No. 07-474

In The Supreme Court of the United States

ANUP ENGQUIST,

Petitioner,

v.

OREGON DEPARTMENT OF AGRICULTURE, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF RESPONDENTS

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The League of California Cities and California State Association of Counties respectfully submit this brief *amicus curiae*, pursuant to Supreme Court Rule 37 and the consents of all parties.[1]

INTERESTS OF THE *AMICI CURIAE*

The League of California Cities ("League") is an association of 478 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide – or nationwide – significance. The Committee has identified this case as being of such significance

The California State Association of Counties ("CSAC") is a non-profit corporation with all of California's 58 counties as members. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is

[1] The parties have consented to the filing of all briefs *amicus curiae*. Counsel for *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their members or their counsel, made a monetary contribution to the preparation or submission of this brief.

overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

There are approximately 1,425,123 local government employees employed within the State of California, a significant number of whom are employed by the cities and counties represented by the League and CSAC.[2] Thus, this case presents an issue in which members of the League and CSAC have a significant stake.

SUMMARY OF ARGUMENT

This brief will provide the Court with the California cities' and counties' perspectives on the negative effects that would follow from acknowledgement of the "class-of-one" theory of equal protection in the context of public employment. As this Brief describes, this Court should affirm the Ninth Circuit's decision declining to apply the theory.

[2] See U.S. Census Bureau, Local Government Employment and Payroll Data, March 2006, available online at http://www.census.gov/govs/www/apesloc06view.html. The cited figure includes counties, municipalities, townships, special districts, and school districts within California.

Section I of this Brief describes that applying the class-of-one theory would effectively eliminate public sector at-will employment. As Section I.A describes, an employer reserves the right to terminate at-will employees (which in the public sector includes probationary employees) for any reason, with limited exceptions. As Section II.B describes, however, applying the class-of-one theory, would open up virtually every public sector termination to federal court review for whether it has a "rational basis." Such review would apply not only to terminations but to other personnel decisions, including discipline, hiring, and promotion.

Section II describes that the vast majority of public employees already enjoy significant due process protections not afforded to private employees, including protection against employment decisions that appear to be arbitrary or lack a rational basis. California expressly recognizes the right of public employees to engage in collective bargaining, and collective bargaining agreements across the state provide for notice, appeal rights, and other protections against arbitrary or irrational personnel decisions. Several statutory schemes, including the Public Safety Officers' Procedural Bill of Rights and Firefighters' Procedural Bill of Rights, also explicitly provide for due process rights to specified public employees. Class-of-one equal protection is unnecessary to protect public employees' rights and would only serve to create additional unnecessary and unwarranted litigation.

Section III explains that application of rational basis review to all public employment decisions is not the simple and straightforward undertaking its proponents suggest. To the contrary, rational basis review would entail enormous judicial involvement in state employment decisions. As this Court noted in *Bishop v. Wood*, 426 U.S. 341, 349-350 (1976), "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." Section III describes that, moreover, due to the highly subjective nature of most employment decisions, rational basis review would lead to unpredictable and inconsistent results for public employers and employees.

Next, Section IV describes that the Ninth Circuit's refusal to extend the class-of-one theory of equal protection to the public employment context does not result in any deprivation of constitutional rights available to other litigants. To the contrary, it simply puts public and private sector employees on equal footing. Public employees continue to enjoy the right to assert class-of-one claims against the government in contexts *outside* of the employment relationship, the same as any private individual.

Finally, Section V describes that recognizing the class-of-one theory in the public sector probably would open the proverbial "floodgates" of litigation. This is demonstrated by the numerous unanswered questions regarding the application of rational basis review to public employment personnel decisions. The questions include whether the violation of any labor

statute would constitute a separate violation of equal protection, or whether such a violation would entitle the plaintiff to punitive damages under 42 U.S.C. section 1983 even if the underlying statute violated would not. Substantial additional litigation could result as the courts struggle to further define the contours of rational basis review as applied to the employment decisions.

For each of these reasons, the Court should affirm the Ninth Circuit's decision.

ARGUMENT

I. THE PRACTICAL EFFECT OF APPLYING THE CLASS-OF-ONE THEORY OF EQUAL PROTECTION TO PUBLIC EMPLOYMENT WOULD BE TO ELIMINATE AT-WILL EMPLOYMENT IN THE PUBLIC SECTOR.

The Ninth Circuit's decision, holding that the class-of-one theory of equal protection is inapplicable to personnel decisions by public employers, should be affirmed because at-will public employees are entitled to no substantially greater protection under state at-will employment laws than private employees. Stated another way, law-abiding public employers should have the right to dismiss at-will employees for any reason or no reason at all, even if arbitrary or irrational or merely perceived as such, as long as the reason is not unlawful.

California law provides an example of how at-will employment functions and how public employees, even at-will, already have significant protections against irrational employment decisions.

A. At-Will Employment in California

Under California law, employment is, by default, "at-will." California Labor Code section 2922 expressly provides that "[a]n employment, having no specified term, may be terminated at the will of either party on notice to the other." That is, employment may be ended by either party "'at any time without cause,' for any or no reason, and subject to no procedure except the statutory requirement of notice." See, *Guz v. Bechtel National, Inc.*, 24 Cal.4th 317, 335 (2000). Under California law, at-will employees may even be terminated for reasons that are arbitrary or irrational. See, e.g., *Silo v. CHW Medical Foundation,* 27 Cal.4th 1097, 1104 (2002); see also, *Carter v. Escondido Union High School Dist.*, 148 Cal.App.4th 922, 929 (2007) (at-will employment applied in the public employment context).

Of course, as discussed in the above-cited cases, there are limits to any employer's ability, whether public or private, to terminate even an at-will employee. Specifically, although employment at-will is terminable for any or no reason, or reasons that are arbitrary or irrational, an employer may not terminate an employee "for an unlawful reason or a purpose that contravenes fundamental public policy."

See, *Gantt v. Sentry Insurance*, 1 Cal.4th 1083, 1094 (1992).

There are numerous prohibited/unlawful bases for ending an at-will employment relationship. For example, an employer may not terminate an employee if the termination would violate a fundamental public policy grounded in the constitution, a statute or an administrative regulation. *Green v. Ralee Engineering Co*., 19 Cal.4th 66, 71 (1998). An employer may not unlawfully discriminate against an employee on the basis of his or her race, religious creed, color, national origin, ancestry, physical or mental disability, medical condition, marital status, sex, age, or sexual orientation. *California Government Code* § 12940. Nor may an employer terminate an employee on the basis that he or she engaged in certain delineated protected activities. See, e.g., *California Labor Code* § 132a (prohibiting taking adverse action against an employee who files a workers' compensation claim due to workplace injury); *California Labor Code* § 1102.5 (prohibiting retaliation against whistleblowers); *California Labor Code* § 6310 (prohibiting retaliation against employees who notify government authorities of unsafe working conditions); *California Government Code* § 12940, subdivision (h) (prohibiting taking adverse employment actions against employees who report or oppose unlawful discrimination or harassment).

As long as a termination is not expressly unlawful or does not run afoul of any public policy of the state, an employer is otherwise free to terminate an

at-will employee for any reason, or no reason at all. *Gantt,* 1 Cal.4th at 1094.

B. Applying The Class-of-One Theory of Equal Protection to Public Employment Opens Every Personnel Decision to Constitutional Rational Basis Scrutiny, Including the Decision to Retain or Dismiss an At-Will Employee.

Applying the class-of-one theory of equal protection to public employment would effectively eliminate at-will public employment by subjecting all public employment personnel decisions (e.g., hiring, firing, transfers, promotions, etc.) to rational basis scrutiny. However, it offends core principals of equal protection, if not the equal protection clause itself, to afford at-will public employees greater protection under California's laws governing at-will employment than at-will private sector employees.

Although the underlying case arose in the employment termination context, the class-of-one theory could potentially apply to any personnel decision. Petitioner, citing *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), observes that to make out a successful class-of-one claim, the plaintiff must establish that: (1) the government treated him or her differently from other similarly situated persons; (2) the difference in treatment was intentional; and (3) the difference in treatment was not rationally related to any legitimate government purpose. 528 U.S. at 564. This is not necessarily a very high threshold to meet.

In addition, there is nothing about this formulation that limits it to employee terminations as opposed to other types of employment actions, including demotions or discipline. See also *Engquist v. Oregon Department of Agriculture*, 478 F.3d 985, 996 (9th Cir. 2007) (declining to apply class-of-one theory to all "decisions made by public employers as to their employees").

Petitioner's assertion that class-of-one claims are difficult to prove and rational-basis review effectively limits successful class-of-one claims is unavailing. For one, the decision to dismiss or discipline or take any other personnel action against an employee generally results in differential treatment of the employee from other employees who are not subject to the personnel action, thereby satisfying the first element above. And any decision to take a personnel action affecting one employee instead of others is generally intentional, thereby satisfying the second element. Finally, personnel decisions, unlike regulatory actions, are oftentimes based on highly subjective determinations, which can easily be characterized in pleadings as "arbitrary" or "irrational." Therefore, a defendant's ability to overcome a class-of-one equal protection claim at the pleading stage is extremely limited.

As discussed above, California generally permits an employer to terminate an at-will employment relationship for no reason, or for an arbitrary or irrational reason, as long as it does not do so for an unlawful reason. *Gantt,* 1 Cal.4th at 1094. This is the law of the state of California as it pertains to at-will

employment and, thus, should apply to *all* at-will employees, whether in the public or private sector. U.S. Constitution, Amendment 14 § 1.

If class-of-one equal protection is extended to public employment, however, any time a public employer dismisses an employee (or makes any other personnel decisions such as discipline, hiring, promotion, transfer, etc.) the employer runs the risk of being dragged into court to defend against an equal protection claim. Not only is the public employer subject to suit, but the employee might be able to obtain punitive damages against individual defendants. *Smith v. Wade*, 461 U.S. 30, 35 (1983). Thus, as a practical matter, application of the class-of-one theory of equal protection to the public employment context effectively ends at-will public employment, while providing yet another theory of relief to the bundle of protections already available to public employees. For this reason, the Court should affirm the Ninth Circuit's decision.

II. THE VAST MAJORITY OF PUBLIC EMPLOYEES IN CALIFORNIA MAY ALREADY AVAIL THEMSELVES OF SIGNIFICANT CONSTITUTIONAL AND OTHER PROTECTIONS AGAINST EMPLOYMENT DECISIONS LACKING A RATIONAL BASIS.

California law already provides a myriad of due process protections for the vast majority of public employees against employment decisions which lack a rational basis. Accordingly, there is no need for

class-of-one equal protection in the public employment context and the Court should affirm the Ninth Circuit's decision.

Although the rules differ from agency to agency, and some agencies admittedly only provide for at-will employment, the civil service rules of most public employers in California provide for "good cause" or "for cause" dismissals once an employee has completed his or her probationary employment period. Numerous counties and municipalities have created civil service commissions which provide a forum to independently review employee discipline and terminations. (E.g., the Los Angeles County Civil Service Commission, Los Angeles City Civil Service Commission, City of Long Beach Civil Service Commission, City of Napa Civil Service Commission, County of Sonoma Civil Service Commission, City and County of San Francisco Civil Service Commission, City of Coronado Civil Service Commission, etc.)

Furthermore, California law expressly recognizes the right of public employees to engage in collective bargaining. *California Government Code* §§ 3500, *et seq*.[3] These laws (or statutes) have resulted in

[3] The Meyers-Milias-Brown Act, Government Code §§ 3500, *et seq*., applies to employees of local governments, including cities, counties and special districts. Similar California provisions apply to other categories of public employees. See, e.g., the Dills Act or State Employer-Employee Relations Act, covering most employees of state agencies (*California Government Code* §§ 3512, *et seq*.), the Educational Employment Relations Act, covering employees of elementary, secondary and unified school

(Continued on following page)

countless memoranda of understanding and collective bargaining agreements between public employers within the State of California and the unions that represent their employees. Most of these agreements provide for notice, appeal rights and other protections against arbitrary or irrational personnel decisions.

In the specific context of peace officers, *California Government Code* §§ 3304, *et seq*., the "Public Safety Officers' Procedural Bill of Rights," provides notice and administrative appeal rights for officers facing dismissal or other forms of discipline. Similarly, on January 1, 2008, *California Government Code* §§ 3250, *et seq*., the Firefighters' Procedural Bill of Rights, became law. As with the Public Safety Officers' Procedural Bill of Rights, the Firefighters' Procedural Bill of Rights also provides notice and administrative appeal rights for firefighters prior to dismissal.

Also, under existing California law, public employees having these "for cause" rights are entitled to state law due process procedures before significant disciplinary action is implemented (i.e. the "*Skelly* Pre-Action Procedure"), as well as post-disciplinary appeal rights before a non-biased hearing officer or

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districts, community college districts and county offices of education (*California Government Code* §§ 3540, *et seq*.), the Higher Education Employer-Employee Relations Act, covering employees of the University of California and California State University System (*California Government Code* §§ 3560, *et seq*.).

body, where the employer bears the burden of proof. See, *Duncan v. Department of Personnel Admin*., 77 Cal.App.4th 1166 (2000). Furthermore, if an aggrieved employee is still unhappy with the outcome following the appeal, *California Code of Civil Procedure* § 1094.5 provides for judicial review of the administrative decision in most circumstances. These additional due process safeguards are protections similar to, but arguably more effective than, rational-basis review as a defense against arbitrary and irrational employment decisions. These significant due process protections are not available to the public at large, but are instead reserved for public employees. Thus, the notion that public employees will be left with no means to protect against arbitrary employment decisions, absent extension of class-of-one equal protection to the public employment sphere, is incorrect. For this reason, the Court should affirm the Ninth Circuit's decision.

III. ATTEMPTS TO DEMONSTRATE THE PRACTICAL FEASIBILITY OF RATIONAL BASIS REVIEW OF EMPLOYMENT DECISIONS, IN FACT, CONFIRM THAT SUCH REVIEW WILL ENTAIL ENORMOUS JUDICIAL INVOLVEMENT IN STATE EMPLOYMENT DECISIONS.

Application of rational basis review to public employment personnel decisions will not be the easy undertaking its proponents suggest. Rather, rational basis review will entail enormous judicial involvement in

state and/or local agency or public employer employment decisions.

In attempting to formulate a workable framework for rational basis review of employment decisions, Judge Reinhardt's dissent discusses the case *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936 (9th Cir. 2004), which found for the plaintiff in a regulatory case under a class-of-one theory because the defendant harbored actual hostility and antagonism for the plaintiff. In discussing that case, Judge Reinhardt suggests that an employer might be able to act on his dislike of an employee if that dislike "has its roots in the employee's mediocre performance or lack of initiative, or in some other response to the individual not based on malice or irrationality, even if the employee has met the minimum requirements of the job." *Engquist,* 478 F.3d at 1013, fn.1. Given the subjective nature of even the most run-of-the-mill personnel decisions, the determination as to whether the "dislike" of an employee is "rational" is a very difficult one to make and, as such, will undoubtedly lead to unpredictable and inconsistent results. Moreover, availability of summary judgment to resolve such claims, which are likely to focus on factual disputes over intent and cause, may be sharply reduced.

Again citing *Squaw Valley*, Judge Reinhardt further suggests that a plaintiff in a class-of-one employment case could demonstrate the lack of a rational basis by showing that an asserted rational basis was merely pretext for different treatment.

Engquist, 478 F.3d at 1013-1014. Permitting a pretext inference in a class-of-one equal protection claim will lead to an anomalous result, however. By permitting a pretext inference, class-of-one claims become no harder, and in fact possibly easier, to prove than other types of employment claims. In an ordinary class-based discrimination claim, the plaintiff must demonstrate some class-based animus in order to prevail. See, e.g., *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 610 (1993). Under a class-of-one theory, however, the plaintiff need not allege discrimination based on a statutorily protected class before using pretext to show prohibited conduct. Rather, a jury could apparently legitimately find no rational basis – and therefore liability – in any termination case, simply because the jury disbelieved the employer's proffered reason.

IV. THE NINTH CIRCUIT'S DECISION PLACES PUBLIC EMPLOYEES IN THE SAME POSITION AS PRIVATE EMPLOYEES AND PRIVATE CITIZENS WHO BRING CLASS-OF-ONE CLAIMS AGAINST THE GOVERNMENT IN NON-EMPLOYMENT CONTEXTS.

Petitioner and numerous *amici curiae* in support of petitioner, incorrectly suggest that the Ninth Circuit's decision itself violates the Constitution's mandate of equal protection of the laws by depriving citizens of fundamental rights which are available to other litigants. *Only* a public employee may assert an

equal protection claim against his or her *government employer*, in its capacity as *employer*. Private sector employees may not bring Fourteenth Amendment equal protection claims against their private sector employers because the Fourteenth Amendment protects only against state action. See, e.g., *United States v. Guest*, 383 U.S. 745, 755 (1966).

The Ninth Circuit's decision leaves public employees in no different a position than private employees. Although, under the Ninth Circuit's decision, public employees may not assert a *class-of-one* equal protection claim against their government employers in the capacity as employer, public employees retain their right to bring suspect classification equal protection claims against their employers. Moreover, public employees continue to enjoy the right to assert class-of-one claims against the government in contexts *outside* of the employment relationship, the same as any private individual (e.g., with respect to zoning, licensing, or other regulatory matters). There is simply no deprivation of any rights.

V. EQUAL PROTECTION RATIONAL BASIS SCRUTINY OF PUBLIC EMPLOYMENT DECISIONS THREATENS TO OPEN UP THE FLOODGATES OF LITIGATION IF ONLY DUE TO THE UNANSWERED QUESTIONS REGARDING ITS SCOPE.

A number of important questions are not answered by the proponents of the class-of-one theory: (1) Does an employer's adverse action in violation of

anti-discrimination laws or the Fair Labor Standards Act ("FLSA"), for example, also *a fortiori* lack a "rational basis" and create additional 42 U.S.C. § 1983 liability? (2) Would this type of theory open up personal liability under Section 1983 for managers otherwise not subject to it under statutes like the FLSA or labor relations laws governing union-employer bargaining? (3) Does the availability of punitive damages against individuals under Section 1983 mean that those who prove violation of labor laws can also prove a lack of rational basis and thus obtain punitive damages against government employees, even when statutes like the FLSA and labor relations laws do not allow for punitive damages? These are among the numerous questions that district courts, appellate courts, and even this Court will be required to address in the future should the class-of-one theory of equal protection be extended to employment decisions. These questions demonstrate the potential for widespread expansion of "rational basis" review of public employment decisions, an expansion which the Ninth Circuit's decision in this case confirms is unwarranted. For this reason, the Court should affirm the Ninth Circuit's decision.

CONCLUSION

For the foregoing reasons and those set forth in the brief for Respondent Oregon Department of Agriculture, as well as other *amici curiae* in support of Respondent, *amici curiae* League of California

Cities and California State Association of Counties urge the Court to affirm the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

March 26, 2008

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