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No. 07-474

IN THE
SUPREME COURT OF THE UNITED STATES

ANUP ENGQUIST,
Petitioner

v.

OREGON DEPARTMENT OF ARGRICULTURE,
JOSEPH (JEFF) HYATT, JOHN SZCZEPANSKI,
Respondents

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

BRIEF OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace.

NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA has a strong interest in insuring that the full panoply of constitutional rights, including equal protection, are available to public servants.

To ensure that the rights of working people are protected, NELA has filed numerous amicus curiae briefs before the United States Supreme Court and the federal appellate courts regarding the interpretation and application of statutory

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

rights. See e.g., *Smith v. City of Jackson*, 544 U.S. 228 (2005); *Adams v. Florida Power Co.*, 535 U.S. 228 (2002).

SUMMARY OF ARGUMENT

The Ninth Circuit's prediction of a torrent of employment claims based upon *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000) is unsupported by empirical evidence and inconsistent with practical experience. As such, concerns about a "flood" of litigation cannot be a basis for denying public employees the right to bring "class-of- one" equal protection claims.

ARGUMENT

This brief addresses the concern articulated by the Ninth Circuit in *Engquist v. Oregon Dep't of Agriculture*, 478 F.3d 985 (9th Cir. 2007), that "applying the class-of-one theory to public employment would. . .generate a flood of new cases, requiring the federal courts to decide whether any public employee was fired for an arbitrary reason or a rational one." *Id.* at 995. This fear is groundless; it is wholly unsupported by facts and by the experience of the Circuits.

This Court has previously relied upon actual experience to discount the specter that allowance of certain claims will open "floodgates." *See Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 300, 115 S.Ct. 2144, 132 L.Ed.2d 226 (1998)(11

years of experience suggests that argument claiming potential flood of litigation is wrong); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.11, 106 S.Ct. 1233, 90 L.Ed. 623 (1986), superceded by statute, (20 years of operation of Part B of Medicare program raises serious doubts about claims of future inundation). As in *Rambo* and *Bowen,* this Court need not speculate as to what *might* happen. The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth and Tenth Circuits have all applied the class-of-one theory to public employees since *Olech. Engquist, supra,* 478 F.3d at 993 (collecting cases); *Kirby v. City of Elizabeth City,* 388 F.3d 440 (4th Cir. 2004); *Howard v. Columbia Pub. Sch. Dist.*, 363 F.3d 797 (8th Cir. 2004). Far from creating a "flood" of litigation, reliance on the class-of-one theory has been relatively rare since 2000. *See Engquist,* supra, 478 F.3d at 1013 (Reinhardt, J., dissenting): "Nor are those circuits drowning in the 'flood' of class-of-one employment disputes feared by the majority." As the Petitioner aptly notes, there have been "only 162 reported public employment cases – approximately 24 cases per year – even assert[ing] an Olech class-of-one equal-protection violation in federal court." Brief for the Petitioner, page 49.

Federal courts have considered and ruled upon equal protection class of one claims in the workplace for over thirty years. See, *e.g., Trister v. University of Miss.*, 420 F.2d 499, 503 -504 (5th Cir. 1969); *Martin v. Harrah Ind. Sch. Dist.*, 579 F.2d 1192 (10th Cir. 1978), rev'd, *Harrah Ind. Sch. Dist.*

v. Martin, 440 U.S. 194, 99 S.Ct. 1062, 59 L.Ed.2d 248 (1979); *Ziegler v. Jackson*, 638 F.2d 776 (5th Cir. 1981); *Ciechon v. City of Chicago*, 686 F.2d 511, 522-23 (7th Cir. 1982); *Batra v. Board of Regents of University of Nebraska*, 79 F.3d 717 (8th Cir. 1996). No empirical evidence has been cited by the *Engquist* majority or by the Respondents[2] in support of the notion that an abundance of such claims has deluged the courts. In fact, not one of the Circuits, including those with decades of experience, has bemoaned the administrative burdens attendant to permitting such claims.

What is more, a review of decisions in class-of-one employment cases does not evidence a "struggle. . .to define the contours of class-of-one cases" as suggested by the *Engquist* majority. 478 F.3d at 993. Rather, it reveals the articulation of clear and logical principles of law, rooted in well-settled constitutional jurisprudence, such that litigants know in advance whether or not their claims qualify for Constitutional protection. The *Engquist* majority's prediction of a flood of litigation is undercut by the acknowledgment that the various Circuits permitting such claims have developed judicially discernible and manageable standards, with the specific intent of confining the circumstances to which the theory can apply .

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[2] The Respondents' Brief in Opposition to Petition for Writ of Certiorari, page 15, undermines the notion of a barrage of *Olech*-based employment claims by noting that "there are many public employees, but almost no successful class-of-one public employee claims."

This Court has recognized that the issue of whether or not a cause of action may "open the floodgates to a host of unworthy suits" depends "not on the potential popularity of a claim that could be well defined," but whether "litigation [is] invited because the elements of a claim are so unclear that no one can tell in advance what claim might qualify or what might not." *Wilkie v. Robbins*, ___ U.S. ___ , 127 S.Ct. 2588, 2604, 168 L.Ed.2d 389 (2007). As to class-of-one employment claims, the Circuit Courts have developed definite criteria that clearly circumscribe these claims. As articulated in *Olech, supra,* 528 U.S. at 564, a plaintiff must establish that (1) the government treated him or her differently from other similarly situated persons; see, *e.g., Nielsen v. D'Angelis*, 409 F.3d 100, 104-05 (2d Cir. 2005); *Purze v. Village of Winthrop Harbor*, 286 F.3d 452, 455 (7th Cir. 2002), citing *Indiana State Teachers Ass'n v. Bd. Of Scho. Comm's*, 101 F.3d 1179, 1181-82 (1996) and *Hill v. Borough of Kitztown*, 455 F.3d 225, 239 (3rd Cir., 2006); (2) the difference in treatment was intentional; see, *e.g., Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006) and *Jennings v. City of Stillwater*, 383 F.3d 1199, 1211 (10th Cir. 2004); and (3) the difference in treatment was not rationally related to any legitimate government purpose. See *Whiting v. Univ. of S. Mississippi*, 451 F.3d 339, 348 (5th Cir. 2006); *Lauth v. McCollum*, 424 F.3d 631, 634 (7th Cir. 2005) and *Squaw Valley v. Goldberg*, 375 F.3d 936, 944-47 (9th Cir. 2006).

The recognition of this cause of action has not been construed as an open invitation to litigate

every governmental employment decision. Indeed, the opposite is true. Due to the consistent refusal of the Circuit Courts to permit such actions to proceed in all but the most meritorious situations, there exists no incentive to bring questionable or spurious claims. What is more, civil rights plaintiffs who litigate under 42 U.S.C. Section 1983 are well aware that they can recover damages only upon proof that their "clearly established constitutional rights" have been violated, as official action is protected by qualified immunity unless its unlawfulness is apparent in light of pre-existing law. *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002); *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Plaintiffs therefore have no incentive to bring equal protection claims which stretch the boundaries of existing law.

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury." *Baker v. Carr*, 369 U.S. 186, 208, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803). "The majority opinion [in Engquist], in the name of prudence, eviscerates the Constitution's promise of equal protection to all Americans." *Apache Bend Apartments, Ltd. v. United States*, 98 F.2d 1174, 1186 (5th Cir. 1993) (Goldberg, J., dissenting).

CONCLUSION

For the foregoing reasons, in addition to those set forth in Petitioner's brief, the decision of the Ninth Circuit Court of Appeals must be reversed.

Respectfully Submitted,

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