No. ______

In the
Supreme Court of the United States

CHARTER COMMUNICATIONS, INC.,

Petitioner,

v.

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

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Twice now in the context of federal anti-discrimination laws, this Court has instructed that the rule of but-for causation is the "default rule[]" against which Congress is presumed to legislate. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 347 (2013); *see also Gross v. FBL Fin. Serv., Inc.*, 557 U.S. 167 (2009). In the decision below, however, the Ninth Circuit read the implied cause of action in 42 U.S.C. §1981 enacted in the Civil Rights Act of 1866 to allow a plaintiff to recover by showing that race was merely a "motivating factor" in a defendant's decision. In so doing, the Ninth Circuit not only disregarded *Nassar* and *Gross*, but exacerbated a circuit split on the standard of causation that should apply to claims under section 1981. The Ninth Circuit then applied its diluted causation standard in a manner that would impose section 1981 liability for allegedly considering the race of a speaker in making editorial decisions or allocating scarce expressive resources, despite this Court's contrary teaching in cases like *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995). The questions presented are:

1. Whether, in accordance with this Court's directive that "but-for" causation is the default rule for federal anti-discrimination statutes, the implied cause of action under section 1981 enacted in the Civil Rights Act of 1866 imposes a but-for standard of causation or instead incorporates the "motivating factor" standard first created in the late twentieth century for Title VII claims.

2. Whether a cable operator has a First Amendment right to include racial considerations

among the factors it evaluates in making editorial determinations as to what programming to carry on its limited bandwidth.

PARTIES TO THE PROCEEDING

Petitioner is Charter Communications, Inc. It was defendant in the District Court and defendant-appellant in the Court of Appeals.

Respondents are the National Association of African American-Owned Media and Entertainment Studios Networks, Inc. Respondents were plaintiffs in the District Court and plaintiffs-appellees in the Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

Liberty Broadband Corporation, a public company, owns more than 10% of Charter Communication Inc.'s stock. No public company other than Liberty Broadband Corporation owns 10% or more of Charter.

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PETITION FOR WRIT OF CERTIORARI

Charter Communications, Inc., like many other programming distributors, decided not to carry channels produced by respondent Entertainment Studios Networks, Inc. ("ESN") based on business considerations. ESN is owned by Byron Allen, who is African American. ESN responded with a torrent of litigation, suing Charter and others under 42 U.S.C. § 1981. ESN leveled sensational charges that all the major programming distributors that rejected ESN's programs were not making rational business and editorial judgments, but were in fact discriminating against "the voices of African American-owned media companies"—even though ESN's own complaint acknowledged the existence of legitimate business reasons for Charter to decline to carry ESN's programming. Emphasizing that race in fact played no role whatsoever in its programming decision, Charter then moved to dismiss on the grounds that section 1981 requires a showing of but-for causation and that the First Amendment would protect Charter even if ESN's allegations (which Charter emphatically denies) were taken at face value.

The Court of Appeals for the Ninth Circuit, however, held that a section 1981 plaintiff need not show but-for causation. Instead, the court held that a plaintiff could "prevail" in such an action by showing merely that race was *one* "motivating factor" in a decision—even if the defendant would have reached the same decision for nondiscriminatory reasons. The Ninth Circuit also held that the First Amendment posed no obstacle to ESN's suit.

In rejecting a but-for standard of causation, the Ninth Circuit failed to follow this Court's clear instructions in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), and *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013), that but-for causation is the "default rule" in anti-discrimination actions absent a clear congressional indication to the contrary. Applying that rule to an *implied* cause of action based on a statute enacted *in 1866* should have been a straightforward exercise. When Congress does not even provide an express cause of action, it cannot possibly override the default rule *Gross* and *Nassar* recognized. And if Congress had enacted an express cause of action with an express causation standard in 1866, it is unfathomable that Congress would have adopted a motivating factor test not invented until a century and a half later.

In disregarding this Court's precedent, the Ninth Circuit exacerbated a clear conflict in the circuits on the causation standard for section 1981 claims. Some circuits correctly hold, consistent with *Gross* and *Nassar*, that the standard is but-for causation. Others have imported Title VII standards and allowed a plaintiff to make out a *prima facie* case under section 1981 by showing that race was a motivating factor in a contracting decision, with the burden then shifting to the defendant, who may still defeat liability by showing that race was not a but-for cause. The Ninth Circuit has now adopted a third, and even more plaintiff-friendly causation standard under which a plaintiff can prevail on *his entire case* simply by showing that "discriminatory intent was *a* factor" in a defendant's decision even if the same decision would

have been made for other reasons having nothing to do with race. This new standard would require a lesser showing for recovering damages under section 1981's implied cause of action than under any other federal anti-discrimination law.

While the Ninth Circuit's precedent-defying and split-deepening decision on causation would be reason enough to grant review, its decision also disregards core First Amendment rights. Plaintiffs' lawsuit seeks to punish Charter for its protected editorial decision not to carry ESN's programming and to dictate the criteria that cable companies (and other selectors of content) can use when selecting the speech they will promote. But this Court made clear in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), that even facially neutral anti-discrimination laws cannot be applied to force speakers to accept and disseminate speech against their will. Particularly when combined with the Ninth Circuit's motivating-factor causation standard, the decision below chills protected First Amendment activity by permitting discovery and potential liability whenever race can be alleged to play any role in a decision about content.

Given the conflicts between the Ninth Circuit's ruling, its sister circuits, and this Court's precedent, as well as the exceptional importance of the issues implicated, this Court should grant the petition for certiorari to correct the Ninth Circuit's errors.

OPINIONS BELOW

The Ninth Circuit's revised opinion, as well as its order denying rehearing en banc, is reported at 915 F.3d 617 and reproduced at App.1-25. A previous

opinion, reported at 908 F.3d 1190, was withdrawn following panel rehearing. The district court issued its ruling on October 24, 2016. A copy of that decision is reproduced at App.26-54, and the district court's December 12, 2016 order granting interlocutory appeal is reproduced at App.55-70.

JURISDICTION

The Ninth Circuit issued its amended opinion and denied Charter's petition for rehearing en banc on February 4, 2019. App.1. Charter then filed this timely petition for certiorari. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment is reproduced at App.100. Section 1981, Title 42 of the United States Code, originally enacted as section one of the Civil Rights Act of 1866, is reproduced at App.100.

STATEMENT OF THE CASE

A. Statutory Background

In the wake of the civil war, Congress sought to ensure that recently freed slaves would enjoy the full protection of the law entitled to them as American citizens. To that end, the Thirty-Ninth Congress overrode President Andrew Johnson's veto to enact the Civil Rights Act of 1866. Section 1 of that Act is codified as section 1981, Title 42 of the United States Code today. It provides that, "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts … as is enjoyed by white citizens." 42 U.S.C. §1981(a). This text is largely unchanged since its

enactment. *See Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 384 (1982).

Section 1981, by its terms, does not specify any remedy or provide an express cause of action, but this Court has inferred a private right of action for damages for those denied the right to contract by private entities. *See Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975); *see also Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001). Because Congress did not enact an express cause of action, Congress had no occasion to address the details of the cause of action, such as the standard of causation or the measure of damages. To fill that gap, this Court has looked to default rules and how the statute would have been understood at the time of its enactment. For example, a decade ago this Court held that section 1981 does not provide a remedy for one who merely makes contracts for others as an agent, because "[w]hen the Civil Rights Act of 1866 was drafted, it was well known that '[i]n general a mere agent, who has no beneficial interest in a contract which he has made on behalf of his principal, cannot support an action thereon.'" *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 475 (2006) (quoting 1 S. Livermore, *A Treatise on the Law of Principal and Agent* 215 (1818)).

In more recent years, Congress has enacted express causes of action as part of other federal anti-discrimination statutes, such as Title VII, which was enacted as part of the Civil Rights Act of 1964. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), a fractured Court concluded that, for status-based discrimination claims under Title VII, if the plaintiff

made a showing that discrimination was *one* factor motivating the defendant's action, "the burden of persuasion would shift to the employer, which could escape liability if it could prove that it would have taken the same employment action in the absence of all discriminatory animus." *Nassar*, 570 U.S. at 348. *Price Waterhouse* thus established a "burden-shifting" framework for so-called "mixed motive" claims under which "an employer could avoid all liability under Title VII by establishing the absence of 'but for' causation." *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 850 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003).

Congress responded to *Price Waterhouse* in the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1075 (1991), by amending part of Title VII to provide that a plaintiff could establish a claim by showing "that race … was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. §2000e-2(m). That amendment altered the *Price Waterhouse* framework by allowing a plaintiff to prevail—not just shift the burden of proof—by showing race was a motivating factor, but even then the defendant could preclude a damages award by showing that it would have made the same decision for non-discriminatory reasons. *See id.* §2000e-5(g)(2)(B). At the same time, Congress amended other anti-discrimination laws—including section 1981, *see* Pub. L. No. 102-166, 105 Stat. 1071, 1071-72—without adding similar language authorizing mixed motive claims.

This Court has since clarified that the but-for causation standard remains the "default rule" and that the motivating-factor standard or burden-shifting

approaches should not be adopted absent clear congressional direction. In *Gross*, for example, this Court held that neither the 1991 amendments to Title VII nor *Price Waterhouse*'s burden shifting framework could be applied to the Age Discrimination in Employment Act (ADEA). The Court warned that, "[w]hen conducting statutory interpretation, we must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." *Gross*, 557 U.S. at 174. And then in *Nassar*, this Court held that the mixed motive amendments to the status-based discrimination provisions of Title VII could not apply to a separate provision in Title VII addressing retaliation claims. *See* 570 U.S. at 351-60. In both cases, the Court emphasized that but-for causation is the default rule for causation. *Gross*, 557 U.S. at 176-77; *Nassar*, 570 U.S. at 346-47.

B. Factual & Procedural Background

Plaintiffs allege that ESN is "a 100% African American-owned television production and distribution company" owned by Byron Allen. App.76. ESN produces seven channels (Comedy.TV, Recipe.TV, Cars.TV, Pets.TV, MyDestination.TV, ES.TV, and JusticeCentral.TV), most of which target the same audiences as better-known channels Charter already carries (Comedy Central, Food Network, Velocity, Animal Planet, The Travel Channel, and E!). App.99.

According to plaintiffs, starting in 2011, ESN sought a carriage contract with Charter—that is, a contract under which Charter would carry ESN's channels. App.81. Charter repeatedly declined ESN's

offer for legitimate business reasons, such as limited bandwidth and other operational considerations. App.82-87. As the FCC has observed, "there are more programming vendors seeking linear carriage than bandwidth capacity to carry them," and so programming distributors "simply cannot carry all channels that seek carriage." *In re Herring Broad., Inc.*, 24 FCC Rcd. 12967, 12999 (2009).

Having failed to secure carriage on the merits of its offerings, ESN resorted to the same tactic it used against Comcast, AT&T, and DirecTV when they rejected ESN's programming—it sued and leveled sensational allegations of racial discrimination.[1] The complaint makes a number of wild accusations, including that Charter's pledge to promote diversity in a memorandum of understanding with respected civil rights groups (such as the Urban League and Al Sharpton's National Action Network) is actually a conspiracy to promote discrimination. App.92-94. Plaintiffs even included the FCC in its original suit, claiming that the FCC itself was part of the conspiracy to provide "cover" for discrimination. The amended complaint seeks $10 billion in damages from Charter for alleged discrimination under 42 U.S.C. §1981. App.96-97.

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[1] ESN's suit against Comcast was dismissed, but the same Ninth Circuit panel reversed in an unpublished memorandum. *See Nat'l Ass'n of African Am.-Owned Media v. Comcast Corp.*, 743 F. App'x 106 (9th Cir. 2018). The case against AT&T and DirecTV ended in a confidential settlement after a magistrate judge tentatively held that plaintiffs' claims were barred by the First Amendment. App.52 n.14.

Charter moved to dismiss the complaint because it failed plausibly to allege that racial animus was the but-for cause of Charter's decision and because the First Amendment barred any suit purporting to punish Charter based on its editorial decisions about whether to carry particular content. The District Court for the Central District of California denied the motion but certified its order for interlocutory review. App.26-70.

The Ninth Circuit affirmed. The Ninth Circuit first acknowledged that *Gross* and *Nasser* abrogated its prior practice of incorporating into section 1981 "the same legal principles as those applicable in a Title VII disparate treatment case," including the motivating factor standard of causation. App.9-10. The court then turned "to the text of §1981 to determine whether it permits a departure from the but-for causation standard." App.14. Section 1981 "guarantees 'the same right' to contract 'as is enjoyed by white citizens.'" App.14. In the Ninth Circuit's view, this was "distinctive language, quite different from the language of the ADEA and Title VII's retaliation provision" addressed in *Gross* and *Nassar*, "both of which use the word 'because' and therefore explicitly suggest but-for causation." App.14. The Ninth Circuit therefore held that section 1981 contemplated "mixed-motive claims," 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 such that she was denied the same right as a white citizen." App.15. The Ninth Circuit concluded that plaintiffs stated a claim under this motivating factor standard. App.15.

Turning to Charter's First Amendment argument, the Ninth Circuit ruled that the First Amendment did not bar plaintiffs' suit. According to the Ninth Circuit, plaintiffs' proposed application of section 1981 to Charter's editorial decision was content neutral because it "does not seek to regulate the *content* of Charter's conduct, but only the manner in which it reaches its editorial decisions—which is to say, free of discriminatory intent." App.22-23. The Ninth Circuit reasoned that "nothing in §1981 punishes a defendant for the content of its programming." App.23. Instead, section 1981 "prohibits Charter from discriminating against networks on the basis of race," which "has no connection to the viewpoint or content of any channel that Charter chooses or declines to carry." App.23.

Charter raised both the causation and First Amendment issues in petitioning for rehearing and rehearing en banc. In response, the panel issued a revised opinion, which left the causation analysis unchanged but added a footnote to its First Amendment analysis attempting to distinguish between considerations of race and viewpoint. App.20 n.11. The Ninth Circuit denied en banc review. App.1-2.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision below deepens an entrenched circuit conflict and contradicts the clear teaching of this Court's decisions in *Gross* and *Nassar*. The circuits have now embraced at least three different views of the standard of causation in bringing section 1981 claims. The Seventh Circuit has repeatedly embraced a but-for test; other circuits have borrowed the burden-shifting framework from Title

VII; and the Ninth Circuit has now adopted an even more plaintiff-friendly approach in which showing that race played a motivating factor in a contractual decision suffices not just to shift the burden of proof but to impose liability. There is no reason to tolerate that circuit split, especially when this Court's cases in *Gross* and *Nassar* make clear that the "default rule" of but-for causation applies to section 1981. It could hardly be otherwise, as Congress could not overcome a default rule in an implied cause of action that does not even address causation. Nor could Congress have somehow anticipated a late-twentieth-century novelty in a statute enacted in 1866. The issue is important, the circuit split is entrenched, and the decision below is erroneous. The case for plenary review is clear.

In addition, this Court should grant certiorari to eliminate the threat to First Amendment values posed by the decision below. As this Court made clear in *Hurley*, the application of anti-discrimination statutes to editorial decisions about which groups to include in a parade, which actors to cast in a play, which authors to feature in a forum, or which shows or channels to carry on cable raises serious First Amendment issues. The Ninth Circuit cast those concerns aside by relying on false distinctions between the editorial process and editorial decisions and between race and viewpoint. The Ninth Circuit's errors reinforce each other as the decision below threatens liability for any editorial judgment motivated even in part by racial considerations. This Court should grant review on both questions presented.

I. The Ninth Circuit Exacerbated A Circuit Conflict And Misapplied This Court's Precedent On The Standard Of Causation For Federal Civil Rights Statutes.

In holding that a plaintiff can conclusively establish causation under section 1981 by showing that discrimination was merely a "motivating factor" in a defendant's decision—even if the defendant would have reached the same decision for other, non-discriminatory reasons—the Ninth Circuit deepened an existing circuit conflict and disregarded this Court's clear instructions about the "default rule" for proving causation in federal anti-discrimination statutes. Absent correction, the Ninth Circuit's decision will further undermine principles of consistency, predictability, and fairness in the law governing employment and other contractual relationships.

A. The Ninth Circuit's Decision Exacerbates An Important And Entrenched Circuit Conflict.

The Ninth Circuit's decision squarely conflicts with decisions of the other courts of appeals. While the courts of appeals were already divided between those that apply the but-for test this Court's precedents demand and those that apply a burden-shifting approach borrowed from Title VII, the Ninth Circuit opened up a third front by adopting an even more plaintiff-friendly causation standard under which a plaintiff can prevail—not just shift the burden—by showing that race was a motivating factor in a contractual decision. The Ninth Circuit then denied

en banc review, rendering the split in the circuits both deep and entrenched.

First, the Seventh Circuit has long applied the correct rule that, under section 1981, "[t]o be actionable, racial prejudice must be a but-for cause … of the refusal to contract." *Bachman v. St. Monica's Congregation*, 902 F.2d 1259, 1262-63 (7th Cir. 1990); *see also Vasquez v. Caterpillar Logistics, Inc.*, 2017 WL 4773081, at *10 (N.D. Ind. Oct. 20, 2017) ("Section 1981 requires a 'but for' causation analysis."), *aff'd*, 742 F. App'x 141 (7th Cir. 2018). As that court explained, unlike with Title VII, section 1981 does not "explicitly authorize[] relief where a plaintiff demonstrates only that race was a 'motivating factor' for the adverse action." *Smith v. Wilson*, 705 F.3d 674, 679 (7th Cir. 2013). The court therefore has refused to "import the authorization of partial 'motivating-factor' relief found in [Title VII] into entirely different statutes—Title VI, §1981, or §1983." *Id.* at 680.

Second, a number of other circuits have borrowed a burden-shifting framework from the Title VII context and transplanted it to the implied cause of action under section 1981. *Goodman v. Bowdoin College*, 380 F.3d 33, 44-45 (1st Cir. 2004); *Henry v. Wyeth Pharms., Inc.*, 616 F.3d 134, 154 (2d Cir. 2010); *Brown v. J. Kaz, Inc.*, 581 F.3d 175, 182 n.5 (3d Cir. 2009); *Payan v. UPS*, 905 F.3d 1162, 1168 (10th Cir. 2018); *Mabra v. United Food & Commercial Workers Local Union No. 1996*, 176 F.3d 1357, 1358 (11th Cir. 1999); *DeJesus v. WP Co.*, 841 F.3d 527, 532 (D.C. Cir. 2016); *Ruiz v. A.B. Chance Co.*, 234 F.3d 654, 671 (Fed. Cir. 2000). Some of these decisions predate *Gross* and *Nassar*, but others postdate those decisions and

perpetuate the very mistake this Court tried to correct in those decisions.

For example, the D.C. Circuit in *DeJesus v. WP Company* applied Title VII's motivating factor standard to a section 1981 claim—even though the court recognized that *Gross* mandated but-for causation in the context of ADEA claims and even though "Title VII and §1981 are different in important ways." 841 F.3d at 532. The D.C. Circuit in *DeJesus* made clear, however, that it was employing the motivating factor standard only as a burden-shifting test and recognized that "a legitimate, non-discriminatory reason for the challenged employment decision" could overcome a plaintiff's prima facie showing that race was "a motivating factor" for the decision. *Id.* (quoting 42 U.S.C. §2000e-2(m); *Johnson v. Perez*, 823 F.3d 701, 706 (D.C. Cir. 2016)).

Similarly, in *Brown v. J. Kaz, Inc.*, the Third Circuit applied *Price Waterhouse*'s "mixed-motive[] analysis" to a claim of discrimination under §1981. 581 F.3d at 182. Under that standard, the Third Circuit allowed a plaintiff to state a *prima facie* case with evidence that discrimination was a motivating factor. *See id.* at 182-83. But as the Third Circuit readily acknowledged, if the defendant responds with proof that race was not the "but for" cause, that defeats the plaintiff's claim entirely. *See id.* at 182-83 & n.5.

Other circuits have vacillated between but-for causation and some variation of the motivating-factor/*Price Waterhouse* burden-shifting framework. For example, in *Calloway v. Miller*, the Eighth Circuit held that "to establish a violation of §1981," a plaintiff

must show that "the result would not have occurred but for the [discriminatory] conduct." 147 F.3d 778, 781 (8th Cir. 1998). Later, that same court noted that "Eighth Circuit model jury instructions suggest there is some confusion as to the appropriate causation standard to apply in §1981 racial discrimination claims," and went on to state that circuit precedent required Title VII and section 1981 claims to be treated the same. *Wright v. St. Vincent Health Sys.*, 730 F.3d 732, 739 n.6 (8th Cir. 2013). The Sixth Circuit has similarly struggled to adhere to a consistent standard. *Compare Aquino v. Honda of Am., Inc.*, 158 F. App'x 667, 676 n.5 (6th Cir. 2005) ("Congress could have added a 'mixed motive' option for lawsuits under §1981 but lawmakers evidently chose not to do so."), *with Bobo v. UPS*, 665 F.3d 741, 756 (6th Cir. 2012) (holding that "review [of] Title VII and §1981 claims" should be "under the same standard").

In the decision below, the Ninth Circuit adopted a third and even more plaintiff-friendly approach to causation. According to the Ninth Circuit, evidence that race was a motivating factor in a defendant's decision is sufficient for a plaintiff to ultimately *prevail*—even if the defendant can prove that he would have made the same decision regardless of the plaintiff's race. App.14-15. Although the court acknowledged that it was no longer permitted simply to "borrow[] the causation standard of Title VII's discrimination provision and apply[] it to §1981 due to the statutes' shared objectives" under *Gross* and *Nassar*, App.13, in the course of two paragraphs the court quickly leaped past the default rule of but-for

causation and read Title VII's standard back into section 1981.

Although the Ninth Circuit purported to rely on Third Circuit dicta from *Brown v. J. Kaz, Inc.*, the Ninth Circuit actually reached a result that conflicts with both the *dicta* and the holding in *Brown*. In *Brown*, the Third Circuit applied the *Price Waterhouse* to section 1981 and suggested in a footnote that the motivating-factor standard of causation and burden-shifting were permissible under the text of section 1981. 581 F.3d at 182-83 & n.5. But while the *burden* shifts under *Price Waterhouse*, the ultimate *standard* of proof for contested claims remains but-for causation, as the Third Circuit itself clearly recognized. *See id.* The Ninth Circuit in this case, by contrast, held that a section 1981 plaintiff could *prevail* outright on her claim simply by showing that "discriminatory intent was *a* factor" in a defendant's decision even if the same decision would have been made for other reasons. App.15 (emphasis added). That approach produces a novel causation standard for a damages action that is easier to satisfy than the applicable causation standard under any other federal civil rights statute.

The Ninth Circuit denied an en banc petition documenting this circuit split, and many of the decisions from other circuits have perpetuated the error of borrowing Title VII principles for other statutes like section 1981, even after this Court's decisions in *Gross* and *Nassar*. The split is thus not only deep-seated and multi-faceted, but entrenched and unlikely to benefit from further percolation. This Court should take this case to resolve the circuit split.

B. The Ninth Circuit Disregarded *Gross* and *Nassar*.

The Ninth Circuit's decision conflicts not only with the decisions of its sister circuits but also with the clear teaching of this Court in *Gross* and *Nassar*. In addition to admonishing courts not to borrow a causation standard from one statute and import it into another, *see Gross*, 557 U.S. at 174-75; *Nassar*, 570 U.S. at 346-47, those cases held that the default standard for all federal anti-discrimination statutes is but-for causation. If a default standard means anything, it means that when Congress said nothing at all about causation because it failed to create an express cause of action in the first place, the default rule applies. Congress cannot displace the default rule with silence, and yet Congress did nothing in section 1981 to address causation. Even worse, the motivating factor approach to causation would not emerge for over a century, and so attributing that diluted standard of causation to the 1866 Congress is wholly inappropriate under *Gross* and *Nassar* and wholly anachronistic as well.

This Court emphasized that the presumption in favor of the but-for standard of causation rests on fundamental principles of tort law, under which an "act or omission is not regarded as a cause of an event if the particular event would have occurred without it." *Gross*, 557 U.S. at 176-77 (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* 265 (5th ed. 1984)); *see also Nassar*, 570 U.S. at 346 (explaining that but-for causation is "a standard requirement of any tort claim") (quoting Restatement of Torts §431 cmt. a (1934)). This rule of

but-for causation applies unless the statutory text affirmatively demonstrates congressional intent to override the rule with a different standard. *See Nassar*, 570 U.S. at 347.

Instead of starting from the premise that the rule is but-for causation unless the statutory text overcomes that presumption, the Ninth Circuit asked whether anything in section 1981 "permits" the court to apply a mixed-motive theory. App.15. That is the wrong question, especially when it comes to an implied cause of action. Precisely because Congress did not expressly create a cause of action, it did not supply any details about the claim and so the statutory text may theoretically "permit" multiple approaches to causation. But in the absence of a congressional specification that some other causation standard is the only permissible one, the default rule governs. That is the point of a default rule—but-for causation is not simply one option among many for courts to select or reject whenever alternative approaches are permissible.

The Ninth Circuit compounded its error by relying on the absence of the word "because" in section 1981. App.14-15. The absence of the word "because" is not an invitation to freelance. Rather, it is a clear sign that Congress did not expressly address the question of causation and so the default rule applies. It is thus immaterial that section 1981 does not use the same phrase—"because of"—as the statutes in *Gross* and *Nassar*. This Court's "insistence on but-for causality has not been restricted to statutes using the term 'because of.'" *Burrage v. United States*, 571 U.S. 204, 213 (2014). Instead, *Gross* and *Nassar* rested their

analysis largely on the conclusion that but-for causation is the presumptive background rule against which Congress legislates.

Departure from the presumption in favor of the default rule of but-for causation was especially unjustified in light of the fact that section 1981 dates all the way back to the first days of Reconstruction. When it comes to statutory construction, courts' "job is to interpret the words consistent with their 'ordinary meaning … at the time Congress enacted the statute." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). This Court's textual analysis of section 1981 has thus focused on the original public meaning of the provision, *i.e.*, how the statute would have been understood "[w]hen the Civil Rights Act of 1866 was drafted." *Domino's*, 546 U.S. at 475. There can be no doubt that but-for causation was the prevailing causation standard at the time of section 1981's enactment. *See, e.g.*, Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 Harv. L. Rev. 103, 109 n.22 (1911) ("At an early day the 'but for' rule prevailed."); John D. Rue, *Returning to the Roots of the Bramble Bush: The "But for" Test Regains Primacy in Causal Analysis in the American Law Institute's Proposed Restatement (Third) of Torts*, 71 Fordham L. Rev. 2679, 2684 (2003) ("The 'but for' test emerged unchallenged from the mists of time, entering the twentieth century as the only widely accepted judicial test of factual cause.").

Indeed, when Congress enacted the operative language of section 1981, the motivating factor standard of causation was still over a century before its time. That standard is a late-twentieth century

judicial creation that rose to prominence with this Court's decision in *Price Waterhouse*, and was refined by Congress in 1991. Civil Rights Act of 1991, Pub. L. No. 102-166 §107, 105 Stat. 1071, 1075 (1991). The Thirty-Ninth Congress in 1866, by contrast, operated solely against the longstanding tort rule of but-for causation embedded in the common law. *See, e.g.*, *Gross*, 557 U.S. at 176-77; *Nassar*, 570 U.S. at 346-47.

There is no plausible basis for concluding that if Congress had created an express cause of action in 1866 and if Congress had expressly provided for a standard of causation that it would have picked anything other than a but-for test. Thus, the correct application of *Gross* and *Nassar* to section 1981 should have been an overdetermined equation. Because Congress did not address a cause of action or causation expressly, the default rule of but-for causation should have applied. And because Congress enacted section 1981 nearly a century and half before the motivating factor test was conceived, the 1866 Congress' intent to apply a but-for standard should have been inescapable. The Ninth Circuit's contrary conclusion is irreconcilable with the plain import of this Court's decisions in *Gross* and *Nassar*.

C. The Standard for Causation Is Exceptionally Important.

This Court has recognized the importance of getting the causation standard right by granting certiorari in numerous cases involving the proper causation rules for federal anti-discrimination rules. *See, e.g.*, *Nassar*, 570 U.S. at 342-43; *Gross*, 557 U.S. at 169-70; *Price Waterhouse*, 490 U.S. at 232; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 793-

94 (1973). The Court has likewise recognized the importance of providing uniform rules for the details of the implied cause of action under section 1981. *See, e.g.*, *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 445 (2008); *Domino's*, 546 U.S. at 472; *Gen. Bldg. Contractors*, 458 U.S. at 378; *Runyon v. McCrary*, 427 U.S. 160, 163 (1976). Even beyond the basic importance of adopting a uniform and correct causation standard for section 1981 claims, the Ninth Circuit's newly-minted causation standard will have serious consequences that will upend discrimination law and which underscore the need for this Court's review.

First, the Ninth Circuit's decision will transform section 1981 into the preferred vehicle for advancing discrimination claims in the circuit because, unlike under Title VII, there will be no partial mixed-motive defense available to defendants. *See Nassar*, 570 U.S. at 349 (under Title VII, an "employer's proof that it would still have taken the same employment action [regardless of race] would save it from monetary damages"). Over the years, Congress has taken pains to fashion a textually grounded and carefully balanced regime designed to combat racial discrimination. But by converting section 1981's implied cause of action into the least demanding anti-discrimination statute, the Ninth Circuit has effectively displaced Congress' careful fine-tuning with a new judicial creation.

Second, the Ninth Circuit's causation standard will impede courts' ability to screen out frivolous claims at the motion to dismiss and summary judgment stages. To survive, a plaintiff would have to plead or show only a material issue of fact regarding whether a

discriminatory motive played *any role whatsoever* in an individual's contracting decision, regardless of whether it actually made a difference.

While a jury may ultimately reject a plaintiff's assertion that race factored into a decision, requiring a large number of dubious section 1981 claims to proceed to trial would sap judicial resources, delaying the timely adjudication of claims that actually have merit. As this Court explained in *Nassar*, the "proper interpretation and implementation of" an antidiscrimination statute's "causation standard have central importance to the fair and responsible allocation of resources in the judicial and litigation systems." 570 U.S. at 358. "[L]essening the causation standard could also contribute to the filing of frivolous claims, which would siphon resources from efforts by employer, administrative agencies, and courts to combat" discrimination. *Id.*

Third, the Ninth Circuit's construction of section 1981 will harm the ability of employers and others to combat racial discrimination. While large employers may prevent discrimination because of race and even prevent racially-motivated decisions from having real-world impact by putting in place race-neutral procedures to guide the decision-making process of their personnel, such efforts cannot always avoid the possibility that someone in the process will be motivated in some degree by race. Imposing liability under a motivating-factor causation regime even where racial motivations have no ultimate causal effect on the employment decision will disincentivize efforts to weed out discrimination because of race. As this Court noted in *Nassar*: "It would be inconsistent

with the structure and operation" of section 1981 "to so raise the costs, both financial and reputational, on an employer whose actions were not in fact the result of any discriminatory or retaliatory intent." 570 U.S. at 358-59.

II. The Ninth Circuit's Decision Cannot Be Reconciled With First Amendment Protections For Editorial Decisions.

Plaintiffs' section 1981 claim also should have been dismissed as a matter of law because it runs headlong into bedrock First Amendment principles. Like a bookstore's choice of which books to stock on its shelves or a theater operator's decision about which traveling productions to sign for a run on its stage, the First Amendment protects Charter's "exercis[e] [of] editorial discretion over which stations or programs to include in its repertoire." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994). The Supreme Court has already recognized in this very context that "[c]able operators … are engaged in protected speech activities even when they only select programming originally produced by others." *Hurley*, 515 U.S. at 570; *see also Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982, 993 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("[T]he Supreme Court has squarely held that a video programming distributor such as Comcast both engages in and transmits speech, and is therefore protected by the First Amendment.").

Under decisions like *Hurley*, it is clear that plaintiffs cannot wield laws of general applicability—including antidiscrimination laws like section 1981—to force cable companies to accept channels that they do not wish to carry, to punish them for declining to

carry certain channels, or to dictate the criteria that may or may not be used in selecting channels. Because plaintiffs' section 1981 claim seeks to hold Charter liable for exercising protected editorial decisions in selecting programming, it should have been dismissed as a matter of law.

In concluding otherwise, the Ninth Circuit weakened First Amendment protections for *all* outlets that select and promote speech originally produced by others. According to the court, section 1981 is content neutral as applied in a case such as this because it "does not seek to regulate the *content* of Charter's conduct, but only the manner in which it reaches its editorial decisions—which is to say, free of discriminatory intent." App.22-23. But that is a false dichotomy. Just as decisions about which group to include in a parade reflect editorial discretion so too do decisions about which channels to carry. And "the manner in which" those editorial decisions are made is part and parcel of the editorial decisions themselves. A statute necessarily regulates content when it restricts the "manner in which [a speaker] reaches its editorial decisions" by making certain criteria for selecting speech off limits (such as the race of the original producer of speech).

When Charter emphasized the First Amendment problems with the Ninth Circuit's original opinion, the Ninth Circuit responded with a new footnote seeking to distinguish between editorial decisions based on race "separate and apart from the underlying content" and decisions based on substance or viewpoint. App.20 n.11. As the Ninth Circuit saw it, a "bookstore's choice of which books to stock on its

shelves, or a theater owner's decision about which productions to stage, or a cable operator's selection of certain perspectives to air, are decisions based on content, and not *necessarily* on the racial identities of the parties with which they contract (or refuse to contract)." App.20 n.11 (emphasis added).

But that is just another false dichotomy. Although decisions about content are often unrelated to the characteristics of the speaker (and generally should be), clearly that is not always the case when it comes to editorial decisions in circumstances where race and content are related. Indeed, plaintiffs themselves draw a connection between racial identity and content when they assert that their suit is intended to draw attention "voices of African American-owned media companies." App.89.

Just a few examples confirm that the Ninth Circuit's purportedly bright-line pronouncement about the relationship between race and content is elusive and incoherent. *Invisible Man* and *The Color Purple* would be a very different books if they were written by white men. Or to use the Ninth Circuit's own example, forcing a bookseller to include white or Asian authors would make a hash of an editorial decision to feature only books written by African American authors. The bookseller could make that race-conscious decision on the view that such authors have been underrepresented in the past and the bookstore's mission is to promote such authors without regard to the substantive content of their works. Another outlet may publish works solely by African Americans on the different view that African Americans have a unique experience that necessarily

influences the substantive content of their speech, and that *only* African Americans can produce the authentic content that outlet wishes to disseminate. *See* Sunili Govinnage, *I read books by only minority authors for a year. It showed me just how white our reading world is*, Wash. Post (Apr. 24, 2015), https://wapo.st/2EastOM. Although the Ninth Circuit might perceive these examples as motivated by something other than "racial animus," that label simply ignores the reality that considerations of race can be inseparable from content, viewpoint and substance, and thrusting section 1981 into these sensitive decisions raises a host of First Amendment problems.

Other examples abound; take musical theater. The musical *Hamilton* is notable for its creator's decision to cast exclusively minority actors as the Founding Fathers. As one commentator observed, the ethnicity of *Hamilton*'s cast "will inspire young fans of the musical to dig deeper into the stories of the American revolutionaries and not be put off by the fact that they were mostly white men in waistcoats." David Horsey, *'Hamilton' gets past race by imagining Founding Fathers with black and brown faces*, L.A. Times (Sept. 18, 2017), https://lat.ms/2SWNO6y. A refusal to contract with a white actor to play George Washington cannot be made an antidiscrimination violation without profoundly undermining First Amendment values.

A multitude of internet outlets help illustrate the situation further. *The Huffington Post* has a web magazine and blog entitled "Black Voices" that is dedicated to "[a]mplifying black voices through news

that matters." *Black Voices,* HuffPost, https://bit.ly/2SCtgkw (last visited Mar. 6, 2019). The founders intend that to be "a site that is written for and about and by black folk." Allison Keyes, *HuffPost BlackVoices Gains Digital Ground,* NPR (Aug. 11, 2011), https://n.pr/2Sxc3ci. Similarly, the web magazine and blog "The Root" was designed to be "a 21st-century version of a national black newspaper, … featuring articles from notable black writers." Frank Ahrens, *Post Launches Site With African American Focus*, Wash. Post (Jan. 28, 2008), https://wapo.st/2DPtk6v.

The idea that an individual's race necessarily affects how that person's message is perceived is not only widely assumed by many Americans across the country—it is reflected in federal policy. Federal statutes and FCC agency regulations have long reflected the view that minority ownership affects the content of speech produced by a company. *See, e.g.*, *Statement of Policy on Minority Ownership of Broad. Facilities*, 68 F.C.C.2d 979, 981 (1978) ("[T]he Commission believes that ownership of broadcast facilities by minorities is [a] significant way of fostering the inclusion of minority views in the area of programming."); *In re Policies & Rules Regarding Minority & Female Ownership of Mass Media Facilities*, 10 FCC Rcd. 2788, 2788 (1995) ("It has long been the judgment of Congress that promoting minority ownership of broadcasting and cable television facilities serves to enhance the diversity of

viewpoints presented on our nation's radio and television stations and cable systems.").[2]

Finally, ESN's own case proceeds on the assumption that its minority ownership *does* affect content. The suit, after all, seeks to impose $10 billion in liability on Charter based expressly on Charter's decision that it would not carry the content offered by ESN. The complaint makes clear that part of Plaintiffs' objective here (and in their campaign of lawsuits against other cable providers as well) is to promote the distinct "voices of African American-owned media companies." App.89. Similarly, plaintiffs admit that their objective is to have the court dictate the criteria that Charter can use in selecting the content it carries. ER320[3] (ESN seeks to "prohibit the use of race as a factor in Charter's choice of which channels to carry").

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[2] The FCC's policy was based in part on direction from the federal courts that "it is upon ownership that public policy places primary reliance with respect to diversification of content." *TV 9, Inc. v. FCC*, 495 F.2d 929, 938 (D.C. Cir. 1973); *see also Garrett v. FCC*, 513 F.2d 1056, 1063 (D.C. Cir. 1975) ("[B]lack ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the black citizenry."). That understanding has informed the FCC's efforts to promote programming diversity in a variety of ways. *See In re Comm'n Policy Regarding the Advancement of Minority Ownership in Broad.*, 92 F.C.C.2d 849, 849-50 (1982) ("[W]e have taken steps to enhance the ownership and participation of minorities in the media, with the intent of thereby increasing the diversity in the control of the media and thus diversity in the selection of available programming …."); *see also, e.g.*, *In re Radio Jonesboro, Inc.*, 100 F.C.C.2d 941, 945 & n.9 (1985).

[3] The reference to ER is to the excerpts of record Charter submitted in the Ninth Circuit.

As these examples demonstrate, the belief that the race (or gender, religion, age, and so forth) of a speaker affects the content of the speech is widespread and forms the gravamen of plaintiffs' claims. Yet until now no court has ever suggested that, consistent with the First Amendment, federal courts could *declare* that belief to be wrong and prohibit a speaker from taking race into account in selecting speech to disseminate. Under the Ninth Circuit's reasoning, anti-discrimination laws would prevent content providers from taking the race of a speaker into account in making editorial judgments about the speech they choose to publish.

The Ninth Circuit's approach conflicts with this Court's unanimous decision in *Hurley*. There, an LGBT group claimed that the defendant's refusal to allow the group to participate in a parade violated a Massachusetts anti-discrimination law. 515 U.S. at 561. This Court emphasized that, even if the parade organizers excluded the group on grounds that would otherwise violate the law, an anti-discrimination statute of general applicability could not be used to punish their selection of speech and thus "requir[e] petitioners to alter the expressive content of their parade." *Id.* at 572-73. The "general rule of speaker's autonomy," *id.* at 578, means that "[w]hatever the reason[s]" a speaker may have for choosing *not* to repeat speech, that decision is "presumed to lie beyond the government's power to control"—whether the reasons for the choice are good or bad, *id.* at 575.

Unlike the *Hurley* case where the discrimination was avowed, Charter vehemently denies that race played any role in its decisions. But First Amendment

rights are chilled even—indeed, especially—by groundless suits, and Charter is entitled to defend against plaintiffs' meritless claims by pointing to the legal rule that plaintiffs cannot use a lawsuit to tell a cable company "how to exercise its editorial discretion about what networks to carry any more than" it could "tell the *Wall Street Journal* or *Politico* or the *Drudge Report* what columns to carry; or tell the MLB Network or ESPN or CBS what games to show." *Comcast*, 717 F.3d at 994 (Kavanaugh, J., concurring).

The gravity of the Ninth Circuit's error under the First Amendment is compounded by the court's relaxing of the causation standard for claims under section 1981. According to the Ninth Circuit, even if the evidence shows that Charter rejected ESN's programming for run-of-the-mill editorial reasons (*e.g.*, lack of demand for weak content), Charter still could not prevail based upon that First Amendment-protected editorial judgment as long as a jury could find that race was *a* factor, however small, in the decision. In the Ninth Circuit's words, if "discriminatory intent plays *any* role in a defendant's decision," that is enough to prevail. App.15.

Such a rule rides roughshod over First Amendment protections for editorial discretion by imposing liability whenever race plays even a small role in an editorial decision. It would allow a claim against a bookseller who already dedicated an entire section to Asian authors to be sued because it did not have room for what it deemed to be an inferior work of an Asian author. And it would allow even an objectively terrible white actor to bring an action for being denied a part in *Hamilton* even if factors other than race would

provide an obvious explanation for why the actor would not get a part as a Founding Father in the minority cast of *Hamilton* (or in any kind of cast for any other play). Left in place, the Ninth Circuit's reasoning will have a devastating chilling effect on the free speech rights of all speech platforms—from magazines, to websites, to bookstores and theaters—that select and promote speech originally produced by others.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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