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 THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, THE COUNCIL OF STATE GOVERNMENTS, AND THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Seventh Circuit erred in holding, in an acknowledged departure from the rule in at least four other circuits, 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?

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INTEREST OF AMICI CURIAE[1]

Established in 1935, the International Municipal Lawyers Association (IMLA) is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA is a nonprofit, nonpartisan professional organization with over 3,500 members. The membership is comprised of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys.

Since its founding, IMLA has served as a national, and now an international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law, through education and advocacy, by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional

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[1]Pursuant to Rule 37.6, *amici curiae* and their counsel hereby represent that none of the parties to this case nor their counsel authored this brief in whole or part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation or submission of this brief. The parties have filed blanket consents for the filing of amicus briefs in this case.

management of local governments throughout the world.

The Council of State Governments (CSG) is the nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

Amici respectfully submit this brief to underscore the dangers posed by the Seventh Circuit's ruling in *Levin v. Madigan*, 692 F.3d 607 (7th Cir. 2012) to state and municipal governments. Not only is the decision erroneous as a legal matter, as a practical matter it will, if allowed to stand, subject state and municipal employers to dramatically increased litigation costs and damages awards by eradicating crucial and time-honored barriers to suing these entities as employers. Indeed, the Seventh Circuit's approach would actually make it easier to sue these public-sector employers than their private-sector counterparts. The illegitimate expenses that such suits would impose are public ones that cash-strapped states and municipalities can ill afford, especially in the current economic climate.

Accordingly, *amici* ask the Court to reverse the judgment of the Seventh Circuit, or at least to clarify that constitutional age-discrimination suits cannot be used as substitutes for ADEA actions to avoid administrative exhaustion.

SUMMARY OF ARGUMENT

State and local governments are, collectively, one of the largest employers in the United States. Like

their private-sector counterparts, public-sector employees are protected against age discrimination by the ADEA. The ADEA requires, as a condition of its protections, that employees must first exhaust their claims before the EEOC. The EEOC, which is statutorily required to resolve age-discrimination claims informally, is very effective at this task. Through its mediation program, its efforts to facilitate private settlements, and conciliation of meritorious discrimination claims, the EEOC often can end discrimination cases quickly, inexpensively, and without the burdens of trial.

1. The Seventh Circuit's ruling that public employees may file § 1983 age discrimination claims against their employers, if affirmed, will eliminate the ADEA's administrative protections in many cases, and uniquely subject government employers to increased costs and burdens of federal litigation. Plaintiffs would have several reasons to eschew ADEA claims in favor of § 1983 claims, which EEOC does not have jurisdiction over.

First, § 1983 has a longer statute of limitations than the ADEA—in some cases over five years longer—meaning that plaintiffs with stale ADEA claims can revive such claims in federal court under § 1983. Second, § 1983 plaintiffs can indirectly sue state governments (by naming individual supervisors as defendants, who in turn are indemnified by the state for losses), or sue for punitive damages, neither of which are options in an ADEA suit. Third, plaintiffs who are seeking to force a quick settlement (which is not uncommon with municipal defendants) will not want to "waste time" before an agency. Fourth, some plaintiffs might simply choose to file

directly in federal court because several courts (erroneously) treat § 1983 claims and ADEA claims as fungible, meaning that there is no substantive disadvantage in filing § 1983 claims.

Whatever the reason, shunting age-discrimination claims from the EEOC to federal courts will create unique, additional litigation expenses for public employers. Federal lawsuits are considerably more expensive than administrative review. These litigation costs come at direct public expense, since money spent on lawsuits cannot be spent on public services. And in this economy, state and local governments cannot afford such increased burdens—burdens which will not be borne by any other employer.

2. At a minimum, if the Court were to affirm the Seventh Circuit's judgment, it should at least hold that § 1983 age-discrimination claims should not be subjected to heightened ADEA-style scrutiny, and thus should not be adjudicated using the burden-shifting *McDonnell Douglas* framework commonly used in ADEA cases. As this Court held long ago, constitutional age-discrimination claims are reviewed only for a rational basis. Thus, governmental action should be upheld if any "reasonably conceivable" set of facts would justify the action. Under rational basis review, the government need not articulate the actual reason for its actions, as hypothetical or conjectural reasons are sufficient. As a result, the plaintiff has the burden of negating all possible rational reasons for the government's actions.

The *McDonnell Douglas* test is incompatible with rational-basis review. That test places the burden on the employer to articulate its actual reasons for an

employment action, bases potential liability on whether that specific reason is true or false, and does not require the plaintiff to rebut all possible reasons for an action. The fundamental incompatibility between rational-basis review and *McDonnell Douglas* review is apparent in this very case, where the district court found that there were facially legitimate reasons to terminate Mr. Levin, but nonetheless allowed Mr. Levin's claims to go to trial because there was evidence casting doubt on one (but not all) of the Government's asserted justifications for his termination. If § 1983 claims are not preempted, then they should not be allowed to apply the lowered proof standards of the ADEA.

ARGUMENT

I. STATE AND LOCAL GOVERNMENT, ONE OF THE NATION'S LARGEST JOB SECTORS, WILL SUFFER UNIQUE, UNAFFORDABLE FINANCIAL BURDENS IF THE SEVENTH CIRCUIT'S DECISION STANDS.

State and local government employment is one of the largest employment sectors in the country, accounting for approximately 13% of the nation's total jobs.[2] The most recent available census data show that there are 14.6 million full-time state and local employees, and another 4.9 million part-time employees.[3] These employees, like their private-sector counterparts, have a remedy for age

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[2] *See* U.S. Bureau of Labor Statistics, Employment by Major Industry Sector, *at* http://data.bls.gov/cgi-bin/print.pl/emp/ep_table_201.htm

[3] *See* U.S. Census Bureau, Government Employment & Payroll, *at* http://www2.census.gov/govs/apes (linking to summary table for "2011 State and Local Government").

discrimination in the ADEA. As a condition of that remedy, Congress requires that the EEOC be given an opportunity to administratively review, and attempt to resolve, employment disputes before employees can resort to federal court.

The EEOC is very effective at resolving discrimination claims at minimal expense to the parties involved, and without requiring the litigation costs and burden on judicial resources that federal litigation entails. Should the Seventh Circuit be affirmed, however, plaintiffs' attorneys and their public-sector employee clients will be able to flood the federal courts with ADEA-style claims, without ADEA-style preliminary exhaustion procedures that, in turn, would deprive public-sector employers, and only these employers, of the benefits of the ADEA while imposing all its burdens. Nothing in law or logic recommends this kind of inter-branch hostile takeover—vitiating key administrative procedures, provided for by Congress, through judicial fiat.

A. The EEOC's Mediation, Settlement Facilitation, and Conciliation Programs, Designed to Carry Out its Statutory Responsibilities, Are Successful, Popular Alternatives to Federal Court Litigation.

Under the ADEA, a party alleging age discrimination must file an administrative charge with the EEOC within 180 or 300 days (depending on the state) of the date on which the allegedly discriminatory act occurred. *See* 29 U.S.C. § 626(d)(1). The party may not file a civil action until at least 60 days after filing a charge. *Id.* § 626(d). The EEOC, upon receiving this charge, "shall promptly notify all persons named in such charge as

prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." *Id.* § 626(d)(2).

In order to fulfill its statutory mandate, the EEOC has created several processes through which it attempts to obtain binding resolutions to resolve charges of employment discrimination without the need for litigation. These methods "include mediation, settlement and conciliation." U.S. Equal Employment Opportunity Comm'n, Resolving a Charge, http://www.eeoc.gov/employers/resolving.cfm.

1. The first method by which the EEOC attempts to informally resolve employment disputes is through its mediation program. Once it receives a charge, but before it investigates, the EEOC offers the employer and employee the services of an experienced mediator who will give "the parties the opportunity to discuss the issues raised in the charge, clear up misunderstandings, determine the underlying interests or concerns, find areas of agreement and, ultimately, to incorporate those areas of agreements into solutions." U.S. Equal Employment Opportunity Comm'n, Facts About Mediation, http://eeoc.gov/eeoc/mediation/facts.cfm. If the parties can reach agreement, the case can be resolved without any investigation or litigation. *Id.* If not, the EEOC proceeds with its investigation of the charge. *Id.*

The EEOC's mediation program has been described as "a remarkably efficient mechanism that often produces a practical solution for workplace disputes while avoiding the time, expense, and emotional strain of a trial." Robert E. Talbot, *A Practical Guide*

to Representing Parties in EEOC Mediations, 37 U.S.F. L. Rev. 627, 628 (2003). One study undertaken by the EEOC shows that some 96% of employers and 91% of employees who participated would use the program again if offered.[4] It is also highly effective: in 2012, some 76% of the parties who agreed to mediate were able to successfully resolve their claims, in an average of only 101 days.[5]

2. The second process by which the EEOC attempts to resolve employment disputes is through the facilitation of private settlement agreements. During the charge investigation process, EEOC investigators "have the authority to sign any settlement agreement which is agreeable to both parties," including agreements requiring "withdrawal of the charge." 29 C.F.R. § 1601.20. These settlement agreements can "save [an employer] the time and effort associated with [EEOC] investigations," and allow charges to be terminated with "no admission of liability." U.S. Equal Employment Opportunity Comm'n, Resolving a Charge, http://www.eeoc.gov/employers/resolving.cfm. Over the past decade, between 6.5% and 11.1% of

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[4] *See* U.S. Equal Employment Opportunity Comm'n, An Evaluation of the Equal Employment Opportunity Commission Mediation Program (Sept. 2000), http://eeoc.gov/eeoc/mediation/report/index.html.

[5] *See* U.S. Equal Employment Opportunity Comm'n, EEOC Mediation Statistics FY 1999 through FY 2012, http://www.eeoc.gov/eeoc/mediation/mediation_stats.cfm. These statistics show that the mediation program's success rate has risen steadily since 1999.

ADEA cases at the EEOC were resolved each year via settlement.[6]

3. The third way the EEOC attempts to resolve employment disputes without litigation is through conciliation. Once an investigation is complete, if the EEOC "establishes that there is 'reasonable cause' to believe that discrimination has occurred, the parties will be invited to participate in conciliation discussions." *Id.* During the conciliation process, the EEOC investigator works with the employer and employee "to obtain agreement that the respondent will eliminate the unlawful employment practice and provide appropriate affirmative relief" without the need for litigation. 29 C.F.R. § 1601.24(a). In 2012, the EEOC successfully conciliated 45% of the cases in which it found reasonable cause for discrimination.[7]

The EEOC's collective administrative efforts to resolve disputes without litigation have been recognized as highly successful, and with good reason, for they "at once enable[ ] aggrieved individuals to seek redress for harms suffered, allow[ ] employers to resolve workplace disputes earlier and through more informal means, and help[ ] to reduce the federal court dockets." Anne Noel Occhialino & Daniel Vail, *Why The EEOC (Still) Matters*, 22 Hofstra Lab. & Emp. L.J. 671, 692 (2005).

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[6] *See* U.S. Equal Employment Opportunity Comm'n, Age Discrimination in Employment Act FY 1997 – FY 2012, http://www.eeoc.gov/eeoc/statistics/enforcement/adea.cfm.

[7] The EEOC found 770 charges showed reasonable cause for discrimination, and conciliated 343 of them. *See* U.S. Equal Employment Opportunity Comm'n, *supra*, http://www.eeoc.gov/eeoc/statistics/enforcement/adea.cfm.

B. Without Preemption, Government Employers Face Increased Federal-Court Litigation of Age Discrimination Claims, With Resulting Financial Harm.

If the Seventh Circuit's judgment is affirmed, however, public-sector employees will be able to bypass the EEOC and its effective pre-suit resolution processes entirely. Specifically, they will be allowed to file § 1983 age-discrimination claims in lieu of ADEA claims, bypassing the EEOC entirely. Section 1983 constitutional claims are not generally subject to administrative exhaustion, *see Patsy v. Bd. of Regents of Florida,* 457 U.S. 496, 516 (1982), and the EEOC does not have statutory authority to police constitutional discrimination claims in any event. *See, e.g.*, 29 U.S.C. § 626(b) (providing only that the EEOC shall enforce the "provisions of this chapter"); 42 U.S.C. § 2000e-5(a) (same); *see also* U.S. Equal Employment Comm'n, Laws Enforced by EEOC, http://www.eeoc.gov/laws/statutes/index.cfm (setting forth the limited federal statutes over which the EEOC has authority).

Diverting age-discrimination claims from the EEOC will increase the quantity and decrease the quality of age-discrimination claims in federal courts. These additional suits will be costly in terms of already-scarce judicial resources. And worse, they will surely lead to significantly increased state and municipal litigation costs which these entities, and ultimately the taxpayers, can ill afford.

1. Without Preemption of § 1983 Age Discrimination Claims, Employers Will Face More Federal Litigation. Although ostensibly the ADEA is more protective of employee rights than § 1983, there

would be a drastic increase in federal age-discrimination litigation if the Court were to affirm in this case. There are several reasons why plaintiffs would choose to bring § 1983 claims directly in federal court, instead of proceeding through the ADEA's administrative processes.

First, many plaintiffs would file § 1983 age claims in federal court, in lieu of ADEA claims, out of necessity. The ADEA has a relatively short statute of limitations. It requires a party alleging age discrimination to file an administrative charge with the EEOC within 180 or 300 days (depending on the state) of the date on which the allegedly discriminatory act occurred; otherwise, the claim is time-barred. *See* 29 U.S.C. § 626(d)(1); 42 U.S.C. § 2000e-5(e).

By contrast, § 1983 claims "borrow the state statute of limitations for personal injury actions." *Owens v. Okure*, 488 U.S. 235, 236 (1989) (citing *Wilson v. Garcia*, 471 U.S. 261 (1985). In nearly every state, plaintiffs have significantly more time than the ADEA's 300-day maximum to file a § 1983 suit—two or three years in most,[8] with some states giving plaintiffs up to *six years* to file.[9] Indeed, if

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[8] *See, e.g.*, *Gomez v. Randle*, 680 F.3d 859, 864 (7th Cir 2012) (Illinois, 2 years); *Koch v. Hose*, 589 F.3d 626, 634 (3d Cir. 2009) (Pennsylvania, 2 years); *McCune v. City of Grand Rapids*, 842 F.2d 903, 905 (6th Cir. 1988) (Michigan, 3 years); *Shomo v. City of New York*, 579 F.3d 176, 181 (2d Cir 2009) (New York, 3 years); *Price v. City of San Antonio*, 431 F.3d 890, 892 (5th Cir. 2005) (Texas, 2 years).

[9] The limitations period is four years in Florida, Nebraska, Utah, and Wyoming, five years in Missouri, and six years in Maine, Minnesota, North Dakota, and Wisconsin. *See City of Hialeah, Florida v. Rojas*, 311 F.3d 1096, 1103 n. 2 (11th Cir

§ 1983 age-discrimination claims are held to be viable nationwide, then government employers would face not only expanded liability going forward, they would also become liable retroactively for *past* age discrimination that would have been time-barred under the ADEA up to a half-decade ago.

Second, many plaintiffs will have financial incentives to bring § 1983 claims instead of ADEA claims. State employees, for instance, cannot receive any damages under the ADEA; liability under the ADEA flows to the employer and the state as employer is protected from damages suits by the Eleventh Amendment. *Kimel v. Board of Regents*, 528 U.S. 62, 66-67 (2000). By contrast, under § 1983, a plaintiff can sue the specific individuals *working* for a state government, and these individuals do not share in the state's sovereign immunity. *Kentucky v. Graham*, 473 U.S. 159, 165-67 (1985). And while the state technically remains immune to § 1983 damages,

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2002); *Baker v. Chisom*, 501 F.3d 920, 922 (8th Cir. 2007); *Fratus v. DeLand*, 49 F.3d 673, 675 (10th Cir. 1995); *Gee v. Pacheco*, 627 F.3d 1178, 1190 (10th Cir. 2010); *Sulik v. Taney County, Mo.*, 393 F.3d 765, 766-67 (8th Cir 2005); *Small v. City of Belfast*, 796 F.2d 544, 546 (1st Cir. 1986); *Egerdahl v. Hibbing Cmty. Coll.*, 72 F.3d 615, 618 n. 3 (8th Cir. 1995); *Carpenter v. Williams County, N.D.*, 618 F. Supp. 2d 1293, 1294 (D.N.D. 1985); *Gray v. Lacke*, 885 F.2d 399, 409 (7th Cir. 1989).

Only California, Kentucky, Louisiana, and Tennessee—all of which have one-year limitations periods for § 1983 actions—have filing deadlines similar to the ADEA's 300-day maximum. *Knox v. Davis*, 260 F.3d 1009, 1013 (9th Cir. 2001); *Collard v. Ky. Bd of Nursing*, 896 F.2d 179, 182 (6th Cir. 1990); *Bourdais v. New Orleans City*, 485 F.3d 294, 298 (5th Cir. 2007), *Hughes v. Vanderbilt Univ.*, 215 F.3d 543, 547 (6th Cir. 2000).

in practice most states indemnify their employees, preserving the state as a "deep pocket" that will satisfy most § 1983 judgments.[10]

Likewise, a plaintiff might prefer a § 1983 suit because of the possibility of winning punitive damages. Under the ADEA, punitive damages are generally unavailable.[11] But they are permitted in § 1983 suits against individuals acting under color of state law. *Smith v. Wade*, 461 U.S. 30, 35 (1983).

Third, some plaintiffs might believe that the *in terrorem* effect of a federal lawsuit would be leverage for a quick settlement, and thus they would not want to "waste time" having an administrative agency review their claims. And not without reason. As discussed below, *infra* at Part I.B.2, EEOC proceedings are relatively inexpensive. By contrast, the costs of federal civil discovery are high, and fall almost entirely on the employer in discrimination cases. Indeed, these discovery costs can approach or exceed a plaintiff's potential damages award. *See* Rodney A. Satterwhite & Matthew J. Quatrara, *Asymmetrical Warfare: The Cost Of Electronic Discovery In Employment Litigation*, 14 Rich. J.L. & Tech. 9, ¶ 8 (2008). Such costs may "systemically force [a state or municipal defendant] to either resolve cases that would otherwise be decided on the merits, or resolve them at a higher price because electronic discovery is inevitable." *Id.* For it is well-established that municipalities will often "just make

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[10] Martin A. Schwartz, *Should Juries Be Informed That Municipality Will Indemnify Officer's § 1983 Liability For Constitutional Wrongdoing?*, 86 Iowa L. Rev. 1209, 1211 (2001),

[11] *See generally* 1 Barbara T. Lindemann et al., Employment Discrimination Law 12-176 (5th ed. 2012).

a business decision to settle, rather than run the risk of a much greater tort judgment against [them]." Henry Goldman, *Legal Claims Add to New York City's Budget Woes*, Bloomberg Businessweek (Sept. 13, 2012), http://www.businessweek.com/articles/2012-09-13/legal-claims-add-to-new-york-citys-budget-woes (quoting New York City mayor Michael Bloomberg). Plaintiffs, particularly those seeking nuisance settlements of relatively weak claims, will thus have very little incentive to bring ADEA claims through the EEOC, but significant incentive to immediately sue in federal court.

Fourth and finally, plaintiffs may well file § 1983 claims in lieu of ADEA claims because many courts (including the district court below) erroneously treat ADEA and § 1983 claims as fungible. As discussed at length in IMLA's petition-stage briefing, these courts impose the same *McDonnell Douglas* burden-shifting test used for ADEA claims to § 1983 age-discrimination claims, apparently presuming that age-based decisions are "arbitrary and irrational" under the rational-basis test.[12] *See generally infra* at

[12] *See, e.g., Levin v. Madigan*, No. 07-C-4765, 2011 WL 2708341, at *12-20 & n.16 (N.D. Ill. July 12, 2011); *Burkhardt v. Lindsay*, 811 F. Supp. 2d 632, 651 (E.D.N.Y. 2011) (citing authority for proposition that "[a]ge-based employment discrimination claims brought pursuant to § 1983 are analyzed under the three-step, burden-shifting framework" of *McDonnell Douglas*); *Shapiro v. New York City Dep't of Educ.*, 561 F. Supp. 2d 413, 422 n.2 (S.D.N.Y. 2008) ("An equal protection claim for age discrimination pursuant to § 1983 is analyzed under the same standards as a claim made pursuant to the ADEA."); *Siler v. Hancock County Bd. of Educ.*, 510 F. Supp. 2d 1362, 1381-82 (M.D. Ga. 2007) ("when a plaintiff asserts a § 1983 claim based on age discrimination, courts apply the same analysis to such a claim as they would an ADEA claim.); *Abel v. Auglaize County Highway Dep't*, 276 F. Supp. 2d 724, 733 (N.D. Ohio 2003)

Part II. If the courts do not impose any substantive disadvantage on § 1983 age-discrimination claimants, then the decision to forego "delay" in the EEOC, and simply head to federal court, becomes costless. Indeed, it becomes economically efficient.

2. Federal Constitutional Age-Discrimination Litigation is More Costly Than Administrative Review, and Comes at the Unique Expense of Public Employers. But whatever an individual's motivation, shifting age-discrimination cases from the EEOC to the federal courts will impose unique, costly burdens on public employers. As a general matter, the costs of federal litigation far outstrip the costs of EEOC administrative review. On average, an "employer defending itself against a discrimination claim" at the EEOC would spend "between $4,000 and $10,000." Susan K. Hippensteele, *Revisiting the Promise of Mediation for Employment Discrimination Claims*, 9 Pepp. Disp. Resol. L.J. 211, 225 (2009). In federal court, that same employer would likely spend "at least $75,000 to take a case to summary judgment, and at least $125,000, and possibly much more, to defend itself at trial." *Id.*

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("Since Plaintiff claims age discrimination in violation of 42 U.S. § 1983, he can make the required showing of discriminatory intent and purpose by following the methods of proof in Age Discrimination in Employment Act cases."); *Stalhut v. City of Lincoln*, 145 F. Supp. 2d 1115, 1121-22 (D. Neb. 2001) (applying *McDonnell Douglas* to both ADEA and § 1983 age claim); *Mummelthie v. City of Mason City*, 873 F. Supp. 1293, 1332-36 (N.D. Iowa 1995) ("a § 1983 claim based on alleged violation of equal protection in the employment context is analyzed in the same way as . . . an ADEA claim of age discrimination").

This is simple common sense. If an age-discrimination case survives a motion to dismiss, then it will not be resolved until after civil discovery has been completed. And this Court has recognized discovery as the most costly aspect of modern civil litigation, amounting to between 60 and 90 percent of all litigation costs. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007); *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 268 (2004) (Breyer, J., dissenting). Worse, these costs are decidedly one-sided in employment cases, with employers bearing the brunt. Satterwhite & Quatrara, *supra*, at ¶¶ 6-7 (2008). And the specter of such costs often has immediate impact, well in advance of trial, as municipalities often set aside cash reserves to "cover the expected outlay of funds" that might result from a future claim not yet decided. Sydney Cresswell & Michael Landon-Murray, *Assessing the Fiscal Impact of Lawsuits on New York State Municipalities* 7 (Oct. 2011) *at* http://www.albany.edu/polis/research.shtml.

Moreover, these new, unique costs will come at the direct public expense, because "every dollar that [governments] spend on litigation can be spent on services to the public." Christina Villacorte, *Group Says Los Angeles County, City Under Siege From Lawsuits*, L.A. Daily News (Apr. 13, 2013) (internal quotation marks omitted), *available at* 2013 WLNR 9042802; *accord, e.g.*, Bethany Krajelis, *Group Reports On City Litigation Costs, Urges Constraint*, Chicago Daily Law Bulletin (July 28, 2011), *at* http://www.chicagolawbulletin.com/News-Extra/study1-7282011bk.aspx ("if [Chicago] didn't spend so much fighting and settling lawsuits, it could save taxpayer dollars, help the city to close its budget deficit and avoid personnel cuts"); John P. Avlon, *Sue*

City, Forbes (Jul. 14, 2009), at http://www.forbes.com/2009/07/14/new-york-city-tort-tax-opinions-contributors-john-p-avlon.html (noting that, with one exception, damages paid by New York City agencies come "out of the general city budget fund."); Jeremy Boren, *Lawsuits Add To Pittsburgh's Financial Woes*, Pitt. Tribune Review (April 8, 2006) ("Lawsuits have amplified the costs of guiding Pittsburgh out of its financial mess."), *available at* 2006 WLNR 5946277. If governments have to spend more on litigation, they will have to either cut services or increase taxes or debt to cover the difference. Neither is an attractive choice in these troubled economic times. It is hard to ask property owners to pay more tax, or citizens to make do with less public services, solely to feed the litigation beast, particularly when those expenses could have been avoided with well-established, pre-trial EEOC review procedures.

Finally, and perhaps most troublingly, these new financial burdens would be imposed solely on government employers—arguably the class of employers least well-positioned to bear them. Constitutional age-discrimination suits may only be brought against persons acting under the color of state law, *see* 42 U.S.C. § 1983, and so private employers will face only ADEA, and not § 1983 liability. It would be puzzling for this Court to impose such a double standard, particularly given its recent recognition that the federal government and the states have *already* given workers significant employment protections (here, the ADEA), and that if "every employment decision became a constitutional matter" then this Court "will have undone Congress's (and the States') careful work." *Engquist v. Oregon*,

553 U.S. 591, 607 (2008) (internal quotation marks and citations omitted). Yet that would flow inexorably from an affirmance of the Seventh Circuit's outlier decision here.

* * *

If this Court were to affirm the Seventh Circuit, the real-world results would be swift, sure, and severe. The EEOC will lose the opportunity to mediate, settle, or conciliate age discrimination claims for one of the nation's largest job sectors. Government employers will face increased litigation expenses from increased numbers of federal lawsuits. And taxpayers will, one way or another, suffer as a result. Governments, acting in the capacity of employers and not sovereigns, should not be singled out and forced to bear these increased burdens.

II. IF THIS COURT REJECTS PREEMPTION, IT SHOULD AT LEAST CLARIFY THAT A § 1983 CLAIM IS NOT FUNGIBLE WITH CLAIMS UNDER THE ADEA.

Although some increase in federal litigation over age-discrimination claims will be inevitable if this Court were to affirm the Seventh Circuit's ruling permitting § 1983 claims by aggrieved state and municipal employees, some of the impact would be mitigated were the Court to make clear—contrary to the district court's ruling below—that § 1983 age discrimination claims should not be adjudged under the same evidentiary framework of ADEA cases. Accordingly, even if the Court were inclined to permit § 1983 claimants to end-run the ADEA, at the very least, the Court should correct the lower courts' incorrect handling of what should be difficult-to-prove rational-basis age discrimination claims.

The trial court, along with several others to address the issue, *see supra* n. 12, held that § 1983 age discrimination plaintiffs and ADEA plaintiffs alike may prove their allegations under the burden-shifting test of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) used in Title VII cases. But that test is fundamentally inconsistent with this Court's teachings on rational-basis review, which is how § 1983 age-discrimination claims should be evaluated.[13] *See Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976). If plaintiffs choose, for whatever reason, to forego the ADEA and its generous provisions, then those plaintiffs should have to contend with the stringent limitations on equal-protection claims that, as here, involve non-suspect classifications.

Under the *McDonnell Douglas* test, once a plaintiff has shown that he was treated differently than a similarly-situated employee not in the protected class, it is "presum[ed] that the employer unlawfully discriminated against the employee." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981). The employer must then rebut this prima facie case with "admissible evidence" that there was a "legitimate, nondiscriminatory reason" for the difference in treatment. *Id.* at 254-55. If the

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[13] Although the vast majority of precedents on rational-basis review have come in the context of legislation and not executive decision-making, this Court has never "suggest[ed] that the protections of the Equal Protection Clause are any less when the classification is drawn by . . . administrative action." *Nordlinger v. Hahn*, 505 U.S. 1, 16 n.8 (1992); *cf. Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367-68 (2001) (same rational-basis test would apply in Equal Protection case involving discrimination against individual employees).

employer does not set forth such a rationale, the plaintiff prevails as a matter of law. *Id.* at 254.

If, however, the employer does produce such evidence, then the presumption falls away. The plaintiff may yet prevail by offering evidence that the employer's stated pretext is false. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993). If the plaintiff proves that the stated reason is false, then that is, itself, sufficient to allow a jury to infer that the actual reason for the employment decision was unlawful discrimination. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000).

Whatever its usefulness in the context of the ADEA,[14] where heighted scrutiny applies to age-based classifications, *see Kimel*, 528 U.S. at 88, it is not appropriate for constitutional age discrimination claims reviewed for only a rational basis. Under rational-basis review, governmental action "must be upheld against equal protection challenge if there is *any reasonably conceivable* state of facts that could provide a rational basis" for that action. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (emphasis added); *accord Armour v. City of Indianapolis*, 132 S.Ct. 2073, 2080 (2012) (rational-basis standard met if decision "rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.") (internal citation marks and quotations omitted).

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[14] Although widely adopted by the Courts of Appeals, this Court "has not definitively decided whether the evidentiary framework *of McDonnell Douglas* . . . is appropriate in the ADEA context." *Gross v. FBL Fin. Servs., Inc.*, 129 S.Ct. 2343, 2349 n.2 (2009).

The Government need not state the *actual* reason for its decision, and in fact it "has no obligation to produce evidence to sustain the rationality of" its decision. *Heller v. Doe*, 509 U.S. 312, 320 (1993). Rather, the rational-basis test is satisfied so long as any plausible hypothetical reason for an action exists, "whether or not the basis has a foundation in the record." *Id.* at 320-21; *Beach Commc'ns*, 508 U.S. at 315 (governmental action reviewed for rational basis "is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."). And because hypothetical reasons for the Government's actions suffice, "the burden is upon the challenging party to negative any reasonably conceivable state of facts that could provide a rational basis for the" action. *Garrett*, 531 U.S. at 367.

The *McDonnell Douglas* test cannot be squared with any of these fundamental pillars of rational basis review. It requires the Government to state the specific, actual factual basis for its decision, or else suffer a default judgment. It subjects that specific factual assertion to courtroom analysis, without recognizing that the Government's decision can be justified by "rational speculation" and hypothetical justifications outside of the record. And it eliminates the plaintiff's burden to disprove *every* conceivable state of facts that might have supported the Government's action, by instead premising potential liability on the truth or falsity of the Government's specific, stated reason.

Indeed, this case actually highlights how badly suited *McDonnell Douglas* burden-shifting is to a rational-basis adjudication. The district court here

specifically found that there were "facially legitimate" reasons for the Government's decision to terminate Levin, including his supervisor's perceptions of Levin's substandard "work ethic, productivity, performance, judgment, and human relations." *Levin v. Madigan*, No. 07-C-4765, 2011 WL 2708341, at *18 (internal quotation marks omitted). Under rational-basis review, that should be the end of the inquiry, and the end of the plaintiff's case, because there were reasonably conceivable reasons to fire Levin. *See, e.g., Beach Commc'ns*, 508 U.S. at 313. But, applying *McDonnell Douglas*, the district court denied summary judgment because Levin had evidence, among other things, that "the reasons were manufactured post-hoc" and that *one* (but not all) of the stated reasons did not have a "solid factual foundation" *Levin*, 2011 WL 2708341, at *18-20. Such analysis is self-evidently incompatible with rational-basis review, where post-hoc justifications are entirely permissible, and where the plaintiff has the burden to show that *all* possible reasons for an action are implausible, and not just a single one.

Under a proper rational basis review, Levin's claims should have been dismissed. Yet the Illinois Attorney General's office is still being forced to expend resources to litigate an ADEA-style claim—resources that, plainly, Illinois could better spend elsewhere. *See, e..g.*, *Illinois In Poorest Fiscal Condition of All States*, Chi. Tribune (June 21, 2012), *at* http://articles.chicagotribune.com/2012-06-21/business/chi-illinois-in-poorest-fiscal-condition-of-all-states-20120621_1_unfunded-pension-liability-general-fund-state-funds ("Illinois' financial condition continued to deteriorate in fiscal 2011, leaving it with the lowest level of net assets in the country, as its

liabilities, including money owed for public pensions, grew.").

* * *

The rational-basis test is, by design, difficult for a plaintiff to overcome. Indeed, this Court has "never found the Equal Protection Clause implicated in the specific circumstance where, as here, government employers are alleged to have made an individualized, subjective personnel decision in a seemingly arbitrary or irrational manner." *Engquist.*, 553 U.S. at 605-06. So if this Court holds that § 1983 age-discrimination claims are not preempted by the ADEA (and it should hold them preempted), it should also hold that plaintiffs take the bitter with the sweet. These § 1983 age discrimination claims should be reviewed under the deferential standards of rational-basis review, and not the heightened scrutiny of *McDonnell Douglas* burden-shifting available under the ADEA.

CONCLUSION

The judgment of the Seventh Circuit should be reversed.

Respectfully submitted,

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