UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-2180

Courtney Saunders

Appellant

v.

Kyle Thies, individually and in his official capacity as a law enforcement officer for the Des Moines, IA Police Dept., et al.

Appellees

Appeal from U.S. District Court for the Southern District of Iowa - Central
(4:19-cv-00191-JAJ)

ORDER

The petition for rehearing *en banc* is denied. The petition for panel rehearing is also denied.

Chief Judge Smith, Judges Kelly, Erickson, and Grasz would grant the petition for rehearing *en banc*.

GRASZ, Circuit Judge, with whom SMITH, Chief Judge, joins, dissenting.

Because I believe this case presents important issues that should be addressed by the court sitting *en banc*, I would grant the petition for rehearing.

One issue is the applicable standard for equal protection claims alleging selective law enforcement based on race. When the district court granted summary judgment to the defendants on the plaintiff's equal protection claims alleging racially discriminatory law enforcement it did so by relying on and applying a test that requires the challenged enforcement action to have been undertaken "solely on the basis of race." I question whether this is an erroneous standard. Long before *Clark v. Clark*, 926 F.3d 972 (8th Cir. 2019) and *Gilani v. Matthews*, 843 F.3d 342 (8th Cir. 2016), this court held that claimants must only show the challenged enforcement action was

"motivated by a discriminatory purpose." *United States v. Bell*, 86 F.3d 820, 823 (8th Cir. 1996). *See also Johnson v. Crooks*, 326 F.3d 995, 1000 (8th Cir. 2003); *United States v Brown*, 9 F.3d 1374, 1376 (8th Cir. 1993). Not only does this test pre-date the more recent formulation, but it seems to be consistent with Supreme Court precedent. *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *United States v Armstrong*, 517 U.S. 456, 465 (1996).

The formulation of the applicable standard is of material importance to claimants. The difference between "solely on the basis of race" and "motivated by" race could be game-changing. When it comes to qualified immunity analysis, the first prong of the analysis requires identification of a constitutional violation and the second entails a determination of whether the right alleged to have been violated is "clearly established." If race must be the "sole" basis of allegedly discriminatory law enforcement, an equal protection claim will rarely ever succeed. As in a Fourth Amendment unreasonable seizure claim, all that a rogue officer motivated by race would need to do is identify some other objectively sufficient justification for a stop—perhaps a small crack in a windshield or a defective license plate light bulb. *See United States v. Benitez*, 613 F. Supp. 2d 1099, 1101 (S.D. Iowa 2009) ("[E]ven if the decision to initiate a traffic stop was based upon a defendant's race, no Fourth Amendment violation has occurred so long as probable cause existed for the stop."). The "sole basis" test would appear to improperly morph equal protection analysis into something akin to Fourth Amendment review.

The question may be asked whether this is the ideal case in which to address this long-festering issue. Maybe not. But if not now, when? This uncertainly has gone unaddressed by our court for far too long, leaving both the public and the district courts to guess what the law is. Some might also point out this has all-to-familiar consequences for the second prong of qualified immunity analysis. How can the law ever be clearly established if we refuse to clarify the correct legal standard? From the public's perspective this may produce a cynical perception that the law is a "heads I lose, tails you win" game. This has a necrotizing effect on the rule of law. Our court

should give no credence to the notion that—however rare—selective enforcement of the law for "driving while black" is in any way tolerated or systematically protected by qualified immunity.

Perhaps there is some very reasonable response to all this. If so, I say that is all the more reason the case should be re-heard and the issues resolved in a reported *en banc* opinion.

September 12, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans