No. _____

In the

Supreme Court of the United States

NICOLAS TASHMAN,

Petitioner,

v.

ADVANCE AUTO PARTS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

MARK S. SCHUVER
Bar No. 318899
Counsel of Record
MATHIS, MARIFIAN, & RICHTER, LTD.
23 Public Square, Suite 300
Belleville, IL 62220
618-234-9800
mschuver@mmrltd.com

June 22, 2023 *Counsel for Petitioner*

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

42 U.S.C. § 1981 guarantees 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." A direct conflict exists among federal courts of appeals as to when, and under what circumstances, an employer can be held responsible under § 1981 for the acts of an employee.

This case squarely presents the following question:

Whether general common law principles of *respondeat superior* apply to hold an employer liable for an employee's tortious acts under 42 U.S.C. § 1981.

PARTIES TO THE PROCEEDING

Petitioner is Nicolas Tashman, a natural-born U.S. citizen of Jordanian/Middle Eastern descent.

Respondent is Advance Auto Parts, Inc.

CORPORATE DISCLOSURE STATEMENT

Respondent Advance Auto Parts, Inc. has no parent company and no publicly held company or corporation owns 10% or more of its stock.

RELATED PROCEEDINGS

Nicolas Tashman v. Advance Auto Parts, Inc., No. 20-00943, United States District Court for the Eastern District of Missouri. Judgment entered April 8, 2022.

Nicolas Tashman v. Advance Auto Parts, Inc., No. 22-1949, United States Court of Appeals for the Eighth Circuit. Judgment entered March 27, 2023.

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The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App., *infra,* 1a-16a) is reported at 63 F.4th 1147. The opinion of the United States District Court for the Eastern District of Missouri (Pet. App., *infra,* 17a-35a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS

42 U.S.C. § 1981(a) provides that "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(b) states: "For purposes of this section, 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."

INTRODUCTION

Petitioner, Nicolas Tashman, is a natural-born U.S. citizen of Middle Eastern descent. Pet. App. 18a. On September 19, 2019, he entered an Advance Auto Parts store intending to purchase a part and test a car battery. Pet. App. 2a, 18a. Respondent's salesperson, Kevin Doe ("Doe"), went to the battery testing counter with Petitioner and, without provocation, threw a piece of paper and a pen on Petitioner's battery, stating: *"Put your damn name and number on that paper."* CA JA 340, 341, 343, 378. Petitioner responded, *"Excuse me?"* to which Doe began yelling: *"Go back to your damn country, go to your camel country," "I get off in a few minutes, I'll kick your ass,"* "*I'm going to beat your ass,*" and telling Petitioner to "*get the fuck out*" of the store. Pet. App. 2a, 18a. Doe began to approach Petitioner, requiring two employees to physically restrain Doe and push him to the back of the store. Pet. App. 21a. The entire incident was recorded on the store's video cameras. Pet. App. 2a. Petitioner immediately called Respondent's corporate headquarters and reported the incident in a telephone conversation recorded by Respondent. D. Ct. Doc. 34-2.

Although Respondent was fully informed of Doe's attack that same day, Doe was not disciplined in any manner. CA JA 383, 396, 411-13. To the contrary, Doe was affirmatively assured by the district manager that he would not be fired. Pet. App. 2a. It was not until nearly two months later, and only after Petitioner's attorneys sent Respondent a letter

threatening litigation, that Doe was finally terminated. Pet. App. 2a.

Petitioner brought suit alleging unlawful discrimination under 42 U.S.C. § 1981, as well as state law claims for assault and intentional infliction of emotional distress. Pet. App. 1a-2a. The district court granted Respondent's motion for summary judgment, declaring that in order to establish the element of "discriminatory intent" under § 1981 Petitioner was required to show that Respondent knew or should have known of prior similar conduct by Doe. Pet. App. 27a. The district court further rejected the well-established theory of ratification holding, as a matter of law, that affirmatively advising Doe that he would not be fired and refusing to discipline him did not constitute ratification. Pet. App. 30a. In a clear split with decisions of other federal appellate and district courts, the Eighth Circuit affirmed. Pet. App. 16a.

The legal issue presented here - when, and under what circumstances, an employer can be held responsible under § 1981 for the acts of an employee in the public accommodation context - is an issue that has suffered from years of jurisprudential vacillation and uncertainty. Appellate and district courts around the country have struggled mightily with the question of whether and how to apply the doctrine of *respondeat superior* under § 1981.

To date, two circuits have directly confronted the issue—both announcing different and incompatible

views.[1] The Fifth Circuit, applying well-established general agency principles as stated in the Restatement (Second) of Agency § 219, has held that an employer, in a Section 1981 public accommodation context, may be found vicariously liable for the torts of its employees while acting in the scope of their employment.[2] The Fifth Circuit's holding has been followed by a significant number of district courts, and was cited with apparent approval by the Eighth Circuit in a prior decision. In the instant case, however, the Eighth Circuit has limited employer liability to § 213 of the Restatement (Second) of Agency, rejecting *respondeat superior* liability, and finding that the Respondent may only be held liable if there is evidence that it knew or should have known of prior similar conduct by Doe.

This Court has never squarely addressed this important and reoccurring question.[3] This Petition

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[1] In a decision published without a written opinion made before the 1991 amendment to § 1981, the Third Circuit affirmed an unpublished district court decision which, in part, held that an employer may be held liable under § 1981 for the discriminatory acts of a non-management employee if "the harassment was so pervasive that an inference of constructive knowledge arises." *Perry v. Command Performance*, 945 F.2d 395 (Table) (3d Cir. 1991) *affirming* 1991 WL 46475, at *3 (E.D.Penn. 1991) (unreported). Ultimately, the *Perry* court held that the plaintiff could not establish a § 1981 claim because the discriminatory conduct occurred after formation of a race-neutral contract for hairstyling services.

[2] *Arguello v. Conoco, Inc*., 207 F. 3d 803, 810 (5th Cir. 2000).

[3] This Court considered the applicability of *respondeat superior* in a § 1981 case but did not reach a decision on that issue. *General*

should be granted to resolve a clear and significant conflict among federal courts to provide predictability and certainty to a critical area of the law, and to correct the Eighth Circuit's wrongly-held interpretation of *respondeat superior* liability under § 1981.

STATEMENT OF THE CASE

1. Petitioner is a United States citizen of Arab/Middle Eastern descent. Pet. App. 18a. On September 19, 2019, he entered Respondent's Advance Auto Parts store in Florissant, Missouri, with the "specific intent of purchasing a MAP sensor for his vehicle and to test a car battery to determine if he needed to additionally purchase a new battery." Pet. App. 18a. Respondent advertises free battery testing and charging to induce customers into its stores to generate sales. Pet. App. 26a. It's a "*moneymaking proposition.*" CA JA 452.

Upon entering the store, Petitioner approached Respondent's salesperson, Kevin Doe, and informed him that he wanted to test his battery. CA JA 339, 377. Doe is a white male. CA JA 368, 501. Respondent's employees described Petitioner as appearing "*of a different descent.*" CA JA 574-75. Doe testified that he had previously waited on a woman who he (mistakenly) associated as being Petitioner's wife because "she wore head gear or a scarf [like]

Bldg. Contractors Ass'n., Inc. v. Pennsylvania, 458 U.S. 375, 391-95 (1982).

someone from [a] Muslim or Middle Eastern background." CA JA 374-75.

Doe and Petitioner walked back to the battery testing counter where Doe threw a piece of paper and a pen on Petitioner's battery and stated: *"Put your damn name and number on that paper."* CA JA 340-41, 343, 378. Taken aback by Doe's gruffness, Petitioner stated *"Excuse me?,"* to which Doe responded by yelling: *"Go back to your damn country, go to your camel country," "I get off in a few minutes, I'll kick your ass,"* "*I'm going to beat your ass,*" and telling Petitioner to "*get the fuck out*" of the store 4 or 5 times, among other threats to Petitioner and his family. Pet. App. 2a, 18a.

Two employees had to restrain Doe from physically approaching Petitioner and push Doe to the back of the store. Pet. App. 21a. Multiple employees, including the store manager, then told Petitioner to leave the store. Pet. App. 21a. Doe and other employees testified that Petitioner never threatened Doe, never exhibited anger towards him and never became physical towards Doe in any way. CA JA 381, 610-11. The entire incident was recorded on the store's video cameras. Pet. App. 2a.

Within 3 to 5 minutes, Petitioner called Respondent's corporate office and reported the incident. Pet. App. 2a, CA JA 351-52. This phone conversation was recorded by the Respondent. D. Ct. Doc. 34-2. While *"still shaking"* and *"in fear of [his] life,"* Petitioner stated: "*I could tell he was prejudice against me from like the way he was talking to me and*

the stuff he said to me. Like go back to your country and all this other stuff." CA JA 357-59, 362, 365. The corporate representative called the store manager, who confirmed that Doe had threatened to "*kick [Petitioner's] ass. Those were his exact words.*" CA JA 363.

Respondent's district manager was informed of the incident that same day. CA JA 411-13. The district manager called the store manager and other employees who confirmed that they had to get between Doe and Petitioner to prevent a physical altercation. CA JA 422, 424-25. Doe admitted to the district manager that he used foul language, cussed and told Petitioner that he was going to "*kick his ass*." CA JA 427-28. Respondent admits that Doe "shout[ed] derogatory and racist statements" at Petitioner." Pet. App. 19a.

In violation of company policy, no one prepared a written incident report documenting the incident. CA JA 429, 434-35, 478, 524, 526-27, 631. It is undisputed that Doe was not disciplined in any way. CA JA 369, 400, 454-57. To the contrary, the district manager affirmatively told Doe that he did not want to fire him. Pet. App. 2a.

Six weeks later, the regional HR manager learned of the incident after Petitioner's attorney sent a litigation letter to Respondent's corporate headquarters. Pet. App. 2a. The regional HR manager testified that the district manager should have escalated the incident to him immediately but did not do so. CA JA 470-471, 479-80. The regional HR

manager, who did not have authority to terminate Doe, ordered the district manager to fire Doe. Pet. App. 2a. The Vice President of Operations also told the district manager multiple times to terminate Doe. CA JA 443-44, 448. Despite those directives, the district manager did not terminate Doe until November 12, 2019 - - nearly two (2) months after the altercation. Pet. App. 2a. Even then, Doe was never told why he was terminated. CA JA 394. In fact, Doe was told that he was still *"free to come into the store*." CA JA 450.

2. Petitioner filed his Complaint in the United States District Court for the Eastern District of Missouri alleging unlawful discrimination under 42 U.S.C. § 1981, as well as Missouri state law claims for assault and intentional infliction of emotional distress. Pet. App. 17a-18a. At the close of discovery, Respondent filed its motion for summary judgment. The district court granted the motion, holding that "[i]n order to establish a 'discriminatory intent' by an employer related to an employee's misconduct, Plaintiff must show that the employer knew or should have known of the employee's racially hostile propensities." Pet. App. 27a. Relying on the Eighth Circuit's decision in *Green v. Dillard's, Inc.*, 483 F.3d 533 (8th Cir. 2007), the district court limited its decision to only apply the Restatement (Second) of Agency § 213, without any consideration or discussion of general agency principles or the Restatement (Second) of Agency § 219.

3. Petitioner appealed, and the Eighth Circuit affirmed. In its published opinion, the Eighth Circuit

stated, "To establish a *prima facie* case of discrimination in the retail context, a § 1981 plaintiff must show (1) membership in a protected class, (2) discriminatory intent on the part of the defendant, and (3) interference by the defendant with an activity protected under the statute." Pet. App. 3a-4a. The Eighth Circuit held that Petitioner had satisfied the first and third elements, finding that "[i]t is undisputed that [Petitioner] is a member of a protected class" and that "[b]y entering the store, requesting a battery test, and considering a purchase, [Petitioner] was engaged in making a contract." Pet. App. 4a. Rejecting all other general agency principles, including the Restatement (Second) of Agency § 219, the Eighth Circuit held that it was required to adhere strictly to its prior decision in *Green* where it adopted the Restatement (Second) of Agency § 213 as the standard for proving an employer's discriminatory intent under § 1981." Pet. App. 5a (citing *Green v. Dillards,* 483 F.3d 533, 540-41 (8th Cir. 2007)).

The Eighth Circuit declined to discuss or apply the theories of employer liability recognized by the Fifth Circuit and the overwhelming number of district courts which apply the general agency principle embodied in the Restatement (Second) of Agency § 219 that a master is subject to liability for the torts of its servants while acting in the scope of employment, even though those cases were cited without criticism and with apparent approval in the Eighth Circuit's prior decision in *Green*. Stating that *Green's* recognition of those decisions was *dicta*, the Eighth Circuit in the instant case concluded that it was bound by *Green's* application of the Restatement (Second) of

Agency § 213 for all § 1981 public accommodation cases because "[i]t is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel." Pet. App. 5a (citing *Mader v. United States,* 654 F.3d 794, 800 (8th Cir. 2011)).

Similarly, the Eighth Circuit rejected the long-established principle of ratification as expressed in the Restatement (Third) of Agency § 4.01 (2006). Ignoring the fact that the Respondent not only refused to discipline Doe for the attack on Petitioner but effectively condoned his actions by assuring him he would not be fired, the Eighth Circuit held, as a matter of law, that "[t]he two-month delay here is insufficient to show that Advance Auto ratified Doe's conduct." Pet. App. 15a.

REASONS FOR GRANTING THE WRIT

I. There is an Irreconcilable Split Among the Circuits Regarding the Question Presented

The circuit conflict presented by this case is as clear as can be. This case squarely presents a direct conflict between the Fifth Circuit (together with a host of federal district court cases from across the country) and the Eighth Circuit on the critical issue of *respondeat superior* liability under § 1981 in the context of public accommodation cases.

In 2007, the Eighth Circuit in *Green v. Dillard's, Inc.*, 483 F.3d 533, 540 (8th Cir. 2007), discussed with approval the Fifth Circuit's decision in *Arguello v.*

Conoco, Inc., 207 F.3d 803 (5th Cir. 2000), and its application of vicarious liability under the Restatement (Second) of Agency § 219. *See also McKinnon v. Yum! Brands, Inc.,* 2017 WL 3659166, at *7 (D. Idaho 2017) ("The Eighth Circuit has cited *Arguello* approvingly"). Citing *Arguello* and other cases following its reasoning, the Eighth Circuit in *Green* noted that "[t]he significant number of summary judgments denied or final judgments upheld against retailers based on actions of their nonsupervisory employees is also ***worthy of note***." *Green*, 483 F.3d at 540 (emphasis added). However, upon revisiting this issue in the instant case, the Eighth Circuit chose to rigidly adhere to the direct liability standard found in the Restatement (Second) of Agency § 213, which it had applied under the specific facts of its prior decision in *Green.*

In *Green,* the court was not required to consider vicarious liability because sufficient evidence was presented showing that the defendant knew of the employee's dangerous propensities and failed to take action. Therefore, application of vicarious liability under § 219 was not necessary or appropriate. As such, *Green* did not reject *respondeat superior* liability under § 219. In fact, *Green* cited with apparent approval the Fifth Circuit's *Arguello* decision and a litany of § 1981 district court cases finding *respondeat superior* liability under general agency principles, including § 219 of the Restatement. *See Green,* 483 F.3d at 540. Yet in the present case, the Eighth Circuit held that § 213 is the *only* standard that applies to establish an employer's discriminatory intent under § 1981.

Taking into consideration the unique circumstances of a consumer's interactions with the employing entity in a public accommodations context and applying well-recognized and long-established principles of agency law, the Fifth Circuit and numerous district courts have come to the opposite conclusion. Restatement § 219 provides for vicarious liability without evidence that the employer knew or should have known of its employee's racially hostile propensities. Instead, Section 219 imposes liability where the employee is found to be acting within the course and scope of employment. In short, the Fifth Circuit recognizes the application of *vicarious liability* to conform to the purpose of Section 1981, *see infra,* in the context of the consumer's real-world social interactions with non-supervisory employees.

In addition to Section 219, the Eighth Circuit similarly rejected an alternative theory of vicarious liability – the long-established doctrine of ratification. "Ratification is the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority." Restatement (Third) of Agency § 4.01; *see also* Restatement (Second) Agency § 82 (Ratification) ("Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him."). "Ratification of an agent's unauthorized acts may be made by overt action or inferred from silence and inaction." *Lincoln Benefit Life v. Wilson*, 907 F.3d 1068, 1076 (8th Cir. 2018).

It has long been held that ratification is generally a question of fact to be determined by the jury. Restatement (Third) of Agency § 4.01 Comment d.; s*ee also Irvine v. Irvine*, 76 U.S. 617, 623 (1869); *Leviten v. Bickley, Madeville & Wimple,* 35 F.2d 825, 828 (2d Cir. 1929) (principal's ratification of agent's unauthorized act by acquiescence for unreasonable time is ordinarily for jury). And yet, despite uncontroverted evidence that Respondent failed to take any action to discipline Doe following the incident and affirmatively told Doe that his employment would *not* be terminated for the attack on Petitioner, the Eighth Circuit held, as a matter of law, that the two-month delay in terminating Doe was "insufficient to show that Advance Auto ratified Doe's conduct." Pet. App. 15a.

This Court's review is necessary to bring uniformity to the rule for determining the standards of employer liability in the public accommodation context under § 1981.

1. a. In *Arguello v. Conoco, Inc.,* 207 F.3d 803 (5th Cir. 2000), the Fifth Circuit applied general agency principles to section 1981, holding an employer liable for the torts of its employee while acting in the scope of employment. *Id.* at 813. The *Arguello* plaintiffs alleged that, while purchasing gasoline and other services at the defendant's gas stations, they were subjected to racial discrimination including racial epithets such as "*f***ing Iranian bitch*" and "*go back to where you came from you poor, f***ing Mexicans*." *Id.* at 805, n. 2. As in the present case, the defendant did not challenge whether the incidents had occurred.

Id. at 811. The only dispute was whether there was a legal remedy under § 1981 to hold the employer liable for its employee's actions. *Id.*

Relying on this Court's discussion in G*eneral Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 392 (1982), the Fifth Circuit held that general agency principles would apply under § 1981. *Arguello,* 207 F.3d at 809. Citing to the general agency principle embodied in the Restatement (Second) of Agency § 219, the *Arguello* court looked to case law and treatises discussing Restatement (Second) of Agency § 228 (detailing when conduct is within the scope of employment) to arrive at a set of factors courts are to consider in determining if an employee's acts are within the scope of employment. *Id.* at 810. The *Arguello* court held:

> Under general agency principles a master is subject to liability for the torts of his servants while acting in the scope of their employment. Some of the factors used when considering whether an employee's acts are within the scope of employment are: 1) the time, place and purpose of the act; 2) its similarity to acts which the servant is authorized to perform; 3) whether the act is commonly performed by servants; 4) the extent of departure from normal methods; and 5) whether the master would reasonably expect such act would be performed. *Domar Ocean Transportation Ltd. v. Independent Refining Company*, 783 F.2d 1185, 1190 (5th Cir.1986) (citing Prosser and Keeton,

> The Law of Torts 502 (5th ed.1984)); Restatement § 228.

Id. at 810.

After considering these factors, the Fifth Circuit concluded that the employee's acts[4] were within the scope of employment and that the employer could be held liable under § 1981 consistent with long-established agency principles of vicarious liability. *Id.* at 812.

b. While other circuits have not yet been presented with an opportunity to apply the Fifth Circuit's vicarious liability standard, a significant number of district courts have adopted it. In *McKinnon v. Yum! Brands, Inc.,* 2017 WL 3659166 (D. Idaho 2017), the court noted that while the issue of vicarious liability

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[4] The Fifth Circuit found Smith's behavior towards Arguello occurred while on-duty inside Conoco, where she was employed; the purpose of Smith's interaction with Arguello was to complete the sale of gas and other store items; and the confrontation occurred while Smith was completing Arguello's purchase of her items and processing the credit card transaction. *Id.* Additionally, Smith's actions were similar to those she was authorized by Conoco to perform – the sale of gasoline, other store items, and the completion of credit card purchases are the customary functions of a gasoline store clerk. *Id.* at 810-11. Finally, while Smith did not utilize the normal methods for conducting a sale and Conoco could not have expected Smith to shout racial epithets at Arguello, the Fifth Circuit found Smith's actions took place while she was performing her normal duties as a clerk and Conoco had authorized Smith to interact with customers as they made purchases. *Id.*

has not yet been resolved by this Court or the Ninth Circuit, the Ninth Circuit has applied *respondeat superior* principles in the employment discrimination context to hold an employer vicariously liable. *Id.* at *6. The district court went on to note that "the Fifth Circuit in *Arguello* laid out a strong case for applying *respondeat superior* to non-supervisory employees in a [§ 1981] public accommodation setting." *Id.* Turning to the Eighth Circuit's 2007 decision in *Green*, the *McKinnon* court stated:

> The Eighth Circuit has cited *Arguello* approvingly in suggesting that retailers may be held liable for the discriminatory actions of their nonsupervisory employees. *Green v. Dillard's, Inc.*, 483 F.3d 533, 540 (8th Cir. 2007) (holding the retail employer directly liable under § 1981 because it engaged in negligent or reckless conduct in supervising its sales staff, but noting the "significant number of summary judgments denied or final judgments upheld against retailers based on actions of their nonsupervisory employees") (emphasis added). Several district courts have also cited *Arguello* approvingly.

Id. at *7.

Persuaded by the logic of *Arguello* and the overwhelming weight of district court decisions that have approved its reasoning, *McKinnon* held that *respondeat superior* is applicable to § 1981 public accommodation claims. *Id.*

Other district court decisions are in accord. *See e.g., Sherman v. Kasotakis*, 314 F. Supp. 2d 843, 860-61 (N.D. Iowa 2004) (agreeing with the logic of *Arguello*); *Williams v. Ramada Inn*, No. CIV.A. 3:2006-217, 2007 WL 2253564, at *5 (W.D. Pa. Aug. 3, 2007) (citing *Arguello* approvingly); *Solomon v. Waffle House, Inc.,* 365 F.Supp.2d 1312, 1328-29 (N.D. Ga. 2004) (applying §219 to hold employer liable for the torts of its employees committed while acting in the scope of employment); *Eddy v. Waffle House, Inc.,* 335 F.Supp.2d 693, 701 (2004) (finding that "an employer may be held vicariously liable for racial epithets unexpectedly uttered by its non-supervisory employees under general agency principles where made in the normal course of business and while conducting 'normal duties'"); *Slocumb v. Waffle House, Inc.,* 365 F.Supp.2d 1332, 1341 (N.D. Ga. 2005) (applying § 219 of the Restatement); *Thomas v. Freeway Foods, Inc.,* 406 F.Sup.2d 610, 620 (M.D.N.C. 2005)("it is well settled that an employer can be held liable for the behavior of its employees if the behavior is within the course and scope of the employee's employment").

2. a. Although it had previously cited *Arguello* approvingly in its decision in *Green*, the Eighth Circuit has now flatly rejected the application of general agency principles to establish discriminatory intent under § 1981. In a departure from the above cases, the Eighth Circuit has uniquely determined that an employer may be held liable *only* for harm to its customers resulting from its own negligent or reckless conduct (*i.e.*, upon a showing that it knew or should have known of the employee's prior discriminatory

propensities). Pet. App. 5a. (applying Restatement (Second) of Agency § 213).

In *Green*, the Eighth Circuit rejected the defendant's argument that vicarious liability is not permissible under § 1981, noting that "[s]imilar arguments have been rejected elsewhere." *Green,* 484 F.3d at 540. Citing to *Arguello*, *Solomon*, *Eddy,* and a number of other cases applying general agency principles of *respondeat superior* as exemplified in § 219, the *Green* court stated, "[t]he *significant number* of summary judgments denied or final judgments upheld against retailers based on actions of their nonsupervisory employees is also *worthy of note*." *Id.* (emphasis added). The *Green* court's statement that *Arguello* and its progeny are "*worthy of note*" can hardly be described as a rejection of those decisions.

Contrary to the Eighth Circuit's present interpretation, *Green* did *not* hold that direct liability is the *only* method to establish discriminatory intent under § 1981. Instead, *Green* merely held that a direct liability standard was appropriate given that, *under the specific facts of that case,* "plaintiffs have made out a *prima facia* case of negligence." *Green,* 483 F.3d at 540. *Green* addressed the liability standard "in the context of the evidence brought forward by the parties." *Id.* at 540. The *Green* plaintiffs produced evidence that the defendant employer previously disciplined the employee at issue for the same conduct. *Id.* at 540-41. Accordingly, the Eighth Circuit in *Green* had no need to consider a liability standard beyond Restatement § 213's direct liability standard. In so doing, however, *Green* did not foreclose a plaintiff from

establishing discriminatory intent by way of *respondeat superior*. *Id.* at 540.

3. Consistent with its decision that *only* § 213's direct liability standard applies to hold an employer vicariously liable under § 1981, the Eighth Circuit summarily concluded, as a matter of law, that that the two-month delay in terminating Doe was "insufficient to show that Respondent had ratified Doe's conduct." Pet App. 15a. This is despite the fact that Respondent affirmatively told Doe that his employment would *not* be terminated for the attack on Petitioner. The Eighth Circuit's decision is in direct conflict with the general rule of ratification as outlined by the Fifth Circuit in *Arguello* and other federal court decisions.

Under well-established general agency principles of ratification, a principal's failure to sanction an agent's improper behavior may be deemed ratification thereof, giving rise to the principal's liability. *See BE & K Const. Co. v. N.L.R.B.*, 23 F.3d 1459, 1466 (8th Cir. 1994) (quoting Restatement (Second) of Agency § 94) ("An affirmance of an unauthorized transaction can be inferred from a failure to repudiate it."). *See also, e.g., Siguenza-Chavez v. Double Check Company, Inc.*, 2021 WL 5103922, at *3-4 (W.D. Mo. July 13, 2021) (defendant's failure to suspend, terminate, or discipline employees created a genuine issue of material fact as to whether employer ratified employee's conduct); *Sherman v. Kasotakis*, 314 F. Supp. 2d 843, 861 (N.D. Iowa 2004) (applying Restatement § 217C, employer liable for punitive damages after supervisor failed to (1) confront waiter

after witnessing racially discriminatory acts, and (2) fire waiter after promising patrons he would do so).

According to the Fifth Circuit, an employer ratifies the actions of an employee where the employer knew of the act and adopted, confirmed, or failed to repudiate the act of its employee. *Arguello*, 207 F.3d at 812 (ultimately holding Conoco did not ratify actions where customer service supervisor *immediately* counseled clerk about her behavior). Applying the Fifth Circuit's rule to the present case, ample evidence was presented that Respondent had ratified Doe's actions when the store manager and district manager confirmed Doe's actions and affirmatively told Doe that his employment would *not* be terminated for the attack on Petitioner.

In *Solomon v. Waffle House, Inc.*, 365 F.Supp.2d 1312, (N.D. Ga. 2004), plaintiffs filed suit under § 1981 for racial discrimination alleging, among other claims, that the restaurant had ratified the discriminatory conduct of one of its servers. *Id.* at 1328. Finding that management's failure to sanction the server's improper behavior could be interpreted by the jury as acquiescence by the employer in the behavior, the *Solomon* court held that there was sufficient evidence in the record for a reasonable jury to conclude that the defendant had ratified the server's conduct. *Id.* at 1329.

Indeed, ratification was even recognized in the Eighth Circuit's prior decision in *Green*. After concluding that sufficient evidence established that the employee had been disciplined for similar conduct

in the past, the *Green* court went on to state that a "jury could also infer that inaction by Dillard's contributed to the incident." *Green,* 483 F.3d at 541. The court noted that this was supported by evidence that the defendant did not consistently keep records of complaints and that its managers had not taken "prompt corrective action." *Id*.

Here, the Eighth Circuit wrongly determined that there was no ratification, despite sufficient evidence establishing that the Respondent not only exhibited a clear intent not to discipline Doe, but affirmatively condoned his actions by telling him he would not be fired. The Eighth Circuit's narrow interpretation of ratification is inconsistent with "the general common law" of agency applied by other federal courts. This Court should accept this Petition to bring uniformity to the application of ratification under § 1981.

II. The Appellate Court's Decision is Inconsistent with the Purposes of the Act

The Eighth Circuit's decision directly conflicts with the purpose of § 1981—to combat racial discrimination, deter wrongs and compensate injured individuals—and is inconsistent with this Court's binding precedent to apply *vicarious liability* to Title VII and § 1981 employment cases. *See Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 754 (1998) (Title VII); *Faragher v. City of Boca Raton,* 524 U.S. 775, 807 (1998) (Title VII); *Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 72 (1986) (Title VII); *Fitzgerald v. Mountain States Tel. & Tel. Co.,* 68 F.3d 1257, 1262-63 (10th Cir. 1995) (determining punitive damages in

§ 1981 employment context); *Miller v. Bank of America,* 600 F.2d 211, 213 (9th Cir. 1979) (§ 1981 employment context).

Section 1981 is one of the nation's oldest civil rights statutes. Originally enacted as the Civil Rights Act of 1866, it was intended to ensure that persons of all races can enjoy equal contractual rights. In order to achieve this fundamental goal, Congress drafted Section 1981 to be deliberately broad. Indeed, in the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, Congress made clear that Section 1981 encompasses no less than "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). Thus, by its own terms, Section 1981 not only guarantees persons the right to enter into contractual relationships free of racial discrimination, but also guarantees persons the right to enjoy all the corresponding benefits of those contractual relationships.

The Civil Rights Act of 1866, now codified in 42 U.S.C. §§ 1981 and 1982, granted all citizens "the same right, *in every State and Territory in the United States*, to make and enforce contracts, … as is enjoyed by white citizens…" *Excerpted in Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 422 (1968) (emphasis added). The Act's overarching purpose was to give "real content to the freedom guaranteed by the Thirteenth

Amendment" [5] and to eradicate the Black Codes—laws which had burdened persons of color with "onerous disabilities and burdens, and curtailed their rights * * * to such an extent that their freedom was of little value * * *." *Id.* at 422, 433; *citing Slaughter-House Cases,* 83 U.S. 36, 70 (1872).

In *Jones*[6], this Court considered the broad language used to dispose of discrimination under the Act and acknowledged that when Congress passed the 1866 Civil Rights Act, it did so on the basic assumption that "it was approving a comprehensive statute forbidding *all* racial discrimination affecting the basic civil rights enumerated in the Act." *Jones,* 392 U.S. at 428, 435 (emphasis added). "For the same Congress that wanted to do away with the Black Codes *also* had before it an imposing body of evidence pointing to the mistreatment of Negros by private individuals and

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[5] The Thirteenth Amendment to the U.S. Constitution was passed in 1865 to abolish the institution of slavery. U.S. CONST. amend. XIII.

[6] While *Jones* specifically interpreted what is now 42 U.S.C. § 1982, the provision granting equal property rights to all citizens, its legislative intent and history have been held to be identical to that of 42 U.S.C. § 1981. *Runyon v. McCrary,* 427 U.S. 160, 170 (1976) (stating that the holding in *Jones* "necessarily implied that portion of s. 1 of the 1866 Act presently codified as 42 U.S.C. § 1981 likewise reaches purely private acts of racial discrimination…"); *Goodman v. Lukens Steel Co.,* 482 U.S. 656, 676 (1987) (both §§ 1981 and 1982 were derived from § 1 of the Civil Rights Act of 1866; their wording and their identical legislative history have led the Court to construe them similarly).

unofficial groups, mistreatment unrelated to any hostile state legislation." *Id.* at 427.

The Eighth Circuit's narrow interpretation of § 1981 is not only inconsistent with the Fifth Circuit and numerous district court decisions, but also with the broad remedial purposes, and the correspondingly broad remedial language, of § 1981. Under the Eighth Circuit's interpretation, store employees would be free to discriminate with relative impunity, safe in the knowledge that they are granted "one free bite of the apple" no matter how egregious their conduct and racial animus. Requiring employer knowledge would afford protection to the wrongdoer, rather than the individuals Congress intended to protect.

Section 1981's broad scope has been memorialized in numerous decisions and now constitutes "an important part of the fabric of our law." *Runyon v. McCrary*, 427 U.S. 160, 190 (1976) (Stevens, J., concurring). Applying the Eighth Circuit's narrow construction of Section 1981 would be wholly inconsistent with Congress's intent to ensure equal rights in contracting for all. To remain true to the plain text of Section 1981, its historical underpinnings, and the significant precedent interpreting this foundational statute, the Court should confirm that employer liability for the torts of its employees under §1981 is not *narrower* than other areas of tort law, but rather at least as broad.

b. Because § 1981 liability is an issue of federal law implicating common law principles, the Court considers, not the law of any one state, but "the

general common law" of *respondeat superior*. *See Kolstad v. American Dental Ass'n,* 527 U.S. 526, 542 (1999) (applying agency principles to determine punitive awards under Title VII and § 1981). *Arguello* and its progeny clearly follow long-established principles of general agency law. *See infra* Part III.

The Fifth Circuit's *vicarious liability* standard is consistent with the broad remedial purposes of § 1981, society's expectations in a retail-consumer environment, and long-established principles of agency law. Under these principles, a reasonable jury could find that Doe acted within the scope[7] of his employment establishing Respondent's discriminatory intent under § 1981 and/or that the Respondent had ratified Doe's conduct. In comparison, the Eighth Circuit's narrow liability standard is in conflict with general principles of agency law and does not afford protection to *all* citizens, but instead permits discrimination without liability where an employer does not have prior knowledge of an employee's racially hostile propensities. This was not Congress's intent when it enacted the Civil Rights Act of 1866.

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[7] Doe was clearly acting within the scope of his employment. The attack and racial epithets occurred while Doe was on-duty inside Respondent's premises during work hours. Pet. App. 2a, 18a. The sole purpose of Doe's interaction with Petitioner was to conduct a battery-test — a service provided by the Respondent for the benefit of the Respondent. Pet. App. 18a, 26A.

III. The Eighth Circuit's Decision is Wrong

a. The Eighth Circuit's decision conflicts with Section 1981's legislative intent. It is apparent from the debates and the wording of other civil rights sections that Congress did not intend that section 1981 reject the concept of *respondeat superior* ordinarily applicable in common-law tort actions. Nor is there evidence that Congress intended to import into the statute a strict causation requirement. To the contrary, Congress' emphasis on broad, sweeping legislation to implement the Thirteenth Amendment cautions against such an inference. *Haugabrook v. City of Chicago,* 545 F.Supp. 276, 281 (N.D. Ill. 1982) (disapproved on other grounds by *Jett v. Dallas Independent School District,* 491 U.S. 701 (1989)).

In *General Bldg. Contractors Ass'n, Inc. v. Pennsylvania,* this Court considered § 1981's broad language and legislative history and concluded that § 1981 claims require a showing of intentional discrimination. *General Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 389 (1982) (stating "Congress… acted to protect the freedmen from intentional discrimination by those whose object was "to make their former slaves' dependent serfs, victims of unjust laws, and debarred from all progress and elevation by organized social prejudices.") It was at that time that this Court first considered applying the doctrine of *respondeat superior* to a § 1981 claim. *Id.* at 392-93. There, this Court analyzed the doctrine of *respondeat superior*, "[o]n the assumption that *respondeat superior* applies to suits based on Section 1981 …" *Id.* at 375.

This Court went to great lengths to consider whether the doctrine of *respondeat superior* would apply to hold an employer liable, stating: "the doctrine of *respondeat superior,* as traditionally conceived and as understood by the District Court … enables the imposition of liability on a principal for the tortious acts of his agents and, in the more common case, on the master for the wrongful acts of his servant." *Id.* at 392. This Court further noted that the *respondeat superior* doctrine is applicable under Section 1981 when the employer or principal has some degree of control over the activities of another. *Id.* at 392, 403-04. In defining the doctrine, this Court stated:

> "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. A master-servant relationship is a form of agency in which the master employs the servant as "an agent to perform service in his affairs" and "controls or has the right to control the physical conduct of the other in the performance of the service."

Id. at 392.

While this Court has never definitively stated that the *respondeat superior* doctrine applies to a Section 1981 action, the concurring opinion in *General Bldg. Contractors* stated that "nothing in the Court's opinion prevent the respondents from litigating the question of the employers' liability under Section 1981 by

attempting to prove the traditional elements of *respondeat superior*." *Id.* at 404.

b. The Eighth Circuit's decision fails to consider the statutory history and language of § 1981 or this Court's prior recognition of *vicarious liability* in § 1981 cases. First, the Eighth Circuit's approach frustrates the very purpose of § 1981 – to guarantee to "all persons" the same civil rights. The Eighth Circuit's direct liability standard would instead make those rights dependent on the employer's prior knowledge, policies, or conduct -- a limitation that is nowhere reflected in the Act or its legislative history, and which would result in different outcomes despite identical wrongful conduct. Under the Eighth Circuit's direct liability standard, a plaintiff would be entitled to protection under the Act only where he was able to produce evidence that the employer knew of the employee's racially hostile propensities, thereby denying persons the same civil rights where, as here, proof of the employer's prior knowledge is unavailable. Such an outcome is in direct contradiction with the Act's stated purpose of guaranteeing to "all persons" the same civil rights.

In support of its decision, the Eighth Circuit noted that the Respondent "had a written policy prohibiting discrimination based on any protected status." Pet. App. 7a. Under this reasoning, an employer could simply enact a blanket policy prohibiting all bad acts, thereby inoculating the employer from all vicarious liability. Such a result is in direct conflict with the express purpose of § 1981 and the traditional elements of *respondeat superior*.

The absolute language of § 1981 does not suggest that vicarious liability cannot be imposed under that law. If Congress intended to limit an employer's liability to direct liability only, it would have specified as such in the statute. *See e.g., Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 58 (1986) (examining Title VII's limiting definition of an "employer" to include any "agent" of the employer, so as to hold the employer vicariously liable in some instances but not in others); *Monell v. Dept. of Soc. Servs.,* 436 U.S. 658, 692 (1978) (examining § 1983's statutory language "causes," so as to hold governmental entities cannot be held vicariously liable). Section 1981 contains no such limiting language. *See Miller v. Bank of America,* 600 F.2d 211, 213 (9th Cir. 1979) (considering the language of the statute so as to apply vicarious liability to a § 1981 employment case.) Such a rule would create an enormous loophole in the protections afforded by Congress in enacting § 1981. *Id.*

And, while this Court has never definitively stated that the *respondeat superior* doctrine applies to a § 1981 consumer action, the doctrine has routinely been applied by the lower courts. Indeed, "there is nothing in Section 1981 to lead a court to believe that *respondeat superior* is inapplicable to actions brought under the statute, and every court which has engaged in a meaningful analysis of the issue has so held." *Jones v. Local 520, Intern. Union of Operating Engineers,* 524 F.Supp. 487, 492 (S.D. Ill. 1981). *See also, Fitzegerald v. Mountain States Tel. and Tel. Co.,* 68 F.3d 1257, 1263-64 (10th Cir. 1995) (applying *vicarious liability* to hold an employer liable for punitive damages).

c. The Eighth Circuit's decision is equally wrong on the issue of ratification. It has long been held that ratification is generally a question of fact to be determined by the jury. Restatement (Third) of Agency § 4.01 Comment d.; s*ee also Irvine v. Irvine,* 76 U.S. 617, 623 (1869). And yet, the Eighth Circuit concluded, as a matter of law, that that the two-month delay in terminating Doe was "insufficient to show that Advance Auto ratified Doe's conduct." Pet. App. 15a. This is despite uncontroverted evidence that Respondent not only failed to take any action to discipline Doe following the incident, but also affirmatively told Doe that his employment would *not* be terminated for the attack on Petitioner.

While the Eighth Circuit recognized the application of ratification, it purported to require that the principal receive a benefit from the agent's conduct. Pet. App. 15a; citing *State ex. Inf. McKittrick v. Koon,* 356 Mo. 284, 201 S.W.2d 446, 456 (Mo. banc 1947); *Rider v. Julian,* 365 Mo. 313, 282 S.W.2d 484, 496 (Mo. banc 1955); *Compton v. Vaughan,* 222 S.W.2d 81, 83 (Mo. 1949); *St. Louis Mut. Life Ins. Co. v. Walter,* 329 Mo. 715, 46 S.W.2d 166, 171 (1931). However, those cases do not consider the unique circumstances of a § 1981 civil rights violation in the public accommodation context. Section 1981 civil rights violations arise because an individual was refused the right to contract. Accordingly, the Court cannot expect the employer to "receive a benefit" where its employee refused an individual the right to contract. To require such a showing given the unique circumstances of § 1981 public accommodation cases would permit a defendant to deny a person the right

to make and enforce contracts based on race without redress.

Another case relied upon by the Eighth Circuit, *Long's Marine, Inc. v. Boyland*, 899 S.W.2d 945, 948 (Mo.App. 1995), is in opposition. In *Long*, the court stated that a principal's repudiation must be *immediate* to avoid ratification. *Id*. at 948. Other federal and state cases are in accord. *See also Egnatic v. Nguyen*, 113 S.W.3d 659, 676 (Mo. Ct. App. 2003) (once a principal receives notice of an unauthorized act performed by an agent, the principal must *immediately* repudiate the agent's action or the principal is presumed to have ratified the act); *Sooter v. Magic Lantern, Inc.,* 771 S.W.2d 359, 363 (Mo. Ct. App. 1989) ("[a]n unauthorized act of an agent may be affirmed by a principal who fails to repudiate the act after learning of it."); *Compton v. Vaughan,* 222 S.W.2d 81, 83 (Mo. 1949) (failure of the principal to "protest, or dissent, or disaffirm or repudiate ... will be liberally construed in favor of the ratification by the principal."). The two-month delay in terminating Doe, after having previously affirmed that he would not be terminated, clearly gives rise to a question of fact which should have been decided by the jury.

IV. The Question Presented Is Frequently Recurring

As the Eighth Circuit acknowledged in *Green*, a "significant number" of lower courts have considered the question presented in this Petition. The issue has been considered by federal courts across the country and is important to consumers and businesses alike.

In *General Bldg. Contractors Ass'n, Inc. v. Pennsylvania,* 458 U.S. 375, 395 (1982), this Court considered applying the doctrine of *respondeat superior* to a § 1981 claim but did not reach a decision on the issue. Nonetheless, in the concurring opinion, Justice O'Connor and Justice Blackmun noted that "nothing in the Court's opinion prevent the respondents from litigating the question of the employers' liability under Section 1981 by attempting to prove the traditional elements of *respondeat superior*." *Id.* at 404. This case squarely presents an opportunity for this Court to finally address this important question.

V. This Case Presents an Ideal Vehicle for Resolving this Conflict

This case presents an especially clean opportunity for the Court to answer this long simmering and important question.

First, the critical facts are not in dispute. The incident was recorded on video and the parties do not dispute that there was an altercation between Doe and Petitioner where "Doe continued to shout derogatory

and racist statements at [Petitioner]." CA JA. 280. By contrast, other § 1981 public accommodation cases are often clouded by disputes over significant facts which may be outcome-dispositive of the case.

Second, this case presents a single legal issue. Although three elements are required to establish a *prima facie* case of discrimination in the retail context under § 1981, the Eighth Circuit has already concluded that Petitioner satisfied the first and third elements, finding that "[i]t is undisputed that [Petitioner] is a member of a protected class" and that "[b]y entering the store, requesting a battery test, and considering a purchase, [Petitioner] was engaged in making a contract." Pet. App. 4a. This leaves this Court with the singular decision of determining the standard for applying *respondeat superior* liability under § 1981.

Third, this case presents a textbook example of discrimination in the retail context under § 1981.

Fourth, the decision of the Eighth Circuit was published and is not interlocutory.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

DATED this 22nd day of June, 2023.

Respectfully submitted,

MARK S. SCHUVER
Bar No. 318899
Counsel of Record
MATHIS, MARIFIAN, & RICTHER, LTD.
23 Public Square, Suite 300
Belleville, IL 62220
618-234-9800
mschuver@mmrltd.com

Counsel for Petitioner