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IN THE SUPREME COURT OF THE UNITED STATES

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LISA MADIGAN, ET AL., :

Petitioners : No. 12-872

v. :

HARVEY N. LEVIN :

- - - - - x

Washington, D.C.

Monday, October 7, 2013

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 10:03 a.m.

APPEARANCES:  
MICHAEL A. SCODRO, ESQ., Solicitor General, Chicago,  
Illinois; on behalf of Petitioners.  
EDWARD R. THEOBALD, III, ESQ., Chicago, Illinois; on  
behalf of Respondent.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: Our first case this  
4 term is Case 12-872, Madigan v. Levin.

5 Mr. Scodro?

6 ORAL ARGUMENT OF MICHAEL A. SCODRO

7 ON BEHALF OF THE PETITIONERS

8 MR. SCODRO: Mr. Chief Justice, and may it  
9 please the Court:

10 Congress has crafted a comprehensive body of  
11 administrative and judicial procedures and remedies that  
12 are tailored specifically to combatting discrimination  
13 against older workers. In extending these procedures  
14 and remedies to government employees, Congress did not  
15 intend to permit State and municipal workers alone to  
16 frustrate this regime or bypass it entirely using the  
17 more general remedies of Section 1983.

18

19 JUSTICE GINSBURG: Mr. Scodro, there's a  
20 preliminary question before we get to the question you  
21 presented, and that is, what authority did the Seventh  
22 Circuit have to deal with the question under the Age  
23 Discrimination Act? I mean, it was -- it went to the  
24 Seventh Circuit on interlocutory review --

25 MR. SCODRO: That's correct.

1 JUSTICE GINSBURG: -- a qualified immunity  
2 question. Everybody agrees that there is no qualified  
3 immunity, that there -- that there is, indeed, a claim  
4 that the Equal Protection Clause includes age. So  
5 Second -- Seventh Circuit had no authority to deal with  
6 any question other than that, did it?

7 MR. SCODRO: It did, Your Honor. The  
8 Seventh Circuit properly followed this Court's holding  
9 in Wilkie. In footnote -- in footnote 4 of that  
10 opinion, the Court concluded correctly that whether or  
11 not there was a Bivens action for a recognized -- in  
12 that case, due process violation, was itself part and  
13 parcel of the first prong of the qualified immunity  
14 inquiry and, therefore, properly considered on  
15 interlocutory --

16 JUSTICE GINSBURG: But in Wilkie, the whole  
17 case was dismissed by the district court, wasn't it? So  
18 whatever was said in that footnote was dicta.

19 MR. SCODRO: Your Honor, there's an argument  
20 in one of the amicus briefs that the -- there was an  
21 alternative route under 1254 in Wilkie and -- and,  
22 therefore, the argument is raised that it was dicta.  
23 But it wasn't dicta in context, Your Honor. The court  
24 didn't consider that alternative route.

25 The court squarely held that it had

1 jurisdiction, and that -- it goes on to say in the  
2 footnote that the appellate court properly exercised  
3 jurisdiction because the question of whether there is or  
4 is not a Bivens action for this constitutional right is  
5 properly considered part of the QI in --

6 JUSTICE ALITO: Now, we have an amicus brief  
7 from law professors who argue that the Seventh Circuit  
8 should not have considered the question of whether there  
9 was a cause of action under Section 1983. But they also  
10 go on to argue that we, nevertheless, have jurisdiction  
11 to consider that question and that it is a -- a matter  
12 of discretion for us to decide whether to do that. Is  
13 that -- do you agree with that position?

14 MR. SCODRO: We do agree with that position.  
15 They cite Clinton versus Jones, and they cite the  
16 Fitzgerald decision for that position, Your Honor. And  
17 we would agree that -- while those may be modest  
18 extensions of the holdings in those cases, we would  
19 agree that this Court can exercise 2254 jurisdiction  
20 over the question.

21 JUSTICE KENNEDY: If we adopt that  
22 formulation and that solution, is it as if we are  
23 granting certiorari before judgment on an issue in our  
24 own discretion? Is that the way it works?

25 MR. SCODRO: That's -- I think that -- no, I

1 think the Court would still fairly consider the -- the  
2 Seventh Circuit's judgment on the issue, Your Honor.  
3 And, again, I would -- I would return to --

4 JUSTICE KENNEDY: Well, but how -- what's  
5 the mechanism for us -- what's the rationale that we can  
6 exercise jurisdiction where a court of appeals could  
7 not? Because we have --

8 MR. SCODRO: Well --

9 JUSTICE KENNEDY: -- authority to grant  
10 certiorari before judgment or for some other reason?

11 MR. SCODRO: The theory advanced in the  
12 amicus brief, with which we confer, is that 1254 grants  
13 the Court jurisdiction over the case, and that would  
14 include issues like this that were part and parcel of  
15 the case before the appellate court.

16 Now, I should note that that amicus brief  
17 begins with the false premise that there was an exercise  
18 of pendent appellate -- appellate jurisdiction in this  
19 case. And, as we explained briefly in our reply brief,  
20 the one reference -- the sole reference to pendent  
21 appellate jurisdiction on Page 7-A of the Petitioner's  
22 appendix is merely a reference or a brief description of  
23 the failed argument advanced by the Respondent that  
24 pendent jurisdiction would not be a proper proceeding  
25 here.

1           And the Court did not advance.           They -- they  
2           squarely cited Wilkie and advanced along the --

3           JUSTICE KAGAN:           Could -- could I go back,  
4           Mr. Scodro, to the -- to the rationale of -- of the --  
5           that -- that you're relying on. I mean, you keep on  
6           saying, "part and parcel." But how is it part and  
7           parcel? That seems to allay the distinction between a  
8           right and a remedy. There's one question whether there  
9           has been a violation of law.

10          MR. SCODRO:           Sure.

11          JUSTICE KAGAN:           There's another question  
12          whether a cause of action exists to remedy that  
13          violation. Why aren't those two separate inquiries?

14          MR. SCODRO:           Well, Your Honor, the Court, in  
15          Wilkie, moved from one to the other in the footnote.  
16          And I think that --

17          JUSTICE KAGAN:           Well, I guess I'm asking you  
18          to explain it to me --

19          MS. SCODRO:           Sure. Sure --

20          JUSTICE KAGAN:           -- because that footnote is  
21          about a sentence long. So what's the theory as to why  
22          these are part and parcel of each other?

23          MR. SCODRO:           Because a -- the Qualified  
24          Immunity Doctrine itself arises out of Section 1983 in  
25          Bivens, it would seem sensible, as a matter of first

1 principles, to consider whether or not there is such a  
2 cause of action at all, at the outset, with the right to  
3 interlocutory appeal, rather than, given the qualified  
4 immunity as defense from litigation is -- and not just  
5 judgment, rather than waiting until final judgment and  
6 on a 1291 appeal, then addressing for the first time on  
7 appeal.

8 JUSTICE KAGAN: Well, that seems a different  
9 argument, not that the two really are intertwined with  
10 each other, but it -- that it just might make sense to  
11 consider the one at the outset, even though, in fact,  
12 it's a separate inquiry.

13 MR. SCODRO: I think -- and I want to be  
14 clear -- I think there are two different rationales here.  
15 When discussing why it's -- Wilkie was correct in what  
16 it said in footnote 4, I would submit my most recent  
17 answer, namely, that it's part and -- it is -- not part  
18 and parcel, but it is natural and rational to -- to  
19 consider whether or not the cause of action exists at  
20 the outset.

21 With regard to --

22 JUSTICE SCALIA: Well, if you're correct  
23 that the two are one and the same, how -- how is it that  
24 we have authorized district courts to do the one or the  
25 other?



1           We -- we have not required district courts  
2           to reach the merits if they're -- if they can resolve  
3           the question on -- on the basis of qualified immunity  
4           alone. Well, how can that be, if the merits are  
5           necessarily part of the qualified immunity  
6           determination?

7           MR. SCODRO:           Well, Your Honor, some of the  
8           merits we know are part of it under the Court's decision  
9           in Hartman, where the Court concluded that the absence  
10          or the failure to properly plead an element is, indeed,  
11          properly considered a part of the qualified immunity  
12          inquiry.

13          And here, the -- what -- what Wilkie did  
14          essentially, as I read it, is essentially add to that  
15          line of cases the idea that the presence or not of the  
16          Bivens action in that case, but logically speaking, the  
17          Section 1983 action here would be -- would be  
18          appropriately considered as part of the -- the first  
19          prong of the traditional two-prong qualified immunity.

20          JUSTICE GINSBURG:        You're running up against  
21          the Seventh Circuit in that respect because the Seventh  
22          Circuit held that the existence of -- of an -- whether  
23          ADEA was the exclusive remedy, that that was irrelevant  
24          to the qualified immunity issue.

25          MR. SCODRO:           Your Honor, toward the end of

1 the Court's opinion, it's true, the Court uses the  
2 phrase that "it's irrelevant to the qualified immunity  
3 inquiry."

4 In that context, I would submit the Court is  
5 using the phrase "qualified immunity," and I think this  
6 is clear in context, to refer as -- as lower courts  
7 have, at times, done -- to the second prong; that is the  
8 clearly established element of qualified immunity.

9 Earlier in the opinion, in the section  
10 labeled "jurisdiction," the Court actually cites Wilkie  
11 and makes clear that it's following Wilkie's command  
12 that the presence or not of the Section 1983 action for  
13 a recognized constitutional right is considered part of  
14 the first prong.

15 JUSTICE ALITO: If the existence of a cause  
16 of action could not be considered in an interlocutory  
17 qualified immunity appeal, what would the effect be on  
18 the defendant's right not to be tried, which is the  
19 whole reason for allowing an interlocutory appeal in  
20 qualified immunity cases?

21 Wouldn't it be the case that, if the  
22 district court found that there was no qualified  
23 immunity, then the case would have to be tried, and  
24 only at the end of the case could it be determined  
25 whether there actually was a cause of action? So you'd

1 have a trial, potentially, about nothing.

2 MR. SCODRO: That -- that's correct, Your  
3 Honor. In my earlier response to Justice Sotomayor's  
4 question, I think there -- or Justice Kagan's  
5 question -- I apologize -- I think it was -- that --  
6 that's exactly right. This is immunity from litigation,  
7 immunity from suit.

8 JUSTICE GINSBURG: The decision was that  
9 there was no qualified immunity. And the question is,  
10 having determined there was no qualified immunity,  
11 should they have stopped there? There wouldn't have  
12 been a trial -- if there is no qualified immunity, then  
13 they have no exemption from trial.

14 MR. SCODRO: No, Your Honor. To decide that  
15 there isn't qualified immunity, the Court needs to  
16 consider both prongs and resolve them both adverse to  
17 the defendant. And, therefore, it was essential for the  
18 Court here to consider the argument that there is no  
19 Section 1983 action.

20 JUSTICE SOTOMAYOR: I'm not sure you see the  
21 distinction or -- or you're facing the distinction. The  
22 right not to be tried is one of qualified immunity.

23 MR. SCODRO: Correct.

24 JUSTICE SOTOMAYOR: But you can have a  
25 constitutional violation and still not have a remedy,

1 which is what this question involves.

2 So how do we deal with the concept that  
3 other people who have motions to dismiss that are denied  
4 still undergo trials, still experience the expense, and  
5 yet, we've said, repeatedly, an interlocutory appeal is  
6 not warranted.

7 And so what makes it warranted here, where a  
8 court has already said that there was a -- or at least  
9 there's enough evidence to suggest a constitutional  
10 violation and that a reasonable officer wouldn't have  
11 believed his or -- a person would have believed his or  
12 her conduct was appropriate?

13 MR. SCODRO: Your Honor, with regard to that  
14 question, I would return to the notion that is a matter  
15 of first principles, given that qualified immunity is an  
16 outgrowth of Section 1983. The Court was very just --  
17 was justified in Wilkie in treating the presence or not  
18 of the cause of action.

19 This is a -- we're not talking about an  
20 affirmative defense, for example, in the form of statute  
21 of limitations as one example. We're talking about the  
22 existence or not of the Bivens right in that case, in  
23 the Section 1983 right here.

24 It seems consistent with the fact that  
25 qualified immunity exists as a defense against Section

1 1983 and Bivens to contemplate the existence or not of  
2 that cause of action right at the threshold.

3 JUSTICE SCALIA: Maybe -- well, maybe you  
4 better say a few words about the merits?

5 MR. SCODRO: Thank you, Your Honor.

6 (Laughter.)

7 MR. SCODRO: The -- the ADEA's remedial  
8 regime has the two elements that this Court has looked  
9 at, repeatedly, in determining whether a comprehensive  
10 regime or a regime is sufficiently comprehensive to  
11 displace more general Section 1983 --

12 JUSTICE GINSBURG: There's another  
13 preliminary question, and that is, why are we talking  
14 about the ADEA, when the district court held that the  
15 ADEA doesn't cover Mr. Levin? And there seems to be not  
16 much of a dispute about that. You're not arguing that  
17 the ADEA does cover him, are you?

18 MR. SCODRO: Well, we are -- we are arguing  
19 that the ADEA's rights and remedies do apply to  
20 Mr. Levin. And the reason is that, in 1991, with the  
21 amendments -- as part of the Civil Rights Overhaul Act of  
22 that year, the amendments in that Act extended, and it's  
23 a section entitled "Coverage of previously exempt State  
24 employees."

25 It -- it extended ADEA rights and remedies

1 to the previously exempt policymakers at other high  
2 levels.

3 JUSTICE ALITO: Well, has -- has the Court  
4 ever held that an antidiscrimination statute that does  
5 not provide any rights for a particular class of  
6 plaintiffs, nevertheless, extinguishes the right of  
7 action that those plaintiffs would have under Section  
8 1983?

9 What if Mr. Levin were under 40 years old?  
10 Would you say that his equal protection Section 1983  
11 cause of action was extinguished by the ADEA?

12 MR. SCODRO: No, we would not, Your Honor.  
13 And the reason --

14 JUSTICE ALITO: So what is the difference  
15 between someone who's under 40 and someone who is not an  
16 employee, within the meaning of the ADEA?

17 MR. SCODRO: Sure. And, again, we're  
18 talking about the 1974 to 1991 period, just to be clear,  
19 because, since '91, appointees and employees, alike,  
20 are -- are -- have the full range of ADEA rights and  
21 remedies.

22 During that period, under 40s -- as this  
23 Court held in *Cline*, that workers under the age of 40  
24 simply were not part of the social ill that Congress  
25 aimed to redress. They were concerned with the plight

1 of the relatively older worker. It's why the Court  
2 concluded in Cline that reverse discrimination is not  
3 covered and, also, the explanation for why Congress drew  
4 a line at age 40.

5 Just as in Smith, for example, the Education  
6 of the Handicapped Act didn't extend to cover all manner  
7 of hurdles confronted by a disabled student. It -- it  
8 focused solely on a single issue facing -- a  
9 curricular issue facing these students. Undoubtedly,  
10 those students not covered by it would have retained  
11 their Section 1983 right, same with under-40 here.

12 Now, as to the -- the narrow exception that  
13 existed between '74 and '91 for high-level government  
14 policy -- policymakers, we have the EEOC's understanding  
15 of why exactly Congress did that. They did so because  
16 there was concern on the part of members of Congress  
17 that it would be inappropriate from a matter of  
18 federalism and operationally to have federal involvement  
19 in the hiring decisions made by the highest members --  
20 the elected members of state and local government. And  
21 that concern applies equally to Section 1983 claims.

22 Because that concern applies equally --  
23 we're not talking about people who weren't within the  
24 scope of the social ill; we're talking about a  
25 deliberate carveout for reasons that apply equally to

1 Section 1983 -- we would submit that the exception,  
2 likewise, would have had force during that interim  
3 period.

4 JUSTICE ALITO: Why --

5 JUSTICE KAGAN: For some -- for -- please.

6 JUSTICE ALITO: Well, why should we consider  
7 that question? If this -- if we were back in the era  
8 before the enactment of the GERA, yes, we would have to  
9 consider that question. But now that the new statute  
10 has been passed, why should we consider whether someone  
11 who was a non-employee lacked a -- a 1983 cause of  
12 action during the period when that -- prior to the  
13 enactment of that statute?

14 MR. SCODRO: You're actually -- absolutely  
15 correct, Your Honor. As we say in our reply brief,  
16 there is no need for the Court to confront that question  
17 in this case.

18 CHIEF JUSTICE ROBERTS: Which question?

19 MR. SCODRO: The question of whether or not,  
20 between 1974 and 1991, exempt employees -- those who  
21 then obtained ADEA rights in 1991, whether those  
22 employees could be -- their Section 1983 claims could  
23 have been displaced by -- notwithstanding the fact that  
24 they were carved out.

25 JUSTICE KAGAN: But I think the point here



1 is that Mr. Levin is covered not by the ADEA, but by a  
2 separate statute, the GERA. And there's a separate  
3 question whether the GERA would displace constitutional  
4 relief, which apparently has -- has never been argued to  
5 anybody in this case.

6 MR. SCODRO: Two points, Your Honor. First,  
7 as we explain in reply and in -- in our opening brief,  
8 the GERA is properly considered merely a part of the  
9 broader remedial regime under the ADEA, and we explain  
10 why to look at it otherwise would create all sort of  
11 manner of artificialities.

12 It's -- it's -- we know, from past statutes  
13 like the Genetics Act that was passed more recently, the  
14 way in which Congress would incorporate GERA by  
15 reference instead of vice-versa. We know that, for  
16 example, in that same 1991 Act, 1981(a) was added and  
17 provided punitive damages for a whole array of --

18 JUSTICE KAGAN: Well, there are some  
19 similarities -- many similarities, between the ADEA and  
20 the GERA, but there are also real differences. I mean,  
21 they're obvious -- they obviously cover different  
22 people; there are different procedural prerequisites for  
23 the suit; you get a different kind of review, you only  
24 get administrative review under the GERA.

25 So it's a separate inquiry as to whether

1 this statute that has some commonalities, but some  
2 differences, displaces constitutional claims, and it's  
3 an inquiry that really has never been addressed in this  
4 case.

5 MR. SCODRO: And, Your Honor, to the extent,  
6 if the Court has concerns about addressing that -- and,  
7 again, I -- I'm happy to go on as to why it would be  
8 artificial to consider the two separately.

9 But if the Court were to conclude that,  
10 rather than an -- effectively amending the ADEA, that  
11 the GERA amendments in 1991 really created a whole new  
12 statute that needs to be considered independent, the  
13 proper remedy would not be to dismiss this appeal, but  
14 would be to vacate the Seventh Circuit's judgment to  
15 permit Respondent to raise a claim that is new to this  
16 case on the merits here; namely, that there are  
17 different rules for appointees than employees.

18 CHIEF JUSTICE ROBERTS: This is an -- the  
19 qualified immunity question is presented on  
20 interlocutory appeal.

21 MR. SCODRO: It is, Your Honor.

22 CHIEF JUSTICE ROBERTS: Decisions on the  
23 merits, factual and legal, are still pending. Now --  
24 now, we have a determination by the district court that  
25 Mr. Levin is not an employee.

1 MR. SCODRO: Yes.

2 CHIEF JUSTICE ROBERTS: The prior district  
3 court determined that he was. The Respondents alleged  
4 that he was an employee in their complaint. I presume,  
5 depending upon how we rule on the qualified immunity  
6 issue, the parties may want to revisit their positions  
7 on that question as the case goes go forward.

8 And the district court in the first  
9 instance, I suppose, would be the one to decide whether  
10 they're allowed to revisit the issue in light of the  
11 change in his perception of the law or not.

12 MR. SCODRO: That's correct, Your Honor. If  
13 this -- if I'm understanding your question, that if --  
14 if the -- depending on how this Court rules, it is  
15 always true, under Rule 54, that he could seek to have  
16 the district court reconsider his status.

17 It's also true that, if he wished to proceed  
18 under the GERA process for vindicating ADEA rights, he  
19 has the option of seeking a dismissal without prejudice  
20 of his statutory claims -- this has occurred in a  
21 handful of district court opinions -- and then ask the  
22 EEOC if he can proceed in the first instance before an  
23 ALJ and to advance those claims. That is also an option  
24 that --

25 JUSTICE BREYER: But there are a few things

1 I -- I don't really know. I mean, does -- do you have  
2 to allege a claim under GERA for this particular  
3 individual? I don't know.

4 And if you do, I don't know whether GERA  
5 simply picked up whatever saving of the equal protection  
6 otherwise would have existed in the ADEA or didn't. And  
7 I believe that GERA applies to employment discrimination  
8 claims based on gender or race or other things, right?

9 Well, every circuit in the country has said  
10 you don't lose your -- your constitutional claim there.  
11 So are we supposed to read GERA, it goes this way in  
12 some cases and that way in other cases, when GERA is  
13 silent on the matter?

14 And so I looked to see what the Seventh  
15 Circuit said. Nothing. I looked to see what you argued  
16 below. Nothing. I looked to see whether it's obvious  
17 that GERA does apply or doesn't apply and simply picks  
18 it up or not. I don't know. Maybe I'm just being  
19 thick.

20 But nonetheless, where I don't know so much  
21 and the whole case turns on it, why are we hearing an  
22 issue that might not even be in the case?

23 MR. SCODRO: Your Honor, the Seventh Circuit  
24 was -- pronounced a rule that was indifferent as between  
25 appointees and employees. The reason for that was the

1 Seventh Circuit was asked to announce a rule that is  
2 indifferent as to employees and appointees. There  
3 was -- the Respondent sought and obtained a rule that  
4 the ADEA does not displace, period.

5 JUSTICE BREYER: That's about people not  
6 like the client who's at issue here. That is about  
7 people whom the ADEA did cover. Isn't that an advisory  
8 opinion in respect to this case? I don't know. That  
9 has a certain ring to it.

10 But -- but what are we doing, deciding  
11 whether the ADEA applies and in what way to a person to  
12 whom it doesn't apply, assuming that GERA is, in fact, a  
13 separate statute that you have to sue under, the answer  
14 to which I do not know and which has never been argued.

15 MR. SCODRO: Your Honor, there's very little  
16 lower court authority on the effect of GERA. I will say  
17 that what courts have done for I -- there is a case, for  
18 example, in which the allegation was Title VII as  
19 amended in 1991, and the Court construed that,  
20 naturally, to include the GERA rights.

21 JUSTICE BREYER: And so, if there's so  
22 little about it, sometime, on occasion, we dismiss a  
23 case as improvidently granted, which is not a  
24 particularly desirable thing to do. But how could we  
25 avoid doing that here?

1           MR. SCODRO:           Your Honor, to reiterate a  
2 point made just a few moments ago, I think that the  
3 proper resolution, if -- GERA and the ADEA, again, are  
4 really one remedial regime. And -- and I've -- I've  
5 pointed out 1981(a) as an example of a -- of a similar  
6 regime, where punitive damages were added to a number  
7 of statutes.

8           And yet, if we considered any one of those  
9 statutes today, we would agree that it includes punitive  
10 damages, even though it was added in a freestanding  
11 statute as part of the 1991 Act.

12           But, again, I would say, as a procedural  
13 matter, should the Court harbor concerns about this  
14 issue and wish to permit the claim that appointees and  
15 employees are entitled to different displacement rules  
16 and the counterargument that, no, they're not because  
17 GERA effectively amends and adds to the ADEA, the way to  
18 handle that procedurally would be to vacate the judgment  
19 below and to let the parties argue those points to that  
20 court.

21           As it stands, the Seventh Circuit was asked  
22 to issue a broad pronouncement that is indifferent to  
23 whether -- the Seventh Circuit was well aware and states  
24 that Mr. Levin was subject to an interlocutory  
25 determination that he was an appointee.

1           And the court went on -- and the only  
2    relevance that had in the court's analysis, based on the  
3    way it was framed below, is that, well, because  
4    appointees and people under 40 and other categories  
5    appear to be carved out -- and we have answers to all of  
6    those in our briefs in response -- but because all of  
7    them appear to be carved out, the ADEA does not  
8    displace, ever, as to appointees or employees.

9           That doesn't contemplate a new argument that  
10   as an -- as an appointee, rather, Mr. Levin has -- is  
11   subject to a different displacement rule. It would be  
12   for the Seventh Circuit to confront that in the first  
13   place.

14           JUSTICE SOTOMAYOR:           I'm sorry. I -- the  
15   only issue that's before us is whether someone who's  
16   exempted from the ADEA still has a 1983 claim, correct?  
17   That's what the Seventh Circuit said. If you're not a  
18   part of the statute, then you still have your 1983  
19   rights?

20           MR. SCODRO:           Your Honor, what the Seventh  
21   Circuit held is that the ADEA does not displace Section  
22   1983 claims for employees or appointees. It was a  
23   sweeping ruling that was sought. And the contention now  
24   is, well, perhaps the court should not have reached such  
25   a sweeping ruling, perhaps the court could have ruled,

1 instead, that, as an appointee, Mr. Levin is entitled to  
2 a different rule that is specific to appointees because  
3 they're exempt under the ADEA.

4 That argument was never advanced before the  
5 Seventh Circuit. And, at this point, again, we would  
6 say should the Court harbor concerns about addressing  
7 this case, we would ask that they -- they vacate and let  
8 the Seventh Circuit address that issue in the first  
9 instance.

10 If permitted, I would like to reserve my  
11 remaining time for rebuttal.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
13 Mr. Theobald.

14 ORAL ARGUMENT OF EDWARD R. THEOBALD, III,  
15 ON BEHALF OF THE RESPONDENT

16 MR. THEOBALD: Mr. Chief Justice, and may it  
17 please the Court:

18 I'd like to first address the jurisdictional  
19 issue. We made the argument before the Seventh Circuit  
20 that the Seventh Circuit did not have jurisdiction to --  
21 on this issue of preclusion. And we argued that, under  
22 Swint -- the Court's decision in Swint, on an  
23 interlocutory appeal of qualified immunity, the Court  
24 would have to reach the -- in order to reach the issue  
25 of qualified immunity, it would have to address the



1 preclusion issue.

2           And our position was you don't have to look  
3 at -- you don't even consider that on qualified  
4 immunity. It's not part of the equation.

5           CHIEF JUSTICE ROBERTS:           Well, we said the  
6 exact opposite in Wilkie in footnote 4. I mean, you can  
7 say it's only a footnote, but it is what we said.

8           MR. THEOBALD:           Well, we respectfully  
9 disagree, Your Honor. And we made that argument, and in  
10 the decision that the Seventh Circuit reached, they  
11 said, we didn't have to consider this preclusion issue  
12 to reach the qualified immunity denial, that qualified  
13 immunity was not applicable. So we did argue that, and  
14 that was our position there.

15           With respect to the issue presented here,  
16 the only thing that is pertinent is whether or not the  
17 ADEA can preclude an individual who's not covered by it,  
18 regardless if that individual is under 40 years old or  
19 if they're exempt from the statute or if they have a  
20 claim that the ADEA doesn't address.

21           CHIEF JUSTICE ROBERTS:           Well, your  
22 brother --

23           JUSTICE GINSBURG:           But did --

24           CHIEF JUSTICE ROBERTS:           -- who just sat  
25 down, explained that the Seventh Circuit's ruling didn't

1 consider the issue that you're -- you're talking about  
2 now.

3 MR. THEOBALD: Well, I would respectfully  
4 disagree, Your Honor. We -- the Seventh Circuit -- we  
5 made it clear in the Seventh Circuit that Mr. Levin had  
6 been excluded. He was excluded in July of 2011 by a  
7 decision of District Clerk Chang. He said in that --

8 CHIEF JUSTICE ROBERTS: Was that the -- was  
9 that the first one or the second one?

10 MR. THEOBALD: The second one. Judge Korr  
11 initially decided the issue twice and said Mr. Levin was  
12 covered by the ADEA.

13 JUSTICE ALITO: In your brief, could I  
14 just -- you say -- I think this is pretty close to the  
15 exact words -- there's no realistic possibility of your  
16 obtaining a holding that Mr. Levin is an employee within  
17 the ADEA. But do you concede that now?

18 MR. THEOBALD: I concede that there's no  
19 realistic possibility.

20 JUSTICE ALITO: No. Do you concede that he  
21 is not an employee? If you just say that there's no  
22 realistic possibility that the courts are going to take  
23 this correct position, then the issue is still in the  
24 case.

25 So is it your position that he is an

1 employee or he is not an employee?

2 MR. THEOBALD: Well, I -- I mean, they  
3 dodged -- he's -- the court has ruled -- the Seventh  
4 Circuit in *Opp v. Cook County State's Attorney*, Your  
5 Honor, made it very clear their State's attorneys would  
6 be -- appointees would not be covered under the ADEA.

7 JUSTICE ALITO: Well, if you're not willing  
8 to say that he is not an employee, then the issue is  
9 still in the case, and we would have -- if we were to  
10 rule on the ADEA issue, wouldn't we have to decide  
11 whether there is a remedy for somebody who is an  
12 employee within the ADEA?

13 MR. THEOBALD: Well --

14 JUSTICE ALITO: The district court might be  
15 wrong on that. The Seventh Circuit might be wrong on  
16 that. And you may be right. There's not much of a  
17 realistic possibility that you're going to get a  
18 reversal of that. But the issue is still in the case,  
19 unless you want to give it up.

20 MR. THEOBALD: Well, the Court will so rule.  
21 The Seventh Circuit ruled in the *Opp v. Cook County*  
22 case, and this Court denied cert in 2011 on the *Opp*  
23 *v. Cook County* case. But to stand here --

24 CHIEF JUSTICE ROBERTS: So you don't want --  
25 you don't want to -- you don't want to give it up, which

1 makes sense. I mean, you've got a client. It depends  
2 on what we do, right? I mean, depending on what our  
3 ruling is, it may be advantageous to you to argue, as  
4 you alleged in your complaint, that he's an employee.

5 MR. THEOBALD: Well, as we stand here now,  
6 he is not in this case. And I -- I don't know --

7 JUSTICE BREYER: It's pretty universal he's  
8 not an employee under ADEA, though he might be under  
9 GERA. You have to say yes or no because, if you're  
10 going to say -- I mean, you know, let's either do it or  
11 not do it. If you -- if you want to leave this issue in  
12 the case, it's possible to argue we should decide this  
13 whole issue on the ground that, although he's not really  
14 a bird, he's a fish or whatever.

15 (Laughter.)

16 JUSTICE BREYER: But, I mean, that -- this  
17 is supposed to be fairly realistic, I think, what we're  
18 supposed to do.

19 MR. THEOBALD: Okay. Well, going back to  
20 Mr. Levin being not covered, we believe the Court's  
21 decision in Davis v. Passman and the Court's decision in  
22 Smith v. Robinson, which is the only case where the  
23 Court has precluded a 1983 constitutional claim, that  
24 that --

25 CHIEF JUSTICE ROBERTS: Well, just to get

1 this clear, you asked for this ruling from the Seventh  
2 Circuit. And -- and you won based on a factual record  
3 that was no different then than it is now. You asked  
4 for this ruling based on these facts, you won, and now,  
5 you want to insulate that from any review.

6 I mean, I think it'd -- it'd be a feather in  
7 your cap if you can pull it off. But it seems to me --

8 (Laughter.)

9 CHIEF JUSTICE ROBERTS: It seems to me that,  
10 since you asked for the ruling on the merits and got it,  
11 we ought to be able to review it, to determine whether  
12 it's right or wrong. And to the extent there's a  
13 factual issue that would persist in the case, if it goes  
14 back on qualified immunity, you and the parties can  
15 reposition themselves on that.

16 I mean, it is an issue that was apparently  
17 close enough for one district court to say, yes, the  
18 other district court, on looking at it again, to say no.  
19 The deck will be reshuffled depending on how we rule.  
20 And as I see you standing there, I don't see you willing  
21 to concede for -- for the future that he's not an  
22 employee.

23 MR. THEOBALD: Well, we think the difference  
24 was, after the district court's decision in our case,  
25 that the Seventh Circuit decided another case in 2010,

1 and that's why the second district court judge followed  
2 that precedent. And that precedent, where this Court  
3 denied cert, there's no real possibility that any court  
4 is going to find Mr. Levin as being covered by the ADEA.

5 JUSTICE BREYER: There's no real possibility  
6 that any court is going to find that your client was, in  
7 fact, an employee without GERA. That's what you said;  
8 is that right?

9 MR. THEOBALD: GERA is -- is another --

10 JUSTICE BREYER: It's a different statute.  
11 But just without GERA --

12 MR. THEOBALD: Right.

13 JUSTICE BREYER: -- he's a political  
14 appointment or whatever it is, so he's not within ADEA.  
15 That's what I think this is about.

16 MR. THEOBALD: Yes, Your Honor.

17 JUSTICE BREYER: That's correct?

18 MR. THEOBALD: Yes.

19 JUSTICE BREYER: And you agree with that?

20 MR. THEOBALD: Yes.

21 JUSTICE BREYER: Okay. Then thank you very  
22 much. And then my argument comes into play that we  
23 shouldn't be deciding issues of an advisory nature that  
24 do not involve individuals who fall within the statute  
25 that someone once interpreted.

1 JUSTICE KAGAN: Do you also agree that he is  
2 covered by GERA?

3 MR. THEOBALD: It is unclear, Your Honor.  
4 We don't -- GERA is unclear whether, first of all, in  
5 the Alaska case v. EEOC, whether it applies to States.  
6 States have argued that they're not included in the  
7 definition -- definition of GERA. And the State of  
8 Illinois has not waived sovereign immunity under the  
9 GERA statute.

10 JUSTICE ALITO: So what --

11 MR. THEOBALD: So whether or not there's a  
12 remedy there is very unclear. And this -- as  
13 Justice Breyer mentioned, it's been never discussed in  
14 this case. It was never discussed in the Seventh  
15 Circuit, never discussed in the district court. It  
16 wasn't discussed at the EEOC. When we filed a charge,  
17 the Attorney General didn't come in and say this should  
18 be handled under GERA --

19 JUSTICE KAGAN: Well, it was never discussed  
20 because you never raised it; isn't that right?

21 MR. THEOBALD: Our position was it was  
22 inapplicable. We didn't -- we wouldn't raise it. It  
23 would be -- someone else would raise it. There's about  
24 a handful of cases, nationally, that are filed under  
25 GERA every year. Some years, there's no cases filed at

1 the EEOC. It's seldom used.

2 JUSTICE ALITO: You want us to hold that the  
3 Seventh Circuit lacked jurisdiction to consider  
4 whether -- whether there is a cause of action under  
5 Section 1983. So that precedent, that Seventh Circuit  
6 precedent, would be wiped from the books. The issue  
7 would be back in the case. If ultimately there was  
8 another appeal, maybe it would go to a different Seventh  
9 Circuit panel. Maybe it would come out differently.

10 So you want that wiped away. And you want  
11 us to hold only -- to limit our consideration to the  
12 ADEA and not consider GERA, so that would be back in the  
13 case when it came -- when it went back to the district  
14 court. So that's correct? That's what you want?

15 MR. THEOBALD: Yes, Your Honor. And  
16 that's -- our position is we didn't argue the  
17 jurisdictional issue in our brief, but the court was  
18 concerned about it, and we did address it in the Seventh  
19 Circuit.

20 I would point out, in the Seventh Circuit's  
21 decision, though, their decision throughout the -- for  
22 instance, the -- the Seventh Circuit talks about  
23 Mr. Levin not being an appointee on the policymaking  
24 level and exempt, so that was in the case. It wasn't  
25 something where they just decided whether the ADEA



1 precludes individuals that are covered.

2 JUSTICE GINSBURG: And as far as the -- the  
3 preclusion is concerned, why does it make a difference  
4 whether it's ADEA or GERA? Wouldn't the arguable  
5 preclusion be even stronger under -- under GERA because  
6 there is a special administrative remedy, you have to go  
7 to the EEOC first, and the only form for review is the  
8 Federal Circuit?

9 MR. THEOBALD: That's correct, Your Honor.  
10 The -- there's no preclusion under GERA or the ADEA.  
11 We've set forth that the Court should look at preclusion  
12 with two questions. The first question, under  
13 preclusion, is under Sea Clammers.

14 Sea Clammers was a case where they passed a  
15 new statute with the new right and had an enforcement  
16 provision in the statute, and the issue was whether or  
17 not, under Sea Clammers, the Congress intended to  
18 preclude 1983 to enforce that statute. And the Court  
19 came to the conclusion, yes, that it would be  
20 inconsistent to use 1983 with that statute.

21 The second standard that the Court has used  
22 is under Smith v. Fitzgerald, which is applicable here,  
23 if we're looking at whether the ADEA precludes somebody  
24 covered by the ADEA. And that is, when a statute is  
25 passed with an enforcement provision, did Congress

1 intend to use that enforcement provision to also enforce  
2 preexisting independent statutory or constitutional  
3 rights?

4 And, two, did Congress intend to use this  
5 provision in the new statute to be the sole exclusive  
6 remedy of the preexisting independent constitutional  
7 right? GERA cannot preclude a constitutional -- GERA --  
8 there's no evidence that, when Congress passed GERA,  
9 they intended GERA to enforce the constitutional right  
10 to equal protection of the law. It doesn't --

11 JUSTICE ALITO: Well, can I ask you a  
12 question about the constitutional right? Do you -- do  
13 you agree that the standard for an equal protection  
14 age-discrimination claim is traditional, full-blown,  
15 rational-basis review?

16 MR. THEOBALD: Yes, Your Honor.

17 JUSTICE ALITO: So that if there's any  
18 conceivable ground on which the decision-maker could have  
19 decided that age was -- it was proper to make an age  
20 classification, there is no constitutional violation?

21 MR. THEOBALD: We can see where the rational  
22 basis test -- and the court found -- we survived summary  
23 judgment on our equal protection gender discrimination  
24 claim and the age discrimination claim.

25 JUSTICE ALITO: No, I'm just talking about

1 equal protection age discrimination.

2 MR. THEOBALD: Yes.

3 JUSTICE ALITO: And what if the Illinois  
4 legislature passed a statute that said, now, forget  
5 about the ADEA, there is no ADEA, there is no state  
6 anti-discrimination law involved here, all we are  
7 talking about is equal protection. And they passed a  
8 law that said, all attorneys working for the State of  
9 Illinois must retire at the age of 60 because everybody  
10 knows -- you know, once a lawyer passes 60, there's  
11 nothing left.

12 (Laughter.)

13 MR. THEOBALD: We're all in trouble.

14 JUSTICE ALITO: Would that be -- would that  
15 survive a rational basis review?

16 MR. THEOBALD: I don't believe so. This  
17 Court has considered the -- that issue on two occasions.  
18 In Gregory v. Ashcroft, that was before the Court, It  
19 was a -- the plaintiffs were excluded, like Mr. Levin,  
20 and yet, this Court acknowledged the equal protection  
21 1983 claim. They didn't -- the reasons that were used  
22 in that case were insufficient to meet the rational  
23 basis test.

24 JUSTICE KAGAN: Mr. Theobald, are there any  
25 cases out there in the universe of cases in which a

1 person does not have an ADEA claim or a GERA claim, but  
2 has -- has pressed a successful constitutional claim  
3 based on age discrimination?

4 MR. THEOBALD: Well, GERA has never been --  
5 there's one case on GERA that we could find. It's over  
6 a 20-year-old District Court of New York decision that  
7 said GERA can't preclude anything. So if we put GERA  
8 together with the ADEA, it's only been really one  
9 district court has addressed that issue. And --

10 JUSTICE KAGAN: I guess the question is what  
11 are the circumstances in which, given the very low  
12 standard -- or given -- given the very low rational  
13 basis standard, what are the circumstances in which you  
14 would have a viable constitutional claim, but not a  
15 statutory claim? What would that case look like?

16 MR. THEOBALD: If you had a claim under  
17 1983, it would also, I believe, violate the ADEA.  
18 If that -- if I -- if that's your question.

19 JUSTICE KENNEDY: Would there be any  
20 unfairness to the parties if this case were remanded to  
21 the court of appeals with instructions for it in turn to  
22 remand to the district court to see whether or not the  
23 GERA issue has been properly presented or waived and to  
24 consider that? Would there be --

25 MR. THEOBALD: Well, it would be --

1 JUSTICE KENNEDY: -- any unfairness to the  
2 parties in doing that?

3 MR. THEOBALD: It would be very unfair to  
4 us, Your Honor. We were scheduled to go to trial in May  
5 before the Court granted cert. The case has been  
6 pending almost six years. And to raise this issue at  
7 this -- this issue in GERA was raised this year. It  
8 wasn't raised for six years, never -- whenever it was  
9 part of this case. And I don't think that --

10 JUSTICE KENNEDY: That argument -- that  
11 argument could be made in the district court.

12 MR. THEOBALD: Well, for something that's as  
13 suspect as GERA, whether it even applies, it's -- the  
14 State has not said it applies --

15 JUSTICE BREYER: What about doing --

16 MR. THEOBALD: -- the State of Illinois.

17 JUSTICE BREYER: What if the -- is there  
18 anything unfair about this? I think Justice Ginsburg  
19 wrote an opinion in -- I recall a Third Circuit case  
20 involving ERISA or some medical thing, and an issue came  
21 up that was quite relevant, and nobody had really  
22 thought about it before or done much about it. And what  
23 she wrote, to my recollection, is, well, we would like  
24 the advice of the lower court if they want to give it.

25 And so we send it back for the Third Circuit

1 to consider whether it's appropriate to reach the issue  
2 and, if it is appropriate to reach the issue, do so.  
3 Or, if they think the district court should reach it, do  
4 so. In other words, we can't figure it out at this  
5 moment what's fair in terms of the entire litigation.

6 Now, would that -- would that be a serious  
7 problem for you or your client?

8 MR. THEOBALD: Well, our position is that,  
9 yes, that none of these apply. ADEA cannot preclude  
10 somebody that's covered. The Seventh Circuit opinion  
11 covers that. The ADEA can't preclude somebody that's  
12 not covered. And this Court's opinion in  
13 Davis v. Passman and footnote 22 in Smith v. Robinson  
14 talks about --

15 JUSTICE SOTOMAYOR: I don't know if you've  
16 satisfied my colleagues. I'm not sure that you've  
17 answered directly. I think your adversary is right,  
18 that the Seventh Circuit held that no one is precluded  
19 from a 1983 claim, whether they're an employee or a  
20 non-employee.

21 That's the way the case was litigated.  
22 That's the way they decided. The broad statement,  
23 whether he's an employee or not an employee, he doesn't  
24 have a 1983 -- he has a 1983 action. You've come in,  
25 and you've said he's not an employee, so he's entitled

1 to his 1983 claim.

2 MR. THEOBALD: Yes.

3 JUSTICE SOTOMAYOR: All right. My  
4 colleagues are asking you, that only takes care of half  
5 of this problem because the circuit said, even if he was  
6 an employee, he would still have it. And so you're  
7 being asked are you giving up that part of the claim,  
8 that he's not an employee?

9 MR. THEOBALD: Yes, he's been excluded.

10 I --

11 CHIEF JUSTICE ROBERTS: Well, then I  
12 assume -- if you're saying the qualified immunity ruling  
13 should not be reviewed because this person was not an  
14 employee, but instead covered by GERA, right? Is that  
15 what --

16 MR. THEOBALD: We don't agree that he's  
17 covered by GERA, but it's -- it's not clear.

18 CHIEF JUSTICE ROBERTS: Well, they didn't  
19 address GERA in the preclusion ruling, right? So  
20 presumably, they get another -- they get a chance on an  
21 interlocutory appeal. The whole thing is -- qualified  
22 immunity is supposed to protect them from trial.

23 And if you say the GERA issue wasn't --  
24 wasn't considered, even though the Seventh Circuit's  
25 ruling was sweeping and didn't distinguish, well, they

1 should have a chance to assert qualified immunity under  
2 that ground, I would think.

3 MR. THEOBALD: Well, I don't think that that  
4 would factor in, Your Honor, with the qualified immunity  
5 analysis. The Seventh Circuit held and the district  
6 court held that your decision in Kimel and --  
7 acknowledged equal protection 1983 claims, and that's  
8 the issue in qualified immunity.

9 They have not asked this Court to review the  
10 qualified immunity aspect of the Seventh Circuit's  
11 decision, just the preclusion part.

12 JUSTICE ALITO: Well, that's true, but is  
13 that the issue? Is that really the qualified immunity  
14 issue, whether irrational age discrimination violates  
15 equal protection? Or is the qualified immunity issue  
16 whether, on the facts here, an official could believe  
17 that there was no constitutional violation -- reasonably  
18 believe there was no constitutional violation?

19 Isn't the latter --

20 MR. THEOBALD: It's the -- it's the latter,  
21 yes.

22 JUSTICE ALITO: Isn't the latter the real  
23 question?

24 MR. THEOBALD: Yes, Your Honor.

25 JUSTICE ALITO: Well, that's not what the



1 district court held though, is it?

2 MR. THEOBALD: The district court did so  
3 hold, yes.

4 JUSTICE ALITO: Well, I thought the district  
5 court simply held that an official should have realized  
6 that irrational age discrimination was a violation of  
7 the Constitution, not that an official should have  
8 realized that it was a violation of the Constitution to  
9 do what was alleged to have been done here.

10 MR. THEOBALD: I think they -- it answered  
11 both questions, really. I don't -- I don't see the  
12 difference.

13 JUSTICE ALITO: You don't see the difference  
14 between the two?

15 MR. THEOBALD: No, Your Honor. I -- I think  
16 that the court's -- the district court's decision held  
17 no qualified immunity. The Seventh Circuit cited this  
18 Court's decision in *Kimel*. The other cases before this  
19 Court, *Gregory v. Ashcroft*, acknowledged an age  
20 discrimination case -- case brought through 1983, and it  
21 was clearly established.

22 The Seventh Circuit acknowledged the 1983  
23 age discrimination equal protection claim in 1977 in  
24 *Gault v. Garrison*. This is a well-settled issue.

25 JUSTICE ALITO: If there's a qualified

1 immunity appeal on the question -- on the issue of  
2 whether, let's say, a search was an unreasonable search,  
3 would qualified immunity be denied on the ground that an  
4 official should realize that an unreasonable search is  
5 unconstitutional?

6 Would that be -- that -- would that be the  
7 issue under qualified immunity?

8 MR. THEOBALD: Well, if the facts that the  
9 officer was presented, if there wasn't -- it wasn't well  
10 settled, that the conduct --

11 JUSTICE ALITO: Ah, on the facts that were  
12 presented?

13 MR. THEOBALD: Yes, Your Honor. So on the  
14 people that aren't covered, we have four groups: People  
15 that are under 40 under the ADEA; people in the -- that  
16 are exempt; individuals that work for a government  
17 employer that have less than 20 employees are not  
18 covered by the ADEA; and people that have a particular  
19 type of claim -- a retaliation claim, a claim for  
20 emotional distress damages, something like that --  
21 they're not covered.

22 The State concedes that the people under 40,  
23 they're going to bring equal protection claims through  
24 1983. There's no difference between those people and  
25 Mr. Levin and the other two categories. You're either

1 in or you're out.

2 JUSTICE SCALIA: Yeah, but that's not what  
3 the Seventh Circuit held. I mean, that -- that may well  
4 be, but we're asked to review a holding by the Seventh  
5 Circuit that, even if you aren't covered, even if you're  
6 not exempt, you still have a 1983 claim. That's --  
7 that's why we took this case.

8 And now, you're -- you're telling us we  
9 should not review what the Seventh Circuit held. And  
10 that would, presumably, remain the circuit law, right?

11 MR. THEOBALD: Yes, Your Honor.

12 JUSTICE KAGAN: Well, not if there's no  
13 jurisdiction, right? If they didn't have jurisdiction,  
14 the thing would be wiped out.

15 MR. THEOBALD: Yes, that -- that is true.  
16 But I believe the Seventh Circuit, in its opinion -- and  
17 I could just refer to things in the appendix at page  
18 57A, the district court's opinion, the district court  
19 said Mr. Levin is exempt. In the Seventh Circuit  
20 opinion, the Seventh Circuit Docket No. 44 talks about  
21 end-runs. The Seventh Circuit Docket No. 37, page 67,  
22 the plaintiff was an employee on the policymaking level.

23 So it's clear that the Seventh Circuit knew  
24 we argued that he was exempt. We argued that the --  
25 being exempt under this court's decision in

1 Fitzgerald gives an individual the right to bring an  
2 equal protection claim. And the Court mentioned that,  
3 in Fitzgerald, the decision in 2009, being exempt from  
4 Title IX --

5 CHIEF JUSTICE ROBERTS: In the Seventh  
6 Circuit, even though they -- you had that reference to  
7 him being exempt, the Seventh Circuit basically said it  
8 didn't make a difference, right? Whether he was covered  
9 as -- as an employee or not covered or covered under  
10 GERA or anything else, under their analysis, it doesn't  
11 make a difference.

12 MR. THEOBALD: I think we could read the  
13 opinion that way, but they certainly were aware that  
14 Mr. Levin was not covered. The -- the State has argued,  
15 since Mr. Levin has been excluded, before the Seventh  
16 Circuit and before this Court, they used the terms  
17 "exhaustion," "not exhausting remedies," and they used  
18 the word "avoids the scheme," "avoids the ADEA."

19 In the opening brief before -- the merits  
20 brief before this Court, the State used the term  
21 "exhaustion" or "failure to exhaust" more than a dozen  
22 times. They used the term "avoiding the ADEA" at least  
23 six times.

24 This argument is the old Zombro argument,  
25 the first case that held preclusion where somebody

1 didn't go through. Exhaustion has nothing to do with  
2 this case. This Court's opinion in Patsy v. Board of  
3 Regents said you don't have to exhaust from 1983.

4 All the cases, Johnson v. Railway Express,  
5 CBOCS v. Humphries, there's no exhaustion required. And  
6 to top it off, Mr. Levin, he exhausted his remedies. He  
7 filed at the EEOC. He got a right to sue under Title  
8 VII. So --

9 JUSTICE GINSBURG: Let -- let's assume that  
10 the question that was presented is before us. And  
11 you -- you have argued Fitzgerald. The other side says  
12 Smith v. Robinson should control. So why shouldn't the  
13 Handicapped Act decision control? That, like the ADEA,  
14 has allowed procedural parts that wouldn't be included  
15 in an equal protection claim.

16 MR. THEOBALD: We believe, Your Honor, that  
17 those two cases are the second standard. The Smith --  
18 we -- we agree with the standard in Smith. We agree in  
19 the standard with Fitzgerald. And the standard in  
20 Smith, what that case was about was the Education for  
21 All Handicapped Act, whether that Act precluded the use  
22 of 504 of the Rehabilitation Act, the statutory claim,  
23 and whether it precluded 1983 constitutional claims.

24 And the Court in Smith v. Fitzgerald said  
25 that it did because there was no -- the EHA, the

1 remedies and the procedures there was not for a de novo  
2 review in court, so the plaintiff's claim was precluded.  
3 We have no problem with the Smith standard.

4 But the Court also said, in Smith, that if  
5 there are matters that are offered to the children, the  
6 disability of the disabled children or their parents  
7 under the EHA that that doesn't cover, those things, if  
8 they're offered to parents and if they're offered in a  
9 discriminatory manner or denied for discrimination,  
10 those claims can be brought under the 1983 equal  
11 protection claims or under Section 504 of the  
12 Rehabilitation Act, the -- the preexisting statutory  
13 claim.

14 So applying that to the ADA, there is no  
15 evidence that in passing the ADA, for covered  
16 individuals, that Congress intended to preclude the  
17 preexisting 1983 equal protection claim, so our second  
18 standard in our brief is the Smith-Fitzgerald standard.  
19 In Fitzgerald, the Court went further and explained, if  
20 the rights and protections of the statute that is  
21 seeking to be -- precluding are different than the equal  
22 protection claim, then there is no preclusion.

23 And here, the rights and protections between  
24 the ADA and the equal protection through 1983 are  
25 vast -- are vast. There's different parties, there are

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1 different defendants. In the ADEA, the entity is the  
2 defendant. In equal protection 1983, it's individuals.  
3 In the ADEA, all these exemptions of people that aren't  
4 covered, if somebody pursues a 1983 equal protection  
5 claim, there is no exemptions of individuals.

6 So to conclude, Your Honor, we adopt the  
7 Smith standard. We have no problem with Smith.

8 JUSTICE SCALIA: Counsel, I'm trying to --  
9 trying to see how -- how many of these arguments that  
10 you have made before us about why -- why we can't get to  
11 the holding of the Seventh Circuit, how many of them you  
12 made in your brief in opposition. I mean, we -- we  
13 don't like to dismiss a case as improvidently granted,  
14 and --

15 MR. THEOBALD: We could have done --

16 JUSTICE SCALIA: -- only when the -- when  
17 the case is before us, counsel suddenly finds all sorts  
18 of reasons why we shouldn't have taken it in the first  
19 place. You should have told us that before we took it in the first place.

20 MR. THEOBALD: We could have done a better  
21 job -- we could have done a better job, Your Honor, and  
22 I apologize for that. We did try to point out that  
23 Mr. Levin was exempt. We did say that and how, under  
24 Fitzgerald, the exemptions formed the basis of an equal  
25 protection claim.

1 JUSTICE SCALIA: Well, I read your brief in  
2 opposition as -- as going exclusively to what your  
3 unfortunate brother barely had a chance to argue; that  
4 is, the merits of the case. That -- that's what your  
5 brief in opposition addressed, and here, we end up  
6 spending most of our discussion on -- on other stuff.

7 I -- I don't -- I don't like to encourage  
8 that.

9 MR. THEOBALD: We could have done a better  
10 job.

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
13 Mr. Scodro, you have five minutes remaining.

14 REBUTTAL ARGUMENT OF MICHAEL A. SCODRO

15 ON BEHALF OF THE PETITIONERS

16 MR. SCODRO: Thank you, Mr. Chief Justice.  
17 Just a couple of quick points.

18 Justice Kagan, in answer to your question to  
19 my colleague, I am not aware of any cases, nor can I  
20 conceive of one, in which one would have an equal  
21 protection claim, but could not state a cause of action  
22 under the ADEA, and I think this Court's decision in  
23 *Kimel* makes clear that such a universe does not exist.

24 The question -- in response to a question  
25 from Justice Sotomayor regarding the scope of the



1 Seventh Circuit's decision below, proof positive that  
2 the Seventh Circuit was -- was, in fact, announcing the  
3 sweeping rule that Respondent sought, is the fact that  
4 the Court departs openly from the -- the law in other  
5 circuits. So it was, in fact, they were creating, they  
6 were knowingly creating the split.

7 The only reference in the analysis portion  
8 of the case to the fact that there are exemptions for  
9 high-level officials appears on page 33A --

10 JUSTICE SOTOMAYOR: Can you tell me what the  
11 authority is for Congress to extinguish a right for a  
12 constitutional violation? Meaning --

13 MR. SCODRO: Sure.

14 JUSTICE SOTOMAYOR: -- assume that  
15 someone -- it was the question that Justice Alito asked  
16 you -- someone under of the age of 40, someone who's not  
17 covered by any statute, someone who's part of an  
18 employer under 20, what would suggest to you in -- in  
19 this statute that Congress intended to extinguish those  
20 people's rights?

21 MR. SCODRO: Sure, Your Honor. There are  
22 really two parts to my answer. The first is they --  
23 they didn't. It has been overstated what has not --  
24 what has been exempted. Our position is that nobody  
25 whose Section 1983 claims are -- would be displaced

1 would not, in exchange, receive the full rights and  
2 benefits under the ADEA. There is a reference to --

3 JUSTICE SOTOMAYOR: I'm sorry. Restate that  
4 again, so I understand what you are saying.

5 MR. SCODRO: Of course. Nobody who -- the  
6 universe of -- of employees -- or workers, to use the  
7 neutral term here -- the universe of workers who would  
8 not have a Section 1983 claim under the State's theory,  
9 that every member of that universe would have a right to  
10 bring a claim under the Equal Protection Clause.

11 The under-40s, we agree -- as we say in our  
12 brief, we agree that under 40, that was not the social  
13 ill that Congress was addressing in the Age  
14 Discrimination Act, consistent with this Court's holding  
15 in Cline; and therefore, those individuals retain their  
16 right, the small workplace, the under 20. The EEOC --

17 JUSTICE SOTOMAYOR: Absent the GERA --

18 MR. SCODRO: Yes.

19 JUSTICE SOTOMAYOR: -- would people who are  
20 executive officers, et cetera, absent the GERA --

21 MR. SCODRO: Yes.

22 JUSTICE SOTOMAYOR: -- would they have  
23 retained a constitutional right?

24 MR. SCODRO: They would. We do not -- we --  
25 we understand the displacement doctrine and -- and

1 certainly, as applied here, it would displace the 1983  
2 remedies. We assume that courts retain their inherent  
3 authority to use equitable power to stop the ongoing  
4 violation of the Constitution. And --

5 JUSTICE KAGAN: Mr. Scodro, you are in a  
6 situation where the question is not whether the remedial  
7 scheme displaces a 1983 suit brought for a violation of  
8 the same statute that contains the remedial scheme.  
9 Instead, you have to argue that this remedial scheme  
10 displaces a preexisting statutory or constitutional  
11 right. And when we've had that situation in the past,  
12 we've looked to more than just the remedial scheme  
13 itself.

14 You know, Smith looks to the language of the  
15 statute, which refers to constitutional claims. It  
16 looks to legislative history. It looks to the  
17 coincidence between the statute -- the new statutory  
18 claim and the old constitutional claim. And it seems to  
19 me that you don't have any of those things.

20 All you have is a complicated remedial  
21 scheme, which would be enough to say, look, you can't  
22 bring 1983 suits to vindicate this statute. But seems  
23 as though it's not enough under our case law to repeal  
24 preexisting rights and remedies.

25 MR. SCODRO: Your Honor, Smith -- as we

1 understand Smith, and certainly, as it's been read by  
2 Rancho Palos Verdes in Fitzgerald, even, it stands for  
3 the proposition that the lodestar inquiry -- and I think  
4 the word "primary emphasis" or that phrase may be used  
5 in Fitzgerald to describe the comprehensiveness of the  
6 regime as the first and most important inquiry.

7 After that, Smith makes clear that we are  
8 allowed to consider if there is a comprehensive regime,  
9 whether there is contrary evidence in the face of the  
10 legislative history, as there is, for example, for  
11 Title VII, not so for the ADEA.

12 JUSTICE GINSBURG: But why -- if the ADEA is  
13 expanding the Civil Rights protection against age  
14 discrimination much more generous to the employee, isn't  
15 it strange to think that Congress, at the same time,  
16 wanted employees to have these expanded rights and to do  
17 away with the preexisting remedy?

18 MR. SCODRO: No, Your Honor, not at all.

19 When Congress provided the expanded right,  
20 they recognized that there were characteristics  
21 particular to age discrimination that warranted very low  
22 damages awards and a procedural predicate that would  
23 emphasize swift and informal dispute resolution.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 MR. SCODRO: Thank you.

1 CHIEF JUSTICE ROBERTS: The case is  
2 submitted.

3 (Whereupon, at 11:04 a.m., the case in the  
4 above-entitled matter was submitted.)

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