No. 10-11

IN THE
Supreme Court of the United States

WORLDWIDE NETWORK SERVICES, LLC AND
WORLDWIDE NETWORK SERVICES INTERNATIONAL, FZCO,
Petitioners,

v.

DYNCORP INTERNATIONAL LLC,
Respondent.

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

BRIEF OF THE NATIONAL URBAN LEAGUE AND THE WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici the National Urban League and the Washington Lawyers' Committee for Civil Rights and Urban Affairs are 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.

The National Urban League

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.

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

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), counsel for *amici* represent that all parties were provided notice of *amici*'s intention to file this brief at least 10 days before its due date. Counsel for *amici* also represent that all parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

and 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.

The Washington Lawyers' Committee for Civil Rights and Urban Affairs

The Washington Lawyers' Committee for Civil Rights and Urban Affairs, headquartered in Washington, D.C., is a non-profit civil rights organization established to eradicate discrimination by enforcing federal and local civil rights laws through litigation in the federal and state courts. During the Committee's 40-year history, it has represented thousands of individuals discriminated against on the basis of race, gender, national origin, religion, disability, and other protected categories, and in cases alleging discrimination in employment, public accommodations, housing, education, and various types of contractual contexts. The Committee's cases range in size from individual matters to nationwide pattern-and-practice cases. Leveraging the *pro bono* resources of the private bar, the Committee provides tens of thousands of hours of legal representation to victims of discrimination each year.

From its extensive civil rights litigation experience, the Committee has amassed expertise in the issues of law and procedure raised in the present matter. The Committee's lawyers regularly litigate cases alleging claims under 42 U.S.C. § 1981, including claims for which punitive damages are requested as relief. The Committee also frequently litigates within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, and thus has substantial familiarity with Fourth Circuit jurisprudence on punitive damages and other relevant issues.

PRELIMINARY STATEMENT

As the jury found, the facts of this case are extraordinary. Respondent DynCorp International LLC ("DynCorp") engaged in deliberate and egregious racial discrimination that nearly destroyed the business of Petitioners Worldwide Network Services, LLC and Worldwide Network Services International, FZCO (collectively, "WWNS"). High-level DynCorp executives:

- Used the harshest racial slurs – "nigger," "kaffir," "bush baby," "stupid black mother . . . ." – to demean a WWNS executive, Pet. App. 11a-12a, Pet. 4;
- Complained "'[t]wo to three times a week' that 'people of Anglo descent . . . had made a grave error' because they 'had taken the black man as a youth and attempted to clothe him and send him to school' and that 'the proper role of the black man was to go out and kill a lion, proving his manhood, at which point in time he should be put to work to feed his family . . . and mated with a woman so that he would have more children, who could then be put to work feeding their family,'" Pet. App. 12a (alterations in original);
- Drove a WWNS manager from his workplace at gunpoint, *see id.* at 11a;
- Stole all of WWNS's non-managerial employees, *see id.*;
- Stopped processing or paying WWNS invoices for completed work, *see id.*; and
- Ultimately "celebrated WWNS's demise during a company dinner" at which one senior executive read a fictionalized letter from WWNS in

> Ebonics (to the delight and laughter of those in attendance), while another was officially presented with a T-shirt reading "WWNS – I took them down, and all I got was this lousy T-Shirt," *id.* at 12a-13a.

The jury found DynCorp liable for violating 42 U.S.C. § 1981 and awarded WWNS punitive damages. *See id.* at 16a-17a.

This Court held in *Smith v. Wade*, 461 U.S. 30 (1983), that a jury may award punitive damages when – as here – "the defendant's conduct is shown to be motivated by evil motive or intent, *or* when it involves reckless or callous indifference to the federally protected rights of others." *Id.* at 56 (emphasis added) (interpreting 42 U.S.C. § 1983); *see* Pet. 9 ("There is no dispute in this case that the same standard governs claims arising under 42 U.S.C. § 1981.") (citing cases).

In later interpreting the similar standard for punitive damages that Congress adopted under 42 U.S.C. § 1981a(b)(1) – "malice or . . . reckless indifference to the federally protected rights of an aggrieved individual" – this Court identified two different ways that a plaintiff may prove that a defendant acted with "the requisite mental state." *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 534-35 (1999). First, "egregious or outrageous acts may serve as evidence supporting an inference of the requisite 'evil motive.'" *Id.* at 538. Alternatively, because a defendant can be liable for punitive damages even without "a showing of egregious or outrageous discrimination independent of the employer's state of mind," a defendant is liable for punitive damages if the plaintiff establishes "the [defendant]'s knowledge that it may be acting in violation of federal law." *Id.* at 535. A plaintiff may

use either method of proof to show that the defendant "discriminate[d] in the face of a perceived risk that its actions will violate federal law." *Id.* at 536.

In this case – and in others on which the court of appeals relied in reaching its decision here – the Fourth Circuit ignored this Court's clear holding in *Kolstad* that "egregious misconduct is evidence of the requisite mental state." *Id.* at 535. Instead, over the dissent of Chief District Judge Jones, the court of appeals vacated the jury's award of punitive damages because it could find no evidence that DynCorp knew that it might be violating WWNS's rights under § 1981. *See* Pet. App. 34a-35a. For the reasons explained by Petitioners, that holding is inconsistent with this Court's decisions and in conflict with decisions of the First, Second, Third, Sixth, Eighth, and Ninth Circuits. *See* Pet. 8-15.

Amici urge the Court to grant the petition because the question presented in this case is an exceedingly important one. Courts across the nation look to this Court's decisions in *Wade* and *Kolstad* to evaluate claims for punitive damages under numerous federal civil rights statutes. *See* Pet. App. 31a; Pet. 8-9 & n.3. Because discrimination in contracting and employment has proven harmful to the economy and society as a whole, and because the availability of punitive damages is particularly essential for combating discrimination in those areas, this Court should grant the petition and ensure that punitive damages remain an effective tool to deter the most egregious forms of discrimination under § 1981 and other civil rights laws, as Congress clearly intended.

ARGUMENT

I. DISCRIMINATION IN CONTRACTING AND EMPLOYMENT HARMS THE ECONOMY AND HARMS SOCIETY

This case involves egregious, overt racial discrimination in contracting that violated WWNS's rights under § 1981. *See supra* pp. 3-4. The Fourth Circuit's refusal to follow this Court's approach in *Kolstad*, in contrast to the vast majority of other circuits, makes punitive damages effectively unavailable even in the most egregious cases of intentional discrimination. As a result, such discrimination will be undeterred, leading to potentially serious harms to the economy and society as a whole.

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). As a result, "[t]he economic future of this country is in large part dependent on the increases in productivity that will be realized when society allows people of color to reach their full potential by dismantling the barriers erected by contractual discrimination." 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, 188 (1993).

Moreover, the disparities created by discrimination in contracting and employment are felt – and compounded – for generations. Beyond the "cumulative impact of pervasive acts of racial discrimination," which "can be debilitating over the course of an individual's lifetime," the "lingering effects of past contractual discrimination . . . are largely responsible for the fact that communities of racial minorities (African Americans in particular) enjoy a disproportionately small share of society's bounty as each successive generation passes along its inherited economic disadvantage to the next." *Id.* at 187.

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 eradi-

> cated, economic benefits will accrue to the society as a whole due to the enhanced productivity of people of color.

Id. at 216; *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 Bus. 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.

Moreover, intentional discrimination causes more than economic harm. "[I]ntentional discrimination is a different kind of harm, a serious affront to personal liberty." *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020, 1043 (9th Cir. 2003). "Freedom from discrimination on the basis of race or ethnicity is a fundamental human right recognized in international instruments to which the United States is a party, and the intentional deprivation of that freedom is highly reprehensible conduct." *Id.* (citing International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force for the United States Nov. 20, 1994)); *see also Romano v. U-Haul Int'l*, 233 F.3d 655, 673 (1st Cir. 2000) (finding that plaintiff's termination on the basis of her sex was "more reprehensible than would appear in a case involving economic harms only"); *Zarcone v. Perry*, 572 F.2d 52, 55 (2d Cir. 1978) ("It cannot be that it is less important to deter intentional deprivations of fundamental constitutional rights . . . than it is to deter intentional injuries to personal property interests.").

As Congress and commentators alike have observed, "the harms women and religious and racial minorities suffer as a consequence of the various types of intentional discrimination are the same," and they include "humiliation; loss of dignity; psychological (and sometimes physical) injury," and "damage to the victim's professional reputation and career." H.R. Rep. No. 102-40(I), at 65 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 603 ("Edwards Report"); *see also* Paul Brest, *Forward: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1, 8 (1976) ("Decisions based on assumptions of intrinsic worth and selective indifference inflict psychological injury by stigmatizing their victims as inferior. Moreover, because acts of discrimination tend to occur in pervasive patterns, their victims suffer especially frustrating, cumulative and debilitating injuries.").

Ultimately, the economic and non-economic injuries caused by discrimination harm society and betray the aspiration and promise of the Reconstruction Amendments. *See Zhang*, 339 F.3d at 1043 ("There can be no question of the importance of our society's interest in combating discrimination; this nation fought the bloodiest war in its history in part to advance the goal of racial equality, adding several amendments to the Constitution to cement the battlefield victory."). "[T]olerating racial discrimination and its effects constitutes an anathema to any claim that society is fair and just." Williams, 62 Geo. Wash. L. Rev. at 187-88.

Punitive damages are a critical tool for ensuring a fair and just society that does not tolerate illicit discrimination. Without robust and consistent imposition of punitive damages in appropriate cases, "tortfeasors lack adequate incentives to refrain from

or minimize harmful conduct because their expected liability will be less than their expected benefit." Timothy J. Moran, *Punitive Damages in Fair Housing Litigation: Ending Unwise Restrictions on a Necessary Remedy*, 36 Harv. C.R.-C.L. L. Rev. 279, 287 (2001). Punitive damages are thus important in discrimination cases because they compel those who engage in illicit discrimination to "internalize[] the full cost of the harm that [they] cause[] even when the conduct is not always detected." *Id.*

II. PUNITIVE DAMAGES ARE AN ESSENTIAL TOOL FOR DETERRING AND COMBATING ALL FORMS OF DISCRIMINATION

A. Numerous Civil Rights Statutes Rely on Punitive Damages To Deter and To Punish Discrimination

Clarifying the proper standard for imposing punitive damages in discrimination cases is important because Congress and the federal courts have applied a uniform standard for punitive damages to a variety of civil rights statutes, including 42 U.S.C. §§ 1981 and 1983, Title VII (42 U.S.C. § 1981a), the Fair Housing Act ("FHA") (42 U.S.C. § 3613(c)(1)), and the Americans with Disabilities Act of 1990 ("ADA"). *See Kolstad*, 527 U.S. at 534-38 (§ 1981a); *Wade*, 461 U.S. at 56 (§ 1983); *Quigley v. Winter*, 598 F.3d 938, 952-53 (8th Cir. 2010) (FHA); *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 441 (4th Cir. 2000) (§ 1981); *Criado v. IBM Corp.*, 145 F.3d 437, 445 (1st Cir. 1998) (ADA). Just as the same standard for punitive damages applies across numerous civil rights statutes, there is the same need to ensure that the threat of punitive damages remains genuinely available to deter and to punish all forms of intentional discrimination. *See* Edwards Report at 65, *reprinted*

in 1991 U.S.C.C.A.N. 603 ("Where the manifestations of prohibited conduct are the same, and the harms caused are the same, the remedies should be the same as well.").

The purposes of punitive damages in civil rights cases are principally to deter and to punish. Across all federal civil rights statutes, the "focus" in determining the propriety of punitive damages "is on the character of the tortfeasor's conduct – whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards." *Wade*, 461 U.S. at 54; *see Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 551 (10th Cir. 1999) ("The purpose of punitive damages is 'to punish what has occurred and to deter its repetition.'") (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21 (1991)). Moreover, punitive damages are intended to act as both a general and a specific deterrent – "to deter others as well as the particular defendant." *Zarcone*, 572 F.2d at 56.

B. Punitive Damages Are Crucial to Enforcing Federal Civil Rights Statutes

Robust enforcement of the twin goals of punishment and deterrence is crucial to the success of federal civil rights statutes to remedy and eradicate discrimination. Punitive damages turn on "the actor's state of mind." *Kolstad*, 527 U.S. at 535. It is a defendant's reprehensible mental state of malice or callous indifference resulting in deliberate discrimination that must be deterred. *See id.* at 538 ("Conduct warranting punitive awards has been characterized as 'egregious,' for example, *because* of the defendant's mental state."). Often, it is only punitive damages that can deter conduct that springs from a malicious state of mind.

Punitive damages ensure that the total financial impact of a plaintiff's successful discrimination lawsuit will deter future conduct by a defendant with a malicious or callous mental state and a proven willingness to engage in illicit discrimination. *See* Edwards Report at 70, *reprinted in* 1991 U.S.C.C.A.N. 608 ("Data suggests that employers do indeed implement measures to interrupt and prevent employment discrimination when they perceive that there is increased liability.") (quoting "Dr. Freada Klein, one of the foremost experts on the sexual harassment in the workplace and a consultant to leading corporations"). Without appropriate deterrence in the form of punitive damages, a defendant with a proven willingness to discriminate may continue to do so whenever a plaintiff is unwilling or unable to establish substantial compensatory damages. *See Swinton v. Potomac Corp.*, 270 F.3d 794, 819 (9th Cir. 2001) ("But for [plaintiff]'s decision that he couldn't take it any longer and thus had to quit, nothing in the record suggests that [defendant] would have done anything to address a workplace replete with racial and ethnic slurs . . . . The fact that the harm from unchecked racial harassment occurring day after day cannot be calculated with any precision does not deflate its magnitude.").

Compensatory damages vary from case to case and address the economic harm to a plaintiff; they do not address the underlying reprehensibility of a defendant's mental state that led to the specific harms suffered by the plaintiff – and perhaps countless other silent victims. Depending on a number of factors, a defendant's reprehensible state of mind may or may not result in damages of any significance to the defendant. Sometimes a defendant's reprehensible

mental state results in significant compensatory damages to the plaintiff, and sometimes it does not; sometimes a defendant's reprehensible mental state is manifested in overt discrimination, and sometimes the discrimination is difficult to detect;[2] and sometimes a plaintiff is willing to endure a lengthy lawsuit to vindicate her rights, and sometimes she is not. *See* Moran, 36 Harv. C.R.-C.L. L. Rev. at 284-96 (discussing the importance of punitive damages to deter discrimination in light of the difficulty of obtaining meaningful compensatory awards).

Indeed, scholars recognize that "[c]ompensatory damages are insufficient, and punitive damages necessary, to deter wrongful conduct in at least four instances," all of which pervade discrimination lawsuits:

> (1) when the harmful conduct is not always detected by the victim;
>
> (2) when the probability of recovery is low and does not offer an adequate incentive for every victim (or her attorney) to file suit;
>
> (3) when the harm that is recoverable through compensatory damages does not fully capture the harm caused by the conduct; and
>
> (4) when the wrongdoer derives illicit benefits from the conduct that exceed the value of the

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[2] *See, e.g., Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 645 (2007) (Ginsburg, J., dissenting) ("Pay disparities often occur . . . in small increments; cause to suspect that discrimination is at work develops only over time. Comparative pay information, moreover, is often hidden from the employee's view. . . . Small initial discrepancies may not be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves.").

> harm when measured by compensatory damages alone.

Id. at 285; *see generally* Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1 (1982).

Both Congress and this Court have recognized this important function of punitive damages, and the Fourth Circuit's decision here risks undermining it. One of the reasons Congress added a punitive damages remedy to Title VII was that, "[a]ll too frequently," the statute left "prevailing plaintiffs without remedies for their injuries and allow[ed] employers who discriminate to avoid any meaningful liability." Edwards Report at 68, *reprinted in* 1991 U.S.C.C.A.N. 606; *see* Joseph A. Seiner, *The Failure of Punitive Damages in Employment Discrimination Cases: A Call for Change*, 50 Wm. & Mary L. Rev. 735, 749-50 (2008) (reviewing legislative history and concluding that "the addition of new remedial relief to Title VII was a critical component of deterring future wrongful conduct and encouraging 'private enforcement' of the statute"). This Court, meanwhile, has recognized that, where a defendant's egregious conduct or mental state is difficult to detect or results in small compensatory damages, a greater magnitude of punitive damages can be appropriate to ensure adequate deterrence. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996) ("Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value

of noneconomic harm might have been difficult to determine.").[3]

The Fourth Circuit's decision in this case disregards this Court's punitive damages rulings and weakens the important role of punitive damages in protecting citizens against unlawful discrimination. *Amici* urge the Court to grant the petition to address this important issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[3] In accordance with those principles, courts routinely uphold punitive damages awards in discrimination cases bearing those characteristics. *See, e.g., Swinton*, 270 F.3d at 817-19 (where plaintiff was subject to "daily abuse featuring . . . perhaps the most offensive and inflammatory racial slur in English, . . . a word expressive of racial hatred and bigotry," and his employer "did absolutely nothing to stop it," upholding punitive damages to provide adequate deterrence in light of the fact that plaintiff "was paid only $8.50 per hour," "the personal distress and indignity visited upon [plaintiff] are difficult to calculate," and, "[b]ut for" plaintiff's lawsuit, nothing suggested that defendant would have addressed its pervasive discrimination) (internal quotation marks omitted); *Deters v. Equifax Credit Info. Servs., Inc.*, 202 F.3d 1262, 1266-67, 1273 (10th Cir. 2000) (where plaintiff was subjected to pervasive sexual harassment, upholding punitive damages to provide adequate deterrence in light of "small amount of economic damages" for "injury [that] is primarily personal").

Respectfully submitted,

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