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Brief of Petitioner, Engquist v. Oregon Dept. of Agriculture, No. 07-474 (U.S. Feb. 20, 2008)

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No. 07-474

IN THE

Supreme Court of the United States

ANUP ENGQUIST,

Petitioner,

v.

OREGON DEPARTMENT OF AGRICULTURE, JOSEPH (JEFF) HYATT, JOHN SZCZEPANSKI,

Respondents.

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

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QUESTION PRESENTED

Whether traditional equal protection "rational basis" analysis under *Village of Willowbrook* v. *Olech*, 528 U.S. 562 (2000), applies to public employers who intentionally treat similarly situated employees differently with no rational bases for arbitrary, vindictive or malicious reasons.

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OPINIONS BELOW

The opinion of the Ninth Circuit (Pet. 12a-69a) is reported at 478 F.3d 985.[1] The April 8, 2004 opinion of the District Court, granting in part and denying in part Respondents' summary judgment motion (JA 13), is available at 2004 WL 792790. The September 14, 2004 opinion of the District Court, denying Respondents' second summary judgment motion judgment (JA 49), is available at 2004 WL 2066748. The judgment of the District Court (Pet. 8a-11a) is not reported.[2]

JURISDICTION

The Ninth Circuit denied Petitioner's petition for rehearing and rehearing *en banc* on July 12, 2007. Pet. 70a-71a. The certiorari petition was timely filed on October 5, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

APPLICABLE CONSTITUTIONAL PROVISION

The Fourteenth Amendment provides, in pertinent part:

> [N]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.

---

[1] The Ninth Circuit dismissed the Oregon Department of Agriculture from the appeal. "Respondents" herein refers to Joseph Hyatt and John Szczepanski, unless otherwise indicated.

[2] "ER" is Respondents' Excerpts of Record in the Ninth Circuit. "SER" is Petitioner's Supplemental Excerpts of Record in the Ninth Circuit.

STATEMENT

A. Overview

Petitioner Anup Engquist worked at the Oregon Department of Agriculture. Her complaint claimed, *inter alia*, that Respondents Joseph Hyatt and John Szczepanski caused her to lose her job "for arbitrary, vindictive, and malicious reasons in violation of the Equal Protection Clause." JA 10, ¶ 26. This claim was made under the class-of-one doctrine. See, *e.g.*, *Village of Willowbrook* v. *Olech*, 528 U.S. 562 (2000) (per curiam). Following trial, the jury found that Respondents had intentionally treated Engquist "differently than others similarly situated . . . without any rational basis and solely for arbitrary, vindictive, or malicious reasons." Pet. 3a-4a. The Ninth Circuit reversed, holding that the Equal Protection Clause does not protect classes of one in public employment. *Id.* at 19a-27a.

B. Facts

Anup Engquist is a woman born in India.[3] In December 1992, she was hired by the Oregon Department of Agriculture ("ODA") to work as an international food standards specialist in the Export Service Center ("ESC"), a laboratory within ODA's Laboratory Services Division ("LSD"). Pet. 14a-15a. The ESC is one of two laboratories in the LSD, and the LSD is one of ten ODA divisions.[4]

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[3] The facts set forth are taken from the extensive record of the eleven-day jury trial.

[4] Established in 1990, the ESC was initially funded by grants with the expectation that it would become self-sustaining, a goal it reached in two years. Under Corristan and Engquist, ESC was highly successful, SER 212-13, generating a profit for the State in excess of $250,000 in 18 months. After Corristan and

Engquist was hired by Norma Corristan, the LSD administrator and a Mexican-American. The ESC manager reported to Corristan. Engquist's job was to generate business for the ESC and to consult with the ESC's "customers," companies that export food overseas. Engquist developed an international database of food additives, laws, and regulations; marketed the ESC's services, which included testing and certifying exported goods and providing consulting services for customers; and created food safety training and scientific exchange programs. ER 131-34.

Respondent Joseph Hyatt was hired in 1990 as a chemist and made it difficult for Engquist to do her job. He did not communicate with her or give her information necessary for her job, and made false, derogatory statements about her to others. SER 163-64. Hyatt took it upon himself to monitor her, even following her when she went to the ladies room. *Id.* at 166. He told other employees she was absent from her work location when she was present and that she lied on time sheets. *Id.* Hyatt conceded that he made false, derogatory statements to others about Engquist. *Id.* at 254.

In response, Corristan initiated disciplinary action against Hyatt. She required him to attend anger management and diversity training programs. Corristan testified that Hyatt told her that "it made him angry to have to go." SER 194.

Afterwards, Corristan heard Hyatt comment that Engquist did not do anything, did not work, did not show up for work, and that whatever she did was

Engquist were terminated, ESC's operation generated a loss to the State in excess of $662,000. SER 155-57.

insignificant—all claims Corristan believed were false. SER 195-96.

In December 1999, when the incumbent ESC manager left, Hyatt asked Corristan to promote him to that position. Corristan refused on the ground that he was unready to be a manager. SER 197. Denied promotion to be ESC manager a second time, Hyatt transferred from the LSD to the Administrative Services Division to work as a systems analyst in Information Services. Hyatt continued to work in the same building as Engquist, and to torment her.

Respondent John Szczepanski became ODA's Assistant Director in 2001, and oversaw the LSD. Pet. 15a. At the time, about thirty employees worked in the LSD, including about thirteen in the ESC. Trial Tr. Vol. 5, 15:6-10; *id.* at 16:23-17:2.

In June 2001, Szczepanski removed the ESC from Corristan's supervision and assumed control of the laboratory. Szczepanski contemporaneously told a customer that Corristan and Engquist "would be gotten rid of." SER 181-82. In September 2001, Hyatt told a coworker that Szczepanski had asked him to prepare a personnel plan and that the two of them were working on "getting rid of Norma and Anup." *Id.* at 188-89. Hyatt said the plan was confidential because he did not know whom to trust. *Id.*

Hyatt then sent Szczepanski an email urging him to sharply limit Corristan's and Engquist's duties. He told Szczepanski to remove Corristan from all ESC responsibilities and to eliminate Engquist's management responsibilities. Hyatt even wrote a "draft letter" for Szczepanski to send to Corristan, advising Szczepanski to "put it into your own words." SER 139. Szczepanski did as Hyatt suggested. These

communications are remarkable because at the time Hyatt did not work for LSD. *Id.* at 221-22, 259-60.

Meanwhile, since December 1999, Corristan, Engquist, and one other employee had jointly assumed the duties of the departed ESC manager. After assuming control of the ESC, Szczepanski moved to fill the position. Hyatt, Engquist, and a third employee applied for the position. Szczepanski chose Hyatt, ignoring the recommendation of an independent expert and deviating from the list of official interview questions, effective October 2001. Trial Tr. Vol. 6B, 31:15-21; *id.* at 32:7-13; Trial Tr. Vol. 4B, 91:13-92:11; Pls.' Exs. 30-31.

Almost immediately upon his appointment, Hyatt began curtailing Engquist's duties, excessively monitoring her performance and circulating false statements and innuendo to others. For example, Hyatt twice lied, telling a coworker that Enqgust was falsifying her time cards. He sent emails falsely implying that Engquist was spending work-time doing crossword puzzles, suggesting that she was abusing sick leave, and insinuating that she was using state resources to start a private business.[5] SER 143-49.

Szczepanski and Hyatt ultimately eliminated Corristan's and Engquist's positions. Szczepanski dismissed Corristan in December 2001 and Engquist in February 2002. They claimed that their actions were taken for budgetary reasons, but Engquist introduced evidence, which the jury credited, that

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[5] Engquist introduced a mountain of venomous writings and emails by Szczepanski and Hyatt expressing their antipathy toward her and Corristan. These statements were made both before and after Hyatt's promotion. A sampling is found at SER 139-57.

this was not a credible or rational justification for dismissing her and Corristan rather than others in LSD. Pursuant to her collective bargaining agreement, Engquist was given the opportunity to "bump" into another position at her level, but she was found unqualified for the only other such position. She declined to move to a position below her level.

In sum, Szczepanski gave Hyatt the promotion that Corristan had denied him, and Hyatt and Szczepanski terminated both Corristan, who had disciplined Hyatt, and Engquist, who had been a thorn in Hyatt's side for years. Across ODA's ten divisions, Corristan and Engquist were the only full-time employees who lost their jobs during this period (though other employees were subsequently dismissed). Referring by name to Corristan and Engquist, Hyatt afterward stated that he "couldn't afford to get rid of any more female minorities because he had already gotten rid of two." SER 185.

C. District Court Proceedings

In December 2002, Engquist filed this action, naming as defendants the ODA, Szczepanski, and Hyatt, and asserting a number of claims.[6] As part of her equal protection claim, Engquist alleged that Szczepanski and Hyatt had taken adverse employment actions against her "for arbitrary,

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[6] She alleged harassment, discrimination and retaliation against ODA based on race, color, sex, and/or national origin in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a), 2000e-3(a). She further claimed that Hyatt and Szczepanski engaged in discrimination based on "race, color, sex, national origin, and/or for arbitrary, and malicious reasons" in violation of the Equal Protection Clause. She also set forth claims under 42 U.S.C. § 1981, the Due Process Clause, and based on the tort of intentional interference with contract. JA 5-12.

vindictive, and malicious reasons in violation of the Equal Protection Clause." JA 10.

After discovery, Respondents moved for summary judgment. Their motion did not address Engquist's class-of-one claim. In April 2004, the District Court granted Respondents' motion in part and denied it in part.[7]

Respondents subsequently filed a motion for partial summary judgment on the class-of-one claim. In response, Engquist argued that, among their approximately 30 LSD co-workers—whom Engquist presented as the relevant comparators for purposes of her class-of-one claim—only she and Corristan were targeted for elimination for arbitrary, malicious and vindictive reasons. The District Court denied Respondents' motion:

> Under the theory urged by plaintiff, she must show that she was singled out as a result of animosity on the part of Hyatt and Szczepanski. To do so, she must show that their actions were spiteful efforts to punish her for reasons unrelated to any legitimate state objective. As with any equal protection claim, plaintiff must also demonstrate that she was treated differently than others who were similarly situated . . . .
>
> Hyatt was allegedly working on a plan with Szczepanski to terminate plaintiff's position. . . . . There is evidence that plaintiff performed her job

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[7] The District Court dismissed that portion of Engquist's Title VII and equal protection claims alleging unlawful harassment. As to her § 1981 claim, the court dismissed the portion alleging violations based on her gender. As to her due process claim, the court dismissed the portion alleging violations of procedural due process. The court denied the remainder of the motion. JA 13-48.

> satisfactorily and that her termination was not the result of "reorganization" or budgetary cuts. Based on this same evidence, there are genuine issues of fact as to whether plaintiff was singled out as a result of animosity on the part of Hyatt and Szczepanski, thereby violating her equal protection rights. Accordingly, the court concludes that plaintiff's "class of one" theory survives and defendants' motion is denied.

JA 58-59 (citations omitted).

Engquist's case proceeded to an eleven-day trial. At the close of the evidence, the District Court instructed the jury:

> To bring a successful Equal Protection claim under the "class of one" doctrine, Plaintiff must prove that defendants treated her differently than others similarly situated.
>
> Second, that the different treatment caused the denial of Plaintiff's promotion, the exercise of her bumping rights or the termination of her employment.
>
> Third, that no rational basis exists for the difference in treatment.
>
> And fourth, that Defendant took these actions for arbitrary, vindictive, or malicious reasons.

JA 63-64.

The jury unanimously returned a verdict for Engquist on her class-of-one claim. The jury also returned verdicts for Engquist on her substantive due process and intentional interference with contract

claims. Finally, the jury also rejected Respondents' qualified-immunity defense. Pet. 1a-6a.[8]

D. Appeal

In a 2-1 decision, the Ninth Circuit reversed, holding that "the class-of-one equal protection theory is not applicable to decisions made by public employers." Pet. 19a. The majority (Tashima and Graber, JJ.) began by offering a distinction between the government acting as a proprietor managing its own internal affairs and as a sovereign making and applying laws and rules to private parties. *Id.* at 23a-24a.

After noting limits on public employee rights under the First and Fourth Amendments, the majority concluded that "[t]he class-of-one theory of equal protection is another area of law where the rights of public employees should not be as expansive as the rights of ordinary citizens." Pet. 25a. The court did not reach the other grounds for Respondents' appeal (*e.g.*, the sufficiency of the evidence as to "similarly situated" employees, and qualified immunity).

Judge Reinhardt dissented. First, he stated that he would have adopted the approach of every other circuit to consider the issue. Pet. 60a-61a. Second, he explained why the majority's failure to allow class-

---

[8] Before Engquist's trial in federal court, Corristan sued Respondents in Multnomah County Circuit Court. In November 2003, the jury awarded Corristan $1.1 million in damages. SER 158. The jury found for Corristan, *inter alia*, on her claims that Hyatt and Szczepanski violated her equal protection rights through different treatment without a rational basis for arbitrary, vindictive, or malicious reasons; that Hyatt discriminated against Corristan on the basis of gender or ethnicity; and that Hyatt intentionally interfered with Corristan's employment.

of-one claims in public employment was inconsistent with precedent. *Id.* at 61a-62a. Third, he demonstrated that the majority's concern that the doctrine would eliminate at-will employment was misplaced, explaining that at-will employment did not mean that the "government may freely treat its employees maliciously and irrationally." *Id.* at 61a-62a. Fourth, he showed that the other circuits had avoided a flood of litigation by applying principles that cabined the application of the claim. *Id.* at 65a.

SUMMARY OF ARGUMENT

I. The Equal Protection Clause contains one simple command: No state shall "deny to *any person* within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1 (emphasis added). These majestic words mean what they say. The Clause does not limit its mandate to "discrete or insular minorities," "fundamental rights," or "suspect classifications"; it protects "persons." This Court has recognized this principle from its pronouncement in *Missouri* v. *Lewis*, 101 U.S. 22, 31 (1879), that the Clause "means that no person or class of persons shall be denied the same protection," to its holding in *Village of Willowbrook* v. *Olech*, 528 U.S. 562, 564 (2000) (per curiam), that a violation of the Clause can exist if a single "plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."

In holding that "the class-of-one theory of equal protection is inapplicable to decisions made by public employers with regard to their employees," (Pet. 19a), the divided panel below not only ignored the Constitution's plain text and its interpretation by this Court, it also jettisoned a cardinal rule of

constitutional law. Instead of tailoring a public employee's constitutional right to fit the context, the panel simply decreed that the right did not exist. The panel thereby rejected this Court's approach to public employment, in areas as diverse as free speech, search and seizure, and due process. In each of these areas, this Court has been careful to "ensure that citizens are not deprived of fundamental rights by virtue of working for the government." *Connick* v. *Myers*, 461 U.S. 138, 147 (1983). For this reason alone, the decision below should be reversed.

II. Reversal is appropriate for another reason specific to the Equal Protection Clause. This Court has repeatedly held that "strict scrutiny" review is appropriate for racial classifications in the public employment context. It has not distinguished between the public employment and all other settings in the application of strict scrutiny. Yet the Ninth Circuit has now held that a central aspect of the Equal Protection Clause, rational-basis scrutiny, protects only some public employees, some of the time. There are not two Equal Protection Clauses, one for the population at large (providing both strict scrutiny and rational-basis review) and another for public employees (providing only the former). The divided panel below erred in concluding otherwise.

Under the Constitution's text and this Court's doctrine, there is nothing unique about equal protection claims brought by a small group or a single individual, a so-called "class of one." If a *state legislature* enacted a law that singled out a public employee for unequal treatment without any rational basis, that law would violate the Clause despite the narrowness of its application and this Court's trust in the democratic process to remedy imprudent legislative measures. If a *state actor* intentionally

singles out a public employee for unequal treatment without a rational basis, that decision violates the Clause as well.

III. In practice, the weighty burden a plaintiff must shoulder under rational-basis review effectively limits successful class-of-one claims against public employers. In light of the wide range of legitimate government objectives in the workplace, public employers will usually be able to proffer a rational basis for their differential treatment of an employee. Nine circuit courts have recognized class-of-one claims for public employees. None has faced the "flood of litigation" or the parade of horribles imagined by the divided panel below which rewrote the Constitution on grounds of policy.

Instead, these courts of appeals have weeded out insubstantial equal protection claims simply by following this Court's time-honored approach. To succeed, a class-of-one plaintiff must establish "that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Olech*, 528 U.S. at 564. The Court's standard places significant burdens on a plaintiff. She must prove that (1) the public employer acted intentionally; (2) she was treated differently from other similarly situated employees; and (3) the difference in treatment was not rationally related to any legitimate government objective.

Although *Olech* does not require that a class-of-one plaintiff allege that the unequal treatment he received was the result of animus or vindictiveness, several courts of appeals have observed that a plaintiff may need to establish one of these factors to surmount rational basis review. For example, animus may be necessary to show that the

government's unequal treatment was intentional, or that the plaintiff was treated differently from similarly situated employees, or that the government can offer no rational basis for its classification of the employee.

The application of the rational basis test to class-of-one employment plaintiffs by nine different courts of appeals has fulfilled the Clause's guarantee without unduly burdening everyday decisions of government employers. Although class-of-one suits by public employees rarely succeed, in this case a jury specifically found that Engquist carried the burden of proving that the Respondents: (1) "intentionally," (2) treated her "differently than others similarly situated"; (3) "without any rational basis," and (4) "solely for arbitrary, vindictive, or malicious reasons." (Pet. 3a-4a.) The jury's unanimous judgment should be respected.

Equal protection rights should not—and need not—be categorically withdrawn in the public employment setting. The proper path is to leave room for courts to apply the set of tested rules that have proven successful in discouraging frivolous cases, while permitting meritorious ones.

Finally, the Court of Appeals' suggestion that following the Constitution might open "floodgates" is even more attenuated than that argument was in *Olech*. Government officials make millions of zoning and licensing decisions each year, and there has been no flood of class-of-one claims in those contexts. And, as noted, no flood of such claims burdens government employers in the circuits where such claims are allowed. This experience, while not directly relevant to the interpretation of constitutional text, is yet another reason why this Court should reject the speculative reasoning of the Ninth Circuit here.

ARGUMENT

I. THE FOURTEENTH AMENDMENT PROHIBITS STATE ACTORS FROM DISCRIMINATING AGAINST INDIVIDUALS WITHOUT A RATIONAL BASIS.

A. The Text of the Equal Protection Clause Protects All Persons From Unequal Treatment.

The Equal Protection Clause is simple, clear, and direct: "No state shall . . . deny to *any person* within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1 (emphasis added). The text does not limit itself to certain classes, nor does it exempt public employers from its command. Whoever the state actor and whatever the state action, the Clause demands that government treat all similarly situated persons equally unless there is a rational basis for doing otherwise. See, *e.g.*, *Village of Willowbrook* v. *Olech*, 528 U.S. 562, 564-65 (2000) (per curiam); *Wade* v. *United States*, 504 U.S. 181, 185-87 (1992); *City of Cleburne* v. *Cleburne Living Ctr.,* 473 U.S. 432, 439 (1985).

The Equal Protection Clause thus "protect[s] persons, not groups." *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 227 (1995) (emphasis omitted); see also *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948) ("The rights created by . . . the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."). The Clause prohibits the government from singling out individuals for harsh treatment without a rational basis, even if no other person falls within the same "classification." *Olech*, 528 U.S. at 564-65. In short, as this Court recently reaffirmed in *Olech*,

the text contemplates that an individual may bring a claim as a "class of one." *Id.*

B. The History of the Equal Protection Clause Demonstrates That the Clause Was Originally Understood To Protect Individual Persons, Not Just Classes.

Olech's understanding that the Equal Protection Clause protects individuals from discrimination by a state actor is supported by that Clause's history. The Fourteenth Amendment was enacted in large part to support and validate the Civil Rights Act of 1866, ch. 31, 14 Stat. 27, which declared that "all persons born in the United States . . . are hereby declared to be citizens of the United States" and that "such citizens, of every race and color, . . . shall have the same right" as others to "make and enforce contracts" and enjoy the "full and equal benefit of all laws and proceedings for the security of person and property." *Id.* § 1. The Civil Rights Act had been passed under the Thirteenth Amendment, which authorized Congress to enforce the constitutional prohibition on slavery through legislation. Cong. Globe, 39th Cong., 1st Sess. 474, 1124 (1866) (statements of Sen. Trumbull and Rep. Cook); see U.S. Const. amend. XIII, § 2. However, when some legislators expressed doubt that the Act could reasonably be construed as a remedy against slavery, its proponents responded by advancing the Fourteenth Amendment, with its broader guarantee of equal protection for all. Cong. Globe, 39th Cong., 1st Sess. 1294, 2465 (1866) (statements of Rep. Wilson and Rep. Thayer); see also *Hurd* v. *Hodge*, 334 U.S. 24, 32-33 (1948).

After adoption of the Amendment, Congress extended the Civil Rights Act's protections not only to "citizens, of every race and color," 1866 Act § 1, but to all "persons," Enforcement Act of 1870, ch. 114, 16

Stat. 140, § 16. This change reflects a broad conception of the Clause as a guarantor of *personal* rights against all forms of invidious discrimination. See *United States* v. *Wong Kim Ark*, 169 U.S. 649, 695 (1898).

Statements by the Framers underscore the original understanding that the Clause protects individuals against discriminatory treatment. Representative John Bingham, the principal architect of the Clause, emphasized that the constitutional right is "personal" and extends to "every man." Cong. Globe, 39th Cong., 1st Sess. 1094 (1866).

This Court's decisions, starting from its earliest pronouncements, have consistently embraced these principles. *Missouri* v. *Lewis*, 101 U.S. 22 (1879), which concerned a challenge to state court jurisdictional restrictions, emphasized that the Equal Protection Clause protects both "persons and classes of persons." *Id.* at 30. The Clause "means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons *or* other classes in the same place and under like circumstances." *Id.* at 31.

Similarly, in *Barbier* v. *Connolly*, 113 U.S. 27 (1884), the Court held that the Clause

> undoubtedly intended . . . that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; . . . that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances. . . .

Id. at 31.

The Court made the same point in *Atchinson, Topeka & Santa Fe R.R.* v. *Mathews*, 174 U.S. 96, 104-05 (1899):

> [T]he equal protection guarantied by the constitution forbids the legislature to select a person, natural or artificial, and impose upon him or it burdens and liabilities which are not cast upon others similarly situated. . . . Neither can it make a classification of individuals or corporations which is purely arbitrary. . . .

Neither *Lewis* nor *Barbier* nor *Atchinson* uses the phrase "class of one," but all recognize the underlying principle that individuals, not just classes, are entitled to equal protection.

C. The Fourteenth Amendment Protects Individuals From Unequal Treatment by State Officials and Agencies.

This Court made clear early on that the Equal Protection guarantee protects against discrimination arising not only from a legislative act but also from the conduct of an administrative official. *Ex parte Virginia*, 100 U.S. 339, 347 (1880), held that the Fourteenth Amendment "must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws." *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886), found that although the law at issue in the case was "fair on its face, and impartial in appearance," it had been "applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances." *Id.* at 373-74.

At the start of the next century, the Court expressly found the Fourteenth Amendment applicable to all state officials:

> The provisions of the 14th Amendment are not confined to the action of the state through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the state acts, and so it has been held that whoever, by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition; and as he acts in the name of the state and for the state, and is clothed with the state's powers, his act is that of the state.

Raymond v. *Chicago Union Traction Co.*, 207 U.S. 20, 35-36 (1907).

In *Sunday Lake Iron Co.* v. *Wakefield Township*, 247 U.S. 350 (1918), and *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441 (1923), the Court held that higher tax assessments imposed by state officials against a single company, but not against similarly situated businesses, would violate the company's right to equal protection if the disparate treatment was "intentional and arbitrary." *Sunday Lake*, 247 U.S. at 352; accord *Sioux City*, 260 U.S. at 445-47; see also *McFarland* v. *Am. Sugar Ref. Co.*, 241 U.S. 79, 86 (1916). Likewise, in *Snowden* v. *Hughes*, 321 U.S. 1 (1944), the Court recognized that "unequal application" of an otherwise neutral law constitutes a denial of equal protection if it intentionally targets "a particular class or person" or if the state official has a "discriminatory design to favor one individual or class over another." *Id.* at 8. For "the Fourteenth Amendment does not permit a state to deny the equal

protection of its laws because such denial is not wholesale." *Id.* at 15 (Frankfurter, J., concurring).

More recently, in *Allegheny Pittsburgh Coal* v. *County Commission*, 488 U.S. 336, 345-46 (1989), this Court held that state officials' imposition on a landowner of an increased tax burden, not shared by similarly situated landowners, violated equal protection even though the governing statute was neutral on its face. See also *Hillsborough* v. *Cromwell*, 326 U.S. 620, 623 (1946); *Nordlinger* v. *Hahn*, 505 U.S. 1, 16 n.8 (1992) ("the protections of the Equal Protection Clause are [not] any less when the classification is drawn by legislative mandate . . . than by administrative action . . . ."); cf. *Esmail* v. *Macrane*, 53 F.3d 176, 180 (7th Cir. 1995) (Posner, J.) ("A class of one is likely to be the most vulnerable of all.").

This Court's protection of individuals from discriminatory treatment by government officials has extended well beyond the realms of regulation and taxation. For example, in *Wade*, 504 U.S. 181, a criminal defendant claimed that the prosecutor violated his right to equal protection by failing to move for a reduction in sentence in light of his cooperation. While the Court acknowledged that prosecutors must have wide discretion in such decisions, the Court held the defendant entitled to relief "if the prosecutor's refusal to move was not rationally related to any legitimate Government end." *Id*. at 186. Notwithstanding the obvious potential for abuse, the Court held that the same equal protection analysis in *Sioux City* and *Allegheny Pittsburgh* should apply to cases in other contexts raising a class-of-one claim, even when the government has extremely broad discretion and even when litigants possess the most obvious incentives to litigate.

All these decisions stand for the proposition—reflected in the constitutional text, contemplated by its Framers, and understood consistently by this Court—that the Equal Protection Clause reaches all forms of alleged discrimination by state actors, whether premised on disparate classification of a group or discrimination against a single individual.

D. *Olech* and Subsequent Precedent Follow From the Text and History of the Fourteenth Amendment.

Olech's holding flowed inexorably from the Constitution's text, its original meaning, and this Court's long history of protecting individuals against unequal treatment by state actors. The plaintiffs in *Olech* were homeowners who claimed that the local government's demand for a 33-foot easement over their property in exchange for a municipal water connection, when other homeowners had been required to provide only a 15-foot easement to receive such services, violated the Equal Protection Clause. 528 U.S. at 563. They alleged that the municipality's differential treatment of them was "irrational and wholly arbitrary," and motivated by ill will, occasioned by prior litigation involving the parties. *Id.* The plaintiffs did not, however, assert membership in a particular group or suggest that the discrimination at issue resulted from a broadly applicable invidious classification. *Id.* at 563-64.

This Court upheld the claim. *Id.* at 564-65. In a per curiam opinion, citing *Sioux City* and *Allegheny Pittsburgh*, it stated: "Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Id.* "Whether the complaint

alleges a class of one or of five is of no consequence because we conclude that the number of individuals in a class is immaterial for equal protection analysis." *Id.* at 564 n.*. Because the complaint in *Olech* alleged intentionally disparate treatment, which was objectively "irrational and wholly arbitrary," this Court allowed the plaintiffs to proceed. *Id.*

Olech represents the logical application of this Court's settled precedents. Cases from *Atchinson* through *Sioux City* to *Wade* recognized that whatever the context, intentionally disparate treatment of an individual, no less than discriminatory classification of a group, violates the Equal Protection Clause if it is not rationally related to legitimate state goals. *Olech* simply applied these principles and selected a phrase to describe them: "class of one." See *Cobb* v. *Pozzi*, 363 F.3d 89, 111 (2d Cir. 2003) ("[T]he Supreme Court did not depart from well settled equal protection principles in *Olech*. Rather, the *Olech* Court merely 'reaffirmed' that equal protection claims can be brought by a 'class of one.'" (citations omitted)).

In accordance with *Olech* and its predecessors, the courts of appeals have applied the class-of-one doctrine in a range of contexts. For example, they have applied it to claims by a family alleging that complaints of harassment were ignored because the dispute involved a friend of the police, *DeMuria* v. *Hawkes*, 328 F.3d 704 (2d Cir. 2003); by an individual banned from public gatherings for allegedly lewd dancing when other dancers were allowed to stay, *Willis* v. *Town of Marshall*, 426 F.3d 251 (4th Cir. 2005); by a landowner denied a construction permit when permits were granted to others, *Bell* v. *Duperrault*, 367 F.3d 703 (7th Cir. 2004); and by a real estate developer allegedly denied building

approvals, *Campbell* v. *Rainbow City*, 434 F.3d 1306 (11th Cir. 2006).

None of these opinions even questions whether the Equal Protection Clause applies, despite differences in context from *Olech*. None requires that the plaintiff allege membership in a particular class or group. Rather, all recognize that a valid class-of-one claim arises when the plaintiff is treated differently from others who are similarly situated in relevant respects without a rational basis.

Nine different circuits have applied rational-basis scrutiny to class-of-one claims in the public employment context in the wake of *Olech*.[9] Indeed, some circuits recognized class-of-one claims in the public employment context years before *Olech*.[10] These decisions adhere to the long-established principle that the Equal Protection Clause applies to all forms of discrimination, whatever the context and whoever the actor. See *Nordlinger*, 505 U.S. at 16 n.8; *Wade*, 504 U.S. at 185-87.

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[9] *See Stotter* v. *Univ. of Tex.*, 508 F.3d 812 (5th Cir. 2007); *Scarbrough* v. *Morgan County Bd. of Educ.*, 470 F.3d 250 (6th Cir. 2006); *Hill* v. *Borough of Kutztown*, 455 F.3d 225 (3d Cir. 2006); *Whiting* v. *Univ. of S. Miss.*, 451 F.3d 339 (5th Cir. 2006); *Stachowski* v. *Town of Cicero*, 425 F.3d 1075 (7th Cir. 2005); *Neilson* v. *D'Angelis*, 409 F.3d 100 (2d Cir. 2005); *Bizzarro* v. *Miranda*, 394 F.3d 82 (2d Cir. 2005); *Kirby* v. *City of Elizabeth City*, 388 F.3d 440 (4th Cir. 2004); *Howard* v. *Columbia Pub. Sch. Dist.*, 363 F.3d 797 (8th Cir. 2004); *Cobb*, 363 F.3d 89; *Wojcik* v. *Mass. St. Lottery Comm'n,* 300 F.3d 92 (1st Cir. 2002); *Hedrich* v. *Bd. of Regents*, 274 F.3d 1174 (7th Cir. 2001); *Giordano* v. *City of New York*, 274 F.3d 740 (2d Cir. 2001); *Bartell* v. *Aurora Pub. Schs.*, 263 F.3d 1143 (10th Cir. 2001); *Hilton*, 209 F.3d at 1005.

[10] *E.g.*, *Ciechon* v. *City of Chicago*, 686 F.2d 511 (7th Cir. 1982); *Zeigler* v. *Jackson*, 638 F.2d 776, 779 (5th Cir. 1981); *Batra* v. *Bd. of Regents*, 79 F.3d 717, 722 (8th Cir. 1996).

Of course, the Clause will be applied differently in different contexts. Employment decisions are influenced by a host of considerations not applicable in other circumstances, meaning that in practice it will likely be more difficult to prove a lack of rational basis for an employment decision. See *infra* Part III. But, regardless of *how* the Clause applies, it always applies.

In any context, whether zoning or criminal prosecution or public employment, the Equal Protection Clause prohibits intentional discrimination against an individual that lacks a rational basis. *Olech*, 528 U.S. at 564; *Wade*, 504 U.S. at 185-87. As we now demonstrate, the Ninth Circuit erred in holding that public employees, alone among those subject to state action, may intentionally be discriminated against without any rational basis for the differentiation whatsoever.

II. PUBLIC EMPLOYERS ARE STATE ACTORS AND PUBLIC EMPLOYEES ARE "PERSONS" ENTITLED TO "EQUAL PROTECTION OF THE LAWS."

There is no circumstance in which a person absolutely loses his or her rights under the Fourteenth Amendment. See, *e.g.*, *Wong*, 169 U.S. at 695 ("These provisions are universal in their application . . . ."). For every constitutional right that it has considered, including the Fourteenth Amendment, this Court has treated public employers as state actors. This Court has not treated public employment as a constitution-free zone, and has not set aside any provision of the Constitution simply because the state is acting as employer.

This result follows inexorably from the constitutional text: "The fourteenth amendment

imposes constitutional restrictions upon the 'States' as such, not upon the States acting in some capacities and not others." Robert Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. Rev. 1713, 1763 (1987). The government as employer still acts as a sovereign, and public employees are still citizens entitled to equal protection of the laws. *Collins* v. *City of Harker Heights, Tex.*, 503 U.S. 115, 119 (1992). Instead of reading into the Fourteenth Amendment a distinction that the text does not reveal, this Court has applied the Constitution in this realm to take into account the "*practical realities of government employment*," *Waters* v. *Churchill*, 511 U.S. 661, 672 (1994) (plurality), and the important need for "the efficient provision of public services," *Garcetti* v. *Ceballos*, 126 S. Ct. 1951, 1958 (2006).

The divided panel below abandoned this balanced approach. The need for efficiency exists in all arenas of government activity: in virtually every setting, the government must efficiently perform tasks to serve the public interest—in mandating easements, issuing licenses, and enforcing the law. In each instance, the government could conceivably operate more efficiently if its actions were not limited by the Constitution. In each instance, allowing a class-of-one equal protection claim could theoretically give rise to a multitude of claims; after all, governments impose easements, issue licenses, and enforce the law in millions of decisions every day. Yet, the government's interest in efficient operations has not been deemed sufficient justification to set the Constitution aside altogether, as the Ninth Circuit did here. This Court has not found that the government's needs justify completely abandoning

any constitutional constraint on the state's actions; it should not do so now.

A. The Constitution Applies to the Government as Employer.

The government is not exempt from constitutional limitations when it acts as employer. "[S]tate and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer." *Cafeteria & Rest. Workers Union* v. *McElroy*, 367 U.S. 886, 897-98 (1961). See also *Garcetti*, 126 S. Ct. at 1958. Indeed, this Court has recognized that its "responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government." *Connick*, 461 U.S. at 147.

This was not always the case. For the first half of the twentieth century, the "unchallenged dogma" was that "a public employee had no right to object to conditions placed upon the terms of employment." *Id.* at 143 (noting the superseded doctrine and collecting cases). Public employees who did "not choose to work on such terms [as set out by the government] . . . [we]re at liberty to retain their beliefs and associations and go elsewhere." *Adler* v. *Bd. of Educ.*, 342 U.S. 485, 492 (1952).

That rule—exempting the government from constitutional restraint in managing its employees—has long since been repudiated. "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Keyishian* v. *Bd. of Regents of SUNY*, 385 U.S. 589, 605-06 (1967) (internal quotation marks omitted). It is now firmly established that public employers are

state actors subject to the Constitution in their dealings with employees.[11] For decades, this Court has treated public employers as state actors for purposes of every constitutional claim it has considered.

For instance, in the context of freedom of speech and association, this "Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment." *Garcetti*, 126 S. Ct. at 1957; see also *City of San Diego* v. *Roe*, 543 U.S. 77, 80 (2004) (per curiam). Rather, the courts "arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering* v. *Bd. of Educ.*, 391 U.S. 563, 568 (1968); see also *Connick*, 461 U.S. at 142.

As was once true of this Court's First Amendment jurisprudence, public employees at one time were denied the Fourteenth Amendment guarantee of procedural due process. See*, e.g., Bd. of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 571 n.9 (1972). It is now clear, however, that public employees are entitled to due process. *Id.*; see also *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 540 (1985); *NCAA* v. *Tarkanian*, 488 U.S. 179, 192 (1988).

Consistent with its modern First Amendment precedent, this Court analyzes the public employee's

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[11] *Compare McAuliffe* v. *Mayor of New Bedford*, 29 N.E. 517, 517 (1892) (Holmes, J.) (a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman"), *with Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967) (stating that "policemen . . . are not relegated to a watered-down version of constitutional rights").

entitlement to due process with consideration for the efficiency concerns and needs of the government employer. This Court assesses whether due process has been denied by balancing "the private interest in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination." *Loudermill*, 470 U.S. at 542-43 (citing *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976)). But a state action that deprives government employees of liberty or property may nonetheless be "so irrational that it may be branded 'arbitrary,'" and violate the Due Process Clause. *Kelly* v. *Johnson*, 425 U.S. 238, 247-48 (1976).

It is equally settled that the Fourth Amendment's prohibition of unreasonable search and seizures applies to public employers. In *O'Connor* v. *Ortega*, 480 U.S. 709, 717 (1987), a plurality observed that "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer." See also *id.* at 730 (Scalia, J., concurring); *Nat'l Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 665 (1989). The public employer's interests are taken into account when courts assess the reasonableness of the search or seizure. See *id.* at 671.

A similar analysis applies to the Fifth Amendment right against self-incrimination. See *Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967) (the Fourteenth and Fifteenth Amendments "exten[d] to all, whether they are policemen or other members of our body politic"). In each of these contexts, this Court's has accommodated the needs of public employers without giving the government a blank check to make employment decisions, shorn of all constitutional restraint.

This Court has rejected the claims of judges, high executive officials and members of Congress that they are absolutely immune from liability for employment actions. In so doing, the Court has acknowledged that the government interest in effectiveness is counterbalanced by the "salutary effects that the threat of liability can have," and the "undeniable tension between official immunities and the ideal of the rule of law." *Forrester* v. *White*, 484 U.S. 219, 223 (1988). Instead of absolute immunity, the proper balance between the government's interest in effectiveness, and the employee's constitutional rights, is struck by qualified immunity in employment challenges. *Id.* at 230; *Harlow* v. *Fitzgerald*, 457 U.S. 800, 813 (1982). Qualified immunity balances rights and itself allows for the disposal of "insubstantial claims without resort to trial." *Id.* at 818. There is, in short, no circumstance in which government employers are or should be absolutely immune from a class of constitutional claims.

Finally, as discussed in the following section, it is axiomatic that the Equal Protection Clause constrains public employers. This Court has expressly recognized that if a public employer intentionally disadvantages a suspect class, the Clause requires strict judicial scrutiny.[12] See*, e.g.*, *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 273-74 (1986) (plurality); *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 273 (1979). It necessarily follows that public employers should be treated as state actors for

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[12] There is no fundamental right to government employment for purposes of the Equal Protection Clause. *See Mass. Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 313 (1976) (per curiam).

purposes of class-of-one claims which arise under precisely the same constitutional text.

This Court's jurisprudence thus uniformly treats public employers as state actors for constitutional purposes.

B. As Is True of All Other Constitutional Claims, Class-of-One Claims May Be Brought Against Government Employers.

Respondents bear a heavy burden. They must show why a single aspect of the Fourteenth Amendment's Equal Protection Clause—class-of-one claims—should be treated differently from every other constitutional right in the public-employment setting. As demonstrated above, this Court's practice is to apply the Constitution to public employers and to address concerns unique to the employment setting by delineating the cause of action to take those concerns into account. There is no basis, either in the text of the Equal Protection Clause or in this Court's cases, to depart from that practice.

As noted, *supra* at 14, the text of the Equal Protection Clause imposes constitutional restrictions on the States without qualification; it does not distinguish the State as "taker" of private property, from the State as "regulator," the State as "law enforcer," or the State as "employer." And, neither the court below nor Respondents have provided any reason for this Court to write this unprecedented proviso into the Clause.

Indeed, this Court has already rejected any such departure. In *Collins*, 503 U.S. 115 (1992), the widow of a sanitation worker who drowned in a sewer line sued under § 1983, claiming that the city violated her husband's liberty interests by not properly training

and warning regarding the risks of working in sewers. This Court rejected the court of appeals' distinction between a government acting as a sovereign with respect to a citizen and a government acting as a manager with respect to an employee:

> The Court of Appeals' analysis rests largely on the fact that the city had, through allegedly tortious conduct, harmed one of its employees rather than an ordinary citizen over whom it exercised governmental power. The employment relationship, however, is not of controlling significance. . . . *The First Amendment, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and other provisions of the Federal Constitution afford protection to employees who serve the government as well as to those who are served by them,* and § 1983 provides a cause of action for all citizens injured by an abridgment of those protections. Neither the fact that petitioner's decedent was a government employee nor the characterization of the city's deliberate indifference to his safety as something other than an "abuse of governmental power" is a sufficient reason for refusing to entertain petitioner's federal claim under § 1983.

Id. at 119 (emphasis added). *Collins* makes clear that the fact that a government acts as an employer (rather than a sovereign) may affect the balancing of constitutional interests, but it does not transform state action into something else or nullify the application of the Constitution. *Collins*' analysis alone mandates reversal of the decision below.

In addition, this Court has already recognized that the Equal Protection Clause protects a public employee, who is not part of any specially protected class, from irrational treatment by her public

employer. *Harrah Indep. Sch. Dist.* v. *Martin*, 440 U.S. 194 (1979). Martin, a teacher, was dismissed by the school board because she (along with three colleagues) did not comply with a continuing-education requirement. Because Martin "neither asserted nor established the existence of any suspect classification or the deprivation of any fundamental constitutional right," the Court found "the only inquiry is whether the State's classification is rationally related to the State's objective." *Id.* at 199 (internal citations and quotation marks omitted). Although this Court ultimately concluded that Martin was not "deprived of equal protection of the laws" because the school board's action was rationally related to a legitimate objective, *id.*, the critical point here is that this Court never questioned that the Equal Protection Clause protected Martin against irrational and unequal treatment at the hands of her public employer.

Martin and *Collins* share the same premise as *Olech*: The Clause protects persons from irrational or arbitrary state discrimination. This Court has repeatedly characterized its cases addressing constitutional claims subject to heightened scrutiny as forbidding arbitrary or irrational treatment of such employees, using the same language *Olech* uses to describe a class-of-one claim. See *Cafeteria Workers*, 367 U.S. at 897-98 ("We may assume that [the public employee] could not constitutionally have been excluded from [her workplace] if the announced grounds for her exclusion had been patently arbitrary or discriminatory . . . ."); *Wieman* v. *Updegraff*, 344 U.S. 183, 192 (1952) ("It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.").

Furthermore, in cases raising public employees' constitutional claims that do *not* call for strict scrutiny, this Court has employed the same formulation. See *Murgia*, 427 U.S. at 313; *Rutan* v. *Repub. Party of Ill.*, 497 U.S. 62, 98 (1990) (Scalia, J., dissenting) ("When dealing with its own employees, the government may not act in a manner that is 'patently arbitrary or discriminatory,' but its regulations are valid if they bear a 'rational connection' to the governmental end sought to be served.") (citations omitted).

In sum, this Court has held, repeatedly, that public employers are bound by the Equal Protection Clause for purposes of both strict scrutiny and rational-basis review. The text, history, and precedent interpreting the Clause prohibit exempting government employers alone from class-of-one liability.

C. The Ninth Circuit's Decision Should Be Reversed Because It Wrongly Equates Public and Private Employment.

In seeking an exception to the Court's usual practice of considering the employment setting as a factor in how (and not whether) to apply the Constitution to the state as employer, both Respondents and the divided panel below asserted that the state is not acting as a sovereign when it acts as employer. As demonstrated above, this view is plainly inconsistent with this Court's precedent.

Further, even when acting as an employer, the government remains the sovereign, capable of relating to its employees in ways that are impossible for private employers. For example:

- No private employer has the power to legislate the terms and conditions of employment for its employees, removing

their susceptibility to negotiation.

- No private employer has the power to enact a law forbidding strikes by employees holding particular positions critical to the company and to the public interest. But see Or. Rev. Stat. § 243.736 (2007).
- No private employer can fund its retiree benefits plans and programs with the public fisc. But see Or. Rev. Stat. § 238A.025 (2007).
- No private employer is entitled to sovereign immunity. In contrast, sovereign immunity ordinarily bars damages suits against states, even when important federal laws are at issue. See, *e.g.*, *Alden* v. *Maine*, 527 U.S. 706, 732-33 (1999); *Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000) (holding that the Age Discrimination in Employment Act does not abrogate sovereign immunity); *Bd. of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356 (2001) (holding that Title I of the Americans with Disabilities Act does not abrogate sovereign immunity).

Public employees' constitutional rights have never been abrogated in their entirety; they are, at most, qualified in some respects. Just as "[c]onstitutional protection against unreasonable searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer," *O'Connor*, 480 U.S. at 731 (Scalia, J., concurring), constitutional protection against illegitimate discrimination does not disappear merely because the government has the right to make rational decisions in its capacity as employer.

The Ninth Circuit ignored the fundamental distinction between limiting a constitutional right and eliminating it altogether. In an attempt to support its conclusion by analogy to the First and Fourth Amendment contexts, the Ninth Circuit recognized that "the Court has *limited* the rights of public employees as compared to ordinary citizens." Pet. 24a (emphasis added). Then, however, the panel abruptly transformed "limited" into "eliminated," thereby stripping public employees of the right of "every person within the State's jurisdiction" to be secure "against intentional and arbitrary discrimination." *Olech*, 528 U.S. at 564 (citation omitted).

Neither the text of the Equal Protection Clause nor this Court's cases suggest that public employers may intentionally, arbitrarily, and irrationally treat similarly situated persons differently. The Fourteenth Amendment exists as a limitation on state action, see *Lugar* v. *Edmondson Oil Co.,* 457 U.S. 922, 924 (1982), irrespective of the capacity in which the state acts.

Rather than eliminating constitutional constraints on states when they act as employers, this Court should do what it has done with respect to all other constitutional rights in the context of public employment—carefully delineate the class-of-one cause of action to protect the relevant government interests and the employee's constitutional rights.

III. PROPER APPLICATION OF RATIONAL BASIS REVIEW APPROPRIATELY LIMITS CLASS-OF-ONE CLAIMS BY PUBLIC EMPLOYEES.

Traditional class-of-one equal protection analysis requires a plaintiff to show that a public employer

has intentionally treated similarly situated employees differently for reasons that are not rationally related to any legitimate government interest. This requirement appropriately limits class-of-one claims, fully accommodates the government's interests as employer, and deters inappropriate and irrational government conduct that ill-serves the public's interest in fair and efficient government.

A. Plaintiffs Bear the Significant Burden of Proving Each Element of a Class-Of-One Claim.

To make out a successful class-of-one claim, a plaintiff must establish that: (1) the government treated him or her differently from other similarly situated persons; (2) the difference in treatment was intentional; and (3) the difference in treatment was not rationally related to any legitimate government purpose. See *Olech*, 528 U.S. at 564.

Each element of this claim is a significant hurdle for plaintiffs asserting class-of-one claims, and all must be satisfied for the plaintiff to prevail. Experience with such claims in the federal courts demonstrates that it is difficult for plaintiffs to prove the elements of a class-of-one claim; only a handful of such claims have succeeded. The cause of action itself, and the difficulties plaintiffs face in proving each element, inherently limit the number of successful class-of-one cases and ensure that run-of-the-mill government employment decisions will not be subjected to constitutional scrutiny. See *Cordi-Allen* v. *Conlon*, 494 F.3d 245, 255 (1st Cir. 2007) ("The *Olech* class of one suit serves an important but relatively narrow function. It is not a vehicle for federalizing run-of-the-mill zoning, environmental, and licensing decisions.").

1. The Plaintiff Must Prove That the Government's Differential Treatment Was Intentional.

To begin, a plaintiff making a class-of-one equal protection claim must demonstrate that the government's differential treatment of him or her was intentional—not the result of chance, mistake, or careless error. Mere differences in treatment cannot form the basis of a claim: the government must have deliberately differentiated between like individuals. This element of the cause of action emerges directly from *Olech*. See 528 U.S. at 564.

Olech's intent requirement flows from this Court's decision in *Snowden* to limit the government's liability in cases involving unintended error. In *Snowden*, the Court explained that "an erroneous or mistaken performance of [a] statutory duty, although a violation of the statute, is not without more a denial of the equal protection of the laws." 321 U.S. at 8. Rather, an additional requirement is the "element of intentional or purposeful discrimination." *Id*.

Similarly, in *Sunday Lake*, 247 U.S. 350, this Court recognized that the Equal Protection Clause does not prohibit unequal taxation that results from an honest mistake. See also *Ciechon* v. *City of Chicago*, 686 F.2d 511, 522, 523 (7th Cir. 1982) (equal protection "does not mean that error or mistake in the application of the law gives rise to an equal protection claim," but "[r]ather, [when] it was an intentional act with no rational basis").[13] In this case,

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[13] For example, *Giordano*, 274 F.3d 740, rejected a challenge to retire a police officer as disabled "because of his regimen on the drug Coumadin." *Id.* at 742. While the plaintiff showed that the department retained another officer taking Coumadin, the plaintiff presented "no evidence . . . that those responsible

the jury found, and Respondents have never disputed, that their treatment of Engquist was intentional.

2. The Plaintiff Must Prove That He or She Was Treated Differently From Other Similarly Situated Persons.

A class-of-one plaintiff must also establish that he or she was treated differently from others similarly situated in relevant respects. *Olech*, 528 U.S. at 564. This requirement screens out cases that involve no genuine discrimination, while permitting cases that do.

The courts of appeals have scrupulously applied the "similarly situated" requirement to require class-of-one plaintiffs to establish significantly unequal treatment, eliminating *de minimis* and insubstantial claims. See, *e.g., Hill* v. *Borough of Kutztown*, 455 F.3d 225, 239 (3d Cir. 2006) (rejecting class-of-one claim where public employee could not point to similarly-situated employees); *Neilson* v. *D'Angelis*, 409 F.3d 100, 106 (2d Cir. 2005) (factual comparison to comparators "too remote" to support similarity).

The First Circuit's application of this condition highlights its limiting effect in the public-employment context. "Plaintiffs claiming an equal protection violation must first identify and relate specific instances where persons situated similarly *in all relevant aspects* were treated differently." *Rubinovitz* v. *Rogato*, 60 F.3d 906, 910 (1st Cir. 1995) (internal quotation marks omitted; emphasis added). See also *Buchanan* v. *Maine*, 469 F.3d 158, 178 (1st Cir. 2006) (finding that, although "an exact

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for terminating him because of his Coumadin use knew they were treating him differently from anyone else." *Id.* at 751.

correlation need not exist between a plaintiff's situation and that of others," the claim failed because no comparators were similarly situated (internal quotation marks omitted)); *Jennings* v. *City of Stillwater*, 383 F.3d 1199, 1214 (10th Cir. 2004); *Griffin Indus., Inc.* v. *Irvin*, 496 F.3d 1189, 1203-04 (11th Cir. 2007).

Only where the plaintiff can present evidence that the government has treated unequally people who are similarly situated in the respects relevant to the differential treatment will a class-of-one claim be permitted to proceed. See *Zeigler*, 638 F.2d at 779;[14] *Ciechon*, 686 F.2d at 522-23. This principle captures the essence of the equal protection violation, namely, the government's treatment of similar people in different ways without a rational basis for the discrimination. In this case, the jury explicitly found that the government singled Engquist out for harsher treatment than the similarly situated individuals in the LSD. Pet. 3a-4a.

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[14] In *Zeigler*, a police department discharged a patrolman pursuant to a "character requirement" following his convictions for presenting a firearm and criminal provocation, 638 F.2d at 777. In his challenge, the plaintiff presented evidence of "at least three individuals . . . retained on the police force following their convictions" of similar crimes. *Id*. at 779. Given the similarity of the offenses and the fact that all officers were "equally subject to the character requirement" and its offense list, they were similarly situated. *Id*. That was so despite any number of differences between the three officers in their employment and personal characteristics; the inquiry properly focused only on whether those individual characteristics were relevant to the state's proffered rationale for its action.

3. **The Plaintiff Must Establish That The Unequal Treatment Is Not Rationally Related to a Legitimate Government Purpose.**

The third element of class-of-one claims requires a plaintiff to demonstrate that the government's intentional discrimination was without a legitimate basis. This Court has explained that "a classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between disparity of treatment and some legitimate governmental purpose." *Cent. State Univ.* v. *Am. Ass'n of Univ. Professors*, 526 U.S. 124, 127-28 (1999) (internal quotation marks omitted).

"Rational basis" review is premised on the judicial deference due to governmental policy decisions resulting from democratic processes, see*, e.g.*, *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152 & n.4 (1938). Yet, this Court's jurisprudence has consistently reaffirmed that state action against a nonsuspect class fails even this relaxed scrutiny if, *inter alia*, the classification is based on an "irrational prejudice" rather than legitimate governmental interests, see*, e.g.*, *Cleburne*, 473 U.S. at 447-50, or if the asserted policy reason for the justification is not "plausible," see*, e.g.*, *Nordlinger*, 505 U.S. at 11.

In rational-basis cases, the plaintiff must overcome a strong presumption in favor of the government. *Hodel* v. *Indiana*, 452 U.S. 314, 331-32 (1981). To be sure, the plaintiff always has an opportunity to negate the government's asserted bases for its discriminatory classification or treatment. If the reasons the government puts forward for treating an individual unequally reveal an illegitimate purpose,

or are not rationally related to the proffered objective, then the plaintiff can prevail.

In *Cleburne*, for example, this Court invalidated the application of an ordinance requiring a home for the mentally disabled to obtain a "special use permit" before constructing a new facility. See 473 U.S. at 450. The plaintiffs prevailed by establishing that each of the defendant city's asserted rationales for the discriminatory treatment was either unrelated to a legitimate objective or was based on an illegitimate purpose. This Court concluded that the classification bore no rational relationship to more legitimate government objectives, such as concerns about overcrowding or the possibility of a flood. *Id.* at 449-50.

The Equal Protection Clause is a guarantee against discriminatory treatment, not adverse government actions (unless they affect fundamental rights).[15] Thus, equal protection analysis does not focus on whether the government had a rational basis for harming someone—instead it focuses on whether the

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[15] For this reason, cases in which this Court has refrained from recognizing certain Due Process Clause rights for public employees, *e.g.*, *Collins*, 503 U.S. 115; *Bishop* v. *Wood*, 426 U.S. 341 (1976), bear no relation to the guarantee the Equal Protection Clause provides against intentional discriminatory treatment at the hands of government actors. Although the Due Process Clause only protects against the deprivation of discrete recognized interests, the Equal Protection Clause applies to all persons, whether or not they are part of a special class or exercising a special right. Unlike the plaintiffs in *Bishop* and *Collins*, Engquist does not seek recognition of a special right, nor does she ask the courts to impose any novel duty on public employers. And unlike the plaintiffs in these Due Process Clause cases, Engquist does allege—and a jury found—that she was treated differently from similarly situated individuals, and discriminated against irrationally by the government.

government had a rational basis for harming one person and not another. As *Olech* explains, this Court's "cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is *no rational basis for the difference in treatment."* 528 U.S. at 564 (emphasis added). For this reason, an equal protection plaintiff need not establish that the government had no rational basis for taking action against her. But the plaintiff is required to prove that the government had no rational basis for taking action against her *as opposed to somebody else* similarly situated.

A governmental employment decision is thus rational whenever the discrimination relates to a legitimate government interest. *E.g.*, *Bizzarro* v. *Miranda*, 394 F.3d 82, 89 (2d Cir. 2005). In practice, it has been difficult for plaintiffs to show that the government has failed to meet this standard, particularly in the context of public employment. For example, the courts of appeals have noted that a government employer's disciplinary decision is rationally related to a legitimate government purpose where the employee violated an established rule or policy. See *Wojcik*, 300 F.3d at 105; *Lauth* v. *McCollum*, 424 F.3d 631, 634 (7th Cir. 2005). Only an arbitrary governmental deviation from established policy undermines the rationality of the government's proffered basis for action. See *Zeigler* v. *Jackson*, 638 F.2d 776, 779 (5th Cir. 1981).

The rationality of a government employment decision relying on either an employee rule violation or a legitimate government purpose reduces the universe of potentially irrational government decisions. Accordingly, court conclusions of

irrationality have been largely confined to cases in which the plaintiff employee demonstrates animus or improper motive on the part of the government decision-maker. See *Scarbrough*, 470 F.3d at 261; *Ciechon*, 686 F.2d at 516.

These principles, at the heart of rational basis review, have effectively limited the number of class-of-one cases. The Equal Protection Clause does not require perfect equality in treatment for all similarly situated individuals. Instead, a plaintiff must prove that the government's discrimination is not rationally related to a legitimate government purpose, a showing possible for only that tiny fraction of plaintiffs who have suffered intentional, irrational, and discriminatory government treatment. In this case, Engquist alleged malice and the jury can be said to have credited her evidence that she was discriminated against because of Respondents' ill-will instead of a legitimate government purpose.

4. **The Presence of Animus, Ill-Will, Malice, or Vindictiveness.**

If the government is unable to articulate a rational basis for discriminating against an individual plaintiff, it follows that the government's discrimination was either arbitrary or motivated by animus.

In *Cleburne* itself, after negating the proffered rationales, this Court emphasized that the city's decision "appears to us to rest on an irrational prejudice." 473 U.S. at 450. In other words, rather than looking behind the record to evaluate the subjective intent of the city's decision to require a "special use permit," the Court concluded that the city's offered justifications were facially unconvincing. See*, e.g.*, *id*. (noting that the city's interests in

"avoiding concentration of population" and "lessening congestion of the streets . . . obviously fail to explain why apartment houses, fraternity and sorority houses, hospitals and the like, may freely locate in the area without a permit").

Like *Cleburne*, this Court's decision in *Olech* did not require a plaintiff to allege animus. *Olech*, 528 U.S. at 565 (permitting claim due to allegations of "irrational and wholly arbitrary" government action, without reaching "the alternative theory of 'subjective ill will' relied on by [the lower] court"). Justice Breyer's concurring opinion nonetheless viewed allegations of "'vindictive action,' 'illegitimate animus,' or 'ill will'" as sufficient to state a class-of-one claim. *Id.* at 566 (Breyer, J., concurring in the result). Following Justice Breyer, several courts, including the trial court in this case, have looked to animus or vindictiveness in assessing class-of-one violations.

Proof of animus need not, however, be an independent, additional factor in class-of-one cases. Rather, courts use evidence of malice and vindictiveness as a proxy for other elements that a plaintiff must prove. Given the potential value of evidence of animus in reducing the likelihood of elevating innocuous government mistakes to constitutional issues, courts have looked to evidence of animus and vindictiveness as probative of (1) whether the classification is rationally related to a legitimate government purpose, (2) the existence of similarly situated comparators, and (3) the intentional nature of the governmental discrimination.

For example, in *Scarbrough*, 470 F.3d 250, the Sixth Circuit relied on evidence of improper animus undergirding a governmental employment decision to

establish the irrationality of the government action. In that case, the defendant board of education refused to rehire the plaintiff as the director of schools after plaintiff was asked to speak at a church convention with "a predominantly gay and lesbian congregation." *Id.* at 253-54. Reviewing the board's differential treatment of the plaintiff, as compared to the successful candidate, for "rationality," the court noted that "[t]he desire to effectuate one's animus against homosexuals can never be a legitimate governmental purpose." *Id.* at 261 (citation omitted).

Noting that a "plaintiff may demonstrate that the government action lacks a rational basis either [1] by negativing every conceivable basis which might support the government action, or [2] by demonstrating that the challenged government action was motivated by animus or ill-will," *id.* at 261 (citation omitted), the court concluded that the plaintiff "offered sufficient evidence to create a genuine issue of material fact as to whether [board members] were motivated by animus against homosexuals." *Id.*

Similarly, the First Circuit has viewed evidence that the governmental decision was motivated by vindictiveness or animus as relevant to the requirement that the plaintiff be treated differently from others who are similarly situated. See *Cordi-Allen*, 494 F.3d at 251 n.4 ("We note that the degree of similarity required may be relaxed somewhat if the plaintiff has presented evidence of personal malice and bad faith retaliation." (internal quotation marks omitted)). Otherwise, a class-of-one plaintiff would face greater difficulty in establishing a claim where the plaintiff produced significant evidence of animosity underlying the government action, because that animosity would itself distinguish the plaintiff

from potentially similarly situated comparators. See *U.S. Dep't of State* v. *Ray*, 502 U.S. 164, 179 (1991) ("[w]e generally accord . . . official conduct a presumption of legitimacy"); *United States* v. *Chem. Found.*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.")

Moreover, a plaintiff's evidence of vindictiveness or malice can be used to demonstrate that the mere act of discrimination was committed intentionally. In class-of-one challenges to governmental regulation, the regulation itself might give rise to an inference of improper motive, but in the employment context the plaintiff may need to demonstrate personal vindictiveness or malice in order to prove that the unequal treatment was intentionally directed at her. Indeed, although subjective intent has little—if anything—to contribute to analysis of whether particular legislation is "rational," it understandably plays a greater role in assessing the propriety of governmental *employment* decisions. See, *e.g.*, *Raytheon Co.* v. *Hernandez*, 540 U.S. 44, 52 (2003) (noting the reliance upon subjective intent in employment cases alleging disparate treatment).

Here, as in *Olech*, this Court need not decide as a general rule whether proof of malicious or vindictive conduct is necessary in order to state a class-of-one claim. It would suffice merely to adopt the principle, as have so many courts of appeals, that a finding of animus is highly relevant to establishing the elements required to prove an equal protection violation.

5. **The Jury Found the Government's Different Treatment of Engquist to Be Without Any Rational Basis.**

Because plaintiffs face significant hurdles in proving a class-of-one claim, as established in *Olech*, allowing plaintiffs to bring such claims does not substantially burden the day-to-day administration of government, but it does protect individuals from the rare circumstance in which the government discriminates without a rational basis. Although it is difficult for a plaintiff to overcome the rational basis test, it is not impossible. See, *e.g.*, *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612, 623 (1985) (invalidating a New Mexico tax exemption because there was no reason for the state to "prefer established resident veterans over newcomers in the retroactive apportionment of an economic benefit"); see also *Allegheny Pittsburgh*, 488 U.S. at 345-46.

In *Olech* itself, this Court found that the Village lacked a rational basis for requiring the respondents to cede it a 33-foot easement in exchange for connecting their property to the municipal water supply when similarly situated property owners were asked only for 15-foot easements.

Here, the district court properly instructed the jury on all of the elements Engquist needed to prove to win her class-of-one equal protection claim. Pursuant to the judge's instructions, the jury found in this case that (1) "the acts . . . of the defendants were intentional," (2) the plaintiff "prove[d] that defendants treated her differently than others similarly situated," (3) "the different treatment caused the denial of Plaintiff's promotion, the exercise of her bumping rights or the termination of her employment," (4) "no rational basis exists for the difference in treatment," and (5) "Defendant took

these actions for arbitrary, vindictive, or malicious reasons." JA 63-64. By finding each of these factors, the jury's verdict places Engquist's case in the small set of cases in which plaintiffs are able to prove that unequal treatment at the hands of the government is not rationally related to a legitimate government purpose.

B. Employees' Class-of-One Claims Are Inherently Limited by the Wide Array of Public Employers' Legitimate Objectives.

For a class-of-one claim to succeed, the plaintiff must establish that the government's discrimination was not rationally related to a legitimate government purpose. In practice, this has proven a high hurdle for plaintiffs to clear, especially in the public-employment setting, in which government has a wide array of legitimate interests that justify differential treatment of employees.

Indeed, the range of legitimate government objectives is likely to be far greater in the employment context than in others. For example, a government employer, like a private employer, has a legitimate interest in retaining a competent and professional workforce and promoting collegiality in the workplace. Accordingly, the government employer generally can reasonably terminate an individual on the basis that he or she lacks adequate knowledge of the relevant subject matter or is antisocial or insubordinate. It follows that public employees will have fewer opportunities to bring a valid class-of-one claim than citizens subject to other government action.

For example, it would not be rationally related to a legitimate government objective for a zoning official

to deny a home permit to an individual based on the official's belief that the individual was antisocial. In contrast, for an agency to terminate an employee for the same reason generally would relate rationally to a legitimate interest of a government employer. Unlike the zoning official, the public employer often must take into account the individual personalities and interpersonal relationships of employees in the workplace. The close relationship between the employer and employee, and the varied needs and interests involved in the employment context, mean that considerations such as concerns over personality conflicts that would be unreasonable as grounds for "arm's-length" government decisions (*e.g.*, zoning, licensing) may well justify different treatment of a public employee.

Public employers in different fields have cited to a vast array of specific legitimate objectives in the courts of appeals. In *Bizzarro*, for instance, a corrections officer refused to assist his superiors in conducting an internal prison investigation into the shipment of contraband into the facility. 394 F.3d at 83. The court concluded that the ensuing disciplinary charges were "rationally related" to the department's legitimate need to eliminate contraband. *Id*. at 88-89. The rationality of a government decision relying on either an employee rule violation or a legitimate policy interest further reduces the universe of potentially illegitimate government decisions.

Still, not all public employment decisions will be related to a "legitimate" government objective. See *Scarbrough*, 470 F.3d at 261 ("animus against homosexuals can never be a legitimate governmental purpose"); *Cleburne*, 473 U.S. at 446-47 ("[S]ome objectives—such as 'a bare . . . desire to harm a politically unpopular group,'—are not legitimate state

interests.") (citation omitted). If an employee is discriminated against for having some particular personal characteristic unrelated to workplace efficiency, or belonging to some unpopular group, this does not serve a legitimate government objective. So too, it serves no legitimate interest of the government if an employee is discriminated against for whistle-blowing, or because a boss has been bribed to hire somebody else.

Nonetheless, the wide range of legitimate bases for discriminatory treatment that are unique to the employment relationship places firm limits on class-of-one employment cases.

C. Public Employers Have Been Subject to Rational-Basis Review For Years With No Ill Effects.

Both before and since *Olech*, circuit and district courts have applied a variety of principles that limit the field of class-of-one public employment cases. Such claims have placed no strain on the docket.

In the seven years since *Olech* was decided, only 162 reported public employment cases—approximately 24 cases per year—even *asserted* an *Olech* class-of-one equal-protection violation in federal court. All but a handful were disposed of via summary judgment or a motion to dismiss. These small numbers are dwarfed by the large number of employment suits filed every year. In fiscal year 2006, there were nearly 15,000 claims of employment discrimination filed in federal court alone. *Judicial Business of the United States Courts, 2006 Annual Report of the Director*, available at http://www.uscourts.gov/judbususc/judbus.html. The relatively small number of class-of-one public employment cases filed over the course of seven

years—even though no circuit (until now) has held them invalid—demonstrates that applying this doctrine to public employment has not led, and will not lead, to a flood of litigation.[16]

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[16] The Ninth Circuit's decision was driven in part by concern that allowing class-of-one claims by public employees would "invalidate the practice of public at-will employment." Pet. 25a. This concern is misplaced for several reasons.

First, "[i]t is the former employee who has the burden of proving that his discharge was motivated by an impermissible consideration," *Rutan*, 497 U.S. at 80 (Stevens, J., concurring)—here, a violation of the Equal Protection Clause. "*There is a clear distinction between the grant of tenure to an employee—a right which cannot be conferred by judicial fiat—and the prohibition of a discharge for a particular impermissible reason*." *Id.* at 80-81 (emphasis added) (citations omitted).

Second, as noted *supra*, a class-of-one claim must be based on *intentional* conduct and differential treatment of similarly situated employees. A public employer, accordingly, can terminate or discipline an at-will employee "without cause" if its conduct is not intentional and if there is no differential treatment of similarly situated employees.

Third, the Ninth Circuit's prediction is devoid of practical support. Nine circuits permit such claims, and there is no flood of class-of-one claims—let alone successful claims—by formerly at-will employees.

Finally, the Ninth Circuit's quotation of *Waters,* 511 U.S. at 679, for the proposition that "an at-will government employee . . . generally has no claim based on the Constitution at all," misreads the decision. In *Waters* itself, the Court granted all public employees—whether at-will or not—a right to sue their employers for violations of First Amendment rights. See *id.* at 678. This Court has made clear that at-will employees may bring constitutional claims against their public employers. *E.g.*, *Perry* v. *Sindermann*, 408 U.S. 593, 599 (1972) (although at-will employment status is "highly relevant to [an employee's] procedural due process claim[,]" a "lack of formal contractual or tenure security in continued employment . . . [is] irrelevant to his free speech claim"). In sum, there is no need to

In comparison to the numerous avenues into courts already available to plaintiffs in employment disputes—any of which may permit extensive discovery—it is difficult to envision a circumstance in which the class-of-one claim would seriously alter the current litigation balance in the trial courts.

Public employees who are members of no special class can still allege substantive and procedural due process violations, retaliation in violation of the First Amendment, and a variety of other claims.[17] And no matter what the race or gender of a public employee may be, that employee can allege discrimination (or so-called "reverse discrimination") under § 1983—with its accompanying *heightened* scrutiny, which will undoubtedly be more attractive to litigants than the deferential "rational basis" standard.

This case amply demonstrates the point: Ms. Engquist asserted statutory and substantive due process violations in addition to her equal-protection claim. Even if Ms. Engquist had no class-of-one equal-protection claim, discovery in her case would have proceeded, and the case would have gone to trial. JA 36 ("The court finds that this evidence is sufficient to create an issue of fact as to whether defendants were motivated to terminate plaintiff for discriminatory reasons" in violation of Title VII.); *id.* at 40-41 (denying government's motion for summary judgment with respect to substantive due process claim). See also *Gilbert* v. *Homar*, 520 U.S. 924, 929-

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eliminate the constitutional right to equal protection for public employees to preserve at-will public employment.

[17] Other statutory and constitutional causes of action available to public employees are no substitute for their right to equal protection. *Bd. of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 680 (1996). Each constitutional provision guarantees discrete rights.

31 (1997) (suggesting that the Due Process Clause protects against disciplinary measures short of termination).

Of the 162 public employment cases filed over the past seven years alleging a class-of-one equal protection violation, the vast majority asserted other causes of action as well. Thus, curtailing the equal-protection rights of a class-of-one public employee would do little, if anything, to reduce the caseload of the federal courts.[18]

[18] Allowing a cause of action for Ms. Engquist, a state employee, would not automatically create a class-of-one remedy for federal employees, whether at-will or not. Congress has provided a statutory cause of action, 42 U.S.C. § 1983, to remedy constitutional violations committed by state and local officials. *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961). However, no similar statute provides a general cause of action to remedy constitutional violations committed by federal government officials. *See Bivens* v. *Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971). In *Bivens*, this Court suggested that it would not craft a cause of action for a constitutional violation by the federal government if the plaintiff had available another remedy, "equally effective in the view of Congress." 403 U.S. at 397. This Court first applied that exception in *Bush* v. *Lucas*, 462 U.S. 367 (1983), where in light of extensive federal civil service protections it declined to create a cause of action for a constitutional suit by a federal employee against his public employer. A similar analysis would be applicable here.

In contrast to cases concerning the availability of a *Bivens* remedy, as a general rule this Court does not consider the availability of state laws and procedures for substantive constitutional claims brought under § 1983. *Monroe*, 365 U.S. at 183. In the limited context of procedural due process cases, this Court does consider available state law remedies to determine whether a constitutional violation has occurred, for a deprivation of life, liberty, or property "is not complete unless and until the State fails to provide due process." *Zinermon* v. *Burch*, 494 U.S. 113, 125 (1990); *see also Parratt* v. *Taylor*, 451

Moreover, federal courts have available a range of procedural tools to prevent meritless cases from moving forward and clogging up the courts. For example, through the requirements of Federal Rule of Civil Procedure 8 or other mechanisms under the Federal Rules of Civil Procedure (such as Rule 56(f)), courts can require plaintiffs to plead and produce evidence of the facts that support a class-of-one claim. Indeed, this Court has recently clarified that, to survive a motion to dismiss, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp.* v. *Twombly*, 127 S. Ct. 1955, 1974 (2007).

In practice, accordingly, a plaintiff cannot just plead the legal elements of a class-of-one claim without more, but must also plead facts sufficient to demonstrate that each element of his or her claim has been satisfied in the public employment setting. See *id*. at 1965 ("[F]ormulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level."). Thus, when faced with a class-of-one complaint that fails to make plausible factual allegations that the government's action was

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U.S. 527, 531-35 (1981); *Hudson* v. *Palmer*, 468 U.S. 517, 522-30 (1984). Thus, in that one "special" category of cases, "to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate." *Zinermon*, 494 U.S. at 125.

When suits concern substantive constitutional rights, though, "the constitutional violation actionable under § 1983 is complete when the wrongful action is taken." *Id.* (citations omitted); *see also Collins*, 503 U.S. at 119-20 ("[T]he Equal Protection . . . Clause[] . . . afford[s] protection to employees who serve the government as well as to those who are served by them, and § 1983 provides a cause of action for all citizens injured by an abridgment of [it].").

irrational and intentional, the lower courts can dismiss the case under Rule 12(b)(6). See *Ass'n of Cleveland Fire Fighters* v. *City of Cleveland*, 502 F.3d 545, 548-50 (6th Cir. 2007) (applying *Twombly* to class-of-one claim and concluding that plaintiffs raised insufficient factual allegations to "raise a right to relief above the speculative level" (quoting *Twombly*, 127 S. Ct. at 1965)); *Phillips* v. *County of Allegheny*, No. 06-2869, 2008 WL 305025 (3d Cir. Feb. 5, 2008) (discussing in detail pleading requirements for class-of-one equal protection claims, and noting *Twombly*).

Other mechanisms provided by the Federal Rules of Civil Procedure also allow courts to dispose of meritless class-of-one cases quickly. For example, prior to discovery, "the court may order a reply to the defendant's or a third party's answer under Federal Rule of Civil Procedure 7(a), or grant the defendant's motion for a more definite statement under Rule 12(e)." *Crawford-El* v. *Britton*, 523 U.S. 574, 598 (1998); see also *Schultea* v. *Wood*, 47 F.3d 1427, 1432-33 (5th Cir. 1995) (en banc) (upholding the district courts' power in qualified-immunity cases to order a reply pleading far greater detail than that required by Rule 8(a)(2)).

The combination of the substantive elements of a class-of-one cause of action and certain tools embodied in the Federal Rules of Civil Procedure allows courts to address such claims, while balancing the equal protection rights of public employees with the appropriate discretion governmental employers have in making employment decisions. And, in fact, this is what has happened. The Ninth Circuit's unsubstantiated speculation that allowing class-of-one claims will overwhelm the federal courts and public employers with litigation is proven wrong by

the courts' actual experience in the nine circuits where such claims have been authorized.[19]

Finally, there is no reason to believe that more and more insubstantial class-of-one claims will arise in the public-employment context than in other government settings, such as the land-use context addressed in *Olech*. State and local governments make millions of zoning and licensing decisions each year.[20] State and local prosecutors make hundreds of

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[19] Notably, the rational-basis standard that applies to class-of-one claims is virtually identical to the standard this Court applies in assessing whether a union—which has both a statutory duty to represent its members and an obligation to "govern" in the overall interest of the bargaining unit as a whole—has breached its duty to individual members. In balancing these interests, this Court has held that "a union breaches its duty of fair representation if its actions are either 'arbitrary, discriminatory, or in bad faith,'" and "that a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' as to be irrational.'" *Air Line Pilots Ass'n* v. *O'Neill*, 499 U.S. 65, 67 (1991) (citation omitted). Negligence is not enough. *United Steelworkers* v. *Rawson*, 495 U.S. 362, 372 (1990). Like unions, public employers have government and public interests to serve—interests that must be balanced against employees' rights not to be intentionally treated arbitrarily or irrationally. The Court designed its fair-representation test to balance the relevant interests, and it has proven wholly workable. There is no reason why class-of-one claims would be any different.

[20] "[Z]oning decisions . . . occur thousands of times every day in this country." *Lemke* v. *Cass County*, 846 F.2d 469, 471 (8th Cir. 1987) (Arnold, J., concurring). There were over 1.8 *million* building permits issued for new construction in 2006. U.S. Census Bureau, *Building Permits-Annual Data*, available at http://www.census.gov/const/bpann.pdf.

Oklahoma issued 3 million licenses in fiscal year 1998, including over 1 million business licenses. Marie Price, *New*

thousands more.[21] And prisons and jails similarly make millions of individualized decisions each year. In many of these contexts, a plaintiff can assert that the government is behaving improperly, and file a federal lawsuit to, for example, strike down a housing inspection failure, reinstate a liquor license, undo a plea agreement, or contest the imposition of prison discipline.

While the wholesale elimination of constitutional rights would certainly cut the number of federal cases, that course is both impermissible and unnecessary. Instead, the discretion built into rational-basis review, coupled with the traditional tools that federal courts have employed to manage such cases, reserves the class-of-one claim for appropriate cases of irrational and arbitrary government conduct. Public employees, who after all serve our citizenry, should have the same rights as the variety of other persons whose ability to bring rational-basis challenges has been affirmed by this Court.

Law Aimed at Licensing Businesses, Journal Record, June 30, 1998.

New York's Division of Alcoholic Beverage Control "regulates nearly 70,000 licenses and permits statewide each year." *See* N.Y. State, Div. Alcoholic Bev. Control, *Licensing Information*, available at http://abc.state.ny.us/JSP/content/licensing.jsp.

[21] Approximately 95% of the 1,078,920 convicted state felons in 2004 pled guilty. *See* Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics Online*, available at http://www.albany.edu/sourcebook/pdf/t5462004.pdf. In 2004, 71,692 defendants pled guilty out of 83,391 federal defendants. *Id.*

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

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