NO. 21-15970

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TROY K. SEGUIRANT,
Defendant-Appellant,

v.

HITOSHI YOSHIKAWA,
Plaintiff-Appellee.

APPEAL
From the United States District Court for the District of Hawai‘i
Civil No. 18-00162 JAO-RT

APPELLANT’S PETITION FOR REHEARING EN BANC

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RULE 35.1 STATEMENT

En banc review is warranted because this case "involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue." Fed. R. App. P. 35(b)(1)(B). Remarkably, the panel decision conflicts with published decisions of every other geographic circuit—eleven in total. The panel applied binding circuit precedent recognizing an implied cause of action against state actors under 42 U.S.C. § 1981. *See* Op. 14 (citing *Federation of African-American Contractors v. City of Oakland*, 96 F.3d 1204, 1210–14 (9th Cir. 1996) ("*Federation*")). As the panel noted, however, "most circuits" have "den[ied] a private right of action against state actors." *Id.* Indeed, every other geographic circuit has concluded that no such private right of action exists. *See, e.g.*, *Duplan v. City of New York*, 888 F.3d 612, 620 & n.2 (2d Cir. 2018) (noting that "[e]very subsequent Circuit to consider the issue, however, has declined to follow *Federation*'s reasoning").

In addition to conflicting with decisions of every other circuit, *Federation* is inconsistent with this Court's recent jurisprudence. *Federation* recognized an implied cause of action based on the four-factor test of *Cort v. Ash*, 422 U.S. 66 (1975). However, following *Federation*, the Supreme Court tightened the test for recognizing implied causes of action in *Alexander v. Sandoval*, 532 U.S. 275 (2001). Post-*Sandoval* decisions of this Court have recognized that *Cort*'s framework is no

longer good law. *See, e.g.*, *Segalman v. Southwest Airlines Co.*, 895 F.3d 1219, 1224 (9th Cir. 2018).

Federation is wrongly decided, and this case is a flawless vehicle for reconsidering it. Rehearing en banc is warranted to bring this Court into alignment with its sister circuits and harmonize this Court's case law.

BACKGROUND

A. Legal background

Title 42, Section 1981(a) provides as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

That provision was enacted in the Civil Rights Act of 1871. Until 1991, § 1981 consisted of that provision only.

Section 1981 has long been understood to bar racially discriminatory state action. *See, e.g.*, *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964). Additionally, in a series of decisions culminating in *Runyon v. McCrary*, 427 U.S. 160 (1976), the Supreme Court held that § 1981 "reaches purely private acts of racial discrimination." *Id.* at 170. Although § 1981 includes no express cause of action, the Court also recognized an implied cause of action to enforce § 1981 against

private defendants. *See Johnson v. Railway Express Agency, In.*, 421 U.S. 454, 459-60 (1975) (stating that "§ 1981 affords a federal remedy against discrimination in private employment on the basis of race").

In 1989, the Supreme Court issued two decisions concerning § 1981 that are relevant to this case. First, in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), the Supreme Court reaffirmed *Runyon*'s holding that "§ 1981 prohibits racial discrimination in the making and enforcement of private contracts." *Id.* at 172. However, the Court held that "§ 1981 does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations." *Id.* at 171.

One week later, in *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989), the Supreme Court held that although § 1981 supplied an implied cause of action against *private defendants*, it did not supply an implied cause of action against *state actors*. Instead, "the express cause of action for damages created by § 1983 constitutes the exclusive federal remedy for violation of the rights guaranteed in § 1981." *Id.* at 733. As the Court explained, "[t]hat we have read § 1 of the 1866 Act to reach private action and have implied a damages remedy to effectuate the declaration of rights contained in that provision does not authorize us to do so in the context of the 'state action' portion of § 1981, where Congress has established its own remedial scheme." *Id.* at 731.

In 1991, Congress enacted the Civil Rights Act of 1991, which amended § 1981. It relabeled former § 1981 as § 1981(a), and added new sections § 1981(b) and § 1981(c), as follows:

> (b) "Make and enforce contracts" defined
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) Protection against impairment
>
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

As noted in the legislative history, subsection (b) overrode *Patterson*'s holding that § 1981 did not apply to post-formation racial harassment, while subsection (c) codified the holdings of *Runyon* and *Patterson* that § 1981 applied to both private and governmental conduct. H.R. Rep. No. 102–40(I) at 92, 141 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 630, 670, 1991 WL 70454.

Following these amendments, § 1981 plaintiffs began to argue that the addition of § 1981(b) and (c) overrode not only *Patterson*, but also *Jett*. Their theory was that the addition of § 1981(b) and (c) established an implied cause of action to sue state officials under § 1981, notwithstanding the Supreme Court's rejection of such a private cause of action in *Jett*.

The first federal appellate court to hear this argument was the Fourth Circuit, which rejected it, finding that the 1991 amendments to the Civil Rights Act "did not purport to overrule *Jett*'s holding." *Dennis v. County of Fairfax*, 55 F.3d 151, 156 n.1 (4th Cir. 1995).

In *Federation of African-American Contractors v. City of Oakland*, 96 F.3d 1204 (9th Cir. 1996), this Court reached the opposite conclusion. The two-judge majority opinion[1] held that "the Civil Rights Act of 1991 creates an implied cause of action against state actors under 42 U.S.C. § 1981, and thus statutorily overrules *Jett*'s holding that 42 U.S.C. § 1983 provides the exclusive federal remedy against municipalities for violation of the civil rights guaranteed by 42 U.S.C. § 1981." *Id.* at 1205. The Court acknowledged that it was departing from the Fourth Circuit's view in *Dennis*. *Id.* at 1209. The Court applied the four-part test of *Cort v. Ash*, 422 U.S. 66 (1975), which "outlined the factors to be considered in determining whether a statute implies a private cause of action for damages." *Federation*, 96 F.3d at 1210. The Court found that the 1991 legislative amendments "plainly confer[] a right in favor of the plaintiff"; the House Committee reports "clearly contemplate that § 1981 rights are to receive parallel protections against state actors and private actors"; "an implied cause of action … complements—rather than clashes with—the legislative

[1] The third panel member would have resolved the case on other grounds. 96 F.3d at 1216 (Beezer, J., concurring).

scheme"; and "[p]rivate causes of action against state actors who impair federal civil rights have not been traditionally relegated to state law." *Id.* at 1212–15.

In the subsequent years, all ten other geographic circuits have rejected *Federation* and held that the 1991 amendments to § 1981 did not override *Jett*. *Buntin v. City of Boston*, 857 F.3d 69, 72–75 (1st Cir. 2017); *Duplan v. City of New York*, 888 F.3d 612, 620-21 & n.2 (2d Cir. 2018); *McGovern v. City of Philadelphia*, 554 F.3d 114, 120 (3d Cir. 2009); *Oden v. Oktibbeha Cty.*, 246 F.3d 458, 463-64 (5th Cir. 2001); *Arendale v. City of Memphis*, 519 F.3d 587, 598–99 (6th Cir. 2008); *Campbell v. Forest Preserve Dist. of Cook Cty.*, 752 F.3d 665, 670–71 (7th Cir. 2014); *Onyiah v. St. Cloud State University*, 5 F.4th 926, 929–30 (8th Cir. 2021); *Bolden v. City of Topeka*, 441 F.3d 1129, 1136–37 (10th Cir. 2006); *Butts v. Cty. of Volusia*, 222 F.3d 891, 894 (11th Cir. 2000); *Brown v. Sessoms*, 774 F.3d 1016, 1021 (D.C. Cir. 2014).

B. Proceedings in this case

According to Plaintiff Hitoshi Yoshikawa's Third Amended Complaint,[2] Yoshikawa bought waterfront property in 2014 and hired an architect, James Schmit, and contractor, Greg Talboys, to secure design plans and permits to renovate the

[2] The panel stated: "Because this case was decided at the motion to dismiss stage, we have taken the facts from the Third Amended Complaint (TAC) and, for purposes of this appeal will assume them to be true." Op. 5. Consistent with the panel opinion, Defendants-Appellants will recite the facts as alleged in the Third Amended Complaint, but does not admit that any of those facts are true.

property. Op. 5. Yoshikawa's plans were complicated by the fact that a nonconforming structure was on the property. *Id.*

On May 6, 2016, Defendant Troy Seguirant issued a Notice of Violation, alleging that Yoshikawa's project inappropriately reconstructed the nonconforming structure without a new building permit. Op. 6. On March 14, 2017, Seguirant issued a Notice of Order stating a new building permit was required. Op. 7.

In October 2016, the acting director of the Department of Planning and Permitting (DPP) issued a letter stating that a revised proposal from Schmit was acceptable, and authorizing Yoshikawa to submit an application for a permit. Op. 6. Yoshikawa revised and resubmitted new plans in December 2016. *Id.* Yoshikawa subsequently obtained an Amended Building Permit. Op. 7.

On February 2, 2017, Talboys allegedly overheard Seguirant telling a neighbor, "I keep shutting them down but f--- [expletive] these Haoles don't listen, that's why I try [sic] keep it local." *Id.* "Haoles" is allegedly a derogatory term for Caucasian people. Op. 6 n.2.

In April 2017, Seguirant issued a second Notice of Violation, repeating the initial allegations and stating that Yoshikawa submitted false information to obtain

the Amended Building Permit. Op. 7. In 2018, the Building Board of Appeals[3] determined that Yoshikawa had failed to obtain the appropriate permit. *Id.*

Yoshikawa filed this suit in March 2018. In his Third Amended Complaint, as relevant here, Yoshikawa asserted claims under 42 U.S.C. § 1981 and § 1983 against Seguirant and the City and County of Honolulu.

Seguirant filed a motion to dismiss, which the district court granted in part and denied in part. The district court dismissed Yoshikawa's claims under 42 U.S.C. § 1983, finding that he did not adequately allege Due Process or Equal Protection violations. *Yoshikawa v. City and County of Honolulu*, 542 F. Supp. 3d 1099, 1123–24 (D. Haw. 2021). However, the court denied the motion to dismiss with respect to Yoshikawa's § 1981 claim, finding that Yoshikawa adequately alleged that "Seguirant, motived by racial animus, tried to prevent the Project from proceeding by engaging in multiple inspections and issuing multiple violations." *Yoshikawa v. City and County of Honolulu*, 542 F. Supp. 3d 1099, 1111 (D. Haw. 2021).

The court further held that Seguirant was not entitled to qualified immunity. *Id.* at 1112. The court acknowledged the "circuit split as to whether Section 1981 provides a remedy against government officials." *Id.* But it found that "[t]he existence of a circuit split regarding the viability of a claim does not entitle a

[3] The Third Amended Complaint and panel opinion refer to the "Board of Building Appeals," but the correct title is "Building Board of Appeals." *See* https://www.honolulu.gov/boards-and-commissions.

government official to qualified immunity where the claim is recognized in the circuit in which the action is maintained." *Id.* "Thus, the fact that other circuits may not recognize a claim under Section 1981 against government officials does not entitle Seguirant to qualified immunity." *Id.*[4]

Seguirant appealed the denial of qualified immunity. A panel of this Court affirmed. The panel traced the history of § 1981 and explained that in *Jett*, the Supreme Court "held that § 1981 did not create an action for damages against state actors." Op. 14. Congress amended § 1981 in 1991. *Id.* As the panel explained, "most circuits have continued to follow *Jett* and deny a private right of action against state actors," but the Ninth Circuit had "held that the Civil Rights Act of 1991 statutorily overruled *Jett*." Op. 14 (citing *Federation*, 96 F.3d at 1210–14). The Ninth Circuit "thus recognize[s] a § 1981 damages action against state actors." *Id.*

Bound by *Federation*, the panel held that Yoshikawa stated a § 1981 claim against Seguirant. Op. 18. It further held that Seguirant was not entitled to qualified immunity, citing authority that "a public official is not entitled to qualified immunity in a § 1981 case if he is accused of intentional racial discrimination." Op. 18. Although the panel disagreed with aspects of the district court's analysis, it nonetheless concluded that "the complaint stated a claim for racial discrimination

[4] The City filed a separate motion to dismiss, which was granted in part and denied in part. 542 F. Supp. 3d at 1123-24. The claims against the City are not relevant to this appeal.

under § 1981 based upon actions … that a reasonable government official would have known violated clearly established constitutional and statutory rights." Op. 22.

ARGUMENT

I. There is a widely acknowledged 11-1 circuit split on whether plaintiffs may sue state officials under 42 U.S.C. § 1981.

As explained above, the Ninth Circuit has held that Congress's 1991 amendments to § 1981 overturned *Jett* and resulted in an implied cause of action against state officials under § 1981. Each of the eleven other geographic circuits have held that *Jett* remains good law and no such implied cause of action exists.

This circuit split has been widely acknowledged. In *Federation*, this Court noted that the Fourth Circuit had reached the opposite conclusion. 96 F.3d at 1209. In subsequent decisions, the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits have all expressly acknowledged and rejected *Federation*. *Buntin*, 857 F.3d at 74; *Duplan*, 888 F.3d at 620; *McGovern*, 554 F.3d at 118; *Oden*, 246 F.3d at 463-64; *Arendale*, 519 F.3d at 596; *Campbell*, 752 F.3d at 670-71; *Onyiah*, 5 F.4th at 929; *Bolden*, 441 F.3d at 1136; *Butts*, 222 F.3d at 894; *Brown*, 774 F.3d at 1021.

Given the unusually large volume of out-of-circuit authority rejecting *Federation*, the en banc court should reconsider this issue afresh.

II. *Federation* conflicts with this Court's recent jurisprudence.

Federation's analysis is inconsistent not only with other circuits' decisions, but also with this Court's recent case law concerning implied private rights of action.

Federation relied on the four-part test of *Cort v. Ash*, 422 U.S. 66 (1975), which "outlined the factors to be considered in determining whether a statute implies a private cause of action for damages." *Federation*, 96 F.3d at 1210. *Federation* was decided five years prior to *Alexander v. Sandoval*, 532 U.S. 275 (2001). As this Court has recognized, *Sandoval* significantly narrows *Cort*'s framework for recognizing implied causes of action. *See, e.g.*, *Segalman v. Southwest Airlines Co.*, 895 F.3d 1219, 1224 (9th Cir. 2018) ("[I]n the wake of *Sandoval*, we evaluate whether an implied private cause of action exists under a statute by using ordinary tools of statutory interpretation, and we are not constrained by the *Cort* framework") (quotation marks omitted); *Logan v. U.S. Bank Nat. Ass'n*, 722 F.3d 1163, 1171 (9th Cir. 2013) (declining to apply *Cort*).

Federation is therefore premised on a legal framework that is no longer good law. Rehearing en banc is warranted to harmonize this Court's case law.

III. *Federation* is wrongly decided.

Federation is wrong. The 1991 amendments to § 1981 did not overturn *Jett*.

Other circuits' decisions rejecting *Federation* have "coalesced around three cogent points." *Duplan*, 888 F.3d at 620. "First, there is no indication the legislative

history that Congress intended the 1991 amendments to overrule *Jett*." *Id.* Rather, Congress intended for those amendments to codify Supreme Court decisions holding that § 1981 applies to private conduct, while overruling *Patterson*'s holding that § 1981 is inapplicable to post-formation conduct. *Id.*; *see also, e.g.*, *Buntin*, 857 F.3d at 75 (similar analysis of legislative history); *Campbell*, 752 F.3d at 671 (similar).

Second, "[b]ecause § 1983 already provides a remedy against state actors, there is no reason to infer from the rights-conferring language of § 1981(c) that it creates an additional, and duplicative, remedy." *Duplan*, 888 F.3d at 620–21; *see also, e.g.*, *Buntin*, 857 F.3d at 75 (similar); *McGovern*, 556 F.3d at 118 (similar).

Third, as noted above, *Federation* relied on the four-part test of *Cort v. Ash*. After *Sandoval*, *Federation*'s justifications for recognizing an implied cause of action no longer hold water. *See Duplan*, 888 F.3d at 21 ("[S]ince *Federation* was decided, the Supreme Court has increasingly discouraged the recognition of implied rights of actions without a clear indication of congressional intent."); *McGovern*, 554 F.3d at 118–19 ("In relying on *Cort*, however, the Ninth Circuit failed to recognize, as we have done previously, that *Cort* has been 'altered ... virtually beyond recognition' by subsequent decisions of the Supreme Court.").

Because *Federation* is wrong, the en banc court should reconsider it.

IV. This issue is practically important.

The Court should reconsider this question en banc because it is practically significant to states and local governments and their employees. First, as the volume of appellate precedent attests, the issue recurs frequently—any time a plaintiff sues a state or local government official for racial discrimination, the plaintiff can tack on a § 1981 claim, increasing the burden and complexity of litigation.

Moreover, *Federation* allows plaintiffs to use § 1981 as a mechanism to evade limitations on suits brought under § 1983. For example, the statute of limitations for § 1983 suits against state officials is supplied by state law, and in the case of Hawai'i, it is two years. *See, e.g.*, *Bird v. Department of Human Services*, 935 F.3d 738, 743 (9th Cir. 2019). By contrast, the statute of limitations for § 1981 suits against state officials is four years. *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382 (2004) (statute of limitations for § 1981 claims "made possible by" the 1991 amendments is four years); *Duplan*, 888 F.3d at 619 (noting difference in statutes of limitations). Thus, plaintiffs can rescue time-barred claims under § 1983 by styling them as § 1981 claims. This is exactly what the Supreme Court sought to avoid in *Jett* when it held that § 1983 "provides the exclusive federal damages remedy for the violation of the rights guaranteed by § 1981 when the claim is pressed against a state actor." 491 U.S. at 735. Rehearing en banc is warranted to avoid imposing such a burden on state and local governments.

V. This case is an ideal vehicle.

This case presents the Court with an ideal vehicle to reconsider *Federation*.

First, this case arises on appeal from a denial of qualified immunity. As this Court has stated, a defendant may challenge the availability of a cause of action when appealing the denial of qualified immunity. *See Solida v. McKelvey*, 820 F.3d 1090, 1093–94 (9th Cir. 2016); *Rodriguez v. Swartz*, 899 F.3d 719, 735 (9th Cir. 2018), *vacated on other grounds*, 140 S. Ct. 1258 (2020). This case is therefore a procedurally proper vehicle for reconsidering *Federation*.

Second, the issue is squarely presented. The district court and the panel both noted the circuit split but nonetheless stated they were bound by *Foundation*. *Yoshikawa*, 542 F. Supp. 3d at 1112; Op. 14.

Third, the issue is outcome-determinative as to Seguirant. The district court dismissed Yoshikawa's § 1983 claims against Seguirant with prejudice. 542 F. Supp. 3d at 1123–24. Yoshikawa did not bring any other claims against Seguirant.

For these reasons, if the Court is inclined to reconsider *Federation*, it should do so in this case.

CONCLUSION

The petition for rehearing en banc should be granted.

DATED: Honolulu, Hawai‘i, September 7, 2022.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for Rehearing/Responses

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9th Cir. Case Number(s) 21-15970

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/response to petition is *(select one)*:

[ ] Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words: _____.**
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OR

[**X**] In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature s/ Robert M. Kohn **Date** 9/7/2022
*(use "*s/[typed name]*" to sign electronically-filed documents)*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Appellant's Petition for Rehearing En Banc

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*(use "*s/[typed name]*" to sign electronically-filed documents)*

No. 21-15970

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TROY K. SEGUIRANT,

Defendant-Appellant,

vs.

HITOSHI YOSHIKAWA,

Plaintiff-Appellee.

On Appeal from the United States District Court for the District of Hawai'i,
Honorable Jill A. Otake, United States District Judge
(Civil No. 18-00162 JAO-RT)

PLAINTIFF-APPELLEE HITOSHI YOSHIKAWA'S RESPONSE TO DEFENDANT-APPELLANT'S PETITION FOR REHEARING EN BANC

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I. DEFENDANT-APPELLANT'S PETITION LACKS THE REQUIRED STATEMENT REQUIRED BY FRAP 35(b) AND SHOULD BE DENIED

FRAP 35(b) provides:

> **(b) Petition for Hearing or Rehearing En Banc.** A party may petition for a hearing or rehearing en banc.
>
> **(1)** The petition must begin with a statement that either:
>
> (A) **the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions**; or
>
> (B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

(Bold emphasis added). Here, the Defendant-Appellant's Petition for rehearing en banc does not contain the required FRAP 35(b) statement that the Opinion of this Court either conflicts with a decision of the United States Supreme Court, or conflicts with a decision "of the court to which the petition is addressed". As such, the Petition for rehearing en banc should be denied.

Further, Defendant-Appellant's argument that this Court's decision allegedly conflicts with other circuits is not only incorrect but does not allow for en banc rehearing under FRAP 35, the decision must conflict with either a United States

Supreme Court decision or with another decision *of the Ninth Circuit Court of Appeals*. This is why Defendant-Appellant's Petition lacks the required statement since this Court's Opinion (Dkt. No. 46).

II. THERE ARE NO VALID GROUNDS FOR EN BANC REVIEW

This Court's Opinion filed July 25, 2022 carefully considered the Defendant-Appellant's appeal of the denial of qualified immunity. (Dkt. No. 43). There are no valid grounds for rehearing this Court's carefully decided Opinion (Dkt. No. 43) en banc under Ninth Circuit Court Rule 35-1.

Rule 35-1 provides in pertinent part:

> When the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity, the existence of such conflict is an appropriate ground for petitioning for rehearing en banc.

There is no direct conflict with this Court's Opinion herein with another court of appeals which "substantially affects a rule of national uniformity". The Defendant-Appellant attempts to manufacture such a dispute stating:

> The panel applied binding circuit precedent recognizing an implied cause of action against state actors under 42 U.S.C. § 1981. *See* Op. 14 (citing *Federation of African-American Contractors v. City of Oakland*, 96 F.3d 1204, 1210–14 (9th Cir. 1996) ("*Federation*")). As the panel noted, however, "most circuits" have "den[ied] a private right of action against state actors." *Id.*

(Dkt. 46 at 6). However, this Court relied on "the Civil Rights Act of 1991, which added § 1981(c) to the statute." As this Court stated: "That subsection provides

that '[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law." 42 U.S.C. § 1981(c)." This Court relied on direct federal statutory authority in recognizing the Plaintiff-Appellee's cause of action, and United States Supreme Court binding authority recognizing the Plaintiff-Appellee's right to maintain a cause of action under 42 U.S.C. § 1981, to wit: *Comcast Corp. v. Nat'l Ass'n Afr. Am.-Owned Media*, 140 S.Ct. 1009, 1014 (2020) and *Johnson v. v. Ry Express Agency*, 421 U.S. 454, 459-60 (1975). (Dkt. No. 43 at 15).

Thus, this is not a situation where there is a split of authority amongst the Circuits and the United States Supreme Court hasn't spoken, or there is no Federal legislation expressly authorizing the cause of action.

This Court's Opinion also expressly rejects the Defendant-Appellant's argument, relying on *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), "that there is a circuit split over the applicability of the fourth element of the test in non-employment cases". (Dkt. No. 43 at 20). As this Court stated, *McDonnell Douglas* is not the "proper measure of a § 1981 claim at the motion to dismiss stage." Id. Thus, Defendant-Appellant conflates a split of authority regarding an evidentiary burden for presenting a certain type of evidence in opposition to summary judgment, with a pleading requirement. (Dkt. No. 43 at 20-21). This Court, following *Swierkiewicz*, stated: "we have made clear that the evidentiary

strictures of *McDonnell Douglas* do not determine the sufficiency of a § 1981 claim." (Dkt. 43 at 21).

III. CONCLUSION

Seguirant was properly denied qualified immunity for the justified and logical reasons set forth herein affirmed by the District Court's order. ER 9. Respectfully, this Court should affirm the District Court's ruling and remand this case for further proceedings.

DATED: Honolulu, Hawaii, October 18, 2022.

By: /s/ *Paul V.K. Smith*_____
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