No. 14-363

IN THE

Supreme Court of the United States

ANTHONY HILDEBRAND,

Petitioner,

v.

ALLEGHENY COUNTY, PENNSYLVANIA, *ET AL.,*

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether certiorari review is warranted where petitioner's alleged, lopsided circuit split is illusory, the district court ruled for respondent on an independent ground providing an alternative basis for affirming the judgment below, further percolation would be warranted under petitioner's reading of the law if there were a split, and the Third Circuit (like every other circuit to address the question on similar facts) reached the correct result under this Court's established standards.

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The certiorari petition should be denied. The circuit split that petitioner alleges is illusory. The only decision purportedly at odds with the otherwise unanimous weight of circuit authority—the Seventh Circuit's decision in *Levin*—did not involve an ADEA-covered employee, as respondent in that case stressed in successfully urging this Court to dismiss the certiorari petition. Accordingly, the Seventh Circuit remains free to align itself with every other court of appeals to address the issue, including the Third Circuit here, in holding that the ADEA displaces § 1983 equal protection claims raised by employees covered by the ADEA.

This case is not a suitable vehicle for addressing the question presented in any event. As the district court correctly ruled, petitioner has not adequately pled that respondent engaged in the pattern or practice of age discrimination that *Monell* requires for § 1983 liability. This constitutes an independent ground for affirming the Third Circuit's judgment, one that even petitioner does not contend warrants certiorari review.

Moreover, even if there were a split and this case offered a vehicle for resolving it, petitioner's own view of the merits would counsel for greater percolation.

Finally, the Third Circuit reached the correct result on the merits. The ADEA is precisely the breed of comprehensive remedial regime that displaces competing § 1983 remedies under this Court's well-established test. The rule adopted by

the Third Circuit (and every other circuit to address the issue on these facts) provides for the fair and efficient resolution of employee claims.

STATEMENT

Petitioner Anthony Hildebrand was employed as a detective for the Allegheny County District Attorney's Office for five years before his termination from that position on February 18, 2011. Pet. App. 3a. Prior to his time at the District Attorney's Office, petitioner worked as an undercover narcotics detective for the Pittsburgh Police Department. *Id.*

In his amended complaint, petitioner acknowledged that he was informed at the time of his firing that his termination was the result of his unauthorized use of a government vehicle. Pet. App. 39a. Petitioner further noted that on March 14, 2011, approximately a month after his termination, he was informed that he had been discharged both because of his unauthorized use of a motor vehicle and because he had lied to his superiors. *Id.*

On December 1, 2011, petitioner submitted an intake questionnaire to the U.S. Equal Employment Opportunity Commission ("EEOC") alleging he was dismissed from his position at the District Attorney's Office because of discrimination on the basis of his age. Pet. App. 4a. Petitioner wished the EEOC to investigate his claim and "want[ed] to file a charge of age discrimination." On January 11, 2012, petitioner completed a "Charge of Discrimination" with the

EEOC, naming the District Attorney as the respondent. *Id.* The EEOC issued a right-to-sue letter on May 7, 2012. Petitioner then filed suit in the U.S. District Court for the Western District of Pennsylvania, naming respondents Allegheny County and the Allegheny County District Attorney's Office as defendants.

Petitioner's seven-count complaint contained various allegations involving his termination. As relevant here, petitioner raised age-discrimination claims under 42 U.S.C. § 1983 for purported violations of the Equal Protection Clause and under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634. Pet. App. 5a. Respondents moved to dismiss the complaint in its entirety, arguing, among other things, that petitioner had failed to plead facts sufficient to show that he had exhausted his administrative remedies prior to filing suit under the ADEA, *id.* at 60a-62a, and that petitioner had not adequately pled the existence of a municipal policy or custom of age discrimination, as required for § 1983 municipal liability under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 691 (1978), Pet. App. 68a. The district court agreed with respondents and dismissed both counts without prejudice. *Id.* at 79a.

On December 13, 2012, petitioner filed an amended complaint, again including ADEA and § 1983 equal protection claims for alleged age discrimination. Once again, moreover, the district court granted respondents' motions to dismiss both

claims, although this time with prejudice. *Id.* at 54a. As to the ADEA claim, the district court found that petitioner had not pled facts sufficient to show that he had timely filed that claim within 300 days of the last alleged act of age discrimination. *Id.* at 43a-44a. For purposes of petitioner's § 1983 claims, the court found that the District Attorney's Office was not a separate entity from Allegheny County. *Id.* at 48a. Finally, as for Allegheny County, the court again found that petitioner had not pled sufficient facts demonstrating the existence of a settled policy or custom of age discrimination necessary to state a claim against the County under *Monell*. *Id.* at 52a.

The Third Circuit affirmed the district court's dismissal of petitioner's § 1983 claim, although on a different ground. Noting that § 1983 is a statutorily-created remedy that "provides a method for vindicating federal rights elsewhere conferred," Pet. App. 9a (quoting *Albright v. Oliver*, 510 U.S. 266, 271 (1994)) (internal quotation marks omitted), the Third Circuit observed that "[s]ection 1983 claims are not available . . . where Congress has evinced an intent to preclude such claims through other legislation," *id.* at 9a-10a (quoting *Ahlmeyer v. Nev. Sys. of Higher Educ.*, 555 F.3d 1051, 1055 (9th Cir. 2009) (alteration in original)). To determine whether Congress intended to preclude § 1983 claims to vindicate a particular federal right, this Court has instructed courts to ask whether "remedial devices provided in a particular Act are sufficiently comprehensive." *Id.* at 10a (quoting *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20-21 (1981)).

The Third Circuit analyzed the four principal decisions in which this Court has explained when a statutory scheme should be understood to displace suits under § 1983. *See* Pet. App. 10a-15a. Starting with *Sea Clammers*—which held that a plaintiff could not bring suit under § 1983 to vindicate alleged violations of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (FWPCAA), 33 U.S.C. § 1401 *et seq.* (1976)—the Third Circuit observed that this Court placed particular weight on the "unusually elaborate enforcement provisions" of the FWPCAA and concluded that permitting parallel § 1983 suits to proceed would thwart this carefully delineated statutory scheme. *See* Pet App. 10a (quoting *Sea Clammers*, 453 U.S. at 13).

The Third Circuit then turned to *Smith v. Robinson*, 468 U.S. 992, 1008-09 (1984). In *Smith*, the issue was whether detailed remedial provisions contained in the Education of the Handicapped Act Pub. L. No. 91-230, Title VI, (EHA), 84 Stat. 175 (1970), precluded a plaintiff from bringing a § 1983 equal protection claim for disability discrimination. The Third Circuit noted that this Court's opinion in *Smith* again focused on the "'comprehensive nature of the procedures and guarantees' set forth in the statute's remedial scheme" in concluding that Congress intended to preclude handicapped children from bringing equal protection claims to vindicate rights protected by the EHA. *See* Pet. App. 10a-11a (quoting *Smith*, 468 U.S. at 1011).

The Third Circuit likewise examined *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 127 (2005), where once more this Court found that Congress's creation of a carefully calibrated statutory scheme (the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56) would be thwarted were plaintiffs permitted to allege substantive violations of that act through suits under § 1983. *See* Pet. App. 11a.

Finally, the Third Circuit turned to the more recent case of *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246 (2009), in which this Court observed that, in the foregoing decisions, "the statutes at issue required plaintiffs to comply with particular procedures and/or to exhaust particular administrative remedies prior to filing suit." *Id.* at 254. In contrast, the statute in *Fitzgerald* (Title IX) did not contain an administrative exhaustion requirement or promulgate a detailed remedial regime. Pet. App. 14a (citing *Fitzgerald*, 555 U.S. at 255-256). The absence of those procedures, combined with the lack of an express private right of action in Title IX, persuaded this Court that in passing that Act Congress did not intend to preclude § 1983 suits alleging sex discrimination in education. Pet App. 15a (citing *Fitzgerald*, 555 U.S. at 258).

Applying this framework, the Third Circuit expressly agreed with four other Courts of Appeal to have addressed the issue and held that the ADEA displaces § 1983 age-discrimination claims by ADEA-covered employees. *See* Pet. App. 22a. The Third Circuit noted the significance this Court has given to

the existence of a comprehensive remedial regime in suggesting that Congress intended to preclude § 1983 suits and observed that the ADEA provides exactly such a regime. Under the ADEA, employers are prohibited from "fail[ing] or refus[ing] to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age." *Id.* at 20a (quoting 29 U.S.C. § 623(a)(1) (ellipsis in original)). Likewise, the ADEA provides a private right of action for employees and requires employees to file a charge with the EEOC before filing suit in court. *Id.* The Third Circuit found that Congress's detailed scheme "would be undermined if plaintiffs could sue directly under § 1983." *Id.* at 20a-21a.

Nor did the Third Circuit "believe that the rights and protections of the ADEA and the Equal Protection Clause differ in such significant ways as to demonstrate congressional intent to allow parallel § 1983 claims alleging age discrimination." *Id.* at 21a. Indeed, the court reasoned, beyond merely paralleling the protections afforded by the Equal Protection Clause, "the ADEA encompasses the protections afforded by the Fourteenth Amendment, while significantly expanding prohibitions on age discrimination elsewhere." *Id.* To the extent "certain government employees are either exempted from the ADEA or limited to certain remedies," the Third Circuit continued, those limitations evidenced "congressional intent to specifically define the rights of those employees rather than to permit such employees to circumvent these limitations by filing directly under § 1983." *Id.* at 22a.

The Third Circuit thus held that because petitioner could have availed himself of the protections against age discrimination provided by the ADEA—petitioner had in fact made just such a claim—he was precluded from bringing an age discrimination claim under § 1983.[1]

REASONS FOR DENYING THE PETITION

I. The Alleged Circuit Split Is Illusory.

Petitioner offers one reason for certiorari review—a purported "circuit conflict regarding whether the ADEA precludes a section 1983 claim of unconstitutional age-based discrimination." Pet. 5. This conflict, petitioner claims, is between the First, Third, Fourth, Fifth, Ninth, Tenth, and District of Columbia Circuits, on the one hand, and a Seventh Circuit decision on the other. *See id.* at 8-10. But while petitioner is certainly correct that in *Hildebrand* the Third Circuit joined six other Circuits in ruling that the ADEA preempts a § 1983 age-discrimination claim, the Seventh Circuit's decision in *Levin v. Madigan*, 692 F.3d 607 (7th Cir. 2012), is not to the contrary. As discussed further below, in *Levin*, the Seventh Circuit was not even

[1] The Third Circuit affirmed the district court's dismissal of petitioner's ADEA claim against Allegheny County, finding that petitioner had not named the County on his EEOC intake questionnaire and thus had not exhausted his administrative remedies. Pet. App. 30a. The court found that petitioner had sufficiently exhausted his administrative remedies against the District Attorney's Office, however, and permitted that claim to proceed. *Id.*

presented with the question of whether an ADEA-covered employee could bring an age discrimination claim pursuant to § 1983. Thus *a fortiori* the Seventh Circuit did not issue a controlling decision on the issue.

A. The Third Circuit Has Joined All Other Courts Of Appeal To Address The Question On These Facts.

Having reviewed this Court's precedent, the Third Circuit joined the First, Fourth, Fifth, Ninth, Tenth, and District of Columbia Circuits in ruling that in promulgating the ADEA's detailed remedial provisions, Congress intended to preclude equal protection suits alleging age discrimination under § 1983 and the Equal Protection Clause. *See Tapia-Tapia v. Potter*, 322 F.3d 742 (1st Cir. 2003); *Zombro v. Baltimore City Police Dep't*, 868 F.2d 1364 (4th Cir. 1989); *Lafleur v. Tex. Dep't of Health*, 126 F.3d 758 (5th Cir. 1997); *Ahlmeyer v. Nev. Sys. of Higher Educ.*, 555 F.3d 1051 (9th Cir. 2009); *Migneault v. Peck*, 158 F.3d 1131 (10th Cir. 1998), *summarily vacated on other grounds sub nom. Bd. of Regents of Univ. of N.M. v. Migneault*, 528 U.S. 1110 (2000); *Chennareddy v. Bowsher*, 935 F.2d 315 (D.C. Cir. 1991). In each of these cases, the plaintiff was an "employee" covered by the ADEA.

B. The Seventh Circuit's Decision In *Levin* Does Not Conflict With The Third Circuit's Ruling, Leaving The Seventh Circuit Free To Align Itself With Every Other Circuit In A Future Case.

In discussing its conclusion, the Third Circuit claimed "the Seventh Circuit diverged from [the] consensus view, concluding instead that the ADEA does not preclude constitutional claims of age discrimination asserted under § 1983." Pet. App. 16a-17a. Petitioner seizes upon this statement, and others like it in the Third Circuit's decision, to claim that "[t]he Third Circuit . . . expressly disagreed with the reasoning and conclusion of the Seventh Circuit in *Levin* . . . [and] recognized this circuit conflict." Pet. App. 7, 10.

But *Levin* did not create the lopsided, 7-to-1 conflict that petitioner wishes it had. Although the Third Circuit's decision was contrary to certain statements the Seventh Circuit made in *Levin*, even a brief examination of *Levin* makes clear that the Seventh Circuit was not asked to decide whether an *ADEA-covered* employee may bring an age discrimination suit under § 1983. Thus any statements by the *Levin* court on that issue were non-binding dicta that could not create a circuit conflict.

In *Levin*, the Seventh Circuit framed the question presented as "whether the ADEA precludes a § 1983 equal protection claim." *Levin*, 692 F.3d at 615. After conducting an analysis of the statutory text and legislative history of the ADEA and discussing the reasoning of other courts to have addressed the issue, the Seventh Circuit concluded "the ADEA is not the exclusive remedy for age discrimination in employment claims." *Id.* 621-622. In light of this discussion in *Levin*, it is not surprising that the

Third Circuit thought its decision in *Hildebrand* was in conflict with *Levin*.

As the Seventh Circuit noted in describing the procedural background of the case, however, the district court there had determined that Levin was "*not an 'employee' for purposes of Title VII and the ADEA, thus foreclosing any claim Levin could bring under those statutes*." *Levin*, 692 F.3d at 610 (emphasis added). The Seventh Circuit never addressed, let alone reversed, the district court's finding that Levin was not covered by the ADEA. Thus, *Levin*'s extended analysis of whether the ADEA preempts age discrimination suits under § 1983 was limited to whether it does so for non-ADEA-covered employees.

Indeed, to the extent the *Levin* court was answering that question for ADEA-covered employees, it was addressing an issue not presented by the facts, and its decision was therefore advisory. *See, e.g.*, *Cohens v. Virginia*, 19 U.S. 264, 399 (1821) (Marshall, C.J.) ("It is a maxim not to be disregarded, that general expressions, in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.").

Although this Court generally does not specify its reasons for dismissing a writ of certiorari as improvidently granted, one of the most well-established bases for dismissal is that a case does not present the question the Court initially believed it

had granted certiorari to resolve. *See Evans v. Newton*, 382 U.S. 296, 315 (1966) (Harlan, J., dissenting) ("In my view the writ should be dismissed as improvidently granted because the far-reaching constitutional question tendered is not presented by this record with sufficient clarity to require or justify its adjudication, assuming that the question is presented at all."). In his merits brief in this Court, respondent in *Levin* urged that "[t]he only question regarding the ADEA actually presented by the circumstances of [his] case is whether the ADEA precludes a section 1983 age-based equal protection claim by an employee (like Levin) who is *not* covered by the ADEA." *Levin*, Resp. Br. at 16, *Madigan v. Levin*, 134 S. Ct. 2 (2013) (No. 12-872), 2013 WL 4011048 (emphasis in original). "There assuredly," respondent continued, "is no circuit conflict regarding this exceedingly uncommon question." *Id.* at 12.

Likewise, during oral argument, respondent's counsel conceded that his client was not covered by the ADEA, in effect rendering any decision this Court issued on the preemptive effect of the ADEA advisory. *See* Transcript of Oral Argument at 30, *Madigan v. Levin*, 134 S. Ct. 2 (2013) (No. 12-872) (counsel for Levin "agree[ing]" that the respondent is "not within the ADEA"). A number of Justices made this observation during argument. *See e.g.*, *id.* at 13 ("[W]hy are we talking about the ADEA when the district court held that the ADEA doesn't cover Mr. Levin? And there seems to be not much of a dispute about that." (Ginsburg, J.,)); *id.* at 21 (Justice Breyer questioning whether a decision concerning the

preemptive effect of the ADEA would be "an advisory opinion in respect to this case"); *id.* at 16-17 ("I think the point here is that Mr. Levin is covered *not by the ADEA*, but by a separate statute, the GERA.") (Kagan, J.,) (emphasis added)). Following argument, the Court dismissed the certiorari petition.

If the question of an ADEA-covered employee's right to proceed under § 1983 was not before this Court in *Levin*—meaning any decision by the Court would have been advisory—then the same was true of the Seventh Circuit's decision in that case. That court could not have issued a binding decision on the question of whether the ADEA preempts § 1983 suits by ADEA-covered employees, because Levin was not such an employee.

Accordingly, the Seventh Circuit is free to revisit *Levin*'s non-binding opinion in a case involving an ADEA-covered worker and there hold, without overruling circuit precedent, that the ADEA displaces § 1983 constitutional claims. *See United States v. Crawley*, 837 F.2d 291, 292-293 (7th Cir. 1988) (noting that an opinion, or part of an opinion, "not grounded in the facts of the case" constitutes non-binding dictum that is not controlling precedent in subsequent cases); *see also Espinosa v. United Student Aid Funds, Inc.*, 553 F.3d 1193, 1199 n.3 (9th Cir. 2008) ("Anything [a prior case] has to say as to matters not presented in that case is, in any event, dicta and thus not binding on us."), *aff'd*, 559 U.S. 260 (2010). Without binding circuit precedent, the Seventh Circuit remains free, for example, to conclude that *Levin*'s displacement analysis applies

only to § 1983 constitutional claims brought by *non*-ADEA workers. With the benefit of *Hildebrand*, the court may decide that the Third Circuit's view is the more persuasive and dispense with the *dicta* in *Levin*. In either case, the Seventh Circuit could do so without overruling precedent.[2]

As such, no circuit split exists now and, depending on what the Seventh Circuit decides to do in the future, such a conflict may never arise. Should the Seventh Circuit or another court of appeals apply *Levin*'s ADEA displacement analysis in a case involving ADEA-covered workers, then the Court can determine at that point whether to resolve a true split in authority.

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[2] Indeed, when the *Levin* defendants filed an interlocutory appeal of a district court ruling on remand that Levin's § 1983 claims were not preempted by the Government Employee Rights Act—an enactment not previously considered in the litigation extending ADEA-type rights to government employees, like Levin, who are exempted from ADEA coverage—the Seventh Circuit declined to hold that *Levin* already resolved the preemption issue for this non-covered employee. *Levin v. Madigan*, No 14-2244, 2014 WL 6736999, at *1 (7th Cir. Sept. 30, 2014). On the contrary, the court characterized its prior, original decision (on which petitioner now relies) solely in terms of its conclusion that the underlying equal protection rights were clearly established, without regard to the § 1983 preemption question: "[This] court rejected that preemption argument and ruled that the appellants are not entitled to qualified immunity—regardless of the question whether claims under § 1983 are preempted—because '[a]t the time of the alleged wrongdoing, it was clearly established that age discrimination in employment violates the Equal Protection Clause.'" *Id.* at *1 (quoting *Levin*, 692 F.3d at 622).

II. The Judgment Below Must Be Affirmed Regardless Of The Answer To The Question Presented.

In any event, far from the "excellent vehicle" that petitioner describes, Pet. 26, this case does not require the Court even to address the question presented to affirm the judgment below. The district court granted respondent's motion to dismiss on an independent, alternative ground—one that the Third Circuit had no need to address but that provides a separate basis for upholding that court's judgment without ever reaching the ADEA-displacement issue.

This case reached the Third Circuit after the district court dismissed the ADEA and § 1983 claims in petitioner's second amended complaint. *See* Pet. App. 7a-8a. Regarding the latter, the district court held that petitioner failed to plead sufficient facts to state a plausible claim against respondent Allegheny County under any theory of municipal liability established by *Monell* and its progeny. *See id.* at 52-53a.

Federal Rule of Civil Procedure 8 required petitioner to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atla. Corp. v. Twombly,* 550 U.S. 544, 570 (2007); *see also Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). Petitioner's age discrimination claim against the County could survive a motion to dismiss only if petitioner alleged sufficient facts to support a plausible inference that the municipality adopted a policy or practice of age discrimination. *See Monell*, 436 U.S. at 690-695. "Policy is made when a 'decisionmaker possess[ing]

final authority to establish municipal policy with respect to the action' issues an official proclamation, policy, or edict." *Andrews v. City of Phila.*, 895 F.2d 1469, 1480 (3d Cir. 1990) (quoting *Monell*, 436 U.S. at 690) (alternation in original). Conduct becomes custom only "when, though not authorized by law, 'such practices of state officials [are] so permanent and well-settled' as to virtually constitute law." *Id.* (quoting *Monell*, 436 U.S. at 690) (alteration in original).

The district court properly ruled that petitioner could not plausibly establish municipal liability under *Twombly*/*Iqbal* simply by identifying offending county employees, as petitioner did here. *See* Pet. App. 50a. Even after the court granted petitioner leave to amend his complaint, he still could not allege any facts to support a plausible inference that these employees were county officials adopting official policy, or that they had acted pursuant to a permanent or well-settled course of conduct. *Id.* at 50a-51a. Petitioner opposed dismissal by asserting that the employees "engaged in a campaign, [via an] unwritten policy/custom to 'rid the [DA's Office] and AC offices of older employees." Pet. 51a (citing Doc. no. 21, p. 9) (internal quotation marks omitted) (alterations in original). But the district court rightly observed that petitioner identified no paragraph in the amended complaint supporting that assertion, and the court's own review revealed no detail regarding the frequency with which alleged discriminatory conduct occurred, or whether the County had subjected others to similar treatment. *Id.* Separately, the court concluded that petitioner

could not state a § 1983 claim against the Allegheny County District Attorney because petitioner had conceded that the District Attorney was not an entity separate from Allegheny County for purposes of § 1983 under Third Circuit precedent. *Id.* at 48a.

The Third Circuit never addressed this separate and sufficient ground for dismissing petitioner's § 1983 age discrimination claims, having concluded instead that the ADEA displaced them. Because this ground provides an independent basis for affirming the judgment below, this case does not present a vehicle for addressing the question presented.

III. Additional Reasons Counsel Against Certiorari Review In This Case.

Finally, if petitioner were correct and this Court's decision in *Fitzgerald* meaningfully changed the legal test for displacing § 1983 claims, then such a change in analysis would counsel in favor of further percolation in the lower courts. Petitioner is not correct, however. The Third Circuit applied the proper legal standard and correctly determined that Congress intended the ADEA's comprehensive remedial scheme to serve as the sole remedy available to ADEA-covered workers claiming age discrimination in their employment.

A. Even If A Split Exists, Further Percolation Is Warranted In Light Of *Fitzgerald*.

If petitioner were correct that *Fitzgerald* meaningfully changed the Court's standard for review of statutory displacement of § 1983 constitutional claims, the dearth of circuit decisions

applying the relatively recent decision in *Fitzgerald* in ADEA displacement decisions would counsel strongly in favor of allowing this issue to percolate further in the circuit courts.

Aside from the Seventh and Third, only one other circuit has addressed the ADEA's impact on § 1983 equal protection claims post-*Fitzgerald*. In *Ahlmeyer v. Nevada System of Higher Education*, 555 F.3d 1051, 1060 (9th Cir. 2009), the Ninth Circuit affirmed a district court's denial of a motion to amend a complaint to assert § 1983 constitutional claims of age discrimination. That decision—issued less than one month after this Court decided *Fitzgerald*—never mentions *Fitzgerald*. Instead, relying on *Sea Clammers* and *Smith*, *Ahlmeyer* holds that the ADEA displaces § 1983 constitutional claims. *See id.* at 1058. Likewise, a handful of unpublished Ninth Circuit decisions have applied *Alhmeyer* in similar circumstances without mentioning *Fitzgerald*. *See, e.g.*, *Atkins v. Creighton Elementary Sch. Dist.*, 584 F. App'x 432 (9th Cir. 2014) (unpublished); *Cummins v. City of Yuma*, 410 F. App'x 72 (9th Cir. 2011); *Robertson v. Qadri*, 399 F. App'x 219 (9th Cir. 2010).[3]

This Court has "in many instances recognized that when frontier legal problems are presented,

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[3] In only one published opinion has the Ninth Circuit discussed *Ahlmeyer*'s holding. Even then, however, the case did not involve ADEA claims and the court made no mention of *Fitzgerald*. *See Okwu v. McKim*, 682 F.3d 841, 844-45 (9th Cir. 2012).

periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting). That principle applies with force where only three circuits have yet had occasion to consider *Fitzgerald*'s impact, only two have considered that decision, and only one has issued a binding decision. Thus, even if further percolation does not resolve the purported split on *Fitzgerald*'s impact, it would give this Court an opportunity to obtain a much broader range of views on the question now presented.

B. Like Every Court To Address The Issue, *Hildebrand* Correctly Applied This Court's Precedent.

In the end, petitioner's criticism of *Hildebrand* rests on his tortured reading of the legal standard applied in *Smith* and *Fitzgerald*. According to petitioner, *Fitzgerald* affirms what *Smith* purportedly established some thirty years earlier—that different standards govern a finding of (a) congressional intent to displace § 1983 *constitutional* claims and (b) congressional intent to displace § 1983 claims based on *statutory* rights. Pet. 12-13. Petitioner argues that, even if a statute's comprehensive remedial scheme suffices to infer Congress' intent to displace statutory claims, it is *per se* insufficient after *Smith* to do so with respect to constitutional claims. *Id.* The reason, argues petitioner, it that *Smith* demands a threshold finding that Congress enacted the statute at issue for the express purpose of enforcing a constitutional right.

Pet. 12. Only then, petitioner argues, may a court consider whether Congress intended the statute's remedial scheme to displace, not supplement, competing § 1983 constitutional claims. Even for that determination, however, the argument continues, the existence of a comprehensive legal scheme is never sufficient after *Fitzgerald* to find that Congress intended the scheme to displace § 1983 constitutional claims. Pet. 14-15.

The problem for petitioner is that neither *Smith* nor *Fitzgerald* adopts the artificial distinction he advocates. Neither decision suggests that a statute's comprehensive remedial scheme is *per se* insufficient to establish congressional intent to displace competing § 1983 constitutional claims. Nor does either decision require a threshold finding that Congress enacted that statute to vindicate constitutional rights. Absent any true circuit split, this Court need not grant certiorari simply to reaffirm what its precedents have long established.

1. *Smith* Demands No More Than The Existence Of A Comprehensive Remedial Scheme To Establish Congress' Intent To Bar § 1983 Claims.

Petitioner argues that, after *Smith*, a court may not infer congressional intent to displace competing § 1983 constitutional claims from a statute's comprehensive remedial regime. Pet. 12. A statute's remedial scheme is irrelevant, argues petitioner, absent an independent finding that Congress enacted that statute specifically to enforce the

constitutional rights asserted in § 1983 claims. *Id* at 12-15.

Nothing in *Smith* supports this tortured reading. As noted, the Court there confronted the question of whether Congress intended the EHA to displace competing § 1983 equal protection claims of discrimination in access to a free appropriate public education. The Court found that Congress had so intended, applying the same standard it adopted in *Sea Clammers* to determine whether Congress meant for legislation to displace § 1983 claims based on *statutory* rights. *See Smith*, 468 U.S. at 1010-1011. Specifically, given the EHA's "comprehensive" and "elaborate" remedial procedures, and its efforts to vest local agencies with primary responsibility for developing educational plans, the Court found "it difficult to believe that Congress also meant to leave undisturbed the ability of a handicapped child to go directly to court with an equal protection claim to a free appropriate public education." *Id.* at 1011. Permitting direct access to the courts under § 1983 would "circumvent the EHA administrative remedies," "be inconsistent with Congress' carefully tailored scheme," and "render superfluous most of the detailed procedural protections outlined in the statute." *Id.* at 1011-1013.

Smith is thus a straightforward application of the standard the Court adopted in *Sea Clammers* to determine congressional intent. The Court never implied that Congress' having enacted the EHA to remedy constitutional rights was the lynchpin of its decision. That is, the Court nowhere suggested that

it would have declined to infer from the same remedial scheme congressional intent to displace § 1983 constitutional claims had Congress not also intended the EHA to vindicate constitutional rights. To the contrary, *Smith* makes clear that, absent compelling evidence to the contrary in the legislative history, a comprehensive remedial scheme on par with the EHA will establish congressional intent to displace § 1983 constitutional claims. The thirty-year-old decision thus offers no support for petitioner's novel argument that the existence of a statute's comprehensive remedial scheme—while compelling evidence of congressional intent to displace § 1983 *statutory* claims—is *per se* insufficient to establish such intent with respect to § 1983 *constitutional* claims.

2. *Fitzgerald* Reaffirms That The Existence Of A Comprehensive Remedial Regime Is Of Paramount Importance In Determining Congress' Intent To Bar § 1983 Claims.

Nor does petitioner find support in *Fitzgerald* for his claim that a statute's comprehensive remedial scheme is *per se* insufficient to establish Congress' intent to displace § 1983 constitutional claims. Indeed, *Fitzgerald* reaffirms the paramount importance of evaluating the nature and scope of the remedial scheme in making that determination.

This Court in *Fitzgerald* had to decide whether Title IX of the Civil Rights Act displaced § 1983 constitutional claims of discrimination in education. While applying without alteration the *Sea Clammers*

and *Smith* standard, the Court now concluded that Congress had not intended Title IX to displace competing § 1983 constitutional claims. The Court reviewed its line of decisions since *Sea Clammers* and observed: "In 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." *Fitzgerald*, 555 U.S. at 253. The Court's prior cases inferred Congress' intent to displace competing § 1983 claims because "the statutes at issue required plaintiffs to comply with particular procedures and/or to exhaust particular administrative remedies prior to filing suit." *Id.* at 254. Offering plaintiffs a more direct route to court via § 1983 claims "would have circumvented these procedures and given plaintiffs access to tangible benefits—such as damages, attorney's fees, and costs—that were unavailable under the statute." *Id.*

In contrast, Title IX not only lacks notice provisions and administrative exhaustion requirements, but it also contains no express private right of action. *See id.* at 255-256. Indeed, the only express enforcement mechanism in Title IX is an administrative proceeding that may result in withdrawal of federal funding from non-complying institutions. *See id.* at 255. Title IX's remedial processes, therefore, "stand in stark contrast to the 'unusually elaborate,' 'carefully tailored,' and 'restrictive' enforcement schemes of the statutes at issue in *Sea Clammers, Smith,* and *Rancho Palos Verdes.*" *Id.* In these circumstances, "parallel and concurrent § 1983 claims will neither circumvent

required procedures, nor allow access to new remedies." *Id.* at 255-256. Also mindful that "[t]his Court has never held that an implied right of action had the effect of precluding suit under § 1983," *id.* at 256, *Fitzgerald* was unwilling on these facts to conclude that Congress had intended Title IX to preclude § 1983 claims.

Having determined that Congress had not intended Title IX to preclude § 1983 constitutional claims, the Court concluded by observing that a comparison of the substantive rights and protections under Title IX and the Equal Protection Clause "lends further support" for its conclusion. *Id.* at 256. *Fitzgerald* had earlier remarked that, "[w]here the contours of such rights and protections diverge in significant ways, it is not likely that Congress intended to displace § 1983 suits enforcing constitutional rights." *Id.* at 252-253. The existence of such significant divergence in *Fitzgerald* bolstered the Court's finding based on the absence of a comprehensive remedial scheme that Title IX did not preclude § 1983 claims. *Id.* at 258. In a similar vein, the Court found further support in the observation that Congress had modeled Title IX on a similar Title that courts uniformly read to permit competing § 1983 claims. *See id.* at 258-259. While these additional observations in "further support" bolstered the Court's conclusion that Title IX does not preclude § 1983 constitutional claims, *Fitzgerald* never mandated consideration of these or any like factors in evaluating congressional intent to displace § 1983 claims with a separate statutory scheme.

Instead, *Fitzgerald* is another decision applying without alteration the same standard that the Court has applied since *Sea Clammers* to determine congressional intent to displace § 1983 claims. *Fitzgerald* reaffirms the Court's practice of "plac[ing] primary emphasis on the nature and extent of that statute's remedial scheme." *Id.* at 253. It leaves no doubt that petitioner incorrectly reads *Smith* to condition consideration of a statute's remedial scheme on a separate finding that Congress intended a statute to enforce constitutional rights. Thus, while recognizing that *Smith* diverged from *Sea Clammers* to the extent the former involved constitutional claims, *Fitzgerald* observed: "As in *Sea Clammers*, however, this Court focused on the statute's detailed remedial scheme in concluding that Congress intended the statute to provide the sole avenue for relief." *Id.* at 253-254. *Fitzgerald* thus offers no support for the artificial distinction that petitioner suggests between the standard governing a finding of Congress' intent to preclude § 1983 constitutional claims and such intent to preclude § 1983 statutory claims. This Court need not grant certiorari to reaffirm thirty years of case law.

C. *Hildebrand* Is A Sensible Ruling That Permits Administrative Resolution Of Legitimate Age Discrimination Claims While Preventing Circumvention Of The ADEA's Remedial Regime At Substantial Cost To Public Employers.

Not only did the Third Circuit apply the correct legal standard articulated in *Smith* and *Fitzgerald* to

evaluate ADEA displacement, but its ruling with respect to the ADEA is a sensible result and is fully consistent with the decisions reached in those cases.

As the Third Circuit aptly observed, there is "no debate that the ADEA provides a comprehensive remedial scheme." Pet App. 20a. "The enforcement scheme for the [ADEA] is complex—the product of considerable attention during the legislative debates preceding passage of the Act." *Lorillard v. Pons*, 434 U.S. 575, 577-578 (1978). The carefully calibrated administrative procedures that Congress crafted—which evidence a strong preference for informal dispute resolution—provide more than adequate means to resolve age discrimination claims. For example, the ADEA's elaborate remedial scheme: (i) requires employees to promptly notify the EEOC of age discrimination claims, generally within 180 days of alleged discrimination, 29 U.S.C. § 626(d)(1)(A); (ii) mandates that the EEOC "promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion," *id.* § 626(d)(2); and (iii) prohibits the employee from filing suit during this critical 60-day period during which the EEOC works to effectuate informal dispute resolution. *Id.* § 626(d)(1). At the end of this exhaustion period, the EEOC may choose to bring suit against the employer to vindicate employee rights. *Id.* § 626(c)(1). Should the EEOC ultimately terminate litigation vindicating those rights, then the ADEA permits the employee to file suit. *Id.* § 626(e).

Were these processes not enough to establish an elaborate and comprehensive remedial scheme, the ADEA goes a step further, importing the Fair Labor Standards Act's (FLSA) equally comprehensive remedial scheme to delineate the types of relief available to aggrieved employees in a civil action under the ADEA. *Id.* § 626(b). Importing FLSA remedies with some modification gives ADEA-covered employees the right to seek (among other things) reinstatement, promotion, certain injunctive relief, reasonable attorney's fees, and other costs associated with an action. *See* 29 U.S.C. § § 216(b), 217. Congress also took care to provide ADEA litigants with the right to seek liquidated damages, while deciding to limit that right to cases of "willful" violations. 29 U.S.C. § 626(b). And for certain high-level public employees excluded from ADEA coverage under 29 U.S.C. § 630(f), Congress passed the Government Employee Rights Act of 1991, Pub. L. No. 102-166, Title III, 105 Stat. 1088, 42 U.S.C. § 2000e-16a *et seq.*, which extends the ADEA's substantive protections to these employees through an administrative process that makes the overall remedial regime for age discrimination claims still more comprehensive.

In light of these robust processes and remedies—supporting substantive rights that exceed constitutional protections—the Third Circuit was correct in finding that the ADEA establishes an elaborate and comprehensive scheme on par with those in *Sea Clammers* and *Smith*. Accordingly, it should come as no surprise that the Third Circuit joined its sister circuits in holding that the ADEA's

comprehensive scheme would be "undermined if plaintiffs could sue directly under § 1983." Pet App. 21a.

Likewise, the Third Circuit correctly concluded that ADEA limitations on the remedies available to certain workers—including a bar on punitive damages, *see* 29 U.S.C. § 626(b)—also "demonstrate[ ] congressional intent to specifically define the rights of those employees rather than to permit such employees to circumvent these limitations by filing directly under § 1983." Pet. 22a. Permitting plaintiffs to pursue certain § 1983 constitutional claims would render impotent several carefully-crafted limitations on the relief available to ADEA litigants. *See Rancho Palos Verdes*, 544 U.S. at 121, 124; *Fitzgerald*, 555 U.S. at 254-255; *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 15, 21 (1981).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

NO. 14-363

ANTHONY HILDEBRAND,

Petitioner,

v.

ALLEGHENY COUNTY AND ALLEGHENY COUNTY DISTRICT ATTORNEY'S OFFICE

Respondents.

As required by Supreme Court Rule 33.1(h) I certify that the Brief in Opposition, contains 6,628 words, excluding the parts of the Brief that are exempted by Supreme Court Rule 33.1(d)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 30, 2014.

/s/ Virginia Spencer Scott
Virginia Spencer Scott