No. 18-1171

In the Supreme Court of the United States

COMCAST CORPORATION, PETITIONER

v.

NATIONAL ASSOCIATION OF AFRICAN AMERICAN-OWNED MEDIA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether, to establish a claim of racial discrimination under 42 U.S.C. 1981(a), a plaintiff must prove that race was the but-for cause of the denial of the "right * * * to make and enforce contracts."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, and rule:

Statutes and rule—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

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INTEREST OF THE UNITED STATES

The question presented in this case is whether a plaintiff alleging racial discrimination in the making of a contract under 42 U.S.C. 1981 must establish that, but for the consideration of race, the defendant would have made the contract. The Court's construction of Section 1981 may have repercussions for other federal anti-discrimination laws that the United States enforces or that apply to the federal government. Indeed, the Court has pending before it this Term the question whether the federal-sector provision of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 633a(a), requires a plaintiff to prove that age was a but-for cause of the challenged personnel action. See *Babb* v. *Wilkie*, cert. granted, No. 18-882 (June 28, 2019). The United States

has participated as amicus curiae in other cases concerning the scope of Section 1981 where, as here, the Court's interpretation of Section 1981 could affect the interpretation of statutes that the United States enforces or that apply to the federal government. See, *e.g.*, *CBOCS W., Inc.* v. *Humphries*, 553 U.S. 442 (2008); *Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004); *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989); *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656 (1987).

STATEMENT

Respondent Entertainment Studios Networks, Inc. (Entertainment Studios) is an African-American-owned operator of television networks. Pet. App. 2a. It sought, and failed, to secure a carriage contract with petitioner, a cable-television company. *Ibid.* Entertainment Studios, together with respondent National Association of African American-Owned Media, alleges that petitioner violated 42 U.S.C. 1981 by refusing to contract with it. Pet. App. 2a. The district court granted petitioner's motion to dismiss, concluding that respondents had not plausibly pleaded that race, rather than legitimate business reasons, led to the refusal. *Id.* at 5a-7a. The court of appeals reversed, concluding that, under Section 1981, respondents needed to plead only that race was a factor in petitioner's decision, and that respondents had plausibly done so. *Id.* at 2a-4a.

1. Section 1981 is one the Nation's oldest civil rights laws. It provides the following "[s]tatement of equal rights":

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be

> parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. 1981(a) (emphasis omitted).

This Court has previously "traced the evolution of [Section 1981] and its companion, 42 U.S.C. § 1982." *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 383-384 (1982). The "operative language of both laws apparently originated in § 1 of the Civil Rights Act of 1866, 14 Stat. 27, enacted by Congress shortly after ratification of the Thirteenth Amendment." *Id.* at 384. "Following ratification of the Fourteenth Amendment, Congress passed what has come to be known as the Enforcement Act of 1870, 16 Stat. 140, pursuant to the power conferred by § 5 of the Amendment," and "Section 16 of that Act contains essentially the language that now appears in § 1981." *Id.* at 385. Section 1981(a) is ultimately "derived from § 1977 of the Revised Statutes of 1874, which in turn codified verbatim § 16 of the 1870 Act." *Ibid.*

From Section 1981(a)'s general statement of equal rights, this Court has inferred a cause of action for claims that private parties have engaged in intentional racial discrimination. It first inferred such a cause of action from the parallel language of 42 U.S.C. 1982, which gives "[a]ll citizens" the "same right * * * as is enjoyed by white citizens * * * to inherit, purchase, lease, sell, hold, and convey real and personal property." See *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 413-414 (1968) (injunctive relief); see also *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 238-240 (1969)

(damages). Later, the Court extended that reasoning to Section 1981, concluding that "[a]n individual who establishes a cause of action under § 1981 is entitled to both equitable and legal relief, including" damages. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975). The Court has, however, declined to infer Section 1981 causes of action against the federal government, see *Brown* v. *GSA*, 425 U.S. 820, 835 (1976), or against state actors covered by 42 U.S.C. 1983, see *Jett* v. *Dallas Indep. Sch. Dist.*, 491 U.S. 701, 735 (1989).

Since 1870, Congress has substantively amended Section 1981 on only one occasion, after this Court's decision in *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989). In *Patterson*, the Court "reaffirm[ed]" that Section 1981 "prohibits racial discrimination in the making and enforcement of private contracts." *Id.* at 172. But it also limited the scope of Section 1981's substantive protections, concluding that the statute did not apply to discriminatory conduct after a contract has already been formed—*i.e.*, "postformation conduct"—and instead applied only where the alleged discrimination relates to the "formation" or enforcement of a contract. *Id.* at 176-177.

As part of the Civil Rights Act of 1991 (1991 Act), Pub. L. No. 102-166, 105 Stat. 1071, Congress codified *Patterson*'s first holding and repudiated its second. See *Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369, 383 (2004) (characterizing the 1991 Act as "overturn[ing] *Patterson*"). The 1991 Act added subsections (b) and (c). 1991 Act § 101, 105 Stat. 1071-1072. Subsection (c) confirms that "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law." 42 U.S.C. 1981(c). Subsection (b), meanwhile, defines

the phrase "'make and enforce contracts'" to "include[] the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. 1981(b).

2. a. Respondent Entertainment Studios was founded by and is wholly owned by Byron Allen, "an African American actor/comedian/media entrepreneur." Pet. App. 40a. It operates seven television networks: Justice Central.TV, Comedy.TV, ES.TV, Pets.TV, Recipe.TV, MyDestination.TV, and Cars.TV. *Id.* at 42a-43a. Entertainment Studios relies on cable operators like petitioner to deliver its content to their subscribers. *Id.* at 2a, 10a. For more than a decade, Entertainment Studios attempted to secure a carriage contract with petitioner, but petitioner declined to carry its networks. *Id.* at 2a.

b. Entertainment Studios, together with respondent National Association of African American-Owned Media, sued petitioner (along with other cable distributors and a host of private and governmental defendants) under 42 U.S.C. 1981. See Pet. App. 113a. Respondents alleged that petitioner had discriminated "against 100% African American-owned media in contracting for channel carriage and advertising." *Id.* at 116a. They sought damages "in excess of $20 billion." *Id.* at 145a.

Petitioner moved to dismiss the complaint, and the district court granted the motion. Pet. App. 111a-112a. Respondents then amended their complaint, *id.* at 78a-108a, and petitioner again moved to dismiss, see *id.* at 74a. The district court granted the motion. *Id.* at 77a. It determined that respondents had not stated a claim under Federal Rule of Civil Procedure 12(b)(6) because

they had not plausibly alleged that racial discrimination, rather than legitimate business reasons, led to the denial of carriage. *Id.* at 76a. The court, however, granted respondents "leave to amend one last time." *Ibid.*

Respondents then filed a second amended complaint, which is the operative complaint here. Pet. App. 33a-73a. That complaint alleged that petitioner had provided several legitimate business reasons—bandwidth constraints, a preference for sports and news programming, and a lack of demand—for refusing to carry Entertainment Studios' networks, but that those reasons were misleading or pretextual. See *id.* at 48a-54a.

For the third time, petitioner moved to dismiss under Federal Rule of Civil Procedure 12(b)(6). Pet. App. 5a. The district court granted the motion, this time with prejudice. *Id.* at 7a. The court explained that the facts alleged "were ambiguous, and did not exclude the alternative explanation that [petitioner's] refusal to contract with [Entertainment Studios] was based on legitimate business reasons." *Id.* at 5a-6a. It further explained that "not one fact" added to the second amended complaint "is either antithetical to a decision not to contract with [Entertainment Studios] for legitimate business reasons or, in itself, indicates that the decision was racially discriminatory." *Id.* at 6a. As such, the court concluded that the complaint "stops short of the line between possibility and plausibility of entitlement to relief." *Ibid.* (quoting *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009)).

3. The court of appeals reversed. Pet. App. 1a-4a. In the decision below, the court incorporated its legal analysis in another decision issued by the same panel in a similar suit against a different cable operator, *National Ass'n of African American-Owned Media* v.

Charter Communications, Inc., No. 17-55723 (9th Cir. Feb. 4, 2019), petition for cert. pending, No. 18-1185 (filed Mar. 8, 2019). Pet. App. 2a; see *id.* at 8a-31a.

In *Charter*, the court of appeals considered what causation standard applies to Section 1981 claims. Pet. App. 15a-21a. The court recognized that two decisions of this Court involving other federal anti-discrimination statutes had instructed that but-for causation is the default standard. See *id.* at 16a-20a (citing *University of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338 (2013), and *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009)). Nevertheless, the court of appeals concluded that "the text of § 1981 * * * permits a departure from" that default. *Id.* at 20a. The court observed that Section 1981 "guarantees 'the same right' to contract 'as is enjoyed by white citizens.'" *Ibid.* (quoting 42 U.S.C. 1981(a)). And it reasoned that "[i]f discriminatory intent plays *any* role in a defendant's decision not to contract with a plaintiff, * * * then that plaintiff has not enjoyed the *same right* as a white citizen." *Id.* at 21a. The court thus concluded that a plaintiff can prevail "[e]ven if racial animus was not the but-for cause of a defendant's refusal to contract." *Ibid.*

In the decision below, the court of appeals reiterated that respondents "needed only to plausibly allege that discriminatory intent was a factor in [petitioner's] refusal to contract, and not necessarily the but-for cause of that decision." Pet. App. 2a. The court then determined that, under that standard, respondents' complaint included sufficient allegations from which the court could infer that Entertainment Studios had been treated differently because of the race of its owner. *Id.* at 3a. Although the court acknowledged that "legitimate, race-neutral reasons for [petitioner's] conduct

are contained within the" complaint, it did not believe that those allegations rendered implausible the claim that "discriminatory intent played at least some role in [petitioner's] refusal to contract with Entertainment Studios." *Id.* at 4a. The court thus concluded that respondents had stated a plausible claim under Section 1981. *Ibid.*

SUMMARY OF ARGUMENT

In the aftermath of the Civil War, Congress sought to protect certain civil rights of newly freed slaves by enacting 42 U.S.C. 1981. Section 1981 guarantees that all persons in 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). Although the statute does not expressly describe the necessary causal link between a plaintiff's race and a defendant's refusal to contract, the text is most naturally read to require but-for causation, and background common-law principles confirm that a but-for rule applies. The court of appeals erred in concluding otherwise. See Pet. App. 2a, 20a-21a.

A. In recent years, this Court has addressed similar questions about the appropriate causation standard under other federal anti-discrimination laws, including the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, and the retaliation provision of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000e *et seq.* See *University of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338 (2013); *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009). Under both statutes, the Court concluded that a plaintiff must prove that a protected trait or action was the but-for cause of an adverse employment decision. See *Nassar*, 570 U.S. at

362; *Gross*, 557 U.S. at 178. As the Court explained, federal anti-discrimination laws effectively authorize tort claims; "[c]ausation in fact * * * is a standard requirement of" such claims; and "an action 'is not regarded as a cause of an event if the particular event would have occurred without it.'" *Nassar*, 570 U.S. at 346-347 (citation omitted). Congress is therefore "presumed to have incorporated" the "default rule[]" of but-for causation. *Id.* at 347.

B. Nothing in Section 1981 evinces an intent to depart from that default. The text of Section 1981 guarantees that all persons have "the same right" to certain enumerated outcomes, including the right "to make * * * contracts." 42 U.S.C. 1981(a). Because "making" a contract means entering a contract, a person does not enjoy "the same right" guaranteed by Section 1981 if race prevents her from entering a contract that a similarly situated white person would have entered. And the inverse is also true: If a plaintiff and a defendant would not have entered a contract even if the plaintiff were white, then her rights under Section 1981 have not been infringed. That understanding of Section 1981's text is consistent with the default but-for rule. And it avoids the anachronistic result of applying a motivating-factor test that developed in federal law in the twentieth century to a statute enacted in the nineteenth.

Section 1981's structure, history, and purpose confirm that a but-for rule applies. Congress originally paired Section 1981 with a criminal enforcement provision that covers discrimination "on account of" or "by reason of" a person's race—classic formulations of but-for causation. See Civil Rights Act of 1866 (1866 Act), ch. 31, § 2, 14 Stat. 27; Enforcement Act of 1870 (1870 Act), ch. 114, § 17, 16 Stat. 144; see also *Gross*, 557 U.S.

at 176. And Congress could not have plausibly intended to apply a but-for standard to the legislation's key enforcement provision, while establishing a different standard for the declaratory language in Section 1981. Indeed, the provision that became Section 1981 originally included parallel but-for language, but it was removed during the legislative process as part of an effort to narrow the scope of the legislation. See *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 388 n.15 (1982). In narrowing the legislation, Congress did not silently adopt a lower causation standard. To the contrary, it took but-for causation as a given, as its core objective was to eliminate facially discriminatory laws, under which race is necessarily the but-for cause of a person's disparate treatment.

C. Nor can the court of appeals' decision be defended on alternate grounds. Respondents suggest, see Br. in Opp. 33-35, that the pleading standard under Section 1981 differs from the ultimate liability standard. But if a plaintiff must prove but-for causation at trial, then a plaintiff must also "adequately * * * *allege* th[at] requirement[]" in its complaint. *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 346 (2005).

Relatedly, other courts of appeals have adopted a burden-shifting framework, under which a plaintiff may make out a prima facie case of a Section 1981 violation by demonstrating that "race plays any role in a challenged decision by a defendant," at which point the defendant has the burden of persuasion to "prove[] that the same decision would have been made regardless of the plaintiff's race." *Brown* v. *J. Kaz, Inc.*, 581 F.3d 175, 183 n.5 (3d Cir. 2009). That framework—which courts have transplanted from the Title VII and Equal Protection Clause contexts—should not apply here.

This Court has cautioned that existing burden-shifting approaches should not be extended to different anti-discrimination schemes governed by their own statutory text. See *Nassar*, 570 U.S. at 362; *Gross*, 557 U.S. at 179 n.6. And neither the text of Section 1981 nor the relevant common-law principles support recasting an element of a plaintiff's claim as an affirmative defense. Because Section 1981 does not authorize a shift in the burden of persuasion, a plaintiff must plead and prove all elements of her claim, including but-for causation.

ARGUMENT

A SECTION 1981 PLAINTIFF MUST ESTABLISH BUT-FOR CAUSATION

Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts * * * as is enjoyed by white citizens." 42 U.S.C. 1981(a). As amended, the statute prohibits purposeful discrimination both by private entities and "under color of State law." 42 U.S.C. 1981(c); see *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 391 (1982). And although the statute does not expressly provide a private cause of action for damages, this Court has long determined that such actions are available. See, *e.g.*, *Runyon* v. *McCrary*, 427 U.S. 160, 168 (1976). The question here is the causation standard that a Section 1981 plaintiff must satisfy—that is, whether racial discrimination must be the "but-for" reason why the defendant refused to contract with the plaintiff, or need only be a factor in the defendant's decision.

A. But-For Causation Is The Default Rule For Federal Anti-Discrimination Laws

1. This Court recently considered similar questions concerning the causation standard under the ADEA and Title VII's retaliation provision. See *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009); *University of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338 (2013). In those decisions, the Court made clear that "[c]ausation in fact * * * is a standard requirement of any tort claim." *Nassar*, 570 U.S. at 346. And 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.'" *Id.* at 347 (citation omitted). Thus, when Congress creates a tort action, such as Section 1981, this Court presumes that it intended to incorporate that "default rule[], * * * absent an indication to the contrary in the statute itself." *Ibid.*

In *Gross*, the Court applied those principles to the ADEA, which makes it "unlawful for an employer * * * [to] discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1). The Court explained that "[t]he words 'because of' mean 'by reason of: on account of,'" suggesting that age must be the determinative factor for the adverse employment action. 557 U.S. at 176 (citation omitted). It buttressed that textual point by identifying the general common-law rule that "[a]n act or omission is not regarded as a cause of an event if the particular event would have occurred without it." *Id.* at 177 (quoting W. Keeton et al., *Prosser and Keeton on the Law of Torts* § 41, at 265 (5th ed. 1984)). The Court accordingly concluded that an ADEA plaintiff must prove "that age

was the 'but-for' cause of the challenged employer decision." *Id.* at 178.

In *Nassar*, the Court reached a similar conclusion with respect to Title VII retaliation claims under 42 U.S.C. 2000e-3(a), which makes it unlawful for an employer to discriminate against an employee "because he has opposed any [unlawful employment] practice" or participated in a Title VII investigation or proceeding. This time, the Court began with the principle that "[c]ausation in fact—*i.e.*, proof that the defendant's conduct did in fact cause the plaintiff's injury—is a standard requirement of any tort claim." *Nassar*, 570 U.S. at 346. It explained that, "[i]n the usual course, this standard requires the plaintiff to show 'that the harm would not have occurred' in the absence of—that is, but for—the defendant's conduct." *Id.* at 346-347 (quoting Restatement of Torts § 431 cmt. a, § 432(1) & cmt. a (1936)). The Court reasoned that but-for causation is therefore "the background against which Congress legislated in enacting Title VII, and these are the default rules it is presumed to have incorporated, absent an indication to the contrary in the statute itself." *Id.* at 347. Because Title VII's retaliation provision did not include a contrary indication, the Court determined that a plaintiff "must establish that his or her protected activity was a but-for cause" of an adverse employment action. *Id.* at 362; see *id.* at 352.

Both *Gross* and *Nassar* distinguished the Court's earlier decision in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), which dealt with the causation standard for Title VII discrimination claims. See *Gross*, 557 U.S. at 174-175; *Nassar*, 570 U.S. at 348-351. Title VII's discrimination provision, 42 U.S.C. 2000e-2(a)(1), makes it an "unlawful employment practice" for an employer to

refuse to hire, to discharge, "or otherwise to discriminate against any individual" with respect to the terms and conditions of employment, "because of such individual's race, color, religion, sex, or national origin." In *Price Waterhouse*, a plurality of the Court and two Justices concurring in the judgment concluded that if a Title VII plaintiff proves that her membership in a protected class "played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the [protected trait] into account." 490 U.S. at 258; see *id.* at 259-260 (White, J., concurring in the judgment); *id.* at 276 (O'Connor, J., concurring in the judgment).

Two years later, Congress responded by enacting "a new burden-shifting framework" that "abrogated a portion of *Price Waterhouse*[]." *Nassar*, 570 U.S. at 349; see 1991 Act § 107, 105 Stat. 1075-1076. Under that new framework, a plaintiff generally can establish a Title VII violation by demonstrating that a protected trait "was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. 2000e-2(m). The burden then shifts to the employer to demonstrate that it "would have taken the same action in the absence of the impermissible motivating factor." 42 U.S.C. 2000e-5(g)(2)(B). An employer who carries that burden does not wholly escape liability for declaratory or certain injunctive relief, but a court may "not award damages" or back pay, or order the plaintiff's "reinstatement, hiring, or promotion." 42 U.S.C. 2000e-5(g)(2)(B)(ii). As both *Gross* and *Nassar* explained, the text of Title VII's discrimination pro-

vision thus specifically authorizes liability when discrimination is a "motivating factor" in a defendant's adverse decision—a textual command that departs from the default but-for rule. See *Gross*, 557 U.S. at 174; *Nassar*, 570 U.S. at 350-351. But in light of the tailored statutory amendment, and the Court's doubts about its earlier divided decision, "the rule of *Price Waterhouse* is not controlling" elsewhere. *Nassar*, 570 U.S. at 362; see *Gross*, 557 U.S. at 178-179 & n.5.

2. When Section 1981 was first enacted in 1866, but-for causation was firmly established as the default test for factual causation. Although nineteenth-century tort law did not employ the label of "but-for" causation, it required that a defendant's tortious conduct be the *causa sine qua non*—or "cause without which not"—of the plaintiff's injury, a concept that comports with modern understandings of but-for causation. See *Hayes* v. *Michigan Cent. R.R.*, 111 U.S. 228, 241 (1884) (defining *causa sine qua non* as "a cause which if it had not existed, the injury would not have taken place"). Tort commentaries often mentioned the well-settled requirement of *causa sine qua non* in juxtaposition with the developing requirement of *causa causans*, which was akin to the modern concept of proximate causation. See, *e.g.*, Walworth Howland Roberts & George Wallace, *The Duty & Liability of Employers* 346 (3d ed. 1885) ("The leading principle of the law as to damages is that the act of the defendant must be the *causa causans*, or proximate cause of the plaintiff's loss, and not merely a *causa sine qua non*."); Thomas William Saunders, *A Treatise Upon the Law Applicable to Negligence* 9 (1871) ("In order to make a defendant liable, his negligence must be the *causa causans*, and not merely a *causa sine qua non*.").

Those commentaries embraced the proposition that "[i]f the damage complained of would have ensued notwithstanding the conduct complained of, then such conduct is not a cause." 1 Edwin A. Jaggard, *Hand-book of the Law of Torts* 62 (1895) (emphasis omitted); see *ibid.* ("A cause is a necessary antecedent. It must be a causa sine qua non of the damage complained of."); Thomas G. Shearman & Amasa A. Redfield, *A Treatise on the Law of Negligence* § 8, at 7 (1st ed. 1869) (explaining that a plaintiff could recover only if the defendant could "have prevented the injury from occurring by the exercise of due care"). As a result, the prevailing nineteenth-century rule was that "[w]here two or more causes concur to produce an effect, and it cannot be determined which contributed most largely, or whether, without the concurrence of both, it would have happened at all, and a particular party is responsible only for the consequences of one of these causes, a recovery cannot be had." 1 Francis Hilliard, *The Law of Torts or Private Wrongs* 78-79 (1866).

Over time, commentators and courts began to drop the Latin phrase *causa sine qua non* in favor of the label "but-for" causation. See Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 Harv. L. Rev. 103, 108 (1911) (equating "The But for Rule" and "The *Causa sine qua non* Rule"); 1 Theodore Sedgwick, *A Treatise on the Measure of Damages* 199 (9th ed. 1912) (equating "Causa sine qua non" and "The 'but for which' rule") (emphasis omitted). But whatever the label, "the 'but for' requirement [was] generally one of the indispensable elements to make out legal cause" through the early twentieth century. Smith, 25 Harv. L. Rev. at 109; see G. Edward White, *The Emergence and Doctrinal Development of Tort Law, 1870-1930*, 11 U. St. Thomas L.J.

463, 464-465 (2014) (explaining that "late nineteenth-century tort law" required "plaintiffs to satisfy, by a preponderance of the evidence, the 'but-for' test for factual causation"). Because that was "the background against which Congress legislated," Congress is "presumed to have incorporated" that "default rule[]" in Section 1981, "absent an indication to the contrary in the statute itself." *Nassar*, 570 U.S. at 347.

B. Section 1981 Retains The Default Rule Of But-For Causation

Nothing in Section 1981 indicates that Congress intended to depart from the default but-for rule. To the contrary, the text, structure, history, and purpose of Section 1981 confirm that racial discrimination must be a but-for cause of the defendant's refusal to make a contract with the plaintiff.

1. The text of Section 1981 supports a but-for rule

The operative language in Section 1981 is the guarantee that all citizens "shall have the same right * * * to make and enforce contracts." 42 U.S.C. 1981(a). Although Section 1981 does not use specific causal language, as did the statutes in *Gross* and *Nassar*, it is still most naturally read to require but-for causation. And at a minimum, nothing in Section 1981 demonstrates any intent to depart from the default but-for rule.

a. Section 1981 does not employ specific but-for language, such as by barring discrimination "because of," "on account of," or "based on" race. Cf., *e.g.*, 29 U.S.C. 623(a)(1), 633a(a); 42 U.S.C. 2000e-3(a), 12203(a). Importantly, however, neither does it specify any other standard of causation. Unlike, for example, Title VII's discrimination provision, it does not prohibit a decision in which race "was a motivating factor * * * , even

though other factors also motivated" the defendant's decision. 42 U.S.C. 2000e-2(m); see 38 U.S.C. 4311(c) (similar for veteran status). As this Court recently made clear, the absence of specific causal language departing from the default but-for rule suggests that Section 1981 retains that rule. See *Nassar*, 570 U.S. at 347; see also *CBOCS W., Inc.* v. *Humphries*, 553 U.S. 442, 459 (2008) (Thomas, J., dissenting) ("It is true that § 1981(a), which was enacted shortly after the Civil War, does not use the modern statutory formulation prohibiting 'discrimination on the basis of race.' But that is the clear import of its terms.").

The absence of specific causal language is particularly telling here because Congress amended Title VII to dispense with the default rule, while simultaneously amending Section 1981 in ways unrelated to causation. As noted above, Congress added the "motivating factor" standard to Title VII in the Civil Rights Act of 1991. 1991 Act § 107, 105 Stat. 1075-1076. That same Act amended several other federal anti-discrimination statutes, including substantively amending Section 1981. See § 101, 105 Stat. 1071-1072; see also pp. 4-5, *supra*. Yet Congress conspicuously did not establish a motivating-factor standard for any discrimination statute other than Title VII. Imposing such a standard outside of Title VII would thus fail to "give effect to Congress' choice" to add a special causation standard to Title VII's discrimination provision, while leaving Section 1981's causation standard untouched. *Nassar*, 570 U.S. at 354 (quoting *Gross*, 557 U.S. at 177 n.3).

b. The court of appeals nevertheless concluded that "the text of § 1981 * * * permits a departure from the but-for causation standard." Pet. App. 20a. It observed

that "Section 1981 guarantees 'the same right' to contract 'as is enjoyed by white citizens.'" *Ibid.* (quoting 42 U.S.C. 1981(a)). The court reasoned that "[i]f discriminatory intent plays *any* role in a defendant's decision not to contract with a plaintiff, even if it is merely one factor and not the sole cause of the decision, then that plaintiff has not enjoyed the *same right* as a white citizen." *Id.* at 21a. That reasoning is flawed.

i. Although Section 1981 indeed guarantees all persons "the same right * * * as is enjoyed by white citizens," 42 U.S.C. 1981(a), the court of appeals overlooked the key textual question: the same right *to what*? And the textual answer is that Section 1981 guarantees the right to take several specifically enumerated legal actions. Alongside the right "to make * * * contracts," Section 1981 secures the right "to sue," to "be [a] part[y]," and to "give evidence." All of those are discrete actions with legal effect, which a person must be allowed to take without regard to race. The "same right" that Section 1981 guarantees is thus the right to a particular set of outcomes that a person could achieve if she were white.

That guarantee is consistent with the default rule of but-for causation. If a similarly situated white person would be permitted to make a contract, Section 1981 provides that everyone must have the "same right" to make that contract, regardless of race. See *Domino's Pizza, Inc.* v. *McDonald*, 546 U.S. 470, 476 (2006) (explaining that Section 1981 "offers relief when racial discrimination blocks the creation of a contractual relationship"). But if a similarly situated white person would not, Section 1981 does not promise relief. And at the very least, it does not promise it in clear enough

terms to override the "default rule[]" of but-for causation. *Nassar*, 570 U.S. at 347.

ii. That point holds regardless of whether the right "to make" a contract protects only entering into a contract or earlier, pre-formation conduct. When Section 1981 was enacted, the ordinary legal usage of the term "make" was the former—*i.e.*, entry into a contract. Leading legal dictionaries at the time defined the word "make" to mean "to execute, to perform, to do." Henry James Holthouse, *New Law Dictionary* 278 (Henry Penington ed. 1847); see 2 John Bouvier, *A Law Dictionary, Adopted to the Constitution and Laws of the United States of America and of the Several States of the Union* 96 (10th ed. 1860) (Bouvier) (defining "to make" as "[t]o perform or execute") (capitalization and emphasis omitted). And they in turn defined "execute" as "[t]o perform, carry out, carry into force, complete"—*i.e.*, "rendering the instrument so far complete as to give force and operation to its contents." Holthouse, *New Law Dictionary* 192 (capitalization and emphasis omitted); see 1 Bouvier 495 (defining "execution" in contracts as "[t]he accomplishment of a thing; as the execution of a bond and warrant of attorney, which is the signing, sealing, and delivery of the same"). The concept of "making" a contract in Section 1981 thus meant entering or executing a contract, not the entire process by which parties may ultimately arrive at a contract.[1]

[1] Although Congress later amended Section 1981 to define "'make and enforce contracts'" as "the making, performance, modification, and termination of contracts, and the enjoyment of all" contractual benefits, 1991 Act § 101, 105 Stat. 1072, that amendment merely clarified that the statute covers "post-contract-formation conduct."

But even if the term "make" did encompass discrimination at earlier stages of the contracting process, it would not matter here. Reading the term "make" broadly to include actions antecedent to the decision whether to contract (*e.g.*, a discriminatory refusal to consider applications because of race) would merely expand the list of protected outcomes; it would not change the underlying *causation standard* applicable to the items on that list. The question would remain whether a plaintiff was denied a specific protected outcome because of race. See pp. 12-18, *supra*.

c. It is particularly implausible that Congress in 1866 employed the phrase "the same right * * * to make * * * contracts," 42 U.S.C. 1981(a), as shorthand for a motivating-factor standard of causation because that test did not develop under federal law until well into the twentieth century. It first appeared in the 1930s in federal labor law, in the context of National Labor Relations Board adjudications of retaliatory discharge claims involving protected union activities. See *Consumers Research, Inc.*, 2 N.L.R.B. 57, 73 (1936) (rejecting argument that "it must be found that the *sole* motive for discharge was the employee's union activity"); see also *Wright Line*, 251 N.L.R.B. 1083, 1089 (1980) (adopting burden-shifting test). Several decades later, this Court incorporated the motivating-factor concept into a burden-shifting framework for mixed-motive constitutional claims. See *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 285-287 (1977); see also pp. 29-31, *infra*. A plurality of the Court next extended a comparable burden-shifting framework to Title VII. See *Price Waterhouse*, 490 U.S. at 248-249 (relying in

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CBOCS W., 553 U.S. at 451. It did not alter the word "make" or otherwise extend the statute to pre-contract-formation conduct.

part on *Mt. Healthy*). Meanwhile, Justice O'Connor's concurring opinion in *Price Waterhouse* relied on a similar motivating-factor concept derived from the twentieth-century common law of torts. See *id.* at 263-264.[2]

Finally, in 1991—more than a century after Section 1981 was enacted—Congress incorporated the motivating-factor concept into a federal statute, Title VII. See 1991 Act § 107, 105 Stat. 1075-1076. Given that history, the Congress that enacted Section 1981 in 1866 could not have plausibly used the phrase "the same right" to implicitly adopt a motivating-factor standard that began developing in federal law in the 1930s and that Congress first explicitly adopted (in a different statute) in 1991.

2. The broader statutory structure confirms that a but-for rule applies

The language that now appears in Section 1981(a) was first enacted as Section 1 of the 1866 Act and Section 16 of the 1870 Act. See *General Bldg. Contractors*,

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[2] The burden shifting that *Mt. Healthy* and *Price Waterhouse* applied in "mixed-motives cases" is distinct from the burden-shifting that applies in "pretext cases." *Price Waterhouse*, 490 U.S. at 260 (White, J., concurring in the judgment). In pretext cases, courts apply the framework in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), under which a plaintiff establishes a prima facie case of discrimination; a defendant then bears the burden of *production* to offer a race-neutral explanation for its action; and the plaintiff may challenge that explanation as pretextual. See *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 257-258 (1981). The *McDonnell Douglas* framework—which determines the order of the parties' proof but does not relieve the plaintiff of its burden of persuasion—is not at issue here. See *Price Waterhouse*, 490 U.S. at 292 (Kennedy, J., dissenting) (arguing for adherence to *McDonnell Douglas* framework rather than adoption of "dual burden-shifting mechanisms").

458 U.S. at 384-385. Although those sections do not include specific causal language, two closely related sections indicate that Section 1981 adheres to the default but-for rule. See *Husted* v. *A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1842 (2018) ("look[ing] to context to decide" the appropriate causation standard).

a. First, in both the 1866 and 1870 Acts, the general rights-creating language in Section 1981 was followed by an enforcement provision. That provision made it a federal misdemeanor to:

> under color of any law, statute, ordinance, regulation, or custom, * * * subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties *on account of* such person having at any time been held in a condition of slavery or involuntary servitude * * * , or *by reason of* his color or race, than is prescribed for the punishment of white persons.

1866 Act § 2, 14 Stat. 27 (emphasis added); see 1870 Act § 17, 16 Stat. 144 (18 U.S.C. 242). Congress thus employed the sort of express causal language—"on account of" and "by reason of," *ibid.*— that this Court has construed to require but-for causation. See *Gross*, 557 U.S. at 176 (defining "because of" to mean "by reason of: on account of" and thereby to require but-for causation) (citation omitted); *Nassar*, 570 U.S. at 350 (same).

The causal language in Section 2 offers a particularly revealing textual clue because Section 1's rights-creating language and Section 2's enforcement mechanism function in tandem. As the 1866 Act's sponsors explained, Section 2 was meant "to give effect to what are declared to be the rights of all persons in the first section." Cong. Globe, 39th Cong., 1st Sess. 474 (1866)

(Sen. Trumbull); see *id.* at 1118 (Rep. Wilson) (describing Section 1 as "the declaratory portions of this bill" and Section 2 as among the "sanctions as will render it effective"). The Court has similarly described "the penal part"—*i.e.*, Section 2—as the provision "by which the declaration [in Section 1] is enforced, and which is really the effective part of the law." *The Civil Rights Cases*, 109 U.S. 3, 16 (1883). Given the close relationship between the two sections, it would be anomalous to impose a lower causation standard for the judicially inferred cause of action under Section 1 than the express causation standard that Congress adopted in Section 2 for the enforcement of Section 1's guarantees. Cf. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 736 (1975) ("It would indeed be anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express cause of action.").

b. Second, in Section 3 of the 1866 Act, Congress built upon, rather than repudiated, the common law. Section 3 established jurisdiction in the federal courts. See 1866 Act § 3, 14 Stat. 27. That provision specifies that, "in all cases where such [federal] laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law * * * shall be extended to and govern said courts in the trial and disposition of such cause." *Ibid.* Because Section 3 affirms that Congress intended to borrow common-law principles in the absence of contrary instructions, Congress's omission of a specific causation standard in Section 1 suggests its satisfaction with the prevailing common-law rule of but-for causation.

3. The history and purpose of Section 1981 underscore that Congress intended a but-for rule

The legislative history and overarching purpose of Section 1981 also support a but-for standard of causation.

a. When the bill that became the 1866 Act originally passed the Senate, it included characteristic but-for language in Section 1, as in Section 2. Section 1 stated that "there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States *on account of* race, color, or previous condition of slavery." S. 61, 39th Cong., 1st Sess. § 1 (1866) (emphasis added). As this Court has explained, however, that "passage had occasioned controversy in both the Senate and the House because of the breadth of the phrase 'civil rights and immunities.'" *General Bldg. Contractors*, 458 U.S. at 389 n.15. The House thus struck that "broad language," which "could have been interpreted to encompass the right of suffrage and other political rights." *Ibid.* Representative Wilson, the bill's House sponsor, explained that he did not believe that striking the clause "materially changes the bill; but some gentlemen were apprehensive that the words we propose to strike out might give warrant for a latitudinarian construction not intended." Cong. Globe, 39th Cong., 1st Sess. 1366 (1866).

The removal of the causal language "on account of race"—which would have confirmed Congress's intent to require but-for causation—thus appears to have been a casualty of the removal of the entire passage containing the ambiguous phrase "civil rights or immunities." And because that phrase "was removed in an effort to *narrow* the scope of the legislation," it would make no sense to construe its removal as silently endorsing a

broader theory of causation. *General Bldg. Contractors*, 458 U.S. at 389 n.15. Indeed, even after Section 1's amendment, Representative Wilson continued to describe the bill as targeting "State laws discriminating in reference to these rights on account of race or color." Cong. Globe, 39th Cong., 1st Sess. 1367 (1866).

b. Congress's underlying purpose in enacting Section 1981 likewise supports a but-for rule. Although Section 1981—as interpreted by this Court, see *Runyon*, 427 U.S. at 168-175, and as confirmed by Congress, see 1991 Act § 101, 105 Stat. 1071-1072—now covers broader ground, it was enacted primarily to eliminate facially discriminatory state laws. And race was necessarily the but-for cause of the denial of equal rights under such laws.

Section 1981 "represents an immediately post-Civil War legislative effort to guarantee the then newly freed slaves the same legal rights that other citizens enjoy." *CBOCS W.*, 553 U.S. at 448. The 1866 and 1870 Acts targeted state laws that expressly discriminated against African-Americans. See *Buchanan* v. *Warley*, 245 U.S. 60, 79 (1917) (describing the Acts as designed, in part, to permit African-Americans to exercise "fundamental rights in property" without "state legislation discriminating against [them] solely because of color"); see also, *e.g.*, Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (Sen. Trumbull) ("Since the abolition of slavery, the Legislatures which have assembled in the insurrectionary States have passed laws relating to the freedmen, and in nearly all the States they have discriminated against them."). Examples of facially discriminatory state laws thus appear throughout the legislative record, including laws that punished crimes differently based on race, see, *e.g.*, *id.* at 1415 (Sen. Davis); that

prohibited African-Americans from testifying against white persons, see, *e.g.*, *id.* at 479 (Sen. Saulsbury); or that prevented African-Americans from owning property or running a business, see, *e.g.*, *id.* at 602 (Sen. Hendricks); *id.* at 1160 (Rep. Windom).

Because Congress focused on facially discriminatory state laws, the existence of but-for causation was obvious: But for a person's race, the law would treat him or her differently. In enacting Section 1981, Congress sought to "eradicate" such "blatant deprivations of civil rights, clearly fashioned with the purpose of oppressing the former slaves." *General Bldg. Contractors*, 458 U.S. at 388. But the legislative record, like the text and structure of Section 1981 itself, does not reveal any intention to go further and to bar private contracting decisions that would have been the same had race not been considered.

C. The Court Of Appeals Erred In Requiring A Section 1981 Plaintiff To Plead Only That Race Was A Motivating Factor

1. For the reasons given above, the court of appeals incorrectly concluded that a Section 1981 plaintiff may prevail by showing that race "play[ed] *any* role in a defendant's decision not to contract with a plaintiff." Pet. App. 21a. In so doing, the court arrived at a rule that does not apply to any other federal anti-discrimination law: A defendant is subject to damages liability under Section 1981 solely because the plaintiff can prove that an illegitimate motive played a part in the defendant's conduct, even if the defendant would have taken the challenged action without regard to any protected characteristic. See *ibid.*

In their brief in opposition, however, respondents characterize (at 20, 25, 30, 33-35) the court of appeals'

decision as establishing a plaintiff's *pleading burden*, not defining the ultimate standard for *liability* under Section 1981. But the decision below, considered alongside the parallel *Charter* decision, cannot fairly be read that way. Although the court at times described respondents' allegations as sufficient to "state[] a plausible claim," Pet. App. 4a, it repeatedly made clear that it was adopting a liability standard, see, *e.g.*, *id.* at 20a (asking whether Section 1981 "permits a departure from the but-for causation standard"); *id.* at 21a (determining that the "text permits an exception to the default but-for causation standard"); *id.* at 21a (concluding that "a plaintiff can still prevail" if race was not a but-for cause, and "need only prove that discriminatory intent was a factor").

In any event, even if the court of appeals' decision could be recast as a decision about pleading requirements, the result would be the same. If Section 1981 requires but-for causation, then a plaintiff must ordinarily allege but-for causation to "state a claim to relief that is plausible on its face." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Indeed, this Court has treated as self-evident the proposition that a "holding about plaintiffs' need to *prove*" certain causation requirements means that the complaint must "adequately * * * *allege* th[o]se requirements." *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 346 (2005).[3]

[3] The United States takes no position on whether respondents have plausibly pleaded but-for causation, and this Court did not grant certiorari on that question. As such, the Court should vacate and remand for the court of appeals to consider that question in the first instance. See *United States* v. *Stitt*, 139 S. Ct. 399, 407 (2018) ("[W]e are a court of review, not of first view.") (citation omitted).

2. Alternatively, some courts of appeals have eliminated the need for a plaintiff to plead but-for causation by adopting a burden-shifting framework for Section 1981 claims akin to that in *Price Waterhouse*, *supra*, or *Mt. Healthy*, *supra*. Under that framework, a plaintiff makes out a prima facie case of a Section 1981 violation by demonstrating that "race plays any role in a challenged decision by a defendant," at which point the defendant has the burden of persuasion to "prove[] that the same decision would have been made regardless of the plaintiff's race." *Brown* v. *J. Kaz, Inc.*, 581 F.3d 175, 183 n.5 (3d Cir. 2009); see, *e.g.*, *Anderson* v. *Wachovia Mortg. Corp.*, 621 F.3d 261, 267-269 (3d Cir. 2010).

The court of appeals did not adopt that burden-shifting framework, see Pet. App. 20a-21a, and respondents have not clearly advocated for it, see C.A. Br. 45-46; Br. in Opp. 34-35. But if respondents urge that alternative ground and the Court addresses it, the Court would need to reject burden shifting in order to dispose of this case. Under *Price Waterhouse*-style burden shifting, the lack of but-for causation is effectively an affirmative defense. See 490 U.S. at 246 (plurality opinion). And a plaintiff does not need to plead the existence of an affirmative defense in its complaint. See *Gomez* v. *Toledo*, 446 U.S. 635, 640 (1980). If burden shifting were appropriate here, the court of appeals' judgment would therefore be correct, even if its reasoning would remain overbroad. Burden shifting, however, is not appropriate here. *Gross* and *Nassar* instruct that courts should apply ordinary statutory-interpretation principles to federal anti-discrimination statutes, and under those principles the burden of persuasion remains on Section 1981 plaintiffs.

a. As an initial matter, *Price Waterhouse* and *Mt. Healthy* do not control here of their own force. Indeed, *Price Waterhouse* is no longer good law on this point. In that decision, a divided Court adopted a burden-shifting framework for Title VII discrimination cases. See 490 U.S. at 258 (plurality opinion). But Congress swiftly abrogated the Court's decision and instead incorporated its own burden-shifting framework into the statutory text. See 42 U.S.C. 2000e-2(m), 2000e-5(g)(2)(B). This Court subsequently explained that "there is no reason to think that the different balance articulated by *Price Waterhouse* somehow survived that legislation's passage." *Nassar*, 570 U.S. at 362. It has thus declined to apply *Price Waterhouse*'s reasoning to other federal anti-discrimination statutes, even to a different part of Title VII. See *id.* at 348-351, 362. No reason exists to treat Section 1981 any differently.

Nor do this Court's constitutional decisions control. In *Mt. Healthy*, the Court adopted a burden-shifting framework for evaluating a plaintiff's claim that a school district's refusal to rehire him violated his First Amendment rights. 429 U.S. at 276, 287. In crafting that framework, the Court focused on the constitutional context, analogizing to "other areas of constitutional law" and seeking to "protect[] against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights." *Id.* at 286-287. It settled on requiring a plaintiff to show that his protected conduct was a "'substantial factor'" or "'motivating factor'" for the adverse employment action, at which point the governmental employer could defend itself by showing "by a preponderance of the evidence that it would have reached the same decision as to [the plaintiff's] employment even in

the absence of the protected conduct." *Id.* at 287. The Court has since applied the same test to claims of discrimination under the Equal Protection Clause. See *Hunter* v. *Underwood*, 471 U.S. 222, 228 (1985).

That test does not, however, extend to the *statutory* discrimination claim here. To be sure, Section 1981 and the Equal Protection Clause share a similar history, and the Court has previously construed them to cover similar substantive ground. See *General Bldg. Contractors*, 458 U.S. at 389-390. But those similarities do not justify transplanting a constitutionally inspired burden-shifting framework into Section 1981. As the Court explained in *Gross*, "the constitutional cases such as *Mt. Healthy* have no bearing on the correct interpretation of ADEA claims, which are governed by statutory text." 557 U.S. at 180 n.6. The same is true of Section 1981 claims. If the Court applies its ordinary statutory-interpretation methodologies to federal anti-discrimination statutes, as *Gross* and *Nassar* instruct, then it cannot adopt a burden-shifting framework for Section 1981 merely because such a framework applies under the Equal Protection Clause.

b. Apart from replicating *Price Waterhouse* and *Mt. Healthy*, respondents have not identified any basis for imposing a burden-shifting framework for Section 1981 claims. For three reasons, shifting the burden of persuasion is unwarranted.

First, and most fundamentally, nothing in the text or structure of Section 1981 authorizes any shift in the burden of persuasion. In most circumstances, absent a contrary indication, the Court "usually assume[s] * * * that plaintiffs bear the burden of persuasion regarding the essential aspects of their claims." *Schaffer* v. *Weast*, 546 U.S. 49, 57 (2005). In *Gross*, for example, once the

Court concluded that the ADEA requires a showing of but-for causation, it explained that "[i]t follows" that a "plaintiff retains the burden of persuasion to establish that age was the 'but-for' cause of the employer's adverse action." 557 U.S. at 177.

Second, nothing in the nineteenth-century common law of torts suggests a departure from that ordinary assumption. Rather, except for certain context-specific presumptions (*e.g.*, for common carriers), a plaintiff bore the burden to establish causation. See, *e.g.*, Charles C. Black, *Proof and Pleadings in Accident Cases* § 1, at 2-3 (1886) ("[I]t is incumbent on the plaintiff to prove * * * [t]hat the injury sustained by the plaintiff was the direct and natural result and consequence from [the] neglect or breach of duty by the defendant."); James H. Deering, *The Law of Negligence* § 405, at 635 (1886) ("One must not only prove negligence but that the injury resulted from the negligence."). And even under modern tort-law principles, burden shifting occurs only where multiple defendants acted tortiously and a plaintiff cannot prove which defendant caused its harm. See Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 28 (2010). By contrast, courts "do not ordinarily shift the burden of proof" in a "single-defendant case in which the plaintiff can prove tortious conduct but is unable to prove factual causation." *Id.* § 28 cmt. g.

Third, practical concerns counsel against adopting new burden-shifting regimes for federal anti-discrimination statutes. In *Gross*, the Court explained that, "in cases tried to a jury, courts have found it particularly difficult to craft an instruction to explain [the] burden-shifting framework." 557 U.S. at 179. It thus

observed that, even if *Price Waterhouse* "was doctrinally sound, the problems associated with its application have eliminated any perceivable benefit to extending its framework" to other statutes. *Ibid.*; see *Price Waterhouse*, 490 U.S. at 287 (Kennedy, J., dissenting) (warning that the "creation of a new set of rules for 'mixed-motives' cases * * * provides limited practical benefits at the cost of confusion and complexity").

Section 1981 therefore should not be read to incorporate *Price Waterhouse*-style burden shifting, and a plaintiff retains the burden of persuasion on all elements of her claim. Because those elements include but-for causation, a plaintiff must plausibly plead but-for causation in her complaint.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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