SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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COMCAST CORPORATION,)

Petitioner,)

v.) No. 18-1171

NATIONAL ASSOCIATION OF AFRICAN)

AMERICAN-OWNED MEDIA, ET AL.,)

Respondents.)

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Pages: 1 through 71

Place: Washington, D.C.

Date: November 13, 2019

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Washington, D.C.

Wednesday, November 13, 2019

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:07 a.m.

APPEARANCES:

MIGUEL ESTRADA, ESQ., Washington, D.C.;
on behalf of the Petitioner.

MORGAN L. RATNER, Assistant to the Solicitor General, Department of Justice, Washington, D.C.;
for the United States, as amicus curiae, supporting the Petitioner.

ERWIN CHEMERINSKY, ESQ., Berkeley, California;
on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

(10:07 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 18-1171, Comcast Corporation versus the National Association of African American-Owned Media.

Mr. Estrada.

ORAL ARGUMENT OF MIGUEL ESTRADA

ON BEHALF OF THE PETITIONER

MR. ESTRADA: Mr. Chief Justice, and may it please the Court:

The Ninth Circuit held in this case that a plaintiff may succeed on a Section 1981 claim merely by showing that race was a factor that was considered in the defendant's decision-making, even if the decision would have made and was made for entirely appropriate business reasons having nothing to do with race.

Solely on this basis, the Ninth Circuit saved the Plaintiff's third complaint from dismissal. We submit that this decision is wrong and should be reversed for at least three reasons.

The first is that it is contrary to this Court's decisions, such as Gross and

Nassar, holding that but-for causation is the background rule that Congress must have presumed to have been adopted in all federal statutes unless the statute provides otherwise, which we submit Section 1981 does not, either as originally adopted in 1866 or as amended in 1991.

Second, in 1991, Congress amended Title VII to provide for a motivating factor standard but did not amend Section 1981 to provide the same, even though it amended Section 1981 in other respects at the same time.

This all but conclusively shows that Section 1981 requires but-for causation, as this Court concluded in Gross and Nassar, with respect to the ADEA and the retaliation provisions of Title VII.

And, third, it is -- if the Ninth Circuit is affirmed, it would be vastly easier to recover damages under Section 1981's judicially implied cause of action than under any express cause of action actually enacted by Congress under any federal antidiscrimination law. And, thus, affirming the Ninth Circuit would effectively mean that Section 1981 would

completely displace the carefully tailored regime that Congress has devised in Title VII to govern employment discrimination cases.

No well-advised plaintiff would ever sue under Title VII in any employment case.

CHIEF JUSTICE ROBERTS: Counsel, I wonder if the distinction they're fighting over is -- is somewhat academic. In the contract negotiation process, for example, there may be several steps along the way, and if at one of those steps there's clear racial -- excuse me -- animus evident and that, you know, the process continues on, and at the end of the day, the contract is denied, it may be hard to prove but-for causation.

On the other hand, it's also hard to ignore the part -- the step in which there was clearly evident racial animus. And it may be a reasonable argument or -- or -- excuse me -- allegation that that animus continued through, even though manifested only at one stage of the process.

MR. ESTRADA: Well, all complaints are different, Mr. Chief Justice, and I don't rule out, you know, the possibility that a complaint

may allege such an expression of animus that it could actually imply that the animus continued until the end, such that it -- the complaint does allege but-for causation.

Now the Plaintiff, from the motion to dismiss in this case to the Ninth Circuit, have stuck their case on the proposition that they are alleging that race was a motivating factor and a motivating factor only, and they were not prepared to prove but-for causation.

And, you know, we contend that that is wrong under Gross and Nassar. Now we don't think that this complaint actually passes pleading standards under any standard, as we made clear, but, of course, you know, it is also the case that we have cases like Gross and Nassar in which it is evident from the record that some consideration of the protected factor was made in the employment context.

And at the end, you know, the jury still had to be instructed that it had to determine whether that was a determinative factor in the decision-making.

And in all of these cases, you know, the Court has already determined that the --

that the fact finder will have to make the decision, as -- as Gross said, whether that factor not only played a role but also had, as Justice Thomas put it in Gross, a determinative effect in the decision-making.

JUSTICE KAGAN: Mr. Estrada, you said that the Respondents here continue to say that they don't have to prove but-for causation. I'm a little bit confused about that point. And I guess this is for Mr. Chemerinsky to think about as well.

But, in your reply brief, you make the good point that on page 47 or 49 of the Respondents' brief, they seem to say the opposite. They seem to suggest by quoting that Third Circuit case --

MR. ESTRADA: The Kaz case, right.

JUSTICE KAGAN: -- that, in fact, they are going to have to prove but-for causation at the end. And the question here is really what they have to allege now.

MR. ESTRADA: I --

JUSTICE KAGAN: And if -- if -- if -- if we take it that way, I mean, Mr. Chemerinsky can say what he wants to say about that, but

let's just assume that that's true, that they are going to have to plead but-for -- excuse me, that they're going to have to prove but-for causation at the end; that is the ultimate standard in the case.

But this is a complaint. And, you know, it's pre-discovery and the Plaintiff is not going to know what the Defendant was thinking about in making whatever contract decisions the Defendant was making.

And -- and -- and so what do you think the Plaintiff has to allege at the beginning?

MR. ESTRADA: Well, I think -- you know, I have two answers to that. I think, first, the Ninth Circuit's ruling in this case had nothing to say about the difference between pleading and the merits. In fact, the Ninth Circuit worked from what was needed to prevail on the merits to then upholding the complaint.

JUSTICE KAGAN: Yeah, so I take that point, and I would think that if -- if my assumption holds, which is that the Respondents do have to prove this at the end, then you would have to say that the Ninth Circuit is wrong. But you would still have --

MR. ESTRADA: That would not be novel.
JUSTICE KAGAN: -- the question of whether the complaint is sufficient.
MR. ESTRADA: Yes. Now the second point I was going to make is the whole question of whether there may be burden-shifting has been introduced somewhat coyly by the Respondent. We don't actually know what their position is on that, but I understand what they're trying to say based on the Kaz case that it may be that but-for sort of applies in the sense that the burden of showing but-for causation is shifted to us, so that in the sense what actually is happening is that they are arguing for the PriceWaterhouse framework without daring to name its name.
JUSTICE KAGAN: Yes, so they could be saying that -- and I guess this is another thing for Mr. Chemerinsky to be thinking about -- they could be saying that, that this is essentially an attempt to shift the burden of but-for causation onto you.
But they don't have to be saying that.
MR. ESTRADA: If I --
JUSTICE KAGAN: Excuse me,

Mr. Estrada. They don't have to be saying that. They could be saying no, we -- we really do believe that in the end we're going to have to prove but-for causation, but because we're pre-discovery, because we can't really -- I mean, you don't want people throwing around baseless allegations in their complaint, that -- that -- that a complaint should be found sufficient even if it doesn't allege but-for causation.

You know, it's enough to say they made a racist mark and they gave -- and they gave contracts to lots of white firms that weren't as good as our firm. And that's enough. Yes.

MR. ESTRADA: Now the -- the answer to -- you know, the bottom line answer to, I think, the theory that underlies all of your questions is that -- the answer to your question is actually controlled by Rule 8, Twombly and Iqbal. And it's actually very clear from Iqbal especially, which was a discrimination case, and from Twombly antecedently, where Justice Souter, in writing Twombly, said we do not want people to open the doors to discovery based on conclusory allegations or formulaic elements of

the offense dressed up as factual assertions.

And, in our view, that's what we have in this case. And so it is not an answer to say, because you can say that in practically every case, antitrust, antidiscrimination, et cetera, that the facts especially with respect to mental state will always be in the possession of the defendant.

JUSTICE GORSUCH: Well, Mr. Estrada, though --

JUSTICE KAGAN: If --

JUSTICE ALITO: Can I --

JUSTICE GORSUCH: -- isn't it -- isn't it -- I'm -- I'm sorry.

JUSTICE ALITO: No, go ahead.

JUSTICE GORSUCH: Isn't it perfectly common when -- when -- when you're alleging a mental state of an opposing party and you have yet to have discovery to allege on information and belief mental states, and isn't that the simple solution here?

MR. ESTRADA: Well, yes and no, Justice Gorsuch. You can -- you can -- you can allege that, so long under Twombly and Iqbal, as you also allege facts from which --

JUSTICE GORSUCH: You have to have a good faith -- right, right, but positing Justice Kagan's facts, there's a statement and you have some factual circumstances that might lead to that inference.

MR. ESTRADA: Yes, yes.

JUSTICE GORSUCH: Then you would -- you would plead that mental state.

MR. ESTRADA: And if you plead the factual circumstances that plausibly give rise to the inference, then you would have a case that -- that possibly complies with Twombly and Iqbal.

JUSTICE SOTOMAYOR: Well, but isn't that the point --

JUSTICE KAGAN: Maybe. I mean, you -- you said Iqbal and Twombly and that seems quite right, but we had this case before Iqbal and Twombly, which is in the Title VII context -- I'm not sure how to pronounce it -- Swierkiewicz or something like that.

MR. ESTRADA: Versus Sorema, yes.

JUSTICE KAGAN: Which -- which -- which Twombly said we're thinking about that case and that case is still good law. And what

-- and what -- what that case said, this was actually a McDonnell Douglas shifting case --

MR. ESTRADA: Uh-huh.

JUSTICE KAGAN: -- with the prima facie case. And Swierkiewicz said you don't actually have to in your pleadings even show the prime facie case, that we understand pleadings in this field are really different. And -- and Iqbal and Twombly says, yeah, that's still good law.

MR. ESTRADA: With all due respect, Justice Kagan, I think that that is not a fully accurate characterization of the case or of how Iqbal actually distinguished it.

What was happening in the Sorema case -- let's call it that to make our lives easier -- is that the Second Circuit had ruled that the complaint was deficient because the plaintiff had played -- had failed to allege the McDonnell Douglas framework in the complaint.

Now the Court overturned that ruling, pointing out that the McDonnell Douglas framework is an evidentiary framework that a plaintiff may choose to use at a trial, not a pleading framework. And that was what Twombly

actually later, you know, reaffirmed.

And what Twombly was basically saying is you may choose to prove your case in a particular way, but you are not required to -- to -- to plead that in all cases.

McDonnell Douglas, for example, does not even apply if you have direct evidence of discrimination. It's a way to prove your case circumstantially.

So it doesn't make sense to impose on plaintiffs, you know, the burden to put that in a pleading. And I think all the Court was saying is that if a plaintiff has a choice down the road to prove his case in a particular way, that is not a requirement of pleading.

But, again, none of that has anything to do with --

JUSTICE SOTOMAYOR: But I'm not sure -- I go back to the Chief Justice's initial point -- which is, if I come forward and show that race was a motivating factor, it can also be the but-for. Until a defendant is deposed and discovery is held, then that becomes an issue for the trier of fact of whether or not that motivating factor was a but-for cause.

So I think as long as you have enough in your complaint to show racial animus and a reasonable inference can be drawn that that's a but-for cause, I think a plaintiff has done more than enough.

MR. ESTRADA: Well --

JUSTICE SOTOMAYOR: What you seem to be suggesting is that they're required to anticipate every potentially independent reason you may have had without really knowing it --

MR. ESTRADA: Well --

JUSTICE SOTOMAYOR: --and disproving it in the complaint. That makes no sense.

MR. ESTRADA: No, actually, I -- I have said nothing to -- to that effect, Justice Sotomayor. I have said that under Twombly and Iqbal, a plaintiff is required to allege facts, not conclusory recitation of the elements of the offense, that plausibly give rise to the inference.

JUSTICE SOTOMAYOR: The problem is that the Ninth Circuit -- neither the Ninth Circuit and even the government admits that it didn't look at this complaint through the lens that would be provided if we find but-for

causation.

MR. ESTRADA: Correct. But I will point out that if you find but-for causation, you would then have to examine that under the requirements of Iqbal that require --

JUSTICE SOTOMAYOR: Not us. The Ninth Circuit.

MR. ESTRADA: Well, somebody. It would be -- it would be permissible to -- for you as you did in Twombly and in Iqbal itself. Iqbal, of course, was a discrimination case, and you examined the complaint in that case, too, thinking that that would be informative for the lower courts.

It would not be, you know, with all due respect, you know, as many worthy efforts have been made in this case, through Blueline, the complaint in this case, for the edification of the court.

I mean, it is worth reading because there are any number of allegations in the complaint to the --

JUSTICE ALITO: But if the --

JUSTICE KAVANAUGH: There are a lot of --

JUSTICE ALITO: -- Mr. Estrada, if the -- if the Respondents now agree that in the end the burden -- the -- the -- the substantive standard is but-for, is there a dispute about that issue before us, or is the only question before us whether enough facts were pled under 12(b)(6) and Iqbal and Twombly, which is what this seems to have devolved into and is, therefore, not the big issue that has been portrayed.

MR. ESTRADA: Well, I think that for -- they would further have to agree that what they mean is but-for causation, and they bear the burden of persuasion like on all elements.

JUSTICE ALITO: So the disagreement then would be, you know, if the evidence is exactly in equipoise, which way does it go --

MR. ESTRADA: No, I think they --

JUSTICE ALITO: -- that's what it would be?

MR. ESTRADA: -- no, I think what they mean to say in accepting the CAS standard is but-for in the sense that they accept the PriceWaterhouse plurality opinion. They just don't want to call it that because they

understand that this Court is not buying it.

JUSTICE ALITO: Okay. So it's -- it's -- what would happen if it's in equipoise and who has the burden of production on the issue?

MR. ESTRADA: The burden of persuasion, Your Honor, because, under the --

JUSTICE ALITO: Yeah.

MR. ESTRADA: -- plurality in -- in PriceWaterhouse, you know, the burden of persuasion, even if it is but-for, shifts to the defendant.

JUSTICE ALITO: Right, but it's but-for by a preponderance. It's a question of who has that --

MR. ESTRADA: Correct, but I --

JUSTICE ALITO: -- who has that burden.

MR. ESTRADA: -- think what's really going on is that the Respondents are really arguing PriceWaterhouse, as they did expressly in both courts below, they're not actually citing it, but they are actually in a way sort of admitting that somebody has -- may have a but-for burden of persuasion, but they would like it to be us.

Now that is also equally wrong for any number of different reasons.

JUSTICE ALITO: Yeah, well, I don't know why the Ninth Circuit did what it did here and I don't know why the Respondents have argued the case the way they did here.

But, if -- if you look at the recitation of facts on pages 3 to 5 of the Respondents' brief, could you say that those are insufficient to raise, if pled, those would be insufficient to raise -- to satisfy the pleading standard even if the burden of persuasion is but-for causation?

Comcast told Entertainment Studios its channels are good enough. It needed to get support in the field.

It turned out that, according to them, that -- that it didn't matter whether they got support in the field and so forth. There is a recitation of facts.

MR. ESTRADA: Yes, we do say that that's enough. And -- and we have a number of reasons for that. Some of what they say is actually not in the complaint and has not been in the last two complaints. That's point one.

Some of what they say about, you know, the demand for their services is something that they were able to allege in their third and last complaint, you know, all of the notion about how much they're carried and how many customers, you know, they reach, is driven entirely by the fact that they are currently -- may I finish, Mr. Chief Justice?

CHIEF JUSTICE ROBERTS: Sure.

MR. ESTRADA: -- that they're currently carried by AT&T and DirecTV, which is -- which are now one company.

Now it should be perfectly clear to everybody in this courtroom that that's an allegation that they were only able to make in the third complaint in this case. It was not in the first or the second complaint. And the reason for that is during the pendency of the entire litigation in this case, they were suing AT&T and DirecTV as they were suing us. And that --

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. ESTRADA: Thank you.

CHIEF JUSTICE ROBERTS: Ms. Ratner.

ORAL ARGUMENT OF MORGAN L RATNER, FOR THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING THE PETITIONER

MS. RATNER: Mr. Chief Justice, and may it please the Court:

The court of appeals found that a plaintiff can prevail under Section 1981 if race played any role in a decision not to contract, even if it was not a but-for cause.

That's wrong under this Court's decisions in Gross and Nassar, and nobody defends that test as the ultimate standard for causation under Section 1981.

Instead -- and I think this gets to Justice Kagan's line of questions -- Respondents invoke burden-shifting to argue that at the pleading stage, motivating factor -- a motivating factor can be enough.

That might have been true under PriceWaterhouse burden-shifting, but PriceWaterhouse no longer controls. So, for the first time, Respondents turn to McDonnell Douglas burden-shifting instead.

But McDonnell Douglas, even if it applies in this context, is not relevant to the

causation question. It shifts only the burden of production at trial. So it can't affect the elements that a plaintiff needs to prove or that a plaintiff needs to plead.

And the Swierkiewicz decision that Justice Kagan pointed to underscores that. It says that there's no different analysis under what was then the old notice pleading standard, but now, under Twombly and Iqbal, for these types of antidiscrimination cases.

JUSTICE SOTOMAYOR: Can I take you back to the basic structure? Mr. Chemerinsky can speak for himself as to what burdens he's accepting or not, okay? But I'm looking at the statute, and I don't see any of the but-for language, "because of" or any of the other that we have interpreted in any other statute.

What I see is a statute that says all citizens must have the same right. And if you -- talking about in the making, performance, execution of the contract. And we've also said the civil rights law was designed to eliminate all race discrimination. I'm not sure how we can square those two things with a but-for.

How can it be that if you're treated

differently because of your race in the formation of the contract, but you're denied the contract for another reason, that other people may have been denied for, but you were treated differently, more burdens were put on you, more expenses were put on you, and at the end, they say, eh, you know, we really would never take on anyone like you with your business because, and it's true, nobody with your business plan has been accepted before, but you've been run around in circles and made to expend a lot of money --

MS. RATNER: So --

JUSTICE SOTOMAYOR: -- why is that not actionable?

MS. RATNER: So let me give you three responses, Justice Sotomayor. The first is the text says the same right to make a contract. I think if you asked an ordinary English speaker whether someone who would never have been granted that contract, regardless of her race, whether that person was denied the same right to make that contract, I think people would say no. But even if that --

JUSTICE SOTOMAYOR: Except the dictionary -- the dictionary says definition of

making is just "the process of being made."

MS. RATNER: Yeah.

JUSTICE SOTOMAYOR: So it's the process. It's not just the entering into the contract. There are different words in the statute.

MS. RATNER: So I'm happy to address the making point, but let me just --

JUSTICE SOTOMAYOR: But I want to --

MS. RATNER: -- underscore the --

JUSTICE SOTOMAYOR: -- but I want to go back to the broader point, which is how can you say that you have the same right and that we're eliminating all vestiges of discrimination if we are not using motivating factor but are using a but-for standard?

MS. RATNER: Justice Sotomayor, there's a lot baked in there. I -- I think to the extent you think there is some ambiguity in the "same right" language, the next place to look is a very important textual clue, and that's Section 2 of the 1866 Act. So, when Congress originally enacted this provision, Section 1 was the general declaration of rights, Section 1 of the 1866 Act. That's now become

Section 1981.

And Congress had an enforcement mechanism, Section 2, and that does use classic but-for language. So I think that's a good indication of the substantive scope.

And true enough, 100 years later, this Court inferred a private right of action, but I don't think that can change the substantive scope that Congress enacted.

JUSTICE BREYER: I -- I -- I -- unfortunately, I -- I'm stuck back at the Chief Justice's question and I think what Justice Gorsuch was elaborating on that, that -- as I understand their questions, but -- but, anyway, my question is I don't understand; if we're talking about pleadings, what's the difference? I mean, you know, they have some evidence, and the evidence is, on information and belief, we think that the Defendant here used race improperly to deny us the contract. Then they list it.

And who cares whether they say it was a motivating factor or whether they say it was a but-for?

MS. RATNER: I --

JUSTICE BREYER: I can understand it making a difference later when you decide who has the burden of proof, because, at that point, you know, the Defendant maybe should have the whole burden of proof. After all, he knows what's going on in his mind and the Plaintiff doesn't.

MS. RATNER: The --

JUSTICE BREYER: Or maybe you should say you split it, production versus -- but we're not apparently arguing about that. We're just arguing about the complaint. And, sure, you want him to say information and but-for, they'll say but-for. You want him to say motivating factor, they'll say motivating factor.

Can you give me a case where it makes a difference?

MS. RATNER: Yeah, Justice Breyer, I think it's often going to make a difference later down the line --

JUSTICE BREYER: Yes, later down --

MS. RATNER: -- when it's important to get the standard.

JUSTICE BREYER: -- the line. But if we eliminate that out --

MS. RATNER: And let me give you a -- let me give you a hypothetical. This is sort of a silly one, but instead of thinking of but-for in sort of a formal legal way, think of it as did race plausibly make a difference?

Someone applies to be an associate of a law firm. They get a letter back where they think there's some sort racial language in there, and the letter also says: And, also, we're not hiring you because you never went to law school.

If that person files a complaint complaining about the racial aspect of that denial, I don't think any court would say that there was any plausible way that that person was going to be hired as a law firm associate, regardless of their race, because they weren't a lawyer to start with.

Those are the types of things that are going to --

JUSTICE BREYER: No, then it --

MS. RATNER: -- be explained about --

JUSTICE BREYER: -- wasn't a motivating factor. It wasn't a motivating factor and it wasn't a but-for condition. There

we are. I mean --

MS. RATNER: So I think the core difference, and -- and you see that in the court of appeals' decision, is the idea that race could have been some sort of consideration, but a consideration that had no ultimate effect on the result.

JUSTICE BREYER: Well, if it's a --

MS. RATNER: And that's --

JUSTICE BREYER: -- consideration, it's true it wouldn't be a consideration where the applicant was a white person. Indeed, it couldn't have been.

And if the applicant is a black person, it could be. So this says -- the statute says you should treat a white person and a black person alike. And so, I mean, that's their reasoning.

If it really does make a difference, and -- and I don't -- I'm stuck --

MS. RATNER: If it --

JUSTICE BREYER: -- on both those points.

MS. RATNER: -- if it really does make a difference, then you have but-for causation.

But-for cause does not mean sole cause.

JUSTICE BREYER: Even though it says alike --

MS. RATNER: It means --

JUSTICE BREYER: -- and even though a black person and a white person -- even though a white person wouldn't be treated --

MS. RATNER: Okay.

JUSTICE BREYER: -- that way because, of course, he couldn't be.

MS. RATNER: On that separate question, the statute does not say everybody is to be treated alike for all purposes. It says that everybody, regardless of race, has the same right to enter a contract.

And we certainly agree that any consideration of race is pernicious and it has no role in private conduct, but this Court has made clear in Domino's Pizza that Section 1981 is not an omnibus remedy for all racial injustice.

JUSTICE ALITO: Well, I think --

JUSTICE KAGAN: Can I take you --

JUSTICE ALITO: -- what you're -- what you're saying is that this makes a difference at

the pleading stage in those rare cases, if they exist at all, where the complaint goes out of its way to refute itself.

MS. RATNER: I -- I think that is very true. And I think there are certain circumstances, and we don't have a position on whether this case is one of them, where someone could go out of their way to say what the potential arguments of the defendant are.

But where the rubber is going to meet the road in a lot of these cases is going to be at summary judgment. So we think it's important that the Court --

JUSTICE KAVANAUGH: You agree in this case that we should vacate, therefore, and remand and not resolve the issue here?

MS. RATNER: We don't have a position on whether this particular complaint satisfies Twombly and Iqbal. We don't think the Court's ordinary practice would be to go on and resolve that question, is there anything formally --

JUSTICE KAVANAUGH: You agree that it's --

MS. RATNER: -- stopping the Court? No.

JUSTICE KAVANAUGH: Excuse me. You agree it's unusual with a complaint with paragraph after paragraph of allegation like this to toss it at the 12(b)(6) stage?

MS. RATNER: You know, I -- I don't want to get into the particulars of this complaint because we don't have a view on it. I think oftentimes the additional allegations could be things that cast doubt on the plausibility of some other allegations. It's possible that that was what --

JUSTICE KAGAN: Well, in general --

MS. RATNER: -- was behind the district court's thinking.

JUSTICE KAGAN: -- what would you say a complaint has to do in order to survive a 12(b)(6) motion in this area?

MS. RATNER: A complaint has to do exactly the same things that a complaint needs to do under the Age Act, under the ADEA, under Title VII of retaliation claims. This isn't a new innovation. It's just plead enough to think that race made a difference.

And if a judge looks at those allegations and plausibly believes that race

made a difference, then that's going to be enough to survive under Twombly and Iqbal.

JUSTICE SOTOMAYOR: Are you endorsing the McDonnell Douglas burden-shifting -- not burden-shifting, but the burden remains with the plaintiff, but the -- the production with the defendant to set forth the reasons why?

MS. RATNER: So the Court said in Patterson that McDonnell Douglas applies in 1981 cases at least in the employment context. We think it's an open question whether it would apply beyond the employment context, but for purposes --

JUSTICE SOTOMAYOR: So should we address that issue?

MS. RATNER: I don't think so. For purposes of this case, we'd be willing to assume that it applies here. It just doesn't matter under that Swierkiewicz decision I alluded to before --

JUSTICE SOTOMAYOR: Not for the pleading stage, but we did grant -- the question presented was whether -- what the standard was.

CHIEF JUSTICE ROBERTS: Yes.

MS. RATNER: May I respond?

McDonnell Douglas does not change the standard. It shifts only the order of introducing evidence at trial, so it won't have an effect on the ultimate standard.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Chemerinsky.

ORAL ARGUMENT OF ERWIN CHEMERINSKY

ON BEHALF OF THE RESPONDENTS

MR. CHEMERINSKY: Good morning, Mr. Chief Justice, and may it please the Court:

Statutory language matters. Where federal civil rights statutes use the words "because of" or "based on," this Court has inferred a requirement for but-for causation. But this Court has never created a requirement for but-for causation in the absence of such language. Section 1981 uses no such words.

It's crucial to remember the procedural posture of this case. It is on a motion to dismiss. All the Ninth Circuit held was it's sufficient to state a claim under Section 1981 to allege that race was a motivating factor in the denial of the contract. This is on page 2a of the supplement to the cert

petition.

There is a good deal of confusion in this case so far about the relationship between motivating factor, but-for causation, and burden-shifting.

Where this Court has adopted a motivating factor standard, it's then adopted a burden-shifting framework. That's true in constitutional cases. It's true with regard to Mt. Healthy versus Doyle and Village of Arlington Heights. It's true in statutory cases like McDonnell Douglas and Burdine.

On the other hand, where the Court has adopted but-for causation, it's rejected burden-shifting, such as in Gross versus FBL Financial Services.

Ultimately, Your Honors, the issue before this case was pled, to resolve by looking at the plain language of Section 1981 and Congress's broad remedial purpose.

To start with the plain language, Section 1981 says that all persons should have the same right to contract as white individuals. This is about creating a requirement for color blindedness with regard to contracting.

If race is used as a motivating factor in denying a contract, then there is not the same right with regard to contracting.

Also, in terms of the plain language of the statute, it's very important to compare Section 2 of the Civil Rights Act of 1866 with Section 1.

Section 2, which provides criminal consequences of violation, does use causal language, such as "by reason of" and "cause to be subjected." Section 1 does not use such language.

JUSTICE ALITO: At the end of the day -- at the end of the day, what is the burden of persuasion in this case, in a case like this?

MR. CHEMERINSKY: Your Honor, this Court has never reached that question, and it's not presented here on the pleadings.

Ultimately, the question would be does the burden of persuasion shift, as under Section 703M, or does it remain with the plaintiffs at all times.

We think that implicitly, by in Patterson versus McLean, adopting the McDonnell Douglas/Burdine framework, it would say the

burden of production shifts, but the burden of persuasion is always --

JUSTICE KAGAN: The burden of --

MR. CHEMERINSKY: -- with the plaintiff.

JUSTICE KAGAN: -- persuasion as to what, Mr. Chemerinsky? Are -- are -- are -- what is your view as -- in -- in the last analysis, ultimately, does but-for causation have to be shown?

MR. CHEMERINSKY: In the end, Your Honor, I believe that this Court's adoption in Patterson versus McLean of the McDonnell Douglas burden-shifting framework does indicate that the burden of persuasion in the end would rest with the plaintiff.

JUSTICE KAGAN: But -- but burden of persuasion as to what issue?

MR. CHEMERINSKY: The burden of persuasion in terms of showing that the contract would not have been issued but for race.

JUDGE ALITO: Okay. So --

MR. CHEMERINSKY: But that's very different, of course, Your Honor, as compares to what has to be pled.

JUSTICE ALITO: Yeah, so -- so this is just a pleading case. This is just an issue of whether it's a -- it's a, you know, a 12(b)(6) Iqbal/Twombly pleading case.

MR. CHEMERINSKY: That's exactly right, Your Honor. That's why I began in my introduction by pointing you to page 2A of the supplement to the cert petition where all the Ninth Circuit held was that, in this case, the Plaintiffs had to plead that race was a motivating --

JUSTICE KAVANAUGH: You're --

MR. CHEMERINSKY: -- factor.

JUSTICE KAVANAUGH: -- you're not agreeing with the Ninth Circuit then?

MR. CHEMERINSKY: No, Your Honor, I am agreeing with the Ninth Circuit.

JUSTICE KAVANAUGH: Not -- not with their test.

MR. CHEMERINSKY: Well, remember, in this case, all the Ninth Circuit focused on was pleading, and that's all the Ninth Circuit should focus on because this is on a motion to dismiss.

Now I do think there's an issue down

the road that could be faced, is at the very end who has the burden of persuasion?

Here, I think Patterson versus McLean --

JUSTICE KAVANAUGH: You just said, I thought, to Justice Kagan, that the Plaintiff would have the burden of persuasion at the end of showing but-for causation. Did I mishear that?

MR. CHEMERINSKY: No, you didn't, Your Honor. What I was saying was by -- in Patterson versus McLean, this Court, adopting the McDonnell Douglas burden-shifting framework, McDonnell Douglas shifts the burden of production but never shifts the burden of persuasion.

And so, in that sense, that's why we said Patterson versus McLean seems to answer the question.

JUSTICE SOTOMAYOR: So all you're arguing, I think, is if you plead motivating factor, that that's enough to survive at a pleading stage?

MR. CHEMERINSKY: Exactly.

JUSTICE SOTOMAYOR: But you accept

that as a -- as a matter of burden at trial or in summary judgment, you do have to prove but-for causation?

MR. CHEMERINSKY: That's what this Court, I think, implied in Patterson versus McLean by adopting the --

JUSTICE SOTOMAYOR: So what do you do --

MR. CHEMERINSKY: -- McDonnell Douglas burden-shifting framework.

JUSTICE SOTOMAYOR: -- so what do you do with the extreme example that the assistant solicitor general raised? You know, you're black, but -- and you're not a lawyer. We don't hire non-lawyers.

And you don't allege in the complaint that you're a lawyer or that you graduated from law school or whatever. What happens in that?

MR. CHEMERINSKY: I assume in that instance that there's not sufficient allegations, even under Swiekiewicz versus Sorema.

But, Justice Sotomayor, imagine a different example. Imagine that somebody files a complaint that says, I went to a hotel to rent

a room and I was told that I was not going to get a room because none were available and also the hotel doesn't rent to blacks. Should that be sufficient to survive a motion to dismiss?

We would say yes, because his race is a motivating factor. The argument on the other side is, because it doesn't allege but-for causation, that wouldn't be enough.

And that shows why but-for causation is an inappropriate, in fact, often an impossible standard at the pleading stage.

JUSTICE SOTOMAYOR: You -- you would --

JUSTICE KAGAN: Mr. Chemerinsky --

CHIEF JUSTICE ROBERTS: If you asked -- if I understand your answer to Justice Sotomayor's question about Ms. Ratner's hypothetical, why is it that that fails under your view at the pleading stage?

They would say, well, based on whatever the racial indication is in the letter, that that may have been a motivating factor.

MR. CHEMERINSKY: If the complaint alleges that race is a motivating factor, then that is sufficient in order to state a claim.

CHIEF JUSTICE ROBERTS: Even if it also -- even if, as in the hypothetical, the person's not a lawyer?

MR. CHEMERINSKY: Well, the reason I answered Justice Sotomayor that way is it has to be plausible that the plaintiff can recover. If an element of the cause of action is not present, then it's not plausible. And I think that would be the question under --

CHIEF JUSTICE ROBERTS: What -- what --

MR. CHEMERINSKY: -- Iqbal and Twombly.

CHIEF JUSTICE ROBERTS: -- what element of the cause of action would be absent in that hypothetical?

MR. CHEMERINSKY: I think the question is, is it plausible that the plaintiff was discriminated against on account of race.

In the hypothetical that's given -- please, Justice --

CHIEF JUSTICE ROBERTS: No, I was just going to say, even though a -- a -- a white person would not have had that discriminatory -- in other words, been denied an equal -- they're

not treated the same, which is your theory, but they're treated differently on the account of race because one was the subject of a racially discriminatory conduct -- comment and the other wasn't.

MR. CHEMERINSKY: You're right, Your Honor. As you're spelling out the hypothetical, I would say if the complaint is plausible that race was a motivating factor, that should be enough to withstand the motion to dismiss.

JUSTICE BREYER: Why doesn't it -- why doesn't it also fit the but-for test? I mean, you know, if -- if he hadn't been black, they would have rented it to him.

MR. CHEMERINSKY: Well, but, Your Honor --

JUSTICE BREYER: Well, then why on those same facts can't you put your bottom line, and, therefore, but-for the racial discrimination? What's the difference?

MR. CHEMERINSKY: Go back to the hypothetical.

JUSTICE BREYER: I can't get the difference between motivating factor and but-for.

MR. CHEMERINSKY: But there's an enormous difference, which like --

JUSTICE BREYER: What?

MR. CHEMERINSKY: -- this Court has so often said, motivating factor. Let me go back to the hypothetical that I gave to Justice Sotomayor.

JUSTICE BREYER: Yeah. Yeah.

MR. CHEMERINSKY: A hotel says to an individual that we're not renting a room to you because we have no rooms and because you're black.

JUSTICE BREYER: Right.

MR. CHEMERINSKY: That doesn't allege that race was a but-for cause.

JUSTICE BREYER: But it does allege the famous tort case that every student studies, the two hunters. Okay?

MR. CHEMERINSKY: Summers versus Tice.

JUSTICE BREYER: The two -- correct. Thank you.

JUSTICE GORSUCH: They're both --

JUSTICE BREYER: Excellent. Head of the class.

(Laughter.)

JUSTICE BREYER: But in -- in -- in -- in that -- in that case, you had two hunters and they both shot the person, either would have been sufficient.

Now no tort professor ever said that that doesn't meet the but-for case -- test. And even though literally it would have happened anyway, okay?

So what it seems to me is the other is that possible exception, but I don't know why ordinary tort law wouldn't take care of it.

MR. CHEMERINSKY: But, Your Honor, this Court has so frequently drawn a distinction between motivating factor and but-for causation because it matters so much.

It is much harder to allege and prove but-for causation than to allege that race is a motivating factor. And so that's why especially at the pleading stage it's essential --

JUSTICE GORSUCH: But could you answer -- could you answer Justice Breyer's question?

MR. CHEMERINSKY: Sure.

JUSTICE GORSUCH: Wouldn't the very hypothetical you've given us satisfy the but-for test?

MR. CHEMERINSKY: No, Your Honor, because the position that --

JUSTICE GORSUCH: You disagree with the case? Was it Tice?

MR. CHEMERINSKY: No, I don't disagree with Summers versus Tice.

JUSTICE GORSUCH: All right. Well, that's good. That's a start.

(Laughter.)

MR. CHEMERINSKY: Your Honor, the position that the opposing counsel has taken is that the complaint has to deny all alternative explanations.

JUSTICE GORSUCH: No, no, that's not the position, at least as being explored by Justice Breyer. It's just that it has to be plausible that it caused the injury.

And isn't the hypothetical you've given us meet that standard? There are two contributing causes. They're both but-for causes. And under traditional tort principles, why wouldn't that be exactly the sort of case that would survive a 12(b)(6) motion?

MR. CHEMERINSKY: I would hope it would, but that's not how --

JUSTICE GORSUCH: Okay.

MR. CHEMERINSKY: -- this Court has often used the phrase but-for causation.

JUSTICE GORSUCH: All right.

JUSTICE BREYER: Would it be all right to explain? Suppose the opinion said, look, it's the defendant who knows what's in his mind. How can you expect a plaintiff normally to know everything in the defendant's mind? How could you?

And so all he has to do is allege on information and belief that he thinks that this racial part of it was motivating and -- and -- and now say call that motivating or call it but-for.

But he has to believe that. And -- and then we go on to what's actually difficult, I think, is the burden-shifting. Suppose we said something like that.

MR. CHEMERINSKY: Well --

JUSTICE BREYER: No? Yes?

MR. CHEMERINSKY: -- Your Honor, yes. I mean, I think that if the -- if the answer is this complaint goes forward either way, and the Ninth Circuit was correct, I will accept that

answer, of course.

JUSTICE KAGAN: Well, Mr. Chereminsky --

(Laughter.)

JUSTICE GORSUCH: So you just don't --

MR. CHEMERINSKY: So I'm not going to --

JUSTICE GORSUCH: The legal rule doesn't matter. You just want to win?

JUSTICE KAGAN: Mr. Chereminsky --

MR. CHEMERINSKY: I want the law to be clear that motivating factor is sufficient because I think often but-for is --

JUSTICE GORSUCH: All right, but on that, wouldn't it be unusual for us to say that the test for the pleading stage is motivating factor, but the test at the trial or at summary judgment is but-for?

MR. CHEMERINSKY: Emphatically, no, Your Honor. This Court in --

JUSTICE GORSUCH: Why -- why wouldn't that be a little unusual?

MR. CHEMERINSKY: Because this Court in so many contexts has ultimately said it's but-for --

JUSTICE GORSUCH: No. Well, now --
MR. CHEMERINSKY: -- but, at the pleading stage, motivating factor.
JUSTICE GORSUCH: -- we -- we've said in PriceWaterhouse it's motivating factor throughout. We haven't made some special exception for pleading stage.
And McDonnell Douglas, which you relied on earlier, is a but-for test. And the plaintiff just has to plead a prima facie case of but-for causation or -- or motivating factor, depending on the circumstances --
MR. CHEMERINSKY: No, Your Honor.
JUSTICE GORSUCH: -- and context.
MR. CHEMERINSKY: First, Swierkiewicz versus Sorema specifically says, and was a unanimous decision of this Court, that plaintiffs do not need to plead a prima facie case.
Second, in every area --
JUSTICE GORSUCH: Well --
MR. CHEMERINSKY: -- where this Court --
JUSTICE GORSUCH: -- we can disagree over what Swierkiewicz said, but -- but isn't --

isn't it the -- wouldn't it be a little unusual for us to apply different legal standards at different stages of the same case?

MR. CHEMERINSKY: No, Your Honor. Take constitutional cases like Mount Healthy versus Doyle and Village of Arlington Heights. All that's required at the pleading stage is motivating factor, though, in the very end, it would be but-for causation.

This is true under McDonnell Douglas and Burdine as well. What's required at the pleading stage is very different than what's required at the very end.

JUSTICE GORSUCH: On McDonnell Douglas --

JUSTICE ALITO: But what if the --

JUSTICE GORSUCH: I'm sorry.

JUSTICE ALITO: What if the complaint alleges this was not the but-for cause of the adverse action against me, but it was a motivating factor? Would that be sufficient to go forward?

MR. CHEMERINSKY: Yes, if I understand your hypothetical. All that should be required at the pleading stage is motivating factor.

JUSTICE ALITO: Even if -- even if it concedes -- even if the plaintiff concedes in the complaint that it wasn't a but-for cause? And even if but-for cause is the standard at the end of the day, the case should be permitted to go forward toward its inevitable doom?

MR. CHEMERINSKY: But, Your Honor, the whole point of the burden-shifting framework is to be able to establish what was the actual cause. The problem, as I go back to Justice Gorsuch's question, is it's not realistic to say to the plaintiff that you have to allege that this was the but-for cause and deny all other causes at that stage.

JUSTICE KAGAN: Well, that's right, but that seems very different from saying you have to allege a motivating cause.

I mean, it's true that you cannot expect the plaintiff to negate everything else that might be in the defendant's mind. This is pre-discovery. The plaintiff isn't going to know everything else that could have been in the defendant's mind.

But, as long as the plaintiff comes forward with sufficient allegations to say,

given what I know, you know, this defendant made a racist remark, this defendant gave contracts to white firms that were not as qualified as our contract were, why do you have to label that anything? Why do you just have to say those are the kinds of facts that at this stage of the litigation allow the -- the complaint to go forward?

MR. CHEMERINSKY: I think they should be, Justice Kagan. As I said to Justice Breyer earlier, I think -- all we're saying is that those allegations should be sufficient.

And as Justice Alito pointed out, pages 3 to 5 of the complaint allege those facts, and each of those facts is found in the second amended complaint.

JUSTICE KAVANAUGH: If we --

JUSTICE KAGAN: But then, Mr. Chemerinsky, it -- don't you think that the Ninth Circuit has to be reversed? I mean, I'm just going to read you a sentence from the Ninth Circuit which seems to say something very different.

It says, "even if racial animus was not the but-for cause of a defendant's refusal

to contract, a plaintiff can still prevail" -- prevail, not like satisfy the pleading standard -- "prevail if she demonstrates that discriminatory intent was a factor in that decision."

So, I mean, that seems wrong, right?

MR. CHEMERINSKY: But it wasn't the issue before the Ninth Circuit. The issue before the Ninth Circuit was solely about the pleading. And, here, I direct you to the language I referred to on page 2a of the --

JUSTICE GORSUCH: Can we just have an answer --

JUSTICE KAVANAUGH: If we -- if we --

JUSTICE GORSUCH: -- to Justice Kagan's question --

MR. CHEMERINSKY: I'm sorry.

JUSTICE GORSUCH: -- before you proceed on to page whatever it is?

MR. CHEMERINSKY: Sure.

JUSTICE GORSUCH: I just -- I'd be grateful to know, doesn't -- don't you agree that the Ninth Circuit was wrong?

MR. CHEMERINSKY: What I was saying is in terms of the statement of whether or not in

order to prevail. And my response to Justice Kagan was that wasn't the issue before the Ninth Circuit --

JUSTICE GORSUCH: I understand that.

MR. CHEMERINSKY: -- or this Court.

JUSTICE GORSUCH: I understand that.

MR. CHEMERINSKY: But I would say, Your Honor --

JUSTICE GORSUCH: Would -- would you agree the Ninth Circuit was wrong, though?

MR. CHEMERINSKY: Well, what I would say is what I said to Justice Kagan's initial question. Patterson versus McLean adopts the burden-shifting of McDonnell Douglas --

JUSTICE GORSUCH: I've got it. We're not going to get an answer.

MR. CHEMERINSKY: I'm sorry.

JUSTICE KAVANAUGH: If we -- if we -- if we write an opinion -- if we write an opinion that says in 1981 cases, the plaintiff has the ultimate burden of persuasion to prove that race was a but-for cause of the decision, we vacate and remand for the Ninth Circuit to analyze the complaint, what is wrong with that decision?

MR. CHEMERINSKY: Well, because it's

not the issue before this Court, Your Honor.

JUSTICE KAVANAUGH: Well, isn't it the issue given what Justice Kagan just read from the Ninth Circuit's decision, which influenced how the Ninth Circuit assessed the complaint? If we articulate the right standard and then vacate for them to analyze the complaint under the right standard, wouldn't that be the -- the better way to go?

MR. CHEMERINSKY: But the right standard for the complaint is to allege that race was a motivating factor. Whatever is the conclusion with regard to who ultimately has the burden of persuasion doesn't change the pleading stage.

And that's why I keep going back to what the Ninth Circuit actually held on page 2a --

JUSTICE KAVANAUGH: Well, we wouldn't be saying --

MR. CHEMERINSKY: -- of the supplement to the complaint.

JUSTICE KAVANAUGH: -- we wouldn't be saying anything about the pleading stage under the hypothetical opinion I just articulated. It

would just be saying the ultimate burden of persuasion in 1981 cases, contrary to what the Ninth Circuit has -- had said per Justice Kagan's recitation.

MR. CHEMERINSKY: Sure. And I think this Court, if it wanted to face the issues not before it, could say at the pleading stage, motivating factor is sufficient. Patterson versus McLean says the McDonnell Douglas/Burdine burden-shifting applies. It shifts the burden of production but not the burden of persuasion. And I think that would deal with all of the issues that we're talking about here.

JUSTICE BREYER: Sure -- I'm not sure --

CHIEF JUSTICE ROBERTS: Is the burden of --

JUSTICE BREYER: -- look, now at least I've got in my head what I -- God. Don't go further if I don't have it right.

Smith says this man wouldn't contract with me. I know him. He is the most bigoted person in this state, and as normal, he said all kinds of racist things and jumped up and down and so forth. And, by the way, he's my fifth

cousin, and he hates me, and I've never met anybody who hated me so much. And I think, for both reasons, he would have never entered into this contract.

Now there we have two sufficient causes in the absence of the either, and do you win under this statute or do you not?

Because the reason they put it in the pleading stage is if you -- what you allege, I don't know there ever has been a complaint like this, but if there were, if you don't win, then why do we let you go further if you can't win?

MR. CHEMERINSKY: Your Honor, because this Court has said we don't want to determine at the pleading stage what was the actual cause. That's a question of fact for the jury.

JUSTICE BREYER: But do you think you do win or not? I mean, you know, the two hunters, they win. Do they win here or not?

MR. CHEMERINSKY: If at the end the plaintiff concedes that he or she would have never gotten the contract anyway, I believe at the end, under the standard adopted in Patterson versus McLean, the plaintiff would not prevail.

CHIEF JUSTICE ROBERTS: So the --

MR. CHEMERINSKY: But that doesn't --
CHIEF JUSTICE ROBERTS: I'm sorry. Go ahead.
MR. CHEMERINSKY: I was going to say but that doesn't tell us what's required at the pleading stage or at the prima facie case stage.
JUSTICE SOTOMAYOR: Well, why don't you --
CHIEF JUSTICE ROBERTS: Well, we're talking about --
JUSTICE SOTOMAYOR: I'm sorry.
CHIEF JUSTICE ROBERTS: -- what is or is not before us. It seems to me that your focus is on the availability of the burden-shifting mechanism, right?
MR. CHEMERINSKY: Yes.
CHIEF JUSTICE ROBERTS: Okay, well, that's not in the question presented either.
MR. CHEMERINSKY: That's correct, Your Honor. I think the only reason that I go to the burden-shifting was Patterson versus McLean adopted the burden-shifting, and it answers many of the questions that have been put to me today. But the --
JUSTICE SOTOMAYOR: I -- I --

MR. CHEMERINSKY: -- only issue before you, because this case is on a motion to dismiss the pleadings --

JUSTICE SOTOMAYOR: Mr. Chemerinsky --

MR. CHEMERINSKY: Yes.

JUSTICE SOTOMAYOR: -- the worst thing we could possibly do is to try to describe a pleading standard on the basis of McDonnell Douglas or PriceWaterhouse, which were trial burdens or summary judgment burdens.

Why isn't it simple enough to say you -- from the allegation, it's a reasonable conclusion that race was a -- was -- was the but-for -- was the reason for the denial of a contract?

MR. CHEMERINSKY: Exactly, Your Honor.

JUSTICE SOTOMAYOR: So -- and -- in --

MR. CHEMERINSKY: That's all you need to say in this case.

JUSTICE SOTOMAYOR: And I don't disagree with you, potentially, that in most circumstances, you prove a -- you prove a motivating factor, that'll be enough. That's what I think my two colleagues have been saying.

MR. CHEMERINSKY: And I completely

agree.

CHIEF JUSTICE ROBERTS: I hesitate to say some thing is the worst thing we could do.

(Laughter.)

CHIEF JUSTICE ROBERTS: But --

JUSTICE SOTOMAYOR: No, you're right. We've done a lot worse.

(Laughter.)

CHIEF JUSTICE ROBERTS: But -- but if -- if it is a reasonable conclusion based on what you've pled, why have you so strenuously resisted alleging but -- but-for causation?

MR. CHEMERINSKY: Your Honor, because we live in a world of multiple causes, and we believe that all that's required by the plain language of the statute or by Congress's broad remedial intent is that race be a motivating factor.

We do actually allege but-for causation in the complaint. I mean, if you look at the complaint itself, and I can direct you to the specific paragraph of the complaint, it says but-for causation -- paragraph 103 of the complaint says that "the denial of the contract was" -- I'm quoting the words -- "on account of

race."

And the specific paragraphs of the complaint support that. So we do have a section in our brief that we meet the requirement for but-for causation.

But I think when you focus on the statutory language, when you focus on Congress's broad remedial purpose, it did not mean to impose a requirement for but-for causation at the pleading or at the prima facie case stage either.

JUSTICE KAGAN: Mr. Chemerinsky, it just strike -- strikes me as confusing to throw in a different causal standard for the pleading stage as opposed to the ultimate stage, as opposed to saying, look, at the pleading stage we understand that not everybody's going to know everything so we're going to not require too much in the way of -- of -- of -- of proof.

I mean, you're suggesting that but-for cause is sole cause. But-for cause has never been sole cause. There can be three but-for causes in a case. You know, if you take away each of these three things, the outcome would have been different.

But motivating factor is something different. Motivating factor you can take out and the outcome would still be the same. And it just seems quite confusing to me to put in something that's not the same question as the ultimate question at the pleading stage, rather than to understand the pleadings are pleadings and they're before discovery and nobody can be expected to know what the defendant is going to say.

MR. CHEMERINSKY: I disagree, Justice Kagan. This Court has repeatedly adopted a motivating standard pleading approach, even though in the end it's a but-for cause standard.

I go back to what I said to Justice Gorsuch. If you look at the constitutional cases like Mt. Healthy versus Doyle, Village of Arlington Heights versus Metropolitan Development Corporation, all that's required at the pleading stage is motivating factor.

That's true with regard to Title VII as well. It's a motivating factor standard at the pleading stage.

I think to require but-for causation at the pleading stage would be often an

insurmountable burden. In fact, that was Justice O'Connor's point in PriceWaterhouse, how but-for causation is so difficult.

JUSTICE KAVANAUGH: These -- I'm sorry -- these cases, as you know, are not usually thrown out at the motion to dismiss stage and usually you have the ultimate legal test in mind, and you just look at the facts alleged in the complaint to see, as Justice Sotomayor rightly said, whether there's a way you could plausibly infer from those facts that it would ultimately meet the test for 1981 or for discrimination.

And this is a helpful question for you. Isn't -- isn't that just how it usually works?

MR. CHEMERINSKY: Yes.

JUSTICE KAVANAUGH: Yeah, I believe.

(Laughter.)

JUSTICE KAVANAUGH: Yeah. In other words, we shouldn't get in -- or why should we get -- I guess I'm picking up on Justice Kagan's now: Here's the legal test for 1981. Go look at the facts alleged in the complaint, the facts, and just see whether they would meet the

standard.

And it's pretty rare, at least in my years of looking at discrimination complaints, it's pretty rare to throw one out at the motion to dismiss stage --

MR. CHEMERINSKY: Your Honor --

JUSTICE KAVANAUGH: -- as long as it passes, you know, a pretty low bar.

MR. CHEMERINSKY: And that's exactly right. And that's what the Ninth Circuit did, if you read the opinion in this case. The Ninth Circuit says in the bottom of page 2A that the only question before us is the pleadings.

And it says that the standard is motivating factor at pleadings.

JUSTICE KAVANAUGH: Well, but --

MR. CHEMERINSKY: And at the top of page 3 it --

JUSTICE KAVANAUGH: -- the problem --

MR. CHEMERINSKY: -- then says that's not --

JUSTICE KAVANAUGH: -- the problem -- and I'm repeating myself, but the problem is that they were assessing that arguably, as Justice Kagan pointed out, with the wrong test

in mind. If they had the right test in mind, they still might allow the complaint to go forward. But that was the question presented in the cert petition.

MR. CHEMERINSKY: But I think all this Court needs to say then is that the Ninth Circuit is correct in saying that the pleading stage, motivating factor is sufficient, and perhaps you want to remand to assess whether or not they applied the standard.

Though I think, again, if you look at the top of page 3 of the opinion in this case, that's exactly what they did, was say there's plausible allegations here that race was a motivating factor.

CHIEF JUSTICE ROBERTS: But -- but you told me that we don't even have to do that because you say that you did plead but-for cause.

MR. CHEMERINSKY: Yes, Your Honor, we did plead but-for causation, but we do not believe that it's a requirement. We believe that at the pleading stage all that's necessary is motivating factor.

CHIEF JUSTICE ROBERTS: Well, that

sounds like an advisory opinion for me saying, well, you know, they're not arguing that but-for cause is required, but they alleged it anyway, but we're supposed to forget about that and -- and instead address this very slippery question, which isn't even presented under your argument today.

MR. CHEMERINSKY: Yeah. I agree with that. I think the only question presented is about the pleading stage.

It's quite notable that there was a second question in the cert petition that this Court did not grant cert on.

And that was the question of whether or not the plaintiff has the burden of negating all other explanations at the pleading stage. I think that shows why we're here today and what we're arguing about and why it matters so much.

But I agree completely, to Justice Roberts, all that is before this Court is whether the Ninth Circuit was correct that at the pleading stage, it just has to be alleged, that race was a motivating factor in the denial of the contract.

JUSTICE ALITO: I know you didn't

draft the complaint, but the complaint goes on and on and on with a lot of facts, including an allegation that Comcast entered into a racist conspiracy with the NAACP, the National Union League, Al Sharpton and the National Action Network.

And do you think that had any effect on the -- what the district court did here in granting dismissal under 12(b)(6)?

MR. CHEMERINSKY: It shouldn't, Your Honor, because it's not in the second amended complaint. And the only operative complaint before the district court, and the matter that is now before this Court, was the second amended complaint.

And the second amended complaint alleges many facts that would support plausibly that race was the motivating factor in denying contracts. And you alluded to these earlier on pages 3 to 5.

These are such things as that Mr. Allen was told over many years things to do and he'd get carriage. He did those and didn't get carriage; that he was told that there was no bandwidth, but they then carried eight white --

80 white-owned channels, that all of the channels that are carried by the other cable companies are carried by Comcast, except for Mr. Allen's channels.

All of this is at least enough to allege that race is a motivating factor.

CHIEF JUSTICE ROBERTS: But also enough to allege that the NAACP and the National Urban League and the other individuals were in on the conspiracy?

MR. CHEMERINSKY: Your Honor, that is not in the second amended complaint. And the only thing that was before the district court and the matter that is before this Court is the second amended complaint.

What you're referring to here is not properly before the district court and not properly before this Court.

In conclusion, ultimately this case comes down to two different conceptions of what must be pled.

Our view is that there should be enough to allege that race is a motivating factor. The other side says it has to be alleged that race is the but-for cause.

When you think of Congress's broad remedial purposes in 1866, is there a doubt that Congress wanted then to open the door to claims with regard to race discrimination in contracting, not to close that door.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Estrada, three minutes remaining.

REBUTTAL ARGUMENT OF MIGUEL ESTRADA ON BEHALF OF THE PETITIONER

MR. ESTRADA: Yes, thank you, Mr. Chief Justice.

Let me start with the last question that was asked and the answer given by counsel.

I would refer the Court to the -- to the Pet App starting at page 54A and paragraph 59, which is the second amended complaint which is the current complaint at issue where the current complaint continues to allege that white-owned media and Comcast in particular works hand in glove with the federal government to execute this racist conspiracy.

I would further refer the Court to paragraph 64 -- 62, 64, and 65, which are on the

pages following, in which the current complaint goes on to allege that we paid off the signatories to the memorandums of understanding. It doesn't name them by name but those were incorporated by reference and the district court took judicial notice of the MAU.

And obviously the signatories are named. They are the NAACP, the Urban League, and Al Sharpton.

And so the allegation is that we paid off the oldest civil rights organizations in the court -- in the country to give us cover for race discrimination.

The complaint goes on in paragraph 73 and 81 to say that we have a minority-owned networks that are run by Magic Johnson and Diddy Combs, which apparently are some sort of artists, and it claims that these African American entertainers actually signed up with Comcast to give us cover for our racial discrimination.

Now, the period covered by the complaint is 2005 to February 2015 when the complaint was filed.

So in a nutshell, the theory of the

complaint is that Comcast engaged in a racist plot with the Obama Administration, the oldest civil rights -- with the oldest civil rights organizations in the country, Diddy, and Magic Johnson.

And that -- if -- if that actually in any planet satisfies, I don't know how many paragraphs this has, Justice Kavanaugh, it -- it can have 100 paragraphs, but if in any planet that satisfies the plausibility standard on Iqbal, the civil justice system has real problems.

If I could go back to the question that Justice Alito asked earlier with respect to the allegations that are listed in those pages, you know, the thing that I wanted to make clear with respect to the settlement and that I was making clear with respect to the time period covered by the complaint, which is 2008 to February 2015, is that the carriage by AT&T and DirecTV, which are probably the largest in the country, 25 million or so, is -- post-dates the events in the complaint.

And so that the allegations in the current operative complaint with respect to

demand that they can show by reference to this carriage is one that was by dint of a settlement that was entered during the pendency of this litigation.

We ask for judicial notice, again, of the fact that these complaints were all pending in the Central District of California, and this probably had some bearing on the fact that Judge Hatter, who didn't just fall off the turnip truck, granted our motion to dismiss.

Thank you, Mr. Chief Justice.

CHIEF JUSTICE ROBERTS: Thank you. Counsel. The case is submitted.

(Whereupon, at 11:06 a.m., the case was submitted.)