American Bar Association
www.supremecourtpreview.org

No. 07-474

IN THE
Supreme Court of the United States

ANUP ENGQUIST,
Petitioner,
v.

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

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

BRIEF OF PROFESSOR RICHARD EPSTEIN AND THE RUTHERFORD INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

AARON M. PANNER
Counsel of Record
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Amici
Professor Richard Epstein
and the Rutherford Institute

February 27, 2008

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTION, STATUTES, AND RULES

ADMINISTRATIVE MATERIALS

OTHER MATERIALS

INTEREST OF *AMICI CURIAE*[1]

The Rutherford Institute is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing free legal representation to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have filed briefs as an *amicus* of this Court on numerous occasions. Institute attorneys currently handle more than 100 cases nationally, including many cases that concern the interplay between the government and its citizens.

Richard A. Epstein is the James Parker Hall Distinguished Service Professor of Law at the University of Chicago and Kirsten Bedford Senior Fellow at the Hoover Institution. He is also a visiting professor at New York University Law School. He has taught and written in constitutional law and political theory since he began teaching in 1968. His books include *Takings: Private Property and the Power of Eminent Domain* (1985) and *Bargaining with the State* (1993).

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters reflecting their blanket consent to the filing of *amicus* briefs in this case are on file with the Clerk.

STATEMENT

1. In 1992, petitioner Anup Engquist was hired as an international food standards specialist in an Oregon Department of Agriculture laboratory. *See* Pet. App. 14. During the course of her employment, Engquist developed an acrimonious relationship with respondent Jeff Hyatt. *See id.* at 15. By the fall of 2001, Hyatt and Engquist's supervisor, respondent John Szczepanski, "were working to 'get rid of'" Engquist. *Id.* Their efforts ultimately proved successful: Hyatt was chosen over Engquist for a managerial position for which both applied, *see id.*, and for which there was evidence that Engquist was better qualified. *See* JA 18. By late 2001, Hyatt had reduced Engquist's workload to the point where there was insufficient work to justify a full-time position. *See* JA 20. In January 2002, Engquist's position was eliminated in a reorganization of the laboratory. *See* Pet. App. 16. Although the state collective bargaining agreement permitted Engquist to "bump" to another position, she was found unqualified for the only position available to her. *See id.*

2. Engquist filed suit against the Department, alleging, *inter alia*, that the Department, Hyatt, and Szczepanski violated her rights under the Equal Protection Clause. In particular, Engquist alleged that she was singled out "for arbitrary, vindictive and malicious reasons." JA 10. After the district court denied defendants' motions for summary judgment on Engquist's equal protection claim, *see* JA 49-59, the case proceeded to trial.

Engquist "presented her case on the theory that Szczepanski and Hyatt were acting out of malice." Pet. App. 67 (Reinhardt, J., dissenting). The jury was instructed that, "[t]o bring a successful Equal

Protection claim under the 'class of one' doctrine, Plaintiff must prove that defendants treated her differently than [sic] others similarly situated[,] . . . that no rational basis exists for the difference in treatment[,] [a]nd . . . that Defendant took these actions for arbitrary, vindictive, or malicious reasons." JA 63-64. The jury returned a verdict in Engquist's favor, answering "yes" to a special verdict form question that asked whether "the individual defendants intentionally treat[ed] the plaintiff differently than [sic] others similarly situated . . . without any rational basis and solely for arbitrary, vindictive or malicious reasons." Pet. App. 3-4. The jury awarded Engquist $175,000 in compensatory damages and $125,000 in punitive damages on her equal protection claim. *See id.* at 4-5.

3. The court of appeals reversed, holding that Engquist's "equal protection claim is invalid as a matter of law." Pet. App. 59. The court concluded that *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam) – which confirmed that the Equal Protection Clause protects individuals against government discrimination that lacks a rational basis – did not apply to the employment decisions of public employers. *See* Pet. App. 23-27. In the court's view, "[b]ecause the government as employer has broader powers than the government as regulator, the scope of judicial review is correspondingly restricted." *Id.* at 24. The court stated that public employees have a wealth of other legal protections available to remedy alleged arbitrary treatment, *see id.* at 25, and that allowing individual equal protection claims to proceed "would completely invalidate the practice of public at-will employment," *id.*, and "generate a flood of new cases," *id.* at 26.

Judge Reinhardt dissented. *See id.* at 59-69. He would have affirmed the judgment on the grounds that equal protection "class of one" claims could be asserted against public employers. *Id.* at 67.

SUMMARY OF ARGUMENT

I. The Equal Protection Clause prohibits the government from intentionally discriminating against persons without a legitimate basis. In *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam), the Court confirmed that an individual who is singled out for disparate treatment solely for "irrational and wholly arbitrary" reasons has a claim under the Equal Protection Clause. The petitioner in this case established at trial that she was singled out for unfavorable treatment solely because of personal animus. Under this Court's precedents, that is sufficient to uphold her claim.

II. In spite of these clearly established principles, the court of appeals held that petitioner could not prevail as a matter of law because she was a public employee. That restriction on the reach of the Equal Protection Clause is without precedent or justification. The Equal Protection Clause applies to the actions the government takes in its role as employer as well as in its role as regulator. In particular, this Court has repeatedly applied the Equal Protection Clause to public employees. To be sure, the government does have "broader powers" as an employer than as a regulator. But these broader powers are not unlimited. Whatever the application of the contract-at-will doctrine in the private sector, it does not completely define the role of public employers in our system of limited government.

Government employees do not surrender their constitutional rights as a condition of accepting

public employment. This Court has accommodated the protection of individual rights and the needs of the public employer without immunizing government action from constitutional scrutiny. The analysis of public employees' speech, for example, or their right to be free from unreasonable searches, turns on a balancing of interests. That same balancing applies to the Equal Protection Clause.

The government's interest in avoiding unmeritorious litigation does not justify curtailing individuals' equal protection rights. The substantive and procedural standards governing rational basis equal protection claims give the government wide latitude. But that latitude does not extend to cases where a jury on proper instructions has reached the conclusion that the defendant acted without any justification at all. In all events, the costs of government compliance with the requirements imposed by the Equal Protection Clause protect significant individual liberty interests against arbitrary abuse of government power – a core purpose of the Equal Protection Clause.

ARGUMENT

The Equal Protection Clause applies when the government singles out an individual for unequal treatment without any rational basis, including for reasons solely of animus or malice. That principle applies to government action directed at government employees, just as it does to other government actions. Policy-based arguments for immunizing state action from constitutional scrutiny are contrary to precedent and unpersuasive.

I. THE EQUAL PROTECTION CLAUSE PROHIBITS THE GOVERNMENT FROM INTENTIONALLY DISCRIMINATING AGAINST INDIVIDUALS WITHOUT A RATIONAL BASIS

In *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam), this Court held that an individual who alleges that she has been "intentionally treated differently from others similarly situated," without any "rational basis for the difference in treatment," can claim a violation of the Equal Protection Clause. *Id.* at 564. The Court stated that allegations of "irrational and wholly arbitrary" treatment were "sufficient to state a claim for relief under traditional equal protection analysis." *Id.* at 565 (internal quotation marks omitted); *see also Whren v. United States*, 517 U.S. 806, 813 (1996) ("the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause").

Under the "traditional equal protection analysis," the Court invoked in *Olech*, courts apply heightened scrutiny to government classifications based on race or sex because they "generally provide[] no sensible ground for differential treatment" and "are so seldom relevant to the achievement of any legitimate state

interest that *laws grounded in such considerations are deemed to reflect prejudice and antipathy*." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 441 (1985) (emphasis added); *see also*, *e.g.*, *United States v. Virginia*, 518 U.S. 515, 531-32 (1996); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality op.). Even when state action "neither burdens a fundamental right nor targets a suspect class," the Court will invalidate government action that "bears [no] rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996); *see also Heller v. Doe*, 509 U.S. 312, 319-20 (1993). A paradigmatic case of such irrational government discrimination involves action based on illegitimate animus or hostility against a group. Thus, in *City of Cleburne*, the Court held that requiring a special permit to construct a home for the mentally handicapped was not "rationally related to a legitimate governmental purpose" when it appeared that the policy "rest[ed] on an irrational prejudice against the mentally retarded." 473 U.S. at 446, 450. And, in *Romer*, the Court found that a Colorado constitutional amendment forbidding the extension of employment discrimination laws to include sexual orientation was "inexplicable by anything but animus toward the class it affects" and therefore unconstitutional. 517 U.S. at 632.

The same principle applies when the government singles out an *individual* for unfavorable treatment for reasons that are "irrational and wholly arbitrary." *Olech*, 528 U.S. at 565 (internal quotation marks omitted). "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular" or otherwise vulnerable

person "cannot constitute a legitimate governmental interest." *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) (emphasis omitted); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 369-70 (1886) (concluding that the Equal Protection Clause does not "leave room for the play and action of purely personal and arbitrary power"). "'[T]he purpose of the equal protection clause . . . is to secure *every person* within the State's jurisdiction against intentional and arbitrary discrimination.'" *Olech*, 528 U.S. at 564 (emphasis added) (quoting *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923)); *cf.* Richard A. Epstein, *Liberty, Equality, and Privacy: Choosing a Legal Foundation for Gay Rights*, 2002 U. Chi. Legal F. 73, 74 ("The most obvious and direct threats to any constitutional protection are legislative or executive actions that are directed toward a single person."). The "fundamental insight of the class-of-one cases is that vicious or exploitative discrimination can sometimes be found even when the victim does not belong to a group that is a familiar target of such treatment." *Bell v. Duperrault*, 367 F.3d 703, 712 (7th Cir. 2004) (Posner, J., concurring).

Petitioner made the very demanding showing required to make out a violation of the Equal Protection Clause in this case. The jury found that the defendants acted "without any rational basis" *and* "solely for arbitrary, vindictive or malicious reasons." Pet. App. 3-4. Whatever else may be sufficient to prove a claim of individual discrimination under *Olech*, a plaintiff who proves that the government acted out of animus or malice and with no other legitimate justification has established that "she has been intentionally treated differently from others

similarly situated," with no "rational basis for the difference in treatment," and in a manner that is "irrational and wholly arbitrary." *Olech*, 528 U.S. at 564-65 (internal quotation marks omitted).

II. THE EQUAL PROTECTION CLAUSE APPLIES TO PUBLIC EMPLOYMENT DECISIONS

A. The Ninth Circuit held, despite these settled principles, that intentional and irrational discrimination against an individual *in the public employment context* does not implicate the Equal Protection Clause. That holding cannot be reconciled with this Court's precedents, which establish beyond dispute that the Equal Protection Clause applies to the government in its capacity as an employer.

The Fourteenth Amendment forbids "any State" from "deny[ing] to any person within its jurisdiction the equal protection *of the laws*." U.S. Const. Amend. XIV, § 1 (emphasis added). The Equal Protection Clause sweeps broadly. "[T]he prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action, or whatever the guise in which it is taken." *Cooper v. Aaron*, 358 U.S. 1, 17 (1958) (citations omitted); *see also Avery v. Midland County*, 390 U.S. 474, 479-80 (1968) ("[t]he Equal Protection Clause reaches the exercise of state power however manifested"). When the government is acting in its capacity as an economic actor rather than as a regulator – as in making employment or contracting decisions – it nevertheless can act only pursuant to the authorization of law, and the Equal Protection Clause applies to those actions. *See*, *e.g.*, *Collins v. City of Harker Heights*, 503 U.S. 115, 119-20 (1992) ("the Equal

Protection . . . Clause[] . . . afford[s] protection to employees who serve the government as well as to those who are served by them"); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (holding that Equal Protection Clause applies to government contracting).

Specifically, this Court has consistently required that the government respect the rights of public employees to equal protection of the laws in their capacity as public employees. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality op.) (noting that "public employers . . . must act in accordance with [the] core purpose[s] of the Fourteenth Amendment") (internal quotation marks omitted); *Davis v. Passman*, 442 U.S. 228, 235-36 (1979) (recognizing right under the Equal Protection Clause to be free of gender discrimination in public employment). In keeping with that precedent, every circuit to consider the question has held that a plaintiff may sue a state or local government employer under 42 U.S.C. § 1983 for violations of the Equal Protection Clause. *See Annis v. County of Westchester*, 36 F.3d 251, 254-55 (2d Cir. 1994) (collecting cases).

B. This Court's decisions therefore should leave no room for dispute that the Equal Protection Clause applies to public employment decisions. As described above, it does. The court of appeals nevertheless carved out a policy-based exception to this Court's "traditional equal protection analysis," *Olech*, 528 U.S. at 565, by holding that evidence of irrational and wholly arbitrary action based on animus fails to implicate the Equal Protection Clause. That exception is without precedent or policy justification.

1. While this Court has recognized that the government's interests as an employer differ from its

interests as a regulator, this Court has repeatedly rejected the suggestion that government employees surrender their constitutional rights. Public employees cannot be fired for engaging in protected speech on matters of public concern. *See*, *e.g.*, *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1957 (2006) ("The Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment."); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). And "the Fourth Amendment protects individuals from unreasonable searches conducted by the Government, even when the Government acts as an employer." *National Treasury Employees Union v. von Raab*, 489 U.S. 656, 665 (1989); *see also O'Connor v. Ortega*, 480 U.S. 709, 719-20 (1987) (plurality op.).

Indeed, the Court has never held that a person surrenders constitutional rights as a consequence of acceptance of public employment. To be sure, "'the government as employer . . . has far broader powers than does the government as sovereign.'" Pet. App. 23 (quoting *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality op.)). Nevertheless, individual employees' constitutional rights still constrain the government's conduct. *See*, *e.g.*, *O'Connor*, 480 U.S. at 717 (plurality op.) ("Individuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer."); *Connick v. Myers*, 461 U.S. 138, 147 (1983) ("[o]ur responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government").

This means that the government, as an employer, is constrained in its conduct towards its employees in ways that private employers are not. That

distinction is in the text of the Constitution: the Fourteenth Amendment applies to state action, not to the actions of private citizens. "[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).

The Court has ensured, however, that the government's legitimate interests as an employer are taken into account in evaluating the constitutionality of its conduct. In the context of public employees' speech on matters of public concern, for example, the *Pickering* test asks "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Garcetti*, 126 S. Ct. at 1958. That approach ensures that government employees "must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Id.* The speech restriction must "balance . . . 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*, 391 U.S. at 568.

Similarly, the Court has held that even though the Fourth Amendment's warrant requirement does not apply to government searches of its employees' property – because the government is not, in that circumstance, acting in a law enforcement capacity – the Amendment's general requirement that a search be reasonable in the circumstances carries its full force. *See National Treasury Employees Union*, 489 U.S.

at 665-66. Whether that criterion is met depends on the importance of the government interest in the search and the intrusiveness of the search, given the context. *See id.* at 668-72.

The same analysis applies here. The traditional contours of rational basis scrutiny protect the interests of both the government employer and the individual employees. The plaintiff in a rational basis case bears the burden of proving each element of her claim – that the government intentionally discriminated against her; that she was treated differently than others similarly situated; and that the discrimination was not rationally related to a legitimate government purpose. *See Olech*, 528 U.S. at 564. Furthermore, in this context, the Equal Protection Clause operates against the background norms of at-will public employment. *See*, *e.g.*, *Bishop v. Wood*, 426 U.S. 341, 345 n.8 (1976). The public employment relationship is one of mutual consent. *See Andrews v. Louisville & N.R.R. Co.*, 406 U.S. 320, 324 (1972). The need for constitutional scrutiny of such consensual relationships is diminished. *Cf.* Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 67-73 (1988). Moreover, the range of legitimate government interests implicated by employment decisions is broad. A range of factors – skill, efficiency, interpersonal dynamics, collegiality, and the various needs of both the government and the employee – will be considered in further employment decisions. So long as an employment action is rationally related to the government's needs as an employer, the Equal

Protection Clause is not implicated (assuming no more searching scrutiny is warranted for other reasons).[2]

Nevertheless, the core limitation embodied by the Equal Protection Clause protects public employees, like other citizens, from the arbitrary exercise of state power. "The *Olech* class of one suit serves an important but relatively narrow function." *Cordi-Allen v. Conlon*, 494 F.3d 245, 255 (1st Cir. 2007). Here, the jury found that petitioner was singled out for adverse treatment based on the personal animus of her supervisor and co-worker and for no other reason. Petitioner therefore has made out a violation of the Equal Protection Clause.

2. The policy argument for wholly immunizing government employment decisions from constitutional challenge in this context is unpersuasive. At the outset, such an exemption would pose a substantial threat to the constitutional rights of millions of persons. The federal, state, and local governments employ more than 6.5 million people. *See* U.S. Census Bureau, *Statistical Abstract of the United States: 2008*, at Table 602 (Oct. 2007), *available at* http://www.census.gov/compendia/statab/2008 edition.html. Abrogating those employees' right to be free from illegitimate disparate treatment would expose them to risk of significant injury.

There is no serious argument that the government has an interest in protecting its ability to engage in "vicious or exploitative discrimination." *Bell*, 367 F.3d at 712 (Posner, J., concurring). The government

---

[2] Furthermore, as a practical matter, many States provide statutory protections for public employees against adverse employment action that exceed the minimum protection afforded by the Equal Protection Clause.

does have a genuine interest in legal rules that do not encourage non-meritorious litigation and erroneous findings of liability. *See* Pet. App. 24; *cf.* David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. Chi. L. Rev. 73 (2005) (explaining, in the antitrust context, the social costs of litigation and erroneous findings of liability). But there is no evidence that application of ordinary equal protection standards in the public employment context sets the bar too low.

Substantively, rational basis review is the most deferential standard of constitutional scrutiny, designed to give the government "wide latitude," such that "even improvident decisions" are not subject to constitutional challenge. *See City of Cleburne*, 473 U.S. at 440. Moreover, when a legitimate reason justifies government action, an additional improper motivation will not render the action unconstitutional. *See*, *e.g.*, *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Albiero v. City of Kankakee*, 246 F.3d 927, 932 (7th Cir. 2001). Once the government asserts a rational basis for its conduct – even after the fact – the burden is on the plaintiff to show that the asserted basis is in fact pretext for an illegitimate purpose. *See Board of Trustees v. Garrett*, 531 U.S. 356, 367 (2001).

In any event, the government must bear costs of compliance with the Fourteenth Amendment that private employers need not bear, because the Fourteenth Amendment applies to the former but not to the latter. For example, under the Due Process Clause of the Fourteenth (and the Fifth) Amendment, the government "may not constitutionally authorize the deprivation" of "a property interest in

public employment" without "appropriate procedural safeguards." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (brackets omitted). That is a procedural right unavailable to private employees but that is required by the Fourteenth Amendment's command that the government not deprive any person of his property without due process of law.

Nor does opening the door in this narrow class of extreme cases open the floodgates to disruptive future litigation. The *Olech* decision has generated relatively little follow-on litigation, and we are confident that the rules fashioned in this case in the district court below and in the other circuits assure that this result will carry over to employment cases. Quite simply, in most instances, statutory remedies against abuse by government officials offer paths of lesser resistance than the constitutional claim under the Equal Protection Clause. Allowing plaintiff's equal protection claim in this case will fill the gap in the rare egregious case outside the scope of statutory claims. The tradeoff therefore is this: Does this Court deny relief in rare cases of manifest and undisputed abuse because of the unproven fear of unlimited litigation? The correct answer to that question is not to slam the door, but to keep it ajar.

The government wields enormous power in its capacity as employer. Even though these powers are rightly broader than those that it exercises in its capacity as a regulator, they are not absolute. Given the vital interests at stake for individual employees, the Equal Protection Clause reflects the People's determination that the government should not act based solely on illegitimate animus – towards an identifiable group or towards an individual. The Court should reaffirm that principle here.

CONCLUSION

The court of appeals' judgment should be reversed.

Respectfully submitted,

AARON M. PANNER
Counsel of Record
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Amici
Professor Richard Epstein
and the Rutherford Institute

February 27, 2008