No. 07-474

In the Supreme Court of the United States

ANUP ENGQUIST,

Petitioner,

v.

OREGON DEPARTMENT OF AGRICULTURE, JOSEPH (JEFF) HYATT, JOHN SZCZEPANSKI,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Based solely on policy concerns, the Ninth Circuit held that the Equal Protection Clause does not protect public employees who are singled out for adverse treatment by public employers without a rational basis and only for vindictive or malicious reasons. This Court granted the petition to resolve this single issue.

Respondents effectively concede that the Ninth Circuit's policy concerns are unfounded:

- "Respondents admit that where [class-of-one] claims have been recognized apparently the sky has not fallen and at-will employment has not come to an end." Resp. Br. 40 n.14.
- "[T]he plaintiff almost always is unsuccessful in these cases." *Id.* at 27.
- "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." Resp. Br. Opp'n 23.
- The absence of a flood of litigation in the nine circuits that have recognized class-of-one claims in public employment "may be due to the fact that the vast majority of public employees have recourse to remedies other than bringing an equal protection claim in federal court." Resp. Br. 30 n.10.

Respondents also acknowledge that the Fourteenth Amendment's text supports the right of any person, including public employees, to bring class-of-one claims. *Id.* at 14. Respondents argue, however, that "the constitutional text [should not be] taken

literally." *Id.* Further, in defending the Ninth Circuit's decision, Respondents distort the record and raise legal and factual issues foreclosed by the jury's verdict.

There is only one Equal Protection Clause. The Court has consistently interpreted it to apply in the public employment context as in all others. Reversal is warranted on this ground alone. Moreover, Respondents admit that the lower courts have been able to weed out meritless public employee class-of-one claims using *existing* rules. This Court therefore need not decide whether animus or some other additional requirement is needed to cabin public employees' class-of-one claims. Indeed, because the jury found animus here, the adoption of such a requirement would still require reversal of the decision below.

I. THE EQUAL PROTECTION CLAUSE PROTECTS INDIVIDUALS FROM DISCRIMINATORY TREATMENT BY STATE EMPLOYERS.

Respondents do not contend that *Village of Willowbrook* v. *Olech*, 528 U.S. 562 (2000) (per curiam), should be overruled. Instead, they argue that this Court should adopt a new *per se* rule, excluding some public employees from the definition of "persons" under the Fourteenth Amendment. This proposed rule radically departs from the Amendment's text and history and this Court's precedents.

A. The Constitutional Text Plainly Protects All Persons, Including Public Employees.

"This Court has constantly reiterated that the language of the Constitution where clear and

unambiguous must be given its plain evident meaning," *Reid* v. *Covert,* 354 U.S. 1, 8 n.7 (1957) (plurality), and that "no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible," *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 339 (1816).

The text of the Equal Protection Clause unambiguously protects "any person." Its "basic principle" is to "protect *persons*, not *groups*." *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 227 (1995). A public employee is no less a "person" than the property owners in *Olech*, and, like them, the public employee may assert a class-of-one claim.[1]

Respondents counter that the Framers' reference to "'[a]ny person' did not literally mean *any* person." Br. 19. But the statements they quote concern the Apportionment Clause, not the Equal Protection Clause. Cong. Globe, 39th Cong., 1st Sess. 2766-67 (1866).

B. This Court Has Already Held That the Fourteenth Amendment Protects Individual Public Employees from Discriminatory Treatment By State Employers.

This Court has repeatedly held that under the Equal Protection Clause, a public employer's discriminatory treatment of its employees is subject to rational basis review, even when no fundamental right or suspect class is involved. *E.g.*, *New York City Transit Auth.* v. *Beazer*, 440 U.S. 568 (1979); *Harrah*

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[1] Although Respondents complain that Petitioner ignores the phrase "of the laws," Br. 17, this Court has made clear that the phrase includes not only legislative but also administrative actions. Pet. Br. 17-20.

Indep. Sch. Dist. v. *Martin*, 440 U.S. 194 (1979) (per curiam); *Mass. Bd. of Ret.* v. *Murgia*, 427 U.S. 307 (1976). Respondents simply ignore this precedent, while the United States unconvincingly seeks to distinguish it.

Amicus United States claims that this precedent is distinguishable because it involves circumstances in which "the government categorically excludes a class of workers," and thus the court reviewed an employment classification "to determine whether the objective, group-based distinction [was] rationally related to a legitimate government interest." U.S. Br. 9. This distinction fails for a number of reasons.

First, the proposed distinction between a group and a class-of-one is artificial. As Respondents observe, "'Class of one' is not to be taken literally. *Olech* itself may have involved a class of five, rather than of one." Br. 28. Engquist could, of course, have characterized her claim as part of a group, a "class of two" with Corristan. Pet. Br. 6. The number of affected individuals has no bearing on whether they possess an equal protection right. As *Olech* establishes, the Fourteenth Amendment protects classes of one, two, or five. And government actions can be even more dangerous when aimed at a single individual. *Amici* Br. of Richard Epstein & Rutherford Inst. ("Epstein Br.") 8.

Second, the United States' proposed theory glosses over key facts. In *Harrah*, for instance, this Court did not review an official regulatory or legislative policy, but rather a school board's vote to handle an individual teacher's case in a particular manner. Martin's challenge was not to the official Board policy to deny raises to teachers who did not comply, but instead to the Board's vote to treat her noncompliance as grounds for not renewing her

contract. This Court properly subjected "the Board's action" against Martin to rational-basis review. 440 U.S. at 199.

Third, as *Harrah* reveals, the United States' proposed distinction makes little sense in practice. It is rarely possible to know whether a state employer's discrimination is an official government policy or a government official's decision, as a matter of his policy preferences, to target a particular class. A line between an official policy targeted at some non-suspect class (*e.g.*, the class of employees with green hair, or employees who blow the whistle on a supervisor, or employees who are over 65 years old) and an official's decision to target some individual characteristic or behavior (*e.g.*, dying one's hair green, or blowing the whistle on a supervisor, or being 66 years old) is unworkable.

Fourth, this Court long ago rejected the theory that governments could evade the Fourteenth Amendment if its discrimination was the result of an official's policy decision in some particular case rather than of a formally adopted law or regulation. *E.g.*, *Snowden* v. *Hughes*, 321 U.S. 1, 8 (1944) (holding that "unequal application" of an otherwise neutral law constitutes a denial of equal protection if it intentionally targets "a particular class or person" or if the state official has a "discriminatory design to favor one individual or class over another"); *Raymond* v. *Chicago Union Traction Co.*, 207 U.S. 20, 35-36 (1907). This Court's precedents are well-founded, for a classification that derives from a formally adopted official policy is no more pernicious than a classification targeted by a single official, at a single individual.

In sum, Respondents and their *amici* propose abandoning this Court's settled and well-understood

precedent—that discrimination in employment is subject at least to rational-basis review—for an alternative that has no basis in the Constitution, conflicts with this Court's precedents, and would be tremendously difficult to implement (if not entirely meaningless) in practice.

C. This Court Takes Public Employer Interests Into Account When Enforcing Public Employees' Constitutional Rights, Instead of Eliminating Those Rights.

The United States erroneously asserts that this Court has "categorically foreclosed constitutional claims that have the potential to disrupt the workplace and impair the functioning of public employers." Br. 8. On the contrary, this Court carefully balances constitutional commands with public employers' interests on a case-by-case basis.

To be sure, this balancing may yield "more limited" forms of constitutional protection "in the public employment context," U.S. Br. 9, but this Court has never imposed a *categorical* forfeiture of those rights. See, *e.g.*, *O'Connor* v. *Ortega*, 480 U.S. 709, 717 (1987) ("[W]e reject the contention made by the Solicitor General . . . that public employees can never have a reasonable expectation of privacy in their place of work.").[2]

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[2] The United States' description (Br. 9) of *O'Connor* is incomplete. There, this Court unmistakably held that public employees possess Fourth Amendment rights and a reasonable expectation of privacy. 480 U.S. at 717. Indeed, both the plurality and the concurring Justice emphasized that constitutional "protection against *unreasonable* searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as

None of the opinions cited by Respondents or the United States (U.S. Br. 8-9, 15; Resp. Br. 34-37) "categorically foreclos[ed]" public employees from bringing constitutional claims. In *Garcetti* v. *Ceballos*, 547 U.S. 410 (2006), the denial of First Amendment protection was focused entirely on the fact that the speech in question was performed in furtherance of official duties—*i.e.*, job-related speech. *Id.* at 422-25. This Court specifically declined to decide whether the same would hold true for *non*-job-related speech.[3] Here, in contrast, the jury found *no* conceivable job- or performance-related rationale for Respondents' action. *Garcetti*'s holding was a result—not a repudiation—of this Court's traditional balancing. *Id.*

Similarly, in *Batson* v. *Kentucky*, 476 U.S. 79 (1986), this Court stated that "a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, *as long as that reason is related to his view concerning the outcome of the case to be tried*." *Id.* at 89 (emphasis added and internal quotation marks omitted). And in *J.E.B.* v.

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employer." *Id.* at 717 (quoting *id.* at 731 (Scalia, J., concurring in the judgment)). Similarly, although a government employer has substantial discretion in employee management, the Constitution forbids such an employer from acting in a "patently arbitrary" manner. *Cafeteria & Rest. Workers Union* v. *McElroy*, 367 U.S. 886, 898 (1961); Pet Br. 31.

[3] This rule does not apply to all speech. As the United States acknowledges, where an employee's statements are not made in her professional capacity, "the Court has balanced the employee's interests against the government's interest in effectively performing its functions." U.S. Br. 9 (citing *Pickering* v. *Bd. of Educ.*, 391 U.S. 563 (1968)). *Garcetti* itself eschewed a *per se* rule, expressly reserving the question of "whether the analysis . . . would apply in the same manner to a case involving speech related to scholarship or teaching." 547 U.S. at 425.

Alabama ex rel. T.B., 511 U.S. 127 (1994), the Court stated: "Our conclusion that litigants may not strike potential jurors solely on the basis of gender . . . does [not] conflict with a State's legitimate interest in using such challenges *in its effort to secure a fair and impartial jury*." *Id.* at 143 (emphasis added).

Far from holding that equal protection never applies, the jury cases recognize that peremptory challenges must be rationally related to the governmental interest at hand. For example, *Batson* and *J.E.B.* allow a prosecutor to remove a disabled juror because she may become drowsy at trial. See *United States* v. *Harris*, 197 F.3d 870, 876 (7th Cir. 1999). But they do not permit removal based on a prosecutor's "irrational animosity toward or fear of disabled people." *Id.* "[W]here a classification is subject only to 'rational basis' review, the state may use its peremptory challenges to strike jurors for any reason rationally related to the selection of an impartial jury." *Id.* at 874.

Just as a peremptory challenge must rationally relate to the "outcome of the case," a public employer's decisions must rationally relate to some legitimate government purpose. Indeed, what applies to jury selection applies *a fortiori* to employment, given inherent constraints upon *voir dire*. See *J.E.B.*, 511 U.S. at 148 (O'Connor, J., concurring); William Blackstone, 4 Commentaries *346 (describing peremptory challenges as an "arbitrary and capricious species of challenge").

Respondents' reliance (Br. 37) on *Kelley* v. *Johnson*, 425 U.S. 238 (1976) is similarly unavailing. In that case, this Court rejected a police officer's due process challenge to a grooming regulation only after finding the regulation rationally related to legitimate government interests. *Id.* at 247-48.

Respondents and their *amici* make no response to *Wade* v. *United States*, 504 U.S. 181 (1992), in which this Court unanimously allowed an equal protection challenge to a prosecutor's failure to seek a downward departure. Indeed, equal-protection rights of convicted felons are not limited to sentencing. See *Sandin* v. *Conner*, 515 U.S. 472, 487 n.11 (1995) ("Prisoners . . . retain other protection from arbitrary state action even within the expected conditions of confinement" and "may invoke . . . the Equal Protection Clause"). Thus, on Respondents' logic, convicted felons have greater protections than public employees, notwithstanding the greater judicial burden of sentencing challenges

Only one appellate court—the Ninth Circuit—has departed from this well-settled balancing approach and categorically denied the protections of the Equal Protection Clause to a single class of people. Nine other courts of appeals followed this Court's consistent approach, carefully balancing government and employee interests on a case-by-case basis. Pet. Br. 22; Epstein Br. 13-16. No flood of litigation has resulted. Pet. Br. 49-56. Enough time has passed to put such concerns to rest. Cf. *Metro. Stevedore Co.* v. *Rambo*, 515 U.S. 291, 300 (1995) (dismissing litigation-flood concerns based on 11-year experience).

Respondents seek support from *Lauth* v. *McCollum*, 424 F.3d 631 (7th Cir. 2005), but that decision did not nullify public employees' class-of-one claims. It permitted them. Noting that it was "reluctant to complicate the law by proposing different standards for different categories of discriminatory state action," it took the "more promising approach" of ensuring that the standard of proof was appropriately

protective of both government employers and employees. *Id.* at 634.

Amicus United States contends that categorical exclusion of public employee class-of-one claims is essential because simply recognizing that such claims may be asserted severely impairs government efficiency. Br. 16-17.[4] This is hyperbole. To state a claim, an employee must allege that the employer singled her out for a reason not rationally related to a legitimate employment-based interest, and ultimately prove that the employer's proffered rationales for its actions are implausible and not rationally related to any employment-based concern. The limited reach of such a claim reveals why the government's interest in efficiency should not absolutely trump the equal protection right; the whole point of allowing the claim is to guard against irrational and discriminatory employment actions by public employers. Valid as efficiency concerns may be, it cannot be in the public interest to act in such ways.

The United States further argues that the rarity of successful class-of-one actions is reason to eliminate them. But that rarity is a reason to allow such actions, not prohibit them. This Court continues to recognize *Bivens* actions, for example, even though the success rate of such claims is vanishingly small. See HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 821 (5th ed. 2003) (reporting

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[4] For federal employees, *Bivens* actions are foreclosed. Pet. Br. 52 n.18; U.S. Br. 22 n.5. Nor is equitable relief available, for reasons advanced by the United States elsewhere. U.S. Opp. Cert. 8-9, *Dotson* v. *Griesa*, 126 S. Ct. 2859 (2006) (No. 04-1276). The United States also admits that sovereign immunity may bar claims and that exhaustion would be required. U.S. Br. 22 n.5. Tellingly, they fail to quantify the number of employees (undoubtedly tiny) lacking administrative appeal rights.

that in 15 years, "more than 12,000 *Bivens* actions had been filed; that only thirty had resulted in judgments for plaintiffs at the trial level . . . that only four judgments had actually been paid; and that settlements are rare."). Similarly, *Wade* downward-departure challenges are almost never successful, yet this Court recognizes them.

D. Respondents' Policy Arguments Do Not Distinguish this Case from *Olech*.

Respondents and their *amici* warn that allowing class-of-one claims by public employees will subject every decision by public employers to judicial scrutiny. The local government made the same argument in *Olech*. Pet. Br. at 7, *Olech*, 528 U.S. 562 (No. 98-1288).

As Respondents concede, this feared result has not come to pass. Although judges have expressed concern "about the transformation of every local or state governmental decision into a constitutional matter," Resp. Br. 25, their concerns have not been limited to employment. In fact, none of the opinions Respondents cite regarding this "transformation" is an employment case. *Id*. (citing Justice Breyer's concurrence in *Olech*; a zoning case, *Cordi-Allen* v. *Conlon*, 494 F.3d 245, 252 (1st Cir. 2007); and a law-enforcement treatment case, *Jennings* v. *City of Stillwater*, 383 F.3d 1199, 1210 (10th Cir. 2004)).

Respondents do not ask this Court to overrule *Olech*, which is, in any event, deeply rooted in the Constitution's text and precedent.[5] But the very

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[5] *Olech* refutes Respondents' assertion (Br. 23-24) that its holding did not flow from earlier decisions. The Court acknowledged—without dissent—that "[o]ur cases have recognized successful equal protection claims brought by a 'class

cases they cite undermine their policy-based claim that employment decisions, alone among all state actions, should be immune from the Equal Protection Clause.

Carving out employment is particularly inapt because there is often no material difference between the state's control over an individual's livelihood as employer, on the one hand, and as regulator, on the other. State actions affect employment in a host of ways—through direct employment, contracting, licensing, and regulation. Under Respondents' theory, the following individuals have recourse while the public employee does not: an architect who is repeatedly singled out and denied licenses by a Building Commission without rational basis; an architect whose projects are singled out for particularly strict regulation without rational basis; and an architect with whom the government contracts and then terminates without rational basis. See *Burt* v. *New York*, 156 F.2d 791 (2d Cir. 1946) (L. Hand, J.) (considering, in light of *Snowden*, the claims of an architect whose applications were denied because of "personal hostility").

It makes little sense, and denies "equal protection," to allow such individuals, but not public employees, to challenge irrational governmental treatment. To be sure, the balancing test for an equal protection claim may weigh more heavily in the government's favor in the employment context, where the employee has day-to-day interaction with the government actor, but that is no reason for the courts to extend

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of one.'" 528 U.S. at 564 (citing *Allegheny Pittsburgh Coal* v. *County Comm'n*, 488 U.S. 336 (1989); *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441 (1923); *Sunday Lake Iron Co.* v. *Wakefield*, 247 U.S. 350 (1918)). *See also* Pet. Br. 18-19 (citing additional authority). [0]

equal protection to one type of interaction and deny it to another. Whether an individual is directly employed by the State, or merely dependent on it for his employment, provides no basis for unequal treatment under the Constitution.

Finally, the opinions cited by Respondent demonstrate that courts have successfully avoided constitutionalizing everyday government action "with regard to everything from zoning to licensing to speeding to tax evaluation." *Jennings*, 383 F.3d at 1211. Governments make millions of zoning and licensing decisions, many of which are fraught with personality disputes of epic proportion. As discussed in detail in Part II, *infra*, the courts of appeals have carefully accounted for government interests by following this Court's equal protection doctrine, as prescribed in *Olech*.[6]

In sum, Respondents and their *amici* raise the same alarmist policy concerns that were submitted to this Court in *Olech*. This Court rejected those concerns then, they have not materialized in practice in the interim, and they provide no basis for distinguishing this case from *Olech* now. For these reasons alone, this Court should reverse the opinion of the Ninth Circuit.

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[6] *Olech* therefore adheres to this Court's repeated admonition that any difficulty in line-drawing is no justification for extinguishing a right altogether. *E.g.*, *City of Boerne* v. *Flores*, 521 U.S. 507, 519-20 (1997) (noting that, although it is difficult to distinguish "the line" between statutes permissibly and impermissibly enacted under § 5 of the Fourteenth Amendment, "the distinction exists and must be observed").

II. TRADITIONAL EQUAL PROTECTION DOCTRINE APPROPRIATELY BALANCES THE CONSTITUTIONAL RIGHTS OF EMPLOYEES AND THE INTERESTS OF THEIR EMPLOYERS.

Nine courts of appeals recognize class-of-one claims brought by public employees. No litigation flood has resulted. At-will employment continues to exist in States in all nine of those circuits. This Court's traditional equal protection doctrine has proved sufficient to prevent or quickly dispose of meritless claims, avoiding the constitutionalization of "everyday" government employment decisions.

The class-of-one claim serves an important but limited function. It prevents the government from discriminating against its employees without any rational basis. The claim furthers good government by precluding public authorities from intentionally and irrationally depriving individuals of their livelihoods, and by guaranteeing taxpayers that renegade managers will not abuse valuable public employees.[7] Class-of-one plaintiffs will—and should—succeed only in those rare cases in which the government employer acts in ways that are not conceivably related to the public interest, and that can serve no plausible government purpose.

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[7] The federal experience shows that prohibiting arbitrary employment decisions improves government functioning and job performance. *Amici* Br. of Nat'l Educ. Ass'n *et al.* 16-18.

A. The Highly Deferential Rational-Basis Test Protects Government Employment Decisions from Invasive Judicial Scrutiny.

Even if a public employer intentionally treats an employee differently from others similarly situated, the employee cannot prevail on a class-of-one claim unless she establishes that the government lacks any basis for its action that is rationally related to a legitimate government interest. *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 446-50 (1985). This traditional rational-basis test is highly deferential and avoids improper judicial intrusion into government decisionmaking.[8]

Under the rational-basis test, a plaintiff may show that the "'facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.'" *Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62, 84 (2000) (citation omitted). Thus, the state action must be

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[8] There are reasons why the rational-basis test could apply differently to administrative than to legislative action. As the United States observes, the "any conceivable basis" concept has roots in the notion that the remedy for bad legislation is with the "people" via the ballot box. U.S. Br. 25 (quoting *McCray* v. *United States*, 195 U.S. 27, 55 (1904)). That logic is irrelevant in assessing administrative employment decisions. It is also difficult, if not impossible, to divine the actual motivations of hundreds of legislators, unlike individual employment actions. In addition, this Court has rejected explicitly the "any conceivable basis" test in the analogous context of Administrative Procedures Act challenges. *E.g.*, *Bowen* v. *Am. Hosp. Ass'n*, 476 U.S. 610, 626-27 (1986) (plurality). Because Respondents failed to appeal the jury's verdict that Petitioner's termination lacked any rational basis, this case is not an appropriate vehicle to decide whether a different standard should apply.

"grounded in a sufficient factual context for [the Court] to ascertain some relation between the [challenged] classification and the purpose it served." *Romer* v. *Evans*, 517 U.S. 620, 632-33 (1996).

As Petitioner detailed in her opening brief, the rational-basis test is particularly difficult for employee-plaintiffs to satisfy because of the wide range of legitimate government purposes in the employment context. Pet. Br. 47-49. Given the individualized nature of the employment relationship, the government has more latitude in its employment-related decisions than in regulating at arms-length. Whereas concerns about an individual's personality or working style would not be relevant in land-use, they are unquestionably relevant in employment. After all, what is "rational" in the workplace is very different from what is "rational" in the Statehouse.

Class-of-one plaintiffs can virtually never overcome performance or work-environment rationales.[9] In fact, it is a rare case indeed when a plaintiff can survive an employer's motion for summary judgment indicating a performance or work-environment rationale for unequal treatment. While the United States contends otherwise (Br. 13), in the vast majority of situations, there is no need for trial because a supervisor's discontent with the employee's performance or the effect thereof on workplace efficiency will be sufficient for the government to satisfy the rational-basis test.

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[9] In only rare cases could a plaintiff negate these stated reasons for the adverse action, even if untrue. An example might be a situation in which a supervisor claims an employee disrupts his work environment, but the employee works 1000 miles away and never interacts with anyone.

In sum, the rational-basis test does not lead to excessive judicial review of legitimate government employment decisions. If the government plausibly claims performance issues as the basis for its discrimination, the inquiry ends there.

B. Engquist Prevailed Here Only Because Respondents Disclaimed Any Performance Rationale for Their Discriminatory Treatment.

Respondents do not quarrel with the jury finding that there was "no rational basis" for their differential treatment of Engquist.[10] The United States' invitation to this Court to second-guess the jury's finding, U.S. Br. 32, is too late.

Respondents explicitly *disclaimed* any workplace or performance-based rationale for terminating Enquist.[11] Nonetheless, for Engquist to prevail, she still had to convince the jury that there was "no rational basis" for Respondents' action, and to do so in the teeth of a business-judgment instruction that barred the jury from finding for her based on its disagreement with Respondents' stated reasons. App. A-5 ("You should not find that a decision is unlawful just because you may disagree with the defendant's stated reasons or because you believe the decisions are harsh and unreasonable . . . ."); 10B Trial Tr. 110, 150-51.

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[10] The Ninth Circuit did not question the jury's rational-basis verdict either, Pet. App. 19.

[11] Respondents successfully barred many of Engquist's trial witnesses on this ground. E.g., App. A-2 (quoting Respondents' attorney discussing eleven witnesses "all of which are primarily put on the witness list . . . to talk to how well plaintiff did her job, and it is not going to be the defendants' position the plaintiff did not do her job well.").

At trial, Respondents had every opportunity to offer any conceivable theory for differentiating Engquist from other employees, even rationales that did not actually motivate them. *E.g.*, 8 Trial Tr. 3-4 (State claiming they noticed only after termination that Engquist purportedly misrepresented her qualifications). But those defenses failed because the jury found as a matter of fact that the proffered rationales could not be rationally related to the decision to fire Engquist instead of others similarly situated. *E.g.*, *id.* at 5-9 (showing how State misread her job application).

The position of the United States and other *amici* demonstrates how the rational-basis test works in practice to account for "everyday" employment decisions. *Amici* assert that the state budget crisis provided ample rationale for Engquist's termination. U.S. Br. 7; *Amici* Br. of Pa. *et al.* ("Pa. Br.") 14. The budget crisis was one of Respondents' initial stories, but they abandoned it because Engquist was paid from customer fees, not the state budget. 3 Trial Tr. 47-48. Oregon's budget cuts were no more relevant to Engquist than cuts in California.[12]

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[12] 4B Trial Tr. 36 (Deputy Director of the Department of Agriculture stating that no cost-shifting arrangement was in place so cutting her position could not save General Funds and would not be rational). The budget-crisis rationale was tried (unsuccessfully) in a parallel case by her co-worker, Corristan, who was paid from the Oregon budget.

The trial revealed that the stated rationales for Corristan's and Engquist's terminations contradicted one another. With Corristan, Respondents asserted a need for General Fund reductions, and with Engquist, they asserted a need due to ESC shortfalls. 6B Trial Tr. 30. This high-wire act collapsed in both cases when it was pointed out that they hired a new employee out of ESC funds (instead of using those funds for Corristan) and were contemplating yet another hire. Nor could

In the end, the jury trial showed that Respondents' decision to terminate Engquist instead of others similarly situated could not possibly be explained by any business judgment or conceivable rational basis. J.A. 64.[13]

Respondents could have argued at any point that Engquist had to be dismissed because of performance or workplace concerns. But they did not make such arguments and instead disclaimed them. And for good reason. Had they claimed that they were firing Petitioner for a performance-related reason, they would have been required to use the collective bargaining agreement's generous procedures for termination for cause.

In sum, rational-basis review applies to government employment actions. This test usually places a nearly insurmountable burden on plaintiffs. The government may permissibly discriminate against an employee if it can point to a plausible rational basis for its action. It is only when, as here, the plaintiff has negated those rationales that a claim may proceed.

C. Several Additional Factors Limit Successful Class-of-One Claims and Prevent Burdensome Litigation.

As explained, the rational-basis test is highly deferential to state action. Moreover, a series of additional requirements under traditional doctrine—(1) similarly-situated employees; (2) intentional

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Respondents explain why they terminated Engquist, who was the major source of ESC revenue. *See infra* pages 21-22.

[13] On a separate count, intentional interference with contract, the jury found that Respondents acted "against the employer's best interest," or for their own benefit outside the scope of their employment. 10B Trial Tr. 135-36.

discrimination; (3) adverse employment actions; (4) and high pleading standards—further limits successful cases, particularly in employment.

First, the Parties agree that the similarly-situated requirement is difficult for employees to satisfy. Although Respondents do not detail their proposed test, they identify two subtests in use today: (a) that the comparator be "*prima facie* identical in all respects," and (b) the comparator be "treated differently *in the same time period*." Resp. Br. 43-44 (citations omitted). Petitioner agrees entirely with the second standard, and with much of the first. Contrary to the United States' position (Br. 17), there is no confusion in the law about this requirement.

With respect to the "prima facie identical" concept, the test turns on similarity in respects *relevant* to the state's treatment of the employee-plaintiff, as the cases make clear. Pet. Br. 37-38. It is of no consequence that two employees have different hair colors unless that trait is relevant to the employment decision. The requirement is for *similar*, not *identical*, individuals. See *Miller-El* v. *Dretke*, 545 U.S. 231, 247 n.6 (2005). The similarly situated requirement ensures that discriminatory treatment—and not mere policy disagreement—is at issue.

Here, the trial court and jury found that Petitioner fulfilled this requirement. The Ninth Circuit never reached the question. For that reason, Respondents do not even ask this Court to resolve it. Instead they merely speculate that "[h]ad the Ninth Circuit reached the issue, it would have found" for them. Resp. Br. 45. That prophecy is not correct, particularly since the similarly situated requirement requires detailed examination and is a question of fact. *E.g.*, *George* v. *Leavitt*, 407 F.3d 405, 414-15 (D.C. Cir. 2005). Since the Ninth Circuit has not

considered the issue, and neither party asks this Court to resolve it, the Court should not do so. And the fact that this issue is still lingering is yet another reason why this Court should decline Respondents' invitation to adopt prematurely a series of further "heightened standards" at this juncture.

In any event, to correct the record, there was ample evidence for the jury's finding. Respondents proffered one rationale for their termination of Engquist—declining wheat revenues. Engquist proved that she was similarly situated to the other employees with respect to that rationale.[14] She identified 30 comparators. 6B Trial Tr. 58. The degree of similarity was complete with respect to the proffered justification—the employees were all potentially subject to a layoff due to declining wheat revenues.[15] The trial court agreed. *Id*. at 68.[16]

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[14] Budgetary rationales traditionally involve inquiry into whether similarly-situated persons are singled out impermissibly. *E.g.*, *Romer*, 517 U.S. at 635 (finding goal of "conserving resources to fight discrimination against other groups" inadequate to preclude antidiscrimination protections for homosexuals); *James* v. *Strange*, 407 U.S. 128 (1972) (holding as unconstitutional a debt recoupment statute that treated civil and criminal defendants differently because the government could not explain why criminal defendants were singled out for less favorable treatment); *Plyler* v. *Doe*, 457 U.S. 202, 229 (1982) ("[E]ven if improvement in the quality of education [due to increased funds] were a likely result of barring some *number* of children from the schools of the State, the State must support its selection of *this* group as the appropriate target for exclusion.").

[15] Respondents' closing argument was devoted to the wheat story. 10B Trial Tr. 65, 70-74, 99-100. It failed for many reasons, including the fact that the shortfall was actually caused by Respondents' actions (2 Trial Tr. 64; 8 Trial Tr. 181-82, 185; 1 Trial Tr. 121), that new products would replace any potential loss in wheat (3 Trial Tr., 105; 8 Trial Tr. 215-217), that budget

cuts were unnecessary (3 Trial Tr. 25-26, 35; 8 Trial Tr. 218), and that Szczepanski disavowed the restructuring rationale a few months after terminating Engquist (7 Trial Tr. 147).

If anything, the differences among comparators cut in Engquist's favor. Respondents retained employees who brought in no income or clients, while terminating Engquist, who brought in the bulk of revenue and new clients—approximately $200,000 from 40 different clients in 2001 alone. 2 Trial Tr. 30. Szczepanski admitted that Engquist "was the main person to get business." 5 Trial Tr. 180; see also 3 Trial Tr. 47-48 (testimony that it was irrational to fire Engquist because she was in a "business gathering position" "essential to the center."); *id.* at 68, 112-13; 10B Trial Tr. 29. Szczepanski also hired another person, Hyatt, and reprogrammed the position to pay for it out of wheat revenues. 3 Trial Tr. 22-23 (stating that filling position cost ESC $40,000); 1 Trial Tr. 94-95; 6B Trial Tr. 30. And just days *after* terminating Engquist, Respondents sought to hire another new employee in wheat. 4B Trial Tr. 38-39. Hyatt admitted at trial that he "made false statements about Anup Engquist." SER 254. The evidence against Hyatt was so overwhelming that Respondents' Counsel was forced to admit to the jury in another legal proceeding that Hyatt "was a horse's ass." SER 57.

The only other layoffs occurred months after Engquist's, and were the result of other significant events, including Respondents' failed trip to Korea to meet wheat clients, Engquist's termination (which reduced ESC clients), and Respondents' mismanagement. These other layoffs are not relevant under Respondents' standard, which focuses on "*the same time period*." Br. 44. And they weren't comparable in any event, as those termination notices attributed layoffs to declining ESC revenue, unlike Engquist's. *E.g.*, 7 Trial Tr. 52, 145-46; 4B Trial Tr. 39; 10B Trial Tr. 41-42. That evidence fit Engquist's claim that the precipitous decline in ESC revenue was *caused* by her termination (and not an explanation for it).

[16] The trial court paid scrupulous attention to the similarly situated requirement, even granting Respondents' motion to exclude evidence before trial on the class-of-one theory unless it met the requirement. App. A-2.

Second, it is not enough for a plaintiff to establish that she was treated differently from similarly situated employees. She must also show that she was singled out for that discriminatory treatment—that the government intentionally targeted her. Some courts require class-of-one plaintiffs to demonstrate that they were targeted out of animus, vindictiveness, or malice as part of this inquiry.

The Parties agree that animus is an important factor in successful class-of-one cases. It is Respondents and the United States that disagree. Respondents view animus as a crucial additional requirement; the United States wants to eliminate the inquiry altogether. Petitioner takes a middle ground: animus need not be required but is likely to be relevant.

To begin, the United States erroneously describes Petitioner's position. U.S. Br. 26-30. Unlike the dissent below, Petitioner has never claimed that animus, by itself, is sufficient to state a class-of-one violation; rather it is a potential piece of (not the entire) puzzle. An individual may be treated differently from others similarly situated if the government has a rational basis for doing so, even when animus is present.

At the same time, as Petitioner has explained, there is no need for this Court to make animus an independent factor. Pet. Br. 43.[17] Instead, inquiries

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[17] Dissenting in *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), Justice Breyer argued that "discrimination that rests solely upon 'negative attitudes,' 'fear,' or 'irrational prejudice,'" violates the Fourteenth Amendment. *Id.* at 381 (quoting *Cleburne*, 473 U.S. at 448, 450) (citation omitted). In response, the majority recognized that "presence alone" of irrational bias "does not a constitutional

into animus will almost always be a natural byproduct of litigation because it is intertwined with the intentionality requirement in employment litigation. Given the panoply of other employment protections, it is doubtful that eliminating class-of-one "animus" will preclude discovery and litigation on this topic. Pet. Br. 51-53. This case amply proves the point, as evidence of animus was discoverable for Engquist's Title VII claim, which survived summary judgment. J.A. 35-36.

In any event, Respondents do not dispute Engquist's claim that she "alleged malice and the jury can be said to have credited her evidence that she was discriminated against because of Respondents' ill-will instead of a legitimate government purpose." Pet. Br. 42.[18]

Moreover, the fact that the jury instruction treated animus as an *additional* requirement the jury had to

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violation make" because *Cleburne* stated that such negative attitudes must be "'*unsubstantiated by factors which are properly cognizable.*'" *Id.* at 367 (citation omitted). Taken together, this discussion of *Cleburne* suggests that courts may take note of evidence of improper motives so long as plaintiffs negate the proffered rationales.

[18] At trial, Respondents blocked Engquist's attempt to strike "arbitrary" from the jury instruction—something she sought to make a jury finding regarding animus absolutely clear. J.A. 69-71. Respondents cannot profit from the ambiguity they created. *Palmer* v. *Hoffman*, 318 U.S. 109, 119 (1943); *Freytag* v. *Commissioner*, 501 U.S. 868, 895 (1991) (Scalia, J., concurring).

To the extent the instruction was unclear (something Respondents do not claim), the *noscitur a sociis* canon removes the ambiguity. *See California* v. *Brown*, 479 U.S. 538, 543 (1987). And the jury's punitive damages award, based on the instruction "that Defendants' conduct was malicious or in reckless disregard of plaintiff's right," 10B Trial Tr. 142, is further evidence that the jury found malice.

find lays to rest the United States' concern (Br. 14) that Engquist's trial was improper. Animus did not substitute for the rational-basis, similarly situated, or intentionality requirements; it was a *separate* required finding. J.A. 63-64. Thus, while this Court need not decide whether animus is an independent requirement for class-of-one claims, if animus were required then reversal of the decision below would be necessary.

Third, case law further accommodates government needs by limiting actionable cases to materially adverse employment actions, thereby excluding minor complaints.[19] *E.g.*, *McPhaul* v. *Madison County Bd.*, 226 F.3d 558, 564 (7th Cir. 2000); *Bowman* v. *Shawnee State Univ.*, 220 F.3d 456, 462 (6th Cir. 2000) ("[*D*]*e minimis* employment actions are not materially adverse and, thus, not actionable."); see also *Rutan* v. *Repub. Party of Ill.*, 497 U.S. 62, 114 (1990) (Scalia, J., dissenting) ("The loss of one's current livelihood is an appreciably greater constraint than such other disappointments as the failure to obtain a promotion or selection for an uncongenial transfer.").[20]

Fourth, the law ensures that judicial scrutiny does not cripple government efficiency, not by withholding constitutional protections from public employees, but

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[19] The *de minimis* doctrine also precludes inconsequential constitutional claims. *See Ingraham* v. *Wright*, 430 U.S. 651, 674 (1977); *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 87 (1973) (Marshall, J., dissenting).

[20] Claims may also be restricted to "tangible employment action[s]," requiring "a significant change in employment status" and not a "bruised ego" or a "reassignment to [a] more inconvenient job." *Burlington Indus.* v. *Ellerth*, 524 U.S. 742, 761 (1998) (internal quotation marks and citations omitted).

by establishing high standards of proof and carefully employing procedural tools such as pleading and discovery requirements. Pet. Br. 53-54; *Crawford-El* v. *Britton*, 523 U.S. 574, 593 (1998) ("[V]arious procedural mechanisms already enable trial judges to weed out baseless claims that feature a subjective element . . . ."); *id.* at 599 (suggesting "postpon[ing] all inquiry regarding the official's subjective motive until discovery has been had on objective factual questions"); *id.* at 601 (Kennedy, J., concurring) ("[T]he authority to propose [further] far-reaching solutions lies with the Legislative Branch, not with us.").

As the experience of nine circuits shows, class-of-one claims do not generate additional lawsuits or discovery. Plaintiffs already have other vehicles, such as Title VII, to bring such claims. Pet. Br. 51-52. Similarly, due process and equal protection claims—whether based on race or gender or having nothing to do with a suspect class—already obligate employers to defend their decisions. *E.g.*, *Harrah*, 440 U.S. at 199.

All of these factors, required under existing doctrine, place heavy burdens on class-of-one employees and prevent the constitutionalization of "everyday" employment decisions.

D. This Court Need Not Eliminate Equal Protection Rights To Preserve At-Will Employment.

Petitioner's opening brief explained why class-of-one claims will not eliminate at-will employment. Pet. Br. 50 n.16. The United States nonetheless argues that at-will employment can only be preserved by terminating equal-protection rights of public employees. U.S. Br. 17-20. At best, these concerns

might result in a different balancing of the relevant interests in class-of-one cases involving at-will public employees; they do not justify eliminating the cause of action for all public employees.[21]

Nonetheless, Respondents themselves do not embrace the United States' claim: they acknowledge that class-of-one claims have not undermined at-will employment. Resp. Br. 40 n.14.[22] This is because the traditional rational-basis test combined with the other demanding factors that plaintiff-employees must overcome preserves at-will employment. Indeed, Respondents' *amici* show that at-will employment is still recognized in the states within the nine circuits that recognize class-of-one claims for employees. Pa. Br. App. A.

As commonly understood, at-will employees may be fired for "good reason, bad reason, or no reason at all." In practice, whatever the actual reason for the dismissal, a public employer can almost always articulate some plausible rationale (even after-the-fact) for terminating an at-will employee, be it performance, personality, or effect on the office environment. As the practice of nine circuits bears out, employees can almost never negate these purported rationales (unless, as here, the defendant

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[21] Because this case involves a contractual employee, there is no need now to consider adopting any of the mechanisms that would absolutely preclude at-will class-of-one claims, such as animus or the *de minimis* doctrine. So, too, this Court need not grapple with the question of whether an adverse employment action for "no reason," is for an implicit reason, government efficiency.

[22] *Amici* Pennyslvania et al. appear to agree. Pa. Br. 7-8 ("[M]any of these adverse effects could be minimized, if not eliminated, by a proper understanding and rigorous application of the correct principles").

expressly disclaims performance-based justifications, which it would have no reason to do for an at-will employee).

Furthermore, this Court has long recognized that the Equal Protection Clause trumps state statutory and common-law employment regimes. Preserving at-will employment could never be a sufficient basis to preclude an individual from claiming she was terminated out of racial or gender prejudice. Protections against discrimination, retaliation, dismissal in violation of public policy, and other "bad reasons" have severely limited at-will employment in the public sector (and any resulting concerns should be addressed as part of the balancing process).

Implied covenants of good faith and fair dealing do far more than class-of-one claims to further constrain public at-will employment. "The single, most important change in employment law over the past decade has been the demise of at-will employment" as "the result of court decisions" recognizing "an implied covenant of good faith and fair dealing," Deborah Markowitz, *The Demise of At-Will Employment and the Public Employee Conundrum*, 27 Urb. Law. 305, 305-06 (1995) (footnotes omitted). This covenant has been read to require employers to act "in good faith by treating all like employees alike." *Id.* at 313 (footnote omitted). And the covenant imposes many broad restrictions beyond similar treatment, so that "employers soon will no longer be able to terminate employees for no cause or bad cause." Deborah Ballam, *Employment At-Will: The Impending Death of a Doctrine*, 37 Am. Bus. L.J. 653, 686-87 (2000). Recognizing class-of-one claims does not end public at-will employment as either a practical or theoretical matter.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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April 9, 2008

ADDENDUM

Excerpts from Proceedings in the Trial Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ANUP ENGQUIST,

Plaintiff,

vs. No. CV-02-1637-AS

OREGON DEPARTMENT OF
AGRICULTURE, JOHN SZCZEPANSKI,
and JOSEPH (JEFF) HYATT,

Defendants.

October 15, 2004

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* * *

COURT TO COUNSEL

On Number 8, the evidence regarding the class of one, I'm going to grant the motion but permit the plaintiff to provide evidence of others similarly situated to take it out of the motion. I don't know if that's clear, but I'm going to grant the motion in limine with respect to Number 8 unless the plaintiff actually supplies evidence of others similarly situated.

Do you understand that, Mr. Brischetto?

MR. BRISCHETTO: I don't, but I'll need to think it through and maybe we can talk about it Monday.

THE COURT: Okay, good. What I'm saying is that -- let me help you out a little bit on the summary judgment. It may be if it's sufficient to get a fast summary judgment motion, but I still think there has to be evidence that similarly situated persons, in order to have a viable class of one claim, go to the jury.

MR. BRISCHETTO: Okay. I'm hearing that differently. Typically, a motion in limine, I would say, would exclude evidence. And you're not talking about order of proof, you're talking about at the end of the case, there need to be? I mean, because --

THE COURT: Well, I think the motion -- I didn't mean to interrupt, but I think the motion is that if evidence of discrimination based on class of one should be excluded

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unless there's a basis for a showing that there is similarly situated persons.

MR. COLLINS: That's correct.

October 18, 2004

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MR. ABRAMS: Your Honor, there's a series of about 11 witnesses here from 14 to 25, all of which are primarily put on the witness list, as far as we can determine, to talk to how well plaintiff did her job, and it is not going to be the defendants' position the plaintiff did not do her job well.

So this really is putting her positive

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character into evidence before it's been attacked. And if we slip up and -- and, you know, we've had some

discussion in discovery about whether she left early, whether she did crossword puzzles, things like that. You know, I -- I would argue there may be some role for this in rebuttal, but I would argue all 11 of these witnesses should be excluded as cumulative and character evidence and character not in question.

THE COURT: Mr. Brischetto.

MR. BRISCHETTO: Well, they're offered on several bases. Number one, contrary to defendants' assertions, they are apparently going to put on evidence that Ms. Engquist was denied promotion because of claimed performance problems. And that evidence will be coming in in our case-in-chief. My understanding is that because it comes in our case-in-chief, that we have the opportunity to rebut it at that time.

So it will be relevant to Szczepanski's claim that she had performance problems and she would be denied promotion on that basis.

It would also be related to the termination claims and whether or not the terminations were arbitrary, vindictive and malicious. Even if we prove that the decision to lay her off was inappropriate, a jury could conclude that they terminated her improperly for

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performance reasons.

So in order to show that there is no other reason, we have to show that she was a good performer. It relates to the intentional interference with contract claim because it shows that she's a good employee and why are they doing this to her.

THE COURT: Well --

MR. ABRAMS: Your Honor, I think a couple things. Number one, termination, I think the evidence is going to be

that we look at the position, the function of the position. At no point is there any evidence that we laid off Ms. Engquist because we didn't think she was doing that position well.

As to the specifics that might have been taken into account in terms of the promotion. Now, if I know that project X was not handled well, it is not a counter to that that she did X, Y, and Z (a) fine and (b) fine. You can counter by bringing in evidence specifically saying you're wrong, she did X well.

Trotting 11 witnesses up there to talk about generally she performed still is character evidence, it doesn't go to the issues Mr. Brischetto raises.

THE COURT: Although I don't buy your allusion, or whatever it's called, to X, Y, and Z, because you could do that in certain instances.

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I'm going to preclude this on the plaintiff's case-in-chief. It can come in on rebuttal if in fact there's a question raised as to her performance in either in whole or in part.

November 17, 2004

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MR ABRAMS [TO JURY]: Ladies and gentlemen, the Judge will tell you that in a case such as this, it isn't up to you to decide whether you agree with the business judgments that were made by the agency. In this case, Mr. Hyatt and Mr. Szczepanski, it isn't a question of whether, as Mr. Brischetto suggests, other agencies were able to get past these cuts without cutting staff. It isn't a question of whether you think that is public policy, to cut staff.

The question is whether there was discrimination and whether these actions were based upon vindictiveness and

discrimination without -- without, and I emphasize that -- without any rational basis. Ladies and gentlemen, whether you agreed with these decisions or not, they were made in the best interests of the State of Oregon and the Department of Agriculture.

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COURT [TO JURY]: You should not find that a decision is unlawful just because you may disagree with the defendant's stated

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reasons or because you believe the decisions are harsh and unreasonable, as long as the defendant would have reached the same decision, regardless of the plaintiff's race, color, national origin, gender or classification.