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P R O C E E D I N G S

(10:23 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 06-1431, CBOCS West v. Humphries. Mr. Hawkins.

ORAL ARGUMENT OF MICHAEL W. HAWKINS  
ON BEHALF OF THE PETITIONER

MR. HAWKINS: Mr. Chief Justice, and may it please the Court:

Based on the plain terms of section 1981, this Court's interpretation of that statute under Runyon, Patterson, and Domino's Pizza, as well as Congress's recognition of the distinction between discrimination and retaliation and this Court's decision in Burlington Northern, section 1981 does not contain a separate cause of action for retaliation.

The Court starts with a review of the text of the statute. Section 1981(a) says that all persons shall have the right, the same right as is enjoyed by white citizens to make and enforce contracts. Words like "the same," "equal," and "like" are all in 1981(a), and those words all have normal, plain, ordinary meaning, that is identical. So what section 1981 says is in the making and enforcing of contracts, all persons shall have identical rights as white citizens.

1 As we move into this issue --

2 JUSTICE ALITO: Do you see any meaningful  
3 difference between the language of 1981 and 1982 in this  
4 regard?

5 MR. HAWKINS: Justice Alito, I do, and in  
6 that context section 1981 was amended in 1991, and with  
7 a lot of this Court's precedent in terms of how statutes  
8 are viewed, they all have a life. This section 1981 has  
9 a new life when it was amended in 1981.

10 JUSTICE ALITO: Do you think that it was  
11 narrowed in 1981?

12 MR. HAWKINS: I think with respect to this  
13 issue, Your Honor, of retaliation, that it was. And I  
14 say it because of this. In 1991, Congress passed the  
15 1991 Civil Rights Act and in that act they also included  
16 retaliation for 2 U.S.C. 1212. So Congress was  
17 consciously thinking about this issue of retaliation.  
18 They had Patterson that had come before it, they had  
19 West Virginia Hospital that had come before it, saying  
20 you have to have specific terms, you have to deal with  
21 specific issues.

22 JUSTICE ALITO: Well, wasn't the purpose of  
23 the 1991 act to broaden the scope of 1981 rather than  
24 narrow it?

25 MR. HAWKINS: Your Honor, with respect to

1 the '91 act, it was supposed to specifically pick up the  
2 post-formation contract issues under Patterson.

3 JUSTICE SCALIA: Which is to say it was  
4 designed to overrule Patterson.

5 MR. HAWKINS: Well, Your Honor --

6 JUSTICE SCALIA: Not overrule. They can't  
7 overrule us, but change the law --

8 MR. HAWKINS: Well, it didn't --

9 JUSTICE SCALIA: -- so that Patterson would  
10 no longer be right.

11 MR. HAWKINS: It didn't change Patterson. I  
12 believe as Chief Judge Easterbrook said, Patterson has  
13 been cited some 27 times by this Court --

14 JUSTICE GINSBURG: "EES-ter-brook."

15 MR. HAWKINS: Or "EES-ter-brook." I'm  
16 sorry. Thank you, Your Honor.

17 By this Court, and in that context it is  
18 still good law. What it did was to clarify the issue of  
19 post-formation contracts.

20 JUSTICE KENNEDY: Do you mean Patterson  
21 would come out the same under 1981 as amended by the  
22 1991 act.

23 MR. HAWKINS: Yes. I think Patterson should  
24 come out the same, Your Honor.

25 JUSTICE KENNEDY: I think Congress would

1 have been quite amazed at that result.

2 JUSTICE SCALIA: I think that they would be  
3 astounded.

4 MR. HAWKINS: No. In the context of the new  
5 post-formation -- excuse me. I understood your question  
6 a little differently, Your Honor. Yes, it would come  
7 out differently if you were dealing with the precise  
8 issue in Patterson.

9 JUSTICE GINSBURG: But are you saying that  
10 before the 1991 amendment retaliation was included?

11 MR. HAWKINS: No. I would say, Justice  
12 Ginsburg, that before the 1991 amendment retaliation  
13 wasn't included and it wasn't included after the 1991  
14 amendment.

15 JUSTICE SCALIA: What change did the 1991  
16 amendment make then?

17 MR. HAWKINS: Well, it wasn't included --

18 JUSTICE SCALIA: You say it was intended to  
19 change the outcome of Patterson. In what respect? You  
20 say not in the respect of whether retaliation is  
21 included but in what respect then?

22 MR. HAWKINS: In respect to the  
23 post-formation. Patterson was dealing with those  
24 aspects of just the initial making and enforcing of a  
25 contract, not once you've got the contract established

1 and in this case employment, what happens, promotions,  
2 demotions, actions of that nature, Justice Scalia.

3 JUSTICE SCALIA: I don't understand you.  
4 Patterson said that post-formation actions were not  
5 covered, right?

6 MR. HAWKINS: Correct.

7 JUSTICE SCALIA: Retaliation is one, but  
8 just one of many post-formation actions, right?

9 MR. HAWKINS: Well, Your Honor --

10 JUSTICE SCALIA: What other post-formation  
11 actions were there that --

12 MR. HAWKINS: What other post-formation --

13 JUSTICE SCALIA: What was the post-formation  
14 action that was in action in Patterson?

15 MR. HAWKINS: Patterson was dealing with the  
16 issue about after you had the relationship could an  
17 employer take an adverse discriminatory action against  
18 the individual, and the Court said no. It was dealing  
19 with a harassment situation. Afterwards you could not  
20 have a cause of action in the post-formation situation.

21 JUSTICE KENNEDY: And Congress changed that  
22 and the case we have is also post-formation.

23 MR. HAWKINS: Well, but Congress changed it  
24 to say that it would include, in subsection 1981(b),  
25 that it would include certain specified post-formation

1 conduct with respect to --

2 JUSTICE SCALIA: It didn't specify them. I  
3 think your point is probably that it includes the same  
4 post-formation conduct that is prohibited at formation,  
5 which is to say discrimination on the basis of race,  
6 which is not retaliation; right?

7 MR. HAWKINS: It did not change that, that's  
8 correct, Your Honor. It did not add retaliation.  
9 And so what has taken place with respect to this issue  
10 of discrimination and retaliation and the reason that we  
11 say that it does not exist in section 1981 is Congress  
12 in some 30 statutes we've been able to run across has  
13 specifically included retaliation in provisions where  
14 they so applauded appropriate --

15 JUSTICE KENNEDY: Under your view, would  
16 harassment be prohibited by 1981 as amended?

17 MR. HAWKINS: If it is racial harassment,  
18 meaning the treating of someone differently than a white  
19 citizen because of their race, then it would be. That's  
20 the status issue and that's what was addressed in  
21 Burlington Northern in terms of the distinction that  
22 exists between discrimination and retaliation, one being  
23 based on the individual status, which is really what  
24 section 1981 is focused on.

25 JUSTICE KENNEDY: But the term "harassment"



1 is not included in 1981(b).

2 MR. HAWKINS: Well, if it's just harassment,  
3 Justice Kennedy, in the abstract -- I'm harassing  
4 somebody because I don't like them -- whether they're  
5 black or white, that wouldn't be actionable under  
6 section 1981. You have to have a focus of "I'm taking  
7 this action against the individual because of the color  
8 of their skin, because of their race."

9 JUSTICE GINSBURG: Why isn't that true here?  
10 Because we're not talking about retaliation in a vacuum;  
11 we're talking about retaliation for complaining about  
12 race discrimination.

13 MR. HAWKINS: Your Honor, if you have a  
14 situation where -- and I think it's even addressed in  
15 some of the Respondent's brief. And many of the cases  
16 going back in the '70s and '80s that were even cited by  
17 the Seventh Circuit, all deal with situations even where  
18 they were, if you want to call them retaliation, they  
19 were retaliation based on directly the person's color of  
20 their skin. They were this particular supervisor or  
21 this employer is taking this or that action against  
22 somebody because they're a black person. They're not  
23 taking --

24 JUSTICE GINSBURG: What kind of -- what kind  
25 of right to be free from discrimination would there be

1 if once one complains one can be fired, demoted? That  
2 would not be a very effective right, would it be?

3 MR. HAWKINS: Well, Your Honor, I mean there  
4 are alternatives for that particular issue. In this  
5 particular case, there was Title VII that fully  
6 protected the Respondent from any form of discrimination  
7 or retaliation. In addition, in the State of Illinois  
8 there are State statutes.

9 JUSTICE GINSBURG: But one can say the same  
10 thing for Title VII and, say, the Equal Pay Act. There  
11 are a lot of overlapping antidiscrimination laws. That  
12 doesn't mean that we shrink one because another exists.

13 MR. HAWKINS: No, but there is precedent for  
14 the fact that where one law does cover a particular  
15 situation, we don't go about removing that impact. So  
16 Title VII clearly does cover this particular situation  
17 of a retaliation, a pure retaliation claim.

18 JUSTICE SCALIA: Why didn't they -- why  
19 didn't they proceed under Title VII then? What -- what  
20 help --

21 MR. HAWKINS: Well, they did proceed under  
22 Title VII, and that was dismissed by the Federal court  
23 because he did not pay his proper filing fee on time in  
24 compliance with Title VII requirements.

25 JUSTICE GINSBURG: Well, that's -- that's

1 often the case, isn't it? I mean, the argument you just  
2 made could go as well for somebody who uses 1981 to  
3 complain about a racially-based demotion wasn't able to  
4 use Title VII because he filed too late. That's a  
5 typical use of 1981; is it not?

6 MR. HAWKINS: Well, it can be a use, yes,  
7 Your Honor, that people do use it for that very purpose.

8 JUSTICE GINSBURG: So what is the difference  
9 between this case -- you say, well, there's Title VII  
10 and this would erode Title VII. Doesn't it erode Title  
11 VII when I'm complaining about, say, a demotion?

12 MR. HAWKINS: No, because they can coexist  
13 with respect to those particular issues, and this Court  
14 has recognized that those two statutes can coexist.

15 JUSTICE SCALIA: Does -- does the person who  
16 is retaliated against, that is the person who complained  
17 and is retaliated against, have to be the person who was  
18 discriminated against?

19 MR. HAWKINS: Well, Your Honor, based on a  
20 reading of Domino's, it would certainly appear that the  
21 individual who is making the complaint to have  
22 protection must be the individual who has the  
23 contractual right, as opposed to complaining about a  
24 third person.

25 CHIEF JUSTICE ROBERTS: Now, is your

1 position that in that situation a retaliation is not  
2 covered by 1981?

3 MR. HAWKINS: Yes, Your Honor.

4 CHIEF JUSTICE ROBERTS: I would have thought  
5 that you could argue that it's direct discrimination.  
6 In other words, if you're fired, whatever form the  
7 retaliation takes, that, as Justice Ginsburg suggests,  
8 that that would be on the basis -- basis of race. And I  
9 thought your position, or at least your position could  
10 be narrowed to say it's only when the individual against  
11 whom the retaliation takes place is not the individual  
12 complaining of the direct discrimination that your  
13 position would be pertinent.

14 MR. HAWKINS: Well, Your Honor, we take the  
15 position that in order to have a retaliation claim under  
16 section 1981, it really has to be a discrimination  
17 claim. You have to be able to show that you --

18 CHIEF JUSTICE ROBERTS: Well, that's right.  
19 That's why I thought the person directly discriminated  
20 against would be able to phrase the retaliation claim  
21 certainly as a discrimination claim.

22 MR. HAWKINS: Well, Your Honor, they can  
23 make -- phrase it however they want to in terms of their  
24 particular complaint, but the issue in terms of the  
25 analysis under the plain text of section 1981 is whether

1 or not a white person in this situation is being treated  
2 differently with respect to making a similar complaint.

3 JUSTICE SCALIA: Surely -- surely, you don't  
4 mean what you just said a minute ago, that in order to  
5 have a retaliation claim you must have a discrimination  
6 claim.

7 MR. HAWKINS: Well --

8 JUSTICE SCALIA: Surely it's your position  
9 that even when you have a discrimination claim, you  
10 don't have a retaliation claim. I thought it was your  
11 position there are no retaliation claims under this  
12 statute.

13 MR. HAWKINS: There is no retaliation claim  
14 in the abstract under this statute; correct.

15 JUSTICE SCALIA: Period. Okay.

16 JUSTICE KENNEDY: Do you practice in this --

17 JUSTICE GINSBURG: In this case you would --

18 JUSTICE KENNEDY: -- in this area --

19 MR. HAWKINS: Yes, Your Honor.

20 JUSTICE KENNEDY: Perhaps you can maybe just  
21 tell me based on your experience: After 1981 was  
22 amended, did 1981(b) supersede Title VII in  
23 run-of-the-mill termination and harassment cases?

24 MR. HAWKINS: No, Your Honor. In my 32  
25 years of experience of doing labor and employment law,

1 and particularly in employment law, individuals are not  
2 typically bringing 1981 retaliation claims, where most  
3 --

4 JUSTICE KENNEDY: No, no, not retaliation.  
5 I mean harassment, discharge, et cetera.

6 MR. HAWKINS: Did we see a big spurt in  
7 those?

8 JUSTICE KENNEDY: Yes.

9 MR. HAWKINS: No, Your Honor.

10 JUSTICE KENNEDY: Why not? There's a longer  
11 statute of limitations. There's no cap on damages.

12 MR. HAWKINS: From our experience, more and  
13 more people -- there's been a trend to go to State court  
14 because more and more States --

15 JUSTICE KENNEDY: Well, then I have to  
16 refine the hypothetical. I don't want to take too much,  
17 but in Federal court --

18 MR. HAWKINS: In Federal --

19 JUSTICE KENNEDY: -- because it does seem to  
20 me that Congress told us: We don't care if there's an  
21 overlap between 1981 and Title VII, we don't care if  
22 there's a longer statute of limitations, we don't care  
23 if there's no cap on damages; we want 1981 to work. And  
24 that's -- 1981 does apply in a large number of  
25 employment discrimination cases.

1 MR. HAWKINS: In the Federal system.

2 JUSTICE KENNEDY: And if that's true, then  
3 why do we worry about retaliation? If Congress is not  
4 concerned about it, why should we be?

5 MR. HAWKINS: Your Honor, in answer to your  
6 question, yes, we've seen more adding on section 1981  
7 claims with Title VII claims in Federal court. So the  
8 answer to that question is yes.

9 JUSTICE GINSBURG: Of course, it's just for  
10 race claims, and Title VII covers sex, national origin,  
11 religion.

12 MR. HAWKINS: Title VII covers race and  
13 retaliation.

14 JUSTICE GINSBURG: Yes, but my point is  
15 that 1981 would not be available to other categories.  
16 It's only race, right?

17 MR. HAWKINS: Correct.

18 JUSTICE SCALIA: Any other advantages to  
19 1981? You get attorney's fees in 1981?

20 MR. HAWKINS: Longer statute of limitations,  
21 similar attorney's fees, yes.

22 JUSTICE SCALIA: But you get that under  
23 Title VII?

24 MR. HAWKINS: Yes, you do, but it's a longer  
25 statute of limitations, and it's uncapped damages

1 because of the caps under Title VII that exists.

2 JUSTICE BREYER: What happens in just a  
3 basic employment case? I'm trying to remember from law  
4 school. Somebody's contract with another man, he's the  
5 employee, and he says -- the employer says: I'm firing  
6 you because you won't help me rob the bank. Or the  
7 employee goes and he finds some money in a wallet or  
8 something on the street, and he says, I'm going to  
9 return it to the rightful owner, and the employer says,  
10 I hate rightful owners, so I'm firing you. Now, when  
11 the employee goes to court, I take it -- my vague  
12 recollection is the employer can't do that.

13 MR. HAWKINS: Well, it's going to depend  
14 upon the State and --

15 JUSTICE BREYER: The State law -- some  
16 kind of policy against that from the State law, he  
17 couldn't do it?

18 MR. HAWKINS: That's correct.

19 JUSTICE BREYER: Well, here we have a  
20 Federal statute that says that a black person shall have  
21 the same right to make a contract as a white person.  
22 But if nobody ever can report on that, that they're not,  
23 it's not going to be the same right; it's going to be  
24 zero right. So, why by parity of reasoning wouldn't  
25 this provide for the same kind of thing?



1           MR. HAWKINS: Well, Justice Breyer, if white  
2 individuals are also terminated for making complaints --

3           JUSTICE BREYER: Oh, no. It would make no  
4 difference whether you're a thief in my example, whether  
5 you're good-hearted. It doesn't matter who you are.  
6 You could even be somebody from another country. You  
7 don't have to be American. You could be anything. But  
8 the State law tries to follow out that -- that policy of  
9 not having bank robberies and of returning money to  
10 rightful owners.

11           Well, here we have a Federal policy, and the  
12 Federal policy is that black people shall be treated the  
13 same as white in respect to making a contract. But were  
14 the law to allow you to fire anybody who complained  
15 about it, then black people wouldn't have that right.  
16 And therefore the policy is that you can't do it under  
17 this statute because otherwise the written policy is  
18 ineffective.

19           I'm just remembering that from my written --  
20 from my policy arguments that were in contract law.

21           MR. HAWKINS: Well, Your Honor, I would go  
22 back to the plain, clear terms with their ordinary  
23 meaning, and it says "equal right as white citizens,"  
24 and it talks about the same and that --

25           JUSTICE BREYER: Does it say anywhere, by

1 the way, in that statute that a black person who is  
2 discriminated against can go to court and file a  
3 lawsuit?

4 MR. HAWKINS: If they have --

5 JUSTICE BREYER: Does it say that?

6 MR. HAWKINS: If they are not being treated  
7 --

8 JUSTICE BREYER: Yes. Does it say is in  
9 that statute, 1981?

10 MR. HAWKINS: Does it have the words "you  
11 may go into court for lawsuit"?

12 JUSTICE BREYER: Yes, correct.

13 MR. HAWKINS: No, it does not.

14 JUSTICE BREYER: No. Okay.

15 JUSTICE SCALIA: Mr. Hawkins, is there a  
16 Federal common law? Are we sitting here to apply a  
17 Federal common law?

18 MR. HAWKINS: No, we're here dealing dealing  
19 with Federal statutes.

20 JUSTICE SCALIA: So State courts can do  
21 that. They can make it up; can't they?

22 MR. HAWKINS: State courts develop public  
23 policy. They do.

24 JUSTICE BREYER: And have we developed a  
25 policy here in creating a right of action under this

1 1981?

2 MR. HAWKINS: Rights of action have existed  
3 under Federal statute, that's correct.

4 JUSTICE BREYER: Which is the statute that  
5 does -- is there a statute that specifically gives you a  
6 right to sue under 1981? Is there a statute?

7 MR. HAWKINS: Well, this Court has  
8 established that, particularly with respect to section  
9 1981, that an individual does have a private right of  
10 action.

11 JUSTICE BREYER: It has established it.  
12 Yes, that's my point: That the Federal court implied  
13 from the statute a right of action.

14 Now, if they're implying a right of action  
15 from the statute, why wouldn't courts also imply those  
16 rights of action necessary to make the statute  
17 effective?

18 MR. HAWKINS: Because this Court in a  
19 variety of cases such as Russello, West Virginia,  
20 University Hospital, Arlington Public Schools, has said  
21 that we look at the text and we examine the text of the  
22 statute, and unless it is ambiguous -- and I would  
23 certainly submit that words like "same," "like," "equal"  
24 are not ambiguous terms -- that we leave it alone; that  
25 that's --

1 JUSTICE BREYER: That isn't the word I was  
2 looking for. The word I was looking for in 1981(a) is  
3 the word "and can bring a lawsuit in Federal court." I  
4 don't see that written there.

5 MR. HAWKINS: It's not in there, Your Honor.

6 JUSTICE BREYER: No, correct. So we've  
7 implied that. And therefore, if I can imply that, why  
8 can't we imply a lawsuit on behalf of those who need the  
9 lawsuit to make the right effective?

10 MR. HAWKINS: Because --

11 JUSTICE BREYER: That was my basic question.

12 MR. HAWKINS: Well, in response to it, I  
13 would simply say that you have to look to the text as to  
14 how you're trying to apply it, and what you're applying  
15 it to, and this particular statute protects against  
16 different treatment, not specifically with respect to  
17 some other --

18 JUSTICE SCALIA: Mr. Hawkins, don't we have  
19 a whole line of recent cases which say we have set our  
20 face against implying causes of action?

21 MR. HAWKINS: Yes.

22 JUSTICE SCALIA: A whole bunch of recent  
23 cases saying we're not going to do that any more.

24 MR. HAWKINS: Yes, Your Honor.

25 JUSTICE SCALIA: We used to do it, but we

1 said we're not going to do it any more.

2 MR. HAWKINS: That's correct, Your Honor.

3 JUSTICE SCALIA: So why don't you invoke  
4 those?

5 MR. HAWKINS: Well, I -- we -- we do invoke  
6 those in our brief, and those are all part of what I'm  
7 getting at in terms of -- I mean Arlington School Board  
8 was one of those cases.

9 CHIEF JUSTICE ROBERTS: We do have those  
10 recent cases, but we also have the Sullivan case  
11 interpreting -- interpreting 1982, which arose under the  
12 prior approach to these questions. And my question for  
13 you is: Under principles of stare decisis, which body  
14 do we follow, the earlier case interpreting 1982 under  
15 the more freewheeling approach to statutory  
16 interpretation or this later body of law that says we're  
17 not going to do that any more?

18 MR. HAWKINS: Well, Mr. Chief Justice,  
19 particularly since this Court has Runyon, Patterson, and  
20 Domino's interpreting section 1981, that's what to look  
21 at to interpret section 1981, not Sullivan, which  
22 interprets a different statute. They all --

23 JUSTICE GINSBURG: But it's a statute that  
24 has the same derivation. They're both from the 1866  
25 Civil Rights Act, and they're both set up the same way.

1 1982 also says "same" as 1981 does. So wouldn't it be  
2 odd to take these twin measures and say one includes  
3 retaliation and the other doesn't?

4           Wouldn't Congress, when it revised 1981 in  
5 1991 been aware of Sullivan and expect this Court to  
6 interpret those twin statutes the same way?

7           MR. HAWKINS: Justice Ginsburg, with all due  
8 respect, I would think not; and the reason is this  
9 Court, when it acted in 1991, had in front of it to look  
10 at Patterson, which was saying, we're going to interpret  
11 section 1981 in a straightforward, plain-text situation.  
12 In fact, Patterson says in it if the right is not  
13 specifically set forth in section 1981, there is no  
14 relief.

15           Then after that, you had West Virginia,  
16 which was decided in March of 1991, again taking that  
17 same sort of approach with respect to if it's not in the  
18 statute, we're not going to make it. It may be that  
19 it's a job left for Congress. So they act on those and  
20 pass the law in November of '91.

21           That's the context. And even in the Jackson  
22 case, in looking back, Justice O'Connor ended up saying  
23 that what we are looking back at is 1972 following 1969.  
24 So in 1991 we're looking at section 1981 being amended,  
25 and we're looking at Patterson and West Virginia to give

1 the context.

2 JUSTICE GINSBURG: Wouldn't you look at what  
3 Congress was trying to do in the 1991 amendments? That  
4 is, Congress changed the law that this Court had  
5 declared; and the message, the essential message, was  
6 this Court has been too stingy in its interpretation of  
7 Title -- of 1981, so we're going to change it.

8 MR. HAWKINS: Correct.

9 JUSTICE GINSBURG: And it seems to me that  
10 we wouldn't be hearing -- we wouldn't be grasping that  
11 message.

12 MR. HAWKINS: But, Your Honor, in --

13 JUSTICE SCALIA: Why do you agree with that?  
14 I don't understand why you agree with that.

15 MR. HAWKINS: Well, I think that there was  
16 some perspective. I don't personally agree with it, but  
17 I think there was some --

18 JUSTICE SCALIA: Then don't say "yes." I  
19 mean, it may well be that Congress thought our  
20 interpretation of 1981 was perfectly reasonable, or it  
21 had no idea what our interpretation of 1981 was. But  
22 they know what they wanted to do in -- in 1991. Okay?

23 MR. HAWKINS: I agree, Justice Scalia.

24 JUSTICE SCALIA: That's all we know for  
25 sure.

1 MR. HAWKINS: Right.

2 JUSTICE SCALIA: That Congress wanted that  
3 disposition. They weren't necessarily disapproving our  
4 prior decision. Is there anything in the statute which  
5 said the Supreme Court made a bad decision, and we're  
6 going to fix it?

7 MR. HAWKINS: No. There's nothing in that  
8 at all.

9 JUSTICE GINSBURG: There is something to  
10 that effect in the legislative history that explains why  
11 Congress made the amendments it did in 1991.

12 MR. HAWKINS: And we could have a whole  
13 debate about the legislative history and whether it --

14 JUSTICE BREYER: Why not? Because the  
15 legislative history does say, when they passed this,  
16 that the new law will involve a claim, allow them to  
17 make a claim of harassment, discharge, demotion,  
18 promotion, transfer, retaliation, and hiring.

19 MR. HAWKINS: Justice Breyer --

20 JUSTICE BREYER: So when they write that in  
21 the House report, isn't that some evidence that they did  
22 look back and see Sullivan, and they did think that in  
23 1982 there's a retaliation action, and therefore in 1981  
24 there is one? Isn't there at least evidence that there  
25 were people in Congress thinking that?



1 MR. HAWKINS: Yes, that's evidence that  
2 somebody in Congress was thinking that.

3 JUSTICE BREYER: And that someone --

4 MR. HAWKINS: But I think if we just use an  
5 analogy with contract law, if we're negotiating a  
6 contract --

7 JUSTICE SCALIA: Did the committee vote on  
8 that committee report?

9 MR. HAWKINS: No, they did not.

10 JUSTICE SCALIA: So how do you know that  
11 anybody in Congress thought that?

12 MR. HAWKINS: Well, somebody wrote it in a  
13 report.

14 JUSTICE SCALIA: It could have been a  
15 teenager who wrote the report.

16 MR. HAWKINS: It doesn't have any  
17 significance with respect to this legislation. What I'm  
18 saying is I think it works against -- that argument  
19 works against what ended up being in the statute.

20 JUSTICE KENNEDY: Well, I think we're  
21 familiar with that debate. But if we can look -- look  
22 at the statute, if I ask you why isn't this an enjoyment  
23 of a benefit, a privilege or term or a condition of the  
24 contract, is your answer that this was an at-will  
25 contract?

1           MR. HAWKINS: I think the Seventh Circuit is  
2 saying we're not making the at-will argument in this  
3 case, and that's not where we are going.

4           JUSTICE BREYER: All right, so then why is --  
5 if it's not --

6           MR. HAWKINS: I mean, it could be made and  
7 it could be developed.

8           JUSTICE BREYER: All right, because I don't  
9 think that's a good argument. Why isn't this a  
10 benefit or a privilege that's been denied?

11          MR. HAWKINS: Whether it -- it may well be a  
12 benefit or a privilege, Your Honor, but it isn't shown  
13 that there's different treatment than a white employee.  
14 I mean just to say, I exercised this benefit and  
15 something happened to me negatively, therefore, I have a  
16 claim under section 1981, that's not where it's going.

17          JUSTICE STEVENS: Mr. Hawkins, is it at all  
18 relevant on the issue that the several courts of appeals  
19 have come out the same way both before the 1991  
20 amendment and since the 1991 amendment, and opinions to  
21 the contrary are pretty scarce? Does that have any  
22 weight in a sort of a stare decisis sense?

23          MR. HAWKINS: No. Stare decisis applies  
24 when it's the same facts and the same set of law, and  
25 this is not the same facts and the same set of law.

1 This is section 1991, Your Honor.

2 JUSTICE STEVENS: No, but even under the  
3 1991 the courts of appeals have been fairly uniform on  
4 the answer to the very issue we're confronting here.  
5 Isn't that true?

6 MR. HAWKINS: They have, but I would submit,  
7 Your Honor, that they haven't been following the text of  
8 the statute. They have just been relying on Sullivan.

9 JUSTICE STEVENS: My question is, are they  
10 entitled to give any stare decisis weight to a consensus  
11 among all the courts of appeals both before and after  
12 the 1991 amendment.

13 MR. HAWKINS: I don't believe the Supreme  
14 Court has to give stare decisis --

15 JUSTICE STEVENS: Don't have to, but does it  
16 make sense in trying to understand the stability of the  
17 law generally?

18 MR. HAWKINS: Based on our argument it does  
19 not, Your Honor.

20 Thank you. I would like to reserve my time,  
21 Mr. Chief Justice.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
23 Ms. Hyndman.

24 ORAL ARGUMENT OF CYNTHIA H. HYNDMAN

25 ON BEHALF OF THE RESPONDENT

1 MS. HYNDMAN: Thank you, Mr. Chief Justice,  
2 and may it please the Court:

3 I'd like to address the questions that  
4 Justice Ginsburg and Justice Breyer raised about the  
5 effectiveness of section 1981 if there is no right to  
6 bring an action for retaliation. Section 1981 doesn't  
7 provide any specific remedies or any type of enforcement  
8 mechanism. It can only be enforced through a private  
9 lawsuit. Petitioner's basically asking this Court to  
10 allow an employer to be able to fire an employee who  
11 brought a private lawsuit to enforce his section 1981  
12 rights.

13 If the Court were to allow employers to do  
14 that, then any employer or contracting party would have  
15 the ability to exempt themselves from section 1981  
16 liability. Take the example of a person who complains  
17 that he was not promoted because of his race in  
18 violation of section 1981. His employer fires him for  
19 making that complaint. If he did not have protection  
20 under section 1981 against retaliation, he would never  
21 have the opportunity to remedy that discriminatory  
22 promotion.

23 JUSTICE SCALIA: That's a good argument to  
24 Congress. Congress should enact a retaliatory  
25 provision. But the statute says what it says, and what

1 it says is that there has to be discrimination on the  
2 basis of race. And firing somebody for -- in  
3 retaliation for making a complaint is not firing him on  
4 the basis of race. Indeed, the person making the  
5 complaint may not have been the person who was racially  
6 discriminated against. You would acknowledge that you  
7 couldn't fire -- if retaliations claims lie, you  
8 couldn't fire a white whistleblower who says this  
9 employer has been discriminating against blacks.  
10 Wouldn't that white whistleblower have a cause of action  
11 for being fired?

12 MS. HYNDMAN: They would in fact have a  
13 cause of action, Justice Scalia. But this Court --

14 JUSTICE SCALIA: On your theory, but that  
15 has nothing to do with the text of the statute, which  
16 requires discrimination on the basis of race. I agree  
17 with you entirely that it would make sense to provide a  
18 cause of action for retaliation, but we don't write  
19 statutes. We read them. And there's nothing in this  
20 statute that says that.

21 MS. HYNDMAN: This Court held in the Jackson  
22 case that discrimination on the basis -- that  
23 retaliation when there was a complaint about sex  
24 discrimination constituted discrimination on the basis  
25 of sex. So it follows that here under section 1981 if

1 someone makes a complaint about race discrimination and  
2 they are retaliated against, that they are being  
3 discriminated against on the basis of race.

4 JUSTICE SCALIA: Well, you can say that, but  
5 it doesn't make any sense.

6 MS. HYNDMAN: Well, that's what the Court  
7 held in Jackson, Your Honor.

8 JUSTICE SCALIA: It didn't make any sense  
9 then, either.

10 (Laughter.)

11 CHIEF JUSTICE ROBERTS: Counsel, if we rule  
12 in your favor, why would anyone ever bring a Title VII  
13 action if they could bring a 1981 action?

14 MS. HYNDMAN: There's a lot of reasons to  
15 bring a Title VII action, Your Honor. Title VII allows  
16 an employee to go to the EEOC, and the EEOC has a lot of  
17 advantages. And so you can bring both a Title VII and a  
18 section 1981 claim.

19 CHIEF JUSTICE ROBERTS: All right. So if  
20 you bring -- you'd at least bring them both, right,  
21 because --

22 MS. HYNDMAN: That's correct.

23 CHIEF JUSTICE ROBERTS: -- 1981 allows you  
24 to get out of the Title VII cap on damages?

25 MS. HYNDMAN: That's correct.

1 CHIEF JUSTICE ROBERTS: Well, isn't that  
2 kind of rendering Congress' careful -- I mean the 1991  
3 legislation was a careful compromise. In exchange for  
4 the expansions of Title VII, they put caps on the  
5 damages. You would allow them to keep the expansion,  
6 but do away with the caps.

7 MS. HYNDMAN: Congress said specifically  
8 in -- in the 1991 Civil Rights Act that the damage caps  
9 do not apply if an employee has a right under section  
10 1981 and so --

11 CHIEF JUSTICE ROBERTS: Well, you're just  
12 begging the question. You're assuming you have the  
13 right that's at issue here today.

14 MS. HYNDMAN: Well -- and we do have the  
15 right that's at issue here today, because --

16 JUSTICE GINSBURG: When were -- when there  
17 damages, as opposed to back pay, added as a remedy for  
18 Title VII?

19 MS. HYNDMAN: Title VII damages were added,  
20 compensatory and punitive damages were added, in the  
21 1991 Civil Rights Act.

22 JUSTICE GINSBURG: So it wasn't that it was  
23 cut back, as the Chief suggested.

24 MS. HYNDMAN: That's right.

25 JUSTICE GINSBURG: It's the first time ever

1 Title VII plaintiffs were entitled to get money damages  
2 as distinguished from simply back pay?

3 MS. HYNDMAN: That's absolutely --

4 CHIEF JUSTICE ROBERTS: Well then, why do  
5 they put the caps in? I mean, I do think that is a  
6 limitation on the remedy they provided. They provided a  
7 damage remedy with a very clear cap and it's not a  
8 particularly generous cap, either.

9 MS. HYNDMAN: That's correct.

10 CHIEF JUSTICE ROBERTS: And you would allow  
11 them to completely obliterate that cap under any case  
12 that could be brought under 1981.

13 MS. HYNDMAN: And Congress clearly made  
14 that -- made that choice.

15 JUSTICE KENNEDY: Well, you say it's clear,  
16 but neither you or the government seems to tell me any  
17 words in this statute. Your argument is that we should  
18 create a cause of action in order to make this  
19 effective. I understand that argument. I think the  
20 Court's cases stand against it, and if you want to --  
21 but it seems to me that you're admitting that nothing in  
22 the words of the statute as amended help you. And the  
23 government -- which as well is an impairment, which I  
24 think is quite wrong because that's not what section (c)  
25 is intended for. But that's almost an admission on the



1 government's part that it can't find any words in  
2 section (b) either.

3 MS. HYNDMAN: The words in the statute that  
4 provide the basis for this claim is that you are  
5 entitled to the same rights to make and enforce  
6 contracts as white citizens. And this Court has  
7 consistently interpreted that to mean --

8 JUSTICE KENNEDY: But that was there  
9 before -- but that was there as of the time of  
10 Patterson.

11 MS. HYNDMAN: That's correct. And this  
12 Court --

13 JUSTICE KENNEDY: So then Congress did  
14 nothing by the amendment to help your case.

15 MS. HYNDMAN: What the Court did to help our  
16 case was that after Patterson was decided and before the  
17 section -- before the Civil Rights Act of 1991 was  
18 passed, the lower courts had interpreted Patterson to  
19 restrict retaliation claims because they generally  
20 involve post-formation conduct. And what Congress made  
21 clear in the -- in the Civil Rights Act of 1991 is that  
22 they wanted to have protection throughout the entire  
23 contractual relationship.

24 JUSTICE KENNEDY: Patterson was not a  
25 retaliation case.

1 MS. HYNDMAN: That's correct, Your Honor.

2 JUSTICE KENNEDY: Patterson was a discharge  
3 and harassment case.

4 MS. HYNDMAN: That's correct.

5 JUSTICE KENNEDY: And the words do seem to  
6 cover that.

7 JUSTICE STEVENS: No. But your point is  
8 that Patterson made a number of lower courts think that  
9 retaliation was no longer a viable cause of action.

10 MS. HYNDMAN: That's absolutely right,  
11 Justice --

12 JUSTICE STEVENS: Before Patterson they had  
13 all thought retaliation was a cause of action.

14 MS. HYNDMAN: They consistently thought  
15 there was a cause of action for retaliation based upon  
16 Sullivan.

17 JUSTICE KENNEDY: But nothing that you  
18 argued so far shows that the words of the statute as  
19 amended -- that is to say new subsection (b) -- help your  
20 case.

21 MS. HYNDMAN: The words of the statute that  
22 help us establish the cause of action are that it  
23 made -- that Congress made clear that the entire  
24 contractual relationship would be covered from the  
25 beginning of the contractual relationship through the

1 end, through termination. And coupling that with the  
2 original words of the statute that lower courts had  
3 interpreted to allow a cause of action for retaliation  
4 and with subsection (c), which uses broader language, it  
5 says "impairment by discrimination" -- under this  
6 Court's holding in Jackson --

7 JUSTICE KENNEDY: I do not read subsection  
8 (c) as giving substantive rights. I mean, you can argue  
9 about that. I think you have to talk about (b), and I  
10 think you have a valid point when they say that they're  
11 extending the protection for the life of the contract.  
12 But I still want to know what particular words in  
13 section (b) you rely on? "Benefit"? "Privilege"?

14 MS. HYNDMAN: Any of those could apply,  
15 Justice Kennedy. But the -- what Congress was  
16 legislating against was this Court's restriction in  
17 Patterson and saying that the rights that are protected  
18 are only those rights at the making of the contract and  
19 the enforcement of the contract. And they expanded the  
20 language to cover the entire contractual relationship.  
21 So that, for example, here where you have a termination  
22 caused by retaliation, then you would have a cause of  
23 action for retaliation under the statute.

24 JUSTICE SCALIA: I guess those court of  
25 appeals cases pre-1991 that found there was a

1 retaliation claim, right, those cases were just wrong as  
2 to whether there was any post-contract claim? Right? I  
3 mean, they were wrong about that. Patterson, in effect,  
4 said you're wrong.

5 MS. HYNDMAN: Patterson said you were wrong.

6 JUSTICE SCALIA: So if they were wrong about  
7 whether there's a post-contract claim, why wouldn't they  
8 be wrong about whether there's a retaliation claim?

9 MS. HYNDMAN: There were --

10 JUSTICE SCALIA: I don't know why we should  
11 give deference to them on the one point when they've  
12 been proven wrong on the other one.

13 MS. HYNDMAN: They based that on -- on this  
14 Court's reading in Sullivan. And Sullivan interpreted  
15 the companion statute to section 1981, which was section  
16 1982.

17 JUSTICE STEVENS: Because it's ironic to say  
18 all those cases were wrong when Congress agreed with  
19 them and disagreed with Patterson.

20 MS. HYNDMAN: That's correct.

21 JUSTICE BREYER: Well, is the rationale of  
22 those cases -- and it's important to get the right  
23 rationale. If I say this and I'm wrong tell me I'm  
24 wrong. And I thought that the heart of it is not that  
25 the retaliated -- the act of retaliation is

1 discrimination. It isn't. What they say is when the  
2 white man helps the black man from being discriminated  
3 against, it falls within the statute, not because you've  
4 discriminated against the black man, but because if it  
5 didn't fall within the statute it would seriously erode  
6 or destroy the black man's right. That's what it seemed  
7 to me Douglas said in Sullivan.

8 MS. HYNDMAN: That's correct, Justice  
9 Breyer.

10 JUSTICE BREYER: And so then we're looking  
11 very hard in a place for a word that couldn't be there.

12 MS. HYNDMAN: I would agree with that.

13 JUSTICE KENNEDY: But that was true in  
14 Sullivan because a property owner who wants to sell is  
15 in a particularly advantageous position to enforce the  
16 rights of the buyer. It's part of his own contract.  
17 And to extend it to the situation we have here is quite  
18 an extension of Sullivan in my view.

19 MS. HYNDMAN: Well, I would disagree with  
20 that respectfully, Justice Kennedy. I would say here,  
21 when you have the person who was the victim of the  
22 discrimination, who was also -- who was complaining about  
23 the discrimination and then gets fired, he's in actually  
24 a better position than the white homeowner was in  
25 Sullivan.

1 CHIEF JUSTICE ROBERTS: When you agreed with  
2 Justice Breyer that we're looking for a word that  
3 couldn't be there, you said yes, but it is in fact a  
4 word that is there in about 37 other statutes, right?

5 MS. HYNDMAN: Those statutes --

6 CHIEF JUSTICE ROBERTS: The word could be  
7 there. I'm not saying whether it has to be there or  
8 not. But it certainly could be there, and it's not  
9 here.

10 MS. HYNDMAN: The word "retaliation" --

11 CHIEF JUSTICE ROBERTS: Yes.

12 MS. HYNDMAN: -- does not appear in -- in  
13 those -- there's actually very few Federal statutes where  
14 the actual word "retaliation" appears. But the other  
15 statutes that --

16 CHIEF JUSTICE ROBERTS: But they provide a  
17 specific cause of action for retaliation, correct?

18 MS. HYNDMAN: They do, but there is no  
19 specific cause of action provided in section 1981 at  
20 all. And this Court has already held that there is a  
21 private cause of action under section 1981, and what  
22 we're asking --

23 CHIEF JUSTICE ROBERTS: And that gets me to  
24 the -- this -- the question I asked your friend and I'll  
25 ask you as well. I think you have a case under Sullivan,

1 which recognized, although it's 1982, this type of  
2 action. But Sullivan would not come out the same way  
3 today given Alexander against Sandoval and our new  
4 approach to statutory interpretation. So if you're  
5 concerned about stare decisis, which body of law do you  
6 give effect to, the Sullivan case or our more recent  
7 cases on how to read statutes?

8 MS. HYNDMAN: I think you give effect to  
9 Sullivan in this situation, and the reason is because at  
10 the time that Congress was legislating and amending  
11 section 1981, and it was acting against the backdrop of  
12 this Court's jurisprudence, it had Patterson in front of  
13 it, it had -- it knew that Sullivan was still good law.  
14 It knew that this Court had repeatedly directed that  
15 section 1981 and section 1982 be construed similarly;  
16 and Patterson did not address the specific situation  
17 that was in Sullivan, that is whether you could bring a  
18 cause of action for retaliation.

19 CHIEF JUSTICE ROBERTS: Of course, by 1991  
20 our new approach to reading statutes was pretty clearly  
21 established.

22 MS. HYNDMAN: That's correct. But --

23 CHIEF JUSTICE ROBERTS: So if Congress were  
24 looking at both of those bodies of law, then wouldn't  
25 the normal care be for it to put in a retaliation

1 provision?

2 MS. HYNDMAN: If they were legislating on a  
3 clean slate I might agree with that Justice -- Chief  
4 Justice Roberts. But in this situation they were not  
5 legislating on a clean slate. What they were doing was  
6 amended one of the oldest civil rights acts in this  
7 country, the Civil Rights Act of 1866. And given that  
8 they were going to amend that law and they amended it  
9 based upon what this Court had said in Patterson, and I  
10 think under those circumstances it -- they wouldn't  
11 necessarily go and create and write a reticulated  
12 statute such as the modern antidiscrimination statutes  
13 are.

14 JUSTICE ALITO: You're saying they would  
15 have -- you're saying they would have added an express  
16 retaliation provision in 1981 -- in 1991 if they had  
17 thought that the mode of reasoning in Sullivan was no  
18 longer sound? Is that what this comes down to?

19 MS. HYNDMAN: I don't know that that's  
20 necessarily true. I think they -- they legislated  
21 against the backdrop both of Sullivan and the lower  
22 courts' consistent recognition of a cause of action.

23 JUSTICE ALITO: When you say they legislated  
24 against the backdrop, you're -- are you not relying on  
25 something they didn't do, rather than anything that they



1 did?

2 MS. HYNDMAN: I wouldn't necessarily agree  
3 with that, Justice Alito. I would --

4 JUSTICE GINSBURG: The interpretation was  
5 consistent with this -- was it 2005, long after those  
6 other new approach statutes, decisions were on the  
7 books. Jackson was in 2005.

8 MS. HYNDMAN: That's correct, Justice  
9 Ginsburg; and at that time this Court said that you look  
10 to the language of the statute, and there in Title IX  
11 the language was broad. It was a general ban on  
12 discrimination, such as we have in section 1981 and  
13 section 1982, and in fact the Jackson Court relied on  
14 Sullivan and relied on this Court's interpretation of  
15 Sullivan to find that there was a cause of action for  
16 retaliation under Title IX.

17 JUSTICE KENNEDY: What I'm -- what I'm  
18 taking away from the argument is that if I were to write  
19 this opinion in your favor, I would have to say that  
20 it's necessary to imply a cause of action prohibiting  
21 retaliation in order to make these other words  
22 effective. And that seems to me a very limited argument  
23 and a very difficult argument for you to prevail upon,  
24 given the authorities and the approach of the Court that  
25 we've discussed.

1 MS. HYNDMAN: Well, the Court has already  
2 implied a cause of action and the question is whether --

3 JUSTICE KENNEDY: I understand that, and --  
4 and there certainly is an implied cause of action as to  
5 all the terms in the contract, but you want to add --  
6 for me to add a new term. You can't use the existing  
7 terms to say that there is a cause of action other --  
8 that helps your client, other than that there is a  
9 general approach that there is protection post-contract  
10 formation. I would have to agree with that; and I don't  
11 think you can get out of it impairment.

12 MS. HYNDMAN: Well, the language in this  
13 statute that guarantees the same right to make and  
14 enforce contracts by citizens provides that basis, based  
15 on this Court's decision in Jackson.

16 JUSTICE KENNEDY: Now you're back to making  
17 enforcement, as with Patterson.

18 MS. HYNDMAN: I'm sorry. I didn't hear --  
19 I'm sorry, I didn't hear you, Justice Kennedy.

20 JUSTICE KENNEDY: Now you're just talking  
21 about "make or enforce" and that brings us right back to  
22 where we started.

23 MS. HYNDMAN: But -- subsection (b) defines  
24 "make and enforce" more broadly. And that was the purpose  
25 of the language in section 1981(b), that was to make

1 clear that the terms "make and enforce contracts" cover  
2 the entire contractual relationship, from the beginning  
3 of the relationship to the end of it.

4 CHIEF JUSTICE ROBERTS: To the extent your  
5 argument relies so heavily on Sullivan, I went back and  
6 read it, and rather than an implied-right-of-action case  
7 it looked to me like a third-party standing case.

8 MS. HYNDMAN: And I know there is some  
9 disagreement about that, but the Court in Jackson found  
10 that -- it did -- that Sullivan did stand for the  
11 proposition that there was a cause of action for  
12 retaliation.

13 CHIEF JUSTICE ROBERTS: But I think --  
14 that's right. Now I get back to another stare decisis  
15 question. Do I rely on what Sullivan actually said, or  
16 do I rely on Jackson's reinterpretation of Sullivan?

17 MS. HYNDMAN: Well, if you look at what  
18 Sullivan actually said, Chief Justice Roberts, I think  
19 you would find that you could read it more expansively  
20 that just a third-party standing case. In that case the  
21 white lessor, Mr. Sullivan, had been expelled from the  
22 corporation after he advocated the rights of his black  
23 lessee, Mr. Freeman; and he was allowed under -- the  
24 Court allowed him to bring his action to recover damages  
25 and get injunctive relief, because he himself was

1 expelled from that corporation. So he was the person  
2 that had the injury in that circumstance. So I think  
3 that it's not --

4 CHIEF JUSTICE ROBERTS: You agree, though,  
5 that the language in the opinion focuses on it as a  
6 third-party standing question?

7 MS. HYNDMAN: The -- the Court says that  
8 Mr. Sullivan does have standing to bring the action. I  
9 do agree with that, but if you read the entire opinion,  
10 you would see that they also say that Mr. Sullivan had  
11 the right to bring his action for damages and injunctive  
12 relief.

13 Just to sum up: Because this Court in  
14 Sullivan and Jackson has recognized that persons who  
15 themselves were not victims of discrimination must be  
16 protected against retaliation when they advocate the  
17 rights of those victims; otherwise the underlying  
18 discrimination would go unchecked. We are not asking  
19 the Court to do anything here that they haven't already  
20 done. We are just asking that the victim of the  
21 discrimination here, Mr. Humphries, have the same  
22 protection against retaliation that this Court has  
23 already recognized that his advocate would have. Thank  
24 you.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 General Clement.

2 ORAL ARGUMENT OF GEN. PAUL D. CLEMENT

3 ON BEHALF OF THE UNITED STATES,

4 AS AMICUS CURIAE,

5 SUPPORTING THE RESPONDENT

6 GENERAL CLEMENT: Mr. Chief Justice, and may  
7 it please the Court:

8 This Court has already inferred a private  
9 cause of action under section 1981. So the question  
10 before the Court now is simply the scope of the basic  
11 guarantee in section 1981 and particularly whether it  
12 prohibits retaliation against someone who exercised  
13 their undoubted right to complain about racial  
14 discrimination in the contractual process.

15 JUSTICE SCALIA: It's a little more  
16 complicated than that. We inferred that cause of action  
17 in the bad old days, when we were inferring causes of  
18 action all over the place.

19 Now, the position the government takes here  
20 is that we should infer this new cause of action to  
21 assist the one that's already on the books. Is the  
22 government going to be consistent in this position? And  
23 you want us to in the future go back to our prior  
24 practice of readily inferring causes of action that are  
25 not set forth in the -- in the text of the statute?

1 Is the government willing to live with that?

2 GENERAL CLEMENT: No, Justice Scalia, we're  
3 not asking to you to go back to the bad old days. But I  
4 think it's important to recognize that we are simply  
5 asking you to interpret the scope of the cause of action  
6 you've already inferred. And I think that's consistent  
7 with the way this Court has approached 1981 cases.  
8 Patterson would be a great example. This Court in  
9 Patterson didn't say, are we going to infer a new cause  
10 of action for harassment? No. This Court interpreted  
11 the basic prohibition of 1981 and said it didn't cover  
12 harassment. We think if you interpret the basic  
13 prohibitions in 1981, it covers retaliation.

14 JUSTICE SCALIA: Patterson was still the bad  
15 old days. When do you think the bad old days ended?

16 (Laughter.)

17 GENERAL CLEMENT: Patterson was 1989. I  
18 don't think anybody thinks Patterson was the bad old  
19 days.

20 JUSTICE SCALIA: Oh, I'm sorry. I'm  
21 thinking of Sullivan.

22 GENERAL CLEMENT: The bad old days ended  
23 when you got on the Court, Mr. Justice Scalia.

24 (Laughter.)

25 GENERAL CLEMENT: Now, I think the

1 considerations of precedent as well speak very loudly  
2 here. And Justice Alito asked the question, what would  
3 cause the Court to interpret 1981 and 1982 differently?  
4 And the answer is absolutely nothing. These are two --  
5 these aren't just two closely related statutes that were  
6 codified together.

7 JUSTICE KENNEDY: Are you asking us to  
8 infer, to find implied in the words a cause of action  
9 against retaliation?

10 GENERAL CLEMENT: No. We're asking to you  
11 interpret the cause of action that exists --

12 JUSTICE KENNEDY: What words --

13 GENERAL CLEMENT: -- to include retaliation.

14 JUSTICE KENNEDY: What words in the statute?  
15 And not "impairment" because I don't agree with the  
16 government on that.

17 GENERAL CLEMENT: Okay, Justice Kennedy. I  
18 think part of the disconnect may be, if I could try to  
19 address this, is there are two reasons you might think  
20 that retaliation isn't covered. One reason you might  
21 think retaliation isn't covered is because it's not  
22 discrimination on the basis of race. The other reason  
23 that you might think retaliation is not covered and the  
24 reason that the court of appeals, post-Patterson,  
25 pre-1991, thought that retaliation wasn't covered was

1 simply that it was post-formation conduct. And as to  
2 that, what is clear is that 1981(b) provides a textual  
3 answer to that. Of --

4 JUSTICE KENNEDY: A third reason is that the  
5 word isn't in the statute.

6 GENERAL CLEMENT: Well -- but neither is the  
7 word "harassment," Justice Kennedy. Neither, frankly,  
8 is the word "discrimination on the basis of race."

9 JUSTICE KENNEDY: Well, that's a benefit,  
10 privilege, and term of the contract --

11 GENERAL CLEMENT: Is --

12 JUSTICE KENNEDY: -- to me fairly obvious to  
13 include harassment. That was the situation in  
14 Patterson. That's what Congress sought to address.  
15 Retaliation is something quite different.

16 GENERAL CLEMENT: Sure, but I don't think  
17 there's any doubt since Mr. Humphries was fired that he  
18 no longer enjoys the benefits and privileges of his  
19 contractual relationship. They were clearly interfered  
20 with. His rights under 1981 are clearly implicated. It  
21 would seem to me the only argument that he's not covered  
22 is that he was retaliated -- he was fired, he lost his  
23 contractual relationships not because he was  
24 African-American --

25 JUSTICE KENNEDY: Well, then why were you --



1                   GENERAL CLEMENT:  -- but he claimed --

2                   JUSTICE KENNEDY:  -- talking about  
3  impairment in your brief?

4                   GENERAL CLEMENT:  We were making a slightly  
5  different point, Justice Kennedy, which is we think this  
6  case is a fortiori from the Jackson case in a couple of  
7  respects.  First and foremost, we think that a 1982  
8  precedent, if it governs Title IX, ought to a fortiori  
9  govern 1981.

10                  But the second way we think this case is a  
11  fortiori from Jackson is that the same textual obstacles  
12  are not present here that the Jackson -- that the  
13  Jackson dissenters identified.  You know, the Jackson  
14  dissenters didn't say that retaliation isn't a form of  
15  discrimination.  They said it's not discrimination on  
16  the basis of sex.  And if you look at the text of  
17  1981(a), (b), and (c), you find that it's actually more  
18  capacious language, and you don't have the same problem.  
19  It doesn't say "discrimination on the basis of race."

20                  Now, to be sure, we're not saying that 1981  
21  isn't a race statute; of course it is.  But those exact  
22  words don't appear and don't provide a stumbling block.  
23  And if you look at the form that 1981 takes, it doesn't  
24  take the form of an express prohibition of  
25  discrimination on the basis of race; it actually

1 textually takes the form of a guarantee of equal  
2 treatment. And it seems to me that a guarantee of equal  
3 treatment quite naturally is violated not just by the  
4 basic discrimination but is also violated by retaliating  
5 --

6 CHIEF JUSTICE ROBERTS: So, if you have --

7 GENERAL CLEMENT: -- against someone for  
8 exercising their rights.

9 CHIEF JUSTICE ROBERTS: If you have an  
10 employer who fires everybody who complains about  
11 practices at work, that would not be covered  
12 retaliation?

13 GENERAL CLEMENT: Mr. Chief Justice, you're  
14 right. Judge Easterbrook's hypothetical of the equal  
15 opportunity retaliator I think, as a theoretical matter,  
16 would not be covered by this statute. But of course I  
17 think it's only an interesting theoretical possibility,  
18 because I rather doubt that employer would have many  
19 employees in practice. I mean, in practice --

20 CHIEF JUSTICE ROBERTS: Do you think it's  
21 unusual for employers to have a practice that anybody  
22 who alleges that I've committed a violation of Federal  
23 law, I want to get rid of them?

24 GENERAL CLEMENT: Well, I -- I actually do  
25 think that's unusual, and I do think if an employer -- I

1 mean, just in looking at the cases that are actually  
2 decided, you don't see that as the nondiscriminatory  
3 defense that many employers resort to. And I think as a  
4 practical matter that's just not the position that  
5 they're taking. And I think as a practical matter  
6 you're going to see that those are covered by the  
7 statute.

8           You -- Mr. Chief Justice, you also asked  
9 about stare decisis and which cases that this Court  
10 should point to. I think there are a couple reasons why  
11 Sullivan is the precedent that this Court should follow  
12 in this case. First of all, this Court followed it in a  
13 less analogous context just a few terms ago in Jackson.

14           Second, this Court has a whole line of  
15 cases, including Tillman and Runyon, that treat 1982  
16 cases as binding authority for section 1981 purposes.  
17 So if this Court were to turn its back on Sullivan, I  
18 think it would also be turning its back on cases like --

19           CHIEF JUSTICE ROBERTS: You don't have any  
20 doubt that Sullivan would come out differently today  
21 under our current analysis?

22           GENERAL CLEMENT: It -- I mean, it's hard to  
23 say. I mean, you know, Jackson was just three terms  
24 ago, Mr. Chief Justice, so -- and I don't know how  
25 Jackson would have been decided without the benefit of

1 Sullivan. I certainly think that the current Court  
2 would be a tougher Court to make the arguments that  
3 carried the day in Sullivan than the Court at the time,  
4 but --

5 JUSTICE SOUTER: It would be a tougher Court  
6 to make the argument on inferring a cause of action,  
7 period. But I don't know whether it would be a tougher  
8 Court to make the argument that, if there is a cause of  
9 action, it's got to include this, which was your point a  
10 moment ago.

11 GENERAL CLEMENT: And I think that's a very  
12 fair point, Justice Souter. And I guess I would say  
13 that, just to amplify something my co-counsel said, I  
14 really do think -- I mean, the Jackson Court took the --  
15 the Sullivan case to be something other than a  
16 third-party standing case and to be a case about  
17 retaliation. I really think that that is the correct  
18 reading of the opinion. If you look at the critical  
19 paragraph on page --

20 CHIEF JUSTICE ROBERTS: The correct reading  
21 of Jackson or of Sullivan?

22 GENERAL CLEMENT: Of both, but more to the  
23 point, of Sullivan. If you go to page 237 of the  
24 Sullivan opinion, after the Court's disposed of  
25 Freeman's claim the whole discussion of Sullivan's claim

1 is prefaced with the observation "we turn now to  
2 Sullivan's claim for" expulsion -- "for advocacy on  
3 Freeman's behalf."

4 JUSTICE KENNEDY: Well, of course, and you  
5 in your brief bracketed that and just made that  
6 equivalent to retaliation. I don't think it is because  
7 he was arguing that he didn't -- he was himself injured  
8 because he couldn't sell his own property. He has an  
9 interest in his own property. And that just isn't true  
10 in the standard retaliation case of the type we're  
11 discussing.

12 GENERAL CLEMENT: But, Justice Kennedy, if  
13 that were the only claim that Sullivan could bring,  
14 i.e., if he could only bring the second half of the  
15 leasehold claim that Freeman had, I would agree with  
16 your reading of Sullivan. But what the Court is focused  
17 on is not Sullivan's ability to sue for his inability to  
18 sell to Freeman. They allow him to sue because he was  
19 expelled from the property owner's association after the  
20 fact. Now, why was he expelled from the property  
21 owner's association? Not because of his race; but  
22 because he had advocated on Freeman's behalf. The point  
23 about Sullivan getting to sue for his expulsion from --

24 JUSTICE KENNEDY: But a seller is -- or a  
25 would-be seller is always a built-in advocate for a

1 buyer if some third person interferes with the contract.

2 GENERAL CLEMENT: I agree with that, but I  
3 think what's critical is that he was allowed to recover  
4 not just for that injury but for his expulsion from the  
5 property owner's association. And that's not an injury  
6 that was an obvious injury to Freeman at all. But more  
7 to the point, it doesn't really matter whether Freeman  
8 and Sullivan can sue for that or just Sullivan. The  
9 point is somebody could sue for Sullivan's expulsion  
10 from the property owner's association. And I don't  
11 understand how that's anything other than a retaliation  
12 holding. And as I said, this Court on a number of  
13 occasions has given 1982 holdings even stare decisis  
14 effect, using those words in Runyon in the 1981 context.  
15 And so I think that's also something that this Court  
16 would have to confront.

17 JUSTICE ALITO: If we thought --

18 GENERAL CLEMENT: When --

19 JUSTICE ALITO: If we thought Sullivan was  
20 incorrectly decided, what should we do? Should we say  
21 we accept it insofar as it interpreted section 1982, but  
22 we don't necessarily have to extend it to 1981, to take  
23 an approach similar to what we did in the recent John R.  
24 Sand & Gravel case? Or do we have to apply the  
25 reasoning in the 1981 case because of the close

1 relationship between the two provisions?

2 GENERAL CLEMENT: I think you have to apply  
3 its reasoning. That would be consistent with decisions  
4 like Runyon and Tillman that say that you apply 1982  
5 cases and 1981.

6 Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you, General.

8 Mr. Hawkins, you have three minutes  
9 remaining.

10 REBUTTAL ARGUMENT OF MICHAEL W. HAWKINS

11 ON BEHALF OF THE PETITIONER

12 MR. HAWKINS: Respondent and the government  
13 and its amicus arguments are more appropriate on the  
14 floor of Congress debating whether or not to amend  
15 section 1981 to include retaliation.

16 Instead of giving the clear and plain  
17 meaning of the terms and the ordinary and natural  
18 definitions, the Seventh Circuit relied on extrinsic  
19 issues to reach its decision in violation of Article 1,  
20 section 1 of the Constitution. It exercised its will  
21 instead of its judgment in violation of the principles  
22 set forth in Jones versus Bock, where this Court had  
23 said the judge's job is to construe the statute, not to  
24 make it better.

25 George Washington said in 1790: "I've always

1 been persuaded that the success of our nation and our  
2 government depends upon the acceptance of its people and  
3 that that would depend upon the interpretation and  
4 execution of its laws. Therefore, it is important that  
5 the judicial system should not only be independent in  
6 its operation but as perfect as possible in its  
7 formation." To follow the text of the statute, this  
8 Court's interpretations of section 1981 and the  
9 Constitution --

10 JUSTICE SCALIA: This is no longer  
11 Washington, right?

12 MR. HAWKINS: I understand, Your Honor.  
13 (Laughter.)

14 JUSTICE SCALIA: Okay. I didn't know where  
15 he stopped and you began.

16 (Laughter.)

17 MR. HAWKINS: The Seventh Circuit's decision  
18 should be reversed. Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
20 The case is submitted.

21 (Whereupon, at 11:20 a.m., the case in the  
22 above-entitled matter was submitted.)

23

24

25



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