No. 12-872

IN THE

Supreme Court of the United States

LISA MADIGAN, *et al.*,
Petitioners,
v.
HARVEY N. LEVIN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE SERVICE EMPLOYEES INTERNATIONAL UNION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 56 national and international labor organizations with a total membership of approximately 12 million working men and women.[1] The AFL-CIO, through its affiliate unions, represents several million state and local government employees and thus has a strong interest in matters that affect these workers' employment rights, including the right to be free of unconstitutional age discrimination.

The Service Employees International Union (SEIU) represents over 2.1 men and women working in health care, property services, and public services. SEIU is deeply committed to principles of equal opportunity and nondiscrimination, including the right of its members who work for state and local governments to be free from unconstitutional discrimination on the basis of age.

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[1] Counsel for the petitioners and counsel for the respondent have filed letters with the Court consenting to the filing of *amicus* briefs on either side. No counsel for a party authored this brief *amici curiae* in whole or in part, and no person or entity, other than the *amici*, made a monetary contribution to the preparation or submission of this brief.

STATEMENT

Harvey Levin was terminated from his position as an Illinois Assistant Attorney General in 2006 when he was 61 years old. Levin filed suit under 42 U.S.C. § 1983 against Illinois Attorney General Lisa Madigan in both her official and individual capacities, the State of Illinois, the Office of the Illinois Attorney General, as well as several individual defendants who are the petitioners in this case, alleging, *inter alia*, that he was terminated on the basis of his age in violation of the Equal Protection Clause of the Fourteenth Amendment.

The defendants successfully argued to the district court that Levin was excluded from coverage under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, as an "appointee on the policymaking level." *Levin v. Madigan*, No. 07 C 4765, 2011 U.S. Dist. LEXIS 74475, *25, *34 (N.D. Ill., July 12, 2011) (quoting 29 U.S.C. § 630(f)). In tension with their principal argument, the individual defendants also asserted qualified immunity from Levin's equal protection claim on the ground that the ADEA provides the exclusive remedy for age-related discrimination claims by public employees and, therefore, Levin failed to state a viable constitutional claim under § 1983. *Id.* at *35-*41. The district court rejected this claim, concluding that "the ADEA does not preclude a § 1983 suit for age discrimination" and that the individual defendants were not entitled to qualified immunity because "a reasonable official would have known that the official was violating a clearly established constitutional right." *Id.* at *36-*37.

The individual defendants filed an interlocutory appeal of the district court's denial of qualified immunity, renewing their argument that they were entitled to qualified immunity because the ADEA precluded Levin's constitutional claim. The court of appeals conducted an extensive analysis of the issue and, while recognizing that "[a]ll other circuit courts to consider the issue have held that the ADEA is the exclusive remedy for age discrimination claims," *Levin v. Madigan*, 692 F.3d 607, 616 (7th Cir. 2012) (citing *Zombro v. Baltimore City Police Department*, 868 F.2d 1364 (4th Cir. 1989), and cases following *Zombro*), ultimately agreed with the district court that "the ADEA is not the exclusive remedy for age discrimination in employment claims," *id.* at 622.

The individual defendants then filed a petition for a writ of certiorari seeking review of the court of appeals' decision. The Court granted the writ of certiorari on the question whether "state and local government employees may . . . bring[] age discrimination claims directly under the Equal Protection Clause and 42 U.S.C. § 1983." Pet. Br. i.

SUMMARY OF ARGUMENT

Congressional intent is the touchstone in determining whether a statutory enactment precludes the availability of a § 1983 claim for a constitutional violation. All parties agree that neither the statutory text nor the legislative history of the ADEA indicate Congress's intent to preclude age-related equal protection claims brought under § 1983. And, it is especially unlikely that Congress would have intended to

displace the category of constitutional claims at issue in this case because Levin is an "appointee on the policymaking level" who is excluded from ADEA coverage altogether.

Moreover, petitioners' argument that Congress intended to preclude age-related equal protection claims brought pursuant to § 1983 when it enacted the ADEA is foreclosed by this Court's decision in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), which holds that "the ADEA . . . 'cannot be understood as responsive to, or designed to prevent, unconstitutional behavior,'" *id.* at 86 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997)). Although *Kimel* concerned State sovereign immunity under the Eleventh Amendment, this Court's negative answer to the question presented in that case – whether there was "congruence and proportionality between the [constitutional] injury to be prevented or remedied and the means adopted [in the ADEA] to that end," *id.* at 81 (quoting *City of Boerne*, 521 U.S. at 520) – is dispositive of the question presented here – whether "the contours of [the] rights and protections" provided by the ADEA and the Equal Protection Clause "diverge in significant ways." *Fitzgerald v. Barnstable School Comm.*, 555 U.S. 246, 252-53 (2009).

A *de novo* comparison of the "rights and protections" provided by the ADEA and the Equal Protection Clause yields the same result. The ADEA and the Constitution differ in terms of the categories of age-related discrimination claims covered, who may bring suit, and who may be held legally responsible for violations. Viewed as a whole, the ADEA's

"protections are narrower in some respects and broader in others" than the Equal Protection Clause, leading to the conclusion, as in *Fitzgerald*, that "[the statute] was not meant to be an exclusive mechanism for addressing [] discrimination . . . , or a substitute for § 1983 suits as a means of enforcing constitutional rights." *Id.* at 256-58.

The petitioners' emphasis on the ADEA's comprehensive remedial regime is unavailing for the basic reason that that remedial regime applies only to violations of the ADEA and not to the many categories of age discrimination claims that are not covered by the ADEA but that can be pleaded under the Equal Protection Clause. Likewise, the petitioners' contention that permitting constitutional claims for age-related discrimination will unleash a flood of litigation against public employers is overstated. Age-related decisions by public actors remain presumptively lawful under the Constitution, so a plaintiff who wishes to challenge such a decision must carry the heavy burden of proving that an allegedly unconstitutional age-related employment decision is not only unwise but irrational and arbitrary.

ARGUMENT

1. In determining whether a statutory enactment displaces a preexisting § 1983 claim for a constitutional violation, "[t]he crucial consideration is what Congress intended." *Fitzgerald v. Barnstable School Comm.*, 555 U.S. 246, 252 (2009) (quoting *Smith v. Robinson*, 468 U.S. 992, 1012 (1984)).

All agree that neither the text nor legislative histo-

ry of the ADEA contain any statement or other indication of congressional intent to foreclose § 1983 claims for age-related violations of the Equal Protection Clause. Indeed, this Court has previously strongly indicated that Congress did not consider the matter – and thus could not have intended to foreclose such claims – observing, upon an "examination of the ADEA's legislative record," that "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation." *Kimel v. Florida Board of Regents*, 528 U.S. 62, 89 (2000)

This prior "conclusion[] regarding [lack of] congressional intent can be confirmed by [the] statute's context." *Fitzgerald*, 555 U.S. at 253. As this Court has explained,

> "In cases in which the § 1983 claim alleges a constitutional violation, lack of congressional intent may be inferred from a comparison of the rights and protections of the statute and those existing under the Constitution. Where 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 252-53.

The rationale for this "significant divergence" rule is straightforward. Where a statute does not provide the same substantive rights and protections as the Constitution, this Court will "not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection

claim," because, "[s]ince 1871, when it was passed by Congress, § 1983 has stood as an independent safeguard against deprivations of federal constitutional . . . rights." *Smith*, 468 U.S. at 1012. "[T]here can be no doubt that § 1 of the Civil Rights Act [*i.e.*, 42 U.S.C. § 1983] was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 700-01 (1978).

The interpretive rule against implied preclusion of § 1983 claims for constitutional violations is of special force in a case such as this one because the ADEA excludes Levin from its coverage altogether as an "appointee on the policymaking level." 29 U.S.C. § 630(f). It is thus exceedingly unlikely that Congress impliedly intended to preclude § 1983 claims like Levin's where, by doing so, it would deprive similarly-situated individuals of *any* statutory cause of action for age-related "official violation[s] of federally protected rights." *Monell*, 436 U.S. at 700-01. Indeed, "[e]ven if Congress repealed all statutory remedies for constitutional violations, the power of federal courts to grant the relief necessary to protect against constitutional deprivations or to remedy the wrong done is presumed to be available in cases within their jurisdiction," *Smith*, 468 U.S. at 1012 n.15 (citing *Bell v. Hood*, 327 U.S. 678, 684 (1946), and *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396 (1971); *id.*, at 400-406 (Harlan, J., concurring in judgment)), such that, even absent a cause of action under § 1983, Levin still could plead a claim for age-related discrimination directly under the Equal Protection Clause.

2. Moreover, this Court has previously determined that the contours of the rights and protections provided by the Equal Protection Clause and the ADEA *do* differ in significant ways. *Kimel* holds that "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.'" 528 U.S. at 86 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997)). Although *Kimel* concerned whether Congress lawfully abrogated the Eleventh Amendment in extending the ADEA to state employers, the Court's analysis fully answers the question presented by this case.

Kimel, like this case, involved claims of age discrimination brought against state employers, albeit under the ADEA rather than the Equal Protection Clause. 528 U.S. at 69-71. The state defendants contended that Congress had not lawfully abrogated sovereign immunity in extending the ADEA to the States. *Ibid.* Under established Eleventh Amendment jurisprudence, the validity of that defense turned on whether there was "congruence and proportionality between the [constitutional] injury to be prevented or remedied and the means adopted [in the ADEA] to that end." *Id.* at 81 (quoting *City of Boerne*, 521 U.S. at 520).

This Court concluded that "the substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the [ADEA]." *Id.* at 83. In reaching that conclusion, this Court reiterated its prior holding that "age is not

a suspect classification under the Equal Protection Clause," *ibid.* (citing *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Vance v. Bradley*, 440 U.S. 93 (1979); *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976)), such that "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," *ibid.* The ADEA, in contrast, "makes unlawful, in the employment context, *all* 'discrimination against any individual . . . because of such individual's age.'" *Id.* at 86 (quoting 29 U.S.C. § 623(a)(1)) (emphasis added). As a result, whereas "an age classification [by the State] is presumptively rational" under the Equal Protection Clause, *id.* at 84, "[u]nder the ADEA . . . the State's use of age is prima facie unlawful," *id.* at 87.

Although the *Kimel* decision used the Eleventh Amendment language of "congruence and proportionality," *id.* at 81, to determine whether "the ADEA [wa]s . . . designed to prevent[] unconstitutional behavior," *id.* at 86 (quotation marks omitted), there is no meaningful difference between that standard and the standard set forth in *Fitzgerald* that "[w]here the contours of [the] rights and protections diverge in significant ways, it is not likely that Congress intended to displace § 1983 suits enforcing constitutional rights," 555 U.S. at 252-53. *Kimel*'s holding 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,'" 528 U.S. at 86 (quoting *City of Boerne*, 521 U.S. at 532), is therefore conclu-

sive as to the question presented here of whether the ADEA displaces claims brought under § 1983 for age-related equal protection violations.[2]

3. Even if this Court in *Kimel* had not already undertaken the relevant analysis, a *de novo* comparison of the ADEA and the Equal Protection Clause demonstrates that "[the] rights and protections

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[2] Petitioners contend for the first time in their opening brief to this Court that the Government Employee Rights Act of 1991 (GERA), 42 U.S.C. §§ 2000e-16a – 2000e-16c, forecloses § 1983 claims by ADEA-excluded "appointees on the policymaking level" like Levin. *See* Pet. Br. 30-34. That argument, which petitioners did not raise before the court of appeals or in their petition for a writ of certiorari and which is not within the scope of the question presented, has been waived. Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). *See also Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1336 (2011) ("We do not normally consider a separate legal question not raised in the certiorari briefs.").

Moreover, to the extent that the GERA covers age discrimination claims it is subject to the same Eleventh Amendment analysis as the Court applied to the ADEA in *Kimel*, as the GERA provides a cause of action for age discrimination only by cross-referencing the substantive anti-discrimination provisions of the ADEA. *See* 42 U.S.C. § 2000e-16b(a)(2). And, because "when Congress enacted the GERA in 1991, it made no findings regarding discrimination against state employees at the policy-making level," *Alaska v. EEOC*, 564 F.3d 1062, 1077 (9th Cir. 2009) (en banc) (O'Scannlain, J., concurring in part and dissenting in part), GERA claims against state employers, like such claims under the ADEA, "cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Kimel*, 528 U.S. at 86 (quoting *City of Boerne*, 521 U.S. at 532).

diverge in significant ways, [such that] it is not likely that Congress intended to displace § 1983 suits enforcing constitutional rights." *Fitzgerald*, 555 U.S. at 252-53. In particular, the rights and protections provided by the ADEA and the Equal Protection Clause differ in terms of what categories of age-related claims are covered, who may bring suit, and who may be held legally responsible for violations.

As we have already explained, "[t]he [ADEA], through its broad restriction on the use of age as a discriminating factor, prohibits *substantially more* state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard." *Kimel*, 528 U.S. at 86 (emphasis added). At the same time, the ADEA also "*exempts* from its restrictions several activities that may be challenged on constitutional grounds." *Fitzgerald*, 555 U.S. at 257 (emphasis added).

In particular, the Equal Protection Clause broadly covers claims for discrimination based on age whenever "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the Court] can only conclude that the legislature's actions were irrational." *Vance*, 440 U.S. at 97. That is because "[t]he Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985).

As a result of the "direction that all persons similarly situated should be treated alike," *ibid.*, the Equal Protection Clause permits any claim challenging irrational age-related discrimination by a state actor. This includes, for example, reverse age discrimination, a category of claim that is not permitted by the ADEA. *See General Dynamic Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004). Similarly, the Equal Protection Clause permits claims for age-related discrimination by employees who are younger than 40, while the ADEA limits its statutory protections "to individuals who are at least 40 years of age." 29 U.S.C. § 631(a).

Also unlike the ADEA, neither § 1983 nor the Equal Protection Clause sets any limit on the extent of protection or remedies available for age-related discrimination based on the particular occupation of the public employee who brings suit. In contrast, the ADEA broadly excludes from coverage elected officials, their staff, and, as is especially pertinent to this case, "appointee[s] on the policymaking level" like Levin. 29 U.S.C. § 630(f). *See, e.g.*, *Gregory*, 501 U.S. at 467 ("appointed state judges" are excluded from ADEA coverage as "'appointee[s] on the policymaking level'").

The ADEA also permits employers, within statutorily-prescribed limits, to set maximum hiring ages and mandatory retirement ages for firefighters and law enforcement officers, 29 U.S.C. § 623(j), and to set mandatory retirement ages for certain bona fide executives and high-level policymakers, § 631(c). The Equal Protection Clause, in contrast, does not contain similar safe harbors for age discrimination against these categories of employees.

Finally, the ADEA and the Equal Protection Clause differ with regard to who may be held liable for age-related discrimination. An employee may sue an employer, employment agency, or labor organization under the ADEA, 29 U.S.C. § 623(a)-(c), but may not sue an individual defendant. In contrast, under § 1983, an employee may sue any "*person* who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws," 42 U.S.C. § 1983 (emphasis added), including individual defendants.

A state or local employer, on the other hand, "cannot be held liable under § 1983 on a *respondeat superior* theory" for unconstitutional age-related discrimination by its employees. *Monell*, 436 U.S. at 691. Rather, a plaintiff proceeding against a public employer must prove that the discrimination occurred as a result of a government custom, policy, or practice. *Ibid.* In contrast, under the ADEA, an employer is vicariously liable for age discrimination by its managerial and supervisory employees. *See* 29 U.S.C. § 630(b) (defining "employer" to include "any agent" of a covered employer). *See also Smith v. Metropolitan Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1024 (7th Cir. 1997) ("[T]he actual reason for the 'and any agent' language in the definition of 'employer' was to ensure that courts would impose *respondeat superior* liability upon employers for the acts of their agent." (quotation marks and citation omitted)).

In sum, as in *Fitzgerald*, the ADEA's "protections

are narrower in some respects and broader in others" than the Equal Protection Clause, leading to the conclusion that "Congress did not intend [the ADEA] to preclude § 1983 constitutional suits." 555 U.S. at 256.

4. The Petitioners' heavy reliance on the fact that the ADEA "creates a comprehensive remedial regime" misses the essential point that the ADEA remedial scheme is *not* designed to "displace[] competing claims under § 1983." Pet. Br. 11 (indentation, bold, and initial capital letters omitted). The substantive rights and protections provided by the ADEA are not coextensive with those provided by the Equal Protection Clause, and thus the existence of the ADEA's remedial regime for the claims created by the statute provides no evidence of congressional intent to displace § 1983 claims for age-related constitutional violations.

While the ADEA does create a comprehensive remedial regime for *violations of the ADEA*, that statute provides no remedy at all for many age-related equal protection violations. For this reason, the mere existence of the ADEA's comprehensive remedial regime says nothing about whether Congress intended to displace § 1983 claims for age-related constitutional violations. Rather than focus on the mechanics of the ADEA's remedial scheme, the proper analysis in this case concerns whether "the contours of . . . rights and protections [provided by the ADEA and the Equal Protection Clause] diverge in significant ways." *Fitzgerald*, 555 U.S. 252-53.

While it is true that many of this Court's decisions compare remedies rather than substantive "rights

and protections," *ibid.*, the claims at issue in each of these prior cases are easily distinguishable from those presented here. As the court of appeals correctly recognized, "the plaintiffs in [*Middlesex County Sewerage Authority v. National*] *Sea Clammers* [*Association*, 453 U.S. 1 (1981),] and *Ranchos Palos Verdes* [*v. Abrams*, 544 U.S. 113 (2005)] sought to assert federal *statutory* rights under § 1983," *Levin v. Madigan*, 692 F.3d 607, 612 (7th Cir. 2012) (emphasis in original), in contrast to the § 1983 claim for a constitutional violation that Levin presents here. "[A] comparison of the rights and protections of the statute and those existing under the Constitution," *Fitzgerald*, 555 U.S. at 252-53, was, therefore, unnecessary in *Sea Clammers* and *Ranchos Palos Verdes* because the plaintiffs' § 1983 claims in those cases merely "s[ought] damages under § 1983 *for violation of a statute*," *Levin*, 692 F.3d at 611 (emphasis added), rather than for violation of a constitutional right.

Although *Smith v. Robinson*, 468 U.S. 992 (1984), presents the converse situation from *Sea Clammers* and *Ranchos Palos Verdes*, it too is easily distinguishable from this case. In *Smith*, this Court found that "Congress intended [plaintiffs] with constitutional claims . . . to pursue those claims through [a] carefully tailored administrative and judicial mechanism set out in [a] statute." 468 U.S. at 1009. *See also Preiser v. Rodriguez*, 411 U.S. 475 (1973). "[A] comparison of the rights and protections of the statute and those existing under the Constitution," *Fitzgerald*, 555 U.S. at 252-53, was thus unnecessary in *Smith* because, rather than creating new substantive rights and protections, the

statute in that case merely provided an "administrative and judicial mechanism," *Smith*, 468 U.S. at 1009, to enforce the same constitutional protection that was the object of the plaintiff's parallel § 1983 claim. As the court of appeals in this case correctly explained, "in *Smith*, it was more than just the comprehensive remedial scheme that convinced the Court that the [statute] is an exclusive remedy," rather the key factor was that the statute "provide[d] a remedy *for violation of constitutional rights*." *Levin*, 692 F.3d at 619 (quoting *Zombro*, 868 F.2d at 1373 (Murnaghan, J., dissenting)) (emphasis added).

In this case, Levin's § 1983 claim seeks to vindicate his constitutional rights under the Equal Protection Clause, not his statutory rights under the ADEA. This case is not, therefore, governed by *Sea Clammers* or *Ranchos Palos Verdes*. And, in contrast to the statute at issue in *Smith*, the ADEA "cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Kimel*, 528 U.S. at 86 (quoting *City of Boerne*, 521 U.S. at 532). Nor is there any evidence Congress intended to require plaintiffs with age-related equal protection claims to pursue those claims through the ADEA's "administrative and judicial mechanism," *Smith*, 468 U.S. at 1009, since, in fact, "the ADEA prohibits very little conduct likely to be held unconstitutional," *Kimel*, 528 U.S. at 88. Rather, as in *Fitzgerald*, the fact that the ADEA's "protections are narrower in some respects and broader in others" "lends . . . support to the conclusion that Congress did not intend [the ADEA] to preclude § 1983 constitutional suits" of the sort presented by Levin in this case. 555 U.S. at 256.

Finally, the petitioners' contention that permitting § 1983 claims for age-related Equal Protection Clause violations will have "significant, adverse consequences" for public employers who must defend against such suits, Pet. Br. 20, is greatly overstated. "Government employees who are victimized by the types of discrimination covered by Title VII have a far greater incentive than age discrimination victims to bring their claims under the equal protections clause . . . because the types of discrimination covered by Title VII are subject to much closer scrutiny than age discrimination claims when challenged on equal protection grounds." *Zombro*, 868 F.2d at 1376 (Murnaghan, J., dissenting). Yet, despite clear post-Title VII precedent permitting constitutional claims for race and sex discrimination under § 1983, *see Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975); *Henley v. Brown*, 686 F.3d 634, 642 (8th Cir. 2012), there has been no flood of such suits against public bodies. Likewise, "the vast majority of government workers who assert age discrimination claims will choose to rely on ADEA and its prescribed enforcement mechanism," *Zombro*, 868 F.2d at 1376 ((Murnaghan, J., dissenting), because, as petitioners admit, the few plaintiffs who do plead "equal protection claims for alleged age discrimination are unlikely to succeed in the end," Pet. Br. 20, due to the limited substantive protections the Constitution provides to individuals based upon their age.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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