No. 12-872

IN THE

Supreme Court of the United States

LISA MADIGAN, IN HER INDIVIDUAL CAPACITY, ANN SPILANE, ALAN ROSEN, ROGER P. FLAHAVEN, AND DEBORAH HAGAN

Petitioners,

v.

HARVEY LEVIN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

AMICI CURIAE BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION AND ILLINOIS ASSOCIATION OF SCHOOL BOARDS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICI[1]

The National School Boards Association ("NSBA") is a not-for-profit organization of state associations of school boards and their approximately 13,800 member districts across the United States, which employ almost 6.4 million people. Taken as a whole, the public school districts represented by NSBA constitute the single largest government employer in the nation and are responsible for educating more than 50 million public school students.

The Illinois Association of School Boards ("IASB") is a voluntary organization of 98% of local boards of education in the State of Illinois dedicated to strengthening the public schools through local citizen control. IASB is organized by member school boards as a private not-for-profit corporation under authority granted by Article 23 of The Illinois School Code. IASB programs are designed to provide leadership, service and advocacy for local school boards.

Amici seek to foster excellence and equity in public education through school board leadership. *Amici* support the reasonable application of anti-

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[1] Pursuant to Supreme Court Rule 37.6, no part of this brief was authored by counsel for any party, and no person or entity other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. In accordance with Supreme Court Rule 37.3, counsel for both parties have granted consent to this brief, and the requisite consent letters have been filed with the Clerk of this Court.

discrimination laws that balance the rights of public school employees with the educational and fiscal challenges facing public schools. In this case, *Amici* seek to demonstrate how Petitioners' argument, if accepted, would handcuff public school districts and public school officials in meeting personnel-related challenges necessary to operate public schools and would hamper school districts' ability to accomplish their educational mission. Further, *Amici* seek to provide the Court with argument and authority in support of its contention that federal and state anti-discrimination laws already contain comprehensive and adequate remedies for age discrimination, and that the unnecessary expansion of 42 U.S.C. § 1983 (2013) will needlessly lead to costly, time-consuming litigation for public school districts and public school officials.

SUMMARY OF THE ARGUMENT

In the face of reduced budgets and unprecedented reform directives, school district employers are working hard to innovate and improve student achievement with experienced and aging staffs. If this Court expands the scope of 42 U.S.C. § 1983 to cover age discrimination in employment, which is already encompassed by the comprehensive provisions of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* (2013), and state and local requirements, school boards and their members will face the specter of additional liability (in both their official and individual capacity) as they attempt to bring about unprecedented change. This expansion of Section 1983's reach is unnecessary to

protect aging employees, and unnecessarily burdensome on school district employers called upon to do more and more with less and less.

These employers must already comply with the ADEA, passed by Congress in 1967 to eradicate age discrimination in the workplace. The ADEA provides broad relief for aggrieved individuals and empowers the U.S. Equal Employment Opportunity Commission ("EEOC") to secure voluntary compliance with the law through its investigation and conciliation functions. In addition to the ADEA, state anti-discrimination laws, collective bargaining agreements, civil service laws and school-district established grievance procedures provide ample remedies to school employees who assert age discrimination claims.

In expanding the scope of 42 U.S.C. § 1983 to cover age discrimination in employment, the Seventh Circuit provided an unnecessary, redundant and costly remedy to public employees, including school district employees. Section 1983 litigation routinely involves multiple parties and wide-ranging discovery. The attention and resources that must be expended by school districts and school officials to defend Section 1983 claims distracts from accomplishing the educational mission with which they are tasked and is wasteful when the claim is cognizable under other laws. In addition, school officials may face individual capacity claims for legitimate employment decisions made for educational reasons.

The Seventh Circuit's decision departs from the majority view of the circuit courts of appeals that have faced the same question and should be reversed

by this Court. America's public schools must be free from additional and redundant litigation so they can meet the challenges of preparing students for the world that awaits them.

ARGUMENT

I. THE SEVENTH CIRCUIT DECISION HANDCUFFS SCHOOL DISTRICTS AND PUBLIC SCHOOL OFFICIALS IN MEETING THE CHALLENGES OF OUR NATION'S PUBLIC SCHOOLS

America's public schools face unprecedented challenges and are under increased pressure to do more with less. Public schools must comply with legislative dictates passed each year at both the federal and state levels. On the federal level, the challenges presented by the No Child Left Behind Act of 2001, 20 U.S.C. § 6301 *et seq.* (2013), to meet Adequate Yearly Progress relentlessly permeate districts' operations. Numerous other federal statutory requirements put pressure on school officials to meet the needs of a diverse student body while providing a free public education to all who cross the threshold of the schoolhouse door. For example, public schools must meet the expansive mandates contained in laws such as the Individuals with Disabilities Education Improvement Act, which requires public schools to provide individualized free appropriate public education to students with disabilities, 20 U.S.C. § 1401(3)(a) (2013); the McKinney-Vento Homeless Assistance Act, which

requires public schools to meet the unique needs of homeless youth, 42 U.S.C. § 11431 *et seq*. (2013); and the Equal Educational Opportunity Act of 1974, which requires that public schools assist non-native English speaking students to help them overcome language barriers and participate equally in the educational program, 20 U.S.C. § 1703 (2013). At the state level, each legislative session brings a host of new laws and some otherwise unconventional methods of teaching students in various settings (*e.g.*, home-schooling).

At the same time, the K-12 teaching workforce is aging rapidly. According to the National Center for Education Statistics (NCES), among full-time and part-time public school teachers in 2007-08, 56% were over the age of 40.[2] During this same period of time, 7.6% of all full-time and part-time public school teachers were moved to a different school at some point in the school year. Many times these employees (referred to in the NCES data as "movers") are placed in low-performing schools to improve student learning as part of a school district's reform efforts. Other times these "movers" are reassigned to deal with changing enrollment trends school districts often encounter based upon population movement and other socio-economic realities within the district.

Other educational needs can result in decisions with age-related implications. For example, teachers who have recently completed teacher preparation programs in fields such as English Language Learners ("ELL") programs and computer technology literacy tend to be younger. School

[2] *See* nces.ed.gov/FastFacts/display.asp?id=28.

districts should be free to hire and place individuals they believe are best qualified to teach ELL and technology skills irrespective of seniority or the impact such assignments may have on older workers; but the specter of Section 1983 litigation for age discrimination claims has the potential to affect those decisions in a manner that disserves the educational mission of America's public schools. Even under the strain of establishing liability under *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978), it is not difficult to envision a claim by a single disaffected teacher over the age of 40 or a class of teachers claiming that the assignment of teachers under the age of 40 to work in such programs is statistically disparate and therefore indicative of a "custom, policy or practice" sufficient to trigger liability under Section 1983.

Similarly, other employment decisions that favor recently trained teachers and administrators may adversely affect older workers, but are made without regard for the age of these employees. Public school districts faced with various federal and state mandates must be free to assign the most appropriate personnel to serve the needs of students to comply with these mandates and to otherwise provide the best possible education for students.

The financial strain many school districts have faced may also necessitate decisions by school districts with respect to salary and benefit cuts that could adversely impact older workers. For example, a public school district's decision to change its retirement benefit program will undoubtedly impact employees who are closer to retirement age more than employees who will not retire for many years. It

is untenable to put the cloud of constitutional litigation over elected officials and school administrators who are charged with the difficult task of making hard financial decisions during difficult times.

In the final analysis, the potential for personal liability under Section 1983 for otherwise neutral actions that tend to impact older workers disparately makes it difficult for an already burdened public school system to recruit and retain qualified school officials. The defenses available under the ADEA in disparate impact claims (i.e., that liability will not lie where an otherwise neutral employment decision is based on reasonable factors other than age) are designed to address such claims. By contrast, Section 1983 jurisprudence has not evolved to deal with the fine contours of unique theories of recovery such as claims based upon disparate impact. It is difficult to justify the years of litigation that would be necessary for these types of defenses to be advanced in Section 1983 litigation when one considers the financial and temporal drain such litigation would have on public school officials.

II. EXPANSIVE FEDERAL AND STATE LAWS ALREADY PROTECT SCHOOL EMPLOYEES, OBVIATING THE NEED FOR EXPANSION OF 42 U.S.C. § 1983 TO COVER CLAIMS OF AGE DISCRIMINATION IN THE SCHOOL CONTEXT

A. The ADEA offers ample protection to school employees from age discrimination.

By any measure, the comprehensive scheme created by the ADEA and its amendments provides adequate protections for employees 40 and over from discrimination based on age, such that expanding 42 U.S.C. § 1983 to also cover age discrimination in employment would be superfluous.

The ADEA covers employers that employ 20 or more individuals, as well as state and local governments, employment agencies, labor organizations and the federal government. 29 U.S.C. § 626(f) (2013). The ADEA is sweeping in its scope, and protects employees and applicants from discrimination on the basis of age with respect to the terms, conditions or privileges of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments and training. *Id.* at § 623(a). An individual may bring an action for a "hostile work environment" based on age. *E.g.*, *Brennan v. Metropolitan Opera Ass'n,* 192 F.3d 310, 318 (2d Cir. 1999) (citations omitted). In 2005, the protections of the ADEA were extended to

employment decisions that disparately impact older workers. *Smith v. City of Jackson*, 544 U.S. 228 (2005). The EEOC, which enforces the ADEA, has interpreted the statute to allow employers to favor workers who are 40 years of age or older, even when doing so negatively impacts younger workers under the age of 40. *See Facts About Age Discrimination*, http://www.eeoc.gov/facts/age.html.

The ADEA also contains an anti-retaliation clause that protects individuals who oppose discriminatory, age-related employment practices and those who file a charge of discrimination, or who participate or testify in an investigation, proceeding or litigation of a claim under the ADEA. 29 U.S.C. § 623(d) (2013). Less obvious aspects of the employment relationship also fall within the ambit of the ADEA. For example, the ADEA prohibits discrimination in apprenticeship programs and regulates job notices and advertisements. *Id.* at § 623(e). *Facts About Age Discrimination*, http://www.eeoc.gov/facts/age.html. The statute also prohibits discrimination in employee benefit plans such as health coverage and pensions. 29 U.S.C. § 623(i) (2013). Further, according to the EEOC, while the ADEA does not expressly prohibit age-related inquiries, "because such inquiries may deter older workers from applying for employment or may otherwise indicate possible intent to discriminate based on age, requests for age information will be closely scrutinized to make sure that the inquiry was made for a lawful purpose, rather than for a purpose prohibited by the ADEA." *Facts About Age Discrimination*, http://www.eeoc.gov/facts/age.html

The ADEA also contains unique protections not found in any other federal equal employment opportunity law. In 1990, Congress amended the ADEA through the passage of the Older Workers Benefit Protection Act ("OWBPA") 29 U.S.C. § 626(f)(1)(B), (F), (G) (2013), which allows employers "in limited circumstances" to reduce benefits based on employee age, but only if "the cost of providing the reduced benefits to older workers is the same as the cost of providing benefits to younger workers." *Facts About Age Discrimination*, http://www.eeoc.gov/facts/age.html; *see also* 29 U.S.C. § 623(i) (2013). Thus, the aging school work force is protected from attempts by school districts to hand the burden of budgetary constraints to them through reduced benefits.

The OWBPA also amended the ADEA to require any waiver of an age discrimination claim to meet certain standards to ensure the waiver is given knowingly and voluntarily. To secure a valid waiver of an ADEA claim, the written waiver of claims tendered by the employer must specifically refer to ADEA rights or claims; not waive rights or claims that may arise in the future; be in exchange for valuable consideration; advise the individual in writing to consult an attorney before signing the waiver; and provide the individual at least twenty-one days to consider the agreement and at least seven days to revoke the agreement after signing it. *Id.* at § 626(f). School districts wishing to secure waivers of ADEA claims must comply with the strict requirements of the statute.

Under OWBPA school districts offering early retirement incentive plans must also clear certain

thresholds when separating an employee in connection with an exit incentive or other employment termination program that impacts two or more employees. Instead of twenty-one days, an employee must be afforded at least forty-five days to consider a separation agreement before signing and an additional seven days to revoke the agreement. *Id.* at § 626(f)(1)(F)(ii). In either case, the agreement is not effective or enforceable until after the expiration of the revocation period. School districts, like all covered employers, are also required to provide certain information to employees in writing, including information regarding: any class, unit or group of individuals included in the program; any eligibility factors for the program; any time limits applicable to that program; job titles of all individuals eligible or selected for the program; ages of all individuals eligible or selected for the program; and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program. *Id.* at § 626(f)(1)(H).

B. The ADEA's voluntary resolution process and expansive remedies encourage compliance by school district employers.

In enacting the ADEA, Congress prioritized the voluntary resolution of employment disputes over litigation of age discrimination claims. Indeed, like claims filed pursuant to Title VII, but unlike claims filed pursuant to 42 U.S.C. § 1983 (2013), the ADEA requires aggrieved individuals to file a charge

of discrimination with the EEOC as a mandatory condition precedent to filing suit. In turn, the ADEA directs the EEOC to "attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance . . . through informal methods of conciliation, conference and persuasion." 29 U.S.C. § 626 (2013). An aggrieved individual is also required to give the EEOC at least sixty days' notice of an intent to file such an action. *Id.* at § 626(d). While no employer relishes receiving an EEOC charge, school districts need a constant and stable work force that is able to deliver education in a harmonious environment conducive to learning; therefore, districts have a strong incentive to resolve employment disputes as early as possible without litigation.

The relief available to aggrieved individuals is also expansive under the ADEA. The ADEA provides that an aggrieved individual may bring an action for whatever "legal or equitable relief as will effectuate the purposes of this Act." *Id.* at § 626(c)(1). In addition to injunctive relief, ADEA plaintiffs may secure: compelled employment (for applicants), reinstatement, front pay, lost benefits, promotion, and back pay. *Id.* at § 626(b). Where an employer is found to have engaged in conduct that it "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA," a willful violation is established and liquidated damages are awarded, which are generally computed by doubling the amount awarded to the plaintiff. *Id.* at § 626(b); *see, e.g., Trans World Air Lines v. Thurston*, 469 U.S. 111, 126 (1985). Upon establishing a violation of the ADEA, a plaintiff is entitled to reasonable attorney's

fees and costs. 29 U.S.C. § 626(b) (2013). In addition, anyone who interferes with the EEOC's performance of its duties under the ADEA is subject to criminal penalties amounting to a fine, up to one year of prison, or both. *Id.* at § 629.

C. School district employees have additional protections under state anti-discrimination laws, collective bargaining agreements, civil service laws and school district established grievance procedures.

In the public school setting specifically, employees in many states have remedies under a collective bargaining agreement at their disposal. Many, if not most, of these agreements contain just cause provisions, prohibitions on discriminatory practices and retaliation, and mandates that ensure public school districts administer their personnel policies and practices in a fair and evenhanded manner. An employee grievance filed under such a collective bargaining agreement may ultimately terminate in binding arbitration that affords the employee significant relief when discrimination is found.

State civil service laws and local ordinances also protect many school district employees. Such laws typically establish a board to adjudicate claims of unfair treatment, failure to follow the established civil service code, and workplace discrimination. In addition, school districts commonly make internal grievance procedures available, allowing employees to make complaints of discrimination, which the

district will then investigate and attempt to resolve. This often serves as the first layer of protection against age discrimination. *See, e.g., Grievance Procedure of Raymore-Peculiar School District*, *available at* http://www.raypec.k12.mo.us/index.aspx?NID=813 (establishing grievance procedure for school district employees who contend they have been discriminated with respect to, *inter alia*, employment). These procedures provide employees an avenue to resolve complaints in a cost-effective and efficient manner, sometimes producing resolutions without the need for adversarial proceedings. Employees often have the right to appeal the decisions of school site administrators to the district superintendent and/or the board of education.

D. Notwithstanding the many protections afforded school district employees, the Seventh Circuit unnecessarily expanded the scope of 42 U.S.C. § 1983 to cover age discrimination.

It is against this backdrop of extensive protections against discrimination based on age in the employment context that the Seventh Circuit Court of Appeals declined to follow the overwhelming majority of its sister circuits and determined that a federal constitutional remedy, enforced against the employee's supervisors in their individual capacities through Section 1983, was necessary. Given the remedies available to plaintiffs

against governmental entities such as public school districts, the Seventh Circuit's decision is misplaced and misguided. An individual who believes he has been the victim of age discrimination does not need a redundant constitutional remedy to vindicate his rights.

The litany of remedies available to employees for age and other types of discrimination under federal law, state laws and collective bargaining agreements provide ample incentive for public school districts to adhere to non-discriminatory practices. Through proactive personnel practices and internal policies that work to eradicate workplace discrimination, school districts may investigate internal allegations of discrimination and remedy specific situations, so they do not burden federal courts with the role of "a super-personnel department that reexamines an entity's business decisions." *Chapman v. AI Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000) (en banc).

This case provides the Court with the opportunity to reaffirm that public entity employers, including public school districts, should not be burdened with the specter of additional litigation when sufficient, effective remedies are already in place to remedy age discrimination. This is particularly important given the stakes that are involved in Section 1983 litigation, which often forces individual capacity public servants to defend themselves without adequate resources and jeopardizes their personal property.

III. EXISTING REMEDIES AVAILABLE TO EMPLOYEES ARE LESS COSTLY, LESS BURDENSOME, AND MORE ALIGNED WITH CONGRESSIONAL INTENT THAN EXPENSIVE, TIME-CONSUMING CONSTITUTIONAL LITIGATION

Because the ADEA, state equal employment opportunity statutes, collective bargaining agreements, civil service laws and school district-established grievance procedures provide comprehensive and more easily accessible remedies against schools that discriminate on the basis of age, a constitutional remedy via Section 1983 is redundant and unnecessary. These non-Section 1983 remedies also result in less costly, less complex, and less intrusive litigation. Because the litigation of constitutional claims against school districts under Section 1983 is more intricate and involved, both parties will incur greater legal costs. Protracted litigation in public schools not only redirects precious public funding away from the classroom, but also leads to the unnecessary expenditure of human capital, diminishes employee and supervisor morale, divides schools and school boards, and strains school board-union relationships.

A. The ADEA's comprehensive administrative scheme promotes the statute's purpose to eliminate unlawful discrimination quickly and precludes the need for a Section 1983 claim.

Congress mandated the deliberate involvement of the EEOC in ADEA disputes precisely to avoid wasteful and protracted litigation. Statutorily, the EEOC has specific responsibility to notify "prospective defendants" when a charge of discrimination is filed and "seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion." 29 U.S.C. § 626(d) (2013). "[W]hile the EEOC is not formally tasked with investigating ADEA claims, the EEOC must necessarily investigate in order to engage in conciliation, conference, and persuasion." *Shikles v. Sprint/United Management*, 426 F.3d 1304, 1311 (10th Cir. 2005) (citing *Occidental Life Ins. v. EEOC*, 432 U.S. 355, 368 (1977) ("[T]he EEOC . . . is a federal administrative agency charged with . . . investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion.").

By contrast, 42 U.S.C. § 1983 (2013) contains no such pre-suit mechanism for federal agency intervention and resolution of disputes before a lawsuit is filed. Allowing plaintiffs to use Section 1983 to bypass the express pre-suit mechanism created by Congress "to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion"

diametrically opposes Congressional intent; 29 U.S.C. § 626(d) (2013); and allows litigation to become the remedy of first resort when little is gained by doing so.

This case is different than the situation presented in *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 255-56 (2009), where the Court was called upon to construe the provisions of another federal anti-discrimination statute—Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2013)—that has no administrative exhaustion requirement and no notice provisions. For this, and other reasons, the Court held that Title IX was not intended by Congress to be the sole mechanism for asserting claims for gender discrimination in schools. *Fitzgerald*, 555 U.S. at 258.

The *Fitzgerald* Court was not concerned about a litigant's ability to assert parallel and concurrent Section 1983 claims and thus circumvent procedures required by Congress because Title IX does not contain elaborate administrative procedures. *Id.*; *cf.*, *Millay v. Surry Sch. Dep't*, 707 F.Supp.2d 56, 59 (D. Maine 2010) (citing Magistrate Judge's Recommended Decision finding "[r]egarding the § 1983 claim, *Fitzgerald* is distinguishable since, unlike Title IX, the IDEA provides an 'unusually elaborate,' 'carefully tailored,' and 'restrictive' enforcement scheme.") (citation omitted). That is not the situation in this case. Accordingly, the applicable analysis is the one previously articulated by this Court in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n,* 453 U.S. 1 (1981); *Smith v. Robinson,* 468 U.S. 992 (1984); and *Rancho Palos Verdes v. Abrams,* 544 U.S. 113 (2005). These

decisions point to the administrative and remedial schemes of the respective statutes at issue to find that a plaintiff may not end run the remedies provided in these statutes in favor of a Section 1983 remedy. The administrative scheme put in place by Congress and the remedies available to age discrimination plaintiffs are "sufficiently comprehensive" to preclude use of Section 1983. *Sea Clammers*, 453 U.S. at 20 ("When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983").

B. Constitutional claims under Section 1983 impose litigation burdens on both parties that prolong and complicate the resolution of age discrimination complaints without providing greater protection or more effective remedies.

The proof requirements in constitutional litigation against a school district are daunting. To prevail under the Equal Protection Clause, a plaintiff must establish invidious and purposeful discrimination by school officials. To hold the school district itself liable, the plaintiff must prove that the district maintained a custom, policy, or practice of discrimination to satisfy the strictures of *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978), which can be a difficult hurdle to clear. *See, e.g.*, *Rost v. Steamboat Springs RE-2 Sch. Dist.*, 511

F.3d 1114, 1124-25 (10th Cir. 2008) (holding that school district was not liable in Section 1983 action because requirements of *Monell* could not be satisfied); *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716 (6th Cir. 1996) (same). In order to meet this burden, plaintiffs must engage in extensive discovery. *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012) (noting the "costly, time-consuming, and intrusive" nature of discovery in Section 1983 litigation). In Section 1983 litigation, where the *Monell* doctrine applies, a plaintiff must seek discovery designed to uncover a district-wide custom, policy, or practice. *See Cadiz v. Kruger*, 2007 WL 4293976 at *3 (N.D. Ill. 2007) (acknowledging that a *Monell* claim involves "broad" discovery and that "the presence of a *Monell* claim will typically expand the scope and thus the cost of discovery"); *Vodak v. City of Chicago*, 2004 WL 1381043 at *5 (N.D. Ill. 2004) (noting that *Monell* claims "allow a broad inquiry into police practices and procedures, citizen complaints, similar incidents, and internal disciplinary actions 'extending well beyond the immediate circumstances surrounding plaintiffs' arrests.'") (citing *Langford v. City of Elkhart*, 1992 WL 404443 (N.D. Ind. 1992)) (unpublished). Thus, a plaintiff must delve into prior incidents of age discrimination and, where multiple defendants are involved, must propound discovery to several different parties. Responding to such expansive discovery requests often requires school districts to expend enormous amounts of human and financial resources that are more appropriately spent on educating children.

When school officials are sued in their individual capacity under Section 1983, defendants are entitled to assert the defense of qualified immunity early in the litigation and, if denied, are entitled to file an interlocutory appeal while discovery is stayed. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982); *see also Behrens v. Pelletier*, 516 U.S. 299, 308 (1996) (the defense of qualified immunity also extends to insulate public officials from the burden associated with engaging in discovery); *Anderson v. Crieghton*, 483 U.S. 635, 646 n.6 (1987) (one of the purposes of the qualified immunity standard is to protect public officials from discovery); *Mitchell v. Forsythe*, 472 U.S. 511, 526 (1985) (qualified immunity not only provides a defense to liability, but also gives a public official immunity from suit itself). Qualified immunity shields public officials from suit unless they personally participated in, or were deliberately indifferent to, a violation of an individual's clearly established constitutional rights. *See Williams v. Bd. of Regents*, 477 F.3d 1282, 1300 (11th Cir. 2007) (discussing general standards applicable to qualified immunity defense). While the qualified immunity defense offers school officials important protections, it remains the subject of considerable debate and litigation, and as a practical matter, is raised by counsel for individual capacity defendants in all but the most unique of cases, thus increasing the time and expense to both parties needed to resolve the discrimination claim.

Moreover, Section 1983 cases often involve multiple defendants—the school district and/or multiple school administrators—thus complicating

the litigation. The ADEA, by contrast, does not permit individual liability claims. *Fantini v. Salem State College*, 557 F.3d 22, 28-32 (1st Cir. 2009) (holding that individual liability does not exist under ADEA); *see also Hill v. Borough of Kutztown*, 455 F.3d 225, 246 n.29 (3d Cir. 2006); *Medina v. Ramsey Steel Co.*238 F.3d 674, 686 (5th Cir. 2001) (the ADEA "provides no basis for individual liability for supervisory employees") (citation omitted); *Horwitz v. Board of Educ. of Avoca Sch. Dist. No. 37*, 260 F.3d 602, 610 n.2 (7th Cir. 2001); ("Hill did not bring an ADEA claim against Mayor Marino himself, nor could he have because the ADEA does not provide for individual liability."); *Butler v. City of Prairie Village,* 172 F.3d 736, 744 (10th Cir.1999) (citing with approval cases from other circuits holding that there is no individual liability under the ADEA); *Martin v. Chemical Bank*, 129 F.3d 114 (2d Cir. 1997) (no individual liability under the ADEA); *Sabouri v. Ohio Dep't of Educ.*, 142 F.3d 436 (6th Cir. 1996) ("Sabouri may not seek relief from the individual defendants because neither Title VII nor the ADEA provides for individual liability."); *Smith v. Lomax*, 45 F.3d 402, 403 n. 4 (11th Cir.1995) (no individual liability under the ADEA); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510 (4th Cir. 1994) (rejecting claim against individual capacity defendant); *Miller v. Maxwell's Int'l, Inc.,* 991 F.2d 583, 587 (9th Cir. 1993) (holding that individual liability under ADEA does not exist).

Because of the risk of multiple parties and rules governing conflicts of interest, it is often impossible for an attorney to represent both a governmental entity defendant and an individual

defendant in Section 1983 litigation. Thus, more lawyers typically appear in such cases, which invariably complicates litigation and results in higher legal costs for school districts and other public entities.

Finally, the statute of limitations in Section 1983 cases is often longer than the limitations period applicable in ADEA cases. Section 1983 borrows the most analogous statute of limitations period in each state. *Wilson v. Garcia*, 471 U.S. 261, 273-74 (1985). Thus, the limitations periods applicable to Section 1983 actions will vary state-by-state and claim-by-claim. By contrast, the ADEA provides a uniform limitations period which clearly defines when one must file a charge of discrimination: within 180 days in states with no anti-discrimination statute, and 300 days in states where such a law exists. The longer statute of limitations periods applicable to Section 1983 actions create uncertainty in public school districts, which are routinely faced with the need to move school administrators to different schools at the end of a school year and must reallocate teachers to different schools based upon the needs of the schools within the district.

CONCLUSION

For all of the above reasons, *Amici Curiae* urge this Court to reverse the Seventh Circuit's decision.

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