CONTRACTING FREE FROM RACIAL ANIMUS: *COMCAST CORPORATION V. NATIONAL ASSOCIATION OF AFRICAN AMERICAN-OWNED MEDIA AND ENTERTAINMENT STUDIOS*

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INTRODUCTION

The United States has come a long way in promoting racial equality since the 1866 and 1964 Civil Rights Acts, but racial animus still plays an impermissible role in many contracting and employment decisions. *Comcast Corporation v. National Association of African American-Owned Media and Entertainment Studios* offers the Supreme Court the opportunity to decide which causal standard applies to claims alleging racial bias in contracting under 42 U.S.C. § 1981. Specifically, the Court will decide whether § 1981 requires a plaintiff to demonstrate that racial animus was the but-for cause or simply a motivating-factor in the defendant's refusal to contract. Section 1981, originally enacted under Section One of the Civil Rights Act of 1866, guarantees that all individuals have the "same right" to contract as white citizens.[1] While the Court has determined the applicable causal standards under similarly operating statutes, such as Title VII and the Age Discrimination in Employment Act (ADEA),[2] it has never squarely addressed the issue regarding § 1981 claims.[3]

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1. 42 U.S.C. § 1981(a) (2012).

2. For more information comparing Title VII and § 1981, *see infra* Part II.B.

3. *See* United States Court of Appeals for the Third Circuit, *Disparate Treatment – Mixed-Motive Claim*, INSTRUCTIONS FOR RACE DISCRIMINATION CLAIMS UNDER 42 U.S.C. § 1981 (May 2016), https://www.ca3.uscourts.gov/sites/ca3/files/6_Chap_6_2014_spring_with_July_update. (Last visited Jan. 29, 2020) [hereinafter Instructions for Race Discrimination Claims] (highlighting the lack of precedent on § 1981's causal burden making it unclear whether a mixed-

This Commentary argues that 42 U.S.C. § 1981 requires a motivating factor, rather than a but-for causal standard. A but-for causal standard presents an extremely high burden to plaintiffs, especially at the pleading stage where defendants often have sole access to potentially incriminating evidence. This causal burden impacts those who do not fall under Title VII's definition of "employee," and rely on § 1981 as their avenue for redress. By denying a remedy to such individuals when they confront discriminatory contracting practices, § 1981's promise of granting people of color the "same right" to contract as white individuals is unfulfilled. In contrast, a motivating-factor causal standard would make it easier for plaintiffs to bring successful § 1981 claims and vindicate their right to contract free of racial animus.[4] Accordingly, the Supreme Court should affirm the Ninth Circuit's holding and interpret § 1981 to require a motivating-factor standard.

I. FACTS

The National Association of African American-Owned Media and Entertainment Studios Networks, Inc. ("ESN"), Respondent in this case, is an African American-owned media company that owns, operates, and distributes seven television channels.[5] Starting in 2008, ESN engaged in conversations with Comcast Corporation ("Comcast"), Petitioner in this case, seeking carriage of their channels on Comcast's cable distribution platform.[6]

When ESN first offered Comcast its channels, Comcast declined, claiming that ESN needed support from Comcast's regional offices.[7] When ESN obtained support from the regional offices, Comcast declined again, this time requiring ESN to gain support from Comcast's division offices.[8] Upon traveling to these division offices, representatives informed ESN that their support was insignificant

motive claims are actionable).

4. Brief of Lawyers' Committee for Civil Rights Under Law and Twenty-One National Organizations as Amici Curiae In support of Respondents at 23, Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media, Inc., 2019 WL 3824689 (August 8, 2019) (No. 18-1171), *petition for cert filed,* (March 8, 2019) (No. 18-1171) [hereinafter Brief of Lawyers' Committee] ("Allowing litigants to prevail if race played *an* impermissible role in contractual decisions is the fairest way to address race discrimination in contracting.").

5. Brief for Respondents at 1, Comcast Corp. v. Nat'l Ass'n African American-Owned Media and Entm't Studios, Inc., 2019 WL 3824689 (Sept. 23, 2019) (No. 18-1171) [hereinafter Brief for Respondents].

6. *Id.* at 2.

7. *Id.* at 3.

8. *Id.* at 4.

because they "deferred to the decision of the corporate office."[9] Finally, Comcast denied ESN's channels a third time, citing insufficient bandwidth.[10] Despite these claims, Comcast has launched more than eighty white-owned networks since 2010, including lesser known and less successful channels than those owned by ESN.[11] As one Comcast executive allegedly said, they were not "trying to create any more Bob Johnsons."[12] In response, ESN filed suit against Comcast, alleging that racial animus fueled Comcast's refusal to carry their channels in violation of 42 U.S.C. § 1981. Their claim was based on the idea that ESN had not been given the "same right" to contract as white-owned media companies.[13]

ESN filed this action against Comcast and several other parties, claiming that they refused to carry ESN's channels because of their status as a one hundred percent African American-owned media company.[14] The original complaint alleged that Comcast and the other parties conspired to discriminate against one hundred percent African American-owned media companies in favor of networks with symbolic minority ownership,[15] who were granted carriage under Memoranda of Understanding (MOU).[16] ESN asserted that the MOU was a sham to "whitewash Comcast's discriminatory business practices."[17] Comcast and the other parties moved to dismiss the complaint under Federal Rule of Criminal Procedure 12(b)(6) for failure to state a claim under § 1981.[18] The district court granted the motion to dismiss.[19]

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9. *Id.*

10. *Id.*

11. *Id.* at 4–5.

12. *Id.* ("Bob Johnson is the African American founder of Black Entertainment Television ("BET"), a groundbreaking network").

13. *Id.* at 28–29

14. Brief for Petitioner at 7, Comcast Corp. v. Nat'l Ass'n of African American-Owned Media and Entm't Studios, Inc., 2019 WL 3824689 (Aug. 8, 2019) (No. 18–1171) [hereinafter Brief for Petitioner] (filing claims against former FCC Commissioner Meredith Atwell Baker, the NAACP, the National Urban League, the National Action Network, Al Sharpton, and Time Warner Cable).

15. Brief for Respondents, *supra* note 5 at 52–53 (claiming that the MOU networks were substantially white-owned with an African American "figure head" instead of truly being minority-owned).

16. Brief for Petitioner, *supra* note 14, at 7–8 (Under the MOU, Comcast collaborated with the NAACP and the Urban League to devise a plan which would provide minority-owned networks "avenues for seeking carriage from Comcast beyond those ordinarily available to others.").

17. Brief for Respondents, *supra* note 5, at 8.

18. *Id.* at 5.

19. *Id.*

ESN then filed its First Amended Complaint which alleged all of the previous claims except for conspiracy.[20] Comcast again filed a motion to dismiss for failure to state a claim, and again the district court granted the Motion.[21] The Second Amended Complaint, this time filed against Comcast alone, elaborated on Comcast's interactions with ESN and the white-owned channels that Comcast chose to carry.[22] For a third time, Comcast filed a motion to dismiss for failure to state a claim, and the district court granted the Motion.[23] ESN appealed the decision to the Ninth Circuit Court of Appeals.[24]

The Ninth Circuit reversed, holding that ESN stated sufficient facts from which the court could "plausibly infer that [ESN] experienced disparate treatment due to race."[25] Moreover, Comcast's band-width explanation was not "so compelling as to render Plaintiff's theory of racial animus implausible."[26] The Ninth Circuit subsequently denied Comcast's petition for a panel rehearing and a rehearing *en banc*.[27] The Supreme Court granted certiorari on June 10, 2019 to decide whether § 1981 claims require a motivating-factor or a but-for causal standard.[28]

II. LEGAL BACKGROUND

A. *42 U.S.C. § 1981 and the 1866 Civil Rights Act*

Title 42 of the United States Code § 1981(a) states that "[a]ll persons . . . shall have the same right . . . in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens."[29] A plaintiff may recover compensatory and punitive damages under § 1981.[30] Originally enacted as part of the Civil Rights Act of 1866, § 1981

20. *Id.* at 6.

21. *Id.* (holding that ESN failed to plead enough facts to make a plausible claim for relief in light of Comcast's legitimate business reasons for denial of carriage).

22. *See id.* at 10–12 (discussing Comcast's refusal to contract with ESN even though it contracted with white-owned channels and minority-owned media companies while excluding ESN as a 100% African-American owned media company).

23. *Id.* at 1 n. 1.

24. *Id.* at 2

25. Nat'l Ass'n of African American-Owned Media v. Comcast Corp., 743 Fed. App'x. 106, 107 (9th Cir. 2018), *cert. granted in part*, 139 S. Ct. 2693, 1089 (2019).

26. *Id.*

27. Nat'l Ass'n of African American-Owned Media v. Comcast Corp., 914 F.3d 1261 (9th Cir. 2019).

28. Comcast Corp. v. Nat'l Ass'n of African American-Owned Media, 139 S. Ct. 2693, 2693–94 (2019).

29. 42 U.S.C. § 1981(a) (2012).

30. 42 U.S.C. § 1981a(a)(1) (2012).

was designed to reinforce the Thirteenth Amendment and render the Black Codes unlawful.[31] The Black Codes were laws enacted to keep freed slaves in coercive labor agreements so that the Southern plantation economy could remain intact.[32] The Civil Rights Act of 1866 responded directly to the Black Codes, granting African Americans the same right as white individuals to contract, own, transfer, and inherit property, and to serve on juries.[33]

Since 1866, two significant adjustments have been made to § 1981. The first significant adjustment to the statute came in *Runyon v. McCrary*.[34] In *Runyon*, the Court created a private right of action in §1981 claims, holding that Virginia private schools violated § 1981 by refusing to admit African American students.[35] Consequently, plaintiffs may bring § 1981 claims against *both* private actors and the government.[36] The second significant adjustment occurred when Congress passed the Civil Rights Act of 1991, which defined "make and enforce contracts" as "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[37] Congress added this definition to § 1981 to override *Patterson v. McClean Credit Union*,[38] which held that discriminatory actions made after the completion of a contract were not subject to liability under § 1981.[39] Since the 1991 amendment, Congress has not made any substantial changes to the language of § 1981.

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31. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 427 (1968) ("For the same Congress that wanted to do away with the Black Codes *also* had before it an imposing body of evidence pointing to the mistreatment of Negroes by private individuals . . . .") (emphasis in original).

32. John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws",* 50 COLUM. L. REV. 131, 143 (1950) ("Under the pre-rebellion black codes, the free Negro's position differed little from that of slave, except that a freedman had the right to the fruits of his own labor.").

33. 42 U.S.C. §§ 1981, 1982, 1983 (2012).

34. 427 U.S. 160, 173–74 (1976).

35. *Id.* at 173 ("[T]his consistent interpretation of the law necessarily requires the conclusion that § 1981, like § 1982, reaches private conduct.").

36. *Id.*

37. 42 U.S.C. § 1981(b) (2012).

38. Fray v. Omaha World Herald Co., 960 F.2d 1370, 1373 (8th Cir. 1992) ("The Civil Rights Act of 1991 . . . amends § 1981 to overrule *Patterson.*").

39. Patterson v. McClean Credit Union, 491 U.S. 164, 171 (1989) (holding that § 1981 does not provide a remedy for discrimination when the conduct "occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations").

B. *Title VII and Mixed Motive Claims*

Plaintiffs bringing workplace discrimination suits, particularly claims regarding discriminatory hiring and contracting practices, often file claims under both Title VII and § 1981 because the two statutes work in tandem to help employees bring claims alleging workplace discrimination.[40] Title VII of the 1964 Civil Rights Act, now codified as 42 U.S.C. §2000(e), forbids employment discrimination "because of such individual's race, color, religion, sex, or national origin."[41] To bring a claim under Title VII, plaintiffs must follow a detailed procedure.[42] When a plaintiff believes she has encountered discriminatory hiring practices, she must first file a claim with the Equal Employment Opportunity Commission (EEOC), which then determines whether impermissible discrimination was a factor in the employment practice.[43] If the EEOC determines that impermissible discrimination has taken place, the employer is then given the opportunity to change their practices according to a timeline dictated by the EEOC report.[44] Only after the employer has failed to fix these discriminatory practices can the plaintiff file a claim in court.[45]

The difficult procedure that plaintiffs must follow to bring a Title VII claim is balanced by Title VII's recognition of mixed-motive claims with an accompanying burden-shifting framework.[46] In *Price Waterhouse v. Hopkins*, the court recognized mixed-motive claims under Title VII, holding that when an employee's status as a member of a protected class is a motivating factor in the employment decision, she has stated a proper claim under § 1981.[47] This motivating-factor

40. *See* Instructions for Race Discrimination Claims, *supra* note 2 ("The protections afforded by Section 1981 may in many cases overlap with those of Title VII. But the standards and protections of the two provisions are not identical.").

41. 42 U.S.C. § 2000e-2(a)(1) (1991).

42. *See* Brief For the Chamber of Commerce of the United States Amicus Curiae in Support of Petitioners at 10–11, Comcast Corp. v. Nat'l Ass'n of African Am. Owned Media, Inc., 2019 WL 3824689 (Aug. 8, 2019) (No. 18–1171), *petition for cert filed*, (Mar. 8, 2019) (referring to Section 1981's creation of an "express, finely reticulated private cause of action").

43. *Filing a Lawsuit in Federal Court*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Nov. 24, 2019), https://www.eeoc.gov/federal/fed_employees/lawsuit.cfm (last visited Jan. 21, 2020).

44. *See Overview of Federal Sector EEOC Complaint Process*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N) https://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm (last visited Jan. 21, 2020).

45. *See id.*

46. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 244–45 (1989) (If discriminatory intent "played a motivating part in an employment decision, the defendant may avoid finding of liability only by proving that it would have made the same decision even if it had not [taken gender into account].").

47. *See id.* ("[O]nce a plaintiff in a Title VII case shows that gender played a motivating part

standard then triggers a burden-shifting framework through which employers can defend themselves.[48] Once an employee shows by a preponderance of the evidence that her status as a member of a protected class was a factor in the employment decision, the burden then shifts to the employer to show "that it would have made the same decision even if it had not taken the plaintiff's [status] into account."[49] If an employer is successful in this showing, the court may prevent the employee from recovering any damages or limit the amount of damages the employee can seek.[50]

C. *The Interaction between Title VII and § 1981.*

For most employees, Title VII and § 1981 work in tandem as protections against discriminatory hiring practices.[51] For example, if an African-American doctor is not hired by a hospital because of his race, he can bring both a Title VII claim because he was denied equal employment, and also a § 1981 claim because he was denied the same opportunity to enter into an employment contract as a white doctor. Under Title VII, he must follow the EEOC procedure, but only needs to show that his race was a motivating factor in the hospital's decision not to hire him. Under § 1981, however, he must show that his race was the but-for cause of the hospital's refusal to hire him. Under this system, the African-American doctor has two legal claims to vindicate his right to employment free of racial animus.

Plaintiffs may only take advantage of Title VII, however, if they are "employees," defined as "individual[s] employed by an employer[.]"[52] To take another example, if instead of a doctor, the African-American man is the owner of a media company seeking to enter into an agreement with a cable company, he is not an "employee" and thus may not take advantage of Title VII. The only recourse he has is § 1981,

in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role.").

48. *See id.* at 249 ("[O]nce the plaintiff had shown that his constitutionally protected speech was a 'substantial' or 'motivating factor' in the adverse treatment of him by his employer, the employer was obligated to prove 'by a preponderance of the evidence that it would have reached the same decision as to [the plaintiff] even in the absence of the protected conduct.'") (quoting Mt. Healthy City Bd. Of Ed. v. Doyle, 429 U.S. 274, 287 (1977)).

49. *Id.* at 258.

50. *Id.* at 252 (holding that for an employer to mitigate liability the employer "must show that its legitimate reason, standing alone, would have induced it to make the same decision").

51. *See* Johnson v. Ry. Exp. Agency, Inc., 421 U.S. 454, 459 (1975) (holding that Title VII and § 1981 "augment each other, and are not mutually exclusive").

52. 42 U.S.C. § 2000(e) (2012).

where he must show that that racial animus was the but-for cause of the cable company's refusal to contract. Simply because this African-American man operates his own company, he is at a substantial disadvantage when seeking a remedy because he must satisfy a but-for causal standard instead of a motivating factor standard. Without Title VII's lower causal standard as a second avenue for redress, the African-American business owner will likely not be able to vindicate his right to contract free of racial animus.

III. HOLDING

The same day that the Ninth Circuit ruled on the present case, it also ruled on a different case, *National Association of African American-Owned Media and Entertainment Studios Inc. v. Charter Communications*.[53] ESN's allegations against Charter Communications ("Charter") were substantially similar to the allegations against Comcast.[54] Charter defended their choice not to carry ESN's channels as due to a lack of bandwidth.[55] In *Charter*, the Ninth Circuit ruled that mixed motive claims are cognizable under § 1981, holding that "[i]f discriminatory intent plays *any* role in a defendant's decision not to contract . . . then that plaintiff has not enjoyed the *same right* as a white citizen."[56] Therefore, "[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[.]"[57]

The Ninth Circuit applied the *Charter* holding to the case at issue, ruling that ESN stated a proper claim under § 1981 because it plausibly alleged that racial discrimination was "a factor" in Comcast's refusal to carry ESN's channels.[58] Even though Comcast had cited some race-neutral reasons for denying ESN's channels, such reasons were not so strong as to make ESN's "theory of racial animus implausible."[59] In light of the Ninth Circuit reading § 1981 to require a motivating-factor

53. Brief for Petitioner, *supra* note 14, at 13.

54. *See* Nat'l Ass'n of African American-Owned Media and Entm't Studios, Inc. v. Charter Commc'ns, 908 F.3d 1190, 1194–95 (9th Cir. 2018) (alleging that Charter refused to carry their channels because they are an African American-owned business, while Charter's business justifications include limited bandwidth).

55. *Id*.

56. *Id.* at 1199 (emphasis in original).

57. *Id.*

58. Nat'l Ass'n of African American-Owned Media v. Comcast Corp., 743 Fed. App'x. 106, 107 (9th Cir. 2018), *cert. granted in part*, 139 S. Ct. 2693 (2019).

59. *Id.*

causal standard, Comcast appealed the decision and the Supreme Court granted certiorari.[60]

IV. ARGUMENT

A. *Petitioner's Argument*

Before the Supreme Court, Comcast argues that ESN did not present a cognizable § 1981 claim because they could not show that ESN's status as a one hundred percent African-American-owned company was the but-for cause in Comcast's decision not to carry their channels.[61] First, Comcast argues that the plain language of § 1981 requires a but-for causal standard[62] because "a plaintiff who would not have been able to make a contract irrespective of his race has not been denied the same right [to contract]."[63] Put simply, Comcast would have refused to carry ESN's channels even if it were owned by a white man, instead an African-American man. Assuming that § 1981's language is ambiguous rather than plain, Comcast argues that under *University of Texas Southwestern Medical Center v. Nassar*,[64] but-for causation still must be applied to the statute. [65] In *Nassar*, the Court considered the proper causal standard for Title VII retaliation claims.[66] The Court recognized that when analyzing statutes based on tort law, including discrimination, but-for causation is the "default [rule] . . . absent an indication to the contrary in the statute itself."[67] Because there is no explicit causal language in § 1981, the default but-for causation rule applies.[68]

Second, Comcast argues that but-for causation must be the standard for § 1981 claims because it was "the *sine qua non* of tort liability when § 1981 was enacted in 1866."[69] When enacting the Civil

60. *See* Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media, 139 S. Ct. 2693, 2693–94 (2019).

61. Brief for Petitioner, *supra* note 14, at 40 ("The Ninth Circuit's erroneous conclusion that the Plaintiffs did not need to plead but-for causation has no basis in law.").

62. *Id.* at 20.

63. *Id.* at 19 (internal quotations omitted).

64. 570 U.S. 338 (2013).

65. *Id.* at 3 (citing Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 347 (2013)).

66. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 343 (2013) ("The question the Court must answer here is whether that lessened causation standard is applicable to claims of unlawful employer retaliation under § 2000e-3(a).").

67. *Id.* at 347.

68. Brief for Petitioner, *supra* note 14, at 23 (arguing that the but-for default rule must apply in this case because there is no express motivating factor causal language in § 1981).

69. *Id.*

Rights Act of 1866, Congress relied heavily on the common law, which required but-for causation as "one of the indispensable elements to establish legal causation."[70] The Court did not loosen this strict causal standard until 1981, when it recognized mixed-motive claims under Title VII in *Price Waterhouse v. Hopkins*.[71] Therefore, the enacting Congress could not have intended § 1981 to require a motivating-factor causal standard because it was not yet in the legal landscape.

Third, Comcast asserts that § 1981 requires but-for causation because Congress had the opportunity to specifically authorize mixed-motive claims under § 1981 in the Civil Rights Act of 1991 but chose not to do so.[72] In the Civil Rights Act of 1991, Congress codified *Price Waterhouse v. Hopkins*, recognizing a motivating-factor causal standard under Title VII.[73] Congress did not, however, change § 1981's causal standard while amending the statute to provide a definition for "make and enforce contracts.[74] By adding this definition to § 1981, Congress was clearly considering the scope and application of the statute and could have added a causal standard if it had wanted.[75] Congress's choice not to add a causal standard to § 1981 indicates that Congress consented to the but-for causation default rule.[76]

In light of Congress' inaction, the *expressio unius* canon further compels reading § 1981 as limiting the "motivating-factor standard only to those causes of Action to which Congress advertently made that standard pertinent and not to others."[77] The Court endorsed this reasoning in *Gross v. FBL Financial Services*, where it considered whether mixed-motive claims were cognizable under the ADEA.[78] Applying *expressio unius*, the Court held that but-for causation is proper under the ADEA because Congress specifically amended Title VII to require a motivating-factor causal standard, but declined to

70. Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 109 (1911).

71. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (holding that mixed motive claims are cognizable under Title VII).

72. Brief for Petitioner, *supra* note 14, at 28.

73. *Id.*

74. *Id.* at 28 ("Although the 1991 Act dispensed with but-for causation in limited respects for *some* antidiscrimination claims, it notably did *not* extend that new causation standard to Section 1981.") (emphasis in original).

75. *See id.* at 31 ("Congress's decision not to apply the motivating-factor standard to Section 1981 claims was hardly an accident.").

76. *See id.* (explaining that Congressional inaction demonstrates a decision to not extend mixed motive claims to § 1981 claims).

77. *Id.* at 17.

78. *See* Gross v. FBL Fin. Servs., 557 U.S. 167, 175 (2009) ("We cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA.").

make such changes to the ADEA in 1991.[79] Because Congress did not add a motivating-factor causal standard to the language of § 1981, just as it chose not to amend the ADEA, Congress must have intended § 1981 to require a but-for causal standard.

Furthermore, Petitioner argues that the Congressional inaction here is even weightier than in *Gross* because anything other than a but-for causal standard would "vitiate the carefully crafted regime that Congress enacted with respect to status-based discrimination under Title VII."[80] To bring a Title VII claim, plaintiffs must follow the specific EEOC procedures, and the remedies available are limited.[81] Under § 1981, plaintiffs are not required to follow the EEOC procedure and are also entitled to compensatory and punitive damages.[82] Therefore, if plaintiffs are allowed to bring mixed-motive claims under § 1981, there will be no reason for them to bring Title VII claims, as they could avoid its multi-step procedure.[83] Previously, the Court has sought to avoid this result because "[w]here conduct is covered by both § 1981 and Title VII, the detailed procedures of Title VII are rendered a dead letter."[84] Section 1981 should not be construed so as to nullify Congress's carefully created scheme under Title VII.[85]

Fourth, in cases where the Court has analyzed § 1981 claims, it has applied a but-for causal standard.[86] Private claims under § 1981 are a judicially implied right of action, requiring the "contours of the action . . . to be judicially delimited . . . unless Congress resolves the questions."[87] In previous § 1981 cases, the Court used language invoking but-for causation, such as "because of" the plaintiff's race, "solely because of the plaintiff's race," and "solely because of [his] race and color."[88] In using this language, the Court created a scheme in

79. *Id.* ("When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.").

80. Brief for Petitioner, *supra* note 14, at 32.

81. *See Remedies for Employment Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/employers/remedies.cfm (last visited Jan. 20, 2020).

82. Johnson v. Ry. Express Agency Inc., 421 U.S. 454, 460 (1975).

83. *See* Brief for Petitioner, *supra* note 14, at 33 ("Under the Ninth Circuit's decision, however, there would be no reason for a plaintiff to ever follow this carefully crafted regime when broader liability and more expansive remedies are available under Section 1981.").

84. *Id.* at 32–33 (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 181 (1989)).

85. *Id.* at 32, 33.

86. *See id.* at 39 ("This Court has consistently read Section 1981's judicially implied private right of action to require a showing that the challenged action was taken 'because of' the plaintiff's race.").

87. *See id*. at 34–35 (citing Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 749 (1975)).

88. *See id.* at 35–36 (citing Buchanan v. Warley, 245 U.S. 60, 60 (1917)); *see also* Jones v.

which plaintiffs bringing § 1981 claims against private actors must satisfy a but-for causal standard.[89] Through its decisions construing § 1981, the Court has shaped the "contours" the statute to require a but-for causal standard.

Lastly, Comcast asserts that although the Civil Rights Act of 1866 was a sweeping piece of legislation, § 1981 is just one narrow and limited piece of that legislation.[90] The contracts provision of the Civil Rights Act of 1866 was meant to specifically address the Black Codes in the South, which prohibited African-Americans from entering into voluntary contracts for hire.[91] Section 1981 was simply never meant to reach relationships like the one between Comcast and ESN; it was "designed to police discrimination that has [a] *dispositive* impact on the right to contract."[92] Rather than being a "cure-all" approach to any kind of alleged discrimination, § 1981 was aimed at ameliorating racism that impacted the end result, rather than the process, of a contract.[93] Section 1981, therefore, does not apply to ESN's claim because Comcast would have rejected ESN's channels regardless of ESN's ownership's race—racial discrimination did not have a "dispositive impact" on ESN's right to contract.[94]

B. *Respondent's Argument*

First, ESN emphasizes that the Court has already recognized a motivating-factor standard with an accompanying burden-shifting framework under § 1981.[95] In *Patterson v. McClean Credit Union,* the Court "expressly held that the burden shifting framework developed under Title VII [mixed-motive claims] applies to claims brought under

Alfred H. Mayer Co., 392 U.S. 409, 419 (1968); Runyon v. McCrary, 427 U.S. 160, 170–71 (1976); Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 605 (1987).

89. *See* Brief for Petitioner, *supra* note 14, at 35 (arguing that the Court has been using "because of" language when analyzing & § 1981 claims since *Warley*, 245 U.S. 60); *see also* Gross v. FBL Fin. Servs., 557 U.S. 167, 176, 177 (2009) (reasoning that "because of" means "by reason of" and the "the plaintiff retains the burden of persuasion to establish that age was the "but-for' cause of the employer's adverse action").

90. *See* Brief for Petitioner, *supra* note 14, at 21 (arguing that § 1981 is limited in nature).

91. *See* John P. Frank and Robert F. Munro, *The Original Understanding of Equal Protection Laws*, 50 COLUM. L. REV. 131, 144–45 (1950) (arguing that the Black Codes functioned to keep African-Americans dependent on and subordinate to white men).

92. Brief for Petitioner, *supra* note 14, at 21.

93. *See id.* (arguing that § 1981 does not provide relief except when racial discrimination has a "dispositive impact on the right to contract").

94. *Id.*

95. Brief for Respondents, *supra* note 5, at 18 ("This Court has already decided that burden shifting is appropriate under Section 1981 and there is no basis for overruling that precedent.").

[S]ection 1981."[96] Although Congress abrogated *Patterson*'s holding that post-contract racial harassment claims are not cognizable under § 1981, it did not touch the Court's holding recognizing a motivating-factor causal standard, triggering the burden-shifting framework.[97] Therefore, all that is required to seek relief under § 1981 is a showing that racial discrimination was a motivating factor in the refusal to contract.[98]

Moreover, s*tare decisis* directs the court to uphold this burden-shifting framework.[99] Because *stare decisis* allows for greater reliance on judicial decisions, provides notice to potential litigants, and promotes predictability, the Court "will not depart from . . . *stare decisis* without some compelling justification."[100] When construing statutory law, the Court applies a heightened *stare decisis* to curb legislating from the bench and unpredictable results.[101] Here, no compelling justification exists for the Court to cast aside its heightened *stare decisis* standard and overrule the burden-shifting framework.[102]

Second, the plain text of § 1981 compels a motivating-factor causal standard triggering a burden-shifting framework.[103] The critical language at issue is "same right"[104] and an African American plaintiff does not have the "same right" to contract "if race is used as a motivating factor for denying him . . . the ability to enter into a contract."[105] Both past and present dictionary definitions of "same" bolster this reading because each dictionary lists "identical" as one of the first definitions.[106] Under this definition of "same," ESN has not been afforded the same right to contract because it was denied carriage when Comcast accepted less successful white-owned networks.[107]

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96. 491 U.S. 164, 171 (1989).

97. *See* Brief for Respondents, *supra* note 5, at 13 (arguing that the 1991 Amendment "left the burden shifting holding of this decision untouched").

98. *See id.* at 18 (arguing that the Court adopted the burden-shifting framework in Patterson v. McLean Credit Union, 491 U.S. 164, 187 (1989)).

99. *Id.* at 24.

100. Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991).

101. *See* Brief for Respondents, *supra* note 5, at 13 ("[B]ecause *Patterson* involved interpretation of a statute, this court applies *stare decisis* with enhanced force.") (internal quotation omitted).

102. *Id.* at 26.

103. *See id.* at 28 (arguing that a motivating-factor standard is compelled by the text of § 1981).

104. *Id.* at 28–29.

105. *Id.* at 29.

106. *See id.* (citing *An American Dictionary of the English Language* (1964) and *Johnson's English Dictionary, as Improved by Todd* (1828)).

107. *Id.* at 4–5.

Furthermore, in contrast to Comcast's argument that § 1981 only guarantees that the outcome of the contracting decision be the same, ESN argues that the entire contracting process must be identical.[108] As mentioned by Comcast, in 1991 Congress amended § 1981 by defining "make and enforce" contracts to include the process of creating and revising a contract.[109] What Comcast ignored, however, is that by adding "making, performance, and modification" to the definition, Congress created a scheme that protects against racial discrimination in all stages of contracting, not just the result.[110] Therefore, if racial discrimination is a motivating factor at any stage of the contracting process, the plaintiff has a cognizable claim under § 1981.[111]

In addition, a but-for causal standard is inappropriate under § 1981 because the statute lacks "because of" causal language.[112] In *Gross*, the Court held that ADEA claims required a but-for causal standard because the statute included the words "because of" which require "that age discrimination be the reason that the employer decided to act"; "therefore, a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision."[113] The Court followed the *Gross* reasoning in *Nassar,* where the Court decided which causal standard applied to retaliation claims under Title VII.[114] Just as it found "because of" dispositive in *Gross*, the Court decided that the "because of" language in the retaliation provision in Title VII triggered a but-for causal standard. Most importantly, the *Nassar* Court contrasted Title VII's retaliation language with § 1981, which lacked "because of" in its text.[115] Without language triggering but-for causation, § 1981 imposed a "broad general bar" on discrimination rather than a strict but-for causal standard.[116] Absent such "because of" language, but-for

108. Brief for Respondents, *supra* note 5, at 30.

109. Brief for Petitioners, *supra* note 14, at 29–30.

110. *See* Brief for Respondents, *supra* note 5, at 36 ("Congress stated that it was responding 'to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.'") (quoting the Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(4), 105 Stat. 1071).

111. *See id.* at 39 ("It is beyond a stretch for Comcast to argue . . . that Congress in passing the 1991 Act intended for section 1981 plaintiffs to plead that racial discrimination was a but-for cause of the refusal to contract.").

112. *See id.* at 14 ("[T]his Court has required but-for causation for statues that use words such as 'because,' 'because of,' or 'based on.'").

113. Gross v. FBL Fin. Servs., 557 U.S. 167, 176, 178 (2009).

114. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 352 (2013).

115. *Id.* at 355–56.

116. Brief for Respondents, *supra* note 5, at 32.

causation is not triggered, and therefore not appropriate for § 1981 claims.

Third, ESN points to § 1981's legislative history to support the claim that the statute requires a motivating factor standard of causation.[117] Section 1981 was originally enacted under the Civil Rights Act of 1866[118] to enforce the Thirteenth Amendment and prohibit facially discriminatory laws in the post-Civil War South.[119] In contrast to Comcast's assertion that § 1981 was meant to be narrow in scope, Congress has repeatedly taken steps to broaden § 1981. When first drafting the statute, Congress specifically chose broad language.[120] A prior version of the statute used "on account of" instead of "same right" as the operative language.[121] Congress rejected the "on account of" language in favor of "same right" to broaden the scope of the statute.[122] Over one hundred years later Congress further broadened § 1981's scope by defining "make" to cover all aspects of the contract making and revising process.[123] The legislative history of § 1981 indicates Congress specifically crafted it to be broad, encompassing more than just claims that could satisfy the "but-for" causal standard.[124]

Finally, ESN rebuts Comcast's contention that tort law firmly established but-for causation when the Civil Rights Act of 1866 was enacted.[125] The cases Comcast cites to support their argument concern negligence claims.[126] Discrimination, in contrast, is an intentional tort. Consequently, the negligence cases describing but-for causation do not shed light on the legal background of discrimination law in 1866.[127] It

117. *Id.* at 34.

118. *Id.* at 35.

119. *See id.* at 44–45 (arguing that Congress enacted the Civil Rights Act of 1866 as a sweeping solution to the Black Codes).

120. *See id.* at 35 ("Critically, the phrase 'by reason of' does not appear in section 1 of the Civil Rights Act of 1866. This shows that Congress knew how to use language that connotes but-for causation, but made a deliberate choice to use broader language in defining the rights protected by section 1981.").

121. *Id.* at 36.

122. *Id.* at 35 ("Congress knew how to use language that connotes but-for causation but made a deliberate choice not to include that language in the final bill.").

123. *See* 42 U.S.C. § 1981(b) (defining "make and enforce" to include pre and post-contracting actions).

124. *See* Brief for Respondents, *supra* note 5, at 48 ("Given the broad remedial purpose of section 1981, a 'motivating factor' pleading standard with burden shifting is appropriate.").

125. *Id.* at 39.

126. *Id.* at 15.

127. *See id.* at 41 ("Comcast mistakenly relies on 19th century tort cases involving negligence, not intentional torts . . . [t]here were no general rules on factual causation in intentional torts in the mid-19th century.").

was not until later in the nineteenth century that tort causation standards started to formalize into but-for causation and proximate cause, and intentional torts started to move away from strict liability.[128] Therefore, it is incorrect to state that but-for cause was the *sine qua non* of all tort law in 1866.

V. ANALYSIS

The Supreme Court should hold that ESN has asserted a valid § 1981 claim because it has properly alleged that racial animus was a motivating factor in Comcast's refusal to carry ESN's channels. The first two arguments recognize the changing face of racism in the United States and the difficulties that even sophisticated and well-funded plaintiffs, like ESN, have in satisfying a but-for casual standard. First, the way in which racial animus appears in hiring and contracting has changed greatly since Congress enacted § 1981 in 1866, and therefore, the standard of causation should reflect those changes. Second, ESN is not covered under Title VII because it is not an employee – but rather a business – analogous to a business owner or an independent contractor. Because ESN may not take advantage of Title VII's lower causal standard, it must meet the almost impossible but-for causal standard before proceeding to discovery, making it likely that it will be left without meaningful remedy. The second two arguments address concerns that a motivating factor standard will open the litigation floodgates to frivolous claims and will impose greater costs on companies who face litigation under § 1981. First, the concern about frivolous claims is unwarranted because pleadings standards still act as the gatekeepers to litigation. Second, a motivating-factor test will not impose greater costs on employers because they should already be used to a motivating-factor causal standard under Title VII discriminatory hiring claims.

A. *The Changing Face of Racism and Barriers to Meeting a But-for Causal Standard.*

First, racial discrimination today no longer looks like it did in 1866, and the causal standard for proving racial discrimination in contracting should reflect this change. When the Civil Rights Act of 1866 was passed, racial animus was overt, normalized, and outwardly violent.[129]

128. *See id.* at 42.

129. *See generally* Frank and Monroe, *supra* note 91 (describing the racial animus present during Civil Rights Act of 1866).

Today, racism no longer looks like the Black Codes, but rather is more covert. Getting at discriminatory intent and not just disparate impact is even harder as companies hire lawyers to help them avoid liability. The Court has even said that discriminatory intent is "one that is often not susceptible to direct proof[,]" but rather comes in the form of inferences from circumstantial evidence.[130] Furthermore, those who discriminate on the basis of race "may be sufficiently sophisticated or wary of litigation so as to not broadcast their intentions."[131]

Although a Comcast executive allegedly made a comment about not creating Bob Johnsons,[132] it is hard to believe that there is a smoking gun that revealed that the only reason Comcast refused to carry ESN's channels was because ESN is solely owned by African-Americans. Large companies like Comcast take steps and hire attorneys specifically to advise them on how to avoid liability and would lose business if they outwardly promoted racist practices.[133] Companies today take proactive steps to guard themselves against discrimination claims. Yet, news stories of racist hiring practices and other policies such as grooming and dress code continue to surface, revealing that racist policies persist even in the absence of smoking gun, overtly racist evidence. Rather, racial animus comes out in quick comments, "neutral" policies based on neatness, and subtle actions. Just because racial animus does not look like a legal structure of segregation does not mean it is harmless.

This issue becomes even weightier at the pleadings stage because "the facts necessary to prove these claims are largely in the control of the defendant."[134] Even though the procedural posture of this case is lengthy, the case has not made it to discovery phase.[135] Consequently, ESN has not been privy to documents, records, phone calls, and other evidence that would reveal whether Comcast refused to carry ESN's channels because of the racial makeup of its ownership. The only evidence ESN currently has is the statement an executive made about Bob Johnson and the fact that ESN's channels were denied while less

130. Washington v. Duty Free Shoppers, Ltd., 710 F. Supp. 1288, 1289 (N.D. Cal. 1988) (quoting Rogers v. Lodge, 458 U.S. 613, 618 (1982)).

131. Brief of Lawyers' Committee, *supra* note 4, at 24 ("[I]ndependent contractors would be particularly vulnerable to racial discrimination under a heightened evidentiary standard.").

132. *See* Brief for Respondents, *supra* note 5, at 4–5.

133. Brief of Lawyers' Committee, *supra* note 4, at 24.

134. *Id.* at 23.

135. *See* Brief for Petitioner, *supra* note 14, at 9 (noting that the case has not proceeded past the pleadings stage and has not advanced to discovery).

successful white-owned networks were carried. Any other evidence is in Comcast's control and out of ESN's reach. To say that ESN then must assert enough facts to show that racial animus was the but-for cause of Comcast's refusal to contract is an insurmountable hurdle. In fact, applying the but-for causal standard, the district court held three times that ESN did not assert enough facts to bring a valid § 1981 claim. Without access to any other evidence which would allow them to assert more facts, the but-for causal standard keeps ESN from access to any remedy.

ESN is not alone in this issue. Plaintiffs bringing § 1981 claims have "limited success at every level of the [litigation process]" and often lack access to counsel and other legal experts.[136] If a multi-million dollar company such as ESN cannot gain access to enough information to successfully meet the but-for causal standard, then the ordinary individual will certainly not be able to meet the but-for causal standard either. It is nearly impossible today for a victim of racial discrimination to satisfy the but-for causal standard at any stage of litigation—but especially at the pleadings stage. Although a but-for causal standard may have made sense in 1866 or even in 1991, it is simply not working today. If § 1981 is to fulfill its promise of guaranteeing people of color the same right to contract as white people, a but-for causal standard is inappropriate.

Second, § 1981 claims should require a motivating factor standard because § 1981 provides the only means of redress for those who do not qualify as "employees" under Title VII. Business owners, interns, and companies do not qualify for Title VII protections. In addition, the First, Third, Seventh, Eighth, and Tenth Circuits have also held that independent contractors are not covered by Title VII protections.[137] Therefore, § 1981 "serves as a vital safe harbor" for a significant section of the workforce who face racial discrimination in contracting but who do not fit into Title VII's definition of "employee".

Because ESN is not an employee, but a business, it cannot bring a claim under Title VII, and therefore § 1981 is the only avenue for ESN to vindicate its right to contract free of racial animus. Because of its status as a business, it must meet the almost impossible but-for causal

136. *See* Brief of Lawyers' Committee, *supra* note 4, at 26, 23.

137. *See* Alberty-Velez v. Corporacion de P.R. para la Difusion Publica, 361 F.3d 1 (1st Cir. 2004); Scott v. UPS Supply Chain Solutions, 523 Fed. App'x 911 (3d Cir. 2013); Ost v. West Suburban Travelers Limousine, 88 F.3d 435 (7th Cir. 1996); Wortham v. Am. Fam. Ins. Grp., 385 F.3d 1139 (8th Cir. 2004); Brackens v. Best Cabs, Inc., 146 Fed. App'x 242 (10th Cir. 2005).

standard in order to receive remedy for wrongful discrimination in contracting. While ESN is a multimillion-dollar company, most minority owned business are small mom-and-pop shops who are already vulnerable against larger corporations like Comcast.[138] Making these small business owners satisfy a but-for causal standard will prevent them from vindicating their right to contract free of racial animus. If they are not able to seek remedy, larger companies like Comcast will be able to continue to discriminate based on race without repercussion.

Not only will many businesses be without a remedy, but so will anyone who does not fall under the definition of "employee" under Title VII. One especially vulnerable group is independent contractors of color who look to § 1981 for their sole avenue of redress.[139] The number of independent contracting jobs in the United States is steadily increasing, and "African Americans, Hispanics, and . . . women of color are overrepresented in low-wage independent contractor jobs."[140] Subjecting these independent contractors of color to a but-for causal standard simply because they are not classified as "employees" seems patently unfair. For example, suppose there is an adjunct professor who is not classified as an employee and is not promoted to a full-time position based on his race. In order to seek redress he must bring a claim under § 1981 and satisfy a but-for causal burden. In contrast, a professor who is classified as an "employee" and is refused promotion due to his race can bring a claim under Title VII, and must only satisfy a motivating-factor causal standard. Both professors are victims of impermissible racial discrimination, yet only one must satisfy an almost impossible causal burden while the other has an opportunity for remedy, first through EEOC orders and then through the courts. The two professors should have to satisfy the same causal burden so that they can both vindicate their right to contract free of racial animus.

Therefore, instead of helping people of color and minority-owned businesses vindicate their right to contract, a but-for causal standard under § 1981 instead closes the door to a meaningful remedy when a person or company has been the victim of discriminatory contracting practices. ESN's inability to meet the but-for causal standard represents a whole group of people of color who cannot access remedy when they

138. Minority Bus. Dev. Ass'n, *U.S. Business Fact Sheets*, https://www.mbda.gov/page/us-business-fact-sheets (last visited Jan. 12, 2020).

139. *See* Brief of Lawyers' Committee, *supra* note 4, at 16.

140. *Id.* at 18.

are discriminated against simply because they are not classified as "employees." Both ESN and all other non-employees these other people should be held to the same standard as those who are eligible to bring claims under Title VII; they should be held to a motivating-factor causal standard.

B. *Frivolous Claims and Cost Concerns*

One concern that opponents of a motivating-factor standard have is that lowering the causal standard will open the litigation floodgates to frivolous §1981 claims. If these frivolous claims continue to discovery and beyond, companies like Comcast will have to spend exorbitant amounts of time, money, and energy to defend against false claims, whereas a but-for causal standard keeps these frivolous claims out in the first place. This concern, however, is overstated; pleading standards still function as an essential gatekeeper for litigation and keep frivolous claims out.

Under a motivating-factor standard, a plaintiff would still have to present allegations which "plausibly suggest"[141] that racial animus was a motivating factor in the contracting decision pursuant to Rule Eight of the Federal Rules of Civil Procedure.[142] A claim is plausible when there are enough facts "to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[143] Only such facts and not mere conclusory allegations are "entitled to be assumed true" when deciding whether a plaintiff has properly stated a claim.[144] Therefore, to continue past the pleading stage and go onto discovery, ESN would still have to present enough facts to state a "plausible" claim that racial animus was a motivating factor in Comcast's refusal to carry their channels. If ESN is unable to meet this burden, the case will be dismissed. It is true that ESN would have to assert fewer facts at the pleading stage under a motivating-factor than a but-for causal standard. But without discovery, ESN simply does not yet have concrete proof of racial discrimination. They only have circumstantial evidence based on disparate treatment. This lack of access to information at the pleading stage does not indicate weakness in ESN's assertions, but is simply a function of Comcast having sole control over the materials that would likely reveal express racial animus. Consequently, a motivating-factor

141. Bell Tel. Corp. v. Twombly, 550 U.S. 544, 557 (2007).
142. FED. R. CIV. P. 8.
143. *Twombly*, 550 U.S. at 556.
144. Ashcroft v. Iqbal, 556 U.S. 662, 681 (2009).

standard is not an open door to frivolous discrimination claims; it is merely a recognition that evidence of overt racial animus is difficult, if not impossible, to obtain prior to discovery.

A second concern regarding the motivating-factor standard is that this lower burden will impose significant costs on companies like Comcast who now must proceed to discovery and further defend themselves against discriminatory contracting claims. Again, this concern is overstated. Companies like Comcast are already familiar with motivating-factor causal standards in discrimination suits under Title VII. While Comcast's decisions not to carry networks do not fall under Title VII liability, all of its interactions with its employees do fall under Title VII. Therefore, each time Comcast hires, fires, promotes, or suspends an employee, or implements a new dress code or standard of conduct, Comcast is engaging in actions that Title VII addresses. Because Comcast engages in these actions daily, they know what is at stake when they impermissibly consider race when making contracting and employment decisions. They know how to litigate and defend themselves against a motivating-factor causal standard because they have been doing it in Title VII cases since the 1980s. Plainly, Comcast already knows how defend itself against discrimination claims that require a motivating-factor causal standard. A motivating-factor causal standard under § 1981 would just require Comcast to apply the same strategies it uses to avoid and defend itself against Title VII claims to claims brought by independent contractors and other companies. Because they already have the tools and experience to do this, they should not be subject to undue costs.

CONCLUSION

Under § 1981, ESN should be required to show that racial animus was a motivating-factor, not the but-for cause, of Contract's refusal to carry their channels. Holding plaintiffs like ESN to a but-for causal standard would impact minority businesses and employees, giving them the impossible task of proving that racial animus was the sole cause for refusal to contract before proceeding to discovery. Without access to important documents in the defendant's possession, these minority businesses and employees are left without remedy and unjustly denied access to the courts. Holding ESN to the high but-for causal standard would unjustly deny them access to the Court. This result is unjust and goes against § 1981's guarantee that people of color have the same right

to contract as white individuals.[145] Therefore, the Supreme Court should affirm the Ninth Circuit's ruling and hold that § 1981 requires a motivating factor, and not a but-for causal standard.

145. 42 U.S.C. § 1981(a) (2012).