No. 13-998

In the Supreme Court of the United States

CHENELL HAMMOND,

Petitioner,

v.

KMART CORP. and SEARS HOLDINGS CORP.,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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STATUTE

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REPLY BRIEF FOR PETITIONER

In 1991, Congress amended 42 U.S.C. § 1981 to make clear that it prohibits discrimination during the performance of a contract, not merely discrimination that blocks the formation of a contractual relationship. Pet. 20-21. Ever since, there has been no doubt that racially discriminatory harassment *in the workplace* violates the statute, because such harassment is discrimination during the performance of a contract. Pet. 21-22. Yet five circuits interpret the statute differently when it comes to racially discriminatory harassment *in the retail setting*. In these five circuits, in the retail setting, the only discrimination that violates § 1981 is discrimination that blocks the formation of a contractual relationship. Pet. 11-15. These five circuits are interpreting § 1981, in the retail setting, as if Congress had never amended it.

The statute itself does not distinguish between employment contracts and retail contracts. It bans the same discrimination during the performance of all contracts alike. In these five circuits, the text of § 1981 now has different meanings depending on whether the harassment takes place at work or in a store. During the performance of a contract between an employer and an employee, a supervisor's racial harassment violates the statute, even if it does not prevent the employee from entering into a contractual relationship. But during the performance of a contract between a store and a customer, a store clerk's racial harassment violates the statute only if it prevents the customer from entering into a contractual relationship.

This is such a strange way to interpret the statute that it would be surprising if all circuits subscribed to it. In fact, they do not. The Third and Sixth Circuits correctly hold that the racially discriminatory harassment of a contractual customer violates § 1981 whether or not such harassment "blocks" or "thwarts" the formation of a contract. In these circuits, a contractual customer who is subjected to racial harassment states a claim under the statute even if she otherwise successfully completes the transaction. Pet. 15-18.

Respondents suggest that the decision below is compelled by *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470 (2006), Br. in Opp. 3-5, and that the certiorari petition misstates the law in the Third and Sixth Circuits, Br. in Opp. 7-11. These suggestions are incorrect.

1. To the extent *Domino's Pizza* has any bearing on the Question Presented, it supports the view of the Third and Sixth Circuits, not the view of the five circuits that have added the extra-textual "thwarting" requirement. In *Domino's Pizza*, the Court held that to state a claim under § 1981, the plaintiff himself must have a contractual relationship with the defendant. *Domino's Pizza*, 546 U.S. at 476. The Court clarified that the statute does not prohibit discrimination against the agents of contractual parties, but only discrimination against the contractual parties themselves. *Id.* at 476-77. The holding of *Domino's Pizza* thus has no bearing on our case, because Chenell Hammond's contract with Kmart was on her own behalf, not as an agent for another. Nor

does the holding of *Domino's Pizza* have any bearing on any of the other cases that make up the circuit split, all of which involved customers contracting for themselves rather than as agents.

Respondents rely, not on the holding of *Domino's Pizza*, but on two sentences from the Court's opinion. One reads: "Any claim brought under § 1981, therefore, must initially identify an impaired 'contractual relationship,' § 1981(b), under which the plaintiff has rights." *Id.* at 476. The other reads: "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." *Id.* In context, these passages simply underscore the holding of *Domino's Pizza* that § 1981 only protects a plaintiff who has a *contract* (actual or proposed) with the defendant. Neither these sentences, nor any other part of *Domino's Pizza*, give any support to the "thwarting" requirement that has been imposed by five circuits.

If these passages have any relevance to the Question Presented, they support the view of the Third and Sixth Circuits, because they make clear that discrimination need not block the formation of a contractual relationship to be actionable under § 1981. Discrimination is also actionable if it "impairs an existing contractual relationship"—for instance, if it impairs the relationship by causing one of the contracting parties to be subjected to racial harassment.

2. Respondents contend that the Third Circuit has switched to the other side of the split, Br. in Opp. 8-9, and that the law stated in Sixth Circuit opinions is mere dictum, Br. in Opp. 10-11. Neither of these claims is correct.

a. In *Brown v. Philip Morris Inc.*, 250 F.3d 789 (3d Cir. 2001), the lone case respondents cite as evidence of the Third Circuit's change of heart, the court in fact reaffirmed its long-held view that § 1981 bars discrimination against a customer even where such discrimination does not block the formation of a contractual relationship. *Brown* was an unsuccessful lawsuit alleging that the marketing of menthol cigarettes to African-Americans violated § 1981. *Id.* at 793-94. The Third Circuit held that the plaintiffs were not making any of the kinds of claims that are actionable under the statute. They were not claiming "that they have been deprived by defendants of the right to contract for, purchase, own or use either menthol or non-menthol cigarettes." *Id.* at 797. They were not claiming that "defendants have engaged in a discriminatory refusal to deal with African-Americans." *Id.* And—in a reaffirmation of the principle that discrimination is actionable even where it does not block the formation of a contract—the Third Circuit noted that the plaintiffs were not claiming "that defendants have dealt with customers on differing terms on the basis of race." *Id.*

Brown can thus hardly be read to overrule *Hall v. Pennsylvania State Police*, 570 F.2d 86, 92 (3d Cir. 1978), in which the Third Circuit held that § 1981 is violated by offering "services under different terms

dependent on race," even where the difference consisted simply of "disparaging treatment" and the customer otherwise successfully completed his transaction. *Brown* does not purport to overrule *Hall*. It does not even mention *Hall*. The Third Circuit has not crossed over to the other side of the split.

b. In two cases, the Sixth Circuit has held that under § 1981, customers may "establish a *prima facie* case of discrimination by showing that they received service in a 'markedly hostile manner … [that] a reasonable person would find objectively discriminatory.'" *Keck v. Graham Hotel Sys., Inc.*, 566 F.3d 634, 641 (6th Cir. 2009) (quoting *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 872 (6th Cir. 2001). In both cases, the Sixth Circuit applied this rule to the facts at hand, and determined that the customers had established prima facie cases.

In *Christian*, the Sixth Circuit undertook a thorough analysis of the appropriate standard for a prima facie case under § 1981 in the retail setting. In a painstaking discussion that occupies seven pages of the Federal Reporter, *Christian*, 252 F.3d at 867-73, the Sixth Circuit weighed the pros and cons of several alternative standards before determining that the proper standard is one that allows a customer to plead a prima facie case by alleging that she was either (a) deprived of services that similarly situated white people received, or (b) treated in a hostile and discriminatory manner. *Id.* at 872. This was hardly a stray comment or a passing dictum. Rather, it was a thoughtful and deliberate statement of the law.

After elaborating this standard, the Sixth Circuit applied it to the facts of the case, in just as thorough a manner. *Id.* at 873-80. The Sixth Circuit concluded at the end of this portion of its opinion that under its standard "Christian raised a genuine issue of fact as to whether she received services in a markedly hostile manner and in a manner which a reasonable person would have found objectively discriminatory." *Id.* at 878. Respondents thus err in dismissing *Christian* as merely "suggest[ing]" circumstances under which a customer "might be able to state a claim under Section 1981 against a retailer." Br. in Opp. 10. The Sixth Circuit genuinely disagrees with the five circuits that have required customers to allege that they were thwarted in their efforts to enter into a contract.

Any doubt on this score was removed in *Keck*, where the Sixth Circuit again explicitly applied its "markedly hostile manner" standard to the facts of the case. In *Keck*, the Sixth Circuit once again explained that there are two ways customers can state a prima facie case under § 1981—by alleging that "they were denied the right to enter into a contract for such services while similarly situated persons outside the protected class were not, or [that] they were treated in such a hostile manner that a reasonable person would find it objectively discriminatory." *Keck*, 566 F.3d at 639. The Sixth Circuit held that the *Keck* plaintiffs had stated a prima facie case in both ways. First, the plaintiffs alleged that they had been deprived of services on a discriminatory basis. *Id.* at 640-41. And second, they alleged that they had been treated in a markedly hostile manner that a

reasonable person would find discriminatory. *Id.* at 641.

The Third and Sixth Circuits have thus refrained from imposing the extra-textual "thwarting" requirement that five other circuits have imposed in the retail setting. Indeed, the First Circuit has recognized the existence of this conflict on three separate occasions, including in the decision below. Pet. 11. So have several commentators. Pet. 10-11. The conflict is real.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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