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1 P R O C E E D I N G S

2 (10:23 a.m.)

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

5 Mr. Hawkins.

6 ORAL ARGUMENT OF MICHAEL W. HAWKINS

7 ON BEHALF OF THE PETITIONER

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

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

17 The Court starts with a review of the text
18 of the statute. Section 1981(a) says that all persons
19 shall have the right, the same right as is enjoyed by
20 white citizens to make and enforce contracts. Words
21 like "the same," "equal," and "like" are all in 1981(a),
22 and those words all have normal, plain, ordinary
23 meaning, that is identical. So what section 1981 says
24 is in the making and enforcing of contracts all persons
25 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 it, 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 "EAS-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 would
24 come out the same, Your Honor.

25 JUSTICE KENNEDY: I think Congress would

1 have been quite amazed at that rule.

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: 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 did they -- why did
19 they proceed under Title VII then? What -- what help --

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

24 JUSTICE GINSBURG: Well, that's -- that's
25 often the case, isn't it? I mean, the argument you just

1 made could go as well to somebody who uses 1981 to
2 complain about a racially-based demotion wasn't able to
3 use Title VII because he filed too late. That's a
4 typical use of 1981; is it not?

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

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

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

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

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

24 CHIEF JUSTICE ROBERTS: Now, is your
25 position that in that situation a retaliation is not

1 covered by 1981?

2 MR. HAWKINS: Yes, Your Honor.

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

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

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

21 MR. HAWKINS: Well, Your Honor, they can
22 make -- phrase it however they want to in terms of their
23 particular complaint, but the issue in terms of the
24 analysis under the plain text of section 1981 is whether
25 or not a white person in this situation is being treated

1 differently with respect to making a similar complaint.

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

6 MR. HAWKINS: Well --

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

12 MR. HAWKINS: There is no retaliation claim
13 in the abstract under this statute, period, correct.

14 JUSTICE SCALIA: Okay.

15 JUSTICE KENNEDY: You practice in this --

16 JUSTICE GINSBURG: And you say --

17 JUSTICE KENNEDY: -- in this area --

18 MR. HAWKINS: Yes, Your Honor.

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

23 MR. HAWKINS: No, Your Honor. In my 32
24 years of experience of doing labor and employment law,
25 and particularly in employment law, individuals are not

1 typically bringing 1981 retaliation claims, where most
2 --

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

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

7 JUSTICE KENNEDY: Yes.

8 MR. HAWKINS: No, Your Honor.

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

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

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

17 MR. HAWKINS: In Federal --

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

25 MR. HAWKINS: In the Federal system.

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

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

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

10 MR. HAWKINS: Title VII covers race and
11 retaliation.

12 JUSTICE GINSBURG: My point is that 1981
13 would not be available to other categories. It's only
14 race, right?

15 MR. HAWKINS: Correct.

16 JUSTICE SCALIA: Any other advantages to
17 1981? You get attorney's fees in 1981?

18 MR. HAWKINS: Longer statute of limitations,
19 similar attorney's fees, yes.

20 JUSTICE SCALIA: But you get that under
21 Title VII?

22 MR. HAWKINS: Yes, you do, but it's a longer
23 statute of limitations, and it's uncapped damages
24 because of the caps under Title VII that exists.

25 JUSTICE BREYER: What happens in just a

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

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

13 JUSTICE BREYER: The State law, is there
14 some kind of policy against that from the State law, he
15 couldn't do it?

16 MR. HAWKINS: That's correct.

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

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

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

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

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

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

23 JUSTICE BREYER: Does it say anywhere, by
24 the way, in that statute that a black person who is
25 discriminated against can go to court and file a

1 lawsuit?

2 MR. HAWKINS: If they have --

3 JUSTICE BREYER: Does it say that?

4 MR. HAWKINS: If they are not being treated
5 --

6 JUSTICE BREYER: Yes. Does it say is in
7 that statute, 1981?

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

10 JUSTICE BREYER: Yes, correct.

11 MR. HAWKINS: No, it does not.

12 JUSTICE BREYER: No. Okay.

13 JUSTICE SCALIA: Is there a Federal common
14 law? Are we sitting here trying to write a Federal
15 common law?

16 MR. HAWKINS: No, we're here dealing dealing
17 with Federal statutes.

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

20 MR. HAWKINS: State courts develop public
21 policy. They do.

22 JUSTICE BREYER: And have we developed a
23 policy here in creating a right of action under this
24 1981?

25 MR. HAWKINS: Rights of action have existed

1 under Federal statute, that's correct.

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

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

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

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

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

23 JUSTICE BREYER: That isn't the word I was
24 looking for. The word I was looking for in 1981(a) is
25 the word "and can bring a lawsuit in Federal court." I

1 don't see that written there.

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

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

7 MR. HAWKINS: Because --

8 JUSTICE BREYER: That was my basic question.

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

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

18 MR. HAWKINS: Yes.

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

21 MR. HAWKINS: Yes, Your Honor.

22 JUSTICE SCALIA: We used to do it, but we
23 said we're not going to do it any more.

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

25 JUSTICE SCALIA: So why don't you invoke

1 those?

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

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

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

20 JUSTICE GINSBURG: But it's a statute that
21 has the same derivation. They're both from the 1866
22 Civil Rights Act, and they're both set up the same way.
23 1982 also says "same" as 1981 does. So wouldn't it be
24 odd to take these twin measures and say one includes
25 retaliation and the other doesn't?

1 Wouldn't Congress, when it revised 1981 in
2 1991 been aware of Sullivan and expect this Court to
3 interpret those twin statutes the same way?

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

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

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

24 JUSTICE GINSBURG: Wouldn't you look at what
25 Congress was trying to do in the 1991 amendments? That

1 is, Congress changed the law that this Court had
2 declared; and the message, the essential message, was
3 this Court has been too stingy in its interpretation of
4 Title -- of 1981, so we're going to change it.

5 MR. HAWKINS: Correct.

6 JUSTICE GINSBURG: And it seems to me that
7 we wouldn't be hearing -- we wouldn't be grasping that
8 message.

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

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

12 MR. HAWKINS: Well, I think that there was
13 some perspective. I don't personally agree with it, But
14 I think there was some --

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

20 MR. HAWKINS: I agree, Justice Scalia.

21 JUSTICE SCALIA: That's all we know for
22 sure.

23 MR. HAWKINS: Right.

24 JUSTICE SCALIA: That Congress wanted that
25 disposition. They weren't necessarily disapproving our

1 prior decision. Is there anything in the statute which
2 said the Supreme Court made a bad decision, and we're
3 going to fix it?

4 MR. HAWKINS: No. There's nothing in that
5 at all.

6 JUSTICE GINSBURG: There is something to
7 that effect in the legislative history that explains why
8 Congress made the amendments it did in 1991.

9 MR. HAWKINS: And we could have a whole
10 debate about the legislative history and what --

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

16 MR. HAWKINS: Justice Breyer --

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

23 MR. HAWKINS: Yes, that's evidence that
24 somebody in Congress was thinking that.

25 JUSTICE BREYER: And that someone --

1 MR. HAWKINS: But I think if we just use an
2 analogy with contract law, if we're negotiating a
3 contract --

4 JUSTICE SCALIA: Did the committee vote on
5 that committee report?

6 MR. HAWKINS: No, they did not.

7 JUSTICE SCALIA: So how do you know if
8 anybody in Congress thought that?

9 MR. HAWKINS: Well, somebody wrote it in a
10 report.

11 JUSTICE SCALIA: It could have been a
12 teenager who wrote the report.

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

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

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

1 JUSTICE BREYER: All right.

2 MR. HAWKINS: It could be made and it could
3 be developed.

4 JUSTICE BREYER: All right, because I don't
5 think that's is a good argument. Why isn't this a
6 benefit or a privilege that's been denied?

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

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

19 MR. HAWKINS: No. Stare decisis applies
20 when it's the same facts and the same set of law And
21 this is not the same facts and the same set of law.
22 This is section 1991, Your Honor.

23 JUSTICE STEVENS: I know, but even under the
24 1991 the courts of appeals have been fairly uniform on
25 the answer to the very issue we're confronting here.

1 Isn't that true?

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

5 JUSTICE STEVENS: My question is, are they
6 entitled to give any stare decisis weight to a consensus
7 among all the courts of appeals both before and after
8 the 1991 amendment.

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

11 JUSTICE STEVENS: Don't have to, but does it
12 make sense in trying to understand the stability of the
13 law generally?

14 MR. HAWKINS: Based on our argument it does
15 not, Your Honor.

16 Thank you. I would like to reserve my time,
17 Mr. Chief Justice.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Ms. Hyndman.

20 ORAL ARGUMENT OF CYNTHIA H. HYNDMAN

21 ON BEHALF OF THE RESPONDENT

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

24 I'd like to address the questions that
25 Justice Ginsburg and Justice Breyer raised about the

1 effectiveness of section 1981 if there is no right to
2 bring an action for retaliation. Section 1981 doesn't
3 provide any specific remedies or any type of enforcement
4 mechanism. It can only be enforced through a private
5 lawsuit. Petitioner's basically asking this Court to
6 allow an employer to be able to fire an employee who
7 brought a private lawsuit to enforce his section 1981
8 rights.

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

19 JUSTICE SCALIA: That's a good argument to
20 Congress. Congress should enact a retaliatory
21 provision. But the statute says what it says, and what
22 it says is that there has to be discrimination on the
23 basis of race. And firing somebody for -- in
24 retaliation for making a complaint is not firing him on
25 the basis of race. Indeed, the person making the

1 complaint may not have been the person who was racially
2 discriminated against. You would acknowledge that you
3 couldn't fire -- if retaliations claims lie, you
4 couldn't fire a white whistleblower who says this
5 employer has been discriminating against blacks.
6 Wouldn't that white whistleblower have a cause of action
7 for being fired?

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

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

17 MS. HYNDMAN: This Court held in the Jackson
18 case that discrimination on the basis -- that
19 retaliation when there was a complaint about sex
20 discrimination constituted discrimination on the basis
21 of sex. So it follows that here under section 1981 if
22 someone makes a complaint about race discrimination and
23 they are retaliated against that they are being
24 discriminated against on the basis of race.

25 JUSTICE SCALIA: Well, you can say that, but

1 it doesn't make any sense.

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

4 JUSTICE SCALIA: It didn't make any sense
5 then, either.

6 (Laughter.)

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

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

15 CHIEF JUSTICE ROBERTS: All right. So if
16 you bring -- you'd at least bring them both, right,
17 because --

18 MS. HYNDMAN: That's correct.

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

21 MS. HYNDMAN: That's correct.

22 CHIEF JUSTICE ROBERTS: Or isn't that
23 rendering Congress' careful -- I mean the 1991
24 legislation was a careful compromise. In exchange for
25 the expansions of Title VII, they put caps on the

1 damages. You would allow them to keep the expansion,
2 but do away with the caps.

3 MS. HYNDMAN: Congress said specifically
4 in -- in the 1991 Civil Rights Act that the damage caps
5 do not apply if an employee has a right under section
6 1981 and so --

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

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

12 JUSTICE GINSBURG: When were -- when there
13 damages, as opposed to back pay, added as a remedy for
14 Title VII?

15 MS. HYNDMAN: Title VII damages were added,
16 compensatory and punitive damages were added, in the
17 1991 Civil Rights Act.

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

20 MS. HYNDMAN: That's right.

21 JUSTICE GINSBURG: It's the first time ever
22 Title VII plaintiffs were entitled to get money damages
23 as distinguished from simply back pay?

24 MS. HYNDMAN: That's absolutely --

25 CHIEF JUSTICE ROBERTS: Well then, why do

1 they put the caps in? I mean, I do think that is a
2 limitation on the remedy they provided. They provided a
3 damage remedy with a very clear cap and it's not a
4 particularly generous cap, either.

5 MS. HYNDMAN: That's correct.

6 CHIEF JUSTICE ROBERTS: And you would allow
7 them to completely obliterate that cap under any case
8 that could be brought under 1981.

9 MS. HYNDMAN: And Congress clearly made
10 that -- made that choice.

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

24 MS. HYNDMAN: The words in the statute that
25 provide the basis for this claim is that you are

1 entitled to the same rights to make and enforce
2 contracts as white citizens. And this Court has
3 consistently interpreted that to mean --

4 JUSTICE KENNEDY: But that was there
5 before -- but that was there as of the time of
6 Patterson.

7 MS. HYNDMAN: That's correct.

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

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

19 JUSTICE KENNEDY: Patterson was not a
20 retaliation case.

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

22 JUSTICE KENNEDY: Patterson was a discharge
23 and harassment case.

24 MS. HYNDMAN: That's correct.

25 JUSTICE KENNEDY: And the words do seem to

1 cover that.

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

5 MS. HYNDMAN: That's absolutely right,
6 Justice --

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

9 MS. HYNDMAN: They consistently thought
10 there was a cause of action for retaliation based upon
11 Sullivan.

12 JUSTICE KENNEDY: But nothing that you
13 argued so far shows that the words of the statute as
14 amended, that is to say new subsection (b), help your
15 case.

16 MS. HYNDMAN: The words of the statute that
17 help us establish the cause of action are that it
18 made -- that Congress made clear that the entire
19 contractual relationship would be covered from the
20 beginning of the contractual relationship through the
21 end, through termination. And coupling that with the
22 original words of the statute that lower courts had
23 interpreted to allow a cause of action for retaliation
24 and with subsection (c), which uses broader language, it
25 says "impairment by discrimination" -- under this

1 Court's holding in Jackson --

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

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

19 JUSTICE SCALIA: I guess those court of
20 appeals cases pre-1991 that found there was a
21 retaliation claim, right, those cases were just wrong as
22 to whether there was any post-contract claim? Right? I
23 mean, they were wrong about that. Patterson, in effect,
24 said you're wrong.

25 MS. HYNDMAN: Patterson said you were wrong.

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

4 MS. HYNDMAN: There were --

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

8 MS. HYNDMAN: They based that on -- on this
9 Court's reading in Sullivan. And Sullivan interpreted
10 the companion statute to section 1981, which was section
11 1982.

12 JUSTICE KENNEDY: Because it's ironic to say
13 all those cases were wrong when Congress agreed with
14 them and disagreed with Patterson.

15 JUSTICE BREYER: But is the rationale of
16 those cases -- and it's important to get the right
17 rationale. If I say this and I'm wrong tell me I'm
18 wrong. And I thought that the heart of it is not that
19 the retaliated -- the act of retaliation is
20 discrimination. It isn't. What they say is when the
21 white man helps the black man from being discriminated
22 against, it falls within the statute, not because you've
23 discriminated against the black man, but because if it
24 didn't fall within the statute it would seriously erode
25 or destroy the black man's right. That's what it seemed

1 to me Douglas said in Sullivan.

2 MS. HYNDMAN: That's correct, Justice
3 Breyer.

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

6 MS. HYNDMAN: I would agree with that.

7 JUSTICE KENNEDY: But that was true in
8 Sullivan because a property owner who wants to sell is
9 in a particularly advantageous position to enforce the
10 rights of the buyer. It's part of his own contract.
11 And to extend it to the situation we have here is quite
12 an extension of Sullivan in my view.

13 MS. HYNDMAN: Well, I would disagree with
14 that respectfully, Justice Kennedy. I would say here,
15 when you have the person who was the victim of the
16 discrimination, who was also, who was complaining about
17 the discrimination and then gets fired, he's in actually
18 a better position than the white homeowner was in
19 Sullivan.

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

24 MS. HYNDMAN: Those statutes --

25 CHIEF JUSTICE ROBERTS: The word could be

1 there. I'm not saying whether it has to be there or
2 not. But it certainly could be there, and it's not
3 here.

4 MS. HYNDMAN: The word "retaliation."

5 CHIEF JUSTICE ROBERTS: Yes.

6 MS. HYNDMAN: -- does not appear in -- in
7 those. There's actually very few Federal statutes where
8 the actual word "retaliation" appears. But the other
9 statutes that --

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

12 MS. HYNDMAN: They do, but there is no
13 specific cause of action provided in section 1981 at
14 all. And this Court has already held that there is a
15 private cause of action under section 1981, and what
16 we're asking --

17 CHIEF JUSTICE ROBERTS: Is this -- the
18 question I asked your friend and I'll ask you as well.
19 I think you have a case under Sullivan, which
20 recognized, although it's 1982, this type of action.
21 But Sullivan would not come out the same way today given
22 Alexander against Sandoval and our new approach to
23 statutory interpretation. So if you're concerned about
24 stare decisis, which body of law do you give effect to,
25 the Sullivan case or our more recent cases on how to

1 read statutes?

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

13 CHIEF JUSTICE ROBERTS: Of course, by 1991
14 our new approach to reading statutes was pretty clearly
15 established.

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

17 CHIEF JUSTICE ROBERTS: So if Congress were
18 looking at both of those bodies of law, then wouldn't
19 the normal care be for it to put in a retaliation
20 provision?

21 MS. HYNDMAN: If they were legislating on a
22 clean slate I might agree with that Justice -- Chief
23 Justice Roberts. But in this situation they were not
24 legislating on a clean slate. What they were doing was
25 amended one of the oldest civil rights acts in this

1 country, the Civil Rights Act of 1866. And given that
2 they were going to amend that law and they amended it
3 based upon what this Court had said in Patterson, and I
4 think under those circumstances it -- they wouldn't
5 necessarily go and create and write a reticulated
6 statute such as the modern antidiscrimination statutes
7 are.

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

13 MS. HYNDMAN: I don't know that that's
14 necessarily true. I think they -- they legislated
15 against the backdrop both of Sullivan and the lower
16 courts' consistent recognition of a cause of action.

17 JUSTICE ALITO: When you say they legislated
18 against the backdrop, you're -- are you not relying on
19 something they didn't do, rather than anything that they
20 did?

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

23 JUSTICE GINSBURG: The interpretation was
24 consistent with this -- was it 2005, long after those
25 other new approach statutes, decisions were on the

1 books. Jackson was in 2005.

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

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

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

22 JUSTICE KENNEDY: I understand that, and --
23 and there certainly is a cause of action as to all the
24 terms in the contract, but you want to add -- for me to
25 add a new term. You can't use the existing terms to say

1 that there is a cause of action other -- that helps your
2 client, other than that there is a general approach that
3 there is protection post-contract formation. I would
4 have to agree with that; and I don't think you can get
5 out of it impairment.

6 MS. HYNDMAN: Well, the language in this
7 statute that guarantees the same rights to make and
8 enforce contracts by citizens provides that basis, based
9 on this Court's decision in Jackson.

10 JUSTICE KENNEDY: Now you're making
11 enforcement, as with Patterson.

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

14 JUSTICE KENNEDY: Now you're just talking
15 about make or enforce and that brings us right back to
16 where we started.

17 MS. HYNDMAN: But -- subsection (b) defines
18 make and enforce more broadly. And that was the purpose
19 of the language in section 1981(d), that was to make
20 clear that the terms make and enforce contracts cover
21 the entire contractual relationship, from the beginning
22 of the relationship to the end of it.

23 CHIEF JUSTICE ROBERTS: To the extent your
24 argument relies so heavily on Sullivan, I went back and
25 read it, and rather than an implied right of action case

1 it looked to me like a third party standing case.

2 MS. HYNDMAN: And I know there is some
3 disagreement about that, but the Court in Jackson found
4 that -- it did find that Sullivan did stand for the
5 proposition that there was a cause of action for
6 retaliation.

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

11 MS. HYNDMAN: Well, if you look at what
12 Sullivan actually said, Chief Justice Roberts, I think
13 you would find that you could read it more expansively
14 that just a third party standing case. In that case the
15 white lessor, Mr. Sullivan, had been expelled from the
16 corporation after he advocated the rights of his black
17 lessee, Mr. Freeman; and he was allowed under -- the
18 Court allowed him to bring his action to recover damages
19 and get injunctive relief, because he himself was
20 expelled from that corporation. So he was the person
21 that had an had injury in that circumstance. So I think
22 that it's not --

23 CHIEF JUSTICE ROBERTS: You agree, though,
24 that the language in the opinion focuses on it as a
25 third party standing question.

1 MS. HYNDMAN: The -- the Court says that
2 Mr. Sullivan does have standing to bring the action. I
3 do agree with that, but if you read the entire opinion,
4 you would see that they also say that Mr. Sullivan had
5 the right to bring his action for damages and injunctive
6 relief.

7 Just to sum up, because this Court in
8 Sullivan and Jackson has recognized that persons who
9 themselves were not victims of discrimination must be
10 protected against retaliation when they advocate the
11 rights of those victims; otherwise the underlying
12 discrimination would go unchecked -- we are not asking
13 the Court to do anything here that they haven't already
14 done. We are just asking that the victim of the
15 discrimination here, Mr. Humphries, have the same
16 protection against retaliation that this Court has
17 already recognized that his advocate would have. Thank
18 you.

19 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
20 General Clement.

21 ORAL ARGUMENT OF GEN. PAUL D. CLEMENT,
22 ON BEHALF OF THE UNITED STATES,
23 AS AMICUS CURIAE,
24 SUPPORTING THE RESPONDENT

25 GENERAL CLEMENT: Mr. Chief Justice, and may

1 it please the Court:

2 This Court has already inferred a private
3 cause of action under section 1981. So the question
4 before the Court now is simply the scope of the basic
5 guarantee in section 1981 and particularly whether it
6 prohibits retaliation against someone who exercised
7 their undoubted right to complain about racial
8 discrimination in a contractual process.

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

13 Now, the position the Government takes here
14 is that we should infer this new cause of action to
15 assist the one that's already on the books. Is the
16 Government going to be consistent in this position? And
17 you want us to in the future go back to our prior
18 practice of readily inferring causes of action that are
19 not set forth in the -- in the text of this statute?

20 Is the Government willing to live with that?

21 GENERAL CLEMENT: No, Justice Scalia, we're
22 not asking to you to go back to the bad old days. But I
23 think it's important to recognize that we are simply
24 asking you to interpret the scope of the cause of action
25 you've already inferred. And I think that's consistent

1 with the way this Court has approached 1981 cases.
2 Patterson would be a great example. This Court in
3 Patterson didn't say, are we going to infer a new cause
4 of action for harassment? No. This Court interpreted
5 the basic prohibition of 1981 and said it didn't cover
6 harassment. We think if you interpret the basic
7 prohibitions in 1981, it covers retaliation.

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

10 (Laughter.)

11 GENERAL CLEMENT: Patterson was 1989. I
12 don't think anybody thinks Patterson was the bad old
13 days.

14 JUSTICE SCALIA: Oh, I'm sorry. I was
15 thinking of Sullivan.

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

18 (Laughter.)

19 GENERAL CLEMENT: Now, I think the
20 considerations of precedent as well speak very loudly
21 here. And Justice Alito asked the question, what would
22 cause the Court to interpret 1981 and 1982 differently?
23 And the answer is absolutely nothing. These are two --
24 these aren't just two closely related statutes that were
25 codified together.

1 JUSTICE KENNEDY: Are you asking us to
2 infer, to find implied in the words a cause of action
3 against retaliation?

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

6 JUSTICE KENNEDY: What words --

7 GENERAL CLEMENT: -- to include
8 retaliation.

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

12 GENERAL CLEMENT: Okay, Justice Kennedy. I
13 think part of the disconnect may be, if I could try to
14 address this, is there are two reasons you might think
15 that retaliation isn't covered. One reason you might
16 think retaliation isn't covered is because it's not
17 discrimination on the basis of race. The other reason
18 that you might think retaliation is not covered and the
19 reason that the court of appeals, post-Patterson,
20 pre-1991, thought that retaliation wasn't covered was
21 simply that it was post-formation conduct. And as to
22 that, what is clear is that 1981(b) provides a textual
23 answer to that. A --

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

1 GENERAL CLEMENT: Well -- but neither is the
2 word "harassment," Justice Kennedy. Neither, frankly,
3 is the words "discrimination on the basis of race."

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

6 GENERAL CLEMENT: Is --

7 JUSTICE KENNEDY: -- to me fairly obvious to
8 me to include harassment. That was the situation in
9 Patterson. That's what Congress sought to address.
10 Retaliation is something quite different.

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

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

21 GENERAL CLEMENT: -- but he claimed -- -

22 JUSTICE KENNEDY: -- talking about
23 impairment in your brief?

24 GENERAL CLEMENT: We were making a slightly
25 different point, Justice Kennedy, which is we think this

1 case is a fortiori from the Jackson case in a couple of
2 respects. First and foremost, we think that a 1982
3 precedent, if it governs Title IX, ought to a fortiorari
4 govern 1981.

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

15 Now, to be sure, we're not saying that 1981
16 isn't a race statute; of course it is. But those exact
17 words don't appear and don't provide a stumbling block.
18 And if you look at the form that 1981 takes, it doesn't
19 take the form of an express prohibition of
20 discrimination on the basis of race; it actually
21 textually takes the form of a guarantee of equal
22 treatment. And it seems to me that a guarantee of equal
23 treatment quite naturally is violated not just by the
24 basic discrimination but is also violated by retaliating
25 --

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

2 GENERAL CLEMENT: -- against someone for
3 exercising their rights.

4 CHIEF JUSTICE ROBERTS: If you have an
5 employer who fires everybody who complains about
6 practices at work, that would not be covered
7 retaliation?

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

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

19 GENERAL CLEMENT: Well, I -- I actually do
20 think that's unusual, and I do think if an employer -- I
21 mean, just in looking at the cases that are actually
22 decided, you don't see that as the nondiscriminatory
23 defense that many employers resort to. And I think as a
24 practical matter that's just not the position that
25 they're taking. And I think as a practical matter

1 you're going to see that those are covered by the
2 statute.

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

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

14 CHIEF JUSTICE ROBERTS: You don't have any
15 doubt that Sullivan would come out differently today
16 under our current analysis?

17 GENERAL CLEMENT: It -- I mean, it's hard to
18 say. I mean, you know, Jackson was just three terms
19 ago, Mr. Chief Justice, so -- and I don't know how
20 Jackson would have been decided without the benefit of
21 Sullivan. I certainly think that the current Court
22 would be a tougher Court to make the arguments that
23 carried the day in Sullivan than the Court at the time,
24 but --

25 JUSTICE SOUTER: It would be a tougher Court

1 to make the argument on inferring a cause of action,
2 period. But I don't know whether it would be a tougher
3 Court to make the argument that, if there is a cause of
4 action, it's got to include this, which was your point a
5 moment ago.

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

15 CHIEF JUSTICE ROBERTS: The correct reading
16 of Jackson or of Sullivan?

17 GENERAL CLEMENT: Of both, but more to the
18 point, of Sullivan. If you go to page 237 of the
19 Sullivan opinion, after the Court's disposed of
20 Freeman's claim the whole discussion of Sullivan's claim
21 is prefaced with the observation "we turn now to
22 Sullivan's claim for" expulsion -- "for advocacy on
23 Freeman's behalf."

24 JUSTICE KENNEDY: Well, of course, and you
25 in your brief bracketed that and just made that

1 equivalent to retaliation. I don't think it is because
2 he was arguing that he didn't -- he was himself injured
3 because he couldn't sell his own property. He has an
4 interest in his own property. And that just isn't true
5 in the standard retaliation case of the type we're
6 discussing.

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

19 JUSTICE KENNEDY: But a seller is -- or a
20 would-be seller is always a built-in advocate for a
21 buyer if some third person interferes with the contract.

22 GENERAL CLEMENT: I agree with that, but I
23 think what's critical is that he was allowed to recover
24 not just for that injury but for his expulsion from the
25 property owner's association. And that's not an injury

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

12 JUSTICE ALITO: If we thought --

13 GENERAL CLEMENT: When --

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

22 GENERAL CLEMENT: I think you have to apply
23 its reasoning. That would be consistent with decisions
24 like Runyon and Tillman that say that you apply 1982
25 cases and 1981.

1 Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you, General.

3 Mr. Hawkins, you have three minutes

4 remaining.

5 REBUTTAL ARGUMENT OF MICHAEL W. HAWKINS

6 ON BEHALF OF THE PETITIONER

7 MR. HAWKINS: Respondent and the government
8 and its amicus arguments are more appropriate on the
9 floor of Congress debating whether or not to amend
10 section 1981 to include retaliation.

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

20 George Washington said in 1790 "I've always
21 been persuaded that the success of our nation and our
22 government depends upon the acceptance its people and
23 that that would depend upon the interpretation and
24 execution of its laws. Therefore, it is important that
25 the judicial system should not only be independent in

1 its operation but as perfect as possible in its
2 formation." To follow the text of the statute, this
3 Court's interpretations of section 1981 and the --

4 JUSTICE SCALIA: This is no longer
5 Washington, right?

6 MR. HAWKINS: I understand, Your Honor.
7 (Laughter.)

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

10 (Laughter.)

11 MR. HAWKINS: The Seventh Circuit's decision
12 should be reversed. Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 The case is submitted.

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

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