

***Comcast Corp. v. National Association of African American-Owned Media, No. 18-1171***

Today, the Supreme Court held unanimously that a plaintiff claiming race discrimination in contracting under 42 U.S.C. § 1981 bears the burden of pleading and proving that the defendant's unlawful conduct was the "but for" cause of the plaintiff's injury. The Court held that this burden remains with the plaintiff at every phase of the lawsuit, including the pleadings stage.

**Background:** Entertainment Studios Network (ESN), which is owned by an African-American businessman, operates seven television networks. ESN sought to have Comcast carry its channels but Comcast refused, citing business justifications such as lack of demand for ESN's programming. ESN and the National Association of African-American Owned Media sued Comcast under 42 U.S.C. § 1981, which guarantees "[a]ll persons ... the same right ... to make and enforce contracts ... as is enjoyed by white citizens," claiming that Comcast's decision had a discriminatory motive.

The district court dismissed the complaint, holding that the plaintiffs failed to allege facts plausibly showing that Comcast would have contracted with ESN but for racial animus. The Ninth Circuit reversed, holding that the plaintiffs needed to plausibly allege that discriminatory intent was a factor in Comcast's refusal to contract but were not obliged to plead facts showing that racial animus was the but-for cause of that decision.

**Issue:** Whether a plaintiff claiming discrimination in contracting under 42 U.S.C. § 1981 must plead and prove that race was the "but for" cause of injury or whether the more permissive "motivating factor" standard applies.

**Court's Holding:** In an opinion written by Justice Gorsuch, the Supreme Court held that a plaintiff bringing a Section 1981 claim must both plead and prove that its injury would not have occurred "but for" discrimination by the defendant. Justice Ginsburg concurred in part and concurred in the judgment.

According to the Supreme Court's opinion, "[i]t is 'textbook tort law' that a plaintiff seeking redress for a defendant's legal wrong typically must prove but-for causation." And the Court further observed that "to determine what the plaintiff must plausibly allege at the outset of a lawsuit, we usually ask what the plaintiff must prove in the trial at its end." After applying "[a]ll the traditional tools of statutory interpretation," the Court concluded that "§ 1981 follows the usual rules, not any exception." "To prevail," the Court held, "a plaintiff must initially plead and ultimately prove that, but for race, it would not have suffered the loss of a legally protected right." It rejected the argument that Section 1981 should be construed to incorporate Title VII's "motivating factor" test, holding that to do so "would ... require more than a little judicial adventurism, and look a good deal more like amending a law than interpreting one."

In her concurring opinion, Justice Ginsburg addressed an issue reserved by the Court's opinion—whether Section 1981 prohibits discrimination in the contracting process, or only in its outcome. She wrote: "[I]f race indeed accounts for Comcast's conduct, Comcast should not escape liability for injuries inflicted during the contract-formation process."