No. 07-474

In the Supreme Court of the United States

ANUP ENGQUIST,
Petitioner,
v.

OREGON DEPARTMENT OF AGRICULTURE,
ET AL.
Respondents.

**BRIEF OF *AMICUS CURIAE,*
NATIONAL FRATERNAL ORDER OF POLICE,
IN SUPPORT OF PETITIONER.**

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QUESTION PRESENTED

This case involves the issue of whether a public employee is entitled to the shield of the Equal Protection Clause of the United States Constitution on a "class-of-one" basis when her employer intentionally treats her differently than similarly situated employees with no rational basis and for arbitrary, vindictive or malicious reasons.

The National Fraternal Order of Police respectfully submits that a public employee should be provided the protection of the Equal Protection Clause and should be allowed to argue a class-of-one theory where she has been treated differently than similarly situated public employees without any rational basis and in an arbitrary, vindictive or malicious fashion.

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Now comes the National Fraternal Order of Police, by and through undersigned counsel, and hereby respectfully submits its Brief in support of Petitioner urging reversal of the judgment of the United States Court of Appeals for the Ninth Circuit.

INTEREST OF *AMICUS*[1]

With this Brief, the National Fraternal Order of Police ("FOP") submits the views of its more than 325,000 law enforcement members regarding the potential implications for officers in law enforcement that will result from the decision rendered by the Ninth Circuit Court of Appeals. The Brief will focus on:

1. The importance of protecting the constitutional rights of public employees and, more specifically, law enforcement officers; and

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[1] The submission of this Brief was consented to by all parties hereto.

The Office of General Counsel to the National Fraternal Order of Police authored this Brief in its entirety. There are no other entities which made monetary contribution to the preparation or submission of this Brief.

2. The use of this case to establish a workable standard for the protection of the constitutional rights of public employees.

STATEMENT.

As succinctly stated by President Calvin Coolidge:

> The duties which a police officer owes to the State are of a most exacting nature. No one is compelled to choose the profession of a police officer, but having chosen it, everyone is obliged to live up to the standard of its requirements. To join in that high enterprise means the surrender of much individual freedom. The police officer has chosen a profession that he must hold at all peril. He is the outpost of civilization. He cannot depart from it until he is relieved. A great and honorable duty is his, to be greatly and honorably fulfilled.
>
> But there is toward the officer a corresponding duty of the State. It owes him a generous compensation for the perils he endures for the protection of society. It owes him the knowledge of security that is to be his, from want in his declining years. It owes him that

> measure which is due to the great importance of the duties he discharges.[2]

The Fraternal Order of Police is the world's largest organization of sworn law enforcement officers, with more than 325,000 members in more than 2,100 lodges. The FOP is the voice of those who dedicate their lives to protecting and serving our communities. Law enforcement officers occupy a unique niche within the realm of public employment. Although police officers undeniably occupy the most dangerous and stressful positions in the public domain, police officers are afforded the least protection in regard to their own employment. Only 24 of the 50 States recognize the right of law enforcement officers to engage in binding collective bargaining with their employers. In addition, every State prohibits law enforcement officers from striking in regard to the terms and conditions of their employment.

The FOP perspective on the issues presented in this case is unique and particularly appropriate to the substantive issues presented by this case. Law enforcement personnel nationwide work every day to promote and ensure the safety of people everywhere. Yet it is this class of public employees that enjoys the least protection in regard to the security of their own employment. The Decision of the Ninth Circuit Court of Appeals further erodes the few constitutional protections enjoyed by law enforcement, society's front line of defense.

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[2] Calvin Coolidge, President of the United States, 1924.

As public servants, the members of the FOP have always recognized that the first and foremost duty of their profession is to serve society. In exchange for that commitment, law enforcement has only asked to be treated fairly by their governmental employer. In the words of past Grand FOP President, Michael L. Barrett:

> Back in 1915 . . . the 23 police officers who organized it [the FOP] no doubt had in mind the old Biblical saying 'Give to Ceasar the things that are Ceasar's and to God the things that are God's.' Therefore we, as public servants, if we give to the public the things that belong to the public, we have a right to ask for what belongs to us.[3]

It is with these interests in mind that the FOP and its membership respectfully request this Honorable Court to reverse the Decision of the Ninth Circuit Court of Appeals and find that public employees are entitled to constitutional protection from arbitrary, malicious or vindictive employment decisions.

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[3] Grand President's Report, *Minutes of the 11th Convention, Fraternal Order of Police, South Bend, Indiana* (August 17-19, 1927) p. 13.

ARGUMENT.

I. The United States Constitution Remains One of the Few Enduring Protections For Law Enforcement Officers Against Arbitrary and Capricious Governmental Employment Action.

> The essence of government is power; and power, lodged as it must be in human hands, will ever be liable to abuse.
>
> James Madison, 1829.

According to the U.S. Department of Labor, Bureau of Labor Statistics, police officers and detectives held approximately 861,000 jobs in 2006. Of that number, 79% were employed by local governments, 11% were employed by state police agencies and 7% were employed by various federal agencies. The reality of these statistics is that the vast majority of law enforcement personnel are employed at the local level of government. These officers, in cities and towns across the United States, are ever vulnerable to the whim of local politics, the absence of standardized employment policies and procedures, and little statutory protection regarding the terms and conditions of their employment.

Only 24 States recognize the right of law enforcement officers to enter into binding collective

bargaining agreements with their employers.[4] In addition, officers who have the least protection from arbitrary or vindictive employment decisions are those who work in law enforcement agencies which are not subject to collective bargaining agreements and are not subject to Civil Service laws. In many cases, these law enforcement agencies are free to treat their employees however they choose, so long as they do so in compliance with the United States Constitution and other applicable federal laws. Even in those States which have Civil Service laws applicable to law enforcement, many such laws make the decisions of Civil Service Boards either completely unreviewable in court or excessively difficult to review.[5]

Another employment issue that uniquely affects law enforcement personnel is the continued blurring of the line between on-duty and off-duty conduct. Many municipalities currently have regulations regarding both the off-duty conduct of police officers and conduct

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[4] Alaska, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin.

[5] See, e.g., *Billings v. Civil Serv. Comm'n*, 154 W. Va. 688; 178 S.E.2d 801 (W. Va. 1971)("[a] final order of the Civil Service Commission based upon a finding of fact will not be reversed by this Court upon appeal unless it is clearly wrong."); *City of Detroit v. Detroit Lieutenants' and Sergeants' Assoc.*, No. 250424, 2005 WL 387647, (Mich. Ct. App. Feb. 17, 2005)(stating that even "silly" fact finding by an arbitrator must be upheld on review).

which is defined as "unbecoming" an officer.[6] The intense media scrutiny felt by police officers regarding even day-to-day job responsibilities as well as off-duty conduct results in political pressure for both the governmental employer and the officer.[7] Because of the higher standard to which police officers are held and the resulting political and media pressure which comes to bear, police officers are uniquely vulnerable to politically motivated, arbitrary and capricious employment action. As stated above, in many jurisdictions where officers have no binding collective bargaining rights and no civil service protection, constitutional rights claims may be the only recourse for aggrieved officers.

One of the first reported cases to recognize the cause of action for class-of-one equal protection in a public employment context is the case of *Chiechon v. City of Chicago.* In *Chiechon*, the plaintiff was a paramedic who worked for the defendant city. *Chiechon v. City of Chicago*, 686 F.2d 511, 513 (7th Cir. 1982). In the midst of "record-setting snow conditions as the result of a blizzard," Plaintiff Chiechon and a fellow paramedic responded to a call regarding a man having difficulty breathing. *Id*. at 513-14. Plaintiff

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[6] Thomas Martinelli, *Minimizing the Risk by Defining Off-Duty Police Misconduct,* The Police Chief, 2007, Vol. 74, pgs. 40-45.

[7] See, e.g., *Malec v. Vill. of Oak Brook*, No. 06 C 5167, 2007 U.S. Dist. LEXIS 36507 at *5 (N.D. Ill. May 18, 2007)(". . . police officials have always been subject to far more detailed scrutiny and reporting requirements than ordinary employees or government workers.")

Chiechon and her fellow paramedic urged the patient to "go to the hospital," but he refused. *Id*. After the paramedics had left, the patient died. *Id*. A few days after the patient's death, his family contacted several public officials as well as the news media regarding the incident. *Id*. at 515. The family complained regarding inadequate service of the paramedics, which prompted significant media attention and criticism of the city's administration. *Id*. Following intense media scrutiny, Plaintiff Chiechon was terminated as a paramedic. However, her fellow paramedic was not. *Id*. at 516. In holding the paramedic's termination violative of the Equal Protection Clause of the United States Constitution, the Seventh Circuit Court of Appeals stated as follows:

> In this case the family's grief was expressed in pointless vengeance and, in view of media and family pressure, the official investigation was single-mindedly and intentionally directed to ruining the career of one, but only one, of the four employees involved in this unfortunate incident. Because of these two factors, we have no difficulty in finding violations of procedural due process and equal protection. However, we have no intention of opening the floodgates to review all municipal personnel decisions. It is only because these defendants purposely and invidiously chose one of two similarly situated employees for undeserved punishment and misused otherwise legitimate disciplinary

> procedures that our intervention is justified.

Id. at 516-17 (citations omitted).

Unfortunately for police officers, critical and traumatic incidents involving the performance of their job duties many times end up receiving media scrutiny. This simply cannot be said for most other professions. One need only turn on the television, radio or peruse the internet to find dozens of stories regarding police officer involved shootings, incidents involving traffic stops, and claims of police brutality. With the media attention that accompanies critical police incidents involving the public, police officers are particularly vulnerable to the type of "scapegoating" which occurred in the *Chiechon* case. In jurisdictions that do not recognize collective bargaining or other state law based employment protections, the availability of a class-of- one equal protection claim is important to ensure that similarly situated public employees are treated comparably.

A current example of this type of "scapegoating" can be seen in the case of former Belmont County, Ohio, Sheriff Deputy Barbara Snyder.[8] Ms. Snyder began her employment with the Belmont County, Ohio, Sheriff's Department in 1996 as a part-time jailer and was promoted to Sergeant in 2000.

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[8] Sgt. Snyder's case is currently pending in the United States District Court for the Southern District of Ohio, Case No. 08cv111.

In early 2007, the FBI began to investigate the Belmont County Sheriff's Department regarding an allegation that departmental employees in the jail used excessive force on a former inmate. Specifically, the allegations consisted of "unwarranted and excessive tasering" of an inmate. The FBI investigation into the inmate's allegations led to intense media scrutiny. As a result, Sgt. Snyder, the supervisor of the shift accused of inmate abuse, as well as all other members of her shift were put on administrative leave. During the course of the FBI investigation, it was determined that Sgt. Snyder was not on duty on any of the dates or times that the inmate was alleging abuse. Sgt. Snyder was exonerated of all charges by the FBI investigation. Despite this fact, Sgt. Snyder was summarily terminated by the Belmont County Sheriff's Department in part because she was the supervisor of the shift accused of inmate abuse (even though she was not present and had no knowledge of any of the incidents) and because of the intense media attention regarding the allegations. However, Sheriff deputies who actually engaged in the alleged prisoner abuse were given the opportunity to either resign or retire, in lieu of being terminated. The Belmont County Sheriff was able to use Sgt. Snyder as a "scapegoat" to satisfy the public's and media's appetite for punishment, while allowing the deputies who had actually engaged in wrongful conduct to resign or retire without having a publicaly vetted termination on their records.

Luckily, Sgt. Snyder resides in a State that allows binding collective bargaining between police officers and their public employers, and has available to her a potential Title VII claim for gender

discrimination. However, a police officer who does not have such protections available to him or her, either by way of State collective bargaining or Civil Service laws, might not have any recourse for the clearly disparate and prejudicial treatment such as the example set forth above. This is exactly the type of governmental conduct, based upon whim and caprice, with no legitimate or rational basis, that the Equal Protection Clause of the United States Constitution is uniquely designed to prevent.

II. The Standard for Articulating A Class-Of-One Equal Protection Claim Can Be Narrowly Drawn by This Court to Establish A Workable Standard for the Protection of the Constitutional Rights of Public Employees.

As pointed out by the Ninth Circuit, "Other Courts of Appeals have chosen to apply *Olech's* class-of-one theory to public employment decisions."[9] Some, but not all, of the courts applying this doctrine have limited the claims by requiring a showing of ill will or other animus as an element of the claim. *Engquist*, *supra* at 993. The FOP advocates a showing of intent

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[9] *Engquist v. Oregon Dept. of Agric.*, 478 F.3d 985, 993 (9th Cir. 2007) citing *Scarabrough v. Morgan Cty. Bd. of Ed.*, 470 F.3d 250 (6th Cir. 2006); *Hill v. Borough of Kitz Town*, 455 F.3d 255 (3d Cir. 2006); *Whiting v. Univ. of Miss.*, 451 F.3d 339 (5th Cir. 2006); *Neilson v. D'Angelis*, 409 F.3d 100 (2d Cir. 2005); *Levenstein v. Salafsky*, 414 F.3d 767 (7th Cir. 2005); *Campagna v. Mass. Dep't Envtl. Prot.*, 334 F.3d 150 (1st Cir. 2003); *Bartell v. Aurora Pub. Sch.*, 263 F.3d 1143 (10th Cir. 2001).

for the purposes of analyzing the viability of a public employee's claim for class-of-one equal protection. Public employees enjoy all constitutional rights equally with all citizens of the United States, including equal protection. However, in the public employment context reasonable limits may be placed on these rights. The FOP is not advocating the "constitutionalization" of every aspect of the public employment relationship. Instead, aggrieved public employees, including police officers, should be allowed to state a class-of-one claim under the Equal Protection Clause where they have been treated differently than similarly situated co-employees in an arbitrary or capricious fashion that is motivated by animus or some other ill intent. Such a framework allows the discretion of public officials to make employment decisions without regular court interference and depriving public employees of the constitutional protections to which they, and all citizens of the United States, are entitled.

The notion of equal protection requires not that everyone be treated the same, but only that those similarly situated be treated similarly. This Court stated in the case of *Nordlinger v. Hahn*, "of course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications. It simply keeps governmental decision makers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). In the public employment context, the FOP is not advocating for a constitutional review for every public employee who claims to have been aggrieved by a governmental employment decision. Instead, public employees should be provided

protection from arbitrary decisions motivated by impermissible rancor. As stated by the Seventh Circuit in the *Chiechon* case:

> Equal protection demands at a minimum that a municipality must apply its laws in a rational and nonarbitrary way . . . This requires a showing that its application of the law 'rationally furthers some legitimate, articulated state purpose and therefore does not constitute invidious discrimination.' . . . This does not mean that error or mistake in the application of the law gives rise to an equal protection claim . . . rather, it protects against intentional invidious discrimination by the state against persons similarly situated.

Chiechon, 686 F.2d at 522-23 (citations omitted).

The FOP urges this Court to adopt a workable test based upon these constitutional principles. Specifically, public employees should be insulated from decisions by their governmental employer which treat similarly situated employees dissimilarly based upon an arbitrary or capricious decision that is motivated by rancor or other ill will. As has been outlined by the previous section in this Brief, police officers, as a unique group of public employees, are frequently subjected to outside pressures from the media and other groups which can result in employment decisions based upon political motivation or for the purposes of "scapegoating." With such a wide range of state-based

protections, or lack thereof, for police officers around the country, the endorsement by this Court of the viability of an equal protection claim, under the parameters as set forth herein, would protect police officers from the most invidious and malicious types of treatment.

In addition, such narrow tailoring for this type of claim would certainly address any concern that this Court's endorsement of a class-of- one equal protection claim for public employees would lead to an "avalanche" of federal court filings by aggrieved public employees. The FOP does not advocate federal court review of every employment decision. Instead, requiring a showing of ill intent should sufficiently limit such claims to only the most egregious situations.

In fact, an examination of the reported cases in federal circuits that currently recognize class-of-one equal protection claims demonstrates that such a cause of action has not been abused in the past. Such recognition has not led to a "flood" of equal protection claims in federal courts. In the past five years, the cases where public employees have articulated claims for class-of-one equal protection which resulted in reported decisions are as follows[10]:

[10] The research done by counsel for *Amicus* FOP included reported cases within the Appellate Circuit, including District Court reported decisions.

District & Appellate Courts	Cases
First Circuit:	3 cases
Second Circuit:	78 cases
Third Circuit:	21 cases
Fifth Circuit:	8 cases
Sixth Circuit:	7 cases
Seventh Circuit:	32 cases
Tenth Circuit:	8 cases

Even in the Appellate Circuits that have recognized class-of-one equal protection claims since the inception of *Olech*[11] in 2000, there certainly has not been a "flood" of cases involving this type of claim. For a larger picture, in the year 2000, alone, 21,032 cases were filed by plaintiffs in Federal Courts alleging civil rights complaints related to employment.[12] Based upon this empirical evidence, there is no reason to believe that the filing of class-of-one equal protection claims will significantly increase should this Court recognize the viability of such a claim. This is particularly the case if the Court adopts, as urged by the FOP, some sort of "intent" requirement for the maintenance of such a claim.

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[11] *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073 (2000).

[12] U.S. Department of Justice, Bureau of Justice Statistics, *"Civil Justice Data Brief,"* July 2002.

CONCLUSION.

In the words of Winston Churchill, "We make a living by what we get. We make a life by what we give." These words spoken about the sacrifice that so many made during the Second World War are very appropriate for describing those individuals who have chosen to serve society in law enforcement. The public employees who risk their lives every day to enforce the laws of the United States should be entitled to protection under the very laws they are sworn to uphold. This Court has an opportunity to craft a standard by which public employees may bring class-of-one equal protection claims while still maintaining the managerial rights of governmental employers.

Based upon the foregoing, the National Fraternal Order of Police respectfully requests this Court to reverse the judgment of the United States Court of Appeals for the Ninth Circuit and hold that public employees are entitled to bring class-of-one claims under the Equal Protection Clause.

Respectfully submitted,

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