No. 22-1240

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

Respondent's Brief in Opposition is premised on a fatal mischaracterization of this Court's decision in *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982). *General Building* did not hold that the doctrine of *respondeat superior* is inapplicable in all § 1981 cases. To the contrary, this Court refrained from deciding that issue because it found that the facts of that particular case did not support its application. Nonetheless, this Court cited the application of *respondeat superior* in § 1981 cases favorably, and invited the opportunity to resolve this issue in a future case with appropriate facts.

This Petition for a Writ of Certiorari should be granted because the instant case presents the exact factual scenario that this Court identified in *General Building*.

ARGUMENT IN SUPPORT OF CERTIORARI

I. *General Building* invited the application of vicarious liability where a traditional agency or master-servant relationship exists.

In G*eneral Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982), this Court did not foreclose the application of *respondeat superior* in all § 1981 cases. On the contrary, that issue remains ripe for review. Respondent's sly attempt to mischaracterize this Court's holding in G*eneral Building* is unpersuasive. Indeed, this Court's prior

decision reflects a willingness to apply *respondeat superior* in a traditional setting to hold an employer liable for the intentional acts of its employee under § 1981.

In *General Building,* a class of racial minorities brought suit under § 1981 against a local union, a trade association and various construction industry employers. *Id.* at 378. Plaintiffs alleged that exclusive hiring arrangements under collective bargaining agreements entered into between the union and the employers, as well as an apprenticeship program established by the union, were being operated in a racially discriminatory manner. *Id.* The district court found that although the programs were neutral on their face, the union in administering the programs practiced a pattern of intentional discrimination in violation of § 1981. *Id.* at 381. Although the association and the employers did not intentionally discriminate against the minority workers and were not aware of the union's discriminatory practices, they were held liable by the district court under § 1981 based on a finding that they had delegated the hiring procedures to the union. *Id.* The Third Circuit, sitting *en banc*, affirmed. *Id.* at 382.

On review, this Court stated that it was called upon to resolve two questions: (1) whether liability under §1981 requires proof of discriminatory intent, and (2) whether, absent such proof, liability can nevertheless be imposed vicariously on the association and the employers for the discriminatory conduct of the union. *Id.* at 378.

As to the first question, this Court held that § 1981 can be violated only by purposeful discrimination. *Id.* at 391. As to the second question, this Court found the doctrine of *respondeat superior* inapplicable, not because it determined that an employer could not be liable for the intentionally discriminatory acts of its employee, but because it found no agency or master-servant relationship existed between the union, the employers and the association to hold the employers and the association liable for the intentional acts of the union. *Id.* at 376, 392, 395. Following a careful examination of the relationship between the union, the association and the employers, this Court held that those relationships "simply cannot be accurately characterized as one between principal and agent or master and servant." *Id.* at 392, 393.

However, the holding in *General Building* does not, as Respondent now contends, reflect a rejection of *respondeat superior* in § 1981 cases. To the contrary, this Court specifically cited to the Restatement (Second) of Agency, including § 219 which is at the core of the irreconcilable split among the circuits in this Petition, and stated: "The doctrine of *respondeat superior*, as traditionally conceived . . . enables the imposition of liability on a principal for the tortious acts of his agent and, in the more common case, on the master for the wrongful acts of his servant. *See* Restatement (Second) of Agency §§ 215–216, 219 (1958) (Restatement); W. Prosser, Law of Torts §§ 69–70 (4th ed. 1971) (Prosser); W. Seavey, Law of Agency § 83 (1964) (Seavey)." *Id.* at 392.

In the concurring opinion, Justices O'Connor and Blackmun noted that this Court's holding was "based on the failure of the trial court to make 'findings regarding the relationship between the JATC and petitioners … that might support application of *respondeat superior*.' " *Id.* at 404. More importantly, the concurring opinion specifically stated that once the case is remanded to the district court "nothing in the Court's opinion prevents the respondents from litigating the questions of the employers' liability under § 1981 by attempting to prove the traditional elements of *respondeat superior." Id*.

Respondent's argument that *General Building* held that vicarious liability is not available under § 1981 is patently incorrect. *Opp.* p. 8. While *General Building* found that *respondeat superior* was not applicable to support the imposition of liability on parties with whom no agency or employment relationship existed, this Court made clear that in more "traditionally conceived" cases, including the master-servant relationship presented here, the doctrine of *respondeat superior* may be applicable. *Id.* at 392.

In the end, rather than firmly rejecting vicarious liability in all § 1981 claims, this Court simply found the doctrine unsuitable as applied to the facts of that case. In fact, this Court specifically noted "[o]n the assumption that *respondeat superior* applies to suits based on § 1981, there is no basis for holding either the employers or the associations liable under that doctrine without evidence that an agency relationship existed at the time the JATC committed the acts on

which its own liability was premised." *Id.* Accordingly, while this Court did not definitively rule that vicarious liability would apply to § 1981 claims, it noted favorably that it may apply where a "traditionally conceived" agency or master-servant relationship exists. *Id.* This case squarely presents an opportunity for this Court to address this long simmering and important question.

II. The Eighth Circuit's decision conflicts with *General Building* and the Fifth Circuit's decision in *Arguello,* as well as its own decision in *Green.*

The Eighth Circuit's determination in this case 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. 2a, creates an undeniable split of authority among the courts of appeals and conflicts with *General Building.*

a. The Fifth Circuit, expressly relying on *General Building*, held that general agency principles would apply under § 1981 to hold Conoco, Inc., liable for the actions of its store clerk. *Arguello v. Conoco, Inc.,* 207 F.3d 803, 809 (5th Cir. 2000). Respondent's attempt to distinguish this decision and to reconcile it with the Eighth Circuit's holding are flawed and unpersuasive.

Respondent contends that *Arguello* was "wrongly decided because it ignored the precedent set in *General Building*." Opp. 12. This is factually

incorrect. The *Arguello* court directly cited and relied on *General Building*—on more than one occasion—to support its holding that an employer may be held vicariously liable for its employee's tortious actions under § 1981. *See Arguello,* 207 F.3d at 807 (citing *General Building* to determine whether an agency relationship exists); *see also id.* at 809 (citing *Flanagan v. A.E. Henry Comm. Health Svcs. Ctr.,* 876 F.2d 1231, 1233 (5th Cir. 1989), which relied on this Court's implication in *General Building* that agency principles apply under § 1981 to hold an employer liable for the discriminatory acts of plaintiff's supervisors). Relying on *General Building,* the Fifth Circuit concluded that "a plaintiff must establish a close connection between the employer and the third party who engages in the intentional discrimination" (*i.e.* a traditional agency or master-servant relationship). *Id.*

In *Arguello,* the Fifth Circuit was faced with determining whether Conoco could be held liable under Title VII and § 1981 for the acts of its non-supervisory employee in a public accommodation context. 207 F.3d at 808-09. *Arguello* relied on Title VII cases, including *Flanagan* and *Faragher v. City of Boca Raton,* 534 U.S. 775 (1998)[1], to apply the doctrine

[1] While *Faragher* is limited to Title VII employment claims, it was appropriate for the Fifth Circuit to consider the case and its application of vicarious liability in determining Conoco's liability under § 1981 given that courts generally apply the same standard of liability under Title VII to § 1981. *See Kim v. Nash Finch Co.*, 123 F.3d 1046, 1056 (8th Cir. 1997); *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1255 (10th Cir. 1988*); Lowe v. City of Monrovia*, 775 F.2d 998, 1010 (9th Cir. 1985), opinion amended, 784 F.2d 1407 (9th Cir. 1986).

of *respondeat superior* to the discriminatory acts of non-supervisory employees. *Arguello,* 207 F.3d at 908.

While this Court in *Faragher* required the discriminating party be in a supervisory position, the Fifth Circuit determined that "[i]n a public accommodation case such as this, the supervisory status of the discriminating employee is much less relevant than it is in an employment discrimination case." *Id.* at 810. The *Arguello* court reasoned that the clerk's discriminatory conduct was just as harmful as if the discriminatory acts had been committed by a supervisory employee. *Id.* The Fifth Circuit was "not persuaded that the Supreme Court would apply the same restricted vicarious liability rule in a public accommodation context as it did in *Faragher,* which involved discrimination in the workplace." *Id.*

Arguello did not ignore this Court's decision in *General Building* because, contrary to Respondent's argument, *General Building* did not hold that *respondeat superior* is inapplicable in §1981 cases. To the contrary, *General Building* cited with favor the Restatement (Second) on Agency, including § 219, and invited a future court to make that decision. The split between the Eighth Circuit's decision in this case and the Fifth Circuit's decision in *Arguello* creates the perfect vehicle for this Court to finally address whether vicarious liability applies to § 1981 claims, and to also determine whether, in a public accommodation context, vicarious liability applies to hold an employer liable for those discriminatory actions of non-supervisory employees.

b. Next, Respondent claims that the Eighth Circuit in *Green v. Dillard's, Inc.,* 483 F.3d 533 (8th Cir. 2007), rejected application of vicarious liability in claims filed under § 1981. *Opp. p. 15.* Respondent is, once again, incorrect.

Contrary to Respondent's argument, the Eighth Circuit did not reject *Arguello's* application of vicarious liability, but instead cited it favorably. In *Green,* the Court examined whether the plaintiffs had satisfied the discriminatory intent element of a § 1981 claim. 483 F.3d at 540. The Eighth Circuit determined that the plaintiffs had produced direct evidence of the employee's discriminatory intent, but Dillard's argued that it could not be held vicariously liable under § 1981. *Id.* The Eighth Circuit soundly rejected Dillard's argument, stating "[s]imilar arguments have been rejected elsewhere," and went on to favorably cite *Arguello*'s application of vicarious liability in § 1981's public accommodation context. The Eighth Circuit further noted that "the 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*). *Id.*

Ultimately, the Eighth Circuit in *Green* never ruled on the application of vicarious liability under § 1981 because the court found that "plaintiffs made out a *prima facie* case of negligence" against Dillard's. *Id.* at 540. The Eighth Circuit concluded that plaintiffs had produced evidence that Dillard's did, in fact, have reason to know of its employee's hostile propensities. *Green,* 483 F.3d at 540-41. Accordingly,

the *Green* Court held Dillard's directly liable, thereby avoiding the need to determine whether vicarious liability applied. *Id.* at 540-41 (*emphasis added*).

c. Respondent simply misconstrues the element of "discriminatory intent" and seeks to limit Section 1981 liability to direct intentional discrimination. *Opp*. 18. While this Court in *General Building* required proof of purposeful discrimination, it recognized that an employee's purposeful discrimination could be imputed to hold an employer liable under the traditional elements of *respondeat superior*. Thus, even under vicarious liability, there is still a finding of purposeful discrimination. This is in line with the broad language of the statute, the intent of Congress and the purpose of the Civil Rights Act of 1866.

Originally enacted as the Civil Rights Act of 1866, Section 1981 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. In *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 426 (1968), this Court explained that § 1 of the 1866 Act "was meant to prohibit *all racially motivated* deprivations of the rights enumerated in the statute." Furthermore, as recognized in *General Building,* 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." *General Building,* 458 U.S. at 388 *citing* Cong.Globe, 39th Cong., 1st Sess., 1839 (1866) (Rep. Clarke).

The Eighth Circuit's decision in the present case runs counter to Congress' purpose in enacting Section 1981. It also runs counter to the Fifth Circuit's decision in *Arguello*, and this Court's *dicta* in *General Building*. This Court's review is particularly warranted given the statute's purpose, Congress' intent, and the current, unavoidable split among the circuits on this critical issue.

III. The Eighth Circuit's decision conflicts with well-established agency principles of ratification.

The district court 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 for two months did not constitute ratification. Pet. App. 30a. In a clear split with decisions of other federal appellate and district courts, the Eighth Circuit affirmed, holding that such evidence was "insufficient to show that Respondent ratified Doe's conduct." Pet. App. 15a.

By rejecting the long-established principle of ratification, the Eighth Circuit has flouted federal precedent and created a conflict with various circuits. In fact, rather than apply well-established general agency principles of ratification, the Eighth Circuit examined ratification under Missouri law as applied to Petitioner's state law claims. Pet. App. 15a ("According to the Missouri Supreme Court, implied ratification requires that the principal receive a benefit from the agent's conduct"). The Eighth

Circuit's departure from well-established federal precedent merits this Court's review.

The Eighth Circuit's decision completely ignores the undisputed fact that Doe was affirmatively told by Respondent's district manager that he would *not* be fired, and that the incident was not documented or reported to the regional HR manager, as was required. Pet. App. 2a., CA JA 470-471, 479-80. Ignoring those facts, the Eighth Circuit held, *as a matter of law*, that a delay of two-months before initiating an investigation and terminating Doe was insufficient to ratify his conduct. Pet. App. 14a; Opp. 19. This holding is in direct conflict with the decisions of numerous federal courts, including *Arguello,* 207 F.3d at 812 (finding no ratification where clerk was *immediately* counseled); *see also 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). Rather than view the record as a whole, as required on appeal, the Eighth Circuit rationalized Respondent's non-

response and delay *as a matter of law* because Doe was *eventually* terminated (albeit only after Respondent was warned of litigation).

A clear review of the facts reveals Respondent ratified Doe's discriminatory act on more than one occasion. First, Respondent's store manager and district manager failed to *immediately* reprimand Doe or do so within a reasonable time. CA JA 369, 400, 411-13, 454-57. Instead, the district manager affirmatively assured Doe that he would not be fired. Pet. App. 2a.; *see* Restatement (Third) of Agency § 4.01 ("Ratification is the affirmance of a prior act done by another…") Thereafter, for six weeks Doe's misconduct remained undisciplined, unreported and unreviewed. Pet. App. 2a; *see Lincoln Benefit Life v. Wilson*, 907 F.3d 1068, 1076 (8th Cir. 2018) (Ratification of an agent's unauthorized acts may be inferred from silence and inaction). It wasn't until Respondent's regional HR manager was informed of litigation that Respondent's district manager was directed to fire Doe. Pet. App. 2a. Even then, the district manager remained reluctant to do so and never told Doe why he was being terminated.

Despite ample evidence of ratification, the Eighth Circuit departed from long-established precedent and determined that there was no ratification *as a matter of law*. The Eighth Circuit's decision was unwarranted, creates a clear split in authority with other circuits, and provides the perfect opportunity for this Court to resolve the issue.

CONCLUSION

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

DATED this 12th day of September, 2023.

Respectfully submitted,

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