Nos. 18-1185, 18-1171

In the
Supreme Court of the United States

CHARTER COMMUNICATIONS, INC.,
Petitioner,
v.
NATIONAL ASSOCIATION OF AFRICAN AMERICAN-OWNED MEDIA, AND ENTERTAINMENT STUDIOS NETWORKS, INC.,
Respondents.

COMCAST CORPORATION,
Petitioner,
v.
NATIONAL ASSOCIATION OF AFRICAN AMERICAN-OWNED MEDIA, AND ENTERTAINMENT STUDIOS NETWORKS, INC.,
Respondents.

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. One of the Chamber's responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community. It filed an amicus brief in support of rehearing en banc in the Ninth Circuit in the proceedings below, and has filed amicus briefs in this Court in cases directly relevant to the questions presented here, including in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013); *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009); and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Chamber's members are deeply committed to preventing discrimination in the workplace. Their operations also depend on consistency, predictability, and fairness in the law governing employment and

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[1] No counsel for a party authored this brief in whole or in part. No person or entity, other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties received notice and have provided consent to this filing.

other contractual relationships. The Ninth Circuit's decisions in *National Association of African American-Owned Media v. Charter Communications, Inc.*, 915 F.3d 617 (9th Cir. 2019) ("*Charter*"), Charter Pet. App. 1a-25a, and *National Association of African American-Owned Media v. Comcast Corp.*, 743 F. App'x 106 (9th Cir. 2019) ("*Comcast*"), Comcast Pet. App. 1a-4a, prescribe a new and watered-down standard of causation for Section 1981 cases that upsets existing law, directly conflicts with the decisions of this Court and other circuits, and will impose unintended costs and burdens on employers, including potential liability even when the alleged discrimination did not actually result in the complained-of action. This Court's intervention and correction of these decisions is warranted.[2]

The Ninth Circuit's decisions in these cases adopted a "mixed-motive" causation standard under which "[e]ven if racial animus was not the but-for cause of a defendant's refusal to contract, a plaintiff can still prevail if she demonstrates that discriminatory intent was *a* factor in that decision." Charter Pet. App. 15a (emphasis added). That standard contravenes the default rule established by this Court and rooted in longstanding tort principles: Except where Congress has explicitly specified otherwise, federal statutes proscribing discriminatory conduct impose liability only where that conduct is the cause in fact (or but-for cause) of

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[2] Because the *Charter* and *Comcast* petitions raise the identical issue under Section 1981, the Chamber is filing the same amicus brief in both cases. The Court should grant both petitions and consolidate the cases for argument.

the plaintiff's injury. *See Nassar*, 570 U.S. at 347; *Gross*, 557 U.S. at 178.

The Ninth Circuit's decisions also conflict with the decisions of five other circuits, which have held that Section 1981 adopts a but-for causation standard. These clear conflicts of authority are reason enough to grant review. But the practical consequences of the Ninth Circuit's decisions confirm the urgent need for this Court's immediate intervention. The Ninth Circuit's new rule threatens to undermine Congress's comprehensive and oft-amended statutory scheme for remedying employment discrimination in Title VII by turning Section 1981 into a more expansive vehicle for judicial innovation in the field of employment-discrimination claims involving race.

As the decisions below well illustrate, acceptance of a mixed-motive causation standard makes even frivolous Section 1981 claims nearly impossible to defeat before trial. *See* Comcast Pet. 22-23. And by increasing the odds that entirely legitimate workplace decisions will result in burdensome litigation and undeserved reputational harms, such a standard is likely to prevent businesses from evenhandedly and fairly applying workplace standards in circumstances when doing so would be good for companies, coworkers, and consumers alike. That is not a result Congress could conceivably have intended, and it does not further the objective of identifying, and penalizing, actual discrimination where it does exist. Indeed, under the Ninth Circuit's novel standard, an employer may be held liable under Section 1981 even when the plaintiff fails to allege, much less prove, that race was the actual cause of the complained-of injury.

The petitions should be granted.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISIONS CONFLICT WITH DECISIONS OF THIS COURT AND FIVE OTHER CIRCUITS

A. This Court Has Held That But-For Causation Is The Default Rule For Federal Discrimination Laws

This Court has already held that, when Congress legislates, it does so according to certain "default rules it is presumed to have incorporated, absent an indication to the contrary in the statute itself." *University of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 347 (2013). This includes the "background" principle of "[c]ausation in fact": the requirement that a plaintiff offer "proof that the defendant's conduct did in fact cause the plaintiff's injury." *Id.* at 346-47. Causation in fact, or "but-for" causation, "retains a secure position as a fundamental criterion of tort liability" because it is a "factual, policy-neutral inquiry." Richard W. Wright, *Causation in Tort Law*, 73 Cal. L. Rev. 1735, 1813 (1985); *see also* Note, *Rethinking Actual Causation in Tort Law*, 130 Harv. L. Rev. 2163, 2164 (2017) (describing "but-for" causation as the "standard definition of actual causation"). As the Court in *Nassar* noted, it is "textbook tort law that an action 'is not regarded as a cause of an event if the particular event would have occurred without it.'" 570 U.S. at 347 (quoting W. Page Keeton et al., *Prosser and Keeton on Law of Torts* 265 (5th ed. 1984)).

In *Nassar*, the Court vacated a decision of the Fifth Circuit holding that retaliation claims arising under Title VII require a showing only that

retaliation was *a* motivating factor in the adverse employment action. 570 U.S. at 349. In so holding, *Nassar* built on this Court's decision a few years earlier in *Gross v. FBL Financial Services, Inc.*, in which the Court held that the Age Discrimination in Employment Act of 1967 (ADEA) requires plaintiffs to prove that "age was the 'but-for' cause of the challenged employer decision." 557 U.S. 167, 178 (2009). There, too, the Court refused to assume that Congress intended a mixed-motive standard where "the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor." *Id.* at 174.

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

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

The operative language of Section 1981 has not changed since its enactment in the Civil Rights Act of 1866. It sets out a basic statement of equal civil rights among persons, recognizing, among other things, that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a). Unlike the 1991 amendment to Title VII, which expressly provides for mixed-motive liability in certain cases, *see* 42 U.S.C. § 2000e–2(m), the text of Section 1981 evinces no intent whatsoever to depart from the default rule of but-for causation. To the contrary, all

signs point *toward* the conclusion that Section 1981 plaintiffs must prove but-for causation.

First, the plain terms of the statute prohibit racial discrimination simply where a person who is not "white" has been deprived of the enjoyment of "the same right . . . to make and enforce contracts" that he would otherwise enjoy if he were "white." 42 U.S.C. § 1981(a). If the result would have been the same for a white person (*i.e.*, if race was not the but-for cause of a challenged action), a plaintiff has received "the same right" as a white person.

Second, the historical context of Section 1981 bolsters the conclusion that Congress intended a but-for causation standard. When Section 1981 was enacted, "but-for" causation was the bar that plaintiffs in American courts had to hurdle. *See* G. Edward White, *The Emergence and Doctrinal Development of Tort Law, 1870–1930*, 11 U. St. Thomas L.J. 463, 464-65 (2014). Indeed, mixed-motive liability was not invented until a century later, when it first appeared in the fractured decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and shortly afterwards was codified in modified form for some—but not all—Title VII claims in the Civil Rights Act of 1991. *See Nassar*, 570 U.S. at 348-49.

Third, at the same time that Congress was enacting an express mixed-motive causation standard for a subset of Title VII claims, Congress also amended Section 1981 to address this Court's decision in *Runyon*. *See Pittman v. Oregon, Emp't Dep't*, 509 F.3d 1065, 1068 (9th Cir. 2007). Yet its amendments to Section 1981 conspicuously lacked the mixed-motive causation standard that it simultaneously added to Title VII. Under *Nassar* and *Gross*, it is necessary to give "effect to Congress'

choice" in 1991 by recognizing mixed-motive liability only where Congress had called for it. *Nassar*, 570 U.S. at 354 (quoting *Gross*, 557 U.S. at 177 n.3). The Ninth Circuit's decisions in these cases upset that choice by imposing a mixed-motive standard for Section 1981 that Congress did not.

Moreover, the Ninth Circuit's adoption of a mixed-motive standard for Section 1981 is even more extreme in that these cases, unlike *Gross* and *Nassar*, involve an inferred private right of action. This Court's precedents require courts to proceed with particular care when it comes to creating or expanding the contours on an implied private right. *See Janus Capital Grp., Inc. v. First Derivative Traders,* 564 U.S. 135, 142 (2011); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.,* 552 U.S. 148, 165 (2008). The Ninth Circuit, however, threw such caution to the wind by dramatically expanding the scope of liability under Section 1981 without a shred of evidence that Congress actually intended that result.

C. The Ninth Circuit's Decisions Below Conflict With The Decisions Of At Least Five Other Circuits

Outside of the Ninth Circuit, every other circuit that has considered the issue has recognized that Section 1981 liability rests ultimately on but-for causation, either because the plaintiff must prove but-for causation or because the defendant can prevail if it shows the *absence* of but-for causation. The Seventh Circuit stated the prevailing rule succinctly: "Absent explicit statutory authorization . . . we cannot import the . . . 'motivating-factor' relief found in § 2000e–2(m) into entirely different statutes." *Smith v. Wilson*, 705 F.3d 674, 680 (7th

Cir. 2013) (Wood, J.), *cert. denied*, 571 U.S. 829 (2013); *see also Brown v. J. Kaz, Inc.*, 581 F.3d 175, 182 n.5 (3d Cir. 2009); *Aquino v. Honda of Am., Inc.*, 158 F. App'x 667, 676 & n.5 (6th Cir. 2005); *Mabra v. United Food & Commercial Workers Union No. 1996*, 176 F.3d 1357, 1357-58 (11th Cir. 1999); *Calloway v. Miller*, 147 F.3d 778, 781 (8th Cir. 1998).

The Ninth Circuit here relied largely on a mistaken understanding of the Third Circuit's pre-*Nassar* decision in *J. Kaz, Inc.*, which, "albeit in dicta and without formally resolving the issue," suggested that a plaintiff could make a "'prima facie'" showing of Section 1981 liability where he showed that race played "'any role'" in the challenged action. Charter Pet. App. 14a (quoting *J. Kaz, Inc.*, 581 F.3d at 182 n.5).

Significantly, in *J. Kaz* the Third Circuit imported the burden-shifting framework of *Price Waterhouse* into Section 1981, under which a defendant may defeat a claim by showing that it would have taken the same action without any impermissible motivating factor. 581 F.3d at 182 n.5. Although the Ninth Circuit in *Charter* pointed to *J. Kaz* in adopting its mixed-motive standard, it lost sight of the critical point: the Third Circuit's rule ultimately bars the imposition of liability where it is shown that discrimination was not the but-for cause of the plaintiff's asserted injury. *Id.* The Ninth Circuit's decisions in these cases recognize no such defense, and thus impose liability in circumstances where no other court of appeals does.

As the petitions for certiorari explain in detail, the Ninth Circuit's decisions make the Circuit a stark outlier on this important and recurring issue.

II. THE NINTH CIRCUIT'S NEW MIXED-MOTIVE STANDARD FOR SECTION 1981 CLAIMS WILL DISRUPT EMPLOYMENT LAW AND IMPOSE SUBSTANTIAL BURDENS AND COSTS ON BUSINESSES

This clear conflict of authority is reason enough to grant review. But the importance of the question presented underscores the need for this Court's intervention now. The consequences of the Ninth Circuit's decisions will reach far across the field of employment litigation, upsetting decades of relatively stable case law, imposing considerable reputational and financial costs on businesses that have not discriminated, and disrupting workplaces.

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

By watering down the causation standard for Section 1981 claims, the Ninth Circuit's decisions also threaten to disrupt employment discrimination law in a circuit that is home to nearly twenty percent of the nation's population. Until the decisions here, the Ninth Circuit had held that Section 1981 claims should be analyzed according to "the same legal principles as those applicable in a Title VII disparate treatment case." *Metoyer v. Chassman,* 504 F.3d 919, 930 (9th Cir. 2007) (quoting *Fonseca v. Sysco Food Servs. of Ariz., Inc.*, 374 F.3d 840, 850 (9th Cir. 2004)). A plaintiff alleging race-based discrimination in an employment context, therefore, had no reason to prefer the judicially created private cause of action under Section 1981 to the express, finely reticulated

private cause of action that Congress established in Title VII.

Following *Charter* and *Comcast*, however, employment discrimination plaintiffs in the Ninth Circuit have a substantial reason to circumvent Congress's limits on employment discrimination claims under Title VII by bringing their claims under Section 1981's inferred cause of action instead. Unlike the express cause of action written by Congress to govern employment discrimination on the basis of race, the inferred cause of action as amended by the Ninth Circuit now apparently recognizes *no* defense to damages liability for defendants who show that they would have taken the same action regardless of the race of the plaintiff. *See* Charter Pet. App. 15a; *cf. Nassar*, 570 U.S. at 349 (explaining that, under Title VII as amended by the 1991 Civil Rights Act, an "employer's proof that it would still have taken the same employment action [regardless of race] would save it from monetary damages"). Plaintiffs who could not possibly recover damages under Title VII because of the express limits Congress has carefully crafted in Title VII will thus resort to the judicially fashioned remedy under Section 1981 instead.

This Court has previously cautioned that courts should be "reluctant" to give Section 1981 a reading that will facilitate this sort of "circumvent[ion of] the detailed remedial scheme constructed in" Title VII. *Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1989), *superseded by statute as stated in CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 450 (2008). The Ninth Circuit, however, apparently paid no heed to those concerns. Moreover, its decision will be particularly disruptive because it will channel

litigants away from the highly detailed regime set out in Title VII—a regime that is the product of decades of interaction between Congress, the courts, and litigants—and towards a free-form, judicially crafted body of rules (yet to be developed) under Section 1981. Where the Ninth Circuit might take that case law in the absence of a carefully legislated Title VII framework is anyone's guess. Whatever else might be said of this result, it is not one that will enhance the predictability and stability of employment law on which employers rely.

B. The Ninth Circuit's Mixed-Motive Standard Will Punish And Deter Legitimate Employment Actions, Disrupt Workplaces, And Impose Unwarranted Costs And Reputational Harms On Businesses

Changing the causation standard for Section 1981 claims from "but-for" to "a motivating factor" will produce unfair results by: discouraging employers from taking lawful employment actions; penalizing employers that did nothing wrong; and forcing employers to settle even meritless claims to avoid the financial costs, reputational effects, and workplace disruptions that accompany drawn-out employment-discrimination litigation.

Employment decisions are inherently subjective in some measure. So it will be relatively easy for a plaintiff to allege that discrimination was *a* motivating factor. Then the defendant effectively has the burden of proving a negative—that discrimination was not *a* factor. Proving a negative is always difficult and it will be especially difficult when allegations of discrimination and mixed motives are swirling about. *See Elkins v. United*

States, 364 U.S. 206, 218 (1960) ("[A]s a practical matter it is never easy to prove a negative . . . .").

1. When deciding whether and how to apply employment laws and workplace standards to a member of a protected class, employers must carefully consider the potential for unfair charges of discrimination. To take an extreme example: if an employee is caught stealing intellectual property, and the company has a written policy that all employees caught stealing will be terminated, the employee's firing should be above reproach. And the company, its customers, honest employees, and commerce in general would benefit from application of that policy. But even a baseless charge of discrimination could cause the company considerable litigation expenses and reputational consequences.

Under the Ninth Circuit's new standard, that problem is aggravated. If the fired employee is a racial minority, he or she could bring suit arguing that the manager who fired the employee harbored racial animus and therefore had an additional reason ("a motivating factor") for wanting to fire the employee. That is a problem especially for large organizations with geographically dispersed operations, which rely on the enforcement of neutral written policies to prevent discrimination, but which cannot pervasively monitor their employees' consciences for evidence (either probative or exculpatory) of additional, discriminatory motives.

Or take a more mundane example: a manager who is not good at customer service or who routinely shirks his job duties. Leaving the manager in his job is bad for the company, the company's customers who receive lousy service, and a more junior employee who might otherwise get a promotion. But

demoting or terminating the employee is risky if the employee might allege racial animus, no matter how little basis there might be for the allegation.

2. When an employer in such a situation considers the high financial cost of defending against an employment suit, and the reputational consequences of being charged with discrimination, it may decide not to take any action even if it is confident it would ultimately prevail at trial. It is already well known that employers can be overly reticent to act based on concerns about potential litigation costs, regardless of the existence of perfectly legitimate business reasons for taking employment actions. Commentators have warned against the "slippery slope" of liability and "the reality that, in the modern workplace, employers often act in prophylactic ways to avoid violating the law—taking measures not otherwise required by law in order to minimize their potential liability." Jessica K. Fink, *Protected By Association? The Supreme Court's Incomplete Approach To Defining The Scope Of The Third-Party Retaliation Doctrine*, 63 Hastings L.J. 521, 545 (2012).

Or businesses might essentially pay a toll for taking necessary employment actions. Commentators have noted the discrimination "*de facto* severance" system" whereby employers pay employees who file even meritless EEOC charges to avoid the costs of defending against discrimination charges. David Sherwyn et al., *Assessing The Case For Employment Arbitration: A New Path For Empirical Research*, 57 Stan. L. Rev. 1557, 1579 (2005); *see also* Fink, *supra*, at 545 ("Even where the termination or demotion has nothing to do with the employee's gender or nationality or previous

discrimination complaint, savvy employers know that it might cost them well into the six figures to defend against a Title VII discrimination or retaliation suit—even where the suit ultimately proves to be without merit."); David Sherwyn et al., *In Defense Of Mandatory Arbitration Of Employment Disputes: Saving The Baby, Tossing Out The Bath Water, And Constructing A New Sink In The Process*, 2 U. Pa. J. Lab. & Emp. L. 73, 82 (1999) ("[E]mployees file baseless discrimination charges because they know that their former employers are willing to pay a nominal amount of money in order to avoid the aggravation, costs, and losses of time, resources, and productivity that inevitably arise in defending such allegations." (footnote omitted).)

Neither outcome is fair to anyone. Both impose inefficient drags on businesses—especially small businesses—with reverberating implications for commerce in general. And innocent employees will ultimately suffer, too: Claims of race-based discrimination can disrupt, and inflame, the workplace precisely because of how serious such allegations are when meritorious; by adopting a new mixed-motive standard that is so low as to encourage meritless claims, the Ninth Circuit's decisions will needlessly agitate the workplace, and distract from real instances of racial discrimination that should, by all means, be rooted out and eliminated.

3. These problems are exacerbated by the fact that the Ninth Circuit's new standard will be especially difficult for employers to satisfy on the pleadings, before costly and time-consuming discovery, or even on summary judgment. As the Ninth Circuit's decisions in these cases illustrate, the new mixed-motive standard will put more

pressure on the proper application of the pleading standards set out in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-56 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 677-80 (2009), in deciding whether claims may pass the motion-to-dismiss stage.

Under *Iqbal* and *Twombly*, a complaint must present "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" *Id.* (quoting *Twombly*, 550 U.S. at 557). Likewise, where there is an "obvious alternative explanation" for the defendant's conduct, the burden is on the plaintiff to provide "factual content to 'nudg[e]' his claim of purposeful discrimination 'across the line from conceivable to plausible.'" *Id.* at 682-83 (alteration in original) (quoting *Twombly*, 550 U.S. at 570). The application of these principles is all the more important in mixed-motive cases where an action is supported by legitimate considerations but the allegation is that discrimination was afoot.

The *Comcast* and *Charter* cases prove the point. In *Comcast*, the district court dismissed the plaintiffs' claims three separate times for failure to adequately plead a Section 1981 claim, ultimately concluding that they had failed to allege facts plausibly indicating that Comcast's refusal to contract with plaintiff Entertainment Studios Networks was "racially discriminatory" or done with anything other than "legitimate business reasons" in mind. *See* Comcast Pet. App. 6a. The Ninth Circuit reversed on the grounds that, although the plaintiffs' complaint in *Comcast* itself had alleged "legitimate,

race-neutral reasons for [Comcast's] conduct," those "alternative explanations [were not] so compelling as to render Plaintiffs' theory of racial animus implausible." *Id.* at 4a. What was that theory? That Comcast "engineered an industry-wide racist conspiracy with the federal government and the entire civil rights establishment—not against companies owned by African-Americans, but *only* against a made-up racial category of '100% African American-owned' companies." Comcast Pet. 23.

In *Charter,* the Ninth Circuit likewise held that plaintiffs' claims of racial discrimination could proceed, even though, the court had to admit, "it is plausible that Charter's conduct was attributable wholly to legitimate, race-neutral considerations," because "those alternative explanations are [not] so compelling as to render Plaintiffs' allegations of discriminatory intent *im*plausible." Charter Pet. App. 18a. Among other things, the *Charter* complaint alleged that "Charter's pledge to promote diversity in a memorandum of understanding with respected civil rights groups (such as the Urban League and Al Sharpton's National Action Network) is actually a conspiracy to promote discrimination." Charter Pet. 8.

As Comcast's petition explains at length, these flawed holdings are misconstructions of the proper pleading standard recognized in *Twombly* and *Iqbal*. But they are also the natural outgrowths of a mixed-motive rule that puts a nearly impossible burden of disproof on businesses accused of racial discrimination, even when the accusations (as here) border on frivolous. Under the Ninth Circuit's new rule, an organization can be held liable for money damages—even where it can prove that the action

complained of was taken for overwhelmingly race-neutral reasons—so long as the plaintiff can point to "a factor" that was thought to be infected by discriminatory intent. Charter Pet. App. 15a. Even where the alleged discriminatory intent turns out to be illusory, the bare accusation alone can be enough, as in these cases, to get the claim past the motion-to-dismiss stage. In that event, the financial and reputational costs of litigation will often induce many defendants to settle even meritless claims.

The mixed-motive standard also makes it more difficult to resolve discrimination cases on summary judgment. To survive summary judgment under traditional but-for causation principles, a plaintiff must show that a jury could conclude that the employer would not have taken the action but for the allegedly discriminatory purpose. By contrast, a plaintiff can defeat a motion for summary judgment under a mixed-motive causation standard simply by showing that there is a material issue of fact over whether the allegedly discriminatory purpose was *a* motivating factor—a much easier showing. The elimination of summary judgment as an effective tool for weeding out meritless claims will greatly increase the costs and burden of litigation, and force defendants to settle even baseless cases.

In *Nassar,* this Court anticipated just these sorts of problems in rejecting mixed-motive retaliation claims under Title VII, noting that "lessening the causation standard could . . . contribute to the filing of frivolous claims, . . . [and] would make it far more difficult to dismiss dubious claims at the summary judgment stage." 570 U.S. at 358. The Court further explained that it "would be inconsistent with the structure and operation of Title VII to so raise

the costs, both financial and reputational, on an employer whose actions were not in fact the result of any discriminatory or retaliatory intent." *Id.* at 358–59. The same goes for claims brought against businesses under Section 1981.

* * * * *

The added costs and burdens of the Ninth Circuit's new mixed-motive causation standard for Section 1981 strongly bolster the need for this Court's intervention here. Leaving the decisions below in place would unfairly burden countless employers simply by virtue of the fact that they operate in Alaska, Arizona, California, Hawaii, Idaho, Montana, Oregon, and Washington, and even invite forum shopping for larger employers whose operations span multiple States. And more to the point, the mixed-motive standard at issue in this case should not be the law in any circuit at all.

CONCLUSION

The petitions for a writ of certiorari should be granted and the decisions below reversed.

Respectfully submitted,

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