No. 18-1185

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

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a plaintiff can state a claim under 42 U.S.C. § 1981 by alleging that racial discrimination was a motivating factor in the challenged refusal to contract.

2. Whether the First Amendment can be asserted to bar a claim for racial discrimination where a defendant cable distributor refuses to carry a television network based on the race of the network's owner.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel state that Entertainment Studios Networks, Inc. is a privately owned corporation. It has no parent corporation, and no publicly held corporation owns 10% or more of the stock.

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STATUTORY PROVISIONS 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."

INTRODUCTION

This is a case about alleged racial discrimination in contracting in violation of the Civil Rights Act of 1866, codified at 42 U.S.C. § 1981. Respondent Entertainment Studios Networks, Inc. ("Entertainment Studios") is an African American-owned media company that owns and operates television networks, produces television series and operates a motion-picture production and distribution company.

Entertainment Studios alleges that Petitioner Charter Communications ("Charter") refused to carry Entertainment Studios' channels because Entertainment Studios is owned by an African American. In a lengthy complaint, Entertainment Studios alleged that for over five years Charter refused to contract or meet in good faith with Entertainment Studios, while at the same time Charter agreed to launch and expand distribution for lesser-known, white-owned channels.

Entertainment Studios also alleged that the same high-ranking Charter executives who refused to meet in good faith made racially derogatory comments at the same time Charter refused to contract.

The District Court below held that Entertainment Studios alleged a plausible claim for racial discrimination under section 1981, and the District Court rejected the argument that the claim was barred by the First Amendment. The District Court certified an interlocutory appeal on the First Amendment issue pursuant to 28 U.S.C. § 1292(b), and the Court of Appeals unanimously affirmed the District Court's decision on both the section 1981 issue and the First Amendment question.

Charter presents two arguments for why this Court should grant certiorari. First, Charter argues that the Ninth Circuit applied the wrong causation standard under section 1981. In Charter's view, a plaintiff cannot state a claim for racial discrimination even if the allegations show that the defendant was motivated by race. Rather, Charter argues that a plaintiff must meet a higher pleading burden by alleging and proving that race was the "but-for" cause of the refusal to contract.

This argument finds no support in the law. Every circuit court of appeals in the entire country applies a "motivating factor" causation standard for racial discrimination claims under section 1981. Charter argues that this Court should change the law and impose a "but-for" causation standard *at the pleading stage*. But

Charter cites no decision of this Court or of any circuit court of appeals requiring a section 1981 plaintiff to allege "but-for" causation to survive a motion to dismiss. Moreover, this case is the wrong vehicle for considering this issue because Entertainment Studios does allege "but-for" causation.

Second, Charter argues that Entertainment Studios' racial discrimination claim must be dismissed under the First Amendment. In Charter's view, a cable distributor has a First Amendment right to refuse to contract with television programmers even if the cable distributor was solely motivated by racial animus. Charter claims that the Court should impose a blanket rule and dismiss this case so that Charter and other major cable distributors can freely exercise their editorial discretion.

As the District Court recognized below, Charter is arguing for a First Amendment-based exemption from discrimination laws for the entire cable industry. Thankfully, there is no law to support such an exemption. "Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." *Norwood v. Harrison*, 413 U.S. 455, 470 (1973).

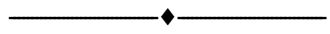
Media companies do not have a First Amendment-based immunity from generally applicable laws, such as section 1981. Even the press must comply with generally applicable civil rights, employment, tax,

copyright and other laws even if the enforcement of those laws has an incidental impact on speech.

Charter relies solely on this Court's decision in *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995), but that case is inapposite. *Hurley* involved a forced association problem created when a state court issued an injunction requiring organizers of a parade to allow an LGBT group to march in the parade with its own banner. The organizers did not exclude members of the LGBT community from marching, but they objected to a specific group because the group sought to convey its own message.

Among the many reasons why *Hurley* does not apply here, Charter has not claimed that it refused to contract with Entertainment Studios because of the message Entertainment Studios seeks to convey on its channels. Nor can it. The channels are not specifically directed to African American audiences, and they do not seek to convey an African American-based message. Rather, the channels are general lifestyle programming with mass audience appeal. Moreover, there is no split among the circuits on this issue, and Charter does not claim that one exists.

In short, Charter fails to identify an error below, and it certainly fails to present a compelling reason for why this Court should grant certiorari.



STATEMENT OF THE CASE

A. The Entertainment Studios Channels

Entertainment Studios is a media company that produces television series, owns and operates multiple television networks (channels), and operates a full-service, motion-picture production and distribution company. App-77, ¶¶ 20, 22. Entertainment Studios is solely owned by Byron Allen, an African American comedian, television host and entrepreneur. App-77, ¶ 20.

This case is about Entertainment Studios' channels JusticeCentral.TV, Cars.TV, ES.TV, MyDestination.TV, Pets.TV, Comedy.TV and Recipe.TV (the "Entertainment Studios Channels"). App-77-78, ¶¶ 22-23. The Entertainment Studios Channels are award-winning lifestyle channels with general audience appeal. *Id*. The Entertainment Studios Channels are carried by major multichannel video programming distributors ("MVPDs"), including Verizon FIOS, AT&T U-verse, DirecTV, Suddenlink, RCN, Centurylink, and many others. App-77, ¶ 21. These MVPDs compete directly with Charter. App-80, ¶ 32.

B. Allegations Of Racial Discrimination

In 2011, Entertainment Studios began offering its channels to Charter for carriage on its cable distribution platform. App-81, ¶ 36. Charter Senior Vice President Allan Singer ("Singer") was Entertainment Studios' primary point-of-contact. App-81, ¶ 33. Singer

had decision-making authority over whether to launch the Entertainment Studios Channels. App-81, ¶ 34.

Singer first told Entertainment Studios "to be a bit patient" and to try again "next year." App-81, ¶ 36. When Entertainment Studios tried next year, Singer said that "now" was not the right time because Charter was not launching new networks. App-82, ¶ 37. Contrary to Singer's representation, Charter was launching new networks at that time. In late 2012, Charter announced that it had entered into carriage contracts to launch the Longhorn Network, among other networks. App-82, ¶ 38.

Entertainment Studios tried again the next year, and this time it provided Singer with data showing that there was significant viewer demand for its channels. App-83, ¶ 41. Singer told Entertainment Studios that he did not believe Entertainment Studios' data, and said that Charter would not carry the channels "for the foreseeable future." App-82, ¶ 39. In the same year, Charter announced that it had entered into a carriage contract with the white-owned network RFD-TV. App-82-83, ¶ 40.

Singer told Entertainment Studios that he would block any future efforts to obtain carriage, stating: "Even if you get support from management in the field, I will not approve the launch of your networks." App-84, ¶ 44.

Charter finally agreed to meet with Entertainment Studios in 2015 while Charter was pursuing a merger with Time Warner Cable. App-85-86, ¶¶ 50-51.

The Entertainment Studios' team traveled to Charter's headquarters in Stamford, Connecticut, but when they arrived they realized that Singer scheduled the meeting only so Charter could tell the FCC—the agency overseeing the merger—that it met with an African American-owned programmer. App-86, ¶ 51.

At the meeting, Singer gave Entertainment Studios two reasons why Charter would not launch the Entertainment Studios Channels. First, Singer said that Charter wanted to wait to "see what AT&T does." App-86, ¶ 52. Second, Singer said that there were "too many unknowns" with the proposed merger. App-86, ¶ 53. At the end of the meeting, Singer boorishly stated: "You go back to the line." *Id.*

Neither explanation is the true reason why Charter refused to contract. AT&T carried Justice-Central.TV at the time of the meeting, and thus Charter should have agreed to at least carry Justice-Central.TV. App-86, ¶ 52. But Charter refused to launch the channel. *Id.* Charter was also launching and expanding distribution for channels despite the pending merger. App-87, ¶ 55. With the merger pending, Charter expanded its distribution of white-owned RFD-TV to urban areas, such as Los Angeles and Atlanta, and expanded distribution of white-owned CHILLER to all Charter subscribers. *Id.* The expansion of RFD-TV to urban areas is particularly questionable since the demand for *rural* programming is less in those areas than general lifestyle programming, such as the Entertainment Studios Channels. *Id.*

After this meeting, Respondents obtained direct evidence of racially derogatory comments made by Singer. In 2016, Singer approached a group of African Americans protesting outside of Charter's headquarters in Stamford, Connecticut. App-73, ¶¶ 4-5. Singer yelled at the protestors, telling them they were typical African Americans looking for a "handout." App-73, ¶ 5. Singer told one of the protestors that he was out of work because he spent his money on frivolous things. *Id.* Two days after Entertainment Studios showed Charter their allegations about Singer's racist comments, Charter announced that Singer was leaving the company. *Id.*

Respondents also obtained direct evidence of racist comments made by Charter President and CEO Tom Rutledge. Allen and Rutledge both attended the Cable Hall of Fame dinner on May 16, 2016. App-74, ¶ 8. At the dinner, Rutledge refused to speak with Allen, made a dismissive hand gesture and called Allen a "Boy." *Id.* The term "Boy" is a derogatory name for an African American man that has roots in the Jim Crow era. App-74, ¶ 9.

C. Relevant Procedural History

On January 27, 2016, Entertainment Studios and the National Association of African American-Owned Media ("NAAAOM") filed a lawsuit against Charter in the Central District of California alleging racial discrimination in contracting in violation of 42 U.S.C.

§ 1981.[1] NAAAOM is an organization comprised of African American-owned media companies, including Entertainment Studios, that is devoted to ensuring that its members obtain the same rights to contract as are enjoyed by white persons. App-75-76, ¶¶ 14-17.

With leave of court, Respondents filed a First Amended Complaint ("FAC"). In response, Charter filed a Rule 12(b)(6) motion to dismiss, arguing that Respondents had failed to state a plausible section 1981 claim.[2] App-26. The District Court denied the motion.

1. The District Court Opinion

In a lengthy opinion, the District Court recognized that causation is a "necessary element" of a section 1981 claim. App-35-36. The District Court analyzed the allegations in the FAC and held that Respondents "plainly have pled that [Entertainment Studios] suffered discrimination on the basis of race, and that such racial discrimination *caused* [Charter's] repeated refusal to contract." App-36 (emphasis added). The District Court also found that Respondents had alleged

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[1] In its complaint, Respondents also asserted a due process claim under the Fifth Amendment against the FCC, but Respondents voluntarily dismissed that claim.

[2] Charter also filed a Rule 12(b)(1) motion challenging NAAAOM's associational standing, which the District Court granted with leave to amend. Respondents filed a Supplement to the FAC to identify the members of NAAAOM per the District Court's Order. App-76, ¶ 17.

sufficient facts to undermine Charter's purported race-neutral reasons for not contracting. App-37-42.

Charter argued that Respondents were required to allege facts showing that racial discrimination was the "but-for" cause of Charter's refusal to contract. Charter made this argument based on this Court's decisions in *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009), and *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013). The District Court rejected Charter's argument, explaining that *Gross* and *Nassar* did not involve section 1981, and that neither case changed the causation standard for discrimination claims brought under section 1981. App-44.

Charter also argued that the First Amendment barred Respondents' claim. Charter made this argument based on *Claybrooks v. Am. Broad. Cos., Inc.*, 898 F. Supp. 2d 986 (M.D. Tenn. 2012) (holding that the First Amendment barred a lawsuit filed by African Americans claiming that they were not cast on the *Bachelor* because of their race), and this Court's decision in *Hurley*, 515 U.S. 557 (holding that Massachusetts public accommodation law could not be used to require organizers of an expressive parade to allow an LGBT group to march in the parade and promote their own message). The District Court rejected Charter's argument, explaining that this case presents a "forced message" issue that is more similar to the issue in *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (holding that intermediate scrutiny applied to the must-carry provisions in the Cable Television

Consumer Protection and Competition Act of 1992). App-49.

The District Court also explained that it was troubled by the far-reaching implications of Charter's argument and the lack of authority supporting it:

> The Court is somewhat further troubled by the fact that, in essence, what [Charter] seeks here is a First Amendment-based exemption from racial discrimination laws for an entire industry. Were that the law, the Court might expect there to have been more decisions supporting or reflecting it than a single district decision from Tennessee that dealt simply with a challenge to the casting decisions for one television show, a situation that—as set forth further above—appears to have a much more direct impact on speech activities than what is presented here. App-51 n.13.

Charter filed a motion to file permission to proceed with an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), which the District Court granted. App-69.

2. The Ninth Circuit Unanimously Affirms

The Ninth Circuit granted Charter's petition for interlocutory appeal and unanimously affirmed the denial of Charter's Rule 12(b)(6) motion. App-2. To determine the proper causation standard under section 1981, the Ninth Circuit recognized that "but-for" causation is the default rule per *Gross* and *Nassar*, and focused on "the text of § 1981 to see if it permits a

mixed-motive claim." App-12. The court held that "mixed-motive claims are cognizable" under section 1981, explaining that the "motivating factor" causation standard is the "most natural reading" of section 1981. App-15 ("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, the plaintiff has not enjoyed the *same right* as a white citizen.").

The Ninth Circuit went further, and analyzed whether the court had engaged in the correct analysis in its prior opinion in *Metoyer v. Chassman*, 504 F.3d 919 (9th Cir. 2007). App-12. Based on *Gross* and *Nassar*, the court held that *Metoyer* erroneously relied on Title VII law as the source for causation standards under section 1981. *Id.* (explaining that the reasoning of *Metoyer* is "incompatible" with *Gross* and *Nassar*). Instead of relying on *Metoyer*, the court held that "motivating factor" was the correct causation standard based on the text of section 1981. App-15.

The court then analyzed Respondents' allegations, and concluded that Respondents had plausibly alleged that racial discrimination was a "motivating factor" in Charter's refusal to contract. App-17. The court also considered Charter's race-neutral justifications, but found that "those explanations are [not] so compelling to render [Respondents'] allegations of discriminatory intent *im*plausible." App-18.

On Charter's First Amendment defense, the Ninth Circuit recognized that there is "some ambiguity as to

whether rational basis review or a heightened form of scrutiny ought to be applied." App-21. The court concluded that resolution of this issue was not required because Respondents' claim "survives even a heightened standard of review." App-22. On which level of heightened scrutiny to apply, the Ninth Circuit concluded that strict scrutiny would not apply because section 1981 is a content-neutral law. *Id.* (citing *Turner*, 512 U.S. at 642). The court held that Respondents' claim survives intermediate scrutiny because section 1981 serves a significant government interest of prohibiting racial discrimination and is narrowly tailored to those ends. App-22-25.

Charter filed a petition for panel rehearing and rehearing en banc. The panel granted rehearing, withdrew its original decision, and filed a superseding opinion that again unanimously affirmed the denial of Charter's Rule 12(b)(6) motion. App-1-2. The primary difference between the original opinion and the superseding opinion is the insertion of footnote 11, which states that the court's First Amendment holding is limited to race discrimination—not viewpoint discrimination. Footnote 11 reads:

> We note that our analysis here is limited to cases of discriminatory contracting based on a plaintiff's *race*, not contracting based on a plaintiff's *viewpoint*. 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). Here, by contrast, [Respondents] plausibly pleaded that Charter refused to contract with Entertainment Studios due to racial animus, and they must ultimately prove that Entertainment Studios' racial identity, separate and apart from the underlying content of its programming, was a factor in Charter's decision. Accordingly, our First Amendment analysis is limited to cases involving racially discriminatory contracting that incidentally impacts speech, and should not be construed as applying to cases where a refusal to contract is instead based solely on the viewpoint or substance of a plaintiff's content or message. App-20 n.11.

REASONS TO DENY THE PETITION

I. THE DECISION BELOW ON THE STANDARD FOR PLEADING A CLAIM UNDER SECTION 1981 DOES NOT CONFLICT WITH A DECISION OF A CIRCUIT COURT OF APPEAL OR OF THIS COURT

Charter presents two arguments for why the Court should grant certiorari on the causation standard of section 1981. First, Charter argues that the decision below, in which the Ninth Circuit held that Respondents can state a claim by showing that race was a "motivating factor," exacerbates an already deep-seated and entrenched circuit split. Second, Charter

argues that the "motivating factor" standard applied below conflicts with this Court's decisions in *Gross* and *Nassar*.

A. The "Motivating Factor" Causation Standard Is Applied In Every Circuit For Status-Based Discrimination Claims Under Section 1981

Courts typically draw a distinction between two types of claims that can be brought under section 1981. The first is a status-based discrimination claim, which is where the plaintiff alleges that he or she suffered discrimination in contracting because of the plaintiff's racial status. *See*, *e.g.*, *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 455-56 (2008). The second is a retaliation claim, which is where a plaintiff claims that he or she suffered an adverse contracting action because of his or her conduct or speech. *See*, *e.g.*, *id.*

This is a status-based discrimination case. Respondents allege that Charter refused to contract with Entertainment Studios because of the racial status of its owner, Byron Allen. App-72, ¶ 1.

As shown by the chart in the Appendix attached hereto, *every* circuit court of appeal applies a "motivating factor" causation standard for status-based discrimination claims under section 1981. There is no disagreement among the circuits on this issue.

Indeed, Charter recognizes in its petition that the First, Second, Third, Sixth, Eighth, Tenth, Eleventh,

D.C. and Federal Circuits use the same mixed-motive, burden-shifting frameworks to analyze Title VII and section 1981 claims. Pet. at 13 (citing *Goodman v. Bowdoin Coll.*, 380 F.3d 33, 44-45 (1st Cir. 2004); *Henry v. Wyeth Pharm., 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. United Parcel Serv.*, 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. LLC*, 841 F.3d 527, 532 (D.C. Cir. 2016); *Ruiz v. A.B. Chance Co.*, 234 F.3d 654, 671 (Fed. Cir. 2000); Pet. at 15 (citing *Wright v. St. Vincent Health Sys.*, 730 F.3d 732, 739 n.6 (8th Cir. 2013), and *Bobo v. United Parcel Serv., Inc.*, 665 F.3d 741, 756 (6th Cir. 2012)).

According to Charter, the only circuit that does not apply the "motivating factor" standard is the Seventh Circuit. Pet. at 14. But Charter's argument is based on a misreading of a nearly three-decades-old case. Charter cites *Bachman v. St. Monica's Congregation*, 902 F.2d 1259, 1262-63 (7th Cir. 1990), but the court did not *reject* the motivating factor standard in that case. The court did not mention the motivating factor standard at all. And the Seventh Circuit has clarified in subsequent cases that the "motivating factor" standard still applies. *See*, *e.g.*, *Killebrew v. St. Vincent Health, Inc.*, 295 F. App'x 808, 810 (7th Cir. 2008) (holding that a plaintiff can meet her prima facie burden under section 1981 by showing that race "was the *motivating factor* behind the ill-treatment" (emphasis added)).

Further, the Seventh Circuit has expressly noted that it is an *open question* whether mixed-motive claims are cognizable under section 1981. *Smith v. Wilson*, 705 F.3d 674, 681 (7th Cir. 2013) ("we need not decide in the present case whether *Gross* foreclosed burden-shifting for claims" under section 1981 because the defendant prevailed on summary judgment and, "rightly or wrongly, the district court assigned to the defendants the burden of disproving 'but for' causation"). Charter cites a district court decision that rejects the "motivating factor" standard. Pet. at 13 (citing *Vasquez v. Caterpillar Logistics, Inc.*, Case No.: 1-15-CV-398-TLS, 2017 WL 4773081, at *10 (N.D. Ind. Oct. 20, 2017)). But the district court's reasoning was not adopted by the Seventh Circuit. *See Vasquez v. Caterpillar Logistics, Inc.*, 742 F. App'x 141, 142-43 (7th Cir. 2018) (affirming the grant of summary judgment in defendant's favor because the plaintiff had not submitted evidence of discrimination and because the defendant submitted evidence that it fired the plaintiff for a legitimate reason, which was not rebutted by the plaintiff with sufficient evidence).

In sum, *no* circuit court has rejected the "motivating factor" standard for status-based discrimination claims under section 1981. As a result, if the Court grants certiorari now, the Court will be deprived of "the benefit it receives from permitting several courts of appeals to explore a difficult question before [it] grants certiorari." *United States v. Mendoza*, 464 U.S. 154, 160 (1984); *see also E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977) (observing "the wisdom

of allowing difficult issues to mature through full consideration by the courts of appeals"). The Court should wait until an actual conflict develops before considering this issue.

B. The Ninth Circuit Did Not Reject Charter's "Mixed-Motive" Defense As A Matter Of Law

Charter claims that the Ninth Circuit created a new causation standard in that a plaintiff can prevail *at trial* if it proves that race was a "motivating factor." Pet. at 15. Charter is misreading the decision below.

The Ninth Circuit's decision was on an interlocutory appeal from the denial of a Rule 12(b)(6) motion to dismiss. The Ninth Circuit did not conclusively establish the causation standards to be applied at summary judgment or trial. The Ninth Circuit only held that "mixed-motive" claims are cognizable under section 1981, and that Respondents can state a claim by alleging that race played a "motivating factor" in Charter's refusal to contract. App-15.

For roughly three decades, federal courts have recognized that in "mixed-motive" cases a defendant can avoid certain liability—such as damages and injunctive relief—if it proves that it would have made the same decision regardless of improper motive. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45 (1989) (plurality opinion) ("[T]he defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to

play such a role." (footnote omitted)); *Smith*, 705 F.3d at 679-80 (holding that a defendant has a complete defense to liability under section 1981 if it proves it would have made the same decision regardless of race); *Mabra*, 176 F.3d at 1358 n.2 (same); *see also Metoyer*, 504 F.3d at 932 (collecting Ninth Circuit cases dating back to 1980 holding that a defendant can avoid money damages and certain forms of injunctive relief by establishing a "mixed-motive" defense), *abrogated on other grounds by Nat'l Ass'n of African American-Owned Media v. Charter Commc'ns, Inc.*, 915 F.3d 617, 625-26 (9th Cir. 2019).

The Ninth Circuit did not reject Charter's ability to assert a "mixed-motive" defense as a matter of law because it was not, and is not, yet at issue. It is axiomatic that a federal court does not decide issues that are not before it. *Jackson v. United States*, 881 F.2d 707, 710 (9th Cir. 1989) (explaining that the cornerstone of the Article III "case or controversy" requirement is that "a federal court should decide only those questions necessary for adjudication of the case before it" (citation omitted)).

In arguing that the Ninth Circuit created a new causation standard, Charter is asking this Court to *assume* that the Ninth Circuit rejected Charter's ability to assert a "mixed-motive" defense later in the case. The Court should not commit its resources based on this assumption. The far better course is for the Court to allow the District Court to consider the applicability of Charter's "mixed-motive" defense if it is presented through a summary judgment motion or at trial.

C. The Decision Below Does Not Conflict With This Court's Decisions In *Gross* Or *Nassar*

Charter argues that certiorari is warranted because the Ninth Circuit's pleading rule conflicts with this Court's decisions in *Gross* and *Nassar*. Pet. at 17-20. This argument fails because the Court did not interpret section 1981 in *either case* and the reasoning of these cases is inapplicable to section 1981. Both of these cases involve statutes with language quite different from section 1981. Moreover, both cases were decided on appeal following trial. The Court did not address, let alone change, *pleading burdens* in either case.

1. *Gross* Involved Whether A Mixed-Motive Jury Instruction Was Proper Under The ADEA

Gross was an appeal following a jury trial involving a claim of age discrimination brought under the Age Discrimination in Employment Act ("ADEA"). *Gross*, 557 U.S. at 170-71. At issue was whether the district court properly gave a "mixed-motive" instruction to the jury. The district court had instructed the jury that it must return a verdict for the plaintiff ("Gross") if he proved that age was a "motivating factor" in the defendant's ("FBL") decision to demote him. *Id.* The district court also instructed the jury that FBL had the burden to show that it would have demoted Gross regardless of his age. *Id.* at 171. The jury returned a verdict for Gross. *Id.* The Eighth Circuit held,

based on this Court's Title VII decision in *Price Waterhouse*, 490 U.S. 228, that the district court improperly shifted the burden of persuasion to FBL. *Id.* The Eighth Circuit held that the burden should not have shifted because Gross did not present direct evidence linking discriminatory animus to his demotion. *Id.* at 172.

This Court vacated the Eighth Circuit's opinion, holding that the Court of Appeals improperly relied on law developed under Title VII to determine the proper evidentiary burdens for claims brought under the ADEA. 557 U.S. at 180. The Court explained that, when conducting statutory interpretation, courts "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." *Id.* at 174 (quoting *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008)). Thus, the Court "focus[ed] on the text of the ADEA to decide whether it authorizes a mixed-motives age discrimination claim." *Id.* at 175. The ADEA provision at issue prohibits an employer from taking an adverse employment action "*because of*" age. *Id.* at 176 (quoting 29 U.S.C. § 623(a)(1)). The Court held that the ordinary meaning of the words "because of" means, in the context of the ADEA, that "age was the 'reason' that the employer decided to act." *Id.* Based on the text of the ADEA, the Court held that a plaintiff must prove that age was the "but-for" cause of the adverse employment action, and that the burden of persuasion does not shift to the defendant. *Id.* at 176-77.

2. *Nassar* Involved Whether There Was Sufficient Evidence To Support A Jury Verdict Of Retaliation Under Title VII

Nassar was an appeal following a jury trial involving claims brought under Title VII. *Nassar*, 570 U.S. at 342. The plaintiff ("Nassar") was hired by the defendant ("University") as a physician and a member of its faculty. *Id.* at 344. Nassar ultimately sued the University for both status-based discrimination on account of his race and retaliation in connection with his complaints about the harassment. *Id.* at 345. Nassar prevailed on both Title VII claims at trial. *Id.* In affirming the retaliation verdict, the Fifth Circuit held that Nassar only needed to show that retaliation was a motivating factor for the adverse employment action, and that Nassar had presented sufficient evidence to support the jury's verdict. *Id.*

This Court vacated the Fifth Circuit's opinion. 570 U.S. at 363. The Court held retaliation claims brought under Title VII require proof of "but-for" causation, and that mixed-motive claims are not cognizable. The Court explained that there was no meaningful textual difference between the words "because of" used in the ADEA provision in *Gross* and the word "because" used in the retaliation provision of Title VII at issue in the case. *Id.* at 352. The Court also found significant the fact that Congress amended Title VII in the Civil Rights Act of 1991 by adding a motivating factor provision applicable to status-based discrimination claims but not for retaliation claims. *Id.* at 353-54. For these

reasons, the Court held that a plaintiff pursuing a retaliation claim under Title VII must prove "that the desire to retaliate was the but-for cause of the challenged employment action." *Id.* at 352.

3. *Gross* And *Nassar* Involved Different Statutes That Defined Discrimination Using Different Language Than Section 1981

Gross and *Nassar* are statutory interpretation decisions that have little bearing on this case. Unlike the ADEA provision at issue in *Gross* and the Title VII retaliation provision at issue in *Nassar*, section 1981 does not use the words "because of" or "because." Rather, section 1981 provides that all persons shall enjoy the "same right" to contract as is enjoyed by white citizens. 42 U.S.C. § 1981(a).

Section 1981 differs from Title VII and the ADEA in other ways as well. Unlike Title VII's "detailed statutory scheme," section 1981 contains a "broad and brief" prohibition on racial discrimination. *Nassar*, 570 U.S. at 355-56. Section 1981 is a "broadly worded civil rights statute," *CBOCS*, 553 U.S. at 452, that uses "capacious language" to describe the rights granted therein, *Nassar*, 570 U.S. at 355.

Section 1981 also has a different remedial purpose than Title VII and the ADEA. Section 1981 is not limited to discrimination in the employment context. Rather, Congress intended to prohibit "*all* racially motivated deprivations of the rights enumerated in the

statute." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 426 (1968); *see also CBOCS*, 553 U.S. at 445, 448 (explaining that section 1981 is a "longstanding civil rights law" that was enacted as part of the Civil Rights Act of 1866 designed to "guarantee the then newly freed slaves the same legal rights that other citizens enjoy").

Gross and *Nassar* also have little bearing on this case because neither decision addressed, let alone changed, *pleading burdens*. The Court did not discuss whether a plaintiff must plead "but-for" causation to state an age discrimination claim under the ADEA or a retaliation claim under Title VII. Those remain open questions under the ADEA and Title VII. *Cf. Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 510 (2002) (holding that the prima facie requirement under Title VII "is an evidentiary standard, not a pleading requirement"). Certainly, whether a plaintiff must allege "but-for" causation to state a status-based discrimination claim *under section 1981* is an open question not resolved by this Court in *Gross* or *Nassar*. *See Hagan v. City of New York*, 39 F. Supp. 3d 481, 502 (S.D.N.Y. 2014) (explaining that *Nassar* did not "alter the pleading requirements since causation is a question of fact and a plaintiff need not establish a prima facie case to withstand a motion to dismiss").

Because *Gross* and *Nassar* did not address pleading burdens, if the Court were to grant certiorari, the Court would have to address a second, analytically-distinct question of what the *pleading burdens* are under section 1981. This secondary question is necessarily implicated because this Court and the lower

appellate courts have held that pleading burdens in discrimination cases are different than evidentiary burdens at summary judgment or trial. *Swierkiewicz*, 534 U.S. at 510 (noting that the prima facie requirement under Title VII "is an evidentiary standard, not a pleading requirement"); *Maduka v. Sunrise Hosp.*, 375 F.3d 909, 912 (9th Cir. 2004) ("[T]here is little doubt that *Swierkiewicz* governs complaints in section 1981 discrimination actions."); *see also Brown v. Sessoms*, 774 F.3d 1016, 1023 (D.C. Cir. 2014) ("We have been clear, however, that '[a]t the motion to dismiss stage, the district court cannot throw out a complaint even if the plaintiff did not plead the elements of a prima facie case.'" (alteration in original) (quoting *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 493 (D.C. Cir. 2008))); *cf. Swanson v. Citibank, N.A.*, 614 F.3d 400, 405 (7th Cir. 2010) (adopting a liberal pleading standard for section 1981 claims, holding that a section 1981 plaintiff need only allege the type of discrimination, by whom and when).

4. The Ninth Circuit Followed The Approach Prescribed By This Court In *Gross* And *Nassar*

Charter argues that the Ninth Circuit failed to accord sufficient deference to "but-for" causation as the default rule, Pet. at 18, but this argument is negated by the four-corners of the opinion. The Ninth Circuit recognized that but-for causation is the default rule per *Gross* and *Nassar* and then "look[ed] to the text of § 1981 to determine whether it permits a departure

from the but-for causation standard." *Charter*, 915 F.3d at 625. This is the analytical approach required by *Gross* and *Nassar*.

Charter claims that the Ninth Circuit, in looking to the text of section 1981 to see if it "permits" mixed-motive claims, asked the "wrong question." Pet. at 18. But Charter is wrong, *Nassar*, 570 U.S. at 346-47; *Gross*, 557 U.S. at 175, and, moreover, Charter fails to identify what the "right question" is. *Id.*

Instead, Charter makes a brand new argument that the default rule must apply because Congress did not create an express cause of action under section 1981. *Id.* In over three years of litigation, Charter has not once made an "implied cause of action" argument until now, and Charter cites no law to support it. Charter cites no decision of this Court or of any circuit court of appeals holding that the causation standard for implied causes of action must be based on background principles or default rules.

Nor does Charter provide a compelling rationale for why the Court should adopt a new "implied cause of action" statutory interpretation rule. Rather, the far better approach is for courts to focus on the statutory text, as the Court did in *Gross* and *Nassar* and as the Ninth Circuit did below.

Charter next argues that the Ninth Circuit erroneously based its interpretation on the lack of the words "because" or "because of" in section 1981. Pet. at 18. Charter cites *Burrage v. United States*, 571 U.S. 204, 213 (2014), for the proposition that but-for

causality is not predicated on the words "because" or "because of." *Id.* Although that is true, it fails to support Charter's argument because the other statutory language identified by the Court in *Burrage* is not similar to the language of section 1981. *Compare Burrage*, 571 U.S. at 213-14 (noting that the phrases "by reason of," or "based on," or "as a result of" typically connote but-for causation) *with* 42 U.S.C. § 1981(a) (all persons shall enjoy the "same right" to contract "as is enjoyed by white citizens").

Charter argues that the Ninth Circuit's interpretation is contrary to the original intent of the drafters of section 1981. Pet. at 19. But Charter cites no evidence of the drafter's intent to support that assertion. Instead, Charter argues that but-for causation was the "prevailing standard" at the time. *Id.* Assuming that to be the case, the fact that Congress in 1866 decided to use the language "same right" instead of "because," "by reason of" or some other phrase connoting "but-for" causation shows that Congress intended to grant expansive rights to racial minorities. *Cf. Nassar*, 570 U.S. at 355-56; *CBOCS*, 553 U.S. at 452; *Jones*, 392 U.S. at 426.

D. Charter's Policy Arguments Are Unfounded

In its petition, Charter presents a parade of horribles that it claims will occur because of the Ninth Circuit's decision below. Pet. at 20-23. But the claimed negative implications depend on the Court accepting

Charter's *assumption* that the decision below rejected the "mixed-motive" defense as a matter of law. As explained in Part I.A.2, *supra*, the Ninth Circuit did not reject Charter's "mixed-motive" defense because it was not yet at issue.

The only argument Charter makes that is actually directed at the "motivating factor" *pleading* standard is that, in its view, courts applying the standard will be deprived of their ability to dismiss meritless section 1981 claims. Pet. at 21-22. Charter's argument ignores this Court's decisions in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). *Iqbal* and *Twombly* announced pleading rules designed to strike the right balance between allowing courts to dismiss claims based on conjecture but permitting potentially meritorious claims to proceed. *See Twombly*, 550 U.S. at 556 ("Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.").

Per *Iqbal* and *Twombly*, if a section 1981 plaintiff only asserts conclusory allegations that race played a "motivating factor" in the challenged decision, the case should be dismissed. *Iqbal*, 556 U.S. at 678-79; *Twombly*, 550 U.S. at 556-57. And if a section 1981 plaintiff alleges facts that do not show plausible racial discrimination, the case should be dismissed as well. *Iqbal*, 556 U.S. at 678-79; *Twombly*, 550 U.S. at 556-57.

There is nothing in the record to suggest that these pleading rules would not apply when courts apply the "motivating factor" standard on a Rule 12(b)(6) motion. Indeed, in applying the "motivating factor" standard, the Ninth Circuit made clear that some of Respondents' allegations, by themselves, were not sufficient. App-16 ("Corporate red tape, inconsistent decision-making among network leadership, and even boorish executives are not themselves necessarily indicative of discrimination."). This demonstrates that *Iqbal* and *Twombly* will continue to allow courts to dismiss claims based merely on conjecture or speculation. This, of course, is not such a case. App-16-19; App-36.

E. This Case Is An Inappropriate Vehicle For Deciding This Question Because "But-For" Causation Is Alleged In The Complaint

Finally and quite importantly, Respondents' complaint expressly alleges "but-for" causation. Because this matter is on the appeal of the denial of a motion to dismiss, this case is the wrong vehicle for addressing the question of whether "but-for" causation must be alleged and proven for liability under section 1981.

The complaint identifies purported race-neutral reasons that Charter gave to explain its refusal to contract, and then alleges facts showing that those reasons are untrue. For example, Charter claimed that it wanted to "wait to see what AT&T does," but AT&T carried JusticeCentral.TV at the time and now carries

all of the Entertainment Studios Channels. App-86, ¶ 52. Nevertheless, Charter refused to carry *any* of the channels. *Id.*

In addition, Charter claimed that there were "too many unknowns" with its proposed merger with Time Warner Cable, but Charter entered into new contracts with lesser-known, white-owned channels to expand distribution with the pending merger. App-86-87, ¶¶ 53, 55. The pending merger was not an impediment to contract for these white-owned channels. *Id.*

II. CHARTER HAS NOT PROVIDED A BASIS FOR CERTIORARI ON THE FIRST AMENDMENT ISSUE

Charter argues that Respondents' section 1981 claim "should have been dismissed as a matter of law because it runs headlong into bedrock First Amendment principles." Pet. at 23. As the District Court below aptly characterized, Charter is arguing for a blanket First Amendment immunity for Charter and other MVPDs from *all discrimination laws* applied in connection with channel carriage decisions. App-51 n.13. As explained below, Charter's argument is legally flawed. Moreover, Charter's petition alleges no split among the circuits on this issue and none exists.

A. Charter's Argument Conflicts With Multiple Decisions Of This Court

Section 1981 is a content-neutral statute that regulates *conduct*, not speech. *See Rumsfeld v. Forum for*

Acad. & Institutional Rights, Inc., 547 U.S. 47, 62 (2006) ("Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct."); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (rejecting a First Amendment defense raised by the owner of a drive-in and sandwich shop that refused service to African Americans, noting that "this is not . . . even a borderline case").

The enforcement of racial discrimination laws, such as section 1981, does not offend the First Amendment simply because such enforcement may have incidental effects on speech. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (rejecting the defendant newspaper company's First Amendment defense based on the "well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news"). In *Cohen*, this Court explained that the press, like all other institutions, must comply with generally applicable laws:

> The press may not with impunity break and enter an office or dwelling to gather news. Neither does the First Amendment relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a

> criminal investigation, even though the reporter might be required to reveal a confidential source. *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972). The press, like others interested in publishing, may not publish copyrighted material without obeying the copyright laws. See *Zacchini v. Scripps–Howard Broadcasting Co.*, 433 U.S. 562, 576–579, 97 S.Ct. 2849, 2857–2859, 53 L.Ed.2d 965 (1977). Similarly, the media must obey the National Labor Relations Act, *Associated Press v. NLRB*, 301 U.S. 103, 57 S.Ct. 650, 81 L.Ed. 953 (1937), and the Fair Labor Standards Act, *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 192–193, 66 S.Ct. 494, 497, 90 L.Ed. 614 (1946); may not restrain trade in violation of the antitrust laws, *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945); *Citizen Publishing Co. v. United States*, 394 U.S. 131, 139, 89 S.Ct. 927, 931, 22 L.Ed.2d 148 (1969); and must pay non-discriminatory taxes, *Murdock v. Pennsylvania*, 319 U.S. 105, 112, 63 S.Ct. 870, 874, 87 L.Ed. 1292 (1943); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 581–583, 103 S.Ct. 1365, 1369–1371, 75 L.Ed.2d 295 (1983). Cf. *University of Pennsylvania v. EEOC*, 493 U.S. 182, 201–202, 110 S.Ct. 577, 588–589, 107 L.Ed.2d 571 (1990).

Id. at 669-70; *see also Branzburg v. Hayes*, 408 U.S. 665, 683 (1972) (media companies do not possess "special immunity from the application of general laws" (citation omitted)).

Charter's argument for a First Amendment-based immunity conflicts with this law. The Ninth Circuit properly recognized that *Cohen* and *Rumsfeld* suggest that rational basis review could be the appropriate standard to apply to Charter's First Amendment defense. App-21.

Charter argues that rational basis review is not the correct standard because the First Amendment protects its editorial decisions about which channels to carry. Pet. at 23. This argument does not account for the fact that section 1981 is generally applicable law that only has an incidental impact on speech. *Rumsfeld*, 547 U.S. at 62; *Cohen*, 501 U.S. at 669; *Newman*, 390 U.S. at 402 n.5. Also, nothing in Respondents' complaint challenges the ability of Charter to make any editorial decisions it chooses. The point is just that it cannot discriminate on the basis of race.

Charter argues that *dismissal* is required, but this argument conflicts with this Court's reasoning in *Turner*. In *Turner*, the Court held that the "must carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992 were regulations of protected speech and therefore triggered heightened scrutiny. *Turner*, 512 U.S. at 636-37 (noting that the "must carry" laws reduce the number of channels over which cable distributors exercise unfettered control). However, the Court held that strict scrutiny was not the right standard because the "must carry" provisions were content neutral. *Id.* at 655, 661-62; *see also id.* at 637 ("[N]ot every interference with speech triggers the same degree of scrutiny under the First Amendment.").

Based on *Turner*, the Ninth Circuit assumed, without deciding, that heightened scrutiny applied but noted that intermediate scrutiny is the appropriate level of heightened scrutiny because section 1981 is a content-neutral law. App-22-23. The Ninth Circuit properly applied intermediate scrutiny, holding that section 1981 serves a "significant government interest" by prohibiting racial discrimination and that it is narrowly tailored to achieve those ends. App-24-25.

In its petition, Charter does not argue that section 1981 is a content-based statute. Charter also does not argue that section 1981 fails to serve a significant government interest or that it is not narrowly tailored. Instead, to support its breathtaking request for a First Amendment-based immunity, Charter relies *solely* upon one decision of this Court—*Hurley*. Pet. at 23-24.

B. *Hurley* Is Inapposite

Hurley involved a forced association issue presented on much different facts. In that case, a Massachusetts state court found, following a bench trial, that organizers of the Boston St. Patrick's Day Parade violated Massachusetts public accommodations law by excluding a gay, lesbian and bisexual group ("GLIB") from marching in the parade. The state courts rejected the organizer's First Amendment defense and issued an injunction requiring the organizers to allow GLIB to march with their own banner. *Hurley*, 515 U.S. at 561-64.

This Court unanimously reversed. 515 U.S. at 566. The Court held that the parade was an exercise of the organizer's First Amendment rights. *Id.* at 569 ("Not many marches, then, are beyond the realm of expressive parades, and the South Boston celebration is not one of the them."). Next, the Court explained that the issue presented was nuanced because the Massachusetts public accommodations law had "been applied in a peculiar way" because no individual member of GLIB claimed to have been excluded because of their sexual orientation. *Id.* at 572. Rather, the issue presented was whether the organizers of the parade could exclude GLIB because of the *message* GLIB intended to express while marching in the parade. *Id.* (noting that the "disagreement goes to the admission of GLIB as its own parade unit carrying its own banner"). In addressing this forced message issue, the Court held that the First Amendment prohibited the Massachusetts courts from requiring the organizers of the parade to allow GLIB to march with its own message.

Hurley is inapposite for three primary reasons. First, Respondents do not allege that Charter refused to contract because of any disagreement with the *message* conveyed on the Entertainment Studios Channels. Rather, Respondents allege that Charter refused to contract because of the race of Entertainment Studios' owner. App-72, ¶ 1. The issue presented here is the converse of the issue in *Hurley* in that Charter refused to contract based on the racial *status* of Entertainment Studios' owner, and not because of any *message* he seeks to convey on his channels. App-77-78,

¶¶ 22-23 (the Entertainment Studios Channels contain lifestyle programming with general audience appeal).

Second, *Hurley* was not a cable case. This is a critical distinction because this Court in *Hurley* expressly noted that the forced association issues presented in the case are "absent in the cable context." 515 U.S. at 576 (citing *Turner*, 512 U.S. at 655). This is because cable viewers rarely consider the content on a particular channel to be the message of the cable *distributor*. *Id.*

Third, *Hurley* was decided on appeal following a bench trial with a fully developed evidentiary record. *Hurley* was not a pleadings case. This is particularly important here because Charter has submitted *no evidence* that it refused to contract with Entertainment Studios because of a desire not to be associated with the message conveyed on the Entertainment Studios Channels.

Thus, the Ninth Circuit and the District Court below properly concluded that *Hurley* does not require dismissal of this case.

C. The Hypotheticals Presented By Charter Do Not Involve Racial Discrimination Like That Alleged Here

Like it argued in its petition for rehearing in the Ninth Circuit, Charter claims that the decision below will have far-reaching and damaging implications on the genuine exercise of First Amendment protected

speech. Pet. at 25-27. But the hypotheticals presented by Charter do not involve racially discriminatory *conduct* like that alleged here.

Charter claims that the decision below would prohibit a bookstore owner from refusing to stock its shelves with novels written by Asian or white authors, even if the owner of the bookstore intended to promote an African American viewpoint. Pet. at 25-26. This hypothetical is not implicated here because Charter has not claimed that it refused to contract with Entertainment Studios to promote white or Asian viewpoints. Rather, it claims that it was motivated by race-neutral *business* reasons.

Charter also claims that the decision below would prohibit the creator of *Hamilton* from making casting decisions based on race. Pet. at 26. This hypothetical is even further afield, and Charter cites no law to support its argument. The Ninth Circuit below properly rejected this hypothetical because this case involves racially discriminatory contracting that, at most, "incidentally impacts speech." App-20 n.11. As explained by the District Court below, casting decisions "have a much more direct impact on speech activities than what is presented here." App-51 n.13.

Charter also claims that the decision below would prohibit The Huffington Post from publishing its Internet magazine and web blog "Black Voices," Pet. at 26-27, but Charter is conflating publishing decisions with contracting decisions. If "Black Voices" wants to publish speech with a particular viewpoint, it can do so.

But if The Huffington Post implements a hiring policy that blocks white journalists, section 1981 prohibits that conduct.[3] *See Cohen*, 501 U.S. at 669.

D. There Is No Split Among The Circuits On This Issue

It is telling that Charter does not allege that there is any split among the circuits on this issue. That, of course, is because none exists. Charter is raising a claim of potential enormous significance: that media companies have a First Amendment exemption from anti-discrimination laws. Indeed, its argument has no stopping point. It would allow every media company of every type to discriminate on race and sex in violation of every federal and state anti-discrimination law. But in the absence of a split among the circuits, there is no need for this Court to confront this issue; and it surely would be better to wait to allow the issue to percolate in the lower courts.

[3] There is no evidence of such a policy, as "Black Voices" publishes articles by white journalists, such as Carly Ledbetter, Andy Campbell, Christopher Mathias, and Rebecca Klein, among many others.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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