No. 12-872

In The Supreme Court of the United States

LISA MADIGAN, in her individual capacity, ANN SPILLANE, ALAN ROSEN, ROGER P. FLAHAVEN, and DEBORAH HAGAN,

Petitioners,

v.

HARVEY LEVIN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICI CURIAE AARP AND NATIONAL SENIOR CITIZENS LAW CENTER IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

AARP is a nonpartisan, nonprofit organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for issues that matter most to families, such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. AARP is dedicated to addressing the needs and interests of people aged fifty and older, including older workers, and strives through legal and legislative advocacy to preserve the means to enforce their rights. AARP has a long history of advocating for vigorous enforcement of age discrimination laws at the federal and state level, including the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621-634 (ADEA). AARP has submitted briefs to this Court in virtually all recent cases construing the ADEA, *see e.g., Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Smith v. City of Jackson*, 544 U.S. 228 (2005); *Gomez-Perez v. Potter*, 553 U.S. 474 (2008); *Ky. Ret. Sys. v. EEOC*, 554 U.S. 135 (2008); *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008); *Gross v. FLB Fin. Servs.*, 557 U.S. 167 (2009), as well as virtually all cases involving age discrimination claims under the Equal

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[1] In accordance with Supreme Court Rule 37.6, Amici state that: (1) no counsel to a party authored this brief, in whole or in part; and (2) no person or entity, other than Amici and its counsel have made a monetary contribution to the preparation or submission of this brief. Written consent of the parties has been obtained and will be filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

Protection Clause of the Fourteenth Amendment to the U.S. Constitution, *see, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Vance v. Bradley*, 440 U.S. 93 (1979); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976).

The National Senior Citizens Law Center ("NSCLC") is a non-profit organization whose principal mission is to protect the rights of low income older adults. For more than 40 years, NSCLC has sought to ensure the health and economic security of older persons with limited income and resources, through advocacy, litigation, and the education and counseling of local advocates. NSCLC's Federal Rights Project seeks to keep the courts open to justice and works to ensure that people retain the right to enforce basic guarantees to health care, economic security and civil rights. NSCLC has also participated as counsel in class action lawsuits representing older adult workers facing age discrimination. NSCLC is profoundly concerned about the impact that the Court's decision may have on its clients' ability to enforce their rights to fair treatment as employees.

Amici's interest in this case arises from Petitioners' attempt to persuade this Court to frustrate Congress' intent in enacting the ADEA by holding that the ADEA's comprehensive remedial provisions provide the exclusive federal damages remedy for age discrimination, thereby precluding constitutional claims for age discrimination pursuant to 42 U.S.C. § 1983. Such a result would leave employees of state government entities, who

are covered by the ADEA,[2] but who are barred by this Court's decision in *Kimel* from suing their state employers for money damages, without a federal damages remedy for age discrimination. Congress surely could not have intended such a result when it extended coverage of the ADEA to state (as well as federal) employees in 1974. In this brief, Amici urge the Court to reject such a result by holding that the ADEA's comprehensive remedies apply only to violations of its own terms, an outcome that permits constitutional claims by state employees who cannot seek a damages remedy under the statute itself.

SUMMARY OF THE ARGUMENT

Since its enactment in 1967, the Age Discrimination in Employment Act (ADEA) has achieved significant progress in decreasing the prevalence of age discrimination in the work place. However, Congress never intended the ADEA to be the exclusive remedy for age discrimination. Instead, the ADEA was intended to be a floor complementing those protections against age discrimination that pre-existed its enactment and not a ceiling foreclosing future protections from being added to assist in the fight against ageism.

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[2] Amici agree with Respondent that the Question Presented is not raised by the facts of this case, *see* Brief of Respondent at 8-15, and further that "the only question regarding the ADEA actually presented by the circumstances of this case is whether the ADEA precludes a section 1983 age-based equal protection claim by an employee (like Levin) who is *not* covered by the ADEA." *Id*. at 16.

Although the ADEA's procedural and remedial provisions were derived from the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*., (FLSA), Congress' assignment of enforcement of the ADEA to the Wage and Hour Division in the Department of Labor using FLSA procedures and remedies was based on pragmatic, not substantive, considerations. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. (Title VII), not the FLSA, is the ADEA's closest legislative parallel. Therefore, the analysis of congressional intent concerning the exclusivity of the ADEA for addressing work place age discrimination should place significantly more weight on the analogy between Title VII and the ADEA than that between the ADEA and the FLSA.

Allowing individuals to seek recovery for age discrimination through a claim under 42 U.S.C. § 1983 and the Equal Protection Clause of the Fourteenth Amendment would not undermine the comprehensive remedial scheme set forth in the ADEA. Because this Court held in *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000), that the ADEA was an invalid abrogation of states' Eleventh Amendment immunity, there is no meaningful private enforcement of federal age discrimination protections for state employees. And although *Kimel* did not deprive the Equal Employment Opportunity Commission (EEOC) of its authority to enforce the ADEA against the states, the agency's efforts in this regard have been minimal at best. The inability of state employees to obtain meaningful private relief under the ADEA combined with the dearth of enforcement actions by the EEOC essentially has

left these workers without a federal damages remedy for age discrimination. A § 1983 equal protection claim would provide such a remedy. This result is consistent with Congress' intent in enacting federal statutory protections against age discrimination in employment.

ARGUMENT

I. LIKE ITS CLOSEST LEGISLATIVE PARALLEL, TITLE VII, THE ADEA PROVIDES THE EXCLUSIVE FEDERAL REMEDY FOR VIOLATIONS OF ITS OWN STATUTORY PROVISIONS, BUT DOES NOT PRECLUDE CLAIMS FOR VINDICATION OF CONSTITUTIONAL RIGHTS.

A. The ADEA's Closest Legislative Parallel Is Title VII.

Like Title VII, which prohibits discrimination based on race, color, religion, sex, or national origin, the text of the ADEA does not address whether it is the exclusive remedy for age discrimination in employment. To make this determination, this Court should analyze the legislation most analogous to the ADEA. Contrary to Petitioners' contention, that legislation is not the FLSA, but Title VII.

On more than one occasion, this Court has acknowledged the shared goals of the ADEA and Title VII: "[T]he ADEA and Title VII share a common purpose, the elimination of discrimination

in the workplace . . . ." *Oscar Meyer & Co. v. Evans*, 441 U.S. 750, 756 (1979). This Court has clearly expressed its conviction that the ADEA is an integral part of the nation's collective law prohibiting arbitrary employment discrimination: "The ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide." *McKennon v. Nashville Banner Publ. Co.*, 513 U.S. 352, 357 (1995) (grouping the ADEA with Title VII, the Americans with Disabilities Act (ADA), the National Labor Relations Act (NLRA), and the Equal Pay Act). Importantly, in *Lorillard v. Pons*, 434 U.S. 575, 584 (1978), this Court declared:

> There are important similarities between [Title VII and the ADEA] . . . both in their aims - the elimination of discrimination from the workplace – and in their substantive prohibitions. In fact, the prohibitions of the ADEA were derived *in haec verba* from Title VII."

Relying in part on *Lorillard* and citing the similar "objectives, substantive prohibitions, and legislative histories" of Title VII and the ADEA, the court below reaffirmed its conclusion in *EEOC v. Elrod*, 674 F2d 601, 607 (7th Cir. 1982), that "Title VII is the legislation which most closely parallels the ADEA." *Levin v. Madigan*, 692 F.3d 607, 620 n. 5 (7th Cir. 2012). As pointed out in *Elrod*, after enforcement of the ADEA was transferred from the Wage and Hour Division of the Department of Labor to the EEOC in 1978, the EEOC published

guidelines which stated: "It is the Commission's position that these proposed interpretations be interpreted in a manner which is consistent with Title VII." 674 F.2d at 610 n. 12, citing 44 Fed.Reg. 68,858 (1979). While candidly acknowledging that "the remedial provisions of the ADEA, which we focus on in determining exclusivity, differ from those of Title VII," *Madigan,* 692 F.3d at 620 n. 5, the lower court nevertheless completely rejected any reliance on the FLSA, concluding (correctly) that "cases addressing FLSA exclusivity speak little" to the issue this Court must decide. *Madigan*, 692 F.3d at 620.

B. The ADEA's Relationship To The FLSA Is More Pragmatic Than Substantive And Is Essentially Fortuitous.

The ADEA "incorporates some features of both Title VII and the Fair Labor Standard Act of 1938, which has led [this Court] to describe it as 'something of a hybrid.'" *McKennon*, 513 U.S. at 357, (quoting *Lorillard,* 434 U.S. at 578). Specifically, the substantive provisions of the ADEA are modeled after Title VII, while its remedial provisions incorporate provisions of the FLSA. *Id.*; 29 U.S.C. § 626(b).

The purpose of incorporating the remedial, *i.e.*, enforcement, provisions of the FLSA into the ADEA was "to utilize the existing investigative and enforcement machinery of the Wage and Hour Division of the Department of Labor" the federal

agency designated to enforce the ADEA.[3] S. Special Comm. on Aging, 93d Cong. IMPROVING THE AGE DISCRIMINATION LAW: A WORKING PAPER, 11 (Comm. Print 1973). The legislative history of the ADEA indicates that the Wage and Hour Division was chosen for reasons of administrative efficiency. At the time Congress was drafting the ADEA in 1967, the fledgling EEOC was already backlogged with uninvestigated charges of race and sex discrimination. *See* 113 Cong. Re. C. 7076 (1967) (testimony of Sen. Javits); *Age Discrimination in Employment*: Hearings Before the Gen. Subcomm. On Labor of the H. Comm. on Educ. And Labor, 90th Cong. 13 (1967). Significantly, Congress did not prohibit age discrimination through an amendment to the FLSA, but rather enacted a separate statute – the ADEA - and chose the Wage and Hour Division as the enforcement agency, which would allow enforcement of the ADEA to proceed under procedures with which the Division was familiar due to its long experience with enforcing the FLSA.[4]

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[3] As originally enacted, the ADEA refers only to the Secretary of Labor. It was the understanding of Congress in 1967 that the Wage and Hour Division would enforce the ADEA. *See, e.g.*, 113 Cong. Rec. 7076 (1967) (remarks of Sen. Javits).

[4] In 1978, the Carter Administration decided that the ADEA would be more efficiently enforced by the EEOC and transferred the duties of ADEA enforcement from the Wage and Hour Division to the EEOC. Reorg. Plan No. 1 of 1978, 3 C.F.R. § 321 (1978), reprinted in 92 Stat. 3781 (1978). Among President Carter's stated objectives was efficiency, specifically to "produce more effective law enforcement through unification of planning, training and sanctions." *See* Civil Rights Reorganization, 14 Weekly Comp. Pres. Doc. 398 (Feb. 23, 1978).

In *EEOC v. Elrod*, 674 F.2d at 604-605, the Seventh Circuit described the legislative process which extended the coverage of the ADEA to state public employees:

> Legislation to extend the ADEA to government employees was first introduced on March 9, 1972, by Senator Bentsen. S. 3318, 92d Cong., 2d Sess. (1972); 118 Cong.Rec. 7745 (1972). Also in March of 1972, Congress considered and passed amendments to Title VII which extended coverage of that act to state and local government employees. Equal Employment Opportunity Act of 1972, Pub.L.No. 92-261, 86 Stat. 103 (amending 42 U.S.C. § 2000e). The Title VII amendments were explicitly passed under § 5 of the Fourteenth Amendment. H.R.Rep.No. 92-238, 92d Cong., 2d Sess., reprinted in (1972) U.S.Code Cong. & Ad.News 2137, 2154. In May of 1972, Senator Bentsen again presented his proposed amendment to the ADEA. 118 Cong.Rec. 15894 (1972). The Senator noted the overwhelming approval of the Title VII amendments by Congress, and urged similar support for the ADEA amendment, arguing that the principles underlying the Title VII amendments "are directly applicable to the Age Discrimination in Employment

> Act." *Id.* at 15895. The Senate voted in favor of the ADEA amendment 86-0, but the amendment failed to survive House-Senate conference committees after being attached to two bills. S.Rep.No.93-690, 93d Cong., 2d Sess. 55 (1974); 120 Cong.Rec. 8768 (1974) (remarks of Sen. Bentsen).
>
> In 1974, the ADEA amendment was reintroduced and passed with a group of amendments to the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq. ("FLSA").

Thus, "the connection of the [1974] ADEA amendment [extending coverage to state and federal public employees] to the legislation enacting FLSA amendments was largely fortuitous." *Kelly v. Wauconda Park Dist.*, 801 F.2d 269, 271 n.4 (7th Cir. 1986), quoting *Elrod*, 674 F.2d at 610.

C. The ADEA And The FLSA Are Inherently Different.

Wage and hour violations are "inherently different," from employment discrimination, Daniel P. O'Meara, PROTECTING THE GROWING NUMBER OF OLDER WORKERS: THE AGE DISCRIMINATION IN EMPLOYMENT ACT, 94 (1989). According to Secretary of Labor Wirtz, who recommended that Congress place enforcement of the ADEA with an agency other than the Wage and Hour Division:

> There are … real differences between the enforcement of minimum wage law and the enforcement of a prohibition against discrimination … it takes a very different approach to administer a prohibition against discrimination on the basis of age than it does a minimum wage law.

Age Discrimination in Employment: Hearings Before the Subcomm. on Labor of the S. Comm. on Labor and Public Works, 90th Cong. 44 (1967).

Due to these inherent differences between employment discrimination and wage and hour violations, in several areas where ADEA and Title VII differ in remedial/procedural provisions the courts have often ignored FLSA precedent and used Title VII precedent. *See* O'Meara, *supra,* 85-88. The following examples serve to illustrate this point:

1. Although the ADEA statute of limitations is incorporated by reference from the FLSA statute of limitations, courts have unanimously applied *Delaware State College v. Ricks*, 449 U.S. 250 (1980), a Title VII decision holding that the limitations period is triggered when the employee was informed of his impending termination rather than on his last day of employment to the ADEA. *See, e.g., Runyan v. Nat'l Cash Register Corp.*, 787 F.2d 1039, 1044 n. 8 (6th Cir.

1986); *Herman v. Nat'l Broadcasting Co., Inc.*, 744 F.2d 604, 606 (7th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985).

2. The EEOC's subpoena power is derived from the Wage and Hour Division's power under the FLSA, yet the courts have defined the EEOC's subpoena powers by looking to the agency's subpoena powers defined in Title VII.[5] Even though this Court stated in *Lorillard* that when courts interpret language incorporated from the FLSA, such as the FLSA/FTCA subpoena language, they should look exclusively to FLSA case law and that reliance on Title VII case law is "misplaced," 434 U.S. at 585, lower courts have regularly looked to Title VII case law when deciding ADEA subpoena cases. *See, e.g., EEOC v. Gladieux Refinery, Inc.*, 631 F.Supp. 927, 930-35 (N.D. Ind. 1986); *EEOC v. Delaware State Police*, 618 F. Supp. 451, 453 (D. Del. 1985).

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[5] Section 7(a) of the ADEA, 29 U.S.C. § 626(a), authorizes the EEOC to issue subpoenas by incorporating § 209 of the FLSA, which, in turn, incorporates § 9 of the Federal Trade Commission Act, 15 U.S.C. § 49, which states that "the Commission shall have the power to require by subpoena the attendance and testimony of witnesses and the production of" documentary evidence. Thus, the ADEA indirectly adopts the subpoena provisions of the FTC.

3. Even though the ADEA's language authorizing an award of back pay is incorporated from the FLSA, which defines back pay as mandatory with no provision for a duty to mitigate, the courts have looked to Title VII's back pay language to hold that a back pay award under the ADEA, like such an award under Title VII, is discretionary and that a duty to mitigate exists. Section 7 of the ADEA, 29 U.S.C. § 626 (b) provides that "[a]mounts owing to a person as a result of a violation of [the ADEA] shall be deemed to be unpaid minimum wages … for purposes of sections 216 and 217 of this title …." Section 216 is section of the FLSA, which provides that '[a]ny employer who violates … this title shall be liable to the employee … in the amount of their unpaid minimum wages …." Section 7 further provides that back pay "shall" be awarded, while the similar provision of Title VII, section 706(g), 42 U.S.C. §2000e-5(g), states that if the court finds a violation of Title VII, "the court may … order … reinstatement or hiring of employees, with or without back pay …." Nevertheless, the "overwhelming pattern" among the lower courts has been to rely on Title VII case law when deciding ADEA back pay questions. O'Meara, *supra* at 295; *see, e.g.,*

Goldstein v. Manhattan Indus., Inc., 758 F.2d 1435, 1446 (11th Cir. 1985); *Coleman v. City of Omaha*, 714 F.2d 804, 808 (8th Cir. 1983).

4. Although the ADEA's authorization of attorney's fee awards is derived from the FLSA, the lower courts have looked to federal anti-discrimination law, *i.e.*, 42 U.S.C. § 1988 (the Civil Rights Attorney's Fees Awards Act of 1976) and Title VII, instead of the FLSA, in determining such awards. *See Sullivan v. Crown Paper Bd. Co.,* 719 F.2d 667, 669 n.1 (3d Cir. 1983) ("The fact that attorney's fees under the ADEA are governed by the Fair Labor Standards Act . . . rather than the principal fee award statute . . . is of no consequence. Section 216(b) provides only that 'reasonable' fees may be awarded. It has been the practice of federal courts to treat the various fee-shifting antidiscrimination statutes as governed by the same standards."); *Heiar v. Crawford Cty., Wis.*, 746 F.2d 1190, 1203 (7th Cir. 1984) ("Although the [ADEA] is not a civil rights act within the meaning of section 1988, age discrimination cases commonly cite section 1988 cases on fee questions . . . ."); *Rodriguez v. Taylor*, 569 F.2d 1231, 1250 (3d Cir. 1977) ("[I]n the analogous context of ADEA

> suits, district court judges should look to cases of similar complexity, in particular other employment discrimination and related civil rights suits, to determine reasonable hourly rates for counsel who do not have normal practice billing rates.").

The courts' reliance on Title VII decisions rather than FLSA cases serves to confirm that Title VII, not the FLSA, is the ADEA's closest legislative parallel.

D. ADEA Statutory Rights Diverge Significantly from § 1983 Equal Protection Age Discrimination Claims.

An ADEA plaintiff may sue only his employer, an employment agency or a labor organization. 29 U.S.C. § 623(a) – (c). Under § 1983, a plaintiff may sue individuals – so long as that individual caused or participated in the alleged deprivation of the plaintiff's constitutional rights. 42 U.S.C. § 1983. *See Madigan*, 692 F.3d at 621, citing *Kuhn v. Goodlow*, 678 F.3d 552, 555-56 (7th Cir. 2012). As is particularly pertinent here, the ADEA expressly limits or exempts claims by certain individuals, including elected officials and certain members of their staff, appointees, law enforcement officers, and firefighters. 29 U.S.C. §§ 623(j), 630(f); *Madigan*, 692 F.3d at 621. The ADEA also does not permit reverse discrimination claims, *see Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 593 (2004), or claims by employees under age 40. 29 U.S.C. §

631(a). There are no such limitations for § 1983 equal protection claims.

In light of *Kimel,* and in spite of the fact that ". . . . Congress certainly intended to provide a remedy for age discrimination against state employers when it amended the ADEA in 1974," *Mustafa v. State of Neb. Dep't of Corr. Servs.*, 196 F. Supp. 2d 945, 956 (D. Neb. 2002), the practical effect of precluding § 1983 claims is the elimination of a federal damages remedy against state actors because such claims are barred by Eleventh Amendment immunity. "Permitting total preemption such that no federal forum is available appears incompatible with the purpose of section 1983 and Congress' creation of a remedial scheme to address age discrimination in the ADEA." *Id.* Thus the court in *Mustafa* was "accordingly reluctant to find the ADEA impliedly repeals all section 1983 claims for age discrimination because implied repeal would eliminate the availability of a federal forum merely because the litigant is a state employee." *Id.*[6]

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[6] The same reasoning counsels rejection of Petitioners' belated argument that the availability of a claim for age discrimination by "high-level policymakers and government attorneys" such as Levin, among other state employees exempt from ADEA coverage, but covered by the Government Employee Rights Act (GERA), further demonstrates Congress' intent to preclude § 1983 equal protection claims against workplace age bias. *See* Pet. Br. at 30-34. *Kimel* surely applies to GERA age discrimination claims and the same differences between § 1983 equal protection age discrimination claims and the ADEA exist between § 1983 equal protection age discrimination claims and GERA.

E. Unlike Rights Enforceable Under Title VII And The ADEA, The Rights Created By The FLSA Are Not Based On Rights Also Guaranteed By The Constitution.

The court below candidly acknowledged that every other circuit court that has considered the issue presented here has held that the ADEA does not permit constitutional claims pursuant to § 1983, "largely" relying on the reasoning of the U.S. Court of Appeals for Fourth Circuit in *Zombro v. Baltimore City Police Dep't*, 868 F.2d 1364 (4th Cir. 1989). *Madigan*, 692 F.3d at 616. As pointed out in *Mummelthie v. City of Mason City, Iowa*, 873 F.Supp. 1293, 1323, (N.D. Iowa 1995), *Zombro* "looked to the FLSA to determine whether the ADEA was the exclusive federal remedy for age discrimination in employment, finding that the FLSA provisions incorporated into the ADEA had been interpreted to provide an exclusive remedy."

As the court below also pointed out, however, reliance on Congress' incorporation of the FLSA's remedial scheme into the ADEA to hold that Congress intended to preclude a § 1983 constitutional remedy for age discrimination is completely misplaced. It is "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" because "[u]nlike Title VII and the ADEA, the rights created by the FLSA are not based on rights also guaranteed by the constitution." *Madigan*, 692 F.3d at 620. This

conclusion does no violence to the notion that the FLSA is the sole remedy for violation of rights created by the FLSA and, similarly, that the ADEA is the sole remedy for violation of ADEA rights. It means merely that § 1983, which provides a remedy for constitutional violations, "cannot be used as an alternate mechanism to assert violation of the ADEA's provisions against states." *Mustafa*, 196 F. Supp. 2d at 956 n. 13.

In *Zombro*, the leading case holding that the ADEA is the exclusive federal remedy for age discrimination in employment, the majority found that "§ 1983 and ADEA remedies could not coexist, because allowing a § 1983 claim to proceed would allow a plaintiff to bypass the detailed and comprehensive remedial scheme Congress established in the ADEA." *Mummelthie*, 873 F.Supp. at 1327. However, as pointed out in *Mummelthie*, "Congress established the remedial scheme of the ADEA *to vindicate rights secured by the ADEA*, not to vindicate rights secured by the Constitution," *id* (emphasis in original), therefore, "there is no bypass of the ADEA when § 1983 is used to vindicate federal constitutional claims of age discrimination." *Id.* Judge Murnaghan, concurring in part and dissenting in part in *Zombro*, 868 F.2d at 1373, put it more succinctly: The "ADEA does not purport to 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."

Thus, the dissent in *Zombro* rejected the majority's conclusion that Congress could not have intended to preserve a § 1983 remedy for age discrimination because doing so would undermine the ADEA enforcement mechanism it created:

> It is up to Congress, not this Court, to balance the risks and benefits inherent in allowing alternatives to co-exist in the fight against discrimination. In the context of Title VII, Congress clearly believed that the need to retain a variety of methods to combat discrimination outweighed the risk that multiple remedies would undermine Title VII's comprehensive enforcement mechanism. Nothing indicates that Congress intended to strike a different balance in enacting the ADEA.

Id. (internal citations omitted) (Murnaghan, J., concurring in part and dissenting in part). Moreover, in *Kimel*, this Court declared that "it is clear that the ADEA cannot be understood as responsive to, or as designed to prevent, unconstitutional behavior." 528 U.S. at 86.

The ADEA, therefore, is not the exclusive federal remedy for age discrimination in employment because even if this Court were to find that the ADEA provides the sole remedy for violation of its

statutory provisions, such a conclusion does not preclude distinct *constitional* claims under § 1983.[7]

II. PERMITTING PUBLIC EMPLOYEES TO CHALLENGE WORKPLACE AGE BIAS UNDER § 1983 AND THE EQUAL PROTECTION CLAUSE WOULD NOT UNDERMINE FEDERAL STATUTORY PROTECTIONS AGAINST AGE DISCRMINATION.

A central premise of Petitioners' argument, that "the ADEA's remedial regime displaces respondent's § 1983 claims," is that "competing claims under § 1983 would upend a comprehensive federal regime targeting the same harm." Pet. Br. at 10. Available evidence and common sense point decisively to the contrary.

Neither private nor government enforcement of the ADEA (or the GERA, Government Employee Rights Act of 1991, 42 U.S.C. §§ 2000e-16a through 2000e-16c (GERA)) on behalf of state employees is robust enough to plausibly affirm the notion (or justify the metaphor) that they constitute an "applecart" prone to being "upend[ed]" if § 1983 equal protection age discrimination claims are allowed. Rather, to the extent empirical data exists on this question, and to the degree a fair assessment of probabilities is feasible, the data shows that state

[7] This is so whether the ADEA is considered in combination with the GERA, as Petitioners urge, or on its own, as it should be, being a statute wholly separate from and independent of the GERA.

employers face negligible risk of accountability for acts of age bias under the ADEA (or the GERA) and further, that other public employees have little incentive to invoke § 1983 instead of the ADEA (or the GERA).

Lacking other options, state employees should have the choice to rely on longstanding rights under the Fourteenth Amendment. Non-state public employees, however, face no barrier like *Kimel*— impeding their reliance on the ADEA. Hence, there is no realistic prospect of their often asserting far more difficult claims under § 1983. Thus, recognizing a 1983 equal protection claim for age discrimination does not portend significant additional litigation risks, or costs for public employers, or disruption of a delicate structure of robust statutory protection from age discrimination for older state employees.

A. Due To *Kimel*, Private Enforcement Of Federal Statutory Age Discrimination Protections For State Employees Is Quite Limited.

Shortly after *Kimel*, the EEOC acknowledged the dramatic limitation on private enforcement of the ADEA that the decision represented, and accordingly, the Commission's increased responsibility for protecting state employees: "The effect of *Kimel* is effectively to make EEOC the only entity that can sue state governments for age discrimination in federal court." EEOC, "The 2000s: Charting A Course for the 21st Century,"

http://www.eeoc.gov/eeoc/history/35th/2000s/index.html (statement issued in conjunction with the 35th Anniversary of the EEOC, and reported on the "EEOC 35th Anniversary" webpage). Moreover, while the *Kimel* majority expressed confidence that its decision did "not signal the end of the line for employees who find themselves subject to age discrimination at the hands of their state employers," because "[s]tate employees are protected by state age discrimination statutes," 528 U.S. at 91, the "practical reality of *Kimel*" is otherwise: *i.e.*, "relevant state laws are a patchwork of uneven protections that are generous in some locales and stingy in others." Carlton J. Snow, *American Law in a Time of Global Interdependence: U.S. National Reports to the XVIth International Congress of Comparative Law: Section III Collective Agreements and Individual Contracts Employment in Labor Law*, 50 AM J. COMP. L. 319, 344 (Fall 2002). [8]

A review of available sources – such as reported decisions in the most common electronic legal databases, Lexis and Westlaw, and data collected by the EEOC — confirms a low overall level of private ADEA enforcement activity in federal

[8] This "patchwork" also impedes reliance on the ADEA in actions brought in state courts: "In those states that provide no meaningful remedy for age discrimination under state law, the absence of a state remedy may actually provide the justification for cutting off the federal ADEA remedy in a state forum." Ivan E. Bodensteiner & Rosalie B. Levinson, *Litigating Age and Disability Claims Against State and Local Government Employers in the New "Federalism" Era*, 22 BERKELEY J. EMP. & LAB. L. 99, 116 (2001).

courts on behalf of state employees since issuance of the *Kimel* decision. This fact rebuts Petitioners' claims that the ADEA (whether on its own or together with the GERA) constitutes a cohesive scheme of protection from age discrimination that Congress must have intended to preclude § 1983 equal protection claims. While it is hard to definitively infer causation from such data, the data strongly suggest that *Kime*l plays a major, possibly decisive, role in discouraging private federal statutory age discrimination enforcement.

Searches for reported state employee ADEA (and GERA age bias) decisions since January 11, 2000 in Lexis and Westlaw produced less than 100 results, or an average of less than seven cases per year.[9] A majority of these decisions involve ADEA claims for monetary relief only, that courts dismissed with prejudice, either via a motion to dismiss or at summary judgment, based on *Kimel*. Many of these claims, at least a solid plurality, were brought by pro se litigants who may have been unaware of *Kimel*'s preclusive effect on such litigation.

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[9] Undersigned counsel conducted these searches, which obviously can be done in various ways, using search terms to identify the ADEA (and/or the GERA) mentioned in the same paragraph as "state employee" or "state employees" in decisions reported since January 11, 2000. For instance using Lexis, such a search might be done as follows: {ADEA /p "state employee" & date after 1/1/2000} and {GERA /p "state employee" & date after 1/1/2000}. The GERA results were screened further to identify age bias cases, and both sets of results were reviewed to identify instances of private age discrimination enforcement.

Plainly, an average of less than seven reported ADEA (and GERA) cases per year since *Kimel* falls far short of a robust private enforcement regime on behalf of state employees. Logic suggests numerous reasons for this pattern, such as the lack of a damages remedy for emotional distress under the ADEA, even before *Kimel*. In any event, the data indicates that a § 1983 equal protection claim for age discrimination is not at all likely to "upend" the metaphorical applecart, but rather, at most, that it will allow a modest rise in private enforcement activity.

B. EEOC Enforcement Of Federal Statutory Age Discrimination Protections For State Employees Is Minimal.

In 2006, the EEOC declared itself "uniquely positioned" to address age discrimination by state employees, because the agency "can file ADEA suits against state entities and obtain monetary relief, whereas private litigants are limited by sovereign immunity to obtaining only injunctive relief in such cases." EEOC, "Systemic Task Force Report to the Chair of the Equal Employment Opportunity Commission," March 2006, at section I.A. (citing *Kimel*) *available at* http://www.eeoc.gov/eeoc/task_reports/systemic.efc. Nevertheless, available records show that in nearly thirteen years since the *Kimel* decision, the EEOC has reported suing only seven

state employers under the ADEA.[10] By contrast, in the thirteen years before *Kimel*, the EEOC sued approximately three time as many state employers.[11] This is inconsistent with the significant increase in ADEA charges received by the EEOC over roughly the same period: from 16,008 in fiscal year 2000 to 22,857 in fiscal year 2012.[12] That record demonstrates that EEOC age discrimination enforcement on behalf of covered state employees is inadequate. It belies Petitioners' claim that Congress intended the EEOC to maintain an exclusive regime of federal statutory age discrimination enforcement, and Petitioners' further assertion that the EEOC can be relied on, under reasonably foreseeable conditions, to successfully manage such a task.

Nor is the trickle of EEOC age discrimination enforcement activity on behalf of state employees likely to swell any time soon. For instance, the EEOC recently released Strategic Enforcement Plan" highlights a variety of priorities, but these do

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[10] This estimate draws on EEOC press releases available on the Commission's website, *see* www.eeoc.gov/eeoc/newsroom/index.cfm, and analysis of the results of searches in electronic legal databases: Lexis {search: EEOC/p "state employee" & date after 1/1/2000} and Westlaw {search: "EEOC v." /200 ADEA and after 1-10-2000}.

[11] This estimate is based on analysis of the results of the same searches for the period 1/1/1987 through 12/31/1999.

[12] Age Discrimination in Employment Act, FY 1997-FY 2012, EEOC, AgeDiscriminationwww.eeoc.gov/eeoc/statistics/enforcement/adea.cfm.

not include the problem of age discrimination against state employees unable to secure monetary relief in private enforcement actions. *See* "U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2013-2016" (approved Dec. 17, 2012) available at http://www.eeoc.gov/eeoc/plan/sep.cfm. A key factor seriously compromising the agency's ability to pursue with vigor potential areas of its enforcement jurisdiction is the cutback by Congress in agency resources in recent years. *Id*. at 3 ("Between FY 2000 and 2008, EEOC staffing levels and funding dropped nearly 30 percent. An infusion of resources in 2009 allowed for some rebuilding of capacity, but that was quickly stalled when funding was reduced and hiring freezes were implemented in FY 2011 and FY 2012."). It would be illogical in the extreme for this Court to conclude, at the very time Congress is limiting EEOC resources needed to combat age discrimination under federal statutes, that Congress intended such laws to strip victims of workplace age bias remedies available to them for nearly 100 years under the Civil Rights Act of 1871 and the Equal Protection Clause.

Petitioners also stress that the EEOC plays an important role in carrying out Congress' "preference for informal conflict resolution and voluntary compliance" under the ADEA by implementing the statutory directive to "seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." Pet Br. at 22 (quoting 29 U.S.C. § 626(b)).

Petitioners first cite the fact that "the ADEA affords the EEOC an initial uninterrupted period within which to contact the employer and resolve the dispute informally . . . ." *Id*. at 22. Among the steps EEOC takes at this stage is to offer parties voluntary mediation. *See* EEOC, "Mediation," www.eeoc.gov/employees/mediation.cfm. But without any prospect of obtaining a monetary recovery in litigation, state employees who are charging parties – unlike private-sector or local government employees – have no means to persuade their employers to agree to any such relief. For the same reason, a state employee's capacity to convince a state employer to agree to declaratory or injunctive relief also is drastically reduced.

Charges of discrimination that result in a finding of probable cause that a violation has occurred typically lead to conciliation efforts by the EEOC. *See* e.g., EEOC, "Resolving a Charge," www.eeoc.gov/employers/resolving.cfm. Yet state employees face similar barriers to successful outcomes from conciliation as they do in earlier EEOC efforts at informal conflict resolution. Because state employers are not subject to an award of monetary relief in litigation, due to *Kimel*, they have no incentive to provide any such relief in conciliation, and little incentive to agree to meaningful injunctive or declaratory relief. Thus, although informal dispute resolution efforts by the EEOC in state employee cases may ultimately succeed in avoiding litigation, such efforts are very unlikely to bring about meaningful relief for victims of age discrimination. Any such relief is likely to be

far less than in cases of comparable severity involving private or non-state public employees.

Finally, to the extent there is any serious possibility of favorable results of informal dispute resolution processes coordinated by the EEOC in state employee ADEA (or GERA age bias) cases, such prospects would not be materially lessened by the possibility of charging parties litigating parallel § 1983 equal protection age discrimination claims. This is so because of the sheer difficulty of prevailing under § 1983, a fact that Petitioners acknowledge. It follows that recognizing a right for state employees to assert § 1983 age discrimination claims would not cause appreciable harm to the ADEA's (or GERA's) enforcement scheme.

C. The Availability of Monetary Relief And The Greater Ease of Proving Age Discrimination For Non-State Public Employees Under The ADEA and GERA Means Such Employees Are Unlikely To Use A § 1983 Equal Protection Claim to "Bypass" Federal Statutory Age Discrimination Claims and Processes.

While this case does not directly implicate the rights of non-state public employees, it does so indirectly. In an attempt to boost their case against state employee constitutional claims challenging age bias, Petitioners offer speculation regarding "significant harms" likely to result from recognizing

a right for non-state public employees to challenge age bias under § 1983 and the Fourteenth Amendment. Pet. Br. at 10. These claims are unpersuasive, especially given Petitioners' discussion of the steep challenges facing plaintiffs advancing such claims.

At some length, Petitioners explain the enormous difficulty facing most plaintiffs in proving age discrimination liability in § 1983 equal protection cases. *See id.* ("it is difficult to prevail ultimately on age discrimination claims under the Equal Protection Clause"); *id.* at 38-42 (section of brief contending "The Equal Protection Clause Offers Little Likelihood of Success on Age Discrimination Claims . . ."). Petitioners acknowledge that "equal protection claims for alleged age discrimination, like respondent's here, are particularly limited by the 'relaxed' standard against which they are judged." *Id.* at 39-40 (citing *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976) (per curiam)). Further, Petitioners note that in the Equal Protection Clause context, "an age classification is presumptively rational" and thus "a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests." *Id.* at 40 (quoting *Kimel*, 528 U.S. at 83-84, 84-86.). It stands to reason that non-state public employee complainants who can assert claims for relief based on more favorable terms under the ADEA are unlikely to rush to embrace the strategy of suing under the Equal Protection Clause.

Without empirical support, Petitioners also assert that age bias suits by non-state public employees asserting § 1983 equal protection claims will "[i]mpose [s]ubstantial [c]osts on [p]ublic [e]mployers." *Id.* at 38. Petitioners rely on vague allegations that such suits necessarily involve "high discovery costs" and a serious "threat of punitive damages." *Id.* Yet Petitioners fail to explain why this supposed threat (or even the threat of compensatory damages, which are unavailable to any ADEA plaintiff) is so great when in the same breath they characterize § 1983 equal protection age bias claims as so difficult to win. As to other supposed evidence of harm, Petitioners identify nothing substantial beyond that which also applies equally to non-state public employee ADEA (or GERA) age discrimination claims: *e.g.,* that such claims "readily survive motions to dismiss," *Id.* at 10; or that in some instances, "discovery costs may approach or exceed the potential damages recovery." *Id.* at 42.

CONCLUSION

For the reasons set forth above, Amici Curiae urge the Court to affirm the judgment of the U.S. Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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