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 Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AND AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

This brief *amicus curiae* is filed on behalf of a coalition of employee organizations which collectively represent millions of workers employed by state and local governments, public school districts and universities, agencies of the federal government, and other public entities.[1] Directly or through their

[1] The parties have consented to the filing of 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

affiliates, *amici* represent their members in dealing with their employers in regard to the terms and conditions of their employment. In some situations, this representation may be based on rights that are guaranteed to public employees by the United States Constitution, including the right to equal protection of the laws established by the Fourteenth Amendment. The issue presented by this case—whether the Ninth Circuit was correct in categorically excluding government decisions involving public employment from the purview of the Equal Protection Clause in "class of one" cases—is accordingly of vital interest to *amici* and their members.

Amicus National Education Association ("NEA") is a nationwide employee organization with more than 3.2 million members, the vast majority of whom are employed by public school districts, colleges, and universities throughout the United States.

Amicus American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 56 national and international labor organizations with a total membership of approximately 10.5 million working men and women. The AFL-CIO's affiliated unions represent employees at every level of government, in virtually every job from sanitation worker to teacher. For example, the American Federation of Teachers, AFL-CIO ("AFT") represents over 1.4 million employeees in public schools, community colleges, universities, state government, and health care; the American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME") represents over 1.5 million employeees

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other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

in state, county, and local governments; and the American Federation of Government Employees, AFL-CIO ("AFGE") represents approximately 600,000 federal and District of Columbia government workers.

Amicus American Association of University Professors ("AAUP") is a national membership organization consisting of approximately 45,000 college and university faculty, librarians, graduate students, and academic professionals, including both unionized public employees and those unprotected by collective bargaining agreements or tenure.

SUMMARY OF ARGUMENT

1. The Ninth Circuit's exclusion of public employees from the coverage of the Equal Protection Clause in class-of-one cases marks a radical departure from this Court's constitutional jurisprudence, which—while striking a balance between public employees' rights as citizens and the government's particular needs as employer—has never held that a constitutional protection available to other litigants simply does not apply to public employees, thereby permitting the government to misuse its authority as employer for purposes unrelated to public administration. More specifically to the point, this Court's cases have consistently applied the Equal Protection Clause to government actions in the employment context.

2. The decision of the court below rests on policy more than on legal doctrine. But the court's concerns about upsetting personnel practices and abolishing employment at will in the public sector are misplaced. The commands of the Equal Protection Clause are in fact fully consistent with established public-sector employment practices. And that the

Equal Protection Clause prohibits the public employer from acting on certain impermissible grounds unrelated to employment hardly equates to a "just cause" regime inconsistent with the concept of employment at will.

3. The Ninth Circuit's concern about constitutionalizing everyday governmental decisions identifies a legitimate problem with which the lower courts have struggled. But the problem of cabining class-of-one claims extends beyond the context of public employment, and it is not solved by an arbitrary ban on such claims by public employees. The appropriate solution lies, rather, in the fuller development of the standards for class-of-one claims generally, pursuant to which a plaintiff should be required to plead and prove that she was intentionally treated differently from others similarly situated for a reason unrelated to any legitimate government objective.

ARGUMENT

I. THERE IS NO BASIS IN THIS COURT'S CONSTITUTIONAL CASES FOR THE NINTH CIRCUIT'S CATEGORICAL REJECTION OF EQUAL PROTECTION CLAIMS OF PUBLIC EMPLOYEES WHEN THEY OCCUPY A CLASS OF ONE

A. The Ninth Circuit's Decision Finds No Support In This Court's Cases Involving The Constitutional Rights Of Public Employees

It is now settled law that "[t]he First Amendment, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and other provisions of the Federal Constitution afford protection to employees

who serve the government as well as to those who are served by them." *Collins v. City of Harker Heights*, 503 U.S. 115, 119-20 (1992). This Court has held that public employees can assert First Amendment rights, Fourth Amendment rights, Fifth Amendment rights, rights to due process, and other constitutional rights, including the right to equal protection, against their government employer. *See, e.g., Elrod v. Burns*, 427 U.S. 347 (1976) (freedom of association); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) (freedom of speech); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (unreasonable search and seizure); *Garrity v. New Jersey*, 385 U.S. 493 (1967) (compelled self-incrimination); *Board of Regents v. Roth*, 408 U.S. 564 (1972) (due process); *Washington v. Davis*, 426 U.S. 229 (1976) (equal protection).

In each of these lines of cases, this Court has considered the public employer's legitimate need to retain the authority and discretion integral to managing its workforce. Yet in none of these areas has the Court struck the balance in favor of categorically barring public employees from asserting a constitutional right against their government employer, or from doing so using any theory available to other litigants. For example, under the Fourth Amendment this Court has "reject[ed] the contention . . . that public employees can *never* have a reasonable expectation of privacy in their place of work" *vis-à-vis* their government employer. *O'Connor*, 480 U.S. at 717 (emphasis added). Instead of entirely insulating the government's use of its power as employer from constitutional scrutiny, this Court has, in its prior cases, chosen to formulate standards for the adjudication of constitutional claims which do not interfere with effective and efficient public

administration but nevertheless protect public employees' constitutional rights.

The Ninth Circuit's holding in this case represents a radical departure from this Court's approach to public-employee cases not only because it categorically bars government workers—and only government workers—from asserting class-of-one claims, but also because that categorical bar permits the government to use its power as employer to invade the rights of its employees as citizens for reasons wholly unrelated to efficient public administration.

This Court's jurisprudence has attempted to strike a balance between public employees' rights as citizens and the government's needs *as employer*. This has been most explicit under the First Amendment. In *Pickering*, for example, this Court explained, "The problem in any case is to arrive at a balance between the interests of the teacher, 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." 391 U.S. at 568. This Court's prior decisions have sought "[t]o reconcile the employee's right to engage in speech and the government employer's right to protect its own legitimate interests *in performing its mission*." *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (emphasis added).

The Ninth Circuit's holding, in contrast, sweeps far beyond "the government employer's right to protect its own legitimate interests in performing its mission" because it protects the government employer's decisions even if they have nothing to do with performing its mission and, indeed, even if they are

inimical to its mission. In *Waters v. Churchill*, this Court explained:

> [T]he extra power the government has in this area comes from the nature of the *government's mission as employer*. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her.

511 U.S. 661, 674-75 (1994) (emphasis added). But the Ninth Circuit's decision grants government "extra power" simply because it is exercised through employment sanctions (such as termination) and even when its exercise is wholly unrelated to "the government's mission as employer."

In other words, the Ninth Circuit's decision permits the government to use its power as employer in a manner which, if it involved any other form of governmental authority, would violate the Equal Protection Clause, even when the use of that power is for purposes wholly unrelated to employment. The Ninth Circuit observes that "'[t]he paradigmatic class-of-one case should be one in which a public official, for some improper motive, 'comes down hard on a hapless private citizen.'" Pet. App. 25 (quoting *Lauth v. McCollum*, 424 F.3d 631, 633 (7th Cir. 2005)). Yet this is exactly what the Ninth Circuit's decision permits. Under the Ninth Circuit's rule, the government can treat the "hapless private citizen" who happens to be a government employee differently than another similarly-situated citizen-

employee, and—"without any rational basis and solely for arbitrary, vindictive, or malicious reasons"[2] having nothing to do with the employment relationship—impose a range of sanctions on him or her, including termination.[3]

No prior decision of this Court concerning the constitutional rights of public employees wholly insulates the exercise of the state's power as employer from constitutional scrutiny even when that power is exercised for reasons unrelated to employment. In *Pickering*, for example, this Court recognized, that in some circumstances, "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." 391 U.S. at 573. The same is true when the government uses its power as employer in a manner that treats one employee differently than another for arbitrary and even malicious reasons wholly unrelated to employment. In such a case, as in *Pickering*, "it is necessary to regard the [public employee] as the member of the general public he seeks to be." 391 U.S. at 574.

Yet the Ninth Circuit's decision permits just such an abuse of power solely because it is the power of employment. The Ninth Circuit's decision insulates the state's use of its power as employer, rather than

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[2] As the jury found in this case, *see* Pet. App. 4.

[3] Of course, employment sanctions, particularly termination, represent a potent form of state power. This Court has "frequently recognized the severity of depriving a person of the means of livelihood." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985).

accommodating the state's unique needs as employer, and it is therefore contrary to this Court's clear command that "[t]he provisions of the 14th Amendment . . . relate to and cover all the instrumentalities by which the state acts." *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20, 35-36 (1907). In *Connick v. Myers*, this Court stated, "Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government." 461 U.S. 138, 147 (1983). In order to fulfill that responsibility, this Court must reverse the Ninth Circuit's categorical rejection of public-employee class-of-one claims.

Of course, this Court cannot "ignore the 'commonsense realization that government offices could not function if every employment decision became a constitutional matter.'" *San Diego*, 543 U.S. at 83 (quoting *Pickering*, 461 U.S. at 143). But the Ninth Circuit's holding insulates decisions that should not be classified as "employment decisions." And this Court has never accepted arguments for restricting public employees' constitutional rights based on interests that "are not interests that the government has in its capacity as an employer." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 70 n.4 (1990).

Nor has this Court ever accepted the mere inconvenience of judicial scrutiny of personnel decisions (which we demonstrate below has been and will remain minimal in this instance) as a proper basis for limiting government employees' constitutional rights. This Court has recognized the fact that "[t]he operational realities of the workplace" may insulate actions by the government as employer that would be subject to challenge if taken by the government outside the employment context. *O'Connor*, 480 U.S. at 717. But

what this Court has "balanced" against individual rights has been "the realities of the workplace," not simply the inconvenience of the minimal judicial oversight needed to insure that workplace powers are not abused to achieve objectives unrelated to operational needs. The government is constrained by the Constitution and private employers are not. Government decisions, even employment decisions, are subject to constitutional scrutiny while private decisions are not. Thus, this Court has long recognized, "[T]he state 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 Workers v. McElroy*, 367 U.S. 886, 897-98 (1961).

In *Rutan*, this Court expressly rejected the Seventh Circuit decision to limit the proscription of patronage practices to the context of termination or the "substantial equivalent of a dismissal," 497 U.S. at 75, on the grounds that "the opposite conclusion would open state employment to excessive interference by the Federal Judiciary." *Id.* at 76 n.8. This Court stated, "We respect but do not share this concern." *Id*. "The . . . fears of excessive litigation," this Court similarly held in *Board of County Comm'rs v. Umbehr*, "cannot justify a special exception to our [constitutional] precedent." 518 U.S. 668, 681 (1996).

And even if it were a proper basis for categorically curtailing public employees' constitutional rights, the specter of a flood of litigation conjured up by the Ninth Circuit has no basis in logic or experience. As we explain below in Part II, most public employees have more promising grounds and less expensive and more expeditious means of challenging arbitrary, adverse actions than filing constitutional claims in

federal or state court. Thus, of the many types of government decisions made every day, employment decisions are among the least likely to result in class-of-one claims. Moreover, as we discuss in Part III, only rare cases of abusive discrimination will result in a colorable class-of-one claim.

For these reasons, as Judge Reinhardt states in his dissent, "The seven circuits that have recognized the theory . . . [have not been] drowning in the 'flood' of class-of-one employment disputes feared by the majority." Pet. App. 65. Indeed, as Petitioner points out, nine circuits have recognized the theory and there is no evidence of a flood in any of them. *See* Brief for the Petitioner 22, 52 (162 cases filed in all circuits since *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam), was decided). Even Respondent concedes that:

> There may be millions of government employees, but the number of successful class-of-one equal protection claims brought by public employees against their employers is almost nil. Thus, even if this Court were to grant certiorari and reverse the decision of the court of appeals, the outcome in very, very few cases would be changed.

Brief in Opposition 23. "The lack of success of most plaintiffs in these circuits demonstrates the ability of the courts to allow for recovery under the class-of-one theory without constitutionalizing every employment dispute," as Judge Reinhardt correctly points out. Pet. App. 65.

The fear of "deluging federal courts with claims" has been a recurring one in the adjudication of public employees' constitutional claims. *Davis v. Passman*, 442 U.S. 228, 248 (1979). Yet while this Court has

consistently declined to close the courthouse door to public employees, no such deluge has occurred, either of class-of-one claims or of any of the other myriad constitutional claims this Court has carefully tailored to fit the public-employment relationship.

The Ninth Circuit's opinion offers no colorable reason why—rather than developing standards that take account of the governmental interests specific to the employment context, as the Court has done in applying other provisions of the Constitution—the concern with government's needs as employer requires a categorical exclusion of public employees from the protection of the Equal Protection Clause in class-of-one cases, whether or not the government's action was based on legitimate employment concerns. This Court has never resorted to such a categorical exclusion of public employees in order to accommodate the government's interests as employer. And, as we demonstrate below in Part III, there is no need to do so here.

B. The Ninth Circuit's Decision Finds No Support In The Law Of Equal Protection

Turning to the specific question presented under the Equal Protection Clause, we begin with two observations that are beyond dispute. There is, in the first place, no question that, as a general matter, the Equal Protection Clause constrains the actions of governmental entities, in their capacities as employers, in their relationship with their employees. Indeed, the proposition is so well established that this Court, routinely and without question, scrutinizes the employment actions of governmental entities pursuant to the Equal Protection Clause.

And that is true whether or not the public-employee plaintiff alleges differential treatment on a basis that requires some degree of heightened scrutiny. *See*, *e.g.*, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (layoffs of nonminority teachers pursuant to affirmative action plan violated Equal Protection Clause); *Washington v. Davis*, 426 U.S. 229 (1976) (use of allegedly racially discriminatory personnel test upheld under Equal Protection component of Fifth Amendment); *Davis v. Passman*, 442 U.S. 228 (1979) (termination of employment because of gender violated Equal Protection component of Fifth Amendment); *Gregory v. Ashcroft*, 501 U.S. 452, 470-73 (1991) (mandatory retirement age upheld as rational under Equal Protection Clause); *Harrah Indep. Sch. Dist. v. Martin*, 440 U.S. 194, 199-201 (1979) (per curiam) (non-renewal of teachers failing to comply with continuing education requirements upheld as rational under Equal Protection Clause).

A second point is equally clear. While, as we discuss below in Part III, the standard for pleading and proving a class-of-one claim has been the subject of considerable confusion in the wake of this Court's decision in *Olech*, the central holding of the unanimous Court in that case is beyond question: when a government defendant is alleged to have denied equal protection of the laws to an individual, it matters not whether the alleged discrimination was based on the plaintiff's membership in a class comprising one, two, or many members.

It might well be thought that these two propositions, taken together, would suffice to establish the subsidiary proposition that denial of equal protection to members of a "class of one" is unconstitutional in the context of public-employment decisions, as it is

with regard to other government actions—and indeed nine of the ten Circuits that have had occasion to apply this Court's *Olech* decision in the public-employment setting have seen no reason to create an exception for a category of government decisions that is otherwise indisputably covered by the Equal Protection Clause. *See* Brief for the Petitioner 22 & nn.9-10 (citing cases).

In reaching the contrary conclusion, the Ninth Circuit suggested no doctrinal basis for excepting public employment from the purview of the Equal Protection Clause when—and apparently only when—the employer's impermissible animus is directed at a class comprising only the plaintiff. Nor can we discern any reasoned way to reconcile that exception with the law of Equal Protection generally.

The Ninth Circuit did, to be sure, point to the government's broader powers as employer as a justification for the exception. Pet. App. 23-25. But not only does that reasoning fail (as discussed above) to justify the categorical insulation of the use of the state's power as employer even for purposes unrelated to employment; it also fails to explain the basis for the state of the law created by the Ninth Circuit's holding—that the Equal Protection Clause protects public employees from discriminatory treatment targeted at a protected class (as to which some form of heightened scrutiny is appropriate), and from discriminatory treatment targeted at a non-protected class (which is evaluated under a rational-basis standard), but not from discriminatory treatment that targets a class of which the plaintiff is the only member. If there is a reason why the government's role as employer justifies excluding public employees from the ambit of the Equal Protection Clause in the

latter case but not the two former, the Ninth Circuit did not explain it.

Many employment decisions affect a class of more than one that is not a protected class to which heightened scrutiny applies—for example, when the employer lays off certain employees but not others or pays employees in one classification more than in another—and it cannot be that the applicability *vel non* of the Equal Protection Clause turns on how many members the class embraces. Indeed, this Court has specifically so held. *Olech*, 528 U.S. at 564 n.* ("the number of individuals in a class is immaterial for equal protection analysis").

In point of fact, the Ninth Circuit's decision appears to rest more on concerns of policy than on any exegesis of legal doctrine. Allowing public employees to bring class-of-one claims would, the court feared, "upset long-standing personnel practices" and "completely invalidate the practice of public at-will employment," Pet. App. 25, and would effectively constitutionalize public-sector employment law, "requiring the federal courts to decide whether any public employee was fired for an arbitrary reason or a rational one." *Id.* at 26. As we now explain, both kinds of policy concerns are unfounded.

II. THE NINTH CIRCUIT'S POLICY CONCERNS ABOUT THE IMPACT OF CLASS-OF-ONE CASES ON PUBLIC EMPLOYMENT PRACTICES ARE MISPLACED

A. The Ninth Circuit's decision not only creates a wholly unprecedented categorical bar on public employees' assertion of a constitutional claim available to all other persons aggrieved by state action, it does so based on its own, idiosyncratic notion of what

is necessary for efficient public administration—a notion contradicted by over a century of consistent legislative judgment to the contrary. The Ninth Circuit elevates the public employer's presumed ability to be *completely* arbitrary over public employees' constitutional right to equal protection. As Judge Reinhardt correctly observes in his dissent, the majority "believes that arbitrary treatment of public employees is a necessary and acceptable part of public employment." Pet. App. 64. But the Ninth Circuit's policy judgment is not only an illegitimate basis for judicial curtailment of constitutional rights, it is contrary to the theory of public administration almost universally accepted by the elected branches of government.

As this Court has recognized, Congress as well as the legislative branch of virtually every state have already "weighed the competing policy considerations and concluded that efficient management of government operations did not preclude the extension of [a set of civil service rights much more extensive than the narrow prohibition at issue in this case] to government employees." *Bush v. Lucas*, 462 U.S. 367, 384 (1983). Contrary to the Ninth Circuit's view, the legislative branches have concluded that protection against arbitrary treatment "would improve the efficiency and morale of the civil service. 'It will do away with the discontent and suspicion which now exists among the employees and will restore that confidence which is necessary to get the best results from the employees.'" *Id*. at n.24 (quoting 48 Cong. Rec. 4654 (1912)). Indeed, the Office of Personnel Management points to "the indispensable role played by the merit system in representative government." *See* Office of Personnel Management, *Biography of an Ideal* (available at https://www.opm.gov/Biographyof

AnIdeal/PU_SStext.htm). The protection against arbitrary treatment that the legislative and executive branches have deemed central to effective public administration extends to protection of constitutional rights. Thus, the U.S. Civil Service Commission reported in 1972 that "merit principles . . . also mean protection of individual constitutional rights" and that those principles "help Government, as an employer, to attract, select, retain, and utilize people with demonstrated ability to serve the public well." U.S. Civil Service Commission, *Eighty-Ninth Annual Report* 1 (1973).

As a result of this legislative consensus, "Federal civil servants [and civil servants in virtually every state] are now protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action." *Bush*, 462 U.S. at 385. Today, over 90% of the federal workforce works under some form of merit system, according to the Office of Personnel Management. *See Biography of an Ideal*, *supra.* The overwhelming majority of states have similarly adopted comprehensive merit systems for large portions of their workforces. *See* Lawrence D. Greene, *Federal Merit Requirements: A Retrospective Look*, 11 Public Personnel Management J. 53 (1982). Indeed, at least twelve states mandate merit systems in their constitutions.[4] Of course, one of the "central principles" of the merit system is "absence of arbitrary removals." Subcommittee on

[4] *See* Alaska Const. art. XII, § 6; Cal. Const. art. VII, § 1; Colo. Const. art. XII, § 13; Ga. Const. art. IV, § III, ¶ I; Haw. Const. art. XVI, § 1; Kan. Const. art. 15, § 2; La. Const. art. X, § 8; Mich. Const. art. XI, § 5; Mo. Const. art. IV, § 19; N.J. Const. art. VII, § 1, ¶ 2; N.Y. Const. art. V, § 6; Ohio Const. art. XV, § 10.

Manpower and Civil Service of the Committee on Post Office and Civil Service, House of Representatives, *History of Civil Service Merit Systems of the United States and Foreign Countries*, Comm. Print No. 94-29, 94th Cong., 2d Sess. 7 (Dec. 31, 1976).

The Ninth Circuit's peculiar prescription for effective public administration not only contradicts the virtually uniform judgment of the legislative branches of the federal and state governments, it is also internally contradictory. On the one hand, the court suggests that the need for constitutional protection "'is especially thin' given the number of other legal protections that public employees enjoy." Pet. App. 25 (quoting *Lauth*, 424 F.3d at 633). On the other hand, it asserts, "A judicially-imposed constitutional proscription of arbitrary public employer actions would also upset long-standing personnel practices. . . . [E]mployers have traditionally possessed broad discretionary authority in the employment context. The power of employers to discharge employees for reasons that may appear arbitrary, unless constrained by contract or statute, is well-established under the common law of at-will employment." Pet. App. 25. But both propositions cannot be true: Either public employees do not need the Equal Protection Clause's protection against wholly arbitrary or malicious treatment because such protection exists elsewhere, or extending such protection would work a significant change in public personnel administration.

The Ninth Circuit's holding rests on the latter assumption: "Applying equal protection to forbid arbitrary or malicious firings of public employees would completely invalidate the practice of public

at-will employment. . . . We decline to effect such a significant change in employment law under the general provisions of the Fourteenth Amendment." *Id.* at 25-26. But the court provides no evidence that a contrary holding would "effect . . . a significant change in [public sector] employment law." It cites only two decisions, *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975); *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320 (1972), both relating solely to *private-sector* employment. *See* Pet. App. 25. The indisputable facts of contemporary *public* administration are to the contrary.

B. There is another flaw in the Ninth Circuit's prediction of dire consequences for public administration. Even assuming, contrary to fact, that large numbers of public employees are employed at will, the Ninth Circuit is simply incorrect when it states that "[a]pplying equal protection to forbid arbitrary or malicious firings of public employees would completely invalidate the practice of public at-will employment." Pet. App. 25. Of course, no public employee in any jurisdiction is employed wholly at-will. Under both federal and state law, some reasons for discharge are unlawful, for example sex, race, and national origin. *See* 42 U.S.C. § 2000e-2(a)(1). In the public sector, additional reasons are unlawful, for example, party affiliation. *See Elrod*, *supra*. Continued adjudication of public employee class-of-one claims would simply mean that there would continue to be one more narrow exception to the employment-at-will rule in those relatively few instances where public employees are employed at will. This would hardly "completely invalidate the practice of public at-will employment" as the Ninth Circuit suggests, for "[t]here is a clear distinction between the grant of tenure to an employee . . . and the prohibition of a

discharge for a particular impermissible reason." *Rutan*, 497 U.S. at 80-81 (Stevens, J., concurring).

In a jurisdiction where employment at will is "completely invalidate[d]," an employer is required to have just cause for its adverse actions. *See, e.g.*, Mont. Code Ann. § 39-2-904(2) (barring discharge of employees after probationary period absent just cause). Under a just-cause standard, an employer must not only come forward with evidence of a proper motive for its actions, but must carry the burden of proof. *See Elkouri & Elkouri, How Arbitration Works* 949 (Alan Miles Ruben 6th ed. 2003) ("The burden of proof is generally held to be on the employer to prove guilt of wrongdoing, and probably always so where the agreement requires just cause for discipline.").

The situation under the existing, narrow exceptions to the employment-at-will rule, including the class-of-one equal protection exception, is entirely different: "It is the former employee who has the burden of proving that his discharge was motivated by an impermissible consideration." *Rutan*, 497 U.S. at 80 (Stevens, J., concurring). The employer bears no burden of proof; rather it is the employee, in the class-of-one context, who must prove both that he or she was intentionally treated differently than a similarly situated employee and that the action was taken for reasons unrelated to any legitimate government purpose. And the employer need not build a factual case against the employee or cite specific failures of performance, but remains free, during an employee's probationary period, for example, to terminate the employee based on a vague feeling that the employee does not fit well in the position. Unless the employee can prove that a similarly situated employee was intentionally treated

differently and that the asserted work-related rationale (however vague) was a pretext for malicious or otherwise improperly motivated action, the employer's virtually unfettered discretion remains intact. Such a modest exception hardly spells the end of employment at will in the limited situations where it is the rule in public-sector employment.

III. THE POLICY CONCERN ABOUT CONSTITUTIONALIZING ROUTINE GOVERNMENTAL DECISIONS IS NOT LIMITED TO THE CONTEXT OF PUBLIC EMPLOYMENT, AND ITS SOLUTION LIES IN THE ELABORATION OF A GENERALLY APPLICABLE STANDARD FOR PLEADING AND PROVING CLASS-OF-ONE CLAIMS

The second policy issue upon which the Ninth Circuit based its decision was its fear of constitutionalizing myriad routine government decisions. That is, to be sure, an entirely legitimate concern. But the Ninth Circuit's solution of categorically excluding public employees from the coverage of the Equal Protection Clause in class-of-one cases neither measures the full scope of that problem nor resolves it in more than a very limited and unsatisfactory fashion. Not only is there no doctrinal basis for the exception crafted by the Ninth Circuit, but the court's solution resolves only a small portion of the much larger problem with which the lower federal courts have struggled in the wake of *Olech*—how to cabin the class-of-one cases in a way that avoids "effectively provid[ing] a federal cause of action for review of almost every executive or administrative decision made by state actors." *Jennings v. City of Stillwater*, 383 F.3d 1199, 1211 (10th Cir. 2004).

That problem extends far beyond the area of public employment, and its solution, we respectfully submit, lies not in arbitrarily excluding public employment from this corner of Equal Protection law, but rather in a further explication of the generally applicable standard for pleading and proving class-of-one claims.

A. The Lower Courts Have Struggled With The Problem Of Cabining Class-Of-One Claims In A Variety Of Contexts

Carving out its exception for public employment, the Ninth Circuit worried that "[t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies . . . ." Pet. App. 24 (quoting *Bishop v. Wood*, 426 U.S. 341, 349-50 (1976)). But the potential problem of constitutionalizing the myriad of decisions made daily by government administrators is by no means limited to "personnel" decisions or to the context of public employment. To the contrary, the class-of-one cases decided by the courts of appeals in the eight years since *Olech* have involved cases challenging every type of routine governmental action, ranging from land-use, zoning, licensing, and tax assessments to policing and prosecutorial decisions[5]—and in many of these cases the courts have

[5] To cite only a handful of examples, *see Jicarilla Apache Nation v. Rio Arriba County*, 440 F.3d 1202 (10th Cir. 2006) (reclassification, for tax assessment purposes, of property use); *Campbell v. Rainbow City*, 434 F.3d 1306 (11th Cir. 2006) (denial of zoning variances); *Jennings v. City of Stillwater*, 383 F.3d 1199 (10th Cir. 2004) (reluctance of police investigators to prosecute); *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936 (9th Cir. 2004) (discriminatory enforcement of environmental

wrestled with the same concerns articulated by the Ninth Circuit about cabining the class-of-one doctrine in a way that does not result in routine constitutional review of government decisions. *See*, *e.g.*, *Bell v. Duperrault*, 367 F.3d 703, 712-13 (7th Cir. 2004) (Posner, J., concurring); *Jennings*, 383 F.3d at 1210-12.

That task has not been made easier by the lower courts' uncertainty about the proper interpretation of this Court's brief opinion in *Olech*, and in, particular, about the standard that should be required for pleading and proving class-of-one claims. As Judge Posner has observed in soliciting this Court's "enlighten[ment]" on that score, "the post-*Olech* cases are all over the map." *Bell*, 367 F.3d at 711 (concurring op.). And the difficulty is focused precisely on the problem of avoiding routine constitutional review of government administrators' decisions:

> In the wake of *Olech*, the lower courts have struggled to define the contours of class-of-one cases. All have recognized that, unless carefully circumscribed, the concept of a class-of-one equal protection claim could effectively provide a federal cause of action for review of almost every executive and administrative decision made by state actors.

Jennings, 383 F.3d at 1210-11.

In short, the Ninth Circuit's categorical exclusion of public employment from the purview of the Equal

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regulations); *Bell v. Duperrault*, 367 F.3d 703 (7th Cir. 2004) (denial of permit to extend a pier); *Nevel v. Village of Schaumburg*, 297 F.3d 673 (7th Cir. 2002) (revocation of building permit); *Shipp v. McMahon*, 234 F.3d 907 (5th Cir. 2000) (unequal police protection).

Protection Clause, insofar as class-of-one cases are concerned, fails to address the broader problem of how the class-of-one doctrine can be cabined in a way that is both consistent with Equal Protection law generally and that does not systematically "transform many ordinary violations of city or state law into violations of the Constitution." *Olech*, 528 U.S. at 565 (Breyer, J., concurring). Nor does it offer a solution to the widespread disarray in the lower courts, in the wake of *Olech*, over the proper standard for pleading and proving a class-of-one claim.

B. The Problem Of Appropriately Cabining Class-Of-One Claims—In Employment Cases Or Otherwise—Can Be Resolved By Further Articulation Of The Standard For Pleading And Proving All Such Claims

The issue that troubles and divides the lower courts is not, in short, whether Equal Protection law categorically excepts public employment from class-of-one cases, but rather how to develop a standard for pleading and proof of such cases that appropriately constrains federal-court review of everyday government decisions.

This Court could, of course, resolve the case before it simply by reversing the Ninth Circuit's decision barring all class-of-one cases in the public-employment context and leaving for another day the elaboration of standards for pleading and proving class-of-one cases. But the Court may also wish to use this case to give further guidance on the latter issue. At the very least, the Court should be cognizant, in answering the question upon which review was granted, of the availability of a remedy

for the Ninth Circuit's policy concern about routinely constitutionalizing government decisions—a remedy which is consistent with this Court's public-employee and Equal Protection cases, which truly resolves the problem the Ninth Circuit identified, and which does not categorically and arbitrarily exclude from the purview of the Equal Protection Clause one class of cases that accounts for only a portion of the problem. To that end we offer the following analysis of the appropriate standard for pleading and proving class-of-one cases.

1. *A Class-Of-One Plaintiff Must Plead And Prove That She Was Intentionally Treated Differently Than Others Similarly Situated For Reasons Unrelated To Any Legitimate Government Objective*

a. Any Equal Protection claim based on state actors' administrative or executive decisions will require the plaintiff to plead and prove that he or she was (1) intentionally (2) treated differently from others similarly situated, and (3) that the reason for such intentionally disparate treatment was an impermissible one.

The requirement that the differential treatment must have been intentional is well established in Equal Protection law generally, *Washington v. Davis*, 426 U.S. 229 (1976), and if properly applied it suffices to dispose of the concern that mere errors or inadvertent differences in government administrators' application of the law to different persons could form the basis for a cause of action under the Equal Protection Clause. As this Court has explained, "[t]he unlawful administration by state

officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination." *Snowden v. Hughes*, 321 U.S. 1, 8 (1944); *see also id.* at 15 (Frankfurter, J., concurring) ("[T]o give rise to a constitutional grievance a departure from a norm must be rooted in design and not derive merely from error or fallible judgment.").

While the element of differential treatment from others similarly situated can entail difficult issues of proof,[6] the showing that the government treated the plaintiff(s) differently from other similarly situated

[6] Showing that the plaintiff who alleges discriminatory treatment was similarly situated to others who were not so treated is a standard element of discrimination cases, whether statutory or constitutional, and there is no reason why this element should be treated any differently in class-of-one cases. In particular, it should be open to plaintiffs in appropriate cases to prove this element by inference—for example, by showing that the government's action was motivated by concerns so far outside the realm of legitimate government purposes that, absent an illegitimate motivation, any hypothetical comparator necessarily would have been treated differently. *Cf.* Pet. App. 66 (Reinhardt, J., dissenting) ("There is no need for an identically situated comparator in cases involving malice because the government does not ordinarily treat people maliciously, and, thus, is obviously treating individuals unequally under such circumstances."); Brief for the Petitioner 43 ("[C]ourts use evidence of malice and vindictiveness as a proxy for other elements that a plaintiff must prove," including "the existence of similarly situated comparators."). The possibility of proving discriminatory treatment by inference is particularly significant where the plaintiff holds a unique position—such as, for example, the head of a governmental department—and would be hard pressed to identify other employees similarly situated in all relevant respects.

persons is obviously part of any Equal Protection claim, for "[i]t is this comparative element that distinguishes the Equal Protection Clause from the Due Process Clause." *Jennings*, 383 F.3d at 1213 (citing *Ross v. Moffitt*, 417 U.S. 600, 609 (1974)).

It is the third element that is most directly related to the difficulties the lower courts have experienced in applying *Olech*. In the more usual Equal Protection case, of course, the impermissible motive that is alleged to have resulted in the denial of equal protection is the consideration of plaintiff's membership in some class—whether it is a class that is afforded some level of heightened scrutiny (such as a class defined by race) or one that is not afforded any such heightened protection (such as a class defined by age, sexual orientation, or perhaps eye color), so that alleged discrimination on the basis of membership in that class is evaluated under a rational basis standard. In these cases, the discriminatory treatment that the plaintiff claims to have suffered is alleged to have been motivated by the impermissible consideration of membership in the class—impermissible because not rationally related (at a minimum) to any legitimate government objective.

But the impermissible motive demonstrated by showing that the government discriminated against the plaintiff because of the plaintiff's membership in a disfavored class is logically no more than a special case of the more generic requirement that to show a denial of equal protection one must show that the reason for the discriminatory governmental action was unrelated to any legitimate government objective.

Put differently, it is the governmental actor's allegedly impermissible motive in treating the plain-

tiff differently that *defines* the class against which the discriminatory treatment is directed – whether the discriminatory animus is alleged to be directed against a conventionally large class (blacks, women, gays, disabled persons, etc.) or against a "class of one." The latter type of class—whether in reality it contains one, two, or five individuals, *see Olech*, 528 U.S. at 564 n*—can be defined as consisting of those persons alleged to have been treated differently because of, for example, animus stemming from a previous lawsuit, *Olech*, 528 U.S. at 563, a desire to protect the local football team from embarrassment, *Jennings*, 383 F.3d at 1211, personal hostility, *Bell*, 367 F.3d at 708; *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 945-48 (9th Cir. 2004); a hostile mother-in-law, *Shipp v. McMahon*, 234 F.3d 907, 916 (5th Cir. 2000), or the need for a scapegoat, *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982).

These allegations of a reason *unrelated to any legitimate government objective* for the discriminatory treatment the plaintiff alleges thus serve the same purpose as the more conventional allegations of discriminatory treatment on account of race, gender, age, and the like—they offer an answer to the question *why* the plaintiff was treated differently from other similarly situated persons. Just as a conventional Equal Protection plaintiff cannot survive a motion to dismiss without alleging (for example) that the reason for the differential treatment was his or her race—and cannot survive summary judgment without offering appropriate proof of that allegation—so too is it appropriate to require a class-of-one plaintiff to identify the reason why he or she was treated differently.

In sum, we submit that what a class-of-one plaintiff must plead, and subsequently prove, is that he or she was intentionally treated differently than others similarly situated for a reason unrelated to any legitimate government objective.

b. We recognize that this formulation of the pleading and proof standard for class-of-one claims may be in some tension with this Court's opinion in *Olech*—but we submit that upon examination the discrepancy is more apparent than real.

In *Olech*, the Court explained that it had recognized Equal Protection claims based on discrimination against a "class of one" in cases "where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is *no rational basis for the difference in treatment*." 528 U.S. at 564 (emphasis added). Holding that these allegations were sufficient to state a cause of action, the Court determined that it need not reach any question of "subjective ill will" on the part of the government decision-makers. *Id.* at 565.

The Court's formulation, elaborated only briefly in its short *per curiam* opinion, was controversial from the start. Concurring in the result, Justice Breyer considered the "added factor" of "'vindictive action,' 'illegitimate animus,' or 'ill will'" necessary to prevent "transforming run-of-the-mill zoning cases into cases of constitutional right." *Id.* at 566. And just weeks after *Olech* was decided, the Seventh Circuit—fearing that the formulation "irrational and wholly arbitrary" articulated by this Court would be insufficient to prevent the federal courts from being "drawn deep

into the local enforcement of petty state and local laws"—held that it would

> gloss "no rational basis" in the unusual setting of "class of one" equal protection cases to mean that to make out a prima facie case the plaintiff must present evidence that the defendant deliberately sought to deprive him of the equal protection of the laws *for reasons of a personal nature unrelated to the duties of the defendant's position*.

Hilton v. City of Wheeling, 209 F.3d 1005, 1008 (7th Cir. 2000) (emphasis added).

In a subsequent opinion Judge Posner explained that the formulation "reasons of a personal nature" did not mean only personal animus on the part of the governmental actor, but extended to any "improper motives for a public official":

> It should be noted that "reasons of a personal nature unrelated to the duties of the defendant's position" go beyond personal hostility to the plaintiff (i.e., animus), the motive emphasized in our *Olech* opinion and in Justice Breyer's concurrence. Personal reasons can include larceny, as in *Forseth v. Village of Sussex,* 199 F.3d 363, 371 (7th Cir. 2000), or a desire to find a scapegoat in order to avoid adverse publicity and the threat of a lawsuit, as in *Ciechon v. City of Chicago* . . . , 686 F.2d at 524—improper motives for a public official (scapegoating is not a legitimate tactic of public officials any more than stealing is), but different from personal hostility.

Bell, 367 F.3d at 710 (Posner, J., concurring).

In short, the Seventh Circuit reads *Olech* to require that the class-of-one plaintiff must have been in-

tentionally deprived of the equal protection of the laws for a reason unrelated to any legitimate government objective—whether that reason is personal animus or some other improper motivation. Because the motive for the discriminatory treatment is an improper one, the government's treatment of the plaintiff is necessarily "irrational" or "arbitrary," when measured against legitimate government objectives, and in that sense "there is no rational basis for the difference in treatment." *Olech*, 528 U.S. at 564.

That formulation is, we believe, an appropriate elaboration of this Court's holding in *Olech*. It is, to be sure, possible to read the terms "no rational basis," 528 U.S. at 564, and "irrational and wholly arbitrary," *id.* at 565, as allowing a class-of-one plaintiff to prevail upon a showing that the government defendant discriminated against the plaintiff for no reason at all. But people tend to act for reasons, and it is difficult to see how a governmental action could be *intentionally* arbitrary and irrational—as it must be—without the existence of some "personal" motive (in Judge Posner's sense), *i.e.*, a motivation unrelated to any legitimate government interest.

Properly understood, therefore, the Seventh Circuit's formulation that a class-of-one plaintiff must plead and prove a "personal" or "improper" motive for the government's discriminatory action is merely an elaboration of *Olech*'s holding that the discriminatory treatment must be both "intentional" and "arbitrary."

This development of a more elaborated standard for pleading and proving class-of-one claims should ensure that the Equal Protection Clause does not, as the Ninth Circuit feared, "provide a federal cause of action for review of almost every executive or

administrative government decision." Pet. App. 22. The requirement that a class-of-one plaintiff plead and prove discriminatory treatment that was both intentional and the result of an illegitimate motive appropriately limits class-of-one claims—whether in the context of public-employment decisions or otherwise—to those in which the government has indeed acted intentionally to deny the plaintiff the equal protection of the laws.

2. *The Government Defendant Cannot Escape Liability Merely By Hypothesizing A Rational Motivation For The Differential Treatment*

Several of the cases in which the lower courts have endeavored to develop pleading and proof standards for class-of-one claims have held that the plaintiff cannot prevail if there was *any possible rational basis* for the government's action, and indeed that the defendant need only articulate, not prove, an imaginable rational basis in order to escape liability. *Lauth*, 424 F.3d at 634; *Jicarilla Apache Nation v. Rio Arriba County*, 440 F.3d 1202, 1209-12 (10th Cir. 2006).[7]

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[7] We note, as an initial matter, that the proper inquiry is not whether there was a rational basis for the government action *per se*—denying a license, failing to provide police protection, firing an employee—but rather whether there was a rational basis, in taking this action, for treating the plaintiff differently from others similarly situated. Otherwise, there could never be an Equal Protection claim in any case in which the government was acting within a range of permissible discretion—no matter how egregiously differently that discretion was exercised to the disadvantage of the plaintiff, as compared to others similarly situated. For example, the government's action in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), in denying a permit for a laundry

We certainly agree that a defendant can and should escape liability in cases in which the disparate treatment of the plaintiff in fact rested on a rational basis, *i.e.*, one related to a legitimate government purpose—and that is so even if the defendant is shown to have been motivated *also* by improper animus. The courts have a well-established, time-tested tool for sorting out just this sort of problem—the "mixed motive" analysis of *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977). Under *Mt. Healthy*, a defendant whose acts were substantially motivated by an improper purpose can nonetheless escape liability by showing that he would have taken the same action even absent the improper motivation.[8]

But it is one thing to say that the defendant in a class-of-one case can prevail by showing that there was, in fact, a rational and legitimate basis for treating the plaintiff differently, and quite another to suggest that there can be no violation of the Equal Protection Clause as long as the defendant is able to

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in a wooden building would hardly have been irrational if considered in isolation; it became irrational and impermissible only because permits were denied to one class of applicants based on the impermissible consideration of their national origin. Accordingly, as this Court put it in *Olech*, the relevant question is whether there is a "rational basis *for the difference in treatment*." 528 U.S. at 564 (emphasis added).

[8] As applied to the facts of the *Olech* case, for example, even if the Village officials who insisted on the 33-foot easement were shown to have been driven by animus stemming from the Olech family's previous successful lawsuit against the Village, Ms. Olech would still lose if the Village were able to establish that it also had a rational and proper reason for seeking a broader easement in her case and that it would have done so even absent any improper animus or retaliatory motive.

hypothesize a rational basis for the differential treatment. The Seventh Circuit arrived at that position by observing that "a plaintiff who does not belong to any 'suspect' (that is, favored) class—by definition, 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.'" *Lauth*, 424 F.3d at 634.

But this analysis confuses the inquiry in cases dealing with legislative classifications—where (absent any heightened scrutiny) the court looks only to whether there could be any conceivable rational basis for the legislature's classification—with cases involving administrative and executive actions. In the latter cases, the principal inquiry (which normally does not arise in cases involving legislative classifications) is usually one of fact—why did the government actor treat the plaintiff differently from others similarly situated? In an employment case, for example, the question might be whether the plaintiff was fired because of her religion or because of inadequate job performance. In a class-of-one case, the inquiry would be similarly factual, *e.g.*, whether the firing was because of inadequate job performance or (as in Judge Reinhardt's example) "because the employee's sister refused [the supervisor's] sexual advances." Pet. App. 64 (dissenting op.).

Such questions are resolved by application of the usual analytical and evidentiary tools, including the burden-shifting framework established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). But these factual questions are not resolved by looking to what, hypothetically, *could have* motivated the defendant.

There is no question that the motives typically alleged in class-of-one cases have nothing to do with a protected class or a fundamental right, and thus the permissibility of government acting on the basis of those motives (or classifications) is evaluated under a rational basis standard. But the antecedent factual question of why the plaintiff was treated differently than others similarly situated nevertheless cannot be avoided simply by hypothesizing a legitimate reason for the different treatment. The issue is not whether a rational basis for treating the plaintiff differently can be imagined, but rather whether, in fact, the plaintiff was denied the equal protection of the laws by being intentionally treated differently than others similarly situated for reasons unrelated to any legitimate government objective.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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