No. 16-56479

IN THE

United States Court of Appeals for the Ninth Circuit

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

Plaintiffs – Appellants,

v.

COMCAST CORPORATION,

Defendant – Appellee.

On Appeal from the United States District Court
for the Central District of California
Case No. 2:15-cv-01239 | Hon. Terry J. Hatter

BRIEF FOR APPELLEE COMCAST CORPORATION

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Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, Comcast Corporation states that it has no parent corporation. It is a publicly held corporation, and no corporation owns 10% or more of its stock.

Table of Contents

Table of Contents
(continued)

Table of Authorities

Page

Cases

Table of Authorities
(continued)

Table of Authorities
(continued)

Table of Authorities
(continued)

Constitutional Provisions

Statutes

Rules

Table of Authorities
(continued)

Page

Administrative Proceedings

Introduction

The district court dismissed this case—three separate times—after concluding that Plaintiffs' allegations of race discrimination in violation of 42 U.S.C. § 1981 were not remotely plausible. Plaintiffs attack that conclusion and ask this Court to hold the district court in error. But there is a huge chasm between the way that Plaintiffs describe this case in their appellate brief and their actual allegations in their complaint. Plaintiffs evidently have little desire to defend the complaint they actually filed, because the centerpiece of this appeal—a comment they ascribe to an unnamed Comcast executive—appears *nowhere* in the operative complaint. And although no one would know it from Plaintiffs' appellate brief, what does appear in the complaint is an outlandish conspiracy theory that the district court correctly found implausible (to put it charitably) under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

The gravamen of each of Plaintiffs' complaints was that Comcast conspired with the oldest and most respected civil-rights organizations in the country to intentionally perpetrate and cover up race discrimination against *some* African American businesses—those whose ownership is "100% African American." For good measure, the complaints further alleged that the federal government was either in on the conspiracy or duped into aiding it. Thus, each of the dismissed complaints posits that Comcast joined with the Federal Communications Commission ("FCC"),

the NAACP, the National Urban League, and the National Action Network, to craft a "racist" plan to discriminate against "100% African American" cable programmers. ER100–03; ER283–86; ER503–09.

In particular, the complaints alleged that Comcast was able to "perpetuate its institutionalized, exclusionary and racist agenda," ER94, by entering into an agreement with the civil-rights groups, with the approval of the federal government, that created a "Jim Crow process" that puts African Americans at the "back of the bus," ER108, and is actually designed as "window dressing" for discriminating against 100% African American programmers, ER102. The agreement, which is referred to in the complaint and thus properly was considered by the district court on a motion to dismiss, on its face says the opposite: The parties agreed to *expand* carriage opportunities for African American and other minority programmers beyond those ordinarily available. Yet Plaintiffs assert in conclusory terms that the allegedly "sham" agreement between Comcast and the civil-rights organizations "bamboozled President Obama and the federal government." ER277. Claiming to have been injured by this conspiracy, Plaintiff Entertainment Studios Networks ("ESN") sought damages exceeding *$20 billion* dollars, along with the National Association of African American-Owned Media ("NAAAOM"). (NAAAOM was created by ESN for purposes of this litigation, and is not itself a programmer).

It gets even more implausible. As mentioned, Plaintiffs do not allege that Comcast refuses to carry, hire, or otherwise do business with

African Americans, because they know that allegation would be false. So instead, Plaintiffs say that the wide-ranging conspiracy was supposedly directed *only* against "100% African American-owned media companies," ER63, a category that no one has ever heard of before and that conveniently includes ESN but virtually no one else. Plaintiffs' allegation, in other words, is that Comcast discriminated against 100% African American owned companies in favor of *other* companies that were owned by African Americans (just not 100% owned by them). Plaintiffs have never attempted to explain why Comcast would carry, and the FCC and civil-rights organizations would promote, television networks owned by African Americans, yet at the same time would discriminate against "100% African American-owned" networks. The contrived racial category only reinforces the implausibility of Plaintiffs' contentions. Even if Plaintiffs' insistence on racial purity could be countenanced, they admit in the complaint that Comcast *does* carry a 100% African American owned network. ER92.

There is more. At the time Plaintiffs filed this suit, ESN was carried primarily by smaller, regional multichannel distributors; most other national, large multichannel distributors had, like Comcast, chosen not to license ESN's channels. That virtually unanimous judgment of Comcast's peer market participants renders even more implausible Plaintiffs' allegation that Comcast refused carriage of ESN because of a bizarre conspiracy with civil-rights organizations against "100% African American"

programmers. Plaintiffs responded by unleashing a campaign of litigation not only against Comcast and the civil-rights organizations, but also against the federal government and the major players in the television industry, targeting companies that had announced mergers or other corporate transactions and subjecting them to similar allegations of racist conspiracies with the government.

Plaintiffs filed this lawsuit at a strategic time when Comcast had a proposed merger with Time Warner Cable pending under review by the FCC. Plaintiffs evidently hoped that their incendiary allegations would disrupt the merger and pressure Comcast and Time Warner Cable to offer ESN carriage that was not supported by the marketplace. Judicially noticeable pleadings filed by Plaintiffs show that they have attempted this same tactic multiple times in recent years against other large multichannel video programming distributors that declined to enter contracts to carry ESN's seven high-definition (and thus, bandwidth-intensive) television channels. Around the same time that Plaintiffs filed this suit against Comcast and Time Warner Cable, they filed a nearly identical multi-billion-dollar lawsuit against AT&T and DirecTV, two other multichannel video programming distributors that had declined to license ESN's channels and that had their own merger pending before the FCC. Comcast and Time Warner Cable ultimately dissolved their proposed merger, after which Time Warner Cable formed a new proposed partnership with Charter Communications (which also declined to carry ESN's

networks). As soon as that merger went before the FCC, ESN struck again, slapping Charter with yet another Section 1981 lawsuit—this time naming the FCC itself as a defendant.

Now on appeal, Plaintiffs' brief to this Court runs away from the allegations in their operative complaint. Almost entirely gone is any mention of the alleged conspiracy with the civil-rights organizations and the FCC, the fact that the alleged discrimination is limited to "100% African American" owned companies, or the fact that the discrimination was supposedly implemented through Comcast's diversity-*promoting* initiative, even though those allegations are the core of the complaint whose plausibility is under review in this appeal. Instead, Plaintiffs now present as the centerpiece of their appeal an allegation regarding a single stray remark that does not even appear in the operative complaint. But Plaintiffs already had three chances to plead their case; they are not entitled to invent a new complaint in their appellate brief. For the complaint that Plaintiffs actually put before the district court, the court observed the rank implausibility of Plaintiffs' allegations and correctly dismissed them.

Plaintiffs' claim also fails for an independent reason that the district court did not need to reach: The First Amendment prohibits Plaintiffs from suing under 42 U.S.C. § 1981 to override Comcast's editorial discretion regarding which networks to offer to its audience. Like a newspaper's decision about which columns to print or a bookstore's choice of

what books to stock, Comcast's exercise of discretion to select the mix of channels to include in its lineup is protected by the First Amendment. But Plaintiffs, through this action, seek to impose billions of dollars in liability based on what programming Comcast has selected (and not selected) for carriage.

After three deficient complaints, and after providing Plaintiffs with a warning that they had one final chance to allege actual facts supporting their claim, the district court acted well within its discretion when it dismissed this case with prejudice. This Court should affirm the district court's judgment.

Jurisdictional Statement

Comcast agrees with Plaintiffs' statement of jurisdiction.

Issues Presented

I. Whether the district court correctly dismissed Plaintiffs' Second Amended Complaint for failure to plead any facts to state a plausible claim of discrimination against "100% African American" programmers.

II. Whether the First Amendment prohibits a plaintiff from suing a multichannel video programming distributor to alter its editorial discretion in selecting its channel lineup.

III. Whether the district court abused its discretion in denying leave to amend after Plaintiffs failed three separate times to state a plausible claim and did not request leave to amend.

Pertinent Statute and Constitutional Provision

Pursuant to Ninth Circuit Rule 28-2.7, the pertinent statute and constitutional provision are as follows.

42 U.S.C. § 1981 provides:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

* * *

The First Amendment to the Constitution of the United States provides, in relevant part, that "Congress shall make no law … abridging the freedom of speech."

Statement of the Case

A. Plaintiffs Allege That Comcast, Civil-Rights Organizations, And The FCC Conspired To Discriminate Against 100% African American Owned Media Companies

ESN is owned by "Byron Allen, an African American actor/comedian/media entrepreneur." ER89. It "owns and operates seven high definition television networks." ER91. ESN claims to be "the only 100% African American–owned multi-channel media company in the United States which owns and controls multiple television networks." ER89.

ESN "has met and spoken with senior Comcast executives responsible for licensing television networks on numerous occasions beginning as early as 2008 and as recently as 2015 to license Entertainment Studios networks for availability to Comcast's pay television subscribers." ER85. In these "multiple meetings over multiple years with multiple, senior Comcast officials," ESN has "describ[ed] its available networks and request[ed] the opportunity to negotiate carriage arrangements." ER95. As the FCC has recognized, however, "[b]ecause there are more programming vendors seeking linear carriage than bandwidth capacity to carry them, [multichannel video programming distributors] simply cannot carry all channels that seek carriage." *In re Herring Broad., Inc.*, 24 FCC Rcd. 12967, 12999 (2009). Although Comcast ultimately declined to carry ESN's channels after considering them, Comcast officials provided suggestions to ESN about how to strengthen its application for carriage in the future. ER96–97.

In February 2015, ESN and NAAAOM filed this action against Comcast, former FCC Commissioner Meredith Attwell Baker, the NAACP, the National Urban League, the National Action Network, Rev. Al Sharpton, and Time Warner Cable, alleging that they had all conspired to engage in race discrimination against 100% African American owned media companies in violation of 42 U.S.C. § 1981. ER488–517. ESN demanded "damages in excess of *$20 billion*." ER516 (emphasis added); *see also* ER115; ER300. Plaintiffs also sought "injunctive relief prohibiting Comcast from discriminating against 100% African American–owned media companies, including Entertainment Studios, based on race in connection with contracting for carriage and advertising." ER516; *see also* ER115; ER300–01.

1. The centerpiece of Plaintiffs' three complaints to the district court was their allegation of an elaborate conspiracy between Comcast, Ms. Baker, three respected civil-rights organizations, and Rev. Sharpton. According to Plaintiffs, "Defendants NAACP, National Urban League, Al Sharpton, National Action Network and Meredith Attwell Baker acted as co-conspirators by accepting cash payments, jobs and other favors from Comcast in exchange for their public support and approval of Comcast's racist policies and practices in contracting for channel carriage." ER515; *see also* ER95 (alleging that Comcast engaged in discrimination "with the implicit support of the FCC"); ER100–03; ER283–86.

Plaintiffs alleged that as part of this conspiracy Comcast bribed

Ms. Baker while she was an FCC Commissioner. Specifically, Plaintiffs alleged that Comcast "influenced and secured favorable votes from government regulators," including Ms. Baker, to obtain "approval of the Comcast/NBC-Universal transaction." ER495; *see also* ER425 (accusing Ms. Baker of "accept[ing] bribes in exchange for a favorable administrative decision"); ER103; ER283.

As for the civil-rights organizations, Plaintiffs' conspiracy theory centered on the voluntary agreements to promote diversity that Comcast made in 2010 with leading organizations representing African Americans, Asian Americans, and Hispanic Americans. ER101–02; ER283–84; ER490–91. With respect to the African American community, Comcast entered into a Memorandum of Understanding ("MOU") with the NAACP, the National Urban League, and the National Action Network that was intended "to enhance the policies and programs by which African Americans may realize greater participation" in several aspects of Comcast's business, including with respect to cable programming services. Supplemental Excerpts of Record, SER25–26.[1]

Comcast in the MOU "committed to add at least ten (10) new independently-owned and-operated programming services over the next eight (8) years" and agreed that "[f]our (4) of the new networks will be linear

[1] The district court took judicial notice of the MOU, which was incorporated by reference in Plaintiffs' complaints and was available in the records of the FCC. ER200; SER39–42.

video programming services in which African Americans have a majority or substantial ownership interest." SER33. Comcast further committed that the "services will be added on commercially comparable and competitive terms to the carriage of the services by other distributors." SER33.

Plaintiffs alleged that the MOU was "a sham, undertaken to whitewash Comcast's discriminatory business practices." ER490; *see also* ER87; ER95; ER286–87. In Plaintiffs' view, the MOU was not an effort to promote opportunities for African Americans, but instead "a 'Jim Crow' process with respect to licensing channels from 100% African American–owned media" under which "Comcast has reserved a few spaces for 100% African American–owned media in the 'back of the bus' while the rest of the bus is occupied by white-owned media companies." ER492; *see also* ER108; ER292. Plaintiffs claimed that the "NAACP, National Urban League, and Al Sharpton's National Action Network" all "accepted large donations/pay-offs for their signatures" on the MOU. ER504; *see also* ER101; ER285. Plaintiffs also asserted that "Defendants NAACP, National Urban League, and Al Sharpton's National Action Network signed onto the MOUs with Comcast knowing—and agreeing—that Comcast would use the MOUs to perpetuate civil rights violations against 100% African American–owned media companies, including Entertainment Studios." ER505.

2. Plaintiffs allege that Comcast told ESN that it "could apply to take one of the four network slots set aside (through the MOU) for African

American-owned networks" and ESN "duly applied" for carriage through that process. ER104. Comcast, however, selected two other networks, Aspire (led by Earvin "Magic" Johnson) and Revolt (led by Sean "Diddy" Combs), that have majority or substantial African American ownership. ER104–105; SER54.

Plaintiffs have repeatedly attacked Aspire and Revolt for allegedly not being really owned by African Americans. Plaintiffs initially alleged that "Comcast has given African American celebrities token ownership interests in those channels to serve as figureheads," ER507, and that "[i]n reality, the[se] networks … are owned, controlled, and backed by white-owned media," and "neither is a network with truly 'majority or substantial' African American ownership," ER288. But during the course of this litigation, Plaintiffs admitted that they lacked "sufficient information" to determine the ownership of Aspire and that they have "no way of knowing who owns what in Revolt." SER170, 179. (Plaintiffs made these admissions in a petition asking the FCC to investigate Comcast's compliance with the MOU, which the district court judicially noticed, ER200.) In their most recent complaint, Plaintiffs have backtracked and claim only that the actual ownership of Aspire and Revolt is "vague." ER106. Yet in their brief to this Court, Plaintiffs contend once again (at 43) that Magic

Johnson and Sean Combs are "mere figure heads" for these networks.[2]

In addition to Aspire and Revolt, Plaintiffs have conceded that Comcast carries the Africa Channel, which is a 100% African American owned network. ER92; ER293; ER490. Plaintiffs nonetheless alleged that "Comcast refuses to treat 100% African American–owned media companies, including Entertainment Studios, the same as similarly-situated white-owned media companies." ER492; *see also* ER100 ("White-owned media in general—and Comcast in particular—have worked hand-in-hand with governmental regulators to perpetuate the exclusion of truly African American–owned media from contracting for channel carriage and advertising."); ER282.

In their initial complaint—but in neither of their two subsequent complaints—Plaintiffs alleged that on an unspecified occasion an unidentified Comcast executive allegedly said that "We're not trying to create any more Bob Johnsons." ER492. Plaintiffs allege that was a reference to the African American founder of Black Entertainment Television,

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[2] In response to Plaintiffs' petition, both Aspire and Revolt submitted letters to the FCC denying Plaintiffs' speculations about their ownership. *See* April 4, 2016 Letter of Aspire Channel, LLC ("NAAOM's assertions regarding the ownership and control of Aspire Channel, LLC ('Aspire') and its 'ASPiRE' network are false."), http://goo.gl/wKyCGV; April 1, 2016 Letter of Revolt Media and TV, LLC ("Since its founding in 2011, the Company has been and continues to be an African American owned and controlled company."), http://goo.gl/31ilEH. The FCC has taken no action on Plaintiffs' petition.

which was sold to Viacom for $3 billion in 2001. ER492. Plaintiffs dropped this allegation from both of their two amended complaints and made no further reference to this statement until their opposition to Comcast's motion to dismiss the Second Amended Complaint. ER35.

3. At the time this action was filed, Comcast and Time Warner Cable had entered into a merger agreement that was awaiting regulatory approval, including by the FCC. ER489–90. Plaintiffs claimed that, as part of the merger, Time Warner Cable "adopted and agreed with Comcast's racist policies and practices in connection with contracting for channel carriage, including the dual paths for carriage (*i.e.* the White Process vs. the MOU/Minority process)." ER496. On that basis, Plaintiffs also named Time Warner Cable as a Defendant and alleged that it too had violated Section 1981. ER513–14.

Two months before this action was filed, Plaintiffs filed a similar complaint seeking $10 billion in damages from AT&T and DirecTV, who at that time were also seeking regulatory approval to merge and had previously refused ESN's carriage demands. *See NAAAOM v. AT&T, Inc.*, C.D. Cal. No. 2:14-cv-09256-PJW, Dkt. 1 (Dec. 2, 2014). Plaintiffs alleged in that complaint that "in cahoots with the FCC and non-media civil rights advocacy groups, the major white-owned video programming distributors have concocted ways to perpetuate the exclusion of truly 100% African American–owned networks," and that AT&T was "paying off non-

media, so-called African American civil rights groups—such as the National Urban League and Reverend Jesse Jackson, among others—in order to 'buy' their endorsement for its acquisition of DirecTV." *Id.* at 15–16. Plaintiffs asserted that AT&T and DirecTV's decision not to carry ESN's networks violated Section 1981. *Id.* at 19. That "lawsuit settled with AT&T U-Verse and DirecTV carrying ESN's channels." ER48 n.5.

B. The District Court Dismisses Plaintiffs' Initial Complaint, But Grants Leave To Amend

All of the defendants moved to dismiss the initial complaint under Rule 12(b)(6) because Plaintiffs failed to allege sufficient facts to state a plausible claim. ER435–82; SER1–20. Ms. Baker, the NAACP, the National Urban League, the National Action Network, and Rev. Sharpton also moved to dismiss under Rule 12(b)(2) for lack of personal jurisdiction. The district court granted the motions, finding that it lacked personal jurisdiction over all defendants except Comcast and Time Warner Cable, and that Plaintiffs had failed to allege any plausible claim for relief. ER353–55. Plaintiffs have not appealed as to personal jurisdiction.

Plaintiffs immediately filed a notice of appeal, ER352, but the district court clarified that the dismissal was intended to be without prejudice and that Plaintiffs were permitted to file an amended complaint, ER350; ER351. Based on the parties' stipulation, this Court dismissed the appeal. ER343.

C. The District Court Dismisses Plaintiffs' First Amended Complaint, But Again Grants Leave To Amend

Plaintiffs then filed an amended complaint, naming only Comcast and Time Warner Cable as Defendants. The First Amended Complaint was largely identical to the initial complaint: It continued to allege a conspiracy between Comcast and the now-dismissed defendants (Ms. Baker, the civil-rights organizations, and Rev. Sharpton), centered on the FCC's approval of the NBCUniversal transaction and the allegedly "sham" MOU, which had supposedly "bamboozled President Obama and the federal government." ER277.

Rather than providing additional facts relating to Comcast's treatment of ESN, Plaintiffs instead added conclusory allegations that Comcast had supposedly discriminated against *other* African American owned programmers in the past. ER295–98. Plaintiffs do not reprise the allegations regarding these other networks in their brief to this Court.

Comcast again moved to dismiss the First Amended Complaint under Rule 12(b)(6) because Plaintiffs had failed to allege sufficient facts to state a plausible claim, and the district court granted the motion. ER198–200. The court noted that the complaint showed "legitimate business reasons for denying [ESN] carriage, namely, lack of demand for ESN programming, and the bandwidth costs associated with carrying ESN's channels." ER200. The court was not persuaded that ESN's pleading

plausibly showed "that Comcast's explanation is mere pretense for intentional racial discrimination." ER200. Plaintiffs had merely pled percentage ratings growth for one of their channels on another network, which "is hardly compelling evidence that Comcast could not have declined to carry ESN's channels because of legitimate business concerns." ER200. "[A]n increase from 1 viewer to 10 viewers results in ratings growth of 900%," but "such a relative benchmark does nothing to exclude the possibility that the alternative explanation, Comcast's legitimate business reasons, is true." ER200.

The district court gave Plaintiffs "one last chance" to amend, but warned that "[i]f Plaintiffs file a second amended complaint with pleading deficiencies, this case will then be dismissed with prejudice." ER200. The court suggested that "[t]o better support [their] allegations," Plaintiffs could provide "the actual number of viewers gained rather than just the percentage of viewer growth." ER200.

As for Time Warner Cable, its planned merger with Comcast had been called off prior to the filing of the First Amended Complaint, and Plaintiffs voluntarily dismissed Time Warner Cable. ER570. Time Warner Cable subsequently agreed to merge with Charter Communications, and during the pendency of that merger Plaintiffs launched another Section 1981 action seeking billions of dollars, this time against Charter. Plaintiffs alleged that "Charter is playing the same game as Comcast" because it too supposedly made "sham diversity commitments."

NAAAOM v. Charter Commc'ns, Inc., C.D. Cal. No. 2:16-cv-609, Dkt. 1 at 5 (Jan. 27, 2016). Plaintiffs also initially named the FCC as a defendant in that action, alleging that it was "encouraging the racist and discriminatory practices of Charter" and seeking to enjoin the FCC "from utilizing the sham diversity agreements offered by Charter." *Id.* at 24.[3]

D. The District Court Dismisses Plaintiffs' Second Amended Complaint, This Time With Prejudice

Like the two complaints before it, Plaintiffs' Second Amended Complaint centered on allegations of a conspiracy between Comcast, Ms. Baker, the civil-rights organizations, and Rev. Sharpton, and again devoted numerous paragraphs to the supposedly "sham" MOU and the FCC's approval of the NBCUniversal transaction. ER100–108.

Plaintiffs ignored the district court's suggestion to plead the actual number of viewers for ESN's networks, alleging only the number of homes that have *access* to its networks (a figure that increased after AT&T and DirecTV agreed to carry ESN's networks as part of the settlement of Plaintiffs' lawsuit). ER90. Plaintiffs also alleged that "Comcast has continued to offer bandwidth and network carriage to newer, lesser-known, white-owned television networks (e.g., Inspirational Network, Fit TV,

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[3] Plaintiffs later dismissed their claim against the FCC. *NAAAOM v. Charter Commc'ns, Inc.*, C.D. Cal. No. 2:16-cv-609, Dkt. 42 (July 29, 2016). The district court denied Charter's motion to dismiss, but certified its order for interlocutory appeal under 28 U.S.C. § 1292(b), and this Court granted Charter's petition for permission to appeal. *See* 9th Cir. Nos. 16-80190, 17-55723.

Outdoor Channel, and Current TV) while it has simultaneously told Entertainment Studios it had no bandwidth or carriage availability." ER85–86. The Second Amended Complaint, however, contains no further allegations about these "white-owned television networks."

Comcast again moved to dismiss under Rule 12(b)(6) because Plaintiffs had failed to allege sufficient facts to state a plausible claim, and the district court granted the motion, now with prejudice. ER1–3.

The court explained that its prior order had "clearly identified the problem: the benchmarks provided by Plaintiffs—allegedly representing demand by viewers for ESN channels—were ambiguous, and did not exclude the alternative explanation that Comcast's refusal to contract with ESN was based on legitimate business reasons." ER1–2. And while the court "went out of its way to suggest cures for the pleading deficiencies," Plaintiffs had "merely provided the Court with different opaque benchmarks," such as "the allegation that eighty million people may have *access* to ESN in all fifty states." ER2. Those figures, like the "viewer growth statistics" from the prior complaints, "represent[ed] potential, not actual, demand for ESN content." ER2. "In short, not one fact added to the SAC is either antithetical to a decision not to contract with ESN for legitimate business reasons or, in itself, indicates that the decision was racially discriminatory." ER2.

The district court explained that it would not grant Plaintiffs an-

other opportunity to amend because "Plaintiffs were warned, in no uncertain terms, that 'leave to amend' would only be provided 'one last time'" and "[t]he deficiencies identified have not been cured." ER2.[4]

Summary of the Argument

This Court should affirm the judgment of the district court.

I. The district court correctly dismissed this case because Plaintiffs failed to plead any facts to support their conclusory, highly implausible assertion that Comcast participated in a conspiracy with civil-rights organizations and the FCC to discriminate against the category of 100% African American owned cable networks. In fact, Plaintiffs failed to plead any facts to show that race played *any* role in Comcast's decision not to carry ESN's channels.

A. The Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), explained the pleading standard—plausibility—that applies to a claim, like this one, alleging intentional race discrimination. Here, the district court correctly concluded that Plaintiffs pled no facts to support their claimed conspiracy, which is implausible (indeed, outlandish) on its face. Moreover, under *Iqbal* and its progeny, a plaintiff fails to state a plausible claim when it does not plead facts tending to exclude obvious, non-discriminatory alternative reasons for the challenged conduct.

B. Plaintiffs' complaint itself revealed multiple non-discriminatory

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[4] Plaintiffs did not ask the district court for leave to amend in their opposition to Comcast's motion. *See* ER53–54.

business reasons why Comcast declined to carry ESN, including Comcast's judgment that ESN's networks lacked sufficient consumer demand to warrant allocating to them Comcast's limited bandwidth. Plaintiffs never pled any facts tending to exclude those alternative explanations.

C. Plaintiffs have not shown discrimination based on a "change in procedure" because Comcast did not approve ESN only to reverse course after learning something about race. Furthermore, Plaintiffs did not allege facts plausibly showing that Comcast agreed to carry "similarly situated" "white-owned" channels. Plaintiffs' allegations are based on an invented racial category. And Plaintiffs refused the district court's suggestion to plead facts showing that ESN's channels had higher viewer demand than the other channels allegedly added by Comcast.

D. Plaintiffs' "Bob Johnsons" allegation is not a part of this case because it appears nowhere in the operative complaint. After pleading this allegation in the first complaint, Plaintiffs abandoned it and omitted it from their two last complaints. In any event, contrary to Plaintiffs' assertions, that single alleged statement would not constitute "direct evidence" of race discrimination. The statement does not refer to race at all, and Plaintiffs have pled no facts about who supposedly said this or in what context, so they cannot show that the statement—if it actually occurred—was anything more than a stray remark that as a matter of law is insufficient to show that Comcast had a corporate policy of discrimina-

tion. Even on Plaintiffs' view that the alleged remark referred to a programmer who made billions upon the sale of his business, the *substance* of the comment simply recites a reality of the marketplace: No one enters into commercial transactions in order to make *the other side* fabulously rich.

E. Although Plaintiffs pled no facts to show that race played *any* role in Comcast's decision not to carry ESN, Plaintiffs are also wrong that they can prevail under Section 1981 by showing merely that race was a "motivating factor" in a defendant's decision not to contract. Instead, a plaintiff must show that discrimination was the but-for cause unless the statute specifically says otherwise, *see Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2525 (2013), which Section 1981 does not. This Court's contrary holding in *Metoyer v. Chassman*, 504 F.3d 919 (9th Cir. 2007), was overruled by the reasoning of *Nassar* and other recent decisions of the Supreme Court.

II. The Court can also affirm the dismissal of this case because Plaintiffs are attempting to regulate Comcast's First Amendment right to exercise editorial discretion in selecting which channels to transmit to subscribers. As the Supreme Court has held, "cable operators" like Comcast "engage in and transmit speech," and therefore, like newspapers and bookstores, "they are entitled to the protection of the speech and press provisions of the First Amendment." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994). Here, Plaintiffs are seeking to use 42 U.S.C. § 1981

to impose billions of dollars in liability, as well as an injunction that would infringe on Comcast's editorial discretion, based on the content that Comcast has selected (and not selected) for carriage. The First Amendment does not permit Plaintiffs to use Section 1981 to force Comcast to communicate a specific set of channel content that it has no desire to offer.

III. The district court did not abuse its discretion in declining to permit Plaintiffs to file a *fourth* complaint. Plaintiffs did not ask the district court for another opportunity to amend, so the district court could not have abused its discretion. *Alaska v. United States*, 201 F.3d 1154, 1163–64 (9th Cir. 2000). Any such request would have been properly denied because Plaintiffs repeatedly failed to allege a plausible claim despite filing three complaints. And further amendment would be futile because Plaintiffs have not identified any new allegations that would make their Section 1981 claim plausible. *Gonzalez v. Planned Parenthood of L.A.*, 759 F.3d 1112, 1116 (9th Cir. 2014).

Standard of Review

This Court "review[s] *de novo* the district court's dismissal for failure to state a claim." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). "If support exists in the record, a dismissal may be affirmed on any proper ground, even if the district court did not reach the issue or relied on different grounds or reasoning." *Id.* (quotation marks and citation omitted).

"To survive a motion to dismiss, a complaint must contain sufficient

factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Rule 8 "requires 'more than labels and conclusions,'" and "plaintiffs must include sufficient 'factual enhancement' to cross 'the line between possibility and plausibility.'" *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 995 (9th Cir. 2014) (quoting *Twombly*, 550 U.S. at 557).

This Court "review[s] the district court's denial of leave to amend a complaint for abuse of discretion." *Gonzalez v. Planned Parenthood of L.A.*, 759 F.3d 1112, 1114 (9th Cir. 2014).

Argument

I. The District Court Correctly Held That Plaintiffs Failed To Plead A Plausible Violation Of 42 U.S.C. § 1981

Section 1981(a) provides in relevant part that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts … as is enjoyed by white citizens[.]" This statute "reaches only purposeful discrimination" on the basis of race. *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 389 (1982).

The district court's task was to determine whether Plaintiffs stated a *plausible* violation of Section 1981. But Plaintiffs' theory of discrimination here is that ESN was the victim of a massive conspiracy between Comcast, some of the nation's oldest civil-rights organizations, and the

FCC to perpetuate discrimination—not against African Americans—but only against the category of "100% African American-owned media companies." ER89. To call those allegations implausible is to give them too much credit; Plaintiffs' "they're-plotting-against-me-with-the-government" theory is preposterous on its face. That is especially so when the document that Plaintiffs claim as the smoking gun—Comcast's commitment in the MOU to expand opportunities for African American programmers—on its face provided an additional path for African American owned networks to obtain carriage.

On appeal, Plaintiffs have run away from their conspiracy theory, their contrived racial category, and their assertions that Comcast's robust diversity initiative was really a covert tool for discrimination. One would not know from reading Plaintiffs' appellate brief that those are the central allegations in their complaint, or that the discrimination Plaintiffs claim supposedly was the implementation of that outlandish plot. Plaintiffs' appellate counsel might wish that they were defending a more reasonable, less fantastical complaint, but they are stuck with what Plaintiffs actually pled, because those were the allegations that were before the district court. Plaintiffs cannot ask this Court to put a respected district court judge in error by turning a blind eye to the bizarre allegations that they pled, and looking instead to another allegation that *does not even appear* in the operative complaint.

As for the few genuine factual allegations in the operative complaint, the district court correctly concluded that none came remotely close to undermining the many obvious lawful alternative explanations for Comcast's decision not to carry ESN's networks that were suggested by the complaint itself, to say nothing of basic common sense. In short, Plaintiffs never pled any facts to plausibly suggest that race played any role whatsoever in Comcast's carriage decisions. The district court properly dismissed this case with prejudice.

A. *Iqbal* Describes The Requirements For Pleading Plausible Intentional Race Discrimination

Plaintiffs devote a substantial portion of their brief to arguing that they can prevail under Section 1981 by showing that race was merely a "motivating factor" for the defendant, even though the defendant also had other legitimate motives. *E.g.*, Plaintiffs' Br. 43–50 (citing *Metoyer v. Chassman*, 504 F.3d 919, 934 (9th Cir. 2007)). As explained below at Part I.E., Plaintiffs are wrong on the law: This Court's reasoning in *Metoyer* did not survive the Supreme Court's recent precedents, including the holding that a discrimination claim requires proof of but-for causation "absent an indication to the contrary in the statute itself." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2525 (2013). No such contrary indication appears in Section 1981.

Regardless, the district court did not decline to apply *Metoyer*; the

court instead correctly recognized that, even under Plaintiffs' view of Section 1981, Plaintiffs here failed to state a plausible claim for discrimination under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *Iqbal* and this case are similar in several respects: Both involved allegations of intentional race discrimination unsupported by sufficient facts to state a plausible claim for relief. *See id.* at 677; Plaintiffs' Br. 27. (Though Iqbal, at least, had the good sense not to plead that the alleged discrimination against him resulted from a conspiracy between the government and the most respected civil-rights organizations in the country.)

1. The plaintiff in *Iqbal* was a Pakistani Muslim who had been detained in the wake of the September 11, 2011 terror attacks, and who alleged that he was arrested and subjected to harsh conditions of confinement because of intentional discrimination. 556 U.S. at 666. The Supreme Court held that his complaint was deficient because Rule 8 requires a plaintiff to plead *facts*, not legal conclusions or "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," to plausibly show that the defendant acted with discriminatory intent. *Id.* at 678. Thus, the Court began by identifying and setting aside the complaint's legal conclusions, which are not presumed true, *id.* at 679, including "a 'formulaic recitation of the elements' of a … discrimination claim," *id.* at 681 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Then, looking only to the complaint's factual allegations, the Supreme Court determined that they did not plausibly show the required discriminatory intent, *Iqbal*, 556 U.S. at 680, which is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense," *id.* at 679. The Court explained that if 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.* at 678 (quoting *Twombly*, 550 U.S. at 557). Thus, where there is an "obvious alternative explanation," unrelated to race, for the plaintiff's adverse treatment, then the plaintiff cannot state a claim without "more by way of factual content to 'nudge' his claim of purposeful discrimination 'across the line from conceivable to plausible.'" *Id.* at 682, 683 (quoting *Twombly*, 550 U.S. at 570).

The plaintiff in *Iqbal* did not plausibly establish intentional discrimination "given more likely explanations," including that the defendants acted with the non-discriminatory intent to investigate persons with a potential connection to the September 11 terror attacks, a policy that the Court found would naturally "produce a disparate, incidental impact on Arab Muslims." 556 U.S. at 681; *see also Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014) (holding that a plaintiff has not plausibly alleged a violation of the law when there is an "'obvious alternative explanation for [the] defendant's behavior'" (quoting *Iqbal*, 556 U.S. at 682)); *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d

1104, 1108 (9th Cir. 2013) (*Iqbal* requires plaintiffs to allege "facts tending to exclude the possibility that the alternative explanation is true, in order to render plaintiffs' allegations plausible" (citation omitted)).

2. Plaintiffs' complaint here never came close to *plausibly* showing discrimination. This is not like an ordinary federal civil-rights case where a member of a racial-minority group was denied a deal or a job and pleads facts to show that the adverse decision was likely based on his race, as opposed to any other factor. The complaint here was based on literal conspiracy theories, invented racial categories, and a deliberate misreading of a diversity-*promoting* document. Moreover, the complaint was filed as part of an industry-wide campaign of litigation designed to manipulate the approval processes for corporate mergers. At the same time, the complaint and common sense suggest multiple and obvious reasons for ESN's failure to secure carriage with Comcast (and other major carriers) that have nothing to do with race. And the complaint failed to allege any *facts* that made discrimination a plausible, more likely explanation for that failure. All of those factors were properly considered by the district court under *Iqbal*, and all of them rendered Plaintiffs' complaint manifestly implausible.

Each of Plaintiffs' three complaints was full of conclusory assertions that Comcast refused carriage on account of ESN's claimed racial identity (100% African American) and gave preferential treatment to applicants of other races. Those recitations of the elements of a Section 1981 cause

of action are not presumed true, and the district court correctly set them aside in determining whether the complaint states a claim for relief. *See* ER199 (criticizing Plaintiffs for relying on "legal conclusions, not factual allegations, to support [their] § 1981 claim").

Where the complaints did manage to include a few actual facts, the district court correctly determined that none of those facts plausibly showed that Comcast had *any* intent to discriminate against 100% African American content-providers. ER2. Plaintiffs badly err (at 43–50) in their criticism of the district court for applying this Court's precedents in *Eclectic Properties* and *Century Aluminum*. This case does indeed present "two possible explanations, only one of which can be true and only one of which results in liability." *Century Aluminum*, 729 F.3d at 1108. Comcast declined to carry ESN's networks either (a) based in whole or in part on the fact that ESN's owner was 100% African American, as part of a conspiracy with civil-rights organizations and the federal government; or (b) because of wholly legitimate business reasons having nothing at all to do with race, including that ESN's channels did not have sufficient consumer interest or demand to warrant the costs those channels would impose on Comcast. For that reason, *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011), is not applicable here, as Plaintiffs wrongly claim (at 40–41). *See Eclectic Properties*, 751 F.3d at 999 n.8.

The district court correctly recognized that here, as in *Iqbal*, there is an "obvious alternative explanation" from Comcast's decision on the

face of the complaint that had nothing to do with race, and so Plaintiffs were required to plead additional facts "tending to exclude the possibility that the alternative explanation is true." ER199–200 (quoting *Century Aluminum*, 729 F.3d at 1108). But Plaintiffs never got close: Despite three separate complaints, "not one fact" undermined Comcast's business explanations or suggested that Comcast's carriage decisions were motivated, however remotely, by race. ER2. "As between [those] obvious alternative explanation[s] … and the purposeful, invidious discrimination [Plaintiffs] ask [the court] to infer, discrimination is not a plausible conclusion." *Iqbal*, 556 U.S. at 682 (quotation marks and citation omitted).

B. Plaintiffs Never Alleged Any Facts Tending To Exclude Comcast's Obvious Non-Discriminatory Business Reasons For Declining To Carry ESN's Channels

1. As Plaintiffs themselves alleged, Comcast explained to ESN that it has limited bandwidth to add new channels or services. ER97. As the FCC has explained, "[b]ecause there are more programming vendors seeking linear carriage than bandwidth capacity to carry them, [multichannel video programming distributors] simply cannot carry all channels that seek carriage." *In re Herring Broad., Inc.*, 24 FCC Rcd. 12967, 12999 (2009). Plaintiffs contend (at 39) that they undermined this explanation by alleging that Comcast has added other new channels since 2010. But saying that Comcast has limited bandwidth does not mean, of course, that Comcast lacks the "physical capacity" to add any additional channels, Plaintiffs' Br. 39; *limited* bandwidth forces Comcast (and every

other multichannel video distributor) to be very selective in evaluating whether the "bandwidth necessary to carry" any particular applicant would be optimally utilized on the applicant's channels, or instead whether the bandwidth "could be used for better purposes." *In re Herring Broad., Inc.*, 26 FCC Rcd. 8971, 8976 (2011).

The obvious alternative explanation is that Comcast simply made a judgment that, when it came to ESN, Comcast's bandwidth could be better used on other channels or services, such as the African American owned channels it selected in connection with the MOU, other channels that Comcast offers to its customers, or even broadband Internet service (since Comcast's limited bandwidth affects *all* services). The district court suggested that Plaintiffs plead evidence (if they could) comparing consumer demand for ESN's channels to the other networks that Comcast added. ER200 ("To better support its allegations, for example, Plaintiffs could have provided the actual number of viewers gained rather than just the percentage of viewer growth.") But Plaintiffs repeatedly refused to make those allegations, instead relying on "opaque benchmarks," ER2—such as Emmy awards and nominations, Plaintiffs' Br. 40—that did not tend to exclude Comcast's non-discriminatory explanation that it preferred other channels. *See* ER2 (district court noting that Plaintiffs alleged only "potential, not actual, demand for ESN's content").

Plaintiffs also contend (at 39) that bandwidth has not been a prohibitive concern for *other* multichannel video programming distributors.

But that says nothing at all about whether ESN's channels were the right fit *for Comcast* based on its own bandwidth limitations, strategic business objectives, and editorial goals. That different programming distributors have adopted different business strategies and made different editorial choices does not provide any support for Plaintiffs' contention that Comcast was motivated by race.

2. Similarly, the fact that Comcast has added some channels not devoted to "news and sports" does not show that Comcast's expressed preference for those types of channels was a pretext. *Contra* Plaintiffs' Br. 39. Comcast's decision to carry other channels does not suggest in any way that Comcast was motivated by discrimination against 100% African American programmers when it declined to carry ESN's channels. Plaintiffs alleged no facts tending to exclude Comcast's explanations that ESN's channels were not the right fit for Comcast's channel mix at the time, and that Comcast preferred other networks—including the two African American owned or controlled networks that Comcast launched pursuant to the MOU.

3. Comcast also explained that ESN had not shown sufficient consumer demand for its channels to justify carriage. Plaintiffs' primary response (at 36, 40) is that ESN's channels are carried by some other multichannel video programming distributors. In the first place, allegations like these at best speak only to whether ESN met the baseline qualification criteria to be seriously considered for carriage—they do not support

any inference about *why* ESN's application was rejected. *See, e.g.*, *Han v. Univ. of Dayton*, 541 F. App'x 622, 627 (6th Cir. 2013) (rejecting plaintiff's argument that "simply because he was good at his job and was an Asian-American male, he is entitled to a reasonable inference of race and gender discrimination").

In any event, Plaintiffs have not alleged that ESN met the standards that Comcast demands of applicants for carriage on *its* network. Although ESN claims that 50 multichannel video programming distributors carry its channels, Plaintiffs' Br. 40, virtually all of these are concededly smaller, regional operators that are not comparable to Comcast. Before Plaintiffs' campaign of litigation, almost all of the other large multichannel video programming distributors similarly refused to carry ESN's suite of seven networks, including Charter Communications, Time Warner Cable, DirecTV, and AT&T. That strongly suggests that ESN's networks lack sufficient consumer and market appeal to make them an attractive business proposition to the programming distributors most analogous to Comcast. Plaintiffs cannot extract any inference of discrimination from the fact that its channels are now carried on AT&T and DirecTV, *contra* Plaintiffs' Br. 36, 40, because that deal came about only because AT&T and DirecTV settled Plaintiffs' lawsuit against them, not because consumers actually demanded ESN's networks. *See* ER48 n.5. That Comcast (like Charter and Time Warner Cable) has not caved to

ESN's demands does not suggest anything about a conspiracy to discriminate against 100% African American owned channels.

4. Plaintiffs also say (at 41) that Comcast's business explanations "can[not] be resolved on the pleadings." But that argument ignores *Iqbal*, *Eclectic Properties*, and *Century Aluminum*: Because the complaint itself revealed obvious non-discriminatory explanations for Comcast's decision not to contract, Rule 8 required Plaintiffs to come forward with facts tending to exclude those alternative explanations. As in *Iqbal*, Plaintiffs do not have those facts.

C. None Of Plaintiffs' Other Allegations Plausibly Showed That Race Played Any Role In Comcast's Decisions

1. Plaintiffs say (at 34) that they sufficiently pled a Section 1981 claim by showing "departures from normal procedure." They cite *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), where the Supreme Court gave as a hypothetical example a property that had always been zoned for multi-family housing and then was suddenly re-zoned when the town learned of "plans to erect integrated housing." *Id.* at 267; *see also Progress Dev. Corp. v. Mitchell*, 286 F.2d 222, 225–26, 230–31 (7th Cir. 1961) (defendants approved the plaintiff's development project and then reversed that decision when they learned about the plaintiff's plan to sell homes to African Americans).

Plaintiffs have not alleged anything remotely similar here. They

did not allege that Comcast ever accepted ESN for carriage only to reverse course after learning something about the race of ESN's owner. ESN self-identified as an African American owned company right from the beginning. *See* ER121 (ESN's marketing materials attached to Plaintiffs' complaint). Comcast never refused to consider ESN for carriage based on that racial identity; on the contrary, as the complaint concedes, "multiple" Comcast executives participated in "multiple meetings over multiple years" with ESN's representatives regarding potential carriage. ER95. When Comcast decided that ESN's channels were not the right fit, Comcast encouraged ESN to apply again in the future and made suggestions for how ESN could strengthen its application going forward. ER95–97. There is no plausible reason for Comcast to invest this time and effort with ESN if Comcast were part of a conspiracy to discriminate against 100% African American owned programmers.

The most that Plaintiffs have plausibly alleged is that ESN attempted to improve its carriage application in the ways that Comcast suggested, but came up short in Comcast's eyes. Plaintiffs allege (at 35), for example, that they received mixed messages from different Comcast executives about whether ESN needed to obtain support "in the field" for its channels from Comcast's regional offices. ER96. But the fact that an applicant allegedly "was inconsistently advised" regarding how to best position its carriage application, ER96, says nothing about an intent to

discriminate based on race. ESN's frustration with the corporate decision-making process is the same one that has been experienced by many entrepreneurs—of whatever race—that have attempted to break-in with their products to large companies. There is no plausible inference of discrimination that can be drawn from these facts.

2. Plaintiffs also allege that Comcast has added "lesser-known, white-owned networks" rather than ESN. Plaintiffs' Br. 36. This bare, unsupported allegation is implausible on its face because (among other things) it depends entirely on Plaintiffs' contrived view of racial identity, which treats any company not owned 100% by African Americans as "white-owned." As the complaint concedes, Comcast recently added Revolt and Aspire, two channels that are in fact owned by African Americans—Magic Johnson and Sean "Diddy" Combs. Although Plaintiffs initially alleged that Messrs. Johnson and Combs are mere fronts for "white" companies, Plaintiffs admitted in their most recent complaint that they have no support for their speculation that those networks are actually "white-owned." *See* ER106. But Plaintiffs nevertheless dismiss these and other minority-owned networks carried by Comcast because their theory of discrimination is not based on allegations about the treatment of minority-owned channels; it is based on comparing "100% African American owned" channels against everyone else. ER86 ("None of the networks that Comcast launched, while refusing to carry [ESN], were 100% African American-owned."). And even if Plaintiffs' offensive insistence on racial

purity were accepted, they admit that Comcast *does* carry the Africa Channel, a 100% African American owned network. ER92.

Moreover, Plaintiffs' brief ignores the factual context that undermines their attempt to compare ESN to supposedly similarly situated "white-owned" channels. In order to show that others were treated more favorably, a plaintiff's comparators must be "similarly situated … *in all material respects*." *Moran v. Selig*, 447 F.3d 748, 755 (9th Cir. 2006) (emphasis added). But running a multichannel video programming distribution network is not like renting ballroom space—at issue in *Lindsey v. SLT Los Angeles, LLC*, 447 F.3d 1138 (9th Cir. 2006)—where the defendant is largely indifferent to the content of the plaintiff's event. The nature of Comcast's business is to select just the right mix of channels to achieve the widest possible appeal to subscribers. Plaintiffs say (at 37) that it is a "factual issue" whether ESN is similarly situated to any other network carried by Comcast. But that is wrong. This Court can rely on "judicial experience and common sense," *Iqbal*, 556 U.S. at 679, to know that the well-known and highly popular Comedy Central network is not similarly situated in all material respects—especially consumer demand—to ESN's Comedy.TV, and no *facts* in Plaintiffs' complaint would suggest that the two networks are comparable. Even two channels in the same genre can be very different depending on whether they show similar programming, target broader or narrower audiences, or have a different "look and feel." *Herring Broad., Inc. v. FCC*, 515 F. App'x 655, 656–57 (9th

Cir. 2013).

This Court has refused to allow plaintiffs to open the doors to discovery based on nothing more than a conclusory assertion that someone else similarly situated got better treatment, while "fail[ing] to allege any facts [in] support." *Ghosh v. Uniti Bank*, 566 F. App'x 596, 597 (9th Cir. 2014) (affirming dismissal of a complaint alleging national-origin discrimination); *see also Martinez v. Nat'l R.R. Passenger Corp.*, 438 F. App'x 595, 595 (9th Cir. 2011) (affirming dismissal of a male Amtrak employee's gender-discrimination claim because he failed to adequately allege the existence of a "similarly-situated female employee who was not fired"). Here, Plaintiffs' complaint includes no factual allegations that would show why the other channels Comcast carried were inferior to such a degree that the only plausible explanation for rejecting ESN was discrimination against 100% African American media companies. Plaintiffs criticize Comcast's other channels for being "lesser-known," ER85—whatever that means—but they did not allege that these channels had less consumer demand than ESN's channels, which is obviously a critical factor when selecting channels. The district court told Plaintiffs that they could potentially better support their claim with allegations regarding "actual number[s] of viewers" for ESN's channels. ER200. But Plaintiffs refused to plead any facts about actual viewers, relying instead on the number of consumers that "may have *access* to ESN." ER2.

In *Aragon v. Republic Silver State Disposal Inc.*, 292 F.3d 654,

663–64 (9th Cir. 2002), relied on by Plaintiffs (at 38), this Court concluded that the plaintiff's comparison to employees of other races failed to "demonstrate that [the defendant's] legitimate, nondiscriminatory reasons … were a pretext for illegal discrimination." Similarly here, nothing in Plaintiffs' sparse allegations regarding the other channels Comcast carries were sufficient to exclude Comcast's multiple nondiscriminatory reasons for declining to carry ESN's channels.

D. Plaintiffs Have Alleged No Facts That Would Constitute Direct Evidence Of Discrimination

Remarkably, the centerpiece of Plaintiffs' brief on appeal is a factual allegation that does not even appear in the operative complaint. In their original complaint, Plaintiffs alleged that: "On one of the many occasions when Entertainment Studios attempted to contract with Comcast, a Comcast executive told Entertainment Studios: 'We're not trying to create any more Bob Johnsons[.]'" ER492; *see also* ER510 (alleging that when ESN "reached out to Comcast, a Comcast executive stated that Comcast was 'not going to create any more Bob Johnsons'"). But that allegation was dropped in the First Amended Complaint, and it was omitted again in the Second Amended Complaint, the operative complaint in this appeal. It is therefore not a part of this case anymore.

1. Plaintiffs concede "that the Bob Johnson statement was not alleged in the [Second Amended Complaint]," Plaintiffs' Br. 22, but contend

that this omission was "inadvertent[ ]," Plaintiffs' Br. 17. It defies credulity that Plaintiffs inadvertently managed to leave out of their *two* most recent complaints—and their opposition to the motion to dismiss the First Amended Complaint—the single allegation that they now contend provides direct evidence of discrimination. It is far more likely that Plaintiffs agreed with the district court's conclusion that an allegation relating to an unnamed speaker in a vaguely described factual setting did little to advance their claims under *Iqbal*. Plaintiffs evidently have come to regret their tactical choice over which allegations they left on the cutting-room floor, but that cannot now save their implausible claim.

Ultimately, however, it makes no difference whether Plaintiffs cut their alleged Bob Johnson statement deliberately or inadvertently. "It is a basic principle that the complaint may not be amended by the briefs in opposition to a motion to dismiss, nor can it be amended by the briefs on appeal." *Thomason v. Nachtrieb*, 888 F.2d 1202, 1205 (7th Cir. 1989). Plaintiffs cite no authority for the proposition that a factual allegation, having been dropped from successive amendments to a complaint, remains a viable basis for denying a Rule 12(b)(6) motion to dismiss. That Comcast's motion referred to "the papers filed in this case," Plaintiffs' Br. 22 (quoting ER22), did not breathe new life into stale allegations that Plaintiffs omitted. No court has held otherwise.

2. In any event, even if the alleged Bob Johnson statement were still at issue, that one-sentence stray remark would not make it plausible that

ESN was refused carriage because it was the victim of a wide-ranging conspiracy against 100% African American media companies. Plaintiffs pled nothing else about who supposedly made this statement, or when, or in what context, or whether the speaker had any role in Comcast's carriage decisions.

Even when the Bob Johnson statement was a part of this case, the district court properly concluded that it did not make Plaintiffs' claim of race discrimination plausible. To begin with, the alleged statement says nothing about race. That alone distinguishes it from virtually every authority on which Plaintiffs rely, where the plaintiffs confronted statements that unmistakably referred to race (or sex). *See Evans v. McKay*, 869 F.2d 1341, 1345 (9th Cir. 1989) (a particular defendant stated that "whites have no rights on the reservation"); *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998) (supervisor told the plaintiff that he "did not want to deal with another female" employee, and the company president "made derogatory comments about women at meetings"); *Hernandez v. MidPen Hous. Corp.*, No. 13-5983, 2014 WL 2040144, at *3 (N.D. Cal. May 16, 2014) (plaintiff's supervisor "on several occasions exhibited her intent to discriminate against plaintiff due to her Russian race").[5]

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[5] Plaintiffs also cite *Swanson v. Citibank, N.A.*, 614 F.3d 400, 402–03 (7th Cir. 2010), in which a bank representative allegedly told the plaintiff that she did not need to indicate her race on a loan application and that

Nor have Plaintiffs pled any facts or context to support any plausible inference that the supposed Bob Johnson statement was a comment on race, rather than the fact that Bob Johnson was a programmer who made billions of dollars. *See* Plaintiffs' Br. 29 ("Bob Johnson [sold] BET to Viacom for $3 billion in 2001."). There is nothing invidious or surprising about a company not looking to massively enrich any contractual counterparty, of whatever race. *Cf. Konarski v. Rankin*, 603 F. App'x 544, 547 (9th Cir. 2015) ("alleged comment that 'nobody likes you' does not plausibly establish discrimination [under Section 1981] on the basis of Polish ancestry"). No one in a market economy aims to enrich the other side of a negotiation.

Moreover, the allegation of a single offhand remark, even accepted as true, cannot support an inference about Comcast's corporate policy. Plaintiffs provided virtually no detail about the context of this statement, even though some unidentified person at ESN allegedly heard the statement firsthand. Plaintiffs do not allege who made this statement, and they do not allege that the speaker was a decision-maker on ESN's application for carriage. *Cf. Enlow v. Salem-Keizer Yellow Cab Co.*, 389 F.3d 802, 812 (9th Cir. 2004) (only "evidence of conduct or statements by per-

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the representative's wife and son were part African American. But the court of appeals explicitly stated that the bank representative's comment was "largely extraneous" to whether the plaintiff's claim could survive a motion to dismiss. *Id.* at 405–06.

sons involved in the decision-making process" can constitute direct evidence under the Age Discrimination in Employment Act (quotation marks and citation omitted)). In fact, Plaintiffs do not allege that this statement or its speaker had any meaningful connection at all to ESN's application. Although Plaintiffs say *in their brief* (at 32) that "[t]he Bob Johnson statement was stated by a Comcast executive *as a reason* for Comcast's refusal to contract," that allegation never appeared in any of their complaints (even their first). And Plaintiffs cannot now amend their complaint with their briefing. *See Morales-Cruz v. Univ. of Puerto Rico*, 676 F.3d 220, 225 n.2 (1st Cir. 2012) ("It is clear beyond hope of contradiction, however, that a plaintiff cannot constructively amend h[er] complaint with an allegation made for the first time in an appellate brief." (quotation marks and citation omitted)).

In cases where courts found that racial statements were direct evidence of discrimination, the plaintiffs provided context that is completely missing from the complaint here. *E.g.*, *Evans*, 869 F.2d at 1345 (the plaintiff was able to identify the defendant who made a racial remark and describe his role in supporting a boycott against the plaintiff); *Godwin*, 150 F.3d at 1221 (the plaintiff identified the supervisor who made the discriminatory comment). Plaintiffs cite no cases where this Court has opened the doors of discovery to a plaintiff claiming discrimination based on such a vague single remark.

Plaintiffs respond (at 33) that whether this statement was "unrelated to [Comcast's] decision," and whether the statement "can be attributed to the company," are "fact-intensive" issues that "cannot be resolved on the pleadings." But even accepting every allegation in the initial complaint as true, Plaintiffs have alleged no facts that would support those legal conclusions. It is *Plaintiffs'* burden to plead facts to make their legal claim plausible, and a single remark—by an unknown person, at an unknown time and place, to an unidentified individual—without any alleged connection to Comcast's decision regarding carriage of ESN's channels, does not make it plausible that Comcast as a company discriminated against ESN because it is "100% African American" owned.

This Court held in *Konarski* that a Section 1981 claim was properly dismissed under *Iqbal* where the plaintiff alleged only "one of two" statements "by other lower-level … employees [that] could plausibly be interpreted to convey animus against Polish people." 603 F. App'x at 547. Those selective statements, made by employees that did not necessarily influence the decision in the plaintiff's case, "d[id] not make out a widespread pattern of conduct sufficient to establish" that the defendant had a "policy or custom of discrimination" in violation of Section 1981. *Id*. Plaintiffs' allegations here are even weaker than in *Konarski* because the Bob Johnson statement cannot plausibly be interpreted to convey animus against African Americans when the speaker's message was that ESN should not expect to sell its channels for anywhere near $3 billion. But

regardless, as in *Konarski*, there are no facts to make it plausible that this statement can be attributed to Comcast *as a company*.

This Court has also rejected other discrimination claims where, as here, the plaintiff could not plausibly allege that purportedly biased statements were connected to the plaintiff's adverse treatment. *See Navarette v. Nike, Inc.*, 332 F. App'x 405, 406 (9th Cir. 2009) (the plaintiff's allegations were insufficient to support her discrimination claims under Section 1981 and other statutes because although she alleged "two remarks regarding Spanish-speaking people and Mexicans, 'stray' remarks are insufficient to establish discrimination"); *Nesbit v. Pepsico, Inc.*, 994 F.2d 703, 705 (9th Cir. 1993) (allegation that a supervisor told the plaintiff in a meeting that "we don't necessarily like grey hair" was not sufficient to support a claim for age discrimination because the comment "was uttered in an ambivalent manner and was not tied directly to [the plaintiff's] termination").

In sum, even if this alleged statement were properly before this Court, it does nothing to make Plaintiffs' claim of race discrimination plausible.

E. A Section 1981 Plaintiff Must Allege That Race Was The But-For Cause Of The Defendant's Refusal To Contract, Not Merely A Motivating Factor

Plaintiffs rely on *Metoyer* for the proposition that "a [S]ection 1981 plaintiff need only prove that race was a 'motivating factor' in the defendant's refusal to contract." Plaintiffs' Br. 45 (quoting 504 F.3d at 939).

Metoyer held that even when a defendant can show that it "would have made the same decision … without taking race … into account," that "mixed motive" defense does not allow the defendant to "escape liability." 504 F.3d at 931.

The district court did not take issue with *Metoyer*; it simply applied *Iqbal* and concluded that Plaintiffs did not plausibly allege that race played any role in Comcast's carriage decisions. Especially in light of the peculiar conspiracy-theory pleadings that Plaintiffs filed in the district court, this Court can and should affirm on that basis and leave clarification of the law for another day. But if the Court were inclined to question the district court's conclusion, then it would need to address whether, in order to state a claim for a violation of Section 1981, Plaintiffs must plausibly allege that race was the *but-for* cause of the refusal to contract, or merely (as Plaintiffs contend) a "motivating factor." As to that question, recent Supreme Court precedents have overruled *Metoyer* by "undercut[ting] the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Rodriguez v. AT&T Mobility Servs. LLC*, 728 F.3d 975, 979 (9th Cir. 2013).

1. *Metoyer* refused to allow a mixed-motive defense to Section 1981 for two reasons. First, this Court noted that "there is nothing in the plain language of § 1981 establishing a mixed-motive defense to liability," so "[a]ny mixed-motive defense would have to be interpreted by the courts into the statute." 504 F.3d at 934. Second, this Court previously held

that it would "apply 'the same legal principles as those applicable in a Title VII disparate treatment case'" to Section 1981, *id.* at 930 (quoting *Fonseca v. Sysco Food Servs. of Ariz., Inc.*, 374 F.3d 840, 850 (9th Cir. 2004)), and Congress amended Title VII in 1991 to disallow a mixed-motive defense, *id.*; 42 U.S.C. § 2000e-5(g)(2)(B).

The Supreme Court has since fatally undermined both parts of *Metoyer*'s reasoning. First, in *Nassar*, the Supreme Court explained that "for any tort claim," "[i]n the usual course, th[e causation] standard requires the plaintiff to show that the harm would not have occurred in the absence of—that is, but for—the defendant's conduct." 133 S. Ct. at 2524–25 (quotation marks and citation omitted). This rule of but-for causation "is the background against which Congress legislated in enacting Title VII, and these are the default rules it is presumed to have incorporated, absent an indication to the contrary in the statute itself." *Id.* at 2525. For that reason, the Supreme Court held that a plaintiff may not allege a mixed-motive case of *retaliation* under Title VII (as opposed to a case alleging disparate treatment, where § 2000e-5(g)(2)(B) governs).

Whereas *Metoyer* reasoned that a mixed-motive defense is not available under Section 1981 because the statute does not provide one, *Nassar* held that but-for causation is always the presumptive standard for discrimination liability unless the statute expressly says otherwise. And Section 1981 does not include a provision like § 2000e-5(g)(2)(B) allowing mixed-motive claims, or anything like it.

Second, in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), the Supreme Court refused to allow mixed-motive claims under the Age Discrimination in Employment Act ("ADEA") because "Congress neglected to add such a provision [allowing mixed-motive claims] to the ADEA when it amended Title VII … even though it contemporaneously amended the ADEA in several ways." *Id.* at 174. "When Congress amends one statutory provision but not another it is presumed to have acted intentionally." *Id.* *Gross* thus further undermined *Metoyer*, which had ignored Congress' decision to amend Title VII to allow mixed-motive claims while neglecting to amend Section 1981 in the same way despite making contemporaneous changes.

Third, in *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008), the question presented was "whether § 1981 encompasses retaliation claims." 553 U.S. at 446. If *Metoyer* were correct that Section 1981 presumptively borrows from Title VII, then that question should have been very easy, because Title VII explicitly provides for retaliation claims. *See* 42 U.S.C. § 2000e-3(a). But the Supreme Court's opinion in *CBOCS* never suggested that Title VII's retaliation provision had any relevance. Instead, the Court stated that "the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent." 553 U.S. at 455 (quotation marks and citation omitted).

In sum, *CBOCS* rejected *Metoyer*'s reasoning that Section 1981

readily incorporates Title VII standards. And *Gross* and *Nassar* held that when another provision of federal anti-discrimination law does not include a mixed-motive statute similar to Title VII's disparate-treatment section, those other provisions do not incorporate the mixed-motive rule.

2. The district court overseeing Plaintiffs' case against Charter recently declined to hold that *Nassar* and *Gross* overruled *Metoyer*. *See NAAAOM v. Charter Commc'ns, Inc.*, C.D. Cal. No. 2:16-cv-609, Dkt. 57 at 10–12 (Oct. 24, 2016). That conclusion (which is now on appeal to this Court) was wrong. First, the district court noted that *Nassar* and *Gross* were not Section 1981 cases. *Id.* at 11. That is true but irrelevant: *Metoyer* interpreted Section 1981 by drawing inferences from Title VII's status-based discrimination provisions; *Nassar* and *Gross* explained that those inferences are not permissible. It is the Supreme Court's *reasoning* in *Nassar* and *Gross* (and *CBOCS*) that overruled *Metoyer*. Second, the district court quoted *Nassar* for the proposition that, under Title VII, "but-for causation is *not* the test" for status-based discrimination, and said that "'[s]tatus-based discrimination,' … is (allegedly) involved in this [Section 1981] case." *Id.* (quoting *Nassar*, 133 S. Ct. at 2522–23). The district court appears to have overlooked that this portion of *Nassar* referred to 42 U.S.C. § 2000e-5(g)(2)(B), which abrogates but-for causation *only* for status-based claims under Title VII, and which does not apply to Section 1981.

A majority of the other courts of appeals to consider the question

have reached the opposite conclusion as *Metoyer*: When a plaintiff cannot show that race was the but-for cause of the defendant's refusal to contract, then the plaintiff cannot prove a violation of Section 1981. *See Brown v. J. Kaz, Inc.*, 581 F.3d 175, 182 n.5 (3d Cir. 2009);[6] *Aquino v. Honda of Am., Inc.*, 158 F. App'x 667, 676 (6th Cir. 2005); *Mabra v. United Food & Commercial Workers Local Union No. 1996*, 176 F.3d 1357 (11th Cir. 1999); *Bachman v. St. Monica's Congregation*, 902 F.2d 1259, 1262–63 (7th Cir. 1990). *But see Dulin v. Bd. Com'rs of Greenwood Leflore Hosp.*, 586 F. App'x 643, 648 (5th Cir. 2014).

In sum, even if this Court believed that the operative complaint plausibly pleads that race played some role in Comcast's decision not to carry ESN (which it does not), affirmance would still be required because Plaintiffs have not attempted to allege facts establishing but-for causation. And given Comcast's multiple non-discriminatory business reasons for declining to carry ESN's networks, Plaintiffs could not do so.

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[6] Plaintiffs' brief (at 46) misrepresents the Third Circuit's holding in *Brown*, which rejected the reasoning in *Metoyer* and held that a Section 1981 defendant "has a complete defense to liability if it would have made the same decision without consideration of [the plaintiff's] race." 581 F.3d at 182 n.5. If the defendant would have declined to contract "regardless of the plaintiff's race, then the plaintiff has, in effect, enjoyed 'the same right' as similarly situated persons" of other races. *Id.* (quoting 42 U.S.C. § 1981(a)).

II. The First Amendment Prohibits Plaintiffs From Suing To Alter Comcast's Selection Of A Programming Lineup

Because Plaintiffs failed to allege sufficient facts to state a plausible claim under Section 1981, the district court did not reach Comcast's alternative argument that Plaintiffs' case fails as a matter of law under the First Amendment because it is an impermissible attempt to regulate Comcast's right to exercise editorial discretion in selecting which channels to transmit to subscribers. Even if Plaintiffs had stated a plausible claim, the Court should affirm dismissal on this alternative ground, which appears on the face of Plaintiffs' complaint. *See Sams v. Yahoo! Inc.*, 713 F.3d 1175, 1179 (9th Cir. 2013); *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010).

A. The Supreme Court has held that both "[c]able programmers and cable *operators* engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (emphasis added); *see also* ER50 ("Plaintiffs agree that, under the law, Comcast is entitled to some First Amendment protection in deciding which channels to carry."). By "exercising editorial discretion over which stations or programs to include in its repertoire," cable operators like Comcast "see[k] to communicate messages on a wide variety of topics and in a wide variety of formats." *Turner*, 512 U.S. at 636 (quotation marks and citation omitted); *see also Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982,

993 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("Just as a newspaper exercises editorial discretion over which articles to run, a video programming distributor exercises editorial discretion over which video programming networks to carry and at what level of carriage.").

Plaintiffs respond (at 51) that Section 1981 is a generally applicable law and that "[i]t is well-established that the enforcement of generally applicable laws do not offend the First Amendment." But the Supreme Court has repeatedly held that even generally applicable laws *can* violate the First Amendment, depending on how they are applied. *See Turner*, 512 U.S. at 640 ("the enforcement of a generally applicable law may or may not be subject to heightened scrutiny under the First Amendment"). For example, the Supreme Court held in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 572–73 (1995), that a plaintiff could not use a generally applicable anti-discrimination law to force the defendant to include unwanted participants in its parade. As applied to a party engaged in First Amendment speech, the general statute "violate[d] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.*; *see also Bartnicki v. Vopper*, 532 U.S. 514, 526, 533–34 (2001) (holding that a "content-neutral law of general applicability," as applied, violated the First Amendment).

Plaintiffs rely on *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), but they misread that decision. In *Cohen*, the Supreme Court held that

"generally applicable laws do not offend the First Amendment simply because their enforcement against the press has *incidental effects* on its ability to gather and report the news." *Id.* at 669 (emphasis added). But *Cohen* did not hold, as Plaintiffs suggest, that a generally applicable statute can *never* violate the First Amendment. *Hurley* proves the point. The First Amendment would not allow a plaintiff to sue a bookstore under Section 1981 for refusing to stock a book by an African American author. For the same reason, Plaintiffs cannot use Section 1981 to compel Comcast to alter its channel lineup to include Plaintiffs' preferred "voices and viewpoints." ER93.

Plaintiffs are wrong (at 54–55) to analogize their claim under Section 1981 to the *content-neutral* statute at issue in *Turner*. The statute there required cable operators to set aside bandwidth for transmission of over-the-air local broadcast stations based on the operator's channel capacity; it did "not depend upon the content of the cable operators' programming" and did not "impose[] a restriction, penalty, or burden by reason of the views, programs, or stations the cable operator has selected or will select." 512 U.S. at 644. By contrast, this lawsuit depends entirely on the content of Comcast's programming and seeks to impose $20 billion in monetary liability on Comcast by reason of the programming that Comcast has selected (and not selected) for carriage, as well as an injunction ordering Comcast to select different content in the future. Plaintiffs' attempt to use Section 1981 to force Comcast to communicate a specific

set of content is a direct infringement on Comcast's First Amendment rights that warrants the highest level of scrutiny.

B. Two district courts faced with similar attempted applications of Section 1981 have recently come to that same conclusion. In *Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 435–36 (S.D.N.Y. 2014), the court granted judgment on the pleadings in favor of an Internet search engine that had allegedly violated Section 1981 and other civil-rights statutes by censoring pro-democracy political speech of Chinese activists. The court held that strict scrutiny applied because the plaintiffs had "call[ed] upon the Court to impose a penalty on [the search engine] precisely because of what it does and does not choose to say." *Id.* at 441. The court further reasoned that "to allow Plaintiffs' suit to proceed, let alone to hold [the search engine] liable for its editorial judgments, would contravene the principle upon which '[o]ur political system and cultural life rest': 'that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.'" *Id.* (quoting *Turner*, 512 U.S. at 641).

Similarly, in *Claybrooks v. American Broadcasting Companies*, 898 F. Supp. 2d 986, 988–99 (M.D. Tenn. 2012), the court held at the pleading stage that the First Amendment prohibited the plaintiffs from suing the producers of two television programs (*The Bachelor* and *The Bachelorette*) under Section 1981 for allegedly refusing to cast African Americans. The court concluded that the plaintiffs' suit impermissibly attempted to use

Section 1981 to "regulate[] speech based on its content—*i.e.*, the race(s) of the Shows' respective cast members—which implicates strict scrutiny," and that, under *Hurley*, "the First Amendment protects the right of the producers of these Shows to craft and control those messages, based on whatever considerations the producers wish to take into account." *Id.* at 993, 1000.

Plaintiffs argue (at 56–57) that *Claybrooks* is distinguishable because this lawsuit is about "channel distribution" rather than "on-screen diversity for a television show." That is a distinction without a difference. Exercise of "editorial control and judgment" is a "crucial process" that is fully protected by the First Amendment. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). Content distributors exercising that discretion are not second-class citizens under the First Amendment. *See Turner*, 512 U.S. at 636. If they were, the government could "tell Amazon or Politics and Prose or Barnes & Noble what books to sell; or tell the *Wall Street Journal* or *Politico* or the *Drudge Report* what columns to carry; or tell the MLB Network or ESPN or CBS what games to show; or tell *SCOTUSblog* or *How Appealing* or *The Volokh Conspiracy* what legal briefs to feature." *Comcast*, 717 F.3d at 993 (Kavanaugh, J., concurring).

C. Plaintiffs claim (at 56) that, unlike other content distributors, cable distributors receive less First Amendment protection because "consumers rarely associate the speech of a television show or television channel with the cable distributor." The district court in Plaintiffs' action

against Charter accepted a similar argument. *See Charter Communications*, C.D. Cal. No. 2:16-cv-609, Dkt. 57 at 14. But *Turner* involved the retransmission of local *broadcast* signals, and it was "cable's long history of serving as a conduit for *broadcast* signals" that led the Court to find "little risk that cable viewers would assume that the *broadcast* stations carried on a cable system convey ideas or messages endorsed by the cable operator." *Turner*, 512 U.S. at 655 (emphasis added); *see also id* at 629 (noting distinction between "broadcast stations" and "cable programming networks").

By contrast, Comcast's editorial choices at issue here do not concern retransmission of local broadcast stations, which viewers are unlikely to believe were hand-picked by a cable operator, particularly because Congress has provided local broadcasters with unique compulsory-carriage rights on cable systems. *See* 47 U.S.C. §§ 534, 535. Unlike must-carry local broadcast stations, cable programming networks do not enjoy a right to compulsory carriage and instead must negotiate for carriage with cable providers. This means by definition that every cable programming network carried by a cable provider reflects an editorial *choice* by that provider, in contrast to must-carry local broadcast stations that are retransmitted on the cable system. And in the context here, where ESN's channels are only cable programming networks (not local broadcast stations), there is every reason to believe that cable viewers *would* assume that

Comcast's carriage (or lack of carriage) of ESN's channels reflects Comcast's editorial discretion and speech. The First Amendment thus forecloses Plaintiffs' attempt to hold Comcast liable under Section 1981 for exercising its right to use editorial discretion in selecting what content to transmit to its subscribers.

III. The District Court Did Not Abuse Its Discretion In Denying Plaintiffs Leave To File Yet Another Amended Complaint

Plaintiffs were permitted to file three complaints, and each time they failed to allege facts to state a plausible claim of race discrimination. Before they filed their third complaint, the district court warned that another complaint with the same deficiencies would be "dismissed with prejudice." ER200. Yet Plaintiffs recycled the same insufficient allegations, and refused to take up the district court's suggestion to add facts to show consumer demand for ESN's networks. *See* ER2 ("The Court went out of its way to suggest cures for the pleading deficiencies."). Instead, Plaintiffs simply added different "opaque benchmarks" that did not tend to exclude Comcast's legitimate business reasons for declining to carry ESN's channels. ER2. The district court did not abuse its discretion in declining to provide Plaintiffs with a chance to file a *fourth* complaint.

Plaintiffs' bid for an additional chance to amend fails at the threshold because they never even asked the district court for another opportunity to amend, either in opposition to Comcast's third motion to dismiss

or in a motion after dismissal was granted. *See* ER53–54 (noting "additional evidence" but not seeking leave to amend). "Where a party does not ask the district court for leave to amend, the request on appeal to remand with instructions to permit amendment comes too late." *Alaska v. United States*, 201 F.3d 1154, 1163–64 (9th Cir. 2000) (quotation marks and citation omitted).

Even if Plaintiffs had requested leave to amend, the district court had "particularly broad" discretion to dismiss with prejudice given that Plaintiffs had multiple opportunities to amend and yet still failed to remedy the defects in their complaint. *Gonzalez v. Planned Parenthood of L.A.*, 759 F.3d 1112, 1116 (9th Cir. 2014) (a "district court's discretion in denying amendment is particularly broad when it has previously given leave to amend" (quotation marks and citation omitted)); *see also Mililani Grp., Inc. v. O'Reilly Auto., Inc.*, 621 F. App'x 436, 436–37 (9th Cir. 2015) (finding no abuse of discretion where a plaintiff "failed to state a claim against [the defendant] in three pleadings, even after the district court identified the deficiencies in the First Amended Complaint and granted leave to amend to allow [the plaintiff] to remedy them").

Granting leave to amend here would also have been futile, as none of the new allegations that Plaintiffs now mention (at 57–58) so much as hint that Comcast declined to carry ESN's channels because of intentional discrimination. *See Gonzalez*, 759 F.3d at 1116. Plaintiffs first say

(at 57–58) that Universal Studios, after being acquired by Comcast, invited ESN only to press junkets for movies that "feature a predominantly African American cast." But this allegation has nothing to do with Comcast's carriage decisions. And Plaintiffs have not offered any facts showing how this alleged change regarding press junkets is evidence of racial basis against ESN. Plaintiffs next assert (at 58) that "Comcast has rejected over 100 carriage applications by African American-owned channels in the last 50 years." But they do not allege that any of these alleged rejections were due to race discrimination, or even that this number of purported rejections (two per year over five decades) is disproportionate compared to other groups. Finally, Plaintiffs allege in wholly conclusory fashion (at 58) that Comcast "devotes bandwidth to affiliated networks that are underperforming by industry standards." But Plaintiffs fail to even identify those networks, much less show how the alleged underperformance stacks up to ESN's networks. Nor do Plaintiffs allege that these networks are similarly situated to ESN in all material respects.

None of these late-coming allegations makes it plausible that Comcast declined to contract with ESN because of a conspiracy with civil-rights organizations and the FCC to discriminate against 100% African American programmers, rather than because of legitimate business considerations that had nothing to do with race.

Conclusion

This Court should affirm the judgment of the district court.

Dated: June 14, 2017

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Certificate of Compliance

1. This brief complies with the type-volume requirement of this Court's Rule 32-1(a) because it contains 13,876 words, as determined by the word count function of Microsoft Word 2016, excluding the parts of the brief exempted by this Court's Rule 32-1(c) and Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point New Century Schoolbook font.

s/ *Miguel A. Estrada*

Statement of Related Cases

Pursuant to Ninth Circuit Rule 28-2.6, Comcast Corporation states that two of the issues in this case—whether a claim under 42 U.S.C. § 1981 requires a plaintiff to allege facts establishing that race was the but-for cause of the defendant's refusal to contract, and whether the First Amendment prohibits a plaintiff from suing a multichannel video programming distributor under Section 1981 for declining to carry the plaintiff's channels—are likely to be raised in No. 17-55723, *National Association of African-American Owned Media v. Charter Communications, Inc.*

s/ *Miguel A. Estrada*

Certificate of Service

I hereby certify that on June 14, 2017, I filed the foregoing Brief for Appellee Comcast Corporation with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users, and service on them will be accomplished by the appellate CM/ECF system.

s/ *Miguel A. Estrada*