

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

COMCAST CORPORATION,)
)
 Petitioner,)
)
 v.) No. 18-1171
)
 NATIONAL ASSOCIATION OF AFRICAN)
)
 AMERICAN-OWNED MEDIA, ET AL.,)
)
 Respondents.)

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1 P R O C E E D I N G S

2 (10:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 18-1171,
5 Comcast Corporation versus the National
6 Association of African American-Owned Media.

7 Mr. Estrada.

8 ORAL ARGUMENT OF MIGUEL ESTRADA

9 ON BEHALF OF THE PETITIONER

10 MR. ESTRADA: Mr. Chief Justice, and
11 may it please the Court:

12 The Ninth Circuit held in this case
13 that a plaintiff may succeed on a Section 1981
14 claim merely by showing that race was a factor
15 that was considered in the defendant's
16 decision-making, even if the decision would have
17 made and was made for entirely appropriate
18 business reasons having nothing to do with race.

19 Solely on this basis, the Ninth
20 Circuit saved the Plaintiff's third complaint
21 from dismissal. We submit that this decision is
22 wrong and should be reversed for at least three
23 reasons.

24 The first is that it is contrary to
25 this Court's decisions, such as Gross and

1 Nassar, holding that but-for causation is the
2 background rule that Congress must have presumed
3 to have been adopted in all federal statutes
4 unless the statute provides otherwise, which we
5 submit Section 1981 does not, either as
6 originally adopted in 1866 or as amended in
7 1991.

8 Second, in 1991, Congress amended
9 Title VII to provide for a motivating factor
10 standard but did not amend Section 1981 to
11 provide the same, even though it amended Section
12 1981 in other respects at the same time.

13 This all but conclusively shows that
14 Section 1981 requires but-for causation, as this
15 Court concluded in *Gross* and *Nassar*, with
16 respect to the ADEA and the retaliation
17 provisions of Title VII.

18 And, third, it is -- if the Ninth
19 Circuit is affirmed, it would be vastly easier
20 to recover damages under Section 1981's
21 judicially implied cause of action than under
22 any express cause of action actually enacted by
23 Congress under any federal antidiscrimination
24 law. And, thus, affirming the Ninth Circuit
25 would effectively mean that Section 1981 would

1 completely displace the carefully tailored
2 regime that Congress has devised in Title VII to
3 govern employment discrimination cases.

4 No well-advised plaintiff would ever
5 sue under Title VII in any employment case.

6 CHIEF JUSTICE ROBERTS: Counsel, it --
7 I -- I wonder if the distinction they're
8 fighting over is -- is somewhat academic. I --
9 in the contract negotiation process, for
10 example, there may be several steps along the
11 way, and if at one of those steps there's clear
12 racial -- excuse me -- animus evident and that,
13 you know, the process continues on, and at the
14 end of the day, the contract is denied, it -- it
15 may be hard to prove but-for causation.

16 On the other hand, it's also hard to
17 ignore the part -- the step in which there was
18 clearly evident racial animus. And it may be a
19 reasonable argument or -- or -- excuse me --
20 allegation that that animus continued through,
21 even though manifested only at one stage of the
22 process.

23 MR. ESTRADA: Well, all complaints are
24 different, Mr. Chief Justice, and I don't rule
25 out, you know, the possibility that a complaint

1 may allege such an expression of animus that it
2 could actually imply that the animus continued
3 until the end, such that it -- the complaint
4 does allege but-for causation.

5 Now the Plaintiffs, from the motion to
6 dismiss in this case to the Ninth Circuit, have
7 stuck their case on the proposition that they
8 are alleging that race was a motivating factor
9 and a motivating factor only, and they were not
10 prepared to prove but-for causation --
11 causation.

12 And, you know, we contend that that is
13 wrong under Gross and Nassar. Now we don't
14 think that this complaint actually passes
15 pleading standards under any standard, as we
16 made clear, but, of course, you know, it is also
17 the case that we have cases like Gross and
18 Nassar in which it is evident from the record
19 that some consideration of the protected factor
20 was made in the employment context.

21 And at the end, you know, the jury
22 still had to be instructed that it had to
23 determine whether that was a determinative
24 factor in the decision-making.

25 And in all of these cases, you know,

1 the Court has already determined that the --
2 that the fact finder will have to make the
3 decision, as -- as Gross said, whether that
4 factor not only played a role but also had, as
5 Justice Thomas put it in Gross, a determinative
6 effect in the decision-making.

7 JUSTICE KAGAN: Mr. Estrada, you --
8 you said that the Respondents here continue to
9 say that they don't have to prove but-for
10 causation. I'm a little bit confused about that
11 point. And I guess this is for Mr. Chemerinsky
12 to think about as well.

13 But, in your reply brief, you make the
14 good point that on page 47 --

15 MR. ESTRADA: Forty-nine.

16 JUSTICE KAGAN: -- or 49 --

17 MR. ESTRADA: Right.

18 JUSTICE KAGAN: -- of the Respondents'
19 brief, they seem to say the opposite. They seem
20 to suggest by quoting that Third Circuit case --

21 MR. ESTRADA: The Kaz case, right.

22 JUSTICE KAGAN: -- that, in fact, they
23 are going to have to prove but-for causation at
24 the end. And the question here is really what
25 they have to allege now.

1 MR. ESTRADA: I --

2 JUSTICE KAGAN: And if -- if -- if --
3 if we take it that way, I mean, Mr. Chemerinsky
4 can say what he wants to say about that, but
5 let's just assume that that's true, that they
6 are going to have to plead but-for -- excuse me,
7 that they're going to have to prove but-for
8 causation at the end; that is the ultimate
9 standard in the case.

10 But this is a complaint. And, you
11 know, it's pre-discovery and the Plaintiff is
12 not going to know what the Defendant was
13 thinking about in making whatever contract
14 decisions the Defendant was making.

15 And -- and -- and so what do you think
16 the Plaintiff has to allege at the beginning?

17 MR. ESTRADA: Well, I think -- you
18 know, I have two answers to that. I think,
19 first, the Ninth Circuit's ruling in this case
20 had nothing to say about the difference between
21 pleading and the merits. In fact, the Ninth
22 Circuit worked from what was needed to prevail
23 on the merits to then upholding the complaint.

24 JUSTICE KAGAN: Yeah, so I take that
25 point, and I would think that if -- if my

1 assumption holds, which is that the Respondents
2 do have to prove this at the end, then you would
3 have to say that the Ninth Circuit is wrong.

4 But you would still have --

5 MR. ESTRADA: That would not be novel.

6 JUSTICE KAGAN: -- the question of
7 whether the complaint is sufficient.

8 MR. ESTRADA: Yes. Now the second
9 point I was going to make is the whole question
10 of whether there may be burden-shifting has been
11 introduced somewhat coyly by the Respondent. We
12 don't actually know what their position is on
13 that, but I understand what they're trying to
14 say based on the Kaz case, that is, maybe that
15 but-for sort of applies in the sense that the
16 burden of showing but-for causation is shifted
17 to us so that, in a sense, what actually is
18 happening is that they are arguing for the
19 PriceWaterhouse framework without daring to name
20 its name.

21 JUSTICE KAGAN: Yes, so they could be
22 saying that -- and I guess this is another thing
23 for Mr. Chemerinsky to be thinking about -- they
24 could be saying that, that this is essentially
25 an attempt to shift the burden of but-for

1 causation onto you.

2 But they don't have to be saying that.

3 MR. ESTRADA: If I --

4 JUSTICE KAGAN: Excuse me,

5 Mr. Estrada. They don't have to be saying that.

6 They could be saying no, we -- we really do

7 believe that in the end we're going to have to

8 prove but-for causation, but because we're

9 pre-discovery, because we can't really -- I

10 mean, you don't want people throwing around

11 baseless allegations in their complaint, that --

12 that -- that a complaint should be found

13 sufficient even if it doesn't allege but-for

14 causation.

15 You know, it's enough to say they made

16 a racist mark and they gave -- and they gave

17 contracts to lots of white firms that weren't as

18 good as our firm. And that's enough. That --

19 yes.

20 MR. ESTRADA: Well, the -- now the --

21 the -- the answer to -- you know, the bottom

22 line answer to, I think, the theory that

23 underlies all of your questions is that -- the

24 answer to your question is actually controlled

25 by Rule 8, Twombly and Iqbal. And it's actually

1 very clear from Iqbal especially, which was a
2 discrimination case, and from Twombly
3 antecedently, where Justice Souter, in writing
4 Twombly, said we do not want people to open the
5 doors to discovery based on conclusory
6 allegations or formulaic elements of the offense
7 dressed up as factual assertions.

8 And, in our view, that's what we have
9 in this case. And so it is not an answer to
10 say, because you can say that in practically
11 every case, antitrust, antidiscrimination, et
12 cetera, that the facts especially with respect
13 to mental state will always be in the possession
14 of the defendant.

15 JUSTICE GORSUCH: Well, Mr. Estrada,
16 though --

17 JUSTICE KAGAN: If --

18 JUSTICE ALITO: Can I --

19 JUSTICE GORSUCH: -- isn't it -- isn't
20 it -- I'm -- I'm sorry.

21 JUSTICE ALITO: No, go ahead.

22 JUSTICE GORSUCH: Isn't it perfectly
23 common when -- when -- when you're alleging a
24 mental state of an opposing party and you have
25 yet to have discovery to -- to allege on

1 information and belief mental states, and isn't
2 that the simple solution here?

3 MR. ESTRADA: Well, yes and no,
4 Justice Gorsuch. You can -- you can -- you can
5 allege that so long, under Twombly and Iqbal, as
6 you also allege --

7 JUSTICE GORSUCH: You have to have a
8 good faith --

9 MR. ESTRADA: -- facts from which --

10 JUSTICE GORSUCH: -- right, right, but
11 positing Justice Kagan's facts, there's a
12 statement and you have some factual
13 circumstances that might lead to that inference.

14 MR. ESTRADA: Yes, yes.

15 JUSTICE GORSUCH: Then you would --
16 you would plead that mental state.

17 MR. ESTRADA: And if you plead the
18 factual circumstances that plausibly give rise
19 to the inference, then you would have a case
20 that -- that possibly complies with Twombly and
21 Iqbal.

22 JUSTICE SOTOMAYOR: Well, but isn't
23 that the point --

24 JUSTICE KAGAN: Maybe. I mean, you --
25 you said Iqbal and Twombly, and that seems quite

1 right, but we had this case before Iqbal and
2 Twombly, which is in the Title VII context --
3 I'm not sure how to pronounce it -- Swierkiewicz
4 or something like that.

5 MR. ESTRADA: Versus Sorema, yes.

6 JUSTICE KAGAN: Which -- which --
7 which Twombly said we're thinking about that
8 case and that case is still good law. And what
9 -- and what -- what that case said -- this was
10 actually a McDonnell Douglas shifting case --

11 MR. ESTRADA: Uh-huh.

12 JUSTICE KAGAN: -- with the prima
13 facie case. And Swierkiewicz said you don't
14 actually have to in your pleadings even show the
15 prime facie case, that we understand pleadings
16 in this field are really different. And -- and
17 Iqbal and Twombly says, yeah, that's still good
18 law.

19 MR. ESTRADA: With all due respect,
20 Justice Kagan, I think that that is not a fully
21 accurate characterization of the case or of how
22 Iqbal actually distinguished it.

23 What was happening in the Sorema
24 case -- let's call it that to make our lives
25 easier -- is that the Second Circuit had ruled

1 that the complaint was deficient because the
2 plaintiff had pled -- had failed to allege the
3 McDonnell Douglas framework in the complaint.

4 Now the Court overturned that ruling,
5 pointing out that the McDonnell Douglas
6 framework is an evidentiary framework that a
7 plaintiff may choose to use at a trial, not a
8 pleading framework. And that was what Twombly
9 actually later, you know, reaffirmed.

10 And what Twombly was basically saying
11 is you may choose to prove your case in a
12 particular way, but you are not required to --
13 to -- to plead that in all cases.

14 McDonnell Douglas, for example, does
15 not even apply if you have direct evidence of
16 discrimination. It's a way to prove your case
17 circumstantially.

18 So it doesn't make sense to impose on
19 plaintiffs, you know, the burden to put that in
20 a pleading. And I think all the Court was
21 saying is that if a plaintiff has a choice down
22 the road to prove his case in a particular way,
23 that is not a requirement of pleading.

24 But, again, none of that has anything
25 to do with --

1 JUSTICE SOTOMAYOR: But I'm not
2 sure -- I go back to the Chief Justice's initial
3 point, which is, if I come forward and show that
4 race was a motivating factor, it can also be the
5 but-for. Until a defendant is deposed and
6 discovery is held, then that becomes an issue
7 for the trier of fact of whether or not that
8 motivating factor was a but-for cause.

9 So I think as long as you have enough
10 in your complaint to show racial animus and a
11 reasonable inference can be drawn that that's a
12 but-for cause, I think a plaintiff has done more
13 than enough.

14 MR. ESTRADA: Well --

15 JUSTICE SOTOMAYOR: What you seem to
16 be suggesting is that they're required to
17 anticipate every potentially independent reason
18 you may have had without really knowing it --

19 MR. ESTRADA: Well --

20 JUSTICE SOTOMAYOR: -- and disproving
21 it in the complaint. That makes no sense.

22 MR. ESTRADA: No, actually, I -- I
23 have said nothing to -- to -- to that effect,
24 Justice Sotomayor. I have said that under
25 Twombly and Iqbal, a plaintiff is required to

1 allege facts, not conclusory recitation of the
2 elements of the offense, that plausibly give
3 rise to the inference.

4 JUSTICE SOTOMAYOR: The problem is
5 that the Ninth Circuit -- neither the Ninth
6 Circuit and even the government admits that it
7 didn't look at this complaint through the lens
8 that would be provided if we find but-for
9 causation.

10 MR. ESTRADA: Correct. But I will
11 point out that if you find but-for causation,
12 you would then have to examine that under the
13 requirements of Iqbal that require --

14 JUSTICE SOTOMAYOR: Not us. The Ninth
15 Circuit.

16 MR. ESTRADA: Well, somebody. It
17 would be -- it would be permissible to -- for
18 you as you did in Twombly and in Iqbal itself.
19 Iqbal, of course, was a discrimination case, and
20 you examined the complaint in that case, too,
21 thinking that that would be informative for the
22 lower courts.

23 It would not be, you know, with all
24 due respect, you know, as many worthy efforts
25 have been made in this case, through BlueLine,

1 the complaint in this case, for the edification
2 of the Court.

3 I mean, it is worth reading because
4 there are any number of allegations in the
5 complaint to the --

6 JUSTICE ALITO: But if the --

7 JUSTICE KAVANAUGH: There are a lot of
8 --

9 JUSTICE ALITO: -- Mr. Estrada, if the
10 -- if the Respondents now agree that in the end
11 the burden of -- the -- the -- the substantive
12 standard is but-for, is there a dispute about
13 that issue before us, or is the only question
14 before us whether enough facts were pled under
15 12(b)(6) and Iqbal and Twombly, which is what
16 this seems to have devolved into and is,
17 therefore, not the big issue that has been
18 portrayed?

19 MR. ESTRADA: Well, I think that for
20 -- they would further have to agree that what
21 they mean is but-for causation, and they bear
22 the burden of persuasion like on all elements.

23 JUSTICE ALITO: So the disagreement
24 then would be, you know, if the evidence is
25 exactly in equipoise, which way does it go --

1 MR. ESTRADA: No, I think they --

2 JUSTICE ALITO: -- that's what it
3 would be?

4 MR. ESTRADA: -- no, I think what they
5 mean to say in accepting the CAS standard is
6 but-for in the sense that they accept the
7 PriceWaterhouse plurality opinion. They just
8 don't want to call it that because they
9 understand that this Court is not buying it.

10 JUSTICE ALITO: Okay. So it's -- it's
11 -- what would happen if it's in equipoise and
12 who has the burden of production on the issue?

13 MR. ESTRADA: The burden of
14 persuasion, Your Honor, because, under the --

15 JUSTICE ALITO: Yeah.

16 MR. ESTRADA: -- plurality in -- in
17 PriceWaterhouse, you know, the burden of
18 persuasion, even if it is but-for, shifts to the
19 defendant.

20 JUSTICE ALITO: Right, but it's
21 but-for by a preponderance. It's a question of
22 who has that --

23 MR. ESTRADA: Correct, but I --

24 JUSTICE ALITO: -- who has that
25 burden.

1 MR. ESTRADA: -- think what's really
2 going on is that the Respondents are really
3 arguing PriceWaterhouse, as they did expressly
4 in both courts below. They're not actually
5 citing it, but they are actually in a way sort
6 of admitting that somebody has -- may have a
7 but-for burden of persuasion, but they would
8 like it to be us.

9 Now that is also equally wrong for any
10 number of different reasons.

11 JUSTICE ALITO: Yeah, well, I --

12 JUSTICE KAVANAUGH: But if you're --

13 JUSTICE ALITO: -- don't know why the
14 Ninth Circuit did what it did here and I don't
15 know why the Respondents have argued the case
16 the way they did here.

17 But, if -- if you look at the
18 recitation of facts on pages 3 to 5 of the
19 Respondents' brief, could you say that those are
20 insufficient to raise in a -- if pled, those
21 would be insufficient to raise -- to satisfy the
22 pleading standard even if the burden of
23 persuasion is but-for causation?

24 Comcast told Entertainment Studios its
25 channels are good enough. It needed to get

1 support in the field.

2 It turned out that, according to them,
3 that -- that it didn't matter whether they got
4 support in the field and so forth. There is a
5 recitation of facts.

6 MR. ESTRADA: Yes, we do say that
7 that's enough. And -- and we have a number of
8 reasons for that. Some of what they say is
9 actually not in the complaint and has not been
10 in the last two complaints. That's point one.

11 Some of what they say about, you know,
12 the demand for their services is something that
13 they were able to allege in their third and last
14 complaint, you know, all of the notion about how
15 much they're carried and how many customers, you
16 know, they reach, is driven entirely by the fact
17 that they are currently -- may I finish, Mr.
18 Chief Justice?

19 CHIEF JUSTICE ROBERTS: Sure.

20 MR. ESTRADA: -- that they're
21 currently carried by AT&T and DirecTV, which is
22 -- which are now one company.

23 Now it should be perfectly clear to
24 everybody in this courtroom that that's an
25 allegation that they were only able to make in

1 the third complaint in this case. It was not in
2 the first or the second complaint. And the
3 reason for that is, during the pendency of the
4 entire litigation in this case, they were suing
5 AT&T and DirectTV as they were suing us. And
6 that --

7 CHIEF JUSTICE ROBERTS: Thank -- thank
8 you, counsel.

9 MR. ESTRADA: Thank you.

10 CHIEF JUSTICE ROBERTS: Ms. Ratner.

11 ORAL ARGUMENT OF MORGAN L RATNER, FOR
12 THE UNITED STATES, AS AMICUS CURIAE,
13 SUPPORTING THE PETITIONER

14 MS. RATNER: Mr. Chief Justice, and
15 may it please the Court:

16 The court of appeals found that a
17 plaintiff can prevail under Section 1981 if race
18 played any role in a decision not to contract,
19 even if it was not a but-for cause.

20 That's wrong under this Court's
21 decisions in Gross and Nassar, and nobody
22 defends that test as the ultimate standard for
23 causation under Section 1981.

24 Instead -- and I think this gets to
25 Justice Kagan's line of questions -- Respondents

1 invoke burden-shifting to argue that at the
2 pleading stage, motivating factor -- a
3 motivating factor can be enough.

4 That might have been true under
5 PriceWaterhouse burden-shifting, but
6 PriceWaterhouse no longer controls. So, for the
7 first time, Respondents turn to McDonnell
8 Douglas burden-shifting instead.

9 But McDonnell Douglas, even if it
10 applies in this context, is not relevant to the
11 causation question. It shifts only the burden
12 of production at trial. So it can't affect the
13 elements that a plaintiff needs to prove or that
14 a plaintiff needs to plead.

15 And the Swierkiewicz decision that
16 Justice Kagan pointed to underscores that. It
17 says that there's no different analysis under
18 what was then the old notice pleading standard,
19 but now, under Twombly and Iqbal, for these
20 types of antidiscrimination cases.

21 JUSTICE SOTOMAYOR: Can I take you
22 back to the basic structure? Mr. Chemerinsky
23 can speak for himself as to what burdens he's
24 accepting or not, okay? But I'm looking at the
25 statute, and I don't see any of the but-for

1 language, "because of" or any of the other that
2 we have interpreted in any other statute.

3 What I see is a statute that says all
4 citizens must have the same right. And if you
5 -- talking about in the making, performance,
6 execution of the contract. And we've also said
7 the civil rights law was designed to eliminate
8 all race discrimination. I'm not sure how we
9 can square those two things with a but-for.

10 How can it be that if you're treated
11 differently because of your race in the
12 formation of the contract, but you're denied the
13 contract for another reason, that other people
14 may have been denied for, but you were treated
15 differently, more burdens were put on you, more
16 expenses were put on you, and at the end, they
17 say, eh, you know, we really would never take on
18 anyone like you with your business because, and
19 it's true, nobody with your business plan has
20 been accepted before, but you've been run around
21 in circles and made to expend a lot of money --

22 MS. RATNER: So --

23 JUSTICE SOTOMAYOR: -- why is that not
24 actionable?

25 MS. RATNER: So let me give you three

1 responses, Justice Sotomayor. The first is the
2 text says the same right to make a contract. I
3 think if you asked an ordinary English speaker
4 whether someone who would never have been
5 granted that contract, regardless of her race,
6 whether that person was denied the same right to
7 make that contract, I think people would say no.

8 JUSTICE SOTOMAYOR: Except the
9 dictionary --

10 MS. RATNER: But even if that's --

11 JUSTICE SOTOMAYOR: -- the dictionary
12 says definition of making is just "the process
13 of being made."

14 MS. RATNER: Yeah.

15 JUSTICE SOTOMAYOR: So it's the
16 process. It's not just the entering into the
17 contract. There are different words in the
18 statute.

19 MS. RATNER: So I'm happy to address
20 the making point, but let me just --

21 JUSTICE SOTOMAYOR: But I want to --

22 MS. RATNER: -- underscore the --

23 JUSTICE SOTOMAYOR: -- but I want to
24 go back to the broader point, which is how can
25 you say that you have the same right and that

1 we're eliminating all vestiges of discrimination
2 if we are not using motivating factor but are
3 using a but-for standard?

4 MS. RATNER: Justice Sotomayor,
5 there's a lot baked in there. I -- I think to
6 the extent you think there is some ambiguity in
7 the "same right" language, the next place to
8 look is a very important textual clue, and
9 that's Section 2 of the 1866 Act. So, when
10 Congress originally enacted this provision,
11 Section 1 was the general declaration of rights,
12 Section 1 of the 1866 Act. That's now become
13 Section 1981.

14 And Congress had an enforcement
15 mechanism, Section 2, and that does use classic
16 but-for language. So I think that's a good
17 indication of the substantive scope.

18 And true enough, 100 years later, this
19 Court inferred a private right of action, but I
20 don't think that can change the substantive
21 scope that Congress enacted.

22 JUSTICE BREYER: I -- I -- I --
23 unfortunately, I -- I'm stuck back at the Chief
24 Justice's question and I think what Justice
25 Gorsuch was elaborating on that, that -- as I

1 understand their questions, but -- but, anyway,
2 my question is I don't understand; if we're
3 talking about pleadings, what's the difference?
4 I mean, you know, they have some evidence, and
5 the evidence is, on information and belief, we
6 think that the Defendant here used race
7 improperly to deny us the contract. Then they
8 list it.

9 And who cares whether they say it was
10 a motivating factor or whether they say it was a
11 but-for?

12 MS. RATNER: I --

13 JUSTICE BREYER: I can understand it
14 making a difference later when you decide who
15 has the burden of proof, because, at that point,
16 you know, the Defendant maybe should have the
17 whole burden of proof. After all, he knows
18 what's going on in his mind and the Plaintiff
19 doesn't.

20 MS. RATNER: The --

21 JUSTICE BREYER: Or maybe you should
22 say you split it, production versus -- but we're
23 not apparently arguing about that. We're just
24 arguing about the complaint. And, sure, you
25 want him to say information and but-for, they'll

1 say but-for. You want him to say motivating
2 factor, they'll say motivating factor.

3 Can you give me a case where it makes
4 a difference?

5 MS. RATNER: Yeah, Justice Breyer, I
6 think it's often going to make a difference
7 later down the line --

8 JUSTICE BREYER: Yes, later down --

9 MS. RATNER: -- when it's important to
10 get the standard.

11 JUSTICE BREYER: -- the line. But if
12 we eliminate that out --

13 MS. RATNER: And let me give you a --
14 let me give you a hypothetical. This is sort of
15 a silly one, but instead of thinking of but-for
16 in sort of a formal legal way, think of it as,
17 did race plausibly make a difference?

18 Someone applies to be an associate of
19 a law firm. They get a letter back where they
20 think there's some sort of racial language in
21 there, and the letter also says: And, also,
22 we're not hiring you because you never went to
23 law school.

24 If that person files a complaint
25 complaining about the racial aspect of that

1 denial, I don't think any court would say that
2 there was any plausible way that that person was
3 going to be hired as a law firm associate,
4 regardless of their race, because they weren't a
5 lawyer to start with.

6 Those are the types of things that
7 are going to --

8 JUSTICE BREYER: No, then it --

9 MS. RATNER: -- be explained about --

10 JUSTICE BREYER: -- wasn't a
11 motivating factor. It wasn't a motivating
12 factor and it wasn't a but-for condition. There
13 we are. I mean --

14 MS. RATNER: So I think the core
15 difference, and -- and you see that in the court
16 of appeals' decision, is the idea that race
17 could have been some sort of consideration, but
18 a consideration that had no ultimate effect
19 on the result.

20 JUSTICE BREYER: Well, if it's a --

21 MS. RATNER: And that's --

22 JUSTICE BREYER: -- consideration,
23 it's true it wouldn't be a consideration where
24 the applicant was a white person. Indeed, it
25 couldn't have been.

1 And if the applicant is a black
2 person, it could be. So this says -- the
3 statute says you should treat a white person and
4 a black person alike. And so, I mean, that's
5 their reasoning.

6 If it really does make a difference,
7 and -- and -- and I don't -- I'm stuck --

8 MS. RATNER: If it --

9 JUSTICE BREYER: -- on both those
10 points.

11 MS. RATNER: -- if it really does make
12 a difference, then you have but-for causation.
13 But-for cause does not mean sole cause.

14 JUSTICE BREYER: Even though it says
15 alike --

16 MS. RATNER: It means --

17 JUSTICE BREYER: -- and even though a
18 black person and a white person -- even though a
19 white person wouldn't be treated --

20 MS. RATNER: Okay.

21 JUSTICE BREYER: -- that way because,
22 of course, he couldn't be.

23 MS. RATNER: On that separate
24 question, the statute does not say everybody is
25 to be treated alike for all purposes. It says

1 that everybody, regardless of race, has the same
2 right to enter a contract.

3 And we certainly agree that any
4 consideration of race is pernicious and it has
5 no role in private conduct, but this Court has
6 made clear in Domino's Pizza that Section 1981
7 is not an omnibus remedy for all racial
8 injustice.

9 JUSTICE ALITO: Well, I think --

10 JUSTICE KAGAN: Can I take you --

11 JUSTICE ALITO: -- what you're -- what
12 you're saying is that this makes a difference at
13 the pleading stage in those rare cases, if they
14 exist at all, where the complaint goes out of
15 its way to refute itself.

16 MS. RATNER: I -- I think that is very
17 true. And I think there are certain
18 circumstances, and we don't have a position on
19 whether this case is one of them, where someone
20 could go out of their way to say what the
21 potential arguments of the defendant are.

22 But where the rubber is going to meet
23 the road in a lot of these cases is going to be
24 at summary judgment. So we think it's important
25 that the Court --

1 JUSTICE KAVANAUGH: You agree in this
2 case that we should vacate, therefore, and
3 remand and not resolve the issue here?

4 MS. RATNER: We don't have a position
5 on whether this particular complaint satisfies
6 Twombly and Iqbal. We don't think the Court's
7 ordinary practice would be to go on and resolve
8 that question, is there anything formally --

9 JUSTICE KAVANAUGH: You agree that
10 it's --

11 MS. RATNER: -- stopping the Court?
12 No.

13 JUSTICE KAVANAUGH: Excuse me. You
14 agree it's unusual with a complaint with
15 paragraph after paragraph of allegation like
16 this to toss it at the 12(b)(6) stage?

17 MS. RATNER: You know, I -- I don't
18 want to get into the particulars of this
19 complaint because we don't have a view on it. I
20 think oftentimes the additional allegations
21 could be things that cast doubt on the
22 plausibility of some other allegations. It's
23 possible that that was what --

24 JUSTICE KAGAN: Well, in general --

25 MS. RATNER: -- was behind the

1 district court's thinking.

2 JUSTICE KAGAN: -- what would you say
3 a complaint has to do in order to survive a
4 12(b)(6) motion in this area?

5 MS. RATNER: A complaint has to do
6 exactly the same things that a complaint needs
7 to do under the Age Act, under the ADEA, under
8 Title VII retaliation claims. This isn't a new
9 innovation. It's just plead enough to think
10 that race made a difference.

11 And if a judge looks at those
12 allegations and plausibly believes that race
13 made a difference, then that's going to be
14 enough to survive under Twombly and Iqbal.

15 JUSTICE SOTOMAYOR: Are you endorsing
16 the McDonnell Douglas burden-shifting -- not
17 burden-shifting, but the burden remains with the
18 plaintiff, but the -- the production with the
19 defendant to set forth the reasons why?

20 MS. RATNER: So the Court said in
21 Patterson that McDonnell Douglas applies in 1981
22 cases at least in the employment context. We
23 think it's an open question whether it would
24 apply beyond the employment context --

25 JUSTICE SOTOMAYOR: So --

1 MS. RATNER: -- but for purposes --

2 JUSTICE SOTOMAYOR: -- should we
3 address that issue?

4 MS. RATNER: I don't think so. For
5 purposes of this case, we'd be willing to assume
6 that it applies here. It just doesn't matter
7 under that Swierkiewicz decision I alluded to
8 before --

9 JUSTICE SOTOMAYOR: Not for the
10 pleading stage, but we did grant -- the question
11 presented was whether -- what the standard was.

12 CHIEF JUSTICE ROBERTS: Yes.

13 MS. RATNER: May I respond?

14 McDonnell Douglas does not change the
15 standard. It shifts only the order of
16 introducing evidence at trial, so it won't have
17 an effect on the ultimate standard.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Mr. Chemerinsky.

21 ORAL ARGUMENT OF ERWIN CHEMERINSKY

22 ON BEHALF OF THE RESPONDENTS

23 MR. CHEMERINSKY: Good morning, Mr.
24 Chief Justice, and may it please the Court:
25 Statutory language matters. Where

1 federal civil rights statutes use the words
2 "because of" or "based on," this Court has
3 inferred a requirement for but-for causation.
4 But this Court has never created a requirement
5 for but-for causation in the absence of such
6 language. Section 1981 uses no such words.

7 It's crucial to remember the
8 procedural posture of this case. It is on a
9 motion to dismiss. All the Ninth Circuit held
10 was it's sufficient to state a claim under
11 Section 1981 to allege that race was a
12 motivating factor in the denial of the contract.
13 This is on page 2a of the supplement to the cert
14 petition.

15 There is a good deal of confusion in
16 this case so far about the relationship between
17 motivating factor, but-for causation, and
18 burden-shifting.

19 Where this Court has adopted a
20 motivating factor standard, it's then adopted a
21 burden-shifting framework. That's true in
22 constitutional cases. It's true with regard to
23 Mt. Healthy versus Doyle and Village of
24 Arlington Heights. It's true in statutory cases
25 like McDonnell Douglas and Burdine.

1 On the other hand, where the Court has
2 adopted but-for causation, it's rejected
3 burden-shifting, such as in Gross versus FBL
4 Financial Services.

5 Ultimately, Your Honors, the issue
6 before this case was pled can be resolved by
7 looking at the plain language of Section 1981
8 and Congress's broad remedial purpose.

9 To start with the plain language,
10 Section 1981 says that all persons should have
11 the same right to contract as white individuals.
12 This is about creating a requirement for color
13 blindedness with regard to contracting.

14 If race is used as a motivating factor
15 in denying a contract, then there is not the
16 same right with regard to contracting.

17 Also, in terms of the plain language
18 of the statute, it's very important to compare
19 Section 2 of the Civil Rights Act of 1866 with
20 Section 1.

21 Section 2, which provides criminal
22 consequences of violation, does use causal
23 language, such as "by reason of" and "cause to
24 be subjected." Section 1 does not use such
25 language.

1 JUSTICE ALITO: At the end of the day
2 -- at the end of the day, what is the burden of
3 persuasion in this case, in a case like this?

4 MR. CHEMERINSKY: Your Honor, this
5 Court has never reached that question, and it's
6 not presented here on the pleadings.

7 Ultimately, the question would be,
8 does the burden of persuasion shift, as under
9 Section 703M, or does it remain with the
10 plaintiffs at all times?

11 We think that implicitly, by, in
12 Patterson versus McLean, adopting the McDonnell
13 Douglas/Burdine framework, it would say the
14 burden of production shifts, but the burden of
15 persuasion is always --

16 JUSTICE KAGAN: The burden of --

17 MR. CHEMERINSKY: -- with the
18 plaintiff.

19 JUSTICE KAGAN: -- persuasion as to
20 what, Mr. Chemerinsky? Are -- are -- are --
21 what is your view as -- in -- in the last
22 analysis, ultimately, does but-for causation
23 have to be shown?

24 MR. CHEMERINSKY: In the end, Your
25 Honor, I believe that this Court's adoption in

1 Patterson versus McLean of the McDonnell Douglas
2 burden-shifting framework does indicate that the
3 burden of persuasion in the end would rest with
4 the plaintiff.

5 JUSTICE KAGAN: But -- but burden of
6 persuasion as to what issue?

7 MR. CHEMERINSKY: The burden of
8 persuasion in terms of showing that the contract
9 would not have been issued but for race.

10 JUDGE ALITO: Okay. So --

11 MR. CHEMERINSKY: But that's very
12 different, of course, Your Honor, as compares to
13 what has to be pled.

14 JUSTICE ALITO: Yeah, so -- so this is
15 just a pleading case. This is just an issue of
16 whether it's a -- it's a, you know, a 12(b)(6)
17 Iqbal/Twombly pleading case.

18 MR. CHEMERINSKY: That's exactly
19 right, Your Honor. That's why I began in my
20 introduction by pointing you to page 2A of the
21 supplement to the cert petition where all the
22 Ninth Circuit held was that, in this case, the
23 Plaintiffs had to plead that race was a
24 motivating --

25 JUSTICE KAVANAUGH: You're --

1 MR. CHEMERINSKY: -- factor.

2 JUSTICE KAVANAUGH: -- you're not
3 agreeing with the Ninth Circuit then?

4 MR. CHEMERINSKY: No, Your Honor, I am
5 agreeing with the Ninth Circuit.

6 JUSTICE KAVANAUGH: Not -- not with
7 their test.

8 MR. CHEMERINSKY: Well, remember, in
9 this case, all the Ninth Circuit focused on was
10 pleading, and that's all the Ninth Circuit
11 should focus on because this is on a motion to
12 dismiss.

13 Now I do think there's an issue down
14 the road that could be faced, is at the very end
15 who has the burden of persuasion?

16 Here, I think Patterson versus McLean
17 --

18 JUSTICE KAVANAUGH: You just said, I
19 thought, to Justice Kagan, that the Plaintiff
20 would have the burden of persuasion at the end
21 of showing but-for causation. Did I mishear
22 that?

23 MR. CHEMERINSKY: No, you didn't, Your
24 Honor. What I was saying was by -- in Patterson
25 versus McLean, this Court, adopting the

1 McDonnell Douglas burden-shifting framework,
2 McDonnell Douglas shifts the burden of
3 production but never shifts the burden of
4 persuasion. And so, in that sense, that's why
5 we said Patterson versus McLean seems to answer
6 the question.

7 JUSTICE SOTOMAYOR: So all you're
8 arguing, I think, is if you plead motivating
9 factor, that that's enough to survive at a
10 pleading stage?

11 MR. CHEMERINSKY: Exactly.

12 JUSTICE SOTOMAYOR: But you accept
13 that as a -- as a matter of burden at trial or
14 in summary judgment, you do have to prove
15 but-for causation?

16 MR. CHEMERINSKY: That's what this
17 Court, I think, implied in Patterson versus
18 McLean by adopting the --

19 CHIEF JUSTICE ROBERTS: So what --

20 JUSTICE SOTOMAYOR: So what do you do
21 --

22 MR. CHEMERINSKY: -- McDonnell Douglas
23 burden-shifting framework.

24 JUSTICE SOTOMAYOR: -- so what do you
25 do with the extreme example that the assistant

1 solicitor general raised? You know, you're
2 black, but -- and you're not a lawyer. We don't
3 hire non-lawyers.

4 And you don't allege in the complaint
5 that you're a lawyer or that you graduated from
6 law school or whatever. What happens in that?

7 MR. CHEMERINSKY: I assume in that
8 instance that there's not sufficient
9 allegations, even under Swiekiewicz versus
10 Sorema.

11 But, Justice Sotomayor, imagine a
12 different example. Imagine that somebody files
13 a complaint that says, I went to a hotel to rent
14 a room and I was told that I was not going to
15 get a room because none were available and also
16 the hotel doesn't rent to blacks. Should that
17 be sufficient to survive a motion to dismiss?

18 We would say yes, because his race is
19 a motivating factor. The argument on the other
20 side is, because it doesn't allege but-for
21 causation, that wouldn't be enough.

22 And that shows why but-for causation
23 is an inappropriate, in fact, often an
24 impossible standard at the pleading stage.

25 JUSTICE SOTOMAYOR: You -- you would

1 --

2 JUSTICE KAGAN: Mr. Chemerinsky --

3 CHIEF JUSTICE ROBERTS: If you asked
4 -- if I understand your answer to Justice
5 Sotomayor's question about Ms. Ratner's
6 hypothetical, why is it that that fails under
7 your view at the pleading stage?

8 They would say, well, based on
9 whatever the racial indication is in the letter,
10 that that may have been a motivating factor.

11 MR. CHEMERINSKY: If the complaint
12 alleges that race is a motivating factor, then
13 that is sufficient in order to state a claim.

14 CHIEF JUSTICE ROBERTS: Even if it
15 also -- even if, as in -- in the hypothetical,
16 the person's not a lawyer?

17 MR. CHEMERINSKY: Well, the reason I
18 answered Justice Sotomayor that way is it has to
19 be plausible that the plaintiff can recover. If
20 an element of the cause of action is not
21 present, then it's not plausible. And I think
22 that would be the question under --

23 CHIEF JUSTICE ROBERTS: What -- what
24 --

25 MR. CHEMERINSKY: -- Iqbal and

1 Twombly.

2 CHIEF JUSTICE ROBERTS: -- what
3 element of the cause of action would be absent
4 in that hypothetical?

5 MR. CHEMERINSKY: I think the question
6 is, is it plausible that the plaintiff was
7 discriminated against on account of race.

8 In the hypothetical that's given --
9 please, Justice -- Justice --

10 CHIEF JUSTICE ROBERTS: No, I was just
11 going to say, even though a -- a -- a white
12 person would not have had that discriminatory --
13 in other words, been denied an equal -- they're
14 not treated the same, which is your theory, but
15 they're treated differently on the account of
16 race because one was the subject of a racially
17 discriminatory conduct -- comment and the other
18 wasn't.

19 MR. CHEMERINSKY: You're right, Your
20 Honor. As you're spelling out the hypothetical,
21 I would say if the complaint is plausible that
22 race was a motivating factor, that should be
23 enough to withstand the motion to dismiss.

24 JUSTICE BREYER: Why doesn't it -- why
25 doesn't it also fit the but-for test? I mean,

1 you know, if he hadn't been black, they would
2 have rented it to him.

3 MR. CHEMERINSKY: Well, but, Your
4 Honor --

5 JUSTICE BREYER: Well, then why on
6 those same facts can't you put your bottom line,
7 and, therefore, but-for the racial
8 discrimination? What's the difference?

9 MR. CHEMERINSKY: Go back to the
10 hypothetical.

11 JUSTICE BREYER: I can't get the
12 difference between motivating factor and
13 but-for.

14 MR. CHEMERINSKY: But there's an
15 enormous difference, which is why --

16 JUSTICE BREYER: What?

17 MR. CHEMERINSKY: -- this Court has so
18 often said motivating factor. Let me go back to
19 the hypothetical that I gave to Justice
20 Sotomayor.

21 JUSTICE BREYER: Yeah. Yeah.

22 MR. CHEMERINSKY: A hotel says to an
23 individual that we're not renting a room to you
24 because we have no rooms and because you're
25 black.

1 JUSTICE BREYER: Right.

2 MR. CHEMERINSKY: That doesn't allege
3 that race was a but-for cause.

4 JUSTICE BREYER: No, but it does
5 allege the famous tort case that every student
6 studies, the two hunters. Okay?

7 MR. CHEMERINSKY: Summers versus Tice.

8 JUSTICE BREYER: The two -- correct.
9 Thank you.

10 JUSTICE GORSUCH: They're both --

11 JUSTICE BREYER: Excellent. Head of
12 the class.

13 (Laughter.)

14 JUSTICE BREYER: But in -- in -- in --
15 in that -- in that case, you had two hunters and
16 they both shot the person, either would have
17 been sufficient.

18 Now no tort professor ever said that
19 that doesn't meet the but-for case -- test. And
20 even though literally it would have happened
21 anyway, okay?

22 So what it seems to me is the other is
23 that possible exception, but I don't know why
24 ordinary tort law wouldn't take care of it.

25 MR. CHEMERINSKY: But, Your Honor,

1 this Court has so frequently drawn a distinction
2 between motivating factor and but-for causation
3 because it matters so much.

4 It is much harder to allege and prove
5 but-for causation than to allege that race is a
6 motivating factor. And so that's why especially
7 at the pleading stage it's essential --

8 JUSTICE GORSUCH: But could you answer
9 -- could you answer Justice Breyer's question?

10 MR. CHEMERINSKY: Sure.

11 JUSTICE GORSUCH: Wouldn't the very
12 hypothetical you've given us satisfy the but-for
13 test?

14 MR. CHEMERINSKY: No, Your Honor,
15 because the position that --

16 JUSTICE GORSUCH: You disagree with
17 the case? Was it Tice?

18 MR. CHEMERINSKY: No, I don't disagree
19 with Summers versus Tice.

20 JUSTICE GORSUCH: All right. Well,
21 that's good. That's a start.

22 (Laughter.)

23 MR. CHEMERINSKY: Your Honor, the
24 position that the -- opposing counsel has taken
25 is that the complaint has to deny all

1 alternative explanations.

2 JUSTICE GORSUCH: No, no, that's not
3 the position, at least as being explored by
4 Justice Breyer. It's just that it has to be
5 plausible that it caused the injury.

6 And isn't the hypothetical you've
7 given us meet that standard? There are two
8 contributing causes. They're both but-for
9 causes. And under traditional tort principles,
10 why wouldn't that be exactly the sort of case
11 that would survive a 12(b)(6) motion?

12 MR. CHEMERINSKY: I would hope it
13 would, but that's not how --

14 JUSTICE GORSUCH: Okay.

15 MR. CHEMERINSKY: -- this Court has
16 often used the phrase but-for causation.

17 JUSTICE GORSUCH: All right.

18 JUSTICE BREYER: Would it be all right
19 to explain? Suppose the opinion said, look,
20 it's the defendant who knows what's in his mind.
21 How can you expect a plaintiff normally to know
22 everything in the defendant's mind? How could
23 you?

24 And so all he has to do is allege on
25 information and belief that he thinks that this

1 racial part of it was motivating and -- and --
2 and now say call that motivating or call it
3 but-for.

4 But he has to believe that. And --
5 and then we go on to what's actually difficult,
6 I think, is the burden-shifting. Suppose we
7 said something like that.

8 MR. CHEREMINSKY: Well --

9 JUSTICE BREYER: No? Yes?

10 MR. CHEREMINSKY: -- Your Honor, yes.
11 I mean, I think that if the -- if the answer is
12 this complaint goes forward either way, and the
13 Ninth Circuit was correct, I will accept that
14 answer, of course.

15 JUSTICE KAGAN: Well, Mr.
16 Chereminsky --

17 (Laughter.)

18 JUSTICE GORSUCH: So you just don't --

19 MR. CHEREMINSKY: So I'm not going to
20 --

21 JUSTICE GORSUCH: The legal rule
22 doesn't matter. You just want to win?

23 JUSTICE KAGAN: Mr. Chereminsky --

24 MR. CHEREMINSKY: I want the law to be
25 clear that motivating factor is sufficient

1 because I think often but-for is very difficult.

2 JUSTICE GORSUCH: All right, but on
3 that, wouldn't it be unusual for us to say that
4 the test for the pleading stage is motivating
5 factor, but the test at the trial or at summary
6 judgment is but-for?

7 MR. CHEMERINSKY: Emphatically, no,
8 Your Honor. This Court in --

9 JUSTICE GORSUCH: Why -- why wouldn't
10 that be a little unusual?

11 MR. CHEMERINSKY: Because this Court
12 in so many contexts has ultimately said it's
13 but-for --

14 JUSTICE GORSUCH: No. Well, now --

15 MR. CHEMERINSKY: -- but, at the
16 pleading stage, only motivating factor.

17 JUSTICE GORSUCH: -- we -- we've said
18 in PriceWaterhouse it's motivating factor
19 throughout. We haven't made some special
20 exception for pleading stage.

21 And McDonnell Douglas, which you
22 relied on earlier, is a but-for test. And the
23 plaintiff just has to plead a prima facie case
24 of but-for causation or -- or motivating factor,
25 depending on the circumstances --

1 MR. CHEMERINSKY: No, Your Honor.

2 JUSTICE GORSUCH: -- and context.

3 MR. CHEMERINSKY: First, Swierkiewicz
4 versus Sorema specifically says, and it was a
5 unanimous decision of the Court, that plaintiffs
6 do not need to plead a prima facie case.

7 Second, in every area --

8 JUSTICE GORSUCH: Well --

9 MR. CHEMERINSKY: -- where this
10 Court --

11 JUSTICE GORSUCH: -- we can disagree
12 over what Swierkiewicz said, but -- but isn't --
13 isn't it the -- wouldn't it be a little unusual
14 for us to apply different legal standards at
15 different stages of the same case?

16 MR. CHEMERINSKY: No, Your Honor.
17 Take constitutional cases like Mt. Healthy
18 versus Doyle and Village of Arlington Heights.
19 All that's required at the pleading stage is
20 motivating factor, though, in the very end, it
21 would be but-for causation.

22 This is true under McDonnell Douglas
23 and Burdine as well. What's required at the
24 pleading stage is very different than what's
25 required at the very end.

1 JUSTICE GORSUCH: On McDonnell Douglas

2 --

3 JUSTICE ALITO: But what if the --

4 JUSTICE GORSUCH: I'm sorry.

5 JUSTICE ALITO: What if the complaint

6 alleges this was not the but-for cause of the

7 adverse action against me, but it was a

8 motivating factor? Would that be sufficient to

9 go forward?

10 MR. CHEMERINSKY: Yes, if I understand

11 your hypothetical. All that should be required

12 at the pleading stage is motivating factor.

13 JUSTICE ALITO: Even if -- even if it

14 concedes -- even if the plaintiff concedes in

15 the complaint that it wasn't a but-for cause?

16 And even if but-for cause is the standard at the

17 end of the day, the case should be permitted to

18 go forward toward its inevitable doom?

19 MR. CHEMERINSKY: But, Your Honor, the

20 whole point of the burden-shifting framework is

21 to be able to establish what was the actual

22 cause. The problem, as I go back to Justice

23 Gorsuch's question, is it's not realistic to say

24 to the plaintiff that you have to allege that

25 this was the but-for cause and deny all other

1 causes at that stage.

2 JUSTICE KAGAN: Well, that's right,
3 but that seems very different from saying you
4 have to allege a motivating cause.

5 I mean, it's true that you cannot
6 expect the plaintiff to negate everything else
7 that might be in the defendant's mind. This is
8 pre-discovery. The plaintiff isn't going to
9 know everything else that could have been in the
10 defendant's mind.

11 But, as long as the plaintiff comes
12 forward with sufficient allegations to say,
13 given what I know, you know, this defendant made
14 a racist remark, this defendant gave contracts
15 to white firms that were not as qualified as our
16 contract were, why do you have to label that
17 anything? Why do you just have to say those are
18 the kinds of facts that at this stage of the
19 litigation allow the -- the complaint to go
20 forward?

21 MR. CHERMERINSKY: I think they should
22 be, Justice Kagan. As I said to Justice Breyer
23 earlier, I think -- all we're saying is that
24 those allegations should be sufficient.

25 And as Justice Alito pointed out,

1 pages 3 to 5 of the complaint allege those
2 facts, and each of those facts is found in the
3 second amended complaint.

4 JUSTICE KAVANAUGH: If we --

5 JUSTICE KAGAN: But then,
6 Mr. Chemerinsky, it -- don't you think that the
7 Ninth Circuit has to be reversed? I mean, I'm
8 just going to read you a sentence from the Ninth
9 Circuit which seems to say something very
10 different.

11 It says, "even if racial animus was
12 not the but-for cause of a defendant's refusal
13 to contract, a plaintiff can still prevail" --
14 prevail, not like satisfy the pleading
15 standard -- "prevail if she demonstrates that
16 discriminatory intent was a factor in that
17 decision."

18 So, I mean, that seems wrong, right?

19 MR. CHEMERINSKY: But it wasn't the
20 issue before the Ninth Circuit. The issue
21 before the Ninth Circuit was solely about the
22 pleading. And, here, I direct you to the
23 language I referred to on page 2a of the --

24 JUSTICE GORSUCH: Can we just have an
25 answer --

1 JUSTICE KAVANAUGH: If we -- if we --

2 JUSTICE GORSUCH: -- to Justice

3 Kagan's question --

4 MR. CHEMERINSKY: I'm sorry.

5 JUSTICE GORSUCH: -- before you

6 proceed on to page whatever it is?

7 MR. CHEMERINSKY: Sure.

8 JUSTICE GORSUCH: I -- I just -- I'd
9 be grateful to know, doesn't -- don't you agree
10 that the Ninth Circuit was wrong?

11 MR. CHEMERINSKY: What I was saying is
12 in terms of the statement of whether or not in
13 order to prevail. And my response to Justice
14 Kagan was that wasn't the issue before the Ninth
15 Circuit --

16 JUSTICE GORSUCH: I understand that.

17 MR. CHEMERINSKY: -- or this Court.

18 JUSTICE GORSUCH: I understand that.

19 MR. CHEMERINSKY: But I would say,
20 Your Honor --

21 JUSTICE GORSUCH: Would -- would you
22 agree the Ninth Circuit was wrong, though?

23 MR. CHEMERINSKY: Well, what I would
24 say is what I said to Justice Kagan's initial
25 question. Patterson versus McLean adopts the

1 burden-shifting of McDonnell Douglas --

2 JUSTICE GORSUCH: I've -- I've got it.
3 We're not going to get an answer.

4 MR. CHEMERINSKY: I'm sorry.

5 JUSTICE KAVANAUGH: If we -- if we --
6 if we write an opinion -- if we write an opinion
7 that says in 1981 cases, the plaintiff has the
8 ultimate burden of persuasion to prove that race
9 was a but-for cause of the decision, we vacate
10 and remand for the Ninth Circuit to analyze the
11 complaint, what is wrong with that decision?

12 MR. CHEMERINSKY: Well, because it's
13 not the issue before this Court, Your Honor.

14 JUSTICE KAVANAUGH: Well, isn't it the
15 issue given what Justice Kagan just read from
16 the Ninth Circuit's decision, which influenced
17 how the Ninth Circuit assessed the complaint?
18 If we articulate the right standard and then
19 vacate for them to analyze the complaint under
20 the right standard, wouldn't that be the -- the
21 better way to go?

22 MR. CHEMERINSKY: But the right
23 standard for the complaint is to allege that
24 race was a motivating factor. Whatever is the
25 conclusion with regard to who ultimately has the

1 burden of persuasion doesn't change the pleading
2 stage.

3 And that's why I keep going back to
4 what the Ninth Circuit actually held on page 2a
5 --

6 JUSTICE KAVANAUGH: Well, we wouldn't
7 be saying --

8 MR. CHEMERINSKY: -- of the supplement
9 to the complaint.

10 JUSTICE KAVANAUGH: -- we wouldn't be
11 saying anything about the pleading stage under
12 the hypothetical opinion I just articulated. It
13 would just be saying the ultimate burden of
14 persuasion in 1981 cases, contrary to what the
15 Ninth Circuit has -- had said per Justice
16 Kagan's recitation.

17 MR. CHEMERINSKY: Sure. And I think
18 this Court, if it wanted to face the issues now
19 before it, could say at the pleading stage,
20 motivating factor is sufficient. Patterson
21 versus McLean says the McDonnell Douglas/Burdine
22 burden-shifting applies. It shifts the burden
23 of production but not the burden of persuasion.
24 And I think that would deal with all of the
25 issues that we're talking about here.

1 JUSTICE BREYER: Sure -- I'm not
2 sure --

3 CHIEF JUSTICE ROBERTS: Is the burden
4 of --

5 JUSTICE BREYER: -- look, now at least
6 I've got in my head what I -- God. Don't go
7 further if I don't have it right.

8 Smith says this man wouldn't contract
9 with me. I know him. He is the most bigoted
10 person in this state, and, as normal, he said
11 all kinds of racist things and jumped up and
12 down and so forth. And, by the way, he's my
13 fifth cousin, and he hates me, and I've never
14 met anybody who hated me so much. And I think,
15 for both reasons, he would have never entered
16 into this contract.

17 Now there we have two sufficient
18 causes in the absence of the either, and do you
19 win under this statute or do you not?

20 Because the reason they put it in the
21 pleading stage is if you -- what you allege, I
22 don't know there ever has been a complaint like
23 this, but if there were, if you don't win, then
24 why do we let you go further if you can't win?

25 MR. CHERMERINSKY: Your Honor, because

1 this Court has said we don't want to determine
2 at the pleading stage what was the actual cause.
3 That's a question of fact for the jury.

4 JUSTICE BREYER: But do you think you
5 do win or not? I mean, you know, the two
6 hunters, they win. Do they win here or not?

7 MR. CHEMERINSKY: If at the end the
8 plaintiff concedes that he or she would have
9 never gotten the contract anyway, I believe, at
10 the end, under the standard adopted in Patterson
11 versus McLean, the plaintiff would not prevail.

12 CHIEF JUSTICE ROBERTS: So that the --

13 MR. CHEMERINSKY: But that doesn't --

14 CHIEF JUSTICE ROBERTS: I'm sorry. Go
15 ahead.

16 MR. CHEMERINSKY: I was going to say
17 but that doesn't tell us what's required at the
18 pleading stage or at the prima facie case stage.

19 JUSTICE SOTOMAYOR: Well, why don't
20 you --

21 CHIEF JUSTICE ROBERTS: Well, we're
22 talking about --

23 JUSTICE SOTOMAYOR: I'm sorry.

24 CHIEF JUSTICE ROBERTS: -- what is or
25 is not before us. It seems to me that your

1 focus is on the availability of the
2 burden-shifting mechanism, right?

3 MR. CHEMERINSKY: Yes.

4 CHIEF JUSTICE ROBERTS: Well, that's
5 not in the question presented either.

6 MR. CHEMERINSKY: That's correct, Your
7 Honor. I think the only reason that I go to the
8 burden-shifting was Patterson versus McLean
9 adopted the burden-shifting, and it answers many
10 of the questions that have been put to me today.
11 But the --

12 JUSTICE SOTOMAYOR: I -- I --

13 MR. CHEMERINSKY: -- only issue before
14 you, because this case is on a motion to dismiss
15 the pleadings --

16 JUSTICE SOTOMAYOR: Mr. Chemerinsky --

17 MR. CHEMERINSKY: Yes.

18 JUSTICE SOTOMAYOR: -- the worst thing
19 we could possibly do is to try to describe a
20 pleading standard on the basis of McDonnell
21 Douglas or PriceWaterhouse, which were trial
22 burdens or summary judgment burdens.

23 Why isn't it simple enough to say
24 you -- from the allegation, it's a reasonable
25 conclusion that race was a -- was -- was the

1 but-for -- was the reason for the denial of a
2 contract?

3 MR. CHEMERINSKY: Exactly, Your Honor.

4 JUSTICE SOTOMAYOR: So -- and in --

5 MR. CHEMERINSKY: That's all you need
6 to say in this case.

7 JUSTICE SOTOMAYOR: And I don't
8 disagree with you, potentially, that in most
9 circumstances, you prove a -- you prove a
10 motivating factor, that'll be enough. That's
11 what I think my two colleagues have been saying.

12 MR. CHEMERINSKY: And I completely
13 agree.

14 CHIEF JUSTICE ROBERTS: I hesitate to
15 say some thing is the worst thing we could do.

16 (Laughter.)

17 CHIEF JUSTICE ROBERTS: But --

18 JUSTICE SOTOMAYOR: No, you're right.
19 We've done a lot worse.

20 (Laughter.)

21 CHIEF JUSTICE ROBERTS: But -- but if
22 -- if it is a reasonable conclusion based on
23 what you've pled, why have you so strenuously
24 resisted alleging but cause -- but-for
25 causation?

1 MR. CHEMERINSKY: Your Honor, because
2 we live in a world of multiple causes, and we
3 believe that all that's required by the plain
4 language of the statute or by Congress's broad
5 remedial intent is that race be a motivating
6 factor.

7 We do actually allege but-for
8 causation in the complaint. I mean, if you look
9 at the complaint itself, and I can direct you to
10 the specific paragraph of the complaint, it says
11 but-for causation -- paragraph 103 of the
12 complaint says that "the denial of the contract
13 was" -- and I'm quoting the words -- "on account
14 of race."

15 And the specific paragraphs of the
16 complaint support that. So we do have a section
17 in our brief that we meet the requirement for
18 but-for causation.

19 But I think when you focus on the
20 statutory language, when you focus on Congress's
21 broad remedial purpose, it did not mean to
22 impose a requirement for but-for causation at
23 the pleading or at the prima facie case stage
24 either.

25 JUSTICE KAGAN: Mr. Chemerinsky, it

1 just strike -- strikes me as confusing to throw
2 in a different causal standard for the pleading
3 stage as opposed to the ultimate stage, as
4 opposed to saying, look, at the pleading stage,
5 we understand that not everybody's going to know
6 everything, so we're going to not require too
7 much in the way of -- of -- of -- of proof.

8 I mean, you're suggesting that but-for
9 cause is sole cause. But-for cause has never
10 been sole cause. There can be three but-for
11 causes in a case. You know, if you take away
12 each of these three things, the outcome would
13 have been different.

14 But motivating factor is something
15 different. Motivating factor you can take out
16 and the outcome would still be the same. And it
17 just seems quite confusing to me to put in
18 something that's not the same question as the
19 ultimate question at the pleading stage, rather
20 than to understand the pleadings are pleadings
21 and they're before discovery and nobody can be
22 expected to know what the defendant is going to
23 say.

24 MR. CHEMERINSKY: I disagree, Justice
25 Kagan. This Court has repeatedly adopted a

1 motivating standard pleading approach, even
2 though in the end it's a but-for cause standard.

3 I go back to what I said to Justice
4 Gorsuch. If you look at the constitutional
5 cases like Mt. Healthy versus Doyle, Village of
6 Arlington Heights versus Metropolitan
7 Development Corporation, all that's required at
8 the pleading stage is motivating factor.

9 That's true with regard to Title VII
10 as well. It's a motivating factor standard at
11 the pleading stage.

12 I think to require but-for causation
13 at the pleading stage would be often an
14 insurmountable burden. In fact, that was
15 Justice O'Connor's point in PriceWaterhouse, how
16 but-for causation --

17 JUSTICE KAVANAUGH: But these -- the
18 --

19 MR. CHEMERINKSY: -- is so difficult.

20 JUSTICE KAVANAUGH: -- I'm sorry --
21 these cases, as you know, are not usually thrown
22 out at the motion to dismiss stage and usually
23 you have the ultimate legal test in mind, and
24 you just look at the facts alleged in the
25 complaint to see, as Justice Sotomayor rightly

1 said, whether there's a way you could plausibly
2 infer from those facts that it would ultimately
3 meet the test for 1981 or for discrimination.

4 And this is a helpful question for
5 you. Isn't -- isn't that just how it usually
6 works?

7 MR. CHEMERINSKY: Yes.

8 JUSTICE KAVANAUGH: Yeah, I believe.

9 (Laughter.)

10 JUSTICE KAVANAUGH: Yeah. In other
11 words, we shouldn't get in -- or why should we
12 get -- I guess I'm picking up on Justice Kagan's
13 now: Here's the legal test for 1981. Go look
14 at the facts alleged in the complaint, the
15 facts, and just see whether they would meet the
16 standard.

17 And it's pretty rare, at least in my
18 years of looking at discrimination complaints,
19 it's pretty rare to throw one out at the motion
20 to dismiss stage --

21 MR. CHEMERINSKY: Your Honor --

22 JUSTICE KAVANAUGH: -- as long as it
23 passes, you know, a pretty low bar.

24 MR. CHEMERINSKY: And that's exactly
25 right. And that's what the Ninth Circuit did if

1 you read the opinion in this case. The Ninth
2 Circuit says in the bottom of page 2A that the
3 only question before us is the pleadings. And
4 it says that the standard is motivating factor
5 at pleadings.

6 JUSTICE KAVANAUGH: Well, but --

7 MR. CHEMERINSKY: And at the top of
8 page 3, it --

9 JUSTICE KAVANAUGH: -- the problem --

10 MR. CHEMERINSKY: -- then says that's
11 not --

12 JUSTICE KAVANAUGH: -- the problem --
13 and I'm repeating myself, but the problem is
14 that they were assessing that arguably, as
15 Justice Kagan pointed out, with the wrong test
16 in mind. If they had the right test in mind,
17 they still might allow the complaint to go
18 forward. But that was the question presented in
19 the cert petition.

20 MR. CHEMERINSKY: But I think all this
21 Court needs to say then is that the Ninth
22 Circuit is correct in saying at the pleading
23 stage, motivating factor is sufficient, and
24 perhaps you want to remand to assess whether or
25 not they applied the standard.

1 Though I think, again, if you look at
2 the top of page 3 of the opinion in this case,
3 that's exactly what they did, was say there's
4 plausible allegations here that race was a
5 motivating factor.

6 CHIEF JUSTICE ROBERTS: But -- but
7 you've told me that we don't even have to do
8 that because you say that you did plead but-for
9 cause.

10 MR. CHEMERINSKY: Yes, Your Honor, we
11 did plead but-for causation, but we do not
12 believe that it's a requirement. We believe
13 that at the pleading stage all that's necessary
14 is motivating factor.

15 CHIEF JUSTICE ROBERTS: Well, that
16 sounds like an advisory opinion for me saying,
17 well, you know, they're not arguing that but-for
18 cause is required, but they alleged it anyway,
19 but we're supposed to forget about that and --
20 and instead address this very slippery question
21 which isn't even presented under your argument
22 today.

23 MR. CHEMERINSKY: Yeah, I agree with
24 that. I think the only question presented is
25 about the pleading stage.

1 It's quite notable that there was a
2 second question in the cert petition that this
3 Court did not grant cert on, and that was the
4 question of whether or not the plaintiff has the
5 burden of negating all other explanations at the
6 pleading stage. I think that shows why we're
7 here today and what we're arguing about and why
8 it matters so much.

9 But I agree completely, Chief Justice
10 Roberts, all that is before this Court is
11 whether the Ninth Circuit was correct that at
12 the pleading stage, it just has to be alleged,
13 that race was the motivating factor in the
14 denial of the contract.

15 JUSTICE ALITO: I know you didn't
16 draft the complaint, but the complaint goes on
17 and on and on with a lot of facts, including an
18 allegation that Comcast entered into a racist
19 conspiracy with the NAACP, the National Union
20 League, Al Sharpton, and the National Action
21 Network.

22 And do you think that had any effect
23 on what the district court did here in granting
24 dismissal under 12(b)(6)?

25 MR. CHERMERINSKY: It shouldn't, Your

1 Honor, because it's not in the second amended
2 complaint. And the only operative complaint
3 before the district court, and the matter that's
4 now before this Court, was the second amended
5 complaint. And the second amended complaint
6 alleges many facts that would support plausibly
7 that race was the motivating factor in denying
8 contracts.

9 And you alluded to these earlier on
10 pages 3 to 5. These are such things as that Mr.
11 Allen was told over many years things to do and
12 he'd get carriage. He did those and didn't get
13 carriage; that he was told that there was no
14 bandwidth, but they then carried eight white --
15 80 white-owned channels; that all of the
16 channels that are carried by the other cable
17 companies are carried by Comcast, except for Mr.
18 Allen's channels.

19 All of this is at least enough to
20 allege that race is a motivating factor.

21 CHIEF JUSTICE ROBERTS: But also
22 enough to allege that the NAACP and the National
23 Urban League and the other individuals were in
24 on the conspiracy?

25 MR. CHERMERINSKY: Your Honor, that is

1 not in the second amended complaint. And the
2 only thing that was before the district court
3 and the matter that's before this Court is the
4 second amended complaint.

5 What you're referring to here is not
6 properly before the district court and not
7 properly before this Court.

8 In conclusion, ultimately, this case
9 comes down to two different conceptions of what
10 must be pled. Our view is there should be
11 enough to allege that race is a motivating
12 factor. The other side says it has to be
13 alleged that race is the but-for cause.

14 When you think of Congress's broad
15 remedial purposes in 1866, there can't be any
16 doubt that Congress wanted then to open the door
17 to claims with regard to race discrimination in
18 contracting, not to close that door.

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Mr. Estrada, three minutes remaining.

23 REBUTTAL ARGUMENT OF MIGUEL ESTRADA ON

24 BEHALF OF THE PETITIONER

25 MR. ESTRADA: Yes, thank you, Mr.

1 Chief Justice.

2 Let me start with the last question
3 that was asked and the answer given by counsel.

4 I would refer the Court to the -- to
5 the Pet. App. starting at page 54A and paragraph
6 59, which is the second amended complaint, which
7 is the current complaint at issue, where the
8 current complaint continues to allege that
9 white-owned media and Comcast in particular
10 works hand in glove with the federal government
11 to execute this racist conspiracy.

12 I would further refer the Court to
13 paragraph 64 -- 62, 64, and 65, which are on the
14 pages following, in which the current complaint
15 goes on to allege that we paid off the
16 signatories to the memorandums of understanding.
17 It doesn't name them by name, but those were
18 incorporated by reference and the district court
19 took judicial notice of the MAU.

20 And, obviously, the signatories are
21 named. They are the NAACP, the Urban League,
22 and Al Sharpton.

23 And so the allegation is that we paid
24 off the oldest civil rights organizations in the
25 court -- in the country to give us cover for

1 race discrimination.

2 The complaint goes on in paragraph 73
3 and 81 to say that we have minority-owned
4 networks that are run by Magic Johnson and Diddy
5 Combs, which apparently are some sort of
6 artists, and it claims that these African
7 American entertainers actually signed up with
8 Comcast to give us cover for our racial
9 discrimination.

10 Now the period covered by the
11 complaint is 2005 to February 2015, when the
12 complaint was filed.

13 So, in a nutshell, the theory of the
14 complaint is that Comcast engaged in a racist
15 plot with the Obama Administration, the oldest
16 civil rights -- with the oldest civil rights
17 organizations in the country, Diddy, and Magic
18 Johnson.

19 And that -- if that actually in any
20 planet satisfies, I don't know how many
21 paragraphs this has, Justice Kavanaugh, it -- it
22 can have 100 paragraphs, but if in any planet
23 that satisfies the plausibility standard on
24 Iqbal, the civil justice system has real
25 problems.

1 If I could go back to the question
2 that Justice Alito asked earlier with respect to
3 the allegations that are listed in those pages,
4 you know, the thing that I wanted to make clear
5 with respect to the settlement and that I was
6 making clear with respect to the time period
7 covered by the complaint, which is 2008 to
8 February 2015, is that the carriage by AT&T and
9 DirecTV, which are probably the largest in the
10 country, 25 million or so, is -- post-dates the
11 events in the complaint.

12 And so that the allegations in the
13 current operative complaint with respect to
14 demand that they can show by reference to this
15 carriage is one that was by dint of a settlement
16 that was entered during the pendency of this
17 litigation.

18 We ask for judicial notice, again, of
19 the fact that these complaints were all pending
20 in the Central District of California, and this
21 probably had some bearing on the fact that Judge
22 Hatter, who didn't just fall off the turnip
23 truck, granted our motion to dismiss.

24 Thank you, Mr. Chief Justice.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. The case is submitted.

2 (Whereupon, at 11:06 a.m., the case
3 was submitted.)

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