No. 12-872

IN THE

Supreme Court of the United States

LISA MADIGAN, ET AL.,

Petitioners,

v.

HARVEY N. LEVIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF 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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INTEREST OF AMICUS CURIAE[1]

The International Municipal Lawyers Association (IMLA) is a nonprofit, nonpartisan professional organization consisting of more than 3500 members. The membership is comprised of local government entities, including cities and counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts.

Since its founding, IMLA has served as a national, and now international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

IMLA respectfully submits this brief to highlight the danger of the Seventh Circuit's ruling in *Levin v. Madigan*, 692 F.3d 607 (7th Cir. 2012) to state and

[1]Pursuant to Rule 37.6, *amicus curiae* and their counsel hereby represent that none of the parties to this case nor their counsel authored this brief in whole or part, and that no person other than *amicus* paid for or made a monetary contribution toward the preparation or submission of this brief. *Amicus curiae* files this brief with the written consent of all parties, copies of which are on file in the Clerk's Office. All parties received timely notice of IMLA's intention to file this brief.

municipal governments, as the practical effect of the ruling will erroneously subject state and municipal employers to increased litigation costs and damages awards that they cannot afford. Accordingly, IMLA writes to urge this Court to grant certiorari.

SUMMARY OF ARGUMENT

The petition for certiorari explains why, as a matter of law, the ADEA should be held to preempt § 1983 age discrimination cases against state and municipal employees. *Amicus* calls attention to two erroneous premises regarding the ADEA and § 1983 claims on which *Levin* rests, which if properly understood, further demonstrate the need for preemption. Amicus also discusses the consequences of allowing both ADEA and § 1983 age discrimination claims, including significantly higher litigation costs and damages exposure for governmental employers.

First, while the ADEA provides plaintiffs with greater statutory protection against age discrimination than does the constitution, the ADEA does vindicate both statutory *and* constitutional rights, contrary to the Seventh Circuit's apparent understanding. The constitution protects against arbitrary age discrimination; so does the ADEA. And because constitutional age-discrimination claims are reviewed only for rational basis, any act that violates the constitution would also violate the ADEA. In *Smith v. Robinson*, 468 U.S. 992 (1984)—another case involving a statute which subsumed a rational-basis equal-protection right within its substantive statutory requirements—this Court held that § 1983 equal protection claims were preempted and that plaintiffs had to follow the statute's more specific

procedures for vindicating their constitutional claims. The same rationale for preemption applies here.

Second, if § 1983 claims are not preempted, they will become a substitute method for bringing ADEA-style claims—one which lets plaintiffs avoid the ADEA's mandatory administrative processes favoring voluntary conciliation of claims. This is so for two reasons: (1) the ADEA prevents employers from relying on plausible, constitutional age-based rationales for employment actions, because to do so would be an admission of statutory liability; and (2) by effectively requiring employers to adopt age-neutral criteria for employment decisions, age-based discrimination will arguably be arbitrary and irrational, and thus lacking a "rational basis" under the constitution. In actual practice, those district courts which have allowed § 1983 age-discrimination claims—including the district court here—appear to presume the irrationality of age discrimination, and simply review constitutional age claims under the same framework used for assessing ADEA claims. This Court has found preemption in other cases where otherwise, plaintiffs could "wholly frustrate explicit congressional intent" and avoid statutory "requirement[s] by the simple expedient of putting a different label on their pleadings." *Preiser v. Rodriguez*, 411 U.S. 475, 489-490 (1973).

The consequences of allowing plaintiffs to simply bring ADEA-style claims under § 1983, and under the same standards of review, would be disastrous for state and municipal governments. The ADEA's mandate that the EEOC attempt to conciliate age-discrimination claims is a very effective method of resolving such cases without resorting to federal

court. Under § 1983, there is no such requirement, and so the federal courts will be flooded with a greater amount of low-quality cases.

Further, because well-pled age discrimination claims are likely to survive motions to dismiss regardless of factual merit, these cases will advance to the discovery stage at a minimum—which is by far the most costly aspect of civil litigation. Discovery costs in employment discrimination are one-sided, falling almost entirely on the government and creating perverse incentives to settle unmeritorious cases. Statistically, government employers also fare relatively poorly in those discrimination suits that do go to trial. Further, allowing § 1983 claims also permits plaintiffs to avoid this Court's ruling in *Kimel v. Board of Education*, 528 U.S. 62 (2000) and recover damages (indirectly) from state governments, creating a new source of damages that would otherwise not be present under the ADEA.

These increased costs and damages will directly impact state and local governments' ability to serve the public. The costs of litigation directly impact budgets which have already been cut or otherwise strained over the last few years. Certiorari should be granted and the Seventh Circuit's decision reversed.

ARGUMENT

I. BY ALLOWING § 1983 AGE DISCRIMINATION CLAIMS AND ADEA CLAIMS TO CO-EXIST, THE SEVENTH CIRCUIT GIVES PLAINTIFFS AN ALTERNATIVE MEANS FOR BRINGING ADEA-TYPE CLAIMS WITHOUT ADEA PROCEDURES.

As discussed at length in the certiorari petition, every appellate court other than the Seventh Circuit

to address the issue has held that the ADEA preempts equal-protection age-discrimination claims by state and municipal employees, as the ADEA's comprehensive remedial regime shows that Congress intended to foreclose resort to any other statute for the enforcement of its substantive provisions. Pet. 12-22. The certiorari petition persuasively explains why this is so as a matter of precedent.

Amicus wishes to additionally bring to the Court's attention two fundamentally erroneous premises on which the Seventh Circuit's decision appears to rest: that the ADEA does not "address constitutional issues," 692 F.3d at 618, and that "Section 1983 cannot be used as an alternative mechanism to assert violation of the ADEA's provisions against the states," *id.* at 619-20 (quoting *Mustafa v. Neb. Dep't of Corr. Servs.*, 196 F. Supp. 2d 945, 956 n.13 (D. Neb. 2002)). In fact, the ADEA does provide a remedy for constitutional violations, and as a practical matter, the ADEA's provisions ensure that constitutional age discrimination claims will become an "alternative mechanism" for bringing ADEA-type claims against state and municipal governments.

By misapprehending the scope of the ADEA and its interplay with the corresponding constitutional right against age-discrimination, the Seventh Circuit's ruling enables government employees to bring the *same claim* he or she might have under the ADEA, but with additional benefits (such as damages from state officials) while at the same time depriving state and municipal employers (and only those employers) of the ADEA's statutory protections. Not only is this result unjust and dangerous to state and municipal governments, it is itself further proof that the ADEA

and § 1983 age claims are simply incompatible, and that the former must implicitly preempt the latter.

A. The ADEA Vindicates the Equal Protection Clause's Guarantee Against "Arbitrary" Age Discrimination, and Thus Should Provide the Procedures for Addressing Such Claims.

As the Seventh Circuit recognized, comprehensive statutory remedial schemes may preempt constitutional claims brought under § 1983 to vindicate the same right. *Levin*, 692 F.3d at 618 (citing *Smith v. Robinson*, 468 U.S. 992 (1984) and *Preiser v. Rodriguez*, 411 U.S. 475 (1973)). It held, however, that the ADEA's provisions provided a "mechanism to enforce *only* the substantive rights created by the ADEA itself." *Id.* at 619. (internal quotation marks and citation omitted). This is simply incorrect; the ADEA protects the *same* right as the equal protection clause, and at a higher level of scrutiny than the constitution does alone.

The statutory purpose of the ADEA is "to prohibit arbitrary age discrimination in employment." 29 U.S.C. § 621(b) (emphasis added). That is the same guarantee provided by the equal protection clause. This Court has clearly established that "age discrimination in employment violates the Equal Protection Clause." *Levin*, 692 F.3d at 622 (citing *Kimel v. Board of Regents*, 528 U.S. 62, 83 (2000)). And while age discrimination claims are only subject to rational basis review, *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976), "arbitrary and irrational discrimination violates the Equal Protection Clause under even [this Court's] most deferential standard of review," *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988). This is so

whether "intentional and arbitrary discrimination" is "occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) (internal quotation marks and citations omitted).

To be sure, this Court has held that the ADEA's prohibitions are broader than that of the constitution, "effectively elevat[ing] the standard for analyzing age discrimination to heightened scrutiny." *Kimel*, 528 U.S. at 88. As such, age-discrimination claims that would fail rational-basis review are subsumed within, and remedied by, the ADEA itself. *See Ahlmeyer v. Nev. Sys. of Higher Educ.*, 555 F.3d 1051, 1058 (9th Cir. 2009) ("We are unable to perceive . . . a constitutional claim for age discrimination that is not vindicated fully by the ADEA.").

Indeed, in this sense, the ADEA is similar to the Education of the Handicapped Act (EHA), which the Seventh Circuit addressed but held distinguishable. *Levin*, 692 F.3d at 618-19. While discrimination against the disabled is subject only to rational basis review, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985), the EHA protects disabled children's equal-protection right to equal educational access while *also* providing broader, more comprehensive remedies above that constitutional floor, *Bd. of Education v. Rowley,* 458 U.S. 176, 198-204 (1982). In *Smith v. Robinson*, this Court held that the EHA's statutory remedies preempted § 1983 claims, as allowing § 1983 claims would "render superfluous most of the detailed procedural protections outlined in the statute" and "run counter to Congress' view that" the underlying right to be

vindicated was best served through the administrative procedures set forth in the EHA, noting that "[n]o federal district court presented with a constitutional claim to a public education can duplicate that process." 468 U.S. at 1011-12.

Here, as in *Smith*, the equal protection right to be free of arbitrary age discrimination is addressed by, and vindicated by, the broader substantive protections of the ADEA. And, like in *Smith*, allowing a plaintiff to resort to § 1983 would run counter to Congress's view that age discrimination should be resolved through an administrative process calling for "informal methods of conciliation, conference, and persuasion." 29 U.S.C. § 626(b); *see also infra* Part II.A. As in *Smith*, the specific statutory means of vindicating age discrimination should proceed through the ADEA and not § 1983.

B. Without Preemption, § 1983 Suits Will Become a Substitute Method of Bringing ADEA-Type Claims, Contrary to The Intent of Congress.

Another fundamental error in the Seventh Circuit's reasoning is that, if ADEA and § 1983 age-discrimination claims are both viable, then § 1983 *does* become an effective alternative to vindicate ADEA rights without any of the corresponding ADEA responsibilities. *See Levin*, 692 F.3d at 619-20. This also supports preemption; Congress cannot plausibly have intended to both *create* new substantive rights and then have them vindicated through a generic statute that lacks all of the protections intended to accompany those rights. *See City of Ranchos Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005); *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea*

Clammers Ass'n, 453 U.S. 1, 20 (1981); *Preiser v. Rodriguez*, 411 U.S. 475, 489-490 (1973).

To illustrate how this is so, recall that the constitution allows age-based classifications so long as they have rational bases. A government employer could rely on such general classifications so long as it set forth a plausible age-related reason for doing so, even if "imperfect" or "not true . . . in the majority of cases." *Kimel*, 528 U.S. at 85-86. Thus, older employees could be terminated at a certain age in order to avoid "tedious and often perplexing decisions" about whether they were still physically or mentally fit for a job, *Gregory v. Ashcroft*, 501 U.S. 452, 471-72 (1991), or as a part of "personnel policies . . . designed to create predictable promotion opportunities and thus spur morale" among younger workers, *Vance v. Bradley*, 440 U.S. 93, 98-101 (1979). Only "arbitrary" and "irrational" age-based classifications would be unconstitutional, *see Bankers Life*, 486 U.S. at 83, and decisions based on plausible age-based generalities are neither.

By contrast, the ADEA makes it flatly "unlawful" to "discriminate against any individual because of such individual's age," with limited exceptions. *See*, *e.g.*, 29 U.S.C. § 623(a), (b), (j). The sort of plausible, if imperfectly-fitting, rationales for favoring younger employees over older, while sufficient to protect against constitutional equal-protection claims, will subject an employer to statutory liability. *See, e.g.*, *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 408, 423 (1985) (affirming ruling that requiring flight engineers to retire at 60, where employer's justification was age-based physical decline and greater health issues, violated the ADEA).

As a practical matter, then, the statutory provisions of the ADEA require state and municipal employers to officially adopt non-discriminatory policies with respect to age.[2] But ironically, by doing so, the ADEA enables plaintiffs to allege valid § 1983 age-discrimination claims. The rational basis test is not satisfied if the Government's means are not "rationally related" to a "legitimate" end, *Cleburne*, 473 U.S. at 440; that is, if an action is arbitrary and irrational. *Bankers Life*, 486 U.S. at 83. When, as is the case for virtually all state and municipal jobs, official policy is *not* to discriminate through age-based generalities, plaintiffs will undoubtedly argue that employment actions intended to harm someone because of their age are not "legitimate," and would in fact be "arbitrary" and "irrational" deviations from stated policy. If so, such claims would likely clear the hurdle of rational-basis review.[3]

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[2] While state employers have sovereign immunity from suits by individuals, *see infra* Part II.B, states remain subject to the ADEA, can be sued by the federal government (via the EEOC), and thus cannot simply ignore the ADEA's precepts. *See Alden v. Maine*, 527 U.S. 706, 755 (1999) ("In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government"); *cf. Bd. of Trs. v. Garrett,* 531 U.S. 356, 374 n.9 (2001) (allowing EEOC suits against states for violations of the Americans With Disabilities Act, despite the states' sovereign immunity).

[3] In *Engquist v. Oregon Dep't of Agriculture*, 553 U.S. 591, 605-09 (2008), this Court limited the availability of equal protection claims in the public employment setting; however, that ruling was expressly limited to "class of one" claims—*i.e.*, where someone is "fired not because she was a member of an identified class . . . but simply for 'arbitrary, vindictive, and malicious reasons.'" *Id.* at 595, 607. Without clarification by this court, a government employee's age-based discrimination claim would not fall under *Engquist*'s core holding.

Indeed, in the district court decision in this very case, and in other cases rejecting ADEA preemption, the irrationality of the alleged age discrimination appears to be presumed when (as it must to avoid statutory ADEA liability) the employer asserts non-age-based reasons for the termination. These courts simply ask whether the asserted reasons are false pretexts for age discrimination, using the familiar *McDonnell Douglas* test used for ADEA claims. *See Levin v. Madigan*, No. 07-C-4765, 2011 WL 2708341, at *12-20 & n.16 (N.D. Ill. July 12, 2011); *Burkhardt v. Lindsay*, 811 F. Supp. 2d 632, 651 (E.D.N.Y. 2011) (citing authority for proposition that "[a]ge-based employment discrimination claims brought pursuant to § 1983 are analyzed under the three-step, burden-shifting framework" of *McDonnell Douglas*); *Shapiro v. New York City Dep't of Educ.*, 561 F. Supp. 2d 413, 422 n.2 (S.D.N.Y. 2008) ("An equal protection claim for age discrimination pursuant to § 1983 is analyzed under the same standards as a claim made pursuant to the ADEA."); *Siler v. Hancock Cnty. Bd. of Educ.*, 510 F. Supp. 2d 1362, 1381-82 (M.D. Ga. 2007) ("when a plaintiff asserts a §1983 claim based on age discrimination, courts apply the same analysis to such a claim as they would an ADEA claim.); *Abel v. Auglaize County Highway Dept.*, 276 F. Supp. 2d 724, 733 (N.D. Ohio 2003) ("Since Plaintiff claims age discrimination in violation of 42 U.S. § 1983, he can make the required showing of discriminatory intent and purpose by following the methods of proof in Age Discrimination in Employment Act cases."); *Stalhut v. City of Lincoln*, 145 F. Supp. 2d 1115, 1121-22 (D. Neb. 2001) (applying *McDonnell Douglas* to both ADEA and § 1983 age claim); *Mummelthie v. City of Mason City*, 873 F. Supp. 1293, 1332-36 (N.D. Iowa

1995) ("a § 1983 claim based on alleged violation of equal protection in the employment context is analyzed in the same way as . . . an ADEA claim of age discrimination").

Allowing concurrent lawsuits under the ADEA and § 1983 thus places state and municipal employers in an impossible position. Because of the requirements of the ADEA itself, plaintiffs can choose to file a constitutional age-discrimination suit, have the claim treated *exactly* like an ADEA disparate-treatment claim, while entirely avoiding the ADEA's comprehensive procedural framework. This Court has made clear that § 1983 claims are preempted if otherwise, plaintiffs could "wholly frustrate explicit congressional intent" and avoid statutory "requirement[s] by the simple expedient of putting a different label on their pleadings." *Preiser*, 411 U.S. at 489-490; *see also Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106–07 (1989) (finding preemption if "allowing a plaintiff to bring a § 1983 action would be inconsistent with Congress's carefully tailored scheme."). The *Levin* decision allows precisely this, and for that reason this Court should grant certiorari and reverse.

II. THE SEVENTH CIRCUIT'S DECISION WILL INCREASE LITIGATION AND LITIGATION COSTS, AT THE EXPENSE OF THE COURTS, GOVERNMENTS, AND THE PUBLIC.

The consequences of allowing plaintiffs to bring ADEA-style claims under § 1983 while avoiding the ADEA's procedures will be severe. *Levin* will lead to an explosion of litigation costs and damages awards that state and municipalities are ill-equipped to afford.

A. Allowing § 1983 Age-Discrimination Claims Will Prevent Administrative Review and Conciliation of Age Claims, Leading to a Greater Quantity and Lower Quality of Federal-Court Suits.

When Congress drafted the ADEA, it placed the primary responsibility for enforcement with the Equal Employment Opportunity Commission. *See, e.g.*, *Kralman v. Ill. Dep't of Veterans' Affairs*, 23 F.3d 150, 155 (7th Cir. 1994). An aggrieved employee cannot simply rush into court; rather, he or she must first file a charge with the EEOC, who will then notify the employer about the alleged age discrimination and then attempt "to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." 29 U.S.C. § 626(d); *Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 400 (2008) ("The agency's duty to initiate informal dispute resolution processes upon receipt of a charge is mandatory in the ADEA context."). Such informal administrative mediation and conciliation is particularly necessary in the ADEA context, where the length of formal litigation "is particularly prejudicial to the rights of 'older citizens to whom, by definition, relatively few productive years are left.'" *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 757 (1979) (internal quotation omitted).

Moreover, EEOC conciliation is a highly useful and effective means of resolving age-discrimination claims without resort to federal litigation. For instance, in FY 2012, the EEOC resolved 27,335 ADEA charges (more than the 22,857 new ADEA

charges filed that year).[4] A full 23,284 those claims – or 85.2% – were found to lack reasonable cause to believe that discrimination occurred, or were closed for administrative reasons. Of the 4,051 remaining merits resolutions, however, 3,624 were either settled, voluntarily withdrawn after the employer granted the employee a benefit, or successfully conciliated by the EEOC. Only 427 meritorious claims could not be conciliated. There can be little doubt that this administrative process "at once enables aggrieved individuals to seek redress for harms suffered, allows employers to resolve workplace disputes earlier and through more informal means, and helps to reduce the federal court dockets." Anne Noel Occhialino & Daniel Vail, *Why The EEOC (Still) Matters*, 22 Hofstra Lab. & Emp. L.J. 671, 692 (2005).

If, however, as *Levin* presages, ADEA claims can simply be recast as § 1983 age-discrimination claims, this critical conciliation mechanism will be bypassed altogether, to the detriment of state and municipal employers (and only those employers). This, in turn, will increase the quantity and decrease the quality of age-discrimination claims in federal courts. Not only will these additional suits be costly in terms of already-scarce judicial resources, they will also lead to skyrocketing state and municipal litigation costs.

This is so because, regardless of factual merit, well-pled claims of disparate treatment will largely survive motions to dismiss, *see, e.g.*, *Swierkiewicz v.*

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[4] This statistical data is taken from the EEOC's website at http://www.eeoc.gov/eeoc/statistics/enforcement/adea.cfm.

Sorema N.A., 534 U.S. 506 (2002),[5] and therefore such claims—including claims that otherwise might have been resolved by the EEOC—will proceed to civil discovery prior to summary judgment. As this Court has recognized, discovery is by far the most costly aspect of modern civil litigation, amounting to between 60 and 90 percent of all litigation costs. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007); *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 268 (2004) (Breyer, J., dissenting). And in the employment-discrimination context, these costs are decidedly one-sided against government employers, who will have far more electronically-stored information of potential relevance than will a single plaintiff. *See* Rodney A. Satterwhite & Matthew J. Quatrara, *Asymmetrical Warfare: The Cost Of Electronic Discovery In Employment Litigation*, 14 Rich. J.L. & Tech. 9, ¶¶ 6-7 (2008). Because such discovery costs can approach or exceed the potential damages available to a plaintiff, even a party with a weak claim (one which might not have survived EEOC mediation) can leverage the specter of discovery costs to "systemically force [a state or municipal defendant] to either resolve cases that would otherwise be decided on the merits, or resolve them at a higher price because electronic discovery is inevitable." *See id.* ¶ 8.

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[5] In *Swierkiewicz*, this Court unanimously held that age-discrimination claims were sufficiently pled by asserting that a termination was due to age, and giving "the events leading to [the] termination, provid[ing] relevant dates, and includ[ing] the ages . . . of at least some of the relevant persons involved with [the] termination." 534 U.S. at 514. Later, in *Bell Atlantic Corp. v. Twombly*, this Court found that *Swierkiewicz* was consistent with the new Rule 12(b)(6) pleading standard that it was announcing. 550 U.S. 544, 569-70 (2007).

Finally, if these claims do manage to proceed to trial, successful age-discrimination plaintiffs will be "awarded larger compensatory damages than victorious plaintiffs alleging other forms of discrimination." Aida M. Alaka, *Corporate Reorganizations, Job Layoffs, and Age Discrimination: Has* Smith v. City of Jackson *Substantially Expanded the Rights of Older Workers Under the ADEA?*, 70 Alb. L. Rev. 143, 175 (2006). Government defendants have also faired particularly poorly in employment discrimination suits. *See* Jury Verdict Research, *Employment Practice Liability: Jury Award Trends and Statistics* 27 (2006) (showing that plaintiffs obtained a median award of $212,544 in federal employment-discrimination suits against government entities—20% higher than all defendants overall, and highest of the defendant types listed).

There should be no mistake that state and local governments, large and small, will face burdensome litigation under *Levin*. Government officials make millions of employment decisions each year, and the potential number of newly-permitted § 1983 age-discrimination claims that they could face is substantial to say the least. By allowing plaintiffs to avoid Congress's preference for mediation of age-discrimination claims, the courts will be clogged with weak and frivolous suits, which will impose huge discovery costs on state and municipal governments, and potentially lead to more settlements of unmeritorious claims, and the payment of more and larger damages awards.

B. With Respect to State Employers, *Levin* Renders *Kimel v. Board of Regents* a Dead Letter By Allowing Damages For What are Effectively ADEA Claims.

In *Kimel v. Board of Regents*, this Court held that Congress, through the enactment of the ADEA, did not validly abrogate the states' sovereign immunity so as to allow damages claims against the states without their consent. 528 U.S. at 66-67. The *Levin* decision effectively nullifies *Kimel* by forcing states to pay damages claims through mere artful pleading.

The ADEA seeks to vindicate an employee's right to be free from arbitrary age discrimination by allowing suit against the employer tolerating the discrimination, but not against individual employees personally. *See Levin*, 692 F.3d at 621. By contrast, § 1983 permits suit against *individuals* who allegedly violate constitutional rights under color of state law. *See, e.g.*, *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). Thus, using this case as an example, by naming the Attorney General personally as having violated the Equal Protection Clause and not the Attorney General's office, a plaintiff can make the same assertion of wrongdoing (since, after all, an agency can only act through its officials), yet recover damages. *See id.* at 166-67 (defendants in personal-capacity suits unable to claim sovereign immunity).

While the individual defendant would technically be personally liable for any such damages, states "frequently indemnify their employees to protect them from liability for unlawful conduct within the scope of their employment . . . that is subject to § 1983 liability," Martin A. Schwartz, *Should Juries Be Informed That Municipality Will Indemnify Officer's*

§ 1983 Liability For Constitutional Wrongdoing?, 86 Iowa L. Rev. 1209, 1211 (2001), and so ultimately the states will bear the cost of any such § 1983 age-discrimination awards.

In other words, the practical effect of *Levin* is that it allows plaintiffs to (1) re-label their ADEA claims as equal-protection violations, while advancing the same claimed injury; (2) re-label the defendant as the supervisor instead of the employing agency while alleging the same wrongdoing; and (3) indirectly collect otherwise forbidden money damages from the state.[6] This creates an entire category of damages exposure that states heretofore did not have to face, and which as described below, they cannot afford.

C. When State and Municipal Governments Face Increased Litigation Costs and Exposure to Damages Awards, The Funds Available for Public Services are Directly Reduced.

The increase in burdensome federal litigation and the availability of damages that will be wrought by *Levin* will come at the direct expense of the public whom state and municipal governments serve. New lawsuits and new liabilities will divert state and municipal funds that could otherwise be used to fund governmental services, or else will require the imposition of new taxes or the acquisition of even more debt. *See, e.g.*, Steve Schultze, *Abele Budget*

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[6] Further, an individual-capacity § 1983 suit also allows for punitive damages, *Smith v. Wade*, 461 U.S. 30, 35 (1983), which are not allowed against municipalities, *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 263-64 (1981), or under the ADEA alone, *see Ahlmeyer*, 555 F.3d at 1059. *Levin* thus increases the damages exposure for state and municipal employers alike.

Still Leaves $92 Million Shortfall In 4 Years, Study Says, Milwaukee Journal Sentinel, Oct. 10, 2012 (potential liability from municipal employee lawsuits "could pose a severe threat to future budgets"); Bill Swinford, *Business Leaders: Too Many Frivolous Lawsuits Cost Jobs*, Marion Daily Republican, May 1, 2012 (""The money cities spend fighting frivolous lawsuits is taxpayer money that's sucked out of our city budgets,' [Herrin, IL Mayor Vic] Ritter said. 'That means we have to cut jobs, reduce services or raise taxes.'"); Bethany Krajelis, *Group Reports On City Litigation Costs, Urges Constraint*, Chicago Daily Law Bulletin, July 28, 2011 ("if [Chicago] didn't spend so much fighting and settling lawsuits, it could save taxpayer dollars, help the city to close its budget deficit and avoid personnel cuts"); Kevin Corcoran, *Hoosiers Get Stuck With State's Legal Bills*, Indianapolis Star, Sept. 19, 2002, at A1 (noting legal expenses and damages awards "siphon[] millions annually from state coffers.")

State and municipal governments—and ultimately, the taxpayers—simply cannot afford these expanded costs and liabilities. Today, over half of the states have "projected (and in most cases now have closed) budget gaps totaling $55 billion for fiscal year 2013," which combined with reduced federal aid have "le[d] to some of the deepest cuts to state services since the start of the recession.'" Phil Oliff, *et al.*, Center on Budget and Policy Priorities, *States Continue To Feel Recession's Impact* 2 (June 27, 2012), *available at* http://www.cbpp.org/files/2-8-08sfp.pdf; Michael A. Pagano, *et al.*, National League of Cities, *Research Brief on America's Cities* 7 (Sept. 2012) ("as of August 2012 . . . total local government employment in the U.S. had decreased by approximately 650,000 jobs

from peak levels in 2008."), *available at* http://www.nlc.org/find-city-solutions/center-for-research-and-innovation/finance/city-fiscal-conditions-in-2012. Among the agencies most affected by these cuts are state consumer protection bureaus[7]—the very sort of agency for whom respondent Levin worked, and from whom he now seeks $1,000,000 or more in compensatory and punitive damages. Doc. 16 at 22-23. The Seventh Circuit's unnecessary and erroneous enabling of his suit, and others like it, only exacerbates the harm to state and municipal governments that budget woes have already brought.

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For these reasons, the Petition for a Writ of Certiorari should be granted.

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[7] *See* Michelle Singletary, *Shock Therapy To Avoid Scams*, Washington Post, July 31, 2012, *available at* 2012 WLNR 20309401 ("[Director of consumer protection at the Consumer Federation of America Susan] Grant said state budget cuts were most frequently cited as the biggest challenges that state and local consumer protection agencies faced last year" and that "[i]n a year of austerity, consumer-protection services are something viewed as nonessential.")

Respectfully submitted,

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