No. 12-

# 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 Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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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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## PETITION FOR A WRIT OF CERTIORARI

Petitioners, Lisa Madigan, Illinois Attorney General in her individual capacity, Ann Spillane, Alan Rosen, Roger P. Flahaven, and Deborah Hagan, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, which, in a published opinion, affirmed the judgment of the district court denying petitioners qualified immunity from respondent's equal protection claim brought pursuant to 42 U.S.C. § 1983.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit affirming the denial of qualified immunity (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 (App. 38a-102a) is not reported.

## JURISDICTION

The court of appeals entered judgment on August 17, 2012. App. 1a. On November 6, 2012, Justice Kagan extended until January 14, 2013 the time within which to file a certiorari petition. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

In relevant part, the Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of

> citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

Section 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

42 U.S.C. § 1983.

## STATEMENT

1. Respondent Harvey Levin was employed as an Assistant Illinois Attorney General from September 5, 2000, until his termination, with 11 other attorneys, on May 12, 2006. App. 2a-3a. He was 55 years old at the time he was hired in 2000. App. 3a. Respondent claimed that he was replaced by a female attorney in her thirties. *Ibid*.

2. Respondent filed an amended complaint alleging both age and sex discrimination. Doc. 16. As relevant to this appeal, he claimed that he was fired because of

his age in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq*., and, via 42 U.S.C. § 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." App. 3a.

3. Petitioners moved, *inter alia*, 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. In the alternative, petitioners argued that qualified immunity shielded them from respondent's § 1983 claim for damages. *Ibid*.

4. 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 same class of injury that the statute redresses. App. 125a-126a. And the court acknowledged that whether *Sea Clammers* and its progeny apply to foreclose § 1983 claims in this context is a question over which federal courts are currently split. App. 122a-125a. Specifically, although "[s]everal courts of appeals have held that the ADEA provides the exclusive remedy for age discrimination claims and therefore precludes age discrimination suits brought under § 1983," App. 122a-123a (citing *Ahlmeyer v. Nev. Sys. of Higher Educ.*, 555 F.3d 1051 (9th Cir. 2009); *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)), district courts remain "deeply divided" over the question, App. 123a. Ultimately, the district court here rejected the unanimous weight of federal appellate authority and sided with certain district courts to hold that the ADEA does not foreclose § 1983 equal protection claims for alleged age discrimination. App. 124a-125a. In light of the nationwide uncertainty on this issue, however, the court awarded petitioners qualified immunity on respondent's § 1983 claim. App. 133a.

Later, in response to petitioners' motion for summary judgment, the district court reiterated its holding that the ADEA does not displace § 1983 age discrimination claims. App. 57a. The court went on, however, to reverse its earlier determination that petitioners were entitled to qualified immunity based on the legal uncertainty over whether such displacement is proper. App. 70a-73a.

5. Petitioners appealed from the denial of qualified immunity, and the Seventh Circuit affirmed the holding that the ADEA does not displace § 1983 age discrimination claims. The court acknowledged that the displacement issue was one of first impression in that circuit, but that "[a]ll other circuit courts to consider the issue have held that the ADEA is the exclusive remedy for age discrimination claims, largely relying on the Fourth Circuit's reasoning in *Zombro*[.]" App. 20a (citing *Ahlmeyer*, 555 F.3d 1051; *Tapia-Tapia v. Potter*,

322 F.3d 742 (1st Cir. 2003); *Migneault*, 158 F.3d 1131; *Lafleur*, 126 F.3d 758; and *Chennareddy v. Brown*, 935 F.2d 315 (D.C. Cir. 1991)). But district courts in other circuits are split, the court observed, App. 20a, and "[g]iven the conflicting case law, further review of the issue is required," App. 23a.

The court explained that the question is "admittedly a close call, especially in light of the conflicting decisions from our sister circuits." App. 23a. But, in a "decision [that] creates a conflict among the circuits," the court held that the ADEA does not "preclude a § 1983 claim for constitutional rights." App. 23a & n.2. The Seventh Circuit 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 violating those same statutes. App. 9a-10a. And the Seventh Circuit acknowledged that "the ADEA enacts a comprehensive statutory regime for enforcement of its own statutory rights, akin to *Sea Clammers* and *Rancho Palos Verdes*." App. 23a. Furthermore, the court observed, this Court has also displaced § 1983 claims of plaintiffs, like respondent, who seek to bypass a specific statutory remedy by raising a *constitutional* claim under § 1983. App. 10a-13a (citing *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. App. 17a, 26a-28a. Those decisions, the Seventh Circuit reasoned, 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. App. 26a-28a, 32a. Here, because the Seventh Circuit determined that the ADEA lacks "legislative history or statutory language precluding constitutional claims," and that there are differences between the "rights and protections afforded by the ADEA as compared to a § 1983 equal protection claim," the court resolved what it conceded was a "close call" in favor of preserving respondent's constitutional age discrimination claim. App. 23a.

## REASONS FOR GRANTING THE PETITION

This petition raises an important and frequently recurring question over which the lower federal courts are hopelessly divided—whether the ADEA displaces § 1983 equal protection claims for alleged age discrimination by state and local government employers. In its decision below, the Seventh Circuit acknowledged that its holding that the ADEA does not foreclose these § 1983 claims created a split with the rule in several other circuits, and that district courts in the remaining circuits are themselves deeply divided. This Court's intervention is needed to reconcile this growing, nationwide split in authority. The question is of exceptional importance to state and local government employers, and the Seventh Circuit's decision not only adds to the conflict among lower federal courts, but it reaches the wrong result by misreading this Court's case law.

### I. Courts Are Intractably Divided Over Whether The ADEA Precludes A § 1983 Equal Protection Claim For Age Discrimination In Employment.

As the Seventh Circuit acknowledged, its holding that the ADEA does not preclude a § 1983 equal protection claim for age discrimination in employment "creates a conflict among the circuits." App. 23a n.2. The decision below further recognized that district courts in circuits where the question is unresolved are also "split on the issue." App. at 20a. This well-developed and deepening division of lower court authority calls for certiorari review.

Four circuits—the Fourth, Fifth, Ninth, and Tenth—have held that the ADEA precludes § 1983 equal protection claims by state and local government employees for age discrimination in employment, precisely the rule the Seventh Circuit rejected here. See *Zombro*, 868 F.2d at 1369 ("The conclusion is irresistible that the ADEA provides the exclusive judicial remedy for claims of age discrimination."); *Lafleur*, 126 F.3d at 760 ("we agree" "that an age discrimination claim brought under § 1983 is preempted by the ADEA") (internal quotation marks omitted); *Ahlmeyer*, 555 F.3d at 1057 ("the ADEA precludes the assertion of age discrimination in employment claims, even those seeking to vindicate constitutional rights, under § 1983"); *Migneault*, 158 F.3d at 1140 ("the law of this circuit" is "that age discrimination claims brought under § 1983 are preempted by the ADEA"), abrogated on other grounds by *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (all cited by Seventh Circuit at App. 20a).

And two more federal courts of appeals—the First and District of Columbia Circuits—have held that the ADEA preempts age discrimination claims by *federal* employees, and have suggested that the same rule may apply to their state and local counterparts. See *Tapia-Tapia*, 322 F.3d at 745 (citing *Lafleur* and *Zombro* with favor in holding that ADEA precludes constitutional claims by federal employees); *Chennareddy*, 935 F.2d at 318 (citing *Zombro* with favor for rule "that the ADEA provides the exclusive remedy for a federal employee who claims age discrimination") (both cited by Seventh Circuit at App. 20a). Thus, as

the Seventh Circuit acknowledged, given "the conflicting decisions from [its] sister circuits," App. 23a, the decision below subjects state and local governments within Illinois, Indiana, and Wisconsin to a different rule than government employers face in the Fourth, Fifth, Ninth, and Tenth Circuits (and likely the First and District of Columbia Circuits as well).

Meanwhile, as the Seventh Circuit further recognized, district courts in circuits that have yet to address this question are also deeply "split on the issue." App. 20a. Federal courts in the Second, Third, Sixth, Eighth, and Eleventh Circuits—even courts within the same State—have reached contrary holdings on the issue of ADEA exclusivity. Thus, in the Second Circuit, which has not ruled on whether the ADEA is the exclusive remedy for age-based employment discrimination claims, district courts are openly "divided" on that question. *Donlon v. Bd. of Educ. of the Greece Cent. Sch. Dist.*, No. 06-CV-6027T, 2007 WL 4553932, at *2 (W.D.N.Y. Dec. 20, 2007); *accord Reed v. Town of Branford*, 949 F. Supp. 87, 89 (D. Conn. 1996). District courts within the State of New York alone—where the issue arises regularly—have reached inconsistent holdings. Compare, *e.g.*, *Shapiro v. N.Y. City Dep't of Educ.*, 561 F. Supp. 2d 413, 420 (S.D.N.Y. 2008) (ADEA is not exclusive remedy), *Stampfel v. City of N.Y.*, No. 04 Civ. 5036, 2005 WL 3543696, at *3 (S.D.N.Y. Dec. 27, 2005) (same), *Donlon*, 2007 WL 4553932, at *3 (same), and *Jungels v. State Univ. College of N.Y.*, 922 F. Supp. 779, 785 (W.D.N.Y. 1996) (same), aff'd *sub nom. Jungels v. Jones*, 112 F.3d 504 (2d Cir. 1997) (unpublished table decision), with, *e.g.*,

*Gregor v. Derwinski*, 911 F. Supp. 643, 651 (W.D.N.Y. 1996) (ADEA is exclusive remedy), and *Tranello v. Frey*, 758 F. Supp. 841, 850-851 n.3 (W.D.N.Y. 1991) (same), aff'd on other grounds, 962 F.2d 244 (2d Cir. 1992).

And even if the Seventh Circuit is correct that the "weight of authority" among district courts in the Second Circuit favors no preclusion of § 1983 age discrimination claims, App. 20a, the opposite is true of the Eleventh Circuit. Georgia district courts have universally held that the ADEA precludes § 1983 claims based on age discrimination. See *Ficklin v. Bibb Cnty. Sch. Dist.*, Civil Action No. 5:09-CV-191 (MTT), 2011 WL 672327, at *8 (M.D. Ga. Feb. 17, 2011); *Ford v. Oakwood*, 905 F. Supp. 1063, 1066 (N.D. Ga. 1995); *Ring v. Crisp Cnty. Hosp. Auth.*, 652 F. Supp. 477, 482 (M.D. Ga. 1987). At the same time, district courts in Florida have reached conflicting holdings on the issue, leaving that State's public employers and employees (like New York's) with conflicting guidance. Compare *Ray v. City of Opa-Locka*, No. 12-CV-21769, 2012 WL 4896162, at *3 (S.D. Fla. Oct. 15, 2012) (ADEA is exclusive remedy), with *Hornfeld v. N. Miami Beach*, 29 F. Supp. 2d 1357, 1369 (S.D. Fla. 1998) (ADEA is not exclusive remedy), rev'd in part, vacated in part, 208 F. 3d 1010 (11th Cir. 2000) (unpublished table decision).

District courts in the Eighth Circuit are also split. Some hold that the ADEA does not preclude § 1983 age discrimination claims. See *Mummelthie v. City of Mason*, 873 F. Supp. 1293, 1323 (N.D. Iowa 1995), aff'd, 78 F.3d 589 (8th Cir. 1996) (unpublished table decision); *Mustafa v. Neb. Dep't of Corr. Servs.*, 196 F. Supp. 2d 945, 955-956 & n.1 (D. Neb. 2002) (following

*Mummelthie*). Others, meanwhile, have adopted the contrary rule. See *Adair v. eStem Pub. Charter Schs.*, No. 4:11-cv-541-DPM, 2012 WL 474019, at *2 (E.D. Ark. Feb. 14, 2012); *Kelley v. White*, No. 5:10CV00288 JMM, 2011 WL 4344180, at *3 (E.D. Ark. Sept. 15, 2011); *Hamilton v. City of Springdale*, Civil No. 10-5061, 2011 WL 2560258, at *13 (W.D. Ark. June 29, 2011); *Dudley v. Lake Ozark Fire Prot. Dist.*, No. 09-4086-cv-c-NKL, 2010 WL 1992188, at *8 (W.D. Mo. May 17, 2010). And in the State of Nebraska, a district court held that the ADEA does not preclude § 1983 claims based on age discrimination, see *Mustafa*, 196 F. Supp. 2d at 955-956 & n.11, while the Nebraska Supreme Court reached the opposite conclusion, see *Humphrey v. Neb. Pub. Power Dist.*, 503 N.W.2d 211, 216 (Neb. 1993).

Case law in the Third Circuit is just as muddled. Many lower courts there have held that the ADEA is the exclusive remedy for age discrimination in employment claims. See, *e.g.*, *Phillis v. Harrisburg Sch. Dist.*, Civil Action No. 1:07-cv-1728, 2010 WL 1390663, at *10 (M.D. Pa. Mar. 31, 2010); *Cataldo v. Moses*, No. Civ. A. 02-2588 (FSH), 2005 WL 705339, at *17 (D.N.J. Mar. 29, 2005); *Farmer v. Camden City Bd. of Educ.*, Civil No. 03-685 (JBS), 2005 WL 984376, at *9 (D.N.J. Mar. 28, 2005); *Barlieb v. Kutztown Univ.*, No. Civ. A 03-4126, 2003 WL 22858575, at *4 (E.D. Pa. Dec. 1, 2003). But at least one Pennsylvania district court has suggested otherwise. See *Alba v. Housing Auth. of City of Pittston*, 400 F. Supp. 2d 685, 706 (M.D. Pa. 2005) (indicating that employee may be able to "assert a constitutional claim for age discrimination independent

of his ADEA claim," although instant plaintiff did not do so).

Finally, case law in the Sixth Circuit is also conflicted. In one unreported decision, that court noted, in dicta but approvingly, that the Fourth and Fifth Circuits have held "that the ADEA's exclusivity prevents § 1983 liability." *Edwards v. Armstrong*, 593 F.3d 170 (unpublished table decision), 1995 WL 390279, at *4 (6th Cir. June 30, 1995) (citing *Zombro* and *Hobbs v. Hawkins*, 968 F.2d 471 (5th Cir. 1992)). In an earlier decision, however, the Sixth Circuit considered a due process claim premised on age discrimination in employment pursuant to § 1983, and the court assumed without deciding that the ADEA is not the exclusive remedy for such claims. See *McLaurin v. Fischer*, 768 F.2d 98, 102 (6th Cir. 1985).

In short, the question whether the ADEA precludes § 1983 employment discrimination claims arises regularly, and the federal courts are intractably divided. Only this Court can impose national uniformity on this recurring question.

## II. The Question Presented Is Important, And This Case Is An Ideal Vehicle For Resolving The Deepening Split Among Lower Federal Courts.

The question presented in this appeal is not only recurring and unsettled; it also is extraordinarily important to state and local governments, and to the proper functioning of the comprehensive scheme that Congress has carefully crafted for resolving employment disputes. With the ADEA, Congress decided that these

disputes, specifically, should be resolved wherever possible through prompt notice and informal conciliation rather than litigation. Under the Seventh Circuit's rule, however, the more than one million state and local workers located in Illinois, Indiana, and Wisconsin may bypass the ADEA's dispute resolution process and go straight to court, undercutting the Act as a means of securing voluntary compliance with federal age discrimination laws.[1] The decision below also deprives States and local governments of the ADEA's prompt notice requirement and emphasis on conciliation. Whether Congress intended this anomalous result is an important question that warrants Supreme Court review.

The ADEA establishes a comprehensive remedial regime for age discrimination claims. See *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."). Parties wishing to file suit first must give notice promptly 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 also

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[1] See U.S. Census Bureau, Government Employment & Payroll, 2011 State & Local Government, Illinois, Indiana, & Wisconsin, available at http://www.census.gov/govs/apes (and select relevant State in drop-down box under "2011 State & Local Government").

29 U.S.C. § 626(b) ("Before instituting any action under this section, the [EEOC] shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion."). Should the EEOC ultimately decide to file suit against the employer, moreover, the employee may not proceed separately with his or her own action. 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.").

The ADEA also imports elements of the Fair Labor Standards Act's (FLSA) remedial scheme. See 29 U.S.C. § 626(b) (incorporating by reference 29 U.S.C. § 211(b), involving federal cooperation with state and local agencies; parts of § 216, involving, *inter alia*, damages and attorney's fees and costs; and § 217, involving injunctions). "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." 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).

Allowing state and municipal employees to sue separately 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.'") (quoting *Ring*, 652 F. Supp. at 482). "'An impatient plaintiff might unilaterally dispense with the informal negotiations contemplated by Congress,'" for example, "'needlessly casting all concerned into costly litigation.'" *Britt*, 978 F.2d at 1449 (quoting *McCroan v. Bailey*, 543 F. Supp. 1201, 1209 (S.D. Ga. 1982)); see also *Phillis*, 2010 WL 1390663, at *10 ("if a plaintiff were allowed [to proceed under § 1983] * * * , she would be able to avoid the statutory framework established by Congress to deal with age discrimination claims"). This is precisely what the ADEA set out to avoid.

At the same time, plaintiffs could bypass the EEOC entirely, notwithstanding the critical role Congress assigned it under the Act. See *Frye v. Grandy*, 625 F. Supp. 1573, 1575 (D. Md. 1986) ("The 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 [ADEA]."). And plaintiffs could seek punitive damages under § 1983, see, *e.g.*, *Smith v. Wade*, 461 U.S. 30, 35-36, 51, 56 (1983), a form of relief

unavailable under the ADEA, see *Ahlmeyer*, 555 F.3d at 1059, which instead affords a limited, liquidated damages recovery, see 29 U.S.C. § 626(b); 29 U.S.C. § 216(b) (incorporated into § 626(b) by reference).

There are approximately 20 million state and local employees nationwide,[2] and whether § 1983 is available to circumvent the ADEA's comprehensive remedial regime—including its requirements of prompt notice, informal dispute resolution, and EEOC participation—is an important and frequently recurring question requiring this Court's immediate review. The answer should not vary (as it does now) from State to State and, in places, among federal judges or between federal and state judges within a State.

Moreover, this case is an ideal vehicle to resolve that question. The parties exhaustively briefed ADEA exclusivity in the Seventh Circuit, and the court expressly decided that issue in a thorough opinion. It is a purely legal question that does not turn on any disputed issues of fact. And because respondent is exempt from the ADEA's protections, for he is not an "employee" within the meaning of the Act, see App. 68a, the Court's resolution of the question presented in petitioners' favor would fully dispose of respondent's age discrimination claim.

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[2] See U.S. Census Bureau, Statistical Abstract of the United States: 2012, Table 461 (Governmental Employment & Payrolls: 1982 to 2009), available at http://www.census.gov/compendia/statab/2012/tables/12s0461.pdf.

### III. The Seventh Circuit's Rule Follows From A Misreading Of This Court's Precedent.

Finally, the Seventh Circuit's decision not only exacerbates a split among lower federal courts on an important and recurring issue, but it misapplies this Court's case law to reach the wrong result.

In enacting a new law, Congress may displace a remedy under § 1983 either "expressly, by forbidding recourse to § 1983 in the statute itself, *or impliedly*, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Blessing v. Freestone*, 520 U.S. 329, 341 (1997) (emphasis added). Even without an express statement by Congress, therefore, "[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." *Sea Clammers*, 453 U.S. at 20; see also *Rancho Palos Verdes*, 544 U.S. at 121 ("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."). This is because, when a law includes a detailed remedial structure, courts must presume that Congress did not intend to invite plaintiffs to use § 1983 to bypass that structure. See *Smith*, 468 U.S. at 1012 ("Allowing a plaintiff to circumvent the [Education of the Handicapped Act (EHA)] administrative remedies would be inconsistent with Congress' carefully tailored scheme."). This Court has applied that reasoning to displace § 1983 as a remedy for rights conferred by statute, see *Rancho Palos Verdes*, 544 U.S. at 119-125;

*Sea Clammers*, 453 U.S. at 19-21, as well as rights arising under the Constitution, see *Smith*, 468 U.S. at 1008-1013; *Preiser*, 411 U.S. at 489-500.

Here, the Seventh Circuit acknowledged that "the ADEA enacts a comprehensive statutory scheme for enforcement of its own statutory rights, akin to the one in *Sea Clammers* and *Rancho Palos Verdes*," App. 23a, a regime that includes (as discussed in Part II) an emphasis on prompt notice, informal dispute resolution, creation of a significant role for the EEOC, and limitations on potential remedies. Nor can there be any dispute that allowing a competing cause of action for age discrimination under § 1983 would give state and municipal employees an end run around this remedial regime, precisely what *Sea Clammers* and its progeny seek to avoid.

Nevertheless, the Seventh Circuit read this Court's decisions to require something more than a comprehensive remedial regime before displacing a § 1983 remedy for the alleged violation of a constitutional right. In particular, the decision below stressed the absence of specific indications in the ADEA's text or legislative history of an intent to displace § 1983 remedies, and the court also cited certain differences between the substantive rights created by the ADEA and those embodied by the Equal Protection Clause (although the court "freely acknowledge[d] that ADEA's heightened scrutiny provides a *stronger* mechanism [than equal protection] for plaintiffs to challenge age discrimination in employment"). App. 29a (emphasis added). The Seventh Circuit's rule—that a comprehensive, statutory remedial regime is not alone

grounds to displace a competing, § 1983 remedy that would undermine that statutory regime—appears nowhere in this Court's jurisprudence. Indeed, although the Seventh Circuit relies most heavily on *Smith* and *Fitzgerald*, neither decision supports the ruling below.

*Smith* held that the EHA displaced the plaintiff's equal protection claim under § 1983. And while the Seventh Circuit is correct that the EHA includes some reference to constitutional claims, see App. 26a-27a, that is not surprising in a law that (unlike the ADEA) regulates exclusively the conduct of government actors, who are alone subject to constitutional constraints. Critically, however, the Court gave no indication in *Smith* that it would have reached a different result without those statutory references. On the contrary, the Court instead emphasized the "comprehensive nature of the procedures and guarantees" that the EHA established. 468 U.S. at 1011. There, as here, "[a]llowing a plaintiff to circumvent the [statute's] administrative remedies would be inconsistent with Congress' carefully tailored scheme." *Id.* at 1012.

Nor does *Fitzgerald* support the Seventh Circuit's ruling. In rejecting the defendants' claim there that Title IX of the Civil Rights Act displaces § 1983 equal protection claims, the Court observed that Title IX differed in some respects substantively from the Equal Protection Clause. See 555 U.S. at 256-258. But the Court saw that merely as "further support" for its initial conclusion, earlier in the opinion, that Title IX does not displace equal protection claims because the former has none of the complex, remedial measures required by *Sea Clammers* and *Smith*. See *id.* at 255-256.

In fact, *Fitzgerald* reaffirmed that, "[i]n determining whether a subsequent statute precludes the enforcement of a federal right under § 1983, [this Court has] placed primary emphasis on the nature and extent of that statute's remedial scheme," and further observed—contrary to the Seventh Circuit's decision here—that this "focus[] on the statute's detailed remedial scheme" applies equally when displacing constitutional claims. *Id.* at 253, 254. Thus, the *Fitzgerald* Court reasoned, whereas "the statutes at issue" in *Sea Clammers*, *Smith*, and *Rancho Palos Verdes* "required plaintiffs to comply with particular procedures and/or to exhaust particular administrative remedies prior to filing suit," Title IX "has no administrative exhaustion requirement and no notice provisions." *Id.* at 254, 255. In fact, on its face Title IX offers "no express private remedy" at all, "much less a more restrictive one." *Id.* at 256. Rather, the right to sue under that statute was judicially implied, and the Supreme 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." *Ibid.*

Not only is the Seventh Circuit's rule without support in this Court's case law, but it also runs counter to the special deference usually afforded the government in its role as employer. "[T]he Government has traditionally been granted the widest latitude in the dispatch of its own internal affairs." *Sampson v. Murray*, 415 U.S. 61, 83 (1974) (internal quotation marks omitted); see also *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, *J.*, concurring) ("Government, as an

employer, must have wide discretion and control over the management of its personnel and internal affairs"). And the ADEA reflects this deference; it does not apply to state elected officials, their personal staff, appointees at the policymaking level, or legal advisors. See 29 U.S.C. § 630(f). With these exemptions, Congress afforded States maximum leeway when employing persons who, like respondent here, must "perform to [an elected official's] personal satisfaction rather than to the more generalized standards applied to other * * * workers," *Monce v. San Diego*, 895 F.2d 560, 561 (9th Cir. 1990) (internal quotation marks omitted), or in whom the official "must place a significant degree of trust," *EEOC v. Reno*, 758 F.2d 581, 584 (11th Cir. 1985). And contrary to the Seventh Circuit's presumption that these carve-outs in the ADEA favor preserving a competing § 1983 remedy, see App. 33a, these state-specific exemptions make it all the more implausible that Congress intended to invite state employees to bypass them using § 1983.

And indeed, it is *only* state and municipal workers, alone among all U.S. employees, that may circumvent the ADEA's remedial regime under the Seventh Circuit's rule. It is undisputed that the ADEA forecloses constitutional claims by *federal* employees. See, *e.g.*, *Paterson v. Weinberger*, 644 F.2d 521, 524-525 (5th Cir. 1981); see also *supra* p. 8. And because private employers are not state actors, they cannot be subject to § 1983 claims, either. See, *e.g.*, *Rehberg v. Paulk*, 132 S. Ct. 1497, 1505 (2012). That leaves state and local government workers, but with nothing in the ADEA's text or legislative history to suggest that these workers

alone should retain the ability to bypass the Act—on the contrary, with clear evidence in the ADEA that Congress intended to disqualify certain high-level state workers from bringing suit for alleged age discrimination—the Seventh Circuit's rule is all the more implausible as a reflection of congressional intent.

* * *

In short, the federal courts are intractably divided over the question presented in this petition, it is a recurring question of national significance, and the Seventh Circuit erred based on a misreading of this Court's case law.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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