No. 09-322

In The
Supreme Court of the United States

CRYSTAL GREGORY; ALBERTA TURNER; CARLA TURNER; TREVA GAGE; DEBRA HAMILTON; CAPRIA LEE; JEFF MCKINNEY; ARNEL MONROE; MICHAEL RICHMOND; MAREN SNELL; FELICIA TURNER; MICHAEL WARRICK; and LASHANDA WISHAM,

Petitioners,

v.

DILLARD'S, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

The issue before this Court is narrow yet important: the level of race-based treatment permissible in a retail setting under 42 U.S.C. § 1981. Pet. at i. More precisely, must race-based treatment actually prevent customers from completing their transactions? The circuit courts of appeals apply varying standards for determining liability, ranging from actual prevention to less significant interference. *See* Pet. at 10. This Court should grant certiorari to resolve the split in the circuits and to clarify the proper standard. Defining Section 1981's reach in the retail context is important to shoppers and retailers, and resolving this issue would benefit both. *Id.* at 21-27; Br. Opp. at 13; *see also* Petition for Writ of Certiorari, *Dillard's, Inc. v. Green*, 2007 WL 2436689, at *24 (U.S. Aug. 23, 2007) (No. 07-260).

Dillard's addresses neither the division among the courts of appeals regarding the requisite standard for Section 1981 in the retail context, nor whether actual prevention of the formation of the retail contract is required. Rather than admit the existence of an obvious circuit split, Dillard's attempts to misdirect this Court's attention to race-based surveillance, an issue that is necessarily subsumed within the larger questions concerning race-based treatment and contract prevention. Dillard's further tries to confuse the issue by making arguments that are directed to the merits, instead of providing any credible reason for denying certiorari.

Section 1981 safeguards the rights of people to purchase merchandise free from race-based discrimination. Currently, these rights vary depending on the location of the store because there is no clear standard defining liability under Section 1981 in the retail context.

I. Because Of The Split In The Circuits, Whether A Plaintiff Pleads A Section 1981 Claim Under *Twombly* And *Iqbal* Can Be Determined Only After The Court Articulates The Appropriate Standard

Dillard's principally relies on the Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2006), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), which provide no basis for denying certiorari on the issue presented here. This Court is being asked to decide what a plaintiff must plead and prove under Section 1981 in the retail context. To require a plaintiff to satisfy these standards without knowing what the claim demands is to require prescience among Section 1981 plaintiffs regarding the sufficiency of their pleadings.

The Court was able to evaluate the sufficiency of the pleadings in *Iqbal* and *Twombly* because the legal standards for the underlying claims were well-settled. *Iqbal* involved a *Bivens* suit,[1] the standard for

[1] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1978).

which was "clear." *Iqbal,* 129 S. Ct. at 1948. The Court laid out those requirements in a methodical and specific manner in several previous decisions. *Id.* at 1948-49. As with *Iqbal*, the Court in *Twombly* discussed another well-settled legal standard: Section I of the Sherman Antitrust Act. *Twombly*, 550 U.S. at 555. *Iqbal* and *Twombly* are distinguishable from this case, where inter-circuit confusion exists regarding the essential elements of a Section 1981 claim. *See* Pet. at 9-18.

In some circuits, mere interference with an attempt to purchase merchandise is sufficient to trigger a Section 1981 claim. *See, e.g.*, *Hall v. Pa. State Police*, 570 F.2d 86, 92 (3d Cir. 1986). In other circuits, actual prevention is required to state a Section 1981 claim in the retail context. *See, e.g.*, *Arguello v. Conoco, Inc.*, 330 F.3d 355, 358-59 (5th Cir. 2003); *Kinnon v. Arcoub, Gopman & Assoc.*, 490 F.3d 886, 892 (11th Cir. 2007); *Bagley v. Ameritech Corp.*, 220 F.3d 518, 521 (7th Cir. 2000). Yet other circuits have different standards.[2] *See, e.g.*, *Hampton v. Dillard's Dep't Stores, Inc.*, 247 F.3d 1091, 1106 (10th Cir. 2001); *Christian v. Wal-Mart Stores*, 252 F.3d 862, 872 (6th Cir. 2001). In *Iqbal* and *Twombly*, the substantive law was settled, which can be contrasted with Petitioners' case, where no single standard currently exists. In Petitioners' case, the

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[2] For an extended discussion of these cases, *see* Pet. at 12-14.

area of law is uncertain, and therefore, this Court must resolve the underlying legal standard before rendering a judgment on the sufficiency of the pleadings.

Dillard's discussion of *Twombly* and *Iqbal* is nothing more than a distraction. Dillard's insists that the question presented does not apply to Petitioners, whose claims the district court dismissed under Rule 12(b)(6). This assertion avoids the very issue the Petition addresses, that is, the applicable standard for Section 1981 in the retail context.

While the factual allegations in Petitioners' complaints go well beyond those contained in the excerpt Dillard's provides, *see* Br. Opp. at 2-3, this demonstrates why this Court should grant review. Using an actual prevention standard, the Eighth Circuit found the pleading insufficient. However, Petitioners' pleadings are deficient only if one assumes the actual prevention standard. The pleadings would be sufficient, even under *Iqbal* and *Twombly*, if the standard were "marked hostility" as in the Sixth Circuit, or "race based treatment" as in the Third Circuit. *See* Pet. at 14-16. It is this type of inconsistency across the courts of appeals that Petitioners are asking this Court to examine.

II. Dillard's Seeks To Evade The Clear Circuit Split By Improperly Focusing On Only Race-Based Surveillance

Dillard's does not respond to the arguments presented in the Petition for Certiorari and ignores the circuit split on the correct standard for pleading and proving Section 1981 claims in a retail setting.[3] Br. Opp. at 8.

Ignoring the fact that other circuit courts have come to different conclusions, Dillard's assumes that Section 1981 could only require application of the actual prevention standard adopted by the Eighth Circuit.[4] *E.g.*, Br. Opp. at 7-8. The importance of uniformly applying Section 1981 mandates that the rift between circuits be resolved.

Petitioners alleged that Dillard's discriminated on the basis of race in the making and enforcing of contracts, which included much more than race-based surveillance. *See* Pet. at 6-7. The heart of the issue presented is what level of race-based treatment –

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[3] Indeed, Dillard's attempt to classify Petitioners' case as a race-based surveillance case – for which Dillard's claims there is no circuit split – is vexing. In its petition for certiorari in *Dillard's, Inc. v. Green*, Dillard's expressly used race-based surveillance cases to illustrate the broader circuit split on discriminatory treatment under Section 1981. *Petition for Writ of* Certiorari, *Green*, 2007 WL 2436689, at *18.

[4] For a more detailed discussion of the actual prevention standard applied by the Eighth Circuit, *see* Pet. at 11-12.

whether it takes the form of harassment, surveillance, or some other treatment – is needed to establish a Section 1981 claim. Without clarification from this Court, the rights of consumers will continue to vary. As Dillard's acknowledges, the purpose of Section 1981 is "to protect racial minorities from being shut out of a market by purposeful acts based on race." Br. Opp. at 12. In light of Petitioners' evidence that the race-based conduct of Dillard's was intentional and systematic, Petitioners are asking this Court to clarify whether such purposeful acts qualify as racial discrimination that shut minorities out of the marketplace, and whether such purposeful acts can lead to contract prevention without actual refusal to complete a transaction.

Dillard's argues that Petitioners' claims do not fall within the reach of Section 1981. Br. Opp. at 8. This argument is directed at the merits of Petitioners' underlying claims, rather than to the splintered legal standard that Petitioners have asked this Court to clarify.[5] *Id.* Interestingly, Dillard's asked the Court to

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[5] Dillard's not only ignores the confusion about the legal standard at issue, but also mischaracterizes and trivializes Petitioners' claims to be less than what is averred in the complaints. *See generally* Part I, *supra*. Petitioners' case is about more than race-based surveillance, "perceived racial slights," or "hurt feelings," Br. Opp. at 8; it is about Dillard's interference with Petitioners' ability to form contracts, which Congress intended to protect under Section 1981.

resolve this same division among circuits in its petition for certiorari in *Green*. *See* Petition for Writ of Certiorari, *Green*, 2007 WL 2436689, at *18.

Dillard's also contends that the Court's decision in *Domino's Pizza, Inc. v. McDonald's* somehow weighs against granting certiorari in this case. 546 U.S. 470 (2006). In *Domino's Pizza*, the Court held that plaintiffs "must identify injuries flowing from a racially motivated breach of *their own* contractual relationship."[6] *Id.* at 480 (emphasis added). This is not an issue here, since each individual Petitioner has alleged a breach of his or her *own* ability to contract with Dillard's. *See* Pet. at 3-6.

III. Dillard's Hyperbole Regarding "Runaway Litigation" And Speculation About Increased "Shoplifting, Vandalism, Loitering, and Violence" Should Be Disregarded[7]

The bulk of Dillard's Brief in Opposition contains arguments concerning the standard that this Court should ultimately adopt; it does not address whether this Court should take this case to resolve an obvious

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[6] In *Domino's Pizza*, the plaintiff, an individual, alleged a breach of contract on behalf of the corporation in which he was the sole shareholder and contracting officer. The Court noted that under basic agency law, such an "officer of a corporation has no rights and is exposed to no liability under the corporation's contracts." *Domino's Pizza*, 546 U.S. at 477.

[7] Br. Opp. at 8, 13.

and growing circuit split on an issue of significant public importance. For example, Dillard's argues that a broad reading of the statutory language of Section 1981 would "defy the statutory language and congressional intent" as well as result in runaway litigation from opportunists seeking damages for "perceived or imagined slights and indignities." Br. Opp. at 9. This argument is not relevant to whether this Court should accept this case to articulate an appropriate standard.

Similarly, Dillard's argues that retailers have a right to monitor customers in order to prevent shoplifting and violence. Petitioners do not question retailers' rights to protect property, staff, and customers. However, the question is not about whether a store conducting surveillance can monitor one race more closely than another. The issue in this case is what level of race-based treatment is tolerated under Section 1981 when the purported justification is surveillance but the intended effect is to harass, intimidate, and dissuade African-American customers from patronage.[8]

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[8] The *Gregory* dissent notes that there is nothing in Section 1981's legislative history, nor in the case law, that suggests that the statute tolerates a certain level of intentional discrimination. Pet. App. at 67-68. But that is the issue the Petitioners are asking this Court to resolve.

Dillard's also refers to unaccompanied minors involved in disruptive behavior in retail establishments and to two tragic incidents involving armed gunmen who opened fire in retail settings. Br. Opp. at 14 & nn.7-8. These examples of extreme situations requiring surveillance are irrelevant and attempt to divert this Court's attention from the question presented by Petitioners. Equally important, there is absolutely no evidence that Dillard's race-based surveillance policy had anything to do with preventing violence in the store. *See* Pet. at 6 (noting that a "code 44" was announced whenever an African-American entered the store).[9]

This Court has the opportunity to resolve the growing split in the circuits on this important issue and to make it easier for merchants and businesses to implement lawful policies. Petitioners respectfully

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[9] Dillard's citation of these sad and tragic events in one sense highlights the issues surrounding the type of race-based surveillance that Dillard's employed in its Columbia, Missouri store. At least one of the examples that Dillard's provides involved a white teenager in Nebraska opening fire in a department store. Br. Opp. at 14 n.8.

request that this Court grant their Petition for Writ of Certiorari.

Respectfully submitted,

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