

No. 17-666

In the
Supreme Court of the United States

JEFF WRIGHT,
Petitioner,

v.

MELISSA MAYS, et al.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

GREGORY M. MEIHN
Counsel of Record
FOLEY & MANSFIELD, PLLP
130 East Nine Mile Road
Ferndale, Michigan 48220
(248) 721-8161
gmeihn@foleymansfield.com

Counsel for Petitioner

TABLE OF CONTENTS

INTRODUCTION.....	1
I. No Clear Standard or Test Exists to Determine “Congressional Intent” to Preclude Section 1983 Claims.....	2
A. This Court Has Always Held That The Comprehensive Remedial Scheme Test is Integral to Determining Congressional Intent...	3
B. <i>Fitzgerald</i> Did Not Provide A Clear Standard For Determining When And If The “Contours Of The Rights And Protections” Test Must Also Be Applied To Determine Congressional Intent.....	6
II. The Circuit Split Regarding The ADEA Serves As An Example of the Live Conflict Regarding Which Test to Apply to Preclusion Claims.....	8
CONCLUSION.....	11

TABLE OF AUTHORITIES

CASES

<i>Chickasaw Nation v. United States</i> , 534 U.S. 84, 93, 122 S. Ct. 528, 535, 151 L. Ed. 2d 474 (2001).....	2
<i>City of Rancho Palos Verdes, Cal. v. Abrams</i> , 544 U.S. 113 (2005).....	2, 5, 7, 10
<i>Dole v. United Steelworkers of Am.</i> , 494 U.S. 26, 35, 110 S. Ct. 929, 934, 108 L. Ed. 2d 23 (1990).....	2
<i>Fitzgerald v. Barnstable Sch. Comm.</i> , 555 U.S. 246 (2009).....	<i>passim</i>
<i>Hildebrand v. Allegheny Cty.</i> , 757 F.3d 99 (3d Cir. 2014).....	9
<i>Levin v. Madigan</i> , 692 F.3d 607, 619 (7th Cir. 2012) <i>cert. granted</i> , 133 S. Ct. 1600 (2013), and <i>cert. dismissed</i> , 134 S. Ct. 2 (2013).....	9, 10
<i>Middlesex Cty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n</i> , 453 U.S. 1 (1981).....	<i>passim</i>
<i>Smith v. Robinson</i> , 468 U.S. 992 (1984).....	2, 4, 5, 7
<i>Stilwell v. City of Williams</i> , 831 F.3d 1234, 1242 (9th Cir. 2016).....	9, 10
<i>Texas Indus., Inc. v. Radcliff Materials, Inc.</i> , 451 U.S. 630, 639, 101 S. Ct. 2061, 2066, 68 L. Ed. 2d 500 (1981).....	3
<i>Zumbro v. Baltimore City Police Dep’t</i> , 868 F.2d 1364, 1366–67 (4th Cir. 1989) <i>cert. denied</i> , 493 U.S. 850 (1989).....	10

CONSTITUTION AND STATUTES

Equal Protection Clause.....	8
42 U.S.C. § 1983.....	<i>passim</i>
Age Discrimination in Employment Act.....	1, 8
ADEA.....	1, 8, 9, 10
Education of the Handicapped Act	5
EHA.....	5
SDWA.....	11
Title IX of the Education Amendments of 1972.....	7
Title IX.....	7, 8

INTRODUCTION

The Sixth Circuit’s decision below has further deepened a pre-existing conflict regarding the correct standard to apply when determining preclusion of section 1983 suits by federal statutes. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 129 S. Ct. 788, 172 L. Ed. 2d 582 (2009) and prior decisions of this Court have made clear that congressional intent is the guiding principle in determining preclusion of section 1983 suits by federal statutes. However, what *Fitzgerald* did not fully clarify is the *specific* test or standard to apply in determining congressional intent and whether such a test differs depending on if the rights at issue were created by statute or by the Constitution.

Following the ambiguous combination of the “remedial scheme” and “rights and contours” tests presented in *Fitzgerald*, confusion has arisen among the lower courts as to how to determine if a claim brought under section 1983 is precluded by federal statute. This confusion is evident in the circuit split regarding cases involving the Age Discrimination in Employment Act (“ADEA”) and its potential preclusion of constitutional claims brought under section 1983. And while the ADEA conflict is not directly dispositive of the issue here, it serves as a fitting example of the lower courts consistent failure and inability to apply a uniform test to the issues concerning preclusion analysis.

Such a haphazard approach to preclusion analysis is inconsistent with this Court’s precedents and must be remedied. Promulgating a uniform test to be applied to preclusion analysis is the crucial key

to this case, as well as numerous other cases now pending and likely to be asserted in the future.

I. No Clear Standard or Test Exists to Determine “Congressional Intent” to Preclude Section 1983 Claims.

Respondents contend that there is no confusion over the test applied to determine if a federal statute precludes a claim brought pursuant to section 1983 by asserting that the test is always “congressional intent.” See Resp’t Br. 15. Respondents are correct in their assertion that Congress’ intent should always dictate the inquiry. This Court has reiterated in every case on the subject of preclusion of section 1983 claims that the “crucial consideration” is congressional intent. *See Fitzgerald*, 555 U.S. at 252 (quoting *Smith v. Robinson*, 468 U.S. 992, 1012, 104 S. Ct. 3457, 3468, 82 L. Ed. 2d 746 (1984)); *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 120–21, 125 S. Ct. 1453, 1458, 161 L. Ed. 2d 316 (2005); *Middlesex Cty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 13, 101 S. Ct. 2615, 2622, 69 L. Ed. 2d 435 (1981).

However, congressional intent is a guiding principle, not a rigorous standard that can be uniformly applied. There are numerous methods courts have employed in attempts to extrapolate the intent of Congress. *See Chickasaw Nation v. United States*, 534 U.S. 84, 93, 122 S. Ct. 528, 535, 151 L. Ed. 2d 474 (2001) (discussing the canons of interpretation of express statutory language); *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 35, 110 S. Ct. 929, 934, 108 L. Ed. 2d 23 (1990) (“Our starting point is the language of the statute, but in expounding a

statute, we are not guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.”) (internal quotations and citations omitted); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639, 101 S. Ct. 2061, 2066, 68 L. Ed. 2d 500 (1981) (“Congressional intent may be discerned by looking to the legislative history and other factors.”).

In the context of preclusion analysis, courts have searched for congressional intent by looking to the express language of the statute; examining the legislative history; considering the context surrounding the statute; scrutinizing the nature of the remedial scheme and whether it is sufficiently comprehensive; and, as expressed in *Fitzgerald*, comparing whether the contours of the rights and protections of the statute and those existing under the Constitution diverge in significant ways. *Fitzgerald*, 555 U.S. at 252–53.

The resolution of this case rests on this Court’s guidance as to which of these methods must be used in analyzing a federal statute to determine if Congress intended to preclude parallel claims brought under section 1983.

A. This Court Has Always Held That The Comprehensive Remedial Scheme Test is Integral to Determining Congressional Intent.

In their brief, Respondents attempt to discredit the test promulgated by this Court in *Sea Clammers* which dictates that a sufficiently comprehensive remedial scheme “may suffice to demonstrate

congressional intent to preclude the remedy of suits under § 1983.” 453 U.S. at 20. Respondents emphasize the language “*may suffice*” and assert, without providing support, that the comprehensive nature of a remedial scheme “is particularly telling when a plaintiff invokes Section 1983 to enforce rights created in the same statute” but that when it involves constitutional claims for “legal rights that existed before the adoption of the statute, things may be very different.” Resp’t Br. 16-17.

Respondents discuss *Smith* as the only case where this Court has held that the comprehensive remedial scheme of a federal statute forecloses the “longstanding” section 1983 remedy for violations of preexisting constitutional rights. See Resp’t Br. 18. Respondents appear to imply that the legislative history cited in *Smith* provides “direct evidence” of congressional intent and that in the absence of such “direct evidence,” a comprehensive remedial scheme “does not necessarily suggest an intent to foreclose independent remedies for preexisting constitutional rights.” See Resp’t Br. 17-18.

Yet, with this argument, Respondents (along with some lower courts) seem to have lost sight of this Court’s reasoning for looking to the remedial scheme in the first place. As explained in *Sea Clammers*, the remedial scheme of a statute *is* direct evidence of congressional intent. Indeed, it is the *language of the statute itself* that is the very first place to look for congressional intent. This Court explained that “[w]e look first, of course, to the statutory language, particularly to *the provisions made therein for enforcement and relief*. Then we review the legislative history and other traditional

aids of statutory interpretation.” *See Sea Clammers*, 453 U.S. at 13 (emphasis added). Somehow in the intervening years between this Court’s decision in *Sea Clammers* and today, a statute’s remedial scheme has been divided from the “express language of the statute” into a separate, secondary consideration, falling after the express language and legislative history in preclusion analysis.

In *Smith*, this Court continued the reasoning of *Sea Clammers* and used the extensive remedial scheme provided in the Education of the Handicapped Act (EHA) as the basis for its decision that Congress intended to preclude constitutional claims to a free appropriate public education brought via section 1983, and that such claims must be pursued only “through the carefully tailored administrative and judicial mechanism set out in the statute.” 468 U.S. at 1009.

A similar analysis followed in *Rancho Palos Verdes*, where this Court looked in particular to the provision of an express private remedy as “an indication that Congress did not intend to leave open a more expansive remedy under § 1983.” 544 U.S. at 121.

It was not until *Fitzgerald*, a case involving a statute lacking a comprehensive remedial scheme, that this Court found the need to go beyond examining the language of the statute itself, i.e., its remedial scheme, in order to determine congressional intent.

B. Fitzgerald Did Not Provide A Clear Standard For Determining When And If The “Contours Of The Rights And Protections” Test Must Also Be Applied To Determine Congressional Intent.

While *Fitzgerald* states that “[i]n cases in which the § 1983 claim alleges a constitutional violation, lack of congressional intent *may* be inferred from a comparison of the rights and protections of the statute and those existing under the Constitution.” *Id.* at 252-253 (emphasis added). However, it does not expressly state that this comparison should displace all other methods of inferring congressional intent.

Nonetheless, the Sixth Circuit and other lower courts have interpreted *Fitzgerald* to indicate that the only applicable test—or at least the *most* applicable test—in a case involving constitutional claims is an examination of the “contours of the rights and protections” of the statute, whether they diverge from those provided by the Constitution, and whether the constitutional claims are “virtually identical to” the available statutory claims. Thus, the Sixth Circuit and Respondents attempt to draw a bright line between suits involving constitutional claims and those involving only statutory claims and point to *Fitzgerald*’s “rights and protections” test as the authoritative standard.

But this Court has not drawn such a clear distinction. While relying primarily on the “rights and protections” test, this Court reiterated in *Fitzgerald* that “[i]n determining whether a subsequent statute precludes the enforcement of a federal right under § 1983, we have placed *primary*

emphasis on the nature and extent of that statute's remedial scheme.” *Id.* at 253 (emphasis added).

Moreover, *Fitzgerald* provided guidance on determining the preclusive effect of a statute that did *not* have an extensive and elaborate remedial scheme. This Court specifically noted in *Fitzgerald* that the statute at issue, Title IX of the Education Amendments of 1972, is different than those at issue in *Sea Clammers*, *Smith*, and *Rancho Palos Verdes*, explaining:

In all three cases, the statutes at issue required plaintiffs to comply with particular procedures and/or to exhaust particular administrative remedies prior to filing suit...Offering plaintiffs a direct route to court via § 1983 would have circumvented these procedures and given plaintiffs access to tangible benefits—such as damages, attorney's fees, and costs—that were unavailable under the statutes.

Id. at 254.

In contrast, when this Court first looked to the remedial scheme of Title IX, it noted that the limited remedies provided by the statute “stand in stark contrast to the ‘unusually elaborate,’ ‘carefully tailored,’ and ‘restrictive’ enforcement schemes of the statutes at issue in *Sea Clammers*, *Smith*, and *Rancho Palos Verdes*.” *Id.* at 255. In particular, this Court noted Title IX’s lack of an express private remedy and the difficulty of determining

congressional intent on the basis of an implied remedy. *Id.* at 255-56.

Since there was no extensive remedial scheme present, it was necessary for this Court to delve further to determine congressional intent. It did so by comparing “the substantive rights and protections guaranteed under Title IX and under the Equal Protection Clause” and determining that this comparison “*lends further support* to the conclusion that Congress did not intend Title IX to preclude § 1983 constitutional suits.” *Id.* at 256. (emphasis added). *Fitzgerald* provides no guidance on what to do if the section 1983 claim alleges a constitutional violation and there *is* a comprehensive remedial scheme.

II. The Circuit Split Regarding The ADEA Serves As An Example of the Live Conflict Regarding Which Test to Apply to Preclusion Claims.

Respondents contend that the circuit split regarding the Age Discrimination in Employment Act of 1967 (“ADEA”) is not relevant because “ADEA is not at issue here.” Resp’t Br. 33-34. In doing so, Respondents construe the circuit conflict too narrowly. It is not merely a conflict regarding the ADEA – it is a conflict as to the appropriate test to apply in preclusion analysis and whether such a test must differ in the face of constitutional claims brought under section 1983. The circuit split regarding whether the ADEA forecloses remedies under section 1983 simply provides an apt example of this conflict.

When a § 1983 claim asserted a constitutional right, the Third Circuit concluded that the ADEA’s comprehensive remedial scheme is sufficient to preempt such a claim. *See Hildebrand v. Allegheny Cty.*, 757 F.3d 99, 108–09 (3rd Cir. 2014) (concluding that *Fitzgerald* did not abrogate the requirement that congressional intent may be inferred absent an express statement), *cert. denied*, 135 S. Ct. 1398 (2015). The Seventh and Ninth Circuits, however, have reached a different conclusion, requiring a comparison of the rights and remedies of the statute and the Constitution. *See Stilwell v. City of Williams*, 831 F.3d 1234, 1242 (9th Cir. 2016) (interpreting *Fitzgerald* as setting out different approaches to determining congressional intent); *Levin v. Madigan*, 692 F.3d 607, 619 (7th Cir. 2012) (holding that “some additional indication of congressional intent” is required to preclude constitutional claims), *cert. granted*, 133 S. Ct. 1600 (2013), and *cert. dismissed*, 134 S. Ct. 2 (2013).

The primary split is between the Third Circuit and the Seventh and Ninth Circuits. The Third Circuit interprets *Fitzgerald* very narrowly, explaining that the Supreme Court has consistently emphasized the comprehensiveness of a statute’s remedial scheme as the primary factor to determine congressional intent. *Hildebrand*, 757 F.3d at 108. Although the Third Circuit recognizes that the rights-and-remedies test provides “an additional framework” for making preemption determinations, the Third Circuit relies upon the Supreme Court’s statement in *Sea Clammers* that “[w]hen 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.” *Id.* (quoting *Sea Clammers*, 453 U.S. at 19, 101 S. Ct. at 2625–26). Even though that statement was made in context of the parties’ statutory claims, the Third Circuit explained that “we do not believe it disturbed [that] basic principle.” *Id.* at 108–09.

The Third Circuit’s interpretation is consistent with *Sea Clammers* and its progeny. Pointing to the ADEA’s comprehensive scheme, the Fourth Circuit explained that permitting statutory claims veiled as constitutional claims would “severely undermine, if not debilitate, the enforcement mechanisms created by Congress under the ADEA.” *Zumbro v. Baltimore City Police Dep’t*, 868 F.2d 1364, 1366–67 (4th Cir. 1989) (“The court today declines to construct from the spacious contours of the equal protection clause a generalized federal right of action to encompass every conceivable grievance in the workplace.”), *cert. denied*, 493 U.S. 850 (1989).

In contrast, the Seventh and Ninth Circuits have interpreted *Fitzgerald* to give rise to two separate tests. *See Stilwell*, 831 F.3d at 1242; *Levin*, 692 F.3d at 619. While acknowledging that the critical inquiry is the intent of the legislature, these circuits concluded that different tests apply depending on whether plaintiffs assert either a statutory or constitutional right. For statutory rights, these circuits agree with the Third Circuit: “[I]f we were evaluating a purely statutory right, as in *Sea Clammers* or *Rancho Palos Verdes*, the fact that some aspects of the ADEA’s protections are narrower would suggest preclusion. That is because, if a statute creating a right also creates a mechanism for enforcement that is more limited than § 1983, we

assume Congress intended those limits to apply to that right.” *Stillwell*, 831 F.3d at 1248 (quotations omitted). However, when a constitutional claim is being asserted, the Seventh and Ninth Circuits have read *Fitzgerald* to expressly provide for the rights-and-remedies test because the protections of the statute may be narrower than the Constitution. *Id.*

This Court must resolve whether its federal-preclusion analysis is dependent on if the plaintiff asserts a statutory right, a constitutional right, or both and which test or tests must be used to determine Congress’s intent. More specifically, resolution is required to determine whether the Sixth Circuit applied the proper test to Respondents’ claims and the SDWA and if the Sixth Circuit’s application was consistent with *Fitzgerald* and prior decisions of this Court.

CONCLUSION

For the forgoing reasons and based on the arguments presented in Petitioner’s original brief, the petition for *certiorari* should be granted.

Respectfully Submitted,

GREGORY M. MEIHN

Counsel of Record

FOLEY & MANSFIELD, PLLP

130 East Nine Mile Road

Ferndale, MI 48220

(248) 721-8161

gmeihn@foleymansfield.com

Dated: February 20, 2018