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

REPLY BRIEF OF PETITIONERS

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Respondents' opposition only confirms the need for this Court's review. Respondents cannot explain how the 1866 Congress could foresee a novel causation standard first invented a century later nor how the default standard of but-for causation does not apply when Congress expressly addressed neither causation nor a cause of action. Rather than try to explain such matters, respondents try to minimize the conflict with this Court's precedents and among the circuits. But *Gross v. FBL Financial Service, Inc.*, 557 U.S. 167 (2009), and *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013), underscore that but-for causation was *the* common-law test in 1866 and remains the "default" standard today. *Id.* at 347. Moreover, the Seventh Circuit has long applied a but-for test; other circuits borrow Title VII's motivating-factor/burden-shifting approach; and the Ninth Circuit's decision here embraces an even more plaintiff-friendly approach. That approach is not only wrong, but consequential. By adopting a more forgiving causation standard for §1981 claims than for Title VII claims, the Ninth Circuit will divert litigation from a statute reflecting Congress' express decisions to one reflecting judge-made rules.

The Ninth Circuit's erroneous First Amendment holding only heightens the need for review. If plaintiffs need only allege that race played some role in an editorial decision and the First Amendment provides no protection, then suits like this will proliferate and First Amendment values will suffer. The need for this Court's plenary review is clear.

I. The Proper Causation Standard For §1981 Actions Merits This Court's Review.

A. The Ninth Circuit Widened a Circuit Split On §1981's Causation Standard.

Respondents' claim that "every" circuit adheres to the "motivating factor" causation standard for status-based §1981 claims is doubly mistaken. Opp.15. Not only has the Seventh Circuit long required but-for causation, but the Ninth Circuit's motivating-factor-*vel-non* approach breaks from the Title-VII-based burden-shifting approach adopted by other circuits. In short, there is an entrenched three-way circuit split, and the Ninth Circuit stands alone.

1. In *Bachman v. St. Monica's Congregation*, 902 F.2d 1259, 1262-63 (7th Cir. 1990), the Seventh Circuit squarely held that in §1981 claims, "racial prejudice must be a but-for cause … of the refusal to transact." Respondents offer three theories to cloud that clear holding, but none is persuasive. First, they contend that *Bachman* "did not *reject* the motivating factor standard." Opp.15. But what matters is not what *Bachman* rejected, but what it held—namely, that "racial prejudice must be a but-for cause." In doing so, *Bachman* necessarily rejected competing standards of causation, such as "motivating factor."

Second, respondents suggest (at 16) that the Seventh Circuit "clarified" its rule in *Killebrew v. St. Vincent Health, Inc.*, 295 F. App'x 808 (7th Cir. 2008). But circuits do not "clarify" published precedents in unpublished, non-precedential opinions. Even so, *Killebrew* involved both Title VII and §1981 claims, and is in all events consistent with *Bachman*. The Court noted in passing that Killebrew had not

asserted that race was "*the* motivating factor behind" her treatment. *Id.* at 810 (emphasis added). The use of the definite article is critical, as *the* motivating factor behind a decision is its but-for cause.

Third, respondents claim that a post-*Bachman* decision described the question here as "open." Opp.17 (citing *Smith v. Wilson*, 705 F.3d 674 (7th Cir. 2013)). But, in reality, *Smith* unequivocally reaffirmed that §1981 does not "authorize[] relief where a plaintiff demonstrates only that race was a motivating factor for the adverse action." *Smith*, 705 F.3d at 679; *see also id.* at 680 ("[W]e cannot import the authorization of partial 'motivating factor' relief … into … §1981."). The question that *Smith* suggested was "open" was a different one: specifically, whether courts should "shift the burden of persuasion" to §1981 defendants "of disproving 'but for' causation." *Id.* at 680, 681. Not only is that a separate question (which the Seventh Circuit did not need to answer), but the Seventh Circuit's formulation underscores that it views §1981 actions to require proof of "'but for' causation." Not surprisingly, a district court within the Seventh Circuit cited *Smith* for the proposition that §1981 "requires a 'but for' causation analysis." *Vasquez v. Caterpillar Logistics, Inc.*, 2017 WL 4773081, at *10 (N.D. Ind. Oct. 20, 2017). The long and short of it is that the Seventh Circuit has consistently required but-for causation for nearly thirty years.

2. Respondents next deny that the Ninth Circuit broke company with the circuits that borrow the Title VII burden-shifting framework by suggesting (at 18-19) that it is too early to tell whether the Ninth Circuit intends its motivating-factor test to govern later

stages in the proceeding, such as summary judgment and trial. That claim is mystifying. The Ninth Circuit could hardly have been clearer that it was abandoning its prior practice of borrowing Title VII's burden-shifting approach as foreclosed by *Gross* and *Nassar*. *See* App.13. But then, rather than conclude that the "default" standard of but-for causation governs a judicially-inferred cause of action, the Ninth Circuit divined a motivating-factor standard in the text of §1981. To state the obvious, the Ninth Circuit did not expressly jettison circuit precedent borrowing Title VII's burden-shifting approach in favor of a motivating-factor test, only to leave open the possibility that burdens could be shifted later or that something other than a motivating-factor test would apply at summary judgment or trial.

The Ninth Circuit was emphatic in its view that §1981 requires a plaintiff to satisfy only a motivating-factor standard of causation in order to prevail. *See* App.15 (stating that "[e]ven if racial animus was not the but-for cause," a §1981 plaintiff "can still prevail if she demonstrates that discriminatory intent was a factor in that decision"). What is more, the general rule is that the same legal standard governs at all stages of a case. *See, e.g., Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 346 (2005); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561-62 (1992). One of the few exceptions to that basic rule is the kind of burden-shifting framework employed in Title VII claims. But borrowing that burden-shifting framework is precisely what the Ninth Circuit rejected. Thus, there is no denying that the Ninth Circuit decision broke new ground in holding that a §1981 plaintiff can "prevail" merely by demonstrating that race was a motivating

factor in a contractual decision. Nor can it be denied that in doing so, the Ninth Circuit deepened an existing circuit split by adopting a more plaintiff-friendly approach to §1981 claims than even the Title-VII-based burden-shifting framework adopted by multiple circuits. *Accord* Chamber.Br.7-8.[1]

B. The Ninth Circuit's Decision Conflicts With *Gross* and *Nassar a*nd Is Both Deeply Flawed and Consequential.

Respondents contend that *Gross* and *Nassar* "have little bearing on this case." Opp.23. But even the Ninth Circuit recognized that those decisions were game-changers that required reconsideration of circuit precedent. Despite respondents' efforts to minimize and distinguish those precedents, this Court's recognition that but-for causation is the "default" standard of causation has especial force when it comes to an implied cause of action based on a statute enacted in 1866. Faithful application of those precedents to §1981 claims requires a but-for standard and reversal.

Respondents first contend that, unlike the provisions at issue in *Gross* and *Nassar*, §1981 does not use the word "because." Opp.23. But even respondents concede, as they must, that "but-for causality is not predicated on the words 'because' or

[1] As they did below, respondents contend that their complaint sufficiently alleges "but-for" causation. Opp.29-30. Even the Ninth Circuit did not accept this argument (which is belied on the face of the complaint); otherwise, there would have been no need for its analysis of the causation standard and its determination that respondents satisfied the motivating-factor standard.

'because of.'" Opp.26-27 (citing *Burrage v. United States*, 571 U.S. 204, 213 (2014)); Pet.18.

Respondents next follow the Ninth Circuit's lead in divining a "motivating factor" standard from §1981's "'same right' to contract" language. Opp.23; App.14-15. But that language is fully consistent with a but-for test and in all events reflects solely a substantive anti-discrimination guarantee, not the causation standard for a private remedy (since none is expressly set forth in §1981). The results in *Gross* and *Nassar* would not have varied if the ADEA were written to guarantee older workers the same right to employment as younger workers, or if Title VII's anti-retaliation provision were written to guarantee the same right as one who never complained. Every anti-discrimination statute seeks to give its beneficiaries the same rights as others, but the lesson of *Gross* and *Nassar* is that unless Congress specifically provides otherwise, the default causation standard for private actions seeking recovery under those anti-discrimination statutes is but-for causation.

Respondents next contend that, unlike Title VII and the ADEA, §1981 is a "'broad and brief' prohibition on racial discrimination" not limited to "the employment context." Opp.23-24. That is true enough, but respondents ignore the reason for §1981's brevity and the consequences of its breadth. Section 1981's prohibition is "brief" because the absence of an express cause of action saved Congress the trouble of specifying matters like the causation standard or the limitations period. That brevity makes adoption of the "default" standard of causation particularly appropriate. And the fact that §1981 is "broad,"

covering all manner of contracts, not just employment contracts, is precisely what makes the decision below so consequential. By adopting a causation standard for §1981's broad implied cause of action that is less demanding than for any express anti-discrimination action crafted by Congress, the Ninth Circuit will make §1981 the remedy of choice for all racial discrimination claims and allow its own conceptions of causation to crowd out the express decisions of Congress. *Accord* Chamber.Br.9-18.[2]

In the end, respondents have no real answer to the incompatibility of the decision below and *Gross* and *Nassar*. This Court held in those decisions that, "absent an indication to the contrary in the statute itself," the "default rule[]" for all federal anti-discrimination statutes is but-for causation, which derives from basic precepts of tort law. *Nassar*, 570 U.S. at 347; *Gross*, 557 U.S. at 176-77. If ever there were a context where the default presumption is not overcome by contrary statutory text, it is with respect to §1981's implied cause of action. Because Congress did not expressly provide for any private recovery, it had no occasion to address the causation standard in terms that could overcome the default presumption of but-for causation. As this Court has made clear, when

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[2] Respondents repeat their confusion between causation standards and burden shifting by claiming that neither *Gross* nor *Nassar* "addressed, let alone changed, *pleading burdens*." Opp.24. Just so. But neither did the decision below. All three decisions addressed causation standards, which incidentally need to be satisfied by pleadings and evidence at various stages of the proceedings. The problem is that the Ninth Circuit adopted a causation standard here very different from the default standard embraced in *Gross* and *Nassar*.

Congress does not provide an express cause of action, "the federal courts must fill in the interstices of the implied cause of action," including the "element[] … of causation." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 394-95 (1982). Nor is there any serious doubt that if the 1866 Congress had expressly addressed causation, it would have adopted the common-law/but-for test, which was the only standard then-extant. *Nassar*, 570 U.S. at 346-47. The notion that Congress would have adopted a "motivating factor" test not invented until a century later is anachronistic and utterly implausible. *See* Pet.17-20.

Respondents do not seriously dispute any of this, but rather complain that petitioner has made a "brand new argument" regarding implied causes of action. Opp.26. That is both mistaken and misguided. It is mistaken because petitioner's Ninth Circuit briefs and rehearing petition emphasized that but-for causation was the prevailing standard in 1866, that §1981 was an implied cause of action, and that an implied cause of action necessarily incorporates the default standard. It is misguided because the "'implied cause of action' argument," *id.*, is not some separate claim or defense, but just an additional reason the but-for standard applies, and one that took on added force when the Ninth Circuit decision attempted to side-step *Gross* and *Nassar* by focusing on §1981's "same right" language. By seizing on language from §1981's *substantive* guarantee, the Ninth Circuit highlighted the anomaly of its failure to apply the "default" causation standard in a context where Congress not only failed to overcome the default rule but did not

expressly provide for any private recovery whatsoever.[3]

II. The Court Should Grant Review On The First Amendment Question As Well.

Respondents do not contest the importance of the First Amendment issue in this case. If anything, they emphasize it. *See* Opp.38 ("[Petitioner] is raising a claim of potential enormous significance."). Contrary to respondents' rhetoric, however, petitioner does not seek a blanket "First Amendment exemption from anti-discrimination laws" for "media companies." Opp.38. Petitioner invokes only the protection this Court has already established for editorial decisions, including cable operators' judgments about which channels to carry. *See Turner Broad. Sys. v. FCC*, 512 U.S. 622, 636 (1994); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 570 (1995).

Respondents contend that First Amendment concerns are misplaced here because §1981 "is a content-neutral statute that regulates *conduct*, not speech." Opp.30-31. But this Court rejected that precise argument in *Hurley*, *see* 515 U.S. at 575-78, and here respondents are using §1981 to demand $10 billion from petitioner based on petitioner's

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[3] Respondents have no answer to this Court's emphasis in both *Gross* and *Nassar* of Congress' decision in 1991 to amend Title VII and the ADEA, but to adopt the "motivating factor" causation standard only for Title VII status-based claims. *See Nassar*, 570 U.S. at 353-54; *Gross*, 557 U.S. at 174-75. That reasoning applies with equal force here: Congress amended §1981 in 1991 without adding the Title VII language authorizing mixed-motive status-based claims. Pet.6.

editorial decision not to carry ESN's particular channels. This Court has already recognized that such editorial decisions are protected speech. *See Turner*, 512 U.S. at 636; *Hurley*, 515 U.S. at 578.

Respondents' appeal (at 31-33) to *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), is misplaced and reinforces the constitutional concerns raised by the decision below. In *Cohen*, the Court held that the First Amendment did not license a newspaper to break a promise of confidentiality with impunity. *Id.* at 665. The Court held that holding the newspaper to the terms of its own voluntary promises did not violate the First Amendment because state law was not being used to dictate content or editorial decisions. *See id.* at 670-71. Respondents' use of §1981 here goes well beyond holding petitioner to the terms of its voluntary undertakings. Indeed, it is precisely petitioner's voluntary decision not to carry respondents' content that respondents seek to punish. That effort directly parallels the claim in *Hurley*, and it is *Hurley*, not *Cohen*, that provides the relevant precedent.

Respondents seek to distinguish *Hurley* on two grounds, neither of which is persuasive. First, they claim that the *Hurley* defendants articulated an expressive rationale for excluding a group from their parade, which is missing here. Opp.35. But petitioner plainly had editorial reasons for declining respondents' content, which the First Amendment fully protects. Moreover, *Hurley* ultimately held that the organizer's actual rationale did not matter. "[W]hatever the reason" for that decision, "it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed

to lie beyond the government's power to control." 515 U.S. at 575. Second, respondents suggest that cable operators' editorial discretion is not comparable to that of parade organizers because the former have must-carry obligations. Opp.36. But that claim is doubly problematic. First, this case has nothing to do with cable operators' obligation to carry *broadcast* signals. It involves only non-broadcast programming that petitioner has no obligation to carry. Second, *Hurley* itself went out of its way to confirm that outside of the must-carry context, cable operators exercise First Amendment rights akin to those of newspapers selecting columnists for their opinion pages. *See* 515 U.S. at 570.

Respondents do not seriously dispute that the Ninth Circuit's decision would open the way for attacks on the editorial judgments of newspapers, bookstores, websites, and theaters if they decline to contract with aspiring authors and actors. Respondents claim only that these scenarios are "not implicated here because [petitioner] has not claimed that it refused to contract with Entertainment Studios" based on ESN's "viewpoint[]." Opp.37. Not only does that contradict respondents' own allegations—which equate the race of a station's ownership with its "voice[]," App.89—but respondents miss the point. The Ninth Circuit took a naïve view that decisions based on race and content are neatly separable. App.20 n.11, 22-23. But that is not always so. A newspaper with two opinion-page writers focused on issues of concern to a minority community may decline to hire a third. The decision below opens the door to §1981 claims based on that decision, and the Ninth Circuit's blithe assurance that race and

content are different will do nothing to lessen the chilling effect of the decision below.

That chilling effect will be exacerbated by the Ninth Circuit's "motivating factor" standard of causation. Perhaps if a plaintiff had to prove that race was the but-for cause for a decision not to contract, casting decisions and editorial judgments could be made without fear of an inevitable §1981 claim by the disappointed would-be contractor. But if alleging that race was "a factor" in the decision is enough to survive a motion to dismiss, and if proof that race played some role is enough to "prevail," App.15, then the chilling effect will be profound. Thus, the First Amendment concerns raised by the decision below are both an additional reason to grant the first question presented and a reason to grant the second question as well.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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