Nos. 08-2108(L) & 08-2166(XAP)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WORLDWIDE NETWORK SERVICES, LLC and
WORLDWIDE NETWORK SERVICES INTERNATIONAL, FZCO,

Plaintiffs-Appellees / Cross-Appellants,

v.

DYNCORP INTERNATIONAL LLC,

Defendant-Appellant / Cross-Appellee.

On Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF OF THE NATIONAL URBAN LEAGUE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES / CROSS-APPELLANTS AND IN SUPPORT OF AFFIRMANCE

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INTEREST OF *AMICUS CURIAE*[1]

Amicus the National Urban League is interested in this case because the Court's decision in this matter will directly affect the ability of African-Americans to participate fully in our nation's economic life without facing the invidious barriers of discrimination.

Established in 1910, the National Urban League is the nation's oldest and largest community-based movement devoted to empowering African-Americans and other disadvantaged people to enter the economic and social mainstream. Today, the National Urban League, headquartered in New York City, spearheads the non-partisan efforts of its local affiliates. There are more than 100 local affiliates of the National Urban League located in 35 states and the District of Columbia providing direct services to more than 2 million people nationwide through programs, advocacy, and research.

The mission of the National Urban League movement is to enable African-Americans and other disadvantaged people to secure economic self-reliance, parity, power, and civil rights. The National Urban League seeks to implement that mission by, among other things, empowering all people in attaining economic self-sufficiency through education, health care, job training, good jobs, home ownership, entrepreneurship, and wealth accumulation; and promoting and

[1] Counsel for *amicus* represents that all parties have been contacted and have consented to the filing of this *amicus* brief.

ensuring our civil rights by actively working to eradicate all barriers to equal participation in all aspects of American society, whether political, economic, social, educational, or cultural.

SUMMARY OF ARGUMENT

Plaintiffs' brief demonstrates that the jury verdict in this case should be affirmed. The National Urban League submits this *amicus* brief not to repeat plaintiffs' arguments, but to make three points.

First, ordinary principles of vicarious liability and causation apply under 42 U.S.C. § 1981. Under those principles, the jury properly held DynCorp liable for the racially motivated actions of its employees that prevented plaintiffs from making, performing, and enjoying the benefits of a contract.

Second, *Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277 (4th Cir. 2004) (en banc), does not support a different result. *Hill* would not be relevant here even if this case arose under the same statutes at issue in that case, Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 ("ADEA"). In any event, *Hill* is grounded in specific language in Title VII and the ADEA that does not exist in § 1981, and thus has no application here. Furthermore, *Hill* is inconsistent with ordinary principles of agency and causation, and should not be extended to a different statutory context.

Third, contrary to the arguments of the U.S. Chamber of Commerce, exempting business decisions from § 1981 would harm the economy by sanctioning racial discrimination in contracting. The Chamber fails to recognize that discrimination is detrimental not only to its victims, but also to the economy as a whole. Moreover, § 1981 does not burden businesses' legitimate decisions and activities.

ARGUMENT

I. UNDER § 1981, ORDINARY VICARIOUS LIABILITY PRINCIPLES GOVERN AN EMPLOYER'S LIABILITY FOR AN EMPLOYEE'S DISCRIMINATORY CONDUCT

Section 1981 provides, in relevant part, that "[a]ll persons within the jurisdiction of the United States shall have the same right … to make and enforce contracts … as is enjoyed by white citizens." 42 U.S.C. § 1981(a). In 1991, in response to Supreme Court decisions that adopted an overly restrictive interpretation of the statute, Congress added § 1981(b), defining the right "to make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *Id.* § 1981(b). Congress also added subsection (c), codifying the Supreme Court's holding in *Runyon v. McCrary*, 427 U.S. 160 (1976), that "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination." 42 U.S.C. § 1981(c).

Section 1981 sweeps far more broadly than Title VII, governing not only employment contracts, but also contracts made in retail settings, public accommodations, and other business contexts. Unlike Title VII, however, § 1981 covers only intentional discrimination. It does not create a "disparate impact" cause of action. *See General Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 391 (1982).

The courts of appeals, including this Court, have applied ordinary principles of vicarious liability to determine when employers violate § 1981 through the conduct of their employees. Courts have asked, first, whether the employer is responsible for the employee's conduct under agency law (e.g., whether the conduct is within the scope of employment); and, second, whether the employee's actions caused the impairment of rights protected by § 1981. *See infra* Part I.A. Applying that standard to the facts of this case, DynCorp is plainly responsible for the racially motivated interference of its employees with WWNS's contractual rights. *See infra* Part I.B.

A. This Court has applied ordinary principles of vicarious liability under § 1981, holding employers responsible for discriminatory conduct by employees that impairs a plaintiff's ability to make or enforce a contract. The Court has not required that the particular employees who act with discriminatory intent be formal decisionmakers or even supervisors. Rather, it has focused on whether the

employee's actions interfered with a contractual interest. For example, in *Williams v. Staples, Inc.*, 372 F.3d 662 (4th Cir. 2004), the Court held that Staples could be liable for the actions of a store clerk who interfered with an African-American plaintiff's ability to enter a contract by refusing to accept his out-of-state check, even though Staples' policy was to accept all checks for processing. In *Denny v. Elizabeth Arden Salons, Inc.*, 456 F.3d 427 (4th Cir. 2006), the Court held that a salon could be liable under § 1981 for the actions of a receptionist who allegedly stated, when the plaintiff attempted to add a hair service to a spa package purchased for her mother, that the salon "did not do black people's hair." *Id.* at 429 (internal quotation marks omitted). The plaintiff alleged that a manager confirmed that view. According to the Court, these allegations constituted "not only strong but direct evidence of *the salon's* intent to discriminate." *Id*. at 434 (emphasis added). Similarly, in *Eddy v. Waffle House, Inc.*, 482 F.3d 674 (4th Cir. 2007), *vacated and remanded on other grounds*, 128 S. Ct. 2957 (2008), the plaintiffs, one of whom was allegedly told by a waitress that the restaurant did not serve African-Americans, sued Waffle House under § 1981. The Court stated that, "'[t]o prove a § 1981 claim, a plaintiff must ultimately establish both that the defendant intended to discriminate on the basis of race, and that the discrimination

interfered with a contractual interest.'" *Id.* at 678 (quoting *Denny*, 456 F.3d at 434) (alteration omitted).[2]

Other circuits have also held employers liable when an employee acts in a discriminatory manner to impair a contractual right. For example, in *Hampton v. Dillard Department Stores, Inc.*, 247 F.3d 1091 (10th Cir. 2001), the court held that Dillard could be liable for the actions of a security officer who interfered with an African-American plaintiff's redemption of a coupon for a free perfume sample. While the security officer did not necessarily intend to prevent the plaintiff from using her coupon, he effectively did so by interrupting her conversation with a salesperson at the perfume counter. *See id.* at 1106.

Likewise, in *Arguello v. Conoco, Inc.*, 207 F.3d 803 (5th Cir. 2000), the court rejected the defendant's argument, based on *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), that an employer could not be liable for the discriminatory conduct of a non-supervisory employee. The case involved an incident in which a store clerk asked for a customer's identification when she attempted to pay with a

[2] District courts in this Circuit have also recognized vicarious liability under § 1981. For example, in *Davis v. American Society of Civil Engineers*, 330 F. Supp. 2d 647 (E.D. Va. 2004), *aff'd*, 123 F. App'x 139 (4th Cir. 2005), the Court rejected the defendants' argument that, because § 1981 requires intentional discrimination, the defendant society – which lacked an independent intent to discriminate – could not be liable for the actions of its agent. The court found "no question that under the general application of the doctrine of respondeat superior, a principal can be liable for the tortious actions of its agent or servant." *Id.* at 654 (citing *Restatement (Second) of Agency* §§ 215-216, 219 (1958)).

credit card; said that an out-of-state driver's license was not acceptable identification; and, when the customer disagreed, began to shout racial epithets at her. The court explained that *Faragher* was a Title VII case and that its more restrictive vicarious-liability rule, allowing attribution of actions by supervisors, was not necessarily sensible outside of the employment context. Instead, the court applied the general agency principles codified in *Restatement* § 219, under which an employer is liable for the torts of employees acting within the scope of their employment, as well as for torts committed outside that scope where the employer was "negligent or reckless," "the conduct violated a non-delegable duty" of the employer, the employee "purported to act or to speak on behalf of the principal and there was reliance upon apparent authority," or the employer "was aided in accomplishing the tort by the existence of the agency relation." *See Arguello*, 207 F.3d at 810; *see also id*. at 809 (noting the Supreme Court's "implication" in *General Building Contractors* "that agency principles apply under § 1981"). The Fifth Circuit found that the store clerk's actions were potentially within the scope of her employment because, *inter alia*, they occurred while she was on duty and the completion of credit card purchases was one of her customary functions. *See also Green v. Dillard's, Inc.*, 483 F.3d 533, 540 (8th Cir. 2007) (collecting cases in which courts found employers vicariously liable under § 1981 for the actions of non-supervisory employees and holding that an employer could be liable for its

own negligence in placing an employee with racially discriminatory tendencies on the sales floor), *cert. denied*, 128 S. Ct. 1120 (2008).

Thus, in determining whether an employer has violated § 1981, courts consistently ask two questions: first, whether vicarious liability for the employee's actions is consistent with ordinary principles of agency law; and, second, whether the employee's conduct caused a violation of § 1981. The employee's status is relevant only insofar as it bears on the issue of causation: *i.e.*, whether the employee's actions were a but-for cause of interference with the plaintiff's effort to make or to perform a contract, or with the plaintiff's enjoyment of the benefits of a contract. For example, in *Hampton*, the security guard was not a "decisionmaker" with respect to whether the plaintiff could redeem her coupon, but his actions effectively stopped her from doing so. *See* 247 F.3d at 1106. Similarly, in *Eddy*, this Court did not consider whether the waitress who made the discriminatory statement to one plaintiff was a "formal decisionmaker" with respect to whether the plaintiffs' party would receive service. The relevant question was whether her statement interfered with the plaintiffs' enjoyment of the customary benefits of a contractual relationship with a restaurant. *See* 482 F.3d at 678. And in *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, *opinion supplemented on denial of reh'g on other grounds*, 266 F.3d 407 (6th Cir. 2001), the Sixth Circuit explicitly adopted a "causal nexus" standard in concluding that an

employer could be liable for a manager's exclusion of the plaintiffs from a Wal-Mart store following a clerk's accusation of shoplifting, where the clerk (but not the manager) was allegedly motivated by racial animus. According to the court, the relevant question was whether the plaintiffs presented sufficient evidence for a jury to conclude that the clerk's racial animus was a but-for cause of the exclusion. *See id.* at 876-78.

B. In this case, general agency principles support the jury's finding of DynCorp's liability for the racially motivated actions of its employees, which caused the violation of § 1981. As explained in detail in plaintiffs' brief in this Court, there was evidence from which the jury could conclude that four high-ranking DynCorp employees' racial animus led them to interfere with WWNS's contractual rights: DeBeer, Walsh, Rosenkranz, and Merrick. As plaintiffs discuss in their brief, the record supported the conclusion that Merrick and DeBeer exercised authority over WWNS and its employees in Iraq, and that they took a number of actions to hinder WWNS's performance of its contract. The evidence before the jury further showed that those individuals excluded WWNS from planning meetings; refused to provide security badges to WWNS employees; denied WWNS access to needed equipment; ignored WWNS's request for approval and guidelines; and eliminated WWNS's managerial positions in Iraq. The record further supported the conclusion that Walsh stopped payments to

WWNS under its contract and conspired to replace WWNS with another contractor. Finally, the employee whom DynCorp characterizes as the "formal decisionmaker" in ending WWNS's contract, Cashon, testified that the termination decision was collective, that he consulted with Rosenkranz (his supervisor) about the decision, and that he relied on information provided by DeBeer. *See generally* Appellees' Br. 5-13.

Under the agency principles applicable both to contract-related actions and to torts by employees, DynCorp is liable for these employees' conduct. Indeed, DynCorp effectively admits as much: it does not contest the jury's finding that it was liable for breach of contract and tortious interference with contract based on the employees' actions. As plaintiffs demonstrate in their brief, both agency law at the time of § 1981's enactment and modern law make employers liable for the contract-related conduct of agents who act within the scope of their employment, are held out as having competent authority, or have "a power arising from the agency relation," even if those agents act against the principal's policies or instructions. *See id.* at 29-31 (internal quotation marks omitted). Similarly, employers are liable for torts committed by employees acting within the scope of their employment, acting with "apparent authority," or whose tortious activity is "aided . . . by . . . the agency relation." *Restatement* § 219; *see Faragher*, 524 U.S. at 801-02.

Here, as plaintiffs establish, the conduct that violated § 1981 – racially motivated interference with WWNS's ability to perform a contract, receive payments under a contract, and renew a contract – was within the scope of Walsh's, Rosekranz's, DeBeer's, and Merrick's employment. These senior executives were charged with entering, monitoring, supervising, and terminating contracts with independent contractors such as WWNS. *See* Appellees' Br. 10-11. Moreover, the executives were "aided by the agency relation" in interfering with WWNS's contractual rights. It was their relationships with DynCorp that enabled them to take the adverse actions of stopping payments to WWNS under the contract, preventing WWNS from performing on the contract in Iraq, and ultimately declining to renew or extend the contractual relationship. Indeed, DynCorp does not argue that any racially motivated actions were outside the scope of the executives' employment.

Finally, the jury was specifically required to find, and there was more than sufficient evidence to support, a causal nexus between the racially motivated actions of these employees and the violation of WWNS's rights under § 1981. Section 1981 forbids race-based interference with the ability to make, perform, or enjoy the benefits of contracts. The jury concluded that, "but for the race of WWNS's owners, DynCorp would have renewed or extended WWNS' CIVPOL subcontract or task orders." J.A. 1763; *see* Appellees' Br. 17-18. That is enough

to support DynCorp's § 1981 liability. *See id.* (noting that but-for causation is the standard for both § 1981 and Title VII claims). DynCorp's argument that Cashon, the alleged "formal decisionmaker," based his termination of WWNS's contract on his own, neutral assessment of WWNS's performance is simply a factual quarrel with the jury's verdict: if DynCorp were correct, then the jury would not have answered the question regarding but-for causation in the affirmative. If the record permits a reasonable finding that racial animus caused the termination, then DynCorp plainly violated § 1981 through the discriminatory acts of its employees who, concededly acting within the scope of their employment and aided by their relationship with DynCorp, interfered with WWNS's contractual rights.

II. *HILL* DOES NOT SUPPORT A DIFFERENT RESULT

In seeking to overturn the jury's verdict, defendant and its *amicus* supporter, the U.S. Chamber of Commerce, rely nearly exclusively on this Court's decision in *Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277 (4th Cir. 2004) (en banc), a case that does not even involve § 1981. That argument is incorrect for multiple reasons.

A. As an initial matter, even if this case involved the same standards as Title VII, *Hill* would be irrelevant. As plaintiffs explain, this case, unlike *Hill*, involves the actions of supervisory employees who were alleged to have undertaken the discriminatory conduct that led to the actions of which plaintiffs

complain. *See* Appellees' Br. 17-21. In *Hill*, by contrast, the issue was whether and in what circumstances the actions of "subordinate" employees without supervisory responsibilities and who had not made the ultimate employment decision could be attributed to the defendant. 354 F.3d at 291; *compare id.* at 287 ("'Tangible employment actions fall within the special province of the supervisor.'") (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 762 (1998)). Beyond that, as plaintiffs also note (at 21-23), *Hill* is a case involving appropriate summary judgment standards, which are irrelevant in this case, which was submitted to the jury with a proper instruction as to the need to show that discriminatory intent caused the interference with plaintiffs' contracts.

B. In any event, even if *Hill* would be relevant were this a Title VII case, there is no basis in that decision to extend it to § 1981 – a statutory provision that, among other things, does not contain language analogous to that which the Court interpreted in *Hill*, was enacted nearly a century before Title VII, and is not limited to the employment context.

Although one would not know it from reading the briefs filed by defendant and its supporting *amicus*, this Court's decision in *Hill* was explicitly grounded in the text of Title VII and the ADEA, as well as the Supreme Court case law interpreting those particular statutes. The Court stated unambiguously that it was relying on the "language" of those statutes and reiterated that those specific

"statutes and governing precedents" were the basis of its analysis. 354 F.3d at 287, 289. The Court thus made clear that it was declining "to expand the contours" of those specific "acts." *Id.* at 291. In sum, on its face, *Hill* makes clear that the Court's conclusion was limited to the proper inquiry to determine vicarious liability under "*Title VII or the ADEA*." *Id* (emphasis added).

The Chamber of Commerce nevertheless suggests that this Court relied on cases not decided under Title VII or the ADEA in reaching its result. *See* Chamber Br. 8. In fact, the Court expressly *declined* to rely on decisions such as the ones cited by the Chamber in reaching its conclusion. In particular, the four court of appeals cases that the Chamber cites are among a long list of cases, *see* 354 F.3d at 289, that *Hill* concluded the Court need *not* "parse," because "the language of the discrimination statutes" and the Supreme Court case law interpreting those decisions provided the appropriate "focus" for the Court's analysis. *Id.* at 290. The Chamber's argument thus misconstrues *Hill*.

The fact that *Hill* is grounded in the Court's understanding of Title VII and the ADEA is critical here. As the Supreme Court has long established, "Section 1981 is not coextensive in its coverage with Title VII." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975). Most basically, as noted above, while Title VII applies only to employment, § 1981, enacted nearly a century earlier, applies to the right "to make and enforce" all "contracts." 42 U.S.C.

§ 1981(a). Moreover, while § 1981 is focused exclusively on racial discrimination, Title VII applies to race, gender, national origin, ethnicity, and religion. *See id.* § 2000e-2(a). As this Court has made plain, the "Supreme Court has instructed" that the two statutes must be treated as "*separate and distinct*." *Aleman v. Chugach Support Servs., Inc.*, 485 F.3d 206, 211 (4th Cir. 2007) (emphasis added).

Not only are these statutes separate and distinct generally; they also differ as to the specific issue decided in *Hill*. *Hill* specifically relies on Title VII's definition of an "'employer'" to include "'any agent'" of "'a person engaged in an industry affecting commerce.'" 354 F.3d at 287 (quoting 42 U.S.C. § 2000e(b)). No analogous text appears in § 1981. The reason for that asymmetry is fundamental: § 1981 is *not* limited to employment and thus should not be interpreted – and, as demonstrated by such cases as *Arguello*, *see supra* pp. 6-7, has not been interpreted – to impose a test that is specific to the employment context and derived from a specific statutory definition of an "employer." *See Hill*, 354 F.3d at 287 (relying upon specific rules for employment and noting, for instance, that, in the employment context, "'[t]angible *employment* actions fall within the special province of the supervisor'") (quoting *Ellerth*, 524 U.S. at 762) (emphasis added). Because § 1981 applies to all contracts, and not just to employment, it would be incongruous to conclude that Title VII's employment-

specific analysis should be applied across-the-board to the much larger class of contracts within § 1981's ambit.

In this regard, the Chamber of Commerce's attempt (at 12-15) to suggest that § 1981 has some unique meaning in the context of "business disputes" has the interpretive issue backwards. The broad language of § 1981 must have a single meaning that can be applied consistently to all the "contracts" that fall within the statute's coverage, regardless of whether those contracts give rise to what the Chamber characterizes as "business disputes." *See, e.g., Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (holding that statutory language must be given one meaning for all applications). There is thus no textual foundation for the Chamber's unsupported assertion (at 12) that "more stringent standards" should be applied in some § 1981 cases than in others.

On the contrary, as plaintiffs have explained persuasively and in detail in its brief (at 23-28), § 1981's text, history, and purpose establish that Congress intended to apply a broad rule of responsibility in this context and all others within that statute's coverage. As WWNS demonstrates, the relevant Nineteenth Century principles of agency law, as well as the post-Civil War context of the statute, counsel for a much broader scope of vicarious liability than this Court recognized in *Hill*.

In this regard, *Cerqueira v. American Airlines, Inc.*, 520 F.3d 1 (1st Cir.), *cert. denied*, 129 S. Ct. 111 (2008), discussed at length by the Chamber of Commerce, does not undermine the distinction between these statutes or suggest that *Hill* provides the correct rule in this case. As the First Circuit explained in that case, which involved preventing an individual from traveling on a flight, the court's decision there relied centrally on Congress's enactment of 49 U.S.C. § 44902(b), which acts as an "affirmative grant of permission to the air carrier" to refuse to transport passengers who might be inimical to safety. 520 F.3d at 12-14. The court stressed that, in light of that specific statutory authorization and the "expedient manner" in which such decisions must be made, *id.* at 14-15, judicial scrutiny of such determinations is narrower than that permitted in ordinary employment cases under Title VII and state anti-discrimination laws, much less ordinary § 1981 cases, *see id.* at 17-19 (explaining that Title VII's *McDonnell Douglas*[3] burden-shifting analysis is a "mismatch with this case" because of Congress's passage of § 44902(b) and stating that theories of liability applicable under state employment law are not applicable in a "§ 1981 federal claim *where the air carrier has made a decision within the statutory authorization of § 44902(b)*") (emphasis added). Indeed, the court went out of its way to note that it had not decided whether to adopt *Hill* as a standard even under Title VII. *See id.*

[3] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

at 19 n.24. *Cerquiera* thus provides no support for applying *Hill* to § 1981 cases that do not involve Congress's express determination regarding air safety under § 44902(b).

C. Even aside from all these other points, *Hill* should not be extended to apply here because it is incorrect even as to the different statute and different circumstances involved there. Most basically, to the extent that *Hill* purports to rely on general principles of agency, it is inconsistent with those principles, as discussed above and in plaintiffs' brief. As the Seventh Circuit has explained, the *Hill* test is "inconsistent with the normal analysis of causal issues in tort litigation." *Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004).

In addition, *Hill* relies on a mistaken understanding of Supreme Court case law. As the Tenth Circuit explained, *Hill* incorrectly reads language describing the plaintiff's evidence in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), as establishing a legal test. *See EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 487 (10th Cir. 2006) (McConnell, J.) (Fourth Circuit's "strict approach makes too much of the phrase 'actual decisionmaker' in *Reeves*"; Supreme Court was merely "describing what the petitioner's evidence showed, not prescribing the 'outer contours' of liability"), *cert. dismissed*, 549 U.S. 1334 (2007). Similarly, the Department of Justice told the Supreme Court in 2007 that *Hill* not only is an "outlier," but also – and, in the government's words, "[m]ore

fundamentally" – "*misconstrued*" *Reeves*. Brief for the Respondent at 27, *BCI Coca-Cola Bottling Co. v. EEOC*, No. 06-341 (U.S. filed Mar. 27, 2007) (emphasis added), *at* http://www.usdoj.gov/osg/briefs/2006/3mer/2mer/2006-0341.mer.aa.pdf. As the Department of Justice further explained, "no agency law question was presented in [*Reeves*] and the phrase 'actual decisionmaker' appears in a single sentence describing the evidence in the case in a part of the opinion that did not contain any discussion of agency principles." *Id.* at 28.

In sum, for these reasons, and the additional reasons discussed in plaintiffs' brief, *Hill* is based on faulty legal premises and, for that reason, has not been followed by other courts even as to Title VII. *See* Appellees' Br. 34-35 (collecting cases). There is no reason to compound that error by extending that decision both outside of the summary-judgment realm and to the different statutory context presented here.

III. EXEMPTING BUSINESS DECISIONS FROM § 1981 WOULD HARM THE ECONOMY AND ALLOW BUSINESSES OPENLY TO DISCRIMINATE ONCE AGAIN ON THE BASIS OF RACE

The Chamber of Commerce purports to concede (at 12) that "[n]o one would debate the importance of civil rights statutes in general and 42 U.S.C. § 1981 in particular." Yet, the Chamber spends the next 7 pages of its brief seeking to limit the effectiveness of challenges that attempt to vindicate rights granted by Congress under those important statutes. The Chamber's arguments rely on extreme and

hypothetical scenarios and disregard the significant evidence in this record that there was pervasive racial hostility among DynCorp's executives that led directly to the discriminatory conduct of which plaintiffs complain. Moreover, and perhaps most importantly, the Chamber's arguments disregard the real harm that discrimination in contracting does to our nation's economy.

A. Racial Discrimination in Contracting Harms the Economy

The Chamber's brief nowhere acknowledges that rooting out racial discrimination in business contracts benefits not only the victims of that invidious discrimination, but also the economy as a whole.

In particular, racial discrimination is detrimental to the economy due to the inherent inefficiencies in such decisions. Race-based discrimination in business imposes substantial costs on companies, whose discriminatory practices cause them to pass over chances to contract with minority-owned companies whose services are traditionally underpriced. *See generally* Gary S. Becker, *The Economics of Discrimination* (2d ed. 1971) ("Becker"). To their own competitive disadvantage, companies motivated by racial discrimination willingly incur this cost of contracting with more expensive, less efficient businesses to avoid contracting with minorities. These added costs have the effect of reducing economic growth generally. *See id.* at 27-30 (comparing discrimination to raising transportation costs for international trade; the general effect of which is less

international trade). For the same reasons, racial discrimination "'results in a clear and potentially serious loss of efficiency'" by the misdistribution of resources. Billy J. Tidwell, The National Urban League, Inc., Research Dep't, *The Price: A Study of the Costs of Racism in America* 71-72 (July 1990) (quoting Thomas F. D'Amico, *The Conceit of Labor Market Discrimination*, *in* Papers and Proceedings of the Ninety-Ninth Annual Meeting of the American Economic Association, *The Economics of Discrimination Thirty Years Later*, 77 Am. Econ. Rev. 310, 310 (May 1987)). As one researcher has explained:

> When society's rewards and penalties are distributed to its members in a manner not consonant with their relative productivities, then at least some scarce resources are bound to be overallocated to relatively unproductive members of the "favored" race . . . and underallocated to more productive members of the race being discriminated against . . . . Society's aggregate real output, therefore, will fall below its potential . . . .

Id. (quoting D'Amico, 77 Am. Econ. Rev. at 310) (ellipses in original).

Moreover, as long as African-Americans are subject to significant discrimination that limits their career opportunities and the opportunities of their businesses, they have reduced incentives to maximize their skills. Simply put, there is less incentive to develop one's human capital if a person believes that that development will not be rewarded because of his or her race:

> There are strong arguments that racial discrimination, in fact, hampers the efficiency of markets by creating disincentives for the optimal acquisition of human capital by racial minorities. . . . [T]o the extent that racial discrimination is eradicated, economic benefits will accrue to the society as a whole due to the enhanced productivity of people of color.

Neil G. Williams, *Offer, Acceptance, and Improper Considerations: A Common-Law Model for the Prohibition of Racial Discrimination in the Contracting Process*, 62 Geo. Wash. L. Rev. 183, 216 (1993); *see also* Samuel Issacharoff, *Review Essay: Contractual Liberties in Discriminatory Markets*, 70 Tex. L. Rev. 1219 (1992); BNet Business Network, *Commentary: Erase Institutional Racism, Boost Local Economy*, Long Island Business News (Apr. 29, 2005) ("[A]s we confront the socioeconomic challenges of a global economy, the fastest way to expand our regional economy is to create equal opportunities for everyone."), *at* http://findarticles.com/p/articles/mi_qn4189/is_20050429/ai_n14606294?tag=content;col1.

B. Racial Discrimination in Business Decisions Is Not Unique

The Chamber of Commerce also claims that § 1981 improperly burdens businesses with having to defend challenges to their decisions. As explained below, however, neither this case nor § 1981 itself presents a burden to a company's legitimate and lawful activities. On the contrary, this case provides companies with a clearer understanding of how to avoid the discriminatory actions intended to be addressed by § 1981.

First, the Chamber baldly asserts without any empirical support that, in contract dealings between businesses, as opposed to employment or public service, there are "less dramatic" differences in bargaining power and the defendant may

seek contractual remedies. Chamber Br. 13. The Chamber does not provide any evidence for the "less dramatic" differences in bargaining power. Indeed, one can just as easily posit scenarios in which an employee has more options in the marketplace than a company negotiating a contract. For instance, some subcontractors may well be dependent on a few government contractors, while individual experts in some fields have many employment opportunities. In any event, the Chamber cites no legal principle that § 1981 protects only those racial minorities with little bargaining power. Rather, § 1981 bars intentional racial discrimination in contracting regardless of bargaining power and, as noted above, in so doing, benefits the economy as a whole.

Second, the Chamber expresses a concern that, in the business context, the racial identity of a corporation may be difficult to ascertain. *Id.* at 13-14. Whatever its merit, that theoretical concern has nothing to do with this case, where even defendant does not contend that it cannot be liable under § 1981 because plaintiffs are companies, not individuals. Moreover, as plaintiffs explain, in this instance, both plaintiffs' top executives are African-American, and WWNS has been certified as disadvantaged by the Small Business Administration under § 8(a) of the Small Business Act, 15 U.S.C. § 637(a). *See* Appellees' Br. 3. Even assuming that some cases may require courts to consider when a corporation can take advantage of § 1981, affirming the jury verdict here raises no such concern.

Third, the Chamber suggests that challenged decisions in what it terms "typical employment or public service case[s]" will not be decisions that have potential major economic significance to the defendant, while decisions in § 1981 cases will. Chamber Br. 14. According to the Chamber, it is "highly questionable" that § 1981 "was intended to allow juries to second guess significant business decisions of such magnitude." *Id.* The notion that § 1981 applies only to *unimportant* contracts is without any statutory foundation. *See Lauture v. IBM*, 216 F.3d 258, 263 (2d Cir. 2000) ("Congress believed that § 1981 was of 'particular importance' because it 'is the only federal law banning race discrimination in *all* contracts.'") (quoting H.R. Rep. No. 102-40(II), at 35 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 729) (emphasis added in *Lauture*). If anything, Congress intended § 1981 to apply especially to business decisions of great magnitude. A statute that bars only inconsequential race discrimination was hardly Congress's aim. *See* 118 Cong. Rec. 3371 (1972) (noting that § 1981 provides "fundamental constitutional guarantees"). The fact that pervasive racial discrimination infected these important business dealings makes § 1981 even more important here, both to ensure that minority businesses are able to compete fairly for such contracts and to avoid harm to the economy.

Fourth, the Chamber implies that in § 1981 cases the defendant company will have based its decision to terminate a contract on there being a "better

choice"; that companies in this context are replaced "often for reasons that have little to do with the plaintiff itself." Chamber Br. 15. That argument, however, assumes that the alternative is a better choice for reasons having nothing to do with race. Where, as here, the evidence demonstrated that the contract was terminated because of race, the alternative is in no way "better" and in fact is likely to be less efficient, thus, as discussed above, harming not only the plaintiff, but the economy as a whole. *See generally* Becker, *supra* (discussing inherent inefficiencies and added costs of discriminatory practices). Moreover, as noted above, the need to resolve a question of fact – such as the defendant's basis for terminating a contract – should not be the reason for allowing companies to discriminate on the basis of race.

CONCLUSION

For the foregoing reasons, and those stated in plaintiffs' brief, the Court should affirm the judgment of the district court.

Respectfully submitted,

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March 17, 2009

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I hereby certify that, on March 17, 2009, I caused the foregoing Brief of the National Urban League as *Amicus Curiae* in Support of Plaintiffs-Appellees / Cross-Appellants and in Support of Affirmance to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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