APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18-35551

D.C. No. 3:15-cv-01277-SB

[Filed: November 18, 2021]

CONSTANCE GEORGE,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
PATRICIA BARCROFT; et al.,	)
	)
Defendants-Appellees.	)

MEMORANDUM[*]

Appeal from the United States District Court
for the District of Oregon
Stacie F. Beckerman, Magistrate Judge, Presiding

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Argued and Submitted November 9, 2021[**]
Portland, Oregon

Before: GRABER and CHRISTEN, Circuit Judges, and R. COLLINS,[***] District Judge.

Constance George appeals the district court's judgment in favor of Patricia Barcroft, House of Hope Recovery, Bridges to Change, Inc., and Washington County Department of Housing Services (Washington County). George alleges defendants discriminated against her on the basis of her race and religion. We lack jurisdiction to review George's appeal from the dismissal of her claims against Bridges to Change and Washington County. We affirm the district court's judgment as to George's claims against Barcroft and House of Hope.

We review de novo the timeliness of a notice of appeal, *United States v. Withers*, 638 F.3d 1055, 1061 (9th Cir. 2011), and a district court's order granting summary judgment, *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1156 (9th Cir. 2013). We may consider jurisdictional questions at any time. *See Rowe v. United States*, 633 F.2d 799, 800 (9th Cir. 1980).

[**] The panel heard oral argument on Plaintiff-Appellant's claims against Patricia Barcroft and House of Hope Recovery. But the panel unanimously concluded that, as to Plaintiff-Appellant's claims against Bridges to Change, Inc. and Washington County Department of Housing Services, the case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[***] The Honorable Raner C. Collins, United States District Judge for the District of Arizona, sitting by designation.

1. We have jurisdiction over George's claims on appeal if: (1) she appealed a "final decision[]," 28 U.S.C. § 1291; (2) her appeal was timely, *see Portland Fed. Emps. Credit Union v. Cumis Ins. Soc'y, Inc.*, 894 F.2d 1101, 1103 (9th Cir. 1990); and (3) she complied with "the notice required by Rule 3," *Smith v. Barry*, 502 U.S. 244, 248–49 (1992).

George indicated her intent to appeal the district court's April 20, 2018 judgment by filing a motion for pro bono counsel in the district court on May 21, 2018. The April 20, 2018 judgment was final because the district court had fully adjudicated George's claims and the judgment indicated finality as to all claims and parties. *See Casey v. Albertson's Inc.*, 362 F.3d 1254, 1258 (9th Cir. 2004); *see also Hall v. City of Los Angeles*, 697 F.3d 1059, 1070 (9th Cir. 2012) ("Once a district court enters final judgment and a party appeals, . . . earlier, non-final orders become reviewable."). George's notice of appeal was timely because she filed her motion for pro bono counsel with the district court within 30 days after entry of the judgment. *See* Fed. R. App. P. 4(a)(1)(A). And because George's motion gave notice of her intent to appeal the court's final judgment, we construe her motion to be the "functional equivalent" of a formal notice of appeal. *Smith*, 502 U.S. at 248.

However, George did not serve her notice of appeal on Bridges to Change or Washington County. As such, she did not comply with the requirements of Federal Rule of Appellate Procedure 3 as to those two defendants. The purpose of a notice of appeal "is to ensure that the filing *provides sufficient notice* to other

parties and the courts." *Id.* (emphasis added); *see also In re Sweet Transfer & Storage, Inc.*, 896 F.2d 1189, 1193 (9th Cir. 1990) ("In prior cases, we have required the document in question to have been *served* upon the other parties."), *superseded in part by rule as stated in In re Arrowhead Ests. Dev. Co.*, 42 F.3d 1306 (9th Cir. 1994). Accordingly, we conclude that we lack jurisdiction over George's appeal of her claims against Bridges to Change and Washington County. We consider the merits of the appeal as to Barcroft and House of Hope.

2. George alleges the district court erred in granting summary judgment on her religious discrimination claims against House of Hope and Barcroft. We analyze Fair Housing Act "disparate treatment claims under Title VII's three-stage *McDonnell Douglas*/*Burdine* test." *Gamble v. City of Escondido*, 104 F.3d 300, 305 (9th Cir. 1997). To establish a disparate treatment claim, "the plaintiff must first establish a prima facie case." *Id.* The district court concluded George failed to establish a prima facie case because it found "no evidence in the record that Barcroft did not terminate a non-Jehovah's Witness resident under similar circumstances." Although the prima facie stage of the *McDonnell-Douglas* framework is "not onerous," George bore the burden to produce *some* evidence of the defendants' treatment of a similarly situated individual. *See Lyons v. England*, 307 F.3d 1092, 1112 (9th Cir. 2002).

On appeal, George offers a new theory of "reasonable inferences," but her theory is based on

evidence that was not presented to the district court.[1] We affirm the district court's order granting summary judgment in favor of House of Hope and Barcroft because George failed to present "any legitimate 'comparator' evidence on her religious discrimination claim," *Bodett v. CoxCom, Inc.*, 366 F.3d 736, 744 (9th Cir. 2004), and because her "reasonable inferences" theory relies on evidence she did not present to the district court.

3. George urges us to remand her discrimination claims to the district court. First, she contends the district court should consider whether the Fair Housing Act's religious exception, 42 U.S.C. § 3607(a), applies to Barcroft and House of Hope. Because we affirm the district court's decision that George did "not present[] any evidence of disparate treatment on the basis of religion," we decline to remand for the district court to consider this exception. George also requests remand for the district court to consider whether a new trial is warranted on her racial discrimination claim, but she fails to assert any colorable argument as to why remand of that claim is warranted. Accordingly, we decline to grant George's request for remand.

---

[1] George contends she had "no occasion" to present her "reasonable inferences" theory to the district court because the district court *sua sponte* addressed her failure to make a prima facie showing. However, George expressly argued in her opposition to Barcroft and House of Hope's motion for summary judgment that she had established a prima facie case pursuant to the Fair Housing Act, and she did not ask the district court for an opportunity to present more evidence.

AFFIRMED IN PART and DISMISSED IN PART.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

Case No. 3:15-cv-01277-SB

[Filed: July 29, 2020]

CONSTANCE GEORGE,	)
	)
Plaintiff,	)
	)
v.	)
	)
HOUSE OF HOPE RECOVERY; BRIDGES TO CHANGE, INC.; WASHINGTON COUNTY DEPARTMENT OF HOUSING SERVICES; and PATRICIA BARCROFT,	)
	)
Defendants.	)
	)

AMENDED JUDGMENT

Based on the Orders of the Court and the Verdict of the Jury,

Judgment is hereby entered in favor of all Defendants and against Plaintiff, and this case is dismissed.

DATED this 29th day of July, 2020.

/s/ Stacie F. Beckerman
HON. STACIE F. BECKERMAN
United States Magistrate Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18-35551

D.C. No. 3:15-cv-01277-SB
District of Oregon, Portland

[Filed: January 5, 2022]

CONSTANCE GEORGE,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
PATRICIA BARCROFT; et al.,	)
	)
Defendants-Appellees.	)

ORDER

Before: GRABER and CHRISTEN, Circuit Judges, and R. COLLINS,[*] District Judge.

The memorandum disposition filed on November 18, 2021 is amended, and the amended memorandum

[*] The Honorable Raner C. Collins, United States District Judge for the District of Arizona, sitting by designation.

disposition is filed concurrently with this order. The panel has unanimously voted to deny the petition for panel rehearing. The petition for panel rehearing (Dkt. 94) is DENIED. No future petitions for rehearing or rehearing en banc will be entertained.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18-35551

D.C. No. 3:15-cv-01277-SB

[Filed: January 5, 2022]

CONSTANCE GEORGE,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
PATRICIA BARCROFT; et al.,	)
	)
Defendants-Appellees.	)

AMENDED MEMORANDUM[*]

Appeal from the United States District Court
for the District of Oregon
Stacie F. Beckerman, Magistrate Judge, Presiding

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Argued and Submitted November 9, 2021[**]
Portland, Oregon

Before: GRABER and CHRISTEN, Circuit Judges, and R. COLLINS,[***] District Judge.

Constance George appeals the district court's judgment in favor of Patricia Barcroft, House of Hope Recovery, Bridges to Change, Inc., and Washington County Department of Housing Services (Washington County). George alleges defendants discriminated against her on the basis of her race and religion. We lack jurisdiction to review George's appeal from the dismissal of her claims against Bridges to Change and Washington County. We affirm the district court's judgment as to George's claims against Barcroft and House of Hope.

We review de novo the timeliness of a notice of appeal, *United States v. Withers*, 638 F.3d 1055, 1061 (9th Cir. 2011), and a district court's order granting summary judgment, *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1156 (9th Cir. 2013). We may consider jurisdictional questions at any time. *See Rowe v. United States*, 633 F.2d 799, 800 (9th Cir. 1980).

[**] The panel heard oral argument on Plaintiff-Appellant's claims against Patricia Barcroft and House of Hope Recovery. But the panel unanimously concluded that, as to Plaintiff-Appellant's claims against Bridges to Change, Inc. and Washington County Department of Housing Services, the case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[***] The Honorable Raner C. Collins, United States District Judge for the District of Arizona, sitting by designation.

1. We have jurisdiction over George's claims on appeal if: (1) she appealed a "final decision[]," 28 U.S.C. § 1291; (2) her appeal was timely, *see Portland Fed. Emps. Credit Union v. Cumis Ins. Soc'y, Inc.*, 894 F.2d 1101, 1103 (9th Cir. 1990); and (3) she complied with "the notice required by Rule 3," *Smith v. Barry*, 502 U.S. 244, 248–49 (1992).

George indicated her intent to appeal the district court's April 20, 2018 judgment by filing a motion for pro bono counsel in the district court on May 21, 2018. The April 20, 2018 judgment was final because the district court had fully adjudicated George's claims and the judgment indicated finality as to all claims and parties. *See Casey v. Albertson's Inc.*, 362 F.3d 1254, 1258 (9th Cir. 2004); *see also Hall v. City of Los Angeles*, 697 F.3d 1059, 1070 (9th Cir. 2012) ("Once a district court enters final judgment and a party appeals, . . . earlier, non-final orders become reviewable."). George's notice of appeal was timely because she filed her motion for pro bono counsel with the district court within 30 days after entry of the judgment. *See* Fed. R. App. P. 4(a)(1)(A). And because George's motion gave notice of her intent to appeal the court's final judgment, we construe her motion to be the "functional equivalent" of a formal notice of appeal. *Smith*, 502 U.S. at 248.

However, George did not provide adequate notice of an appeal from a judgment against Bridges to Change and Washington County. Therefore, she did not comply with the requirements of Federal Rule of Appellate Procedure 3 as to those two defendants. The purpose of a notice of appeal "is to ensure that the filing *provides*

sufficient notice to other parties and the courts." *Id.* (emphasis added); *see also In re Sweet Transfer & Storage, Inc.*, 896 F.2d 1189, 1193 (9th Cir. 1990) ("In prior cases, we have required the document in question to have been *served* upon the other parties."), *superseded in part by rule as stated in In re Arrowhead Ests. Dev. Co.*, 42 F.3d 1306 (9th Cir. 1994). Accordingly, we conclude that we lack jurisdiction over George's appeal of her claims against Bridges to Change and Washington County. We consider the merits of the appeal as to Barcroft and House of Hope.

2. George alleges the district court erred in granting summary judgment on her religious discrimination claims against House of Hope and Barcroft. We analyze Fair Housing Act "disparate treatment claims under Title VII's three-stage *McDonnell Douglas*/*Burdine* test." *Gamble v. City of Escondido*, 104 F.3d 300, 305 (9th Cir. 1997). To establish a disparate treatment claim, "the plaintiff must first establish a prima facie case." *Id.* The district court concluded George failed to establish a prima facie case because it found "no evidence in the record that Barcroft did not terminate a non-Jehovah's Witness resident under similar circumstances." Although the prima facie stage of the *McDonnell-Douglas* framework is "not onerous," George bore the burden to produce *some* evidence of the defendants' treatment of a similarly situated individual. *See Lyons v. England*, 307 F.3d 1092, 1112 (9th Cir. 2002).

On appeal, George offers a new theory of "reasonable inferences," but her theory is based on

evidence that was not presented to the district court.[1] We affirm the district court's order granting summary judgment in favor of House of Hope and Barcroft because George failed to present "any legitimate 'comparator' evidence on her religious discrimination claim," *Bodett v. CoxCom, Inc.*, 366 F.3d 736, 744 (9th Cir. 2004), and because her "reasonable inferences" theory relies on evidence she did not present to the district court.

3. George urges us to remand her discrimination claims to the district court. First, she contends the district court should consider whether the Fair Housing Act's religious exception, 42 U.S.C. § 3607(a), applies to Barcroft and House of Hope. Because we affirm the district court's decision that George did "not present[] any evidence of disparate treatment on the basis of religion," we decline to remand for the district court to consider this exception. George also requests remand for the district court to consider whether a new trial is warranted on her racial discrimination claim, but she fails to assert any colorable argument as to why remand of that claim is warranted. Accordingly, we decline to grant George's request for remand.

---

[1] George contends she had "no occasion" to present her "reasonable inferences" theory to the district court because the district court *sua sponte* addressed her failure to make a prima facie showing. However, George expressly argued in her opposition to Barcroft and House of Hope's motion for summary judgment that she had established a prima facie case pursuant to the Fair Housing Act, and she did not ask the district court for an opportunity to present more evidence.

AFFIRMED IN PART and DISMISSED IN PART.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

Case No. 3:15-cv-1277-SI

[Filed: February 8, 2017]

CONSTANCE GEORGE,	)
	)
Plaintiff,	)
	)
v.	)
	)
HOUSE OF HOPE RECOVERY, BRIDGES TO CHANGE, INC., WASHINGTON COUNTY DEPARTMENT OF HOUSING SERVICES, and PATRICIA BARCROFT,	)
	)
Defendants.	)

OPINION AND ORDER

Moloy K. Good, GOOD LAW CLINIC, PLLC, 211 E. 11th Street, Suite 104, Vancouver, WA 98660. Of Attorneys for Plaintiff Constance George.

Kenneth S. Mitchell-Phillips, THE LAW OFFICES OF KEN MITCHELL-PHILLIPS, P.C., 650 N.E. Holladay Street, Suite 1600, Portland, OR 97232. Of Attorneys for

Defendants House of Hope Recovery and Patricia Barcroft.

Kyle T. Abraham, BARRAN LIEBMAN LLP, 601 S.W. Second Avenue, Suite 2300, Portland, OR 97204. Of Attorneys for Defendant Bridges to Change, Inc.

Ryan J. McLellan and Sean K. Conner, SMITH FREED EBERHARD P.C., 111 S.W. Fifth Avenue, Suite 4300, Portland, OR 97204. Of Attorneys for Defendant Washington County Department of Housing Services.

Michael H. Simon, District Judge.

Plaintiff Constance George has sued House of Hope Recovery ("HOH"), Bridges to Change, Inc. ("Bridges to Change"), Washington County Department of Housing Services (the "County"), and Patricia Barcroft ("Barcroft"), collectively Defendants, alleging violations of: (1) the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3601 *et seq.*; (2) 42 U.S.C. § 1981 ("Section 1981"); (3) and 42 U.S.C. § 1982 ("Section 1982"). All Defendants have filed motions for summary judgment. At oral argument, Plaintiff conceded Bridges to Change's and the County's motions, as well as her Section 1982 claim against HOH. Accordingly, the Court grants summary judgment in favor of Bridges to Change and the County. Remaining before the Court is HOH and Barcroft's motion for summary judgment against Plaintiff's claims under the FHA and Section 1981. For the following reasons, HOH and Barcroft's motion is granted in part and denied in part.

STANDARDS

A party is entitled to summary judgment if the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the burden of establishing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The court must view the evidence in the light most favorable to the non-movant and draw all reasonable inferences in the non-movant's favor. *Clicks Billiards Inc. v. Sixshooters Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001). Although "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ruling on a motion for summary judgment," the "mere existence of a scintilla of evidence in support of the plaintiff's position [is] insufficient . . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 255 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation and quotation marks omitted).

BACKGROUND

Plaintiff was a participant in Bridges to Change's "Homeless to Work" program. Through Bridges to Change, Plaintiff discovered HOH, a non-profit organization that operates a residential recovery house in Beaverton, OR. ECF 36-1 at 6:19-7:1. HOH offers a "Christ-centered Housing Opportunity" that aims "to support women while they become firmly grounded in

a personal relationship with Jesus Christ as well as a strong recovery program, which includes recovery from drug/alcohol addiction." ECF 36-2 at 2.

On March 5, 2013, Plaintiff and Nancy Ferry, an employee of Bridges to Change, met with Defendant Barcroft, HOH's Executive Director, to determine whether Plaintiff qualified for housing at HOH. According to Plaintiff, who is an African-American Jehovah's Witness, Barcroft asked her, without any context, "how [Plaintiff] felt about white people." ECF 36-1 at 11:11-12. Plaintiff states that she responded that she "love[s] all people." ECF 36-1 at 11:9-14. Although HOH offered religious meetings, Barcroft did not tell Plaintiff that HOH requires attendance at religious meetings.[1] ECF 36-1 at 14:4-11. At the conclusion of the interview, Barcroft decided that Plaintiff could move into HOH. ECF 36-1 at 13:21-23. HOH and Barcroft dispute aspects of Plaintiff's account of the initial interview, but have not filed any admissible evidence to support their version of the facts.[2]

---

[1] Plaintiff does not remember Barcroft reviewing the HOH's rules and requirements during the interview. ECF 36-1 at 13:17-20.

[2] Much of the factual support for HOH and Barcroft's account of the interview, as well as other facts of this case, is contained in two documents. First, HOH and Barcroft have filed records of a complaint that Plaintiff filed with the Oregon Bureau of Labor and Industries' Civil Rights Division ("BOLI"). ECF 29-1 at 2-60. Plaintiff objects to the BOLI records as hearsay. The Court overrules George's objection to the BOLI records in part. The Court holds that BOLI's factual findings are admissible as public records, but that any otherwise inadmissible hearsay statements contained within the BOLI records are not admissible. *See* Fed. R. Evid. 805;

Plaintiff arrived at HOH on March 10, 2013. ECF 36-1 at 12:10-11. On March 19, 2013, Plaintiff says she informed Barcroft that she was a Jehovah's Witness and separately asked to be excused from the meeting that evening because she was ill. ECF 36-1 at 14:17-19, 16:6-7. Plaintiff states that she was told that she had to attend the meeting, ECF 36-1 at 14:19-20, even though HOH's "Cold & Flu Protocol" advises residents to stay in their rooms when feeling ill. ECF 36-2 at 13. Plaintiff states that before she became ill, her intention had been to attend the meeting. ECF 36-1 at 21:15-18. According to Plaintiff, "[t]hat same evening a white woman asked, that was a resident of the house, asked to be excused due to illness. She was told to stay home and get well. But I was told that I had to attend the meeting." ECF 36-1 at 15:9-12. Plaintiff states that Barcroft terminated Plaintiff's residency at HOH that same day. ECF 36-1 at 22:11-17.

Plaintiff filed a complaint with BOLI on November 25, 2013. ECF 29-1 at 57. BOLI determined that "[t]here is no substantial evidence that [Plaintiff] was

---

Schuett v. Eli Lilly & Co., 2011 WL 5865950, at *19 (D. Or. Nov. 22, 2011) ("While Rule 803(8) allows for admission of the agency's factual findings [in BOLI records], it does not allow the admission of hearsay contained within such factual findings.").

Second, HOH and Barcroft have filed a declaration of HOH and Barcroft's counsel. ECF 29. George objects to paragraphs 4-5 and 7-28 of the declaration of counsel as not based on personal knowledge. The Court sustains George's objection to paragraphs 4-5 and 7-28 of the declaration of counsel because these paragraphs summarize HOH and Barcroft's account of the facts, and there is no evidence that counsel has personal knowledge of these facts.

subjected to unlawful discrimination based on race or that [Plaintiff] was unlawfully denied housing based on religion in violation of the Fair Housing Act . . . ." ECF 29-1 at 60.

DISCUSSION

Plaintiff brings a claim for both racial and religious discrimination against HOH and Barcroft under the FHA. Against HOH, Plaintiff also brings a claim for racial discrimination under Section 1981. Both of Plaintiff's claims are for disparate treatment.

A. FHA

HOH and Barcroft argue that they are entitled to summary judgment on Plaintiff's FHA claim because this Court should defer to the BOLI's determination that the claim is not supported by substantial evidence. *See Plummer v. W. Int'l Hotels Co., Inc.*, 656 F.2d 502 (9th Cir. 1981). HOH and Barcroft, however, provide no authority for the proposition that BOLI's finding precludes Plaintiff's right to a trial if there is a genuine issue of material fact.[3] The Court may not weigh the

---

[3] HOH and Barcroft cite *Plummer* for the proposition that "agency determinations 'are entitled to great deference by district court[s].'" ECF 28 at 8 (quoting *Plummer*, 656 F.2d at 504). This quote from *Plummer* is found in an explanatory parenthetical for *Blizard v. Fielding*, 572 F.2d 13, 16 (1st Cir. 1978). In *Blizard*, the First Circuit noted earlier "authority indicating that [Equal Employment Opportunity Commission] determinations are entitled to great deference," but held that "with respect to a finding of no probable cause by the Commission, the law today is clear: such finding will not bar a trial de novo on the charges." 572 F.2d at 15-16. Accordingly, the First Circuit found that "[m]ere failure of the court in this instance to make reference to the EEOC

probative value of the evidence on a motion for summary judgment and thus turns to HOH and Barcroft's remaining arguments on Plaintiff's religious and racial discrimination theories.

1. Religion

HOH and Barcroft argue that they may legally discriminate on the basis of religion because their activities are subject to the religious exemption to the FHA. *See* 42 U.S.C. § 3607(a). The Court need not address this argument because, as discussed next, Plaintiff has not presented any evidence of disparate treatment on the basis of religion.

The FHA prohibits "discriminat[ion] against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(b). "FHA claims . . . may be brought under theories of both disparate treatment and disparate impact." *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 711 (9th Cir. 2009). Courts "analyze FHA . . . disparate treatment claims under Title VII's three-stage *McDonnell Douglas/Burdine* test." *Gamble v. City of Escondido*, 104 F.3d 300, 305 (9th Cir. 1997); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981). Accordingly, to establish a case of disparate treatment based on religion or race, a plaintiff must

---

findings is not sufficient to sustain an allegation of prejudicial error." *Id.* at 16.

first show that: (1) she is a member of a protected class; (2) she was treated differently in the terms, conditions, or privileges of her rental relationship or in the provision of services or facilities to her as a tenant; and (3) the different treatment was, at least in part, because of her religion or race. *See* 42 U.S.C. § 3604(b).

> Second, if the plaintiff establishes the prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its action.
>
> Third, if the defendant satisfies its burden, the plaintiff must prove by a preponderance of evidence that the reason asserted by the defendant is a mere pretext.

Gamble, 104 F.3d at 305 (citations omitted).

In support of her claim, Plaintiff points to evidence that HOH excused another woman from attending the meeting at issue after the woman informed HOH that she was ill, but the record contains no evidence of the other woman's religion. Plaintiff also points to evidence that Plaintiff informed Barcroft that Plaintiff was a Jehovah's Witness on the same day that Barcroft terminated Plaintiff's residency, but there is no evidence in the record that Barcroft did not terminate a non-Jehovah's Witness resident under similar circumstances. Accordingly, the Court grants summary judgment for HOH and Barcroft on Plaintiff's claim of religious discrimination under the FHA.

2. Race

HOH and Barcroft also argue that the evidence does not support Plaintiff's claim of racial discrimination, asserting without further elaboration, that ECF 29-1 provides "mounds of evidence" to refute her claim. ECF 28 at 9. HOH and Barcroft appear to be referring to hearsay statements contained in the BOLI records.

In response, Plaintiff points to evidence that on March 19, 2013, she asked to be excused from the meeting that evening because she was ill, but was told that she nevertheless had to attend the meeting. ECF 36-1 at 14:17-20. According to Plaintiff, "[t]hat same evening a white woman asked, that was a resident of the house, asked to be excused due to illness. She was told to stay home and get well. But I was told that I had to attend the meeting." ECF 36-1 at 15:9-12. Plaintiff states that Barcroft terminated Plaintiff's residency at HOH later that same day. ECF 36-1 at 22:11-17. HOH and Barcroft argue that they terminated Plaintiff's tenancy for legitimate, non-discriminatory reasons, namely that Plaintiff failed to attend the meetings that she was required to attend and gave conflicting stories about why she could not attend those meetings. HOH and Barcroft, however, identify no admissible evidence to support their version of the facts. The Court denies HOH and Barcroft's motion for summary judgment against Plaintiff's claim of racial discrimination under the FHA.

B. Section 1981

HOH argues that it is entitled to summary judgment against Plaintiff's Section 1981 claim for

several reasons. First, HOH argues that there is no evidence of intentional race-based discrimination.[4] Section 1981 states that: "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981(a). The *McDonnell Douglas* analytical framework that applies to Plaintiff's FHA claim also applies to her Section 1981 claim. *Surrell v. Cal. Water Serv. Co.*, 518 F.3d 1097, 1105 (9th Cir. 2008). Plaintiff alleges that HOH's discriminatory conduct deprived her of the "same right enjoyed by white citizens to lease and hold real property on the basis of her race." ECF 1 ¶ 44. Because these allegations are based on the same conduct described above, Plaintiff's evidence, viewed in the light most favorable to Plaintiff, is sufficient to defeat HOH's motion for summary judgment.

In briefing, HOH also argues that Plaintiff's Section 1981 claim is barred by Oregon's two-year statute of limitations for personal injury actions. *See* Or. Rev. Stat. § 12.110(1); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660-62 (1987) (upholding an appellate court's application of the forum state's statute of limitations for personal injury actions to a Section 1981 claim).

---

[4] HOH compares Plaintiff's allegations to those that the Fourth Circuit found insufficient in *Francis v. Giacomelli*, 588 F.3d 186, 195 (4th Cir. 2009). In *Francis*, the Fourth Circuit dismissed disparate treatment claims brought by two African-American plaintiffs based on an allegation that the two African-American plaintiffs allegedly suffered the same treatment as a third white plaintiff. *Id.* In contrast, Plaintiff alleges here that a white resident of HOH received different treatment.

Plaintiff correctly responds that *Goodman* has been superseded by statute.

The four-year statute of limitations in 28 U.S.C. § 1658(a) applies to Plaintiff's Section 1981 claim because the claim "was made possible by a post-1990 enactment." *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382 (2004). Before Congress amended Section 1981 in 1991, Section 1981 "cover[ed] only conduct at the initial formation of the contract and conduct which impair[ed] the right to enforce contract obligations through legal process." *Patterson v. McLean Credit Union*, 491 U.S. 164, 179 (1989). Plaintiff does not allege either type of conduct and would have been unable to bring a Section 1981 claim under *Patterson*. In 1991, however, Congress amended Section 1981 to define the terms "make and enforce contracts" as "include[ing] the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b); *see also Jones*, 541 U.S. at 373 (noting that the amendment was in response to *Patterson*). Because HOH's alleged discriminatory termination of Plaintiff's tenancy relates to "conduct that occurred after the formation of the contract," Plaintiff's Section 1981 claim arises under the 1991 amendment and thus is not untimely. *Jones*, 541 U.S. at 373, 382-83.[5]

---

[5] For similar reasons, the Court rejects HOH's contention that it is entitled to summary judgment against Plaintiff's Section 1981 claim because Section 1981 "covers only conduct at the initial

CONCLUSION

Defendant Washington County Department of Housing Services' Motion for Summary Judgment (ECF 22) is GRANTED. Defendant Bridges to Change, Inc.'s Motion for Summary Judgment (ECF 24) is GRANTED. Defendants House of Hope Recovery's and Patricia Barcroft's Motion for Summary Judgment (ECF 28) is GRANTED in part and DENIED in part; Plaintiff's claim under Section 1982 is DISMISSED.

IT IS SO ORDERED.

DATED this 8th day of February, 2017.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge

---

formation of the contract and conduct which impairs the right to enforce contract obligations through legal process." *Patterson*, 491 U.S. at 179. The 1991 amendment supersedes *Patterson*.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

Case No. 3:15-cv-01277-SB

[Filed: April 20, 2018]

CONSTANCE GEORGE,	)
	)
Plaintiff,	)
	)
v.	)
	)
HOUSE OF HOPE RECOVERY et al.,	)
	)
Defendants.	)
	)

JUDGMENT

BECKERMAN, Judge.

This action came on for trial before a jury, Honorable Stacie F. Beckerman presiding, and the issues having been tried and the jury having duly rendered its verdict, JUDGMENT IS HEREBY ENTERED in favor of Defendants House of Hope Recovery and Patricia Barcroft and against Plaintiff Constance George. This action is dismissed.

DATED this 20th day of April, 2018.

/s/ Stacie F. Beckerman
Stacie F. Beckerman
United States Magistrate Judge

APPENDIX F

Name, Address, E-mail, & Phone
constancegeorge60@gmail.com
971 732-4899
Constance George
16865 N.W Avondale Dr
Beaverton OR 97006

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

Case No.: 3:15-CV-1277-SI

[Filed: May 21, 2018]

Constance George
Plaintiff(s),

v.
Bridges to chang Inc
Washington County Department of Housing Services, House of Hope Recovery,
Defendant(s).

MOTION FOR APPOINTMENT OF PRO BONO COUNSEL

I, Constance George, move for the appointment of pro bono counsel.

To support this motion, I declare under penalty of perjury that (check one):

☑ I have been granted, or have applied for, permission to proceed *in forma pauperis*.

☐ I have attached an affidavit demonstrating my inability to pay the cost of an attorney.

I have made the following diligent efforts to obtain legal counsel but have been unsuccessful because of my poverty (describe below):

I am unemployed and homeless. I am currently Living with my son and family.

I need appointed counsel to assist me because (describe below):

I would like to Appeal the earlier Jury Verdict of first trial and earlier Summary Judgement ruling by Judge Michael H. Simon. (opinion and order).

/s/ Constance George
Signature

5-21-2018
Date

Constance George
Printed Name

AFFIDAVIT IN SUPPORT OF MOTION FOR APPOINTMENT OF PRO BONO COUNSEL

I answer the following questions under penalty of perjury:

1. **Are you currently incarcerated? □ Yes ☑ No**

   If you answered yes, where are you are incarcerated? _____

2. **Are you currently employed? □ Yes ☑ No**

   If you are employed:

   List your employer's name: _____

   List your employer's address: _____

   Amount of take-home pay:
   $ ___ per____ (hour, day, week, month)

   If you are not employed:

   Name your last employer: Areotex Employment Services

   Last employer's address: Fife WA

   Date of last employment: May June 2010

   Amount of take-home pay:
   $ 950 per hr (hour, day, week, month)

3. **Is your spouse or significant-other employed?**

   □ Yes □ No ☑ Not Applicable

   Name of employer: _____

Employer's address: _____

Date of last employment: _____

Amount of take-home pay:
$ ___ per____ (hour, day, week, month)

4. Have you received money from any of the following sources in the last 12 months?

- **Business, professions, or other self-employment:**

  ☐ Yes Amount Received: $____ Amount expected in future: $ _____

  ☑ No

- **Rent payments, interest, or dividends:**

  ☐ Yes Amount Received: $____ Amount expected in future: $ _____

  ☑ No

- **Pensions, annuities, or life insurance payments:**

  ☐ Yes Amount Received: $____ Amount expected in future: $ _____

  ☑ No

- **Disability or workers compensation payments:**

  ☐ Yes Amount Received: $____ Amount expected in future: $ _____

☑ No

- **Gifts or inheritances:**

  ☑ Yes Amount Received: $ $300.00 Amount expected in future: $ 0

  ☐ No

- **Any other sources:** seeking employment

  ☐ Yes Amount Received: $____ Amount expected in future: $ _____

  ☐ No

5. Do you have cash or savings accounts, including prison trust accounts?

☐ Yes Total amount: $_____

☑ No

6. Do you own any real estate, stocks, bonds, securities, other financial instruments, automobiles, or other valuable property?

☐ Yes (describe below) ☑ No

Type of Asset	Brief Description	Estimated Value

7. Do you have any other assets?

☐ Yes (describe below) ☑ No

Type of Asset	Brief Description	Estimated Value

8. Do you have monthly expenses, including housing, transportation, utility, judgments, loan payments, or other regular expenses?

☐ Yes (describe below) ☑ No

Expense Description	Estimated Monthly Payment

9. List the persons (or, if under 18, initials only) who are dependent on you for support:

Name or Minor's Initials	Relationship (Spouse, child, parent, etc.)	Amount of Monthly Support Your Provide

10. Do you have any debts or financial obligations?

☑ Yes (describe below) ☐ No

I owe a couple of family member and friends.

/s/ Constance George
Signature

5-21-2018
Date

Constance George
Printed Name

APPENDIX G

[handwritten]

[Filed: June 29, 2018]

6/29/2018

Constance George
16865 NW Avondale Dr
Beaverton OR 97006

To: United States Oregon District Court
Re: Motion notice to Appeal case 3:15-cv-01277 Summary Judgements rulings by District Judge Michael Simon.

I Constance George (Plaintiff) would like to Appeal because I believe I was denied the opportunity to a fair trial when Judge Simon presided over my case.

First I would like to make mention I took extensive steps to resolve matters with defendants Bridges to Change, WA County Dept Housing Services, Living Hope Fellowship House of Hope Recovery, and Patricia Barcroft, before filing a Lawsuite in U.S. District Court. I spoke with defendant Bridges to Change upperlevel management up to Director and coordinator Chuck Simpson. I spoke with Livinghope Fellowship H.O.H Execuetive Byran Wheelon, WA County Housing Services Jimmy Williams, I filed complaints with Oregon Ethics Point, I also spoke with WA County Parole and Probation Supervisors about the alleged violations of Federal Housing act before filing a

complaint with B.O.LI, and U.S Urban Housing Dept. I did not concede to any part of this Lawsuite or Authorize my then Attorney Moloy K. Good to do so. I met my Attorney Mr Good In April 15th 2014 at this time I discussed what happend while I partispated in Bridges to Change Homeless to work program administerd by WA county Housing Services, House of Hope, and what I experienced filing a complaint with B.O.L.I and US Urban Housing. At that time I provided Mr Good with a number of Docuements I received from Bureau. Mr Good filed this Lawsuite July 10th 2015 before I reviewed within ~~days~~ a few days I told Mr Good about changes that needed to be corrected. Mr Good never made those changes despite telling me the courts would allow changes to be made. ~~In sept~~ During Mr Goods Representation I experienced unethical, unprofessional behavior. During Mr Good Representation I was asked to dismiss WA county Housing Services and Bridges to Change a couple of times I refrused. During Mr Goods Reprsentation I Learned when Mr Good was appearing in court most of the time in Nov 2016 when I Linked on to my case. I have included this Docuement because my address is Listed as the Good Law Clinic. Also defendant House of Hope Recovery address is Living Hope Fellowship Church.

While Judge Simon presided over my case After the mistrial April 2017 the Jury myself plaintiff my Attorney, Defendant Barcroft and Defendants Attorney were invited to remain and Discuss mistrial during this session the Attorney's were ordered to settlement mediation and Judge Simon said if the matter could not be settled he wanted to know why before he would

set a new trial date. I had declined to engage in settlement with House of Hope and Patrica Barcroft a week or so before the trial. It took another 7 months for settlement mediation. Nov 9th 2017 I only went to settlement mediation because of that order. Prior to settlement mediation I met with Mr Good to discuss mediation procedures Mr Good and I could not agree on a demand it was at this time Mr Good stated know one wants an Angry Black women coming forward about a Housing Discrimination.

During Settlement mediation that Judge Marco Hernandez presided over Ms Barcroft and her Attorney was sent to the Judges Chamber and Mr Good and I Stayed In court-room we still did not agree on a settlement Judge Hernandez offered me to have another Judge preside over my case I accepted Mr Good wanted me to waite for Judge Simon Calendar. I have included a copy of a Demand Mr Good presented to the Courts when I do not know.

After settlement mediation I filed a complaint with Oregon State Barr Assoc. In Dec 2017 about Mr Goods representation. Mr Good withdrew from my case.

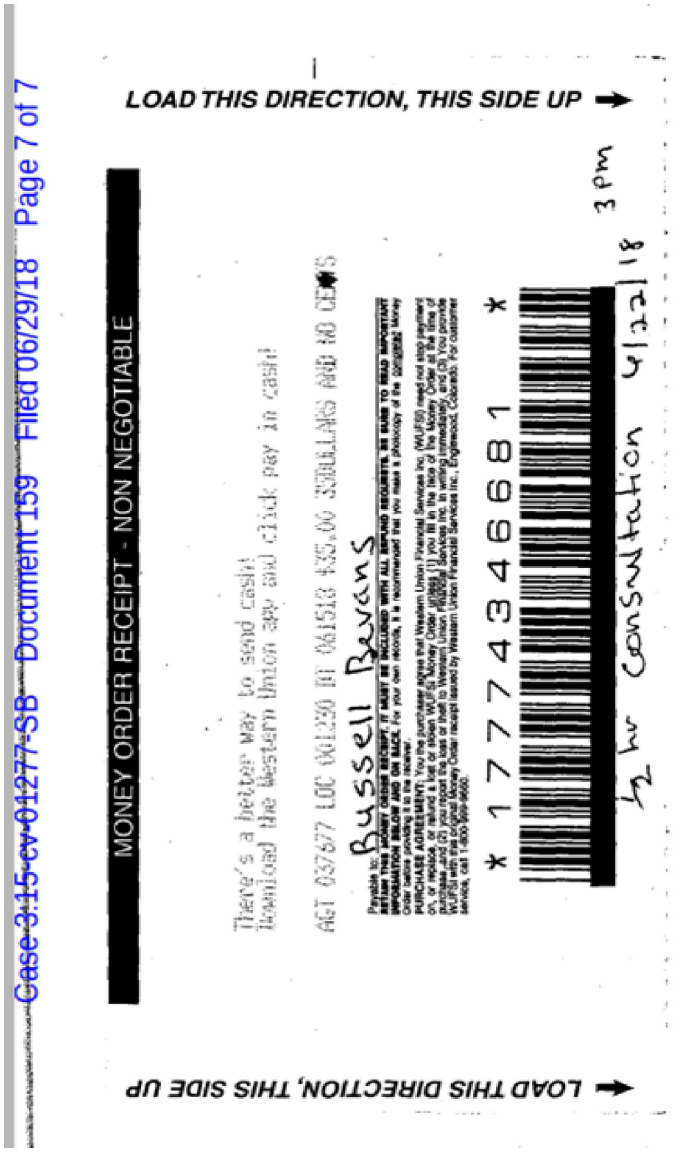
Magistrate Judge Stacie Beckerman appointed pro bono counsel to my case conditionally for a specific purpose, Counsel that could not help me appeal any earlier rulings in my case. I did ask Deputy Gissel Williams before I was Appointed Counsel if I should seek other counse I was told no the court would appoint counsel. Since Trial that Judge Stacie Becker presided over and Judgement entered I have tried to obtain counsel to the best of my ability receipt attached and contacted the U.S. Court of appeals but was told to file

notice of Appeal In U.S. District first, even before I can file a motion for appointment of counsel. Since these procedures are complicated and likely require the help of an attorney I asking the ~~court~~ U.S. District Court for a little mercy and allow me to Appeal the earlier rulings on Summary Judgements by Judge Michael Simon. During Mr Goods representation

~~Thank you, Constance George~~

During Mr Goods representation I wanted to appeal Judge Simons Summary Judgement rulings but I was told this could only be done after court procedures with the House of Hope and Ms Barcrofts trial was ruled. My experience while Honorable Judge Staice Beckerman was presideing was wonderful.

Thank you very much
/s/ Constance George



APPENDIX H

[handwritten]

[Filed: August 7, 2020]

8-5-2020

TO: United State District Court Clerk

FR: Constance George
Case # 3:15-CV-01277-SB

I Constance George appeal the Judgement in favor of Washington County Department of Housing Services and Bridges to Change Inc.

I would also like to ask the Court to waive filing fee.

Thank you very much

/s/ Constance George

APPENDIX I

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 18-35551

D.C. No. 3:15-cv-01277-SB
District of Oregon, Portland

[Filed: October 13, 2020]

CONSTANCE GEORGE,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
PATRICIA BARCROFT; HOUSE OF HOPE RECOVERY,	)
	)
	)
Defendants-Appellees.	)
	)

ORDER

On July 10, 2015, Plaintiff-appellant Constance George initiated this civil action by filing a complaint in the district court. On February 9, 2017, the district court entered an order granting a motion for summary judgment in favor of two of the defendants in the district court action, Bridges to Change, Inc. ("Bridges") and Washington County Department of

Housing Services ("Washington County DHS"). The district court did not enter a separate judgment as to defendants Bridges and Washington County DHS pursuant to Federal Rule of Civil Procedure 54(b). The district court action proceeded to trial with respect to the remaining defendants, House of Hope Recovery and Patricia Barcroft, and on April 6, 2018, a jury verdict was entered. On April 20, 2018, the district court entered a final judgment in favor of defendants House of Hope Recovery and Patricia Barcroft, and against plaintiff Constance George.

On May 21, 2018, appellant filed a pro se filing in the district court seeking appointment of counsel for appeal, and stating appellant "would like to appeal the earlier Jury verdict of first trial and earlier summary Judgment ruling by Judge Michael H. Simon." On June 29, 2018, appellant filed an additional pro se filing, which the district court construed as a notice of appeal and which opened this appeal no. 18-35551.

On July 28, 2020, while this appeal was proceeding with pro bono counsel appointed, appellant filed in the district court a pro se motion to enter final judgment with respect to defendants Bridges and Washington County DHS. On July 29, 2020, the district court entered an amended judgment, stating that the judgment was in favor of all defendants and against plaintiff. On August 7, 2020, appellant filed a pro se notice of appeal of the amended judgment, which this court docketed as an amended notice of appeal in this appeal No. 18-35551, docket No. 33.

A review of this court's docket reflects that ,when this court opened this appeal, it erroneously listed only

defendants House of Hope Recovery and Patricia Barcroft as defendants-appellants, and did not include defendants Bridges or Washington County DHS on this court's docket. Although the final judgment entered on April 20, 2018 identified only defendants House of Hope Recovery and Patricia Barcroft by name, defendants Bridges and Washington County DHS should properly have been included as defendants-appellees on this court's docket at the time the appeal was opened. *See Litchfield v. Spielberg*, 736 F.2d 1352, 1355 (9th Cir. 1984) (an appeal from a final judgment draws into question all earlier, non-final orders and rulings which produced the judgment).

The Clerk shall amend the docket to add defendants Bridges and Washington County DHS as defendants-appellants in this appeal.

The opening brief filed by pro bono counsel on September 25, 2020 does not address the merits of the claims against defendants-appellees Bridges and Washington County DHS. Within 35 days after the date of this order, appellant's counsel shall file either a supplemental brief with respect to the claims against defendants-appellees Bridges and Washington County DHS, or a statement that no supplemental brief will be filed. If counsel declines to file a supplemental brief, appellant may, within 60 days after the date of this order, file a pro se supplemental brief with respect to the claims against defendants-appellees Bridges and Washington County DHS only.

In addition to all other claims raised in any supplemental opening brief, appellant shall address whether failure to previously seek to add defendants

Bridges and Washington County DHS to this court's docket or raise the merits of the claims against them in the initial opening brief resulted in a waiver of the claims against defendants-appellees Bridges and Washington County DHS on appeal, and the effect, if any, of the district court's entry of an amended judgment.

Filing of the answering brief is stayed pending further order of the court.

APPENDIX J

United States Court of Appeals
for the Ninth Circuit

No. 18-35551

[Filed: June 3, 2021]

CONSTANCE GEORGE,	)
	)
Plaintiff-Appellant,	)
	)
vs.	)
	)
HOUSE OF HOPE RECOVERY and PATRICIA BARCROFT,	)
	)
Defendants-Appellees.	)

DECLARATION OF LINCOLN DAVIS WILSON

I, LINCOLN DAVIS WILSON, hereby declare and state as follows:

1. I am Counsel at the Law Firm Dechert LLP. In June 2020 I was appointed by this Court's Pro Bono Panel to represent Plaintiff-Appellant Constance George in the above-captioned appeal.

2. Shortly after my appointment, I saw that the original 2018 judgment did not name Defendants Washington County and Bridges to Change ("Program

Defendants") and that they were not listed on the appellate docket.

3. Since the appeal had been pending two years, I understood that this Court had treated the original judgment as related only to Defendants House of Hope Recovery and Patricia Barcroft, and that a separate judgment would be required for an appeal as to the Program Defendants.

4. I sought to resolve any issue concerning these matters by scheduling a July 16, 2020 conference call with counsel for the Program Defendants, including Kyle Abraham and Sean Conner.

5. On the call, Mr. Conner agreed with my understanding that the original judgment did not resolve claims against the Program Defendants.

6. Mr. Conner stated that he had attempted, without success, to get the district court to issue a judgment in his client's favor.

7. I asked whether the Program Defendants would consent to entry of a separate judgment in their favor so that Ms. George could appeal the dismissal of her claims against them.

8. They declined, stating that their clients did not want to take any action that would require them to participate in an appeal.

9. On September 14, 2020, after Ms. George had obtained an amended judgment naming the Program Defendants, Mr. Conner sent me an email stating that he "found out today that Ms. George was able to do

what [he] could not: she got an amended judgment issued dismissing the claims against Washington County and Bridges to Change." (*See* Ex. 1, 9/14/20 Email Thread.)

10. Mr. Conner then asked me by email whether I knew anything about the basis of Ms. George's appeal from the amended judgment. (*See id.*)

11. Continuing the parties' efforts to work together to resolve procedural concerns, I responded by email that I was not representing Ms. George on her appeal of those matters and that she would be proceeding pro se. (*See id.*)

12. After reading the accusations against me in the Program Defendants' response brief, I requested another phone conference, which took place on April 21, 2021 with myself, Mr. Conner, and Josh Goldberg.

13. On that telephone call, the attorneys for the Program Defendants conceded that they had reversed their position on the nature of the original judgment and were now arguing that their prior view was inexcusable.

14. I asked that they file a corrected version of their brief omitting this argument, but they did not commit to doing so.

15. Shortly after the call, I sent a follow-up email memorializing our conversation. (*See* Ex. 2, 4/21/21 Email Thread.)

16. My email confirmed that "the view that [the Program Defendants] call inexcusable was one [they]

previously shared," and that they had "acknowledged that [they] had changed positions on this point." (*See id.*)

17. I reiterated my request that the Program Defendants withdraw Point II of their response brief to avoid having to present this matter to the Court. (*See id.*)

18. The Program Defendants did not respond to my email.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 2, 2021.

/s/ Lincoln Davis Wilson
Lincoln Davis Wilson

APPENDIX K

In The United States Court of Appeals for the Ninth Circuit

No. 18-35551

[Filed: December 2, 2021]

CONSTANCE GEORGE,	)
	)
Plaintiff-Appellant,	)
	)
vs.	)
	)
PATRICIA BARCROFT; HOUSE OF HOPE RECOVERY; BRIDGES TO CHANGE, INC.; WASHINGTON COUNTY DEPARTMENT OF HOUSING SERVICES,	)
	)
Defendants-Appellees.	)

On Appeal From the United States District Court
for the District of Oregon
Hon. Michael H. Simon, U.S.D.J.
Hon. Stacie F. Beckerman, U.S.M.J.
Case No. 15-cv-1277

PETITION FOR PANEL REHEARING

Lincoln Davis Wilson
DECHERT LLP
Three Bryant Park
1095 Avenue of the Americas
New York, NY 10036-6797
Tel.: 212 -698-3500
lincoln.wilson@dechert.com

Pro Bono Counsel for Plaintiff-Appellant Constance George

*[*** tables omitted for purposes of printing ***]*

PRELIMINARY STATEMENT

Plaintiff-Appellant Constance George respectfully requests that the Court grant panel rehearing because it overlooked controlling law in dismissing her appeal as to the Program Defendants (Bridges to Change and Washington County) for lack of jurisdiction. The Court's ruling on those claims violates the Federal Rules of Appellate Procedure and creates new conflict both with a published decision of this Court and the decisions of other circuits. In its decision, the Court rejected Ms. George's arguments that the original 2018 judgment was not final, but it agreed she had filed a timely pro se appeal from that judgment. Dkt. 93-1 at 3. However, the Court also dismissed Ms. George's contention that she was not required to provide "formal notice to the Program Defendants" of that appeal. Dkt. 74 at 19. Instead, it reasoned that because Ms. George "did not serve her notice of appeal" on the Program Defendants, the Court lacked jurisdiction over her appeal as to them. Dkt. 93-1 at 3.

This ruling overlooked three critical aspects of the law and the record. First, even if the original judgment were final as to the Program Defendants, Rule 3(d)(1) specifically provides that it is the district court, not the appellant, that has the duty to serve the notice of appeal, as three courts of appeal have held. *United States v. Uni Oil, Inc.*, 710 F.2d 1078, 1080 n.1 (5th Cir. 1983); *Frieder v. Morehead State Univ.*, 770 F.3d 428, 430 (6th Cir. 2014); *Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369, 1379 (10th Cir. 1979). Second, the record shows that the district court did serve Ms. George's notice of appeal as required by Rule 3(d)(1) and that the Program Defendants received it. And third, as both the decisions above and this Court have held, Rule 3(d)(3) dictates that a lack of service does not affect the validity of an appeal. *See Pollard v. The GEO Grp., Inc.*, 629 F.3d 843, 852 n.7 (9th Cir. 2010), *rev'd on other grounds sub nom. Minneci v. Pollard*, 565 U.S. 118 (2012). Thus, dismissing Ms. George's appeal as to these Defendants for lack of jurisdiction would directly transgress the requirements of Rule 3(d) and create an intra- and inter-circuit conflict of authority.

Ms. George has challenged the dismissal of her claims against the Program Defendants ever since she commenced this appeal in 2018. In her first pro se post-appeal filing in the district court, she addressed her claims against the Program Defendants on the first page, contending they were erroneously dismissed based on a concession of her former counsel. D.C. Dkt. 159 at 1. She specifically stated she "wanted to appeal Judge Simon's Summary Judgement rulings but . . . was told this could only be done" after the case against

the House of Hope Defendants concluded. *Id*. at 6. And she took every step required to do so by filing a timely notice of appeal, which the district court served on the parties.

Having sought for more than three years to challenge the ruling below, Ms. George should not be deprived of that opportunity by a misreading of the Federal Rules. The Court should grant rehearing to correct these errors and should resolve Ms. George's appeal as to the Program Defendants on the merits.[1]

ARGUMENT

I. MS. GEORGE WAS NOT REQUIRED TO SERVE THE NOTICE OF APPEAL BECAUSE RULE 3 COMMITS SERVICE TO THE DISTRICT COURT, NOT THE APPELLANT.

The Court ruled that it lacked jurisdiction over Ms. George's appeal as to the Program Defendants because her failure to serve them with her notice of appeal "did not comply with the requirements of Federal Rule of Appellate Procedure 3." Dkt. 93-1 at 3. But this overlooks that Rule 3 does not assign the task of serving the notice of appeal to the appellant, but to the district court:

---

[1] Counsel addresses only the issue of jurisdiction over Ms. George's appeal as to the Program Defendants and refers the Court to Ms. George's pro se briefing regarding the merits of those claims. *See* Dkt. 44; Dkt. 73. Ms. George disagrees with the Court's disposition of her claims against the House of Hope Defendants but does not address them in this petition. She reserves her further appellate rights accordingly.

> (d) Serving the Notice of Appeal.
>
> (1) *The district clerk* must serve notice of the filing of a notice of appeal by sending a copy to each party's counsel of record—excluding the appellant's—or, if a party is proceeding pro se, to the party's last known address. . . .

Fed. R. App. P. 3(d)(1) (emphasis added).

Three other circuits have recognized that the obligation of service belongs to the district court, not the appellant. The Tenth Circuit has held that "[t]he duty to serve the notice falls on the clerk of the district court." *Perington*, 631 F.2d at 1379; *accord Reid v. Hamby*, 124 F.3d 217, 1997 WL 537909, at *1 (10th Cir. 1997). The Sixth Circuit has likewise rejected a service objection from appellees that would read the "notice more carefully than they read Rule 3," since "[t]he person required to notify the appellees is not the appellant but the district clerk." *Frieder*, 770 F.3d at 430. And the Fifth Circuit has called such an objection to the appellant's lack of service "frivolous" because Rule 3(d) states "plainly that the responsibility for serving the notice on the parties is the clerk's, and not the appellant's." *Uni Oil, Inc.*, 710 F.2d at 1080 n.1; *accord Moore v. Hood Cty.*, 20 F.3d 468, 1994 WL 122162, at *1 (5th Cir. 1994).

In ruling that Ms. George was required to serve the notice here, the Court relied on the Supreme Court's statement in *Smith v. Barry*, 502 U.S. 244 (1992), that the "purpose of a notice of appeal 'is to ensure that the filing *provides sufficient notice* to other parties and the courts.'" Dkt. 93-1 (quoting *Smith*, 502 U.S. at 248)

(emphasis added). But this language from *Smith* refers to the substance of a purported notice of appeal, not the process of serving it. As *Smith* explained in that passage, it is "the notice afforded ***by a document***, not the litigant's motivation in filing it," that "determines ***the document's sufficiency*** as a notice of appeal." *Smith*, 502 U.S. at 248 (emphasis added). Applying *Smith* here, Ms. George's timely pro se filing gave "the notice required by Rule 3," and so "it is effective as a notice of appeal." *Id*. at 248-49. And the Court's imposition of an additional obligation of service on Ms. George overlooked Rule 3's commitment of that responsibility to the district court.

II. THE DISTRICT COURT SERVED MS. GEORGE'S NOTICE OF APPEAL ON THE PROGRAM DEFENDANTS.

The Court's decision also overlooked that the district court satisfied the obligation of service that Rule 3 assigns to it. The district court docket shows that counsel for both of the Program Defendants were registered for electronic case filing. And the document that this Court identified as Ms. George's notice of appeal was entered on the electronic docket and served on all parties via ECF. *See* ER01.

The Program Defendants would have continued to receive ECF notices even though they were dismissed at summary judgment. As the district court's ECF manual states, "[t]he Court is required under Fed. R. Civ. P 77(d) to notify counsel of record of the entry of all orders and judgments, ***including post-judgment orders and appeal activity, even if the litigant represented has been terminated from the case***."

U.S. District Court, District of Oregon, CM/ECF User Manual, Discontinuing NEFs for a Case, *available at* https://bit.ly/2ZI8Uen (emphasis added). The clerk will not cease issuing these notices of filings unless the party's counsel moves to withdraw or files a formal request. *Id*. The Program Defendants did neither here.

Thus, as Ms. George explained in her reply brief, there is no question that the Program Defendants received notice of Ms. George's appeal—they simply believed it related only to the House of Hope Defendants. *See* Dkt. 74 at 19. Ms. George's counsel even conferred with the Program Defendants to address the fact that the appellate docket did not list them. *See* Dkt 75-2 ¶¶ 4-6. They confirmed that they were aware of Ms. George's appeal. *See id*. And despite arguing that Ms. George failed to formally serve the notice of appeal, *see* Dkt. 61 at 14, the Program Defendants have never claimed that they did not receive ECF notice. The Court's ruling thus overlooked that the Program Defendants received all the notice to which they were entitled under Rule 3.

III. EVEN IF THE DISTRICT COURT HAD NOT SERVED THE NOTICE OF APPEAL, IT WOULD NOT AFFECT THE COURT'S JURISDICTION.

Finally, the Court overlooked that the Federal Rules specifically provide that even if the district court fails to serve a notice of appeal, it does not impair appellate jurisdiction. Rule 3 states that "[t]he district clerk's failure to serve notice ***does not affect the validity of the appeal***." Fed. R. App. P. 3(d)(3) (emphasis added). This Court has so held in a published opinion, recognizing that where defendants

"were never served with the notice of appeal, . . . such a failure does not affect the validity of the appeal." *Pollard*, 629 F.3d at 852 n.7. This is especially true "in light of the liberal construction" mandated for Rule 3. *Id*. And the other circuits agree that "[e]ven if the clerk fails in this duty . . . , the 'failure to serve notice does not affect the validity of the appeal.'" *Frieder*, 770 F.3d at 430 (quoting Fed. R. App. P. 3(d)(3)); *accord Perington*, 631 F.2d at 1379; *Uni Oil, Inc.*, 710 F.2d at 1080 n.1.

The Court's decision in *In re Sweet Transfer & Storage, Inc.*, 896 F.2d 1189 (9th Cir. 1990), does not require a different result. *Sweet Transfer* held that the purported notice of appeal was ineffective because, among other things, it had not "been *served* upon the other parties." *Id*. at 1193. But that holding from the pre-ECF era does not apply here, where the district court did serve Ms. George's notice of appeal on the Program Defendants via ECF.

In addition, whether *Sweet Transfer* remains good law is in doubt. Not only has its holding on bankruptcy procedure been superseded by rule, *see In re Arrowhead Ests. Dev. Co.*, 42 F.3d 1306 (9th Cir. 1994), but its treatment of service of a notice of appeal as a jurisdictional requirement rests on a questionable foundation. To support that requirement, *Sweet Transfer* relied on the 1978 decision in *Rabin v. Cohen*, 570 F.2d 864, 866 (9th Cir. 1978). But the year after the *Rabin* decision, Rule 3(d) was amended to extend the district court's service obligation to civil appeals like this one and like *Rabin*. *See* Fed. R. App. P. 3 (1979 Advisory Committee Note). Because the other

courts of appeals acknowledge that Rule 3(d) directs that a lack of service by the district court does not affect the validity of an appeal, *Sweet Transfer* should be limited to the historical bankruptcy context in which it was decided, and this Court should regard *Pollard* as the law of this Circuit.

The Court should grant rehearing to prevent a conflict with Rule 3(d), *Pollard*, and the decisions of the other circuits regarding service of a notice of appeal. The Court's decision overlooked that the obligation of service does not fall to the appellant, that the district court did serve the notice of appeal, and that a lack of service does not affect the Court's jurisdiction. It should vacate its dismissal for lack of jurisdiction and resolve Ms. George's appeal as to the Program Defendants on the merits.

CONCLUSION

The Court should grant rehearing for the reasons above.

Dated: December 2, 2021

Respectfully submitted,

/s/ Lincoln Davis Wilson
Lincoln Davis Wilson
DECHERT LLP
Three Bryant Park
1095 Avenue of the Americas
New York, NY 10036-6797
Tel.: 212 -698-3500
lincoln.wilson@dechert.com

Pro Bono Counsel for Plaintiff-Appellant Constance George

*[*** certificates omitted for purposes of printing ***]*

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-35551

[Filed: December 28, 2021]

CONSTANCE GEORGE,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
HOUSE OF HOPE RECOVERY; BRIDGES TO CHANGE, INC.; WASHINGTON COUNTY DEPARTMENT OF HOUSING SERVICES; and PATRICIA BARCROFT,	)
	)
Defendants-Appellees.	)

Appeal from the United States District Court
District of Oregon, Portland
(CV. No. 3:15-cv-01277-SB)

DEFENDANTS-APPELLEES BRIDGES TO CHANGE, INC. AND WASHINGTON COUNTY DEPARTMENT OF HOUSING SERVICES' RESPONSE TO PETITION FOR PANEL REHEARING

Josh M. Goldberg, OSB No. 180414
BARRAN LIEBMAN LLP
601 SW Second Avenue, Suite 2300
Portland, Oregon 97204-3159
Email: jgoldberg@barran.com
Telephone: (503) 228-0500
Facsimile: (503) 274-1212

Attorney for Defendant-Appellee Bridges to Change, Inc.

Sean K. Conner, OSB No. 132518
SMITH FREED EBERHARD
111 SW Columbia St, Suite 800
Portland, Oregon 97201
Email: sconner@smithfreed.com
Telephone: (503) 227-2424
Facsimile: (503) 227-2535

Attorney for Defendant-Appellee Washington County Department of Housing Services

*[*** tables omitted for purposes of printing ***]*

SUMMARY OF ARGUMENT

Constance George's ("Ms. George") petition for a panel rehearing is premised on an invitation to revisit Ninth Circuit 43-year-old precedent contained in *Rabin v. Cohen*, 570 F.2d 864, 866 (9th Cir. 1978). Under *Rabin* and its progeny, Ms. George's Motion for Appoint of Pro Bono Counsel ("Motion") could not serve as a substitute for a notice of appeal for Bridges to

Change ("Bridges") and Washington County Department of Housing Services ("Washington County") because it failed to serve the essential purpose of providing notice that an appeal is proceeding against them. *Smith v. Barry*, 112 S. Ct. 678, 681, (1992) (explaining the purpose behind Rule 3 is "to ensure that the filing provides sufficient notice to other parties and the courts."); *Cel-A-Pak v. Cal. Agric. Labor Relations Bd.*, 680 F.2d 664, 667 (9th Cir. 1982) ("Documents not so denominated have been treated as notices of appeal so long as they clearly evince the party's intent to appeal and provide notice to both the opposing party and the court.").

At issue is not a mere technical variation from the rules. Compounding Ms. George's errors arising out of the filing of her Motion (which was filed on the deadline to file a notice of appeal), Ms. George then waited 39 days after she filed her Motion to file a notice of appeal on June 29, 2018. ER 75; *see* F. R. App. P. 4(a)(5)(C) ("No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later."). Because the District Court informed Ms. George in a minute order in April that her deadline to file an appeal was May 21, 2018, Ms. George understood her filing was late. ER 74. Ms. George also did not address the confusion created by her filings for a period of longer than two years, comply with Rule 3(c), or serve her opening brief as required by Rule 25(b). Even after securing counsel on April 15, 2019, and addressing any purported misunderstanding about the scope of her appeal on August 7, 2020, by obtaining an amended judgment and filing an amended

notice of appeal, Ms. George nonetheless failed to address the merits of her claims against Bridges and Washington County in her September 24, 2020, opening brief. ER 76-77. In fact, the first filing from the Ninth Circuit was served on Bridges and Washington County on October 13, 2020—18 days after Ms. George had already filed her opening brief.

Even if the Court were to conclude it had jurisdiction, the Court was well within in its authority to exercise its discretion and dismiss Ms. George's appeal against Bridges and Washington County for her failure to comply with applicable rules. Because the Court applied the law in a manner consistent with *Rabin* and its progeny, a panel rehearing is not necessary to ensure the uniformity of case law and the Court should deny the petition.

STANDARD OF REVIEW

F. R. App. Proc. 35(a) provides:

> An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:
>
> (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or
>
> (2) the proceeding involves a question of exceptional importance.

ARGUMENT

I. MS. GEORGE'S MOTION WAS NEVER SERVED ON BRIDGES OR WASHINGTON COUNTY.

As an initial matter, Ms. George repeatedly and incorrectly states that Bridges and Washington County were served with her Motion. As the Excerpt of Record unambiguously notes, Bridges and Washington County were terminated from the matter in CM/ECF after the District Court granted their motions for summary judgment and no longer received notifications of documents filed with the District Court as of February 8, 2017. ER 61.

Although Ms. George speculates that Bridges and Washington County received notice of her Motion in 2018, Ms. George's assertion is not supported by the record. As a matter of fact, the first notice Bridges and Washington County received that Ms. George was proceeding with an appeal against either Bridges or Washington County was when counsel for Ms. George identified himself on July 10, 2020—781 days after Ms. George's deadline to file a timely notice of appeal. Strictly speaking, neither Ms. George nor the District Court has ever served her Motion on either Bridges or Washington County.

As a consequence, Bridges and Washington County did not receive service of Ms. George's Motion and did not have actual notice of her intent to proceed with an appeal against them until more than two years after Ms. George initiated her appeal. Therefore, because Ms. George's Motion did not provide actual notice for

such an extended period of time, it cannot be fairly said to be the functional equivalent of a notice of appeal as to her appeal against Bridges and Washington County.

II. THE COURT FOLLOWED THE LAW WHEN IT DISMISSED MS. GEORGE'S APPEAL AGAINST BRIDGES AND WASHINGTON COUNTY.

The Court must deny Ms. George's petition for panel review because it does not show that "the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed." F. R. App. P. 35(b)(1)(A). The Ninth Circuit's cases uniformly hold that notices of appeal not denominated as such must be served on all parties to serve as a proper substitute for a notice of appeal or provide for timely actual notice of the appeal.

This line of cases goes back to *Rabin v. Cohen*, 570 F.2d 864, 866 (9th Cir. 1978). There, the Ninth Circuit explained:

> documents which are not denominated notices of appeal will be so treated when they serve the essential purpose of showing that the party intended to appeal, are served upon the other parties to the litigation, and are filed in court within the time period otherwise provided by Rule 4(a).

Under this line of cases, courts may choose to exercise their sound discretion not to recharacterize a document as a notice of appeal, if it fails to serve the "essential purpose" of providing notice because it has not been served upon the other parties. *See Torres v. Oakland*

Scavenger Co., 487 U.S. 312, 316, (1988) ("[A] court may … find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires."); *S.M. v. J.K.*, 262 F.3d 914, 922-23 (9th Cir. 2001).

In re Sweet Transfer & Storage, Inc., 896 F.2d 1189, 1193 (9th Cir. 1990), controls. There, the Ninth Circuit interpreted the notice of appeal from a bankruptcy proceeding just as it would a Fed. R. App. P. 4(a)(4). *Id.* 1192. Although other portions of the Bankruptcy Rules are interpreted differently because of their specific wording, at issue was BR 8002(a). It provides that "[if] a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days of the date on which the first notice of appeal was filed." *Id.* In assessing whether a document not denominated as a notice of appeal can be treated as a notice of appeal, the Ninth Circuit invoked *Rabin*. The Ninth Circuit rejected as meritless the appellant's argument that "their request for transcripts and their letter [to the court] should be held to constitute a notice of appeal" and explained:

> It is arguable whether these documents "clearly evince the [parties'] intent to appeal." Additionally, neither of the documents provided notice to Sweet. In prior cases, we have required the document in question to have been *served* upon the other parties.

Id. at 1193 (emphasis in original).

Ms. George's attempt to distinguish *Sweet Transfer & Storage* by indicating that "the district court did

serve Ms. George's notice of appeal on the Program Defendants via ECF" misrepresents the nature of this case's history and, as explained more fully above, is not supported by the record. Nor is there any apparent reason to limit the precedential value of *Sweet Transfer & Storage* to appellate bankruptcy proceedings, as the question in front of the Court is the same as it is here: when must a document not denominated as a notice of appeal be served on the parties to serve as the functional equivalent of a notice of appeal.

Admittedly, this Court has chosen to exercise its discretion to treat motion to proceed *in forma pauperis* as a notice of appeal, but only because it "satisfie[d] the three conditions which permit[ted the Court] to so interpret (1) it demonstrates his intent to appeal; (2) it was served upon defendants; and (3) it was timely filed." *Wilborn v. Escalderon*, 789 F.2d 1328, 1330 (9th Cir. 1986) (emphasis added).

Rabin, *Sweet Transfer & Storage* and *Wilborn* are entirely consistent with *Smith v. Barry*. Although Ms. George cites *Smith*, 502 U.S. at 248–49, for the proposition that an opening brief can be construed as a notice for appeal, Ms. George, however, neglected to note that the opening brief served in *Smith* was prematurely filed and was served on all parties "while the motion for J. N. O. V. was pending." *Id.* at 246. The Supreme Court affirmed that "a court may" but is not required to "find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires." *Id.* at 248.

Importantly, Ms. George does not address the jurisdictional defects of her purported notice of appeal that are also addressed in *Smith*:

> This principle of liberal construction does not, however, excuse noncompliance with the Rule. Rule 3's dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review.

Id. at 248. In remanding, the Supreme Court reversed the Fourth Circuit's conclusion that an opening brief "can never be considered a notice of appeal." *Id.* at 247. It also directed the Fourth Circuit to consider whether the opening brief provided "adequate notice of appeal because it lacks information required by Rule 3(c)." *Id.* at 249; *see United States ex rel. Hoggett v. Univ. of Phx.*, 863 F.3d 1105, 1108-09 (9th Cir. 2017) ("We will 'not strain to characterize artificially' a motion as something it is not, simply to keep an appeal alive."). Here, Ms. George makes no representation that she complied with Rule 3(c) or provided notice of the "name the court to which the appeal is taken." *Smith*'s result is indistinguishable and entirely consistent with the Court's ruling.

The Court lawfully exercised its discretion to conclude Ms. George's Motion was not the functional equivalent of a notice of appeal because it was not served on them, did not provide actual notice of her intent to proceed with an appeal against Bridges and Washington County, and failed to comply with Rule 3(c). Ms. George also provides no reason to explain away her delay of over two years to rectify any errors

arising from her filing or indicate how any neglect on her part is excusable.

The Court's decision to dismiss Ms. George's appeal is entirely consistent with this Court's prior rulings. Therefore, granting her petition is not necessary to secure or maintain uniformity of the court's decisions and the Ninth Circuit must deny Ms. George's petition for a panel rehearing.

III. DISMISSAL IS CONSISTENT WITH RULE 3(D)(3).

Ms. George's reliance on Rule 3(d)(3) is misplaced. It provides that the "district clerk's failure to serve notice does not affect the validity of the appeal." First, Ms. George never preserved any error that the District Court erred and is not permitted to address an error for the first time on a petition for panel rehearing. Even if it could possibly constitute legal error and the issue was properly preserved, the clerk of the District Court followed the CM/ECF User Manual and provided notice of "orders and judgment," but it did not need to serve motions for pro bono counsel because it is neither an order nor a judgment. U.S. District Court, District of Oregon, CM/ECF User Manual, Discontinuing NEFs for a Case, available at https://bit.ly/2ZI8Uen.

Second, Ms. George's failure to notify the Ninth Circuit of the apparent exclusion of Bridges and Washington County, even after she obtained counsel on April 15, 2019, her failure to comply with Rule 3(c), her failure to serve her opening brief on Bridges and Washington County, and her failure to raise the merits

of her claims in her opening brief are separate violations each of which warrant dismissal.

For example, Circuit Rule 3-2(b) requires the appellant to identify "all parties to the action along with the names, addresses and telephone numbers of their respective counsel, if known." Its Advisory Committee Note clearly states:

> When any party or counsel is not accurately listed in the docket, significant problems, such as lack of notice or waiver of arguments, can result. Because the representation statement is filed by appellants (and none is required in pro se or criminal appeals), the Court expects and requires that all parties will carefully review the Court's caption and listing of counsel and parties at the outset of every appeal and will notify the Court immediately of any corrections or updates.

Despite Ms. George's obligation to immediately notify the Court of any corrections or updates that may have been needed to the case caption, Ms. George's counsel never filed a Representation Statement and waited more than two years after the appeal was first docketed to make any attempt to cure Ms. George's error when she filed her Motion. Ms. George's delay is more than four times the length of time in which a District Court could reopen the time to file a notice of appeal when there is excusable neglect. *See* 27 U.S.C. § 2107 (limiting time to reopen time to file a timely notice of appeal to 180 days "upon a showing of excusable neglect or good cause.").

Rule 3(a)(2) plainly provides the Court with the authority to exercise its discretion to dismiss an appeal based on Ms. George's missteps and provides:

> An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal.

(emphasis added). As the United States Supreme Court explained, Rule 3(a)(2) "provides the consequences for litigant errors associated with filing a notice of appeal" and empowers the Ninth Circuit to, "in its discretion, overlook defects in a notice of appeal *other* than the failure to timely file a notice" or decide to dismiss the appeal. *Manrique v. United States*, 137 S. Ct. 1266, 1274 (2017) (emphasis in original).

Ms. George's case law, cited for the proposition that an appellant has no responsibility in ensuring the Court and other parties have notice of her appeal, is inapposite. *Pollard v. GEO Grp., Inc.*, 629 F.3d 843 (9th Cir. 2010), involved the appellant's failure to serve a notice of appeal and opening brief. *Id.* at 852. However, critically in *Pollard*, counsel for all the respondents received actual notice of both the notice of appeal and opening brief, as the Ninth Circuit noted "the same law firm represents GEO and the individually named defendants on appeal." *Id.* at 853. It should be unsurprising and uncontroversial that service of counsel imputes notice to the individual defendants. Therefore, because the individual defendants had actual notice of the appeal and the

opening brief, in its "sound discretion," the Court decided not to dismiss the appeal. *Id. Pollard*, however, does not address the situation at hand, where respondents Bridges and Washington County were not served with Ms. George's Motion and did not have actual notice of Ms. George's appeal. The appellant in *Pollard* also did not appear to take Ms. George's other missteps, including failing to comply with Rule 3(c), timely inform the Court of any inaccuracies of its caption, and address the merits of the appeal against the individual defendants in the opening brief.

Because Ms. George's failure to act extends far beyond simply providing timely notice of her appeal, "it is within [the Court's] sound discretion to dismiss the appeal." *Azizian v. Federated Dep't Stores, Inc.*, 499 F.3d 950, 961 (9th Cir. 2007). Because the Court's ruling is consistent with the Federal Rules of Appellate Procedure and its precedent, granting the petition is not necessary to preserve the uniformity of case law and the Court should deny Ms. George's petition for panel rehearing.

IV. MS. GEORGE'S CITATION TO OUT-OF-CIRCUIT CASES DOES NOT IDENTIFY CONFLICTING AUTHORITY.

Not even Ms. George's cited out-of-circuit case law is in conflict with *Rabin* and its progeny or the Court's dismissal of Ms. George's appeal as to Bridges and Washington County. *United States v. Uni Oil, Inc.*, 710 F.2d 1078, (5th Cir. 1983) ("*Uni I*"), does not address the issues presented in this case or in *Rabin*. Unlike this case, *Uni I* concerned the requirements for a notice appeal itself, not the requirements for when a court

will treat a document that was not denominated as a notice of appeal as such. Further, that case is perfectly consistent with *Rabin* and held that failure to specifically name the respondents in a notice of appeal did not prevent the Court of Appeals from hearing the appeal. It emphasized that "the government's notice of appeal was served on counsel for Ball and Enterprise Marketing and plainly demonstrated an intention to appeal from the entire order of April 21, 1982," consistent with *Rabin*. *Uni I*, 710 F.2d at 1080, n.1. (emphasis added). Additionally, while an individual defendant, Thomas Hajecate ("Mr. Hajecate"), claims that he was not served with the notice of appeal, in fact, his attorney also represented Uni Oil in the appeal and received a copy of the notice of appeal. *See United States v. Uni Oil, Inc.*, 646 F.2d 946 (5th Cir. 1981). Because Mr. Hajecate had actual notice of the appeal, he "was in no sense prejudiced by the alleged delay in his notification. He [also] unquestionably received a preliminary (typewritten) copy of the government's brief on appeal when the other defendants received their copies." *Id.* Importantly, *Uni I* did not address what may occur in the event there was not actual notice and the appellant did not cooperate to clarify the intended scope of the appeal or raise the merits of her appeal in her opening brief.

Ms. George's other cases do not deal with a lack of actual notice and similar missteps. *Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369, 1379 (10th Cir. 1979), dealt with a case where the notice of appeal and "all motions and briefs thereafter filed in the appeal appear to have been mailed to [the respondent]." *Id.* at 1379. Finally, *Frieder v. Morehead*

State Univ., 770 F.3d 428 (6th Cir. 2014), involved a notice of appeal that identified some but not all of the defendants and the unnamed respondents challenged they did not receive sufficient notice; however, the clerk served the notice of appeal to all parties. *Id.* at 430 ("Even if the clerk fails in this duty (which no one contends happened here), the 'failure to serve notice does not affect the validity of the appeal.'") (emphasis added). Even if Ms. George previously cited this out-of-circuit case law to the Court, these cases have no bearing on the parties' dispute and do not create a conflict that warrants a panel rehearing.

V. MS. GEORGE DOES NOT ADDRESS THE FUTILITY OF HER PETITION.

Ms. George's petition is futile. Ms. George's claims against Bridges and Washington County are premised on respondeat superior liability for the conduct of House of Hope and Patricia Barcroft. Ms. George's claims against the primary actors in this case have been fully heard and a final judgment has been entered in their favor and it has been affirmed by this Court. Therefore, Ms. George's claims premised on vicarious liability against Bridges and Washington County fail as a matter of law and rehearing is moot.

CONCLUSION

For all of the above-mentioned reasons, the Court must deny Ms. George's petition for a panel rehearing.

RESPECTFULLY SUBMITTED this 28th day of December, 2021.

BARRAN LIEBMAN LLP

s/ *Josh M. Goldberg*
Josh M. Goldberg, OSB No. 180414
jgoldberg@barran.com

Attorney for Defendant-Appellee
Bridges to Change, Inc.
SMITH FREED EBERHARD

s/ *Sean K. Conner*
Sean K. Conner, OSB No. 132518
sconner@smithfreed.com

Attorney for Defendant-Appellee
Washington County Department of
Housing Services

*[*** certificates omitted for purposes of printing ***]*