No. 18-1171

In The Supreme Court of the United States

COMCAST CORP.,

Petitioner,

v.

NATIONAL ASSOCIATION OF AFRICAN AMERICAN-OWNED MEDIA, et al.,

Respondents.

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

BRIEF OF LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND TWENTY-ONE NATIONAL ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

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

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INTEREST OF *AMICI CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nonpartisan, nonprofit organization that was formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination. The principal mission of the Lawyers' Committee is to secure equal justice for all through the rule of law. To that end, the Lawyers' Committee has participated in hundreds of impact lawsuits challenging race discrimination prohibited by the Constitution and federal statutes relating to employment, housing, education, voting rights, and public accommodations. As a leading national racial justice organization, the Lawyers' Committee has a vested interest in ensuring that racial and ethnic minorities have strong enforceable protections from race discrimination in every facet of their lives.

Statements of interest for all other *amici* are included in the appendix.

[1] All parties have consented to the filing of this brief by blanket consent or letter. No counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae*, its members, and its counsel have made monetary contributions to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about the critical protections afforded to African Americans, and other racial and ethnic minorities, by one of the nation's oldest, and most important, civil rights laws—42 U.S.C. § 1981.[2] *Amici* respectfully submit this brief in support of Respondents to detail how the application of a but-for analysis to claims brought under section 1981, as proposed by Petitioner, could hinder access to these protections. The application of a but-for standard to establish claims of intentional race discrimination would be inconsistent with the statute's text, history, and purpose.

There is no language in section 1981 demonstrating an explicit or implicit but-for causation standard. Instead the statute's language guarantees "the same right" to contract "as is enjoyed by white citizens." 42 U.S.C. § 1981(a). A proper interpretation of guaranteeing individuals the "same right" requires that discrimination play no role in contracting decisions.

Immediately following the Civil War, states that belonged to the Confederacy were required to ratify the Thirteenth Amendment, which abolished chattel slavery and involuntary servitude. However, southern states found ways to circumvent the intent and protections of the Amendment. Through the Black Codes, white southerners implemented work conditions that

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[2] After the Civil War, the Reconstruction Congress enacted the Civil Rights Act of 1866, part of which was later codified as 42 U.S.C. § 1981.

paralleled chattel slavery and conspired to limit contracting opportunities for newly freed African Americans.

Through what is now section 1981, the Reconstruction Congress passed legislation, prior to passing the Fourteenth and Fifteenth Amendments, to secure the right to make and enforce contracts for all individuals regardless of race or color. Congress viewed the contract as a symbol of equality and believed that if the burdens of discrimination were lifted from the contracting process it would "break down *all* discrimination between black men and white men." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 432 (1968) (internal citation omitted) (emphasis added).

Sadly, the goals of the Civil Rights Act of 1866 were not immediately realized. After its passage, section 1981 was rendered dormant for nearly a century.[3] Even after the Court overturned legalized segregation in 1954, many institutions were slow to desegregate and continued to discriminate and exclude African Americans. Congress responded by passing the Civil

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[3] Geri J. Yonover, *Dead-End Street: Discrimination, the Thirteenth Amendment, and Section 1982*, 58 Chi.-Kent L. Rev. 873, 874-75 (1982).

> This dormancy may have occurred, in part, as a result of the Supreme Court decisions in the Civil Rights Cases, *Plessy v. Ferguson*, and *Hodges v. United States*, which progressively contracted the reach of congressional power under the amendment. Designed for the sweeping purpose of granting the right of freedom, very few litigants had successfully invoked it, except in attacks on peonage.

Rights Act of 1964; however, this did not eliminate discrimination against African Americans.

In *Runyon v. McCrary*, the Court expanded the protections of section 1981 to also cover victims of private acts of discrimination. 427 U.S. 160, 170 (1976). Since *Runyon*, the Court has revived section 1981 and recognized that the statute protects African Americans and other minorities in a variety of contexts, including public accommodations, education, and employment. These cases have revived section 1981.

The breadth of the scope of section 1981 cannot be overstated. Section 1981 complements the protections provided by other core civil rights statutes, including the Civil Rights Act of 1964. Section 1981 also provides critical protection from discrimination when some of these other statutes do not. For example, section 1981 provides a safe harbor for low-wage independent contractors of color and consumers of color who experience discrimination in retail settings.

Petitioner urges this Court to ignore this country's shameful history of discrimination that led Congress to enact section 1981 and apply a but-for causation pleading standard to section 1981 claims. However, the application of this standard would contravene Congress's goal of ensuring that all people, regardless of race, can enter into contracts free from *any* discrimination. In practice, the application of this standard will result in the premature dismissal of viable intentional race discrimination in contracting claims and make it harder for African Americans and other minorities to have access to the courts.

The intent of section 1981—to free the contracting process from the burdens of discrimination—counsels against requiring victims of race discrimination to move mountains to prove their case. This is particularly so because Congress has expressly indicated that it did not intend to limit access to the courts for victims of race discrimination.

This Court should reaffirm its previous holdings that race discrimination claims must be analyzed holistically and that section 1981 is violated if race discrimination played *any* role in a contracting decision. We urge this Court to affirm the Ninth Circuit's ruling denying Comcast's motion to dismiss.

ARGUMENT

I. Congress's Intent Was To Eliminate All Race Discrimination In Contracting When It Enacted 42 U.S.C. § 1981.

A. 42 U.S.C. § 1981 was enacted in 1866 to ensure full equality for newly freed African Americans.

At the height of the Civil War, 88 percent of the United States' African American population (3.9 million persons) lived in the Confederacy and were subjected to the horrific institution of slavery.[4] Soon after the end of the Civil War, on December 6, 1865,

[4] U.S. Census Bureau, "1860 Census: Population of the United States," at vi-viii, https://bit.ly/2lCRNqy (last modified Jan. 16, 2018).

Congress ratified the Thirteenth Amendment to the United States Constitution formally abolishing slavery. After the war, society refused to extend emancipated African Americans full benefits and equality under the law. According to W.E.B. Dubois, after slavery was abolished the "slave went free; stood a brief moment in the sun; then moved back again toward slavery." W.E.B. Du Bois, *Black Reconstruction in America: An Essay Toward a History of the Part Which Black Folk Played in the Attempt to Reconstruct Democracy in America*, *1860-1880*, 26 (Routledge, ed., 2017).

The Thirteenth Amendment was the first step toward securing full personhood for newly freed African Americans. As a condition of regaining federal representation, states that belonged to the former Confederacy were required to ratify the Thirteenth Amendment, thus abolishing chattel slavery and involuntary servitude. Rebecca E. Zietlow, *Slavery, Liberty and the Right to Contract*, 19 Nev. L.J. 447, 448 (2018). Southern states were initially reluctant to comply, but eventually ratified the Amendment to maintain the fragile peace between the states. *Id.* at 462. These states did, however, find other ways to skirt the freedoms enshrined in the Amendment.

In the summer of 1865, these states implemented Black Codes—laws that forced African Americans to work in a labor economy based on debt or low wages. *Id.* Under the Black Codes newly freedmen and freedwomen continued to live in conditions that paralleled the institution of chattel slavery. Southern whites

refused to contract with former slaves. When they did, "many used the labor contract itself to restore conditions as onerous as those under slavery," fixing wages, forbidding work outside the contract, and using physical violence to coerce work. Danielle Tarantolo, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 Yale L.J. 170, 186-87 (2006). Black Codes prevented African Americans from leaving "exploitive employers during the duration of their contracts." *Id.*

To ensure that the Thirteenth Amendment was enforceable in all states and to provide emancipated slaves with broad rights and protections, the Reconstruction Congress enacted section 1 of the Civil Rights Act of 1866, later codified as 42 U.S.C. § 1981.

B. While section 1981's enactment was motivated in great part by the Black Codes, Congress was explicitly clear that it intended to broadly attack contractual race discrimination in any form.

The right to enter into a contract free from the burdens of discrimination was "a means toward [Congress's] goal of establishing equal citizenship and fundamental rights for freed slaves and empowering all workers. . . ." *See* Zietlow at 448. A review of the legislative history makes the intent of the bill's sponsor, Senator Lyman Trumbull (IL), abundantly clear. When commenting on the bill's objective he stated:

> This measure is intended to give effect to that declaration [abolishing slavery under the Thirteenth Amendment] and secure to all persons within the United States *practical freedom*. There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themselves of their benefits.

Jones, 392 U.S. at 431-32 (internal quotations omitted) (emphasis added). Senator Trumbull's intent was not only to "destroy all discrimination embodied in the Black Codes" but to secure the great "fundamental rights for all men" and to "break down *all discrimination* between black men and white men." *Id.* at 432 (citing Cong. Globe, 39th Cong., 1st Sess. at 475) (emphasis added).

The Civil Rights Act of 1866 secured "the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property" for all individuals, regardless their race or color. *Id.* It was a sweeping indictment of the Black Codes enacted by southern states and, as recognized by the Court, "[w]hen the Senate passed the Civil Rights Act . . . it did so fully aware of the breadth of the measure it had approved." *Id.* at 433.[5]

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[5] The Civil Rights Act of 1866 was introduced as S. 61 by Sen. Trumbull (R-IL) on Jan. 5, 1866. Barry Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of*

C. A century after passage, this Court interpreted section 1981 to apply to contract discrimination experienced by African Americans and other racial and ethnic minorities in various contexts.

The vestiges of slavery persisted in the decades after the Civil War. *Plessy v. Ferguson* upheld the constitutionality of segregation. 163 U.S. 537 (1896). In the shadow of *Plessy*, Jim Crow laws enacted in the late nineteenth and early twentieth centuries excluded African Americans from places of public accommodation and systematically relegated them to second-class citizenship. This code of segregation "lent the sanction of law to a racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking." C. Vann Woodward, *The Strange Career of Jim Crow* 7 (1955).

The constitutionality of legalized segregation went unchecked for over half a century until overturned in *Brown v. Board of Ed. of Topeka, Shawnee Cty. Kan.*, 347 U.S. 483 (1954). After numerous legal

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Section 1981, 98 Yale L.J. 541, 550 (1989). S. 61 passed the United States Senate (33-12) on Feb. 12, 1866. Govtrack, https://bit.ly/2lfzg3k (last accessed Sept. 23, 2019). S. 61 passed the United States House of Representatives (111-38) on Mar. 13, 1866. Govtrack, https://bit.ly/2nlDaID (last accessed Sept. 23, 2019). President Andrew Johnson vetoed the bill on Mar. 27, 1866. Barry Sullivan, *supra*, 98 Yale L.J. 541, 550 (1989). The Senate overrode the veto (33-15) on Apr. 6, 1866. Govtrack, https://bit.ly/2nka4t5) (last accessed Sept. 23, 2019). The House of Representatives overrode the veto (H 122-41). Govtrack, https://bit.ly/2laVFyC (last accessed Sept. 23, 2019). The bill became the law on Apr. 8, 1866. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 435 (1968).

challenges and demonstrations against racial segregation, Congress passed the Civil Rights Act of 1964 outlawing Jim Crow discrimination and segregation. Many institutions, however, were slow to desegregate and continued to exclude African Americans.

After section 1981 was passed in 1866, the statute remained "largely unused for nearly a century." Joanna Grossman, *The Supreme Court Holds that an Important Federal Civil Rights Law, Section 1981, Prohibits Retaliation as Well as Discrimination*, Find Law (June 10, 2008).[6] However, beginning in the 1970s, courts began interpreting section 1981 to prohibit discrimination against African Americans in various contexts, including in public accommodations, employment, and education. In 1973, the Court held in *Tillman v. Wheaton-Haven Recreation Assn., Inc.*, that a private swimming club that denied admission to African Americans was not exempt from section 1981 coverage. 410 U.S. 431 (1973). In 1975, in *Johnson v. Railway Express Agency*, the Court held that section 1981 applies to race discrimination in public and private sector employment. 421 U.S. 454 (1975). This Court further recognized in *Johnson* that while employer coverage under Title VII and section 1981 differ, Congress intended individuals to have access to remedies under Title VII while also having the right to sue under section 1981. *Id.* at 459. Furthermore, "the two procedures augment each other and are not mutually exclusive." *Id.* In 1976, the Court similarly ruled that section 1981 bars private schools

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[6] *Available at* https://bit.ly/2ndXbAB.

from discriminating against applicants on the basis of race, extending the statute's protections to purely private acts of discrimination. *See generally Runyon*, 427 U.S. 160 (1976).

Though the statute's purpose is deeply rooted in the eradication of racial discrimination against African Americans, other racial and ethnic minorities, including Hispanics and Asians, have utilized section 1981 to challenge discriminatory practices in contemporary times. *See generally* Eileen R. Kaufman, *A Race By Any Other Name: The Interplay Between Ethnicity, National Origin and Race for Purposes of Section 1981*, 28 Ariz. L. Rev. 259, 260-61 (1986). Thus, the statute's importance to large swaths of the American public cannot be overstated.

II. This Court's Decisions In *Gross* And *Nassar* Are Not Applicable To Section 1981 Claims Because The Statutory Language Is Different.

Coupled with section 1981's legislative history, a plain reading of the statute demonstrates that section 1981 was intended to attack all considerations of race discrimination in contracting.[7] Thus, neither *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), nor *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 570 U.S. 338 (2013), control section 1981 claims.

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[7] For a complete discussion of the plain language of the statute, please see Resp't Br. at 14, 28-34.

In *Gross*, the Court held that the plain language of the Age Discrimination in Employment Act of 1967 (ADEA) supported a but-for causation standard. *Gross*, 557 U.S. at 176. The ADEA provides that:

> It shall be unlawful for an employer to fail or refuse to hire or 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.

29 U.S.C. § 623(a)(1). The Court held that "[t]he words '*because of*' mean 'by reason of: on account of' and '[t]hus 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.'" *Gross*, 557 U.S. at 176 (internal citation omitted) (emphasis added).

Similarly in *Nassar*, the Court held the mixed-motive analysis did not apply to the retaliation provision of Title VII of the Civil Rights Act of 1964. *Nassar*, 570 U.S. at 361-62. Like the ADEA, the retaliation provision of Title VII provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. §2000e-3(a). The Court again held that the "because of" language required that claims be "proved according to traditional principles of but-for causation." *Nassar*, 570 U.S. at 360.

The Court in *Gross* stated that the "statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language expresses the legislative purpose." *Gross*, 557 U.S. at 175 (quoting *Engine Mfrs. Assn. v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004)). A plain reading of 42 U.S.C. § 1981(a) does not include any "but-for" or "because of" language. Instead, section 1981 language broadly, and plainly guarantees "the same right" to contract "as is enjoyed by white citizens[.]" 42 U.S.C. § 1981(a). The only reasonable interpretation of guaranteeing individuals the "same right" requires that discrimination play no role in contracting decisions. Section 1981's language is simple and leaves no room for the application of a but-for analysis, as argued by Petitioner Comcast.

III. Section 1981 Provides African Americans And Other Racial And Ethnic Minorities Critical Protections Against Discrimination In Contracting, Including In Areas Not Covered By Other Civil Rights Statutes Such As Title II And Title VII Of The Civil Rights Act Of 1964.

As the United States becomes increasingly diverse, communities of color need and rely on the protections of anti-discrimination laws, including section

1981. Because of its broad language, section 1981 provides critical protections against contractual discrimination for countless individuals, including those not covered by other civil rights statutes, like Title II and Title VII of the Civil Rights Act of 1964.

According to the 2010 Census, 38.9 million people (or 13 percent) identified as African American, 50.5 million people (or 16 percent) were of Hispanic or Latino origin, and 17.3 million people (or 5.6 percent) identified as Asian, either alone or in combination with another race.[8] As of July 2017, the Latino share of the United States population rose to 18 percent. In light of the increasing visibility of minority populations, civil rights laws like section 1981 must be strengthened, not weakened. Racism continues to persist in the United States, and African Americans and other marginalized groups are currently experiencing heightened levels of discrimination and bigotry in our country. Section 1981 continues to serve as a vital tool in combatting individual discrimination for millions of Americans.

A. Race discrimination is an ongoing evil that has no role in our society.

"Congress, as well as two presidents who recommended the [Civil Rights Act of 1964], clearly intended to eradicate an unhappy chapter in our history." *Hamm*

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[8] U.S. Census Bureau, The Black Population: 2010, https://bit.1O791Rc; U.S. Census Bureau, The Hispanic Population: 2010, (May 2011), https://bit.ly/2vi7QJB; U.S. Census Bureau, The Asian Population: 2010, (Mar. 2012), https://bit.ly/2sPSn29.

v. City of Little Rock, 379 U.S. 306, 315 (1964). However, *amici* are profoundly aware that structural racial inequality and discrimination still exist. The Court and individual Justices universally agree on this point. *See, e.g.*, *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855, 867 (2017) ("It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons."); *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project*, 135 S.Ct. 2507, 2525 (2015) ("Much progress remains to be made in our Nation's continuing struggle against racial isolation."); *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) ("Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.").

Racial discrimination is an "evil . . . which in varying degrees manifests itself in every part of the country." *Oregon v. Mitchell*, 400 U.S. 112, 284 (1970) (Stewart, J., concurring) (overruled on other grounds by U.S. Const. amend. XXVI). It is "illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring) (quoting A. Bickel, *The Morality of Consent* 133 (1975)).

Ignoring our nation's tragic legacy of race-based discrimination, Petitioner asks this Court also to ignore its past pronouncements and allow race to play some role in contracting decisions, so long as race

discrimination is not the but-for cause of a refusal to contract. Section 1981 is an important bulwark against this uniquely destructive evil and requiring but-for causation would serve as a barrier to plaintiffs seeking nothing more than racial equality in the making and enforcement of contracts. The Court should reject this divisive argument and reaffirm that if race discrimination plays *any* part in the contracting decision, the law has been violated and African Americans, and other minorities, have been harmed.

B. Independent contractors should be entitled to the same proof standards in race discrimination claims as employees covered under Title VII of the Civil Rights Act.

Although a but-for standard threatens to undermine efforts to eradicate racial discrimination in contracting generally, independent contractors would be particularly vulnerable to racial discrimination under a heightened evidentiary standard. Notably, Title VII prohibits discrimination from playing any role in employment decisions. 42 U.S.C. § 2000e-2(m). However, where a Title VII plaintiff must be an "employee" within the meaning of the statute, independent contractors are not "employees" under this statute. 42 U.S.C. § 2000e(f). *See, e.g.*, *Wortham v. Am. Family Ins. Grp.*, 385 F.3d 1139, 1141 (8th Cir. 2004) ("Independent contractor status is not protected under . . . Title VII."). Section 1981 therefore serves as a vital safe harbor for independent contractors who are victims of racial

discrimination, but not covered under the anti-discrimination provisions of Title VII. Applying a higher evidentiary standard than that applied to "employees" under Title VII would disproportionally impact this growing segment of American workers.

The "gig economy" refers to a growing segment of the labor market where workers are employed outside a traditional full-time or part-time model, usually in a freelance capacity.[9] Once referring to musicians without consistent work, the term "gig economy" has grown to encompass freelancers, contractors, on-call workers, and temp agency workers. George Howard, *Gigs Are No Longer Just For Musicians: How The Gig Economy Is Creating A Society Of Starving Artists*, Forbes (March 26, 2018).[10] The gig economy is being fueled by technology, which has facilitated the mobility of employees. Driving for online app car services; selling products or services on online sites; working as a freelance writer or web designer all fall within the contemporary gig economy.[11]

Businesses are increasingly replacing employees with independent contractors and one in five workers is currently a contract worker. *Id.* Nearly all—or 94 percent—of net jobs created from 2005 to 2015 were

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[9] *See* 2018 Marketplace Edison Research Poll on the Gig Economy. *Available at* https://bit.ly/2mMNJUy.

[10] *Available at* https://bit.ly/2nfAtbm.

[11] *Supra* note 9.

these sorts of impermanent jobs.[12] African Americans, Hispanics, and women, including women of color are overrepresented in low-wage independent contractor jobs. Almost one-third (31 percent) of Hispanic adults and 27 percent of African Americans earn money through the gig economy, compared to 21 percent of Whites. African Americans and Hispanics (55 percent and 47 percent, respectively) are more likely to rely on their independent contractor job for their primary source of income than Whites (41 percent).[13] Despite increased participation in this sector, independent contractor jobs provide *less* job security, fewer benefits, and receive lower wages than employees.[14]

Independent contractors should be held to the same evidentiary standard as employees covered under Title VII.[15] The Circuits have interpreted section

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[12] Yuki Noguchi, Freelanced: The Rise of the Contract Workforce, (Jan. 22, 2018) Nat'l Pub. Radio, Inc., https://n.pr/2n2oVoU.

[13] *See* 2018 Marketplace Edison Research Poll on the Gig Economy, *supra* note 9.

[14] Gig employees usually do not have financial safety nets such as retirement accounts, health care coverage, or insurance. They also typically lack assurances regarding the length of a job or the availability of ongoing assignments or jobs—all of which increase financial instability. *See* note 9, *supra*, 2018 Marketplace Edison Research Poll on the Gig Economy.

[15] The Third Circuit, in *Brown v. J. Kaz, Inc.*, provided a persuasive analysis of why the same standard of proof should be applied to section 1981 claims and Title VII claims. In *Brown*, an African-American worker brought action against a company, alleging discrimination in violation of Title VII, the Pennsylvania Human Relations Act, and section 1981. *Brown v. J. Kaz, Inc.*, 581 F.3d 175 (3d Cir. 2009).

1981's evidentiary proof standard to be largely consistent with Title VII.[16] Deborah Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 Tex. L. Rev. 859, 914 (2012). To hold independent contractors' section 1981 claims to a different standard would create confusion for courts, would subject the same employer to different standards depending on the plaintiff's employment status, and exacerbate independent contractors' vulnerability to race discrimination and harassment. For these additional reasons, a but-for standard should not be applied to these claims.

C. Consumers of color who experience retail discrimination rely on section 1981 and must be afforded robust federal anti-discrimination protections.

Everyone, regardless of race or ethnicity, should have equal access to the public sphere free from *any* discrimination. American businesses have a shameful and storied history of excluding people of color from participating in the economy. While "whites only" signs

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[16] *See Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989) (superseded by statute on other grounds as stated in *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008)); *Payan v. United Parcel Serv.*, 905 F.3d 1162, 1168 (10th Cir. 2018); *Wright v. St. Vincent Health Sys.*, 730 F.3d 732, 739 (8th Cir. 2013); *Bobo v. United Parcel Serv., Inc.*, 665 F.3d 741, 757 (6th Cir. 2012); *Anderson v. Wachovia Mortg. Corp.*, 621 F.3d 261, 269 (3d Cir. 2010); *Metoyer v. Chassman*, 504 F.3d 919, 930-31 (9th Cir. 2007); *Lawrence v. Univ. of Tex. Med. Branch at Galveston*, 163 F.3d 309, 311 (5th Cir. 2007).

are no longer acceptable, other egregious forms of consumer profiling have taken their place.[17] Requiring section 1981 claims to fail in the absence of but-for causation would make it unnecessarily difficult for plaintiffs who experience contractual discrimination on the basis of race to bring successful suits against public accommodations, and in particular would harm individuals who experience discrimination in the retail establishments which is not covered by Title II of the Civil Rights Act of 1964.

In retail establishments, "shopping while black" or consumer racial profiling is an all too familiar experience for people of color who have been questioned by security guards or worse, been wrongly apprehended for shoplifting. According to a 2018 Gallup poll, two-thirds of African Americans feel that they are treated worse than whites when shopping. Cassi Pittman Claytor, *Shopping While Black: Yes, Bias against Black Customers is Real*, The Guardian (June 24, 2019).[18] These attitudes have been confirmed by research showing that black customers are ten times more likely to be targeted as potential thieves than white customers. Catherine Dunn, *Shopping While Black: America's Retailers Know They Have a Racial Profiling Problem. Now What?* Int'l Business Times (Dec. 15,

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[17] *See generally*, Janell Ross, *Segregation Now: #LivingWhileBlack experiences are the new version of 'whites only' signs*, NBC News (May 31, 2019) https://nbcnews.to/2KmIbtE (discussing recent incidents involving racial profiling of consumers at hotels, coffee shops, college campuses and museums).

[18] *Available at* https://bit.ly/2NcCbH0.

2015).[19] One academic researcher noted that, "since 1990, the popular press has reported hundreds of accounts of consumer racial profiling and marketplace discrimination against consumers of color." Anne-Marie G. Harris, et al., *Courting Customers: Assessing Consumer Racial Profiling and Other Marketplace Discrimination*, 24 J. of Pub. Pol'y and Mktg. 163, 164 (Spring 2005). Title II prohibits discrimination on the basis of race, color, religion or national origin in certain public accommodations, including restaurants, hotels and places of entertainment. 42 U.S.C. § 2000a, et seq. Title II, however, does not cover discrimination in retail establishments. While section 1981 is most commonly used by litigants to challenge employment discrimination, litigants also commonly rely on section 1981 to challenge contractual discrimination occurring in retail establishments.

For example, in *Wash. v. Duty Free Shoppers, Ltd*, seventeen black plaintiffs filed suit to challenge a duty-free store's pretextual practices, "including telling them they could not shop at the store because they were not international travelers and that the store was closing when, in fact, it was not closing" to deny them service. *Wash. v. Duty Free Shoppers, Ltd.*, 710 F.Supp. 1288, 1288-90 (N.D. Cal. 1988). The court rejected defendants' argument that because no store employees "admitted in his or her deposition that he or she was discriminating and no store documents reveal discriminating intent, then there is no evidence that they

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[19] *Available at* https://bit.ly/2lsQr1c.

discriminated against plaintiffs." *Id.* at 1289. The court noted that the issue of discriminatory intent is "one that is often not susceptible to direct proof, and a court should consider all conflicting inferences that may be presented by the circumstantial evidence in the case." *Id.* (citing *Rogers v. Lodge*, 458 U.S. 613, 618 (1982)). *See also Green v. Dillard's*, 483 F.3d 533 (8th Cir. 2007) (reversing the district court's grant of summary judgment to Dillard's finding that African-American plaintiffs had produced sufficient direct and indirect evidence supporting a potential violation of 1981); *Hampton v. Dillard's*, 247 F.3d 1091 (10th Cir. 2001) (affirming district court's order denying Dillard's motion for judgment as a matter of law after jury found that race was a motivating factor in denying her a fragrance sample).

Individuals who experience consumer profiling often do not have direct evidence that race discrimination was the "but-for" reason they were denied a contractual opportunity, but instead have circumstantial evidence supporting an inference that race may have motivated the defendant's actions. Requiring but-for causation for section 1981 claims would make it even harder for consumers of color to challenge and remedy pervasive race discrimination in retail establishments.

IV. Reversing The Ninth Circuit's Ruling Would Have A Chilling Effect On Future Efforts To Mount Necessary Civil Rights Claims, And In Turn, Hinder Progress.

Allowing litigants to prevail if race played *an* impermissible role in contractual decisions is the fairest way to address race discrimination in contracting. Minority plaintiffs already face an uphill battle in our legal system. Low-income people of color are more likely to represent themselves *pro se* because they lack financial resources to secure counsel. Imposing a but-for causation standard upon section 1981 claims would be yet another burden on marginalized litigants.

A. A but-for standard is inappropriate for intentional race discrimination contracting claims.

Requiring plaintiffs to show that their race was the but-for cause of adverse action is an onerous task when considered in relationship to how contracting decisions are made in practice. Since decisions are seldom made "on [the] basis of one rationale to the exclusion of all others," proving but-for causation would be greatly difficult for plaintiffs. *Dare v. Wal-Mart Stores, Inc.*, 267 F.Supp.2d 987, 991 (D. Minn. 2003). This difficulty is further heightened because the facts necessary to prove these claims are largely in the control of the defendant. Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 Geo. L.J. 489, 515-16 (2006)

("the fact in question . . . occurs entirely inside the decisionmaker's head").

The Court has also recognized that proving discriminatory intent is a demanding undertaking. *See Village of Arlington Heights v. Metro*, 429 U.S. 252, 266 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."). Because contracting decisions oftentimes result from various considerations which may be "legitimate and at times illegitimate, objective and subjective, rational and irrational," but-for causation is the improper standard to adopt in section 1981 claims. *Dare*, 267 F.Supp.2d at 987.

Courts have recognized the obvious: in today's world, those intending to discriminate on the basis of race may be sufficiently sophisticated or wary of litigation so as to not broadcast their intentions. *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999) ("Outright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence."). *See also Aman v. Furniture Rental Corp.*, 85 F.3d 1074, 1082 (3d Cir. 1996) ("The sophisticated would-be violator has made our job a little more difficult. Courts today must be increasingly vigilant in their efforts to ensure that prohibited discrimination is not approved under the auspices of legitimate conduct."); *Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987) ("Defendants of even minimal sophistication will neither admit

discriminatory animus nor leave a paper trail demonstrating it. . . .").

Amici are also concerned that a but-for standard would encourage judges to employ their subjective "judicial experience" and "common sense" to determine whether a defendant's alternative explanation is more convincing than the allegation of discrimination. However, judges, like all humans often harbor implicit biases and may analyze allegations from the perspective that discrimination is rare. Thus, where a judge harbors certain racial biases, even compelling evidence may be disbelieved. *See* Victor Quintanilla, *Beyond Common Sense: A Social Psychological Study of* Iqbal's *Effect on Claims of Race Discrimination*, 17 Mich. J. Race & L. 1, 5 (2011) (discussing the role of implicit bias in influencing judicial decisions at the pleadings stage).

The Court should reject applying a but-for analysis to section 1981 claims because implicit bias continues to permeate through every facet of American life and minorities continue to face discriminatory practices daily. *See Texas Dept. of Housing*, 135 S.Ct. at 2511-12 (recognizing "unconscious prejudices and disguised animus . . . escape easy classification as disparate treatment.").

B. Low-income and under-resourced litigants will have difficulty meeting a but-for evidentiary standard, and rejecting such a standard will not result in frivolous litigation overwhelming the courts.

Between 1998-2017, nineteen percent of employment discrimination cases were litigated *pro se* because many workers lack the resources necessary to hire an attorney. Mitchell Levy, *Empirical Patterns of Pro Se Litigation in Federal District Courts*, 85 U. Chi. L. Rev. 1819, 1841 (2018). Even when employees are able to secure "expensive and often elusive legal representation . . . [e]mpirical studies of employment law claims show that plaintiffs have limited success at every level of the process." Ann C. Hodges, *The Limits of Multiple Rights and Remedies: A Call For Revisiting the Law of the Workplace*, 22 Hofstra Lab. & Emp. L.J. 601, 611 (2005); *see also* Phyllis Tropper Baumann, *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. Rev. 211, 289 (1992) ("[T]itle VII plaintiffs typically are economically insecure.").

A but-for standard will serve as another hurdle for low-income litigants who are unable to retain counsel capable of litigating complex race discrimination cases. Moreover, plaintiffs' attorneys may be discouraged from filing lawsuits that are unlikely to prevail under a heightened but-for standard. A but-for evidentiary requirement would likely make litigation more costly, require more discovery, greater strategic planning, and the retention of experts in multiple fields. Again,

under-resourced litigants with either no attorney or inexperienced counsel may find themselves in a legal quagmire, unable to properly mount their case. A but-for standard will shift section 1981 out of reach for under-resourced communities that continue to be plagued by intentional race discrimination.

Petitioner Comcast and supporting *amici* hollowly contend that rejecting a but-for evidentiary standard will open the floodgates to litigation; yet they fail to cite any empirical evidence to substantiate these claims. Title VII adopted a mixed-motive standard nearly thirty years ago, and courts are not flooded with Title VII claims. *See, e.g.*, U.S. Equal Emp. Opportunity Comm'n*, EEOC Litigation Statistics, FY 1997 through FY 2018* (2018) (noting that the number of Title VII enforcement actions have decreased over time and the number of lawsuits in 2018 was half the number of suits filed ten years prior); *see also* U.S. Equal Emp. Opportunity Comm'n, *Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2017* (2018) (noting that the percentage of charges based upon race ranged only from 32.2 percent to 37.3 percent over ten years, and the lowest percent of race-based charges was in fiscal year 2018). Moreover, most circuits have ruled that mixed motive cases can be brought under section 1981 and appellants have provided no evidence that

there has been a flood of section 1981 cases in those circuits.[20]

Furthermore, allegations suggesting that adopting a mixed-motive standard will somehow invite frivolous claims disregards workers' hesitancy to pursue legal action and the considerable expense of litigation. *See* Brianne J. Gorod, *Rejecting "Reasonableness": A New Look at Title VII's Anti-Retaliation Provision*, 56 Am. U. L. Rev. 1469, 1478-79 (2007) ("One study found that 'more than one-third of those who reported unfair treatment took no further action, and only 3 [percent] reported suing their employer.' ").

Comcast's request to impose a but-for evidentiary standard to section 1981 claims cannot withstand judicial scrutiny. A decision from this Court in favor of Comcast would unjustifiably harm the most marginalized groups in our society by excusing discrimination on the basis of race or ethnicity, and threatens to roll back substantial strides the courts have made in eliminating discrimination in contracting. This Court should not incentivize businesses, employers and other entities to limit economic opportunities to people of color—doing so would be wholly inconsistent with Congressional intent, the plain language of section 1981, and this Court's precedents.

[20] *See Charter Comm. v. Nat'l Ass'n of African American-Owned Media, et al.*, Opp'n to Pet. Cert. App. 1-4 (Apr. 12, 2019) (No. 18-1185).

CONCLUSION

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

Respectfully submitted,

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