No. _____

IN THE
Supreme Court of the United States

NAYONN GRAY,
PETITIONER,
v.
AUTOZONERS, LLC AND NICHOLAS ISLES,
INDIVIDUALLY

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

42 U.S.C. § 1981 provides that "[a]ll persons . . . have the same right . . . to make and enforce contracts." 42 U.S.C. § 1981(a). The statute further states that "the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *Id*. § 1981(b).

The question presented is:

Whether summary judgment should be granted when there are genuine issues of material fact as to whether a defendant's refusal to provide services requested under contract was motivated by racially discriminatory intent, in violation of 42 U.S.C. § 1981, when the defendant called himself a *"white power oppressor,"* admitted the statement was a synonym for racist, and expressly intended to mock and trivialize the plaintiff.

PARTIES TO THE PROCEEDINGS

Petitioner Nayonn Gray was the plaintiff before the district court and appellant before the court of appeals. Respondents Autozoners, LLC, and Nicholas Isles, were the defendants in the district court and appellees in the court of appeals.

RELATED PROCEEDINGS

United States District Court (E.D. Mich.):

Gray v. Autozoners, LLC, No. 20-CV-12261 (Aug. 20, 2020)

United States Court of Appeals (6th Cir.):

Gray v. Autozoners, LLC, No. 22-1069 (Nov. 15, 2022)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Rules

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-15a) is available at 2022 WL 16942609. The court's order denying rehearing denied *en banc* (App. 37a-38a) is available at 2022 U.S. App. LEXIS 35072.

The district court's order dismissing Petitioner's case (App. 16a-34a) is available at 2022 WL 36419.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on November 15, 2022. App. 1a-15a. The court of appeals denied a timely petition for rehearing *en banc* on December 19, 2022. App. 37a-38a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

Title 42, section 1981 of the United States Code provides:

> (a) Statement of equal rights. 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.
>
> (b) "Make and enforce contracts" defined. 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.

42 U.S.C. § 1981.

Michigan's Elliott-Larsen Civil Rights Act ("ELCRA") provides that, "[e]xcept where permitted by law, a person shall not:"

> (a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status.

Mich. Comp. Laws § 37.2302.

STATEMENT OF THE CASE

This case presents an issue of fundamental importance to the resolution of how latent racial animus must be in order to establish that it in fact motivated the denial of another individual's "right . . . to make and enforce contracts" as defined in 42 U.S.C. § 1981. The federal statute establishes a federal cause of action for individuals claiming intentional racial discrimination.

In the proceedings below, the Sixth Circuit broadened the requirement for what constitutes indirect racial discrimination in a commercial establishment in its affirmation of the district court's summary judgment in favor of defendants. The Sixth Circuit impliedly allowed as precedent that even

outright words of "*white power oppressor*," combined with the pretextual events leading up to the refusal to enforce contractual obligations, do not meet the standards to uphold a racial discrimination claim under § 1981.

This case undoubtedly meets the criteria for this Court's review. This issue is deeply rooted in American history, particularly in the present atmosphere. Discrimination based on immutable characteristics associated with race, no matter how consistent with business necessity, is not justifiable. The Civil Rights Act was enacted, subsequently revised, and one of its parts was codified in 42 U.S.C. § 1981 in order to increase enforcement and preservation of such fundamental civil rights. This demonstrates how firmly embedded and protected such fundamental civil rights are inside the American legal system and culture.

A. Legal Background

1. Following the mistreatment and discrimination endured by African Americans in the South, "Congress passed the Civil Rights Act of 1866 in the aftermath of the Civil War to vindicate the rights of former slaves." *Comcast Corp. v. Nat'l Ass'n of African Am.- Owned Media*, 140 S. Ct. 1009, 1021 (2020). 42 U.S.C. § 1981 codifies Section 1 of the statute. 42 U.S.C. § 1981; Civil Rights Act of 1866. 42 U.S.C. § 1981 explicitly states that "[a]ll persons" in the United States "the same right" "to make and enforce contracts" as is "enjoyed by white citizens," including "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(a)–(b). The statute currently defines "make and enforce contracts" to "include the making, performance,

modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship. § 1981(b)." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 474–75 (2006).

2. Michigan's ELCRA provides that, "[e]xcept where permitted by law, a person shall not . . . [d]eny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of . . . race[.]" Mich. Comp. Laws § 37.2302.

3. "The same race-discrimination framework can be used to examine both Section 1981 and Elliott-Larsen claims. The Sixth Circuit has explained that both types of cases call for the same race-discrimination analysis as is conducted under Title VII." *Jackson v. Quanex Corp.*, 191 F.3d 647, 658 (6th Cir. 1999).

4. Summary judgment is proper where there is no Genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In considering such a motion, the court must construe all reasonable factual inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). All inferences to be drawn from the underlying facts must be considered in the light most favorable to the party opposing the motion. *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962);

Watkins v. Northwestern Ohio Tractor Pullers Ass'n, Inc., 630 F.2d 1155, 1158 (6th Cir. 1980).

B. Facts & Procedural History

1.a. "Put me on Facebook, the white power oppressor man," said Defendant Isles to Plaintiff Nayonn Gray, a 24-year-old African American man, who on August 7, 2020, went into AutoZone Store Number 2256, driven by his friend, Demetrius Stone, seeking to enforce a contract with Defendants by means of initiating a warranty exchange on a faulty battery purchased in May 2020. See App 3a, ECF No. 22, PageID.388, pg. 22. It is undisputed that Plaintiff's battery was still within the warranty period. See App. 10a.

b. Defendant Isles explained his mindset when denying Plaintiff the warranty exchange because Defendant Isles was the "White Power Oppressor" – he admitted the statement is "a synonym for racist." ECF No. 22-3, PageID.492, pg. 109:15-16. "It was nasty, insultery [sic] words that I felt captured the moment[]" *Id*. Isles admitted he had made the statement to mock and trivialize Mr. Gray. *Id*.

c. As Defendant Isles explained, "Mr. Gray wanted to exchange the battery he came in with for a new one off the shelf." ECF No. 22-3, PageID.467, pg. 8:24-25. Defendant, however, denied Plaintiff the warranty exchange before testing the condition of the battery claiming that it was sufficient that Plaintiff "had already availed himself of the warranty repeatedly and [he] was not going to grant an additional warranty exchange." See App. 18a, ECF No. 22-3, PageID.488, pg. 93:1-4.

d. When Plaintiff persisted with his request that AutoZone honor the warranty, Defendant then

accused Plaintiff of abusing or misusing the battery, causing it not to work properly, including that Plaintiff had drained the battery by hooking it up to an aftermath sound system, which was untrue. See App. 3a, ECF No. 22-3, PageID.491, pg. 102:24-25. According to Defendant, AutoZone Store 2256 had a diverse customer base, including "black folks, Hispanic folks" who "install aftermarket sound systems into their vehicle, to replace the speakers in the speaker well, to install amplifiers in their trucks, to install new radios in the dashboard," and the Defendant concluded, without objectively testing the battery, that the Plaintiff, who belongs within that demographic, abused the battery, so triggering the warranty exception. ECF No. 22-3, PageID.491, pg. 103:11-14.

f. In response, Plaintiff pulled out his camera to capture the "unprofessional and inappropriate conduct" so he can record Defendant Isles say "on video . . . that [he could not] return the battery," which was a breach of warranty policy. See App. 4a, ECF No. 22-2, PageID.413, pg. 34:14.

g. Defendant Isles repeated "put me on Facebook, the white power oppressor, man." ECF No. 22-3, PageID.468, pg. 10:5-6. Defendant Isles then instructed the plaintiff to "leave the store" without completing the transaction for which he had originally come. ECF No. 22-3, PageID.507, pg. 168:17-18.

h. Kaiyana Webb, an African American employee at the store, who observed that Plaintiff was "visibly shaken after his encounter with Defendant Isles testified that Defendant Isles's remarks were upsetting, "inappropriate," and "unnecessary." ECF No. 22-6, PageID.569, pg. 68:10.

i. Plaintiff and his mother reported Defendant Isles's conduct to AutoZone's corporate office, but AutoZone took no further action and weeks after the incident Defendant Isles was permitted to work at the store. ECF No. 22-2, PageID.438, pg.137:13-16. Plaintiff filed his complaint when AutoZone did not take any measures to address his complaint against Defendant Isles. ECF No. 22-3, PageID.477, pg. 47:24-25. Webb reported Defendant's Isles's conduct to the district manager upon his return to work. ECF No. 22-6, PageID.556, pg. 17:11-12.

j. AutoZone initiated an investigation only after when Defendant Isles acknowledged to making the statement "put me on Facebook, the white power oppressor man," to a local newspaper and stating that he owed no apology to the Plaintiff. See App. 20a, ECF No. 22-6, PageID558, pg. 22:8-10. According to AutoZone's investigation, Defendant Isles "did trivialize and seek humor in a customer's complaint [sic] of racial bias," which corroborated the authenticity of the situation as laid out in the action. ECF No.22, PageID.388, pg. 22. Yet, Defendant Isles "was not disciplined" for the actions that led to the lawsuit – he was terminated for his communication with the press about the lawsuit. ECF No.22-3, PageID.486, pg. 84:10-13.

2.a. On November 2, 2020, Petition filed his first amended complaint, alleging that Defendants Autozoners, LLC and Nicholas Isles discriminated against Plaintiff in violation of 42 U.S.C. § 1981, and deprived Plaintiff of his civil right to make and enforce contracts by: (a)Subjecting Plaintiff, because of his race, to discrimination in denying service that he requested, and therefore denying him the ability to

contract to receive Defendants' continued services and (b) Subjecting Plaintiff, because of his race, to embarrassment, humiliation, verbal and nonverbal harassment on its premises, which had the purpose and/or effect of denying Plaintiff full and equal access to the making of a contractual relationship between Plaintiff and Defendants to obtain further services, as well as denial of public accommodation in violation of the Elliott-Larsen Civil Rights Act, MCL § 37.2101 and asserted an intentional infliction of emotional distress claim. ECF No.14, PageID.79, pg. 7-14.

b. On January 4, 2022, the district court granted the Defendants' motion for summary judgment without oral argument and dismissed all of the Plaintiff's complaints. See App. 35a. On April 18, 2022, the district court denied the plaintiff's motion to stay taxation of costs pending appeal. See App. 39a.

3.a. On November 15, 2022, following oral argument, the Court of Appeals for the Sixth Circuit affirmed the judgement of the district court, concluding that Plaintiff failed to establish that Defendants' proffered reason for the warranty denial was pretext for race discrimination and that Plaintiff has failed to establish extreme and outrageous conduct and severe emotional distress that could support a claim for intentional infliction of emotional distress. See App. 15a.

b. The Sixth Circuit denied a timely petition for rehearing *en banc*. See App. 37a-38a.

REASONS FOR GRANTING THE PETITION

The decision below deviates significantly from the fundamental principles and perspectives of the American judicial system and society at large. As it stands, the Sixth Circuit's decision is bad precedent and will be used as persuasive authority by lower courts in any future cases alleging violations of 42 U.S.C. § 1981. The Sixth Circuit upheld the unjustified refusal to provide a service to a black customer. This ruling has far-reaching implications for the denial of a constitutionally guaranteed right for those who have traditionally been disenfranchised and discriminated against. This frightening notion makes it legally and socially acceptable to declare oneself a "*white power oppressor*" as the reason for denying a contractual service without fear of discipline, a remark intimately linked to America's dark history and white supremacy. Accordingly, the Court should grant the petition.

I. There are genuine issues of material fact as to whether defendant's refusal to provide services requested under contract was motivated by racially discriminatory intent, in violation of 42 U.S.C. § 1981, when the defendant referred to himself as a *"white power oppressor."*

42 U.S.C. § 1981 prohibits intentional race discrimination in both the making and enforcing of contracts with private actors. 42 U.S.C. § 1981. The statute's protection extends to "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *Id*. § 1981(b). A plaintiff can establish the intent

element through either direct or circumstantial evidence—neither route is more preferable. *Amini v. Oberlin Coll.*, 440 F. 3d 350, 358 (6th Cir. 2006); *Unroe v. Bd. of Educ., Rock Hill Loc. Sch. Dist.*, No. 1:04-CV-00181, 2006 WL 22081, at *15 (S.D. Ohio Jan. 4, 2006). The burden of producing direct or circumstantial evidence "is not onerous and should preclude sending the case to the jury only where the record is devoid of evidence that could reasonably be construed to support the plaintiff's claim." *White v. Baxter Healthcare Corp.*, 533 F.3d 381 (6th Cir. 2008) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)); see also *Griffin v. Finkbeiner*, 689 F.3d 584, 595 (6th Cir. 2012).

A. Plaintiff has proffered direct evidence to show that Defendant acted with discriminatory intent by denying Plaintiff services pursuant to valid warranty and declaring himself as a "*white power oppressor.*"

Direct evidence is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor or the but-for cause of an adverse action. *Amini, at 539*; *Kocak v. Cmty. Health Partners of Ohio, Inc.*, 400 F.3d 466, 470 (6th Cir. 2005). It does not require the factfinder to draw any inferences to reach that conclusion. *See Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000). Evidence of discrimination is considered direct evidence when a racial motivation is explicitly expressed. *Amini*, at 539.

The lower court incorrectly claimed that the case at issue was not comparable to *Dicarolo*. In *Dicarolo*,

a supervisor's alleged comments that an Italian American employee was "dirty wop" and that there were too many "dirty wops" working at the facility constituted direct evidence of discrimination as it was made by an "individual with decision-making authority." *DiCarolo v. Potter,* 358 F.3d 408, 416-7 (6th Cir. 2004). Under this precedent, the direct evidence of the requisite discriminatory animus is sufficiently present as Defendant Isles, who in his position as, assistant store manager and who was "in charge of the store," made the decision not to exchange Plaintiff's warranty-protected battery while subsequently stating "[p]ut me on Facebook, the white power oppressor[.]" ECF No.22-3, PageID.496, pg. 123:14; ECF No.22, PageID.468, pg.10:5-6. *See Hopson v. DaimlerChrysler Corp.,* 306 F.3d 427, 433 (6th Cir. 2002) (holding that a company manager's opinion that "race was a factor" in the company's decision not to promote the plaintiff was not direct evidence for purposes of the plaintiff's discrimination claim because the manager had "no involvement in the decision-making process with respect to the particular jobs at issue." As in *DiCarolo*, the proximity between the decision and the remark, which in this case is a matter of minutes, is sufficient to preclude summary judgment based on direct evidence.

Similarly, in *Scheick v. Tecumseh Pub. Sch.*, 766 F.3d 523, 531 (6th Cir. 2014), the Court deemed the board member's statement to plaintiff that "we want someone younger," "sufficient to permit a reasonable juror to conclude that [plaintiff's] age was the but-for cause [of the employer's] decision not to contract the [plaintiff] for his services." The Court emphasized that even though the employer may prove otherwise, the plaintiff "has met his burden to come forward with

evidence sufficient to establish that a genuine issue of material fact exists for trial." *Id.* at 532. Here, in direct response to Plaintiff's request for an explanation as to why he could not exchange his warranty-protected battery, Defendant Isles responded to "[p]ut me on Facebook, the white power oppressor, man." ECF No.22-3, PageID.496, pg. 123:14. Similarly, to how summary judgment was precluded in *Scheick* because it was a question of fact as to whether age was a but-for cause for the plaintiff and defendant's contract not being renewed, here it is a genuine issue of material fact as to whether discrimination is the but- for cause of Defendant Isles's refusal to perform service for a black customer, so it must be decided by a jury as a question of fact.

The case at hand is significantly different from *Devoux v. Bair*d, in which the court determined that the plaintiff does not state a claim of relief under 1981 because he "does not allege that Defendants prohibited him from making any purchases at the store" because he had completed his purchase prior to the race-based comment being directed at him. *Devoux v. Baird*, No. 5:12-CV-01406-GRA, 2014 WL 1767477, at *4 (D.S.C. May 1, 2014); *see also Garrett v. Tandy Corp.*, 295 F.3d 94 (1st Cir. 2002) ("To satisfy the foundational pleading requirements for a suit under section 1981, a retail customer must allege that he was actually denied the ability to make, perform, enforce, modify, or terminate a contract, or to enjoy the fruits of a contractual relationship, by reason of a race-based animus.") In this case, however, the plaintiff had a claim for relief under 1981 because he did not complete the original transaction for which he entered AutoZone, namely, to obtain a replacement battery, which was undisputedly still protected by warranty,

prior to Defendant Isles blatantly stating he was a "white power oppressor." ECF No. 22, PageID.387, pg.21.

The Ninth Circuit stated that, "[t]he plaintiff must present 'very little' direct evidence of the employer's discriminatory intent in order to overcome summary judgment." *Chuang v. Univ. of California Davis, Bd. of Trustees*, 225 F.3d 1115, 1128 (9th Cir. 2000) (quoting *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998.) In *Chuang*, the plaintiff produced a single comment from the defendant indicating that he "did not want to interact with another female after having dealt with . . . [the only female marketing manager]," and this was sufficient to establish discriminatory animus. *Id*. at 1121. Defendant Isles stated unequivocally that he would not replace the battery because he was the white power oppressor, but as Webb put it, what "does white power or anything, black power or anything have to do [performing a job]?" ECF No.22-6 PageID.556, pg. 14:9-11.

"The ultimate question of fact in a Title VII race-discrimination case is, of course, whether the defendant discriminated against the plaintiff on the basis of race. Racial animus is not the only inference that can be drawn from evidence that the proffered reason for an adverse employment action was pretext. Evidence that the employer's proffered reason for the termination was not the actual reason thus does not mandate a finding for the employee, *St. Mary's Honor Ctr. v. Hicks,* 509 509 U.S. 502, 511 (1993), . . . but is enough to survive summary judgment[.]" *Griffin v. Finkbeiner,* 689 F.3d 584, 594 (6th Cir. 2012). As the Sixth Circuit held, "[t]he jury can decide whether racial animus was the actual reason for [plaintiff's]

termination." *Id*. Defendant Isles admitted the statement "white power oppressor" was "a synonym for racist." ECF No.22-3, PageID.492, pg. 109:16. "It was nasty, insultery [sic] words that [he] felt captured the moment[.]" ECF No.22-3, PageID.493, pg. 113:9-10. When questioned by Defendant's Isles's attorney during deposition Plaintiff testified that "[he] didn't know we still had to go through this. This is not the 60's, 1960's or anything like that. It's not what I wanted to go through that day. So, I mean white oppression." ECF No.22-2, PageID.412, pg. 33:20-23. "[F]or people who throw around [the term white] oppressor, they don't really understand the oppressed, so it can be light-hearted to someone or sarcastic to someone who may not understand oppressed[.]" ECF No.22-6, PageID.567, pg. 58:11-15. Throughout the 1960s, a period known as the Jim Crow era, anti-black bigotry and legalized racial discrimination were institutionalized. Hence, given the context and what Defendant Isles testified about the comment, if it were a question of intent and what Defendant Isles testified about his intent, it must be submitted to the jury as a question of fact, which the Sixth Circuit improperly precluded.

Here, when Plaintiff asked Defendant Isles why he could not return his battery under warranty, Isles told him to "[p]ut me on Facebook, the white power oppressor, man." ECF No.22-3, PageID.496, pg. 123:14. A racially charged response to Plaintiff's question about why he could not exercise his valid warranty conveys a racial motivation in a way that the Sixth Circuit's judgment that such information is not direct evidence of discrimination fails to account for. Therefore, direct evidence, pursuant to *Amini*, 440 F. 3d at 359, is established.

B. Plaintiff has established a prima facie inference of racial discrimination because the reason Defendant, a self-described "*white power oppressor*," provided for refusing to replace Plaintiff's battery was pretextual and is racially motivated.

"Circumstantial evidence . . . is proof that does not on its face establish discriminatory animus, but does allow a factfinder to draw a reasonable inference that discrimination occurred." *Jordan v. Mathews Nissan, Inc.*, 539 F. Supp. 3d 848, 869 (M.D. Tenn. 2021) (quoting *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 570 (6th Cir. 2003)). The standard for establishing an inference or *prima facie case* of discrimination is necessarily flexible and varies with the facts unique to each case. *Texas Dep't of Community. Affairs v. Burdine*, 450 U.S. 248 (1981); *Lindsay v. Yates,* 498 F. 3dd 434, 439 (6th Cir. 2007). The amount that must be produced to create a *prima facie* case is "very little." *Flores v. Merced Irr. Dist.,* 758 F. Supp. 2d 986, 994 (E.D. Cal. 2010) (quoting *Burdine,* 450 U.S. at 253.) "This so-called *McDonnell Douglas* test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained." *Guz v. Bechtel Nat'l, Inc.*, 8 P.3d 1089, 1113 (Cal. 2000). As noted by this Court, "[t]he prima facie case method established in *McDonnell Douglas* was 'never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light

of common experience as it bears on the critical question of discrimination.'" *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (quoting *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978)). To establish a *prima facie* case of discrimination under § 1981, plaintiffs must show (1) that they are members of a protected class; (2) that defendants had the intent to discriminate on the basis of race; and (3) that the discrimination interfered with a protected activity as defined in § 1981. *Hunter v. Buckle, Inc.*, 488 F. Supp. 2d 1157, 1169 (D. Kan. 2007); *see also Callwood v. Dave & Buster's, Inc.*, 98 F. Supp. 2d 694, 705 (D. Md. 2000) (they "did not enjoy the privileges and benefits of the contract . . . under factual circumstances which rationally support an inference of unlawful discrimination.)" It is undisputed that Plaintiff meets the first two prongs of the three-part *prima facie* test. See App. 10a. As the Sixth Circuit noted, "the pertinent question is whether [Plaintiff] 'did not enjoy the privileges and benefits' of the warranty contract, under circumstances that rationally support an inference of unlawful discrimination." *Id.* A plaintiff can establish the third element of the *prima facie* test by establishing whether "(a) they were deprived of services while similarly situated persons outside the protected class were not deprived of those services, and/or (b) they received services in a markedly hostile manner and in a manner which a reasonable person would find objectively unreasonable." *Callwood,* 98 F. Supp. 2d at 705.

1. Plaintiff was treated differently than his similar situated counterparts

To prevail on a similarly situated person theory, a plaintiff must allege at least one instance in which they were treated differently from a similarly situated non-minority. *Hu v. City of New York*, 927 F.3d 81, 101 (2d Cir. 2019) (*see Smith v. City of Toledo, Ohio*, 13 F.4th 508, 515 (6th Cir. 2021) (where a disparate pay claim was dismissed because plaintiffs could not point a similarly situated individual outside the protected class who was treated better than they were.); *see also Mallory v. Caterpillar Fin. Servs. Corp.*, 256 F. Supp. 3d 770, 779 (M.D. Tenn. 2017). However, drawing parallels between circumstances need not be identical. *Graham v. Long Island R.R.*, 230 F.3d 34, 40 (2d Cir. 2000); *see McGuinness v. Lincoln Hall*, 263 F.3d 49 (2d Cir. 2001). In a commercial establishment setting, this test is "written with the understanding that 'the comparison will never involve precisely the same set of [conduct] occurring over the same period of time and under the same sets of circumstances.'" *Christian*, 252 F.3d at 871 (quoting *Callwood*, 98 F. Supp. 2d at 707.) Whether two employees are similarly situated ordinarily presents a question of fact for the jury. *Taylor v. Brentwood Union Free Sch. Dist.,* 143 F.3d 679, 684 (2d Cir.1998) *see Hargett v. National Westminster Bank, USA,* 78 F.3d 836, 839–40 (2d Cir.1996) (noting that jury was asked to decide "similarly situated" issue).

The panel incorrectly held that Gray did not make a *prima facie* case because he did not identify a comparator person "of a different race, who was similarly situated to him, but who was treated better"

by the defendant. See App. 10a, 13a. However, under the *Christian* precedent, there is no requirement of showing how a § 1981 defendant "treated" comparable to other customers. *Christian*, 252 F.3d at 871. Rather, the primary inquiry is on whether other customers were allowed to enjoy the benefits of the same type of contract sought by Plaintiff. In this case, Defendant Isles, as an employee of Defendant AutoZone, deprived Plaintiff of similarly situated persons outside the protected class by deviating from Defendant AutoZone's philosophy and mission of providing excellent customer service; its practice was to replace a battery for a customer if the battery was still under warranty. ECF No.22-5, PageID.543, pg. 7:12-13.

Francisco Segovia, a coworker of Defendant Isles at Store #2256 and a Parts Sales Manager, testified that Defendant AutoZone routinely receives batteries for replacement pursuant to a warranty. ECF No.22-5 PageID544, pg. 10:14; ECF No.22- 5, PageID.543, pg. 7:12-13. As Segovia described, "My training has been to, if it is under warranty, replace it." ECF No.22-5, PageID.543, pg. 7:12-13. Additionally, a jury could reasonably find Defendant treated Plaintiff differently than similarly situated others through Isles's conduct. For example, although Isles tests the batteries before deciding whether to exchange them pursuant to a warranty, he did not test Plaintiff's battery before deciding to deny the exchange. ECF No.22-3, PageID.480, pg. 59:1-15. He also admits he never told white customers he was the "*white power oppressor*." ECF No.22-3, PageID.494, pg. 114:18.

In accordance with precedent, there is a genuine issue of material fact in this case as to whether Defendant AutoZone and Defendant Isles denied Plaintiff services while similarly situated persons

outside the protected class were not. Plaintiff has made a showing that any similarly situated non-protected persons were treated more favorably than he was—that is, were provided exchange of battery under warranty—and, thus, he has made out a *prima facie* case of race discrimination.

2. Plaintiff received services in a markedly hostile and objectively discriminatory manner

An inference of discrimination may also arise in a § 1981 retail discrimination case where a plaintiff "received services in a markedly hostile manner and in a manner which a reasonable person would find objectively unreasonable." *Christian*, 252 F.3d at 872; *see also Callwood*, 98 F. Supp. 2d at 707. Some factors that are relevant to whether service in the commercial context is "markedly hostile" include: Whether the conduct is (1) so profoundly contrary to the manifest financial interests of the merchant and/or her employees; (2) so far outside of widely accepted business norms; and (3) so arbitrary on its face, that the conduct supports a rational inference of discrimination. *Christian,* 252 F.3d at 871-72, 879; *Callwood*, 98 F. Supp. 2d at 707. The burden of establishing a *prima facie* case sufficient to raise a jury question "is not meant to be onerous." *Christian*, 252 F.3d at 870.

The third element of the *prima facie* test "makes actionable the deprivation of service, as opposed to an outright refusal of service and better comprehends the realities of commercial establishment cases in which an aggrieved plaintiff may have asked to leave the place of business prior to completing her purchase, refused service within the establishment, or refused

outright access to the establishment." *Christian*, 252 F.3d at 873. In *Leach,* an employee called plaintiff a name that any African American would find deeply offensive after he had completed his purchases and was about to exit. *Leach v. Heyman*, 233 F. Supp. 2d 906, 909-11 (N.D. Ohio 2002). There, the court held that "a jury could find that [defendant's] conduct throughout the course of her dealing with plaintiff was indicative of racial animus, even though that motivation may have overtly manifested itself only when [defendant] came after plaintiff as he was leaving the store." *Id*. at 911. In *Leach*, the transaction was complete, but in the present case, the Plaintiff had not received the battery he asked to be replaced under warranty prior to or after Defendant Isles's statement that he rejected service because he was a "*white power oppressor, man*." ECF No. 22, PageID.387, pg.21.; ECF No. 22-3, PageID.468, pg. 10:5-6. The hostile and discriminatory environment was evident from the start, as Stone stated that Defendant Isles was the first to raise his voice, became irate, and began yelling while other customers were present. ECF No.22-9, PageID.703, pg. 37:8-18.

Here, the circumstantial evidence contains all the elements necessary to raise an inference of illegal discrimination under *Christian*: (1) Plaintiff is a member of a protected class; (2) Plaintiff sought to make or enforce a contract for services ordinarily provided for by Defendants; and (3) Plaintiff was denied the right to enter into, or enjoy the benefits or privileges of, the contractual relationship in that (a) Plaintiff was deprived of services while similarly situated persons outside the protected class were not, and/or (b) Plaintiff received services in a markedly

hostile manner and in a manner that a reasonable person would find objectively discriminatory.

3. Defendant's Legitimate Explanation for its Behavior is Insufficient and Pretextual

Once a plaintiff has established the necessary elements of a *prima facie* case, the burden shifts to the defendant to proffer a legitimate explanation for its behavior. *Christian*, 252 F.3d at 879. A defendant's articulated justification can be rebutted by showing that (1) the stated reasons had no basis in fact; (2) the stated reasons were not the actual reasons; or (3) the stated reasons were insufficient to explain the defendant's action. *Id*. The burden is one of persuasion. *Jordan v. Mathews Nissan. Inc.*, 539 F. Supp. 3d 848, 865 (M.D. Tenn. 2021) ("In other words, once the burden has shifted back to the plaintiff, the plaintiff must show by a preponderance of the evidence each of two components of pretext: that the defendant's reasons (i) were not it's true reasons and (ii) were instead actually a pretext for discrimination.")

In this case, the Sixth Circuit incorrectly held that Defendant Isles could reasonably conclude from the repeated exchanges in Plaintiff's warranty history that either the battery was not the problem and something else was wrong with Plaintiff's car, or that the battery was failing repeatedly due to misuse. Moreover, the Sixth Circuit incorrectly held that Defendant Isles's decision to deny the warranty exchange was in Defendant AutoZone's financial interests, as the latter loses money on a battery that is returned under a warranty because exchanged

batteries cannot be resold as new even if they are not defective. However, in order for Defendant to have reasonably denied the replacement under the exceptions in the warranty, there had to have been misuse or abuse, and Defendant Isles and Defendant AutoZone have not presented any such evidence. See App. 2a. Additionally, this has no basis in fact as Defendant's Warranty does not limit the number of battery exchanges during the warranty period. *Id.* Defendant's argument is also inconsistent with Isles's admission that there is no limit on how many times a customer could exchange a battery under warranty. ECF No.22-3, PageID.480, pg. 61:20. Further, Defendant's employee, Segovia, testified there "are many occasions that happened like that . . . what we have been told from our district manager if that if the item is under warranty, just take care of the customer." ECF No.22-5, PageID.545, pg. 15:19-22. Segovia further testified that, "If the customer is not happy with it, if he insists on getting a new one from the DM, we have been told to replace them." ECF No.22-5, PageID.545, pg. 16:1-5. Autozoner employee, Webb explained customers have returned batteries multiple times over a couple months due to faulty parts. ECF No.22-6, PageID.565, pg. 51:11-12.. Defendant Autozoner even trains its employees to work with customers to replace warranty protected batteries, with or without testing the batteries. ECF No.22-5, PageID.545, pg. 15:19-22; ." ECF No.22-5, PageID.545, pg. 16:1-5. This all casts doubt on Defendant's alleged reason, indicating that "a discriminatory reason more likely motivated" Defendant Isles "proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256.

The Sixth Circuit made critical and legal errors, and overstepped the jury's role, where they could infer an unlawful notice. This Court noted that "a disparate treatment plaintiff can survive summary judgment without producing any evidence of discrimination beyond that constituting his prima facie case, if that evidence raises a genuine issue of material fact regarding the truth of the employer's proffered reasons." *Chuang v. Univ. of California Davis, Bd. of Trustees*, 225 F.3d 1115, 1127 (9th Cir. 2000). Particularly, the Court overlooked Defendant Isles's response when Plaintiff Gray repeatedly asked him to proffer a legitimate explanation for his behavior: "put me on Facebook, I'm the *white power oppressor*." See App. 9a, 124a. In *Lizardo*, a hostess responded to an accusation of discrimination by a customer with, "Don't even go there." *Lizardo v. Denny's, Inc.,* 270 F.3d 94, 100 (2d Cir. 2001). When another customer complained, "this is ridiculous", he was escorted out of the restaurant. *Id*. The Second Circuit determined that the plaintiffs failed to provide any evidence that defendant's justifications, even if pretextual, were based on discrimination because "no comment or statement made by the defendants had any racial content or overtone." *Id*. at 104. Meanwhile, in this case, Defendant Isles's response to Plaintiff was far more aggravated and indicative of racial animus, as he accompanied his actions with a racial epithet. Defendant Isles, was steadily becoming more and more angry during the incident, even quipped that Plaintiff might have misused the battery to make drugs, because, Isles reasoned, the store regularly served a diverse customer base, including "black folks, [and] Hispanic folks" who would "install aftermarket

sound systems into their vehicles, to replace the speakers in the speaker wells, to install amplifiers in their trucks, [and] to install new radios in the dashboard." ECF No. 22-3, PageID.491, pg. 103:11-14.. However, Stone, who was three feet away from the counter where Mr. Gray was being helped, testified that the Plaintiff had the original 1987 stereo in his Chevy Caprice. ECF No. 22-9, PageID.699, pg. 21:9-18. As the Sixth Circuit reasoned in *Griffin*, 689 F.3d at 525–26, "these statements are sufficient evidence of racial only if they some connection to the decision to terminate [plaintiff]," similarly, statements made by Defendant Isles are sufficient evidence of racial only if they have some connection to Defendant Isles denying the battery warranty replacement. In addition, Defendant Isles's rather prejudiced and persistent discriminating intent is evidenced by his reference to a bald AutoZone employee as his "skin head brother" after the encounter with Plaintiff. ECF No. 22-6, PageID.557, pg. 18:13-16. Furthermore, a reasonable juror could have concluded that Defendant Isles's refusal to replace the battery in accordance with the warranty was pretextual. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 146 (2000).

C. "*White Power Oppressor*" statement is subject to ambiguity

In light of the well-established rule on summary judgment that, when viewing the factual evidence, we must *draw all reasonable inferences in favor of the nonmoving party*, all contested facts must be assumed in his favor. The Sixth Circuit stated in *DiCarlo* that "although direct evidence generally cannot be based on isolated and ambiguous remarks . . . when made by

an individual with decision-making authority, such remarks become relevant in determining whether there is enough evidence to establish discrimination." *DiCarlo v. Potter*, 358 F.3d 408, 416 (6th Cir. 2004).

Here, Defendant Isles, in his capacity as assistant store manager, denied the battery exchange before even testing the battery, like he does for other customers. ECF No.22-3, PageID.496, pg. 123:14; ECF No.22-3, PageID.480, pg. 59:1-15. Defendant Isles insinuated Plaintiff misused the battery by cooking drugs, and in response to the customer's question about why he was being denied service, Defendant Isles responded to put him on Facebook as a "*white power oppressor*." ECF No. 22-3, PageID.468, pg. 10:5-6. Plaintiff testified that the statement was a shock as "[he] didn't know we still had to go through this. This is not the 60's, 1960's or anything like that. It's not what I wanted to go through that day . . . white oppression." ECF No.22-2, PageID.412, pg. 33:20-23. The judge of the Sixth Circuit Court of Appeals remarked at oral argument that, when considered literally, the term "*white power oppressor*" refers to someone who oppresses white people and not African Americans. Notwithstanding Defendant Isles's own admission that the phrase "*white power oppressor*" was a "synonym for racist . . . It was nasty, insultery [sic] words that [he] felt captured the moment[.]" ECF No. 22-3, PageID.492, pg. 109:15-16. In an interview as part of the investigation, Defendant Isles admitted that he and other employees "did trivialize and seek humor in a customer's compliant [sic] of racial bias." ECF No. 22, PageID:388, pg. 22. Stone testified that understood the white power oppressor comment to be a racial slur, which he linked to lynching, and noted

that after Defendant Isles made the comment, another Autozoner looked over at him, and everyone was shocked that Defendant Isles said this out of the blue. ECF No. 22-9, PageID.705, pg. 42:9-10. Webb, remarked that white power is "usually associated with racism, usually racist groups like the . . . Ku Klux Klan . . . [and] as far as an African-American growing up . . . if a Caucasian person was to walk up to [her] and [said] white power, [she] wouldn't associate it with anything that's going to be positive." ECF No. 22-36 PageID.571, pg. 75:1-9. Given the discrepancy between the lower courts' interpretation, what other witnesses testified it to mean, what Defendant Isles testified he meant, and what the Plaintiff understood it to mean, it is clear that reasonable people may differ as to the interpretation of "*white power oppressor*" in this context and Defendant Isles's intent when making the statement. Therefore, it must be resolved by a jury because "the task of disambiguating ambiguous utterances is for trial, not for summary judgment." *Shager v. Upjohn Co.*, 913 F.2d 398, 402 (7th Cir. 1990) (On a motion for summary judgment the ambiguities in a witness's testimony must be resolved against the moving party.*)*

Consistent with precedent, the question of intent would be one for the jury to decide as a question of fact. *Unroe*, 2006 WL 22081, at *16 ("However, it is not the Court's role to decide whether testimony of one individual should be believed over that of another-that is the fact-finder's job."). As such, the Sixth Circuit encroached upon the province of the jury with respect to the material issue of intent.

II. This Case Is an Ideal Vehicle to Review a Case That Presents Issues of National Importance

The Court should grant certiorari because this case presents a key issue of national importance. Precedent matters. "The legal doctrine of stare decisis requires [courts], absent special circumstances, to treat like cases alike." *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020). The idea that "all men are created equal" was crucial to the founding of the United States. The subsequent laws passed in the United States after its inception demonstrate how vital the principle of equality is, even if it took years of suffering, slavery, and discrimination to really enforce that declaration on all individuals regardless of race, color, or national origin. Congress codified 1981 shortly after the Civil War, which guarantees all persons the equal right to form and enforce contracts as white citizens and outlaws racial discrimination in the making and execution of private contracts. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). This clearly demonstrates Congress' acknowledgment of the distressing past and subsequent ramifications that racial discrimination has in today's society, and its effort to remedy that evil in an equally pervasive manner. Discrimination based on immutable features related to race is unjustifiable, and § 1981 was enacted to defend and protect such fundamental civil rights.

Accordingly, the Sixth Circuit's holding is now a dangerous source of persuasive authority that can be cited by the lower courts and other appellate courts. The Sixth Circuit dismissed Defendant Isles's disturbing comments as "troubling stereotypes about African Americans." See App. 12a. Yet, the holding is

contrary to the core values of the American legal and judicial system and of society as a whole. And preventing this action from proceeding to trial ensures that a person in Plaintiff's position will be treated discriminatorily when attempting to request contractually protected services. It allows a person to self-identify as a "*white power oppressor*" when denying service to a black consumer, and states that such conduct is not illegal under § 1981. If not reversed, there is no restriction on how liberally the Sixth Circuit's decision below could be interpreted. Discrimination laws protect individuals from unfair treatment, denial of opportunities, and denial of services based on their skin color, ethnicity, national origin, religion, gender, or disability. 42 U.S.C. § 1981. We have made progress as a country by enacting the Civil Rights Act and other anti-discrimination statutes; but, to permit behavior like that of Defendants in the case at bar cannot be condoned because it will compel us to take more than ten steps back in our stride to prohibit discrimination on such basis. Defendants' contention that he was a "*white power oppressor*," is "atrocious and utterly intolerable" to an American. *Hayley v. Allstate Ins. Co.,* 262 Mich. App. 571, 577, 686 N.W.2d 273 (2004). To be consistent with its precedent and the longstanding American commitment to combating discrimination and protecting civil rights, this Court should overrule the Sixth Circuit's decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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