No. 16–56479

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

COMCAST CORPORATION,

Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California
Case No. 2:15-cv-01239 | Hon. Terry J. Hatter

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REHEARING OR REHEARING EN BANC

Daryl Joseffer
Jonathan Urick
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
Telephone: (202) 463-5337

Gregory G. Garre
Charles S. Dameron
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
Telephone: (202) 637-2207
Facsimile: (202) 637-2201
gregory.garre@lw.com

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Counsel for Amicus Curiae *Chamber of Commerce of the United States of America*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the Chamber of Commerce of the United States of America states that it is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent company and has issued no stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation, representing approximately 300,000 direct members and an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing amicus briefs in cases involving issues of vital concern to the nation's business community. The Chamber often files amicus briefs in cases pending before the Supreme Court and courts of appeals, and has filed amicus briefs in cases directly relevant to the questions at issue in this case, including in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013), and *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Chamber's members are deeply committed to preventing workplace discrimination. They also rely on consistency, predictability, and fairness in the law governing employment and other contractual relationships. The panel decisions in *National Association of African-American Owned Media et al. v. Charter*

[1] No party's counsel authored any part of this brief, and no party or person other than *amicus*, its members, or its counsel made any monetary contribution intended to fund preparation or submission of this brief. All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2), (4)(E); 9th Cir. R. 29–2(a).

Communications, No. 17–55723, and *National Association of African-American Owned Media et al. v. Comcast Corporation*, No. 16–56479, prescribe a new and watered-down causation standard for Section 1981 claims that upsets existing law and exposes employers to potential liability even when the alleged discrimination did not actually result in the complained-of action. Rehearing is warranted.[2]

The panel decisions in these cases adopted a "mixed-motive" causation standard under which, "[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." *NAAAOM v. Charter Commc'ns.*, 908 F.3d 1190, 1199 (2018) ("*Charter*"). That standard contravenes the default rule established by the Supreme Court and rooted in longstanding tort principles: Except where Congress says otherwise, federal anti-discrimination statutes impose liability only where discrimination is the cause in fact (or but-for cause) of the plaintiff's injury. *See Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 570 U.S. 338, 347 (2013); *Gross v. FBL Fin. Servs. Inc.*, 557 U.S. 167, 178 (2009). The panel's decisions also bring this Circuit into direct conflict with five other circuits, which have held that Section 1981 requires but-for causation.

[2] Because the *Charter* and *Comcast* cases present the same issue, the Chamber is filing the same amicus brief in support of rehearing both cases.

The practical consequences of the panel's decisions only heighten the need for further review. The panel decisions threaten to undermine Congress's comprehensive statutory scheme for remedying employment discrimination in Title VII by turning Section 1981 into a more expansive vehicle for employment-discrimination claims involving race. As the panel decisions well illustrate, acceptance of a mixed-motive causation standard makes even frivolous Section 1981 claims nearly impossible to defeat before trial. The resulting burden of litigation costs and attendant settlement pressures on businesses is one that Congress did not intend, and that scarcely advances the objective of penalizing actual discrimination where it does exist. Under the panel's new standard, an employer may be held liable under Section 1981 even when the plaintiff fails to allege, much less prove, that race was the actual cause of the complained-of injury.

The petition for rehearing should be granted.

ARGUMENT

I. THE PANEL DECISIONS CONFLICT WITH THE DECISIONS OF THE SUPREME COURT AND FIVE OTHER CIRCUITS

A. The Supreme Court Has Made Clear That But-For Causation Is The Default Rule For Federal Anti-Discrimination Laws

The Supreme Court has held that, when Congress legislates, it does so according to certain "default rules it is presumed to have incorporated, absent an indication to the contrary in the statute itself." *Nassar*, 570 U.S. at 347. One of

those rules is the "background" principle of "[c]ausation in fact": the requirement that a plaintiff offer "proof that the defendant's conduct did in fact cause the plaintiff's injury." *Id.* at 346–47. Causation in fact, or "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); *see also* Note, *Rethinking Actual Causation in Tort Law*, 130 Harv. L. Rev. 2163, 2164 (2017) (describing "but-for" causation as the "standard definition of actual causation"). As the Supreme Court observed in *Nassar*, it is "textbook tort law that an action 'is not regarded as a cause of an event if the particular event would have occurred without it.'" 570 U.S. at 347 (quoting W. Keeton et al., Prosser and Keeton on Law of Torts 265 (5th ed. 1984)).

In *Nassar*, the Supreme Court vacated a decision of the Fifth Circuit holding that retaliation claims arising under Title VII require a showing only that retaliation was *a* motivating factor in the adverse employment action. The Court recognized that Congress, in 1991, had amended Title VII to provide that "an unlawful unemployment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors motivated the practice." 42 U.S.C. § 2000e–2(m); *see Nassar*, 570 U.S. at 352. But the Court emphasized that this amendment—expressly allowing for "mixed-motive" liability in Title VII status-

based discrimination cases—"says nothing about retaliation claims." 570 U.S. at 353. Accordingly, the Court held that the default principle of but-for causation applied to retaliation claims under Title VII. *Ibid.*

Nassar built on the Supreme Court's decision a few years earlier in *Gross v. FBL Financial Services, Inc.*, in which the Court held that the Age Discrimination in Employment Act of 1967 (ADEA) requires plaintiffs to prove that "age was the 'but-for' cause of the challenged employer decision." 557 U.S. at 178. Here again, the Court refused to assume that Congress intended a mixed-motive standard where "the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor." *Id.* at 174. The Court further noted that, although Congress had chosen to amend Title VII to allow certain mixed-motive claims in 1991, it did "not make similar changes to the ADEA." *Ibid.* "[W]hen Congress amends one statutory provision but not another," the Court explained, "it is presumed to have acted intentionally." *Ibid.*

In short, *Nassar* and *Gross* make clear that, absent a specific directive from Congress to the contrary, liability under federal anti-discrimination statutes is governed by the "default" rule of but-for causation.

B. Nothing In The Text Or History Of Section 1981 Evidences Any Intent To Depart From The Default But-For Causation Rule

The operative language of Section 1981 has not changed since its enactment in the Civil Rights Act of 1866. It sets out a basic statement of equal civil rights

among persons, recognizing, among other things, that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, . . . as is enjoyed by white citizens[.]" 42 U.S.C. § 1981(a). Unlike the 1991 amendment to Title VII, which expressly provides for mixed-motive liability in certain cases, *see* 42 U.S.C. § 2000e–2(m), the text of Section 1981 evinces no intent whatsoever to depart from the default rule. To the contrary, all signs indicate that Section 1981 plaintiffs must prove but-for causation.

First, by its terms, Section 1981 applies where a person who is not "white" has been deprived of the enjoyment of "the same right . . . to make and enforce contracts" that he would otherwise enjoy if he were "white." 42 U.S.C. § 1981(a). The Supreme Court has explained that the post-Civil War Congress enacted Section 1981 and its companion property-rights legislation, Section 1982, to ensure that the Thirteenth Amendment's "promise of freedom" to former slaves would include "the freedom to buy whatever a white man can buy, the right to live wherever a white man can live." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968). If the result would have been the same for a white person (*i.e.*, if race was not the but-for cause of a challenged action), a plaintiff has received "the same right" as a white person. *See Runyon v. McCrary*, 427 U.S. 160, 170–71 (1976) (Section 1981 provides a remedy where a business denies a person, "solely because [of his race], the same opportunity to enter into contracts as [it] extends to white offerees.").

Second, the historical context of the enactment of Section 1981 bolsters the conclusion that Congress intended the but-for causation standard to apply. At the time of the statute's enactment, "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, 464–465 (2014). Indeed, mixed-motive liability did not arise until a century later, when it appeared in the fractured decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and shortly afterwards was adopted by Congress in the Civil Rights Act of 1991 for certain Title VII claims. *See Nassar*, 570 U.S. at 348–49.

Third, Congress undertook in the Civil Rights Act of 1991 to amend Section 1981 so as to codify the Supreme Court's decision in *Runyon*. *See Pittman v. Oregon Emp't Dep't*, 509 F.3d 1065, 1068 (9th Cir. 2007). Yet even as Congress codified an express mixed-motive causation standard for certain Title VII claims in the 1991 legislation, it declined to do so with respect to Section 1981 claims, just as it declined to do so with respect to Title VII *retaliation* claims and age-discrimination claims under the ADEA. *See Nassar*, 570 U.S. at 354; *Gross*, 557 U.S. at 174. The Supreme Court's decisions in *Nassar* and *Gross* gave "effect to Congress' choice" in 1991, by holding that the mixed-motivate standard does not extend to Title VII retaliation claims or age-discrimination claims. *Nassar*, 570 U.S. at 354 (quoting

Gross, 557 U.S. at 177 n.3). The panel decisions in these cases upset that choice by imposing a mixed-motive standard for Section 1981 that Congress rejected.

C. The Panel Decisions Conflict With The Decisions Of Five Other Circuits

Every other circuit that has considered this issue has recognized that Section 1981 liability rests ultimately on but-for causation. The Seventh Circuit stated the prevailing rule succinctly: "Absent explicit statutory authorization . . . we cannot import the . . . 'motivating-factor' relief found in § 2000e–2(m) into entirely different statutes." *Smith v. Wilson*, 705 F.3d 674, 680 (7th Cir. 2013) (Wood, J.); *accord Aquino v. Honda of America, Inc.*, 158 F. App'x 667, 676 & n.5 (6th Cir. 2005); *Calloway v. Miller*, 147 F.3d 778, 781 (8th Cir. 1998).

Two other circuits have held that Section 1981 defendants are entitled to a mixed-motive *defense*: that is, a defendant who proves a *lack* of but-for causation is entitled to judgment. *See Brown v. J. Kaz, Inc.*, 581 F.3d 175, 182 n.5 (3d Cir. 2009) ("[The defendant] has a complete defense to liability if it would have made the same decision without consideration of [plaintiff's] race."); *Mabra v. United Food & Commercial Workers Union No. 1996*, 176 F.3d 1357 (11th Cir. 1999).

In reaching the opposite conclusion, the panel here pointed to "dicta" in the Third Circuit's pre-*Nassar* decision in *Brown v. J. Kaz, Inc.*, suggesting that a plaintiff could make a "prima facie" showing of Section 1981 liability where he showed that race played "any role" in a defendant's challenged action. *Charter*, 908

F.3d at 1199 (quoting *J. Kaz, Inc.*, 581 F.3d at 182 n.5). Significantly, the Third Circuit imported the burden-shifting framework of *Price Waterhouse* into Section 1981, under which a defendant may defeat a claim by showing that it would have taken the same action without any impermissible motivating factor. *J. Kaz,* 581 F.3d at 182 n.5. In relying on *J. Kaz*, the panel lost sight of the fact that the Third Circuit's rule ultimately bars the imposition of liability where a defendant shows that discrimination was not the but-for cause of the plaintiff's asserted injury. *Ibid.* The panel decisions in these cases recognize no such defense, and thus impose liability in circumstances where Title VII and other anti-discrimination statutes do not.

As the petitions for rehearing in *Charter* and *Comcast* explain in detail, the panel decisions make the Ninth Circuit a stark outlier on this issue.

II. THE PANEL DECISIONS WILL DISRUPT EMPLOYMENT LAW AND IMPOSE SUBSTANTIAL COSTS ON BUSINESSES

As if this were not bad enough, the consequences of the panel decisions will reach far across the field of employment litigation, upsetting decades of relatively stable case law and imposing considerable costs on businesses in the Ninth Circuit.

A. The Panel's Mixed-Motive Causation Standard For Section 1981 Will Disrupt Employment Discrimination Law

By watering down the causation standard for Section 1981 claims, the panel's decisions threaten to disrupt employment discrimination law more generally. Prior Ninth Circuit law had held that Section 1981 claims should be analyzed according

to "the same legal principles as those applicable in a Title VII disparate treatment case." *Metoyer v. Chassman*, 504 F.3d 919, 930 (9th Cir. 2007) (citing *Fonseca v. Sysco Food Servs. of Ariz., Inc.*, 374 F.3d 840, 850 (9th Cir. 2004)).

The panel's decisions here, however, undermine Title VII by making Section 1981 a more attractive channel for employment discrimination claims based on race: one that apparently recognizes *no* mixed-motive defense to damages liability. *See Charter*, 908 F.3d at 1199; *compare Nassar*, 570 U.S. at 349 (explaining that, under Title VII as amended by the 1991 Civil Rights Act, an "employer's proof that it would still have taken the same employment action [regardless of race] would save it from monetary damages").

In abrogating *Metoyer*, the panel decisions have paved the way for a steady migration of employment discrimination claims away from the highly detailed regime set out in Title VII—a regime that is the product of decades of interaction between Congress, the courts, and litigants—and towards a free-form, judicially crafted body of rules (yet to be developed) under Section 1981. This will undermine the predictability of employment law, not to mention the intent of Congress.

B. The Panel's Mixed-Motive Standard Will Impose Substantial Litigation Costs On Businesses

Changing the causation standard from "but-for" to "motivating factor" makes it significantly more difficult and costly for defendants to defend against discrimination claims. Employment decisions are inherently subjective in some

measure. So it will be relatively easy for a plaintiff to allege that discrimination was *a* motivating factor. Then the defendant effectively has the burden of proving a negative—that discrimination was not *a* factor. Proving a negative is always difficult and it will be especially difficult when allegations of mixed motives are swirling about. *See Elkins v. United States,* 364 U.S. 206, 218 (1960) ("[A]s a practical matter it is never easy to prove a negative. . . .").

As the panel's decisions in these cases illustrate, the new mixed-motive standard will put more pressure on the proper application of the pleading standard recognized in *Ashcroft v. Iqbal*, 556 U.S. 662, 677–80 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554–56 (2007), in deciding whether claims may pass the motion-to-dismiss stage. As the Court explained in *Iqbal* and *Twombly*, to survive a motion to dismiss, a complaint must present "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557) (some internal quotation marks omitted). Likewise, where there is an "obvious alternative explanation" for the defendant's conduct, the burden is on the plaintiff to provide "factual content to 'nudge' his claim of purposeful discrimination 'across the line from conceivable to plausible.'" *Id.* at 682–83 (quoting *Twombly*, 550 U.S. at 570). The application of these principles is

all the more important in mixed-motive cases where an action is supported by legitimate considerations but the allegation is that discrimination was afoot.

The *Comcast* and *Charter* cases prove the point. In *Comcast*, for example, the district court correctly dismissed the plaintiffs' claims three times. It concluded on the plaintiffs' third try that they had failed to allege facts plausibly indicating that Comcast's refusal to contract with plaintiff Entertainment Studios Networks was "racially discriminatory" or done with anything other than "legitimate business reasons" in mind. See *NAAAOM v. Comcast*, No. 2:15-cv-01239-TJH-MAN, Doc. 80, at 2 (C.D. Cal. Oct. 5, 2016). The panel reversed on the grounds that, although the complaint 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." *NAAAOM v. Comcast*, 743 F. App'x 106 (9th Cir. 2018). The *Charter* panel likewise held that plaintiffs' claims of racial discrimination could proceed, even though "it is plausible that Charter's conduct was attributable wholly to legitimate, race-neutral considerations," because "those alternative explanations are [not] so compelling as to render Plaintiffs' allegations of discriminatory intent *im*plausible." 908 F.3d at 1201.

As the rehearing petitions explain, these flawed holdings rest on a fundamental misunderstanding of the pleading standards recognized in *Twombly* and *Iqbal*. But they are also the natural outgrowths of a mixed-motive rule that puts a

nearly impossible burden of disproof on businesses accused of racial discrimination, even when the accusations (as here) border on frivolous. Under the panel's 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" thought to be infected by discriminatory intent. *Charter*, 908 F.3d at 1199. Even where the alleged discriminatory intent turns out to be illusory, the bare accusation can be enough, as in these cases, to get the claim 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 allegedly discriminatory purpose. By contrast, a plaintiff can defeat a motion for summary judgment under a mixed-motive causation standard simply by showing that there is a material issue of fact over whether the allegedly discriminatory purpose was *a* motivating factor—a much easier showing. The elimination of summary judgment as an effective tool for weeding out meritless claims will greatly increase the costs and burden of litigation, and force defendants to settle even baseless cases.

In *Nassar,* the Supreme Court anticipated just these sorts of problems in rejecting mixed-motive retaliation claims under Title VII, noting that "lessening the causation standard could . . . contribute to the filing of frivolous claims, . . . [and] would make it far more difficult to dismiss dubious claims at the summary judgment stage." *Nassar*, 570 U.S. at 358. That is especially so with respect to 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) of additional, discriminatory motives. The Court further explained that it "would be inconsistent with the structure and operation of Title VII to so raise the costs, both financial and reputational, on an employer whose actions were not in fact the result of any discriminatory or retaliatory intent." *Id.* at 358–59. The same goes for claims brought against businesses under Section 1981.

The added costs and burdens of the panel's new mixed-motive causation standard for Section 1981 provide additional reason to rehear these cases.

CONCLUSION

The petition for rehearing should be granted.

Respectfully submitted,

s/ Gregory G. Garre

Daryl Joseffer
Jonathan Urick
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
Telephone: (202) 463-5337

Gregory G. Garre
Charles S. Dameron
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
Telephone: (202) 637-2200
Facsimile: (202) 637-2201
gregory.garre@lw.com

December 13, 2018

Counsel for Amicus Curiae *Chamber of Commerce of the United States of America*

CERTIFICATE OF SERVICE

I, Gregory G. Garre, hereby certify that on December 13, 2018, I electronically filed the foregoing Brief of the Chamber of Commerce of the United States of America As *Amicus Curiae* In Support of Petition for Rehearing or Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

s/ Gregory G. Garre
Gregory G. Garre