No. _____

In the Supreme Court of the United States

CBOCS WEST, INC.,
Petitioner,

v.

HEDRICK G. HUMPHRIES,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

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

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed on the caption.

Pursuant to Supreme Court Rule 29.6, Petitioner CBOCS West, Inc. makes the following disclosure:

Petitioner is wholly owned by its parent CBRL Group, Inc.

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INTRODUCTORY PRAYER

The Petitioner respectfully requests that a writ of *certiorari* be granted to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 10, 2007.

OPINIONS BELOW

The Opinion of the United States District Court for the Northern District of Illinois, issued on October 6, 2005, is reported as 392 F. Supp.2d 1047 (N.D. Ill. 2006) and has been included in the appendix on pages 47a - 54a. The Opinion of the United States Court of Appeals for the Seventh Circuit, issued on January 10, 2007, is reported as 474 F.3d 387 (7th Cir. 2007) and has been included in the appendix on pages 2a - 46a. The Order of the United States Court of Appeals for the Seventh Circuit denying Petitioner's Request for Rehearing, issued on January 29, 2007, is reported as No. 05-4047, 2007 U.S. App. LEXIS 3124 and has been included in the appendix on page 1a.

JURISDICTION

The Judgment of the Court of Appeals for the Seventh Circuit was entered on January 10, 2007. A timely Request for Rehearing was denied on January 29, 2007. This Petition is timely filed according to Supreme Court Rules 13.1 and 13.3. The Court derives jurisdiction from 28 U.S.C. § 1254(1).

STATUTE INVOLVED

United States Code, *Title 42*:

> *Section 1981(a)* - All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . .
>
> *Section 1981(b)* - 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.

STATEMENT OF THE CASE

The sole legal issue presented here - whether race retaliation is cognizable under Section 1981 - is an issue that has suffered from years of jurisprudential vacillation and uncertainty. Appellate and district courts around the country have struggled mightily with the question of whether retaliatory discharge is encompassed within those five seemingly unambiguous words in Section 1981: "to make and enforce contracts." This Court has not squarely addressed this reoccurring question, arguably contributing (albeit inadvertently) to the vacillation and uncertainty with its decisions in *Sullivan v. Little Hunting Park* and *Patterson v. McLean Credit Union*.

A. *Sullivan v. Little Hunting Park* - The Uncertain Beginning Of Retaliation Under Section 1981

The uncertainty surrounding this issue started with *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). In that case, the plaintiff, a white homeowner, sued a non-profit corporation created to operate a community park. *Id.* at 234. The homeowner had a transferable membership interest in the corporation, entitling him to use the park. *Id.* The homeowner sought to transfer his membership interest to a black homeowner, which, pursuant to the corporation's bylaws, required approval from its board of directors. *Id.* at 234-35. The board of directors refused to approve the transfer. *Id.* at 235. When the white homeowner protested, he was expelled from the corporation by the board of directors. *Id.*

The white homeowner then sued under Sections 1981 and 1982 based on his "expulsion for the advocacy" of the black homeowner. *Id.* at 237. This Court held that the white homeowner had standing to bring a Section 1982 action. From the Court's perspective, the white homeowner was "punished for trying to vindicate the rights of minorities protected by s 1982." *Id.* The Court reasoned that "[s]uch a sanction would give impetus to the perpetuation of racial restrictions on property." *Id.* In so holding, the Court did not reference the term "retaliation" or "retaliatory termination," nor analyze the applicability of Section 1981 to the facts. Yet it seemed obvious from the Court's opinion that retaliation claims were cognizable under Section 1982, which, of course, is Section 1981's companion statute. *Humphries*, 474 F.3d at 394 ("it was clear that the white landowner's basis for standing was that he had suffered retaliation for asserting the rights of another"); *General Building Contr. Assoc. v. Pennsylvania*, 458 U.S. 375, 384

(1982) (recognizing that Section 1982 is Section 1981's "companion statute").

In the wake of *Sullivan*, courts divided on the issue. At the district court level, some courts concluded that retaliation was cognizable under Section 1981. *See e.g. Cox v. Consolidated Rail Corp.*, 557 F. Supp. 1261, 1266 (D. D.C. 1983); *Houston v. Jewell Co., Inc.*, No. 85-C-10108, 1986 U.S. Dist. LEXIS 25835, at *3-6 (N.D. Ill. May 6, 1986). Other district courts reached the opposite conclusion. *See e.g. Tramble v. Converters Ink Co.*, 343 F. Supp. 1350, 1354 (N.D. Ill. 1972); *Persons v. United Parcel Services, Inc.*, 502 F. Supp. 1176, 1176 (N.D. Ga. 1980); *Ekanem v. Health and Hospital Corp. of Marion County*, No. 77-224-C, 1980 U.S. Dist. LEXIS 16002, at *66-67 (S.D. Ind. Nov. 28, 1980). At the circuit court level, however, there emerged a "general consensus . . . that section 1981 broadly prohibited discrimination in all contractual facets of the employment relationship, including 'post formation' adverse acts, such as retaliation." *Humphries*, 474 F.3d at 394. *See e.g. Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266, 1268-70 (6th Cir. 1977); *Goff v. Continental Oil Co.*, 678 F.2d 593, 598 (5th Cir. 1982); *Choudhury v. Polytechnic Institute of New York*, 735 F.2d 38, 44 (2d Cir. 1984). The "general consensus" that existed among the circuits was short-lived.

B. *Patterson v. McLean Credit Union* - The Vacillation and Uncertainty Continues

This Court's 1989 decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) dramatically changed the doctrinal landscape of Section 1981. In *Patterson*, the Court confronted the question of whether a racial harassment claim was cognizable under Section 1981. It answered this question in the negative. In doing so, the Court vaguely defined for

the first time the parameters of Section 1981 in the employment context, namely the meaning of the phrase "to make and enforce contracts." According to the Court, Section 1981 means exactly what it says: the right to make contracts and the right to enforce contracts. *Patterson*, 491 U.S. at 176. The first right, the Court explained, "does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions." *Id.* at 177. The second right, the right to enforce contracts, was also narrowly and literally construed. This right, according to the Court, only protects against "*private* efforts to impede access to the courts or obstruct nonjudicial methods of adjudicating disputes about the force of binding obligations." *Id.* at 177-78 (emphasis in original).

Patterson's textually sensitive construction swept from Section 1981's coverage "so called 'post-formation' discriminatory conduct of an employer." *Humphries*, 474 F.3d at 394. Naturally many of the circuit courts reversed course on the position they had taken post-*Sullivan* and concluded that retaliation, which they viewed as "post-formation" conduct, was not cognizable under Section 1981. *See e.g. McKnight v. GM Corp.*, 908 F.2d 104, 112 (7th Cir. 1990); *Gonzalez v. Home Ins. Co.*, 909 F.2d 716, 719-20 (2d Cir. 1990); *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1313 (7th Cir. 1989); *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1534-35 (11th Cir. 1990). However, not all of the circuits were convinced that *Patterson* foreclosed Section 1981 based retaliation claims. The Eighth Circuit in *Hicks v. Brown Group, Inc.*, 902 F.2d 630, 635 (8th Cir. 1989) held that a "claim for discriminatory discharge continues to be cognizable under Section 1981." Thus, despite the major

circuit shift, in the years following the Court's decision in *Patterson*, there was continued uncertainty.

C. The Civil Rights Act of 1991 - Continued Vacillation and Uncertainty

Two years after *Patterson*, Congress amended Section 1981 with the Civil Rights Act of 1991. The amended Section 1981 saw the addition of a new subsection, which reads:

> 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.

42 U.S.C. § 1981(b). On its face, the new subsection does not mention retaliation or retaliatory termination. Nevertheless, the addition of subsection (b) prompted yet a second major shift in the circuits, with a number of courts modifying their post-*Patterson* position on the question. *Humphries*, 474 F.3d at 397 ("[t]he Civil Rights Act of 1991 led several circuits to reverse course (again) . . . "). To date, the Second, Fifth, Eighth, Ninth, and Eleventh circuits have directly addressed the issue. *See Hawkins v. 1115 Legal Serv. Care*, 163 F.3d 684, 693 (2d Cir. 1998); *Foley v. Univ. of Houston Sys.*, 355 F.3d 333, 339 (5th Cir. 2003); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1059 (8th Cir. 1997); *Manatt v. Bank of America*, 339 F.3d 792, 800 (9th Cir. 2003); *Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1411 (11th Cir. 1998).

Despite the general shift in the circuits following the 1991 amendment, the vacillation and uncertainty has persisted.

The Eleventh Circuit, for instance, ruled in 1997 that a retaliation claim was not cognizable under Section 1981, but one year later appeared to change its mind. *Compare Little v. United Technologies, Carrier Transicold Div.*, 103 F.3d 956, 961 (11th Cir. 1997) (dismissing Section 1981-based retaliation claim because there was no evidence presented that the retaliation was motivated by racial animus) *with Andrews v. Lakeshore Rehab. Hosp., 140 F.3d 1405, 1411* (11th Cir. 1998) (deciding that retaliation was cognizable under Section 1981). The Seventh Circuit has followed a similar path since the 1991 amendment. *Compare Hart v. Transit Management of Racine, Inc.*, 426 F.3d 863, 866 (7th Cir. 2005) ("§ 1981, in contrast, encompasses only racial discrimination on account of the plaintiff's race and does not include a prohibition against retaliation for opposing racial discrimination . . .") *with Humphries*, 474 F.3d at 402 (recognizing that "our recent *Hart* decision appears to have created some confusion in the district courts and has already been misapplied in several decisions . . .," the court went on to "overrule our holding in *Hart* . . .").

There is confusion in other circuits. For instance, there is an apparent intra-circuit split in the Sixth Circuit. *Compare McCary v. Ohio Civil Service Employees Assoc.*, No. C2-99-995, 2000 U.S. Dist. LEXIS 21386, at *17 (S.D. Ohio Nov. 22, 2000) (citing *Day v. Wayne County Bd. of Auditors*, 749 F.2d 1199, 1204 (6th Cir. 1984) and holding that "a claim of retaliation is not cognizable under" Section 1981) *with Wagner v. Merit Distribution*, 445 F. Supp.2d 899, 906 (W.D. Tenn. 2006) ("§ 1981 is an appropriate ground for . . . [plaintiff's] retaliation claim"); *Cf Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 575 (6th Cir. 2000) (not directly addressing the issue of retaliation under Section 1981, but observing that "it is clear that a Caucasian high-level affirmative action official could bring a claim under § 1981.

. . for discrimination based upon his advocacy on behalf of minorities . . .").

REASONS FOR GRANTING THE WRIT

A. The Continued Vacillation and Uncertainty

This continued vacillation and uncertainty alone justifies review. *Calhoon v. Harvey*, 379 U.S. 134, 137 (1964) (granting *certiorari* because of "the importance of the questions presented and conflicting views in the courts of appeals and the district courts"); *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176 (1980) (*certiorari* granted "to forestall a possible conflict in the lower courts" on an "important" issue even though there was no "direct conflict" among various district court and court of appeals opinions). The time has come to settle the debate. Retaliation claims are being filed with greater frequency.[1] There is an apparent intra-circuit split in the Sixth Circuit. There are three other circuits that have not yet ruled on this issue. And, in those circuits that have found retaliation cognizable under Section 1981 since the 1991 amendments, the Seventh and Eleventh

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[1] Over a ten year period, the number of EEOC retaliation charges for all statutes has risen from 18,198 in 1997, to 22,555 in 2006. *EEOC Charge Statistics*, http://www.eeoc.gov/stats/charges.html (last viewed April 18, 2007). The number of EEOC charges based on the explicit retaliation clause in Title VII have risen from 16,394 in 1997 to 19,560 in 2006. *Id.* In fact, retaliation claims brought under various statutes now account for 29.8 percent of all charges brought before the EEOC, whereas such charges only accounted for 22.6 percent of retaliation claims in 1997. And, retaliation claims now account for 25.8 percent of all charges brought pursuant to Title VII, compared with 20.3 percent in 1997. *Id.*

Circuits have demonstrated that any one of these circuits could at any time unpredictably reverse course.

The unpredictability and uncertainty surrounding this issue is starkly highlighted by Judge Edmondson's comment about his circuit's decision in *Andrews* finding retaliation cognizable under Section 1981 when, just one year earlier, another three judge panel had reached the opposite conclusion: "[b]y the way, this view-- whether accurate or inaccurate -- of the law seems to have been prevalent in the federal courts nationwide." *Andrews*, 140 F.3d at 1413. This "follow-the-leader" mentality breads the type of uncertainty and vacillation that has plagued this issue in the forty years since *Sullivan*. Further delay by this Court will only perpetuate the historical uncertainty and vacillation.

B. The Text of Section 1981 Does Not Make Race Retaliation Actionable

Further delay will also tacitly endorse a construction of this major federal statute that entirely ignores its text. There is no dispute that Section 1981, either in its pre-amended or post-amended form, does not mention retaliation or retaliatory termination. Virtually every court that has addressed the issue concedes this point. *See e.g. Humphries*, 474 F.3d at 399 ("after all, the specific word 'retaliation' still does not appear in section 1981 . . ."); *Evans v. Kansas City, Missouri School Dist.*, 65 F.3d 98, 101 (8th Cir. 1995) ("[s]ection 1981 has no specific retaliation provision . . ."). In the absence of any textual support, the Court below relied heavily, if not exclusively, on what it claims is the legislative history. The Seventh Circuit specifically claimed that "the legislative history confirms that Congress intended retaliation to be included within Section 1981." *Humphries*, 474 F.3d at 398. Other circuits have made similar claims. *See e.g.*

Hawkins, 163 F.3d at 693 ("legislative history supports the view that this definition was intended to encompass both a race-based failure to promote and retaliation for a complaint of such a failure to promote").

The "legislative history" that purportedly evinces Congress' intent consists of one excerpt from a House committee report. The excerpt provides, in relevant part, that "[t]he Committee intends this provision to bar all race discrimination in contractual relations . . . [,][which] would include, but not be limited to, claims of harassment, discharge, demotion, promotion, transfer, retaliation, and hiring." H.R.Rep. No. 40(I), 102d Cong., 1st Sess. 92 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 630. Reliance on legislative history, particularly the legislative history from this committee report, is inappropriate for two reasons.

First, legislative history cannot be used as a substitute for the statutory text. This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992) (citations and internal quotations omitted) (Thomas, J.). Meaning is derived from the text, not legislative history. The text is preferred over legislative history because the latter is unreliable and misleading. For instance, legislative history, like committee reports, "has addictive consequences," leading jurists to naively believe "that what is said by a single person in a floor debate or by a committee report represents the view of Congress as a whole - so that we sometimes even will say (when referring to a floor statement and committee report) that 'Congress has expressed' thus-and-so." *Zedner v. United States*, 126 S.Ct. 1976, 1991 (2006) (Scalia, J., concurring). Worse yet, reliance on legislative history gives "unelected staffers and lobbyists . . . both the power and the incentive to

attempt strategic manipulations of legislative history to secure results that they were unable to achieve through the statutory text." *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005) (Kennedy, J.). Legislative history is also subject to manipulation, conscious or otherwise. As Justice Kennedy explained in *Exxon Mobil*, for the jurist, "investigation of legislative history has a tendency to become . . . an exercise in looking over a crowd and picking out your friends." *Id.* (internal quotations removed).

The text thus retains primacy when interpreting federal statutes. Legislative history should not and cannot be consulted in the face of "unambiguous text." *Arlington Central School Dist. Board of Educ. v. Murphy*, 126 S.Ct. 2455, 2463 (2006) (Alito, J.). Section 1981 is no exception. *Domino's Pizza, Inc. v. McDonald*, 126 S. Ct. 1246 (2006) (interpreting Section 1981 from a textualist perspective) (Scalia, J.). "The authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp.*, 545 U.S. at 568. And "[w]hatever temptations the statesmanship of policymaking might suggest, the judge's job is to construe the statute - not make it better." *Jones v. Bock*, 127 S. Ct. 910, 921 (2007) (Roberts, J.). If the statute needs to be made "better," that is a task for Congress, not the courts. *Interview with Chief Justice Roberts*, University of Miami (Nov. 13, 2006) (explaining the importance of constrained decision-making and noting that "[n]ot a single person has voted for me, and if we don't like what the people in Congress do, we can get rid of them, and you don't like what I do, it's kind of too bad . . ."). Had the Seventh Circuit (and the other circuit courts) followed this methodological approach to statutory interpretation, as this Court demands, it would have invariably concluded that retaliation is not cognizable under Section 1981. There is

simply nothing in the text of Section 1981(a) or (b) to support any other conclusion.

At its core, Section 1981 "protects the equal right of 'all persons . . . to make and enforce contracts' without respect to race." *Id.* at 1250. With the 1991 amendment, the phrase "make and enforce" now includes the making (which is not new), performing, modifying, and terminating (also not new) of a contract. In amending Section 1981, Congress did not strip it of its fundamental underpinnings, leaving intact the necessary motivational prerequisite to bringing a claim under this section. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 311-12 (1994) ("*Patterson* did not overrule any prior decision of this Court"). Even though amended, therefore, an employer's conduct will not be actionable under Section 1981 unless its conduct was "racially motivated." *Runyon v. McCarey*, 427 U.S. 160, 168 (1976) ("[i]t is now well established that s 1 of the Civil Rights Act of 1866 . . . prohibits racial discrimination in the making and enforcement of private contracts"); *General Building Contr. Assoc.*, 458 U.S. at 389 ("§ 1981 reaches only purposeful discrimination"); *Georgia v. Rachel*, 384 U.S. 780, 791 (1966) ("Congress intended to protect a limited category of rights, specifically defined in terms of racial equality"). From a textualist perspective, this means that, in the employment context, Section 1981 protects the equal right of all persons (or employees) without regard for race to make, perform, modify, and terminate a contract. Employer actions that are not racially motivated are necessarily lawful under Section 1981.

Retaliatory terminations are, of course, not racially motivated. *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 185 (2005) ("[a] claim of retaliation is not a claim of discrimination on the basis of [race]") (Thomas, J.,

dissenting). The motivation behind the retaliatory termination, by definition, is the protected activity, which in most situations is some form of complaint. *See e.g. Humphries*, 474 F.3d at 404 (to prevail on a retaliation claim, plaintiff must prove that there is a "causal connection between" the termination and the "protected activity"). The complaining party's race has nothing to do with the termination. In fact, under a retaliation theory, but for the employee's complaint, the employee, whether white or black, would not have been terminated. Under a discriminatory termination theory, on the other hand, but for the employee's race, the employee would not have been terminated. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (to prove discriminatory termination requires that the employee's race "actually played a role in the [decisionmaking process] and had a determinative influence on the outcome").

This obvious conceptual distinction between retaliatory termination and discriminatory termination was even accepted by the court below, which noted that "it may be that, strictly speaking, a discriminatory termination of a contract is not the same thing as a retaliatory discharge -- for instance, analytically, retaliation need not have a discriminatory intent behind it." *Humphries*, 474 F.3d at 398; *see also Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1312 (7th Cir. 1989) ("retaliation and discrimination are separate wrongs"). Consequently, although a discriminatory termination is prohibited by Section 1981, a retaliatory termination is not. *Domino's Pizza*, 596 S.Ct. at 1249 ("Congress amended the statute . . . adding § 1981(b), which defines 'make and enforce' to bring post formation conduct, including discriminatory termination, within the scope of § 1981"). The text of the statute and the plain meaning of the terms in that statute demand this result. The legislative history cannot be used to reach a result that is not, at all, tethered to the text

of Section 1981. The Seventh Circuit obviously decided to ignore this basic tenet of Supreme Court jurisprudence, providing yet another reason for granting *certiorari*. *Army & Air Force Exchange Serv. v. Sheehan*, 456 U.S. 129, 130 (1959) (granting *certiorari* because the decision below "appeared to be in conflict with our precedents"); Rehnquist, THE SUPREME COURT - HOW IT WAS, HOW IT IS 265 (1987) (recognizing that, in determining whether to grant *certiorari*, "another important factor is the perception of one or more justices that the lower court decision may well have been an incorrect application of Supreme Court precedent").

There is a second and more obvious reason that reliance on the legislative history is inappropriate: the "legislative history" in this case actually contradicts the Seventh Circuit's holding. Congress was certainly aware of the interpretive norm employed by the Court at the time it amended Section 1981. *Humphries*, 474 F.3d at 411 (Easterbrook, J., dissenting). For instance, *Patterson*, the very case that Congress sought to address with the 1991 amendment, was the product of a strict text-based interpretation. *See e.g. Patterson*, 491 U.S. at 176 (construing Section 1981 by looking to "its plain terms . . ."); *Humphries*, 474 F.3d at 395 (recognizing that *Patterson* "severely curtailed the reach of section 1981 claims"). Yet Congress failed to include retaliation in the text of subsection (b), no doubt realizing that it would not be read into the statute by a Court that abandoned some time ago judicial extrapolation of federal statutes. Moreover, the House committee report that supposedly shows the intent of Congress delineated the types of employer actions that would be covered by the new subsection (b). Not one of these actions is mentioned in the amended Section 1981, again, despite the very real possibility that the prevailing interpretive norm would prevent these words from being read into the amended version of Section 1981.

Perhaps most revealing is the explicit inclusion by Congress of retaliation in other federal employment statutes. Both before and after the 1991 amendment, Congress has included explicit retaliation provisions in a number of other statutes governing employment including Title VII, the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967, the Fair Labor Standards Act of 1938, the Family and Medical Leave Act of 1993, and the Uniformed Services Employment and Reemployment Rights Act of 1994. This is telling because "when Congress intends to include a prohibition against retaliation in a statute, it does so." *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 190 (2005) (Thomas, J., dissenting). These peculiar facts lead to only one logical conclusion: whether the product of compromise or a change-of-heart, Congress in 1991 did not intend to include retaliation in Section 1981.

With no support in the text or the legislative history, the Seventh Circuit and the courts that preceded it have reached a conclusion that is simply wrong. An erroneous construction of a major federal statute, particularly one that strays so far afield from this Court's precedents and interpretive norms cannot stand. The Court should thus exercise its supervisory authority and grant *certiorari*. *Florida v. Rodriguez*, 469 U.S. 1, 7 (1984) ("[a]s the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation") (Stevens, J., dissenting); *Elder v. Holloway*, 510 U.S. 510, 505 (1994) (granting *certiorari* where the decision below "seemed to be out of line with the authorities").

C. The Seventh Circuit's Holding Effectively Eviscerates Several Portions of Title VII

Title VII has several unique features not shared with Section 1981. *Humphries*, 474 F.3d at 409 ("§ 1981 and Title VII have different but overlapping provisions . . .") (Easterbrook, dissent). Title VII has an exhaustion requirement and an administrative conciliation and mediation process. It has two interrelated statute of limitations periods. It also imposes caps on damages. And, perhaps most importantly, Title VII established an administrative agency, the Equal Employment Opportunity Commission, to "protect the public interest and further our national initiative against employment discrimination . . . ." *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 459 (6th Cir. 1998). Section 1981 contains none of these features.

The Seventh Circuit's holding quite obviously allows would-be plaintiffs to circumvent these features of Title VII by reading "§ 1981 to have the same substantive content as Title VII, but without [the] features" that "Congress thought necessary." *Humphries*, 474 F.3d at 409. The Respondent in this case did just that after missing the filing deadline under Title VII. *Id.* at 389. And, as Judge Easterbrook astutely pointed out below, "[t]his is not the first time a disgruntled employee has turned to § 1981 after missing the deadline for litigation under Title VII." *Id.* at 409. If the Seventh Circuit's decision is not reversed, employees will be able to bypass the EEOC and go right to court long after Title VII's statute of limitations period has run, without any meaningful opportunity for conciliation and mediation. This would not be inconsequential. Since 1997, the EEOC has successfully conciliated over 4000 disputes. *EEOC Charge Statistics,* https://www.eeoc.gov/stats.html (last viewed April 18, 2007). Another 10,881 disputes were otherwise settled with the

EEOC during that same time period. *Id.* The Seventh Circuit's decision could flood the federal courts with cases that might have been resolved at the administrative level.

Patterson advises against a construction of Section 1981 that facilitates such a result. *Patterson*, 491 U.S. at 182 ("[w]e should be reluctant . . . to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute"). This is particularly true where the circumvented statute provides coverage, as is the case here. *Id.* ("the availability of the latter statute [Title VII] should deter a tortuous construction of the former statute [Section 1981] to cover this type of claim"). Courts must not be permitted to "undo the work of Congress . . ." based on one statement in one committee report. *Frank's Nursery & Crafts, Inc.*, 177 F.3d at 459. Indeed, as this Court has made clear, "repeals by implication are not favored," permissible only when "the two statutes are in irreconcilable conflict." *Branch v. Smith*, 538 U.S. 254, 272 (2003). As already explained above, Title VII and Section 1981 are not in irreconcilable conflict. The two are only in conflict because of the circuit courts' atextual and unacceptably "tortuous" interpretation of Section 1981. This Court should grant *certiorari* and put an end to the senseless conflict by articulating a proper textual application of Section 1981.

CONCLUSION

A writ of *certiorari* should be issued to review the judgment and opinion of the Seventh Circuit Court of Appeals. If *certiorari* is not granted, the Court runs the risk of perpetuating the vacillation and uncertainty that has plagued this issue for forty years. The Court would also run the risk of tacitly endorsing an atextual construction of a

major federal statute that "demolishes components of Title VII that Congress thought necessary to expedite the resolution of disputes and resolve many of them out of court." *Humphries*, 474 F.3d at 409.

Respectfully submitted,

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