

No. _____

**In the Supreme Court
of the United States**

BLESSING NWOSU,

Petitioner,

versus

1600 WEST LOOP SOUTH, L.L.C.; JANE DOE,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an African American restaurant patron who was singled out and had a wool shawl forcibly placed on her without warning or consent while an entire restaurant of similarly- or more casually-dressed non-Black patrons sat undisturbed is barred from recovering under 42 U.S.C. § 1981 merely because she had the grace and composure to stay in the restaurant on behalf of her friend.

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are:

1. Petitioner Blessing Nwosu, who was the plaintiff in the District Court, and appellant in the Court of Appeals; and
2. Respondents 1600 West Loop South, L.L.C., and Jane Doe, who were defendants in the District Court, and appellees in the Court of Appeals.

Additionally, Hospitality Headquarters, Inc., and Landry's L.L.C. were defendants in the District Court that were voluntarily dismissed before the appeal. Landry's L.L.C. was included in the caption for the appeal as an appellee, but no claims were brought against it on appeal.

RELATED PROCEEDINGS

Nwosu v. 1600 West Loop South, LLC, et al., No. 4:23-cv-4016, United States District Court for the Southern District of Texas. Judgment entered February 21st, 2025.

Nwosu v. 1600 West Loop South, LLC, et al., No. 25-20079, United States Court of Appeals for the Fifth Circuit. Rehearing denied January 23rd, 2026.

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
RELATED PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
42 U.S.C. § 1981	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	4
I. Irrespective of the Court’s determination on the merits, it should reverse Fifth Circuit’s decision for its flagrant violation of the summary judgment standard.	7
II. The Fifth Circuit’s requirement for plaintiffs to show that they were “forced to leave” conflicts with the plain text of § 1981, and this Court should step in to clarify the application of § 1981 in this context.	9
CONCLUSION	12

**TABLE OF CONTENTS
OF THE APPENDIX**

Opinion of the United States Court of
Appeals for the Fifth Circuit,
Issued: December 12th, 2025 1a

Denial of Rehearing by the United States
Court of Appeals for the Fifth Circuit,
Issued: January 23rd, 2026 8a

Order of the United States District Court
for the Southern District of Texas,
Issued: February 21st, 2025 9a

TABLE OF AUTHORITIES

CASES

<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986)	8
<i>Arguello v. Conoco, Inc.</i> , 330 F.3d 355 (5th Cir. 2003)	6, 9
<i>Christian v. Wal-Mart Stores, Inc.</i> , 252 F.3d 862 (6th Cir. 2001)	11
<i>Eddy v. Waffle House, Inc.</i> , 482 F.3d 674 (4th Cir. 2007)	11
<i>Hager v. Brinker Tex., Inc.</i> , 102 F.4th 692 (5th Cir. 2024)	6
<i>King v. Baylor Univ.</i> , 46 F.4th 344 (5th Cir. 2022)	10
<i>Landgraf v. Usi Film Prods.</i> , 511 U.S. 244 (1994)	10
<i>Lizardo v. Denny’s, Inc.</i> , 270 F.3d 94 (2d Cir. 2001)	11
<i>Patterson v. McLean Credit Union</i> , 491 U.S. 164 (1989)	10
<i>Salazar-Limon v. City of Houston</i> , 581 U.S. 946 (2017)	8
<i>Tolan v. Cotton</i> , 572 U.S. 650 (2014)	8

STATUTES

42 U.S.C. § 1981	6, 9
------------------------	------

OTHER AUTHORITIES

Note, Supreme Court Per Curiam Practice: A Critique, 69 HARV. L. REV. 707, 708 (1956)	7
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PETITION FOR WRIT OF CERTIORARI

Petitioner Blessing Nwosu respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion is not reported, but may be found at *Nwosu v. 1600 W. Loop S., L.L.C.*, 2025 U.S. App. LEXIS 32653 (5th Cir. Dec. 12, 2025), and is reproduced at 1a–7a. The opinion of the District Court for the Southern District of Texas is nor reported, but may be found at *Nwosu v. 1600 West Loop South, LLC*, 2025 U.S. Dist. LEXIS 31609 (S.D. Tex. Feb. 21, 2025), and is reproduced at 9a–20a.

JURISDICTION

The Court of Appeals denied Petitioner's timely filed request for rehearing on January 23rd, 2026. 8a. Because Petitioner received a 30-day extension, this petition is timely filed on or before May 26th, 2026, as the first day that is not a Saturday, Sunday, federal legal holiday, or day on which the Court building is closed after the 30th day. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1981

(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

As discussed further *ante*, although the Fifth Circuit provides a recitation of the facts “based on the summary-judgment record,” Pet. App. 2a, it omits any reference to genuine, material factual disputes, and Petitioner’s positions on those disputes entirely. Based on the summary judgment record, she provides the following facts at issue in this Petition.

Petitioner Blessing Nwosu is a highly educated public school teacher, having earned several degrees, including a Master’s in Theological studies, and has been a successful beauty pageant contestant. She, an African American woman, was merely trying to celebrate her friend’s birthday at the Bloom & Bee Restaurant in the Post Oak Hotel. She was wearing a long, formal dress that exposed her shoulders and part of her upper back (but not much of her chest). Her formal dress was certainly fit for the stated “business casual” dress code, and was well in line with the amount of exposure of other, white patrons in Bloom & Bee at the time, as well as the patrons that proliferate Bloom & Bee’s social media page. As a notable example, Blessing’s dress had substantial straps that tie at the neck, while other patrons on social media had entirely strapless dresses. Her dress was also as formal or more formal than those other patrons.

Blessing was part of the only African American party in the restaurant. Despite the formality of her dress and the fact that it was in line with the

attire of other patrons and Bloom & Bee's own social media page, Blessing was singled out, and had an itchy wool shawl forced upon her by the hostess without warning and without permission. Blessing testified to a physical injury with respect to the shawl in the form of itchiness and skin sensitivity, as well as the force of the contact from the hostess that forced the shawl on her. Blessing was extremely embarrassed and offended by the contact and the situation as a whole, but did not want to cause a further scene, and did not want to distract from or further ruin her friend's celebration, and so stayed for the duration of the meal, about 1-2 hours.

Petitioner brought the present civil action for the violation of her civil rights under 42 U.S.C. § 1981. After voluntarily dismissing the incorrect corporate defendants as described *supra*, the case went to discovery, and the district court granted Respondent's motion for summary judgment, dismissing the case. Both the district court and the Fifth Circuit agree that the first two elements of her *prima facie* case are met, namely that Petitioner showed that she was a member of a racial minority, and that Respondent had the intent to discriminate on the basis of race. Pet. App. 5a.

REASONS FOR GRANTING THE PETITION

Blessing Nwosu met with her friends to celebrate one friend's birthday at the Bloom & Bee restaurant, hoping to have kind of "enchanted" and "elegant" experience that Bloom & Bee

advertises on its website and public-facing Instagram page. To that end, Blessing—a successful beauty pageant contestant—wore a sophisticated and tasteful ankle-length dress.¹ That hope was shattered almost immediately, however, when the hostess forced an itchy wool shawl on her without permission, warning, or explanation. She was part of the only Black party in the entire restaurant of similarly (in fact, less formally) dressed, largely Caucasian patrons, and her dress was equally or less revealing than many light-skinned patrons that proliferate Bloom & Bee’s Instagram. To be clear, there is no construction of the facts on the record under which she actually violated the restaurant’s dress code, as Respondent claimed (and the Panel assumed) below.

In line with her natural elegance, Blessing chose to suffer the indignity for the duration of the meal instead of abandoning her friend’s birthday celebration and causing a scene. And her reward for showing grace and stoicism in the face of such treatment? According to the Fifth Circuit, she

¹ The district court’s opinion appears to have been printed and scanned before being uploaded to the ECF, one or both steps of which was done in black & white. The picture of Blessing’s dress as it appeared in the district court’s opinion is reproduced here. Pet. App. 11a. As a copy of a copy of a copy, it is not a particularly detailed visual. If the Court believes that the photograph is necessary to its disposition at this stage, Petitioner will gladly provide the full color version that was before the courts below.

forfeit her chance of a remedy under what should be the straightforward application of civil rights law.

In its opinion, the Fifth Circuit pointed to its precedent in *Hager v. Brinker Tex., Inc.*, 102 F.4th 692 (5th Cir. 2024), for the proposition that an actionable claim under 42 U.S.C. § 1981 effectively requires “exposure to harassment rising to the level that would force the [plaintiff] to leave the restaurant.” Pet. App. 6a. The plain text of § 1981 guarantees the nondiscriminatory performance of contracts, including “the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationships.” 42 U.S.C. § 1981(b). As the Fifth Circuit once paid lip service to, the dining contract “continues over the course of the meal and entitles the customer to benefits in addition to the meal purchased,” such as a reasonable atmosphere, service, and (for example) the opportunity to enjoy one’s meal without being singled out and physically handled by employees. *Arguello v. Conoco, Inc.*, 330 F.3d 355, 358 (5th Cir. 2003). Millions of Americans dine in restaurants every day, and the exact contours of how § 1981 protects restaurant customers has not been squarely addressed by this Court, and is not consistent among the federal Circuits. It should do so here. In addition, it should correct the Fifth Circuit’s flagrant and wanton disregard of the summary judgment standard when it resolved multiple material fact disputes in Respondent’s favor.

I. Irrespective of the Court's determination on the merits, it should reverse Fifth Circuit's decision for its flagrant violation of the summary judgment standard.

As Petitioner explains elsewhere herein, the Fifth Circuit clearly reached a decision that conflicts with the plain text of § 1981, but its first and perhaps most essential error is in ignoring factual disputes and resolving them in the movant's (here, Respondent's) favor. Its resolution of these issues are not minor disagreements, nor are they close calls. Instead, the Fifth Circuit ignored Petitioner's clear, consistent, and evidence-based positions, and constructed a straw man from Respondent's version of the facts and affirmed the district court on that basis. Irrespective of the Court's decision on the merits of the case, the Court could choose to summarily reverse.

This Court's use of summary disposition dates back to the late nineteenth century. Note, Supreme Court Per Curiam Practice: A Critique, 69 HARV. L. REV. 707, 708 (1956). These dispositions took the form of short, per curiam decisions, sometimes offering only a single sentence stating the result and not always providing even a citation to authority. *See id.* at 707. Cases were summarily affirmed or reversed when they presented issues falling squarely within existing Supreme Court precedent. *See id.* at 708. As Justice Alito has pointed out, summary reversals may be appropriate "if the lower court conspicuously failed to apply a governing legal rule." *Salazar-Limon v. City of*

Houston, 581 U.S. 946, 947 (2017) (Alito, J., concurring with the denial of a petition for writ of certiorari).

Facing a similar situation to the present case in *Tolan v. Cotton*, this Court summarily reversed the Fifth Circuit for “fail[ing] to adhere to the axiom that in ruling on a motion for summary judgment, ‘[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.’” *Tolan v. Cotton*, 572 U.S. 650, 651 (2014) (per curiam) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). It went on to note that although “this Court is not equipped to correct every perceived error coming from the lower federal courts, we intervene here because the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents.” *Id.* at 659 (cleaned up).

Here, the Fifth Circuit resolved several crucial factual disputes in Respondent’s favor. The two most material such instances are its assumption that Blessing had, in fact, violated the dress code despite the fact that she has asserted the opposite throughout the litigation, and its statement that the hostess “quietly approached Nwosu and placed a shawl on her shoulders and back,” and told her that “her attire was too revealing under the restaurant’s dress code,” despite the fact that Blessing has asserted throughout the litigation and in her deposition that the shawl was forcibly put on her without warning, permission, or explanation. Pet. App. 2a–3a, 6a–7a. It further claimed

that she dined at Bloom & Bee for “nearly four-and-a-half hours,” despite the fact that Blessing provided deposition testimony that she only dined for one or two hours. Pet. App. 7a.

Such a clear and flagrant misapprehension of the summary judgment standard can and should be corrected either through summary reversal, or as part of a full review of the merits.

II. The Fifth Circuit’s requirement for plaintiffs to show that they were “forced to leave” conflicts with the plain text of § 1981, and this Court should step in to clarify the application of § 1981 in this context.

As noted *supra*, the Fifth Circuit’s decision in this case does not square with § 1981(b)’s plain text. Congress protected “the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship”—not merely the right to complete a commercial transaction. Each of those enumerated categories has independent meaning. A restaurant’s dining contract offers, among other things, an atmosphere consistent with its representation to the public, service free from discriminatory indignity, and the experience of being treated like every other patron. *See, e.g., Arguello v. Conoco, Inc.*, 330 F.3d 355, 358 (5th Cir. 2003). Those are clearly “benefits” and “privileges” of the relationship within the ordinary meaning of those terms. And as discussed at length in the briefing below, Bloom & Bee’s *public-facing* statements and understanding of its dress code are

contractual terms. *See King v. Baylor Univ.*, 46 F.4th 344, 358–59 (5th Cir. 2022). Essentially, Blessing should have been entitled to the benefit and privilege of Bloom & Bee’s advertised “elegant” and “enchanted” atmosphere, so long as she complied with the terms of the contract, namely the restaurant’s stated dress code (“business casual”), and its publicly available illustration of what fits that dress code (e.g. Bloom & Bee’s public Instagram page). On the available evidence, she very clearly did meet the dress code in her formal dress that was overall less revealing than other contemporaneous customers as well as customers pictured on Instagram. Nevertheless, based on the way she was treated, she was denied the benefits and privileges of the dining contract due to her race.

The Fifth Circuit’s decision here effectively reduces § 1981 to a single inquiry in the restaurant context: whether the plaintiff was prevented from eating her meal. *See Pet. App.* 6a. In doing so, it contravenes Congress’s express intention in passing the 1991 amendments to the Civil Rights Act. Congress enacted this language specifically to overrule this Court’s narrow reading of § 1981 in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), which had limited the statute to conduct at the moment of contract formation. The 1991 amendments were an explicit, deliberate expansion of the statute’s coverage to protect the ongoing performance of—and all benefits flowing from—contractual relationships. *See Landgraf v. Usi Film Prods.*, 511 U.S. 244, 250–51 (1994). The

intent was never to set a floor of bare completion, which is all the Fifth Circuit has reduced it to.

This Court has not yet addressed the exact contours of how § 1981 protects restaurant customers. As a result, the various Circuits have not reached a consensus, to the extent that they have reached the issue. *See, e.g., Eddy v. Waffle House, Inc.*, 482 F.3d 674, 678 (4th Cir. 2007), *vacated and remanded on other grounds*, 554 U.S. 911 (2008) (not articulating a specific standard, but citing *Arguello* to support the point that the member of a party need not witness or receive discriminatory conduct directly, so long as one member of the party does); *Lizardo v. Denny's, Inc.*, 270 F.3d 94, 103 (2d Cir. 2001) (looking for more than “markedly hostile treatment” (*see Christian, ante*)); *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 878–89 (6th Cir. 2001) (in the retail context but widely adapted, looking for services received “in a markedly hostile manner and in a manner which a reasonable person would have found objectively discriminatory,” and also looking at an employee’s behavior that “may be characterized as hostile and objectively discriminatory in that it was profoundly contrary to the manifest financial interests of Wal-Mart and far outside of widely-accepted business norms.”). It should and must step in to provide the necessary clarity.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari.

Respectfully submitted,

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May 26th, 2026

APPENDIX

APPENDIX TABLE OF CONTENTS

	Page
Opinion of the United States Court of Appeals for the Fifth Circuit, Issued: December 12th, 2025	1a
Denial of Rehearing by the United States Court of Appeals for the Fifth Circuit, Issued: January 23rd, 2026	8a
Order of the United States District Court for the Southern District of Texas, Issued: February 21st, 2025	9a

1a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25-20079

BLESSING NWOSU,
Plaintiff-Appellant,

versus

1600 WEST LOOP SOUTH, L.L.C.; LANDRY’S, L.L.C.,
doing business as POST OAK HOTEL; JANE DOE,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:23-CV-4016

Before BARKSDALE, WILLETT, and DUNCAN, *Circuit Judges.*

PER CURIAM:*

At issue is whether the district court erred by granting summary judgment to 1600 West Loop South, LLC, against Blessing Nwosu’s 42 U.S.C. § 1981 claim; and, it seems (as discussed *infra*), by declining to exercise supplemental jurisdiction over her two state-law claims (assault and intentional infliction of emotional distress). **AFFIRMED.**

* This opinion is not designated for publication. *See* 5th Cir. R. 47.5.

2a

I.

The following recitation of facts is based on the summary-judgment record, containing, *inter alia*: Nwosu’s deposition transcript; defendant’s employee’s declaration; defendant’s property guidelines and dress code; and photographs attached to the parties’ summary-judgment filings.

1600 West Loop South, LLC, is the sole owner and operator of The Post Oak at Uptown Houston (Hotel), including the Bloom & Bee restaurant (B&B) inside the Hotel. The Hotel is the only five-star hotel in Houston, Texas. It maintains property guidelines on its public website, stating, *inter alia*: “a strict dress code is always enforced in public areas including the lobby level and venue outlets”; “[e]xcessive revealing attire in these areas will result in expulsion from the property”; and “[b]usiness casual attire [is] required in the lobby and public areas after 6:00 pm”.

B&B is one of six dining-and-drinking establishments at the Hotel and purports to provide a luxurious, family-friendly environment. Its dress code—also available online—is “family friendly” from open until 6:00 p.m., and “business casual” from 6:00 p.m. to close. B&B trains its employees to enforce the dress code based on the “totality of the outfit”.

If a guest’s clothing is not in compliance with the dress code, B&B staff are instructed to provide them a shawl to wear. If a guest refuses to do so, the guest has the option to dine at one of the other restaurants at the Hotel with a more relaxed dress code.

Nwosu, a black female, and her friends, also black females, gathered at B&B for a birthday celebration on 24 May 2023. They arrived around 2:00 p.m. and were seated upon arrival. Minutes later, Dunmore, a hostess

at B&B and also a black female, quietly approached Nwosu and placed a shawl on her shoulders and back. She informed Nwosu her attire was too revealing under the restaurant's dress code. Nwosu did not complain or otherwise raise concerns about the shawl or the dress-code's enforcement that afternoon. She and her friends had dinner and were in the restaurant for about four-and-a-half hours. This was Nwosu's third meal at B&B.

Nwosu filed this action on 20 October 2023, claiming: race discrimination under 42 U.S.C. § 1981; and intentional infliction of emotional distress under Texas law (based on B&B's alleged "outrageous and utterly intolerable" conduct of placing shawl on her). She named as defendants: 1600 West Loop South, LLC; Hospitality Headquarters, Inc.; and Landry's, LLC, d/b/a the Hotel. She then filed her First Amended Complaint, raising, in addition to her original claims: under 42 U.S.C. § 1983 for race discrimination; and assault under Texas law (based on B&B's hostess' touching, placing shawl on, her). She also added "Jane Doe"—the individual who did so—as a new defendant. Hospitality Headquarters, Inc., and Landry's, LLC, were later dismissed. One of two remaining defendants, 1600 West Loop South, LLC (B&B), filed for summary judgment.

The district court granted B&B's motion on 21 February 2025, concluding: Nwosu "utterly fail[ed]" to defend her claim under § 1983 in response to B&B's motion and did not plead the existence of a requisite state actor; and her § 1981 claim failed because she could not show her alleged discrimination concerned one or more enumerated activities in the statute. The court then dismissed: her state-law claims without

prejudice, because she had no surviving federal-law claims; and Jane Doe, for failure to timely serve.

II.

Nwosu contends the district court erred by: concluding her alleged discrimination did not concern an enumerated activity under § 1981; and declining to retain her state-law claims following dismissal of her federal-law claims (as noted, the confusion about this claim is discussed *infra*). B&B counters that: she fails to show the denial of a cognizable right under the parties' dining contract; and the court properly dismissed her state-law claims without prejudice.

As an initial matter, and as the district court noted, Nwosu did not defend her claim under § 1983 in response to B&B's summary-judgment motion. Moreover, she does not raise it on appeal. Accordingly, she abandons it. *E.g., Rollins v. Home Depot USA*, 8 F.4th 393, 397–98 (5th Cir. 2021).

A.

Turning to Nwosu's § 1981 claim, she contends B&B's dress code was enforced in a discriminatory manner, "subject[ing] her to rudeness, assault, and an unreasonably hostile atmosphere".

"We review a grant of summary judgment *de novo*, applying the same standard as the district court." *Batyukova v. Doege*, 994 F.3d 717, 724 (5th Cir. 2021) (citation omitted). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law". FED. R. CIV. P. 56(a). "A dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Dyer v. Hous.*, 964 F.3d 374, 379 (5th Cir. 2020) (citation omitted). "A fact is material if

its resolution could affect the outcome of the action.” *Id.* (citation omitted).

Plaintiff may prove a discrimination claim under § 1981 with either direct or circumstantial evidence. *Ayorinde v. Team Indus. Servs. Inc.*, 121 F.4th 500, 507 (5th Cir. 2024). Where, as here, only circumstantial evidence of race discrimination is offered, our court applies the burden-shifting framework provided in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973). *E.g.*, *Hager v. Brinker Tex., Inc.*, 102 F.4th 692, 699 (5th Cir. 2024). Under that standard, plaintiff has the initial burden of establishing a *prima facie* case of race discrimination. *Id.* The burden then “shifts to . . . defendant to produce evidence of a legitimate, non-discriminatory reason for its conduct”. *Id.* If defendant succeeds, “the burden shifts back to . . . plaintiff to show that this proffered reason is merely pretext for discrimination”. *Id.* For the following reasons, Nwosu fails to establish a *prima facie* case of discrimination. Therefore, we do not reach the *McDonnell-Douglas* burden-shifting steps. *See id.*

To establish a *prima facie* case of discrimination under § 1981, plaintiff must show “(1) that she is a member of a racial minority; (2) that [defendant] had intent to discriminate on the basis of race; and (3) that the discrimination concerned one or more of the activities enumerated in the statute”. *Morris P. Dillard Dep’t Stores, Inc.*, 277 F.3d 743, 751 (5th Cir. 2001).

The district court’s decision rested solely on the third element of a *prima facie* case under § 1981, and the parties do not contest the court’s conclusion on the other elements. Accordingly, we address only whether Nwosu’s alleged discrimination concerns one or more enumerated activities under § 1981. It does not.

Plaintiff's loss must be "an actual, not speculative or prospective, contract interest". *Id.* Moreover, "Section 1981 does not provide a general cause of action for race discrimination". *Arguello P. Conoco, Inc.*, 330 F.3d 355, 358 (5th Cir. 2003). "Rather, it prohibits intentional race discrimination with respect to certain enumerated activities." *Id.* These activities include: "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship". 42 U.S.C. § 1981(b).

In the restaurant context, the contractual relationship "continues over the course of the meal and entitles the customer to benefits in addition to the meal purchased". *Arguello*, 330 F.3d at 360. It encompasses "more than simply the purchase of food", including "related 'benefits, such as utensils with which to eat the food, access to the restrooms, and the opportunity to consume the meal without exposure to harassment rising to the level that would force the patrons to leave the restaurant'". *Hager*, 102 F.4th at 700 (quoting *Dunaway v. Cowboys Nightlife, Inc.*, 436 F. App'x 386, 392 (5th Cir. 2011)).

"[A] restaurant patron's right to finish her meal is not absolute", however. *Dunaway*, 436 F. App'x at 392. "If she violates the policies of the restaurant in some way, she may be forcibly removed even before she has the chance to complete her meal". *Id.* ("Although unpublished cases from this court rendered after [1 January 1996] . . . are not controlling precedent, they may be considered persuasive authority." *United States v. Johnson*, 619 F.3d 469, 473 n.3 (5th Cir. 2010); see 5th Cir. R. 47.5.4.) Even when a restaurant's policies are listed on its website, patrons are bound by

those terms if provided notice. *See King v. Baylor Univ.*, 46 F.4th 344, 358–59 (5th Cir. 2022).

Nwosu admits she was aware of B&B’s business-casual dress code before dining, and she does not assert denial of any cognizable benefit under § 1981. *See Arguello*, 330 F.3d at 360; *Dunaway*, 436 F. App’x at 392–93. Rather, she concedes her waitress: was not rude; did not refuse her service; and provided her with silverware for her meal.

Moreover, the alleged discrimination did not “ris[e] to the level that would force [her] to leave [B&B]”. *Hager*, 102 F.4th at 700 (citation omitted). To the contrary, she dined and otherwise remained for nearly four-and-a-half hours after she was requested to wear a shawl. Accordingly, her alleged discrimination does not concern an enumerated activity under § 1981.

B.

For her other issue, Nwosu contends, in her opening brief, that the district court erred in declining to exercise supplemental jurisdiction over her state-law claims after dismissing her federal-law claims. In her reply brief, however, she asserts her state-law claims should be revived only if her federal-law claims are reinstated. In any event, the district court did not abuse its discretion in declining to exercise supplemental jurisdiction over her state-law claims. *See Wong v. Stripling*, 881 F.2d 200, 204 (5th Cir. 1989) (noting abuse-of-discretion standard); *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639 (2009) (noting court’s declining supplemental jurisdiction in such cases is “purely discretionary”).

III.

For the foregoing reasons, the judgment is **AFFIRMED**.

8a

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25-20079

BLESSING NWOSU,

Plaintiff-Appellant,

versus

1600 WEST LOOP SOUTH, L.L.C.; LANDRY'S, L.L.C.,
doing business as POST OAK HOTEL; JANE DOE,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:23-CV-4016

ON PETITION FOR REHEARING EN BANC

Before BARKSDALE, WILLETT, and DUNCAN, *Circuit Judges.*

PER CURIAM:

Treating the petition for reheating en banc as a petition for panel rehearing (5TH CIR. R.40 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P.40 and 5TH CIR. R.40), the petition for rehearing en banc is DENIED.

9a

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 4:23-cv-4016

BLESSING NWOSU,

Plaintiff,

vs.

1600 WEST LOOP SOUTH, LLC, *et al.*,

Defendants.

ORDER

Pending before this Court is 1600 West Loop South, LLC's¹ Motion for Summary Judgment. (Doc. No. 30). Blessing Nwosu ("Plaintiff") responded in opposition, (Doc. No. 31), to which Defendant replied, (Doc. No. 32).

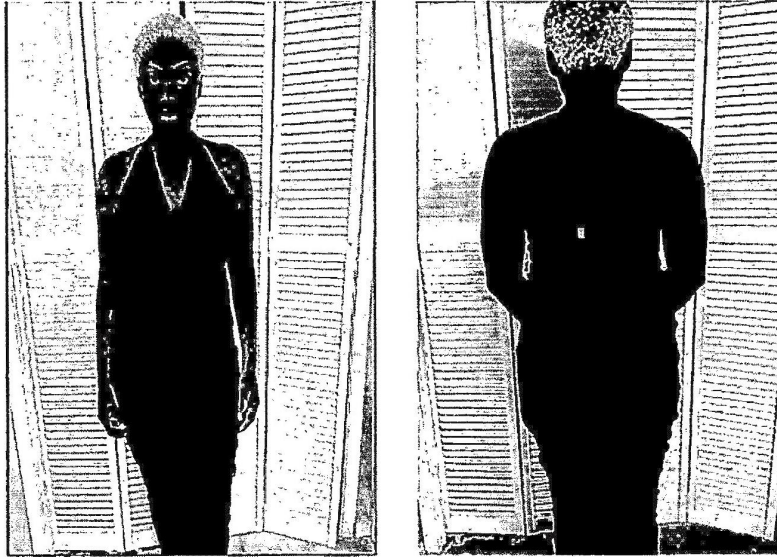
¹ While Hospitality Headquarters, Inc. and Landry's LLC were initially joined as defendants in this case, pursuant to the parties' joint motion, (Doc. No. 21), the Court dismissed them, (Doc. No. 22). The Court also notes that Plaintiff also named a "Jane Doe" as defendant, representing that she, "when identified, will be served with process," but, to date, this has not been done, despite the fact that Defendant expressly identified a Janayjah Dunmore as the Jane Doe figure. *See* (Doc. No. 30 at 14) *and* (Doc. No. 30-1 at 3). Rule 4 requires that service of process be effected within 90 days after the Complaint is filed. FED. R. CIV. P. 4(m). This time period has long since expired. Therefore, the Court hereby dismisses Jane Doe from the case for failure to timely serve. Thus, 1600 West Loop South, LLC is the sole defendant; and, consequently, this Order disposes of the entire case.

Having considered the motion, the applicable law, and the summary-judgment evidence, the court GRANTS the motion as to Plaintiff's federal-law claims. (Doc. No. 30). The Court declines to exercise supplemental jurisdiction over Plaintiff's state-law claims and dismisses them without prejudice to being filed in state court, if Plaintiff so chooses.

Also pending before this Court is Plaintiff's Motion to Extend Expert Witness Deadlines (doc. No. 23). Defendant responded in opposition, (Doc. No. 24), and Plaintiff filed a reply, (Doc. No. 25). Given that the Court's disposition of this case does not depend on what an expert may testify to, the Court need not address this motion before granting the summary judgment. Thus, Plaintiff's Motion to Extend Expert Witness Deadlines is DENIED as moot. (Doc. No. 23). The Court similarly DENIES as moot Plaintiff's Motion to Extend Deadlines. (Doc. No. 26).

I. Background

Plaintiff brings this suit for alleged racial discrimination at a restaurant. Plaintiff is an African American woman. (Doc. No. 13 at 4). On May 24, 2023, Plaintiff, along with her friends, gathered at Bloom & Bee restaurant in the Post Oak Hotel in Houston, Texas, for a birthday brunch for one of her friends. (*Id.* at 6). Her outfit for this occasion, displayed below and the focal point of this case, was a red dress with a halter top:



(Doc. No. 30-12).

Bloom & Bee is one of six dining and drinking establishments at Post Oak Hotel, the only five-star hotel in Houston. (Doc. No. 30-3 at 1). Bloom & Bee purports to be one of the more upscale of the six. As such, Bloom & Bee strives to offer patrons “fine dining in a luxurious and family-friendly environment.” (*Id.*). Consequently, the hotel has a property guideline, and the restaurant has a dress code, both of which have been in effect since at least 2018. (*Id.* at 1-2). The hotel’s property guidelines, available online, state that “[e]xcessive[ly] revealing attire in [public areas] will result in expulsion from the property. (Doc. No. 30-2 at 1). The restaurant’s dress code, also listed online, sets out the standard as “business casual.”² (Doc. No.

² While, on its website, Bloom & Bee requires “business casual” attire without any temporal qualifications, the Assistant Food and Beverage Director, Faith Chen, avers that “Bloom & Bee’s dress code is family-friendly from open until 6 p.m. and business

30-4 at 1). The summary-judgment evidence also demonstrates that employees are trained to identify violations of this dress code and enforce them, instructing them to consider the “totality of the outfit.” (Doc. No. 30-22 at 3). That is, whether an outfit is “excessively revealing” depends on the combination of the various pieces of the outfit. For example, the employee-training slide deck instructs that ripped jeans may be inappropriate in certain circumstances as being “too casual” or “overly revealing,” but in other circumstances and considering the “totality of the outfit,” they may be acceptable.³ (*Id.* at 4-5).

To accommodate patrons who may not comply with the dress code, Defendant trains its employees to offer two options: 1) for those with overly revealing attire, wear a shawl that the restaurant provides; or, 2) for those completely out of dress code, dine at a different restaurant at the Post Oak Hotel that does not have as strict a dress code. (Doc. No. 30-6). It is the shawl and its application that forms the basis of Plaintiff’s claims.

Plaintiff claims and Defendant does not dispute that after she was seated, Defendant’s hostess approached Plaintiff from behind and placed the shawl on her, simultaneously explaining that her shoulders were too revealing. (Doc. No. 13 at 6-7). Though Plaintiff found this conduct “offensive” and “rude,” (*Id.* at 7), she did not raise the issue with anyone at that time, (Doc. No.

casual from 6 p.m. until close.” (Doc. No. 30-3 at 2). Nevertheless, the parties’ dispute is around whether Plaintiff’s attire was too revealing (in violation of the hotel’s property guidelines), not whether her attire was too casual.

³ This “standard,” of course, leaves much to the eye of the beholder.

30-11 at 91:14-23). In fact, she stayed for almost five hours, arriving at around 2:00 pm, (Doc. No. 13 at 6), and closing out the check around 6:51 pm, (Doc. No. 30-14).

Nevertheless, based on this turn of events, Plaintiff has sued the establishment asserting several causes of action: (1) violation of 42 U.S.C. § 1981; (2) violation of 42 U.S.C. § 1983, (3) assault; and (4) intentional infliction of emotional distress. (Doc. No. 13 at 10-14). Defendant, through the present motion, moves for summary judgment on all four causes of action. (Doc. No. 30).

II. Legal Standard

Summary judgment is warranted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a). “The movant bears the burden of identifying those portions of the record it believes demonstrate the absence of a genuine issue of material fact.” *Triple Tee Golf Inc. v. Nike, Inc.*, 485 F.3d 253, 261 (5th Cir. 2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986)).

Once a movant submits a properly supported motion, the burden shifts to the non-movant to show that the court should not grant the motion. *Celotex*, 477 U.S. at 321-25. The non-movant then must provide specific facts showing that there is a genuine dispute. *Id.* at 324; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A dispute about a material fact is genuine if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The court must draw all reasonable inferences in the light most favorable to the

nonmoving party in deciding a summary judgment motion. *Id.* at 255. The key question on summary judgment is whether there is evidence raising an issue of material fact upon which a hypothetical, reasonable factfinder could find in favor of the nonmoving party. *Id.* at 248. It is the responsibility of the parties to specifically point the Court to the pertinent evidence, and its location, in the record that the party thinks are relevant. *Malacara v. Garber*, 353 F.3d 393, 405 (5th Cir. 2003). It is not the duty of the Court to search the record for evidence that might establish an issue of material fact. *Id.*

III. Analysis

A. Section 1981

Section 1981 of the Civil Rights Act states:

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.

42 U.S.C. § 1981(a). The term “make and enforce contracts” is broad and includes the “making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.” *Id.* § 1981(b). In short, the statute serves to protect against racial discrimination for certain enumerated activities.

Plaintiff can raise an issue of material fact in support of her such discrimination claim under § 1981 with either direct or circumstantial evidence.

Dunaway v. Cowboys Nightlife, Inc., 436 F. App'x 386, 390 (5th Cir. 2011). Direct evidence is one that, "if believed, proves the fact of discriminatory animus without inference or presumption." *Obudela v. Exxon Mobil Corp.*, 736 F. App'x 437, 442 (5th Cir. 2018). Without direct evidence, however, Plaintiff can rely on circumstantial evidence, in which case the *McDonnell Douglas* burden-shifting framework applies. *Id.* at 443 (citing *Alvarado v. Tex. Rangers*, 492 F.3d 605, 611 (5th Cir. 2007)). Under that framework, Plaintiff bears the burden of establishing prima facie case of discrimination. *Id.* If she satisfies that burden, the burden then shifts back to Defendant to articulate some legitimate, non-discriminatory reason for its conduct. *Id.* If Defendant produces a legitimate alternative reason, the burden then shifts back to Plaintiff to establish either (1) that the proffered reason is a pretext for discrimination or (2) that the reason, while true, is not the only reason for its conduct. *Id.*

To establish prima facie case for a § 1981 claim, Plaintiff must show that (1) she is a member of a racial minority, (2) Defendant had intent to discriminate on the basis of race, and (3) the discrimination concerned one or more of the activities enumerated in the statute. *Arguello v. Conoco, Inc.*, 330 F.3d 355, 358 (2003). The first element is not contested. *See* (Doc. No. 30 at 24).

Regarding the second element, Plaintiff offers sufficient evidence to raise a fact issue. The record shows a post on Bloom & Bee's Instagram account, posted on October 12, 2024, of four women holding up their drinks. (Doc. No. 31-2). The photo is captioned "Join us for brunch this weekend at Bloom & Bee!" (*Id.*). It also shows a white woman wearing a dress that is at least as revealing as Plaintiff's, but without

a shawl in sight. (*Id.*). That patron is wearing a halter top—with exposed shoulders and back and her upper thigh is visible in the picture, which suggests her dress may be split or shorter than Plaintiff’s. In other words, the picture shows a woman outside of the protected class wearing a revealing outfit, without a shawl, enjoying meals and drinks, and during brunch—when the dress code was likely been identical to when Plaintiff entered the hotel premises at around 2:00 pm. While the Court recognizes that the incident Plaintiff complains of and the social media post are over a year apart, the photo nonetheless serves as circumstantial evidence of disparate treatment towards Plaintiff, a minority woman, and the non-minority patron. It, therefore, at least raises a genuine issue of fact on whether Defendant had discriminatory intent.

Despite raising a face issue on the first two elements, however, Plaintiff, as a matter of law, cannot establish the third element—that the discrimination concerned one or more of the activities enumerated in the statute—and thus, her § 1981 claim fails. The statutory text and Fifth Circuit precedent make this clear. The text prohibits discrimination in two broad categories: in the “making, performance, modification, and termination of contracts,” and in “the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship” once the contract is formed. § 1981(b). Here, the former is not an issue. The parties do not dispute that Plaintiff entered the restaurant, remained there, and ordered and consumed food and beverages as she pleased (i.e., making and modification of the contract). Plaintiff also does not dispute that she received all the food and beverages she ordered (i.e., performance of the contract). The evidence also shows that she was free to terminate the

contract—by paying the bill and leaving, which she did at 6:51 pm (i.e., termination of the contract). (Doc. No. 30-14).

The issue, therefore, is whether she was free to enjoy “all the benefits, privileges, terms, and conditions of the contractual relationship” once the contract was formed. The Court holds as a matter of law that she was. Plaintiff claims that Defendant is liable under § 1981 because it denied (1) her “right to show [her] shoulders at Bloom & Bee and wear the attire [she] arrived in” because her “appearance was altered by the host’s staff”; and (2) “uninterrupted service” because the shawl was placed on her. (Doc. No. 30-10 at 5) (PL’s Interrog. Resp.). Those purported “rights” are not contractual rights at all. Indeed, the dress code *was* a term of the contract. The dress code is published online, both for the hotel and for the restaurant, (Doc. No. 30-3 at 1-2), and she knew that the hotel’s property guidelines (which contains the ban on overly-excessive attire) existed, even if she chose not to read them, (Doc. No. 30-11 at 50:1-20). Once she chose to enter the private property owned by Defendant, she agreed to abide by those guidelines which supplemented the terms of the contract and the restaurant was entitled to enforce them, even with a brief interruption in service. *See King v. Baylor Univ.*, 46 F.4th 344, 358-59 (5th Cir. 2022) (IA] customer on notice of contract terms available on the internet website is bound by those terms.”) (internal quotes omitted); *see also One Beacon Ins. Co. v. Crowley Marine Servs., Inc.*, 648 F.3d 258, 269 (5th Cir. 2011) (“The chief consideration when determining the validity of contractual terms . . . is whether the party to be bound had reasonable notice of the terms at issue and whether the party manifested assent to those terms.”). In effect, Plaintiff is arguing here that she had a contractual right to (1) violate the

contractual terms and (2) avoid the enforcement of those terms. That cannot be. As the Fifth Circuit has explained, “a restaurant patron’s right to finish her meal is not absolute. If she violates the policies of the restaurant in some way, she may be forcibly removed even before she has the chance to complete her meal . . . or enjoy some other benefit of the restaurant.” *Dunaway*, 436 F. App’x at 392. Far from forcibly removing her, Defendant chose to accommodate Plaintiff notwithstanding her alleged non-compliance with the dress code, allowing both Plaintiff and Defendant to form and perform the terms of their contract.

Plaintiff’s argument that Defendant’s enforcement of the dress code violates her contractual right contravenes this circuit’s § 1981 case law. As mentioned above, the Fifth Circuit in *Dunaway* made clear in § 1981 context that if a patron “violates the policies of the restaurant in some way, she may be forcibly removed even before she has the chance to complete here meal.” *Id.* Moreover, in *Arguello*, the Fifth Circuit held that, in a restaurant context, unlike in a retail context, there is a “contractual relationship that continues over the course of the meal and entitles the customer to benefits in addition to the meal purchased.” *Arguello*, 330 F.3d at 360. In so holding, the court cited to, and quoted in an explanatory parenthetical, a case from the Eastern District of Louisiana—*Charity v. Denny’s Inc.*, No. CIV A 98-0554, 1999 WL 544687 (E.D. La. 1999). The sentence the Fifth Circuit chose to highlight is illuminating: “[I]t could reasonably be said that a customer who enters a restaurant for service is contracting for more than just food . . . Dining in a restaurant includes being served in an atmosphere which *a reasonable person would expect in the chosen place.*” *Arguello*, 330 F.3d at 360

n.9 (quoting *Charity*, 1999 WL 544687, at *3 (emphasis added)). At Bloom & Bee, an establishment in “the only five-star hotel in the city of Houston,” (Doc. No. 30-3 at 1), a reasonable person would expect a dress code and for it to be enforced. Such enforcement is how the restaurant would maintain the atmosphere that a reasonable person would expect from it, which, in turn, provides the “benefits, privileges, terms, and conditions” that forms the backdrop of a contractual relationship. Thus, the enforcement of Defendant’s dress code cannot be a violation of a contract or its benefits, privileges, terms, or conditions, because the enforcement itself forms the benefits and privileges of dining at such an establishment. While recognizing that Plaintiff may feel that the dress code was applied to her due to her race, because of the narrow statutory text and the circuit’s case law concerning the breadth of § 1981, the Court grants Defendant’s Motion for Summary Judgment as to the § 1981 claim.

B. Section 1983

Plaintiff asserts a § 1983 claim in her First Amended Complaint, (Doc. No. 13 at 13), but utterly fails to defend it in her Response to the Motion for Summary Judgment, *see generally* (Doc. No. 31). That may be for good reason because the Supreme Court made clear that “the under-color-of-state-law element of § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful.” *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 536 U.S. 40, 50 (1999) (internal quotes omitted). Here, Plaintiff does not argue that Defendant is a state actor or acted under color of state law. Thus, the Court grants summary judgment in favor of Defendant on Plaintiff’s § 1983 claim.

C. Assault & Intentional Infliction of Emotional Distress

Having granted summary judgment on Plaintiff's § 1981 and § 1983 claims, the Court is only left with state-law claims over which it could exercise supplemental jurisdiction, namely, assault and intentional infliction of emotional distress. *See* 28 U.S.C. § 1367. The Court finds that a state court is a more appropriate forum in which to litigate the state-law claims, and thus, declines to exercise supplemental jurisdiction over those claims, pursuant to 28 U.S.C. § 1367(c)(3) ("The district courts may decline to exercise supplemental jurisdiction over a claim . . . if[] . . . the district court has dismissed all claims over which it has original jurisdiction.").

IV. Conclusion

For the foregoing reasons, the Court DISMISSES Jane Doe from the case for want of prosecution; GRANTS Defendant's Motion for Summary Judgment as to Plaintiff's federal-law claims, (Doc. No. 30); declines to exercise its supplemental jurisdiction over Plaintiff's state law claims, and thus, they are dismissed without prejudice to filing in state court, if Plaintiff so chooses; DENIES as moot Plaintiff's Motion to Extend Expert Witness Deadlines, (Doc. No. 23); and DENIES as moot Plaintiff's Motion for Extend Deadlines, (Doc. No. 26).

It is so ordered.

Signed on this 21st day of February 2025.

/s/ Andrew S. Hanen
Andrew S. Hanen
United States District Judge