No. 17-22

IN THE

Supreme Court of the United States

FLOYD G. ELMORE,

Petitioner,

v.

HARBOR FREIGHT TOOLS USA, INC.,

Respondent.

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

REPLY BRIEF OF PETITIONER

ARTHUR A. BENSON, II
JAMIE K. LANSFORD
ARTHUR BENSON & ASSOCIATES
4006 CENTRAL STREET
Kansas City, MO 64111
(816) 531-6565

SARAH O'ROURKE SCHRUP
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063

CARTER G. PHILLIPS *
JEFFREY T. GREEN
MATTHEW J. LETTEN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Petitioner

* Counsel of Record

September 12, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondent reluctantly concedes that there is a clear split among the circuits on the question presented. Brief in Opposition at 6 ("Opp'n Br."). Unable to escape the fact that the circuits have come to differing conclusions regarding a state action requirement for a "full and equal benefit" claim under 42 U.S.C. § 1981(a), Respondent instead inaccurately attempts to diminish the scope of the circuit split and, self-destructively, argues that any split is "long-standing," Opp'n Br. at 4–8, which is a compelling reason for this Court to intervene now.

Respondent is incorrect because the circuits are split two-to-three on the question presented—not one-to-five as Respondent claims—and this division has a material impact on the ability of plaintiffs to bring successful claims under the Full and Equal Benefits Clause. Moreover, the question presented is ripe for review as it has been considered by at least five circuits and numerous District Courts over the past 14 years.

Respondent next attempts to sidestep the state action question and claims that the question presented is not dispositive in this case because Mr. Elmore's complaint failed to allege a nexus to an existing law or proceeding, racial discrimination on the part of Respondent's store manager, or an independent violation of state law. Opp'n Br. at 8–11. These arguments were not presented to the courts below and are not properly part of the question presented by this case. And in any event, Mr. Elmore's complaint was sufficient on all counts—with the exception of a state action requirement imposed by the court below and a

handful of circuits that have departed from the plain text of § 1981(a).

I. THE ENTRENCHED CIRCUIT SPLIT OVER WHETHER § 1981 HAS A STATE ACTION REQUIREMENT WARRANTS THIS COURT'S REVIEW.

Respondent's math on the circuit split in this case does not add up.

First, Respondent refuses to place the Sixth Circuit's decision in *Chapman* v. *Higbee Co.*, 319 F.3d 825 (6th Cir. 2003) (en banc), on the side of the split that is in Mr. Elmore's favor. Opp'n Br. at 7. Respondent argues that while "[t]he Sixth Circuit does not expressly require state action," it "recognizes its distinction is likely one without a difference." *Id.* But the decision in *Chapman* was unequivocal in holding that "section 1981 plainly protects against impairment of its equal benefit clause by *private discrimination*." 319 F.3d at 833 (emphasis added). Regardless of whether the facts at issue in that case could be "fairly attributable to the state," Opp'n Br. at 7 (quoting *Chapman*, 319 F.3d at 834–35), the Sixth Circuit still considered and expressly rejected any state action requirement.

In addition, Respondent selectively quotes from *Chapman* while trying to evade the plain meaning of the holding. Opp'n Br. at 7 (quoting *Chapman*, 319 F.3d at 831) ("A century of Fourteenth Amendment adjudication has . . . made it understandably difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons."). On this point, the very next sentence of the opinion belies Respondent's argument. *Chapman*, 319 F.3d at 831 (emphasis in original) ("Yet *there is nothing*

inherent in the phrase that requires the action working the deprivation to come from the State.").

Second, Respondent also tries to include the Seventh Circuit among the courts that have embraced the state action requirement when the Seventh Circuit has never considered the question. Opp'n Br. at 7. Respondent tries to argue that the Seventh Circuit "made clear its similar view" that state action is necessary in *Palmer* v. *Board of Education of Community Unit School District 201-U,* 46 F.3d 682 (7th Cir. 1995). Opp'n Br. at 7. In *Palmer*, the Seventh Circuit explained that § 1981 "was designed to remove obstacles to the full participation of blacks in the legal system." 46 F.3d at 687. Nowhere in that opinion did the Seventh Circuit address whether the state is the only entity capable of erecting obstacles to the full and equal benefit of laws and proceedings.

Accordingly, the circuits have been divided two-three on the question presented for at least 14 years since the Second and Sixth Circuits became the first to hold that state action is not a necessary element of a full and equal benefit claim. See *Chapman*, 319 F.3d at 831; *Phillip* v. *Univ. of Rochester*, 316 F.3d 291, 296 (2d Cir. 2003). This division is far from the picture of "general agreement" painted by Respondent where the two conceptions of state action have "tolerably co-existed." Opp'n Br. at 4, 8. Indeed, any notion of tolerable co-existence on this question is simply wishful thinking. If Mr. Elmore were proceeding in the Second or Sixth Circuit, his complaint would not have been dismissed on account of a lack of alleged state action. Instead, by accident of geography, Mr. Elmore resides in a circuit where any and all claims under the Full and Equal Benefit Clause must come cloaked with the imprimatur state of action.

II. THE STATE ACTION QUESTION IS RECURRING AND IMPORTANT.

Respondent claims the legal issue in this case "is neither particularly recurring nor particularly important." Opp'n Br. at 11.

First, there is no threshold number of cases that determines when an issue is worthy of review. See Sup. Ct. R. 10. And regardless of precisely how many cases brought under § 1981 allege a full and equal benefit claim, a contract claim, or a mixed theory, the question of state action continues to present itself. Indeed, at least five circuits and numerous district courts have addressed the precise issue on at least one occasion. See *Green* v. *Wal-Mart Stores, Inc.*, No. 2:09CV00457 DS, 2010 WL 3260000, at *4 (D. Utah Aug. 18, 2010); *Barot* v. *DRS Techs., Inc.*, No. 6:08-cv-1179-Orl-31DAB, 2008 WL 4371815, at *2–3 (M.D. Fla. Sept. 23, 2008); *Hester* v. *Wal-Mart Stores, Inc.*, 356 F. Supp. 2d 1195, 1200 (D. Kan. 2005); *Withrow* v. *Clarke*, No. 06-11597-RCL, 2008 WL 8188363, at *7 (D. Mass. Aug. 15, 2008).

Second, those claims that do arise under the Full and Equal Benefit Clause and run aground on the state action issue are of vital importance, as § 1981 was aimed at countering insidious racial discrimination by protecting certain "fundamental rights" from impairment by discriminatory conduct. *Phillip*, 316 F.3d at 295–96. Respondent argues that this issue is less important because the remedies available under § 1981 are potentially duplicative of state law. Opp'n Br. at 13–14. This argument misunderstands the purpose of § 1981. As the Second Circuit observed when discussing the Civil Rights Act of 1866, the legislative history suggests a concern with "freedmen's inability to obtain redress in southern courts." *Phillip*, 316 F.3d at 296. It is thus not at all surprising

that § 1981 provides a federal remedy for racial discrimination that might also exist in state tort law.

In addition, Respondent mischaracterizes Mr. Elmore's argument about the importance of discrimination claims brought under the Full and Equal Benefit Clause as a "policy argument," Opp'n Br. at 1, that in effect interprets § 1981 as an "omnibus remedy for *all* racial injustice." *Domino's Pizza, Inc.* v. *McDonald*, 546 U.S. 470, 479 (2006). Not so. Mr. Elmore only asks that this Court align the scope of the rights under the Full and Equal Benefit Clause with the plain text of § 1981(a), which provides a remedy for certain forms of racial discrimination without regard to a requirement of state action.

III. MR. ELMORE SUFFICIENTLY ALLEGED A FULL AND EQUAL BENEFIT CLAIM.

Respondent's remaining arguments against certiorari focus on the merits of Mr. Elmore's complaint as opposed to the entrenched circuit split regarding state action. Opp'n Br. at 8–14. These arguments fail because—setting aside that the merits of Mr. Elmore's complaint are not necessary to resolve the narrow legal issue presented—Mr. Elmore's complaint would have survived a motion to dismiss but for the state action requirement.

In the complaint, Mr. Elmore alleged that he is African–American; described in detail the wrongful accusations, verbal threats, and obscene gestures made by the manager and her companion; and alleged that they accused him of theft and threatened to summon the police. Petition Appendix at 46a–48a. Mr. Elmore further alleged that his "race was a motivating factor in the decision by Harbor Freight employees and/or agents to implicate him in a prior theft" and that Respondent "intentionally discriminated on

the basis of race in implicating [Mr.] Elmore in a prior theft and causing him to be a target of a criminal investigation." *Id.* at 48a.

These allegations are assumed to be true at the motion to dismiss stage, *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009), and state a plausible claim that racial animus motivated the conduct of the store manager and her companion. See *Chapman*, 319 F.3d at 833; *Phillip*, 316 F.3d at 298. Moreover, the allegations are more than sufficient to state a claim under the Full and Equal Benefits Clause where Respondent falsely implicated Mr. Elmore for shoplifting because of his race. See, *e.g.*, *id.* ("[P]laintiffs' allegations are sufficient because plaintiffs claim that defendants attempted to trigger a legal proceeding against plaintiffs but would not have taken the same action had white students engaged in the same conduct."); *Martin* v. *J.C. Penney Corp.*, 28 F. Supp. 3d 153, 157 (E.D.N.Y. 2014) (holding that allegations of store security officers falsely accusing African–American customers of shoplifting because of their race stated a full and equal benefit claim); *Bishop* v. *Toys "R" Us–NY LLC*, 414 F. Supp. 2d 385, 394 (S.D.N.Y. 2006) (same).

Respondent nonetheless argues that Mr. Elmore's complaint would be dismissed in the Second Circuit because he failed to allege that Respondent "committed an independently actionable violation of state law." Opp'n Br. at 9 (citing *Murray* v. *NYC Dep't of Corr.*, No. 13-cv-7090 (KAM) (LB), 2016 WL 5928672, at *4 (E.D.N.Y. Sept. 30, 2016)) (emphasis added) ("A violation of § 1981's equal benefit clause . . . requires that at least some of Defendants' challenged actions *constituted a tort*."). Yet this Court need not decide whether a full and equal benefit claim requires a separately alleged violation of state law, a question that

was not presented below and certainly has not been decided by the lower courts. Instead, the applicability of this requirement would be an appropriate topic for remand after this Court decides whether state action is a threshold element of every full and equal benefit claim.

In any event, even assuming that Mr. Elmore must have alleged an "independently actionable violation of state law," *id.*, Mr. Elmore's complaint alleged facts that would give rise to numerous state law causes of action against Respondent and its employees. To start, Mr. Elmore alleged as separate claims for relief the torts of negligent supervision and negligent training under Missouri law. See *Garrett* v. *Albright*, No. 06-CV-4137-NKL, 2008 WL 795621, at *5 (W.D. Mo. Mar. 21, 2008) (citing *G.E.T. ex rel. T.T.* v. *Barron*, 4 S.W.3d 622, 624 (Mo. Ct. App. 1999)).

In addition, Mr. Elmore alleged that Respondent's store manager falsely accused him of shoplifting in the presence of at least one other person. These facts could support a claim of defamation or intentional infliction of emotional distress. See *Hester* v. *Barnett*, 723 S.W.2d 544, 556 (Mo. Ct. App. 1987) (finding that false imputations of crime are per se defamatory); *Polk* v. *Inroads/St. Louis, Inc.*, 951 S.W.2d 646, 648 (Mo. Ct. App. 1997) ("The tort of intentional infliction of emotional distress has four elements: (1) the defendant must act intentionally or recklessly; (2) the defendant's conduct must be extreme and outrageous; and (3) the conduct must be the cause (4) of severe emotional distress."). Mr. Elmore also alleged that the store manager called the police and reported Mr. Elmore for shoplifting because of Mr. Elmore's race. These allegations might support a plausible criminal violation of a Missouri law against making false police reports. See Mo. Rev. Stat. § 575.080 (2017); see

also *Brandt* v. *City of La Grange*, No. 2:15CV7 ERW/HEA, 2015 WL 1542086, at *3 (E.D. Mo. Apr. 7, 2015) ("[Section] 575.080 creates the crime of making a false report, but does not create a separate civil or private cause of action."). Any one of these state law claims would satisfy Respondent's alleged requirement. But none of these issues was preserved below and provide no reason to forgo deciding the fundamental state action question that barred Mr. Elmore's claims from going forward at the outset. This Court should review that holding and allow respondent's 13th hour arguments to be considered on remand after the complaint is reinstated.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

ARTHUR A. BENSON, II
JAMIE K. LANSFORD
ARTHUR BENSON & ASSOCIATES
4006 CENTRAL STREET
Kansas City, MO 64111
(816) 531-6565

SARAH O'ROURKE SCHRUP
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063

CARTER G. PHILLIPS *
JEFFREY T. GREEN
MATTHEW J. LETTEN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Petitioner

* Counsel of Record

September 12, 2017