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 RESPONDENTS

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QUESTION PRESENTED

Whether a plaintiff can state a claim under 42 U.S.C. § 1981 by alleging that racial discrimination was a motivating factor in the defendant's refusal to contract.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

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

Pursuant to this Court's Rule 29.6, undersigned counsel state that Entertainment Studios Networks, Inc. ("Entertainment Studios") is a privately owned corporation. Entertainment Studios is wholly owned by Allen Media, LLC, which is wholly owned by Allen Media Holdings, LLC, which is wholly owned by Byron Allen. No publicly held corporation owns 10% or more of the stock of Entertainment Studios.

Respondent National Association of African American-Owned Media is an organization comprised of African American-owned media companies, including Entertainment Studios, that is devoted to ensuring that its members obtain the same right to contract as is enjoyed by white persons. It is not a corporation.

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STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1981(a) provides: "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 enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

STATEMENT OF THE CASE

This case is about racial discrimination in contracting in violation of 42 U.S.C. § 1981.[1] Respondent Entertainment Studios Networks, Inc. ("Entertainment Studios") is an African American-owned media company that owns and operates television networks. App. 40a.

[1] This case is before this Court on Comcast's motion to dismiss Respondents' Second Amended Complaint for failure to state a claim upon which relief can be granted. App. 1-4a. This Court has been clear that "of course, the allegations of the complaint are generally taken as true for purposes of a motion to dismiss." *Hughes v. Rowe*, 449 U.S. 5, 10 (1980). The only relevant pleading for this lawsuit is the Second Amended Complaint. Nonetheless, Comcast repeatedly refers to allegations in earlier complaints that were not included, and were not intended to be, in the Second Amended Complaint. *See* Brief for Petitioner [hereafter, "Pet. Br."] i, 5, 7, 8. These allegations are irrelevant in evaluating the motion to dismiss the Second Amended Complaint.

For eight years, Entertainment Studios offered its channels to Petitioner Comcast Corporation ("Comcast") to obtain carriage on its cable distribution platform, but Comcast refused to contract. App. 35a. Comcast told Entertainment Studios that its channels were "good enough" and were on the "short list" for imminent carriage. App. 48a, 62a. But Comcast refused to launch *any* of Entertainment Studios' channels, telling Entertainment Studios that it lacked capacity to carry additional channels, while at the same time launching more than 80 lesser-known, white-owned channels. App. 50-53a.

After years of being passed over for white-owned networks, Respondents sued Comcast for racial discrimination in contracting in violation of 42 U.S.C. § 1981. The District Court dismissed Entertainment Studios' claim for failing to state a claim upon which relief can be granted, App. 5-7a, but the Ninth Circuit reversed. App. 1-4a.

The Ninth Circuit reversed and held the Second Amended Complaint sufficiently alleged that race was a factor for Comcast's refusal to contract and thus stated a claim for relief under 42 U.S.C. § 1981. App. 2-3a.

A. The Entertainment Studios Channels

Entertainment Studios is a media company that produces television series, owns and operates multiple television channels, and operates a full-service, motion-picture production and distribution company. App.

40-41a. Entertainment Studios is solely owned by Byron Allen, an African American entrepreneur. App. 41a.

This case is about seven Entertainment Studios channels JusticeCentral.TV, Cars.TV, ES.TV, MyDestination.TV, Pets.TV, Comedy.TV, and Recipe.TV (the "Entertainment Studios Channels"). App. 42-43a. The Entertainment Studios Channels are award-winning lifestyle channels with general audience appeal. *Id.* They are carried by major multichannel video programming distributors, including Verizon FIOS, AT&T U-verse, DirecTV, Suddenlink, RCN, CenturyLink, and many others. App. 41a.

B. Allegations of Racial Discrimination

Since 2008, Entertainment Studios has offered its channels to Comcast for carriage on its cable distribution platform. App. 35a. Entertainment Studios has even offered JusticeCentral.TV for free with no license fees. App. 54a. But Comcast has steadfastly refused to contract with Entertainment Studios.

For years, Comcast has given Entertainment Studios the run-around with false promises of carriage. App. 48-50a. Comcast told Entertainment Studios that its channels are "good enough" for carriage. App. 62a. But Comcast told Entertainment Studios that it needed to get support "in the field," which meant support from Comcast's regional offices and management. App. 49a. When Entertainment Studios obtained field support, Comcast reversed course and said that field support no longer mattered. *Id.*

Comcast then told Entertainment Studios to get support from Comcast's various Division offices, but the Divisions told Entertainment Studios that they deferred to the decision of the corporate office. *Id.* Comcast's false promises and instructions caused Entertainment Studios to incur hundreds of thousands of dollars in travel, marketing and other costs. App. 49-50a.

Comcast also told Entertainment Studios that its channels were on the "short list" for imminent carriage, App. 48a, but that Comcast lacked sufficient bandwidth to carry the channels. App. 50a. Comcast's explanation, however, is belied by its conduct because Comcast launched more than 80 networks since 2010, including the lesser-known, white-owned channels Inspirational Network, Baby First Americas, Fit TV (now defunct), Outdoor Channel, and Current TV (now defunct). App. 35a, 50a.

As the largest cable distributor with an advanced, state-of-the-art platform, Comcast has bandwidth to carry the Entertainment Studios Channels. App. 50-51a. Of the more than 500 channels carried by Comcast's major competitors—Verizon FIOS, AT&T U-verse and DirecTV—Comcast carries every single one of those channels, *except* the Entertainment Studios Channels. App. 53-54a.

One Comcast executive candidly told Entertainment Studios why it refused to contract: "We're not

trying to create any more Bob Johnsons."[2] App. 118a. Bob Johnson is the African American founder of Black Entertainment Television ("BET"), a groundbreaking network that was eventually sold to Viacom for $3 billion. *Id.* Comcast did not want to support an African American media entrepreneur who would compete against the white-owned networks Comcast owned and/or carried. App. 119a.

C. Procedural History

On February 20, 2015, Respondents filed a lawsuit against Comcast and other parties in the Central District of California alleging racial discrimination in contracting in violation of 42 U.S.C. § 1981. App. 113a.

1. The District Court Proceedings

Comcast filed a Rule 12(b)(6) motion to dismiss, which the District Court granted. App. 109-112a. In its four-page opinion, the District Court devoted just two

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[2] The Bob Johnson allegation was in the first Complaint and was intended to be in the Second Amended Complaint ("SAC"), but was inadvertently dropped in amending the Complaint. Respondents realized this mistake in opposing Comcast's motion to dismiss the SAC. Respondents argued in the Ninth Circuit that the district court erred in denying leave to amend, but the Ninth Circuit did not resolve the issue because the court held that the SAC plausibly alleged a claim for racial discrimination under section 1981. App. 4a. In any event, Comcast in its brief to this Court extensively refers to the first Complaint. Pet. Br. at i, 5, 7, 8. This certainly opens the door for Respondents, too, to refer to allegations in the first Complaint, which were intended to be in the SAC.

paragraphs to whether Respondents adequately alleged a section 1981 claim. App. 111-112a. The District Court stated only that Respondents had "failed to allege any plausible claim for relief." App. 112a.

Respondents filed a First Amended Complaint, in which Respondents dropped their conspiracy claim. App. 78a. Comcast filed a Rule 12(b)(6) motion to dismiss, which the District Court granted in another four-page opinion. App. 74-77a. The District Court again did not discuss the elements of a section 1981 claim or identify the governing legal standards for pleading intentional discrimination. *Id.* The District Court also did not consider the vast majority of Respondents' allegations and focused, instead, on one allegation—ratings growth for JusticeCentral.TV—and found that it was "hardly compelling evidence" of discrimination. App. 76a. The District Court noted that Respondents could "better support" their allegations by alleging the actual number of viewers gained. *Id.*

Respondents filed a Second Amended Complaint, which is the operative complaint in this litigation. App. 33a. Respondents did not have the Nielsen data necessary to identify the actual number of viewers gained for JusticeCentral.TV. But to address the District Court's request for more evidence, Respondents added multiple allegations to show that the Entertainment Studios Channels are in high demand and that Comcast's refusal to contract constitutes racial discrimination. *E.g.*, App. 34-53a (¶¶ 2, 6, 8, 9, 24, 25, 26, 27, 28, 29, 30, 50, 54, 55, 56, 57).

Comcast again filed a Rule 12(b)(6) motion to dismiss, which the District Court granted. App. 5-7a. In a three-page opinion, the District Court again failed to discuss the elements of a section 1981 claim or identify the governing legal standards for pleading intentional discrimination. *Id.* The District Court noted that Respondents provided additional allegations, but, in its view, the new allegations were just "opaque benchmarks" that showed possible, but not plausible, discrimination. App. 6a.[3]

2. The Ninth Circuit Proceedings

A three-judge panel of the Ninth Circuit unanimously reversed the District Court's dismissal of Respondents' claim. App. 1-4a. The Ninth Circuit, based on its companion decision in *Nat'l Ass'n of African American-Owned Media v. Charter Commc'ns, Inc.*, 915 F.3d 617 (9th Cir. 2019) (*NAAAOM)*, held that to state a claim under section 1981, a plaintiff only need allege that racial discrimination was a motivating factor in Comcast's refusal to contract. App. 3a. The Ninth Circuit concluded that Respondents adequately alleged

[3] Respondents also sued Charter Communications for race discrimination in failing to carry its channels. The district court assigned to this case denied Charter Communications' motion to dismiss under Rule 12(b)(6), but certified to the Ninth Circuit the question of whether liability for failing to carry the channels would violate the First Amendment. The two cases were briefed and argued separately, with the Ninth Circuit affirming the district court's refusal to dismiss the case in the Charter Communications case and reversing the district court's granting of the motion to dismiss in the Comcast case. App. 3a.

racial discrimination through the following well-pleaded allegations of fact:

> 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 decisions 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. *Id.*

Comcast argued that Respondents must allege more facts to plausibly show that the lesser-known, white-owned networks launched by Comcast were similarly situated with Entertainment Studios. App. 3a n.1. The Ninth Circuit considered but rejected that argument, holding 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.*

Comcast argued that there are race-neutral justifications for its refusal to contract. App. 4a. The Ninth Circuit considered Comcast's race-neutral justifications, but held that they are not so compelling to

render Respondents' theory of racial animus implausible and justify granting a Rule 12(b)(6) motion. *Id.*

The Ninth Circuit denied Comcast's petition for panel rehearing and rehearing en banc. *Nat'l Ass'n of African American-Owned Media v. Comcast Corp.*, 914 F.3d 1261 (9th Cir. 2019).

SUMMARY OF ARGUMENT

Adopted one year after the Civil War, the Civil Rights Act of 1866 remains one of the most important federal civil rights laws. Congress saw an urgent need for an expansive statute to eradicate the "badges and incidents of slavery." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 (1968). A key portion of this statute, now codified as 42 U.S.C. § 1981, mandates 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).

This case asks this Court to choose between two different approaches as to what must be pled for causation for a claim under section 1981. The United States Court of Appeals for the Ninth Circuit held that it is sufficient to allege that race was a motivating factor for the refusal to contract to withstand a Rule 12(b)(6) motion to dismiss. App. 3a.

Comcast, though, argues that the plaintiff must meet a higher burden and allege that race was the but-for cause for the denial of contracting. *See* Pet. Br. 1. Under its view, a plaintiff who alleges that race was a motivating factor for the refusal to contract would not be entitled to conduct discovery no matter how strong the evidence of racism unless the plaintiff could meet the stringent requirement of plausibly alleging that race was the but-for cause for the refusal to contract.

Each of these approaches has been adopted by this Court for other civil rights statutes. For example, for claims under the Age Discrimination in Employment Act and for retaliation claims under Title VII, this Court has said that a plaintiff must allege and prove that the prohibited ground was the but-for cause of the adverse employment action. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009); *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 352 (2013). Based on the language of these statutes, the Court explicitly said that it was not enough to show that the prohibited ground was a "motivating factor" and rejected a burden shifting approach. The burden of production and persuasion always remains with the plaintiff.

By contrast, for race and sex discrimination under Title VII of the 1964 Civil Rights Act, this Court has said a plaintiff is not required to allege and prove but-for causation, but rather need only raise an inference of discrimination. If the plaintiff makes out a prima facie case, the burden shifts to the defendant to present evidence that it was motivated by legitimate,

nondiscriminatory reasons. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Thus, the choice before this Court for section 1981 is between a motivating factor/burden shifting approach or a but-for causation requirement. *See Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312, 341 (6th Cir. 2012) (Donald, J., concurring, in part; dissenting, in part) (noting that burden shifting is the real issue in the "war over two catch-phrases—'but for' and 'motivating factor' "). Indeed, the United States, in its brief in support of Comcast, acknowledges that if "burden shifting were appropriate here, the court of appeals' judgment [below] would therefore be correct, even if its reasoning would remain overbroad." Brief for the United States as Amicus Curiae Supporting Petitioner [hereafter "U.S. Br."] 29.

The choice between these approaches is enormously important. Under a but-for test, it is likely that many potentially meritorious claims would be dismissed at the pleading stage. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 264 (1989) (O'Connor, J., concurring) (recognizing that the but-for test, at times, "demands the impossible" (citation omitted)). By contrast, a motivating factor standard would require a plaintiff to plausibly allege intentional racial discrimination, but it would allow many more potentially meritorious cases to proceed to discovery.

An example illustrates why this matters. Suppose that Comcast sent a letter to Entertainment Studios at the conclusion of contract negotiations. In that letter, Comcast listed three reasons why it refused to contract: (1) Entertainment Studios is owned by an African American and Comcast does not want to contract with an African American; (2) Entertainment Studios' channels are not sufficiently distributed on Comcast's competitors' platforms to warrant carriage; and (3) Comcast believes that its viewers would prefer other programming.

Under Comcast's approach, the above facts, without more, would not be sufficient to withstand a motion to dismiss. A plaintiff would have to allege—without the benefit of discovery—facts that plausibly undercut the race-neutral reasons stated in the letter. But that is very difficult to do, especially in the context of civil rights litigation where the defendant typically is the only party with access to evidence of the defendant's motives.

Respondents urge this Court to affirm the Ninth Circuit and hold that it is sufficient to withstand a motion to dismiss for a plaintiff to plausibly allege that racial discrimination was a motivating factor for the refusal to contract. The defendant, of course, would have an opportunity to present evidence at summary judgment or trial that it had race-neutral reasons for its conduct. *See* Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 Yale L.J. 1106 (2018) (discussing contrasting approaches to mixed motive analysis and why they matter).

First, *precedent* supports the decision below. As explained above, in proposing a but-for causation pleading standard, Comcast and the United States are also arguing that burden shifting does not apply for claims brought under section 1981. But in *Patterson v. McLean Credit Union*, this Court expressly held that the burden shifting framework developed under Title VII applies to claims brought under section 1981. 491 U.S. 164, 186-87 (1989). This Court stated the burden shifting approach "structured as a 'sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination,' should apply to claims of racial discrimination under § 1981." *Id.* at 186 (citation omitted).

Congress effectively approved of the use of burden shifting for section 1981 when Congress abrogated a different holding of *Patterson* in the Civil Rights Act of 1991, but left the burden shifting holding of this decision untouched. *See Gross*, 557 U.S. at 174 ("When Congress amends one statutory provision but not another, it is presumed to have acted intentionally."). And because *Patterson* involved interpretation of a statute, this Court applies *stare decisis* with "enhanced force." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015).

Under the burden shifting framework approved in *Patterson*, a plaintiff is not required to prove but-for causation to establish a prima facie case. Rather, a plaintiff need only submit evidence that raises an *inference* of discrimination; it is enough to allege and present a prima facie case that race was a motivating

factor in the refusal to contract. Once a plaintiff does that, the burden shifts to the defendant to submit evidence that it was motivated by race-neutral reasons. Only then is a plaintiff required to negate those reasons.

Second, the *plain language* of section 1981 supports requiring a plaintiff to plausibly allege that race was a motivating factor in the refusal to contract, not but-for causation. Section 1981 requires that African Americans, and other racial minorities, have the "same" right to contract as whites. But, as the Ninth Circuit explained, African Americans are not accorded the "same" right to contract if race is used as a motivating factor for denying them the ability to enter into a contract. App. 20-21a. The dictionary definition of "same" indicates that Congress intended that racial minorities receive "identical" treatment. Noah Webster, *An American Dictionary of the English Language* (Noah Porter ed., 1864) (defining "same" as "identical"). African Americans and whites are not treated identically if race is a motivating factor in the denial of a contract to an African American individual.

Importantly, this Court has required but-for causation for statutes that use words such as "because," "because of," or "based on." The Court stressed that it was these words that justified the conclusion of but-for causation under the Age Discrimination in Employment Act and for retaliation claims under Title VII. *Gross*, 557 U.S. at 176-77; *Nassar*, 570 U.S. at 352. Section 1981 does not use any such terms that have been found to connote but-for causation.

Third, the *historical background* surrounding section 1981 indicates that but-for causation should not be required. Section 3 of the Civil Rights Act of 1866 was explicit that courts were to reject the common law where it is "deficient" in furnishing "suitable remedies." Thus, Congress was clear in its intent to deviate from the common law to ensure that all racial minorities have the "same right" to contract.

Comcast nevertheless contends that but-for causation was an "indispensable element" of common-law torts when Congress enacted the Civil Rights Act of 1866. Pet. Br. 17. But Comcast relies on 19th century tort cases involving *negligence*, not intentional torts like section 1981. Noted legal historian Professor G. Edward White observed that causation was not an issue in "intentional tort cases or cases where an act-at-peril standard of liability governed. . . ." G. Edward White, *Tort Law in America: An Intellectual History* 314 (1980). In the mid-19th century, tort law was understood as a body of "wrongs," many of which were actionable without the plaintiff having to establish they were actually harmed. *See* Charles G. Addison, *Wrongs and Their Remedies: A Treatise on the Law of Torts* 775 (1866).

Finally, the *purpose* of section 1981 supports allowing cases to proceed on plausible allegations that there was a racial motivation in the denial of contracting. The goal of the Civil Rights Act of 1866 was "sweeping," and it is a "comprehensive statute forbidding *all* racial discrimination affecting the basic civil

rights enumerated in the Act." *Jones*, 392 U.S. at 433, 435.

This Court is asked to choose between two interpretations of causation under this vital civil rights statute. One would make it very difficult for plaintiffs to withstand a motion to dismiss; the other would allow civil rights plaintiffs to go forward with their suits. There can be no doubt as to which of these approaches is more consistent with the broad remedial purposes of the Civil Rights Act of 1866.

ARGUMENT

I. THE NINTH CIRCUIT APPLIED THE CORRECT PLEADING STANDARD.

This case asks the Court to make a choice between two different standards for pleading and ultimately proof under 42 U.S.C. § 1981. Comcast and the United States as *amicus* argue that section 1981 should be interpreted as requiring that a plaintiff allege and prove that race was the but-for reason for the denial of a contract. *See*, *e.g.*, Pet. Br. 16; U.S. Br. 8. They rely primarily on this Court's decisions in *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009), and *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013). *See*, *e.g.*, Pet. Br. 13; U.S. Br. 12. Both Comcast and its *amici* give great weight to this Court's statement in *Nassar* of a presumption in favor of but-for causation in interpreting civil rights statutes. Pet. Br. 3 (quoting *Nassar*, 570 U.S. at 347); U.S. Br. 12.

But as discussed below, both *Gross* and *Nassar* involved civil rights statutes that use the words "because" and "because of." The Court stressed in each case that it was this language that was the basis for concluding that but-for causation was required under these particular laws. *See Gross*, 557 U.S. at 176-77; *Nassar*, 570 U.S. at 350. The terms "because" and "because of" are not found in section 1981.

An alternative approach, which this Court has already applied to section 1981, is a familiar burden shifting framework that only requires the plaintiff, at the initial step, to submit evidence which raises an inference of discrimination. *See Burdine*, 450 U.S. at 253-55; *Green*, 411 U.S. at 802-03. Under this approach, the plaintiff is not required to prove but-for causation. A plaintiff is only required to set forth a prima facie case to shift the burden of production to the defendant to show that there was a legitimate, nondiscriminatory reason for its decision. As discussed below, this is the approach the Court expressly adopted for section 1981. *Patterson*, 491 U.S. at 186-87.

By contrast, if the Comcast but-for standard is applied at the pleading stage, it would effectively close the door to a large number of section 1981 claims in federal court by those who suffer race discrimination in contracting. As Justice O'Connor observed in *Price Waterhouse*, a motivating factor test with burden shifting is necessary because at times the but-for test without burden shifting "demands the impossible." 490 U.S. at 264 (O'Connor, J., concurring).

This Court should adopt the motivating factor/ burden shifting approach for section 1981 based on precedent, because of the statutory language of section 1981, in light of the tort law that existed in 1866, and to fulfill the broad remedial purpose of section 1981.

A. This Court Has Already Decided that Burden Shifting Is Appropriate Under Section 1981 and There Is No Basis for Overruling that Precedent.

1. In *Patterson v. McLean Credit Union*, This Court Adopted a Burden Shifting Approach, Rather Than But-For Causation, for Section 1981.

In *Patterson*, this Court expressly held that the burden shifting framework developed under Title VII applies to claims brought under section 1981. 491 U.S. at 186-87. In its brief, Comcast repeatedly cites the portion of *Patterson* in which this Court narrowly interpreted the phrase "to make and enforce contracts" to not include claims based on post-contract conduct such as racial harassment. Pet. Br. 21, 22, 33, 34. This aspect of *Patterson* was abrogated by Congress in the Civil Rights Act of 1991 (the "1991 Act"). But Comcast fails to acknowledge that later in the decision this Court held that a burden shifting causation framework is applicable to claims brought under section 1981 and that *this holding* was left untouched by Congress in the 1991 Act. *Patterson*, 491 U.S. at 186.

Patterson was a lawsuit brought under section 1981 by an African American bank employee against her former employer, McLean Credit Union ("McLean"). 491 U.S. at 169. The Court granted certiorari on two questions: (1) whether the district court properly declined to submit Patterson's racial harassment claim to the jury; and (2) whether the district court erred when it instructed the jury on Patterson's failure to promote claim that Patterson was required to prove she was better qualified than the white employee who received the promotion. *Id.* at 170-71.

On the first question, the Court affirmed the district court, holding that section 1981 only applies to the making and enforcement of contracts, and a claim for racial harassment which occurs after contract formation is not actionable unless it impairs the making of a new contract. 491 U.S. at 179-80. This holding was later abrogated by Congress when it amended section 1981 in the 1991 Act. *See*, *e.g.*, *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 373 (2004) ("Congress responded to *Patterson* by adding a new subsection to § 1981 that defines the term 'make and enforce contracts' to include the 'termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.'" (quoting 42 U.S.C. § 1981(b))).

On the second question, the Court adopted a burden shifting approach for causation under section 1981. This Court stated:

> We have developed, in analogous areas of civil rights law, a carefully designed framework of proof to determine, in the context of disparate treatment, the ultimate issue whether the defendant intentionally discriminated against the plaintiff. See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). We agree with the Court of Appeals that *this scheme of proof, structured as a 'sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination,' should apply to claims of racial discrimination under § 1981. Patterson*, 491 U.S. at 186 (emphasis added) (citation omitted).

This Court then went on and explained how this is to be applied under section 1981:

> Under our well-established framework, the plaintiff has the initial burden of proving, by a preponderance of the evidence, a prima facie case of discrimination. The burden is not onerous. Here, petitioner need only prove by a preponderance of the evidence that she applied for and was qualified for an available position, that she was rejected, and that after she was rejected respondent either continued to seek applicants for the position, or, as is alleged here, filled the position with a white employee. Once the plaintiff establishes a prima facie case, an inference of discrimination arises. In order to rebut this inference, the employer must present evidence that the plaintiff was rejected, or the other applicant was

> chosen, for a legitimate nondiscriminatory reason. 491 U.S. at 186-87 (citations omitted).

The Court concluded that the district court erred in instructing the jury on the last step of the burden shifting framework. At trial, McLean produced evidence that it did not promote Patterson because it decided to promote a better-qualified white employee instead. The district court instructed the jury that Patterson was required to show that she was better qualified than the white employee who was promoted. The Court held that this instruction was erroneous because it was only one of many ways Patterson could show that McLean's purported race-neutral reason was pretext. 491 U.S. at 188.

The "motivating factor" pleading burden applied by the Ninth Circuit follows from the prima facie standard of the *McDonnell Douglas/Burdine* framework that this Court approved in *Patterson*. Both require the plaintiff to raise an inference that the defendant engaged in intentional discrimination. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 (1977) ("The importance of *McDonnell Douglas* lies . . . in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act."); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) ("A prima facie case under *McDonnell Douglas* raises an *inference* of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on

the consideration of impermissible factors." (emphasis added)).

A plaintiff who plausibly alleges that intentional racial discrimination was a "motivating factor" in the defendant's adverse contracting decision has raised an inference of discrimination sufficient to plead a prima facie case. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993) (explaining that the prima facie case required by *McDonnell Douglas* sets forth "minimal requirements").

The United States argues that the *McDonnell Douglas/Burdine* framework is different from a "motivating factor" standard with burden shifting as articulated by this Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), and *Price Waterhouse*, in that the burden of persuasion shifts in the latter but not in the former framework. U.S. Br. 22 n.2.[4] But this misses the point because this is a pleadings case and there are no shifting burdens of production or persuasion that apply on a Rule 12(b)(6) motion to dismiss. Thus, to the extent there is any difference in these burden shifting frameworks, such differences will only matter at a later stage in the case, such as at summary judgment or trial. Most importantly, the prima facie, or initial burden, in both

[4] The United States argues that this case does not involve "pretext" and therefore *McDonnell Douglas* does not apply, but that argument is contradicted by the allegations in the Second Amended Complaint. *E.g.*, App. 48-49a (alleging that every time Entertainment Studios "satisfied one pretextual hurdle created by Comcast, another one would pop up").

tests requires the plaintiff only to allege facts that give rise to an inference of discrimination, either through the four-part prima facie test of *McDonnell Douglas* or through other facts that give rise to an inference of discrimination. *Int'l Bhd. of Teamsters*, 431 U.S. at 358; *Furnco Constr. Corp.*, 438 U.S. at 577. As the Ninth Circuit held, at the pleading stage in a section 1981 case, the requirement is that the plaintiff plausibly allege that race was a motivating factor in the refusal to contract. There is no dispute that Respondents' Second Amended Complaint alleged this.

2. Congress in the Civil Rights Act of 1991 Did Not Change *Patterson's* Causation Framework for Section 1981 Cases.

In the 1991 Act, Congress did not disturb the burden shifting holding of *Patterson*. Congress amended section 1981 to confirm that the statute applied to private acts of discrimination and to abrogate the Court's narrow interpretation of the phrase "to make and enforce contracts" found in the text of section 1981. *R.R. Donnelley*, 541 U.S. at 372-73 (citations omitted).

Congress's decision in the 1991 Act to abrogate one holding of *Patterson*, but not the burden shifting causation holding, is powerful evidence that Congress approved of the Court's application of the *McDonnell Douglas/Burdine* burden shifting framework for section 1981 claims. As this Court declared in *Gross*, 557 U.S. at 174: "When Congress amends one statutory

provision but not another, it is presumed to have acted intentionally." *See Johnson v. Transp. Agency, Santa Clara Cty., Cal.*, 480 U.S. 616, 629 n.7 (1987) ("Congress has not amended the statute to reject our construction, nor have any such amendments even been proposed, and we therefore may assume that our interpretation was correct.").

This is not an issue of interpreting congressional silence, which the Court has recognized is not, by itself, persuasive evidence of approval. *See*, *e.g.*, *Patterson*, 491 U.S. at 175 n.1. Rather, it is significant that Congress expressly amended section 1981 to abrogate one aspect of *Patterson* two years after the decision, but did not amend the statute further to abrogate the additional holding of *Patterson* that the *McDonnell Douglas*/*Burdine* burden shifting framework applies to section 1981.

3. *Stare Decisis* Warrants Following This Court's Analysis in *Patterson*.

In *Patterson*, this Court observed: "The Court has said often and with great emphasis that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.'" 491 U.S. at 172 (citation omitted). The Court has emphasized "that *stare decisis* 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.' . . . *Stare decisis* thereby avoids the instability and unfairness that accompany

disruption of settled legal expectations." *Randall v. Sorrell*, 548 U.S. 230, 243-44 (2006) (citation omitted); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Because "[a]dherence to precedent promotes stability, predictability, and respect for judicial authority," this Court has emphasized that it "will not depart from the doctrine of *stare decisis* without some compelling justification." *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991).

Moreover, the doctrine of *stare decisis* applies with "enhanced force" because *Patterson* involved interpretation of a statute. *Kimble*, 135 S. Ct. at 2409 ("*[S]tare decisis* carries enhanced force when a decision . . . interprets a statute. Then, unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees."); *see also Neal v. United States*, 516 U.S. 284, 285 (1996) ("Once the Court has determined a statute's meaning, it adheres to its ruling under *stare decisis*. . . . It is the responsibility of Congress, not this Court, to change statutes that are thought to be unwise or unfair.").

The "enhanced force" of *stare decisis* applies regardless of whether the *McDonnell Douglas*/*Burdine* holding of *Patterson* was based on the text or the policies and purposes of the law. *Kimble*, 135 S. Ct. at 2409 ("Indeed, we apply statutory *stare decisis* even when a decision has announced a 'judicially created doctrine' designed to implement a federal statute." (citation omitted)). "All [of the Court's] interpretive decisions, in whatever way reasoned, effectively become part of

the statutory scheme, subject (just like the rest) to congressional change. Absent special justification, they are balls tossed into Congress's court, for acceptance or not as that branch elects." *Id.*

In sum, there is no basis for discarding *stare decisis* and overturning precedent, especially because Congress effectively approved a burden shifting framework when it overruled other aspects of *Patterson* but left this crucial aspect untouched.

4. A Section 1981 Plaintiff Is Not Required to Allege Facts which Negate Potential Race-Neutral Reasons.

Under the *McDonnell Douglas/Burdine* framework, a plaintiff need only prove a prima facie case of discrimination to shift the burden to the defendant to show that there were race-neutral reasons for its conduct. *Patterson*, 491 U.S. at 186-87. But this Court has held, in a unanimous opinion, that a plaintiff is not required to plead a prima facie case under the *McDonnell Douglas/Burdine* framework to survive a motion to dismiss. *Swierkiewicz v. Sorema*, 534 U.S. 506, 511 (2002) ("This Court has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss."); *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569-70 (2007) (affirming *Swierkiewicz* as correctly decided).

Because a plaintiff is not required to allege a prima facie case to survive a motion to dismiss, a plaintiff is not required to allege facts which negate a defendant's potential race-neutral reasons. *See*, *e.g.*, *Jones v. Bock*, 549 U.S. 199, 211-12, 216 (2007) (holding that a plaintiff is not required to plead the absence of a defense); *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 84 (2d Cir. 2015) (holding that a plaintiff is not required to plead a prima facie case under *McDonnell Douglas*, and instead is only required to "give plausible support to a minimal inference of discriminatory motivation" (citation omitted)); *Body by Cook, Inc. v. State Farm Mut. Auto. Ins.*, 869 F.3d 381, 386-87 (5th Cir. 2017) (holding that, although not required, a plaintiff who alleges a prima facie case under *McDonnell Douglas* has alleged an inference of discrimination to state a claim under section 1981).

As this Court in *Swierkiewicz* held, application of a prima facie pleading requirement is too onerous in that it may result in dismissal in cases where discovery may "uncover" evidence of discrimination. *Swierkiewicz*, 534 U.S. at 511. But that is what Comcast and the United States argue is required under section 1981.

Similarly here, it would be too much to ask of a plaintiff to plead facts which plausibly undercut all of the potential race-neutral reasons for the defendant's refusal to contract, especially when discovery may uncover the evidence which proves the defendant acted with racial animus and disproves the defendant's purported race-neutral reasons. The Ninth Circuit's approach achieves the right balance by requiring a

plaintiff to allege facts which plausibly show that race was a motivating factor in the defendant's refusal to contract. A plaintiff who can make that showing should have the ability to conduct discovery to determine the true reasons why the defendant refused to contract.

B. A "Motivating Factor" Pleading Standard Is Consistent with the Text of Section 1981.

The statutory text supports that it should be sufficient under section 1981 for a plaintiff to plausibly allege that race was a motivating factor in the refusal to contract.

1. A Person Does Not Have the "Same Right" to Contract if His or Her Race Played a Role in the Refusal to Contract.

The first step in statutory interpretation is to examine the statutory text and, unless otherwise defined, "'statutory terms are generally interpreted in accordance with their ordinary meaning.'" *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) (citation omitted).

Section 1981 provides, in relevant part, that all persons "shall have the *same right* . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a) (emphasis added). The phrase "same right" is the critical language.

An African American individual is not accorded the "same right" to contract if race is used as a

motivating factor for denying him or her the ability to enter into a contract. As the Ninth Circuit explained: "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, then that plaintiff has not enjoyed the *same right* as a white citizen." *NAAAOM*, 915 F.3d at 626; *see also Brown v. J. Kaz, Inc.*, 581 F.3d 175, 182 n.5 (3d Cir. 2009) ("If race plays any role in a challenged decision by a defendant, the plain terms of the statutory text suggest the plaintiff has made out a prima facie case that section 1981 was violated because the plaintiff has not enjoyed 'the same right' as other similarly situated persons.").

Noah Webster, *An American Dictionary of the English Language* (1864), defined "same" as "[i]dentical; not different or other." Samuel Johnson, *Johnson's English Dictionary, as Improved by Todd* (1828), likewise defined "same" as "[n]ot different; not another; identical." African Americans who seek a contract are not treated identically as white persons if their race is a significant reason that they are denied a contract. In other words, if the defendant places added burdens on a person of color seeking a contract that do not apply to similarly situated white persons, the plaintiff has not enjoyed the same right to make a contract.

In interpreting other statutes that use the word "same," this Court has rejected but-for causation and approved the use of a burden shifting framework. For example, in *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338, 1345, 1353-1354 (2015), this Court held

that *McDonnell Douglas/Burdine* applied to claims brought under the Pregnancy Discrimination Act, which requires employers to treat " 'women affected by pregnancy . . . the *same* for all employment-related purposes' " (emphasis added) (quoting 42 U.S.C. § 2000e(k)).

The United States argues that but-for causation is required because, in its view, a plaintiff has not been denied a right to "make" a contract if race was not the but-for cause of the denial. U.S. Br. 20-21. This argument is flawed for multiple reasons. First, the United States undermines its own argument by subsequently stating that the text of section 1981 does not contain language requiring but-for causation and it "does not specify any other standard of causation." U.S. Br. 17.

Second, in the 1991 Act, Congress amended section 1981 to broaden the definition of to "make and enforce contracts" to include not just contract formation and enforcement, but also 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. § 1981(b) (emphasis added). Thus, section 1981 also applies to the *process* of forming a contract, which would include contract negotiations and pre-conditions to contracting. This is especially relevant here as Comcast placed added obstacles for Entertainment Studios that caused the company to incur hundreds of thousands of dollars in marketing, travel and other costs. App. 49-50a. Those costs are recoverable against a defendant who was motivated by racial discrimination when it created those obstacles, regardless of whether a contract is ultimately awarded. 42 U.S.C. § 1981(b).

2. The Text of Section 1981 Does Not Require But-For Causation.

The text of section 1981 does not contain the words "because," "because of," "based on," "by reason of" or any other language that this Court has found to require but-for causation. This Court has held that it is these words that create a requirement for a plaintiff to allege and prove but-for causation. *Gross*, 557 U.S. at 176-77; *Nassar*, 570 U.S. at 350; *see also Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 63 (2007) ("In common talk, the phrase 'based on' indicates a but-for causal relationship. . . .").

In *Gross*, this Court held that but-for causation, and not the *Price Waterhouse* burden shifting framework, applied to disparate treatment claims under the Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1). This Court said that this was because the statute used the words "because of":

> The ADEA provides, in relevant part, that "[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age." The words "because of" mean "by reason of: on account of." 1 Webster's Third New International Dictionary 194 (1966); see also 1 Oxford English Dictionary 746 (1933) (defining "because of" to mean "By reason *of*, on account *of*" (italics in original)); The Random House Dictionary of the English Language 132 (1966) (defining

> "because" to mean "by reason; on account"). Thus, the 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. *Gross*, 557 U.S. at 176 (citations omitted).

The Court followed this reasoning in *Nassar*, again stressing that the words "because of" give rise to a requirement of but-for causation. The Court relied on *Gross* and held that "but for" causation is required for retaliation claims under Title VII:

> This enactment, like the statute at issue in *Gross*, makes it unlawful for an employer to take adverse employment action against an employee 'because' of certain criteria. Cf. 29 U.S.C. § 623(a)(1). Given the lack of any meaningful textual difference between the text in this statute and the one in *Gross*, the proper conclusion here, as in *Gross*, is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action. 570 U.S. at 352.

Quite significantly, the Court explicitly contrasted this with statutes like section 1981 that do not use the words "because of." 570 U.S. at 355-56. The Court explained that section 1981 is a "broad, general bar[] on discrimination" that uses "capacious language," unlike

Title VII which is a "detailed statutory scheme" that "enumerates specific unlawful employment practices." *Id.*

The United States recognizes that section 1981 "does not employ specific but-for language, such as barring discrimination 'because of,' 'on account of,' or 'based on' race." U.S. Br. 17. Comcast too, albeit implicitly, recognizes that but-for causation language is lacking in section 1981, and thus it resorts to scouring this Court's prior decisions concerning section 1981 for any use of the terms "because," or "because of" or "solely" in describing the rights protected by section 1981. Pet. Br. 35, 36. But even Comcast acknowledges 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." Pet. Br. 36.

The decisions cited by Comcast used the phrase "solely because of" not to describe the appropriate causation standard, but rather to describe what the *evidence* showed in those cases: that the contract or property rights at issue were impaired solely because of race. *Runyon v. McCrary*, 427 U.S. 160, 165 (1976) (affirming judgment that private schools violated section 1981 by admittedly denying admission solely because of race); *Buchanan v. Warley*, 245 U.S. 60, 81-82 (1917) (holding that it was error for the Kentucky courts to invalidate a contract for the sale of real estate based on an ordinance that mandated racially segregated housing); *see Jones*, 392 U.S. at 409 (reversing the dismissal of a complaint which alleged that African Americans were denied housing solely because of race).

The language quoted by Comcast is taken out of the context of the decisions; not one of the cases it cites considered whether but-for causation is required under section 1981.

3. The Legislative History and Statutory Structure Further Undermine the But-For Causation Argument.

Comcast and the United States pull from bits of the legislative history and other statutory provisions of the Civil Rights Acts of 1866 and 1991 to argue that Congress intended for a but-for causation standard to apply to claims brought under section 1981. But looking to the legislative history and statutory structure of these civil rights laws only serves to further confirm that they did not create a but-for causation requirement. *See Jones*, 392 U.S. at 422, 426 ("Our examination of the relevant history, however, persuades us that Congress meant exactly what it said," which was "to prohibit *all* racially motivated deprivations of the rights enumerated in the statute").

a. The Civil Rights Act of 1866

Comcast and the United States argue that the Court should interpret the phrase "same right" in section 1981 in light of the criminal enforcement provision set forth in a different section of the Civil Rights Act of 1866. Pet. Br. 37; U.S. Br. 23. Quite the contrary, the difference in language used in the criminal enforcement provision further supports that a suit under

section 1981 requires only that the plaintiff plausibly allege that race was a motivating factor in the refusal to contract.

Section 1981 was originally enacted as part of section 1 of the Civil Rights Act of 1866. Section 1 contained similar language to section 1981 today, namely that all persons shall enjoy the same right to contract as is enjoyed by white persons. Section 2 of the Civil Rights Act of 1866 set forth a criminal penalty for any 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."

Critically, the phrase "by reason of" does not appear in section 1 of the Civil Rights Act of 1866. This shows that Congress knew how to use language that connotes but-for causation, but made a deliberate choice to use broader language in defining the rights protected by section 1981. *See*, *e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (explaining that the "usual rule [is] that 'when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended' " (quoting 2A N. Singer, *Statutes and Statutory Construction* § 46:06, p. 194 (6th rev.ed 2000))).[5]

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[5] Comcast argues that the criminal enforcement provision in section 2 of the Civil Rights Act of 1866 sets the limits on the judicially implied cause of action under section 1981 based on the

The United States also argues that the Court should find it significant that a *prior version* of section 1 of the Civil Rights Act of 1866 used the phrase "on account of" to describe the rights provided in the statute. U.S. Br. 25-26. But citation to the prior version of section 1 further drives the point home: Congress knew how to use language that connotes but-for causation but made a deliberate choice not to include that language in the final bill.

b. The Civil Rights Act of 1991

Comcast and the United States argue that Congress, in the 1991 Act, implicitly rejected the motivating factor standard for section 1981 when Congress added a "motivating factor" provision to Title VII but not to section 1981. Pet. Br. 31; U.S. Br. 30. This argument is contrary to the statutory text, the legislative history of the 1991 Act and this Court's prior section 1981 decisions.

In Section 3 of the 1991 Act, Congress stated that it was responding "to recent decisions of the Supreme Court *by expanding* the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(4), 105 Stat. 1071 (emphasis added).

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rule that implied causes of action should be interpreted the same as "comparable express causes of action." Pet. Br. 37 (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 736 (1975)). But a *criminal enforcement* provision of a statute is not "comparable" to a judicially implied *civil* damages remedy, and Comcast cites no case to suggest otherwise.

Consistent with this express purpose, this Court has recognized that Congress amended section 1981 only to respond to specific decisions of this Court which narrowly interpreted section 1981. In *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 372-73 (2004), the Court explained that Congress amended section 1981 in response to *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), which narrowly interpreted the phrase "to make and enforce contracts." In *R.R. Donnelley*, the Court explained that, with the 1991 Act, "Congress responded to *Patterson* by adding a new subsection to § 1981 that defines the term 'make and enforce contracts' to include the 'termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.'" *R.R. Donnelley*, 541 U.S. at 373.

Four years after *R.R. Donnelley*, this Court again recognized that Congress amended section 1981 only to respond to specific decisions of this Court that it wanted to overrule. In *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008), this Court addressed whether retaliation claims are cognizable under section 1981. *Id.* at 451. Similar to Comcast's argument here, the defendant argued that the Court should give weight to the fact that Congress, when it amended section 1981 in the Civil Rights Act of 1991, did not add a provision that specifically authorized retaliation claims. *Id.* at 453-54. But this Court expressly rejected that argument, explaining that, because existing case law established that retaliation claims were cognizable under section 1981, "there was no need for Congress [in the

1991 Act] to include explicit language about retaliation." *Id.* at 454.

Similarly here, there was no decision of this Court rejecting a motivating factor standard for section 1981 and thus there was no need for Congress to add a specific provision to section 1981 to confirm that was sufficient for a claim of discrimination. Congressional action was unnecessary because this Court in *Patterson* already had interpreted section 1981 to use the burden shifting framework. *Patterson*, 491 U.S. at 186-87.

Comcast goes even further and quotes a report from the House Judiciary Committee recommending passage of the 1991 Act. Pet. Br. 30 (quoting a passage where the Judiciary Committee states that, in enacting the 1991 Act, Congress will restore the "broad scope" of section 1981 and ensure that all Americans "'may not be harassed, fired or otherwise discriminated against in contracts because of their race'" (quoting H.R. Rep. No. 102-40, pt. 2, at 12 (1991))). Comcast argues that the Court should infer from the use of the phrase "because of" in this report that Congress, in passing the 1991 Act, "understood Section 1981 to incorporate traditional notions of causation, yet made no effort to change that approach." Pet. Br. 30.

But Comcast takes this language from the legislative history out of its context. The sentence that Comcast quotes from the report is the last sentence of a paragraph that begins by describing how the 1991 Act would overrule the holding of *Patterson* that narrowly

interpreted the phrase "to make and enforce contracts" in section 1981. H.R. Rep. No. 102-40, pt. 2, at 12 (1991). The report does not talk about causation principles, default rules, but-for causation, or anything similar in the context of section 1981. It is beyond a stretch for Comcast to argue, based on one sentence taken out of context in one piece of legislative history, that Congress in passing the 1991 Act intended for section 1981 plaintiffs to plead that racial discrimination was a but-for cause of the refusal to contract.

C. The Common Law in 1866 Did Not Require But-For Causation for Intentional Torts.

This case can and should be resolved based on the plain language of section 1981 as interpreted by this Court in *Patterson*. But Comcast claims, based on section 3 of the Civil Rights Act of 1866, that this Court must look to the common law as it existed in 1866 to determine the proper pleading burdens for section 1981 claims brought today. Pet. Br. 23. Comcast selectively quotes from section 3 to create a misleading impression that Congress intended for courts to apply the common law as of 1866 to deny access to the courts for civil rights plaintiffs. Obviously, the goal of the Civil Rights Act of 1866 was to abrogate, not codify, the common law that allowed race discrimination.

Here is the full quote from the relevant part of section 3 with the language omitted by Comcast in its brief set forth in *italics*:

> [b]ut in all cases where [the laws of the United States] are not adapted to the object, *or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law*, the common law, *as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States*, shall be extended to and govern said courts in the trial and disposition of such cause. . . . Sec. 3, Civil Rights Act of 1866 (emphasis added).

Thus, the express language of the Civil Rights Act of 1866 demonstrates that Congress intended for courts to (1) reject the common law where it is "deficient" in furnishing "suitable remedies" or (2) apply the common law "as modified and changed" as long as such modifications or changes are consistent with federal law.[6] Sec. 3, Civil Rights Act of 1866. Congress therefore did not intend for courts to apply purported common-law principles of 1866 to *deny* access to the courts when there are plausible allegations that a defendant

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[6] Given the language of section 3 of the Civil Rights Act of 1866, it is unpersuasive for Comcast to cite the general rule of statutory interpretation in that Congress is ordinarily understood to legislate against a background of common-law principles. Pet. Br. 24 (citing *Samantar v. Yousuf*, 560 U.S. 305, 320 n.13 (2010)). This is because Congress expressly stated in the statute that courts must disregard the common law where "deficient" in furnishing "suitable remedies." Sec. 3, Civil Rights Act of 1866.

was motivated by intentional racial discrimination in refusing to contract. App. 3a.

Comcast argues that but-for causation was an "indispensable element" of common law torts when Congress enacted section 1981 in 1866. Pet. Br. 17; *see also* U.S. Br. 15. But in making this claim Comcast mistakenly relies on 19th century tort cases involving *negligence*, not intentional torts. Pet. Br. 24-25. Section 1981 requires intentional discrimination. *See Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 583 n.16 (1984) ("Under [section 1981] relief is authorized only when there is proof or admission of intentional discrimination.").

There were no general rules on factual causation in intentional tort cases in the mid-19th century. G. Edward White, *Tort Law in America: An Intellectual History* 314 (1980) (explaining that rules on factual causation emerged relatively late in the development of tort law). Professor White attributes this to causation not being at issue in "intentional tort cases or cases where an act-at-peril standard of liability governed. . . ."[7] Comcast tries to show otherwise by citing a few cases that applied but-for causation in the

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[7] The United States quotes Professor White asserting a "but-for" test in 19th century tort law. U.S. Br. 16, citing G. Edward White, *The Emergence and Doctrinal Development of Tort Law, 1870-1930*, 11 U. St. Thomas L.J. 463 (2014). However, Professor White is clear that he is talking about personal injury negligence cases, where the but-for approach played a more substantial though still not exclusive role. *Id.* at 464-65 (discussing "the scope of liability for accidental personal injuries").

mid-19th century. Pet. Br. 24-25. But this material does not support the conclusion that it was an indispensable element of causation in *intentional* tort cases in 1866.[8]

In the mid-19th century, tort law was understood as a body of "wrongs," many of which were actionable without the plaintiffs having to establish they were actually harmed. *See* Charles G. Addison, *Wrongs and Their Remedies: A Treatise on the Law of Torts* 775 (1860). The requirement for but-for causation for intentional torts did not evolve into the familiar concept that is known today until later in the 19th century. *Id.*; *see also* Joseph H. Beale, *The Proximate Consequences of an Act*, 33 Harv. L. Rev. 633, 641 (1920). In fact, by the early 20th century the phrase but-for had still not entered the common law mainstream of the United States for intentional torts; causation focused on proximate cause. *See* Nicholas St. John Green, *Proximate and Remote Cause*, 4 Am. L. Rev. 201, 205 (1870); *see also* William L. Prosser, *Proximate Cause in California*, 38 Cal. L. Rev. 369, 396 (1950).

The renowned torts scholar William Prosser details the rise of but-for causation, describing the ongoing debate in the legal community in the middle of the 20th century about whether but-for causation was a viable test for determining liability. *Proximate Cause in California*, 38 Cal. L. Rev. at 377. In all the cases

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[8] It is simply not relevant for Comcast to cite treatises and law review articles published in the early 20th century that describe but-for causation as essential, because none of these authorities state whether but-for causation was generally required in the mid-19th century.

that he references that deal with "causa sine qua non," or but-for causation, none go further back then the case of *Stacy v. Knickerbocker Ice Co.*, 84 Wis. 614, 54 N. W. 1091 (1893). *Id.* at 377 n.22.

As Professor Beale explains, courts in the 19th century were more concerned with the "consequences of an act" than with the causes of the damage. 33 Harv. L. Rev. at 636. While "in very few cases up to the year 1900" is proximate cause even part of the investigation, but-for causation is not mentioned at all. *Id.* When it came to causation, the general consensus during this time was that one bad apple spoils the bunch, because "The question is not what would have happened, but what did happen. A murdered man would have died in time if the blow had not been given; yet the murderer's blow is a cause of his death." *Id.* at 638. Therefore, it did not matter if there were multiple causes for an event: the consequence remained the same, so the actor was responsible for the damage. *Id.*

As a result, parties seeking recovery in the 19th century for intentional torts did not have to prove that the offender's act was a but-for cause for their injury. *See*, *e.g.*, *Ashby v. White*, 92 ER 126 (1703) (holding that a plaintiff who was denied the ability to sell his horse because the defendant intentionally prevented the sale opportunity did not have to prove that he would have been able to sell the horse otherwise); *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506 (1838) (holding that a plaintiff can prevail without proving that the defendant's conduct caused harm given that the defendant intentionally engaged in tortious conduct).

In sum, Comcast and the United States are wrong to argue that but-for causation was an essential element of intentional tort claims in the mid-19th century. Quite the contrary, for intentional torts, no such causation requirement existed.[9]

D. A "Motivating Factor" Pleading Standard Is Consistent with the Remedial Purpose of Section 1981.

The Civil Rights Act of 1866, adopted just a year after the end of the Civil War, had a broad remedial purpose. *See* Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 Harv. J. on Legis. 187, 199-200 (2005) ("[O]ne of the principal objectives of the Thirty-Ninth Congress was to make the Constitution's guarantees of freedom and fundamental rights a practical reality. Republicans achieved this objective by enacting the Civil Rights Act of 1866. . . ."). As early as *The Civil Rights Cases*, 109 U.S. 3 (1883), this Court acknowledged that Congress undertook to enforce the Thirteenth Amendment by "secur[ing] to all citizens of every race and color, and

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[9] The United States argues that the "motivating factor" test with burden shifting did not exist in 1866 and therefore it is inappropriate under section 1981. U.S. Br. 22. But *McDonnell Douglas/Burdine* burden shifting did not exist in 1964 when Title VII was adopted and yet the Court concluded that it was an appropriate framework to effectuate the statute's purposes. *Green*, 411 U.S. at 802-03. Most importantly, the burden shifting approach existed for section 1981 after *Patterson* and Congress left it unaltered in the 1991 Act.

without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property, as is enjoyed by white citizens." *Id*. at 22.

Section 1981 was designed to "guarantee the then newly freed slaves the same legal rights that other citizens enjoy." *CBOCS*, 553 U.S. at 448. As this Court explained, section 1 of the Civil Rights Act of 1866 was "sweeping" and is a "comprehensive statute forbidding *all* racial discrimination affecting the basic civil rights enumerated in the Act." *Jones*, 392 U.S. at 433, 435; *see also id.* at 431-32 (Senator Trumbull, the proponent of the bill that became the Civil Rights Act of 1866, said that the purpose of the law was to give "practical freedom" to the newly freed slaves and that it would affirmatively secure basic civil rights by "break[ing] down *all* discrimination between black men and white men").

The United States wrongly declares that section 1981 "was primarily enacted to eliminate facially discriminatory state laws." U.S. Br. 26. This Court repeatedly has rejected that view and held that "it is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein. . . ." *Jones*, 392 U.S. at 436. In light of the expansive goal of section 1981—eradicating the "badges and incidents of slavery"—there is no doubt

which approach to causation is more consistent with the purpose of the Civil Rights Act of 1866.

A century after section 1981 was enacted, Justice Thurgood Marshall recognized that many of the "badges of slavery" remained in existence. *Jones*, 392 U.S. at 445 (Marshall, J., dissenting): "While the institution has been outlawed, it has remained in the minds and hearts of many white men. Cases which have come to this Court depict a spectacle of slavery unwilling to die."

Still today, badges of slavery remain. It would be wrong for this Court to walk back from the promises of economic inclusion set forth in section 1981. Today, the wealth gap between African Americans and white people remains significant. "Though black people make up nearly 13 percent of the United States population, they hold less than 3 percent of the nation's total wealth. The median family wealth for white people is $171,000, compared with just $17,600 for black people." Trymaine Lee, *A Vast Wealth Gap, Driven By Segregation, Redlining, Evictions and Exclusion, Separates White and Black America*, N.Y. Times Magazine (Aug. 18, 2019).

According to a January 2016 report from the Minority Business Development Agency, African American-owned businesses account for only $150.2 billion in gross receipts whereas all U.S. firms account for $33.5 trillion.[10] In other words, African American-owned

[10] U.S. Department of Commerce, Minority Business Development Agency, "Fact Sheet: U.S. Minority-Owned Firms," January

firms account for roughly 0.4% of the gross receipts in the entire U.S. economy.

In the area of media ownership, the focus of this litigation, the picture is similarly dismal. "[A]ccording to the latest FCC analysis, people of color collectively owned 7% of all U.S. full-power commercial broadcast television stations, or just 98 of the nation's 1,388 stations. (Though we note that a significant number even of these stations are only nominally owned by people of color, with broadcasters like Sinclair using shell companies headed by people of color to evade FCC ownership rules)." Written testimony of Craig Aaron (President and CEO of Free Press and Free Press Action) before the U.S. Senate Committee on Science, Commerce, and Transportation Subcommittee on Communications, Technology, Innovation, and the Internet Regarding "The State of the Television and Video Marketplace," June 5, 2019, at 17. According to the Federal Communications Commission, in 2015 whites owned 1,030 stations (74.4%), while African Americans owned 12 stations (0.9%). Federal Communications Commission's Third Report on Ownership of Commercial Broadcast Stations: Ownership Data as of October 1, 2015; released May 2017 at 7.

Section 1981 remains a critically important civil rights statute to ensure basic civil rights to minority-owned businesses. Comcast's proposed pleading standard would effectively shut the door to the federal

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2016, http://www.mbda.gov/sites/default/files/2012SBO_MBEFactSheet020216.pdf.

courts for African Americans and other people of color who are treated differently in contracting on account of race.

Given the broad remedial purpose of section 1981, a "motivating factor" pleading standard with burden shifting is appropriate.[11] This is exactly what the Ninth Circuit held below. In adopting a motivating factor pleading standard, the Ninth Circuit stated that it was "persuaded by the reasoning of the Third Circuit" in *Brown v. J. Kaz, Inc.*, 581 F.3d 175 (3d Cir. 2009). App. 20a. In *J. Kaz*, the Third Circuit approved of a burden shifting approach for causation under section 1981. The court stated that the burden shifting "framework makes sense in light of section 1981's text. If race plays any role in a challenged decision by a defendant, the plain terms of the statutory text suggest the plaintiff has made out a prima facie case that section 1981 was violated because the plaintiff has not enjoyed 'the same right' as other similarly situated

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[11] This Court's constitutional civil rights cases further show why a motivating factor pleading standard is fair and strikes the right balance. *See Mt. Healthy City Sch. Dist*, 429 U.S. at 287 (applying a "motivating factor" standard for First Amendment retaliation claims but permitting the defendant to avoid liability if it proves that it would have made the same decision regardless of protected conduct); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 n.21 (1977) (holding that a plaintiff asserting a racial discrimination claim under the Equal Protection Clause of the Fourteenth Amendment can establish liability by showing that race was a "motivating factor," but that a defendant can avoid liability by "establishing that the same decision would have resulted even had the impermissible purpose not been considered").

persons. However, if the defendant then proves that 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." 581 F.3d at 182 n.5.

Comcast and its *amici* argue that the Ninth Circuit's pleading standard disrupts the carefully crafted motivating factor test Congress added to Title VII in 1991. Pet. Br. 32-34. This argument is based on the assumption that the Ninth Circuit eliminated Comcast's ability to present evidence that it had race-neutral reasons for its refusal to contract. But as shown above, the Ninth Circuit did not eliminate Comcast's right to present a defense that it would have made the same decision without regard to race. This question was not addressed by the Ninth Circuit because Comcast's affirmative defenses were not at issue. *See Bock*, 549 U.S. at 211-12, 216 (holding that a plaintiff is generally not required to plead the absence of an affirmative defense).

Moreover, Comcast and its *amici* are wrong in their claim that affirming the Ninth Circuit's approach to causation under section 1981 would render Title VII superfluous in employment discrimination claims. Pet. Br. 33. That argument ignores the significant differences between the two statutes. For example, Title VII allows liability based on disparate impact, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), but section 1981 requires proof of intentional discrimination, *Firefighters Local Union No. 1784*, 467 U.S. at 583 n.16. In

addition, section 1981 only pertains to racial discrimination, whereas Title VII encompasses discrimination across many other protected categories.

Most importantly, though, if Congress was concerned about this overlap in light of this Court's holding concerning causation in *Patterson*, it could have amended section 1981 as it did to overrule other aspects of this Court's decision in that case. But Congress was not troubled by the overlap because Congress has recognized "that the remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive." *Johnson v. Ry. Exp. Agency, Inc.*, 421 U.S. 454, 459 (1975) (citation omitted).

II. RESPONDENTS ADEQUATELY ALLEGE CAUSATION UNDER ANY STANDARD

The Court did not grant certiorari on Comcast's argument that the Second Amended Complaint does not allege but-for causation, and it is improper for Comcast to make that argument here. As the United States observed: "this Court did not grant certiorari" on the question of "whether Respondents plausibly pleaded but-for causation." U.S. Br. 28 n.3. As such, if this Court were to reverse the Ninth Circuit, the United States is correct that "the Court should vacate and remand for the court of appeals to consider in the first instance." *Id.*

Even if the Court were to examine the Second Amended Complaint to determine whether it alleges but-for causation, the decision below should be affirmed. In a lengthy complaint, Respondents adequately alleged but-for causation through the following facts:

- Comcast senior executive Jennifer Gaiski told Entertainment Studios to get support "in the field" so she could present such support to Comcast senior management Greg Rigdon and Neil Smit, but when Entertainment Studios obtained "field" support, Comcast said "field" support did not matter, App. 48-49a, ¶ 45;
- Comcast told Entertainment Studios to obtain Division support, but the Divisions told Entertainment Studios that they deferred to corporate, which caused Entertainment Studios to waste hundreds of thousands of dollars on marketing, travel and other expenses, App. 49-50a, ¶¶ 46-47;
- Comcast executives Madison Bond and Jennifer Gaiski told Byron Allen of Entertainment Studios that Comcast would carry the Entertainment Studios Channels if they were carried on Comcast's principal competitors Verizon FIOS, AT&T U-verse and DirecTV, but Comcast still refuses to contract with Entertainment Studios even though Verizon FIOS, AT&T U-verse and DirecTV now carry the Entertainment Studios Channels, App. 50a, ¶ 48;

- Comcast told Entertainment Studios that it lacked capacity to carry the Entertainment Studios Channels, but Comcast launched more than 80 channels since 2010, including lesser-known, white-owned channels such as Inspirational Network, Fit TV, Outdoor Channel and Current TV, App. 35a, ¶ 7, App. 50-51a, ¶ 50;

- Comcast told Entertainment Studios that it wanted to focus on sports and news networks, but launched white-owned networks that have nothing to do with sports and news, such as Baby First Americas, Fit TV and Outdoor Channel, App. 51a, ¶ 51;

- Comcast claims that there is not enough demand for the Entertainment Studios Channels, but the channels are carried by over 50 MVPDs who broadcast the channels to over 80 million cumulative subscribers, and one of the channels (Cars.TV) won an Emmy Award, App. 43a, ¶ 30, App. 51-53a, ¶¶ 53-54;

- Of the more than 500 channels that are carried by Verizon FIOS, AT&T U-verse and DirecTV, Comcast carries *all* of the channels *except* for the Entertainment Studios Channels, App. 53-54a, ¶¶ 56-57; and

- To obtain FCC approval for its merger with NBC Universal, Comcast entered into a memorandum of understanding ("MOU") with civil rights groups that required Comcast to launch four African American-owned networks, but rather than launch the Entertainment Studios Channels—which are established, carried

> by Comcast's competitors and are truly African American-owned—Comcast chose to launch brand new networks that are predominately white-owned with African American figureheads, App. 58-62a, ¶¶ 72-81.

These are well-pleaded allegations which give rise to plausible inferences of racial discrimination. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (explaining that circumstantial evidence "is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence" (citation omitted)); *McDonnell Douglas*, 411 U.S. at 802 (circumstantial facts include treating similarly situated persons of a different race more favorably).

Comcast does not squarely address these allegations in its brief. Rather, Comcast resorts to mischaracterizing Respondents' claim as resting solely on a "vast conspiracy" between Comcast, the FCC and civil rights organizations and leaders. Pet. Br. 7. Like it did in the Ninth Circuit below, Comcast is still attacking a conspiracy claim that Respondents dropped several years ago and that is not part of the Second Amended Complaint that is the basis for the lawsuit before this Court.

In addition to the facts in the Second Amended Complaint, Respondents have direct evidence of discrimination that is in the record. Respondents alleged in the first Complaint that, during one meeting, a Comcast executive told Entertainment Studios, "We're not trying to create any more Bob Johnsons," the African American former owner of BET. App. 118a, ¶¶ 15-16.

No matter how this Court decides the question presented, this case must be remanded for further proceedings.

CONCLUSION

The Court should affirm the decision below and remand for further proceedings.

Respectfully submitted,

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