

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.)

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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 Plaintiffs, 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 --

14 MR. ESTRADA: Forty-nine.

15 JUSTICE KAGAN: -- or 49 --

16 MR. ESTRADA: Right.

17 JUSTICE KAGAN: -- of the Respondents'
18 brief, they seem to say the opposite. They seem
19 to suggest by quoting that Third Circuit case --

20 MR. ESTRADA: The Kaz case, right.

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

25 MR. ESTRADA: I --

1 JUSTICE KAGAN: And if -- if -- if --
2 if we take it that way, I mean, Mr. Chemerinsky
3 can say what he wants to say about that, but
4 let's just assume that that's true, that they
5 are going to have to plead but-for -- excuse me,
6 that they're going to have to prove but-for
7 causation at the end; that is the ultimate
8 standard in the case.

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

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

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

23 JUSTICE KAGAN: Yeah, so I take that
24 point, and I would think that if -- if my
25 assumption holds, which is that the Respondents

1 do have to prove this at the end, then you would
2 have to say that the Ninth Circuit is wrong.

3 But you would still have --

4 MR. ESTRADA: That would not be novel.

5 JUSTICE KAGAN: -- the question of
6 whether the complaint is sufficient.

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

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

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

2 MR. ESTRADA: If I --

3 JUSTICE KAGAN: Excuse me,

4 Mr. Estrada. They don't have to be saying that.

5 They could be saying no, we -- we really do

6 believe that in the end we're going to have to

7 prove but-for causation, but because we're

8 pre-discovery, because we can't really -- I

9 mean, you don't want people throwing around

10 baseless allegations in their complaint, that --

11 that -- that a complaint should be found

12 sufficient even if it doesn't allege but-for

13 causation.

14 You know, it's enough to say they made

15 a racist mark and they gave -- and they gave

16 contracts to lots of white firms that weren't as

17 good as our firm. And that's enough. Yes.

18 MR. ESTRADA: Well, the -- now the --

19 the -- the answer to -- you know, the bottom

20 line answer to, I think, the theory that

21 underlies all of your questions is that -- the

22 answer to your question is actually controlled

23 by Rule 8, Twombly and Iqbal. And it's actually

24 very clear from Iqbal especially, which was a

25 discrimination case, and from Twombly

1 antecedently, where Justice Souter, in writing
2 Twombly, said we do not want people to open the
3 doors to discovery based on conclusory
4 allegations or formulaic elements of the offense
5 dressed up as factual assertions.

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

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

15 JUSTICE KAGAN: If --

16 JUSTICE ALITO: Can I --

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

19 JUSTICE ALITO: No, go ahead.

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

1 MR. ESTRADA: Well, yes and no,
2 Justice Gorsuch. You can -- you can -- you can
3 allege that so long, under Twombly and Iqbal, as
4 you also allege --

5 JUSTICE GORSUCH: You have to have a
6 good faith --

7 MR. ESTRADA: -- facts from which --

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

12 MR. ESTRADA: Yes, yes.

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

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

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

22 JUSTICE KAGAN: Maybe. I mean, you --
23 you said Iqbal and Twombly, and that seems quite
24 right, but we had this case before Iqbal and
25 Twombly, which is in the Title VII context --

1 I'm not sure how to pronounce it -- Swierkiewicz
2 or something like that.

3 MR. ESTRADA: Versus Sorema, yes.

4 JUSTICE KAGAN: Which -- which --
5 which Twombly said we're thinking about that
6 case and that case is still good law. And what
7 -- and what -- what that case said -- this was
8 actually a McDonnell Douglas shifting case --

9 MR. ESTRADA: Uh-huh.

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

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

21 What was happening in the Sorema
22 case -- let's call it that to make our lives
23 easier -- is that the Second Circuit had ruled
24 that the complaint was deficient because the
25 plaintiff had pled -- had failed to allege the

1 McDonnell Douglas framework in the complaint.

2 Now the Court overturned that ruling,
3 pointing out that the McDonnell Douglas
4 framework is an evidentiary framework that a
5 plaintiff may choose to use at a trial, not a
6 pleading framework. And that was what Twombly
7 actually later, you know, reaffirmed.

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

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

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

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

24 JUSTICE SOTOMAYOR: But I'm not
25 sure -- I go back to the Chief Justice's initial

1 point, which is, if I come forward and show that
2 race was a motivating factor, it can also be the
3 but-for. Until a defendant is deposed and
4 discovery is held, then that becomes an issue
5 for the trier of fact of whether or not that
6 motivating factor was a but-for cause.

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

12 MR. ESTRADA: Well --

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

17 MR. ESTRADA: Well --

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

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

1 inference.

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

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

12 JUSTICE SOTOMAYOR: Not us. The Ninth
13 Circuit.

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

21 It would not be, you know, with all
22 due respect, you know, as many worthy efforts
23 have been made in this case, through BlueLine,
24 the complaint in this case, for the edification
25 of the Court.

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

4 JUSTICE ALITO: But if the --

5 JUSTICE KAVANAUGH: There are a lot of
6 --

7 JUSTICE ALITO: -- Mr. Estrada, if the
8 -- if the Respondents now agree that in the end
9 the burden of -- the -- the -- the substantive
10 standard is but-for, is there a dispute about
11 that issue before us, or is the only question
12 before us whether enough facts were pled under
13 12(b)(6) and Iqbal and Twombly, which is what
14 this seems to have devolved into and is,
15 therefore, not the big issue that has been
16 portrayed?

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

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

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

25 JUSTICE ALITO: -- that's what it

1 would be?

2 MR. ESTRADA: -- no, I think what they
3 mean to say in accepting the CAS standard is
4 but-for in the sense that they accept the
5 PriceWaterhouse plurality opinion. They just
6 don't want to call it that because they
7 understand that this Court is not buying it.

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

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

13 JUSTICE ALITO: Yeah.

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

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

21 MR. ESTRADA: Correct, but I --

22 JUSTICE ALITO: -- who has that
23 burden.

24 MR. ESTRADA: -- think what's really
25 going on is that the Respondents are really

1 arguing PriceWaterhouse, as they did expressly
2 in both courts below. They're not actually
3 citing it, but they are actually in a way sort
4 of admitting that somebody has -- may have a
5 but-for burden of persuasion, but they would
6 like it to be us.

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

9 JUSTICE ALITO: Yeah, well, I --

10 JUSTICE KAVANAUGH: But if you're --

11 JUSTICE ALITO: -- don't know why the
12 Ninth Circuit did what it did here and I don't
13 know why the Respondents have argued the case
14 the way they did here.

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

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

25 It turned out that, according to them,

1 that -- that it didn't matter whether they got
2 support in the field and so forth. There is a
3 recitation of facts.

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

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

17 CHIEF JUSTICE ROBERTS: Sure.

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

21 Now it should be perfectly clear to
22 everybody in this courtroom that that's an
23 allegation that they were only able to make in
24 the third complaint in this case. It was not in
25 the first or the second complaint. And the

1 reason for that is, during the pendency of the
2 entire litigation in this case, they were suing
3 AT&T and DirectTV as they were suing us. And
4 that --

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 MR. ESTRADA: Thank you.

8 CHIEF JUSTICE ROBERTS: Ms. Ratner.

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

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

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

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

22 Instead -- and I think this gets to
23 Justice Kagan's line of questions -- Respondents
24 invoke burden-shifting to argue that at the
25 pleading stage, motivating factor -- a

1 motivating factor can be enough.

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

7 But McDonnell Douglas, even if it
8 applies in this context, is not relevant to the
9 causation question. It shifts only the burden
10 of production at trial. So it can't affect the
11 elements that a plaintiff needs to prove or that
12 a plaintiff needs to plead.

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

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

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

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

20 MS. RATNER: So --

21 JUSTICE SOTOMAYOR: -- why is that not
22 actionable?

23 MS. RATNER: So let me give you three
24 responses, Justice Sotomayor. The first is the
25 text says the same right to make a contract. I

1 think if you asked an ordinary English speaker
2 whether someone who would never have been
3 granted that contract, regardless of her race,
4 whether that person was denied the same right to
5 make that contract, I think people would say no.

6 JUSTICE SOTOMAYOR: Except the
7 dictionary --

8 MS. RATNER: But even if that's --

9 JUSTICE SOTOMAYOR: -- the dictionary
10 says definition of making is just "the process
11 of being made."

12 MS. RATNER: Yeah.

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

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

19 JUSTICE SOTOMAYOR: But I want to --

20 MS. RATNER: -- underscore the --

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

1 using a but-for standard?

2 MS. RATNER: Justice Sotomayor,
3 there's a lot baked in there. I -- I think to
4 the extent you think there is some ambiguity in
5 the "same right" language, the next place to
6 look is a very important textual clue, and
7 that's Section 2 of the 1866 Act. So, when
8 Congress originally enacted this provision,
9 Section 1 was the general declaration of rights,
10 Section 1 of the 1866 Act. That's now become
11 Section 1981.

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

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

20 JUSTICE BREYER: I -- I -- I --
21 unfortunately, I -- I'm stuck back at the Chief
22 Justice's question and I think what Justice
23 Gorsuch was elaborating on that, that -- as I
24 understand their questions, but -- but, anyway,
25 my question is I don't understand; if we're

1 talking about pleadings, what's the difference?
2 I mean, you know, they have some evidence, and
3 the evidence is, on information and belief, we
4 think that the Defendant here used race
5 improperly to deny us the contract. Then they
6 list it.

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

10 MS. RATNER: I --

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

18 MS. RATNER: The --

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

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

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

6 JUSTICE BREYER: Yes, later down --

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

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

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

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

22 If that person files a complaint
23 complaining about the racial aspect of that
24 denial, I don't think any court would say that
25 there was any plausible way that that person was

1 going to be hired as a law firm associate,
2 regardless of their race, because they weren't a
3 lawyer to start with.

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

6 JUSTICE BREYER: No, then it --

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

8 JUSTICE BREYER: -- wasn't a
9 motivating factor. It wasn't a motivating
10 factor and it wasn't a but-for condition. There
11 we are. I mean --

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

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

19 MS. RATNER: And that's --

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

24 And if the applicant is a black
25 person, it could be. So this says -- the

1 statute says you should treat a white person and
2 a black person alike. And so, I mean, that's
3 their reasoning.

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

6 MS. RATNER: If it --

7 JUSTICE BREYER: -- on both those
8 points.

9 MS. RATNER: -- if it really does make
10 a difference, then you have but-for causation.
11 But-for cause does not mean sole cause.

12 JUSTICE BREYER: Even though it says
13 alike --

14 MS. RATNER: It means --

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

18 MS. RATNER: Okay.

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

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

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

7 JUSTICE ALITO: Well, I think --

8 JUSTICE KAGAN: Can I take you --

9 JUSTICE ALITO: -- what you're -- what
10 you're saying is that this makes a difference at
11 the pleading stage in those rare cases, if they
12 exist at all, where the complaint goes out of
13 its way to refute itself.

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

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

24 JUSTICE KAVANAUGH: You agree in this
25 case that we should vacate, therefore, and

1 remand and not resolve the issue here?

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

7 JUSTICE KAVANAUGH: You agree that
8 it's --

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

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

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

22 JUSTICE KAGAN: Well, in general --

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

25 JUSTICE KAGAN: -- what would you say

1 a complaint has to do in order to survive a
2 12(b)(6) motion in this area?

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

9 And if a judge looks at those
10 allegations and plausibly believes that race
11 made a difference, then that's going to be
12 enough to survive under Twombly and Iqbal.

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

18 MS. RATNER: So the Court said in
19 Patterson that McDonnell Douglas applies in 1981
20 cases at least in the employment context. We
21 think it's an open question whether it would
22 apply beyond the employment context --

23 JUSTICE SOTOMAYOR: So --

24 MS. RATNER: -- but for purposes --

25 JUSTICE SOTOMAYOR: -- should we

1 address that issue?

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

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

10 CHIEF JUSTICE ROBERTS: Yes.

11 MS. RATNER: May I respond?

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

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Mr. Chemerinsky.

19 ORAL ARGUMENT OF ERWIN CHEMERINSKY

20 ON BEHALF OF THE RESPONDENTS

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

23 Statutory language matters. Where
24 federal civil rights statutes use the words
25 "because of" or "based on," this Court has

1 inferred a requirement for but-for causation.
2 But this Court has never created a requirement
3 for but-for causation in the absence of such
4 language. Section 1981 uses no such words.

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

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

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

24 On the other hand, where the Court has
25 adopted but-for causation, it's rejected

1 burden-shifting, such as in Gross versus FBL
2 Financial Services.

3 Ultimately, Your Honors, the issue
4 before this case was pled can be resolved by
5 looking at the plain language of Section 1981
6 and Congress's broad remedial purpose.

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

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

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

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

24 JUSTICE ALITO: At the end of the day
25 -- at the end of the day, what is the burden of

1 persuasion in this case, in a case like this?

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

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

9 We think that implicitly, by, in
10 Patterson versus McLean, adopting the McDonnell
11 Douglas/Burdine framework, it would say the
12 burden of production shifts, but the burden of
13 persuasion is always --

14 JUSTICE KAGAN: The burden of --

15 MR. CHEMERINSKY: -- with the
16 plaintiff.

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

22 MR. CHEMERINSKY: In the end, Your
23 Honor, I believe that this Court's adoption in
24 Patterson versus McLean of the McDonnell Douglas
25 burden-shifting framework does indicate that the

1 burden of persuasion in the end would rest with
2 the plaintiff.

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

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

8 JUDGE ALITO: Okay. So --

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

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

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

23 JUSTICE KAVANAUGH: You're --

24 MR. CHEMERINSKY: -- factor.

25 JUSTICE KAVANAUGH: -- you're not

1 agreeing with the Ninth Circuit then?

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

4 JUSTICE KAVANAUGH: Not -- not with
5 their test.

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

11 Now I do think there's an issue down
12 the road that could be faced, is at the very end
13 who has the burden of persuasion?

14 Here, I think Patterson versus McLean
15 --

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

21 MR. CHEMERINSKY: No, you didn't, Your
22 Honor. What I was saying was by -- in Patterson
23 versus McLean, this Court, adopting the
24 McDonnell Douglas burden-shifting framework,
25 McDonnell Douglas shifts the burden of

1 production but never shifts the burden of
2 persuasion. And so, in that sense, that's why
3 we said Patterson versus McLean seems to answer
4 the question.

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

9 MR. CHEMERINSKY: Exactly.

10 JUSTICE SOTOMAYOR: But you accept
11 that as a -- as a matter of burden at trial or
12 in summary judgment, you do have to prove
13 but-for causation?

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

17 JUSTICE SOTOMAYOR: So what do you do
18 --

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

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

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

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

8 But, Justice Sotomayor, imagine a
9 different example. Imagine that somebody files
10 a complaint that says, I went to a hotel to rent
11 a room and I was told that I was not going to
12 get a room because none were available and also
13 the hotel doesn't rent to blacks. Should that
14 be sufficient to survive a motion to dismiss?

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

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

22 JUSTICE SOTOMAYOR: You -- you would
23 --

24 JUSTICE KAGAN: Mr. Chemerinsky --

25 CHIEF JUSTICE ROBERTS: If you asked

1 -- if I understand your answer to Justice
2 Sotomayor's question about Ms. Ratner's
3 hypothetical, why is it that that fails under
4 your view at the pleading stage?

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

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

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

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

20 CHIEF JUSTICE ROBERTS: What -- what
21 --

22 MR. CHEMERINSKY: -- Iqbal and
23 Twombly.

24 CHIEF JUSTICE ROBERTS: -- what
25 element of the cause of action would be absent

1 in that hypothetical?

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

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

7 CHIEF JUSTICE ROBERTS: No, I was just
8 going to say, even though a -- a -- a white
9 person would not have had that discriminatory --
10 in other words, been denied an equal -- they're
11 not treated the same, which is your theory, but
12 they're treated differently on the account of
13 race because one was the subject of a racially
14 discriminatory conduct -- comment and the other
15 wasn't.

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

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

25 MR. CHEMERINSKY: Well, but, Your

1 Honor --

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

6 MR. CHEMERINSKY: Go back to the
7 hypothetical.

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

11 MR. CHEMERINSKY: But there's an
12 enormous difference, which is why --

13 JUSTICE BREYER: What?

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

18 JUSTICE BREYER: Yeah. Yeah.

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

23 JUSTICE BREYER: Right.

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

1 JUSTICE BREYER: No, but it does
2 allege the famous tort case that every student
3 studies, the two hunters. Okay?

4 MR. CHEMERINSKY: Summers versus Tice.

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

7 JUSTICE GORSUCH: They're both --

8 JUSTICE BREYER: Excellent. Head of
9 the class.

10 (Laughter.)

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

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

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

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

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

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

7 MR. CHEMERINSKY: Sure.

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

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

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

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

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

19 (Laughter.)

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

24 JUSTICE GORSUCH: No, no, that's not
25 the position, at least as being explored by

1 Justice Breyer. It's just that it has to be
2 plausible that it caused the injury.

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

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

11 JUSTICE GORSUCH: Okay.

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

14 JUSTICE GORSUCH: All right.

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

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

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

5 MR. CHEREMINSKY: Well --

6 JUSTICE BREYER: No? Yes?

7 MR. CHEREMINSKY: -- Your Honor, yes.
8 I mean, I think that if the -- if the answer is
9 this complaint goes forward either way, and the
10 Ninth Circuit was correct, I will accept that
11 answer, of course.

12 JUSTICE KAGAN: Well, Mr.
13 Chereminsky --

14 (Laughter.)

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

16 MR. CHEREMINSKY: So I'm not going to
17 --

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

20 JUSTICE KAGAN: Mr. Chereminsky --

21 MR. CHEREMINSKY: I want the law to be
22 clear that motivating factor is sufficient
23 because I think often but-for is very difficult.

24 JUSTICE GORSUCH: All right, but on
25 that, wouldn't it be unusual for us to say that

1 the test for the pleading stage is motivating
2 factor, but the test at the trial or at summary
3 judgment is but-for?

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

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

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

11 JUSTICE GORSUCH: No. Well, now --

12 MR. CHEMERINSKY: -- but, at the
13 pleading stage, only motivating factor.

14 JUSTICE GORSUCH: -- we -- we've said
15 in PriceWaterhouse it's motivating factor
16 throughout. We haven't made some special
17 exception for pleading stage.

18 And McDonnell Douglas, which you
19 relied on earlier, is a but-for test. And the
20 plaintiff just has to plead a prima facie case
21 of but-for causation or -- or motivating factor,
22 depending on the circumstances --

23 MR. CHEMERINSKY: No, Your Honor.

24 JUSTICE GORSUCH: -- and context.

25 MR. CHEMERINSKY: First, Swierkiewicz

1 versus Sorema specifically says, and it was a
2 unanimous decision of the Court, that plaintiffs
3 do not need to plead a prima facie case.

4 Second, in every area --

5 JUSTICE GORSUCH: Well --

6 MR. CHEMERINSKY: -- where this
7 Court --

8 JUSTICE GORSUCH: -- we can disagree
9 over what Swierkiewicz said, but -- but isn't --
10 isn't it the -- wouldn't it be a little unusual
11 for us to apply different legal standards at
12 different stages of the same case?

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

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

23 JUSTICE GORSUCH: On McDonnell Douglas
24 --

25 JUSTICE ALITO: But what if the --

1 JUSTICE GORSUCH: I'm sorry.

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

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

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

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

24 JUSTICE KAGAN: Well, that's right,
25 but that seems very different from saying you

1 have to allege a motivating cause.

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

8 But, as long as the plaintiff comes
9 forward with sufficient allegations to say,
10 given what I know, you know, this defendant made
11 a racist remark, this defendant gave contracts
12 to white firms that were not as qualified as our
13 contract were, why do you have to label that
14 anything? Why do you just have to say those are
15 the kinds of facts that at this stage of the
16 litigation allow the -- the complaint to go
17 forward?

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

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

1 JUSTICE KAVANAUGH: If we --

2 JUSTICE KAGAN: But then,

3 Mr. Chemerinsky, it -- don't you think that the
4 Ninth Circuit has to be reversed? I mean, I'm
5 just going to read you a sentence from the Ninth
6 Circuit which seems to say something very
7 different.

8 It says, "even if racial animus was
9 not the but-for cause of a defendant's refusal
10 to contract, a plaintiff can still prevail" --
11 prevail, not like satisfy the pleading
12 standard -- "prevail if she demonstrates that
13 discriminatory intent was a factor in that
14 decision."

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

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

21 JUSTICE GORSUCH: Can we just have an
22 answer --

23 JUSTICE KAVANAUGH: If we -- if we --

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

1 MR. CHEMERINSKY: I'm sorry.

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

4 MR. CHEMERINSKY: Sure.

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

8 MR. CHEMERINSKY: What I was saying is
9 in terms of the statement of whether or not in
10 order to prevail. And my response to Justice
11 Kagan was that wasn't the issue before the Ninth
12 Circuit --

13 JUSTICE GORSUCH: I understand that.

14 MR. CHEMERINSKY: -- or this Court.

15 JUSTICE GORSUCH: I understand that.

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

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

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

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

1 MR. CHEMERINSKY: I'm sorry.

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

9 MR. CHEMERINSKY: Well, because it's
10 not the issue before this Court, Your Honor.

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

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

25 And that's why I keep going back to

1 what the Ninth Circuit actually held on page 2a

2 --

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

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

7 JUSTICE KAVANAUGH: -- we wouldn't be
8 saying anything about the pleading stage under
9 the hypothetical opinion I just articulated. It
10 would just be saying the ultimate burden of
11 persuasion in 1981 cases, contrary to what the
12 Ninth Circuit has -- had said per Justice
13 Kagan's recitation.

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

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

25 CHIEF JUSTICE ROBERTS: Is the burden

1 of --

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

5 Smith says this man wouldn't contract
6 with me. I know him. He is the most bigoted
7 person in this state, and, as normal, he said
8 all kinds of racist things and jumped up and
9 down and so forth. And, by the way, he's my
10 fifth cousin, and he hates me, and I've never
11 met anybody who hated me so much. And I think,
12 for both reasons, he would have never entered
13 into this contract.

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

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

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

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

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

9 CHIEF JUSTICE ROBERTS: So the --

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

11 CHIEF JUSTICE ROBERTS: I'm sorry. Go
12 ahead.

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

16 JUSTICE SOTOMAYOR: Well, why don't
17 you --

18 CHIEF JUSTICE ROBERTS: Well, we're
19 talking about --

20 JUSTICE SOTOMAYOR: I'm sorry.

21 CHIEF JUSTICE ROBERTS: -- what is or
22 is not before us. It seems to me that your
23 focus is on the availability of the
24 burden-shifting mechanism, right?

25 MR. CHEMERINSKY: Yes.

1 CHIEF JUSTICE ROBERTS: Well, that's
2 not in the question presented either.

3 MR. CHEMERINSKY: That's correct, Your
4 Honor. I think the only reason that I go to the
5 burden-shifting was Patterson versus McLean
6 adopted the burden-shifting, and it answers many
7 of the questions that have been put to me today.
8 But the --

9 JUSTICE SOTOMAYOR: I -- I --

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

13 JUSTICE SOTOMAYOR: Mr. Chemerinsky --

14 MR. CHEMERINSKY: Yes.

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

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

25 MR. CHEMERINSKY: Exactly, Your Honor.

1 JUSTICE SOTOMAYOR: So -- and in --

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

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

9 MR. CHEMERINSKY: And I completely
10 agree.

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

13 (Laughter.)

14 CHIEF JUSTICE ROBERTS: But --

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

17 (Laughter.)

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

23 MR. CHEMERINSKY: Your Honor, because
24 we live in a world of multiple causes, and we
25 believe that all that's required by the plain

1 language of the statute or by Congress's broad
2 remedial intent is that race be a motivating
3 factor.

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

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

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

22 JUSTICE KAGAN: Mr. Chemerinsky, it
23 just strike -- strikes me as confusing to throw
24 in a different causal standard for the pleading
25 stage as opposed to the ultimate stage, as

1 opposed to saying, look, at the pleading stage,
2 we understand that not everybody's going to know
3 everything, so we're going to not require too
4 much in the way of -- of -- of -- of proof.

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

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

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

25 I go back to what I said to Justice

1 Gorsuch. If you look at the constitutional
2 cases like Mt. Healthy versus Doyle, Village of
3 Arlington Heights versus Metropolitan
4 Development Corporation, all that's required at
5 the pleading stage is motivating factor.

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

9 I think to require but-for causation
10 at the pleading stage would be often an
11 insurmountable burden. In fact, that was
12 Justice O'Connor's point in PriceWaterhouse, how
13 but-for causation --

14 JUSTICE KAVANAUGH: But these -- the
15 --

16 MR. CHEMERINKSY: -- is so difficult.

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

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

4 MR. CHEMERINSKY: Yes.

5 JUSTICE KAVANAUGH: Yeah, I believe.

6 (Laughter.)

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

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

18 MR. CHEMERINSKY: Your Honor --

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

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

1 it says that the standard is motivating factor
2 at pleadings.

3 JUSTICE KAVANAUGH: Well, but --

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

6 JUSTICE KAVANAUGH: -- the problem --

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

9 JUSTICE KAVANAUGH: -- the problem --
10 and I'm repeating myself, but the problem is
11 that they were assessing that arguably, as
12 Justice Kagan pointed out, with the wrong test
13 in mind. If they had the right test in mind,
14 they still might allow the complaint to go
15 forward. But that was the question presented in
16 the cert petition.

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

23 Though I think, again, if you look at
24 the top of page 3 of the opinion in this case,
25 that's exactly what they did, was say there's

1 plausible allegations here that race was a
2 motivating factor.

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

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

12 CHIEF JUSTICE ROBERTS: Well, that
13 sounds like an advisory opinion for me saying,
14 well, you know, they're not arguing that but-for
15 cause is required, but they alleged it anyway,
16 but we're supposed to forget about that and --
17 and instead address this very slippery question
18 which isn't even presented under your argument
19 today.

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

23 It's quite notable that there was a
24 second question in the cert petition that this
25 Court did not grant cert on, and that was the

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

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

12 JUSTICE ALITO: I know you didn't
13 draft the complaint, but the complaint goes on
14 and on and on with a lot of facts, including an
15 allegation that Comcast entered into a racist
16 conspiracy with the NAACP, the National Union
17 League, Al Sharpton, and the National Action
18 Network.

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

22 MR. CHEMERINSKY: It shouldn't, Your
23 Honor, because it's not in the second amended
24 complaint. And the only operative complaint
25 before the district court, and the matter that's

1 now before this Court, was the second amended
2 complaint. And the second amended complaint
3 alleges many facts that would support plausibly
4 that race was the motivating factor in denying
5 contracts.

6 And you alluded to these earlier on
7 pages 3 to 5. These are such things as that Mr.
8 Allen was told over many years things to do and
9 he'd get carriage. He did those and didn't get
10 carriage; that he was told that there was no
11 bandwidth, but they then carried eight white --
12 80 white-owned channels; that all of the
13 channels that are carried by the other cable
14 companies are carried by Comcast, except for Mr.
15 Allen's channels.

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

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

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

1 second amended complaint.

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

5 In conclusion, ultimately, this case
6 comes down to two different conceptions of what
7 must be pled. Our view is there should be
8 enough to allege that race is a motivating
9 factor. The other side says it has to be
10 alleged that race is the but-for cause.

11 When you think of Congress's broad
12 remedial purposes in 1866, there can't be any
13 doubt that Congress wanted then to open the door
14 to claims with regard to race discrimination in
15 contracting, not to close that door.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Mr. Estrada, three minutes remaining.

20 REBUTTAL ARGUMENT OF MIGUEL ESTRADA ON
21 BEHALF OF THE PETITIONER

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

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

1 I would refer the Court to the -- to
2 the Pet. App. starting at page 54A and paragraph
3 59, which is the second amended complaint, which
4 is the current complaint at issue, where the
5 current complaint continues to allege that
6 white-owned media and Comcast in particular
7 works hand in glove with the federal government
8 to execute this racist conspiracy.

9 I would further refer the Court to
10 paragraph 64 -- 62, 64, and 65, which are on the
11 pages following, in which the current complaint
12 goes on to allege that we paid off the
13 signatories to the memorandums of understanding.
14 It doesn't name them by name, but those were
15 incorporated by reference and the district court
16 took judicial notice of the MAU.

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

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

24 The complaint goes on in paragraph 73
25 and 81 to say that we have minority-owned

1 networks that are run by Magic Johnson and Diddy
2 Combs, which apparently are some sort of
3 artists, and it claims that these African
4 American entertainers actually signed up with
5 Comcast to give us cover for our racial
6 discrimination.

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

10 So, in a nutshell, the theory of the
11 complaint is that Comcast engaged in a racist
12 plot with the Obama Administration, the oldest
13 civil rights -- with the oldest civil rights
14 organizations in the country, Diddy, and Magic
15 Johnson.

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

23 If I could go back to the question
24 that Justice Alito asked earlier with respect to
25 the allegations that are listed in those pages,

1 you know, the thing that I wanted to make clear
2 with respect to the settlement and that I was
3 making clear with respect to the time period
4 covered by the complaint, which is 2008 to
5 February 2015, is that the carriage by AT&T and
6 DirecTV, which are probably the largest in the
7 country, 25 million or so, is -- post-dates the
8 events in the complaint.

9 And so that the allegations in the
10 current operative complaint with respect to
11 demand that they can show by reference to this
12 carriage is one that was by dint of a settlement
13 that was entered during the pendency of this
14 litigation.

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

21 Thank you, Mr. Chief Justice.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel. The case is submitted.

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

Official - Subject to Final Review

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