No. 09-___

IN THE
Supreme Court of the United States

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

Petitioners,

v.

DYNCORP INTERNATIONAL LLC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A plaintiff who prevails on a claim of race discrimination in contracting under 42 U.S.C. § 1981 may obtain punitive damages if the defendant acted with malice or with reckless indifference to the plaintiff's rights under federal law. *Kolstad v. American Dental Association*, 527 U.S. 526 (1999). The question presented is:

Whether evidence of overt and egregious intentional discrimination on the basis of race can support an inference that the defendant acted with malice or with reckless indifference to the plaintiff's federally protected rights, as the First, Second, Third, Sixth, Eighth, and Ninth Circuits have held, or is to be ignored in review of the award, as the Fourth Circuit ruled here.

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

RULE 29.6 DISCLOSURES

Petitioner Worldwide Network Services, LLC, has no parent corporation, and no publicly owned corporation owns ten percent or more of its stock. Petitioner Worldwide Network Services International, FZCO, is wholly owned by Worldwide Network Services, LLC, and no publicly owned corporation owns ten percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Worldwide Network Services, LLC, and Worldwide Network Services International, FZCO, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 4a) and its order denying rehearing (App., *infra*, 1a) are unreported. The order and judgment of the district court (App., *infra*, 64a) are also unreported.

JURISDICTION

The Fourth Circuit denied the timely petition for rehearing on March 29, 2010. App., *infra*, 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1981 of Title 42 of the United States Code provides:

> **§ 1981. Equal rights under the law**
>
> (a) Statement of equal rights
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of

every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

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

STATEMENT OF THE CASE

Following a trial in the Eastern District of Virginia, a jury found the defendant liable for race discrimination in contracting in violation of 42 U.S.C. § 1981, based on extensive evidence of overt racial discrimination, express racial epithets, racially offensive caricatures of African Americans by high-level executives at corporate meetings and an official corporate function. The jury awarded contract, compensatory, and punitive damages to the plaintiffs. In a decision in which the panel divided three different ways, the Court of Appeals for the Fourth Circuit overturned the punitive damages award for insufficient evidence of *mens rea*. In so ruling, the court of appeals declined to address or consider whether the egregiousness of the discriminatory conduct itself would support a jury inference of intentional or reckless indifference to federally protected rights. That ruling conflicts with the rulings of six other circuits and with binding precedent from this Court.

1. Petitioners Worldwide Network Services, LLC, and Worldwide Network Services International, FZCO (collectively, "WWNS") specialize in the deployment of information technology and communications networks in high-risk environments, including theaters of military conflict like Iraq and Afghanistan. C.A. J.A. 586-587. Walter Gray and Reginald Bailey, both of whom are African Americans, head the company, which is certified by the Small Business Administration as a Section 8(a) disadvantaged company. 15 U.S.C. § 637(a); C.A. J.A. 41, 592-594. In 2004, respondent DynCorp awarded WWNS a four-year contract to provide

communication and information technology services for DynCorp's "CIVPOL" contract with the State Department, which supported civilian police programs in Iraq and Afghanistan. C.A. J.A. 42, 596, 1234-1235, 1606-1607.

Although WWNS had received "excellent" and "good" reviews for its work, DynCorp's and WWNS's relationship deteriorated when DynCorp brought in new management in December 2005. App., *infra*, 10a. The new Information-Technology Manager was a South African, Leon DeBeer, who called Mr. Gray a "nigger," "kaffir," and a "bush baby." App., *infra*, 12a; C.A. J.A. 872, 931.[1] In addition, "two to three times a week," DeBeer would state that "people of Anglo descent"

> had made a grave error, that error being that we had taken the black man as a youth and attempted to clothe him and send him to school, and that we were quite erroneous in this, and that the proper role of the black man was to go out and kill a lion, proving his manhood, at which point he should be put to work to feed his family * * * and mated with a woman.

App., *infra*, 12a; C.A. J.A. 874. He also said that the end of WWNS's contractual relationship with DynCorp "was being manufactured by" persons within DynCorp. App., *infra*, 12a; C.A. J.A. 869. In addition, Richard Walsh, the Vice-President of Operations, called Gray "a stupid black mother* * *."

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[1] In South Africa, "kaffir" is a highly derogatory term used to refer to a black person. App., *infra*, 12a.

App., *infra*, 11a-12a; C.A. J.A. 1723. The Division President, Robert Rosenkranz, fired DynCorp's only minority executive, a decision that involved "discriminatory things." App., *infra*, 12a; C.A. J.A. 1019.

DynCorp's actions went far beyond ordinary contract termination between two businesses, and included driving a WWNS manager from his workplace at gunpoint, stealing all of WWNS's non-managerial employees and thus crippling its ability to continue to function as a business, and abruptly halting all payments to WWNS for already completed work without explanation, even though the federal government had paid DynCorp for the work. App., *infra*, 11a. Because almost all of the company's business came from DynCorp, those actions "nearly destroyed WWNS." App., *infra*, 11a.

DynCorp's high-level executives then "celebrated WWNS's demise during a company dinner" attended by high-level executives. App., *infra*, 12a. At that dinner, a senior executive read a fictionalized letter from Mr. Gray in Ebonics – that is, like "the character on Fat Albert." C.A. J.A. 1029. "[I]t was something like * * * we-ba going-ba, do-ba, thank-you ba." C.A. J.A. 1023. All the while, Vice-President Walsh was "laughing" and "happy," while Division President Rosenkranz "laugh[ed] his a** off." App., *infra*, 13a; C.A. J.A. 1029. Indeed, all of the executives laughed "continuously" throughout the presentation. C.A. J.A. 1152. Walsh was officially presented with a T-shirt reading "WWNS – I took them down, and all I got was this lousy T-Shirt." App., *infra*, 12a; C.A. J.A. 1139.

2. WWNS filed suit against DynCorp under, *inter*

alia, 42 U.S.C. § 1981. At trial, WWNS introduced evidence establishing that DynCorp's racially motivated breach of contract and targeted destruction of WWNS had nearly destroyed the company, causing many of its more than 100 employees to lose their jobs, and financially devastating the company. App., *infra*, 11a; C.A. J.A. 587, 670-672, 792-793, 1599-1600. WWNS also introduced evidence that it had warned DynCorp through a "cease-and-desist" letter prior to the expiration of the CIVPOL task orders that DynCorp's actions "have been racially-motivated in violation of anti-discrimination laws." App., *infra*, 60a.

After an eleven-day trial, the jury found DynCorp liable and awarded $3.42 million in compensatory damages under Section 1981.[2] The district court also entered judgment as a matter of law for WWNS on more than $2.5 million in unpaid invoices for completed work. App., *infra*, 67a. The jury awarded $10 million in punitive damages. App., *infra*, 66a.

3. A Fourth Circuit panel that was divided three ways affirmed the jury's liability determination, but reversed the punitive damages award. As relevant here, the majority expressly noted that "the record contains abundant evidence of racial animus," App., *infra*, 30a, and that the evidence supported a finding that DynCorp's stated reason for the termination "was merely a pretext for discrimination," App., *infra*, 26a.

Judge Duncan, nevertheless, went on to hold that

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[2] The jury also awarded $1.6 million for breach of contract, and $83,000 for tortious interference with contract under state law.

the punitive damages award should be vacated on the ground that "WWNS has been unable to cite any evidence that DynCorp * * * perceived [a] risk that [its] decision would violate federal law." App., *infra*, 34a. In so ruling, Judge Duncan ignored WWNS's argument (C.A. Br. 40-41) that the egregiousness of the overt discrimination evidenced DynCorp's intentional or reckless indifference to WWNS's federally protected rights.

Judge Niemeyer dissented from the majority's decision upholding the liability verdict under Section 1981. But, "to provide Judge Duncan with a majority on her discussion of punitive damages, [he] join[ed] her discussion of punitive damages in Parts II(D)(1) and (2)," but not part 3, which remanded for retrial a state-law punitive damages question. App., *infra*, 41a.

Judge Jones joined Judge Duncan's decision upholding the liability determination, but dissented from vacatur of the punitive damages award. He concluded that the egregious discrimination in this case provided "ample evidence" that DynCorp terminated its contractual relationship with WWNS "in the face of knowledge that 'it may be acting in violation of federal law.'" App., *infra*, 59a-60a (quoting *Kolstad v. American Dental Association*, 527 U.S. 526, 535 (1999)). Judge Jones further noted that the record contained additional evidence of DynCorp's malice or reckless indifference to federal law in the form of the cease-and-desist letter, a letter confirming that DynCorp's decisionmakers were on notice "regarding [DynCorp's] wrongful and improper conduct in terminating [WWNS's] services under the CivPol subcontract," and an internal DynCorp

PowerPoint presentation documenting the executives' knowledge that "WWNS is planning legal action against [DynCorp] based on racial discrimination." App., *infra*, 60a; C.A. J.A. 2694, 2788.

WWNS's petition for rehearing and rehearing en banc was denied. App., *infra*, 1a.

REASONS FOR GRANTING THE WRIT

The refusal of the sharply divided court of appeals to accept egregious "evidence of racial animus" as supporting a finding of malice or reckless indifference to federally protected rights squarely conflicts with binding precedent from this Court and with the decisions of numerous other circuits on a question of significant and recurring importance to the enforcement of civil rights laws. Moreover, this case, with its record evidence of overtly racist comments and caricatures made by senior level executives of a major corporation, cleanly presents that question for review because the court of appeals itself accepted that the evidence of racial discrimination was "abundant," App., *infra*, 30a, yet deemed it irrelevant to the punitive damages question. Accordingly, this Court's review is warranted.

I. THE COURT OF APPEALS' REJECTION OF OVERT DISCRIMINATORY CONDUCT AS EVIDENCE OF MALICE OR RECKLESS INDIFFERENCE TO FEDERAL RIGHTS SQUARELY CONFLICTS WITH THIS COURT'S PRECEDENT

In *Smith v. Wade*, this Court held that punitive damages are available under 42 U.S.C. § 1983 "when

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." 461 U.S. 30, 56 (1983). In so holding, this Court relied on the common law tort standard and could "discern no reason why a person whose federally guaranteed rights have been violated should be granted a more restrictive remedy than a person asserting an ordinary tort cause of action." *Id.* at 48-49. There is no dispute in this case that the same standard governs claims arising under 42 U.S.C. § 1981.[3]

In *Kolstad v. American Dental Association*, 527 U.S. 526 (1999), this Court held that, to satisfy that standard, the defendant "must at least discriminate in the face of a perceived risk that its actions will violate federal law," *id.* at 536.[4] While egregious acts are not a prerequisite to punitive damages, *id.* at 534-535, this Court specifically held that "egregious misconduct is evidence of the requisite mental state," *id.* at 535, and that "egregious or outrageous acts may serve as evidence supporting an inference of the requisite 'evil motive,'" *id.* at 538. Accordingly, "evidence of an employer's egregious behavior would provide one means of satisfying the plaintiff's burden to 'demonstrat[e]' that the employer acted with the

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[3] *See, e.g., Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 441 (4th Cir. 2000); *Berger v. Iron Workers Reinforced Rodmen*, 170 F.3d 1111, 1139 n.17 (D.C. Cir. 1999) (en banc); *Yarbrough v. Tower Oldsmobile, Inc.*, 789 F.2d 508, 514 (7th Cir. 1986).

[4] The statute at issue in *Kolstad*, 42 U.S.C. § 1981a(b)(1), frames the standard as "malice or * * * reckless indifference to the federally protected rights of an aggrieved individual." *See Kolstad*, 527 U.S. at 535 (Congress looked to *Smith* in adopting language in Section 1981a).

requisite 'malice or * * * reckless indifference.'" *Id.* at 539 (citation omitted).

In this case, the court of appeals acknowledged the "abundant" evidence of overt racial discrimination, App., *infra*, 30a, but refused to factor it into its punitive damages analysis, instead vacating the jury's award because of the perceived absence of direct evidence about DynCorp's high-level executives' familiarity with legal rules. App., *infra*, 34a-35a. Indeed, the court of appeals' analysis of its own caselaw outlines a pattern of Fourth Circuit decisional law that upholds punitive damages awards only when the record contains direct evidence that the particular individuals' were "specifically aware" of the state of the law in the form of posters, training, or individualized review of legal documents. *Id.* at 34a (quoting *EEOC v. Federal Express Corp.*, 513 F.3d 360, 373 (4th Cir. 2008)). When the evidence of malice or reckless indifference instead takes the form of "severe or pervasive" discrimination (whether race or sex discrimination), the Fourth Circuit vacates punitive damages awards. App., *infra*, 34a (discussing and quoting decision vacating punitive damages award in *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325 (4th Cir. 2003) (en banc), notwithstanding the "severe or pervasive" sex discrimination suffered in that case). *See also Anderson v. G.D.C., Inc.*, 281 F.3d 452, 460 (4th Cir. 2002) (considering egregiousness of misconduct only in conjunction with direct evidence that employer knew such conduct might violate federal law).

The Fourth Circuit's persistent refusal to consider the egregiousness of discriminatory conduct as evidence of the requisite mental state for punitive

damages has now culminated in this case, where even Fortune 1000 Presidents and Vice-Presidents are held as a matter of law to be presumptively ignorant of their duty not to destroy a company because of its ownership by "nigger[s]," "kaffir[s]," and "bush bab[ies]." App., *infra*, 12a; C.A. J.A. 872, 931.

That rule that egregious evidence of racism itself cannot establish the requisite mental state squarely conflicts with *Kolstad* and, indeed, defies the Court's holding that "egregious behavior would provide one means of satisfying the plaintiff's burden," 527 U.S. at 539; *see* WWNS C.A Br. 40 (citing and quoting relevant *Kolstad* language). What this Court in *Kolstad* understood – and the Fourth Circuit overlooked in this case and *Ocheltree* – is that "deterrence of future egregious conduct is a primary purpose of * * * punitive damages," *Smith*, 461 U.S. at 49, and highly egregious "acts of intentional discrimination are just the sort of conduct that punitive damages aim to deter," *DiMarco-Zappa v. Cabanillas*, 238 F.3d 25, 38 (1st Cir. 2001); *see also Sockwell v. Phelps*, 20 F.3d 187, 192 (5th Cir. 1994) ("The purpose of punitive damages under § 1983 is to deter future egregious conduct in violation of constitutional rights."); *United States for Use and Benefit of Evergreen Pipeline Constr. Co., Inc. v. Merritt Meridian Constr. Corp.*, 95 F.3d 153, 160 (2d Cir. 1996) (New York law) ("[T]he purpose of awarding punitive damages is * * * to punish the defendant and to deter egregious conduct.").

The court of appeals made no effort to reconcile its decision with *Kolstad*, woodenly forging ahead down the path broken by *Ocheltree* and simply

disregarding the very evidence that this Court has held can be critical and sufficient evidence to support punitive damages. Indeed, the departure from controlling precedent is so stark in a case of such high-level and high-profile race discrimination as to warrant summary reversal under *Kolstad*.

To be sure, the 67-page decision in this case was unpublished. But that is because the court implemented once again the rule it adopted in its en banc decision in *Ocheltree*, which held that malice or reckless indifference to federally protected rights could not be inferred "either directly or by imputation" by the "severe or pervasive" nature of the discrimination itself. *Ocheltree*, 335 F.3d at 327, 336; *see* App., *infra*, 34a (applying and following *Ocheltree*).

With some frequency, this Court grants certiorari to review unpublished decisions, particularly when, as here, they reflect the continued application, expansion, and entrenchment of a prior published decision that conflicts with the law of this Court or of other circuits, *see infra*. *See, e.g.*, *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 1133 (U.S. Jan. 15, 2010) (No. 09-448); *Krupski v. Costa Crociere*, 130 S. Ct. 1133 (U.S. Jan. 15, 2010) (No. 09-337); *Hertz Corp. v. Friend*, 129 S. Ct. 2766 (U.S. June 8, 2009) (No. 08-1107); *Ricci v. DeStefano*, 129 S. Ct. 893, 894 (U.S. Jan. 9, 2009) (Nos. 07-1428 & 08-328); *Flores-Figueroa v. United States*, 129 S. Ct. 457 (U.S. Oct. 20, 2008) (No. 08-108); *Melendez-Diaz v. Massachusetts*, 552 U.S. 1256 (U.S. Mar. 17, 2008) (No. 07-591).

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH THE LAW OF OTHER CIRCUITS

The Fourth Circuit's refusal in this case, as in its en banc *Ocheltree* decision, to consider the egregiousness of discriminatory conduct as relevant evidence supporting a finding of malice or reckless indifference to federal rights directly conflicts with the decisions of other courts of appeals, which have hewed to this Court's direction in *Kolstad* and held that direct evidence of the decisionmaker's knowledge of federal law is not required. In the Second Circuit, "[a] plaintiff may establish the requisite state of mind for an award of punitive damages with evidence (1) that the defendant 'discriminate[d] in the face of a perceived risk that its actions . . . violate[d] federal law,' *or* (2) of 'egregious or outrageous acts' that 'may serve as evidence supporting an inference of the requisite evil motive.'" *United States v. Space Hunters, Inc.*, 429 F.3d 416, 427 (2d Cir. 2005) (alterations and omission in original) (citations and some internal quotation marks omitted). Thus, had this case arisen in the Second Circuit, the damages award would have been affirmed.

The case also would have come out exactly the opposite in the Third Circuit, which has ruled that "recklessness and malice may be inferred when a manager responsible for showing and renting apartments repeatedly refuses to deal with African-Americans about the apartment, and misrepresents the apartment's availability. *Alexander v. Riga*, 208 F.3d 419, 431 (3d Cir. 2000). Likewise, the Eighth Circuit holds that "a reasonable jury could have found Hudson's behavior 'sufficiently abusive' to

manifest the requisite malice or reckless disregard for Ogden's rights." *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1010 (8th Cir. 2000). So too in the First and Ninth Circuits, and apparently the Sixth Circuit as well. *See DiMarco-Zappa v. Cabanillas*, 238 F.3d 25, 38 (1st Cir. 2001) ("The extent of federal statutory and constitutional law preventing discrimination on the basis of ethnicity or race suggests that defendants had to know that such discrimination was illegal, and that in misgrading DiMarco's test they exhibited 'reckless and callous indifference' to her federal rights, if not evil intent."); *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 515-516 (9th Cir. 2000) (evidence that employer took retaliatory actions and engaged in continuing effort to cover up campaign against employee supported punitive damages award); *Jeffries v. Wal-Mart Stores, Inc.*, 15 Fed. App'x 252, 265, 2001 WL 845486, at *9 (6th Cir. 2001) ("[T]he jury could have concluded that Wal-Mart engaged in a pattern of calculated retaliatory conduct so egregious as to be in reckless disregard of Jeffries's right to be free from retaliation.").

Federal prohibitions on race and gender discrimination are national laws enacted by Congress to combat national problems. Their operation should not vary based on geographical boundaries. That a major corporation's high level officers still felt free in 2005-2006 to engage in the type of overt and egregious racially discriminatory conduct aimed at *destroying* a minority-owned business that was displayed in this case underscores that the deterrence of punitive damage awards is needed as much in the Fourth Circuit as in the First, Second, Third, Sixth, Eighth, and Ninth Circuits. The Fourth

Circuit's denial of rehearing en banc, moreover, demonstrates that only this Court's review can restore the needed uniformity in enforcement and deterrence.

The question on which the circuits are in conflict, moreover, is an important and recurring question of law that cuts across multiple federal anti-discrimination laws, as the Fourth Circuit's pattern of rejecting egregious-discrimination evidence documents. That is because the same punitive damages standard governs numerous civil rights statutes, including Title VII and the Americans with Disabilities Act, 42 U.S.C. § 1981a(b)(1), and 42 U.S.C. §§ 1981 and 1983. *See Kolstad*, 527 U.S. at 535-536; *Smith*, 461 U.S. at 56. Tens of thousands of cases are filed under those laws each year in federal court alone. *See* Admin. Office of U.S. Courts, *Federal Judicial Caseload Statistics: March 31, 2009*, App. Table C-2 (2009). Indeed, both this Court's grant of review in *Kolstad* and the breadth of the circuit conflict documents the frequency with which the issue arises and its importance to the day-to-day enforcement of vital civil rights laws. This Court's resolution of the conflict thus warrants certiorari review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. In the alternative, the judgment should be summarily reversed in light of this Court's decision in *Kolstad v. American Dental Association*, 527 U.S. 526 (1999).

Respectfully submitted,

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