No. 18-1171

IN THE

Supreme Court of the United States

COMCAST CORP.,

Petitioner,

v.

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

Respondents.

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

BRIEF OF AMICI CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., AND TEN CIVIL RIGHTS LITIGATING ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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September 30, 2019

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INTERESTS OF AMICI CURIAE[1]

This brief is submitted by the NAACP Legal Defense and Educational Fund, Inc., and ten other civil rights litigating organizations.

The **NAACP Legal Defense and Educational Fund, Inc. ("LDF")**, is a non-profit, non-partisan law organization established under the laws of New York to assist Black people and other people of color in the full, fair, and free exercise of their constitutional and statutory rights. Founded in 1940 under the leadership of Thurgood Marshall, LDF focuses on eliminating racial discrimination in economic justice, education, criminal justice, and political participation. Throughout its history, LDF has represented plaintiffs seeking to protect their rights under 42 U.S.C. § 1981, *see, e.g.*, *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990); *Patterson v. McLean Credit Union*, 485 U.S. 617 (1988), and has a strong interest in the proper interpretation and application of Section 1981 on behalf of civil rights claimants in the full range of economic transactions covered by the statute, including bank loans, home purchases and rentals, employment discrimination, and contracts for services.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici curiae state that no counsel for a party authored this brief in whole or in part and that no person other than amici curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel for amici curiae state that both parties have filed blanket consent to the filing of amicus briefs.

The **American Civil Liberties Union ("ACLU")** is a nationwide, non-profit, non-partisan organization of nearly 2 million members dedicated to defending the principles of liberty and equality embodied in the U.S. Constitution and our nation's civil rights laws. Founded more than 90 years ago, the ACLU has participated in numerous cases before this Court involving the scope and application of federal civil rights laws, both as direct counsel and as amicus curiae. Through its Racial Justice Program, the ACLU engages in nationwide litigation and advocacy to enforce and protect the rights of people of color against unlawful discrimination.

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that works to protect the rights of individuals and communities to worship as they see fit and to preserve the separation of religion and government as a vital component of democratic governance. With a national network of more than 300,000 supporters, Americans United has since 1947 been safeguarding our American value of religious freedom for all people. Americans United regularly serves as a party, as counsel, or as an amicus curiae in cases before this Court and in the federal and state courts nationwide. Americans United believes that people should not experience discrimination because of their religion and that religion should not be used as a justification to harm others. Thus, it is critical to our work and our mission that the proper causation analysis is applied to discrimination claims involving not just race, but a wide spectrum of traits, including religion.

Farmworker Justice is a non-profit organization that empowers farmworkers—people who labor on farms and ranches in the United States—to improve their wages and working conditions, immigration status, health, occupational safety, and access to justice. Farmworker Justice accomplishes these aims through policy advocacy, litigation, training, public education and support for organizing. There are an estimated 2.4 million farmworkers in the United States, not including their family members. Approximately 83 percent of farmworkers are Hispanic and 76% of farmworkers were born in foreign countries. In service to farmworkers, Farmworker Justice maintains a strong interest in supporting the implementation of the civil rights statutes in this action.

The **Fred T. Korematsu Center for Law and Equality** is a non-profit organization based at the Seattle University School of Law. It works to advance justice through research, advocacy, and education. Inspired by the legacy of Fred Korematsu—who defied military orders during World War II that resulted in the unlawful incarceration of 120,000 Japanese Americans—the Korematsu Center works to advance social justice for all. It has a special interest in ensuring that minorities are able to participate fully in this nation's civic and economic life.[2]

The **Impact Fund** is a non-profit foundation that provides funding, training, and co-counsel to public

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[2] The Korematsu Center does not represent the official views of Seattle University.

interest litigators across the country. It is a California State Bar Legal Services Trust Fund Support Center, providing services to legal services projects across California. The Impact Fund is counsel in a number of major civil rights class actions, including cases challenging employment discrimination, lack of access for those with disabilities and violations of fair housing laws.

LATINOJUSTICE PRLDEF ("LJP") is a national not-for-profit civil rights legal defense fund that has advocated for and defended the constitutional rights and the equal protection of all Latinos under the law. Since our founding in 1972 as the Puerto Rican Legal Defense & Education Fund, LJP's continuing mission is to promote the civic participation of the greater pan-Latino community in the United States, to cultivate new Latino community leaders, and to engage in and support law reform cases around the country challenging multiple forms of invidious discrimination involving criminal justice, education, employment, fair housing, immigrants' rights, language rights, redistricting and voting rights. LJP strives to ensure that Latinos are not illegally or unfairly affected by discriminatory policies and practices.

The **Mexican American Legal Defense and Education Fund ("MALDEF")** is a national civil rights organization established in 1968. Its principal objective is to secure the civil rights of Latinos living in the United States through litigation, advocacy, and education. MALDEF's mission is to foster sound public policies, laws, and programs to safeguard the civil rights of Latinos living in the United States and

to empower the Latino community to participate fully in our society.

The **National Women's Law Center ("NWLC")** is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights and the rights of all people to be free from sex discrimination. Since its founding in 1972, NWLC has focused on issues of key importance to women and girls, including economic security, employment, education, and health, with special attention to the needs of low-income women and those who face multiple and intersecting forms of discrimination. NWLC has participated as counsel or amicus curiae in a range of cases before the Supreme Court and the federal Courts of Appeals to secure equal treatment and opportunity in all aspects of society through enforcement of the Constitution and laws prohibiting discrimination. NWLC seeks to ensure that rights and opportunities are not restricted on the basis of gender and that all individuals, including women of color and LGBTQ individuals, enjoy the full protections against sex discrimination promised by federal law.

Outten & Golden LLP ("O&G") is a national law firm at the forefront of employment and civil rights litigation for two decades, representing individuals in all sectors of the economy confronting systemic discrimination in hiring, compensation, promotion, and wrongful termination. O&G has represented plaintiffs seeking to protect their rights under 42 U.S.C. § 1981, *see, e.g.*, *Perez, et al., v. Wells Fargo Bank, N.A.*, Case No. 17-cv-00454 (N.D. Cal.), *Rodriguez v. Procter & Gamble,* Case No. 1:17-cv-

22652 (S.D. Fla.); *Juarez, et al. v. The Northwestern Mutual Life Insurance Company, Inc.*," Case No. 14-cv-5107 (S.D.N.Y.), and our clients have a strong interest in the proper interpretation and application of Section 1981 in the employment and lending context.

The **Southern Coalition for Social Justice ("SCSJ")** is a 501(c)(3) nonprofit public interest law organization founded in 2007 in Durham, North Carolina. SCSJ partners with communities of color and economically disadvantaged communities in the South to defend and advance their political, social, and economic rights through the combination of legal advocacy, research, organizing and communications. In the past, one of amicus' primary practice areas was immigrants' rights and it remains important to our mission. The Southeast plays a crucial role in the human rights crisis faced by immigrant communities. Between 2000 and 2009, immigrants made up more of the growth of the suburban poor population in the South than in any other region. SCSJ frequently advocates on behalf of immigrants and immigrant community groups who have been subject to racially discriminatory governmental practices, from police actions to education policies. SCSJ has participated in Know Your Rights education with communities across the state, and we have represented individuals placed in removal proceedings due to immigration enforcement policies under 287(g) and the Secure Communities programs. Finally, as part of amicus' criminal justice reform efforts, SCSJ is working to ensure that the open data policing resources we have placed in the hands of communities across the South is also available to groups focused on "crimmigration,"

the intersection between immigration and criminal law. SCSJ advocates for the rights for all immigrants, regardless of immigration status or national origin, and for the application of basic human rights principles to policies affecting migrant communities.

SUMMARY OF ARGUMENT

Originally enacted as part of the Civil Rights Act of 1866, 42 U.S.C. § 1981 is our nation's oldest civil rights law. It remains one of our most important. By mandating that all people in the United States have the same right "to make and enforce contracts . . . as . . . white citizens," it is designed to ensure that all Americans have equal opportunities to work, to bank, to shop, to rent or buy a home, and to become entrepreneurs free from racial discrimination.

The arguments advanced by Petitioner Comcast Corporation are inconsistent with the plain text of Section 1981, and they would frustrate the fundamental purpose of the statute's drafters—to place African Americans on equal footing as white citizens in our nation's economy without the taint of racial discrimination. Comcast urges the Court to hold not only that Section 1981 requires "but-for" causation, but also that "but-for" causation can be resolved on the pleadings and that the existence of non-racial justifications for a defendant's conduct means a Section 1981 claim should be dismissed without discovery or trial. If successful, Comcast's arguments would, in many cases, impose an impossible pleading burden on victims of

discrimination and prevent them from vindicating meritorious claims.

Respondents' pleading contained plausible allegations that Comcast's refusal to contract with them was motivated by racial discrimination. Respondents' Complaint therefore cannot be dismissed on the pleadings even assuming *arguendo* that Section 1981 includes a "but-for" causation requirement. When a plaintiff presents well-pleaded allegations supporting a plausible inference that a defendant's conduct was motivated by racial discrimination, the same allegations also support a plausible inference that discrimination was a "but-for" cause of the defendant's conduct. That is clear from this Court's precedent, which has repeatedly recognized the logical connection between motivating-factor discrimination and "but-for" causation.

It is also clear from Comcast's own brief. All of Comcast's arguments about why, in its view, Respondents failed to present sufficient allegations of "but-for" causation are actually arguments about why Respondents supposedly failed to allege that Comcast was motivated by racial discrimination in refusing to contract with them. But this Court denied certiorari on that question. Comcast's sleight of hand in seeking to revive it simply underscores that a Section 1981 complaint rises or falls on whether the plaintiff has adequately pleaded that racial discrimination was a motivating factor for the defendant's conduct.

Equally untenable is Comcast's argument that the potential existence of additional, non-racial

explanations for its refusal to contract with Respondents defeats their Section 1981 claim. A "but-for" cause is not required to be the sole cause, and there can be multiple "but-for" causes for a defendant's action. These principles are especially important in racial discrimination cases. If an employer fires a Black employee for a mistake but gives white employees who make the same mistake only a mild reprimand, the employer has denied the Black employee the same right "to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a). It does not matter that the employee's mistake constitutes an additional, non-racial justification for the firing. These legal principles are also critical to uphold given that women of color and others often face discrimination based on more than one protected trait.

Comcast is, of course, entitled to present evidence that in this case it really would have refused to contract with Respondents even in the absence of any discriminatory motive. But that is a fact-intensive question that requires discovery and, in most cases, the vigorous examination of fact and evidence at trial. It cannot be resolved on the pleadings.

ARGUMENT

I. "But-For" Causation Can Rarely Be Resolved on the Pleadings in Race Discrimination Cases Because Plausible Allegations of Motivating-Factor Discrimination Give Rise to a Plausible Inference of "But-For" Causation.

Amici curiae agree with Respondents that Section 1981 does not require the plaintiff to prove "but-for" causation. However, even if the Court were to disagree with this position, any disputes regarding the causal connection between race and Comcast's actions involve factual inquiries that cannot be resolved on a motion to dismiss.

In reviewing a motion to dismiss, courts must accept all well-pleaded factual allegations contained in the complaint as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) ("When there are well-pleaded factual *allegations*, a court should assume their veracity . . . .") (emphasis added). In the instant case, the Ninth Circuit held that Respondents plausibly alleged that race was a motivating factor in Comcast's refusal to contract. The plausibility of Respondents' allegations is not an issue before the Court. *See Comcast Corp. v. N.A. of African American-Owned Media*, 139 S. Ct. 2693, 2693-94 (2019). The Court, therefore, must accept as true Respondents' allegations that race was a motivating factor in Comcast's conduct.

Because Respondents alleged facts giving rise to a plausible inference that race was a motivating factor in Comcast's conduct, they likewise necessarily alleged facts making it plausible that race was a "but-for" cause of the aggrieved conduct. This is clear from this Court's precedent in cases involving both Equal Protection Clause and First Amendment claims.

In *Arlington Heights*, the Court held that if a plaintiff shows that state conduct was motivated, even in part, by a racially discriminatory purpose, the burden shifts to defendants to prove they would have made the same decision without consideration of the impermissible, discriminatory purpose. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 n.21 (1977); *see also Hunter v. Underwood*, 471 U.S. 222, 228 (1985) ("Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor."). *Arlington Heights* thereby makes clear that, once the plaintiff establishes that race was a motivating factor in the defendant's conduct, that creates a presumption that race was also a "but-for" cause of the defendant's conduct, and the burden shifts to the defendant to rebut that inference.

The Court has similarly held that when a plaintiff shows the exercise of his First Amendment rights was a motivating factor in the defendant's decision not to rehire him, the burden shifts to the defendant to show it would have taken the same action even in the

absence of the protected conduct. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (citing *Arlington Heights*, 429 U.S. at 270 n.21). In other words, the defendant bore the burden of rebutting the presumed "but-for" causation.

For the reasons stated by Respondents, this Court should adopt (indeed already has adopted) a similar burden-shifting framework under Section 1981. *See* Respondents' Br. at 18-28. Burden-shifting aside, *Arlington Heights* and *Mt. Healthy* stand for a more fundamental proposition: When a plaintiff demonstrates that the defendant was motivated at least in part by legally prohibited considerations, it logically follows that those same considerations were at least *a* "but-for" cause of the defendant's conduct.

By holding that "but-for" causation must be rebutted following a showing that discrimination was a motivating factor, *Arlington Heights* and *Mt. Healthy* necessarily recognize that motivating factor allegations constitute allegations of "but-for" causation—a party "cannot rebut what has not been alleged." *Kaur v. Holder*, 561 F.3d 957, 961 (9th Cir. 2009). As the Third Circuit explained in discussing *Mt. Healthy*, this Court's burden-shifting framework "did not deviate from the requirement of 'but for' causation; rather, its only effect was to allocate and specify burdens of proof." *Lewis v. Univ. of Pittsburgh*, 725 F.2d 910, 916 (3d Cir. 1983).

Thus, by plausibly pleading that discrimination was a motivating factor in Comcast's conduct, Respondents have plausibly alleged "but-for"

causation. Regardless of whether the burden of proof ultimately shifts to Comcast to prove that it would have acted similarly without the consideration of race, Respondents' plausible allegations of discrimination create a plausible inference of "but-for" causation. Those allegations must be accepted as true at this stage in the litigation and, at a minimum, survive a motion to dismiss to make way for a fact-intensive inquiry concerning Comcast's motives and the cause of its failure to contract with Respondents.

Comcast's brief to this Court underscores this point. Although Comcast contends that Respondents failed to plead "but-for" causation, its arguments are all focused on its assertion that Respondents failed to plead "that race played any role in Comcast's decision not to carry ESN's networks." Pet'r Br. at 43. However, this Court did not grant certiorari on that question, and the case comes to this Court on the premise that Respondents *have* adequately alleged that race played a role in Comcast's decision not to carry ESN's networks. Comcast makes no argument that would allow a court to: (a) recognize that Respondents plausibly alleged that race was a motivating factor for Comcast's refusal to contract, but (b) find that it is implausible to infer that race was a "but-for" cause of Comcast's conduct. *See id*. at 40-47. That is because plausible allegations that the defendant was motivated by discrimination necessarily permit a logical inference that discrimination was a "but-for" factor for the defendant's conduct.

Consistent with this principle, none of the cases cited by Comcast in support of its contention that "but-for" causation is necessary for Section 1981 liability dealt with that issue on the pleadings. In contrast, federal courts have repeatedly recognized in a wide variety of contexts that assessing "but for" causation is a factual inquiry generally reserved for the finder of fact at trial, rather than on summary judgment, let alone on the pleadings. *See, e.g.*, *Donathan v. Oakley Grain, Inc.*, 861 F.3d 735, 737, 740-43 (8th Cir. 2017) (reversing grant of summary judgment after review of "fully developed summary judgment record" demonstrated that reasonable jury could find impermissible retaliatory "but-for" cause despite defendants' proffered explanations); *Redd v. N.Y. State Div. of Parole*, 678 F.3d 166, 178 (2d Cir. 2012) ("Issues of causation, intent, and motivation are questions of fact. . . . [and where] fact questions such as 'state of mind or intent are at issue,' summary judgment 'should be used sparingly[.]'"); *Ideal Steel Supply Corp. v. Anza*, 652 F.3d 310, 328 (2d Cir. 2011) ("[B]ut-for causation is an issue of fact for the jury . . . not, where there is evidence to support a finding of causation, a matter to be decided by the court on a motion for summary judgment.") (citing *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989)); *Smith v. Harrington*, No. C 12–03533 LB, 2015 WL 1407292, at *21 n.9 (N.D. Cal. Mar. 27, 2015) (noting that while "but-for" causation is generally reserved for the trier of fact to resolve, the issue could be decided on a motion for summary judgment where causation could

not reasonably be established on the basis of the facts).

"When a federal court reviews the sufficiency of a complaint, before the reception of any evidence . . . its task is necessarily a limited one." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) *overruled on other grounds by Davis v. Scherer*, 468 U.S. 183 (1984). While the Court's pleading standard does require more than a "defendant-unlawfully-harmed-me-accusation," it does not require "detailed factual allegations" that meet a "probability requirement." *Iqbal*, 556 U.S. at 678 (citation omitted). With Respondents' allegations of racial motivation accepted as true at this stage, it is plausible to infer that Comcast's discrimination was a "but-for" cause of Comcast's refusal to contract. Thus, assuming *arguendo* that "but-for" causation is required under Section 1981, Respondents have met their burden. It is impossible for the Court to discern the role that race did or did not play without a record upon which to base this fact-intensive analysis. "'[F]erreting out the most likely reason for the defendants' actions is not appropriate at the pleadings stage.'" *McDonough v. Anoka County*, 799 F.3d 931, 946 (8th Cir. 2015) (quoting *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 458 (6th Cir. 2011)).

II. A Defendant's Proffer of Additional Reasons for the Challenged Conduct Does Not Negate "But-For" Causation.

Comcast insists that Respondents' complaint recites "other . . . race-neutral explanations," for Comcast's refusal to contract. Pet'r Br. at 5. But any references to possible race-neutral reasons for Comcast's actions do not refute the inference that Comcast's discrimination was a "but-for" cause of its conduct. A "but-for" cause is not required to be a *sole* cause. At the pleadings stage, it is impossible to discern whether Comcast would have refused to contract with Respondents based solely on those purported race-neutral reasons had Comcast not also been motivated by discrimination.

As one court has aptly stated, "[i]t has long been the law that there is a difference between 'but for' causation and 'sole' causation." *Archie v. Home-Towne Suites, LLC*, 749 F. Supp. 2d 1308, 1315 n.4 (M.D. Ala. 2010) (citing *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n.10 (1976)); *accord McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1076 (11th Cir. 1996) (emphasizing that "because of" is not equivalent to "solely because of") (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

Indeed, "but-for" causation "'is a de minimis standard of causation, under which even the most remote and insignificant force may be considered the cause of an occurrence.'" *Gen. Refractories Co. v. First State Ins. Co*, 855 F.3d 152, 161 (3d Cir. 2017)

(citation omitted). As this Court has recognized: "but for 'is the minimum concept of cause[.]'" *Burrage v. U.S.*, 571 U.S. 204, 211 (2014) (citation omitted).

It necessarily follows that there can be multiple "but-for" causes of a defendant's action, conduct, or decision. Indeed, this is a basic principle of tort law: "It is by no means true that the but-for test reduces everything to a single cause." Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, *The Law of Torts* § 186 (2d ed.). *See also* Fowler V. Harper et al., *4 Harper, James and Gray on Torts* § 20.2, at 100–101 (3d ed. 2007) ("Probably it cannot be said of any event that it has a single causal antecedent . . . .").

Courts across the country have acknowledged and applied this basic principle in a variety of contexts. *E.g.*, *State v. Hennings,* 791 N.W.2d 828, 836 (Iowa 2010), *overruled on other grounds by State v. Hill*, 878 N.W.2d 269 (Iowa 2016) (holding that the existence of multiple factual cases did not relieve the defendant of liability as "just because the boys' presence in the street was a separate factual cause [of defendant running them over with his car] does not mean race was not also a but-for cause"); *Parnell v. Peak Oilfield Serv. Co.*, 174 P.3d 757, 765 (Alaska 2008) (overturning jury instruction that implied there could be only one "but-for" cause); *Spann v. Shuqualak Lumber Co., Inc.*, 990 So. 2d 186, ¶ 13 (Miss. 2008) (reversing grant of summary judgment because identification of which potential causes out of multiple factors actually caused an accident is a "question within the province of a jury"); *Lipchitz v.*

Raytheon Co., 434 Mass. 493, 506 n.19 (Mass. 2001) ("That a defendant's discriminatory intent, motive or state of mind is 'the determinative cause' does not imply the discriminatory animus was the only cause of that action.") (citation omitted).

Thus, Comcast's references to potentially plausible, non-discriminatory justifications for its refusal to contract with Respondents does not render it implausible that Comcast's discrimination was also a "but-for" cause of its conduct. Once again, this is an issue that cannot be resolved on the pleadings. To require Respondents "to rule out every possible lawful explanation for [Comcast's] conduct . . . would invert the principle that the 'complaint is construed most favorably to the nonmoving party,' and would impose the sort of 'probability requirement' at the pleading stage which *Iqbal* and *Twombly* explicitly reject." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 (8th Cir. 2009) (vacating and remanding where, on Rule 12(b)(6) motion, district court improperly drew inferences in defendants' favor and penalized plaintiff for failing to allege facts contradicting those inferences).

Comcast's position is likewise inconsistent with the reality of racial discrimination in our society. Defendants will often be able to proffer a facially race-neutral justification for discriminatory conduct, but that does not make the discrimination any less pernicious or illegal. Additionally, it should be noted that women of color often face workplace or other discrimination based on more than one protected

trait. Thus, for example, race discrimination and sex discrimination could each be but-for causes for a particular action and having more than one cause does not negate the other when it comes to civil rights protections. As discussed herein, but-for causation does not mean sole cause—in the context of civil rights laws, this principle is particularly important for women of color and others who face discrimination connected to multiple and intersecting identities.

Consider a recent study involving law firm partners' review of associates' written work product. In this study, researchers presented partners with an identical written memo from a hypothetical Black associate and a hypothetical white associate.[3] The only difference was the listed race of the associate. Yet, the partners evaluated this identical memo much more negatively when it came from a hypothetical Black associate. In reviewing the exact same memo, on average the partners marked twice as many spelling and grammatical errors for the hypothetical Black associate as for the hypothetical white associate, and gave the Black associate an average 3.2/5.0 rating as compared to 4.1/5.0 for the white associate.[4]

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[3] Arin N. Reeves, Nextions, Written in Black and White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills, https://nextions.com/wp-content/uploads/2017/05/written-in-black-and-white-yellow-paper-series.pdf.

[4] *See id.*

In the real world, such harsher evaluations of a Black associate's mistakes could result in a Black associate being denied a promotion offered to a white associate whose comparable mistakes were not judged as harshly. The firm could proffer a race-neutral reason for not promoting the Black associate (i.e., the mistakes in the associate's work product), but race would still be a "but-for" cause of the adverse action. Section 1981 unquestionably prohibits such discrimination because the Black associate has been denied the "same right to . . . make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a); *see id.* (b) (defining "make and enforce" contracts). Yet under Comcast's theory, the existence of a race-neutral reason for the firm's conduct would lead to dismissal at the pleading stage of a Section 1981 violation.

The Court's longstanding efforts to eradicate racial discrimination in the exercise of peremptory challenges are also instructive. In *Batson v. Kentucky*, 476 U.S. 79, 98 (1986), the Court recognized that facially race-neutral preemptory challenges "create a cloak for possible discrimination."[5] Thus, even where a prosecutor identifies a facially legitimate reason for striking prospective Black jurors (e.g., voir dire responses that "could well have signaled a limit on their willingness to impose a death sentence . . ." in a

[5] Bobby Marzine Harges, *Batson Challenges in Criminal Cases: After Snyder v. Louisiana, Is Substantial Deference to the Trial Judge Still Required?*, 19 B.U. Pub. Int. L.J. 193, 193-194 (2010).

capital case), the strike violates the Equal Protection Clause if the prosecutor's failure to strike white jurors who provide similar answers indicates that the prosecutor was motivated by racial discrimination. *Miller-El v. Dretke*, 545 U.S. 231, 245 (2005).

In sum, when a plaintiff plausibly alleges that racial discrimination was a motivating factor for the defendant's conduct, it is plausible to infer that racial discrimination was also *a* "but-for" cause of the defendant's conduct. The potential existence of "other . . . race-neutral explanations" for the defendant's conduct, Pet'r Br. at 5, may suggest that discrimination was not the sole cause, but that is not the standard. And the pleadings are not the time to resolve the "subtle question of causation . . ." that is raised if a defendant contends that it would have reached the same outcome based solely on non-racial considerations. *Snyder v. Louisiana*, 552 U.S. 472, 486 (2008).

CONCLUSION

For the foregoing reasons, as well as those stated by Respondent, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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