No. 06-1431

# In the Supreme Court of the United States

CBOCS WEST, INC., PETITIONER

*v.*

HENDRICK G. HUMPHRIES

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SEVENTH CIRCUIT*

**BRIEF FOR THE UNITED STATES**
**AS AMICUS CURIAE SUPPORTING RESPONDENT**

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## QUESTION PRESENTED

Whether a claim asserting retaliation against an individual who has complained of intentional racial discrimination is cognizable under 42 U.S.C. 1981.

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## INTEREST OF THE UNITED STATES

The question presented in this case is whether a claim asserting retaliation against an individual who has complained of intentional racial discrimination is cognizable under 42 U.S.C. 1981. The United States has participated as amicus curiae in other cases presenting the question whether a statute's broad-based prohibition of discrimination encompasses a cause of action for retaliation because of complaints about discrimination. See *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a)), and *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (42 U.S.C. 1982). The court of appeals' interpretation of Section 1981 in this case was

based in significant part on this Court's decisions in *Jackson* and *Sullivan*. See J.A. 138-144.

The United States has responsibility for enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. The availability of relief under Section 1981 for acts of racial discrimination in employment may affect the allocation of government resources in enforcing the provisions of Title VII. The United States has often participated as amicus curiae in cases involving Section 1981 where, as here, the Court's interpretation of Section 1981 could affect the interpretation or enforcement of statutes, like Title VII, that the United States enforces. See, *e.g.*, *Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004); *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989); *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656 (1987); *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

## STATEMENT

Respondent is an African-American man who was an associate manager at a Cracker Barrel restaurant owned and operated by petitioner. He alleges that petitioner violated 42 U.S.C. 1981 by retaliating against him because he had complained about racial discrimination against him and another black employee. The district court granted summary judgment for petitioner and dismissed the Section 1981 retaliation claim. On appeal, petitioner argued that Section 1981 does not provide a cause of action for retaliation claims. The court of appeals reversed the grant of summary judgment, holding that Section 1981 encompasses retaliation claims.

1. Section 1981(a) of Title 42 of the United States Code, one of the Nation's oldest civil rights laws, provides the following "[s]tatement of equal rights":

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts * * * as is enjoyed by white citizens.

This Court has repeatedly "traced the evolution of this statute, and its companion, 42 U. S. C. § 1982." *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 383-384 (1982). The "operative language of both laws apparently originated in § 1 of the Civil Rights Act of 1866, enacted by Congress shortly after ratification of the Thirteenth Amendment." *Id.* at 384 (internal citation omitted). The language now contained in Section 1981(a) "is derived from § 1977 of the Revised Statutes of 1874, which in turn codified verbatim § 16" of the Enforcement Act of 1870 (itself a product of Congress's powers to enforce the Fourteenth Amendment). *Id.* at 385. Accordingly, the Court has "recognized that present day 42 U. S. C. § 1981 is both a Thirteenth and a Fourteenth Amendment statute." *Jett* v. *Dallas Indep. Sch. Dist.*, 491 U.S. 701, 722 (1989) (plurality opinion).

From Section 1981(a)'s general statement of equal rights, this Court has inferred a cause of action for claims that private parties have engaged in intentional racial discrimination. It first inferred such a cause of action from the parallel "same right" language of Section 1982, which gives "[a]ll citizens" the "same right * * * as is enjoyed by white citizens * * * to inherit, purchase, lease, sell, hold, and convey real and personal property." See *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 414 (1968) (authorizing enforcement of Section 1982

by suit for an injunction); see also *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 238-240 (1969) (Section 1982 suit for damages). Later, it expressly applied that reasoning to Section 1981, holding that "[a]n 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." *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975).[1]

In *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), after requesting additional briefing and argument on the question, the Court "reaffirm[ed]" that Section 1981 "prohibits racial discrimination in the making and enforcement of private contracts." *Id.* at 172. *Patterson* also limited the scope of Section 1981's substantive protections, holding that Section 1981 "provides no relief" for discrimination with regard to conduct after a contract has already been formed (*i.e.*, "postformation conduct"), and instead applies only where "an alleged act of discrimination" relates to the "formation" or enforcement of a contract. 491 U.S. at 176-177.

In 1991, Congress amended Section 1981 and effectively "overturned *Patterson*" by expanding the definition of "make and enforce contracts" to include a panoply of postformation conduct. *Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369, 383 (2004). That amendment redesignated the former provision as subsection (a) and added new subsections (b) and (c). See Civil Rights Act

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[1] The Court subsequently declined to infer Section 1981 causes of action against the federal government, *Brown* v. *GSA*, 425 U.S. 820, 835 (1976), or against state actors (because they are covered by 42 U.S.C. 1983), *Jett*, 491 U.S. at 735, but in doing so it did not question the continuing validity of an inferred cause of action against private discriminators. See, *e.g.*, *id.* at 731-732.

of 1991 (1991 Act), Pub. L. No. 102-166, § 101, 105 Stat. 1071. Those new provisions read as follows:

> **(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.

42 U.S.C. 1981(b) and (c).

After the 1991 amendments, there is still no express cause of action in Section 1981, but the Court has continued to recognize that Section 1981 "offers relief" to private plaintiffs when "racial discrimination blocks the creation of a contractual relationship" or "impairs an existing contractual relationship." *Domino's Pizza, Inc.* v. *McDonald*, 546 U.S. 470, 476 (2006).

2. Respondent began working as an associate manager at one of petitioner's Cracker Barrel restaurants in 1999, and, viewing the record in a light favorable to respondent, his performance was considered generally excellent for more than two years. J.A. 118. In 2001, Steve Cardin began supervising respondent, and frequently made racially derogatory remarks in the workplace. J.A. 118-119. Cardin, the general manager at the restaurant, issued five disciplinary reports against respondent, all of which respondent claimed were groundless and reflections of Cardin's racial animus. J.A. 119. Respondent complained to district manager William

Christensen about Cardin, but Christensen never investigated his complaints. *Ibid.*

A new general manager, Ken Dowd, took over in September 2001. J.A. 119. Shortly thereafter, Joe Stinnett, one of respondent's fellow associate managers, fired Venus Green,[2] a black female food server, purportedly because she failed to show up for a shift (although a white employee had not been fired after failing to appear "on several occasions without notice"). *Ibid.* Respondent complained to Dowd and Christensen that Green's firing was another example of racial discrimination, and he reminded Christensen of his earlier complaints. J.A. 119-120. In December 2001—a week after that complaint and one day before "a scheduled meeting with Dowd, which, presumably would have created a more elaborate (and less favorable to Cracker Barrel) documentary record of [respondent's] complaints"—Christensen fired respondent, allegedly because he left a safe unlocked. Respondent both denies that he left the safe unlocked and claims that white associate managers routinely left it unlocked. J.A. 120, 155-157.

3. After filing a timely charge with the Equal Employment Opportunity Commission (EEOC) and receiving a right-to-sue letter, J.A. 36-39, 54-57, 58-59, respondent filed suit in the United States District Court for the Northern District of Illinois, alleging one count of racial discrimination in violation of Section 1981 and Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*), and one count of retaliation in violation of Section 1981 and Title VII. J.A. 43-53. The district court dismissed respondent's Title VII claims for procedural deficiencies

[2] The district court (J.A. 109) and court of appeals (J.A. 119) refer to "Venis Green," but Ms. Green's first name is spelled "Venus" in the First Amended Complaint (J.A. 48) and the Answer (J.A. 71).

involving his late payment of filing fees, and respondent did not appeal that dismissal. J.A. 82-92.

The district court then granted summary judgment for petitioner on respondent's Section 1981 claims. J.A. 108-116. The district court held that respondent had failed to allege sufficient facts to prove either directly or indirectly that he had suffered retaliation for his complaints of racial discrimination against himself and his co-worker. J.A. 111-115. The district court further held that respondent's discrimination claim failed because it rested on the same allegations. J.A. 115.

4. The court of appeals reversed. J.A. 117-166. By a 2-1 vote, the court rejected petitioner's argument—raised for the first time on appeal—that Section 1981 does not encompass retaliation claims, and reversed the district court's grant of summary judgment in favor of petitioner on the Section 1981 claim.

Analyzing the origins of Section 1981, the court of appeals observed that it and Section 1982 derived from the Civil Rights Act of 1866, ch. 31, 14 Stat. 27, a Reconstruction-era statute recognized as the "first significant civil rights legislation enacted by Congress" pursuant to Section 2 of the Thirteenth Amendment. J.A. 123-126.

The court of appeals observed that in *Sullivan*, this Court permitted a white landowner to bring suit under Section 1982 for retaliation he had suffered for attempting to vindicate the rights of minorities protected by that statute. J.A. 126-127. Moreover, "[f]ollowing *Sullivan*," the courts of appeals had reached a "general consensus" that Section 1981 "broadly prohibited racial discrimination in all contractual facets of the employment relationship, including 'postformation' adverse acts, such as retaliation." J.A. 128. But later, in the wake of this Court's *Patterson* decision, several courts determined

that "retaliation claims" were precluded "because such employer behaviors purportedly involved now-unprotected postformation conduct." J.A. 129-130.

The court of appeals stated that Congress superseded *Patterson* by enacting the Civil Rights Act of 1991. J.A. 133-134. The court noted that the 1991 Act, which added Section 1981(b), "was to be read broadly to include all aspects of the contractual relationship between parties, including the postformation conduct," and that the legislative history of the 1991 Act refers to "retaliation" as an action that would fall within the scope of Section 1981, as amended. J.A. 134-135. The court of appeals concluded that the 1991 Act led several circuits to "reverse course (again) and to allow retaliation claims under section 1981." J.A. 135.

Based on that backdrop, the court of appeals held that Section 1981, as amended by the Civil Rights Act of 1991, "applies to claims of retaliation." J.A. 136-138. The court explained that its reading of Section 1981 is consistent with this Court's decision in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005), which relied on *Sullivan*'s holding that Section 1982 prohibits retaliation. J.A. 138-144. The court of appeals stated that, "at least for the purpose of interpreting broad statutory discrimination prohibitions that omit specific retaliation provisions, the Supreme Court has determined that retaliation is simply a different form of discrimination, and one that is included within broad-based prohibitions of discrimination." J.A. 141.[3]

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[3] The court of appeals also concluded that respondent had established a *prima facie* case of retaliation sufficient to survive petitioner's motion for summary judgment. J.A. 149-158. Petitioner, however, does not challenge that aspect of the court of appeals' ruling. See Pet. 2

Chief Judge Easterbrook dissented. J.A. 159-166. In his view, the majority (Judges Williams and Posner) misinterpreted this Court's decisions in *Jackson* and *Sullivan*, and failed to follow an appropriately text-based method of statutory interpretation, exemplified by this Court's recent decision in *Domino's Pizza*.

## SUMMARY OF ARGUMENT

The court of appeals correctly held that Section 1981 prohibits retaliation against an individual because that individual has complained about intentional racial discrimination proscribed by Section 1981.

A. That conclusion is compelled by this Court's decisions addressing retaliation claims under broad-based prohibitions against discrimination. *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167 (2005). In *Sullivan*, the Court held that 42 U.S.C. 1982—a companion statute to Section 1981 with similar operative language and common lineage—encompasses retaliation claims. And in *Jackson*, the Court—relying on *Sullivan*—held that the prohibition against sex discrimination in programs receiving federal financial assistance in Title IX of the Education Amendments of 1972, 20 U.S.C. 1618 *et seq.*, encompasses retaliation claims. If—as *Sullivan* and *Jackson* establish—Section 1982 prohibits retaliation, then Section 1981 must do so as well. Considerations of *stare decisis* have their greatest force in the area of statutory interpretation, and petitioner has supplied no basis for this Court to deviate from the statutory holdings of *Sullivan* and *Jackson* in the analogous setting here.

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("The sole legal issue presented here [is] whether race retaliation is cognizable under Section 1981."); Pet. Br. 7 (same).

B. Unlike some anti-discrimination statutes, Section 1981 does not expressly mention retaliation or establish an express cause of action for retaliation. But—as this Court has recognized is true for Section 1982 and Title IX—that is unsurprising, since Section 1981 consists of a general prohibition on discrimination, and it lacks any express cause of action against any form of discrimination. Petitioner incorrectly analogizes Section 1981 to more detailed statutes that include express causes of action. The statutory schemes that are materially analogous to Section 1981 are not the ones cited by petitioner, where Congress expressly provided for a cause of action and expressly prohibited retaliation, but rather the much smaller category of anti-discrimination statutes that are so abbreviated that *any* cause of action, for any kind of prohibited activity, must be inferred.

As this Court reaffirmed just two Terms ago in *Jackson*, in that context it makes sense to include an anti-retaliation protection in the cause of action that the Court has inferred, because that establishes a coherent remedial regime and appropriately protects the right to contract from impairment. Indeed, if anything, the recognition of a retaliation remedy in this case follows *a fortiori* from *Jackson* because the text of Section 1981 more naturally encompasses a retaliation remedy. The dissenting Justices in *Jackson* contended not that retaliation was not a form of "discrimination," but that it was not discrimination "on the basis of sex." See 544 U.S. at 185-186 (Thomas, J., dissenting). Section 1981, as amended, prohibits all "impairment" by "discrimination," which quite naturally includes discrimination on account of having complained about discrimination on account of race.

C. Any doubt about whether Section 1981 proscribes retaliation was resolved by the Civil Rights Act of 1991. The pre-1991 argument against construing Section 1981 to protect against retaliation was not based on a narrow reading of the word "discrimination"—that word did not even appear in the pre-1991 text—but rested on the notion that most retaliation was postformation conduct. However, following this Court's decision in *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), Congress expanded the meaning of the term "make and enforce contracts" in Section 1981 to include all aspects of the contracting process, including postformation conduct, and that should suffice to make retaliation actionable. Petitioner's argument to the contrary demands such a high level of specificity from Congress that it would upset settled doctrine by refusing to countenance claims of racial harassment and preventing *any* private cause of action from being inferred under Section 1981.

D. Policy considerations likewise support the conclusion that Section 1981 prohibits retaliation. This Court's decisions in *Sullivan* and *Jackson*, as well as courts of appeals decisions interpreting Section 1981, recognize that, absent protection against retaliation, the underlying discrimination prohibited by such statutes could go unremedied. And, because of the inferred nature of the underlying rights of action in *Sullivan* and *Jackson*, the Court determined that it was appropriate for the Court to consider that policy concern in interpreting the cause of action it had inferred. Moreover, when Congress enacted the original version of Section 1981 (the Civil Rights Act of 1866), it possessed substantial evidence that the rights of freedmen could not be protected unless those who would help them were also protected from reprisals.

E. Petitioner's contention that recognizing a cause of action for retaliation under Section 1981 will improperly allow employees to bypass Title VII's procedural mechanisms is unpersuasive and, in any event, foreclosed by this Court's repeated explanations that Title VII and Section 1981 are separate and independent remedies for racial discrimination. In addition, many employers are expressly exempted from Title VII coverage, and Section 1981 applies to all types of contracts—not just the employment relationship. Thus, unless Section 1981 itself prohibits retaliation, many of those who complain about racial discrimination that violates the statute will be left without protection against retaliation.

F. *Domino's Pizza, Inc.* v. *McDonald*, 546 U.S. 470 (2006), provides no basis to deviate from the statutory interpretation that the Court adopted the year before in *Jackson*. *Domino's Pizza* does not require that a Section 1981 plaintiff be the direct victim of non-retaliatory, status-based discrimination, but only that, as with any claim of discrimination, the plaintiff allege that retaliatory discrimination has impaired *the plaintiff's own* contract rights. In this case, respondent has alleged that his own contract rights were impaired by retaliation, because his employment contract with petitioner was terminated. Unlike *Domino's Pizza*, this case therefore involves a paradigmatic Section 1981 claim. Moreover, such impairment is likely to exist anytime a plaintiff alleges that a defendant has altered the terms, conditions, or privileges of his employment in retaliation for complaining about conduct prohibited by Section 1981.

## ARGUMENT

### CLAIMS ASSERTING RETALIATION BECAUSE OF COMPLAINTS OF INTENTIONAL RACIAL DISCRIMINATION ARE COGNIZABLE UNDER SECTION 1981

As amended, Section 1981(a) of Title 42 of the United States Code guarantees to every person within the United States "the same right * * * to make and enforce contracts * * * as is enjoyed by white citizens." Section 1981(c) further protects that right against "impairment by nongovernmental discrimination." The text, background, and purposes of Section 1981 demonstrate that the court of appeals correctly held that Section 1981 encompasses claims of retaliation against those who complain about conduct that violates that statute.

#### A. Retaliation Because Of Complaints About Racial Discrimination Impairs Contract Rights In Violation Of Section 1981's General Anti-Discrimination Prohibition

This Court's prior decisions holding that Section 1982 and Title IX encompass claims of retaliation compel the conclusion that the general prohibition of intentional racial discrimination in Section 1981 includes claims of discrimination against those who complain about racial discrimination proscribed by Section 1981. Indeed, given the direct link between Section 1981 and Section 1982, that conclusion is considerably more straightforward than in the *Jackson* case just two Terms ago.

1. In *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), this Court held that 42 U.S.C. 1982—the companion statute to Section 1981—encompasses claims arising from retaliation against those who complain of racial discrimination. Sullivan, a white man, rented a

house to a black man and assigned him a membership share that permitted him to use a private park. The corporation that owned the park refused to approve the assignment because the lessee was black. When Sullivan protested that action, the corporation expelled him and took his membership shares. Sullivan sued the corporation under Section 1982, which provided (and continues to provide) that "[a]ll citizens of the United States shall have the same right * * * as is enjoyed by white citizens * * * to inherit, purchase, lease, sell, hold, and convey real and personal property."

This Court held that Sullivan could maintain an action under Section 1982 not only for having been denied the right to complete his transaction with a black person, but also for his "expulsion for the advocacy of [the black person's] cause." 396 U.S. at 237. The Court reasoned that, "[i]f that sanction [of retaliatory expulsion] * * * can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property." *Ibid.* Thus, in *Sullivan*, this Court construed Section 1982's general prohibition on racial discrimination in the sale or rental of property to cover retaliation against persons who complain about such discrimination.

Similarly, in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005), this Court held that another broad-based prohibition against discrimination protects from retaliation those who complain about the kind of discrimination the statute prohibits. Title IX of the Education Amendments of 1972 provides in relevant part that "[n]o person in the United States shall, on the basis of sex, * * * be subjected to discrimination under any education program or activity receiving Federal finan-

cial assistance." 20 U.S.C. 1681(a). Jackson was the male coach of a high-school-girls' basketball team who complained about sex discrimination in the school's athletic program and was then relieved of his coaching position. He sued the respondent board of education under Title IX, alleging that it had retaliated against him for his complaints about discrimination. 544 U.S. at 171-172.

This Court held that Title IX's prohibition of "discrimination" "on the basis of sex" includes a ban on retaliation against those who complain of sex discrimination. As the Court explained:

> Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action. Retaliation is by definition an intentional act. * * * Moreover, retaliation is discrimination "on the basis of sex" because it is an intentional response to the nature of the complaint: an allegation of sex discrimination. We conclude that when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional "discrimination" "on the basis of sex," in violation of Title IX.

*Jackson*, 544 U.S. at 173-174.

In reaching that interpretation of Title IX, *Jackson* affirmatively relied on *Sullivan*, which it characterized as "interpret[ing] a general prohibition on racial discrimination to cover retaliation against those who advocate the rights of groups protected by that prohibition." 544 U.S. at 176. The *Jackson* Court reasoned that "[r]etaliation for Jackson'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 176-177.[4]

Because the operative language in Section 1982—*i.e.*, "shall have the same right * * * as is enjoyed by white citizens"—is identical to that in Section 1981(a), *Sullivan* and *Jackson* compel the conclusion that Section 1981 encompasses retaliation claims as well.

2. "This Court has said often and with great emphasis that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.'" *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172 (1989) (quoting *Welch* v. *Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987) (plurality opinion)). In addition, the Court has explained 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

[4] Repeating a point made in the dissent in the court of appeals (J.A. 159), petitioner contends that *Jackson* is inapposite because it relied upon ambiguity in the word "discrimination," which supposedly does not appear in Section 1981. Pet. Br. 38. But, as amended in 1991, Section 1981 makes express that it proscribes "discrimination." See 42 U.S.C. 1981(c) (protecting rights "against impairment by nongovernmental discrimination"). Moreover, Section 1981 has uniformly been interpreted as a prohibition on racial "discrimination" in the making and enforcement of contracts. See, *e.g.*, *Domino's Pizza, Inc.* v. *McDonald*, 546 U.S. 470, 474 (2006); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 455, 459-460 (1975). Finally, the real debate in *Jackson* was not over the meaning of the word "discrimination," but the phrase "on the basis of sex" and whether that phrase precluded relief for someone subject to discrimination because he complained about discrimination on the basis of sex. Here, Section 1981, as amended, forbids all impairment and all discrimination, which naturally includes discrimination on the basis of complaining about racial discrimination. See p. 17, *infra*.

remains free to alter what we have done" (as Congress's reaction to *Patterson* itself illustrates). *Id.* at 172-173. Petitioner has provided no basis—much less a compelling basis—for the Court to deviate from the path of statutory construction paved by *Sullivan* and *Jackson* in this case.

Indeed, far from presenting any basis to disregard the statutory constructions in *Sullivan* and *Jackson*, this case presents a more compelling situation for reading the general prohibition at issue to encompass retaliation claims. A retaliation cause of action fits more comfortably within the plain text of Section 1981 than it does within that of Section 1982 or Title IX, because Section 1981 applies whenever contract rights are "impair[ed] by * * * discrimination." 42 U.S.C. 1981(c). The reference to "impairment" connotes a less direct relationship between the discrimination and the effect on the underlying contract rights. Moreover, the primary textual difficulty the Court confronted in *Jackson*—the limitation of the prohibition on discrimination to discrimination "on the basis of sex"—is absent. Unlike Title IX, there is no requirement in Section 1981 that the prohibited discrimination be "on the basis of" status but only that the discrimination impair rights under Section 1981, which vitiates the primary textual concern of the *Jackson* dissent. See 544 U.S. at 185-186 (Thomas, J., dissenting).

Furthermore, because of the direct link between Section 1981 and Section 1982, the conclusion that Section 1981 encompasses retaliation claims follows *a fortiori* from this Court's decision in *Jackson*, which reaffirmed and extended to Title IX *Sullivan*'s holding that Section 1982 encompasses retaliation claims. In addition to their common terms, Sections 1981 and 1982 have a com-

mon origin (the Civil Rights Act of 1866) and common purposes. See, *e.g.*, *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 384 (1982); *Runyon* v. *McCrary*, 427 U.S. 160, 168 & n.8 (1976); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 441 n.78 (1968). Thus, as a result of the close, "historical interrelationship between" Sections 1981 and 1982, this Court has generally found "no reason to construe these sections differently." *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 440 (1973).

For example, in *Runyon*, the Court held that Section 1981 applies to private discrimination, in part because the case was "directly analogous to * * * *Sullivan*." 427 U.S. at 173 n.10. As Justice Powell observed, the holding of *Sullivan* "necessarily appl[ies]" to Section 1981 in light of the two statutes' "common derivation." *Id.* at 187 (Powell, J., concurring); see *id.* at 190 (Stevens, J., concurring) ("Although I recognize the force of MR. JUSTICE WHITE's argument that the construction of § 1982 does not control § 1981, it would be most incongruous to give those two sections a fundamentally different construction."). See also *Shaare Tefila Congregation* v. *Cobb*, 481 U.S. 615, 617-618 (1987) (applying to Section 1982, without further analysis, the Section 1981 discussion and holding of *Saint Francis College* v. *Al-Khazraji*, 481 U.S. 604, 609-613 (1987)).

Given the common origin of Section 1981 and Section 1982, and this Court's decisions in *Sullivan* and *Jackson*, the Court could not interpret Section 1981 to lack a retaliation provision without creating an enormous incongruity in the case law in this area, if not effectively overruling the Court's prior cases. And even petitioner has not asked this Court to take the dramatic step of overruling its prior precedent, much less elaborated on

the relevant considerations. Cf. *Randall* v. *Sorrell*, 126 S. Ct. 2479, 2500 (2006) (Alito, J., concurring in part and concurring in the judgment).

### B. The Absence Of A Reference To Retaliation Is Not Dispositive In The Context Of A General Prohibition On Discrimination That Lacks An Express Cause Of Action

Petitioner's call for a plain-language reading of Section 1981 is premised almost exclusively on the point that, unlike most other federal anti-discrimination statutes, Section 1981 includes neither the word "retaliation" nor a separate provision addressing retaliation. See Br. 12, 14-18. But that line of argument is foreclosed by this Court's decision in *Jackson.*

The school board in *Jackson* contrasted Title IX (which does not address retaliation) with Title VII (which contains a distinct anti-retaliation provision, 42 U.S.C. 2000e-3(a)). The Court explained that Title VII is "a vastly different statute from Title IX," because:

> Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition. * * * By contrast, Title VII spells out in greater detail the conduct that constitutes discrimination in violation of that statute. * * * Because Congress did not list *any* specific discriminatory practice when it wrote Title IX, its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered.

544 U.S. at 175. The Court also stressed that Title IX, unlike Title VII, provides no express cause of action. See 544 U.S. at 175 (citing *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283-284 (1998)). In *Gebser*, the Court had stated that, when a right of action has been

inferred by the courts, it has "a measure of latitude to shape a sensible remedial scheme that best comports with the statute." 524 U.S. at 284.

Like Title IX, Section 1981 is a "broadly written general prohibition" against discrimination in which "Congress did not list *any* discriminatory practice." Accordingly, under the reasoning of *Jackson*, the presence of explicit anti-retaliation provisions in other, dissimilar statutes does not answer whether Congress intended Section 1981 to prohibit retaliation. Moreover, as in Title IX, all causes of action under Section 1981 have been inferred by the courts. See pp. 3-5, *supra*. Thus, in elaborating on the resulting causes of action the Court has assumed a greater latitude to make them workable and sensible—a function distinct from the one that the Court exercises in construing and giving effect to express causes of action with more reticulated remedial schemes.[5]

In that regard, the statutory schemes that are materially analogous to Section 1981 are not the ones cited by petitioner—each of which includes an express right of

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[5] A general nondiscrimination provision does not invariably encompass a prohibition on retaliation. Other indications from text and context can show that claims for retaliation are excluded, as, for instance, in the federal-sector provision of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 633a, that is at issue in *Gomez-Perez* v. *Potter*, cert. granted, No. 06-1321 (oral argument scheduled for Feb. 19, 2008). In the ADEA, there is no need to infer a right of action for federal employees in the anti-discrimination context, and there are obvious differences between the private-sector regime (which includes both anti-discrimination and anti-retaliation provisions), the provision making the private-sector regime applicable to states, and the federal-sector provision. See Gov't Br. at 14-27, *Gomez-Perez*, *supra* (No. 06-1321). Moreover, federal employees generally have means of securing relief for retaliation independent of the ADEA. See *id.* at 27-37.

civil action or an administrative enforcement mechanism to vindicate its principal anti-discrimination provision (Pet. Br. 17-18)[6]—but rather the much smaller category of anti-discrimination statutes—notably, Section 1982 and Title IX—that contain only general prohibitions that have already been interpreted by this Court to embody inferred causes of action against discrimination.

### C. The Statutory History Confirms That Section 1981 Encompasses Retaliation Claims

Before this Court's decision in *Patterson*, the courts of appeals had no difficulty concluding—on the basis of *Sullivan* and the common language and history of Sections 1981 and 1982—that Section 1981 encompassed retaliation claims.[7] Congress is presumed to be aware of that backdrop and when Congress enacted the Civil Rights Act of 1991 in order (in pertinent part) to restore the pre-*Patterson* law recognizing that Section 1981 applied to postformation conduct, Members of Congress

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[6] See 29 U.S.C. 160(b) (provision of National Labor Relations Act authorizing claims of unfair labor practices before the National Labor Relations Board); 29 U.S.C. 216(b) (authorizing civil actions under Fair Labor Standards Act of 1938); 29 U.S.C. 626(c) (authorizing civil actions under the ADEA); 29 U.S.C. 2617(a) (authorizing civil actions under Family and Medical Leave Act of 1993); 38 U.S.C. 4323(a) (authorizing civil actions under Uniformed Services Employment and Reemployment Act of 1994); 42 U.S.C. 2000e-5(f) (authorizing civil actions under Title VII); 42 U.S.C. 12117, 12133, 12188, 12203 (authorizing civil actions under Americans with Disabilities Act of 1990); 49 U.S.C. 31105(b) and (c) (authorizing administrative complaints and judicial review under Surface Transportation Assistance Act of 1982).

[7] See, *e.g.*, *Choudhury* v. *Polytechnic Inst.*, 735 F.2d 38, 42-43 (2d Cir. 1984); *Goff* v. *Continental Oil Co.*, 678 F.2d 593, 598-599 (5th Cir. 1982), overruled by *Carter* v. *South Cent. Bell*, 912 F.2d 832 (5th Cir. 1990); *Winston* v. *Lear-Siegler, Inc.*, 558 F.2d 1266, 1270 (6th Cir. 1977); *London* v. *Coopers & Lybrand*, 644 F.2d 811, 819 (9th Cir. 1981).

had every reason to believe that they were reinstating that result (on a prospective basis). The pertinent provisions of the 1991 Act bolster that conclusion. In adding subsection (b) to Section 1981, Congress evinced an intent to apply Section 1981's prohibition against racial discrimination to all aspects of the contractual relationship—including the postformation conduct that *Patterson* had excluded from the scope of Section 1981.[8]

Petitioner claims (Br. 19) that Congress knew by 1991 that "the judiciary would analyze Section 1981 based on its text," and thus, "if Congress intended Section 1981 to provide for a cause of action based on retaliation, it would have provided [one] in the statutory text." But while Congress would surely have been aware that "text matters" in enacting the 1991 amendments, it clearly did not write on a blank slate or ignore the preexisting judicial constructions of Sections 1981 and 1982. Tellingly, Congress, in amending Section 1981, did not rewrite it to create an express cause of action.[9] Rather, Congress took this Court's decisions recognizing an inferred cause of action as a given. In the same way, Congress legislated against the backdrop of *Sullivan* and

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[8] As added by the 1991 Act, 42 U.S.C. 1981(b) provides:

> 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, and conditions of the contractual relationship.

[9] The 1991 Act added Section 1981(c), which codified this Court's previous holdings that Section 1981 covers discrimination by private parties, see, *e.g.*, *Johnson*, 421 U.S. at 460, but Congress did not create an express cause of action for any discrimination cases. Nevertheless, this Court has continued to infer an anti-discrimination cause of action from Section 1981. See, *e.g.*, *Domino's Pizza*, 546 U.S. at 476 (recognizing that Section 1981 "offers relief").

the direct connection between Section 1981 and Section 1982. There is certainly no indication in the 1991 Act that Congress intended a different construction of Section 1981 than the one that this Court adopted for Section 1982 in *Sullivan*.

To the contrary, it is clear that what Congress intended to address, *inter alia*, was the *Patterson* decision and the limitation of Section 1981 to postformation conduct. Indeed, this Court has acknowledged that the 1991 Act "overturned *Patterson*." *Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369, 383 (2004). But under petitioner's strained reasoning, Congress would not have accomplished its objective because it failed to include the term "harassment" in subsection (b), and has thus made harassment no more actionable than retaliation. In reality, Congress responded to *Patterson* in a way that makes clear that both harassment and retaliation are prohibited—*viz.*, by covering postformation conduct. After all, the argument that retaliation would not be prohibited by the pre-1991 statute would not be based on its limitation to "discrimination" or "discrimination on the basis of race"; those terms did not even appear in the statute. Rather the argument would be that most retaliation would be postformation conduct. Congress unambiguously and textually eliminated that argument, and thus there is no reason to think that retaliation—uniquely among postformation conduct impairing Section 1981 rights—is not prohibited.

The legislative history of the 1991 Act bears this out. The House Report stated:

> The Committee intends this provision to bar all race discrimination in contractual relations. The list set forth in subsection (b) is intended to be illustrative rather than exhaustive. In the context of employ-

> ment discrimination, for example, this would include, but not be limited to, claims of harassment, discharge, demotion, promotion, transfer, *retaliation*, and hiring.

H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 1 at 92 (1991) (emphasis added). The report also stated that subsection (b) was intended to respond to several court of appeals decisions that, after *Patterson*, had held that Section 1981 does not encompass claims of retaliation. *Id.* at 92-93 n.92.[10] The report's principal discussion of minority views did not dispute the majority's characterization of that effect or its desirability. See *id.* at 141 ("While *Patterson* is clearly defensible as a matter of strict statutory construction, we agree * * * that the case creates an illogical situation under which" Section 1981 would not include "claims for harassment, wrongful discharge, and many other employment situations."). Congress had heard evidence that *Patterson* was resulting in the dismissal of "racial harassment" and "retaliation" claims. See *Civil Rights Act of 1990, Hearing Before the Senate Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. 966, 976-983 (1990) (statement of Julius LeVonne Chambers, Director-Counsel, NAACP Legal Defense and Education Fund, Inc.).

In light of this legislative record, it is not surprising that, in the wake of the 1991 Act, the courts of appeals have again reached a broad consensus that Section 1981

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[10] As noted, the reasoning of those cases was based on the argument that retaliation occurred postformation, a concern that the 1991 amendments addressed directly and textually.

encompasses claims of retaliation against those who complain of racial discrimination.[11]

### D. Policy Reasons Recognized In *Jackson* Support The Conclusion That Section 1981 Prohibits Retaliation Against Those Who Complain About Intentional Racial Discrimination Against Themselves Or Others

This Court's decisions in *Jackson* and *Sullivan* were motivated in part by policy concerns about the lack of a retaliation remedy under those statutes. In *Jackson*, the Court stated that, unless retaliation were barred, "individuals who witness discrimination would be loath to report it, and all manner of Title IX violations might go unremedied as a result." 544 U.S. at 180. It also characterized *Sullivan* as recognizing that "the underlying discrimination is perpetuated" when there is no "protection against retaliation." *Id.* at 180.

Providing protections for a supervisor or colleague who speaks up for a co-worker he believes to be a victim of racial discrimination is consistent not only with the rationale of the claims that the Court recognized in *Sullivan* and *Jackson,* but also with the recognition underlying Section 1981's original incarnation that protect-

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[11] See, *e.g.*, *Moore* v. *Consolidated Edison Co.*, 409 F.3d 506, 508 n.2 (2d Cir. 2005); *Aleman* v. *Chugach Support Servs., Inc.*, 485 F.3d 206, 213-214 (4th Cir. 2007); *Foley* v. *University of Houston Sys.*, 355 F.3d 333, 338-339 (5th Cir. 2003); *Johnson* v. *University of Cincinnati*, 215 F.3d 561, 575-576 (6th Cir.), cert. denied, 531 U.S. 1052 (2000); J.A. 136-149 (7th Cir. 2007); *Manatt* v. *Bank of Am., NA*, 339 F.3d 792, 800-801 & n.11 (9th Cir. 2003); *Andrews* v. *Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1411-1413 (11th Cir. 1998).

ing the rights of former slaves would require protections for those allied with them.[12]

As this Court has previously explained at length, the Civil Rights Act of 1866 was intended to protect the "civil rights of whites as well as nonwhites." *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 289 (1976); see *id.* at 287-295. That protection is consistent with the fact that the supporters of slavery had long punished whites and nonwhites who spoke out on behalf of slaves and freedmen in an attempt to discourage such support. See Akhil Reed Amar, *America's Constitution: A Biography* 371-372 (2005); William Lee Miller, *Arguing About Slavery: John Quincy Adams and the Great Battle in the United States Congress* 76 (1995). Even after the Civil War, brutal reprisals continued not just against freedmen but also against those who would assist them. While Congress was considering the Civil Rights Act of 1866 (which contained what later became Section 1981's operative language):

> the senators and representatives had before them a sizeable body of data bearing on the treatment of the Negro, *the loyal white and the northerner* in the South by private individuals and unofficial groups. * * * Accounts in newspapers[,] * * * official documents, private reports and correspondence were all adduced to show that murder, shootings, whippings, robbing, and brutal treatment of every kind were daily inflicted on freedmen *and their white friends*.

Jacobus tenBroek, *Equal Under Law* 181 (rev. ed. 1965) (emphases added; internal quotation marks omitted);

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[12] In this case, respondent alleges that he was terminated by petitioner because he complained about racially discriminatory treatment of both himself and Venus Green. See J.A. 109, 112.

see also Robert J. Kaczorowksi, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. Rev. 863, 877 (1986) ("[W]hile Reconstruction civil rights enactments were intended primarily for the protection of blacks, they were also intended to protect whites.").

Recognizing that Section 1981 encompasses a retaliation right therefore not only accords with the policy considerations identified in *Jackson*, but comports with the purpose and history of Section 1981 itself.

### E. Section 1981's Partial Overlap With Title VII Does Not Preclude Retaliation Claims Here

Petitioner and its amici contend that recognizing a cause of action for retaliation under Section 1981 would be inconsistent with Title VII, which itself authorizes retaliation claims in the employment context. See Pet. Br. 21-26; Chamber of Commerce Amicus Br. 20-24; Equal Employment Advisory Council Amicus Br. 16-18. Notwithstanding the general principle that a specific remedial scheme may trump a more general one, it is well established that potential causes of action under Section 1981 co-exist with those under Title VII, because "legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974).

1. As an initial matter, Title VII and Section 1981 are not co-extensive. See *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 461 (1975). Section 1981 applies broadly to all types of contracts, not just those for employment. Thus, unless Section 1981 itself prohibits retaliation, Title VII cannot ensure a federal remedy for all who are retaliated against for complaining about pri-

vate discrimination that could violate Section 1981. Moreover, even in the employment context, many employers are exempted from Title VII: for example, those with fewer than 15 employees, certain governmental entities, and certain bona fide private membership clubs. See 42 U.S.C. 2000e(b).

In light of the incomplete overlap between the two statutes, it is impossible to tell where petitioner's reasoning would sacrifice potential Section 1981 claims for the sake of Title VII's limits (*e.g.*, in all employment-discrimination cases, or only those that could be covered by Title VII, or only those where the plaintiff fails to meet Title VII's procedural requirements). In fact, petitioner admits that "it could be argued that Section 1981 should not apply in the employment context" at all. Pet. Br. 21 n.2. That broader proposition is wholly inconsistent with precedents of this Court and the text of the 1991 amendments, and thus petitioner draws the line at retaliation claims "for purposes of this brief," *ibid.*, but gives no principled reason for that stopping point.

2. In any event, this Court has already recognized that Title VII's procedural requirements do not alter the applicability of Section 1981. In *Johnson*, the Court held that the timely filing of a Title VII employment-discrimination charge with EEOC does not toll the running of the limitations period applicable to a Section 1981 action based on the same facts. After summarizing the similarities and differences between Title VII and Section 1981 (421 U.S. at 457-460), the Court concluded that "the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent." *Id.* at 461; see also *Runyon*, 427 U.S. at 174 & n.11 (recognizing that Congress did not intend Title VII to

limit Section 1981's applicability to employment discrimination); *General Bldg. Contractors Ass'n*, 458 U.S. at 380 n.4 (noting petitioners were sued under Section 1981 rather than Title VII because they were not named in the EEOC charge). Although *Patterson* invoked the scope of Title VII to support its narrow reading of Section 1981, it also recognized that "there is some necessary overlap" between the two statutes. 491 U.S. at 181.

At least two aspects of the Civil Rights Act of 1991 underscore that Congress intended that, when applicable, Section 1981 would continue to provide remedies independent of Title VII. First, Congress responded to *Patterson*'s attempt to minimize overlap between the statutes by adopting the expanded definition of "make and enforce contracts" that now appears in Section 1981(b). Second, it underscored the overlap and lack of exclusivity of the two statutes by authorizing damages awards under Title VII, 42 U.S.C. 1981a(a)(1), and simultaneously specifying that the new Title VII remedy should not "be construed to limit the scope of, or the relief available under, [S]ection 1981." 42 U.S.C. 1981a(b)(4).

Petitioner stresses (Br. 23) that the Court's decision in *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007), described the importance of short deadlines within the framework of Title VII. But *Ledbetter* also acknowledged that similar discrimination claims might be vindicated under different statutory schemes with fewer procedural requirements. Thus, the Court explained that "the Title VII obstacles" it enforced would not apply to a claim under the Equal Pay Act of 1963, 29 U.S.C. 206(d) (which the petitioner in that case had "elected to abandon"). *Ledbetter,* 127 S. Ct. at 2176 & n.9. The same result follows here, especially in light of

the Court's repeated recognition of Section 1981's continuing vitality alongside Title VII.

3. As an empirical matter, there is no evidence that retaliation claims under Section 1981 will disrupt Title VII. Petitioner (Br. 39) notes the increasing proportion of Title VII charges that include claims of retaliation. See also Chamber of Commerce Amicus Br. 23. But that trend has occurred in the presence of a general consensus that Section 1981 already encompasses retaliation claims. See note 11, *supra*. In this case, the Section 1981 retaliation claim did not deprive petitioner of an opportunity for EEOC-assisted conciliation or any of the other important benefits associated with Title VII, because respondent filed a charge with EEOC and waited for a right-to-sue letter before filing his lawsuit.

Petitioner also claims (Br. 40) that allowing Section 1981 retaliation claims that could not be brought under Title VII will create a legal regime that gives *racial* discrimination a special status compared to other discrimination claims. But this Court's decisions in *Jackson* and *Ledbetter* recognized that certain victims of sex discrimination have remedies under Title IX and the Equal Pay Act that are unavailable to others protected by Title VII. That inevitable result of differently worded but sometimes overlapping anti-discrimination statutes did not justify disregarding the intent of Congress and this Court's decisions in those cases, and there is no reason for doing so here.

In any event, there is nothing problematic about special protections against racial discrimination—especially in light of Section 1981's roots in the Thirteenth Amendment, which "authorized Congress to enact legislation abolishing the 'badges and incidents of slavery.'" *General Bldg. Contractors Ass'n*, 458 U.S. at 390 n.17 (quot-

ing *Civil Rights Cases*, 109 U.S. 3, 20 (1883)). Other constitutional and statutory anti-discrimination provisions are not diminished by the acknowledgement that "[t]he law now reflects society's consensus that discrimination based on the color of one's skin is a profound wrong of tragic dimension" that must be "eradicat[ed]." *Patterson*, 491 U.S. at 174, 188.

### F. This Court's Decision in *Domino's Pizza* Does Not Preclude Retaliation Claims Under Section 1981

In *Domino's Pizza, Inc.* v. *McDonald*, 546 U.S. 470 (2006), this Court held that a plaintiff cannot state a Section 1981 claim unless he has an existing (or proposed) contract that he wishes to make or enforce. *Id.* at 479-480. That relatively unremarkable conclusion by a unanimous Court did not, as petitioner suggests, create a sea change in Section 1981 law or in any way cast doubt on the result (or reasoning) of *Jackson* and *Sullivan*, which were not mentioned in *Domino's Pizza*.

Consistent with the holding of *Domino's Pizza*, however, a Section 1981 plaintiff alleging retaliation must allege that retaliatory discrimination has impaired *the plaintiff's own* contract. At a minimum, a plaintiff may satisfy that requirement by alleging retaliatory conduct that affects the "benefits, privileges, terms, and conditions" of her employment relationship. 42 U.S.C. 1981(b). That ensures that there will be no attempt to make Section 1981 "an omnibus remedy for *all* racial injustice." 546 U.S. at 479. It is also consistent with *Sullivan* and *Tillman*, which allowed white plaintiffs to pursue claims for injury to their own property or contract rights that resulted from retaliation. See *Sullivan*, 396 U.S. at 237; *Tillman*, 410 U.S. at 434, 440.

In this case, there is no question that respondent has alleged that his own contract rights were impaired by petitioner's retaliation: His employment contract was terminated. Accordingly, allowing him to assert a retaliation claim under Section 1981 is perfectly consistent with the rationale and holding of *Domino's Pizza*.[13]

[13] Because the alleged retaliation directly impaired the contractual relationship, this case provides no occasion to consider whether, or to what extent, the retaliation right embodied in Section 1981 is narrower or broader than the one this Court recognized under Title VII in *Burlington Northern & Santa Fe Railway* v. *White*, 126 S. Ct. 2405 (2006). In that case, the Court held that the express anti-retaliation provision in Section 704(a) of Title VII, 29 U.S.C. 2000e-3(a), "extends beyond workplace-related or employment-related retaliatory acts and harm." 126 S. Ct. at 2414. It based that conclusion on textual differences between Title VII's "substantive anti-discrimination provision" (which is limited to employment-related discrimination), and its anti-retaliation provision (which contains "[n]o such limiting words"). 126 S. Ct. at 2411-2412. Section 1981 does not contain such interrelated textual provisions and, as discussed above, in *Jackson* this Court indicated that the Court has more leeway in interpreting and giving effect to an inferred right of action against retaliation under a broad anti-discrimination provision like Title IX—and Section 1981.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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