No._____

In The
Supreme Court of the United States

INTELLIGENT WAVES, LLC,
Petitioner,

v.

MARTHE LATTINVILLE-PACE,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

EVERETT DOUGHERTY
Effectus PLLC
4445 Corporation Lane
Suite 278
Virginia Beach, VA 23462
(757) 942-8959
edougherty@effectus.legal

LEE DOUGHERTY
Counsel of Record
Effectus PLLC
800 Connecticut Ave, NW
Suite 300
Washington, DC 20006
(202) 888-2104
ldougherty@effectus.legal

Counsel for Petitioner

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

QUESTION PRESENTED

On April 1, 2019, Intelligent Waves, LLC ("IW") hired Marthe Lattinville-Pace ("Ms. Lattinville-Pace" or "Respondent"), a 66-year-old person allegedly of French-Canadian decent, as their Senior Vice President of Human Resources. On Wednesday, July 22, 2020, IW terminated her employment. Ms. Lattinville-Pace responded by filing allegations of national origin and age discrimination with the Equal Employment Opportunity Commission ("EEOC"), who, after a thorough investigation finding no discrimination, issued a Dismissal and Notice of Right to Sue on March 25, 2021. Despite the EEOC's decision not supporting her meritless allegations, Ms. Lattinville-Pace brought her case to the Eastern District of Virginia, which dismissed both allegations with prejudice holding, as it relates to age discrimination, that the First Amended Complaint ("FAC") only asserted conclusory allegations and did not assert requisite but-for causation.

The Fourth Circuit affirmed the dismissal of the national origin allegation, but reversed the district court's ruling regarding age discrimination. Failing to apply but-for causation, the court held that Ms. Lattinville-Pace's claim supported a plausible inference that Ms. Lattinville-Pace was terminated due to her age, despite not naming a single fact from the complaint connecting Ms. Lattinville-Pace's age to her termination.

The question presented is:

Does a claim of age discrimination under 29 U.S.C. § 621 *et seq.* fail in the absence of but-for causation?

PARTIES TO THE PROCEEDING

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

RELATED PROCEEDINGS

United States District Court (E.D. Va.):

Lattinville-Pace v. Intelligent Waves LLC, No. 1:21-cv-00698-LO-IDD (Jan. 19, 2022)

United States Court of Appeals (4th Cir.):

Marthe Lattinville-Pace v. Intelligent Waves LLC, No. 22-1144 (Apr. 24, 2024)

TABLE OF CONTENTS

TABLE OF APPENDICES

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

PETITION FOR A WRIT OF CERTIORARI

Petitioner Intelligent Waves, LLC respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

- *Lattinville-Pace v. Intelligent Waves LLC*, No. 22-1144, U.S. Court of Appeals for the Fourth Circuit. Judgment entered Apr. 24, 2024. Pet. App. 1a-9a.

- *Lattinville-Pace v. Intelligent Waves LLC*, No. 1:21-cv-00698, U.S. District Court for the Eastern District of Virginia. Judgment entered Jan. 19, 2022. Pet. App. 11a-15a.

JURISDICTION

The Fourth Circuit issued its opinion on April 24, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a), provides in pertinent part: "It shall be unlawful for an employer . . . to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age . . . ."

STATEMENT OF THE CASE

"It is 'textbook tort law' that a plaintiff seeking redress for a defendant's legal wrong typically must prove but-for causation." *Comcast Corp. v. Nat'l Ass'n of African American-Owned Media*, 589 U.S. 327, 331 (2020); *see also Univ. of Tex. Sw. Med. Ctr. v. Nassar*,

570 U.S. 338, 346-47 (2013). "In the usual course, this standard requires the plaintiff to show 'that the harm would not have occurred' in the absence of—**that is, but for**—the defendant's conduct." *Nassar*, 570 U.S. 346-47 (2013) (emphasis added). This Court has found that "[t]his ancient and simple 'but for' common law causation test, we have held, supplies the 'default' or 'background' rule against which Congress is normally presumed to have legislated when creating its own new causes of action." *Comcast*, 589 U.S. at 332. In the present case, the Fourth Circuit disregarded this default rule and held that but-for causation is *not* the applicable standard for discrimination claims brought under an age discrimination case pursuant to 29 U.S.C. § 623.

There is division among the circuit courts relating to the requirement of but-for causation. While the Second Circuit has issued decisions requiring but-for causation at the pleading stage, a majority of circuit courts hold, as did the Fourth Circuit, that "but-for" causation is not the appropriate pleading standard for allegations of age discrimination. However, the actual text of the ADEA provides no support for displacing the common-law rule requiring but-for causation. The Fourth Circuit's decision states that "Lattinville-Pace was required to allege facts sufficient to support an inference that she was terminated because of her age," but does not agree with the District Court's requirement for but-for causation. Pet. App. 6a. In its decision, the Fourth Circuit listed the six facts that supposedly support such an inference and, remarkably, not a single fact cited demonstrates *any* connection between Ms. Lattinville-Pace's age and her termination. According to the Fourth Circuit's decision, all a plaintiff must allege in order to survive a motion to dismiss in an age discrimination case is that the plaintiff was

older than forty years old and replaced by someone younger than them, even if that person was also over forty years old. This decision ignores the pleading standards set by the Court. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (complaints must plead "more than an unadorned, the-defendant-unlawfully-harmed me accusation."); *see also Comcast*, 589 U.S. at 331 (2020) ("Normally, too, the essential elements of a claim remain constant through the life of a lawsuit . . . . So, to determine what the plaintiff must plausibly allege at the outset of a lawsuit, we usually ask what the plaintiff must prove in trial at its end.").

The Fourth Circuit's decision has created a public policy tornado by effectively guaranteeing every employee over 40 the right to hold their employer hostage in a potentially lengthy, expensive discovery process, without having to allege any fact connecting their age to their termination. The Equal Employment Opportunity Commission ("EEOC") ironically filed an amicus brief in the Fourth Circuit supporting Ms. Lattinville-Pace. The irony comes from the fact that the EEOC—following a thorough investigation that contained *more* information than included in the Amended Complaint—issued to Plaintiff a "Dismissal and Notice of Rights." FAC ¶ 16, Pet. App. 18a. According to the EEOC website, this action is *only* taken by the EEOC when "no violation is found as a result of [the EEOC's] investigation."[1]

The Fourth Circuit's decision in this case fundamentally misinterprets the requirement of causation under the Age Discrimination in Employment Act

---

[1] U.S. Equal Employment Opportunity Commission, Frequently Asked Questions, https://www.eeoc.gov/youth/frequently-asked-questions#Q6

(ADEA), 29 U.S.C. § 623 et seq., by holding that a claim of age discrimination can succeed without demonstrating that age was the but-for cause of the adverse employment action. This holding directly conflicts with this Court's precedent as well as the decisions of other federal courts. This Court should grant review and ensure its precedents are applied to this matter and otherwise bring uniformity to this divisive issue.

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT'S HOLDING THAT THE ADEA DOES NOT REQUIRE BUT-FOR CAUSATION ESTABLISHES CONFLICT WITH THIS COURT'S PRECEDENT AND DECISIONS FROM OTHER FEDERAL COURTS.

The ADEA provides that "It shall be unlawful for an employer . . . to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . ." 29 U.S.C. § 623(a)(1).

The Fourth Circuit's decision to abandon the "default, but-for causation standard" and what Justice Gorsuch described as "textbook tort law" for age discrimination claims brought under the ADEA conflicts with this Court's decisions and the decisions of other courts. Finding a requirement for but-for causation is the natural progression of the law following this Court's decision in *Comcast*, yet the precedent goes back much farther.

In 2002, this Court issued its decision in S*wierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002) ("This case presents the question whether a complaint in an employment discrimination lawsuit must

contain specific facts establishing a prima facie case of discrimination under the framework set forth by this Court in *McDonnel Douglas Corp v. Green*."); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In *Swierkiewicz*, the Court held that plaintiffs do not have a heightened pleading standard, such as a requirement to plead a prima facie case, when alleging employment discrimination, because the framework to do so "does not apply in every employment discrimination case." *Id.* at 511. The Court noted that "[f]or instance, if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving the elements of a prima facie case." *Id.* The Court summarized this thought by stating that "[i]t thus seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered." *Id.* at 511-12. The Court in *Swierkiewicz* provides a nearly identical conclusion as that made by Justice Gorsuch in *Comcast*, wherein the Court finds that "the essential elements of a claim remain constant through the life of a lawsuit . . . to determine what the plaintiff must plausibly allege at the outset of a lawsuit, we usually ask what the plaintiff must prove in the trial at its end." *Comcast Corp.*, 589 U.S. at 331 (2020).[2]

These statements from the Court's decisions

---

[2] *See Comcast Corp. v. Nat'l Ass'n of African American-Owned Media,* 589 U.S. 327, 341 (2020) (Ginsberg, J., *concurring*) ("I join the Court's opinion requiring a plaintiff who sues under 42 U.S.C. § 1981 to **plead** and prove race was a but-for cause of her injury.") (emphasis added); *see also Id.*, fn.1 ("I recognize . . . that our precedent now establishes this form of causation as a 'default rule' in the present context.") (internal punctuation removed).

establish that while pleading standards and evidentiary standards may not be identical and serve separate purposes, the requirement that a plaintiff properly plead a case including but-for causation begins at the onset of a case and is constant through the case's conclusion.

The Court's decision in *Gross* further establishes this requirement for but-for causation in ADEA cases. *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009). If, as Justice Gorsuch stated, to determine what must be initially pled, we must first look at what must be finally proven, then the Court's decision in *Gross* provides exactly what this Court requires to rule on the present case.[3]

The question in *Gross* was "whether a plaintiff must present direct evidence of age discrimination in order to obtain a mixed-motives jury instruction in a suit brought under the [ADEA]." *Id.* at 170-71. In deciding on this case, the Court held that "A plaintiff must prove by a preponderance of the evidence (which may be direct or circumstantial) that age was the 'but-for' cause of the challenged employer's decision." *Id.* at 177-78. The Court explained in *Gross* that "[u]nlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor . . . Congress neglected to add such a provision to the ADEA when it amended Title VII . . . , even though it contemporaneously amended the ADEA in several ways." *Id.* at

[3] *See Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 570 U.S. 338, 343 (2013) ("In *Gross*, the Court concluded that the ADEA requires proof that the prohibited criterion was the but-for cause of the prohibited conduct.").

174.[4] This Court's decision clearly established that under the ADEA, a plaintiff must prove by a preponderance of the evidence that age was the but-for cause of the challenged adverse employment action. The ADEA's text, specifically the phrase "because of such individual's age," requires a showing that age was the determinative factor in the employer's decision. As the Court in *Gross* put it:

> The words 'because of' mean 'by reason of: on account of . . . the ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age is that age was the 'reason' that the employer decided to act . . . To establish a disparate treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision. *Id*. at 176.

Moreover, this Court's more recent decision in *Comcast Corp. v. National Association of African American-Owned Media*, 589 U.S. 327 (2020), reaffirmed the but-for causation standard in the context of other federal anti-discrimination statutes. Although *Comcast* addressed a different statute, the principles of statutory interpretation applied therein are instructive and support the requirement of but-for causation under the ADEA. The Court in *Comcast*

---

[4] *See also Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 570 U.S. 338, 346 (2013) ("Causation in fact – *i.e.*, proof that the defendant's conduct did in fact cause the plaintiff's injury—is a standard requirement of any tort claim.") (*quoting* Restatement of Torts § 9 (1934)); *see also Id.* ("Title VII retaliation claims must be proved according to **traditional principles of but-for causation**…") (emphasis added).

reiterated that "to prevail, a plaintiff must initially plead and ultimately prove that, but for race, it would not have suffered the loss of a legally protected right." *Id*. at 341. In reference to his "textbook tort law" line, Justice Gorsuch goes even as far as to recognize this Court's decision in *Gross*, stating "That includes when it comes to federal antidiscrimination laws like §1981. See 570 U. S., at 346-347, 133 S. Ct. 2517, 186 L. Ed. 2d 503 (Title VII retaliation); ***Gross v. FBL Financial Services, Inc.*, 557 U. S. 167, 176-177, 129 S. Ct. 2343, 174 L. Ed. 2d 119 (2009) (Age Discrimination in Employment Act of 1967)**." *Id*., at 331 (emphasis added).

Therefore, considering the Court's decisions in *Gross* and *Comcast* as well as the Court's ongoing recognition of but-for causation as the default, for a plaintiff to survive a motion to dismiss on an age discrimination allegation the plaintiff must actually plead that age was the but-for cause of the challenged employer's decision. But-for causation does not trigger only after a plaintiff has had the opportunity to fish for evidence conducting discovery of a claim they failed to adequately plead.

The Fourth Circuit's decision departs from *Gross*, *Nassar*, and *Comcast*. In its decision, the Fourth Circuit is effectively noncommittal on its rationale for disregarding the requirement for but-for causation, nor does the Fourth Circuit address but-for causation as the default rule. Indeed, the Fourth Circuit corrects the district court—informing the district court that the reliance on but-for causation "misapprehends the pleading standard" and further suggesting that but-for causation is used *only* in determining "the weight of the evidence"— and proceeds to determine that facts alleged in the Amended Complaint only need to

"support an inference" of causation to survive a motion to dismiss. Pet. App. 5a. The Fourth Circuit does not support its reasoning for abandoning but-for causation, and instead solely focuses its decision on how the facts alleged—none of which connect Ms. Lattinville-Pace's age to her termination—"give Intelligent Waves 'fair notice of what the . . . claim is and the ground upon which it rests' . . . the animating purpose behind [Rule 8]." Pet. App. 6a (quoting the EEOC *amicus curiae*); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The EEOC, and the Fourth Circuit therefore, cherry pick *Twombly* so as to suggest that the standard for a well pled allegation is *mere notice*.[5] *But see Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009) ("[T]he Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context."); *Id.* at 687 ("Rule 8 does not empower respondent to plead the bare elements of his cause of action . . . and expect his complaint to survive a motion to dismiss.").

The EEOCs influence is seen throughout decisions from Appellate Courts that have considered this issue. Many courts, like the Fourth Circuit, have been persuaded to abandon long held pleading standards and replace them with this notion of "mere notice" as the requisite standard. This unique and transformational position is being perpetuated by the Executive Branch and adopted by some courts, even though it is unsupported by neither the law nor decisions of this Court.

The Fourth Circuit's deviation from this established standard undermines the uniform application

---

[5] The Fourth Circuit's contention that "fair notice . . . [is] the animating purpose behind [Rule 8]" is not a quote from a case, but instead an invention of the EEOC.

of federal anti-discrimination laws and creates uncertainty for employers and employees alike. By allowing age discrimination claims to proceed without but-for causation, the Fourth Circuit lowers the evidentiary bar and contradicts the clear mandate of this Court's precedents and the law.

The Second Circuit has upheld the but-for causation standard articulated by this Court, stating "[t]o survive a Rule 12(b)(6) motion to dismiss, a plaintiff asserting an employment discrimination complaint under the ADEA must plausibly allege that adverse action was taken against her by her employer, and that her age was the 'but-for' cause of the adverse action." *Marcus v. Leviton Mfg. Co.*, 661 F. App'x 29, 31-32 (2d Cir. 2016). According to the Second Circuit, "[a] plaintiff must plead facts that give 'plausible support to a minimal inference' of the requisite discriminatory causality." *Id.*; see also *Littlejohn v. City of New York*, 795 F.3d 297, 310-11 (2d Cir. 2015). The Second Circuit in *Marcus* also stated that "the mere fact that an older employee was replaced by a younger employee does not plausibly indicate discriminatory motive." *Id.* The but-for causation requirement of the decision in *Marcus* is not a one-off decision, but demonstrative of the Second Circuit's position on the matter. In *Dolac v. Cnty. of Erie*, the Second Circuit held that:

> To prevail on an ADEA age discrimination claim, it is not sufficient for a plaintiff to allege 'that age was simply a motivating factor' in the employer's adverse action . . . . Rather, to establish age discrimination under the ADEA, 'a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision.' . . . This but-for causation standard applies at the pleading stage, such that 'to

> defeat a motion to dismiss or a motion for judgment on the pleadings, an ADEA plaintiff must plausibly allege that he would not have been terminated but for his age.

Dolac v. Cnty. of Erie, No. 20-2044-cv, 2021 U.S. App. LEXIS 33594, at *8 (2d Cir. Nov. 12, 2021); *see also Gross v. FBL Fin. Servs.*, 557 U.S. 167, 174 (2009).[6]

Demonstrating a divide on this topic and the need for the Supreme Court to formalize this matter, other circuit courts have issued rulings that align with the Fourth Circuit, disregarding but-for causation for a lighter pleading standard. Often these other circuit

---

[6] See e.g. *Boyar v. Yellen*, No. 21-507, 2022 U.S. App. LEXIS 1005, at *5 (2d Cir. 2022) ("To state an ADEA claim, a plaintiff must allege sufficient facts to show that age was the "but-for" cause of the employer's adverse acts."); and *Ninying v. N.Y.C. Fire Dep't*, 807 F.App'x 112, 114 (2d Cir. 2020) ("The ADEA requires a plaintiff to assert that his age is the 'but-for' cause of the alleged adverse employment action . . . While Ninying asserted that he was passed over for a promotion because of his age, he did not allege any facts to show that age discrimination was the but-for cause of the FDNY's failure to promote him."); and *Bockus v. Maple Pro, Inc.*, 850 F App'x 48, 51 (2d Cir. 2021) ("Moreover, a plaintiff alleging age discrimination under the [ADEA] must allege that age was the "but-for" cause of the employer's adverse action.") (internal quotations removed)); and *Golub v. Ne. Univ.*, Civil Action No. 19-cv-10478-ADB, 2019 U.S. Dist. LEXIS 199040 at *8 (D. Mass. Nov. 18, 2019) ("The Supreme Court has explained that plaintiffs must "establish that age was the 'but-for' cause of the employer's adverse action . . . Although Golub does not need to provide evidence at the motion to dismiss stage, the facts as alleged must plausibly claim that age was the but-for cause of Northeastern's decision to terminate his employment.").

courts base their decisions on the *McDonnel Douglas* burden-shifting framework, similar to the Fourth Circuit's erroneous decision.

In coming to its decision, the Fourth Circuit premised its opinion on the *McDonnel Douglas* burden shifting framework. See Pet. App. At 3a ("On appeal, Lattinville-Pace primarily contends that the district court erred in failing to apply the McDonnell Douglas burden-shifting framework to her age and national origin discrimination claims. If it had, she argues, it would have found that she pleaded a prima facie case of discrimination."); see also *Gladden v. Solis*, 490 Fed. Appx. 411, 412 (3d. Cir. 2012) ("[A] claim under the ADEA requires a showing that 'age was the 'but-for' cause of the employer's adverse action . . . However, to survive a motion to dismiss . . . . a plaintiff must merely put forth allegations that raise a reasonable expectation that discovery will reveal evidence of the necessary element.") (internal quotation and punctuation removed); *Leal v. McHugh*, 731 F.3d 405 (5th Cir. 2013); *Basil v. CC Servs.*, No. 1:12-cv-1341, 2012 U.S. Dist. LEXIS 120693, at *11 (N.D. Ill. Aug. 23, 2012) ("Because Basil alleges in his Complaint he is over forty years of age, suffered an adverse employment action, and that he was discriminated against based on his age while similarly situated employees were treated more favorably, Basil properly states a claim for discrimination under the ADEA."); *Sheppard v. David Evans & Assoc.*, 694 F.3d 1045, 1050, fn. 2 (9th Cir. 2012) ("A plaintiff in an ADEA case is not required to plead a prima facie case of discrimination in order to survive a motion to dismiss . . . Nevertheless, in situations such as this, where a plaintiff pleads a plausible prima facie case of discrimination, the plaintiff's complaint will be sufficient to survive a motion to dismiss."); *Buchanan v. Delta Air Lines, Inc.*,

727 Fed. Appx. 639, 642 (11th.Cir. 2018).

The Courts of Appeals are divided particularly due to an inability to establish a uniform pleading standard for age discrimination cases. While some decisions are premised upon this Court's precedent which clearly establishes 'but-for' causation as the default requirement, other courts waffle between what is or is not a *prima facie* case, and whether and to what extent the *McDonnel Douglass* test applies at the pleading stage. Pursuant to this Court's determination in *Comtech*, any confusion as to the pleading standard was remedied, in that plaintiffs should be required to plead the same causation standard that they are required to prove at trial. *Comcast Corp.*, 589 U.S. at 331 (2020).

In the present case, Ms. Lattinville-Pace's failure to allege specific facts linking her age to her termination, other than the fact that she was replaced by a younger individual, is insufficient to meet the but-for causation standard required by the ADEA. This Court's intervention is necessary to resolve the conflict among the Courts of Appeals and to reaffirm the correct standard of causation under the ADEA.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). Under *Twombly* and *Iqbal*, if a complaint pleads facts that are "'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). A central principle of this Court's ruling in *Twombly* is that "the tenet that a court must accept a complaint's allegations as true is inapplicable to the threadbare recitals of a cause of

action's elements, supported by mere conclusory statements." *Id.* at 663.

The Fourth Circuit erred when it concluded that the FAC alleged facts sufficient to state a plausible claim of age discrimination. The Fourth Circuit's decision was based purely on conclusory statements that in no way demonstrated a causal connection between Ms. Lattinville-Pace's age and her termination. Although this Court has stated that "the doors of discovery" are not unlocked "for a plaintiff armed with nothing more than conclusions," the Fourth Circuit has authorized Ms. Lattinville-Pace to engage in a fishing expedition to attempt to discover facts that she failed to allege in her amended complaint. *Iqbal*, 556 U.S. at 678-69. The plausibility standard articulated in *Twombly* and *Iqbal* was purposed to end meritless litigation at the pleading stage so as to preserve scarce judicial resources for plaintiffs with real grievances. In *Comcast*, this Court remanded the matter back to the circuit court to determine whether the complaint "contains sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face under the but-for causation standard." *Comcast*, 589 U.S. at 341 (quoting *Iqbal*, 556 U.S. at 678-679).

Were the Court to order the same remedy in this case, none of the alleged "facts" the Fourth Circuit depends upon in its ruling would pass the but-for causation test. The FAC is entirely sparse to any fact plausibly relating Ms. Lattinville-Pace's age to her termination. The district court went as far as to say that Ms. Lattinville-Pace "does not show that her age played **any role** in Defendant's decision to terminate her employment – let alone the but-for cause. Because Plaintiff only asserts conclusory allegations, she fails to state an age discrimination claim." Pet. App. 14a

(emphasis added). While the Fourth Circuit argues that Ms. Lattinville-Pace was only "required to allege facts sufficient to support an inference that she was terminated because of her age" and that the Fourth Circuit "believe[s] the facts alleged in the complaint are enough to support such an inference," the actual facts cited by the Fourth Circuit fail to rise to even a plausibility standard, let alone a but-for standard. Pet. App. 6a. Hypothetically speaking, if IW were to answer each of the facts cited by the Fourth Circuit in their decision in the affirmative, there would still be no causal connection between Ms. Lattinville-Pace's age and her termination. Ms. Lattinville-Pace does not allege that any comment was made regarding her age by her IW supervisor or even other employees. She does not allege that her age had come up in meetings, interviews, or discussions. Ms. Lattinville-Pace's employment with IW lasted 15 months, she was 66 when she was hired which flies in the face of her allegation that a year later she was terminated because of her age. Ms. Lattinville-Pace draws no connections between her age and any adverse employment decision. This Court has held that courts must "determine whether [facts alleged] plausibly give rise to an entitlement of relief," and yet, even accepting each of the facts alleged by Ms. Lattinville-Pace as true, no fact alleged plausibly connects her termination with her age, failing to give rise to any entitlement to relief. *Iqbal*, 556 U.S. at 679.

In its decision, the Fourth Circuit affirmed the district court's dismissal of Ms. Lattinville-Pace's national origin discrimination claim, stating: "Lattinville-Pace was required to allege facts to satisfy the elements of a cause of action created by [Title VII]—i.e., in this case, that [Intelligent Waves][terminated] her '*because of* [her] [national origin] . . . because she

failed to do so, district court correctly dismissed the claim." Pet. App. 9a (quoting *McCleary-Evans v. Md. Dep't of Transp., State High-way Admin.*, 780 F.3d 582, 585 (4th Cir. 2015)). The Fourth Circuit takes no time to explain why Ms. Lattinville-Pace was required to plead facts that she was terminated "because of" her national origin, yet Ms. Lattinville-Pace was *not* required to plead facts that she was terminated "because of" her age. The Fourth Circuit's decision effectively applied "but-for" causation to Ms. Lattinville-Pace's national origin discrimination claim, yet applied a much weaker standard to her age discrimination claim with no rational justification. And yet, pursuant to this Court's decisions, ADEA allegations are held to a stricter "but-for" standard whereas Title VII allegations are permissible through the "motivating factor test." *See Bostock v. Clayton Cnty.*, 590 U.S. 644, 657 (2020) ("Congress has supplement[ed] Title VII . . . to allow a plaintiff to prevail merely by showing that a protected trait like sex was a 'motivating factor' in a defendant's challenged employment practice."); *see also Gross*, 557 U.S. at 167-168 ("Unlike Title VII, which has been amended to explicitly authorize discrimination claims where an improper consideration was 'a motivating factor' for the adverse action . . . the ADEA does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor.").

The Fourth Circuit's decision essentially flipped this Court's precedent on its head, holding the ADEA requires a lighter pleading standard than Title VII allegations. In doing so, the court established a standard that may cause judicial chaos in the circuit and a rush to file age discrimination claims from every person older than 40 terminated, regardless of the ability to allege facts supporting a discrimination claim.

The Fourth Circuit erred when it did not apply but-for causation to the present case. "It is . . . textbook tort law that an action is not regarded as a cause of an event if the particular event would have occurred without it." *Nassar*, 570 U.S. at 347. Essentially, but-for causation is a fundamental principle of law that this Court has continuously upheld. In *Comcast*, the Court ruled that "To prevail, a plaintiff must initially plead and ultimately prove that, but for race, it would not have suffered the loss of a legally protected right." *Comcast*, U.S. 589 at 341. The ADEA does not provide any indication that courts should apply a separate standard to complaints alleging age discrimination than the one this Court applied to complaints alleging race discrimination in *Comcast*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

EVERETT DOUGHERTY
Effectus PLLC
4445 Corporation Lane
Suite 278
Virginia Beach, VA
23462
(757) 942-8959
edougherty@effectus.legal

LEE DOUGHERTY
Counsel of Record
Effectus PLLC
800 Connecticut Ave, NW
Suite 300
Washington, DC 20006
(202) 888-2104
ldougherty@effectus.legal

Counsel for Petitioner

July 22, 2024