No. 18-1171

IN THE
In the Supreme Court of the United States

Comcast Corp.,
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 OF *AMICUS CURIAE* PROFESSOR W. BURLETTE CARTER IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Does a claim of race discrimination under 42 U.S.C. § 1981 fail in the absence of but-for causation?

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THE INTERESTS OF *AMICUS CURIAE*

Amicus Curiae, W. Burlette Carter, is Professor Emerita of Law at the George Washington University Law School in Washington, D.C. ("the University"). She is a legal scholar, a historian, and an expert in American legal history.[1] She files this brief on her own behalf. Any reference to the University is for identification only.

Amicus has an interest in ensuring that the Court rests its decisions upon a sound legal and historical basis. Before assuming *emerita* status*, Amicus* taught Civil Procedure and Evidence among other courses. Both topics are relevant to these proceedings.

SUMMARY OF THE ARGUMENT

When Section 1981 was adopted, American Tort law was not a distinctly defined field. The "but for" standard, for which Comcast and the Government, as *amicus,* argue, had not yet emerged. So too, negligence was still evolvingg into a regime based on

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[1]Petitioner and Respondents have each filed a blanket consent pursuant to Sup. Ct. R. 37. No counsel for a party authored this brief in whole or in part; no counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief; no person or entity, other than *Amicus* made any monetary contribution intended to fund the preparation or submission of this brief. Any support that *Amicus* has received from the University is nonspecific and of the type the University or its law school regularly provides to all Professors Emeriti.

"fault." *Intentional* tort cases still mirrored strict liability. The proper parallel for Section 1981 claims is intentional torts and a proximate cause regime.

Petitioner misconceives a Section 1981 contract injury. Congress created an "absolute right" to be free from race discrimination in contracting. Separately, the Act also protects from the contract-related consequences of such impermissible consideration of race. Only in exceptional cases can race, along with other factors, be considered. This reading is consistent with Congressional intent, as well as the plain language and original public meaning of Section 1981.

The lesson of history and of the relevant common law is that once plaintiff offers a prima facie case that race played an impermissible role, the defendant has the burden of (1) proving race was not a factor; (2) proving that, while race was a factor, its use was limited and permissible; or (3) *reducing* damages by showing that although race was a factor, its impact on the contracting process was limited.

The trial court did not correctly apply the standard under Fed. R. Civ. P. 12(b)(6) or Fed. R. Civ. P. 12(d). The Second Amended Complaint easily satisfies Fed. R. Civ. P. 8(a). The court also failed to treat the

complaint's allegations as true, as required, and improperly took judicial notice.

The judgment of the Ninth Circuit should be affirmed.

THE ARGUMENT

I. "But For" Was Not the Causation Standard in 1866

The relevant language of Section 1981 emerged from Section 1 of the Civil Rights act of 1866, 14 Stat. 27, passed after the enactment of the Thirteenth Amendment. *See, e.g., General Bldg. Contractors Ass'n v. Pa.*, 458 U.S. 375, 384 & n. 10 (1982). Congress later passed the Fourteenth Amendment to silence allegations that blacks needed an express grant of citizenship and rights to receive rights equal to whites. U.S. Const., am. xiv. Congress then reaffirmed the 1866 statute. Enforcement Act of 1870, 16 Stat. 140.[2]

While both Comcast and the Government, as *amicus,* argue that "but for" causation was the rule when Section 1981 was passed, they are wrong. *See* Pet. at 23; Brief for the United States as *Amicus*

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[2] This Court has reviewed the history of § 1981 on several occasions *See, e.g*, *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 383-384 (1982); *McDonald v. Santa Fe Transp. Co.*, 427 U.S. 273, 287-296 (1976); *Runyon v. McCreary*, 427 U.S. 160, 168-70 (1976); *Jones v. Alfred H. Mayer* 392 U.S. 409, 422-437 (1968).

Curiae Supporting Petitioner ("Gov't. Amicus Brief") at 15.

A. "Torts" Was Not a Separate Field of Law When Section 1981 Was Passed

While the term "tort" was used in 1866 when Section 1981 was passed, "Torts" was not a separate field of law. As G. Edward White writes:

> The emergence of Torts as an independent branch of law came strikingly late in American legal history. . . . Torts was not considered a discrete branch of law until the late 19th century. . . . The first American treatise on Torts [by Francis Hilliard] appeared in 1859; Torts was first taught as a separate law school subject in 1870; the first Torts casebook [by James Barr Ames of Harvard] was published in 1874.[3]

G. Edward White, *The Intellectual Origins Torts in America*, 86 Yale L. J. 671 (1977) ("*Intellectual Origins*") (footnotes omitted). In the Preface to his first edition, Hilliard, himself, noted that his treatise was the first American attempt. *See* Francis Hilliard, *The Law of Torts or Private Wrongs* vii (3d Ed. 1866). Instead of a discrete topic, torts was considered a

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[3] In the 1860's and early 70's, most students studied law by reading books available in lawyers' offices. Ames' casebook was remarkable in that it was designed for students. *See* W. Burlette Carter, *Reconstructing Langdell*, 32 Ga. L. Rev. 1 (1997).

subset of other topics like contracts, and criminal law. Hilliard's attempt to catalog torts included (1) assault & battery; (2) false imprisonment; (3) injuries to character and reputation, libel and slander; (4) certain crimes (e.g., forgery, larceny); (5) malicious prosecution; (6) torts to property, and (7) nuisance. *See generally Hilliard*, *supra*. In the early 1800s, those pleading classic torts had to use the writ of trespass (or, in cases of indirect harm, trespass on the case). (For examples, *see* James Barr Ames, *Select Cases on Torts* (1874)). By the time of the Civil War, in many states, these forms of rigid pleading had been abandoned.[4]

A year prior to Hilliard's effort, barrister Charles Addison published a British text. Charles Addison, *Wrongs and their Remedies, a Treatise on the Law of Torts* (1860). But reviewing Addison's work in 1871, a resistant Oliver Wendell Holmes, Jr. opined "torts is not a proper subject for a law book." Oliver W. Holmes Jr., *Book Review*, 5 Am. L. Rev. 340, 341 (1871). *See*

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[4] *But see Ricker v. Freeman (1870)*, *infra* at p. 10 and note 7 (analyzing whether plaintiff had an action in trespass or case). For a brief history of pleading standards, *see Joseph W. Glannon, Andrew M. Perlman, Peter Raven-Hansen, Civil Procedure: A Coursebook,* 421-27 (3d ed. 2017).

also discussion in G. Edward White, *Intellectual Origins*, at 683.

B. Negligence and Intentional Torts Were Not Formally Distinguished; Scholars Battle Over to What Degree and When Negligence Recognized "Fault" Principles

In 1866, not only was torts not a distinct field (see discussion in Part I(A), *supra*, there also was no *formal* distinction between intentional torts and negligence. In his 1866 edition, Hillard said intent was "of no consequence" and that "in civil actions, the law does not so much regard the intent of the actor than the loss or damage of the party suffering." Hillard, § 15 at 90. *See also* Kenneth J. Vandevelde, *A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort*, 19 Hofstra L. Rev. 447 (1990) (category "intentional torts" forged in the late nineteenth century by O.W. Holmes, Jr. and others). One does see a few early cases occasionally mentioning intent as a factor. With respect to torts "for words" (like slander or libel), some courts held liability required motivation to harm, rather than some other. *Hilliard* at 228-29. But others held intent was not relevant and that falsehoods even spoken by mistake may be actionable if harm was caused. *Id.* at 231.

Under one theory, during the early part of the pre-Civil War period, negligence did not embrace principles of fault. Horwitz writes:

> The dominant understanding of negligence at the beginning of the nineteenth

> century meant neglect or failure fully to perform a preexisting duty, whether imposed by contract, statute, or common law status.
>
> To be sure, actions on an implied contract against doctors or bailees often alleged carelessness or unskillfulness. Yet, even here one strongly suspects that carelessness was merely presumed from failure to perform, or, as Roscoe Pound has put it, "The negligence is established by the liability, not the liability by the negligence."

M. Horwitz, *The Transformation of American Law,* 1780-1860, 87 (1977) ("Transformation I") (citation omitted). The result was a trend Horwitz described as a kind of strict liability. *E.g.*, Horwitz, *Transformation I*, at 32; 85, 89. Some scholars join Horwitz, both in agreeing that prior to the 1870s, negligence largely resembled strict liability and in attributing the toward fault to judicial efforts to subsidize industry. *E.g.,* Horwitz, 63-108. *See also* Robert J. Kaczorowski, *The Common Law Background of Nineteenth Century Tort Law*, 15 Oh. St. L.J. 1127 (1990); Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 Va. L. Rev. 359 (1951); Lawrence M. Friedman, *A History of American Law* 409-427 (2d ed. 1985); Horwitz, Transformation I, 85-86.[5]

Others, however, argue that fault rules in negligence were present to greater degree prior to

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[5] Congresspersons would have discerned their knowledge of tort rules from English common law and state law collectively, absent specific direction in a federal statute.

that time and/or advanced as a natural progression. *E.g.*, Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation,* 90 Yale L.J. 1717 (1981); John F. Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (2006); Robert Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 Ga. L. Rev. 925, 927 (1981).

The Civil War complicates the tracing of torts' evolution. Horwitz skips the period between 1860 and 1870. *Compare* Horwitz, *Transformation* I (1780-1860) to Morton Horwitz, *The Transformation of American Law*, 1870-1960: *The Crisis of Legal Orthodoxy* (1992). G. Edward White begins in 1870. *See* White, *Emergence* at 469. Because of the dramatic changes in labor, industry and torts *after* the Civil War, *Amicus* believes the Court should focus on *1870 and earlier* in analyzing the history of Section 1981.[6] The standard in the era was "proximate cause," *not* "but for" causation.

II. After Negligence Transformed, Intentional Torts Continued to Favor Strict Liability

Despite the shifts in negligence, intentional torts, though not well classified, adhered to the strict

[6] I do not address here additional protections added under the 1991 amendments to Section 1981.

liability regime. Vandevelde at 449 ("all of the classic intentional torts rested on strict liability.")

The Court will remember a key English precedent, *Scott v. Shepherd*, hereinafter the "*Squib Case*". *Scott v. Shepherd*, 96 Eng. Rep. 525 (K.B. 1773) Young Shepherd intentionally threw a lighted squib loaded with gunpowder into a marketplace. As it landed, various persons propelled the squib in self-defense, and it eventually landed in another child's face, putting out his eye. Justice Neal stated the majority view: "[H]e who does the first wrong is answerable for all the consequential damages." *Id.* at 526. Like so many cases of the early era, the *Squib Case* was actually about the proper form of pleadings, whether plaintiff should have used trespass or case. But its substantive principle long affected the law of torts.

In 1870, the *Squib Case* was applied in *Ricker v. Freeman*, 50 N.H. 420 (1870), 1870 N.H. LEXIS 105 (N.H. 1870). In *Ricker,* a 16 year old student, Freeman, was held liable for grabbing a younger pupil and swinging him violently such that he involuntarily crashed into another, Townsend, who pushed him away, and propelled him into an iron clothes hanging hook.[7] While Freeman claimed he had no ill intent, the court said, "To maintain this action, it was not essential for the plaintiff to prove that the act was done with any wrongful intent by the defendant, it being sufficient if it were done without any justifiable cause or purpose, though done accidentally, or by mistake." *Id.* at **11-12. It approved the trial court's jury instructions that, as

[7] The *Ricker* court had to confront whether the plaintiff could plead in trespass or had to plead in case. 50 N.H. at 428-29.

the first actor, Freeman was liable if to any degree his force contributed to the injury. *Id.* at 4429-30. *See also* Vandevelde at p. 450.

Upon finding statutory violations, Judges took a similar approach. In *Collins* v. *East T., V. & G. R. Co.* a railroad challenged a jury damages award under a statute giving a widow a right to sue when an employee-spouse was killed in a railroad accident. The railroad argued the widow should not have received damages for loss of the husband's services and his financial support of her and her children. Upholding the award, the court stated, "The injunctions of the Law upon the defendant were imperative and peremptory. The consequence of disregarding them . . . is absolute and unconditional liability. The Statute makes no exceptions, and tolerates no excuses. The law has not been obeyed and the verdict must stand." Collins v. East T., V. & G. R. Co., 56 Tenn. 841, 1872 Tenn. LEXIS 212 (Tenn. 1872/1874).8 *See also Reeder v. Purdy*, 41 Ill. 279, 289 (1866), 1866 IL LEXIS 303, **17 (landlord who violated statute taking away landlord's common law right of forcibly entry, liable in trespass for "such damages as a jury might deem the case to require."

Noting the "the weight of authority," *Hilliard* observed in his 1866 edition that, "in the case of wrong or violation of a private right, *damage will be presumed.*" (Emphasis in original). "Thus, an action on the case lies against an intruder, by one having a

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[8] For reasons unclear, a case note says the case was decided in 1874 but is reported by order of the court under 1872.

right of way, without proof of actual damage." *Hilliard*, § 6 at 74-75.

The words "but for" do come up in cases discussing causation in this era, but courts use it to demonstrate *proximate* cause was satisfied. Thus, in *Ricker* (see discussion *supra* at p. 9), in finding proximate cause, the court stated, "but for the defendant's wrongful act, the plaintiff would have sustained no injury." Ricker, 50 N.H. at 430.[9]

Comcast's citations don't support its claims that "but for" causation was the test in 1866. Pet'rs Brief at 24. All of its pertinent sources relate to negligence –and to cases after 1870.

Comcast also misinterprets a quote in *Hilliard*. *See* Pet. at 24-25 citing *Hilliard* at 78-79 as stating "['w]here two or more causes concur to produce an effect, and it cannot be determined which contributed most largely, or whether, without the concurrence of both, it would have happened at all, and a particular party is responsible only for the consequences of one of those causes, a recovery cannot be had.[']" The statement is about negligence. *Hilliard* is quoting the holding from one case, *Marble v. Worcester*. *Marble v. Worcester*, 70 Mass 395 (1855). *Marble* is also a case involving statutory construction. Plaintiff's horse-drawn sleigh hit a pothole, and the sleigh stalled. The horse bolted and pitched the sleigh against a post, throwing the rider out and injuring him. He sued under a statute allowing one to recover for injuries

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[9] Though largely not relevant in the era, negligence cases also sometimes used the term "but for" relevant to proximate causation as well. Insurance and common carrier cases similarly used the term but were subject to unique rules by 1850, Horwitz, *Transformation I*, at 264.

caused by a failure to repair highways. The city claimed the bolting horse was the proximate cause of the injury, not its negligence regarding the pothole. (Notably, Massachusetts had already moved to a fault standard in negligence.[10]) The court determines that the "true construction" of the statute is that only proximate causes are compensable for negligence. *Marble*. 70 Mass. at 398. *See also Hilliard* at 78 ("the damage must be the direct and immediate consequence of the act,") And since it cannot determine proximate cause under the statute, it finds for defendant.

Noting that plaintiffs relied upon the *Squib Case* (see *supra* at p. 9), the *Marble* court also distinguishes intentional torts. It says: "But there the act itself was unlawful, dangerous, and, as relied on by some of the judges, wilful; at all events, it was wanton and reckless, tending to cause injury, and, under the maxim that every man shall be presumed to intend the natural and probable consequences of his own acts, intentional." *Id.* at 405. *See also Murphy v. Wilson*, 44 Mo. 313 (1869), 1869 Mo. LEXIS 212 (as to alleged coconspirators in a shooting, "[E]very person is liable for the direct, natural, and probable consequence of his own act" and citing the *Squib Case*). Hilliard makes the same point discussing libel. *Hilliard* at 84-87; *id.* at 333 ("'A man may be justly held responsible for the necessary or ordinary legitimate consequences of his own acts. . . .'"[citation omitted]; And such consequences may be included in

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[10] *Brown v. Kendall*, 60 Mass. 292 (1850), 1850 Mass LEXIS 150.

the chain of causes which connect the original act with the final effect").

The government, as *amicus*, fails equally well in citing G. Edward White. *See* Gov't *Amicus* Brief at 16-17, citing White, *Emergence* at 464-65. As clearly evident from his book's title, White begins his analysis in 1870. Indeed, White identifies "the early 1870's" as the time "when commentators began to write casebooks and treatises on tort law and to identify doctrinal principles that would serve to define Torts as a common law field." White, *Emergence*, at 464-465. He notes that "late nineteenth-century tort law sought to limit the scope of liability for *accidental personal injuries*" and that it did this through *doctrines of causation*." *Id.* at 464 (Emphasis supplied). It is in this post-1870 negligence context that White discusses "but for" causation. *Id.* at 464-65.

III. The Correct Common Law Context for Section 1981 Claims Is Intentional Torts and Its Form of Strict Liability and Proximate Cause; Thus, Generally, Race Cannot Be a Motivating Factor

This Court has held that Section 1981 prohibits only intentional behavior. *General Building Contractors Ass'n, Inc. v. Pennsylvania (General Building)*, 458 U.S. 375, 387, (1982). Congress would have understood liability for intentional torts in terms of strict liability and proximate cause. As established, a person was deemed to be responsible for the consequences of his bad acts. *See* discussion *supra* at part II(C)(2). These facts compel the view

that, under Section 1981, race cannot be a motivating factor and "but for" causation does not apply. There were likely exceptional instances in which Congress would have believed the consideration of race to be appropriate to ensure opportunity or merit. *See also* discussion *infra* in section V. Such instances are not at issue here.

IV. Comcast and the Government Misconstrue Section 1981

A. Under Section 1981, Injury Occurs When Race is Used as a Motivating Factor

1. Congress Created an "Absolute Right" Arising Out of Citizenship

Comcast and the Government also misconstrue Section 1981. The violation is not the denial of a contract. It is the denial of the right to compete for a contract *without race being a factor*. Race as a motivating factor carries its own injury. And so, even if there are also other reasons a license was not granted, the inappropriate use of race, if it occurred, sustains a cause of action. Otherwise, race could be utilized to discourage an applicant from following through with an application. An employer could share information about application processes with one race to the exclusion of the other and then claim the neglected race failed to meet "neutral" standards.

By ending slavery, supporters of the Thirteenth Amendment believed they were bestowing what Blackstone described as "absolute" rights:

> The rights of persons considered in their natural capacities are also of two sorts, absolute and relative. Absolute, which are such as appertain and belong to particular men, merely as individuals or single persons: relative, which are incident to them as members of society, and standing in various relations to each other. . . . By the absolute rights of individuals, we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it.

See 1 William Blackstone, *Commentaries* *123-125 (1753) The reading of Section 1981 is supported by the views of Sen. Trumbull, a key crafter of the 1866 statute. He stated that the bill applied to "such rights as should appertain to every free man." Cong. Globe, 39th Cong., 1st Sess., 474, 476 (1866). *See also* Cong. Globe, 39th Cong., 1st Sess. 1833 (1866) (Statement of Rep. Lawrence referring to conferring absolute rights). *Accord* Robert Kaczorowski, *Review Essay And Comment: Reconstructing Reconstruction: The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of* Runyon v. McCrary, 98 Yale L. J. 565, 568 (1989) (referencing absolute rights in context of Section 1981). The terms absolute rights and relative right were familiar to the generation that gave us Section 1981. *See Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughterhouse Co.*, 15 F. Cas. 649, 653-54 (Circuit Ct. La. 1870) (using terms "absolute" and "relative" rights to determine whether right to keep and slaughter animals is protected under §

1981)[11]; *Wagner v. Lathers*, 26 Wisc. 436, 438-30 (1870) (referring to "the relative as well as the absolute rights of the person"); Election Cases, 65 Pa. 20 (1870) (referring to voting as an absolute right); *See* note 18 *supra*. In 1869 the California Supreme Court used absolute rights logic to reject a statutory limit on the testimony of persons of Chinese ancestry as against a mixed race defendant. *People v. Washington*, 36 Cal. 658, 662-63 (1869). (But the very next year, in a case against a white defendant, the court explicitly rejected that "absolute rights" view and restored the statute. *See People v. Brady at* note 18 *infra*.) Hillard's 1866 text employs the notion of "absolute" and "relative" rights. Among tort actions that secure "absolute rights" he lists assault & battery, false imprisonment, etc. *See Hilliard* at viii. He identified a second set of wrongs based on one's relationship with government and others (including Corporations, joint ownership, master and servant, husband and wife, parent and child etc.). *Id.* at viii-ix. "Absolute rights" is also consistent with this Court's interpretation the Thirteenth amendment was intended to remove the "badges and incidents of slavery" and that that included "restraints upon "those fundamental rights which are the essence of civil freedom . . ." to the same degree enjoyed by white citizens. *Jones v. Alfred H. Mayer*, 392 U.S. 409, 441 (1968); *see* also *id.* at 432, note 54, citing Rep. Lawrence's reference to "absolute rights" and comments of Sen. Trumbull.

This Court's opinion in *Dred Scott* also provided context for Congress in 1866-1870. *Dred Scott v.*

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[11] *But see* (on the holding), *The Slaughterhouse Cases*, 83 U.S. 36 (1872).

Sandford, 60 U.S. 1 (1857). Dred Scott asserted a tort: assault by a slaveholder in seeking to recapture him and his family. To prevail, Scott had to be a person with the rights of citizens, and not merely property of the slaveholder. Thus, Justice Taney wrote. "It becomes necessary, therefore, to determine who were citizens of the several States . . . ." at the founding. 60 U.S. 407. The Court ultimately decided that persons of African descent (including free persons) were not and could not be citizens, that slaves were property under the Constitution, and that, therefore, Scott could not maintain an action in federal courts. *Id.* at 410-11.

Not only could slaves not sue in tort, they could not enter into contracts, including the contract of marriage. *Johnson v. Johnson*, 45 Mo. 595, 1870 Mo. LEXIS 281 ((1870) (wherever slavery prevailed, slaves could not marry); *Scott v. Raub*, 14 S.E. 178 (Va. 1892). Despite the fact that Dred Scott had married in his own way and had a child, *Dred Scott*, 60 U.S. at 527, he had no right to protect his family or even to choose his own name. Justice Catron recognized the practice of slaveholders changing the names of purchased slaves to reflect new ownership when he noted Dred Scott & his family "are parts of his [the slaveholder's] family *in name* and in fact." *Dred Scott*, 60 U.S. at 527 (Catron, J. concurring) (Emphasis supplied). For Congressional mentions, *see also e.g.,* Cong. Globe, 39th Cong., 1st Sess., 1780 & generally 1774-1787 (1866) (in discussion of whether to override veto and pass Section 1981, Sen. Trumbull opining slaves had citizenship rights upon emancipation and referring to opposing Senator's alleged reliance on *Dred Scott* opinion); Cong. Globe,

41st Cong., 2d Sess., 1510 (1870) (Statement of Sen. Jefferson Davis (D-MS) lamenting that Congress "always assumed in defending these measures . . . that the decision of the *Dred Scott* case was a singular, strange infatuation; a denial of the truth of history; a perversion of the facts upon which it was based" but claiming legal authorities disagree).

Thus, in passing the Thirteenth Amendment, Congress sought to move blacks from a state of relative rights (the slave status) to absolute rights (the rights to which all citizens/persons are entitled). U.S Const. am. xiii. It accomplished this by taking advantage of the Amendment's enforcement provisions and, essentially, creating a *new* intentional tort. *(See discussion of North American and United States Gazette*, *infra*, at 22*); cf.* Jones, 329 U.S. at 439 (1968).

2. Congress Knew That Denial of Work and Its Benefits was Essential to Black Oppression

There is a reason Congress mentioned contracts specifically in Section 1981. Slavery provided a tightly regulated labor force. When it ended, blacks had the right to work for wages—and constituted new competition in the workforce. Consider that in 1860 slaves were the *majority* of the population in South Carolina. *See* Census of the United States (1860), https://www.census.gov/library/publications/1864/dec/1860a.html.12. In Alabama, Georgia, Florida and Louisiana their numbers approached 50% of the

[12] Under tables for each state, the data are shown by race and condition and then in the aggregate.

population. *Id.* In Tennessee and some other states they were a third. *Id.*

Free black workers were also subject to race-based regulation. *E.g., Official: An Ordinance*, *Pertaining to Slaves and Free Persons of Color*, Texas Almanac, December 6, 1862, at 1 (neither slaves nor free black persons may start shops without having a white overseer). After *Dred Scott*, Oregon amended its constitution to prevent blacks from migrating there and making contracts. 35th Cong., 2d Sess. (1859), at 170 (Statement of Rep. Gilman). Indiana also had such a restriction. *See* Cong. Globe, 39th Cong.. 3211-3217 (1866) (Statement of Rep. Niblack (D-IN)) defending Indiana constitution's restrictions on black migration and contracting). During the Civil War, only white people could be U.S. mail carriers. When Congress considered repealing the law, Rep. Colfax reminded those on the fence that the law was intended to protect jobs for white men by preventing slaveholders who had government contracts to carry the mail from using slaves to do that work. *See* Cong. Globe, 37th Cong., 2d Sess., 2232 (1862). (Statement of Rep. Colfax (R-IN). And, of course, the overwhelming oppression closed off a host of jobs for blacks.

After rebel states conceded the end of slavery, they scurried to recreate its economic benefits to whites. Noting the recent passage of the Thirteenth Amendment, one newspaper reported, "They are still striving to enforce their black codes everywhere . . . ." *See, e.g., The Constitutional Amendment*, North American and United States Gazette, Aug. 22, 1865. These "Black laws" or "black codes" affected a broad range of rights and formed a web designed to replicate

the slave system. Cong. Globe, 39th Cong., 1st Sess., 588-89 (1866) (Statement of Rep. Donnelly (R-MN) discussing black codes and Freedman's Bureau Bill); Rose E. Vaughn, *Black Codes*, 10 Negro Hist. Bull. 17 18-19, (1946); Joe M. Richardson *Florida Black Codes*, 47 Florida Hist'l Qtly 365 (1969); William J. F. Meredith, *The Black Codes*, 3 Negro Hist. Bull. 76 (1940). *See also Gen. Bldg. Contractors Ass'n*, 458 U.S. at 386-87 (a principal object of the 1866 act was to eradicate the black codes).

Given such clear examples of retrenchment—supporters of the 1866 act would *never* have assumed a standard that, placed the burden on blacks to *prove* race was a "but for" motivating factor, when race was clearly *one* motivating factor.

B. The Original Public Meaning of Section 1981 Was That Race Discrimination Could Not Be a Motivating Factor in Contracting

Some scholars have purported to discern the meaning of Section 1981 and the Thirteenth and Fourteenth Amendments by relying primarily on conflicting statements in the *Congressional Globe*. Some of these have urged a narrow reading. But we can also discern the original public meaning of the 1866 statute (and its companion acts and amendments) from newspapers.[13] These sources

[13]Newspapers and periodicals are self-authenticating under Fed. R. Evid. 902(6). This Court may take judicial notice of the fact that the statements were made, which tends to prove the speakers believed them to be true. *See* Fed. R. Evid. 201. For hearsay exceptions, *see, e.g.,* Fed. R. Evid. 803(16); 803(6).

support the view that the contemporary understanding Section 1981, even among opponents, was that race could *not* be a motivating factor. And these earliest impressions, support an argument that a quick and fierce backlash, triggered narrower readings.

On Feb. 6, 1866, shortly after the passage of the initial bill in the Senate, the *North American and United States Gazette* (*"Gazette"*) discussed the meaning of the bill. One of the *Gazette's* publishers was the mayor of Philadelphia, Morton McMichael.[14] The *Gazette's* interpretation suggests that the dominant party in Congress believed the Thirteenth Amendment was sufficient legal authority for Section 1981. I quote it extensively here.

The Civil Liberty Bill

> On Friday last the United States Senate passed an act, introduced by Mr. Trumbull, of Illinois, to guarantee civil liberty to all the people of the United States, the importance of

[14] The *Gazette* and the *American & Gazette* were daily newspapers published out of Philadelphia by Morton McMichael and George R. Graham. *See* Library of Congress, *North American and United States Gazette*, Loc.gov, https://www.loc.gov/item/sn83025947/; Robert L. Bloom, *Morton McMichael's "North American*," 77 Penn. Mag. of Hist. & Bio. 164, 167 (1953) (discussing merger); Bloom at 165 (partnership with Graham). McMichael was the mayor of Philadelphia from 1865-69. *Bloom* at 177, n. 48. The paper had Whig leanings before turning Republican in 1857. *Id.* at 172-73. After the War and retrenchment, McMichael became a proponent of Radical Reconstruction. *Id.* at 175.

which cannot easily be exaggerated. *It is based on upon the second clause of the anti-slavery amendment to the national Constitution, providing that Congress may enforce the amendment by appropriate legislation,* and it was so clearly demanded by the present condition of affairs at the south, that various attempts at accomplishing the same purpose have been made this session in both houses of Congress. This one of Mr. Trumbull is thoroughly elaborated, and superior to all the rest of the measures pending, and as it is in the nature of a statute only, it will accomplish its purpose without the necessity of ratification by the States. *During the session it has been repeatedly urged that it is better to cure the undoubted evils existing at the south as fruits of slavery and rebellion in this way, by simple statutes, than by constitutional amendment. The objection of the Republicans has been that while they might accomplish their ends by statutes, yet these would be repealable by any subsequent Congress in which the reactionaries might chance to have a majority. Unless the representation of the south can be changed in some way, this is manifestly a peril to which we are constantly liable. As a result of these conflicting opinions, we have both plans going through that the same time. The House is devoting its attention to constitutional amendments, two of which it has already*

> *passed, while the Senate has passed two statutes intended to apply to evils at the south.*
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> Of these, the one now before us is much the most important, although it could hardly be carried into effect without the other, which provides the machinery for the purpose of extending the operations of the Freedmen's Bureau. Our readers will bear in mind that we have heretofore doubted the expediency of that Bureau. But those doubts were based on a belief that the south would sincerely give the freedmen their rights, which has not proved to be so well-founded, and the malignant disposition exhibited toward them everywhere south, renders the maintenance and extension of the Bureau unavoidable. This is the opinion of Lieutenant General Grant and others upon whose judgment we rely. It is not, therefore, a matter of choice as to this Bureau, and Congress has enlarged its scope, and improved its machinery to such an extent, that it will be able to fully enforce this civil liberty statute of Mr. Trumbull, just passed by the Senate.

The article then paraphrased the provisions of the bill. After that, it continued:

> This section states the whole matter at issue at this time, for if these things were guaranteed by the south voluntarily, all trouble would be ended and the reign of harmony prevail everywhere. *It is precisely because they are not so guaranteed by the revolted States* that the

> national government is perplexed to know how to deal with the subject. [Discussing President Johnson's concession to accept the law's principles, but noting states that conceded, even his own, did it "so reluctantly and in such a halting spirit as to lead Republicans generally to doubt the sincerity of the south."] *Even in States where partial concessions have been made, codes of laws to regulate the freedmen have been passed, most barbarous in their character. It is plain, then, that this statute of Senator Trumbull supplements the policy of President Johnson—takes up the work where the conquered rebels stopped short, and carries it through to the end.*
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> The temper of the House being well known, this bill will of course be passed by that body, and we cannot entertain any doubt that it will be approved by the President.[15] *It nullifies at one stroke all the whole mass of black codes the rebellious states have been so carefully cooking up since the recovery of their State powers, to keep the black race in hopeless servitude. It recognizes all persons born under our flag to be citizens of the United States, so that for the first time in our history the entire colored race will be, in the eye of the law, people with a birthright of freedom and civil equality before the law.* It is not alone in the south where this will be felt. States like Oregon and Indiana,

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[15] Of course, President Johnson did in fact veto the bill, demonstrating the degree of opposition to it. Congress overrode that veto.

> which still maintain black codes, will find them annulled by this act . . . .

The Civil Liberty Bill, North American and United States Gazette, Feb. 5, 1866, 1. The article says "we presume" the 1866 bill did not confer voting rights, claiming that such rights were "political," and thus, not a necessary accoutrement of citizenship. It then goes on to discuss the rest of the act. *Id.*

On February 18 1866, the *American and Gazette* (related to the *Gazette* above) [16] argued, "The new Homestead bill, the new Freedmen's Bureau bill, and the Civil Rights bill, added to the Reconstruction Committee's Constitutional amendment, form together a distinct policy intended to break down the power of the oligarchy and maintain the sympathies of the freedmen and the Union men of the south for the party which recognizes their interests and protects and cares for them … ." *The Present Attitude at the South*, American and Gazette, Feb. 18, 1866, 1.

Opponents of these measures also described them as broad, but did not embrace them. The *Natchez Daily Courier* complained that Southern states had made numerous sacrifices for readmission including the abandonment of slavery, submission to the federal government, and swallowing the Confederate debt, but that Republicans still "cry for more blood" and require that "we must put the [N]egro on an equality with us, and submit to such rules and regulations as Congress may see fit to impose on us, that the late,

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[16] See discussion *supra* at note 14.

ignorant slave may be secured in social[17] and political rights that his Maker never intended he should enjoy." *The Radicals Want More Blood*, Natchez Daily Courier, Jan. 18, 1866. On April 19, noting that the "Civil Rights Act, passed over the President's veto, the *Semi-Weekly Telegraph* of Salt Lake City, Utah reported that the bill would be bone of contention throughout the country. It described the act broadly and as including a right of intermarriage:

> The act confers equal rights on all natives of the United states, except untaxed Indians and persons of foreign parentage who design to return to the country of their parents. People of any country, race, or tribe can now become naturalized in America and enjoy the rights of citizenship. People of any country, race, if they pay taxes and become naturalized, can vote, intermarry,[18] and give evidence, the same as

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[17] The term "social" rights popped up in this era to limit the reach and import of Section 1981 and the amendments. *E.g.,* Cong. Globe, 42nd Cong., 2d Sess., 243-248 (1871) .

[18] The notion that the bill afforded a right to intermarry as "contract" and required an end to privately enforced segregation in public accommodations and elsewhere, although today challenged by some scholars, is found in other sources as well. Some papers reported it as one of several reasons to fear the Act. *E.g., Pro Slavery*, National Anti-Slavery Standard, Apr. 7, 1866 (quoting *New York Herald's view*). Some state courts embraced the view. *See, e.g., Hart v. Hoss & Elder*, 26 La. Ann. 90 (La. 1874); *Coger v. N.W. Union Packet Co., 37 Iowa 145* (Iowa 1873) (train segregation); *Redding v. South Carolina R. Co.*, 3 S.C. 1, (1871), 1871 S.C. LEXIS 36 (same). In *Redding* the train owner defended by claiming that he ceased enforcing his

segregated parlor car rules after the Civil Rights Act had passed and that his agent acted without authority. *Id.* at **2-3. *Cf. Burns v. State*, 48 Ala. 195, 1872 Ala. LEXIS 128, (Cty Ct. Mobile, Ala. 1872) (interracial marriage and stating, "The civil rights bill now confers this right upon the [N]egro in express terms, as also the right to make and enforce contracts, amongst which is that of marriage with any citizen capable of entering into that relation"). Courts rejecting this view of the 1866 act and the Thirteenth and Fourteenth Amendments, early on, tended to challenge Congress's authority to declare equality, not the reading of the statute. *E.g., Lonas v. State*, 50 Tenn. 287 (Tenn. Crim. Ct. 1871), 1871 Tenn. LEXIS 100 (14th amendment void re right to determine citizenship); *State v. Gibson*, 36 Ind. 389, 391-405 Ind. LEXIS 174, **9-30 (Ind. 1871) (interracial marriage; 14th amendment void re states exercising traditional powers). *Cf. People v. Brady*, 40 Cal. 198 (1870) (banning persons of Chinese descent from testifying against white persons, no violation of 14th Amendment because punishment for crimes by whites and Chinese descendants equalized; rejecting power of government to curtail state powers; reversing sentiments & overruling in *People v. Washington,* discussed *supra* at p. 21); *but see id.*, Rhodes, C.J., dissenting (Cal. testimony restriction violates 14th Amendment). For similar challenges to the Thirteenth Amendment, *see Thirty Eighth Congress, 2d Session*, Daily Nat'l Intelligencer, Jan. 8, 1865 ((in Jan. 7 discussion of joint resolution proposing amendment to abolish slavery, Mr. Rogers (N.J.) arguing slavery was a state affair into which Congress could not interfere but others arguing to the contrary).

> the smartest American, and must be subject to the same legal penalties and no other.

Civil Rights, Semi-Weekly Telegraph, April 19, 1866.

Another newspaper called Section 1981 a source of vexatious litigation. Relying on the letter of an anonymous "jurist" and citing reports from several other newspapers, it listed the ways blacks were allegedly causing upheaval: by ignoring segregation rules on railways, ignoring marriage restriction laws, and seeking to enforce their contract and other rights in courts. The *Civil Rights Law a Source of Wholesale Litigation*, Daily Nat'l Intelligencer, April 24, 1866, 1.[19] The newspaper blamed this black insistence on numerous outbreaks of violence. *Id.*

After the 1866 act was passed, rebel states continued to insist that any right to regulate contracting or other such behavior belonged to them, not to the federal government. (*See also* note 18, *supra.*) The Fourteenth Amendment was ratified on July 9, 1868 as an attempt to apply belts and suspenders by curbing state behavior. Once again, the *Gazette* gives us a contemporary view. The paper stated that the amendment was "now so near its final incorporation with the national charter, that we publish it below for information of the public." *The*

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[19] A decision by Judge Test of Circuit Court of Lafayette Indiana, holding that a black man could enforce a contract with a white person who hired him, was reported in several newspapers of the day. *See also, e.g., Todays Dispatches . . .* , Daily Evening Bull., Apr. 18, 1866 (San Francisco).

Fourteenth Article, North Am. & U.S. Gazette, July 17, 1868. After quoting the amendment, it stated:

> The distinguishing features of this amendment are very important. It establishes the nationality of citizenship for the first time. . . . The States are still left the control of the suffrage, but they are deprived of all power to discriminate in the citizenship. That is now held to be the indefeasible right of every person, native or naturalized, subject to our laws. . . .
>
> The next important point is that wherein the States are forbidden to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. This is a complete guarantee of civil rights everywhere, and it renders null and void any local law infringing on freedom of speech, or of the free press, forbidding the settlement of any race or color, &c. The black codes of the south, and some of the infamous black laws of the north come under the ban of this provision. Citizens are to have the same rights everywhere, and they are placed beyond the reach of sectional fanaticism. By this section, every person is secured the equal protection of the laws. Such a provision was rendered necessary by the persistent attempts of the rebels to establish a system of caste which

> would deprive the freedmen of all civil rights and of legal status before the laws.

Id.

C. The Plain Language of Section 1981 Confirms an Injury is Committed Once Race is a Motivating Factor

The language Congress chose plainly means that race is to be neutralized *for everyone*. In assessing the statutory language, most commentators focus on the first part of Section 1981: "All persons . . . shall have the same right . . . to make and enforce contracts, . . . as is enjoyed by white citizens." This language is compelling, but the remainder of the statute is worth attention too: they "shall be subject to like punishment, pains, penalties, taxes, licenses, and *exactions of every kind,* [as white persons] *and to none other . . . ."* (Emphasis added). In 1866, the term "exaction" meant a condition, a required promise or financial term, or a prerequisite. Thus, in January of 1866 a newspaper (obviously referring to Section 1981 and other pending bills) referred to agreements Southern states had made for readmission to the union as "solemn pledges exacted and given," but the Radical Republicans still wanted more. *The Radicals Want More Blood*, Natchez Daily Courier, Jan. 18, 1866. In Feb. 6, 1866 another reported that lawyers and other claim agents "had exacted 50%,or more of claims" as fees for their services and then used the money to bribe claims agents to prioritize their

claims. Daily Nat'l Intelligencer, Feb. 6, 1866.[20] Considering race in the matter of contract negotiations is requiring more of one race than another. It is an *extraction*, not applied to others.

V. The Relevant Common Law Commands that Race Cannot Be a Motivating Factor, *Even if* an Employer Claims There are Additional Legitimate Factors to Explain Conduct

A test forged from the common law history of Section 1981 would be this: (1) plaintiff must make a prima facie case that race was an impermissible fact in the contracting process; (2) an employer can respond either (a) by proving that race was not a factor; (b) by proving that, although race was a factor, it was not the only factor *and* the usage of race was permissible under law or (c) minimize damages by proving that although race was a factor, the impact of race upon the *contract*-related opportunity was

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[20] In an 1865 letter to the editor, counsel for immigration companies being prosecuted for extorting Chinese immigrants, praised the companies and claimed that they only "exacted" money from immigrants who sought to leave without paying debts owed being paid. Wh.H.L. Barnes (Counsel for the 'Six Companies'), *The Chinese Companies and Their Dealings with Their Countrymen*, Daily Evening Bull., Nov. 24, 1865, 1.

minimal. The burdens must be satisfied by a preponderance of the evidence.[21]

The rule the founders established in Section 1981 still makes sense today. Race is highly visible, allowing easy segregation of racial minorities. Gordon W. Allport, *The Nature of Prejudice*, 129-141 (1979) (discussing role of visibility in generating/supporting prejudice). Race discrimination is highly efficient. Visibility is carried through DNA. Repeated denials of opportunity based on race can affect individuals, families and entire communities, and through multiple generations, reproducing many of the evils Section 1981 was to guard against. Those denials also deny the isolated group access to supporting infrastructures available to those for whom race is neutralized. They deny the absolute rights every willing citizen has to participate in a broader marketplace for self-advancement. And they deny the country the benefit of the contributions of the excluded individuals and groups.

Of course, when it crafted Section 1981, Congress understood that, in some cases, race might have to be considered as *one* of several factors to ensure opportunity for underrepresented groups within that workspace *and* merit in products, policies or services. Notably, at the same time that it passed Section 1981, Congress also expanded the duties of the Freedman's Bureau (over the President's veto) (Cong. Globe, 39th Cong., 1st Sess., 3838-3842 (1866)). It also passed a

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[21] This Court has recognized that Section 1981 stands independently from Title VII, 42 U.S.C. § 2000e. *E.g., Jones*, 392 U.S. at 416-17, n.20; *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460-61 (1975).

Homestead Act that gave blacks and poor whites greater access to abandoned lands. Warren Hoffnagle, *The Southern Homestead Act: Its Origins and Operation*, 32 Historian 612 (1970) (and citations therein). Congress also well understood retrenchment could be a factor. Thus, there must be a way for a company to argue a business interest in diversity, not so much as a social value, but as an essential means toward producing the top products, getting the best ideas, and providing the services it needs.[22]

The Court should be clear. Section 1981(a) does *not* regulate how an employer or employees *think* about race. It only governs how that thinking is applied to decisions relating to *contracting*.

VI. The Trial Court Erred in Dismissing the Complaint

A. Respondent's Complaint is Sufficient

This Court and Congress abandoned outmoded pleading regimes in 1938 with the adoption of the Federal Rules. *Report of the Advisory Committee on Rules of Civil Procedure, Appointed by the Supreme Court of the United States, Containing Proposed Rules for the District Courts of the United States* (1937), https://www.uscourts.gov/sites/default/files/fr_import/CV04-1937.pdf; *Glannon* at 427. Today, Fed. R. Civ. P. 8(a)(1-3), embraces notice pleading, requiring only a "short and plain" statement of jurisdiction; a "short

[22] *Amicus* reads diversity broadly as including varying experiences and various races, including poor whites.

and plain statement of the claim showing that the pleader is entitled to relief" and a demand for the relief sought. Fed. R. Civ. P. 8. Respondents' complaint satisfies this test. It alleges jurisdiction, states facts supporting an allegation that Comcast rejected applications and committed other acts motivated by race in violation of Section 1981 and seeks damages. *See* Second Am. Comp., JA 33a. [23]

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[23] Where Respondent's conspiracy claims stand is unclear. *See* Brief for Respondents at 6. (Nos. 18-1171, 17-1618 and 17-1623) (suggesting claims were previously dropped). The First Amended Complaint alleged a possible conspiracy including the FCC and some nonprofits. *See* First Am. Comp. at ¶ 29-30. But paragraphs in this Second Amended Complaint might still be read to allege a conspiracy. *E.g.*, Second Am. Comp. ¶¶ 61-74, although some original defendants were dismissed voluntarily or for lack of personal jurisdiction.

This Court's statement in *Oncale*, however, must be noted: "Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of that group." *See Oncale v. Sundowner Serv's*, 523 U.S. 75, 78 (1998) (Citations omitted.) *See also Odds. & Ends*, New York Freeman, Dec. 18 1886 ("Negro" barber refusing to serve other blacks charged under Iowa Civil Rights law). Because of race discrimination's potential for impacting economic status, among those motives might be a desire for financial advancement against an environment in which race blocks legitimate means or even purchasing self-protection. If corporations combined with outside groups to apply unique extractions to some black-owned businesses, even for the purposes of achieving goals unrelated to race, *Amicus* believes that conspiracy would violate § 1981. The same would be true if entities joined with corporations and used

"Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations" *Neitzke* v. *Williams*, 490 U.S. 319, 327 (1989).

Moreover, in comparable contexts, courts have recognized that causation rules are *evidentiary* rules, not rules of pleading. *See Swierkiewicz v. Sorema*, 534 U.S. 506, 511 (2002) (Title VII discrimination plaintiff does not have to plead meeting *McDonald Douglas* evidentiary "but for" standard); *Emekauwa v. Shaw Univ.*, 2019 U.S. Dist. LEXIS 99970, *34-35 (W.D. N.C. 2019); (denying 12(b)(6) motion to dismiss for failure to plead "but for" causation in retaliation claim under False Claims Act).

B. The Trial Court Did Not Treat the Allegations of the Complaint as True and Improperly Took Judicial Notice of Controversial Documents

In deciding whether to grant a 12(b)(6) motion, a trial court must assume the complaint's allegations to be true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Instead, of following this maxim, the district court required the plaintiff to prove the defendants' defenses were *not* true. The district court's approach to causation may even have affected its personal

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political and economic power to *require* racial minorities (or groups purporting to represent them) to participate in such agreements, as a condition to obtaining access to contract related benefits to which whites have access without the requirement.

jurisdiction analysis regarding now dismissed defendants or coconspirators.[24]

The district court compounded the error by taking judicial notice of controversial documents in violation of Fed. R. Evid. 201. *See* Request for Judicial Notice by Defendant Comcast Corp., July 11, 2016 ("Comcast JN Motion"). The Court should not have taken notice of items 4-8 in the Comcast JN motion. Plaintiffs had previously objected to the taking of notice, but were overruled. *See* Objection and Request to Strike Improper Request for Judicial Notice by Defendant Comcast Corporation (filed April 27, 2016). Order Dismissing First Amended Complaint (May 10, 2016), JA at 74A.[25] Fed. R. Evid. 201 states that the court should take judicial notice of an adjudicative fact only when the fact "is not subject to reasonable dispute."

The trial court also violated Fed. R. Civ. P. 12(d) which states, that if "matters outside the pleadings are . . . not excluded by the court, the motion *must* be treated as one for summary judgment under Rule 56 and "[a]ll parties must be given a reasonable opportunity to present *all the material that is pertinent to the motion*." (Emphasis supplied). Prior to the taking of notice, Respondents should have been granted discovery on the matters raised by the controversial documents

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[24] *See, e.g.*, *Perez v. Vezer Indus. Professionals*, 2010 U.S. Dist. LEXIS 86525 (E.D. Cal. 2010) (jurisdiction based on contract); *Moser v. Encore Capital Group*, 2007 U.S. Dist. LEXIS 222968, *9 (S.D. Cal. 2007) (jurisdiction based on conspiracy).

[25] After the ruling, plaintiffs filed their own request for notice. Defendants filed no objections.

and the standard should have been that applicable to summary judgment.

CONCLUSION

The judgment of the U.S. Court of Appeals for the Ninth Circuit should be affirmed.

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