No. 18-1171

IN THE
Supreme Court of the United States

COMCAST CORPORATION,
Petitioner,
v.

NATIONAL ASSOCIATION OF AFRICAN AMERICAN-OWNED MEDIA and ENTERTAINMENT STUDIOS NETWORKS, INC.,
Respondents.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Richard A. Samp
(Counsel of Record)
Marc B. Robertson
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
rsamp@wlf.org

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QUESTION PRESENTED

Does a claim of race discrimination under 42 U.S.C. § 1981 fail in the absence of but-for causation?

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INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public-interest law firm and policy center with supporters in all 50 States.[1] WLF promotes and defends free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF regularly appears as *amicus curiae* in this and other federal courts to address issues arising under federal civil rights laws. *See, e.g., Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015); *Ashcroft v. Iqbal*, 556 U.S. 602 (2009).

Causation in fact—*i.e.*, proof that the defendant's conduct did in fact cause the plaintiff's injury—"is a standard requirement of any tort claim." *Univ. of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 346 (2013). The Ninth Circuit held, however, that Congress abandoned that requirement entirely when it adopted 42 U.S.C. § 1981, an 1866 civil rights statute that prohibits racial discrimination in making and enforcing contracts. The appeals court held that to recover damages under § 1981, a plaintiff need only show that racial discrimination was "a factor" in the defendant's contracting decision—even if the defendant would have made the same decision had racial discrimination not been a factor.

The Ninth Circuit's causation standard is more

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing.

lenient than the causation standard in any other federal civil rights statute. The appeals court held that but-for causation is not an element of a § 1981 claim, despite no evidence—in either the statutory text or legislative history—that Congress intended such a marked departure from traditional tort-law principles. WLF is concerned that if this Court affirms, it will be virtually impossible for defendants to win pre-trial dismissal of even the most insubstantial discrimination claims filed under § 1981.

STATEMENT OF THE CASE

Respondent Entertainment Studios Network ("ESN") owns and operates seven television networks. It is owned 100% by African Americans. Petitioner Comcast Corp. distributes video programming directly to television viewers. Many times over the past decade, ESN has requested that Comcast agree to carry ESN's networks as part of Comcast's cable offerings. Comcast declined to do so, explaining that ESN had not demonstrated sufficient viewer interest in its programming.

ESN and an affiliated organization filed suit against Comcast under § 1981, alleging that Comcast's refusal to carry ESN was a racially motivated refusal to contract. ESN filed similar lawsuits against other large video programming distributors—they too had rebuffed ESN's contract offers.

The district court thrice granted Rule 12(b) motions to dismiss the complaint for failure to state a claim. Pet. App. 109a-112a, 74a-77a, 5a-7a. The first two dismissal orders granted ESN leave to amend, but

the second order warned that the next dismissal would be "with prejudice" if the next complaint were deficient. *Id.* at 77a. In October 2016, the district court dismissed the Second Amended Complaint (SAC) with prejudice after concluding that ESN failed to plead facts sufficient to state a plausible claim that Comcast refused to contract with ESN because ESN was minority-owned. *Id.* at 5a-7a. It held that the facts alleged were fully consistent with Comcast's alternative, non-discriminatory explanation: that it declined a carriage contract because ESN did not demonstrate adequate viewer interest in its programming. *Id.* at 6a.

The Ninth Circuit reversed. Pet. App. 1a-4a. It held that a plaintiff can establish liability under § 1981 by showing that racially discriminatory intent "was a factor" in the challenged contracting decision and "not necessarily the but-for cause of that decision." *Id.* at 2a.[2] The court said that § 1981's statutory language is "distinctive" and "quite different from the language" of other civil rights statutes, most of which (unlike § 1981) "use the word 'because' and therefore explicitly suggest but-for causation." *Id.* at 20a. The court reasoned that § 1981's alternative phrasing—its

[2] In explaining its rationale, the court cited its lengthier decision in *National Association of African American-Owned Media v. Charter Communications, Inc.*, Pet. App. 8a-31a, issued the same day. The two cases—one against Comcast, the other against Charter Communications—raised similar § 1981 claims. Oral arguments in the two cases were heard on the same day by the same three-judge panel. Because the panel explicitly incorporated its *Charter Communications* opinion into its *Comcast* decision, WLF's summary of the decision below includes quotations from the *Charter Communications* opinion.

guarantee of "the same right" to contract "as is enjoyed by white citizens"—demonstrates Congress's intent to eliminate the normal but-for causation requirement:

> If discriminatory intent plays *any* role in a defendant's decision not to contract with a plaintiff, even if it is merely one factor and not the sole cause of the decision, then that plaintiff has not enjoyed the *same right* as a white citizen.

Id. at 21a (emphasis in original).

Applying its "a factor" standard, the appeals court concluded that the SAC included sufficient factual allegations to survive a Rule 12(b)(6) motion to dismiss. Pet. App. 3a-4a. The court cited "[m]ost importantly" the allegation that "Comcast deci[ded] to offer carriage contracts to 'lesser-known, white-owned' networks ... at the same time it informed [ESN] that it had no bandwidth or carriage capacity." *Id.* at 3a. The court noted Comcast's assertion that the complaint included no factual allegations that these "white-owned" networks were similarly situated to ESN. But it concluded that "an extensive comparison of these channels for purposes of determining disparate treatment due to race would require a factual inquiry that is inappropriate in a 12(b)(6) motion." *Id.* at 3a n.1. At the pleadings stage, the court asserted, "we must instead accept as true" ESN's allegations that it was not treated the same as white-owned networks. *Id.*

Although the court acknowledged that "legitimate, race-neutral reasons for [Comcast's]

conduct are contained within the SAC," it concluded that Comcast's "alternative explanations are [not] so compelling as to render [implausible ESN's] theory"—that racial discrimination was *a* factor in Comcast's actions. *Id*. at 4a.

SUMMARY OF ARGUMENT

I. Section 1981 contains few words. It is a "broad, general bar[ ] on discrimination," *Nassar*, 570 U.S. at 355, that does not expressly address causation standards. Under those circumstances, this Court applies the "default rule[ ]" governing causation: the plaintiff must show that the harm would not have occurred "but for" the defendant's conduct. *Id.* at 346-47. Congress is "presumed to have incorporated" the but-for causation standard into a statute "absent an indication to the contrary in the statute itself." *Id.* at 347. The Ninth Circuit's failure to apply the default rule to § 1981 cannot be squared with *Nassar*.

The appeals court concluded that § 1981's text contains an "indication to the contrary" and thus "permits an exception to the but-for standard." Pet. App. 21a (pointing to § 1981's "same right ... as is enjoyed by white citizens" language). But that conclusion misreads the statute's text and history. Section 1981 gives "all persons ... the same right ... to make and enforce contracts ... as is enjoyed by white citizens." One such right enjoyed by white citizens at the time of § 1981's adoption was the right to make and enforce contracts on a nondiscriminatory basis. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). But there is no evidence that whites claiming a violation of that right could prevail on their claims

without demonstrating but-for causation. In the absence of such evidence, § 1981's "same right" language provides no textual support for the Ninth Circuit's conclusion that Congress intended to adopt a more lenient causation standard.

Importantly, § 1981's text focuses on actual conduct (*e.g.*, the right to make and enforce contracts, the right to sue) and says *nothing* about the motives (*e.g.*, racial discrimination) of those allegedly interfering with that conduct. That textual focus indicates that Congress was not interested in examining the many motives that played a role in a defendant's decision-making, particularly when race-based motives did not cause the defendant to act differently than he would have acted had race not been considered. The text thus implies a but-for causation standard: plaintiffs may not recover under § 1981 unless they can establish that a defendant would have entered into contracts with them but for their race.

The appeals court placed great weight on the absence of the phrase "because of" in § 1981. The Ninth Circuit noted accurately that this Court has equated "because of" with but-for causation. *See, e.g., Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176 (2009) ("[T]he ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age is that age was the 'reason' that the employer decided to act."). The appeals court tried to distinguish *Nassar* and *Gross* because the anti-discrimination statutes at issue in those cases, unlike § 1981, include the phrase "because of" and therefore "explicitly suggest but-for causation." Pet. App. 20a. But that approach reverses the proper textual

analysis—but-for causation is the default rule that applies unless a federal statute includes language affirmatively indicating that Congress intended to apply a different causation standard. The omission of specific words from § 1981 cannot supply the requisite affirmative indication.

Moreover, this Court has never placed talismanic importance on the phrase "because of." The Court has discerned a but-for causation requirement in many federal statutes that do not contain the phrase "because of." *See Burrage v. United States*, 571 U.S. 204, 213-14 (2014) (cataloguing such statutes). Indeed, although § 1981 does not use the phrase "because of," this Court has routinely used that phrase in explaining what conduct is actionable under the statute.

Congress's adoption of the Civil Rights Act of 1991, 105 Stat. 1071, considerably strengthens Comcast's interpretation of § 1981. The 1991 Act amended both § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., in significant respects. Among the Title VII amendments was one that altered the causation standard; as amended, the statute now provides that an employee can establish liability for a Title VII violation by proving that unlawful discrimination "was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). Although the 1991 Act substantially revised § 1981, Congress did not amend § 1981's causation standard or adopt any provision remotely similar to § 2000e-2(m). By adopting a motivating-factor causation standard for Title VII cases while simultaneous leaving the § 1981 causation standard unchanged, Congress signaled that

it did not intend to alter the default standard (but-for causation) in § 1981 cases.

There are strong policy reasons not to lower the causation standard in § 1981 cases. By all objective criteria, ESN's claims (alleging a conspiracy involving not just Comcast and other cable providers but also civil rights leaders and even the FCC) are fanciful. Yet if the Court upholds the Ninth Circuit's "a factor" causation standard, it will become very difficult for defendants to win dismissal of even the most frivolous § 1981 claims at the pleadings stage.

Adopting a more lenient causation standard will make it far easier for a § 1981 plaintiff to state a plausible claim for relief under Rule 8. Under causation standards adopted by other federal appeals courts, the plaintiff must allege facts sufficient to state a plausible claim that racial discrimination was the but-for cause of the defendant's decision not to enter into a contract. But under the Ninth Circuit's causation standard, the plaintiff's burden is considerably lighter; he need only allege facts sufficient to state a plausible claim that racial discrimination was *a factor* in the defendant's decision. Under that undemanding standard, a virtually limitless variety of factual allegations would likely suffice to state a plausible claim—thereby forcing deep-pocketed defendants such as Comcast either to bear substantial litigation costs or to agree to settle even insubstantial claims.

II. Every federal appeals court other than the Ninth Circuit has held that a claim of race discrimination under § 1981 fails in the absence of but-

for causation. But the other appeals courts are divided on the issue of *Price Waterhouse*-burden shifting in so-called mixed-motive cases. Citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), some appeals courts have held that if a § 1981 plaintiff establishes that race was a motivating factor in the defendant's challenged decision, the burden of proof shifts to the defendant to establish that it would have made the same decision even if it had not taken the plaintiff's race into account.

The Ninth Circuit had no need to (and did not) address *Price Waterhouse*-burden shifting. It concluded that a showing that racial discrimination was a motivating factor suffices to establish § 1981 liability, even if the defendant can demonstrate the absence of but-for causation. But ESN may attempt to invoke *Price Waterhouse* as an alternate grounds for affirming the judgment.[3]

The Court should reject any such attempt. First, this Court has never applied *Price Waterhouse*-burden shifting to statutory claims other than Title VII employment discrimination claims. There is no good reason to extend *Price Waterhouse*'s approach to § 1981 claims. The Court in *Gross* refused to extend *Price*

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[3] ESN's brief opposing the certiorari petition included hints that ESN may be preparing to invoke *Price Waterhouse*. ESN argued that review was unwarranted because, in light of the availability of *Price Waterhouse* burden shifting, "[a]t the pleading stage, it is entirely unclear whether there is any meaningful difference between a 'motivating factor' standard and a 'but-for' standard." Opp. Br. 34. Of course, the Ninth Circuit's decision is not so limited. The court held that its more lenient causation standard applies throughout a § 1981 proceeding, not simply at the pleadings stage.

Waterhouse-burden shifting to claims arising under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, concluding that those burden-shifting rules were too "difficult to apply" and might not be "doctrinally sound." *Gross*, 557 U.S. at 178-79. Indeed, *Price Waterhouse*'s burden-shifting rules no longer even apply to Title VII claims; Congress amended Title VII in 1991 to establish entirely new standards.

Second, even if *Price Waterhouse*-burden shifting could be applied appropriately in some § 1981 cases, this is not one of them. Under that decision, the burden of proof does not shift to the defendant in a mixed-motive discrimination case unless the plaintiff first produces evidence that an illegitimate factor played a *substantial role* in the adverse action. *Price Waterhouse*, 490 U.S. at 275 (O'Connor, J., concurring in the judgment); *id.* at 259 (White, J., concurring in the judgment).[4] The required evidence is much more than a simple showing that the plaintiff was qualified for the position applied for. If such evidence sufficed to shift the burden of proof, then virtually every case could be tried as a mixed-motive case—a result that Justice O'Connor's opinion emphatically rejected.

At the pleadings stage, *Price Waterhouse* means that to avoid dismissal of a mixed-motive claim, the plaintiff must allege facts creating a plausible inference that racial discrimination played a direct and substantial role in the challenged decision. None of the

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[4] *Price Waterhouse* was a fractured decision in which no one opinion was supported by the majority of the justices. Later decisions have generally viewed the opinions of Justices O'Connor and White as establishing the decision's burden-shifting holding.

factual allegations in ESN's SAC comes close to meeting that standard. The allegations suggest at most that ESN was, by some measure, "worthy" of being offered a carriage contract and that Comcast over the years changed its explanations to ESN about what would be required of ESN to obtain a contract. None of those allegations has a racial component, and they certainly do not rise to the level of factual allegations that race discrimination played a "substantial role" in the decision not to offer a carriage contract to ESN. ESN alleges that Comcast was motivated by racial discrimination, but bare claims of discrimination unsupported by substantial factual allegations are insufficient to render the claims sufficiently plausible to proceed under a *Price Waterhouse* burden-shifting theory.

ARGUMENT

I. A CAUSE OF ACTION UNDER 42 U.S.C. § 1981 REQUIRES PROOF OF BUT-FOR CAUSATION

Section 1981, initially adopted as part of the Civil Rights Act of 1866, 14 Stat. 27, states:

> **Statement of equal rights.** All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains,

> penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a).[5]

The Court has described § 1981 as "a broad and undifferentiated statute" that imposes "a broad, general bar[ ] on discrimination." *Nassar*, 570 U.S. at 356, 355. As enacted, § 1981 was silent on the manner in which individuals could enforce that bar; indeed, the statute did not even expressly create a private right of action for aggrieved individuals.[6] In particular, § 1981 does not expressly address what causation standard applies to claims that racial discrimination has impaired a plaintiff's contracting rights.

Under those circumstances, the Court holds, the

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[5] Section 1981 was initially enacted as part of Section 1 of the Act. Section 1 included what are now codified as 42 U.S.C. § 1981 (which encompasses the right to make and enforce contracts) and 42 U.S.C. § 1982 (which encompasses the sale and rental of property). Given the common pedigree of the two statutes, the Court has recognized that case law addressing § 1982—including *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968)—is highly relevant to a proper understanding of § 1981. *See Runyon v. McCrary*, 427 U.S. 160, 168-69 (1976).

[6] Not until *Runyon*, decided more than a century after the statute's enactment, did the Court hold that § 1981 created an implied private right of action and prohibited not only state-sponsored restrictions on contracting rights but also racial discrimination in the making of private contracts. Congress later codified *Runyon*'s holding by enacting 42 U.S.C. § 1981(c), which states that "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

"default" causation standard applies: the plaintiff must "show 'that the harm would not have occurred' in the absence of—that is, but for—the defendant's conduct." *Nassar*, 570 U.S. at 346-47 (citing Restatement of Torts § 431, Comment *a* (negligence)). That common-law requirement was recognized as fully in the 19th century—when Congress adopted § 1981—as it is today. *See, e.g.,* Oliver Wendell Holmes, *The Common Law* 160 (1881); Jeremiah Smith, *Legal Cause of Actions of Tort*, 25 Harv. L. Rev. 103, 109 (1911).

Congress is "presumed to have incorporated" the but-for causation standard into a statute "absent an indication to the contrary in the statute itself." *Nassar*, 570 U.S. at 347. Because § 1981's "general" anti-discrimination language does not expressly address the standard of causation, the default rule requires § 1981 plaintiffs to show that the defendant's racial discrimination is the but-for cause of their injuries.

A. The Ruling Below Conflicts with the Statute's Text and History

The Ninth Circuit did not dispute that the "default" causation standard in anti-discrimination statutes is but-for causation. But it declined to apply that standard to § 1981 claims because it discerned in § 1981's text "an indication" that Congress intended a more lenient causation standard: a plaintiff can prevail by "demonstrat[ing] that discriminatory intent was *a factor*" in the defendant's refusal to contract. Pet. App. 21a (emphasis added). The court's interpretation of § 1981 is contrary to both its text and its legislative history.

The appeals court focused its interpretation on one phrase in § 1981: the statute's extension to all persons of "'the same right' to contract 'as is enjoyed by white citizens.'" *Id.* at 20a. The court read that language as mandating a relaxed causation standard, reasoning:

> If discriminatory intent plays *any* role in a defendant's decision not to contract with a plaintiff, even if it is merely one factor and not the sole cause of the decision, then that plaintiff has not enjoyed the *same right* as a white citizen.

Id. at 21a (emphasis added).

But that reasoning, which draws no support from any of this Court's decisions,[7] begs the question: what were the existing rights "enjoyed by white citizens" that § 1981 was extending to "all persons," including newly freed slaves? There is no evidence that the common law in 1866 extended to whites the right

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[7] The appeals court cited only one decision in support of its interpretation of § 1981's causation standard: *Brown v. J. Kaz, Inc*, 581 F.3d 175 (3d Cir. 2009). But the appeals court misread *Brown*, which held unequivocally that but-for causation is the proper causation standard in § 1981 cases. *See* 581 F.3d at 182 n.5 (stating that if "the same decision would have been made regardless of the plaintiff's race, then the plaintiff has, in effect, enjoyed 'the same right' as similarly situated persons"); *id.* at 183 (the defendant is entitled to summary judgment on a § 1981 claim "if it prove[s] 'that if [race] had not been part of the process, its [termination] decision concerning [Brown's contract] would nonetheless have been the same" (quoting *Price Waterhouse*, 490 U.S. at 279 (O'Connor, J., concurring in the judgment))).

to prevail on a contract-interference claim without demonstrating but-for causation. In the absence of such evidence, § 1981's "same right" language provides no textual support for the Ninth Circuit's conclusion that Congress intended to adopt a more lenient causation standard for § 1981.

This Court has interpreted the rights "enjoyed by white people" that § 1981 extended to "all persons" as including protection against racial discrimination by private citizens in making contracts. *Runyon v. McCrary*, 427 U.S. at 173; *Santa Fe Trail*, 427 U.S. at 286-87. Congress viewed the rights protected by the Civil Rights Act of 1866, including "the right to make contracts," as "the great fundamental rights"; the Act was intended to "affirmatively secure [those fundamental rights] for all men, whatever their race or color." *Jones*, 392 U.S. at 432 & n.52 (1968) (quoting Cong. Globe, 39th Cong., 1st Sess. at 474 (statement of Sen. Trumbull)). The Act's unstated assumption was that, under pre-existing law, white citizens were entitled to enjoy those fundamental rights on a nondiscriminatory basis. By extending those rights to "all persons," § 1981 barred race-based contracting discrimination against blacks as well as whites. *Santa Fe Trail*, 427 U.S. at 286-87.

The legislative history includes no comparable discussion suggesting that whites were entitled under the common law to recover damages for denial of their "great fundamental rights" based on a causation standard less stringent than but-for causation. In the absence of such evidence, § 1981's "same right" language cannot plausibly be interpreted as congressional abandonment of a but-for causation

standard.

Another textual clue that Congress did not intend to alter the default causation standard is § 1981's exclusive focus on the rights of persons to engage in enumerated conduct and its failure to mention litigants' motivations (such as intent to discriminate on the basis of race). Section 1981 protects the rights of "all persons" (including newly freed black slaves) "to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." *See also Jones,* 392 U.S. at 439 ("Congress ... reache[d] beyond state action to regulate *the conduct* of private individuals.") (emphasis added). Had Congress contemplated adopting a motivating-factor causation standard, one would reasonably expect the statute to have said something about the motivations of those who decline to contract with a § 1981 plaintiff; doing so would assist reviewing courts in determining the level of discriminatory motivation necessary to establish a statutory violation. But by saying nothing about discriminatory motives and instead focusing on the activities that persons are entitled to engage in on a nondiscriminatory basis, Congress signaled that its principal concern was protecting those activities from actual interference. That focus on preventing interference suggests a but-for causation standard; § 1981 liability is triggered only if the plaintiff proves that the defendant would have agreed to a contract but for racial discrimination.

The appeals court placed great weight on the absence of the phrase "because of" in § 1981. Pet. App.

20a-21a. The Ninth Circuit noted accurately that this Court has equated "because of" with but-for causation. *See, e.g., Gross*, 557 U.S. at 176 ("[T]he ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age is that age was the 'reason' that the employer decided to act."). The appeals court sought to distinguish *Nassar* and *Gross* because the anti-discrimination statutes at issue in those cases, unlike § 1981, include the phrase "because of" and therefore "explicitly suggest but-for causation." Pet. App. 20a. That approach reverses the proper textual analysis—but-for causation is the default rule that applies unless a federal statute includes language affirmatively indicating that Congress intended to apply a different causation standard. The omission of specific words from § 1981 cannot supply the requisite affirmative indication.

On the contrary, the Court has discerned a but-for causation requirement in many federal statutes that lack the phrase "because of." *See Burrage*, 571 U.S. at 213-14. Among the many statutory phrases that the Court has cited as evidence that Congress adopted a but-for causation standard are "based on," "by reason of," "obtained as a result of," and "results from." *Id.* And in none of the cases cited by *Burrage* did the court suggest that the absence of one of those phrases gives rise to an inference that Congress has abandoned the "default" requirement of but-for causation.

Moreover, in describing the scope of §§ 1981 and 1982, the Court has repeatedly used the phrase "because of" or other phrases that the Court has associated with but-for causation. *See, e.g., Jones*, 392

U.S. at 421 ("So long as a Negro citizen who wants to buy or rent a home can be turned away simply *because* he is not white, he cannot be said to enjoy 'the *same* right ... as is enjoyed by white citizens ... to ... purchase (and) lease ... real and personal property.'") (quoting 42 U.S.C. § 1982) (first emphasis added); *Runyon*, 427 U.S. at 172 ("§ 1981 affords a federal remedy against discrimination in private employment *on the basis of* race." (quoting *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975)) (emphasis added)); *id.* at 170-71 ("[A] Negro's § 1 right to 'make and enforce contracts' is violated if a private offeror refuses to extend to a Negro, solely *because* he is a Negro, the same opportunity to enter into contracts as he extends to white offerees.") (emphasis added); *St. Francis College v. Al-Kahzraji*, 481 U.S. 604, 613 (1987) ("Based on the history of § 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely *because of* their ancestry or ethnic characteristics.") (emphasis added).

B. The 1991 Amendments to the Statute Confirm that Congress Imposed a But-For Causation Requirement

The history surrounding enactment of the Civil Rights Act of 1991 considerably strengthens the argument that § 1981's causation standard is but-for causation.

Congress adopted the 1991 Act "in large part [as] a response to a series of decisions of this Court interpreting the Civil Rights Acts of 1866 and 1964."

Landgraf v. USI Film Products, 511 U.S. 244, 250 (1994). Of particular relevance here are two of those decisions: *Price Waterhouse* and *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

Price Waterhouse addressed the causation standard for mixed-motive cases arising under Title VII of the Civil Rights Act of 1964. Although no opinion had the support of a majority of the justices, they *unanimously* agreed that an employer is not liable under Title VII, even if it was motivated in part by an illegitimate factor (such as race or sex), "if it can prove that even if it had not taken [the illegitimate factor] into account, it would have come to the same decision regarding a particular person." *Price Waterhouse*, 490 U.S. at 242 (plurality); *id.* at 259-60 (White, J., concurring in the judgment); *id.* at 261 (O'Connor, J., concurring in the judgment); *id.* at 282 (Kennedy, J., dissenting) (expressing his disagreement with the plurality's burden-shifting framework but noting that the plurality's "theory of Title VII liability ... essentially incorporates the but-for standard").

Patterson addressed the scope of the § 1981 right "to make and enforce contracts." The Court held that the right to "make" contracts "extends only to the formation of a contract, and not to problems that may arise later from the conditions of continuing employment"—such as on-the-job racial harassment experienced by an employee. *Patterson*, 491 U.S. at 176, 178.

In response to *Patterson*, the 1991 Act amended § 1981 to broaden what constitutes the "mak[ing]" of a contract so as to encompass conduct that occurs after

the formation of a contract, such as on-the-job racial harassment. *See* 42 U.S.C. § 1981(b). In response to *Price Waterhouse*, the 1991 Act amended Title VII to relax the causation standard for demonstrating an "unlawful employment practice." Under Title VII as amended, a practice is unlawful if "race, color, religion, sex, or national origin was a motivating factor for [the] employment practice, even if other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). After that amendment, employers could no longer avoid liability under Title VII by demonstrating that they would have arrived at the same personnel decision even if race, color, etc. had not been a "motivating factor." Notably, however, the 1991 Act did not add to § 1981 any provision similar to § 2000e-2(m).

This sequence of events is strong evidence that Congress did not intend to alter the "default" rule for § 1981 claims—that such claims require the plaintiff to establish but-for causation. *Price Waterhouse*'s unanimous holding made plain that but-for causation requirements apply to claims arising under federal anti-discrimination statutes. The plaintiff does not prevail unless the finder of fact determines that the defendant would not have undertaken its challenged personnel decision but for its discriminatory motive. As noted above, Congress altered that causation standard with respect to Title VII claims. One can reasonably infer that the 1991 Act's failure to add a similar measure to § 1981—even as Congress was broadly revising other portions of § 1981 and despite its awareness of *Price Waterhouse*—is a strong indication that Congress did not wish to relax the pleading standard for § 1981 claims.

Gross concluded that Congress's decision to add § 2000e-2(m) to Title VII as part of the Civil Rights Act of 1991, while adding no similar provision to the ADEA, was strong evidence that Congress determined that *Price Waterhouse* burden shifting should not apply to ADEA claims. 557 U.S. at 174-75. The Court explained:

> We cannot ignore Congress's decision to amend Title VII's relevant provisions but not make similar changes to the ADEA. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally. … Furthermore, as the Court has explained, "negative implications raised by disparate provisions are strongest" when the provisions were "considered simultaneously when the language raising the implication was inserted."

Ibid (quoting *Lindh v. Murphy*, 521 U.S. 320, 330 (1997)). *Gross*'s reasons for finding significant the 1991 Act's failure to add a provision similar § 2000e-2(m) to the ADEA apply at least as strongly to the 1991 Act's failure to add such a provision to § 1981.[8]

In its brief opposing the certiorari petition, ESN cited *CBOCS West, Inc. v. Humphries*, 553 U.S. 442

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[8] *Nassar* is similar. It held that the 1991 Act's failure to amend Title VII's anti-retaliation provision by adding a provision similar to § 2000e-2(m) was evidence that Congress did not intend § 2000e-2(m)'s relaxed causation standard to apply to Title VII retaliation claims. 570 U.S. at 353-54.

(2008), in support of its argument that the Court should decline to attach any significance to the Civil Rights Act of 1991's failure to add a provision similar to § 2000e-2(m) to § 1981. Opp. Br. at 28. *CBOCS* is inapposite; at issue there was whether to attach significance to the 1991 Act's failure to add an express anti-retaliation provision to § 1981. The Court concluded that the most likely reason that Congress did not add such a provision to § 1981 was a well-founded belief (based on Court decisions interpreting 42 U.S.C. § 1982) that § 1981 already barred retaliation against those who assert rights under the statute. 553 U.S.C. at 454 (citing *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969)). Thus, there was no basis for concluding that the failure to amend § 1981 indicated that Congress did not wish to authorize retaliation claims under § 1981.

The facts here are far different. Congress had no reason to conclude in 1991 that § 1981's causation standard was anything other than but-for causation, the standard universally recognized under the common law. Indeed, after the Court decided *Price Waterhouse* in 1989, Congress was well aware that plaintiffs would not prevail under federal anti-discrimination statutes if the defendant could show that its challenged decision was unaffected by any unlawful discrimination that may have infected the decision-making process. Armed with that knowledge, Congress in 1991 chose to change the Title VII causation standard by adopting § 2000e-2(m), but it chose to make no similar change to the § 1981 causation standard—even as it adopted other major amendments to § 1981. *CBOCS* does not speak to this very different situation.

C. Lessening § 1981's Causation Standard Will Likely Incentivize the Filing of Frivolous Claims

Nassar cautioned that relaxing causation standards for federal anti-discrimination statutes would likely "contribute to the filing of frivolous claims." 570 U.S. at 358. The Court added, "Even if the employer could escape judgment after trial, the lessened causation standard would make it far more difficult to dismiss dubious claims" in advance of trial. *Ibid.*

Similar policy concerns suggest that the relaxed § 1981 causation standard adopted by the Ninth Circuit—a standard unparalleled under federal law—is unwarranted and unworkable. If the Court upholds the Ninth Circuit's "a factor" causation standard, it will become very difficult for defendants to win dismissal of even the most frivolous § 1981 claims at the pleading stage.

Adopting a more lenient causation standard will make it far easier for a § 1981 plaintiff to state a plausible claim for relief under Rule 8. Under causation standards adopted by other federal appeals courts, the plaintiff must allege facts sufficient to state a plausible claim that racial discrimination was the but-for cause of the defendant's decision not to enter into a contract. But under the Ninth Circuit's causation standard, the plaintiff's burden is considerably lighter; he need only allege facts sufficient to state a plausible claim that racial discrimination was merely *a factor* in the defendant's decision. Under that undemanding standard, a virtually limitless

variety of factual allegations would likely suffice to state a plausible claim—thereby forcing deep-pocketed defendants such as Comcast either to bear substantial litigation costs or to agree to settle even insubstantial claims.

Moreover, the Ninth Circuit does not specify how significant racial considerations must be before they qualify as "a factor" in the decision-making process. One might suppose that evidence of a stray, racially-insensitive remark by an official not directly involved in the contract decision-making process would not qualify; but once the but-for causation standard is jettisoned, it becomes very difficult to draw a line between lawful and unlawful conduct. Such uncertainty leads to lengthy and expensive court proceedings.

The Court has held that a criminal statute that imposes a mandatory minimum sentence for unlawfully distributing a controlled substance, where death "results from the use of such substance," requires proof of but-for causation. *Burrage*, 571 U.S. at 218-19. The Court rejected federal government arguments that the statute should apply whenever the distributed drug "contributed materially" to a user's death, declaring that "the Government's proposal ... cannot be reconciled with sound policy." *Id.* at 216. Among the policy reasons cited by the Court for rejecting a "contributed materially" causation standard was its inherent uncertainty, an uncertainty inconsistent "with the need to express criminal laws in terms ordinary people can comprehend." *Id.* at 218. The Court noted that the government attorney at oral argument

> [C]ould not specify how important or how substantial a cause must be to qualify [as having contributed materially to death]. Presumably, the lower courts would be left to guess. ... Is it sufficient that use of a drug made the victim's death 50 percent more likely? Fifteen percent? Five? Who knows.

Ibid. The Ninth Circuit's "a factor" causation standard creates similar uncertainty and ought to be rejected on that ground.

Finally, the Court should not overlook the highly fanciful nature of ESN's claims. ESN alleges a grand conspiracy against a small subset of minority-owned businesses (those in which 100% of the owners are African Americans); the alleged conspirators include the NAACP, the National Urban League, the National Action Network, and Al Sharpton. The Second Amended Complaint provides very few factual allegations to support its alarming legal claims. If complaints of this nature, filed by serial litigators, can survive past the pleading stage and force large corporations to spend millions of dollars to defend themselves, resources will be diverted from addressing the serious racial issues that persist in our Nation. As Judge Harvey Wilkinson explained in a recent Fourth Circuit case:

> Promiscuous accusations of racial prejudice, as exemplified by this complaint, are diminishing the perceived gravity of those unfortunate situations where racial discrimination must be

> confronted and still does occur. Careless racial accusations carry a distinctive sting and visit an especial hurt that serves only to estrange and separate: Americans will eschew racial interactions that carry a risk of accusation when no unlawful animus is afoot. Allowing complaints such as this to go forward trivializes, sadly, the imperishable values our civil rights laws embody.

Woods v. City of Greensboro, 855 F.3d 639, 655-56 (4th Cir. 2017) (Wilkinson, J., dissenting).

II. *PRICE WATERHOUSE*-BURDEN SHIFTING IS INAPPLICABLE TO RESPONDENTS' CLAIMS

A. The Court Has Declined to Apply *Price Waterhouse*-Burden Shifting Outside the Title VII Context in Which It Arose

As shown above, imposing liability under 42 U.S.C. § 1981 requires a finding that the defendant's racial discrimination was the but-for cause of the plaintiff's injury. The Ninth Circuit's decision should be reversed because the court departed from that legal standard.

ESN may, however, seek affirmance on alternative grounds by invoking *Price Waterhouse*-burden shifting. *See supra* at 9 n.3. ESN may argue that even if but-for causation is the causation standard in § 1981 cases, a plaintiff meets its burden of persuasion by demonstrating that race was "a factor"

in a defendant's decision not to contract with the plaintiff. At that point, ESN may argue, the burden of persuasion shifts to the defendant to show that it would not have offered a contract even if race had not been a factor, and a § 1981 plaintiff should prevail if the defendant fails to meet that burden. ESN may argue that the Second Amended Complaint should not have been dismissed under such a burden-shifting regime because it included factual allegations sufficient to make plausible its claims that race was "a factor" in Comcast's decision-making.

The Court need not address *Price Waterhouse*-burden shifting, given that the issue was neither briefed nor addressed in the courts below. If it does address the issue, WLF urges the Court to hold that the burden-shifting regime outlined in *Price Waterhouse* should not be expanded to cover statutory claims other than Title VII claims.

Price Waterhouse addressed the allocation of burden of proof in mixed-motive Title VII cases; that is, cases in which numerous factors contributed to the defendant's employment decision and only some of those factors related to unlawful discrimination (in *Price Waterhouse*, gender discrimination). Although no opinion was joined by a majority of the justices, six justices agreed that once the plaintiff introduces sufficient evidence that gender was a "motivating factor" in an employment decision, the burden of persuasion shifts to the Title VII defendant to show that it would have made the same decision absent consideration of the plaintiff's gender. *Price Waterhouse*, 490 U.S. at 242 (plurality); *id*. at 259-60 (White, J., concurring in the judgment); *id*. at 261

(O'Connor, J., concurring in the judgment).

Price Waterhouse's continued relevance to anti-discrimination statutes is open to serious question. Its burden shifting rules became inapplicable to Title VII claims after Congress adopted the Civil Rights Act of 1991, which changed the Title VII causation standard by adopting 42 U.S.C. § 2000e-2(m). And the Court has never held that *Price Waterhouse*-burden shifting applies to anti-discrimination statutes other than Title VII. Indeed, the Court has repeatedly cautioned that courts "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008).

At issue in *Gross* was whether the burden of persuasion ever shifts to the party defending an alleged mixed-motive claim under the Age Discrimination in Employment Act. The Court held that it does not. *Gross*, 557 U.S. at 173.

The Court cited several reasons for rejecting the petitioner's argument that *Price Waterhouse*'s burden-shifting regime should be incorporated into the ADEA. The Court suggested that *Price Waterhouse* may not have been "doctrinally sound" because burden shifting lacked a textual basis; it stated that "it is far from clear that the Court would have the same approach were it to consider the question today in the first instance." *Id.* at 178-79. The Court also criticized *Price Waterhouse* as being "difficult to apply":

> Whatever the deficiencies of *Price Waterhouse* in retrospect, it has become

> evident in the years since that case was decided that its burden-shifting framework is difficult to apply. For example, in cases tried to a jury, courts have found it particularly difficult to craft an instruction to explain its burden-shifting framework. ... Thus, even if *Price Waterhouse* was doctrinally sound, the problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims.

Gross, 557 U.S. at 179.

For the reasons articulated in *Gross*, the Court should decline to extend *Price Waterhouse*-burden shifting to § 1981 claims. Nothing in the statutory text suggests that a § 1981 plaintiff should ever be relieved of the burden of proving each element of its claim. And there is no reason to believe that burden shifting would be any less difficult to explain to juries in § 1981 cases than it is in ADEA cases.

B. Burden Shifting Is Never Appropriate When, as Here, the Complaint Includes No Factual Allegations Constituting Substantial Evidence of Racial Discrimination

Even if *Price Waterhouse* burden-shifting might be appropriate in some § 1981 cases, this is not one of them. Under that decision, the burden of proof does not shift to the defendant in a mixed-motive discrimination case unless the plaintiff first produces

evidence that an illegitimate factor played a *substantial role* in the adverse action. *Price Waterhouse*, 490 U.S. at 275 (O'Connor, J., concurring in the judgment); *id*. at 259 (White, J., concurring in the judgment). At the pleadings stage, *Price Waterhouse* means that in order to avoid dismissal of a mixed-motive claim, the plaintiff must allege facts creating a plausible inference that racial discrimination played a direct and substantial role in the challenged decision. The Second Amended Complaint contains no factual allegations meeting that standard.

The Ninth Circuit's opinion lists the factual allegations it found most relevant to ESN's § 1981 claim. Pet. App. 3a. None of those allegations suggest that Comcast ever even focused on ESN's status as a minority-owned business; accepting the allegations as true, they are insufficient to state a plausible claim that race played a *substantial* role in Comcast's decision not to offer a carriage contract to ESN. The allegations may have sufficed to state a plausible claim under the Ninth Circuit's novel "a factor" standard, but Justice O'Connor's controlling opinion in *Price Waterhouse* demands more of plaintiffs before they are permitted to invoke burden shifting in a mixed-motive case. To accept ESN's allegations as sufficient would turn every § 1981 claim into a mixed-motive case—a result that Justice O'Connor's opinion emphatically rejected. *Price Waterhouse*, 490 U.S. at 275-77 (O'Connor, J., concurring in the judgment).[9]

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[9] The Ninth Circuit said that the "most important[ ]" of ESN's factual allegations was "Comcast's decisions to offer

The federal appeals courts have widely recognized that shifting the burden to a defendant in a mixed-motive discrimination claim is never appropriate in the absence of a showing that unlawful discrimination played a *substantial* role in the defendant's decision-making. *See, e.g., Anderson v. Wachovia Mortgage Corp*., 621 F.3d 261, 269 (3d Cir. 2010) (the evidence of discrimination "must be so revealing of discriminatory animus that it is unnecessary to rely on the *McDonnell Douglas* burden-shifting framework"); *Chaib v. Geo Group, Inc.*, 819 F.3d 337, 342 (7th Cir. 2016); *Raskin v. Wyatt Co.*, 125 F.3d 55, 61 (2d Cir. 1997) ("To warrant a mixed motive burden shift, the plaintiff must be able to produce a smoking gun or at least a thick cloud of smoke to support his allegations of discriminatory treatment.").

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carriage contracts to 'lesser-known, white-owned' networks" while failing to offer a contract to ESN. That allegation does not give rise to an inference that race played a sufficiently "substantial" role in Comcast's decision-making to bring *Price Waterhouse* burden shifting into play. At most, the "more qualified" allegation might help support a "*prima facie* case" claim under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). But as the Ninth Circuit acknowledged, the Second Amended Complaint does not include *factual* allegations to support ESN's claim that it was better qualified than white-owned networks that obtained contracts. The Court ruled that any comparison of ESN and the white-owned companies "is inappropriate in a 12(b)(6) motion." Pet. App. 3a n.1. That ruling conflicts with *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), which held that when (as here) a complaint alleges facts that admit of an "obvious alternative explanation" for the defendant's conduct, the complaint should be dismissed as implausible in the absence of *factual* allegations from which one can reasonably infer that the plaintiff's explanation is more probable. 556 U.S. at 682-83. ESN failed to include the factual allegations required by *Iqbal*.

The district court provided ESN three opportunities to plead factual allegations sufficient to render plausible its race discrimination claims. ESN has failed to do so, even if one assumes that *Price Waterhouse* burden shifting applies to its § 1981 claim.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

Richard A. Samp
(Counsel of Record)
Marc B. Robertson
WASHINGTON LEGAL
FOUNDATION
2009 Mass. Ave., NW
Washington, DC 20036
(202) 588-0302
rsamp@wlf.org

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