

No. 07-474

IN THE
Supreme Court of the United States

ANUP ENGQUIST,
Petitioner,

v.

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

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

**BRIEF OF THE NATIONAL CONFERENCE OF
STATE LEGISLATURES, INTERNATIONAL
CITY/COUNTY MANAGEMENT ASSOCIATION,
COUNCIL OF STATE GOVERNMENTS,
NATIONAL LEAGUE OF CITIES,
NATIONAL ASSOCIATION OF COUNTIES,
INTERNATIONAL MUNICIPAL LAWYERS
ASSOCIATION, U.S. CONFERENCE OF
MAYORS, AND GOVERNMENT FINANCE
OFFICERS ASSOCIATION, JOINED BY THE
INTERNATIONAL PUBLIC MANAGEMENT
ASSOCIATION FOR HUMAN RESOURCES, AS
AMICI CURIAE SUPPORTING RESPONDENTS**

RICHARD RUDA *
STATE AND LOCAL LEGAL
CENTER
444 North Capitol Street, N.W.
Washington, D.C. 20001
(202) 434-4850

* Counsel of Record for the
Amici Curiae

QUESTION PRESENTED

Whether the equal protection analysis of *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), applies in public employment.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.¹ *Amici* have a compelling interest in fair and effective management of public-sector labor relations and in protecting “the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). *Amici* accordingly submit this brief to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

1. This Court has long recognized that public employees do not enjoy the full range of constitutional protections afforded to them as ordinary citizens due to “the practical realities involved in the administration of a government office.” *Connick v. Myers*, 461 U.S. 138, 154 (1983). This is particularly true where, as here, the asserted interest is at the periphery of the core concerns of the Constitution.

The central purpose of the Equal Protection Clause is “the abolition of all caste-based and invidious class-based legislation.” *Plyler v. Doe*, 457 U.S. 202, 213 (1982). The cases petitioner cites to support her assertion that the Clause has historically been understood to protect “persons, not just classes” involved legislative classes, not discrimination against

¹ The parties have consented to the filing of this *amicus* brief and their consent letters have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* and their members, has made a monetary contribution to the preparation or submission of this brief.

individuals as such. These cases demonstrate that the primary harm against which the Clause is directed is discrimination by virtue of group membership.

Because petitioner's asserted Equal Protection interest is removed from the historic purpose and scope of the Clause, expanding the class-of-one doctrine to encompass a vast array of workplace grievances unrelated to group discrimination would risk trivializing the Constitution and defy this Court's teaching that the Constitution is not a font of tort law. The Court's precedents simply do not support the notion, central to petitioner's theory, that personal dislike of an employee by a supervisor is as repugnant to the Equal Protection Clause as discrimination based on group characteristics such as race, gender, or sexual orientation.

2. State and local governments, which are accountable to the citizenry, have long successfully managed public-sector labor relations through a variety of mechanisms, including collective bargaining, civil service regulations and adjudicatory tribunals, and legal remedies created by statute or common law. This preexisting employment-relations landscape would be severely disrupted were this Court to adopt petitioner's Equal Protection theory. Class-of-one claims would disrupt the workplace and impede governance as longstanding state employment law and remedies would be displaced by federal constitutional law applied in federal courts.

Such disruption is unwise and unwarranted for several reasons. First, in many instances, including this case, the operative collective bargaining agreement will protect members of the bargaining unit from termination other than "for cause." *See* J.A. 38

(dist. ct. op.). Labor agreements also contain detailed frameworks for how layoffs are to be implemented and create bumping rights for employees such as petitioner. *See id.* at 38–39 (citing petitioner’s Collective Bargaining Agreement, arts. 21, 22, 70).

Rights created by collective bargaining agreements, such as the right to be terminated only for cause, are, in turn, subject to administration and adjudication by state labor relations boards, such as Oregon’s Employment Relations Board. According to petitioner’s *amici*, “[t]he overwhelming majority of states have similarly adopted merit systems for large portions of their workforces. Indeed, at least twelve states mandate merit systems in their constitutions. . . . [O]ne of the ‘central principles’ of the merit system is ‘absence of arbitrary removals.’” Br. *Am. Cur. NEA, AFL-CIO & AAUP* 17 & n.4 (collecting state constitutional citations).

In addition to such collectively bargained and state law rights, every State recognizes a variety of tort claims, including intentional interference with contractual relations and wrongful discharge, which protect the same right as petitioner’s class-of-one claim: the right to be free from arbitrary treatment in the workplace. Public employees can thus assert, as petitioner successfully did, a state-law contract-interference claim against supervisors who act outside the scope their employment duties. *See Haddle v. Garrison*, 525 U.S. 121, 126–27 (1998). Moreover, public employees can file state-law wrongful discharge actions if they are terminated in contravention of public policy.

Finally, petitioner’s Equal Protection theory would have severely disruptive consequences if

adopted by this Court. Public employees would potentially have a federal constitutional claim arising from any adverse employment decision that the employee believes was animus-based or otherwise arbitrary, but that the public employer believes was for cause and thus had a rational basis. Petitioner and her *amici* acknowledge that few if any such Equal Protection claims can be resolved short of trial. *See, e.g.*, Pet. Br. 42; Br. *Am. Cur. NEA, AFL-CIO & AAUP* 25. To make matters worse, petitioner admits that almost none of these rational-basis class-of-one claims are meritorious: “In practice, it has been difficult for plaintiffs to show that the government has failed to meet [the rational basis] standard, particularly in the context of public employment.” Pet. Br. 41; *see also id.* at 35 (“[O]nly a handful of [class-of-one] claims have succeeded.”).

Petitioner’s Equal Protection theory thus leads to the worst of all possible worlds: the creation of a vast universe of potential public-employee plaintiffs who can assert fact-intensive constitutional claims that will almost invariably result in trials that they will lose, at great monetary and emotional cost to themselves, to the governmental defendants, and to the citizenry, which depends upon the effective delivery of government services. There is no reason to believe that this is what the drafters of the Fourteenth Amendment intended.

ARGUMENT**I. THE EQUAL PROTECTION ANALYSIS OF *OLECH* SHOULD NOT APPLY IN PUBLIC EMPLOYMENT.****A. A Class-of-One Claim Is Outside the Traditional Concerns of the Equal Protection Clause.**

As respondents demonstrate (Br. 30–37), this Court has long recognized that public employees do not enjoy the full range of constitutional protections afforded to them as ordinary citizens. *See, e.g., Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 1958 (2006) (“When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom.”). Accordingly, while the Court has ensured that public employees are not deprived of their rights under the Constitution, it has readily curtailed federal judicial review where an employee’s interest interferes with “the practical realities involved in the administration of a government office”—particularly where the asserted interest lies outside the core concerns of traditional constitutional protection. *Connick v. Myers*, 461 U.S. 138, 147, 154 (1983).

In *Connick*, for example, this Court held that the First Amendment was not violated where an assistant district attorney was fired for circulating a questionnaire regarding office policies. *Id.* at 141. Recognizing that “the First Amendment’s primary aim is the full protection of speech upon issues of public concern,” the Court concluded that the plaintiff’s “limited First Amendment interest” lay at the periphery of this core function: “[T]he questionnaire touched upon matters of public concern only in a

most limited sense; her survey, in our view, is most accurately characterized as an employee grievance concerning internal office policy.” *Id.* at 154.

Similarly, petitioner’s asserted constitutional interest is removed from the traditional purview of the Fourteenth Amendment’s Equal Protection Clause.² This Court has recognized that the central purpose of the Equal Protection Clause is “the abolition of all *caste-based* and invidious *class-based* legislation.”³ *Plyler v. Doe*, 457 U.S. 202, 213 (1982) (emphasis added). Indeed, this Court’s Equal Protection jurisprudence has been almost entirely concerned with discriminatory class-based legislation and enforce-

² Though *Olech* did not expound on the precise contours of a class of one, *amici* submit that a class-of-one claim involves discrimination against an individual solely because of personal animosity, and is not tied to the exercise of a fundamental right or membership in any class. *Accord* Br. Am. Cur. Lambda Legal Defense & Educ. Fund, ACLU, *et al.* 18 (“In a true ‘class of one’ claim, the plaintiff alleges that he or she has been discriminated against as an individual, not because of any group characteristic shared with others.”); *Jennings v. City of Stillwater*, 383 F.3d 1199, 1210 (10th Cir. 2004). As such, this case does not implicate rational basis review of workplace discrimination against classes, such as classes based on sexual orientation, which are not protected by Title VII and other anti-discrimination legislation. There is consequently no basis for the concern of petitioner’s *amici* that declining to recognize petitioner’s class-of-one claim will lead to the erosion of judicial review for class-based discrimination.

³ The particular evil that spurred the adoption of the Fourteenth Amendment was “discrimination because of race or color.” *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880); *see also* *Washington v. Davis*, 426 U.S. 226, 239 (1976); *Palmer v. Thompson*, 403 U.S. 217, 220 (1971); *Slaughter-House Cases*, 16 U.S. (Wall.) 36, 71–72 (1873).

ment—that is, government action adverse to more than one person.

To be sure, the Equal Protection Clause establishes a general right to be treated the same as all persons similarly situated.⁴ *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Yet every case cited by petitioner in support of the proposition that the Equal Protection Clause has historically been understood to protect “persons, not just classes” involved a legislative class, not discrimination against an individual as such. *See* Pet. Br. 14–17. This fact reflects the political reality that legislation is very rarely directed against an individual by virtue of personal identity or some idiosyncratic personal characteristic. *Cf. McFarland v. American Sugar Refining Co.*, 241 U.S. 79 (1916). Rather, as this Court’s cases demonstrate, the primary harm against which the Equal Protection Clause is directed is discrimination by virtue of group membership. *See, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Romer v. Evans*, 517 U.S. 620 (1996); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Plyler*, 457 U.S. at 202; *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *see generally United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

The danger that the Constitution will be offended when a single person is discriminated against without regard to any shared group characteristic is far more limited. It arises from the paradigmatic situa-

⁴ At this level of generality, this right is no different from the right to be free from unreasonable search and seizure or the right to free speech, in that it may also be limited in the workplace. *See O’Connor v. Ortega*, 480 U.S. 709 (1987); *Connick*, 461 U.S. at 138.

tion identified by this Court in *Olech*, in which “a public official, with no conceivable basis for his action other than spite or some other improper motive . . . comes down hard on a hapless private citizen.” *Lauth v. McCollum*, 424 F.3d 631, 633 (7th Cir. 2005); *cf. Allegheny Pittsburgh Coal v. County Comm’n*, 488 U.S. 336, 345–46 (1989). But as Judge Posner explains:

As one moves away from the paradigmatic case, the sense of a wrong of constitutional dignity, and of a need for a federal remedy, attenuates. And when as in this case the unequal treatment arises out of the employment relation, the case for federal judicial intervention in the name of equal protection is especially thin.

Lauth, 424 F.3d at 633. Accordingly, a consideration of the interests at stake in this case leads to the conclusion that petitioner’s Equal Protection interest is too attenuated from the purposes of the Fourteenth Amendment to state a constitutional claim in the workplace.

Because petitioner’s asserted constitutional interest is removed from the historic purpose and scope of the Equal Protection Clause, expanding the class-of-one doctrine to encompass workplace grievances unrelated to group discrimination would risk trivializing the principles that have historically animated the Clause.⁵ Elevating the expression of personal

⁵ See *Daniels v. Williams*, 474 U.S. 327, 332 (1986) (“To hold that injury caused by [negligence] is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law.”); *Connick*, 461 U.S. at 154 (“[I]t would indeed be a Pyrrhic victory for the great principles of free expression if the [First] Amendment’s safe-

animosity in the workplace—conduct that has been traditionally policed by tort remedies—to constitutional status would defy this Court’s admonition that the Constitution is not to be made a font of tort law. *See Paul v. Davis*, 424 U.S. 693, 701 (1976); *see also* discussion pp. 18–20 *infra*. Moreover, under petitioner’s theory, any public employee who could not provide evidence that a group-based trait was the source of discriminatory animus could nonetheless plead and prove a class-of-one claim by a showing of personal dislike, or, because such animus is not required by *Olech*, simply by challenging an employment decision as irrational. But this Court’s cases do not support the notion that *personal dislike* is as repugnant to the Equal Protection Clause as discrimination based on group characteristics such as race, gender, or sexual orientation.

Conversely, declining to recognize the class-of-one claim in the workplace does not negate a public employee’s Equal Protection rights. Contrary to petitioner’s assertion that the Ninth Circuit “set the Constitution aside altogether,” Pet. Br. 24, 34, the core protections afforded by the Equal Protection Clause remain intact for every public employee.⁶ Federal employees may challenge workplace discrimination on the basis of protected class through Title VII’s comprehensive remedial scheme. *See*

guarding of a public employee’s right, as a citizen . . . were confused with the attempt to constitutionalize the employee grievance . . .”).

⁶ Petitioner is thus mistaken in stating that the Ninth Circuit held that the Equal Protection Clause applies to “some public employees, some of the time.” Pet. Br. 11. The unavailability of the class-of-one claim does not alter the protections of the Clause for *all* employees who assert claims based on class membership.

Brown v. Gen. Servs. Admin., 425 U.S. 820, 835 (1976). In addition, state and local government employees may assert their Equal Protection rights under 42 U.S.C. § 1981, 42 U.S.C. § 1983, and other applicable federal statutes.⁷ The unavailability of a class-of-one claim does not mean that a public employee is without federal Equal Protection rights; it means only that an employee cannot assert the limited constitutional interest recognized in *Olech*.

B. In the Workplace, Equal Protection Rights Should Be Limited To Redressing Group-Based Discrimination.

In other contexts, this Court has signaled its reluctance to extend Equal Protection rights so far that they interfere with the essential operations of state and local governments. For example, in traditional law enforcement, “the Government retains ‘broad discretion’ as to whom to prosecute.” *Wayte v. United States*, 470 U.S. 598, 607 (1985); *see also United States v. Armstrong*, 517 U.S. 456 (1996); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“[S]o long as the prosecutor has probable cause to

⁷ Legislation extends to vulnerable groups that are not suspect classes under the Equal Protection Clause. *See, e.g.*, Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (prohibiting discrimination because of disability); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (prohibiting discrimination because of age); National Labor Relations Act, 29 U.S.C. § 158 (prohibiting discrimination against employees for exercising rights under the Act); *see also* Or. Rev. Stat. § 659A.003 (2007) (prohibiting discrimination against employees because of, *inter alia*, sexual orientation and marital status).

Before the district court, petitioner asserted claims under Title VII and § 1981 alleging discrimination on the basis of sex, ethnicity, and race. Pet. App. 17. The jury rejected these claims. *Id.* at 18.

believe that the accused committed an offense defined by statute, the decision whether or not to prosecute . . . generally rests entirely in his discretion.”).

In *Wayte*, the Court explained that “[t]his broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review” because it entails determinations that are “not readily susceptible to the kind of analysis the courts are competent to undertake.” *Wayte*, 470 U.S. at 607. Though the Court noted that prosecutorial discretion is subject to the Fourteenth Amendment and other constitutional constraints, it understood a showing of “discriminatory purpose” to imply that the prosecutor “selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an *identifiable group*.” *Id.* at 610 (quoting *Massachusetts v. Feeney*, 442 U.S. 256 (1979) (emphasis added)).

The need to limit Equal Protection rights by reference to identifiable groups is likewise demonstrated by this Court’s interpretation of 42 U.S.C. § 1985(3), which prohibits conspiracies “for the purpose of depriving . . . *any person* or class of persons of the equal protection of the laws.” (emphasis added). Notwithstanding the textual grant of a personal right, the Court held that discriminatory intent “means that there must be some racial, or perhaps *otherwise class-based*, invidiously discriminatory animus behind the conspirators’ action.” *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971) (emphasis added). By limiting the reach of the statute to class-based discrimination, the Court explained that it was avoiding the “constitutional shoals that would lie in

the path of interpreting § 1985(3) as a general federal tort law.” *Id.*

Both *Wayte* and *Griffin* reflect this Court’s unwillingness to define discriminatory intent by the discrimination itself. *See United Bhd. of Carpenters & Joiners of America v. Scott*, 463 U.S. 825, 850 (1983) (for purposes of § 1985(3), “the class must exist independently of the defendants’ actions; that is, it cannot be defined simply as the group of victims of the tortious action”); *cf. Futernick v. Sumpter Township*, 78 F.3d 1051, 1059 (6th Cir. 1996) (Boggs, J.) (“From a constitutional perspective, personal animosity not related to group identity or the exercise of protected rights is as *random* as the roll of a dice.”).

A similar scope of review is appropriate in the context of public employment, where the limited right of an individual to be free from arbitrary discrimination because of personal identity must give way by necessity to the government’s interest in managing its internal affairs. This conclusion follows inexorably from the “common-sense realization that government offices could not function if every employment decision became a constitutional matter,” *Connick*, 461 U.S. at 143, and the recognition that it is not the place of the federal judiciary to review every employment decision as a constitutional matter. *Bishop v. Wood*, 426 U.S. 341, 349–50 (1976) (declining to recognize a claim under the Due Process Clause that would result in the “review [of] the multitude of personnel decisions that are made daily by public agencies”).

Recently, this Court reaffirmed these precepts in *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951 (2006). In holding that the First Amendment is not violated when public employees are disciplined for

speech made pursuant to their official duties, the Court recognized that “[t]o hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers,” and such “displacement of managerial discretion by judicial supervision finds no support in our precedents.” *Id.* at 1961.

If petitioner’s constitutional theory is adopted by the Court, the extent of federal-court intrusion into government operations would go well beyond *Garcetti*, because a class-of-one claim could theoretically arise out of any adverse employment decision—for example, involuntary transfers, reassignments, and promotion and pay decisions—not just disciplinary action related to employee speech. And like prosecutorial decisions, personnel decisions are particularly ill-suited for judicial review. As petitioner recognizes, there is a “wide range of legitimate bases for discriminatory treatment that are unique to the employment relationship.” Pet. Br. 49. These “legitimate bases” include employers’ subjective evaluations of employees’ personalities and interpersonal abilities. *See id.*

A class-of-one claim would thus interject the federal courts into workplace disputes that require them to distinguish legitimate from illegitimate bases for personal dislike, and further, if the dislike is irrational, to discern whether dislike was the motivating factor in an otherwise legitimate employment action. *See* Resp. Br. 38–39 (“[T]here 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.”) (citation

omitted). Though traditional rational basis review purports to be minimally searching, this open-ended inspection into subjective motivation goes beyond the mixed-motive analysis that courts use in cases involving race and gender. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *cf. Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

In public employment, “[w]e 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 judicial review for every such error.” *Bishop*, 426 U.S. at 350. Thus, as it has done for other constitutional rights in the workplace, this Court should foreclose judicial review for an interest that does not implicate the central purposes of the Equal Protection Clause.

II. PETITIONER’S CLASS-OF-ONE THEORY WOULD HAVE DISRUPTIVE CONSEQUENCES THAT ARE UNNECESSARY BECAUSE OF EXISTING STATE REMEDIES.

A. State Employee Grievances Should Be Resolved Through State-Created Mechanisms, Not as Federal Constitutional Claims.

The Fourteenth Amendment was never intended to be “a font of tort law to be superimposed upon whatever systems may already be administered by the States.” *Paul v. Davis*, 424 U.S. 693, 701 (1976). Yet extending *Olech* into the realm of public sector labor relations threatens to turn the Equal Protection Clause into a font of employment law for every

adverse employment decision where an employee can allege that differential treatment lacks a rational basis.⁸

Since long before this Court first recognized the class-of-one claim, state and local governments—which, unlike the federal courts, are accountable to the citizenry—have successfully managed public sector labor relations through a variety of mechanisms. These include collective bargaining, civil service regulations and adjudicatory tribunals, and legal remedies created by statute or common law.

This employment-relations landscape, which has evolved over many decades, would be severely disrupted if this Court were to adopt petitioner’s Equal Protection class-of-one theory. Not only would the threat of federal review interfere with existing state and local government labor relations, disrupt management, and impede governance, but state employment law would be displaced by federal constitutional law.

Under petitioner’s theory, employers would be prohibited from taking any adverse employment action unless they were prepared to establish the reasons for their action at trial. Moreover,

imposing a norm of equal treatment changes employment at will, or . . . probationary em-

⁸ This Court has recognized the role of the States in regulating public employment in circumstances that are not the proper subject of federal court review. *See, e.g., Garcetti*, 547 S. Ct. at 1962 (citing the “powerful network of legislative enactments—such as whistle-blower protection laws and labor codes” in rejecting a claim of First Amendment retaliation); *Collins v. City of Harker Heights*, 503 U.S. 115, 128 (1992) (observing that “[p]etitioner’s claim is analogous to a fairly typical state-law tort claim” in rejecting a due process violation).

ployment, into something very close to tenured employment because it is so easy to invent a case of unequal treatment by a supervisor. The principal effect of “class of one” suits by public employees is . . . to undermine discipline in public agencies.

Lauth, 424 F.3d at 633 (Posner, J).⁹

The disruption that would result is, as the Ninth Circuit recognized, unwise and unwarranted for several reasons. First, “[t]he overwhelming majority of state have . . . adopted comprehensive merit systems for large portions of their workforces. . . . Indeed, at least twelve states mandate merit systems in their constitutions.” Br. *Am. Cur. NEA, AFL-CIO & AAUP* 17 (collecting state constitutional provisions). As petitioner’s *amici* explain, “one of the ‘central principles’ of the merit system is ‘absence of arbitrary removals.’” *Id.* The operative collective bargaining agreement in this case likewise protected petitioner from loss of her job other than “for cause.” *See* J.A. 38 (“The Collective Bargaining Agreement appears to provide that plaintiff could be terminated only for cause.”); *id.* (“Plaintiff received notice of her

⁹ A similar concern was expressed in *Bush v. Lucas*, 462 U.S. 367, 389 (1983), in which the Court declined to establish a damages remedy for a violation of the First Amendment: “if management personnel face the added risk of personal liability . . . they would be deterred from imposing discipline in future cases.” Though the question in *Lucas* was whether the Court could issue a remedy in the absence of federal legislation—not whether a constitutional right had been violated—the Court observed that federal employees are “protected by an elaborate, comprehensive scheme . . . forbidding arbitrary action by supervisors” that “appl[ies] to a multitude of personnel decisions that are made daily by federal agencies.” *Id.* at 385.

termination and the stated reasons . . . were due to economic downsizing.”).

The agreement also contained a detailed framework (Article 70), for how layoffs were to be carried out, and numerous protections and bumping rights for employees subject to layoff. As the district court explained,

The Collective Bargaining Agreement outlines the process due in the case of a layoff, and the process for filing grievances and seeking arbitration. . . . The agreement provides that an employee shall be notified of her contractual bumping rights and options and notify the employer within five calendar days of the option she chooses.

Id. at 38–39 (citing Collective Bargaining Agreement, arts. 21, 22, 70). Petitioner “declined to move to a position in a lower job classification,” Pet. Br. 6, and “chose to bump other employees within her classification.” J.A. 39. However, once this attempt failed, instead of challenging her dismissal or her inability to bump to a new position under the agreement, petitioner filed this lawsuit in federal court.

Had petitioner’s union challenged her dismissal under the agreement, her claim would have been adjudicated by a state system specially designed to mediate workplace disputes.¹⁰ Oregon’s Employment

¹⁰ Similar employment tribunals exist in other state and local jurisdictions. *See, e.g.*, Fla. Stat. § 447.201 (2007) (Florida Public Employment Relations Commission); Haw. Rev. Stat. §§ 89-5, 377 (2007) (Hawaii Labor Relations Board); 5 Ill. Comp. Stat. 315/5 (2007) (Illinois Labor Relations Board); Mich. Comp. Laws § 423.3 (2007) (Michigan Employment Relations Commission); Mont. Code Ann. § 39-31-101 (2007) (Montana Labor Standards Bureau); N.Y. Civ. Serv. Law § 200 (2007) (New

Relations Board is a quasi-judicial body which administers collective bargaining agreements for public employees. *See* Or. Rev. Stat. § 243.650 (Public Employee Collective Bargaining Act); Or. Rev. Stat. § 240.005 (State Personnel Relations Law). The Board is designed to “promote stability in the workplace and to reduce workplace disputes and the accompanying costs and disruption of services to the public.” Mission Statement, Employment Relations Board, <http://www.oregon.gov/ERB/MissionStmt.shtml> (last visited Mar. 25, 2008). In particular, “[r]esolution of workplace disputes insures the public that it will continue to receive public services without impairment or interruption; . . . and it is faster, more efficient, and less expensive than resolving these disputes through court proceedings.” *Id.* Board orders are subject to judicial review. *See* Or. Rev. Stat. §§ 240.563, 183.480.

Finally, because the class-of-one claim posited by petitioner would encompass all workplace grievances, however minor, it sweeps much too broadly. By contrast, every State recognizes a variety of carefully circumscribed tort claims, including intentional interference with contractual relations and wrongful discharge, which protect the same right as a class-of-one claim: that is, the right to be free from arbitrary treatment in the workplace.

York Public Employment Relations Board); Cal. Gov’t Code §§ 3540, 3541.5 (2006) (California Public Employment Relations Board); Philadelphia, Pa., Code § 3-804 (2007); Cincinnati, Oh., Mun. Code art. 5 § 1 (2001) (Cincinnati Civil Service Commission); San Francisco, Cal., Ordinances § 16.203 (1994) (Employee Relations Division). *See also Lauth*, 424 F.3d at 632 (“Illinois labor law . . . governs [municipal] labor relations.”) (citing Illinois Public Labor Relations Act, 5 Ill. Comp. Stat. 315/1-27).

Thus, both at-will and tenured employees can assert a contract-interference claim, as petitioner successfully did, against supervisors who act outside the scope of their employment duties. *See Haddle v. Garrison*, 525 U.S. 121, 126–27 (1998) (noting that the harm of third-party interference applies to at-will employment and “has long been a compensable injury under tort law”); J.A. 45–46 (describing Oregon law). Moreover, an employee can assert a claim for wrongful discharge if he or she is discharged in contravention of public policy.¹¹

This Court has repeatedly instructed that the Fourteenth Amendment “does not purport to supplant traditional tort law” and should not “be interpreted to impose federal duties that are analogous” *Collins*, 503 U.S. at 128. Yet the duty that a class-of-one claim would impose on employers overlaps with duties that are already imposed and policed through state-created mechanisms, including but not limited to tort law.¹² In *Davis*, for example,

¹¹ *See, e.g., Nees v. Hocks*, 536 P.2d 512 (Or. 1975) (employee discharged for serving on a jury); *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985) (employee discharged for refusing to participate in an employer’s illegal practices); *Lucas v. Brown & Root, Inc.*, 736 F.2d 1202 (8th Cir. 1984) (employee discharged for rejecting the sexual advances of supervisors); *Wagenseller v. Scottsdale Mem’l Hosp.*, 710 P.2d 1025 (Ariz. 1985) (employee discharged for refusing to join games involving indecent exposure).

Some States also allow employees to claim wrongful discharge for terminations in bad faith or without just cause. *See, e.g., Stark v. Circle K Corp.*, 751 P.2d 162 (Mont. 1988). Oregon does not recognize this claim. *See Sheets v. Knight*, 779 P.2d 1000, 1007–08 (Or. 1989).

¹² The escalation of analogous state tort claims is instructive. *See* James N. Dertouzos & Lynn A. Karoly, RAND Institute for

this Court noted that “if the same allegations had been made about respondent by a private individual, he would have nothing more than a claim of defamation under state law.” 424 U.S. at 698. Similarly, if the same allegations had been made against a private employer in this case, petitioner would have only what she in fact won: a classic claim of contractual interference. This Court should reject petitioner’s invitation to go further and constitutionalize not only tort claims but run-of-the-mill employee grievances.

B. Adoption of Petitioner’s Equal Protection Theory Would Have Disruptive Consequences.

Notwithstanding petitioner’s argument to the contrary, Pet. Br. 34–56, her Equal Protection theory would have severely disruptive consequences if adopted by this Court and applied in public employ-

Civil Justice, Labor-Market Responses to Employer Liability 35 (1992), *available at* <http://www.rand.org/pubs/reports/2007/R3989.pdf> (number of wrongful-termination cases skyrocketed following recognition of the doctrine). Likewise, once the tort of intentional infliction of emotional distress was recognized in the workplace, “the number of cases in which plaintiffs alleged the tort either as an adjunct to other wrongful discharge theories, or as an independent lawsuit, multiplied exponentially.” Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment At Will: The Case Against “Tortification” of Labor and Employment Law*, 74 B.U. L. Rev. 387, 404 (1994).

Plaintiffs routinely seek to bundle state tort claims and employment discrimination claims in the same suit, as petitioner did here. *See* J.A. 9–11 (pleading violations of Title VII, Equal Protection, § 1981, Due Process, and intentional interference with contract). *See also* James N. Dertouzos, Elaine Holland & Patricia Ebener, RAND Institute for Civil Justice, *The Legal & Economic Consequences of Wrongful Termination* 11 (1988), *available at* <http://www.rand.org/pubs/reports/R3602.pdf>.

ment litigation throughout the nation. There are millions of state and local government employees in the United States. Under petitioner's theory, every one of them could potentially have a federal constitutional claim arising from any adverse employment decision that the employee believes was based on animus but that the public employer believes had a rational basis.

Petitioner and her *amici* acknowledge that few if any of these Equal Protection claims can be resolved short of trial. *See* Pet. Br. 8 (“Engquist’s case proceeded to an eleven-day trial”); *id.* at 42 (“a plaintiff must prove that the government’s discrimination is not rationally related to a legitimate government purpose”); *id.* (“Engquist alleged malice and the jury can be said to have credited her evidence”); Br. *Am. Cur.* NEA, AFL-CIO & AAUP 25 (class-of-one claims require the plaintiff to plead and prove impermissible differential treatment by public employer). In the Ninth Circuit, for example, courts “‘require very little evidence to survive summary judgment’ in a discrimination case, ‘because the ultimate question is one that can only be resolved through a searching inquiry’—one that is most appropriately conducted by the fact finder, on a full record.” *Schnidrig v. Columbia Machine, Inc.*, 80 F.3d 1406, 1410 (9th Cir. 1996), *cert. denied*, 519 U.S. 927 (1996); *see also* Robert C. Farrell, *Classes, Persons, Equal Protection, and Village of Willowbrook v. Olech*, 78 Wash. L. Rev. 367, 415–24 (2003) (allegations of animus enable class-of-one claims to survive dispositive motions).

The real-world consequences of adopting petitioner’s Equal Protection theory would thus be systematically disruptive, but there is at least one more

reason why it should be rejected. As she admits, almost none of the rational-basis class-of-one actions filed by employees are meritorious: “In practice, it has been difficult for plaintiffs to show that the government has failed to meet [the rational basis] standard, particularly in the context of public employment.” Pet. Br. 41; *see also id.* at 35 (“[O]nly a handful of [class-of-one] claims have succeeded.”); *id.* at 42 (success is possible for only a “tiny fraction of plaintiffs”); *Lauth*, 424 F.3d at 633–34 (surveying decisions of courts of appeals and finding “no ‘class of one’ cases in which a public employee has prevailed” between 1982 and 2005).

Petitioner asserts that “court conclusions of irrationality have been largely confined to cases in which the plaintiff employee demonstrates animus or improper motive.” *Id.* at 41–42. But this is scarcely a limiting principle (as she contends) because employees who experience adverse treatment by their supervisors commonly attribute it to animus. *See* Pet. Br. 45 (“subjective intent . . . understandably plays a greater role in assessing the propriety of governmental employment decisions” than it does in challenges to government regulation).

Petitioner’s Equal Protection theory is not only duplicative of state-created mechanisms, but leads to the worst of all possible worlds: the creation of a vast universe of potential plaintiffs who can assert fact-intensive constitutional claims that will almost invariably result in trials that they will lose, at great monetary and emotional cost to themselves, to the governmental defendants, and to the citizenry. Indeed, this result illustrates how attenuated petitioner’s asserted constitutional interest is from the central purpose of the Equal Protection Clause. The

widespread and systemic costs of constitutionalizing the run-of-the-mill employee grievance overwhelm the utility of recognizing the class-of-one claim in the workplace—which, as petitioner admits, could never be vindicated for more than a “tiny fraction of plaintiffs.” Petitioner has offered no reason for this Court to create a federal constitutional remedy that goes beyond those carefully tailored by state and local governments to redress grievances and tortious conduct where relief is warranted.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

RICHARD RUDA *
Chief Counsel
STATE AND LOCAL LEGAL
CENTER
444 North Capitol Street, N.W.
Suite 309
Washington, D.C. 20001
(202) 434-4850

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* Counsel of Record for the
Amici Curiae