No. _____

IN THE

Supreme Court of the United States

COMCAST CORPORATION,

Petitioner,

v.

NATIONAL ASSOCIATION OF AFRICAN AMERICAN-OWNED MEDIA AND ENTERTAINMENT STUDIOS NETWORKS, INC.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Entertainment Studios Networks ("ESN") owns several television networks that it sought to have carried on Comcast's cable system. Comcast and ESN met multiple times to discuss a potential deal, but Comcast ultimately declined to carry ESN's networks. ESN's response was to sue Comcast, claiming that Comcast's decision was based on an outlandish racist conspiracy between Comcast, the NAACP, and other civil-rights groups and leaders to disadvantage wholly African American–owned networks in violation of 42 U.S.C. § 1981.

The district court dismissed ESN's complaint three times, but the Ninth Circuit reversed. The court first ruled that Section 1981 does not require but-for causation, thereby exacerbating a conflict with the decisions of five other courts of appeals. It then held that ESN's claim was plausible despite the alternative explanations for Comcast's conduct on the face of the complaint, and the complaint's failure to allege facts showing that the other companies with which Comcast contracted were similarly situated to ESN.

The questions presented are:

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

2. Can a plaintiff state a plausible claim for relief if the complaint does not allege facts tending to exclude obvious alternative explanations for the challenged conduct and does not allege facts to support all elements of the claim?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

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

Pursuant to this Court's Rule 29.6, undersigned counsel state that Comcast Corporation is a publicly held corporation. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Comcast Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit is unpublished but is available at 743 F. App'x 106. Pet. App. 1a–4a. The order denying Comcast's petition for rehearing or rehearing en banc is published at 914 F.3d 1261. *Id.* at 32a. The orders of the district court are unpublished. *Id.* at 5a–7a, 74a–77a, 109a–12a. The Ninth Circuit's opinion in *National Association of African American-Owned Media v. Charter Communications, Inc.*, which presented similar legal questions as this case, and was argued and decided on the same day by the same panel, is published at 915 F.3d 617. *Id.* at 8a–31a.

JURISDICTION

The Ninth Circuit issued its opinion on November 19, 2018, and issued its order denying rehearing or rehearing en banc on February 4, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1981(a) provides that "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to

like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

STATEMENT OF THE CASE

"It is . . . textbook tort law that an action 'is not regarded as a cause of an event if the particular event would have occurred without it.'" *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 347 (2013) (quoting W. Keeton et al., *Prosser and Keeton on the Law of Torts* 265 (5th ed. 1984)). For that reason, this Court has held that but-for causation is "the default rule[] [Congress] is presumed to have incorporated" when it creates a private right of action, which may be overcome only by "an indication to the contrary in the statute itself." *Id.* Despite this default rule, the Ninth Circuit held in this case that but-for causation is *not* the applicable standard for discrimination claims brought under 42 U.S.C. § 1981.

Up until now, at least five courts of appeals—including the Third, Sixth, Seventh, Eighth, and Eleventh Circuits—have issued decisions holding that this "default rule" applies to discrimination claims under Section 1981. And for good reason: Nothing in the text of the statute purports to displace the common-law rule requiring but-for causation. Unlike Title VII of the Civil Rights Act of 1964, which expressly allows a court to find employment discrimination where improper considerations "w[ere] a motivating factor for any employment practice, even though other factors also motivated the practice," 42 U.S.C. § 2000e-2(m), Section 1981 merely states that "[a]ll persons . . . shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens," *id.* § 1981(a). And it is unlikely in the extreme that a statute enacted in 1866—long before

Congress or the courts began to recognize mixed-motive theories of discrimination—would incorporate a different rule.

But in this case, the Ninth Circuit departed from this Court's precedent and decisions in several of its sister circuits when it held that "to prevail in a Rule 12(b)(6) motion on their § 1981 claim, Plaintiffs needed only to plausibly allege that discriminatory intent was a factor in [the] refusal to contract, and not necessarily the but-for cause of that decision." Pet. App. 2a. The Ninth Circuit did so based not on any evidence that Congress intended to depart from the default rule of but-for causation, but instead because there was, in its view, a *lack* of evidence "explicitly *suggest[ing]* but for-causation." *Id.* at 20a (emphasis added).

The Ninth Circuit compounded this error by holding that Plaintiffs' complaint stated a plausible claim that Comcast violated Section 1981 when it declined to distribute Plaintiffs' television networks to Comcast's cable-television subscribers. Plaintiffs contend that Comcast did not base its decision on legitimate business considerations, but on an outlandish racist plot against "100% African American-owned media companies"—a contrived racial category gerrymandered to include Plaintiffs and virtually no one else—that involved, among others, the United States Government, the country's oldest and most respected civil-rights organizations (including the NAACP and the National Urban League), prominent African-Americans (including Earvin "Magic" Johnson, Sean "Diddy" Combs, and Al Sharpton), and "white-owned media." Pet. App. 54a–57a. For these supposed transgressions, Plaintiffs sought $20 *billion* in damages.

The Ninth Circuit held that these far-fetched allegations pitting the government, civil-rights groups and leaders, and private industry against Plaintiffs stated a "plausible" claim under Section 1981. The court reached that result only by contravening this Court's teaching that where there is an "'obvious alternative explanation'" for the plaintiff's treatment that is not unlawful, the *plaintiff* must plead "more by way of factual content to 'nudg[e]' his claim of purposeful discrimination 'across the line from conceivable to plausible.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 682–83 (2009) (alteration in original) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 567, 570 (2007)). The Ninth Circuit ignored all allegations in the complaint implausibly asserting that Comcast was engaged in a racist plot with the government, civil-rights groups, and other media companies. And while it did acknowledge that "legitimate, race-neutral reasons for [Comcast's] conduct are contained within the [complaint]," it deemed them immaterial because it "c[ould not] conclude that these alternative explanations are so compelling as to render Plaintiffs' theory of racial animus *im*plausible." Pet. App. 4a (emphasis added). Importantly, the Ninth Circuit also relieved Plaintiffs of their obligation to allege facts showing that the other networks Comcast carried were similarly situated to ESN's networks, even though in the absence of such facts a factfinder would be unable "to infer discriminatory intent." *Id.* at 23a n.8; *see also id.* at 3a n.1.

The upshot of the Ninth Circuit's decision is that a plaintiff alleging a Section 1981 claim may now survive a motion to dismiss even where it does not allege facts establishing *either* but-for causation *or* plausible discrimination. This nonsensical holding violates this Court's decisions in *Nassar*, *Twombly*, and *Iqbal*, and

departs from the decisions of numerous other courts of appeals. This Court should grant review to bring uniformity to these important issues.

1. Plaintiff Entertainment Studios Networks ("ESN") "was founded in 1993 by Byron Allen, an African American actor/comedian/media entrepreneur." Pet. App. 40a. Today, ESN "owns and operates seven high definition television networks." *Id.* at 42a. According to Plaintiffs, "[i]t is the *only* 100% African American–owned multi-channel media company in the United States which owns and controls multiple television networks." *Id.* at 40a (emphasis added).

Like all television networks, ESN depends on carriage agreements with video programming distributors—such as Time Warner Cable, DirecTV, and Comcast—to deliver its content to consumers' television screens. Pet. App. 10a. But as the FCC has recognized, "[b]ecause there are more programming vendors seeking linear carriage than bandwidth capacity to carry them, [video programming distributors] simply cannot carry all channels that seek carriage." *In re Herring Broad., Inc.*, 24 FCC Rcd. 12967, 12999 (2009).

ESN "met and spoke[] with senior Comcast executives responsible for licensing television networks on numerous occasions beginning as early as 2008 and as recently as 2015 to license the [ESN] networks for availability to Comcast's pay television subscribers." Pet. App. 35a. At these meetings, Comcast expressed concern about ESN's ability to generate interest among its subscribers, but provided suggestions on how ESN could strengthen its application. *Id.* at 48a–50a. Ultimately, however, Comcast declined to carry ESN's networks.

Comcast was not alone in its determination that ESN's offerings did not show sufficient promise to merit its limited bandwidth. On the contrary, nearly all large distributors at the time of Comcast's decision had declined to enter into carriage agreements with ESN—including Charter Communications, Time Warner Cable, DirecTV, and AT&T.

ESN and the National Association of African American-Owned Media ("NAAAOM"), an entity created by ESN's owner, Pet. App. 39a, responded by filing a string of lawsuits against the above-named distributors, alleging in each case that the decision not to carry ESN's networks was the result not of capacity constraints or other business considerations, but racial animus against ESN. And Plaintiffs did not stop there. Rather, they alleged a vast conspiracy among video programming distributors, governmental agencies, and prominent civil-rights figures to systematically exclude "truly African American–owned media." *Id.* at 54a.

Plaintiffs originally filed this action against Comcast, former FCC Commissioner Meredith Attwell Baker, the NAACP, the National Urban League, the National Action Network, Al Sharpton, and Time Warner Cable. Pet. App. 113a, 126a–27a. The complaint alleged that these Defendants all worked in concert to discriminate against "100% African American–owned media companies"—a novel racial category artificially constructed by Plaintiffs to include ESN but exclude the networks that are majority or substantially owned by African-Americans that Comcast carries—in violation of Section 1981. *Id.* at 115a–16a, 134a–35a. In particular, the complaint alleged that while Comcast was engaged in an effort to acquire another company, the NAACP, National Urban

League, Al Sharpton and National Action Network entered into memoranda of understanding ("MOUs") designed to "whitewash Comcast's discriminatory business practices" in exchange for "large cash 'donations.'" *Id.* at 115a–16a. Although the MOUs provided preferential treatment to minority-owned networks, Plaintiffs alleged that they in fact "created a 'Jim Crow' process" with only "a few spaces for 100% African American–owned media in the 'back of the bus.'" *Id.* at 118a.

All of the Defendants moved to dismiss the initial complaint under Federal Rule of Civil Procedure 12(b)(6) because Plaintiffs failed to allege sufficient facts to state a plausible claim, and Ms. Baker, the NAACP, the National Urban League, the National Action Network, and Rev. Sharpton also moved to dismiss under Rule 12(b)(2) for lack of personal jurisdiction. Pet. App. 109a. The district court dismissed the action, finding that it lacked personal jurisdiction over all Defendants other than Comcast and Time Warner Cable, and that "plaintiffs have failed to allege any plausible claim for relief" because their "complaint pleads facts that are merely consistent with [the] defendant[s'] liability." *Id.* at 111a–12a.

Plaintiffs then filed a First Amended Complaint ("FAC"), naming only Comcast and Time Warner Cable as Defendants (Time Warner Cable was later voluntarily dismissed). Pet. App. 78a, 83a–84a. The FAC was largely identical to the original complaint, centering on an alleged conspiracy between Comcast and the now-dismissed Defendants to use the MOUs to "bamboozle[] President Obama and the federal government." *Id.* at 79a. Rather than allege additional facts regarding Comcast's treatment of ESN, the FAC asserted in conclusory fashion that Comcast had in

the past discriminated against *other* African-American programmers, and that ESN's ratings have shown positive growth. *Id.* at 96a–97a, 101a–05a.

The district court granted Comcast's motion to dismiss under Rule 12(b)(6), concluding that Plaintiffs "have not sufficiently pled facts that make a plausible claim for relief" in light of Comcast's "legitimate business reasons for denying [ESN] carriage, namely, lack of demand for ESN programming, and the bandwidth costs associated with carrying ESN's channels." Pet. App. 76a. The FAC's allegations concerning ESN's ratings growth "d[id] nothing to exclude the possibility that the alternative explanation . . . is true" because such a "relative benchmark" did not reveal anything about "the actual number of [ESN] viewers." *Id.* The district court gave Plaintiffs "one last time" to amend, but warned that "[i]f Plaintiffs file a second amended complaint with pleading deficiencies, this case will then be dismissed with prejudice." *Id.* at 76a–77a.

Like the two complaints before it, the operative Second Amended Complaint ("SAC") alleged that "[w]hite-owned media in general—and Comcast in particular—have worked hand-in-hand with governmental regulators to perpetuate the exclusion of truly African American–owned media from contracting for channel carriage and advertising," Pet. App. 54a, with Comcast "buy[ing]" the support of civil-rights groups in the form of MOUs that operated as "smokescreen[s]" for its alleged discriminatory conduct, *id.* at 55a–56a.

The SAC acknowledged the legitimate business reasons offered by Comcast for its decision not to carry ESN's networks, including bandwidth constraints, a preference for sports and news programming, and the

lack of demand for ESN's offerings. Pet. App. 50a–52a. But it brushed these justifications aside as "phony excuses" because Comcast entered into carriage agreements with other networks during this time and because other distributors elected to carry ESN's networks. *Id.* at 50a–51a. The SAC, however, failed to allege facts showing that the networks with which Comcast contracted were similarly situated to ESN's networks. Nor did the SAC disclose that many of the other distributors that had agreed to carry ESN's networks did so only in response to Plaintiffs' campaign of litigation under Section 1981.

The SAC conceded that during the same time in which Comcast was allegedly refusing to contract with ESN because of the race of its owner, it entered into carriage agreements with two other networks, Aspire (led by Earvin "Magic" Johnson) and Revolt (led by Sean "Diddy" Combs), that have majority or substantial African-American ownership. Pet. App. 58a–59a. According to Plaintiffs, however, these are not "truly African American–owned media companies" because they are not *100%* owned by African-Americans. *Id.* at 60a–61a. Plaintiffs also admitted that Comcast carried two networks that *were* wholly owned by African-Americans, Africa Channel and Black Family Channel, *id.* at 44a, but insisted that this simply confirmed Comcast's discrimination because business disputes occasionally arose between those networks and Comcast, *id.* at 65a–67a.

2. The district court again dismissed Plaintiffs' claims on the ground that they "did not exclude the alternative explanation that Comcast's refusal to contract with ESN was based on legitimate business reasons." Pet. App. 6a. The court noted that in dismiss-

ing Plaintiffs' FAC, it had gone "out of its way to suggest cures for the pleading deficiencies." *Id.* For example, the court had explained that an allegation concerning ESN's "ratings growth . . . on a competing cable network" was inadequate to state a plausible claim because "such a relative benchmark does nothing to exclude the possibility that the alternative explanation, Comcast's legitimate business reasons, is true." *Id.* at 76a. The court added that "[t]o better support its allegations, for example, Plaintiffs could have provided the actual number of viewers gained rather than just the percentage of viewer growth." *Id.*

Plaintiffs did not heed the district court's advice. On the contrary, "not one fact added to the SAC [wa]s either antithetical to a decision not to contract with ESN for legitimate business reasons or, in itself, indicate[d] that the decision was racially discriminatory." Pet. App. 6a. Rather, Plaintiffs "merely provided the Court with different opaque benchmarks." *Id.* Among other things, "Plaintiffs added the allegation that eighty million people may have *access* to ESN," but "similar to the viewer growth statistics in the FAC, this allegation represents potential, not actual, demand for ESN content, and thus it does not necessarily undercut . . . Comcast's alternative explanation." *Id.* The court therefore concluded that "the SAC 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Iqbal*, 556 U.S. at 678).

3. Plaintiffs' appeal was argued before the same panel and on the same day as *National Association of African American-Owned Media v. Charter Communications, Inc.*, No. 17-55723 (9th Cir.). Charter, like Comcast, had declined to carry ESN's networks because "bandwidth and operational demands precluded

carriage opportunities." Pet. App. 10a. As they had done when Comcast reached the same conclusion, Plaintiffs responded by filing a suit "claim[ing] that Charter's refusal to enter into a carriage contract was racially motivated" in violation of Section 1981. *Id.* at 9a. The panel issued its decision in both cases on the same day. Its published opinion in *Charter* addressed the common legal questions in the two cases, while its unpublished opinion in this action applied its holdings in *Charter* to the facts alleged here.

a. In *Charter*, the Ninth Circuit held that "mixed-motive claims are cognizable under § 1981," such that "[e]ven if racial animus was not the but-for cause of a defendant's refusal to contract, a plaintiff can still prevail if she demonstrates that discriminatory intent was a factor in that decision." Pet. App. 21a. The court acknowledged that this Court had recently "endorsed a but-for causation requirement as applied to two federal statutes: the Age Discrimination in Employment Act (ADEA) and retaliation claims brought under Title VII." *Id.* at 16a (citing *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177–78 (2009); *Nassar*, 570 U.S. at 362–63). And it conceded that in those cases "the Court endorsed the use of a *default, but-for causation standard* . . . from which courts may depart only when the text of a statute permits." *Id.* at 17a (emphasis added).

The Ninth Circuit nevertheless held that Section 1981 permitted a departure from the "default, but-for causation standard" because, unlike the ADEA and Title VII's retaliation provision, Section 1981 did not "use the word 'because,'" which "explicitly suggest[s] but-for causation." Pet. App. 20a. Rather, Section 1981 "guarantees 'the same right' to contract 'as is enjoyed by white citizens,'" *id.*, and "[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," *id.* at 21a (emphases in original).

The Ninth Circuit next considered whether Plaintiffs stated a valid Section 1981 claim under *Twombly* and *Iqbal*. Answering in the affirmative, the court pointed to Plaintiffs' conclusory assertion that "Charter secured contracts with 'white-owned, lesser-known' networks during the same period" that it was negotiating with ESN. Pet. App. 22a. In doing so, it brushed aside Charter's argument that "'[t]he complaint fails to allege any facts whatsoever showing that [ESN's] channels are 'similarly situated' to the channels Charter added.'" *Id.* at 22a–23a n.8. Despite conceding that "in order for us to infer discriminatory intent from these allegations of disparate treatment, we would need to conclude that the white-owned channels were similarly situated" to ESN's, the Ninth Circuit held that "such a thorough comparison of channels would require a factual inquiry that is inappropriate in reviewing a 12(b)(6) motion." *Id.*

The Ninth Circuit similarly dismissed Charter's alternative explanations for its decision not to contract with ESN. Although it acknowledged that "it is plausible that Charter's conduct was attributable wholly to legitimate, race-neutral considerations," the court held that Plaintiffs' claim survived a motion to dismiss because "those alternative explanations are [not] so compelling as to render Plaintiffs' allegations of discriminatory intent *im*plausible." Pet. App. 25a (emphasis in original).

b. Relying on its opinion in *Charter*, the Ninth Circuit "conclude[d] that the district court improperly

dismissed Plaintiffs' SAC" in this action because "to prevail in a Rule 12(b)(6) motion on their § 1981 claim, Plaintiffs needed only to plausibly allege that discriminatory intent was a factor in Comcast's refusal to contract, and not necessarily the but-for cause of that decision." Pet. App. 2a.

The court then held that "Plaintiffs' SAC includes sufficient allegations from which we can plausibly infer that Entertainment Studios experienced disparate treatment due to race and was thus denied the same right to contract as a white-owned company." Pet. App. 3a. Plaintiffs' "fail[ure] to adequately plead that . . . other, white-owned channels were similarly situated to [ESN's] networks" was irrelevant because "an extensive comparison of these channels for purposes of determining disparate treatment due to race would require a factual inquiry that is inappropriate in a 12(b)(6) motion." *Id.* at 3a n.1. And although the court did not deny that "legitimate, race-neutral reasons for [Comcast's] conduct are contained within the SAC," it could not "conclude that these alternative explanations are so compelling as to render Plaintiffs' theory of racial animus implausible." *Id.* at 4a.

4. Both Charter and Comcast petitioned for panel rehearing and rehearing en banc. The panel made a minor amendment to its opinion in *Charter*, and denied Comcast's petition outright. Pet. App. 32a.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S HOLDING THAT SECTION 1981 DOES NOT REQUIRE BUT-FOR CAUSATION CONFLICTS WITH THIS COURT'S PRECEDENT AND DECISIONS OF NUMEROUS COURTS OF APPEALS.

The Ninth Circuit's decision to abandon the "default, but-for causation standard" for discrimination

claims brought under 42 U.S.C. § 1981 squarely conflicts with decisions of this Court and other federal courts of appeals.

A. "Causation in fact—*i.e.*, proof that the defendant's conduct did in fact cause the plaintiff's injury—is a standard requirement of any tort claim." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 346 (2013). This rule stretches back to "[c]ommon-law approaches to causation[, which] often require proof of but-for cause as a starting point toward proof of legal cause." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 282 (1989) (Kennedy, J., dissenting); *see also Moore v. PaineWebber, Inc.*, 189 F.3d 165, 174 (2d Cir. 1999) (Calabresi, J.) ("At common law, causation involves three elements . . . : but-for causation, causal link or tendency, and proximate cause."). As one leading treatise explains, "[a]n act or omission is not regarded as a cause of an event if the particular event would have occurred without it." W. Keeton et al., *Prosser and Keeton on the Law of Torts* 265 (5th ed. 1984).

In *Price Waterhouse*, this Court confirmed that this common-law standard applied to claims of employment discrimination brought under Title VII of the Civil Rights Act of 1964, which prohibits employers from taking certain adverse actions "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1)–(2). In a fractured decision, the Court held that an employer cannot be held liable for discrimination under that statute "if it can prove that, even if it had not taken [a protected characteristic] into account, it would have come to the same decision regarding a particular person." *Price Waterhouse*, 490 U.S. at 242 (plurality op.).

Two years later, Congress enacted the Civil Rights Act of 1991, which, among other things, responded to

Price Waterhouse by expressly abandoning but-for causation for certain Title VII claims. In doing so, Congress left no room for ambiguity: As amended, Title VII now states that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m).

In two subsequent decisions, however, this Court made clear that but-for causation remains the *sine qua non* of a discrimination claim where Congress has not expressly directed otherwise. First, in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), the Court considered whether the ADEA, which "makes it unlawful for an employer to take adverse action against an employee 'because of such individual's age,'" permitted claims based on a mixed-motive theory. *Id.* at 170 (quoting 29 U.S.C. § 623(a)). The Court held that it did not. As the Court explained, "[u]nlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor." *Id.* at 174. This fact had particular salience because "Congress neglected to add such a provision to the ADEA when it amended Title VII . . . , even though it contemporaneously amended the ADEA in several ways." *Id.*

Second, in *Nassar*, the Court held that a plaintiff asserting a Title VII *retaliation* claim must allege that retaliation was a but-for cause of his injury. In so holding, the Court explained that "[c]ausation in fact . . . is a standard requirement of any tort claim," and "[i]n the usual course, this standard requires the plaintiff to show 'that the harm would not have oc-

curred' in the absence of—that is, but for—the defendant's conduct." 570 U.S. at 346–47. That principle is "the background against which Congress legislated in enacting Title VII, and [is] the default rule[] it is presumed to have incorporated, absent an indication to the contrary in the statute itself." *Id.* at 347. The Court found no evidence that Title VII's retaliation provision overcame that default rule. As in *Gross*, the Court attached significance to the fact that Congress amended Title VII to expressly allow mixed-motive claims with respect to status-based discrimination, while saying nothing of retaliation. *Id.* at 360 ("The text of § 2000e-2(m) mentions just the first five of these factors, the status-based ones; and it omits the final two, which deal with retaliation.").

The Ninth Circuit's decision in this case conflicts with *Gross* and *Nassar* in three ways. *First*, the court flipped the default rule of but-for causation on its head. The only reason cited by the Ninth Circuit for departing from *Gross* and *Nassar* is that Section 1981 employs "distinctive language, quite different from the language of the ADEA and Title VII's retaliation provision, both of which use the word 'because' and therefore *explicitly suggest* but-for causation." Pet. App. 20a (emphasis added). But as this Court held in *Nassar*, the absence of language "explicitly suggest[ing] but-for causation" is not the same as "an indication . . . in the statute itself" that but-for causation *does not* apply. 570 U.S. at 347. But-for causation is the *default rule*—that is, the rule that is presumed to apply—unless the statutory language affirmatively *excludes it*.

Second, the Ninth Circuit misapplied the statutory analysis required under *Gross* and *Nassar*. Both of those cases emphasized that courts "cannot ignore

Congress' decision to amend Title VII's relevant provisions but not make similar changes to" other anti-discrimination provisions. *Gross*, 557 U.S. at 174; *see also Nassar*, 570 U.S. at 353. Yet, as with ADEA and Title VII retaliation claims, Congress declined to amend Section 1981 to overcome the presumption of but-for causation—even though it *did* amend Section 1981 in other ways. *See* Civil Rights Act of 1991 § 101, Pub. L. No. 102-166, 105 Stat. 1071. The Ninth Circuit made no mention of this drafting history, notwithstanding its obvious import.

Third, the single statutory indicium of the proper causation standard offered by the Ninth Circuit comes nowhere close to overriding the default rule of but-for causation. The court reasoned that because "Section 1981 guarantees 'the same right' to contract 'as is enjoyed by white citizens,'" "[i]f discriminatory intent plays *any* role in a defendant's decision not to contract with a plaintiff, even if it is merely one factor and not the sole cause of the decision, then that plaintiff has not enjoyed the *same right* as a white citizen." Pet. App. 20a–21a (emphases in original). But that is a *non sequitur*. Section 1981 only guarantees all persons the same right to a substantive *result* as white citizens—namely, the making and enforcement of contracts. If the decision-maker would not have made a contract with the disappointed party even if that party were white, then it cannot be said that the party was denied "the same right to make [a] contract[] . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a).

B. The Ninth Circuit's decision also conflicts with decisions of five other courts of appeals, each of which has held, consistent with *Gross* and *Nassar*, that a Section 1981 claim will not lie unless discrimination is a but-for cause of the plaintiff's alleged harm.

1. The Seventh Circuit has held that for a Section 1981 claim "[t]o be actionable, racial prejudice must be a but-for cause . . . of the refusal to transact." *Bachman v. St. Monica's Congregation*, 902 F.2d 1259, 1262–63 (7th Cir. 1990). In that case, Jewish plaintiffs claimed that the defendants refused to sell them a property because of their religion. *Id.* at 1260. The plaintiffs argued that the district court erred in failing to instruct the jury that "if, in the midst of good reasons, ancestry is but one factor, a denial of housing would be unlawful." *Id.* at 1262. The Seventh Circuit disagreed. Writing for the court, Judge Posner explained that "if the defendants would have refused to sell the house to the [plaintiffs] even if [they] had not been Jewish, the fact that the defendants would in any event have refused to sell to them because they were Jewish would let defendants off the hook." *Id.* (emphasis omitted).

2. The Eighth Circuit reached the same conclusion in *Calloway v. Miller*, 147 F.3d 778 (8th Cir. 1998). Considering in that case whether municipal election officials discriminated against an African-American officeholder when they altered the election schedule for her office, the Eighth Circuit explained that "[t]o establish a violation of § 1981 or § 1983, the plaintiff must establish that the defendants' unconstitutional action was the 'cause in fact' of the plaintiff's injury," which meant "the result would not have occurred but for the conduct." *Id.* at 781. Because the election schedule was determined by law, and because "[t]he plaintiff point[ed] to nothing . . . under Arkansas law which establishes any authority or responsibility for the defendants to perfect, control, or alter the City's election process," the Eighth Circuit affirmed summary judgment for the defendant. *Id.*

To be sure, the Eighth Circuit subsequently suggested, in dicta and without any discussion of (or even citation to) its published decision in *Calloway*, that "the same causation standard applies in parallel Title VII and § 1981 racial discrimination claims." *Wright v. St. Vincent Health Sys.*, 730 F.3d 732, 739 n.6 (8th Cir. 2013). That the Eighth Circuit appears to have taken both sides on this issue confirms that there is significant confusion among the lower courts, and the need for this Court's review.

3. The Eleventh Circuit in *Mabra v. United Food & Commercial Workers Local Union No. 1996*, 176 F.3d 1357 (11th Cir. 1999), also held that but-for causation is required under Section 1981. The plaintiff in that case "challenge[d] the district court's conclusion that the recent Title VII amendments limiting the impact of a mixed-motive defense do not apply to § 1981 claims." *Id.* at 1357. The Eleventh Circuit rejected that challenge because although "the mixed-motive amendments specifically add two provisions to the text of Title VII[,] they make no amendment or addition to § 1981." *Id.* The court therefore affirmed the grant of summary judgment to the defendant. *Id.* at 1358.

4. The Third Circuit has also held that the lack of but-for causation defeats a Section 1981 claim in *Brown v. J. Kaz, Inc.*, 581 F.3d 175 (3d Cir. 2009). There, the plaintiff, an African-American woman, responded to an advertisement posted by the defendant seeking traveling sales representatives. *Id.* at 177. At the conclusion of plaintiff's training, the defendant decided not to offer her a job. *Id.* at 178. Plaintiff alleged that this decision stemmed from a racially charged interaction with the defendant's recruiting manager;

the defendant, on the other hand, pointed to the plaintiff's discomfort with driving and failure to complete training assignments on time. *Id.* at 177–78. Although the plaintiff had plainly presented evidence that racial animus was *a* factor in the decision not to hire her, the Third Circuit held that the defendant was entitled to summary judgment "if it prove[s] 'that if [race] had not been part of the process, its [adverse] decision . . . would nonetheless have been the same.'" *Id.* at 183 (second alteration in original) (quoting *Price Waterhouse*, 490 U.S. at 279 (O'Connor, J., concurring in the judgment)).

The Ninth Circuit erroneously believed *Brown* supported its reading of Section 1981 because *Brown* suggested, "in dicta and without formally resolving the issue," that "'[i]f race plays any role in a challenged decision by a defendant, the plain terms of the statutory text suggest the plaintiff has made out a prima facie case that section 1981 was violated.'" Pet. App. 20a–21a (alteration in original). But that statement concerned only the application of a burden-shifting framework, not the ultimate requirements for liability under Section 1981. And on that latter issue, *Brown* held that a defendant "has a complete defense to liability if it would have made the same decision without consideration of [plaintiff's] race" because if "the same decision would have been made regardless of the plaintiff's race, then the plaintiff has, in effect, enjoyed 'the same right' as similarly situated persons." 581 F.3d at 182 n.5. Notably, *Brown* is the *only* precedential authority cited by the Ninth Circuit for its interpretation of Section 1981. *See* Pet. App. 20a–21a.

5. The Ninth Circuit's decision also conflicts with *Aquino v. Honda of America, Inc.*, 158 F. App'x 667

(6th Cir. 2005), which involved a Section 1981 claim premised on a mixed-motive theory of liability. *Id.* at 669–71. The Sixth Circuit acknowledged that the Civil Rights Act of 1991 amended Title VII to permit such a theory, but emphasized that while "Congress could have added a 'mixed motive' option for lawsuits under § 1981 . . . [,] lawmakers evidently chose not to do so." *Id.* at 676 n.5. It then affirmed the district court's grant of summary judgment to the employer. *Id.* 678.

The Sixth Circuit later held in *Bobo v. United Parcel Service, Inc.*, 665 F.3d 741 (6th Cir. 2012), that a plaintiff can establish liability under Section 1981 by showing that "race was a motivating factor in his termination, even though other factors also motivated his discharge." *Id.* at 757. As the Eighth Circuit did in *Wright*, however, the Sixth Circuit reached this conclusion without any meaningful analysis. More problematically, the Sixth Circuit's reasoning was premised on the fact that "Congress in 1991 added to *Title VII* a new statutory provision codifying the mixed-motive alternative for proving an unlawful employment practice," *id.* (emphasis added)—an approach to interpreting Section 1981 that even the Ninth Circuit rejected in the decision below, *see* Pet. App. 19a ("[R]ather than borrowing the causation standard from Title VII's disparate treatment provision and applying it to § 1981 because both are anti-discrimination statutes, we must instead focus on the text of § 1981 to see if it permits a mixed-motive claim.").

* * *

If the Ninth Circuit had recognized that Section 1981 requires but-for causation, the district court's

dismissal of Plaintiffs' claim would have been affirmed. Indeed, the Ninth Circuit acknowledged that "legitimate, race-neutral reasons for [Comcast's] conduct are contained within the SAC." Pet. App. 4a. Only by abandoning the "default" rule of but-for causation could the Ninth Circuit conclude that Plaintiffs stated a violation of Section 1981.

Given that the Ninth Circuit has created a clear conflict regarding a central issue in any Section 1981 case, this Court should grant certiorari to bring a uniform approach to this important issue.

II. THE NINTH CIRCUIT'S DECISION CONTRAVENES *TWOMBLY* AND *IQBAL*, AS WELL AS THE DECISIONS OF OTHER COURTS OF APPEALS.

After improperly watering down Section 1981's causation standard, the Ninth Circuit further erred when it concluded that the SAC alleged facts sufficient to state a *plausible* claim of race discrimination.

This Court articulated the "plausibility" standard in *Twombly* and *Iqbal* precisely in order to end litigation like this at the pleading stage and preserve scarce judicial resources for litigants with real grievances. Because "[l]itigation . . . exacts heavy costs in terms of efficiency and expenditure of valuable time and resources," *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009), courts have an obligation to weed out inadequate claims "'at the point of minimum expenditure of time and money by the parties and the court,'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007). Nothing in the Federal Rules of Civil Procedure or this Court's decisions permits a court to sidestep this obligation, as the Ninth Circuit did here, by wholly ignoring a complaint's facially absurd allegations that the de-

fendant engineered an industry-wide racist conspiracy with the federal government and the entire civil-rights establishment—not against companies owned by African-Americans, but *only* against a made-up racial category of "100% African American–owned" companies.[1] If a "plausibility" test does not screen out a case like *that*, it is difficult to imagine what it does bar from federal court.

Even apart from ignoring the patent implausibility of the complaint's actual allegations, the Ninth Circuit also relieved Plaintiffs of their obligation under *Twombly* and *Iqbal* to support their ostensible legal claims with sufficient factual allegations in at least two different ways. *First*, the Ninth Circuit improperly discounted the import of obvious alternative explanations for Comcast's conduct, holding in contravention of *Twombly* and *Iqbal* that such alternative explanations bear upon the sufficiency of a claim only where they "are so compelling as to render Plaintiffs' theory of racial animus *im*plausible." Pet. App. 4a (emphasis added).

Second, and relatedly, the Ninth Circuit held that it is "inappropriate in reviewing a 12(b)(6) motion" to inquire into whether the other networks with which Comcast contracted were similarly situated to ESN, even though the court acknowledged that "to infer discriminatory intent from these allegations of disparate treatment, we would need to conclude that the white-owned channels were similarly situated." Pet. App.

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[1] Although this conspiracy theory was nonsensical on its face, Plaintiffs' concession that Comcast *did* carry a network that was "100% African American–owned"—the Africa Channel, Pet. App. 44a—rendered it even more incoherent.

22a–23a n.8. In other words, the Ninth Circuit concluded that a formulaic recitation of this element of the offense will do just fine at the pleading stage—precisely the opposite of what this Court has held.

The result was to allow Plaintiffs to "unlock the doors of discovery . . . armed with nothing more than legal conclusions." *Iqbal*, 556 U.S. at 678–79. Because the SAC advances "'a largely groundless claim'" with no "reasonably founded hope that the [discovery] process will reveal relevant evidence," *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975)), the Ninth Circuit should have affirmed the district court's dismissal.

A. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). Under *Twombly* and *Iqbal*, if a complaint pleads facts that are "'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). Thus, if there is an "'obvious alternative explanation'" for the plaintiff's treatment that is not unlawful, the plaintiff cannot state a claim without "more by way of factual content to 'nudg[e]' his claim of purposeful discrimination 'across the line from conceivable to plausible.'" *Id.* at 682–83 (alteration in original) (quoting *Twombly*, 550 U.S. at 567, 570).

The decision below flipped the pleading standard articulated in *Twombly* and *Iqbal* on its head. Although the Ninth Circuit acknowledged that "legitimate, race-neutral reasons for [Comcast's] conduct

are contained within the SAC," Pet. App. 4a, it nonetheless held that Plaintiffs stated a claim under Section 1981 despite their failure to allege facts tending to refute those obvious innocent explanations. In the court's view, it was sufficient that "these alternative explanations are [not] so compelling as to render Plaintiffs' theory of racial animus *im*plausible." *Id.* (emphasis added). But under *Twombly* and *Iqbal*, it is *plaintiff's* burden to allege "sufficient factual matter, accepted as true, to 'state a claim to relief that *is plausible* on its face.'" *Iqbal*, 556 U.S. at 678 (emphasis added).

Twombly and *Iqbal* teach that it is not enough simply to recite, as the Ninth Circuit did here, the various allegations from which a factfinder could "infer that [ESN] experienced disparate treatment due to race." Pet. App. 3a. On the contrary, a complaint that at first blush might appear to state a plausible claim could nevertheless be found wanting in light of "more likely explanations." *Iqbal*, 556 U.S. at 681.

In *Twombly*, for example, the plaintiff's complaint supported its claim under Section 1 of the Sherman Act by alleging that the defendants were engaged in parallel business behavior. 550 U.S. at 553. This Court conceded that "a showing of parallel 'business behavior is admissible circumstantial evidence from which the fact finder may infer agreement,'" *id.* at 553, but nevertheless held that the complaint was properly dismissed because it did not "raise a reasonable expectation that discovery will reveal evidence of illegal agreement," *id.* at 556. Because the alleged parallel behavior is "consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market," *id.* at 554, the

plaintiffs were required to plead additional facts "nudg[ing] their claims across the line from conceivable to plausible," *id.* at 570.

So, too, in *Iqbal*. There, the plaintiff alleged that defendants "'arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11,'" an allegation that, "[t]aken as true, . . . [was] consistent with" the plaintiffs' theory that defendants "purposefully designated detainees 'of high interest' because of their race, religion, or national origin." 556 U.S. at 681 (first omission in original). Yet this was not enough to survive a motion to dismiss because the national security response to September 11 predictably "produce[d] a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims." *Id.* at 682. Given this "'obvious alternative explanation' for the arrests," the plaintiff's alleged discrimination was, without "more by way of factual content," "not a plausible conclusion." *Id.* at 682–83.

As in *Twombly* and *Iqbal*, Plaintiffs' allegations in this case are, at most, "'merely consistent with'" Comcast's liability. *Iqbal*, 556 U.S. at 678. But compared with the "obvious alternative explanation[s]" for Comcast's decision not to carry ESN's networks, Plaintiffs' theory of a vast conspiracy among Comcast, the FCC, leading civil-rights organizations, and prominent African-Americans to purposefully discriminate against African American–owned media companies "is not a plausible conclusion." *Id.* at 682. Plaintiffs had multiple opportunities to cure this deficiency—with precise guidance from the district court on how to do so—but their allegations continued to "'stop[] short of the line between possibility and plausibility of entitlement to relief.'" *Id.* at 678.

Under this Court's precedent, the Ninth Circuit should have affirmed the district court's order dismissing the SAC. It avoided doing so only by improperly disregarding Plaintiffs' failure to allege facts tending to refute the alternative explanations for Comcast's behavior that appeared on the face of the SAC.

B. The Ninth Circuit also relieved Plaintiffs of their burden to plead facts supporting a key element of their case.

To state a claim for relief under Section 1981, a plaintiff must allege that the purported adverse action involved a discriminatory intent. In support of their claim that Comcast refused to contract with ESN because of the race of ESN's owner, Plaintiffs asserted that Comcast "continued to launch other, newer, lesser-distributed, white-owned networks." Pet. App. 36a. The Ninth Circuit acknowledged that it could only "infer discriminatory intent from these allegations of disparate treatment" if it could "conclude that the white-owned channels were similarly situated to" ESN's. *Id.* at 22a–23a n.8. But it nonetheless held that "an extensive comparison of these channels for purposes of determining disparate treatment due to race would require a factual inquiry that is inappropriate in a 12(b)(6) motion." *Id.* at 3a n.1. Of course, no "factual inquiry" was necessary; Plaintiffs needed only to *allege* facts showing that those other channels were similarly situated, as they asserted. Yet based on this supposed concern over a premature factual inquiry, the Ninth Circuit held that it "must . . . accept as true" Plaintiffs' conclusory assertion—even though it was unsupported by any factual details—"that lesser-known, white-owned channels secured carriage

at the same time that Comcast refused to contract with Entertainment Studios." *Id.*

The Ninth Circuit's approach not only conflicts with this Court's teaching that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," *Iqbal*, 556 U.S. at 678, but also the decisions of multiple other courts of appeals that have upheld the dismissal of Section 1981 claims where the plaintiff failed to allege *facts* showing that the party with whom the defendant ultimately contracted was similarly situated.

For example, in *Burgis v. New York City Department of Sanitation*, 798 F.3d 63 (2d Cir. 2015), the Second Circuit considered the claim by a group of New York City sanitation workers that the Department of Sanitation's promotional practices discriminated against them on the basis of race and national origin in violation of the Equal Protection Clause and Section 1981. *Id.* at 66. The district court dismissed for "fail[ure] to sufficiently allege discriminatory intent," *id.* at 68, and the Second Circuit affirmed. Writing for the court, Judge Rakoff observed that "[w]hile the [complaint] generally alleges with respect to seven plaintiffs that they have been passed over for subsequent promotions while White individuals, who were allegedly less qualified, were promoted, the [complaint] fails to provide meaningful specifics of the alleged difference in qualifications." *Id.* This was fatal to plaintiffs' claims, for "[w]ithout any specificity as to the qualifications considered for each position and without any reference to specific statements or individual circumstances that suggest discriminatory treatment . . . [,] it is equally possible that plaintiffs have not been promoted for valid, non-discriminatory reasons." *Id.* at 69.

The Fifth Circuit reached a similar conclusion in *Body by Cook, Inc. v. State Farm Mutual Automobile Insurance*, 869 F.3d 381 (5th Cir. 2017). In that case, an African-American man brought suit on behalf of himself and the repair shop he owned against various automobile insurance companies after they refused to classify the repair shop as "a referral repair shop." *Id.* at 384. The Fifth Circuit concluded that, with respect to most of the defendants, the "generalized allegations" in the plaintiffs' complaint "are not specific enough to plead discriminatory intent" because "[t]hey fail to identify . . . specific instances when [plaintiffs] w[ere] refused a contract but a similarly situated non-minority owned body shop was given a contract." *Id.* at 387. Notably, however, the claim against State Farm survived because the plaintiffs' complaint "contain[ed] more specific allegations regarding State Farm's discriminatory intent," and specifically "alleg[ed] that similarly situated body shops were treated differently than [plaintiffs] and allowed into State Farm's Direct Repair Service Program," thereby "mak[ing] plausible the inference that the difference was because of [plaintiff's] minority-owned status." *Id.*

Had Plaintiffs been held to their obligation to allege facts—rather than mere "legal conclusions," *Iqbal*, 556 U.S. at 678—to support their assertion that the other channels Comcast agreed to carry were similarly situated to ESN, their facially implausible claim that Comcast's decision was the result of a racist conspiracy involving the FCC, civil-rights organizations, and other African-Americans to discriminate against "100% African American–owned" companies would never have proceeded past the pleading stage. Yet the Ninth Circuit instead adopted a watered-down pleading standard for Section 1981 claims that cannot be

reconciled with *Twombly*, *Iqbal*, or the decisions of other courts of appeals.

CONCLUSION

It is a fundamental principle of law that, absent a statutory indication to the contrary, a defendant cannot be held liable for harms caused to another unless it is the but-for cause of those harms. The Ninth Circuit departed from this long-established principle when it held that liability will lie under Section 1981 even in the absence of but-for causation. And it further erred by disregarding the plausible alternative explanations for Comcast's conduct on the face of the complaint, as well as the complaint's failure to allege facts supporting an essential element of Plaintiffs' claim.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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