No. 18-1171

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 FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND THE NATIONAL SCHOOL BOARDS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every

Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded

private cause of action that courts have long inferred from it—should be applied in a manner that is consistent with its terms and the background rules against which it was adopted. Section 1981 was intended to protect people who have been harmed *because of* discrimination. It should not be turned into a tool for plaintiffs who have not actually been harmed by discrimination (and who would have been treated the same way regardless of their race) to impose litigation burdens and settlement demands on businesses, local governments and school districts, and other contracting entities merely by alleging that race was *a* factor in the challenged decision.

The Ninth Circuit's decision in this case, however, would do just that. Under its "mixed-motive" standard, "[e]ven if racial animus was not the but-for cause of a defendant's refusal to contract, a plaintiff can still prevail if she demonstrates that discriminatory intent was *a* factor in that decision." Pet. App. 21a (emphasis added). Such a standard would invite tenuous allegations of discrimination and make it difficult to resolve cases on summary judgment, requiring fact-heavy trials into defendants' subjective mindsets. Defendants would have strong incentives to settle even meritless claims simply to avoid these litigation costs. Moreover, because plaintiffs in such trials would inevitably focus their evidence on whether their former co-workers or business partners harbored racist thoughts (rather than on objective qualifications for a position or contract), the standard would invite race-based divisions. As a practical matter, the prospect of such litigation would prevent employers from evenhandedly and fairly applying non-discriminatory workplace standards in circumstances when doing so

limitations that Congress adopted to go with it. Absent a concrete indication that Congress intended

ARGUMENT

I. ALL SIGNS POINT TO THE CONCLUSION THAT SECTION 1981 ADOPTS THE DEFAULT RULE OF BUT-FOR CAUSATION

A.

B. Nothing In The Text Or History Of

action that would allow individuals to enforce Section 1981's strictures against private parties. Indeed, such a cause of action was never codified in the statute, and was not definitively established until this Court inferred its existence nearly 90 years after Section 1981 was enacted. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975); *see also Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 720 (1989) (opinion of O'Connor, J.) (noting, in describing "the history surrounding the adoption of the Civil Rights Act of 1866," that "nowhere did the Act provide for an express damages remedy for violation of the provisions of § 1").

Instead, the enforcement mechanism Congress adopted to give Section 1981 effect was a federal criminal provision contained in the very next section of the 1866 Civil Rights Act. That express cause of action spoke more directly to the causation standard that must be met in order to establish liability than did the basic prohibition set forth in Section 1981. And the standard Congress employed in the express cause of action to enforce the "right[s] secured or protected by this act" was, unmistakably, a but-for causation standard. It applied to discrimination "*on account of*" a person's prior "condition of slavery" or "*by reason of*" a person's "color or race." Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27 (emphasis added).[2]

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[2] Section 2 of the 1866 Civil Rights Act stated that:

any person who, under color of any law . . . shall subject,
or cause to be subjected, any inhabitant of any Stathab23accausation sta.6(2 T1(4u(ha.4(tua[(

As this Court has recognized, those formulations—"on account of" and "by reason of"—are hallmarks of a but-for standard. *Nassar*, 570 U.S. at 350 (citation omitted).

The broader legal context also confirms that Congress intended a but-for standard. When Section 1981 was enacted, "but-for" causation was *the* bar that plaintiffs in American courts had to hurdle. *See* G. Edward White, *The Emergence and Doctrinal Development of Tort Law, 1870–1930*, 11 U. St. Thomas L.J. 463, 464-65 (2014).[3] An 1874 treatise on tort law, for example, explained that "one person cannot, in general, maintain an action against another, for doing an illegal or wrongful act, unless he has thereby suffered loss." 1 Francis Hilliard, *Law of Torts or Private Wrongs* 76 (4th ed. 1874). And to recover damages "for an injury occasioned by the conduct of another," a person "must show the relation of *cause and effect* . . . between the conduct complained of and the injury." *Id.* at 82 (emphasis

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than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor.

14 Stat. at 27.

[3] *See also, e.g.*, *Sowles v. Moore*, 26 A. 629, 629-30 (Vt. 1893); *Cleveland, Columbus, Cincinnati & Indianapolis Ry. Co. v. Wynant*, 34 N.E. 569, 574 (Ind. 1893); *Smith v. Sabine & E. Tex. Ry. Co.*, 13 S.W. 165, 166 (Tex. 1890); *Gould v. Chicago, Burlington & Quincy R.R. Co.*, 24 N.W. 227, 227-28 (Iowa 1885); *City of Rockford v. Russell*

added). Even then, but-for cause would not always be *sufficient*—the additional concept of proximate cause meant that "the damage must be the direct and immediate consequence of the act complained of"—but it would always be at least *necessary*. *Id.*

By contrast, the sort of "mixed-motive" liability that the Ninth Circuit imported into Section 1981 here was unheard of in 1866. Indeed, mixed-motive liability was not even conceptualized and adopted until the 20th Century. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *see also Nassar*, 570 U.S. at 348-49 (discussing

altered) (citation omitted). These "on the basis of" race and "solely because" of race formulations are interchangeable with a but-for causation standard. *See Nassar*, 570 U.S. at 350 (attributing same meaning to similar phrases).

At the very least, these decisions put Congress on notice that nothing in Section 1981 clearly evinced a departure from the default rule of but-for causation. If Congress nevertheless desired a mixed-motive standard in Section 1981, it could have amended the statute to adopt such a standard, just as Congress did with Title VII in the wake of this Court's decision in *Price Waterhouse*. Doing so would have been especially easy, moreover, since Congress amended Section 1981 at the same time (and in the same bill) as it was adding the express mixed-motive causation standard to Title VII. *See Pittman v. Oregon, Emp't Dep't*, 509 F.3d 1065, 1068 (9th Cir. 2007). Yet, Congress declined to adopt or suggest in any way a mixed-motive standard for Section 1981. Just as it did with similarly un-amended provisions in *Nassar* and *Gross*, this Court should give "effect to Congress' choice" *not* to amend Section 1981 in this fashion by preserving the default but-for standard. *Nassar*, 570 U.S. at 354 (quoting *Gross*, 557 U.S. at 177 n.3).

Declining to impose a mixed-motive standard that Congress did not see fit to add itself is especially appropriate here, moreover, because the underlying cause of action for Section 1981 at issue is an *inferred* one rather than an express one. This Court's precedents require courts to proceed with particular care when it comes to creating or expanding the contours of an inferred private right. *See Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011); *Stoneridge Inv. Partners, LLC v.*

Scientific-Atlanta, Inc., 552 U.S. 148, 165 (2008). Such a cause of action should hew as closely as possible to any express cause of action that Congress established with respect to the same prohibitions—which in this case, as discussed above, involved a but-for standard. *See supra* at 7-9.

II. A MIXED-MOTIVE STANDARD FOR SECTION 1981 CLAIMS WOULD BE DIFFICULT TO ADMINISTER AND WOULD INTERFERE WITH EXPRESS CAUSES OF ACTION CONGRESS HAS ENACTED TO COMBAT DISCRIMINATION

As scholars have long recognized, the requirement of but-for causation "retains a secure position as a fundamental criterion of tort liability" because it is a "factual, policy-neutral inquiry." Richard W. Wright, *Causation in Tort Law*, 73 Cal. L. Rev. 1735, 1813 (1985). This requirement is familiar to courts, understandable for juries, and predictable for both potential plaintiffs and defendants—a combination that leads to fair resolution of individual cases and often helps businesses and individuals avoid the need for protracted litigation entirely.

Adopting a judge-made, mixed-motive standard, by contrast, would create uncertainty for businesses and other contracting parties, making litigation under Section 1981 more difficult to administer and predict. And it would have a spillover effect, throwing litigation under *other* statutes into disarray, by allowing plaintiffs to use Section 1981's general provisions to circumvent express limitations that Congress has adopted with respect to more carefully targeted provisions (like Title VII). This Court should not invite that sort of disruption and confusion

without exceedingly good cause—cause that is wholly lacking here.

A. A Mixed-Motive Standard For Section 1981 Would Disrupt Employment Discrimination Law

Although this particular case does not involve a claim of racial discrimination in employment, a significant portion of the cases brought under Section 1981 do. It is thus especially important to understand how a decision embracing the Ninth Circuit's mixed-motive standard here could seriously disrupt the tens of thousands of employment discrimination cases filed in federal court every year.

As the Court knows well, Congress addressed racial discrimination in private employment most directly in Title VII of the Civil Rights Act of 1964, which contains a finely reticulated set of rules specifically designed for such cases. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 366 (2011) (describing the "detailed remedial scheme" of Title VII). Some of those rules, such as the express limitation on Title VII's applicability to small

to reach conduct for which Congress expressly declined to provide relief in the analogous express causes of action under Title VII inevitably undermines, to at least some degree, a congressional choice about the proper scope of liability. *Cf. Janus Capital Grp.*, 564 U.S. at 142 (alteration in original) (noting that the "[c]oncerns with the judicial creation of a private cause of action caution against its expansion" (quoting *Stoneridge Inv. Partners*, 552 U.S. at 165); *supra* at 11-12.

Reading Section 1981 in a way that facilitates circumvention of Title VII would also disrupt the business of the federal courts. Title VII uses clear, readily administered rules about burden shifting, damages calculations, and the like to carefully balance the interests of employers and employees. Those rules have been refined through decades of interaction between Congress, the courts, and litigants (including the Equal Employment Opportunity Commission), and as a result their operation is well-understood and relatively predictable. Courts depend on them to process the high volume of employment discrimination cases filed every year in a timely and efficient manner. The Ninth Circuit's new mixed-motive standard for claims under Section 1981, however, would channel litigation away from the well-defined, express rules of Title VII into a murkier and less predictable world of judge-made standards under Section 1981.

Under the Ninth Circuit's rule, plaintiffs who could choose to sue under either the cause of action inferred from Section 1981 or the express cause of action under Title VII would almost invariably prefer the inferred cause of action under Section 1981. That is because, on the Ninth Circuit's interpretation,

Section 1981 allows plaintiffs to recover damages even if the defendant shows that it would have made the exact same decision if the plaintiff were white, whereas under Title VII damages are unavailable in that circumstance. *See Nassar*, 570 U.S. at 349 (discussing defendant's ability to avoid damages under Title VII where discrimination was not a but-for cause of challenged employment action); Pet. App. 21a (indicating lack of such a defense under Ninth Circuit rule for Section 1981). Even if a plaintiff *hopes* he would be able to show that discrimination was a but-for cause of the challenged employment decision and thus that recovery under Title VII is appropriate,

Under the Ninth Circuit's standard, that problem would be aggravated. Even if the company is confident that there is a race-neutral basis for the action, if the fired employee is a member of a racial minority group, he could bring suit arguing that the manager who fired him harbored racial animus and therefore that race was a factor in wanting to fire the employee, too. That would be a problem especially for large organizations with geographically dispersed operations, which rely on the enforcement of neutral written policies to prevent discrimination, but which cannot pervasively monitor their employees' consciences for evidence (either probative or exculpatory) about additional, discriminatory motives.

Or to take a more mundane example: consider a manager who is objectively bad at customer service or who routinely and flagrantly shirks his job duties. Leaving the manager in his job is bad for the company, the company's customers who receive lousy service, and a more junior employee who might otherwise get a promotion. But under the Ninth Circuit's standard, demoting or terminating such an employee could be even worse for the company if there is a risk the employee might allege racial animus, no matter how little basis there might be for the allegation and no matter how clear it is that the demotion or termination is objectively warranted.

To be sure, where racial animus *is* the basis for a decision, it should be identified and penalized. All have an interest in ridding the workplace of such discrimination. But creating a federal cause of action for employees who allege that race was just *a* factor carries with it real costs for employers and

workplaces alike. There is no indication that Congress wanted to impose those costs here.

In considering the financial and reputational costs of defending against an employment suit under the Ninth Circuit's watered-down standard, an employer might decide not to take any action against the employee even if it is confident it would ultimately prevail in any litigation. It is well established that employers can be overly reticent to act based on concerns about potential litigation costs, regardless of the existence of perfectly legitimate business reasons for taking employment actions. Commentators have warned against the "slippery slope" of liability and "the reality that, in the modern workplace, employers often act in prophylactic ways to avoid violating the law—taking measures not otherwise required by law in order to minimize their potential liability." Jessica K. Fink, *Protected By Association? The Supreme Court's Incomplete Approach To Defining The Scope Of The Third-Party Retaliation Doctrine*, 63 Hastings L.J. 521, 545 (2012).

Some employers also pay what amounts to a toll for taking necessary employment actions. Commentators have noted discrimination law's "*de facto* severance" system whereby employers pay employees who file even meritless EEOC charges to avoid the costs of defending against discrimination claims. David Sherwyn et al., *Assessing The Case For Employment Arbitration: A New Path For Empirical Research*, 57 Stan. L. Rev. 1557, 1579 (2005); *see also* Fink, *supra*, at 545 ("Even where the termination or demotion has nothing to do with the employee's gender or nationality or previous discrimination complaint, savvy employers know that it might cost them well into the six figures to defend against a Title

Title VII inapplicable to them. *See, e.g.*, 42 U.S.C. § 2000e(f). But Section 1981 covers contracting more generally. The Ninth Circuit's rule allowing mixed-motive claims under Section 1981 thus could encourage unsuccessful bidders to threaten costly and damaging litigation in an attempt to get their bids re-considered.

None of this is to say, of course, that individuals who are actually discriminated against because of their race should be without recourse: Such discrimination should, by all means, be rooted out and eliminated. And Section 1981 has played an important role in holding individuals accountable for such discrimination. But a mixed-motive standard sweeps much more broadly than that, including to situations where racism was not the cause of a challenged decision. Such a standard cannot help but distract from the most serious cases of racial discrimination by lowering the bar to the point that it will invite the filing of meritless claims.

C. This Case Underscores The Problems With A Mixed-Motive Standard For Section 1981 Claims

This case illustrates how the Ninth Circuit's mixed-motive standard would invite such problems. The district court dismissed respondents' claims three separate times for failure to adequately plead a violation of Section 1981, ultimately concluding that they had failed to allege facts plausibly indicating that Comcast's refusal to contract was "racially discriminatory" or done with anything other than "legitimate business reasons" in mind. *See* Pet. App. 6a. The Ninth Circuit reversed on the grounds that, although respondents' complaint itself had alleged "legitimate, race-neutral reasons for [Comcast's]

conduct," those "alternative explanations [were not] so compelling as to render Plaintiffs' theory of racial animus implausible." *Id.* at 4a. What was that theory? Essentially, that Comcast "engineered an industry-wide racist conspiracy with the federal government and the entire civil rights establishment—not against companies owned by African-Americans, but *only* against a made-up racial category of '100% African American-owned' companies." Pet. 22-23 (discussing complaint).

In the abstract, it is hard to believe that such allegations could be sufficient to move a case forward. But that case-specific determination was the natural outgrowth of a mixed-motive rule that puts a nearly impossible burden of disproof on entities accused of racial discrimination, even when the accusations (as here) are inherently implausible. Under that rule, an organization can be held liable for money damages—even where it can prove that the action complained of was taken for overwhelmingly race-neutral reasons—so long as the plaintiff can point to "a factor" that was thought to be infected by discriminatory intent. Pet. App. 21a. Even where the alleged discriminatory intent turns out to be illusory, the bare accusation alone can be enough, as it was in this case, to get past the motion-to-dismiss stage. In that event, the financial and reputational costs of litigation will often induce many defendants to settle even meritless claims.

The mixed-motive standard also makes it more difficult to resolve discrimination cases on summary judgment. To survive summary judgment under traditional but-for causation principles, a plaintiff must show that a jury could conclude that the employer would not have taken the action but for the

CONCLUSION

The Ninth Circuit's decision should be reversed.

Respectfully submitted,

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