No. 14-363

In The Supreme Court of the United States

ANTHONY HILDEBRAND,

Petitioner,

v.

ALLEGHENY COUNTY and ALLEGHENY COUNTY DISTRICT ATTORNEY'S OFFICE,

Respondents.

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

REPLY BRIEF

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I. There Is A Circuit Conflict Regarding Whether The ADEA Precludes A Section 1983 Action To Redress Unconstitutional Age-Based Discrimination

The Third Circuit decision in this case expressly recognized that it conflicts with the Seventh Circuit decision in *Levin v. Madigan*, 692 F.3d 607 (7th Cir. 2012) ("*Levin I*"). Pet.App. 15a, 16a, 18a, 19a. The Seventh Circuit decision in *Levin I* was avowedly inconsistent with earlier decisions in the Fourth, Fifth, Ninth and Tenth Circuits. 692 F.3d at 616. A series of district court decisions have recognized this circuit split. Pet. 11. Although these appellate and trial court decisions have divergent views about the merits, they agree that there is a well-established circuit conflict.

(1) Respondent asserts that "*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." Br.Opp. 11. That is incorrect. Nothing in the Seventh Circuit's analysis of the preclusion issue is "limited to," or even about, non-ADEA-covered workers. That analysis assumed that Levin was covered by the ADEA.[1]

[1] The Seventh Circuit argued that because this Court has invalidated the ADEA insofar as it authorizes actions against states, *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000), "[w]ithout the availability of a § 1983 claim, a state employee (like Levin) who suffers age discrimination in the course of his employment is left without a federal damages remedy." 692 F.3d

(Continued on following page)

The Seventh Circuit decision in *Levin I* treated the preclusion issue as posing a single question – whether the ADEA precludes section 1983 Equal Protection age discrimination claims – , not several different questions depending on whether a particular plaintiff or claim is covered or remedied by the ADEA. The Seventh Circuit explained that "the issue before us [is] whether the ADEA precludes a § 1983 equal protection claim," 692 F.3d at 615, and "conclude[d] that the ADEA is not the exclusive remedy for age discrimination in employment claims." 692 F.3d at 622. During the oral argument in *Madigan v. Levin*, *cert. dismissed,* 134 S.Ct. 2 (2014), Justice Sotomayor correctly described the decision in *Levin I*:

> [T]he Seventh Circuit held that no one is precluded from a section 1983 claim whether they're an employee or a non-employee. That's the way the case was litigated. That's the way they decided. The broad statement, whether he's an employee or not an employee ... he has [a] 1983 action.

Oral Argument 37, available at 2013 WL 5522663. Justice Scalia noted that the Seventh Circuit had decided that the ADEA does not preclude section 1983 claims by covered employees. See n.8, *supra*. That is how the Seventh Circuit decision in *Levin I* was also characterized by counsel for the state petitioner at

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at 621. That argument necessarily assumed that Levin was covered by the ADEA, and would thus be affected by *Kimel*.

oral argument in this Court[2] and by counsel for the state on remand in *Levin.*[3]

The brief in opposition illustrates the well-developed nature of the circuit split. Respondents argue that under *Smith v. Robinson,* 468 U.S. 992 (1984) and *Fitzgerald v. Barnstable School Committee,* 555 U.S. 246 (2009), the mere existence of a comprehensive statutory remedial scheme would bar section 1983 action to enforce a constitutional right, as it usually would bar a section 1983 action to enforce a statute. Br.Opp. 20-28 (citing *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n,* 453 U.S. 1 (1981)). That very argument is the linchpin of the Third Circuit decision below. Pet.App. 10-21. But the Seventh Circuit in *Levin I* emphatically rejected this approach. 692 F.3d at 611-21.

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[2] Oral Argument, 20 ("MR. SCODRO: ... [T]he Seventh Circuit ... pronounced a rule that was indifferent as between appointees and employees.").

[3] Defendants' Response to Plaintiff's Status Report, *Levin v. Madigan*, available at 2014 WL 1030446 ("[T]he appellate court ... held that the ADEA did not displace the § 1983 remedy for any individuals, whether or not they were 'employees' under the statute. *See* [692 F.3d] at 621-22.... [T]he appellate court's broad holding regarding ADEA displacement made no distinction between covered and exempted individuals."); Defendants-Appellants' Response to Plaintiff-Appellee's Motion to Dismiss Appeal for Lack of Jurisdiction or for Summary Affirmance, No. 14-2244 (7th Cir.), 9 (noting the "broad ruling from this Court in *Levin I* that the ADEA did not displace a § 1983 age discrimination claim for both employees under that statute and non-employees.").

"For the preclusion of *constitutional* claims, we believe more is required than a comprehensive remedial scheme." 692 F.3d at 618 (emphasis in original). "[E]ven though the ADEA is a comprehensive remedial scheme, ... we cannot say that the ADEA's scheme alone is enough to preclude § 1983 constitutional claims." 692 F.3d at 618. Respondents do not contend that the ADEA meets the more demanding standard applied to section 1983 constitutional claims by the Seventh Circuit in *Levin I*.

Respondents suggest that the subsequent Seventh Circuit in *Levin v. Madigan,* 2014 WL 6736999 (7th Cir. Sept. 30, 2014) ("*Levin II*"), "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." Br.Opp. 14 n.2 (emphasis added). To the contrary, in *Levin II* the Seventh Circuit clearly described the preclusion holding in *Levin I*. "The first appeal ... included the argument that age discrimination claims brought under 42 U.S.C. § 1983 are preempted by the Age Discrimination in Employment Act. This court rejected that preemption argument...." *Levin II*, 2014 WL 6736999 at *1. Respondents also assert that in *Levin II* the Seventh Circuit indicated that *Levin I* had no bearing on whether the ADEA precluded a section 1983 action of a *covered* employee.

> [W]hen 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.

Br.Opp. 14 n.2 (emphasis added). The phrase "declined to hold" suggests that *Levin II* actually analyzed the defendant's new preclusion contention, and in doing so rejected an argument that *Levin I* applied to covered employees. But in fact *Levin II* simply never reached the preclusion issue; the Seventh Circuit merely rejected qualified immunity. "This court already has ruled ... that the appellants are not entitled to qualified immunity, regardless of the preemption question.... [G]iven the court's earlier ruling on qualified immunity, we need not address preemption in this appeal." *Levin II,* 2014 WL 6736999 at *1. The defendants-appellants in *Levin II* agreed that *Levin I* applied to ADEA-covered employees. See n.3, *supra.*

(2) Respondents argue in the alternative that in *Levin I* the Seventh Circuit *should not* have decided whether the ADEA precludes section 1983 Equal Protection actions by ADEA-covered employees. None of the various iterations of this argument are persuasive.

The Seventh Circuit decision does not contain distinct analyses and holdings dealing separately

with section 1983 actions by ADEA-covered and non-ADEA-covered workers. The analysis in *Levin I* of this Court's decisions in the *Sea Clammers* and *Robinson* line of cases was equally applicable to both groups of potential plaintiffs. The Seventh Circuit was not obligated to look for some alternative ground that applied only to one group or the other.

It is assuredly not the case, as respondents suggest, that the "facts" in *Levin I* involved a non-covered employee. To the contrary, at the time of *Levin I* the parties were embroiled in a protracted legal dispute about whether Levin was covered by the ADEA. In 2008 a district court decision in the *Levin* litigation held that Levin was covered. *Levin v. Madigan*, 2008 WL 4286668 at *2-*5 (N.D.Ill. Sept. 12, 2008). Three years later another district court decision in that case concluded that Levin was not covered. *Levin v. Madigan,* 2011 WL 2708341 at *9-*11 (N.D.Ill. July 12, 2011). The appeal in *Levin I* was limited to whether the defendants were entitled to qualified immunity; the coverage issue was not before the Seventh Circuit.

Respondents imply that the Seventh Circuit in *Levin I* resolved the dispute about whether Levin was covered by the ADEA. That is not so. Respondents assert that "the Seventh Circuit noted in describing the procedural background of the case, [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)." Br.Opp. 11. But the quoted passage from *Levin I* is not a holding by the appellate

court regarding Levin's status, but only a description of the 2011 district court opinion. The Seventh Circuit did not "note[ ] ... that Levin was 'not an "employee"'"; rather, it noted that "[District] Judge Chang [in 2011] determined that Levin is not an 'employee'...." 692 F.3d at 610.

Respondents insist that "[t]he Seventh Circuit never addressed, let alone reversed, the district court's finding that Levin was not covered by the ADEA." Br.Opp. 11. But the Seventh Circuit failed to "reverse[ ]" the 2011 district court conclusion because the appellate court's limited jurisdiction over the qualified immunity appeal did not include the coverage issue.

Respondents assert that it is "clear that the Seventh Circuit was not *asked* to decide whether an ADEA-covered employee may bring an age discrimination suit under § 1983." Br.Opp. 10 (emphasis added and omitted). That is not correct. The defendants in *Levin* urged the Seventh Circuit to broadly hold that the ADEA bars section 1983 Equal Protection claims. Their argument that was never limited to any particular group of workers,[4] and their

[4] Brief of Defendants-Appellants, *Levin v. Madigan,* No. 11-2820 (7th Cir.), 13 ("the ADEA's comprehensive remedial scheme forecloses constitutional claims by state or local employees for age discrimination in employment under § 1983."), 16, 17; Reply Brief of Defendants-Appellants, *Levin v. Madigan,* No. 11-2820 (7th Cir.), 7 ("the ADEA displaces § 1983 claims by state and local employees for violations of the Equal Protection Clause based on age"), 8.

brief did not even mention the dispute regarding whether Levin himself was covered by the ADEA. The defendants repeatedly argued in *Levin I* that if section 1983 actions were not precluded, employees could "circumvent," "avoid," and "evade" the ADEA administrative scheme,[5] an argument that was only applicable to ADEA-covered employees. Similarly, Levin urged the Seventh Circuit to hold that the ADEA does not preclude section 1983 claims, a contention that was not limited to or directed at any particular group of potential plaintiffs.[6] As counsel for the petitioners in *Madigan v. Levin* correctly explained to this Court during the oral argument, "the Seventh Circuit was asked to announce a rule that is indifferent as to employees and appointees." Oral Argument, 20.[7]

(3) In this Court the problem which led to the dismissal of the writ in *Madigan v. Levin* arose because of the particular manner in which the petitioners framed the Question Presented.

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[5] Brief of Defendants-Appellants, 12, 20, 22, 23.

[6] Brief of Plaintiff, Appellee, Harvey Levin, 37, available at 2012 WL 6763830; see Reply Brief for Petitioners, *Madigan v. Levin*, 2 ("Respondent never argued below that [if he is not covered by the ADEA] his § 1983 claim survives even if an employee's would not.").

[7] In the *Madigan* litigation, the parties used the term "employee" to refer to covered individuals and "appointee" to refer to certain non-covered workers. Section 630(f) of the ADEA defines "employee" (the persons covered by the Act) to exclude certain appointees. 29 U.S.C. § 630(f).

Although the Seventh Circuit in *Levin I* had broadly held (without limitation as to any particular type of worker) that the ADEA does not preclude section 1983 actions, the petition in *Madigan* set out a Question Presented that was limited to workers who actually are covered by the ADEA.

> Whether the Seventh Circuit erred in holding ... 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.

Pet., i (emphasis added). Only ADEA-covered workers could be said to "avoid" the ADEA remedial scheme by filing a section 1983 action.

Petitioners' merits brief, however, proceeded on the assumption that Levin was not covered by the ADEA at all. Brief for Petitioners, 37. Respondent in turn acknowledged that the 2011 district court decision in that case had held that Levin was not covered by the ADEA; in a deliberately phrased statement, respondent observed: "There is no realistic possibility that this determination will be overturned on appeal." Brief for Respondent, 9. In reply, petitioners did not argue that there was a significant chance that the Seventh Circuit might at some point in the future hold that Levin was covered by the ADEA. Instead, they contended that the ADEA precludes section 1983 claims by non-covered workers. Reply

Brief for Petitioners, 3. But the Question Presented was not about non-covered workers.

At oral argument in *Madigan*, the posture of the case became even more complicated. Counsel for respondent reiterated that there was not a "realistic possibility" the Seventh Circuit would hold Levin was covered by the ADEA, but repeatedly balked when asked to formally stipulate that Levin was not covered. Oral Argument 26-29, 37-38. Counsel for petitioners at first argued that the ADEA precluded section 1983 actions by even non-covered workers, *id.* at 16, but later appeared to say the opposite. *Id.* at 49. The Court subsequently dismissed the writ as improvidently granted. 134 S.Ct. 2 (2013).

This regrettable series of developments did not alter the meaning or significance of the Seventh Circuit decision in *Levin I* or the conflict that it created.[8]

II. The Question Presented Is Ripe for Review by This Court

When this Court granted review in *Madigan v. Levin*, the question at issue had been addressed by

[8] Oral Argument, 41-42: "JUSTICE SCALIA: ... [W]e're asked to review a holding by the Seventh Circuit that even if ... you're not exempt, you still have a 1983 claim. That's – that's why we took this case. And now you're – you're telling us we should not review what the Seventh Circuit held. And that would presumably remain the circuit law, right? MR. THEOBALD: Yes, Your Honor."

the Fourth, Fifth, Seventh, Ninth and Tenth Circuits. The question presented has now also been considered at length by the Third Circuit. The legal issues involved have been well vetted by the lower courts, and the question is ripe for decision by this Court.

Respondents suggest that review be deferred to permit the lower courts to further debate the significance of this Court's 2009 decision in *Fitzgerald*. Br.Opp. 17. But we emphatically did not contend (and respondents do not contend) that the decision in *Fitzgerald changed* the governing standard. To the contrary, the petition makes abundantly clear that *Fitzgerald* merely applied the same standard utilized in the 1984 decision in *Smith v. Robinson*. Pet. 13-21. Respondents themselves acknowledge that petitioner's "criticism of *Hildebrand* rests on his ... reading of *the* legal standard applied in *Smith* and *Fitzgerald*." Br.Opp. 19 (emphasis added). The Seventh Circuit in *Levin I* relied on this Court's decisions in *Robinson* and in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), as well as on *Fitzgerald*. 692 F.3d at 612-19.

Further delay was not warranted when this Court granted review almost two years ago in *Madigan v. Levin*, and it would make even less sense today. It is unlikely that other lower courts will add significantly to the detailed and well-reasoned conflicting decisions of the Third Circuit in the instant case and of the Seventh Circuit in *Levin I*. Respondents do not suggest that further consideration of the 2009 decision in *Fitzgerald* is going to eliminate the conflict by prompting the Third, Fourth, Fifth, Ninth and Tenth

Circuits to all abandon their well-established holdings that the ADEA precludes section 1983 Equal Protection claims for age discrimination. The controlling issue in the lower courts has been a disagreement about the relationship between the *Sea Clammers* line of cases and the *Smith* line of cases; additional lower court commentary about the meaning of this Court's past decisions will not enhance this Court's ability to resolve the question presented.

III. This Case Presents An Excellent Vehicle for Resolving The Question Presented

This case presents an ideal vehicle for deciding the question presented. There has never been any dispute that petitioner is an employee covered by the ADEA. The decision of the Third Circuit rests solely on its holding – contrary to the Seventh Circuit decision in *Levin I* – that the ADEA precludes any section 1983 Equal Protection action for age discrimination.

Respondents argue that, even if the Third Circuit decision is overturned, they may ultimately prevail on other grounds. They contend that the complaint in this case lacks sufficient allegations to establish liability under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978). Br.Opp. 15-17. But that proffered defense, as respondents acknowledge, is "an independent, alternative" issue (Br.Opp. 15), in no way related to the preclusion question. "The Third Circuit never addressed this separate [ground]"

(Br.Opp. 17), and respondents do not suggest that this Court itself should consider that issue. If petitioner prevails in this Court on the question of whether the ADEA precludes his section 1983 claim, respondents would be free on remand to advance this defense.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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