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Brief for Respondent. Madigan v. Levin, 571 U.S. 1 (2013) (No. 12-872), 2013 U.S. S. Ct. Briefs LEXIS 3187

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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 FOR RESPONDENT

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TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Cited Authorities

Cited Authorities

CONSTITUTION, STATUTES AND RULES

Cited Authorities

Cited Authorities

Cited Authorities

Cited Authorities

OTHER AUTHORITIES

STATEMENT

Harvey Levin, male, was hired in 2000 as an attorney in the office of the Illinois Attorney General. Levin received outstanding evaluations from his supervisors. (Pet.App. 3a). In May 2006, when Levin was 61 years old, he was discharged. Defendants hired a substantially younger female attorney to replace Levin. Two other male attorneys over 50, in the same bureau, were discharged at the same time as Levin, and both were replaced by substantially younger lawyers. Levin contends that he was fired because of his age and gender; the defendants deny that they acted with any such purposes.

In November 2006, Levin filed a charge with the EEOC and the Illinois Department of Human Rights, alleging discrimination on the basis of age and gender. That charge specifically asserted that this discrimination violated Title VII of the 1964 Civil Rights Act and the Age Discrimination in Employment Act (ADEA). The defendants denied that they had discriminated against Levin, but did not then dispute the applicability of Title VII and the ADEA to Levin's claim. In July 2007 the EEOC issued a right to sue letter to Mr. Levin, which authorized him to file suit under Title VII. For reasons not relevant here, no such letter was required to file suit under the ADEA. *See* 29 U.S.C. § 626(d)(1). Levin commenced this action in District Court in August 2007, asserting claims under the ADEA and Title VII.

On September 21, 2007 the defendants moved to dismiss Levin's complaint. In that motion defendants for the first time asserted that Levin was not covered by the ADEA or by Title VII. Section 630(f) of the ADEA

excludes from the definition of an employee protected by the ADEA elected officials and their "appointee[s] on the policymaking level." 29 U.S.C. § 630(f). Title VII contains a similar exclusion. 42 U.S.C. § 2000e(f).

Because the viability of Levin's ADEA and Title VII claims were now in jeopardy, Levin took two precautionary actions. First, on September 27, 2007, Levin amended his federal complaint to add additional counts, alleging that the defendants violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by engaging in intentional age and gender based discrimination. Levin relied on section 1983 as providing the cause of action to enforce these two constitutional equal protection claims. Second, Levin filed a timely complaint with the Illinois Human Rights Commission alleging age and sex discrimination. The Illinois Human Rights Commission has the authority to adjudicate state-law complaints and to order relief. 775 ILCS 5/8-102. (The Illinois Department of Human Rights, where Levin's earlier charge had been filed, only has authority to seek to conciliate such charges). In February 2008, the defendants asked the Illinois Human Rights Commission to stay all administrative proceedings on Levin's state law claim, noting that he had a related claim pending in federal court. The state Commission granted that stay over Levin's objection, and Levin's state law administrative claim has been held in abeyance ever since.

In November 2007 the defendants filed in federal court a second motion to dismiss Levin's Title VII and ADEA claims on the ground that Levin was not covered by those statutes. That motion also argued qualified immunity and asserted that Levin's age-based equal protection claim

was precluded by the ADEA; it did not contend, however, that Levin's gender discrimination equal protection claim was precluded by Title VII. In September 2008 the district court denied the motion to dismiss, holding that Levin was not within the exclusion in the ADEA and Title VII for certain policymaking level employees. That decision did not address the defendants' contention that the ADEA precluded Levin's age-based equal protection claim. (R. 54-55).

In October, 2008, defendants filed a third motion to dismiss. In March 2010, the district judge issued another order on the pending requests for dismissal. In that order the district court held, as it had in 2008, that Levin was not excluded from coverage under the ADEA and Title VII. (Pet. App. 107a-114a). The district court also concluded that the ADEA did not preclude Levin from bringing a 42 U.S.C. § 1983 action alleging intentional age-based discrimination that violated the Equal Protection Clause of the Fourteenth Amendment. (Pet. App. 121a-131a). In rejecting that interpretation of the ADEA, the district judge relied on decisions by this Court that Title VII does not preclude a plaintiff from seeking relief in a section 1983 action for discrimination on the basis of race or gender. (Pet. App. 121a-131a). The district court dismissed Levin's section 1983 age discrimination action on another ground, holding that the defendants were entitled to qualified immunity due to the lack of unanimity of decisions on petitioners' preclusion argument; but it rejected the qualified immunity defense to Levin's section 1983 sex discrimination claim. (Pet. App. 131a-133a). The judge who had ruled on those motions for dismissal then retired, and the case was assigned to another judge.

In July 2011, the new judge, ruling on a defense motion for summary judgment, revisited a number of issues that had been addressed by the first judge. The new district judge, disagreeing with two prior decisions of his predecessor, held that Levin was excluded from coverage under the ADEA and Title VII, and dismissed those statutory claims. On the other hand, the district judge also concluded, in disagreement with the earlier 2010 decision, that Levin's 42 U.S.C. § 1983 age discrimination equal protection claim was not barred by qualified immunity. (Pet App. 5a-7a, 38a-102a). The court held that Levin had adduced sufficient evidence to permit a jury to find that he had indeed been discharged because of his age and gender.

The defendants appealed the denial of qualified immunity. In the court of appeals they renewed their argument that Levin's section 1983 equal protection age discrimination claim was barred by the ADEA. The Seventh Circuit held that the ADEA does not bar a plaintiff from pursuing a section 1983 claim for age discrimination alleged to violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The court of appeals acknowledged that its interpretation of the ADEA was in conflict with decisions in several other circuits. (Pet. App. 1a-37a).

This Court granted review to resolve that conflict, and the district court vacated the May 6, 2013 trial date.

SUMMARY OF ARGUMENT

I. The Question Presented is "[w]hether . . . state and local government employees may avoid the Federal Age Discrimination in Employment Act's comprehensive

remedial regime by bringing age discrimination claims directly under the Equal Protection Clause and 42 U.S.C. § 1983." In this case, however, Levin himself is not covered by the ADEA. The district court held that Levin is not an employee within the scope of the ADEA, and there is no realistic possibility of overturning that judgment on appeal. Levin has no interest in whether workers who are covered by the ADEA can bring such section 1983 actions, and the resolution of that issue would not affect Levin's own claim.

Petitioners suggest that this Court decide whether the Government Employees Rights Act ("GERA") precludes Levin from bringing a section 1983 equal protection action. That issue, however, is not within the scope of the question presented. GERA and the ADEA are entirely separate statutes, and the petition never mentioned GERA. Petitioners never relied on GERA in the courts below, and have waived this issue. Moreover, there is no circuit conflict regarding the effect of GERA on the ability of an employee to bring a section 1983 complaint alleging intentional age-based discrimination that violates the Equal Protection Clause of the Fourteenth Amendment.

II. The circumstances of this case do present a question about whether the ADEA bars section 1983 claims by workers who are *not* covered by the ADEA, leaving such age-discrimination victims with neither remedy. That issue also was never raised below, and it is unclear whether petitioners claim the ADEA has any such impact.

The ADEA does not bar section 1983 equal protection claims alleging intentional age discrimination brought by

non-covered workers. Rather, the ADEA simply leaves undisturbed whatever remedies those non-covered workers otherwise possess. *Davis v. Passman*, 442 U.S. 228 (1979), held in an analogous situation that the exclusion of certain federal workers from the protections of Title VII does not constitute a limitation on constitutional judicial remedies for the excluded workers.

III. This Court's decisions in *Middlesex Cnty Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981), and *Smith v. Robinson*, 468 U.S. 992 (1984), address distinct questions. The issue in *Sea Clammers* is whether, when Congress adopts a statute establishing a new legal right, it intends that, in addition to whatever enforcement mechanisms the statute itself contains, the statutory right can also be enforced through the cause of action provided by section 1983. However, unlike in *Sea Clammers*, Levin's complaint does not seek to use 42 U.S.C. § 1983 to enforce the statutory provisions of the ADEA. Rather, Levin's complaint alleges that defendants-petitioners violated the Equal Protection Clause of the Fourteenth Amendment by engaging in intentional age based discrimination by and through 42 U.S.C. §1983.

The issue in *Smith* is whether, when Congress creates a new legal right, it intends to reduce the remedies and protections previously available under a pre-existing independent right.

Because these lines of cases present different questions, they are governed by different legal standards. Under *Sea Clammers* the central question is whether the particular remedies provided by the statute in question to enforce the statutory rights are incompatible with

permitting enforcement of those rights through section 1983. That question usually turns on whether the statute itself contains a private cause of action.

Under *Smith* a statutory scheme does not bar use of section 1983 to enforce a constitutional right unless (a) the statutory scheme was created for the purpose of enforcing that constitutional right, and (b) Congress intended that scheme to be the exclusive method of enforcing that constitutional right, displacing pre-existing remedies. That standard was satisfied in *Smith* because Congress had adopted the statute in that case for the express purpose of enforcing the equal protection rights of handicapped children, and the uniquely elaborate statutory scheme of rights and procedures was fashioned by Congress to be "the most effective vehicle" for protecting those rights. 468 U.S. at 1012-13.

IV. The ADEA clearly does not meet the *Smith* and *Fitzgerald* standard. "[I]t is clear that the ADEA cannot be understood as responsive to, or as designed to prevent, unconstitutional behavior." *Kimel v. Florida Bd. Of Regents*, 528 U.S. 62, 86 (2000). A fortiori the ADEA was not intended to be the exclusive remedy for unconstitutional age discrimination in violation of the Equal Protection Clause.

This Court has repeatedly held that Title VII does not preclude victims of race or gender based discrimination in employment from obtaining relief under other federal law. The purpose of Title VII and the ADEA were to supplement, not supplant, already existing remedies. Petitioners do not ask this Court to overturn those deeply entrenched precedents. Petitioners can offer no

persuasive reason why Congress would have wanted age discrimination to be treated differently than discrimination claims under Title VII.

V. GERA does not preclude section 1983 actions by the workers to whom it applies. Like Title VII, and the ADEA, GERA was not enacted to provide redress for constitutional violations. Petitioners do not suggest that GERA would bar a race or gender discrimination equal protection § 1983 claim by a covered worker. GERA cannot have a preclusive effect for age-based equal protection constitutional claims; GERA applies equally to all covered forms of discrimination.

ARGUMENT

I. THE "QUESTION PRESENTED" IS NOT PRESENTED BY THIS CASE

(1) This Court granted certiorari in this case to decide whether a state and local government employee covered by the ADEA may bring a section 1983 claim for age discrimination alleged to violate the Equal Protection Clause. The Question Presented was specifically framed to address the circumstance of those covered employees: "Whether the Seventh Circuit erred in holding . . . that state and local government employees may *avoid* the Federal Age Discrimination in Employment Act's comprehensive remedial regime by bringing age discrimination claims directly under the Equal Protection Clause and 42 U.S.C. § 1983." (Pet.Br. i)(emphasis added). "This case asks whether state and municipal employees may *avoid* the remedial regime established by the . . . ADEA . . . by using 42 U.S.C. § 1983 and the Equal Protection Clause

to bring age discrimination claims against their public employers." (Pet.Br. 2)(emphasis added). Only an employee who has a claim which *could* be raised under the ADEA administrative provisions might be said to have "avoid[ed]" those provisions by instead filing a section 1983 claim.

The petition emphasized that covered employees who wish to file an ADEA suit are required, before doing so, to first notify the EEOC of their intent to sue; such notice, petitioners stressed, could lead to EEOC conciliation efforts to resolve the underlying dispute. (Pet. 13-14). If covered employees could also bring section 1983 equal protection claims, the petition warned, those workers could "bypass" the ADEA administrative process applicable to their claims. (Pet. 15, 17, 21, 22; see *id.* at 14 ("evade"), 19 ("circumvent")).

However, petitioners now acknowledge that Levin is *not* covered by the ADEA. (Pet. Br. 5, 37). Section 630(f) of the ADEA excludes from the definition of an "employee" protected by the ADEA certain state and local workers. "The term 'employee' . . . shall not include any person elected to public office in any State or political subdivision of any State . . . , or any person chosen by such officer to be on such officer's personal staff, or any appointee on the policymaking level . . . ." 29 U.S.C. § 630(f). In the district court defendants argued, ultimately successfully, that Levin was excluded by section 630(f) from the coverage of the ADEA. In 2011 the district court concluded, as the defendants had repeatedly urged, that "Levin is not an 'employee' covered by . . . the ADEA," and therefore dismissed his ADEA claim. (Pet.App. 68a). There is no realistic possibility that this determination will be overturned on appeal. The district court applied binding

Seventh Circuit precedent regarding Assistant State's Attorneys. (Pet. App. 60a-68a)(citing *Opp v. Office of the State's Attorney of Cook Cnty.*, 630 F.3d 616 (7th Cir. 2010), *cert. denied* 132 S.Ct. 92 (2011)).[1]

A worker such as Levin who is not an employee under section 630(f) is neither required nor entitled to file a notice with the EEOC under section 626(d), because he or she has no claim under section 623 of the ADEA. Such workers neither need nor may invoke, and thus could not "bypass," the conciliation process established by section 626(d). Levin could no more "evade" the section 626(d) notice and conciliation process than a woman could evade the draft. Despite the fact that the ADEA and its section 626(d) enforcement scheme do not apply to Levin himself, petitioners devote much of their brief to the importance of that section 626(d) process. (E.g., Pet. Br. 20-24). Under the Seventh Circuit decision, petitioners object, "public-sector workers . . . could ignore every one of the ADEA's requirements." (Pet. Br. 9). But those requirements simply did not apply to Levin himself.

Although there is a circuit conflict regarding whether state and local workers covered by the ADEA may bring a section 1983 equal protection claim for age discrimination, the resolution of that issue would have no effect on the outcome of the instant litigation. Petitioners do not argue otherwise; when their merits brief does focus on Levin's own claim, they contend only that Levin's section 1983

1. We noted that holding in our brief in opposition. (Br. Opp. 3). The petition mentioned that "respondent is exempt from the ADEA's protections, for he is not an 'employee' within the meaning of the Act." (Pet. 16).

action is barred by a different statute, the Government Employee Rights Act of 1991 (GERA). (See pp. 49-54, infra). But petitioners do not assert that the resolution of their GERA argument, regarding the effect of GERA on workers *not* covered by the ADEA, turns on whether the ADEA bars section 1983 constitutional equal protection claims by workers who *are* covered by the ADEA. If Levin were to bring a declaratory judgment action seeking a determination that ADEA-covered employees can maintain a section 1983 equal protection claim asserting age discrimination, that action would be dismissed for want of Article III standing.[2]

(2) The circumstances of this case could pose the question of whether the decision of Congress to *exclude* a worker or claim from the scope of the ADEA bars an excluded worker from pursuing a section 1983 equal protection constitutional claim.

That issue, however, is not fairly included in the question presented. Sup. Ct. Rule 14.1(a). The question presented concerns workers who *are* covered by the ADEA—those who would be in a position to "avoid" using the ADEA administrative provisions—not workers excluded from the protections of the ADEA. The question of whether workers excluded from coverage of the ADEA may pursue a section 1983 claim is not a "subsidiary" issue that is necessary or relevant to the question of whether covered workers may advance such claims. With regard to workers who are covered by the ADEA, the question at issue is whether Congress wanted those workers to have only a single remedy for age discrimination, the

2. Mr. Levin is now in private practice.

remedy provided by the ADEA. With regard to workers who are excluded from ADEA coverage, the controlling issue would be whether Congress wanted to deny those workers any remedies at all for age discrimination under the constitution. (See pp. 16-20, infra).

It is unclear whether petitioners contend that the ADEA precludes section 1983 equal protection actions by workers who are not covered by the ADEA itself. In any event, petitioners never advanced any such argument in the courts below, and it has been waived. Moreover, resolution of this issue is of insufficient importance to warrant use of this Court's limited resources. There assuredly is no circuit conflict regarding this exceedingly uncommon question.

(3) Petitioners' merits brief does argue that Levin's section 1983 equal protection age discrimination claim is precluded by the Government Employees Rights Act. (Pet. Br. 37). But that issue assuredly is not fairly included within the question presented and it was never raised in the courts below.

The question presented in the petition is expressly about, and limited to, the ADEA itself. The petition never mentions GERA. Although petitioners' merits brief now refers to GERA as one of the "statutes involved" (Pet. Br. 2), the provisions of GERA were not included in the "statutes involved" set out in the petition itself. Petitioners' new argument regarding GERA is not fairly encompassed within the question presented, which is limited to a question about the meaning of the ADEA itself. Whether the ADEA precludes section 1983 equal protection constitutional claims does not turn on whether GERA precludes such claims, or vice versa. The ADEA and GERA age discrimination claims are by definition

mutually exclusive; GERA only applies to individuals who are excluded from coverage under the ADEA.

Petitioners repeatedly but incorrectly describe GERA as if it were part of the ADEA. Petitioners' brief refers to "[t]he ADEA, with its exhaustive procedures and remedies, *including* special rules for certain state and local government employees." (Pet. Br. 10)(emphasis added). "[T]he ADEA creates a . . . detailed remedial regime . . . . [T]hat regime *includes* special procedures for certain government employees [such as] the plaintiff." (Pet. Br. 19)(emphasis added).[3] That is not correct. GERA, enacted in 1991, is emphatically neither a part of, an amendment to, nor codified with, the ADEA. GERA is a separate freestanding statute.[4]

As originally enacted in 1991, most of GERA dealt with discrimination against Senate employees, and it created a detailed remedial scheme for those federal workers. 105 Stat.1088. Section 302 forbade discrimination against Senate employees on the basis of race, color, religion, sex, national origin, age, disability or handicap. *Id.* Section 321 of GERA provided that the prohibitions and remedies applicable to Senate employees under sections

3. Under the heading "the ADEA creates a comprehensive remedial regime," the brief states that "Congress also focused on certain state and local government employees and created special rules for these officials . . . ." (Pet. Br. 19). *See* Pet. Br. 30 ("The Government Employee Rights Act of 1991 . . . makes *the ADEA's remedial regime* still more comprehensive by 'extend[ing] protections against discrimination based on . . . age . . . to [these] previously exempt high-level state employees.'"(Emphasis added)

4. The portion of GERA that remains in effect is codified with Title VII in Title 42 of the United States Code, not in or after the ADEA provisions in Title 29.

302 and 307(h) would apply as well to state and local government workers, as well as to certain Presidential appointees, who had previously been excluded from coverage under the ADEA, Title VII, and the Americans With Disabilities Act. Section 321 directed the EEOC to establish an administrative process for resolving complaints under that section. In 1995 Congress repealed the provisions regarding Senate employees, dealing with those workers in separate legislation, and rewrote GERA so that the substantive and remedial provisions originally incorporated by reference into section 321 were now written into the successor of that provision. GERA is no more a part of the ADEA than it is a part of Title VII, the Rehabilitation Act, or the Americans with Disabilities Act.

Petitioners repeatedly describe GERA as providing a remedy to enforce the "ADEA protection" applicable to employees such as Levin, as if the ADEA itself somehow forbade discrimination against workers who were not "employees" under the ADEA, and GERA merely provided an enforcement mechanism for that ADEA right. "Congress also created a specialized, administrative process that certain high-ranking public-sector employees must follow to vindicate their *rights under the ADEA*." (Pet.Br. 2)(emphasis added). "[H]igh-level policymakers and government attorneys may seek *the ADEA's protection* only through a specialized administrative procedure." (Pet. Br. 9)(emphasis added).[5]

5. *See* Pet. Br. 36 ("[H]igh-level policymakers and government attorneys . . . now receive *ADEA protections* by operation of GERA")(emphasis added), 48 ("Congress simply concluded that, given their high station and the nature of their work, these officials must pursue *their ADEA rights* through a specially designed, administrative process.") (emphasis added).

That is not correct. The ADEA never did and still does not apply to, or protect, state and local government workers who are excluded by section 630(f) from the definition of an employee under the ADEA. The only statutory prohibition regarding age discrimination against such employees is in GERA itself. 42 U.S.C. § 2000e-16b(a). However, Levin's complaint does not seek to use 42 U.S.C. § 1983 to enforce the statutory provisions of the ADEA, GERA or any statutory provision. Rather, Levin's complaint alleges that defendants-petitioners violated the Equal Protection Clause of the Fourteenth Amendment by engaging in age based discrimination.

This Court would not have granted review to determine whether GERA precludes section 1983 equal protection claims regarding age discrimination. There are no circuit court decisions at all about that question. The EEOC receives only a handful of complaints a year under GERA nationwide. The issue is thus of little importance.

In the instant case, any GERA-based defense to Levin's section 1983 equal protection claim was assuredly waived. The defendants did not argue in either the district court or the court of appeals that Levin's equal protection claim was barred by GERA, and neither lower court ever addressed that issue. It was not until petitioners' merits brief in this Court, filed six years after Levin's original district court complaint, that the defendants for the first time raised this issue.

Under these circumstances, the Court may wish to dismiss the petition as improvidently granted.

II. THE ADEA DOES NOT PRECLUDE SECTION 1983 CLAIMS BY WORKERS *NOT* COVERED BY THE ADEA

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. That issue was not raised in the courts below and is not within the scope of the Question Presented. It is unclear whether petitioners even contend that the ADEA bars such claims. In any event, prior decisions of this Court make clear that the ADEA has no such effect.[6]

This Court in *Davis v. Passman*, 442 U.S. 228 (1979) rejected a contention that Title VII precluded the constitutional claims of an employee not covered by Title VII. As originally enacted, §717 of Title VII was limited to the competitive service. 86 Stat. 111. In *Davis* a federal employee who was not in the competitive service, and who thus was excluded from the protections of § 717, brought suit for gender-based discrimination under the Due Process Clause of the Fifth Amendment. This Court

6. In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the plaintiffs asserted age discrimination claims under both the ADEA and the Equal Protection Clause. The Court held that the plaintiffs were "policymaking level" employees, and thus not "employee[s]" within the scope of the ADEA. 29 U.S.C. § 630(f). The Court then resolved on the merits the constitutional claim asserted by the plaintiffs. Although amicus briefs were filed in that case by 15 states, the National Governors' Conference, and the National League of Cities, neither they nor the defendant questioned the authority of this Court to address the constitutional claims.

rejected the argument that Congress' decision to exclude the plaintiff from the protections of Title VII barred her constitutional claim.

> The Court of Appeals apparently interpreted § 717 of Title VII . . . as an explicit congressional prohibition against judicial remedies for those in petitioner's position. When § 717 was added to Title VII to protect federal employees from discrimination, it failed to extend this protection to . . . employees such as petitioner who are not in the competitive service. . . . There is no evidence, however, that Congress meant § 717 to foreclose alternative remedies available to those not covered by the statute. Such silence is far from "the clearly discernible will of Congress" ... On the contrary, § 717 leaves undisturbed whatever remedies petitioner might otherwise possess.

442 U.S. 247 (footnote omitted).

Smith v. Robinson addressed a similar question regarding the preclusive impact of the Education for All Handicapped Children Act ("EHA"). The Court held that the EHA precludes only those claims under the Rehabilitation Act that would also be actionable under the EHA. "Of course, if a State provided services beyond those required by the EHA, but discriminatorily denied those services to a handicapped child, § 504 would remain available to the child as an avenue of relief." 468 U.S. at 1020 n. 22; see 468 U.S. 1013 (the EHA precludes § 1983 equal protection claim "where the EHA is available to a handicapped child asserting a right . . . based . . . on

the Equal Protection Clause"), 1021 ("We emphasize the narrowness of our holding. We do not address a situation where the EHA is not available or where §504 guarantees substantive rights greater than those available under the EHA.")

Similarly, *Preiser v. Rodriguez* held that the Habeas Corpus Act does not bar § 1983 actions by a current or former inmate who seeks damages for allegedly having been improperly imprisoned. Because an action for monetary relief is not cognizable in a habeas corpus action, the Court reasoned, the Act does not preclude such §1983 actions. 411 U.S. 475, 499 (1973); *see also: Spencer v. Kemna*, 523 U.S. 1, 19 (1998) (Souter, J., concurring) (no preclusion for § 1983 after plaintiff no longer covered by habeas statute); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106-09 (1989).

Petitioners appear to suggest that Congress excluded certain workers, and practices, from the scope of the ADEA, because Congress affirmatively wanted to permit age-based discrimination against the excluded workers. Regarding the exclusions in § 630(f), petitioners seem to assert there is "clear evidence in the ADEA that Congress intended to disqualify certain high-level state workers from bringing suit for alleged age discrimination" under the Equal Protection Clause. (Pet. 22). However, such arguments have been rejected. *Smith v. Lomax*, 45 F.3d 402, 407-408 (11th Cir. 1995).

On petitioners view, the purpose of limiting the protections of the ADEA to workers 40 and older, was to legalize age based discrimination against younger workers. But Congress has no authority under §5 of the

Fourteenth Amendment to legalize actions that violate the Constitution. *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). Congress' power under §5 is limited to adopting measure to enforce the guarantees of the Amendment; §5 grants Congress no power to restrict, abrogate, or dilute these guarantees. *Id.* 458 U.S. 732-33.

Congress could not by statute directly nullify the requirements of the Equal Protection Clause. Petitioners appear to suggest, however, that Congress intended the ADEA to accomplish the same thing indirectly, by selectively excluding certain constitutional claims from the rights enforceable under section 1983. A statute which expressly provided that the cause of action in § 1983 could not be used to enforce a particular constitutional right, like a law stripping federal courts of jurisdiction over such a constitutional claim, would raise serious constitutional questions. *See Ex parte McCardle*, 74 U.S. 506 (1869). The ADEA should be construed in a manner that avoids that troubling constitutional issue.

III. *SEA CLAMMERS* AND *SMITH V. ROBINSON* ESTABLISH DIFFERENT STANDARDS FOR RESOLVING DISTINCT LEGAL QUESTIONS

A. The Two Questions Are Distinct

This case concerns the difference between two distinct legal questions to which this Court's decisions establish different answers.

The first question is whether, when Congress adopts a statute creating a new legal right, it intends that, in addition to whatever enforcement mechanisms the statute itself establishes, the statutory right can also be enforced through the cause of action provided by section 1983. Section 1983 is part of the background against which modern legislation is enacted; Congress is assumed to understand that the laws it adopts will be enforceable through the cause of action provided by §1983 if rights created by those laws are violated by officials acting under color of state law. But Congress could expressly provide that a newly created right may not be enforced through a section 1983 cause of action. Even in the absence of such an express bar, the remedies or procedures available in a section 1983 action might be so clearly inconsistent with the particular enforcement scheme that is part of the statute as to demonstrate that Congress intended that the statutory rights would be enforced only under the terms of those specific enforcement provisions, and not also by means of a section 1983 action.

Thus in *Sea Clammers,* the plaintiffs sought to use § 1983 to enforce the substantive rights created by the Federal Water Pollution Control Act and the Marine

Protection, Research and Sanctuaries Act. *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981) The issue there was whether Congress intended to permit a section 1983 cause of action, in addition to the remedies provided by those two statutes, to enforce the statutory rights. However, unlike in *Sea Clammers*, Levin's complaint does not seek to use § 1983 to enforce the ADEA.

The second question is whether, when Congress creates a new legal right, it intends to *reduce* remedies and protections under some other, pre-existing independent right. In *Smith,* parents claiming that their son was not receiving an appropriate education asserted a claim under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and a § 1983 equal protection claim. *Smith v. Robinson*, 468 U.S. 992, 994 (1984). The defendants contended that in enacting the EHA, Congress intended to preclude parents from pursuing such § 504 and § 1983 equal protection claims, claims that those plaintiffs clearly could have asserted prior to 1975. The preclusion issue in *Smith* regarding the plaintiffs' pre-existing statutory rights and remedies under the Rehabilitation Act did not involve any question regarding § 1983. On the other hand, the defendants' argument in *Smith* regarding the plaintiffs' equal protection claim necessarily concerned the applicability of the §1983 cause of action, because Congress could not by statute have narrowed the underlying constitutional rights at issue. Here the question, as in *Smith*, is whether the ADEA precludes the plaintiff from asserting his pre-existing section 1983 equal protection claim.

This Court distinguished between these two questions in *Smith* itself. The body of the Court's opinion is devoted to the second question, holding that the EHA bars enforcement in certain circumstances of the Rehabilitation Act and constitutional claims that existed prior to the enactment of the EHA. 468 U.S. at 1010-13 (constitutional claim barred), 1016-20 (Rehabilitation Act claim barred). *Smith* referred separately to the first question, mentioning in a footnote that "[c]ourts generally agree that the EHA may not be claimed as the basis for a § 1983 action." 468 U.S. at 1009 n. 11. The Court also distinguished between these two questions in *Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366, 377-78 (1979).

B. The Sea Clammers Standard

Under *Sea Clammers*, in the absence of an express provision addressing the issue, whether a section 1983 cause of action can be used to enforce a statutory right will usually depend on the nature of the enforcement mechanisms contained in the statute itself. Often the existence or absence of a private cause of action in that statute is of importance.

Section 1983 does not conflict with a statutory remedial scheme merely because section 1983 adds another method of enforcement, or provides an additional remedy. Statutes sometimes have several different types of enforcement provisions, and the addition of a private civil action might complement those other types of enforcement measures. Thus when a statutory scheme lacks an express private cause of action, it is unlikely that utilization of the cause of action in section 1983 to enforce that statute would be inconsistent with the statute itself. This Court noted in

Rancho Palos Verdes that "in *all* of the cases in which we have held that § 1983 *is* available for a violation of a federal statute, we have emphasized that the statute at issue . . . *did not* provide a private judicial remedy . . . for the rights violated." *Rancho Palos Verdes, Cal. v. Abrams,* 544 U.S. 113, 121 (2005)(emphasis in original).

On the other hand, where a statute's enforcement provisions already include a private cause of action, the utilization of section 1983 as a second private cause of action to enforce that statute might well be inconsistent with the statutory scheme. The statutory and section 1983 causes of action could be so irreconcilable that it would simply make no sense for both of them to apply to the same substantive rights. For example, in *Rancho Palos Verdes* the statutory cause of action had to be commenced within 30 days after final action by the government entity at issue; a section 1983 cause of action would have been subject to a multi-year limitations period. 544 U.S. at 116, 122. The statutory scheme was inconsistent with the availability of a section 1983 cause of action because the limitations period governing a civil action to enforce a particular right cannot be *both* 30 days and several years; it has to be one or the other.

C. The Smith Standard

Smith v. Robinson, 468 U.S. 992 (1984), and *Fitzgerald v. Barnstable School Committee,* 555 U.S. 246 (2009), delineate the standard that must be met to demonstrate that Congress intended that a statute preclude use of § 1983 to enforce a particular constitutional right. The defendants must show both that Congress adopted the statute as a method of enforcing that constitutional right, and also that

Congress intended that statutory enforcement remedy to be the exclusive method of enforcing that constitutional right. *Smith*, 469 U.S. at 1009 ("the question to be asked . . . is whether Congress intended that the EHA be the exclusive avenue through which a plaintiff may assert those [constitutional] claims"); *Fitzgerald*, 555 U.S. at 256 (burden on the defendant to show that Congress saw Title IX as the "sole" means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions.) The focus of this inquiry, unlike the issue in *Sea Clammers*, is not how Congress intended that the statutory rights in the EHA or Title IX would be enforced, but on whether Congress in adopting those statutes intended to enforce a particular constitutional right, and if so, whether it intended this new method of enforcing the Constitution to be *exclusive*.

The first element of the *Smith/Fitzgerald* test is a demonstration that in enacting a given statute Congress intended the legislation, not merely to enforce the rights established by the statute itself, but also to provide a remedy for a constitutional right. In *Smith* that showing was made in several ways. The EHA itself expressly stated that one purpose of the legislation was to protect the "equal protection rights of handicapped children." Section 3 of the EHA explained that the purpose of the legislation was "to assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law."[7]

7. In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), there was textual evidence that Congress intended to provide a remedy for constitutional violations when it adopted the habeas corpus act. 411 U.S. at 483 (quoting 28 U.S.C. § 2241(c)).

The legislative history of the EHA specifically emphasized the need to assure that handicapped children had access to the appropriate public education which several courts had held was guaranteed by the Equal Protection Clause. 468 U.S. at 1010. The Senate Report explained the intent of Congress was to provide a remedial mechanism to enforce the constitutional rights of handicapped children. S.Rep. 94-168, p. 9 (1975). Further, the EHA applied to the very individuals—handicapped children in public schools—whose constitutional rights were at stake. *Smith*, 468 U.S. at 1009 ("petitioner's constitutional claims . . . are . . . virtually identical to their EHA claims").

In *Fitzgerald*, on the other hand, there was no showing that Congress had enacted Title IX to provide redress for an identified constitutional problem. The text of Title IX, like the ADEA, contains no reference to equal protection or any other constitutional right. Because there was a lack of congruity between the schools and practices covered by Title IX, and the schools and practices subject to the Equal Protection Clause, the Court concluded it was unlikely that Congress intended Title IX to be a remedy—least of all an exclusive remedy—for equal protection violations. "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." *Fitzgerald*, 555 U.S. at 252-53.

Second, there must be a showing that Congress intended the statutory scheme in question to be the

exclusive remedy for the constitutional right. *Fitzgerald*, 555 U.S. at 252 ("exclusive avenue"), 256 ("sole means"). Such a showing is necessary to meet a defendant's burden of proving that the statutory scheme was actually intended to supplant, rather than merely supplement, enforcement of that constitutional right under section 1983. Congress often adopts a series of overlapping statutes and remedial schemes to deal with a single problem. *Sea Clammers* recognized that Congress had enacted complementary environmental protection laws, noting that the Court's decision left unaffected civil actions to enforce federal anti-pollution laws other than the two particular statutes at issue in that case. 453 U.S. 1, at 20 n. 31. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48 (1974), the Court noted that "Title VII was designed to supplement rather than supplant, existing laws and institutions relating to employment discrimination." Where Congress creates complementary provisions to address a particular problem, those provisions will ordinarily have different remedies or procedural schemes. Such differences alone cannot demonstrate that one provision was intended to preclude use of the other; Congress may simply have intended to provide several tools for addressing a difficult problem.[8] Thus the mere fact that a statute was adopted to provide a remedy for a constitutional violation does not, without more, establish that the law was intended to be the only such remedy, displacing section 1983 actions or any other pre-existing right or remedy.

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8. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 461 (1975) ("Congress has made available to the claimant . . . independent administrative and judicial remedies. The choice is a valuable one. Under some circumstances, the administrative route may be highly preferred over the litigatory; under others the reverse may be true").

The Court in *Smith* concluded Congress intended the EHA to be the exclusive means for enforcing the equal protection rights of handicapped children because "[t]he legislative history [of the EHA]... indicates that Congress perceived the EHA as *the most effective vehicle* for protecting the constitutional right of a handicapped child to a public education." 468 U.S. at 1012-13 (emphasis added). The comprehensive scheme established by the EHA is described in detail in *Board of Education of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176 (1982). The elaborate system of rights and procedures created by the EHA resembled a detailed judicial decree, and was in fact modeled after the judgments in two landmark equal protection cases on which Congress heavily relied. 458 U.S. at 192-95. Under the EHA an "individualized educational program," containing a number of required elements, must be developed to meet the needs of each child, through a highly structured process spelled out in the statute.

This Court in *Smith* reasoned, "we find it difficult to believe that Congress also meant to leave undisturbed the ability to go directly to court with an equal protection claim to a free appropriate public education." "No federal district court presented with a constitutional claim to a public education can duplicate that process." 468 U.S. at 1011-12 (footnote omitted). "The very importance which Congress has attached to compliance with certain procedures in the preparation of an IEP would be frustrated if a court were permitted simply to set state decisions at nought." *Board of Education of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176, 206 (1982).

The decision in *Smith* emphatically did not turn (as would at least usually be true under *Sea Clammers*) on whether the EHA provided to parents—at the end of this highly structured administrative process to enforce the litany of EHA rights—a private cause of action to enforce a claim that their handicapped child had been denied an adequate education. The EHA does not permit a judge to make a *de novo* determination of whether a handicapped child is receiving a free appropriate education. To the contrary, only two years before *Smith* the Court held in *Rowley* that federal courts have only very limited authority to entertain claims of a violation of the EHA's substantive rights. 458 U.S. at 207.

The demanding standard in *Smith* and *Fitzgerald* is supported by the presumption against repeal by implication of pre-existing rights or remedies. *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 preclusion. *Branch v. Smith*, 538 U.S. 254, 273 (2003). "Evidence of congressional intent [to preclude] must be both unequivocal and textual." *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989). The standard for repeals by implication is a demanding one. *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 142 (2001)("The rarity with which [the Court has] discovered implied repeals is due to the relatively stringent standard for such findings, namely, that there be an irreconcilable conflict between the two federal statutes at issue.") This presumption has even greater force where, as here, the question is whether a statute whose purpose was an expansion of protection precludes use of §1983 to enforce a pre-existing constitutional right. "[W]e should not lightly conclude that Congress intended to preclude reliance

on §1983 as a remedy for a substantial equal protection claim." *Fitzgerald v. Barnstable School Committee,* 555 U.S. at 256 (quoting *Smith*, 468 U.S. at 1012).

A bar to the enforcement of pre-existing means of enforcing constitutional rights could well mean that remedies were significantly reduced, or even eliminated, for some whose rights had been violated. For example, a plaintiff who establishes a violation in a section 1983 case would be entitled to compensatory damages. On the other hand, the lower courts have unanimously agreed that compensatory damages are not available under the ADEA. If the ADEA bars section 1983 age-based equal protection claims by state and local government employees, that would reduce the remedies previously available for those constitutional violations, and would leave some victims of constitutional violations with no meaningful relief at all. For example, age-based harassment (like sexual or racial harassment) often does not result in lost wages; the ADEA itself thus provides no monetary relief for such harassment,[9] even though such relief would be available in a section 1983 equal protection action. Because it is unlikely that Congress would intend such a retrogressive consequence, the courts should not assume absent some unequivocal demonstration that Congress wanted to remove what for some workers would be the only meaningful monetary relief that exists for the violation of a pre-existing right.

The 1991 Civil Rights Act did not, as petitioners assert, endorse the decision in *Smith.* (Pet. Br. 32-33). But this dispute is beside the point, because we have no

9. *Collazo v. Nicholson*, 535 F. 3d 41, 45 (1st Cir. 2008).

quarrel with the standard actually utilized by this Court in *Smith*, and more recently in *Fitzgerald*. The legislative events of 1991 do not, as petitioners assert, reveal "failed efforts to overturn portions of *Smith*." (Pet. Br. 33). To the contrary, Congress in 1986 had already overturned *Smith*. The Handicapped Children's Protection Act of 1986 expressly authorized counsel fees in disputes about the education of a handicapped child (the specific issue in *Smith*) and provided as well that nothing in the EHA "shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal Statutes protecting the rights of handicapped children and youth." 20 U.S.C. § 1415(l). The accompanying House report expressed disagreement with *Smith*'s interpretation of the EHA.[10] That history illustrates the need for caution in construing statutes to preclude by mere implication either the enforcement of pre-existing statutory rights or the use of § 1983 to enforce constitutional rights.

D. The *Sea Clammers* and *Smith* Standards Are Different

There is not, as petitioners suggest, a single standard governing both of the distinct issues in *Sea Clammers* and *Smith*. (Pet. Br. 13, 17). If, as petitioners contend, those questions were governed by such a common standard, it would necessarily follow as to any given statute that the two questions would always have the same answer. On petitioners' theory, whenever Congress intends to preclude use of §1983 to enforce a newly created right, it necessarily intends as well to bar use of §1983 to enforce

10. H.R.Rep. 99-296, p. 4.

any related pre-existing constitutional or statutory right, and to bar enforcement in any other way of all related pre-existing statutory claims, such as the Rehabilitation Act claims at issue in *Smith*.

But it assuredly is not true that in every case in which Congress does not want a new statutory right enforced under section 1983, it also intends to bar enforcement of all pre-existing rights under other statutes or in the Constitution. S*ea Clammers* itself insisted that the unavailability of § 1983 to enforce the two particular federal anti-pollution statutes at issue in that case in no way limited the plaintiff's right to seek redress under any *other* federal environment protection statutes. "The legislative history makes clear Congress' intent to allow further enforcement of antipollution standards arising under *other* statutes or state common law." 453 U.S. at 20 n. 31 (emphasis in original). Similarly, in *Rancho Palos Verdes* this Court emphasized that although the plaintiff there could not use § 1983 to enforce the TCA, its decision did not restrict the plaintiff's right to rely on § 1983 to enforce any other federal right that might be implicated by the dispute at hand. 544 U.S. at 126. And the Court in *Novotny*, although holding that a "deprivation of a right created by Title VII cannot be the basis for a cause of action under §1985(3)," 442 U.S. at 378, made clear that the enactment of Title VII did not preclude §1985(3) actions to enforce constitutional rights. 442 U.S. at 372 (majority opinion), 379 (Powell, J., concurring). The lower courts have repeatedly concluded that the intent of Congress, in adopting particular statutes which cannot be enforced through § 1983, was to nonetheless permit § 1983 actions to enforce other, independent rights.[11]

11. *E.g., Henley v. Brown*, 686 F.3d 634,642 (8th Cir. 2012) (citing cases).

Petitioners efforts to fashion a single standard governing *Sea Clammers* and *Rancho Palos Verdes* on the one hand, and *Smith* and *Fitzgerald* on the other, illustrate the difference between these cases.

(1) Petitioners argue that *Sea Clammers* and *Smith* both hold that a "comprehensive remedial scheme" bars a § 1983 action. (Pet. Br. 11, 15, 45, 47-48). But this contention rests on using the vague phrase "comprehensive remedial scheme" to refer to quite different requirements. Under *Sea Clammers* and *Rancho Palos Verdes*, a statutory enforcement scheme will usually preclude use of section 1983 to enforce the statutory rights if that scheme itself includes a private cause of action. The actual decision in *Rancho Palos Verdes* has nothing to do with comprehensiveness. "We . . . hold that the TCA—by providing a judicial remedy different from § 1983 in § 332(c)(7) itself—precluded resort to § 1983." 544 U.S. at 127. In *Rancho Palos Verdes*, the enforcement provision which was "central to the . . . case" consisted of a single sentence creating a private cause of action. 544 U.S. at 116 (quoting 47 U.S.C. § 332(c)(7)(B)(v)). Although *Sea Clammers* did characterize the anti-pollution measures in that case as having a comprehensive enforcement scheme, the determinative aspect of the statutes in that case was that each had a private cause of action with requirements different than those governing section 1983.

Conversely, although the comprehensiveness of a statutory enforcement scheme is relevant under *Smith* and *Fitzgerald*, the mere existence of a private cause of action does not render a statutory scheme "comprehensive." The existence of a cause of action under the EHA played no role in the *Smith* analysis. What mattered in *Smith* was

the creation by Congress of a "comprehensive federal-state scheme for the provision of special education to handicapped children." *Smith*, 468 U.S. at 1002. Even under *Smith*, moreover, the comprehensiveness of a statutory scheme is not controlling in and of itself, but matters only to the extent that Congress intended the scheme to be the exclusive means of enforcing the constitutional right at issue. *See Smith*, 468 at 1010. Thus, because of the absence of such a showing that Congress intended Title VII to be the exclusive method by which a plaintiff could enforce pre-existing rights, *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975), held that "[d]espite Title VII's range and its design as a *comprehensive* solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief." (Emphasis added).

In determining whether a statutory right can be enforced through section 1983, as in *Sea Clammers*, petitioners' proposed "comprehensive remedial scheme" standard would usually require only that the statute contain a private cause of action. In determining whether a statute bars enforcement of the Equal Protection Clause through §1983, as occurred in *Smith*, "comprehensive remedial scheme" refers to an elaborate system of rights and procedures, like that created by the EHA to enforce the equal protection rights of handicapped children, which demonstrates an intent to create an exclusive and superior method for enforcing a constitutional right. And in the instant case, the "comprehensive remedial scheme" appears to refer to the combination of a private right of action with the charge filing requirement of §626(d)(1),

more than what was sufficient in *Sea Clammers*, but far less than was required in *Smith*. A vague formula with three different meanings is not a legal standard which the lower courts could predictably administer in addressing whether to preclude a pre-existing remedy to enforce a constitutional right.

(2) Petitioners also assert that *Rancho Palos Verdes* creates a general rule, applicable to both lines of cases, that "the presence . . . 'of a more restrictive private remedy' alone establishes Congress' intent to displace a competing §1983 cause of action." (Pet. Br. 38, see also:15-16)(quoting *Rancho Palos Verdes*, 544 U.S. at 121). As petitioners use the phrase "competing cause of action," a § 1983 equal protection claim "compet[es]" with an ADEA cause of action, and thus would be governed by this rule. Thus, according to petitioners, the existence of "less comprehensive remedies under [a statute] than [are available] in a § 1983 suit . . . counsels for preclusion [of a § 1983 action to enforce a constitutional right]". (Pet. Br. 51)

However, the portion of *Rancho Palos Verdes* from which this passage is quoted clearly refers only to the question of whether a § 1983 cause of action could be used to enforce a statutory right, in addition to the private right of action provided by the statute itself. The existence of a "more restrictive" private right of action in a statute may support a conclusion that the rights in the statute itself may not also be enforced through § 1983. But under *Smith*, a demonstration that a statute precludes use of §1983 to enforce a constitutional right requires a showing that Congress believed the statute's remedial provisions would be the "most effective" method of enforcing that right than

a § 1983 action. 468 U.S. 992, 1013 (1984). The fact that the remedies provided under a statutory scheme are actually "more restrictive" than in a §1983 action would at least ordinarily be fatal to a suggestion that Congress adopted the statute for the purpose of providing a *better* remedy for the constitutional rights at stake. Petitioners' suggestion that a statutory scheme is likely to displace a § 1983 equal protection constitutional claim if the statutory scheme provides "less comprehensive" remedies stands the *Smith* standard on its head.

IV. THE ADEA DOES NOT PRECLUDE SECTION 1983 EQUAL PROTECTION ACTIONS

A. The ADEA Does Not Satisfy the *Smith* and *Fitzgerald* Preclusion Standard

To meet the standard established by *Smith* and *Fitzgerald*, petitioners must show that "Congress saw [the ADEA] as the sole means of vindicating the constitutional right to be free" from irrational age-based distinctions violative of the Equal Protection Clause. *Fitzgerald*, 555 U.S. at 256. Petitioners, however, do not even claim that "Congress intended that the [ADEA] be the exclusive avenue through which a plaintiff may assert those [constitutional] claims." *Smith*, 468 U.S. at 1009.

The Court's decision in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000), forecloses any possibility of meeting this standard. Judged against the backdrop of this Court's equal protection jurisprudence, it is clear that the ADEA cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. 528 U.S. at 86. "Congress never identified any pattern of age

discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation." 528 U.S. at 89.

In addition, the prohibitions enacted by the ADEA have little correlation with potential constitutional violations. On the one hand, almost all the government employment practices that fall within the prohibitions of the ADEA are not constitutional violations. "The [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. To the extent that a few employment decisions that violate the ADEA might also happen to violate the Equal Protection Clause, that effect would be an entirely incidental effect of legislation not intended to address constitutional violations at all. On the other hand, the ADEA is limited in a manner that excludes many employees and possible constitutional claims. The ADEA, for example, does not forbid age-based discrimination against individuals under the age of 40, even though age-based equal protection violations could occur with regard to those workers. Discrimination (and thus even irrational actions) against government workers because of their youth is also outside the scope of the ADEA. *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 587 (2004). Given these exclusions, the purpose of the ADEA clearly was not to enforce the Equal Protection Clause.

Petitioners emphatically do not contend that the statutory scheme in the ADEA, like the rights and procedures in the EHA in *Smith*, was framed to create

a "more effective" remedy for unconstitutional age discrimination. To the contrary, petitioners repeatedly point out that the remedies in the ADEA are *less* effective than those available in a §1983 action. Petitioners stress, for example, that (under prevailing lower court decisions) a successful ADEA Plaintiff cannot obtain punitive damages or compensatory damages.

B. ADEA Is Not The Exclusive Remedy for Age Discrimination in Employment

Rather than attempting to argue that Congress intended the ADEA to be a method, indeed the exclusive method, for enforcing equal protection claims related to age discrimination in employment, petitioners advance a far more reaching claim, that Congress intended the ADEA to be the exclusive remedy for *all* claims of age discrimination in employment. (Pet. Br. 35)("Congress clearly intended that all claims of age discrimination be limited to the rights and procedures authorized by the ADEA.") "Congress anticipated that the ADEA . . . would comprehensively regulate the field of age discrimination in employment." (*Id.* at 49).

Petitioners contend that this sweeping conclusion is required by one sentence in *Preiser v. Rodriguez*, 411 U.S. 475 (1973) . Petitioners argue that *Preiser* establishes a general rule of statutory interpretation that a plaintiff cannot "avoid the requirements [of one statutory scheme] 'by the simple expedient of putting a different label on [his] pleadings.'" (Pet. Br. 34, 37)(*quoting Preiser*, 411 U.S. at 489-90). If the facts of a case are actionable under two federal laws, a plaintiff cannot "avoid" the remedial or procedural limitations imposed in one law merely by

"label[ing]" his claim to assert a violation of the other, more favorable provision. Differing causes of action under the various statutes applicable to a particular right present "competing claim[s]" (Pet. Br. 11-18), and only one cause of action can win that competition.

On this view *Preiser* creates a race to the bottom; if two or more federal provisions apply to a given claim, the provision with the most stringent "requirements" must be applied, and a plaintiff may not "avoid" those requirements by asserting claims under the other more favorable provisions. However, *Preiser* does not require this extraordinary result. In *Preiser*, the Court held that legal challenges to prison conditions (as distinct from attempts to obtain an inmate's release) could be brought *either* as a habeas corpus action (which is subject to an exhaustion requirement) or as a § 1983 action (thus "avoid[ing]" that requirement). *Preiser*, 411 U.S. at 499. It is a commonplace of civil litigation that a single set of facts may be actionable under several different federal (and possibly state) laws; often each count in a multi-count civil complaint "put[s] a different label" on each part of the pleadings.

Petitioners object that a plaintiff should not be able to "avoid" the lack of punitive damages under the ADEA by "label[ing] pleadings" as a request for relief in a §1983 equal protection action. However, it could be argued with equal cogency that a plaintiff should not be able to "avoid" the strictures of §1983, which severely limits governmental liability, by simply "label[ing] pleadings" as a claim under the ADEA, which imposes strict liability on public employers.

Where federal laws overlap, and thus both provide relief for a single set of facts, courts have no authority to characterize that situation as a "competition" and pick a winner. "There is some necessary overlap between Title VII and §1981, and where the statutes do in fact overlap, we are not at liberty 'to infer any positive preference for one over the other." *Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1989). "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. 'When there are two acts upon the same subject, the rule is to give effect to both if possible." The intention of the legislature to repeal "must be clear and manifest."'" *Morton v. Mancari*, 417 U.S. 535, 550 (1974). Where one set of facts violates several provisions of federal law, the differing procedures and remedies involved are ordinarily deemed complementary; federal judges are not authorized to hold a Hunger Games-like competition in which only one provision can survive.

Petitioners contend that established jurisprudence under the Fair Labor Standards Act demonstrates that the ADEA must be the exclusive remedy for age discrimination in employment. (Pet. Br. 25-27). According to petitioners, the lower courts agree "that the FLSA's exhaustive regime displaces other, competing causes of action—including state law contract, negligence, and fraud claims for failure to pay overtime, . . . [and] parallel state law claims." (Pet. Br. 26-27). On this view, the FLSA displaces any state or common law claim relating to a failure to pay overtime and at least some claims regarding failure to pay straight time wages. Because the ADEA incorporates the procedures and remedies of

the FLSA, petitioners reason, the ADEA also displaces all "competing causes of action."

However, the most obvious example of a state law claim "parallel" to the FLSA would be a claim under a state minimum wage law, such as the Illinois statute. *See* 820 ILCS 105/1 *et seq.* Assuredly the Attorney General of Illinois is not asking this Court to hold that the FLSA preempts that state law. Nor can petitioners be proposing that the ADEA "displaces" the "competing cause[] of action" provided by the Illinois statute forbidding age discrimination in employment, the Chicago and Cook County ordinances which contain similar prohibitions, or the guarantee of equal protection in Article 1, §2 of the Illinois State Constitution. Unsurprisingly, the lower court opinions relied on in petitioners' brief do not hold that the FLSA displaces all "parallel" state claims. Rather, those decisions make precisely the distinction explained above between *Sea Clammers* and *Smith.* The FLSA precludes the states and private parties from creating additional remedies for violations of the FLSA itself; the enforcement provisions contained in the FLSA are the only method by which an employee can obtain redress for a violation of that federal statute itself. But the states and parties are free to create other rights independent of the FLSA—such as a statutory or contractual entitlement to overtime pay—and to enforce those rights in any way they please. *Kendall v. City of Chesapeake, Va.*, 174 F.3d 437, 439 (4th Cir. 1999)("We hold that the elaborate remedial scheme provided in the FLSA demonstrates a congressional intent to prohibit § 1983 actions to enforce *such FLSA rights.*") (emphasis added); *Lerwill v. Inflight Motion Pictures, Inc.*, 343 F.Supp. 1027, 1029 (N.D. Cal. 1972) (FLSA is the exclusive method of enforcing only regarding "whatever rights [a plaintiff] may have *under the FLSA.*")(emphasis added). (Pet.App.30a-31a)

C. This Court's Decisions Regarding Title VII Are Controlling Here

(1) Title VII and the ADEA are aspects of a single overall national policy to eradicate bias in the workplace.

> "The ADEA, enacted in 1967 as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions. The ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (race, color, sex, national origin, and religion); the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*. (disability);the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (sex)."

McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 357 (1995).

This Court has repeatedly held that Title VII[12] does not bar covered employees from bringing a §1983 action under the Equal Protection Clause regarding discrimination in employment on the basis of race, gender, or national origin. In a series of decisions over a period of

12. Senator Bentsen sponsored the amendment to the ADEA to protect state and local government employees in 1972 at the same time that Congress was considering extension of Title VII to those same government employees. In that year Senator Bentsen stated "I believe that the principles underlying these provisions in the EEOC bill [extending Title VII protection to government employees] are directly applicable to the Age Discrimination in Employment Act." 118 Cong.Rec. 15,895 (1972).

four decades, this Court has recognized that Title VII does not preclude § 1983 constitutional equal protection claims or claims under other federal anti-discrimination statutes. That well-established rule applies not only to state and local government workers, but also to employees of private employers, who may assert claims under § 1981.

Shortly before the ADEA was amended in 1974 to apply to state and local government employees, the Court addressed this issue in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). *Alexander* held that "legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination." 415 U.S. at 47, citing as examples of that congressional practice "42 U.S.C. §1981 (Civil Rights Act of 1866) [and] 42 U.S.C. §1983 (Civil Rights Act of 1871)." 415 U.S. at 47 n. 7. "Title VII was designed to supplement rather than supplant, existing laws and institutions relating to employment discrimination." 415 U.S. at 48. *Johnson v. Railway Express Agency, Inc.* 421 U.S. 454, 459 (1975), reiterated that interpretation of Title VII. "Despite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief." *Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1989), explained that under this well established body of law "[w]here conduct is covered by both §1981 and Title VII, the detailed procedures of Title VII are rendered a dead letter, as the plaintiff is free to pursue a claim by bringing suit under § 1981 without resort to those statutory prerequisites." *See North Haven Bd. Of Ed. v. Bell*, 456 U.S. 512, 535 (1982)(Title VII and Title IX).

In *CBOCS v. Humphries*, 553 U.S. 442 (2008), the defendant expressed a concern similar to that advanced by petitioners, objecting that if § 1981 were interpreted to encompass retaliation claims, plaintiffs could skip the exhaustion requirements in Title VII, and obtain remedies outside of Title VII. This Court rejected that objection as inconsistent with the long-recognized intent of Congress to afford discrimination victims access to several overlapping remedies. 553 U.S. at 454-55.

Eleven circuits have long agreed that Title VII does not bar employment discrimination claims in § 1983 equal protection cases or actions under other federal statutes. *See Henley v. Brown*, 686 F.3d 634,642 (8th Cir. 2012), *cert. denied*, 133 S.Ct. 868 (2013). That rule has been a core principle of Title VII jurisprudence for decades, and a deeply entrenched part of the background of other legislation, including amendments to Title VII itself. Understandably, petitioners did not seek to dismiss Levin's gender equal protection constitutional claim as precluded by Title VII (R.16,36-37), and do not ask this Court to overrule *Alexander, Johnson, Patterson, Bell* or *CBOCS*.

(2) The national policy to prevent and correct age discrimination in employment, like the similar policy regarding discrimination on the basis of race, gender, national origin, religion and disability, involves a range of overlapping prohibitions and remedies. The ADEA is not the only federal statute forbidding age discrimination in employment; other federal laws[13] of narrower scope,

13. 5 USC §§2302(b)(1)(B) , 7116(b)(4); 22 U.S.C. §§ 3905(b)(1), 4115(b)(4); 26 U.S.C. § 7471(a)(6)(A). Two federal laws forbid

contain such a prohibition. In addition, forty-nine states have their own statutes forbidding age discrimination in employment. *See* Amici Brief State of Michigan and 20 Other States, *et al.,* pp.14-23. State or local laws do not require that employees file charges with the EEOC. In addition, state constitutions (including in Illinois) contain guarantees of equal protection of the laws, which often are construed in light of the prevailing federal interpretation of the Equal Protection Clause in the Fourteenth Amendment, and in some, if not most, instances would be interpreted to forbid age discrimination. Petitioners do not contend that Congress in adopting the ADEA precluded enforcement of any of these divergent state and local laws, which could also be supplemental claims in federal court. Thus, it is counterintuitive to believe that Congress chose "silence" as the means to express an intention to preclude use of § 1983 to enforce the Equal Protection Clause of the Fourteenth Amendment.

(3) Petitioners argue that the ADEA should be construed to preclude § 1983 age-based equal protection claims in order to prevent employees from bringing suit under § 1983 without first filing a notice of intent to sue under §626(d)(1) of the ADEA. (Pet. Br. 20-24). Such

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age discrimination in employment by certain employers. 12 U.S.C. § 3106a; 47 U.S.C. § 554. Four statutes expressly prohibit such discrimination by certain recipients of federal funds and certain grant recipients. 15 U.S.C. § 3151(a); 42 U.S.C. §§5057(a)(1), 12635(a)(1); 49 U.S.C. § 5332(b); The Age Discrimination Act of 1975; 42 U.S.C.§6101, 45 CFR 90 and 91, contain a general prohibition against age discrimination by recipients of federal funds permitting injunctive relief for age discrimination claims against schools receiving federal assistance. *See Long v. Fulton County Sch. Dist.*, 807 F. Supp. 2d 1274, 1284 (N.D.GA.2011).

§ 1983 suits, petitioners insist, would undermine and evade the conciliation process established by the ADEA. But that objection would extend to Title VII.

This line of reasoning, if adopted by the Court with regard to the ADEA, would be even more compelling in the context of Title VII, because potential Title VII plaintiffs are much more likely to disregard their statutory claims. As petitioners point out, employees asserting age discrimination claims have a far better chance of succeeding on the merits if they proceed under the ADEA than if they file suit instead under the Equal Protection Clause. (Pet. Br. 44, *see also*: 10, 20, 34, 38, 47). The consequent *disincentive* for age-discrimination plaintiffs to spurn potential ADEA claims is illustrated by actual experience. "[T]he vast majority of government workers who assert age discrimination claims will choose to rely on ADEA...they simply have a much better chance of winning." *Zombro v. Baltimore City Police Dept.*, 868 F.2d 1364, 1376 (4th Cir. 1989)(Murnaghan, J., dissenting).

Mr. Levin did file a complaint with EEOC and a state agency and received a right to sue notice, and added a § 1983 claim to his complaint only after defendants asserted in the district court that the ADEA excluded Levin from its protections. The sole reason that petitioners can suggest for an employee to file suit without first filing the 60-day advance notice needed to preserve an ADEA claim is that a plaintiff might be "impatient." (Pet. Br. 35). But no prudent individual would abandon an ADEA claim on that ground.

On the other hand, employees alleging discrimination on the basis of race, gender, color, national origin and

religion would have a far greater incentive to proceed directly with a § 1983 equal protection claim, rather than filing a Title VII charge. For a plaintiff alleging intentional discrimination on those grounds, the standard of proof under Title VII (unlike the ADEA) is not more favorable than under the Equal Protection Clause. *Zombro*, 868 F.2d at 1376 (Murnaghan, J., dissenting).

Petitioners also object that employees able to maintain a § 1983 equal protection action could obtain remedies not available under the ADEA such as punitive damages.[14] But punitive damages are a normal part of judicial remedies, and were available in Section 1983 race and sex discrimination cases when they were not authorized by Title VII. Deterrence of future egregious conduct is the primary purpose of § 1983 and punitive damages, which directly advance the public's interest in preventing constitutional deprivations. This Court found a damages remedy against the wrongdoer a more effective deterrent than damages against an employer. *Carlson v. Green*, 446 U.S. 14, 21 (1980).

Petitioners object that if plaintiffs can bring §1983 equal protection claims alleging age discrimination, defendants will be subject to burdensome discovery. (Pet.

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14. The text of the ADEA does not bar punitive or compensatory damages. Although the phrase "legal . . . relief" in §626(b) has been construed by the lower courts to exclude such damages, those lower court decisions occurred only after the 1974 amendment to the ADEA extended coverage to state and local government employees. *Vazquez v. Eastern Airlines, Inc.*, 579 F.2d 107, 110 (1st Cir. 1978). However, post-1974 developments shed no light on the intent of Congress in 1974, when it applied the ADEA to public employment. *See Fitzgerald*, 555 U.S. at 256.

Br. 34, 41-44). However, in §1983 actions the defense of qualified immunity often protects public officials from such a burden. *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987). Discovery is not significantly different in ADEA or Title VII cases.

Petitioners assert that this Court's decisions regarding Title VII are distinguishable, because "the remedial provisions of the ADEA, which are the 'focus' of any preclusion analysis, 'differ from those of Title VII.'" (Pet. Reply 9). Section 626(b) of the ADEA provides that the ADEA is to be "enforced in accordance with the powers, remedies, and procedures" of the Fair Labor Standards Act. Petitioners argue that this Court's decision in *Lorillard v. Pons*, 434 U.S. 575 (1978), "stressed the 'significant differences' between the [FLSA and Title VII] in terms of their 'remedial and procedural provisions.'" (Pet.Reply 10)(quoting *Lorillard*, 434 U.S. at 584). *Lorillard*, petitioners assert, "list[ed] many differences between [those] laws' remedial schemes." (Pet. Reply 10).

However, only some of the remedial provisions applicable to the ADEA are incorporated by reference from the FLSA. The particular remedial provisions of the ADEA and the FLSA of concern to this Court in *Lorillard* are entirely different from the aspects of the ADEA on which petitioners rely on herein.[15] Petitioners

15. The differences relied on by *Lorillard* between Title VII and the ADEA (including provisions incorporated from the FLSA) were the provision for legal relief in the ADEA but not Title VII, the fact that back pay is mandatory under the FLSA but only permissive under Title VII, and the practice of trying FLSA (but not Title VII) cases before juries. 434 U.S. at 584-85. Petitioners do not suggest that any of those aspects of the ADEA remedies and procedures are relevant to the issues in this case.

place particular reliance on the requirement in § 626(d)(1) that an employee, prior to filing suit, file an EEOC charge, and the provisions in §626(b) and §626(d)(1) for conciliation. But none of those provisions derive from or is found in the FLSA. The requirement in §§ 626(b) and 626(d)(1) of federal efforts "to eliminate" any unlawful practice "through informal methods of conciliation, conference, and persuasion" are lifted, verbatim, from § 706(b) of Title VII. 42 U.S.C. § 2000e-5(b). The FLSA does not require that workers file any charge with the Secretary of Labor prior to filing suit; that requirement in § 626(d)(1) of the ADEA evidently was based on the creation of such a requirement several years earlier in Title VII. Section 626(d)(1) establishes three deadlines for an ADEA charge: 180 days after the event; 300 days in state with an anti-discrimination law, or within 30 days notice of the termination of a state proceeding. These are the identical deadlines earlier provided in §706(e) of Title VII, and much of the same wording is the same. 42 U.S.C. § 2000e-5(e). Petitioners also rely on the fact that the lower courts have held that punitive damages are not available under the ADEA; but that rule, which emerged after the 1974 amendments to the ADEA, is based on an interpretation of the phrase "legal . . . relief" in §626(b), not on the FLSA.

Petitioners also argue that the sole basis of the established interpretation of Title VII is a statement in a 1972 committee report regarding the Title VII amendments of that year that "ma[d]e clear that Congress intended to preserve state and municipal employees' right to advance constitutional claims." (Pet. Reply. 10). Petitioners stress that this language in the 1972 House report is not contained in any of the reports regarding

the 1974 amendments to the ADEA. *Id.* This analysis greatly understates the nature and significance of the events surrounding the 1972 amendments to Title VII. The committee report accurately described the effect of the legislation reported by the Committee itself, but a majority of the House initially voted *not* to preserve those rights, instead adopting an amendment to the legislation that made Title VII the exclusive remedy. The Senate disagreed, stripping the House limitation from the bill, and restoring the system of overlapping remedies that continues to this day.

V. GERA DOES NOT PRECLUDE SECTION 1983 EQUAL PROTECTION ACTIONS

Petitioners contend that Levin's section 1983 claim is precluded by GERA. But that argument was never advanced in the courts below and has been waived; that issue is also outside the scope of the question presented. Preliminary to deciding whether GERA precludes Levin's section 1983 equal protection claim, the Court would first have to determine whether GERA applies to Levin at all. There is some dispute as to whether GERA covers state employees[16]; because petitioners never relied on GERA in the courts below, those courts had no occasion to address this threshold issue.

GERA, now codified at 42 U.S.C. §§ 2000e-16a to 2000e-16c, is what remains of a considerably longer statute enacted in 1991. Section 2000e-16c(a) defines the

16. *See Alaska v. EEOC*, 564 F. 3d 1062, 1083-1087 (Ikuta J., dissenting)(9th Cir. 2009)(en banc), *cert. denied*, 558 U.S. 1111 (2010).

employees covered by GERA in terms that are identical to the exclusions in the ADEA, Title VII, and the ADA, except that elected officials are not within the scope of GERA. Section 2000e-16b(a) directs that

> [a]ll personnel actions affecting [the covered employees] . . . shall be free from any discrimination based on –
>
> > (1) race, color, religion, sex, or national origin, with the meaning of section 2000e-16 of this Title;
> >
> > (2) age, within the meaning of section 633a of Title 29; or
> >
> > (3) disability, within the meaning of section 791 of Title 29 and sections 12112 to 12114 of this Title.

Section 2000e-16c(b) provides that a covered employee may file a complaint with the EEOC within 180 days after the occurrence of an alleged violation. GERA does not establish any administrative procedures for adjudicating such complaints, but contemplates that the EEOC will do so. 29 C.F.R. §§ 1603.100, *et seq.* If the EEOC determines that a section 2000e-16b(a) violation occurred, it is to order appropriate relief. For a violation of the section 2000e-16b(a)(2) prohibition against age discrimination, the remedies may include the remedies that could be awarded under section 633a(c) of the ADEA. 42 U.S.C. § 2000e-16b(b)(2).

Petitioners contend that GERA precludes a covered employee from bringing a section 1983 constitutional equal protection action alleging age-based discrimination.[17] But here, as with the ADEA itself, this Court's decisions regarding race and gender discrimination are an insurmountable obstacle. In the cases described above, this Court recognized the longstanding national policy of providing independent overlapping remedies for such discrimination. That policy is reflected in the 1991 Civil Rights Act itself, of which GERA was a part. That 1991 Act strengthened Title VII as well as section1981, both of which apply to racial discrimination in employment, reflecting the understanding of Congress that the types of discrimination forbidden by Title VII are also addressed independently by other federal provisions. See *Johnson v. City of Fort Lauderdale,* 148 F.3d 1228, 1231 (11th Cir. 1998)("it would be perverse to conclude that Congress [in the Civil Rights Act of 1991] provided additional remedies and simultaneously intended silently to extinguish the remedy that § 1983 provided for many years"). GERA does not preclude applicant for policy-making position, excluded from Title VII, from maintaining race discrimination claim under 42 U.S.C. §§ 1981 and 1983. *See Stubblefield v. City of Jackson,* 871 F.Supp. 903, 910 (S.D.Miss. 1994) ("[j]ust as Title VII is not the exclusive avenue of redress for a violation of one's right to be free from unlawful discrimination based on race, neither is the Government Employee Rights Act the exclusive remedy.")

17. This case does not present the question of whether a section 1983 action could be maintained to enforce the substantive rights of GERA in section 2000e-16b(a).

Petitioners do not appear to contend that GERA bars claims of discrimination based on any of the grounds forbidden by Title VII, such as claims under section 1981, Title VI, or the Equal Protection Clause. But if Congress did not intend GERA to bar enforcement of a covered worker's rights under the Equal Protection Clause (or under other federal statutes) to be free from discrimination on the basis of race or gender, it is difficult to understand how petitioners could show that Congress nonetheless intended GERA to bar enforcement of that worker's right under the Equal Protection Clause to be free from irrational age-based discrimination. The prohibitions against race and gender are set out in the same sentence in section 2000e-16b(a) as the prohibition against age discrimination, and all of those prohibitions are enforced under the terms of section 2000e-16c(b).

Petitioners suggest that the treatment of age claims under GERA may be distinguished from race and gender claims because in 1991, when GERA was enacted, the Fourth Circuit had decided in *Zombro* that the ADEA precludes section 1983 actions. (Pet. Br. 32). But the isolated and sharply divided appellate opinion in that case assuredly would have not convinced Congress that the view of a two judge majority was the settled construction of the ADEA. The First Circuit in 1990 had declined to decide the issue[18], and prior to 1991 both this Court[19] and the circuit courts[20] had entertained and determined on

18. *Izquieerdo Prieto v. Mercado Rosa,* 894 F.2d 467, 470 (1st Cir. 1990).

19. *Vance v. Bradley,* 440 U.S. 93, 99 (1979).

20. *E.g., Alford v. City of Lubbock,* 664 F.2d 1263, 1266 (5th Cir. 1982); *Gault v. Garrison,* 569 F.2d 993, 997 (7th Cir. 1977), *cert. denied,* 440 U.S. 945 (1979).

the merits equal protection challenges to practices also covered by the ADEA.

GERA provides a procedure for enforcing the anti-discrimination provisions of section 2000e-16b(a). Petitioners do not contend that GERA, like the EHA in *Smith*, was intended to provide a method of enforcing rights in the Constitution, least of all the exclusive method for doing so. Section 2000e-16a(b) states that the purpose of GERA "is to provide procedures"—not "to provide *the* procedures"—to protect covered employees from discrimination. Like the ADEA, GERA was not enacted as a remedy for constitutional violations, and both its substantive standards and its coverage are substantially different from the protections of the Equal Protection Clause. As such, for many of the very same reasons applicable to the ADEA, the contours, rights, and protections of § 1983 equal protection actions and those limited rights in GERA diverge in such significant ways, which makes clear that Congress could not have intended GERA to replace §1983 as the "sole" and "exclusive" remedy to enforce the prohibition of the Equal Protection Clause against gender, race, religion, age, color, and national origin discrimination.

Petitioners have not met their burden to prove that the text, legislative history and remedies of GERA were intended by Congress to be the "exclusive" remedy for workers to enforce the Equal Protection Clause. GERA cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 86 (2000).

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed. In the alternative, the petition should be dismissed as improvidently granted.

Respectfully submitted,

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