No. 07-474

In The Supreme Court of the United States

ANUP ENGQUIST,

Petitioner,

v.

OREGON DEPARTMENT OF AGRICULTURE, *ET AL.*,

Respondents.

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

BRIEF OF THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC. AND THE NORTH CAROLINA TROOPERS ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

J. Michael McGuinness
Counsel of Record
THE MCGUINNESS LAW FIRM
Post Office Box 952
Elizabethtown, NC 28337
(910) 862-7087 (Telephone)
(910) 862-8865 (Facsimile)
jmichael@mcguinnesslaw.com
Counsel for Amicus Curiae

William J. Johnson
NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC.
317 South Patrick Street
Alexandria, VA 22314
(703) 549-0775 (Telephone)
(703) 684-0515 (Facsimile)
bjohnson@napo.org
Counsel for Amicus Curiae

THE LEX GROUP[DC] ♦ 1750 K Street N.W. ♦ Suite 475 ♦ Washington, DC 20006
(202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦www.thelexgroupdc.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

Books

Articles

INTEREST OF THE AMICUS CURIAE[1]

The National Association of Police Organizations, Inc. ("NAPO") and its affiliate, the National Law Enforcement Officers' Rights Center of the Police Research and Education Project, are national non-profit organizations which represent law enforcement officers throughout the United States. NAPO is a coalition of police associations that seeks to protect the rights of law enforcement officers and to enhance public safety through legal advocacy, education and legislation. NAPO represents over 1,000 law enforcement organizations, with over 238,000 sworn law enforcement officers and 11,000 retired officers. NAPO often appears as amicus curiae in appellate cases of special importance to the law enforcement profession.

The North Carolina Troopers Association, Inc. (NCTA) is a voluntary, non-profit association of over one thousand members of the North Carolina Highway Patrol. NCTA has worked for over thirty years to enhance public safety and protect its Troopers. In recent years, many North Carolina Troopers have been subjected to egregious arbitrary treatment by the N.C. Highway Patrol comparable to the arbitrary decisionmaking at issue in this case.

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1. Counsel of Record for all parties received notice at least 10 days prior to the due date of the *amici's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or counsel made a monetary contribution to its preparation or submission.

These employment practices have had adverse effects on both agency efficiency and public safety.

NAPO, NCTA and the American law enforcement profession have a vital interest in the equal protection issues before this Court. The Ninth Circuit's bold holding is inconsistent with this Court's precedent, numerous other decisions and settled professional law enforcement personnel standards. The Ninth Circuit's decision to eliminate core equal protection rights is a fundamental impediment to proper personnel administration in law enforcement.

Experience has unfortunately demonstrated that law enforcement officers are particularly vulnerable to abuse by unelected bureaucrats and politicians who indulge in arbitrary, discriminatory and retaliatory employment practices against officers. This is especially true in the south, where collective bargaining is prohibited by law. The class-of-one equal protection doctrine is among the few remaining constitutional safeguards allowing police officers to protect their careers by challenging arbitrary personnel decisions and disparate treatment by their employers. NAPO and NCTA submit this brief to assist this Court in its resolution of this enormously important case.

SUMMARY OF ARGUMENT

America's law enforcement officers form a unique class of professionals[2] who sometimes suffer from arbitrary abuse of government power by their employers. Police officers and public employees are constitutionally entitled to equal protection in employment under the class-of-one doctrine reaffirmed in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). The class-of-one equal protection principle is particularly necessary in non-collective bargaining jurisdictions where there is no check on abusive government power.

This Court, like every other Circuit that has spoken on the issue but the Ninth, has long held that the Equal Protection Clause applies to public employment just as it does in many other contexts where citizens need protection from governmental arbitrariness and disparate treatment. More specifically, since *Willowbrook*, several Circuits have continued to find that the class-of-one principle applies to public employment. Most also hold that a showing of malice is not required. The Ninth

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2. In 2004, there were 14,254 police agencies, employing 675,734 sworn police officers and 294,854 civilians, serving the 278 million persons in America. See Uniform Crime Statistics in *www.fbi.gov/ucs/cius_04/law_enforcement_personnel.* Crime fighting has taken its toll on American police officers, who often develop illnesses and disabilities from their high stress profession, resulting in an average life span of only 57 years. Since 1792, when Deputy Sheriff Isaac Smith became the first police officer to die in service, more than 17,900 police officers have been killed in the line of duty. See http://lawenforcementmuseum.org/TheMemorial/facts.htm More than 56,000 police officers are assaulted each year. Id.

Circuit's holding and reasoning is contrary to this Court's equal protection jurisprudence because:

1) equal protection has historically protected police officers from arbitrariness and disparate treatment by their employers; and

2) there is no legitimate justification for excluding police officers from this settled foundation of core constitutional protection; and

3) unique aspects of the police personnel environment necessitate class-of-one equal protection as a tool to protect police officers from unlawful arbitrariness and disparate treatment by employers.

Police officers need class-of-one equal protection because:

> Law enforcement officers across America face great challenges every day as they fight the war against crime and drugs. They are on the front line; their lives are in constant jeopardy. All of us owe them our gratitude and our respect... *[T]oo often law enforcement officers lose their jobs for frivolous reasons - or for no reason at all. For example, an officer may have a difference of opinion with a superior."*

Senator Jesse Helms, Congressional Record, January 31, 1991, Vol. 137, No. 21, 102nd Congress (emphasis added).

This Court has long recognized the unique working environment of police officers and that the constitutional rights of police officers are entitled to great weight. This Court has held that law enforcement officers are not required to make do with a "watered down version of constitutional rights." *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). Lower courts have historically followed this Court's teachings that constitutional protections for America's law enforcement officers are critically necessary. See e.g. *Konraith v. Williquette*, 732 F. Supp. 973, 978 (W.D. Wis. 1990) (constitutional rights of law enforcement officers "must be afforded great weight"); *Edwards v. City of Goldsboro*, 178 F.3d 231 (4th Cir. 1999); *Barrett v. Thomas*, 649 F.2d 1193 (5th Cir. 1981).

If police officers are not afforded equal protection in employment, the many problems that fester in abusive police work environments will continue to grow, therefore further jeopardizing officers, public safety and ultimately the American criminal justice system. In many jurisdictions, collective bargaining and freedom from arbitrariness are unavailable to police officers, thus the class-of-one principle provides crucial residual protection in those states.

ARGUMENT

I. CLASS OF ONE EQUAL PROTECTION PROVIDES IMPORTANT PROTECTIONS TO POLICE OFFICERS WHO HAVE HISTORICALLY BEEN SUBJECTED TO ARBITRARINESS IN EMPLOYMENT.

America's police officers serve in an employment environment where employers enjoy considerable discretion. Substantial parts of America, especially the many and growing states of the South, prohibit public sector collective bargaining by statute. See, e.g., N.C.G.S. 95-98; Beaird, *Public Employee Labor Relations in the Southeast - An Historical Perspective*, 59 N.C.L. Rev. 71 (1980). In North Carolina, for example, bargaining with law enforcement agencies as an organized unit is a misdemeanor crime. N.C.G.S. 95-99. These jurisdictions afford little or no protection from arbitrary and disparate treatment, thus leaving police officers without any means to protect their careers. For example, Sheriff Joe McQueen of Wilmington, North Carolina, has proclaimed that officers "serve at the whim of the Sheriff." See *The Impact Of Willowbrook On Equal Protection And Selective Enforcement,* which appears in, *Section 1983 Litigation* (Practicing Law Institute; 2000; 641 PLI/LIT 469). Scores of cases demonstrate how some police employers make employment decisions based upon arbitrary, retaliatory and discriminatory

considerations.[3] Most of the egregious police personnel cases arise from southern jurisdictions where collective bargaining is unavailable.

Police officers still have to occasionally endure explicit ticket or charge "quotas" in order to remain employed in some areas. See *Gravitte* v. *N.C. Division of Motor Vehicles*, 33 Fed. Appx. 45 (4th Cir. 2002)(officer disciplined for non-compliance with explicit ticket quotas). This archaic quota practice requires coerced criminal charges predicated upon an arbitrary production quota. Disciplinary decisions predicated upon non-compliance with ticket or charge quotas is another example of arbitrariness in personnel decisionmaking.

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[3] E.g., *Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007)(police officers reassigned after informing prosecutor that the chief of police had harbored a felon); *Green v. Barrett*, 226 Fed. Appx. 883 (11th Cir. 2007)(jailer fired for testifying that the jail was unsafe); *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006)(correctional officer fired for communicating to her state senator and State Inspector General about sexual harassment); *Kirby v. Elizabeth City*, 388 F.3d 440 (4th Cir. 2005)(officer disciplined for testifying about malfunctioning police equipment); *Edwards v. City of Goldsboro*, 178 F.3d 231 (4th Cir. 1999)(officer disciplined for teaching off-duty firearms safety class); *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. *en banc* 1997) (firing for political activities); *Worrell v. Bedsole*, 1997 WL 153830 (4th Cir. 1997)(deputy fired for reporting failures in providing safe police equipment); *Carroll v. N.C.D.E.N.R*, 358 N.C. 649, 599 S.E.2d 888 (2004)(officer disciplined for nominal speeding while responding to medical emergency); *Newberne v. N.C. Department of Crime Control and N.C. Highway Patrol*, 359 N.C. 782, 610 S.E.2d 201 (2005)(retaliation against whistleblowing Trooper); *Howell v. Town of Carolina Beach*, 106 N.C. App. 410, 419 S.E.2d 277 (1992)(officer fired for reporting malfunctioning police firearms), and other cases cited herein.

A leading example of arbitrary decisionmaking in the police personnel context is *Ziegler v. Jackson*, 638 F.2d 776 (5th Cir. 1981). There, the Fifth Circuit reversed summary judgment and imposed judgment as a matter of law for an officer who had been terminated after he was convicted of a misdemeanor firearm and provocation offense. Three other officers were retained despite their convictions for assault and battery. The Court reasoned that there was no justification for the disparate treatment between the Plaintiff and his three comparator officers. The *Ziegler* non-arbitrariness principle has been recognized in police personnel training and applied for nearly thirty years.

Police officers have occasionally sought and obtained relief under the Equal Protection Clause for different kinds of arbitrariness by police employers. E.g., *Knussman v. Maryland*, 272 F.3d 625 (4th Cir. 2001) (equal protection verdict for trooper affirmed; disparate treatment in leave benefits); *Beardsley v. Webb*, 30 F.3d 524 (4th Cir. 1994)(affirming verdict for deputy sheriff victimized by disparate treatment and sexual harassment); *Hayes v. North State*, 10 F.3d 207 (4th Cir. 1993)(partial summary judgment for police officers affirmed in case involving disparate treatment in promotions); *Wood v. Mills*, 528 F.2d 321 (4th Cir. 1975)(disparate treatment in pay among jailers held to violate equal protection).

The leading treatise examining police personnel issues describes cases of unlawful and sometimes egregious police discipline. See W.

Aitchison, *The Rights of Police Officers* (5th Ed. 2004). This 455 page treatise and other authorities cited herein demonstrate that class-of-one claims are hardly ever brought by police officers. In fact, in Aitchison, there is no treatment of class-of-one claims. However, removing police employment from the reach of equal protection would constitute a giant retreat and expose American police officers to even more arbitrariness at a time when officers critically need fundamental equal protection.

II. CLASS OF ONE EQUAL PROTECTION PROVIDES CRUCIAL PROTECTIONS TO POLICE OFFICERS IN NON-COLLECTIVE BARGAINING STATES.

The proper and efficient functioning of the American criminal justice system depends largely on the efficiency of the law enforcement profession. Police officers serve as the first responders and front line of defense within America. Since September 11, 2001, homeland security and many other growing problems have added greater stressors and new workplace risks to the law enforcement profession. Budgets are strained; conditions are deteriorating; pressures are intensifying. More than ever before, American police officers need the fundamental protection from workplace arbitrariness prohibited by the Equal Protection Clause.

Historically, police officers have only very rarely brought class-of-one equal protection claims. Many regions of the country with collective bargaining and statutory protections for officers have minimized the need for the occasional class-of-

one claim. Nevertheless, class-of one equal protection must remain as a deterrent to arbitrary abuse of power; it is also especially necessary that the class-of-one principle remain as a cause of action for officers who have no other recourse against arbitrariness.

In the new millennium, complaints against law enforcement officers are increasing. Some complaints often become highly politicized, both within agencies and in the media. Police employers are more prone to react to political pressures from interest groups and others when the easy solution is to just fire the officer. Many of these complaints represent nothing more than an angry suspect who has had an unpleasant encounter with an officer. In many such encounters, police officers have been verbally abused, spit upon, harassed, stalked, assaulted, battered, ambushed, stabbed, shot, run over and sometimes even killed. Police work conditions have been characterized as "scandalous." Bopp & Schultz, *A Short History of American Law Enforcement* 73 (1972). American police officers serve in this unique and sometimes horrifying employment environment. Law enforcement officers are the most challenged, threatened, accused, abused and violated class of persons in America. Thus, their need for equal protection is imperative.

Law enforcement officers must survive not only a highly dangerous workplace but also endless personnel related investigations and complaints. "[A]n officer oftentimes only has a split second to make the critical judgment...." *Ford v. Childers*, 855 F.2d 1271, 1276 (7th Cir. 1988). This Court has long

recognized the unique burden of the police officer who must make a split second decision. E.g., *Scott v. Harris*, 127 S. Ct. 1769 (2007). Once that decision is made, however, the officer must then endure a process of Monday morning quarterbacking that often continues for many years of complaints, investigations, interviews, interrogations, orders, testing, polygraphing, fitness for duty exams, administrative charges, certification investigations, civil suits, depositions, civilian review boards, media scrutiny, certification agency inquiries, disciplinary actions, and grand jury probes. "The policeman's world is spawned of degradation, corruption and insecurity.... he walks alone, like a pedestrian in Hell." William A. Westley, *Violence and the Police* (1970). See *Violent Encounters: A Study of Felonious Assaults On Our Nations' Law Enforcement Officers* (2006; U.S. Department of Justice)("Law enforcement officers, charged with safeguarding the nation's citizens, face potential felonious death and assault daily.").

The Class Of One Doctrine Improves The Quality of Police Services.

The laws governing police employment relations profoundly affect both the quality of police services and the daily lives of police officers everywhere. Agencies, officers and the public are all better served by meaningful equal protection for police officers. Equal protection safeguards against government arbitrariness which can deprive an

officer of his or her entire career because a single adverse action often dooms the officer's career.

Similarly, an arbitrary decision deprives the agency of an officer and erodes agency morale. With the tremendous cost of properly training new officers, it makes sound economic sense to afford basic equal protection to officers. Police agencies benefit from a healthy non-arbitrary and non-discriminatory work environment which inspires community confidence and taxpayer support.

Equal protection not only promotes efficiency and professionalism within the police workplace; it also promotes officer trust, confidence and positive morale. This in turn leads to valuable benefits for everyone including enhanced public safety. A positively motivated law enforcement workforce breeds an environment of collegiality, efficiency and esprit de corps.

Without class-of-one equal protection, arbitrary and discriminatory government power goes unchecked. Denying equal protection to law enforcement officers would frustrate the entire system by demoralizing valuable officers and rewarding abusive management officials for their own misconduct.

The class-of-one principle has long been available to protect police officers in America. See, e.g., *Ziegler v. Jackson*, 638 F.2d 776 (5th Cir. 1981)(recognizing non-suspect class disparate treatment equal protection claim for police officer); *Toomer v. Garrett*, 155 N.C. App. 462, 574 S.E.2d 76

(2002)(Officer Toomer was singled out for arbitrary disparate treatment by publicly disclosing his personnel file following settlement; class-of-one claim recognized).

The post-*Willowbrook* class-of-one cases have been very sporadic. Class-of-one employment cases have been very rare. *Willowbrook* opened no floodgate of litigation in public employment or otherwise. For example, in the Fourth Circuit, there appear to be only eleven published cases that cite *Willowbrook* and only five appear to address the merits of a class-of-one claim. Only one was a police employment claim. *Kirby v. Elizabeth City,* 388 F.3d 440 (4th Cir. 2005). While other causes of action may occasionally be available, in many states where collective bargaining is outlawed or where there is inadequate statutory protection, class-of-one equal protection is sometimes the only source of residual protection to challenge arbitrariness or disparate treatment.

Arbitrary personnel decisionmaking is especially dangerous in police agencies where officer morale and esprit de corps are essential to maintain close working relationships and to retain an experienced police workforce that can effectively protect public safety. Police officers must be free to conduct investigations and make charging decisions free of improper influence by elected officials and bureaucrats seeking to manipulate the criminal justice process.

Even in large police agencies, political intervention in the officer's work environment occurs

occasionally, thereby corrupting the criminal justice process and often scapegoating the officer involved. For example, in Fayetteville, North Carolina, Officer Jennifer Rodriguez recently had the courage to ticket the wife of a high level prominent military official for a red light violation. This ticket provoked direct political and non-police administrative intervention causing the issued ticket to be "voided." Officer Rodriguez came under attack and was subjected to overt hostility in the workplace, verbal abuse, direct retaliation and other misconduct which ultimately cost Officer Rodriguez her job and her career. See Buxton, *Officer Was Scapegoated In Scandal*, February 2, 2008; http://www.fayobserver.com., and earlier articles; Trautman, *A Study of Law Enforcement* 23 (1990)(observing political influence on police officers); *Knight v. Vernon*, 214 F.3d 544 (4th Cir. 2000) (jailer fired for political reasons) and other cases cited *infra*. Such political intermeddlings into police investigations are troublesome occupational hazards for police officers in the new millennium.

There have been very few police personnel class-of-one claims in recent years. The doctrine is more likely needed for application in the more occasional rogue police agency, where police management deviates from professional and constitutional disciplinary standards. For example, in North Carolina's largest police agency, the North Carolina Highway Patrol, agency management has imposed arbitrariness and disparate treatment upon some troopers while covering up and condoning

severe and even criminal misconduct of others.[4] Political intermeddling into the lives and work of Troopers has continued for years. See, e.g. *Michael Gahagan v. N.C. Highway Patrol*, 2000 WL 33946065 (W.D.N.C. 2000; and 2000 CVS 19; Madison County Superior Court) (Trooper transferred due to partisan pressure from Democratic Party political operatives).

Arbitrariness and disparate treatment problems have interfered with North Carolina Troopers and precluded them from enjoying the same rights as other Troopers.[5] These and other personnel cases unlawfully disciplining police officers and Troopers have wreaked havoc in North

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4. E.g. *Monty Poarch v. N.C. Highway Patrol*, 03 OSP 2004 (September 17, 2007; ALJ decision; Trooper fired for having an off-duty affair while other troopers who committed a broad range of crimes and other severe misconduct were not punished or punished with trivial discipline; adopted in part). While certain career service state Troopers enjoy limited rights under the State Personnel Act, N.C.G.S. chapter 126, other Troopers and municipal and county police officers only have protection from arbitrariness as provided by the class-of-one doctrine.

5. See *Jerry Brand v. N.C. Highway Patrol*, 2005 WL 1799895 (M.D.N.C. 2005)($63,000 verdict affirmed for retaliatory transfer)*; Jerry Brand v. N.C. Highway Patrol*, 352 F. Supp. 2d 606 (M.D.N.C. 2004)(denying summary judgment); *Andreas Dietrich v. N.C. Highway Patrol, 2001 WL 3405588;* 00 OSP 1039; ALJ decision; arbitrary discipline reversed); *Charles Lindquist v. N.C. Highway Patrol*, (98 OSP 0170)(Trooper retaliated against for writing article about Patrol Commander's misconduct; arbitrary discipline reversed); *Edward Royal v. N.C. Highway Patrol*, (06-756; N.C. Ct. App.; July 3, 2007)(arbitrariness and disparate treatment of Trooper; arbitrary discipline reversed); *Allan Williams v. N.C. Highway Patrol*, (98 CV 1217; Columbus Superior Court; Trooper retaliated against by transfer and physical battery because Trooper reported supervisor for misconduct; jury verdict for Trooper); *Terrence Hardy v. N.C. Highway Patrol*, 2003 WL 21638179, 02 OSP 1670.

Carolina for many years. The availability of class-of-one claims is a powerful deterrent to bureaucrats contemplating arbitrary decisions.

America's law enforcement officers work in peril. The danger of death or serious injury to officers is compounded by the risk of arbitrary employment treatment, which represents unique stressors for American police officers. The Ninth Circuit's decision to eliminate basic equal protection for police officers represents an extremist view of our Constitution which, if adopted by this Court, would leave officers at the mercy of governmental abuse while also reducing police agency efficiency and public safety. The Equal Protection Clause must remain as a meaningful tool for protection of the American law enforcement profession.

III. POLICE OFFICERS ARE ENTITLED TO THE SAME EQUAL PROTECTION AS AFFORDED TO OTHER CLASSES OF CITIZENS.

The Ninth Circuit's decision effectively renders public employees and police officers second class citizens by holding that "the class-of-one theory of equal protection is not applicable to decisions made by public employers." 478 F.3d at 993. There is no legitimate basis to carve out such a special niche eliminating equal protection for police officers.

As government has grown, so has the scope of power enjoyed by government employers.[6] Americans from all walks of life must rely on the Constitution for protection from arbitrary and oppressive government power.[7] Contemporary law enforcement bureaucracies afford vast opportunities for abusive tactics that are unconstitutionally arbitrary.[8] Cases adjudicating the rights of law enforcement officers demonstrate the necessity of consistent legal safeguards.[9] Patrol commanders, sheriffs, police chiefs, and other local government officials are more prone to influence by direct political and other improper pressures, and therefore

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6. Millions of individuals are employed by more than eighty two thousand governmental units at local, state, and federal levels. As of 1991, more than 18 million persons were employed by local, state or the federal government. See *Waters v. Churchill*, 511 U.S. 661, 697 n.3 (1994)(Stevens, J. and Blackmun, J., dissenting)(citing the 1991 figures from the U.S. Department of Commerce Statistical Abstract of the United States, Table No. 500, page 318 (113 ed. 1993). The 2005 data indicate that there were 18,644,112 government employees that year. http://ftp2census/gov/govs/apes/05fedfun.pdf.

7. See Senator Sam J. Ervin, Jr., *Preserving The Constitution* 165, 213 - 214 (1984); Boward, *Lost Rights: The Destruction of American Liberty* 1-6, 49 - 51 (1995). In North Carolina, a local government singled out a woman whose Elvis Presley style dancing offended some people and the town banished her from dances at a town facility. See *Willis v. Town of Marshall*, 426 F.3d 251 (4th Cir. 2005), where the Fourth Circuit applied the class-of-one doctrine and denied summary judgment to the Town because it had treated Ms. Willis arbitrarily and subjected her to disparate treatment.

8. See *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996)(cataloging cases of government retaliation in different contexts).

9. See Levinson, *Silencing Government Employee Whistleblowers In The Name of "Efficiency"*, 23 Ohio Northern U. L. Rev. 17 (1996)(cataloging numerous cases demonstrating retaliation against police officers).

more likely to act with retaliatory, discriminatory or other improper motives.[10]

Police officers have been subject to the most sweeping personal attacks, including risky invasions into their personal lives.[11] Police officers sometimes end up having to fight to protect their careers because a significant disciplinary finding often dooms an officer's entire career.[12]

This Court has long held that the Equal Protection Clause applies to a wide range of public employment related decisions. See *Washington v. Davis*, 426 U.S. 229 (1976); see also *Nevada Dept. of Human Resoures v. Hibbs*, 538 U.S. 721, 728-29 (2003). "Equal protection demands at a minimum that ... [government] must apply its laws in a rational and nonarbitrary way." *Ciechon v. City of Chicago,* 686 F.2d 511 (7th Cir. 1982). "Equal protection does require at the least, however, that the state act sensibly and in good faith." *Brandon v. Dist. of Col.*,

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10. See, e.g. *Knight v. Vernon*, 214 F.3d 544 (4th Cir. 2000)(jailer fired for lack of political loyalty); *Edwards v. City of Goldsboro*, 178 F.3d 231 (4th Cir. 1999)(officer suspended and disciplined for teaching a concealed carry firearms safety course where the police chief was a political opponent of the concealed carry law), and cases cited herein.

11. See *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998)(examining privacy interests of police officers in a challenge whereby the home addresses of officers were disclosed). Accord *Fraternal Order of Police v. Philadelphia*, 812 F.2d 105 (3rd Cir. 1987).

12. This Court has recognized the very narrow liberty interest claim, which provides limited protection from certain types of publicized stigmatizing allegations. See *Codd v. Velger*, 429 U.S. 624 (1977)(New York City police officer suffered stigmatizing effects of termination by inclusion of information within his personnel file).

734 F.2d 56, 56 (D.C. Cir. 1984), quoting *Logan v. Zimmerman Brush*, 455 U.S. 422, 439 (1981).

The Ninth Circuit's decision excluding class-of-one cases from public employment is wholly unprecedented. There is simply no logical basis to categorically exclude equal protection claims from public employment. Ironically, the Ninth Circuit has carved out a particular class for complete exclusion from the Equal Protection Clause. This holding sharply conflicts with more than a century of equal protection law, a cornerstone of American jurisprudence and history. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), this Court enunciated a fundamental principle:

> When we consider the nature and the theory of our institutions of government ... they do not leave room for the play and action of *purely personal and arbitrary power* ... The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems intolerable in any country where freedom prevails...118 U.S. at 369 (emphasis added).

Yick Wo launched more than a century of evolving equal protection jurisprudence which has become settled doctrine. E.g., *McFarland v. American Sugar*, 241 U.S. 79, 86-87 (1916)(statute that bristled with severities that touch the plaintiff alone was arbitrary and a violation of equal protection);

Snowden v. Hughes, 321 U.S. 1, 8-9 (1944); *Oyler v. Boyles*, 368 U.S. 448 (1962); *Bankers Life v. Crenshaw*, 486 U.S. 71, 83 (1988). Cf. *Missouri v. Lewis*, 101 U.S. 22, 28, 11 Otto 22 (1879)(Equal protection "inure[s] to the common benefit of all.").[13] *Willowbrook* was but the latest decision by this Court to reaffirm this settled equal protection doctrine:

> 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.
>
> The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person...against intentional and arbitrary discrimination...." 528 U.S. at 564.

In *Willowbrook,* this Court held the allegations by the plaintiff that the Village's conduct was "irrational and wholly arbitrary" were sufficient to state a "traditional" equal protection claim "quite apart from the Village's subjective motivation." This Court in Willowbrook *did not* require a showing of malice or animus. 528 U.S. at 565 (class-of-one claim based on "irrational and wholly arbitrary" government action). See Geha, *With Malice Toward*

[13.] Selective enforcement is a recognized subset of equal protection. See 16B Am Jur 2d Constitutional Law, section 889, *What Constitutes Selective Enforcement or Discriminatory Administration* (1998).

One: Malice And The Substantive Law In "Class Of One" Equal Protection Claims In The Wake Of Village Of Willowbrook v. Olech, 54 Me. L. Rev. 329 (2002). Although malice may be one means to demonstrate arbitrariness, the threshold for constitutional protection has never required malice. Arbitrariness may be otherwise shown from either vindictiveness, retaliation, bad faith, selective enforcement or disparate treatment.

In *Indiana Teachers v. School Committee,* 101 F.3d 1179, 1181 (7th Cir. 1996), the Seventh Circuit explained:

> The equal protection clause does not speak of classes. A class, moreover, can consist of a single member... The equal protection clause protects class-of-one plaintiffs victimized by the wholly arbitrary act. The equal protection clause can be brought into play as a protection against allowing the government to single out a hapless individual, firm or other entity for unfavorable treatment.

Some Of Willowbrook's Early Antecedents Established The Floor Of Equal Protection.

Since 1944, this Court has recognized that selective enforcement may support an equal protection claim even where there is no suspect class. In *Snowden v. Hughes*, 321 U.S. 1, 8-9 (1944), the Court recognized that an equal protection

violation may be premised upon deliberate selective enforcement based upon "unjustifiable standards." In *Oyler v. Boyles*, 368 U.S. 448 (1962), the Court held that equal protection prohibits discrimination on grounds of race, religion or "other arbitrary classification." The American law enforcement profession has experienced both "unjustifiable standards" and "arbitrary classifications." "The Equal Protection Clause prohibits 'arbitrary and irrational discrimination' even if no suspect class or fundamental right is implicated." *Muller v. Costello*, 187 F.3d 298, 309 (2d Cir. 1999), quoting *Bankers Life v. Crenshaw*, 486 U.S. 71, 83 (1988). See Cheval, *By The Way -The Equal Protection Clause Has Always Protected A "Class-Of-One:" An Examination of Village of Willowbrook v. Olech*, 104 W. Va. L. Rev. 593 (2002)(reviewing history of non-suspect class equal protection).

In *Esmail v. Macrane*, 53 F.3d 176, 179-180 (7th Cir. 1995), perhaps the seminal modern case reviewing the "vindictive action" line of equal protection decisions, the Seventh Circuit considered a recurring problem of arbitrariness: governmental vindictiveness or revenge. Vindictiveness has long been recognized by the Court as an improper motive. E.g., *U.S. v. Goodwin*, 457 U.S. 368, 372 (1982). E*smail* observed that "[t]he charge here is that a powerful public official picked on a person out of sheer vindictiveness; and we must consider what standing such a charge has in the law of equal protection." 53 F.3d at 178. *Esmail* held that selective enforcement premised upon vindictiveness violates equal protection.

As *Esmail* observed, this Court in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446-47 (1985) explained that some objectives of government action simply are illegitimate. A personal vendetta, selective enforcement or bad faith intent to injure are clearly not legitimate governmental objectives. In *Esmail*, the Seventh Circuit reasoned that:

> If the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court... [N]either in terms nor in interpretation is the [equal protection] clause limited to protecting members of identifiable groups. It has long been understood to provide a kind of last-ditch protection against government action... *Esmail,* 53 F.3d at 179-180.

Early Circuit Court Foundation Further Established Non-Suspect Class Equal Protection.

Foundation for the class-of-one strand of equal protection jurisprudence is derived from *Snowden*, *Oyler*, other cases of this Court, and the leading Second Circuit cases of *Burt v. City of New York,* 156 F.2d 791 (2d Cir. 1946), *LeClair v. Saunders*, 627 F.2d 606 (2d Cir. 1980), and their progeny. *Burt* has been characterized as the "grandfather" of the class-of-one cases. See Geha, *With Malice*

Toward One: Malice And The Substantive Law In "Class Of One" Equal Protection Claims In The Wake Of Village Of Willowbrook v. Olech, 54 Me. L. Rev. 329, 338-39 (2002).

In *Burt*, Judge Learned Hand's opinion concluded that an architect stated a valid class-of-one equal protection claim where city officials "deliberately misinterpreted and abused their statutory power in order to deny his applications." The architect alleged that city officials selected him for oppressive measures, unconditionally approving applications of other architects. The architect alleged that he was "singled out for unlawful oppression" and that he was a victim of "purposeful discrimination." The Second Circuit concluded that deliberate misinterpretation of a statute against a plaintiff for the purpose of singling him out states a valid equal protection claim. Cf. *Gagliardi v. Village of Pawling*, 18 F.3d 188, 193 (2d Cir. 1994)(holding that the crux of an equal protection claim is the "singling him out alone for that misinterpretation"). Judge Hand's analysis in *Burt* has been characterized as "particularly persuasive" by other courts. See *Smith v. Eastern New Mexico*, 72 F.3d 138, 1995 WL 749712, at 7 (10th Cir. 1995).

In *LeClair v. Saunders*, 627 F.2d 606, 609-10 (2d Cir. 1980), the Second Circuit held that a "selective treatment" claim may be premised upon:

> intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.

LeClair observed that equal protection may be violated when "unequal administration of a state statute shows intentional or purposeful discrimination." *LeClair* has served as settled precedent relied upon by the law enforcement profession for nearly thirty years.

In *Ciechon v. City of Chicago,* 686 F.2d 511, 522 (7th Cir. 1982), the court reasoned that "[e]qual protection demands at a minimum that ... [government] must apply its laws in a rational and nonarbitrary way."[14] There, the plaintiff, a paramedic, was fired as a result of alleged mistreatment of a patient on an ambulance run. However, Ciechon and her partner paramedic, Ritt, were equally responsible for the welfare of a patient. However, Ciechon was fired and Ritt was not punished at all. The Court's decision in *Ciechon* was grounded upon the fact that the "defendants purposely and invidiously chose one of two similarly situated employees for undeserved punishment and misused otherwise legitimate disciplinary procedures..." 686 F.2d at 517.

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14. Arbitrary and capricious is defined as "willful and unreasonable action without consideration or in disregard of facts or without determining principle." BLACKS LAW DICTIONARY 96 (5th ed. 1979). For additional definitions of arbitrary and capricious, see *United States v. Carmack,* 329 U.S. 230, 243 n.14 (1946). Arbitrary is defined as "without adequate determining principle . . . [or] fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned . . . ." *Id. See also Bruno's, Inc. v. United States*, 624 F.2d 592, 594 (5th Cir. 1980)(arbitrary and capricious means either "unwarranted in law" or "without justification in fact").

These and other cases have long provided equal protection for police officers victimized by arbitrary adverse employment actions. There is no justification for revolutionary change in this crucial constitutional law protecting police officers.

CONCLUSION

WHEREFORE, this Court should reverse the Ninth Circuit decision below and adopt a practical standard of proof forbidding governmental arbitrariness in employment grounded in either vindictiveness, disparate treatment, selective enforcement or bad faith. Too many law enforcement officers are subjected to workplace arbitrariness and disparate treatment to allow the complete elimination of this time honored doctrine. Law enforcement officers, like all other persons under the jurisdiction of our Constitution, should continue to enjoy the class-of-one strand of equal protection.

/s/ J. Michael McGuinness
J. Michael McGuinness*
The McGuinness Law Firm
P.O. Box 952
Elizabethtown, N.C. 28337
(910) 862-7087 Telephone
(910) 862-8865 Facsimile
jmichael@mcguinnesslaw.com
*Counsel of Record

William J. Johnson
National Association of Police Organizations Inc.
317 South Patrick Street
Alexandria, Virginia 22314
(703) 549-0775 Telephone
(703) 684-0515 Facsimile
bjohnson@napo.org

In The
Supreme Court of the United States

No. 07-474
ANUP ENGQUIST,

***Petitioner*,**

v.

OREGON DEPARTMENT OF AGRICULTURE, *ET AL.*,

***Respondents*.**

AFFIDAVIT OF SERVICE

I, David Frazer, of lawful age, being duly sworn, upon my oath state that I did, on the 27th day of February, 2008, cause to be filed, via hand delivery, to the Clerk's Office of the Supreme Court of the United States forty (40) copies of this Amicus Brief and further sent via UPS Ground Transportation (3) copies and an electronic version to:

Neal Katyal
Counsel of Record
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9000
katyaln@law.georgetown.edu

Counsel for Petitioner

Mary H. Williams
Counsel of Record
Janet A. Metchalf
OREGON DEPARTMENT OF JUSTICE
1162 Court Street, N.E.
Salem, Oregon 97301
(503) 378-4402
mary.williams@doj.state.or.us

Counsel for Respondents

David H. Remes
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, NW.
Washington, D.C. 20004
(202) 662-5212
dremes@cov.com

Counsel for Petitioner

I further sent an electronic copy of said Amicus Brief to the Clerk of Court at:

meritsbriefs@supremecourt.gov

_____

Affiant, David Frazer
The LEX Group DC
1750 K Street, NW
Suite 475
Washington, DC 20006
(202) 955-0001

I am duly authorized under the laws of the District of Columbia to administer oaths.

_____

Notary Public

My Commission Expires: _____

To Be Filed For:

J. Michael McGuinness
Counsel of Record
Post Office Box 952
THE MCGUINNESS LAW FIRM
Elizabethtown, N.C. 28337
(910) 862-7087

Counsel for Amicus Curiae

William J. Johnson
NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC.
317 South Patrick Street
Alexandria, Virginia 22314
(703) 549-0775

Counsel for Amicus Curiae

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AFFIDAVIT OF COMPLIANCE

This *Amicus Curiae* Brief of The National Association of Police Organizations, Inc. and The North Carolina Troopers Association, Inc. in Support of Petitioner has been prepared using:

Microsoft Word 2000;

New Century Schoolbook;

12 Point Type Space.

As required by Supreme Court Rule 33.1(h), I certify that this brief contains 5,772 words, excluding the parts of the brief that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

_____

Affiant, David Frazer
The LEX Group^{DC}
1750 K Street, NW, Suite 475
Washington, DC 20006
(202) 955-0001

I am duly authorized under the laws of the District of Columbia to administer oaths.

_____

Notary Public

My Commission Expires: _____

To Be Filed For:

J. Michael McGuinness
Counsel of Record
THE MCGUINNESS LAW FIRM
Post Office Box 952
Elizabethtown, North Carolina 28337
(910) 862-7087

Counsel for Amicus Curiae

William J. Johnson
NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS INC.
317 South Patrick Street
Alexandria, Virginia 22314
(703) 549-0775

Counsel for Amicus Curiae