

**EXTENSION OF TIME TO REQUEST FOR
A PETITION FOR WRIT OF CERTIORARI**
No. _____

In the Supreme Court of The United States

From the U.S. Court of Appeals for the First Circuit No. 16-1549

BEST AUTO REPAIR SHOP, INC.; ELVIS MARTINEZ-EVANGELISTA,

Petitioners--Appellants

v.

UNIVERSAL INSURANCE GROUP; UNIVERSAL INSURANCE COMPANY;
CARIBBEAN ALLIANCE INSURANCE COMPANY; EASTERN AMERICA
INSURANCE COMPANY; JUANITA ORTIZ; JOHN DOE; JANE DOE,

Respondents-- Appellees

**APPLICATION FOR EXTENSION OF TIME TO FILE
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

To the Honorable Justice Stephen Breyer of the First Circuit:

I. Introduction

The Petitioners Elvis Martinez and Best Auto Repair, Inc.¹ (together, “Mr. Martinez”) respectfully request that the Honorable U.S. Supreme Court extend the deadline by Forty (40) days for filing a Petition for a writ of Certiorari from an Order dated January 12, 2018 from the U.S. Court of Appeals for the First Circuit denying

¹ Best Auto Repair Shop Inc., is a small, privately held corporation operating in San Juan, Puerto Rico with no parent company. Best Auto Repair Shop Inc., is not publicly traded.

a petition for rehearing and a rehearing *En Banc* filed by Mr. Martinez seeking review of the First Circuit Court's judgment affirming a District Court's 72-page decision, by refusing to review the District Court's decision on waiver grounds. The Opinion and Order are attached.

The current deadline in this case for the filing the Petition of Certiorari is April 12, 2018. Petitioner Mr. Martinez respectfully requests an extension of forty (40) days from the current deadline, or until May 22, 2018, to fully complete and file the Petition for Certiorari, for the reasons that follow.

II. Brief Description Of Case

Mr. Martinez filed a civil rights action pursuant to 42 U.S.C. § 1981 against defendants Universal Insurance Company and Juanita Ortiz (together "Universal"). The case, with an enormous record, including direct evidence of racial discrimination, was actively litigated since 2009, to vindicate the right of Mr. Martinez to be free from racism in contracting. In 2013, Universal filed a motion for summary judgment to attempt to dismiss the Section 1981 claim, but it was denied by District Court Judge Domínguez, who adopted the recommendation of Magistrate Judge Silvia Carreño Coll. Both Judge Dominguez and Magistrate Judge Carreño Coll determined that the Section 1981 claim for racism against Mr. Martinez in contracting had to be determined by a jury. However, when the case was reassigned to a newly appointed District Court Judge in 2014, Pedro Delgado, he

granted Universal's motion for reconsideration of the denial of summary judgment in its entirety.

On appeal, a panel of the First Circuit affirmed largely alleging that an issue of law was waived. Reliance on waiver on a matter purely of law is so erroneous as to call for an exercise of this Court's supervisory power and conflicts with decisions of other Circuit Court the First Circuit and even the Supreme Court and completely ignores the great public interest in preventing racial discrimination in contracting. This case involves a question of exceptional importance: whether 42 U.S.C. § 1981 protects against the impairment of the ability to enter into a contract and contractual relationships or, as the District Court (Judge Delgado) held, it is limited to contracts.

III. Relief Requested; 40 Day Extension Of Time

The good cause for seeking this extension of time is twofold: First, a member of the undersigned attorney's immediate family recently passed away thus taking the undersigned attorney, a solo practitioner who has represented Mr. Martinez on a contingency basis throughout the proceedings, away from our office for a considerable period of time. On February 9, 2018 the undersigned's brother in law, Mr. Manuel Del Valle died from cancer. In helping the undersigned's sister and her two children during this difficult period, the undersigned attorney has been away from the office thus he has been unable to attend to this Petition.

Second, the passage of Hurricane Maria through the territory of Puerto Rico on September 20, 2018 caused massive destruction in the island. The undersigned,

a solo practitioner, suffered massive financial losses due to the hurricane, including damage to his own office. As a good faith effort was made by the undersigned to draft the petition but the filing of a petition seeking a writ of certiorari is time consuming and expensive, it is respectfully requested that Mr. Martinez be granted this extension, so he can file a petition to vindicate his civil rights.

CONCLUSION

For the reasons set forth above, we respectfully request that the Honorable Supreme Court grant an extension of forty (40) days from the current deadline, or until May 22, 2018 to file a Petition For A Writ of Certiorari.

CERTIFICATE OF SERVICE

I hereby certify that today, March 20, 2017, a true and correct copy of the foregoing Application To Extend Time has been served on the attorneys for the Respondent: Juan J. Casillas Ayala, and Israel Fernandez-Rodriguez and Rafael Gonzales Muñoz at their address of record by First Class Mail at P.O. Box 195075, San Juan, PR 00919-5075 and has been electronically served on the same attorneys at their e-mail address Juan J. Casillas Ayala jcasillas@cstlawpr.com, and Israel Fernandez-Rodriguez ifernandez@cstlawpr.com, and Rafael Gonzales Muñoz info@gonzalezmunozlaw.com.

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United States Court of Appeals For the First Circuit

No. 16-1549

BEST AUTO REPAIR SHOP, INC.; ELVIS MARTINEZ-EVANGELISTA

Plaintiffs - Appellants

MARIA BETANCOURT-BORIA

Plaintiff

v.

UNIVERSAL INSURANCE GROUP; UNIVERSAL INSURANCE COMPANY;
CARIBBEAN ALLIANCE INSURANCE COMPANY; EASTERN AMERICA INSURANCE
COMPANY; JUANITA ORTIZ; JOHN DOE; JANE DOE

Defendants - Appellees

Before

Howard, Chief Judge,
Torruella, Lynch, Thompson,
Kayatta and Barron,

Circuit Judges.

ORDER OF COURT

Entered: January 12, 2018

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

/s/ Margaret Carter, Clerk

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

No. 16-1549

BEST AUTO REPAIR SHOP, INC.; ELVIS MARTINEZ-EVANGELISTA,

Plaintiffs -

MARIA BETANCOURT-BORIA, Appellants,

Plaintiff,

v.

UNIVERSAL INSURANCE GROUP; UNIVERSAL INSURANCE COMPANY;
CARIBBEAN ALLIANCE INSURANCE COMPANY; EASTERN AMERICA
INSURANCE COMPANY; JUANITA ORTIZ; JOHN DOE; JANE DOE,

Defendants – Appellees

**APPELLANTS' PETITION
FOR REHEARING OR FOR A REHEARING EN BANC**

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Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, Appellants move the Court for rehearing or rehearing *En Banc* of the Court's judgment of November 16, 2017 affirming the District Court's 72-page decision, by refusing to review the District Court's decision on waiver grounds.

STATEMENT PURSUANT TO FED. R. APP. P. 35

Pursuant to Federal Rule of Appellate Procedure 35(b), Plaintiffs-Appellants Elvis Martinez and Best Auto Repair, Inc. (together, "Mr. Martinez") file this Petition for Rehearing or for Rehearing *En Banc* of the panel's November 16, 2017 Opinion in this case, which should be granted for the following reasons:

First, the panel's decision relying on waiver is erroneous, as explained below, and conflicts with decisions of the First Circuit and even the Supreme Court and completely ignores the great public interest in preventing racial discrimination in contracting. This a discrimination case under 42 U.S.C. § 1981 with direct evidence of racial discrimination.¹ Importantly, it is undisputed that Mr. Martinez and Best Auto both made a *prima facie* case of discrimination. Consideration by the full First Circuit is therefore necessary to secure and maintain uniformity of the law. In allowing the dismissal of a civil rights action filed in 2009 with direct proof of racial discrimination

¹ See Brief at 13 ("From Best Auto? Elvis? That black Dominican from Best Auto? We took him out of the Network and we're going to take him out of the business.").

on grounds that one issue of the decision by the District Court was waived, (it was not, see Brief at 58-59), the Panel's result conflicts with:

1. National Ass'n of Social Workers v. Harwood, 69 F.3d 622, 625-29 (1st Cir. 1995) (listing the general rules of waiver, including whether the issue is purely legal or lends itself to resolution without further fact development and allowing review of issue never raised at the district court);
2. Abril-Rivera v. Johnson, 795 F.3d 245 (1st Cir. 2015) (deciding to apply a safe harbor defense which was never argued in the district court or on appeal because waiver is a matter of discretion);
3. Singleton v. Wulff, 428 U.S. 106, 121 (1976) ("Certainly, there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, [o]r where "'injustice might otherwise result.'"") (citations omitted).

Second, this case involves a question of exceptional importance: whether 42 U.S.C. § 1981 protects against the impairment of the ability to enter into a contract and contractual relationships or, as the District Court held, it is limited to contracts. *En banc* review is particularly warranted here, given the Panel's refusal to review the erroneous interpretation of the reach of Section 1981 by the DC, although the issue was addressed throughout and in the Appellants' Brief.

REASONS FOR REQUESTING REHEARING

In affirming the District Court’s opinion, the Panel Opinion in this case has the following legal and factual errors, including:

- (1) The Panel Opinion’s waiver conclusion is erroneous. First, it is undisputed that Mr. Martinez and Best Auto both made a *prima facie* case of discrimination. Second, the Opinion reaches the wrong result for the wrong reasons; The DC’s principal holdings were two: (a) Defendant Ortiz was the only decisionmaker and (b) there was no “pretext”, but a business reason to discriminate against Mr. Martinez. The Panel focuses on one phrase and one aspect of the multiple holdings in the 72-page Opinion by the District Court (“DC”) and fails to mention all of the multiple factual and legal errors in the DC’s Opinion addressed in Mr. Martinez’s Brief, including the “restrictive” interpretation of the reach of Section 1981 (See Brief, at 58-59).² Third, the merits of the District Court’s restrictive view of the reach of Section 1981 is addressed in the Brief. (See Brief, at 58-59). In other words, there is no

² The Panel even gets Mr. Martinez’s challenge wrong when it repeatedly asserts that it consists of an appeal from *the denial of a motion for reconsideration*. See Panel Op., at 1 and 5 (emphasis added) (“We start with the plaintiffs’ challenge to the denial of the motion for reconsideration of the grant of summary judgment to the defendants on the § 1981 claims.”) See also Op., at 9. Contrary to that assertion, Judge Delgado granted Universal’s motion for reconsideration and Mr. Martinez’s appealed that grant of summary judgment on reconsideration.

The Opinion also erroneously asserts that other Universal employees, apart from Juanita Ortiz, were sued. See Op., at 2. Again, that assertion is factually wrong.

waiver. Finally, to refuse to review a ruling on a purely issue of law is erroneous and contrary to this Circuit Court's precedents, particularly given the strong public interest in preventing racial discrimination in contracting.

- (2) The Panel's Opinion also inverts the standard of summary judgment against the non-movant and misinterprets the contract law of Puerto Rico;
- (3) Even if one accepts the Panel's waiver argument of one issue in a 72-page Opinion, exceptional circumstances merit review by the Court given the strong public interest in preventing national and racial discrimination in contracting and to prevent a miscarriage of justice.

ARGUMENT

I. There was No Waiver Of One Issue Raised in the DC's Opinion

The Panel's Opinion gives the impression that the holdings of the DC's Opinion were never addressed in Mr. Martinez's Brief. The DC's Opinion contains many holdings (and many omissions of material facts), which were all addressed in the Brief, including the principal holdings on pretext and who were the decisionmakers in the case. According to the Opinion, the "plaintiffs' federal claims necessarily fail if the District Court is right about what § 1981 requires, and that the plaintiffs failed to challenge that conclusion in their opening brief on appeal."

Contrary to that conclusion reached by the Panel, that holding and all of the DC's multiple erroneous holdings in its 72-page Opinion are addressed in the Mr. Martinez's

Opening Brief, including, in its grant of a motion for reconsideration filed by the Universal Appellees, the DC's rejection, without any explanation, of findings of fact and conclusions of law made by both Magistrate Judge Carreño and Judge Dominguez. See Op., at 58 ("In that sense, what the District Court failed to understand, in its impermissible narrow reading of Section 1981, is that Universal is liable for the interference with each of those contracts of Mr. Martinez's customers.").

The DC's first legal (erroneous) ruling was to reverse the decision by Judge Dominguez that Mr. Martinez's claims under Section 1981 were NOT time barred. See DC's Opinion at 35 ("[Mr. Martinez] cannot breathe life into the claim relying on letters that Universal sent to its insureds after July 13, 2008 (a year prior to the date they filed the complaint), because by July 2009 the action had already expired, and those letters were but the effects of the decision they have challenged as discriminatory." (citing to Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 628-629 (2007))).

This aspect of the DC's erroneous holding is fully addressed in the Brief as follows:

Both Magistrate Judge Carreño and Judge Dominguez rejected Universal's argument - relying on Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 628-629 (2007) - that its decision to target Mr. Martinez in October of 2007 was the only act of discrimination alleged to have occurred. The District Court, however, adopted Universal's argument and concluded that that defendant Ortiz is the decision maker by narrowing impermissibly the discriminatory conduct in this case to the

sending of the letters as “mechanical acts.” Not only is the District Court’s conclusion wrong as a matter of law, but it is also contrary to the facts in this case. The discriminatory conduct in this case is vast, including but not limited to, the harassment, intimidation and constant and prolonged haggling with Mr. Martinez’s customers, as they themselves testified.

See Brief, at 51 (footnote omitted). The Brief then fully discusses the reasons both factual and legally why that conclusion by the DC is so erroneous. Id. at 52-53.

Mr. Martinez’s Brief even challenges the conclusion that his Section 1981 claim was time barred under Puerto Rico’s statute of limitations in an entire Section of the brief (and an entire Section of his Reply Brief). See Brief, at 60-63 (arguing that the DC initially erred in concluding that to toll the statute of limitations, Mr. Martinez had to allege in the complaint that he had sent tolling letters). The Panel’s Opinion erroneously (and incredibly) asserts that Mr. Martinez does “not dispute the District Court’s statute of limitations ruling.” See Op., at 10. Contrary to that assertion, Mr. Martinez devoted an entire section of the Brief to dispute that “ruling” and an entire section of his Reply Brief to contest the DC’s erroneous statute of limitations “ruling.” For the Opinion to state that the statute of limitations “ruling” was not disputed is mind-boggling.

The DC next held that Mr. Martinez could not claim that contracts existed because a key element was missing: all of Mr. Martinez’s contracts had a condition precedent. See DC’s Opinion, at 44 (“In consequence, a critical contractual element – fulfillment of a condition precedent to the contract’s existence – would be lacking had

they authorized plaintiffs to repair a vehicle prior to awaiting Universal's determination.""). As set forth in the pages 55-58 of the Brief, Mr. Martinez discusses why that conclusion is wrong and contrary to Puerto Rico law.

Next, the District Court ("DC") held that Universal had legitimate valid reasons for the conduct challenged and that Mr. Martinez's claim failed under the pretext analysis. The DC held: "These are valid, nondiscriminatory reasons for the decision challenged here",³ adopting, without any explanation, or even a citation to the record, Universal's mischaracterizations of fact to find a justification for the illegal discrimination.

As explained in Mr. Martinez's Brief that holding by the DC is erroneous as it omits essential material facts:

The threats, harassment and intimidation that Mr. Martinez's customers experienced at the hands of Universal -- including, obstructing the adjustment process, providing unreasonably low estimates, harassing and intimidating customers, waiting for prolonged periods of time, not providing any explanation, dealing with two and three different Universal representatives, even having to file lawsuits (Pimentel) and administrative claims (Aleman), the closing of their claims, etc., are never mentioned by the Court, although they are clear violations of Section 1981's prohibition against discriminatory interference.

Another questionable "business decision" showing pretext is not even discussed in Judge Delgado's Opinion; Ortiz's order to inform the largest insurance brokers in Puerto Rico that Universal had "no commercial relations" with Best Auto. See Appendix, Vol. V, at 3396.

³ See DC's Opinion, at 52.

See Brief, at 34-35. The Brief also drives a stake through the assumptions of pretext in the DC's Opinion:

Indeed, if one objectively looks at the interference with the contracts of Mr. Martinez, it simply makes no business sense as inevitably Universal pays more to his customers for the repair of their car, once removed from Best Auto. See Appendix, Vol. V, at 3311.

Two examples are the handling of the claims of Pedro Torres and Jose Guevara, which are mentioned by Judge Delgado, but he draws no reasonable inferences in favor of Mr. Martinez. The result in both claims is undisputed: Universal ended up paying more for those repairs. *Id.* at 3316; Vol. IV, at 2991-92.

See Brief, at 31.

The Panel's Opinion reads as if no facts in support of violations of illegal discrimination proscribed by Section 1981 are discussed or none of the case law which support reversal is mentioned. While the exact phrase "elements" is not cited, Mr. Martinez's Brief repeatedly and extensively describes the contracts he had, the illegal conduct never even mentioned in the DC's Opinion, which violates Section 1981 and rejects the DC's restrictive interpretation of the reach of Section 1981 with case law.

The Panel's Opinion misapprehends the rules of waiver by impermissibly extending waiver to dismiss a massive record which contains direct evidence of discrimination (as found by both Magistrate Carreño and Judge Dominguez) and extends back to 2009 by alleging that one of many contentions in the DC's 72-page

Opinion is not fully addressed in the opening brief.⁴ The Panel cited to Díaz-Colón v. Fuentes-Agostini, 786 F.3d 144, 149 (1st Cir. 2015) and Sparkle Hill, Inc. v. Interstate Mat Corp., 788 F.3d 25, 29 (1st Cir. 2015) to support its waiver argument. Both cases are completely distinguishable.

In Sparkle Hill, after the defendant moved for summary judgment, the plaintiff filed no opposition to summary judgment and instead appealed the dismissal for failure to oppose the summary judgment motion. In contrast, as the vast record in this case shows, Mr. Martinez filed an opposition to Universal's summary judgment, which two federal judges held prevented the entry of summary judgment on the Section 1981 claim.

Similarly, in Díaz-Colón, the District Court had rejected a qualified immunity defense because the defendants had not sufficiently argued and briefed such defense,

⁴ None of the evidence submitted by Mr. Martinez is mentioned at all in the Opinion, including the direct evidence of racial discrimination in this record. See Brief, at 12-15. Instead, the Opinion, to support its waiver conclusion, displays antipathy towards the attorney for Mr. Martinez as exemplified by marshalling allegations that are incorrect (For example, Mr. Martinez did not contest characterization of negligence claim to defamation ((But see Brief 64-65); Mr. Martinez did not submit evidence of enforceable contracts (But see Brief, at 32-34 (describing contracts with Wilfredo Valentin and Jose E. Maldonado Rodriguez), at 65 (describing contracts of Valentin, Cardona, Pimentel, Maldonado, Trinidad and Cardona); Mr. Martinez did not contest the statute of limitations ruling, But see discussion above)) to show the attorney's obvious incompetence and even reaching into comments made by the Magistrate Judge hinting that the attorney is lazy for not doing his work, although those same comments were rejected by Judge Dominguez when he rejected the Magistrate's recommendation and denied summary judgment on the negligence and tortious interference claims.

instead “merely [citing] federal case law regarding qualified immunity, without applying it to the facts of their case.” 788 F.3d at 148. On appeal, the First Circuit noted that “defendants’ lengthy brief to us makes no mention of the district court’s actual grounds for its ruling on the qualified immunity defenses.” Id. In contrast, the district court in this case never deemed anything waived on summary judgment and, contrary to the Panel’s conclusion, as explained below, the multiple errors (and omissions of material fact) in the DC’s Opinion are discussed in Mr. Martinez’s Brief.

Importantly, the First Circuit has recognized that waiver is not proper in a case, such as this one, with a fully developed vast record and where every holding by the DC, including pretext, statute of limitations, who were the decisionmakers, etc., is discussed thoroughly in the Brief. As stated in Sparkle Hill: “This does not mean that any and all contentions in support of an appellant’s argument are waived if not included in the opening brief.” Sparkle Hill, Inc., 788 F.3d at 29.

It is also simply unfair to apply waiver in this case. As this Circuit has recognized, waiver is used to avoid sandbagging “which deprive the appellee of an opportunity to respond in writing on the issue.” See Sparkle Hill, Inc., 788 F.3d at 28. That is not the case here; the Universal Appellees responded in their opposition brief to some of the errors described in the Appellants’ Opening Brief; other errors it simply never addressed, as pointed out in the Reply, at pages 20-24.

Notably at oral argument, the Universal Appellees never argued that the Section 1981 claim was waived, not even when prompted by one of the judges. Instead, the entire focus of Appellees' oral argument was on defending the merits of the reconsideration by Judge Delgado to grant a dismissal of all of the Section 1981 claims. In other words, the merits of the case.

II. The Panel's Opinion inverts the standard of summary judgment against the non-movant Appellants and misinterprets contract law of Puerto Rico

The Panel's Opinion also inverts the standard of summary judgment against the non-movant – Mr. Martinez -- and misinterprets the contract law of Puerto Rico. As both Judge Dominguez and Judge Carreño held, Mr. Martinez presented more than enough evidence to show, that there are numerous controversies of fact that must be decided by the jury, which precluded a summary disposition of the case. However, the Panel examines the facts in the light most favorable to Universal even adopting misstatements such as that Mr. Martinez did not contest the characterization of his negligence claim to a defamation claim. In fact, in his Brief, Mr. Martinez extensively contested the mischaracterization to a defamation claim, described the allegations in the Complaint showing why it was a complete mischaracterization and referred to certain specific facts which rejected such mischaracterization. See Brief, at 64-65.

The inversion of the summary judgment standard against Mr. Martinez is clearly evidenced in the Opinion's rejection of Mr. Martinez opposition to the grant of summary judgment on the tortious interference claim. First, the DC held that Mr.

Martinez did not present “admissible evidence of enforceable contracts.” In reaching that erroneous conclusion the DC violated summary judgment by completely disregarding the evidence of contracts presented by Mr. Martinez, including the testimony of Mr. Martinez’s customers, Maldonado Rodriguez, Trinidad, Valentin, Cardona, and Pimentel, among others. See Brief, at 58. But the Opinion affirms, never explaining what actually the DC held, much less does the Opinion mention the evidence rejecting such holding.

Next, the DC held that the contracts on the record were barred by the statute of limitations. See Opinion, at 70 (“Considering that the complaint was filed in July 2009, it is clearly outside the one-year statute of limitations for a tortious interference claim.”). In his Brief (and in his Reply), Mr. Martinez explained in a full section, the reasons why the statute of limitations was tolled, and the DC’s ruling is wrong. Incredibly, the Panel claims that he never did dispute the ruling! See Op., at 10.

Although at the summary judgment stage, there is “no room for credibility determinations, [and] no room for the judge to superimpose his own ideas of probability and likelihood” Greenburg v. Puerto Rico Mar. Shipping Auth., 835 F.2d 932, 936 (1st Cir.1987), the Panel does exact opposite indulging on inference after inference in favor of the movants., the Universal Appellees, when it rejects the evidence of contracts presented by Mr. Martinez. See Brief, at 13, at 32-34, at 50, at 55-56, at

58, at 65 (describing contracts). The Brief also refers to other examples of Universal's impairments of Mr. Martinez's contracts. See Brief, at 34.

Although there is no condition precedent in the contract between Best Auto and its customers, without explanation, the Panel's Opinion adopts the mischaracterization that there was a condition precedent, and then states that Mr. Martinez did not "identify any evidence in the record that supports a contrary conclusion." But in the Brief Mr. Martinez explained:

But that allegation [of requiring approval as a condition precedent] was denied by Mr. Martinez as incorrect, as Magistrate Judge Carreño correctly noted:

Plaintiffs deny this fact, PLAINTIFFS' OPPOSITION SUMF, ¶ 77, and we agree that nothing in the portions of Martínez's deposition cited by Universal suggests that such authorization was necessary. It is true that Martínez admitted that Universal's adjustors would sometimes give him instructions, see e.g., Docket No. 115-35, at 22 ("[The] appraiser from Universal Insurance Company, well, he would take a look at the damages and, 'Elvis, take this down, take this down, do this, do that.'"), but these statements are vague and come nowhere near supporting Universal's claim that it prescribed what repairs Martínez would perform.
See Appendix, Vol. V, at 3533.

See Brief, at 57. In this way, the Opinion's factual conclusions are improper because to reach them contradictory evidence and credibility determinations are made in favor of Universal. In sum, this vast record of racial discrimination in contracting, with all inferences made in favor of Mr. Martinez, overwhelmingly shows factual controversies that must be decided by a jury after a trial, not on summary judgment. A rehearing should be granted.

III. The Opinion Fails to Consider Exceptional Circumstances And The Public Interest In Preventing and Combatting National And Racial Discrimination

Even accepting the Panel's waiver argument, exceptional circumstances merit review by this Court to prevent a miscarriage of justice and the extreme prejudice against the public interest in preventing national and racial discrimination.

Time after time, this Circuit Court has allowed argument for the first time on appeal, even when they were not raised at the District Court. National Ass'n of Social Workers v. Harwood, 69 F.3d 622, 625-29 (1st Cir. 1995) (citing opinions); Abril-Rivera v. Johnson, 795 F.3d 245 (1st Cir. 2015). The criteria enumerated in those cases is easily satisfied here. First, there is no need to factfinding by this Court as demonstrated in this vast factual record, totaling five volumes of Appendix in this Court. Although the issue is not of constitutional magnitude, the third factor is easily satisfied as even the DC found that Mr. Martinez had satisfied a *prima facie* case of discrimination. That is the reason for the DC's two principal holding are on pretext and who is the decisionmaker, not on the elements of Section 1981. Equally important, there is no prejudice at all to the Universal Appellees, as their brief shows. Indeed, at oral argument the Universal Appellees argued in favor of the merits of the case, not waiver. And, whether a contract is a necessary element of Section 1981 is purely a question of law.

There is great public interest in preventing national and race discrimination in contracting. As the evidence clearly shows, Defendant Ortiz and Universal erected a

special structure at Universal to racially discriminate against Mr. Martinez because he is black and Dominican. Defendant Ortiz was replaced by her nephew, Joe Ortiz, who continues the racially discriminatory pattern and interference until this day. Nevertheless, the Panel's Opinion gives *carte blanche* to the racial discrimination against Mr. Martinez by relying on waiver.

The technical decision by the Panel failed to consider the very great public interest in combatting and preventing the pattern of national and racist discrimination against Mr. Martinez by Universal and Defendant Ortiz. In all of 2007, 2008, 2009 2010, 2011 and 2012, no other body shop in Puerto Rico was targeted by Universal with a special structure for discriminating because Mr. Martinez is black and Dominican, even those repair shops which repeatedly engaged in fraud and criminal conduct against Universal. Out of the more than ten thousand claims for automobile accidents, that Universal received every year from 2007 to 2012, Universal harassed and interfered only with the customers of Mr. Martinez. Both Magistrate Judge Carreño and Judge Dominguez concluded that the case had to be decided by a jury.

It unfair to focus on one issue (really, one phrase) in a 72-page decision, which, contrary to the Panel's Opinion, is briefed at 58-59. See Sparkle Hill, at 29 (considering the practical effect of the "technical" decision). This case had been actively litigated since 2009, with many thousands of hours of work spent and large costs to vindicate the right of Mr. Martinez to be free from racism in contracting. Congressman John

Lewis recently remarked that “[w]hen you see something that is not right, not fair, you have a moral obligation to say something or do something.”⁵ Although the law in this Circuit may not be about morality, combatting racism is. To prevent a miscarriage of justice, Mr. Martinez’s petition should be granted, and the District Court’s decision reversed and remanded.

CONCLUSION

For the reasons set forth above, we respectfully request that the Court grant this petition for rehearing. In the alternative, the Court is respectfully requested to grant a rehearing *en banc*.

CERTIFICATE OF COMPLIANCE WITH RULE 40 (B)

This Petition complies with the type-volume limitation of Fed. R. App. P. 40 (B) because it contains approximately 3780 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) m.

CERTIFICATE OF SERVICE

I hereby certify that today, December 15, 2017, a true and correct copy of the foregoing corrected Brief has been electronically served by the Notice of Docketing Activity to the following ECF filers, in compliance with Rule 25 of the Federal Rules of Appellate Procedure and Rule 4 of the Administrative Order Regarding Case Management/ Electronic Case Files System (“CM/ECF”) of the US Court of Appeals

⁵ <https://www.facebook.com/Y.481838750855.294249.89550890855/10155172280210856/?type=3>

for the First Circuit: to attorneys Juan J. Casillas Ayala, and Israel Fernandez-Rodriguez and Rafael Gonzales Muñoz and all other counsel of record.

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United States Court of Appeals For the First Circuit

No. 16-1549

BEST AUTO REPAIR SHOP, INC.; ELVIS MARTÍNEZ-EVANGELISTA,

Plaintiffs, Appellants,

MARÍA BETANCOURT-BORIA,

Plaintiff,

v.

UNIVERSAL INSURANCE GROUP; UNIVERSAL INSURANCE COMPANY;
CARIBBEAN ALLIANCE INSURANCE COMPANY; EASTERN AMERICA INSURANCE
AGENCY; JUANITA ORTIZ; JOHN DOE; JANE DOE,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Pedro A. Delgado-Hernández, U.S. District Judge]

Before

Howard, Chief Judge,
Torruella and Barron, Circuit Judges.

Carlos M. Sánchez La Costa, for appellants.
Juan J. Casillas-Ayala, with whom Israel Fernández-Rodríguez,
and Casillas Santiago Torres LLC were on brief, for appellees.

November 16, 2017

BARRON, Circuit Judge. Plaintiffs-Appellants -- Best Auto Repair Shop, Inc. ("Best Auto") and Elvis Martínez-Evangelista ("Martínez") -- appeal the District Court's denial of their motion for reconsideration of the District Court's grant of summary judgment dismissing all of their claims. We affirm, largely on waiver grounds.

I.

The plaintiffs¹ brought suit in the United States District Court for the District of Puerto Rico against various insurance companies and certain of those companies' employees -- including Juanita Ortiz ("Ortiz") -- pursuant to 42 U.S.C. § 1981 and Puerto Rico law. With respect to § 1981, the suit alleges that these defendants had unlawfully interfered with the plaintiffs' right to "make or enforce" existing and prospective contracts with the defendants' insureds or third-party claimants.²

¹ This appeal arises from a pair of consolidated, one of which, early on, also included María Betancourt-Boria ("Betancourt") as a plaintiff. However, finding that Betancourt's injury was derivative of her interest in the auto repair shop, the District Court terminated her from the case in September 2011. As Betancourt was already dismissed from the case at all times relevant to this appeal, our references to "the plaintiffs" refer to Martínez and Best Auto.

² 42 U.S.C. § 1981 "protect[s] against impairment by nongovernmental discrimination and impairment under color of State law" the right of "[a]ll persons within the jurisdiction of the United States [to] have the same right in every State and Territory to make and enforce contracts," wherein "the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits,

Specifically, the suit alleges that these defendants had discriminated against Martínez and his business, Best Auto, by excluding Best Auto as a repair shop for which the insurance companies would reimburse repairs by their insureds or third-party claimants, because Martínez is black and Dominican. Pursuant to the federal courts' supplemental jurisdiction, see 28 U.S.C. § 1367, the plaintiffs also brought related Puerto Rico law claims for negligence and tortious interference with contracts.

On March 8, 2013, the defendants moved for summary judgment with respect to all of the plaintiffs' claims. The defendants included in their briefing an argument that the plaintiffs' negligence claims were more properly characterized as defamation claims and that, as defamation claims, they must be dismissed on summary judgment.

The District Court referred the defendants' summary judgment motions to a magistrate judge. The Magistrate Judge that was assigned the case then issued a report and recommendation that Ortiz's motion be denied, but that the remaining defendants' motion be granted in part. In so deciding, the Magistrate Judge concluded that the plaintiffs' negligence claims were more appropriately characterized as defamation claims, which should be dismissed as

privileges, terms, and conditions of the contractual relationship."

time-barred, unsupported by the evidence, or for having failed to allege that the supposedly defamatory statements were not merely opinions for which there could be no liability.³ All parties filed objections to the Magistrate Judge's report and recommendation, and these objections included objections by the plaintiffs to the characterization of their negligence claims as claims for defamation.

On March 27, 2014, the District Court issued an order denying Ortiz's motion for summary judgment and partially granting the remaining defendants' motion for summary judgment, but denying summary judgment as to: Martínez's 42 U.S.C. § 1981 claims for, prior to February 20, 2009, interference with contracts and interference with Martínez's ability to make contracts; Best Auto's 42 U.S.C. § 1981 claims for, after February 20, 2009, interference with contracts and interference with the making of contracts; and Martínez's and Best Auto's claims for tortious interference with contracts and negligence under Puerto Rico law.

³ The Magistrate Judge concluded that, although the defendants contended in their summary judgment briefing that the plaintiffs' negligence claims should be treated as defamation claims, in their opposition to the motion for summary judgment "[p]laintiffs ma[d]e no effort to respond to [the defendants'] . . . arguments," and that, as the "[p]laintiffs ha[d] not given [the court] any other indication of the basis for their negligence claims," the court would "not do their work for them." Thus, on that basis, the Magistrate Judge recommended granting summary judgment in the defendants' favor, given the numerous grounds on which the Magistrate Judge had determined that the defamation claims failed.

With regard to the negligence claims, in particular, the District Court explained that such claims were appropriately treated as defamation claims, as the plaintiffs did not dispute this characterization in their summary judgment briefing and the Magistrate Judge had, thus, deemed the issue uncontested.

The plaintiffs and the defendants each moved for reconsideration, with Ortiz and the other defendants filing a joint motion for reconsideration. On March 31, 2016, the District Court granted the defendants' motion for reconsideration. In doing so, the District Court granted summary judgment on all the claims against the defendants that remained after the District Court's March 27, 2014 summary judgment ruling. The plaintiffs now appeal this March 31, 2016 ruling granting summary judgment to the defendants.

II.

We start with the plaintiffs' challenge to the denial of the motion for reconsideration of the grant of summary judgment to the defendants on the § 1981 claims. In the March 31, 2016 motion for reconsideration order, the District Court held that the plaintiffs failed to establish an essential element of a § 1981 action. Specifically, the District Court ruled that, even with "[a]ll reasonable inferences . . . drawn in favor of [the plaintiffs]," the plaintiffs' § 1981 claims failed because the "[p]laintiffs' clients were at liberty to contract with them

without Universal's paying for anything," and, as such, the "plaintiffs cannot point to a prohibited interference with their right to 'make and enforce contracts' under Section 1981."

Whatever doubts we may have about whether the District Court's conclusion is right, the key fact for purposes of this appeal is that the District Court provided a substantial analysis of precedents from both our circuit and from others in support of its conclusion. Yet, the plaintiffs on appeal do not address any of that precedent, or even the underlying legal ruling about the types of claims that are actionable under § 1981, in their opening brief. See Díaz-Colón v. Fuentes-Agostini, 786 F.3d 144, 149 (1st Cir. 2015) (quoting Rodríguez v. Municipality of San Juan, 659 F.3d 168, 175 (1st Cir. 2011)) (holding "we deem waived claims not made" (internal quotation marks omitted)).

To be sure, faced with defendants' arguments in their brief that the plaintiffs expressly waived the issue by failing to raise it in their opening brief, the plaintiffs do include a short footnote in their reply brief that appears to attempt to address the District Court's statutory holding. But, "[o]ur precedent is clear[] [that] we do not consider arguments for reversing a decision of a district court when the argument is not raised in a party's opening brief." Sparkle Hill, Inc. v. Interstate Mat Corp., 788 F.3d 25, 29 (1st Cir. 2015). We thus see no basis for overturning the ruling granting summary judgment to the defendants

on the § 1981 claims, given that the plaintiffs' federal claims necessarily fail if the District Court is right about what § 1981 requires, and that the plaintiffs failed to challenge that conclusion in their opening brief on appeal. We, therefore, affirm the denial of the motion to reconsider the dismissal of the § 1981 claims.

III.

We turn then to the Puerto Rico law claims, which consist of claims for negligence and tortious interference with contracts. As described in our recent opinion in Wilber v. Curtis, 872 F.3d 15 (1st Cir. 2017), when all federal claims have been dismissed, it is an abuse of discretion for a district court to retain jurisdiction over the remaining pendent state law claims if doing so would not serve "the interests of fairness, judicial economy, convenience, and comity." Id. at 23 (quoting Desjardins v. Willard, 777 F.3d 43, 45-46 (1st Cir. 2015)).

As was the case in Wilber, however, the plaintiffs ask us to overturn the District Court's summary judgment ruling as to the pendent claims solely on the ground that the District Court erred in concluding that there was no genuine issue of material fact that would preclude granting summary judgment to the defendants on each of those claims. Furthermore, the only arguments presented to us on appeal do not require us to resolve any difficult issues of Puerto Rico law in order to decide if

affirmance of the District Court's March 31, 2016 ruling is appropriate. We thus proceed to the merits. See Wilber, 872 F.3d at 23 (citing Disher v. Info. Res., Inc., 873 F.2d 136, 141 (7th Cir. 1989)).

We "normally review a district court's decision to grant or deny a motion for reconsideration for abuse of discretion." Santiago v. Puerto Rico, 655 F.3d 61, 67 (1st Cir. 2011). But here, as "the parties' arguments [are] directed to the underlying substantive issue (the propriety vel non of summary judgment) rather than the procedural issue (the desirability vel non of reconsideration)," we review de novo the summary judgment ruling. Id. at 67-68. In doing so, we "take the facts, along with all reasonable inferences therefrom, in the light most favorable to the nonmoving party," and "affirm only if the record, so viewed, discloses that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Id.

A.

We start with the "negligence" claims. In the District Court's motion for reconsideration ruling, the District Court held that the plaintiffs had not timely contested the defendants' characterization of the negligence claims as defamation claims. The District Court granted summary judgment dismissing the negligence claims on the grounds that, as defamation claims, they

were time-barred and that, in any event, the plaintiffs had failed to prove an essential element of such claims.

On appeal, the plaintiffs' only argument for reversing the summary judgment ruling as to the negligence claims is that the District Court erred in characterizing them as defamation claims. But, as the District Court found, the plaintiffs did not contest this characterization in their opposition to the defendants' motion for summary judgment. Given that the plaintiffs do not make any arguments that the claims are not appropriate for summary judgment as defamation claims, we thus affirm the grant of summary judgment to the defendants as to the negligence claims. See Schneider v. Local 103 I.B.E.W. Health Plan, 442 F.3d 1, 3 (1st Cir. 2006) (finding that where a party "never responded to any of the arguments against them made by the [the other party] in their summary judgment memo," "an issue . . . ignored at summary judgment may be deemed waived" on appeal (internal quotation marks omitted)).

B.

With respect to the District Court's denial of the motion to reconsider the grant of summary judgment in favor of the defendants as to the claims of tortious interference with contracts, we also affirm. In ruling that the defendants were entitled to summary judgment on the tortious interference claims, the District Court found that for certain of the customer

agreements with which the defendants allegedly tortiously interfered, the alleged interference occurred at a time that makes the claims for tortious interference time-barred. And, in their briefing to us on appeal, the plaintiffs do not dispute the District Court's statute of limitations ruling. That leaves, then, only the plaintiffs' challenge to the District Court's ruling granting the defendants summary judgment as to the tortious interference claims that the District Court did not rule to be time-barred.

The District Court ruled that summary judgment must be granted to the defendants as to these remaining tortious interference claims because the plaintiffs did not "submit admissible evidence of enforceable contracts" with respect to these particular claims.⁴ In so ruling, however, it is somewhat unclear what the District Court was concluding. On the one hand, the District Court's conclusion may have been that the plaintiffs had not provided sufficient evidence from which a reasonable jury

⁴ Notably, some of the evidence proffered by the plaintiffs, in the form of charts "summariz[ing] testimony" submitted pursuant to Federal Rule of Evidence 1006 -- which permits the admission of summary charts of documents -- was disregarded by the District Court as failing to comply with Rule 1006. But, the plaintiffs do not develop any argument that the District Court erred in this respect, and, in any event, the District Court found the charts would have been unhelpful to its enforceability determination as they failed to include information such as "the terms of the [alleged] contract" and if the parties "relied on an estimate as a contract."

could find that there were any contracts in place at all. On the other hand, the District Court was perhaps ruling instead that the plaintiffs had not provided sufficient evidence from which a jury reasonably could find anything other than that, even if contracts had been executed, they were subject to a condition or conditions precedent -- i.e., "completion of [the defendants]'s inspection and adjustment process" which included "[the defendants'] ultimate inspection; a determination of whether the car could be repaired; and how much [the defendants] would pay for the repair" -- that had not been fulfilled at the time of the allegedly "interfer[ing]" actions by defendants. See Terradata, Inc. v. Budget Rent-A-Car Int'l, Inc., 218 F. Supp. 2d 101, 104-05 (D.P.R. 2002) (explaining "[a] contract subject to a [condition precedent] remains a pre-contract until the [condition precedent] . . . is met," and finding no tortious interference where the condition precedent was not met); Satellite Broad. Cable, Inc. v. Telefónica de España, 786 F. Supp. 1089, 1095 (D.P.R. 1992), opinion adhered to as modified on reconsideration, 807 F. Supp. 210 (D.P.R. 1992) (quoting Henna v. Saure & Subirá, 22 P.R.R. 776, 785 (1915) aff'd, 237 F. 145 (1st Cir. 1916)) (finding, in the case of a contract subject to a condition precedent, no tortious interference as "it is plain that so long as the condition is not realized[] . . . there is no contract" (emphasis removed)). Either way, however, the

plaintiffs provide us with no reason to overturn the grant of summary judgment against them as to these claims.

The plaintiffs first argue that the District Court erred by relying on Massachusetts state law rather than Puerto Rico law in granting summary judgment as to these claims and that "under the Civil Code of Puerto Rico, a verbal contract is binding and valid." But the District Court did not grant summary judgment on the ground that the contracts were not enforceable because they were made orally. And, in any event, the District Court cited to a First Circuit case, albeit one concerning Massachusetts law, merely in the course of explaining the nature of a "condition precedent." Thus, we see no error in these aspects of the District Court's ruling.

The plaintiffs next contend that the record shows that there is a genuine issue of disputed fact concerning whether the oral agreements with the customers were subject to a condition precedent in the first place. On that basis, the plaintiffs argue that the District Court's ruling cannot be sustained. But, once again, we do not agree.

Setting aside for the moment what the record shows regarding the alleged contract with one of the customers, Iraida Cardona ("Cardona"), we note that the District Court comprehensively reviewed the record in finding that the customers' agreements were conditioned on the completion of the defendants'

inspection and adjustment process, including the obtaining of authorization from the insurer to make the payments for the repairs. The plaintiffs, however, do not identify any evidence in the record that supports a contrary conclusion. Instead, the plaintiffs point only to the fact that the record shows that the plaintiffs' customers testified that they each had a "contract" with the plaintiffs. That testimony, provided in conclusory fashion, does not suffice to create a dispute of fact as to whether these agreements were subject to an as-yet-unfulfilled condition precedent. And the plaintiffs identify no evidence in the record that suggests that the condition (or conditions) precedent identified by the District Court had been satisfied at the time of the alleged tortious interference with the alleged contracts. Thus, the "contracts" testimony on which the plaintiffs rely does not warrant reversal of the District Court's summary judgment ruling. Cf. WHTV Broad. Corp. v. Centennial Commc'ns Corp., 460 F. Supp. 2d 297, 304 (D.P.R. 2006) (explaining that "while [a] condition precedent is pending it can be said that the [contractual] obligation does not exist" (internal quotation marks omitted)); Terradata, Inc., 218 F. Supp. 2d at 104-05 (finding no tortious interference where the condition precedent was not met).

With respect to the alleged contract with Cardona, the plaintiffs do point out that she testified that she had a binding agreement with Martínez (and/or Best Auto) to repair her vehicle.

The plaintiffs also argue that the record evidence demonstrates that this binding agreement was not contingent on an insurance company first completing its inspection and adjustment process or on Cardona first receiving authorization from an insurer to pay for the repairs.

But, the defendants contend in response that the evidence regarding the agreement with Cardona did not suffice to establish a claim for tortious interference because the record established that "Cardona actually repaired her car at Martínez's shop with her own money" and that her insurance claim was never resolved. In other words, the defendants contend that the evidence shows that Cardona was at liberty to contract with the plaintiffs without the defendants paying for anything and that, as a result, there was no prohibited interference with the contract with Cardona. The plaintiffs simply do not address this ground for affirming the ruling below in their briefing to us, even though the argument that the plaintiffs make would not suffice to warrant reversal of the District Court's ruling if the defendants are right on this score. See Díaz-Colón, 786 F.3d at 149. Accordingly, this argument for challenging the summary judgment ruling fails as well.

The plaintiffs' final ground for challenging the summary judgment ruling as to the tortious interference claims relies on Article 1072 of the Puerto Rico Civil Code, codified at Title 31

§ 3047 of the Laws of Puerto Rico Annotated. The plaintiffs argue that, under § 3047, the District Court necessarily erred in granting summary judgment because, insofar as a contract is subject to a condition precedent, that contract's condition must be "deemed fulfilled" if the defendants "impede[d] the fulfillment of the condition" and there is at least a genuine issue of material fact as to whether the defendants did so impede the fulfillment of the condition of the agreements at issue. But, § 3047 states only that a "condition shall be considered as fulfilled when the obligated party should voluntarily prevent its fulfillment," P.R. Laws Ann. tit. 31, § 3047 (2017), see also Satellite Broad. Cable, Inc., 807 F. Supp. at 212, and the plaintiffs do not allege that the defendants were an "obligated party" with respect to a contract between the plaintiffs and their customers.⁵ Nor do the plaintiffs identify any other authority for reaching the same conclusion that they mistakenly contend is compelled by § 3047. Thus, for this reason, too, the plaintiffs' challenge to the summary judgment ruling on the tortious interference claims fails.

IV.

We, therefore, affirm the District Court's summary judgment ruling with respect to all claims.

⁵ The plaintiffs instead make clear the alleged contracting parties were only Martínez and his customers, as they argue only that the agreement of Martínez and each customer was necessary to form each alleged contract.