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

BRIEF *AMICUS CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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The Center for Workplace Compliance respectfully submits this brief as *amicus curiae*.[1] The brief supports the position of Petitioner before this Court and thus urges reversal of the decision below.

[1] The parties have consented to the filing of this brief. Counsel for *amicus curiae* authored this brief in its entirety. No person or entity other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICUS CURIAE*

Founded in 1976, the Center for Workplace Compliance (CWC) (formerly the Equal Employment Advisory Council (EEAC)) is the nation's leading nonprofit association of employers dedicated exclusively to helping its members develop practical and effective programs for ensuring compliance with fair employment and other workplace requirements. Its membership includes more than 200 major U.S. corporations, collectively providing employment to millions of workers. CWC's directors and officers include many of industry's leading experts in the field of equal employment opportunity and workplace compliance. Their combined experience gives CWC a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of employment-related requirements.

All of CWC's members are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, Section 1981 of the Civil Rights Act of 1866 (Section 1981), 42 U.S.C. § 1981, as amended, and other federal employment-related laws and regulations. As employers, and as potential defendants to claims asserted under these laws, CWC has a substantial interest in the issue presented in this matter regarding whether Section 1981 permits liability for race discrimination in the absence of but-for causation. The Ninth Circuit below erred in concluding that in proving their claims, Section 1981 plaintiffs need only show that race played *a* role in the challenged decision, regardless of how innocuous.

CWC has participated as *amicus curiae* in many cases before this Court involving the proper interpretation of federal civil rights laws. *See, e.g.*,

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981); *Connecticut v. Teal*, 457 U.S. 440 (1982); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997); *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470 (2006); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008); *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009); and *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013). Because of its experience in these matters, CWC is especially well-situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

As its name suggests, the National Association of African American-Owned Media (NAAAOM) is composed of several African American-owned media companies, including Entertainment Studios Networks, Inc. (ESN). Pet. App. 39a. ESN depends on carriage contracts with video programing distributors like Petitioner Comcast Corporation (Comcast) to deliver its programming to viewers. Pet. App. 10a. After several years of negotiating unsuccessfully to secure a carriage contract with Comcast, NAAAOM and ESN (collectively "Respondents") sued Comcast, claiming that its actions in denying them the sought-after carriage contracts was racially motivated, in violation of Section 1981 of the Civil Rights Act of 1866 (Section 1981). Pet. App. 143a; 119a.

Comcast moved to dismiss, arguing that Respondents failed to assert that race discrimination was *the*, not merely *a*, reason for Comcast's actions and thus could not plausibly assert a Section 1981 violation. Pet. App. 5a-6a. After allowing Respondents multiple opportunities to amend their complaint, the district court agreed with Comcast and dismissed the action. *Id.*

The Ninth Circuit reversed. Pet. App. 2a. Relying principally on its rationale in a related case decided on the same day, *National Association of African American-Owned Media v. Charter Communications, Inc.*, 915 F.3d 617 (9th Cir. 2019), it held that Respondents needed only to "plausibly allege that discriminatory intent was a factor in Comcast's refusal to contract, and not necessarily the but-for cause of that decision." *Id.*

Comcast filed a Petition for a Writ of Certiorari, which this Court granted on June 10, 2019. *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, No. 18-1171, 2019 WL 1116317 (U.S. June 10, 2019).

SUMMARY OF ARGUMENT

The decision below, which relieves plaintiffs suing under Section 1981 of the Civil Rights Act of 1866 (Section 1981), 42 U.S.C. § 1981, of the burden of proving that unlawful race discrimination was *the* reason for the refusal to contract, conflicts with the plain meaning of the statute and is contrary to this Court's rationale in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013), and *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009).

As relevant here, Section 1981 provides, "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 … as is enjoyed by white citizens ….” 42 U.S.C. § 1981(a). Section 1981 is not an employment statute, but does encompass employment-based race discrimination claims. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975).

Although Congress amended Section 1981 in the 1991 Civil Rights Act to specify that “the term ‘make and enforce contracts’ includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship,” 42 U.S.C. § 1981(b), unlike Title VII of the Civil Rights Act (Title VII), 42 U.S.C. § 2000e-2(m), it did not incorporate into Section 1981 a motivating factor test at that time, or at any time since. Pub. L. No. 102-166, § 107, 105 Stat 1071 (1991). The omission of such language in the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq*., led this Court in *Gross* to conclude that the “default” but-for causation rule applies to age discrimination claims. 557 U.S. at 177. The Court reached a similar conclusion in *Nassar*, holding there that because Congress incorporated the motivating factor test only into the status-based discrimination provisions of Title VII, but-for causation applies to conduct-based Title VII retaliation claims. 570 U.S. at 360.

Although this Court has not ruled directly on the question, its reasoning in *Gross* and *Nassar* strongly suggests that but-for causation applies to Section 1981 claims as well. Specifically, because Section 1981 does not expressly allow for mixed-motive claims, plaintiffs must demonstrate that race was *the* reason, not simply

a reason, for the adverse contractual action. As the Court observed in *Gross*, "We cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally." 557 U.S. at 174 (citation omitted). Because the court below disregarded both the plain text of Section 1981, as well as this Court's lessons in *Gross* and *Nassar*, its decision should be reversed.

As general as its text, Section 1981 nevertheless has a very specific, and narrow, purpose: to prevent race discrimination in contractual relationships. And yet unlike Title VII, plaintiffs asserting Section 1981 claims are not required to exhaust administrative remedies and may recover uncapped compensatory and punitive damages, as well as attorney's fees and costs. In contrast, when Congress amended Title VII to incorporate the motivating factor test, it also limited the damages available to plaintiffs proceeding under such a theory where the employer can show that it would have made the same decision even absent the discriminatory factor. 42 U.S.C. § 2000e-5(g)(2)(B).

Strict adherence to the actual text of Section 1981 and this Court's holdings in *Gross* and *Nassar* is especially important given the breadth of remedies available under Section 1981 as compared to Title VII. Therefore, it stands to reason that a more stringent causation standard should apply, not only to reinforce important distinctions between the two laws, but also to discourage potentially frivolous, yet costly, litigation, including against smaller employers subject *only* to Section 1981.

Allowing mixed-motive causation under Section 1981, especially given the lack of textual support for

doing so, would serve as a perverse incentive for plaintiffs to pursue mixed-motive claims exclusively under Section 1981 in the hopes of bypassing Title VII's detailed administrative scheme meticulously designed by Congress, thereby achieving windfall damages otherwise unavailable and, more importantly, thwarting Title VII's important policy aims and objectives, including the prompt and informal resolution of workplace discrimination claims without resort to protracted, acrimonious litigation.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION BELOW, WHICH PERMITS THE IMPOSITION OF SECTION 1981 LIABILITY EVEN WHERE RACE IS NOT THE BUT-FOR REASON FOR THE CHALLENGED ADVERSE DECISION, IS DIRECTLY CONTRARY TO THE STATUTE'S PLAIN TEXT AND THIS COURT'S RULINGS IN *GROSS* AND *NASSAR*

Ignoring the statute's plain text, and disregarding this Court's reasoning in analogous cases, the Ninth Circuit below held that plaintiffs asserting race discrimination claims under Section 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981, need not establish but-for causation to prevail on the merits. Rather, "[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. Because it is irreconcilable with Section 1981's text and several of this Court's applicable precedents, the decision below is erroneous and should be reversed.

A. Section 1981 Does Not Authorize Mixed-Motive Claims

Section 1981 was enacted during the Reconstruction era following the Civil War as part of the country's first comprehensive civil rights legislation. It provides:

> 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 benefits 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.

42 U.S.C. § 1981. "Among the many statutes that combat racial discrimination, § 1981, originally § 1 of the Civil Rights Act of 1866 … has a specific function: It protects the equal right of '[a]ll persons within the jurisdiction of the United States' to 'make and enforce contracts' without respect to race." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 474 (2006) (citation omitted).

Section 1981 was intended specifically to override state laws preventing African Americans from entering into contracts, and for more than 100 years, was not raised in the employment context. In 1975, however, this Court held in *Johnson v. Railway Express Agency* that Section 1981 also "affords a federal remedy against discrimination in private employment on the basis of race." 421 U.S. 454, 460 (1975).

Section 1981 does not expressly authorize mixed-motive claims or otherwise permit plaintiffs to recover

damages where race – in combination with any number of other permissible non-race factors – merely played a role, however insignificant, in the challenged decision. This Court has never suggested that race discrimination claims under Section 1981 may be brought under a mixed-motive theory, and its recent causation rulings strongly suggest the opposite is true. And there is no sound policy basis for recognizing an implied right to bring such claims.

1. Congress has never amended Section 1981 to include an explicit "motivating factor" test or to otherwise authorize mixed-motive causation

In *Price Waterhouse v. Hopkins*, a plurality of this Court ruled that where a plaintiff proves that gender, along with other legitimate factors, played "a motivating part" in an employment decision, the plaintiff has shown that the decision was "because of" sex in violation of Title VII of the Civil Rights Act (Title VII) of 1964, 42 U.S.C. §§ 2000e *et seq.* 490 U.S. 228, 250 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. Under those circumstances, the employer could avoid liability by proving, by a preponderance of the evidence, that it would have made the same decision without having considered the protected characteristic. *Id.* at 249.

This mixed-motive analysis thus shifts the burden of proof regarding causation to the employer after the plaintiff shows, by direct evidence, that a protected characteristic was a motivating factor in the employment decision. Notably, *Price Waterhouse* was a sex discrimination case brought and decided under Title VII, and this Court has never expressly extended its holding in that case to claims of race discrimination in

the making and enforcement of contracts under Section 1981.

Two years after *Price Waterhouse* was decided, Congress enacted the Civil Rights Act of 1991 (CRA), which codified a "motivating factor" test applicable to mixed-motive cases brought under Title VII. Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075. Consequently, Section 703 of Title VII now provides, "Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). "This, of course, is a lessened causation standard." *U. of Tex. S.W. Med. Ctr. v. Nassar*, 570 U.S. 338, 349 (2013).

After a plaintiff makes that showing, Title VII specifies that the employer may significantly limit its liability for damages stemming from the discrimination by demonstrating that it "would have taken the same action in the absence of the impermissible motivating factor ...." 42 U.S.C. § 2000e-5(g)(2)(B). Specifically:

> On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court may grant declaratory relief, injunctive relief …, and attorney's fees ... and shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment ....

Id.

Significantly, the 1991 CRA did not similarly amend Section 1981 to include a motivating factor test, although Congress made other substantive revisions to it at that time, most notably by specifying that the term "make and enforce contracts" includes "the making, performance, modification, and termination of contracts and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b).

"As in all cases involving statutory construction, our starting point must be the language employed by Congress, and we assume that the legislative purpose is expressed by the ordinary meaning of the words used." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (citations and internal quotations omitted). On its face, Section 107 of the 1991 CRA, which codified the motivating factor test, applies only to cases of workplace discrimination in violation of Title VII, and Congress consciously and conspicuously chose not to incorporate the motivating factor burden-shifting analysis into Section 1981 or any other federal nondiscrimination law. *See, e.g., Gross v. FBL Financial Services*, *Inc.*, 557 U.S. 167, 174 (2009) ("Unlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress neglected to add such a provision to the ADEA when it amended Title VII to add §§ 2000e-2(m) and 2000e-5(g)(2)(B), even though it contemporaneously amended the ADEA in several ways") (citations omitted).

If the plain text of Section 107 were not enough, the legislative history of the CRA confirms that the motivating factor amendment was intended to apply only to Title VII. Preliminary versions of the bill

contained a "Rules of Construction" section that provided:

> In interpreting Federal civil rights laws, including laws protecting against discrimination on the basis of race, color, national origin, sex, religion, age, and disability, courts and administrative agencies shall not rely on the amendments made by the Civil Rights and Women's Equity in Employment Act of 1991 as a basis for limiting the theories of liability, rights and remedies available under civil rights laws not expressly amended by such Act.

H.R. Rep. No. 102-40, pt. 1, at 12 (1991). That language was dropped and never became part of the final bill.

Unlike Title VII, Section 1981 is not a comprehensive nondiscrimination law, but a narrow statutory provision that prohibits *only* intentional race discrimination in the making and enforcement of contracts. *Domino's*, 546 U.S. at 474-75. Although Congress in 1991 extended Section 1981's protections to include post-formation conduct, it neither expanded the categories of protected classes beyond race nor incorporated the considerably less onerous motivating factor causation standard that it added at that time to Title VII.

Said differently, Congress in enacting the 1991 Amendments had both Title VII and Section 1981 in its sights, but made substantively different changes to each. That it chose to ease the causation standard applicable to discrimination claims brought under Title VII, but not Section 1981, cannot reasonably be said to have been unintentional because, "When Congress amends one statutory provision but not another,

it is presumed to have acted intentionally." *Gross,* 557 U.S. at 174; see also *Russello v. United States*, 464 U.S. 16, 23 (1983) ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (citation omitted).

Accordingly, to allow Section 1981 plaintiffs to recover under a mixed-motive theory in the absence of any statutory language or congressional action authorizing it would be to disregard longstanding principles of law and statutory construction reinforced repeatedly by this Court. Because the decision below is unfaithful to those principles, it should be reversed.

2. This Court has characterized Section 1981 as prohibiting discrimination "because of" race, meaning that race must be *the*, not merely *a*, reason for the challenged action

Although this Court has not ruled directly on the appropriate causation standard applicable to Section 1981 claims, it has had occasion to resolve other important questions arising under the Act, including for example its application to race discrimination in the employment context, *Railway Express,* 421 U.S. at 459-60, as well as the scope of its employment protections. See *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008). While none of the Court's Section 1981 decisions specifies what causation standard applies, many generally describe the statute's primary aim being to prohibit discrimination "because of" race, which the Court has said means that race was *the* but-for reason for the employer's action. See, e.g., *Railway Express,* 421 U.S. at 459-60 ("it is well settled among

the federal Courts of Appeals—and we now join them—that § 1981 affords a federal remedy against discrimination in private employment on the basis of race") (footnote omitted); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 434 (1968) (observing as to Section 1981's legislative history and purposes, "it seemed evident that, with respect to basic civil rights—including the 'right to … purchase, lease, sell, hold, and convey … property,' Congress must provide that 'there … be no discrimination' on grounds of race or color") (footnote omitted); *Runyon v. McCrary*, 427 U.S. 160, 170-71 (1976) (right to "make and enforce contracts" violated "if a private offeror refuses to extend to [an African American], solely because he is [African American], the same opportunity to enter into contracts as he extends to white offerees") (footnote omitted); *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 388 (1982) ("Similarly, in *Runyon v. McCrary*, supra, we stated that § 1981 would be violated 'if a private offeror refuses to extend to a[n African American], *solely because he is a[n African American]*, the same opportunity to enter into contracts as he extends to white offerees'").

The Court in these cases describes Section 1981 consistently as prohibiting discrimination "because of race," in no way suggesting, even in passing, that contracting parties may be held liable for adverse decisions based only tangentially on race. Its characterization of Section 1981 as barring discrimination "because of" race thus strongly suggests that but-for causation applies.

B. The Rationale Of *Gross* And *Nassar* Confirms The Impropriety Of Allowing Mixed-Motive Causation In Section 1981 Cases

This Court's rejection of mixed-motive causation in cases brought under statutes containing the same "because of" language, notably the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, and the anti-retaliation provision of Title VII, 42 U.S.C. § 2000e-3(a), further supports the conclusion that Section 1981 requires but-for causation as well. In *Gross*, this Court ruled that on its face, the term "because of" age as used in the ADEA means "that age was the 'reason' that the employer decided to act." 557 U.S. at 176. In *Nasser*, which held that the mixed-motive test does not apply to retaliation claims under Title VII despite "motivating factor" language in the antidiscrimination provision of the same statute, the Court was even more direct in pointing out that phrases like "because of" and "based on" "indicate[] a but-for causal relationship." 570 U.S. at 350 (citations omitted). It observed that when Congress does not specify a particular standard, liability for wrongful conduct typically will attach where the defendant's conduct did, in fact, result in injury to the plaintiff. Thus, in the usual course, such an approach "requires the plaintiff to show 'that the harm would not have occurred' in the absence of—that is, but for—the defendant's conduct." *Id.* at 346-47 (citation omitted).

Also relevant to the Court's assessment in *Gross* was the fact that Congress did not amend the ADEA when it revised Title VII to include the motivating factor test, which would shift the burden to employers to prove that the challenged action would have been taken even absent consideration of the illegitimate

factor. "Absent some reason to believe that Congress intended otherwise, ... we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief." 557 U.S. at 177. And since the statute does not permit recovery based on the existence of both permissible and impermissible reasons, as Title VII does, the Court concluded that ADEA plaintiffs alleging intentional age discrimination may not proceed under a mixed-motive theory.

Rather, ADEA plaintiffs retain the ultimate burden of proving that the challenged employment action would not have occurred but-for the employer's unlawful consideration of age. The Court in *Nassar* found *Gross* to be particularly instructive with respect to both the proper meaning of the phrase "because" as used in Title VII, 570 U.S. at 351, as well as "the significance of Congress' structural choices in both Title VII itself and the law's 1991 amendments." *Id.*

Misapplying this Court's rationale in *Gross* and *Nassar*, the Ninth Circuit below concluded that Respondents needed only "plausibly allege that discriminatory intent was a factor in Comcast's refusal to contract, and not necessarily the but-for cause of that decision." Pet. App. 2a. It adopted the holding and rationale of its "contemporaneously filed opinion in *National Association of African American-Owned Media v. Charter Communications, Inc.*," *id.*, in which it explained that this Court's analysis in *Gross* "did not center on the shared objectives of the statute at issue there and Title VII's antidiscrimination provision … but instead focused on the statute's text and history," Pet. App. 16a – specifically the lack of language authorizing mixed-motive claims – in concluding that such claims are not cognizable under the ADEA.

The Ninth Circuit in *Charter Communications* candidly conceded that *Gross* and *Nassar* "cast doubt on the propriety of our application of the Title VII standard to § 1981 claims," *id.*, observing that this Court in those cases was "fairly clear that … borrowing the causation standard of Title VII's discrimination provision and applying it to § 1981 due to the statutes' shared objectives, without considering § 1981's text—is not permitted." Pet. App. 19a. Finding critical to its analysis the absence in Section 1981 of explicit "because of" language, the Ninth Circuit cast aside *Gross* and *Nassar*, relying instead on out-of-circuit dicta suggesting that "'[i]f 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.'" Pet. App. 21a (emphasis added). Accordingly, it held that "unlike the ADEA or Title VII's retaliation provision, § 1981's text permits an exception to the default but-for causation standard by virtue of "an indication to the contrary in the statute itself." *Id.*

The Ninth Circuit's rationale is directly at odds with both *Nassar* and *Gross*, and should be rejected by this Court. See *Fairley v. Andrews*, 578 F.3d 518, 525-26 (7th Cir. 2009) (the decision "do[es] not survive *Gross*, which holds that, unless a statute (such as the Civil Rights Act of 1991) provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in all suits under federal law"); see also *Brown v. J. Kaz, Inc.*, 581 F.3d 175, 186 (3d Cir. 2009) (Jordan, J., concurring) ("There is an irony here. While recognizing a textual distinction between the ADEA and § 1981, the Majority's approach … ignores the fundamental instruction in *Gross* that analytical con-

structs are not to be simply transposed from one statute to another without a thorough and thoughtful analysis. Even when there has been such analysis, later arising Supreme Court precedent may require reevaluation").

Moreover, the notion that liability can or should attach where race played *any* role – whether consequential or not – in an employer's actions ignores the practical realities in which such decisions are made. Especially in the employment context,

> Race and gender always 'play a role' … in the benign sense that these are human characteristics of which decisionmakers are aware and about which they may comment in a perfectly neutral and nondiscriminatory fashion. For example … a mere reference to 'a lady candidate' might show that gender 'played a role' in the decision, but by no means could support a rational factfinder's inference that the decision was made 'because of' sex.

Price Waterhouse, 490 U.S. at 277 (O'Connor, J., concurring).

For those reasons, and in the absence of any contrary indication by Congress, this Court should hold that a claim of race discrimination under Section 1981 cannot be sustained in the absence of but-for causation. Construing Section 1981 in such a manner does not deprive race discrimination plaintiffs of their statutory rights, nor does it diminish the critical importance of our nation's civil rights laws, especially as a means of eradicating discrimination on the basis of race. As this Court explained in *Patterson v. McLean Credit Union*:

> The law now reflects society's consensus that discrimination based on the color of one's skin is a

> profound wrong of tragic dimension. Neither our words nor our decisions should be interpreted as signaling one inch of retreat from Congress' policy to forbid discrimination in the private, as well as the public, sphere. Nevertheless, in the area of private discrimination, to which the ordinance of the Constitution does not directly extend, our role is limited to interpreting what Congress may do and has done.

491 U.S. 164, 188 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

II. ALLOWING SECTION 1981 LIABILITY TO ATTACH EVEN IN THE ABSENCE OF BUT-FOR CAUSATION WOULD FRUSTRATE WORKPLACE ANTI-DISCRIMINATION EFFORTS

Plaintiffs alleging race discrimination often bring claims under both Section 1981 and Title VII. "The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality." *Gen. Bldg. Contractors*, 458 U.S. at 384 (citation and internal quotations omitted). Likewise, Congress enacted Title VII with the express purpose of ensuring "equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1993) (citations omitted).

Despite their undeniably common purpose of prohibiting race discrimination, Section 1981 and Title VII are not coextensive or coequal in every respect.

Accordingly, any notion that Title VII's motivating factor test should be available in Section 1981 cases simply because they both, at bottom, make it unlawful to discriminate based on an individual's race is false.

Even the Ninth Circuit below conceded that such an approach "is incompatible with *Gross*, which suggests that, rather than borrowing the causation standard from Title VII's disparate treatment provision and applying it to § 1981 because both are antidiscrimination statutes, we must instead focus on the text of § 1981 to see if it permits a mixed-motive claim." Pet. App. 18a-19a. This is especially true when one considers the detailed scheme established by Congress for identifying, investigating, and promptly resolving alleged workplace discrimination.

A. Title VII's Detailed Administrative Enforcement Scheme Is Designed To Promote Prompt And Informal Resolution Of Discrimination Claims

Title VII sets forth "'an integrated, multistep enforcement procedure' that … begins with the filing of a charge with the EEOC alleging that a given employer has engaged in an unlawful employment practice." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977)) (footnote omitted).

Upon the filing of a charge, Title VII provides in relevant part:

> [T]he Commission shall serve a notice of the charge ... within ten days, and shall make an investigation thereof. ... If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge .... If the

> Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

42 U.S.C. § 2000e-5(b). If conciliation fails, the EEOC is authorized to bring suit against offending employers in its own name. However, this Court has said on numerous occasions that Congress intended voluntary compliance to be the "preferred means of achieving the objectives of Title VII." See, e.g., *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986) (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) and *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975)); see also 29 C.F.R. § 1608.1(b) (Congress "strongly encouraged employers … to act on a voluntary basis to modify employment practices and systems which constituted barriers to equal employment opportunity, without awaiting litigation or formal government action").

In the employment discrimination context, voluntary compliance often is best achieved when victims act promptly to raise their concerns and employers take swift action to investigate and resolve problems. This is true even within the confines of Title VII's administrative scheme. This Court has recognized, for instance, that Title VII's relatively brief limitations periods were chosen consciously to encourage prompt processing of all charges of discrimination. See *Mohasco Corp. v. Silver*, 447 U.S. 807, 825-26 (1980). Thus, promptly filed claims yield the benefit of providing early notice to an employer of alleged workplace discrimination, thereby offering an opportunity for informal and cooperative resolution of the issue, in

accordance with the well-recognized objectives of Title VII.

Title VII's administrative scheme also benefits charging parties, who often appear before the EEOC unrepresented by counsel and are unlikely to have extensive knowledge of federal EEO law. Indeed, unlike direct litigation in federal court, the EEOC's administrative charge procedures are designed for ease of access by those who do not wish, or cannot afford, to engage a lawyer to represent them.

Moreover, although the EEOC – unlike private litigants – can pursue enforcement actions that are "not limited to the claims presented by the charging parties," *Gen. Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 331 (1980), and is unencumbered by federal procedural rules governing class actions, the agency cannot act without first having attempted to resolve the matter informally through conciliation. This Court has described the EEOC's duty to conciliate as a "key component of the statutory scheme." *Mach Mining, LLC v. EEOC*, __ U.S. __, 135 S. Ct. 1645, 1651 (2015). Congress's focus on informal resolution of Title VII discrimination claims reinforces the value and importance of the administrative charge resolution process, which simply is unavailable to Section 1981 plaintiffs. See *Railway Express*, 421 U.S. at 460 ("the filing of a Title VII charge and resort to Title VII's administrative machinery are not prerequisites for the institution of a § 1981 action") (citations omitted).

B. Applying A Motivating Factor Causation Standard To Section 1981 Claims Would Encourage Applicants And Employees Alleging Race Discrimination To Bypass Title VII Entirely

Even though Title VII's remedial scheme is far more detailed and comprehensive, race discrimination plaintiffs have a strong incentive to include a Section 1981 count in their federal court complaints, because the timeframes for filing an action under Section 1981 are much more generous, and it offers much broader remedies, than under Title VII. For example:

> An individual who establishes a cause of action under § 1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages. … And a backpay award under § 1981 is not restricted to the two years specified for backpay recovery under Title VII.

Railway Express, 421 U.S. at 460 (citations omitted). Those plaintiffs benefit, on the one hand, from participating in the Title VII administrative exhaustion process because as a practical matter, resolution of a Title VII race discrimination claim likely also will resolve any claimed Section 1981 workplace violation. On the other hand, they still retain the right to sue under both statutes should the matter not be resolved to their satisfaction, thus benefitting from Section 1981's generous remedies.

Were Section 1981's causation standard relaxed to permit recovery under a mixed-motive theory, most plaintiffs likely would bypass Title VII entirely, thus depriving employers of the opportunity to promptly investigate and correct problems (which if left unresolved could cause further harm to the workplace),

as well as curtailing significantly the EEOC's enforcement authority. As this Court warned:

> Where conduct is covered by both § 1981 and Title VII, the detailed procedures of Title VII are rendered a dead letter, as the plaintiff is free to pursue a claim by bringing suit under § 1981 without resort to those statutory prerequisites. We agree that, after *Runyon*, there is some necessary overlap between Title VII and § 1981, and that where the statutes do in fact overlap we are not at liberty "to infer any positive preference for one over the other." We should be reluctant, however, to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute.

McLean Credit Union, 491 U.S. at 181 (citation omitted), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

Given the breadth of remedies available under Section 1981 as compared to Title VII, it stands to reason that a more stringent causation standard should apply, not only to reinforce important distinctions between the two laws, but also to serve as a check against potentially frivolous, "bet the farm" litigation, including against smaller employers subject *only* to Section 1981.

> [N]othing in the text of § 1981 suggests that it was meant to provide an omnibus remedy for *all* racial injustice. If so, it would not have been limited to situations involving contracts. Trying to make it a cure-all not only goes beyond any expression of congressional intent but would produce satellite § 1981 litigation of immense scope.

Domino's, 546 U.S. at 479.

In contrast, applying but-for causation to Section 1981 claims respects the statute's principal aim of preventing race discrimination in contracting, while rightly reserving the statute's comparatively more generous remedies – including uncapped compensatory and punitive damages – for those cases in which race, and only race, was the basis for the adverse action.

CONCLUSION

For the foregoing reasons, *amicus curiae* Center for Workplace Compliance respectfully submits that the decision below should be reversed.

Respectfully submitted,

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