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INTEREST OF *AMICI CURIAE*¹

Amici are members of the U.S. Senate and House of Representatives, many of whom are members of the Congressional Black Caucus (CBC). For nearly 50 years, the CBC has been committed to using the full constitutional power, statutory authority, and financial resources of the federal government to ensure that African Americans and other marginalized communities in the United States have the opportunity to achieve the American Dream. This commitment includes expanding access to capital, contracts, and counseling for minority-owned businesses. As members of Congress, *amici* have a strong interest in ensuring that the laws Congress has passed are interpreted in a manner that is consistent with their text, history, and Congress's plan in passing them. The statute at issue in this case—42 U.S.C. § 1981—was passed immediately after the Civil War as part of a broader effort to ensure that the newly freed slaves enjoyed the same rights as other citizens. Critical to that effort was Section 1981's guarantee that all persons have an equal right to make and enforce contracts without regard to race. *Amici* therefore have a strong interest in ensuring that Section 1981 is properly understood to allow a person who is denied that right to state a claim, regardless of whether she pleads or proves that race was a but-for cause of that denial.

¹ The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress first enacted 42 U.S.C. § 1981 in the Civil Rights Act of 1866 as part of an “immediately post–Civil War legislative effort to guarantee the then newly freed slaves the same legal rights that other citizens enjoy,” *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 448 (2008); see Cong. Globe, 39th Cong., 1st Sess. 476 (1866) (Senator Trumbull, the bill’s Senate sponsor, describing the rights protected as “fundamental rights belonging to every man as a free man”), and “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). The statute provides, in relevant part, that “[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.” 42 U.S.C. § 1981(a). It defines the term “make and enforce contracts” broadly to “include[] the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.” *Id.* § 1981(b).

Respondents National Association of African American–Owned Media and Entertainment Studios Networks, Inc. (ESN) allege that Petitioner Comcast Corporation’s refusal to enter into a contract with ESN to carry its television channels was racially motivated in violation of Section 1981. Pet. App. 2a, 34a. After a district court dismissed Petitioner’s suit for failure to state a claim, the court of appeals reversed, holding that “[i]f discriminatory intent plays *any* role in a defendant’s decision not to contract with a plaintiff, even if it is merely one factor and not the sole cause of the decision, then that plaintiff has not enjoyed the *same right* as a white citizen” and can state a viable claim

under Section 1981. *Id.* at 21a. This Court should affirm the judgment below because Respondents could state a cognizable claim against Petitioner by alleging that Petitioner denied them the right to make and enforce contracts free from racial discrimination, regardless of whether race was a but-for cause of that denial.

First, the plain text of Section 1981 guarantees all persons, regardless of race, an equal right to make and enforce contracts, and it does not require a showing of but-for causation. Petitioner is wrong to argue that Section 1981 is subject to a “default rule” that requires a showing of but-for causation. Pet’r Br. 23. While this Court has recognized that statutes containing causal phrases like “because of” or “results from” generally require such a showing absent an indication to the contrary, *see, e.g., Burrage v. United States*, 571 U.S. 204, 212 (2014); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 347 (2013), Section 1981 contains no such causal language. Accordingly, no “default rule” requiring but-for causation applies.

Instead, Section 1981’s plain text guarantees all persons the same right to make contracts—a right that “embrace[s] all aspects of the contractual relationship,” *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 303 (1994), including the right to engage in the “formation of a contract,” *Patterson v. McLean Credit Union*, 491 U.S. 164, 176 (1989)—without respect to race. Any racial discrimination that infects this process necessarily deprives those involved of the “same right” to make a contract as members of another race, even if the outcome of the contract negotiations remains the same. It follows that the plain language of Section 1981 encompasses every racially motivated refusal to contract, regardless of whether other motives prompt that refusal as well.

Second, the structure and history of Section 1981 confirm that the statute, by design, prohibits any racial discrimination in the making and enforcement of contracts, regardless of whether that discrimination is a but-for cause of the parties' failure to enter into an agreement. Congress first enacted Section 1981 alongside another provision that contained express causal language, *see Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 384 (1982), and Congress omitted such language from Section 1981. Indeed, as originally drafted, the provision that became Section 1981 contained express causal language, but Congress removed that language before enacting the law. *See id.* at 388 n.15. This Court should not now impose a requirement that Congress deliberately chose not to include when it passed the statute.

Moreover, contrary to Petitioner's assertions, *see* Pet'r Br. 28-32, this Court should not infer anything from Congress's failure to amend Section 1981—over a century after its passage—to more explicitly allow plaintiffs to bring claims where race is one of multiple motivations for an adverse action simply because it amended part of Title VII of the Civil Rights Act in this manner. Section 1981 is an entirely separate statute that contains markedly different language, so Congress's failure to amend Section 1981 when it amended Title VII says nothing about the causation standard required to state a claim under Section 1981.

In short, this Court should hold that a person who is denied the right to contract to which she is entitled under Section 1981 need not plead or prove that race was a but-for cause of that denial. To hold otherwise would fundamentally alter the statute that Congress passed in the immediate aftermath of the Civil War “to prohibit *all* racially motivated deprivations of the

rights enumerated in the statute,” *Jones*, 392 U.S. at 426.

ARGUMENT

I. THE PLAIN TEXT OF SECTION 1981 GUARANTEES ALL PERSONS, REGARDLESS OF RACE, AN EQUAL RIGHT TO MAKE AND ENFORCE CONTRACTS, AND IT DOES NOT REQUIRE A SHOWING OF BUT-FOR CAUSATION.

This Court has long recognized that “the starting point for interpreting a statute is the language of the statute itself.” *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). “And where the statutory language provides a clear answer, [the analysis] ends there as well.” *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 254 (2000) (quoting *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999)). The plain text of Section 1981 should resolve this case.

Section 1981 provides that “[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.” 42 U.S.C. § 1981(a). The statute defines “make and enforce contracts” to “include[] the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.” *Id.* § 1981(b). Based on this plain language, this Court should hold that Section 1981 prohibits a person or entity from using race as a factor in the refusal to make a contract, regardless of whether race is a but-for cause of that refusal. This is because such a racially tinged refusal deprives putative contracting parties of the critically important right that Congress guaranteed them when it passed Section

1981: the same right to make contracts as is enjoyed by members of another race. *See CBOCS*, 553 U.S. at 459 (Thomas, J., dissenting) (“[Section] 1981 is an *equal-rights* provision.”).

A. *No “Default Rule” Favoring But-For Causation Applies to Section 1981.*

As an initial matter, Petitioner is incorrect to assert that Section 1981 is subject to a “default rule” that requires a showing of but-for causation. *See* Pet’r Br. 23. To be sure, this Court has recognized that statutes containing causal phrases like “because of” or “results from” generally require a showing of but-for causation absent an indication to the contrary. *See, e.g., Burtage*, 571 U.S. at 212 (“Where there is no textual or contextual indication to the contrary, courts regularly read phrases like ‘results from’ to require but-for causality.”); *Nassar*, 570 U.S. at 347 (“[T]hese are the default rules [Congress] is presumed to have incorporated [in Title VII], absent an indication to the contrary in the statute itself.”). But this “default rule” does not apply to Section 1981, which contains no such causal language. *See Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009) (“When conducting statutory interpretation, we ‘must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.’” (quoting *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008))).

Indeed, in this respect, Section 1981 is unlike every statute that this Court has held requires a showing of but-for causation. In *Gross*, for example, this Court held that the Age Discrimination in Employment Act (ADEA), which makes it unlawful for an employer to take adverse action against an individual “*because of* such individual’s age,” 29 U.S.C. § 623(a) (emphasis added), requires proof “that age was the ‘but-for’ cause

of the challenged adverse employment action.” *Gross*, 557 U.S. at 180. The Court explained that its inquiry “must focus on the text of the ADEA,” and it especially emphasized the statute’s use of the term “because of.” *Id.* at 175; *see id.* at 176 (quoting 29 U.S.C. § 623(a)(1) and italicizing those words). It noted that “[t]he words ‘because of’ mean ‘by reason of: on account of,’” *id.* (quoting 1 *Webster’s Third New International Dictionary* 194 (1966)), and that it had previously recognized that the phrase “by reason of” requires a showing of but-for causation, *id.* (citing *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 652-55 (2008)). The Court therefore concluded that, “under the plain language of the ADEA, . . . a plaintiff must prove that age was the ‘but-for’ cause of the employer’s adverse decision.” *Id.*; *see id.* at 183 (Stevens, J., dissenting) (“Today, . . . the Court interprets the words ‘because of’ in the ADEA ‘as colloquial shorthand for “but-for” causation.” (citation omitted)); *Burrage*, 571 U.S. at 212-13 (describing how the Court’s decision in *Gross* “[r]el[ie]d on dictionary definitions” and “the ordinary meaning of the word ‘because’”); *Nassar*, 570 U.S. at 350 (explaining that the Court in *Gross* “[c]oncentrat[ed] first and foremost on the meaning of the phrase ‘because of . . . age’” (quoting *Gross*, 557 U.S. at 176) (internal quotation marks omitted)).

For similar reasons, this Court held in *Nassar* that the antiretaliation provision of Title VII of the Civil Rights Act, which, among other things, makes it “an unlawful employment practice for an employer to discriminate against any of his employees . . . *because* [the employee] has opposed any practice made an unlawful employment practice by this subchapter,” 42 U.S.C. § 2000e-3(a) (emphasis added), requires proof of but-for causation. 570 U.S. at 352. The Court emphasized that this provision, “like the statute at issue

in *Gross*, makes it unlawful for an employer to take adverse employment action against an employee ‘because’ of certain criteria,” *id.* (citing 29 U.S.C. § 623(a)(1)), and it explained that, “[g]iven the lack of any meaningful textual difference between the text in this statute and the one in *Gross*, the proper conclusion here, as in *Gross*, is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action,” *id.* Thus, the antiretaliation provision’s use of the causal term “because” triggered application of the default rule requiring but-for causation absent an indication otherwise, and the Court concluded that nothing in Title VII indicated that this default rule should not apply.²

The following year, this Court reiterated the relevant rule: “In sum, it is one of the traditional background principles ‘against which Congress legislate[s],’ that a phrase such as ‘results from’ imposes a requirement of but-for causation.” *Burrage*, 571 U.S.

² The Court distinguished between Title VII’s antiretaliation provision, 42 U.S.C. § 2000e-3(a), and the provision prohibiting employment discrimination “because of [an] individual’s race, color, religion, sex, or national origin,” *id.* § 2000e-2(a)(1), which this Court has recognized is an example of the rare law that contains an express causal phrase and yet does not require a plaintiff to prove that the discrimination would not have occurred but for that protected status. That provision falls within this exception because, since the passage of the 1991 Civil Rights Act, Title VII has expressly stated that a plaintiff who brings such a claim must demonstrate only that “race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.” *Id.* § 2000e-2(m); see *Nassar*, 570 U.S. at 348-49. In *Nassar*, the Court concluded that this “motivating factor” provision, by its terms, does not also apply to retaliation claims. 570 U.S. at 352-57.

at 214 (quoting *Nassar*, 570 U.S. at 347); *id.* at 213 (explaining that “insistence on but-for causality has not been restricted to statutes using the term ‘because of,’” but also extends to statutes containing causal phrases such as “based on” (citing *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 63 (2007)) and “by reason of” (citing *Gross*, 557 U.S. at 176; *Bridge*, 553 U.S. at 653-54; and *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 265-68 (1992))). The Court also noted that state courts “usually interpret similarly worded criminal statutes in the same manner.” *Id.*; *see id.* at 214 (collecting state court decisions holding that statutes containing the phrases “results in,” “because of,” and “obtained as a result of” require but-for causation). Accordingly, the Court concluded that “[w]here there is no textual or contextual indication to the contrary, courts regularly read phrases like ‘results from’ to require but-for causality.” *Id.* at 212; *see Safeco Ins. Co.*, 551 U.S. at 63 (“In common talk, the phrase ‘based on’ indicates a but-for causal relationship.”); *see also* U.S. Br. 25 (describing the phrase “on account of” as “characteristic but-for language” (emphasis removed)).

Because Section 1981 contains no such causal language, this but-for cause “default rule” is inapposite. *See* U.S. Br. 17 (conceding that “Section 1981 does not use specific causal language, as did the statutes in *Gross* and *Nassar*”).³ Unlike the ADEA and Title VII,

³ Petitioner emphasizes that this Court has sometimes used causal language to describe Section 1981 and that it has held that Section 1981 is violated when a plaintiff has proven that she was discriminated against “because of” her race. *See* Pet’r Br. 34-38. These assertions, however, do not help Petitioner for two reasons. First, this Court’s descriptions of a statute are no substitute for the statutory text. *See Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1949 (2016) (“[O]ur constitutional struc-

Section 1981 states that “[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.” 42 U.S.C. § 1981(a). Accordingly, no causal “default rule” applies. In any event, as the next Section explains, the statute’s plain language makes clear that a plaintiff can bring a cognizable claim under Section 1981 without establishing but-for causation.

B. Section 1981’s Plain Language Prohibits Racial Discrimination in the Making of Contracts, Regardless of Whether Race Is a But-For Cause of Any Adverse Action.

As this Court has recognized, Section 1981’s plain text “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) (quoting 42 U.S.C. § 1981(a)). The statute therefore guarantees everyone the same right to engage in the contract-formation process regardless of race, and it makes no difference whether that process would have produced a different outcome but for someone’s race.

ture does not permit this Court to ‘rewrite the statute that Congress has enacted.’” (quoting *Dodd v. United States*, 545 U.S. 353, 359 (2005))). This Court therefore has not (and could not have) inserted causal language into Section 1981 by occasionally describing it in causal terms. And second, although the cases on which Petitioner relies have concluded, for instance, that a showing of discrimination “solely because” of race is *sufficient* to state a claim under Section 1981, *see, e.g., Runyon v. McCrary*, 427 U.S. 160, 170-71 (1976); *Jones*, 392 U.S. at 419, Petitioner concedes that “these decisions did not directly present the question at issue here—that is, whether but-for causation is a necessary condition of a Section 1981 claim,” Pet’r Br. 36.

To begin, the “right . . . to make . . . contracts,” 42 U.S.C. § 1981(a), extends beyond the ability to sign documents and officially enter into agreements: it “embrace[s] all aspects of the contractual relationship,” *Rivers*, 511 U.S. at 303, including the right to negotiate terms and otherwise participate in the “formation of a contract,” *Patterson*, 491 U.S. at 176, *superseded on other grounds by statute*, Civil Rights Act of 1991, § 101(2)(b), Pub. L. No. 102-166, 105 Stat. 1071, 1071-72; *see id.* at 176-77 (noting that Section 1981 prohibits both “the [racially discriminatory] refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms”).⁴ Accordingly, Section 1981, on its face, guarantees all persons the right to make a contract on an equal basis without respect to race. Any racial discrimination that infects this process necessarily deprives those involved of the “same right” to make a contract as members of another race, even if the outcome of the contract negotiations remains the same. *Cf. Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (recognizing that “separate but equal” is “inherently unequal”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (noting that “[c]lassifications based on race carry a danger of stigmatic harm” and holding that race-conscious contracting is subject to strict scrutiny for equal protection purposes). Thus, a person who is denied

⁴ That Congress superseded *Patterson* by amending Section 1981 to clarify that the statute also covers *post*-contract-formation activities only underscores the validity of the Court’s statements in *Patterson* about the breadth of the right to initially “make” a contract. *See* U.S. Br. 4, 20 n.1 (explaining that the amendment to Section 1981 defining “make and enforce contracts” “merely clarified that the statute covers ‘post-contract-formation conduct’” (citation omitted)).

that right has a colorable claim under the statute, regardless of whether she was ultimately able to enter into a contract.

The ordinary, contemporaneous definition of the word “make” reinforces this conclusion. *See Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) (“[It is] a ‘fundamental canon of statutory construction’ that words generally should be ‘interpreted as taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute.’” (omission in original) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979))); Pet’r Br. 26 (agreeing that Section 1981’s terms “must be read as they would have been understood at the time of their enactment”). At the time Congress enacted Section 1981, the “ordinary, . . . common meaning” of the term “make” was “[t]o cause to exist; to bring into being; to produce; to frame; to fashion; to create; . . . [t]o form of materials; to cause to exist in a certain form; to construct; to fabricate.” Noah Webster, *An American Dictionary of the English Language* 802 (1864). The right to make contracts governed by Section 1981 therefore encompasses not only the right to enter into contracts, *id.* (including the word “execute” in one sub-definition of “make”), but also the right to form or construct those agreements, and Section 1981 thus prohibits any racial discrimination that factors into that process.

The statutory definition of the phrase “to make and enforce contracts,” which Congress added in the Civil Rights Act of 1991, strongly reinforces this point. Section 1981 now clarifies 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.” Civil Rights Act of 1991, § 101, 105 Stat. 1072, codified at 42 U.S.C.

§ 1981(b). *Webster's* defined “making” in 1991 as “the act or process of forming, causing, doing, or coming into being.” *Webster's Ninth New Collegiate Dictionary* 719 (1991). Thus, Section 1981 prohibits racial discrimination in the contract-formation *process*, regardless of whether that discrimination ultimately drives the parties not to reach an agreement.

The other language in Section 1981 guaranteeing “[a]ll persons . . . the *same right* . . . as is enjoyed by white citizens” likewise ensures equality in all aspects of the contract-making process, not merely in the outcome. 42 U.S.C. § 1981(a) (emphasis added). The ordinary public meaning of the word “same” in 1866 was “[n]ot different or other; identical.” *Webster, supra*, at 1167. A person who faces racial discrimination in the contract-making process is therefore deprived of “the same right . . . to make and enforce contracts,” 42 U.S.C. § 1981(a), as someone of another race who would enjoy a different contract-making experience. Likewise, a person who is denied an opportunity to make a contract for both racial and nonracial reasons is denied “the same right . . . to make and enforce contracts,” *id.*, as someone of another race because she does not receive the same opportunity to make contracts on a purely nonracial basis. *Cf. Runyon v. McCrary*, 427 U.S. 160, 171 (1976) (recognizing that Section 1981 guarantees African Americans “the same opportunity to enter into contracts” as white persons).

Indeed, this Court has recognized that Section 1981’s language guaranteeing “[a]ll persons . . . the same right” to do certain things, which originally appeared in the Civil Rights Act of 1866, is “comprehensive” and “forbid[s] *all* racial discrimination affecting the basic civil rights enumerated in the Act.” *Jones*, 392 U.S. at 435. In *Jones*, 392 U.S. 409, this Court examined Congress’s use of identical language in 42

U.S.C. § 1982—Section 1981’s “sister statute,” *CBOCS*, 553 U.S. at 452, which was enacted alongside it in the 1866 Act, *Gen. Bldg. Contractors*, 458 U.S. at 383-84, and which provides that “[a]ll citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property,” 42 U.S.C. § 1982. The Court concluded that “Congress meant exactly what it said” in Section 1982 and that the statute “must encompass every racially motivated refusal to sell or rent.” *Jones*, 392 U.S. at 421-22; *cf. Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (“[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.”); *Loughrin v. United States*, 573 U.S. 351, 360 (2014) (same). Because the two statutes share largely the same language, history, and purpose, this Court’s “precedents have long construed §§ 1981 and 1982 similarly,” *CBOCS*, 553 U.S. at 447; *see Gen. Bldg. Contractors*, 458 U.S. at 383-84 (summarizing the joint history of Section 1981 “and its companion, 42 U.S.C. § 1982”), and this Court has repeatedly confirmed that the Court’s holding in *Jones* applies to Section 1981, *Runyon*, 427 U.S. at 171.

It therefore follows that the plain language of Section 1981 “encompass[es] every racially motivated refusal” to contract, regardless of whether other motives prompt that refusal as well. *Jones*, 392 U.S. at 421; *see id.* at 436 (“[I]t is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein.”).

II. THE STRUCTURE AND HISTORY OF SECTION 1981 CONFIRM THAT THE STATUTE DOES NOT REQUIRE A SHOWING OF BUT-FOR CAUSATION.

Section 1981's structure and history confirm that the statute, by design, prohibits racial discrimination in the making and enforcement of contracts, regardless of whether that discrimination is a but-for cause of the parties' failure to enter into an agreement.

First, when Congress initially enacted Section 1981 in the aftermath of the Civil War, it passed it alongside another provision that contained express causal language. But Congress deliberately omitted such language from Section 1981. The operative text of Section 1981 guaranteeing “[a]ll persons . . . the same right . . . to make and enforce contracts,” 42 U.S.C. § 1981(a), originally appeared in Section 1 of the Civil Rights Act of 1866. *Gen. Bldg. Contractors*, 458 U.S. at 384. Section 2 of that Act, by contrast, provided that “any person who . . . shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by . . . this act . . . by reason of his color or race . . . shall be deemed guilty of a misdemeanor.” Civil Rights Act of 1866, § 2, 14 Stat. 27, 27 (emphasis added). And in 1870, while Congress kept the operative text of Section 1 the same, see *Screws v. United States*, 325 U.S. 91, 99 n.6 (1945), it amended Section 2 to expand the criminal penalties available to those who deprive civil rights “on account of such person being an alien, or by reason of his color or race,” Act of May 31, 1870, § 17, 16 Stat. 140, 144 (emphases added).

Congress's inclusion of such express causal language “unambiguously requir[ing] but-for causation,” Pet'r Br. 37, in Section 2 but not in Section 1 reflects a deliberate congressional choice. See *Dean v. United*

States, 556 U.S. 568, 573 (2009) (“[W]here 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.” (alteration in original) (emphasis added) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))); *Nassar*, 570 U.S. at 353 (“Just as Congress’ choice of words is presumed to be deliberate, so too are its structural choices.”).

Indeed, as originally drafted, the provision that became Section 1981 contained an introductory statement that “there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States *on account of* race, color, or previous condition of slavery.” Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (emphasis added) (statement of Sen. Trumbull); *see Gen. Bldg. Contractors*, 458 U.S. at 388 n.15. Congress removed that sentence before passing the law, however, after disputes arose regarding “the breadth of the phrase ‘civil rights and immunities,’” which “could have been interpreted to encompass the right of suffrage and other political rights.” *Gen. Bldg. Contractors*, 458 U.S. at 388 n.15. Accordingly, the statute that Congress ultimately enacted protects specific, enumerated rights, including the right to make and enforce contracts free from racial discrimination. *See Domino’s Pizza*, 546 U.S. at 479 (explaining that Section 1981 was not “meant to provide an omnibus remedy for *all* racial injustice,” but rather was “limited to situations involving contracts”).

Although the United States as *amicus* argues that the deletion of the phrase “on account of” was merely

“a casualty of the removal of the entire passage containing the ambiguous phrase ‘civil right or immunities,’” U.S. Br. 25, this Court must assume that Congress’s “structural choices” are “deliberate,” *Nassar*, 570 U.S. at 353. *See Gross*, 557 U.S. at 177 n.3 (“We must give effect to Congress’ choice.”). Indeed, this Court has recognized that when Congress considers a provision while crafting a bill but deletes it before passage, this removal “strongly militates against a judgment that Congress intended a result that it expressly declined to enact.” *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 200 (1974); *see Nassar*, 570 U.S. at 353 (“[I]t would be improper to conclude that what Congress omitted from the statute is nevertheless within its scope.”). And even if Congress did not specifically intend the removal of the words “on account of” to signal anything about the appropriate causation standard, it remains the case that Congress failed to include that language in the final version of Section 1981, even though it did include such terminology in a separate provision. Thus, Section 1981, as enacted, contains no causal language and plainly allows plaintiffs to bring claims where race is one of multiple motivations for an adverse action.

Second, this Court should not infer anything from Congress’s failure to amend Section 1981—over a century after its enactment—to more explicitly allow plaintiffs to bring mixed-motive claims simply because Congress separately amended part of Title VII in this manner. After a plurality of this Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989), adopted a burden-shifting framework that required but-for causation for liability under Title VII, Congress enacted the Civil Rights Act of 1991, which amended Title VII

to clarify that “an unlawful employment practice is established when the complaining party demonstrates that race . . . was a motivating factor for any employment practice, even though other factors also motivated the practice.” Civil Rights Act of 1991, § 107(a), 105 Stat. 1075, codified at 42 U.S.C. § 2000e-2(m). But Section 1981 is an entirely separate statute from Title VII that has always contained markedly different language, so Congress’s failure to amend Section 1981 when it amended Title VII says nothing about the causation standard required to state a claim under Section 1981.

This Court has repeatedly emphasized that “[c]ongressional inaction lacks ‘persuasive significance’ because ‘several equally tenable inferences’ may be drawn from such inaction, ‘including the inference that the existing legislation already incorporated the offered change.’” *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *United States v. Wise*, 370 U.S. 405, 411 (1962)). Moreover, in a statutory interpretation dispute, the Court’s role is to “determine the Legislature’s intent as embodied in particular statutory language.” *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). Accordingly, “subsequent legislative history is a ‘hazardous basis for inferring the intent of an earlier’ Congress.” *Pension Benefit Guar. Corp.*, 496 U.S. at 650 (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)). This Court therefore should not draw any inferences about the causal requirements of Section 1981—which was first enacted in 1866—based on Congress’s silence in this regard in 1991.

To be sure, this Court stated in *Gross* that it could not “ignore Congress’ decision to amend Title VII’s relevant provisions” to explicitly prohibit mixed-motive

status-based discrimination “but not make similar changes to the ADEA.” *Gross*, 557 U.S. at 174. But the ADEA and Title VII, unlike Section 1981, contain identical causal language. See 42 U.S.C. § 2000e-2(a)(1) (prohibiting discrimination in employment “because of” certain traits); 29 U.S.C. § 623(a)(1) (prohibiting discrimination in employment “because of” an individual’s age). Because the Court in *Gross* “[c]oncentrat[ed] first and foremost on the meaning of the phrase ‘because of . . . age’” in the ADEA, *Nassar*, 570 U.S. at 350 (quoting *Gross*, 557 U.S. at 176) (internal quotation marks omitted), the Court found it noteworthy that Congress chose to amend Title VII to clarify that that statute prohibits mixed-motive status-based discrimination, despite its use of the words “because of,” without also modifying the exact same language in the ADEA when it otherwise amended that statute. See *Gross*, 557 U.S. at 174.⁵

Section 1981, by contrast, does not contain similar—or, indeed, *any*—causal language that might have prompted Congress to clarify the applicable causation requirement after the Court’s decision in *Price Waterhouse*. There is therefore no reason for this Court to find the Title VII amendment relevant here. See Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 Tex. L. Rev. 859, 860 (2012) (criticizing the notion that the Court’s “single judicial interpretation” in

⁵ Although Congress reenacted and otherwise amended Section 1981 in the 1991 Act, it did so only to define “make and enforce contracts” in response to *Patterson*, which had unduly narrowed the scope of Section 1981 itself. See *CBOCS*, 553 U.S. at 451; U.S. Br. 20 n.1 (explaining that “that amendment merely clarified that the statute covers ‘post-contract-formation conduct’”).

Price Waterhouse could “spread readily across multiple statutes”).

Indeed, this Court has rejected the analogous argument that Congress intended for Section 1981 “*not* to cover retaliation” simply because, when it reenacted Section 1981 in 1991, “Congress *did not* include an *explicit* antiretaliation provision or the word ‘retaliation’ in the new statutory language—although Congress has included explicit antiretaliation language in other civil rights statutes.” *CBOCS*, 553 U.S. at 453-54. The Court concluded that Section 1981 already gave rise to claims for retaliation, and thus, “there was no need for Congress to include explicit language about retaliation.” *Id.* at 454. Along the same lines, because Section 1981’s text already allowed plaintiffs to challenge racial discrimination in the making of contracts even when multiple motives are at play, there was no need for Congress to more explicitly state that in the 1991 Act.

Finally, Petitioner argues that allowing mixed-motive claims under Section 1981 would “completely circumvent[]” the “finely balanced remedial scheme for motivating-factor claims” under Title VII that, in its view, Congress created by “carefully limit[ing] the remedies potentially available to a plaintiff relying on a motivating-factor standard [and] excluding the types of compensatory and punitive damages available under Section 1981.” Pet’r Br. 17; *see id.* at 32. Congress passed Title VII, however, against the backdrop of Section 1981’s existing protections, and nothing in Title VII’s text indicates that Congress intended to circumscribe the important protections against racial discrimination that Congress provided for in Section 1981. Indeed, this Court rejected a similar argument

in *CBOCS*. See 553 U.S. at 455 (rejecting the argument “that permitting a § 1981 retaliation action would allow a retaliation plaintiff to circumvent Title VII’s ‘specific administrative and procedural mechanisms,’ thereby undermining their effectiveness” (citation omitted)). In that case, the Court explained that “Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination,” so any “overlap” between the statutes “reflects congressional design.” *Id.* (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974)). The Court should reject Petitioner’s argument here for the same reason.

Petitioner’s *amici* also contend that allowing such claims under Section 1981 would “impose litigation burdens and settlement demands on businesses, local governments and school districts, and other contracting entities” and “invite tenuous allegations of discrimination.” Chamber Amicus Br. 3. But if this Court recognizes (as it should) that Section 1981 allows mixed-motive claims, any plaintiff seeking to bring such a claim will still need to show that she was denied an equal right to make and enforce contracts, as the statute requires. And in any event, speculative concerns about “tenuous allegations of discrimination” provide no basis for rewriting the statute that Congress passed. See *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) (“[I]n every case we must respect the role of the Legislature, and take care not to undo what it has done.”).

* * *

When Congress passed Section 1981 in the aftermath of the Civil War, it was part of a larger effort “to guarantee the then newly freed slaves the same legal rights that other citizens enjoy.” *CBOCS*, 553 U.S. at

448. As the statute’s text, structure, and history make clear, Section 1981 was passed “to prohibit *all* racially motivated deprivations of the rights enumerated in the statute,” *Jones*, 392 U.S. at 426, not just deprivations of the right to contract for which race was a but-for cause. As “the only federal law banning race discrimination in all contracts,” Section 1981 “has been a critically important tool used to strike down racially discriminatory practices in a broad variety of contexts.” H.R. Rep. No. 102-40, pt. 2, at 35 (1991). This Court should not rewrite Section 1981 and disturb the vital protections that Congress passed that statute to provide.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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U.S. Senate

Harris, Kamala D.
Senator of California

Blumenthal, Richard
Senator of Connecticut

Booker, Cory A.
Senator of New Jersey

Wyden, Ron
Senator of Oregon

U.S. House of Representatives

Bass, Karen
Representative of California

Beatty, Joyce
Representative of Ohio

Clarke, Yvette D.
Representative of New York

Lee, Barbara
Representative of California

Payne, Jr., Donald
Representative of New Jersey

Pressley, Ayanna
Representative of Massachusetts

Scott, Robert C. "Bobby"
Representative of Virginia

2A

LIST OF *AMICI* – cont'd

Watson Coleman, Bonnie
Representative of New Jersey