No. 24-

IN THE

Supreme Court of the United States

MILLIA PROMOTIONAL SERVICES AN ARIZONA NON-PROFIT CORPORATION AND KHAMILLIA HARRIS,

Petitioners,

v.

STATE OF ARIZONA, ACTING THROUGH ARIZONA DEPARTMENT OF ECONOMIC SECURITY, DIVISION OF EMPLOYMENT AND REHABILITATION SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

An issue of recurring, unresolved, national importance: The only way that 42 U.S.C. § 1981 can protect the rights of Blacks and other minorities to make and enforce contracts, to sue, to be parties in litigation, and to have and enjoy the same full and equal protection of all laws and proceedings that are enjoyed by white citizens is for district courts to grant summary judgment against them only in strictest compliance with the summary-judgment standards—and only after taking into account all available evidence, in particular, all circumstantial evidence.

After all, those who act to deprive Blacks and other minorities of their contract rights only rarely come out of the shadows and admit that they acted with discriminatory intent. Almost all cases brought under 42 U.S.C. § 1981 depend solely on circumstantial evidence. District courts must recognize that basic fact. District courts can deprive Blacks and minorities of their right to a jury trial in these unique cases only when, after having had the chance to consider all of the available circumstantial evidence, reasonable jurors could not find any discriminatory intent.

This, then, is the issue: Under 42 U.S.C. § 1981, may district courts do what the district court did here on summary judgment, which is to make factual and credibility determinations, weigh the evidence, and refuse to credit the circumstantial evidence that a reasonable jury could have relied on to find that racial discrimination was a substantial reason for impairing the contract rights of an energetic, talented, caring, and formerly successful Black businesswoman.

This Court has never addressed the exceptional importance of circumstantial evidence in establishing discriminatory intent in 42 U.S.C. § 1981 cases, and has therefore not provided sufficient guidance to federal courts tasked with interpreting and applying 42 U.S.C. § 1981's protections. As a result, litigants such as Khamillia Harris have not had a fair chance to present the circumstantial evidence of discriminatory intent to juries. This petition is an opportunity to correct that problem and protect the contract rights of Blacks and other minorities that was the congressional goal from 1866 to the present date.

PARTIES TO THE PROCEEDING

In accordance with Supreme Court Rule 14(b), all parties to the proceeding are named in the caption.

STATEMENT OF RELATED CASES

Millia Promotional Services v. Arizona Dept. of Economic Security, United States District Court for the District of Arizona No. 2:18-cv-04701-SMM (Doc. 92). Order entered January 11, 2023.

Millia Promotional Services v. State of Arizona, United States Court of Appeals for the Ninth Circuit No. 23-15180 (App. Doc. 43-1). Memorandum entered April 12, 2024.

Millia Promotional Services v. State of Arizona, United States Court of Appeals for the Ninth Circuit No. 23-15180 (App. Doc. 35). Order entered May 1, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

On April 12, 2024, the United States Court of Appeals for the Ninth Circuit filed its unreported opinion, entitled Memorandum (App. 1a).

JURISDICTION

On April 12, 2024, the United States Court of Appeals for the Ninth Circuit filed its unreported opinion, entitled "Memorandum" (App. 1a), affirming both the January 11, 2023 Order (App. 7a) and the January 11, 2023 Judgment (App. 36a) of the United States District Court for the District of Arizona.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV § 1, provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1981 provides, in relevant part:

Equal Rights Under the Law

(a) Statement of equal rights

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.

(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.

STATEMENT OF THE CASE

A. Introduction: Ignoring the summary-judgment standard and refusing to let the trier of fact consider and weigh the circumstantial evidence defeats the protections Congress created in 42 U.S.C. § 1981.

This case lies at the intersection of congressional intent, public policy, justice, and history. At the close of the 1876 presidential election, a resurgent post-Civil War congressional coalition of white Southern Democrats forged a voting bloc sufficient to result in the corrupt Compromise of 1877 that gave the presidency to "His Fraudulency," Rutherford B. Hayes (1822-1893).

The "Compromise of 1877," also often described as the "Corrupt Bargain," was a Devil's bargain with two main parts. First, the Southern Democrats in Congress agreed that Hayes won the 1876 election and could be inaugurated as 19th President of the United States. Second, in exchange, the Republicans in Congress secretly promised the rapid end of Reconstruction and the withdrawal of federal troops that had supported Black enfranchisement and inclusion in public affairs and private business. Freedom from direct federal control allowed the Southern states to create the vicious Jim Crow laws that gradually stripped Southern Blacks of their economic and electoral rights and returned many of them to a condition of servitude revoltingly close to slavery. *See* C. Vann Woodward, *Reunion and Reaction* (1967) (providing a detailed history of the Compromise of 1877).

The goal of the Southern Democrats was to prevent effective enforcement of the congressional post-Civil War legislation enacted to protect the newly freed Black population. Just after the Civil War, after all, Congress had passed several remedial statutes, including § 1 of the Civil Rights Act of 1866.

Section 1 was strong post-Civil War legislation seeking to ensure that newly freed slaves received the same rights as all other citizens. The Civil War ended in April 1865; later that year the States ratified the 13th Amendment, which abolished slavery. In April 1866, the Civil Rights Act of 1866 became law. After the 14th Amendment's ratification, Congress reenacted the 1866 Act as part of the Enforcement Act of 1870. Congress recodified the statute in 1874. It is now codified at 42 U.S.C. § 1981.

Section 1981 guarantees to all "persons" the same right "to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." Claims under the statute have largely concerned its contract clause, which provides for "the same right . . . to make and enforce contracts" that "white citizens" possess. That right to make and enforce contracts applies to private *and* government acts. The statute's text expressly protects "against impairment by nongovernmental discrimination and impairment under color of State law." Those multiple evils happened here.

B. The facts disclose circumstantial evidence of discriminatory intent.

This case concerns a Black Arizona businesswoman, Khamillia Harris, the holder of a master's degree in

psychology, a bachelor's degree in social work, and an education certificate. She founded and owns a nonprofit company (Millia Promotional Services) that helps handicapped and disadvantaged people obtain work and educational opportunities through programs provided by the State of Arizona ("State").

Khamillia does this important, technical, and highly-specialized public-service work through contracts procured through a State agency with the ponderous title of Arizona Department of Economic Security, Division of Employment and Rehabilitation Services (DERS). For the sake of brevity, we will refer to it as the "Agency." Without contracts through the State's Agency, Khamillia cannot provide the critically important services that offer hope, work, education, and a brighter future to her clients—and she cannot operate her nonprofit business.

Unfortunately, certain persons in the State Agency's hierarchy decided that it was more important to racially discriminate against Khamillia in handing out and supervising these contracts than it was to treat her fairly. Strong circumstantial evidence supported the clear inference of race-based discriminatory intent. We lack space to list all of the circumstantial evidence, but the Excerpts of Record (ER) at the Ninth Circuit overflowed with circumstantial evidence that Khamillia had presented to the district court—and that the district court and then the Ninth Circuit downplayed or chose to ignore. Examples of the circumstantial evidence included, but were not limited to, the following:

- Rates for two white vendors were significantly higher than the rates for Khamillia's business. Her request for

an equal rate was ignored and the disparity continued. (ER-36-¶13).

- After protest of a non-payment letter, Agency officers displayed animus toward Khamillia and her business and began singling them out for adverse action. (ER-37-¶28).

- Khamillia gave Defendant Mackey an eyewitness account of the statements and adverse actions taken by Defendants Poetz, Daugherty, and Zweig against Khamillia and her business, which caused them to suffer substantial economic loss—including repeated loss of clients. (ER-38-39-¶42).

- Before the adverse actions taken against it, Khamillia's business had a steady stream of clients. (ER-38-39-¶43).

- Although the rates of Khamillia and her business were significantly lower than other similarly situated vendors, Defendants refused to give to her business even a modest rate increase to match the other vendor rates. (ER-39-¶45).

- Defendant Poetz "bragged" to Khamillia about her family owning a plantation, braggadocio which, for Khamillia, was offensive, inherently racist, and improper commentary. (ER-40-¶53).

- The Agency provided false, pretextual reasons for denying a rate increase, including: (1) reliance on an audit not performed until after the fact; (2) a lack of parity and equal pay; and (3) supposed errors in the

manner or form of the request not raised until after this lawsuit started. (ER-42-43-¶¶4,6).

- Defendant Mackey admitted at deposition that she did not even know why the rate-increase request was denied. (ER-43-¶8).

- Permission to use a logo indicating affiliation with the Agency was denied to Khamillia, although two white vendors had and continued to benefit economically from the State's approval of use of the Agency's logo. (ER-43-¶10).

- Agency officials used threats, retaliation, and false pretenses to encourage Client S to stop using the services of Khamillia's business, proffered no rational excuse for the discriminatory act, and cut off communication on the issue. (ER-39¶46)(ER-45-¶15). Agency officials berated Khamillia, performed a false audit, and incorrectly accused her of taking advantage of Agency services, overbilling, and keeping no records. (ER-45-48-¶¶16-22).

- The Agency "lost" the records for Client S, but then refused to accept Khamillia's complete copy of the case file. (ER-48-¶¶23-25).

- Agency personnel made false and racially stereotypical comments that Khamillia was "argumentative, combative, unapproachable and not easy to talk to" and "talks over people to get her point across." (ER-49-¶26). When Khamillia protested the use of that sort of racial stereotyping, Agency officials did not retract the comments and instead described counselors as

bus drivers, clients as passengers, and vendors as bus stops. For Khamillia, the weird bus-stop analogy was an unsubtle way to tell her she belonged at the back of the bus—a historically racist trope. (ER-49-50-¶¶27-28).

- Agency officials refused to investigate Khamillia's complaints that they were singling her out for adverse actions because she was Black. (ER-50-¶¶29-32).

- Instead of positive action, the Agency did an impromptu, unprecedented "desk audit" of Khamillia's business that, despite odd and unsupported aspersions cast against Khamillia, found nothing of note. (ER-50-15-¶¶32-33)(ER-53-¶47).

- Without explanation or warning, Agency officials closed the file on a "Client M" who had benefitted from and showed promise in training. (ER-51-¶¶35-36). The Agency also used the same tactics with a promising "Client L." (ER-51-53-¶¶37-41). Those sorts of repeated wrongful acts undercut Khamillia's business and ability to survive economically.

- After May 2017, when Khamillia complained of the racial discrimination, she received no clients at all from the main counselor referrals. Then, with no justification, Khamillia's business was removed as a vendor on the "Vendor List" for client selection and was "uninvited" to attend vendor quarterly meetings. (ER-53-¶43). Indeed, 10 Vocational Rehab officers intentionally ignored Khamillia's efforts to present and/or provide marketing materials. (ER-53-¶44).

- Agency officials conspired to complete a false "deficiency report" against Khamillia's business before conducting any proper case-file review. (ER-53-¶45).

- One Agency official went so far as to deviate from policy and her assigned duties as a supervisor by taking on contract monitoring duties to personally audit and remove clients from Khamillia's caseload. (ER-53-¶46).

- The record at the district court repeatedly showed that the Agency's officials had given false, inconsistent testimony for their adverse actions. The false accusations levelled against Khamillia and her business included (a) billing above authorization; (b) no written authorization; (c) high cost; (d) client non-progression; (e) client boundaries and meshing; (f) contract compliance; (g) documentation/forms; (h) the amount of provided services; and (i) counselor interactions. (ER-54-¶49). Reasonable jurors could conclude that all of the false accusations were mere pretexts for racial discrimination.

REASONS FOR GRANTING THE PETITION

1. The summary-judgment standard and the unique proof requirements for a contract claim brought under 42 U.S.C. § 1981 require that district courts make every reasonable effort to allow juries to consider all of the circumstantial evidence.

In cases where Black persons seek a remedy for racial discrimination in contract matters, it is critically important for district courts to follow the summary-judgment standard and to respect the dispositive role of circumstantial evidence.

After all, except in the rarest of rare cases, a plaintiff cannot prove a violation of 42 U.S.C. § 1981 with a single fact. As the United States District Court for the Central District of Illinois perceptively explained in 1980:

> Relevant considerations in determining the existence of a discriminatory purpose are the historical background of the decision, the specific sequence of events which occurred, the departure of the actual procedures followed from normal procedure, substantive departures, and contemporary statements by the decision-makers. The underlying discriminatory purpose must not be the sole or even dominant factor that influenced the allegedly discriminatory action. It is sufficient for it to be a motivating factor. Of course, evidence of a discriminatory purpose may be only circumstantial.

Little v. United States, 489 F.Supp. 1012, 1022-23 (C.D. Ill. 1980).

Indeed, "it is the exceptional case where there is clear, direct evidence of racial animus." *Id.* at 1024. Therefore, "in the typical case the discriminatory racial purpose must be divined from inferences and implications arising out of circumstantial evidence." *Id.*

Here, no single fact proves Defendants violated 42 U.S.C. § 1981. But that does not matter because, at the district court, in opposing the grant of summary judgment, Khamillia provided substantial circumstantial evidence of the violation of 42 U.S.C. § 1981 and of the damages caused to Millia Promotional Services and to

Khamillia Harris, a competent, diligent, and respected Black businesswoman.

Section 1981, after all, was "meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race." *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003) (internal quotation marks and citation omitted). "'Race' is interpreted broadly to mean classes of persons identifiable because of their ancestry or ethnic characteristics." *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 612-13 (1987)).

As the court of last resort poised at the pinnacle of federal appellate review, this Court does not resolve factual disputes, but resolves legal questions arising from the grant of summary judgment and therefore "must take the evidence in petitioner['s] favor." *United States ex rel. Schutte v. SuperValu Inc.*, 143 S.Ct. 1391, 1397 n.2 (2023). "As is appropriate at the summary-judgment stage, facts that are subject to genuine dispute are viewed in the light most favorable to [a petitioner's] claim." *Taylor v. Rojas*, 141 S.Ct. 52, 53 n.1 (2020).

Indeed, because summary judgment deprives the jury of its role in deciding factual disputes and in drawing factual inferences from the evidence, summary judgment is only proper "if 'the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.'" *Tolan v. Cotton*, 572 U.S. 650, 656-57 (2014) (quoting Fed. Rule Civ. Proc. 56(a)). Here, the State of Arizona never did that.

In assessing if summary judgment is warranted, "a court must view the evidence in the light most favorable

to the opposing party" and "adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party." *Tolan*, 572 U.S. at 657 (internal quotation marks omitted). That ensures that a jury—not a judge relying on a mere paper record—will determine which story is credible.

The jury's role is particularly important in 42 U.S.C. § 1981 cases, where the stakes are not just about the particular parties involved in one case, but whether there will be accountability when contracting parities across the nation act with discriminatory intent to deprive Blacks and other minorities of their congressionally protected contract rights. *Cf. Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (The jury represents the "judgment of the community.").

2. The district court failed to follow the burden-shifting analysis that federal appellate courts require in 42 U.S.C. § 1981 cases.

In a 42 U.S.C. § 1981 case, the plaintiff has the initial burden of proving, by a preponderance of the evidence, a prima facie case of discrimination. *Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989). "The burden is not onerous." *Id.*

In the Ninth Circuit and across the nation, federal district and appellate courts regularly apply the *McDonnell Douglas* burden-shifting analysis to section 1981 claims of racial discrimination. *Lindsey v. SLT Los Angeles, LLC*, 447 F.3d 1138, 1144-45 (9th Cir. 2006) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792,

802-03 (1973)). "'The proof required to establish a prima facie case is 'minimal and does not even rise to the level of a preponderance of the evidence.'" *Lindsey*, 447 F.3d at 1144 (quoting *Chuang v. University of California Davis, Board of Trustees*, 225 F.3d 1115, 1124 (9th Cir. 2000)).

Khamillia and her business met that minimal burden by providing and identifying evidence that they were being treated in a discriminatory manner for no justifiable reason and/or based on clearly pretextual reasons and that similarly situated white vendors were not confronting the same discriminatory conduct.

Once a plaintiff establishes a prima facie case of discrimination, as Khamillia and her business did, an inference of discrimination arises that an employer can only rebut by proving a legitimate, nondiscriminatory reason for the apparently discriminatory conduct. The State Defendants failed to do that.

The plaintiff "retains the final burden of persuading the jury of intentional discrimination." *Patterson*, 491 U.S. at 186-87. Although the plaintiff "retains the ultimate burden of persuasion," the plaintiff "must also have the opportunity to demonstrate that respondent's proffered reasons for its decision were not its true reasons." *Id*. at 187.

In December 2023, the Eleventh Circuit sensibly suggested that a plaintiff should "always" survive summary judgment in a 42 U.S.C. § 1981 case if the plaintiff presents circumstantial evidence creating a triable issue on an employer's discriminatory intent with a convincing mosaic of circumstantial evidence that would

allow a jury to infer intentional discrimination by the decisionmaker. *Tynes v. Florida Dept. of Juvenile Justice*, 88 F.4th 939, 946 (11th Cir. 2023). The term "convincing mosaic" is not challenging. The 11th Circuit explained a "'convincing mosaic' of circumstantial evidence is simply enough evidence for a factfinder to infer intentional discrimination in an employment—the ultimate inquiry in a discrimination lawsuit." *Id.*

The 11th Circuit approach in *Tynes* is clearer and easier to use than the approach that the Ninth Circuit and the other circuit and district courts apply. It is also more faithful to the summary-judgment standard and offers greater protection for the contract rights that Congress sought to guarantee when it created 42 U.S.C. § 1981 in the first instance. In a productive sense, *Tynes* simplifies and streamlines the *McDonnell Douglas* analysis.

Furthermore, in his brilliant and perceptive concurrence in *Tynes*, Circuit Judge Kevin C. Newsom concluded that the *McDonnell Douglas* framework "not only lacks any real footing in the text of Rule 56 but, worse, actually obscures the answer to the only question that matters at summary judgment: Has the plaintiff shown a 'genuine dispute as to any material fact'—in the typical Title VII case, as to whether her employer engaged in discrimination based on a protected characteristic." *Tynes*, 88 F4th at 949.

"Summary judgment," Circuit Judge Newsom wrote, "turns on the existence of a genuine factual dispute; courts deciding summary-judgment motions don't weigh evidence, and they don't decide (let alone announce) whether they're convinced." *Id.* at 955. And yet, in our

case, the district court weighed the circumstantial evidence, and concluded it was "weak" and "far from substantial." (App. 30a). In the district court's opinion, the circumstantial evidence that Khamillia had presented did not create genuine, triable issues on pretext, "even when viewed cumulatively." (App. 30a).

In our case, the district court conflictingly found that although Khamillia's circumstantial evidence may have been "specific" it supposedly was "not substantial." (App. 31a). Over and over, the district court dismissed "specific" circumstantial evidence as not "substantial." (App. 31a, 32a, 33a). But at "the summary judgment stage, the trial judge's function is not himself to weigh the evidence and determine the truth of the matter." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

On appeal, the Ninth Circuit was equally dismissive of the circumstantial evidence in a slightly different way. The Ninth Circuit decided that the disparate treatment that Khamillia stated she was subjected to was "explainable by any number of nondiscriminatory factors." (App. 5a). But whether evidence is explainable and what the explanations may be are matters of inference for the jury alone to consider. Indeed, the district court must view the facts and draw all reasonable inferences from those facts in the light most favorable to the nonmoving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007).

Here, the district court ended the case in mid-stream, depriving Khamillia and her business of their right and opportunity to prove their case in chief and to persuade the jury that the intentional acts that the Agency and its officials had committed against them were discriminatory,

unjustified, and unjustifiable. Neither the district court nor the Ninth Circuit took any inferences in favor of Khamillia and weighed the evidence and found it wanting. But that approach is impermissible at the summary-judgment stage, especially when trying to implement a statute that depends so heavily on circumstantial evidence to establish discriminatory intent.

CONCLUSION

Based on the evidence identified in the record, reasonable jurors could find the State Defendants discriminated against Harris and Millia Promotional Services and that the explanations proffered for that apparent discrimination were pretexts and nothing more. *Noyse v. Kelly Services*, 488 F.3d 1163, 1170 (9th Cir. 2007).

District courts must be scrupulous in following the summary-judgment rules and guidelines in 42 U.S.C. § 1981 cases because proving discriminatory intent is exceptionally hard. In addition, district courts must recognize that circumstantial evidence is often the only way to prove and support an inference of discriminatory intent.

For those reasons, this Court should grant the petition as an opportunity to instruct federal judges across our nation that the plain words of 42 U.S.C. § 1981, and its policy, intent, and history, require exceptional deference to the jury's role as the factfinder of the existence of discriminatory intent. Only in the rarest of rare cases should the district court grant a summary judgment that prevents the jury from deciding if the direct

and circumstantial evidence supports an inference of discriminatory intent.

Respectfully submitted,

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July 2024

APPENDIX

TABLE OF APPENDICES

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED APRIL 12, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-15180

D.C. No. 2:18-cv-04701-SMM

MILLIA PROMOTIONAL SERVICES, AN ARIZONA NONPROFIT CORPORATION; KHAMILLIA HARRIS,

Plaintiffs-Appellants,

v.

STATE OF ARIZONA, ACTING THROUGH ARIZONA DEPARTMENT OF ECONOMIC SECURITY, DIVISION OF EMPLOYMENT AND REHABILITATION SERVICES; *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Arizona.
Stephen M. McNamee, District Judge, Presiding.

April 4, 2024, Argued and Submitted,
Phoenix, Arizona; April 12, 2024, Filed

Appendix A

Before: CLIFTON, BYBEE, and BADE, Circuit Judges.

MEMORANDUM*

Millia Promotional Services and its founder and owner Khamillia Harris (collectively "Millia") appeal the order of the District Court for the District of Arizona dismissing its civil rights claims against the State of Arizona and granting summary judgment in favor of the individual Defendants. We affirm.

Millia contracted with Arizona's Division of Employment and Rehabilitation Services ("DERS") to provide employment services to clients referred by DERS in exchange for payment by the State. The individual Defendants, employees of DERS, were involved in managing and monitoring client cases referred to Millia. Millia sued the Defendants—in both their individual and official capacities—for racial discrimination in contracting (42 U.S.C. § 1981), deprivation of civil rights (42 U.S.C. § 1983), conspiracy to interfere with civil rights (42 U.S.C. § 1985), and neglect to prevent civil rights violations (42 U.S.C. § 1986). It alleged that the Defendants had taken various adverse actions against the business—including denying a rate increase, prohibiting use of the DERS logo on Millia's website, and transferring clients from Millia to other service providers—on account of Harris's race. To prove racial animus, Millia cited the higher pay rate of white-owned vendors as well as several instances in

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

which the Defendants used what seemed to Harris to be racial stereotypes and undertones.

The district court dismissed the claims against Arizona and against the individual Defendants in their official capacities under the Eleventh Amendment. It also held that certain aspects of the claims were barred by Arizona's statute of limitations. Finally, the district court granted summary judgment to the Defendants on the remaining claims because Millia failed to establish a prima facie case of racial discrimination or, in the alternative, had failed to show that the Defendants' legitimate explanations of their actions were pretextual.

We have jurisdiction under 28 U.S.C. § 1291 and review the district court's rulings on sovereign immunity, statute of limitations, and summary judgment de novo. *Gordon v. County of Orange*, 888 F.3d 1118, 1122 (9th Cir. 2018); *Lukovsky v. City & County. of San Francisco*, 535 F.3d 1044, 1047 (9th Cir. 2008); *Doe v. Lawrence Livermore Nat'l Lab'y*, 131 F.3d 836, 838 (9th Cir. 1997).

1. There was no error in the district court's dismissal of the claims against the State or the money damages claims against the individual Defendants in their official capacities. That such suits are barred by sovereign immunity has been well-established since the Supreme Court's decision in *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). Millia misreads the district court's order, believing that the dismissal also affected the individual-capacity claims for money damages. Because the district court clearly went on to deal with those claims

at the summary judgment stage, this argument is without merit.

2. We likewise find no error in the district court's application of Arizona's statute of limitations. For actions that were cognizable under the pre-1990 version of the 42 U.S.C. § 1981—like Millia's claims based on alleged discrimination in contract formation—state tort law determines the limitations period. *Lukovsky*, 535 F.3d at 1048 n.2. Arizona requires that such claims be brought within two years of the alleged discrimination. Ariz. Rev. Stat. § 12-542. The district court properly ruled that damages arising from DERS's denial of Millia's rate increase request and from Benjamin White's comments were untimely because those events occurred more than two years before Millia initiated its suit. Millia claims that the limitations period should be tolled because it did not learn until later that these actions were apparently motivated by racial animus. But we have unequivocally stated that the statute of limitations accrues when the actual injury occurs and not when plaintiffs learn "that there was an allegedly discriminatory motive." *Lukovsky*, 535 F.3d at 1051. The district court therefore properly barred damages arising from actions taken outside the limitations period.

3. We affirm the district court's summary judgment in favor of the individual Defendants because Millia failed to make out a prima facie case of racial discrimination in contracting. To establish a prima facie case, the § 1981 plaintiff must show that (1) she is a member of a protected class; (2) she attempted to engage in activity protected

under the statute (such as making or enforcing contracts); (3) she was denied the right to engage in the activity; and (4) similarly situated parties outside of the protected class were treated more favorably. *See Lindsey v. SLT Los Angeles, LLC*, 447 F.3d 1138, 1145 (9th Cir. 2006). It would certainly violate a person's rights to "make and enforce contracts" under § 1981 if she were paid less, received fewer client referrals, or were otherwise treated unfavorably based on her race. *Cf. Strother v. S. Cal. Permanente Med. Grp.*, 79 F.3d 859, 878 (9th Cir. 1996) (holding that exclusion from partner meetings and denial of secretarial support available to others supported a § 1981 claim). But Millia has not alleged that similarly situated vendors were treated more favorably. Comparators must "have similar jobs and display similar conduct." *Vasquez v. County of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2004). Millia did not produce any evidence that the vendors who enjoyed a higher pay rate or that used the DERS logo on their websites were similarly situated. This differential treatment is explainable by any number of nondiscriminatory factors such as greater experience, more services offered, or permission from DERS to use its logo. Of course, at the summary judgment phase we do not require robust evidence or precise comparisons that could only be drawn with the benefit of discovery. *See Hawn v. Exec. Jet Mgmt., Inc.*, 615 F.3d 1151, 1157 (9th Cir. 2010). But we require more than the naked assertion that someone is similarly situated to the plaintiff.

Because Millia's claims under 42 U.S.C. §§ 1983, 1985, and 1986 depend on the underlying § 1981 claim, they fall with Millia's failure to establish a prima facie

case of racial discrimination. Having determined that Millia did not make out a prima facie case, we need not consider the Defendants' explanations for their actions nor Millia's evidence of pretext. *See Robinson v. Adams*, 847 F.2d 1315, 1318 (9th Cir. 1987) (holding that "summary judgment was appropriate" where the plaintiff "has not pointed to evidence creating a genuine dispute about facts material to a prima facie case").

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, FILED JANUARY 11, 2023

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-18-04701-PHX-SMM

MILLIA PROMOTIONAL SERVICES, *et al.*,

Plaintiffs,

v.

ARIZONA DEPARTMENT OF
ECONOMIC SECURITY, *et al.*,

Defendants.

January 10, 2023, Decided
January 11, 2023, Filed

ORDER

Pending before the Court is Defendants' Motion for Summary Judgment. (Doc. 77). The Motion is fully briefed. (Docs. 87, 91). For the reasons set forth below, the Court grants Defendants' Motion.

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I. Background and Procedural History

Plaintiffs are Khamillia Harris, an African-American woman, and Millia Promotional Services ("MPS"), an Arizona nonprofit organization founded by Harris that provides rehabilitative instructional services, disability employment services, and educational services. (Doc. 14 at 3). This lawsuit arises out of the contractual relationship between MPS and the Arizona Department of Economic Security ("ADES"), Division of Employment and Rehabilitation Services ("DERS"). DERS is a state agency that provides employment, career, and disability-related services to qualified individual clients under a federal program. (Doc. 78 at 2). To carry out its work, DERS contracts with private vendors, who provide services to DERS clients. (*Id.*) MPS is one such vendor. (*Id.*)

Relevant here are two contracts that MPS entered into with DERS: a Rehabilitation Instructional Services ("RIS") contract for rehabilitative services entered into in October 2015 and a disability employment related services ("DRES") contract entered into in August 2016. (*Id.*) At the time, MPS was one of 38 RIS vendors and one of 22 Career Exploration and Supported Education vendors within Arizona. (*Id.*)

On June 11, 2016, Harris requested an increased pay rate for her vendor contracts. (Doc. 88-1 at 14). That request was denied. (Doc. 78 at 3). In a July 20, 2016 email sent to Harris by a non-defendant ADES procurement specialist, it was explained that ADES was "currently attempting to negotiate a lower price on all of our . . .

[vendor] contracts by asking all of our vendors to give the State a 10% reduction in all contract pricing." (Doc. 88-1 at 23). Rather than agreeing to Harris' proposed rate increase or asking her to reduce her fees by 10%, ADES decided to "leave [MPS'] rates the same" as a "compromise." (*Id.*)

DERS employee Benjamin White—who is not a defendant in this case—was initially responsible for overseeing the application process that resulted in MPS' contract with DRES, signed in August 2016. (Doc. 14 at 7). In June 2016, White told Harris that "[a]s a new vendor, you can be invited to sit at the table to eat, but you will be only offered bread crumbs compared to the other vendors until you make a name for yourself." (*Id.* at 6-7). A few days later, White responded to Harris' inquiry about the status of some of her application materials by joking that it was possible that someone in the office had "used [them] for toilet paper." (*Id.* at 7). Harris reported this remark to White's supervisors, who removed White from his position overseeing Plaintiffs' DRES contract application process. (*Id.*)

On July 26, 2016, White emailed MPS. (Doc. 88-1 at 17). After seeking clarification about MPS' nonprofit status, White told Harris that he had received an objection from an unnamed party about a reference to MPS' ADES contract and the listing of DERS as a sponsor on MPS' website. (*Id.*) White claimed not to fully understand the objection but cited the relevant provision from the contract's Uniform Terms and Conditions: "The Contractor shall not use, advertise or promote information

for commercial benefit concerning this Contract without the prior written approval of the Procurement Officer." (*Id.*) White informed Harris that the references to DERS on MPS' website was fine if it had been "cleared by the ADES Chief Procurement Officer." (*Id.*) White told Harris that she "might want to address this matter at some time." (*Id.*)

In reply, Harris asked White to put her in touch with the person who had spoken to him about MPS' website. (*Id.*) Two hours later, White emailed Harris letting her know that he would "notify the Procurement Specialist about your request." (*Id.* at 18).

The following morning, a non-defendant ADES procurement specialist wrote to Harris to follow up on a conversation the two had had earlier that morning. (*Id.* at 20). The specialist provided Harris with the names and contact information for the two procurement specialists assigned to MPS' contracts and told Harris that at least one of them "will be more than happy to assist you with all of your questions and concerns regarding both contracts." (*Id.*) Neither party has stated or provided evidence that Harris replied to the procurement specialist's email. Harris did not follow up by requesting the use of the DERS logo and name on the MPS website. (Doc. 78-1 at 57-59). Instead, Harris removed them from the website. (*Id.*)

Among MPS' clients was Client S. (Doc. 78 at 5). In April of 2017, Client S decided to transfer from one ADES office to another. (Doc. 78 at 6; Doc. 88-1 at 64). At the new office, Client S met with his new Vocational Rehabilitation

("VR") counselor, Defendant Rollonda Daugherty, who audited the services Client S had previously received. (*Id.*; Doc. 88-1 at 91). The results of the audit gave Daugherty "great concern" as the authorized number of hours of services Client S had received "far exceeded" the amount of hours laid out in his individualized plan for employment. (Doc. 88-1 at 92). Further, it appeared to Daugherty that Client S had "not been making progress." (*Id.*) Client S stated that he felt he was being "set up for failure" because although he was supposed to be going to school as part of his services, his "several learning disabilities" meant he only lasted "a couple of days or a couple of weeks." (*Id.*) As a result, Daugherty met with Defendant Crystal Poetz—her supervisor—about Client S. (*Id.*)

Client S' previous goals had been to work as a nursing assistant, patient care technician, and lab technician. (Doc. 78 at 6). Despite the many hours Client S had worked with MPS, he had not sought disability resource services or accommodations to help with his reading deficiencies and had completed some but not all required documents related to his education. (*Id.*; Doc. 88-1 at 94). Client S's spelling was at a third-grade level and math at a fourth-grade level. (Doc 78 at 7). Based on the audit, Daugherty and Poetz determined that he did not have the aptitude to continue on the goals he had set with MPS. (*Id.*) Daugherty and Poetz recommended to Client S that he keep his current job, complete a reading course he was taking, and when he felt he was ready, reapply for services with DERS. (*Id.*) Client S seemingly followed this advice and did not seek further services with DERS—and, by extension, with MPS. (*Id.* at 8).

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On May 2, 2017, Harris and Defendant Traci Zweig-Przecioski met to discuss Harris' concerns with how DERS handled Client S. (*Id.* at 8). Despite the initial concerns about MPS overbilling for its work with Client S, Zweig-Przecioski later learned that Harris had received verbal authorization from a non-defendant VR counselor for all the additional hours billed. (*Id.*; Doc. 88 at 10; Doc. 88-1 at 69). At this meeting, Zweig-Przecioski allegedly told Harris that Poetz had found Harris to be "combative, aggressive, unapproachable, and not easy to talk to as [she] talk[s] over people.". (Doc. 88 at 15; Doc. 88-1 at 77). Nevertheless, MPS was paid for all hours requested. (Doc. 78 at 8; Doc. 88 at 4).

Another of MPS' clients was Client M, who MPS began working with in July 2017. (Doc. 88-5 at 85). Less than three months later, DERS—through non-Defendant Lisa Adamu—ended Client M's services. (*Id.*) Adamu explained to Harris that Client M's case was closed was because Client M needed training and education in order to overcome "barriers to employment" and that Client M agreed with the change. (*Id.*; Doc. 88-2 at 62). On August 15, 2017, Harris met with Defendant Kristen Mackey—Zweig-Prezecioski's supervisor—to discuss concerns that MPS was being treated differently to other vendors, specifically that her case load has been reduced. (Doc. 78-1 at 219-19). In response, Mackey ordered a report on MPS' client numbers, which indicated that MPS' client numbers were consistent with other sole proprietor vendors. (*Id.* at 205; Doc. 87 at 7).

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On December 14, 2018, Plaintiffs Harris and MPS filed a Complaint in this Court. (Doc. 1). On March 11, 2019, they filed an Amended Complaint, alleging violations of 42 U.S.C. § 1981, § 1983, § 1985, and § 1986. (Doc. 14). Plaintiffs named as a Defendant the State of Arizona, acting through the DERS. (Doc. 14). The remaining Defendants are being sued in both their personal and official capacities. (Doc. 14 at 4-5).

On April 15, 2022, after the parties had completed discovery, Defendants filed a Motion for Summary Judgment, requesting judgment on all claims. (Doc. 77).

II. Legal Standard

"A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought." Fed. R. Civ. P. 56(a). A court must grant summary judgment if the pleadings and supporting documents, viewed in the light most favorable to the nonmoving party, show "that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." *Id.*; *see Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Jesinger v. Nev. Fed. Credit Union,* 24 F.3d 1127, 1130 (9th Cir. 1994). A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A dispute is genuine if it is "such that a reasonable jury could return a verdict for the nonmoving party." *Id.*; *see Jesinger,* 24 F.3d at 1130.

At summary judgment, the judge's function is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. *Anderson,* 477 U.S. at 249. To survive a defendant's motion for summary judgment, a plaintiff must do more than provide a mere "scintilla of evidence" in support of its position. *Id. a*t 252. Rather, it must provide evidence on which a jury could reasonably find for the plaintiff. *Id.*

A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." *Celotex,* 477 U.S. at 323-24. Summary judgment is appropriate against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id. a*t 322; *see also Citadel Holding Corp. v. Roven,* 26 F.3d 960, 964 (9th Cir. 1994). The moving party need not disprove matters on which the opponent has the burden of proof at trial; instead, the moving party may identify the absence of evidence in support of the opposing party's claims. *See Celotex,* 477 U.S. at 317, 323-24.

III. Discussion

Plaintiffs make four claims: that Defendants violated 42 U.S.C. § 1981, § 1983, § 1985, and § 1985. (Doc. 14 at 14-17). The latter three claims all rely on the § 1981 claim.[1]

1. A § 1986 claim can only be made if there is a valid § 1985 claim. *Karim-Panahi v. Los Angeles Police Dep't,* 839 F.2d 621, 626 (9th Cir. 1988). A § 1985 claim can only be made if there is a valid § 1981 or § 1983 claim. *Astre v. McQuaid,* 804 F. App'x 665,

The Court focuses its attentions on Plaintiffs' § 1981 claim because if Defendants are entitled to summary judgment on this claim, they are also entitled to summary judgment on the remaining claims. However, before discussing the merits, the Court addresses Defendants' Eleventh Amendment and statute of limitations arguments.[2]

A. Eleventh Amendment

Defendants contend that the Eleventh Amendment bars Plaintiffs' claims against the State of Arizona and against defendants in their official capacities. (Doc. 77 at 6). In their reply, Plaintiffs do not dispute this—instead, they note that the Eleventh Amendment does not bar suit against defendants in their personal capacities. (Doc. 87 at 23).

First, the Eleventh Amendment bars Plaintiffs' claims against the State of Arizona. *Fireman's Fund Ins. Co. v. City of Lodi,* 302 F.3d 928, 957 (9th Cir. 2002), *as amended on denial of reh'g and reh'g en banc* (Oct. 8, 2002) (explaining that the Eleventh Amendment bars suits seeking damages or injunctive relief against a State).

667-68 (9th Cir. 2020). And in turn, a § 1983 claim can only be made if there is a valid § 1981 claim. *Id.* at 667.

2. Defendants also raise a standing argument for the first time in their Reply. (Doc. 91 at 5). Because the Court grants Defendants' Motion for Summary Judgment on other grounds, it will not address standing.

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State officials sued in their official capacities are generally entitled to Eleventh Amendment immunity. *Flint v. Dennison,* 488 F.3d 816, 825 (9th Cir. 2007). There is, however, an important exception. *Id. A*gency officials made by sued in their official capacities for prospective injunctive relief. *Id.*; *Los Angeles Cnty. Bar Assoc. v. Eu,* 979 F.2d 697, 704 (9th Cir. 1992) (citing *Ex Parte Young,* 209 U.S. 123, 155-56, 28 S. Ct. 441, 52 L. Ed. 714 (1908)).

Here, Plaintiffs have sued several Defendants in their official capacities and seek an injunction ordering Defendants not to discriminate and retaliate against Plaintiffs in the future. (Doc. 14 at 19). Because this is prospective injunctive relief, Plaintiffs may continue to seek this relief from Defendants in their official capacities. However, the Eleventh Amendment bars Plaintiffs from seeking any other relief against the Defendants in their official capacities.

B. Statute of Limitations

Section 1981 does not provide a statute of limitations. 42 U.S.C. § 1981; *Jones v. R.R. Donnelley & Sons Co.,* 541 U.S. 369, 371, 124 S. Ct. 1836, 158 L. Ed. 2d 645 (2004). Instead, the statute of limitations depends on whether the claim was cognizable before the Act's 1990 amendments or only made cognizable by those amendments. *Lukovsky v. City & Cnty. of San Francisco,* 535 F.3d 1044, 1048, n.2 (9th Cir. 2008) (citation omitted). If a claim was cognizable before the 1990 amendments, the statute of limitations is set by the relevant state's statute of limitations for personal injury torts. *Id.* at 1048. In Arizona, that

statute of limitations is two years. A.R.S. § 12-542(2). If, however, the claim would only be cognizable after the 1990 amendments, then a federal catch-all statute of limitations of four years applies. *Lukovsky,* 535 F.3d at 1048 n.2; *see Jones,* 541 U.S. at 382. Thus, whether the statute of limitations for Plaintiffs' claims is two years or four depends on whether each claim was cognizable in the pre-1990 version of the Act.

The 1990 amendments expanded the definition of "make and enforce contracts" to include the "termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." § 1981(b); *see Jones,* 541 U.S. at 373. The main effect of this expansion was to allow for claims centering around harassing conduct that took place post-contract formation. *Jones,* 541 U.S. at 372-73.

Defendants assert that Plaintiffs' claims centering around the denial of rate increase, the contract application process, and denial of use of DERS/RSA logo constitute claims cognizable before the 1990 amendments and thus each have two-year statutes of limitations. (Doc. 77 at 7). The Court will address the nature of each claim in turn.

First, Plaintiffs do not dispute that their request for a pay rate increase constitutes an issue of contract formation, was therefore cognizable before the 1990 amendments, and carries a two-year statute of limitations. Rather, Plaintiffs argue that the statute of limitations for the denial of pay rate increase claim began tolling at a later date—from May 2, 2017 rather than from July 20,

2016. They argue that, although they were denied a rate increase on July 20, 2016, they only realized that they had a "cognizable legal claim for racial discrimination" at this later date. (Doc. 87 at 21). Plaintiffs cite *Lukovsky f*or the proposition that a claim accrues when the plaintiff knows or has reason to know of the injury that is the basis of the action. (*Id.*); *Lukovsky,* 535 F.3d at 1048.

*Lukovsky m*akes clear however, that it is a plaintiff's knowledge of the actual injury that triggers accrual, rather than knowledge of the "legal injury, i.e., that there was an allegedly discriminatory motive . . . ." *Lukovsky,* 535 F.3d at 1051. Here, Plaintiffs knew of the actual injury on July 20, 2016, when they were informed that they would not be receiving a rate increase. (Doc. 88-1 at 23). Their later knowledge or belief that there was an allegedly discriminatory motive is irrelevant for determining when a claim accrues for purposes of the statute of limitations. Thus, the statute of limitations for Plaintiffs' claim based on denial of a rate increase began tolling on July 20, 2016. Plaintiffs commenced this action over two years later, on December 14, 2018, and thus their claims stemming from the denial of a rate increase are barred by the statute of limitations.

Second, Mr. White's comment about toilet paper was made during and about Plaintiffs' application for an RIS contract. (Doc. 78 at 4). This claim therefore falls squarely within the pre-1990 amendments' definition of "mak[ing] and enforce[ing] contracts" because they pertain to contract formation. They therefore carry a two-year statute of limitations. Mr. White's comments were made

in July 2016 and the statute of limitations accrued in July 2018. (*Id.*) Because Plaintiffs filed their claim in December 2018, the two-year statute of limitations bars Plaintiffs from bringing a claim based on this comment.

Third, Plaintiffs' claim centering around Defendants' denial of their use of the DERS/RSA logo on their website is not an issue of contract formation but rather pertains to the "benefits, privileges, terms, and conditions" of their existing contractual relationship with Defendants. It is a post-formation claim that could only have been made under the 1990 amendments and therefore has a four-year statute of limitations. Plaintiffs were warned about their use of the logo on July 20, 2016 and filed their claim in December 2018—well within the four-year statute of limitations. A claim based on this alleged injury is therefore not barred by the statute of limitations.

1. Plaintiffs' Defenses to Statute of Limitations

Plaintiffs raise three equitable defenses to Defendants' statute of limitations arguments.

(a) Equitable Tolling

First, Plaintiffs argue that even if their claim based on the denial of a rate increase did accrue in July of 2016, the statute of limitations was equitably tolled until May 2, 2017. (Doc. 87 at 21). Plaintiffs' argument here centers on the allegation that Defendants' fraudulent actions prevented Plaintiffs from ascertaining that their rights had been violated. (*Id.* at 22).

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Plaintiffs are only entitled to equitable tolling if they can show (1) that they have been pursuing their rights diligently, and (2) that some extraordinary circumstance stood in their way and prevented timely filing. *Smith v. Davis,* 953 F.3d 582, 597-98 (9th Cir.), *cert. denied,* 141 S. Ct. 878, 208 L. Ed. 2d 440 (2020) (citing *Holland v. Florida,* 560 U.S. 631, 649, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010)). In considering the second element—whether an extraordinary circumstance existed—courts are not bound by "mechanical rules" and should make a determination based on all of the facts of the case. *Id.* at 600 (citing *Holland* at 649-50).

Here, there is no indication that Plaintiffs did not diligently pursue their rights. Rather, the issue is whether Plaintiffs have presented a sufficient extraordinary circumstance. Plaintiffs argue that the justifications that Defendants gave for denying a rate increase—justifications that Plaintiffs claim are "fraudulent" and pretextual—present such an extraordinary circumstance. (Doc. 87 at 21-22). Evaluating the record before it, the Court finds that Defendants' justifications for denying the requested rate increase do not constitute extraordinary circumstance necessary to equitably toll the statute of limitations. Defendants informed Plaintiffs that they were denying the requested rate increase because at that time Defendants were "asking all of [their] vendors to give the State a 10% reduction in all contract pricing" and thus denying the rate increase request but refraining from asking for a reduction represented a "compromise." (Doc. 88-1 at 23). Plaintiffs have not argued that Defendants were not in fact seeking rate reductions from their vendors

at this time and have not shown that this justification for denying the rate increase request was fraudulent or pretextual. Indeed, it is undisputed that Defendants reduced the rates for other vendors. (Doc. 78-1 at 21). As such, Defendants' response to Plaintiffs' request for a rate increase appears reasonable, nondiscriminatory, and does not represent an extraordinary circumstance. Because Plaintiffs have failed to meet this second element, the statute of limitations for the denial of rate increase claim will not be equitably tolled.

(b) Equitable Estoppel

Next, Plaintiffs argue that Defendants should be equitably estopped from asserting a state of limitations defense for the denial of rate increase claim. (Doc. 87 at 22). Unlike equitable tolling, which focuses on the actions of the plaintiff, equitable estoppel focuses on the wrongful actions of a defendant which prevent the plaintiff from asserting their claim. *Leong v. Potter,* 347 F.3d 1117, 1123 (9th Cir. 2003). Courts consider a non-exhaustive list of factors, including: "(1) the plaintiff's actual and reasonable reliance on the defendant's conduct or representations, (2) evidence of improper purpose on the part of the defendant, or of the defendant's actual or constructive knowledge of the deceptive nature of its conduct, and (3) the extent to which the purposes of the limitations period have been satisfied." *Santa Maria v. Pacific Bell,* 202 F.3d 1170, 1176 (9th Cir. 2000), *overruled on other grounds by Socop-Gonzalez v. I.N.S.,* 272 F.3d 1176 (9th Cir. 2001), *overruled on other grounds by Smith v. Davis,* 953 F.3d 582 (9th Cir. 2020). A typical, successful equitable estoppel argument is

one where the defendant promises not to plead the statute of limitations, but later does so anyway. *Id.* at 1176-77. Equitable estoppel may also apply where a defendant misrepresents or conceals facts necessary to support a discrimination charge. *Id.* at 1177 (citation omitted).

As with their equitable tolling argument, Plaintiffs hinge their argument here on the claim that Defendants fraudulently concealed their alleged violations of the Civil Rights Act by justifying their actions with false, pretextual reasons. (Doc. 87 at 22). Yet Plaintiffs' equitable estoppel argument must fail for the same reason as its equitable tolling argument. As the Court addressed above, Defendants have given a reasonable explanation for their denial of a rate increase and Plaintiffs have not provided any concrete evidence of any wrongful action or improper purpose—i.e., that this explanation was in fact fraudulent or pretextual. Further, Plaintiffs have not presented any evidence that Defendants concealed or misrepresented any facts necessary to support a discrimination charge—arguing only that they allegedly concealed their true motives. As such, there is insufficient evidence of improper purpose on the part of the Defendant for this Court to equitably estop Defendants from asserting a statute of limitations defense.

(c) Laches

Finally, Plaintiffs argue that the equitable defense of laches bars Defendants' statute of limitations defense. (*Id.*) As Plaintiffs themselves note, however, laches is a defense for defendants to use against plaintiffs who unreasonably

delay commencing an action. (*Id.*) (citing *Real Progress, Inc. v. Dwyer v. Trinity Fin. Servs.,* No. C20-1236-JLR-SKV, at *17, 2021 U.S. Dist. LEXIS 160144 (W.D. Wash. Aug. 6, 2021) (citation omitted)). As such, Plaintiffs may not raise it here.

D. Section 1981 Claims

Plaintiffs make a claim under § 1981, which protects the right to "make and enforce contracts" free from racial discrimination. (Doc. 14 at 14; *see* 42 U.S.C. § 1981(a)). In evaluating such claims, courts apply the burden-shifting framework outlined in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-03, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Under this framework, a plaintiff must first present a prima facie case of discrimination. *Id.* at 802. To do so outside of the employment context, a plaintiff must show that: (1) she belongs to a protected class; (2) the defendants intended to discriminate against her on the basis of her race; (3) she was engaged in an activity protected under the statute; and (4) the defendants interfered with that activity. *Lindsey v. SLT L.A., LLC,* 447 F.3d 1138, 1145 (9th Cir. 2006).[3]

3. There is a circuit split as to whether plaintiffs must also meet a fifth element in non-employment contract-based § 1981 claims—that similarly-situated persons outside the protected class were offered the contractual services that were denied to plaintiffs. *Lindsey,* 447 F.3d at 1145. The Ninth Circuit has not ruled on whether this additional element is required. *Id.* Because the Court finds that Plaintiffs' claim fails even without having to meet this additional element, it will not address it here.

If the plaintiff can show such a prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the challenged conduct. *Weil v. Citizens Telecom Servs. Co., LLC,* 922 F.3d 993, 1002 (9th Cir. 2019) (citing *McDonnell Douglas,* 411 U.S. at 802). If they can do so, the plaintiff may then show, via competent evidence, that the articulated reason was merely pretextual. *Id.*

Here, there is no dispute that Harris—as an African-American—belongs to a protected class. There is also no dispute that Plaintiffs' contractual relationship with DERS is protected under § 1981. Instead, Defendants base their argument largely around the second and fourth elements, arguing that Plaintiffs have not presented evidence showing either that Defendants intended to racially discriminate against Plaintiffs or that their existing contractual rights were violated. (Doc. 77 at 7-13). And even if Plaintiffs did make out a prima facie case, Defendants argue, their actions were taken for legitimate, non-discriminatory reasons, which Plaintiffs have failed to prove were pretextual. (*Id.* at 11-12, 15). The Court agrees with Defendants on both fronts. Plaintiffs have failed to establish a prima facie § 1981 claim and, even if they had, Defendants have articulated legitimate, nondiscriminatory reasons for their actions which Plaintiffs have not shown to be pretextual. Despite the lengthy record produced during discovery, Defendants have shown an "absence of evidence to support [Plaintiffs'] case." *Celotex,* 477 U.S. at 325.

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(1) Prima Facie § 1981 Case

(a) Loss of referrals and loss of Client S as a client

Plaintiffs argue that their loss of referrals and Client S' transfer to a different vendor are actionable under § 1981. (Doc. 14 at 14). Section 1981 offers relief when "racial discrimination impairs an existing contractual relationship, so long as the plaintiff has . . . rights under the *existing* . . . contractual relationship." *Domino's Pizza, Inc. v. McDonald,* 546 U.S. 470, 476, 126 S. Ct. 1246, 163 L. Ed. 2d 1069 (2006) (emphasis added).

Here, Plaintiffs formed two contracts with Defendants and seek relief for the impairment of their existing contractual relationship with Defendants. (Doc. 14 at 12). Specifically, they claim as injuries "loss of referrals" and "interference with contractual relationships." (*Id.* at 14). To determine if their contractual relationship was impaired, the Court must determine what rights Plaintiffs had under their existing contractual relationship with DERS with regard to continued referrals and noninterference from DERS. The terms and conditions of Plaintiffs' contracts with Defendants make clear that Plaintiffs possessed no right to continued referrals or to a set number of referrals. The terms and conditions for the 2015 RIS contract make clear that MPS is to provide services "on an as needed, if needed basis. There is no guarantee of the number of referrals to be provided by DERS/RSA." (Doc. 88-1 at 4). Similarly, the DERS Special Terms and Conditions states that DERS "makes

no guarantee to...provide any number of referrals." (Doc. 78-1 at 82). As such, the fact that MPS did not gain any new referrals after the disagreements outlined above does not constitute an impairment of Plaintiffs' contractual relationship with DERS. Further, nothing in the terms and conditions of the contracts suggests that Plaintiffs had any right to continued, exclusive work with clients. Indeed, the contract contemplates the "transition [of a client] to a subsequent Contractor." (*Id.*) Finally, as Defendants note, Plaintiffs were paid for all of their services.

Accordingly, Plaintiffs' lack of referrals and the loss of Client S and other clients do not impair any rights that Plaintiffs had under their existing contractual relationship with DERS. As a result, Section 1981 cannot offer Plaintiffs any relief from these alleged injuries.

Even if the loss of Client S was actionable under Section 1981, Defendants have provided a non-discriminatory explanation for transferring Client S to a new vendor—because Client S showed no progression in his education goal plan. (Doc. 87 at 20; Doc. 88-1 at 92). Based on the evidence, the Court finds this explanation to be legitimate. The burden therefore shifts to Plaintiffs to provide evidence showing that such explanations were merely a pretext for intentional discrimination. The Court will analyze the issue of pretext below.

(b) Denial of rate increase request

Plaintiffs' claim stemming from the denial of their request for a rate increase is barred by the statute of

limitations, as explained above. Regardless, the record presents no evidence that Plaintiffs' contract contained any right to a rate increase. Further, as explained above, Defendants supplied a legitimate, nondiscriminatory reason for declining to increase the rates at which MPS was paid—they were asking all vendors for a 10% reduction in rates. (Doc. 88-1 at 23).

Plaintiffs attempt to paint this explanation as false by categorizing the reduction as Defendants' attempt to bring parity to rates between vendors. (Doc. 87 at 12). Plaintiffs argue that if this rationale was true, "MPS' rate increase would have been approved to achieve parity and equal pay." (*Id.*) However, Plaintiffs' argument here is unavailing as the record does not support their contention that the 10% reduction was intended to achieve parity and equal pay among vendors. Plaintiffs also point out that Defendant Mackey stated in her deposition that she did not know why MPS' rate increase was denied. (Doc. 87 at 3). Mackey, however, was not responsible for denying Plaintiffs' rate increase request and her lack of knowledge as to why it had been denied is irrelevant.

(c) Removal of agency logo from website

Plaintiffs allege that White (who is not a party to this litigation) ordered Plaintiffs to remove the DERS logo from the MPS website in retaliation for reporting White's toilet paper comments to his supervisor. (Doc. 14 at 7).

It is unclear what action on Defendants' part here constitutes contractual impairment. Plaintiffs' contract

made clear that they had no right to use the agency logo or otherwise refer to their contract with the agency on their website. (Doc. 88-4 at 61). Defendants did not deny Plaintiffs' request to use the logo on their website because Plaintiffs did not in fact request such use. Defendants did not directly order Plaintiffs to remove it. Rather, White (a non-party) accurately informed Harris that her use of the logo was in violation of the Uniform Terms and Conditions. (Doc. 88-1 at 17). Harris was given the contact information for two employees who could help with a request to use the logo. (Doc. 88-1 at 20). Rather than follow up with these employees to request permission to use the logo, Plaintiffs voluntarily removed the logo, in compliance with the terms of their contract. (Doc. 78-1 at 57-59). This does not constitute a contractual impairment and thus cannot be the subject of a § 1981 claim.

In sum, the record does not indicate that Defendants impaired Plaintiffs' contractual rights and thus Plaintiffs have not presented a prima facie claim under § 1981.

(2) Pretext

Even if the record did support a prima facie claim under § 1981, Plaintiffs' claim would still fail. Had they presented a prima facie claim, the burden would shift to Defendants to articulate a legitimate, nondiscriminatory reason for the challenged action. *Weil,* 922 F.3d at 1002. Once a defendant has articulated some legitimate, non-discriminatory explanation for their actions, the burden then shifts back to the plaintiff to show that the defendant's stated reasons were merely pretextual. *Id.*

(citing *McDonnell Douglas,* 411 U.S. at 802). Plaintiffs must not only show that a defendant's stated reasons were false, but that discrimination was the real reason. *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 515, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). Plaintiffs can show this in two ways. First, they can present direct evidence proving discriminatory animus. *Coghlan v. Am. Seafoods Co. LLC,* 413 F.3d 1090, 1095 (9th Cir. 2005). If there is no direct evidence, then plaintiffs can show pretext using circumstantial evidence that is both "specific and substantial." *Vasquez v. Cnty. of Los Angeles,* 349 F.3d 634, 641 (9th Cir. 2003).

Circumstantial evidence may be substantial when explanations for defendants' conduct provided during litigation proceedings materially contradict explanations given contemporaneously. *Godwin v Hunt Wesson, Inc.*, 150 F.3d 1217, 1222 (9th Cir. 1998). Shifting explanations alone, however, are not necessarily "sufficiently probative" to create a triable issue with respect to a defendants' intent to racially discriminate. *Id.*; *Nidds v. Schindler Elevator Corp.,* 113 F.3d 912, 918 (9th Cir. 1996).

Here, as explained above, Defendants have provided legitimate, non-discriminatory reasons for their actions. As such, at the summary judgment stage, the record must show a triable issue as to whether such explanations were merely pretextual. *Manatt v. Bank of America,* 339 F.3d 792, 801 (9th Cir. 2003) ("Because [plaintiff] failed to introduce any direct or specific and substantial evidence of pretext, summary judgment for [defendant] must be affirmed.").

Plaintiffs do not provide any direct evidence that Defendants' stated reasons were false or that Defendants' actions were in fact motivated by racially discriminatory animus. Instead, Plaintiffs raise several pieces of circumstantial evidence. The Court finds these pieces of circumstantial evidence weak, far from substantial, and finds that they do not create any genuine, triable issue as to pretext, even when viewed cumulatively. The Court addresses each piece of circumstantial evidence in turn.

Poetz's Plantation Comment

Plaintiffs allege that—outside of their presence and not in any relation to Plaintiffs—Poetz "bragged" about her family once owning a "plantation" during a discussion at work. (Doc. 14 at 12). As Harris admits, however, she was not present during this discussion and did not know the context in which this comment was made. (Doc. 78-1 at 73, 75). Further, Plaintiffs do not dispute Defendants' assertion that Poetz made her comment in the context of a conversation about slavery that occurred during Black History Month and that Poetz's tone was mournful rather than bragging. (Doc. 77 at 13). There does not appear to be perfect consistency among those present as to why Poetz may or may not have referenced her ancestors' plantation—Poetz testified that she couldn't remember why it came up, but recalls mentioning a very large farm her family once owned (Doc. 88-1 at 116); Mackey remembered mention of a plantation and its location but didn't provide any context (Doc. 88-1 at 31); Ellis recalls Poetz "tear[ing] up" at a luncheon during Black History Month after telling her coworkers that

she thought her family once owned a plantation (Doc. 78-1 at 238). Regardless of the exact phrasing or tone of the remark, the record could not allow a reasonable jury to conclude that merely by mentioning the fact that her ancestors had once owned a plantation, Poetz—let alone other Defendants—would act with racial animus toward Plaintiffs. This circumstantial evidence may be specific, but it is not substantial.

Poetz's Description of Harris

Plaintiffs allege that Poetz described Harris to Zweig-Przecioski as "combative, aggressive, unapproachable, and not easy to talk to as [she] talk[s] over people to get [her] point across." (Doc. 14 at 10). Plaintiffs argue that "such categorizations were based on prevailing stereotypes used to pejoratively describe African-Americans." (*Id.*)

Defendants counter that such a description does not invoke race as it could describe a person of any race. (Doc. 77 at 13). Indeed, Harris acknowledged that these descriptors could apply to any individual regardless of race. (Doc. 78-1 at 173). Plaintiffs themselves, in their Response, describe Daugherty—who is not African American—as "combative" and the actions of Daugherty and Poetz as "aggressive." (Doc. 87 at 4, 13, 14). The Court does not rule out that such descriptors could in some circumstances be based on racial stereotypes. Here, however, no reasonable jury could find that this description constitutes substantial evidence of Defendants' racially discriminatory motives.

Appendix B

Zweig-Przecioski's Bus Metaphor

Plaintiffs next bring up a metaphor that Defendant Zweig-Przecioski used to explain the relationship between DERS, vendors, and clients. In Zweig-Przecioski's metaphor counselors are the bus drivers, clients the passengers, and vendors the bus stops. (Doc. 87 at 6). The counselors deliver clients to the vendors. (*Id.*) According to Plaintiffs, such a metaphor "seemed" to be a coded racial directive that Ms. Harris should "get to the back of the bus." (*Id.* at 6, 18). The Court finds that no reasonable jury could deem this a coded racial message. Defendant Zweig-Przecioski's metaphor is a clear and effective one, does not feature anyone sitting at the back of any bus, and Plaintiffs—in this metaphor—do not even ride the bus. This is far from "substantial" circumstantial evidence of pretext.

White's Crumbs Metaphor

Plaintiffs raise another metaphor as evidence of pretext. During the application process for the DRES contract, Plaintiffs alleges that White (who is not a defendant) told Harris that "as a new vendor, you can be invited to sit at the table to eat, but you will only be offered bread crumbs compared to the other vendors until you make a name for yourself." (Doc. 14 at 6-7). As with the bus metaphor, however, no reasonable jury could find this metaphor to be substantial evidence of racially discriminatory animus.

Appendix B

White's Toilet Paper Comments

Plaintiffs also point to another comment made by non-defendant White during the DERS contract application process—his "joke" to Harris that perhaps a misplaced application form of hers had been "used...for toilet paper." (*Id.* at 7). White's comment was certainly crass and unprofessional and White was removed from his role overseeing Plaintiffs' contract application as a result. (Doc. 14 at 7; Doc. 78 at 4). Again, however, the Court finds that no reasonable jury could conclude that this constitutes substantial evidence of pretext, discrimination, or discriminatory motive on behalf of Defendants.

Plaintiffs list several other brief pieces of evidence that they argue demonstrate pretext. (Doc. 87 at 19-20). Like those addressed above, however, the Court does not find them—even when viewed cumulatively with the others—to be "substantial" or to raise a triable issue as to whether Defendants possessed racially discriminatory motives for their actions.

In sum, Plaintiffs' circumstantial evidence—even when viewed cumulatively and in the light most favorable to Plaintiffs—would not allow a reasonable jury to conclude that Defendants' otherwise legitimate explanations for their actions were merely a pretext for intentional discrimination. Although the circumstantial evidence Plaintiffs provide is specific, it is not substantial. Even if Plaintiffs had presented a prima facie § 1981 claim, they would still not have a viable claim because they have not met their burden of showing pretext. The Court

will therefore grant Defendants' Motion for Summary Judgment as to Plaintiffs' § 1981 claims.

E. Plaintiffs' Remaining Claims

Because the Court grants Defendants' Motion for Summary Judgment as to Plaintiffs' § 1981 claims, it must also grant the Motion as to Plaintiffs' remaining § 1983, § 1985, and § 1986 claims, which are all ultimately predicated on what is an invalid § 1981 claim. *See Astre,* 804 Fed. App'x at 667-68.

IV. Conclusion

On this record, no reasonable jury could conclude that Defendants intentionally discriminated against Plaintiffs on the basis of race. The record does not show any impairment of Plaintiffs' contractual relationship with Defendants and thus does not support a prima facie § 1981 claim. Even if Plaintiffs had presented a prima facie case under § 1981, the evidence that Plaintiffs have presented is insufficient to show that Defendants' legitimate, nondiscriminatory reasons for their actions were merely a pretext for racial discrimination. Because Plaintiffs have failed to raise a genuine issue of material fact as to their claims, Defendants are entitled to summary judgment.

Accordingly,

IT IS HEREBY ORDERED granting Defendants' Motion for Summary Judgment. (Doc. 77).

IT IS FURTHER ORDERED directing the Clerk of the Court to enter judgment in favor of Defendants and terminate this case.

Dated this 10th day of January, 2023.

/s/ Stephen M. McNamee
Honorable Stephen M. McNamee
Senior United States District Judge

APPENDIX C — JUDGMENT IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, FILED JANUARY 11, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

NO. CV-18-04701-PHX-SMM

MILLIA PROMOTIONAL SERVICES, *et al.*,

Plaintiffs,

v.

ARIZONA DEPARTMENT OF ECONOMIC SECURITY, *et al.*,

Defendants.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that, pursuant to the Court's Order filedJanuary 11, 2023, which granted Defendants Motion for Summary Judgment, judgment is entered in favor of Defendants and against Plaintiff. Plaintiff to take nothing, and the complaint and action are dismissed.

Appendix C

Debra D. Lucas
District Court Executive/
Clerk of Court

January 11, 2023

s/ D. Draper
By Deputy Clerk

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED MAY 1, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-15180

D.C. No. 2:18-cv-04701-SMM
District of Arizona, Phoenix

MILLIA PROMOTIONAL SERVICES, AN ARIZONA NONPROFIT CORPORATION; KHAMILLIA HARRIS,

Plaintiffs-Appellants,

v.

STATE OF ARIZONA, ACTING THROUGH ARIZONA DEPARTMENT OF ECONOMIC SECURITY, DIVISION OF EMPLOYMENT AND REHABILITATION SERVICES; KRISTEN MACKEY, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS ARIZONA DEPARTMENT OF ECONOMIC SECURITY, DIVISION OF EMPLOYMENT AND REHABILITATION SERVICES REHABILITATION SERVICES INTERIM ADMINISTRATOR; TRACI ZWEIG-PRZECIOSKI, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS ARIZONA DEPARTMENT OF ECONOMIC SECURITY,

Appendix D

CONTRACT MONITORING LIAISON; CRYSTAL POETZ, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS ARIZONA DEPARTMENT OF ECONOMIC SECURITY, DIVISION OF EMPLOYMENT AND REHABILITATION SERVICES REHABILITATION SERVICES UNIT SUPERVISOR; ROLLANDA DAUGHERTY, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS ARIZONA DEPARTMENT OF ECONOMIC SECURITY, DIVISION OF EMPLOYMENT AND REHABILITATION SERVICES VOCATIONAL REHABILITATION COUNSELOR; YOLANDA SETTLES, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS ARIZONA DEPARTMENT OF ECONOMIC SECURITY, DIVISION OF EMPLOYMENT AND REHABILITATION SERVICES VOCATIONAL REHABILITATION COUNSELOR,

Defendants-Appellees.

ORDER

Before: CLIFTON, BYBEE, and BADE, Circuit Judges.

The panel judges have voted to deny appellants' petition for panel rehearing. Appellants' petition for panel rehearing, filed April 29, 2024, is DENIED.