No. 16-1386

In the Supreme Court of the United States

SUSAN L. VAUGHAN,
Petitioner,
v.

ANDERSON REGIONAL MEDICAL CENTER,
Respondent.

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

BRIEF OF AARP AND AARP FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

AARP is a nonpartisan, nonprofit organization, with a membership of approximately 38 million, which is dedicated to addressing the needs and interests of people age 50 and older. AARP's charitable affiliate, AARP Foundation, creates and advances effective solutions that help low-income individuals 50 and older secure the essentials. Among other things, AARP and AARP Foundation advocate to preserve the means to enforce older workers' rights, including through participation as amici curiae in federal courts, including this Court. *See, e.g.*, *Gomez-Perez v. Potter*, 553 U.S. 474 (2008); *Smith v. City of Jackson*, 544 U.S. 228 (2005); *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581 (2004).

More than one-third of AARP members and nearly a quarter of low-income adults 50 and older are employed or are seeking work. Thus, assuring proper interpretation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-34, has been a particular focus of AARP's and AARP

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[1] In compliance with Rule 37.6 of this Court, amici curiae AARP and AARP Foundation state that no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund the brief's preparation or submission, and further certifies that no person, other than AARP, its charitable affiliate, and its members, contributed money intended to prepare or submit this brief. Both parties have consented to the filing of this brief.

Foundation's legal advocacy. AARP and AARP Foundation submit this brief because the ADEA's prohibition on retaliation is crucial to the Act's vitality, and effective enforcement of that prohibition turns on plaintiffs having access to all appropriate remedies, including compensatory damages, as Congress intended.

SUMMARY OF ARGUMENT

This Court has made clear that broad, effective retaliation protections are critical to anti-discrimination statutes because, "[p]lainly, effective enforcement could . . . only be expected if employees felt free to approach officials with their grievances." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). Accordingly, the Court has intervened repeatedly to guard the vitality of anti-retaliation provisions in a wide variety of contexts—including the Age Discrimination in Employment Act (ADEA) and Fair Labor Standards Act (FLSA), both of which are at issue in this case. *See id.* (addressing retaliation under the FLSA); *Gomez-Perez v. Potter*, 553 U.S. at 479 (addressing retaliation under the ADEA). However, protection from retaliation in name alone is not sufficient: "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies." *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969).

The Fifth Circuit's holding that no damages beyond lost wages are available in retaliation cases under the ADEA violates this principle by denying "unfettered access to statutory remedial

mechanisms" to discrimination plaintiffs who are punished by employers for challenging age. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). This Court's review is necessary to correct this error, which presents a critically important issue of federal law by undermining the effectiveness of the ADEA's anti-retaliation provision—and, thereby, seriously weakening the Act's protections from discrimination..

Moreover, this case presents an ideal vehicle for the Court's review because the Fifth Circuit's reasoning runs counter to the underlying logic of many of this Court's opinions. Most saliently, the Court of Appeals failed to adhere to the basic principle that this Court has expressed repeatedly: that the ADEA fully incorporates the FLSA's remedies. *See Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 582 (1978).[2] Given that the Fifth Circuit itself acknowledges that the FLSA's retaliation remedies include damages beyond lost wages, *see Pineda v. JTCH Apartments, L.L.C.*, 843 F.3d 1062 (5th Cir. 2016), the same court's refusal to apply that holding to the ADEA cannot be squared with this Court's admonitions to maintain a parallel remedial scheme between the two statutes. Nor can the Court of Appeals' decision survive this Court's

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[2] Amici concur that confusion, including a split in federal appellate authority, exists as to whether the principle of ADEA incorporation of FLSA remedies makes available damages other than lost wages for ADEA retaliation in appropriate circumstances. *See* Pet. at 9 (discussing *Moskowitz v. Trustees of Purdue Univ.*, 5 F.3d 279 (7th Cir. 1993)). However, amici focus herein on other aspects of the Fifth Circuit's decision warranting review by this Court.

consistent reasoning that expansion of the ADEA's coverage automatically extends FLSA remedies to older workers beyond those categories initially covered by the ADEA. *See EEOC v. Wyoming*, 460 U.S. 226, 233 & n.5 (1983) (discussing 1974 and 1978 ADEA amendments); *Lehman v. Nakshian*, 453 U.S. 156, 166 (1981) (same). Finally, the Fifth Circuit's view that damages beyond lost wages undermine a supposed preference for administrative enforcement in ADEA cases is inconsistent with this Court's jurisprudence finding that private remedies and administrative enforcement schemes in civil rights laws are compatible. In particular, this Court has recognized that the ADEA's administrative enforcement scheme is designed to expedite, rather than foreclose, the path to federal court for older plaintiffs. *Oscar Mayer & Co. v. Evans,* 441 U.S. 750, 757 (1979).

The Court should grant the petition for certiorari to correct the Fifth Circuit's errant course and reorient the law concerning ADEA remedies to be consistent with the Court's prior decisions.

ARGUMENT

I. Plaintiffs' Ability To Seek Damages Beyond Lost Wages In ADEA Retaliation Cases Is A Critically Important Issue of Federal Law Because Effective Retaliation Remedies Are Vital To The ADEA's Enforcement.

The Court should resolve remaining uncertainty regarding the remedies available in ADEA retaliation cases because comprehensive retaliation protections are essential to effective enforcement of anti-discrimination statutes. This Court highlighted the crucial role of retaliation protections in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), when it rejected an attempt to narrow Title VII's retaliation provision.[3] The Court explained that "broad protection from retaliation helps assure the cooperation" of employees "willing to file complaints and act as witnesses," and it is this "cooperation upon which accomplishment of [Title VII's] primary objective depends." *Id.* at 67.

Likewise, in *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), when the Court concluded that Title IX implicitly prohibits retaliation, it recognized that "effective protection" from discrimination requires protection from

[3] The ADEA's retaliation prohibition was modeled after Title VII's and the two sections are identical. *Compare* 29 U.S.C. § 623(d) (2012) (ADEA), *with* 42 U.S.C. § 2000e-3 (2012) (Title VII).

retaliation because "without protection against retaliation, the underlying discrimination is perpetuated." *Id.* at 180 (citing *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969)). The Court went on to explain that if it were to take a contrary view, "Title IX's enforcement scheme would unravel" because "[w]ithout protection from retaliation, individuals who witness discrimination would likely not report it, [deliberate] indifference claims would be short-circuited, and the underlying discrimination would go unremedied." *Id.* at 180-81.

These decisions exemplify the Court's consistent intervention to ensure that individuals can freely oppose discrimination of any kind without fear of reprisal under a wide array of statutes. *See*, *e.g.*, *Gomez-Perez v. Potter*, 553 U.S. 474, 479 (2008) (holding that the prohibition of "discrimination" in the federal-sector provision of the ADEA encompasses protection from retaliation); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 446 (2008) (holding that 42 U.S.C. § 1981's protection from discrimination encompasses retaliation for opposing race discrimination in contracting); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (holding that Title VII's retaliation prohibition covers former employees); *Sullivan*, 396 U.S. at 237 (holding that 42 U.S.C. § 1982 covers retaliation for opposing race discrimination in housing).

Moreover, the Court has made clear that full and effective *remedies* for retaliation are necessary to make a statute's protections from discrimination meaningful. Under Title VII, in both *Burlington* and

Robinson, the Court referred to the importance, in retaliation cases, of "[m]aintaining unfettered access to statutory remedial mechanisms." *Burlington*, 548 U.S. at 64 (citing *Robinson,* 519 U.S. at 346).

Additionally, in *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960), the Court took care to ensure that retaliation was compensable under the FLSA.[4] Although the statute did not yet include an express private right of action for retaliation, the Court ruled that in a Department of Labor enforcement action, federal courts may award lost wages to employees terminated for complaining of wage and hour violations. *Id.* at 296. The Court explained that this remedy was necessary to ensure that employees would come forward to report FLSA violations:

> To an employee considering an attempt to secure his just wage deserts under the [FLSA], the value of such an effort may pale when set against the prospect of discharge and the total loss of wages for the indeterminate period necessary to seek and obtain reinstatement. Resort to statutory remedies might thus often take on the character of a calculated risk, with restitution of partial deficiencies in wages due for past work perhaps obtainable only at the cost of irremediable entire loss of pay for an

[4] As discussed below, *see infra* p.10, the ADEA's remedies are based on, and cross-reference, those of the FLSA. *See Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 577-79 (1978).

> unpredictable period. Faced with such alternatives, employees understandably might decide that matters had best be left as they are. We cannot read the [FLSA] as presenting those it sought to protect with what is little more than a Hobson's choice.

Id. at 292-93. In other words, the Court concluded that without an appropriate monetary remedy, individuals who wanted to report or oppose unlawful employment practices would be protected in theory, but too vulnerable in fact to help enforce the statute. *Id.*[5] As the Court explained in another retaliation case, "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies." *Sullivan*, 396 U.S. at 239.

Congress' 1977 amendment to the FLSA, which added the law's expansive remedial provision for retaliation to 29 U.S.C. § 216(b), reflects Congress' judgment that damages beyond lost wages are just such a "necessary and appropriate remed[y]" in retaliation cases. Indeed, non-wage damages are particularly critical in retaliation cases because retaliation often does not involve any direct wage

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[5] *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), was also a basis for one Court of Appeals to "allow[] compensatory damages for a FLSA anti-retaliation claim." Pet. at 11 (citing *Lambert v. Ackerley*, 180 F.3d 997 (9th Cir. 1999)). Additionally, three other circuits — the First, Third and Eleventh — relied on *Mitchell* to broadly construe the FLSA's anti-retaliation provision. *Lambert*, 180 F.3d at 1003-04. In turn, that provision, adopted in 1977, is central to the argument that damages other than lost wages are available for ADEA retaliation. *See* Pet. at 15.

loss. Under *Burlington*, a "materially adverse" action necessary to state a retaliation claim under Title VII includes conduct other than "employment-related" actions constituting independent Title VII violations. 548 U.S. at 62-64. Accordingly, an employee may sue for any retaliatory action that would deter a reasonable person from opposing discrimination—for example, as this Court described, actions such as a change in schedule or exclusion from training. *See id.* ("A provision limited to employment-related actions would not deter the many forms that effective retaliation can take."). Such adverse actions do not necessarily directly result in any lost wages, but, nonetheless, fall under the Court's deliberately broad construction of retaliation.

Unless an employment discrimination statute allows non-wage damages for retaliation claims, employees who experience retaliation that does not involve wage loss have no remedy for past retaliatory action. *Id.* Such a construction would thwart the Court's purpose in construing retaliation provisions broadly, covering precisely these actions to ensure effective private enforcement of the laws' discrimination bans. *See id.* at 63 ("The antiretaliation provision seeks to . . . prevent[] an employer from interfering (through retaliation) with *an employee's efforts to secure or advance enforcement* of [Title VII's] basic guarantees.") (emphasis added).

Without an effective ADEA remedy for the actions that the Court has found so important to encompass in anti-retaliation protections generally, employees will surely not feel free to oppose, report,

and cooperate with the investigation of age discrimination claims without fear of reprisal, as Congress intended. Accordingly, at stake in this case is no less than effective enforcement of the ADEA, using the "unfettered access to statutory remedial mechanisms" that this Court has vigilantly guarded. *See id.* at 64. That is a critical question of federal law that merits the Court's consideration.

II. This Case Presents a Compelling Vehicle for Resolving the Issue of Plaintiffs' Ability to Seek Damages Beyond Lost Wages for Retaliation Under the ADEA Because the Fifth Circuit's Reasoning Clashes with Multiple Rulings of this Court.

The panel in *Vaughan v. Anderson Regional Medical Center*, 849 F.3d 588 (5th Cir. 2016), based its decision precluding damages other than lost wages for ADEA retaliation on a forty-year-old precedent, *Dean v. American Security Insurance. Co.*, 559 F.2d 1036 (5th Cir. 1977), whose facts pre-date Congress's amendment of the FLSA to include compensatory damages for retaliation and, thus, is at odds with many of this Court's precedents. *See* Pet. at 9-10. The Court should grant certiorari to address the Fifth Circuit's departure from the Court's rulings, and to prevent *Dean* from influencing future litigation in lower courts on the important, unsettled

issue of permissible monetary relief for retaliation claims under the ADEA. [6]

A fundamental flaw in the Fifth Circuit's ruling is its failure to adhere to a bedrock principle for construing the ADEA that, "but for [certain] changes Congress expressly made, it intended to incorporate *fully* the remedies and procedures of the FLSA." *Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. at 582 (1978) (emphasis added) (noting specific deviation in the ADEA from the FLSA's remedy scheme, none of which concern retaliation and quoting one of the ADEA's framers explaining that the ADEA's enforcement language "incorporates by reference, to the greatest extent possible, the provisions of the [FLSA]."); *accord Lehman v. Nakshian*, 453 U.S. 156, 166 (1981) ("The ADEA['s] Section 7 incorporated the enforcement scheme used in employee actions against private employers under the FLSA."); *McKennon v. Nashville*

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[6] *Dean v. American Security Insurance Co.*, 559 F.2d 1036 (5th Cir. 1977*)*, is the basis for at least one other appellate decision consistent with the panel decision in this case. *See* Pet. at 13 (discussing *Snapp v. Unlimited Concepts, Inc*., 208 F.3d 928, 936 (11th Cir. 2000). Further, *Dean*, an ADEA discrimination case, is readily distinguishable from this retaliation case. Indeed, the panel identified no aspect of *Dean* speaking directly to retaliation; rather, it asserted that *Dean* "contains no suggestion that its holding . . . silently excluded ADEA retaliation cases," *see Vaughan v. Anderson Regional Medical Center*, 849 F.3d 588, 591 (5th Cir. 2016), and added that *Dean* controls "Vaughan's ADEA retaliation claim" since *Dean* claimed to "appl[y] to all 'private actions posited upon the ADEA.'" *Id.* at 594 (citing 550 F.2d at 1040). This overly elastic notion of stare decisis, elevating sheer dictum to the status of holding, is untenable.

Banner Publ. Co., 513 U.S. 352, 357 (1995) ("[The ADEA's] remedial provisions incorporate by reference the provisions of the Fair Labor Standards Act of 1938."); *see also Lubke v. City of Arlington,* 455 F.3d 489, 499 (5th Cir. 2006) ("Because the remedies available under the ADEA . . . track the FLSA, cases interpreting remedies under the statutes should be consistent.").

Yet in *Vaughan*, based on *Dean*, the Fifth Circuit said that damages other than lost wages are *not* available to remedy ADEA retaliation. 849 F.3d at 591. In doing so, the *Vaughan* court ignored *Pineda v. JTCH Apartments, L.L.C.*, 843 F.3d 1062 (5th Cir. 2016), in which another panel of the very same court held, just three days after the original panel decision in *Vaughan*, that such relief *is* available under the FLSA. *See id.* at 1065 (noting "the uniform view of our sister circuits that damages for emotional distress are available in FLSA retaliation suits"). The panel had ample opportunity to correct its departure from the principle of consistent interpretation of FLSA and ADEA remedies, but it chose not to address the issue at all, even after granting a rehearing petition specifically founded on *Pineda. See Vaughan v. Anderson Reg. Med. Ctr.,* 843 F.3d 1055 (5th Cir. 2016); *Vaughan v. Anderson Reg. Med. Ctr.,* No. 16-60104, Appellant's Petition for Rehearing En Banc (5th Cir., Jan. 6, 2017).[7]

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[7] *See also Vaughan v. Anderson Reg. Med. Ctr.,* No. 16-60104, Brief for AARP and AARP Foundation Amici Curiae Supporting Plaintiff-Appellant's Petition for Rehearing En Banc (5th Cir., Jan. 16, 2017).

Instead, the panel, on rehearing, summarily rejected applying the Fair Labor Standards Amendments Act of 1977, Pub. L. No. 95-151, 91 Stat. 1245 (Nov. 1, 1977), to the ADEA. This amendment to the FLSA, enacted less than six weeks after *Dean*, specified that thereafter, "[a]ny employer who violates" the anti-retaliation provision of the FLSA, section 15(a)(3), 29 U.S.C. § 215(a)(3), "shall be liable for such legal and equitable relief as may be appropriate to effectuate the purposes of [the anti-retaliation provision]." *Id.* (quoting current 29 U.S.C. § 216(b)). Yet, the Fifth Circuit did not credit Congress with having updated ADEA remedies by amending FLSA remedies. Instead, the panel unilaterally created an exception to the incorporation principle. It concluded that "the 1977 FLSA [A]mendments do not disturb our holding in *Dean*, because they added language to the FLSA that we have already construed in the context of the ADEA — in *Dean*." 849 F.3d at 592.

But the 1977 FLSA Amendments demanded a change in the Fifth Circuit's reading of the ADEA's remedial provision, section 7(b), because *Dean* amounted to a superseded construction of the ADEA, whose meaning was altered by "Congress' express incorporation of the anti-retaliation [and other] remedies of the [FLSA] into the ADEA." Pet. at 5; *accord Lorillard*, 434 U.S. at 578-79 & n.5.[8]

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[8] Specifically, section 7(b) has always stated, inter alia:

Ironically, the *Vaughan* panel held *against* incorporation of new FLSA remedies in the ADEA one factor that should have *favored* such incorporation: the fact that the ADEA already included virtually identical language. Thus, the Fifth Circuit adhered to *Dean*, ruling that the pre-existing, "similar language in the ADEA's remedy provision did not make pain and suffering damages available, because such damages would frustrate the ADEA's preference for administrative resolutions." 849 F.3d at 592 (citing *Dean,* 559 F.2d at 1038-39).

The panel's reasoning is in tension with this Court's rulings in several significant respects. In the first place, both *Dean* and *Vaughan* failed to account for this Court's decisions giving real-world effect to the portion of section 7(b) of the ADEA that "gives federal courts the discretion to 'grant such legal or equitable relief as may be appropriate to effectuate the purposes of [the Act].'" *McKennon*, 513 U.S. at 357-58. In contrast, in *Lorillard*, this Court read section 7(b)'s authorization for courts to "grant legal or equitable relief" as supporting Congress' intent that the ADEA operate according to the common law implications of the term "legal relief," such as

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> The provisions of this chapter shall be enforced in accordance with the . . . remedies . . . provided in sections . . . 216 (except for subsection (a) thereof), . . . of this title . . . . In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal and equitable relief as may be appropriate to effectuate the purposes of this chapter . . . .

Pet. at 2 (reproducing 29 U.S.C. § 626(b)).

affording aggrieved individuals a right to a jury trial. 443 U.S. at 583. Moreover, in doing so, *Lorillard* cited the availability of similar relief under the FLSA—i.e., that "a right to jury trial in private actions under the FLSA" was "well established." *Id.* at 580. Consequently, there is no logical reason why, after the 1977 FLSA Amendments (if not before), the "well established" FLSA retaliation remedy of damages other than lost wages, *see Pineda*, 843 F.3d at 1064-65, is not equally available under section 7(b) of the ADEA. The panel's answer was wholly inadequate. A grant of certiorari is necessary to enable the Court to conclusively resolve this important question.

Second, this Court's review is necessary because the panel's dismissal of the 1977 FLSA Amendments as irrelevant to ADEA retaliation remedies ignored another principle established in this Court's decisions: that the ADEA's "incorporate[ion] by reference" of FLSA remedies, *see McKennon*, 513 U.S. at 357, is ongoing, not static. That is, the panel failed to acknowledge that the ADEA-FLSA incorporation principle has allowed the application of ADEA remedies to evolve alongside the FLSA's. Thus, instead of considering how the 1977 FLSA Amendments may have modified remedies under the ADEA, the *Vaughan* and *Dean* panels both "spent [their] time considering whether a stand-alone provision of the ADEA provided [damages other than lost wages]." *Pineda*, 843 F.3d at 1065.

While the *Dean* panel, naturally, could only "look[] at the pre-1977 FLSA," *id.,* the *Vaughan*

panel's decision to do no more runs counter to this Court's decisions. For instance, this Court described the parallel evolution of the two statutes in *EEOC v. Wyoming*, 460 U.S. 226 (1983). There, the Court treated provisions of the 1974 ADEA Amendments "extend[ing] the substantive prohibitions of the Act to [private] employers having at least 20 workers" and to local and state government employers, as likewise extending FLSA remedies to these new contexts. *Id.* at 233 & n.5. (describing 1974 amendments to definitions of "employer" in sections 11(b) and 11(f) of the Act).

Similarly, in 1978, when Congress amended the ADEA to raise the cap on the ADEA's protections from age 65 to 70 for private and local and state government employees, Congress again simply amended the ADEA's coverage provisions. *Id.* at 233 n.5. The Court took in stride the notion that the amendment to the ADEA also automatically extended FLSA remedies to many additional individuals. *Accord Lehman*, 453 U.S. at 166 ("The ADEA originally applied only to actions against private employers. Section 7 incorporated the enforcement scheme used in employee actions against private employers under the FLSA. . . . . State and local governments were added [in 1974] as potential defendants by a simple expansion of the term 'employer' . . . . The existing substantive and procedural revisions . . . were thereby extended to cover state and local government employees.").[9]

[9] The Court noted: that "the first attempt to prohibit age discrimination in federal employment . . . would have simply amended the definition of 'employer' . . . . The result would presumably have been have been to bring federal employees

Given that this Court has made clear that amendments to the ADEA's coverage provisions automatically "update" application of the FLSA's remedy provisions, it follows that, absent some express provision to the contrary, amendments to the FLSA's remedy provisions—like the 1977 FLSA Amendments—should automatically update remedies available under the ADEA. The Court should take this opportunity to ensure that all courts abide by this principle.

Additionally, the Court's decisions regarding federal statutory civil rights remedies call into question *Dean*'s and the panel's conclusion that certain ADEA administrative enforcement provisions establish "the ADEA's preference for administrative resolutions," and further, that a remedy of damages beyond lost wages for retaliation would "frustrate" that supposed "preference." *See Vaughan*, 849 F.3d at 592. In *McKennon,* the Court stressed the importance of the ADEA's private enforcement features, not its administrative enforcement regime, and described the ADEA as similar in this respect to other employment statutes:

> The ADEA, in keeping with [its] purposes, contains a vital element found in both Title VII and the Fair Labor Standards Act: It grants an injured employee a right of action to obtain the authorized relief. 29 U.S.C. § 626(c). The private litigant who seeks redress for his or

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under the procedural provisions of § 7." *Lehman v. Nakshian*, 453 U.S. 156, 166 n. 14 (1981).

> her injuries vindicates both the deterrence and the compensation objectives of the ADEA.

513 U.S. at 358. Indeed, the Court stressed that parallels between the ADEA and Title VII include their remedial goals, such as "[c]ompensation for injuries caused by the prohibited discrimination." *Id.* By no means did the Court qualify this commonality in light of the ADEA's pre-suit administrative enforcement process. Rather, the Court also cited as common objectives of the two laws both "[d]eterrence" and their role "as a 'spur or catalyst' to cause employers 'to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges' of discrimination . . . ." *Id.* (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-418 (1975)). Plainly, monetary relief for ADEA retaliation, including damages other than for lost wages, would contribute to achieving the vindication of each of these goals.

A variety of other factors — this Court's jurisprudence, post-*Dean* amendments to the ADEA, the ADEA's history, and the post-1991 operation of Title VII— all fit poorly with the rationale the panel cited as demonstrating the ADEA's supposed "preference for administrative resolutions." *Vaughan*, 849 F.3d at 592. In particular, the Fifth Circuit, following *Dean*, mischaracterized the ADEA as distinctly focused on administrative enforcement because the Act originally provided for a 60-day period of "notice" to the Secretary of Labor before any lawsuit could be filed and also for the automatic termination of an individual's right to sue if the

agency chose to initiate litigation within 60 days. *Dean*, 559 F.2d at 1038-39. To be sure, this Court has noted that the ADEA requires an "aggrieved individual to file a charge before filing a lawsuit." *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 403-04 (2008). But significantly, the Court has added that the ADEA "does not condition the individual's right to sue upon the agency taking any action." *Id.* at 404. Rather, a potential litigant must merely wait 60 days after filing a charge with the Equal Employment Opportunity Commission (EEOC) to file the suit. 29 U.S.C. § 626(d)(1). In light of this, the Court of Appeals' failure to explain why two specific features, among many of the ADEA's administrative enforcement process, decisively disfavor money damages for retaliation in federal litigation is particularly defective.

Regarding the EEOC's (formerly the Department of Labor's) power to take charge of ADEA litigation, the question arises whether the Fifth Circuit really believes—or ever had a valid basis for believing—that Congress intended federal agency litigation to be the principal form of ADEA enforcement in federal court. Certainly in recent years, that proposition is without foundation. The EEOC's ADEA litigation enforcement program over the past twenty years has been miniscule in comparison to number of ADEA charges filed.[10] The

[10] In fiscal years 1997 through 2016, the agency filed suit in no more than 50 (and as few as 2) new ADEA cases in any year, and resolved between 12 and 51 such cases in any year. *See* EEOC, AGE DISCRIMINATION IN EMPLOYMENT ACT (Charges filed with EEOC) (includes concurrent charges with Title VII, ADA

same is almost certainly true of EEOC ADEA litigation compared to private ADEA litigation.[11]

Indeed, the ADEA's scheme arguably demonstrates *more* of a preference for private enforcement than otherwise similar civil rights statutes that permit damages beyond lost wages. In particular, since the Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1079 (Nov. 21, 1991), Title VII has permitted recovery of emotional distress damages in retaliation cases, despite never having had a provision like the ADEA's permitting an individual to initiate litigation in federal court after a time certain following submission of a charge to the EEOC. In fact, under Title VII, an individual has never been entitled to file a lawsuit until he or she receives a "right to sue" notice from the agency, *see* 42 U.S.C. § 2000e-5(f)(1), an event that in recent years more likely than not has taken more than six months.[12] By comparison, the so-called ADEA 60-day

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and EPA) FY 1997 through FY 2016, https://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm. In the same period, ADEA charges filed with the agency ranged from 14,141 in FY 2000 to 24,582 in FY 2008. *See* EEOC LITIGATION STATISTICS, FY 1997 through FY 2016, https://www.eeoc.gov/eeoc/statistics/enforcement/adea.cfm.

[11] For example, a Lexis search for federal district court cases containing the term ""ADEA claim" for the first five months of 2017 yields 152 cases brought by a private plaintiff and none by the EEOC.

[12] *See* EEOC, FY 2011 PERFORMANCE AND ACCOUNTABILITY PERFORMANCE RESULTS 4, https://www.eeoc.gov/plan/2011par_performance.cfm (less than 50% of "private sector charges

"notice" period works far more like a preference for litigation than one for administrative resolution.[13]

In any event, as this Court recognized in *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), one of Congress's concerns in crafting section 7(d) of the ADEA had nothing to do with the relative merits of administrative versus private enforcement. 29 U.S.C. § 626(d). Rather, Congress sought to expedite state and federal agency processing of age bias charges so that complainants could take full advantage of the opportunity to pursue litigation in federal court, if necessary. *Evans*, 441 U.S. at 757 (quoting 113 Cong. Rec. 7076 (1967) (statement of Sen. Javits) and explaining that "the delay inherent in sequential [processing of state and federal charges under Title VII, as opposed to concurrent agency] jurisdiction [under the ADEA] is particularly prejudicial to the rights of 'older citizens . . . .'"). The Fifth Circuit never has given this factor due weight in analyzing ADEA remedies.

Further cause to grant certiorari exists here in light of this Court's reaffirmance in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) that administrative remedies specified in Title IX of the Education Amendments of 1972 to address sex

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[we]re resolved in 180 days or fewer" in fiscal years 2008 through 2011).

[13] Moreover, the reference to "notice" is no more. In 1978, shortly after *Dean*, in amending 29 U.S.C. § 626(d), Congress deleted the word "notice." Pub. L. No. 95-256, § 4(a), (b)(1), (c)(1), 92 Stat. 190, 191 (April 6, 1978).

discrimination by schools receiving federal funds do not preclude a private individual from filing suit to obtain compensatory damages. *Id.* at 70-73 (discussing 20 U.S.C. §§ 1681-1688 (2012); *see also Cannon v. Univ. of Chicago*, 441 U.S. 677, 704-706, 710-712 (1979) (finding unpersuasive asserted evidence of "inconsistency between [a] private remedy and [a] public remedy" under Title IX). *Franklin* explained that "[i]n the years before and after Congress enacted [Title IX], the Court followed a common-law tradition [and] regarded the denial of a remedy as the exception rather than the rule." 503 U.S. at 72 (internal quotation marks omitted). The *Franklin* Court also found no evidence, after the announcement of *Cannon,* of Congressional "inten[t] to limit the remedies available in a suit brought under Title IX." *Id.* at 71. As a result, *Franklin* rejected limiting remedies to enforce Title IX's private right of action to back pay and prospective relief. *Id.* at 75-76.

Franklin's application of "the traditional presumption in favor of appropriate relief," including damages other than lost wages, 503 U.S. at 73, calls for re-examination of the Fifth Circuit's inconsistent analysis of the ADEA, which was enacted shortly before Title IX, and the 1977 FLSA Amendments, which Congress enacted shortly prior to its initial decision finding a public remedy under Title IX. That is, *Franklin* poses the question why the ADEA and the FLSA, read together in proper historical context, should not afford victims of ADEA retaliation compensatory damages as a component of "legal and equitable relief as may be appropriate to effectuate

the purposes of" both laws. *See* Pet. at 1-3 (reproducing 29 U.S.C. §§ 626(b) and 215(b)(3)). Now is the time for the Court to answer that question.

CONCLUSION

For the reasons noted above and in the Petition, certiorari should be granted.

Respectfully Submitted,

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