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.

BRIEF ON THE MERITS FOR RESPONDENTS

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

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QUESTIONS PRESENTED

Whether class-of-one equal protection analysis applies to decisions made by public employers with respect to their employees? If so, how should the theory apply and should it be limited so as to avoid subjecting every state and local government employment decision to federal court review?

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BRIEF ON THE MERITS FOR RESPONDENTS

STATEMENT OF THE CASE

A. Statement of Facts

1. The promotion

In 1992, petitioner was hired to work as a Program Technician 1, International Food Standards Specialist, for the Export Service Center (ESC), one of two laboratories making up the Oregon Department of Agriculture's (ODA's) Laboratory Services Division. (E.R. 129-31; E.R.181-83; E.R. 114).[1] Initially, her job was funded under a grant to develop a database of food additives, laws, and regulations for several different countries. (E.R. 129-31). While she traveled under that grant, she also began to market ESC's services, which include testing and certifying exported foods and providing consulting services for companies that wish to export food overseas. (E.R. 131-33). Eventually, petitioner began to market ESC's services at trade shows and to provide consulting services to clients who wanted to formulate a product that complied with a specific country's regulations. (E.R. 133-37).

In 1999, the ESC manager, Gary Carter, left the ODA. (E.R. 136). The manager position remained vacant for almost two years, with an ESC chemist serv-

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[1] The citations are to the record before the Ninth Circuit Court of Appeals.

ing as the interim acting manager and petitioner absorbing some of Carter's former duties. (E.R. 152-53; E.R. 185-88).

During the summer of 2001, however, respondent John Szczepanski—the ODA Assistant Director in charge of overseeing the Laboratory Services Division—became concerned about the continued viability of the ESC in the marketplace. To address those concerns, then-ODA Director Phil Ward appointed Szczepanski to directly oversee ESC's operations. (E.R. 229; E.R. 245-46; E.R. 290-91; E.R. 103). Shortly after he was appointed to oversee ESC's operations, Szczepanski learned that ESC was on the cusp of losing its wheat-testing business—75 percent of its revenue—to a private laboratory that offered "lower prices and better service." (E.R. 296-98). Because ESC's budget operated almost entirely on fees charged for its services to exporters—rather than funding provided by tax revenues—the loss of wheat-testing revenue was devastating to ESC. (E.R. 289, 297). After learning this news, Szczepanski made it a priority to fill the still-vacant ESC manager position with someone who could guide the laboratory through the difficult financial period. (E.R. 298).

Petitioner and respondent Joseph (Jeff) Hyatt—who had worked at the ODA since 1990—both applied for the ESC manager position. (E.R. 141; E.R. 227). Although petitioner had a more extensive educational background and more experience with the consulting and customer-service aspects of the position, Hyatt was offered the promotion. (E.R.143; E.R. 155-57; E.R. 226). At trial, Szczepanski proffered several jus-

tifications for his choice. Specifically, Szczepanski indicated that he chose Hyatt over petitioner because he felt that Hyatt's experiences starting his own coffee company, developing business plans, managing budgets, running retail establishments, and working as a supervising chemist within the agency gave Hyatt the entrepreneurial, managerial, and marketing skills ESC needed. (E.R. 243; E.R. 300-02). Szczepanski also explained that, because Hyatt previously had worked as a chemist for the division, he understood what it takes to run a laboratory and, if need be, could "work the bench" as a chemist alongside his subordinates. (E.R. 302).

Petitioner did not get the promotion. Rather, as explained below, her position was eliminated and she was laid off several months later.

2. The lay off

In late 2001, ESC, which operated almost entirely on fee-based revenues, was running in the red because it had lost its wheat-testing business. (E.R. 216; E.R. 304-05). At that same time, the State of Oregon began falling into a recession. That recession, exacerbated by the events of September 11, 2001, led to a significant revenue shortfall for the State's 2001-2003 budget. (E.R. 104). In October 2001, the governor asked state agencies funded by tax and lottery revenues to immediately begin discussing budget-reduction proposals based on the governor's office's recommendations and guidelines. (E.R. 104). The governor instructed that budget cuts should be swift and long lasting and urged agencies to develop proposals that included "eliminating or restructuring

programs." (E.R. 104; *see also* E.R. 205, 213; E.R. 223).[2]

In response to that directive, in November 2001 respondent Szczepanski submitted a plan to address the Laboratory Services Division's budget problems. (E.R. 230-31). In that plan, he suggested that the department could reorganize the Laboratory Services Division by consolidating its two physically separate laboratories—the regulatory laboratory and the ESC—into one laboratory, allowing the laboratories to share operating costs, including employees, equipment, and rent. (E.R. 204; E.R. 220; E.R. 228; E.R. 231-37; E.R.108, 109). The regulatory laboratory, unlike the ESC, is funded from the State's general fund (comprised of tax funds and other revenue), and was subject to the budget-cutting directive. Thus, the purpose of the laboratory reorganization was two-fold: (1) it would reduce the regulatory laboratory's general-fund expenditures; and (2) it would address ESC's financial problems resulting from the loss of wheat-testing business. (E.R. 206, 216; E.R. 228; E.R. 231-33, 236-7; E.R. 108, 109).

As a result of ESC's loss of wheat-testing revenue and as part of the reorganization, petitioner's Program Technician 1, Food Standards Specialist, position—the only position at the ODA with that classifi-

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[2] The State is not allowed to "run in the red." Or. Const. Art. IX, § 6.

cation and description[3]—was chosen for layoff. Four "Chemist" positions were also chosen for layoffs in 2002; five additional positions were terminated in 2003. (E.R. 241-43; E.R. 308; E.R. 114, 115). Ultimately, ten out of a total of about 13 employees were laid off from the ESC. (E.R. 242).[4]

3. Petitioner's "bumping" request

Petitioner's layoff notice explained that her termination "does not reflect adversely on [her] performance, but [was] the result of reorganization." (E.R. 114). It also explained that she had five days to select one of the three options available pursuant to her collective-bargaining agreement. (E.R. 114). She could elect to (1) displace the ODA employee with the lowest seniority in her current classification in a position for which she was qualified; (2) demote to the lowest senior position in any classification in the ODA for which she was qualified; or (3) be laid off. (E.R.126; E.R. 121; E.R. 196-201).

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[3] Petitioner's position was one of only two Program Technician 1 positions at the ODA and the only "Food Standards Specialist" position in the entire agency. (E.R. 114, 115).

[4] The reorganization ultimately reduced the size of both the regulatory lab and the ESC, making it possible for the programs to share employees. At the time of trial, ESC's revenues were exceeding its expenses, which allowed the agency to lower the rates it charges for regulatory lab services. (E.R. 310-11; E.R. 314-16).

Unfortunately, there was only one other position classified as "Program Technician 1" within the entire agency. (E.R. 115). When she received notice of her layoff, petitioner was provided with information about that position, as the Grants Administrative Officer for the Natural Resources Division. (E.R. 196-200; E.R. 110, 114, 120). Petitioner understood that, pursuant to the collective-bargaining agreement, she would be allowed to bump into that position only if she was capable of performing the specific requirements of the position within a 30-day orientation period. (E.R. 146-47; E.R. 165-67; E.R. 196; E.R. 114). Petitioner's second option—taking a demotion—would have provided quite a few more options, but petitioner would have had to take a pay cut if she chose that option. (E.R. 197-98, 200-01).

Petitioner chose the first option—that is, she elected to attempt to displace the only other ODA employee occupying a Program Technician 1 position. (E.R. 196-97; E.R.115; E.R. 126). Petitioner was not allowed to bump into that position, however, because the ODA human resource manager, Karin Nilsson, determined that she did not have the requisite experience to perform the job within 30 days. Specifically, Nilsson concluded that petitioner did not have sufficient "knowledge of the functions, laws, statutes, rules, policies or procedures of the Soil and Water Conservation Districts, or the Agricultural Water Quality Management Program," and that it was not possible for someone without previous knowledge and experience with those matters to become familiar enough with them to "perform the duties of this job

adequately with only a 30-day orientation period." (E.R. 110, 115).

B. District court proceedings

As noted, petitioner worked for the ESC from 1992 until she was laid off in February 2002. Shortly after her layoff, she brought this lawsuit alleging, among other things, that her supervisors at the ODA, respondents Hyatt and Szczepanski, subjected her to harassment, denied her a promotion, deprived her of bumping rights, retaliated against her, and terminated her employment in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 1981, and 42 U.S.C. § 1983. (E.R. 1, 4-6) (JA 511). Petitioner also brought a state-law claim for intentional interference with her employment relationship, and sought economic, noneconomic, and punitive damages, as well as attorney fees and costs. (E.R. 6-7) (JA 11-12).

Respondents filed an answer in which they asserted that petitioner failed to state a claim upon which relief could be granted and that they are entitled to qualified immunity. (E.R. 8, 13-15). Respondents subsequently filed a motion for summary judgment. (E.R. 19-26). The district court later issued an order granting respondents' motion for summary judgment in part and denying it in part. (E.R. 27) (JA 13-48). The court declined to grant summary judgment in respondents' favor on several of petitioner's claims. (E.R. 50-52) (JA 40-47).

Respondents subsequently filed a motion for partial summary judgment, seeking to narrow the scope of petitioner's broadly pleaded equal-protection claim.

(E.R. 58). In their supporting memorandum, respondents asserted that, to the extent petitioner's equal-protection claim rested on a class-of-one theory, it failed as a matter of law because: (1) that theory does not apply to public-employment decisions; (2) petitioner had failed to identify other similarly situated employees; and (3) respondents are entitled to qualified immunity on that aspect of petitioner's claim. (E.R. 61-78). The district court denied respondents' motion, concluding that "there are genuine issues of fact as to whether p[etitioner] was singled out as a result of animosity," and inviting respondents to develop a record on the qualified-immunity issue at trial. (E.R. 79, 80, 88) (JA 59).

Respondents renewed their challenges to the class-of-one theory in their trial memorandum. (E.R. 97, 99). Respondents also moved in limine to exclude evidence supporting petitioner's class-of-one theory. (E.R. 89, 92). The district court denied those motions, except that it agreed that petitioner could prove her class-of-one theory only if she could demonstrate that other similarly situated persons were treated differently. (E.R. 95) (JA 60).

The remaining claims proceeded to an 11-day jury trial, focusing in large part on petitioner's theory that Hyatt and Szczepanski had hatched and executed a plan to "get rid of" her because of her race, color, gender, or national origin, or for arbitrary, malicious, or vindictive reasons. (*See, e.g.*, E.R. 326 (petitioner's closing argument)). Petitioner relied primarily on evidence that, before Hyatt was promoted to the ESC manager position, he and Szczepanski each had told

people that they had been working on a plan to "get rid of" petitioner. (E.R. 177; E.R. 326).

After petitioner rested her case-in-chief, respondents orally moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50, renewing the challenges to the class-of-one theory they had raised on summary judgment. (E.R. 247). Respondents also asserted that they are entitled to qualified immunity on that claim. (E.R. 248). Respondents renewed their motions again at the close of their case-in-chief. (E.R. 319; *see also* E.R. 333). Respondents also objected to the jury instructions on the class-of-one theory contending that it was inappropriate for the district court to submit that claim to the jury. (E.R. 331) (JA 71).

Ultimately, the jury rejected all of petitioner's claims against the ODA and many of the claims against Hyatt and Szczepanski, including her claims relating to discrimination on the basis of a suspect classification. (E.R. 334) (App. 1-7). On that claim, the jury expressly found that respondents did not discriminate against petitioner "because of race, color, gender or national origin by causing the loss of promotion, loss of bumping rights or causing termination of her employment[.]" (App. 1). The jury nonetheless concluded that respondents Hyatt and Szczepanski violated petitioner's equal-protection rights and intentionally interfered with her employment relationship for other improper reasons—*i.e.*, out of malice or

for arbitrary or vindictive reasons. (E.R. 336-38) (App. 3-7).[5]

Specifically, the jury found that Hyatt and Szczepanski (1) "intentionally treat[ed] the plaintiff differently than others similarly situated with respect to the denial of her promotion, termination of her employment, or denial of bumping rights without any rational basis and solely for arbitrary, vindictive or malicious reasons"; (2) "subject[ed] plaintiff to arbitrary and unreasonable government actions causing [her] to be unable to pursue her profession"; and (3) "intentionally interfere[d] with [her] employment relationship through improper means or for an improper purpose by causing the loss of promotion, the loss of bumping rights or causing the termination of employment." (E.R. 336-38) (App. 3-6). The jury awarded economic, noneconomic, and punitive damages for each claim totaling $425,000. (E.R. 336-38, 374-76) (App. 4-7).

Following the verdict, respondents Hyatt and Szczepanski filed a written motion for judgment as a matter of law on each of the claims on which the jury

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[5] The jury also ruled in petitioner's favor on her substantive due process claim, but the Ninth Circuit later reversed, concluding that petitioner had not presented sufficient evidence to sustain that claim. *Engquist v. Oregon Department of Agriculture*, 478 F.3d 985, 999 (9th Cir. 2007) (App. 28).

found in petitioner's favor. (E.R. 340-71).[6] The district court denied that motion as well. (E.R. 372, 373). The district court entered judgment in favor of petitioner and against Hyatt and Szczepanski on the class-of-one, substantive-due-process, and intentional-interference claims, and dismissed all other claims against respondents. (E.R. 374) (App. 8-11). The district court also awarded petitioner $172,740 in attorney fees, $5,073.58 in out-of-pocket expenses, and $16,322.58 in costs on her claims against respondents Hyatt and Szczepanski. (E.R. 379, 385) (App. 10-11).

C. The Ninth Circuit decision

The Ninth Circuit panel majority held "that the class-of-one theory of equal protection is inapplicable to decisions made by public employers with regard to their employees." *Engquist v. Oregon Department of Agriculture*, 478 F.3d 985, 996 (9th Cir. 2007) (App. 27). The majority noted that, in other contexts, that court had applied class-of-one analysis, but the court had not yet decided "whether class-of-one theory

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[6] Petitioner contends, without citation to anything in the record, that she "presented as the relevant comparators for purposes of her class-of-one claim" the "approximately 30 LSD co-workers[.]" (Pet. Br. 7). In fact, respondents protested throughout the district court proceedings that petitioner never had identified any "similarly situated" comparators. They continued this protest in their post-trial motion for judgment notwithstanding the verdict and on appeal. (E.R. 348-50; App. Br. 29-32; Reply Br. 5-8).

should be extended to public employment decisions." *Id.* at 993 (App. 21). Ultimately, the majority determined that the class-of-one theory should not apply in this context. The State was acting as an employer, a setting in which its powers are broader than when government acts as a regulator, and in which "the scope of judicial review is correspondingly restricted." *Id.* at 994 (App. 24). The court also observed that "[i]n other areas of constitutional law, the [United States Supreme] Court has limited the rights of public employees as compared to ordinary citizens." *Id.* (App. 24)(citations omitted). The court concluded that "[t]he class-of-one theory of equal protection is another constitutional area where the rights of public employees should not be as expansive as the rights of ordinary citizens." *Id.* at 995 (App. 25).

The panel also thought that "[a] judicially-imposed constitutional proscription of arbitrary public employer actions would * * * upset long-standing personnel practices." *Id.* (App. 25). "[E]mployers have traditionally possessed broad discretionary authority in the employment context." *Id.*(App. 25). And "[t]he 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." *Id.* (App. 25) (citations omitted). Applying equal protection class-of-one theory "to forbid arbitrary or malicious firings of public employees would completely invalidate the practice of at-will employment." *Id.* (App. 25) (citation omitted). The panel declined to "effect such a significant change in employment law[.]" *Id.* (App. 25-26). The panel also was concerned that "applying the

class-of-one theory to public employment would * * * generate a flood of new cases." *Id.* (App. 26). Although the panel recognized and discussed this Court's decision in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam), the panel concluded that brief opinion was "too slender a reed on which to base such a transformation of public employment law." *Id.* at 996 (App. 26). For those reasons, the panel majority held that the class-of-one theory does not apply to a public employer's decisions regarding its employees. *Id.* (App. 27).

On this point, the dissent disagreed. The dissent noted that the "[t]he majority's holding relating to the class-of-one theory of equal protection creates inter-circuit conflict[.]" *Id.* at 1011 (App. 60). The dissent also suggested that "[t]he majority's approach is * * * at odds with" this Court's precedent, citing *Village of Willowbrook v. Olech*. *Id.* (App. 61-62). The dissenting judge would have affirmed the award of damages on the class-of-one claim. *Id.* at 1014-15 (App. 67).

SUMMARY OF ARGUMENT

The issues in this case are whether the class-of-one equal protection theory applies in the public employment context and, if the theory applies at all, how it should be cabined to avoid turning every public employment decision, from hiring and firing to promotion to who gets to take vacation when, into a constitutional case in federal court. Nothing warrants extending class-of-one theory into the context of public employment decisions.

Petitioner attempts to build her case for extending class-of-one theory into the public employment context on the text of the Equal Protection Clause, on the history underlying adoption of the Fourteenth Amendment, and on this Court's pre-*Olech* case law. None of those sources justifies the extension for which petitioner advocates. The text applies to "any person," but the constitutional text has not been taken literally and its framers did not intend that it be taken literally. Moreover, although the history that led to the adoption of the Fourteenth Amendment is in some respects unclear, what is clear is that the primary purpose of the amendment was to protect the rights of the newly freed slaves and to abolish class legislation. Class-of-one theory is far removed from those weighty concerns. In addition, although petitioner relies on prior case law, before *Olech* this Court had never expressly considered whether the Equal Protection Clause applies to a class of one.

Petitioner also suggests that class-of-one theory — flowing in her view inexorably from constitutional text, history, and prior case law — has been easily and consistently applied by the federal appellate courts. In fact, however, the federal appellate courts have struggled with application of the theory. Although the courts almost uniformly agree on the need to limit the theory so as to avoid constitutionalizing every state and local government decision, they are split on how to accomplish that result. Given the prospect of subjecting every government employment decision to scrutiny in federal court, the question becomes whether class-of-one analysis should be extended into the public employment context.

This Court should not extend class-of-one equal protection analysis into the public employment context because personnel decisions often are highly subjective, and subjecting them to constitutional scrutiny in federal court could led to random second-guessing of the decisions of public employers. Such a result could chill the exercise of public-employer discretion, to the detriment of both the employer and the public. A fearful or overly cautious public employer is not in the best interest of the government or the public it serves. In other constitutional contexts, this Court has held that ordinary public employment decisions are not subject to federal judicial review even if the decisions are mistaken, unreasonable, or pretextual. The rationale is that federal court simply is not the forum in which to review the multitude of personnel decisions made daily by public agencies. That rationale applies with equal force here.

This Court also has distinguished between government acting as an employer and government acting as a lawmaker or regulator, stressing that government has far broader discretion when it acts as an employer. That greater discretion, and the need for efficient provision of public services, also permit government to restrict the constitutional rights of its employees in a number of ways that would be impermissible if applied to citizens generally. Petitioner's approach, which is to apply customary rational-basis review to class-of-one cases brought by public employees, takes no account of government's role as an employer. Because of the number of variables and the individualized focus of employment decisions, customary rational basis review applies awkwardly at

best to those decisions. Because there are so many variables, it becomes impossible truly to determine who is similarly situated to the affected employee, and the means/ends analysis of equal protection law also threatens to become subjective in the extreme. Public employer decisionmaking should not be subject to the unpredictable and subjective second-guessing that would be the result of applying customary rational basis review to such decisions.

Thus, this Court should not extend the class-of-one theory into the public employment context. Doing so does not give adequate deference to the discretion of public employers, and in fact may chill the exercise of their discretion.

Alternatively, if this Court holds that the theory applies to public employer decisionmaking, the Court should restrict application of the theory. The Court can do that by imposing a demanding "similarly situated" requirement and by requiring that there be no conceivable rational basis for the government action and that animus or ill-will be the only possible explanation for the action. For many of the reasons given above, those restrictions are needed to avoid subjecting the employment-related decisions of public employers to subjective, unpredictable second-guessing in federal court. A rigorous "similarly situated" requirement will help to limit the number of variables in play and thus to reduce the degree of subjectivity and the risk of unpredictability that inheres in federal court review in the public employment context. Requiring that there be no conceivable rational basis for the government action and that animus or ill-will

be the only possible basis for the action is consistent with this Court's equal protection jurisprudence and also will help to reign in class-of-one cases if they permissibly can be brought to challenge the actions of public employers.

ARGUMENT

A. The text and history of, and this Court's case law regarding, the Equal Protection Clause do not lead to the conclusion that class-of-one analysis should apply to a public employer's personnel decisions regarding its employees.

According to petitioner, class-of-one equal protection theory flows "inexorably from the Constitution's text, its original meaning," and this Court's case law. (Pet. Br 20). In fact, however, class-of-one theory in general is at the outskirts of the concerns that underlie the Equal Protection Clause of the Fourteenth Amendment, and applying the theory in the context of decisions public employers make about their employees is so far removed from those concerns as to distort the clause and its application. Such an extension of the class-of-one theory is unwarranted.

Petitioner begins her argument by stressing the text of the Equal Protection Clause: "No state * * * shall deny to *any person* within its jurisdiction the equal protection of the laws." (Pet. Br. 14, quoting U.S. Const. amend. XIV, § 1) (emphasis added by petitioner). Petitioner's textual approach is flawed. To begin with, it is highly selective. She chooses to focus on the term "any person" while ignoring "of the laws."

To be sure, this Court has held that the Equal Protection Clause also protects against discrimination arising from the acts of administrative officials. *Ex parte Virginia*, 100 U.S. 339, 347 (1880); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886); *Raymond v. Chicago Union Traction Co.,* 207 U.S. 20, 35-36 (1907). But those decisions indicate that strict literalism has not guided this Court's interpretation and application of the clause.[7]

In addition, in a related context, the Court has not construed the term "any person" as being a signal that class-based discrimination is not required. This Court has interpreted the first clause of 42 U.S.C. § 1985(3), the surviving version of section 2 of the Civil Rights Act of 1871 – which applies to private conspiracies undertaken for the purpose of depriving "any person or class of persons" of the equal protection of the laws – as requiring a plaintiff to show *inter alia* "that 'some racial, or *perhaps otherwise class-based*, invidious discriminatory animus [lay] behind the conspirators' action[.]'" *Bray v. Alexandria Clinic*, 506 U.S. 263, 267-68 (1993), quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971) (emphasis added). Even though that statute includes the term "any person," the Court has required a showing of some racial or perhaps otherwise class-based discrimination.

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[7] In *Olech*, this Court did not rely on the wording of the Equal Protection Clause.

In any event, it is clear that at least some of those who considered and adopted the Fourteenth Amendment did not intend for the term "any person" to be taken literally. During the debates the following exchange occurred about application of the clause to women. The exchange makes it clear that, although the term "any person" was used, the Equal Protection Clause was not originally intended to extend to women. "Any person" did not literally mean *any* person.

> Mr. Johnson: Females as well as males?
>
> Mr. Howard: Mr. [James] Madison does not say anything about females.
>
> Mr. Johnson: "Persons."
>
> Mr. Howard: I believe Mr. Madison was old enough and wise enough to take it for granted there was such a thing as the law of nature which has a certain influence even in political affairs, and that by that law women and children are not regarded as the equals of men. Mr. Madison would not have quibbled about the question of women's voting or of an infant's voting. He lays down a broad democratic principle, that those who are to be bound by the laws ought to have a voice in making them; and everywhere mature manhood is the representative type of the human race.

Bret Boyce, "Originalism and the Fourteenth Amendment," 33 Wake Forest L. Rev. 909, 986

(1998), quoting Cong. Globe, 39th Cong., 1st Sess. 2767 (1866). Respondents do not suggest a return to the mores (and prejudices) of the past, but the fact remains that by "any person" the framers did not really mean *any* person.

Turning from text to history, this Court has observed that evidence regarding the circumstances surrounding the adoption of the Fourteenth Amendment is "inconclusive." *Brown v. Board of Education,* 347 U.S. 483, 489 (1953). As one commentator has noted, the debates of the Thirty-Ninth Congress "certainly do not tell us whether the architects of the clause intended to extend 'equal protection' to a so-called 'class of one.' No one in the Thirty-Ninth Congress considered whether an individual could challenge government action motivated by alleged illegitimate animus under the Equal Protection Clause. The concerns of the time, which included the plight of the newly-freed slaves in the aftermath of a Civil War fought, in part, to render them free, were far weightier." Timothy Zick, "Angry White Males: The Equal Protection Clause and 'Classes of One,'" 89 Ky. L.J. 69, 88 (2000). That is, the focus of the debates and of the clause was to "abolish[] all class legislation in the States and do[] away with the injustice of subjecting one caste of persons to a code not applicable to another." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866). *See also id.* at 174 (in a true republican government there is "no class legislation, no class privileges" and no laws that legislate "against [one class] for the purpose of disadvantaging the interests of [another]"); Cong Globe, 39th Cong, 1st Sess. app. 219 (1866) (Equal Protection Clause was designed to prevent the

States from "deny[ing] to all citizens the protection of equal laws"); Cong. Globe, 40th Cong., 2d Sess. 883 (1868) (clause intended to give the federal government "the power to protect classes against class legislation"); Cong. Globe, 39th Cong., 1st Sess. 2511 (clause would "prohibit State legislation discriminating against classes of citizens"). *See also Plyler v. Doe*, 457 U.S. 202, 213 (1982) (Equal Protection Clause "was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation"); *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here.").

The weighty concerns that led to the adoption of the Fourteenth Amendment are far removed from class-of-one equal protection theory. As will be shown below, they are even farther removed when that theory is applied in the context of a public employer's decisions made about its employees.

In arguing that class-of-one analysis should apply in the public employment context, petitioner also relies on this Court's pre-*Olech* case law as a source for that theory. Of course, if it were true that this Court's holding in *Olech* in fact flowed "inexorably" from earlier case law, it would be strange indeed that there was a preexisting circuit split as to whether the Equal Protection Clause applies to a class of one. *Compare Futernick v. Sumpter Township*, 78 F.3d 1051, 1057-60 (6th Cir. 1996) (declining to accept the plaintiff's class-of-one equal protection theory); *New*

Burnham Prairie Homes, Inc. v. Village of Burnham, 910 F.2d 1474, 1481-82 (7th Cir. 1990) (equal protection claim lacked merit because the "plaintiffs [did] not allege that they [were] singled out because they belong to any particular class"); *with Esmail v. Macrane,* 53 F.3d 176, 180 (7th Cir. 1995) (recognizing class-of-one claim, although admitting that the theory was "remote from the primary concern of the framers of the equal protection clause"). And if earlier case law led as inevitably to class-of-one analysis as petitioner suggests, there would seem to have been little need for this Court to have granted certiorari in *Olech* "to determine whether the Equal Protection Clause gives rise to a cause of action on behalf of a 'class of one' where the plaintiff did not allege membership in a class or group." *Olech*, 528 U.S. at 564 (footnote omitted). The case law was simply not as settled or self-evident as petitioner contends.

Petitioner cites *Missouri v. Lewis*, 101 U.S. 22, 30, 31 (1880), *Barbier v. Connolly*, 113 U.S. 27, 31 (1885), and *Atchison, Topeka & Sante Fe R.R. v. Mathews*, 174 U.S. 96, 104-05 (1899), contending that, while none of them use the phrase "class of one," "all recognize the underlying principle that individuals, not just classes, are entitled to equal protection." (Pet. Br. 17). None of those cases dealt with a class of one, however. In *Lewis,* state law prescribed that all appeals were to be taken in the state Supreme Court except for appeals in cases from four counties and one city, which were to be taken to a court of appeals, with only some of those cases being then appealable to the Supreme Court. 101 U.S. at 29. *Barbier* considered a city and county licensing scheme for laundries.

113 U.S. at 29-30. And in the opinion, the Court observed that "[c]lass legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." *Id.* at 32. *Atchison, Topeka & Sante Fe R.R.* concerned a state law that assumed negligence when damages were due to a fire caused by operating a railroad, and that in some circumstances imposed attorney fees against the railroad. 174 U.S. at 97. Because none of those cases involved a class of one, they do not lead, inexorably or otherwise, to endorsement of the theory, especially in the context of public employment.

In arguing that class-of-one analysis "represents the logical application of this Court's settled precedents" (Pet. Br. 21), petitioner also relies on *Sunday Lake Iron Co. v. Wakefield Township,* 247 U.S. 350 (1918), *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923), *Snowden v. Hughes*, 321 U.S. 1 (1944), *Allegheny Pittsburgh Coal v. County Commission*, 488 U.S. 336 (1989), and *Wade v. United States*, 504 U.S. 181 (1992). (Pet. Br. 18-19). Yet none of those cases is truly a class-of-one case. *Sunday Lake Iron Co.* dealt with application of a state law that required the reappraisal of all mining properties. *Sioux City Bridge Co.* focused on the remedy that should be applied when a taxpayer's property had been overvalued. The state court had held that the proper remedy was to raise the rate of taxation on other properties. 260 U.S. at 444, 446. In *Snowden,* the Court concluded that there was no adequate allegation of pur-

poseful discrimination. 321 U.S. at 10. *Allegheny Pittsburgh Coal* dealt with a tax assessment system that valued recently sold properties based on the purchase price and that undervalued properties that had not been sold in the recent past. 488 U.S. at 338, 344. In *Wade*, the Court simply held that "federal district courts have authority to review a [federal] prosecutor's refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive[,]" such as "race or religion." 504 U.S. at 185-86. Those cases do not logically extend to applying class-of-one analysis in the context of public employment decisions.

In sum, neither the text or history of the Fourteenth Amendment, nor this Court's pre-*Olech* case law, compels the conclusion that class-of-one equal protection analysis should be applied to judge the myriad of day-to-day decisions public employers make about their employees.

B. The federal appellate courts have struggled to define the elements of a class-of-one equal protection case and have been cautious in applying the theory; that prudent caution counsels against extending the theory into the public employment context.

Respondents do not gainsay that in *Olech* this Court applied class-of-one equal protection analysis in a situation where the Village allegedly had "intentionally demanded a 33-foot easement as a condition of connecting [the plaintiff's] property to the municipal water supply where the Village required only a 15-foot easement from other similarly situated prop-

erty owners." 528 U.S. at 565 (citation omitted).[8] But, although petitioner portrays the circuits' response to *Olech* as one of simplicity and uniformity, in fact the response has been fractured, leading to Judge Posner's plea for this Court to "enlighten us" regarding the elements of a class-of-one claim. *Bell v. Duperrault*, 367 F.3d 703, 711 (7th Cir. 2004) (Posner, J., concurring). *See also Jennings v. City of Stillwater*, 383 F.3d 1199, 1210 (10th Cir. 2004) (in the wake of *Olech*, lower courts have struggled to define the contours of class-of-one cases).

The response also has been notably cautious, with judges worrying about the transformation of every local or state governmental decision into a constitutional matter and about thus trivializing application of the Equal Protection Clause. *See Olech,* 528 U.S. at 566 (Breyer. J., concurring in the result) (noting the concern that application of the theory could "transform many ordinary violations of city or state law into violations of the Constitution"); *Cordi-Allen v. Conlan*, 494 F.3d 245, 252 (1st Cir. 2007) (class-of-one claims must be limited because otherwise, "the federal court would be transmogrified into a supercharged version of a local zoning board"); *Jennings*, 383 F.3d at 1210-11 (unless carefully circumscribed,

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[8] Admittedly, in *Olech* the Court also cited *Sioux City Bridge*, *Sunday Lake Iron,* and *Allegheny Pittsburgh Coal Co.* in support of the Court's endorsement of class-of-one analysis. *Id.* But those decisions had not explicitly considered the issue.

concept of 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). In this situation, the question then becomes whether to extend application of the theory into the public employment context.

C. The other circuits that have applied class-of-one analysis in the public employment context have given the issue little thoughtful consideration; applying class-of-one analysis in this context has been questioned.

As petitioner notes, the nine other circuits that have considered the question have all held that class-of-one analysis applies in the public employment context. (Pet. Br. 22 & n. 9). *See Campagna v. Mass. Dep't. of Envt'l Prot.,* 334 F.3d 150, 156 (1st Cir. 2003); *Neilsen v. D'Angelis*, 409 F.3d 100, 104 (2nd Cir. 2005); *Hill v. Borough of Kutztown*, 455 F.3d 225, 239 (3rd Cir. 2006); *Kirby v. City of Elizabeth City,* 388 F.3d 440 (4th Cir. 2004), *cert. denied*, 547 U.S. 1187 (2006); *Whiting v. Univ. of Miss.,* 451 F.3d 339, 348-50 (5th Cir. 2006), *cert. denied* ___ U.S. ___, 127 S. Ct. 1038 (2007); *Scarbrough v. Morgan County Bd. of Educ.,* 470 F.3d 250, 260-61 (6th Cir. 2006); *Levenstein v. Salafsky,* 414 F.3d 767, 775-76 (7th Cir. 2005); *Howard v. Columbia Pub. Sch. Dist.,* 363 F.3d 797, *cert. denied,* 543 U.S. 956 (8th Cir. 2004); *Bartell v. Aurora Public Schools*, 263 F.3d 1143, 1148-49 (10th Cir. 2001). Nevertheless, although there is no doubt that the split exists, what is notable about the other circuits' decisions, applying the class-of-one theory in the context of public employment actions, is both

their lack of analysis – of any careful consideration of whether the theory should apply in this setting – and their sense of unease about the theory in general. That is, while the other circuits apply the class-of-one theory, they hardly embrace it.

None of the other circuits' decisions cited above contains any thoughtful analysis of whether the class-of-one theory should apply to review government employer decisionmaking. The usual approach is simply to cite *Olech* and then apply the theory. *See, e.g., Hill,* 455 F.3d at 239; *Campagna*, 334 F.3d at 156. That lack of analysis may flow from the fact that the plaintiff almost always is unsuccessful in these cases. *See Engquist*, 478 F.3d at 994 (making that point, and citing cases for it).

Applying class-of-one analysis to public employment decisions has been the subject of some criticism, however. In *Lauth v. McCollum,* 424 F.3d 631 (7th Cir. 2005), the plaintiff, a village police officer, brought suit in federal court after the police chief asked the village's board to sanction the officer for misfeasance (the board obliged). Judge Posner observed that "[t]here is clearly something wrong with a suit of this character coming into federal court dressed as a constitutional case." *Lauth*, 424 F.3d at 632. If class-of-one cases can be brought in federal court, and if "any unexplained or unjustified disparity in treatment by public officials is therefore to be deemed a prima facie denial of equal protection, endless vistas of federal liability are opened. Complete equality in enforcement is impossible to achieve; nor can personal mo-

tives be purged from all official action[.]" *Lauth*, 424 F.3d at 633, citing *inter alia Olech.*

D. Applying class-of-one equal protection analysis in the public employment context is an extremely poor fit.

1. By their nature, personnel decisions single out individual employees; public employers need considerable flexibility in managing their operations and their employees.

Applying class-of-one analysis in a public employment context is a particularly poor fit. At the outset of this discussion, it may be helpful to clarify what respondents mean by a "class of one" in this context. "Class of one" is not to be taken literally. *Olech* itself may have involved a class of five, rather than of one. 528 U.S. at 564 n. *. Instead, "'[c]lass of one' is somewhat of a misnomer, in that what distinguishes such claims is the absence of a constitutionally salient class identification, not the number of plaintiffs per se." *Grubbs v. Bailes,* 445 F.3d 1275, 1281-82 n. 4 (10th Cir.), *cert. denied* ___ U.S. ___, 127 S. Ct. 384 (2006) (citation to *Olech* omitted). That is, class-of-one cases are those in which the governmental action taken, and the alleged discrimination itself, define the supposed class, aside from any other shared characteristic(s) of the class members. Nonetheless, although class-of-one cases are not defined by a specific number, the larger the class the more likely it is that discrimination based on some shared class characteristic can be proven or at least inferred. Thus, class-of-one cases are apt to involve a few individual plaintiffs who claim that they arbitrarily have been treated dif-

ferently from others similarly situated for no rational reason. In the public employment context, such a claim will often reduce to a contention that the public employee was treated differently because the employer or someone in authority did not like the employee and had no rational reason for the dislike.

Yet personnel decisions, by their very nature, single out individual employees. Sometimes employees are singled out based on obviously rational differences—*i.e.*, differences in educational background or quality and quantity of work. But oftentimes, employment decisions are based on highly subjective value judgments—*e.g.*, perceived levels of assertiveness, maturity, or the ability to work well with or manage others. Indeed, employment decisions might even boil down to a characteristic as esoteric as whether the employee is a good "fit" for the work environment.[9]

As an employer, the government has a strong interest in having the flexibility to decide how best to manage its operations and employees. Judicial oversight of these day-to-day personnel decisions would undermine efficient decisionmaking and would ultimately trivialize the important protections guaran-

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[9] In this case, for example, the jury's verdict may represent nothing more than the judgment that respondents did not like petitioner and that their dislike was arbitrary. Whether someone's dislike of another person is arbitrary or rational is a highly subjective value judgment.

teed by the federal constitution. As one district court judge aptly put it, because "practically every employee, public or private, is bound to be convinced at some point that he or she is getting the short end of the stick, it is not hard to imagine the bee hive of constitutional litigation that would be generated by this variant of the 'class of one' doctrine." *Campagna v. Commonwealth of Mass.*, 206 F. Supp. 2d 120, 127 (D. Mass. 2002), *aff'd* 334 F.3d 150 (1st Cir. 2003).[10]

2. Ordinary public-employment decisions are not subject to federal judicial review, even if they are mistaken, unreasonable, or pretextual.

It is well settled that ordinary public-employment decisions—those that do not implicate a fundamental right or a suspect classification—are not subject to federal judicial review, even if they are mistaken, unreasonable, or pretextual. *See, e.g., Waters v. Churchill*, 511 U.S. 661, 679 (1994) (plurality opinion) ("We have never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information"); *Collins v. City of Harker Heights*, 503 U.S. 115, 128 (1992) ("state law, rather than the Federal Constitution, generally governs the substance of the [pub-

[10] And if this bee hive may not yet be actively humming, as petitioner suggests, that 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.

lic] employment relationship"); *Connick v. Myers,* 461 U.S. 138, 146-47 (1983) ("ordinary dismissals * * * are not subject to judicial review * * * even if the reasons for the dismissal are alleged to be mistaken or unreasonable"); *Bishop v. Wood*, 426 U.S. 341, 349-50 (1976) (public-employment decisions do not implicate due-process concerns even if a supervisor "deliberately lied" about his reasons for terminating the employee). *See generally Singleton v. Cecil*, 176 F.3d 419, 425-28 (9th Cir.), *cert. den.*, 528 U.S. 966 (1999) (en banc) (canvassing Supreme Court jurisprudence relating to judicial review of public-employment decisions).

In *Bishop*, for example, a police officer who had been terminated without a hearing claimed that he had been deprived of a property interest in his employment and of the liberty interests to be free from public stigma and pretextual termination. In addressing the officer's second claimed liberty interest—freedom from termination based on false information—the Court concluded that the termination did not implicate a liberty interest even if the supervisor had *deliberately lied* about the reasons for terminating the officer although "[s]uch fact might conceivably provide the basis for a state-law claim[.]" *Bishop,* 426 U.S. at 349 and n.13 (emphasis added).

This Court did not end its discussion there. Rather, the Court went on to explain more generally that "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." *Id.* at 349.

> We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways.

Id. at 349-50. *See also Connick*, 461 U.S. at 146-49 (relying, in part, on the limitations set forth in the above-quoted passage from *Bishop* to explain why public-employment decisions involving speech on matters of private concern are not subject to judicial review). The rationale behind the Court's refusal to review most challenges to public-employer decision-making is simple: It reflects the "common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Connick,* 461 U.S. at 143.[11]

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[11] Petitioner's response to this line of cases is to assert that, because they deal with the Due Process Clause, they "bear no relation to the guarantee [of] the Equal Protection Clause[.]" (Pet. Br. 40 n. 15). But in some respects that assertion begs the question

Footnote continued…

That rationale applies with equal force here. There is nothing about the Equal Protection Clause that defeats the "common-sense realization that government offices could not function if every employment decision became a constitutional matter," *id*, or that indicates that federal court is the appropriate forum in which to review the multitude of personnel decisions made daily by public agencies.

3. Government's role as an employer is significantly different from its role as an enforcer of the law and provider of public services.

The limited scope of review that generally applies to public employment decisions also stems from the recognition that the government agency's role as a sovereign enforcer of the law and provider of public services is fundamentally different from its role as an employer. *Waters*, 511 U.S. at 679-80; *see also Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 896 (1961) (noting difference between government action to manage its own internal affairs and action "to regulate or license"). Indeed,

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(…continued)
that is presented here – petitioner asserts that "the Equal Protection Clause applies to all persons, whether or not they are part of a special class[.]" And it is beside the point in any event, which is that this Court had recognized that federal court review of everyday public employment decisionmaking is neither required nor wise.

as the Court explained in *Waters*, "the government as employer * * * has *far broader powers* than does the government as sovereign." *Waters*, 511 U.S. at 671 (emphasis added). For example, "when a[] [public] employee counsels her co-workers to do their job in a way with which the public employer disagrees, her managers may tell her to stop, rather than relying on counterspeech." *Id.* at 672. And the Court never has suggested "that the Constitution bars the governor from firing a high-ranking deputy" for criticizing the governor's legislative program. *Id.*

As the Court cautioned in *Waters*, reviewing courts should not treat the government's interests as an employer the same way it treats the government's interests as a sovereign. *Id.* at 674-75. Rather, "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as an employer." *Id.* at 675. Consequently, even when a public-employment decision implicates protected speech, for example, reviewing courts must take care to assign the government's efficiency concerns as an employer "a greater value" and to give the employer's justification for its actions "greater deference." *Id.* at 673, 675. *See also Kelley v. Johnson,* 425 U.S. 238, 245 (1976) (finding fact that policeman, subject to hair-grooming standards, brought claim as public employee, rather than as citizen, "highly significant"); *Rutan v. Repub. Party of Ill.,* 497 U.S. 62, 94 (1990) (Scalia, J., dissenting) (noting that restrictions Constitution places upon government in its capacity as lawmaker, that is, as regulator of private conduct, are

not same as restrictions it places upon government in its capacity as employer, and cataloging examples).

4. Government may impose restrictions on the constitutional rights of its employees that it may not impose on private citizens.

Because government's role as an employer is significantly different from its role as an enforcer and administrator of laws, government may restrict the constitutional rights of its employees in many ways that would not be permissible if applied to others. "Private citizens perhaps cannot be prevented from wearing long hair, but policemen can." *Rutan,* 497 U.S. at 94 (Scalia, J., dissenting), citing *Kelley v. Johnson,* 425 U.S. at 247. In many circumstances, public employees' workplaces and property may be searched without probable cause and without a warrant. *O'Connor v. Ortega,* 480 U.S. 709, 723 (1987) (plurality); *id.* at 732 (Scalia, J., concurring in the judgment). Public employees can be dismissed if they refuse to provide incriminating information that relates to their job performance. *Gardner v. Broderick*, 392 U.S. 273, 277-78 (1968). Private citizens cannot be punished for speech of merely private concern, but government employees can be fired for engaging in such speech. *Connick*, 461 U.S. at 147. Private citizens cannot be punished for partisan political activity, but federal and state employees can be dismissed or punished for that reason. *Public Workers v. Mitchell*, 330 U.S. 75, 101 (1947); *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 556 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601, 616-17 (1973).

A close reading of these lines of authority thus reveals the following about constitutional claims raised by public employees: If a public employee's challenge to an adverse employment decision does not implicate a fundamental right or a suspect classification, it is not subject to federal judicial review. Allowing federal review in such ordinary cases would conflict with the "common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Connick*, 461 U.S. at 143.

Petitioner responds to this argument by asserting that "[t]he government as employer still acts as sovereign" (Pet. Br. 24), but it never has been respondents' position that the State somehow loses its status as sovereign when it acts as an employer. Instead, respondents' point is that the fact that this case arises in the public employment context is, as this Court put it in *Kelley v. Johnson*, "highly significant." 425 U.S. at 245. Petitioner apparently shares the view that this context makes a difference. At points in her brief, she indicates that the class-of-one equal protection right should somehow be tailored to fit this context. (*e.g.,* Pet. Br. 11, 34). But, other than stressing the difficulties in proving a rational basis equal protection claim, she offers no clue as to how the public employment context should be taken into account. She simply argues for application of the usual approach. She also contends that what respondents argue for and what the Ninth Circuit majority approved is unprecedented because exempting public employment decisions from class-of-one analysis will somehow nullify a constitutional right. But the public

employee who cannot claim relief under the First Amendment because she is not speaking on a matter of public concern, for example, or the policeman who must face grooming requirements that would be impermissible if applied to others, is equally without constitutional recourse. Line-drawing is involved in all of these examples. The only difference here is that respondents urge that the line be drawn at the point where the "class" is defined solely by the action taken or by the supposed discrimination itself. When the class is defined solely in that way, no equal protection claim should lie in the public employment context.[12]

5. Applying class-of-one equal protection analysis to public employment decisions would subject public employer decision-making to random second-guessing.

Drawing the line at that point is appropriate—not only because of the distinction between government as regulator and government as employer, and because of the considerably broader discretion that government enjoys as an employer and the corresponding limits that it may impose on what would otherwise be its employees' constitutional freedoms—but because customary equal protection analysis at best applies

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[12] And holding that public employees cannot pursue a class-of-one claim against their employer would not withhold from public employees any constitutional right enjoyed by private employees, who cannot bring an equal protection claim against their employers.

awkwardly in a class-of-one setting and, in the employment context in particular, reduces to the kind of random second-guessing criticized in *Jennings*, 383 F.3d at 1210. *See also Waters,* 511 U.S. at 676 (plurality) (allowing judicial factfinder to determine facts to which the *Connick* test is applied would force the government manager to "have to ask not what conclusions she, as an experienced professional, can draw from the circumstances, but rather what conclusions a jury would later draw").

As discussed above, employment decisions are inherently subjective, involve a multitude of variables, and inevitably depend upon judgments that focus upon the particular qualities and personalities of individuals. Normal rational basis equal protection analysis requires a showing that others similarly situated were treated differently. *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). When a class or group is involved, and a difference in treatment is shown, "[t]he sample size is large enough to raise a concern that the disfavored class was selected not because they were the most culpable [or the most eligible], but because of their membership in the class." *Jennings*, 383 F.3d at 1213. But when the sample is reduced to a single individual or a few individuals, "there is no way to know whether the difference in treatment was occasioned by legitimate or illegitimate considerations without a comprehensive and largely subjective canvassing of all possible rele-

vant factors." *Id.* at 1213-14.[13] Thus, as the focus narrows, the difference in treatment of those similarly situated becomes less and less an indication of impermissible discrimination and more and more simply an indication of a difference in treatment that says nothing about discrimination. A public employer will almost inevitably treat employee A somewhat differently than employee B, and employee A will always be different in some relevant respects and similar in some respects to employee B. Because of the number of variables, the "similarly situated" requirement fails to perform its usual function. Instead, the inquiry threatens to collapse on itself and to permit a jury to find discrimination simply because its members do not believe that a proffered reason for an employment action is rational enough to have convinced them to take that action.

In the public employment context, the threat of such a "subjective canvassing" in a judicial proceeding may hinder and chill the exercise of the employer's discretion, leading to government inefficiencies and poorer public service. The prospect of such second-guessing by a jury also is inconsistent with the concept of at-will employment. Because an at-will employee can be fired for any reason or no reason at all, *Waters*, 511 U.S. at 679 (plurality), 688 (Scalia, J., concurring), it makes little sense to review the deci-

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[13] In *Jennings,* the court suggested that the key to understanding *Olech* is that it is a single-variable case. *Id.* at 1214.

sion to determine if it was made for an irrational reason. By definition, it is not rational to fire someone or take some other employment action for no reason.[14]

Rational basis review under the Equal Protection Clause also generally examines whether a reasonable "fit" exists between the legislative or administrative goal and the means chosen to effect that goal. *See, e.g., Cleburne,* 473 US at 446 (requiring such a fit). When a class or group is involved, "fit" analysis allows one to consider "whether the class's distinctive trait (*e.g.,* its status as black, mentally retarded or Chinese) is a satisfactory proxy for the conduct the government seeks to regulate" or whether instead the fit is so poor as to indicate that government is acting irrationally. William D. Araiza, "Litigating Takings: Irrationality and Animus in Class-of-One Equal Protection Cases," 34 Ecology L.Q. 493, 505 (2007). In contrast, the particularized nature of class-of-one cases, and of class-of-one public employment cases in particular, makes it extremely difficult to perform conventional "fit" analysis. Again, the number of variables and the narrow focus on a single individual

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[14] That is not to say that applying class-of-one analysis in the public employment context would spell the end of at-will employment. Respondents admit that where such claims have been recognized apparently the sky has not fallen and at-will employment has not come to an end. But it is to say that the concept of at-will employment is at odds with class-of-one rational basis review.

or a few individuals, and on other individual comparators, makes it almost impossible to determine whether the action chosen is rationally related to a legitimate end. That determination becomes a highly subjective one.

In short, applying customary rational-basis review to a class of one in the public employment context can only lead to unpredictable, indeed irrational, results. Because so many variables are in play, and because employment decisions often are both highly subjective and particularized, neither the "similarly situated" nor the means/end "fit" analysis can perform their usual function, at least with any predictability. When an employee is singled out for discipline, and when that employee necessarily is alike in some respects and different in others to other employees, how is one to determine whether those employees are all similarly situated? When only that employee is disciplined, how is one to decide whether the discipline chosen is rationally related to the employee's situation, without taking over the role of the employer and substituting one's own judgment for that of the employer? The decisions of public employers should not be subject to such subjective, unpredictable second-guessing in federal court.

In sum, class-of-one analysis should not apply in the public employment context, where the government's discretion as an employer is broad, where public employees' rights must be adjusted to accommodate that discretion, where employees may be at-will ones, and where the number of variables and the often subjective nature of employment decisions about

hiring, promoting, laying off, and firing employees make customary rational basis review difficult, if not impossible, to apply. Attempting to apply customary rational basis review in this setting could chill the exercise of public employer discretion, leading to government inefficiency and poor public service. Applying such review also threatens to subject the decisions of public employers and managers to subjective, random second-guessing in federal court. This Court should affirm the decision of the Court of Appeals and hold that class-of-one equal protection analysis does not apply in the public employment context.

E. If class-of-one analysis applies at all in the public employment context, it should be limited by requiring that those who are claimed to be similarly situated be very similar indeed, and by requiring that there be no conceivable rational basis for the action taken and that animus be the only possible reason for the employment action.

Alternatively, this Court should cabin application of the class-of-one theory in this context. All the reasons given above for not applying class-of-one analysis in the public employment context also are reasons for restricting the theory if it applies at all. How class-of-one analysis should apply to the decisions of public employers, if it should apply at all, is fairly included in the question presented by petitioner. Petitioner asks "[w]hether *traditional equal protection 'rational basis'* analysis" applies. (Pet. Br. i) (emphasis added). And, as mentioned above, what is striking about the federal appellate courts' response to *Olech*

is the expressed concern that class-of-one analysis, unless restrained, can serve to federalize every governmental decision and thus trivialize the protection of the Equal Protection Clause, and the courts' attempts to restrict application of the theory. *See Indiana Teachers v. School Com'rs of Indianapolis*, 101 F.3d 1179, 1181 (7th Cir. 1996) (concept of equal protection is trivialized when it is used to subject every decision made by state or local government to constitutional review by federal courts); *Jennings*, 383 F.3d at 1210 (in wake of *Olech,* lower courts have struggled to define the contours of class-of-one cases; noting the danger that federal courts will become general purpose second-guessers of the reasonableness of broad areas of state and local decisionmaking). The effort to restrict application of class-of-one analysis generally has taken two forms: (1) a more-demanding "similarly situated" test, and/or (2) a requirement of a showing that there is no conceivable rational basis for a governmental decision and that animus is the only possible reason for the decision. If this Court decides that class-of-one equal protection analysis applies in the public employment context, respondents urge the Court to impose both of those requirements.

The Second Circuit requires that the "similarity between plaintiffs and the persons with whom they compare themselves must be extremely high." *Neilson v. D'Angelis*, 409 F.3d 100, 104 (2d Cir. 2005) (citation omitted). The Seventh Circuit demands that a class-of-one plaintiff prove that the plaintiff was treated differently than someone else who is *prima facie* identical in all respects. *Purze v. Village of Winthrop Harbor,* 286 F.3d 452, 455 (7th Cir. 2002) (citation omit-

ted). The Eighth Circuit has stressed that "[i]dentifying disparity in treatment is especially important in class-of-one cases." *Barstad v. Murray County*, 420 F.3d 880, 884 (8th Cir. 2005), citing *Jennings*, 383 F.3d at 1213. To effect that requirement, the court demands that the plaintiff find a comparator who was treated differently *in the same time period*. *Barstad*, 420 F.3d at 884 (citation omitted). As discussed above, the reason for this enhanced "similarly situated" requirement is that as the sample size reduces to a few or to one and the number of variables increases, "there is no way to know whether the difference in treatment was occasioned by legitimate or illegitimate considerations without a comprehensive and largely subjective canvassing of all possible relevant factors." *Jennings*, 383 F.3d at 1213-14.[15] And that is particularly true in the public

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[15] In addition, a more stringent standard must be applied than is applied in a racial discrimination case. "Otherwise, the [defendant] in the former will perversely find it easier to perform an illegal act than in the latter. A finding of general 'similarity' alone would do the trick in the 'class of one' case, even where the differential treatment was the result of a good faith disagreement as to the governmental interests or simple negligence, while a finding of racial motive based on the entire record would be needed in the employment discrimination case. The standard of similarity in such a 'class of one' equal protection case cannot be one under which persons who believe they may have suffered racial discrimination would find it

Footnote continued…

employment context because employment decisions are by their nature highly subjective. Given that reality, a strict and demanding "similarly situated" requirement is needed to make certain that the fact-finder in federal court is truly reviewing the actual decision that the employer made – should I fire, promote, or lay-off this employee or that one? The question of whether petitioner satisfied the "similarly situated" requirement remains open in this case. Defendants raised it on appeal (App. Br. 29-32), but the Ninth Circuit did not reach it.

Had the Ninth Circuit reached the issue, it would have found that petitioner failed to prove that respondents treated other similarly situated employees differently. As noted, a state action will trigger equal-protection review only if the person invoking equal protection was treated differently from other "similarly situated" persons. *Cleburne*, 473 U.S. at 439; *see also Olech*, 528 U.S. at 564 ("class of one" claim requires proof that the plaintiff "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment"). Persons are "similarly situated" if they are in "all relevant respects" alike. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Thus, to prevail on her class-of-one claim, petitioner had to prove that other

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to their legal benefit to abandon the race claim – the core of equal protection – in order to argue that they are a 'class of one.'" *Neilson*, 409 F.3d at 106.

ODA employees who were like her "in all relevant respects" were treated differently.

She failed to satisfy that burden with respect to any of the adverse employment actions at issue here. Because only one person—Hyatt—was promoted to ESC manager, petitioner could successfully challenge the promotion on a class-of-one theory only if she proved that she and Hyatt were alike in all relevant respects. In other words, she was obligated to show that the two of them had substantially similar backgrounds. Petitioner failed to make that showing. To the contrary, as she conceded below, Hyatt was more qualified than her in at least two respects—he was more familiar with the laboratory's standard operating procedures and had experience working as a chemist for the Laboratory Services Division. (E.R. 155).[16] Because petitioner and Hyatt were not similarly situated in all relevant respects, her equal-protection challenge to the promotion decision fails as a matter of law.

Petitioner also failed to prove that respondents treated other similarly situated employees differently during the layoff and bumping processes. The record reflects that several, indeed most, other ESC employ-

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[16] Petitioner nonetheless believed that Szczepanski could not rationally have chosen Hyatt over her because she has a more extensive educational background and more experience with the consulting and customer service aspects of the position. (E.R. 143; E.R. 155).

ees were laid off and, as a result, were treated the same way petitioner was treated. To the extent petitioner is claiming that she was treated differently from the ESC employees who were not laid off or who were allowed to bump into other laboratory positions, her claim nonetheless fails because she did not demonstrate that those employees held similar jobs. *Cf. Vasquez v. County of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003) (employees are similarly situated "when they have similar jobs and display similar conduct"). The record reflects that no other ODA employee held a job similar to petitioner's because petitioner's position was the *only* Program Technician 1, Food Standards Specialist, position in the entire agency. (E.R. 114, 115).[17] Moreover, unlike other positions in the ESC, most of the work petitioner performed could not be directly billed out to a client. (E.R. 241; E.R. 306).

Even assuming, for the sake of argument, that equal-protection guarantees come into play when a public employer treats unequally employees who are identical in all relevant respects, petitioner still failed to prove her claim. When, as in the present case, government actors treat unequally persons who are unequal in a rationally relevant respect, the Equal Protection Clause does not apply. *Garrett,* 531 U.S. at

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[17] It was undisputed below that the only other "Program Technician 1" position in the agency was the "Grants Administrative Officer" position plaintiff attempted to bump. (E.R. 110, 115).

366-67 ("where a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation") (citation and internal quotation marks omitted). Petitioner failed to demonstrate that respondents treated her differently from employees who were like her in all relevant respects. In fact, the record, viewed in the light most favorable to petitioner, shows that no other employee was similarly situated. As a result, petitioner's class-of-one claim should fail as a matter of law.

In addition to strictly applying the "similarly situated" requirement, the other way in which federal courts have sought to limit class-of-one cases after *Olech* is to require some showing of animus, ill-will, or "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), *cert. denied,* 531 U.S. 1080 (2001). *See also Williams v. Pryor*, 240 F.3d 944, 951 (11th Cir. 2001); *Shipp v. McMahon*, 234 F.3d 907, 916-17 (5th Cir. 2000), *overruled on other grds*, *McClendon v. City of Columbia*, 305 F.3d 314, 329 (5th Cir. 2002); *Bryan v. City of Madison*, 213 F.3d 267, 276-66 and n. 17 (5th Cir. 2000), *cert. denied,* 531 U.S. 1145 (2001). Only one federal appellate court decision has held that proof of a personal motive is not required. *Jackson v. Burke*, 256 F.3d 93, 96-97 (2nd Cir. 2001) (*per curiam*). And the court that decided that case later described the assertion as "dicta" and said the question whether a personal motive is required is an open one. *Harlen Associates v. Incorporated Village of Mineola*, 273

F.3d 494, 499-500 (2nd Cir. 2001).[18] The reason for imposing the requirement again is to limit the reach of class-of-one cases. *Bell*, 367 F.3d at 709 (Posner, J., concurring) (otherwise anyone can claim to be a class-of-one plaintiff).[19]

Imposing an animus requirement is not barred by this Court's decision in *Olech*. In *Olech* the majority noted that the plaintiff's complaint alleged that the Village's demand for a wider easement than that demanded of other similarly situated property owners "was 'irrational and wholly arbitrary[.]'" 528 U.S. at 565. Those allegations, the Court concluded, were "sufficient to state a claim for relief * * *" *Id.* The Court thus found it unnecessary to "reach the alternative theory of 'subjective ill will' relied on by" the court below. *Id.*[20] The Court left the question open.

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[18] The split on this issue is described in more detail in *Bell*, 367 F.3d at 711.

[19] In citing these decisions, respondents do not necessarily agree with the circuits' view of the role of animus in the analysis. At least some of these decisions appear to view the test as a subjective one, in which a showing of animus serves as a substitute for a showing of no rational basis. *See, e.g., Hilton,* 209 F.3d at 1008. Consistent with this Court's case law, respondents argue for an objective test.

[20] Justice Breyer, concurring in the result, noted that the appellate court had found that the respondent "had alleged an extra factor as well – a factor that the Court of Appeals called 'vindictive action,'

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And, as Judge Posner has noted, "[it] is not as if the term 'irrational and wholly arbitrary" were self-defining." *Bell,* 367 F.3d at 711 (Posner, J., concurring). *See also DeMuria v. Hawkes*, 328 F.3d 704, 706-07 (2nd Cir. 2003) (pointing out that *Olech* dealt with a dismissal on the pleadings, and not with what a plaintiff must prove).

The rule in rational basis review is that the State need not articulate its reasoning when it makes a particular decision. "Rather, the burden is upon the challenging party to negative '"any reasonably conceivable state of facts that could provide a rational basis for the classification."'" *Board of Trustees v. Garrett,* 531 U.S. 356, 367 (2001), quoting *Heller v. Doe,* 509 U.S. 312, 320 (1993), in turn quoting *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 313 (1993). But, in *Garrett*, this Court explained the role that animus, ill-will, "negative attitudes," or "fear" nevertheless can play in rational-basis equal protection analysis. Because the test is an objective one, that looks to whether there is any reasonably conceivable state of facts that could provide a rational basis for the action taken, "[a]lthough such biases [as

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'illegitimate animus,' or 'ill will.'" *Id.* at 566, quoting *Olech v. Village of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998). In Justice Breyer's view, "the presence of that added factor in this case is sufficient to minimize any concern about transforming run-of-the-mill zoning cases into cases of constitutional right." *Id.*

negative attitudes or fear] may often accompany irrational (and therefore unconstitutional discrimination, *their presence alone does not a constitutional violation make*." *Id.* (emphasis added). Instead, as this Court noted in *Cleburne*: "'Mere negative attitudes, or fear, *unsubstantiated by factors which are properly cognizable* in a zoning [or other] proceeding, are not permissible bases for treating a home for the mentally retarded [or a person] differently * * *'" *Id.*, quoting *Cleburne*, 473 U.S. at 448 (emphasis added in *Garrett*; bracketed material added).

Thus, although animus, ill-will, or impermissible reasons for a governmental action can weigh in the analysis, "their presence alone does not a constitutional violation make." For a constitutional violation to have occurred, "[t]hose reasons 'must be the *only* reasons for the adverse action of which the plaintiff is complaining. If there are legitimate as well as illegitimate reasons, the presence of the latter will not taint the former." *Bell*, 367 F.3d at 713 (Posner, J., concurring) (emphasis in original; citation omitted). *See also Lauth,* 424 F.3d at 634 (animus comes into play only when, no rational reason or motive being imaginable for the injurious action taken by the defendant against the plaintiff, the action would be inexplicable unless animus had motivated it). As Judge Posner points out, "[i]t would be absurd to give a convicted murderer a remedy under the equal protection clause merely because the prosecutor, in addition to thinking it his duty to prosecute, hoped that the publicity from a successful prosecution would enable him to launch a political career." *Bell,* 367 F.3d at 713.

In sum, even if this Court decides that the class-of-one equal protection theory applies in the public employment context, the Court should limit the reach of the theory. The Court can accomplish that result by imposing a strict and demanding "similarly situated" standard *and* by clarifying that such a constitutional claim requires that there be no conceivable rational basis for the action taken and that ill-will or animus must be the only possible basis for what the employer did. Although resolution of those issues may not be absolutely required here, the issues are fairly included in the question presented by petitioner. The circuits are in disarray on how to limit class-of-one claims, although they are virtually unanimous on the need to do so to avoid constitutionalizing every state and local government decision. Both a rigorous "similarly situated" requirement, and the endorsement of an objective test that looks to ill-will and animus only if that can be the only conceivable basis for an employment action, serve to limit the reach of class-of-one claims, in the public employment context in particular and more generally. Moreover, both requirements are true to this Court's equal protection jurisprudence. Clarification on these points will assist the lower courts, and help to bring predictability and consistency to this area of the law, to the benefit of both plaintiffs and government defendants.

CONCLUSION

To reiterate, class-of-one claims are not defined by a number *per se*, but by the fact that it is the action taken against the member(s) of the class that itself defines the class. Although such classes are not de-

fined by a number, by their very nature they are apt to be small and individualistic, rather than being marked by any class characteristic. Applying the Equal Protection Clause to such classes is far removed from the weighty concerns that led to adoption of the Fourteenth Amendment. Extending class-of-one equal protection analysis into the public employment arena is not compelled by the text or history of the Fourteenth Amendment or by this Court's case law. Applying the theory in the public employment context also overlooks the inherently subjective nature of many (if not most) employment decisions, the greater discretion that government exercises when it acts as an employer, rather than as a lawmaker or regulator, and this Court's past reluctance to countenance federal court review of the multitude of day-to-day employment decisions made by state and local governments. Petitioner herself suggests that the public employment setting is significant and that it should be taken into context, but she offers no analytical response other than that customary rational basis review should apply. That response is not adequate. To avoid constitutionalizing every employment action made by state and local government employers and managers, this Court should hold that class-of-one equal protection analysis should not extend to the public employment context.

Alternatively, even if the theory applies to review public employment decisions, the theory should be limited by imposing a demanding "similarly situated" requirement and by applying an objective test, that looks to see whether there is any conceivable rational basis for the employment action taken or whether in-

stead animus or ill-will is the only possible reason behind the action. Such limitations will help to constrain class-of-one theory in this context, and are true to this Court's equal protection case law.

For all the reasons given above, this Court should affirm the judgment of the court of appeals.

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