No. 18-1171

# In The Supreme Court of the United States

COMCAST CORPORATION,

*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 *AMICI CURIAE* EMPLOYMENT LAW PROFESSORS IN SUPPORT OF RESPONDENTS


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## INTEREST OF *AMICI CURIAE*[1]

The *amici* are professors who teach and research American employment discrimination law. They have a professional interest in ensuring 42 U.S.C. § 1981, which provides a cause of action for discrimination in the making and enforcing of contracts, including employment contracts, is interpreted in a manner consistent with its text, purpose, and history. The *amici* are: Sandra Sperino, University of Cincinnati College of Law; Anthony Michael Kreis, Chicago-Kent College of Law; Sachin Pandya, University of Connecticut School of Law; Deborah Widiss, Indiana University Maurer School of Law; Charlotte Alexander, J. Mack Robinson College of Business, Georgia State University; Rachel Arnow-Richman, University of Denver Sturm College of Law; Rick Bales, ONU College of Law; Robert Bird, University of Connecticut School of Business; Elizabeth Brown, Bentley University; Martha Chamallas, The Ohio State University Moritz College of Law; David Cohen, Drexel University Thomas R. Kline School of Law; Jennifer Drobac, Indiana University Robert H. McKinney School of Law; Leora Eisenstadt, Temple University, Fox School of Business; Melissa Essary, Campbell Law School; Richard Frankel, Drexel University Thomas R. Kline School of Law; Michael Green, Texas A&M University School of Law; Tristin Green, University of San Francisco School of Law; D. Wendy Greene, Drexel University Thomas

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[1] The parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief.

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## SUMMARY OF ARGUMENT

This Court should not interpret section 1981 to require proof of but-for causation, given that statute's text, history, and purpose. Although Comcast invokes the canon of statutory construction that Congress intends statutory terms to have their settled common-law meaning, that canon does not apply here. Section 1981 has no statutory text that reflects a

common-law understanding of causation. Indeed, in 1866, when Congress enacted the predecessor to section 1981, there was no well-settled common law of tort at all. Rather, just as courts have read 42 U.S.C. § 1982, which shares common text, history and purpose, this Court should read section 1981 to require plaintiffs alleging race discrimination to prove that Comcast was motivated at least *in part* by race.

Moreover, even if Congress had intended section 1981 to incorporate tort law's evolving understanding of factual causation, that common-law doctrine includes not only but-for cause, but a bundle of causal standards that are appropriate in different cases. Thus, to approximate the common law, this Court could choose two options: (1) apply but-for cause along with all of its supporting causal doctrines, including those which apply in cases with multiple, sufficient causes of an injury, or (2) apply a motivating factor standard, an approach that mitigates the limitations of but-for cause through a single standard.

Even if this Court were to interpret section 1981 to require showing *only* but-for cause, it should make clear that but-for cause is not "sole" cause. That is, in this context, but-for cause simply requires a plaintiff to prove that race is *one* of the causes for an injury, even if there were also other causes. Accordingly, in most cases, it is not appropriate to dismiss section 1981 claims at the pleading stage on causation grounds.

## ARGUMENT

### I. Section 1981's Text and Purpose Indicate that Congress Did Not Intend to Require Proof of But-for Causation

Section 1981 affords "[a]ll persons" the "same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a). Section 1981 provides a cause of action against race discrimination in employment that remains "separate, distinct, and independent" from Title VII, *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 461 (1975), and other federal laws that prohibit employment discrimination. Congress itself has stressed section 1981's nature as an independent federal cause of action. *See* 42 U.S.C. § 1981a(b)(4) (cautioning against reading a Title VII amendment to "limit the scope of . . . section 1981 of this title").

Comcast, however, argues that this Court should adopt "textbook tort law" on factual cause and require the plaintiffs-respondents to prove that race was the but-for cause of Comcast's refusal to contract with them. This argument rests on two flawed ideas. First, Comcast assumes that it is appropriate to apply the common law to section 1981's primary, operative provision. Second, it assumes that if the Court were to apply common law, the common law requires the plaintiff to prove but-for cause. Neither proposition is correct. Comcast's argument contravenes this Court's warning to not "adopt a causal standard so strict that it would undermine congressional intent where neither the plain text of the statute nor legal tradition demands

such an approach." *Paroline v. United States*, 572 U.S. 434, 458 (2014).

First, unlike the statutory term "because" in the Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1) ("because of"), and Title VII's retaliation provision, *see* 42 U.S.C. § 2000e-3(a) ("because"), which this Court reads to require proof of but-for causation, *see University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 360 (2013); *Gross v. FBL Financial Services*, 557 U.S. 167, 177 (2009), Congress did *not* use the word "because" or another similar term in the text of 42 U.S.C. § 1981 to denote the requisite connection between a defendant's alleged conduct and injury suffered.[2]

Rather, section 1981 provides that "all persons" shall "have the same right" to make contracts "as is enjoyed by white citizens." 42 U.S.C. § 1981(a). Non-white persons enjoy "the same right" as white citizens only if race plays no motivating role in any impairment of the rights that section 1981 protects, including the right to make contracts. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 426 (1968) (section 1 of Civil Rights Act of 1866 "was meant to prohibit *all* racially motivated deprivations of the rights enumerated in the statute").

Second, Comcast's view directly conflicts with the long-standing practice of reading section 1981 and 1982 similarly, due to their common language, origins,

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[2] For discussion of the difficulties of applying tort common law to statutes, see generally Sandra F. Sperino, *The Tort Label*, 66 FLA. L. REV. 1051 (2014).

and purposes. *See CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 447-48 (2008). Congress originally wrote sections 1981 and 1982 together in the same section of the same Act, *see* Act of April 9, 1866, c. 31, § 1, 14 Stat. 27, re-enacted by Act of May 31, 1870, c. 114, § 18, 16 Stat. 140, 144; *see Jones*, 392 U.S. at 436 (1870 re-enactment did not alter 1866 act's scope). Thus, section 1982 uses similar language, declaring that all citizens "have the same right . . . as is enjoyed by white citizens" with respect to property. 42 U.S.C. § 1982. "Indeed, § 1982 differs from § 1981 only in that it refers, not to the 'right . . . to make and enforce contracts,' 42 U.S.C. § 1981(a), but to the 'right . . . to inherit, purchase, lease, sell, hold, and convey real and personal property,' § 1982." *CBOCS West*, 553 U.S. at 448. Moreover, "[l]ike § 1981, § 1982 represents an immediately post-Civil War legislative effort to guarantee the then newly freed slaves the same legal rights that other citizens enjoy." *Id.*; *accord Tillman v. Wheaton-Haven Recreation Association*, 410 U.S. 431 (1973); *Runyon v. McCrary*, 427 U.S. 160 (1976).

This matters here, because, based on section 1982's text, history, and purpose, courts have ruled that plaintiffs bringing section 1982 claims need only show that a defendant was motivated *in part* by race, even if other causes existed. *Payne v. Bracher*, 582 F.2d 17, 18 (5th Cir. 1978); *Green v. Century 21*, 740 F.2d 460, 464 (6th Cir. 1984); *Woods-Drake v. Lundy*, 667 F.2d 1198, 1202 (5th Cir. 1982); *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344, 349-50 (7th Cir. 1970); *Williams v. Matthews Co.*, 499 F.2d 819, 826 (8th Cir.

1974); *Steele v. Title Realty Co.*, 478 F.2d 380, 383 (10th Cir. 1973); *Miller v. Poretsky*, 595 F.2d 780, 788 (D.C. Cir. 1978).

Third, when Congress originally enacted the Civil Rights Act of 1866, torts was not yet a fully-developed area of common law, but an ill-defined residual category for diverse civil actions not arising out of contract. The first American torts treatise was published only seven years earlier. *See* Francis Hilliard, *The Law of Torts or Private Wrongs* (1859).[3] Torts was not taught as a separate law school course until a Boston practitioner taught it at Harvard in 1870 by abridging an *English* torts treatise. *See* G. Edward White, *The Emergence and Doctrinal Development of Tort Law*, *1870-1930*, 11 U. ST. THOMAS L. REV. 463, 467-68 (2014). Calling that abridged edition a "cheap little book" for the practicing lawyer, Oliver W. Holmes Jr. lamented that, as it then existed, "Torts is not a proper subject for a law book," and longed for a not-yet-written treatise that dealt with the subject "philosophically." Book Notices, 5 AM. L. REV. 340-41 (1871); *see* White, 11 U. ST. THOMAS L. REV. at 468-69 & n.10. Only in 1873 did Holmes first introduce his influential views on general tort-law principles. *See* Oliver W. Holmes Jr., *The Theory of Torts*, 7 AM. L. REV. 652 (1873); *see also* Oliver Wendell Holmes, THE COMMON LAW 53-110 (Little, Brown & Co. 1881). And the first *Restatement* on torts was not published until over half a century later. *See* 1

[3] For later editions, *see* Francis Hilliard, *The Law of Torts or Private Wrongs* (2d ed. 1861); and Francis Hilliard, *The Law of Torts or Private Wrongs* (3d ed. 1866).

*Restatement (First) of Torts* § 9 (1934) (defining "legal cause"); *id.* §§ 279-280 (using substantial factor causation for intentional wrongs). Thus, this Court should not act as if Congress was legislating against a well-developed and understood body of tort law generally or a body of causation doctrine specifically. *See* G. Edward White, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 14 (expanded ed. 2003) ("Nor was a comprehensive standard of liability for 'tort' actions present in any developed form prior to the 1870s.").

Fourth, requiring but-for cause in section 1981 cases would contravene a key purpose of the Civil Rights Act of 1866: to secure by federal statute the *equality* of all persons with respect to certain enumerated rights, including that "[o]ne race shall not be more favored in this respect than another." Cong. Globe 1117 (Rep. Wilson); *see McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 292, 296 (1976) (explaining Thirty-ninth Congress intended to "establish[ ] in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves"). The Civil Rights Act of 1866's mandate is unequivocal: non-white persons are guaranteed absolute "equality with the white man in all affairs of life," and its language is therefore "comprehensive" to secure equal citizenship by "includ[ing] within its broad terms every right arising in the affairs of life." *Coger v. Nw. Union Packet Co.*, 37 Iowa 145, 156 (1873).

Given this aim, it seems unlikely that Congress would have wanted courts to borrow from the common

law so as to make it harder to prove section 1981 liability. To the contrary, this Court has long "implied a damages remedy to effectuate the declaration of rights contained in" section 1 of the 1866 Act, *Jett v. Dallas Independent School District*, 491 U.S. 701, 731 (1989), despite no express remedy in the statutory text. And this Court has read section 1981 to authorize a retaliation cause of action—though *not* expressly in the text itself and *not* a background common-law tort principle—in part "for reasons related to the *enforcement* of the express statutory right." *CBOCS West*, 553 U.S. at 452. Thus, it makes little sense that this Court would now import a causation standard that would make it *harder* to enforce the rights that section 1981 protects, given the statute's history and purpose.

Fifth, the *expressio unius* canon, *see Marx v. General Revenue Corp.*, 568 U.S. 371, 381 (2013), counsels against applying but-for causation to section 1981 liability. The Thirty-ninth Congress knew how to expressly refer to common law, because, in the Civil Rights Act of 1866, it did just that. At the same time it wrote what is now section 1981(a), *see* § 1, 14 Stat. 27, Congress also provided, in section 3 of that Act, "federal jurisdiction to hear, among other things, civil actions brought to enforce § 1" of the Act, *Moor v. Alameda County*, 411 U.S. 693, 705 (1973), and further provided that in "all cases" where federal laws are unsuited or

> deficient in the provisions necessary to furnish suitable remedies . . . , *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. . . .

§ 3, 14 Stat. 27, codified as amended at 42 U.S.C. § 1988(a) (emphasis added). In this way, the Thirty-ninth Congress let federal courts borrow to some limited extent from state common law to "furnish suitable remedies" in civil cases so long as "federal law is unsuited or insufficient," thus "complement[ing] the various acts which do create federal causes of action for the violation of federal civil rights," *Moor*, 411 U.S. at 702 & n.14, 703 (citing, *inter alia*, §§ 1981, 1982).

Congress, however, did *not* expressly refer to common law when declaring, in section 1 of the same Act, its protection for all persons to enjoy the "same" enumerated rights "as is enjoyed by white citizens." 42 U.S.C. § 1981(a). That Congress could have but did not do so implies that Congress did not intend courts to be tied to common law principles when deciding when section 1981 had been violated. That inference is stronger still, given how Congress had *already* referred expressly to "common law" in various federal statutes.[4]

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[4] *See*, *e.g.*, Act of June 22, 1860, ch. 179, § 4, 12 Stat. 72, 73 (extending "common law" to execute treaty obligations where federal law is unsuited or deficient in providing remedies); Act of June 19, 1860, ch. 158, § 8 (providing, for divorces in District of Columbia, that "legitimacy of issue" of persons divorced for a

Accordingly, the *expressio unius* canon counsels against relying on common law to restrict the scope of section 1981 liability.

## II. Textbook Tort Doctrine on Factual Causation Includes More Than Just But-for Cause.

Even if the Thirty-ninth Congress intended section 1981 to incorporate by reference common-law tort doctrine's evolving understandings of causation, that doctrine is more than just the but-for cause test. Instead, that doctrine consists of a bundle of causal standards and accompanying rules for when to apply them. These other causal standards cover cases (1) where an injury has multiple, sufficient causes; or (2) that justify shifting or changing the burden of proof on factual causation.

Accordingly, if Congress intended section 1981 to borrow from textbook tort common law, this Court must assume that Congress intended to incorporate *all* that doctrine, not just one piece of it. As this Court has explained:

> [T]he availability of alternative causal standards where circumstances warrant is, no less than the but-for test itself as a default, part of the background legal tradition against which Congress has legislated.

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cause not specifically authorized "shall be tried and determined, according to the course of the common law").

*Paroline*, 572 U.S. at 458 (internal citation omitted). If a court wants to apply textbook tort law, it has two choices, both of which try to ameliorate the widely known problems with but-for cause. It can use but-for cause, along with a host of other supporting causation doctrines, such as consideration of multiple, sufficient causes or shifting burdens of proof where appropriate. Or, it can choose the motivating factor standard, along with appropriate remedial principles. Importantly, adopting but-for cause alone does not mimic the common law.

First, tort law recognizes that a but-for test should not apply in multiple, sufficient cause cases, *i.e.*, where there are at least two concurrent yet independent causes of an injury (one of which is the defendant's wrongful conduct) and each cause, if occurring alone, would still have led to the injury. *Cf. Burrage v. United States*, 571 U.S. 204, 214-15 (2014) (refusing to "accept or reject" whether the statutory phrase "resulting from" in federal drug statute applies in cases of multiple, sufficient causes).

To illustrate the problem, suppose Person A negligently starts a fire that races toward a house. A lightning strike then starts a second fire on the other side of the house; both fires reach the house at the same time, burning it down. In such a case, Person A's negligent conduct is not the but-for cause of the damage to the house. Had Person A not started the fire, the house would have burned down anyway. *See* Dan B. Dobbs et al., THE LAW OF TORTS § 189 (2d ed. 2019) (citing

*Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry.*, 146 Minn. 430 (1920)).

Accordingly, the drafters of the *Restatement of Torts* recognized that the plaintiff should not be required to prove but-for cause when multiple, sufficient causes exist, but instead just that the defendant's conduct was a sufficient cause of the injury. *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 27 & Reporters' Note (2010); *Restatement (Second) of Torts* § 432(2) (1965); *see also Bostic v. Georgia-Pac. Corp.*, 439 S.W.3d 332, 344 (Tex. 2014) (discussing causal frameworks); Dobbs, *supra*, at § 189 ("It would be a windfall to the negligent defendants if they were to escape liability for the harm merely because another tortfeasor's negligence was also sufficient to cause the same harm."). This Court also has recognized that but-for cause is not appropriate in multiple, sufficient cause cases. *Paroline*, 572 U.S. at 451; *Nassar*, 570 U.S. at 347 (citing *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 27, and cmt. b (2010)).

Second, textbook tort doctrine recognizes that courts may shift or change the burdens of proof on causation when multiple actors act wrongfully, only one harms the plaintiff, and it is atypically or unduly difficult for the plaintiff to prove *which* of them harmed the plaintiff. *E.g.*, *Restatement (Second), supra*, at § 433B(3); *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 28(b); *Summers v. Tice*, 199 P.2d 1, 3 (Cal. 1948); *Sindell v. Abbott Laboratories*, 607 P.2d 924, 928 (Cal. 1980) (market share liability); *see also*

*Price Waterhouse v. Hopkins*, 490 U.S. 228, 263 (1989) (O'Connor, J., concurring in the judgment) (acknowledging tort law "has long recognized that in certain 'civil cases' leaving the burden of persuasion on the plaintiff to prove 'but-for' causation would be both unfair and destructive of the deterrent purposes embodied in the concept of duty of care").

For example, in *Summers v. Tice*, 199 P.2d 1, 3 (Cal. 1948), two quail hunters—each armed with a twelve-gauge shotgun—negligently shot toward the plaintiff at about the same time. One shot struck plaintiff in the upper lip. The other shot, which struck him in the right eye, "was the major factor in assessing damages," and it could have only come from the gun of either one or the other defendant, not both. Though both defendants had breached a duty of care, if the plaintiff bore the burden of proving *which* of the defendants caused his eye injury, that burden would be too hard to meet, and therefore plaintiff would not recover for his injuries. Accordingly, the court shifted the burden of proving causation to the defendants. *See id.* at 3-4.

Thus, one way to apply tort common law to a statute is to adopt but-for cause and all of the other causation doctrines that address its known deficiencies. Together, these doctrines form the common law doctrine of causation.

Another option is to pair a motivating-factor standard with a same-action damages defense so as to vindicate a person's section 1981 rights without overcompensating plaintiffs. For example, in *Edwards v.*

*Jewish Hosp. of St. Louis*, 855 F.2d 1345 (8th Cir. 1988), the court held that a plaintiff could establish section 1981 liability by showing that race was a "substantial or motivating factor" in his or her discharge, *id.* at 1349, but that the defendant-employer could avoid reinstatement or back pay by showing that it would have fired the plaintiff "even if race had not been a motivating factor." *Id.* This defense "prevents an employee from being placed in a better position as a result of his race than he would otherwise occupy." *Id*. Relying in part on the common-law practice of awarding nominal damages for deprivations of "absolute" rights that should be "scrupulously observed" even if a plaintiff cannot prove how such deprivation caused her any actual injury, *id.* at 1350 (quoting *Carey v. Piphus*, 435 U.S. 274, 266 (1978)), the court observed that "the right to be free from intentional racial employment discrimination [under section 1981] is absolute in the same sense," *id.*

Indeed, several circuits had adopted the same approach under Title VII, even before 1991, when Congress codified the rule by adding 42 U.S.C. § 2000e-5(g).[5] *See also Harris v. City of Santa Monica*, 294 P.3d

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[5] *See*, *e.g.*, *Fadhl v. City & Cnty. of San Francisco*, 741 F.2d 1163, 1166-67 (9th Cir. 1984); *Patterson v. Greenwood Sch. Dist.* 50, 696 F.2d 293, 295 (4th Cir. 1982); *Day v. Mathews*, 530 F.2d 1083, 1085 (D.C. Cir. 1976); *King v. Laborers Int'l Union of N. Am.*, 443 F.2d 273, 278-79 (6th Cir. 1971). Congress added § 2000e-5(g) in response to a same-action defense to Title VII *liability* announced in *Price Waterhouse v. Hopkins*, 490 U.S. 22 (1989), *see Desert Palace v. Costa*, 539 U.S. 90, 94 (2003), and thus it has no relevance to the scope of section 1981 liability.

49, 66-67 (Cal. 2013) (recognizing "substantial motivating factor" liability under State employment discrimination for discriminatory firing, but precluding remedies of reinstatement, back pay, and noneconomic damages if defendant proves same-action defense); *cf. Paroline*, 572 U.S. at 458 (interpreting statute to require restitution in an amount that "comports with the defendant's relative role in the causal process that underlies the victim's general losses").

Applying but-for cause as a stand-alone causation doctrine does not mimic the common law. Instead, it would require plaintiffs to prove more than the common law requires. Requiring the plaintiff to establish but-for cause to prevail on a section 1981 claim would also create the odd result that race discrimination claims under section 1981 would have a more constrained causal standard than employment discrimination claims brought under Title VII. 42 U.S.C. § 2000e-2(a). This would be particularly inappropriate since section 1981 and its legislative twin, section 1982, were enacted to universally stamp out the vestiges of slavery and all racial barriers to equal public citizenship for former slaves.

## III. But-for Cause Can Exist Even if Factors Other than Race Played a Role in the Decision.

Even if this Court reads *only* the but-for cause standard into section 1981, that standard does not require proving that *only* race caused the outcome.

Rather, a party can establish but-for cause even where there are many other causal factors, *i.e.*, so long as the defendant's conduct

> combines with other factors to produce the result, so long as the other factors alone would not have done so—if, so to speak, it was the straw that broke the camel's back. Thus, if poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived.

*Burrage*, 571 U.S. at 211. An act can be a necessary condition of harm even when it is one of many acts that were together necessary for the harm to occur. *See McDonald*, 427 U.S. at 282 n.10, *Restatement (Third)*, *supra*, at § 26 cmt. b & c; *see also Restatement (Second)*, *supra*, at § 430, cmt. d.

To illustrate, if a child suffers a seizure after a vaccination, and that seizure would not have occurred absent *both* the vaccination and that child's prior traumatic injury, then the vaccination is still a but-for cause of the seizure. *See Restatement (Second)*, *supra*, at § 430, cmt. c; *see also id.* § 433B, illus. 5. An act can also be a cause of an outcome if it accelerates "an outcome that otherwise would have occurred at a later time." *Restatement (Third)*, *supra*, at § 26 cmt. b.

To illustrate further, suppose that an employer considers firing an employee for chronic tardiness, and soon thereafter learns that the employee is pregnant.

Then, the employer fires her. Even if the employer would not have fired her for tardiness alone or pregnancy alone, but instead her pregnancy combined with the tardiness to produce the firing, then her pregnancy was a but-for cause of her termination. But for her pregnancy, she would not have been terminated. *Cf. Jones v. Oklahoma City Pub. Sch.*, 617 F.3d 1273, 1277 (10th Cir. 2010) (but-for causal standard, read by *Gross* into ADEA, "does not require plaintiffs to show that age was the sole motivating factor in the employment decision"; employer liable under ADEA even "if other factors contributed to its taking an adverse action, as long as age was the factor that made a difference") (internal citations omitted).

Unfortunately, some courts err by equating but-for cause with sole cause,[6] *cf. Price Waterhouse*, 490 U.S. at 241 & n.7 (explaining the difference). Other courts correctly state that but-for cause does not mean sole cause, but then misapply but-for cause when multiple people are involved in an adverse action or when both legitimate and discriminatory reasons combine to produce an adverse outcome,[7] *see Leal v. McHugh*, 731

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[6] *See*, *e.g.*, *Rattigan v. Holder*, 982 F. Supp. 2d 69, 81 (D.D.C. 2013), *aff'd*, 780 F.3d 413 (D.C. Cir. 2015); *Hendon v. Kamtek, Inc.*, 117 F. Supp. 3d 1325, 1330 (N.D. Ala. 2015); *Montgomery v. Bd. of Trustees of the Univ. of Alabama*, No. 2:12-CV-2148-WMA, 2015 WL 1893471, at *4 (N.D. Ala. Apr. 27, 2015).

[7] *E.g.*, *Saunders v. McMahon*, 300 F. Supp. 3d 211, 231 (D.D.C. 2018); *Shumate v. Selma City Bd. of Educ.*, No. CIV. 11-00078-CG-M, 2013 WL 5758699, at *2 (S.D. Ala. Oct. 24, 2013), *aff'd*, 581 F. App'x 740 (11th Cir. 2014); *see also U.S. ex rel. Schweizer v. Oce N. Am.*, 956 F. Supp. 2d 1, 13 (D.D.C. 2013) (in

F.3d 405, 415 (5th Cir. 2013) (discussing erroneous inference from "mixed motive" standard that a plaintiff cannot prove but-for cause in all multiple cause cases). In fact, "[n]o modification of the but-for standard is necessary or appropriate to account for the multiple causes in every causal set." *Restatement (Third)*, *supra*, at § 26 cmt. i. Thus, if this Court reads but-for cause into section 1981, it should at least take pains to make clear to the lower courts that but-for cause does not mean sole cause and that plaintiffs may prevail on a but-for cause standard in many multiple cause cases.

Similarly, dismissals of section 1981 claims at the pleading stage for failure to state a claim on causation grounds should rarely be appropriate. FED.R.CIV.P. 12(b)(6). In most cases, the plaintiff's complaint will plausibly plead but-for cause. Even in cases involving multiple causes, the procedural posture of the case will make it inappropriate for a judge to determine the relative role played by each causal factor. *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508 & n.1 (2002) (court "must accept as true all of the factual allegations contained in the complaint"); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (same). Even if the Court adopts but-for cause, dismissal of this case is not appropriate.

False Claims Act case); Leora F. Eisenstadt, *Causation in Context*, 36 BERKELEY J. EMP. & LAB. L. 1, 22 (2015).

## CONCLUSION

For these reasons, the Court should affirm the decision below.

Respectfully submitted,

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