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No. 04-593

IN THE

# Supreme Court of the United States

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Domino's Pizza, LLC; Domino's Pizza, Inc.;
and Debbie Pear,

*Petitioners*,

v.

John McDonald.

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On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit

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## BRIEF FOR THE RESPONDENT

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## QUESTIONS PRESENTED

1. Can an individual who is the actual target of a discriminator's racially motivated breach of a contract bring suit under 42 U.S.C. 1981 for the damages he suffers even if he is not a formal party to the contract?

2. Can an individual who is the direct victim of a discriminator's racially motivated impairment of contractual relationships he has with others bring suit under 42 U.S.C. 1981 even if the discriminator is not also a party to those contracts?

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## BRIEF FOR THE RESPONDENT

## STATEMENT OF THE CASE

Respondent John McDonald is an African American entrepreneur who lives in Nevada. McDonald was the sole officer, director, and stockholder of JWM Investments, Inc., a Nevada corporation he formed in 1996 for the purpose of developing and leasing real property.

1. Because the district court dismissed respondent's complaint for failure to state a claim, see Pet. App. 7, the following allegations from the complaint, *id* 11-14, must be taken as true. In January 1997, petitioner Domino's Pizza, Inc. ("Domino's") entered into four agreements with McDonald's corporation, each for the construction of a restaurant in or around Las Vegas that Domino's would subsequently lease and operate. To McDonald's information and belief, he was the only African-American developer used by Domino's to construct restaurants in the southwestern United States.

Petitioners breached several key provisions of the contracts. First, Domino's failed to execute estoppel certificates necessary for JWM to obtain the bank financing it needed to continue performing the contracts. Second, Domino's demanded that respondent either amend or abandon three of the contracts. Third, Domino's failed to pay rent on completed restaurants it had already occupied.

As McDonald sought to perform and enforce the terms of the contracts, he was met with hostility and racial animus. When McDonald telephoned petitioner Pear, the real estate negotiator for Domino's, to reiterate the need for Domino's to satisfy its obligation to provide the estoppel certificates, Pear told McDonald she would see to it that he personally would experience serious financial repercussions and lose his business and financial position if he didn't voluntarily terminate his dealings with Domino's after completing the first of the four restaurants. McDonald then reminded Pear

that he had entered into four contracts with Domino's and informed her that he intended to see them through to completion. Pear responded "I don't like dealing with you people anyway." She also announced that she would personally see to it that Domino's did no further business with McDonald and threatened to use company attorneys to bury him if he initiated a court action to enforce JWM's contracts with Domino's. The conversation concluded with Pear informing McDonald that he "didn't have a chance in hell" of winning. Subsequently, Domino's routed McDonald's calls to Vice President and General Counsel Joe Graziani. Told of petitioner Pear's discriminatory treatment, Graziani refused to conduct any investigation. Graziani agreed to honor Domino's obligations only if McDonald acquiesced in amendments to the contracts favorable to Domino's. Because McDonald insisted on full performance of the existing contracts, Domino's continued to deny the estoppel certificates to which JWM was entitled.

Despite petitioners' refusal to satisfy their contractual promises, McDonald performed his obligations under the contracts. Fulfilling the terms proved to be costly, however, as Domino's made good on Pear's threats to financially ruin him. As a result of being denied the estoppel certificates, McDonald had to forgo numerous construction offers, lost financing for projects not yet started, and was unable to realize potential sales of real property. Because his business depended entirely on his ability to secure land and then develop, sell, or lease it, petitioners' refusal to sign the certificates locked up JWM's resources, thus jeopardizing McDonald's company.

McDonald's financial situation was further damaged when Domino's failed to pay rent on the completed restaurants it already occupied and when its agent, Pear, made derogatory statements about McDonald to Steward Olson, the chief lending officer for Nevada First Bank, who had

formerly agreed to finance construction of two of the restaurants.[1] According to Olson, Pear's statement led him to believe that McDonald was dishonest and untrustworthy. Opposition to Motion to Dismiss at 4. With few resources and fewer prospects, JWM was forced by petitioners' misconduct to file for Chapter 11 bankruptcy (*In Re JWM Investments, Inc.,* Case No. 00-19303 LBR, U.S. Bankruptcy Court, District of Nevada).

As a result of petitioners' misconduct, McDonald's net worth decreased by several million dollars. For example, he lost $500,000 because he had personally pledged certificates of deposit to obtain loans on which JWM later defaulted. Because of the bankruptcy of his wholly owned corporation and personal defamation, his credit is now ruined and he has been unable to finance other business ventures. Affidavit of John McDonald in Support of Opposition to Motion to Dismiss ¶ 5. McDonald has also suffered pain, humiliation, and emotional distress. *Id.*

2. In 2002, McDonald filed suit under 42 U.S.C. 1981 against petitioners Domino's Pizza, LLC; Domino's Pizza, Inc.; and Debbie Pear. The complaint alleged that petitioners' actions constituted intentional racial discrimination against him "that occurred during the term of a contract." Pet. App. 16 (Compl. ¶ 44). Respondent sought injunctive and monetary relief, including "front pay, back pay and other lost benefits," compensatory damages for pain and suffering and emotional distress, punitive damages, costs and attorney's fees. *Id.* 17 (Compl. ¶¶ 2-5).

Petitioners moved to dismiss the complaint on the grounds that McDonald had no right to recover under section 1981 because his company, JWM Investments, Inc., was the

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[1] The following allegations were made in respondent's Opposition to Defendants' Motion to Dismiss (Document 11 on the district court docket sheet reprinted in the Joint Appendix) [hereinafter "Opposition to Motion to Dismiss"].

formal signatory of the contract with Domino's. The district court agreed, and in an unpublished order, granted the motion to dismiss. *Id.* 3-7.

3. On appeal, the Ninth Circuit unanimously reversed. Pet. App. 1-2. The court of appeals recognized that McDonald could not bring suit for injuries suffered by JWM, but under its longstanding precedent, see *Gomez* v. *Alexian Bros. Hosp.*, 698 F.2d 1019 (CA9 1983), it held that McDonald was entitled to sue under section 1981 for injuries he had suffered as the actual target of petitioners' discrimination that were "distinct from [those] suffered by JWM Investments, Inc." Pet. App. 2. Subsequently, the court of appeals denied Domino's petition for rehearing and petition for rehearing en banc. *Id.* 8.

## SUMMARY OF ARGUMENT

1. Section 1981 was enacted to protect individuals' "personal right to engage in economically significant activity free from racially discriminatory interference." *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 662 (1987). In this case, petitioners directly targeted respondent, a black entrepreneur, refusing to fulfill their contractual obligations with his wholly owned corporation because of racial animus against him. Thus, contrary to petitioners' insinuations, the injuries giving rise to this case are not "collateral," Petr. Br. 13, and the rights respondent asserts are not "derivative," *id.* at 20. McDonald is not suing as a "bystander" to racial discrimination, *id.* at 37, nor because he "happens" to have been the owner and operator of JWM. *Id.* at 8.

The core of petitioners' argument is that they need not answer under section 1981 for their intentional racial discrimination against respondent because he chose, like countless other entrepreneurs, to conduct his business in corporate form. Even though McDonald negotiated, signed, performed, and sought to enforce the contract, petitioners insist that it somehow was not his "own," *id.* at 14, and

therefore even as the actual target of their racial animus, he cannot bring suit.

Petitioners' cramped construction of section 1981 finds no support in its text, structure, history, or purposes and it is contradicted by decades of precedent.

First, by its plain terms, section 1981's protections are not confined to the formal signatories to a contract. Section 1981 protects the right of individuals to "make and enforce contracts," without limiting that right to "parties" making and enforcing "their own" contracts. The text also expressly protects the "performance" of a contract, which will frequently be carried out by individuals who are not themselves formal signatories to a contract but whose participation is integral to the contractual relationship.

Second, as this Court has recognized and Congress has emphatically reaffirmed, the focus of section 1981 lies not in assuring that private parties comply with the common law of contracts, but rather in securing equal economic opportunity, by imposing a nonnegotiable duty to refrain from intentional racial discrimination. The remedies available under section 1981 (unlike those in contract law), are defined not by the expectations of the parties, but by the full harm the intentional tortious discrimination has caused – and they include personal, as well as economic, damages. Consistent with the law's treatment of torts (but not breaches of contract) committed by a corporate officer, courts have imposed *individual* liability for violating section 1981.

Third, this Court's precedents firmly establish that persons who are the direct targets of racial discrimination can bring suit without regard to contractual formalities. This Court's first case allowing a section 1981 suit to proceed against a private defendant, *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973), reinstated the claims of an African-American family subjected to a private club's racially discriminatory guest policy, even though the relevant contract was not "their own," but rather bound the club and

their white would-be hosts. *Runyon* v. *McCrary*, 427 U.S. 160 (1976), likewise upheld an award of separate damages to a plaintiff – a two-year-old private school applicant – who was the target of the intentionally discriminatory admission policy, although his parents (who were awarded separate damages) were the would-be contracting party. And *Goodman* v. *Lukens Steel*, 482 U.S. 656 (1987), sustained a claim brought by black steelworkers against a union for its intentionally discriminatory refusal to enforce provisions of a contract to which those steelworkers were not parties.

Section 1981 and 42 U.S.C. 1982 started out as adjacent clauses of a single sentence in the Civil Rights Act of 1866. This Court's section 1982 decisions reinforce the conclusion that section 1981 covers cases like respondent's. For example, in *Sullivan* v. *Little Hunting Park, Inc.* 396 U.S. 229 (1969), this Court expressly rejected a privity argument indistinguishable from the one advanced by petitioners here, awarding damages both to the African-American family targeted by the defendant's discrimination *and* to the white individual who was the formal signatory to the contract with the discriminator. And in *Shaare Tefila Congregation* v. *Cobb*, 481 U.S. 615 (1987), this Court permitted recovery by both the corporate owner of a synagogue desecrated for racial reasons and by the individual congregants who suffered their own personal injuries as a result of the vandalism.

Fourth, petitioners' proposed restriction of section 1981 poses an unacceptable danger to the core interests protected by that statute. Petitioners' construction would limit a discriminator's liability for the same harm caused by the same actions with the same intent because of the fortuity that the contract was signed by a corporation rather than by a sole proprietor. For a variety of pragmatic reasons, corporations may decline to sue even when their workers are the actual targets of intentional discrimination by parties with whom the corporation has contracted. Remarkably, Domino's argues that individual victims of discrimination should not be

permitted to sue because that would interfere with the discretion of a corporation to placate wrongdoers by ignoring their illegal actions. To the contrary, the danger that corporations will do this is precisely why individuals *should* be able to sue.

Nor should this Court be swayed by the ill-considered suggestion that the statute's protections should be denied to those who "decide to do business" through the corporate form. Although state and federal law attach certain benefits and burdens to incorporation, forfeiture of the personal protections of section 1981 has never been one of them. Were that the law, minority businesspeople unwilling to forfeit those protections would be forced to compete on a permanently unequal basis – literally the antithesis of the level playing field that Congress intended section 1981 to foster. Nor is there the least merit in the idea that holding Domino's liable for intentional discrimination would enable McDonald to "have it both ways": in reality, it is Domino's that is selective in its respect for the corporate form, lifting the veil of the legally "nonracial" JWM to discriminate against its owner-operator, but then seeking to invoke that very corporate formality to cut off liability for harm this intentional discrimination caused.

Giving effect to Congress' plain intention to protect individuals in McDonald's position carries no plausible danger of the open-ended liability that petitioners and their *amici* brandish. These slippery slope arguments have a common defect: willful blindness to the principle that distinguishes McDonald's case from the hypotheticals they pose. The plaintiff in this case was the actual, intended target of petitioners' discriminatory conduct. Recognizing his right to sue under section 1981 leaves no opening for suits based on injury as a result of racial discrimination directed against someone else.

2. It is settled law that the 1866 Civil Rights Act's prohibitions are not limited to *defendants* who were

contracting parties. Given the Reconstruction Congress's predominant concern with the Black Codes and other efforts, public and private, to forbid black people from entering into voluntary transactions with willing partners, petitioners cannot seriously dispute that the rights guaranteed by section 1981 are protected "against the actions of third parties," *Sullivan*, 396 U.S. at 237, as well as against those of formal signatories. Because the complaint's allegations establish that petitioners' racially discriminatory acts intentionally denied McDonald the rights and benefits of "the contractual relationship" he had with JWM, he has stated a claim under section 1981 against petitioners.

Rather than contend that third-party actions may never be the basis for section 1981 liability, petitioners contend, first, that respondent's complaint fails to allege that he had any contractual relationship with JWM and, second, that liability for section 1981 claims against discriminators who impair a plaintiff's contractual rights should be defined by and limited to the common-law tort of third party interference with contractual relations. Thus, after conceding that section 1981 provides a cause of action for an individual whose employer was persuaded by a defendant "to fire the employee, or to staff the employee on a different project, because of his race," Petr. Br. 33, they paradoxically suggest that section 1981 somehow does not reach discriminatory actions aimed at the contractual relationship for similarly racial reasons but directed at the minority employee.

Contrary to petitioners' assertions, the complaint includes numerous allegations that may – and at this stage of the proceedings, must – be read to assert a contractual relationship between JWM and McDonald. The complaint plainly describes an employment relationship between JWM and McDonald. Moreover, as the "owner" of the corporation, McDonald was necessarily party to a second contract with JWM, in his capacity as shareholder. To be sure, this latter contractual relationship does not entitle him to sue for injuries

to the corporation. But the injuries alleged in this complaint are not corporate. Rather they involve personal injuries to McDonald caused by discriminatory acts directed at him as a black small-business owner.

Nor is there any basis for concluding that Congress intended to limit section 1981 liability for impairment of a plaintiff's contractual relations to racially motivated instances of common-law tortious interference. The text of the statute contains not a hint of that limitation. To the contrary, an individual's ability to "perform" an employment contract is impaired when he is intimidated into abandoning it, and history shows the Reconstruction Congress to have been especially concerned about that sort of behavior.

## ARGUMENT

### I. Section 1981 Protects the Actual Targets of Contract-Related Discrimination Regardless of Whether They Contract Through Formal Intermediaries.

Section 1981 provides 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." 42 U.S.C. 1981. In construing section 1981 and the parallel provision of 42 U.S.C. 1982,[2] which originated in the same

[2] Section 1982 provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

Given that "[t]he operative language of both § 1981 and § 1982 is traceable" to the same sentence of the 1866 Civil Rights Act, this Court has consistently construed the statutes to reach the same types of defendants (the only difference being that section 1982 covers transactions involving real and personal property while section 1981 covers contracts more generally). *Runyon* v.

sentence of the Civil Rights Act of 1866, this Court has extended its protections to cover intentional racial discrimination to two classes of individuals. First, sections 1981 and 1982 protect targets of discrimination when they are actual or would-be contract signatories or property owners. See, *e.g.*, *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *Tillman* v. *Wheaton-Haven Recreational Ass'n*, 410 U.S. 431 (1973); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968). Second, sections 1981 and 1982 protect the actual targets of discrimination when they are conducting their activities through an actual or would-be signatory or owner. See *Shaare Tefila Congregation* v. *Cobb*, 481 U.S. 615 (1987); *Runyon* v. *McCrary*, 427 U.S. 160 (1976). As a black entrepreneur conducting his business through a wholly-owned corporation, respondent falls squarely within this well-recognized second category.

### A. The Most Natural Reading of the Plain Language of Section 1981 Protects the Contracting Behavior of Actual Targets of Discrimination Regardless of Whether They Are Formal Signatories.

This case turns on the unsurprising premise that section 1981, enacted to "bar *all* race discrimination in contractual relations," H.R. Rep. 102-40, pt. 1, at 92 (1991) (emphasis added),[3] was intended to protect the actual targets of that discrimination. The unlawfulness of the discrimination alleged in this case is not in dispute.[4] There is no question, for

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*McCrary*, 427 U.S. 160, 171 (1976) (quoting *Tillman* v. *Wheaton-Haven Recreational Ass'n*, 410 U.S. 431, 439 (1973)).

[3] See also H.R. Rep. 101-644, pt. 2, at 43 (1990) ("The Committee intends this provision to bar *all* racial discrimination in contracts.") (emphasis added).

[4] While there was originally some uncertainty as to petitioners' precise position, compare Defendants' 12(b)(6) Motion to Dismiss for Failure to State A Claim Upon Which Relief Can Be Granted at 6-7 (claiming only JWM could sue) with Reply to Plaintiff's Opposition

example, that petitioners would be liable to McDonald if he had operated his business as a sole proprietorship. See *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975). The question in this case is whether McDonald lost the protection of section 1981 when he organized his business as a corporation instead. Nothing in the text of section 1981 supports petitioners' contention that actual targets of discrimination are somehow stripped of protection when they do business through a corporation. To the contrary, when a minority entrepreneur like McDonald does business through a corporation, the terms of section 1981 protect both the actions taken by that entrepreneur and the benefits that he or she receives from the transaction.

Petitioners insist that the reference in section 1981 to the right to "make and enforce contracts" grants to potential plaintiffs only "the right to be free from racial discrimination in *their own* actual or prospective contractual relationships." Petr. Br. 14 (emphasis added); see also *id.* at 25 (McDonald sustained no injury "to any actual or potential contractual relationship of *his own*") (emphasis added). But the words "their own" (or "his own") simply are not to be found in the language of section 1981.[5] The failure of Congress to include

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to Defendants' 12(b)(6) Motion to Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted at 6. (claiming no one could sue), eventually petitioners agreed that JWM would have a section 1981 claim, Supplemental Reply to Opposi[ti]on to Motion to Dismiss at 3. In the court of appeals, petitioners argued only that an action by McDonald was improper because it was based on a violation of the rights of a third party, JWM. Defendants-Appellees' Answering Brief at 6, 9-13, *McDonald* v. *Domino's Pizza, LLC*, (CA9 2004) (No. 02-16900).

[5] *Jackson* v. *Birmingham Board of Education*, 125 S. Ct. 1497 (2005), rejected a similar attempt to read into Title IX of the Education Amendments of 1972 a limitation not to be found in the text of that statute:

such a limitation cannot be dismissed as "a mere slip of the legislative pen." *Jones*, 392 U.S. at 427. Here, as with section 1982 in *Jones*, section 1981 should be "accord[ed] a sweep as broad as its language." *Id.* at 437 (quoting *United States* v. *Price*, 383 U.S. 787, 801 (1966)).[6]

Section 1981 provides that all persons have a right to be free from discrimination "to make and enforce contracts," not merely to make and enforce *their own* contracts. For example, one person can make a contract as an agent for someone else. Where the party to a contract is a corporation, a natural person of necessity must actually negotiate, approve, and execute the contract. Congress did not provide more narrowly only that all persons have a right to be "parties" to a contract, an omission all the more telling because the very term "parties" is used elsewhere in section 1981 itself (protecting the right of all persons to "be parties" to a lawsuit). If Domino's refused to deal with the salesman for a pepperoni manufacturer because the salesman was black, that would violate the section 1981 right of the salesman to make a contract on behalf of his principal. By contrast, JWM's accountant would not have a claim under section 1981, even though that accountant

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> [Title IX] is broadly worded; it does not require that the victim of the retaliation must also be the victim of the discrimination that is the subject of the original complaint. If the statute provided instead that "no person shall be subjected to discrimination on the basis of *such individual's* sex," then we would agree with the Board. However, Title IX contains no such limitation.

125 S. Ct. at 1507 (internal citation omitted) (emphasis in original).

[6] This Court has emphasized the "broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866," from which 42 U.S.C. 1981 and 1982 derive. *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969). Section 1981, like section 1982, is to be "broadly construed." *City of Memphis* v. *Greene*, 451 U.S. 100, 120 (1981).

undoubtedly lost some business when, as a result of petitioners' discriminatory actions, JWM went bankrupt. But that is because, unlike Mr. McDonald, the accountant was not the target of Domino's racial discrimination.

The text of section 1981 has always protected the right to "enforce" a contract through legal action. It was precisely because McDonald was an African American who threatened to take legal action – that is, to "enforce" the contract he had made with Domino's as president of JWM – that he was threatened and verbally abused by petitioners' employees. Pet. App. 13 (Compl. ¶ 19) (alleging that petitioner Pear "threatened to use the company's attorney to bury Plaintiff in the event a court action was initiated").

As amended in 1991, the text of section 1981 also expressly protects the "performance" of a contract. 42 U.S.C. 1981(b). Performance of a corporation's contracts will frequently be carried out by the individuals who are its owners or employees, as occurred in this case. Cf. *Braswell* v. *United States*, 487 U.S. 99, 110 (1988) (noting that "[a]rtificial entities such as corporations" may act only through natural persons); 1 William Meade Fletcher, Fletcher Cyclopedia of the Law of the Law of Private Corporations § 30 (perm. ed., rev. vol. 1999).

Finally, the text of section 1981 protects "the enjoyment of all benefits, privileges, terms, and conditions of *the* contractual relationship." 42 U.S.C. 1981(b) (emphasis added). Again, the plain language of the statute is not limited to enjoyment of the benefits of the plaintiff's *own* contractual relationships.

In sum, the very activities that an entrepreneur personally undertakes when doing business through his corporation – negotiating and executing contracts, performing contracts, taking steps to enforce contracts – as well as the benefits the entrepreneur receives as wages or from the status of owning a corporation are precisely the activities and benefits protected by the literal language of section 1981.

Petitioners' suggestion that the sole, or even the primary, purpose of section 1981 in a case such as this was to protect the

interest of the corporation is inconsistent with the plain language of section 1981. The manifest intent of section 1981 was to protect against intentional *racial* discrimination. *Gen. Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 383-391 (1982). But a corporation does not have a race. "As a corporation, [JWM] has no racial identity and cannot be the direct target of the petitioners' alleged discrimination." *Village of Arlington Heights* v. *Metro. Housing Dev. Corp*., 492 U.S. 252, 263 (1977). There are of course cases in which a defendant imputes to a corporation the race of the actual target of its discrimination. Under those circumstances, the corporation also has a cognizable claim under section 1981 in not being a victim of race-based discrimination. See *infra* Part I.D. But clearly the corporation's interest does not supplant the core interest of the individual human being who is the actual target of the defendant's racial animus. Section 1981 was "intended to protect from discrimination identifiable classes of persons who are subject to intentional discrimination solely because of *their ancestry or ethnic characteristics*." *Saint Francis Coll*. v. *Al-Khazraji*, 481 U.S. 604, 613 (1987) (emphasis added).

That the interests of a corporation could not be the sole or primary interests protected by section 1981 is reinforced by the original language of section 1 of the 1866 Civil Rights Act.

> [A]ll persons born in the United States and not subject to any foreign power * * * are hereby declared to be citizens of the United States; and such citizens, of every race and color, * * * shall have the same right * * * to make and enforce contracts * * * as is enjoyed by white citizens * * * .

14 Stat. 27 (1866). In the form in which they were first enacted, the rights now contained in section 1981 were accorded *only* to individuals who were United States citizens by virtue of having been born in this country, a group that obviously could not include corporations. As of 1866, it was emphatically the interests of private individuals that section 1981 was intended to

protect. That section 1981's protections subsequently expanded to cover entities other than natural persons hardly undermines their coverage of human beings.

### B. Respondent's Ability To Engage in Business and Sell His Labor Free From Racial Discrimination Lies at the Core of Section 1981's Protections.

The provisions of section 1981 regarding discrimination in contracting were enacted to "guarante[e] the personal right to engage in economically significant activity free from racially discriminatory interference." *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 662 (1987). As the first Justice Harlan explained:

> [T]he freedom established by the 13th Amendment * * * "is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work when he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

*Hodges* v. *United States*, 203 U.S. 1, 35-36 (1906) (Harlan, J., dissenting) (quoting *Allgeyer* v. *Louisiana*, 165 U.S. 578, 589 (1897) (emphasis omitted). Justice Harlan's view ultimately prevailed when this Court overruled *Hodges* in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 443 n.78 (1968).

The 1866 Civil Rights Act was adopted in large part to nullify the Black Codes, which severely limited economic rights of the newly freed slaves. See Harold M. Hyman & William M. Wiecek, Equal Justice Under Law 319-20 (1982). The Act's supporters believed that freedom would be valueless if the newly freed slaves could not engage in economic transactions. Section 1981 prohibited discrimination related to contracts, not to federalize the common law of contracts, but as a method of providing to the newly freed slaves "the means of holding and enjoying the proceeds of their toil." Cong. Globe,

39th Cong., 1st Sess. 1159 (1866) (statement of Rep. Windom).[7]

Congress adopted the 1866 Civil Rights Act as a comprehensive charter designed to protect the hard-won liberty of the freedmen and to ensure that they could rely on their skills and initiative to advance their economic interests. The protections enumerated in section 1 of the Act encompassed every right that the framers knew or could foresee that the former slaves might require in order to participate fully in economic life. Congress stopped short of an unrestricted prohibition against *all* forms of discrimination only because of a concern that it might be construed to extend to political rights. *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 388 n.15 (1982). The rights enacted in section 1 should be given full effect and construed to reach new devices and schemes intended to deny individuals on the basis of race the ability to hold and enjoy the proceeds of their toil.

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[7] One of the key pieces of evidence on which Congress relied in enacting section 1981 was a comprehensive report by Major General Carl Schurz on conditions in the South. See Report of C. Schurz, S. Exec. Doc. No. 2, 39th Cong., 1st Sess. (1865) [hereinafter "Schurz Report"]; see also *Jones*, 392 U.S. at 428 (describing the Schurz Report).

The Schurz Report recounted that the newly freed slave "is positively prohibited from working or carrying on a business for himself." Schurz Report, *supra*, at 24. Senator Eliot warned that without the protections of the 1866 Civil Rights Act, a freedman would be "without the right to acquire or use any instrumentalities of carrying on the industry of which he may be capable." Cong. Globe, 39th Cong., 1st Sess. 514 (1866). Senator Trumbull pointed to a newly enacted Mississippi law whose purpose was "to prevent any freedmen from doing any independent business." *Id.* at 1759. Representative Lawrence explained that the enactment of section 1 was required to enable the freed slaves "to secure the privilege and rewards of labor." *Id.* at 1832-33.

The zone of interests protected by a statute such as section 1981 directed at racial discrimination is manifestly different from the zone of interests protected by traditional contract law. The basic purpose of the common law of contracts, and of statutes such as the Uniform Commercial Code providing for the enforcement of contracts, is to protect the interests of contracting parties, and of certain intended third-party beneficiaries. Thus, if a state-law contract action were brought against Domino's, the zone of interests protected by Nevada contract law presumably would be limited to JWM, as a contracting party, and to any intended third-party beneficiaries. But the purpose of section 1981 is to protect against racial discrimination.[8] The overarching purpose of Reconstruction, after all, was not to deal with a sudden rash of contract violations, but to secure the freedom of the former slaves, and to assure that they could participate in the economic life of the nation unencumbered by racial discrimination.

Thus, the interests asserted by McDonald – to conduct business and to be compensated for his labor unimpeded by racial discrimination – lie at the very heart of the concerns that section 1981 was fashioned to address. For his entrepreneurial efforts in acquiring land and constructing and leasing restaurants, Domino's was to pay a substantial sum in rent to JWM, most or all of which, after expenses, would go to McDonald in recompense for his time, effort, and skills.

The complaint alleges that certain Domino's officials took a series of discriminatory actions because of their racial animus toward McDonald. Domino's had no racially motivated ill will toward JWM as such; Domino's would not have taken the actions complained of if McDonald had been white. The

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[8] This distinction plays out in the calculation of damages. The damages in contracts cases are intended to give the injured party the economic benefits of his bargain, measured through reliance, restitution, or expectation. By contrast, section 1981 claims sound in tort, see, *e.g.*, *Goodman*, 482 U.S. at 661-62, and can include non-economic damages as well.

discriminatory acts were directed at McDonald in a highly personal manner: a Domino's official threatened McDonald with personal financial ruin, Pet. App. 12 (Compl. ¶ 19), and, referring to McDonald's race, admonished him "I don't like dealing with you people anyway." *Id*. 13. The complaint asserts that as a result of the discrimination of which he was the actual target,[9] McDonald suffered injuries distinct from any damages that occurred to JWM,[10] the corporation through which he was doing business. JWM too was injured, but those harms were incidental to the discrimination aimed at

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[9] Petitioners correctly observe that the "circumstances of this case allow McDonald to claim that he was the *direct target* of the alleged discrimination." Petr. Br. 37 (emphasis added).

[10] The complaint identifies several such monetary claims:

1. The complaint alleges that McDonald personally suffered "damages for pain and suffering, emotional distress and humiliation," Pet. App. 16 (Compl. ¶ 46), and sought compensatory damages for those injuries, *id.* at 17.

2. The complaint sought back pay and front pay, which McDonald assertedly would have received if Domino's had not violated section 1981. *Id.* 17 (Compl. ¶ 2). This is not money which JWM itself could have recovered. JWM could only have recovered an amount equal to the profit it would have obtained from the contracts (and perhaps certain consequential damages). The amount of wages that JWM would have paid to McDonald could not have been recovered by JWM; to the contrary, those wages would have been subtracted from the contracted-for amounts in determining what profits JWM would have made.

3. The complaint alleges that McDonald was forced by the defendant's actions "to sit on the land *he* already possessed and not develop, sell or lease them [sic]." *Id.* 14 (Compl. ¶ 26) (emphasis added). Redress for that injury was within the scope of the damages "for pecuniary losses" sought in the complaint. *Id.* 17 (Compl. ¶ 3).

4. The complaint asserts that "Plaintiff had numerous construction offers which he was unable to secure" because of petitioners' discriminatory conduct. *Id.* 13 (Compl. ¶ 24).

McDonald; Domino's only took action harmful to JWM because it was owned and operated by an African-American.

### C. Section 1981 Protects the Actual Targets of Contract-Related Discrimination, Including When They Do Business Through Intermediate Persons or Entities.

Had the intentional discrimination in this case been taken against McDonald as a sole proprietor, he undoubtedly could have invoked section 1981. That case would be directly controlled by this Court's decisions in *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973), and *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975). But here, as in most substantial business agreements, the underlying contract was between two corporations:[11] JWM, of which McDonald was the owner-operator, and Domino's. JWM was, in petitioners' apt phrase, merely a "corporate intermediary" between McDonald and Domino's. Petr. Br. 27. "McDonald himself chose to do business *through* JWM." *Id.* at 26 (emphasis omitted and added). Whatever the contractual formalities, Domino's understood that it was "do[ing] business" with McDonald. The deal fell apart precisely because certain Domino's officials objected to dealing with an African-American.

The fact that JWM rather than McDonald was formally the party to the contract neither places the intentional discrimination by Domino's outside the prohibitions of section 1981 nor puts McDonald's "right to engage in economically significant activity" outside the zone of interests that section 1981 protects. *Goodman*, 482 U.S. at 662. Section 1981

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[11] More recently, entrepreneurs and now professionals, including lawyers, doctors, and accountants, do business as limited liability companies or professional corporations. The discussion in this brief of the use and purposes of corporations is, in general, equally applicable to LLCs and PCs.

provides redress both for McDonald, the actual target of the discrimination, and for JWM, an intermediate victim of the discriminatory acts.[12]

### 1. This Court's Precedents Recognize That Sections 1981 and 1982 Protect Actual Targets of Discrimination Whose Affairs Involve Intermediaries.

Contrary to petitioners' contentions, this Court has consistently applied sections 1981 and 1982 in cases where the actual targets of discrimination were not themselves either formal signatories or would-be signatories to a contract or formal owners of the property at issue. In *Runyon* v. *McCrary*, 427 U.S. 160 (1976), this Court held that Bobbe's School had violated section 1981 when it refused to admit Michael McCrary because he was African-American. Michael McCrary himself, however, had never sought to contract with the school, and could not legally have done so; at the time of the alleged discrimination, Michael was only two years old. See *McCrary* v. *Runyon*, 515 F. 2d 1082, 1085 (CA4 1975). The individuals who actually sought to contract with Bobbe's School were his parents. The school's discriminatory policies were directed at prospective students, not their parents; the school clearly would have refused to admit Michael McCrary even if he had been the adopted child of white parents. The Court's decision in *Runyon v. McCrary* does not even refer to the race of Mr. and Mrs. McCrary. Michael McCrary was the

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[12] This Court has already recognized the existence of an implied cause of action to enforce section 1981 against private parties. *Jett* v. *Dallas Indep. Sch. Dist.*, 491 U.S. 701, 731-32 (1989). There is also an express cause of action under 42 U.S.C. 1983 for section 1981 claims against governmental defendants.

Whether there is a private cause of action to enforce section 1981 is analytically distinct from the issue of which plaintiffs have claims which fall within the zone of interests protected by section 1981.

actual target of the discrimination; his parents were only the intermediate victims.[13] This Court nonetheless had no doubt that section 1981 allowed Michael McCrary to sue, and properly so.

A similar three-party situation was present in *Shaare Tefila Congregation* v. *Cobb*, 481 U.S. 615 (1987). The defendant had sprayed swastikas and anti-Semitic slogans on the outside of a synagogue owned by the Congregation Shaare Tefila, under Maryland law a non-stock membership religious corporation.[14] Both the Congregation and several of its members sued, alleging that the vandalism violated the right protected by section 1982 to hold property free of racial discrimination.[15] But the defaced synagogue was owned, not by the congregation members whose ancestry was the target of the prohibited discrimination, but by the distinct legal entity, Congregation Shaare Tefila itself. Yet here too, this Court did not question the members' ability to sue.

In either of these cases it might have been possible for those involved to so structure their affairs that the actual targets of the discrimination would have been the contracting party in *Runyon* and the property owner in *Shaare Tefila*. Mr. and Mrs. McCrary could have placed the needed tuition funds in a Uniform Gift to Minors account, and then, as Michael McCrary's legal guardians, entered into a contract on his behalf with the school. It might have been possible to organize the

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[13] At trial, the court awarded Michael damages of $1000, and his parents damages of $2000. See 427 U.S. at 166 n.4.

[14] App. to Pet. for Writ of Cert. at App. D, *Shaare Tefila Congregation* v. *Cobb*, 481 U.S. 615 (1987) (No. 85-2156).

[15] Section 1982 applied to discrimination against Jews because at the time the statute was adopted "race" meant ancestry or ethnic group. *Shaare Tefila Congregation* v. *Cobb*, 481 U.S. at 617-18. Cobb may have acted in part out of animus toward the religious purpose of the Congregation, but *that* animus would not have been actionable under section 1982.

Congregation in *Shaare Tefila* differently, with title to the synagogue building instead being held jointly by all the individual members of the congregation. But the framers of the 1866 Act manifestly did not intend that such an awkward arrangement would be required in order to invoke the protections of sections 1981 and 1982. It is equally unlikely that Congress in adopting section 1981 intended to require the actual targets of discrimination, as a condition of receiving redress for their personal injuries, to give up the right to do business as a corporation.

Petitioners' contention that section 1981 protects from discrimination only the interests of plaintiffs in contractual privity with the defendant is inconsistent with this Court's decision in *Goodman*. The plaintiffs there, black employees who were members of the United Steelworkers, proved that their union had deliberately refused to pursue grievances that asserted that Lukens Steel had violated its collective bargaining agreement by engaging in racial discrimination. But the collective bargaining agreement that the union had unlawfully declined to enforce was a contract between the United Steelworkers and Lukens Steel Company; the aggrieved black employees were not parties to that agreement. Cf. *J.I. Case Co.* v. *NLRB*, 321 U.S. 332, 335-36 (1944) (noting that collective bargaining agreements are not contracts of employment, and that an employee has status under the agreement "somewhat as a third party beneficiary"). If only parties to a particular contract were within the zone of interests protected by section 1981, the plaintiffs in *Goodman* would have had no viable claim. And yet, this Court affirmed the finding of liability against the union. See 482 U.S. at 664-69. *Goodman* was established law when Congress, four years later, adopted the 1991 Civil Rights Act.

### 2. Section 1981 Protects the Interests of Individuals Doing Business or Providing Their Services Through a Corporate Intermediary.

Racial discrimination because of the race of the owner or employees of a corporation easily falls within the scope of section 1981. In modern business transactions, corporations often play an essential intermediate role, as did the parents in *Runyon* and the Congregation in *Shaare Tefila*. Where racial discrimination related to contracts occurs because of the race of a corporation's owner-operator, the owner-operator (like the black applicants in *Runyon* and the Jewish congregation members in *Shaare Tefila*) is the actual target of that unlawful discrimination, while the corporation itself is an intermediate victim.

In the modern world, a number of practical, economic, legal, and tax considerations may compel individuals to conduct their affairs through corporations or other intermediate parties.[16] First, incorporation ordinarily protects a corporation's owners from personal liability for the debts of the firm. Second, an entrepreneur can form several corporations to carry on separate businesses, permitting him or her to establish different equity and financial structures and to work with different co-owners. Third, there can be important federal income tax advantages to doing business as a corporation; for certain taxpayers, doing business as a sole proprietorship could cost thousands of dollars in increased taxes. See Tax Planning for Corporations and Shareholders § 1.01 (Matthew Bender & Co. 2005). Fourth, in some instances the lenders or others with whom an entrepreneur does business may insist on incorporation. See *id.* § 1.02 [1][a][ii].

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[16] Thus, for example, the Small Business Development Center in Nevada – where McDonald lives – urges entrepreneurs to incorporate. Nevada Small Bus. Dev. Ctr., Forms of Business Ownership 6 (2004), *available at* http://www.nsbdc.org/resources/documents/images/FormsofOwnership.pdf (last visited Sept. 20, 2005).

This intractable reality of modern business life is reflected in section 1981 litigation. A significant number of the reported section 1981 decisions (other than those based on employment claims) involve minority-owned corporations. The importance and prevalence of incorporation is reflected in the wide range of business activities of these section 1981 claimants: parking lot maintenance, [17] towing, [18] office supplies, [19] technology services, [20] repair services, [21] medical services, [22] software services, [23] information services, [24] tool manufacturing, [25] retailing of African art and artifacts, [26] the sale and transportation of natural gas[27] and gasoline,[28] and real estate development.[29]

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[17] *Danco, Inc.* v. *Wal-Mart Stores, Inc.*, 178 F.3d 8 (CA1 1999), cert. denied, 528 U.S. 1105 (2000).

[18] *Cardinal Towing & Auto Repair, Inc.* v. *City of Bedford*, 991 F. Supp. 573 (N.D.Tex. 1998).

[19] *Perez* v. *Abbott Laboratories*, No. 94 C 4127, 1995 WL 86716 (N.D.Ill. Feb. 27, 1995).

[20] *Thinket Ink Info. Res., Inc.* v. S*un Microsystems, Inc.*, 368 F.3d 1053 (CA9 2004).

[21] *Harris* v. *Allstate Ins. Co.*, 300 F.3d 1183 (CA10 2002).

[22] *Gomez* v. *Alexian Bros. Hosp.*, 698 F.2d 1019 (CA9 1983).

[23] *Gersman* v. *Group Health Ass'n, Inc.*, 931 F.2d 1565 (CADC 1991), vacated, 502 U.S. 1068 (1992).

[24] *Rosales* v. *AT&T Info. Sys., Inc.*, 702 F. Supp. 1489 (D. Colo. 1988).

[25] *Great Am. Tool & Mfg. Co.* v. *Adolph Coors Co., Inc.*, 780 F. Supp. 1354 (D. Colo. 1992).

[26] *Guides, Ltd.* v. *Yarmouth Group Prop. Mgmt., Inc.*, 295 F.3d 1065 (CA10 2002).

[27] *Searcy* v. *Houston Lighting & Power Co.*, 907 F.2d 562 (CA5 1990), cert. denied, 498 U.S. 970 (1990).

[28] *Bains LLC* v. *Arco Prods. Co.*, 405 F.3d 764 (CA9 2005).

[29] *Des Vergnes* v. *Seekonk Water Dist.*, 601 F.2d 9 (CA1 1979).

Application of section 1981 to a refusal to deal with a corporation (or other entity) because of the race of its employees is of equal importance. Today, millions of individuals who provide labor and services to a business or individual are technically the employees of some other entity. In the construction industry, many of the individuals working at a particular job site are actually employees of specialized subcontractors, rather than of the landowner or general contractor. An entire industry has grown up of firms, such as Kelly Services, Manpower, and Accountemps, that provide temporary employment services. The workers serve on the premises of the business in question and under its supervision; those workers, however, are actually employees of the temporary agency, through which the business whose work they perform pays them.[30] In addition, a large number of individuals with technical skills do their work at one business (*e.g.*, a law firm) while on the payroll of another firm (*e.g.*, a copier service company). If in these cases the entity receiving and ultimately paying for the services could lawfully discriminate against those workers, or refuse to do business with an employer because of the race of its employees, millions of American workers would fall outside the protections of section 1981.

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[30] See U.S. Equal Employment Opportunity Comm'n, Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice No. 915.002, Dec. 3, 1997, *available at* http://www.eeoc.gov/policy/docs/conting.html (last visited Sept. 20, 2005) (explaining that "a temporary employment agency employs the individuals that it places in temporary jobs at its clients' work sites" and then "bills the client for the services performed," and that "both staffing firms and their clients share EEO responsibilities toward [temporary] workers"); see also HR Series: Policies and Practices § 29:1 (Thomson/West 2005) ("What distinguishes [contingent worker] arrangements from the traditional employer-employee relationship is that the business is contracting with another entity * * * rather than hiring an employee.").

### 3. Excluding Claims By Persons Who Are the Actual Targets of Unlawful Discrimination Would Create a Serious Gap in the Enforcement of Section 1981.

If section 1981 (or section 1982) did not apply to such three-way relationships, or if the actual targets of discrimination could not obtain redress in such situations, the effectiveness of sections 1981 and 1982 would be seriously impaired, and would-be discriminators would at times be able to evade the statutory prohibition against discrimination.

If section 1981 did not permit recovery of the damages sustained by the actual target of discrimination whenever a corporation or other intermediary was involved, significant injuries caused by violations of section 1981 would go unredressed. See, *e.g.*, *Guides, Ltd.* v. *Yarmouth Group Prop. Mgmt., Inc.*, 295 F.3d 1065, 1071 (CA10 2002) (jury found that the proven violation of section 1981 had caused $150,000 in damages to the corporation and $200,000 in damages to its owner-operator). In many instances, the wrongdoer would escape liability altogether.

There are a number of types of discriminatory practices that (at least ordinarily) will injure only the actual target of the discrimination, but not the intermediate person or entity. For example, racial harassment of the owner or an employee of a corporation will not injure the corporation itself unless it somehow causes lost profits. See *Bains LLC* v. *ARCO Prods. Co.*, 405 F.3d 764, 767-68, 770-71 (CA9 2005) (only corporation itself permitted to sue despite protracted personal harassment of its Sikh owner-operators); *Danco, Inc.* v. *Wal-Mart Stores, Inc.*, 178 F.3d 8, 10-11, 15-16 (CA1 1999) (noting, in case involving racial harassment of Mexican-American owner-operator, "it seems unlikely that [the corporation] itself could have established monetary damages of any size from the racial incidents").

In the instant case, McDonald asserts that Domino's officials engaged in a number of actions that injured McDonald

personally, but could not have harmed JWM, including threats, verbal abuse, and interference with McDonald's personal business activities. On petitioners' view, none of these injuries, however intentional or foreseeable, would be actionable under section 1981. Under the theory advanced by petitioners, moreover, Domino's would have faced no liability under section 1981 to anyone if Domino's officials had beaten up McDonald in an attempt to intimidate him into canceling JWM's contract, but he had the fortitude to persevere as a small businessman. JWM would have had no claim because it would still have received all the benefits promised by the contract, and under petitioners' theory, McDonald would have had no claim because he wasn't the formal signatory, even though he controlled the signatory completely. Cf. *Hodges* v. *United States*, 203 U.S. 1, 3 (1906) (white armed mob forcibly drove African-American workers from the lumber mill where they worked thereby inducing them to relinquish their contractual entitlements).

Under Domino's interpretation of section 1981, moreover, certain types of injuries would be excluded per se from redress under section 1981 whenever an intermediate corporation is involved. The complaint in the instant case sought damages for the pain and suffering, mental anguish, and humiliation suffered by McDonald. "[T]his sort of noneconomic injury is one of the most serious consequences of discriminatory * * * action." *Allen* v. *Wright*, 468 U.S. 737, 755 (1984).[31] But it is an injury

[31] See H.R. Rep. 102-40, pt.1, at 92 (1991) ("In a wide range of cases, only an award of monetary damages makes a victim whole for *physical, emotional* or economic injury resulting from interntional [sic] race discrimination.") (emphasis added); H.R. Rep. 101-644, pt. 1, at 87-88 (1990) (citing the case of a plaintiff who, prior to the 1991 amendments to section 1981, "received nothing for the humiliation, loss of dignity, and psychological and physical harm a federal jury found she had suffered as a result of her employer's intentional discrimination and harassment").

for which only individuals can seek redress; corporations (however beneficent or vindictive their policies) do not themselves have feelings.[32] The complaint also sought backpay, relief which could be obtained only to the extent to which JWM had *not* paid McDonald for the work in question. Wages that were never paid to JWM employees because of Domino's discriminatory conduct represent to JWM, not an injury, but a business expense that was avoided. In an action of its own under section 1981, JWM itself could not collect money owed to it by Domino's that would have been used to pay the salaries of McDonald or other JWM employees for work they would have performed had the breach not occurred. Its damages would include only those wages it actually paid or was still obligated to pay. JWM could sue only for lost profits or other injuries to the corporation, not for economic injuries to its employees. To the extent that the contract payments from Domino's would have been used to pay an employee who never became entitled to wages at all, JWM suffered no injury for which it was entitled to compensation.

Where owners or employees are the actual targets of discrimination and as a result suffer distinct personal injuries, permitting them to obtain redress for those injuries will not impose excessive liability on the wrongdoer. Those individual plaintiffs may only obtain damages for personal injuries that are separate from the harms suffered by a related corporation; the lower courts are competent to ensure that no double recovery occurs. The total amount of damages will be no greater than would have been awarded if the discrimination had been inflicted on a sole proprietorship; the only difference will be

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[32] Similarly, in *Shaare Tefila*, the emotional harm caused to congregation members when the defendants painted "DEATH TO THE JUDE," "TAKE A SHOWER JEW," "DEAD JEW," and a swastika on the walls of the synagogue was undoubtedly far more serious than the financial cost to the Congregation of physically removing that graffiti. See Brief for Petitioner at 3-5, *Shaare Tefila Congregation* v. *Cobb*, 481 U.S. 615 (1987) (No. 85-2156).

that that amount will be divided appropriately among the several victims.

The suggestion by several states that this interpretation of section 1981 would impose unreasonable burdens on state and local officials, see Brief of the States of Alabama et al. as Amici Curiae in Support of Petitioners at 1-2, is simply baffling. The Fourteenth Amendment *already* applies to any racial discrimination by state and local officials or governments against an individual, regardless of whether the victim is an actual or would-be contracting party. Any party that would have a colorable cause of action against a public entity under section 1981 would necessarily also have a Fourteenth Amendment claim under section 1983, which has no contractual requirement and applies to those acting under color of law. Interpreting section 1981 in the manner suggested by petitioners would not add to the types of claims actionable against government officials or governments. In any event, the longstanding availability of equal protection claims against government officials has led to none of the dire consequences predicted by petitioners or their *amici*.

The gaps in the redress available under section 1981 that petitioners' interpretation would create would permit a discriminator to reduce or even to avoid legal liability under section 1981 by engaging in discriminatory practices targeted at the owner-operator or employees of a firm, rather than at the firm itself. In the instant case, although Domino's could have faced liability if it had injured JWM's relationship with its bank, under petitioners' theory it faces no liability for interfering with McDonald's relationship with his personal bank. If Domino's were disposed to use violence to pressure JWM to give up its contract rights, it could avoid section 1981 liability for such tactics by burning (or threatening to burn) McDonald's home, rather than JWM's corporate offices.

Domino's urges that the employees and owners of a corporation should not be permitted to sue for their own injuries because the corporation that was also harmed may prefer, in

order to avoid antagonizing the wrongdoer, not to complain about unlawful racial discrimination. Petr. Br. 38. Although that issue would not arise with regard to the minority owner-operator of a small firm, the situation Domino's describes could well occur in the case of discrimination against a minority employee of a white-owned firm. A temporary employment agency, for example, might decide to ignore the race-based rejection of a black temporary worker, rather than risk alienating an important customer. A bar to actions by the actual targets of that discrimination would mean the minority employees victimized by such discrimination could not even sue for injunctive relief.

The very real possibility that Domino's describes, however, is precisely the reason why the actual victim *should* be permitted to sue, as this Court has already recognized. The tactics regarded by Domino's with such solicitude – a white-owned firm choosing to ignore discrimination against its employees in order to curry favor with the wrongdoer – is essentially the same as the union conduct held unlawful in *Goodman*, 482 U.S. at 669 (stating that "[a] union which intentionally avoids asserting discrimination claims * * * so as not to antagonize the employer and thus improve its chances of success on other issues * * * is liable under * * * § 1981") (internal quotation marks omitted).[33] Surely Congress did not intend that the protection of minority rights under section 1981 would depend in such circumstances on the good will or courage of the white-owned corporation.

[33]Of course, a corporation (unlike a union) would not violate section 1981 by failing to complain about discrimination against its employees. An employer would violate section 1981 only if, in order to placate a customer, it refused to hire racial minorities, or would not assign them to work for that customer.

**4. Section 1981 Does Not Impose on Entrepreneurs a Hobson's Choice of Either Giving Up the Right to Incorporate or Forsaking Full Relief for Violations of the Right to Be Free from Discrimination.**

Petitioners argue that an entrepreneur who chooses to do business through a corporation thereby forfeits the right to redress for personal injuries that would have been compensable under section 1981 if he or she had been doing business as a sole proprietorship. Petr. Br. 8, 26-27, 39. The interpretation of section 1981 advocated by petitioners would work just such a forfeiture, denying relief under section 1981 to minority entrepreneurs who for a variety of legal and practical reasons must incorporate. Congress, however, cannot have intended to impose such a Hobson's choice on the victims of racial discrimination. "This court is unaware of any authority suggesting that a person who lawfully invokes the incorporation laws thereby forfeits his rights under § 1981." *Rosales* v. *AT&T Info. Sys., Inc.*, 702 F. Supp. 1489, 1497 (D. Colo. 1988).

Neither the development of modern corporation law nor the emergence and complexity of federal income tax law could have been foreseen by the Congress that adopted the 1866 Civil Rights Act. But assuredly neither that Congress, nor the Congress which adopted the 1991 Civil Rights Act amending section 1981, intended to compel entrepreneurs to abandon the protections of, or the possibility of full redress under, section 1981 if they chose, often of absolute necessity, to conduct their business through a corporation. The imposition of such a forfeiture would codify in federal law the very type of discriminatory barriers to economic self-advancement that section 1981 was enacted to prevent.

Forcing minority entrepreneurs to forsake incorporation in order to retain the full protection of section 1981 would place them at a serious, perhaps fatal, competitive disadvantage relative to white entrepreneurs, and would therefore be in itself

an improper discriminatory practice. Faced with unlimited potential personal liability, a minority businessperson might attempt to reduce the resulting financial exposure by taking out additional liability insurance. But the cost of that insurance would have to be either passed on to his or her customers, raising prices and reducing competitiveness, or absorbed by the entrepreneur, resulting in lower profits than those earned by white competitors for selling the same good or services at the same price.

Domino's objects that stockholders and employees cannot ordinarily sue for a violation of a corporation's rights. But state corporate law[34] is of little relevance in determining what interests Congress intended to protect when it enacted section 1981. The primary purpose of section 1981 is to protect the *individuals* who may be the targets of intentional racial discrimination in the making and enforcement of contracts; any cause of action a corporation may have depends upon a showing of intentional discrimination against such an individual. In a case such as this, moreover, the very reason that Domino's actions were unlawful was that its officials disregarded the race-neutral corporate veil of JWM, and made their discriminatory decisions based on the race of the individual who owned and operated that corporation. It would be utterly incongruous to now permit Domino's to reduce its

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[34] Contrary to petitioners' contentions, under state law shareholders *are* at times permitted to disregard the existence of the intermediate corporate entity where failing to do so would impair full enforcement of important state statutes. See, *e.g.*, *Cargill, Inc.* v. *Hedge*, 375 N.W. 2d 477, 478-79 (Minn. 1985) (holding that husband and wife owner-occupants of a farm could reverse pierce their family farm corporation to receive a homestead exemption from a creditor); *Roepke* v. *W. Nat'l Mut. Ins. Co.*, 302 N.W. 2d 350, 353 (Minn. 1981) (holding reverse pierce necessary to allow the "stacking" of decedent president and sole shareholder's corporate insurance policies); *U.S. Gypsum Co.* v. *Mackey Wall Plaster Co.*, 199 P. 249 (Mont. 1921) (holding sole stockholders of corporation the "equitable owners" of a debt owed to their corporation).

liability for that veil-piercing violation by invoking the very corporate formalities that Domino's itself unlawfully disregarded.

Such an interpretation of section 1981, moreover, would introduce a serious inequity into the administration of the statute. Section 1981 imposes liability on individual officials or supervisors who engage in unlawful discrimination. McDonald would be personally liable under section 1981 if in his capacity as JWM's president he were to discriminate on the basis of race against a JWM employee or a contractor such as Domino's itself. The underlying reason for allowing such suits is that the individual defendant was discriminating through the corporate entity. But if individual perpetrators can be held liable under such circumstances for violating the prohibitions of section 1981, it would be perverse to hold, as petitioners insist, that individual victims cannot seek vindication for the rights protected by section 1981.

### D. Suits by Corporations Are Proper Under Section 1981 Because They Are Necessary for Full Enforcement of the Section 1981 Prohibition Against Racial Discrimination Against Individuals.

The lower courts have uniformly, and correctly, held that corporations can sue when they are injured by discrimination based on the race of the individuals with whom they do business.[35] But such suits are permissible, not because contracting corporations are the sole (or even primary) intended beneficiaries of section 1981, but because such actions are necessary to vindicate the statutory prohibition against intentional racial discrimination against individuals.

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[35] *Parks Sch. of Bus., Inc.* v. *Symington*, 51 F.3d 1480, 1487-88 (CA9 1995); *Hudson Valley Freedom Theater, Inc.* v. *Heimbach*, 671 F.2d 702, 704-06 (CA2 1982); *Park View Heights Corp.* v. *City of Black Jack*, 467 F.2d 1208, 1212-14 (CA8 1972); *Rosales*, 702 F. Supp. at 1494-95.

In *Barrows* v. *Jackson*, 346 U.S. 249 (1953), Jackson was sued for damages because she had sold her house to non-Caucasians, and permitted them to occupy it, in violation of a restrictive covenant. The Court viewed racially restrictive covenants as violating the constitutional rights of the non-Caucasian buyers. See *id.* at 254 (explaining that such covenants will mean that a prospective seller "will either refuse to sell to non-Caucasians or else will require non-Caucasians to pay a higher price to meet the damages which the seller may incur"). It then held that the white seller, in defending the action, could rely on the illegality of racially restrictive covenants. See *id.* at 254-57 (holding that Jackson "[may] rely on the invasion of the rights of others in her defense to this action"). The antidiscrimination principle would be seriously impaired if the state could "punish [the seller] for not continuing to discriminate against non-Caucasians in the use of her property." *Id.* at 258.

Similarly, in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), a white plaintiff, Sullivan, was permitted to invoke the section 1982 rights of a black family, the Freemans, to whom he had leased a home. Sullivan had attempted to obtain permission for his tenants to use Little Hunting Park, a community park and playground owned by a corporation of which Sullivan was a shareholder. Under the bylaws of the corporation, tenants of homes owned by shareholders such as Sullivan were presumptively entitled to use of the park. The board of the corporation refused for discriminatory reasons to permit the Freemans to use the park. In retaliation for his actions on behalf of the Freemans, Sullivan was expelled from the corporation. This Court held that Sullivan could sue the corporation for damages, and could ground his action on the underlying violation of the Freemans' section 1982 rights. Compliance with section 1982 would be seriously impaired, the Court explained, if Sullivan could obtain no redress for his expulsion since permitting that kind of realiation "would give impetus to the perpetuation of racial restrictions on property." *Id*. at 237.

Section 1981 does not permit a corporation to be punished because it is the vehicle through which a black entrepreneur does business, because it is the means through which black workers provide services, or because it has black shareholders. When such a corporation sustains injuries because of racial discrimination forbidden by section 1981, effective enforcement of section 1981 requires, as it did in *Barrows* and *Sullivan*, that the corporation be able to obtain redress, even though the corporation itself has no racial identity and the actual target of the discrimination itself was instead one or more minority individuals The purposes of section 1981 would be seriously undermined if there were no redress for such injuries to the corporation, and if that corporation were without legal recourse to avoid economic pressure from customers who objected to its minority shareholders or employees.

Petitioners object that a corporate owner-operator personally injured by section 1981 should not be permitted to sue because his or her claim is merely "derivative" of the underlying claim of the corporation that is also injured by the section 1981 violation. See Petr. Br. 20-21, 29-31, 35. In the context of a section 1981 claim such as this, however, this characterization of the legal rights and relationships is precisely backwards. Here, the claims of the corporation derive from the underlying section 1981 prohibition against discrimination against the minority individual who is the actual target of the discrimination, not vice versa.

## II. Respondent Also Stated a Claim Under Section 1981 Because Petitioners' Racially Motivated Acts Intentionally Deprived Him of the Benefits of His Contracts With JWM.

Respondent has already shown why a section 1981 *plaintiff* need not be a formal signatory to the contract whose racially motivated breach triggers the lawsuit. See *supra* Part I. Nor must a section 1981 *defendant* be a formal signatory to the contract whose benefits the plaintiff has been denied. The rights guaranteed by the 1866 Civil Rights Act are protected

"against the actions of third parties" as well as against the actions of formal signatories, *Sullivan*, 396 U.S. at 237 (1969). Domino's racially discriminatory acts intentionally denied McDonald "enjoyment of [the] benefits * * * of the contractual relationship" he had with JWM. 42 U.S.C. 1981(b). Section 1981 therefore permits McDonald to bring suit against petitioners to compensate him for the contractual benefits he lost. [36]

Petitioners' argument to the contrary rests essentially on two subsidiary claims. First, they assert that the complaint "does not allege that [McDonald] was a party to any other contractual relationship that Domino's might have interfered with." Petr. Br. 31. To the contrary, the complaint clearly alleges facts showing two contractual relationships between McDonald and JWM Investments, Inc. – one as an employee, the other as a shareholder. Second, Domino's asserts that even if section 1981 recognizes claims against defendants who are not parties to the contract at issue, such claims are limited to cases where the defendant's purpose is to induce one of the parties to the contract "to violate * * * contractual commitments it had made." *Id.* at 32. That cramped construction disregards the plain language of section 1981, which protects individuals against injuries beyond common-law third-party interference. Even if JWM remained entirely willing to perform on its contract with McDonald, Domino's racially discriminatory acts impaired McDonald's right to "perform[]" his contract as well as his "enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. 1981(b).

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[36] It is entirely possible, for example, that an individual's supervisor might be held liable under section 1981 for discriminating against him, while his actual employer, with whom he has a contractual relationship, will not be liable because no policy-maker ratified the decision. See, *e.g.*, *Jett*, 491 U.S. at 707-08.

### A. McDonald Had a Contractual Relationship with JWM.

The district court dismissed McDonald's complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. But as this Court has repeatedly held, "[g]iven the Federal Rules' simplified standard for pleading, '[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 514 (2002) (quoting *Hishon* v. *King & Spaulding*, 467 U.S. 69, 73 (1984)). Under that standard, the allegations in respondent's complaint plainly are sufficient to conclude that that there were two contractual relationships between McDonald and JWM: one in his capacity as a corporate employee and the other in his capacity as a corporate shareholder.

1. As "President" and "operator" of JWM, Pet. App. 11 (Compl. ¶¶ 10-11), McDonald had a contractual relationship with JWM as an employee. The complaint alleges that McDonald performed a wide range of activities with respect to JWM's dealings with Domino's. For example, McDonald negotiated and entered into leases on behalf of JWM. *Id.* at 11 (Compl. ¶¶ 10, 12). McDonald "put his full effort into getting the building constructed" that JWM agreed to erect at the Bonanza location. *Id.* at 12 (Compl. ¶ 15).

As a result of the services respondent actively performed for JWM, federal law required that he be considered an employee and be paid wages. *Spicer Accounting, Inc.* v. *United States*, 918 F.2d 90, 93 (CA9 1990) (requiring that compensation paid by a small corporation to a shareholder who actively performs services be characterized as wages subject to social security and unemployment taxes); *Veterinary Surgical Consultants, P.C.* v. *Comm'r*, 117 T.C. 141 (2001) (same); Rev. Rul. 74-44, 1974-1 C.B. 287 (1974) (same). The complaint alleges that entitlement to wages: among the remedies the complaint seeks are "front pay [and] back pay." Front pay and back pay operate to replace wages

an individual otherwise would have earned. See *Pollard* v. *E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 846 (2001); *Soc. Sec. Bd.* v. *Nierotko*, 327 U.S. 358, 359, 364 (1946). Thus, the complaint necessarily alleges an obligation for some entity to pay McDonald a salary – namely, JWM.

Petitioners' citation of *Bellows* v. *Amoco Oil Co.*, 118 F.3d 268 (CA5 1997), cert. denied, 522 U.S. 1068 (1998), and the *Fletcher Cyclopedia*, see Petr. Br. 32, do not undermine this conclusion. First, in *Bellows*, the case had advanced far beyond the pleading stage: "*At trial*, Bellow produced no document and presented no testimony evidencing the terms, provisions, or conditions of any contractual relationship * * * ." 118 F.3d at 275 (emphasis added). It was under those very different circumstances that the Fifth Circuit found that the plaintiff had no employment contract. In this case, which was decided solely on the pleadings, McDonald has not yet had the obligation or opportunity to provide evidence to establish his contractual arrangements. Cf. *Haddle* v. *Garrison*, 525 U.S. 121, 127 (1998) (at-will employment arrangements are nonetheless contracts); *Wharf (Holdings) Ltd.* v. *United Int'l Holdings, Inc.*, 532 U.S. 588, 595 (2001) (statutory reference to "any contract" includes oral contracts).

Moreover, the very section of the *Fletcher Cyclopedia* that petitioners cite undercuts their argument. It notes that "the term 'employee' in both Model Business Corporation Acts, includes officers," 2 William Meade Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 266, at 12 (perm. ed., rev. vol. 1998), and Nevada's corporation law is based on the Model Act, see *Cohen* v. *Mirage Resorts, Inc.*, 62 P.3d 720, 726 n.10 (Nev. 2003). In particular, when the officer or owner of a corporation regularly performs work for a corporation, he will generally be treated as an employee. See also 2 Fletcher, *supra*, §§ 266.10, 266.20. That is precisely what the allegations in this case involve.

2. As the "owner" of JWM, Pet. App. 11 (Compl. ¶ 11), McDonald was necessarily party to a second contract with

JWM, this time in his capacity as shareholder of a Nevada corporation. Contrary to petitioners' suggestion, see Petr. Br. at 32, the relationship between a corporation and its shareholders is contractual. See 7A William Meade Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 3634, at 216 (perm. ed., rev. vol. 1997) (corporate charters involve "a contract * * * between the corporation and its stockholders").

To be sure, if McDonald's injuries as a shareholder consisted of nothing more than a decrease in the value of his shares, he would not have suffered a *personal* injury. That injury would belong to the corporation as an entity, and it would be up to the corporate officers to decide whether to sue the defendants – here, petitioners – who had caused that loss of value. But, as respondent has already explained, *supra* at 18-19 & n.9, the complaint alleges that McDonald did suffer a distinct personal injury, an injury that Domino's intended to cause. It charges that petitioner Pear, acting on behalf of Domino's and motivated by racial animus, threatened McDonald that *he* "would experience serious financial [repercussions] and the loss of *his* business and financial position," Pet. App. 12 (Compl. ¶ 19) (emphasis added). The "pain and suffering, emotional distress, mental anguish, and humiliation" McDonald suffered as a result of Domino's discriminatory acts does not merge with the corporation's pecuniary losses. Rather, read in the context of the complaint as a whole, the allegations charge that Domino's humiliated and injured petitioner by impairing his status as the black owner of a corporation with which Domino's new personnel, for discriminatory reasons, *id.* at 13-14 (Compl. ¶ 24, 30), did not wish to do business. Cf. 19 Am. Jur. 2d Corporations § 1937 (2005).

### B. Section 1981's Protection of Individuals' Contractual Rights Against Outside Impairment Extends Beyond Protecting Them Against Induced Breaches By the Other Contracting Party.

Despite petitioners' portrayal of *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), as only "suggest[ing]" or "arguably permitting" claims against discriminators who are not themselves in contractual privity with the plaintiff, Petr. Br. 31, the Court's opinion quite clearly authorized civil rights lawsuits against such defendants. Freeman, the black tenant, had a lease with Sullivan, and not with Little Hunting Park. And yet, the Court recognized that Freeman could bring suit:

> *The right to "lease" is protected by § 1982 against the actions of third parties, as well as against the actions of the immediate lessor.* Respondents' actions in refusing to approve the assignment of the membership share in this case was [sic] clearly an interference with Freeman's right to "lease."

*Id.* at 237 (emphasis added). *Sullivan* thus squarely recognized that a discriminator can be held liable for depriving an individual of benefits that would otherwise flow from a transaction to which the discriminator was not a party. Just as Little Hunting Park could be held liable to Freeman, even though the lease whose benefits Freeman was denied ran between him and Sullivan, so too Domino's can be held liable to McDonald, even though the contracts whose benefits he was denied ran between him and JWM.

#### 1. The History of Section 1981 Reflects Congress's Intention to Reach Impairment of Protected Rights By Outside Parties.

The conclusion that section 1981 reaches third-party discriminators is firmly rooted in its history. The Congress

that originally enacted section 1981 was concerned primarily not with first-party refusals to contract, but rather with acts by outside parties that prevented newly freed slaves from entering into economic transactions with willing partners. This Court's more recent decisions and Congress's 1991 amendments to section 1981 only strengthen the conclusion that when section 1981 "guarantee[s] the personal right to engage in economically significant activity free from racially discriminatory interference," *Goodman*, 482 U.S. at 662, it guarantees that right against impairment "*from any source whatever*." *Jones*, 392 U.S. at 424 (emphasis added).

Early in their brief, petitioners note that "[t]he principal object" of the 1866 Civil Rights Act "was to eradicate the Black Codes, laws enacted by Southern legislatures imposing a range of civil disabilities on freedmen." *Gen. Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 386 (1982); see Petr. Br. 15. But they fail to recognize that this history bears directly on McDonald's claims. The Black Codes, after all, did not involve the government's refusal to contract with black individuals. Rather, they forbade black people from entering into voluntary transactions with willing partners.

One of the key pieces of evidence on which Congress relied in enacting section 1981 was the Schurz Report. See *supra* p.16. That report was filled with examples of attempts by both governments and private individuals to prevent freedmen from pursuing or benefiting from contractual opportunities. For example, Opelousas, Louisiana, enacted an ordinance denying a black person the right to "sell, barter or exchange, any articles of merchandise or traffic within the limits of Opelousas without permission in writing from his employer, or the mayor, or president of the board." Schurz Report, *supra*, at 23. See also *id.* at 94 (reporting a substantially identical St. Landry ordinance); 1 Walter L. Fleming, Documentary History of Reconstruction 305-06 (1906) (referring to South Carolina statute mandating that "[n]o person of color shall pursue or practice the art, trade or business of an artisan, mechanic or shopkeeper, or any other

trade, employment or business * * * on his own account and for his own benefit, or in partnership with a white person, * * * until he shall have obtained a license therefor from the Judge of the District Court"). The whole point of such laws was to prevent black individuals from trading with willing partners.

More particularly, both Schurz and members of Congress specifically identified actions that undermined blacks' ability to establish and benefit from their own businesses – that is, to be entrepreneurs – as a central problem. The freedman, Schurz reported, "is positively prohibited from working or carrying on a business for himself; he is *compelled* to be in the 'regular service' of a white man, and if he has no employer he is *compelled* to find one." Schurz Report, *supra*, at 24

> The opposition to the negro's controlling his own labor, carrying on business independently on his own account – in one word, working for his own benefit – showed itself in a variety of ways. * * * [For example,] the white citizens refuse to sign any bonds for the freedmen.

*Id.* at 24-25. Similarly, in responding to President Johnson's assertion that the Act was unnecessary, Senator Trumbull pointed to a newly enacted Mississippi law whose purpose was "to prevent any freedmen from doing any independent business, and to compel them to labor as employés." Cong. Globe, *supra*, at 1759. See also, *e.g.*, *id.* at 514 (statement of Rep. Eliot on the companion Freedman's Bureau bill that freedmen were being denied the ability to "select their own employers and to choose their own kind of service").[37]

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[37] Although the Freedman's Bureau bill was not enacted, it was sponsored by Senator Trumbull, the author and primary sponsor of the 1866 Act. Accordingly, this Court has relied on its legislative history to interpret the 1866 Act. See, *e.g.*, *Jones*, 392 U.S. at 423 n.30.

Congress's concern with acts that prevented blacks from entering into and benefiting from contractual transactions quite clearly extended to misconduct by private parties, as this Court held in *Jones*, 392 U.S. at 436, *Runyon*, 427 U.S. at 170-71, and *Tillman*, 410 U.S. at 440. See, *e.g.*, Cong. Globe, *supra*, at 475, 500 (statements by Sen. Trumbull that customary deprivations of blacks' rights to make and enforce contracts would be subject to liability under the Act); *id.* at 1156 (statement by Rep. Thornton that "Congress has the power to punish any man who deprives a slave [sic] of the right of contract, or to the right to control and recover his wages"); *id.* at 1160 (reference by Rep. Windom to a report that black farmers had been wrongfully "notified that they must give up their leases" – leases that presumably they and the lessor had entered into voluntarily – "by citizens"). The frequent references to private violence in the legislative history often involved violence directed at intimidating blacks into abandoning contracts.

Section 1981 is not simply a federalized version of the common-law tort of tortious interference. That tort, as petitioners correctly note, applies to actions that induce a third person not to perform a contract with the plaintiff. Restatement (Second) of Torts § 766 (1979); see Petr. Br. 33. In other words, if *A* and *B* have a contract, and *C* induces *B* to violate the contract, then *A* has a claim against *C*. But in enacting section 1981, Congress was also (indeed, primarily) concerned with situations where, for racially discriminatory reasons, *C* causes *A* not to be able to perform *A*'s contract with *B*. Thus, even in situations where *B* remains willing and able to meet its obligations to *A*, section 1981 provides a remedy if *A* has been deterred or punished for seeking to exercise his right to enter into contracts.

Put concretely, even petitioners concede that section 1981 should provide a remedy for an individual if a company contracting with his employer persuaded the employer "to fire the employee, or to staff the employee on a different project, because of his race." Petr. Br. 32. But it is equally clear that

section 1981 must provide a remedy if a discriminator, instead of persuading a black worker's employer to fire him, forces the worker off the job by threatening to kill him if he does not quit or ask for a reassignment. In this second scenario, there would of course be no breach by the employer of the contract. Nonetheless, the employee has clearly been deprived of his ability to perform his employment contract and has also been deprived, at the very least, of some of the benefits that would otherwise have flowed from the contract.

The complaint in this case alleges a version of this second scenario. For racially discriminatory reasons, Domino's prevented McDonald from carrying out his duties as JWM's president and operator. The fact that JWM did not breach its contractual relationship with McDonald is simply immaterial.

Furthermore, section 1981 was intended to do more than protect black individuals' right to be subordinate employees in someone else's enterprise. It was intended as well to protect them in their ability to work for themselves, to be entrepreneurs. In the contemporary economy, that ability to do "independent business," Cong. Globe, *supra*, at 1758 (statement of Senator Trumbull), necessitates that they, like all other Americans, be able to form corporations, with the ensuing contractual status as a shareholder. See *supra* Part I.C.2. Here, too, discriminators' efforts to prevent blacks from acquiring and benefiting from shareholder status fall within the purview of section 1981. If, for example, the State of Nevada were to enact a statute denying black individuals the right to form corporations and work for themselves, that statute would surely violate 42 U.S.C. 1981 and 1982 as well as the Fourteenth Amendment. Because section 1981 reaches private conduct as well as governmental impairment, a private discriminator who acts with the intent to prevent a black individual from owning and obtaining benefits from his own business is also liable under section 1981.

**2. The 1991 Amendments to Section 1981 Reinforce Its Coverage of Discriminators Who Impair an Individual's Opportunity to Reap the Full Benefits of His Contracts with Other Parties.**

In 1991, Congress enacted two amendments to section 1981 that reinforce its coverage of actions by private parties undertaken with the purpose of depriving minority individuals of contractual opportunities.

New subsection 1981(c) provides that the right to make and enforce contracts is "protected against impairment by nongovernmental discrimination and impairment under color of State law." This provision explicitly "codified" this Court's decision in *Runyon* v. *McCrary*. H.R. Rep. No. 101-644, at 42 (1990).

New subsection 1981(b) provides an expansive definition of the term "make and enforce contracts" that includes "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." That provision responded to this Court's decision in *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), interpreting the rights protected by section 1981 more narrowly not to include post-formation conduct.

Section 1981(b) confirms that section 1981 claims are not limited to racially motivated episodes of the narrow common-law tort of intentional interference with contract. Section 1981(b) makes clear that an individual's right to perform a contract – and not just his right to nondiscriminatory performance by the other party – falls within the protection of the statute. The complaint in this case unquestionably alleges that petitioners intentionally denied McDonald the ability to perform his job for JWM because he was black. Petitioner Pear refused to deal with McDonald, see Pet. App. 12-13 (Compl. ¶ 19-20), thereby impairing his ability to perform the parts of his job as President and operator of JWM that required him to interact

with a major customer. In addition, as a result of Domino's refusal to provide estoppel certificates, not only was McDonald unable to perform JWM's construction contracts with Domino's, but "he was unable to move forward with other projects" he might have performed on behalf of JWM. *Id.* at 14 (Compl. ¶ 25).

Moreover, section 1981(b) also expressly protects the right to "enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." The ability to "enjoy[]" the benefits of a contract will clearly be impaired if a contracting party is "punish[ed]" for having engaged in contractual behavior. Cf. *Barrows* v. *Jackson*, 346 U.S. at 258. The complaint alleges that petitioners deliberately drove JWM into bankruptcy because they had decided not to deal with minority-owned businesses and because of race-based animus against McDonald personally. The intent to ruin McDonald *personally*, see *id.* at 12 (Compl. ¶ 19), thus deprived him of the benefit of being a business owner.

### 3. Respondent's Claim Fits Within a Well-Recognized Category of Cases in Which Individuals Have Been Permitted to Sue for Racially Motivated Interference with Their Contractual Relationships.

Modern cases continue to deal with attempts by discriminators to suppress the ability of racial minorities to contract with third parties. A paradigmatic example is *Vietnamese Fishermen's Ass'n* v. *Knights of Ku Klux Klan*, 518 F. Supp. 993 (S.D. Tex. 1981), in which defendant Ku Klux Klan members sought to intimidate Vietnamese-born fishermen into abandoning their shipping business through such tactics as burning the fishermen's boats and pointing weapons at the fishermen and their families.

Courts have consistently recognized, both before and after the 1991 amendments, that section 1981 reaches outsider impairment of an individual's ability to make, perform, and enjoy the benefits of contractual relationships. See, *e.g.*,

*Harris* v. *Allstate Ins. Co.*, 300 F.3d. 1183, 1197 (CA10 2002) ("Relief is available under § 1981 where a party discriminatorily uses its authority to preclude an individual from securing a contract with a third party."); *Spriggs* v. *Diamond Auto Glass*, 165 F.3d 1015 (CA4 1999) (defendants included a company president and the plaintiff's supervisor, as well as the employer with whom he had had a contractual relationship); *Daniels* v. *Pipefitters' Ass'n Local Union No. 597*, 945 F.2d 906 (CA7 1991) (defendant was a union whose discriminatory job referral system denied the plaintiff the ability to enter into employment contracts); *Des Vergnes* v. *Seekonk Water Dist.*, 601 F. 2d 9 (CA1 1979) (defendant was a water district whose racially motivated refusal to include the plaintiff developer's real estate within the district interfered with the plaintiff's ability to enter into contracts with black home buyers).[38]

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[38] See also, *e.g.*, *Faraca* v. *Clements*, 506 F.2d 956 (CA5 1975) (suit against the director of a Georgia center for the developmentally disabled that refused to hire plaintiff as a cottage administrator because plaintiff was in an interracial relationship, even though plaintiff's contract would have been with the state of Georgia, not with defendant); *Belfast* v. *Upsilon Chapter of Pi Kappa Alpha Fraternity at Auburn*, 267 F. Supp. 2d 1139, 1144 (M.D. Ala. 2003) (suit by pizza delivery man attacked for racial reasons because the attack interfered with his employment; explaining the viability of third-party interference claims and relying expressly on amended section 1981(b) to support its conclusions); *Morrison* v. *Am. Bd. of Psychiatry and Neurology, Inc.*, 908 F. Supp. 582 (N.D. Ill. 1996) (suit against credentialing organization whose actions allegedly interfered with the plaintiff's ability to enter into contracts with medical facilities); *Collin* v. *Rector and Bd. of Visitors of Univ. of Va.*, 873 F. Supp. 1008, 1015-16 (W.D. Va. 1995) (defendants included deans and faculty members whose racially motivated actions resulted in plaintiff's denial of tenure at the university); *Coleman* v. *Dow Chemical Co.*, 747 F. Supp. 146, 155 (D.Conn. 1990) (allowing section 1981 claim against the plaintiff's supervisor as well as the employer with

The cases demonstrate two things. First, they show that the outside impairment of minority individuals' contractual opportunities that motivated passage of section 1981 in the first place remains a serious problem today. Second, they show that the recognition of claims against third-party discriminators has not produced the flood of meritless lawsuits petitioners prophesize. Thus, this Court need not impose an unprecedented contractual privity requirement on section 1981 claims.

The claims that are cognizable under section 1981 share three critical elements. They involve (1) purposeful racial discrimination by the defendant (2) directed intentionally at a person who is the plaintiff or a party with whom the plaintiff is in privity that (3) is intended to impair the formation, performance, enforcement, or enjoyment by the plaintiff of benefits of a specific contractual opportunity.[39]

Although none of these elements requires a contractual relationship between the plaintiff and the discriminator, they nonetheless cabin the category of cases that can be brought. For example, a plaintiff whose car was destroyed in a racially motivated firebombing would fail to state a section 1981 claim if he alleged only that the defendant "interfered with his housing rights" and "intimidated him"; while the defendant's act could conceivably be related to some potential contractual opportunity, if a plaintiff fails to point to any specific contract

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whom he had a contractual relationship; relying on *Sullivan* and the common origins of sections 1981 and 1982 in recognizing such claims); *Coley* v. *M&M Mars, Inc.*, 461 F. Supp. 1073, 1076 (M.D. Ga. 1978) (defendants included the plaintiff's co-workers who interfered with his contractual relationship with his employer).

[39] See *Bediako* v. *Stein Mart, Inc.*, 354 F.3d 835, 839 (CA8 2004); *Hampton* v. *Dillard Dept. Stores, Inc.*, 247 F.3d. 1091, 1101-02 (CA10 2001); *Green* v. *State Bar of Tex.*, 27 F.3d 1083, 1086 (CA5 1994); *Mian* v. *Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087 (CA2 1993).

with which the defendant had interfered, he fails to state a claim. See *Stackhouse* v. *DeSitter*, 566 F. Supp. 856, 858-59 (N.D. Ill 1983). Cf. *DeMatteis* v. *Eastman Kodak Co.*, 511 F.2d 306, 311-12 (CA2 1975) (recognizing plaintiff's satisfaction of this element where he alleged that defendant, by punishing him, had impaired his ability to sell his house to an African American; plaintiff had identified a specific contractual right). See also *Southend Neighborhood Improvement Ass'n* v. *St. Clair County*, 743 F.2d 1207, 1211 (CA7 1984) (explaining that a "causal nexus" must exist between the defendant's behavior and the contract right impaired).

By contrast, in this case, the complaint alleges each of the elements of a section 1981 claim against a third-party discriminator. First, it alleges racial animus by petitioners. See Pet. App. 13-14, 16 (Compl. ¶¶ 24, 43-45). Second, the complaint alleges that petitioners' racially discriminatory conduct was directed intentionally at McDonald and the business he owned. See *id.* at 12-14, 16 (Compl. ¶¶ 19, 24, 47). Thus, respondent was not an incidental victim of petitioners' discriminatory conduct, but rather its primary target. Third, given the context of petitioners' discriminatory actions, which were directed at respondent in his capacity as owner-operator or JWM, the complaint clearly alleges that Domino's discrimination impaired his contracts with JWM. See *id.* at 12-14, 16 (Compl. ¶¶ 19-21, 24-26, 30, 47).

The critical flaw in petitioners' analysis is that they assume that if "[s]ection 1981 authorizes suit only by persons whose own right to 'make and enforce contracts' has been infringed," Petr. Br. 25, this necessarily means that the plaintiff's right must involve a contract *with* the defendant. To the contrary, as long as the plaintiff is alleging that the discriminator intentionally impaired his right to make *a* contract, the fact that the discriminators' own contractual rights and responsibilities are not at issue is irrelevant.

## CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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