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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I. This Case Falls Squarely Within The Question Presented.

Respondent claims that the question presented applies only to "employees" under the ADEA, and that the district court's interlocutory determination that he is an "appointee" (one of a class of high-level public officials that 29 U.S.C. § 630(f) exempts from the ADEA's definition of "employee") therefore takes this case outside the scope of the question. Resp. Br. 8-15. Respondent's logic fails at every step.

1. His claim is doomed at the threshold, for this Court was aware of the district court's interlocutory determination when certiorari was granted. The district court's ruling was clear from the certiorari petition (at p. 16), respondent's brief in opposition (at p. 3), the Seventh Circuit's decision (Pet. App. 6a), and the district court opinion (Pet. App. 68a). And while respondent tries to suggest that something has changed—"petitioners now acknowledge that Levin is *not* covered by the ADEA," Resp. Br. 9 (emphasis in original)—that is untrue. Petitioners' opening brief merely notes, just as their certiorari petition did, that the district court's most recent decision finds respondent to be an appointee. Pet. Br. 5, 37; Pet'n 16 (citing district court opinion at Pet. App. 68a).

2. Moreover, respondent raised no objection to the question presented in his brief in opposition. He instead defended the merits of the Seventh Circuit's decision, claiming that review is unwarranted because the "answer to the 'question presented' is found in two

Supreme Court decisions." BIO 5. To avoid waiver, respondent was required to raise any non-jurisdictional "objection to consideration of [the] question presented based on what occurred in the proceedings below." S. Ct. R. 15.2. This he failed to do.

Indeed, the waiver rule should have special force here, where the theory underlying respondent's current objection to the question presented is inconsistent with his legal argument below. Respondent claims that, because the district court determined that he is an appointee rather than an employee, he will not be subject to whatever rule this Court announces for the displacement of an employee's § 1983 claims. But respondent's complaint alleges that he is an "employee," Doc. 16, ¶ 6, and he has never conceded that the district court's contrary, non-final ruling is ultimately correct or controlling. Even now, he remains free to ask the district court to revisit the issue, raise it on appeal from a final judgment, or make it the subject of a certiorari petition. Fed. R. Civ. P. 54(b); *Moses H. Cone Mem'l Hosp. v. Mercury Constr.*, 460 U.S. 1, 13 (1983); see also *Opp v. Office of the State's Attorney of Cook Cnty.*, Cert. Pet'n, 2011 WL 1090104, at *2 (U.S. 10-1163) (challenging Seventh Circuit's "uniquely broad interpretation of [the 'policymaker'] exclusion" as "far more expansive[] than the avowedly narrow construction in other circuits").

Respondent never argued below that he is an appointee, much less that his § 1983 claim survives even if an employee's would not. Instead, he urged the Seventh Circuit to rule just as it did—to reject the view of other circuits and hold broadly that the ADEA does

not displace § 1983 remedies for constitutional claims. Pl's CA7 Br. 1, 15, 22-51. Having sought and obtained that holding, respondent may not immunize it from review with a newfound legal theory and accompanying, unpreserved quarrel with the question presented. Rule 15.2 precludes respondent from benefitting from such an approach. See, *e.g.*, *Knowles v. Iowa*, 525 U.S. 113, 116 n.2 (1998) (rejecting belated objection to certiorari review as waved).

3. Finally, waiver aside—and in line with this Court's decision to grant the certiorari petition notwithstanding the district court's interlocutory order—it is immaterial to the question presented whether respondent's complaint controls the displacement analysis (and he is therefore an employee), or whether the district court's current determination controls (and he is an appointee).

First, if the ADEA displaces § 1983 equal protection claims by employees, as petitioners contend, then it also does so for the appointees and other high-level public officials that § 630(f) exempts. The ADEA's carve-out for these officials showed Congress' determination that elected officials needed "'complete freedom'" when making personnel decisions involving sensitive public posts. Pet. Br. 27-28, 29. It would have undermined that determination to permit those who serve in these posts to bring claims under § 1983 instead. See *infra* p. 13. Whether a plaintiff is an employee or an appointee, that plaintiff "avoid[s] the [ADEA's] comprehensive remedial regime"—in the words of the question presented—by proceeding under § 1983.

Second, with the passage of GERA in 1991, those once-exempt officials are now entitled to the ADEA's rights and remedies, Pet. Br. 30, making any distinction between employees and appointees even more patently irrelevant in resolving the question presented.

Perhaps recognizing that GERA solves the vehicle problem respondent belatedly seeks to introduce, he asks the Court to ignore that statute on the theory that it presents a new question—whether GERA, rather than the ADEA, displaces his § 1983 remedy. Resp. Br. 5, 10-11. But this mischaracterizes both petitioners' argument and GERA. Petitioners do not contend that GERA has any independent ability to displace § 1983 remedies. Petitioners raise GERA in response to the Seventh Circuit's concern that the ADEA "exempts claims by * * * elected officials and certain members of their staff" as well as "appointees." Pet. App. 33a; see generally *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("[O]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to precise arguments they made below.") (internal quotations omitted). GERA shows that the district court's concerns were unfounded, for ADEA rights and remedies extend to the once-exempt, high-level officials (except elected officials themselves). Pet. Br. 30. At the same time, GERA adds to the ADEA's comprehensive remedial regime, and GERA's history provides additional insight into congressional intent. Pet. Br. 30, 32-33.

These points do not depend on whether respondent is an "employee" or an "appointee." And—although neither party discussed GERA below, for respondent has

consistently declined to invoke its procedures as an "appointee"— GERA is part and parcel of the ADEA's "remedial regime," see *infra* Section III.B, and the question presented asks whether plaintiffs may avoid that regime by pursuing remedies for an equal protection violation under § 1983.

For these reasons, respondent's newfound dispute with the question presented is waived and meritless.

II. Respondent's Proposed Test Is Illogical And Irreconcilable With This Court's Precedent.

As petitioners showed in their opening brief (at pp. 11-19), this Court has consistently relied on the existence of a comprehensive remedial regime to conclude that a statute displaces competing remedies under § 1983, whether for the violation of the statute itself or a corresponding constitutional right. Respondent cannot explain away this language in the Court's prior decisions, and his proposed, alternative rule lacks support in either precedent or common sense.

A. This Court Consistently Applies A Single Test Focused On The Statute's Remedial Regime.

1. Although respondent contends that the displacement of § 1983 remedies presents "two distinct legal questions," depending on whether the underlying rights are statutory or constitutional, Resp. Br. 20, in fact this Court has consistently analyzed displacement claims using a single standard focused on the comprehensiveness of a statute's remedial regime, Pet. Br. 11-19. This was true in both *Middlesex County*

Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981) (which displaced § 1983 remedies for statutory violations), and *Smith v. Robinson*, 468 U.S. 992 (1984) (which relied on *Sea Clammers* to displace § 1983 remedies for constitutional violations). See *Sea Clammers*, 453 U.S. at 20 ("[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983"); *Smith*, 468 U.S. at 1011-1012 (citing "comprehensive nature of the procedures and guarantees set out in the" Education of the Handicapped Act).

This Court's subsequent decisions refer to *Sea Clammers* and *Smith* in the same breath and for that same standard. See *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005); *Blessing v. Freestone*, 520 U.S. 329, 347-348 (1997); *Wilder v. Va. Hosp. Assoc.*, 496 U.S. 498, 521 (1990); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989); *Wright v. Roanoke Redev. & Housing Auth.*, 479 U.S. 418, 423, 424, 427 (1987). Most recently, in *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246 (2009), the Court again recognized that, "[a]s in *Sea Clammers*, * * * this Court [in *Smith*] focused on the statute's detailed remedial scheme in concluding that Congress intended the [statute there] to provide the sole avenue for relief." 555 U.S. at 253-254. And *Fitzgerald* reaffirmed 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." *Id.* at 253.

Respondent misreads *Smith* and *Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366 (1979). Resp. Br. 22. He is correct that *Smith* devoted a footnote to whether EHA rights could be vindicated through § 1983. 468 U.S. at 1009 n.11. But the Court treated this issue separately, and briefly, because in that case the plaintiffs' "§ 1983 claims *were not based on alleged violations of the EHA*, but on independent claims of constitutional deprivations." *Id*. at 1008-1009 (emphasis added). The Court simply had no reason to examine the statutory displacement question. *Novotny*, meanwhile, did not involve displacement of a § 1983 action at all. The question there was whether Title VII rights could be asserted within § 1985(3)'s remedial framework. 442 U.S. at 377-378.

2. Conceding that this Court relies on remedial comprehensiveness in its displacement decisions, Resp. Br. 32-33, respondent contends that the phrase "comprehensive remedial regime" is a "vague formula" and accuses the Court of assigning that term "different meanings" in different contexts. Resp. Br. 33-34. To be sure, whether a regime is comprehensive may be a matter of degree, but the term's meaning does not change depending on the context, for the reason the Court relies on this standard is the same regardless of whether the competing § 1983 remedy is for a statutory or constitutional violation. Either way, courts fairly assume that Congress would not intend parties to use the general, § 1983 remedy to circumvent a remedial

scheme carefully crafted to advance a specific legal right. See *Rancho Palos Verdes*, 544 U.S. at 122-123; *Smith*, 468 U.S. at 1011-1012; *Sea Clammers*, 453 U.S. at 20. A comprehensive regime—one that is incompatible with more general, § 1983 remedies—is the best evidence of Congress' intent to displace the latter in a specific universe of cases.

Nor is this inconsistent with the idea, Resp. Br. 37-39, that Congress may create overlapping remedies, by making this interest known either "express[ly] or implicit[ly]." *Rancho Palos Verdes*, 544 U.S. at 122. And of course Congress may create multiple substantive rights in the same area. But § 1983 is not a substantive provision. *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979). It provides a general remedy for federal constitutional and statutory violations, and the presumption against implied repeal therefore does not apply. See *Rancho Palos Verdes*, 544 U.S. at 120 n.2. Accordingly, respondent's reliance on that presumption (at pp. 28-29) is misplaced, as is his repeated reliance on the coexistence of multiple *substantive* rights, see Resp. Br. 39 (citing *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (involving interplay between Title VII and § 1981), and *Morton v. Mancari*, 417 U.S. 535 (1974) (involving interplay between Equal Employment Opportunity Act of 1972 and Indian Reorganization Act of 1934)); see also Resp. Br. 42-43.

B. Respondent's Proposed Rule For Displacing § 1983 As A Remedy For Constitutional Claims Is Unworkable.

Not only is respondent wrong to claim that this Court has created two different tests for displacing § 1983 as a remedy for statutory and constitutional violations, but the test he proposes for the latter class of cases is not viable. Respondent initially asks whether "the statutory scheme was created for the purpose of enforcing [the corresponding] constitutional right" and whether "Congress intended that scheme to be the exclusive method of enforcing that constitutional right." Resp. Br. 7. Respondent then reduces that standard to practice by requiring, variously—and in addition to a comprehensive remedial regime—that Congress include a "reference to equal protection or [another] constitutional right" in "[t]he text" of the statute; that there be near-perfect overlap between the protections of the constitutional right and the new statutory right; and that the statutory remedies be the "most effective" available, by which respondent means they may not be more limited in any way than the remedies offered by § 1983. Resp. Br. 25, 27, 32, 36-37. Each of these criteria is fatally flawed.

1. Respondent's proposed requirement that Congress refer expressly on a statute's face to any constitutional claim it intends to displace disregards the established rule that Congress may "foreclose[]" a § 1983 remedy either "expressly" ("in the statute itself") *or* "impliedly, by creating a comprehensive enforcement scheme that is incompatible with

individual enforcement under § 1983." *Blessing*, 520 U.S. at 341 (internal quotations omitted).

Nor is there support for respondent's express-statement rule in *Smith* and *Preiser v. Rodriguez*, 411 U.S. 475 (1973), as he contends (at p. 24 & n.7). With the EHA in *Smith*, Congress sought to "incorporate[] the major principles" of two then-recently decided district court decisions recognizing a constitutional right to education. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 194 (1982) (internal quotations omitted). Because these cases were "the impetus for the Act," *id.* at 192, Congress naturally made its intent to protect schoolchildren's constitutional rights express. The Court's displacement finding in *Smith* did not hinge on this statutory language, however, but rather on the EHA's comprehensive remedial regime and the absence of legislative history showing any congressional intent to allow plaintiffs to circumvent that regime. Pet. Br. 46. Nor is it surprising that Congress referenced constitutional violations on the face of 28 U.S.C. § 2254, for habeas corpus exists historically to secure discharge from confinement that is "contrary to the Constitution or fundamental law." *Preiser*, 411 U.S. at 485. And the Court did not rely on this textual reference as a basis for its decision in *Preiser*, either.

Moreover, an express-statement rule would make little sense in cases, like this one, where Congress has supplanted a narrow, difficult-to-vindicate constitutional right with one that imposes "substantially higher burdens on state employers." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 87 (2000); see

also *id.* at 87 (ADEA "prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard").* It is unreasonable to expect Congress to refer expressly to an analogous constitutional right where, as here, Congress' intent was not merely to protect that right by statute, but to create protections running well "beyond the requirements of the Equal Protection Clause." *Id.* at 88.

2. Respondent's near-perfect overlap requirement likewise fails. To be sure, *Fitzgerald* includes a comparison between equal protection and Title IX rights, but the Court was clear that this discussion merely "len[t] further support" to its holding. 555 U.S. at 256; see Pet. Br. 18, 46-47. In any event, *Fitzgerald* does not purport to limit displacement of § 1983 remedies to cases where a statute protects *no more* than does a preexisting, constitutional right, as respondent urges (at p. 36). Gender-bias claims trigger heightened

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* Although there is no dispute that equal protection claims for age discrimination are rarely successful, *e.g.*, AARP Br. 28; Nat'l Educ. Ass'n Br. 16, the argument that these claims do not impose substantial discovery and settlement costs on public employers, *e.g.*, Nat'l Educ. Ass'n Br. 22-23, misunderstands applicable law. See Pet. Br. 41-42 (explaining that liberal pleading standard for employment discrimination claims set forth in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), survived *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)).

constitutional scrutiny, and the Court in *Fitzgerald* was unwilling to "lightly conclude" that Congress meant to displace remedies for such "substantial equal protection claim[s]." 555 U.S. at 256 (internal quotations omitted); see also Pet. Br. 46-48. It was therefore significant that Title IX left many of these rights unprotected. See 555 U.S. at 256-257. And although the Court also observed some ways in which Title IX rights were more protective, see *ibid.*, the Court did not purport to announce a rule barring the implied displacement of § 1983 remedies where, as here, the constitutional right is narrowly circumscribed and the statute not only protects that right but also goes much further. Such a case was not before the Court. And there is no reason to suppose that Congress is any less committed to displacing inconsistent remedies when it protects constitutional rights as part of a broad measure with a panoply of protections, than when it passes a law that narrowly codifies a constitutional right. This is particularly so where, unlike in *Fitzgerald*, the statute also offers a "comprehensive remedial scheme comparable to those at issue in *Sea Clammers*, *Smith*, and *Rancho Palos Verdes*." *Id.* at 258.

In short, if *Fitzgerald* adds anything to the "comprehensive remedial regime" standard, but see Pet. Br. 46-47, it is simply that courts may also consider the extent to which a statute leaves "substantial" constitutional rights unprotected. The ADEA does no such thing, for it covers "substantially more" than the Equal Protection Clause. *Kimel*, 528 U.S. at 86. Respondent cites employees under forty and victims of reverse age discrimination as examples of workers

whom the ADEA fails to protect (at pp. 18, 36), but these employees are not subject to the discrimination against relatively older workers that the ADEA was enacted to prevent. See *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 591, 593 (2004) ("Congress * * * ignored everyone under 40" and left the "complaints of the relatively young outside the statutory concern."). Accordingly, nothing in the ADEA suggests that Congress sought to displace constitutional claims for these employees.

In contrast, Congress focused specifically on high-ranking government officials and made the considered judgment, initially, that effective governance precluded these employees from bringing federal age discrimination claims. Pet. Br. 27-30, 48-49. Later, with GERA, Congress again focused on these officials, this time deciding that their federal age claims would not be incompatible with effective government if those claims were adjudicated through a specially designed administrative process. Pet. Br. 30-32. Such targeted exemptions—for conduct that otherwise falls within the discrimination that Congress targeted with the ADEA—suggest that Congress would not want these same employees to bring age-bias claims under § 1983.

Davis v. Passman, 442 U.S. 228 (1979), *Smith*, and *Preiser* are not to the contrary, as respondent contends (at pp. 16-18). *Davis* raised no displacement issue; the question presented there was whether to judicially create a damages remedy for unconstitutional, gender-based employment discrimination. *Id.* at 244-245. Because reinstatement was impossible and there were no state-law remedies available, it was

"damages or nothing" for the plaintiff. *Id.* at 245 & n.23 (internal quotations omitted). Nor was there an "*explicit* congressional declaration that persons in [the plaintiff's] position may not recover money damages." *Id.* at 246-247 (emphasis in original, internal quotations omitted). But not even respondent presses this as the standard for displacement.

Smith, meanwhile, held that the EHA might not displace all Rehabilitation Act claims because the acts are "different substantive statutes." 468 U.S. at 1016. Because § 1983 creates no new substantive rights, the Rehabilitation Act displacement question required a "different analysis" than the question whether the EHA displaces equal protection claims. *Ibid.* Finally, respondent misdescribes the interplay (at issue in *Preiser*) between § 1983 and the federal Habeas Corpus Act. A state prisoner challenging the fact or duration of confinement has no § 1983 action for damages if proving the "damages claim necessarily demonstrates the invalidity of the conviction" and the prisoner does not demonstrate "that the conviction * * * has already been invalidated." *Heck v. Humphrey*, 512 U.S. 477, 481-482, 487-488 (1994). Respondent's contrary claim (at p. 18) misstates the law.

3. Nor is there merit to respondent's contention that, to displace § 1983 as a remedy for constitutional violations, a statute "ordinarily" must offer remedies that are at least as favorable to would-be plaintiffs as the remedies available under § 1983. Resp. Br. 35. Respondent derives this requirement from a passage in *Smith*, where the Court recognized that the "carefully tailored" scheme Congress created in the EHA was "the

most effective vehicle for protecting the constitutional right of a handicapped child to a public education." 468 U.S. at 1012-1013. But "most effective" does not mean "most pro-plaintiff." Rather, it refers to Congress having "carefully tailored" a remedy to the specific right at issue. The very reason for the dispute before the Court in *Smith* was the fact that, unlike § 1983 and § 1988, the EHA did not afford the plaintiff the right to attorney's fees. So the Court could not have used the phrase "most effective vehicle" as respondent here reads it. In fact, contrary to respondent's repeated objection (at pp. 29, 34-35, 36-37), this Court has recognized that more restrictive statutory remedies show that Congress does intend to displace a competing remedy under § 1983. See *Rancho Palos Verdes*, 544 U.S. at 121, 124 ("limitations upon the remedy contained in the statute are deliberate and are not to be evaded through § 1983").

4. Finally, there is nothing to respondent's reliance on *Kimel* (at pp. 7, 35-36). The Court there did not hold that Congress did not intend the ADEA to protect rights already covered by the Equal Protection Clause; it held that Congress "prohibit[ed] substantially more state employment decisions and practices than would likely be held unconstitutional." 528 U.S. at 86. And if respondent's claim is that the ADEA does not displace § 1983 remedies because the Act does not abrogate States' Eleventh Amendment immunity, such a claim is foreclosed by *Dellmuth v. Muth*, 491 U.S. 223 (1989), which holds that the EHA—which, *Smith* establishes, displaces § 1983 equal protection

claims—does not abrogate this immunity either. *Id.* at 232.

III. Respondent May Not Ask The Court To Ignore Parts Of The ADEA's Remedial Regime.

When respondent finally addresses the ADEA's remedial regime, he ignores or understates its major elements, describing it as a mere "combination of a private right of action with the charge filing requirement." Resp. Br. 33. In reality, the ADEA's remedial scheme consists of a comprehensive combination of remedies, limits on remedies, and administrative procedures. Pet. Br. 19-34. And respondent's effort to downplay these elements—arguing that the ADEA is no different than Title VII and that GERA's remedies are immaterial to the displacement analysis—is misguided.

A. It Is Irrelevant That The ADEA Has Some Remedial Elements In Common With Title VII.

Respondent's reasoning appears to proceed as follows: this Court has held that Title VII does not displace § 1983 equal protection claims, Title VII shares certain remedial elements with the ADEA, therefore the ADEA must not displace § 1983 equal protection claims or, at least, the laws' common elements may not be considered in deciding whether the ADEA's regime is sufficiently comprehensive. Resp. Br. 41-49.

This logic fails. As an initial matter, respondent's premise—that "[t]his Court has repeatedly held that

Title VII does not bar covered employees from bringing a § 1983 action under the Equal Protection Clause," Resp. Br. 41 (footnote omitted)—is false, for none of the cases respondent cites actually reaches that holding. The more fundamental point, however, is that whether Title VII displaces § 1983 equal protection claims is immaterial to whether the ADEA does, as the Seventh Circuit recognized. See Pet. App. 31a-32a n.5.

1. Title VII's legislative history, unlike the ADEA's, offers clear evidence that Congress did not want the statute to displace § 1983 remedies for equal protection violations, a point that respondent amplifies in his brief (at p. 49). See H.R. Rep. 92-238, at 17 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2154 ("In establishing the applicability of Title VII to state and local employees, the Committee wishes to emphasize that the individual's right to file a civil action in his own behalf, pursuant to * * * 1981 and 1983, is in no way affected.").

In fact, while respondent observes that many circuits have held that Title VII does not displace § 1983 as a remedy for constitutional claims, Resp. Br. 43, he omits that many have done so relying on Title VII's legislative history. See, *e.g.*, *Latoski v. James*, 66 F.3d 751, 755-756 (5th Cir. 1995); *Keller v. Prince George's Cnty.*, 827 F.2d 952, 958 (4th Cir. 1987); *Trigg v. Fort Wayne Cmty. Schs.*, 766 F.2d 299, 300-301 & n.3 (7th Cir. 1985); *Day v. Wayne Cnty. Bd. of Auditors*, 749 F.2d 1199, 1204 (6th Cir. 1984); *Torre v. Barry*, 661 F.2d 1371, 1373-1375 (D.C. Cir. 1981). Nor does respondent acknowledge that all circuits that displace constitutional age claims have reached a different rule for Title VII.

Rivera v. P.R. Aqueduct & Sewers Auth., 331 F.3d 183, 192 n.7 (1st Cir. 2003); *Keller*, 827 F.2d at 956-963; *Latoski*, 66 F.3d at 755-756; *Roberts v. Coll. of the Desert*, 870 F.2d 1411, 1415-1416 (9th Cir. 1988); *Starrett v. Wadley*, 876 F.2d 808, 814 (10th Cir. 1989); *Torre*, 661 F.2d at 1373-1375.

2. Further, the ADEA and Title VII offer very different remedial regimes, as this Court has recognized. See *infra* p. 19. To be sure, Title VII and the ADEA have some remedial elements in common. But many statutes share such features, and that does not mean that all laws with a common element (the right to punitive damages, for example) have the same remedial regime, or that, if one of these laws fails to displace § 1983 remedies, the same must be true for all of them.

It is a statute's overall remedial regime that matters, and here the ADEA and Title VII diverge sharply. Unlike Title VII, the ADEA forbids awards of punitive damages and compensatory damages for pain and suffering. See Pet. Br. 37-38; *C.I.R. v. Schleier*, 515 U.S. 323, 326 (1995). This alone is compelling evidence of Congress' intent to displace the more general, § 1983 remedy. See *supra* p. 15. And these limitations also affect the ADEA's other remedial elements. Respondent suggests (at p. 45), for example, that few plaintiffs would forego an ADEA claim and rely solely on § 1983. But he not only ignores reasons why plaintiffs may choose not to proceed under the ADEA—*e.g.*, a failure to meet the Act's rigorous filing deadlines or a desire to keep the EEOC from exercising authority over the case—he also disregards the effects of an ongoing § 1983 suit, with a demand for punitive damages, on the

EEOC's ability to resolve a parallel ADEA claim informally.

As this Court has recognized, the ADEA also incorporates much of the FLSA's comprehensive remedial regime, something Title VII does not do: "[R]ather than adopting the procedures of Title VII for ADEA actions, Congress rejected that course in favor of incorporating the FLSA procedures even while adopting Title VII's substantive prohibitions." *Lorillard v. Pons*, 434 U.S. 575, 584-585 (1978). And while respondent attempts to downplay *Lorillard*'s relation to this case (at p. 47), *Lorillard* discussed section 7(b) of the ADEA, 29 U.S.C. § 626, and the incorporated FLSA provisions codified at 29 U.S.C. §§ 216, 217, see 434 U.S. at 578-580, the very provisions on which petitioners relied in their opening brief (at pp. 25-26).

Nor do petitioners contend that the FLSA (and therefore the ADEA) displaces every federal law and preempts every state law that—unlike § 1983, which creates no substantive rights—provides affirmative, pay-related protections. Resp. Br. 39-40. The point, rather, is that courts have recognized the FLSA for its "unusually elaborate enforcement scheme," *Kendall v. City of Chesapeake*, 174 F.3d 437, 443 (4th Cir. 1999), whether in the course of displacing § 1983 as a competing remedy for FLSA violations, or in displacing parallel claims to enforce minimum wage and overtime rights independent of the FLSA but within that statute's scope. See, *e.g.*, *Karna v. BP Corp. N. Am., Inc.*, 2013 WL 1155485, at *20 (S.D. Tex. Mar. 19, 2013) (collecting cases); *Walker v. Serv. Corp. Int'l*, 2011 WL 1370575, at *6 (W.D. Va. Apr. 12, 2011); see also Pet.

Br. 26-27. By incorporating FLSA remedies, the ADEA creates its own "unusually elaborate" scheme. See Pet. Br. 25-27 (describing incorporated FLSA remedies).

B. Respondent's Approach To GERA Is Unsound Legally And Impossible To Follow In Practice.

Finally, GERA is part and parcel of the ADEA's remedial regime and is therefore relevant in deciding whether that regime displaces remedies under § 1983. Respondent depicts GERA as if it were the source of substantive rights independent of the ADEA, and suggests that GERA is irrelevant to the *Sea Clammers*/*Smith* analysis because it also applies to Title VII rights. Resp. Br. 49-53. The second half of this argument fails for the reasons stated above (at pp. 18-19), and respondent is wrong to depict GERA as anything other than part of the ADEA's remedial regime.

1. GERA creates no rights or protections of its own. Rather, it extends rights in the ADEA (and other civil rights laws, including Title VII) to a group of state and municipal officials whom Congress had initially exempted from coverage. That GERA was extending these preexisting rights—and is therefore part of the ADEA's remedial regime rather than a freestanding source of anti-discrimination protections—is obvious from the face of the statute. Section 2000e-16c is entitled "Coverage of previously exempt State employees," and (with the exception of elected officials themselves) extends rights to the same classes of public employee—"member[s] of the elected official's personal

staff," "policymak[ers]," and "immediate advisor[s]" to elected officials—that § 630(f) of the ADEA had exempted from coverage. By expressly incorporating 29 U.S.C. § 633a, § 2000e-16b then extends all of the ADEA's age discrimination rights, remedies, and limitations to these officials. The EEOC may even *sua sponte* reclassify charges that cite the ADEA as complaints subject to GERA's procedures, and vice versa. 29 C.F.R. § 1603.102(e).

2. Nor does it matter that Congress extended the ADEA's substantive coverage by passing a separate statute rather than by amending language in the ADEA. There is no meaningful difference between altering an existing law by amending its own language and enacting a new provision to the same effect elsewhere in the U.S. Code. See *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 439-440 (1992). The ADEA, Title VII, and other laws that GERA extends predated GERA, making it simpler to pass a new law extending all of them to the same classes of public officials, rather than amending each statute. Congress used the same method to abrogate States' Eleventh Amendment immunity under Title IX and other civil rights laws in a single section of the Rehabilitation Act Amendments of 1986. See 42 U.S.C. § 2000d-7; *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 72 (1992). Even though § 2000d-7 appears in Title 42 of the U.S. Code, and Title IX is codified in Title 20, this Court recognizes the former as an "amendment[]" to the latter. *Franklin*, 503 U.S. at 72.

The Genetic Information Nondiscrimination Act of 2008 ("GINA"), Pub. L. 110-233, further illustrates the

point. Unlike the ADEA and other laws whose rights GERA incorporates by reference, GINA was passed after GERA, and it was therefore possible to incorporate GERA's procedures *into it*, which GINA does at 42 U.S.C. § 2000ff-6(b) for the high-level employees that GERA covers. There can be no dispute that GERA's procedures are part of GINA's remedial regime, for the former are incorporated on the face of the latter. Yet the functional relationship between GINA and GERA is the same as the one between the ADEA and GERA.

3. Finally, it would be impracticable to treat the ADEA and GERA separately in deciding whether to displace § 1983 remedies for age-bias claims. It cannot be, for example, that the ADEA displaces § 1983 remedies for constitutional age-bias claims, while GERA does not. As this case illustrates, whether a plaintiff falls within one of the § 630(f) exemptions is often a fact-intensive inquiry that makes a final resolution before trial (and likely appeal) impossible. See *Teneyuca v. Bexar Cnty.*, 767 F.2d 148, 152 (5th Cir. 1985) ("highly factual nature of the inquiry necessary to the determination of the 'personal staff' exception does not lend itself well to disposition by summary judgment"). Indeed, waiting until then to know whether it is proper to dismiss a plaintiff's § 1983 equal protection claim would be particularly absurd in cases where the plaintiff pursues only a constitutional claim. The parties would have to litigate over whether the plaintiff falls within one of the § 630(f) exemptions to decide whether his § 1983 claim can proceed—even though there is no ADEA claim in the case.

In short, GERA is an inseparable element of the ADEA's remedial regime, and, as the opening brief showed (at pp. 30-34), its addition to that regime and the history surrounding its passage provide additional support for the displacement of § 1983 as a remedy for competing constitutional claims. This includes the fact that GERA followed on the heels of failed efforts by Congress to enact "Rules of Construction for Civil Rights Laws," an attempt to overturn *Smith*'s principles for displacing § 1983 remedies for constitutional violations. Pet. Br. 32-33. And it was Congress' failed effort to overturn these principles from *Smith* that petitioners detailed in their opening brief, not Congress' response to that decision's implications for the EHA, specifically, as respondent suggests. Resp. Br. 30.

IV. There Is No Reason To Vacate The Seventh Circuit's Decision On Prudential Grounds.

The contention of one of the *amici* that the Seventh Circuit lacked jurisdiction over the question presented and improperly exercised pendant appellate jurisdiction fails on several grounds. Law Prof. Br. 11. At the threshold, this claim proceeds from the false premise that the Seventh Circuit relied on pendant jurisdiction to resolve the appeal. In fact, the Seventh Circuit mentions that doctrine only in a parenthetical describing one of respondent's cases. Pet. App. 7a. Instead, the court based its jurisdiction on the fact that "the very existence of a freestanding damages remedy under § 1983 *is directly implicated* by a qualified immunity defense," citing *Wilkie v. Robbins*, 551 U.S. 537 (2007). Pet. App. 8a (emphasis added).

Indeed, regardless of the Seventh Circuit's perceived basis for exercising jurisdiction, *Wilkie* controls here, and that decision did not rest on an exercise of pendant jurisdiction. In a qualified immunity appeal, whether a cause of action exists for an alleged constitutional violation is not a question considered *in addition* to an appealable interlocutory determination, as a pendant claim would be. See *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 50-51 (1995). Rather, the issue is itself subject to immediate review under the collateral order doctrine. *Wilkie*, 551 U.S. at 550 n.4. This is so because the qualified immunity inquiry has two prongs: whether there has been a violation of federal law, and whether that law was clearly established at the relevant time. *Camreta v. Greene*, 131 S. Ct. 2020, 2031-2032 (2011). And before a court can determine whether there has been a violation of federal law under the first prong, it may have to determine whether a cause of action exists for a violation of that federal law, and, if so, the elements of the claim. *Wilkie*, 551 U.S. at 550 n.4; *Hartman v. Moore*, 547 U.S. 250, 257 n.5 (2006); see also *Ashcroft v. Iqbal*, 556 U.S. 662, 672-673 (2009) (discussing *Wilkie* and *Hartman*).

Accordingly, the Seventh Circuit properly exercised jurisdiction over the question presented.

CONCLUSION

The judgment of the Seventh Circuit should be reversed.

Respectfully submitted.

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