No. 12-872

In the Supreme Court of the United States

LISA MADIGAN, in her individual capacity, ANN SPILLANE, ALAN ROSEN, ROGER P. FLAHAVEN, and DEBORAH HAGAN,
PETITIONERS,

v.

HARVEY LEVIN,
RESPONDENT.

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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the Seventh Circuit erred in holding, in an acknowledged departure from the rule in at least four other circuits, that state and local government employees may avoid the Federal Age Discrimination in Employment Act's comprehensive remedial regime by bringing age discrimination claims directly under the Equal Protection Clause and 42 U.S.C. § 1983.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit affirming the denial of qualified immunity (Pet. App. 1a-37a) is reported at 692 F.3d 607. The memorandum opinion of the United States District Court for the Northern District of Illinois denying qualified immunity (Pet. App. 38a-102a) is not reported.

JURISDICTION

The appellate court entered judgment on August 17, 2012. Pet. App. 1a. On November 6, 2012, Justice Kagan granted petitioners' motion to extend the filing date for the certiorari petition to and including January 14, 2013. The petition was timely filed on January 14, 2013, and granted on March 18, 2013. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

This is an interlocutory appeal from the denial of qualified immunity pursuant to the collateral order doctrine. See *Mitchell v. Forsyth*, 472 U.S. 511, 526-527 (1985). To establish a qualified immunity defense, a defendant may show either that the plaintiff failed to set forth a viable claim, or that the rights allegedly violated were not clearly established at the relevant time. See *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012). In this case, petitioners contend that respondent cannot state a viable § 1983 age discrimination claim against them because no such claim is cognizable, and therefore this appeal falls within the collateral order doctrine. See *Wilkie v. Robbins*, 551 U.S. 537, 550 n.4 (2007) (whether to

recognize cause of action is proper question for interlocutory appeal from denial of qualified immunity).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The appendix attached hereto contains the text of the Equal Protection Clause, U.S. Const. amend. XIV, § 1; relevant portions of 42 U.S.C. § 1983; the text of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq*.; relevant portions of the Fair Labor Standards Act, 29 U.S.C. §§ 211, 216, 217; and the text of the Government Employee Rights Act of 1991, 42 U.S.C. § 2000e-16a *et seq*.

STATEMENT

This case asks whether state and municipal employees may avoid the remedial regime established by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq*., by using 42 U.S.C. § 1983 and the Equal Protection Clause to bring age discrimination claims against their public employers. The ADEA creates procedures and remedies to redress age discrimination. Procedurally, the Act's notice and timing requirements encourage the EEOC and its state counterparts to resolve age-based employment disputes informally, before employees may file suit in court. See 29 U.S.C. §§ 626, 633. Congress also has created a specialized, administrative process that certain high-ranking public-sector officials must follow to vindicate their rights under the ADEA. See 42 U.S.C. § 2000e-16a through § 2000e-16c. Remedially, the ADEA offers several legal and equitable options, while it bars punitive damages in favor of a capped, liquidated

damages award. See 29 U.S.C. § 626(b). The question presented is whether Congress intended this regime to be exclusive, or whether state and local public-sector employees may use § 1983 equal protection claims to bypass it.

1. Respondent Harvey Levin was employed as an Assistant Illinois Attorney General from September 5, 2000, until his termination, with eleven other attorneys, on May 12, 2006. Pet. App. 2a-3a. He was 55 years old at the time he was hired in 2000. Pet. App. 3a. He held the position of Senior Assistant Attorney General at the time his employment was terminated. *Ibid.* Respondent claimed that he was replaced by a female attorney in her thirties, though no newly hired attorney assumed respondent's cases. Pet. App. 3a, 55a. Four of the twelve attorneys fired in May 2006 were under 40, and eight of the twelve were "substantially younger" than respondent. Pet. App. 78a.

Respondent filed an amended complaint in the United States District Court for the Northern District of Illinois, raising federal claims for both age and sex discrimination in the decision to terminate his employment. Doc. 16. As relevant to this appeal, he alleged that he was fired because of his age in violation of the ADEA, and, via § 1983, that his termination also violated the Equal Protection Clause of the Fourteenth Amendment. Doc. 16 at 1-9, 21-23. Petitioners claimed, in response, that respondent's "low productivity, excessive socializing, inferior litigation skills, and poor judgment led to his termination." Pet. App. 3a.

Petitioners moved, *inter alia*, to dismiss the ADEA claim on the ground that respondent is not an "employee" within the meaning of the statute because he was an "appointee on the policymaking level." Doc. 9 at 1; Doc. 10 at 3-7; see 29 U.S.C. § 630(f). Petitioners also moved to dismiss the equal protection count on the ground that the ADEA displaced any competing, constitutional claim for age discrimination under § 1983. Doc. 36 at 2; Doc. 37 at 4-6. In the alternative, petitioners argued that qualified immunity shielded them from respondent's § 1983 claim for damages. Doc. 36 at 2; Doc. 37 at 10-12.

2. The district court initially denied petitioners' motion to dismiss the ADEA claim, reasoning that, although respondent was a policymaker, Doc. 55 at 6, he was not appointed by the Attorney General, *id*. at 7-9, and therefore did not fall within the exemption from ADEA coverage for appointed policymakers.

Turning to the equal protection claim, the district court recognized the series of decisions from this Court, see, *e.g.*, *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981), holding that a federal statute may implicitly foreclose § 1983 as an alternative remedy for the class of injury that the statute redresses. Pet. App. 125a-126a. And the court acknowledged that whether the *Sea Clammers* rule forecloses § 1983 claims in this context is a question over which federal courts are currently split. Pet. App. 122a-125a. Specifically, although "[s]everal courts of appeals"—all to address the issue—"have held that the ADEA provides the exclusive remedy for age discrimination claims and therefore precludes age

discrimination suits brought under § 1983," Pet. App. 122a-123a, district courts in other circuits remain "deeply divided" over the question, Pet. App. 123a. Ultimately, the district court here rejected the unanimous decisions of the federal appellate courts and held that the ADEA does not foreclose § 1983 equal protection claims for alleged age discrimination. Pet. App. 124a-125a. In light of the nationwide uncertainty on this issue, however, the court awarded petitioners qualified immunity on respondent's § 1983 claim. Pet. App. 133a.

3. In response to petitioners' motion for summary judgment, the district court revisited its initial conclusion that respondent was an "employee" within the meaning of the ADEA and determined instead that he was an appointee. Pet. App. 57a, 59a-68a. Accordingly, the court granted summary judgment to petitioners on respondent's ADEA claim. Pet. App. 68a.

Turning to respondent's equal protection claim, the court reiterated its holding that the ADEA does not displace § 1983 equal protection claims for age discrimination in public employment. Pet. App. 57a. But the court went on to reverse its earlier determination that petitioners were entitled to qualified immunity based on the legal uncertainty over whether such displacement is proper. Pet. App. 70a-73a.

The court also held that respondent met the minimal showing required to defeat summary judgment on the equal protection claim. Pet. App. 84a-93a. Among other things, the court noted that respondent identified a single similarly situated employee who,

although 49 years old, was "substantially younger" than respondent was when he was fired, but who was not herself fired despite having comparable scores on the most recent performance review. Pet. App. 82a, 86a. And the court determined that respondent "manage[d] to create a dispute of material fact" by contesting petitioners' claims that his job performance was lacking, despite the fact that "a good deal of Levin's evidence on this issue is exclusively his own testimony." Pet. App. 89a-90a. The court "emphasize[d] that summary judgment determinations are made by viewing the evidence in the light most favorable to the non-movant," and that a "jury might well find otherwise at a trial where this evidence is not automatically viewed" in respondent's favor and where respondent bears the burden of proof. Pet. App. 101a-102a.

4. Petitioners filed an interlocutory appeal from the denial of qualified immunity, and the Seventh Circuit affirmed the holding that the ADEA does not displace § 1983 equal protection claims for age discrimination. The court acknowledged that, while the displacement question was one of first impression in that circuit, "[a]ll other circuit courts to consider the issue have held that the ADEA is the exclusive remedy for age discrimination claims." Pet. App. 20a (citing *Ahlmeyer v. Nev. Sys. of Higher Educ.*, 555 F.3d 1051 (9th Cir. 2009); *Tapia-Tapia v. Potter*, 322 F.3d 742 (1st Cir. 2003); *Migneault v. Peck*, 158 F.3d 1131 (10th Cir. 1998), vacated on other grounds *sub nom. Bd. of Regents of Univ. of N.M. v. Migneault*, 528 U.S. 1110 (2000); *Lafleur v. Tex. Dep't of Health*, 126 F.3d 758 (5th Cir. 1997) (*per curiam*); and *Zombro v. Baltimore*

City Police Dep't, 868 F.2d 1364 (4th Cir. 1989)). But district courts in other circuits are split, the court observed, Pet. App. 20a, and "[g]iven the conflicting case law, further review of the issue is required," Pet. App. 23a.

The court described the question as "admittedly a close call, especially in light of the conflicting decisions from our sister circuits." *Ibid.* Ultimately, however, the Seventh Circuit became the first federal appellate court to hold that the ADEA does not "preclude a § 1983 claim for constitutional rights." Pet. App. 23a & n.2. The court recognized that, in *Sea Clammers* and another decision, *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005), this Court held that comprehensive remedial regimes in federal statutes—environmental laws in *Sea Clammers* and the Telecommunications Act in *Rancho Palos Verdes*—displaced a § 1983 remedy for the violation of those laws. Pet. App. 9a-10a. And the Seventh Circuit acknowledged that "the ADEA enacts a comprehensive statutory scheme for enforcement of its own statutory rights, akin to *Sea Clammers* and *Rancho Palos Verdes*." Pet. App. 23a. Furthermore, the court observed, this Court has displaced § 1983 claims brought by plaintiffs, like respondent, who seek to bypass a specific statutory remedy by raising a constitutional claim under § 1983. Pet. App. 10a-13a (citing, *e.g.*, *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Smith v. Robinson*, 468 U.S. 992 (1984), superceded by statute, PL 99-372, 100 Stat. 796 (1986)).

But the Seventh Circuit interpreted *Smith*, *Preiser*, and a third decision, *Fitzgerald v. Barnstable School*

Committee, 555 U.S. 246 (2009), to require something more than the established, *Sea Clammers* inquiry into the scope of a law's remedial regime when determining whether that law displaces a § 1983 remedy for the violation of a constitutional (rather than a statutory) right. Pet. App. 17a, 26a-28a. The Seventh Circuit read those decisions to direct courts to look for express statements of congressional intent in the statute's text and legislative history, and to compare the statute's protections to those available under the Constitution via § 1983. Pet. App. 26a-28a, 32a. The court also relied on the general principle that implied repeal of pre-existing claims is disfavored. Pet. App. 25a-26a. Here, despite the fact that the "ADEA's heightened scrutiny provides a stronger mechanism" than equal protection "for plaintiffs to challenge age discrimination in employment," Pet. App. 29a, because the ADEA lacks "legislative history or statutory language precluding constitutional claims," and because there are differences between the "rights and protections afforded by the ADEA as compared to a § 1983 equal protection claim," the court permitted respondent to proceed on his equal protection count, Pet. App. 23a.

SUMMARY OF ARGUMENT

The Seventh Circuit's judgment should be reversed. Congress has enacted an exhaustive procedural and remedial regime for resolving federal age discrimination claims. The EEOC (and in some cases state regulators) must attempt to settle these claims informally whenever possible, and if litigation is unavoidable, the ADEA offers plaintiffs a detailed menu of legal and equitable remedies. At the same time, Congress has balanced competing interests and enacted special rules for resolving federal age claims by certain state and municipal employees. Thus, high-level policymakers and government attorneys may seek the ADEA's protections only through a specialized administrative procedure—a process commensurate with the unique sensitivities that arise when these officials seek federal relief against their public employers.

Respondent's rule—which the Seventh Circuit adopted in conflict with all other federal appellate courts to reach the question—would allow public employees to sidestep every element of this comprehensive regime. Far from abiding by special restrictions, as Congress intended, public-sector workers alone could ignore every one of the ADEA's requirements. Unlike their private-sector counterparts, state and local government employees could file suit without notifying the EEOC or state regulators, much less affording them the time the ADEA guarantees to pursue informal conflict resolution. And public employees alone could seek punitive damages for claimed age discrimination, a remedy that the ADEA disallows in favor of a capped, liquidated-damages

remedy. On top of all this, respondent's rule would permit high-level state and municipal employees to avoid the requirements that Congress created specifically for them.

Such a result is not only absurd in theory but would impose significant harms in practice, for while it is difficult to prevail ultimately on age discrimination claims under the Equal Protection Clause, these claims readily survive motions to dismiss, and they carry high discovery costs and the threat of punitive damages. Congress could not have intended to permit these claims to proceed, as the rule announced in *Sea Clammers* and *Smith* recognizes. This rule presumes that Congress meant to bar competing claims under § 1983 when these claims would upend a comprehensive federal regime targeting the same harm. The ADEA, with its exhaustive procedures and remedies, including special rules for certain state and local government employees, is precisely the type of statutory scheme that the *Sea Clammers*/*Smith* principle exists to protect. Accordingly, the ADEA's remedial regime displaces respondent's § 1983 equal protection age discrimination claim.

ARGUMENT

Until the Seventh Circuit's decision below, every federal appellate court to address the issue had properly held that the relief available under the ADEA displaces competing § 1983 equal protection remedies for age discrimination in state and local government employment. The controlling legal principle is well settled—when a federal statute creates a comprehensive remedial regime, Congress intends plaintiffs to use that regime, rather than § 1983, to seek relief for the same class of harms. Here, Congress has created an exhaustive regime for redressing age discrimination claims, including special rules for certain government employees. This easily demonstrates Congress' intent to displace competing remedies under § 1983. In the end, the Seventh Circuit erred by misreading this Court's decisions in *Smith* and *Fitzgerald* to announce a more rigorous test for displacing § 1983 claims involving constitutional rights, a test that lacks support in those cases and is out of step with other decisions of this Court.

I. A Statute That Creates A Comprehensive Remedial Regime Displaces Competing Claims Under § 1983.

While § 1983 generally provides a remedy for the violation of federal statutory or constitutional rights, see *Maine v. Thiboutot*, 448 U.S. 1, 4-5 (1980), this is not always so, see *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989). "[T]here is only a rebuttable presumption that [a federal] right is enforceable under § 1983." *Blessing v. Freestone*, 520

U.S. 329, 341 (1997); see also *Rancho Palos Verdes*, 544 U.S. at 120. Congress may rebut that presumption and foreclose a § 1983 remedy in one of two ways, either (1) expressly on the face of a statute or in its legislative history or (2) impliedly by creating a "comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Blessing*, 520 U.S. at 341; see also *Smith*, 468 U.S. at 1012 (relying on fact that legislative history did not affirmatively establish congressional intent to permit competing constitutional claim under § 1983).

1. This Court first announced the test for impliedly displacing § 1983 remedies in *Sea Clammers*. There, the Court held that the citizen-suit provisions in the Federal Water Pollution Control Act (FWPCA) and the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA) foreclosed the plaintiffs from proceeding under § 1983 for violations of the same laws. The Court explained that, "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive," this alone "may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." 453 U.S. at 20. Accordingly, when "a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under § 1983." *Ibid*. (internal quotation marks omitted).

It was thus dispositive that the statutes in *Sea Clammers* contained "unusually elaborate enforcement provisions," *id*. at 13, including authorizing the Administrator of the Environmental Protection Agency

to respond to violations of the FWPCA with compliance orders and lawsuits, see *id.* at 13-14. "[A]ny interested person" could also seek judicial review of various Administrator decisions. *Ibid*. And the FWPCA's express citizen-suit provision authorized claims for injunctive relief, while requiring citizens to comply with certain procedures before filing suit. See *id*. at 14. The MPRSA contained most of these same elements. See *ibid*.

"In view of these elaborate enforcement provisions," the Court held, "it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under MPRSA and FWPCA." *Ibid*. Rather, without "strong indicia of a contrary congressional intent," the Court was "compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Id*. at 15. Indeed, it was "hard to believe that Congress intended to preserve the § 1983 right of action when it created so many specific statutory remedies, including the two citizen-suit provisions." *Id*. at 20. With such statutory remedies in place, the Court inferred that Congress "intended to supplant any remedy that otherwise would be available under § 1983." *Id.* at 21.

2. The foregoing analysis is not limited to displacing competing § 1983 remedies for statutory violations. The Court relied on *Sea Clammers* and applied its test, without alteration, to displace competing § 1983 *constitutional* claims in *Smith*.

At issue in *Smith* was whether the remedial process set forth in the Education of the Handicapped Act

(EHA) supplanted a § 1983 equal protection claim for disability discrimination in the denial of educational opportunities. See 468 U.S. at 1008-1009. The EHA provided an "enforceable substantive right to a free appropriate public education" and "an elaborate procedural mechanism to protect the rights of" children with disabilities. *Id*. at 1010-1011. This mechanism advanced "Congress' intent that each child's individual educational needs be worked out through a process that begins on the local level and includes ongoing parental involvement, detailed safeguards, and a right to judicial review." *Id*. at 1011.

Due to these comprehensive procedures and Congress' expressed intent to give local agencies primary responsibility for developing educational plans, this Court found "it difficult to believe that Congress also meant to leave undisturbed the ability of a handicapped child to go directly to court with an equal protection claim to a free appropriate public education." *Ibid*. Permitting such a claim under § 1983 would render most of the EHA's procedural protections "superfluous" and undo Congress' decision to have parents and local educators, rather than district courts, determine an appropriate educational plan. *Id*. at 1011-1012. Because "[a]llowing a plaintiff to circumvent the EHA administrative remedies would be inconsistent with Congress' carefully tailored scheme," the Court applied *Sea Clammers* to hold that the EHA displaced equal protection claims for a free appropriate public education. *Id*. at 1012-1013.

In fact, *Smith*'s application of the implied-displacement rule from *Sea Clammers* to constitutional

claims was presaged by this Court's 1973 decision in *Preiser*. There, plaintiff inmates sought to challenge the revocation of good-conduct credits, and the Court held that the plaintiffs may do so only under the federal habeas corpus statute; they could not sidestep that law by seeking relief under § 1983 for violations of their constitutional rights. See 411 U.S. at 488-490. The habeas statute required the plaintiffs to exhaust their state remedies before pursuing federal judicial relief, and the Court determined that it "would wholly frustrate explicit congressional intent to hold that the [plaintiffs there] could evade this requirement by the simple expedient of putting a different label on their pleadings." *Id*. at 489-490. Accordingly, because "Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, * * * that specific determination must override the general terms of § 1983." *Id*. at 490. Thus, as *Sea Clammers* and *Smith* would later make express, a statute's comprehensive remedial regime alone suffices to demonstrate Congress' displacement of a competing § 1983 remedy for violation of a statutory or constitutional right.

3. The Court applied this same principle yet again in *Rancho Palos Verdes*, this time to reject the plaintiff's effort to obtain relief under § 1983 for violations of the Telecommunications Act of 1996 (TCA). Reiterating the rule from *Sea Clammers* and *Smith*, the Court emphasized not merely the comprehensive nature of the TCA's remedial scheme, but that statute's more limited remedies: the "provision of an express, private means

of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983." 544 U.S. at 121. Because the "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others," the Court recognized that the "existence of a more restrictive private remedy" than is available generally under § 1983 "has been the dividing line" in Supreme Court case law in determining whether Congress impliedly displaced a § 1983 remedy. *Ibid*. (internal quotation marks omitted).

In short, the implied-displacement rule from *Sea Clammers* and *Smith* proceeds from the premise that "limitations upon the remedy contained in the statute are deliberate and are not to be evaded through § 1983." *Id*. at 124. It was therefore dispositive in *Rancho Palos Verdes* that the TCA allows only 30 days to file a petition to review a final governmental action, requires district courts to resolve these suits expeditiously, bars plaintiffs from recovering attorney's fees and costs, and may bar compensatory damages as well. See *id*. at 122-123. Section 1983 imposes none of these procedural requirements or remedial limits. See *id*. at 123.

The Court also made clear in *Rancho Palos Verdes* that the implied displacement of § 1983 claims does not "contravene the canon against implied repeal" (on which the Seventh mistakenly relied, see Pet. App. 25a-26a), for that canon does not apply to a statute, like § 1983, that creates no substantive rights but merely provides a cause of action to remedy the violation of an "'otherwise defined federal right.'" 544 U.S. at 120 n.2

(quoting *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 376 (1979)).

4. This Court most recently applied the *Sea Clammers*/*Smith* displacement analysis to determine whether Title IX of the Civil Rights Act supplants a § 1983 remedy under the Equal Protection Clause for gender discrimination in education. Once again, the Court stressed that, "[i]n determining whether a subsequent statute precludes the enforcement of a federal right under § 1983," the Court has "placed primary emphasis on the nature and extent of that statute's remedial scheme." *Fitzgerald*, 555 U.S. at 253 (citing *Sea Clammers*, 453 U.S. at 20). Where the § 1983 claim is based on a statutory right, evidence that Congress intended to displace that remedy may be found in the text of the statute, or it may be implied from the creation of a comprehensive enforcement regime. See *id*. at 252. Where the § 1983 claim is based on a constitutional violation, the Court continued, courts also may ask whether "the contours of [the statutory and constitutional] rights and protections diverge in significant ways." *Id*. at 252-253.

Thus, *Fitzgerald* recognized, in *Sea Clammers*, *Smith*, and *Rancho Palos Verdes*, the statutes required plaintiffs to undertake particular procedures or exhaust administrative remedies before filing suit, and offering them a direct route to court via § 1983 "would have circumvented these procedures and given plaintiffs access to tangible benefits—such as damages, attorney's fees, and costs—that were unavailable under the statutes." *Id*. at 254. Unlike the laws in those cases, the Court reasoned, Title IX does not even provide an

express private right of action; rather, that right was judicially implied. See *id.* at 255. In fact, by the statute's terms, the only way to penalize gender discrimination is through an administrative procedure to withdraw federal funding. See *ibid.* This procedure "stand[s] in stark contrast to the 'unusually elaborate,' 'carefully tailored,' and 'restrictive' enforcement schemes of the statutes at issue" in *Sea Clammers*, *Smith*, and *Rancho Palos Verdes*. *Ibid.* "[P]arallel and concurrent § 1983 claims [for gender discrimination] will neither circumvent required [Title IX] procedures nor allow access to new remedies." *Id*. at 255-256. Indeed, the Court "has never held that an implied right of action had the effect of precluding suit under § 1983, likely because of the difficulty of discerning congressional intent in such a situation." *Id*. at 256. Accordingly, *Fitzgerald* held that Title IX does not supplant a § 1983 remedy. See *ibid.*

Fitzgerald then went on to compare the substantive rights guaranteed under Title IX and the Equal Protection Clause, reasoning that this comparison "lends further support to the conclusion" the Court had reached previously in the opinion "that Congress did not intend Title IX to preclude § 1983 constitutional suits." *Ibid.* Moreover, the Court reasoned, Title IX's context and history show that the Congress that passed it "explicitly envisioned that private plaintiffs would bring constitutional claims to challenge gender discrimination," and "it must have recognized that plaintiffs would do so via [§ 1983]." *Id.* at 258. Finally, Title IX was modeled on Title VI with the express understanding that the former would be interpreted in

step with the latter, and courts had uniformly read Title VI to permit competing § 1983 claims. See *id*. at 258-259.

In short, the fact that Title IX provided no express, private right of action (and thus by definition no comprehensive regime to enforce that right) alone ensured that the plaintiffs' § 1983 equal protection claim would survive. See *id.* at 256. In contrast, as explained in Part II, the ADEA creates a private right of action and a detailed remedial regime more exhaustive than those found sufficient to displace § 1983 remedies in *Sea Clammers*, *Smith*, and *Rancho Palos Verdes*. As further explained, that regime includes special procedures for certain government employees that plaintiffs like respondent could sidestep entirely under his proposed rule.

II. The ADEA Creates A Comprehensive Remedial Regime That Displaces § 1983 Claims.

Congress has created an exhaustive remedial regime for age discrimination claims by private and public-sector employees. The regime includes an important role for the EEOC (and its state counterparts), whom Congress tasks with resolving age discrimination conflicts informally whenever possible, and the ADEA defines a spectrum of relief that plaintiffs may recover when litigation does ensue. Congress also focused on certain state and local government employees and created special rules for these officials commensurate with the unique problems that their age discrimination claims present. Permitting public employees to reframe

their age discrimination complaints as § 1983 equal protection claims would allow these employees to ignore this carefully drawn regime wholesale, precisely what the *Sea Clammers*/*Smith* rule exists to prevent. And failing to apply that rule here would have significant, adverse consequences, for while equal protection claims for alleged age discrimination are unlikely to succeed in the end, these claims readily survive motions to dismiss, and they carry high discovery costs and the threat of punitive damages for state and municipal employers.

A. The ADEA Establishes An Exhaustive Remedial Regime That Favors Informal Conflict Resolution And Gives The EEOC Substantial Control Over Federal Age Discrimination Claims.

As this Court has recognized, the ADEA establishes a comprehensive remedial regime for federal age discrimination claims. See, *e.g.*, *Lorillard v. Pons*, 434 U.S. 575, 577-578 (1978) ("The enforcement scheme for the [ADEA] is complex—the product of considerable attention during the legislative debates preceding passage of the Act."). It "is a precisely drawn, detailed statute, similar to other statutory schemes which have been held to provide the exclusive judicial remedy for a stated abuse." *Zombro*, 868 F.2d at 1369. The regime advances Congress' preference for resolving these claims informally and vests considerable authority in the EEOC to investigate, cooperatively redress, and, if need be, litigate federal age claims.

1. Congress concluded that much of the arbitrary age discrimination in the American workplace was the

product of misinformation and ill-founded assumptions about the effect of age on occupational performance. See, *e.g.*, *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 587 (2004) (describing ADEA's legislative history, which showed "disadvantage to older individuals from arbitrary and stereotypical employment distinctions"); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) ("Congress' promulgation of the ADEA was prompted by its concerns that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.").

In line with this conclusion, the ADEA aims "to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). And as this Court has recognized, the Act makes it a priority for the EEOC to resolve age-based workplace disputes informally and cooperatively whenever possible. See, *e.g.*, *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 401 (2008) (describing "Congress' expressed desire that the EEOC act as an information provider and try to settle employment disputes through informal means"). Congress stressed "that the responsibility for enforcement vested in the Secretary [of Labor, now the EEOC] * * *, be initially and exhaustively directed through informal methods of conciliation, conference, and persuasion and formal methods applied only in the ultimate sense." H.R. Rep. No. 805, at 5 (1967); see also S. Rep. No. 723, at 5 (1967) (describing Congress' intention that "formal methods be applied only if voluntary compliance cannot be achieved"). In this sense, "[t]he role of the EEOC is central to effectuating the policies of the [ADEA]," for

"[i]nformal conciliation pursued by the EEOC is the primary method of dispute resolution envisioned by the Act." *Frye v. Grandy*, 625 F. Supp. 1573, 1575 (D. Md. 1986).

2. The ADEA gives effect to its preference for informal conflict resolution and voluntary compliance by (1) requiring aggrieved employees to notify the EEOC promptly of claimed age discrimination, (2) directing the EEOC to resolve disputes informally, and (3) forbidding employees from filing suit for an initial period to allow the EEOC time to reach an informal, voluntary resolution before any litigation begins. Thus, before filing a federal age discrimination suit, an aggrieved employee must submit a claim to the EEOC, generally within 180 days of the alleged discrimination, see 29 U.S.C. § 626(d)(1)(A), at which point the EEOC "shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion," 29 U.S.C. § 626(d)(2); see 29 U.S.C. § 626(b); 29 C.F.R. § 1626.12; 29 C.F.R. § 1626.15(b); see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27 (1991) (explaining that before filing suit on behalf of employee, EEOC must attempt to remedy discrimination "'through informal methods of conciliation, conference, and persuasion'") (quoting 29 U.S.C. § 626(b)); *Lorillard*, 434 U.S. at 580 (same).

To this end, the ADEA affords the EEOC an initial, uninterrupted period within which to contact the employer and resolve the dispute informally, before the start of any litigation. The Act forbids an aggrieved party from initiating an age discrimination suit for 60 days after filing his or her charge with the EEOC. See

29 U.S.C. § 626(d)(1); 29 C.F.R. § 1626.7(a); see also S. Rep. No. 723, at 5 (60-day notice provision exists "to allow time for the Secretary to mediate the grievance"); *id*. at 10 ("During the 60-day period, the Secretary must seek to eliminate unlawful practices by informal methods of conciliation."); H.R. Rep. No. 805, at 5, 10 (same, nearly verbatim). Meanwhile, EEOC regulations detail the way in which the Commission typically will initiate efforts at conciliation and the nature of "[a]ny agreement reached as a result of efforts" at informal conflict resolution. 29 C.F.R. § 1626.15(b), (c). Only upon notice of the "failure of such conciliation" may "the charging party or any person aggrieved by the subject matter of the charge * * * commence action to enforce their rights without waiting for the lapse of 60 days." 29 C.F.R. § 1626.12.

3. Congress gave state regulators a role in this initial, pre-litigation process as well. Plaintiffs in "deferral" States—those that offer an administrative remedy for age discrimination claims in employment—may not bring suit in federal court unless they have filed a discrimination charge with the appropriate state agency and either (1) 60 days have elapsed, or (2) that agency has terminated proceedings. See 29 U.S.C. § 633(b); see also *Oscar Meyer Co. v. Evans*, 441 U.S. 750, 754-755 (1979) (in deferral States, filing requirement is mandatory). This state exhaustion requirement "is intended * * * to give state agencies a limited opportunity to settle the grievances of ADEA claimants in a voluntary and localized manner so that the grievants thereafter have no need or desire for independent federal relief." *Oscar Meyer*, 441 U.S. at

761; see also *Love v. Pullman Co.*, 404 U.S. 522, 526 (1972) (Title VII's exhaustion rule "give[s] state agencies a prior opportunity to consider discrimination complaints"). Like the EEOC exhaustion requirement, this process encourages "conciliation efforts" and "may well facilitate rapid settlements," thus avoiding delay, which can be "particularly prejudicial to the rights of 'older citizens to whom, by definition, relatively few productive years are left.'" *Oscar Meyer*, 411 U.S. at 757 (quoting 113 Cong. Rec. 7076 (1967) (Sen. Javits)).[1]

4. The EEOC's role does not end with its (and state regulators') efforts at informal conflict resolution, however. The Commission also enjoys vast investigatory powers. See, *e.g.*, 29 C.F.R. § 1626.4 ("The Commission may, on its own initiative, conduct investigations of employers, employment agencies and labor organizations."); see also 29 C.F.R. § 1626.15. And

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[1] A deferral State may waive its right to this initial 60-day period. See *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 117 (1988) (plurality op.) (States "may, if they choose, waive the [Title VII] 60-day deferral period but retain jurisdiction over discrimination charges by entering into worksharing agreements with the EEOC"). The Seventh Circuit has held that Illinois' workshare agreement with the EEOC, which apportions initial jurisdiction over discrimination complaints between the Illinois Department of Human Resources and the EEOC, allows certain ADEA plaintiffs to file with the EEOC without first filing with the state agency. See, *e.g.*, *Kaimowitz v. Bd. of Trs. of the Univ. of Ill.*, 951 F.2d 765, 767 (7th Cir. 1992).

"[u]pon the failure of informal conciliation, conference and persuasion * * *, the Commission may initiate and conduct litigation." 29 C.F.R. § 1626.15(d). Indeed, the EEOC may pursue litigation against an employer even where an employee files a charge but later seeks to withdraw it, see 29 C.F.R. § 1626.13, or where the employee decides to waive his or her own right to file suit, see 29 U.S.C. § 626(f)(4).

Moreover, the EEOC's right to pursue litigation against an employer displaces the employee's own right to do so. See 29 U.S.C. § 626(c)(1) ("[T]he right of any person to bring such action shall terminate upon the commencement of an action by the [EEOC] to enforce the right of such employee under this chapter."). If the EEOC dismisses a charge or if "the proceedings" on that charge "are otherwise terminated by the Commission," then the claimant may file his or her own suit under the Act. 29 U.S.C. § 626(e) (giving employee 90 days to file suit after receiving notice that EEOC has terminated proceedings); see also 29 C.F.R. §§ 1626.17, 1626.18(c).

5. Beyond its preference for informal conflict resolution and rules giving the EEOC (and state regulators) priority in litigation, the ADEA also details the relief available to aggrieved employees. Here, the Act imports remedies from the Fair Labor Standards Act (FLSA). See 29 U.S.C. § 626(b) (incorporating by reference 29 U.S.C. § 211(b), parts of § 216, and § 217); *C.I.R. v. Schleier*, 515 U.S. 323, 325 (1995) ("The ADEA incorporates many of the enforcement and remedial mechanisms of the [FLSA]."). These FLSA sections allow employees to sue in federal or state court for compensatory damages, "employment, reinstatement,

promotion," "a reasonable attorney's fee to be paid by the defendant," "costs of the action," and injunctive relief otherwise prohibiting employers from violating the Act. 29 U.S.C. §§ 216(b), 217; see also 29 U.S.C. § 626(b). Like FLSA plaintiffs, moreover, victims of age discrimination may receive liquidated damages, though such damages are available under the ADEA "only in cases of willful violations," 29 U.S.C. § 626(b), and never in an amount that exceeds the compensatory award, see 29 U.S.C. § 216(b).

Courts have long recognized the FLSA for its "comprehensive remedial scheme," "as shown by the 'express provision for private enforcement in certain carefully defined circumstances.'" *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 144 (2d Cir. 1999) (quoting *Northwest Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 93 (1981)). Indeed, the statute provides such a "very detailed and carefully defined right of action" that "a clearer case of implied intent to exclude other alternative remedies by the provision of one would be difficult to conceive." *Lerwill v. Inflight Motion Pictures, Inc.*, 343 F. Supp. 1027, 1028 (N.D. Cal. 1972); see also *Kendall v. City of Chesapeake*, 174 F.3d 437, 443-444 (4th Cir. 1999) ("Like the statutes at issue in *Sea Clammers* * * *, the FLSA provides an 'unusually elaborate' enforcement scheme.").

Accordingly, courts have held that the FLSA's exhaustive regime displaces other, competing causes of action—including a contract action to recover for violations of the rights provided by the statute, see *Lerwill*, 343 F. Supp. at 1028; state law contract, negligence, and fraud claims for failure to pay overtime,

see *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 194 (4th Cir. 2007); employer claims to contribution or indemnification, see *Herman*, 172 F.3d at 143-144; parallel state law claims, see *Roman v. Maietta Constr., Inc.*, 147 F.3d 71, 76 (1st Cir. 1998); opt-out class actions to vindicate FLSA rights, see *Knepper v. Rite Aid Corp.*, 675 F.3d 249, 257-258 (3rd Cir. 2012); a RICO claim for violations of wage and hour laws, see *Gordon v. Kaleida Health*, 847 F. Supp. 2d 479, 489-490 (W.D.N.Y. 2012); and, applying *Sea Clammers* and *Smith*, claims under § 1983 for violations of the FLSA itself, see *Kendall*, 174 F.3d at 443-444; *Montano-Perez v. Durrett Cheese Sales, Inc.*, 666 F. Supp. 2d 894, 905 (M.D. Tenn. 2009).

"Thus, not only is the ADEA's remedial scheme itself comprehensive, but it gains added comprehensiveness through inclusion of elaborate and extensive procedures under the FLSA," a statute courts have recognized for its own exhaustive remedial scheme. David C. Miller, *Alone in its Field: Judicial Trend to Hold that the ADEA Preempts § 1983 in Age Discrimination in Employment Claims*, 29 Stetson L. Rev. 573, 586 (2000).

B. Congress Added Still More To The ADEA's Remedial Regime By Focusing On The Proper Scope And Form Of Federal Age Discrimination Claims Available To Public Employees.

Not only does the ADEA establish an exhaustive remedial scheme, with a strong preference for informal conflict resolution, but Congress has focused particular

attention on the proper scope of federal age discrimination claims available to public employees, specifically. Initially, Congress determined that certain high-level government policymakers should not be permitted to bring federal age discrimination claims at all, out of concern that such lawsuits would involve federal courts and regulators in the most sensitive quarters of state and municipal government. Later, and even after this Court's decisions in *Sea Clammers* and *Smith* made clear that comprehensive federal statutes displace competing § 1983 claims for constitutional violations, Congress created a specialized, administrative remedy for these once-excluded, high-level government employees.

1. Congress extended the ADEA's protections to federal, state, and municipal employees for the first time in 1974. See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28, 88 Stat. 74 (amending 29 U.S.C. § 630). In doing so, however, Congress withheld these protections from certain high-level policymakers and government attorneys. The ADEA thus "exempt[s]" from the definition of "employee" "any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office," provided the worker in question is not "subject to the civil service laws of a State government, governmental agency, or political subdivision." 29 U.S.C. § 630(f).

Congress borrowed this language from a Title VII exemption enacted two years earlier, when Congress extended that law to public employees. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (amending 42 U.S.C. § 2000e). Congress recognized that "officers who participate directly in the formulation, execution or review of broad public policy perform functions that go to the heart of representative government." *Gregory v. Ashcroft*, 501 U.S. 452, 462 (1991) (internal quotation marks omitted). Legislators thus intended these exceptions to give elected officials "complete freedom" to decide who will "develop[] policies that will implement the overall goals of the elected officials." EEOC Dec. No. 79-8, EEOC Dec. P 6739, 1978 WL 5829 (EEOC Oct. 20, 1978); accord EEOC Dec. No. 78-42, EEOC Dec. P 6725, 1978 WL 5794 (EEOC Sept. 29, 1978).[2] "In order to achieve these goals, an elected official is likely to prefer individuals with similar political and ideological outlooks. Congress intended to allow elected officials the freedom to appoint those with whom they feel they can work best." EEOC Dec. No. 79-8, EEOC Dec. P 6739, 1978 WL 5829 (EEOC Oct. 20, 1978).

By extending the ADEA to public employees, while withholding federal age claims from a small subset of the most high-level officials, Congress thus struck "a

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[2] Because this provision in the ADEA has little legislative history, courts look to the history of Title VII's identical provision when interpreting it. See, *e.g.*, *Butler v. N.Y. State Dep't of Law*, 211 F.3d 739, 747 (2d Cir. 2000); *EEOC v. Massachusetts*, 858 F.2d 52, 55 (1st Cir. 1988).

delicate balance between the protection of employees from age discrimination," on the one hand, "and the protection of a state's—and its people's—ability to independently govern itself," on the other. *EEOC v. Massachusetts*, 858 F.2d 52, 57 (1st Cir. 1988). See generally *Gregory*, 501 U.S. at 464-465 (discussing 29 U.S.C. § 630(f)). Congress struck a similar balance—on a temporary basis in 1986 and then permanently in 1996, see *Correa-Ruiz v. Fortuno*, 573 F.3d 1, 5 (1st Cir. 2009)—in narrowing the circumstances under which firefighters and peace officers may seek redress under the Act, see 29 U.S.C. § 623(j).

2. Congress turned its attention again to the proper scope of federal age claims for public employees in 1991, this time to create a specialized administrative process for those high-level policymakers and government attorneys—except elected officials themselves—that the ADEA had excluded from its scope in 1974. The Government Employee Rights Act of 1991 ("GERA"), 42 U.S.C. §§ 2000e-16a through 2000e-16c, makes the ADEA's remedial regime still more comprehensive by "extend[ing] protections against discrimination based on * * * age * * * to [these] previously exempt high-level state employees." *Bd. of Cnty. Commr's v. EEOC*, 405 F.3d 840, 844 (10th Cir. 2005).

GERA entitles these employees to such remedies as are available under the ADEA. See 42 U.S.C. § 2000e-16b(b)(2). But GERA's "special procedures and limited remedies" are "unlike those for other complainants." 1 Mark A. Rothstein, *et al., Employment Law* § 2.5, at 120 (3d ed. 2004). Unlike ADEA plaintiffs, an aggrieved employee proceeding under GERA must

obtain an administrative determination from the EEOC before seeking judicial relief, and then must appeal to the federal circuit courts, where Congress has sharply curtailed the scope of judicial review.

Specifically, the employee must file a discrimination complaint with the EEOC within 180 days of the alleged ADEA violation. See 42 U.S.C. § 2000e-16c(b)(1); 29 C.F.R. § 1603.102(a). (Alternatively, if an age discrimination claim by a state or local official falls within the jurisdiction of a qualified state or local agency, that agency has an initial 60 days to process the complaint if it wishes to do so. See 42 U.S.C. § 2000e-16c(b)(2); 29 C.F.R. § 1603.103(a).) Once a complaint is properly before the EEOC, the Commission then must determine whether a violation has occurred and, if so, provide for appropriate relief in a final order, consistent with the Administrative Procedure Act, 5 U.S.C. §§ 554-557. See 42 U.S.C. § 2000e-16c(b)(1).

This process generally begins with a hearing before an administrative law judge, see 29 C.F.R. §§ 1603.201-1603.217, who (absent "good cause") must issue a decision on the merits within 270 days of receiving the complaint for a hearing, see 29 C.F.R. § 1603.217(a). From the ALJ's decision, one may appeal to the Commission itself, see 29 C.F.R. §§ 1603.301-1603.304, and from there, judicial review is available in the federal courts of appeals, see 42 U.S.C. § 2000e-16c(c). Judicial review is sharply circumscribed, however. See 42 U.S.C. § 2000e-16c(d). A final EEOC determination is subject to reversal only if it is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; (2) not made consistent with required procedures;

or (3) unsupported by substantial evidence." *Ibid.*; see also *Marion Cnty. Coroner's Office v. EEOC*, 612 F.3d 924, 929 (7th Cir. 2010) (describing standards for judicial review of EEOC order under GERA); *Dyer v. Radcliffe*, 169 F. Supp. 2d 770, 775 (S.D. Ohio 2001) (describing GERA's "more limited form of judicial review").

But GERA is significant not only for the comprehensiveness it adds to the age discrimination regime and its focus on the proper scope of claims by high-level public employees. The legal context surrounding its enactment is significant in its own right. By GERA's enactment in 1991, this Court had decided *Sea Clammers* and had extended the rule announced in that case to constitutional claims in *Smith*. See *supra* pp. 12-14. And the Fourth Circuit, the only federal appeals court to have reached the issue, had applied *Sea Clammers* and *Smith* to hold that the ADEA displaces equal protection claims for age discrimination in state employment. See *Zombro*, 868 F.2d at 1366-1371.

In fact, by the time Congress enacted GERA, legislators had twice failed to overturn *Smith*'s principles for displacing constitutional claims under § 1983. GERA originated as an amendment to what became the Civil Rights Act of 1991 after two other attempts at civil rights reform failed in 1990 and early 1991. See S. Amend. 1287 to S. 1745, 102d Cong. (1991) (amendment of Sen. Grassley). The bills' proponents feared that comprehensive civil rights legislation would lead courts to find implied limitations on the reach of earlier civil rights laws, and these legislators cited

Smith as a source of their concern. See*, e.g.,* H.R. Rep. No. 102-40, pt. 1, at 87-89 (1991); H.R. Rep. No. 102-40, pt. 2, at 34-35 & nn. 62, 65 (1991). The two unenacted bills' supporters in Congress thus would have codified certain "Rules of Construction for Civil Rights Laws," which included language directing courts to construe all civil rights laws "broadly"; forbidding repeal or amendment of civil rights laws "by implication"; and dictating that "courts and administrative agencies shall not rely on the amendments made by the [Act] as a basis for limiting the theories of liability, rights, and remedies available under civil rights laws not expressly amended by such Act." H.R. 1, 102d Cong. § 109 (1991) (as passed by House, June 5, 1991); S. 2104, 101st Cong. § 11 (1990) (as vetoed by President, Oct. 22, 1990).

But these proposals never became law; *Smith* (and *Zombro*) remained in place. See generally *Watson v. U.S.*, 552 U.S. 74, 82-83 (2007) (because "Congress remains free to alter what [this Court] ha[s] done," Congress' failure to modify prior interpretation of statute demonstrates "congressional acquiescence" in that interpretation) (internal quotation marks omitted). And after these failed efforts to overturn portions of *Smith* put legislators on notice that making the ADEA's remedial regime more comprehensive would itself ensure the displacement of equal protection claims under § 1983, they nevertheless chose to confer ADEA rights on the previously excluded class of policymakers, with significant procedural limitations. See *McQuiggin v. Perkins*, No. 12-126, slip op. 14 n.3 (U.S. 2013)

("Congress legislates against the backdrop of existing law.").

C. Section 1983 Claims For Age Discrimination Would Allow Plaintiffs To Circumvent Congress' Comprehensive Remedial Regime, At Substantial Cost To Public Employers.

The doctrine announced in *Sea Clammers* and *Smith* exists to prevent plaintiffs from using § 1983 to sidestep a comprehensive remedial regime. See *supra* Part I. That doctrine compels the displacement of § 1983 equal protection claims for age discrimination in state and municipal employment. As shown above, the ADEA creates an exhaustive remedial regime, which Congress crafted with particular focus on the proper scope of federal age claims for public employees. It is inconceivable that Congress intended to allow plaintiffs to ignore that regime entirely "by the simple expedient of putting a different label on their pleadings." *Preiser*, 411 U.S. at 489-490. This becomes especially clear when one considers that § 1983 equal protection claims offer plaintiffs little likelihood of ultimate success, while they impose substantial costs on public employers.

1. Section 1983 Equal Protection Claims For Age Discrimination Would Circumvent Congress' Carefully Constructed Remedial Regime.

As many courts have recognized, allowing state and municipal employees to pursue age claims under § 1983 invites them to evade the ADEA's carefully constructed remedial regime in obvious ways. Parties would have

"direct and immediate access to the federal courts, [the Act's] comprehensive administrative process would be bypassed, and the goal of compliance through mediation would be discarded." *Zombro*, 868 F.2d at 1366; see *id.* at 1367 ("[I]f * * * § 1983 is available to the ADEA litigant, the congressional scheme behind ADEA enforcement could easily be undermined if not destroyed."); *Britt v. Grocers Supply Co., Inc.*, 978 F.2d 1441, 1448 (5th Cir. 1992) ("By establishing the ADEA's comprehensive scheme for the resolution of employee complaints of age discrimination, Congress clearly intended that all claims of age discrimination be limited to the rights and procedures authorized by the ADEA.") (internal quotation marks omitted).

1. If the ADEA did not preclude § 1983 constitutional claims, "[a]n impatient plaintiff might unilaterally dispense with the informal negotiations contemplated by Congress," "needlessly casting all concerned into costly litigation." *Britt*, 978 F.2d at 1449 (internal quotation marks omitted). This is precisely what the ADEA set out to avoid. Plaintiffs could bypass the EEOC entirely, notwithstanding its pivotal role under the Act. See *Frye*, 625 F. Supp. at 1575 ("The role of the EEOC is central to effectuating the policies of the" ADEA.). Likewise, although Congress sought to give state regulators an independent role in processing age claims, respondent's rule would permit public employees to bypass these regulators, too. And if a plaintiff sought to bring both an ADEA and an equal protection claim, the ability to proceed immediately in court on a § 1983 complaint would be sure to undermine

regulators' efforts at an informal, voluntary resolution of the ADEA claim.

Thus, just as permitting a § 1983 equal protection claim in *Smith* would have "render[ed] superfluous most of the detailed procedural protections outlined in the [EHA]" and "run counter to Congress' view that the needs of handicapped children are best accommodated" in a particular way—by having parents and the local education agency work together to formulate an individualized plan for each handicapped child's education," 468 U.S. at 1011-1012—permitting constitutional claims for alleged age discrimination in public employment would disregard Congress' strong preference for the informal resolution of age discrimination claims in the workplace. And just as permitting plaintiffs to seek relief under § 1983 would have ignored the "elaborate enforcement provisions" of the MPRSA and FWPCA, *Sea Clammers*, 453 U.S. at 14-15—which included a role for both federal regulators and private plaintiffs, see *id.* at 13-14—§ 1983 equal protection claims would sidestep the ADEA's even more detailed scheme and analogous division of labor between regulators and aggrieved employees. Here, as in *Sea Clammers*, without "strong indicia of a contrary congressional intent," courts should presume that "Congress provided precisely the remedies it considered appropriate." *Id.* at 15.

2. And for the high-level policymakers and government attorneys who now receive ADEA protections by operation of GERA, claims under § 1983 would avoid the regime Congress created for these officials. Worse still, employees could seek to proceed at

once administratively under GERA and in court on an equal protection claim. Section 1983 suits, which "involve plenary judicial evaluation of asserted rights deprivations," "differ considerably" from the "deferential consideration of matters within an agency's expertise" that GERA anticipates. *Rancho Palos Verdes*, 544 U.S. at 128 (Breyer, *J.*, concurring). Allowing high-level employees to proceed under § 1983 would "undermine the compromise"—between protecting workers and preserving the effective functioning of government—"that the [ADEA] reflects." *Id.* at 128-129 (same). See generally *Bush v. Lucas*, 462 U.S. 367, 389 (1983) (recognizing that Congress is best positioned to strike proper balance between "governmental efficiency," on the one hand, and "the rights of employees," on the other).

This case illustrates the point. While respondent insists that he is an "employee" within the meaning of the ADEA, the district court has held that respondent is instead an "appointee to a policymaking level," Pet App. 68a, meaning he may pursue his ADEA remedies only under GERA's specialized administrative process. Respondent's proposed rule, however, would allow him to avoid these requirements, "by the simple expedient of putting a different label on [his] pleadings." *Preiser*, 411 U.S. at 489-490.

3. Finally, in addition to its procedural rules, the ADEA "limits relief in ways that § 1983 does not." *Rancho Palos Verdes*, 544 U.S. 113 at 122. Again, in lieu of the punitive damages available under § 1983, see *Smith v. Wade*, 461 U.S. 30, 35-36, 51, 56 (1983), the ADEA permits only limited, liquidated damages, see 29

U.S.C. § 626(b); 29 U.S.C. § 216(b) (incorporated by reference into § 626(b)); see also *Ahlmeyer*, 555 F.3d at 1059. As in *Rancho Palos Verdes*, the presence here "of a more restrictive private remedy" alone establishes Congress' intent to displace a competing § 1983 cause of action, for "limitations upon the remedy contained in the statute are deliberate and are not to be evaded through § 1983." 544 U.S. at 121, 124.

2. The Equal Protection Clause Offers Little Likelihood Of Success On Age Discrimination Claims, But These Easily Pled Claims Impose Substantial Costs On Public Employers.

The costs of allowing plaintiffs to sidestep ADEA remedies and proceed directly under the Equal Protection Clause are significant, and when compared with the low likelihood of success on those claims, it becomes even more obvious that Congress did not intend to leave competing § 1983 claims intact. On the contrary, it is far more reasonable to conclude that in creating its own comprehensive remedy and more robust substantive rights, the ADEA displaces § 1983 claims that can be very costly to litigate while offering the plaintiff little chance of ultimate success.

1. This Court has never sustained an equal protection claim for age discrimination in public employment. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000) ("We have considered claims of unconstitutional age discrimination under the Equal Protection Clause three times," and "[i]n all three cases * * * held that the age classifications at issue did not

violate the * * * Clause."). This is not surprising, given the deference afforded the government in its role as employer. This Court has recognized "[t]ime and again * * * that the Government has a much freer hand in dealing 'with citizen employees than it does when it brings its sovereign power to bear on citizens at large.'" *Nat'l Aeronautics & Space Admin. v. Nelson*, 131 S. Ct. 746, 757-758 (2011) (quoting *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008)). "[G]overnment offices could not function if every employment decision became a constitutional matter,'" *Engquist*, 553 U.S. at 599 (quoting *Connick v. Myers*, 461 U.S. 138, 143 (1983)), and such "realities of the employment context" limit the constitutional rights of public employees, *id.* at 600; see also *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2497 (2011) ("The government's interest in managing its internal affairs requires proper restraints on the invocation of rights by employees when the workplace or the government employer's responsibilities may be affected."); *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) ("When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom.").

Public employees' equal protection rights are circumscribed by "'[t]he government's interest in achieving its goals as effectively and efficiently as possible.'" *Engquist*, 553 U.S. at 598-599 (quoting *Waters v. Churchill*, 511 U.S. 661, 675 (1994) (plurality op.)). And equal protection claims for alleged age discrimination, like respondent's here, are particularly limited by the "relaxed" standard against which they are judged. *Mass. Bd. of Retirement v. Murgia*, 427 U.S.

307, 314 (1976) (*per curiam*). Age classifications survive constitutional scrutiny so long as they are not "so unrelated to the achievement of any combination of legitimate purposes" that a court "can only conclude" they are "irrational." *Vance v. Bradley*, 440 U.S. 93, 97 (1979); see also *Kimel*, 528 U.S. at 84 ("because an age classification is presumptively rational," plaintiff must "prov[e] that the facts on which the classification is apparently based could not reasonably be conceived to be true") (internal quotation marks omitted).

Consistent with the Equal Protection Clause, "a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests." *Kimel*, 528 U.S. at 83-84. The public employer may assume, for example, that advancing age brings increased susceptibility to physical and mental difficulties, although such "broad generalizations" may be "imperfect" and "probably not true * * * in the majority of cases." *Id.* at 84-86 (internal quotation marks omitted). Thus, public employers may terminate employees who reach a certain, predetermined age to avoid "tedious and often perplexing decisions" about whether they are still "physically and mentally qualified" for a job, *Gregory*, 501 U.S. at 471-472 (internal quotation marks omitted), as a part of "personnel policies * * * designed to create predictable promotion opportunities and thus spur morale" among younger workers, *Vance*, 440 U.S. at 98, and to "assure[] predictability and ease in establishing and administering" pension plans, *Gregory*, 501 U.S. at 471.

2. Notwithstanding these impediments to ultimate success, age-based equal protection claims threaten significant costs for government employers. Liberal pleading standards mean that, regardless of ultimate merit, well-pleaded complaints of employment discrimination generally will survive a motion to dismiss. This is because allegations that "a decisionmaker[] undert[ook] a course of action because of, and not merely in spite of, [the action's] adverse effects upon an identifiable group," *Ashcroft v. Iqbal*, 556 U.S. 662, 676-677 (2009) (internal quotation marks omitted, third alteration in original), provide "fair notice of what [the plaintiff's] claims are and the grounds upon which they rest" and thus state a claim for employment discrimination, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002).[3] Such complaints will survive dismissal even if it "'appear[s] on the face of the pleadings that a recovery is very remote and unlikely.'" *Id.* at 515 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)); see also *Skinner v. Switzer*, 131 S. Ct. 1289, 1296 (2011) (citing *Swierkiewicz* with approval); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569-570 (2007)

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[3] *Swierkiewicz* addressed the pleading standard for employment discrimination claims under the ADEA. The prevailing rule among those lower courts that recognize constitutional age discrimination claims is that these claims are "analyzed under the same standards as a claim made pursuant to the ADEA." *Shapiro v. N.Y. City Dep't of Educ.*, 561 F. Supp. 2d 413, 422 n.2 (S.D.N.Y. 2008); see also IMLA Amicus Br. in Supp. of Cert. 11-12 (collecting cases). The district court followed this approach here. See Pet. App. 117a.

(reaffirming *Swierkiewicz*'s pleading standard). Thus, the district court in this case required respondent to plead merely "that he suffered an adverse employment action on the basis of his * * * age." Pet. App. 117a.

This generous pleading standard "relies on liberal discovery rules and summary judgment motions * * * to dispose of unmeritorious claims," *Swierkiewicz*, 534 U.S. at 512, but discovery is by far the most costly aspect of modern civil litigation, accounting for up to 90 percent of litigation costs, see *Twombly*, 550 U.S. at 559; *Intel Corp. v. Advanced Micro Devices*, 542 U.S. 241, 268 (2004) (Breyer, *J.*, dissenting). Thus, "[t]he practical problem with allowing [constitutional age discrimination] claims to go forward in th[e public employment] context is not that it will be too easy for plaintiffs to prevail, but that governments will be forced to defend a multitude of such claims in the first place." *Engquist*, 553 U.S. at 608. Moreover, because discovery costs may approach or exceed the potential damages recovery—and when the threat of punitive damages is added to the mix—public employers are pressured to settle claims that would be unlikely to succeed at trial. See *Delta Airlines, Inc. v. August*, 450 U.S. 346, 363 n.1 (1981) (Powell, *J.*, concurring in the judgment) (observing, in employment discrimination case, that "the cost of litigation in this country * * * has reached the point where many persons and entities simply cannot afford to litigate even the most meritorious claim or defense").

Further, in cases where the plaintiff is a high-ranking government official, additional costs are at stake. GERA requires these employees to try their cases

on a relatively expedited basis before an ALJ, with deferential review on appeal. See *supra* pp. 31-32. But under the Seventh Circuit's rule, plaintiffs who recast their claims in terms of equal protection may instead proceed before a jury in federal district court, subject to more sweeping appellate review. See *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) (noting "'cost and inconvenience and distractions of a trial upon a conclusion of the pleader, * * * [and] the hazard of a judgment against [public officials] based upon a jury's speculation as to motives'"); see also *Iqbal*, 556 U.S. at 685 (litigation's "heavy costs in terms of efficiency and expenditure of valuable time and resources * * * are only magnified" when defendants are senior government officials).

This case brings these costs into sharp relief. Respondent deposed the previous Illinois Attorney General and the current Attorney General's closest advisors, including her Chief of Staff and Chief Deputy Attorney General, and he sought and received interrogatory answers from the Attorney General herself and voluminous written discovery on high-level personnel decisions and other sensitive issues. Doc. 183-2. Furthermore, because the lawsuit places the adequacy of respondent's job performance at issue, petitioners were required to detail facts relating to specific litigation and strategy decisions made by the State's chief legal officer. Petitioners thus developed a factual record concerning the preparation of a lawsuit against a home repair contractor, Pet. App. 47a, 50a, the Office's interaction with other States in multi-State litigation and disagreements among those offices, Pet.

App. 49a-50a, and the handling of a multi-State settlement, Pet. App. 50a. If public officials are "to devote time to [their] duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation," especially where, as here, the underlying constitutional protections are so limited. *Iqbal*, 556 U.S. at 685.

Congress could not have intended this result. It is far more reasonable to presume Congress anticipated that the ADEA, which offers workers more robust substantive rights and an exhaustive remedial regime, would displace costly, generally unsuccessful litigation under § 1983.

* * *

In short, the ADEA creates a comprehensive remedial regime in its own right and by importing FLSA remedies. Congress made informal conflict resolution a priority and devoted substantial attention to the proper scope and limits of federal age claims available to public employees. Permitting these employees to recast their age discrimination claims under § 1983 and the Equal Protection Clause will undercut this regime. Section 1983 equal protection claims for age discrimination have little likelihood of ultimate success, but they are easy to plead, require often burdensome discovery, and carry the threat of punitive damages. These are precisely the circumstances under which *Sea Clammers* and *Smith* presume that Congress intended to displace competing claims under § 1983.

Indeed, it is no surprise that in *Kimel*, when this Court listed the alternative legal avenues open to state employees—who may not recover damages in federal court under the ADEA by operation of the Eleventh Amendment—the Court made no mention of a damages remedy under § 1983, even though the respondents raised that option in their brief. Compare Brief for Respondents, *Kimel*, 1999 WL 631661, at *38 (listing equal protection claims among a state employee's remedial options), with *Kimel*, 528 U.S. at 91-92 (recognizing only that these "employees are [still] protected by state age discrimination statutes"). Under this Court's well-established test, the ADEA displaces those claims.

III. The Seventh Circuit Misread This Court's Decisions In *Fitzgerald* and *Smith*.

Sea Clammers holds that, when Congress enacts a statute with a comprehensive remedial scheme, this alone demonstrates Congress' "intent to preclude the remedy of suits under § 1983." *Sea Clammers*, 453 U.S. at 20; see also *supra* p. 12. And the Seventh Circuit recognized that the ADEA qualifies as a comprehensive remedial scheme. See Pet. App. 25a ("agree[ing] with *Zombro* majority that" ADEA's remedial scheme is "comprehensive"); Pet. App. 28a (acknowledging that "the ADEA sets forth a rather comprehensive remedial scheme"). Rather than apply settled law to displace respondent's § 1983 claim here, however, the Seventh Circuit announced a new rule: "[W]e believe more is required than a comprehensive statutory scheme" to displace a § 1983 remedy for violation of a constitutional (rather than a statutory) right. Pet. App. 27a.

Specifically, under the rule announced below, "the language of the statute or the legislative history" must include "clear or manifest" statements of congressional intent to displace § 1983 claims, or there must be significant (if not perfect) overlap between "the rights and protections afforded by the statute and the Constitution." Pet. App. 32a. The Seventh Circuit purported to derive this novel approach from this Court's decisions in *Smith* and *Fitzgerald*, see Pet. App. 27a, 32a, but this overreads both cases.

1. As explained, see *supra* pp. 12, 14, *Smith* did not require Congress to state its intent to displace constitutional claims on the face of the statute or in its legislative history; the existence of "a carefully tailored [remedial] scheme," and the *absence* of evidence in the legislative history that Congress meant to allow plaintiffs to circumvent that scheme, established Congress' intent to preclude equal protection claims, 468 U.S. at 1012. Indeed, even the Seventh Circuit recognized that its new rule—requiring "clear and manifest" statements of Congress' preclusive intent in the statutory text or legislative history—was an expansion of *Smith*, noting that *Smith* merely "support[ed]" the court's "notion" that more than a comprehensive remedial scheme is required to displace constitutional claims. Pet. App. 27a.

2. Nor does "*Fitzgerald* direct[] [courts] to compare the rights and protections afforded by the statute and the Constitution," as the Seventh Circuit held. Pet. App. 32a. Again, *Fitzgerald*'s discussion on this point merely provided "further support" for the Court's conclusion that Title IX, which includes no express

private right of action, cannot implicitly displace competing constitutional claims. See *supra* p. 18; 555 U.S. at 256 ("A comparison of the substantive rights and protections * * * *lends further support* to the conclusion that Congress did not intend Title IX to preclude § 1983 constitutional claims.") (emphasis added). And Title IX leaves many victims of gender discrimination without any statutory remedy at all—it exempts elementary and secondary schools from its prohibition on discrimination in admissions, and it exempts military service schools and traditionally same-sex institutions from its coverage entirely. See *id.* at 257. The ADEA, in contrast, "prohibits substantially more state employment decisions and practices than would likely be held unconstitutional." *Kimel*, 528 U.S. at 86.

Moreover, *Fitzgerald* involved alleged gender discrimination, which triggers heightened scrutiny under the Fourteenth Amendment. See *Kimel*, 528 U.S. at 84. The purported age-based discrimination at issue here, by contrast, is "unlike governmental conduct based on race or gender," *id.* at 83, and, as explained, is subject to a rational basis standard that makes it nearly impossible for plaintiffs to succeed at trial, see *supra* pp. 38-40. Given the rigorous scrutiny to which race and gender claims are subject, it would be reasonable to expect an "indication of congressional intent" beyond a comprehensive remedial scheme, Pet. App. 28a, to displace claims of unconstitutional race or gender discrimination. But nothing in *Fitzgerald* purports to overturn the rule in *Smith* that a statute's comprehensive remedial regime is alone grounds to

displace a competing § 1983 remedy for alleged discrimination against members of a non-suspect class, whose claims proceed under rational basis review.

3.a. The remaining ways in which the Seventh Circuit relied on *Fitzgerald* also fail. First, contrary to the decision below, see Pet. App. 33a, the fact that the ADEA exempts or places limits on claims for two narrow categories of public workers due to the nature of their jobs does not disfavor preclusion. See 29 U.S.C. § 630(f) (exempting elected officials, their personal staff, their policymaking appointees, and their legal advisors); 29 U.S.C. § 623(j) (limiting cause of action for law enforcement officers and firefighters). In fact, by operation of GERA, the high-ranking appointees to whom the Seventh Circuit refers do receive ADEA protections. Congress simply concluded that, given their high station and the nature of their work, these officials must pursue their ADEA rights through a specially designed, administrative process.

Moreover, by limiting claims by state police and firefighters, 29 U.S.C. § 623(j), Congress made the considered judgment that the benefits in affording these individuals unrestricted federal age discrimination claims (in addition to their state-law rights) are outweighed by the substantial disruption to States' ability to protect the public health and safety that would result if such claims were unqualified. And it would be especially difficult for police or firefighters to succeed on age-based constitutional claims in any event, given the nature of their duties. See *Murgia*, 427 U.S. at 314-315 (rejecting equal protection challenge to mandatory retirement age for police, recognizing that "the

legislature seeks to protect the public by assuring physical preparedness of its uniform police," and "physical ability generally declines with age"). Far from disfavoring preclusion, therefore, this limitation aimed at a narrow class of public employees, and the process that GERA creates for certain high-ranking officials, constitute further evidence that Congress intended to limit the field of age discrimination claims to what is covered by the ADEA.

b. Nor does this Court's holding in *Kimel*—that the ADEA does not validly abrogate the State's Eleventh Amendment immunity—somehow disfavor preclusion, as the Seventh Circuit concluded. See Pet. App. 34a.[4] The ADEA makes "unmistakably clear" Congress' intent "to subject the States to suit for money damages at the hands of individual employees." 528 U.S. at 74 (internal quotation marks omitted). This is further evidence that Congress anticipated that the ADEA—by subjecting the States to suits for money damages—would comprehensively regulate the field of age discrimination in employment.

To be sure, *Kimel* also holds that Congress did not successfully accomplish its goal of abrogating state sovereign immunity. See *id.* at 82-90. But Congress' intent to do so is what matters for purposes of assessing whether it intended to displace § 1983 actions. And although *Kimel* left the door open for Congress to "identif[y] any pattern of [unconstitutional] age

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[4] Illinois has waived its Eleventh Amendment immunity from suit under the ADEA. See 745 ILCS 5/1.5(a) (2010).

discrimination by the States" to support its intended abrogation, *id.* at 89, Congress never did so. Insofar as state employers were concerned, therefore, Congress was content to safeguard their workers from age discrimination through the EEOC's (and state regulators') efforts at informal conflict resolution; federal suits by the EEOC, which may include claims for victim-specific damages[5]; and suits pursuant to state fair employment practice laws.[6] See *Engquist*, 553 U.S. at 609 ("Public employees typically have a variety of protections from just the sort of personnel actions about which Engquist complains[.]").

Moreover, even if the "practical" effects of *Kimel*—that "state employees suing under the ADEA are left without a damages remedy," Pet. App. 34a—were relevant to the preclusion analysis, these effects also would favor preclusion. Like the Seventh Circuit's related concern that the ADEA limits who plaintiffs may sue, see Pet. App. 33a—which translates at best into a potential difference in remedies—such "limitations upon the remedy contained in [a] statute

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[5] See *EEOC v. Bd. of Regents of the Univ. of Wis.*, 288 F.3d 296, 299-301 (7th Cir. 2002) (Eleventh Amendment does not bar EEOC from bringing ADEA claims against States on behalf of employees).

[6] *Kimel*, 528 U.S. at 92 n.* (collecting state statutes prohibiting age discrimination in public employment); *Borough of Duryea*, 131 S. Ct. at 2497 ("Employees who sue under * * * state employment laws often benefit from generous and quite detailed * * * provisions.").

are deliberate and are not to be evaded through § 1983," *Rancho Palos Verdes*, 544 U.S. at 121, 124; see *supra* pp. 15-16. Indeed, the Seventh Circuit's reasoning is irreconcilable with *Bush v. Lucas*. There, Congress' civil-service review process precluded a *Bivens* action by a federal employee complaining that his demotion violated the First Amendment. This was so even though, unlike under *Bivens*, the review process neither allowed the plaintiff to sue his supervisor individually nor offered "complete relief." 462 U.S. at 372, 388-390. Accordingly, contrary to the decision below, the fact that state employees may obtain less comprehensive remedies under the ADEA than they could in a § 1983 suit (or that they may be required to proceed against different defendants) counsels for preclusion, not against it.

CONCLUSION

The judgment of the Seventh Circuit should be reversed.

Respectfully submitted.

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