

No. 26-232

IN THE
Supreme Court of the United States

SHANNON KING, *et al.*,
Petitioners,

v.

LANA FOSTER,
Respondent.

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

BRIEF IN OPPOSITION

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STATEMENT

This case is the most recent chapter in a long history of racial discrimination in employment by members of the Echols County Board of Education, by the Board itself, by the Echols County School District, and by officials of the School District. On three occasions those members, officials and the Board and/or School District have signed—and then violated—agreements promising to take steps to prevent such discrimination. This case concerns the most recent of those agreements and violations.

Respondent Dr. Lana Foster was for 30 years an employee of the Board.¹ During that period she was the only Black educator in the Echols County public schools who held a regular teaching position. Doc. 22, ¶ 93. Board members explained to her that White parents in the community “believed Black teachers should not be teaching their White children.” *Id.*, ¶ 38; *see id.* ¶ 96.

The Board first fired Foster in 2009. *Id.*, ¶ 52. Foster filed suit under Title VII and the Board ultimately agreed to a settlement, under which it restored Foster to her teaching position and paid \$40,000 in back pay. *Id.*, Exhibit 6. The terms of the agreement required

1. The Board sets overall policies for the public schools in Echols County. Professional employees in the public schools are employed by the Board. In practice the two entities function interchangeably; for example, all three agreements set out above and all employment contracts were signed by the District Superintendent on behalf of the Board. The District, under the direction of a Superintendent, operates those schools on a day-to-day basis. For simplicity we refer to both entities as the Board.

the Board to take a number of steps to prevent further discrimination. The Board failed to perform its obligations under that agreement. *Id.*, ¶¶ 95-96.

In 2012 the Civil Rights Division of the U.S. Department of Education opened an investigation into the Board's hiring practices. In the wake of that investigation, the Board signed a Resolution Agreement with the government promising to take a series of steps to prevent racial discrimination in hiring. *Id.*, Exhibit 3. The Board failed to perform its obligations under that agreement. *Id.*, ¶ 98.

The Board again removed Foster in 2018, this time refusing to renew her contract claiming that she was responsible for certain minor financial irregularities. *Id.*, ¶ 99. The dismissal of Foster meant that there were no Black educators in regular teaching positions anywhere in the Echols County public school system. *Id.*, ¶ 159. The charges against Foster were referred by the Board to state officials, who rejected the charges as baseless. *Id.*, ¶ 99. The Board nonetheless declined to reinstate Foster. *Id.*, ¶ 199. Foster filed a Title VII charge with EEOC, but the Board insisted that its actions were not racially motivated.

The Board's position changed when Foster, filed suit in state court under the Georgia Open Records Act and unearthed a large number of starkly racist text messages, including repeated use of the N word, by members of the Board. *Id.*, ¶¶ 101-02. The Board offered to pay Foster \$137,500 if she would drop her lawsuit and agree not to return to work in the Echols public schools. But Foster insisted that any settlement include terms that would end

the Board's discriminatory practices and prevent future discrimination against Black educators.

Eventually the parties agreed to a Negotiated Settlement Agreement which obligated the Board to take a number of detailed actions. *Id.*, Exhibit 1. The Board agreed to adopt a publicly available policy and procedure for hiring educators, to include certain safeguards and record keeping. *Id.*, Sections III-V. The Board also promised to take several specific steps to recruit qualified Black applicants for teaching positions. *Id.*, Section III.

Foster subsequently learned that the Board had failed to take many of the remedial actions required by the 2020 agreement, and in 2023 she filed the instant action. The named defendants were the Board, the School District, the members of the Board, and the then-current superintendent and prior superintendent of the School District. The complaint detailed evidence, obtained through the state Open Records Act, that the Board was in systematic violation of the 2020 agreement. *Id.*, ¶¶ 201-07. It also asserted that since the 2020 agreement the Board had not hired a single Black employee for any professional position. *Id.*, ¶¶ 107, 108, 181, 182. The complaint alleged, in some detail, that the Board had for many years engaged in a general practice of racial discrimination in employment, and had systematically purged Black employees from its workforce. *Id.*, ¶¶ 66, 69, 139, 189. The complaint asserted that the defendants' actions violated a number of federal and state laws, including section 1981. *Id.*, ¶ 116.²

2. In 2024 the Vice-Chair of the EEOC filed a Commissioner's charge against the Board.

The individual defendants, who were sued in their individual capacities, moved to dismiss on the ground of qualified immunity. In their district court motion, the defendants never mentioned section 1981; they argued only that the complaint failed to allege any specific actions on their part, and insisted that any actions that they had taken involved discretionary functions. The district court denied the motion. On appeal the defendants argued that they were entitled to qualified immunity because it was unclear whether section 1981 applied to third-party race-based interference with contract rights. The defendants did not ask the court of appeals to decide whether section 1981 in fact prohibited such conduct. Pet. App. 11a n.4. The defendants also argued they were entitled to qualified immunity because, they asserted, it was unclear whether they were subject to “personal liability.” The court of appeals affirmed the district court decision denying qualified immunity.

REASONS FOR DENYING THE WRIT

This is the case in which Georgia officials argued that they could not reasonably have known that they could be sued for damages if they engaged in intentional discrimination on the basis of race. The other grounds for denying certiorari are set out below.

**I. THE APPLICABILITY OF SECTION 1981 TO
THIRD-PARTY INTERFERENCE IS SETTLED
LAW, IS COMPELLED BY PRIOR DECISIONS
OF THIS COURT, AND DOES NOT WARRANT
FURTHER CONSIDERATION BY THIS COURT**

**A. The Applicability of Section 1981 to Third-
Party Interference Is Settled Law**

That section 1981 applies to racially-motivated third-party interference with contract rights has been settled law for fifty years. Nine circuits interpret section 1981 to apply to such third-party interference, repeatedly and correctly relying on this Court's 1969 holding that section 1982 applies to third-party interference with the rights protected by that section. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). Petitioners' assertion that there is a conflict regarding this issue rests only on one sentence in a single appellate decision, a passage which has never been cited in subsequent lower court opinions, and which did not address *Sullivan*. That isolated case does not warrant use of this Court's limited resources to grant review to reconsider either the holding of *Sullivan* or this Court's repeated holding that sections 1981 and 1982 are to be construed alike. Certiorari would be particularly inappropriate in this case because petitioners did not ask the lower courts to hold that section 1981 is inapplicable to third-party interference with section 1981 rights, the issue which they now ask this Court to address.

1. Petitioners acknowledge that seven courts of appeals hold that a non-contracting party can be liable under section 1981 for racially motivated interference with contract rights. Pet. 9-10. The petition correctly identifies

decisions approving such third-party interference claims in the Third³, Fourth⁴, Fifth⁵, Sixth⁶, Seventh⁷, Tenth⁸ and Eleventh Circuits.⁹ Third-party interference section 1981 claims have also been approved in the First¹⁰ and Second Circuits.¹¹ At the time of the events giving rise to this action, which occurred between 2020 and 2022,

3. *Al-Khazraji v. St. Francis College*, 784 F.2d 505, 518 (3d Cir. 1986), *aff'd* 481 U.S. 604 (1987); *see* Pet. 13.

4. *Painter's Mill Grille, LLC v. Brown*, 716 F.3d 342, 351 (4th Cir. 2013); *see* Pet. 13, 14.

5. *Perry v. VHS San Antonio Partners, LLC*, 990 F.3d 918, 932-33 (5th Cir. 1975); *Faraca v. Clements*, 506 F.2d 956 (5th Cir. 1975); *see* Pet. 12-13. *Perry* commented that the claim recognized in *Faraca* against Clements, who “was, strictly speaking, a third party” was not a “true third-party interference” case because Clements was acting on behalf of the contracting party. *Perry*, 990 F.3d at 932. This is a semantic distinction.

6. *Inter City Contracting, LLC v. Charter Township of Northville*, 87 F.4th 743, 749 and 755 n.7 (6th Cir. 2023); *see* Pet. 14.

7. *Bronson v. Ann & Robert H. Lurie Child.'s Hosp.*, 60 F.4th 437, 452 (7th Cir. 2023); *Muhammad v. Oliver*, 547 F.3d 874, 878 (7th Cir. 2008); *Shaikh v. City of Chicago*, 341 F.3d 627, 630 (7th Cir. 2003); *see* Pet. 14-15.

8. *Harris v. Allstate Ins. Co.*, 300 F.3d 1183, 1197 (10th Cir. 2002); *see* Pet. 13.

9. *Moore v. Grady Memorial Hosp. Corp.*, 834 F.3d 1168, 1172 (11th Cir. 2016) and the instant case; *see* Pet. 14.

10. *DesVergnes v. Seekonk Water Dist.*, 601 F.2d 9, 13-14 (1st Cir. 1979).

11. *Whidbee v. Garzaretti Food Specialties, Inc.*, 223 F.3d 62, 74-75 (2d Cir. 2000); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1316 (2d Cir. 1995).

every circuit to have addressed this issue had reached that same conclusion. The courts of appeals which hold that section 1981 applies to racially-motivated third-party interference with contracts have repeatedly and correctly based that conclusion on this Court's decision in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969).¹²

2. Petitioners assert that “this Court has never decided whether section 1981 liability reaches only parties to the impaired agreement or anyone who allegedly interferes with it.” Pet.11; *see id.* at 3, 5. But this Court has repeatedly decided that section 1982 applies to third-party interference with the right to own and lease property, most importantly in *Sullivan*, and also has long held that section 1981 and section 1982 are to be construed alike. Those well-established lines of decision compel the conclusion, repeatedly recognized by lower courts, that section 1981 like section 1982 applies to third-party interference.

The Black plaintiff in *Sullivan* had leased a home, and the terms of the lease included assignment (for the term of the lease) of the owner's share in a neighborhood swimming pool operated by Little Hunting Park. The Board of Directors of Little Hunting Park, however, refused to approve the assignment of that share, and it was clear that the refusal was based on the tenant's race. The Black tenant sued the Park and Directors under section

12. *Painter's Mills Grille, LLC v. Brown*, 716 F.3d 342, 351 (4th Cir. 2013); *Muhammad v. Oliver*, 547 F.3d 874, 878 (7th Cir. 2008); *Shaikh v. City of Chicago*, 341 F.3d 627, 630 (7th Cir. 2003); *Al-Khazraji v. Saint Francis College*, 184 F.2d 505, 518 (3d Cir. 1980); *Tillman v. Wheaton-Haven Recreation Ass'n*, 517 F.2d 1141, 1146 (4th Cir. 1975); *Faraca v. Clements*, 506 F.2d 956, 959 (5th Cir. 1975).

1982, alleging that their action had interfered on the basis of race with his lease of the home involved.

The defendants in *Sullivan* argued that they were not subject to section 1982 because they were not parties to the lease.¹³ This Court rejected that contention, holding that section 1982 prohibits race-based third-party interference with the right to lease property.

The right to ‘lease’ is protected by § 1982 *against the actions of third parties*, as well as against the actions of the immediate lessor. [Defendant]s’ actions in refusing to approve the assignment of the membership share in this case was clearly an interference with [the tenant’s] right to ‘lease.’ A narrow construction of the language of § 1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866, ... from which § 1982 was derived.

396 U.S. at 236-37 (emphasis added).

This unquestioned interpretation of section 1982 is dispositive of the instant case, because this Court has repeatedly held that sections 1981 and 1982 are to be interpreted alike because sections 1981 and 1982 were both originally part of the same sentence in section 1 of the

13. Brief for Respondents 19 (“There is no contention that Little Hunting Park was a party to the lease”), 22 (“The respondent club was not in privity with the makers of the lease, had no knowledge of the lease, and did not offer to contract with either party nor did they accept an offer from either party.”).

1866 Civil Rights Act. *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 447-48 (2008) (citing *Runyon v. McCrary*, 427 U.S. 160, 173 (majority opinion), 187 (Powell, J., concurring) (1976)); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617-18 (1987); *General Building Contractors Assn., Inc. v. Pennsylvania*, 458 U.S. 375, 383-84 (1982); *Tillman v. Wheaton-Haven Recreation Assn., Inc.*, 410 U.S. 409 (1968); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 n.78 (1968)).

Nothing in *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470 (2006), called into question *Sullivan's* holding that third parties can be held liable for interfering with rights created by section 1 of the 1866 Civil Rights Act. When the plaintiff in *Domino's Pizza* asserted that the defendant had interfered with the plaintiff's contract with the JWM corporation, the Court did not doubt that such third-party interference would violate section 1981, but held only that the complaint failed to allege any actual interference with that contract.

McDonald also argues in his merits brief ... that we should affirm the Ninth Circuit's judgment because Domino's interfered with McDonald's own contracts with JWM.... [T]his contention ... fails McDonald acknowledges that JWM did not breach any contractual obligation to him

546 U.S. at 476 n.4. *Domino's Pizza's* broad articulation of the right of actual contracting parties to be free from racial discrimination did not hint at any exception for racial discrimination by third parties.

We have never retreated from what should be obvious from reading the text of the

statute: Section 1981 offers relief when racial discrimination blocks the creation of a contractual relationship, as well as when racial discrimination impairs an existing contractual relationship, *so long as* the plaintiff has or would have rights under the existing or proposed contractual relationship.

546 U.S. at 476 (emphasis added). At oral argument, counsel for Domino's Pizza expressly agreed that a third party could be liable under section 1981 for racially motivated interference with contract rights.¹⁴

14. Oral Argument, 8-9:

CHIEF JUSTICE ROBERTS: And shouldn't he then have a right to bring a claim under section 1981?

MS. MAHONEY: Your Honor, if his company fired him because [w]e don't want a black CEO because, after all, we're going to lose business with these other companies—then I think under an interference theory, that he probably could sue under 1981, sue both his company and also *the third party that induced the interference*. If we look to common law principles, the common law of tortious interference established various rules that were designed to provide recovery for interference when the causation was sufficiently direct, and the common law says—this is section 766 of the Restatement and cases that follow that—that, in essence, if *the third party*—or if the defendant induces the breach, essentially, you know, tells them, this is how we want it done, we want you to fire so and so if you want our business, if they induce the breach or induce the violation, then they can be liable as well.

(Emphasis added).

CBOCS, reiterating the rule that sections 1981 and 1982 are to be interpreted alike, was decided three years after *Domino's Pizza*. *CBOCS* specifically cited *Sullivan* as an example of a section 1982 case whose interpretation of section 1982 should be applied to section 1981. 553 U.S. at 47-48.

B. There Is No Meaningful Circuit Conflict

1. Much of the petition is devoted to arguing that the numerous circuits which *do* recognize section 1981 third-party interference claims are applying different standards in determining when such claims are permitted. Pet. 12-15. That issue is outside the scope of the question presented, which concerns only whether third-party interference claims are permitted at all. Pet. i. And this case is not an appropriate vehicle for resolving any such differences, because the allegations in the instant case satisfy all of the standards being applied by the courts that recognize such claims.

The Third Circuit holds that “directors, officers, and employees of a corporation may become personally liable when they intentionally cause an infringement of rights protected by Section 1981, regardless of whether the corporation may also be held liable.” *Al-Khazraji v. St. Francis College*, 784 F.2d 505, 518 (3d Cir. 1986), *aff'd*, 481 U.S. 604 (1987). The Third Circuit applied that standard in *Al-Khazraji* to uphold claims against the members of a tenure committee who had allegedly voted to deny tenure to the plaintiff because he was an Arab. Petitioners correctly describe *Al-Khazrai* as holding that section 1981 applies to interference by “agents of a contracting party.” Pet. 13. The third-party interference claim in

the instant case would clearly be permitted in the Third Circuit, because all of the defendants (at the time of their alleged discriminatory conduct) were agents of the Board of Education.

The Tenth Circuit holds that a third party is liable for discriminatory interference with contractual rights if that third party has and uses authority to do so.

Relief is available under § 1981 where a party discriminatorily uses its authority to preclude an individual from securing a contract with a third party. However, this requires the individual to show that the party both possessed sufficient authority to significantly interfere with the individual's ability to obtain contracts with third parties, and that the party actually exercised that authority to the individual's detriment.

Harris v. Allstate Ins. Co., 300 F.3d 1183, 1197 (10th Cir. 2002).¹⁵ The Fourth Circuit adopted this standard in *Painter's Mill Grille, LLC v. Brown*, 716 F.3d 342, 351 (4th Cir. 2013). See Pet 13. The allegations in this case obviously meet the Tenth and Fourth Circuit standard. "[I]t is clear that Defendants were charged with the authority to perform under District contracts, like the Settlement Agreement." App. 48a; see App. 45a.

15. See *Pridgen v. 651 Carpets*, 2022 WL 4585441, at *10 (D. Minn. Sept. 29, 2022) (applying *Harris* standard); *Hunter v. The Buckle, Inc.*, 488 F.Supp.2d 1157, 1171 (D. Kan. 2007) (same).

Petitioners agree that the third-party interference claim in the instant case would be actionable in the Sixth and Seventh Circuits, which do not apply any limitations on the types of third parties which can be held liable. Pet. 14-15.

Petitioners assert that the Fifth Circuit would reject the third-party interference claim in this case (Pet. 25), citing that circuit's decision in *Perry v. VHS San Antonio Partners, LLC*, 990 F.3d 918 (5th Cir. 2021), *cert. den.* 142 S.Ct. 563 (2021). According to petitioners, *Perry* limits claims against non-contracting parties to individuals who are the "alter ego" of a contracting party. Pet. 3, 5, 12. That standard, petitioners insist, is "sever[e]" (Pet 12) and "strict." Pet. 13. The petition insists that the petitioners (including the chair, vice-chair and members of the Board of Education) are not alter-egos of the Board, as (the petition asserts) is required by *Perry*.

But the words "alter ego", "severely" and "strict" are not quotations from *Perry*, and they are not to be found in *Perry* itself. The only actual language from *Perry* quoted by in the petition is the phrase describing the individual held subject to suit in *Faraca* as "essentially one and the same" as the contracting party. Pet. 12, 12-13 (quoting *Perry*, 990 F.3d at 932-33). Petitioners maintain that this phrase means that the individual must be the alter ego of the contracting party in order to be subject to section 1981. But that account of that phrase in *Perry* ignores the rest of the sentence in which the phrase appears. "*Because the [individual defendant] Director was acting on behalf of the [contracting party] State of Georgia when he instructed a subordinate not to hire Dr. Faraca, the Director and the State 'were essentially one and the same.'*" 900 F.3d

at 932-33 (emphasis added) (quoting *Bellow v. Amoco Oil Co.*, 118 F.3d 258, 274 (5th Cir. 1997)). Under *Perry*, third-party interference is actionable when the defendant was “acting on behalf of” a contracting party; “essentially one and the same” is not the standard, it is the court’s rationale for applying section 1981 to individuals acting on behalf of a contracting party.

The defendant officials in the instant case were clearly acting on behalf of the contracting party School Board. The complaint alleges that the named individual defendants were officials responsible for carrying out the Board’s obligations under the Settlement Agreement.¹⁶ It was only because the defendants had that responsibility that their failure to take the steps mandated by the Agreement interfered with the plaintiff’s rights under that agreement.

Petitioners object that some other section 1981 third-party interference cases have involved defendants who had no authority to act on behalf of one of the contracting parties, labeling such claims “attenuated” and “tenuous.” Pet. 10, 20-21. There may be circumstances in which lower courts have approved section 1981 claims that would not, for example, meet the “acting on behalf of” standard in *Perry*. But this case is not an appropriate vehicle for resolving that question, because the defendants in this case were employees or agents clearly acting within the scope of their authority and on behalf of the Board of Education. A decision by this Court as to whether section 1981 applies to third-party claims against defendants not affiliated with the contracting party would have no effect on the disposition of Foster’s claim.

16. Doc. 22, ¶¶ 15, 16, 19, 20, 26, 27, 30, 31, 34, 25, 197-98.

2. Petitioners’ suggestion that there is a circuit conflict ultimately rests on one sentence in a single appellate decision. Pet. 3, 11-12 (citing *Wright v. Eugene & Agnes E. Meyer Found.*, 68 F.4th 612 (D.C. Cir. 2023)). The entire reference to this issue in *Wright* is as follows:

Lastly, we find that Wright cannot maintain a § 1981 claim against Goren individually because, once again, Wright and Goren did not have a contractual relationship. See *Domino’s Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006) (“Any claim brought under § 1981 ... must initially identify an impaired ‘contractual relationship’ ... under which the plaintiff has rights.”).

(Goren, as the chief executive of the foundation with whom Wright had a contract, had allegedly violated that contract for racial reasons). This single 26-word sentence is far too little to warrant a grant of certiorari.

Moreover, it is far from clear that this single sentence will establish controlling precedent in the District of Columbia Circuit. *Wright* cannot be reconciled with several earlier decisions in that circuit holding that section 1981 is to be construed in the same manner as section 1982,¹⁷ because this Court’s decision in *Sullivan* indisputably establishes that third parties can be liable for interfering with section 1982 rights. That sentence is

17. *L. Xia v. Tillerson*, 865 F.3d 643, 660 (D.C. Cir. 2017); *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268, 1271 (D.C. Cir. 1994); *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 35 (D.C. Cir. 1990).

also inconsistent with the D.C. Circuit’s earlier decision in *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268, 1279 (D.C. Cir. 1994), quoting with approval a First Circuit third-party interference decision holding that “§ 1981 confers an implied right of action ‘against *any other person* who, with a racially discriminatory intent, interferes with [the plaintiff’s] right to make contracts with nonwhites.” 28 F.3d at 1279 (quoting *Des Vergnes v. Seekonk Water District*, 601 F.2d 9 (1st Cir. 1979)) (emphasis added).

This isolated sentence in *Wright* does not (at least yet) function as controlling precedent in the District of Columbia Circuit. That sentence (perhaps because of its brevity), so far as we have been able to ascertain, has not been applied, cited or quoted in any subsequent opinion. To the contrary, several post-*Wright* district court decisions in the District of Columbia Circuit have assumed that third-party interference is indeed prohibited by section 1981.¹⁸

The absence in *Wright* of any substantial explanation for the summary conclusion on which petitioners rely weighs heavily against granting certiorari because of *Wright*. In deciding whether (and if so when) to grant review of an issue, this Court gives substantial weight to whether the issue has been well vetted in the lower courts; thoughtful analysis of a question in the lower courts can be important to this Court’s ability to properly resolve

18. *Johnson v. Georgetown University*, 827 F.Supp.3d 133, 170 (D. D.C.2026); *Lambert v. International Union of Bricklayers and Allied Craftworkers*, 2026 WL 1960678, at *7 (D. D.C. July 7, 2026); *Joyner v. Morrison Foerster LLP*, 2023 WL 6313194, at *5 n.3 (D. D.C. Sept. 27, 2023)

an issue. A single sentence in the only appellate decision rejecting section 1981 third-party interference claims does not provide the requisite detailed analysis of this issue. *Wright* does not attempt to distinguish *Sullivan*, or even mention that key decision, because *Sullivan* was never raised in the briefing in *Wright*. A 13,000 word merits brief in this Court addressing whether section 1981 applies to third-party interference claims would necessarily consist almost entirely of reasoning neither found in the 26 words of *Wright* nor aired in the District of Columbia Circuit.

C. Petitioners Asked The Court of Appeals Only to Decide Whether Section 1981 Caselaw Was Clear, Not Whether Section 1981 Does Apply to Third-Party Interference

This is an inappropriate case in which to decide if section 1981 prohibits third-party interference claims because petitioners did not raise that issue in the lower courts. In the district court, petitioners argued only that the complaint lacked sufficient allegations that the individual defendants had taken any action that interfered with respondent's contractual rights and that they had in any event engaged in discretionary functions. Doc. 27-1, 25-26; *see* Doc. 35, 9-10. Petitioners did not argue in the district court that third-party interference was not prohibited by section 1981; indeed, petitioners district court briefs' discussion of qualified immunity did not mention section 1981 at all.

On appeal, petitioners argued only that it was unclear whether section 1981 prohibits third-party interference; they did not address whether section 1981, properly

construed, applies to such third-party actions. The distinction between how a statute or the constitution *should* be interpreted (sometimes referred to as the first step or prong of a qualified immunity analysis), and whether that interpretation was *clear* (at the time of the acts in question) (sometimes referred to as the second step or prong), is an important one. This Court’s qualified immunity opinions hold that a defendant can seek to establish qualified immunity merely by showing that the law was unclear, without bothering to address what the law (correctly understood) is. That is the approach the petitioners took in the court of appeals. *E.g.*, Appellants’ Reply Brief, 19 (“this Court needn’t resolve the difficult question of whether, and in what circumstances, public officials may be liable for tortious interference with public contracts under qualified immunity’s first prong”).¹⁹

The Eleventh Circuit specifically noted that petitioners were only contending that the law was unclear.

The school officials do not appear to challenge the statutory-violation prong on appeal. That is,

19. Appellants’ Opening Brief, 2 (“Statement of The Issues ... [(3) Whether existing law clearly establishes a § 1981 cause of action against a public official who is not a party to any contract with the plaintiff....”), 14 (“the statute’s application to the facts of this case is unclear because none of the officials is a party to the Settlement Agreement.”), 28 (“§ 1981’s application to the facts of this case is unclear [because] none of the individual officials are a party to the Settlement Agreement.”); Appellants’ Reply Brief, 7 (“whether § 1981 creates a tortious interference claim in this factual context is unsettled.”), 13 (“Whether, and to what extent, third parties may be liable for an alleged breach of contraction under – § 1981 is unsettled.”), 13 (“Recent circuit authority casts doubt on the viability of § 1981 interference claims against individual public officials”).

they do not argue that Foster failed to plausibly allege that the school officials denied her rights under § 1981 (setting aside whether those rights are clearly established). Following the school officials' lead, we assume that Foster plausibly alleged a statutory violation against each school official. Accordingly, we address only step two of the qualified immunity analysis: whether the alleged conduct violated clearly established law.

Pet. App. 11a n.4; see 9a (“This appeal asks only one thing: whether Foster’s complaint states a violation of clearly established law sufficient to overcome the school officials’ qualified immunity defense”). And what the court of appeals decided was that the meaning of section 1981 (and, more specifically, the meaning of “our precedent,” *Faraca v. Clements*, 506 F.2d 956 (5th Cir. 1975)) was clear. Pet. App. 12a-14a.

In this Court, on the other hand, petitioners do not ask the Court to grant certiorari to the address the legal issue which they pressed below and which the court of appeals *did* decide, i.e. to grant review to determine whether the court of appeals erred in holding that in 2020-2022 (when the alleged violation of section 1981 occurred) the Eleventh Circuit’s interpretation of section 1981 was clearly established. Not seeking certiorari on that issue makes sense, because there assuredly is no inter-circuit conflict regarding the clarity of Eleventh Circuit precedent in those years. (*Wright*, decided in 2023, said nothing about the clarity of the law in the Eleventh Circuit in prior years).

Instead, petitioners urge this Court to grant certiorari to decide what they suggested the Eleventh Circuit not resolve, whether section 1981 properly construed applies to third-party interference. The issues are related but distinct; lower court precedent can be clear (the issue petitioners raised in the court of appeals) but wrong (the issue petitioners now seek to raise in this Court).

This Court does not ordinarily grant review to decide issues that were not presented and decided below. *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957); *Lawn v. United States*, 355 U.S. 339, 362-363, n.16 (1958). The instant case differs somewhat from *Taylor* and *Lawn*. On the one hand, petitioners affirmatively advised the court of appeals *not* to decide the correct interpretation of section 1981. But although most of petitioners' briefs in the court of appeals contended only that the interpretation of section 1981 was not well-established, there are some scattered sentences in those briefs which suggest how section 1981 should be interpreted.

The primary problem raised by the manner in which this case was litigated until now is that petitioners, having chosen only to litigate in the court of appeals whether the meaning section 1981 was unclear, did not raise in that court—and the court of appeals thus had no occasion to address—at least most of the issues that in this Court would be central to how section 1981 should be interpreted. The bulk of petitioners' briefs in the court below addressed instead the significance of various precedents in the Eleventh Circuit and other courts of appeals. Petitioners in the court below insisted that the meaning of the text of section 1981 was not “obvious.” And petitioners saw no

reason to address the legislative history of section 1981, on which this Court has often relied on when construing that statute, because the legislative history of the 1866 Civil Rights Act, although potentially of considerable importance in deciding the correct interpretation of the statute, would have had little relevance to whether the meaning of the statute was clear in 2022.

II. THERE IS NO CIRCUIT CONFLICT REGARDING THE SECOND QUESTION PRESENTED

The Eleventh Circuit held that qualified immunity can arise from a lack of clarity regarding either of two things: whether the conduct at issue violated a right of the plaintiff, and whether the defendant personally—not merely the entity for which he or she worked—was forbidden to take the action complained of.²⁰ None of the courts of appeals decisions relied on by petitioners holds that in a case such as this some additional element also has to be clearly established in order to avoid qualified immunity. It is unclear what else petitioners intend to ask this Court to hold must also be clearly established.

A. The Meaning of The Second Question Presented Is Unclear

The second question presented is about “personal liability,” but it is not clear what legal issue petitioners are asking the Court to decide.

20. The court of appeals erred in holding that qualified immunity applies to this second issue. If certiorari were granted and petitioners were to challenge the lower court’s finding that the meaning of section 1981 was clear, we will renew our argument that qualified immunity requires only that the plaintiff’s right be clearly established.

Some passages in the petition read as though petitioners maintain that “personal liability” is a distinct element of a claim against an official (over and above the usual elements, such as violation of a right and causation), and are arguing that this extra element (distinct from the usual elements) must be clearly established to avoid qualified immunity. But “personal liability” (as that phrase is ordinarily used) is not an element of a claim against an official; rather, personal liability is what results in a suit against an official in his or her individual capacity if all the elements of a claim are established, and no defense is shown. That is how this Court used the phrase “personal liability” in *Kentucky v. Graham*, 473 U.S. 159, 165 (1983), when it explained that “to establish personal liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right.” 473 U.S. at 165.

When a civil action is brought against a government official, it is often inappropriate to frame the question simply as whether there is “liability.” An official can be sued in his or her official capacity, individual capacity, or both. A suit against an official in his or her official capacity is in substance a suit against the government entity for which the official works; any money judgement would be paid from government funds, and the applicable liability standards would be those for suits against the government (e.g., the requirements of *Monell v. Department of Social Service of City of New York*, 436 U.S. 658 (1978)). *Brandon v. Holt*, 469 U.S. 464 (1985). On the other hand, if an official is sued in his or her individual capacity, any money judgment would be payable from the individual’s personal funds and the liability standards applied would be those for suits against officials personally (e.g., qualified

or absolute immunity). *Hefer v. Melo*, 502 U.S. 21 (1991). To distinguish between these two capacities in which an official can be sued, and to indicate when an individual capacity suit (and possible judgment) is at issue, courts refer to “personal liability” or “individual liability.”

In other passages, the petition suggests that qualified immunity should exist if there was uncertainty regarding *any* issue bearing on whether a particular official could be held liable in his or her individual capacity. For example, the question presented is “Whether, to overcome qualified immunity, a plaintiff must show that *the official’s* personal liability was clearly established at the time of the alleged misconduct?” Pet. i (emphasis added).²¹ That would apparently encompass every conceivable legal issue, such as whether there was a private cause of action to enforce the right in question. It would insist on clarity as to all factual issues specific to the official involved, some of which would be unknowable “at the time of the alleged misconduct,” such as whether the official’s action would subsequently cause injury. And it also would require certainty about possible defenses, such as qualified immunity. For example, it would have to be clearly established that the plaintiff’s asserted right was clearly established, a sort of double-strength version of qualified immunity.

Elsewhere the petition seems to assert only that clarity would be required as to whether (in addition to whether the plaintiff had a right that was violated) the statute at issue imposed an obligation on an official personally,

21. See Pet. 27 (“[the court of appeals erred in holding that the qualified-immunity analysis does not consider whether *the defendant’s* personal liability was clearly established....”) (emphasis added).

rather than only on the government body for which the official worked. One passage describes the issue posed by the second question presented as “whether officials are entitled to qualified immunity when the existence of personal liability for allegedly wrongful conduct is not clearly established.” Pet. 4. But that was the clarity issue addressed by the court of appeals. Pet. App. 11a-14a. The petition does not challenge the court of appeals’ determination that Eleventh Circuit caselaw made clear that section 1981 applies to third-party interference. So if the proposed second question presented concerns whether qualified immunity would bar a case if the legality of third-party interference were unclear, this case would not be an appropriate vehicle for resolving that question.

Perhaps what petitioners have in mind is a requirement that it be clear that there is a private cause of action to enforce the underlying obligation, since without a private cause of action, there would not be personal liability. *See* Pet. 17. But the existence of a private cause of action in section 1983 to enforce section 1981 against government officials is clearly established. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 735 (1989); *Hafer v. Melo*. 502 U.S. at 24; *see* Pet. App. 8a n.3.

Multiple passages in the petition insist that qualified immunity requires a showing that the existence of damages as a form of relief was clearly established. “[F]or purposes of qualified immunity, fair warning is required as to both the conduct that violates federal rights and the potential penalties (e.g., personal-damages liability) that may be imposed for such violations.” Pet. 29; *see* Pet. 4, 5, 15, 27, 30. In this instance, in which the plaintiff relies on the section 1983 private cause of action to enforce

section 1981, the remedies are governed by section 1983. Section 1983, which specifically provides for “liab[ility] to the party injured in an action at law,” has for generations been understood to authorize both actual and punitive damages.

And the petition suggests that qualified immunity would exist if it were unclear “whether section 1981 claims are cognizable against individual government officials.” Pet. 5. “Cognizable ordinarily means [c]apable of being tried or examined before a designated tribunal; within [the] jurisdiction of [a] court or power given to [a] court to adjudicate [a] controversy.” *F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994) (quoting Black’s Law Dictionary 259 (6th ed. 1990)). But subject matter jurisdiction in federal district courts to hear a section 1981 claim clearly exists under sections 1331 and 1343. 28 U.S.C. §§ 1331, 1343.

This uncertainty as to what petitioners would ask the Court to decide if certiorari were granted regarding the proposed second question presented weighs heavily against granting review in this case. A clear understanding of the nature of the question of law that would be before the Court is essential to determining at the certiorari stage the importance of the issue, whether that issue has been fully vetted in the lower courts, whether a case presents an appropriate vehicle for resolving that issue, and the necessity of action by this Court. Uncertainty as to the meaning of a question presented creates an unacceptable risk that a case will ultimately be dismissed as improvidently granted. Petitioners’ reply brief may throw light on the meaning of the proposed second question presented. But the petition itself should have made that entirely clear.

B. There Is No Relevant Circuit Conflict

The Fifth and Eighth Circuit decisions on which the petition relies do not conflict with the decision of the Eleventh Circuit in this case. The types of issues regarding which the Fifth and Eighth Circuit decisions require clarity are the same issues regarding which the Eleventh Circuit also required clarity. The Sixth Circuit decisions on which petitioners rely are expressly limited to takings claims, and would have no application here.

In *Faulk v. City of St. Louis*, 30 F.4th 739, 750 (8th Cir. 2022), the qualified immunity holding stemmed from uncertainty as to whether the alleged actions of the defendants had violated the plaintiff's clearly established rights. That is the quintessential qualified immunity problem, and the Eleventh Circuit recognizes that qualified immunity exists if the defendant's actions did not violate a clearly established federal right. Pet. App. 10a.

The plaintiff in *Faulk* alleged that employees of St. Louis had engaged in a conspiracy that violated section 1985(3). Under the intracorporate conspiracy doctrine, federal anti-conspiracy laws are not violated by a conspiracy among fellow employees of a private corporation. At the time of the alleged misconduct, it was unclear whether the intracorporate conspiracy doctrine applied to section 1985(3) conspiracy claims; if it did, such conspiracies among fellow employees would not violate the statute or any right of the plaintiff under that law. *Ziglar v. Abbasi*, 582 U.S. 120 (2017). *Faulk* applied *Ziglar* to the section 1985(3) conspiracy claims against St. Louis employees. The lack of clarity that led to qualified

immunity in *Faulk* was about whether section 1985(3) had even been violated.

The petition insists that *Faulk* was a decision about “personal liability,” basing that contention on adding the word “personal” to two quotations from *Faulk*. The petition repeatedly excerpts a few words from *Faulk* and quotes them in a description of a supposed holding in *Faulk* that the defendants in that case were immune because “personal ‘liability’” was not clear. The petition asserts that “the Eighth Circuit held that the [defendants] ... were immune from conspiracy claims because personal ‘liability was not clearly established.’” Pet. 16 (quoting *Faulk*, 30 F.4th at 750). But in the actual sentence in *Faulk*, the noun “liability” is not preceded by the adjective “personal.”²² Another sentence in the petition describes *Faulk* as holding that qualified immunity applied because “[r]easonable officers could not ‘have known with any certainty,’ ... (quoting *Ziglar*, 582 U.S. at 155), that they faced personal ‘damage liability for a ... conspiracy claim....’ (emphasis omitted)....” Pet. 16 (quoting *Faulk*, 30 F.4th at 750). But the actual sentence excerpted from *Faulk* does not include the word “personal.”²³ Indeed, the phrase “personal liability” does not appear anywhere in *Faulk*. The uncertainty that led to qualified immunity

22. “*Ziglar* ... granted qualified immunity because the uncertain applicability of the intracorporate conspiracy doctrine meant that § 1985(3) liability was not clearly established.” 30 F.4th at 750.

23. 30 F.4th at 750 (“[the court’s earlier opinions] do not clearly establish that reasonable officers ‘would ... have known with any certainty’ that planning, designing, monitoring, or executing ‘the illegal kettling plan’ would expose them to damage liability for a § 1983 conspiracy claim”) (quoting *Ziglar*, 582 U.S. at 155 (emphasis in *Ziglar*)).

in *Faulk* was not about “personal liability” (whatever petitioners mean by that phrase), but about whether there was any violation of a right on which a finding of liability could be based.

The qualified immunity issue in *Modica v. Taylor*, 465 F.3d 174 (5th Cir. 2006), concerned whether the statute at issue applied to the defendants personally, or only to the entity for which they worked—the same type of issue which the Eleventh Circuit in this case assumed had to be clear. The Family and Medical Leave Act (FMLA) forbids an “employer” from retaliating against an employee for certain protected activity. That prohibition clearly applied to the state agency for which Modica worked, and retaliation by an agent of the agency would constitute retaliation by the agency itself. But Modica had also sued in her individual capacity the particular official who had allegedly taken the retaliatory act. That official argued the FMLA did not apply to her in her individual capacity, and that she thus could not be sued in her individual capacity, because she was not an “employer” under the statute.

The Fifth Circuit in *Modica* assumed that qualified immunity would apply to uncertainty about whether a statute applied to an official in his or her individual capacity. But that is entirely consistent with the Eleventh Circuit decision in this case, which similarly assumed that the defendants here would be entitled to qualified immunity if it were not clear whether section 1981 applied to non-contracting parties in their individual capacities. In *Modica* the Fifth Circuit concluded that the defendants there were entitled to qualified immunity because it was *unclear* if the statute (the FMLA) applied to them in their

individual capacities. In the instant case, the Eleventh Circuit concluded that the defendants were not entitled to qualified immunity because it was *clear* that the statute (section 1981) applied to them in their individual capacities as non-contracting parties. The different results in *Modica* and the instant case stem from differences in the clarity of the two statutes at issue, not from any disagreement between the Fifth and Eleventh Circuits as to *what* must be clear.

As petitioners appear to acknowledge (Pet. 19), the Sixth Circuit at least ordinarily limits qualified immunity to cases in which it was unclear whether the defendant's action violated federal law. "The key inquiry is whether the defendants had 'fair warning' of the unconstitutionality of their actions." *Miller v. Maddox*, 866 F.3d 386, 395 (6th Cir. 2017) (quoting *Cummings v. City of Akron*, 418 F.3d 676, 687 (6th Cir. 2005)). In *Miller* the defendant argued that, even if it was clear that he had violated the plaintiff's constitutional rights, he was entitled to qualified immunity because the elements of the applicable section 1983 action (for malicious prosecution) were unclear. The Sixth Circuit held that ambiguity regarding the scope and availability of a civil action is irrelevant to qualified immunity. In *Jackson v. City of Cleveland*, 925 F.3d 793 (6th Cir. 2019), the Sixth Circuit rejected a similar attempt to broaden the basis of qualified immunity. "Whether a defendant is protected by qualified immunity turns not on whether the defendant was on notice that his actions satisfied the elements of a particular cause of action, but instead on whether the defendant was on notice that his actions violated the laws of the United States." 925 F.3d at 826.

The Sixth Circuit, for reasons that remain unexplained, has taken a different approach to takings claims. Pet 18-19. But as petitioners appear to acknowledge, *Miller* and *Jackson* are the controlling Sixth Circuit standard for all other constitutional or statutory claims, and would have been applied had the instant case arisen in that circuit. The instant race discrimination case is not an appropriate vehicle for resolving any circuit conflict regarding takings claims.

C. This Court Should Not Grant Certiorari To Radically Expand The Scope of Qualified Immunity

Until now this Court has consistently held that qualified immunity is only available when the legal right which the plaintiff asserts was not clearly established at the time of the alleged violation. Petitioners ask the Court to grant review to adopt an enormous and open-ended expansion of qualified immunity law. The petition asserts that “[o]fficials ... must know *both* what conduct is unlawful *and* whether they may be liable in their personal capacities for engaging in in such conduct.” Pet. 38 (emphasis in original). What *else* the Court, in addition to the illegality of a defendant’s actions, will be asked to hold must be clear remains unexplained. Adoption of this ill-defined approach is likely to require a series of decisions by this Court, addressing seriatim such issues as whether there is qualified immunity because of unclarity regarding the existence of a private cause of action, because of unclarity regarding whether a statute applies to individuals, because of unclarity regarding the standard of causation, because of unclarity regarding the degree of proof required (e.g.,

perhaps clear and convincing evidence), or because of unclarity regarding the statute of limitations.

The decisions of this Court provide no basis for such a radical expansion of qualified immunity law. The purpose of qualified is only to guarantee that government officials have fair warning that a proposed course of action would result in a violation of a victim's clearly established statutory or constitutional rights. Government officials who knowingly violate federal law are not entitled to also know with certainty whether the victim has a private cause of action, or what the elements of such a suit might be, or what type or amount of monetary relief the victim might win. The purpose of qualified immunity is not to enable a government official who is contemplating a knowing violation of federal law to make a calculated decision weighing his or her desire to intentionally violate that federal law against the possible financial risks.

Petitioners insist that the absence of a clear understanding as to whether knowing violations of federal law will lead to liability “risks discouraging officials from taking swift and firm action, as well as chilling their decision-making.” Pet 30. But chilling decisions to knowingly violate the Constitution and laws of the United States is a fundamental purpose of our legal system.

The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, *he should be made to*

hesitate; and a person who suffers injury caused by such conduct may have a cause of action.

Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982) (footnote omitted) (emphasis added). If uncertainty as to the availability of a private cause of action, or regarding the amount of damages that might be awarded, brings about greater reluctance to knowingly violate federal law, that is all to the good.

There are doubtless government officials today who would “swift[ly] and firm[ly]” take action which they knew violated federal law if they were assured they could do so with impunity unless it was already clear whether, when, how, and/or in what amount they would face financial liability for that violation. But our form of government does not elevate haste and brazenness over the rule of law. This Court should not grant certiorari to provide any such assurance.

CONCLUSION

For the above reasons, certiorari should be denied.

Respectfully submitted,

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