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 THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND THE NATIONAL SCHOOL BOARDS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. One of the Chamber's responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community. It filed an amicus brief in support of rehearing en banc in the Ninth Circuit in this case, filed an amicus brief in support of certiorari in this case, and has filed amicus briefs in this Court in cases directly relevant to the question presented here, including in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013), and *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009).

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of

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[1] No counsel for a party authored this brief in whole or in part. No person or entity, other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have filed notices with the Court indicating their blanket consent to the submission of amicus briefs.

Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses.

NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases impacting small businesses.

The National School Boards Association (NSBA) represents state associations of school boards across the country as well as their more than 90,000 local school board members. Those school board members in turn govern some 13,800 local school districts, which employ almost 6.4 million people. NSBA advocates for equity and excellence in public education through school board governance.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici's members are deeply committed to preventing discrimination in the workplace and in American business and civic life more broadly. Section 1981 can play an important role in accomplishing that task. But as with other antidiscrimination provisions, Section 1981—and the

private cause of action that courts have long inferred from it—should be applied in a manner that is consistent with its terms and the background rules against which it was adopted. Section 1981 was intended to protect people who have been harmed *because of* discrimination. It should not be turned into a tool for plaintiffs who have not actually been harmed by discrimination (and who would have been treated the same way regardless of their race) to impose litigation burdens and settlement demands on businesses, local governments and school districts, and other contracting entities merely by alleging that race was *a* factor in the challenged decision.

The Ninth Circuit's decision in this case, however, would do just that. Under its "mixed-motive" standard, "[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 (emphasis added). Such a standard would invite tenuous allegations of discrimination and make it difficult to resolve cases on summary judgment, requiring fact-heavy trials into defendants' subjective mindsets. Defendants would have strong incentives to settle even meritless claims simply to avoid these litigation costs. Moreover, because plaintiffs in such trials would inevitably focus their evidence on whether their former co-workers or business partners harbored racist thoughts (rather than on objective qualifications for a position or contract), the standard would invite race-based divisions. As a practical matter, the prospect of such litigation would prevent employers from evenhandedly and fairly applying non-discriminatory workplace standards in circumstances when doing so

would be good for employers, coworkers, and the public alike.

There is no evidence that Congress intended such a volatile regime. Quite the opposite. In the wake of the Civil War, when Congress originally enacted what became Section 1981, the "but-for" standard of causation was ubiquitous. The express public enforcement mechanisms that Congress adopted to enforce Section 1981, for example, used the "by reason of" and "on account of" language that this Court has recognized as a hallmark of the "but-for" standard. *See* Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27, 27 (1866); *Nassar*, 570 U.S. at 350. And there is nothing in Section 1981 itself that suggests Congress intended something other than that default but-for standard—let alone a "mixed-motive" standard that appears to be unlike any causation test that had ever been applied in *any* context at the time. To the contrary, the text of Section 1981 is consistent with the but-for rule.

Adopting a new mixed-motive standard for the private cause of action inferred from Section 1981 would also conflict with more reticulated anti-discrimination provisions that Congress subsequently enacted. A plaintiff claiming racial discrimination in connection with employment, for example, cannot recover damages under Title VII's express anti-discrimination provision unless race was a but-for cause of the adverse employment action in question. If such plaintiffs can recover damages under Section 1981 without the need for such a showing, they would have no reason to sue under Title VII for discrimination in employment based on race in the first place—circumventing the very provision that Congress designed to deal with such claims, and the

limitations that Congress adopted to go with it. Absent a concrete indication that Congress intended such a counter-productive system of employment discrimination laws (which does not exist), the Court should decline to impose that regime.

Further disrupting matters, claims that are not even *close* to the sort of genuine discrimination with which Congress was concerned would also flourish under a watered-down mixed-motive standard for Section 1981. After all, that standard allowed the complaint here to make it past the pleading stage with wholly implausible allegations about civil rights leaders, the federal government, and the entire entertainment industry conspiring against the carefully gerrymandered category of "100% African American-owned television networks." If this Court allows that result to stand, it will only incentivize plaintiffs' lawyers to push even further beyond the bounds of plausibility, hoping that the defendants will blink (and settle) rather than hold out for a trial at which the question is not whether they made a specific decision because of race but rather whether they, and their employees, might have *considered* race, as one of many factors, while deciding. Of course, all agree that racial discrimination should not play any role in employment or contracting decisions. But imposing a mixed-motive standard would impose real costs on employers, employees, and other contracting parties. There is no reason to conclude that Congress intended to do so in Section 1981.

The decision below should be reversed.

ARGUMENT

I. ALL SIGNS POINT TO THE CONCLUSION THAT SECTION 1981 ADOPTS THE DEFAULT RULE OF BUT-FOR CAUSATION

A. As This Court Has Repeatedly Held, But-For Causation Is The Default Rule For Federal Discrimination Laws

Few legal principles are as well-established and longstanding as the basic tort concept of "[c]ausation in fact," or but-for causation. *University of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 346 (2013). It is "textbook tort law that an action 'is not regarded as a cause of an event if the particular event would have occurred without it.'" *Id.* at 347 (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* 265 (5th ed. 1984)). And the requirement of "proof that the defendant's conduct did in fact cause the plaintiff's injury . . . is a standard requirement of *any* tort claim." *Id.* at 346 (emphasis added).

Because this "'simple test'" provides "background against which Congress legislate[s]," this Court has repeatedly held that but-for causation provides the "default rule[]" Congress "is presumed to have incorporated, absent an indication to the contrary in the statute itself." *Id.* at 346-47 (quoting *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978)); *accord Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 178 (2009). As petitioner has explained, there is no basis for deviating from that settled rule here.

B. Nothing In The Text Or History Of Section 1981 Evidences Any Intent To Depart From The Default Rule

Neither the Ninth Circuit nor respondents have pointed to anything that would suggest Congress intended to dispense with the standard, but-for causation rule when it adopted what has become Section 1981 as the first section of the Civil Rights Act of 1866. And that is not surprising. The text, history, and context of Section 1981 all confirm Congress's intention that the default rule apply.

The operative language of Section 1981 has not changed since 1866. It prohibits racial discrimination in the formation and enforcement of contracts, recognizing that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a). The discrimination prohibited by the statute thus exists where a person who is not "white" has been deprived of the enjoyment of "the same right . . . to make and enforce contracts" that he would otherwise enjoy if he were "white." *Id.* That prohibition fits naturally with the but-for standard: If the contract would have been made or enforced in the same way for a white person—*i.e.*, if the person's race was not the but-for cause of a challenged action—a plaintiff has received "the same right" as a white person. And, conversely, if the contract was made or enforced differently because of the person's race (i.e., because he was not white), the person has *not* received "the same right" as a white person.

The history of Section 1981 reinforces the conclusion that a but-for standard applies. Congress did not, in 1866, enact an express private cause of

action that would allow individuals to enforce Section 1981's strictures against private parties. Indeed, such a cause of action was never codified in the statute, and was not definitively established until this Court inferred its existence nearly 90 years after Section 1981 was enacted. *See Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454, 459-60 (1975); *see also Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 720 (1989) (opinion of O'Connor, J.) (noting, in describing "the history surrounding the adoption of the Civil Rights Act of 1866," that "nowhere did the Act provide for an express damages remedy for violation of the provisions of § 1").

Instead, the enforcement mechanism Congress adopted to give Section 1981 effect was a federal criminal provision contained in the very next section of the 1866 Civil Rights Act. That express cause of action spoke more directly to the causation standard that must be met in order to establish liability than did the basic prohibition set forth in Section 1981. And the standard Congress employed in the express cause of action to enforce the "right[s] secured or protected by this act" was, unmistakably, a but-for causation standard. It applied to discrimination "*on account of*" a person's prior "condition of slavery" or "*by reason of*" a person's "color or race." Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27 (emphasis added).[2]

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[2] Section 2 of the 1866 Civil Rights Act stated that:

> any person who, under color of any law . . . shall subject, or cause to be subjected, any inhabitant of any State . . . to the deprivation of any right secured or protected by this act, or to different punishment, pains or penalties on account of such person having . . . been held in a condition of slavery . . . or by reason of his color or race,

As this Court has recognized, those formulations—"on account of" and "by reason of"—are hallmarks of a but-for standard. *Nassar*, 570 U.S. at 350 (citation omitted).

The broader legal context also confirms that Congress intended a but-for standard. When Section 1981 was enacted, "but-for" causation was *the* bar that plaintiffs in American courts had to hurdle. *See* G. Edward White, *The Emergence and Doctrinal Development of Tort Law, 1870–1930*, 11 U. St. Thomas L.J. 463, 464-65 (2014).[3] An 1874 treatise on tort law, for example, explained that "one person cannot, in general, maintain an action against another, for doing an illegal or wrongful act, unless he has thereby suffered loss." 1 Francis Hilliard, *Law of Torts or Private Wrongs* 76 (4th ed. 1874). And to recover damages "for an injury occasioned by the conduct of another," a person "must show the relation of *cause and effect* . . . between the conduct complained of and the injury." *Id.* at 82 (emphasis

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> than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor.

14 Stat. at 27.

[3] *See also, e.g.*, *Sowles v. Moore*, 26 A. 629, 629-30 (Vt. 1893); *Cleveland, Columbus, Cincinnati & Indianapolis Ry. Co. v. Wynant*, 34 N.E. 569, 574 (Ind. 1893); *Smith v. Sabine & E. Tex. Ry. Co.*, 13 S.W. 165, 166 (Tex. 1890); *Gould v. Chicago, Burlington & Quincy R.R. Co.*, 24 N.W. 227, 227-28 (Iowa 1885); *City of Rockford v. Russell*, 9 Ill. App. 229, 234 (1881); *Wilson v. City of Atlanta*, 60 Ga. 473, 477 (1878); *Flattes v. Chicago, Rock Island & Pac. R.R. Co.*, 35 Iowa 191, 193-94 (1872); *Titcomb v. Fitchburg R.R. Co.*, 94 Mass (12 Allen) 254, 261 (1866); *City of Joliet v. Verley*, 35 Ill. 58, 66 (1864); *Bellefontaine & Indianapolis R.R. Co. v. Bailey*, 11 Ohio St. 333, 338 (1860); *Palmer v. Andover*, 56 Mass (2 Cush.) 600, 607 (1849).

added). Even then, but-for cause would not always be *sufficient*—the additional concept of proximate cause meant that "the damage must be the direct and immediate consequence of the act complained of"—but it would always be at least *necessary*. *Id.*

By contrast, the sort of "mixed-motive" liability that the Ninth Circuit imported into Section 1981 here was unheard of in 1866. Indeed, mixed-motive liability was not even conceptualized and adopted until the 20th Century. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *see also Nassar*, 570 U.S. at 348-49 (discussing Congress's enactment of a modified form of the "mixed motive" standard in the 1991 Amendments to Title VII). And the Ninth Circuit's expansive formulation of the test—which does not even necessarily require that race be a *motivating* factor in the challenged decision, so long as it is "*a* factor," Pet. App. 21a (emphasis added)—moves further still away from the historical norm.

Not surprisingly, then, the language that this Court has used in describing Section 1981 is consistent with a but-for causation standard. When the Court first inferred a private cause of action under Section 1981, for example, it described that cause of action as "afford[ing] a federal remedy against discrimination in private employment *on the basis of* race." *Johnson*, 421 U.S. at 459-60 (emphasis added). In *General Building Contractors Ass'n v. Pennsylvania*, the Court likewise indicated that Section 1981 was "designed to eradicate blatant deprivations of civil rights," such as where "a private offeror refuses to extend to a[n African American], *solely because* he is a[n African American], the same opportunity to enter into contracts as he extends to white offerees." 458 U.S. 375, 388 (1982) (emphasis

altered) (citation omitted). These "on the basis of" race and "solely because" of race formulations are interchangeable with a but-for causation standard. *See Nassar*, 570 U.S. at 350 (attributing same meaning to similar phrases).

At the very least, these decisions put Congress on notice that nothing in Section 1981 clearly evinced a departure from the default rule of but-for causation. If Congress nevertheless desired a mixed-motive standard in Section 1981, it could have amended the statute to adopt such a standard, just as Congress did with Title VII in the wake of this Court's decision in *Price Waterhouse*. Doing so would have been especially easy, moreover, since Congress amended Section 1981 at the same time (and in the same bill) as it was adding the express mixed-motive causation standard to Title VII. *See Pittman v. Oregon, Emp't Dep't*, 509 F.3d 1065, 1068 (9th Cir. 2007). Yet, Congress declined to adopt or suggest in any way a mixed-motive standard for Section 1981. Just as it did with similarly un-amended provisions in *Nassar* and *Gross*, this Court should give "effect to Congress' choice" *not* to amend Section 1981 in this fashion by preserving the default but-for standard. *Nassar*, 570 U.S. at 354 (quoting *Gross*, 557 U.S. at 177 n.3).

Declining to impose a mixed-motive standard that Congress did not see fit to add itself is especially appropriate here, moreover, because the underlying cause of action for Section 1981 at issue is an *inferred* one rather than an express one. This Court's precedents require courts to proceed with particular care when it comes to creating or expanding the contours of an inferred private right. *See Janus Capital Grp., Inc. v. First Derivative Traders,* 564 U.S. 135, 142 (2011); *Stoneridge Inv. Partners, LLC v.*

Scientific-Atlanta, Inc., 552 U.S. 148, 165 (2008). Such a cause of action should hew as closely as possible to any express cause of action that Congress established with respect to the same prohibitions—which in this case, as discussed above, involved a but-for standard. *See supra* at 7-9.

II. A MIXED-MOTIVE STANDARD FOR SECTION 1981 CLAIMS WOULD BE DIFFICULT TO ADMINISTER AND WOULD INTERFERE WITH EXPRESS CAUSES OF ACTION CONGRESS HAS ENACTED TO COMBAT DISCRIMINATION

As scholars have long recognized, the requirement of but-for causation "retains a secure position as a fundamental criterion of tort liability" because it is a "factual, policy-neutral inquiry." Richard W. Wright, *Causation in Tort Law*, 73 Cal. L. Rev. 1735, 1813 (1985). This requirement is familiar to courts, understandable for juries, and predictable for both potential plaintiffs and defendants—a combination that leads to fair resolution of individual cases and often helps businesses and individuals avoid the need for protracted litigation entirely.

Adopting a judge-made, mixed-motive standard, by contrast, would create uncertainty for businesses and other contracting parties, making litigation under Section 1981 more difficult to administer and predict. And it would have a spillover effect, throwing litigation under *other* statutes into disarray, by allowing plaintiffs to use Section 1981's general provisions to circumvent express limitations that Congress has adopted with respect to more carefully targeted provisions (like Title VII). This Court should not invite that sort of disruption and confusion

without exceedingly good cause—cause that is wholly lacking here.

A. A Mixed-Motive Standard For Section 1981 Would Disrupt Employment Discrimination Law

Although this particular case does not involve a claim of racial discrimination in employment, a significant portion of the cases brought under Section 1981 do. It is thus especially important to understand how a decision embracing the Ninth Circuit's mixed-motive standard here could seriously disrupt the tens of thousands of employment discrimination cases filed in federal court every year.

As the Court knows well, Congress addressed racial discrimination in private employment most directly in Title VII of the Civil Rights Act of 1964, which contains a finely reticulated set of rules specifically designed for such cases. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 366 (2011) (describing the "detailed remedial scheme" of Title VII). Some of those rules, such as the express limitation on Title VII's applicability to small employers, plainly have no analogue in Section 1981, and this Court has not insisted that the two statutes be read in lockstep where doing so would be inconsistent with their text. In general, though, the Court has been "reluctant" to give Section 1981 a reading that would facilitate "circumvent[ion of] the detailed remedial scheme constructed in" Title VII. *Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1989), *superseded by statute as stated in CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 450 (2008).

This reluctance is well-founded. For one thing, using the inferred cause of action under Section 1981

to reach conduct for which Congress expressly declined to provide relief in the analogous express causes of action under Title VII inevitably undermines, to at least some degree, a congressional choice about the proper scope of liability. *Cf. Janus Capital Grp.*, 564 U.S. at 142 (alteration in original) (noting that the "[c]oncerns with the judicial creation of a private cause of action caution against its expansion" (quoting *Stoneridge Inv. Partners*, 552 U.S. at 165); *supra* at 11-12.

Reading Section 1981 in a way that facilitates circumvention of Title VII would also disrupt the business of the federal courts. Title VII uses clear, readily administered rules about burden shifting, damages calculations, and the like to carefully balance the interests of employers and employees. Those rules have been refined through decades of interaction between Congress, the courts, and litigants (including the Equal Employment Opportunity Commission), and as a result their operation is well-understood and relatively predictable. Courts depend on them to process the high volume of employment discrimination cases filed every year in a timely and efficient manner. The Ninth Circuit's new mixed-motive standard for claims under Section 1981, however, would channel litigation away from the well-defined, express rules of Title VII into a murkier and less predictable world of judge-made standards under Section 1981.

Under the Ninth Circuit's rule, plaintiffs who could choose to sue under either the cause of action inferred from Section 1981 or the express cause of action under Title VII would almost invariably prefer the inferred cause of action under Section 1981. That is because, on the Ninth Circuit's interpretation,

Section 1981 allows plaintiffs to recover damages even if the defendant shows that it would have made the exact same decision if the plaintiff were white, whereas under Title VII damages are unavailable in that circumstance. *See Nassar*, 570 U.S. at 349 (discussing defendant's ability to avoid damages under Title VII where discrimination was not a but-for cause of challenged employment action); Pet. App. 21a (indicating lack of such a defense under Ninth Circuit rule for Section 1981). Even if a plaintiff *hopes* he would be able to show that discrimination was a but-for cause of the challenged employment decision and thus that recovery under Title VII is appropriate, the Ninth Circuit's rule would induce him to pursue the judicially fashioned remedy under Section 1981 instead in order to avoid any risk. And as that incentive played out over tens of thousands of cases, the resulting instability and uncertainty would significantly increase litigation costs for all parties involved—and the courts as well.

B. A Mixed-Motive Standard Would Impact Legitimate Employment Actions And Contract Decisions, Disrupt Workplaces, And Impose Unwarranted Costs

Changing the causation standard for Section 1981 claims from a "but-for" standard to a "mixed-motive" one would be disruptive in other ways, too—discouraging employers from taking lawful employment actions for fear of litigation burdens; penalizing employers that did nothing wrong; forcing employers to settle even meritless claims to avoid the financial costs, reputational effects, and workplace disruptions that accompany drawn-out employment-discrimination litigation; and opening up new fronts of contentious litigation in contract negotiations.

There is no indication that Congress intended any of this.

Again, much of the effect of watering down Section 1981's causation standard would be felt in connection with employment decisions. Most such decisions are in some measure inherently subjective, and anyone can always claim a particular motive. Invariably, therefore, an employee can allege that discrimination was *a* factor in a decision that he does not like. Under the Ninth Circuit's mixed-motive regime, the defendant would then effectively have the burden of proving a negative—that discrimination was not *a* factor. Proving a negative is notoriously difficult. *See Elkins v. United States,* 364 U.S. 206, 218 (1960) ("[A]s a practical matter it is never easy to prove a negative . . . ."). And doing so would be all the more challenging when allegations of racial discrimination and mixed motives are swirling about.

When deciding whether and how to apply employment laws and workplace standards to a member of a protected class, employers must (rightly so) carefully consider the potential for charges of discrimination. To take an extreme example: if an employee is caught stealing intellectual property, and the company has a written policy that all employees caught stealing will be terminated, the employee's firing should be above reproach. And the company, its customers, honest employees, and commerce in general would benefit from application of that policy. But a baseless charge of discrimination could cause the company considerable litigation expenses and reputational consequences, forcing the company to consider whether keeping the (dishonest) employee on the payroll is ultimately the more efficient course.

Under the Ninth Circuit's standard, that problem would be aggravated. Even if the company is confident that there is a race-neutral basis for the action, if the fired employee is a member of a racial minority group, he could bring suit arguing that the manager who fired him harbored racial animus and therefore that race was a factor in wanting to fire the employee, too. That would be a problem especially for large organizations with geographically dispersed operations, which rely on the enforcement of neutral written policies to prevent discrimination, but which cannot pervasively monitor their employees' consciences for evidence (either probative or exculpatory) about additional, discriminatory motives.

Or to take a more mundane example: consider a manager who is objectively bad at customer service or who routinely and flagrantly shirks his job duties. Leaving the manager in his job is bad for the company, the company's customers who receive lousy service, and a more junior employee who might otherwise get a promotion. But under the Ninth Circuit's standard, demoting or terminating such an employee could be even worse for the company if there is a risk the employee might allege racial animus, no matter how little basis there might be for the allegation and no matter how clear it is that the demotion or termination is objectively warranted.

To be sure, where racial animus *is* the basis for a decision, it should be identified and penalized. All have an interest in ridding the workplace of such discrimination. But creating a federal cause of action for employees who allege that race was just *a* factor carries with it real costs for employers and

workplaces alike. There is no indication that Congress wanted to impose those costs here.

In considering the financial and reputational costs of defending against an employment suit under the Ninth Circuit's watered-down standard, an employer might decide not to take any action against the employee even if it is confident it would ultimately prevail in any litigation. It is well established that employers can be overly reticent to act based on concerns about potential litigation costs, regardless of the existence of perfectly legitimate business reasons for taking employment actions. Commentators have warned against the "slippery slope" of liability and "the reality that, in the modern workplace, employers often act in prophylactic ways to avoid violating the law—taking measures not otherwise required by law in order to minimize their potential liability." Jessica K. Fink, *Protected By Association? The Supreme Court's Incomplete Approach To Defining The Scope Of The Third-Party Retaliation Doctrine*, 63 Hastings L.J. 521, 545 (2012).

Some employers also pay what amounts to a toll for taking necessary employment actions. Commentators have noted discrimination law's "*de facto* severance" system whereby employers pay employees who file even meritless EEOC charges to avoid the costs of defending against discrimination claims. David Sherwyn et al., *Assessing The Case For Employment Arbitration: A New Path For Empirical Research*, 57 Stan. L. Rev. 1557, 1579 (2005); *see also* Fink, *supra*, at 545 ("Even where the termination or demotion has nothing to do with the employee's gender or nationality or previous discrimination complaint, savvy employers know that it might cost them well into the six figures to defend against a Title

VII discrimination or retaliation suit—even where the suit ultimately proves to be without merit."); David Sherwyn et al., *In Defense Of Mandatory Arbitration Of Employment Disputes: Saving The Baby, Tossing Out The Bath Water, And Constructing A New Sink In The Process*, 2 U. Pa. J. Lab. & Emp. L. 73, 82 (1999) ("[E]mployees file baseless discrimination charges because they know that their former employers are willing to pay a nominal amount of money in order to avoid the aggravation, costs, and losses of time, resources, and productivity that inevitably arise in defending such allegations." (footnote omitted).)

Employers already struggle with these problems under existing law. But adopting the Ninth Circuit's mixed-motive standard for Section 1981 claims would exacerbate them. For one thing, lacking the sort of legislative modifications that Congress adopted for employment discrimination claims under Title VII, a mixed-motive standard under Section 1981 would allow for damages even in cases where it is clear that the adverse employment decision in question was objectively appropriate, as long as a jury can be persuaded that race was *a* factor in the decision.

Outside the employment context, the effects would be even more pronounced. If this Court were to affirm the Ninth Circuit's new rule, numerous non-employment contracts would suddenly be subjected to a mixed-motive standard for the first time. School districts and businesses regularly enter into contracts with vendors and independent contractors, for example, in which they select the best proposal from a group of qualified bidders. Congress specifically carved such contracts out from Title VII's scope, making the modified mixed-motive regime under

Title VII inapplicable to them. *See, e.g.*, 42 U.S.C. § 2000e(f). But Section 1981 covers contracting more generally. The Ninth Circuit's rule allowing mixed-motive claims under Section 1981 thus could encourage unsuccessful bidders to threaten costly and damaging litigation in an attempt to get their bids reconsidered.

None of this is to say, of course, that individuals who are actually discriminated against because of their race should be without recourse: Such discrimination should, by all means, be rooted out and eliminated. And Section 1981 has played an important role in holding individuals accountable for such discrimination. But a mixed-motive standard sweeps much more broadly than that, including to situations where racism was not the cause of a challenged decision. Such a standard cannot help but distract from the most serious cases of racial discrimination by lowering the bar to the point that it will invite the filing of meritless claims.

C. This Case Underscores The Problems With A Mixed-Motive Standard For Section 1981 Claims

This case illustrates how the Ninth Circuit's mixed-motive standard would invite such problems. The district court dismissed respondents' claims three separate times for failure to adequately plead a violation of Section 1981, ultimately concluding that they had failed to allege facts plausibly indicating that Comcast's refusal to contract was "racially discriminatory" or done with anything other than "legitimate business reasons" in mind. *See* Pet. App. 6a. The Ninth Circuit reversed on the grounds that, although respondents' complaint itself had alleged "legitimate, race-neutral reasons for [Comcast's]

conduct," those "alternative explanations [were not] so compelling as to render Plaintiffs' theory of racial animus implausible." *Id.* at 4a. What was that theory? Essentially, that Comcast "engineered an industry-wide racist conspiracy with the federal government and the entire civil rights establishment—not against companies owned by African-Americans, but *only* against a made-up racial category of '100% African American-owned' companies." Pet. 22-23 (discussing complaint).

In the abstract, it is hard to believe that such allegations could be sufficient to move a case forward. But that case-specific determination was the natural outgrowth of a mixed-motive rule that puts a nearly impossible burden of disproof on entities accused of racial discrimination, even when the accusations (as here) are inherently implausible. Under that rule, an organization can be held liable for money damages—even where it can prove that the action complained of was taken for overwhelmingly race-neutral reasons—so long as the plaintiff can point to "a factor" that was thought to be infected by discriminatory intent. Pet. App. 21a. Even where the alleged discriminatory intent turns out to be illusory, the bare accusation alone can be enough, as it was in this case, to get past the motion-to-dismiss stage. In that event, the financial and reputational costs of litigation will often induce many defendants to settle even meritless claims.

The mixed-motive standard also makes it more difficult to resolve discrimination cases on summary judgment. To survive summary judgment under traditional but-for causation principles, a plaintiff must show that a jury could conclude that the employer would not have taken the action but for the

allegedly discriminatory purpose. By contrast, a plaintiff can defeat a motion for summary judgment under a mixed-motive causation standard simply by showing that there is a material issue of fact over whether the allegedly discriminatory purpose was *a* factor in the decision—a much easier showing. The elimination of summary judgment as an effective tool for weeding out meritless claims would greatly increase the costs and burden of litigation, and force defendants to settle even baseless cases.

In *Nassar,* this Court pointed to these very sorts of problems in rejecting mixed-motive retaliation claims under Title VII, noting that "lessening the causation standard could . . . contribute to the filing of frivolous claims, . . . [and] would make it far more difficult to dismiss dubious claims at the summary judgment stage." 570 U.S. at 358. The Court further explained that it "would be inconsistent with the structure and operation of Title VII to so raise the costs, both financial and reputational, on an employer whose actions were not in fact the result of any discriminatory or retaliatory intent." *Id.* at 358–59. The same goes for claims under Section 1981.

Section 1981 has long stood as an important protection against discrimination on the basis of race. The Ninth Circuit's decision not only contorts the meaning of Section 1981, but ultimately frustrates its unquestionably compelling objectives.

CONCLUSION

The Ninth Circuit's decision should be reversed.

Respectfully submitted,

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