No. 12-872

IN THE

Supreme Court of the United States

LISA MADIGAN, 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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

When Congress applied the Age Discrimination in Employment Act, 29 U.S.C. §621, *et seq.* (ADEA) to public employers in 1974, did Congress intend to preclude Constitutional Equal Protection age discrimination claims?

PARTIES TO THE PROCEEDINGS

Petitioners Lisa Madigan, Ann Spillane, Alan Rosen, Roger Flahaven, and Deborah Hagan are defendants-appellants in the court below. Respondent Harvey Levin is the plaintiff-appellee in the court below.

TABLE OF CONTENTS

Table of Contents

Page

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Page

Page

Page

Page

Page

Page

STATUTES AND OTHER AUTHORITIES

Cited Authorities

OPINIONS BELOW

The opinion of the Seventh Circuit court of appeals is reported at 692 F.3d 607 (7th Cir. 2012) and reproduced at Pet. App.1a-37a. The decision of district court Judge Edmond Chang denying petitioners' ADEA preclusion argument and denying qualified immunity is not reported but reproduced at Pet. App 38a-102a. The earlier district court opinion of Judge David Coar granting qualified immunity is reported at 697 F. Supp. 2d 958 (N.D. Ill. 2010) and reproduced at Pet. App.103a-141a. The Seventh Circuit held that Congress did not intend the ADEA to preclude Equal Protection age discrimination claims, thus Respondent was authorized to bring this action under the Equal Protection Clause by and through 42 U.S.C. § 1983. Pet. App. 34a. The Seventh Circuit, citing *Kimel v. Florida Bd. Of Regents,* 528 U.S. 62, 83 (2000), held Mr. Levin's §1983 Equal Protection age discrimination claim was clearly established and petitioners-defendants were not entitled to qualified immunity. Pet. App. 36a-37a.

COUNTER-STATEMENT OF FACTS

Plaintiff-Respondent, Harvey Levin, is male and is now 67 years old. On September 5, 2000, the Illinois Attorney General hired respondent as an Assistant Attorney General. In 2002, the respondent was promoted to Senior Assistant Attorney General. Pet. App. 3a.

Throughout the years that respondent was in the Office of the Attorney General his job performance consistently met or exceeded his employer's job expectations. Specifically, respondent was consistently evaluated as "meets expectations" or "exceeds expectations," in all categories of his written performance reviews. In his

performance evaluations, respondent Harvey Levin was described as "a top rate experienced litigator" who was "of great help to all in the Bureau." ....Levin exhibited "outstanding performance on the executive committees of the Firestone . . . multi state cases." .... "Excellent attorney who is always willing to assist others in the Bureau." Pet. App. 3a, 44a-45a.

On May 12, 2006, petitioners Illinois Attorney General, Lisa Madigan and Ann Spillane, Chief of Staff, knowingly instructed co-petitioners Alan Rosen and Roger Flahaven, to meet with respondent Harvey Levin and intentionally terminate Mr. Levin's employment and two other males over the age of 50 years old in Mr. Levin's bureau. (D.C.R[1].16) On May 12, 2006, petitioners Alan Rosen and Roger Flahaven summoned respondent, and without explanation, intentionally terminated respondent, Harvey Levin, at the urging of petitioners Madigan, Spillane and Deborah Hagan. Respondent Levin was 61 years old at the time. (D.C.R.16)

Petitioners did not terminate the employment of similarly situated substantially younger female employees whose work performance was inferior, and knowingly hired a substantially younger female to replace respondent and hired substantially younger individuals to replace the other two males in respondent's bureau who were discharged. As a result of petitioners' intentional discriminatory conduct, respondent suffered damages. (D.C.R.16)

Respondent timely filed age and sex discrimination charges with the EEOC and exhausted administrative remedies required by Title VII, 42 U.S.C. Sec. 2000e-2 *et*

1. District Court Record hereinafter "D.C.R."

seq., and the ADEA. Respondent's four count complaint consisted of a count under the ADEA, a count under Title VII, and two counts under the Equal Protection Clause of the Fourteenth Amendment of age and sex discrimination by §1983. (D.C.R.1,16).

PROCEDURAL HISTORY

On November 26, 2007, petitioners filed motions to dismiss claiming, *inter alia*, qualified immunity on the age and sex discrimination claims under the Equal Protection clause. Pet. App. 4a.

On March 10, 2010, district court Judge David Coar denied petitioners' motions to dismiss and denied petitioners' claims of qualified immunity to respondent's Equal Protection sex discrimination claim, and also denied petitioners' claim that Congress, in 1974 applying the ADEA to the public sector, intended to preclude all §1983 Equal Protection age discrimination actions. However, Judge Coar erroneously granted qualified immunity on respondent's §1983 age discrimination claim based upon the lack of unanimity of decisions on petitioners' preclusion argument. Pet. App. 5a.

On July 12, 2011, district court Judge Edmond E. Chang revisited and reversed retired Judge Coar's March 10, 2010 order granting qualified immunity. Judge Chang dismissed respondent's statutory claims under Title VII and the ADEA and held that respondent was on the "policy-making level" and therefore "exempt." [2] Pet. App. 5a-7a.

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2. The exemptions from Title VII, 42 U.S.C. § 2000 e(f) and the ADEA, 29 U.S.C. § 630(f) are identical.

On July 12, 2011, District Court Judge Edmond Chang denied summary judgment on respondent's §1983 Equal Protection claims for damages for sex and age discrimination. Judge Chang held that respondent presented sufficient evidence that he was performing his job satisfactorily to support an inference that petitioners did not honestly believe that his performance was deficient. This created a causal link between the Constitutional violations of sex and age discrimination in violation of the Equal Protection Clause. Thus, petitioners were not entitled to qualified immunity in that petitioners' conduct in terminating respondent's employment on May 12, 2006 violated clearly established Constitutional rights to be free from intentional sex and age discrimination of which a reasonable person would have known. Pet. App. 68a-102a.

Petitioners filed a piece-meal appeal of the district court's denial of qualified immunity on respondent's Equal Protection age discrimination claim but not on the denial of qualified immunity on respondent's Equal Protection sex discrimination claim. Pet. App. 2a.

Notwithstanding the outcome of this petition, respondent's remaining Equal Protection claim of sex discrimination will go to trial, and all claims of age discrimination for injunctive relief under the Equal Protection clause by and through §1983 against all petitioners-defendants and the Office of the Illinois Attorney General and Lisa Madigan, in her official capacity. (D.C.R. 268-269, 302) The jury trial in this case is scheduled for May 6, 2013 before district court Judge Edmond Chang, and the petitioners have not sought a stay. (D.C.R.302)

REASONS FOR DENYING THE PETITION

INTRODUCTION

Review is not warranted as the answer to the "question presented" is found in two Supreme Court decisions. In *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246 (2009), this Court held that in cases in which the §1983 claim alleges an independent Constitutional Equal Protection violation, and where the contours of such rights and protections diverge in significant ways from statutory rights, it is not likely that Congress intended to preclude §1983 suits enforcing constitutional rights. In *Kimel v. Florida Bd. Of Regents*, 528 U.S. 62 (2000), this Court held that the ADEA, 29 U.S.C. §621, et. seq. is not responsive to, or designed to prevent, unconstitutional behavior based upon age discrimination.

The Seventh Circuit affirmed the district court's judgment that when Congress applied the ADEA to public employment in 1974, it did not intend to preclude §1983 Equal Protection age discrimination claims. It was clearly established that the *Equal Protection Clause of the Fourteenth Amendment* forbids arbitrary age discrimination, *see Kimel v. Fla. Bd. Of Regents,* 528 U.S. 62, 83-84 (2000), and thus, qualified immunity did not apply, and Mr. Levin had established a genuine issue of material fact such that his §1983 age discrimination claim shall proceed to trial. Pet. App. 1a-37a. Pursuant to Seventh Circuit Rule 40 (e), the opinion was circulated before release to all active judges, with no judge favoring a hearing en banc. Pet. App. 23a. Petitioners now seek review of this unanimous judgment of the Seventh Circuit.

Petitioners do not raise a frequently recurring question nor is there a "growing" nationwide split in authority whether Congress in 1974 intended to eliminate §1983 Equal Protection age discrimination claims when Congress applied the ADEA to public employment.

For more than 35 years, courts in the Seventh Circuit have consistently held that §1983 Equal Protection claims of intentional age discrimination in employment stated a clearly established Constitutional right. Likewise, this Court has consistently declined to find that Congress enacting twentieth century civil rights statutes, such as the ADEA, intended to precluded §1983 claims based on Constitutional violations, such as here, age discrimination in violation of the Equal Protection Clause. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975) (Title VII and §1981); *Runyon v. McCrary*, 427 U.S. 160 (1976) (Title II and §1981); *Guardians Association v. Civil Service Commission*, 463 U.S. 582 (1983) (Title VI and §1983); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989)(Title VII and §1981). This Court's decisions in *Kimel v. Fla. Bd. Of Regents, supra,* and *Fitzgerald v. Barnstable School Committee,* 555 U.S. 246 (2009), are clear authority for lower courts that Congress in 1974 did not intend to preclude §1983 age discrimination Equal Protection claims.

The circuits holding that the ADEA precluded §1983 age discrimination actions based upon the Equal Protection Clause are decades old decisions, and distinguishable, as they did not examine Congressional intent in 1974 or predated this Court's decision in *Kimel v. Florida Bd. Of Regents, supra.* or overlooked *Fitzgerald v. Barnstable Sch. Comm.*, *supra*., and thus, are discredited.

Petitioners have presented no compelling reasons why a Writ of Certiorari (Petition) should be granted. Sup. Ct. R. 10. Specifically, petitioners have failed to demonstrate that the Seventh Circuit's opinion conflicts with a decision of this Court. There is not a substantial wide, deep, and persistent conflict among the Circuits, as the Seventh Circuit decision adhered to this Court's decisions in *Kimel* and *Fitzgerald*, and disagreed with petitioners' decades old faulty consensus view, and that disagreement does not warrant review.

This case is also a poor vehicle for certiorari because petitioners would receive little benefit. They have not appealed the sex discrimination claim. Regardless of the outcome of this petition for certiorari, this case will go to trial. No one can be sure of the outcome of the trial and, thus, petitioners now seek interlocutory review of a question that might be unnecessary after the case proceeds to final judgment. Given the benefits of further litigation in the lower courts and the absence of need for immediate review (especially where the decision below correctly followed this Court's decisions), this Court should deny the petition and permit the case to be litigated to final judgment on May 6, 2013. Accordingly, this case does not warrant review by this Court, and the Petition should be denied.

A. Congress Passed §1983 to Enforce the Fourteenth Amendment

In 1868, the Fourteenth Amendment was ratified by the states and in 1871, §1983 was enacted to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes.

This Court has recognized that §1983 was enacted as an exercise of Congress' authority under § 5 of the Fourteenth Amendment to enforce the Amendment's provisions. *See Monroe v. Pape*, 365 U.S. 167, 171 (1961). Since then, the statute has served as a mechanism for vindicating the Fourteenth Amendment's core guarantees, in particular, the guarantee of Equal Protection of the law and freedom from discrimination under color of state law. *See Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

Section 1983's application is guided by the strong presumption that later-enacted statutes do not preclude relief previously available under §1983. This approach also governed the assessment of twentieth century civil rights statutes, which generally have not displaced the rights or remedies provided by their nineteenth-century precursors. The premise underlying §1983 is that Constitutional rights must be enforceable, even where other sources of law also offer protection, and even where protections overlap. *See Monroe*, 365 U.S. at 172-74.

Section 1983 has long been recognized to provide a remedy in the federal courts *supplementary* to any remedy any State might have. *See McNeese v. Bd. of Educ. for Cmty. Unit Sch. Dist.187*, 373 U.S. 668, 672 (1963)(challenge to segregated schools in Illinois). Here, there is no indication that Congress intended for this Constitutional remedy to disappear wherever another remedy is available.

Twentieth century federal anti-discrimination statutes such as Title VII, 42 U.S.C. §2000(e), *et seq.*, Title IX, 42 U.S.C. §1681, *et seq.*, the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*, and the Age Discrimination In Employment Act, 29 U.S.C. §621, *et seq.*

require complaints to be initiated at the EEOC, whereas, Equal Protection claims under §1983 may be filed directly in court. *See Randolph v. IMBS, Inc.*, 368 F.3d 726, 730-732 (7th Cir. 2004).

These differences in administrative exhaustion have led to government employers' contentions that in enacting twentieth century civil rights statutes, Congress intended to preclude Constitutional claims brought through §1983 as they may occupy the same ground. However, the Seventh Circuit held, "*arguments of that kind have never succeeded*," which have been reinforced by this Court's holdings that both old and newer civil rights actions may be enforced according to their terms, despite substantial differences. (emphasis added) *See Randolph v. IMBS, Inc.*, 368 F.3d at 732 citing *Johnson v. Railway Express Agency, Inc.*, *supra. Runyon v. McCrary*, *supra.; Guardians Association v. Civil Service Commission*, *supra.*; *Patterson v. McLean Credit Union*, *supra.*

Moreover, the propriety of permitting respondent's parallel claims is bolstered by this Court's precedent disfavoring repeals by implication. *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987). There must be "irreconcilable conflict" between two statutes in order to find that the later statute precluded the earlier one. *Branch v. Smith,* 538 U.S. 254, 273, (2003); *St. Martin Evangelical Lutheran Church v. South Dakota,* 451 U.S. 772, 788, (1981). "Evidence of congressional intent [to preclude] must be both *unequivocal and textual*." *Dellmuth v. Muth,* 491 U.S. 223, 228 (1989) (emphasis added). Congress knows how to limit statutes when it wishes to do so. "When that is Congress' purpose, it makes its intention clear by using language that makes express exceptions from those statutes or expressly permits the

making of distinctions those statutes would otherwise prohibit." *See Miller v. Clinton*, 687 F.3d 1332, 1339 (D.C. Circuit, 2012).

Where, as here, two remedies are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intent to the contrary, to regard each as effective. *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1017, (1984); *Morton v. Mancari,* 417 U.S. 535, 551 (1974). Here, the rights and contours of the ADEA and the Equal Protection Clause are not irreconcilable, but complementary methods of fighting age discrimination. No review by this Court is warranted.

B. The Seventh Circuit Decision Presents a Thorough and Compelling Rationale for its Holding, and is Not in Conflict With This Court

1. The Seventh Circuit Correctly Applied This Court's Decision in *Fitzgerald v. Barnstable Sch. Comm.*

The Seventh Circuit's decision applied a correct and straight forward end to any inquiries whether in 1974 Congress intended the ADEA to preclude §1983 Equal Protection age discrimination claims. Pet. App. 1a-37a. In determining whether a §1983 Equal Protection claim was precluded, the Seventh Circuit held that the most important consideration in determining preclusion depended on congressional intent. The Seventh Circuit followed this Court's decisions that hold Congressional intent may be inferred from the language of the statute and legislative history, citing *Smith v. Robinson,* 468 U.S. 992, 1009 (1984), the statute's context, *Rancho Palos*

Verdes, Cal v. Abrams, 544 U.S. 113, 127 (2005) (Breyer, J., concurring), the nature and extent of the remedial scheme, *Middlesex Cnty. Sewerage Auth. V. Nat'l Sea Clammers Ass'n,* 453 U.S. 1, 20 (1981), and a comparison of the rights afforded by the statutory scheme versus a § 1983 claim, *Fitzgerald v. Barnstable Sch. Comm.,* 555 U.S. at 252. Pet. App. 17a.

2. It is Counterintuitive to Believe That in 1974 Congress Intended to Bar Constitutional Equal Protection Age Claims as There is No Support for Preclusion in the ADEA Text and Legislative History

The Seventh Circuit examined the text and the legislative history of the ADEA to hold that Congress did not intend to preclude Constitutional Equal Protection age discrimination claims. Pet. App.23a-32a. Unbelievably, petitioners argue at page 18 of their Petition that the Seventh Circuit "required something more" than the usual analysis used to determine preclusion. Remarkably, petitioners argue that omission of any Congressional statement of intent and the lack of reference or mention of the Constitution, or to §1983, or to the Equal Protection Clause, or to the ADEA being the exclusive means to challenge age discrimination in employment, actually or "really" means that Congress intended the opposite: that enacting the ADEA was meant to preclude Constitutional Equal Protection age discrimination claims. However, petitioners have misinterpreted "sounds of silence."

In cases where this Court found preclusion, "silence" was not the basis. Rather, express Congressional intent to preclude was clearly expressed. This Court in *Smith*

v. Robinson, 468 U.S. 992 (1984), held that petitioners who had prevailed on claims under the Education of the Handicapped Act ("EHA"), 20 U.S.C. § 1400 *et seq.*, could not obtain attorneys' fees pursuant to 42 U.S.C. §1988 on claims advanced through §1983. *Id.* This Court examined the EHA's text and legislative history, which stated that Congress intended for the statutory framework to "provide assistance to the States in carrying out their responsibilities *under . . . the Constitution of the United States to provide Equal Protection of the laws*." *Smith*, 468 U.S. at 1010. (emphasis added). Unlike *Smith*, the ADEA contains no clear express statement that it was intended to bar §1983 Equal Protection claims. Pet. App. 11a-12a, 26a-27a.

Likewise, in *Preiser v. Rodriguez,* 411 U.S. 475 (1973), this Court held that state prisoners could not assert claims through §1983 because Congress had enacted the federal *habeas corpus* statute, 28 U.S.C. §2254, which specifically referred to the Constitution and provided a remedy to challenge inmates' custodial status "*in violation of the Constitution…" Id.* (emphasis added).

The Seventh Circuit noted in both *Smith and Preiser,* "the statutes at issue were specifically designed to address Constitutional issues." Pet. App. 26a. However, in contrast to the statutes at issue in *Preiser* and in *Smith*, the ADEA does not provide a remedy for a violation of Constitutional rights. "Instead, it provides a mechanism to enforce only the substantive rights created by the ADEA itself." *See Zombro v. Baltimore City Police Dept.*, 868 F.2d 1364, 1373 (4th Cir. 1989)(Murnaghan, J., concurring in part and dissenting in part). Pet. App. 27a. The Seventh Circuit held that *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n,* 453 U.S. 1,

20 (1981) and *Rancho Palos Verdes, Cal v. Abrams,* 544 U.S. 113, 127 (2005) differ from *Smith,* as those cases were tasked with determining whether §1983 actions to enforce statutory claims were precluded by that statute's own comprehensive scheme. Pet. App. 28a. Simply put, the existence of a comprehensive remedial scheme in the ADEA would preclude a suit only if the §1983 claim was only based on the statutory provisions created by the ADEA. *See Zombro,* 868 F.2d at 1372; *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n,* 453 U.S. at 20. Here, respondent's age discrimination claim is based upon a right independent of the ADEA – the Equal Protection Clause.

It is counterintuitive to believe that in 1974, Congress intended to prohibit the historic use of § 1983 to vindicate Constitutional wrongdoing by enacting the ADEA since there is nothing in the text of the ADEA which expressly precludes a §1983 claim or even addresses Constitutional rights. *Zombro,* 868 F.2d at 1374. There is no evidentiary support in the legislative record for the argument that Congress in 1974 intended to abolish clearly established rights for violations of the Equal Protection Clause by enacting legislation that greatly expanded civil rights to public employees based on their age. Pet. App. 23-34a.

This is especially so, considering this Court's decision in *Kimel v. Florida Bd. Of Regents,* 528 U.S. 62 (2000) which squarely addressed this issue and held that the ADEA and the Fourteenth Amendment's Equal Protection Clause diverge in very significant ways:

> "We have considered claims of unconstitutional age discrimination under the Equal Protection Clause three times." *See Gregory v. Ashcroft,*

> 501 U.S. 452 (1991); *Vance v. Bradley,* 440 U.S. 93 (1979); *Massachusetts Bd. Of Retirement v. Murgia,* 427 U.S. 307 (1976). *Kimel v. Florida Bd. Of Regents,* 528 U.S. at 83.
>
> States may discriminate on the basis of age without offending the *Fourteenth Amendment* if the age classification in question is rationally related to a legitimate state interest." *Kimel v. Florida Bd. Of Regents,* 528 U.S. at 83.
>
> Petitioners' reliance on the "bona fide occupational qualification" (BFOQ) defense [in the ADEA] is misplaced. … *Western Air Lines, Inc.* v. *Criswell,* 472 U.S. 400 (1985), conclusively demonstrates that the defense is a far cry from the rational basis standard *we apply to age discrimination under the Equal Protection Clause. Kimel v. Florida Bd. Of Regents,* 528 U.S. at 86. (emphasis added)
>
> Judged against the backdrop of our Equal Protection jurisprudence, it is clear that the ADEA is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Kimel v. Florida Bd. Of Regents,* 528 U.S. at 86.

The ADEA is not responsive to the Constitution and it cannot supersede the Equal Protection clause. There is no support in the statutory text or the legislative history that support the proposition that the ADEA precludes a §1983 Equal Protection claim for age discrimination. Pet. App.

23a-31a. This explains why petitioners attempt to skip over the text and legislative history of the ADEA and jump straight to its "remedial scheme." However, petitioners' argument that the Seventh Circuit erred when the court examined the actual text and legislative history is without merit and contrary to this Court's jurisprudence.

3. Rights and Protections Between the ADEA and Equal Protection Clause Demonstrate Complementary Methods of Challenging Age Discrimination In Public Employment

Petitioners are wrong in suggesting that the Seventh Circuit misread this Court's decision in *Fitzgerald v. Barnstable Sch. Comm.* This Court held that the analysis of congressional intent to preclude a §1983 claim only enforcing a statutory right is far different from the analysis of Congressional intent to preclude a §1983 claim enforcing the Fourteenth Amendment right to Equal Protection. *Fitzgerald v. Barnstable Sch. Comm.*, supra., 555 U.S. at 259. (Title IX did not preclude §1983 Equal Protection claim). As the Seventh Circuit stated, "[g]iven the absence of any clear or manifest congressional intent in either the language of the statute or the legislative history, *Fitzgerald* directs us to compare the rights and protections afforded by the statute and the Constitution. 555 U.S. at 252." Pet. App. 32a.

Significantly, a review of the ADEA and Section 1983 claims of age discrimination through the Equal Protection Clause provide further evidence that there are complementary methods of fighting age discrimination in employment. The Equal Protection Clause by §1983 provides

rights and protections to all public sector employees, whereas the ADEA provides no rights and no protections to substantial numbers of public sector employees, and some entire offices are exempt from the protections of both Title VII and the ADEA. *Heck v. City of Freeport*, 985 F. 2d 305, 309 (7th Cir. 1993)(exemptions from protection in political patronage cases identical to exemptions from Title VII and ADEA protections); *Americanos v. Carter*, 74 F.3d 138, 141 (7th Cir. 1996)(Indiana Assistant Attorneys General exempt from Title VII and the ADEA); *Upton v. Thompson*, 930 F.2d 1209, 1215 (7th Cir. 1991) and *Dimmig v. Wahl,* 983 F.2d 86 (7th Cir. 1993)(deputy sheriffs exempt); *Livas v. Petka*, 711 F.2d 798, 801 (7th Cir. 1983) and *Opp v. Office of the State's Attorney of Cook Cnty.*, 630 F.3d 616, 619 (7th Cir. 2010)(State's Attorneys); *Hernandez v. O'Malley,* 98 F.3d 293, 294-296 (7th Cir. 1996)(stenographers exempt). Significantly, this Court in *Fitzgerald,* held there was no Congressional intent to preclude §1983 Equal Protection sex discrimination claims brought by persons exempt from Title IX. *Id.* at 257.

Further rights and protections that are divergent between the Equal Protection Clause and the ADEA are found in: (a) public sector state employees age claims under the ADEA are barred by the *Eleventh Amendment,* whereas all public sector employees, including all "State" employees may pursue age discrimination claims under §1983 and the Equal Protection Clause, *Kimel,* 528 U.S. at 91-92; *Owen v. City of Independence, Mo.,* 445 U.S. 622 (1980); (b) the Equal Protection Clause by §1983 imposes liability on the individuals responsible for the unconstitutional conduct, whereas the ADEA imposes liability upon the employer; (c) a §1983 plaintiff may sue the governmental entity if he or she can demonstrate that the Constitutional violation was

caused by (1) a municipal policy; (2) a widespread custom, or (3) a decision-maker with policymaking authority; (d) the ADEA prohibits claims of employees under the age of forty, *Gen. Dynamics Land Sys., Inc., v. Cline,* 540 U.S. 581, 593 (2004), whereas the Equal Protection Clause does not. Pet. App. 32a-34a.

Petitioners' argument that the Seventh Circuit "misapplied" or "required something more" in its analysis regarding preclusion is without merit. The Seventh Circuit explicitly based its holding on the "ADEA's lack of legislative history or statutory language precluding Constitutional claims and the divergent rights and protections afforded by the ADEA as compared to a §1983 Equal Protection claim," citing *Fitzgerald,* 555 U.S. at 252-53. Pet. App. 1a-37a. Considering the language Congress *did use,* and the divergent rights and protections between the ADEA and §1983 Equal Protection claims, it is inconceivable to conclude that Congress in 1974 intended to preclude §1983 Equal Protection age discrimination claims.

4. No Qualified Immunity

Notably absent from the petition is the assertion that petitioners are entitled to qualified immunity. Nevertheless, the Seventh Circuit held that it was "clearly established that age discrimination in employment violates the *Equal Protection Clause*," citing *Kimel,* 528 U.S. at 83. Pet. App. 36a-37a. This Court's decisions in *Massachusetts Bd. of Retirement v. Murgia, supra.*, *Vance v. Bradley, supra.*, *Gregory v. Ashcroft, supra.*, and *Kimel* made it abundantly clear that in 2006, state employees had a clearly established Constitutional

right under the Equal Protection Clause to be free of intentional age discrimination. "Although age is not a suspect classification, states may not discriminate on that basis if such discrimination is not "rationally related to a legitimate state interest." *Kimel,* 528 U.S. at 83; Pet. App. 36a.

The Seventh Circuit and District Court Judge Chang correctly held that determining whether to grant qualified immunity does not concern whether a "particular vehicle (i.e., cause of action) is available." The Seventh Circuit held, "Whether or not the ADEA is the exclusive remedy for plaintiffs suffering age discrimination in employment is irrelevant" to the determination of qualified immunity. Pet. App. 36a-37a. This Court should deny the Petition since what Congress intended in 1974 by applying the ADEA to public employment has absolutely nothing to do with qualified immunity - the basis of petitioners' piecemeal interlocutory appeal.

C. There Does Not Exist a Widespread Circuit Conflict

The Seventh Circuit's analysis reflects a correct and straightforward application of this Court's decisions in *Fitzgerald* and *Kimel.* Pet. 1a-37a. The Seventh Circuit decision distinguishing other circuits' decisions does not create a sufficiently widespread conflict to warrant this Court's involvement. To the extent petitioners have asserted a conflict, the conflict is limited to the Seventh, which remains constant since the 1970s. *See Gault v. Garrison,* 569 F.2d 993, 997 (7th Cir. 1977), *cert. denied,* 440 U.S. 945 (1979); *Kolz v. Bd. of Educ. of the City of Chicago,* No. 77-C-2548, 1978 U.S. Dist. Lexis 14464 at

* 4 (N.D. Ill. J. Crowley Nov. 8, 1978); *McCann v. City of Chicago,* 1991 U.S. Dist. Lexis 83 *7 (N.D. Ill. J. Grady 1991); *Van Arsdel v. Indiana Util. Regulatory Comm'n,* No. IP 88-384-C, 1990 U.S. Dist. Lexis 13936 at *2 (S.D. Ind. Mar. 9, 1990); *Haag v. Bd. of Educ.,* 655 F. Supp. 1267, 1274 (N.D. Ill. 1987).

1. Three out of Four Circuit Decisions Were Decided Prior to *Kimel v. Florida Bd. Of Regents*

The Seventh Circuit's opinion highlighted the decisions of other Circuits (Fourth, Fifth, Ninth and Tenth), that addressed the preclusion issue, and distinguished their deficiencies in relation to the subsequent Supreme Court rulings in *Kimel* and *Fitzgerald*. Pet. App. 20a-34a. Furthermore, all other circuits that have held that the ADEA provides the exclusive remedy for age discrimination in public employment mistakenly relied upon the Fourth Circuit's 1989 decision in *Zombro v. Baltimore City Police Dept*., 868 F.2d 1364, 1368-70 (4th Cir. 1989). However, *Zombro* is not persuasive for a variety of reasons after this Court's decisions in *Kimel and Fitzgerald.* The *Zombro* decision failed to consider the congruity of the "enforcement schemes" between Title VII and the ADEA, erred by implying preclusion from statutory and legislative "sounds of silence" and further erred by inferring Congressional intent via "Sea Clammers," instead of this Court's later analysis in *Fitzgerald* which directs the courts to compare the rights and protections afforded by the statutory claim and the Constitutional claim. *Fitzgerald*, 555 U.S. at 252. Significantly, after *Zombro* this Court squarely addressed the "rights and protections" of the ADEA and

the Equal Protection Clause, and held that the "ADEA cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Kimel v. Florida Bd. Of Regents,* 528 U.S. at 86.

The Fourth Circuit in *Zombro,* further erred by looking to the Fair Labor Standards Act, "FLSA," enacted in 1938, and amended in 1967, 1974, and 1978 in determining ADEA exclusivity. *Zombro,* 868 F.2d at 1369. However, the Seventh Circuit found that the reliance on the FLSA in determining preclusion was a "perplexing argument because the cases which have found the FLSA to be an exclusive remedy do not (and, in fact, cannot) address Constitutional claims." The elaborate remedial scheme provided in the FLSA only demonstrates a congressional intent to prohibit §1983 actions *to enforce such FLSA rights."* (emphasis added). The Seventh Circuit held, "[w]e have no quarrel with the notion that the FLSA is the sole remedy for the enforcement of the FLSA rights, and similarly, the ADEA is the sole remedy for the enforcement of the ADEA rights." Pet. App. 30a.

In *Zombro*, the correct comparison should have been to Title VII, which has the same statutory exemptions as the ADEA, and an equally comprehensive enforcement mechanism. Tellingly, a review of the Fourth Circuit's decisions regarding Title VII demonstrate that Title VII does not preclude §1983 Equal Protection claims. *See Keller v. Prince George's County,* 827 F.2d 952, 963 (4th Cir. 1987); *Beardsley v. Webb,* 30 F.3d 524, 526 (4th Cir. 1994); *Booth v. Maryland,* 327 F.3d 377, 382 (4th Cir. 2003).

The Fifth Circuit in *Lafleur v. Tex. Dep't of Health,* 126 F.3d 758 (5th Cir. 1997), found ADEA preclusion of a §1983

claim by relying on *Jackson v. City of Atlanta*, 73 F. 3d 60, 63 (5th Cir. 1996) to dismiss a §1983 age discrimination claim that did not allege facts that would support an independent claim under §1983. The *Jackson* decision was a §1983 action *only* to enforce a statutory right, not a Constitutional right, and was properly dismissed. The court's analysis and decision in *Lafleur* is contrary to this Court's decision in *Fitzgerald* that declined to find that Title IX precluded §1983 relief when the §1983 claim is based directly on a Constitutional violation, not a statutory one. *Fitzgerald v. Barnstable Sch. Comm.*, supra., 555 U.S. at 259.

The Tenth Circuit in *Migneault v. Peck*, 158 F.3d 1131 (10th Cir. 1998), *abrogated on other grounds by Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); "adopted" the holding in *Lafleur* and held that the defendant was thus entitled to qualified immunity. Yet, the decision in *Migneault* should not be followed for a number of reasons in the wake of *Kimel*. The Tenth Circuit erred when it held that the ADEA's scope was "limited to the unconstitutional conduct Congress seeks to prevent" and that the ADEA was "proportional to the Constitutional violations it seeks to prohibit." *Migneault,* 158 F.3d at 1138-39; *contra Kimel,* 528 U.S. at 81-86. Second, the court erred by merging the qualified immunity analysis with implied preclusion, resulting in the granting of qualified immunity on a §1983 *Equal Protection* claim.

The Tenth Circuit decision overlooked the significance of this Court's decisions that acknowledged the right to challenge age discrimination through the Equal Protection Clause, *Bradley,* 440 U.S. 93 (1979), and *Murgia,* 427 U.S. 307 (1976), and nevertheless summarily adopted the

flawed Fourth and Fifth Circuits' decisions in *Zombro* and *LaFleur. Migneault,* at 1140. However, the Tenth Circuit's decisions regarding Title VII are illustrative. *See Drake v. City of Fort Collins,* 927 F.2d 1156, 1162 (10th Cir. 1991) (plaintiff who alleges that his …Equal Protection rights were violated, and requests remedies for those alleged violations under…[§]1983 has stated an independent basis for that claim); *Notari v. Denver Water Department,* 971 F.2d 585, 587 (10th Cir. 1992)(Title VII does not preclude §1983 Equal Protection claims).

2. The Ninth Circuit Overlooked *Fitzgerald v. Barnstable Sch.Comm.*

The most recent Circuit case which held ADEA preclusion of a §1983 action is *Ahlmeyer v. Nevada Sys. of Higher Educ.*, 555 F.3d 1051 (9th Cir. 2009), and is confusingly unexplainable. The district court in *Ahlmeyer* dismissed plaintiff's complaint, and did not allow the plaintiff to amend the complaint to allege age discrimination holding that "such an amendment would be futile." However, the same district court specifically provided that the plaintiff could file an age discrimination action *under the Fourteenth Amendment. Ahlmeyer v. Nevada Sys. of Higher Educ.,* 3:05-CV-0557, 2006 U.S. Dist. Lexis 8665 at*10, n. 2 (J. Reed D. Nev. February 16, 2006).

The Ninth Circuit did not address the district court's contradictory opinions and focused on irrelevant matters at 555 F.3d 1059, n. 8, rather than the intent of Congress when it amended the ADEA, which should be the focus of "preclusion." *Fitzgerald v. Barnstable, supra.* at 259, n. 2. Having overlooked this Court's decision in *Fitzgerald,* the Ninth Circuit stated that "every circuit who has

considered the issue has concluded similarly that the ADEA is the exclusive remedy for age discrimination claims by *federal* employees," citing, *inter alia*, *Lafleur*. However, respondent, Harvey Levin in the instant case, and the plaintiffs in *Lafleur* and *Ahlmeyer* were not federal employees. *Ahlmeyer,* 555 F.3d at 1057, n. 5.

3. Subsequent Decisions Following the Seventh Circuit's Opinion are Capable of Resolving Any Dispute Given the Decisions in *Kimel* and *Fitzgerald*.

The benefit of this Court's decisions in *Kimel* and *Fitzgerald* and the recent Seventh Circuit opinion must be allowed to percolate further in the lower courts. Allowing further percolation in light of the Seventh Circuit's opinion and this Court's opinion in *Fitzgerald* would obviate any need for this Court's review.

The District of Columbia Circuit, First, Second, Third, Sixth, Eight, and Eleventh Circuits have not addressed whether the ADEA precludes §1983 Constitutional Equal Protection claims of age discrimination in employment under the Fourteenth Amendment. Thus, the issue of ADEA preclusion is not sufficiently mature to warrant this Court's attention at this time, especially in light of this Court's decision in *Fitzgerald*. While petitioners attempt to portray the district courts in other circuits as deeply divided, Pet. page 9, a review of these decisions demonstrates that there is not a square conflict.

First, most of the district court decisions finding preclusion predate this Court's decision in *Fitzgerald.* Second, some of the cases petitioners referred to failed to

allege Constitutional Equal Protection claims, and instead are §1983 actions seeking to enforce statutory provisions of the ADEA as in *Sea Clammers and Rancho Palos Verdes.* As the Seventh Circuit held, the district courts that found §1983 Constitutional Equal Protection claims are not precluded by the ADEA agree that §1983 cannot be used to enforce the ADEA. *See Mustafa v. State of Neb. Dep't of Corr. Servs.,* 196 F. Supp. 2d 945, 956 n.13 (D.Neb. 2002) ("[S]ection 1983 cannot be used as an alternate mechanism to assert violation of the ADEA's provisions against states."); *Mummelthie v. City of Mason,* 873 F. Supp. 1293, 1317 (N.D. Iowa 1995)(no dispute that state and local employees cannot use § 1983 to enforce violations based on the provisions of the ADEA). Pet. App. 31a.

Third, a number of district court cases mistakenly confuse federal employees' attempts to circumvent the ADEA and assert §1983 Fifth Amendment challenges, neither of which pertains to respondent-plaintiff Harvey Levin's claim brought by §1983 to enforce the Equal Protection Clause of the 14th Amendment. The same district court in *Christie v. Marston,* 451 F. Supp. 1142, 1145 (N.D. Ill. 1978)(ADEA exclusive remedy for federal employee age discrimination actions) and *McCann v. Chicago,* 89 C 2879, 1991 U.S. Dist. Lexis 83 at *5 (N.D. Ill. J. Grady Jan. 3, 1991)*(*ADEA does not foreclose §1983 Equal Protection age discrimination actions for State and local employees) explained the exclusive remedies of Title VII and the ADEA for federal employees based on *Brown v. GSA*, 425 U.S. 820 (1976), and held that while "the ADEA was the exclusive remedy for age discrimination in federal employment, there was no basis to foreclose state and local employees from bringing Constitutional age discrimination claims under §1983." *Id. citing Trigg v. Fort Wayne Cmty. Sch.,* 766 F.2d 299, 302 (7th Cir. 1985).

4. This Court Correctly Declined to Review Title VII Preclusion of §1983 Equal Protection Claims This Term

In 1972 when Congress applied Title VII to government employers, Congress did not intend to preclude §1983 Equal Protection discrimination claims despite Title VII's comprehensive and administrative enforcement scheme and exemptions. *See Henley v. Brown*, 686 F.3d 634, 642 (8th Cir. 2012), *cert denied*, 184 L.Ed. 2d 659 (January 7, 2013). Given this Court's holding in *Fitzgerald*, the identical statutory exemptions and comprehensive and administrative enforcement schemes of the ADEA and Title VII are not sufficient to preclude §1983 Equal Protection Constitutional discrimination claims. Pet. App. 1a-37a.

5. §1983 Equal Protection Age Discrimination Claims Are Infrequent

Just as the petitioners in *Henley v. Brown*, 686 F.3d 634, 642 (8th Cir. 2012), *cert denied*, 184 L.Ed. 2d 659 (January 7, 2013), petitioners herein attempt to elevate their argument to "national significance" with an inflated estimate of 20 million state and local employees in the country being affected by this decision. However, in the past 39 years since the ADEA was applied to public employment, there have been less than 40 or so such cases – hardly supportive of proposition that this is a "frequently recurring question." To the contrary, the scarcity of §1983 Equal Protection age discrimination decisions strongly suggests that the issue does not arise with any frequency and contradicts petitioners' wildly speculative and unsubstantiated argument of plaintiffs routinely bypassing the EEOC.

The Seventh Circuit noted, "the ADEA's heightened scrutiny provides a stronger mechanism for plaintiffs to challenge age discrimination in employment…" Pet. App. 29a-30a. Whereas, §1983 Equal Protection age discrimination claims face a higher burden of proof than under the ADEA. However, this Court's decisions in *Bradley* and *Murgia* demonstrate "that the Equal Protection Clause protects against age discrimination," and Equal Protection jurisprudence is not confined to traditional suspect or quasi-suspect classifications. *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432 (1985); *Romer v. Evans,* 517 U.S. 620 (1996). *Bradley* and *Murgia* survived Constitutional scrutiny because the Court found that state action was rationally related to the state's "asserted" interests and *not* because distinctions based on age are exempt from Constitutional scrutiny. *Discovery House, Inc. v. Consolidated City of Indianapolis*, 319 F. 3d 277, 281 (7th Cir. 2003).

Under these circumstances, the questions presented are not sufficiently important to warrant review.

D. This Case is Not an Ideal Vehicle for Review

Despite the substantially similar comprehensive schemes of Title VII and the ADEA, petitioners did not challenge Respondent's §1983 Equal Protection sex discrimination claim as being precluded by Title VII. Petitioners' concern about the "comprehensive scheme" of the ADEA and allowing plaintiffs to circumvent the enforcement or conciliatory scheme of the EEOC is not applicable in this case and highlights why this case is not the proper vehicle to challenge exclusivity. Respondent-plaintiff, Harvey Levin timely complied with EEOC

administrative prerequisites, and brought concurrent claims under Title VII, the ADEA, and the Equal Protection Clause of the 14th Amendment by §1983.

Petitioners' piece-meal interlocutory appeal does not seek review of the appealable issue of denial of qualified immunity, but rather the district court's rejection of petitioners' argument that the Congress in 1974 intended to preclude §1983 Equal Protection age discrimination claims by applying the ADEA to public employment. This case is scheduled to go to trial on May 6, 2013, at which time, the record will be fully developed and complete.

CONCLUSION

Petitioners have failed to present compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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