No. 17-9340

IN THE SUPREME COURT OF THE UNITED STATES

RANDY JOE METCALF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 18 U.S.C. 249(a)(1), which makes it a crime willfully to cause bodily injury "because of the actual or perceived race, color, religion, or national origin of any person," is a valid exercise of Congress's power under Section 2 of the Thirteenth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8[1]) is reported at 881 F.3d 641. The opinion of the district court denying petitioner's motion to dismiss the indictment (Pet. App. 14-23) is unreported.

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[1] The appendix to the petition for a writ of certiorari is not separately paginated. This brief treats the appendix as if it were separately paginated, with the first page following the cover page to the appendix (which is labeled as page 21) as page 1.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 2018 (Pet. App. 12). A petition for rehearing was denied on March 19, 2018 (Pet. App. 13). The petition for a writ of certiorari was filed on June 13, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Iowa, petitioner was convicted on one count of willfully causing bodily injury to a person because of the person's actual or perceived race, color, or national origin, in violation of 18 U.S.C. 249(a)(1). Judgment 1; see Indictment 1. Petitioner was sentenced to 120 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-8.

1. On the evening of January 11, 2015, petitioner went to a bar in Dubuque, Iowa, with his fiancée, where petitioner met two friends -- Jeremy Sanders (Jeremy) and Jeremy's son, Joseph Sanders (Joseph). Pet. App. 2. While at the bar, petitioner, his fiancée, Jeremy, and Joseph drank alcohol and played pool. Ibid. Also at the bar that evening was Lamarr Sandridge, who was socializing with two acquaintances, Sarah Kiene and Katie Flores. Ibid. Aside from Sandridge, who is African-American, all of the patrons at the

bar that evening -- including petitioner, his fiancée, his friends, Kiene, and Flores -- were white. Gov't C.A. Br. 6-7; see Trial Tr. (Tr.) 29, 61, 104-107, 142-143.

At approximately 11 p.m., petitioner became involved in a confrontation with Kiene and Flores over the use of the bar's jukebox. Pet. App. 2; see Gov't C.A. Br. 7. Sandridge stepped in and reproached petitioner for using profanity toward the two women. Gov't C.A. Br. 7. Petitioner responded by calling the women "ni[]er-loving whore[s]," "ni[]er lovers," and "ni[]er-loving c[]ts." Ibid. (citation omitted); see Pet. App. 3; see also Tr. 32-33, 64, 69, 110, 123-125, 146-147, 183-184, 193-195.

Following the confrontation, petitioner spoke with the bar owner, proclaiming his hatred for African-Americas and using epithets to refer to them. Pet. App. 2; see, e.g., Tr. 38 (petitioner stated "I hate them fucking ni[]ers"). Petitioner bragged to the bar owner about having participated in cross burnings, offered to commit violence against African-Americans, and showed the bar owner a swastika tattoo. Pet. App. 2; see Gov't C.A. Br. 7-8; see also, e.g., Tr. 38 (petitioner asked the bar owner if he "ha[d] any [he] want[ed] taken care of," which the bar owner understood as a reference to African-Americans). Petitioner also "displayed his swastika tattoo" to others and stated, "[t]hat's what I'm about." Pet. App. 3. And petitioner continued to yell racial epithets at Sandridge, Kiene, and Flores, repeatedly

referring to Sandridge as a "n----r." Pet. App. 3; see Gov't C.A. Br. 7-8; Tr. 33, 48, 125-126, 143-145, 149-150, 195-197.

At approximately 1:20 a.m., Kiene confronted petitioner, and petitioner's fiancée began filming the confrontation with her cellphone. Pet. App. 3. Flores slapped the phone out of petitioner's fiancée's hands, and a fight ensued. Ibid. Petitioner "charged at Flores, hit her in the head, slammed her into the bar, and pulled her to the ground by her hair." Ibid. Sandridge attempted to stop the attack by striking petitioner, but Jeremy and Joseph attacked Sandridge, holding him in a headlock and punching him repeatedly until he fell to the floor disoriented. Ibid.; see Gov't C.A. Br. 8-9; Tr. 127-128, 150-151, 196-197.

After the larger fight ended, petitioner walked over to Sandridge, who was still lying on the ground, and began kicking and stomping on Sandridge's head while saying "fucking ni[]er, die ni[]er," until the bartender pushed petitioner away. Tr. 85-86; see Tr. 128; Pet. App. 3; Gov't C.A. Br. 9. Petitioner then left the bar briefly, but he soon returned, made his way back to Sandridge (who was still on the floor), and resumed kicking and stomping on Sandridge's head. Pet. App. 3. The next day, petitioner told Jeremy that the "ni[]er" "got what he had coming to him." Tr. 154; see Gov't C.A. Br. 10; see also Tr. 154.

As a result of the assault, Sandridge was hospitalized with a fractured cheekbone, cuts on his eye and nose, bruising and

swelling in his face, a blood clot in his eye, and a sprained ankle. Gov't C.A. Br. 10. The injuries impaired his vision, restricted him to an all-liquid diet, and caused lasting tightness in his face. Ibid.; see Tr. 112-115, 187.

2. A grand jury in the Northern District of Iowa returned an indictment charging petitioner with one count of causing bodily injury to a person because of the person's actual or perceived race, color, and national origin, in violation of 18 U.S.C. 249(a)(1). Indictment 1. Section 249(a)(1), which Congress enacted pursuant to its authority under Section 2 of the Thirteenth Amendment, makes it unlawful for a person

> willfully [to] cause[] bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempt[] to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person.

Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (Shepard-Byrd Act or Act), Pub. L. No. 111-84, § 4707(a), 123 Stat. 2839 (18 U.S.C. 249(a)(1)); see § 4702(7), 123 Stat. 2836; H.R. Rep. No. 86, 111th Cong., 1st Sess. Pt. 1, at 15 (2009). Pursuant to Section 249(b)(1), the Attorney General certified that a federal prosecution of petitioner for violating Section 249(a)(1) "is in the public interest and is necessary to secure substantial justice." D. Ct. Doc. 14 (Jan. 12, 2016).

Petitioner moved to dismiss the indictment, contending that Section 249(a)(1) exceeds Congress's authority under Section 2 of

the Thirteenth Amendment. Pet. App. 14-15. The district court denied the motion, determining that "Congress's enactment of § 249(a)(1) comports with its power under the Thirteenth Amendment" under this Court's decision in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). Pet. App. 22; see id. at 15-22.

Following a trial, a jury found petitioner guilty. Pet. App. 2. Petitioner was sentenced to 120 months of imprisonment. Ibid.

3. The court of appeals affirmed. Pet. App. 1-8. The court rejected petitioner's contention that Section 249(a)(1) exceeds Congress's authority under Section 2 of the Thirteenth Amendment. Id. at 5-6. The court observed that this Court in Jones had determined that Section 2 "gave Congress not only the authority to abolish slavery, but also the 'power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States,'" and that "'[s]urely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.'" Id. at 5 (quoting Jones, 392 U.S. at 439-440) (emphasis omitted).

Applying the test from Jones, the court of appeals "conclude[d] that Congress rationally determined that racially motivated violence constitutes a badge and incident of slavery," adopting the reasoning articulated by the Tenth Circuit in United States v. Hatch, 722 F.3d 1193 (2013), cert. denied, 572 U.S. 1018

(2014), and by the Fifth Circuit in United States v. Cannon, 750 F.3d 492, cert. denied, 135 S. Ct. 709 (2014). Pet. App. 6. The court rejected petitioner's suggestion that it should disregard Jones, which "constitutes binding precedent" construing the Thirteenth Amendment, based on subsequent decisions of this Court addressing the Fourteenth and Fifteenth Amendments. Ibid. (discussing City of Boerne v. Flores, 521 U.S. 507 (1997), and Shelby County v. Holder, 570 U.S. 529 (2013)).

ARGUMENT

Petitioner contends (Pet. 7-19) that his conviction for violating 18 U.S.C. 249(a)(1) is invalid because Section 249(a)(1) is facially unconstitutional. The court of appeals rejected that contention, reasoning that, under Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), Section 249(a)(1) is a valid exercise of Congress's authority under Section 2 of the Thirteenth Amendment. Its decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. a. In enacting 18 U.S.C. 249(a)(1), Congress invoked its authority under the Thirteenth Amendment. See Shepard-Byrd Act § 7202(7), 123 Stat. 2836; H.R. Rep. No. 86, 111th Cong., 1st Sess. Pt. 1, at 15 (2009); Pet. App. 5. Section 1 of that Amendment provides that "[n]either slavery nor involuntary servitude * * * shall exist within the United States," and Section 2 grants Congress the "power to enforce this article by appropriate

legislation." U.S. Const. Amend. XIII. In the Civil Rights Cases, 109 U.S. 3 (1883), this Court held that Section 2 authorizes Congress "to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." Id. at 20. Relying on the Civil Rights Cases, the Court in Jones explained that Section 2 "empowered Congress to do much more" than "'abolish[] slavery.'" 392 U.S. at 439 (citation omitted). Jones reiterated that Section 2 "clothe[s] 'Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.'" Ibid. (quoting Civil Rights Cases, 109 U.S. at 20) (emphasis omitted). And based on its analysis of the Thirteenth Amendment's text, context, history, and precedent, the Court concluded that "[s]urely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." Id. at 440. Applying that standard, the Court in Jones upheld 42 U.S.C. 1982 -- which prohibits racial discrimination in the sale of property -- on the ground that Congress had rationally determined that such discrimination is among the badges and incidents of slavery. 392 U.S. at 438-444.

The Court in Jones acknowledged that, in Hodges v. United States, 203 U.S. 1 (1906), it had reversed (over the dissent of Justices Harlan and Day) a conviction of "a group of white men

[who] had terrorized several Negroes to prevent them from working in a sawmill," on the premise that "only conduct which actually enslaves someone can be subjected to punishment under legislation enacted to enforce the Thirteenth Amendment." Jones, 392 U.S. at 441 n.78. But Jones concluded that the "concept of congressional power under the Thirteenth Amendment" it had relied upon in Hodges is "irreconcilable with the position taken by every member of this Court in the Civil Rights Cases and incompatible with the history and purpose of the Amendment itself." Id. at 442-443 n.78. And the Court "overruled" Hodges "insofar as [it] [wa]s inconsistent" with the Court's reasoning and conclusion in Jones. Id. at 443 n.78.

This Court has reiterated and applied Jones's interpretation of Congress's Section 2 powers in a number of subsequent decisions. For example, in Griffin v. Breckenridge, 403 U.S. 88 (1971), the Court upheld the constitutionality of 42 U.S.C. 1985(3), which creates a cause of action for conspiracy to violate civil rights. See 403 U.S. at 105. The Court stated that, under Section 2, "the varieties of private conduct that [Congress] may make criminally punishable or civilly remediable extend far beyond the actual imposition of slavery or involuntary servitude." Ibid. The Court also repeated Jones's statement that "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate

that determination into effective legislation." Ibid. (quoting 392 U.S. at 440). Similarly, in Runyon v. McCrary, 427 U.S. 160, (1976), the Court relied on Jones to uphold the prohibition in 42 U.S.C. 1981 (1970) of racial discrimination in the making and enforcement of private contracts. See 427 U.S. at 170, 179.[2]

b. The court of appeals in this case recognized that "Jones constitutes binding precedent" concerning the scope of Congress's authority under Section 2 of the Thirteenth Amendment. Pet. App. 6. Applying the standard articulated in Jones, the court "conclude[d] that Congress rationally determined that racially motivated violence," which Section 249(a)(1) prohibits, "constitutes a badge and incident of slavery." Ibid.

In reaching that conclusion, the court of appeals adopted the "thorough discussion of the history of the Reconstruction Amendments and [the] specific analysis of Section 249(a)(1)" in

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[2] See also, e.g., City of Memphis v. Greene, 451 U.S. 100, 125 & n.39 (1981) (quoting Jones, 392 U.S. at 440, for proposition that "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation"); Palmer v. Thompson, 403 U.S. 217, 227 (1971) (noting that under Jones, Congress has broad power to outlaw the "badges of slavery"); Oregon v. Mitchell, 400 U.S. 112, 127-128 (1970) (opinion of Black, J.) (quoting Jones for proposition that Thirteenth Amendment grants Congress the "power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States" (emphasis omitted)); cf. United States v. Kozminski, 487 U.S. 931, 951 (1988) (noting that task of defining "involuntary servitude" under the Thirteenth Amendment and federal statute is an "inherently legislative" task).

United States v. Hatch, 722 F.3d 1193 (10th Cir. 2013), cert. denied, 572 U.S. 1018 (2014). Pet. App. 6. In Hatch, after surveying various historical evidence, the Tenth Circuit "ha[d] no trouble" determining that Congress "could rationally conclude that physically attacking a person of a particular race because of animus toward or a desire to assert superiority over that race is a badge or incident of slavery." 722 F.3d at 1206; see id. at 1197-1200; see also United States v. Cannon, 750 F.3d 492, 501-502 (5th Cir.), cert. denied, 135 S. Ct. 709 (2014) (agreeing with Hatch's historical analysis).

2. The court of appeals correctly applied this Court's precedent addressing Section 2 of the Thirteenth Amendment to 18 U.S.C. 249(a)(1).[3]

a. Petitioner contends (Pet. 16) that the court of appeals erred in concluding that Congress could permissibly determine that

[3] In addition to his argument concerning Section 2, petitioner also argues (Pet. 17-18) that Section 249(a)(1) is inconsistent with the Tenth Amendment, which reserves to the States "[t]he powers not delegated to the United States by the Constitution," U.S. Const. Amend. X. Although the court of appeals did not separately address that argument, it is duplicative of petitioner's Thirteenth Amendment challenge. The Court has explained that, where "a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." New York v. United States, 505 U.S. 144, 156 (1992). Petitioner thus cannot prevail on his Tenth Amendment challenge unless he first prevails on his Thirteenth Amendment challenge. Pet. App. 22-23 (district court rejecting petitioner's Tenth Amendment argument for this reason).

committing violent acts against a person because of the victim's race constitutes "a badge and incident of slavery." Petitioner, however, does not engage with the historical analysis of the Tenth Circuit in Hatch, 722 F.3d at 1205-1206, which the court of appeals here adopted, Pet. App. 6, or attempt to demonstrate that that historical analysis is erroneous.

Petitioner instead suggests (Pet. 16) that the court of appeals' conclusion is incorrect because, in his view, it implies that "an African American individual" also "c[ould] be convicted for an assault against a Caucasian individual." This case, however, does not present that scenario. Petitioner, who is white, was convicted of violating 18 U.S.C. 249(a)(1) for violently assaulting Sandridge, who is African-American, because of his race, following a trial at which extensive evidence was presented that petitioner's actions were motivated by animus toward African-Americans. Pet. App. 2-4; see pp. 2-6, supra. The court of appeals accordingly did not address whether and how Jones might apply differently to the circumstance petitioner describes. See Pet. App. 6. In any event, petitioner makes no attempt to show that Congress could not rationally determine that race-motivated violence may constitute a badge or incident of slavery even when perpetrated against non-African-American victims. Cf. Hatch, 722 F.3d at 1199 (stating that in Hodges the Court had adopted a narrow view of Section 2 in part "because the Thirteenth Amendment

extends its protections to all races, not just formerly enslaved races," but that in Jones the Court had rejected Hodges' narrow interpretation of Section 2).

b. Petitioner also suggests (Pet. 10-16) that the court of appeals should not have followed Jones because, in petitioner's view, Jones is inconsistent with the reasoning of the Court's subsequent decisions in City of Boerne v. Flores, 521 U.S. 507 (1997), and Shelby County v. Holder, 570 U.S. 529 (2013). That is incorrect.

As the court of appeals correctly recognized, neither City of Boerne nor Shelby County provided that court with any sound basis to disregard this Court's precedent in Jones. Pet. App. 6. Neither case mentioned Jones, much less explicitly overruled it. The court of appeals thus appropriately rejected petitioner's invitation to disregard Jones as controlling precedent on the basis of those cases. Ibid.; see State Oil Co. v. Khan, 522 U.S. 3, 20 (1997). Moreover, as the court of appeals additionally explained, neither City of Boerne nor Shelby County even "addressed Congress's power to legislate under the Thirteenth Amendment." Pet. App. 6. Each addressed the scope of Congress's authority under other constitutional provisions.

In City of Boerne, the Court held that the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb et seq., was not a valid exercise of Congress's power under Section 5 of the

Fourteenth Amendment, which gives Congress the "power to enforce, by appropriate legislation," the substantive constitutional rights guaranteed by that Amendment. U.S. Const. Amend. XIV, § 5; see City of Boerne, 521 U.S. at 516-517. The Court concluded that Congress has the power under Section 5 to enact legislation aimed at deterring or remedying violations of the core rights guaranteed by the Fourteenth Amendment, "even if in the process it prohibits conduct which is not itself unconstitutional," but that legislation enforcing Fourteenth Amendment guarantees must have "congruence and proportionality between the [constitutional] injury to be prevented or remedied and the means adopted to that end." City of Boerne, 521 U.S. at 518, 520. Because RFRA "appear[ed], instead, to attempt a substantive change in constitutional protections," the Court concluded that it exceeded Congress's power under Section 5 of the Fourteenth Amendment. Id. at 532. As petitioner acknowledges (Pet. 11), the Court in City of Boerne did not address the Thirteenth Amendment. Nor did the Court discuss whether and how its analysis of the Thirteenth Amendment might differ in light of its distinct purpose and history and the Court's case law construing that Amendment. Cf. City of Boerne, 521 U.S. at 520-524 (discussing history of Fourteenth Amendment).

In Shelby County, the Court held that Section 4(b) of the Voting Rights Act of 1965, 52 U.S.C. 10303(b) (Supp. IV 2016), was

not a valid exercise of Congress's authority under Section 2 of the Fifteenth Amendment, which empowers Congress to enact "appropriate legislation" to enforce that Amendment's protections on the right to vote. U.S Const. Amend. XV, § 2; see Shelby County, 570 U.S. at 552-557. The Court concluded that, under the Fifteenth Amendment, "Congress must ensure that the legislation it passes to remedy th[e] problem" of "racial discrimination in voting" is justified by "current conditions." 570 U.S. at 557. The Court invalidated Section 4(b) because it imposed requirements based on factual circumstances that existed "[n]early 50 years" earlier, and "things ha[d] changed dramatically" in the intervening decades. Id. at 547. As petitioner recognizes (Pet. 15), Shelby County did not "interpret[] the Thirteenth Amendment." Similar to City of Boerne, the Court in Shelby County did not address whether and how analysis of the scope of Congress's authority to remedy racial discrimination in voting under the Fifteenth Amendment might differ from analysis of Congress's authority under the Thirteenth Amendment.

3. No circuit conflict exists on the question presented, and petitioner identifies no alternative considerations that would warrant this Court's review.

As petitioner acknowledges (Pet. 7), the other courts of appeals that have considered the arguments he presses have rejected them and have upheld Section 249(a)(1). The Tenth Circuit in Hatch

and the Fifth Circuit in Cannon each determined that Jones is controlling with respect to Congress's authority to enact 18 U.S.C. 249(a)(1), and each concluded, based on historical analysis, that Congress could rationally determine that race-motivated violence constitutes a badge or incident of slavery in circumstances like those at issue in this case. Cannon, 750 F.3d at 499-502; Hatch, 722 F.3d at 1201-1206. Both Hatch and Cannon also specifically rejected the contention that City of Boerne effectively overruled Jones. See Cannon, 750 F.3d at 503-505; Hatch, 722 F.3d at 1202-1206. Cannon reached the same conclusion with respect to Shelby County. 750 F.3d at 504-505. (Hatch was decided only eight days after Shelby County, and it does not appear that the defendant in Hatch argued in the Tenth Circuit that Shelby County affected its analysis.) In addition, three courts of appeals have held that 18 U.S.C. 245(b)(2)(B) -- which, like Section 249(a)(1), prohibits certain forms of racially motivated violence -- is a valid exercise of Congress's authority under Section 2 of the Thirteenth Amendment under Jones. See United States v. Allen, 341 F.3d 870, 883-884 (9th Cir. 2003), cert. denied, 541 U.S. 975 (2004); United States v. Nelson, 277 F.3d 164, 173-191 (2d Cir.), cert. denied, 537 U.S. 835 (2002); United States v. Bledsoe, 728 F.2d 1094, 1097 (8th Cir.), cert. denied, 469 U.S. 838 (1984).

In light of lower courts' consistent determinations, further review is not warranted. Petitioner suggests (Pet. 11) that the

Court should grant review to "overrule Jones." But he identifies no justification for doing so. Jones considered and rejected the position petitioner advances, and this Court and lower courts have repeatedly applied Jones in the 50 years since it was decided. See pp. 8-10, 15-16, supra. The only intervening developments petitioner cites are City of Boerne and Shelby County, neither of which addressed the proper analysis of the scope of Congress's power under the Thirteenth Amendment. See pp. 13-15, supra. And petitioner does not endeavor to show that the standard Jones articulated is "unworkable." United States v. International Bus. Machines Corp., 517 U.S. 843, 856 (1996); cf. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2097-2098 (2018) (holding departure from precedent warranted in light of subsequent developments, precedent's "unworkab[ility]," and lack of legitimate reliance interests). He thus provides no basis for further review of his conviction in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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