

No. _____

In the Supreme Court of the United States

ANDREW HALL, RON COOPMAN, KEVIN BAKER,
IN THEIR INDIVIDUAL CAPACITIES,
Petitioners,

v.

JOSE FLORES, RYAN REYES, BRIAN PEREZ,
Respondents.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit*

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit, in conflict with *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 724 (1989) and nine federal circuits, erroneously permits direct suits under 42 U.S.C. § 1981 against individual state actors instead of requiring prosecution of such claims under 42 U.S.C. § 1983.

2. Whether municipal employees can be held liable under 42 U.S.C. § 1981 for impairing rights under a contract to which they are not actually parties, in light of *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 477 (2006).

3. Whether the Ninth Circuit improperly invaded the province of state law by allowing public employees to bring § 1981 claims for employment discrimination, when, in California, public employment is conferred by statute, not contract.

**PARTIES TO THE PROCEEDINGS AND
RULE 29.6 STATEMENT**

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

Andrew Hall, Ron Coopman, Kevin Baker, defendants, appellants below, and petitioners here.

Mitchell Waller was a named defendant. He was deceased prior to the jury trial.

Jose Flores, Ryan Reyes, Brian Perez, plaintiffs, appellees below, and respondents here.

There are no publicly held corporations involved in this proceeding. The City of Westminster, a public entity, was a party to the proceedings below and has a beneficial interest with respect to the judgment against the petitioners (chiefs of police) herein, insofar as it will fully indemnify them for the judgment.

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Andrew Hall, Ron Coopman, and Kevin Baker, former chiefs of police for the City of Westminster, California, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit dated October 11, 2017. (App. 1-43.)

OPINIONS BELOW

The opinion of the court of appeals (App. 1-43) is reported at 873 F.3d 739. The opinion of the district court denying defendants' motion for new trial (App. 51) is not reported. The opinion of the district court granting in part and denying in part defendants' motion to dismiss (App. 111-120) is not reported, but is available at 2011 WL 1791097.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on October 11, 2017 (App. 1-43), and denied a petition for rehearing *en banc* on November 17, 2017 (App. 123-124). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

This case arises out of interpretation of 42 U.S.C. § 1981, a federal statute designed to prevent discrimination in the making and enforcement of contracts. This petition seeks review of whether plaintiffs' claim for violation of § 1981 against individual municipal employees—four chiefs of police from the City of Westminster—was legally cognizable.

In *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 724 (1989) this Court held that 42 U.S.C. § 1981

does not provide an independent federal cause of action for damages against local government entities and that “Congress intended that the explicit remedial provisions of § 1983 be controlling in the context of damages actions brought against state actors alleging violation of the rights declared in § 1981.” *Id.* at 731.

In 1991, Congress amended the statute, see 105 Stat. 1071, adding § 1981(b), which defines “make and enforce” to include post-formation conduct, including discriminatory termination, as a basis for liability under § 1981. *See Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 383 (2004). The 1991 amendment therefore extended the protections available under § 1981, but did not address, much less alter this Court’s holding in *Jett* that the enforcement mechanism and remedy was provided by 42 U.S.C. § 1983.

Following the 1991 amendment, nine circuit courts have held that it did not overturn this Court’s decision in *Jett*, and that all claims for damages against state actors under 42 U.S.C. section 1981 must be brought within the confines of section 1983. *See Buntin v. City of Boston*, 857 F.3d 69 (1st Cir. 2017) (“[j]oining the majority of our sister circuits, we hold that § 1981, as the Supreme Court held in *Jett*, provides no implied private right of action for damages against state actors”); *Campbell v. Forest Pres. Dist. of Cook Cnty, Ill.*, 752 F.3d 665, 671 (7th Cir. 2014); *Brown v. Sessoms*, 774 F.3d 1016, 1021 (D.C. Cir. 2014); *McGovern v. City of Philadelphia*, 554 F.3d 114, 122 (3d Cir. 2009); *Arendale v. City of Memphis*, 519 F.3d 587, 599 (6th Cir. 2008); *Bolden v. City of Topeka*, 441 F.3d 1129, 1137 (10th Cir. 2006); *Oden v. Oktibbeha Cnty.*, 246 F.3d 458, 464 (5th Cir. 2001); *Butts v. Cnty.*

of *Volusia*, 222 F.3d 891, 894 (11th Cir. 2000); and, *Dennis v. Cnty. of Fairfax*, 55 F.3d 151, 156 n. 1 (4th Cir. 1995).

The Ninth Circuit is the only circuit to conclude that the 1991 amendment abrogated *Jett*, and permits direct claims against state actors under section 1981. See *Fed’n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1213, 1214 (9th Cir. 1996) (“Federation”) (“42 U.S.C. § 1981 contains an implied cause of action against state actors, thereby overturning *Jett*’s holding that 42 U.S.C. § 1983 provides the exclusive federal remedy against state actors for the violation of rights under 42 U.S.C. § 1981.”)

Review is therefore necessary to resolve a deep and longstanding circuit split, and to compel the Ninth Circuit’s adherence to this Court’s decision in *Jett*. Even putting aside the Ninth Circuit’s improper imposition of liability on petitioners—though that in itself would warrant review—the intervention of this Court is necessary because the Ninth Circuit’s rejection of section 1983 as the sole vehicle for enforcing rights conferred under section 1981 results in inconsistent imposition of liability under section 1981. For example, § 1983 claims are subject to the applicable state law personal injury statute of limitations, which, in California, is two years. *Del Percio v Thornsley*, 877 F.2d 785 (9th Cir. 1989); *Usher v City of Los Angeles*, 828 F.2d 556 (9th Cir. 1987); Cal. Civ. Proc. Code § 335.1. In contrast, the general statute of limitations for federal statutory claims is four years, pursuant to 28 U.S.C. § 1658. Thus, in the Ninth Circuit, § 1981 claims may proceed where they would otherwise be

barred by the shorter limitations period applicable to § 1983 claims.

Given the Ninth Circuit's clear departure from *Jett*, this Court should grant review and summarily reverse the Ninth Circuit with directions to vacate the judgment against petitioners, or retain the matter for full briefing and argument to clarify the law and resolve the clear conflict in the law.

Review is also warranted because the Ninth Circuit's decision is at odds with this Court's decision in *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 477 (2006), which held that a non-party to a contract could not assert a claim under § 1981. The Court noted that the 1991 amendment to the provision underscored that a contractual relationship is the foundation of any claim under the statute. Here, the Ninth Circuit ignored *Domino's Pizza, Inc.*, and has imposed liability on petitioners, none of whom were—nor could be—in a contractual relationship with the plaintiffs.

Finally, review is also necessary because the Ninth Circuit has improperly invaded the province of state law by granting California public employees contract rights enforceable via § 1981, even though the California Supreme Court has repeatedly held that public employment is conferred by statute, not contract. *Miller v. State of California*, 18 Cal.3d 808, 813-14 (1977); *Butterworth v. Boyd*, 12 Cal.2d 140, 150 (1938). The Ninth Circuit sidestepped this authority by misconstruing the California Supreme Court's decision in *White v. Davis*, 30 Cal.4th 528, 563-564 (2003). In *White*, the California Supreme Court held that limited benefits conferred by statute—namely the right to be paid for work performed—may be protected

by the Contracts Clause of the California Constitution. The Ninth Circuit construed *White* as therefore creating a springboard for imposing contractual rights enforceable under § 1981 on virtually every aspect of the employment relationship, including promotion.

The Ninth Circuit's decision violates core principles of federalism by creating contractual rights squarely foreclosed by state law, and vastly increases the scope of potential liability under § 1981 by allowing it to be used as a vehicle to enforce obligations that do not arise from a contractual relationship, and against individuals who are not party to any alleged contract. This is bad law and even worse policy.

The Ninth Circuit was not free to depart from the decisions of this Court and its wholesale revision of California public employment law is untenable. It is essential that this Court grant review.

STATUTORY PROVISIONS AT ISSUE

The full text of 42 U.S.C. § 1981 is quoted below, and is further reproduced at App. 144 (Appendix "J").

42 U.S.C. § 1981—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

This case arises from allegations by plaintiffs, Jose Flores, Ryan Reyes, and Brian Perez—three City of Westminster police officers of Latino descent—that the City of Westminster, as well as four individual Westminster police chiefs, Mitchell Waller, Andrew Hall, Ron Coopman, and Kevin Baker, discriminated against them in violation of 42 U.S.C. § 1981 when they were denied “special assignments” at the City of Westminster police department.

Plaintiffs alleged that they performed their duties well as police officers, but that despite performing well, defendants “have not awarded Plaintiffs Special Assignments or promotions.” (App. 129 [¶ 15]). According to plaintiffs’ operative Second Amended Complaint, “Special Assignments include detective assignments in narcotics, burglary, and gangs ... motor assignments, among others. Defendants also award a Special Assignment for the mall. However, the mall

assignment is less prestigious than other special assignments.” (App. 129 [¶¶ 13-16]).

Plaintiffs’ second claim, as contained in the Second Amended Complaint, is based upon violation of § 1981, and is entitled “discrimination” against Defendants Coopman, Hall, Waller, and Baker. (App. 133 [¶¶ 36-40]).

Plaintiffs’ complaint was originally filed in the United States District Court for the Central District of California on February 15, 2011. Defendants filed a motion to dismiss and motion to strike, arguing that plaintiffs’ § 1981 claims against the defendant chiefs of police were improper and failed to state a claim upon which relief could be granted. The district court denied defendants’ motions. (App. 111-120).

In their Second Amended Complaint, plaintiffs asserted, *inter alia*, a claim for violation of 42 U.S.C. § 1981. Plaintiffs alleged that they were denied “special assignments” which could hypothetically increase their chances of getting promoted. (App. 129-133).

A jury trial on the merits commenced on February 20, 2014, and lasted nine days, before the Honorable District Court Judge David O. Carter.

On February 28, 2014, prior to instructing the jury, plaintiffs’ counsel voluntarily withdrew claims for violation of § 1983 and Title VII (*see* App. 141), leaving only two claims to be submitted to the jury: (1) a state law claim for violation of the California Fair Employment and Housing Act (“FEHA”) against the City of Westminster, and (2) the second cause of action

for violation of § 1981 against the defendant chiefs of police, Waller, Hall, Coopman, and Baker.

On March 6, 2014, after three days of deliberation, the eight-member jury unanimously awarded plaintiffs a total of \$3,341,000—a combination of compensatory and punitive damages—against the chiefs of police for violation of § 1981.¹ (Dkt. 199). Final judgment was issued by Judge Carter based upon the jury’s findings and determinations. (App. 106-110). Following a motion by plaintiffs’ counsel, the district court awarded attorney’s fees and costs. (App. 59-79). The total amount of the verdict (following post-trial motions), attorney’s fees and costs is summarized below:

- Total general damages – \$1,240,000
- Total punitive damages – \$2,101,000
- Total attorney’s fees – \$3,285,673
- Expert fees – \$40,028.49
- Costs – \$18,684.12.

Id.

The district court denied defendants’ motion for new trial and motion for judgment as a matter of law, reiterating that the plaintiffs’ § 1981 claim was proper against the individual chiefs of police. (App. 44-58).

The Ninth Circuit affirmed that holding in section IV of its October 11, 2017 published opinion, expressly espousing a “broader” view of § 1981 claims. (App. 21). The Ninth Circuit held that its prior decision in *Judie v. Hamilton*, 872 F.2d 919, 922-23 (9th Cir. 1989) did

¹ The jury rejected plaintiffs’ § 1981 claim against the City of Westminster.

not preclude it from finding a § 1981 claim cognizable against the chiefs of police in this case. It reasoned that *Judie* (which dismissed a § 1981 claim in Washington state, where public employment was statutory, not contractual) pre-dated the 1991 amendments to § 1981, and that those amendments expanded the reach of § 1981's "make and enforce" provision. (App. 21).

Furthermore, the Ninth Circuit found that the California Supreme Court's decision in *White v. Davis* "indicates a broader view of the applicability of section 1981 to public employees under California law." *Id.* The court concluded that "California law weighs in favor of allowing Plaintiffs' section 1981 claims to proceed in this case." *Id.*

REASONS WHY CERTIORARI IS WARRANTED

I. REVIEW IS NECESSARY BECAUSE THE NINTH CIRCUIT'S CONCLUSION THAT SECTION 1981 CONFERS AN IMPLIED RIGHT OF ACTION IS CONTRARY TO THIS COURT'S DECISION IN *JETT V. DALLAS INDEP. SCH. DIST.*, AND CONFLICTS WITH THE DECISIONS OF THE OTHER NINE CIRCUITS THAT HAVE ADDRESSED THE ISSUE.

The district court and Ninth Circuit permitted plaintiffs' § 1981 claim to proceed to the jury, despite *Jett's* holding that § 1981 does not create a private right of action against state actors.

The gravamen of this petition centers on the scope and application of a federal statute—42 U.S.C. § 1981—and whether plaintiffs' claims under that

statute could have ever been stated in the first place, let alone proceed to a jury against the chiefs of police. A brief historical recitation regarding the enactment of § 1981, and subsequent amendments, is warranted under the circumstances.

1. Statutory Background—42 U.S.C. § 1981

On December 18, 1865, the Secretary of State certified that the Thirteenth Amendment had been ratified and became part of the Constitution. Less than three weeks later, Senator Lyman Trumbull, Chairman of the Senate Judiciary Committee, introduced S. 61, which was to become the Civil Rights Act of 1866. *See* Cong. Globe, 39th Cong., 1st Sess., 129 (1866).

Section 1, as introduced to the Senate by Trumbull, provided:

“That there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, *shall have the same right to make and enforce contracts*, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or

custom to the contrary notwithstanding.”
(Emphasis added).

On April 9, 1866, the Civil Rights Act of 1866 became law. Nowhere did the Act provide for an express damages remedy for violation of the provisions of § 1. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 414, n. 13 (1968) (noting “[t]hat 42 U.S.C. § 1982 is couched in declaratory terms and provides no explicit method of enforcement”); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238 (1969).

Further, no original federal jurisdiction was created by the 1866 Act which could support a federal damages remedy against state actors. *See Allen v. McCurry*, 449 U.S. 90, 99, n. 14 (1980) (§ 3 of the 1866 Act embodied remedy of “post-judgment removal for state-court defendants whose civil rights were threatened”); *Georgia v. Rachel*, 384 U.S. 780, 788-789 (1966); *Strauder v. West Virginia*, 100 U.S. 303, 311-312 (1880).

Finally, the penal provision, the only provision explicitly directed at state officials, was, in Senator Trumbull’s words, designed to punish the “person who, under the color of the law, does the act,” not “the community where the custom prevails.” Cong. Globe, 39th Cong., 1st Sess., 1758 (1866).

In 1871, Congress enacted the direct predecessor of the present-day statute, 42 U.S.C. § 1983. *See Civil Rights Act of 1871*, § 1, 17 Stat. 13. That portion of the 1871 Act “was seen by both opponents and proponents as amending and enhancing the protections of the 1866 Act by providing a new civil remedy for its enforcement against state actors.” *Jett, supra*, 491 U.S. at 724.

The mechanism and vehicle for that enforcement was § 1983 itself. What is now § 1983 was enacted as § 1 of “An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and For other Purposes,” Act of April 20, 1871, ch. 22, 17 Stat. 13. At the time, the immediate impetus for the bill was evidence of widespread acts of violence perpetrated against the freedmen by groups such as the Ku Klux Klan.

**2. *Jett v. Dallas Independent School Dist.*,
491 U.S. 701 (1989)**

In 1989, this Court decided *Jett*, in which Justice O'Connor writing for a plurality held that a municipality may not be held liable for its employees' violations of § 1981 under a respondeat superior theory of liability. At the time this Court decided *Jett*, the existing version of 42 U.S.C. § 1981 read as follows:

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

In *Jett*, a white football coach and schoolteacher was reassigned on the recommendation of an African-American principal. 491 U.S. at 706-707. Alleging race discrimination, the coach sued the school district under § 1981. *Id.* In dismissing the § 1981 claim, this Court held that, even though § 1981 creates an implicit cause

of action against private defendants, state actors such as the school district may not be sued directly under that statute. *Id.* at 731-32.

In so holding, this Court held that a dichotomy exists between rights and remedies created by federal statute. When Congress creates a right, but provides no means of enforcing that right, then a private cause of action is implicit in the rights-creating statute. *See id.*

On the other hand, when a rights-creating statute contains no express cause of action, but a means of enforcing that right is contained elsewhere in federal law, then the Court must examine whether Congress intended to create multiple means of vindicating the same right. *See id.* at 732; *see also Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (“The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.”)

Applying this method of statutory interpretation, *Jett* looked to the express language of § 1981 and § 1983.

While § 1981 was “completely silent” on the issue of whether it created a private cause of action against state actors, § 1983, as originally enacted, provided that any person who, under color of law, deprives another of a right secured by law “shall ... be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress” *Jett*, 491 U.S. at 712, 723. In other words, the language of § 1983 created a cause of action for persons deprived of any civil right, including the “rights guaranteed by § 1981.”

Id. at 733. Accordingly, *Jett* fell into the category of cases where a rights-creating statute (§ 1981) contained no express cause of action, but a means of enforcing that right was contained elsewhere in federal law (§ 1983).

As a result, the plurality in *Jett* determined that it must consider “the text and history of both the Civil Rights Act of 1866 and the Civil Rights Act of 1871, the precursors of §§ 1981 and 1983 respectively” to determine whether Congress intended to create multiple means of vindicating the rights created by § 1981. *Id.* at 712.

In a meticulous discussion of the legislative history of §§ 1981 and 1983, the plurality highlighted that § 1983 “was designed to expose state and local officials to a new form of liability.” *Id.* at 723 (quoting *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259 (1981)). According to *Jett*, “[b]oth proponents and opponents in the House viewed [§ 1983] as working an expansion of federal jurisdiction. Supporters continually referred to the failure of the state courts to enforce federal law designed for the protection of the freedman, and saw [§ 1983] as remedying this situation by interposing the federal courts between the State and citizens of the United States.” *Id.* at 725.

Ultimately, this Court held that “the express cause of action for damages created by § 1983 constitutes the *exclusive federal remedy* for violation of the rights guaranteed in § 1981 by state governmental units.” *Jett, supra*, 491 U.S. at 733. (Emphasis added).

3. The 1991 amendment to § 1981

Two years following *Jett*, § 1981 was amended by the Civil Rights Act of 1991 (“the 1991 Act”), Pub. L. No. 102-166, 105 Stat. 1071. The 1991 Act stated that additional remedies and protections were needed to respond to discrimination in employment, *id.* § 2, and that one of its purposes was “to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.” *Id.* § 3(4).

To that end, section 101 of the 1991 Act added two new subsections to 42 U.S.C. § 1981:

(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.

42 U.S.C. § 1981(b)-(c).

The 1991 amendment to § 1981 did not overrule, let alone address, *Jett*. A report issued by the House Committee on Education and Labor, dated April 24, 1991, stated that the new § 1981(b) was meant to

“overrule *Patterson*,” a case decided one week before *Jett*, in which the Court had found § 1981 inapplicable to racial harassment or discrimination that occurred after a contract’s formation. H.R. Rep. No. 102-40(I) (“House Rep. I”), at 92 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 630, 1991 WL 70454; see *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). The report also stated that the new § 1981(c) was meant to “codify the long-standing principle established in *Runyon v. McCrary*, 427 U.S. 160 (1976), that [§] 1981 reaches private as well as governmental conduct.” House Rep. I, at 141; see also *id.* at 92.

A second report, issued by the House Committee on the Judiciary on May 17, 1991, reiterated both points. H.R. Rep. No. 102-40(II) (“House Rep. II”), at 2, 35-37 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 694-95, 728-31, 1991 WL 87020. The Judiciary Committee’s report cited and described several other then-recent Supreme Court cases that the 1991 Act was meant either to codify or repudiate. See *id.* at 2.

Neither of the House Reports mentioned *Jett* even in passing. Nor did the 1991 Act itself.

Indeed, the only § 1981 decision to be overturned by the 1991 Act was *Patterson*. The House Education and Labor Committee said that, in *Patterson*, the Supreme Court had wrongly decided that § 1981’s guarantee of “the right to make and enforce contracts” applied only to discrimination in contract formation, not problems arising later from conditions of continuing employment. H.Rep. 102-40(I) at 90, 1991 U.S. Cong. Ad. News 628. The committee concluded that there was “a compelling need for legislation to overrule the *Patterson* decision and ensure that federal law prohibits all race

discrimination in all phases of the contractual relationship.” H.Rep. 102-40(I) at 92, 1991 U. S. Cong. Ad. News at 630.

As such, the existing § 1981, subsection (c), states the principle that both private discrimination and color-of-law discrimination are wrongful. Congress did not create a new remedy to assert claims against state actors. Rather, to enforce their rights under § 1981 against a state actor, a plaintiff must bring a claim under § 1983. Neither the subject of *Jett* nor remedies as to state actors were mentioned in the committee reports. Rather, the Education and Labor Committee’s report emphasized the proposition that *Patterson* precluded employees under contract and others with contract rights from obtaining relief for post-formation discrimination. See H.Rep. 102-40(I), 89-92, 1991 U.S. Code. Cong. Ad. News 627-30. The discussion concerned the question of which plaintiffs could benefit and the scope of protections afforded—not which defendants could be held liable. In short, Congress was satisfied with the existing remedy: 42 U.S.C. § 1983.

4. There is a conflict among the circuit courts as to whether *Jett* remains controlling law after the 1991 Amendment to § 1981.

Nine circuit courts have held that the 1991 amendment to § 1981 did not overrule *Jett*. Only the Ninth Circuit has reached the contrary conclusion, finding cause to boldly “overturn” it. Compare *Buntin v. City of Boston*, 857 F.3d 69, (1st Cir. 2017) (“[j]oining the majority of our sister circuits, we hold that § 1981, as the Supreme Court held in *Jett*, provides no implied private right of action for damages against state

actors”); *Campbell v. Forest Pres. Dist. of Cook Cnty, Ill.*, 752 F.3d 665, 671 (7th Cir. 2014); *Brown v. Sessoms*, 774 F.3d 1016, 1021 (D.C. Cir. 2014); *McGovern v. City of Philadelphia*, 554 F.3d 114, 122 (3d Cir. 2009); *Arendale v. City of Memphis*, 519 F.3d 587, 599 (6th Cir. 2008)²; *Bolden v. City of Topeka*, 441 F.3d 1129, 1137 (10th Cir. 2006); *Oden v. Oktibbeha Cnty.*, 246 F.3d 458, 464 (5th Cir. 2001); *Butts v. Cnty. of Volusia*, 222 F.3d 891, 894 (11th Cir. 2000); *Dennis v. Cnty. of Fairfax*, 55 F.3d 151, 156 n. 1 (4th Cir. 1995), *with Fed’n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1214 (9th Cir. 1996).

The decision in the present case is a direct repudiation of *Jett* and highlights the deep conflict amongst the circuits on the question of whether a § 1981 claim can be asserted against state actors.

5. The Ninth Circuit in *Federation of African American Contractors v. City of Oakland*, 96 F.3d 1204, 1213 (9th Cir. 1996) is the lone circuit in the United States to “overturn” *Jett*.

According to the Ninth Circuit, the decision in *Fed’n of African Am. Contractors v. City of Oakland* presented an “issue of first impression: whether the Civil Rights Act of 1991 amended 42 U.S.C. § 1981 to statutorily overrule *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 ... to allow a private right of action against municipalities.” *Fed’n of African Am. Contractors, supra*, 96 F.3d at 1204.

² See also *McCormick v. Miami Univ.*, 693 F.3d 654 661 (6th Cir. 2012).

The Ninth Circuit acknowledged that “the amended 42 U.S.C. § 1981 does not expressly authorize private claimants to sue state actors directly.” *Id.* at 1210. Nonetheless, finding cause to circumvent *Jett*, the court cited to the decision in *Cort v. Ash*, 422 U.S. 66 (1975), outlining factors to be considered in determining whether a statute could somehow imply a private cause of action for damages. *Id.* The court indicated that the *Cort* factors were a “starting point,” but that the “principal focus of the analysis is whether Congress intended to create a private right of action.” *Id.* at 1210-11, citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979); accord *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979).

Applying the *Cort* factors, the Ninth Circuit held that § 1981, by its plain terms, “creates federal civil rights in favor of a class of persons that includes Rondeau Bay.” *Fed’n of African Am. Contractors, supra*, 96 F.3d at 1211.

Next, turning to the issue of legislative intent, the Ninth Circuit found that by including language that explicitly protects § 1981 rights from “impairment” by both private and governmental entities, the amendment enacting § 1981(c) “makes clear” that Congress intended a comparable scope of protection against each type of defendant. *Id.* at 1213. And while Congress “did not add language explicitly recognizing a private cause of action against private actors,” the Ninth Circuit unearthed authorization for its new interpretation of § 1981 liability in *Runyon v. McCrary*, 427 U.S. 160. *Id.* On this point, the Ninth Circuit concluded that:

“The legislative history surrounding the amendment to 42 U.S.C. § 1981 does not explicitly announce an intent to create (or deny) a private right of action against a state actor. Instead, it suggests that Congress’s intent in adding this subsection was to codify *Runyon v. McCrary*, 427 U.S. 160, 49 L. Ed. 2d 415, 96 S. Ct. 2586 (1976), which held that § 1981 rights are protected against private discrimination as well as against discrimination by state actors.” *Fed’n of African Am. Contractors, supra*, 96 F.3d at 1212.

Further, the Ninth Circuit indicated: “[a] report by the House Education and Labor Committee explained that the new subsection § 1981(c) “confirms section 1981’s coverage of both public and private sector employment[,]” and cited *Runyon*. H. Rep. No. 102-40(I), 102d Cong., 1st Sess. 92, reprinted in 1991 U.S.C.C.A.N. 549, 630. *Accord id.* at 670. The House Committee on the Judiciary similarly explained in its report on the legislation that the amendment to § 1981 “is intended to codify *Runyon v. McCrary*[,]” noting, further, that “the Committee intends to prohibit racial discrimination in all contracts, both public and private.” H. Rep. No. 102-40(II), 102d Cong., 1st Sess. 37, reprinted in 1991 U.S.C.C.A.N. 694, 731.

Although these Committee reports do not address the amendment’s potential effect on *Jett*, they clearly contemplate that § 1981 rights are to receive parallel protections against state actors and private actors. Implying a direct cause of action against state actors under 42 U.S.C. § 1981 is consistent with this intent.”

Fed'n of African Am. Contractors, supra, 96 F.3d at 1213.

Thus, the Ninth Circuit “conclude[d] that the amended 42 U.S.C. § 1981 contains an implied cause of action against state actors, thereby overturning *Jett*’s holding that 42 U.S.C. § 1983 provides the exclusive federal remedy against state actors for the violation of rights under 42 U.S.C. § 1981.” *Fed’n of African Am. Contractors, supra*, 96 F.3d at 1214.

Turning to the present case, plaintiffs’ § 1981 claim against the chiefs of police was improper and never should have proceeded at law. The district court denied a motion to dismiss as to the viability of the § 1981 claim (App. 111-120), and ultimately permitted it to go to a jury. The Ninth Circuit affirmed this finding at Section IV of its October 11, 2017 opinion.

The district court’s denial of the defendant chiefs’ motion to dismiss and the Ninth Circuit’s decision contravenes well-established United States Supreme Court precedent in *Jett*, and perpetuates interpretational error regarding the scope and application of § 1981.

Nine circuit courts have consistently maintained, in adherence with *Jett*, that a § 1981 claim cannot be asserted against state actors. Only the Ninth Circuit has chosen to deviate, and the present case has highlighted this error. No § 1981 claim against the chiefs should have been cognizable in keeping with *Jett*.

Indeed, given the plaintiffs’ voluntary dismissal of their § 1983 claim (App. 141) prior to the jury’s deliberations (which left only a defective § 1981 claim

against the chiefs of police to be decided), the federal district court lacked subject-matter jurisdiction, because § 1981 does not provide plaintiffs with a private right of action for damages. *See* Fed. R. Civ. P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action”); *see also Buntin, supra*, 857 F.3d at 72.

Furthermore, the intervention of this Court is necessary because the Ninth Circuit’s rejection of § 1983 as the sole vehicle for enforcing rights conferred under § 1981 results in inconsistent imposition of liability under § 1981. For example, § 1983 claims are subject to the applicable state law personal injury statute of limitations, which, in California, is two years. *Del Percio v Thornsley*, 877 F.2d 785 (9th Cir. 1989); *Usher v City of Los Angeles*, 828 F.2d 556 (9th Cir. 1987); Cal. Civ. Proc. Code § 335.1. In contrast, the general statute of limitations for federal statutory claims is four years, pursuant to 28 U.S.C. § 1658. Thus, in the Ninth Circuit, § 1981 claims may proceed where they would otherwise be barred by the shorter limitations period applicable to § 1983 claims.

The Ninth Circuit got this wrong. *Jett* is controlling, and, in light of the deep split among the circuits, review is necessary in order to clarify the limits of § 1981 claims.

II. REVIEW IS NECESSARY BECAUSE PETITIONERS CANNOT BE LIABLE FOR IMPAIRING RIGHTS UNDER A CONTRACT TO WHICH THEY ARE NOT ACTUALLY PARTIES, IN LIGHT OF *DOMINO'S PIZZA, INC. V. MCDONALD*, 546 U.S. 470 (2006).

Review is necessary because a contractual predicate was missing in this case since day one. Defendants Waller, Hall, Coopman, and Baker were never parties to a contract with plaintiffs Flores, Reyes, and Perez.

In *Domino's Pizza Inc. v. McDonald*, 546 U.S. 470, 475-477 (2006), the plaintiff was a sole shareholder and president of JWM Investments, Inc. He sued Domino's under § 1981 alleging that JWM and Domino's had entered into several contracts, and that Domino's had broken them due to racial animus towards the plaintiff. The district court granted a motion to dismiss under Fed. R. Civ. P. 12(b)(6), finding that McDonald could not bring a § 1981 claim. The Ninth Circuit reversed, claiming that when there are injuries distinct from those of the corporation, a non-party such as McDonald could bring suit under § 1981.

This Court granted review, analyzing whether a plaintiff who lacks any rights under an existing contractual relationship with the defendant, and who has not been prevented from entering into such a contractual relationship, may bring suit under § 1981.

This Court highlighted that “[a]ny claim brought under § 1981 ... must initially identify an impaired ‘contractual relationship.’” *Domino's Pizza, supra*, 546 U.S. at 476. From a policy standpoint, this Court indicated that “[a]bsent the requirement that the

plaintiff himself must have rights under the contractual relationship, § 1981 would become a strange remedial provision designed to fight racial animus in all of its noxious forms, but only if the animus and the hurt it produced were somehow connected to *somebody's* contract.” *Id.* (Italics in original).

This Court specifically addressed the 1991 amendment to § 1981 in *Domino's Pizza* and held that “nothing in the text of § 1981 suggests that it was meant to provide an omnibus remedy for all racial injustice. If so, it would not have been limited to situations involving contracts. Trying to make it a cure-all not only goes beyond any expression of congressional intent but would produce satellite § 1981 litigation of immense scope.” *Id.* at 479. Ultimately, this Court held that “[c]onsistent with our prior case law, and as required by the plain text of the statute, we hold that a plaintiff cannot state a claim under § 1981 unless he has (or would have) rights under the existing (or proposed) contract that he wishes to ‘make and enforce.’” *Id.*

Here, the Ninth Circuit’s October 11, 2017 opinion completely ignores this Court’s 2006 opinion in *Domino's Pizza, Inc.* No recognition was made of the fact that the defendant chiefs of police were never parties to any employment contract.

Even if, *arguendo*, plaintiffs here suffered an impairment of a contractual right, the contract was between the plaintiffs and their employer, the City of Westminster. The individual chiefs of police were not parties to any contract and, thus, were not in privity with the plaintiffs. Absent that essential contractual

nexus between the plaintiffs and the individual chiefs of police, there was simply no jurisdictional basis for liability under 1981. As stated in *Domino's Pizza*, it was jurisdictionally essential under § 1981 to establish that a plaintiff must have rights under a contractual relationship. Conversely, it is equally essential to establish that a putative defendant has “obligations” under the contractual relationship. Where, as here, the chiefs were not parties to any contract between the plaintiffs and the City, then it would follow under the reasoning of *Domino's Pizza* that they could not be personally liable for any impairment of that contract.

Nonetheless, plaintiffs’ § 1981 claim was erroneously permitted to proceed. Under *Domino's Pizza*, no claim under § 1981 should have been cognizable and, accordingly, this Court should grant review to compel the Ninth Circuit’s compliance with this Court’s decision.

**III. THE NINTH CIRCUIT’S DECISION RAISES
FEDERALISM CONCERNS BY
IMPROPERLY INVADING A PROVINCE OF
STATE LAW, WHERE PUBLIC
EMPLOYMENT IN THE STATE OF
CALIFORNIA IS CONFERRED BY
STATUTE—NOT CONTRACT.**

In light of this Court’s decision in *Domino's Pizza*, and its positive reinforcement that a § 1981 claim requires existence of a “contractual relationship,” plaintiffs’ § 1981 claim was defective because there was no contractual relationship between plaintiffs and the individual chiefs of police. Not only was there no contract, but no contract *could have* existed under California law.

In California, public employment is conferred by statute, not contract. The California Supreme Court and lower state appellate courts have repeatedly held that insofar as the duration of such employment is concerned, no employee has a vested contractual right to continue in employment beyond the time or contrary to the terms and conditions fixed by law. *Miller v. State of California*, 18 Cal.3d 808, 813-14 (1977); *Butterworth v. Boyd*, 12 Cal.2d 140, 150 (1938); *Patton v. Board of Harbor Commissioners*, 13 Cal.App.3d 536, 540 (1970); *Humbert v. Castro Valley County Fire Protection Dist.*, 214 Cal.App.2d 1, 13 (1963); *Payne v. State Personnel Board*, 162 Cal.App.2d 679, 681 (1958); *Boutwell v. State Board of Equalization*, 94 Cal.App.2d 945, 950 (1949); *Risley v. Bd. of Civil Service Commrs.*, 60 Cal.App.2d 32, 37-38 (1943); compare *Pennie v. Reis*, 80 Cal. 266, 269 (1889); *Miller v. Kister*, 68 Cal. 142, 144 (1885).

Nor is any vested contractual right conferred on the public employee because he occupies a civil service position, since it is equally well-settled in California that “[t]he terms and conditions of civil service employment are fixed by statute and not by contract.” *Boren v. State Personnel Board*, 37 Cal.2d 634, 641 (1951); see also *Martin v. Henderson*, 40 Cal.2d 583, 590-591 (1953); *State v. Brotherhood of R.R. Trainmen*, 37 Cal.2d 412, 417 (1951).

Despite this well-established principle, the Ninth Circuit’s opinion raises inherent federalism concerns, as it espouses a flawed reading of the California Supreme Court’s decision in *White v. Davis*, *supra*, 30 Cal.4th 528, 563-564.

In *White*, the issue before the California Supreme Court was whether state employees had a quasi-entitlement, protected by the Contracts Clause of the California Constitution, to be paid and receive pension benefits for work performed during a budget impasse. The Court emphasized the narrow scope of its ruling, noting:

“[T]he question of what payments the Controller is authorized to make during a budget impasse is the type of issue that arises frequently but often may evade timely appellate review. Under the circumstances, we conclude it is appropriate to address the state employee salary issue that has been briefed in this court, in order to provide guidance to the Controller and other public officials *in the event of a future budget impasse ... Because the salary issue is the only substantive matter upon which review was sought and granted, we confine our substantive discussion to that category of payments.*”

White, supra, 30 Cal.4th at 563. (Emphasis added).

The *White* Court also reaffirmed that the general terms and conditions of public employment are established by statute, not contract, with only a narrow range of benefits—namely compensation for work already performed—giving rise to any protection by the Contracts Clause:

“[I]t is well established that the terms and conditions of public employment, unlike those of private employment, generally are established by statute or other comparable enactment (e.g., charter provision or ordinance) rather than by

contract. (See, e.g., *Boren v. State Personnel Board*, 37 Cal.2d 634, 641 [234 P.2d 981] (1951).) Nonetheless, a long line of California cases establishes that with regard to at least certain terms or conditions of employment that are created by statute, an employee who performs services while such a statutory provision is in effect obtains a right, protected by the contract clause, to require the public employer to comply with the prescribed condition.”

White, 30 Cal.4th at 564-65.

The California Supreme Court concluded that, pursuant to “well-established principles of state law,” the species of payments at issue in *White* could only be made based upon an available appropriation. *White*, 30 Cal.4th at 574.

On this limited point, the Court held: “[a]ccordingly, we conclude that in light of article XVI, section 7, of the California Constitution, and Government Code sections 12440, 9610, 1231, and 1231.1, the employment rights of state employees reasonably must be viewed as including a condition that the actual payment of an employee’s salary is dependent upon the existence of an available appropriation.”

White, supra, 30 Cal.4th 568-69.

Quite simply, *White* does not address, nor endorse, the expansive interpretation of § 1981 that the Ninth Circuit adopted in its October 11, 2017 opinion.

In short, plaintiffs sought redress under § 1981 for the denial of “special assignments” that were never

vested; never due and owing; nor were part of any fabric of public employment that was contractual in character. (App. 129 [¶¶ 13-16].)

The Ninth Circuit's opinion overrides California state law based upon its flawed reading of *White*. The Ninth Circuit effectively held that because public employees must ultimately be compensated by way of an appropriation enacted after a budget impasse, that "a broader view of the applicability of section 1981 to public employees under California law" would be construed. Thus, the Court concluded that, "California law weighs in favor of allowing Plaintiffs' section 1981 claims to proceed in this case." *Id.*

Nothing from *White* supports this "broader" interpretation of § 1981 and unwarranted expansion of a federal statute in contravention of its plain language and *Jett*. Rather, the Ninth Circuit misapplied *White* to expand the reach of a federal statute to a degree never contemplated by Congress, much less by this Court or the California Supreme Court.

From a policy standpoint, the Ninth Circuit's decision raises serious federalism concerns. The first government of the United States, under the Articles of Confederation ratified in 1781, sought to ensure that "[e]ach state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."

This was the precursor to the enactment of the Tenth Amendment to the United States Constitution, which reads: "The powers not delegated to the United

States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” U.S. CONST., amend. X. The framers wrote the Tenth Amendment to help the people understand that powers not specifically granted to the United States by the document were retained by the states or the public.

The decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976) reflected the general conviction that the Constitution precludes “the National Government [from] [devouring] the essentials of state sovereignty.” *Maryland v. Wirtz*, 392 U.S. 183, 205 (1968) (dissenting opinion). In order to be faithful to the underlying federal premises of the Constitution, courts must look for the “postulates which limit and control.” *Monaco v. Mississippi*, 292 U.S. 313, 322 (1934). But that is not what occurred here.

The Ninth Circuit dangerously misapplied *White* to suit an expansive and unprecedented interpretation of a federal statute. The Ninth Circuit’s decision is convoluted, erroneous, and overreaching. It is therefore vital that this Court grant review.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the petition for writ of certiorari be granted.

Respectfully submitted,

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