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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 OF *AMICI CURIAE* STATE OF MICHIGAN AND 20 OTHER STATES IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Age Discrimination in Employment Act precludes state and local government employees from asserting an age-discrimination claim under 42 U.S.C. § 1983.

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INTEREST OF *AMICI CURIAE*

The *amici* states and their municipalities employ millions of Americans. Each of the *amici* has adopted statutes, rules, and regulations prohibiting discrimination based on age by its constituent branches, departments, agencies, and political subdivisions. Most *amici* have fair-employment-practices agencies responsible for the enforcement of state and federal anti-discrimination laws. Thus, eradicating unlawful employment discrimination by state and local governmental units is of crucial importance to *amici*.

In enacting the Age Discrimination in Employment Act, Congress prioritized voluntary resolution of employment disputes over litigation. Specifically, the ADEA requires an employee to make a charge of discrimination to the Equal Employment Opportunity Commission before filing suit. The ADEA further requires that the EEOC "attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance . . . through informal methods of conciliation, conference, and persuasion." 29 U.S.C. § 626. And the ADEA imposes a notice requirement and ensures timely initiation of claims.

It is well settled that the ADEA provides the exclusive remedy for age-discrimination claims by employees against the federal government. E.g., *Tapia-Tapia* v. *Potter*, 322 F.3d 742, 745 (1st Cir. 2003). But the Seventh Circuit's decision allows state-government employees to bypass the ADEA's comprehensive remedial scheme and seek relief under § 1983. Under that approach, the *amici*—alone among the nation's employers—are deprived of the benefits of the ADEA's comprehensive process.

INTRODUCTION AND SUMMARY OF ARGUMENT

The ADEA creates a far-reaching and detailed statutory scheme for resolving age-discrimination claims. It provides an administrative framework that favors notice, informal resolution of disputes, and timely initiation and resolution of claims. In 1974, Congress extended the ADEA to apply to state and municipal employees.

By contrast, § 1983 creates no substantive rights or protections for the public. Section 1983 is merely a vehicle for the protection of rights granted by other federal laws.

The Seventh Circuit's decision below allows state and local government employees to circumvent the ADEA's comprehensive remedial scheme by bringing age-discrimination claims under § 1983. This approach deprives states and municipalities, alone among employers, of the ADEA's benefits. Under this Court's jurisprudence, Congress's creation of a comprehensive statutory scheme—to prevent age discrimination in a manner broader than the Constitution—precludes the use of § 1983 to vindicate the more limited constitutional right.

This Court should enforce Congress's intent that the ADEA is the only federal remedy for alleged age discrimination by states and municipal governments. Accordingly, the *amici* states respectfully request that this Court reverse the Seventh Circuit and hold that the ADEA displaces § 1983 for age-discrimination claims.

ARGUMENT

I. The ADEA displaces age-discrimination claims under § 1983.

This Court has not considered whether the ADEA displaces a plaintiff's claim for age discrimination under § 1983 against a state or local government employer. Section 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." *Baker* v. *McCollan*, 443 U.S. 137, 144 n.3 (1979). Section 1983 imposes liability on anyone who, under color of state law, deprives a person "of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Redress under § 1983 is available only if the plaintiff can demonstrate that the Constitution or a federal statute creates an individually enforceable right in the class of beneficiaries to which the plaintiff belongs. *Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 120 (2005). Even then, "there is only a rebuttable presumption that the right is enforceable under § 1983" because Congress may have expressly or impliedly forbidden recourse to § 1983. *Blessing* v. *Freestone*, 520 U.S. 329, 341 (1997).

The Court has set forth the appropriate analysis to determine whether statutory enactments preclude claims under § 1983, most recently in *Fitzgerald* v. *Barnstable School Committee*, 555 U.S. 246, 252 (2009). The critical inquiry is congressional intent. *Id*. at 252; *Smith* v. *Robinson*, 468 U.S. 992, 1012 (1984) (citing *Brown* v. *Gen. Servs. Admin.*, 425 U.S. 820, 825–29 (1976)). Evidence of congressional intent

to displace § 1983 can be found in the statutory text, *Rancho Palos Verdes*, 544 U.S. at 120, inferred because individual enforcement under § 1983 "would be inconsistent with Congress' carefully tailored scheme," *Smith*, 468 U.S. at 1012, and "confirmed by a statute's context," *Fitzgerald*, 555 U.S. at 253. The Court has further explained that where the § 1983 claim asserts a constitutional violation, "lack of congressional intent [to displace § 1983] may be inferred from a comparison of the rights and protections of the statute and those existing under the Constitution." *Id.* at 252–53. The Court has applied this approach consistently, regardless of whether the cause of action at issue is based on a statutory right or the Constitution.

A. The ADEA's comprehensive scheme evidences Congress's implied intent to displace § 1983.

As Petitioner explains, the ADEA's comprehensive nature and the overlap of rights and protections between the ADEA and the Fourteenth Amendment demonstrate a congressional intent to displace more general actions, like those under § 1983.

1. The ADEA's scheme is detailed and comprehensive. It is "structured to facilitate and encourage compliance through an informal process of conciliation and mediation." *Zombro* v. *Baltimore City Police Dep't*, 868 F.2d 1364, 1366 (4th Cir. 1989).

For example, the EEOC is required to give pre-suit notice to the employer, 29 U.S.C. § 626(d), and must seek to mediate the grievance "by informal methods of conciliation, conference, and persuasion,"

§ 626(b). This comprehensive scheme demonstrates that "Congress clearly intended that all claims of age discrimination be limited to the rights and procedures authorized by the ADEA." *Britt* v. *Grocers Supply Co.*, 978 F.2d 1441, 1448 (5th Cir. 1992).

2. The ADEA's protections also overlap with the Fourteenth Amendment's protections. The ADEA protects employees who are at least 40 years old from discrimination based on age. 29 U.S.C. § 623. As this Court has stated, "The ADEA broadly prohibits arbitrary discrimination in the workplace based on age." *Lorillard* v. *Pons*, 434 U.S. 575, 577 (1978).

The Equal Protection Clause prohibits classifications based on age only where the classification is not rationally related to government's legitimate objective. See *Mass. Bd. of Ret.* v. *Murgia*, 427 U.S. 307, 312–14 (1976). The rational-basis standard is "a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one," under which legislative action is "presumed to be valid." *Id.*

Thus, while both the ADEA and the Equal Protection Clause protect against age discrimination, the ADEA provides greater protections, subsuming the protections provided by the Equal Protection Clause and enforced under § 1983. This overlap of protection counsels strongly in favor holding that the ADEA's comprehensive provisions displace § 1983 claims. See *Preiser* v. *Rodriguez*, 411 U.S. 475, 485–89 (1973) (preclusion found where the same constitutional rights were protected by habeas corpus scheme and § 1983).

Moreover, correcting the Seventh Circuit's errors and reaffirming the correct displacement analysis is important because myriad federal statutory schemes enforce or implicate other constitutional or statutory rights. The primacy of all these comprehensive congressional schemes must be maintained to achieve Congress's intent. Individuals, like Respondent, should not be allowed to frustrate that intent by resorting to general statutes like § 1983.

The primacy of these schemes is particularly worthy of enforcement because they implement the balance Congress has chosen between protecting federal interests and preserving state sovereignty. In the ADEA, Congress created a system to enforce a right against states, limited to a particular method of enforcement, particular defendants, and particular remedies. Enforcing those limitations is essential to preserve the balance Congress struck. Cf. *Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2011) ("State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." (quotations omitted)).

In the ADEA, Congress overreached its constitutional bounds by seeking to give individuals a cause of action against states.[1] See *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 91 (2000) (holding that the ADEA's purported abrogation of

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[1] Sovereign immunity does not generally prevent suits for money damages under the ADEA against local government units. *Evans* v. *City of Bishop*, 238 F.3d 586, 589 (5th Cir. 2000) (quoting *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 280 (1977)).

state sovereign immunity was invalid). But the ADEA's comprehensive scheme nonetheless indicates how Congress intended to limit state sovereignty. The ADEA still provides individuals with an administrative procedure for seeking relief—the ADEA has been held to be enforceable on behalf of individuals by the EEOC. *E.g.*, *EEOC* v. *Bd. of Supervisors for the Univ. of La. Sys.*, 559 F.3d 270, 272 (5th Cir. 2009); *EEOC* v. *Bd. of Regents of the Univ. of Wis. Sys.*, 288 F.3d 296, 300–01 (7th Cir. 2002). And three states, including Illinois, have enacted statutes waiving sovereign immunity for ADEA claims. 745 ILCS 511.5(a); Minn. Stat § 1.05 sub 1; N.C. Gen. Stat. § 143-300.35(a)(2). Thus, Congress's purpose in providing a comprehensive remedial scheme for age discrimination is not thwarted by the states' sovereign immunity.

In sum, a comparison of the rights and protections of the ADEA and the Fourteenth Amendment, enforced through § 1983, coupled with the comprehensive scope of the ADEA, demonstrate that Congress intended the ADEA to displace § 1983 as the avenue for relief for age discrimination.

B. The Seventh Circuit's analysis is doubly flawed.

The Seventh Circuit reached the incorrect result below because its displacement analysis was flawed. First, the Seventh Circuit erred in applying a heightened standard for constitutional claims. Second, the circuit erred in holding that differences in defendants and remedies available prevented displacement.

1. The Seventh Circuit erred by applying a heightened displacement analysis to constitutional claims.

The Seventh Circuit's analysis of whether the ADEA displaces a government employee's remedies for age discrimination under § 1983 improperly distinguishes between constitutional and statutory rights, applying a higher standard for the displacement of constitutional claims. That distinction is not found in this Court's jurisprudence.

Below, the Seventh Circuit stated, "For the preclusion of *constitutional* claims, we believe more is required than a comprehensive statutory scheme." App. 27a; accord App. 25a ("[W]e have a hard time concluding that Congress's mere creation of a statutory scheme for age discrimination claims was intended to foreclose preexisting constitutional claims."); App. 28a ("In sum, even though the ADEA is a comprehensive remedial scheme, without some additional indication of congressional intent, we cannot say that the ADEA's scheme alone is enough to preclude § 1983 constitutional claims."). But this Court, in focusing on congressional intent, has examined whether a comprehensive statutory scheme exists when considering both statutory claims *and* constitutional claims. The congressional intent inferred from a comprehensive remedial scheme does not change based on the nature of the claim asserted. Compare *Smith*, 468 U.S. at 1012 (constitutional right), with *Middlesex Cnty. Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981) (statutory right).

The Seventh Circuit believes that *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), and *Smith* v. *Robinson*, 468 U.S. 992 (1984), demonstrate that constitutional claims receive different treatment, noting that the statutes at issue "were specifically designed to address constitutional issues" and that this Court also looked to other indicia of congressional intent. App. 26a–28a. But a review of *Preiser* and *Smith* demonstrates that constitutional claims receive the same congressional-intent inquiry as statutory claims. The comprehensive nature of the statutory scheme was the primary consideration driving the Court's holdings in both cases.

In *Preiser*, the Court emphasized that § 1983 is a "general" statute. 411 U.S. at 489. By contrast, the federal habeas corpus statute "explicitly and historically" provides a remedy for a state prisoner to attack his confinement on constitutional grounds. *Id.* The Court explained:

> It would wholly frustrate explicit congressional intent [that a petitioner exhaust state law remedies before seeking federal relief] to hold that the respondents in the present case could evade this requirement by the simple expedient of putting a different label on their pleadings. In short, Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983. [*Id.* at 489–90.]

Smith reaches the same conclusion regarding the Education of the Handicapped Act ("EHA") and

§ 1983. 468 U.S. at 1009. The Court explained that the EHA establishes a "comprehensive scheme" and creates "a process that begins on the local level and includes ongoing parental involvement, detailed procedural safeguards, and a right to judicial review." *Id.* at 1009–11. Allowing § 1983 claims asserting due-process and equal-protection violations that were "virtually identical to their EHA claims" would "render superfluous most of the detailed procedural protections outlined in the statute." *Id.* at 1009, 1011. "No federal district court presented with a constitutional claim to a public education can duplicate that process" and achieve Congress's objective of "having the parents and the local education agency work together to formulate an individualized plan for each handicapped child's education." *Id.* at 1011–12.

Nor has the Court drawn a distinction between constitutional and statutory claims in later cases. To the contrary, the Court has relied on *Preiser* and *Smith*—each of which addressed constitutional claims—in analyzing whether statutory claims were displaced. *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 120 (2005) (citing *Smith*, 468 U.S. at 1012); *Brown*, 425 U.S. at 833 (citing *Preiser*, 411 U.S. at 489–90). Such reliance would have been inappropriate if the distinction the Seventh Circuit draws was correct.

This Court should reaffirm that the displacement analysis remains the same regardless of whether a statutory or constitutional right is at issue. The comprehensive nature of a statutory scheme is

equally evident of congressional intent to preclude § 1983 suits in both circumstances.

2. The Seventh Circuit erred in holding that differences in the defendants and remedies available under the ADEA and § 1983 prevent preclusion.

The Seventh Circuit also mistakenly relied on differences in defendants and remedies available under the ADEA and § 1983 to avoid the conclusion that the ADEA displaces § 1983. App. 32a–34a. But this Court has never held that such differences prevent a comprehensive statutory scheme from displacing § 1983 remedies.

In *Brown* v. *General Services Administration*, this Court considered whether Title VII provides the exclusive judicial remedy for claims of employment discrimination against the federal government. The plaintiff sued, asserting that he had been subject to race discrimination in violation of Title VII and § 1981. 425 U.S. at 823–24. The plaintiff did not file suit within 30 days of the final agency decision and thus could not assert Title VII claims. See *id*. at 824. The Court considered Title VII's remedial scheme and reasoned that "[t]he balance, completeness, and structural integrity of § 717 are inconsistent with the petitioner's contention that the judicial remedy afforded by § 717(c) was designed to merely supplement other putative judicial relief." *Id*. at 832. The Court concluded "[i]t would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading." *Id*. at 833.

Accordingly, the Court held that federal employees' only remedy for unlawful discrimination is Title VII. *Id* at 835. The Court reached this conclusion notwithstanding the fact that Title VII and § 1981, like the ADEA and § 1983, allow for different defendants and remedies. 42 U.S.C. § 1981 (allows individuals to be sued); 42 U.S.C. § 2000e-2 (does not allow individuals to be sued); *Marrero-Rivera* v. *Dep't of Justice of the Commonwealth of Puerto Rico*, 800 F. Supp. 1024, 1031 (D.P.R. 1992) (explaining that until 1991, Title VII and § 1983 offered different remedies).

This Court has reached similar conclusions in the *Bivens* context. In *Bush* v. *Lucas*, 462 U.S. 367, 371 (1983) a federal employee sued his superior for demoting him in violation of his First Amendment rights. The Court held that a federal employee could not maintain such an action because Congress's comprehensive civil-service system addressed such complaints. *Id*. at 380–90. It was of no consequence that the civil-service review process would not result in individual liability and that the plaintiff-employee could not obtain damages for any violations of his constitutional rights. *Id*. This Court declined to second-guess Congress's judgment on these matters. *Id*. at 389; see also *Schweiker* v. *Chilicky*, 487 U.S. 412, 429 (1988) (declining to recognize action for unconstitutional termination of social-security benefits). Thus, again, differences in available defendants and remedies did not affect this Court's analysis, and the Seventh Circuit erred in making such differences dispositive.

II. State and local governments should not be treated less favorably than federal and private employers.

Under the Seventh Circuit's analysis, state and municipal governments—alone among employers—are denied the benefits of the ADEA's comprehensive scheme and its encouragement of "conciliation, conference, and persuasion," 29 U.S.C. § 626. For example, the Seventh Circuit's analysis concludes that Congress intended to require all private employees to exhaust their administrative remedies under state law before filing suit, but not state-government employees. See 29 U.S.C. § 633(b).

The disparate treatment of state and local governments is incongruous, because employment is an area where state and local governments "ha[ve] far broader powers" than in most other contexts in which § 1983 applies. *Engquist* v. *Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008) (quoting *Waters* v. *Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion)). "[T]he extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible." *Id.* Thus, in this sensitive government activity, the states and municipalities should not be afforded the lesser benefits and protections than those afforded to all other employers. See *Zombro*, 868 F.2d at 1369–70 (basing preclusion of § 1983 in part on government employers' need for "wide discretion").

Moreover, the Seventh Circuit's reasoning releases state employees from fulfilling the administrative or other requirements of each state's own law prohibiting age discrimination in employment. Every state and territory but one has a statute that bars age discrimination against public employees, as does the District of Columbia:[2]

Alabama: Ala. Code §§ 25-1-20 to -21 (prohibiting private and public employers from discriminating against persons 40 years of age and older).

Alaska: Alaska Stat. §§ 18.80.220, .300 (prohibiting private and public employers, including the state and a political subdivision of the state, from discriminating on the basis of age).

Arizona: Ariz. Rev. Stat. Ann. §§ 41-1463, -1465 (prohibiting private and public employers from discriminating against persons 40 years of age and older).

Arkansas: Ark. Code Ann. §§ 21-3-202 to -203 (prohibiting public employers from discriminating against persons 40 years of age and older).

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[2] South Dakota's anti-discrimination statute does not include age as a protected class. But the South Dakota Constitution's equal-protection clause prohibits age discrimination to the same extent as the United States Constitution. See S.D. Const. art. VI, § 18; *Lyons* v. *Lederle Labs.*, 440 N.W.2d 769, 771-72 (S.D. 1989).

California: Cal. Gov't Code (Deering) §§ 12926, 12940 (prohibiting private and public employers, including cities and the state or any political or civil subdivision of the state, from discriminating against persons over 40 years of age).

Colorado: Colo. Rev. Stat. §§ 24-34-301, -401, -402 (prohibiting private and public employers, including the state or any political subdivision, commission, department, institution, or school district thereof, from discriminating against persons at least 40 but less than 70 years of age).

Connecticut: Conn. Gen. Stat. §§ 46a–51, 46a–60 (prohibiting private and public employers, including the state and all political subdivisions, from discriminating on the basis of age).

Delaware: Del. Code Ann. tit. 19, §§ 710, 711 (prohibiting private and public employers, including the state or any political subdivision or board, department, commission, or school district thereof, from discriminating against persons 40 or more years of age).

District of Columbia: D.C. Code §§ 2-1401.02, 2-1402.11 (prohibiting private and public employers from discriminating against persons 18 years of age or older).

Florida: Fla. Stat. §§ 760.02, .10; § 112.044 (prohibiting the private and public employers, including the state, counties, municipalities, and special districts or any subdivision or agency thereof, from discriminating on the basis of age).

Georgia: Ga. Code Ann. §§ 34-1-2; 45-19-22, -28, -29 (prohibiting private and public employers, including any department, board, bureau, commission, authority, or other agency of the state, from discriminating against persons between 40 and 70 years of age).

Hawaii: Haw. Rev. Stat. §§ 378-1 to -2 (prohibiting private and public employers, including the state or any of its political subdivisions, from discriminating on the basis of age).

Idaho: Idaho Code Ann. §§ 67-5902, -5909, -5910 (prohibiting private and public employers, including any agency of or any governmental entity within the state, from discriminating against persons 40 years of age and older).

Illinois: 775 Ill. Comp. Stat. 5/1-103, /2-101 to -102 (prohibiting private and public employers, including the state and any political subdivision, municipal corporation, or other governmental unit or agency, from discriminating against persons 40 years of age and older, but in the case of training or apprenticeship programs, age means 18 but not yet 40 years old).

Indiana: Ind. Code §§ 22-9-2-1 to -2 (prohibiting private and public employers, including the state and all political subdivisions, boards, departments, and commissions thereof, from discriminating against persons at least 40 but under 75 years of age).

Iowa: Iowa Code §§ 216.2, .6 (prohibiting private and public employers, including the state or any political subdivision, board, commission, department, institution, or school district thereof, from discriminating against persons 18 and over and persons considered by law to be an adult).

Kansas: Kan. Stat. Ann. §§ 44-1112 to -1113 (prohibiting private and public employers, including the state and all political subdivisions of the state, from discriminating against persons 40 or more years of age).

Kentucky: Ky. Rev. Stat. Ann. §§ 18A.140, 344.030, .040 (West) (prohibiting private and public employers, including state employers, from discriminating against persons age 40 and over).

Louisiana: La. Rev. Stat. Ann. §§ 23:302, :311 to :312 (prohibiting private and public employers, including the state or any state agency, board, commission, or political subdivision of the state, from discriminating against persons at least 40 years of age).

Maine: Me. Rev. Stat. tit. 5, §§ 4553, 4572, 7051 (prohibiting private and public employers from discriminating on the basis of age and barring discrimination on account of age in state classified and unclassified employment).

Maryland: Md. Code Ann., State Gov't §§ 20-601, -606 (LexisNexis) (prohibiting private and public employers, including the state, from discriminating on the basis of age).

Massachusetts: Mass. Gen. Laws ch. 151B, §§ 1, 4 (prohibiting private and public employers, including the commonwealth and all political subdivisions, boards, departments, and commissions thereof, from discriminating against persons greater than 40 years of age).

Michigan: Mich. Comp. Laws § 37.2202 (prohibiting private and public employers from discriminating on the basis of age).

Minnesota: Minn. Stat. §§ 363A.08, .03 (prohibiting private and public employers from discriminating against persons over the age of majority); § 181.81 (prohibiting private employers from refusing to hire or discharging or demoting an individual because such individual has reached an age less than 70); § 43A.01 (personnel actions by state employers must be based on the ability to perform duties without regard to age).

Mississippi: Miss. Code Ann. § 25-9-149 (prohibiting state employers from discriminating on the basis of age).

Missouri: Mo. Rev. Stat. §§ 213.010, .055 (prohibiting private and public employers, including the state or any political or civil subdivision thereof, from discriminating against persons 40 or more years of age, but less than 70 years of age).

Montana: Mont. Code Ann. §§ 49-2-101, -303 (prohibiting private and public employers from discriminating on the basis of age); § 49-3-201 (state and local government officials shall recruit, appoint, assign, train, evaluate, and promote personnel on the basis of merit without regard to age).

Nebraska: Neb. Rev. Stat. §§ 48-1002 to -1004 (prohibiting private and public employers, including the state, governmental agencies, and political subdivisions, from discriminating against persons 40 years of age or more).

Nevada: Nev. Rev. Stat. §§ 613.310, .330 (prohibiting private and public employers from discriminating on the basis of age); § 281.370 (state, county, or municipal departments, housing authorities, agencies, and boards or appointing officers thereof, shall not refuse to hire or discharge a person from employment, or discriminate in compensation or terms of employment, because of a person's age).

New Hampshire: N.H. Rev. Stat. Ann. §§ 354-A:2, -A:7 (prohibiting private and public employers, including the state and all political subdivisions, boards, departments, and commissions thereof, from discriminating on the basis of age).

New Jersey: N.J. Stat. Ann. §§ 10:5-5, -12 (West) (prohibiting private and public employers, including the state and any political or civil subdivision thereof, from discriminating on the basis of age); § 10:3-1 (prohibiting state, county, and municipal employers from discriminating against individuals of least 40 years of age).

New Mexico: N.M. Stat. Ann. § 28-1-7 (prohibiting private and public employers from discriminating on the basis of age).

New York: N.Y. Exec. Law § 296 (McKinney) (prohibiting private and public employers from discriminating on the basis of age).

North Carolina: N.C. Gen. Stat. § 143-422.2 (it is the public policy of the state to protect the right of all persons to seek, obtain, and hold employment without discrimination on the basis of age by private and public employers); § 126-16 (prohibiting state departments and agencies and local political subdivisions of the state from discriminating against individuals at least 40 years of age).

North Dakota: N.D. Cent. Code §§ 14-02.4-02 to -03 (prohibiting private and public employers from discriminating against individuals at least 40 years of age).

Ohio: Ohio Rev. Code Ann. §§ 4112.01, .02 (LexisNexis) (prohibiting private and public employers, including the state and any political subdivision of the state, from discriminating against individuals at least 40 years old).

Oklahoma: Okla. Stat. tit. 25, §§ 1301, 1302 (prohibiting private and public employers from discriminating against persons at least 40 years of age); tit. 74, § 954 (prohibiting any department or agency of the state from discriminating against persons on the basis of age).

Oregon: Or. Rev. Stat. § 659A.030 (prohibiting private and public employers from discriminating against individuals 18 years of age or older); § 240.306 (state employers' recruiting, selecting, and promoting employees for state classified service must be without regard to an individual's age).

Pennsylvania: 43 Pa. Cons. Stat. §§ 954, 955 (prohibiting private and public employers, including the commonwealth or any political subdivision or board, department, commission, or school district thereof, from discriminating against individuals 40 years of age or older and those protected by further amendment to the federal ADEA).

Rhode Island: R.I. Gen. Laws §§ 28-5-6, 28-5-7 (prohibiting private and public employers, including the state and all political subdivisions of the state, from discriminating against persons at least 40 years of age).

South Carolina: S.C. Code Ann. §§ 1-13-30, -80 (prohibiting private and public employers from discriminating against persons at least 40 years of age).

Tennessee: Tenn. Code Ann. §§ 4-21-101, -401 (prohibiting private and public employers, including the state or any political or civil subdivision thereof, from discriminating against persons at least 40 years of age).

Texas: Tex. Lab. Code Ann. §§ 21. 002, .101 (West) (prohibiting private and public employers, including counties, municipalities, state agencies, state instrumentalities, and individuals elected to public office of the state or a political subdivision of the state, from discriminating against persons 40 years of age or older).

Utah: Utah Code Ann. §§ 34A-5-102, -106 (LexisNexis) (prohibiting private and public employers, including the state, any political subdivision of the state, and a board, commission, department, institution, school district, trust, or agent of the state or its political subdivisions, from discriminating against persons 40 years of age or older).

Vermont: Vt. Stat. Ann. tit. 21, §§ 495, 495d (prohibiting private and public employers, including any governmental body, from discriminating against persons 18 years of age or older).

Virginia: Va. Code Ann. § 2.2-3903 (prohibiting employment practices that violate any Virginia or federal statute or regulation governing age discrimination); § 2.2-2639 (prohibiting employers of more than five but less than fifteen persons from discharging any employee on the basis of age if the employee is 40 years of age or older).

Washington: Wash. Rev. Code §§ 49.44.090, 49.60.040, 49.60.180 (prohibiting private and public employers from discriminating against persons 40 years of age or older).

West Virginia: W. Va. Code §§ 5-11-3, -9 (prohibiting private and public employers, including state, or any political subdivision thereof, from discriminating against persons 40 years of age and older).

Wisconsin: Wis. Stat. §§ 111.32 to .33, 111.321 (prohibiting private and public employers, including the state and each agency of the state, from discriminating against persons at least age 40 or over).

Wyoming: Wyo. Stat. Ann. §§ 27-9-102, -105 (prohibiting private and public employers, including the state or any political subdivision or board, commission, department, institution, or school district thereof, from discriminating against persons at least 40 years of age).

Guam: 22 Guam Code Ann. §§ 5101, 5201 (prohibiting private employers from discriminating on the basis of age); §§ 3301, 3302 (prohibiting private employers and the territory of Guam or any authority, board, commission, department, or institution thereof, from discriminating on the basis of age).

Puerto Rico: P.R. Laws Ann. tit. 29, §§ 146, 151 (prohibiting private employers from discriminating against persons who have reached the minimum age that minors are legally allowed to work); tit. 3, § 1462b (public employers must select, train, promote, and retain employees based on merit, without discrimination by reason of age).

Virgin Islands: V.I. Code Ann. tit 10, §§ 64, 64a (prohibiting private and public employers, including the government and its instrumentalities, from discriminating on the basis of age).

Thus, the states (and territories) have taken significant steps to eliminate age discrimination within their jurisdictions and provided rights *greater* than those provided by the Equal Protection Clause. But the Seventh Circuit's approach would allow plaintiffs to bypass each of these state statutory schemes, rather than properly funneling age-discrimination claims into statutes specifically designed to address them. Indeed, Illinois law provided Respondent with a remedy for age discrimination wholly apart from § 1983 and the ADEA. The Illinois Human Rights Act protects against age discrimination, including claims relating to assistant attorneys general. 775 Ill. Comp. Stat. § 5/2-101(2); *Office of Lake Cnty. State's Atty.* v. *Human Rights Comm'n*, 601 N.E.2d 1294, 1303 (Ill. App. Ct. 1992) (assistant state attorney general was an "employee" within meaning of the Human Rights Act).

Below, the Seventh Circuit concluded that Congress intended to allow state and local government employees asserting age-discrimination claims to circumvent the administrative requirements of both the ADEA and any applicable state law—even though Congress has required that all private employees and all federal government employees fulfill these requirements. This result is incorrect and illogical, and it undermines the uniform application of federal and state anti-discrimination law to state employees.

III. At a minimum, where the ADEA protects a state or municipal government employee, § 1983 actions should be displaced.

The Seventh Circuit posited that the ADEA cannot displace § 1983—even where an ADEA claim is made—because the ADEA limits or exempts certain individuals and types of claims from its scope. App. 33a. But at the very least, § 1983 actions should be displaced where the ADEA provides the plaintiff with a vehicle for vindicating his constitutional rights.

In *Preiser*, for example, this Court held that the federal habeas corpus scheme displaced relief under § 1983. *Preiser*, 411 U.S. at 489–90. The Court acknowledged that the scheme's preclusion may not reach *all* possible lawsuits by a prisoner relating to his confinement. If a prisoner sought a remedy for a violated right that the habeas corpus scheme did not protect, the prisoner would not be precluded from litigating a § 1983 claim where the habeas corpus scheme did not provide a remedy. *Id.* at 499 n.14 (observing that a prisoner could filed an action under § 1983 attacking "the conditions of his confinement").

Likewise, in *Davis* v. *Passman*, 442 U.S. 228 (1979), a congressman informed his secretary in writing that he was terminating her employment because of her gender. *Id.* at 230. The secretary sued for violation of the Fifth Amendment's protections against gender discrimination. *Id.* at 231. The secretary was excluded from the gender-discrimination protections of Title VII because she was a congressional employee. *Id.* at 247. Thus, although the Court had held in *Brown* that Title VII provided

the exclusive remedy for federal-employment discrimination, Title VII did not bar the secretary's suit because Title VII offered the secretary no protection. *Id.* The Court explained that *Brown* only held that Title VII's remedies were exclusive "when those federal employees covered by the statute seek to redress the violation of rights guaranteed by the statute." *Id.* at 247 n.26.

Although the ADEA excludes political and policy-making employees like Respondent from the definition of covered employees, Congress has provided those employees with a procedure to enforce the ADEA through the Government Employee Rights Act of 1991, 42 U.S.C. § 2000e-16c. And as Petitioner explains, that fact is dispositive here. Pet. Br. 41.

Thus, this Court's precedents require that the ADEA displace § 1983 at the very least for all state and local government employees that the ADEA protects. Any other result would allow plaintiffs to "wholly frustrate explicit congressional intent . . . by the simple expedient of putting a different label on their pleadings." *Preiser*, 411 U.S. at 489–90.

CONCLUSION

The judgment of the court of appeals should be reversed.

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