STATE OF MICHIGAN
IN THE COURT OF APPEALS

EDWARD JAMES TYSON,

Plaintiff-Appellant,

v

Supreme Court No. 159815
Court of Appeals No. 346595
Trial Ct. No. 17-8628-NO

DAVID CLARENCE DAWKINS and
UNTHANK, LLC,

Defendants-Appellees.
_____/

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN

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INTRODUCTION AND INTEREST OF AMICUS CURIAE[1]

The American Civil Liberties Union (ACLU) of Michigan is the Michigan affiliate of a nationwide nonprofit organization with over 1.7 million members dedicated to protecting the civil rights and civil liberties of all. The ACLU's interest in this case is rooted in core principles of the organization. At issue is a central promise of the Fourteenth Amendment's guarantee of equal protection under the law: that a man has a right, regardless of his racial identity, to enter a place of public accommodation as a business invitee with confidence that the business profiting from his patronage will comply with legal standards designed to protect his personal safety and right not to suffer violent, race-based discrimination. At issue as well is whether the courts will continue to be perceived as institutions that are intolerant of all forms of racial violence.[2]

ARGUMENT

I. PROVIDING TORT REMEDIES FOR RACE-BASED PRIVATE VIOLENCE IS AN ESSENTIAL PART OF THE ORIGINAL MEANING OF "THE EQUAL PROTECTION OF THE LAWS."

Although this is a case brought under the State's tort law, this Court's decision is of constitutional significance. The Fourteenth Amendment prohibits a State from "deny[ing] to any person within its jurisdiction the equal protection of the laws." On the core original meaning of that provision, a state must provide individuals "protection"—including through tort law—against race-based private violence. See TenBroek, *The Antislavery Origins of the Fourteenth Amendment*

[1] Pursuant to MCR 7.212(H)(3), amicus states that no counsel for a party authored this brief in whole or in part, nor did anyone, other than amicus or its counsel, make a monetary contribution intended to fund the preparation or submission of the brief.

[2] Even though Appellee takes issue with details of Appellant's version of relevant events, it remains apparent from the disposition of the criminal case and other facts in the record that whatever occurred on the evening in question, the event was: a) racial; b) violent; and c) the cause of serious injuries. These facts alone are cause for the concerns expressed herein by amicus curiae.

(1951), p 179 (to the Reconstruction Congress, "equal protection" required not just "the absence of discriminatory state legislative or other official action" but also "the presence of adequate affirmative protection to prevent or cope with individual invasions"); Boyce, *Originalism and the Fourteenth Amendment*, 33 Wake Forest L Rev 909, 969 (1998) (Equal Protection Clause "requires equality in the 'protection of the laws,' and appears to have been directed at discriminatory law enforcement, such as the failure of the police in the South to protect blacks from private violence"); Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 Geo Mason U Civ Rts LJ 1, 3 (2008) (Equal Protection Clause "imposes a duty on each state to protect all persons and property within its jurisdiction from violence and to enforce their rights through the court system"); Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 Hofstra L Rev 1379, 1403 (2006) (describing "the standard understanding of the framers of the Fourteenth Amendment, who were concerned with the lack of protection accorded to Unionists and newly-freed slaves in the Reconstruction South").

As Professor John Harrison explains, "usage in the nineteenth century and during Reconstruction recognized something called the protection of the laws," which "referred to the mechanisms through which the government secured individuals and their rights against invasion by others." Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale LJ 1385, 1435 (1992). This usage, notably, included civil remedies in court. See *id.* at 1436 (noting that Blackstone "characterized '[t]he remedial part of the law' as 'the protection of the law,'" and that *Marbury v Madison*, 5 US (1 Cranch) 137, 163 (1803), "explained that someone possessing a right to his commission had a remedy at law because 'the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury'"). Read in light of its history and this established usage, "the plainest possible meaning of

the Fourteenth Amendment mandate that no state shall deny to any citizen 'equal protection of the law' is that no state may deny to any citizen the protection of its criminal *and civil law* against private violence and private violation." West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W Va L Rev 111, 129 (1991) (emphasis added).

In adjudicating tort suits seeking redress for race-based violence, this Court is a state actor subject to the commands of the Equal Protection Clause. See *Shelley v Kraemer*, 334 US 1, 15 (1948) ("judicial action is to be regarded as action on the State for the purposes of the Fourteenth Amendment"); *Ex Parte Commonwealth of Virginia*, 100 US 339, 347 (1879) ("A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way."). Indeed, it may be the most important state actor. Although state and local law enforcement agencies have a key role to play in preventing and deterring private violence, the victims of race-based violence have no straightforward remedy against those agencies when they fail to do their jobs. Because of "[t]he deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands," courts have sharply limited any cause of action against police officers for the failure to provide promised protection. *Town of Castle Rock, Colo v Gonzales*, 545 US 748, 761 (2005). And even when Congress amasses significant evidence that states discriminatorily fail to protect particular classes of victims of violence, the Supreme Court has disallowed legislation granting the victim a civil remedy against the tortfeasor in federal court. See *United States v Morrison*, 529 US 598, 619–626 (2000).

At issue in this case, then, is not just whether Edward Tyson's action satisfies the standards for a merchant's liability under *MacDonald v PKT, Inc*, 464 Mich 322, 336; 628 NW2d 33 (2001), and related cases. At issue is whether Tyson will receive the equal protection of the laws that the

Fourteenth Amendment guarantees him. And that has implications for the Court's application of the liability standards.

Under *MacDonald*, when "a specific situation occurs on the premises that would cause a reasonable person to recognize a risk of imminent harm to an identifiable invitee," the merchant has a "duty … to *respond* reasonably." *Id.*, 464 Mich at 334. As Appellant's briefing has demonstrated, Dawkins's beating of Tyson was a "specific situation" that "would cause a reasonable person to recognize a risk of imminent harm." And Appellee did not "respond reasonably" by timely calling the police or otherwise acting to thwart the violent assault. See *Bailey v Schaaf*, 494 Mich 595, 616; 835 NW2d 413 (2013) ("duty to respond" requires "reasonable efforts to expedite police involvement"). Under the liability standards adopted by the courts of this State, the trial court incorrectly dismissed the action against Appellee.

The racial nature of the violent attack in this case further underscores the importance of Appellee's duty to respond. When read in light of the constitutional requirement of equal protection of the laws, the *MacDonald* test should be understood to require that merchants make their premises equally safe for members of all races. Cf. Chamallas, *Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases*, 14 Lewis & Clark L Rev 1351, 1374 (2010) (describing cases upholding premises liability for sexual assault as reflecting the principle "that tort law requires that premises be made reasonably safe for women as well as men"). When a merchant confronts a situation of race-based violence, any "reasonable person" would "recognize a risk of imminent harm," *MacDonald*, 464 Mich at 334—and only a swift and firm response is reasonable. Because Appellee did not respond reasonably to the horrific racial assault that occurred on its premises, it should be liable.

II. OUR NATION'S HISTORY OF RACE-BASED HARASSMENT AND INTIMIDATION RENDERS EVEN THE APPEARANCE OF JUDICIAL TOLERANCE OF RACIAL VIOLENCE A THREAT TO THE CIVIL RIGHTS OF ENTIRE COMMUNITIES.

There are perhaps no words to adequately characterize the immoral, criminal nature of the racial violence perpetrated in this case. The danger of such racial violence lies not only in the harm it causes the victim, but also in the risk that any perception that there is even the slightest judicial tolerance of such acts can have harmful implications for the citizenship rights of many other persons not directly targeted by the perpetrator. Historically, racially motivated violent acts by private parties have been used to limit or suppress the civil and political rights of entire communities of color, and it is important that this Court and other institutions reinforce the collective rejection of such conduct.

There is a historical context for these concerns. Relevant events began at least during the post-Civil War Reconstruction period when the political gains of formerly enslaved persons were rapid and widespread.

> When the South continued to follow [President Andrew] Johnson's lead and rejected the Fourteenth Amendment, Congress took charge of Reconstruction altogether. It reorganized the ten obstreperous states under military rule, enfranchised blacks, and disenfranchised substantial numbers of whites, including many planters. [Roark, *Masters Without Slaves* (1977), p 186.]

None of this sat well with many members of the white community.

> The congressional program jeopardized the precarious system of white control. Yankees had "disenfranchised her best citizens & enfranchised the blacks," a planter from Virginia moaned when he heard the news, and "we are destined to have negro officers of government from the highest to the lowest." [*Id*.]

Under the protection of federal troops, approximately 1,500 persons of African descent were elected to office throughout the South. This group included U.S. Senators and legislators at every level, a clerk of the Alabama legislature, a Justice of the Peace, postal clerks, Florida's

secretary of state, and school superintendents. P.B.S. Pinchback even became Louisiana's governor, the first person of African descent to hold such an office. Blacks also held many other public offices. Foner, *Freedom's Lawmakers: A Directory of Black Officeholders During Reconstruction* (1993).

Resentful white communities struck back. "[W]hite Southerners of all classes joined hands to end Republican rule. Rallying around the standard of white supremacy and applying large doses of white terrorism, they smashed the fragile Republican coalition in the South, ending the era of Reconstruction." Roark, *Supra.*, p 195.

The violence perpetrated by white communities was brutal. It was in this era and in this climate that the Ku Klux Klan was born. The organization carried out a campaign of terror that was intended to "redeem" white southerners. "Time did work its changes on freedmen. Immobilized by share tenancy, terrorized by the Ku Klux Klan, dispirited by the failure of Reconstruction, blacks gradually settled back into behavior which whites found more acceptable." *Id.*, p 159.

The end of Reconstruction ushered in the protracted "Jim Crow" era of racial segregation and political suppression that took nearly a century to dismantle. The resistance of African Americans to their oppressive circumstances was met by terror and violence.

One example of this occurred in rural Arkansas in 1919. Black sharecroppers in Phillips County, Arkansas grew tired of the system often referred to as debt-tenancy. It was an arrangement whereby sharecroppers lacking resources needed for supplies and necessities would get them on credit from the landowner's plantation store with an expectation of settling the debt after the harvest. After the harvest the landowner would manipulate prices to ensure that not only would

the sharecropper be unable to pay the debt but would also become further indebted and obligated to work another year without compensation.

To challenge this system of neo-slavery, the sharecroppers engaged a white lawyer to help them organize a farmers' protective association that took on the challenge of compelling landowners to disclose their financial records. It was a bold but dangerous endeavor.

> Race relations seemed to reach a nadir in the Arkansas outback that October. Gunfire from black sharecroppers meeting in a church near Elaine, a town in the Arkansas Delta, had left a deputy sheriff dead and several white citizens wounded in the early morning of October. Having provoked the Wednesday shootout, enraged white planters and farmers chased down black men and women in the high cotton of Phillips County in a frenzy lasting seven days, until the count of the dead approached two hundred. [Lewis, *W.E.B. Du Bois: The Fight for Equality and the American Century, 1919–1963* (2000), p 8.]

Although Jim Crow was morally dead at birth, it took a mass movement for civil rights to completely destroy that political zombie. The movement began in the 1950s and yielded a tragic honor roll of famous martyrs that is far too long. But away from the cameras there were also countless Black people who paid a terrible price for their active movement participation. Too often that price was their lives.

The vicious nature of the violence is exemplified by the experience of Hartman Turnbow, a Mississippi farmer and supporter of the Student Non-violent Coordinating Committee (SNCC). Turnbow was well-acquainted with the violent tendencies of movement opponents and his home was an arsenal. He told Martin Luther King: "This non-violence stuff ain't no good. It'll getcha killed." Branch, *Parting the Waters: America in the King Years 1954-63* (1988), p 781. One morning violence literally came knocking:

> At exactly that pre-dawn hour, two firebombs crashed into Hartman Turnbow's farmhouse outside Mileston, Mississippi, between Jackson and Greenwood. Turnbow jumped from bed and tried to put out the fires, until his wife and daughter shouted to him that they

> could not escape because there were armed white men outside. Turnbow grabbed one of his rifles and drove away the intruders in a spirited gunfight. [*Id*.]

As African Americans pursued their citizenship rights, they were often met with racial violence in places of public accommodation, not unlike the violence encountered by Mr. Tyson in the instant case. The late civil rights icon John Lewis knew this all too well from, among many other experiences, his fight for justice in Nashville in the days following President John F. Kennedy's election.

> John Lewis and two companions sat down with their ten-cent hamburgers at a Nashville restaurant called The Krystal, a pioneering chain of the fast-food industry. A visibly distressed waitress poured cleansing powder down their backs and water over their food, while the three Negroes steadfastly ate what they could of their meal. Lewis returned to the restaurant two hours later with his friend James Bevel, the new chairman of the Nashville student movement. Their request to speak with the manager met with the reply that the place was being cleared for emergency fumigation, whereupon the manager locked the front door, turned on a fumigating machine, and exited to the rear, leaving Bevel and Lewis alone amid the rising spray. The two of them endured for some time, with Bevel preaching quietly about the deliverance of Shadrach, Meshach, and Abednego from King Nebuchadnezzar's fiery furnace. Outside, the commotion and the escaping smoke soon attracted a roaring fire engine. A Negro preacher was pleading with the firemen to smash the door, and a news photographer was snapping pictures of the two gasping figures inside, when the nervous manager reappeared with the door key. He tried to make light of the episode, but the fumigation dramatized his association of Negroes with insects and other vermin. For Lewis and Bevel it was but another day of witness. [Branch, *supra*, pp 379-380.]

While the violence in the instant case does not appear to be a response to a specific effort by the victim to advance a civil rights agenda, racial violence often occurs because of a general climate of racial hostility triggered by advances or setbacks in the broader effort to ensure rights, privileges and opportunities of racial minorities. As just one example, during Reconstruction, many of the Klan's victims were individuals who aspired to full citizenship rights. This later

changed, and many victims of white racial violence were not social activists, but they were targeted as part of a general social and political strategy to cast entire communities as worthy of attack simply because of their identity.

> This new Klan of the 1920s cast a wider net than the old, no longer limiting its attacks to black people with political ambitions. In the 1920s its five million members…took out after "Katholics, Kikes and Koloreds, or less poetically and more accurately, after Catholics, Jews, black people, foreigners, organized labor, and the odd loose woman. [Painter, *The History of White People* (2010), p 324.]

Painting with a broad racial brush became a tactic also employed by some public figures who, as a consequence of their actions, created a climate of hostility that increased the likelihood of racial violence committed even by individuals who may not have had a precise political program, but who had internalized the general notion that their personal wellbeing is related to the extent to which people of color are suppressed. While there are diverse opinions about whether the rhetoric and actions of today's most prominent political figures have caused or inflamed racial division, there are nevertheless current objective indicators of racial hostility in the society. "FBI data show that since [President] Trump's election there has been an anomalous spike in hate crimes concentrated in counties where Trump won by larger margins. It was the second-largest uptick in hate crimes in the 25 years for which data are available, second only to the spike after September 11, 2001. Williams & Gelfand, *Trump and Racism: What Do the Data Say?*, Brookings (August 14, 2019).[3]

In light of this history, there has long been a recognition of the need for government to take special measures to protect racial minorities whose citizenship rights are jeopardized by the threat or use of racial violence. Following the enactment of the Thirteenth, Fourteenth, and Fifteenth

[3] https://www.brookings.edu/blog/fixgov/2019/08/14/trump-and-racism-what-do-the-data-say/.

Amendments to grant civil rights, in 1870 Congress saw fit to pass legislation for enforcement of these provisions. See PL 41-114; 16 Stat 140. Often referred to as the "Ku Klux Klan Act," the statute prohibited groups from banding together "to go in disguise upon the public highways, or upon the premises of another" to violate constitutional rights. ("Disguise" refers to the regalia of the Klan and similar groups.)

Michigan's legislature has also demonstrated its understanding of the seriousness of racial violence by enacting an ethnic intimidation statute, see MCL 750.147b, that proscribes the type of violence that occurred in this case. This court upheld the validity of the statute by rejecting a challenge to its constitutionality. *People v Richards*, 202 Mich App 377; 509 NW2d 528 (1993).

The institutions of this state have left no doubt that the public policy of the State of Michigan is to reject racial violence and condemn the suggestion that such conduct is acceptable. Indeed, the ongoing effort to prevent racial violence must be a community enterprise rather than a task left exclusively to the courts and other units of government. Those who advocate or foment racial violence take undeserved comfort in knowing that notwithstanding laws and official proclamations, there remains a segment of the community that endorses racial division and hostility. Even the slightest official expression of indifference or support for such repugnant ideas adds fuel to a dangerous fire.

In this case the court is presented with an opportunity to not only reaffirm the rejection of racial violence, but to also make clear that, minimally, every citizen has an obligation to contact law enforcement agencies when acts of racial violence are committed. For that reason and others this Court should reverse the dismissal of this action that occurred below and remand the case for further proceedings.

CONCLUSION

The trial court's judgment should be reversed.

Respectfully submitted,

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Dated: September 28, 2020