No. 18-1171

IN THE

Supreme Court of the United States

COMCAST CORPORATION,

Petitioner,

v.

NATIONAL ASSOCIATION OF AFRICAN AMERICAN-OWNED MEDIA AND ENTERTAINMENT STUDIOS NETWORKS, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Entertainment Studios Networks ("ESN") owns several television networks that it sought to have carried on Comcast's cable system. Comcast and ESN met multiple times to discuss a potential deal, but Comcast ultimately declined to carry ESN's networks. ESN's response was to sue Comcast for $20 billion, claiming that Comcast's decision was based on an outlandish racist conspiracy between Comcast, the federal government, the NAACP, and other civil-rights groups and leaders to disadvantage wholly African American–owned networks in violation of 42 U.S.C. § 1981.

The district court dismissed ESN's complaint three times, but the Ninth Circuit reversed. Although it recognized that but-for causation is the "default rule" Congress is presumed to incorporate absent "an indication to the contrary in the statute itself," the Ninth Circuit concluded that Section 1981's guarantee of the "same right . . . to make and enforce contracts" provides such a contrary indication. Under the Ninth Circuit's reading, a plaintiff may state a claim under Section 1981's implied private right of action by alleging that "discriminatory intent plays *any* role in a defendant's decision not to contract with a plaintiff, even if it is merely one factor and not the sole cause of the decision." The Ninth Circuit then held that Plaintiffs stated a plausible claim under this standard.

The question presented is:

Does a claim of race discrimination under 42 U.S.C. § 1981 fail in the absence of but-for causation?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Comcast Corporation is a publicly held corporation. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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BRIEF FOR PETITIONER

Petitioner Comcast Corporation respectfully submits that the Court should reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is unpublished but is available at 743 F. App'x 106. Pet. App. 1a–4a. The order denying Comcast's petition for rehearing or rehearing en banc is published at 914 F.3d 1261. *Id.* at 32a. The orders of the district court are unpublished. *Id.* at 5a–7a, 74a–77a, 109a–12a.

JURISDICTION

The Ninth Circuit issued its opinion on November 19, 2018, and denied Comcast's timely petition for rehearing and rehearing en banc on February 4, 2019. Comcast filed a petition for a writ of certiorari on March 8, 2019, which this Court granted on June 10, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1981 provides as follows:

> **(a) Statement of equal rights**
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is en-

> joyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> **(b) "Make and enforce contracts" defined**
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> **(c) Protection against impairment**
>
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

STATEMENT OF THE CASE

The text, history, structure, and context of 42 U.S.C. § 1981 all confirm the background presumption that but-for causation is an essential element of a claim for racially discriminatory contracting. Section 1981 guarantees "[a]ll persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a). By definition, a plaintiff has not been denied the "same right" to make a contract as white citizens if the exact same decision on contract formation would have been made if the plaintiff had been white.

The requirement that Section 1981 plaintiffs must plead and prove but-for causation is confirmed by the

fact that but-for causation was a well-established prerequisite for tort liability when Section 1981 was first enacted in 1866, and by the absence of any indication of congressional intent to reject that presumptively applicable common-law backdrop by adopting a different causation standard. In fact, when Congress—well over a century later—first amended a different anti-discrimination law to dispense with but-for causation in limited circumstances, it made no such change to Section 1981, even while amending the latter statute in other respects. Indeed, Congress has not authorized a departure from the standard of but-for causation under Section 1981 even though this Court has repeatedly and consistently described the judicially implied private right of action under that statute as requiring plaintiffs to show that the challenged contracting decision was made "because of" the plaintiff's race—a clear reference to the traditional requirement of but-for causation.

The Ninth Circuit disregarded this decisive evidence and instead held that a plaintiff can prevail on a claim of discriminatory contracting if "discriminatory intent plays *any* role in a defendant's decision not to contract with a plaintiff, even if it is merely one factor and not the sole cause of the decision." Pet. App. 21a (emphasis in original). The court acknowledged the black-letter rule that "an action 'is not regarded as a cause of an event if the particular event would have occurred without it'"—a principle so well-established that it provides "the default rule[] [Congress] is presumed to have incorporated, absent an indication to the contrary in the statute itself." *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 347 (2013). Nevertheless, the Ninth Circuit concluded that "§ 1981's text permits an exception to the default but-for causation standard" for two reasons: (1) Section 1981 does

not "use the word 'because,'" which "explicitly suggest[s] but-for causation," Pet. App. 20a–21a; and (2) Section 1981 "guarantees 'the same right'" to make contracts "'as is enjoyed by white citizens'"—a right to equal results that, in the Ninth Circuit's view, somehow can be violated even if race did *not* affect the result of the contracting decision, *id.*

This ruling is unsupported by law or precedent, and has vastly expanded the scope of Section 1981's reach while undermining the careful remedial limits that Congress imposed on Title VII when it *did* provide for a "motivating factor" causation standard. Under the decision below, a party may be held liable for racially discriminatory contracting—and subjected to compensatory and punitive damages—even where it would have made the same contracting decision irrespective of race. And indeed, this sweeping interpretation of Section 1981 proved dispositive in this appeal, as the Ninth Circuit reversed the district court's order dismissing this action for the third time because the court of appeals believed it "c[ould] infer from the allegations . . . that discriminatory intent played at least *some role*" in the challenged decision. Pet. App. 4a (emphasis added). In making this inference, it did not point to even a single factual allegation in the operative complaint suggesting that race was considered at all in the challenged decision.

Applying the proper but-for causation standard, there is no doubt that Plaintiffs' allegations are inadequate to state a plausible Section 1981 claim. Comcast adamantly denies that it has engaged in any racial discrimination at any time, but even taking the allegations of the complaint at face value, Plaintiffs have not remotely pleaded a valid claim. Plaintiffs

have alleged an outlandish conspiracy among Comcast, leading civil-rights organizations, and even the federal government to discriminate not against African-Americans, or African American–owned television networks, but only against "*100%* African American–owned" networks—a gerrymandered racial category never before recognized by the courts. Moreover, Plaintiffs allege that this conspiracy was perpetrated through a minority-outreach program that has successfully *increased* the carriage of majority- and substantially minority–owned networks. These allegations are implausible on their own terms, and become even more implausible when considered alongside other allegations in the operative complaint reciting the legitimate, race-neutral explanations Comcast gave for its decision, including a lack of consumer demand, as well as the complaint's concessions that Comcast has carried—and continues to carry—*other* African American–owned channels, including 100% African American–owned networks.

This Court should reverse the judgment of the Ninth Circuit and hold that the district court properly dismissed this action with prejudice for failure to state a claim.

I. PLAINTIFFS' ALLEGATIONS

Plaintiff Entertainment Studios Networks ("ESN") "was founded in 1993 by Byron Allen, an African American actor/comedian/media entrepreneur." Pet. App. 40a. Today, ESN "owns and operates seven high definition television networks." *Id.* at 42a. According to Plaintiffs, "[i]t is the *only* 100% African American–owned multi-channel media company in the United States which owns and controls multiple television networks." *Id.* at 40a (emphasis added).

Like all television networks, ESN depends on carriage agreements with video programming distributors—such as Time Warner Cable, DirecTV, and Comcast—to deliver its content to consumers' television screens. Pet. App. 10a. But as the FCC has recognized, "[b]ecause there are more programming vendors seeking linear carriage than bandwidth capacity to carry them, [video programming distributors] simply cannot carry all channels that seek carriage." *In re Herring Broad., Inc.*, 24 FCC Rcd. 12967, 12999 (2009).

ESN "met and spoke[] with senior Comcast executives responsible for licensing television networks on numerous occasions beginning as early as 2008 and as recently as 2015 to license the [ESN] networks for availability to Comcast's pay television subscribers." Pet. App. 35a. At these meetings, Comcast expressed concern about ESN's ability to generate interest among its subscribers, but provided suggestions on how ESN could strengthen its application. *Id.* at 48a–50a. Ultimately, however, Comcast declined to carry ESN's networks.

Comcast was not alone in its determination that ESN's offerings did not show sufficient commercial promise. On the contrary, nearly all large distributors at the time of Comcast's decision had declined to enter into carriage agreements with ESN, including Charter Communications, Time Warner Cable, DirecTV, and AT&T.

ESN and the National Association of African American-Owned Media ("NAAAOM"), an entity created by ESN's owner, Pet. App. 39a, responded by filing a string of multi-billion dollar lawsuits against the above-named distributors, alleging in each case that

the decision not to carry ESN's networks was the result not of capacity constraints or other business considerations, but racial animus against ESN. Each of these lawsuits was filed in the aftermath of the respective distributors' announcement of a major merger, in an apparent effort to leverage the need for regulatory approval to secure carriage for ESN's networks. And Plaintiffs did not stop there. Rather, they alleged a vast conspiracy among video programming distributors, governmental agencies, and prominent civil-rights figures to systematically exclude "truly African American–owned media." *Id.* at 54a.

Plaintiffs originally filed this action against Comcast, former FCC Commissioner Meredith Attwell Baker, the NAACP, the National Urban League, the National Action Network, Al Sharpton, and Time Warner Cable. Pet. App. 113a–14a, 126a–27a. The complaint alleged that these Defendants all worked in concert to discriminate against "100% African American–owned media companies," a novel racial category artificially constructed by Plaintiffs to include ESN but exclude the many majority or substantially African American–owned networks that Comcast indisputably carries. *Id.* at 115a. Plaintiffs asserted claims under 42 U.S.C. § 1981, which provides that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens," and 42 U.S.C. § 1985, which prohibits conspiracies to interfere with civil rights. *Id.* at 143a–47a.

At the heart of this alleged conspiracy were memoranda of understanding ("MOUs") that Comcast had entered into with the civil-rights leaders and organizations in connection with its acquisition, years earlier, of NBC Universal. The MOUs provided minority-

owned networks additional avenues for seeking carriage from Comcast beyond those ordinarily available to others. Pet. App. 55a–56a, 116a–17a. Although these MOUs were designed to—and did—*increase* the number of minority-owned networks carried by Comcast, Plaintiffs charged that they were in fact a "sham, undertaken to whitewash Comcast's discriminatory business practices." *Id.* at 115a.

The complaint accused *all* of the named defendants of sharing this discriminatory purpose. This included "Defendants NAACP, National Urban League, and Al Sharpton's National Action Network," whom Plaintiffs accused of "sign[ing] onto the MOUs with Comcast knowing—and agreeing—that Comcast would use the MOUs to perpetuate civil rights violations against 100% African American–owned media companies, including Entertainment Studios." Pet. App. 134a. This purported conspiracy also allegedly included the federal government, which, through FCC Commissioner Baker, allegedly "worked hand-in-hand" with "[w]hite-owned media in general—and Comcast in particular . . . to perpetuate the exclusion of 100% African American–owned media from contracting for channel carriage and advertising." *Id.* at 120a.

In sum, the complaint was premised on a contrived racial classification—"100% African American–owned" networks—designed to encompass few entities beyond ESN, and alleged that Comcast conspired with the federal government and the oldest civil-rights organizations in the country to discriminate on the basis of race.

II. PROCEEDINGS IN THE DISTRICT COURT

All of the Defendants moved to dismiss the initial complaint under Federal Rule of Civil Procedure 12(b)(6) because Plaintiffs failed to allege sufficient facts to state a plausible claim under Sections 1981 and 1985, and Ms. Baker, the NAACP, the National Urban League, the National Action Network, and Al Sharpton also moved to dismiss under Rule 12(b)(2) for lack of personal jurisdiction. Pet. App. 109a. The district court dismissed the action, finding that it lacked personal jurisdiction over all Defendants other than Comcast and Time Warner Cable, and that "plaintiffs have failed to allege any plausible claim for relief." *Id.* at 111a–12a.

Plaintiffs then filed a First Amended Complaint ("FAC"). Although the FAC named only Comcast and Time Warner Cable as Defendants (Time Warner Cable was later voluntarily dismissed), and did not *plead* a conspiracy claim under Section 1985, the FAC was largely identical to the original complaint, still centering on an alleged conspiracy between Comcast and the now-dismissed Defendants to use the MOUs to "bamboozle[] President Obama and the federal government." Pet. App. 79a. But rather than allege additional facts to support this claim, the FAC asserted in conclusory fashion that Comcast had in the past discriminated against *other* African-American programmers, and that ESN's ratings had shown growth of between 21% and 552% between 2013 and 2014. *Id.* at 96a–97a, 101a–05a.

The district court again granted Comcast's motion to dismiss under Rule 12(b)(6), concluding that Plaintiffs "have not sufficiently pled facts that make a plausible claim for relief" in light of Comcast's "legitimate business reasons for denying [ESN] carriage, namely,

lack of demand for ESN programming, and the bandwidth costs associated with carrying ESN's channels." Pet. App. 76a. Although the FAC attempted to allege that there was consumer demand for ESN's networks by pointing to ratings *growth*, the district court found these statistics unilluminating because they did not reveal anything about "the actual number of [ESN] viewers": "Surely an increase from 1 viewer to 10 viewers results in ratings growth of 900%, but such a relative benchmark does nothing to exclude the possibility that the alternative explanation, Comcast's legitimate business reasons, is true." *Id.* The district court granted Plaintiffs leave to amend, suggesting that "[t]o better support [their] allegations," they could "provide[] the actual number of viewers gained rather than just the percentage of viewer growth." *Id.* But the court expressly warned that "[i]f Plaintiffs file a second amended complaint with pleading deficiencies, this case will then be dismissed with prejudice." *Id.* at 76a–77a.

Like the FAC, the operative Second Amended Complaint ("SAC") did not name as defendants the civil-rights and governmental defendants who had been dismissed for lack of personal jurisdiction, nor did it plead a conspiracy claim under Section 1985. But the SAC's substantive allegations were indistinguishable from those in the prior, inadequate complaints. Plaintiffs' theory under Section 1981 continued to center on the alleged collusion between "white-owned media," the federal government, and civil-rights groups, focusing closely on the MOUs and the role played by civil-rights organizations in developing them. In particular, Plaintiffs again alleged that "[w]hite-owned media . . . worked hand-in-hand with governmental regulators to perpetuate the exclusion

of truly African American–owned media from contracting for channel carriage and advertising,"[1] Pet. App. 54a, including by "enter[ing] into MOUs with . . . various non-media civil rights groups, including Al Sharpton's National Action Network," *id.* at 55a–56a. The SAC alleged that Comcast "spent millions of dollars to pay non-media civil rights groups" in connection with the MOUs "but it still refused to do business with 100% African American–owned media companies which would have cost Comcast much more." *Id.* at 57a.[2]

The SAC acknowledged the legitimate business reasons offered by Comcast for its decision not to carry ESN's networks, including bandwidth constraints, a preference for sports and news programming, and the lack of demand for ESN's offerings. Pet. App. 50a–52a. But it brushed these justifications aside as

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[1] Plaintiffs also named the FCC as a defendant in the similar Section 1981 action they filed against Charter Communications. *See Nat'l Ass'n of African American-Owned Media v. Charter Commc'ns, Inc.*, No. 2:16-cv-00609 (C.D. Cal.), Dkt. 1. In that case, Plaintiffs later voluntarily dismissed the FCC. *See id.*, Dkt. 42.

[2] In an apparent effort to make the SAC appear less outlandish than its predecessors, Plaintiffs did not expressly name the NAACP and the National Urban League as active participants in the alleged discriminatory scheme. But the SAC continued to stress the role played by the MOUs in the purported scheme, reaffirming that they are an integral component of Plaintiffs' claims. The district court took judicial notice of the contents of the MOUs (and thus the identities of all signatories). Pet. App. 77a; *see also* 2 *Moore's Federal Practice* § 10.05[4] at 10-34 to 10-35 (3d ed. 2015) ("A written instrument not formally attached to a pleading may also be offered by a party in support of a motion to dismiss . . . if the pleading subject to the motion to dismiss referred to the writing and if the writing was central to the pleader's claim for relief.").

"phony excuses" because Comcast entered into carriage agreements with other networks during this time and because other distributors elected to carry ESN's networks. *Id.* at 50a–51a. The SAC, however, failed to allege facts showing that the other networks with which Comcast contracted were similarly situated to ESN's networks. And although the SAC alleged that other major distributors carried ESN's networks, Plaintiffs conceded in their motion to dismiss briefing that the *only* major distributors that had agreed to carry those networks—the now-merged AT&T and DirecTV—did so in response to Plaintiffs' campaign of litigation under Section 1981, after Comcast made the carriage decision challenged here. *See Nat'l Ass'n of African American-Owned Media v. Comcast Corp.*, No. 2:15-cv-01239 (C.D. Cal.), Dkt. 78 at 15 n.5 (conceding that "Plaintiffs sued AT&T U-Verse and DirecTV," resulting in a "settle[ment] with AT&T U-Verse and DirecTV carrying ESN's channels"); *see also Nat'l Ass'n of African American-Owned Media v. AT&T Inc.*, No. 14-cv-09256 (C.D. Cal.), Dkt. 53 at 35–38 (seeking $10 billion in damages under Section 1981).

The SAC also conceded that while Comcast was allegedly refusing to contract with ESN because of the race of its owner between 2008 and 2015, Pet. App. 35a, Comcast in 2012 entered into carriage agreements with two other networks, Aspire (led by Earvin "Magic" Johnson) and Revolt (led by Sean "Diddy" Combs), that have majority or substantial African-American ownership, *id.* at 58a–59a, 61a. According to Plaintiffs, however, these are not "truly African American–owned media companies" because their ownership is "vague." *Id.* at 60a–61a.

Plaintiffs also admitted that Comcast carried two networks that *were* wholly owned by African-Americans, Africa Channel and Black Family Channel (the latter of which was sold before this action was filed). *Id.* at 44a, 66a–67a.

The district court dismissed the SAC. Although the court had gone "out of its way to suggest cures for the pleading deficiencies" in its order dismissing the FAC, the district court found that "Plaintiffs have merely provided the Court with different opaque benchmarks." Pet. App. 6a. In particular, it noted that although "Plaintiffs added the allegation that eighty million people may have *access* to ESN in all fifty states" based on the carriage ESN has been able to arrange, "this allegation represents potential, not actual, demand for ESN content." *Id.* This was because even if ESN's channels were *offered* as part of a cable package to 80 million people, that did not shed any light on how many people actually *watched* them. Thus, the court concluded that the allegation "does not necessarily undercut . . . Comcast's alternative explanation." *Id.* As promised, the district court denied leave to amend and ordered that the action be dismissed with prejudice.

III. THE NINTH CIRCUIT'S DECISION

Plaintiffs' appeal was argued before the same panel and on the same day as *National Association of African American-Owned Media v. Charter Communications, Inc.*, No. 17-55723 (9th Cir.). Charter, like Comcast, had declined to carry ESN's networks because "bandwidth and operational demands precluded carriage opportunities." Pet. App. 10a. As they had done when Comcast reached the same conclusion, Plaintiffs responded by filing a suit "claim[ing] that Charter's refusal to enter into a carriage contract was

racially motivated" in violation of Section 1981. *Id.* at 9a. The panel issued its decision in both cases on the same day. Its published opinion in *Charter* addressed the common legal questions in the two cases, while its unpublished opinion in this action applied its holdings in *Charter* to the facts alleged here.

In *Charter*, the Ninth Circuit held that "mixed-motive claims are cognizable under § 1981," such that "[e]ven if racial animus was not the but-for cause of a defendant's refusal to contract, a plaintiff can still prevail if she demonstrates that discriminatory intent was a factor in that decision." Pet. App. 21a. The court acknowledged that this Court had recently "endorsed a but-for causation requirement as applied to two federal statutes: the Age Discrimination in Employment Act (ADEA) and retaliation claims brought under Title VII." *Id.* at 16a (citing *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177–78 (2009); *Nassar*, 570 U.S. at 362–63). And it conceded that in those cases "the Court endorsed the use of a *default, but-for causation standard* . . . from which courts may depart only when the text of a statute permits." *Id.* at 17a (emphasis added).

The Ninth Circuit nevertheless held that Section 1981 permitted a departure from the "default, but-for causation standard" because, unlike the ADEA and Title VII's retaliation provision, Section 1981 does not "use the word 'because,'" which "explicitly suggest[s] but-for causation." Pet. App. 20a. Rather, Section 1981 "guarantees 'the same right' to contract 'as is enjoyed by white citizens,'" *id.*, and "[i]f discriminatory intent plays *any* role in a defendant's decision not to contract with a plaintiff, even if it is merely one factor

and not the sole cause of the decision, then that plaintiff has not enjoyed the *same right* as a white citizen," *id.* at 21a (emphases in original).

Relying on its opinion in *Charter*, the Ninth Circuit "conclude[d] that the district court improperly dismissed Plaintiffs' SAC" in this action because "to prevail in a Rule 12(b)(6) motion on their § 1981 claim, Plaintiffs needed only to plausibly allege that discriminatory intent was a factor in Comcast's refusal to contract, and not necessarily the but-for cause of that decision." Pet. App. 2a.

The court then held that "Plaintiffs' SAC includes sufficient allegations from which we can plausibly infer that Entertainment Studios experienced disparate treatment due to race" because those allegations suggested "that discriminatory intent played at least *some role* in Comcast's refusal to contract with Entertainment Studios, thus denying the latter the same right to contract as a white-owned company." Pet. App. 3a–4a (emphasis added). But it pointed to no factual allegation in the operative complaint indicating that anyone at Comcast considered race. Rather, the Ninth Circuit cited "Comcast's expressions of interest followed by repeated refusals to contract," its "practice of suggesting various methods of securing support for carriage only to reverse its position once Entertainment Studios had taken those steps," and the complaint's allegation that "Comcast carried every network of the approximately 500 that were also carried by its main competitors . . . *except* Entertainment Studios' channels." *Id.* at 3a.

The Ninth Circuit considered "most important[]" the SAC's allegation that Comcast "offer[ed] carriage contracts to 'lesser-known, white-owned' networks . . . at the same time it informed Entertainment Studios

that it had no bandwidth or carriage capacity." Pet. App. 3a. But it did not dispute that Plaintiffs "failed to adequately plead that . . . other, white-owned channels were similarly situated to [ESN's] networks," instead reasoning that this pleading failure was irrelevant because "an extensive comparison of these channels for purposes of determining disparate treatment due to race would require a factual inquiry that is inappropriate in a 12(b)(6) motion." *Id.* at 3a n.1. And although the court did not deny that "legitimate, race-neutral reasons for [Comcast's] conduct are contained within the SAC," it could not "conclude that these alternative explanations are so compelling as to render Plaintiffs' theory of racial animus implausible." *Id.* at 4a.

Comcast petitioned for panel rehearing and rehearing en banc, which the Ninth Circuit denied. Pet. App. 32a.

SUMMARY OF ARGUMENT

I. The text, history, structure, and context of Section 1981 confirm that a plaintiff cannot state a claim for racially discriminatory contracting in the absence of factual allegations giving rise to a plausible inference of but-for causation. They certainly do not evince a congressional intent to depart from "the default rule[]" requiring plaintiffs to plead and prove but-for causation. *Nassar*, 570 U.S. at 347.

A. Section 1981 guarantees all persons "the same right . . . to make . . . contracts" as white citizens. Where a Section 1981 plaintiff would have been denied a contract even if he were white, he plainly has not been denied the "same right" to contract as white citizens.

B. Standard tools of statutory construction confirm the background presumption that but-for causation is an essential element of a Section 1981 claim that plaintiffs must plead and prove. *Nassar*, 570 U.S. at 347. Not only was but-for causation an indispensable element of common-law torts when Congress first enacted and amended Section 1981 in the decade following the Civil War, but it would be more than a century before the motivating-factor standard adopted below would enter into antidiscrimination jurisprudence.

When Congress first endorsed this motivating-factor standard in the Civil Rights Act of 1991, it did so only with respect to certain claims under Title VII of the Civil Rights Act of 1964. With respect to *those* claims, Congress carefully limited the remedies potentially available to a plaintiff relying on a motivating-factor standard, excluding the types of compensatory and punitive damages available under Section 1981—thereby creating a finely balanced remedial scheme for motivating-factor claims that could be completely circumvented if the decision below stands. Significantly, even though Congress in the same 1991 Act amended Section 1981 in *different* respects, it conspicuously did *not* extend the motivating-factor standard to Section 1981. Under the *expressio unius* canon of statutory construction, Congress is presumed to have acted intentionally by specifying Title VII as a target of these amendments but omitting any such modification to Section 1981. *See Gross*, 557 U.S. at 174. In fact, this Court found Congress's decision not to similarly amend the ADEA and Title VII's retaliation provisions in the Civil Rights Act of 1991 all but dispositive proof that those claims require but-for causation. *See id.*; *Nassar*, 570 U.S. at 353–54. The same is true here.

And over the past century and a half that Section 1981 has been in force, this Court has consistently understood it to require plaintiffs to demonstrate that the challenged contracting decision was taken "because of" the plaintiff's race—a term that this Court has interpreted to require but-for causation. Because the private right of action under Section 1981 has been implied by the courts, this judicial interpretation of that cause of action is entitled to considerable weight.

C. The Ninth Circuit erred in reading Section 1981 to require that race be only a factor in a challenged contracting decision, rather than a but-for cause. Although the court noted that Section 1981 is distinct from other statutes that this Court has interpreted to require but-for causation insofar as it does not use the term "because of," this term has been read into the judicially created private right of action under Section 1981. Even if it had not been, the absence of such language is insufficient to indicate a departure from the *default* requirement of but-for causation. And the Ninth Circuit's supposition that Section 1981's guarantee of "the same right" to contract dictates a departure from the default standard of but-for causation for Section 1981 claims is both counter-textual and contradicted by this Court's precedent.

II. The SAC fails to plausibly allege that race was a but-for cause of Comcast's decision not to carry ESN's networks. Numerous legitimate, race-neutral reasons for Comcast's decision appear on the face of the SAC, and Plaintiffs have failed to plead any facts to dispel these obvious alternative explanations. On the contrary, the SAC admits that Comcast entered into carriage agreements with other African Ameri-

can–owned networks during the same time it was negotiating with ESN, and while Plaintiffs attempt to dismiss this fact on the ground that those networks were not 100% African American–owned, the SAC *also* concedes that Comcast has carried—and continues to carry—other 100% African American–owned networks. Meanwhile, Plaintiffs' conclusory assertion that Comcast entered carriage agreements with lesser-known, white-owned networks was unsupported by any factual allegations suggesting that those networks were similarly situated to ESN's—a fatal flaw that both courts below recognized, but the Ninth Circuit erroneously excused.

Because Plaintiffs have failed to allege a plausible claim three times now, despite specific instruction from the district court on how to do so, the Court should reverse the Ninth Circuit's judgment and hold that the district court correctly dismissed Plaintiffs' action with prejudice.

ARGUMENT

I. SECTION 1981 REQUIRES A PLAINTIFF TO PLEAD AND PROVE THAT RACE WAS A BUT-FOR CAUSE OF THE CHALLENGED CONTRACTING DECISION.

A plaintiff who would not have been able to make a contract irrespective of his race has not been denied "the same right . . . to make . . . contracts" as white citizens. As a result, a plaintiff must plead and prove that but for considerations of race, the challenged contracting decision would have been different. This plain-language reading of the statute is confirmed by its history, structure, and subsequent interpretation by this Court. At a minimum, none of these consider-

ations provides any basis for overriding the background presumption that Section 1981 incorporates the default rule requiring but-for causation.

A. The Plain Text Of Section 1981 Requires But-For Causation.

The plain text of Section 1981 makes clear that a plaintiff cannot state a claim for racially discriminatory contracting in the absence of but-for causation. The statute 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, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." 42 U.S.C. § 1981(a). If race is not a but-for cause of the plaintiff's inability to make a contract—that is, if a Section 1981 defendant would have declined to contract with the plaintiff even if the plaintiff had been white—it cannot plausibly be said that the plaintiff did not enjoy the "same right" to make contracts as a white citizen.

The Seventh Circuit recognized precisely this point when it observed that, "[t]o be actionable, racial prejudice must be a but-for cause, or in other words a necessary condition, of the refusal to transact," as "[o]therwise there is no harm from the prejudice—the harm would have occurred anyway—and without harm there is no tort." *Bachman v. St. Monica's Congregation*, 902 F.2d 1259, 1262–63 (7th Cir. 1990). The Third Circuit has read the statute the same way, and has explained that if "the same decision would have been made regardless of the plaintiff's race, then the plaintiff has, in effect, enjoyed 'the same right' as similarly situated persons." *Brown v. J. Kaz, Inc.*, 581 F.3d 175, 182 n.5 (3d Cir. 2009).

By contrast, the Ninth Circuit in this case read Section 1981 as going far beyond ensuring parity between whites and non-whites in the making of contracts. In its view, the "same right" language of Section 1981 compels the adoption of a causation standard that is met "[i]f discriminatory intent plays *any* role in a defendant's decision not to contract with a plaintiff, even if it is merely one factor and not the sole cause of the decision." Pet. App. 21a (emphasis in original). But Section 1981 does not, as the Ninth Circuit's reading suggests, address conduct that has no effect on a person's ability "to make . . . contracts."

As this Court has emphasized, "nothing in the text of § 1981 suggests that it was meant to provide an omnibus remedy for *all* racial injustice." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 479 (2006). And given its limited nature, the Court has rejected attempts to make Section 1981 "a cure-all" because doing so would "not only go[] beyond any expression of congressional intent but would produce satellite § 1981 litigation of an immense scope." *Id.* In fact, the Court long ago explained that Section 1981 and its related provisions "did not deal with the social rights of men, but with those fundamental rights . . . which it was intended to secure upon the same terms to citizens of every race and color." *Buchanan v. Warley*, 245 U.S. 60, 79 (1917).

Said another way, Section 1981 was designed to police discrimination that has *dispositive* impact on the right to contract: As the Court held in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), Section 1981 "expressly prohibits discrimination *only in the making and enforcement of contracts*," and "[w]here an alleged act of discrimination does not involve the

impairment of one of these specific rights, § 1981 provides no relief." *Id.* at 176 (emphasis added).[3]

In short, jettisoning but-for causation for Section 1981 claims, as the Ninth Circuit did here, would expand the scope of Section 1981 far beyond the statute's evident concern with ensuring an equal right to "make . . . contracts."

B. Other Indicia Of Statutory Meaning Confirm But-For Causation Is Required, And At A Minimum Fail To Overcome The "Default Rule" Of But-For Causation.

Even if there were some ambiguity as to whether an individual has been denied "the same right to contract" as white citizens where race does not affect that individual's ability to make a contract, that ambiguity must be resolved in favor of requiring but-for causation. "Causation in fact—*i.e.*, proof that the defendant's conduct did in fact cause the plaintiff's injury—is a standard requirement of any tort claim," *Nassar*, 570 U.S. at 346, and "this standard requires the plaintiff to show 'that the harm would not have occurred' in the absence of—that is, but for—the defendant's conduct," *id.* at 346–47. Because it is "textbook tort law

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[3] Congress responded to *Patterson* by enacting subsection (b) of Section 1981, which clarifies that "the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1982(b). But as the Court has explained, this amendment merely "defined the scope of § 1981 to include post-contract-formation conduct." *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 451 (2008). It did not change the fundamental point that an individual has not been denied the "same right" to make contracts as white citizens where she would not have been able to make a contract even if she were white.

that an action 'is not regarded as a cause of an event if the particular event would have occurred without it,'" but-for causation provides "the background against which Congress legislate[s]," and it is "the default rule[] it is presumed to have incorporated, *absent an indication to the contrary in the statute itself*." *Id.* at 347 (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* 265 (5th ed. 1984)) (emphasis added).

Section 1981 contains no indication that Congress intended to depart from the "default rule" of but-for causation. On the contrary, standard tools of statutory construction—including the history of the statute's enactment and amendment, its structure, and its interpretation by this Court—confirm that but-for causation is an essential element plaintiffs must plead to state a claim for racially discriminatory contracting.

1. But-For Causation Was The *Sine Qua Non* Of Tort Liability When Section 1981 Was Enacted In 1866.

The statutory history of Section 1981 leaves no doubt that the provision requires but-for causation. Section 1981 was first enacted in the Civil Rights Act of 1866, 14 Stat. 27, and was amended in minor respects in the Civil Rights Act of 1870, 16 Stat. 140, before being recodified in 1874, *see Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 373 (2004). In drafting the provision, Congress drew heavily upon the common law. The Civil Rights Act of 1866 provides that "in all cases where [the laws of the United States] are not adapted to the object [of carrying the statute into effect] . . . , the common law . . . shall be extended to and govern said courts in the trial and disposition of such cause." Civil Rights Act of 1866 § 3, 14 Stat.

27. And "[t]he common law influenced the enforcement provisions of the act just as profoundly as it influenced the definition of the rights protected." George Rutherglen, *Civil Rights in the Shadow of Slavery: The Constitution, Common Law, and the Civil Rights Act of 1866* 57 (2013). Because "Congress is understood to legislate against a background of common-law . . . principles," *Samantar v. Yousuf*, 560 U.S. 305, 320 n.13 (2010) (omission in original; quotation marks omitted), the causation standard under Section 1981 must be interpreted in light of common-law causation standards in the mid–19th century.

Under the common law as it existed in the 1860s, "[t]he 'but for' requirement [wa]s generally one of the indispensable elements to make out a legal cause." Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 Harv. L. Rev. 103, 109 (1911). Indeed, "[a]t least as far back as the mid-nineteenth century, courts have used the test to seek out the 'actual' cause of harm as the basis for liability," and until the early 20th century it was "the only widely accepted judicial test of factual cause." John D. Rue, *Returning to the Roots of the Bramble Bush: The 'But For' Test Regains Primacy in Causal Analysis in the American Law Institute's Restatement (Third) of Torts*, 71 Fordham L. Rev. 2679, 2684, 2687 (2003).

A treatise published in the same year as the Civil Rights Act of 1866 recognized the indispensability of but-for causation when it explained that "[w]here two or more causes concur to produce an effect, and it cannot be determined which contributed most largely, *or whether, without the concurrence of both, it would have happened at all*, and a particular party is responsible only for the consequences of one of those causes, *a recovery cannot be had*." 1 Francis Hilliard, *The Law*

of Torts or Private Wrongs 78–79 (1866) (emphases added). And nearly 50 years later, the Restatement (First) of Torts confirmed the role of but-for causation as the *sine qua non* of liability at common law. *See* Restatement (First) of Torts § 431 (1934) ("The actor's negligent conduct is a legal cause of harm to another if . . . his conduct is a substantial factor in bringing about the harm."); *id.* § 432 ("[T]he actor's negligent conduct is not a substantial factor in bringing about harm to another if it would have been sustained even if the actor had not been negligent.").

Cases decided contemporaneously with Section 1981's enactment in 1866 amply demonstrate the centrality of but-for causation at that time. In *Hayes v. Michigan Central Rail Co.*, 111 U.S. 228 (1884), for example, this Court reversed a directed verdict in favor of the defendant in a case arising after the plaintiff's child was injured crossing the defendant's railroad tracks, which were not properly fenced under local ordinance. *Id.* at 231. Although the defendant urged affirmance "because the want of a fence could not reasonably be alleged as the cause of the injury," *id.* at 241, the Court disagreed: "In the sense of an efficient cause, *causa causans*, this is no doubt strictly true; but that is not the sense in which the law uses the term in this connection. The question is, was it *causa sine qua non*—a cause which, if it had not existed, the injury would not have taken place." *Id.* State court cases are in accord.[4]

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[4] *See, e.g.*, *Titcomb v. Fitchburg R.R. Co.*, 94 Mass. (12 Allen) 254, 261 (1866) (emphasizing that "the burden is on the plaintiffs to show" that a properly maintained "fence would have prevented the occurrence of the injury"); *Flattes v. Chi., Rock Island & Pac. R.R. Co.*, 35 Iowa 191, 193–94 (1872) (reversing jury's verdict for plaintiff in negligence action where "[t]here is no reasonable

In fact, it would be more than a century after the enactment of Section 1981 before the courts began to loosen the strict requirements of but-for causation, perhaps most notably with this Court's fractured decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). But even that case merely adopted a burden-shifting framework for Title VII claims, under which the plaintiff must "show[] that discrimination was a 'motivating' or 'substantial' factor to shift the burden of persuasion to the employer to establish the absence of but-for cause." *Burrage v. United States*, 571 U.S. 204, 213 n.4 (2014). It would be a full 125 years after the initial enactment of Section 1981 before the motivating-factor standard would find its way into any antidiscrimination laws. *Id.*

Retroactively reading these modern innovations into Section 1981 would violate this Court's repeated holdings that statutory provisions derived from the Civil Rights Act of 1866 must be read as they would have been understood at the time of their enactment. In *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987), for example, this Court applied that principle in rejecting the argument that ethnic groups which might be considered "white" today fall outside

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ground for supposing that the sounding of the [train's] whistle would have . . . prevented the injury"); *Gould v. Chi., B. & Q. Rail Co.*, 24 N.W. 227, 227–28 (Iowa 1885) (conceding that "[t]he failure of the conductor to give the signal was undoubtedly negligence," but nevertheless reversing the jury's verdict in favor of plaintiff because "whether [the signal] was given or was not given, . . . the result would have been alike in each case"); *Sowles v. Moore*, 26 A. 629, 629 (Vt. 1893) ("When injury on the part of the plaintiff and negligence on the part of the defendant concur, the plaintiff cannot, nevertheless, recover, if the defendant could not, by the exercise of due care, have prevented the accident from occurring.").

the Act's protection because "[t]he understanding of 'race' in the 19th century . . . was different." *Id.* at 610 (applying Section 1981 to Arab plaintiff). Similarly, in *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987), the Court explained that "the question before us is not whether Jews are considered to be a separate race by today's standards, but whether at the time [42 U.S.C.] § 1982 was adopted, Jews constituted a group of people that Congress intended to protect." *Id.* at 617. Accordingly, Section 1981 must be construed in accordance with its 19th century understanding; "if judges could freely invest old statutory terms with new meanings, we risk amending legislation outside the 'single, finely wrought and exhaustively considered, procedure' the Constitution demands." *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019); *see also, e.g., Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2362 (2019); *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 275–76 (1994).

This is precisely why the Court has held that but-for causation provides the "default rule[]" for statutory claims: it is "the background against which Congress legislated," and thus the rule "it is presumed to have incorporated." *Nassar*, 570 U.S. at 347. Anachronistically injecting a modern causation standard into an 1866 statute without congressional mandate would be especially inappropriate here, given that Congress has dispensed with but-for causation in only a very narrow (and very clearly defined) subset of discrimination claims—a subset that conspicuously excludes Section 1981. *See id.* at 352–53; *Gross*, 557 U.S. at 174–75.

2. Congress Declined To Depart From But-For Causation Under Section 1981 When It Adopted A Motivating-Factor Standard For Other Antidiscrimination Statutes.

The subsequent history of Section 1981 confirms that but-for causation is essential for any claim under the statute. In the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, Congress amended Section 1981 for the first time since its recodification in 1874. Although the 1991 Act dispensed with but-for causation in limited respects for *some* antidiscrimination claims, it notably did *not* extend that new causation standard to Section 1981. This carries a strong implication that Congress meant *not* to depart from but-for causation for Section 1981 claims. After all, "[w]hen Congress amends one statutory provision but not another, it is presumed to have acted intentionally," and the "'negative implications raised by disparate provisions are strongest' when the provisions were 'considered simultaneously when the language raising the implication was inserted.'" *Gross*, 557 U.S. at 174–75.

Congress enacted the Civil Rights Act of 1991 "in large part [as] a response to a series of decisions of this Court interpreting the Civil Rights Acts of 1866 and 1964." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 250 (1994). Among other things, the statute "'respond[ed]' to *Price Waterhouse* by 'setting forth standards applicable in "mixed motive" cases' in two new statutory provisions." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003) (alteration in original). First, it amended Title VII to allow a plaintiff to establish liability by proving that "race, color, religion, sex, or na-

tional origin was a motivating factor for any employment practice, even though other factors also motivated the practice." Civil Rights Act of 1991 § 107(a), 105 Stat. 1075, codified at 42 U.S.C. § 2000e-2(m). Second, it limited the remedies available in such a case where the defendant shows the absence of but-for causation. *Id.* § 107(b), 105 Stat. 1075–76, codified at 42 U.S.C. § 2000e-5(g)(2)(B). The result was a "new burden-shifting framework" under which "a plaintiff could obtain declaratory relief, attorney's fees and costs, and some forms of injunctive relief based solely on proof that race, color, religion, sex, or nationality was a motivating factor in the employment action; but the employer's proof that it would still have taken the same employment action would save it from monetary damages and a reinstatement order." *Nassar*, 570 U.S. at 349.

Crucially, however, Congress made these amendments *only* with respect to claims of status-based employment discrimination under Title VII. By contrast, Congress chose *not* to apply these amendments to Section 1981, even as it carefully amended Section 1981 in *other* ways.

In particular, the 1991 Act added to Section 1981 subsection (b), which defined "make and enforce contracts" to include "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." Civil Rights Act of 1991 § 101, 105 Stat. 1071, codified at 42 U.S.C. § 1981(b). Congress also added subsection (c), which confirmed that Section 1981 protects against both governmental and private discrimination. *Id.*, 105 Stat. 1071–72, codified at 42 U.S.C. § 1981(c). But in doing so, Congress

was clear that it was only modifying the scope of Section 1981's protection, not lowering the causation standard: "By restoring the broad scope of Section 1981, Congress will ensure that all Americans may not be harassed, fired or otherwise discriminated against in contracts *because of* their race." H.R. Rep. No. 102-40, pt. 2, at 12 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 694, 695 (emphasis added); *see also id.* at 37 ("[F]or the purpose of pleading under Section 1981, it is sufficient to allege discrimination *based upon* national origin." (emphasis added)). This Court has recognized that terms like "because of" imply but-for causation. *Burrage*, 571 U.S. at 213–14. Far from justifying a departure from the background rule of but-for causation, therefore, the legislative history of the 1991 Act indicates that Congress understood Section 1981 to incorporate traditional notions of causation, yet made no effort to change that approach.

This Court "cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to" Section 1981. *Gross*, 557 U.S. at 174–75. On the contrary, the *expressio unius* canon of statutory construction compels a reading of the 1991 Act that limits its motivating-factor standard only to those causes of action to which Congress advertently made that standard pertinent, and not to others. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978) (reasoning that because "§ 10 [of the Endangered Species Act] creates a number of limited 'hardship exemptions,'" but that "there are no exemptions in the Endangered Species Act for federal agencies, . . . under the maxim *expressio unius est exclusio alterius*, we must presume that these were the only 'hardship cases' Congress intended to exempt"); *see also Russello v. United States*, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section

of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (alteration in original)).

Congress's decision not to apply the motivating-factor standard to Section 1981 claims was hardly an accident. The 1991 Act amended Section 1981 in its first substantive section, Civil Rights Act of 1991 § 101, 105 Stat. 1071–72, before adopting the motivating-factor standard solely for Title VII claims just six sections later, *id.* § 107, 105 Stat. 1075–76. That legislative determination to dispense with but-for causation to a limited extent for one category of employment-discrimination claims while saying nothing about other antidiscrimination laws was all but dispositive in *Gross* and *Nassar*. In *Gross*, the Court declined to depart from but-for causation with respect to claims brought under the Age Discrimination in Employment Act because, "[u]nlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor." 557 U.S. at 174. The fact that "Congress neglected to add such a provision to the ADEA when it amended Title VII . . . even though it contemporaneously amended the ADEA in several ways," confirmed that Congress "acted intentionally." *Id.* at 174–75.

In *Nassar*, the Court went a step further, holding that Title VII's motivating-factor standard applies only to claims of *status-based* discrimination, to the exclusion of retaliation claims under Title VII. As the Court explained, "[w]hen Congress wrote the motivating-factor provision in 1991, it chose to insert it as a subsection within § 2000e-2, which contains Title VII's ban on status-based discrimination and says

nothing about retaliation. . . . What is more, a different portion of the 1991 Act contains an express reference to all unlawful employment actions, thereby reinforcing the conclusion that Congress acted deliberately when it omitted retaliation claims from § 2000e-2(m)." 570 U.S. at 353–54 (citation omitted).

The same logic applies with even greater force here, because an interpretation of Section 1981 that imposes liability where race is not the but-for cause of an adverse contracting decision would vitiate the carefully crafted regime that Congress enacted with respect to claims of status-based discrimination under Title VII. As detailed above, a Title VII plaintiff who has allegedly suffered an adverse employment action is *not* entitled to monetary damages, hiring, or reinstatement if the employer can show that it would have taken the same action absent any improper consideration. 42 U.S.C. § 2000e-5(g)(2)(B). But under the Ninth Circuit's rule, Section 1981 would contain no such limitation on the availability of monetary damages or broad equitable relief in the absence of but-for causation. So long as the adverse employment action falls within one of the broad categories enumerated in Section 1981(b), the same plaintiff could assert a claim under Section 1981 and be "entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages," *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 460 (1975)—even though the plaintiff received precisely the same employment outcome as an identically situated white person.

This Court has cautioned against such overly broad interpretations of Section 1981 because, "[w]here conduct is covered by both § 1981 and Title VII, the detailed procedures of Title VII are rendered

a dead letter, as the plaintiff is free to pursue a claim by bringing suit under § 1981 without resort to those statutory prerequisites." *Patterson*, 491 U.S. at 181. This is no small matter. Congress adopted "detailed and well-crafted procedures for conciliation and resolution" of discrimination claims in Title VII, "set[ting] up an elaborate administrative procedure, implemented through the EEOC, that is designed to assist in the investigation of claims of racial discrimination in the workplace and to work towards the resolution of these claims through conciliation rather than litigation." *Id.* at 180–81. In the Civil Rights Act of 1991, Congress expanded the scope of liability under Title VII but, consistent with its focus on conciliation, limited plaintiffs to make-whole and declaratory relief in the absence of but-for causation. 42 U.S.C. § 2000e-5(g)(2)(B).

Under the Ninth Circuit's decision, however, there would be no reason for a plaintiff ever to follow this carefully crafted regime when broader liability and more expansive remedies are available under Section 1981. And it is no defense to say that there are other classes of plaintiffs for whom Title VII provides the only remedy for alleged discrimination. These plaintiffs would be those not covered by Section 1981—namely, those who allege discrimination on any basis other than race, including religion, sex, and national origin. It is inconceivable that Congress intended to so drastically depart from Title VII's detailed framework *sub silentio*, and doubly so that it intended to do so for only certain types of status-based discrimination claims.

Of course, "there is some necessary overlap between Title VII and § 1981," which may not be disre-

garded "where the statutes do in fact overlap." *Patterson*, 491 U.S. at 181. But this Court has emphasized that "[w]e should be reluctant . . . to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute." *Id.* That, however, is precisely what the Ninth Circuit did below.

3. This Court's Prior Interpretations Of Section 1981 Confirm That It Requires But-For Causation.

Finally, this Court has consistently interpreted claims under the Civil Rights Act of 1866 (including, but not limited to, Section 1981) to require a showing that the challenged decision was made "because of" the plaintiff's race—language that unmistakably connotes but-for causation. *See Gross*, 557 U.S. at 176 ("[T]he ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age is that age was the 'reason' that the employer decided to act. To establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." (citation omitted)). And while this term has been judicially implied, that hardly diminishes its force in delineating the requirements of a Section 1981 claim, because the *entire* private right of action under that provision has been judicially implied. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 720 (1989) ("[N]owhere did the Act provide for an express damages remedy for violation of the provisions of § 1."); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 736 (1979). As a result, the contours of that right of action "will have to be judicially delimited one way or another unless and until Congress resolves

the question." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 749 (1975).

This Court first indicated more than a century ago that the Civil Rights Act of 1866 requires that a challenged action must have been taken "because of" the plaintiff's race, in the context of a claim brought under Section 1982, *Buchanan*, 245 U.S. 60, which guarantees "the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property," 42 U.S.C. § 1982. Because Section 1981 and Section 1982 were both originally enacted in the Civil Rights Act of 1866, and because they employ nearly identical language, the Court's "precedents have long construed §§ 1981 and 1982 similarly." *CBOCS*, 553 U.S. at 447.

In *Buchanan*, the plaintiff challenged a segregation ordinance that barred him from selling his property to an African-American man. The Court struck down the ordinance under the Fourteenth Amendment, in the process explaining that "[t]he statute of 1866 . . . expressly provided that all citizens of the United States in any state shall have the same right to purchase property as is enjoyed by white citizens," and that "these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him *solely because of color*." 245 U.S. at 78–79 (emphasis added).

The Court reached a similar conclusion in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). There, the Court "h[e]ld that [Section] 1982 bars all racial discrimination, private as well as public, in the sale or rental of property." *Id.* at 413. In doing so, it noted that "a negro citizen who is denied the opportunity to purchase the home he wants *'[s]olely because of [his]*

race and color' has suffered the kind of injury that [Section] 1982 was designed to prevent." *Id.* at 419 (first and second alterations in original; citation omitted; emphasis added).

Runyon v. McCrary, 427 U.S. 160 (1976), is in accord. That case presented the question whether parents of African-American children who were denied access to a private school could state a claim against the school for racially discriminatory contracting under Section 1981. The Court answered in the affirmative, holding that the school's policy of refusing to admit African-American children contravened Section 1981's prohibition on private discrimination because "a Negro's right to 'make and enforce contracts' is violated if a private offeror refuses to extend to a Negro, *solely because he is a Negro*, the same opportunity to enter into contracts as he extends to white offerees." *Id.* at 170–71 (emphasis added).

Finally, in *Saint Francis College*, 481 U.S. 604, the Court explained that, "[b]ased on the history of § 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination *solely because of* their ancestry or ethnic characteristics." *Id.* at 613 (emphasis added); *see also id.* at 614 (Brennan, J., concurring) ("Pernicious distinctions among individuals *based solely on their ancestry* are antithetical to the doctrine of equality upon which this Nation is founded." (emphasis added)).

To be sure, these decisions did not directly present the question at issue here—that is, whether but-for causation is a necessary condition of a Section 1981 claim. But the Court's longstanding understanding that plaintiffs must show that the challenged action

was taken "because of" race is highly relevant in resolving the question here. After all, when courts fashion an implied right of action to vindicate statutory claims, as they have done here, they must do so in a manner that is consistent with the broader statutory regime. And although the Civil Rights Act of 1866 did not create a private right of action, it does expressly authorize *criminal* prosecution for violations of citizens' civil rights. That express authorization for criminal prosecutions unambiguously requires but-for causation. *See* Civil Rights Act of 1866 § 2, 14 Stat. 27 ("[A]ny person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act . . . *by reason of his color or race* . . . shall be deemed guilty of a misdemeanor." (emphasis added)); Civil Rights Act of 1870 § 17, 16 Stat. 144 (expanding criminal penalties to those who deprive civil rights "on account of such person being an alien, or by reason of his color or race"); *see also Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 63 (2007) ("In common talk, the phrase 'based on' indicates a but-for causal relationship.").

As this Court has acknowledged, "[i]t would . . . be anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action." *Blue Chip Stamps*, 421 U.S. at 736. It is especially anomalous to do so where the result would stretch the implied right of action far beyond its common-law roots.

For this reason, the Court rejected the Ninth Circuit's holding that a securities-fraud plaintiff can al-

lege loss causation by asserting that the price of a security "'*on the date of purchase* was inflated because of the misrepresentation.'" *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 342 (2005) (emphasis in original). Because "[j]udicially implied private securities fraud actions resemble in many (but not all) respects common-law deceit and misrepresentation actions," and because "the common law has long insisted that a plaintiff in such a case show . . . that he suffered actual economic loss," the Court "rejected the Ninth Circuit's 'inflated purchase price' approach to proving causation and loss." *Id.* at 343–44. As the Court explained, "the uniqueness of [the Ninth Circuit's] perspective argues against the validity of its approach in a case like this one where we consider the contours of a judicially implied cause of action with roots in the common law." *Id.* at 345.

Thus, reading Section 1981 to require that the challenged action be taken "because of" the plaintiff's race is not only consistent with this Court's decisional law, but compelled by the statute's broader structure.

C. The Ninth Circuit's Rejection Of A But-For Causation Standard For Section 1981 Claims Contravenes The Statutory Text And This Court's Decisions.

The Ninth Circuit offered two reasons for its conclusion that a Section 1981 plaintiff need only allege that race was a factor to state a claim for racially discriminatory contracting. Neither is persuasive.

First, the court observed that Section 1981's text is "quite different from the language of the ADEA and Title VII's retaliation provision, both of which use the word 'because' and therefore explicitly suggest but-for causation." Pet. App. 20a. True, this Court in *Gross*

and *Nassar* did reason that terms like "because of" explicitly suggest but-for causation. *See Gross*, 557 U.S. at 176; *Nassar*, 570 U.S. at 352. But the textual guarantee of "the same right . . . to make . . . contracts" is just as explicit in requiring but-for causation, because a plaintiff who would not have been chosen for a contract irrespective of his race clearly has not been denied the "same" right to make the contract at issue as a white person—which is the right that the statutory text protects. Moreover, as noted above, this Court has consistently read Section 1981's judicially implied private right of action to require a showing that the challenged action was taken "because of" the plaintiff's race. *See supra* Part I.B.3; *see also CBOCS*, 553 U.S. at 459 (Thomas, J., dissenting) ("It is true that § 1981(a), which was enacted shortly after the Civil War, does not use the modern statutory formulation prohibiting 'discrimination on the basis of race.' But that is the clear import of its terms.").

In any event, *Gross* and *Nassar* are equally clear that whether a statute contains language "explicitly suggest[ing] but-for causation," Pet. App. 20a, is irrelevant because but-for causation is the *default rule*, presumed to apply "absent an indication to the contrary in the statute itself," *Nassar*, 570 U.S. at 347. As a result, the mere omission of the term "because of" from Section 1981—a term that expressly requires but-for causation—provides no ground from which to infer a departure from the default but-for causation standard. A "default rule" that operates only when the statutory language already dictates the same rule would be rather toothless.

Second, the Ninth Circuit reasoned that Section 1981's guarantee of "'the same right' to contract 'as is enjoyed by white citizens'" provides such an indication

to the contrary because "[i]f discriminatory intent plays *any* role in a defendant's decision not to contract with a plaintiff, even if it is merely one factor and not the sole cause of that decision, then the plaintiff has not enjoyed the *same right* as a white citizen." Pet. App. 21a. But again, Section 1981 guarantees only the same right to "make . . . contracts"—which has not been denied where the same contract-formation decision would have resulted regardless of the plaintiff's race. *See supra* Part I.A. Nothing in the language of Section 1981 suggests that a plaintiff can pursue a claim under Section 1981 simply by showing that racial considerations were a non-dispositive factor in a challenged decision—and certainly not with sufficient clarity to overcome the default rule of but-for causation.

* * *

The text, history, and structure of Section 1981—along with this Court's consistent reading of the statute as prohibiting refusals to contract "because of" race—all confirm that a plaintiff cannot state a claim for racially discriminatory contracting under Section 1981 without pleading facts sufficient to establish but-for causation. Congress ratified this view when it adopted the motivating-factor standard for status-based discrimination claims under Title VII while making no change to the standard of causation under Section 1981. The Ninth Circuit's erroneous conclusion that Plaintiffs did not need to plead but-for causation has no basis in law.

II. PLAINTIFFS FAILED TO ADEQUATELY ALLEGE BUT-FOR CAUSATION

Racial discrimination is a serious problem with systemic implications that are felt in all facets of

American society, and Comcast has confronted this problem in a proactive and socially responsible manner. It has for decades carried numerous African American–owned channels, including 100% African American–owned channels. Pet. App. 65a–66a. And in recent years it has collaborated with leading civil-rights organizations, including the NAACP and the National Urban League, to launch a new initiative designed to increase the number of minority-owned channels it carries. *Id.* at 55a–58a. As a result of these efforts, Comcast has added multiple African American–owned channels to its lineup. *Id.* at 58a.

These are not Comcast's self-serving assertions; they are allegations in *Plaintiffs'* operative complaint. And yet, under the flawed causation standard adopted by the Ninth Circuit, the SAC was nevertheless found sufficient to state a claim for racially discriminatory contracting in violation of Section 1981 because the court supposedly could "infer from the allegations in the SAC that discriminatory intent played at least *some role* in Comcast's refusal to contract with Entertainment Studios, thus denying the latter the same right to contract as a white-owned company." Pet. App. 4a (emphasis added).

What allegations permitted such an inference? In the words of the Ninth Circuit,

> [t]hese allegations include: Comcast's expressions of interest followed by repeated refusals to contract; Comcast's practice of suggesting various methods of securing support for carriage only to reverse its position once Entertainment Studios had taken those steps; the fact that Comcast carried every network of the approximately 500 that were also carried by its main competitors (Verizon, FIOS, AT&T U-

> Verse, and DirecTV), *except* Entertainment Studios' channels; and, most importantly, Comcast's decision to offer carriage contracts to 'lesser-known, white-owned' networks (including Inspirational Network, Fit TV, Outdoor Channel, Current TV, and Baby First Americas) at the same time it informed Entertainment Studios that it had no bandwidth or carriage capacity.

Pet. App. 3a.

None of these allegations has *anything* to do with race, and they certainly do not suggest that race had any effect at all on Comcast's decision not to carry ESN's networks. The closest the Ninth Circuit came to identifying an allegation that has even a tangentially racial component is the assertion that Comcast agreed to carry "'lesser-known, white-owned' networks." Pet. App. 3a. But as the Ninth Circuit conceded in addressing the same issue in *Charter*, "to infer discriminatory intent from these allegations of disparate treatment, we would need to conclude that the white-owned channels were similarly situated." *Id.* at 22a–23a n.8. And as the district court correctly concluded below, the "SAC failed to adequately plead that these other, white-owned channels were similarly situated to Entertainment Studios' networks." *Id.* at 3a n.1. The Ninth Circuit did not dispute that the SAC failed to allege facts sufficient to establish that the white-owned channels were similarly situated, but simply brushed that failure aside, reasoning that "an extensive comparison of these channels for purposes of determining disparate treatment due to race would require a factual inquiry that is inappropriate in a 12(b)(6) motion." *Id.* That rationale overlooks the fundamental point that the SAC's shortcoming was

not merely an absence of *evidence* suggesting that the channels were similarly situated, but an absence of factual *allegations* that they were so situated. Far from being "inappropriate in a 12(b)(6) motion," as the Ninth Circuit believed, testing the sufficiency of the plaintiff's factual allegations is the very purpose of such a motion.

Because nothing in Plaintiffs' outlandish SAC plausibly suggests that race played any role in Comcast's decision not to carry ESN's networks, much less that race was a but-for cause of Comcast's decision, the Court should hold that the district court correctly dismissed Plaintiffs' action with prejudice for repeatedly failing to state a plausible claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009) (reversing the appellate court's judgment and holding as a matter of law that the complaint failed to state a claim).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678. Factual allegations that are "'merely consistent with' a defendant's liability . . . 'stop[] short of the line between possibility and plausibility of "entitlement to relief."'" *Id.* For this reason, when a complaint alleges facts that admit of an "'obvious alternative explanation'" for the defendant's conduct, it must be dismissed absent "more by way of factual content to 'nudg[e]' [the] claim . . . 'across the line from conceivable to plausible.'" *Id.* at 682–83 (first alteration in original).

The SAC does not plausibly allege that race was a but-for cause of Comcast's decision not to carry ESN's networks, because it openly admits that while ESN was negotiating for a carriage agreement between 2008 and 2015, Comcast contracted to carry at least

two *other* African American–owned networks in 2012, including networks owned by celebrities Earvin "Magic" Johnson and Sean "Diddy" Combs. Pet. App. 58a–61a. Attempting to sidestep the obvious inference that Comcast was happy to carry African American–owned networks so long as they, like any other network, showed a sufficient likelihood of generating consumer demand, Plaintiffs speculate that these networks' African-American owners were "'fronts.'" *Id.* at 54a. But such "'naked assertion[s]' devoid of 'further factual enhancement'" are not sufficient to state a claim. *Iqbal*, 556 U.S. at 678 (alteration in original). In any event, the SAC does not allege that these networks were *not* owned by Mr. Johnson and Mr. Combs, but only that Plaintiffs are *unaware* of the networks' ownership. *See, e.g.*, Pet. App. 59a, 61a. But the very point of the plausibility standard is to prevent plaintiffs from "unlock[ing] the doors of discovery . . . armed with nothing more than conclusions." *Iqbal*, 556 U.S. at 678–79.

Plaintiffs also attempt to brush aside these African American–owned networks because they are not *100%* African American–owned. It is unsurprising that Plaintiffs concocted this gerrymandered racial category, as they are forced to admit that Comcast actively endeavored to carry "*majority or substantial[ly]*" minority-owned channels. Pet. App. 55a (emphasis added). But Plaintiffs' arbitrary racial classification is both legally and factually irrelevant. No court has ever recognized "100% African American–owned media" as a distinct racial category subject to special protection under federal antidiscrimination or civil-rights law. This, too, is unsurprising: According to the SAC, ESN "is the *only* 100% African American–owned multi-channel media company in the United States

which owns and controls multiple television networks." *Id.* at 40a (emphasis added). And even if this were a cognizable racial category, the SAC concedes that Comcast carries the 100% African American–owned Africa Channel, and previously carried Black Family Channel, which was 100% African American–owned before it was sold, *id.* at 44a; *see also id.* at 65a.

Because the SAC contains allegations establishing that Comcast entered into carriage agreements with other African American–owned networks, a court cannot plausibly infer that Comcast would have carried ESN if only ESN were *not* African American–owned. And this inference becomes all the more implausible in light of the numerous "obvious alternative explanation[s]" for Comcast's decision which appear on the face of the SAC. Specifically, the SAC acknowledges that Comcast justified its decision on the ground that "there was insufficient demand for Entertainment Studios' networks," Pet. App. 37a, that Comcast "d[id] not have 'sufficient bandwidth' to accommodate Entertainment Studios' networks," *id.* at 50a, and that Comcast "[wa]s interested in providing carriage only for news and sports channels," *id.* at 51a. These legitimate business reasons for declining to contract with ESN defeat any possible inference that race was the but-for cause of Comcast's decision.

To be sure, Plaintiffs allege that these reasons are "lies," Pet. App. 50a, but they again offer no facts to support this assertion. The closest they come is their claim that Comcast agreed to carry other, unspecified networks that purportedly did not satisfy all of these criteria, but as the Ninth Circuit acknowledged (but disregarded), the SAC did not plead "that these other, white-owned channels were similarly situated to Entertainment Studios' networks." *Id.* at 3a n.1. Absent

any factual allegations sufficient to "nudge" Plaintiffs' claim that race was a but-for cause of Comcast's decision not to carry ESN's networks "across the line from conceivable to plausible," the SAC must be dismissed.

In short, Section 1981 was designed to deal with a serious social problem. But nothing about the SAC is serious. In it, Plaintiffs allege that Comcast engaged in racial discrimination by—of all things—adopting a program that *promoted* the carriage of minority-owned channels. And according to the SAC, Comcast did not act alone, but rather "worked hand-in-hand with governmental regulators," as well as leading civil-rights organizations, "to perpetuate the exclusion of truly African American–owned media from contracting for channel carriage and advertising." Pet. App. 55a. Based on this purported conspiracy, Plaintiffs seek $20 *billion* in damages. In light of these outlandish allegations, as well as the admissions that Plaintiffs make in the SAC, this Court should hold that Plaintiffs have failed to plausibly allege that race was a but-for cause of Comcast's decision not to enter a carriage agreement with ESN and reverse the Ninth Circuit's decision to the contrary. At a minimum, the Court should vacate the judgment below and direct the Ninth Circuit to reconsider the sufficiency of the SAC under the correct but-for causation standard.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted.

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