No. 17-___

IN THE

Supreme Court of the United States

FLOYD G. ELMORE,

Petitioner,

v.

HARBOR FREIGHT TOOLS USA, INC.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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June 30, 2017

QUESTION PRESENTED

Whether the right under 42 U.S.C. § 1981 to "the full and equal benefit of all laws and proceedings" free from "impairment by nongovernmental [racial] discrimination" nonetheless requires an injured plaintiff to allege state action.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Floyd G. Elmore, Plaintiff - Appellant below. Respondent is Harbor Freight Tools USA, Inc., Defendant - Appellee below. Petitioner is not a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Floyd G. Elmore respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. at 1a–10a) is reported at 844 F.3d 764 (8th Cir. 2016). The opinion of the district court granting Defendant's motion to dismiss is included at Pet. App. at 34a–42a.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgment on December 23, 2016. Pet. App. at 11a–12a. The petition for rehearing or rehearing en banc was denied on March 3, 2017. *Id.* at 13a. Justice Alito granted Petitioner's timely application to extend the time to file until July 3, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved is 42 U.S.C. § 1981, which states:

> (a) 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 punish-

> ment, 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) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

STATEMENT OF THE CASE

The Civil Rights Act of 1866 proclaimed that all persons shall have the same right "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). Nothing in the text of the original Act limited the protections of the statute to the impairment of rights via state action. Moreover, 1991 amendments to the statute made clear that the rights enumerated in § 1981 "are protected against impairment by nongovernmental discrimination and impairment under color of State law." *Id.* § 1981(c).

Despite the plain text of § 1981, several federal circuit courts of appeals have added an additional state action requirement specifically when claims are made by victims of racial discrimination who allege the denial of "the full and equal benefit of all laws and proceedings for the security of persons and property." *Id.* at (a) (the "Full and Equal Benefit Clause"). At

least two other circuits have hewed to the statutory language and expressly reject the addition of any state action requirement.

Here, petitioner Floyd G. Elmore ("Mr. Elmore"), an African-American man, filed a § 1981 "equal benefit" claim against respondent Harbor Freight Tools USA, Inc. ("Harbor Freight") after Harbor Freight's store manager and her companion racially profiled Mr. Elmore, wrongfully alleged that he had stolen goods from the store earlier that same day, yelled profanities at both Mr. Elmore and his wife, and called the police to the store to investigate Mr. Elmore. The district court dismissed the complaint because Mr. Elmore failed specifically to allege state action or that Harbor Freight was acting under color of law when it mistreated Mr. Elmore and his wife. The Eighth Circuit affirmed.

The question presented is both important and recurring. It is important because an appended state action requirement precludes entirely meritorious suits under § 1981 that seek redress for violations of civil rights by private actors. That claims based upon such violations will recur is obvious and the actual number of such claims that have been filed proves the point conclusively. Certainly the ability to seek redress for violations of those civil rights under this federal statute should not depend upon geography.

I. FACTUAL BACKGROUND.

On the evening of May 9, 2015, Mr. Elmore, an African-American man, visited Harbor Freight's store in hopes of finding a jackhammer to purchase for his son. Pet. App. at 35a. He was assisted by a store employee, but was unable to find the desired model. *Id.* at 46a.

On his way out of the store, Harbor Freight's white female manager told Mr. Elmore, "I'm watching you. I caught you stealing here earlier today and told you not to come back any more." *Id.* at 35a. Mr. Elmore denied having been in the store that day. At this point, a white male companion of the manager began yelling expletives at Mr. Elmore while the manager called the police. *Id.*

Mr. Elmore then left to pick up his wife who was several blocks away, and the two of them quickly returned to the store. The police had not yet arrived and Mr. Elmore and his wife waited outside the store. The store manager's male companion gave Mr. Elmore and his wife "the finger" and they took pictures of him. *Id.* at 2a, 35a–36a. When the police arrived, they questioned Mr. Elmore and then directed him and his wife to leave explaining that "it was a civil matter." *Id.* at 36a. Mr. Elmore and his wife complied with the request.

Mr. Elmore called Harbor Freight's district manager and described the incident. *Id.* at 2a–3a. The district manager viewed a video of the incident and told Mr. Elmore that the footage "made him sick." *Id.* at 3a. As Mr. Elmore alleged in his complaint, the incident at Harbor Freight humiliated, embarrassed, inconvenienced, and insulted him, and caused him to suffer mental distress, anxiety, and emotional suffering. *Id.* at 48.

II. PROCEEDINGS BELOW.

A. District Court Proceedings.

Mr. Elmore filed suit against Harbor Freight, alleging state law claims for negligent hiring and supervision, and as relevant here, a § 1981 violation for intentional discrimination against Mr. Elmore on the basis of race, falsely implicating him in a prior, unre-

lated theft, and causing him to be the target of an unjustified criminal investigation. *Id.* at 2a–3a. Mr. Elmore alleged that Harbor Freight had denied him "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).

Harbor Freight moved to dismiss for failure to state a claim, arguing that Mr. Elmore failed to allege state action. Pet. App. at 37a. Because existing Eighth Circuit precedent requires state action for claims brought under the Full and Equal Benefit Clause, Mr. Elmore argued that the plain language of § 1981 contemplated no such requirement and that Eighth Circuit precedent was inconsistent with decisions from other courts of appeals.

The district court recited the existing precedent and accordingly dismissed the § 1981 claim. *Id.* at 38a–40a. The district court also declined to exercise supplemental jurisdiction over Mr. Elmore's remaining state law claims and dismissed the complaint in its entirety. *Id.* at 40a–41a.

B. Eighth Circuit's Decision.

On appeal, Mr. Elmore again argued that the imposition of a state action requirement for full and equal benefit claims was inconsistent with the text of § 1981 and decisions from other courts of appeals. The Eighth Circuit stood upon its prior precedent and affirmed. *Id.* at 4a ("Because the state is the sole source of the law, it is only the state that can deny the full and equal benefit of the law.") (quoting *Youngblood* v. *Hy-Vee Food Stores, Inc.*, 266 F.3d 851, 855 (8th Cir. 2001)).

The panel opinion acknowledged the existing split of authority. *Id.* at 4a–5a ("Some courts have agreed with Elmore's interpretation." (citations omitted)).

But the panel noted that it was unable to overrule the decision of a prior panel and was thus "bound" by the state action requirement. *Id.* at 5a. The court also affirmed the dismissal of Mr. Elmore's state law claims, holding that the district court had not abused its discretion in declining to exercise supplemental jurisdiction once the sole federal claim had been dismissed. *Id.* at 5a–6a.

The Eighth Circuit denied Mr. Elmore's timely petition seeking rehearing so that the full Eighth Circuit could revisit its precedent. *Id.* at 13a. Two members of the court of appeals, Judges Smith and Kelly, voted to grant the petition for rehearing en banc. *Id.*

REASONS FOR GRANTING THE PETITION

I. AN ACKNOWLEDGED AND ENTRENCHED CIRCUIT SPLIT EXISTS AS TO WHETHER A "FULL AND EQUAL BENEFIT" CLAIM UNDER § 1981 REQUIRES STATE ACTION.

A. The Second And Sixth Circuits Have Held That State Action Is *Not* Required.

In *Phillip* v. *University of Rochester*, the Second Circuit held that "the 1991 amendment removes any doubt that the conduct of private actors is actionable under the equal benefit clause of Section 1981. Thus, we respectfully differ with the contrary conclusion reached by the Eighth and Third Circuits." 316 F.3d 291, 296 (2d Cir. 2003). The court began with the text of the 1991 amendments to § 1981 and the addition of subsection (c), which provided that the rights protected by § 1981 are "protected against impairment by nongovernmental discrimination and impairment under color of State law." 42 U.S.C. § 1981(c). Because the Full and Equal Benefit Clause is one of the enumerated rights protected by § 1981,

the court held that the text of the amended statute is clear that "[n]o state action is required for a Section 1981 claim." *Phillip*, 316 F.3d at 294.

The Second Circuit rejected contrary reasoning from the Third and Eighth Circuits as not "sufficiently persuasive to displace the clear words of the statute." *Id.* at 294–97. Though "the phrasing of the equal benefit clause does suggest that there must be some nexus between a claim and the state or its activities, the state is not the only actor that can deprive an individual of the benefit of laws or proceedings for the security of persons or property." *Id.* at 295. And because "individuals can deprive others of the equal benefit of laws and proceedings designed to protect the personal freedoms and property rights of the citizenry," the court found "no principled basis for holding that state action is required for equal benefit clause claims but not for contract clause claims." *Id.*

Also in 2003, the Sixth Circuit held en banc that the text of § 1981 was "unambiguous" in providing that state action is not a requirement under the Full and Equal Benefit Clause. *Chapman* v. *Higbee Co.*, 319 F.3d 825, 829–30 (6th Cir. 2003) (en banc). Because the full and equal benefit of laws and proceedings is one of the rights protected by § 1981, that right is "protected against impairment by nongovernmental discrimination." *Id.* at 830 (quoting 42 U.S.C. § 1981(c)). Defendants in that case argued that subsection (c)'s protection against nongovernmental discrimination was limited to the right to make and enforce contracts. *Id.* But the court noted that subsection (c) covers all those rights protected by this section and declined to graft "additional limitations into the statute." *Id.*

The court also considered whether there were grounds for looking past the plain meaning of § 1981,

including whether the application of that plain meaning would produce inconsistencies in the statute, would run contrary to legislative history, or would produce absurd results. *Id.* at 830.

In addressing potential inconsistences, the court relied on this Court's construction of a similar civil rights provision, 42 U.S.C. § 1985(3), as having "rejected the notion that the concept of state action is implicit in an equal protection provision". *Id.* at 831. (citing *Griffin* v. *Brenckenridge*, 403 U.S. 88 (1971) ("A century of Fourteenth Amendment adjudication has . . . made it understandably difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons. Yet *there is nothing inherent in the phrase that requires the action working the deprivation to come from the State.*")).

The court next surveyed the limited discussion of subsection (c) in the legislative history and found no grounds for departing from its plain meaning. *Id.* at 831–33. Finally, the court rejected the argument that the lack of a state action requirement "would have the 'absurd' result of federalizing state tort law." *Id.* at 832. The court noted that the text of the Full and Equal Benefit Clause, and especially its required showing of intentional discrimination, "serves to cabin in both the number and nature of claims that may be brought under its ambit." *Id.*[1]

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[1] Several district courts in other Circuits also have declined to impose a state action requirement. *See, e.g.*, *Williams* v. *Kohl's Dep't Stores, Inc.*, No. 3:12-cv-01385-PK, 2014 U.S. Dist. LEXIS 78084, at *57 n. 14 (D. Or. Mar. 31, 2014); *Johnson* v. *DRS Sensors & Targeting Sys.*, No. 6:07-cv-1324-Orl-28GJK, 2008 U.S. Dist. LEXIS 94031, at *9 (M.D. Fla. Sept. 12, 2008); *Hester* v. *Wal-Mart Stores, Inc.*, 356 F. Supp. 2d 1195, 1198–99 (D. Kan. 2005); *Franceschi* v. *Hyatt Corp.*, 782 F. Supp. 712, 718–19 (D.P.R. 1992).

B. Like The Eighth Circuit, The Third And Fourth Circuits Have Held That State Action Is Required.

In *Brown* v. *Philip Morris Inc.*, 250 F.3d 789, 799 (3d Cir. 2011), the Third Circuit stated, albeit in dicta, that "only state actors can be sued under the 'full and equal benefit' clause of § 1981." In that case, plaintiffs tried for the first time on appeal to raise a full and equal benefit claim under § 1981 against non-state actors. *Id.* The Third Circuit declined to consider the claim but noted that, even if it were to consider such a claim, it would fail because of the lack of state action. *Id.*

As support for a state action requirement, the Third Circuit cited *Mahone* v. *Waddle*, 564 F.2d 1018 (3d Cir. 1977), a case interpreting the pre-1991 version of § 1981 that had stated, again in dicta, that state action is "implicit" in the Full and Equal Benefit Clause. *Id.* at 1029.

Shaare Tefila Congregation v. *Cobb*, 785 F.2d 523, 525–26 (4th Cir. 1986), *rev'd on other grounds*, 481 U.S. 615 (1987), adopted the same view of § 1981 and dismissed an equal benefit claim against private defendants who desecrated a synagogue with swastikas and Ku Klux Klan symbols. *Id.* at 524–25. The court cited the Third Circuit's decision in *Mahone* and agreed that state action is implicit in any claim under the Full and Equal Benefit Clause. *Id.* at 525–26; see also *Jones* v. *Poindexter*, 903 F.2d 1006, 1010 (4th Cir. 1990) ("A § 1981 'full and equal benefit' suit will not stand unless there was state action denying the plaintiff the full and equal benefit of the law.") (citation omitted).

The Eighth Circuit itself first held that full and equal benefit claims require state action in

Youngblood v. *Hy-Vee Stores, Inc.*, 266 F.3d at 853–56. The analysis of the state action requirement in that decision spanned three sentences and cited two other cases in support of its holding—the panel decision from *Chapman* that, as discussed *supra*, was subsequently vacated and reversed (*Chapman* v. *Higbee Co.*, 256 F.3d 416 (6th Cir. 2001), *rev'd en banc*, 319 F.3d 825 (2003)), and the Third Circuit's 1977 decision in *Mahone*. The Eighth Circuit has applied *Youngblood* in subsequent cases without bolstering or supplementing this analysis. *E.g.*, *Bediako* v. *Stein Mart, Inc.*, 354 F.3d 835, 838 n.3 (8th Cir. 2004) ("Under the Full-and-Equal Benefit clause, Bediako had to allege that some sort of state action contributed to her being discriminated against.").

II. THE QUESTION PRESENTED IS BOTH IMPORTANT AND RECURRING.

Even a cursory examination of equal benefit claims shows that these incidents are not trivial but in fact pose grave matters for courts to resolve. *E.g.*, *Shaare Tefila Congregation*, 785 F.2d at 525–26 (suit against private defendants for desecration of a synagogue); *Phillip* 316 F.3d at 292–93 (suit by African-American university students alleging wrongful arrest and imprisonment as a result of discriminatory actions by university security); *Adams ex rel. Harris* v. *Boy Scouts of Am.*, 271 F.3d 769, 772 (8th Cir. 2001) (abuse of "inner-city youths" by white camp counselors); *Bediako* 354 F.3d at 837 (store manager refused reentry to an African-American shopper looking for her missing car keys and stated: "You just want to stay in the store after closing. You just want to rob us. I know your type."). See also Anne-Marie G. Harris, Geraldine R. Henderson & Jerome D. Williams, *Courting Customers: Assessing Consumer Racial Profiling and Other Marketplace Discrimination,* 24 J.

Pub. Pol'y & Mktg. 163, 169 (2005) (describing class-action against department store chain that "[t]arget[ed] people of color to be personally followed by . . . security" and "subject[ed] people of color to false accusations of shoplifting in disproportionately high percentages [90% in some stores]").

Not only are these incidents offensive in nature, they are also recurring. A search of the Bloomberg Law database shows that in 2016 alone federal courts in the Second and Fourth Circuits each handled 134 cases under 1981. And the number of cases (also from 2016 data) is not proportionally lower in those circuits that impose a state action requirement. For example, in the Third and Sixth Circuits the federal courts handled 149 and 89 § 1981 cases respectively. To be sure, these numbers do not separate equal benefit claims from contracting claims under § 1981. However, many cases are filed under mixed theories (see *Green* v. *Wal-Mart Stores, Inc.*, No. 2:09CV00457DS, 2010 WL 3260000, at *1 (D. Utah Aug. 18, 2010); *Williams*, 2014 U.S. Dist. LEXIS 78084 at *48-63), and legal scholarship indicates that the number of equal benefit clause cases has been on the rise for some period of time. See, *e.g.*, Jeremy Deese, *Civil Rights—42 U.S.C. § 1981—Scope of the Equal Benefit Clause*, 71 Tenn. L. Rev. 199, 204-05 (2003) (noting that "[s]ince the 1991 amendment, federal appellate courts have heard an increasing number of claims under § 1981's equal benefit clause").

Requiring plaintiffs pursuing equal benefit claims in certain parts of the country to allege state action would deny redress to an entire class of persons subject to invidious and racially motivated discrimination by private actors. Congress has, first in 1871 and most recently in 1991, sought to protect black Americans and other minorities from racial animus,

whether at the hand of the state or their fellow citizens. Absent intervention by this Court, the scope of legal rights guaranteed to *all non-white persons* will remain an unfortunate accident of geography.

III. THE EIGHTH CIRCUIT'S DECISION IS WRONG.

The Eighth Circuit ignored the plain language of § 1981 to require Mr. Elmore to allege state action in order to vindicate the deprivation of his civil rights. As this Court has repeatedly observed, "the meaning of [a statutory text] begins where all such inquiries must begin: with the language of the statute itself," *Nebraska* v. *Parker*, 136 S. Ct. 1072, 1079 (2016) (internal quotation marks and citation omitted), and this Court assumes that Congress "says in a statute what it means and means in a statute what it says". *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992). When "the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms" unless such a reading produces absurd results. *Hartford Underwriters Ins. Co.* v. *Union Planters Bank*, 530 U.S. 1, 6 (2000) (citation omitted).

Since Reconstruction, § 1981(a) has guaranteed that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a). Section 1981(a) does not reference any requirement of state action and, by its own terms, applies to private actors who interfere with the rights of others to the full and equal benefit of laws and proceedings.

If the text of § 1981(a) were not clear enough on its own to rebut a state action requirement for a full and

equal benefit claim, the 1991 addition of section (c) to the statute dispels any doubt that state action is not a requirement. Under § 1981(c), "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law." 42 U.S.C. § 1981(c). The full and equal benefit of laws and proceedings is one of the rights enumerated and protected by § 1981. Accordingly, § 1981 protects the right to full and equal benefit of laws and proceedings against impairment by nongovernmental and governmental discrimination alike.

Without a clear anchor in the statutory text, the Eighth Circuit and the other circuits in tow argue that state action is "implicit" in the concept of the full and equal benefit of all laws and proceedings. This is incorrect. As the Second Circuit explained in *Phillip*, even if "the phrasing of the equal benefit clause does suggest that there must be some nexus between a claim and the state or its activities, the state is not the only actor that can deprive an individual of the benefit of laws or proceedings for the security of persons or property." 316 F.3d at 295.

There is nothing uncommon (or absurd) about this structure: it is well settled that Congress may prohibit private actors from discriminating on the basis of race. See, *e.g.*, *Griffin*, 403 U.S. at 96–102 (upholding 42 U.S.C. § 1985(3) as to private action); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 421 (1968) (upholding 42 U.S.C. § 1982 as to private action); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 243 (1964) (upholding the public accommodations provision of the Civil Rights Act of 1964).

Finally, even if it were necessary to consult legislative history in this case, that history strongly supports Mr. Elmore's interpretation of § 1981. Section

1981 was originally enacted as part of the Civil Rights Act of 1866, a "sweeping" Reconstruction reform to eradicate public and private discrimination against freed slaves and other black persons. *Jones*, 392 U.S. at 422–23 ("To the Congress that passed the Civil Rights Act of 1866, it was clear that the right to do these things might be infringed not only by 'State or local law' but also by 'custom, or prejudice.'"). After ratification of the Fourteenth Amendment, Congress re-enacted this provision in the Civil Rights Act of 1870. *Id.* at 436. By that time, Southern states under Reconstruction legislatures had "formally repudiated racial discrimination, and the focus of congressional concern had clearly shifted from hostile statutes to the activities of groups like the Ku Klux Klan, operating wholly outside the law." *Id.*

The language of § 1981 remained unchanged for over a century until Congress passed the Civil Rights Act of 1991. Congress added subsection (c)—"The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law"—in order "to strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination." H.R. Rep. No. 102-40(II) (1991), *as reprinted in* 1991 U.S.C.C.A.N. 694 (emphasis added). Nothing in any of this history permits any inference that Congress intended anything other than what the text explicitly creates: a broad set of remedies for discriminatory acts by both public and private entities.

IV. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE CIRCUIT SPLIT THAT IS RIPE FOR REVIEW.

This case presents an excellent opportunity for the Court to resolve a direct, recurring, and entrenched split of authority. *E.g.*, *Hester*, 356 F. Supp. 2d 1198–99 (explicitly "review[ing] the split of authority on the state action issue"). Mr. Elmore has carefully preserved the pure legal question at issue at every level of our court system. Pet. App. at 3a. Moreover, the factual record is not voluminous, as the Eighth Circuit refused to permit Mr. Elmore's claim to proceed beyond the motion to dismiss, and the only question before this Court is a purely legal one of statutory interpretation.

The question presented also is suitable for this Court's review at this time. The key amendments to § 1981 were added in 1991 and, since that time, at least five Circuits have weighed in on the question. The split of authority emerged in the early 2000s and has been acknowledged since. See *Hester*, 356 F. Supp. 2d at 1198–99. Given the time that has elapsed, it is unlikely that the question presented in this case would benefit from being left to percolate among the Circuits. The time for this Court to act is now.

CONCLUSION

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

Respectfully submitted,

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June 30, 2017

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16-1280

FLOYD G. ELMORE, KANSAS CITY, JACKSON COUNTY, MISSOURI

Plaintiff - Appellant

v.

HARBOR FREIGHT TOOLS USA, INC., doing business as Harbor Freight Tools

Defendant - Appellee

Appeal from United States District Court
for the Western District of Missouri - Kansas City

Submitted: November 15, 2016
Filed: December 23, 2016

Before RILEY, Chief Judge, WOLLMAN and KELLY, Circuit Judges.

RILEY, Chief Judge.

Floyd Elmore brought suit against Harbor Freight Tools USA, Inc. after a Harbor Freight manager accused Elmore of stealing from the store earlier in the day. Elmore filed suit in federal district court, alleging fed-

eral claims under 42 U.S.C. § 1981 and state law negligence claims. The district court[1] dismissed Elmore's § 1981 claim for failure to plead state action as required under *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851 (8th Cir. 2001), and, declining to exercise supplemental jurisdiction, dismissed Elmore's state law negligence claims without prejudice. Because we conclude Elmore was required to allege state action as part of his § 1981 claim and the district court did not abuse its discretion in declining to extend supplemental jurisdiction to Elmore's state law negligence claims, we affirm.

I. BACKGROUND

Elmore, an African American, visited his local Harbor Freight hardware store in Independence, Missouri, on May 9, 2015, at approximately 8:30 p.m. As he was exiting the store, after choosing not to make a purchase, a female store manager stated: "I'm watching you. I caught you stealing here earlier today and told you not to come back any more." Elmore responded he had not stolen from the store, or even been at the store earlier that day, and the manager said she would call the police. The manager's male companion was also present and yelled at Elmore. After the manager called the police, Elmore left the store to pick up his wife.

Elmore and his wife returned to the store and took photographs of the manager's male companion making an obscene gesture in their direction. Once the police arrived, they questioned Elmore about the incident and ultimately told him "it was a civil matter" and that Elmore should leave. Elmore left the premises and later called Harbor Freight's district manager to

[1] The Honorable Roseann A. Ketchmark, United States District Judge for the Western District of Missouri.

inform him of the event. The district manager told Elmore the incident "made [him] sick."

Elmore filed suit against Harbor Freight, claiming federal question jurisdiction under 28 U.S.C. §§ 1343 and 1331 and supplemental jurisdiction over state law negligence claims under 28 U.S.C. § 1367. Elmore's complaint included a claim under § 1981 alleging "[t]he actions of Harbor Freight's agents and employees against Plaintiff Elmore on the basis of his race interfered with Elmore's right to the full and equal benefit of the law." Elmore also included two state law negligence claims, alleging Harbor Freight negligently failed to train and supervise its employees to prevent them "from wrongfully engaging in racially discriminatory practices."

Harbor Freight moved to dismiss Elmore's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). On December 30, 2015, the district court granted Harbor Freight's motion and dismissed Elmore's complaint in its entirety. Elmore appeals, and we have jurisdiction pursuant to 28 U.S.C. § 1291.

II. DISCUSSION

A. Standard of Review

We review a district court's grant of a motion to dismiss under Rule 12(b)(6) de novo and take the facts alleged in the complaint to be true. *See Blomker v. Jewell*, 831 F.3d 1051, 1055 (8th Cir. 2016). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'" and include "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662,

678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

B. Section 1981 Claim

To state a claim under § 1981, a plaintiff must plead: "(1) that [the plaintiff] is a member of a protected class; (2) that [the defendant] intended to discriminate on the basis of race; and (3) that the discrimination on the basis of race interfered with a protected activity as defined in § 1981." *Bediako v. Stein Mart*, *Inc.*, 354 F.3d 835, 839 (8th Cir. 2004). One such protected activity is the enjoyment of "the full and equal benefit of all laws and proceedings for the security of persons and property." 42 U.S.C. § 1981(a). "'Because the state is the sole source of the law, it is only the state that can deny the full and equal benefit of the law.'" *Youngblood*, 266 F.3d at 855 (quoting *Chapman v. Higbee Co.*, 256 F.3d 416, 421 (6th Cir. 2001), *rev'd en banc*, 319 F.3d 825 (6th Cir. 2003), citing *Mahone v. Waddle*, 564 F.2d 1018, 1029 (3d Cir. 1977)). Therefore, only state action can give rise to a cause of action under the full-and-equal-benefit clause. *See id.*

Elmore did not plead any state action in his complaint. We have already determined "[u]nder the Full-and-Equal Benefit clause [of 42 U.S.C. § 1981, a plaintiff must] allege that some sort of state action contributed to [the plaintiff] being discriminated against." *Bediako*, 354 F.3d at 838 n.3. Elmore argues we should overrule *Youngblood*'s requirement of state action because the plain language of § 1981 contemplates private actors can deprive others of the full and equal benefit of the law. Some courts have agreed with Elmore's interpretation. *See*, *e.g. Chapman*, 319 F.3d at 830, 833; *Phillip v. Univ. of Rochester*, 316 F.3d 291, 295 (2d Cir. 2003); *Green v. Wal-Mart Stores*, *Inc.*, No. 2:09CV00457, 2010 WL 3260000, at *4 (D. Utah Aug.

18, 2010); *Hunter v. The Buckle*, *Inc*., 488 F. Supp. 2d 1157, 1173 (D. Kan. 2007). However, "'[i]t is a cardinal rule in [the Eighth Circuit] that one panel is bound by the decision of a prior panel.'" *United States v. Betcher*, 534 F.3d 820, 823-24 (8th Cir. 2008) (quoting *Owsley v. Luebbers*, 281 F.3d 687, 690 (8th Cir. 2002)). Thus, we are bound by *Youngblood*'s state action requirement. *See Bilello v. Kum & Go*, *LLC*, 374 F.3d 656, 661 n.4 (8th Cir. 2004). The district court did not err in dismissing Elmore's § 1981 claim for a failure to plead state action.

C. State Law Negligence Claims

Once the district court dismissed Elmore's federal claims, it declined to extend supplemental jurisdiction for his state law negligence claims. A district court has broad discretion to decline to exercise supplemental jurisdiction over state law claims after all claims over which the district court had original jurisdiction have been dismissed. *See Crest Constr. II*, *Inc. v. Doe*, 660 F.3d 346, 359 (8th Cir. 2011). "In exercising its discretion, the district court should consider factors such as judicial economy, convenience, fairness, and comity." *Brown v. Mort. Elec. Registration Sys*., *Inc*., 738 F.3d 926, 933 (8th Cir. 2013); *see also* 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.").

The district court determined a Missouri state court should resolve state claims involving Missouri residents and that it would be more fair and convenient to allow a Missouri state court to hear these claims. Furthermore, the case was in the nascent stages. The district court did not abuse its discretion in declining to exercise supplemental jurisdiction over Elmore's

state law claims once the district court dismissed the claim over which it had original jurisdiction. *See Clark v. Iowa State Univ.*, 643 F.3d 643, 645 (8th Cir. 2011).

III. CONCLUSION

We affirm.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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Michael E. Gans
Clerk of Court

December 23, 2016

Mr. Arthur Benson
ARTHUR BENSON & ASSOCIATES
4006 Central
Kansas City, MO 64111

RE: 16-1280 Floyd Elmore v. Harbor Freight Tools USA, Inc.

Dear Counsel:

The court has issued an opinion in this case. Judgment has been entered in accordance with the opinion. The opinion will be released to the public at 10:00 a.m. today. Please hold the opinion in confidence until that time.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing and petitions for rehearing en banc *must* be received in the clerk's office within 14 days of the date of the entry of judgment. Counsel-filed petitions must be filed electronically in CM/ECF. Paper copies are not required. No grace period for mailing is allowed, and the date of the postmark is

irrelevant for pro-se-filed petitions. Any petition for rehearing or petition for rehearing en banc which is not received within the 14 day period for filing permitted by FRAP 40 may be denied as untimely.

Michael E. Gans
Clerk of Court

AMT

Enclosure(s)

cc: Mr. Patrick Francis Hulla
Ms. Jamie Kathryn Lansford
Ms. Jennifer K. Oldvader
Mr. David Lawrence Schenberg
Ms. Paige Wymore-Wynn

District Court/Agency Case Number(s): 4:15-cv-00583-RK

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Michael E. Gans
Clerk of Court

December 23, 2016

West Publishing
Opinions Clerk
610 Opperman Drive
Building D D4-40
Eagan, MN 55123-0000

RE: 16-1280 Floyd Elmore v. Harbor Freight Tools USA, Inc.

Dear Sirs:

An opinion was filed today in the above case.

Counsel who represented the appellant was Arthur Benson, of Kansas City, MO., Jamie Kathryn Lansford of Kansas City, MO.

Counsel who represented the appellee was Patrick Francis Hulla of Kansas City, MO., Jennifer K. Oldvader, of Kansas City, MO., David Schenberg, of Kansas City, MO.

The judge who heard the case in the district court was Honorable Roseann A. Ketchmark. The judgment of the district court was entered on December 30, 2015.

If you have any questions concerning this case, please call this office.

Michael E. Gans
Clerk of Court

AMT

Enclosure(s)

cc: Lois Law
MO Lawyers Weekly

District Court/Agency Case Number(s): 4:15-cv-00583-RK

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 16-1280

FLOYD G. ELMORE, KANSAS CITY, JACKSON COUNTY, MISSOURI,

Plaintiff - Appellant,

v.

HARBOR FREIGHT TOOLS USA, INC., doing business as Harbor Freight Tools,

Defendant - Appellee.

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:15-cv-00583-RK)

JUDGMENT

Before RILEY, Chief Judge, WOLLMAN and KELLY, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause

is affirmed in accordance with the opinion of this Court.

December 23, 2016

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 16-1280

FLOYD G. ELMORE, KANSAS CITY, JACKSON COUNTY, MISSOURI,

Appellant,

v.

HARBOR FREIGHT TOOLS USA, INC., doing business as Harbor Freight Tools,

Appellee.

Appeal from U.S. District Court for the Western District of Missouri – Kansas City
(4:15-cv-00583-RK)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Smith and Judge Kelly would grant the petition for rehearing en banc.

March 03, 2017

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Filed 01/06/2017]

No. 16-1280

FLOYD ELMORE,

Appellant,

v.

HARBOR FREIGHT TOOLS USA, INC.,

Appellee.

Appeal from the United States District Court
Western District of Missouri, Western Division
The Honorable Roseann A. Ketchmark,
United States District Judge
No. 4:15-CV-00583-RK

PETITION FOR REHEARING *EN BANC*

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PETITION FOR HEARING *EN BANC*

Appellant Floyd Elmore by counsel, and pursuant to FED. R. APP. P. 35 hereby petitions the Court for rehearing *en banc* of the above-captioned appeal because this proceeding involves a question of exceptional importance – whether state action is necessary to state a claim under the Full and Equal Benefits Clause of 42 U.S.C. § 1981 – in that the Eighth Circuit's controlling panel decision in *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851 (2001), *cert. denied*, 535 U.S. 1017 (2002), conflicts with the authoritative decisions of other United States Courts of Appeals[1] that have rejected a state action requirement.

REASONS FOR GRANTING REHEARING *EN BANC*

Rehearing is warranted because this case squarely presents an uncluttered opportunity for this Court *en banc* to review a panel opinion from 2001 that is out of step with all other circuit courts of appeal that have, since the enactment of the Civil Rights Act of 1991 adding a crucial provision to § 1981, considered whether or not a cause of action under the Full and Equal Benefits Clause of 1981(a) requires state action. Here, the panel was bound by the Court's "cardinal rule" to follow *Youngblood*. *Elmore v. Harbor Freight Tools USA, Inc.*, No. 16-1280, slip op. at 4, ___ F.3d ___, 2016 WL 7422276, at * 2 (8th Cir. Dec. 23, 2016) ("Thus, we are bound by *Youngblood*'s state action requirement."). *Youngblood*, however, relied in passing and without analysis on a Sixth Circuit panel decision that

---

[1] *Phillip v. University of Rochester*, 316 F.3d 291 (2d Cir. 2003), and *Chapman v. Higbee Co.*, 319 F.3d 825 (6th Cir. 2003), *cert. denied*, 542 U.S. 945 (2004).

was soon reversed by the Sixth Circuit *en banc* and on a Third Circuit panel decision that pre-dated the 1991 Act. No other circuit has since recognized a state action requirement.

This Court *en banc* now has the opportunity to determine whether *Youngblood* – no longer rooted in the precedent of any other circuit – was properly decided.[2] And it may then determine by its own analysis whether state action is required to state a claim under the Full and Equal Benefits Clause of § 1981.

STATEMENT

Floyd Elmore, an African American, went to a Harbor Freight store on the evening of May 9, 2015, to look at jackhammers and perhaps purchase one. APP. 4 ¶ 2, APP. 5 ¶¶ 8, 9, 10. After deciding against a purchase, Elmore started to leave, but was confronted at the door by a Caucasian female manager who stated, "I'm watching you. I caught you stealing here earlier today and told you not to come back any more." APP. 6 ¶¶ 18-20, 25. Elmore denied stealing or that he had even been there earlier, to which the manager replied, "I'll call the police." APP. 6 ¶¶ 21, 22. The manager's Caucasian male companion yelled at Elmore and the manager called the police. APP. 6 ¶¶ 24, 25. Elmore left the store to go pick up his wife and when the Elmores returned to the store, the police had not yet arrived. The male companion made an obscene gesture in the Elmores' direction and they took photographs of him.

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[2] Overruling *Youngblood* would effectively also overrule *Adams ex rel Harris v. Boy Scouts of America-Chickasaw Council*, 271 F.3d 769 (8th Cir. 2001), *Bediako v. Stein Mart, Inc.*, 354 F.3d 835 (8th Cir. 2004), and *Bilello v. Kum & Go, LLC*, 374 F.3d 656 (8th Cir. 2004).

Elmore and his wife decided to wait outside for the police. APP. 6 ¶¶ 26, 27.

When two police officers arrived, they questioned Elmore and ultimately told him that "it was a civil matter" and that he should leave. APP. 7 ¶¶ 28, 29. Elmore left, but later called Harbor Freight's district manager to report this race-driven incident. The district manager, having viewed a video of the incident, told Elmore the incident "made him sick." APP. 7 ¶¶ 30, 31.

Elmore sued Harbor Freight raising a claim under § 1981's Full and Equal Benefits Clause, alleging that Harbor Freight employees summoned the police on the basis of race to criminally investigate him, and state law claims of negligent failure to train and supervise. APP. 3-11; APP. 6 ¶ 25; APP. 7 ¶¶ 35, 36, 37; APP. 9 ¶¶ 41-46; APP. 10-11 ¶¶ 47-53. The district court granted Harbor Freight's motion to dismiss the § 1981 claim because Elmore did not allege state action and dismissed his state law claims without prejudice. APP. 59-65; ADD. 1-7. Elmore appealed and the panel affirmed.

ARGUMENT

I. *Youngblood* is flawed because it ignores the statute's plain language and because it rests on two cases which no longer provide a foundation.

   A. *Youngblood* ignores the statute's plain language and fails to construe § 1981 to achieve Congress' remedial purposes.

Under *Youngblood*, Elmore's Full and Equal Benefits Clause claim requires state action or that a private party willfully participates in joint activity with the State or its agents. *Youngblood*, 266 F.3d at

855. But better-reasoned cases hold that the clause applies to private actors and state action is not required to state a claim, a position supported by the plain language of the statute. Section 1981 provides:

> (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.
>
> * * *
>
> (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 (emphases added). Subsection (c) was added to § 1981 by the Civil Rights Act of 1991 "to strengthen existing protections and remedies available under federal civil rights laws to provide *more effective deterrence and adequate compensation* for victims of discrimination." *Chapman v. Higbee Co.*, 319 F.3d 825, 829 n. 1 (quoting H.R. Rep. No. 102-40(II), at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. at 694).

Whether state action is required – a question of statutory construction – is answered in the statute's plain language, the starting point for any such query. *Adams v. Apfel*, 149 F.3d 844, 846 (8th Cir. 1998). If the statute is clear and unambiguous, the judicial inquiry ends. *Id*. A statute is clear and unambiguous

when "it is not possible to construe it in more than one reasonable manner." *Id.* Courts are to be "reluctan[t] to interpret a statutory provision so as to render superfluous other provisions in the same enactment." *Id.* (quoting *Freytag v. Commissioner*, 501 U.S. 868, 877 (1991)). Where the statute's language is plain, the "sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (citation and internal punctuation omitted).

Indeed, in *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470 (2006), reversing the Ninth Circuit's holding that a person could assert a claim under the "make and enforce contracts" language in § 1981 even if the person was not a party to the contract, the Supreme Court relied on the plain language of § 1981 to decide that a plaintiff must allege that he was a party to an existing or prospective contractual relationship that was impaired. *Id*. at 479. Thus, *McDonald* directs that courts follow the plain language of § 1981, including § 1981(c). *Doe v. Champaign Community Unit 4 School Dist.*, No. 11-CV-3355, 2012 WL 2370053, at * 4-5 (C.D. Ill. Feb. 24, 2012).

Section 1981's plain language resolves the issue of whether state action is required to state a full and equal benefits claim. It is not. *Phillip v. University of Rochester*, 316 F.3d 291, 294 (2d Cir. 2003). The language is unambiguous and explicitly protects the right to the full and equal benefit of all laws and proceedings for the security of persons and property as enjoyed by white citizens. Accordingly, that right is "protected against impairment by nongovernmental discrimination." § 1981(c).

Moreover, to construe § 1981 as requiring state action for a full and equal benefits claim contravenes

long-standing civil rights jurisprudence. Civil rights legislation designed to address invidious racial discrimination, including § 1981, is generally interpreted broadly in keeping with its remedial purpose. Courts have wide latitude in construing § 1981 to achieve remedial purposes identified by Congress. *See*, *e.g.*, *Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989) (reaffirming *Runyon v. McCrary*, 427 U.S. 160 (1976), and discussing society's deep commitment to eradication of discrimination). Failing – as the *Youngblood* panel did – to construe § 1981 liberally to protect against private discrimination effectively removes a class of racially discriminatory conduct Congress intended to prohibit from the statute's purview.

B. Cursory analysis and reliance on a case predating the 1991 amendments to § 1981 and on a repudiated Sixth Circuit panel opinion further undermine *Youngblood*.

The *Youngblood* panel barely considered whether the full and equal benefit clause protects against impairment by nongovernmental discrimination. The opinion provided no independent analysis, devoting only a single paragraph to the issue. Instead, the panel relied on and quoted the Sixth Circuit panel opinion in *Chapman*, 256 F.3d 416, 421 (6th Cir. 2001) ("Because the state is the sole source of the law, it is only the state that can deny the full and equal benefit of the law."). But the Sixth Circuit *en banc* subsequently repudiated and overruled the *Chapman* panel, holding that the Full and Equal Benefit Clause protects against private discrimination. *See*, *infra* at I.C.

The *Youngblood* panel also relied on dicta in *Mahone v. Waddle*, 564 F.2d 1018, 1029 (3d Cir. 1977), *cert. denied*, 438 U.S. 904 (1978), for its holding that the

concept of state action is implicit in the Full and Equal Benefit Clause. *Mahone*, however, predates the 1991 amendments to § 1981 and does not take § 1981(c) into consideration. And, as the Sixth Circuit in *Phillip* explains, *Mahone* is wrongly decided. *Phillip*, 316 F.3d at 294-96.

C. The *Bilello* panel acknowledged the *Phillip* opinion and the Sixth Circuit's *en banc* reversal of the *Chapman* panel decision.

Three subsequent Eighth Circuit cases have addressed Full and Equal Benefits Clause claims. In *Adams ex rel Harris v. Boy Scouts of America-Chickasaw Council*, applying *Youngblood*, the court's examination of the evidence revealed no evidence that the state situated itself in a position of interdependence or connection with the camp administrators' actions that the conduct in question was attributable to the state. *Adams*, 271 F.3d at 777. Similarly, *Bediako v. Stein Mart, Inc.*, 354 F.3d at 81, only quoted *Youngblood* and readily concluded that there was no evidence to show interdependence or connection between the State and Stein Mart. *Bediako* did not mention that the panel decision in *Chapman*, relied on in *Youngblood*, had been reversed by the Sixth Circuit *en banc* before *Bediako* was submitted and decided. Nor did it acknowledge the Second Circuit's earlier opinion in *Phillip*.

The *Bilello v. Kum & Go* panel applied *Youngblood* and held that the plaintiff had not alleged that state action had caused the denial of full and equal benefit of the laws nor a position of interdependence or connection such that the practice could be attributed to the state. *Bilello*, 374 F.3d at 661. But in a footnote, *Bilello* acknowledged the Sixth Circuit's reversal of the *Chapman* panel and the Second Circuit's *Phillip*

decision rejecting a state action requirement to state a Full and Equal Benefit Clause claim. *Id*. at 661 n. 4. Still, the *Bilello* panel considered itself bound to follow *Youngblood* and even if not, the court concluded that the facts Bilello alleged did not support a claim under the Sixth or Second Circuit standards. *Id*. Bilello did not seek rehearing or rehearing *en banc*.

II. The Second Circuit rejected *Mahone*'s premise in *Phillip*, especially in light of § 1981(c).

Presented with the issue of whether state action is required to state a full and equal benefits claim, the Second Circuit engaged in a "close examination" of *Mahone*, which it termed "the primary and largely unexamined source for the holdings in *Youngblood* and *Brown*." *Phillip*, 316 F.3d at 294. The question presented in *Mahone*, answered affirmatively, was whether police officers who physically and verbally abused African-Americans, falsely arrested them, and gave false testimony against them could be sued under the Full and Equal Benefits Clause. *Mahone*, 564 F.2d at 1028-29. But the court said *in dicta* that there was no danger that construing § 1981 to encompass the defendants' conduct would federalize tort law because the Full and Equal Benefit Clause requires state action. *Id.* (emphasis added). While recognizing that make and enforce contracts claims do not require state action, *id.* at 1029 (citing *Johnson v. Ry. Express Agency*, 421 U.S. 454 (1975), and *Runyon*, 427 U.S. 160), the *Mahone* court found the two clauses so different that *Johnson* and *Runyon* had no application to a full and equal benefit claim. *Id*. Because individuals ordinarily make contracts, the *Mahone* court reasoned, individuals should be held liable for racially motivated infringement of contract rights. *Id*. But the Full and

Equal Benefit Clause "suggest[ed] a concern with relations between the individual and the state, not between two individuals" because states, not individuals, make laws and only the state can take away the protection of the laws it created. *Phillip*, 316 F.3d at 295 (quoting *Mahone*, 564 F.2d at 1029).

The *Phillip* court disagreed with *Mahone*. The state was "not the only actor that can deprive an individual of the benefit of laws or proceedings for the security of persons or property." *Id*. at 295. Therefore, the *Phillip* court saw no "principled" basis for holding that state action was required for equal benefit claims but not for contract claims and rejected the *Mahone* analysis. It also concluded that *Runyon* provided no basis for limiting its conclusion that no state action is required under § 1981. The case involved a make and enforce contract claim, but the Supreme Court had held simply that § 1981 "reaches purely private acts of racial discrimination." *Id.* The *Phillip* court also observed that *Mahone* had not considered the legislative history of the original § 1981, which "suggests legislators' concern over private acts motivated by racial discrimination." *Id*. The bill was to "'break down *all* discrimination between black men and white men.'" *Id*. at 296 (citing *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 432 (1968) (internal citation omitted) (emphasis in *Phillip*)). The *Phillip* court was persuaded by the "extensive description of racial abuses that individuals perpetrated, coupled with the Senate sponsor's broad view of the legislation's aims" that "we should read Section 1981 as broadly as is consistent with the actual language of each clause." *Id*. "We suspect that the Third Circuit erred by finding state action necessary" to support a full and equal benefit claim. *Id*. And, even if *Mahone* had been correctly decided, the *Phillip* court considered adding § 1981(c) to have removed "any

doubt that the conduct of private actors is actionable" under the Full and Equal Benefit Clause (differing "with the contrary conclusion reached by the Eighth and Third Circuits"), placing "*Mahone*'s continuing viability in even greater doubt." *Id*.

III. *Phillip*'s criticism of the *Chapman* panel opinion further undercuts *Youngblood*.

The *Phillip* defendants had relied on arguments espoused by the *Chapman* panel majority. Accordingly, the Second Circuit considered their validity and concluded those arguments lacked merit. *Phillip*, 316 F.3d at 297. The *Phillip* court reiterated its rejection of the proposition that only the state can deprive an individual of the full and equal benefit of laws for the security of persons or property. *Phillip* also rejected the *Chapman* panel's construction of § 1981(c) as unsustainable given its language, observing that *Chapman*'s panel majority had "substituted for those clear words, the statement that 'some of the rights protected by this section are protected against impairment by nongovernmental discrimination and others are protected against impairment under color of state law.'" The *Chapman* panel then determined that the rights protected against private interference were those within the contract clause while others – including those contained in the Full and Equal Benefit Clause – were protected only against state interference. *Id*. But *Phillip* recognized that had that been Congress' intention, the statute would have language specifying which rights were protected against private interference, which against state interference, and which against both. But the § 1981(c) language can only be read to protect all of subsection (a)'s rights against both private and governmental interference. *Id*.

In the Second Circuit's view, the *Chapman* panel's interpretation failed on its own terms. Before the 1991 amendments, it was clearly established that § 1981's Make and Enforce Contract Clause protected against violations by both state and private actors. *Id*. (citing *Patterson*, 491 U.S. at 171). "Thus, the artificial dichotomy that the *Chapman* panel perceived does not exist and its interpretation makes subsection (c) superfluous." *Id.* The *Chapman* panel's resort to legislative history was "ill advised" because the statute was clear on its face.

Refusing to "modify the clear language of subsection (c) to avert a hypothesized federalization of tort law", the Second Circuit relied on the fact that neither the statutory language nor the legislative history of the pre-amendment statute revealed a congressional purpose to preclude a wide federal role in protecting civil rights because on its face, § 1981(c) protects against both private and governmental interference with subsection (a) rights and because the legislative history suggests a broad goal of eliminating discrimination by private and state actors. There was "no persuasive reason" why racially motivated torts that deprive an individual of the equal benefit of the laws or proceedings for the security of persons and property should be outside the ambit of federal authority while racially motivated breaches of contract are not. *Id*. at 297-98. Overuse of the Full and Equal Benefit Clause's protection is prevented by the statute's rigorous burden on plaintiffs which requires proof of a racial animus; identification of a relevant law or proceeding for the security of persons or property; and, persuading a fact finder that the defendant deprived plaintiff of the full and equal benefit of that law or proceeding. *Id*. at 298.

Phillip did not undertake definition of the "universe of laws and proceedings . . . believing this task best resolved case by case." *Id*. But *Phillip*'s facts adequately alleged deprivation of a law or proceeding for the security of persons and property. The court accepted the " plausible inference that the police were called either to criminally investigate plaintiffs' behavior or to restore peace" and had "no difficulty categorizing either a criminal investigation or the restoration of peace as a 'proceeding for the security of persons and property' at the Rule 12(b)(6) stage." Even assuming that § 1981 requires a nexus to state proceedings or laws, but not state action, the allegation that defendants attempted to trigger a legal proceeding against plaintiffs, but would not have taken the same action had white students engaged in the same conduct, was sufficient. *Id*. Here, Elmore alleged that race was a factor when Harbor Freight employees summoned the police to criminally investigate him, so under the Second Circuit's standard, he stated a claim.

IV. Further undermining *Youngblood*, the Sixth Circuit *en banc* reversed the *Chapman* panel.

Just weeks after *Phillip* was decided, the Sixth Circuit *en banc* reversed the *Chapman* panel. *Chapman* involved an allegedly racially motivated stop and search at a Dillard's store. The *Chapman* court found that *Griffin v. Breckenridge*, 403 U.S. 88 (1971), precluded it from finding § 1981(c)'s plain language inconsistent with the statute's equal benefit provision. *Chapman*, 319 F.3d at 831. *Griffin* had held that the analogous equal protection provision in 42 U.S.C. § 1985(3) was applicable to private action and had expressly rejected the notion that the concept of state action is implicit in an equal protection provision. *Id*. (citing *Griffin*, 403 U.S. at 96-102; 42 U.S.C. § 1985(3)

and quoting *Griffin*, 403 U.S. at 97) (". . . *there is nothing inherent in the phrase that requires the action working the deprivation to come from the State*.") (emphasis in *Chapman*). *Griffin*'s interpretation of § 1985(3)'s equal protection provision suggested that § 1981's analogous clause would protect against private impairment even absent subsection (c)'s explicit instruction:

> [T]he failure to mention any such [state action] requisite can be viewed as an important indication of congressional intent to speak in section 1985(3) of all deprivations of 'equal protection of the laws' and 'equal privileges and immunities under the laws,' *whatever their source*.

Id. (quoting *Griffin*, 403 U.S. at 97 (emphasis in *Chapman*), and citing *United States v. Williams*, 341 U.S. 70, 76 (1951) (plurality opinion of Frankfurter, J.) (no state action requirement in analogous equal protection provision of criminal statute); *United States v. Harris*, 106 U.S. 629, 637-39 (1883) (same)). Given the Supreme Court's rejection of the notion that state action is implicit in the concept of equal protection the *Chapman* court could not find § 1981(c)'s plain language inconsistent with the Full and Equal Benefits Clause. *Id.*

The *Chapman* court also found nothing in the legislative history of the 1991 amendments to § 1981 that would prevent application of § 1981(c)'s plain language. *Id*. at 831-32. Like the Second Circuit, the *Chapman* court also rejected the argument that application of § 1981(c)'s plain language would have the "absurd" result of federalizing state law. *Id.* at 832. It further concurred with the Second Circuit that the statutory language and the high threshold of proof required to prove intentional discrimination would

make unlikely federalization of "a wide swath of conduct traditionally covered by state common law." *Id*. at 833.

V. Other courts agree with the Second and Sixth Circuits.

Other courts do not require state action for a full and equal benefit claim.[3]

CONCLUSION

The reach of a remedial civil rights statute has national importance. This Court should recognize that *Youngblood* has been undermined and now stands alone among the post-1991 circuit opinions. This Court should now overrule *Youngblood*. Because only the Court *en banc* can overturn *Youngblood* and give § 1981's Full and Equal Benefit Clause its full effect, rehearing *en banc* should be granted.

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[3] *See*, *e.g.*, *Delaunay v. Collins*, No. 02-8097, 97 Fed.Appx. 229, 2004 WL 377665 (10th Cir. 2004) (recognizing full and equal benefit claim against private party) (not in F.3d); *Lee v. Brown Group Retail*, *Inc.*, No. 03-2304-GTV, 2003 WL 22466187 (D.Kan. Oct. 6, 2003) (not in F.Supp.2d); *Hester v. Wal-Mart Stores*, *Inc.*, 356 F.Supp.2d 1195 (D.Kan. 2005); *Hunter v. The Buckle*, *Inc.*, 488 F.Supp.2d. 1157 (D.Kan. 2007); *Lewis v. Commerce Bank & Trust*, 333 F.Supp.2d 1019 (D.Kan. 2004); *Green v. Wal-Mart Stores*, *Inc.*, No 2:09CV00457-DS; 2010 WL 3260000 (D.Utah Aug. 18, 2010) (not in F.Supp.2d); *Baker v. IPC Int'l Corp.*, No. 11-2622-JTM, 2013 WL 237764 (D.Kan. Jan. 22, 2013) (not in F.Supp.2d); *Withrow v. Clarke*, No. 06-11597-RCL, 2008 WL 8188363, at *6-7 (D.Mass. Aug. 15, 2008), *adopted at* 2008 WL 8188854 (not in F.Supp.2d); *Doe*, No. 11-CV-3355, 2012 WL 2370053 (C.D.Ill. Feb. 24, 2012) (not in F.Supp.2d); and *Palmer v. Wells*, No. 04-12-P-H, 2004 WL 1790180, at *9 (D.Me. Aug. 11, 2004) (not in F.Supp.2d).

Respectfully submitted,

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APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

[Filed 12/30/15]

Case No. 15-00583-CV-W-RK

FLOYD G. ELMORE,

Plaintiff,

v.

HARBOR FREIGHT TOOLS USA, INC.,
D/B/A HARBOR FREIGHT TOOLS,

Defendant.

ORDER

Before this Court is Defendant Harbor Freight Tools USA, Inc.'s ("Defendant") Motion to Dismiss. (Doc. 6, 7.) The Motion is GRANTED insofar as Plaintiff Floyd G. Elmore ("Plaintiff") has failed to state a claim upon which relief can be granted under 42 U.S.C. § 1981's full and equal benefit clause. Plaintiff's remaining state law claims are DISMISSED WITHOUT PREJUDICE.

Factual and Procedural History[1]

Plaintiff is an African-American and resides in Kansas City, Missouri. Defendant is a Delaware corporation, registered with the Missouri Secretary of State as a foreign corporation in good standing. Defendant

[1] The Factual and Procedural History is drawn largely from Plaintiff's Complaint without further attribution. (Doc. 1.)

is the owner of the fictitious name "Harbor Freight Tools," which is also registered with the Missouri Secretary of State. Defendant's principal place of business or corporate headquarters is located in California. Defendant's registered agent is located in Jefferson City, Missouri. Relevant to this action, Defendant operates a business in Independence, Missouri.

At approximately 8:30 p.m., on Saturday, May 9, 2015, Plaintiff went alone to the Defendant's Independence store. He was there to look at jackhammers and perhaps buy one for his son. Plaintiff was provided assistance. However, upon leaving the store without making or attempting to make a purchase, the store manager told Plaintiff: "I'm watching you. I caught you stealing here earlier today and told you not to come back any more." Plaintiff replied: "No. It was not me. I have not been in here today." The female manager responded, "I'll call the police." Plaintiff responded, "Go ahead, call them." The manager's boyfriend or husband yelled at Plaintiff, and the manager called the police.

Plaintiff left the store and went to pick up his wife, who was ten blocks away. When the couple returned to the store, the police had not yet arrived. Plaintiff or his wife took pictures of the manager's boyfriend or husband making an obscene gesture at the photographer. Plaintiff and his wife decided to wait outside of the store.

Sometime later, two Independence police officers arrived at the store and Plaintiff identified himself at their request. They asked, "What's the problem here?" Plaintiff explained that he had no problem but then told the officers what had happened to him and that the store manager and her boyfriend or husband had cursed him and had given him "the finger." The police

responded that "it was a civil matter" and that he should leave. As Plaintiff and his wife were leaving, they saw the manager come out of the store and the officers question her.

On August 4, 2015, Plaintiff filed this three-count suit. He asserts the following claims: Count I – Civil Rights Act of 1866, 42 U.S.C. § 1981; Count II – Negligent Training; Count III – Negligent Supervision. Count I is brought under federal law, and Counts II and III are state law claims. Plaintiff does not allege diversity jurisdiction, but he does assert that the Court has federal question jurisdiction over his § 1981 claim and supplemental jurisdiction over his state law claims.[2]

Standard

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a claim may be dismissed for "failure to state a claim upon which relief can be granted." A complaint must provide "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible if "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim should be dismissed if it only "offers labels and conclusions or

[2] Although the complaint alleges that the parties are citizens of different states, the Plaintiff does not allege that the matter in controversy exceeds $75,000 nor does Plaintiff otherwise invoke diversity of citizenship jurisdiction under 42 U.S.C. § 1332. (Doc. 1 at 2.) Instead, the Plaintiff very clearly invokes the Court's jurisdiction under provisions relating to a federal right and federal question (28 U.S.C. §§ 1343 and 1331) and supplemental jurisdiction over his state law claims (28 U.S.C. § 1367). (Doc. 1 at 2.)

a formulaic recitation of the elements of a cause of action." *Id.* (citations and quotations omitted).

Discussion

In its motion to dismiss, Defendant argues that Plaintiff's claim under § 1981's full and equal benefit clause must be dismissed because such a claim must involve state action and Plaintiff's claim does not allege state action. Defendant also argues that Plaintiff's remaining two state law claims accordingly must be dismissed because they both depend on a finding that Defendant breached its obligations under § 1981.

Count I: 42 U.S.C. § 1981

In his first Count, Plaintiff alleges a claim under 42 U.S.C. § 1981. That provision 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, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a) (emphases added).

To state a claim under § 1981, a plaintiff must allege: "(1) that [he] is a member of a protected class; (2) that [the defendant] intended to discriminate on the basis of race; and (3) that the discrimination interfered with a protected activity as defined in § 1981." *Bediako v. Stein Mart, Inc.*, 354 F.3d 835, 839 (8th Cir. 2004). The Eighth Circuit has highlighted the distinction between the two protected activities emphasized above, which

are the right to contract and the full and equal benefit clause. *Id.* at 840. Here, Plaintiff does not allege any violation as to the right to contract clause, and only asserts a violation as to the full and equal benefit clause.

As to the full and equal benefit clause, the Eighth Circuit has held that "because the state is the sole source of the law, it is only the state that can deny the full and equal benefit of the law." *Bilello v. Kum & Go, LLC*, 374 F.3d 656, 661 (8th Cir. 2004) (quoting *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851, 855 (8th Cir. 2001) (additional citation omitted). "As such, we have held under the Full-and-Equal-Benefit clause [of 42 U.S.C. § 1981 a plaintiff must] allege that some sort of state action contributed to [the plaintiff's] being discriminated against." *Bilello*, 374 F.3d at 661 (citation and internal quotations omitted).

One of the Eighth Circuit's key cases is *Youngblood*. There, the plaintiff entered the defendant's store and browsed. *Youngblood*, 266 F.3d at 853. A store employee believed the plaintiff had shoplifted. *Id.* Police arrived and, after speaking with a store employee, arrested the plaintiff; criminal charges were ultimately dismissed. *Id.* at 854. The plaintiff then filed a civil suit in which he claimed the store discriminated against him, in part alleging that the store had violated the full and equal benefit clause of § 1983. *Id.* at 855. The claim was dismissed.

On appeal, the Eighth Circuit affirmed the dismissal of that claim because the store's conduct did not constitute state action. *Id*. The court noted that no store employee was employed by the police department and that the police department independently investigated the incident. *Id.* The court also found that

state action did not exist simply because the store acted on a state statute "which authorizes merchants to detain suspected shoplifters in a reasonable manner and for a reasonable length of time to investigate whether there has been a shoplifting[.]" *Id.* The court further stated that "a private party's mere invocation of state legal procedures does not constitute state action." *Id.* (citing *Lugar v. Edmondson Oil Co*., 457 U.S. 922, 939 n.21 (1982)).

Here, as in *Youngblood*, Plaintiff alleges that he was falsely accused of theft and also that he was shown an obscene hand gesture. Defendant, as did the store in *Youngblood*, called the police to investigate. *See also Hanuman v. Groves*, 41 Fed. App'x 7, 9 (8th Cir. 2002) ("Merely calling the police to enforce a state statute does not turn [a store's] behavior into state action."); *King v. Express Auto Serv. & Tire Inc.*, No. 15-CV-00312-W-DW (Doc. 31 at 4) (W.D. Mo. October 13, 2015) (police response to defendant's call to police to investigate whether defendant had stolen a vehicle was not state action). As in *Youngblood*, Plaintiff's complaint also expressly alleges that a police officer independently investigated the incident. Specifically, Plaintiff alleged that when the police officers arrived, they asked the Plaintiff what the problem was and that the police also talked with the store manager. (Doc. 1 at 5.) Plaintiff additionally does not assert any well-pleaded facts from which state action could reasonably be inferred.

In fact, Plaintiff does not even argue that he alleged state action. (Doc. 15 at 1-13.) Instead, citing to decisions from other circuits, Plaintiff argues that "[b]etter reasoned decisions hold that the full and equal benefits clause applies to private actors and that state

action is not required to state a valid claim." (Doc. 15 at 2.) As Plaintiff is well aware, the Eighth Circuit has held that "[t]he District Court, however, is bound, as are we, to apply the precedent of this Circuit." *Hood v. United States*, 342 F.3d 861, 864 (8th Cir. 2003).

Accordingly, Plaintiff's § 1981 claim is dismissed for failure to state a claim upon which relief can be granted.

Counts II and III: Negligent Training and Negligent Supervision

Defendant also argues that Plaintiff's state law claims for negligent training and negligent supervision should be dismissed for failure to state a claim. The Court need not address this argument. The only federal claim supporting supplemental jurisdiction of Counts II and III have been dismissed, and Plaintiff does not allege diversity jurisdiction in this case. *See supra* note 1.

Under 28 U.S.C. § 1367(c)(3), the Court may decline to exercise supplemental jurisdiction over a claim if "the district court has dismissed all claims over which it has original jurisdiction." *See Zutz v. Nelson*, 601 F.3d 842, 850 (8th Cir. 2010). "A district court's discretion in these circumstances is very broad." *Brown v. Mortg. Elec. Registration Sys., Inc.*, 738 F.3d 926, 933 (8th Cir. 2013). "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine . . . will point toward declining to exercise jurisdiction over the remaining state-law

claims." *Mo. Roundtable for Life v. Carnahan*, 676 F.3d 665, 678 (8th Cir. 2012) (citation omitted). In exercising its discretion, the Court is to consider "factors such as judicial economy, convenience, fairness, and comity." *Brown*, 738 F.3d at 933.

In *King*, after dismissing the plaintiff's § 1981 claim for failure to allege state action, the court addressed the exact same remaining state law claims, negligent training and negligent supervision. *King*, Doc. 31 at 6. The court found, "comity suggests that a Missouri state court should resolve Plaintiff's state law claims that involve Missouri residents." *Id*. at 7 (citation omitted). As in *King*, the Court finds that "it would be just as – if not more – convenient and fair for the parties to resolve Plaintiff's state law claims in state court." *Id.*

Accordingly, because the Court "has dismissed all claims over which it has original jurisdiction," the Court declines to exercise supplemental jurisdiction over the remaining state law claims. 28 U.S.C. § 1367(c)(3).

Conclusion

For the foregoing reasons, it is hereby ORDERED that:

(1) Defendant's Motion to Dismiss (Doc. 6) is GRANTED insofar as Plaintiff's § 1981 claim is DISMISSED for failure to state a claim; and

(2) Plaintiff's remaining state law claims for negligent training and negligent supervision are DISMISSED WITHOUT PREJUDICE. Plaintiff is entitled to refile these state law claims in state court in accordance with the tolling provision set forth in 28 U.S.C. § 1367(d). The Clerk

of Court is directed to terminate any pending motions, and to then mark this case as closed.

IT IS SO ORDERED.

s/ Roseann A. Ketchmark
ROSEANN A. KETCHMARK, JUDGE
UNITED STATES DISTRICT COURT

DATED: December 30, 2015

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

[Filed 08/04/15]

Case No. 4:15-CV-583

FLOYD G. ELMORE, KANSAS CITY,
JACKSON COUNTY, MISSOURI,

Plaintiff,

v.

HARBOR FREIGHT TOOLS USA, INC., A Delaware Corporation, d/b/a HARBOR FREIGHT TOOLS, Serve Registered Agent: CSC-LAWYERS INCORPORATING SERVICE COMPANY, 221 Bolivar Jefferson City, Missouri 65101,

Defendant.

JURY TRIAL DEMAND

COMPLAINT

COMES NOW Floyd G. Elmore, by undersigned counsel, and for his Complaint against Defendant Harbor Freight Tools USA, Inc. d/b/a Harbor Freight Tools, states and alleges as follows:

DEMAND FOR JURY TRIAL

Plaintiff demands a jury trial on all issues raised herein.

PRELIMINARY STATEMENT

1. This is an action alleging interference with Plaintiff's right to the full and equal benefit of the law in violation of 42 U.S.C. § 1981, negligent training, and negligent supervision.

PARTIES

2. Plaintiff Floyd G. Elmore ("Elmore") is an African-American citizen of the United States residing in Kansas City, Jackson County, Missouri.

3. Defendant Harbor Freight Tools USA, Inc. d/b/a Harbor Freight Tools ("Harbor Freight") is a Delaware corporation, registered with the Missouri Secretary of State as a foreign corporation in good standing. Harbor Freight is the owner of the fictitious name "Harbor Freight Tools" which is also registered with the Missouri Secretary of State. The principal place of business or corporate headquarters of Harbor Freight is 26541 Agoura Road, Calabasas, California 91302-2093. Harbor Freight's registered agent for service of process in Missouri is CSC-Lawyers Incorporating Service Company, 221 Bolivar, Jefferson City, Missouri 65101. Harbor Freight has three locations in the Metropolitan Kansas City Area and in particular, does business at 4368 South Noland Road, in Independence, Jackson County, Missouri 64055.

4. As a corporation, Harbor Freight acts through the actions and omissions of its agents and employees, including the agents and employees at its store in Independence, Jackson County, Missouri.

JURISDICTION AND VENUE

5. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1343 and 1331. Further, this Court has jurisdiction under 28 U.S.C. § 1367 to hear Plaintiff's

state law claims of negligent training and negligent supervision in that all claims made herein are so related to each other that they form part of the same case or controversy under Article III of the United States Constitution.

6. This Court has jurisdiction over Defendant because the unlawful acts alleged in this Complaint were committed in Independence, Jackson County, Missouri, which lies within the Western District of Missouri, at 4368 South Noland Road, Independence.

7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in Independence, Missouri, which lies within the Western Division of the Western District of Missouri.

GENERAL ALLEGATIONS APPLICABLE TO ALL CLAIMS

8. As alleged, *supra* at ¶ 2, Plaintiff Elmore is an African-American male.

9. At approximately 8:30 p.m. on Saturday, May 9, 2015, Elmore went alone to the Harbor Freight store at 4368 South Noland Road, Independence, Missouri. On information and belief, that store is open until 9:00 p.m. Monday through Saturday.

10. Elmore went to Harbor Freight to look at jackhammers, and perhaps to buy one, for his son. Elmore had been in the Harbor Freight store on many occasions and had purchased many items there. During most of those transactions, Elmore had provided his telephone number or zip code.

11. On this occasion, *i.e.*, May 9, 2015, Elmore asked a Harbor Freight employee about jackhammers

and, accompanied by the employee, went to the area of the store where they were located to look at them.

12. Elmore asked where the bits for the jackhammers were and the employee responded, "On the floor, there."

13. Elmore replied, "No, that's a concrete vibrator, not a bit."

14. The employee then said, "Okay, up there."

15. Elmore looked, then replied, "No those bits are little; they won't fit. They need to be like this. Maybe they are down there."

16. The employee then said, "Yeah, that's them. Want me to get you one?"

17. Elmore replied, "No, I'm just looking for my son."

18. Continuing to shop, Elmore picked up the smaller of the jackhammers, and considered it to be too light. He next picked up a different one which was heavy in his estimation.

19. Elmore started to leave the store.

20. At the door of the store, he was confronted by the female manager of the store. She stated, "I'm watching you. I caught you stealing here earlier today and told you not to come back any more."

21. Elmore replied, "No. It was not me. I have not been in here today."

22. The female manager responded, "I'll call the police."

23. Elmore responded, "Go ahead, call them."

24. At this point, the female manager's boyfriend or husband yelled at Elmore.

25. The female manager called the police. On information and belief, this manager was named Erin Wright.

26. Elmore left the store and went to pick up his wife who was ten blocks away. When the Elmores returned to the store, the police had not arrived. Elmore or his wife took pictures of the manager's boyfriend/husband leveling an obscene gesture ("the finger") at the photographer.

27. Elmore and his wife decided to wait outside the store.

28. In time, two Independence police officers, Officers Seiuli and Burchfield, arrived at the store.

29. When the police arrived, they asked Elmore to identify himself and he gave them his name. They asked, "What's the problem here?" Elmore explained that he had no problem but then told the police officers what had happened to him and that the store manager and her boyfriend/husband had cursed him and had given him "the finger." The police told Elmore that "it was a civil matter" and that he should leave.

30. Elmore and his wife left the premises. As Elmore was leaving, he saw the female manager come out of the store and the officers questioning her.

31. Elmore later called the district manager, on information and belief, named "Chris", for Harbor Freight and told him about the incident. The district manager was able to look at video tape of the incident and he told Elmore, "This made me sick."

32. Elmore was damaged as a direct and proximate results of the actions of the Harbor Freight agents' and

employees' actions. In particular, he has suffered injuries consisting of, but not limited to: (a) humiliation; (b) embarrassment; (c) mental distress; (d) insult; (e) inconvenience; (f) anxiety; and, (g) emotional pain and suffering.

COUNT I
Civil Rights Act of 1866, 42 U.S.C. § 1981

33. Plaintiff Elmore hereby adopts, re-alleges, and incorporates by reference the allegations contained in paragraphs 1 through 32 above.

34. As alleged, *supra* at ¶¶ 2 and 8, Elmore is an African-American male.

35. Elmore's race was a motivating factor in the decision by Harbor Freight employees and/or agents to implicate him in a prior theft and to cause him to be a target of a criminal investigation.

36. Defendant intentionally discriminated on the basis of race in implicating Elmore in a prior theft and causing him to be a target of a criminal investigation.

37. The actions of Harbor Freight's agents and employees against Plaintiff Elmore on the basis of his race interfered with Elmore's right to the full and equal benefit of the law in violation of 42 U.S.C. § 1981.

38. Plaintiff Elmore has been damaged as a direct and proximate result of the actions of the Harbor Freight agents' and employees' actions. In particular, he has suffered injuries consisting of, but not limited to: (a) humiliation; (b) embarrassment; (c) mental distress; (d) insult; (e) inconvenience; (f) anxiety; and, (g) emotional pain and suffering.

39. The actions of the Harbor Freight agents and employees were willful, wanton, reckless, and malicious, and further, show a complete and deliberate

indifference to, and conscious disregard for the rights of Plaintiff Elmore. Therefore, Elmore is entitled to an award of punitive or exemplary damages in an amount sufficient t punish Defendant or to deter Defendant and others from like conduct in the future.

40. Plaintiff Elmore is entitled to recover from Defendant Harbor Freight his reasonable attorneys' fees, expenses, and costs, as provided by 42 U.S.C. § 1988,

WHEREFORE, Plaintiff Elmore requests that this Court, after a trial by jury of his claims, enter judgment against Defendant Harbor Freight for Elmore's actual damages, nominal damages, and exemplary or punitive damages as are proven at trial, for his reasonable attorneys fees, expenses, and costs incurred herein, and for any such further legal and equitable relief as this Court deems appropriate.

COUNT II
Negligent Training

41. Plaintiff Elmore hereby adopts, re-alleges, and incorporates by reference the allegations contained in paragraphs 1 through 40 above.

42. Defendant Harbor Freight had a duty to Plaintiff Elmore to train its agents and employees arising from its master and servant relationship with such employees and agents.

43. Defendant Harbor Freight had a duty to Plaintiff Elmore to provide reasonable and effective training to prevent its agents and employees from wrongfully and racially discriminating against Plaintiff Elmore.

44. Defendant Harbor Freight negligently failed to train its agents and employees in a manner that reasonable employers would have under the circumstances.

45. Plaintiff Elmore has been damaged as a direct and proximate result of Defendant Harbor Freight's actions and omissions. In particular, he has suffered injuries consisting of, but not limited to: (a) humiliation; (b) embarrassment; (c) mental distress; (d) insult; (e) inconvenience; (f) anxiety; and, (g) emotional pain and suffering.

46. Defendant Harbor Freight's failure to exercise reasonable care in training its employees was willful, wanton, reckless, and malicious, and, further, shows a complete and deliberate indifference to, and conscious disregard for, the rights of Plaintiff Elmore. Therefore, Plaintiff Elmore is entitled to an award of punitive or exemplary damages in an amount sufficient to punish Defendant Harbor Freight or to deter Harbor Freight and others from like conduct in the future.

WHEREFORE, Plaintiff Elmore requests that this Court, after a trial by jury of his claims, enter judgment against Defendant Harbor Freight for Elmore's actual damages, nominal damages, and punitive or exemplary damages as are proven at trial, for costs incurred herein, and for any such further legal and equitable relief as this Court deems appropriate.

COUNT III
Negligent Supervision

47. Plaintiff Elmore hereby adopts, re-alleges, and incorporates by reference the allegations contained in paragraphs 1 through 46 above.

48. Defendant Harbor Freight had a duty to Plaintiff Elmore to control, direct, and supervise the conduct of its agents and employees arising from their master and servant relationship.

49. Defendant Harbor Freight had a duty to Plaintiff Elmore to exercise reasonable care to prevent its agents and employees from wrongfully engaging in racially discriminatory practices toward Plaintiff Elmore.

50. Defendant Harbor Freight had a duty to Plaintiff Elmore to prevent its agents and employees from wrongfully and racially discriminating against Plaintiff Elmore.

51. Defendant Harbor Freight negligently failed to exercise the proper degree of control and supervision of its agents and employees that reasonable employers would have exercised under the circumstances.

52. Plaintiff Elmore has been damaged as a direct and proximate result of Defendant Harbor Freight's actions and omissions. In particular, he has suffered injuries consisting of, but not limited to: (a) humiliation; (b) embarrassment; (c) mental distress; (d) insult; (e) inconvenience; (f) anxiety; and, (g) emotional pain and suffering.

53. Defendant Harbor Freight's failure to exercise reasonable care in supervising its employees and agents was willful, wanton, reckless, and malicious, and further, shows a complete and deliberate indifference to, and conscious disregard for Plaintiff Elmore's rights. Therefore, Plaintiff Elmore is entitled to an award of punitive or exemplary damages in an amount sufficient to punish Defendant Harbor Freight or to deter Harbor Freight and others from like conduct in the future.

WHEREFORE, Plaintiff Elmore requests that this Court, after a trial by jury of his claims, enter judgment against Defendant Harbor Freight for Elmore's actual damages, nominal damages, and punitive or exemplary damages as are fair and reasonable, for costs incurred herein, and for any such further legal and equitable relief as this Court deems appropriate.

Respectfully submitted,

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✎JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Floyd G. Elmore

(b) County of Residence of First Listed Plaintiff Jackson County, Missouri
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Arthur A. Benson II, Arthur Benson & Associates, P.O. Box 119007, 4006 Central Kansas City, Missouri 64171-9007 816-531-6565 ext 100

DEFENDANTS

Harbor Freight Tools USA, Inc. d/b/a Harbor Freight Tools

County of Residence of First Listed Defendant Los Angeles County, California
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

Unknown

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ❒ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ❒ 2 U.S. Government Defendant
- ❒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	❒ 1	❒ 1	Incorporated *or* Principal Place of Business In This State	❒ 4	❒ 4
Citizen of Another State	❒ 2	❒ 2	Incorporated *and* Principal Place of Business In Another State	❒ 5	❒ 5
Citizen or Subject of a Foreign Country	❒ 3	❒ 3	Foreign Nation	❒ 6	❒ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT
- ❒ 110 Insurance
- ❒ 120 Marine
- ❒ 130 Miller Act
- ❒ 140 Negotiable Instrument
- ❒ 150 Recovery of Overpayment & Enforcement of Judgment
- ❒ 151 Medicare Act
- ❒ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ❒ 153 Recovery of Overpayment of Veteran's Benefits
- ❒ 160 Stockholders' Suits
- ❒ 190 Other Contract
- ❒ 195 Contract Product Liability
- ❒ 196 Franchise

REAL PROPERTY
- ❒ 210 Land Condemnation
- ❒ 220 Foreclosure
- ❒ 230 Rent Lease & Ejectment
- ❒ 240 Torts to Land
- ❒ 245 Tort Product Liability
- ❒ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ❒ 310 Airplane
- ❒ 315 Airplane Product Liability
- ❒ 320 Assault, Libel & Slander
- ❒ 330 Federal Employers' Liability
- ❒ 340 Marine
- ❒ 345 Marine Product Liability
- ❒ 350 Motor Vehicle
- ❒ 355 Motor Vehicle Product Liability
- ❒ 360 Other Personal Injury

PERSONAL INJURY
- ❒ 362 Personal Injury - Med. Malpractice
- ❒ 365 Personal Injury - Product Liability
- ❒ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ❒ 370 Other Fraud
- ❒ 371 Truth in Lending
- ❒ 380 Other Personal Property Damage
- ❒ 385 Property Damage Product Liability

CIVIL RIGHTS
- ❒ 441 Voting
- ❒ 442 Employment
- ❒ 443 Housing/ Accommodations
- ❒ 444 Welfare
- ❒ 445 Amer. w/Disabilities - Employment
- ❒ 446 Amer. w/Disabilities - Other
- ☒ 440 Other Civil Rights

PRISONER PETITIONS
- ❒ 510 Motions to Vacate Sentence

Habeas Corpus:
- ❒ 530 General
- ❒ 535 Death Penalty
- ❒ 540 Mandamus & Other
- ❒ 550 Civil Rights
- ❒ 555 Prison Condition

FORFEITURE/PENALTY
- ❒ 610 Agriculture
- ❒ 620 Other Food & Drug
- ❒ 625 Drug Related Seizure of Property 21 USC 881
- ❒ 630 Liquor Laws
- ❒ 640 R.R. & Truck
- ❒ 650 Airline Regs.
- ❒ 660 Occupational Safety/Health
- ❒ 690 Other

LABOR
- ❒ 710 Fair Labor Standards Act
- ❒ 720 Labor/Mgmt. Relations
- ❒ 730 Labor/Mgmt.Reporting & Disclosure Act
- ❒ 740 Railway Labor Act
- ❒ 790 Other Labor Litigation
- ❒ 791 Empl. Ret. Inc. Security Act

IMMIGRATION
- ❒ 462 Naturalization Application
- ❒ 463 Habeas Corpus - Alien Detainee
- ❒ 465 Other Immigration Actions

BANKRUPTCY
- ❒ 422 Appeal 28 USC 158
- ❒ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ❒ 820 Copyrights
- ❒ 830 Patent
- ❒ 840 Trademark

SOCIAL SECURITY
- ❒ 861 HIA (1395ff)
- ❒ 862 Black Lung (923)
- ❒ 863 DIWC/DIWW (405(g))
- ❒ 864 SSID Title XVI
- ❒ 865 RSI (405(g))

FEDERAL TAX SUITS
- ❒ 870 Taxes (U.S. Plaintiff or Defendant)
- ❒ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ❒ 400 State Reapportionment
- ❒ 410 Antitrust
- ❒ 430 Banks and Banking
- ❒ 450 Commerce
- ❒ 460 Deportation
- ❒ 470 Racketeer Influenced and Corrupt Organizations
- ❒ 480 Consumer Credit
- ❒ 490 Cable/Sat TV
- ❒ 810 Selective Service
- ❒ 850 Securities/Commodities/ Exchange
- ❒ 875 Customer Challenge 12 USC 3410
- ❒ 890 Other Statutory Actions
- ❒ 891 Agricultural Acts
- ❒ 892 Economic Stabilization Act
- ❒ 893 Environmental Matters
- ❒ 894 Energy Allocation Act
- ❒ 895 Freedom of Information Act
- ❒ 900Appeal of Fee Determination Under Equal Access to Justice
- ❒ 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)

☒ 1 Original Proceeding ❒ 2 Removed from State Court ❒ 3 Remanded from Appellate Court ❒ 4 Reinstated or Reopened ❒ 5 Transferred from another district (specify) ❒ 6 Multidistrict Litigation ❒ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing **(Do not cite jurisdictional statutes unless diversity)**:
42 U.S.C. § 1981, denial of full and equal benefit of the law.

Brief description of cause: Plaintiff alleges violation of his right to the full and equal benefit of the law in violation of 42 U.S.C. § 1981 and state law claims of negligent supervision and negligent training.

VII. REQUESTED IN COMPLAINT:

❒ CHECK IF THIS IS A **CLASS ACTION** UNDER F.R.C.P. 23

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☑ Yes ❒ No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE _____ DOCKET NUMBER _____

DATE
August 4, 2015

SIGNATURE OF ATTORNEY OF RECORD
s/ Arthur A. Benson II

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

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INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I. (a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the

Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. Origin. Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date. Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. Do not cite jurisdictional statutes unless diversity.

Example: U.S. Civil Statute: 47 USC 553

Brief Description: Unauthorized reception of cable service

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. Related Cases. This section of the JS 44 is used to reference related pending cases if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.