No. 12-1491

IN THE

Supreme Court of the United States

ANTHONY SMITH and FLYING A.J.'S TOWING COMPANY, LLC, a Wisconsin limited liability company,

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 WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

ROBERT MARC CHEMERS
Counsel of Record
MIGUEL A. RUIZ
SUZANNE M. CROWLEY
SCOTT L. HOWIE
PRETZEL & STOUFFER, CHARTERED
One South Wacker Drive
Chicago, Illinois 60606
(312) 346-1973
rchemers@pretzel-stouffer.com

Counsel for Respondent John Wilson

BENNETT J. BRANTMEIER
AMANDA J. RAMAKER
BRANTMEIER LAW, LLC
234 South Main Street
P.O. Box 309
Jefferson, Wisconsin 53549
(920) 674-6220
ben@bjblaw.net

Counsel for Respondent Town of Beloit, Wisconsin

248294

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

A plaintiff in a federal race-discrimination case must prove "but for" causation unless a statute provides a different burden of proof. While the jury found race a "motivating factor" in a decision to deny Petitioners a chance to apply for Respondents' towing-rotation list, it also found that Petitioners would have been denied that chance regardless of race. Did the jury's special verdict under Title VI and Section 1981 prevent Petitioners from recovering?

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INTRODUCTION

Petitioners present no "compelling reason" for this Court to grant their Petition for Writ of *Certiorari*. *See* Sup. Ct. R. 10. Contrary to what they claim, there is no decision of any federal appeals court that is at odds with the Seventh Circuit's; indeed, Petitioners' effort to portray such a distinction unwittingly illustrates the circuits' uniformity in construing the burden of proof under §1981 and Title VI, and any error in allocating that burden inured to Petitioners' benefit. Nor do they identify any question of federal law "that has not been, but should be, settled by this Court[.]" *See* Sup. Ct. R. 10(c).

Petitioners quarrel with the results in the lower courts, but do not identify any conflict among the circuits or any issue that calls for review in this Court. The Petition for Writ of *Certiorari* should be denied.

STATEMENT OF THE CASE

Petitioner Anthony Smith started his business, Petitioner Flying A.J.'s Towing Company, LLC, in June 2002 (Doc. #269 at 110). Smith approached Chief Tilley, who was then the police chief of Respondent the Town of Beloit, Wisconsin, about having Flying A.J.'s added to the official list of companies that performed municipal towing operations (*id.* at 111). He was unsuccessful, he believed, because Chief Tilley was "on his way out, so I don't think he was in charge of much at the time" (*id.*).

Respondent John Wilson became police chief of the Town of Beloit on May 19, 2003 (Doc. #267 at 123). Smith testified that he telephoned Chief Wilson shortly after

Wilson took over as chief, and asked him if his company could be placed on the tow list (Doc. #269 at 78). According to Smith, Wilson said "that he was redoing the tow list and he was going to get back with me" (*id.*). Smith denied that their conversation was argumentative in any way (*id.*).

Wilson gave a different account of their conversation. According to Wilson, Smith telephoned him at the police department about four or five weeks after he became chief (Doc. 267 at 123–24). Wilson had never met or spoken to Smith and did not know that he was African-American (*id.* at 124, 140). Smith identified himself and said he wanted to get on the tow list (*id.*). Wilson testified that he told Smith that while he was new there, the Town and the police department "seemed to be happy with the three companies" already on the list, that it was a small department, and that he "didn't see any need to be putting on any more tow companies" (*id.* at 124–25). Wilson testified that Smith "got upset," claiming that Wilson's predecessor had been a racist who excluded him from the list for that reason, and accusing the Town and the police department of being racist as well (*id.* at 125). When Wilson said he didn't know what Smith was talking about, Smith accused him of being "a racist just like the rest of them" (*id.*). After "a few more negative comments," Wilson testified, Smith hung up (*id.*).

Wilson admitted to being upset by the conversation, and walked around the building afterward asking if other members of the department knew anything about Smith or his towing company (Doc. #267 at 57–58, 125–26). "It was just generally to go through the department and try to find out what was going on or what kind of reputation Mr. Smith had" (*id.* at 58). He acknowledged that he did

not conduct "a big investigation or anything like that, it was just simply hey, what do you know about this guy" (*id.*; *see also id.* at 140–41). It was through these informal conversations that Wilson learned Smith's race (*id.* at 140–41).

Among the officers with whom he discussed Smith was Officer Alan Cass, who had previously worked for the police department of the City of Beloit, and who told Wilson that Smith had been suspected of dealing drugs there (Doc. #267 at 60–61). Cass himself testified that during his time with the City of Beloit, Smith was reputed to have been involved in drug dealing, though he had never been arrested (Doc. #268 at 8–9). Cass testified that he told Wilson about these rumors when Wilson asked about Smith (*id.*). Officer David Dransfield, who was also part of the conversation with Wilson and Cass, confirmed their account of it, and testified that Wilson said of the rumor of drug dealing, "that settles it then," followed by a racial slur against Smith (Doc. #267 at 169).

Wilson's general conversations with other officers also yielded the rumor—related by a Captain Roden, Wilson thought—that Petitioners had been the subjects of complaints in the City of Beloit about overcharging (Doc. #267 at 57–58, 61). Wilson also testified that he heard a rumor that Petitioners' trucks were not in good condition, but could not remember which officer told him that (*id.* at 62). Wilson testified that these rumors, in addition to Smith's rumored involvement with drug-dealing, were the reasons he did not want Petitioners on the tow list (Doc. #267 at 14, 116, 118).

Wilson testified that his 2003 telephone conversation with Smith was the only conversation they ever had (Doc. #267 at 133). Smith, however, claimed that when he found out that his company had not been added to the tow list, he called Wilson to ask why (Doc. #269 at 78–79). According to Smith, Wilson told him "I chose the one I wanted to use to tow cars for me," and said he would let Smith's company on the list if one company was removed from it (*id.* at 79). Smith also testified that in 2004 or 2005 he learned that one of the companies on the tow list had been removed, and called Wilson to ask if Flying A.J.'s could be added (*id.*). According to Smith, Wilson told him, "I'm happy with who I got towing for me" (*id.* at 80).

In early 2010, the Town changed the procedures for being added to the tow list, using the same procedures and application form adopted by the Rock County Communication Center, which supplied the Town an application packet to be completed by individuals or companies wishing to provide municipal towing services (Doc. #267 at 11–12, 43–45, 128–29). Wilson testified that the rumors about Petitioners had become less frequent, that their trucks were rumored to have "gotten somewhat better," and that the allegations about drug dealing "hadn't come up in quite awhile" (*id.* at 13). The Town was also looking at trying to standardize the policy for towing, and changing its policy to go along with the City of Beloit and the 911 center, "coming out with a standardized policy for the whole county," and the Town was "just going to start including everybody that applied" (*id.* at 13, 20; *see also id.* at 43, 54).

As a result of the changes, Petitioners and C&C Towing, a white-owned company that had been trying for

three or four years to be added to the list, were invited to apply (Doc. #267 at 12–13, 19–21, 77–78, 118, 132–33). C&C applied and was added to the list (Doc. #267 at 22–24, 43). Petitioners did not apply (Doc. #267 at 45, 129; *see also* Doc. #269 at 109).

Before being invited to apply for inclusion on the Town's tow list, Petitioners filed this suit against Chief Wilson and the Town of Beloit, alleging race discrimination in violation of 42 U.S.C. §1981, 42 U.S.C. §1983, and Title VI, 42 U.S.C. §2000d (Doc. #1). Petitioners' claims were eventually tried to a jury, which returned a special verdict: Though it found that race had been a "motivating factor" in Chief Wilson's decision to deny Petitioners an opportunity to apply for inclusion on the Town of Beloit's towing list, the jury found that Wilson still would have denied them that opportunity even if race were not a motivating factor (Doc. #225 at 1). The district court denied Petitioners' motion for a new trial (Doc. #273 at 7) and entered judgment in favor of Respondents, awarding them their statutory costs (Doc. #274).

The Seventh Circuit affirmed the judgment. Pet. App. at 19; *see also Smith v. Wilson*, 705 F.3d 674, 683 (7th Cir. 2013). Though sharply critical of the racial animus that the jury found to have played a role in Respondents' exclusion from the tow list, the court held that Petitioners' claims were brought under statutes that required them to prove but-for causation—that is, that they would not have been denied the chance to apply for the tow list if not for Smith's race—and that the special verdict showed that the jury did not believe this to be the case. Pet. App. at 9, 10. It further held that the district court had assigned Respondents the burden of proving a mixture of motives as a defense to but-

for causation as to the Section 1981 and Title VI claims. Pet. App. at 15. While the district court had arguably been mistaken in assigning Petitioners the burden of disproving the alternate reasons as to their Equal Protection claims, the Seventh Circuit held, Petitioners had waived the error by requesting the jury instruction that assigned the burden, and had not adequately argued the issue on appeal. Pet. App. at 16–18.

REASONS TO DENY THE PETITION

Petitioners rely upon an illusory "circuit split" over the standard of proof that governs discrimination claims under Section 1981. Indeed, Petitioners acknowledge that at least three other circuits apply the same standard to Section 1981 as the Seventh Circuit applied here, holding that a mixed-motives verdict does not entitle a plaintiff to recover under that statute. Pet. at 14–18. But they fail to show how that standard differs from the standard they attribute to another pair of circuits, and their suggestion that the Ninth Circuit applies still another standard is unsupported by the one decision they cite for it. Pet. at 18–20, 20–22. And they treat Title VI as an afterthought, arguing that it should be governed by the same standard as Section 1981 but failing even to suggest that the circuits are split over what the Title VI standard is. Pet. at 24–26.

Despite Petitioners' contentions, only Title VII penalizes an improper motive that was not a but-for cause of the adverse action—and not even for all Title VII claims. Petitioners point to no circuit that views the burden of proof under Section 1981 or Title VI as being the same as that under Title VII. To the contrary, their effort to distinguish one set of circuits from another

manages instead to show that there is no meaningful distinction at all. The only disagreement that Petitioners' authorities suggest is one that Petitioners do not offer as a basis for *certiorari*: whether the burden of proof in a mixed-motive case shifts to a defendant and requires the defense to prove a legitimate alternative motive. That Petitioners are silent on this issue is unsurprising. The Seventh Circuit recognized that since the district court assigned Respondents the burden of proof on that subject as to Petitioners' claims under Title VI and Section 1981, Petitioners were not prejudiced by any error in this regard; indeed, if it was error to assign the burden to Respondents, Petitioners benefitted from the mistake. Pet. App. 14–15.[1]

Since Petitioners cannot claim any prejudice from such an error, they cannot argue that a circuit split over the shifting of the burden of proof is any reason for further review. Since there is no circuit split for this Court to resolve as to what that burden is under Title VI and Section 1981, there is no reason to grant *certiorari* in this case.

1. Though the Seventh Circuit acknowledged that the district court had placed the burden of proof on Petitioners as to their claims under Section 1983, it recognized that Petitioners themselves had proposed the jury instruction that did so (and that Respondents had objected to that instruction as redundant). Pet. App. 17. It also found that Petitioners had not adequately raised the issue on appeal, and that the issue did not rise to the level of plain error. Pet. App. 17–18. Petitioners make no argument at all in this Court concerning their Section 1983 claims.

I. Petitioners' claims required them to prove "but for" causation—that the acts of which they complained would not have occurred but for Smith's race.

The text of neither Section 1981 nor Title VI contains anything to authorize a mixed-motives discrimination claim. There is no such authorization in Section 1981:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981.

Nor is there authority for a mixed-motives claim in Title VI:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d.

While there is a lesser burden of proving motivating-factor causation under Title VII, a statute not at issue in this case, the statutory language that relaxes the burden under that statute is not to be found in Title VI or Section 1981. Indeed, the relaxed alternative burden does not even apply to all portions of Title VII. It is limited to the one class of claims to which Congress applied it when it amended Title VII: the class of status-based discrimination claims under that statute, an exception to the rule that federal claims require proof of but-for causation. Unlike any of the statutes under which Petitioners sued, this portion of Title VII allows for recovery on a showing of motivating-factor causation alone:

> Impermissible consideration of race, color, religion, sex, or national origin in employment practices. Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party 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) (emphasis added).

This statutory distinction in the burden of proof makes this portion of Title VII different from the statutes at issue in this case. Motivating-factor causation does not apply to claims under statutes that do not contain that lesser burden; without a statutory provision expressly allowing for recovery on that lesser showing, a plaintiff must show that a forbidden characteristic was the "but for" cause of the bad act. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167,

177–78 (2009). Indeed, *even under Title VII itself,* proof of motivating-factor causation is not enough to prevail on a *retaliation* claim, since the section that authorizes such claims does not contain the lesser burden. *University of Texas S.W. Med. Ctr. v. Nassar*, ___ U.S. ___, ___, 133 S. Ct. 2517, 2529–30 (2013).

If there were any conflict among the circuits as to the burden of proof, it would be resolved by *Gross* and *Nassar*—both of which reinforce the unremarkable proposition that but-for causation is a required element of any suit under federal law unless federal law expressly states a lesser burden directly applicable to the specific claim. Title VII expressly states a lesser burden, allowing for limited relief for discrimination claims upon proof of motivating-factor causation alone. *Nassar*, 133 S. Ct. at 2533; *Gross*, 557 U.S. at 173–74. By contrast, Title VI and Section 1981 do not.

Since this Court has already rejected two attempts to extend Title VII's motivating-factor standard beyond the statutory limit of that language, there is nothing to be gained from a third examination of this same argument. *Nassar* and *Gross* establish that Title VII discrimination claims are a legislatively expressed exception to the rule that but-for causation is required under federal law—a rule that governs even those parts of Title VII itself to which the lesser standard does not expressly apply. There is nothing in Title VI or Section 1981 that even suggests the lesser standard that applies to one part of Title VII, and no need for this Court to undertake yet another analysis of that question.

II. Petitioners complain of an illusory circuit split.

Even if *Nassar* and *Gross* had not already rejected the notion that the motivating-factor standard can survive outside its natural habitat of Title VII discrimination claims, Petitioners fail to identify any meaningful difference among the circuits as to Title VI and Section 1981. To the contrary, what Petitioners call a "circuit split" is only the ordinary variations in language that different courts use to describe a uniform construction of the statutes at issue.

Federal civil-rights legislation concerning workplace discrimination was enacted against a backdrop that required plaintiffs to prove causation in fact—that is, that the defendant's conduct did in fact cause the plaintiff's injury. *Nassar*, 133 S. Ct. at 2525. This standard ordinarily requires a plaintiff to show that the harm would not have occurred "in the absence of—that is, but for—the defendant's conduct." *Id.* This is "the background against which Congress legislated in enacting Title VII, and these are the default rules it is presumed to have incorporated, absent an indication to the contrary in the statute itself." *Id.*

Indeed, Petitioners acknowledge that the First, Sixth, and Eleventh Circuits share the understanding stated by the Seventh Circuit in this case, that but-for causation is required unless a statute authorizes recovery on a lesser standard of proof. Pet. at 14; *see also id.* at 16 (citing, *e.g.*, *Mabra v. United Food & Commercial Workers Local Union No. 1996*, 176 F.3d 1357 (11th Cir. 1999)); *id.* at 16–17 (citing, *e.g.*, *Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312 (6th Cir. 2012) (en banc)); *and id.* at 18 (citing

Palmquist v. Shinseki, 689 F.3d 66, 76 (1st Cir. 2012)). But though they contend that the Third and Fifth Circuits are in conflict with this understanding, Petitioners offer no authorities from either circuit that illustrate any such conflict. *See* Pet. at 18–20.

Their claim as to how the Fifth Circuit interprets Title VI and Section 1981 is based on sheer clairvoyance, since the pair of cases they cite from that circuit does not discuss either statute. The court cited Section 1981 only in passing in *Carter v. Luminant Power Services Co.*, 714 F.3d 268 (5th Cir. 2013), and not at all in *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010). Nor does either decision even allude to Title VI. Even to the extent that *Smith* might once have been thought analogous to this case, and thus arguably useful in its holding that Title VII retaliation claims may succeed on proof of motivating-factor causation alone, that holding did not survive this Court's recent decision in *Nassar*. Indeed, in *Carter*, the Fifth Circuit anticipated *Nassar* and held that motivating-factor causation was not enough for a plaintiff to prevail on a Title VII retaliation claim under §2000e(2)(m).

While the Third Circuit discussed Section 1981 in *Brown v. J. Kaz, Inc.*, 581 F.3d 175 (3d Cir. 2009), *see* Pet. at 18–19, it did so in the context of summary judgment, and thus held only that the plaintiff had presented enough evidence to make for a jury question as to whether her termination was motivated by racial animus alone. Though it reversed the summary judgment for the defendant, the court emphasized "that we are not holding that [the plaintiff] has proven her case of racial discrimination. What she has shown is that there are disputed facts and inferences on issues material to the disposition." *Brown*,

581 F.3d at 185. In that procedural posture, *Brown* did not suggest any conflict with the principle that a claim under §1981 requires proof that the challenged action would not have occurred but for the proscribed motive.

Indeed, Petitioners' reliance on *Brown* reveals a confusion between two distinct aspects of this Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *Price Waterhouse* rejected employer liability in mixed-motive cases, which Congress later restored in a limited fashion when it amended Title VII; but the same decision also created the now-familiar burden-shifting framework, which those amendments left intact. *Gross*, 557 U.S. at 174. While Petitioners cite *Brown* for the notion that *Price Waterhouse* still applies to Section 1981 in the Third Circuit, Pet. at 18–19, they overlook the fact that *Brown* refers to the burden-shifting framework—and mistakenly contend that the Third Circuit still allows recovery on a showing of motivating-factor causation.

Where the Third Circuit differs with the Seventh Circuit is not in what the burden of proof is, but in how it is allocated and whether it shifts between plaintiff and defendant in mixed-motive cases. But Petitioners cannot openly rely on that disagreement as a ground for *certiorari* because they were not aggrieved by it. Since the district court allocated the burden of proof to Respondents, any error inured to Petitioners' benefit: "[R]ightly or wrongly, the district court assigned to [Respondents] the burden of disproving 'but for' causation." Pet. App. 14–15. If this was error, it did not prejudice Petitioners; to the contrary, it helped them.

Though Petitioners claim that the Ninth Circuit holds yet a third distinct understanding of the burden of

proof, they offer nothing from that circuit more recent than *Gross* and *Nassar*, and nothing to suggest that the Ninth Circuit would continue to believe that Section 1981 cases are governed by the same standards as Title VII disparate-treatment cases. *See* Pet. at 20–22.

Even before those decisions, there was nothing to that effect in *Metoyer v. Chassman*, 504 F.3d 919 (9th Cir. 2007), a Ninth Circuit case that reversed a summary judgment for the defendants due to questions of fact concerning the reason for the plaintiff's discharge. *Id.* at 930–31; *see* Pet. at 20. As a summary-judgment case, *Metoyer* held only that the plaintiff had set forth a factual dispute as to whether she was fired because of her race alone or if she would have been fired anyway for some legitimate reason; the plaintiff was entitled to have a jury decide. While the evidence was sufficient for a jury to be convinced of the former, the court did not suggest that she could recover if the jury was convinced of the latter.

Indeed, *Metoyer* acknowledged important distinctions between Section 1981 and Title VII, expressly declining to apply the *Price Waterhouse* standard to claims under statutes other than Title VII:

> After the decision in *Price Waterhouse*, neither we nor the Supreme Court ever applied the *Price Waterhouse* standard to a claim brought under § 1981. In addition, subsequent to *Price Waterhouse*, we never determined that the legal principles under Title VII continued to apply to claims brought under § 1981 in light of the changes to the Title VII standard.

Metoyer, 504 F.3d at 933.

Even Petitioners acknowledge the Ninth Circuit's conclusion "that a mixed-motive defense to liability is available for a retaliation claim brought under § 1981"—the same conclusion this Court later reached in *Nassar* as to Title VII retaliation claims. *See* Pet. at 21 n.4 (citing *Metoyer*, 504 F.3d at 934). Consistent with this, the Ninth Circuit further observed that even summary judgment can be proper on a §1981 retaliation claim when the mixed-motive defense is proved as an undisputed fact. *Metoyer*, 504 F.3d at 934.

Even apart from this distinction in the procedural posture, *Metoyer* predates both *Nassar* and *Gross*, both of which resolved disparities among the circuits over mixed-motive claims. Since this Court has rejected the very principle Petitioners struggle to find in *Metoyer*, any split that might have resulted from that decision would have been healed already. And though Petitioners also rely on the Ninth Circuit's decision in *Fadhl v. San Francisco*, 741 F.3d 1163 (9th Cir. 1984), that decision is even older—as Petitioners acknowledge, it predates even *Price Waterhouse*, though they regard this as a virtue—and is therefore still less enlightening as to what the Ninth Circuit would hold today. *See* Pet. at 21–22.

The "circuit split" Petitioners describe is nothing of the sort. They point to standards of proof that are the same in every meaningful respect—except the allocation of the burden, a subject that Petitioners do not and cannot openly raise. This Court has only recently heard other cases that raised these competing interpretations of the burden of proof, and in those cases it resolved the very issues that might otherwise justify *certiorari* in this case. The existence of earlier authorities that endorsed now-

outmoded interpretations is no reason for this Court to grant *certiorari* here.

III. The integrity of the statutes depends upon construing them in accord with the language Congress used in drafting them and the principles this Court has used to clarify their application.

Petitioners unwittingly contradict their own argument for reversal of the judgment when they observe that civil-rights laws are meant "to eliminate those discriminatory *practices and devices* which have fostered racially stratified job environments to the disadvantage of minority citizens." Pet. at 26 (quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 349 (1977)) (emphasis added). Just so. But in finding mixed motives for Respondents' actions, the jury concluded that race discrimination could not be regarded as the legal cause of Petitioners' grievance; Petitioners would have been denied an opportunity to apply for the tow list even if not for Smith's race.

Whatever their noble goals, federal civil-rights laws are not intended to penalize decisions that would have been no different if race (or some other forbidden consideration) had not been a factor. *See Nassar*, 133 S. Ct. at 2525. In authorizing a limited remedy in mixed-motive discrimination cases under Title VII, Congress made an express exception to that principle, providing for recovery when race is deemed to be a motivating factor. By contrast, in other statutes Congress chose not to allow recovery on a showing of motivating-factor causation alone—not even for retaliation claims under Title VII. *Nassar*, 133 S. Ct. at 2533; *Gross*, 557 U.S. at 173–74.

Petitioners' notion of civil-rights laws as blunt instruments to eradicate discrimination is far broader than the purpose they quote from *International Brotherhood of Teamsters*, and goes beyond the statutory language that penalizes adverse decisions made solely on the basis of race. Indeed, even the section of Title VII that allows for recovery on a showing of motivating-factor causation is "not itself a substantive bar on discrimination," but "a rule that establishes the causation standard for proving a violation defined elsewhere in Title VII." *Nassar*, 133 S. Ct. at 2530.

No one disputes the evil of race discrimination or the utility of federal laws that are meant to deter it. But it is a curious kind of integrity that ignores the concrete language chosen by Congress to achieve those ends, in favor of an abstract notion that Congress intended something other than what it said. While courts should construe remedial provisions broadly, they must nonetheless "'assume that Congress meant what it said'—and heed what it did not." *Carter*, 714 F.3d at 271 n.13 (quoting *Pinter v. Dahl*, 486 U.S. 622, 653 (1988)). This Court has repeatedly rejected suggestions that it give civil-rights statutes a broader scope than Congress did. Petitioners offer no reason for it to take up the issue yet again.

CONCLUSION

For the foregoing reasons, the petition for writ of *certiorari* should be denied.

Respectfully submitted,

ROBERT MARC CHEMERS
Counsel of Record
MIGUEL A. RUIZ
SUZANNE M. CROWLEY
SCOTT L. HOWIE
PRETZEL & STOUFFER, CHARTERED
One South Wacker Drive
Chicago, Illinois 60606
(312) 346-1973
rchemers@pretzel-stouffer.com

Counsel for Respondent
John Wilson

BENNETT J. BRANTMEIER
AMANDA J. RAMAKER
BRANTMEIER LAW, LLC
234 South Main Street
P.O. Box 309
Jefferson, Wisconsin 53549
(920) 674-6220
ben@bjblaw.net

Counsel for Respondent
Town of Beloit, Wisconsin