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 *AMICUS CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION IN SUPPORT OF RESPONDENT

ALICE O'BRIEN
Counsel of Record
PHILIP A. HOSTAK
National Education Association
1201 16th Street NW
Washington, DC 20036
(202) 822-7035
aobrien@nea.org
phostak@nea.org

Attorneys for Amicus Curiae
National Education Association

August 9, 2013

Peake DeLancey Printers, LLC - (301) 341-4600 - Cheverly MD

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICUS CURIAE*

This brief *amicus curiae* is submitted by the National Education Association ("NEA"), a nationwide employee organization with more than three million members, the vast majority of whom are employed by public school districts, colleges, and universities. NEA is strongly committed to opposing and eliminating employment discrimination of all kinds and firmly supports the enforcement of the Equal Protection Clause of the Fourteenth Amendment against unconstitutional age discrimination.

NEA submits this brief in support of Respondent to address the proper interpretation of the ADEA and to rebut policy arguments made in the briefs *amici curiae* filed by the National School Boards Association and the Illinois Association of School Boards (collectively referred to as "NSBA") and by the International Municipal Lawyers Association, the Council of State Governments, and the International City/County Management Association (collectively referred to as "IMLA") in support of Petitioners.

SUMMARY OF ARGUMENT

I.A. In enacting the ADEA, Congress did not intend to prohibit public employees from pursuing age-based Fourteenth Amendment equal protection claims under the independent and preexisting authority of § 1983. To the contrary, in enacting the ADEA, Congress created distinct statutory rights and protections for a discrete class of older employees, which are judged by distinct liability standards and enforceable against distinct classes of entities through distinct remedies—all of which differ in sig-

No counsel for a party authored this brief in whole or in part. No person or entity other than amici curiae made a monetary contribution to the preparation or submission of the brief. Letters of consent to the filing of amicus briefs in this matter are on file with the Clerk.

nificant ways from the rights and protections afforded by the Equal Protection Clause. Under this Court's § 1983 preclusion principles, these differences negate any suggestion that Congress intended the ADEA to preclude age-based equal protection claims under § 1983.

B. Petitioners' contention that the preclusion analysis applicable to this case begins and ends with an examination of the ADEA's enforcement provisions—without any comparison of the rights and protections provided by the ADEA with those provided by the Equal Protection Clause—is inconsistent with this Court's approach to § 1983 preclusion and the logic underling it. Where it is contended that a statute precludes recourse to § 1983 to enforce the statute's own rights and protections, the presence of a comprehensive enforcement scheme within that statute can suffice to demonstrate that Congress intended to preclude suits to enforce the same statute under § 1983. But the considerations are different where it is contended that a statute precludes recourse to § 1983 to enforce constitutional rights. In that setting, an intent not to preclude such claims may be inferred from a comparison of the rights and protections of the statute and those existing under the Constitution.

C. The ADEA is governed by a markedly different—and easier to meet—substantive standard of liability than the standard that applies to equal protection claims, covers different classes of employees and employers than does the Equal Protection Clause, and provides different remedies from those available for constitutional violations under § 1983.

These points of divergence compel the conclusion that Congress did not intend the ADEA to preclude public employees from pursuing § 1983 remedies for unequal treatment on the basis of age under the Equal Protection Clause, irrespective of the ADEA's enforcement scheme.

II. There is no merit to the rather paradoxical contention advanced by Petitioners and *amici* NSBA and IMLA that although it is very difficult for plaintiffs to prevail on claims of age-based unequal treatment under the Equal Protection Clause, such claims nonetheless impose significant financial burdens on public employers.

As an initial matter, because the question presented in this case is one of pure statutory interpretation, its resolution does not turn on whether recognition of the availability of § 1983 to enforce pre-existing constitutional rights against irrational age-based actions by public employers does or does not impose significant financial burdens on public employers. Thus, irrespective of the merits of the contention, this Court is the wrong forum in which to make that claim.

In any event, the contention that age-based equal protection claims threaten to impose significant litigation costs on public employers in general, or on school districts in particular, fails on its own terms. That argument both overestimates the ease with which plaintiffs can successfully plead meritless claims that a public employer has engaged in age-based unequal treatment that is violative of the Equal Protection Clause and underestimates the disincentives that

plaintiffs (and, importantly, plaintiffs' attorneys) have to do so. NSBA's contention that age-neutral measures undertaken in response to the requirements of federal and state education regulations, but that disproportionately affect older employees, will expose school districts to disparate impact claims under the Equal Protection Clause rests on a fundamental misapprehension of the law. Contrary to NSBA's professed fears, a plaintiff cannot prevail in an equal protection case under a disparate impact theory.

ARGUMENT

I. In enacting the ADEA, Congress did not preclude public employees from pursuing Fourteenth Amendment equal protection claims under § 1983.

The question presented in this case is one of statutory interpretation—namely, whether, in enacting the ADEA, Congress sought to prohibit public employees from pursuing Fourteenth Amendment claims of unequal treatment on the basis of age under the independent and preexisting authority of the Civil Rights Act of 1871, codified at 42 U.S.C. § 1983. We submit that, given the absence of any evidence demonstrating express or implied congressional intent to preclude such Fourteenth Amendment claims—and the textual evidence that Congress intended to create distinct statutory rights and protections in enacting the ADEA—the answer to this question is "no."

At the outset, it is important to emphasize what is not disputed in this case. First, there is no question but that § 1983's longstanding provision of a remedy for

"the deprivation of any rights, privileges, or immunities secured by the Constitution" authorizes public employees to seek judicial remedies for public employer violations of the Fourteenth Amendment's equal protection guarantee, and that, leaving aside the ADEA "preclusion" argument for the moment, that longstanding authorization extends to public employee claims alleging irrational unequal treatment on the basis of age. *See*, *e.g.*, *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976). Second, it is undisputed that there is nothing in the text of the ADEA—or for that matter in the legislative history of either the original enactment or in the amendatory act of 1974 extending the ADEA to public employers—expressly stating an intent to preclude public employees from invoking § 1983 to remedy age-based unequal treatment in violation of the Equal Protection Clause.

All this being the case, Petitioners stake their entire argument on the proposition that congressional intent to preclude § 1983 remedies for such constitutional violations is *implied* solely by the existence of the ADEA's enforcement provisions, which require ADEA claimants to exhaust administrative remedies and to participate in informal conflict resolution procedures prior to litigation—to the exclusion of any other statutory analysis. As we show in the following, that mode of analysis is inconsistent with this Court's teaching in *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246 (2009), and that faulty analysis leads Petitioners to the wrong conclusion on the question presented.

A. As this Court recognized in *Fitzgerald*, the question of whether a statute was intended to pre-

clude claims under § 1983's authorization of suits to redress "the deprivation of any rights, privileges, or immunities secured by the … laws [of the United States]" arises in two distinct categories of cases. *See* 555 U.S. at 252-54. In the first category, the preclusion question arises where Congress enacts legislation that prohibits certain conduct and provides a means for enforcement but is silent on the question of whether the statute's prohibitions are to be enforced solely through that statute's enforcement provisions or whether they can also be enforced pursuant to

In this category of cases, where "the § 1983 claim is based on a statutory right, 'evidence of … *congressional intent [to preclude § 1983 remedies]* may be found directly in the statute creating the right, or inferred from the statute's creation of a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.'" *Fitzgerald*, 555 U.S. at 252 (quoting *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005)) (emphasis added). *See also Blessing v. Freestone*, 520 U.S. 329, 341 (1997); *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981). In this setting—where a plaintiff invokes § 1983 to enforce the very same *statutory* provision for which Congress has already prescribed a particular means of enforcement—Congress's creation of a "comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983," *City of Rancho Palos Verdes*, 544 U.S. at 120, can be sufficient to infer that Congress intended that the statute be enforced exclusively through its own enforcement provisions, *see id.*; *Sea Clammers*, 453 U.S. at 20.

In the second category of cases, the preclusion question arises where Congress has prohibited conduct that can also be the subject of a federal *constitutional* claim pursuant to § 1983's authorization of suits for "the deprivation of any rights, privileges, or immunities secured by the Constitution." *See* 555 U.S. at 252-53. *Fitzgerald* teaches that in such cases, where "the § 1983 claim alleges a constitutional violation," analysis focuses not only on whether the statute's enforcement scheme suggests an implied congressional intent to preclude § 1983 remedies, but also (and critically) on whether "*lack of [such] congressional intent* may be inferred from a comparison of the rights and protections of the statute and those existing under the Constitution." *Id.* at 252 (emphasis added). "Where the contours of such rights and protections diverge in significant ways," this Court explained, "it is not likely that Congress intended to displace § 1983 suits enforcing constitutional rights." *Id.* at 252-53.

Applying this framework to the question presented in *Fitzgerald*—whether Title IX of the Education Amendments of 1972 precluded the plaintiff's § 1983 claim that the defendants' response to allegations of sexual harassment violated the Equal Protection Clause—this Court accordingly looked both to Title IX's enforcement mechanisms *and* to the differences between the rights and protections afforded by Title IX and the Equal Protection Clause, concluding that "[i]n light of the divergent coverage of Title IX and the Equal Protection Clause, as well as the absence of a comprehensive remedial scheme … Title IX was not meant to be an exclusive mechanism for address-

ing gender discrimination in schools, or a substitute for § 1983 suits as a means of enforcing constitutional rights." *Id.* at 258.

The *Fitzgerald* Court first determined that Title IX's enforcement mechanisms—an express provision establishing an administrative procedure for the termination of federal funding to institutions found to violate the Act's nondiscrimination provision and an implied private right of action recognized by this Court's decision in *Cannon v. University of Chicago*, 441 U.S. 677, 717 (1979)—did not constitute a comprehensive enforcement regime of a type that would suggest "that Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection claim." *Fitzgerald*, 555 U.S. at 256 (quoting *Smith v. Robinson*, 468 U.S. 992, 1012 (1984)).

Having found no comprehensive enforcement scheme that would support preclusion, this Court turned to "[a] comparison of the substantive rights and protections guaranteed under Title IX and under the Equal Protection Clause," 555 U.S. at 256. Engaging in this comparison—which, as the Court made clear, is particular to the preclusion analysis that applies to constitutional claims—this Court found that "Title IX's protections are narrower in some respects and broader in others." *Fitzgerald*, 555 U.S. at 256.

The Court first pointed out that Title IX and the Equal Protection Clause apply to different classes of persons and entities: "Title IX reaches institutions and programs that receive federal funds, which may include nonpublic institutions, but it has consistently

been interpreted as not authorizing suit against school officials, teachers, and other individuals," while "[t]he Equal Protection Clause reaches only state actors" and at the same time "§ 1983 equal protection claims may be brought against individuals as well as municipalities and certain other state entities." *Id.* (citations omitted).

Also significant to this Court's analysis was the fact that "Title IX exempts from its restrictions several activities that may be challenged on constitutional grounds." *Id.* In particular, "Title IX exempts elementary and secondary schools from its prohibition against discrimination in admissions" and "exempts military service schools and traditionally single-sex public colleges from all of its provisions," while some of those "exempted activities may form the basis of equal protection claims." *Id.* (citations omitted).

Furthermore, this Court stressed that "[e]ven where particular activities and particular defendants are subject to both Title IX and the Equal Protection Clause, the standards for establishing liability may not be wholly congruent." *Id.* In that regard, this Court noted that "a Title IX plaintiff can establish school district liability by showing that a single school administrator with authority to take corrective action responded to harassment with deliberate indifference" while "[a] plaintiff stating a similar claim via § 1983 for violation of the Equal Protection Clause by a school district or other municipal entity must show that the harassment was the result of municipal custom, policy, or practice." *Id.* at 257-58 (citations omitted).

"Because the protections guaranteed by the two sources of law diverge in this way," this Court found that it could not "agree with the Court of Appeals that 'Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions.'" *Id.* at 256 (citation omitted).

B. Petitioners' submission to this Court is that the preclusion analysis applicable to this case begins and ends with an examination of the ADEA's enforcement provisions. Eschewing any effort to compare the rights and protections provided by the ADEA with those provided by the Equal Protection Clause (other than as a predicate for asserting that age-based equal protection claims are burdensome to employers), Petitioners posit that the ADEA's comprehensive enforcement scheme, by itself, conclusively demonstrates that Congress intended the ADEA to preclude public employees from pursuing § 1983 claims of age-based unequal treatment under the Equal Protection Clause. Petitioners' Brief at 11-34. In so doing, Petitioners seek to wave away this Court's extensive discussion of the differences between Title IX's statutory rights and protections and those of the Equal Protection Clause as merely a superfluous buttressing of a conclusion derived wholly from the lack of particularly comprehensive enforcement mechanisms. Petitioners' Brief at 46-47.

That approach is not only facially inconsistent with *Fitzgerald*'s clear holding that "*lack of congressional intent* [to preclude constitutional claims under § 1983] may be inferred from a comparison of the rights and protections of the statute and those

existing under the Constitution," *Fitzgerald*, 555 U.S. at 252 (emphasis added), and this Court's sustained analysis of that issue, *id.* at 256-59, but also with the logic underlying the Court's methodology.[1]

---

[1] While giving short shrift to this court's decision in *Fitzgerald*, Petitioners rely heavily on *Smith v. Robinson*, 468 U.S. 992 (1984), which they characterize as having held that the Education for All Handicapped Children Act of 1974 ("EHA"), as amended, was intended by Congress to be the exclusive means for enforcing the equal protection rights of disabled children to a free public education based solely on the EHA's enforcement scheme. That characterization of *Smith* is inaccurate, for *Smith* only serves to underscore what is missing in this case: An affirmative indication from the text or legislative history of the statute that Congress intended the statute to be a means for enforcing constitutional equal protection rights at all, much less that it intended the statute to be the exclusive avenue for enforcing such constitutional rights.

The 1975 amendment to the EHA at issue in *Smith* expressly referred to the federal interest "assur[ing] equal protection of the law" in its legislative findings and stated that one of the purposes of the rights established by the statute was "to assure that the rights of handicapped children and their parents or guardians are protected." Pub. L. 94-142, §§ 2 & 3, 89 Stat. 773 (1975). Accordingly, the *Smith* Court found that the text and the legislative history of the EHA affirmatively demonstrated (a) that Congress enacted the EHA for the express purpose of creating "the most effective vehicle for protecting the constitutional right of a handicapped child to a public education" by establishing a right of all disabled children to a public education, providing a private right of action to enforce that right, and providing funding to states to help them meet their constitutional obligation to provide special education services, *Smith*, 468 U.S. at 1013; and (b) given that purpose and the EHA's detailed enforcement scheme, "that Congress intended handicapped children with constitutional claims to a free appropriate public education to pursue those claims through the carefully tailored administrative and judicial mechanism set out in the statute," *id.* at 1009.

As explained above, in *Fitzgerald*, this Court took pains to distinguish the two settings in which § 1983 preclusion analysis arises and to explain the different forms of analysis that each entails.

In the first setting, a plaintiff seeks to use § 1983 to enforce rights or obligations created under a legislative scheme that has its own highly detailed and restrictive enforcement mechanisms—such as the anti-pollution and marine wildlife measures at issue in *Sea Clammers* or the broadcast licensing scheme at issue in *Rancho Palos Verdes*. In that setting, absent an express indication of congressional intent one way or the other, the statute's own enforcement procedures assume paramount importance in the preclusion analysis: There, the mere existence of a detailed and comprehensive enforcement provisions strongly suggests that Congress intended to preclude plaintiffs from enforcing the rights or obligations created by the statute by the direct route that would otherwise be available under § 1983. In such a case, it can fairly be said that direct recourse to the courts via § 1983 would allow circumvention of the statute's carefully wrought methods for enforcing its own substantive terms in a way that is inconsistent with the very existence of those enforcement provisions. *See Fitzgerald*, 555 U.S. at 254-55.

But in the second setting—where, as here, a plaintiff seeks recourse to the courts via § 1983 to enforce not statutorily created rights but long-recognized rights under the Constitution—the considerations are very different. Here, the question is whether, by creating certain substantive rights and protections, along with a comprehensive enforcement scheme, where those

statutory rights and protections apply to at least some circumstances to which the Constitution *also* applies, Congress sought to preclude plaintiffs from enforcing their pre-existing constitutional rights via § 1983. Stated otherwise, the question is not merely whether Congress intended that there be one or two methods for enforcing the same statutory rights, but whether Congress sought to subsume pre-existing constitutional rights that are otherwise enforceable under § 1983 into a statutory scheme creating particular statutory rights and a particular enforcement regime.

In this setting, where there is no affirmative indication of congressional intent that particular constitutional rights and § 1983's provision of a means for enforcing such rights are thus subsumed into a new statute, it is imperative that courts compare the statute's rights and protections with the pre-existing constitutional rights and protections that are asserted to be displaced. The reason for this is plain: If a statute creates substantive rights that bear little resemblance to constitutional rights enforceable under § 1983—because, say, Congress prescribed substantive liability standards that differ markedly from those that apply to the purportedly displaced constitutional rights or Congress chose to protect different classes of persons from those protected by the constitutional right—there is simply no basis for supposing that Congress intended a statute to subsume the pre-existing constitutional right and displace the pre-existing enforcement mechanism of § 1983. Indeed, where the rights and protections of the statute are widely divergent from those of the constitutional right under § 1983, the presence of a statuto-

ry enforcement scheme is of little to no consequence: In such situations, it cannot fairly be said that pursuing § 1983 remedies for the different rights and protections provided under the Constitution works any circumvention of statutorily required procedures.

This is not to say that the presence or absence of a comprehensive enforcement mechanism is irrelevant to the implied preclusion inquiry; indeed the presence of such an enforcement scheme is a necessary condition for such implied preclusion, but it is not sufficient. It cannot be the case—and *Fitzgerald* teaches that it is not the case—that congressional intent to preclude § 1983 remedies for pre-existing constitutional rights can be implied soley from the mere fact that a given statue contains its own comprehensive enforcement mechanisms.

C. Having demonstrated that Petitioners fail to come to grips with *Fitzgerald*'s analysis or the logic underlying it, we turn to the application of that analysis to the circumstances here. Although this case presents a somewhat different pattern from that presented in *Fitzgerald*, the preclusion analysis for constitutional claims applied in *Fitzgerald* compels the same result.

Although the ADEA, unlike Title IX, does contain a comprehensive enforcement scheme, a comparison of the rights and protections afforded by the ADEA with those afforded by the Equal Protection Clause, as applied to claims of age-based unequal treatment, demonstrates that the two diverge widely in their respective liability standards, coverage, and remedies. As developed below, the ADEA is governed by a markedly different—and easier to meet—substantive standard of liability than the standard that

applies to equal protection claims, covers different classes of employees and employers than does the Equal Protection Clause, and provides different remedies from those available for constitutional violations under § 1983. These points of divergence are far more stark than those considered in *Fitzgerald*, and they accordingly compel the conclusion that Congress did *not* intend the ADEA to preclude public employees from pursuing § 1983 remedies for unequal treatment on the basis of age under the Equal Protection Clause, irrespective of the ADEA's enforcement scheme.

The substantive standards governing claims of age discrimination under the ADEA and claims of unequal treatment on the basis of age under the Equal Protection Clause are entirely dissimilar. The ADEA broadly prohibits employment discrimination "against any individual ... because of such individual's age," provided that the employee is forty or more years of age, 29 U.S.C. § 623(a)(1), subject to a number of exceptions, including, prominently, that allowing covered employers to discriminate on the basis of age in circumstances where age is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business," or where the discrimination "is based on reasonable factors other than age," *id.* § 623(f)(1). By contrast, under the Equal Protection Clause, a public employer is permitted to take adverse action against an employee pursuant to an explicitly age-based classification, so long as the age-based classification "is rationally related to a legitimate state interest." *See, e.g.*, *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000). *See also Mass. Bd. of Ret. v. Murgia*, 427 U.S.

307, 316 (1976). Under this famously lenient standard of scrutiny, the rationality of the classification is presumed, thus requiring the plaintiff to prove that the "'facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.'" *Kimel*, 528 U.S. at 84 (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)). And the governmental decisionmaker may rely on "generalizations" to support the rationality of the age-based classification, such as the use "age as a proxy for other qualities, abilities, or characteristics that are relevant to [its] legitimate interests," even where "age proves to be an inaccurate proxy in any individual case." *Id.* at 84.

As this Court emphasized in *Kimel*, the ADEA's allowance of age discrimination where age is a "bona fide occupational qualification" ("BFOQ") "is a far cry from the rational basis standard [courts] apply to age discrimination under the Equal Protection Clause." *Id.* at 86. Under the ADEA, statutory age discrimination (*i.e.*, adverse employment action undertaken because a person is forty or more years of age) is *prima facie* unlawful "even with [the] BFOQ defense," and that defense is "'meant to be an extremely narrow exception to the general prohibition,'" under which the employer must demonstrate "'a substantial basis for believing that *all or nearly all* employees above an age lack the qualifications required for the position,' or that reliance on the age classification is necessary because 'it is *highly impractical* for the employer to insure by individual testing that its employees will have the necessary qualifications for the job.'" *Kimel*, 528 U.S. at 87 (quoting *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400,

412, 422–23 (1985)) (emphasis added by the *Kimel* Court). In this respect, "the ADEA prohibits very little conduct likely to be held unconstitutional [under the rational basis test]." *Kimel*, 528 at 88.

At the same time, however, the scope of the ADEA's prohibition against age discrimination is both narrower in some respects and broader in other respects than the scope of the Equal Protection Clause's prohibition against irrational age-based classifications.

First, as noted above, the ADEA protects against age discrimination in employment only when an otherwise covered employee is forty or more years of age. The Equal Protection Clause, however, can apply to *any* age-based classification (albeit subject to the rational basis standard).[2] Thus, an irrational

---

[2] *See*, *e.g.*, *Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148, 1155 (D.C. Cir. 2004) (classifications based on youth are subject to rational basis scrutiny under the Equal Protection Clause); *Gary v. City of Warner Robins*, 311 F.3d 1334, 1337 (11th Cir. 2002) (applying rational basis scrutiny under the Equal Protection Clause to ordinance prohibiting persons under the age of 21 from entering or working at non-eating establishments); *Stiles v. Blunt*, 912 F.2d 260, 269 (8th Cir. 1990) (applying rational basis scrutiny under the Equal Protection Clause to minimum age requirement for state representatives); *Baccus v. Karger*, 692 F. Supp. 290, 301 (S.D.N.Y. 1988) (holding that a state's requirement that one must be at least 18 years of age before beginning law school violated the Equal Protection Clause); *Nat'l Treasury Emps. Union v. Devine*, 591 F. Supp. 1143, 1149 (D.D.C. 1984) (applying rational basis scrutiny under the Equal Protection Clause to retirement statute providing smaller annual cost-of-living adjustments to those under age 62 than those given to those older than 62).

age-based classification disadvantaging workers who are 39 years of age relative to younger workers would violate the Equal Protection Clause, as would an irrational classification disadvantaging *younger* workers relative to older ones. But such irrational age-based classifications would be wholly outside the ADEA. *See Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 593 (2004) (observing that the Court's ADEA precedents "show our consistent understanding that the text, structure, and history point to the ADEA as a remedy for unfair preference based on relative youth, leaving complaints of the relatively young outside the statutory concern").

Second, although the Equal Protection Clause can potentially apply to any age-based classifications—and thus is broader in scope than the ADEA in this respect—the state action limitation of the Fourteenth Amendment, and the congruent "color of law" requirement of § 1983, limit the reach of the Equal Protection Clause to age-based classifications in public employment settings. By contrast, the ADEA, as amended in 1974, applies not only to age discrimination by public employers (subject of course to the independent 11th Amendment state sovereign immunity limitation recognized in *Kimel*), but also to private employers, private employment agencies, and labor organizations engaged in industries affecting commerce. *See* 29 U.S.C. § 630(b), (c), and (d). And even so, the ADEA effectively exempts certain public employees from its coverage, *see id.* § 623(j) (permitting otherwise unlawful age discrimination against firefighters and law enforcement officers under specified circumstances) and *id.* § 630(f) (exempting elected officials and certain high-level

employees from the Act's coverage), while no such limitations are recognized under the Equal Protection Clause.

Differences also abound between the Equal Protection Clause and the ADEA with respect to the question of who can be held liable for violations, and under what conditions such liability may be established. Under the Equal Protection Clause, a public employee may sue individuals who caused or participated in the alleged deprivation of equal protection, whereas under the ADEA, only covered employers, employment agencies, and employment agencies may be held liable for statutory age discrimination; individuals, no matter how culpable, are exempt from liability. *See Hill v. Borough of Kutztown*, 455 F.3d 225, 246 n.29 (3d Cir. 2006) (collecting cases). And employer liability flows as a matter of course from a finding of age discrimination under the ADEA, under § 1983, a governmental entity may only be held liable if the plaintiff can demonstrate that a violation was caused by a custom, policy or practice of that entity. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978)

And finally, the Equal Protection Clause and the ADEA diverge with respect to the remedies available for violations. A public employee who proves a violation of the Equal Protection Clause may recover not only backpay and attorneys' fees, but also compensatory and, in appropriate cases, punitive damages. Under the ADEA, however, compensatory damages for pain and suffering or emotional distress are prohibited, and the only exemplary damages that can be awarded are liquidated damages in the form of double backpay in cases involving willful viola-

tions. *See* 29 U.S.C. § 626(b); *Comm'r of Internal Revenue v. Schleier*, 515 U.S. 323, 326 (1995); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126 (1985).

As the foregoing catalogue demonstrates, the "rights and protections of the statute and those existing under the Constitution" plainly "diverge in significant ways." *Fitzgerald*, 555 U.S. at 252-53. Indeed, the rights and protections of the ADEA differ from those of the Equal Protection Clause so much more starkly than do the statutory and constitutional provisions considered in *Fitzgerald* that it is not simply "[un]likely that Congress intended to displace § 1983 suits enforcing constitutional rights," *id.* at 253, but positively implausible.

In enacting the ADEA, Congress created distinct statutory rights and protections for a discrete class of older employees, which are judged by distinct liability standards and enforceable against distinct classes of entities through distinct remedies. In this setting, the presence of a comprehensive enforcement scheme in the ADEA carries little significance in the preclusion analysis. While the ADEA's rights and protections surely are enforceable only through the ADEA's procedures, the distinctness of those rights and protections negates any inference of preclusion that might otherwise be drawn from the statute's enforcement scheme.

II. The purported litigation burdens that Petitioners and amici assert to be caused by claims of age-based unequal treatment under the Equal Protection Clause are irrelevant to the preclusion analysis and in any event are grossly exaggerated.

Petitioners, echoed by *amici* NSBA and IMLA, seek to bolster the preclusion argument with the rather paradoxical contention that although it is very difficult for plaintiffs to prevail on claims of age-based unequal treatment under the Equal Protection Clause, such claims nonetheless impose significant financial burdens on public employers. *See* Petitioners' Brief at 38-45; NSBA Brief at 4-7, 16-23; IMLA Brief at 5-18. This contention, as we show in the following, is entirely beside the point of the question presented to this Court and in any event is wholly conjectural and grossly exaggerated.

As an initial matter, we must emphasize an obvious, but critical, point: The question presented in this case does not turn on whether recognition of the availability of § 1983 to enforce pre-existing constitutional rights against irrational age-based actions by public employers does or does not impose significant financial burdens on public employers. Rather, the question presented here is one of pure statutory interpretation—to wit, whether, under this Court's implied preclusion principles, the ADEA's enforcement provisions evince an implied congressional intent to preclude such claims.

Consequently, irrespective of the merits of the contention that § 1983 claims by public employees alleging irrational age-based treatment under the Equal Protection Clause are financially burdensome to public employers, this is the wrong forum in which to make that claim. Any contention that such claims *should be* precluded, based on public employers' experience of claims for pre-existing constitutional rights under the longstanding private enforcement authorization of §

1983, is one for Congress alone to weigh. *See Clark v. Bever*, 139 U.S. 96, 106 (1891) ("It is not for the courts, by mere interpretation of a statute, not justified by its language, to accomplish objects that are within the exclusive province of legislation."). And there is no evidence that any such concerns were presented to Congress—or acted upon by Congress—when the ADEA was enacted or amended.

The foregoing is a complete answer to the policy arguments made by Petitioners and by *amici* NSBA and IMLA. Nonetheless, we pause to note that those arguments are flawed even when considered on their own terms.

The common element in the policy arguments advanced by Petitioners and *amici* NSBA and IMLA is the idea that, notwithstanding the fact that it is very difficult for public employees to prevail on claims alleging irrational age-based treatment under the Equal Protection Clause, liberal pleading standards make it possible for plaintiffs with ultimately meritless equal protection claims to easily survive motions to dismiss and thereby impose on public employers the burdens and costs of extensive discovery. From that premise, Petitioners and *amici* NSBA and IMLA make the cognitive leap of suggesting that plaintiffs are likely to do so in sufficient numbers for those discovery costs to be significant in the aggregate. *See* Petitioners' Brief at 41-44; NSBA Brief at 19-21; IMLA Brief at 3, 15-181. Both the underlying premise and the conjectural conclusion are flawed.

First of all, this line of argument overestimates the ease with which plaintiffs can successfully plead meritless claims that a public employer has engaged

in age-based unequal treatment violative of the Equal Protection Clause, and thereby secure wide-ranging discovery, under contemporary pleading standards—including, notably, those established by this Court's decisions in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). At the same time, this contention underestimates the disincentives that plaintiffs (and, importantly, plaintiffs' attorneys) have to do so.

At the most basic level, "the daunting burden," *Medeiros v. Vincent*, 431 F.3d 25, 31 (1st Cir. 2005), facing plaintiffs under the rational basis standard of scrutiny that applies to age-based classifications means that, to survive a motion to dismiss, such a plaintiff's complaint must contain "well-pleaded factual allegations," rather than mere conclusions, that "plausibly give rise to an entitlement to relief," *Iqbal*, 556 U.S. at 681—*i.e.*, factual allegations establishing that the employer's age-based adverse employment action "is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the [employer's] action[] w[as] irrational." *Vance v. Bradley*, 440 U.S. 93, 97 (1979). It should be needless to add that ultimately meritless age-based equal protection claims are not, as Petitioners suggest, "easy to plead," Petitioners' Brief at 44, at least not with any hope of surviving a motion to dismiss.

As a consequence, there is, contrary to suggestions by Petitioners and *amici* NSBA and IMLA, little incentive for plaintiffs, and plaintiffs' attorneys, to assert age-based equal protection claims except in the most egregious cases. In this regard, it is telling

that neither Petitioners nor *amici* NSBA and IMLA offer any empirical evidence[3] that meritless age-based equal protection claims survive motions to dismiss at a rate sufficient to impose significant discovery costs on public employers. And, although our research has uncovered no data on the precise type of claims at issue here, the empirical evidence that is available on the effect of this Court's decisions in *Twombly* and *Iqbal* on the survival rate of discrimination claims more generally suggests otherwise.[4]

---

[3] To be sure, Petitioners (Brief at 43-44) attempt to bootstrap the discovery conducted in this case as support for their more general contention. That attempt is unavailing, even apart from the dictum that anecdote is not data, because in the district court, Levin raised multiple claims, including claims of sex discrimination under Title VII and age discrimination under the ADEA. There is no indication from the record that the discovery conducted below was attributable in any significant degree to Levin's equal protection claim in particular. Indeed, given that the nature of all Levin's claims entails discovery into the reasons for his employer's adverse action—and that that is precisely the discovery inquiry that Petitioners allude to—there is no reason to suppose that the equal protection claim itself made a marginal difference in the nature or amount of discovery conducted below.

[4] *See, e.g.*, Raymond H. Brescia, *The* Iqbal *Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 Ky. L.J. 235 (2012). This study, which examined employment and housing discrimination cases, reports that 72% of post-*Iqbal* cases are dismissed, and that 50% of post-*Iqbal* cases are dismissed with prejudice, which rates constitute a significant increase from the already-high pre-*Twombly* rates (61% of pre-*Twombly* discrimination cases dismissed, and 46% dismissed with prejudice). *Id.* at 260-61. The study also reports that the number of motions to dismiss based on specificity of the pleadings "accelerated considerably" after *Iqbal* was decided. *Id.* at 281.

Beyond that, *amicus* NSBA breathlessly urges that age-based equal protection claims threaten to "handcuff public school districts and public school officials in meeting personnel-related challenges . . . and accomplish[ing] their educational mission." NSBA Brief at 2. In support of this contention, NSBA offers the following syllogism:

Given (1) that federal and state education regulations mandate that school districts implement education measures that, given school districts' aging workforces, entail "decisions with age-related implications," NSBA Brief at 4-5; and (2) that "it is not difficult to envision a claim by a single disaffected teacher over the age of 40 or a class of teachers claiming that the assignment of teachers under the age of 40 to work in such programs is statistically disparate and therefore … sufficient to trigger liability under § 1983," *id.* at 6; it therefore follows that "the specter of § 1983 litigation" raising such claims "has the potential to affect [school district] decisions [on education measures unrelated to age] in a manner that disserves the educational mission of America's public schools," *id.*

We need not quarrel with the first premise underlying NSBA's chain of reasoning—*i.e.*, that education regulations require school district actions that result in statistically adverse consequences for older education employees—because the NSBA's conclusion is based entirely on a fundamental misapprehension of the law governing equal protection claims. Contrary to NSBA's view that "Section 1983 jurisprudence has not evolved to deal with the fine contours of unique theories of recovery such as claims based on disparate impact," *id.* at 7, the law is quite clear on this

score: Because the Equal Protection Clause imposes liability only for *purposeful* discrimination, a plaintiff cannot prevail in an equal protection case under a disparate impact theory. *See*, *e.g.*, *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1337 (2012) ("[Disparate impact] evidence alone is insufficient [to prove a constitutional violation], even where the Fourteenth Amendment subjects state action to strict scrutiny." (quotation marks and citations omitted)); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) ("[E]ven if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose."); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) ("[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact.").

Consequently, even leaving to one side the difficulty of effectively pleading age-based equal protection claims, NSBA's argument that school districts are uniquely vulnerable to age-based equal protection claims is wholly meritless.

* * * *

In sum, the policy arguments in support of preclusion offered by Petitioners and *amici* NSBA and IMLA are not only irrelevant to the pure issue of statutory construction presented in this case, they are meritless even on their own terms.

The potential for liability for violations of the Equal Protection Clause poses no unjustifiable bur-

dens on public employers generally or school districts in particular.

CONCLUSION

For the foregoing reasons, *amicus* NEA requests that this Court conclude that the ADEA does not preclude § 1983 enforcement of equal protection claims for age discrimination under the Fourteenth Amendment.

Respectfully submitted,

ALICE O'BRIEN
Counsel of Record
PHILIP A. HOSTAK
National Education Association
1201 16th Street NW
Washington, DC 20036
(202) 822-7035
aobrien@nea.org
phostak@nea.org

Attorneys for Amicus Curiae *National Education Association*

August 9, 2013