimination." 426 F.3d at 866. Humphries distinguished *Hart*, which had rested its holding on a decision of the Eleventh Circuit, *Little v. United Technologies*, 103 F.3d 956 (11th Cir. 1997):

> *Little* concludes only that a *prima facie* case was not presented by the white plaintiff [in that case] because the plaintiff did not allege discrimination "due to his race. . . ." [103 F.3d] at 961. . . . Because *Hart* relies solely on *Little* without further analysis, *Hart* must be limited in the same way. Therefore, at most, *Hart* can only mean that a retaliation claim under § 1981 must be based on the plaintiff's race; that is, the plaintiff must contend that his employer discriminated or retaliated against him because of his race.

2/1/06 Appellant's Reply Brief at 5-6. *Little* was limited to its facts in a later Eleventh Circuit opinion, *Andrews v. Lakeshore Rehabilitation Hospital*, 140 F.3d 1405 (11th Cir. 1998), which held that section 1981 protected against race-based retaliation. *Id.* at 1411-13. Humphries explained that, like the plaintiff in *Andrews*, his retaliation claim was race-based and, thus, "actionable under Section 1981. Even if this Court reaches the merits of the viability of retaliation claims under § 1981, Cracker Barrel is simply wrong that § 1981 does not provide a remedy for race-based retaliation." 2/1/06 Appellant's Reply Brief at 2.

The Seventh Circuit agreed that *Hart* had "no application to the facts here, where the plaintiff is plainly asserting retaliation stemming from discriminatory acts targeting him." JA 137. The court then concluded that section 1981 provides broad protection against retaliation and, in so doing, overruled *Hart*. JA 148-49. The court also agreed that Humphries had presented sufficient evidence to support his retaliation claim, and remanded the case for trial. JA 157-58.

SUMMARY OF ARGUMENT

Section 1981 affirmatively guarantees a series of rights, among them the right to "make and enforce contracts." By its terms, section 1981 is different, and broader, than statutes that simply prohibit discrimination. The operative language of section 1981 describes the rights it protects. It does not enumerate conduct that violates those rights as does, for example, Title VII.

The existence of a right provides the right-holder protection not only from direct obstruction of the right, but also from reprisals for exercising the right. The principle that rights are protected from reprisal applies to statutory rights, *see Sheet Metal Workers' Int'l Ass'n v. Lynn*, 488 U.S. 347, 355 (1989) (implied statutory protection against retaliation), as well as constitutional rights, *see, e.g., O'Hare Truck Serv.,*

Inc. v. Northlake, 518 U.S. 712, 715 (1996) (First Amendment protection against retaliation).

In the case of section 1981, the Court has already recognized that plaintiffs are protected from direct obstruction of rights protected by the statute. *See, e.g., Runyon*, 427 U.S. at 172. Historically, the need for protection from reprisals was critical when section 1981 was first enacted. The Civil Rights Act of 1866 was adopted to enforce the Thirteenth Amendment at a time when there was widespread retaliation against freed slaves who attempted to assert their new rights. *See Jones*, 392 U.S. at 427-28; *see also, e.g., Bailey v. Alabama*, 219 U.S. 219, 244 (1911) (recognizing the need for protection against retaliation for the exercise of Thirteenth Amendment rights). Section 1981's protections against reprisal for exercising statutory rights are firmly rooted.

When Humphries complained to his district manager about race discrimination, both against himself and a co-worker, he was exercising his section 1981 right to enjoy the "benefits" or "privileges . . . of the contractual relationship" as well as his right to enforce his contract. Cracker Barrel encouraged employees to complain and created an internal grievance procedure designed to help them do so – the "Open Door Policy." That policy not only created an opportunity for employees to make complaints, it served as a mandatory reporting and investigation structure specifically to resolve complaints of discrimination and harassment. Cracker Barrel could not, under section 1981, expressly make this benefit

available only to white employees; nor could Cracker Barrel retaliate against Humphries because he was a black worker who exercised his right to enjoy that benefit. Similarly, Cracker Barrel could not fire Humphries because he was a black worker who used the Open Door Policy's complaint and investigation procedures to enforce petitioner's anti-discrimination policy.

Even if Humphries' complaints about race discrimination do not constitute an exercise of a section 1981 right, his cause of action for retaliation for making those complaints is still cognizable under section 1981 because Cracker Barrel's conduct constitutes forbidden race-based retaliation. Section 1981 prohibits treating a subset of black workers differently than comparable white workers. If an employer offers the benefit of continued employment to white workers who complain about race discrimination, it must offer the same benefit to black workers who make the same complaint. It cannot fire black complainers, but not white complainers.

Humphries' claim is cognizable under section 1981 both because Cracker Barrel retaliated against him for exercising his section 1981 rights and because it engaged in race-based retaliation. Consideration of these issues resolves this case. However, section 1981 also forbids retaliation against a person who has opposed acts of racial discrimination that violate the statute. This principle was established in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), which recognized that section 1981's companion statute –

section 1982 – provides such broad protection. This Court recently relied on *Sullivan* in *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), in which it concluded that Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681, *et seq*. ("Title IX"), like section 1982, protects against retaliation for complaining about discrimination. *Id.* at 178. And section 1981 provides a more compelling case for recognizing retaliation than does Title IX. Section 1981, unlike Title IX, has no mechanism for enforcement other than private action. Without the ability to report discrimination free of retaliation, section 1981 cannot provide the "adequate protection to victims of discrimination" that Congress explicitly sought. *See* Civil Rights Act of 1991, 105 Stat. at 1071, at Sec. 3(4).

Despite the text, history, and precedent that establish section 1981's protection against retaliation, petitioner argues that section 1981 should be narrowly construed to preclude a cause of action for retaliation because a different statute – Title VII – already provides such relief. This argument ignores the fact that Congress expressly created overlapping remedies in the two statutes. It has long been understood that Title VII "was designed to supplement rather than supplant" other employment discrimination laws, *see Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47-48 (1974), including section 1981. *See Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 460-61 (1975). Any doubt about this was laid to rest

when Congress enacted the Civil Rights Act of 1991, in which it acknowledged the overlap between section 1981 and Title VII, and, rather than eliminating the overlap, codified it. *See, e.g.*, 42 U.S.C. § 1981a(b)(3) (creating right for successful Title VII plaintiffs to recover punitive and compensatory damages subject to cap that expressly does not apply to plaintiffs who can also recover under section 1981). Moreover, there is no indication in the text of either statute to suggest a principled rule for when Title VII would trump section 1981 and when it would not. Furthermore, because section 1981 applies to non-employment contracts and to numerous employees whose employers are exempt from Title VII's coverage, the overlap between the two statutes is far from complete.

Finally, petitioner's argument that the decision in *Patterson* compelled Congress to include an express anti-retaliation provision in its 1991 amendment of section 1981, necessarily assumes that no such protection existed before *Patterson*. But the principles discussed above that establish section 1981's protection against retaliation date back to the statute's enactment in 1866. The effect of *Patterson* was only to limit protection to claims of retaliation for exercising section 1981 rights related to contract formation or contract enforcement. When Congress amended the statute in 1991, it expanded the scope of the rights protected by section 1981 beyond the more limited rights recognized by *Patterson*, thereby

clarifying that section 1981 protects against retaliation throughout the contractual relationship.

ARGUMENT

I. RETALIATION FOR THE EXERCISE OF SECTION 1981 RIGHTS VIOLATES THE STATUTE.

A. Section 1981 Forbids Reprisals Against Individuals For Exercising The Substantive Rights The Statute Protects.

The terms of section 1981 are significantly different, and broader, than a simple prohibition against discrimination. Unlike, for example, section 703(a) of Title VII, section 1981 is not framed merely "to prevent injury to individuals based on who they are, *i.e.*, their status." *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2412 (2006). Instead, most of section 1981 is concerned with protecting individuals "based on what they do, *i.e.*, their conduct." *Id.*

Section 1981(a) states:

> 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 benefit 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.

Rather than taking the form of a prohibition barring specified actors (*e.g.*, employers) from engaging in particular forbidden conduct (*e.g.*, discrimination in employment), section 1981(a) affirmatively guarantees a series of enumerated "right[s]." Five of those are rights to engage in particular conduct: the rights to "make . . . contracts," to "enforce contracts," "to sue," to "be parties," and to "give evidence."[2]

This rights-creating language stands in contrast to the last clause of section 1981(a), which is a prohibition against a particular practice, the imposition of unequal "punishment[s], pains, penalties, taxes, licenses and exactions," as well as to Title VII, which defines a series of "unlawful employment practices" in which employers may not engage. *See* 42 U.S.C. §§ 2000e-2, 2000e-3. The difference in statutory language is of controlling importance. Prohibited violations of the rights-creating provisions of section 1981 are not found in any enumerated list; in this regard section 1981 necessarily forbids *any* conduct – not merely certain specified actions – that impairs those rights. *See* 42 U.S.C. § 1981(c) ("The rights protected by this section are protected against impairment . . . "); *see also Patterson*, 491 U.S. at 175-76

[2] Section 1981(c), enacted as part of the 1991 Act, recognizes this language creates "rights." 42 U.S.C. § 1981(c) ("[t]he rights protected by this section.").

("We must decide also whether the conduct of which petitioner complains falls within one of the enumerated rights protected by § 1981."). Section 1981 must be understood in terms of protecting the rights it creates, not in terms of defining the scope of prohibited conduct.

A defendant's conduct would impair the rights enumerated in section 1981, or the similarly phrased section 1982,[3] if it actually prevented a plaintiff from exercising the right in question. Thus in *Runyon*, the Court held that defendant school officials had violated section 1981 because they had directly obstructed plaintiffs' rights to make contracts when they refused to admit plaintiffs' black children as students. 427 U.S. at 172. *See also Jones*, 392 U.S. at 412 (defendant refused to sell plaintiff a home because he was black, thereby directly obstructing plaintiff's section 1982 right to purchase property). In *Hurd v. Hodge*, 334 U.S. 24 (1948), a third party – a court – prevented the black plaintiffs from buying land from a white seller.

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[3] Section 1982 provides:

> All citizens of the United States shall have the same *right*, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1982 (emphasis added). Significantly, as is true of much of section 1981, the rights guaranteed by section 1982 are to engage in specified types of conduct.

> The Negro petitioners entered into contracts of sale with willing sellers for the purchase of properties upon which they desired to establish homes. Solely because of their race and color they are confronted with orders of court divesting their titles in the properties and ordering that the premises be vacated. . . . Under such circumstances, to suggest that the Negro petitioners have been accorded the same rights as white citizens to purchase, hold, and convey real property is to reject the plain meaning of language.

Id. at 34.

In addition, where the law creates a right – be it statutory or constitutional – the right holder is protected not only from conduct that prevents the exercise of the right, but also from actions that impose sanctions because he or she exercised that right. For example, in *Hurd*, the section 1982 right to purchase real property on a non-discriminatory basis would have been violated if the court, rather than divesting James and Mary Hurd of their title to the land, had instead sentenced them to prison for violating a city ordinance forbidding non-whites from owning the real property in question. Similarly, in *Runyon v. McCrary*, the section 1981 right at issue would have been impaired if Mr. Runyon had admitted young Michael McCrary to the Bobbe's School, but then in retaliation arranged for Mr. and Mrs. McCrary to be fired from their jobs.

The existence of a right routinely affords the right-holder two distinct and equally essential protections: protection from direct obstruction of that right, and protection from reprisal for exercising the right. The First Amendment, for example, precludes (save in the most extraordinary of circumstances) the imposition of a prior restraint that actually prevents an individual from engaging in speech. *See, e.g., Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952). But the First Amendment also applies if the government punishes those who have exercised their right to engage in protected speech. This Court's First Amendment jurisprudence recognizes the unconstitutionality of various forms of retaliation taken against individuals who exercised First Amendment rights. *See, e.g., O'Hare Truck Serv., Inc. v. Northlake*, 518 U.S. 712, 715 (1996) (First Amendment protections extend to case "where government *retaliates* against a contractor . . . for the exercise of rights of political association.") (emphasis added); *Rankin v. McPherson*, 483 U.S. 378, 383 (1987) ("[A] State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech."). Other constitutional rights are similarly protected from reprisals.[4]

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[4] *See, e.g., Lefkowitz v. Turley*, 414 U.S. 70, 82, 84 (1973) (finding New York law that cancelled contracts with state if contractor refused to testify about those contracts a "significant infringement" of Fifth Amendment right against self-incrimination); *United States v. Jackson,* 390 U.S. 570, 581-82 (1968) (provision in Federal Kidnapping Act that imposed death

(Continued on following page)

These principles are not limited to constitutional rights or governmental interference with rights. *Sheet Metal Workers' International Ass'n v. Lynn*, 488 U.S. 347 (1989), concluded that the establishment of federal rights under the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401, *et seq*., carries with it protection from reprisals as well as protection from obstruction. That case concerned the scope of the protections created by section 101(a)(2), which (in rights-creating language similar to section 1981(a)) provides:

> Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views . . . upon any business properly before the meeting. . . .

29 U.S.C. § 411(a)(2). The plaintiff spoke at a union meeting in opposition to a proposal to increase member dues. Five days later, the union removed him from his position as a business representative. 488 U.S. at 350. The union argued that it had not infringed Lynn's section 101 rights because "Lynn, like other members of the Local, was not prevented from attending the special meeting, expressing his views

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penalty only when recommended by a jury unnecessarily chilled the exercise of Fifth Amendment right to plead not guilty and Sixth Amendment right to demand a jury trial by "penalizing those who choose to exercise them").

on [the] dues proposal, or casting his vote." *Id.* at 353-54.

This Court rejected that argument, concluding that the plaintiff's "retaliatory removal stated a cause of action." *Id.* at 355. The section 101 rights of union business agents are

> interfered with, albeit indirectly, [when] the agents [are] forced to choose between their rights and their jobs. . . . This [is] so even though the business agents [are] not actually prevented from exercising their [section 101] rights.

Id. at 354. The Court further explained that "Lynn paid a price for the exercise of his membership rights," because the union's action "presumably discouraged him from speaking out in the future." *Id.* Finally, the Court concluded that the union's dismissal of Lynn was a particularly serious violation of section 101 because it was likely to deter other union members from exercising their own rights. "Seeing Lynn removed from his post just five days after he led the fight to defeat [a] dues increase proposal, other members of the Local may well have concluded that one challenged the union's hierarchy, if at all, at one's peril." *Id.* at 355.

The need for protection from reprisals for the exercise of protected rights was of manifest importance when the Civil Rights Act of 1866 was adopted to enforce the Thirteenth Amendment. In the wake of Emancipation, there were few reported instances in

which former slave owners actually used physical force to restrain their former slaves from leaving their plantations. What was far more widespread and effective in preserving slavery in the aftermath of the Civil War were reprisals by the "night riders" and other private "regulators," who attacked ex-slaves for exercising their newly won right to leave their former owners.

> Organized patrols, with negro hounds, keep guard over the thoroughfares; bands of lawless robbers traverse the country, and the unfortunate who attempts to escape, or he who returns for his wife or child, is waylaid or pursued with hounds, and shot or hung.

Report of C. Shurz, S. EXEC. Doc. NO. 2, 39th Cong., 1st Sess., 19 (1865).

In *Bailey v. Alabama*, 219 U.S. 219 (1911), the Court recognized the importance of protection against retaliation for the exercise of Thirteenth Amendment rights. *Bailey* construed the Thirteenth Amendment to prohibit reprisals against workers who sought to exercise their rights under that constitutional guarantee. The state law in that case had, in effect, made it a crime for a worker to leave his employer during the course of an employment contract in any case in which the worker had received an advance payment. Enforced labor for the payment of a debt, the Court noted, was peonage. 219 U.S. at 243. Just as the Thirteenth Amendment forbade a state from physically preventing a debtor-worker from leaving his or her employment, so too did the Amendment bar a

state from retaliating against a worker because he or she had done so.

> [T]he state could not authorize its constabulary to prevent the servant from escaping and to force him to work out his debt. But the state could not avail itself of the sanction of the criminal law to supply the compulsion any more than it could use or authorize the use of physical force. In contemplation of the law, the compulsion to such service by the fear of punishment under a criminal statute is more powerful than any guard which the employer could station.

Id. at 244 (internal quotation marks and citation omitted).

These well-established principles apply to the rights created by section 1981, which are similarly protected from reprisals as well as from obstruction. Section 1981 would be violated if an employer directly prevented a worker from exercising one of the enumerated rights. The statute thus bars an employer from carrying out a policy of forbidding black but not white workers from "giv[ing] evidence." 42 U.S.C. § 1981(a) ("shall have the same right . . . to . . . give evidence.") Section 1981 would be violated if, in order to prevent blacks from testifying, an employer refused to give the black (but not white) employees the time off from work necessary to testify, or hired thugs to physically bar black workers from entering the courthouse. Section 1981 would equally be violated if that employer, after its workers had succeeded in

giving evidence, singled out and dismissed the black workers who had done so. *Cf. Lynn*, 488 U.S. at 354.

B. The Conduct For Which Humphries Was Fired Constituted An Exercise Of His Section 1981 Rights.

Humphries' complaints to Christensen about race discrimination can be characterized as either an exercise of his section 1981 right to enjoy the "benefits" or "privileges . . . of the contractual relationship," or his right to enforce his contract. In either event, when Cracker Barrel terminated him for complaining about race discrimination, it interfered with his section 1981 rights.

Cracker Barrel encouraged its employees to bring complaints to management's attention. One of the express (and much publicized) benefits Cracker Barrel provided to its employees was the right to use its "Open Door Policy" for internal grievances. *See* JA 93-107. The Open Door Policy accorded employees the opportunity to take up with management officials any grievance they might have about the way in which they were being treated. JA 97. *See also* JA 100 ("We encourage you to go to your manager with any questions or suggestions, or to review *any problems or decisions affecting your job.*") (emphasis added). The Open Door Policy was intended to advance the "welfare, work, working conditions, and satisfaction [of]

an employee of Cracker Barrel." JA 97.[5] Workers were assured that they would not "get into trouble or be retaliated against by using this policy in good faith." JA 97. *See also* JA 100.

The Open Door Policy was specifically intended to be used by employees to complain about discrimination or harassment. JA 95 ("Employees who believe they have been subjected to unlawful discrimination, harassment, or retaliation *must* immediately advise their Manager, Supervisor or the Employee Relations department.") (emphasis added). *See also* JA 96-97, 99-100. The policy also created a mandatory procedure for investigating complaints of discrimination once they were made. Supervisors were directed to use detailed forms to memorialize their investigations. *See* JA 93. They were obligated to take a written, signed statement

[5] Internal mechanisms for redressing worker grievances are a benefit of great practical importance. If a worker's complaint does not involve violation of some statute or contract provision, the worker has no other method of obtaining redress. Even if an aggrieved employee may technically have the right to file a lawsuit, the cost and delay involved often pose an insurmountable barrier. Aggrieved workers "want jobs, not lawsuits." *Ford Motor Co. v. EEOC*, 458 U.S. 219, 230 (1982). The creation of an internal grievance procedure is a concession widely sought by unions in collective bargaining agreements because they provide a fast and efficient method of fairly resolving employment problems. In *Burlington Northern*, 126 S. Ct. at 2409, for example, the plaintiff used just such a grievance process to get her job back, far more quickly than would have been possible through litigation.

from the complainant, and to complete an "Incident Information" form and an "Incident Resolution" form. *Id.* Supervisors were also required to complete an Investigation Log. JA 105-107. Finally, supervisors were obligated to notify the complainant formally of the outcome of the investigation. *See* JA 95.

Humphries took advantage of the Open Door Policy on at least three occasions: in August and October 2001, when he complained to District Manager William Christensen about the fact that Acting General Manager Steve Cardin had issued racially motivated disciplinary warnings to Humphries and had made numerous racist remarks in the workplace, *see* JA 46 at ¶ 11, JA 48 at ¶ 16; and in November 2001, when Humphries reminded Christensen of his earlier complaints about Cardin and also complained that the termination of a co-worker, Venis Green, was racially discriminatory. *See* JA 49 at ¶ 18; JA 119-20. This last meeting occurred when Christensen came to the Bradley store for the express purpose of meeting "individually with employees who wished to speak with him." R. 53 at 37, ¶¶ 163-64 (Plaintiff's Stmt. of Facts). The First Amended Complaint alleges that Cracker Barrel retaliated against Humphries for making these complaints. *See* JA 49 at ¶ 20, JA 51 at ¶ 27.

By invoking the Open Door Policy, Humphries was enjoying a benefit or privilege of his contractual

relationship with Cracker Barrel.[6] Had Cracker Barrel told Humphries that the Open Door Policy was only available to white employees, it undoubtedly would have violated Humphries' section 1981 right to enjoy the same "benefits" and "privileges" of the contractual relationship. If, as is alleged here, Cracker Barrel retaliated against Humphries because he was a black worker who exercised his right to enjoy that benefit, that reprisal also violates section 1981.

Humphries was also trying to enforce his contract when he used the Open Door Policy. Cracker Barrel had a clear policy statement prohibiting racial discrimination: "Cracker Barrel will not tolerate any form of discrimination, harassment or retaliation of its employees due to race." JA 95, 98-99.[7] Under

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[6] This is not to suggest that an employer must have a formal written complaint procedure like the Open Door Policy in order for making a complaint about discrimination to constitute enjoying a benefit or privilege of the contractual relationship. A benefit can be anything that "comprise[s] the 'incidents of employment,' or that form[s] an 'aspect of the relationship between the employer and employees.'" *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984) (citations omitted). If, for example, an employer invited employees in some less formal way to make complaints (such as an employee hot line or a suggestion box), all employees who took advantage of the opportunity to complain would be enjoying a benefit of the contractual relationship. Any interference with the enjoyment of that benefit on the basis of race would violate section 1981.

[7] Cracker Barrel had an equally clear policy regarding harassment: "Cracker Barrel . . . does not tolerate harassment in any form. . . . Employees must avoid any action or conduct which

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Illinois law, a reasonably clear policy statement that is disseminated to employees so they are aware of its contents and continue to work after they receive it can create an "enforceable contractual right[ ]." *Duldulao v. St. Mary of Nazareth Hosp. Ctr.*, 505 N.E.2d 314, 318 (Ill. 1987).[8]

Cracker Barrel's Open Door Policy, with its highly structured internal complaint and investigation procedures, functioned as a means for employees to enforce petitioner's anti-discrimination policy. Humphries' efforts to obtain redress through the Open Door Policy constituted contract enforcement within the scope of section 1981. In *Patterson*, the Court held that section 1981's enforcement clause applies not only to "the legal process," but also to "nonjudicial methods of adjudicating disputes about the force of binding obligations." 491 U.S. at 177. In *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987), the Court read the contract-enforcement clause of section 1981 broadly. There the Court affirmed a

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could be viewed as harassment, including but not limited to . . . [v]erbal abuse of a . . . racial nature . . . racially offensive jokes." JA 96. *See also* R. 54 at Ex. O (Plaintiff's Appendix in Support of Stmt. of Facts).

[8] Whether all the elements necessary to establish the anti-discrimination policy as a contract right would be met here has not been developed in this case because Cracker Barrel did not question the viability of a section 1981 retaliation claim in its summary judgment motion. Because these anti-discrimination policies arguably created contractual rights that Humphries had a section 1981 right to enforce, he ought to have the opportunity to prove this was the case.

finding that a union had violated section 1981 when it refused to file grievances on behalf of black members asserting that the employer had engaged in racial discrimination, which was forbidden by the applicable collective bargaining agreement. *Id.* at 665-66. Such grievances, though at times a highly effective way of enforcing those labor-management contracts, do not involve binding adjudication. *Goodman* nonetheless concluded that such methods of implementing contractual rights were protected by section 1981. *Id.* at 669. *See also Patterson*, 491 U.S. at 177 (citing the process in *Goodman* as an example of section 1981 contract enforcement). When Cracker Barrel fired Humphries for trying to enforce the anti-discrimination provision of his contract, it violated section 1981. *See, e.g., McKnight v. Gen. Motors Corp.*, 908 F.2d 104, 112 (7th Cir. 1990) (recognizing that where contract contains express anti-discrimination term, section 1981 would proscribe racially motivated interference with efforts to enforce that term).

Equally important, section 1981 should protect Humphries from retaliation for using Cracker Barrel's Open Door Policy because the policy *required* that he report Cardin's racially harassing comments and racially discriminatory disciplinary warnings. *See* JA 95. Many employers have instituted such mandatory reporting procedures to reduce their liability for sexual and racial harassment and exposure to punitive damages for discrimination. In the Title VII context, this Court has created incentives

for employers "to adopt antidiscrimination policies" that include processes for making internal complaints of harassment and discrimination for the express purpose of encouraging employees to report such conduct, with the expectation that the conduct could then be remedied without resort to litigation. *See, e.g., Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 544 (1999) (creating affirmative defense for employer against vicarious liability for punitive damages when conduct of its agents is contrary to employer's "good faith efforts to comply with Title VII"); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (creating affirmative defense for employer against vicarious liability for some instances of supervisor sexual harassment where "employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and where plaintiff "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise"); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (same).

These affirmative defenses have been applied to claims of racial harassment under section 1981, *see Swinton v. Potomac Corp.*, 270 F.3d 794, 803 n.3 (9th Cir. 2001), and to limit punitive damage awards under section 1981. *See Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 445 (4th Cir. 2000) (applying good faith defense to punitive damage award under section 1981). If employers who were not otherwise subject to Title VII were given free rein to fire employees who use such internal company procedures to complain

about racial harassment or discrimination, it would create a perverse incentive for employers to create a mandatory reporting structure. Instead of using the procedures to combat racial harassment and discrimination as the Court intended, employers could use them to insulate themselves both from liability and from an obligation to address discrimination and harassment in the workplace, by weeding out the troublemakers who complain about it.[9] Affording employers this "heads I win, tails you lose" advantage is contrary to the goal of creating such policies to avoid the harms discrimination and harassment cause in the workplace. *See Ellerth*, 524 U.S. at 764; *Faragher*, 524 U.S. at 806.

II. SECTION 1981 FORBIDS RACE-BASED RETALIATION.

Section 1981 forbids an employer from denying a black worker the same "benefits . . . of the contractual

[9] Protection from retaliation claims under section 1981 would also give employers an unfair advantage in circumstances where an employee suffers harassment from a co-worker (as opposed to a supervisor). In those situations, the employer's negligence in failing to stop the harassment provides the basis for liability and the employer is liable only "if it knew or should have known about the conduct." *Ellerth*, 524 U.S. at 759. If an employer can legally fire an employee who complains about racial harassment by a co-worker, employees will be reluctant to make an internal complaint about racial harassment. Yet, if an employee does not make an internal complaint about racial harassment, his negligence claim against the employer will fail as a matter of law.

relationship" that are accorded to white workers. That prohibition is of course violated if an employer discriminates against all black workers on the basis of race. But section 1981 is violated as well if, on the basis of race, the employer treats a particular subset of black workers differently than comparable white employees. Even if Cracker Barrel could lawfully dismiss all workers who assert they are victims of racial discrimination, section 1981 requires that it treat black and white complainants alike. *Cf.* JA 166 (Easterbrook, C.J., dissenting). If an employer accords the benefit of continued employment to white workers who allege they were the victims of discrimination, it must accord "the same right" to black workers who make the same allegation. This is true regardless of whether the black workers were actually exercising a section 1981 right when they made their complaints.

In *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1970), the plaintiff in a Title VII action alleged that she had been denied employment because Martin Marietta had a policy of refusing to hire women (but not men) with pre-school-age children. 400 U.S. at 543. Phillips' claim was not founded on Title VII's anti-retaliation provision, but on the section 703(a) prohibition against discrimination on the basis of sex. The court of appeals dismissed her claim, reasoning that the Title VII bar to discrimination on the basis of sex applies only to a practice of discriminating against all women. *Phillips v. Martin Marietta Corp.*, 411 F.2d 1, 3-4 (11th Cir. 1969). This Court reversed.

Section 703(a), the Court held, forbids an employer from having "one hiring policy for women and another for men – each having pre-school-age children." 400 U.S. at 543. Section 1981 would similarly prohibit an employer from dismissing black employees with pre-school-age children but not white employees who also have them. Likewise, section 1981 forbids an employer from having one dismissal policy for blacks who complain about race discrimination, and another for whites who complain about such discrimination.

In the context of section 1981, this Court has recognized that an employer may not, on the basis of race, deny employees who engage in the same conduct – even culpable conduct – the benefits of the contractual relationship. In *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), the white plaintiffs were fired because they misappropriated cargo being shipped by the employer for one of its customers. The plaintiffs alleged that a black employee charged with the same offense had not been fired. This Court held that such discriminatory treatment violated section 1981. 427 U.S. at 285-96. Section 1981 protected McDonald from being fired on a discriminatory basis even though he was a thief; it would also protect him if his employer had fired him for complaining about racial discrimination, but had taken no such action against a black worker who voiced the same complaint.

Race-based retaliation is unlawful because it is a species of racial discrimination.[10] This unremarkable application of the anti-discrimination principle is sufficient to resolve this case. In the court below, Humphries unequivocally asserted that Cracker Barrel had engaged in "*race-based* retaliation," 2/1/06 Appellant's Reply Brief at 2, and that he could proceed with his claim under section 1981 because Cracker Barrel had "retaliated against him because of his race." *Id.* at 5-6.

Cracker Barrel has asked this Court to decide whether retaliation is cognizable under section 1981. The answer, as Sections I and II demonstrate, is yes, at least some of the time, and certainly under the circumstances that Humphries has alleged. In fact, section 1981 provides even broader protection against retaliation under this Court's established precedent.

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[10] Lower courts have noted that a claim of race-based retaliation is distinct from a simple claim of retaliation. In *London v. Coopers & Lybrand*, 644 F.2d 811, 819 (9th Cir. 1981), the court of appeals declined to decide whether retaliation as such is actionable under section 1981, holding only that "where, as here a plaintiff charges an employer with racial discrimination in taking retaliatory action, a cause of action under § 1981 has been stated." *See also Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1411 (11th Cir. 1998) ("race-based retaliation").

III. SECTION 1981 FORBIDS DISCRIMINATION AGAINST AN EMPLOYEE FOR OPPOSING RACIAL DISCRIMINATION PROHIBITED BY THE STATUTE.

Humphries contends that Cracker Barrel retaliated against him because he opposed acts of racial discrimination – that were themselves forbidden by section 1981 – directed against both himself and another black employee. The viability of such a section 1981 claim is firmly established by this Court's decision in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), which provides broad protection against retaliation and is controlling here.

In *Sullivan*, a white homeowner rented a house to a black man and sought to assign him a membership interest in a private community park. 396 U.S. at 234-35. The corporation that owned the park refused to approve the assignment, and when the white homeowner protested, the corporation expelled him. *Id.* The white homeowner brought a claim against the corporation under section 1982. This Court held that the white homeowner could sue under section 1982 because he had been "punished for trying to vindicate the rights of minorities protected by § 1982." *Id.* at 237. If the corporation's sanction was not actionable, the Court reasoned, it "would give impetus to the perpetuation of racial restrictions on property." *Id.* "*Sullivan* . . . interpreted [section 1982's] prohibition on racial discrimination to cover retaliation against those who advocate the rights of groups protected by that prohibition." *Jackson v.*

Birmingham Bd. of Ed., 544 U.S. 167, 176 (2005). "*Sullivan* [held] that the white owner could maintain his *own* private cause of action under § 1982 if he could show that he was 'punished for trying to vindicate the rights of minorities.'" *Id.*

Section 1981 should be accorded the same construction as section 1982. Sections 1981 and 1982 were both carved from section 1 of the 1866 Act, and share the same general purpose and historical origins. *See, e.g., Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 384 (1982); *Runyon*, 427 U.S. at 170; *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431, 439-40 (1973). This Court has often looked to section 1982 to interpret section 1981. *See, e.g., Gen. Bldg. Contractors*, 458 U.S. at 384; *Runyon*, 427 U.S. at 170; *Tillman*, 410 U.S. at 439-40. Moreover, the rights protected by section 1982, *e.g.*, purchasing, leasing, selling, and conveying real property, could easily be recharacterized as rights to "make and enforce contracts."[11] There is simply no meaningful analytical reason to conclude that section 1982 prohibits retaliation while section 1981 does not.

Petitioner suggests that *Sullivan* is no longer controlling because of *Patterson*. But the *Patterson* Court did not discuss *Sullivan* or a cause of action for retaliation under section 1981. A key part of the

[11] In fact, the plaintiffs in *Sullivan* brought their claims under section 1981 as well as section 1982. 396 U.S. at 235.

Patterson ruling was the Court's decision *not* to overrule *Runyon*, regardless of whether it agreed that "*Runyon* was correct as an initial matter." 491 U.S. at 175 n.1. In reaching this conclusion, the Court made clear that "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here . . . the legislative power is implicated, and Congress remains free to alter what we have done." *Id.* at 172-73. When Congress amended section 1981 in the 1991 Act, in part in response to this Court's decision in *Patterson*, it did not choose to limit or overturn the well established application of *Sullivan* to section 1981 cases and, based upon the Court's affirmation of *Runyon* and the importance of the role of *stare decisis* in construing statutes such as sections 1981 and 1982, would not reasonably have concluded that it needed to take any explicit action to assure *Sullivan's* sustained viability.

Here, *Sullivan* not only controls, it offers a straight-forward rule that will be easy for courts to administer and for employers and employees alike to understand. In *Jackson v. Birmingham Board of Education*, the Court drew heavily on *Sullivan* when it concluded that Title IX, like section 1982, protects against retaliation for complaining about discrimination prohibited under that statute.[12] 544 U.S. at 178.

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[12] Section 1981, like Title IX, forbids discrimination. *See* section 1981(c) ("The rights protected by this section are protected against impairment by nongovernmental *discrimination*.") (Emphasis added). That the discrimination against which

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In recognizing implied protection against retaliation for asserting a violation of Title IX, the *Jackson* court expressly recognized that such relief was necessary to provide "effective protection" against discriminatory practices prohibited by the statute. *Id.* at 180 (*quoting Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979)). "If recipients were permitted to retaliate freely, individuals who witness discrimination would be loathe to report it, and all manner of Title IX violations might go unremedied as a result." *Id.* In the same way, recognition of a cause of action for retaliation under section 1981 is necessary to provide "adequate protection to victims of discrimination." 105 Stat. at 1071, at Sec. 3(4) (explaining that one of the purposes of the 1991 Act was to expand "the scope of the relevant civil rights statutes in order to provide adequate protection to victims of discrimination."). And as in Title IX and section 1982, section 1981's prohibition against race discrimination should be construed to forbid discrimination against an individual because he or she opposed race discrimination.

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section 1981 protects is *racial* discrimination has never been in doubt. *See Georgia v. Rachel*, 384 U.S. 780, 790 (1966) (section 1981 protects rights "specifically defined in terms of racial equality"); *see also Runyon*, 427 U.S. at 168 (section 1981 "prohibits racial discrimination"); *McDonald*, 427 U.S. at 295 (section 1981 "was meant, by its broad terms, to proscribe discrimination . . . against, or in favor of, any race"); *Patterson*, 491 U.S. at 172 (reaffirming that section 1981 "prohibits racial discrimination").

Indeed, protection against retaliation is even more essential under section 1981.[13] If, as petitioner contends, it is legal to retaliate against an employee who opposes violations of section 1981, it would be entirely lawful to fire any worker who brought a lawsuit under section 1981, or to threaten to do so unless such a lawsuit was abandoned. Although some section 1981 plaintiffs would be protected against such retaliation by section 704(a) of Title VII, many would not. On petitioner's view, it would even be lawful for an employer not covered by Title VII to adopt a formal policy of firing any worker who brings a lawsuit under section 1981, or who complains about race discrimination. Where potential section 1981 claimants could be suppressed in this manner, employers would have the ability to prevent enforcement of the law.[14]

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[13] Under Title IX, even in the absence of private litigation, substantial alternative enforcement methods remain, and the United States itself can bring a civil action. *See Gebser v. Lago Vista Indep. Schl. Dist.*, 524 U.S. 274, 288 (1998) (recognizing administrative agencies have express authority to enforce Title IX pursuant to agency rules "implementing [Title IX's] nondiscrimination mandate through proceedings to suspend or terminate funding or through 'other means authorized by law.' ") (quoting 20 U.S.C. § 1682). No such alternative enforcement methods exist under section 1981.

[14] This has led some to conclude that protection against retaliation is inherent in the rights section 1981 creates. *See*, *e.g.*, *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1315 (7th Cir. 1989) (Cudahy, J., concurring) ("[I]f an employee is granted certain substantive rights against his or her employer, the employer may not punish the employee's assertion of those

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IV. NEITHER SECTION 1981 NOR TITLE VII SHOULD BE NARROWLY CONSTRUED FOR THE PURPOSE OF AVOIDING ANY OVERLAP BETWEEN THE TWO STATUTES.

Petitioner insists that section 1981 should be narrowly construed to exclude a cause of action for retaliation because retaliation is "already" unlawful under Title VII. Pet. Br. 23. Even though the question presented here is only whether section 1981 forbids retaliation, petitioner argues more broadly that Congress intended Title VII – not any other statute – "to govern claims of race discrimination and retaliation in the employment context." Pet. Br. 9; *see also id.* at 23 ("discrimination and retaliation"); *id.* at 25 ("discrimination and retaliation"); and *id.* at 26 ("discrimination and retaliation."). Petitioner's argument ignores this Court's recognition that Congress intended for Title VII and section 1981 (as well as other federal statutes) to provide overlapping protection against discrimination. Furthermore, petitioner's suggestion that Title VII trumps section 1981 retaliation claims is unsound because the overlap between the two statutes is incomplete.

Petitioner's argument that Congress intended that Title VII would provide the exclusive federal remedy against discrimination (and retaliation) in the workplace is inconsistent with well-established

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rights, since this would allow the employer to take away a right to protection conferred by statute.").

and widely recognized federal civil rights policy. As early as 1974, this Court held that

> legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination. . . . [T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement rather than supplant existing laws and institutions relating to employment discrimination.

Alexander v. Gardner-Denver Co., 415 U.S. 36, 47-49 (1974) (internal citations omitted). Specifically with respect to section 1981, this Court has "emphasiz[ed] the independence of the remedial scheme established by the Reconstruction-Era Acts." *Burnett v. Grattan*, 468 U.S. 42, 49 (1984); *see also Patterson*, 491 U.S. at 181 (when a cause of action lies under both section 1981 and Title VII, a plaintiff is not constrained by Title VII's "detailed procedures," and instead "is free to pursue a claim by bringing suit under § 1981 without resort to those statutory prerequisites."); *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 377 (1979) ("substantive rights conferred in the 19th Century were not withdrawn, *sub silentio*, by subsequent passage of the modern statutes."); *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 462 (1975) (recognizing that Title VII and section 1981 "although related, and although directed to most of

the same ends, are separate, distinct, and independent."). The existence of more than one federal employment discrimination statute necessarily means that the various laws will provide different remedies and/or mandate use of different procedures. "Congress, for whatever reason, sees no need for national uniformity in all aspects of civil rights cases." *Burnett*, 468 U.S. at 52 n.14.

In the Civil Rights Act of 1991, Congress confirmed that plaintiffs may pursue remedies under both section 1981 and Title VII when it amended both statutes, fine tuning the degree to which they differ and overlap. Section 101 of the Act added section 1981(b), which provided a broad definition of "make and enforce contracts," thus deliberately increasing the overlap between section 1981 and Title VII, and overturning *Patterson's* efforts to minimize that overlap. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 303 (1994) (Section 101 "enlarged the category of conduct that is subject to 1981 liability.").

Section 102 of the Act authorized the award of compensatory and punitive damages in certain Title VII cases that were previously only available under section 1981. *See Pollard v. E. I. du Pont de Nemours & Co.*, 532 U.S. 843, 851 (2001). This new damages provision included a cap on a plaintiff's recovery, *see* 42 U.S.C. § 1981a(b)(3), that Congress specifically provided would not apply to section 1981 plaintiffs. *See* 42 U.S.C. §§ 1981a(a)(1) (authorizing compensatory and punitive damages for unlawful intentional discrimination subject to statutory limits "provided

that the complaining party cannot recover under . . . 42 U.S.C. 1981"), and 1981a(b)(4) ("Nothing in this section shall be construed to limit the scope of, or the relief available under . . . 42 U.S.C. 1981."). *See also Pollard*, 532 U.S. at 851 (recognizing compensatory and punitive damages awarded under Title VII "may not exceed the statutory limitations set forth in § 1981a(b)(3), while such damages awarded under § 1981 are not limited by statute"). Thus, in 1991 Congress clearly signaled that it was providing victims of intentional race discrimination in the workplace relief under both Title VII and section 1981, and that it did not wish to saddle successful section 1981 plaintiffs with Title VII's restrictions and limitations.

In fact, Congress has never viewed Title VII, or any other single statute, as the exclusive remedy for employment discrimination. Title VII overlaps not only with section 1981, but also with numerous other federal laws. Congress has enacted at least nineteen federal laws that in overlapping circumstances forbid discrimination in non-federal employment on the basis of race, national origin, sex, or religion.[15] The

[15] *See* 12 U.S.C. § 3106a (International Banking Act of 1978); 16 U.S.C. § 1702(b) (Youth Conservation Corps); 18 U.S.C. § 246 (deprivation of relief benefits); 20 U.S.C. § 1681, *et seq*. (Title IX); 20 U.S.C. § 1703 (Equal Educational Opportunities Act of 1974); 29 U.S.C. § 158 (National Labor Relations Act); 29 U.S.C. § 206(d) (Equal Pay Act); 29 U.S.C. § 2938 (Workforce Investment Act of 1998); 42 U.S.C. § 2000d-3 (Title VI of the Civil Rights Act of 1964); 42 U.S.C. § 9821 (community

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relief afforded by these independent, overlapping statutes that address employment discrimination is necessarily implicated by petitioner's argument.

Furthermore, Congress on two occasions expressly rejected proposals to make Title VII an exclusive remedy for employment discrimination. In 1964, "the Senate defeated an amendment which would have made Title VII the exclusive federal remedy for most unlawful employment discrimination." *Alexander*, 415 U.S. at 49 n.9 (quoting interpretive memorandum of Senator Clark, sponsor of Title VII, at 110 Cong. Rec. 7207 (1964), citing 110 Cong. Rec. 13650-52 (1964)). The Senate rejected a similar proposal in 1972. *Id.* (citing H.R. 9247, 92d Cong., 1st Sess. (1971); H.R. REP. NO. 92-238 (1971)). During the debates on the 1972 proposed amendment, Congress considered (and rejected) the very arguments that petitioner makes here. For example, petitioner argues that if section 1981 were construed to prohibit retaliation, plaintiffs could use section 1981 to bring suit without exhausting Title VII's administrative

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economic development programs); 42 U.S.C. § 9849 (Head Start programs); 42 U.S.C. § 10504 (emergency federal law enforcement assistance); 42 U.S.C. § 10604 (victim compensation and assistance); 42 U.S.C. § 98581(a)(3) (child care and development block grant); 43 U.S.C. § 1863 (Outer Continental Shelf Lands Act or Outer Continental Shelf Resource Management Act); 45 U.S.C. §§ 151, *et seq*. (Railway Labor Act); 47 U.S.C. § 398 (Public Broadcasting Service and National Public Radio); 47 U.S.C. § 544 (cable communications); 50 U.S.C. App. § 2407(a)(1)(B) (war and national defense export regulation).

remedies. Pet. Br. 26. Senator Roman Hruska advanced that precise argument to justify the unsuccessful amendment. *See* 118 Cong. Rec. 3173 (1972) (remarks of Sen. Hruska) (Unless Title VII were made the exclusive remedy, "[T]he employee could completely bypass [ ] the EEOC . . . and file a complaint in Federal court under the provisions of the Civil Rights Act of 1866 against both the employer and union.").[16] Similarly, petitioner objects that discrimination plaintiffs in any number of cases are resorting to section 1981 after "missing the deadline for litigation under Title VII." Pet. Br. 26 (quoting Easterbrook, C.J., dissenting).[17] But it was to preserve that very option that Senator Javits advocated retaining the remedies for employment discrimination

[16] Moreover, Senator Hruska would not have proposed his amendment unless it was clear that Congress intended for plaintiffs to have precisely that option. *Accord Johnson*, 421 U.S. at 462 ("[T]hese are the natural effects of the choice Congress has made available to the claimant by its conferring upon him independent administrative and judicial remedies. The choice is a valuable one. Under some circumstances, the administrative route may be highly preferred over the litigatory; under others the reverse may be true.").

[17] Both petitioner and the dissent below incorrectly assert that respondent resorted to section 1981 when he missed the deadline to bring suit under Title VII. *See* Pet. Br. 26; JA 160. To the contrary, petitioner timely filed his *pro se* complaint asserting claims under *both* Title VII and section 1981 from the start. His Title VII claims were dismissed solely because he was never told that the local rules required him to pay the filing fee even while his second and third IFP Applications were pending. *See* JA 84; and R. 5; R. 10, R. 13.

under section 1981 in addition to Title VII. *See* 118 Cong. Rec. 3370 (1972) (remarks of Senator Javits) (discrimination victims would need to rely on other laws because claims under Title VII "might fall, because of the statute of limitations or other provisions, in the interstices of the Civil Rights Act of 1964.").

Petitioner maintains that its argument about the impact of Title VII on the analysis of section 1981 is limited only to retaliation claims, but its argument is, in fact, broader.[18] Petitioner argues, for example, that Congress cannot have intended the 1991 Act to impose (or expand) a prohibition against retaliation "because Title VII *already* provides for that protection." Pet. Br. 23 (emphasis added). But Title VII also "already provides" protection against discrimination in promotions, discipline or dismissal, and against racial harassment in employment. On petitioner's logic, although Congress in 1991 amended section 1981 in response to *Patterson*, that amendment added virtually nothing to section 1981, because almost every imaginable discriminatory practice was "already" forbidden by Title VII. That simply is not the law. *See Jones v. R.R. Donnelley & Sons*, 541 U.S. 369, 383

[18] Recognizing the sweeping implications of its own reasoning, petitioner observes that "it could be argued that Section 1981 should not apply in the employment context due to Congress' specific enactment of Title VII." Pet. Br. 21 n.9. Yet petitioner claims to address only retaliation claims in its argument. *Id.*

(2004) ("[P]etitioner's hostile work environment, wrongful termination and failure-to-transfer claims . . . 'arose under' the amendment to § 1981 contained in the 1991 Act.").

It is unclear, even with regard to retaliation, what construction of section 1981 petitioner asserts is dictated by the existence of Title VII. Petitioner appears to ask the Court to hold that section 1981 does not forbid retaliation in any context. But there are many situations covered by section 1981 to which Title VII does not apply. Section 1981, unlike Title VII, extends to the making and enforcement of contracts outside of the employment context. *See, e.g., Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 472 (2006) (business contract); *Runyon*, 427 U.S. at 172 (1976) (private school contract); *see also Rivers*, 511 U.S. at 304 ("because it covers *all* contracts . . . a substantial part of 101's sweep does not overlap Title VII.") (citations omitted) (emphasis in original). Title VII does not even cover all employment contracts. *See* 42 U.S.C. § 2000e(b) (exempting employers with fewer than 15 workers, independent contractors, certain government entities and Indian tribes from Title VII);[19] *see also* 43 U.S.C. § 1626(g) (exempting Alaska Native Corporations). *See also Johnson*, 421 U.S. at 460 ("[Title VII] is made inapplicable to certain employers."). Petitioner's argument would,

[19] Congress noted in 1991 that there were 3.7 million firms with fewer than 15 employees. *See* H.R. REP. NO. 102-40, pt. 1, at 90 (1991).

thus, leave many section 1981 plaintiffs without a remedy.

If petitioner is suggesting, on the other hand, that section 1981 retaliation claims are precluded only when Title VII itself applies, then the coverage of section 1981 would vary by plaintiff. A plaintiff whose employer is subject to Title VII would never have a claim for retaliation. On the other hand, a plaintiff whose employer was not subject to Title VII, or a plaintiff who brought non-employment contract claims would be permitted to assert a claim for retaliation under section 1981. This unworkable construction is not only unsupported by the plain language of either statute, it ignores what this Court has already acknowledged: when Title VII and section 1981 do overlap, courts must construe them independently, and are "not at liberty 'to infer any positive preference for one over the other.'" *Patterson*, 491 U.S. at 181 (quoting *Johnson*, 421 U.S. at 461).

V. THE CIVIL RIGHTS ACT OF 1991 RESTORED SECTION 1981's BROAD PROTECTION AGAINST RETALIATION.

Petitioner argues that Congress intended to exclude a cause of action for retaliation from section 1981 because it did not include an express anti-retaliation provision when it amended the statute in 1991. Pet. Br. 14-21. According to petitioner, this Court's opinion in *Patterson* should have signaled to Congress the need for such specificity. *Id.* To the

contrary, Congress' amendment of section 1981 expanded the statute's coverage to restore the anti-retaliation coverage that Congress and the lower courts understood existed before *Patterson*.[20]

Prior to this Court's decision in *Patterson*, the lower courts were in agreement that section 1981 provided protection against retaliation. *See Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1410 (11th Cir. 1998) (collecting cases). The applicability of those protections, however, was closely tied to the scope of section 1981's protection against racial discrimination. In *Patterson*, the Court held that racial harassment did not "fall[ ] within one of the enumerated rights protected by § 1981." 491 U.S. at 176. The Court, thus, read section 1981 more narrowly than the lower courts had and concluded that the statute did not apply to conduct that occurs after the formation of a contract. *Id.* at 179. After *Patterson*, section 1981 did not protect against most racial discrimination against existing employees. While *Patterson* did not address section 1981's protection against retaliation, in its wake that protection was generally no longer applicable. The 1991 Act, by restoring the pre-*Patterson* scope of section 1981's protection against

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[20] *Cf. Foley v. Univ. of Houston Sys.*, 355 F.3d 333, 339 (5th Cir. 2003) ("It seems unreasonable to believe that in enacting the Civil Rights Act of 1991, Congress intended to make the scope of the new § 1981(b) narrower than that of the old § 1981 as it had been interpreted by this Court and many other federal courts before *Patterson*.").

race discrimination, extended the statute's protection against retaliation to a wider range of cases.

Prior to *Patterson*, many lower courts reasoned that "[s]ection 1981 would become meaningless if an employer could fire an employee for attempting to enforce his rights under that statute." *Goff v. Continental Oil Co.*, 678 F.2d 593, 598 (5th Cir. 1982).[21] In general, however, these cases involved opposition to discriminatory practices that had occurred *after* the plaintiffs were hired. *See, e.g., Miller v. Fairchild Indus., Inc.*, 885 F.2d 498, 502-503 (9th Cir. 1989) (wages, office location); *Greenwood v. Ross*, 778 F.2d 448, 450 (8th Cir. 1985) (promotion); *Benson v. Little Rock Hilton Inn*, 742 F.2d 414, 415 (8th Cir. 1984) (racial harassment); *Choudhury*, 735 F.2d at 40 (compensation); *Goff*, 678 F.2d at 594 (compensation and promotion). In the wake of *Patterson*, a worker who complained about discrimination in post-formation conduct was no longer opposing a practice that violated section 1981; therefore, the lower courts concluded that most complaints about racial discrimination were no longer protected by section 1981 against retaliation because the discrimination

[21] *See also Choudhury v. Polytechnic Inst. of N.Y.*, 735 F.2d 38, 43 (2d Cir. 1984) ("We are unwilling to 'give impetus to the perpetuation' of racial discrimination by permitting an employer, with impunity, to penalize its employee for asserting rights under § 1981.") (internal citation to *Sullivan v. Little Hunting Park, Inc.*, omitted).

complained of simply did not violate the statute. *See, e.g., Hill v. Goodyear Tire & Rubber, Inc.*, 918 F.2d 877, 880 (10th Cir. 1990) (citing *Patterson* and concluding that retaliation for complaint about racial harassment not unlawful because harassment "itself is not actionable under the statute.").[22]

Pre-*Patterson* decisions also held that race-based retaliation was unlawful. The lower courts reasoned that because it was unlawful to fire a worker because he or she was black, it was also illegal to fire black – but not white – workers for complaining about company practices.[23] After *Patterson*, because an employer did not violate section 1981 by firing all black workers because of their race, it was also legal to single out and dismiss particular black workers who had complained or filed lawsuits. In this regard, the effect of *Patterson* was to limit race-based retaliation claims

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[22] Not all lower courts foreclosed the possibility that after *Patterson* workers were still protected from retaliation for exercising their section 1981 right to enforce a contract. *See, e.g.*, *Malhotra*, 885 F.2d at 1313; *McKnight*, 908 F.2d at 111-12.

[23] *See, e.g., London v. Coopers & Lybrand*, 644 F.2d 811, 819 (9th Cir. 1981) ("If an employer retaliates against the former employee with the intent to perpetuate the original act of discrimination, or with some other racially discriminatory motive in mind, then interference with rights protected by § 1981 has occurred, and that section must come into play."); *Garcia v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 80 F.R.D. 254, 266 (N.D. Ill. 1978) ("where, as here, the retaliation is alleged to have been motivated by racial discrimination . . . a § 1981 claim can be stated.").

unrelated to contract enforcement, to race-based retaliation in hiring.[24]

Patterson unquestionably changed the landscape for retaliation claims under section 1981. After *Patterson*, section 1981's anti-retaliation protections were no longer applicable to most of the situations in which a worker opposed racial discrimination because most of those situations involved post-formation conduct. The 1991 Act, by amending section 1981 to apply to post-formation conduct, including dismissals, restored the applicability of section 1981 protections to a far wider range of cases. For example, after *Patterson*, Humphries would not have been able to bring his claim that Cracker Barrel interfered with his right to enjoy the benefits of the contract because Cracker Barrel bestowed those benefits post-formation. But after the 1991 Act expanded section 1981's protections to cover post-formation conduct, specifically protecting the right to enjoy the benefits of the contract regardless of race, Humphries' claim became viable.

Because the 1991 Act made clear that section 1981's rights extend to post-formation conduct, no additional language was necessary to protect against all impairments of those rights, including reprisals

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[24] *See, e.g., English v. Gen. Dev. Corp.*, 717 F. Supp. 628, 632 (N.D. Ill. 1989) (upholding claim by employees allegedly discharged because they objected to employer's policy of racial discrimination in the formation of contracts).

for exercising those rights. Contrary to petitioner's assertions, *Patterson* did not require otherwise. The *Patterson* Court dismissed plaintiff's racial harassment claim because the racial harassment complained of did not involve either "making" or "enforcing" a contract, and not because section 1981 did not include the words "racial harassment." *See* 491 U.S. at 177-78. Importantly, the Court did recognize that Patterson's claim for failure to promote might be actionable under section 1981 – even though those words do not appear in the statute – if "the nature of the change in position was such that it involved the opportunity to enter a new contract with the employer." *Id.* at 185. Thus, in light of *Patterson's* construction of section 1981, Congress would not reasonably conclude that it needed to amend section 1981 to add specific causes of action for racial harassment, failure to promote, retaliation, or any other particular interference with section 1981 rights, so long as the complained of conduct impaired rights recognized in the statute. Instead, Congress understood – consistent with the understanding of the lower Courts both before and after *Patterson* – that it needed to define the enumerated rights more expansively so that a broader range of conduct would "fall within" them.

The legislative history of the 1991 Act confirms this construction. *See, e.g.*, H.R. REP. NO. 102-40, pt. 1, at 90 (1991) ("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."); *id.* at 92 ("In cutting back the scope of the rights to 'make' and 'enforce' contracts[,] *Patterson* also has been interpreted to eliminate retaliation claims that the courts had previously recognized under section 1981. Section 210 would restore rights to sue for such retaliatory conduct.") (citations omitted). The House Committee Report reflects a sound congressional understanding that by amending section 1981 and expanding the scope of its prohibition against discrimination, the 1991 Act greatly increased the range of situations to which section 1981's protection against retaliation would apply.

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CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

CYNTHIA H. HYNDMAN
Counsel of Record
ALEEZA M. STRUBEL
ROBINSON CURLEY & CLAYTON, P.C.
300 South Wacker Drive
Suite 1700
Chicago, Illinois 60606
(312) 663-3100

ERIC SCHNAPPER
SCHOOL OF LAW
UNIVERSITY OF WASHINGTON
P.O. Box 353020
Seattle, Washington 98185
(206) 616-3167

CAROLYN SHAPIRO
CHICAGO-KENT COLLEGE OF LAW
ILLINOIS INSTITUTE OF TECHNOLOGY
565 West Adams Street
Chicago, Illinois 60661
(312) 906-5392

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