
CIVIL RIGHTS — STATUTORY STANDING — FIFTH CIRCUIT HOLDS THAT CORPORATIONS HAVE STANDING TO SUE FOR RACIAL DISCRIMINATION UNDER 42 U.S.C. § 1981 WITHOUT REQUIRING PROOF OF AN IMPUTED RACIAL IDENTITY. — *White Glove Staffing, Inc. v. Methodist Hospitals of Dallas*, 947 F.3d 301 (5th Cir. 2020).

“[S]ocieties construct race because they have needs that the concept of race will satisfy.”¹ The reality of race is consequential rather than ontological — people experience race, in both positive and negative ways, because it is assigned to them, not because they truly possess a “race” in the way that they may possess brown skin or blonde hair.² The nature of race as a functional and institutional tool is particularly apparent when a court asks whether a corporation, a legal fiction in its own right, has a “racial identity” in order to determine whether the corporation has standing to bring race discrimination claims.³ Recently, however, in *White Glove Staffing, Inc. v. Methodist Hospitals of Dallas*,⁴ the Fifth Circuit sensibly refrained from this exercise, holding that a corporation had standing to sue for racial discrimination in contracting under section 1981 of the Civil Rights Act⁵ without requiring it to show that it had a racial identity.⁶ In so holding, the Fifth Circuit joined the better side of a widening circuit split in adopting, and extending to new factual terrain, a corporate standing test that focuses on the harm the corporation suffers instead of the corporation’s judicially constructed race. A “racial identity requirement” for § 1981 standing is inherently ill defined and contradicts the statute’s plain text and broad remedial purpose. The Fifth Circuit’s harm-based standard more faithfully adheres to these principles without engaging in unnecessary race construction.

In May 2016, White Glove Staffing, Inc. (White Glove), a temporary staffing company, entered discussions with Methodist Hospitals of Dallas and Dallas Methodist Hospitals Foundation, Inc. (collectively “Methodist”) to provide Methodist with temporary food service workers.⁷ In one of the meetings, a Methodist manager allegedly told White

¹ Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770, 838 (2020).

² See *id.* at 837–39. See generally Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.–C.L. L. REV. 1 (1994) (arguing that race is a social creation rather than a physiological trait).

³ See cases cited *infra* note 48.

⁴ 947 F.3d 301 (5th Cir. 2020).

⁵ 42 U.S.C. § 1981.

⁶ See *White Glove*, 947 F.3d at 308.

⁷ *Id.* at 303.

Glove that its lead chef “preferred Hispanics” as employees.⁸ Nevertheless, White Glove sent its first worker, Carolyn Clay (a Black woman), to a Methodist kitchen later the same month, while negotiations were ongoing.⁹ During one of Clay’s first shifts, a Methodist employee told her that “[t]hey usually don’t let [B]lacks in this kitchen,” and a few days later, a “very upset” Methodist manager told White Glove that Methodist was “not happy” with Clay because the chef “wanted only Hispanics” and asked why the company had sent Methodist “other people.”¹⁰ But White Glove could not find a replacement, so White Glove sent Clay to Methodist again.¹¹ Methodist management told her to leave three hours into her shift.¹² Methodist called White Glove and informed it “the whole deal was off,” and White Glove never sent another worker to Methodist.¹³

In 2017, White Glove sued Methodist in federal court,¹⁴ alleging Methodist had discriminated and retaliated against White Glove in violation of Title VII of the Civil Rights Act of 1964, the Texas Commission on Human Rights Act (TCHRA), and § 1981.¹⁵ Methodist moved to dismiss, arguing that White Glove lacked statutory standing¹⁶ to sue under Title VII and the TCHRA because White Glove was not Methodist’s “employee,”¹⁷ and that White Glove lacked standing to assert a § 1981 discrimination claim because it was a corporation without a “racial identity.”¹⁸ The district court granted Methodist’s motion to dismiss the Title VII, TCHRA, and § 1981 discrimination claims.¹⁹ The

⁸ *Id.* The Methodist chef also allegedly told White Glove to “[s]end [him] some compadres,” which White Glove interpreted to mean the chef wanted Hispanic/Latinx workers. *Id.* (alterations in original).

⁹ *Id.*

¹⁰ *Id.* at 303–04.

¹¹ *Id.* at 304.

¹² *Id.*

¹³ *Id.*

¹⁴ *White Glove Staffing, Inc. v. Methodist Hosps. of Dall.*, No. 17-CV-1158, 2017 WL 3925328, at *1 (N.D. Tex. Sept. 7, 2017). Clay was also a party to the original suit, *id.*, but not to the Fifth Circuit appeal, *see White Glove*, 947 F.3d at 303.

¹⁵ *White Glove*, 2017 WL 3925328, at *1. 42 U.S.C. § 1981 prohibits racial discrimination in the making and enforcement of contracts. *See White Glove*, 947 F.3d at 307 (citing *Domino’s Pizza, Inc. v. McDonald*, 546 U.S. 470, 474–75 (2006)).

¹⁶ Statutory standing (hereinafter “standing”) is the right to sue under a particular federal statute. *See Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 & n.4 (2014).

¹⁷ *White Glove*, 2017 WL 3925328, at *2.

¹⁸ *Id.* Methodist also moved for summary judgment on White Glove’s § 1981 retaliation claim. *White Glove Staffing, Inc. v. Methodist Hosps. of Dall.*, No. 17-CV-1158, 2018 WL 5267525, at *1 (N.D. Tex. Oct. 23, 2018).

¹⁹ *White Glove*, 2017 WL 3925328, at *2–3. In a later order, the district court granted Methodist summary judgment on White Glove’s § 1981 retaliation claim. *White Glove*, 2018 WL 5267525, at *4. Methodist did not contest White Glove’s standing to bring the retaliation claim, but the district court held that White Glove’s opposition was not “purposive” enough to raise a genuine fact issue on whether Methodist retaliated against White Glove. *Id.* at *3.

district court agreed with Methodist that White Glove did not have standing under Title VII or the TCHRA because White Glove was not Methodist's employee.²⁰ The district court also agreed with Methodist that White Glove lacked standing under § 1981 because it was a corporation that had no racial identity.²¹ Although the district court observed that some circuits had endorsed § 1981 standing for corporations with imputed racial identities,²² it noted that the Fifth Circuit had not addressed the question and that "White Glove ha[d] not provided any facts that indicate it ha[d] acquired a racial identity."²³ White Glove appealed.²⁴

The Fifth Circuit affirmed in part, reversed in part, and remanded.²⁵ Writing for a unanimous panel, Judge Haynes²⁶ reversed the district court's dismissal of White Glove's § 1981 discrimination claim,²⁷ holding that White Glove had standing to sue Methodist under § 1981 even though it did not have a racial identity.²⁸ Judge Haynes first acknowledged that the Supreme Court had not addressed whether corporations have standing under § 1981.²⁹ However, she found the district court's authority for rejecting the possibility of corporate standing, language from *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,³⁰ inapposite because the *Arlington Heights* standing analysis was dicta that involved standing under the Fourteenth Amendment, not statutory standing.³¹

Judge Haynes next noted that several other circuits had held that corporations have standing to assert § 1981 claims.³² She rejected Methodist's argument that these cases stood for the rule that a corporation must have an imputed racial identity in order to have standing under § 1981.³³ The fact that the corporations in those cases had imputed racial identities, Judge Haynes held, did not mean that an imputed racial

²⁰ *White Glove*, 2017 WL 3925328, at *2–3.

²¹ *Id.* at *3.

²² *See id.*; *see also* cases cited *infra* note 48.

²³ *White Glove*, 2017 WL 3925328, at *3.

²⁴ *White Glove*, 947 F.3d at 303. White Glove also appealed the grant of summary judgment on the § 1981 retaliation claim. *Id.*

²⁵ *Id.*

²⁶ Judge Haynes was joined by Chief Judge Owen and Judge Costa.

²⁷ *White Glove*, 947 F.3d at 309.

²⁸ *See id.* at 305–07.

²⁹ *Id.* at 305.

³⁰ 429 U.S. 252 (1977); *see also* *White Glove Staffing, Inc. v. Methodist Hosps. of Dall.*, No. 17-CV-1158, 2017 WL 3925328, at *3 (N.D. Tex. Sept. 7, 2017) (citing *Arlington Heights*, 429 U.S. at 263).

³¹ *See White Glove*, 947 F.3d at 305.

³² *Id.*

³³ *See id.* at 306; *cf.* Brief for Appellees at 11–13, *White Glove*, 947 F.3d 301 (5th Cir. 2020) (No. 19-10006).

identity is necessary for a corporation to have standing under § 1981.³⁴ Citing the D.C. Circuit's reasoning in *Gersman v. Group Health Ass'n*,³⁵ Judge Haynes instead held that a corporation could have standing under § 1981 if it suffered harm from racial discrimination.³⁶ Under this harm-based standard, a corporation could have standing under § 1981 even if it had only one minority employee, as long as it alleged that discrimination against that employee interfered with the corporation's right to make or enforce a contractual relationship.³⁷ Since White Glove had alleged that Methodist's discrimination against Clay caused Methodist to end its contractual relationship with White Glove, White Glove could have standing to sue Methodist under § 1981, even though it did not have a racial identity.³⁸

After Judge Haynes determined that White Glove *could* have standing under § 1981 without needing to prove that it had a racial identity, she applied the test developed in *Lexmark International, Inc. v. Static Control Components, Inc.*³⁹ to determine whether White Glove actually *did* have standing.⁴⁰ Under *Lexmark*, statutory standing first requires the plaintiff's claim to fall within the "zone of interests" that the statute was designed to protect.⁴¹ Second, the plaintiff's claimed injury must have been "proximately caused by violations of the statute."⁴² Judge Haynes concluded that White Glove's claim satisfied both *Lexmark* requirements. White Glove's claim met the zone-of-interests requirement because § 1981 protects the right to make and enforce contracts "without respect to race,"⁴³ and White Glove had alleged that Methodist's racist aversion to Black kitchen staff interfered with its contract with Methodist.⁴⁴ White Glove also met the proximate causation standard because it alleged a "sufficiently close connection" between Methodist's discrimination (the violation) and the termination of Methodist's contract negotiations with White Glove (the injury).⁴⁵ Because White Glove's claim met both *Lexmark* prongs, White Glove had statutory

³⁴ *White Glove*, 947 F.3d at 306.

³⁵ 931 F.2d 1565 (D.C. Cir. 1991), *vacated on other grounds*, 502 U.S. 1068 (1992), *aff'd on reh'g*, 975 F.2d 886 (D.C. Cir. 1992).

³⁶ *White Glove*, 947 F.3d at 306–07 (citing *Gersman*, 931 F.2d at 1568).

³⁷ *See id.* at 306 (citing *Gersman*, 931 F.2d at 1569).

³⁸ *See id.* at 306–07.

³⁹ 572 U.S. 118 (2014).

⁴⁰ *See White Glove*, 947 F.3d at 307.

⁴¹ *Lexmark*, 572 U.S. at 129.

⁴² *Id.* at 132.

⁴³ *White Glove*, 947 F.3d at 307 (quoting *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 474 (2006)).

⁴⁴ *See id.* at 307–08.

⁴⁵ *Id.* at 308 (quoting *Lexmark*, 572 U.S. at 133). Judge Haynes held that Methodist had waived the proximate cause issue by addressing it only in a footnote, but noted that even if the argument had not been waived, White Glove would have alleged proximate cause. *Id.*

standing to sue Methodist under § 1981, and Judge Haynes reversed the dismissal of the § 1981 discrimination claim and remanded the case to the district court.⁴⁶

The Fifth Circuit in *White Glove* joined the First, Tenth, and D.C. Circuits in holding that corporations do not need an imputed racial identity to have statutory standing for § 1981 claims.⁴⁷ In doing so, it picked the right side of a broadening circuit split over whether a racial identity is required for corporate standing under § 1981.⁴⁸ A racial identity requirement for corporate standing under § 1981 creates line-drawing problems, contradicts § 1981's text, and frustrates the statute's remedial purpose. *White Glove's* harm-based test avoids these difficulties.

The most obvious problem with a racial identity requirement for corporate § 1981 standing is defining what a "corporate racial identity" means.⁴⁹ If race has contested and variable meanings in the context of natural persons, assigning it to artificial persons is hardly likely to produce a clear standard. Unsurprisingly, therefore, the circuits adhering to a racial identity requirement for corporate standing do not agree on what that requirement entails. Some decisions hold that a corporation possesses a racial identity if it is certified as minority-owned with the

⁴⁶ See *id.* at 308–09. The Fifth Circuit also affirmed the grant of summary judgment on White Glove's § 1981 retaliation claim, agreeing with the district court that White Glove's response to Methodist's conduct did not meet the "purposive opposition" standard. See *id.*

⁴⁷ See *id.* at 307; *Guides, Ltd. v. Yarmouth Grp. Prop. Mgmt., Inc.*, 295 F.3d 1065, 1072 (10th Cir. 2002); *Gersman v. Grp. Health Ass'n*, 931 F.2d 1565, 1568 (D.C. Cir. 1991), *vacated on other grounds*, 502 U.S. 1068 (1992), *aff'd on reh'g*, 975 F.2d 886 (D.C. Cir. 1992); *Des Vergnes v. Seekonk Water Dist.*, 601 F.2d 9, 13–14 (1st Cir. 1979).

⁴⁸ Compare cases cited *supra* note 47, with, e.g., *Woods v. City of Greensboro*, 855 F.3d 639, 645–46 (4th Cir. 2017); *McClain v. Avis Rent A Car Sys., Inc.*, 648 F. App'x 218, 222 n.4 (3d Cir. 2016); *Carnell Constr. Corp. v. Danville Redev. & Hous. Auth.*, 745 F.3d 703, 715 (4th Cir. 2014); *Bains LLC v. Arco Prods. Co.*, 405 F.3d 764, 770 (9th Cir. 2005); *Amber Pyramid, Inc. v. Buffington Harbor Riverboats, LLC*, 129 F. App'x 292, 295 (7th Cir. 2005); *Contemp. Pers., Inc. v. Godiva Chocolatier, Inc.*, No. 09-00187, 2009 WL 2431461, at *2 (E.D. Pa. Aug. 6, 2009) (all looking to imputed racial identity to satisfy corporate standing under § 1981).

⁴⁹ See William Wyatt Allen, Note, *Justice for All: Why the Gersman v. Group Health Association Analysis for Standing Should Be Universally Adopted for Cases Involving Companies Asserting Racial Discrimination Claims*, 18 RUTGERS RACE & L. REV. 29, 52–53 (2017). For a general overview of the concept of corporate racial identity, see generally Richard R.W. Brooks, *Incorporating Race*, 106 COLUM. L. REV. 2023 (2006).

government.⁵⁰ Other cases hold that minority ownership without certification is sufficient.⁵¹ Still others impute a racial identity to a corporation based on a minority-oriented corporate purpose.⁵² These metrics are themselves open to varying interpretations.⁵³ The dangers of this uncertainty are twofold. First, it might dissuade corporations from bringing meritorious claims if they are uncertain whether they will have standing because they do not know which definition of the requirement the court will use. Second, the lack of clarity could tempt judges to reason backwards (subconsciously or otherwise) from their desired outcome; if they think the corporation “should” be able to bring its claim, they may be more likely to select a definition of “racial identity” that allows it to do so, and vice versa.⁵⁴

Aside from the conceptual and line-drawing problems that naturally accompany racial definition, a racial identity requirement for corporate standing is doctrinally inconsistent with both the plain text and remedial purposes of § 1981. On the textual front, § 1981 grants statutory standing to “[a]ll persons” alleging contractual injury from racial discrimination.⁵⁵ The plain meaning of “all” implies that, if “person” includes corporations, every corporation is protected, not just the few that are able to claim a racial identity. There are several reasons to think that corporations are “persons” for § 1981 standing purposes. First, “persons” are the only entities to which the statute confers a cause of action,⁵⁶ so it is hard to see how corporate standing (with or without a racial identity requirement) is possible at all if corporations are not § 1981 “persons.” Second, the Dictionary Act expressly provides that “person” in federal

⁵⁰ See, e.g., *Nat'l Ass'n of Afr. Am.-Owned Media v. Charter Commc'ns., Inc.*, 915 F.3d 617, 622 n.3 (9th Cir. 2019), *vacated*, 140 S. Ct. 1009 (2020); *Carnell*, 745 F.3d at 715; *Autolube Grp. LLC v. Delfin Grp. USA LLC*, No. 13-2422, 2014 WL 5488400, at *5 (D.S.C. Oct. 29, 2014).

⁵¹ See, e.g., *Woods*, 855 F.3d at 645-46; *Bains*, 405 F.3d at 770; cf. *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1058-60 (9th Cir. 2004) (holding that a certified minority-owned business had standing but not explicitly requiring certification).

⁵² See, e.g., *Oti Kaga, Inc. v. S.D. Hous. Dev. Auth.*, 342 F.3d 871, 882 (8th Cir. 2003); *Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702, 706 (2d Cir. 1982) (granting standing to nonprofit “established for the very purpose of advancing minority interests”).

⁵³ For example, does a “minority-owned business” need to be fully minority-owned? If not, what percentage suffices? What determines whether a corporation has a minority-oriented purpose? See Jonathan Bailyn, *A Critical Race Theorist Account of Corporate Racial Standing*, 16 SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUST. 725, 735-38 (2014) (“[D]ifferent concepts of racial and corporate identity have created an unstable doctrine of corporate racialization.” *Id.* at 735.).

⁵⁴ See Avani Mehta Sood, *Motivated Cognition in Legal Judgments — An Analytic Review*, 9 ANN. REV. L. & SOC. SCI. 307, 315-16 (2013) (identifying determinations of threshold questions such as standing as common sites of “motivated cognition” in judicial reasoning); Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 614-15 (2004) (arguing that judges’ personal views routinely influence standing decisions).

⁵⁵ 42 U.S.C. § 1981(a) (emphasis added); see also *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006).

⁵⁶ See 42 U.S.C. § 1981.

statutes includes corporations,⁵⁷ a default rule the Supreme Court has warmly embraced in other contexts.⁵⁸ If corporations are indeed “persons” under § 1981, a racial identity requirement makes little sense, not only in light of the plain meaning of “all,” but also because natural “persons” do not need to have a racial identity to sue under § 1981; the statute confers standing to all natural persons, without regard to racial identity.⁵⁹ There is no reason to read a racial identity requirement into the language of § 1981 as applied to corporate persons when the same language imposes no such requirement on natural persons.⁶⁰

Requiring corporations to assert a racial identity to have statutory standing also contravenes § 1981’s broad remedial objectives. Section 1981’s remedial purposes — to actively deter future discriminatory conduct as well as to compensate victims of discrimination after the fact — are well documented,⁶¹ and the Supreme Court continually invoked these purposes to expand the statute’s reach in the 1970s.⁶² When the Court broke from this trend in *Patterson v. McLean Credit Union*,⁶³ Congress took less than two years to legislatively overrule the decision and again affirmed a broad reading of § 1981.⁶⁴

A corporate standing doctrine that aligns with this clearly expressed legislative intent would allow any corporation asserting a contractual injury arising from racial discrimination to bring a § 1981 claim to redress that injury.⁶⁵ The § 1981 standing test for natural persons, which requires only that the plaintiff allege harm to the protected right,⁶⁶ lives

⁵⁷ 1 U.S.C. § 1.

⁵⁸ See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706–07 (2014).

⁵⁹ See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295–96 (1976); *id.* at 289–95 (detailing how the legislative history of § 1981 supports standing for all races); *Des Vergnes v. Seekonk Water Dist.*, 601 F.2d 9, 13–14 (1st Cir. 1979); John Hope Franklin, *The Civil Rights Act of 1866 Revisited*, 41 HASTINGS L.J. 1135, 1137 (1990).

⁶⁰ Cf. *Clark v. Martinez*, 543 U.S. 371, 378 (2005) (“To give th[e] same words a different meaning for each category would be to invent a statute rather than interpret one.”).

⁶¹ See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422–38 (1968) (examining § 1 of the Civil Rights Act of 1866 and concluding that it supports a broad, remedial interpretation of §§ 1981 and 1982); Franklin, *supra* note 59, at 1136–39 (describing the legislative intent and early judicial interpretations of § 1981); *The Supreme Court, 2019 Term — Leading Cases*, 134 HARV. L. REV. 410, 587 & sources cited nn. 76–77 (2020).

⁶² See, e.g., *McDonald*, 427 U.S. at 295; *Runyon v. McCrary*, 427 U.S. 160, 173 (1976); *Tillman v. Wheaton-Haven Recreation Ass’n*, 410 U.S. 431, 440 (1973).

⁶³ 491 U.S. 164 (1989); *accord id.* at 177 (reading § 1981 narrowly to apply only to discrimination in contract formation instead of in all aspects of contractual relationships).

⁶⁴ See Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1071–72 (codified as amended at 42 U.S.C. § 1981) (extending § 1981 to “all benefits, privileges, terms, and conditions of the contractual relationship,” *id.* at 1072).

⁶⁵ See *Gersman v. Grp. Health Ass’n*, 931 F.2d 1565, 1568 (D.C. Cir. 1991), *vacated on other grounds*, 502 U.S. 1068 (1992), *aff’d on reh’g*, 975 F.2d 886 (D.C. Cir. 1992); Tyler Larson, Note, *I’m a Real Boy: Imputing Racial Identity to Corporations for Racial Discrimination Standing*, 54 U. LOUISVILLE L. REV. 483, 500 (2016).

⁶⁶ See *Domino’s Pizza, Inc. v. McDonald*, 546 U.S. 470, 479–80 (2006).

up to these remedial goals. But a racial identity requirement for corporate persons, in centering the plaintiff's identity rather than the defendant's discriminatory conduct, does precisely the opposite by conferring standing to only a sliver of potential victims. The most inclusive measure of corporate racial identity, majority-minority ownership, covers less than a third of all U.S. businesses.⁶⁷ A racial identity requirement makes the vast majority of U.S. businesses *unable* to litigate § 1981 injuries, turning § 1981's remedial intent on its head.

The facts of *White Glove*, perhaps more than any previous corporate standing case, illustrate the danger that a racial identity requirement poses to the fulfillment of § 1981's remedial purposes. *White Glove* could not have alleged a racial identity under any current definition of the concept: it was not minority-owned,⁶⁸ and its "purpose" was providing food service workers to institutional clients, not "advancing minority interests."⁶⁹ Clearly, however, *White Glove*'s injury — losing a contract because of racial discrimination — is a paradigmatic example of the harm § 1981 is intended to prevent. Unlike in past cases, the direct target of the discrimination was *White Glove*'s Black employee, and not *White Glove* itself.⁷⁰ But the harm *White Glove* suffered — termination of its contract negotiations — was exactly the same as if the discrimination had directly targeted *White Glove* for being minority-owned or otherwise racially identified.⁷¹ A racial identity requirement would have filtered out *White Glove*'s claim on grounds that were completely immaterial to the injury *White Glove* suffered, undermining § 1981's broad objective to "break down all discrimination" in the making and enforcement of contracts.⁷²

Overall, then, *White Glove* exemplifies how the Fifth Circuit's harm-based approach, which requires only that a corporation allege harm to the protected right, rather than possess a judicially constructed racial

⁶⁷ See MINORITY BUS. DEV. AGENCY, U.S. DEP'T OF COM., THE STATE OF MINORITY BUSINESS ENTERPRISES 2 (2018), https://www.mbda.gov/mbda-research-report/files/assets/common/downloads/MBDAStateofMinorityBusinessEnterprises_2012Data.pdf?uni=e7b71c8dc099d7cba95b5be30e6618df [<https://perma.cc/8FUP-QR2T>] (stating that, in 2012, 29.3% of all privately held, for-profit businesses were classified as minority-owned).

⁶⁸ *White Glove*, 947 F.3d at 306.

⁶⁹ *Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702, 706 (2d Cir. 1982).

⁷⁰ See *White Glove*, 947 F.3d at 307.

⁷¹ Cf. *Gersman v. Grp. Health Ass'n*, 931 F.2d 1565, 1569 (D.C. Cir. 1991), *vacated on other grounds*, 502 U.S. 1068 (1992), *aff'd on reh'g*, 975 F.2d 886 (D.C. Cir. 1992) (noting that "the situation would be no different" for the plaintiff if the corporation were nonminority owned and it suffered injury because it had one minority employee).

⁷² *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 432 (1968) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1599 (1866) (statement of Sen. Lyman Trumbull) (emphasis added)) (emphasis omitted).

identity,⁷³ provides a more workable alternative that adheres more faithfully to § 1981's text and remedial objectives.⁷⁴ First, the *White Glove* harm test is more administrable because it does not require an unpredictable and seemingly arbitrary preliminary determination of whether a corporation has a racial identity.⁷⁵ Second, a focus on harm rather than the plaintiff's identity is consistent with the statutory text's undifferentiated, race-neutral protections to all natural and corporate persons who suffer injury to the rights it protects. The statute's remedial and deterrence goals are also more effectively advanced when it is the defendant's conduct, and not the injured party's judicially imposed racial status, that determines whether a claim proceeds. Finally, a harm-based approach to corporate standing encompasses an entire subset of cases, illustrated by *White Glove* itself, in which prejudice against a company's minority employee causes the company's injury; the majority of these cases would likely not be captured by a racial identity-based standing doctrine.⁷⁶ This last point is perhaps *White Glove*'s most novel contribution to corporate § 1981 standing doctrine — it appears to be the only case in which a corporation stated a § 1981 claim based solely on harm from discrimination against one of its employees, rather than discrimination against the corporation itself or one of its owners, shareholders, or officers.⁷⁷ Given the conspicuous absence of Black representation in corporate leadership,⁷⁸ *White Glove*'s grant of § 1981 standing based on discrimination against Clay, a Black woman in a nonmanagerial position, may be especially significant in expanding the scope of § 1981 standing in accordance with its remedial aims.

As one commentator has aptly observed, corporate racial identity is “a myth overlaid upon a fiction.”⁷⁹ And indeed, judicially engrafting race onto corporations foregrounds the socially constructed nature of race. A judge's synthesis of racial identity from seemingly mundane

⁷³ See *White Glove*, 947 F.3d at 306–07; *Gersman*, 931 F.2d at 1569.

⁷⁴ Other commentators have endorsed *Gersman*'s approach to corporate standing under § 1981. See, e.g., Brooks, *supra* note 49, at 2076; Allen, *supra* note 49, at 52–55; Larson, *supra* note 65, at 502–03.

⁷⁵ Cf. *Gersman*, 931 F.2d at 1569; Baily, *supra* note 53, at 746–47.

⁷⁶ Cf. *Gersman*, 931 F.2d at 1569.

⁷⁷ But see *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1488 (9th Cir. 1995) (concluding that a private junior college had standing under § 1981 based on discrimination against its minority students).

⁷⁸ See, e.g., J. Yo-Jud Cheng et al., *Why Do Boards Have So Few Black Directors?*, HARV. BUS. REV. (Aug. 13, 2020), <https://hbr.org/2020/08/why-do-boards-have-so-few-black-directors> [<https://perma.cc/4B43-XF6G>] (noting that Black people made up only 4.1% of Russell 3000 board members in 2019). A recent study finds evidence of racial prejudice at many levels of corporate America. See CTR. FOR TALENT INNOVATION, KEY FINDINGS: BEING BLACK IN CORPORATE AMERICA 2–8 (2019), https://www.talentinnovation.org/_private/assets/BeingBlack-KeyFindings-CTL.pdf [<https://perma.cc/L6KZ-GB8E>].

⁷⁹ Baily, *supra* note 53, at 748.

facts about a business's ownership structure and corporate governance is starkly representative of the process through which societies create, modify, and maintain race as a tool for political control (among other purposes) of certain groups based on skin color, ethnographic origins, and other data.⁸⁰ Perhaps it is telling that, in determining corporate racial identity, many courts use the same inferential practices that *reinforce* racial stratification to administer civil rights statutes that purport to *remedy* it.⁸¹ Fortunately, however, an alternative test for corporate standing exists. The Fifth Circuit, in rejecting a racial identity requirement and embracing a harm-based approach, chose a standard for corporate standing under § 1981 that is easier to apply and more closely aligns with the statute's text and (theoretically) robust enforcement scheme. The Supreme Court has yet to weigh in on the question, but if it does, one hopes it will heed the *White Glove* approach.

⁸⁰ For a seminal articulation of the sociopolitically contingent nature of race, see generally Haney López, *supra* note 2 (outlining “the importance of chance, context, and choice in the social mechanics of race,” *id.* at 62).

⁸¹ *Cf.* Brooks, *supra* note 49, at 2072 (“[W]hen courts condition their attribution of race to a corporate person on their own judgment (or the state’s judgment) they . . . veer down the dead end path of searching for racial essence.”).