No. 06-1431

IN THE

Supreme Court of the United States

CBOSC WEST, INC.,
Petitioner,

v.

HEDRICK G. HUMPHRIES,
Respondent.

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

BRIEF OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE* [1]

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of practitioners who represent employees in labor, employment and civil rights disputes. NELA and its 67 state and local affiliates have a membership of over 3,000 lawyers working on behalf of clients with claims of unlawful treatment in the workplace. NELA strives to protect the rights of its members' clients and regularly supports precedent-setting litigation affecting the rights of employees.

Of particular importance in this case, NELA's members have a wealth of experience representing individuals under Title VII and 42 U.S.C. § 1981. In so doing, they have been guided by, and relied on, the unanimity among eight Courts of Appeals in interpreting this Court's decisions and the Civil Rights Act of 1991 as providing that retaliation is covered by § 1981.

STATUTE AT ISSUE

42 U.S.C. § 1981, as amended by the Civil Rights Act of 1991, provides:

> (a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. Counsel for *amicus curiae* certifies that this brief was not written, in whole or part, by counsel for a party, and that no person or entity, other than *amicus curiae* and counsel, made a monetary contribution to the preparation or submission of the brief. Supreme Court Rule 37.6.

> 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) "Make and enforce contracts" defined. For 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) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

STATEMENT

Respondent, an African American who served as an associate manager in a Cracker Barrel restaurant owned by petitioner, sued petitioner under Title VII and 42 U.S.C. § 1981 after he was fired. The district court held the Title VII claims were procedurally barred (a ruling which was not appealed) and granted summary judgment on the § 1981 claims, one of which alleged the firing was taken in retaliation for respondent's complaints of racial discrimination.

On appeal to the Seventh Circuit, Judge Williams (joined by Judge Posner) held that § 1981 embraces retaliatory conduct, relying principally on this Court's decisions in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), and *Jackson v. Birmingham Board*

of Education, 544 U.S. 167 (2005), as well as § 101 of the Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1072, which responded to *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). The court also held that summary judgment was improper as to the § 1981 retaliation claim and overruled *Hart v. Transit Management of Racine, Inc.*, 426 F.3d 863 (7th Cir. 2005), which held that § 1981 did not protect a non-victim of discrimination who suffered retaliation for complaining about bias suffered by others. Joint Appendix (JA) 117-159.

Chief Judge Easterbrook dissented, arguing that *Jackson* could be distinguished and that *Sullivan* would not be decided the same way today. JA 159-166.

SUMMARY OF ARGUMENT

Section 1981 bars retaliation against workers for complaining about discrimination based on race or color. This issue has been settled since enactment of the Civil Rights Act of 1991—and certainly since the Court's decision three terms ago in *Jackson v. Birmingham Board of Education*. Practitioners from both the plaintiffs' and defense bar share this view, with the result that *nearly half* of all § 1981 claims involve retaliation. *See* Appendix bound with this brief at 3.

This appreciation of the statute's meaning is grounded on the Court's decisions as well as the 1991 Civil Rights Act. Two of those precedents—*Jackson* and *Sullivan v. Little Hunting Park*—would need to be overruled in order to hold that § 1981 does not cover retaliation. *Stare decisis* is not an absolute, but it is a generally trustworthy principle, and it should govern here.

Contrary to the fears expressed by petitioner and its *amici*, Title VII's processes will not wither away if the judgment below is affirmed. Rather, the Seventh Circuit simply preserved the *status quo* in the lower courts—a *status quo* in which retaliation claims are regularly asserted by § 1981 plaintiffs and in which *nine out of ten* lawsuits (88 percent) with § 1981 allegations are accompanied by claims under Title VII (which means that the plaintiff has exhausted Title VII's administrative process). *See* App. at 3. This high rate of coupling results from a recognition that the Title VII machinery is often useful; hence practitioners advise their clients, where possible, to pursue the Title VII approach as well as keeping the § 1981 option open.

1. In *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), the Court held that § 1981, which secures the right to "make and enforce contracts" on the same basis as whites, forbids racial discrimination in private sector employment. A year later, in *Runyon v. McCrary*, 427 U.S. 160 (1976), the Court confirmed that § 1981 reaches private racial discrimination.

After the Court in 1989 ruled in *Patterson v. McLean Credit Union*, 491 U.S. 164, that § 1981 does not cover conduct that occurs after a contract is formed (such as racial harassment), Congress responded by amending § 1981 as part of the Civil Rights Act of 1991. The new definition of "make and enforce contracts" makes it clear that § 1981 applies to all manner of postformation conduct, including harassment and retaliation.

In addition, § 1981 not only protects the right to make and enforce contracts, but also the rights "to sue, be parties [and] give evidence." And another

amendment added in the 1991 Act specifies that all § 1981 rights are protected from "impairment"—weakening—not just simple denial. If an employer fires a black worker because he has filed a lawsuit under § 1981 alleging racial discrimination, there is impairment of the right to sue on the same unfettered basis as whites.

2. Before *Patterson*, the Court had given a broad construction to both statutes enacted during Reconstruction under the Thirteenth Amendment's enabling clause—42 U.S.C. §§ 1981 and 1982. The Court considered § 1982 first, in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), holding that the statute's ban on racial discrimination in the sale and rental of housing applies to private bias as well as state action. In so ruling, the Court examined the common ancestor of *both* §§ 1981 and 1982—§ 1 of the Civil Rights Act of 1866—and held that Congress in 1866 intended to reach private discrimination in § 1 and had the authority to do so under the enabling clause of the Thirteenth Amendment, in order to eliminate the "badges and the incidents of slavery."

Following *Jones*, the Court held in *Sullivan v. Little Hunting Park* that § 1982 prohibited retaliation against someone for seeking to vindicate the rights protected by § 1982. And in *Runyon v. McCrary*, the Court ruled that § 1981 should be interpreted the same fashion as § 1982, in view of their common origin. So it was no surprise that many circuits held that § 1981 likewise bars retaliatory conduct. Then came *Patterson*, with its narrow reading of § 1981, followed almost immediately by the Civil Rights Act of 1991, in which Congress showed a marked preference for the Court's earlier, broader construction of the statute.

3. Finally, just three terms ago, the Court held in *Jackson v. Birmingham Board of Education* that Title IX's ban on sex discrimination includes a prohibition of retaliation, because retaliating against someone for complaining about sex discrimination is itself a form of sex bias. In so holding, the Court pointed to *Sullivan*, saying that the Court there ruled that retaliation for pressing for the rights secured by § 1982 constituted discrimination on the basis of race.

4. Given the Civil Rights Act of 1991, as well as the Court's precedents, eight Courts of Appeals have all held that § 1981 proscribes retaliation. It is not too much to say that a ruling that retaliation is permitted under § 1981 would necessitate over ruling precedent, most notably *Sullivan* and *Jackson*. But there is no reason here to depart from familiar principles of *stare decisis*.

5. In the Civil Rights Act of 1991, Congress for the first time authorized a damage remedy under Title VII, with damages restricted by statutory caps. Uncapped damages were already available under § 1981, however, and Congress carefully wrote the new damage provision to exclude § 1981 claims from the caps.

This and other aspects of the 1991 Act reflect an affirmative congressional interest in securing § 1981's role as a separate source of relief from racial discrimination. That is, Congress wished to preserve § 1981 as an independent source of protection for the very people whose fate was originally bound up with the Union's in the Civil War—and whose post-war plight prompted passage of major civil rights acts a century apart, in 1866 and 1964.

ARGUMENT

I. THE SCOPE OF THE ISSUE

A memorandum from Dr. Laura Beth Nielsen, an Assistant Professor of Sociology at Northwestern University and a Research Fellow for the American Bar Foundation (ABF), is appended to this brief. In the memo, Dr. Nielsen describes the methodology for, and some results concerning 42 U.S.C. § 1981, from an as yet unpublished study of judicial filings under federal statutes relating to employment, including Title VII and § 1981. The study is jointly commissioned by the National Science Foundation and ABF. App. at 1.

The study analyzes data from 1988 through 2003. Focusing on the six-year period 1998-2003, Dr. Nielsen reports that nearly half of all § 1981 filings (45 percent) include a claim of retaliation. App. at 3.

This does not mean that Title VII's processes have been jettisoned. Far from it. Practitioners appreciate the light that an EEOC investigation may shed on frequently unknown facts, and most welcome the opportunity for early resolution afforded by EEOC's conciliation process. *See* 42 U.S.C. § 2000e-5(b). And if conciliation fails and litigation looms, far better if EEOC elects to carry the water and sue on behalf of the complaining party. *See id.* at (f)(1).

Because EEOC performs valuable services, most practitioners whose clients have § 1981 claims advise them also to file a Title VII charge with EEOC. The result is that the vast majority—88 percent—of judicial filings under § 1981 are accompanied by a claim under Title VII. App. at 3. Only 12 percent

stand alone. There is no danger that Title VII will become a dead letter.[2]

II. SECTION 1981 COVERS RETALIATION UNDER THE COURT'S PRECEDENTS, CONSISTENT WITH THE WILL OF CONGRESS

A. Section 1981 Covers Retaliation under the Court's Precedents Interpreting Thirteenth Amendment Statutes

1. *The Four Significant Thirteenth Amendment Decisions: Jones, Sullivan, Johnson and Runyon*

The Court's modern examination of the two statutes passed under the Thirteenth Amendment's enabling clause—42 U.S.C. §§ 1981 and 1982—began in 1968 with *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409. In *Jones*, the Court considered the claim of a black prospective home buyer, who alleged that a developer had refused to sell him a house because of his race in violation of 42 U.S.C. § 1982, which provides that all citizens "shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." In response to the argument that the statute constrains only state action, the Court held that "§ 1982 bars *all* racial discrimination, private as well as public, in the sale or rental of

[2] Section II.B of the *amicus* brief supporting respondent submitted by the Leadership Conference on Civil Rights suggests that the percentage of freestanding 1981 claims is lower than 12 percent and is in fact under one percent. But even the higher figure demonstrates that the overwhelming majority of § 1981 claims are filed together with Title VII allegations and so have traversed the requisite Title VII processes.

property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment." 392 U.S. at 413 (emphasis original) (footnote omitted).

In so ruling, the Court reasoned that "[o]n its face . . . § 1982 appears to prohibit *all* discrimination against Negroes in the sale or rental of property—discrimination by private owners as well as discrimination by public authorities." *Id.* at 421 (emphasis original). Examining the statute's history, the Court observed that § 1982 was originally "part of § 1 of the Civil Rights Act of 1866," which was enacted over President Andrew Johnson's veto and which provided:

> That all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, *to make and enforce contracts, to sue, be parties, and give evidence*, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Id. (emphasis added) (ellipses original) (footnotes omitted).[3]

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[3] The emphasis added to § 1 above highlights language that is the same as in the present day 42 U.S.C. § 1981(a); the Court in

The Court then thoroughly canvassed the legislative history of § 1 of the 1866 Civil Rights Act and concluded that "it is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein." *Id.* at 436.

Eighteen months after deciding *Jones*, the Court in 1969 held that § 1982 prohibits retaliatory conduct. In *Sullivan v. Little Hunting Park*, 396 U.S. 229, the white owner of a share in a community recreational corporation sought to assign the share to an African American. The corporation's board refused to approve the assignment because of the prospective assignee's race, and the white share owner protested. The board then expelled him from the corporation.

Both the black would-be assignee and the white share owner sued, invoking § 1982. The Court first held that the black plaintiff stated a § 1982 claim in challenging the board's refusal to approve the assignment. *Id.* at 236-37. Turning to the white share owner's "expulsion for the advocacy of [the black plaintiff's] cause," the Court held that he had standing to contest being "punished for trying to vindicate the rights of minorities protected by § 1982." *Id.* at 237.

Since *Sullivan*, there has been no doubt that § 1982 bars retaliation, and the Court recently reaffirmed this point in *Jackson v. Birmingham Board of Education*, 544 U.S. 167: "in *Sullivan* we interpreted a general prohibition on racial dis-

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Jones noted that § 1981, like § 1982, is "derived from § 1 of the Civil Rights Act of 1866," and that its "terms . . . closely parallel those of § 1982." 392 U.S. at 441 n.78.

crimination to cover retaliation against those who advocate the rights of groups protected by that prohibition." *Id.* at 176.

Jones noted that §§ 1981 and 1982 share common ancestry and have parallel terminology, *see* 392 U.S. at 441 n.78, so it was foreseeable that the Court would hold, as it did in 1975 in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, that § 1981's prohibition of racial discrimination in the making and enforcing of contracts covers private contracts, specifically contracts of employment. In *Johnson*, the issue was whether filing a Title VII charge with EEOC tolled the statute of limitations for a § 1981 action brought on the same facts. The Court held there was no tolling, because the remedies and procedures of Title VII and § 1981 were entirely separate from, and independent of, one another. On this point, the Court quoted *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48 (1974): "[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." *See* 421 U.S. at 459.

More specifically, the House report on what became the Equal Employment Opportunity Act of 1972 said "that the remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive." *Id.* The Senate report contained similar language. *Id.*

Addressing the protections afforded by § 1981, the Court said that the statute

> relates primarily to racial discrimination in the making and enforcement of contracts. Although this Court has not specifically so held, it is well settled among the Federal Courts of Appeals—and we now join them—that § 1981 affords a federal remedy against discrimination in private employment on the basis of race.

Id. at 459-60 (footnote omitted).

The Court was also satisfied that "Congress did not expect that a § 1981 court action usually would be resorted to only upon completion of Title VII procedures and the Commission's efforts to obtain voluntary compliance." *Id.* at 461. Indeed, the absence of conciliation in § 1981 cases, and the possibly detrimental effect on the Commission's compliance program if a § 1981 lawsuit is unsuccessful, 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." *Id.* In these circumstances, the Court was "disinclined . . . to infer any positive preference for one over the other," *i.e.*, Title VII over § 1981. *Id.*

A year after *Johnson*, in *Runyon v. McCrary*, 427 U.S. 160, which did not involve a contract of employment but rather the right of black parents to enter into contracts to send their children to private schools, the Court treated the question of § 1981's application to private conduct as settled. The Court said that it was "now well established that § 1 of the Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. § 1981, prohibits racial discrimination in the making

and enforcement of private contracts," 427 U.S. at 168, explaining that its ruling on § 1982 in *Jones* "necessarily implied that the portion of § 1 of the 1866 Act presently codified as 42 U.S.C. § 1981 likewise reaches purely private acts of racial discrimination." *Id.* at 170.

The Court said that "[t]he applicability of the holding in *Jones* to § 1981 was confirmed" by the decisions in *Johnson v. Railway Express Agency* and *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973), *see* 427 U.S. at 171, so "[t]he Court of Appeals' conclusion that § 1981 was . . . violated follows inexorably from the language of that statute, as construed in *Jones*, *Tillman*, and *Johnson*." *Id.* at 173.[4]

The Court also thought it "noteworthy" that in the debate culminating in the Equal Employment Opportunity Act of 1972, Congress "specifically considered and rejected an amendment that would have repealed the Civil Rights Act of 1866 . . . insofar as it affords private-sector employees a right of action based on racial discrimination in employment. * * * There could hardly be a clearer indication of

[4] *Tillman* was a challenge to the racially restrictive practices of a recreation association brought under both §§ 1981 and 1982. Rejecting the association's argument that it was a private club, the Court first focused on § 1982 and noted that the association's membership practices were "indistinguishable" from those of the respondent in *Sullivan v. Little Hunting Park*, which the Court had held was not private. 410 U.S. at 438. Turning to the § 1981 claim, the Court said that "[t]he operative language of both § 1981 and § 1982 is traceable to" § 1 of the Civil Rights Act of 1866. *Id.* at *439.* "In light of the historical interrelationship between § 1981 and § 1982, we see no reason to construe these sections differently when applied . . . to the claim of [the association] that it is a private club." *Id.* at 439-40.

congressional agreement with the view that § 1981 does reach private acts of racial discrimination." *Id.* at 174-75 (citation omitted) (footnote omitted). The Court ended its discussion of § 1981's reach by saying that, "[i]n these circumstances there is no basis for deviating from the well-settled principles of *stare decisis* applicable to this Court's construction of federal statutes." *Id.* 427 U.S. at 175.

2. *Section 1981 Covers Retaliation under the Court's Thirteenth Amendment Decisions*

Beginning with *Jones* in 1968 and culminating with *Runyon* in 1976, the Court vivified both Thirteenth Amendment statutes, 42 U.S.C. §§ 1981 and 1982. In *Jones*, which focused on § 1982, the Court held that § 1 of the Civil Rights Act of 1866 reached private racial discrimination, so § 1982, simply a codification of part of § 1, also covers conduct in the private sphere.

Since § 1981 likewise had its origins in § 1, the Court in *Runyon* said that *Jones* "necessarily implied" that § 1981 also reaches private racial discrimination. 427 U.S. at 170. And by the time *Runyon* was decided, it was clear in particular that "Congress clearly has retained § 1981 as a remedy against private employment discrimination separate from and independent of the more elaborate and time-consuming procedures of Title VII." *Johnson v. Railway Express Agency*, 421 U.S. at 466.[5]

[5] *Johnson* dealt with alleged discrimination by a private company, but § 1981 also applies to "[a] union which intentionally avoids asserting discrimination claims, either so as not to antagonize the employer and thus improve its chances of success on other issues, or in deference to the perceived desires of

Finally, the Court in *Sullivan v. Little Hunting Park* held that § 1982 "cover[s] retaliation against those who advocate the rights of groups protected by [its] prohibition" on racial discrimination in housing. *Jackson v. Birmingham Board of Education*, 544 U.S. at 176. Given the common derivation of 42 U.S.C. §§ 1981 and 1982 from a single Reconstruction statute, and given as well the identical operative, rights-conferring language of the two laws—those protected "shall have the same right . . . as is enjoyed by white citizens"—it is small wonder that Courts of Appeals in the 1970's and 1980's held that § 1981 also covers retaliation.[6]

B. In the Civil Rights Act of 1991, Congress Rejected *Patterson*'s Holding Narrowing the Reach of § 1981

1. *Patterson*

In *Patterson v. McLean Credit Union*, 491 U.S. 164, the Court first considered whether to overrule *Runyon*'s holding that § 1981 reaches private conduct. Principles of *stare decisis* counseled against overruling, though, so *Runyon* was not disturbed. *See id.* at 171-75.

One of the plaintiff's claims was an allegation of racial harassment, which the Court held was not

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its white membership." *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 669 (1987).

[6] *See Choudhury v. Polytechnic Inst. of N.Y.*, 735 F.2d 38, 42-43 (2d Cir. 1984); *Goff v. Continental Oil Co.*, 678 F.2d 593, 598 (5th Cir. 1982); *Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266, 1268-70 (6th Cir. 1977); *Setser v. Novack Inv. Co.*, 638 F.2d 1137, 1147 (8th Cir. 1981), *modified on other grounds,* 657 F.2d 962 (1981), *cert. denied*, 454 U.S. 1064 (1982); *London v. Coopers & Lybrand*, 644 F.2d 811, 819 (9th Cir. 1981).

covered by § 1981. More generally, the Court ruled that the statute did not apply to conduct after the contract was formed—in a contract of employment, after the initial hire (except for promotions where "the nature of the change in position was such that it involved the opportunity to enter into a new contract with the employer," *id.* at 185). The Court felt that such "postformation conduct" was beyond the reach of § 1981 because of the "statute's limitation to the making and enforcement of contracts." *Id.* at 180. In addition, "[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 those statutory prerequisites." *Id.* at 181.

2. *The Sweep of the 1991 Civil Rights Act in Overriding Patterson*

In the immediate aftermath of *Patterson*, a few circuits held that § 1981 did not permit claims of retaliation.[7] But the *Patterson* era was short-lived. The Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1072, included statutory responses to several of the Court's decisions with which Congress was dissatisfied, including *Patterson*. *See Landgraf v. USI Film Products*, 511 U.S. 244, 251 (1994).

In particular, § 101 of the Act amended § 1981 to make it clear that the statute covers all manner of postformation conduct by adding two new subsections—(b), which defines "the term 'make and enforce contracts' [as] includ[ing] the making, performance, modification, and termination of con-

[7] *See, e.g., Carter v. South Central Bell*, 912 F.2d 832 (5th Cir. 1990); *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527 (11th Cir. 1990).

tracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship"; and (c), which provides in part that "[t]he rights protected by this section are protected against *impairment* by nongovernmental discrimination" (emphasis added), thus making it clear that the statute is concerned with the impairment—weakening—of the rights enumerated, not just their denial (as well as forestalling any future attempt to overrule *Runyon*).

In addition to being the focus of § 101 of the 1991 Act, § 1981 also figures prominently in § 102, which for the first time authorized damages in Title VII cases but capped damage awards based on the size of the defendant, with a maximum of $300,000 available against defendants employing more than 500 people.[8] Congress wrote § 102 carefully to insure it would *not* limit relief in § 1981 cases, where uncapped damages were already available.[9] Thus subsection (a)(1) in § 102 authorizes damages in Title VII cases of intentional discrimination, "provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. § 1981)." And subsection (b)—which sets forth the various damage caps—provides at subsection (4) that "[n]othing in this section shall be construed to limit the scope of, or the relief available under" § 1981.

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[8] Section 102 is codified (somewhat confusingly) at 42 U.S.C. § 1981*a*.

[9] *See Johnson v. Railway Express Agency*, 421 U.S.at 460 ("An individual who establishes a cause of action under § 1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages.").

Sections 101 and 102 together show that the Court's assumption in *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 306-07 (1994)—"that § 101 reflects congressional disapproval of *Patterson*'s interpretation of § 1981"—is accurate. Indeed, *both* §§ 101 and 102 of the 1991 Civil Rights Act bespeak dissatisfaction with *Patterson*, as well as an affirmative congressional interest in securing § 1981's role as a separate source of relief from racial discrimination, entirely independent of Title VII.

The Court in *Patterson* declined to view § 1981 "as a general proscription of racial discrimination in all aspects of contract relations," 491 U.S. at 181, and expressed reluctance "to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute." *Id.* But §§ 101 and 102 in the Civil Rights Act of 1991 reflect a clear congressional choice precisely in favor of construing § 1981 as "a general proscription of racial discrimination in all aspects of contract relations," regardless of the impact on Title VII's remedial scheme—that is, a return to *Johnson*'s caution against "infer[ring] any positive preference for one [statute] over the other." 421 U.S. at 461. In these circumstances, it is unsurprising that coverage of retaliatory conduct is evident from the statutory text.

3. *Retaliation Is Covered by the Text of the 1991 Amendments to § 1981*

Respondent argues that retaliation must not be covered by the amended § 1981, because the text of the statute does not contain the word. But "harassment" does not appear in the text, either, and there is no doubt that racial harassment is prohibited by § 1981 as amended, because Congress wished to

overturn *Patterson*, which dealt with harassment. *See, e.g., Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004), a § 1981 case in which "plaintiffs alleged that they were subjected to a racially hostile work environment," *id.* at 372, and it was "undisputed that [they] have alleged violations of the amended statute." *Id.* at 373.

The plaintiffs in *Donnelley* also alleged wrongful termination, and "termination"—unlike "harassment"—is included in the statutory text, as the Court pointed out by quoting new subsection (b) of the statute. *Id.* The Court also quoted the language in subsection (b) that further defines "make and enforce contracts" as including "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *Id.* This is the only text that covers harassment, but it covers it nicely, since an employee who is harassed because of race is denied the full "enjoyment . . . of the contractual relationship." In the same fashion, a worker is deprived of enjoyment of the contractual relationship if retaliation follows a complaint about racial discrimination in contract administration.

Congress expected the courts to rely on legislative history in construing the Civil Rights Act of 1991, and it added a proviso in § 105 (the part of the Act responding to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)) which prohibited use of any history other than an interpretive memorandum appearing in the Congressional Record "in construing or applying, any provision of this Act that relates to *Wards Cove*—Business necessity/cumulation/alternative business practice." *See* § 105(b). There are no restrictions on use of legislative history to interpret any other provisions of the Act.

Given the congressional expectation on judicial use of the 1991 Act's legislative history as an interpretive aid, it is noteworthy that the relevant committee reports of both houses of Congress say, in the words of the Senate, that the list of covered acts in § 1981's new subsection (b) "is intended to be illustrative rather than exhaustive." S. Rep. No. 101-315 (1990) at 58. In addition, the House report says that the list "would include, but not be limited to, claims of harassment . . . [and] retaliation." H. Rep. 102-40 (II) (1991) at 37.

Subsection (a) of § 1981—the original statute—is also relevant here, when considered in light of subsection (b)'s inclusion of postformation conduct and new subsection (c)'s declaration that the enumerated rights are protected from "impairment," not just absolute denial. Analysis of § 1981 typically focuses on the right to make and enforce contracts, but § 1981(a) also safeguards the rights "to sue, be parties [and] give evidence" on the same basis as whites. An employer who retaliates against an employee for filing a § 1981 lawsuit has certainly impaired the right to sue in the same unfettered manner that Congress rightly believed was enjoyed by whites. And since filing a Title VII charge with EEOC or lodging an internal complaint of bias are frequently precursors to more formal legal action, an employer who retaliates because of such activity also impairs rights secured by § 1981.

C. *Jackson* Confirms that § 1981 Covers Retaliation

Concurring in *Runyon*, Justice Powell said he agreed with the Court that the "considered holdings [of *Jones v. Mayer* and *Sullivan v. Little Hunting*

Park] with respect to the purpose and meaning of § 1982 necessarily apply to both [§§ 1981 and 1982] in view of their common derivation." 427 U.S. at 187. In *Sullivan*, the Court applied § 1982 to retaliatory conduct. And in the Civil Rights Act of 1991, Congress rejected the Court's narrow reading of § 1981 in *Patterson* and added expansive language to the statutory text. It was clear to the Courts of Appeals prior to *Patterson* that § 1981, like § 1982, barred retaliation, and that point was solidified by the 1991 Act.

The Court dispelled any doubts on this score with its 2005 decision in *Jackson v. Birmingham Board of Education*, 544 U.S. 167, which construed Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, which prohibits sex discrimination by recipients of federal education funding. The issue in *Jackson* was whether a ban on retaliatory conduct was encompassed in Title IX's prohibition of sex discrimination, and the Court held it was.[10]

The Court explained that "[r]etaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination," *id.* at 173; *i.e.*, it is "discrimination 'on the basis of sex' because it is an intentional response to the nature of the complaint: an allegation of sex discrimination." *Id.* at 174. It was also important for the Court that Title IX was enacted three years after its decision in *Sullivan v. Little*

[10] Title IX's bar to discrimination is contained in 20 U.S.C. § 1681(a): "Prohibition against discrimination; exceptions. No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ."

Hunting Park, which "interpreted a general prohibition on racial discrimination to cover retaliation against those who advocate the rights of groups protected by that prohibition." *Id.* at 176 (footnote omitted). In *Jackson*, "[r]etaliation for [plaintiff's] advocacy of the rights of the girls' basketball team in this case is 'discrimination' 'on the basis of sex,' just as retaliation for advocacy on behalf of a black lessee in *Sullivan* was discrimination on the basis of race." *Id.* at 176-77.

Jackson added another, straightforward reason why § 1981 bars retaliation: if "[r]etaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination," 544 U.S. at 173, then retaliation because someone has complained of racial discrimination is likewise a form of intentional racial discrimination.[11]

These two lines of argument—one based on analysis of the Court's decisions in cases involving the two Thirteenth Amendment statutes, including the congressional response to *Patterson* in 1991, the other grounded in *Jackson*'s understanding that retaliation for complaining about discrimination is itself a form of the discrimination complained about—are both anchored by this Court's decisions. Each is powerful in its own right. So it is not surprising that, in

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[11] In *Burlington Northern and Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2412 (2006), the Court said that "[t]he substantive provision [of Title VII] seeks to prevent injury to individuals based on who they are, *i.e.,* their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.,* their conduct." *Jackson* held that if that conduct protested bias against a particular status, then punishing someone for that conduct was equivalent to punishing for the status.

addition to the court below, the other seven circuits to address the question following passage of the Civil Rights Act of 1991 have *all* held that § 1981 prohibits retaliation.[12]

D. Considerations of *Stare Decisis*

1. *The Dissent Below*

Even if the statutory text were less clear, *Sullivan* and *Jackson*, both singly and together, block any effort to say that § 1981 does not reach retaliation. Dissenting below, Chief Judge Easterbrook therefore sought to distinguish *Jackson*, saying first that

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[12] *See Hawkins v. 1115 Legal Service Care*, 163 F.3d 684, 693 (2d Cir. 1998) ("We remain of the view, in light of the broad sweep of § 1981(b), that a retaliation claim may be brought under § 1981."); *Aleman v. Chugach Support Services*, 485 F.3d 206, 213 (4th Cir. 2007) ("Supreme Court . . . precedent . . . hold[s] retaliation to be a form of differential treatment subsumed in the anti-discrimination language of Section 1981," citing *Jackson* and *Sullivan*); *Foley v. University of Houston System*, 355 F.3d 333, 338-39 (5th Cir. 2003) (plaintiffs "contend that the right to be free from retaliation for exercising rights protected by § 1981 was clearly established by the Civil Rights Act of 1991 * * * we agree."); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1059 (8th Cir. 1997) ("Like the substantive claim of racial discrimination, a claim of retaliation, in a racial discrimination context, can violate both Title VII and 42 U.S.C. § 1981."); *Manatt v. Bank of America, N.A.*, 339 F.3d 792, 800-01 (9th Cir. 2003) (recognizing that plaintiff had stated a § 1981 claim where she "contend[ed] that the [defendant] retaliated against her for complaining to her supervisor and to human resources about racial discrimination"); *O'Neal v. Ferguson Construction Co.*, 237 F.3d 1248, 1258 (10th Cir. 2001) (affirming damage award above the cap for Title VII damages for a § 1981 retaliation claim); *Andrews v. Lakeshore Rehabilitation Hospital*, 140 F.3d 1405, 1412-13 (11th Cir. 1998) ("post-1991 retaliation claim brought by [plaintiff] is cognizable under the amended section 1981").

Jackson construed the term "discrimination" in Title IX, but that § 1981 does not contain that term: "The word 'discriminate' does not appear in § 1981." JA 159. This is just wrong. Subsection (c) of § 1981 (added by the Civil Rights Act of 1991) provides that "[t]he rights protected by this section are protected against impairment by nongovernmental *discrimination*" (emphasis added). In any event, the Court has never doubted that § 1981 is concerned with racial discrimination; *see Johnson*, 421 U.S. at 460 ("§ 1981 affords a federal remedy against discrimination in private employment on the basis of race"); *Patterson*, 491 U.S. at 172 (reaffirming that "§ 1981 prohibits racial discrimination in the making and enforcement of private contracts.").

As to *Sullivan*, the dissent plainly thinks it was wrongly decided, saying that "*Sullivan* engaged in a freewheeling 'interpretation' of § 1982," JA 164, and "ignored the language" of the statute. *Id.* "There has been a sea change in interpretive method between *Sullivan* and today," *id.* at 165, however, so *Sullivan*'s construction of § 1982 should not be a model for "§ 1981, its neighbor." *Id.* at 164. But §§ 1981 and 1982 are not mere "neighbors" in the code. These two statutes were originally part of the same law—§ 1 of the Civil Rights Act of 1866—and this is why the Court has instructed that they should be interpreted in the same fashion.

Chief Judge Easterbrook also said that judges should adhere to what he called "the holding of *Patterson*": when interpreting § 1981, courts "must consider the effect that [the interpretation] would have on Title VII." JA 161-62. In the Civil Rights Act of 1991, though, Congress rejected this approach, preferring two independently firing, fully loaded

weapons to combat racial discrimination in employment, even at the expense of Title VII's processes. In such circumstances, some measure of deference to the will of Congress is called for.[13]

2. *Stare Decisis*

It would be extraordinarily difficult to say that § 1981 lacks protection against retaliation, without overruling either or both *Sullivan* and *Jackson*. But overruling either would abridge the principle of *stare decisis* without good cause.

In *Patterson*, the first issue addressed was whether to overrule *Runyon v. McCrary*'s holding that § 1981 covers private conduct, in a setting in which "[s]ome Members of th[e] Court believe[d] that *Runyon* was decided incorrectly, and others consider[ed] it correct on its own footing." 491 U.S. at 171-72. The Court consequently discussed *stare decisis* at some length, saying it is "a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and pre-

[13] The dissent repeatedly cites the Court's unanimous decision in *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470 (2006), in which the black owner of a construction company sought to invoke § 1981 on his own behalf, even though all contracts at issue were (or would have been) with his company, not himself personally. The Court held that § 1981 did not apply, for the statute, which "offers relief when racial discrimination blocks the creation of a contractual relationship, as well as when racial discrimination impairs an existing contractual relationship, *so long as the plaintiff has or would have rights under the existing or proposed contractual relationship,*" 546 U.S. at 476 (emphasis added), did not assist a plaintiff who neither had, nor would have had, contract rights. This is an important principle, but it has nothing to do with claims of retaliation by those who in fact "have rights under the existing or proposed contractual relationship."

serving a jurisprudential system that is not based upon 'an arbitrary discretion.'" *Id.* at 172, *quoting* The Federalist, No. 78.[14]

The Court noted in *Patterson* that it had previously "held that 'any departure from the doctrine of *stare decisis* demands special justification,'" *id.* (citation omitted), and that "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Id.* at 172-73.

The Court concluded that there was "no special justification" for overruling *Runyon*, *id.* at 173, such as "the intervening development of the law," *id.*, or that the decision is "unworkable" or "poses a direct obstacle to the realization of important objectives embodied in other laws," *id.*, or had become outdated, as experience has shown it to be "'inconsistent with the sense of justice or with the social welfare.'" *Id.* at 174, quoting the concurring opinion by Justice

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[14] The Chief Justice echoed these sentiments on the first day of his confirmation hearing, saying "Judges have to have the humility to recognize that they operate within a system of precedent, shaped by other judges equally striving to live up to the judicial oath." *Confirmation Hearing On The Nomination Of John G. Roberts, Jr. To Be Chief Justice Of The United States before the Senate Comm. On The Judiciary*, 109th Cong. at 55 (2005) (statement of nominee) (reprint Serial No. J-109-37). Later, in response to questions from Senator Specter, the Chief Justice said, "I would point out that the principle [of *stare decisis*] goes back even farther than Cardozo and Frankfurter. Hamilton, in Federalist No. 78, said that, 'To avoid an arbitrary discretion in the judges, they need to be bound down by rules and precedents,'" *id.*, at 141-142 (questions by Chairman Specter).

Stevens in *Runyon*, 427 U.S. at 191, which in turn quoted Justice Cardozo. Indeed, on this latter count, *Runyon* was hardly outdated: "To the contrary, *Runyon* is entirely consistent with our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin." 491 U.S. at 174.

There is no "special justification" for overruling either *Sullivan* or *Jackson*. There has been no "the intervening development of the law" that suggests the necessity of overruling; neither decision has proved unworkable or poses an obstacle to the realization of the objectives of other laws; and neither is outdated from the perspective of social mores. As with *Runyon*, the reverse is true.

Sullivan and *Jackson* should remain good law. And if they do, a ruling that retaliation is not covered by § 1981 is, as Justice Rehnquist said in another context, "virtually foreclosed." *International Union of Electrical, Radio & Machine Workers, AFL-CIO, Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229, 236 (1976).[15]

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[15] Justice White dissented in *Runyon v. McCrary*, 427 U.S. at 192, and among other things criticized the majority's reliance on *Johnson v. Railway Express Agency*, labeling *dictum Johnson*'s statement that § 1981 covers private discrimination. *See id.* at 213. Justice Rehnquist joined the dissent. Six months later, Justice Rehnquist wrote the *I.U.E. v. Robbins & Myers* decision, holding that a worker's resort to a collective bargaining agreement's grievance machinery does not toll Title VII's time limits. The decision cited *Johnson* extensively and quoted from it liberally, including setting forth at length the passage saying, "Congress clearly has retained § 1981 as a remedy against private employment discrimination separate from and independent of the more elaborate and time consuming procedures of Title VII."

III. THE PRACTITIONERS' PERSPECTIVE

Especially after *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, which held that many § 1981 claims are subject to the four-year statute of limitations in 28 U.S.C. § 1658, it is usually relatively easy to coordinate Title VII's and § 1981's timing requirements, so as to permit claims under both statutes to be packaged in a single complaint. That is, the Title VII charge in most cases must be filed within 300 days of the event complained of; this gives EEOC more than three years to complete its work if the prospective plaintiff also wishes to rely on § 1981.[16]

On occasion, though, it is either impossible or impractical to coordinate matters subject to Title VII and § 1981, as when the Commission takes an especially long time to complete its processes, or when it acts quickly and sends a notice of right to sue—thereby triggering a 90-period for filing suit, 42 U.S.C. § 2000e-5(f)(1)—and the person aggrieved is awaiting the completion of a nonjudicial proceeding, such as an arbitration under a collective bargaining agreement. These situations do not happen often—

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429 U.S. at 239, *quoting Johnson*, 421 U.S. at 466. This is a homely example of Justice Rehnquist's fealty to precedent, something best exemplified when Chief Justice Rehnquist wrote for the Court in *Dickerson v. United States*, 530 U.S. 428 (2000), which declined to overrule *Miranda v. Arizona*, 384 U.S. 436 (1966).

[16] Section 706(e)(1) of Title VII, 42 U.S.C. § 2000e-5(e)(1), imposes a 180-day deadline on charge filing, but that period is increased to 300 days in jurisdictions having agencies "with authority to grant or seek relief" concerning the charging party's allegations, *id.*, and today there is such an agency in virtually every large jurisdiction.

only 12 percent of § 1981 claims stand alone—but roughly half of these involve retaliation (using the 45 percent figure reported by Dr. Nielsen, *see* App. at 3). If § 1981 does not cover retaliation, such individuals, who reasonably regarded the question whether § 1981 reaches retaliation as settled, will have no remedy. The Court has suggested that "preserving settled interests" is a factor to be considered when statutes are construed, *Donnelley*, 541 U.S. at 382, and these people would find their interests disrupted by a ruling that § 1981 does not reach retaliatory conduct.

A much larger group would also see legitimate expectations thwarted. Whether or not linked to Title VII, 45 percent of all § 1981 claims include an allegation of retaliation. In § 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a, Congress expressly exempted claims under § 1981 from caps on damages under Title VII, underscoring the broader congressional goal of relieving § 1981 claims of all Title VII requirements. In these circumstances, those § 1981 plaintiffs with retaliation claims—like all other § 1981 plaintiffs—reasonably thought their damages would not be subject to caps, either. Some have in all likelihood formulated settlement positions and engaged in bargaining with that in mind.

There is no warrant to unsettle the expectations of § 1981 retaliation claimants. On the contrary, the Civil Rights Act of 1991, as well as the Court's precedents, establish that § 1981 covers retaliation.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

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Da: December 20, 2007

Re: Study of Employment Civil Rights Claims

Method

The principal quantitative data analyzed here were collected through a research design that followed Donohue and Siegelman (Donohue & Heckman 1997; Donohue & Siegelman 1991; 1995; Siegelman & Donohue 1990). The project design was peer-reviewed and funded by the National Science Foundation and the American Bar Foundation.

We drew random samples of all federal employment civil rights cases from seven regionally diverse federal districts: Atlanta, Chicago, Dallas, New Orleans, New York City, Philadelphia, and San Francisco filed between 1988 and 2003. These districts contain about 20% of all filings, capture variation in legal and social context, and, for cost considerations, are located close to federal records depositories. The sample was drawn from the list of all civil employment discrimination cases filed in these districts from 1988 to 2003 compiled by the Administrative Office of the U.S. Courts (AOUSC). 300 cases were randomly selected from each of these districts over the time period to yield a

sample of 2100 cases. Given our knowledge of the universe from which the sample was drawn, it is possible for us to assign sampling weights by district. The analyses reported here are not weighted by geographic region. We included open cases in the overall sample, but only examine closed cases (n=1805) in this report.

We developed an extensive coding form and trained teams of coders for each site. The same data collection manager supervised and trained coders in each location. 10% of the cases were coded independently by different coders to allow for tests of intercoder reliability. We achieved reliability coefficients of 90% across double coded items. These measures indicate that the coding of the cases was highly reliable.

Your Questions

a) How many §1981 claims have been filed each year in the 1998- 2003 period?

Of employment civil rights claims[1] filed in federal court between 1998 and 2003, between 16 and 26% included a §1981 claim.

	% of all employment civil rights claims that include a §1981 claim
1998	17%
1999	16%
2000	20%
2001	26%
2002	23%
2003	17%

[1] Includes everything classified as 442: ADEA, ADA, Tit. VII, § 1981, § 1983, FMLA, PDA, EPA

b) How many of those §1981 claims also had a Title VII claim?

Some 88% of case filings alleging a violation of §1981 also allege a Title VII violation.

c) How many of those Sec. 1981 claims were for retaliation?

Fully 45% of cases alleging a violation of §1981 are for retaliation.

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