No. 85-2169

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SAINT FRANCIS COLLEGE, et al.,

Petitioners,

v.

MAJID GHAIDAN AL-KHAZRAJI,
a/k/a MAJID AL-KHAZRAJI ALLAN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AND PUERTO RICAN LEGAL DEFENSE & EDUCATION FUND AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

The Mexican American Legal Defense and Educational Fund is a national civil rights organization established in 1967. Its principal object is to secure, through litigation and education, the civil rights of Hispanics living in the United States. The Puerto Rican Legal Defense & Education Fund is also a national civil rights organization. Founded in 1972, its principal object is to secure, through litigation and education, the civil rights of Puerto Ricans and other Hispanics living in the United States.

Section 1981 of Title 42, United States Code, has long been an important means of redress for Hispanics victimized by discrimination. In the case at bar, petitioners ask that this Court adopt an extremely narrow view of the discrimination prohibited by Section 1981. If petitioners were to prevail in this case, some doubt might well be cast on the continued availability of Section 1981 as a means of combatting invidious discrimination against Hispanic Americans. For that reason, both of the *amici curiae* have a substantial interest in this case.

The parties have consented to the filing of this brief, which is therefore submitted pursuant to Supreme Court Rule 36.2.

SUMMARY OF ARGUMENT

This brief *amicus curiae* is respectfully submitted in support of the judgment of the United States Court of Appeals for the Third Circuit, and we specifically adopt the arguments urged in respondent's brief. The focus of this brief, however, is limited to showing that the judgment below is mandated by the intent of Congress, as manifested in the legislative history of Section 1981.

1. This case presents an important question of statutory construction: the precise scope of the class which Congress intended to protect against private discrimination under 42 U.S.C. § 1981. The answer to this question can be found in the debates of the Thirty-Ninth Congress, which enacted the Civil Rights Act of 1866, including the original version of Section 1981, and several additional statutory provisions concerned with issues of

"race." These debates establish that the Thirty-Ninth Congress intended to prohibit discrimination based on racial groupings, not in the narrow or technical sense in which that concept is sometimes used today, but in a broader sense that includes what we now call ethnic and ancestral groupings. The debates of the Thirty-Ninth Congress include frequent references to "race," but the context of those references manifests a Nineteenth Century usage of the term, a usage which is inconsistent with any neatly defined concept of scientifically distinct "races." Thus, the ethnic groups to which Members of Congress specifically referred as "races" include the "Anglo-Saxon," "Celtic," "German," "Gypsy," "Hindu," "Irish," "Jewish," "Latin," "Scandinavian," and "Spanish" ancestral groups. Moreover, proponents of the 1866 Act specifically emphasized that this legislation was intended to protect the rights of all such groups.

In other words, the legislative history unequivocally establishes that the Thirty-Ninth Congress intended to prohibit discrimination of a "racial" character. The legislative history also shows that the Thirty-Ninth Congress understood and used that term in an inclusive sense, which encompasses discrimination based on membership in ethnic and ancestral groups, which the Thirty-Ninth Congress did not significantly distinguish from groupings based on color or distinctive physiognomy.

2. The intent of the Thirty-Ninth Congress was subsequently reaffirmed when, following ratification of the Fourteenth Amendment, the Forty-First Congress partially restated and wholly reenacted the 1866 Act as part of the Enforcement Act of 1870. The 1870 Act originated as a simple voting rights bill aimed at enforcing the provisions of the Fifteenth Amendment. As the bill passed through Congress, however, it evolved into a more comprehensive

enactment, which also incorporated the equal protection principles embodied in the Fourteenth Amendment. As this Court has long recognized, the concept of equal protection draws no legally significant distinction between "race" and "national origin." *See, e.g., Graham v. Richardson*, 403 U.S. 365 (1971); *Strauder v. West Virginia*, 100 U.S. 303 (1880). Thus, the Forty-First Congress's explicit incorporation of equal protection principles in Section 1981 underscores the Thirty-Ninth Congress's original intention of prohibiting private discrimination based on ethnicity or ancestry.

ARGUMENT

I.

THE LEGISLATIVE HISTORY OF SECTION 1981 DEMONSTRATES THAT CONGRESS INTENDED TO PROHIBIT DISCRIMINATION BASED ON ETHNIC AND ANCESTRAL GROUP STATUS.

A. The Thirty-Ninth Congress Understood The Term "Race" To Include Ethnic And Ancestral Groups.

When the Thirty-Ninth Congress enacted Section 1981 in its original form, Congress intended to protect the rights of a certain class of people to be free from private discrimination in certain contexts. Although the lower federal courts have divided with respect to the proper definition of that class, that conflict in authority is wholly unnecessary because it is based on the courts' failure to consider exactly what Congress said and meant when it enacted the statute.

The debates of the Thirty-Ninth Congress show that Congress intended to legislate protection for a class de-

scribed in "racial" terms. Moreover, when the statutory language is viewed in concert with the legislative history of Section 1981 and the related bills that were debated in 1866, it is manifest that the Thirty-Ninth Congress commonly used the word "race" to encompass the concepts of ethnicity and ancestry, and that Congress intended, in prohibiting discrimination of a "racial" character, to prohibit discrimination based on ethnicity and ancestry, as well as discrimination based on color. In other words, the legislative history shows that Congress did not intend to limit the application of Section 1981 to discrimination based on differences of color or physiognomy. Congress recognized that differences in language, cultural traditions, and ancestry may stimulate invidious discrimination based on "race." It was the intention of the Thirty-Ninth Congress to prohibit all such invidious discrimination.

As this Court recently observed, "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park'N Fly, Inc. v. Dollar Park And Fly, Inc.*, 469 U.S. 189, 194 (1985). But common usage changes over time, as Justice Holmes noted in *Towne v. Eisner*, 245 U.S. 418, 425 (1918):

> A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.

Thus, in construing a statute that was first enacted almost a century and one quarter ago, this Court must strive to understand the words that Congress used in the precise sense in which those words were then commonly understood; modern significations must not be allowed to obscure Congress's true meaning and intent. In other words,

if Congress's intent is to be ascertained, a statute must be interpreted in light of popular usage contemporary with the statute's enactment, and not in the false light of popular usage prevailing at the time the statute is construed. *Perrin v. United States*, 444 U.S. 37, 42 (1979); *United States v. Thind*, 261 U.S. 204, 209 (1923).[1]

In terms, Section 1981 guarantees that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981. On its face, Section 1981 therefore appears to create a right in favor of an undefined class of "non-white" persons.

This Court has already held that the statutory phrase "the same right . . . as is enjoyed by white citizens" signifies only the "racial character" of the rights which the statute protects, and does not foreclose white citizens from stating a Section 1981 claim for racial discrimination. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 293 (1976). As the legislative history shows, the import of this phrase is to manifest Congress's intention not to reach discrimination based on grounds other than "race"

[1] For purposes of this brief, we assume that the common understanding of the term "race" has narrowed somewhat since 1866. This change is doubtless due to the rise of modern anthropological science and its influence upon our society. At the same time, however, it is important to recognize that modern lexicography still defines the term in the broader way that it was used by the Thirty-Ninth Congress. For example, *Webster's* defines "race" to mean "the descendants of a common ancestor: a family, tribe, people, or nation belonging to the same stock" or "a class or kind of individuals with common characteristics, interests, appearance, or habits as if derived from a common ancestor." *Webster's Third New International Dictionary* at 1870 (1961). As examples of proper usage, *Webster's* notes the expressions "the Anglo-Saxon race" and "the Jewish race." *Id.*; *see also* page 18, note 10, *infra*.

(as Congress understood that term), such as sex and age. *Id.* Representative Shellabarger, one of the sponsors of the bill, made that point with abundant clarity during the 1866 debates (Cong. Globe, 39th Cong., 1st Sess. 1293 (1866)[2]):

> Your State may deprive women of the right to sue or contract or testify, and children from doing the same. But if you do so, or do not do so as to one race, you shall treat the other likewise.

Plainly, the legislative history contains many references to discrimination on account of "race." But the definitional distinction sometimes drawn today, between "race" and "national origin" discrimination, simply did not exist in 1866. To the Thirty-Ninth Congress—and to the American public for many years before and after 1866—the concept of "race" included what we now commonly call "ethnic groupings," and the term was therefore used, not only to distinguish blacks of African descent and the various peoples of Asia from persons of European ancestry, but also to distinguish among the several ancestral groups of European peoples and the various peoples of Latin or Hispanic ancestry. The legislative history of Section 1981 reflects that Nineteenth Century usage of the term "race."

The language of Section 1981 and its companion, 42 U.S.C. § 1982 ("Section 1982")[3] originated in § 1 of the

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[2] The abbreviation "Cong. Globe" will be used in this brief to refer to Cong. Globe, 39th Cong., 1st Sess. (1866).

[3] Section 1982 grants to "[a]ll citizens . . . the same right . . . as is enjoyed by white citizens . . . to . . . hold . . . real and personal property." 42 U.S.C. § 1982.

The proper definition of the class protected under Section 1982 is the question presented in *Shaare Tefila Congregation v. Cobb*, No. 85-2156, which has been consolidated with this case for argument. Because of the common genesis of Sections 1981 and 1982,

(Footnote continued on following page)

Civil Rights Act of 1866, 14 Stat. 27 (the "1866 Act"). *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375, 383-84 (1982); *see also McDonald*, 427 U.S. at 286 (Section 1981); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422-23 (1968) (Section 1982). This Court traditionally has looked to the 1866 debates as the primary source of legislative history for both Sections, because it was during the 1866 debates that the statutory language was most comprehensively discussed. *See, e.g., General Building Contractors*, 458 U.S. at 386-88; *McDonald*, 427 U.S. at 287-96; *Runyon v. McCrary*, 427 U.S. 160, 173 (1976); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969); *Jones*, 392 U.S. at 422-37; *Georgia v. Rachel*, 384 U.S. 780, 791 (1966).[4]

In ascertaining the true sense in which the Thirty-Ninth Congress used the term "race," the debates concerning the 1866 Act itself provide only part of the story.

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[3] *continued*
the same principles must govern in both cases. *See General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 384 (1982) (both Section 1981 and Section 1982 originated in the Civil Rights Act of 1866).

[4] The 1866 Act was enacted to enforce the provisions of the Thirteenth Amendment. *The Civil Rights Cases*, 109 U.S. 3, 22 (1883). After ratification of the Fourteenth Amendment, Congress reenacted the 1866 Act in toto as § 18 of the Enforcement Act of 1870, 16 Stat. 140 (the "1870 Act"). *General Building Contractors*, 458 U.S. at 385 n.11; *Jones*, 392 U.S. at 436 n.71. However, § 16 of the 1870 Act also contained, "with minor changes," that portion of the 1866 Act which is now codified as Section 1981. *Runyon*, 427 U.S. at 168-69 n.8; *Jones*, 392 U.S. at 436. *See* Cong. Globe, 41st Cong., 2d Sess. at 3689 (1870). Thus, this Court has held that Section 1981 traces its lineage to both the 1866 Act and the 1870 Act (*Runyon*, 427 U.S. at 169 n.8), and therefore reflects the principles embodied in both the Thirteenth and Fourteenth Amendments. *General Building Contractors*, 458 U.S. at 386. The significance of the 1870 Act is discussed below. *See* pages 21-23, *infra*.

During the first half of 1866, Congress debated four other measures in which issues of "race" were both central and the subject of repeated discussion. Among those measures was the joint resolution that was eventually ratified as the Fourteenth Amendment. *See General Building Contractors*, 458 U.S. at 384, 391. In addition, Congress debated the expanded Freedman's Bureau bill (S. 60), which covered much the same ground as the 1866 Act. *Jones*, 392 U.S. at 423 n.30, 428 n.39. Also under consideration were H.R. 1, a bill to expand the right of suffrage in the District of Columbia (*see, e.g.*, Cong. Globe at 216, 255, 311), and S.R. 11, a resolution concerning "provisional governments in rebel states" (*see, e.g., id.* at 291). In all of the debates concerning these various measures, the word "race" was repeatedly used, not simply to signify groups identifiable by color or physiognomy, but also to describe the various national or ethnic groupings that were commonly recognized then and still are recognized today.

Congress's use of language during the 1866 debates exhibited three marked characteristics. First, the term "race" was used as a means of distinguishing among various groups, which we now commonly call "ethnic" or "ancestral" groups, including the various ancestral groups of European peoples. Congress's use of the term "race" does not evidence a definition based solely on distinctions of color or physiognomy. Rather, it reflects a broader definition encompassing discernible, commonly recognized ethnic traits. Second, Hispanics or Latins were expressly mentioned as a "race" separate and apart from whites. Third, the term "white" was often used in a very narrow sense to describe persons whose ancestors had emigrated to this country from England. In addition, the legislative history shows that Congress clearly intended the 1866 Act to af-

ford protection against private discrimination to all such "racial" groups.

1. "Race" As Including Ancestral Groupings

Speeches referring to a variety of "races," each corresponding to what we would now call an "ethnic" group, were common. For example, Senator McDougall, speaking against the expanded Freedman's Bureau bill, stated (Cong. Globe at 401, emphasis added):

> I believe something in that Scandinavian race that came from the frozen North .... I believe something in the Saxon and the Celt. But the Numidian . . . and the Carthaginian, not of northern, but of high eastern blood, went down, and so did India, and so did the East, and so did Italy, even before the northern barbarians.
>
> * * *
>
> [N]ever, while I am able to express myself either by word or action, will I commit the great legacy of our fathers, our Constitution . . . to any who are inferior to the *properly understood white races*.

Speaking against a subsequently rejected version of the Fourteenth Amendment resolution,[5] Representative Shellabarger, a proponent of the Civil Rights bill that was eventually enacted as the 1866 Act, stated that the resolution would (*id.* at 405):

> authorize[ ] the States to wholly disfranchise entire races of its people, and that, too, whether that race be white or black, Saxon, Celtic, or Caucasian . . . .

[5] This version of the Fourteenth Amendment resolution would have permitted each state to disfranchise any group of persons, but would have reduced that state's congressional representation accordingly. *See* Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 30-31 (1955).

Speaking against the Civil Rights bill itself, Senator Cowan observed that the early American colonists granted equal political privileges (*id.* at 499):

> to men of their own race from Europe. They opened [the door] to the Irishman, they opened it to the German, they opened it to the Scandinavian races of the North.

Similarly, Senator Cowan also asked (*id.*):

> I should like the honorable Senator from Illinois [Senator Trumbull] or any other Senator to tell me what is meant by the word "race," and where it is settled that there are two races of men, and if it is settled that there are two or more, how many. Where is the line to be drawn?

No one responded to Senator Cowan's question. But that question, coupled with Senator Cowan's own earlier use of the term "Scandinavian races," indicates that "race" had no narrow or technical meaning for him. For Senator Cowan, as for virtually all of the Members who spoke, "race" was simply a colloquial equivalent for "ethnic group," "nationality," or "people."

Representative Shellabarger explained the coverage of the Civil Rights bill most explicitly in ethnic "race" terms (*id.* at 1294):

> Who will say that Ohio can pass a law enacting that no man of the German race, and whom the United States has made a citizen of the United States, shall ever own any property in Ohio, or shall ever make a contract in Ohio . . .? If Ohio may pass such a law, and exclude a German citizen, not because he is a bad man . . . but because he is of the German nationality or race, then . . . you have the spectacle of an American citizen admitted to all its high privileges . . . and yet that citizen is not entitled to either contract, inherit, own property, work, or live upon a single spot of the Republic, nor to breathe its air.

Similarly, Representative Lawrence stated that the Civil Rights bill would protect groups of "naturalized citizens" against state hostility. *Id.* at 1833.[6]

Still other ethnic groups that were described as "races" were Gypsies (*id.* at 498, remarks of Sen. Cowan; *id.* at 1857-58, President Johnson's veto message[7]), Jews (*id.* at 542, remarks of Rep. Dawson), and "Hindoos" (*id.* at 523, remarks of Sen. Davis).

2. "Latins" As A Distinct "Race"

Another common usage is reflected in various Members' discussions of their perception that the Latin or Spanish "race," unlike the Anglo-Saxon or white "race," had failed to establish stable governments in the Western Hemisphere. Representative Kasson argued (*id.* at 238):

> Why, sir, look at those countries where mixed bloods have controlled the Government by universal suffrage. Look at Mexico and the South American republics . . . . Look at the Latin races of the world, and where have they ever succeeded in establishing a permanent and reliable republican Government . . .?

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[6] Representative Lawrence's comments concerning the protection afforded to "naturalized citizens" necessarily referred to members of various white ethnic groups, rather than to blacks or Orientals, because only "free white person[s]" were entitled to naturalization until 1870. *See* Act of March 26, 1790, 1 Stat. 103; *see also* Act of July 14, 1870, 16 Stat. 254 (extending the right of naturalization to "aliens of African nativity and to persons of African descent"). In 1866, therefore, any protection envisioned for "naturalized citizens" necessarily meant protection for members of white ethnic groups—the very groups that would be excluded from protection under Section 1981 if petitioners' construction were adopted.

[7] President Johnson vetoed the Civil Rights bill, but both Houses quickly acted to override the President's veto. *See* Bickel, 69 Harv. L. Rev. at 28-29.

Speaking of Mexico and Peru, Senator Morrill stated (*id.* at 251):

> The dominance of these colonists of the Spanish race . . . was lost only when the gangrene of miscegenation had wasted the energies . . . of that portion of the people . . . .
>
> This decay of national virtue and prowess was most striking in the Spanish-American countries where there was the greatest admixture of the races; hence Mexico was conspicuous in that respect.

Similarly, Representative Kelley suggested that the men who discovered America were not "what we call white men," but were "what are generally known as Basque." *Id.* at 306. Finally, Representative Dawson claimed (*id.* at 542):

> It is impossible that two distinct races should exist harmoniously in the same country, on the same footing of equality by the law. The result must be a disgusting and deteriorating admixture of races, such as is presented in the Spanish States of America by the crossing of the Castilian with the Aztec and the negro.

Thus, Mexicans, either by virtue of their "Latin" blood or because of their intermarriages, were perceived as a "race" separate and apart from whites and blacks, as Representative Johnson's remarks also indicate (*id.* at 306):

> What is it that has torn Mexico all to pieces? The negro blood that runs through the race.

3. "White Race" As "Anglo-Saxon Race"

Finally, far from identifying themselves simply as "white," many Members of Congress specifically advanced the image of an "Anglo-Saxon race," excluding from their membership many persons considered "white" today. Thus, the

term "white race" itself appears to have been afforded an ethnic signification which excluded those whose ancestors had not emigrated to this country from England. Speaking against the District of Columbia Suffrage bill, Representative Kasson stated (*id.* at 238):

> No one denies, as I understand it, that the Latin race, that the mixed races of Indian and Latin, or the mixed race of blacks and whites, or any other races, have developed, as the Anglo-Saxon race has done, the power to govern itself . . . .

Senator Nesmith, speaking on the question of provisional governments in Southern states, observed (*id.* at 291):

> I still believe that this is a white man's Government, framed by white men . . . . [T]he hardy, persevering, industrious, brave, and intelligent Anglo-Saxon race and their descendants, who brought civilization and the arts into the New World . . . are not to be overridden . . . .

And, on the same topic, Senator Stewart stated (*id.* at 298):

> I believe the Anglo-Saxon race can govern this country. . . . I believe it because it is the only race that has ever founded such institutions as ours.

Indeed, Representative Dawson's comments on the expanded Freedman's Bureau bill explicitly show that he saw himself and the other Members of Congress as members of an Anglo-Saxon "race" (*id.* at 542, emphasis added):

> Negro suffrage will, in its tendency, force down the Anglo-Saxon to the negro level, and result inevitably in amalgamation and deterioration of *our* race.

4. Act Applicable To All Such Groups

The foregoing survey demonstrates that the Thirty-Ninth Congress attributed no anthropologically fixed mean-

ing to the word "race," but used that term in a broad sense to describe national or ethnic groups which had attained an historically distinct identity. Although not every Member of the Thirty-Ninth Congress spoke in that manner, no one protested that the many who did so were guilty of distorting the common language of the day.[8]

To be sure, the most immediate problem faced by the Thirty-Ninth Congress was protection of recently freed slaves. *General Building Contractors*, 458 U.S. at 388. But it is equally true that the Thirty-Ninth Congress intended to legislate more generally, as this Court has noted (*McDonald*, 427 U.S. at 296):

> [T]he statutory structure and legislative history persuade us that the 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves.

The scope of that principle can be understood both from the inclusive construction which the Thirty-Ninth Congress gave to the word "race," and from Congress's narrow understanding of the term "white," which focused on Anglo-Saxon ancestry, to the exclusion of Gypsy, Hindu, Jewish, and Latin groups, all of which would generally be considered "Caucasian" in today's racial terminology.

That is not to say that Congress included ethnic or national origin groups within the class to be protected by Section 1981 simply because the available vocabulary made

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[8] Only one member of the Thirty-Ninth Congress dwelt at any length on what might be considered an anthropological approach to race. *See* Cong. Globe at 246-47 (remarks of Sen. Morrill). However, nothing in the legislative record suggests that Congress had any interest in Senator Morrill's analysis.

their exclusion impossible. On the contrary, the Thirty-Ninth Congress, with a remarkably prescient understanding that this Nation would soon be transformed into a Nation of Immigrants, affirmatively intended that discrimination against ethnic groups should be addressed on the same terms as discrimination against blacks. As Representative Lawrence explained (Cong. Globe at 1833):

> This bill, in that broad and comprehensive philanthropy which regards all men in their civil rights as equal before the law, is not made for any class or creed, or race or color, but in the great future that awaits us will, if it become a law, protect every citizen, including the millions of people of foreign birth who will flock to our shores to become citizens and to find here a land of liberty and law.

Moreover, the proponents of the 1866 Act emphasized its application to all such groups. *See id.* at 1294 (remarks of Rep. Shellabarger); *id.* at 1833 (remarks of Rep. Lawrence).

If Congress's only purpose had been to address the special problems of newly freed slaves, it could have cast the 1866 Act in terms of "previous condition of servitude." Or, if Congress's purpose had been to grant rights only to blacks, it could have done so using the common terms "blacks," "Negroes," or "Africans," which would have afforded protection to all blacks, without regard to whether they were newly emancipated. *Cf. United States v. Louisiana*, 225 F. Supp. 353, 363-64 n. 9 (E.D. La. 1963) (three-judge court) (Wisdom, J.), *aff'd*, 380 U.S. 145 (1965). But, by providing that "all persons" should have "the same right . . . as is enjoyed by white citizens," Congress necessarily, and intentionally, opened up the field beyond

discrimination against blacks.[9] The logical conclusion—compelled by the language used in the debates—is that by opening up the class beyond newly freed blacks, the 1866 Act was meant to prohibit discrimination against all ethnic groups.

B. In Just The Same Manner As The Thirty-Ninth Congress, This Court Regularly Used The Term "Race" To Include Ethnicity During The Nineteenth And Early Twentieth Centuries.

The Thirty-Ninth Congress's own pronouncements well demonstrate the sense in which it understood and employed the term "race." In addition, contemporaneous decisions of this Court establish that Congress's understanding of the term was not idiosyncratic, but fully conformed to then-current usage.

Only two years before Congress enacted Section 1981, this Court had occasion to use the term "race" in the same sense in which the Thirty-Ninth Congress used it, that is, in the sense of "ethnic group." In *White v. United States*, 68 U.S. (1 Wall.) 660, 680-81 (1864), the Court observed: "The Mexicans of the Spanish race, like their progenitors, were a formal people . . . ." Nearly a decade later, in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72 (1873), this Court observed that the Thirteenth Amendment would prohibit slavery "of the Mexican or Chinese race."

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[9] As a matter of pure logic, it might be argued that the Thirty-Ninth Congress cast the 1866 Act in broader terms only because Congress intended to prohibit invidious discrimination against Orientals and American Indians (but no other groups), in addition to blacks. That theoretical possibility is unconvincing because the 1866 debates evidence no special solicitude for Orientals and American Indians.

That expansive sense of the word "race" persisted well into the Twentieth Century. In *Hodges v. United States*, 203 U.S. 1, 17 (1906), the Court said that the Thirteenth Amendment

> reaches every race and every individual, and if in any respect it commits one race to the Nation it commits every race and every individual thereof. Slavery or involuntary servitude of the Chinese, of the Italian, of the Anglo-Saxon are as much within its compass as slavery or involuntary servitude of the African.

Similarly, in *Panama Railroad Company v. Rock*, 266 U.S. 209, 212 (1924), this Court described Chile and Panama as being "predominantly Spanish [as distinct from French] in race." Even as late as 1934, Justice Cardozo questioned whether Mexicans were "white persons" entitled to be naturalized. *Morrison v. California*, 291 U.S. 82, 95 n.5 (1934). Indeed, Justice Cardozo went on to note that Mexican migration to California had resulted in "racial problems." *Id.*

It should not be assumed that the eminent authors of these opinions were simply careless or imprecise in their use of language. *See* page 6, note 1, *infra*. The point is not whether they were "correct," as a matter of modern anthropological science, in referring to Anglo-Saxon, Chinese, French, Italian, Mexican, and Spanish ethnic groups as "races." The point is that they did so,[10] and

[10] Indeed, the Court's diction was far from idiosyncratic, but fully agreed with then-current usage. For example, an 1868 account of Irish immigration, which is quoted in S. Feldstein and L. Costello, *The Ordeal of Assimilation* 27 (1974), stated that "10,000 of the Irish race" died in quarantine after arrival here. Similarly, in a 1917 article, which is also quoted by Feldstein and Costello (*id.* at 54), an Ellis Island physician observed that:

(Footnote continued on following page)

their usage of the term "race" is persuasive evidence of the common understanding of the times.[11]

The words of the Thirty-Ninth Congress must be construed as its Members used them. Those Members did not omit "national origin" as a basis for discrimination when they spoke of "race" (*Ortiz v. Bank of America*, 547 F. Supp. 550, 555 (E.D. Cal. 1982)), and no such omission was then inherent in common language usage.

It is therefore proper to say that the legislative history shows that Congress intended to address discrimination

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[10] *continued*

> Those who have inspected immigrants know that almost every race has its own type of reaction during the line inspection. On the line if an Englishman reacts to questions in the manner of an Irishman, his lack of mental balance would be suspected. The converse is also true. If the Italian responded to questions as the Russian Finn responds, the former would in all probability be suffering with a depressive psychosis.

In an 1899 article, President Lowell of Harvard argued that New Mexico was not ready for statehood because "a large part of the inhabitants [were] of Spanish race, and not sufficiently trained in habits of self-government." Lowell, *The Colonial Expansion of the United States*, 83 Atlantic Monthly 145, 149 (1899). By contrast, Lowell observed, the "English-speaking race" had "political good sense." *Id.* at 150. *See also* R. Hofstadter, *Social Darwinism in American Thought*, 171-72 (1955) (quoting contemporary sources justifying military campaigns against Mexico through the alleged superiority of the "Anglo-Saxon race").

[11] Although the dictionary definition of the term "race" may not have changed significantly in the last 120 years (see page 6, note 1, *supra*), there is little doubt that the term describes an evolving concept of social science. *See generally The Concept of Race* (A. Montagu ed. 1964). If this Court were to ignore the intent of the Thirty-Ninth Congress and hold that a present-day definition of "race" defined the scope of the statute, the courts' approach to defining races would necessarily change as social and scientific attitudes changed. Under such an approach, the meaning of the statute would always be in flux.

of a "racial character." But properly seen in its contemporary linguistic context, that intent comprehends discrimination against all persons based on their connection to commonly recognized national or ethnic groups, as well as discrimination based on color.

This Court's function in cases of statutory construction is to give effect to Congress's intent. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 377-78 (1982). In this case, the Court must adhere to the original and manifest intent of the Thirty-Ninth Congress, and the Court must therefore hold that discrimination based on Arab ancestry—as well as discrimination based on Jewish, Hispanic, Spanish, or other ethnic ancestry—is prohibited by Section 1981, notwithstanding any intervening change in the common usage of the words "race" or "white."

II.

A CONSTRUCTION OF SECTION 1981 WHICH INCLUDES NATIONAL ORIGIN OR ETHNIC GROUP DISCRIMINATION IS MANDATED BY CONGRESS'S PURPOSE IN REENACTING THE STATUTE IN 1870.

Congress's 1866 language usage clearly establishes the intended inclusion of ethnic groups within the class to be protected by the 1866 Act. In addition, Congress's 1870 restatement and reenactment of the 1866 Act confirms that intention. Framed against the equal protection background of the Fourteenth Amendment, the 1870 Act was intended to remedy the same kind of class-based discrimination already prohibited to the states under the Equal Protection Clause.

A. The 1866 Act, As Recast In The 1870 Act, Was Intended To Embody A Fourteenth Amendment Equal Protection Standard.

As this Court has observed, the 1866 Act was "an initial blueprint of the Fourteenth Amendment, which Congress proposed in part as a means of 'incorporat[ing] the guaranties of the Civil Rights Act of 1866 in the organic law of the land.' " *General Building Contractors*, 458 U.S. at 389 (citation omitted). The 1870 Act "was enacted as a means of enforcing the recently ratified Fourteenth Amendment." *Id.* Thus, this Court noted a century ago that the Due Process and Equal Protection Clauses of the Fourteenth Amendment applied to "all persons . . . without regard to any differences of race, of color, or of nationality" and that § 1977 of the Revised Statutes (which was § 16 of the 1870 Act and is now Section 1981) was enacted to enforce those clauses "accordingly." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

The proponents of the 1870 Act expressly embraced a Fourteenth Amendment equal protection approach to the statute. Both the House and Senate bills originally were narrowly drafted as voting rights bills to enforce the Fifteenth Amendment. *See* Cong. Globe, 41st Cong., 2d Sess. 2755 (House); *id.* at 3479-80 (Senate). But Senator Stewart, one of the sponsors, moved to amend the Senate bill by including several sections "to secure to all persons the equal protection of the laws." *Id.* at 3480. Senator Stewart's amendment contained three sections, the first of which became § 16 of the 1870 Act (containing the basic provisions now found in Section 1981), and the third of which provided (*id.*):

> That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April 9, 1866, is hereby re-

> ënacted; and said act, except the first and second sections thereof, is hereby referred to and made a part of this act . . . .[12]

By framing a new civil rights provision (§ 16), and by reenacting the 1866 Act in light of changed circumstances (the incorporation of equal protection principles into the organic law through the Fourteenth Amendment), Congress explicitly embraced the view that Section 1981 and Section 1982 go beyond "race discrimination" (as that term is commonly used today), thus making the statutory provision an equal protection analogue.

This Court already has held that Congress, in enacting Section 1981, intended to incorporate the underlying equal protection principles. In *General Building Contractors*,

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[12] As originally drafted, the third section of the Stewart amendment apparently excluded § 1 of the 1866 Act—from which, as we have already noted (*see* pages 7-8, *supra*), the operative language of both Section 1981 and Section 1982 was derived. *See General Building Contractors*, 458 U.S. at 385 n.11. Thus, the net result of Senator Stewart's amendment would have been to extend the rights of entering into contracts and bringing suit—restated from the 1866 Act in § 16 of the 1870 Act—on the same terms as provided in the Equal Protection Clause, while eliminating entirely the rights to hold real and personal property embodied in § 1 of the 1866 Act but not restated in the 1870 bill.

That oversight was corrected, and § 18 of the 1870 Act as passed by the Senate provided (Cong. Globe, 41st Cong., 2d Sess. at 3689 (1870):

> That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April 9, 1866, is hereby reënacted . . . .

Thus, the Senate version of the 1870 bill not only contained a specific provision to protect the right to contract (§ 16), but also reenacted the *whole* 1866 Act, including the provisions now found in Section 1982. And it did so expressly, as Senator Stewart said, "to secure to all persons the equal protection of the laws" (*id.* at 3480).

this Court looked to the historical linkage between the Fourteenth Amendment and Section 1981 to hold that the purposeful discrimination standard applicable to equal protection cases applies to private discrimination under Section 1981. The Court stated (458 U.S. at 389-90):

> The 1870 Act, which contained the language that now appears in § 1981, was enacted as a means of enforcing the recently ratified Fourteenth Amendment. In light of the close connection between these Acts and the Amendment, it would be incongruous to construe the principal object of their successor, § 1981, in a manner markedly different from that of the Amendment itself.

Congress's parallel consideration of the 1866 Act and the Joint Resolution, followed not long after by the passage of the 1870 Act (with its specific equal protection underpinnings), shows that Congress neither knew any distinction between "race" and ethnicity or ancestry nor intended to draw any such distinction. Interpreting Section 1981 to include ethnicity or ancestry discrimination in an equal protection analysis is concordant with congressional intent in both 1866 and 1870.

B. This Court's Equal Protection Cases Show That There Is No Legally Significant Distinction Between Discrimination Based On Race And Discrimination Based On National Origin Or Ethnicity.

"National origin" means "ancestry." *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 89 (1973). Like race, ancestry (or ethnic background) is an "immutable characteristic." *Lockhart v. McCree*, 106 S. Ct. 1758, 1766 (1986). Both are "determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion).

In addition, both race and national origin may involve distinctive physical characteristics that tend to distinguish a person and therefore invite disparate treatment by those who would practice discrimination. As a result, not only the differences themselves, but "stereotyped characteristics not truly indicative of their abilities" have promoted discrimination against members of both racial and ethnic groups. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976).

For these reasons, this Court has long treated race and national origin alike under the Equal Protection Clause. *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971). As Justice Stewart noted in *Fullilove v. Klutznick*, 448 U.S. 448, 525 (1980) (Stewart, J., dissenting):

> The color of a person's skin and the country of his origin are immutable facts that bear no relation to ability, disadvantage, moral culpability, or any other characteristics of constitutionally permissible interest to government. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 [(1943)].

See also Frontiero, 411 U.S. at 686 (plurality opinion); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) ("Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the [Fourteenth] amendment.").

Because the 1870 Act was framed in equal protection terms, the equivalence of race and national origin discrimination under the Equal Protection Clause was intended to be carried over to the prohibition of private discrimination under Section 1981. The irrelevance and unfairness of basing governmental classifications on race and ancestry

is something this Court has long recognized. Private discrimination on those grounds is no less irrelevant and unfair. That is what Congress recognized when it enacted §§ 16 and 18 of the 1870 Act.[13]

The concepts of "race" and ancestry are closely related. The same rationale that condemns discrimination on the one basis necessarily condemns discrimination on the other. It would be contrary to Congress's manifest intent in enacting Section 1981 to separate the two concepts. This Court should reaffirm Congress's original intent to provide protection against discrimination based on ancestry, ethnicity, and national origin.

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[13] Moreover, this Court has long recognized that race and color differences "have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws." *Hernandez v. Texas*, 347 U.S. 475, 478 (1954). Ancestry and ethnicity are also recognized bases for defining groups in our society. Whether by appearance, by language, by cultural traditions, by surname, or by other factors, members of ethnic groups are easily recognized and all too frequently targeted for invidious discrimination. As this Court said in *Castaneda v. Partida*, 430 U.S. 482, 495 (1977), "it is no longer open to doubt that Mexican-Americans are a clearly identifiable class" for equal protection purposes. *See also Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968, 970 (10th Cir. 1979) (group identity of Mexican-Americans is "perfectly clear and well understood" for Section 1981 analysis).

CONCLUSION

The judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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