No. 18-1171

IN THE

Supreme Court of the United States

COMCAST CORPORATION,

Petitioner,

v.

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

Respondents.

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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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Plaintiffs allege an outlandish scheme in which Comcast supposedly coordinated with the federal government, leading civil-rights organizations, and prominent African-Americans to exclude "100% African American-owned" media from the nation's cable systems. Despite the facial implausibility of these allegations, the Ninth Circuit reversed the district court's order dismissing Plaintiffs' Second Amended Complaint ("SAC"), holding that it stated a claim under 42 U.S.C. § 1981 even though Plaintiffs did not allege that "discriminatory intent was . . . the but-for cause" of Comcast's decision not to carry Entertainment Studios Networks' ("ESN") channels, and even though "legitimate, race-neutral reasons for [Comcast's] conduct are contained within the SAC." Pet. App. 2a, 4a. This Court should grant certiorari because this decision conflicts with decisions of other courts of appeals and this Court.

But-for causation is the "default rule[] [Congress] is presumed to have incorporated, absent an indication to the contrary in the statute itself." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 347 (2013). Five federal courts of appeals have held that Section 1981 requires but-for causation. Plaintiffs' attempt to reconcile the Ninth Circuit's rejection of but-for causation with those precedents relies on mischaracterizing what they held. Plaintiffs also cite decisions that purportedly agree with the Ninth Circuit, but even if that were true, it would only confirm the maturity of this conflict and the need for this Court's review.

The Ninth Circuit also flouted this Court's holding that a complaint must allege facts "stat[ing] a claim to relief that is plausible on its face." *Bell Atl. Corp. v.*

Twombly, 550 U.S. 544, 570 (2007). After disregarding the implausibility of the SAC's core allegations, the Ninth Circuit relieved Plaintiffs of their obligation to allege that the "white-owned" channels carried by Comcast were similarly situated to ESN's channels, thereby creating a conflict with decisions from the Second and Fifth Circuits. The Ninth Circuit also rejected this Court's teaching that where there are "'obvious alternative explanation[s]'" for a defendant's conduct, a plaintiff must plead "more by way of factual content to 'nudg[e]' [its] claim of purposeful discrimination 'across the line from conceivable to plausible.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 682–83 (2009).

The Court should grant certiorari and reverse the decision below.

I. THE COURT SHOULD GRANT REVIEW TO DECIDE WHETHER SECTION 1981 REQUIRES BUT-FOR CAUSATION.

The Ninth Circuit's holding that "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, creates a split of authority among the courts of appeals and conflicts with *Nassar* and *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009).

A. Five courts of appeals have held that Section 1981 liability is precluded in the absence of but-for causation. Pet. 17–21. Plaintiffs' attempts to distinguish those decisions and to reconcile them with the Ninth Circuit's holding are unpersuasive.

1. Plaintiffs first contend that the decision below is distinguishable from those cited in Comcast's petition because it supposedly only "address[ed] a plain-

tiff's *pleading burden*," whereas those cases "were decided on appeal from a grant of summary judgment or a judgment based on a jury verdict." Opp. 30. This is factually incorrect and legally irrelevant.

Nothing in the Ninth Circuit's decision limits its holding to the pleading stage. On the contrary, the decision clearly articulates the standard for *liability* under Section 1981: "If discriminatory intent plays *any* role in a defendant's decision not to contract with a plaintiff, even if it is merely one factor and not the sole cause of the decision, then that plaintiff has not enjoyed the *same right* as a white citizen." Pet. App. 21a.

Even if the Ninth Circuit purported to adopt a lower causation standard only at the pleading stage, that would conflict with this Court's decisions holding that the same substantive legal standards apply at all stages of a proceeding. In *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), for example, the parties disputed whether plaintiffs adequately pleaded loss causation in a securities-fraud action. *Id.* at 338. Noting that the plaintiffs could prevail at trial only if they "prove the traditional elements of causation and loss," the Court concluded that "[o]ur holding about plaintiffs' need to *prove* proximate causation and economic loss leads us also to conclude that the plaintiffs' complaint here failed adequately to *allege* these requirements." *Id.* at 346.

Consequently, a Section 1981 plaintiff must substantiate each element of the claim at each stage of the litigation with the type of support appropriate to that stage—*i.e.*, allegations at the pleading stage, evidence at summary judgment and trial. *Lujan v. Defs.*

of Wildlife, 504 U.S. 555, 561 (1992). If the Ninth Circuit's decision held otherwise, that would be further reason to grant certiorari.

2. Plaintiffs next contend that there is no disagreement among the federal courts regarding the causation standard under Section 1981. Plaintiffs are wrong.

a. The Seventh Circuit held in *Bachman v. St. Monica's Congregation*, 902 F.2d 1259 (7th Cir. 1990), that "[t]o be actionable, racial prejudice must be a but-for cause . . . of the refusal to transact." *Id.* at 1262–63. Plaintiffs contend that *Bachman* "did not address the motivating factor standard," Opp. 32, but that assertion cannot be reconciled with the Seventh Circuit's statement that "if the defendants would have refused to sell the house to the Bachmans even if the Bachmans 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 the defendants off the hook." 902 F.2d at 1262.

The Seventh Circuit's unpublished decision in *Killebrew v. St. Vincent Health, Inc.*, 295 F. App'x 808 (7th Cir. 2008), does not undermine *Bachman*. Opp. 32. Plaintiffs emphasize *Killebrew*'s observation that the complaint there was properly dismissed because it "d[id] not assert that race or any other protected ground was the motivating factor behind the ill-treatment," 295 F. App'x at 810, but the reference to "motivating factor" is explained by the fact that the complaint asserted claims under *both* Section 1981 *and* Title VII, *id.* at 808, and Title VII indisputably permits liability on mixed-motive grounds, 42 U.S.C. § 2000e-2(m). Moreover, in a published decision after *Killebrew*, the Seventh Circuit expressly held that the mixed-motive amendments to Title VII did not change

the causation standard for Section 1981 claims. *See Smith v. Wilson*, 705 F.3d 674, 679 (7th Cir. 2013).

b. The Ninth Circuit's decision also conflicts with *Mabra v. United Food & Commercial Workers Local Union No. 1996*, 176 F.3d 1357 (11th Cir. 1999), which held that "the 1991 mixed-motive amendments to Title VII do not apply to § 1981 claims." *Id.* at 1358. Plaintiffs suggest *Mabra* addressed only "the *defendant's* burden in the mixed-motive burden-shifting framework." Opp. 32 & n.5. Not so—*Mabra* expressly held that neither of the two "mixed-motive amendments" to Title VII, including the amendment permitting liability on mixed-motive grounds, applied to Section 1981. 176 F.3d at 1357 & n.2. Plaintiffs' reliance on *Vinson v. Koch Foods of Ala., LLC*, 735 F. App'x 978 (11th Cir. 2018), also does not help them because, like *Killebrew*, it is unpublished and addressed claims under both Title VII and Section 1981. *Id.* at 979.

c. Plaintiffs do not dispute that the Sixth and Eighth Circuits have held that but-for causation is required under Section 1981. *Aquino v. Honda of Am., Inc.*, 158 F. App'x 667, 676 n.5 (6th Cir. 2005); *Calloway v. Miller*, 147 F.3d 778, 781 (8th Cir. 1998). Instead, they cite subsequent decisions from those courts that appear to take a contrary view (albeit without meaningful analysis). *See* Opp. 31; Pet. 19, 21. The fact that these circuits are in conflict both internally and with the Ninth Circuit only confirms the need for this Court to clarify this important and recurring question.

d. Like the Ninth Circuit below, Plaintiffs misread the Third Circuit's decision in *Brown v. J. Kaz, Inc.*, 581 F.3d 175 (3d Cir. 2009). While they cite dicta suggesting a plaintiff need only allege a mixed motive to

shift the burden to defendant to *disprove* but-for causation, Opp. 31, the Third Circuit expressly held that 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. The Ninth Circuit's contrary rule rests on precisely the opposite conclusion. Pet. App. 21a.

Plaintiffs err in contending that *Anderson v. Wachovia Mortgage Co.*, 621 F.3d 261 (3d Cir. 2010), adopts the "motivating factor" standard for Section 1981. Opp. 31–32. *Anderson* did not address the standard for causation under Section 1981, but whether the plaintiff had succeeded in identifying "[d]irect evidence of discrimination" or was instead relegated to the *McDonnell Douglas* burden-shifting framework. 621 F.3d at 269.

e. Finally, Plaintiffs cite cases from other circuits that they claim agree with the Ninth Circuit's interpretation of Section 1981. Opp. App. 1–4. Their assertion does not withstand even minimal scrutiny.

Three cases (two unpublished) simply graft Title VII standards onto Section 1981, which even the Ninth Circuit found improper. *See Swaso v. Onslow Cty. Bd. of Educ.*, 698 F. App'x 745, 747 (4th Cir. 2017); *Odubela v. Exxon Mobil Corp.*, 736 F. App'x 437, 442 (5th Cir. 2018); *Payan v. United Parcel Serv.*, 905 F.3d 1162, 1168 (10th Cir. 2018). Three others involved claims under both Section 1981 and either Title VI or Title VII of the Civil Rights Act of 1964, and did not specifically address whether mixed-motive theories are cognizable under Section 1981. *See Goodman v. Bowdoin Coll.*, 380 F.3d 33, 44 n.18 (1st Cir. 2004); *Henry v. Wyeth Pharm., Inc.*, 616 F.3d 134, 153–54 (2d Cir. 2010); *DeJesus v. WP Co. LLC*, 841

F.3d 527, 529, 536 (D.C. Cir. 2016). And the remaining case applies *McDonnell Douglas* burden-shifting without any consideration of the proper causation standard. *See Ruiz v. A.B. Chance Co.*, 234 F.3d 654, 671 (Fed. Cir. 2000).

Of course, even if these cases did hold that Section 1981 does not require but-for causation, that would merely confirm that the circuit conflict is mature and ripe for this Court's resolution.

B. The Ninth Circuit's decision also conflicts with *Gross* and *Nassar*, which hold that "[c]ausation in fact . . . is a standard requirement of any tort claim" that "requires the plaintiff to show 'that the harm would not have occurred' in the absence of—that is, but for—the defendant's conduct." *Nassar*, 570 U.S. at 346–47; *see also Gross*, 557 U.S. at 174.

Plaintiffs contend *Gross* and *Nassar* are distinguishable because they "did not interpret section 1981." Opp. 20. But those cases announce a rule of statutory interpretation applicable in *all* cases. Indeed, *Nassar* states that but-for causation is the "default rule[] [Congress] is presumed to have incorporated, absent an indication to the contrary in the statute itself." 570 U.S. at 347.

Plaintiffs also assert that "neither decision addressed, let alone changed, *pleading burdens* for any claims." Opp. 25–26. But they addressed the standard for *liability*, and the same substantive standards apply at the pleading stage as at later stages of litigation, as explained above.

Plaintiffs claim the Ninth Circuit followed *Gross* and *Nassar* because it "recognized that 'but-for' causation is the default rule" and "'look[ed] to the text of § 1981 to determine whether it permits a departure

from the but-for causation standard.'" Opp. 26. This misses the point: after acknowledging the principle that but-for causation is required "'absent an indication to the contrary in the statute itself,'" Pet. App. 17a (citation omitted), the Ninth Circuit immediately rejected that principle by deeming the *absence* of language "explicitly suggest[ing] but-for causation" sufficient to reject the default standard, *id*. at 20a.

Citing the Third Circuit's decision in *Brown*, the Ninth Circuit attached dispositive importance to Section 1981's guarantee of "the same right . . . to make and enforce contracts," holding that "[i]f discriminatory intent plays *any* role" in the refusal to contract, then the plaintiff "has not enjoyed the *same right* as a white citizen." Pet. App. 21a. But *Brown* itself acknowledged that 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. Nothing in the text of Section 1981 overcomes the background common-law presumption favoring but-for causation—particularly in a statute enacted in 1866, long before Congress or the courts began to recognize mixed-motive theories of discrimination.

C. This case presents no vehicle problems. Although Plaintiffs criticize Comcast for "challeng[ing] the reasoning of the Ninth Circuit in [*National Association of African American-Owned Media v. Charter Communications, Inc.*, 915 F.3d 617 (9th Cir. 2019)]—a separate case in which Comcast is not a party," Opp. 25, that case was decided on the same day and by the same panel as this case, and its holding was both expressly relied on (as Plaintiffs acknowledge, Opp. 9) and essential to the judgment below.

It is irrelevant that "the District Court did not grant Comcast's Rule 12(b)(6) motion on this basis," Opp. 3, because the *Ninth Circuit* expressly reached the issue of but-for causation under Section 1981.

Finally, while Plaintiffs insist in conclusory fashion that they did allege but-for causation, Opp. 35, the Ninth Circuit obviously disagreed, instead squarely holding that Section 1981 imposes liability in its absence.

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

Plaintiffs alleged that Comcast's decision not to carry ESN's channels was part of a plan to discriminate against "100% African American-owned media" that involved Comcast, the federal government, the country's most respected civil-rights organizations, and prominent African-Americans. Although they now disclaim these implausible allegations by noting that they dropped their conspiracy *cause of action*, Opp. 14, it is beyond dispute that their conspiracy theory remains the centerpiece of the SAC, Pet. 8–9. These allegations not only fail to "state a claim to relief that is plausible on its face," *Twombly*, 550 U.S. at 570—they allege a claim that is *im*plausible (indeed, outlandish) on its face.

But that is not all. The Ninth Circuit departed from *Twombly* and *Iqbal*—and created a split with two of its sister circuits—in two ways, each of which merits this Court's review.

A. The Ninth Circuit flouted this Court's decisions and created a conflict with the Second and Fifth Circuits by holding that Plaintiffs need not allege that

the "white-owned" channels Comcast carried are similarly situated to ESN's channels.

Plaintiffs' contention that they "*identified* the similarly situated channels that received preferential treatment," Opp. 15 (emphasis added), is irrelevant, as they alleged no *facts* showing those channels *were* similarly situated—a point the Ninth Circuit did not dispute. Pet. App. 3a n.1. And while Plaintiffs claim their allegations are sufficient under *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), that case (as *Twombly* recognized, 550 U.S. at 569–70) merely rejected a "*heightened* pleading standard" requiring a plaintiff to allege facts supporting a prima facie case of discrimination under *McDonnell Douglas*, because that standard "does not apply in every employment discrimination case," 534 U.S. at 511–12 (emphasis added).

Plaintiffs claim that *Burgis v. New York City Department of Sanitation*, 798 F.3d 63 (2d Cir. 2015), is distinguishable because it was "based on a *disparate impact* theory," Opp. 17, but that theory had nothing to do with the Section 1981 claim, which the Second Circuit agreed was properly dismissed because the complaint "fail[ed] to provide meaningful specifics of the alleged difference in qualifications" between the aggrieved minorities and the "White individuals, who were allegedly less qualified, who were promoted" over them. 798 F.3d at 68.

Plaintiffs' discussion of *Body by Cook, Inc. v. State Farm Mutual Automobile Ins.*, 869 F.3d 381 (5th Cir. 2017), is similarly erroneous. Plaintiffs note that the plaintiffs stated a Section 1981 claim against one defendant, but ignore that this was because "the Complaint contain[ed] more specific allegations regarding

[the] discriminatory intent"—namely, that the defendant "admitted a non-minority-owned body shop with inferior equipment that did not meet [its] 'qualifications.'" *Id.* at 387. The court dismissed claims against the remaining defendants because the complaint "fail[ed] 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.*

B. This Court has held that if a complaint admits of an "'obvious alternative explanation'" for the defendant's conduct, the plaintiff must allege "more by way of factual content to 'nudg[e]' his claim of purposeful discrimination 'across the line from conceivable to plausible.'" *Iqbal*, 556 U.S. at 682–83. The Ninth Circuit turned this rule on its head, holding that although "legitimate, race-neutral reasons for [Comcast's] conduct are contained within the SAC," the complaint could not be dismissed because those "alternative explanations are [not] so compelling as to render Plaintiffs' theory of racial animus *im*plausible." Pet. App. 4a (emphasis added).

Plaintiffs respond with a list of "circumstantial facts to show racial motive" in the SAC that purportedly demonstrates they "did not rely on conclusory allegations." Opp. 11–13. But the defect in the SAC is not merely that it failed to allege "facts to show a racial motive," but that it failed to allege facts that excluded *other, innocent* explanations for Comcast's conduct.

Plaintiffs also suggest the Court should deny certiorari because they have further evidence of discrimination that they "inadvertently dropped" from the SAC. Opp. 14–15. Even if true, the Ninth Circuit did

not consider this allegation, and the district court correctly ruled that it did not save Plaintiffs' claims when it dismissed their original complaint. In any event, there is no reason why Plaintiffs' omission should be excused, as it was made in *both* amended complaints. Pet. App. 76a–77a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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