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No. 07-474

IN THE
Supreme Court of the United States

ANUP ENGQUIST,

Petitioner,

v.

OREGON DEPARTMENT OF AGRICULTURE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* MEIR J. WESTREICH IN SUPPORT OF PETITIONER; OF REVERSAL OF JUDGMENT ON CLASS OF ONE RATIONAL BASIS EQUAL PROTECTION VERDICT

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INTEREST OF *AMICUS CURIAE* [1]

The parties to this action consent to the filing of all amicus briefs submitted herein. This brief is submitted by undersigned with the following interests: (a) undersigned civil rights firm is currently prosecuting an action substantially similar hereto and arguably involving "class-of-one" equal protection public employment claims, *Carleton v. County of Los Angeles*, C.D.Cal. Case No. CV06-1655DSF; (b) undersigned has long litigated 42 U.S.C. § 1983 rational basis equal protection claims dating to when the theory was first recognized, *see Guillory v. County of Orange*, 731 F.2d 1379, 1383 (9th Cir. 1984) (undersigned as appellant's counsel), and seeks to preserve same; and (c) undersigned has been litigating appeals seeking to apply the underlying constitutional text model as discussed herein.

This brief is desirable and will aid in the disposition of this case because it poses an alternative view of the standards which can be applied to § 1983 public employment rational basis equal protection claims which preserves the rights of public employees to pursue such claims while addressing the public policy concerns expressed in the Ninth Circuit Opinion under review herein; and proposes adoption of an analytic model that has currency in the Supreme Court – the underlying constitutional text model.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or his counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

I.

SUMMARY OF ARGUMENT

The holding subject to this Court's grant of *certiorari* bars all "class-of-one" rational basis equal protection claims in the public employment context, based on asserted public policy concerns for workplace efficiency, *see Engquist v. Oregon Dept. of Agriculture*, 478 F.3d 985, 993-96 (9th Cir. 2007), *cert. granted*, __ U.S. __ (2008), precluding this entire class of claims otherwise permitted by the Supreme Court and Ninth Circuit in actions outside of an employment context, *see Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (and cases cited therein); *Valley Outdoor, Inc. v. City of Riverside*, 446 F.3d 948, 955 (9th Cir. 2006); *Squaw Valley Development Co. v. Goldberg*, 375 F.3d 936, 944-46 (9th Cir. 2004).

This concern has caused other circuits to adopt special tests for public employee rational basis equal protection claims. *See*, *e.g.*, *Levenstein v. Salafsky*, 414 F.3d 767, 775-76 (7th Cir. 2005) (requiring proof that differentially treated classes are otherwise "identical in all respects"); *Neilson v. D'Angelis*, 409 F.3d 100, 104 & n.3 (2d Cir. 2005) (requiring greater proof of similarity between compared classes); *Jennings v. City of Stillwater*, 383 F.3d 1199, 1211 (10th Cir. 2004) (noting circuits which require added malice or ill will element).

In so doing, these circuits have made a classification under which the fundamental right to petition the federal courts under 42 U.S.C. § 1983, or otherwise, for redress of a constitutional grievance, *See Cruz v. Beto*, 405 U.S.

319, 321 (1972); *California Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) – *i.e.* class-of-one rational basis equal protection claims – is being barred or restricted for public employees. Such classifications, even when made by federal courts which are also bound by the First Amendment, *see Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 n.15, 103-104 (1981); *cf. Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575-81 (1980) (state court), and Fifth Amendment equal protection, *see Davis v. Passmen*, 442 U.S. 228, 248-49 (1979); *Shelley v. Kraemer*, 334 U.S. 1, 14-18 (1948), must satisfy the strict scrutiny standard, with its least restrictive means test and presumption against its validity, *see City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-42 (1985); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 64-65, 69-70 (1981). This classification is unnecessary under existing standards for rational basis equal protection claims, with the attendant discriminatory intent requirement. *See* Discussion, Section IV.B, *infra* (and cases cited therein). Other circuits have adopted this view of public employee class-of-one rational basis equal protection claims. *See Scarborough v. Morgan County Board of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006); *Whiting v. The University of Southern Mississippi*, 451 F.3d 339, 348-49 & n.3 (5th Cir. 2006); *Lauth v. McCollum*, 424 F.3d 631, 634 (7th Cir. 2005). Moreover, this Court – to date – has uniformly rejected any requirements for resort to state law or forum remedies or exhaustion requirements for claims pursued under 42 U.S.C. § 1983. *See, e.g., Heck v. Humphrey*, 512 U.S. 477, 483 (1994); *Patsy v. Board of Regents*, 457 U.S. 496, 501-506, 513-514, 516 (1982); *Monroe v. Pape*, 365 U.S. 167, 174-84 (1961).

To the extent that any special pleading or proof requirements are required and constitutionally permissible, there are less intrusive approaches that render unconstitutional the absolute bar under *Engquist.* The policy concerns of the *Engquist* holding, if not met by traditional rational basis equal protection analysis, can be met by existing First Amendment jurisprudence, which balances public employee speech rights, *see San Diego v. Roe*, 543 U.S. 77, 82 (2004); *Pickering v. Board of Education*, 391 U.S. 563 571-75 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964), and the public interest in workplace efficiency, *see Connick v. Myers*, 461 U.S. 138, 142-44, 147-49 (1983); *Pickering*, 391 U.S. at 568, 571-75; *Mt. Healthy City Board of Education. v. Doyle*, 429 U.S. 274, 284-87 (1977), which includes the public interest in redressing unlawful discrimination, *see Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410, 414 (1979).

II.

THE DIVISION AMONG CIRCUITS OVER WHETHER TO DIFFERENTIALLY TREAT CLASS-OF-ONE RATIONAL BASIS EQUAL PROTECTION CLAIMS ARISING FROM THE PUBLIC WORKPLACE HAS CULMINATED WITH THE 9TH CIRCUIT'S TOTAL BAN IN *ENGQUIST*

The Supreme Court has held that in the application of the rational basis standard of the equal protection clause, it applies with equal force to a "class-of-one" as with any other class of greater size. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (and cases cited therein). In so doing, the Court raised policy concerns that the practical effect can be to impose federal judicial review of virtually all government acts which

distinguish one person or from another person or group, especially in the public workplace. *See Village of Willowbrook*, 528 U.S. at 565-66 (J. Breyer, concurring); *Lauth v. McCollum*, 424 F.3d 631, 633-34 (7th Cir. 2005); *Jennings v. City of Stillwater*, 383 F.3d 1199, 1210-11 & n.4 (10th Cir. 2004). *See generally Jicarilla Apache Nation v. Rio Arriba County*, 440 F.3d 1202, 1209-10 (10th Cir. 2006) (discussing circuit divergence on this issue).

Some Circuits have sought to remedy this by adopting standards which treat public employee class-of-one claims differently from all other class-of-one claims, grafting various additional restrictive elements not otherwise contained in traditional rational basis equal protection analysus. *See, e.g.*, *Levenstein v. Salafsky*, 414 F.3d 767, 775-76 (7th Cir. 2005) (requiring proof that differentially treated classes are otherwise "identical in all respects"); *Neilson v. D'Angelis*, 409 F.3d 100, 104 & n.3 (2d Cir. 2005) (requiring greater proof of similarity between compared classes); *Jennings*, 383 F.3d at 1211 (noting circuits which require added malice or ill will element). At least three (3) circuits – the Fifth, Sixth and a divided Seventh – have simply applied the highly restrictive objective standard of the equal protection rational basis standard as discussed in Section IV.B, *infra*. *See Scarborough v. Morgan County Board of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006); *Whiting v. The University of Southern Mississippi*, 451 F.3d 339, 348-49 & n.3 (5th Cir. 2006); *Lauth*, 424 F.3d at 634[2].

2. Two other circuits – First & Third – invoked standard equal protection analysis, but with little discussion beyond the specific facts of the case. *See Hill v. Borough of Kutztown*, 455 F.3d 225, 239 (3rd Cir. 2006); *Campagna v. Massachusetts Dept. of Environmental Protection*, 334 F.3d 150, 156 (1st Cir. 2003).

The latest proffered remedy is the Ninth Circuit *Engquist* holding, subject to this *certiorari* order, which also treats public employee class-of-one rational basis equal protection claims differently than all other such claims, and bars without exception all "class-of-one" rational basis equal protection § 1983 claims in public employment. *See Engquist*, 485 F.3d at 994-96. While more extreme in its application, this rule joins those other circuits in treating such public employee claims, as a class, differently than other classes of such claims.

III.

RATIONALES FOR HOLDINGS WHICH LIMIT PUBLIC EMPLOYEE SPEECH RIGHTS DO NOT LOGICALLY JUSTIFY A BAR OF ALL PUBLIC EMPLOYEE FEDERAL LITIGATION OF ANY FORM OF RATIONAL BASIS EQUAL PROTECTION CLAIMS UNDER 42 U.S.C. § 1983

A. Courts Are Governed By First Amendment Protections Of Free Speech And Petition, Including Access To Federal Courts

The protections of the First Amendment against governmental infringement of rights to free speech and to petition the government for redress of grievances apply equally to federal courts. *See Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 n.15, 103-104 (1981) (noting 1st Amendment applies to federal court, but reserves scope of application). *Cf. Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575-81 (1980) (applying 1st Amendment to state court action). So too does the Fourteenth Amendment's equal protection clause apply

to actions by courts. *See Davis v. Passmen*, 442 U.S. 228, 248-49 (1979) (re implicit equal protection component of 5th Amendment); *Shelley v. Kraemer*, 334 U.S. 1, 14-18 (1948) (equal protection against state court enforcement of discrimination by private parties). The First Amendment's petition clause secures the right to petition federal and other courts for redress of grievances. *See Cruz v. Beto*, 405 U.S. 319, 321 (1972); *California Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

B. Restrictions And Classifications Regarding Protected Speech And Petition Are Subject To Strict Scrutiny By Federal Courts

Governmental restrictions and regulations of rights secured by the First Amendment are subject to the most rigorous scrutiny by courts, with a heavy burden of proof on state actors, normally barring content-based restrictions or future expression and only permitting reasonable time, place and manner restrictions by least restrictive means. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 64-65, 69-70 (1981). The First Amendment secures unpopular or even disruptive speech as part of the open discourse that benefits a democratic and free society. *See City of Houston v. Hill*, 482 U.S. 451, 462-64, 467-69 (1987); *Elrod v. Burns*, 427 U.S. 347, 356-57 (1976).

Likewise, any classification based on activity protected by the First Amendment is subject to the strict scrutiny test under the equal protection clause, *see City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-42 (1985), with *inter alia* its least restrictive

means standard, *see City of Cleburne*, 473 U.S. at 439-42, and the presumption against its validity, *see Schad*, 452 U.S. at 64-65, 69-70.

The *Engquist* holding expressly provides a judicial classification impacting free speech and petition rights otherwise secured by the First Amendment. It provides a complete bar to public employees from seeking a judicial remedy of even the most meritorious class-of-one rational basis claim which would otherwise be available under existing rational basis equal protection jurisprudence. Assessment of this classification should thus be subject to the most rigorous standards of strict scrutiny under the First Amendment and Equal Protection Clause of the Fourteenth Amendment.

C. Public Employee First Amendment Rights Are Subject To Greater Regulation Not Complete Prohibition

The Supreme Court actually once started from an historic premise that public employee free speech rights are not secured under the First Amendment, only to reverse field in *Pickering v. Board of Education*, 391 U.S. 563, 568, 571-75 (1968). *See Connick v. Myers*, 461 U.S. 138, 142-44, 147-49 (1983). The Supreme Court has since largely confined those rights of public employees to matters of public concern, *Connick*, 461 U.S. at 142, 147-49, complaints of legally forbidden discrimination, *see Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410, 414 (1979), and to matters outside the scope of the employee's duties, *see Garcetti v. Ceballos*, 164 L.Ed.2d 689, 701-703 (2006). The Court also imposed a bifurcated, shifting burden of proof when adverse public

employment decisions are based on both forbidden First Amendment motivations and permissible employer reasons. *See Mt. Healthy City Board of Education. v. Doyle*, 429 U.S. 274, 284-87 (1977).

But the scope of protected public employee speech remains substantial as public employees do not lose all free speech rights because they accept public employment. *See San Diego v. Roe*, 543 U.S. 77, 82 (2004); *Pickering*, 391 U.S. at 568, 571-75; *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). These limited restrictions and regulations of public employee speech under the First Amendment must be viewed against the backdrop of speech rights in other contexts. In imposing these public employee speech restrictions and regulations, the courts have merely limited otherwise very broad rights; they have not barred public employee rights altogether. *See Garcetti*, 164 L.Ed.2d at 701-703; *Connick*, 461 U.S. at 142-44, 147-49; *Pickering*, 391 U.S. at 568, 571-73.

D. The Ninth Circuit's Complete Bar In *Engquist* Of Public Employee Class-Of-One Rational Basis Claims Is Not Supportable Under Any Constitutional Analysis

Constitutional protection for rational basis equal protection claims are highly restrictive in their broadest applications. *See* Discussion, Section IV.B, *infra*. Attempts to limit or prohibit remedies for such conduct in employment settings are thus starting from a most restrictive foundation. Still, the *Engquist* holding would bar all such employee claims, not merely further restrict them, as proposed by three Circuits – the Second, a

divided Seventh and Tenth – *see Levenstein*, 414 F.3d at 775-76 (requiring proof that disparately treated classes are "identical in all respects"); *Neilson*, 409 F.3d at 104 & n.3 (requiring greater similarity between disparately treated classes than normal standard); *Jennings*, 383 F.3d at 1211 (adding subjective malice or ill will element to rational basis analysis).

As noted by the *Engquist* holding, *see Engquist*, 485 F.3d at 994-95, the Supreme Court in *Bishop v. Wood*, 426 U.S. 341, 349 (1976) expressed a similar fear from broad application of the due process clause in government personnel settings. But the quoted language was immediately followed by the declaration that this justified strictly restricting such claims to remedying constitutional deprivations, not prohibiting such claims or remedies. *See Bishop*, 426 U.S. at 350.

In barring public employee § 1983 class-of-one rational basis equal protection claims, the *Engquist* holding completely prohibits a First Amendment right of public employees – *i.e.* to seek federal judicial relief, *see e.g. Cruz*, 405 U.S. at 321; *California Transport Co.*, 404 U.S. at 510; *NAACP v. Button*, 371 U.S. 415, 429, 431 n.20 (1963) – in this instance for alleged intentional discriminatory acts otherwise barred by law under the equal protection rational basis test. Likewise, the *Engquist* holding on its face distinguishes between a "class-of-one" and all other size classes – if that distinction then holds up – in restricting access to the federal courts for securing remedies for equal protection rights, which is itself a form of classification.

The classifications – public employee equal protection plaintiffs versus other equal protection plaintiffs; "class-of-one" plaintiffs versus classes of two or more – each involve the right to petition courts for redress, *see Cruz*, 405 U.S. at 321; *California Transport Co.*, 404 U.S. at 510. Thus these judicial classifications are subject to strict scrutiny under the equal protection clause, with *inter alia* its least restrictive means standard, *see City of Cleburne*, 473 U.S. at 439-42, and the presumption against their validity, *see Schad*, 452 U.S. at 64-65, 69-70.These sweeping prohibitions for public employees of already severely limited equal protection remedies – aside from its erroneous premise of practical necessity, *see* Discussion, Section IV.B, *infra* – is inapposite to the norm of limited restrictions of the broadest rights in constitutional jurisprudence. It also raises the potential for pernicious results, such as stripping public employees of all judicial remedies for all non-suspect classes of discrimination.

Clearly, there are less restrictive means of protecting any governmental interest in protecting the efficiency of the governmental workplace without a complete ban of protected speech and petition to the courts for class-of-one rational basis claims. Some have been crafted by other circuits. *See* Section IV.B, *infra*. Strict application of traditional rational basis equal protection jurisprudence will also allay this concern. *See* Section IV.B, *infra*.

E. The *Engquist* Holding Conflicts With Established Rule That § 1983 Claims Are Never Subject To Any Exhaustion Of State Remedies Requirement Or Subordination To State Remedies

Section 1983 claims are never subject to any requirement of exhaustion of state remedies. *See Patsy v. Board of Regents*, 457 U.S. 496, 501-506, 513-514, 516 (1982). *Accord*, *Heck v. Humphrey*, 512 U.S. 477, 483 (1994). Were that otherwise, the exhaustion requirement would actually serve to bar federal claims because of the preclusive effect of the state proceedings. *See Elliott v. Tennessee*,478 U.S. 78/8, 794-99 (1986).

The *Engquist* holding justifies what may become a complete ban on employee rational basis equal protection claims under § 1983 by noting that public employees have available other state and local administrative or judicial remedies. *See Engquist*, 485 F.3d at 995 & n.3. However, § 1983 and its mandate for federal judicial remedies do not permit a requirement of exhaustion of state remedies, *see Patsy*, 457 U.S. at 501-506, nor an absolute bar to seeking such federal judicial remedies because of availability of state remedies[3], *see Monroe v. Pape*, 365 U.S. 167, 174-84 (1961) (§ 1983 relief is supplemental to state remedies; holding).

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3. Nor do procedural due process cases which focus on the availability and adequacy of state remedies have any bearing on this analysis, because in such procedural due process cases, one element is the claimed denial of required process, and hence evidence to the contrary is plainly relevant to that constitutional inquiry. *See e.g. Daniels v. Williams*, 474 U.S. 327, 330-33 (1986); *Hudson v. Palmer*, 468 U.S. 517, 533-36 (1984); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-37 (1982); *Paratt v. Taylor*, 451 U.S. 527, 539-42, 544 (1981).

IV.

EVEN CIRCUIT RULES IMPOSING LESS RESTRICTIVE SPECIAL BURDENS FOR PUBLIC EMPLOYEE CLASS-OF-ONE RATIONAL BASIS EQUAL PROTECTION § 1983 CLAIMS ARE NOT WARRANTED IN LIGHT OF HIGHLY RESTRICTIVE REQUIREMENTS FOR ALL RATIONAL BASIS CLAIMS

As further discussed in this Section IV, the evolution of the standards employed to handle constitutional claims under 42 U.S.C. § 1983 – from the initial analogous tort model to the underlying constitutional text model, combined with (a) the highly restrictive test for any rational basis equal protection claim and (b) the specific intent requirement for all equal protection claims, make any special restrictions for class-of-one claims unnecessary as a matter of policy and application of the least intrusive means test which applies when a classification impacting the fundamental right to petition for redress of grievances, *see* Discussion, Section III, *supra*.

A. The Analogous Tort Model For 42 U.S.C. § 1983 Has Been Subordinated To The More Defined Incorporated Constitutional Text Model

1. Commencing In 1961 Federal Courts Construed Claims Under 42 U.S.C. § 1983 Primarily By The Analogous Tort Model

Commencing with the Supreme Court decision in 1961 in *Monroe*, 365 U.S. at 174-84, the primary methodology for ascertaining elements for damages claims under § 1983 was to look to the most analogous common law tort action. "In the absence of more specific guidance, we looked first to the common law of torts (both modern and as of 1871). . . ." *Smith v. Wade*, 461 U.S. 30, 34 (1983). *Accord*, *Heck*, 512 U.S. at 484-86.

> Over the centuries the common law of torts . . . defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under § 1983 as well.

Carey v. Pyphus, 435 U.S. 247, 257-58 (1978).

2. The Analogous Tort Model Culminated In A Negligent *Scienter* Rule In *Paratt v. Taylor* Which Engendered Conflicting Rulings In 42 U.S.C. § 1983 Jurisprudence

Use of the analogous tort model eventually compelled the Supreme Court to determine whether § 1983 could provide a remedy for a claim wherein the alleged *scienter* is mere negligence, and in *Paratt v.*

Taylor, 451 U.S. 527 (1981) the Court opined that indeed a negligent act could in some cases form the basis for a § 1983 claim. *See Paratt*, 451 U.S. at 534-35. This occurred in the wake of *Maine v. Thiboutot*, 448 U.S. 1, 4-8 (1980) (§ 1983 provides remedy for deprivation of federal statutory as well as constitutional rights) and earlier concerns that § 1983 not become a vehicle for a generalized federal tort remedy for all torts committed by state or local officials, *see*, *e.g.*, *Paul v. Davis*, 424 U.S. 693, 698-700 (1976).

Hence, the *Parratt* ruling almost immediately generated a serious problem: how to avoid § 1983 becoming a generalized federal tort remedy for all commonplace negligence torts committed by any and all state and local public officials. *See*, *e.g.*, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-37 (1982) (placing boundaries on *Parratt* with due process claims); *Hudson v. Palmer*, 468 U.S. 517, 530-36 (1984) (same).

3. *Paratt* Problems Were Resolved By Supreme Court Adoption Of The Incorporated Constitutional Text Model Which Is Now The Predominant Framework For 42 U.S.C. § 1983 Claims

The Supreme Court finally resolved the *Parratt* problem by moving in a different direction. It retrenched on its *Paratt* "negligence" ruling, and instead adopted the alternative formulation suggested in a concurring opinion by Justice Powell in *Parratt*: the proper test for determining elements of claims under § 1983 should be to look to the federal constitutional or statutory right

allegedly deprived, and incorporate the elements for violation of that particular federal right.

> The central question in this case is whether *unintentional* but negligent acts by state officials, causing respondent's loss of property, are actionable. . . . [T]his question requires the Court to determine whether intent is an essential element of a due process claim, just as we have done in cases applying the Equal Protection Clause . . . and the Eighth Amendment's prohibition of "cruel and unusual punishment." . . . . The intent question cannot be given "a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a § 1983 action," [citation omitted]. Rather, we must give close attention to the nature of the particular constitutional violation asserted, in determining whether intent is a necessary element of such a violation. . . . [S]uch a rule would avoid trivializing the right of action provided in § 1983.

Parratt, 451 U.S. at 547-48 & nn.2-7 (J. Powell, concurring). *Compare Daniels v. Williams*, 474 U.S. 327, 330-33 (1986) (requiring specific intent *scienter* in due process claims under § 1983 as previously established element of underlying constitutional provision); *Davidson v. Cannon*, 474 U.S. 344, 347 (1986) (same).

This restored § 1983's grounding in the underlying federal right being deprived. By focusing the analysis on the underlying federal constitutional provision and its established elements, the test eschewed initial

reliance upon analogous torts arising from state law rights, and hence eliminated the attendant risk of converting § 1983 into a generalized federal tort remedy with the feared consequential flood of tort claims against public officials. This benefit was immediately felt in *Daniels* and *Davidson* wherein claimed wrongs were negligent handling of prisoner property or custody, and the sole federal rights implicated were deprivation of property or liberty without due process of law, with its previously established specific intent requirement, *see Daniels*, 474 U.S. at 330-33; *Davidson*, 474 U.S. at 347.

This underlying constitutional text model has been extended to a variety of § 1983 claims, buttressed by parallel reasoning that restricted reliance on substantive due process and its potential for incorporating rights not grounded in specific federal constitutional or statutory provisions. *See*, *e.g.*, *Graham v. Connor*, 490 U.S. 386, 394 (1989) (excessive police force claims; 4th Amendment for unreasonable seizures); *Albright*, 510 U.S. at 271 n.4 (same for malicious criminal prosecution).

The analogous tort model has not been abandoned, but resort thereto is now limited to situations wherein there is a manifest intent of some federal enactment to protect against some harm, but no adequate pre-existing formulation for that federally established right. *See*, *e.g.*, *Heck*, 512 U.S. at 482-84 (analogous tort model for malicious prosecution re post-conviction claim; 4th Amendment inapplicable); *Wyatt v. Cole*, 504 U.S. 158, 164-67 (1992) (common law principles for malicious prosecution based on civil action). The same is true for substantive due process. *Compare Brower v. County of*

Inyo, 489 U.S. 593, 596-97 (1989) (4th Amendment requires proof that seizure occurred "through means intentionally applied") *with County of Sacramento v. Lewis*, 523 U.S. 833, 843-44 (1998) (*Brower* test not met when interference with seizure results from police vehicular accident, so substantive due process applicable).

B. The Test For 42 U.S.C. § 1983 Rational Basis Equal Protection Claims Should Derive From The Existing Elements Of Equal Protection Rights Under Fourteenth Amendment Rational Basis Standard

The courts have applied the rational basis test for claimed deprivation of equal protection of the laws occurs when the classification at issue does not implicate strict scrutiny – *i.e.* no suspect classification [*e.g.* race or national origin] or any fundamental right [*e.g.* First Amendment rights], or heightened scrutiny [*e.g.* gender or "illegitimacy"], *see City of Cleburne*, 473 U.S. at 439-42. In so doing, this Court has ruled that a rational basis equal protection § 1983 claim can be maintained even where the plaintiff represents a mere "class-of-one." *See Village of Willowbrook*, 528 U.S. at 564.

Once again, as with *Parratt*, there are policy concerns about federal judicial review of virtually all government acts which distinguish one person from another person or group, especially in public employment. *See Village of Willowbrook*, 528 U.S. at 565-66 (J. Breyer, concurring); *Lauth*, 424 F.3d at 633-34; *Jennings*, 383 F.3d at 1210-11 & n.4. Courts, as with *Parratt*, have sought to remedy this by grafting various

additional restrictive elements to "class-of-one" claims. *See e.g. Levenstein*, 414 F.3d at 775-76 (requiring proof that differentially treated classes are otherwise "identical in all respects"); *Neilson*, 409 F.3d at 104 & n.3 (requiring greater proof of similarity between compared classes); *Jennings*, 383 F.3d at 1211 (noting circuits which require added malice or ill will element).

Once again, as occurred ultimately with *Parratt*, the solution to this concern is the proper application of the underlying constitutional text model, per *Williams*, *Davidson* and *Connor*, not the grafting of additional special tests for rational basis equal protection § 1983 claims.

As previously mentioned, at least three (3) circuits – the Fifth, Sixth and a divided Seventh – have invoked the underlying constitutional text model[4], simply applying the highly restrictive objective standard of the equal protection rational basis standard as discussed in Section IV.B, *infra*. *See Scarborough*, 470 F.3d at 261; *Whiting*, 451 F.3d at 348-49 & n.3; *Lauth*, 424 F.3d at 634.

The *Lauth* Court, after stating that "we decline to rule that a public employee can *never* maintain a class-of-one case," *Lauth*, 424 F.3d at 634, added:

> [A] plaintiff who does not belong to any suspect (that is favored) class – by definition

4. Two other circuits – First & Third – invoked standard equal protection analysis, but with little discussion beyond the specific facts of the case. *See Hill*, 455 F.3d at 239; *Campagna*, 334 F.3d at 156.

> the situation of a class-of-one plaintiff – must to prevail, "negative any reasonably conceivable state of facts that could provide a rational basis for the classification." [Citations omitted]. "Governmental action only fails rational basis scrutiny if no sound reason for the action can be hypothesized." [Citation omitted]. . . . [T]he target of class-of-one cases is "governmental action wholly impossible to relate to legitimate governmental objectives." [Citations omitted]. Animus thus comes into play only when, no rational reason or motive being imaginable for the injurious action taken by the defendant against the plaintiff, the action would be inexplicable unless animus had motivated it.

Lauth, 424 F.3d at 634[5]. *Accord*, *Scarborough*, 470 F.3d at 261 (same); *Whiting*, 451 F.3d at 348-49 & n.3 (same). The key is the initial focus on whether there is any reasonably conceivable rational basis, objectively determined, for the classification which served as the basis for differential treatment.

Thus, as prescribed in *Lauth*, applying the Supreme Court's underlying constitutional text model to rational basis equal protection § 1983 claims means reference first of all to the Fourteenth Amendment equal protection jurisprudence governing the objective rational basis test; and if that suffices to provide the necessary elements for

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5. *But see Levenstein*, 414 F.3d at 775-76 (adding additional element of proof to standard rational basis test).

such remedy claims, only then to assess the intent or animus requirement in all discrimination claims. *See* Discussion, Section IV.B, *infra*.

1. The Rational Basis Equal Protection Formula Sets An Extremely High Threshold Standard Under Which State Classifications Are Unlawful If Lacking Any Reasonably Conceivable Rational Basis

> The equal protection guarantee of the Fourteenth Amendment does not take from the States all power of classification. [Citation omitted]. Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law. When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern. [Citations omitted].

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 271-72 (1979).

When applicable, the rational basis test under the equal protection clause sets the bar very high for any party challenging a classification under color of state law. The validity of a government classification is presumed so long as it is drawn to be "rationally related to a legitimate state interest." *See City of Cleburne*, 437 U.S. at 440. "[T]he

Equal Protection Clause requires only a rational means to serve a legitimate end." *see City of Cleburne*, 437 U..S. at 442. *Accord*, *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 367 (2001). "[A] classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification' [citations omitted]." *Heller v. Doe*, 509 U.S. 312, 320 (1993). "'[T]he burden is on one attacking the [classification] to negative every conceivable basis which might support it . . . [citation and internal quotation marks omitted]." *Heller*, 509 U.S. at 320. *Accord*, *Board of Trustees of University of Alabama*, 531 U.S. at 367; *FCC v. Beach Communications*, *Inc.*, 508 U.S. 307, 313 (1993); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 60 (1973) ("classification rests on grounds wholly irrelevant to the achievement of the State's objective"). Because this standard focuses on "reasonably conceivable" rationales which "could" have been the basis for the classification, *see Heller*, 509 U.S. at 320; *Board of Trustees of University of Alabama*, 531 U.S. at 367; *FCC*, 508 U.S. at 313, and because the courts eschew second-guessing governmental classifications that are not suspect, *see Heller*, 509 U.S. at 319-21; *FCC*, 508 U.S. at 315-16 & n.7, this test is necessarily an objective one, *see San Antonio Independent School Dist.*, 411 U.S. at 60 ("discrete and **objectively verifiable** classes;" "any state of facts **reasonably** may be conceived to justify it") (emphasis added).

It is at this latter stage that the issue of "pretext" arises when there is a dispute as to what was the actual classification factor – *e.g.* citing business reasons as the classifying factor when excluding a socially disapproved group not protected by strict scrutiny. *See Personnel Administrator of Massachusetts*, 442 U.S. at 272 (right to refute classification that is ostensibly neutral but is pretext for unlawful discrimination); *Squaw Valley Development Co.*, 375 F.3d at 944, 945-46 (same); *Armendariz*, 75 F.3d at 1327 (same). Once it is established that a forbidden classification has occurred, under whatever test, finding a violation of the Fourteenth Amendment prohibition of unequal treatment requires proof that the government actor intended to discriminate, that it was a purposeful discrimination. *See Personnel Administrator of Massachusetts*, 442 U.S. at 272; *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-65 (1977); *Washington v. Davis*, 426 U.S. 229, 242 (1976). "[E]ven if a neutral law has a disproportionately adverse effect upon [a classified group], it is unconstitutional only if that impact can be traced to a discriminatory purpose." *Personnel Administrator of Massachusetts*, 442 U.S. at 272. *Accord*, *Seariver Maritime Financial Holdings, Inc.*, 309 F.3d at 679.

Thus, the test for establishing a constitutionally forbidden deprivation of equal protection of the law under color of law, when applying the rational basis test, imposes a duty on the claiming party to prove (a) first that there is no reasonably conceivable rational basis for the challenged classification – *i.e.* no reasonably conceivable rational relationship to no reasonably conceivable legitimate state objective – and then (b) that

any adverse impact on the classified group to which plaintiff belongs was intentional or purposeful discrimination against that class. If that very standard were to be deemed incorporated into all § 1983 rational basis equal protection claims – per *Williams*, *Davidson* and *Connor* – the bar would be set sufficiently high to preclude the perceived risks of judicial second-guessing of state and local governmental decision-making, or of a flood of litigation thereunder, whether in or out of the employment context. A plaintiff asserting such a § 1983 claim would have to plead the objective absence of any reasonably conceivable rational basis, and a court will be able to readily assess as a matter of law whether there is in fact any reasonably conceivable rational basis, especially where the fact of the classification is not in issue, only whether it is legitimate.

2. Use Of Fourteenth Amendment Equal Protection Rational Basis Test And Proper Treatment Of Extraneous Concepts And Unnecessarily Broad Terms Would Resolve Public Policy Concerns

If § 1983 claims for unlawful classifications are assessed under the rational basis test and carefully adhere to the well-established standard for the constitutional text, *see* Discussion, Section IV.B., *infra*, there would be no uncertainty in those claims nor would there be any danger of overbreadth of application. To the extent such problems do in fact exist, or are fairly anticipated, they arise from confusion about the pretext issue, imprecision of language or reliance upon formulations extraneous to the relevant constitutional text.

Thus, for instance, some cases assume that invocation of a "class of one" means that there is an equal protection remedy without need for proof of a subject class or classification at all. *See Neilson*, 409 F.3d at 104; *Jennings*, 383 F.3d at 1210. This is plainly illogical – *i.e.* an employer might discriminate against left-handedness or anyone not sharing his bed, with evidence of only one affected left-handed person, and this would be a "class of one." These courts overlook the fact that the salient issue is whether there is a classification that differentiates plaintiff from others in terms of some form of employer treatment.

Meanwhile, the pretext issue – which is not an element of an equal protection claim – sometimes becomes factually central to such claims. *See Personnel Administrator of Massachusetts*, 442 U.S. at 272 (citing "classification that is ostensibly neutral but is an obvious pretext for [unlawful] discrimination"). Similarly, rational basis equal protection decisions sometimes contain *dictum*, or cite allegations in the complaint, or discuss matters ancillary to the governing test, using the term[s] "arbitrary," "wholly or plainly arbitrary," "arbitrary and/or capricious" or "malicious" with inexactitude – indeed, they cannot even agree whether it should be "arbitrary **and** capricious" or "arbitrary **or** capricious." *See e.g. Village of Willowbrook*, 528 U.S. at 565 (complaint stated equal protection claim by alleging state action was "irrational and wholly arbitrary"); *City of Cleburne*, 473 U.S. at 446 ("State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational"); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. at 53, 60 (appellants urge system is

"unconstitutionally arbitrary;" "Equal Protection Clause is offended only by . . . classifications that are wholly arbitrary or capricious").

Further confusing the use of the word "arbitrary" in connection with equal protection claims are those cases which view the due process clause as the historic source of remedies for "arbitrary" state action. *See County of Sacramento*, 523 U.S. at 845-46; *Daniels*, 474 U.S. at 331 (and cases cited therein). Then again, other courts have said that the mere fact of "arbitrary" or "capricious" state action does not alone warrant a federal judicial remedy. *See Regents of University of Michigan v. Ewing*, 474 U.S. 214, 226 (1985) ("arbitrary or unreasonable" state action).

Together or separate, the pretext issue and the use of uncertain terms like "arbitrary" or "capricious" add nothing to the threshold standard of the highly restrictive formulation for the rational basis test except uncertainty and fear of what that uncertainty can produce. Thus, the *Engquist* Opinion fears that the "arbitrary" standard of equal protection will effectively denude "at will" discretionary employer decisionmaking. *See Engquist*, 485 F.3d at 964-66.

That uncertainty and risk can be avoided by proper identification of the pretext issue – as a rebuttal to a denial of discrimination on the alleged criterion; and by making clear that broad and uncertain terms regarding arbitrariness, capriciousness or malice are not a part of or alternative to the actual highly restrictive objective legal standard to be applied under § 1983 equal protection rational basis claims, except as it might relate

to the required purposeful discrimination; or, where it might serve as evidence of a classifying factor which does not meet the rigorous rational basis standard.

When applying the undrlying constitutional text model, feared problems do not arise because plaintiffs will need to plead and prove that there is a classifying factor; an actual differential treatment between classes; either the lack of any reasonably conceivable legitimate rational for the classification or any reasonably conceivable legitimate governmental interest served by the classification; and a subjective intent to discriminate. *See* Discussion, Section IV.B, *supra*.

Except for the last element – *i.e.* intent to discriminate – these elements are subject to an objective test, not based on the actual state of mind of the state actor. *See San Antonio Independent School Dist.*, 411 U.S. at 60 ("**objectively verifiable** classes" and "facts **reasonably** . . . conceived") (emphasis added). Hence, courts usually will be able to assess, on any pleading motion, whether the plaintiff has adequately plead an actual classification, the absence of any reasonably conceivable rational basis for the alleged classification – whether or not implicating a class of one or many – and the absence of any reasonably conceivable legitimate state interest served thereby. In such eventuality, mere allegations of subjective animus would not serve as a bar to dismissal, *see e.g. Jicarilla Apache Nation*, 440 F.3d at 1210 (if there was objectively reasonable basis for defendants actions, court did not err granting summary judgment in favor of Defendants without allowing discovery on question of subjective ill will).

Conversely, forms of class-based discrimination for which there is admission by all parties that there is no conceivable rational basis rationally related to any legitimate state purpose, *see*, *e.g.*, *Scarborough*, 470 F.3d at 261; *Engquist*, 485 F.3d, 1011-1014 & nn.1 & 3 (J. Reinhardt dissenting)[6], will not obtain *de facto* official judicial sanction in the public employment realm by stripping all federal remedies therefor, based on unjustified fears which should not in any case control constitutional jurisprudence. This remedy thus defined will not excessively or unreasonably impinge upon legitimate "at will" governmental decision-making any more than does the rule that bars other forms of prohibited discrimination or "infringe[ment on] constitutionally protected interests" in the same context. *See*, *e.g.*, *Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972) ("at will" employment status permits action for any reason or none, so long as it is not done for a legally forbidden reason).

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6. In such cases where there is no dispute over whether even the rational basis test can be satisfied, the defendant does not seek to justify the discriminatory classification, instead merely denying that the classification or differential treatment occurred, or seeking to advance a different permissible classifying factor, in which event the claims turn on the credibility of the parties and disputed claims of pretext.

C. Under The Least Intrusive Means Test There Is No Basis For Applying Special Restrictions To Public Employee § 1983 Class-Of-One Equal Protection Claims

Even those circuits which merely apply more restrictive rules of pleading or proof for public employee § 1983 class-of-one rational basis equal protection claims, to the extent that they serve to bar some public employee claims which would not be otherwise barred, are making a classification which impacts a fundamental right, thereby invoking strict scrutiny and its least intrusive means test, *see City of Cleburne*, 473 U.S. at 439-42, and the presumption against its validity, *see Schad*, 452 U.S. at 64-65, 69-70. Application of standard rational basis equal protection analysis, *see* Discussion, Section IV.B, *supra*, obviates the necessity for such special tests; and in any event, should only be invoked if the intended constitutionally sanctioned purpose cannot be achieved by less intrusive means.

CONCLUSION

Amicus respectfully joins Petitioner in seeking the overruling of the *Engquist* holding and substituting a traditional constitutional approach under the Fourteenth Amendment equal protection clause. To the extent that any special treatment is deemed necessary and constitutionally warranted under the least intrusive means test of the First Amendment, the Court is urged to look to its existing First Amendment jurisprudence for public employee speech which balances the public interest in governmental employment workplace efficiency against the fundamental rights of public employees to access the courts for judicial remedies for meritorious class-of-one rational basis equal protection claims. In so doing, public employee rights to seek redress of remedies under the equal protection clause, under any standard, can be fully preserved fully consistent with the overall public interest, which interest is also served by judicial remedies for discrimination for bidden by the Fourteenth Amendment equal protection clause.

Respectfully submitted,

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