IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPEAL NO. 16-4006

UNITED STATES OF AMERICA,
Appellee

v.

RANDY JOE METCALF, also known as
Randy Joe Weyker,

Defendant/Appellant

Appeal from the United States District Court for the Northern District of Iowa—Dubuque

No. 2:15-cr-0132-LRR-1
Honorable Linda R. Reade,
Chief U.S, District Judge

BRIEF AMICUS CURIAE OF THE CENTER FOR EQUAL OPPORTUNITY IN SUPPORT OF APPELLANT

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The Center for Equal Opportunity states that it has no parent companies, subsidiaries, or affiliates, and that it does not issue shares to the public.

December 27, 2016

s/ John J. Park, Jr.
John J. Park, Jr.

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Center for Equal Opportunity ("CEO") is a research and educational organization formed pursuant to Section 501(c)(3) of the Internal Revenue Code and devoted to issues of race and ethnicity.[1] Its fundamental vision is straightforward: America has always been a multiethnic and multiracial nation, and it is becoming even more so. This makes it imperative that our national policies not divide our people according to skin color and national origin. Rather, these policies should emphasize and nurture the principles that unify us. *E pluribus unum* . . . out of many, one. These principles are embodied in the Reconstruction Era Amendments to the U.S. Constitution. CEO believes that those amendments should be enforced vigorously and consistently with their original purpose, which requires that their meaning not be distorted and their protections not be diluted by invoking those amendments in situations in which they were not originally intended to apply.

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[1] Pursuant to Fed. R. App. Proc. 29(a), all parties have consented to the filing of this brief.

Pursuant to Fed. R. App. Proc. 29(c)(5), Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel for any party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae or its counsel made a monetary contribution to the brief's preparation or submission.

CEO hopes that the following thoughts on *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968)—a key case interpreting Congress's power under Section 2 of the Thirteenth Amendment—and its scope will be of some assistance to this Court in its deliberations.

SUMMARY OF ARGUMENT

Almost fifty years ago, a trio of cases accorded an extraordinary level of judicial deference to Congress in defining the limits of its own power under the Reconstruction Amendments—or at least that is how they have been interpreted. Two of them have since undergone serious refinement and clarification. *Katzenbach v. Morgan*, 384 U.S. 641 (1966)(Fourteenth Amendment) has been substantially modified by *City of Boerne v. Flores*, 521 U.S. 507 (1997). Similarly, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)(Fifteenth Amendment) has been clarified by *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

The third case in the trio is also arguably the most in need of refinement and clarification—*Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). See, e.g., Gerhard Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 Sup. Ct. Rev. 89 (1968)("*Confused Muse*")(criticizing *Jones*); Jennifer Mason McAward, *The Scope of Congress's Thirteenth Amendment Enforcement Power*, 88 Wash. U. L.

Rev. 77 (2010)(stating that "the time is ripe to reconsider *Jones* and the proper scope of Congress's Thirteenth Amendment enforcement power").

Jones (or rather an unnecessary interpretation of *Jones*) is the keystone of the argument of the Department of Justice on this topic. See Brief for the United States in United States v. Cannon, No. 12-20514 (5th Cir. filed February 15, 2013, 2013)(treating it as settled law that Congress has the power to define and prohibit the badges and incidents of slavery even in cases in which it is clear that these badges and incidents are being prohibited for their own sake and not for the sake of eliminating slavery or preventing its return).

For the core arguments as to why Section 249(a)(1) of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009 ("the HPCA"), Pub. L. No. 111-84, 123 Stat. 2835 (2009), is not a proper exercise of Congress's authority under Section 2 of the Thirteenth Amendment, please see the appellant's briefs as well as the Brief of Amici Curiae Gail Heriot and Peter Kirsanow, Members of the U.S. Commission on Civil Rights (filed on or about December 27, 2016)("Commissioners' Brief"). For further discussion as to why this is a matter of some urgency, please see Amicus Curiae Brief of The Cato Institute, *et al.*, (filed December 21, 2016).

This brief is intended to supplement those briefs by discussing some of *Jones*'s shortcomings. CEO agrees with the Commissioners' Brief that *Jones* is

distinguishable from this case and need not be challenged head on, since it interpreted a Reconstruction Era statute that was actually aimed at eradicating slavery and preventing its return. Indeed, this case is to *Jones* as *Shelby County* is to *South Carolina v. Katzenbach*. Like the Civil Rights Era statute in *South Carolina v. Katzenbach*, the Reconstruction Era statute construed in *Jones* was promulgated when the threat it was designed to deal with was at its height. Like the 2006 statute in *Shelby County*, which was passed long after the Fifteenth Amendment disfranchisement threat had been brought under control, the HPCA in this case was passed long after the Thirteenth Amendment had successfully rid the nation of chattel slavery. Just as *South Carolina v. Katzenbach* was not overruled by *Shelby County*, *Jones* need not be overruled for appellants to prevail in this case.

Nevertheless, *Jones*' shortcomings are serious enough and have led Thirteenth Amendment jurisprudence sufficiently astray that they should be addressed in some form. Arguably, *Jones* is at the root of the doctrinal confusion that this Court must address. This brief therefore discusses:

(1) why *Jones* was incorrectly decided as a matter of statutory interpretation and how that error has infected subsequent discussions of Congress's authority under Section 2 of the Thirteenth Amendment; and

(2) how *Jones* never stated that Congress had the power to eliminate the badges and incidents of slavery for their own sake rather than for the sake of ending slavery. Insofar as it could be interpreted otherwise, it would be pure dictum, since the statute at issue in *Jones* was indeed aimed at eradicating slavery, and error.

To this, CEO adds that the scope of Congress's power under Section 2 of the Thirteenth Amendment is an issue that is best addressed sooner rather than later. Congress has several bills pending that purport to rely on an overbroad interpretation of its Thirteenth Amendment powers. See Gail Heriot & Alison Somin, Sleeping Giant?: Section Two of the Thirteenth Amendment, Hate Crimes Legislation and Academia's Favorite New Vehicle for the Expansion of Federal Power ("Heriot & Somin"), 13 Engage 31, 35-36 (October 2012). By addressing this issue now, the federal judiciary could avoid having to decide the constitutionality of these proposals after they have been signed into law.

ARGUMENT

A. In *Jones,* a Serious Error in the Interpretation of a Reconstruction Era Statute May Have Colored Congress's Sense of What the Thirteenth Amendment Was Intended to Cover.

It is logical to look to the statutes that were passed pursuant to the Thirteenth Amendment immediately after ratification to get a sense of what that amendment was understood to mean at the time. But the interpretation given to the Civil Rights Act of 1866 (the "1866 Act") a century later in *Jones* was mistaken.[2] And it is not just Justice Harlan (joined by Justice White) in dissent who has thought so. See, e.g., *Confused Muse* supra at 100 ("I am afraid the Court's approach in *Jones v. Mayer* represents a combination of … creation by authoritative revelation and 'law-office' history."). See also Charles Fairman, 6 History of the Supreme Court of the United States: Reconstruction and Reunion, 1864-88, 1207, 1258 (Macmillan 1971)("In *Jones v. Mayer*, the Court … allowed itself to believe impossible things—as though the dawning enlightenment of 1968 could be ascribed to the Congress of a century agone.").

That may be water under the bridge when it comes to that statute (which is not at issue in this case). But insofar as it colors the modern sense of what

[2] CEO notes that *Jones* is inconsistent with decisions closer in time to the adoption of the Thirteenth Amendment that interpreted its scope much more narrowly than *Jones* does. See *Hodges v. United States*, 203 U.S. 1 (1906); *The Civil Rights Cases*, 109 U.S. 3 (1883).

the 38th Congress intended the Thirteenth Amendment to authorize, it is worth reflecting upon.

The 1866 Act contained the following passage:

> [A]ll persons … shall have the same right, in every State and Territory … to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property … as is enjoyed by white citizens ….

This statute was almost certainly about the legal capacity to contract and the legal capacity to own and convey property—privileges slaves didn't have in the antebellum South. While we tend to take these rights for granted—to the point of their being almost invisible—they are anything but unimportant.[3] A person who cannot make contracts—and both sue and be sued for breach—cannot borrow money from a bank. A person who cannot own and convey property cannot own a farm or even a home. Such persons therefore must be dependent on others, and likely work as sharecroppers or wage laborers. They

[3] In the mid-nineteenth century one of the most significant issues to face the nation was the legal capacity of married women to contract and to own and convey property. See, e.g., N.Y. Married Women's Property Act, 1848 N.Y. Laws ch. 200 at 307. It was thus natural for this issue to come up in 1866 in the context of recently freed slaves. No one has interpreted these laws, which overruled the common law's insistence that a married couple was a single legal entity headed by the husband, to prohibit private discrimination against married women vis-à-vis married men or vis-à-vis single women (both of whom traditionally had legal capacity under the common law).

may end up trapped in relationships that for many practical purposes *are* slavery.

In the immediate period after the Civil War, many members of Congress considered it a priority to ensure that recently freed slaves had the legal capacity to contract and to purchase, own and convey property. They feared that recently enacted Black Codes would essentially re-impose slavery through the back door, and they wanted to prevent it. See, e.g., Miss. Black Code (1865)(prohibiting "any freedman, free negro or mulatto" from renting or leasing lands outside "incorporated cities or towns").

But the legal capacity to purchase property is emphatically not the same thing as the right to insist that others agree to sell. To view the question otherwise would be akin to saying that a "right to marry" encompasses the right to marry someone who doesn't wish to marry you. Hardly anyone would be reckless enough to make the latter argument.

In his message vetoing the 1866 Act, President Andrew Johnson stated that these matters "relate to the internal policy and economy of the respective States." That message shows that he understood the statute to require states to treat African Americans the same as whites on matters of legal capacity and not to require private individuals to refrain from race discrimination. He stated that the effect of the statute would be that nowhere "can any *State*

exercise any power of discrimination between different races." (Emphasis added.) Andrew Johnson, Veto of the Civil Rights Bill (March 27, 1866) in Lillian Foster, Andrew Johnson: His Life and Speeches (1866).

Johnson's view was evidently that Section 2 of the Thirteenth Amendment gave Congress only the authority to prohibit slavery itself. The 1866 Act was thus unconstitutional because a denial of the right to own and convey property was not itself slavery. By contrast, the majority in Congress apparently thought that both the legal capacity to contract and the legal capacity to own and convey property were among the legal incidents that made slavery a viable institution and hence could be prohibited as part of the effort to ban slavery and keep it from re-emerging. Johnson's view was a narrow view of Section 2 authority, but it illustrates where the debate was taking place in 1866: There was doubt in the White House that Congress had *any* prophylactic power under Section 2. On the other hand, members of Congress evidently believed that it had a least some measure of prophylactic power when applied to the legal incidents of slavery.

Congress overrode Johnson's veto weeks later by a vote of 33-15 in the Senate and 122-41 in the House of Representatives. But concern over the 1866 Act's constitutionality remained. Four years later, as an extra precaution against this concern, Congress re-enacted the statute as part of the Civil Rights

Act of 1870 (also known as the Enforcement Act of 1870), 16 Stat. 140 (1870). In the interim, the Fourteenth Amendment had been ratified, which conferred on Congress authority it had not had in 1866 and thus bolstered the argument for the statute's constitutionality.

A century later, when *Jones* reached the Supreme Court, the relevant part of the 1866 Act had long been codified in part at 42 U.S.C. § 1982 and read:

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

Joseph Lee Jones, an African American, and his wife brought the lawsuit against a Missouri real estate developer for refusing to sell them a home on account of Mr. Jones' race. At the time, however, Missouri had no law against private race discrimination in the sale of real estate. The Fair Housing Act of 1968, Pub. L. 90-284, 82 Stat. 73 (1968), was not passed by Congress until a week after their case was argued before the Supreme Court. Instead, their case was premised on § 1982, which they argued should be interpreted to prohibit race discrimination by private parties to a sale, rather than as a mere prohibition on state statutes and practices that make racial

distinctions with regard to the legal capacity to own and convey property. Surprisingly, the Court agreed. [4]

Jones's interpretation is at odds with the statute's text. It states that all citizens should have "the same right … as is enjoyed by white citizens" to own and convey property. But white citizens did not have the right not to be

[4] As Heriot and Somin note, "Contemporary news events are not always a useful explanation for the actions of courts," and, at this point, there is no way to tell whether the events of 1968 affected the outcome in *Jones*. Heriot & Somin at 38, n. 30. Nonetheless, CEO observes that *Jones* was argued on April 1-2, 1968—just five weeks after the publication of the Report of the National Advisory Commission on Civil Disorders (known as the "Kerner Commission Report"). That report attempted to explain the extensive civil unrest that took place over the summer of 1967.

Two days after *Jones* was argued, on April 4, 1968, the Reverend Martin Luther King, Jr. was assassinated. Dozens of cities were engulfed in riots, and, in Washington, D.C., twelve people were killed (mostly in burning homes), more than 1000 injured, and about 1200 buildings were burned. Many of those burned buildings were in middle-class black neighborhoods that didn't begin to recover economically until the 1990s. Federal offices were evacuated all over the city, and the riots came within a few blocks of the White House. It took more than 13,000 federal troops and five days to quell the riots. *See* Ben W. Gilbert, et al., Ten Blocks from the White House: Anatomy of the Washington Riots of 1968 (1968).

On the first full day of violence, President Lyndon Johnson wrote to the Speaker of the House of Representatives urgently requesting that the Fair Housing Act bill, which had been stalled for some time, be given immediate priority. *See* Letter from Lyndon Baines Johnson to Speaker John W. McCormick (Apr. 5, 1968). McCormick delivered, and Johnson signed the bill into law on April 11, 1968. The Fair Housing Act prohibited racial discrimination in the sale or leasing of housing independently of § 1982, so it reduced the legal consequences of the Court's interpretation of §1982 in *Jones*.

discriminated against in a sale between private parties. In 1866, if a property owner had decided to sell only to Asians or only to African Americans, and not to a white citizen because of his race, that property owner would have been wholly within his rights to do so.[5]

Moreover, if Congress had wanted to guarantee that recently freed slaves had the legal capacity to own and convey property, it would have written it

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[5] *Jones* took the position that the text of § 1982 unambiguously prohibits private discrimination. A few years later in *Runyon v. McCrary*, 427 U.S. 160 (1976), the Court interpreted a very similar provision of the statute, 42 U.S.C. § 1981, which covers contracting generally, consistently with *Jones*. But this time several newer members of the Court had come to understand that the dissenting Justices in *Jones*—Harlan and White—had correctly interpreted § 1982. In *Runyon*, Justice White was joined by Justice Rehnquist in a detailed dissenting opinion. Justices Stevens and Powell each filed concurring opinions in which they stated that their view of the case was driven by *stare decisis* and not by an actual belief that the 39th Congress intended to prohibit private discrimination. See *Runyon* at 186 ("If the slate were clean, I might be inclined to agree … that § 1981 was not intended to restrict private contractual choices. Much of the review of the history and purpose of this statute set forth in [Justice White's dissent] is quite persuasive.")(Powell, J., concurring); id., at 189 ("For me, the problem in these cases is whether to follow a line of authority which I firmly believe to have been incorrectly decided.")(Stevens, J., concurring).

A decade later, in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), the Court gave § 1981 a narrow reading to apply only to contract formation and contract enforcement. Congress responded by amending § 1981, thus eliminating the issue of the intent of the 39th Congress. In construing § 1981, the 1991 version of the text and the intent of the 102nd Congress matter now. Unlike the 39th Congress, though, there is no reason to impute any special insight into the Thirteenth Amendment on the part of the 102nd Congress; the 102nd came more than a century after the Amendment.

exactly the way the 1866 Act was written. Legal capacity to own and convey property is limited in all sorts of complicated ways. For example, children and insane persons cannot buy and sell at will. But promulgating a federal statute that defines exactly what legal capacity former slaves have in excruciating detail would be impossible (and counterproductive, since states should be given the leeway to change their age of majority, their definition of insanity, etc.). Instead, the best way to draft a statute would be to guarantee all citizens, including African Americans, the same rights as white citizens—which is exactly what Congress did.[6]

The re-enactment of the Civil Rights Act of 1866 as part of the Civil Rights Act of 1870 is further evidence of *Jones*' error. Congress thought the ratification of the Fourteenth Amendment would bolster the argument for the Act's constitutionality. But the Fourteenth Amendment deals only with state action. It thus adds nothing to the argument for the constitutionality of an act that purported to prohibit race discrimination by private parties. By re-

[6] Note that the 1866 Act also covers the legal capacity to convey generally, to sell, inherit and give as gifts. If the statute were meant to cover private discrimination in these areas, that would go further than the Fair Housing Act, Pub. L. 90-284, 82 Stat. 73 (1968). CEO favors integration through the voluntary choice of individuals to live in neighborhoods where residents of their own race are rare. Most Americans probably assume, however, that they can choose not to buy a home in a neighborhood where they might feel racially isolated. If *Jones*'s interpretation of the 1866 Act is right, they are wrong.

enacting the 1866 Act in 1870, Congress again made itself clear: Its members were commanding *states* to accord equal legal capacities to African Americans and whites.[7]

More evidence was provided when Congress passed the Civil Rights Act of 1875, 18 Stat. 335 (1875), which prohibited race discrimination in public accommodations like railroads, hotels and restaurants. This new law was in keeping with the common law tradition of requiring common carriers and innkeepers to take all comers. But if the *Jones-Runyon* interpretation of §1981 and §1982 is correct, there would be no need for such a limited law: Congress had already gone much further than this in 1866. Had members of Congress forgotten so quickly? For that matter, in 1964, when members of the Senate slept on cots in order to break the filibuster against the Civil Rights Act of

[7] *Jones* invoked statements by members of Congress in connection with a different bill that would have extended military jurisdiction over certain areas of the South where "in consequence of any State or local law, … custom, or prejudice, any of the civil rights belonging to white persons (including the right … to inherit, purchase lease, sell, hold, and convey real and personal property …) are refused or denied to negroes …." See *Jones* at 423 n. 30. The Court suggested that the terms "custom" and "prejudice" show that the 39th Congress was indeed thinking of private discrimination when it passed § 1982. But in context, these words were meant to distinguish "law" (i.e. statutes) from informal administrative practices—like a registrar of deeds who routinely declined to record deeds conveying property to African Americans, despite a lack of legal authority to do so. At most, it would include private actions that rise to the level of denying African Americans the legal capacity to own or convey property, such as a mob that prevents a deed from being recorded.

1964, were they simply ignorant of the fact that their proposed law was largely redundant?

There is lots of other evidence of *Jones*' error—including that discussed in the dissent by Justice Harlan. Worse, this error has almost certainly infected the modern understanding of what the Thirteenth Amendment was all about. A 21st century observer might look at *Jones* and think that if members of the 39th Congress thought prohibiting private discrimination in the sale of real estate was within its Section 2 powers, then they would have thought prohibiting race-motivated violence (as in Section 249(a)(1)) was within its powers too. Given that most members of the 39th Congress were also members of the 38th Congress, which passed the Thirteenth Amendment in the first place, their opinion should be accorded great weight in construing Section 2—or so the argument would run. But the premise is wrong. Members of the 39th Congress *did not* pass a law prohibiting private discrimination in the sale of real estate. There is thus no evidence to suggest that they thought such a law would be within Congress's Section 2 powers.

Much of the modern effort to urge Congress to take ever more aggressive Section 2 positions—including the successful effort to pass Section 249(a)(1) of the HCPA—is built upon a foundation laid by *Jones*. See Heriot & Somin at

35-36 (discussing various novel legislative proposals that rely on Congress's Section 2 power). But it is a foundation of sand.

B. The Thirteenth Amendment Is About Eradicating Slavery and Involuntary Servitude, Not About Eradicating the Badges and Incidents of Slavery. The Latter May Be Outlawed Only as a Means to the Eradication of Slavery and Involuntary Servitude. *Jones* Does Not Hold Otherwise.

The Department of Justice argued below and elsewhere that *Jones* requires lower courts to treat the following as settled law: (1) that Congress must be accorded considerable discretion in determining what is a "badge" or "incident" of slavery; and (2) that Congress has the power to ban these badges and incidents (and maybe even the "relic[s]" and "vestiges" of slavery) unconnected to any ultimate aim of exterminating slavery and preventing its return.[8] Taken together, these two supposed holdings would confer extraordinary power on Congress.

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[8] One very troubling aspect of *Jones* is that it appears equate the "badges" and "incidents" of slavery with the "relic[s]" and "vestiges" of slavery. See *Jones* at 442-43 ("[W]hen racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery"); *id.*, at n. 78 (stating that Congress has the power "to eradicate the last vestiges and incidents of a society half slave and half free"). This loose language has moved Thirteenth Amendment jurisprudence even further from its text and its original intent.

It is interesting to reflect on what this approach might mean for the interpretation of the identically or nearly-identically worded enforcement clauses of the Nineteenth (sex discrimination in voting), Twenty-Third (D.C. electoral votes), Twenty-Fourth (poll tax prohibition) and Twenty-Sixth

The first such supposed holding would be trivial without the second, since designating something a "badge" or "incident" is meaningless unless something turns on that status.[9] In this brief, therefore, CEO concentrates on critiquing the second supposed holding.

This much should be obvious from the text: Section 1 of the Thirteenth Amendment bans slavery and involuntary servitude *and nothing more*. Similarly, Section 2 is unambiguously dependent for its substance on Section 1. It empowers Congress to do what is "necessary and proper" to effectuate Section 1's ban on slavery and involuntary servitude *and nothing more*.

Amendments (18-year-old voting). The now-repealed Twenty-Eighth Amendment (Prohibition) also had a somewhat similar provision.

[9] Alternatively, if "badges" and "incidents" were defined very narrowly to include only those legal incidents that are unique or nearly unique to slavery, the second supposed holding would arguably be trivial.

CEO notes that the first supposed holding skates over an issue: Rather than ask who gets to decide what are the badges and incidents of slavery, one must first ask who gets to decide what is slavery. CEO believes that the Court and not Congress has primary responsibility for *defining slavery* and *involuntary servitude* under the Thirteenth Amendment. Cf. *City of Boerne v. Flores*, 521 U.S. 507 (1997)(holding that the Court has primary responsibility for defining Fourteenth Amendment equal protection violations). On the other hand, Congress is indeed entitled to deference in selecting the *means* by which that judicially defined slavery is to be eradicated and prevented from returning. Cf. *McCulloch v. Maryland*, 17 U.S. 316 (1819)("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of that constitution, are constitutional.").

Amendment co-author Senator Lyman Trumbull and supporter Representative Chilton White both said that Congress's enforcement powers were analogous to those it already had under the Necessary and Proper Clause. See Cong. Globe, 38th Cong., 1st Sess. 553 (1864)(statement of Sen. Trumbull; *id.*, at 1313; Cong. Globe, 38th Cong., 2d Sess. 214 (1865)(statement of Rep. White).

CEO sides with the 39th Congress (and against President Andrew Johnson) on the question of whether Section 2 confers prophylactic power on Congress. See supra at 6. But that prophylactic power must be directed toward the prevention of some particular ill over which the legislature has jurisdiction—in this case the re-emergence of slavery and involuntary servitude—or else it is not prophylactic power. The power to pass prophylactic laws does not authorize a statute that is not aimed at effectuating Section 1's ban on slavery and involuntary servitude. There is no independent power to outlaw the short- or long-term effects of antebellum slavery. Cf. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978)("Powell, J.)(observing that redressing the wrongs attributable to specific instances of discrimination is "far more focused than the remedying of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past."). The Thirteenth Amendment did not prohibit slavery retroactively; it did so

prospectively. If Congress is going to address the effects of the now-distant past, it must be in the context of a good faith effort to prevent the return of these dreaded institutions (or it must be authorized by some other provision of the Constitution).

Jones's undue emphasis on the terms "badges" and "incidents" is perhaps unfortunate. But *Jones* was not the first Supreme Court case to use those terms in discussing Congress's power under Section 2. That distinction goes to *The Civil Rights Cases*. In those cases, the Court was called upon to decide whether the Civil Rights Act of 1875, 18 Stat. 335 (1875), which banned race discrimination in public accommodations, was a valid exercise of Congress's authority under Section 2. The Court stated that Congress had the power to ban the "badges and incidents" of slavery, but ultimately held that racial discrimination in public accommodations was not such a badge or incident, thus beginning a long tradition of narrowly construing those concepts, which was ended by *Jones*.

Note, however, that the Court in *The Civil Rights Cases* did not state that Congress had the power to eradicate the badges and incidents of slavery independently of its power to eradicate slavery and involuntary servitude.

The reason the Court in *The Civil Rights Cases* might have wanted to bring up the concepts of "badges" and "incidents" seems clear enough. Chattel

slavery was an institution that reduced human being to the status of property. Just as law students learn on the first day of classes that property ownership is "a bundle of sticks," *The Civil Rights Cases* conceptualized chattel slavery as a bundle of individual sticks—the badges and incidents of slavery. The best way to ban slavery directly was to ban a sufficient number of the individual sticks to make slavery impossible to maintain. See Heriot & Somin at 35.

Arguably only one of those sticks—the master's right to compel the slave to work—is central to our concept of slavery. Others—like the slave's inability to marry or to own property—may be found in non-slavery contexts too. But later case law, including *Jones*, correctly suggests that such incidents can nevertheless be outlawed by Congress as part of its efforts to ban slavery and keep it from re-emerging. See, e.g., *Bailey v. Alabama,* 219 U.S. 219 (1911).

Rather than emphasize the rhetoric of "badges and incidents," modern Thirteenth Amendment jurisprudence would do well to emphasize Congress's power of prophylaxis. The real point is that Congress has prophylactic power, whether it uses that power to prohibit a badge, incident, vestige, relic or none of the above. Suppose, for example, a pharmaceutical company invents a drug that causes people to insist upon being slaves. The drug is not slavery itself; neither is it a badge, incident, vestige or relic of slavery. Yet CEO has little doubt that Section 2 gives Congress the authority to ban it in the exercise

of its power to effectuate Section 1's ban on slavery, even though the pill is not itself slavery.

Despite the argument advanced by the Department of Justice, *Jones* does not specifically state that Section 2 gives Congress the authority to ban anything it designates as a badge or incident of slavery regardless of whether it is doing so for the purpose of eliminating slavery and preventing its return. If it had so stated, its words would have been dictum, since there is no doubt that § 1982 (whatever its appropriate interpretation) was passed by the 39th Congress for the purpose of eliminating slavery and preventing its return. In 1866, the blood that had recently been spilled for exactly that purpose was barely dry, and the Black Codes being promulgated by the states of the former Confederacy were threatening to make the sacrifice of those who died unavailing.[10]

Jones is thus distinguishable from this case. Congress did not even purport to be acting out of a concern to eliminate slavery or prevent its return. Instead, its findings in the HCPA state that "eliminating racially motivated violence is an important means of eliminating, to the extent possible, the

[10] But if *Jones* had claimed that Section 2 authorizes Congress to promulgate laws that are not aimed at eradicating slavery and if this had not been dictum, then *Jones* would be at odds with the Constitution and should be overruled for that reason.

badges, incidents, and relics of slavery and involuntary servitude" and "in order to eliminate, to the extent possible, the badges, incidents, and relics of slavery, it is necessary to prohibit assaults on the basis of real or perceived religions or national origins." See Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act, P.L. No. 111-84, 123 Stat. 2190 (2009), div. E, § 4702, §§ 7, 8, codified at 18 U.S.C. § 249**.** That is simply not the same as attempting to end slavery and keep it away.[11]

This Court's decision in *United States v. Maybee*, 687 F. 3d 1026 (8th Cir. 2012), is distinguishable. As it noted, Maybee's challenge to the constitutionality of § 249(a)(1) was a "narrow" one. *Id*. at 1030; see also *id*. at 1031 ("a single and quite narrow challenge"). More specifically, Maybee contended that because § 249(a)(1) requires proof of only the willful infliction of an injury motivated by, among other things, the victim's race and does not also require proof that the injury be motivated by the victim's enjoyment of a public benefit, as § 245(b)(2)(B) does, it was unconstitutional. This Court observed that Maybee could not explain "why a finding of constitutional

[11] As for the possibility that Congress might re-promulgate § 249(a)(1) of the HCPA pursuant to its Commerce Clause powers, Metcalf does not question whether such an exercise of those powers would be constitutionally valid. CEO believes that he need not have done so because Congress relied on the Thirteenth Amendment in enacting § 249(a)(1).That said, CEO does not believe it would be constitutional to apply the Commerce Clause power to the events at issue in this case which have neither a connection to interstate commerce nor an impact on it.

sufficiency of a statute based on two elements establishes a precedent that both elements are necessary to avoid constitutional infirmity." *Id.* at 1031. Nor could he explain why § 249(a)(1) could not constitutionally sweep more broadly than § 245(b)(2)(B). *Id.*

Metcalf does not make the argument foreclosed by *Maybee*. Rather, he makes a broader challenge to the sweep of § 249(a)(1).

In so doing, CEO notes that he echoes the sentiments raised by judges of the Fifth and Tenth Circuits. Judge Elrod and Judge Tymkovich have each agreed that the arguments raised by defendant and amici curiae in this case are weighty. In *United States v. Hatch*, 722 F. 3d 1193 (10th Cir. 2013), Judge Tymkovich wrote that the defendants' "arguments raise important federalism questions," which "in light of Jones will be up to the Supreme Court" to resolve. Similarly in *United States v. Cannon*, 750 F.3d 492 (5th Cir. 2014), cert. denied, 135 S. Ct. 709 (2014), in an unusual special concurrence to her own opinion for the panel, Judge Elrod wrote that the Fifth Circuit "would benefit from the Supreme Court" in reconciling the conflicting precedent on this topic. CEO largely agrees with those judges.

Where CEO disagrees is on whether they are bound by *Jones*. Again, *Jones* was interpreting a Reconstruction Era statute that was certainly aimed at ending slavery and preventing its return. Any suggestion by *Jones* that Congress

might have the authority to act even when not motivated by a desire to end slavery and prevent its return was thus pure dictum (as well as inconsistent with the text of the Thirteenth Amendment.

CONCLUSION

This Court should reverse the defendant's conviction. Section 249(a)(1) is not a valid exercise of Congress's authority under Section 2 of the Thirteenth Amendment.

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 5,975 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: December 27, 2016

s/ John J. Park, Jr.
John J. Park, Jr.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing amicus brief of the Center for Equal Opportunity with the Clerk of Court for the Eighth Circuit by using the CM/ECF system on December 27, 2016. I further certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system I also certify that this brief was scanned for viruses and is virus-free to the best of my knowledge and belief.

This 27th day of December 2016

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