No. _____

In The
Supreme Court of the United States

ANTHONY SMITH AND FLYING A.J.'S TOWING COMPANY, LLC,

Petitioners,

v.

JOHN WILSON, IN HIS OFFICIAL CAPACITY AS POLICE CHIEF AND IN HIS INDIVIDUAL CAPACITY, AND TOWN OF BELOIT, WISCONSIN, A MUNICIPAL CORPORATION,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

42 U.S.C. § 1981 and Title VI of the Civil Rights Act of 1964 were enacted to enforce the guarantees of the Fourteenth Amendment – that all races are entitled to equal protection of the laws. Are these statutes violated whenever race is a motivating factor in an adverse decision, and if so, are the courts powerless to provide any type of remedial relief if the defendant proves it would have taken the same action despite the improper consideration of race?

PARTIES TO THE PROCEEDINGS

All parties to this action are set forth in the caption.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Anthony Smith and Flying AJ's Towing Co., LLC state that Flying AJ's Towing Co., LLC is a Wisconsin limited liability company. None of its shares is held by a publicly traded company.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Anthony Smith and Flying A.J.'s Towing Company, respectfully request that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit, entered in this case on January 23, 2013.

OPINIONS BELOW

The January 23, 2013, opinion of the United States Court of Appeals for the Seventh Circuit is published at *Anthony Smith and Flying A.J.'s Towing Company, LLC v. John Wilson et al.*, 705 F.3d 674 (7th Cir. 2013); App. 1a-19a. The June 15, 2011, Order of the United States District Court for the Western District of Wisconsin denying Smith relief is unpublished. App. 20a-29a.

STATEMENT OF JURISDICTION

The Seventh Circuit Court of Appeals entered its final judgment on January 23, 2013. In an Order dated April 1, 2013, Justice Elena Kagan extended the time within which to file a petition for a writ of certiorari to and including June 22, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves civil rights claims under the Civil Rights Act of 1866, 42 U.S.C. § 1981, which prohibits race discrimination in the making and enforcing of contracts. It also alleges violations of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq*., prohibiting race discrimination in programs receiving federal financial assistance, and also 42 U.S.C. § 1983.

42 U.S.C. § 1981 provides, in relevant part, that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . ." 42 U.S.C. § 1981(a). It further provides that "the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b).

42 U.S.C. § 2000d provides that "[n]o person in the United States shall on the grounds of race, color, or national origin, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of

> Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

STATEMENT OF THE CASE

A. Overview

The District Court concisely summarized this case, and in doing so captured the disturbing and fundamental issue that it presents.

> Certainly, in this day and age, when some believe, or want to believe, that racism, at least blatant racism, is a thing of the past, it must be all the more painful to learn that one's worst suspicions are true when it come[s] to the motives of a public official, particularly if the official is the chief of police. That is what happened to [Anthony Smith].

App. 20a.

B. The Established Racism

For over 10 years Anthony Smith offered his towing services, Flying A.J.'s Towing Company, to Town of Beloit Chief of Police John Wilson ("Wilson"). Mr. Smith wanted to be placed on the Town of Beloit's tow list so that his towing company could be one of those called when the police department needed towing services. Flying A.J.'s Towing Company was never added to Beloit's tow list, even though Smith made between twenty-five and forty requests to the town. App. 4a. Mr. Smith, who is African-American, believed his race was motivating Wilson's refusal to place him on the tow list.

Testimony revealed a troubling environment in the Police Department where racial slurs were used regularly in the workplace. "Wilson repeatedly referred to people of color as 'niggers,' 'sand-niggers,' 'towel heads,' and 'spics.'" App. 2a. One employee who worked for the Town as a municipal court clerk testified that "she heard Wilson use the term 'nigger' – as well as other racial slurs for black, Latino and Arab residents – hundreds of times." App. 4a. Another employee, an officer for the Town, testified that Wilson instructed him to "keep blacks out of the Town of Beloit." App. 4a. Indeed, Wilson admitted at trial that there was a "free-flowing use of racial slurs" within the police department during the years in question. App. 4a.

In addition to showing this racially abusive environment, testimony showed that Mr. Smith was the target of these racist outbursts, which were

triggered when Smith would inquire about being placed on the tow list. Police Chief Wilson's response to Mr. Smith's inquiries was: "'[T]hat stupid nigger isn't going to work or tow for me'"; "'I'm not letting that goddamn nigger tow for us'"; "'that goddamn nigger is not towing for us and that's the bottom line'"; "'I'm not going to put that fucking nigger on the tow list.'" App. 4a. The Court of Appeals summarized Chief Wilson's response as "blunt and unambiguous." App. 4a The District Court explained "[t]here is overwhelming evidence supporting the jury's finding that racial animus motivated the defendants' conduct." App. 21a. The Court of Appeals agreed noting that during Wilson's tenure this type of racism "was unfortunately, not aberrational" App. 4a, and describing the evidence of racial bigotry presented at trial as both "staggering and regrettable." App. 3a.

C. Proceedings Below

Smith claimed that he was entitled to relief under Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq*.), 42 U.S.C. § 1981, and 42 U.S.C. § 1983 because race discrimination motivated the defendants' failure to add his tow company to the Town of Beloit's tow list.

A jury found that Smith's race was a "motivating factor" in Wilson's decision not to include Flying A.J.'s Towing Company on the tow list. App. 2a. But the jury further determined that Wilson would have made the same decision even if Smith's race had not

been a factor. To support this conclusion, the defendants offered some testimony to the effect that Wilson inherited a suitable tow list, never added an additional company to the list during his tenure, and rejected a petition by a white-owned tow company to be added to the list.

The District Court found that the absence of any new companies, as well as the denial of the white-owned tow company, was sufficient to support the jury's conclusion that Smith would not have been added to the list "regardless of race." App. 24a. The District Court also observed, "[c]ertainly, the jury *could* have found the other way – that Wilson would have granted Smith's request had he not been African-American – since the evidence demonstrated that Wilson did not give Smith due consideration, at least in part, because of his race." App. 23a.

The District Court held that the jury verdict barred Smith from all relief. However, the opinion concluded with the following scathing reprimand. "Regardless of the outcome here, the jury's finding of a racial motive should elicit embarrassment – not a sense of vindication – on the part of defendants." App. 27a-28a.

The Seventh Circuit declined to second guess this jury determination, given circuit precedent requiring the court of appeals to respect a jury's factual determination unless "no rational jury could have rendered it." App. 6a (citations omitted). Additionally, the Seventh Circuit addressed evidence not discussed by

the District Court: Wilson's testimony that a few of his subordinates told him of rumors that Smith sold drugs and over-billed for his tow services. App. 8a. Despite evidence showing that Smith was never convicted nor even charged with drug dealing or over-charging, the Seventh Circuit reasoned that the over-charging claim could have been used by the jury "to support a finding that [the over-charging] rather than racial bias" was the reason behind Smith's exclusion from the list. App. 9a. The panel concluded that "[w]hile the overwhelming evidence of Wilson's racism certainly could have allowed a jury to attribute Smith's exclusion solely to race, it was not irrational for this jury to reach a contrary conclusion." App. 6a.

Smith argued that he was entitled to some relief given the jury's finding that race was a motivating factor in the decision not to place his company on the tow list. The Seventh Circuit noted that in *Gross v. FBL Financial Services* the Supreme Court concluded that the "because of" language found in the Age Discrimination in Employment Act meant "but-for" cause and that mixed-motive analysis was not appropriate. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180 (2009). Applying a broad interpretation of *Gross*, the Seventh Circuit affirmed the District Court, explaining that "[a]bsent explicit statutory authorization . . . the district courts are powerless to give such relief." App. 12a.

The Seventh Circuit also reviewed Smith's argument that the burden of persuasion should shift to

the defendant after the plaintiff proves that a "motivating factor" contributed to the adverse employment action. App. 12a-15a. At trial, the District Court instructed the jury to allocate the burden of rebutting "but-for" causation to the plaintiffs. App. 14a-15a. The Seventh Circuit did not decide whether the District Court erred in this instruction. App. 14a-15a. The appeals court reasoned that Smith was not prejudiced by the instruction, and therefore it left open the issue of whether *Gross* barred burden-shifting for claims brought under Title VI or § 1981. App. 14a-15a.

In regard to Smith's Equal Protection claim under 42 U.S.C. § 1983, the Seventh Circuit found that the District Court erred by putting the burden of persuasion entirely on Smith. App. 16a-17a. The Seventh Circuit concluded that Constitutional cases are not controlled by *Gross*, but by Supreme Court precedent approving a burden-shifting framework in the Constitutional context. App. 15a-16a. However, it found that an accurate instruction likely would not have affected the result of the trial. App. 17a-18a.

The Seventh Circuit concluded with the chilling observation that "[w]e would have liked to believe that this kind of behavior faded into the darker recesses of our country's history many years ago." App. 18a.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD PROVIDE GUIDANCE ON THE FUNDAMENTAL ISSUE OF HOW MUCH CONSIDERATION OF RACE IS PERMISSIBLE BEFORE THERE IS A VIOLATION OF § 1981 AND TITLE VI, AND WHAT POWER COURTS HAVE TO ADDRESS RACIAL DISCRIMINATION THAT INFECTS CONTRACTUAL DECISIONS.

The Court and Congress have repeatedly emphasized that eliminating race discrimination is one of our Country's highest priorities and that race should not be relevant to the making and enforcement of contracts. This country's civil rights laws reflect our "society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin." *Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989).[1]

Section 1981 and Title VI, in particular, reflect Congressional recognition of the social evil caused by discrimination. Section 1981 and Title VI are

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[1] *See also Johnson v. California*, 545 U.S. 162, 172 (2005) (recognizing "the overriding interest in eradicating discrimination from our civic institutions"); *Runyon v. McCrary*, 427 U.S. 160, 191 (1976) (Stevens, J., concurring) ("The policy of the Nation as formulated by the Congress in recent years has moved constantly in the direction of eliminating racial segregation in all sectors of society."); *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 665 (1976) (concluding that "the elimination of discrimination from our society is an important national goal").

designed to address these pervasive problems in a serious manner equaling the magnitude of race discrimination in the United States. The Court has therefore given § 1981 "a sympathetic and liberal construction."[2] *Runyon*, 427 U.S. at 191 (Stevens, J., concurring); *see also Runyon*, 427 U.S. at 172 (majority opinion) (holding that § 1981 prohibits private schools from excluding students because they are African-American); *McDonald v. Santa Fe Transp. Co.*, 427 U.S. 273, 287 (1976) (holding that § 1981 prohibits racial discrimination against whites as well as blacks); *Tillman v. Wheaton-Haven Recreation Ass'n*, *Inc.*, 410 U.S. 431, 440 (1973) (holding that a private association is not exempt from either § 1981 or § 1982).

The Thirteenth and Fourteenth Amendments attempted to secure this ideal of a Country free of race discrimination through federal legislation. The statutes relied upon by Mr. Smith to vindicate his right to contract free of race-based discrimination were enacted in part to allow citizens to secure these rights. "We have thus recognized that present day 42 U.S.C. § 1981 is both a Thirteenth and Fourteenth Amendment statute." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 722 (1989); *see generally* 2 Barbara T.

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[2] While the Court broke from tradition by narrowly interpreting § 1981 in *Patterson*, Congress immediately responded by providing clarifying language to demonstrate its intention for § 1981 to be read and applied broadly.

Lindermann & Paul Grossman, *Employment Discrimination Law* 2362 (4th ed. 2007). Similarly the prohibition of race discrimination set forth in Title VI flows from our Constitution's promise to secure equal protection for all races. "[Race] discrimination is contrary to [our] national policy, and to the moral sense of the nation. . . . Title VI is simply designed to insure that federal funds are spent in accordance with the Constitution and the moral sense of the Nation." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 332-33 (1978) (Brennan, J., concurring in part.).

The issue Smith asks this Court to address is how much race discrimination these laws tolerate. Here, the jury found that race was a motivating factor in the decision not to even consider Smith for a towing contract. However, based upon the Seventh Circuit's interpretation of *Gross*, both the District Court and the Seventh Circuit determined they were powerless to find a violation of these statutes and to grant Smith any relief. This was because the jury also found that the Smith would not have received a contract even though his race was improperly considered.

This case presents a fundamental question warranting this Court's review: "[t]he specification of the standard of causation under [federal civil rights statutes] is a decision about the kind of conduct that violates [those] statute[s]." *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 237 (1989). Section 1981 is one of our Nation's oldest civil rights statutes. It is no

exaggeration to say that the passage of § 1981 was instrumental to the emergence of the very concept of civil rights under law in the United States. As such, it plays an especially important role in the legal protection of civil rights in this Country. Derived from § 1 of the Civil Rights Act of 1866, § 1981's substantive provisions were passed in direct response to the "Black Codes" enacted in southern States that sought to deprive newly emancipated slaves of civil and economic rights, and thereby "circumvent the requirements of the Thirteenth Amendment" and "essentially continue a pattern of legal enslavement." *Humphries v. CBOCS West, Inc.,* 474 F.3d 387, 392 (7th Cir. 2007) (citing *Slaughter-House Cases,* 83 U.S. (16 Wall.) 36, 70, 21 L.Ed. 394 (1872)). Section 1981's scope is and always has been sweeping. It covers virtually every potential contractual relationship to insure that persons of all races may enjoy the right of contract that is fundamental to this Nation's free enterprise system.

Despite the intervening 150 years since the passage of the Civil Rights Act, the courts are still confused as to what level of conduct constitutes a violation of it. The Seventh Circuit's opinion concludes with this anguished observation.

> [N]o one should have to experience the kind of racial bigotry that Smith endured for years – an experience confirmed by the jury's verdict. We would have liked to believe that this kind of behavior faded into the darker recesses of our country's history many years

> ago. When the chief law-enforcement officer of a Wisconsin town regularly uses language like "fucking nigger" in casual conversation, however, it is obvious that there is still work to be done.

App. 18a. It is time for the Court to resolve this issue, and this case presents an excellent vehicle to address it. For federal civil rights legislation to retain any meaningful role in ensuring that all persons enjoy equal contractual rights, clarification from the Court is required. It must be clear what standard of causation is necessary for demonstrating a violation of the 150-year-old Civil Rights Act and its companion statute, Title VI.

II. THERE IS A MEANINGFUL CIRCUIT SPLIT ON WHETHER 42 U.S.C. § 1981 AND TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, AIMED AT SECURING THE CONSTITUTION'S GUARANTEE OF EQUAL PROTECTION FOR ALL RACES, PERMIT RACE TO BE A MOTIVATING FACTOR IN ADVERSE DECISIONS.

A. Under § 1981 The Courts Struggle With What Legal Standard Achieves Congress' Desire To Make Race Irrelevant To The Making And Enforcing of Contracts.

The issue presented is undoubtedly a fundamental one. In addition, there is a distinct and confusing split among circuit courts as to whether § 1981 is

violated if race is a motivating factor in the making or enforcement of a contract. Further, the circuits continue to struggle with what power, if any, they have to remedy the improper consideration of race when the defendant shows it still would have taken the adverse action without considering race. This confusion across the circuits needs to be resolved by this Court. As the discussion below illustrates several of the circuits have addressed these issues directly under § 1981, or have adopted a rule of law on the issue that dictates the result regarding § 1981. The courts have employed three conflicting types of analyses.

1. Several Circuits Require The Plaintiff To Prove "But-For" Cause Rendering Courts Powerless To Grant Any Relief Based Upon A Showing That Race Was A Motivating Factor.

The First, Sixth, Seventh, and Eleventh Circuits do not permit a plaintiff to establish a violation of § 1981 by showing that race was a "motivating factor" in the defendant's denial of contractual rights. Relying on an expansive reading of *Gross*, these circuits take the position that if a federal antidiscrimination statute does not have the "motivating factor" language or the same-decision defense codified by the 1991 Amendments to Title VII, 42 U.S.C. § 2000e-2(m) and 42 U.S.C. § 2000e-5(g)(2)(b), the plaintiff must prove "but-for cause." In these circuits even if the plaintiff establishes that race infected the decision, that it was a motivating factor, the courts are

powerless to grant any relief if there is evidence showing that the same decision would have been made anyhow.

In the instant case, the Seventh Circuit explained, "[t]he problem that [Mr. Smith] faces is that none of [the] laws explicitly authorizes relief where a plaintiff demonstrates only that race was a 'motivating factor' for the adverse action." App. 10a. The Seventh Circuit, relying on its precedent[3] and applying the *Gross* decision, explained "[f]or the same

[3] The *Smith* opinion is one in a line of cases exhibiting the Seventh Circuit's confusing treatment of *Gross*. The first Seventh Circuit case to address *Gross* adopted a very broad application of *Gross*'s requirement that, absent explicit statutory language directing otherwise, plaintiffs must prove "but-for" causation. *See Fairley v. Andrews*, 578 F.3d 518, 525 (7th Cir. 2009) ("[U]nless a statute . . . provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in *all* suits under federal law.") (emphasis added). Subsequent Seventh Circuit decisions, while in some cases narrowing its application, implemented this far-reaching interpretation. *See Gunville v. Walker*, 583 F.3d 979, 983-84 n.1 (7th Cir. 2009) (applying *Gross* to a First Amendment claim); *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 961 (7th Cir. 2010) (applying the "but-for" requirement to Americans with Disabilities Act claims); *Serafinn v. Local 722, Int'l Bhd. of Teamsters*, 597 F.3d 908, 914-15 (7th Cir. 2010) (affirming "but-for" causation in a case brought under the Labor Management Reporting and Disclosure Act). Recently, further illustrating the confusion, the Seventh Circuit has pulled back slightly on this trend by finding that *Gross* does not apply in "suits to enforce First Amendment rights. . . ." *Greene v. Doruff*, 660 F.3d 975, 977 (7th Cir. 2011); *see also Mays v. Springborn*, No. 11-2218, 2013 WL 2504964, at *2-*3 (7th Cir. June 11, 2013).

reasons we cannot import the authorization of partial 'motivating-factor' relief found in § 2000e-2(m) into entirely different statutes – Title VI, § 1981 or § 1983." App. 12a.

The Eleventh Circuit has taken a similar approach. It explains that its previous holding regarding § 1983 "all but compels the conclusion that the mixed-motive amendments do not apply to § 1981 claims." *Mabra v. United Food & Commercial Workers Local Union No. 1996*, 176 F.3d 1357, 1357 (11th Cir. 1999); *see also Rutstein v. Avis Rent-A-Center Sys., Inc.*, 211 F.3d 1228, 1236 (11th Cir. 2000) ("[Defendant] can escape liability by showing that an individual plaintiff would have been denied or terminated even if no such policy or practice had existed." (citing *Mabra v. United Food & Commercial Workers Local Union No. 1996*, 176 F.3d 1357 (11th Cir. 2000))).

The First and the Sixth Circuits, while not addressing § 1981 directly, have adopted a rule of law prohibiting any motivating factor or same-decision defense analysis unless the statute contains the language set forth in Title VII. In *Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312 (6th Cir. 2012) (en banc), the Sixth Circuit, addressing this issue in the context of the Americans with Disabilities Act, justified its holding that no mixed-motive analysis was available this way: "*Gross* resolves this case. No matter the shared goals and methods of the two laws, [*Gross*] explains that we should not apply the substantive causation standards of one antidiscrimination statute to other anti-discrimination statutes

when Congress use[d] distinct language to describe the two standards." *Lewis*, 681 F.3d at 319-20.

Further examination of the Sixth Circuit treatment of this issue illustrates how the issue has engendered confusion, not only across the circuits, but even within the same circuit. In *Aquino v. Honda of America*, *Inc.*, 158 F.App'x. 667 (6th Cir. 2005 (unpublished opinion), a panel addressed § 1981 directly explaining "[t]he provision in question, [the motivating factor language of Title VII], does not by its plain terms apply to laws other than Title VII. Nor are § 1981 and Title VII identical in nature; rather . . . [they] are distinct and independent." *Aquino*, 158 F.App'x at 676. Seven years later, another panel of the Sixth Circuit explained, "[w]e review Title VII and § 1981 claims under the same standard." *Bobo v. United Parcel Serv., Inc.*, 665 F.3d 741, 756 (6th Cir. 2012). The Sixth Circuit then went on to remark:

> Bobo can proceed on a mixed-motive claim by demonstrating that race was a *motivating factor* in his termination, even though other factors also motivated his discharge. If Bobo can make that showing, UPS is liable, although Bobo's remedies are limited if UPS can establish that it would have taken the same action in the absence of the impermissible factor.

Bobo, 665 F.3d at 757 (emphasis added) (internal citation omitted). Then, as discussed above in *Lewis*, the en banc Sixth Circuit adopted the rule that no mixed-motive analysis is available under an

anti-discrimination statute absent the language of Title VII.

The First Circuit, in holding that mixed-motive analysis is not available in a claim under the Rehabilitation Act of 1973, adopted an analysis similar to that of the Sixth Circuit in *Lewis*. The First Circuit explained, "[t]hat Congress added 'motivating factor' language only to Title VII strongly suggests that such language should not be engrafted by judicial fiat onto other laws that Congress amended at the same time." *Palmquist v. Shinseki*, 689 F.3d 66, 76 (1st Cir. 2012).

2. Other Circuits Hold That § 1981 May Be Violated If Race Was A Motivating Factor But The Court's Holding In *Price Waterhouse* Renders The Courts Powerless To Provide Any Relief If The Defendant Proves A Same-Decision Defense.

The Third and the Fifth Circuits take the view that motivating-factor analysis is available, but that the same-decision defense articulated in *Price Waterhouse,* if established by the defendant, renders a court powerless to grant any relief despite the fact that race was proven to have infected the decision. In effect, these circuits reject *Gross*'s application to § 1981 claims, but instead default to the *Price Waterhouse* analysis. The Third Circuit explained:

> Indeed, use of the *Price Waterhouse* framework makes sense in light of section 1981's

> text. If race plays any role in a challenged decision by a defendant, the plain terms of the statutory text suggest the plaintiff has made out a prima facie case that section 1981 was violated because the plaintiff has not enjoyed "the same right" as other similarly situated persons. However, if the defendant then proves that the same decision would have been made regardless of the plaintiff's race, then the plaintiff has, in effect, enjoyed "the same right" as similarly situated persons.

Brown v. J. Kaz, Inc., 581 F.3d 175, 182 n.5 (3d Cir. 2009).

The Fifth Circuit has not addressed § 1981 directly. However, its rationale for deciding whether mixed-motive analysis applies to other claims beyond Title VII's ban on class-based discrimination suggests the Fifth Circuit would apply the same test to § 1981 claims. Rejecting *Gross*'s application to Title VII retaliation claims, the Fifth Circuit explains that "*Gross* is an ADEA case, not a Title VII case" and that the "*Price Waterhouse* holding remains our guiding light." *Smith v. Xerox Corp.*, 602 F.3d 320, 329 (5th Cir. 2010). Since § 1981 is a companion statute to Title VII, but not to the ADEA, the reasonable expectation is that the Fifth Circuit will apply this same analysis to § 1981 claims. Reinforcing this view, the Fifth Circuit in *Carter v. Luminant Power Serv. Co.*, 714 F.3d 268 (5th Cir. 2013) recently held that the limited same-decision defense codified by the 1991 Amendments to Title VII was not available in a Title

VII retaliation claim and that the proof of a same-decision defense was a complete bar to recovery, basically adopting the *Price Waterhouse* framework. *Carter*, 714 F.3d at 269, 273.

3. The Ninth Circuit Holds That If Race Is A Motivating Factor, Courts Have Power To Vindicate Violations Of The Law But A Same-Decision Defense Limits The Relief Available.

Finally, some courts have found that if race is a motivating factor in the adverse decision, then the courts do have the power to provide some type of relief. However in cases where a same-decision defense is proven, the relief would not include backpay, frontpay, or reinstatement for the plaintiff. Under this analysis the court would, however, have the power to vindicate the congressional intent of the statute by preventing further discrimination.

Metoyer v. Chassman, 504 F.3d 919 (9th Cir. 2007) illustrates this approach. *Metoyer* begins the analysis of the § 1981 issue by observing that "under § 1981, we apply 'the same legal principles as those applicable in a Title VII disparate treatment case.'" *Metoyer*, 504 F.3d at 930 (quoting *Fonseca v. Sysco Food Servs. of Ariz., Inc.*, 374 F.3d 840, 850 (9th Cir. 2004)). The Ninth Circuit then rejects the argument that *Price Waterhouse* controls the analysis under § 1981 and that a showing of a same-decision defense provides a complete defense to a § 1981 claim. It

explains that "we have never held that an employer's mixed-motive acted as a complete defense to liability to causes of action brought under § 1981." *Metoyer*, 504 F.3d at 932. The court concludes "[w]e therefore hold that the defendant cannot raise a mixed-motive defense to liability for discrimination claims brought under § 1981." *Metoyer*, 504 F.3d at 934.[4]

Thus, in the Ninth Circuit, courts have power to provide some types of remedies when it is established that race was a "motivating factor" in the adverse decision. This rule relies on a line of cases, some even predating *Price Waterhouse*, that treat the same-decision defense as a limit on available relief, rather than as an absolute bar to a finding of liability. *Metoyer*, 504 F.3d at 932 (citing *Fadhl v. City of San Francisco*, 741 F.2d 1163, 1166 (9th Cir. 1984)).

In *Fadhl*, the Ninth Circuit was confronted with the city's argument that the city was "not liable for Fadhl's termination unless it can be shown that she was qualified for the program and would have been employed . . . but for sex discrimination by the city." *Fadhl*, 741 F.2d at 1165. The Ninth Circuit explained that "[t]his contention confuses the separate issues of threshold liability and appropriate relief." *Fadhl*, 741 F.2d at 1165. The Ninth Circuit went on to explain

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[4] The Ninth Circuit did, however, find that a mixed-motive defense to liability is available for a retaliation claim brought under § 1981. *Metoyer*, 504 F.3d at 934 (citing *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1062, 1068 (9th Cir. 2004)).

that if the city carried its burden of showing a same-decision defense, then "neither back pay, nor so-called front pay, may be awarded." *Fadhl*, 741 F.2d at 1166. The Ninth Circuit treated the showing of a same-decision defense as limiting damages available to the complaining party, but did not decide that trial courts were powerless to order other remedies to address any discrimination that had been shown.

The Circuits' differing approaches to this issue demonstrate not just a defined split, but also growing confusion that warrants this Court's attention, particularly because of the fundamental right this law was intended to protect.

B. This Confusion Under § 1981 Also Applies To Title VI Claims.

Like § 1981, Title VI is an effort to secure this Country's ideal that persons of every race should be guaranteed equal protection of the law. Both the District Court and the Seventh Circuit treated the § 1981 and Title VI claims as co-equal claims. App. 10a, 25a. The only difference is the requirement of federal financial assistance to trigger Title VI coverage.[5]

[5] 42 U.S.C. § 2000d prohibits discrimination because of race, color, or national origin in "any program or activity receiving Federal financial assistance."

This treatment is consistent with how other courts analyze these mirror image claims. Indeed, as to claims of intentional race discrimination, courts consistently reason that whatever standards apply to Title VII claims will apply to § 1981 and Title VI claims as well. *See Vesom v. Atchison Hosp. Ass'n*, 279 F.App'x 624, 635 (10th Cir. 2008) (Title VII's burden shifting applies in § 1981 and Title VI claims if no direct evidence of discrimination is offered); *Paul v. Theda Med. Ctr., Inc.*, 465 F.3d 790, 794 (7th Cir. 2006) (applying the same test for Title VI and § 1981 cases when establishing a *prima facie* claim of discrimination); *Fuller v. Rayburn*, 161 F.3d 516, 518 (8th Cir. 1998) (applying Title VII's burden shifting, which also applies to § 1981, to Title VI claims); *Muthukumar Nachiappan Subbiah v. Univ. of Tex. at Dallas*, 2011 WL 1771806, at *6 (N.D. Tex. May 10, 2011) (noting that "Title VI and Title VII inquiries are essentially the same, as both require a showing of discriminatory motive" (citing *Bisong v. Univ. of Houston*, 493 F. Supp. 2d 896, 904 (S.D. Tex. 2007))).

The same analysis that drives the courts' determination as to whether mixed-motive claims are available under § 1981 should control the analysis under Title VI. Here the Seventh Circuit noted this principle, explaining that "none of these laws [referring to Title VI and § 1981] explicitly authorizes relief where a plaintiff demonstrates only that race was a 'motivating factor' for the adverse action." App. 10a. Both Title VI and § 1981 seek to achieve the same result, the elimination of race discrimination. The

time has come for the Court to decide whether mixed-motive claims exist under Title VI, and to answer the corresponding question of what relief the courts may grant in mixed-motive Title VI cases when race was a motivating factor in the adverse decision.

C. The Court Through Recent Actions Recognizes the Importance Of The Issue Presented.

The importance of the issue presented is also reflected by the Court's treatment of the issue over the past 25 years. *Price Waterhouse* was the Court's first application of mixed-motive analysis when the discrimination claim was based upon a statutory prohibition, as opposed to a constitutional prohibition. *Price Waterhouse* acquired a life of its own, spawning pages of analysis by the lower courts and academics.[6] Ultimately, the Court in *Gross*, discussing the applicability of the *Price Waterhouse* analysis, found it to be of limited utility and remarked that "[i]t is far from clear that the Court would have the same approach were it to consider the question today in the first instance." *Gross*, 557 U.S. at 178-79. The Court in *Gross* then addressed the applicability of mixed-motive analysis to the ADEA finding that age-based claims require the employee to demonstrate that age was the "but-for" cause of the adverse employment decision.

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[6] A Westlaw Next search for law review articles discussing *Price Waterhouse* yielded 2,531 entries.

Currently the Court has before it a closely related issue: the applicability of mixed-motive analysis in Title VII retaliation claims. *See Nassar v. Univ. of Tex. Sw. Med. Ctr.*, 674 F.3d 448 (5th Cir. 2012), *cert. granted*, 133 S. Ct. 978 (2013) (No. 12-484). The question presented in *Nassar* is "whether Title VII's retaliation provision and similarly worded statutes require a plaintiff to prove but-for causation . . . or instead require only proof that the employer had a mixed motive (*i.e.*, that an improper motive was one of multiple reasons for the employment action)." Question Presented, Petition for Writ of Certiorari, *Univ. of Tex. Sw. Med. Ctr. v. Nassar,* No. 12-484 (U.S. Oct. 17, 2012), 2012 WL 5195809.

Additionally, pending before the Court is a petition for writ of certiorari in *Palmquist v. Shinseki* addressing a parallel issue of whether motivating factor analysis applies to the Rehabilitation Act of 1973, 29 U.S.C. §§ 707-69. *Palmquist v. Shinseki*, 689 F.3d 66 (1st Cir. 2012), *petition for cert. filed* (2012) (No. 12-789).[7]

More than a century has passed since the enactment of § 1981, and over half a century since the enactment of Title VI. Several federal statutes now reinforce these historic laws and share their intent,

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[7] *Nassar* was argued on April 24, 2013. As of the date of this Petition, the Court has not made a decision on the Petition in *Palmquist*. Depending on the analysis adopted by the Court in *Nassar* and whether there is a grant of certiorari in *Palmquist*, a supplement to this Petition may be required.

but they differ in their language. The Court has struggled to articulate standards of causation applicable to all these statutes, which though related are not identical. There is no doubt the Court appreciates both the confusion surrounding mixed-motive analysis and the need to provide additional guidance both to the parties and to the courts. This is an appropriate case to resolve this issue as it relates to federal claims prohibiting race-based discrimination.

III. THE INTEGRITY OF THESE STATUTES IS AT RISK UNLESS THE COURT CLARIFIES THEIR APPLICATION.

Civil rights laws are designed to stop race discrimination. "The primary purpose of [antidiscrimination laws is] to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 349 (1977) (internal quotation marks omitted) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973)). Congress intends to avoid harm by passing statutes that "influence primary conduct." *Faragher v. City of Boca Raton,* 524 U.S. 775, 806 (1988) (citing *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 417 (1975)). The Seventh Circuit's aggressive application of *Gross* to Mr. Smith's race discrimination claims under § 1981 and Title VI gut these historic purposes.

If allowed to stand this decision will serve as a stark warning to anyone who believes they have been a victim of race discrimination. Not only must they be able to prove intentional discrimination, but they must also be able to predict with certainty that they would have been given the opportunity even in the face of blatant racism. Victims of proven racism could end up paying for their attempt to challenge this treatment. As the Seventh Circuit concluded, "[t]he problem that [Smith] faces is that none of these laws explicitly authorizes relief where a plaintiff demonstrates only that race was a 'motivating factor' for the adverse action." App. 10a. The Seventh Circuit then lamented that "[a]s a result of our holding today, Anthony Smith will end up paying statutory costs . . . unless the defendants in the interests of a broader vision of justice choose to forgive that payment." App. 18a.

The Seventh Circuit understood the type of disturbing message its decision could have on those challenging race discrimination. "We can only hope that the outcome of this case does not discourage future plaintiffs who seek to challenge the official misconduct and vindicate the basic guarantees of our Constitution and laws." App. 18a.

But this is truly a hope against hope. The bleak reality is that a Federal court was powerless to remedy racist acts by a government official that were overt, routine, and persistent. Would any rational individual, seeing the shameful racial bigotry that was present here, and understanding that the federal

courts were powerless to address it, attempt to challenge it? The Court should review this matter before the concerns so well articulated by the Seventh Circuit become the reality for § 1981 and Title VI claims.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted this 21st day of June, 2013.

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705 F.3d 674

United States Court of Appeals,
Seventh Circuit.
Anthony SMITH and
Flying A.J.'s Towing Company, LLC,
Plaintiffs-Appellants,
v.
John WILSON, in his official capacity as
Police Chief and in his individual capacity, and
Town of Beloit, Wisconsin, a municipal corporation,
Defendants-Appellees.

No. 11-2496.
Argued Sept. 12, 2012.
Decided Jan. 23, 2013.

Dana L. Kurtz (argued), Attorney, Kurtz Law Offices, Hinsdale, IL, for Plaintiffs-Appellants.

Robert M. Chemers, Scott L. Howie (argued), Attorneys, Pretzel & Stouffer, Chicago, IL, Bennett J. Brantmeier, Attorney, Laitsch & Brantmeier, LLC, Jefferson, WI, for Defendants-Appellees.

Before FLAUM, WOOD, and HAMILTON, Circuit Judges.

WOOD, Circuit Judge.

For the better part of a decade, Anthony Smith sought a place on the Town of Beloit's "tow list," hoping to be called upon when the local police department required towing services. Chief of Police John Wilson denied these requests, and Smith (who is African-American) attributed his exclusion to racial

bias. In December 2008, Wilson's subordinates came forward with allegations that appeared to confirm Smith's suspicions: in everyday conversation, Wilson repeatedly referred to people of color as "niggers," "sand-niggers," "towel heads," and "spics." Several officers specifically recalled that Wilson used such slurs in conversations about Smith.

Smith filed racial discrimination claims against Wilson and the Town of Beloit under Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq.), 42 U.S.C. § 1981, and 42 U.S.C. § 1983. Following a three-day trial, a jury returned a verdict finding that race was a "motivating factor" in Wilson's decision not to include Smith on the list. The jury also found, however, that Wilson would not have added Smith to the list even if race had played no part in Wilson's thinking. The district court concluded that this mixed verdict precluded Smith's requested relief and entered judgment for the defendants.

Smith raises three main issues on appeal. First, he argues that he is entitled to a new trial because the jury's second finding – that his company would have been left off the tow list even had race not been a "motivating factor" in Wilson's decision – was contrary to the manifest weight of the evidence. Second, even if that determination stands, Smith contends that he is entitled to some relief because he succeeded in demonstrating that improper racial considerations at least partially motivated Wilson. Finally, Smith urges that the district court's instruction on the allocation of the burden of persuasion was incorrect.

Notwithstanding the staggering and regrettable evidence of racial bigotry presented at trial, we conclude that the district court properly entered judgment for the defendants.

I

Smith first wrote to the Town of Beloit in 2002 to offer the services of his newly founded company, Flying A.J.'s Towing. These initial efforts bore little fruit, but on May 19, 2003, Wilson became Beloit's new police chief, and Smith heard that Wilson was planning to shake up the Town's tow list. Smith called Wilson in June 2003 to renew his offer.

The parties offer conflicting accounts of this phone conversation. According to Smith, Wilson confirmed that the police department was revising the Town's tow list and promised to be in touch with Smith as the process moved forward. Wilson denies telling Smith that he was revisiting the tow list and maintains that he explained to Smith that he was satisfied with the three companies (Ace Towing, Dewey Towing, and D & J Towing) the Town already used.

Immediately after the 2003 phone call, Wilson surveyed his officers to find out if anyone was familiar with Smith or his tow company. One officer told Wilson of rumors that Smith was involved in drug dealing. Another officer who overheard the exchange testified that Wilson responded, "That settles it then, that fucking nigger isn't going to tow for us." Though

denying the expletive, Wilson concedes that he made the rest of the remark.

This was not the only time Wilson used such language in reference to Smith. Smith testified that he made 25-40 requests – both verbally and in writing – for inclusion on the list between 2003 and 2010. Several officers confirmed that Smith regularly inquired about the list when their paths crossed. When these officers relayed Smith's inquiries, Wilson's response was blunt and unambiguous: "[T]hat stupid nigger isn't going to work or tow for me"; "I'm not letting that goddamn nigger tow for us"; "That goddamn nigger is not towing for us and that's the bottom line"; "I'm not going to put that fucking nigger on the tow list." Wilson concedes making some of these comments; he estimates that he used the term "nigger" to refer to Smith "probably less than ten" times between 2003 and 2011.

Such racism was, unfortunately, not aberrational during Wilson's tenure as police chief. One officer testified that Wilson instructed him to "keep the blacks out of the Town of Beloit" by ticketing and towing their cars across the Town's borders. The municipal court clerk testified that she heard Wilson use the word "nigger" – as well as other racial slurs for black, Latino, and Arab residents – hundreds of times. Wilson himself acknowledged that there was a "free-flowing use of racial slurs" in the Town's police department throughout the relevant period.

As police chief, Wilson was in charge of the Town's tow list, and he made several minor changes to its composition between 2003 and his retirement in 2011. In 2004, he reduced the list from three companies to two after an officer complained that one of the companies (Ace Towing) had damaged a car. Smith asserts that he spoke with Wilson after learning of Ace's removal; Wilson denies such a conversation took place. Wilson also became dissatisfied with Dewey Towing in 2008 and temporarily demoted it from the "primary tow" position to the "secondary tow" position. Soon thereafter, Wilson implemented a "rotational system" that split responsibilities evenly between Dewey and D & J Towing. Wilson did not add any companies during the relevant period.

In 2010, Smith and Flying A.J.'s filed suit against Wilson, in his individual and official capacities, and the Town of Beloit. (For simplicity, we refer to the plaintiffs as "Smith.") Following the jury's finding that Smith would have been excluded from the tow list even if he were white, the district judge solicited post-trial briefing from the parties. Smith argued that he was entitled to a judgment based on the verdict, and he also filed a motion for a new trial on damages or in the alternative on all issues. The district court rejected these arguments, finding that the mixed verdict "legally bars *all* of plaintiffs' requested relief." The district judge nevertheless acknowledged how "painful [it must be] to learn that one's worst suspicions are true when it comes to the motives of a public official, particularly if the official is the chief of

police." It concluded its opinion with an admonishment that bears repeating: "Regardless of the outcome here, the jury's finding of a racial motive should elicit embarrassment – not a sense of vindication – on the part of defendants."

II

We begin with Smith's challenge to the evidentiary support for the jury's verdict – in particular, for its affirmative answer to Question No. 2 on the special verdict form, which asked "Even if race were not a motivating factor, would Wilson still have denied plaintiffs an opportunity to apply for inclusion on the Town's towing list?" Bearing in mind that a verdict may be set aside only if "no rational jury could have rendered" it, we conclude that the district court did not abuse its discretion in denying a new trial on this ground. *Lewis v. City of Chicago Police Dep't*, 590 F.3d 427, 444 (7th Cir.2009) (quoting *Moore ex rel. Estate of Grady v. Tuleja*, 546 F.3d 423, 427 (7th Cir.2008)); *see also King v. Harrington*, 447 F.3d 531, 534 (7th Cir.2006) (same).

While the overwhelming evidence of Wilson's racism certainly could have allowed a jury to attribute Smith's exclusion solely to race, it was not irrational for this jury to reach a contrary conclusion. The defendants presented testimony that Wilson inherited a satisfactory tow list in 2003 and that he had no reason to supplement the roster with additional companies. In 2004, Wilson removed Ace

Towing from the list after receiving a complaint that the company damaged a vehicle, but there is no evidence that Wilson ever restored Ace or any other company to the vacated position. (Plaintiffs repeatedly represented, both in their briefs and at oral argument, that "in 2005, Ace Towing was then put back on the list despite prior complaints." We can find no support in the record for this assertion, and so we do not rely on it to undermine the jury's verdict.) Wilson grew frustrated with Dewey in 2008, and Smith now argues that Wilson removed Dewey from the list before "re-adding" it. But there was also evidence that Wilson merely reconfigured the order of the two-company list in 2008, temporarily demoting Dewey without changing the composition of the list. Smith actually advanced this latter interpretation of events during his closing argument. In short, the jury was entitled to credit Wilson's testimony that he simply "didn't see any need to be putting on any more tow companies" after 2003.

The jury could have relied on evidence that another white-owned tow company, C & C Towing, unsuccessfully petitioned for a place on the tow list during part of the relevant period to buttress Wilson's explanation. The owner of C & C Towing testified that he stopped by the Town's police department repeatedly over three or four years, hoping to speak with someone about adding his company to the list, to no avail. This testimony, showing that Wilson also rebuffed entreaties from a similarly-situated white-owned tow company, also supports the jury's finding.

Somewhat more problematic are Wilson's additional reasons for refusing to consider Flying A.J.'s in particular. At trial, Wilson testified that immediately after his initial 2003 conversation with Smith, Wilson asked his subordinates whether they were familiar with Smith's reputation. According to Wilson, one officer told him that the neighboring town's police department suspected Smith of drug dealing, and another officer later shared rumors that Smith overcharged clients. Wilson conceded that he conducted no further investigation and lacked any evidence corroborating these reports.

Plaintiffs attack these allegations as "hearsay" and "unsubstantiated rumors," arguing that a rational jury should not have been permitted to reach its verdict on the basis of such dubious evidence. We are mindful that certain ostensibly neutral bases for a hiring decision may be predicated on impermissible stereotypes and biases. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."). Particularly when coupled with Wilson's racist disparagement of Smith, the purported link between Smith and drug dealing warrants skepticism. *See* David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. Pa. J. Const. L. 296, 306-17 (2001) (discussing policing based on stereotypes associating

African-Americans and drugs). Were this the sole evidence in the defendants' favor, this would be a much closer case.

But the presumably false accusation that Smith had some association with drug-dealing did not stand alone; it was coupled with a report of overcharging. Smith offers us no reason to characterize a concern about overcharging as a proxy for racial animus. We note as well that Smith misses the point when he characterizes the rumors as "hearsay": they were offered not to prove the truth of the matter asserted (*i.e.,* that Smith overcharged), but rather for the non-hearsay purpose of explaining Wilson's subsequent actions. FED.R.EVID. 801(c). Moreover, it was Smith, not the defendants, who elicited this allegedly improper evidence. If the jury credited Wilson when he said that he believed that Smith overcharged, it could have used that fact to support a finding that this assessment rather than racial bias accounted for Wilson's decision not to include Flying A.J.'s on the tow list.

In the final analysis, viewing the evidence in the light most favorable to the defendants, we conclude that a rational jury could have concluded that no matter how much racism Wilson exhibited, it was inertia, not racial bias, that accounted for Smith's exclusion from the Town's tow list.

III

Smith next contends that the district court erred in concluding that the jury's mixed verdict precluded all of the relief he sought, and that the court erred in assigning the burden of proof for his various claims. These are related inquiries.

A. "Motivating Factor" Relief

Smith argues that despite the jury's finding that Wilson would have denied him a place on the Town's towing list regardless of his race, he is still entitled to a partial recovery under Title VI, 42 U.S.C. § 1981, or 42 U.S.C. § 1983. The problem that he faces is that none of these laws explicitly authorizes relief where a plaintiff demonstrates only that race was a "motivating factor" for the adverse action.

Smith's request is based on an analogy to claims brought under Title VII, which prohibits employment discrimination "because of [an] individual's race." 42 U.S.C. § 2000e-2(a). In 1991, Congress amended Title VII to provide that an "unlawful employment practice" is established where a plaintiff demonstrates "that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). If an employer can establish that the same result would have obtained even "in the absence of the impermissible motivating factor," a court may still grant the plaintiff declaratory relief, injunctive relief, and attorney's fees and costs

(but not damages). 42 U.S.C. § 2000e-5(g)(2)(B). Smith argues that because his discrimination claims share certain similarities to employment discrimination claims brought under Title VII, he is entitled to similar relief here.

The history of the Title VII amendments reveals why Smith's position is not well taken. In 1989, before the addition of the "motivating factor" language to Title VII, the Supreme Court addressed in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), whether a plaintiff could recover under that statute if there were both proscribed and non-proscribed bases for an employment decision. The Court crafted a burden-shifting framework to govern such "mixed-motive" cases: a Title VII plaintiff who showed that an impermissible motive influenced an adverse employment decision "placed upon the defendant the burden to show that it would have made the same decision in the absence of the unlawful motive." *Id.* at 250, 109 S.Ct. 1775. A defendant who made such a showing avoided liability altogether. *Id.* at 258, 109 S.Ct. 1775. The Civil Rights Act of 1991, which amended Title VII and several other statutes, represented both a codification of this burden-shifting approach and a limited rollback of *Price Waterhouse*'s complete defense to employer liability in mixed-motive situations.

As we explained in *McNutt v. Board of Trustees of the University of Illinois*, these amendments only partially abrogated *Price Waterhouse*: for employment discrimination claims falling outside the five

categories specifically listed in 42 U.S.C. § 2000e-2(m), an employer's demonstration that the same result would have occurred without the "motivating factor" still constitutes a complete defense. 141 F.3d 706 (7th Cir.1998). In *McNutt*, a jury found that an employer improperly retaliated against a Title VII plaintiff, but it also found that the plaintiff would have received the same job assignments even in the absence of the retaliatory motive. *Id.* at 707. The district court awarded the plaintiff attorney's fees and costs, despite the fact that § 2000e-2(m) makes no mention of Title VII retaliation claims. *Id.* Acknowledging "compelling logical argument[s]" in favor of granting limited relief for all species of Title VII "motivating factor" claims, we nevertheless vacated the judgment. *Id.* at 709. Absent explicit statutory authorization, we said, the district courts are powerless to give such relief. *Id.* For the same reasons, we cannot import the authorization of partial "motivating-factor" relief found in § 2000e-2(m) into entirely different statutes – Title VI, § 1981, or § 1983. Accord *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir.2010) (rejecting award of injunctive relief, declaratory relief, and attorney's fees and costs for mixed-motive ADA claim).

B. Burden Shifting

Finally, Smith argues that even if his claims require a showing that Wilson's racial bias was outcome-determinative – *i.e.,* "but for" Smith's race, Wilson would have included Flying A.J.'s on the tow

list – "[t]he district court [erred by] requir[ing] Plaintiffs to prove [such] 'but for' causation." In other words, according to Smith, even if partial "motivating-factor" recoveries are a creature of statute, a court should still shift the burden of persuasion to the defendants once the plaintiff establishes that an impermissible "motivating factor" influenced the adverse action. This line of argument is also unavailing.

Burden-shifting for mixed-motive claims outside the Title VII context became more common following *Price Waterhouse,* but in 2009, the Supreme Court held that a mixed-motive jury instruction was never appropriate in a suit brought under the Age Discrimination in Employment Act (ADEA). *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009). Focusing on the statutory text, which prohibits employment decisions "*because of* an individual's age," the Court concluded that the ADEA requires plaintiffs to prove "by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action." *Id.* at 180, 129 S.Ct. 2343. The Gross Court construed the words "because of" as colloquial shorthand for "but for" causation (interestingly, a position that a plurality of the Court had rejected two decades earlier in *Price Waterhouse*, 490 U.S. at 240, 109 S.Ct. 1775).

In the immediate wake of *Gross,* we suggested that burden-shifting no longer would be appropriate for any mixed-motive discrimination claim unless a statute explicitly provides otherwise. *Fairley v. Andrews*, 578 F.3d 518, 525 (7th Cir.2009). We later extended

Gross's prohibition against burden-shifting to claims brought under the Americans with Disabilities Act (ADA) and retaliation claims brought under the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). *Serwatka*, 591 F.3d at 963-64 (ADA); *Serafinn v. Local 722, Int'l Bhd. of Teamsters*, 597 F.3d 908 (7th Cir.2010) (LMRDA).

In *Greene v. Doruff*, however, we attempted to clarify both what *Gross* requires and what its limits are. 660 F.3d 975, 978 (7th Cir.2011) (noting circulation of opinion pursuant to Seventh Circuit Rule 40(e)). While acknowledging that "*Gross* may have implications for suits under other statutes" beyond the ADEA, we held that *Gross* was "inapplicable" to suits "to enforce First Amendment rights." *Id.* at 977. *See Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). *Greene* thus acknowledges that the Supreme Court has never abandoned the *Mt. Healthy* rule. This statute-by-statute approach is also faithful to the *Gross* Court's close scrutiny of the relevant text and its insistence that we not "apply rules applicable under one statute to a different statute without careful and critical examination." 557 U.S. at 174, 129 S.Ct. 2343.

That said, we need not decide in the present case whether *Gross* foreclosed burden-shifting for claims under Title VI (prohibiting discrimination "on the ground of race") and § 1981 (guaranteeing "the same right . . . as is enjoyed by white citizens"). The reason is simple: rightly or wrongly, the district court

assigned to the defendants the burden of disproving "but for" causation. The special verdict form asked the jury to answer "yes" or "no" to the following question:

> QUESTION NO. 2: Even if race were not a motivating factor, would Wilson still have denied plaintiffs an opportunity to apply for inclusion on the Town's towing list?

The court then instructed the jury that "the burden of proof is on the party contending that the answer to a question should be 'yes.'" The court made several passing statements throughout the trial that the plaintiffs bore the burden of proving their claims. Nevertheless, taking the jury instructions as a whole as we must, *see Boyd v. Illinois State Police*, 384 F.3d 888, 894 (7th Cir.2004), it is apparent that this jury was informed that the defendants bore the burden of persuasion on this point. If the district court erred in assigning this burden, Smith was not prejudiced by its mistake. *Id.*

Smith's Equal Protection claim under § 1983 requires separate consideration. Well before *Price Waterhouse* approved of burden-shifting in the Title VII context, federal courts used an identical framework to assess constitutional claims. *See Mt. Healthy*, 429 U.S. at 287, 97 S.Ct. 568; *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 271 n. 21, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Hunter v. Underwood*, 471 U.S. 222, 228, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985); *Board of Cnty. Comm'rs,*

Wabaunsee Cnty. v. Umbehr, 518 U.S. 668, 674, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996). In race discrimination cases, for example, once a plaintiff discharges her burden of establishing that a decision "was motivated in part by a racially discriminatory purpose," the burden shifts to the defendant to "establish[ ] that the same decision would have resulted even had the impermissible purpose not been considered." *Arlington Heights*, 429 U.S. at 271 n. 21, 97 S.Ct. 555. In *Gross,* the plaintiff highlighted these constitutional cases, arguing that burden-shifting was equally appropriate in the ADEA context. Brief for Petitioner at 54-55, *Gross*, 2009 WL 208116. The Court responded by distinguishing "constitutional cases such as *Mt. Healthy*" from ADEA claims, for which the statutory text governs the assignment of the burden of persuasion. *Gross*, 557 U.S. at 179 n. 6, 129 S.Ct. 2343. It was on the basis of this distinction that we concluded in *Greene* that *Gross* "does not affect suits to enforce First Amendment rights." The same conclusion logically follows for the Equal Protection Clause.

In contrast to its Title VI and § 1981 instructions, the district court's § 1983 instructions placed the burden of persuasion squarely on Smith. To establish a violation of the Equal Protection Clause, the court told the jury, the plaintiffs bore the burden of proving:

> . . . that Wilson purposefully treated plaintiffs less favorably than similarly-situated white businesses when Wilson denied plaintiffs an opportunity to apply for inclusion on the Town's towing list.

> Plaintiffs must prove . . . that they were able and ready to provide towing services for the Town and that they suffered an injury in fact. . . .
>
> Question No. 4 on the special verdict form then asked jurors, "Did Wilson violate the plaintiffs' rights to equal protection under the Fourteenth Amendment . . . ?" The jury answered "no." On the claim for which burden-shifting was most clearly warranted, the district court failed to assign to the defendants the burden of proving that the same result would have occurred even had race not been a motivating factor.

For several reasons, however, this error does not change the outcome here. First, it was Smith who proposed the wording of the Equal Protection instruction in the first instance. The defendants wanted to eliminate it on the ground that it was redundant and prejudicial. After proposing the instruction, Smith did not later suggest to the district court that the wording was erroneous, and "it is axiomatic that arguments not raised below are waived on appeal." *Marseilles Hydro Power, LLC v. Marseilles Land and Water Co.*, 518 F.3d 459, 470 (7th Cir.2008) (internal quotation marks omitted). Nor did Smith highlight the language of the Equal Protection instruction in his appellate briefing. *See* FED. R.APP. P. 28(a)(9) ("The appellant's brief must contain . . . citations to the authorities and parts of the record on which the appellant relies."). Finally, we cannot accept Smith's invitation to regard this as "a plain error in the

instructions that . . . affects [plaintiffs'] substantial rights." *See* FED.R.CIV.P. 51(d)(2). Given that the jury found that the defendants proved the same result would have obtained even if race had not been a "motivating factor," we think it quite unlikely that a proper Equal Protection instruction here would have made any difference. This is not enough to justify the uncommon use of the plain error doctrine in a civil case.

IV

We conclude by noting that no one should have to experience the kind of racial bigotry that Smith endured for years – an experience confirmed by the jury's verdict. We would have liked to believe that this kind of behavior faded into the darker recesses of our country's history many years ago. When the chief law-enforcement officer of a Wisconsin town regularly uses language like "fucking nigger" in casual conversation, however, it is obvious that there is still work to be done. As a result of our holding today, Anthony Smith will end up paying statutory costs of $4,423.51 to John Wilson and the Town of Beloit, unless the defendants in the interests of a broader vision of justice choose to forgive that payment. We can only hope that the outcome of this case does not discourage future plaintiffs who seek to challenge official misconduct and vindicate the basic guarantees of our Constitution and laws.

We AFFIRM the judgment of the district court, and we join in that court's epitaph for the case: "Regardless of the outcome here, the jury's finding of a racial motive should elicit embarrassment – not a sense of vindication – on the part of defendants." Each party is to bear its own costs on appeal.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ANTHONY SMITH and
FLYING A.J.'S TOWING
COMPANY, LLC,

Plaintiffs,

v.

JOHN WILSON and
TOWN OF BELOIT,

Defendants.

OPINION AND ORDER

10-cv-062-wmc

Unless subjected to racism, it is likely difficult to fully appreciate the feelings one might have when he suspects, but does not know, that an action taken against him was motivated by his race. Certainly, in this day and age, when some believe, or want to believe, that racism, at least blatant racism, is a thing of the past, it must be all the more painful to learn that one's worst suspicions are true when it come to the motives of a public official, particularly if the official is the chief of police. That is what happened to plaintiff.

Smith suspected for a number of years, and eventually brought suit alleging that defendant John Wilson, the former Chief of Police for the Town of Beloit, had denied his company Flying A.J.'s Towing Company, LLC an opportunity to be placed on the Town's towing list because Smith is African American.

After hearing the evidence, a jury returned the following answers to the special verdict on liability:

> QUESTION NO. 1: Was Smith's race a motivating factor in defendant John Wilson's decision to deny plaintiffs an opportunity to apply for inclusion on the Town of Beloit's towing list?
>
> ANSWER: Yes __X__ No_____
>
> QUESTION NO. 2: Even if race were not a motivating factor, would Wilson still have denied plaintiffs an opportunity to apply for inclusion on the Town's towing list?
>
> ANSWER: Yes __X__ No_____

(Dkt. #225.)

In light of this mixed verdict, the court requested that the parties provide proposed judgments and supporting briefs. Plaintiffs have also filed a motion for a new trial on damages or, in the alternative, a new trial on all issues. (Dkt. #233.) Finally, pending before the court is plaintiffs' motion for attorney's fees. (Dkt. #239.) There is overwhelming evidence supporting the jury's finding that racial animus motivated the defendants' conduct. Unfortunately for Smith, there is also sufficient evidence to support the jury's further finding that the defendants would have acted the same even if race played no role. This finding legally bars *all* of plaintiffs' requested relief. Accordingly, this court will (1) enter judgment for defendants, (2) deny plaintiffs' motion for a trial on

damages or a new trial, and (3) deny plaintiffs' motion for attorney's fees.[1]

BACKGROUND

The Town of Beloit's Chief of Police from 2003 to 2011, John Wilson, regularly used racial slurs to describe people of color, especially African Americans. Wilson acknowledged using the word "nigger" to describe African Americans on numerous occasions while on duty, and specifically acknowledged using that word to refer to plaintiff Anthony Smith. Other Town of Beloit employees also testified to Wilson's regular use of phrases like "fucking nigger" and "goddamn nigger" while on the job. Specifically, after speaking with Smith about his request to be placed on the Town's towing list, a number of employees recalled Wilson telling others "that fucking nigger was not going to tow for the Town of Beloit."

At the time, Smith was not aware Wilson spoke those words, though he suspected that racism may have played a role in his company being denied inclusion on the Town's towing list. Smith's suspicions seemed confirmed when Wilson's use of racial epithets – including specific references to Smith – were

[1] Also pending is plaintiffs' motion to strike defendants' memorandum in support of order on liability judgment. (Dkt. #237.) Since the court did not rely on any confidential statements in defendants' brief in reaching its decisions, this motion is denied as moot.

reported to the Town of Beloit by the police department's union in late 2008.

The jury plainly relied on all of this evidence in finding that Smith's race was a motivating factor in Wilson's decision to deny plaintiffs an opportunity to apply for inclusion on the Town of Beloit's towing list. As reflected above, however, the jury ultimately decided that Wilson and the Town would have made the same decision regardless of Smith's race.

OPINION

Plaintiffs contend that the two answers by the jury – that race was a motivating factor in denying a place on the towing list *and* that Smith and his company would have been denied regardless – constitute an inconsistent verdict, which the court should either: (1) throw out altogether by ordering a new trial or (2) convene another jury to determine Smith's personal damages for the pain and suffering caused by Wilson's discrimination. This court can find no legal basis to grant either request.

Certainly, the jury *could* have found the other way – that Wilson would have granted Smith's request had he not been African American – since the evidence demonstrated that Wilson did not give Smith due consideration, at least in part, because of his race. But the undisputed evidence at trial also demonstrated that during the relevant period (1) *no* new companies were placed on the towing list and (2) at least one other company, a white-owned company,

was denied placement on the list. Accordingly, the jury had a sound factual basis to find a mixed motive, as well as for concluding that Smith and his company would not have been allowed an opportunity for placement on the Town's towing list regardless of race.

As for Smith's demand for damages arising solely from Smith having to confront blatant racism, the court has no reason to doubt that Smith's claimed pain and suffering is real. Indeed, they may well be profound given that Wilson made such offensive remarks as the Town's appointed head of its police department. But the law does not permit recovery under Title VI and 42 U.S.C. § 1981 for racial animus alone.[2]

If this case had been an employment case under Title VII, the result would be different. In particular, Wilson's apparent mixed motive would not have precluded a liability finding, rather it would have limited the remedies available to plaintiffs. *See* 42 U.S.C. § 2000e-5(g)(2)(B) (authorizing certain types of relief, including declaratory relief, injunctive relief

[2] The court submitted the motivating factor special verdict question at plaintiffs' request. Defendants initially suggested a "because of" question, but acquiesced to the motivating factor question provided the court also instruct the jury on a mixed motive and required the jury to decide whether Wilson would have made the same decision.

and attorney's fees).[3] Here, however, the jury's finding that Wilson would have made the same decision even if Smith's race were not a factor relieves defendants of any legal liability under § 1981 *and* Title VI. *See Texas v. Lesage*, 528 U.S. 18, 21 (1999) ("The government can avoid liability by proving that it would have made the same decision without the impermissible motive."); *see also Anderson v. City of Boston*, 375 F.3d 71, 94-95 (1st Cir. 2004) (extending the holding in *Texas v. Lesage* to Title VI and § 1981 claims of race discrimination).

More recently, the United States Supreme Court in *Gross v. Financial Services, Inc.*, 129 S. Ct. 2343, 2349-51 (2009), rejected the use of the mixed motive framework in Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* ("ADEA") claims. Unlike Title VII, the ADEA contains no "motivating factor" language. The Seventh Circuit has since applied the reasoning in *Gross* to foreclose a mixed motive instruction in First Amendment retaliation claims and ADA claims. *See Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 962 (7th Cir. 2010) (eliminating mixed motive instruction in ADA cases); *Fairley v. Andrews*, 579 F.3d 518, 525-26 (7th Cir. 2009) (applying *Gross* to First Amendment retaliation

[3] Nor is this a procedural due process case like *Carey v. Piphus*, 435 U.S. 247 (1978), where the Supreme Court allowed an award of nominal damages for a procedural due process violation even where the student's suspension would have occurred absent the due process violation.

claim and specifically holding that "unless a statute . . . provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in all suits under federal law").

Neither Title VI, nor § 1981, contain the motivating factor or mixed motive language added by Congress in an amendment to Title VII. If the court erred in this case, it was in granting *plaintiffs'* request for a mixed motive instruction and submitting questions number 1 and 2 to the jury, instead of submitting a single "but for" question. Plaintiffs have waived any challenge to an instruction they proffered. Even if they did not, the court's error was harmless. In *Serwatka*, the Seventh Circuit held that the district court erred in asking similar questions, but concluded that by answering "yes" to a "same decision" question (like that in "question no. 2" here, as quoted above), the jury had found that plaintiff "did not show that her disability was a but-for cause of her discharge." 591 F.3d at 963. Accordingly, the Seventh Circuit vacated the district court's grant of declaratory judgment, injunctive relief and an award of attorney's fees and costs, and remanded to the district court with directions to enter judgment for defendant. *Id.* at 964.

The same result is required here. Absent a finding of liability on some claim, plaintiffs are not entitled to damages, including those for pain and suffering, nor are they a "prevailing party" under current law and, therefore, have no right to an attorney's fee award under 42 U.S.C. § 1988. Plaintiffs hint that the Town's change to its towing policy

in March of 2010 could provide an alternative basis for attorney's fees, since the change occurred after this litigation was filed and was arguably motivated, at least in part, by this lawsuit. But this avenue, too, proves a dead end. In *Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 605 (2001), the United State Supreme Court rejected attorney's fees premised on the so-called "catalyst theory," instead requiring an "alternation in the legal relationship of the parties" as a basis for awarding fees under 42 U.S.C. § 1988 and other fee-shifting statutes. *See also Walker v. Calumet City, Ill.*, 565 F.3d 1031, 1033-34 (7th Cir. 2009) (reversing award of attorney's fees because there was no "judicial imprimatur on" the "material alteration in the legal relationship between the parties"). But for the contrary, controlling case law cited above, the court would have thought a similar right of recovery might be implied under Title VI, the grounds of relief expressly granted by Congress under Title VII being every bit as compelling under VI, if not more so.

The court's entry of judgment in defendants' favor is dictated by the jury's finding as to question no. 2. The Town and its former Chief of Police should, however, ponder the jury's answer to the first question – that a chief of police in the first decade of this new millennium factored race into a decision to deny plaintiffs an opportunity to contract with the Town. Regardless of the outcome here, the jury's finding of a

racial motive should elicit embarrassment – not a sense of vindication – on the part of defendants.[4]

ORDER

IT IS ORDERED that:

1) plaintiffs' motion for new trial on damages, or, in the alternative, a new trial (dkt. #233) is DENIED;

2) plaintiffs' motion for attorney's fees (dkt. #239) is DENIED;

3) the motion of plaintiffs' former counsel Gingras, Cates & Luebke to file a reply brief (dkt. #261) is GRANTED;

4) the motion for attorney's fee submitted by Gingras, Cates & Luebke (dkt. #240) is DENIED;

5) plaintiffs' motion to strike defendants' memorandum in support of order on liability judgment (dkt. #237) is DENIED;

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[4] Because defendants offered on February 18, 2011, a substantial sum to plaintiffs to settle this case pursuant to Fed. R. Civ. P. 68, the court will award statutory costs after that date, including the costs of the videotaped depositions – both the videotape and the transcript – for two of defendants' witnesses who were unavailable at trial to which plaintiffs objected. Forbeck's videotaped deposition was played at trial and Robbins's would have been played if the case had progressed to damages. In light of this, the court finds that it is appropriate to award the costs associated with these two depositions.

6) plaintiffs' motion for discovery of defendants' attorneys' fees (dkt. #258) is DENIED AS MOOT;

7) plaintiffs' motions for costs (dkt. ##249, 253) is DENIED;

8) defendants' respective motions for costs are GRANTED; and

9) the clerk of the court is directed to:

   a. enter judgment in favor of defendants,

   b. award statutory costs to defendant Wilson in the amount of $717.65 and to defendant Town of Beloit in the amount of $3,716.86, and

   c. close this case.

Entered this 15th day of June, 2011.

BY THE COURT:

/s/
WILLIAM M. CONLEY
District Judge