No. 12-1491

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

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

The right to equal protection of the law guaranteed by the Thirteenth and Fourteenth Amendments, and secured by 42 U.S.C. § 1981 ("Section 1981") and 42 U.S.C. § 2000d ("Title VI"), could not be more fundamental. "Our Nation from [its] inception has sought to preserve and expand the promise of liberty and equality. . . . This is especially true when we seek assurance that opportunity is not denied on account of race." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring in part and concurring in the judgment). Respondents' attempt to summarily reject this Petition as not presenting "any question of federal law 'that has not been, but should be, settled by this Court'" ignores both the vital civil right involved and the inconsistencies across the circuits. Br. Opp. 1.

A century and a half has passed since Congress enacted Section 1981, but courts remain confused regarding what degree of discrimination constitutes a violation of this law. As a result of this confusion, Section 1981 and Title VI amount to "promise[s] the Nation cannot keep." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968). The "staggering and regrettable" racial bias that Anthony Smith suffered makes this case the ideal vehicle for this Court to finally resolve the issue. App. 3a.

I. *NASSAR* AND *GROSS* DO NOT DETERMINE THE CAUSATION STANDARD UNDER SECTION 1981 AND TITLE VI.

A. SECTION 1981 AND TITLE VI DO NOT CONTAIN THE "BECAUSE OF" LANGUAGE OR THE STRUCTURAL ELEMENTS THAT THE COURT USED TO REQUIRE BUT-FOR CAUSATION IN *NASSAR* AND *GROSS*.

In *Nassar* and *Gross*, the Court focused on the "because of" language in Title VII's antiretaliation provision and the Age Discrimination in Employment Act ("ADEA"). *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2528 (2013); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175-76 (2009) (stating that "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose[,]" and consulting dictionary definitions to determine that "because of" means "but-for"). Section 1981 does not contain this "because of" language.[1] To argue that *Nassar* controls the result in a Section 1981 case misstates the holding in *Nassar* in an attempt to rewrite a century-and-a-half-old statute.

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[1] Title VI likewise lacks the textual and structural elements that the Court used to require but-for causation in *Nassar* and *Gross*. Because Title VI mirrors Section 1981 in terms of substantive standards of proof, the Section 1981 analysis adopted by this Court should also control Title VI claims. Pet. Cert. 22-23.

Additionally, the structure of Section 1981 favors the adoption of a motivating factor standard, or, at a minimum, the rejection of but-for causation. *Nassar*, 133 S. Ct. at 2530. In *Nassar*, this Court suggested that blanket prohibitions of discrimination, such as Section 1981, should not be subject to the rigorous standards explicitly laid out in comprehensive, detailed statutory schemes. *Id.* at 2530-31. This Court expressly noted that Section 1981's breadth distinguishes it from Title VII. *Id.* at 2530.

Considering Section 1981's lack of a particular causation standard, this Court should interpret it as a broad remedy for racism in contractual relationships, consistent with the purpose of the statute. Pet. Cert. 26-27. The language and structural differences between Section 1981 and the statutes at issue in *Nassar* and *Gross* compel the conclusion that those cases do not answer the question presented here.

B. *NASSAR* AND *GROSS* DID NOT DECIDE THE ISSUE OF WHETHER BUT-FOR OR MOTIVATING FACTOR CAUSATION IS REQUIRED BEFORE A COURT MAY GRANT REDRESS FOR DISCRIMINATION UNDER SECTION 1981 AND TITLE VI.

The Court and Congress are clear that a motivating factor analysis applies to Title VII race discrimination claims. *Gross*, 557 U.S. at 173-74; 42 U.S.C. § 2000e-2(m). The narrow issue presented here is whether this same standard applies to race

discrimination claims under Section 1981 and Title VI, a question that Respondents incorrectly assert was answered by *Nassar* and *Gross*. Br. Opp. 10.

The Court distinguished race-based claims under Title VII from the claims raised in *Nassar* and *Gross*. *Nassar*, 133 S. Ct. at 2532 ("The facts of this case also demonstrate the legal and factual distinctions between status-based and retaliation claims, as well as the importance of the correct standard of proof."). Indeed, during oral argument in *Nassar*, Justice Alito noted this difference: "[I]t's a good thing to say to employers, when you are making employment decisions, you take race out of your mind. . . . It's not something you can even think about." Tr. Oral Arg. at 49, *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013) (No. 12-484). He made a similar observation in *Gross*: "Age [is] more closely correlated with legitimate reasons for employment discrimination than race and other factors that are proscribed by Title VII." Tr. Oral Arg. at 47, *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009) (No. 08-441).

Respondents' argument that the Court's analysis of causation for retaliation and age claims controls the analysis for race-based claims ignores the Court's admonishment that causation must be analyzed on a statute-by-statute basis. *See Gross*, 557 U.S. at 174 (2009); *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008). The Court and all of the circuits have consistently applied the same causation analysis for Title VII and Section 1981 status-based claims. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 186

(1989), *superseded by statute on other grounds as stated in CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 292 (1989) (Kennedy, J., dissenting).[2] To hold that a stricter burden of proof applies in Section 1981 cases than in Title VII cases alleging similar race-based misconduct would frustrate the broad, complementary goals of both statutes.

Nassar and *Gross* did not clarify the causation standard for Section 1981. The Court and the circuits have, until recently, applied the same standards to Title VII and Section 1981 claims. *Supra* note 2 and accompanying text. Recognizing as Congress did in Title VII, this Court should now clarify there is no tolerable level of race discrimination under Section 1981 and Title VI.

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[2] *Brown v. City of Syracuse*, 673 F.3d 141, 150 (2d Cir. 2012); *Blue v. Dunn Constr. Co.*, 453 F. App'x 881, 883 (11th Cir. 2011); *Johnson v. AT&T Corp.*, 422 F.3d 756, 761 (8th Cir. 2005); *Bryan v. McKinsey & Co.*, 375 F.3d 358, 360 (5th Cir. 2004); *Williams v. Staples, Inc.*, 372 F.3d 662, 667 (4th Cir. 2004); *Morgan v. Fed. Home Loan Mortg. Corp.*, 328 F.3d 647, 650 (D.C. Cir. 2003); *Kendrick v. Penske Transp. Servs.*, 220 F.3d 1220, 1225 (10th Cir. 2000); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 572 (6th Cir. 2000); *Conward v. Cambridge Sch. Comm.*, 171 F.3d 12, 18-19 (1st Cir. 1999); *Stewart v. Rutgers State Univ.*, 120 F.3d 426, 432 (3d Cir. 1997); *Von Zuckerstein v. Argonne Nat'l Lab.*, 984 F.2d 1467, 1472 (7th Cir. 1993); *Davis v. Los Angeles Cty.*, 556 F.3d 1334 (9th Cir. 1977), *vacated on other grounds in* 440 U.S. 625 (1979).

II. THERE IS A MEANINGFUL CIRCUIT SPLIT AS TO WHETHER SECTION 1981 PROVIDES A REMEDY FOR RACIAL DISCRIMINATION WHEN THE DEFENDANT WOULD HAVE MADE THE SAME DECISION REGARDLESS OF RACE.

Despite Respondents' contrary assertions, Br. Opp. 11, the circuits apply three distinct and conflicting causation tests to Section 1981 race discrimination claims: (1) the *Gross* but-for test; (2) the *Price Waterhouse* burden-shifting framework; and (3) the Title VII motivating factor test. Pet. Cert. 13-22. Although Respondents argue that the three tests are merely "ordinary variations in language[,]" Br. Opp. 11, each standard has a practical effect on litigation strategy, the power of courts to grant relief, and the outcome of the case.

Under the *Gross* standard, courts are powerless to provide any relief, even in cases like Anthony Smith's where there was "overwhelming evidence supporting the jury's finding that racial animus motivated the defendant's conduct." App. 3a. Under the *Price Waterhouse* approach, courts still cannot provide any relief if the defendant shows that it would have made the same decision regardless of race. However, circuits following *Price Waterhouse* adhere to a causation standard that the Court found to be deficient. *Gross*, 557 U.S. at 179 (explaining that the *Price Waterhouse* approach has "problems associated with its application [that] have eliminated any perceivable benefit to extending its framework to ADEA

claims."). Conversely, if this Court adopts Title VII's motivating factor standard, the circuit and district courts would be empowered to remedy the improper consideration of race in contractual decisions.

Petitioners and Respondents agree that the First, Sixth, Seventh, and Eleventh Circuits require Section 1981 plaintiffs to prove but-for causation. Pet. Cert. 14; Br. Opp. 11. Although Respondents argue that the Third Circuit applies the same but-for causation standard, Br. Opp. 12-13, the court expressly rejected the *Gross* but-for test for Section 1981 claims. *Brown v. J. Kaz, Inc*., 581 F.3d 175, 182 n.5 (3d Cir. 2009). The Third Circuit reasoned that *Price Waterhouse* provided the appropriate standard because the *Gross* holding was based on the "because of" language in the ADEA, which is absent from Section 1981. *Id.* In the Third Circuit, "[i]f race plays *any role* in a challenged decision by a defendant . . . the plaintiff has made out a prima facie case that section 1981 was violated. . . ." *Id.* (emphasis added).

Next, Respondents note that the Fifth Circuit has not directly addressed the causation standard under Section 1981. Br. Opp. 12. Petitioners conceded this, but explained why any fair reading of Fifth Circuit precedent leads to the conclusion that the Fifth Circuit would likely apply the *Price Waterhouse* framework. Pet. Cert. 19-20. In *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010), the court declined to adopt the *Gross* but-for standard in the context of a Title VII retaliation claim and instead applied the *Price Waterhouse* framework because it found Title

VII distinguishable from the ADEA. Pet. Cert. 19. Because Section 1981 and Title VII are complementary, the Fifth Circuit likely would apply the same approach under Section 1981. Respondents reject this reasoning as "sheer clairvoyance[.]" Br. Opp. 12. The Fifth Circuit, however, has stated that it will apply its precedents unless overruling them is "unequivocally" required by Supreme Court decisions. *Smith v. Xerox Corp.*, 602 F.3d 320, 330 (5th Cir. 2010). Neither *Nassar* nor *Gross* "unequivocally" holds that but-for analysis applies to Section 1981 suits. As discussed above, those cases do not control the Section 1981 analysis. *See* discussion *supra* at 2-6. Considering the significant difference in the statutes' language, the reasonable conclusion is that the Fifth Circuit will apply the *Price Waterhouse* framework to Section 1981 suits.

Respondents' argument that the Ninth Circuit's holding in *Metoyer v. Chassman* retains no persuasive force in light of *Nassar* is similarly misguided. Br. Opp. 14. In *Metoyer*, the Ninth Circuit plainly stated that "under § 1981, we apply 'the same legal principles as those applicable in a Title VII disparate treatment case[,]'" explaining that there is nothing in the plain language of Section 1981 establishing a mixed-motive defense to liability. *Metoyer v. Chassman*, 504 F.3d 919, 930, 934 (9th Cir. 2007). The *Metoyer* court applied Title VII's mixed-motive provisions to a Section 1981 claim. *Id.* at 932-35. Like this Court in *Nassar*, however, the *Metoyer* court recognized "that a mixed-motive defense to liability is available

for a retaliation claim brought under § 1981." *Id.* at 934. Thus, *Nassar* and *Metoyer* both distinguish race-based claims from conduct-based claims.

In just the few months that have passed since *Nassar* was decided, several district courts have adopted a standard that mirrors the Ninth Circuit's approach in *Metoyer*. In *Bonenberger v. St. Louis Metropolitan Police Department*, the district court noted that race discrimination claims under Title VII and Section 1981 are analyzed under the same standard and that a plaintiff can prevail by showing "that race was a motivating factor." *Bonenberger v. St. Louis Metro. Police Dep't*, 4:12CV21 CDP, 2013 WL 3420535, at *3 (E.D. Mo. July 8, 2013). Upon this showing, the burden then shifts to the employer "to prove that it would have made the same decision even without the illegitimate criterion[;]" however, "[t]his showing by the employer will not defeat a discrimination claim but instead restricts the plaintiff's available remedies." *Id.* Similarly, the district court in *Alexander v. MedPoint Professional Staffing, LLC*, citing *Nassar*, analyzed Title VII and Section 1981 claims under the same standard and stated that a motivating factor analysis is appropriate. *Alexander v. MedPoint Prof'l Staffing, LLC*, No. 1:11-CV-00256-GHD-DAS, 2013 WL 3811595, at *4-5 (N.D. Miss. July 22, 2013).

Contrary to Respondents' contention, the circuits apply three distinct tests that make a difference in practical application. This Court should address the confusion among the circuits.

III. THIS CASE PRESENTS THE APPROPRIATE VEHICLE TO RESOLVE THE ISSUE.

Respondents expend substantial effort attempting to downplay the evidence of racism in this case. The facts, however, are not in dispute. The jury was specifically asked: "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?" App. 21a. The jury responded "yes." App. 21a. Both the district court and the Seventh Circuit acknowledged the "overwhelming evidence" that Anthony Smith was subject to blatant racism, which was both "staggering and regrettable." App. 3a-5a. This Court is rarely presented with such a clear and unequivocally disturbing factual record.

The legal question is also presented clearly. While the jury found that Smith's race was a motivating factor in Respondents' decision to exclude him from the tow list, the jury also found that Respondents would have made the same decision regardless of race. App. 23a. The mixed verdict prevented Smith from obtaining any relief. App. 25a. According to the Seventh Circuit, Section 1981 and Title VI do not "explicitly authorize[ ] relief where a plaintiff demonstrates only that race was a 'motivating factor[.]'" App. 10a. The Seventh Circuit somberly concluded that "[w]e would have liked to believe this kind of behavior faded into the darker recesses of our country's history many years ago." App. 18a. Justice Kennedy has echoed the same disturbing observation: "The enduring hope is that race should not matter; the

reality is that too often it does." *Parents Involved in Cmty. Schs.*, 551 U.S. at 787 (Kennedy, J., concurring in part and concurring in the judgment). In this case, the jury, the district court, and the Seventh Circuit all agreed that Anthony Smith's race mattered.

CONCLUSION

Section 1981 and Title VI were enacted to effectuate the fundamental promises of the Thirteenth and Fourteenth Amendments by securing the right to be free from racial discrimination. As long as the circuits remain confused about the proper causation standard under Section 1981 and Title VI, this promise remains illusory. Clarifying that Section 1981 and Title VI are violated if race is a motivating factor will help to fulfill the enduring hope that race should *never* inhibit equal opportunities. "Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States." *Korematsu v. United States*, 323 U.S. 214, 242 (1944) (Murphy, J., dissenting).

Petitioners respectfully request that this Court grant the Petition for Writ of Certiorari. Given the parallel between Section 1981 and Title VI, and the United States' role in the enforcement of Title VI, this

Court may wish to request the Solicitor General's views on this issue.

Respectfully submitted this 10th day of September, 2013.

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