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 Petition for 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

As the certiorari petition showed, and the Seventh Circuit recognized, the federal courts are intractably divided over the question presented. Moreover, the issue is an important one requiring this Court's immediate intervention, as the *amici* supporting the petition also make clear. Finally, the decision below arises from a misreading of Supreme Court precedent.

Respondent offers no meaningful rebuttal to any of these points. He devotes his brief largely to the merits of the question presented, without challenging the presence of a circuit split. Nor is there anything to respondent's claim that *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246 (2009), announced a new rule demanding further percolation in the lower courts. His claim that this appeal presents a poor vehicle for resolving the question presented likewise falls short, as does his extended discussion of the merits.

I. The Federal Courts Are Deeply Divided, As The Seventh Circuit Recognized, And There Is No Need For Further Percolation.

Respondent cannot, and does not, dispute that four circuits—the Fourth, Fifth, Ninth, and Tenth—squarely hold that the ADEA displaces equal protection claims under § 1983 for alleged age discrimination in state and municipal employment. See Pet. 8. Nor does he dispute that the First and District of Columbia Circuits have announced the same rule for federal employees, with the suggestion that it would extend to state and municipal workers as well. See *ibid.* The Seventh Circuit, in fact, described all six of these circuits as at odds with its holding below. See Pet. App. 20a.

1. Respondent offers two points in rebuttal, but neither supports his request to deny the petition. He

first contends that these circuits, at least the four to address the issue squarely, are wrong on the merits. See Br. in Opp. 19-23. But that is not a ground to deny certiorari review; rather, it is an argument for affirming the judgment below should this Court grant review.

2. Respondent's second point is that this Court's 2009 decision in *Fitzgerald* so changed the law in this area that only decisions rendered after *Fitzgerald* may be counted as part of the split—that is, only the Ninth Circuit's decision in *Ahlmeyer v. Nevada System of Higher Education*, 555 F.3d 1051 (2009), and the Seventh Circuit's contrary decision here. But this response also misses the mark. Even on its own terms, it leaves a one-to-one circuit split over the question presented, and it ignores that, of the fourteen district court decisions cited in the petition as favoring the Fourth/Fifth/Ninth/Tenth Circuit rule, seven were decided after *Fitzgerald*. See Pet. 9-12.

More fundamentally, respondent's reliance on *Fitzgerald* fails because that decision does not purport to change the relevant legal standard at all, much less to announce the new rule that respondent describes. To be sure, *Fitzgerald* acknowledges that, "[i]n cases in which the § 1983 claim alleges a constitutional violation, lack of congressional intent [to displace that claim] may be inferred from a comparison of the rights and protections of the statute and those existing under the Constitution." 555 U.S. at 252. But as the petition showed, *Fitzgerald*'s description of substantive differences between Title IX and § 1983 equal protection claims merely served as "further support" for the Court's conclusion earlier in the opinion that equal

protection claims survive Title IX because the latter lacks the comprehensive remedial regime required to displace § 1983 claims under *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981), and *Smith v. Robinson*, 468 U.S. 992 (1984), superceded by statute, PL 99-372, 100 Stat. 796 (1986). See Pet. 19. In fact, *Fitzgerald* reaffirmed the Court's longstanding rule that, "[i]n determining whether a subsequent statute precludes the enforcement of a federal right under § 1983, we have placed primary emphasis on the nature and extent of that statute's remedial scheme," and that this "focus[] on the statute's detailed remedial scheme" applies even when displacing constitutional claims. 555 U.S. at 253-254.

Accordingly, *Fitzgerald* did nothing to change the rule from *Sea Clammers*, *Smith*, and their progeny that Congress may displace a § 1983 remedy 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). The distinction that respondent proposes between pre- and post-*Fitzgerald* case law is therefore artificial, and it neither reduces the magnitude of the deepening split in authority nor calls for further percolation.

The same goes for *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), on which petitioner also relies. *Kimel* held that the ADEA fails to abrogate States' Eleventh Amendment immunity because the Act's broad sweep, "and the lack of evidence of

widespread and unconstitutional age discrimination by the States," meant that "the ADEA is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment." *Id.* at 91. Having misread *Fitzgerald* to announce a rule—that whether a federal statute displaces constitutional claims under § 1983 turns on whether the statute and the constitutional right provide different protections—respondent then relies on *Kimel* for its observation that the ADEA is on the whole more protective of government employees than the Equal Protection Clause. See Br. in Opp. 5, 13-14. As shown above, however, respondent misstates *Fitzgerald*'s holding, and his reliance on *Kimel* is therefore equally misplaced.

3. Finally, respondent fails in his effort to downplay the split among federal district courts, see Br. in Opp. 23-24, a split that the Seventh Circuit also acknowledged, see Pet. App. 20a. First, respondent contends that "most of the district court decisions finding preclusion predate this Court's decision in *Fitzgerald*," Br. in Opp. 23, but as shown above, this is both misleading and irrelevant. Second, respondent contends that "some" of the district court decisions cited in the petition "failed to allege Constitutional Equal Protection claims, and instead are § 1983 actions seeking to enforce statutory provisions of the ADEA." Br. in Opp. 23-24. But respondent does not identify a single example of such a decision from the petition. Nor can he, for while some of the many district court decisions cited in the petition described the plaintiff's § 1983 claim in general terms—without distinguishing between an underlying ADEA or constitutional

claim—none purported to limit its analysis to non-constitutional claims, and many relied on one or more of the federal appellate decisions holding that the ADEA displaces constitutional causes of action.[*] Finally, respondent criticizes an unspecified "number of district court cases" for purported errors in their analysis, Br. in Opp. 24, but, again, this goes to the merits of this case, not to the existence or extent of the deepening division among lower courts.

In short, respondent cannot deny the existence of a split among the federal courts, and he fails in his effort to downplay this growing divide.

II. This Case Presents An Ideal Vehicle For Resolving The Split In Authority.

1. Respondent suggests that this case is a poor vehicle for certiorari review because petitioners appeal

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[*] See *Ray v. City of Opa-Locka*, No. 12-CV-21769, 2012 WL 4896162, at *3 (S.D. Fla. Oct. 15, 2012); *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); *Gregor v. Derwinski*, 911 F. Supp. 643, 651 (W.D.N.Y. 1996); *Tranello v. Frey*, 758 F. Supp. 841, 850-851 n.3 (W.D.N.Y. 1991), aff'd on other grounds, 962 F.2d 244 (2d Cir. 1992).

from an interlocutory decision denying qualified immunity. See Br. in Opp. 7. But "qualified immunity * * * is both a defense to liability and a limited 'entitlement not to stand trial or face the other burdens of litigation.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). Thus, provided that a district court's order denying qualified immunity "'turns on an issue of law'" (as the decision here does), that order is appealable notwithstanding "'the absence of a final judgment.'" *Ibid.* (quoting *Mitchell*, 472 U.S. at 530). For the same reason, the interlocutory status of an appellate court's decision denying qualified immunity does not affect its suitability for certiorari review, as this Court's many decisions granting certiorari from a denial of qualified immunity confirm. See, *e.g.*, *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012) (reversing appellate court's denial of qualified immunity); *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1241, 1250-1251 (2012) (same); *Pearson v. Callahan*, 555 U.S. 223, 227, 243-245 (2009) (same); see also Eugene Gressman *et al.*, SUPREME COURT PRACTICE 281 n.65 (9th ed. 2007) (distinguishing between "interlocutory" decisions, which are less appealing candidates for certiorari review, and "final" decisions, which include appeals from the denial of qualified immunity).

That petitioners appealed the district court's decision denying qualified immunity on respondent's age discrimination claim but not his sex discrimination claim does not change this result, contrary to respondent's suggestion. See Br. in Opp. 7. Resolution of his sex discrimination claim will require respondent

to present—and petitioners to rebut—different evidence than his age discrimination claim. Qualified immunity entitles petitioners to avoid the time, expense, and other burdens of litigating the latter claim, even while the former claim proceeds.

2. Respondent also suggests that petitioners do not seek review of an appealable issue. See Br. in Opp. 27. But, again, petitioners properly appealed from the denial of qualified immunity pursuant to the collateral order doctrine. See *Mitchell*, 472 U.S. at 526-527. A defendant is entitled to qualified immunity if the plaintiff fails to state a viable claim or fails to show that the rights allegedly violated were clearly established at the relevant time. *Reichle*, 132 S. Ct. at 2093. In this case, petitioners contend that respondent cannot state a viable § 1983 age discrimination claim because no such claim is cognizable. Thus, as the court below held, "the very existence of a freestanding damages remedy under § 1983 is directly implicated by a qualified immunity defense such that we have jurisdiction over this appeal." App. 7a-8a (citing *Wilkie v. Robbins*, 551 U.S. 537 (2007)).

III. Respondent's Merits Arguments Fall Short.

Respondent raises a number of arguments on the merits. We address these claims briefly in turn.

1. Respondent contends that rights may be enforceable pursuant to § 1983 even when they overlap with other remedies, but this does nothing to advance his argument. See Br. in Opp. 8 (citing *McNeese v. Bd. of Educ. for Cmty. Unit Sch. Dist. 187*, 373 U.S. 668, 672 (1963), and *Monroe v. Pape*, 365 U.S. 167, 172-174

(1961), overruled on other grounds, *Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658 (1978)). After *McNeese* and *Monroe* were decided, this Court made clear that § 1983's reach may be limited by a comprehensive remedial scheme in another federal statute. See *Sea Clammers*, 453 U.S. at 19-21; *Smith*, 468 U.S. at 1008-1013; *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 119-125 (2005). The very point of the many decisions that have rejected the Seventh Circuit's rule, and of petitioners' position in this case, is that the ADEA displaces § 1983 equal protection claims under the *Sea Clammers* line of authority. In any event, in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), this Court distinguished *Monroe* and *McNeese* on the ground that there, unlike here, "no other, more specific federal statute was involved that might have reflected" a congressional intent to displace the § 1983 remedy. *Id.* at 492 n.10.

2. And while respondent attempts to distinguish *Preiser* on the ground that the habeas corpus statute at issue there was specifically designed to address constitutional claims, see Br. in Opp. 12, that distinction falls flat. In holding that the habeas statute displaced the § 1983 remedy, *Preiser* relied on the comprehensive remedial scheme requiring state court exhaustion as a precondition to suit: "It would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade [the habeas statute's exhaustion] requirement by the simple expedient of putting a different label on their pleadings." 411 U.S. at 489-490. The Court's focus was on the remedial

scheme, not the fact that there was an express design to address constitutional claims.

3. Nor does respondent succeed in distinguishing *Smith*. There, the Court held that the Education of the Handicapped Act displaced equal protection claims under § 1983, and that statute did include language making reference to constitutional claims. See 468 U.S. at 1010. As the petition explained, however, such references are not surprising in a law that, unlike the ADEA, regulates solely government actors subject to constitutional requirements. See Pet. 19. Moreover, the Court in *Smith* stressed the "comprehensive nature of the procedures and guarantees" in the Act and held, as the Seventh Circuit should have concluded here, that "[a]llowing a plaintiff to circumvent the [statute's] administrative remedies would be inconsistent with Congress' carefully tailored scheme." 468 U.S. at 1011, 1012.

4. Finally, cases holding that Title VII does not preclude § 1983 claims by state and municipal employees do not counsel against preclusion, as respondent contends. See Br. in Opp. 20, 22, 25, 26. Indeed, even the Seventh Circuit recognized that Title VII "does not add much to [the] analysis" here because that statute departs in "significant ways" from the ADEA. Pet. App. 31a-32a n.5.

Most importantly, "the remedial provisions of the ADEA," which are the "focus" of any preclusion analysis, "differ from those of Title VII." Pet. App. 31a-32a n.5. This Court emphasized this distinction in *Lorillard v. Pons*, 434 U.S. 575 (1978), which recognized

that § 626(b), one of the ADEA's remedial provisions, incorporates elements of the Fair Labor Standards Act by reference, demonstrating Congress' intent that "the ADEA be enforced in accordance with the 'powers, remedies, and procedures' of the FLSA," not Title VII. 434 U.S. at 580 (quoting 29 U.S.C. § 626(b)) (emphasis omitted); see also Pet. 14. Accordingly, while the Court acknowledged the "important similarities" between the ADEA and Title VII, "both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions," the Court stressed the "significant differences" between the two in terms of their "remedial and procedural provisions." *Lorillard*, 434 U.S. at 584; see also *id.* at 584-585 (listing many differences between two laws' remedial schemes).

In addition, Title VII's legislative history—unlike the ADEA's—includes specific statements making clear that Congress intended to preserve state and municipal employees' right to advance constitutional claims for race and gender discrimination in the workplace. It is precisely this language, appearing in a 1972 House Report accompanying the bill that extended Title VII to state employees, on which circuit courts have relied to preserve § 1983 remedies for those workers. See, *e.g.*, *Trigg v. Fort Wayne Cmty. Schs.*, 766 F.2d 299, 300-301 & n.3 (7th Cir. 1985) (quoting H.R. Rep. 92-238, at 17 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2154, for its statement that "'[i]n 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'").

There is "no comparable evidence of congressional intent to support § 1983 equal protection challenges in the area of age discrimination concurrent with the comprehensive remedial framework of the ADEA." *Zombro v. Baltimore City Police Dep't*, 868 F.2d 1364, 1371 n.5 (4th Cir. 1989); see also *Ring v. Crisp Cnty. Hosp.*, 652 F. Supp. 477, 480, 482 (M.D. Ga. 1987). The Seventh Circuit thus rightly rejected respondent's analogy to Title VII on this ground as well. See Pet. App. 31a-32a n.5 ("Title VII's legislative history also speaks explicitly to the issue of § 1983 preclusion, while there is no similar history for the ADEA."). Here, too, therefore, respondent's arguments on the merits fall short.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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