

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

COMCAST CORPORATION,)
)
Petitioner,)
)
v.) No. 18-1171
)
NATIONAL ASSOCIATION OF AFRICAN)
)
AMERICAN-OWNED MEDIA, ET AL.,)
)
Respondents.)

Pages: 1 through 71
Place: Washington, D.C.
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 3 COMCAST CORPORATION,)
 4 Petitioner,)
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 6 NATIONAL ASSOCIATION OF AFRICAN)
 7 AMERICAN-OWNED MEDIA, ET AL.,)
 8 Respondents.)
 9 - - - - -

10 Washington, D.C.
 11 Wednesday, November 13, 2019

12
 13 The above-entitled matter came on
 14 for oral argument before the Supreme Court of
 15 the United States at 10:07 a.m.

16
 17 APPEARANCES:
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 19 on behalf of the Petitioner.
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 21 Department of Justice, Washington, D.C.;
 22 for the United States, as amicus curiae,
 23 supporting the Petitioner.
 24 ERWIN CHEMERINSKY, ESQ., Berkeley, California;
 25 on behalf of the Respondents.

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1 P R O C E E D I N G S

2 (10:07 a.m.)

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

7 Mr. Estrada.

8 ORAL ARGUMENT OF MIGUEL ESTRADA

9 ON BEHALF OF THE PETITIONER

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

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

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

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

1 Nassar, holding that but-for causation is the
2 background rule that Congress must have presumed
3 to have been adopted in all federal statutes
4 unless the statute provides otherwise, which we
5 submit Section 1981 does not, either as
6 originally adopted in 1866 or as amended in
7 1991.

8 Second, in 1991, Congress amended
9 Title VII to provide for a motivating factor
10 standard but did not amend Section 1981 to
11 provide the same, even though it amended Section
12 1981 in other respects at the same time.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 MR. ESTRADA: The Kaz case, right.

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

22 MR. ESTRADA: I --

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

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

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

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

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

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

1 MR. ESTRADA: That would not be novel.

2 JUSTICE KAGAN: -- the question of
3 whether the complaint is sufficient.

4 MR. ESTRADA: Yes. Now the second
5 point I was going to make is the whole question
6 of whether there may be burden-shifting has been
7 introduced somewhat coyly by the Respondent. We
8 don't actually know what their position is on
9 that, but I understand what they're trying to
10 say based on the Kaz case that it may be that
11 but-for sort of applies in the sense that the
12 burden of showing but-for causation is shifted
13 to us, so that in the sense what actually is
14 happening is that they are arguing for the
15 PriceWaterhouse framework without daring to name
16 its name.

17 JUSTICE KAGAN: Yes, so they could be
18 saying that -- and I guess this is another thing
19 for Mr. Chemerinsky to be thinking about -- they
20 could be saying that, that this is essentially
21 an attempt to shift the burden of but-for
22 causation onto you.

23 But they don't have to be saying that.

24 MR. ESTRADA: If I --

25 JUSTICE KAGAN: Excuse me,

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

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

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

1 the offense dressed up as factual assertions.

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

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

11 JUSTICE KAGAN: If --

12 JUSTICE ALITO: Can I --

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

15 JUSTICE ALITO: No, go ahead.

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

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

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

6 MR. ESTRADA: Yes, yes.

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

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

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

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

22 MR. ESTRADA: Versus Sorema, yes.

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

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

3 MR. ESTRADA: Uh-huh.

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

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

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

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

1 actually later, you know, reaffirmed.

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

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

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

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

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

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

6 MR. ESTRADA: Well --

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

11 MR. ESTRADA: Well --

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

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

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

1 causation.

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

6 JUSTICE SOTOMAYOR: Not us. The Ninth
7 Circuit.

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

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

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

23 JUSTICE ALITO: But if the --

24 JUSTICE KAVANAUGH: There are a lot of
25 --

1 JUSTICE ALITO: -- Mr. Estrada, if the
2 -- if the Respondents now agree that in the end
3 the burden -- the -- the -- the substantive
4 standard is but-for, is there a dispute about
5 that issue before us, or is the only question
6 before us whether enough facts were pled under
7 12(b)(6) and Iqbal and Twombly, which is what
8 this seems to have devolved into and is,
9 therefore, not the big issue that has been
10 portrayed.

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

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

18 MR. ESTRADA: No, I think they --

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

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

1 understand that this Court is not buying it.

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

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

7 JUSTICE ALITO: Yeah.

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

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

15 MR. ESTRADA: Correct, but I --

16 JUSTICE ALITO: -- who has that
17 burden.

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

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

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

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

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

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

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

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

9 CHIEF JUSTICE ROBERTS: Sure.

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

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

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 MR. ESTRADA: Thank you.

25 CHIEF JUSTICE ROBERTS: Ms. Ratner.

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

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

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

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

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

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

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

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

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

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

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

25 How can it be that if you're treated

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

12 MS. RATNER: So --

13 JUSTICE SOTOMAYOR: -- why is that not
14 actionable?

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

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

1 making is just "the process of being made."

2 MS. RATNER: Yeah.

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

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

9 JUSTICE SOTOMAYOR: But I want to --

10 MS. RATNER: -- underscore the --

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

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

1 Section 1981.

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

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

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

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

25 MS. RATNER: I --

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

8 MS. RATNER: The --

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

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

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

21 JUSTICE BREYER: Yes, later down --

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

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

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

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

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

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

21 JUSTICE BREYER: No, then it --

22 MS. RATNER: -- be explained about --

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

1 we are. I mean --

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

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

9 MS. RATNER: And that's --

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

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

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

21 MS. RATNER: If it --

22 JUSTICE BREYER: -- on both those
23 points.

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

1 But-for cause does not mean sole cause.

2 JUSTICE BREYER: Even though it says
3 alike --

4 MS. RATNER: It means --

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

8 MS. RATNER: Okay.

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

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

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

22 JUSTICE ALITO: Well, I think --

23 JUSTICE KAGAN: Can I take you --

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

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

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

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

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

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

22 JUSTICE KAVANAUGH: You agree that
23 it's --

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

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

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

12 JUSTICE KAGAN: Well, in general --

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

15 JUSTICE KAGAN: -- what would you say
16 a complaint has to do in order to survive a
17 12(b)(6) motion in this area?

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

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

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

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

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

14 JUSTICE SOTOMAYOR: So should we
15 address that issue?

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

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

24 CHIEF JUSTICE ROBERTS: Yes.

25 MS. RATNER: May I respond?

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

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Mr. Chemerinsky.

8 ORAL ARGUMENT OF ERWIN CHEMERINSKY
9 ON BEHALF OF THE RESPONDENTS

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

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

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

1 petition.

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

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

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

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

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

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

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

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

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

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

19 Ultimately, the question would be does
20 the burden of persuasion shift, as under Section
21 703M, or does it remain with the plaintiffs at
22 all times.

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

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

3 JUSTICE KAGAN: The burden of --

4 MR. CHEMERINSKY: -- with the
5 plaintiff.

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

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

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

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

22 JUDGE ALITO: Okay. So --

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

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

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

12 JUSTICE KAVANAUGH: You're --

13 MR. CHEMERINSKY: -- factor.

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

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

18 JUSTICE KAVANAUGH: Not -- not with
19 their test.

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

25 Now I do think there's an issue down

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

3 Here, I think Patterson versus McLean
4 --

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

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

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

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

24 MR. CHEMERINSKY: Exactly.

25 JUSTICE SOTOMAYOR: But you accept

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

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

7 JUSTICE SOTOMAYOR: So what do you do
8 --

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

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

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

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

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

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

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

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

12 JUSTICE SOTOMAYOR: You -- you would

13 --

14 JUSTICE KAGAN: Mr. Chemerinsky --

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

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

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

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

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

10 CHIEF JUSTICE ROBERTS: What -- what
11 --

12 MR. CHEMERINSKY: -- Iqbal and
13 Twombly.

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

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

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

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

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

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

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

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

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

21 MR. CHEMERINSKY: Go back to the
22 hypothetical.

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

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

3 JUSTICE BREYER: What?

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

8 JUSTICE BREYER: Yeah. Yeah.

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

13 JUSTICE BREYER: Right.

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

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

19 MR. CHEMERINSKY: Summers versus Tice.

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

22 JUSTICE GORSUCH: They're both --

23 JUSTICE BREYER: Excellent. Head of
24 the class.

25 (Laughter.)

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

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

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

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

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

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

22 MR. CHEMERINSKY: Sure.

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

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

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

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

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

9 (Laughter.)

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

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

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

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

1 JUSTICE GORSUCH: Okay.

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

4 JUSTICE GORSUCH: All right.

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

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

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

20 MR. CHEMERINSKY: Well --

21 JUSTICE BREYER: No? Yes?

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

1 answer, of course.

2 JUSTICE KAGAN: Well, Mr.

3 Chereminsky --

4 (Laughter.)

5 JUSTICE GORSUCH: So you just don't --

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

7 --

8 JUSTICE GORSUCH: The legal rule

9 doesn't matter. You just want to win?

10 JUSTICE KAGAN: Mr. Chereminsky --

11 MR. CHEMERINSKY: I want the law to be

12 clear that motivating factor is sufficient

13 because I think often but-for is --

14 JUSTICE GORSUCH: All right, but on

15 that, wouldn't it be unusual for us to say that

16 the test for the pleading stage is motivating

17 factor, but the test at the trial or at summary

18 judgment is but-for?

19 MR. CHEMERINSKY: Emphatically, no,

20 Your Honor. This Court in --

21 JUSTICE GORSUCH: Why -- why wouldn't

22 that be a little unusual?

23 MR. CHEMERINSKY: Because this Court

24 in so many contexts has ultimately said it's

25 but-for --

1 JUSTICE GORSUCH: No. Well, now --

2 MR. CHEMERINSKY: -- but, at the
3 pleading stage, motivating factor.

4 JUSTICE GORSUCH: -- we -- we've said
5 in PriceWaterhouse it's motivating factor
6 throughout. We haven't made some special
7 exception for pleading stage.

8 And McDonnell Douglas, which you
9 relied on earlier, is a but-for test. And the
10 plaintiff just has to plead a prima facie case
11 of but-for causation or -- or motivating factor,
12 depending on the circumstances --

13 MR. CHEMERINSKY: No, Your Honor.

14 JUSTICE GORSUCH: -- and context.

15 MR. CHEMERINSKY: First, Swierkiewicz
16 versus Sorema specifically says, and was a
17 unanimous decision of this Court, that
18 plaintiffs do not need to plead a prima facie
19 case.

20 Second, in every area --

21 JUSTICE GORSUCH: Well --

22 MR. CHEMERINSKY: -- where this
23 Court --

24 JUSTICE GORSUCH: -- we can disagree
25 over what Swierkiewicz said, but -- but isn't --

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

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

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

14 JUSTICE GORSUCH: On McDonnell Douglas
15 --

16 JUSTICE ALITO: But what if the --

17 JUSTICE GORSUCH: I'm sorry.

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

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

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

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

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

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

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

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

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

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

17 JUSTICE KAVANAUGH: If we --

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

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

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

6 So, I mean, that seems wrong, right?

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

12 JUSTICE GORSUCH: Can we just have an
13 answer --

14 JUSTICE KAVANAUGH: If we -- if we --

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

17 MR. CHEMERINSKY: I'm sorry.

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

20 MR. CHEMERINSKY: Sure.

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

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

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

4 JUSTICE GORSUCH: I understand that.

5 MR. CHEMERINSKY: -- or this Court.

6 JUSTICE GORSUCH: I understand that.

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

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

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

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

17 MR. CHEMERINSKY: I'm sorry.

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

25 MR. CHEMERINSKY: Well, because it's

1 not the issue before this Court, Your Honor.

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

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

16 And that's why I keep going back to
17 what the Ninth Circuit actually held on page 2a
18 --

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

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

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

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

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

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

16 CHIEF JUSTICE ROBERTS: Is the burden
17 of --

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

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

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

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: So the --

1 MR. CHEMERINSKY: But that doesn't --

2 CHIEF JUSTICE ROBERTS: I'm sorry. Go
3 ahead.

4 MR. CHEMERINSKY: I was going to say
5 but that doesn't tell us what's required at the
6 pleading stage or at the prima facie case stage.

7 JUSTICE SOTOMAYOR: Well, why don't
8 you --

9 CHIEF JUSTICE ROBERTS: Well, we're
10 talking about --

11 JUSTICE SOTOMAYOR: I'm sorry.

12 CHIEF JUSTICE ROBERTS: -- what is or
13 is not before us. It seems to me that your
14 focus is on the availability of the
15 burden-shifting mechanism, right?

16 MR. CHEMERINSKY: Yes.

17 CHIEF JUSTICE ROBERTS: Okay, well,
18 that's not in the question presented either.

19 MR. CHEMERINSKY: That's correct, Your
20 Honor. I think the only reason that I go to the
21 burden-shifting was Patterson versus McLean
22 adopted the burden-shifting, and it answers many
23 of the questions that have been put to me today.
24 But the --

25 JUSTICE SOTOMAYOR: I -- I --

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

4 JUSTICE SOTOMAYOR: Mr. Chemerinsky --

5 MR. CHEMERINSKY: Yes.

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

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

16 MR. CHEMERINSKY: Exactly, Your Honor.

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

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

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

25 MR. CHEMERINSKY: And I completely

1 agree.

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

4 (Laughter.)

5 CHIEF JUSTICE ROBERTS: But --

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

8 (Laughter.)

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

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

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

1 race."

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

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

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

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

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

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

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

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

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

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

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

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

17 MR. CHEMERINSKY: Yes.

18 JUSTICE KAVANAUGH: Yeah, I believe.

19 (Laughter.)

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

1 standard.

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

6 MR. CHEMERINSKY: Your Honor --

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

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

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

16 JUSTICE KAVANAUGH: Well, but --

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

19 JUSTICE KAVANAUGH: -- the problem --

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

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

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Well, that

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

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

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

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

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

25 JUSTICE ALITO: I know you didn't

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

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

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

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

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

1 80 white-owned channels, that all of the
2 channels that are carried by the other cable
3 companies are carried by Comcast, except for Mr.
4 Allen's channels.

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

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

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

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

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

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

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

6 Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Mr. Estrada, three minutes remaining.

10 REBUTTAL ARGUMENT OF MIGUEL ESTRADA ON
11 BEHALF OF THE PETITIONER

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

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

16 I would refer the Court to the -- to
17 the Pet App starting at page 54A and paragraph
18 59, which is the second amended complaint which
19 is the current complaint at issue where the
20 current complaint continues to allege that
21 white-owned media and Comcast in particular
22 works hand in glove with the federal government
23 to execute this racist conspiracy.

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

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

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

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

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

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

25 So in a nutshell, the theory of the

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

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

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

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

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

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

11 Thank you, Mr. Chief Justice.

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

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

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