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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This case presents an important but narrow question: whether "a claim of race discrimination under 42 U.S.C. § 1981 fail[s] in the absence of but-for causation." Pet. i. Departing from this Court's cases, the Ninth Circuit held below that the "but-for causation standard" does not apply to Section 1981 claims for racial discrimination in contracting, and that liability arises if "discriminatory intent was a factor in—and not necessarily the but-for cause of—a defendant's refusal to contract." Pet. App. 21a.

As demonstrated in Comcast's opening brief, that decision cannot be reconciled with this Court's repeated holdings that but-for causation "is the background against which Congress legislate[s]," and thus provides "the default rule[] it is presumed to have incorporated, absent an indication to the contrary in the statute itself." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 347 (2013). Far from providing an "indication to the contrary," Section 1981 confirms this default rule of but-for causation. To begin with, the Ninth Circuit anachronistically ascribed to the 1866 Congress that enacted Section 1981 an intent to incorporate into the statute a lenient causation standard no one ever thought of using until the mid-Twentieth Century.

As a textual matter, a plaintiff has not been denied "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens," 42 U.S.C. § 1981(a), if the same contracting decision would have been made had the plaintiff been white. That logic makes but-for causation an essential element, while properly ensuring full redress whenever a person is denied opportunities because of race. In the end, even Plaintiffs are

forced to admit that a Section 1981 claim fails on the merits if "the same decision would have been made regardless of the plaintiff's race." Resp. Br. 49 (citation and quotation marks omitted).

Unable to meaningfully defend the decision below, Plaintiffs lead the Court on a convoluted detour through inapposite caselaw. On Plaintiffs' telling, the fact that a Section 1981 claim fails in the absence of but-for causation is irrelevant because an entirely *different* causation standard—a "motivating factor" burden-shifting standard—supposedly applies at the pleading stage under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

Plaintiffs are playing a shell game. The *McDonnell Douglas/Burdine* doctrine has nothing to do with the standard Plaintiffs urge and has zero relevance here. The true source of the "motivating factor" standard invoked by Plaintiffs is the plurality opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which concluded that where both legitimate and illegitimate reasons allegedly contributed to a challenged action, a Title VII plaintiff need only show that the illegitimate reason was a motivating factor in order to shift the burden to the defendant to prove it would have made the same decision absent that consideration. But crucially, Congress rejected that approach in the Civil Rights Act of 1991, replacing it with a modified burden-shifting framework that it applied only to certain Title VII claims (for which it made damages unavailable), and which it did not extend to Section 1981. For all other claims not specifically addressed by the 1991 Act, "there is no reason to think that the different bal-

ance articulated by *Price Waterhouse* somehow survived that legislation's passage." *Nassar*, 570 U.S. at 362.

With *Price Waterhouse* unavailable to them, Plaintiffs attempt to repackage the *Price Waterhouse* plurality's "motivating factor" rule under the guise of *McDonnell Douglas*—a case they did not even *cite* in urging that rule on the Ninth Circuit. But nothing in *McDonnell Douglas* supports a "motivating factor" causation standard, whether at the pleading stage or otherwise. The *McDonnell Douglas* framework originated in Title VII cases as a way to determine whether a defendant acted with a *single* discriminatory motive; it permits an inference of discrimination in some employment cases in which the plaintiff excludes the other likely explanations for the defendant's conduct. It says nothing about alleged "mixed motive" cases. A majority of Justices in *Price Waterhouse* recognized precisely that.

When the operative complaint is viewed under the but-for causation lens that Section 1981 and this Court's cases require, it is clear that nothing Plaintiffs alleged suggests that race was the cause of Comcast's decision not to contract. As the FCC has recognized, cable operators receive many more demands for carriage than they could possibly accept. *See In re Herring Broad., Inc.*, 24 FCC Rcd. 12967, 12999 (2009). The complaint itself acknowledges at least three race-neutral reasons for Comcast's carriage decision, Pet. App. 50a–54a, and concedes that Comcast carries other African American–owned networks, and even one 100% African American–owned network, *id.* at 44a—the racial category Plaintiffs invented for this lawsuit.

In addition, the complaint is predicated on outlandish allegations, which Plaintiffs now pretend do not exist. It alleges an utterly implausible scheme among "governmental regulators," civil-rights organizations, and "[w]hite-owned media in general—and Comcast in particular" designed "to perpetuate the exclusion of truly African American–owned media from contracting for channel carriage and advertising." Pet. App. 54a; *see also id.* at 55a–58a. These allegations are *all* in Plaintiffs' operative complaint, contrary to Plaintiffs' claim that Comcast is dwelling on "allegations in earlier complaints." Resp. Br. 1 n.1. In fact, it is Plaintiffs who urge this Court to rely on allegations that were "dropped in amending the Complaint." *Id.* at 5 n.2.

Racial discrimination is a serious problem, and it deserves serious solutions. Comcast has been a leader in aggressively pursuing such solutions. But a watered-down pleading standard for Section 1981 claims will do nothing to address actual racial discrimination. Instead, it will permit frivolous suits such as this one to proceed in the federal courts and open the doors to burdensome discovery demands by plaintiffs who have suffered no deprivation on account of their race, while delaying justice for citizens with meritorious grievances.

This Court should reverse the judgment of the Ninth Circuit and hold that the district court properly dismissed this action with prejudice.

I. THERE IS NO SUPPORT FOR APPLYING A "MOTIVATING FACTOR" PLEADING STANDARD TO SECTION 1981 CLAIMS.

Plaintiffs have made a critical concession by acknowledging that a Section 1981 claim fails on the

merits if "the same decision would have been made regardless of the plaintiff's race," because in that scenario "the plaintiff has, in effect, enjoyed 'the same right' as similarly situated persons." Resp. Br. 49 (quoting *Brown v. J. Kaz, Inc.*, 581 F.3d 175, 182 n.5 (3d Cir. 2009)) (quotation marks omitted). In other words, Plaintiffs ultimately concede that the statutory term "the same right" embodies the same but-for causation standard for liability as the "default rule" required by this Court's cases. This concession cannot be reconciled with the Ninth Circuit's holding that "[i]f discriminatory intent plays *any* role in a defendant's decision not to contract with a plaintiff, even if it is merely one factor and not the sole cause of the decision, then that plaintiff has not enjoyed the *same right* as a white citizen." Pet. App. 21a (emphases in original).

In the face of this tension, Plaintiffs argue that at the *pleading* stage an entirely different rule applies. According to Plaintiffs, "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." Resp. Br. 12 (emphasis added). If a plaintiff makes such an allegation, that supposedly "shift[s] the burden of production to the defendant to show that there was a legitimate, nondiscriminatory reason for its decision." *Id.* at 17.

Plaintiffs purport to draw this "'motivating factor' pleading burden" from "the prima facie standard" under the burden-shifting framework articulated in *McDonnell Douglas*. Resp. Br. 21. But that evidentiary framework has nothing to do with a "motivating factor" causation standard. In fact, because the *McDonnell Douglas* framework is premised on the existence of only a single motive, courts have declined to

apply it in mixed-motive cases like the one alleged in Plaintiffs' operative complaint. Finally, this Court has never applied *McDonnell Douglas* beyond the employment setting in which it arose.

A. *McDonnell Douglas* Says Nothing About "Motivating Factor" Causation.

Plaintiffs alleged in the operative complaint that Comcast had both permissible and impermissible reasons for refusing to contract with ESN. Pet. App. 3a–4a. Taking Plaintiffs' allegations as true, the only question is whether the impermissible reasons alleged in the complaint were the legal cause of the contracting decision.

Price Waterhouse adopted a burden-shifting framework for evaluating causation in mixed-motive cases under Title VII. The question before the Court related to "the respective burdens of proof . . . when it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives." 490 U.S. at 232. The plaintiff contended that "an employer violates [Title VII] whenever it allows [a protected] attribute[] to play any part in an employment decision." *Id.* at 238. The defendant, by contrast, argued that "even if a plaintiff shows that [a protected characteristic] played a part in an employment decision, it is still her burden to show that the decision would have been different if the employer had not discriminated." *Id.* at 237–38.

In a fractured decision, a four-Justice plurality endorsed a framework under which the plaintiff bears the burden of "show[ing] that [a protected characteristic] played a motivating part in an employment decision," at which point "the defendant may avoid a finding of liability . . . by proving that it would have

made the same decision even if it had not allowed [the protected characteristic] to play such a role." 490 U.S. at 244–45 (plurality op.).[1]

The burden-shifting framework that Plaintiffs say applies in this case is remarkably similar to the *Price Waterhouse* plurality's framework. The only distinction between it and the regime advocated by Plaintiffs is that *Price Waterhouse* shifts the burden of *persuasion*, whereas Plaintiffs appear to endorse shifting the burden of *production* (although they equivocate even on this point). *Compare* Resp. Br. 14 (noting that "the burden shifts to the defendant to *submit evidence* that it was motivated by race-neutral reasons" (emphasis added)), *with id.* at 49 ("'[I]f 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.'" (emphasis added)).[2]

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[1] Two other Justices advocated a more rigorous standard. 490 U.S. at 259 (White, J., concurring in the judgment) (concluding that a plaintiff must prove that an "unlawful motive was a *substantial* factor" (emphasis in original)); *id.* at 276 (O'Connor, J., concurring in the judgment) (concluding that a plaintiff "must show by direct evidence that an illegitimate criterion was a substantial factor").

[2] Plaintiffs also argue that "to the extent there is any difference in these burden shifting frameworks, such differences will only matter at a later stage" because "there are no shifting burdens of production or persuasion that apply on a Rule 12(b)(6) motion to dismiss." Resp. Br. 22. Plaintiffs are mistaken. If only the burden of production shifts, Plaintiffs still bear the burden of proving—and thus plausibly *alleging*—but-for causation. *See Lujan v. Defrs. of Wildlife*, 504 U.S. 555, 561 (1992). Plaintiffs elide this distinction when they suggest that "the United States . . . acknowledges that if 'burden shifting were appropriate here, the court of appeals' judgment [below] would therefore be correct.'" Resp. Br. 11 (alteration in original). The United States

Given that they are channeling its burden-shifting framework, it is telling that Plaintiffs do not cite *Price Waterhouse* as authority for their "motivating factor" pleading standard. This omission is even more glaring given that Plaintiffs relied on *Price Waterhouse* in the Ninth Circuit to support this argument. *See* No. 16-56479 (9th Cir.), Dkt. 18 at 45–46; *id.*, Dkt. 32 at 13–16.

The reason Plaintiffs avoid calling their view of the law what it really is—*Price Waterhouse* burden-shifting—is that *Price Waterhouse* has been superseded. Shortly after the Court decided *Price Waterhouse*, Congress amended Title VII and "substituted a new burden-shifting framework for the one endorsed by *Price Waterhouse*." *Nassar*, 570 U.S. at 349. But Congress did not extend that new framework to Section 1981, even though it amended Section 1981 in other ways. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. And this Court has in recent years declined to apply *Price Waterhouse* to other discrimination statutes because "the problems associated with its application have eliminated any perceivable benefit to extending its framework." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 179 (2009).

This leaves Plaintiffs with no option but to dress up their invocation of *Price Waterhouse* in the clothes of *McDonnell Douglas* burden-shifting. But the *McDonnell Douglas* burden-shifting framework has nothing to do with what Plaintiffs propose. It is designed for an entirely different purpose: to "identify[] the presence of an illicit reason" in the absence of any

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made this observation with respect to "*Price Waterhouse*-style burden shifting," which shifts the burden of *persuasion,* such that "the lack of but-for causation is effectively an affirmative defense." U.S. Br. 29.

proffered non-discriminatory explanation for the challenged action. *Wilkie v. Robbins*, 551 U.S. 537, 556 (2007). And once an "illicit reason" is identified, *McDonnell Douglas* does not purport to endorse Plaintiffs' preferred "motivating factor" causation standard; rather, it presumes that in the absence of any non-discriminatory explanation, the "illicit reason" was the *sole cause* of the challenged action.

In *McDonnell Douglas*, the plaintiff had protested his layoff by participating in an illegal "stall in" and "lock in." 411 U.S. at 794–95. When the plaintiff reapplied for work, the employer rejected his application. *Id.* at 796. The plaintiff sued under Title VII, alleging that the employer's action was motivated by race; the employer, on the other hand, argued that it refused to re-hire the plaintiff because of his illegal activities. *Id.*

The Court articulated a burden-shifting framework for inferring discrimination after "eliminat[ing] the most common nondiscriminatory reasons for" adverse employment actions. *Burdine*, 450 U.S. at 254. A plaintiff must first "establish[] a prima facie case of racial discrimination," such as "by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of [the plaintiff's] qualifications." *McDonnell Douglas*, 411 U.S. at 802. The burden then "shift[s] to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* If the employer carries this burden of production, "the presumption raised by the

prima facie case is rebutted" and disappears from the case. *Burdine*, 450 U.S. at 255.

Plaintiffs contend that under *McDonnell Douglas*, "it is enough to allege and present a prima facie case that race was a motivating factor in the refusal to contract." Resp. Br. 13–14. If anything, *McDonnell Douglas* points in the opposite direction. The rationale for the *McDonnell Douglas* framework is that "when all legitimate reasons for rejecting an applicant have been eliminated," it logically follows that the defendant "*based his decision on* an impermissible consideration such as race." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (emphasis added). In other words, *McDonnell Douglas* assumes but-for causation because it "eliminates the most common nondiscriminatory reasons for the plaintiff's rejection," leaving an inference that a discriminatory motive was the *sole reason* for the action. *Burdine*, 450 U.S. at 254. As Professor Malamud has noted, "the McDonnell Douglas-Burdine proof structure is not satisfied by mere proof that discrimination played a role in a challenged employment decision." Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 Mich. L. Rev. 2229, 2259 (1995).

It is for that reason that a majority of Justices in *Price Waterhouse* agreed that *McDonnell Douglas* did not answer the question of causation presented in a case, such as this one, that involves purportedly mixed motives. As Justice White explained, "[i]n pretext cases, 'the issue is whether either legal or illegal motives, but not both, were the "true" motives behind the decision,'" whereas "[i]n mixed-motives cases . . . there is no one 'true' motive behind the decision." *Price Waterhouse*, 490 U.S. at 260 (White, J., concurring in the judgment). As a result, "'mixed-motives'

cases . . . are different from pretext cases such as *McDonnell Douglas* and *Burdine*." *Id.* Justice Brennan made the same point for the four-Justice plurality: "Where a decision was the product of a mixture of legitimate and illegitimate motives . . . it simply makes no sense to ask whether the legitimate reason was '*the* "true reason"' for the decision—which is the question asked by *Burdine*." *Id.* at 247 (plurality op.) (emphasis in original).

Not surprisingly, the courts of appeals have declined to apply *McDonnell Douglas* burden-shifting in mixed-motive cases. *See, e.g.*, *Quigg v. Thomas County Sch. Dist.*, 814 F.3d 1227, 1237 (11th Cir. 2016) ("This [*McDonnell Douglas*] framework is fatally inconsistent with the mixed-motive theory of discrimination because the framework is predicated on proof of a single, 'true reason' for an adverse action."); *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 400 (6th Cir. 2008) ("[T]he *McDonnell Douglas/Burdine* burden-shifting framework does *not* apply to the summary judgment analysis of Title VII mixed-motive claims" (emphasis in original)).

Whatever value *McDonnell Douglas* may have to Section 1981 claims, it provides no support for Plaintiffs' "motivating factor" pleading standard.

B. *Patterson*'s Application Of *McDonnell Douglas* Has No Relevance Here.

Plaintiffs relatedly argue that a "motivating factor" pleading standard applies to Section 1981 claims because *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), held that *McDonnell Douglas* burden-shifting applied to the Section 1981 claim at issue there. Resp. Br. 18–26. This new argument, which

was never advanced below, fails at the threshold because, as just explained, *McDonnell Douglas* does not adopt a "motivating factor" pleading standard.

But in all events, Plaintiffs' argument proceeds from another erroneous premise: that *McDonnell Douglas* should be extended outside the employment context in which it arose. This Court has never applied the *McDonnell Douglas* burden-shifting framework beyond employment-discrimination cases—and for good reason, as the four elements of its prima facie case do not easily map onto the myriad types of contracting scenarios that Section 1981 covers. For example, in many commercial relationships, including the one here, there is no analog to the "job" for which a party is seeking a "candidate" with specified "qualifications." And notably, the Court in *Patterson*, which was an employment case, was careful to emphasize that "the *McDonnell Douglas*/*Burdine* scheme of proof should apply in § 1981 cases *such as this one*." 491 U.S. at 186 (emphasis added).

Whether *McDonnell Douglas* should be extended to non-employment cases is an important question, but one that is far beyond the scope of the question presented here, particularly given that the proper scope of *McDonnell Douglas* was never argued by Plaintiffs below, nor was it passed on by the Ninth Circuit. The Court should therefore not reach this issue, which has no relevance to the causation standard for Section 1981 claims.

II. SECTION 1981 REQUIRES THAT A PLAINTIFF PLEAD AND PROVE BUT-FOR CAUSATION.

Plaintiffs dwell on the *McDonnell Douglas* red herring because it is apparent that but-for causation is an essential element of a Section 1981 claim. The

Court has made clear that but-for causation is the default standard for statutory causes of action, and Section 1981's text, structure, history, and purpose all confirm that this default rule governs here.

A. But-For Causation Is The Default Rule For Statutory Tort Claims.

This Court held in *Nassar* that but-for causation "is the background against which Congress legislate[s]," providing "the default rule[] it is presumed to have incorporated, absent an indication to the contrary in the statute itself." 570 U.S. at 347. Plaintiffs do not acknowledge this default rule anywhere in their brief. Instead, they attempt to distinguish *Nassar* on the ground that the statute in that case used the words "because of." Resp. Br. 31–34. But nothing in the Court's decision suggests that the presumption in favor of but-for causation applies *only* when terms like "because of"—which themselves require but-for causation—are used in a statute. That would not be much of a default rule. And any such reading of *Nassar* is precluded by its explicit endorsement of a "default rule[]" in favor of but-for causation. 570 U.S. at 347.

In any event, this Court has repeatedly described Section 1981 as providing relief where a plaintiff has been discriminated against "because of" race. *See* Petr. Br. 35–36. Plaintiffs attempt to minimize these cases on the ground that they did not "consider[] whether but-for causation is *required* under section 1981," Resp. Br. 33–34 (emphasis added), but surely they carry weight in defining the contours of Section 1981 given that the statute's private cause of action has been judicially implied, *see Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 720 (1989).

B. The Text Of Section 1981 Requires But-For Causation.

Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a).

Plaintiffs' textual argument emphasizes that the word "same" means "identical." Resp. Br. 29–30. But as the United States rightly observes, "the key textual question" is "the same right *to what?*" U.S. Br. 19 (emphasis in original). Section 1981 makes the answer clear: All persons must be afforded the same right as white persons to enter a contract. If a Section 1981 defendant would have declined to contract with the plaintiff even if the plaintiff were white, it cannot plausibly be said that the plaintiff did not enjoy the "same right" to make contracts as a white citizen.

Plaintiffs nonetheless assert that, because Congress in 1991 "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,'" Resp. Br. 30 (quoting 42 U.S.C. § 1981(b)) (emphasis in original), Section 1981 "also applies to the *process* of forming a contract, which would include contract negotiations and pre-conditions to contracting," *id.* (emphasis in original). This argument fails for two reasons.

First, it is inconsistent with the amendment's text and history, both of which confirm that the 1991 amendment merely extended Section 1981 to *post*-contract formation conduct. As this Court has explained, "in 1991, Congress enacted legislation that

superseded *Patterson* and explicitly defined the scope of § 1981 to include post-contract-formation conduct." *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 451 (2008). The term "making . . . of contracts" necessarily relates to the actual decision whether to *form* a contract. And even if there were some ambiguity, all of the other terms in the amendment involve post-formation conduct, such that the term "making . . . of contracts" must take its meaning from these other statutory terms under the *noscitur a sociis* canon of statutory interpretation. *See Yates v. United States*, 135 S. Ct. 1074, 1085 (2015).

Second, this argument has nothing to do with *causation*, but instead goes to the class of *injuries* cognizable under Section 1981. This same confusion of cause and injury infects the arguments of amici supporting Plaintiffs. *See* Torts Scholars' Br. 3–4 (claiming that the common law "presumption of damage eliminated the need to establish the defendant's wrong caused the plaintiff any actual damage"). A guarantee of the *same* contracting process could only be violated if consideration of race actually led to a *different* contracting process. If the contracting process would have played out the same irrespective of race, as would be true in the absence of but-for causation, then it could hardly be said that there had been any infringement of the "same right" to the process of forming a contract.

The text of Section 1981 thus confirms the default rule announced in *Nassar*: If a Section 1981 defendant would have made the same contracting decision

had the plaintiff been white, the plaintiff has enjoyed the "same right" to make contracts as a white citizen.[3]

C. Other Indicia Of Statutory Meaning Confirm That Section 1981 Requires But-For Causation.

The structure, history, and purpose of Section 1981 confirm that but-for causation is an essential element of a claim of racial discrimination in contracting. Plaintiffs' arguments to the contrary only demonstrate the tenuous nature of their position.

The Civil Rights Act of 1866, from which Section 1981 originates, expressly requires but-for causation for the sole, criminal cause of action it created. Civil Rights Act of 1866 § 2, 14 Stat. 27 (penalizing the "deprivation of any right secured or protected by this act . . . *by reason of* [a person's] color or race" (emphasis added)). Plaintiffs concede this, but argue that it merely shows "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." Resp. Br. 35. But Congress did *not* "use broader language" in Section 1981. In fact, it did not use *any language at all* respecting a private cause of action under Section 1981, which has instead been implied by the courts. *See Jett*, 491 U.S. at 720.

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[3] Plaintiffs cite *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338 (2015), for the proposition that, "[i]n interpreting other statutes that use the word 'same,' this Court has rejected but-for causation and approved the use of a burden shifting framework." Resp. Br. 29. But like *McDonnell Douglas*, *Young* did not deal with causation in mixed-motive cases; it addressed only whether and when a court could infer a discriminatory motive relating to the treatment of pregnant workers. *See* 135 S. Ct. at 1353–54.

Second, Congress first enacted Section 1981 against the background of common-law tort law, where "[c]ausation in fact . . . is a standard requirement." *Nassar*, 570 U.S. at 346. As legal scholars have recognized, "[t]he 'but for' requirement is generally one of the indispensable elements to make out a legal cause." Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 Harv. L. Rev. 103, 109 (1911). Contrary to Plaintiffs' assertions, Resp. Br. 42 n.8, this requirement stretches far back into the 19th century: "The 'but-for' test emerged unchallenged from the mists of time, entering the twentieth century as the only widely accepted judicial test of factual cause." John D. Rue, *Returning to the Roots of the Bramble Bush: The 'But For' Test Regains Primacy in Causal Analysis in the American Law Institute's Proposed Restatement (Third) of Torts*, 71 Fordham L. Rev. 2679, 2684 (2003).

Plaintiffs attempt to sidestep this authority by drawing a distinction between negligence and intentional torts, Resp. Br. 41, but their authorities do not support this distinction. Plaintiffs cite Professor White for their contention that "[t]here were no general rules on factual causation in intentional tort cases in the mid-19th century" because causation supposedly was not "at issue in 'intentional tort cases or cases where an act-at-peril standard of liability governed.'" *Id.* But the causation that was "not 'at issue'" was *proximate* causation. *See* G. Edward White, *Tort Law in America: An Intellectual History* 314 (1980). Professor White makes clear that causation was still indispensable to liability for intentional torts, explaining that "[i]n intentional torts cases or cases where an act-at-peril standard of liability governed, issues of causation . . . were typically confined to what came to be called 'factual causation' questions." *Id.*; *see also*

id. at 226 (describing "the traditional 'but for' test for factual causation").

Plaintiffs cite only two cases to support their conception of the mid-19th century common law, Resp. Br. 43, but neither has anything to do with causation; rather, they discuss a category of common-law torts that did not require proof of monetary *damages*. In *Webb v. Portland Manufacturing Co.*, 29 F. Cas. 506 (D. Me. 1838), the court held that a plaintiff could prevail on a claim for wrongful diversion of his water supply without proving damages, because "every injury imports damage in the nature of it; and, if no other damage is established, the party injured is entitled to a verdict for nominal damages." *Id.* at 507. Similarly, in *Ashby v. White*, 92 Eng. Rep. 126 (1703), the court held that "an injury imports a damage, when a man is thereby hindered of his right." *Id.* at 137. That some common-law torts did not require proof of damages has nothing to do with the proper standard of causation under Section 1981, which expressly identifies the injuries cognizable under the statute and makes them actionable only if race was a but-for cause of their occurrence.

Third, a but-for causation rule is consistent with the purpose of Section 1981. As Plaintiffs rightly observe, Section 1981 "remains a critically important civil rights statute to ensure basic civil rights to minority-owned businesses." Resp. Br. 47. But eliminating but-for causation would go beyond the race-neutrality envisioned by Section 1981 and provide individuals a legal claim even if they enjoy the same right to make contracts as if they were white. Such a sweeping rule would allow plaintiffs to evade the carefully crafted regime for addressing workplace discrimination under Title VII. *See* Center for Workplace

Compliance Br. 19–25; Chamber of Commerce Br. 13–15. It would also turn on its head this Court's admonition that "nothing in the text of § 1981 suggests that it was meant to provide an omnibus remedy for *all* racial injustice." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 479 (2006) (emphasis in original).

III. PLAINTIFFS FAILED TO ADEQUATELY ALLEGE BUT-FOR CAUSATION.

Plaintiffs' operative Second Amended Complaint ("SAC") is premised on the contention that Comcast declined to carry ESN's networks as part of a scheme to discriminate against "100% African American–owned media" that involved Comcast, the federal government, the country's most respected civil-rights organizations, and prominent African-Americans. Although Plaintiffs now attempt to distance themselves from these implausible allegations by noting that they dropped their "conspiracy *claim*," Resp. Br. 53 (emphasis added), it is beyond dispute that the *factual allegations* underlying that claim remain in the SAC. Plaintiffs continue to allege that "[w]hite-owned media . . . worked hand-in-hand with governmental regulators to perpetuate the exclusion of truly African American–owned media from contracting for channel carriage and advertising." Pet. App. 54a. They also continue to allege that "Comcast gave monetary 'contributions' to various non-media minority special interest groups in order to 'buy' their support" and "entered into MOUs with these various non-media civil rights groups," which include the NAACP, the Urban League, and the National Action Network. *Id.* at 55a–56a, 77a; *see also* Petr. Br. 11 n.2.

Even if Plaintiffs *had* abandoned their conspiracy theories, what remains of their complaint would still fall far short of plausibly alleging but-for causation.

Like the Ninth Circuit, Plaintiffs attempt to salvage the SAC by rattling off a list of allegations that suggest, at most, that Comcast gave ESN inconsistent information about how to obtain carriage. Resp. Br. 51–53. But nothing about these alleged acts suggests Comcast would have acted any differently had ESN been white-owned. On the contrary, the SAC admits that Comcast had numerous race-neutral reasons for declining to carry ESN's networks, including a preference for sports and news programming and a lack of demand for ESN's offerings. Pet. App. 50a–54a. Plaintiffs also concede that Comcast accepted other African American–owned networks for carriage during the time period covered by the SAC, including one 100% African American–owned network, *id.* at 44a—Plaintiffs' invented-for-this-lawsuit racial category.

With nothing in the SAC to support their claim, Plaintiffs look beyond the operative complaint. In particular, they assert that a Comcast executive stated, "'[w]e're not trying to create any more Bob Johnsons,' the African American former owner of BET." Resp. Br. 53. Comcast denies this statement was ever made, but this is beside the point because Plaintiffs admit that this allegation was "dropped in amending the Complaint," *id.* at 5 n.2, and they themselves concede that "[t]he only relevant pleading for this lawsuit is the Second Amended Complaint," *id.* at 1 n.1. True, Plaintiffs make this concession in urging the Court to disregard their own allegations of an outlandish conspiracy, before opportunistically abandoning this position when it proves an impediment to them. But unlike Plaintiffs' alleged conspiracy, there is not even a hint of this comment in the SAC (or, for that matter, the First Amended Complaint). While Plaintiffs urge the Court to forgive this omission because it was supposedly "inadvertent[]," *id.* at 5 n.2,

there is no doctrine that exempts inadvertent pleading deficiencies from the standard rules of pleading. And it defies credulity to suggest Plaintiffs "inadvertently" omitted from their *two* most recent complaints the single allegation that they now mistakenly contend provides *direct evidence* of discrimination.

Even if Plaintiffs had alleged this supposed one-sentence remark in their SAC, it would hardly give rise to an inference that race was a but-for cause of Comcast's decision not to carry ESN's networks. The statement itself makes no reference to race, and Plaintiffs do not allege who made the comment, when that person supposedly made the comment, or that person's role (if any) in Comcast's decision not to carry ESN's networks. The absence of any relevant context precludes any possible inference that Comcast declined to contract with ESN due to the race of its owner. Indeed, even in *Price Waterhouse* eight Justices agreed that this sort of "stray remark[]" would not remotely suffice to trigger any burden-shifting. 490 U.S. at 251 (plurality op.); *see also id.* at 277 (O'Connor, J., concurring in the judgment); *id.* at 280 (Kennedy, J., dissenting).[4]

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[4] Even if it applied here, Plaintiffs' allegations would be insufficient to shift the burden under *Price Waterhouse*. As Justice O'Connor wrote in her controlling opinion, "in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show *by direct evidence* that an illegitimate criterion was a *substantial factor* in the decision." 490 U.S. at 276 (O'Connor, J., concurring in the judgment) (emphases added). While Congress lessened that burden for the few Title VII claims for which it made burden-shifting available, *see Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98–101 (2003), it also precluded damages in those cases. Thus, Plaintiffs effectively

Unable to defend the sufficiency of the SAC in light of the proper pleading standard, Plaintiffs argue that this Court should not reach that issue because the Court denied certiorari on Comcast's second question presented. Resp. Br. 50. But that question raised a different issue—namely, whether even under the Ninth Circuit's standard the court erred in failing to require Plaintiffs to allege facts "tending to refute [the] obvious innocent explanations" for Comcast's refusal to contract and "showing that the party with whom [Comcast] ultimately contracted was similarly situated." Pet. 25, 28. Whether Plaintiffs have sufficiently alleged but-for causation is a distinct issue that is fully encompassed within the question whether "a claim of race discrimination under 42 U.S.C. § 1981 fail[s] in the absence of but-for causation." Pet. i. Indeed, this Court often assesses the sufficiency of claims after clarifying the governing legal standards. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009).

Despite filing three complaints, Plaintiffs are unable to offer anything more than innuendo and speculation. The Court should bring an end to this meritless case now and reinstate the district court's dismissal of this action with prejudice.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

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seek to construct for Section 1981 a pleading standard that borrows only the most favorable aspects of each of these approaches, none of which applies in the first place.

Respectfully submitted.

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