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

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit properly hold that Respondents alleged sufficient facts to withstand a Rule 12(b)(6) motion to dismiss?

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

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel state that Entertainment Studios Networks, Inc. is a privately owned corporation. It has no parent corporation, and no publicly held corporation owns 10% or more of the stock.

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STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1981(a) provides that: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

INTRODUCTION

This is a case about alleged racial discrimination in contracting in violation of the Civil Rights Act of 1866, codified at 42 U.S.C. § 1981. Respondent Entertainment Studios Networks, Inc. ("Entertainment Studios") is an African American-owned media company that owns and operates television networks.

For over seven years, Entertainment Studios has offered its channels to Petitioner Comcast Corporation ("Comcast") to obtain carriage on its cable distribution platform, but Comcast has steadfastly refused to contract. Comcast told Entertainment Studios that its channels are "good enough" and were on the "short list" for imminent carriage. But for over seven years, Comcast refused to launch *any* of Entertainment Studios' channels, and instead launched more than 80 lesser-known, white-owned channels. Adding insult to injury, Comcast told Entertainment Studios that it lacked

capacity for Entertainment Studios while, at the same time, launching more than 80 other channels.

After years of being passed over for white-owned networks, Entertainment Studios sued Comcast for racial discrimination in contracting in violation of section 1981. The District Court dismissed Entertainment Studios' claim for failing to state a claim upon which relief can be granted, but the Ninth Circuit unanimously reversed. The Ninth Circuit held that Respondents alleged plausible racial discrimination sufficient to withstand a motion to dismiss. The Ninth Circuit held that Respondents adequately alleged that Comcast passed over Entertainment Studios for multiple, lesser-known, white-owned channels and that Comcast told Respondents of methods to secure carriage, only to refuse to contract after Entertainment Studios took those very steps.

Certiorari is not warranted to review whether the Ninth Circuit properly found that Respondents' allegations are sufficient to withstand a motion to dismiss. Respondents do not rely on conclusory allegations or threadbare recitals of the elements of a section 1981 claim. Rather, unlike the plaintiffs in *Iqbal* and *Twombly*, Respondents allege multiple, well-pleaded facts showing that Comcast refused to contract due to racial bias.

In an attempt to create an issue worthy of this Court's review, Comcast argues that the Ninth Circuit applied the wrong causation standard under section 1981. In Comcast's view, a plaintiff cannot state a

claim for racial discrimination under section 1981 even if the allegations show that the defendant was motivated by race. Rather, Comcast argues that a plaintiff must meet a higher pleading burden by alleging that race was the "but-for" cause of the refusal to contract.

As an initial matter, this case is not the right vehicle to address this issue because the District Court did not grant Comcast's Rule 12(b)(6) motion on this basis or even address this issue. The District Court granted Comcast's motion because, in its view, Respondents did not allege a plausible claim. The only issue squarely presented in this case is whether Respondents adequately alleged plausible racial discrimination.

Moreover, Comcast's "but-for" causation argument finds no support in the law. Every circuit court of appeals in the entire country permits plaintiffs to invoke a "motivating factor" causation standard for racial discrimination claims under section 1981. Thus, Comcast is arguing that this Court should *change* the law under section 1981 and, in addition, impose a "but-for" causation standard *at the pleading stage*. But Comcast cites *no decision* of this Court or of any circuit court of appeals requiring a section 1981 plaintiff to allege "but-for" causation to survive a motion to dismiss.

In addition, this case is the wrong vehicle for considering this issue because Respondents have alleged "but-for" causation. In their operative complaint, Respondents identify the purported legitimate business reasons that Comcast told Entertainment Studios, and

allege specific facts showing that Comcast's purported race-neutral reasons are mere pretext. For example, Comcast claimed that it did not have sufficient bandwidth to carry Entertainment Studios' channels, but Comcast launched more than 80 white-owned channels at the same time.

At bottom, Comcast's petition represents nothing more than a request for this Court to review whether the Ninth Circuit properly applied the now well-settled pleading standards announced by this Court in *Iqbal* and *Twombly*. This is not a sufficient reason to grant certiorari.

STATEMENT OF THE CASE

A. The Entertainment Studios Channels

Entertainment Studios is a media company that produces television series, owns and operates multiple television networks (channels), and operates a full-service, motion-picture production and distribution company. Pet. App. 40-41a. Entertainment Studios is solely owned by Byron Allen, an African American comedian, television host and entrepreneur. Pet. App. 41a.

This case is about Entertainment Studios' channels JusticeCentral.TV, Cars.TV, ES.TV, MyDestination.TV, Pets.TV, Comedy.TV and Recipe.TV (the "Entertainment Studios Channels"). Pet. App. 42-43a. The Entertainment Studios Channels are award-winning lifestyle channels with general audience appeal. *Id.*

The Entertainment Studios Channels are carried by major multichannel video programming distributors ("MVPDs"), including Verizon FIOS, AT&T U-verse, DirecTV, Suddenlink, RCN, Centurylink, and many others. Pet. App. 41a.

B. Allegations Of Racial Discrimination

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

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

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

Comcast also told Entertainment Studios that its channels are on the "short list" for imminent carriage, Pet. App. 48a, but that Comcast lacks sufficient bandwidth to carry the channels. Pet. App. 50a. Comcast's explanation does not match up with its conduct, however, because Comcast launched more than 80 networks since 2010, including the lesser-known, white-owned channels Inspirational Network, Baby First Americas, Fit TV (now defunct), Outdoor Channel and Current TV (now defunct). Pet. App. 35a, 50a. As the largest cable distributor with the most state-of-the-art platform, Comcast has bandwidth to carry the Entertainment Studios Channels. Pet. App. 50-51a.

In fact, there are more than 500 channels that are carried by Comcast's major competitors—Verizon FIOS, AT&T U-verse and DirecTV. Pet. App. 53-54a. Comcast carries every single one of those channels, *except* the Entertainment Studios Channels. *Id.*

One Comcast executive candidly told Entertainment Studios why it refused to contract: "We're not trying to create any more Bob Johnsons."[1] Pet. App. 118a. Bob Johnson is the African American founder of Black Entertainment Television ("BET"), a network which targets African American audiences. *Id.*

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[1] The Bob Johnson allegation was inadvertently dropped in amending the Complaint. Respondents realized this mistake in opposing Comcast's motion to dismiss the Second Amended Complaint ("SAC"). Respondents argued in the Ninth Circuit that the district court erred in denying leave to amend, but the Ninth Circuit did not resolve the issue because the court held that the SAC plausibly alleged discrimination. Pet. App. 4a.

C. Relevant Procedural History

On February 20, 2015, Respondents Entertainment Studios and the National Association of African American-Owned Media ("NAAAOM") filed a lawsuit against Comcast and other parties in the Central District of California alleging racial discrimination in contracting in violation of 42 U.S.C. § 1981 and conspiracy to violate 42 U.S.C. § 1981.[2] Pet. App. 113a.

1. The District Court Granted Comcast's Motions To Dismiss

Comcast filed a Rule 12(b)(6) motion to dismiss, which the District Court granted. Pet. App. 109-112a. In its four-page opinion, the District Court devoted only two paragraphs to whether Respondents adequately alleged a section 1981 claim. Pet. App. 111-112a. And in these two paragraphs, the District Court did not recite the elements of a section 1981 claim and it did not analyze *any* of Respondents' allegations. *Id.* The District Court stated only that Respondents had "failed to allege any plausible claim for relief." Pet. App. 112a.

Respondents filed a First Amended Complaint, in which Respondents dropped their conspiracy claim. Pet. App. 78a. Comcast filed a Rule 12(b)(6) motion to dismiss, which the District Court granted in a four-page opinion. Pet. App. 74-77a. In its decision, the

[2] NAAAOM is an organization comprised of African American-owned media companies, including Entertainment Studios, that is devoted to ensuring that its members obtain the same right to contract as is enjoyed by white persons. Pet. App. 39a.

District Court again did not recite the elements of a section 1981 claim or identify the governing legal standards for how to plead intentional discrimination. *Id.* The District Court also did not analyze the vast majority of Respondents' allegations, and instead focused on one allegation—ratings growth for JusticeCentral.TV—and found that it was "hardly compelling evidence" of discrimination. Pet. App. 76a. The District Court noted that Respondents could "better support" their allegations by alleging the actual number of viewers gained. *Id.*

Respondents filed a Second Amended Complaint, which is the operative complaint. Respondents did not have the Nielsen data necessary to identify the actual number of viewers gained for JusticeCentral.TV, but to address the District Court's request for better evidence, Respondents added multiple allegations to show that the Entertainment Studios Channels are in high demand and that Comcast's refusal to contract constitutes racial discrimination.

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

2. The Ninth Circuit Unanimously Reversed

A three-judge panel of the Ninth Circuit unanimously reversed the District Court's dismissal of Respondents' claim. Pet. App. 1-4a. The Ninth Circuit held that, based on its decision in *Nat'l Ass'n of African American-Owned Media v. Charter Commc'ns*, 915 F.3d 617 (9th Cir. 2019), Respondents need only allege that racial discrimination was a "motivating factor" in Comcast's refusal to contract. Pet. App. 3a. The Ninth Circuit held that Respondents adequately alleged racial discrimination through the following well-pleaded allegations of fact:

> Comcast's expressions of interest followed by repeated refusals to contract; Comcast's practice of suggesting various methods of securing support for carriage only to reverse its position once Entertainment Studios had taken those steps; the fact that Comcast carried every network of the approximately 500 that were also carried by its main competitors (Verizon FIOS, AT & T U-verse, and DirecTV), *except* Entertainment Studios' channels; and, most importantly, Comcast's decisions to offer carriage contracts to "lesser-known, white-owned" networks (including Inspirational Network, Fit TV, Outdoor Channel, Current TV, and Baby First Americas) at the same time it informed Entertainment Studios that it had no bandwidth or carriage capacity. *Id.*

Comcast argued that Respondents must allege more facts to plausibly show that the lesser-known, white-owned networks launched by Comcast were

similarly situated with Entertainment Studios. Pet. App. 3a n.1. The Ninth Circuit considered but rejected Comcast's argument, holding that "an extensive comparison of these channels for purposes of determining disparate treatment due to race would require a factual inquiry that is inappropriate in a 12(b)(6) motion." *Id.*

Comcast argued that there are race-neutral justifications for its refusal to contract. The Ninth Circuit considered Comcast's race-neutral justifications, but held that they are not so compelling to render Respondents' theory of racial animus implausible. Pet. App. 4a (citing *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011)). Of course, race-neutral justifications can be considered on summary judgment or trial; but this matter was presented in a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Id.*

The Ninth Circuit denied Comcast's petition for panel rehearing and rehearing en banc.

REASONS TO DENY THE PETITION

I. CERTIORARI IS NOT WARRANTED TO CONSIDER WHETHER THE NINTH CIRCUIT PROPERLY APPLIED SETTLED PLEADINGS LAW

Comcast argues that this Court should grant certiorari because the decision below conflicts with this Court's decisions in *Iqbal* and *Twombly*. Pet. 22. This argument is both wrong and fails to present a reason

to grant certiorari. Sup. Ct. R. 10(a). The Ninth Circuit tested Respondents' allegations under the plausibility standard announced in *Iqbal* and *Twombly*, and correctly held that Respondents asserted well-pleaded allegations of fact that show plausible racial discrimination. Pet. App. 2-4a.

A. Respondents Do Not Rely On Conclusory Allegations

It is now well-settled that, to survive a Rule 12(b)(6) motion to dismiss, a plaintiff cannot rely on conclusory allegations but instead must assert well-pleaded allegations of fact. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007). The plaintiffs in *Iqbal* and *Twombly* failed to meet this standard because they relied on conclusory allegations. *Iqbal*, 556 U.S. at 669, 682-83; *Twombly*, 550 U.S. at 564-65.

Unlike the plaintiffs in *Iqbal* and *Twombly*, Respondents did not rely on conclusory allegations. In a lengthy complaint, Respondents asserted the following circumstantial facts to show racial motive:

- Comcast senior executive Jennifer Gaiski told Entertainment Studios to get support "in the field" so she could present such support to Comcast senior management Greg Rigdon and Neil Smit, but when Entertainment Studios obtained "field" support, Comcast said "field" support did not matter, Pet. App. 49a, ¶ 45;

- Comcast told Entertainment Studios to obtain Division support, but the Divisions told Entertainment Studios that they deferred to corporate, which caused Entertainment Studios to waste hundreds of thousands of dollars on marketing, travel and other expenses, Pet. App. 49-50a, ¶¶ 46-47;
- Comcast executives Madison Bond and Jennifer Gaiski told Byron Allen of Entertainment Studios that Comcast would carry the Entertainment Studios Channels if they were carried on Comcast's principal competitors Verizon FIOS, AT&T U-verse and DirecTV, but Comcast will not contract with Entertainment Studios even though Verizon FIOS, AT&T U-verse and DirecTV now carry the Entertainment Studios Channels, Pet. App. 50a, ¶ 48;
- Comcast told Entertainment Studios that it lacked capacity to carry the Entertainment Studios Channels, but Comcast launched more than 80 lesser-known, white-owned channels since 2010, including Inspirational Network, Fit TV, Outdoor Channel and Current TV, Pet. App. 35a, ¶ 7, Pet. App. 50-51a, ¶ 50;
- Comcast told Entertainment Studios that it wanted to focus on sports and news networks, but launched white-owned networks that have nothing to do with sports and news, such as Baby First Americas,

Fit TV and Outdoor Channel, Pet. App. 51a, ¶ 51;

- Comcast claims that there is not enough demand for the Entertainment Studios Channels, but the channels are carried by over 50 MVPDs who broadcast the channels to over 80 million cumulative subscribers, and one of the channels (Cars.TV) won an Emmy Award, Pet. App. 43a, ¶ 30, Pet. App. 51-53a, ¶¶ 53-54;
- Of the more than 500 channels that are carried by Verizon FIOS, AT&T U-verse and DirecTV, Comcast carries *all* of the channels *except* for the Entertainment Studios Channels, Pet. App. 53-54a, ¶¶ 56-57; and
- To obtain FCC approval for its merger with NBC Universal, Comcast entered into a memorandum of understanding ("MOU") with civil rights groups that required Comcast to launch four African American-owned networks, but rather than launch the Entertainment Studios Channels—which are established, carried by Comcast's competitors and are truly African American-owned—Comcast chose to launch brand new networks that are predominately white-owned with African American figureheads, Pet. App. 58-62a, ¶¶ 72-81.

These are well-pleaded allegations of circumstantial facts which give rise to plausible inferences of

racial discrimination. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (relevant circumstantial facts include proof that the defendant's stated race-neutral reasons are false); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-67 (1977) (relevant circumstantial facts include proof that the defendant departed from normal procedure); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (relevant circumstantial facts include treating similarly situated persons of a different race more favorably); *cf. Desert Palace*, 539 U.S. at 100 (explaining that circumstantial evidence "'is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence'" (quoting *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508 n.17 (1957))).

In fact, Comcast does not even mention these allegations in its petition. Rather, Comcast resorts to mischaracterizing Respondents' claim as resting solely on a "vast conspiracy" between Comcast, the FCC and civil rights organizations and leaders. Pet. 26. Like it did in the Ninth Circuit below, Comcast is still attacking a conspiracy claim that Respondents dropped *over three years ago*. Pet. App. 78a. Respondents are pursuing a direct claim against Comcast. Comcast cannot avoid this lawsuit by ignoring the allegations against it.

Even if this were a close call (which it is not), the Court should not grant certiorari because it would not have the benefit of a complete record. In addition to the circumstantial facts in the Second Amended Complaint, Respondents have *direct* evidence of discrimination. In the Complaint, Respondents alleged

that, during one meeting, a Comcast executive told Entertainment Studios "We're not trying to create any more Bob Johnsons," the African American former owner of BET. Pet. App. 118a, ¶¶ 15-16. The Bob Johnson comment was inadvertently dropped by Respondents in amending the Complaint. Respondents argued in the Ninth Circuit that the District Court erroneously denied Respondents leave to amend, but the Ninth Circuit did not resolve this issue because it held that Respondents' allegations of circumstantial facts are sufficient to state a claim. Pet. App. 4a.

B. Respondents Alleged That Comcast Provided Preferential Treatment To Similarly Situated, White-Owned Channels

Comcast argues that Respondents did not plead sufficient facts to support their allegation that Entertainment Studios was passed over for "lesser-known, white-owned channels." Pet. 28-30. Comcast's argument is wrong and fails to present an issue warranting this Court's review.

1. Respondents' Allegations Are Sufficient Under *Swierkiewicz*

Contrary to Comcast's argument, Respondents do not merely allege that Entertainment Studios was passed over for "lesser-known, white-owned channels." Respondents specifically identified the similarly situated channels that received preferential treatment, including Baby First Americas, Outdoor Channel, Fit TV,

Inspirational Network and Current TV. Pet. App. 35a, ¶ 7; Pet. App. 51a, ¶ 51.

These allegations are sufficient under *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002). In *Swierkiewicz*, a Hungarian national ("Swierkiewicz") who was 53 years old at the time of his complaint sued his employer for national origin discrimination under Title VII and for age discrimination under the ADEA. *Id.* at 509. In support, Swierkiewicz alleged that he worked as an underwriter for an insurance company that was owned and controlled by a French parent corporation. *Id.* at 508. He alleged that his boss, a French national, demoted him in favor of a younger, French national who only had one year of underwriting experience. *Id.* The Second Circuit affirmed the dismissal of Swierkiewicz's complaint on the ground that he had not alleged sufficient facts to state a prima facie case of discrimination. *Id.* at 509.

This Court unanimously reversed. The Court held that Swierkiewicz's complaint "easily satisfie[d] the requirements of Rule 8(a)" because it "provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination." 534 U.S. at 514.[3]

Like the complaint in *Swierkiewicz*, the operative complaint here details the events leading up to

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[3] Although *Swierkiewicz* was decided under the *Conley v. Gibson*, 355 U.S. 41 (1957) standard, this Court in *Twombly* affirmed *Swierkiewicz* as correctly decided. *Twombly*, 550 U.S. at 569-70.

Comcast's refusal to contract, and provides names of channels and the racial composition of the channels' owners that received preferential treatment. Pet. App. 35a, ¶ 7; Pet. App. 51a, ¶ 51. Comcast cites no case holding that Respondents were required to allege additional facts to further show why the white-owned channels are similarly situated.

2. There Is No Inter-Circuit Conflict On Pleading Similarly Situated Persons

Comcast cites decisions from the Second Circuit and the Fifth Circuit in an attempt to show that the decision below creates an inter-circuit conflict on the factual allegations necessary to show preferential treatment of similarly situated persons. Pet. 28-30. But no such conflict exists.

The first case cited by Comcast is *Burgis v. New York City Dep't of Sanitation*, 798 F.3d 63 (2d Cir. 2015). In that case, the plaintiff ("Burgis"), a sanitation worker, attempted to plead a claim under section 1981 by using demographic data to show that the supervisory workforce was not "representative" of the sanitation worker workforce. *Id.* at 66. The district court dismissed Burgis' claim, and the Second Circuit affirmed. The Second Circuit explained that section 1981 requires proof of intentional discrimination, and Burgis cannot allege a plausible claim based on a *disparate impact* theory. *Id.* at 68.

Here, Respondents do not rely on a disparate impact theory. Rather, Respondents allege multiple circumstantial facts to show that Comcast engaged in intentional discrimination. *See supra* Part I.A. Similar allegations of circumstantial facts have been held by the Second Circuit to plausibly show discrimination. *See*, *e.g.*, *Littlejohn v. City of New York*, 795 F.3d 297, 313 (2d Cir. 2015) (holding that an African American former government employee alleged "more than sufficient" facts by alleging that she was replaced by a white employee who was less qualified for the position); *cf. Ofori-Tenkorang v. Am. Int'l Grp., Inc.*, 460 F.3d 296, 306 (2d Cir. 2006) (holding that an African American employee stated a section 1981 claim by alleging that he was segregated from a majority of his white colleagues when he was transferred to South Africa).

The second case cited by Comcast is *Body By Cook, Inc. v. State Farm Mut. Auto. Ins.*, 869 F.3d 381 (5th Cir. 2017). In that case, the plaintiff ("Body by Cook"), an African American-owned body shop, alleged that it was discriminated against by State Farm and other insurers in connection with Body by Cook's application to become an approved body shop. Body by Cook alleged that it met the requirements to be an approved body shop, that a State Farm representative told Body by Cook that it was not accepting new body shops into its program, but that State Farm then admitted a non-minority-owned body shop with inferior equipment that did not meet State Farm's qualifications. *Id.* at 387. The district court dismissed this claim, but the

Fifth Circuit reversed. The court held that Body by Cook's allegations "that similarly situated body shops were treated differently . . . make plausible the inference that the difference in treatment was because of Body by Cook's minority-owned status." *Id.*

That is exactly what Respondents allege happened here. Comcast told Entertainment Studios that its channels were "good enough" for carriage and were on the "short list," but then Comcast refused to contract with Entertainment Studios and instead launched more than 80 lesser-known, white-owned channels. *See supra* Part I.A.

* * *

In sum, the Ninth Circuit did not err in holding that Respondents stated a claim under section 1981. This Court's review is not warranted because the decision below does not conflict with this Court's decisions in *Iqbal* and *Twombly* and there is no conflict among the circuits.

III. THE DECISION BELOW ON THE CAUSATION STANDARD FOR SECTION 1981 DOES NOT CONFLICT WITH A DECISION OF THIS COURT OR ANY CIRCUIT COURT OF APPEALS

Comcast argues that "but-for" causation is required under section 1981, and that certiorari is warranted because the Ninth Circuit adopted a "motivating factor" causation standard that conflicts with two decisions of this Court and with decisions of at least

five other Circuit Courts of Appeals. Pet. 13-22. But these claimed conflicts simply do not exist. There is *no decision* of this Court or of any Circuit Court of Appeals that requires a plaintiff pursuing a status-based discrimination claim under section 1981 to allege "but-for" causation to survive a Rule 12(b)(6) motion to dismiss.[4]

A. The Decision Below Does Not Conflict With This Court's Decisions In *Gross* Or *Nassar*

Comcast argues that the Ninth Circuit's decision conflicts with this Court's decisions in *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009), and *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013). Pet. 16-17. Comcast's argument fails because the Court did not interpret section 1981 in *either Gross* or *Nassar*, and the reasoning of these cases is inapplicable to section 1981. *Gross* and *Nassar* involved statutes with language quite different from section 1981. Moreover, both cases were decided on appeal following trial. The Court did not address, let alone change, *pleading burdens* in either case.

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[4] A status-based discrimination claim is where the plaintiff alleges that she suffered discrimination on account of her race, national origin, religion, age, or sexual orientation, among other impermissible classifications. A retaliation claim is different, in that a plaintiff is not suing because of her status but rather because of her conduct or speech.

1. *Gross* Involved Age Discrimination Under The ADEA

Gross was an appeal following a jury trial on a claim of age discrimination brought under the Age Discrimination in Employment Act ("ADEA"). *Gross*, 557 U.S. at 170-71. At issue was whether the district court properly gave a "mixed-motive" instruction to the jury. The district court instructed the jury that it must return a verdict for the plaintiff ("Gross") if he proved that age was a "motivating factor" in the defendant's ("FBL") decision to demote him. *Id.* The district court also instructed the jury that FBL had the burden to show that it would have demoted Gross regardless of his age. *Id.* at 171. The jury returned a verdict for Gross. *Id.*

The Eighth Circuit reversed, relying upon this Court's Title VII decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *Id.* Based on Justice O'Connor's concurring opinion in *Price Waterhouse*, the Eighth Circuit held that the burden should not have shifted to FBL because Gross did not present direct evidence of discrimination. *Id.* at 172.

This Court vacated the Eighth Circuit's opinion, holding that the Court of Appeals improperly relied on law developed under Title VII to determine the proper evidentiary burdens for claims brought under the ADEA. 557 U.S. at 180. The Court explained that, when conducting statutory interpretation, courts "must be careful not to apply rules applicable under one statute to a different statute without careful and critical

examination." *Id.* at 174 (quoting *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008)).

Thus, the Court "focus[ed] on the text of the ADEA to decide whether it authorizes a mixed-motives age discrimination claim." *Id.* at 175. The ADEA provision at issue prohibited an employer from taking an adverse employment action "*because of*" age. *Id.* at 176 (quoting 29 U.S.C. § 623(a)(1)). The Court explained that the ordinary meaning of the words "because of" means, in the context of the ADEA, that "age was the 'reason' that the employer decided to act." *Id.* Based on the text of the ADEA, the Court held that a plaintiff must prove that age was the "but-for" cause of the adverse employment action, and that the burden of persuasion does not shift to the defendant. *Id.* at 176-77.

2. Nassar Involved Retaliation Under Title VII

Nassar was an appeal following a jury trial involving claims brought under Title VII. *Nassar*, 570 U.S. at 342. The plaintiff ("Nassar") was hired by the defendant ("University") as a physician and a member of its faculty. *Id.* at 344. Nassar sued the University for both status-based discrimination and retaliation in connection with his complaints about the harassment. *Id.* at 345. Nassar prevailed on both Title VII claims at trial. *Id.* In affirming the retaliation verdict, the Fifth Circuit held that Nassar only needed to show that retaliation was a motivating factor for the adverse

employment action, and that Nassar had presented sufficient evidence to support the jury's verdict. *Id.*

This Court vacated the Fifth Circuit's opinion. 570 U.S. at 363. The Court held retaliation claims brought under Title VII require proof of "but-for" causation, and that mixed-motive claims are not cognizable. The Court explained that there was no meaningful textual difference between the words "because of" used in the ADEA provision in *Gross* and the word "because" used in the retaliation provision of Title VII at issue in the case. *Id.* at 352. The Court also found significant the fact that Congress amended Title VII in the Civil Rights Act of 1991 by adding a motivating factor provision applicable to status-based discrimination claims but not for retaliation claims. *Id.* at 353-54. For these reasons, the Court held that a plaintiff pursuing a retaliation claim under Title VII must prove "that the desire to retaliate was the but-for cause of the challenged employment action." *Id.* at 352.

3. The Statutes Involved In *Gross* And *Nassar* Defined Discrimination Using Different Language Than Section 1981

Gross and *Nassar* are statutory interpretation decisions that have little bearing on this case. Unlike the ADEA provision at issue in *Gross* and the Title VII retaliation provision at issue in *Nassar*, section 1981 does not use the words "because of" or "because." Rather, section 1981 provides that all persons shall enjoy

the "same right" to contract as is enjoyed by white citizens. 42 U.S.C. § 1981(a). This difference in language alone supports a different liability standard for section 1981.

Section 1981 differs from Title VII and the ADEA in other ways as well. Unlike Title VII's "detailed statutory scheme," section 1981 contains a "broad and brief" prohibition on racial discrimination. *Nassar*, 570 U.S. at 355-56. Section 1981 is also a "broadly worded civil rights statute," *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 452 (2008), that uses "capacious language" to describe the rights granted therein, *Nassar*, 570 U.S. at 355. These differences in statutory language and structure further support a lessened causation standard under section 1981.

Section 1981 also has a different remedial purpose than Title VII and the ADEA. Section 1981 is not an employment statute. It is a "longstanding civil rights law" that was enacted as part of the Civil Rights Act of 1866 designed to "guarantee the then newly freed slaves the same legal rights that other citizens enjoy." *CBOCS*, 553 U.S. at 445, 448. Congress intended to prohibit "*all* racially motivated deprivations of the rights enumerated in the statute." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 426 (1968). This further shows why a lessened causation standard is appropriate for section 1981.

In addition to the fact that *Gross* and *Nassar* involved different statutes with different language, structure and purpose, *Gross* and *Nassar* also have

little bearing on this case because neither decision addressed, let alone changed, *pleading burdens* for any claims. The Court did not discuss whether a plaintiff must plead "but-for" causation to state an age discrimination claim under the ADEA or a retaliation claim under Title VII. Those remain open questions under the ADEA and Title VII. *Cf. Swierkiewicz*, 534 U.S. at 510 (holding that the prima facie requirement under Title VII "is an evidentiary standard, not a pleading requirement"). Certainly, whether a plaintiff must allege "but-for" causation to state a status-based discrimination claim *under section 1981* is an open question not resolved by this Court in *Gross* or *Nassar*. *See Hagan v. City of New York*, 39 F. Supp. 3d 481, 502 (S.D.N.Y. 2014) (explaining that *Nassar* did not "alter the pleading requirements since causation is a question of fact and a plaintiff need not establish a prima facie case to withstand a motion to dismiss").

4. Comcast Fails To Identify An Error In The Ninth Circuit's Decision In *Charter*

In an attempt to show a conflict between the decision below and this Court's decisions in *Gross* and *Nassar*, Comcast challenges the reasoning of the Ninth Circuit in *Charter*—a separate case in which Comcast is not a party. Pet. 16-17a. Assuming that the reasoning of the *Charter* decision is properly presented by Comcast in its petition here, none of Comcast's arguments have merit, let alone show why certiorari is warranted.

a. The Ninth Circuit In *Charter* Applied The Analytical Approach Used By The Court In *Gross* And *Nassar*

Comcast argues that the Ninth Circuit in *Charter* failed to apply the reasoning of this Court in *Gross* and *Nassar*, Pet. 16, but this argument is negated by the four-corners of the opinion. The Ninth Circuit recognized that "but-for" causation is the default rule per *Gross* and *Nassar* and then "look[ed] to the text of § 1981 to determine whether it permits a departure from the but-for causation standard." *Charter*, 915 F.3d at 625. This is the analytical approach required by *Gross* and *Nassar*. *Nassar*, 570 U.S. at 347; *Gross*, 557 U.S. at 175.

The Ninth Circuit went further and also analyzed whether its prior decision in *Metoyer v. Chassman*, 504 F.3d 919 (9th Cir. 2007), was correctly decided. *Charter*, 915 F.3d at 624-25. In *Metoyer*, the Ninth Circuit held that mixed-motive claims were cognizable under section 1981 based on causation standards developed under Title VII. *Metoyer*, 504 F.3d at 934. Given the Court's instruction in *Gross* that courts should not incorporate law developed under one statute and apply it to another without careful and critical examination, the Ninth Circuit held that *Metoyer* was "incompatible" with *Gross*. *Charter*, 915 F.3d at 624-25.

Instead of relying on Title VII law, the Ninth Circuit followed this Court's instructions and interpreted the text of section 1981. *Charter*, 915 F.3d at 625-26.

Based on the text, the Ninth Circuit held that mixed-motive claims are cognizable under section 1981. *Charter*, 915 F.3d at 625-26.

b. Comcast's Arguments Regarding The Civil Rights Act Of 1991 Have Already Been Rejected By This Court

Comcast argues that the Ninth Circuit in *Charter* failed to give due consideration to the fact that Congress added a motivating factor provision to Title VII in the Civil Rights Act of 1991 (the "1991 Act") but did not add a similar provision to section 1981. Pet. 16-17. Comcast's argument has already been rejected by this Court twice.

This Court has recognized that Congress amended section 1981 only to respond to specific decisions of this Court which narrowly interpreted section 1981. In *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 372-73 (2004), the Court explained that Congress amended section 1981 in response to *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), which narrowly interpreted the phrase "to make and enforce contracts." In *Jones*, the Court explained that, with the 1991 Act, "Congress responded to *Patterson* by adding a new subsection to § 1981 that defines the term '"make and enforce contracts"' to include the 'termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.'" *Jones*, 541 U.S. at 373 (quoting 42 U.S.C. § 1981(b));

cf. Landgraf v. USI Film Prods., 511 U.S. 244, 250 (1994) (recognizing that Congress passed the 1991 Act "in large part [as] a response to a series of decisions of this Court interpreting the Civil Rights Acts of 1866 and 1964").

Four years after *Jones*, this Court again recognized that Congress amended section 1981 only to respond to specific decisions of this Court. In *CBOCS*, the Court addressed whether retaliation claims are cognizable under section 1981. *CBOCS*, 553 U.S. at 451. Similar to Comcast's argument here, the defendant argued that the Court should give weight to the fact that Congress did not add a provision that specifically authorized retaliation claims when Congress amended section 1981 in the 1991 Act. *Id.* at 453-54. But the Court rejected that argument, explaining that, given existing case law establishing that retaliation claims were cognizable under section 1981, "there was no need for Congress [in the 1991 Act] to include explicit language about retaliation." *Id.* at 454.

Similarly here, there was no decision of this Court holding that "but-for" causation is required for status-based discrimination claims under section 1981. Therefore, there was no need for Congress to add a specific "motivating factor" provision when it amended section 1981.

Moreover, Comcast's argument is contradicted by the *express purpose* of the 1991 Act. In Section 3 of the 1991 Act, Congress stated that it was responding "to recent decisions of the Supreme Court *by expanding*

the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(4), 105 Stat. 1071 (emphasis added). Comcast's argument that Congressional silence should be seen as evidence of an intent to *narrow* civil rights is unfounded.

c. The Ninth Circuit Properly Interpreted Section 1981 To Permit Mixed-Motive Claims

Comcast argues that the Ninth Circuit interpreted section 1981 incorrectly because, in its view, the language "same right" requires but-for causation. Pet. 17. But Comcast fails to cite a single case that supports its interpretation. *Id.* In fact, the only case cited by Comcast that actually addresses the statutory text of section 1981 supports the Ninth Circuit's interpretation. Pet. 19 (citing *Brown v. J. Kaz, Inc.*, 581 F.3d 175, 182 n.5 (3d Cir. 2009) (holding that if "race plays any role in a challenged decision by a defendant, the plain terms of the statutory text suggest the plaintiff has made out a prima facie case that section 1981 was violated because the plaintiff has not enjoyed 'the same right' as other similarly situated persons")). For the reasons set forth in Part II.A.3, *supra*, the Ninth Circuit properly interpreted section 1981.

B. The Decision Below Does Not Conflict With Any Court Of Appeals Decision

Comcast argues that the Ninth Circuit's decision below conflicts with decisions of at least five other Circuit Courts of Appeals, but none of the cases cited by Comcast address a plaintiff's *pleading burden* under section 1981. That is what the decision below stands for. The Ninth Circuit held that a plaintiff is required to allege that race played a motivating factor in the refusal to contract. Pet. App. 3a. Comcast has failed to present an actual conflict because all of the cases cited by Comcast were decided on appeal from a grant of summary judgment or a judgment based on a jury verdict. Pet. 18-21. The decisions do not address *pleading burdens* at all.

Moreover, as shown by the chart in the Appendix attached hereto, the Circuit Courts of Appeals all agree that a plaintiff pursuing a status-based discrimination claim under section 1981 can establish a violation by showing that race played a motivating factor. The decision below is consistent with the law in the other circuits. The Court should wait until a conflict actually arises before addressing the proper causation standard under section 1981.

1. Comcast Concedes That The Decision Below Does Not Conflict With The Sixth Or Eighth Circuits

Early in its petition, Comcast argues that the Ninth Circuit's decision conflicts with decisions of the

Sixth and Eighth Circuits. Pet. 2. Yet, later in its petition, Comcast concedes that there are *subsequent* decisions of both the Sixth and Eighth Circuits recognizing that "motivating factor" is a proper causation standard for section 1981 claims. Pet. 19-21 (citing *Wright v. St. Vincent Health Sys.*, 730 F.3d 732, 739 (8th Cir. 2013) (holding that a section 1981 plaintiff can establish a violation of section 1981 by showing that a "discriminatory reason . . . motivated" the defendant (citation omitted)) and *Bobo v. United Parcel Serv., Inc.*, 665 F.3d 741, 757 (6th Cir. 2012) (reversing summary judgment, holding that a "reasonable jury could logically infer that [plaintiff's] race was a *motivating factor* in the discharge decision" (emphasis added))). Thus, Comcast tacitly admits that there is no conflict between the Sixth, Eighth and Ninth Circuits.

2. Comcast Has Not Identified A Conflict With The Third, Seventh Or Eleventh Circuits Either

For the alleged conflict with the Third Circuit, Comcast cites *Brown*, Pet. 19, but that case actually supports the decision below. *Brown*, 581 F.3d at 182 n.5 (explaining that the words "same right" in section 1981 support a "motivating factor" causation standard). Indeed, in *Charter*, the Ninth Circuit stated that it was persuaded by the Third Circuit's reasoning in *Brown*. *Charter*, 915 F.3d at 625. There is no conflict between the Third and Ninth Circuits. *See also Anderson v. Wachovia Mortg. Corp.*, 621 F.3d 261, 269 (3d Cir. 2010) (holding that a plaintiff's burden under section 1981 is

to show that discrimination "was, more likely than not, a *motivating factor*" in the adverse contracting decision (emphasis added)).

For the claimed conflict with the Seventh Circuit, Comcast cites *Bachman v. St. Monica's Congregation*, 902 F.2d 1259 (7th Cir. 1990), Pet. 18, but the court did not *reject* the motivating factor standard in that case. Indeed, the court did not address the motivating factor standard at all. And in the years since *Bachman* was decided, the Seventh Circuit has clarified that a plaintiff can meet her prima facie burden by showing that race "was the *motivating factor* behind the ill-treatment." *Killebrew v. St. Vincent Health, Inc.*, 295 F. App'x 808, 810 (7th Cir. 2008) (emphasis added). Thus, there is no conflict between the Seventh and Ninth Circuits either.

For the claimed conflict with the Eleventh Circuit, Comcast cites *Mabra v. United Food & Commercial Workers Local Union No. 1996*, 176 F.3d 1357 (11th Cir. 1999), Pet. 19, but the court did not *reject* the motivating factor standard in that case either. Rather, the court held that the mixed-motive defense amendments to Title VII do not apply to section 1981 claims.[5] *Id.* at 1357. The court did not address a plaintiff's initial burden under section 1981. And in a subsequent decision,

[5] The issue in *Mabra* is not the issue here. The "mixed-motive defense" is a term that courts use to describe the *defendant's* burden in the mixed-motive burden-shifting framework to show that the defendant would have taken the same action regardless of race. Comcast's mixed-motive defense is not yet at issue in the case.

the Eleventh Circuit has confirmed that a plaintiff can meet her prima facie burden by showing that race played a motivating factor in the challenged contracting decision. *Vinson v. Koch Foods of Ala., LLC*, 735 F. App'x 978, 981-82 (11th Cir. 2018) (reversing summary judgment, holding that plaintiff had submitted evidence showing that race "was a *motivating factor* in the decision to terminate her" (emphasis added)).

Put simply, Comcast has failed to show that the decision below conflicts with *any* decision of *any* Circuit Court of Appeals in the *entire* country.

3. The Court Should Wait For An Actual Conflict To Develop Before Granting Certiorari

If the Court grants certiorari now to address the proper causation standard under section 1981, the Court will be deprived of "the benefit it receives from permitting several courts of appeals to explore a difficult question before [it] grants certiorari." *United States v. Mendoza*, 464 U.S. 154, 160 (1984); *see also E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977) (observing "the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals").

Another reason why the Court should wait is because, if the Court were to grant certiorari here, the Court would also have to address another analytically distinct question of whether the pleading burdens under section 1981 should be the same as the evidentiary

burdens at summary judgment or trial. This secondary question is necessarily implicated because this Court and the lower courts have held that pleading burdens in discrimination cases are different than evidentiary burdens at summary judgment or trial. *Swierkiewicz*, 534 U.S. at 510 (noting that the prima facie requirement under Title VII "is an evidentiary standard, not a pleading requirement"); *Maduka v. Sunrise Hosp.*, 375 F.3d 909, 912 (9th Cir. 2004) ("[T]here is little doubt that *Swierkiewicz* governs complaints in section 1981 discrimination actions."); *see also Brown v. Sessoms*, 774 F.3d 1016, 1023 (D.C. Cir. 2014) ("We have been clear, however, that '[a]t the motion to dismiss stage, the district court cannot throw out a complaint even if the plaintiff did not plead the elements of a prima facie case.'" (alteration in original) (quoting *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 493 (D.C. Cir. 2008))); *cf. Swanson v. Citibank, N.A.*, 614 F.3d 400, 405 (7th Cir. 2010) (adopting a liberal pleading standard for section 1981 claims, holding that a section 1981 plaintiff need only allege the type of discrimination, by whom and when).

Further, if the Court were inclined to address the proper causation standard under section 1981, the Court should not take a case that involves a Rule 12(b)(6) motion to dismiss, but rather it should wait to take a case with a developed evidentiary record. At the pleading stage, it is entirely unclear whether there is any meaningful difference between a "motivating factor" standard and a "but-for" standard. As Justice O'Connor recognized in *Price Waterhouse*, the debate

between "motivating factor" and "but-for" causation primarily deals with the question of whether burden-shifting is appropriate. *See Price Waterhouse*, 490 U.S. at 262-64 (O'Connor, J., concurring) (explaining that the words "because of" mean "but-for" causation, but that a burden-shifting approach is necessary because at times the but-for test without burden-shifting "demands the impossible" (citation omitted)); *Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312, 341 (6th Cir. 2012) (Donald, J., concurring, in part; dissenting, in part) (noting that burden-shifting is the real issue in the "war over two catch-phrases—'but for' and 'motivating factor' "). Burden-shifting is not a concept recognized in pleadings law.

C. This Case Is The Wrong Vehicle To Address The Causation Standards Under Section 1981 Because Respondents Allege But-For Causation

Contrary to Comcast's assertions, Respondents alleged but-for causation. Respondents allege that Entertainment Studios would have received a carriage contract but-for racial animus. As set forth herein, Respondents have alleged multiple direct and circumstantial facts showing that Comcast refused to contract due to racial discrimination. *See supra* Part I.A. Respondents have also alleged multiple facts showing that Comcast's purported race-neutral reasons for its refusal to contract are mere pretext. *See supra* Part I.A. This case is being considered on the denial of a motion to dismiss for failure to state a claim,

so the allegations of "but-for" causation must be accepted as true. That makes this case an inappropriate vehicle for considering the section 1981 issue raised by Comcast.

CONCLUSION

The Court should deny Comcast's petition.

Respectfully submitted,

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