

No. ____

IN THE
Supreme Court of the United States

ELVIS MARTINEZ EVANGELISTA
AND BEST AUTO REPAIR SHOP, INC.,

Petitioners,

v.

UNIVERSAL INSURANCE GROUP, et al,

Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First Circuit's application of waiver to refuse to review a district court's decision holding that a contract is required to assert a claim for prohibited interference with the right to 'make and enforce contracts' under Section 1981 is contrary to this Court's precedents and decisions of other circuit courts of appeals.

2. Whether the First Circuit's refusal to review a district court's decision granting summary judgment by holding that a contract is required to assert a claim for prohibited interference with the right to 'make and enforce contracts' under Section 1981 has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory powers.

PARTIES TO THE PROCEEDING

Best Auto Repair Shop, Inc. and Elvis Martínez-Evangelista are the Petitioners and were plaintiffs-appellants below.

Universal Group, Inc., Universal Insurance, Inc. and Juanita Ortiz, are Respondents and were defendants-appellants below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners make the following disclosure:

Co-Petitioner Best Auto Repair Shop Inc., is a small, privately held corporation operating in San Juan, Puerto Rico with no parent company.

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PETITION FOR WRIT OF CERTIORARI

The statutory definition of the terms “making and enforcement of contracts” is very broad; it 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(b). The interpretation of such a provision is purely a question of law. This Supreme Court, Appellate and district courts around the country have consistently held that pre-contract formation discrimination is encompassed within those five unambiguous words in Section 1981: “to make and enforce contracts.”

The First Circuit, however, refused to review a district court’s holding that Petitioners were not entitled to relief for Respondent Universal’s racism because Section 1981 only extends to actual contracts. Although Petitioners’ briefed all the district court multiple erroneous holdings, including the District Court’s restrictive view of Section 1981, the First Circuit focused on one phrase in the district court’s 72-page opinion and declared that Petitioners waived the appeal. Not only is the First Circuit’s decision in conflict with the decisions of other United States Court of Appeals, but the proper resolution of that issue of law is beyond any doubt and the Court’s refusal to review results is simply an injustice, which calls for an exercise of this Court’s supervisory power.

OPINIONS BELOW

The Opinion of the United States District Court for Puerto Rico, issued on March 31, 2016, has been included in the appendix on pages 15a-97a. The Opinion of the United States Court of Appeals for the First Circuit, issued on November 16, 2017, has been included in the appendix on pages 3a-14a. The Order of the United States. Court of Appeals for the First Circuit denying Petitioner’s Request for

Rehearing, issued on January 12, 2018, has been included in the appendix on page 1a-2a.

JURISDICTION

The Judgment of the Court of Appeals for the First Circuit was entered on November 16, 2017. A timely Request for Rehearing was denied on January 12, 2018. This Petition is timely filed according to Supreme Court Rules 13.1 and 13.3 as an extension of time to file was granted until May 22, 2018. The Court has jurisdiction from 28 U.S.C. § 1254(1).

STATUTE INVOLVED

United States Code, *Title 42*:

Section 1981 (a) - All 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

Section 1981(b) - 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.

STATEMENT OF THE CASE

I. Facts

This case is about the intentional discrimination by Respondents, a large insurance company, and the head of its automobile claims department, Juanita Ortiz, (referred together here as, "Universal") against Petitioners Elvis Martinez and Best Auto Repair, Inc., (referred together here as, "Mr. Martinez").¹ At the instruction and direction of

¹ It is undisputed that Mr. Martinez established a *prima facie* case as, among other facts, he is black and of Dominican nationality and all the

Juanita Ortiz, Universal began interfering with Mr. Martinez's contracts, his ability to contract, and contractual relationships by having its supervisors and adjusters inform Mr. Martinez' customers (Universal's insured and third party claimants), who took their cars for repair to Mr. Martinez that Universal did not have "commercial relations with Elvis Martinez" and that the car had to be removed to a repair shop of Universal's selection.

The culture of racism at Universal against Mr. Martinez was pervasive and unabated and promoted by Ortiz. A former adjuster at Universal, Juan Sanchez Huertas repeatedly heard several Universal supervisors use the derogatory term "That Dominican" immediately after meetings with Juanita Ortiz and was instructed to remove the cars from the repair shop of "that Dominican.". While visiting the Carolina office of Universal with a customer in June of 2007, Mr. Martinez saw and heard a Universal adjuster, David Sanchez Fragosa shaking his head and stating that Universal was "going to take that black Dominican out of the business." Sánchez Fragosa further stated: "From Best Auto? Elvis? That black Dominican from Best Auto? We took him out of the Network and we are going to take him out of the business." Other customers also experienced the direct racism directed at Mr. Martinez and testified at depositions about their shocking experiences.

In a telling sign of the culture of discrimination promoted by Universal against Mr. Martinez, when he complained about the racism and met with two Universal supervisors in June 14, 2007, Universal did nothing, absolutely nothing; adjuster David Sanchez Fragosa was not even interviewed and no one at Universal investigated the allegations of racism against Mr. Martinez. On October 5,

management and supervisors at the automobile Claims Department at Universal were white and Puerto Rican.

2007 defendant Ortiz specifically orders that the employees of the Claims Department at Universal: (1) to inform Mr. Martinez's customers that Universal had no commercial relation with Best Auto and (2) to have her assistant, Millie Lafuente, inform the principal insurance brokers in Puerto Rico that Universal had no commercial relation with Best Auto. Next, at the end of 2007, in the Claims Department a unique and separate structure at Universal applicable only to Mr. Martinez is established. Under this unique structure, all claims involving Mr. Martinez's customers were centralized at Universal's Metro office through her two principal subordinates: Brenda Rivera and Enrique Polanco. In all of 2007, 2008, 2009 2010, 2011 and 2012, no other body shop received this special targeting. Even comparable repair body shops who repeatedly engaged in fraud and criminal conduct against Universal's insured, such as Extreme, Borinquen Body, BSM and Bumper Royal, did not receive this special targeting and discriminatory structure.²

Faced with this evidence, two federal judges held that reasonable inferences of discriminatory animus and intent existed which can only be resolved by a jury. However, a third judge who received the case after the denial of summary judgment, adopted all of Universal's arguments, and granted summary judgment on reconsideration.

II. Proceedings Below

On July 13, 2009, Plaintiff Elvis Martínez Evangelista, and María Betancourt, filed a civil rights action against defendants Universal Insurance Group, Universal Insurance Company, and Juanita Ortiz (the head of

² The pervasive culture of discrimination against Mr. Martinez was also demonstrated by the Chief Executive Officer of Universal, Monique Miranda, who testified at her deposition, among other things, that she does not even know if Universal has or not a written policy to prevent national and racial discrimination.

Universal's auto claims department) alleging that defendants violated 42 U.S.C. § 1981 by interfering with his contracts and his ability to contract with Insured from Universal and third-party claimants. After the case was consolidated on January 12, 2012 with the civil rights action under § 1981 filed by Best Auto Repair Shop, Inc., Mr. Martínez and Best Auto filed an Amended Complaint on June 12, 2012 in the consolidated case.³

After more than 4 years of discovery, including taking more than twenty depositions, Universal filed a motion in March 8, 2013 requesting summary judgment, which was opposed by Mr. Martinez. District Court Judge Domínguez referred Universal's Motion and Mr. Martinez's Opposition to Magistrate Judge Silvia Carreño Coll, who wrote a Report and Recommendation denying Universal's motion for summary judgment as to the causes of action arising under Section 1981 finding: "There is sufficient material in the record to create a fact issue on the question of intent [to discriminate]. . . . Thus, we think only a jury can resolve this question."

On March 27, 2014, Judge Domínguez affirmed Magistrate Judge Carreño's Report and Recommendation holding that a jury had to sort out whether Universal was acting to put Mr. Martinez out of business because of his race "as the Court can neither weigh the evidence nor make credibility determinations."

On March 31, 2014, Judge Domínguez transferred the case to newly appointed District Judge Pedro Delgado. Universal filed a motion for reconsideration of Judge Dominguez's Opinion, and Judge Delgado granted Universal's motion for reconsideration adopting everyone of

³ The Amended Complaint included a list by year and by customer name of each one of Mr. Martinez's contracts that were interfered with by Universal's racism.

Universal's allegations previously rejected by both Judge Carreño and Judge Dominguez. Principally, the opinion of Judge Delgado holds that: (a) Defendant Ortiz was the only decisionmaker and (b) there was no "pretext", but a business reason to discriminate against Mr. Martinez. In its pretext holding, Judge Delgado also asserted that Mr. Martinez had no contracts as required by Section 1981. Mr. Martinez appealed.

On November 16, 2017, the First Circuit affirmed the District Court's 72-page decision, by refusing to review the District Court's decision using waiver to hold that it would not review Mr. Martinez's appeal from the summary judgment dismissal of his causes of action pursuant to Section 1981.⁴

REASONS FOR GRANTING THE WRIT

I.

THE FIRST CIRCUIT'S DECISION TO APPLY WAIVER TO REFUSE TO REVIEW AN ISSUE PURELY OF LAW CONFLICTS WITH THE DECISIONS OF ALL OTHER CIRCUIT COURTS

Waiver, a judge-made doctrine,⁵ was used by the First Circuit to refuse to review a district court's opinion of 72 pages. The issue of whether a contract required to assert a violation of Section 1981 is a pure question of law requiring

⁴ The First Circuit's Opinion incorrectly repeats time and again that Mr. Martinez's appeal is from *the denial of a motion for reconsideration*. See Appendix B, at 4a and 7a (emphasis added). But Mr. Martinez's appealed from the grant of Universal's motion for summary judgment on reconsideration.

⁵ Kontrick v. Ryan, 540 U.S. 443, 458 (2004) ("Although jurists often use the words interchangeably, forfeiture is the failure to make the timely assertion of a right; waiver is the intentional relinquishment or abandonment of a known right.").

no factual developments. The First Circuit held:

Specifically, the District Court ruled that, even with "[a]ll reasonable inferences . . . drawn in favor of [the plaintiffs]," the plaintiffs' § 1981 claims failed because the "[p]laintiffs' clients were at liberty to contract with them without Universal's paying for anything," and, as such, the "plaintiffs cannot point to a prohibited interference with their right to 'make and enforce contracts' under Section 1981."

[G]iven that the plaintiffs' federal claims necessarily fail if the District Court is right about what § 1981 requires, and that the plaintiffs failed to challenge that conclusion in their opening brief on appeal. We, therefore, affirm the denial of the motion to reconsider the dismissal of the § 1981 claims.

See Appendix, at 7a-8a.⁶ The District Court's erroneous legal ruling that a contract is required to assert a claim for violations of Section 1981 prohibition against discrimination in contracting is, beyond any doubt, a clear legal error. This is not a case where the issue was not raised below or where the issue was not briefed, as Mr. Martinez repeatedly argued against the restrictive interpretation of Section 1981 by Judge Delgado throughout his Brief.⁷

⁶ The First Circuit's conclusion that Mr. Martinez's failed to address "what § 1981 requires", is baffling and incorrect as detailed throughout the Appellants' Brief. So is the allegation that the appeal was from "the denial of the motion to reconsider the dismissal . . ." As the record, shows the appeal was from a grant of a motion for reconsideration adopting all of Universal's arguments.

⁷ See pages 59, 60; 48-49. Further, the reach of Section 1981 logically as well as factually is intertwined with the issue of pretext addressed in Mr. Martinez's Brief.

Indeed, the First Circuit, in its refusal to review the record, failed to understand that Mr. Martinez's brief addressed the issue of the broad reach of Section 1981 through different arguments, which addressed the various aspects of the district court's erroneous ruling, including pretext. In Lebron v. National Railroad Passenger Corporation, 513 U.S. 374 (1995), the plaintiff raised in the Supreme Court a First Amendment argument that he not only failed to raise below but had "expressly disavowed." Id. at 378. In the two lower courts, the plaintiff had argued that Amtrak was a private company that was connected with federal entities; in the Supreme Court, however, he argued that Amtrak was not a private company but actually part of the government. This Court nevertheless addressed the new contention, viewing the new argument to be part of the same underlying claim. Similarly, Mr. Martinez addressed the district court's impermissibly restrictive reading of liability under Section 1981 throughout his brief, including with evidence of the mistreatment of his customers and the disparity in retaliation by Universal *vis a vis* other repair shops.

In even more extreme circumstances, this Court and all other Circuit Courts have held that a federal appellate court is justified in resolving an issue not passed at the district court, as where the proper resolution is beyond any doubt, or where "injustice might otherwise result." Singleton v. Wulff, 428 U.S. 106, 121 (1976) (citations omitted); Feld v. Feld, 688 F.3d 779, 782-83 (D.C. Cir. 2012) (a purely legal argument at summary judgment can be reviewed on appeal even if not preserved); Vintero Corp. v. Corporacion Venezolana, 675 F.2d 513, 515 (2d Cir. 1982) (citing various circuits as authority for appellate consideration of new issues if additional facts not required, or pure legal issue involved; unjust enrichment issue considered when only argument for imposition of

constructive trust raised below); Brantley v. Wysocki, 662 Fed. Appx. 138 (3rd Cir. 2016) (citing Singleton and addressing the ultimate issue on summary judgment as an exercise of its discretion); United States v. Faulls, 821 F.3d 502, 512 (4th Cir. 2016) (holding that when “the question before us is purely one of law, and we perceive no injustice or unfair surprise” it can be addressed for the first time on appeal); Green v. Levis Motors, Inc., 179 F.3d 286, 293 (5th Cir. 1999) (holding that waiver does not apply “to a pure question of law”); AAR Int'l, Inc. v. Nimelias Enters. S.A., 250 F.3d 510 (7th Cir. 2001) (addressing an issue of law regarding the interpretation of a *forum non conveniens* clause); Borntrager v. Cent. States Se. & Sw. Areas Pension Fund, 577 F.3d 913, 924 (8th Cir. 2009) (holding that whether a trust agreement provision was preempted by ERISA was a purely legal question and therefore the court could review de novo “for the first time on appeal”); Native Ecosystems Council v. Weldon, 697 F.3d 1043 (9th Cir. 2012) (citing Singleton and addressing issue never raised in the District court to prevent miscarriage of justice; and when the “issue is purely one of law.”); United States v. Tubens, 691 Fed. Appx. 507, 510 (10th Cir. 2017) (quoting Singleton and adjudicating resolution of an *Alleyne* claim, although raised for the very first time on appeal, the proper resolution is beyond any doubt”); Strickland v. Alexander, 772 F.3d 876 (11th Cir. 2014). The First Circuit’s decision cannot be squared with this precedent. This Court should grant review to resolve the conflict between the First Circuit’s decision below and this precedent. The considerations in favor of reaching an issue of the construction of Section 1981 allegedly not presented below are more compelling in this case than in the cited cases. Here, the scope of Section 1981 was adequately briefed at the district court and before the First Circuit. Both parties had an opportunity to brief and argue the issue below, which is a simple issue of legal interpretation of the reach of Section 1981. More important, the issue is one dispositive of the question of liability in this case pursuant to Section 1981.

The waiver doctrine is designed to allow the trial court to make a fully-informed decision. Unlike the appellant in *Singleton*, who raised an entirely new *issue* on appeal, the First Circuit extended waiver to what amounts to a refusal to do its job of reviewing a clear error of law. Whether a contract is required or not to assert a prohibited interference with Mr. Martinez's right to "make and enforce contracts" under Section 1981 is a legal question that does not depend on the factual record below and it does not affect the decision-making ability of the court. The requirement of a contract for a Section 1981 claim established by the district court is not tied to the First Circuit's inherent limitation as a non-trial court. It is purely an issue of law.

The First Circuit in this case abandoned the rule in other Circuits that an issue purely of law is not waived.⁸ Although the circumstances under which a court applies the general rule of waiver are varied and there is no uniformity to determine when a new issue will be heard, the Circuit Courts have consistently held that an issue of law is not waived.

None of the reasons for relying on waiver -- such as (a) facilitation of review and (b) avoiding prejudice -- are found in the First Circuit's decision. The first rationale has

⁸ See, e.g., Allen v. State Bd. of Elections, 393 U.S. 544, 553-54 (1969) (applicability of Voting Rights Act provision not precluded from consideration by failure to raise issue below where all facts are in the record); Federal Election Comm'n v. Lance, 635 F.2d 1132, 1136 (5th Cir.) (facial challenge to constitutionality of Federal Corrupt Practices Act could be raised for first time on appeal when facts fully developed), cert. denied, 453 U.S. 917 (1981); Telco Leasing v. Transwestern Title Co., 630 F.2d 691, 693-94 (9th Cir. 1980) (where issue purely one of law and not affected by factual record below appellate court has discretion to consider for first time application of correct state statute concerning attorney's fees); Higginbotham v. Ford Motor Co., 540 F.2d 762, 768 n.10 (5th Cir. 1976) (new argument based on state wrongful death statute considered on appeal where purely legal question raised and post-oral argument briefs submitted).

no application here since it was the district court itself who resolved the issue contrary to precedent and the statutory language in Section 1981. In this case, no further factual development of the record was necessary and Universal was not prejudiced as it was entirely an issue of law not requiring the presentation of evidence. Finally, this was not a new issue being raised on appeal.

The prejudice rationale of waiver has no application here as the issue is purely of law; neither party presented new evidence or raised a completely new legal theory on appeal. In Ford Motor Co. v. Dept. of Treasury of Indiana, 323 U.S. 459 (1945), sovereign immunity was not argued by the State of Indiana until the suit was before the Supreme Court. Nevertheless, the Court found:

The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court.

Id. at 467. Similarly, the policy behind § 1981 to combat racism in contracting, and the profound national policy of blotting out all vestiges of racial discrimination, are no less frustrated when a Circuit Court refuses to do its simple job of reviewing an erroneous legal determination by a district court, particularly in a case replete with evidence of intentional discrimination against Mr. Martinez because he is black and Dominican. The First Circuit should have done what all other Circuit Courts do: decide the legal issue before it because it is likely to decide it correctly. See, e.g., Bellotti v. Baird, 428 U.S. 132, 143 n.10 (1976) (purely legal issue of federal abstention may be raised for first time on appeal).

It is inconceivable that, contrary to all other Circuit Courts, the First Circuit is relying on waiver to refuse to consider the erroneous legal holding that a contract is

required to assert a claim under Section 1981. It is even more inconceivable that combatting racism in private contracting as prohibitive by Section 1981 is not an issue of sufficient importance for the First Circuit.

Justice should not be sacrificed at the altar of convenience. This Court should review the waiver decision below to resolve the conflicts it creates with the decisions of other appellate tribunals, and to correct the First Circuit's error in disregard of this Court's precedents.

II.

THE FIRST CIRCUIT'S DECISION TO REFUSE TO REVIEW A PURE LEGAL HOLDING LIMITING THE REACH OF SECTION 1981 IS SO MANIFESTLY INCORRECT AS TO CALL FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS

The First Circuit's decision is truly extraordinary. It completely ignores the great public interest in preventing and eradicating racial discrimination in contracting by expanding the judge-made doctrine of waiver. In doing so, the First Circuit shows no concern for the danger of establishing a misleading precedent which may promote racism in private contracting and no desire to correct an erroneous interpretation of an important principle of law.

This Court has stated that, in discrimination cases, "there will seldom be 'eyewitness' testimony as to the employer's mental processes." Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 141 (2000) (citations omitted). This is one of the rare cases in which there is "eyewitness" testimony; not only Mr. Martinez, but also his customers, David Aleman, Wilfredo Valentin, and José Maldonado, among others.

The First Circuit's error, if left uncorrected, will have widespread and immediate negative consequences; the

erroneous legal ruling limiting Section 1981 to contracts is of paramount importance to the public interest. There is no question as to the proper resolution of the matter, as argued in Mr. Martinez Brief, such a restrictive interpretation of the reach of Section 1981 liability, should be rejected. Similarly, the First Circuit's expansion of waiver will create the strong disincentive for appellate court to resolve matters where no question exists about the outcome, and to refuse to decide issues, that they are fully capable of deciding.

The Court should exercise its supervisory powers to require the First Circuit to decide a case "on its merits" in circumstances like this case, where the district court's erroneous legal ruling deserves no deference. Under its supervisory powers, this Court should require the First Circuit to correct its error as justice requires. "The authority which Congress has granted this Court to review judgments of the courts of appeals undoubtedly vests us not only with the authority to correct errors of substantive law, but to prescribe the method by which those courts go about deciding the cases before them." Lehman Brothers v. Schein, 416 U.S. 386, 393 (1974) (Rehnquist, J., concurring).

The First Circuit's decision is potentially a game-changer for purposes of waiver as it expands the doctrine to include as a determining factor the administrative convenience of appellate judges that trumps deciding a pure issue of law wrongly decided. But Federal Rule 28 of Appellate Procedure requires that arguments be accompanied by "citations to the authorities and parts of the record on which the appellant relies.". Fairness demands a reversal of the First Circuit decision as it had brief full of citations to record, including the pertinent direct evidence of intentional discrimination and the relevant case law. The First Circuit's decision to use waiver to place its own administrative priorities before combatting racial discrimination in contracting offends basic and traditional notions of justice, particularly when applied to civil rights

plaintiffs, who do not have the means of a large insurance company to litigate. Notably, this Court has held that it is "entirely contrary to the spirit of the Federal Rules"⁹ to avoid decisions on the merits based on the pleading skills of counsel.

Plainly stated, if certiorari is not granted, the Court runs the risk of creating vacillation and uncertainty as to whether racism that interferes with the formation of a contract is actionable pursuant to Section 1981 because of the First Circuit's inaction. By promoting form over substance, the First Circuit has increased the likelihood of mistaken and, hence, unfair application of the prohibition against racial discrimination in contracting set forth in 42 U.S.C. § 1981.

For all these reasons the petition for a writ of certiorari should be granted.

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⁹ See Foman v. Davis, 371 U.S. 178, 181-82 (1962).