No. 26-232

In the Supreme Court of the United States

SHANNON KING, ET AL.,
INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES,
PETITIONERS,

v.

DR. LANA FOSTER,
RESPONDENT.

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

REPLY BRIEF FOR PETITIONERS

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This case implicates two entrenched circuit splits on issues of exceptional importance—one of which the Eleventh Circuit acknowledged below. Respondent's contrary arguments do not undermine the clear divergence in authority.

First, the circuits are divided over liability for non-contracting defendants under 42 U.S.C. § 1981. The D.C. Circuit forecloses these claims, the Fifth Circuit allows them under extremely narrow circumstances, and the Third, Fourth, Sixth, Seventh, Tenth, and Eleventh Circuits allow them with varying guardrails. Although

respondent attempts, incorrectly, to put more circuits on her side, she cannot dispute the existence of a split.

Respondent claims that petitioners forfeited the first question, but the Eleventh Circuit squarely held that non-contracting parties face section 1981 liability, cleanly teeing up the issue for this Court's review. And respondent's argument that this Court's precedent already resolves the question is patently incorrect. Respondent cites *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), which involved a claim under section 1982. But *Sullivan* predates both *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470 (2006), and amendments to section 1981 that distinguish it from section 1982—both of which point against third-party-interference claims.

Second, the circuits have divided 3-2-1 over whether qualified immunity applies when officials' personal liability for alleged misconduct was not clearly established. This question recurs frequently and across multiple contexts. Although respondent attempts to explain away certain cases from the Fifth and Eighth Circuits requiring clarity as to officials' personal liability, she completely ignores others deciding the question the same way. And her professed confusion over the second question's framing cannot muddy the waters; the Eleventh Circuit clearly articulated and addressed the precise question. Respondent is also wrong on the merits. This Court's qualified-immunity cases demand fair warning of officials' personal damages liability.

I. The Circuits Are Split on Both Questions Presented

Respondent does not deny the existence of either split. Rather, she dismisses the first as "no[t] meaningful" (at 11) and the second as "no[t] relevant" (at 26) (capitalization altered). Not so. The circuits are intractably and deeply divided. Only this Court can settle these conflicts.

A. The Circuits Are Split over Section 1981's Applicability to Non-Contracting Defendants

The circuits are divided 6-2 over whether section 1981 authorizes claims against non-contracting defendants like respondent's. Respondent's attempts to recast the split as lopsided and underdeveloped do not withstand scrutiny.

1. Respondent cannot persuasively explain away the two circuits—the D.C. Circuit and the Fifth Circuit—that have rejected or restricted third-party-interference claims. Respondent (at 15-17) does not dispute that the D.C. Circuit's decision in *Wright v. Eugene & Agnes E. Meyer Foundation*, 68 F.4th 612, 624 (D.C. Cir. 2023), forecloses section 1981 claims against non-contracting defendants. Instead, she (at 16-17) dismisses the decision as failing to "provide the requisite detailed analysis" because its reasoning is brief and does not mention *Sullivan*. But the D.C. Circuit's analysis embraced the straightforward notion that *Domino's Pizza*—which postdates *Sullivan* and emphasizes contractual privity—indicates that section 1981 claims cannot be brought against non-contracting parties. *Id.*; *see infra* Part III.A.

Respondent adds (at 15-16) that *Wright* may not "establish controlling precedent" because it supposedly conflicts with previous circuit decisions. None of the cases respondent cites, however, settled section 1981's applicability to non-contracting defendants. *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.* merely discussed out-of-circuit cases holding that parties have standing under section 1981 to sue to vindicate their own or other people's rights. 28 F.3d 1268, 1279-80 (D.C. Cir. 1994). Likewise, cases acknowledging that sections 1981 and 1982 are generally construed similarly, *e.g.*, *id.* at 1271; *L. Xia v. Tillerson*, 865 F.3d 643, 659 (D.C. Cir. 2017); *Spann v. Colonial Vill., Inc.*, 899

F.2d 24, 35 (D.C. Cir. 1990), do not mandate that both provisions capture third-party interference, *infra* Part III.A. Indeed, *L. Xia* acknowledged the two may differ in scope. *See* 865 F.3d at 659 (declining "to decide whether [Congress' 1991 amendments] affected section 1981's coverage of federal government discrimination"). Additionally, that the D.C. Circuit has not yet applied *Wright*'s section 1981 holding in another case, or that certain district court decisions may have failed to apply that holding, does not undermine *Wright* as controlling precedent. *Contra* BIO 16.

As for the Fifth Circuit, respondent attempts in vain to re-situate it on her side of the split. According to respondent (at 14), *Perry v. VHS San Antonio Partners, L.L.C.*, 990 F.3d 918 (5th Cir. 2021), merely held that "third-party interference is actionable when the defendant was 'acting on behalf of' a contracting party." Not so. Respondent ignores that the Fifth Circuit "do[es] not read [its precedents] to recognize … a true third-party-interference theory of § 1981 liability" but instead "to allow § 1981 liability where the 'third party' and the contracting party are 'essentially one and the same.'" *Id.* at 933 (citation omitted). Where "[n]o evidence suggests" that the non-contracting and contracting parties "are 'essentially one and the same,'" recovery against the former is foreclosed. *Id.* (citation omitted). In other words, the two must be alter egos. *E.g.*, *Alter Ego*, Black's Law Dictionary (12th ed. 2024). Respondent does not, and cannot, argue that her amended complaint provides any non-conclusory allegations that petitioners are "essentially one and the same" as the Board. Pet. 25.

2. Respondent tries to inflate the circuit majority with decisions from the First and Second Circuits. Neither court adopted respondent's rule. Respondent (at 6,

16) cites a First Circuit decision stating that, under section 1981, "a person has an implied [r]ight of action against any other person who, with a racially discriminatory intent, interferes with his right to make contracts with non-whites." *Des Vergnes v. Seekonk Water Dist.*, 601 F.2d 9, 14 (1st Cir. 1979). From this, respondent (at 16) maintains the First Circuit allows "third-party interference" claims. But that language addressed *who may bring* section 1981 claims—whether "a corporation" lacking a racial identity "ha[d] statutory standing." *Id.* at 13-14 (citation omitted). The court did not address the separate question of whom such claims *may be brought against*. Nor could it; the plaintiff sued the putative contracting party (the water district), not the non-contracting parties charged with discrimination (the voters who denied the plaintiff's petition for inclusion within the water district). *Id.* at 15.

Respondent's Second Circuit authority (at 6-7 & n.11) at most sanctions third-party-interference claims against employers and their owners and agents. *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 74-75 (2d Cir. 2000) (holding, regarding claim against "owners and principal shareholders of [defendant employer]," that section 1981 liability attaches when defendant has "causal relationship" to discrimination); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1316 (2d Cir. 1995) (suggesting "employer-entities and their agents" face section 1981 liability). Had the Second Circuit authorized third-party-interference claims writ large, it would not later have had to "assum[e]" a plaintiff can "sue [a non-contracting third party] under § 1981 even though it is not [the plaintiff's] employer." *Felder v. U.S. Tennis Ass'n*, 27 F.4th 834, 848 (2d Cir. 2022).

3. Respondent does not dispute that the courts in the circuit majority "apply[] different standards" to third-

party-interference claims. BIO 11. Even if respondent's claim would be cognizable in each of these circuits, these courts' divergent approaches underscore the necessity of this Court's review. Even the circuits permitting certain section 1981 claims against non-contracting parties cannot agree when such claims may proceed, while the Fifth and D.C. Circuits have disallowed claims like respondent's. Pet. 11-15. Only this Court can resolve the conflict.

B. The Circuits Are Split over Whether Qualified Immunity Requires That Officials' Personal Liability Be Clearly Established

The decision below expressly acknowledged a split on the second question presented between the Fifth Circuit on the one hand and the Seventh and Tenth Circuits on the other hand. Pet.App.17a-18a. The split also sweeps in the Eighth Circuit, which joins the Fifth Circuit, and the Sixth Circuit, which varies approaches based on the context. Pet. 15-19. Respondent's attempts to minimize this acknowledged conflict fail.

1. The Fifth and Eighth Circuits require officials' personal liability to be clearly established to foreclose qualified immunity. Pet. 15-17.

As to the Fifth Circuit, respondent (at 28-29) takes aim at *Modica v. Taylor*, 465 F.3d 174, 187-88 (5th Cir. 2006), while ignoring other Fifth Circuit decisions resolving the question presented. Pet. 16-17 (citing *Buchanan v. Alexander*, 919 F.3d 847, 855-56 (5th Cir. 2019); *Sims v. City of Madisonville*, 894 F.3d 632, 641 (5th Cir. 2018)). The split survives even without *Modica*.

In any event, respondent's characterization of *Modica* is incorrect. *Modica* recognized qualified immunity because it was not clearly established that individual officials could be held personally liable under the Family and Medical Leave Act. 465 F.3d at 187-88. Respondent (at

28) claims *Modica* is "entirely consistent" with the decision below because the Eleventh Circuit held that petitioners would receive "qualified immunity if it were not clear whether section 1981 applied to non-contracting parties in their individual capacities." The decision below forecloses that puzzling assertion. The Eleventh Circuit characterized *Modica* as "endors[ing]" petitioners' argument that they were entitled to qualified immunity because their personal liability under section 1981 was not clearly established. Pet.App.18a. The decision below then rejected petitioners' argument that qualified immunity requires personal liability to be clearly established, Pet.App.16a-18a, squarely conflicting with *Modica*'s basis for granting qualified immunity.

As to the Eighth Circuit, respondent (at 26-28) nitpicks petitioners' reliance on *Faulk v. City of St. Louis*, 30 F.4th 739, 750 (8th Cir. 2022). But respondent again ignores other Eighth Circuit cases contributing to the split. Pet. 16-17 (citing *Green v. City of St. Louis*, 52 F.4th 734, 741 (8th Cir. 2022); *Rinne v. Camden County*, 65 F.4th 378, 385 (8th Cir. 2023)).

Regardless, respondent misunderstands *Faulk*. Respondent claims that confusion over application of the intracorporate conspiracy doctrine to section 1985(3) claims caused qualified immunity to apply. But *Faulk* linked this holding to officers' liability, awarding qualified immunity because the plaintiffs failed to "clearly establish that reasonable officers 'would … have known with any certainty' that planning … 'the illegal kettling plan' would expose them to damage liability for a § 1983 *conspiracy* claim." 30 F.4th at 750 (first omission in original) (citation omitted).

2. On the other side of the split, the Seventh, Tenth, and Eleventh Circuits decline to consider whether officials' liability was clearly established—making them

diametrically opposed to the Fifth and Eighth Circuits. Pet. 17-18.

3. Respondent (at 29-30) concedes that the Sixth Circuit "take[s] a different approach" depending on the context. *Accord* Pet. 18-19. But respondent brushes aside the Sixth Circuit's takings cases, which consider whether personal liability is clearly established, because they arise in a different context. That fact provides more reason to grant the petition. Confusion over the appropriate qualified-immunity standard infects multiple areas of the law across multiple circuits, requiring this Court's intervention.

II. Both Questions Presented Are Recurring and Important

1. Respondent does not dispute that the first question frequently recurs in circuits allowing third-party-interference claims. Pet. 20-21. Instead, respondent (at 17-21) argues that petitioners forfeited the third-party-liability argument. But respondent (at 20) concedes that petitioners' briefs discussed third-party liability. Petitioners cited *Domino's Pizza* and the Fifth Circuit's *Perry* decision, C.A. Appellants' Br. 2, 14, 28-29, and argued that because respondent "failed to identify any contractual relationship with the individual school officials to support her § 1981 claim, they are entitled to qualified immunity," *id.* at 29.

Respondent contends that the third-party-interference issue arose only in the context of petitioners' argument that the law was not clearly established. But a court cannot hold that a law is clearly established without articulating what that law is. The Eleventh Circuit held "that the law clearly prohibits nonparties to a contract from interfering with the plaintiff's contractual rights under § 1981." Pet.App.14a. The court distinguished

Domino's Pizza and held that circuit caselaw allowed section 1981 plaintiffs to pursue "a third-party interference theory." Pet.App.14a-15a. Because the Eleventh Circuit unquestionably "passed on" non-contracting-defendant liability, the issue is preserved for this Court's review. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (citation omitted); *United States v. Williams*, 504 U.S. 36, 41-43 (1992); *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991).

2. Respondent fails to address the recurring and important nature of the qualified-immunity question. Pet. 22-24 & nn.2-4 (collecting cases). Instead, respondent (at 21-25) protests that the second question presented is unclear because the phrase "personal liability" could have many different meanings. There is nothing ambiguous about the question, which asks whether plaintiffs must show that officials' personal liability was clearly established to overcome qualified immunity. Pet. I. Petitioners sought qualified immunity because it was unclear in the Eleventh Circuit whether individual officials could be held personally liable for damages under section 1981. The Eleventh Circuit rejected petitioners' qualified-immunity argument, proclaiming that "[t]he *right* question is whether the wrongfulness of an official's conduct was clearly established—not whether the rules of individual liability were settled." Pet.App.16a. The petition asks the Court to review that straightforward holding.

Contrary to respondent's assertion (at 22), petitioners do not treat personal liability as "a distinct element of a claim"; they simply argue that personal liability must be clearly established too. Nor, as respondent (at 23-24, 32) suggests, does the petition create a slippery slope in which causation, damages, and factual issues are swept into the qualified-immunity analysis. Based on this Court's cases,

petitioners argue only that two things must be clearly established: (1) the plaintiff's right; and (2) the defendant's susceptibility to personal liability. Pet. 27-30. Respondent identifies no real-world example of her slippery-slope hypothetical occurring in any of the circuits employing petitioners' rule.

Respondent (at 24) asserts that the decision below confirmed that individual officials can be held liable under section 1981, making this a poor vehicle. To the contrary, the Eleventh Circuit expressly reserved that issue: "We take no position on the merits of whether individual government officials can face personal liability under § 1981." Pet.App.18a-19a n.8. Instead, the Eleventh Circuit held that "uncertainty … about whether government officials can be held personally liable under § 1981" was "completely beside the point." Pet.App.16a.

Respondent (at 24) adds that *Jett v. Dallas Independent School District*, 491 U.S. 701, 735 (1989), and *Hafer v. Melo*, 502 U.S. 21, 24 (1991), established a private cause of action under section 1983 to enforce section 1981 claims against government officials. *Hafer* is not a section 1981 case, and *Jett* did not clearly resolve the issue; the decision below cited several Fifth and Eleventh Circuit cases postdating *Jett* and *Hafer* that "question[] whether § 1981 claims are cognizable against government officials." Pet.App.16a. For this reason, respondent's discussion (at 25) of section 1983 damages and subject-matter jurisdiction to hear section 1981 claims also is irrelevant. The question presented focuses only on whether qualified immunity applies when it was not clearly established that officials could be held liable under section 1981.

III. The Decision Below Is Incorrect

Respondent argues that this Court's section 1981 and qualified-immunity precedents dictate the outcome here. Respondent is wrong.

A. Section 1981's Applicability to Non-Contracting Parties Remains Unsettled

Respondent maintains (at 8-9) that *Sullivan*, 396 U.S. 229, coupled with the general principle that sections 1981 and 1982 are construed similarly, is "dispositive" of the first question presented. But section 1981's applicability to non-contracting parties is anything but settled, as the circuit confusion demonstrates.

This Court has construed sections 1981 and 1982 "similarly" because of their "common language, origin, and purposes." *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 447-48 (2008). But the statutes differ materially, including in their text and histories. *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 384-86 (1982).

Most saliently, in 1991 Congress amended section 1981 to "positively reinforce[]" its requirement of a particular relationship—a "contractual relationship" with "contract obligations"—between would-be plaintiffs and defendants. *Domino's Pizza*, 546 U.S. at 477; *see also* 42 U.S.C. § 1981(a)-(b) (protecting the right "to make and enforce contracts," which "includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship"). Section 1982, by contrast, contains no language requiring a particular relationship between plaintiffs and defendants. That provision therefore more readily encompasses third-party-interference claims than does section 1981. As a result, *Sullivan*—decided decades before the 1991 amendments and *Domino's Pizza*—does not dictate the outcome.

B. This Court's Review Is Necessary To Safeguard Qualified Immunity's Fair-Notice Function

As for the second question presented, respondent (at 30-32) urges this Court not to "[r]adically [e]xpand" qualified immunity. But respondent's approach would deprive officials of the "fair warning" that she (at 31) concedes this Court's precedents require. *Accord United States v. Lanier*, 520 U.S. 259, 270-71 (1997). Respondent neither acknowledges nor contests that this Court has repeatedly held that "fair warning" requires notice as to both prohibited conduct and possible penalties across myriad contexts. Pet. 28-29 (collecting cases).

Instead, respondent protests (at 30-32) that applying this fair-warning standard in qualified-immunity cases would necessitate seriatim decisions by this Court and incentivize "knowing violation[s] of federal law." Neither contention holds water. The former rests on respondent's mischaracterization (at 30) of the conduct-versus-liability issue as "ill-defined" and "open-ended." *Supra* Part II. The latter disregards that respondent's approach would significantly chill *lawful* conduct. If qualified immunity is unavailable even when it is unclear whether officials could be held personally liable, the threat of such liability and attendant litigation costs will encourage overly cautious decision-making. *See Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). This Court should thus safeguard qualified immunity's scope.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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