No. 07-474

In the Supreme Court of the United States

ANUP ENGQUIST, PETITIONER

v.

OREGON DEPARTMENT OF AGRICULTURE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether or to what extent the Equal Protection Clause entitles a public employee to challenge a personnel action on the ground that it was improperly based on subjective criteria or characteristics unique to the employee herself, rather than on the employee's membership in an identifiable group or class.

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INTEREST OF THE UNITED STATES

This case concerns whether a public employee may assert a class-of-one equal protection claim against a government employer, and if she may, what standard of review applies to her claim. The United States has a significant interest in those issues. The United States is the nation's largest public employer, with over 2,700,000 civilian employees. Federal law establishes detailed civil service rules governing adverse personnel actions and remedies. While the vast majority of federal employees enjoy protection under those rules, some classes of employees do not. See p. 21, *infra*. The Court's decision could have a material impact on the management of federal employees not governed by those civil service rules and the system for resolving federal grievances estab-

lished by Congress. The United States participated as an amicus in *Village of Willowbrook* v. *Olech*, 528 U.S. 562 (2000) (per curiam), the principal decision on which petitioner relies in advancing her equal protection claim.

STATEMENT

1. Petitioner worked at a laboratory operated by the respondent Oregon Department of Agriculture. Pet. App. 14. She applied to be a manager at the lab, but was not selected for the position. She alleges that she had previously made complaints to the laboratory director about the individual who was selected, and that he had been required to attend diversity and anger management training as a result of her complaints. *Id.* at 15. According to petitioner, once he was selected, this new manager worked with the Department's Assistant Director to "get rid" of her by eliminating her position. *Id.* at 15-16.

After her job was eliminated and she determined that no suitable alternative job was available through her rights under a collective bargaining agreement, petitioner brought suit in federal district court against the agriculture department and the two managers whom she alleged were responsible for eliminating her position. Pet. App. 16-17. She asserted claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, 42 U.S.C. 1981, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment; she also made a claim alleging interference with contract. Petitioner asserted a damages action against the individual respondents under 42 U.S.C. 1983, alleging that they violated the Equal Protection Clause by discriminating against her on the basis of her race, national origin, and gender and/or for "arbitrary, vindictive and malicious reasons." J.A. 10.

The district court granted summary judgment for respondents on petitioner's claims of sexual harassment and denial of procedural due process, but allowed the remaining claims to proceed to trial. The jury rejected petitioner's claim of discrimination based on her membership in a suspect class, Pet. App. 1, but found in her favor on the class-of-one claim, *id.* at 3-4. The jury also found in her favor on her substantive due process and contract interference claims and rejected her Title VII and Section 1981 claims. *Id.* at 18. The jury awarded compensatory damages of $175,000 and punitive damages of $125,000 on the class-of-one claim and $125,000 on the contract interference claim. *Id.* at 8-10, 18.

2. a. A divided panel of the court of appeals reversed the judgment on the class-of-one claim. Pet. App. 13-27. The court concluded that the Equal Protection Clause does not encompass such a claim by public employees and therefore set aside the compensatory and punitive damages award for petitioner on that claim. *Id.* at 23-27.

The court of appeals acknowledged (Pet. App. 20) that in *Olech*, *supra*, this Court held that a plaintiff who does not claim to have been discriminated against on the basis of membership in a class or group may assert an equal protection claim as a "class of one." The court explained that whether "to apply [*Olech*'s] class-of-one theory to decisions of public employment presents a significantly different question." *Id.* at 23. The court explained that "the government as employer has broader powers than the government as regulator," and that "the scope of judicial review [in the public employment context] is correspondingly restricted." *Id.* at 24.

The court of appeals concluded that permitting a public employee to bring a class-of-one claim would "upset long-standing personnel practices," and would be unnec-

essary in light of existing remedies for public employees. Pet. App. 25. The court also explained that recognizing employment class-of-one claims "would completely invalidate the practice of public at-will employment." *Ibid.* Finally, the court expressed concern that recognition of such claims "would also generate a flood of new cases, requiring the federal courts to decide whether any public employee was fired for an arbitrary reason or a rational one." *Id.* at 26.

b. Judge Reinhardt dissented on the court's disposition of petitioner's class-of-one claim. Pet. App. 59-68.

SUMMARY OF ARGUMENT

The court of appeals properly rejected petitioner's class-of-one claim.

I. A. Under the principles that have guided this Court in determining the scope of other constitutional provisions in the public employment context, the Equal Protection Clause does not entitle public employees to bring "class of one" claims to challenge personnel actions that they perceive to be based on subjective criteria or idiosyncratic considerations. Public employers have a paramount interest in ensuring that supervisors have the managerial discretion to differentiate among employees based upon individual characteristics. Those characteristics are often based on subjective criteria and interpersonal dynamics that result from daily interactions and frictions in the workplace. The unique features of public employment markedly differ from contexts in which the government interacts with citizens as a regulator. Because subjective and individualized decisionmaking in employment matters is entirely rational and well-nigh inevitable, there is no justification for subjecting personnel actions to constitutional scrutiny—even relatively

relaxed scrutiny—unless an action is based on the employee's membership in an identifiable group or class.

Permitting public employees to bring class-of-one claims would significantly intrude on managerial discretion by constitutionalizing garden-variety personnel actions. Because interpersonal frictions and disputes permeate the workplace, an employee subject to adverse treatment will frequently be able to allege that her supervisor's negative views towards her were based on malice or ill-will. Petitioner has offered no limiting principle that would give supervisors clear guidance as to when courts would defer to a supervisor's discretion. And petitioner's theory would require the federal courts to referee run-of-the-mill decisions in the public workplace and subject public employers to compensatory and punitive damages claims for petty grievances.

B. A class-of-one claim also conflicts with the tradition of at-will employment under which an employee may be terminated for irrational or arbitrary reasons, or for no reason at all. At-will employment is completely at odds with the notion of a class-of-one claim. What distinguishes a class-of-one claim from a more typical equal protection claim is that the allegation is essentially that the government has not articulated any basis for the different treatment that could be tested for rationality. But in the at-will employment context, unlike the regulatory context, the employer *is* entitled to discharge the employee for no reason at all. Finding a constitutional violation in the inability to justify a difference in treatment would defeat the basic notions of at-will employment.

To be sure, today every State as well as the federal government has enacted legislation conferring civil-service protection to certain employees or permitting those employees to engage in collective bargaining. See App.,

infra, 1a-3a. But those schemes demonstrate that there is no need for additional *judicially*-created remedies to police the types of disputes that would be covered by petitioner's theory. Those schemes also are based on legislative policy choices about precisely how and when to restrict managerial discretion in the public employment context. A class-of-one claim based on the Constitution would trump those legislative schemes and confer rights on the very employees that the legislature intended to be employed at-will. There is no reason to believe that the framers of both the original Constitution and the Fourteenth Amendment—who were accustomed to the at-will regime—intended to subject public employers to the micro-management that would follow under petitioner's theory.

II. A. If this Court nevertheless decides that the Equal Protection Clause authorizes class-of-one claims in the public employment context, it should hold that ordinary rational-basis review applies to such claims. That review requires a claimant to show that there is no conceivable rational basis for the challenged action. And once a plausible basis is identified that is supported by the record, a court has no authority to probe further into the actual subjective motivation for a decision. Indeed, in the at-will context, even no reason is a rational basis, which suggests that applying the class-of-one theory to public employees is a mismatch.

B. Allowing public employees to negate a plausible rational basis for an employment action by establishing that the action was actually motivated by malice would transform rational-basis review into heightened scrutiny, even though that treatment conflicts with this Court's equal protection jurisprudence and would interfere with the government's ability to effectively manage its work-

force. The district court in this case erred in permitting the jury to determine that a supervisor's ill-will motivated the decision to eliminate petitioner's position. Respondents produced evidence—apparently undisputed—that the State was experiencing a budget crisis, Pet. App. 15, and the elimination of petitioner's position was a rational response to that budget crisis. No more was needed to dispose of petitioner's class-of-one claim.

ARGUMENT

I. A CLAIM OF ADVERSE TREATMENT BY A CLASS-OF-ONE PUBLIC EMPLOYEE IS NOT SUSTAINABLE UNDER THE EQUAL PROTECTION CLAUSE

In *Olech*, 528 U.S. at 564, this Court observed in the regulatory context that its previous cases "have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." The plaintiff there had alleged that a village had demanded a 33-foot easement as a condition of supplying her property with municipal water, whereas that village had demanded only a 15-foot easement from similarly situated property owners. *Id.* at 565. The lawsuit was brought only after the city relented and ultimately treated the plaintiff like other homeowners. The question in this case is whether the equal protection holding in *Olech* extends to the public employment context—specifically, whether a public employee may bring suit under the Equal Protection Clause alleging differential treatment based on an employee's individual characteristics that do not involve the employee's membership in an identifiable class or group. The Court should answer that question in the negative.

A. A "Class Of One" Claim Is Incompatible With The Nature Of Individualized Personnel Decisions

1. This Court has consistently recognized that the Constitution applies in a different and more limited manner when the government acts in a non-regulatory capacity—*i.e.*, when the challenged "governmental function operating * * * [is] not the power to regulate or license, as lawmaker, an entire trade or profession, or to control an entire branch of private business, but, rather, as proprietor, to manage [its] internal operatio[ns]." *Cafeteria & Restaurant Workers Union, Local 473* v. *McElroy*, 367 U.S. 886, 896 (1961) (*Cafeteria Workers*). In the particular context of public employment, "[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 employer." *Waters* v. *Churchill*, 511 U.S. 661, 675 (1994) (plurality opinion). Accordingly, the "government as employer * * * has far broader powers than does the government as sovereign." *Id.* at 671 (plurality opinion). In light of those principles, "constitutional review of government employment decisions must rest on different principles than review of * * * restraints imposed by the government as sovereign." *Id.* at 674 (plurality opinion).

Even in a context that is generally as highly protected as the First Amendment, this Court has categorically foreclosed constitutional claims that have the potential to disrupt the workplace and impair the functioning of public employers. In *Garcetti* v. *Ceballos*, 547 U.S. 410, 424 (2006), the Court held that the First Amendment gives no protection "to the expressions an employee makes pursuant to his or her official responsibilities." The Court reasoned that subjecting such expressions to

First Amendment review "would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their supervisors in the course of official business." *Id.* at 423.

Even where a public employee speaks as a private citizen on matters of public concern, the First Amendment applies in a more limited fashion in the public employment context. There, the Court has substituted a relatively forgiving balancing test for the rigors of strict scrutiny that apply when the government as regulator targets speech. Specifically, the Court has balanced the employee's interests against the government's interest in effectively performing its functions. *Pickering* v. *Board of Ed.*, 391 U.S. 563 (1968). Similarly, under the Fourth Amendment, public employers need not obtain a warrant to search an employee's property because such a requirement would unduly burden government business and would improperly transform everyday business incidents into constitutional matters. *O'Connor* v. *Ortega*, 480 U.S. 709, 721-722 (1987) (plurality opinion).

2. The above principles apply to class-of-one claims under the Equal Protection Clause, and strongly counsel in favor of limiting the Equal Protection Clause in the public employment context to claims that an employee was discriminated against based on her membership in some objectively identifiable group. When the government categorically excludes a class of workers, a court may review the employment classification to determine whether the objective, group-based distinction is rationally related to a legitimate government interest. *E.g.*, *New York City Transit Auth.* v. *Beazer*, 440 U.S. 568 (1979) (upholding city's exclusion of methadone users from transit employment); *Harrah Indep. Sch. Dist.* v.

Martin, 440 U.S. 194 (1979) (per curiam) (school board rule requiring continuing education for teachers); *Massachusetts Bd. of Ret.* v. *Murgia*, 427 U.S. 307 (1976) (mandatory retirement age for police officers).[1]

The same is not true of class-of-one claims. When an employee has a grievance based on her supervisor's application of subjective criteria in a manner that is unique to the employee, recognition of a cause of action would threaten "to 'constitutionalize the employee grievance.'" *Garcetti*, 547 U.S. at 420 (quoting *Connick* v. *Myers*, 461 U.S. 138, 154 (1983)). A class-of-one employment theory poses a particularly potent threat to the government's "managerial discretion" (*id.* at 423), because it could be the basis for a constitutional claim by almost any public employee challenging almost any workplace decision. A large proportion of personnel decisions involve (or could be claimed to involve) comparisons between individual employees (*e.g.*, who should be hired or promoted) or between an individual and a relevant group (*e.g.*, whether the employee is performing at the expected level). Personnel decisions often turn on factors that are both individualized and subjective or are based on intangible criteria that may be hard to quantify with exact precision. To maintain a functioning workplace, public employers, no less than private employers, must make distinctions among similar employees in ways that ultimately favor some and disfavor others, for reasons that might appear arbitrary, personal, and difficult to probe.

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[1] Such cases differ from class-of-one claims like petitioner's in two respects: 1) the challenged policies on their face draw distinctions based on membership in an identified class, and 2) such broad-based exclusions can be understood as efforts to regulate the workplace in ways that differ from an individualized employment decision.

As a result, any distinction that disfavors an employee is inevitably likely to be perceived as unfair or irrational by the adversely affected employee, even when it is made for wholly legitimate reasons. It thus will frequently be possible for an employee—or her lawyer—to re-characterize a supervisor's actions as being based on "malice" or "ill-will" against the particular employee. Pet. Br. 42; see *Campagna* v. *Massachusetts Dep't of Envtl. Prot.*, 206 F. Supp. 2d 120, 127 (D. Mass. 2003) (in the employment context, "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"). Petitioner's theory would thus transform garden-variety public-sector personnel actions into potential constitutional damages actions under Section 1983.

The unique dynamics of the workplace and necessity for subjective and individualized personnel decisions contrast sharply with the regulatory realm where decisions respecting citizens generally take place pursuant to arms-length transactions and where the principle of equal treatment and the application of neutral criteria are the norm. This is particularly true of the contexts in which this Court has principally applied the class-of-one analysis, namely, easements of and exactions on property. See, *e.g.*, *Olech*, *supra*; *Allegheny Pittsburgh Coal Co.* v. *County Comm'n*, 488 U.S. 336 (1989). In a context like that, equal treatment is generally the norm and a deviation by assessing property value or insisting on easements in substantially different ways raises serious questions. The public employment context lies at the opposite extreme.

Unlike the regulatory context, personnel decisions routinely arise in a workplace environment where manager and employee interact on a daily basis in varied and

unique ways and where there are countless occasions for subjective perceptions of personal disfavor or dislike to arise. As Judge Posner has explained, when the alleged unequal treatment does not arise in the "paradigmatic 'class of one' case," *i.e.*, where a public official "comes down hard on a hapless private *citizen*," but rather "arises out of the employment relation, the case for federal judicial intervention in the name of equal protection is especially thin." *Lauth* v. *McCollum*, 424 F.3d 631, 633 (7th Cir. 2005) (emphasis added).

Petitioner concedes that "the public employer often must take into account the individual personalities and interpersonal relationships of employees in the workplace." Br. 48. Petitioner's amici similarly acknowledge that employers routinely make distinctions based on "interpersonal dynamics" and "collegiality," Epstein Amicus Br. 13, or even on a "vague feeling that the employee does not fit well in the position," NEA Brief 20. That is the nature of personnel decisionmaking and, except where such distinctions are based on otherwise unlawful characteristics, it has never been thought to be prohibited, much less unconstitutional. But neither petitioner nor her amici offers any assurance that every federal and state judge would have a unified judgment as to the circumstances in which such concerns would be sufficiently related to legitimate employment interests.

For instance, if a public employer refuses to hire or promote an individual because the decision-maker perceives that the individual is moody, humorless (or insufficiently serious), rude, too talkative (or too reticent), overly friendly (or too withdrawn), or has a bad attitude or even bad body odor, petitioner has not suggested that the employee would be foreclosed from arguing that such perceptions are not rationally related to the employer's

interests in any given case, or that the employee would be foreclosed from challenging the factual underpinnings of the supervisor's perceptions. Br. 47, 48 (an employer "*generally*" or "*may well*" be able to terminate an individual because he is "antisocial or insubordinate") (emphasis added); Br. 39 ("the plaintiff always has an opportunity to negate the government's asserted bases").[2]

Conversely, if it is the case, as the government contends and petitioner half-way concedes, that it is entirely rational, as a general matter, for supervisors in making personnel decisions to consider interpersonal relationships and subjective criteria, then any benefit of uncovering a truly irrational personnel action is not worth the high cost of potentially subjecting every employment action to review under the Equal Protection Clause. "[G]overnment offices could not function if every employment decision became a constitutional matter." *Connick*, 461 U.S. at 143; see *Bishop* v. *Wood*, 426 U.S. 341, 349 (1976) ("The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies.").

This case well illustrates the point. Petitioner's class-of-one claim is premised on the allegation that respondent Hyatt terminated her because she "had been a thorn in Hyatt's side for years," particularly because petitioner's allegations that Hyatt had sexually harassed her caused Hyatt to have "to attend anger management and diversity training programs." Pet. Br. 3, 6. Retaliation for bringing a claim of sexual harassment is a serious

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[2] Of course, an employee would be free to argue that such idiosyncratic considerations were offered by the employer only as a *pretext* for discrimination based on unlawful factors such as race, gender, or religion. But if the real motivating factor is not unlawful, and instead idiosyncratic, a constitutional case should not lie.

matter. But the jury *rejected* petitioner's retaliation claim and her claim that she was terminated on the basis of her sex. Pet. App. 1, 3. Nonetheless, the jury perceived a constitutional violation because it found that Hyatt irrationally disliked petitioner based on their frequent run-ins over the course of their employment relationship. The jury, moreover, was permitted to probe into the subjective reasons for petitioner's termination, even though respondents offered the rational justification that petitioner's position was eliminated for budgetary reasons. *Id.* at 15-16; Pet. Br. 42 ("In this case, Engquist alleged malice and the jury can be said to have credited her evidence that she was discriminated against because of Respondents' ill-will instead of a legitimate government purpose."); see pp. 31-33, *infra*.

3. Petitioner argues that because the Equal Protection Clause by its terms applies to all "persons," "[t]here is no circumstance in which a person absolutely loses his or her rights under the Fourteenth Amendment." Br. 23. But the First and Fourth Amendments extend to the whole "people," which presumably includes government employees, and yet the precedents discussed above show that the Constitution applies fundamentally differently to public employment, especially when it causes the unleashing of damages claims. The First Amendment is no less "majestic" (Pet. Br. 10) or "direct" (Pet. Br. 14) than the Fourteenth Amendment, but as discussed, the Court has held that public employees have no First Amendment rights whatsoever for expressions pursuant to official duties. *Garcetti*, *supra*; see *City of San Diego* v. *Roe*, 543 U.S. 77, 80 (2004) (per curiam) ("[A] government employer may impose certain restraints on the speech on its employees, restraints that would be *unconstitutional* if applied to the general public.") (emphasis added).

Similarly, this Court has fashioned the scope of the protections guaranteed under the Fourteenth Amendment in light of the practicalities involved in the enforcement of the right. In the area of jury selection, only those peremptory strikes that are based on a suspect classification implicate the Equal Protection Clause. See, *e.g.*, *Batson* v. *Kentucky*, 476 U.S. 79 (1986). Thus, prosecutors may, consistent with equal protection, "exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review." *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 143 (1994). *A fortiori*, there can be no class-of-one claim that an individual juror was singled out because of individual characteristics that do not implicate a suspect classification. See, *e.g.*, *Purkett* v. *Elem*, 514 U.S. 765, 769 (1995) (per curiam).

The limited reach of the Equal Protection Clause in the jury-selection context reflects the practical reality that whatever benefit would accrue from subjecting all peremptory challenges to constitutional review for rationality is not worth the costs of defeating the purpose of peremptory challenges to permit subjective and idiosyncratic distinctions among individuals in jury selection. And that view is not overridden by the fact that the Equal Protection Clause says that "[n]o State shall 'deny to *any person* within its jurisdiction the equal protection of the laws.'" Br. 10 (quoting U.S. Const. Amend. XIV, § 1 (emphasis added by petitioner)). Rather, it simply reflects that the protection conferred by the Clause varies with the context in which it is asserted.

None of this is to suggest that the Equal Protection Clause does not apply in the public employment context. It clearly does. But the scope of the protection available must be interpreted in light of the unique considerations

presented by the public workplace. As discussed, when the basis for alleged discrimination is not rooted in the employee's membership in an identifiable group or class, the high cost of invasive judicial intervention in everyday personnel disputes is not worth the benefit of uncovering the rare case of an unquestionably irrational employment decision. That is particularly true given that the employee is likely to have remedies under state or federal law when the adverse action taken is material. See pp. 20-22, *infra*.

4. Petitioner argues that recognizing class-of-one employment claims would not lead to a large number of suits, because a class-of-one claim is difficult to prove, Br. 35-39, and because those circuits that have recognized such a claim have not seen a flood of claims, Br. 49-50. That contention is untenable.

As an initial matter, recognition of such claims by this Court would significantly enhance awareness of such claims among public employees and eliminate all uncertainty about their viability. More fundamentally, however, the objection to class-of-one claims stems neither from the number of reported decisions on the subject (of which there are many) nor the likelihood of ultimate success at any given trial, but rather from the potential that courts (and perhaps even juries) could second-guess a supervisor's subjective views that an employee's individual characteristics are legitimately employment-related. See *Wilkie* v. *Robbins*, 127 S. Ct. 2588, 2604 n.11 (2007) (limiting *Bivens* remedy based "on the elusiveness of a limiting principle for [the plaintiff's] claim, not [on] the potential popularity of a claim that could be well defined"). The constitutional rule that petitioner envisions would impose a direct burden on the day-to-day functioning of public employers who

operate either in an arena of at-will employment, see, *e.g.*, *Ball* v. *Arkansas Dep't of Cmty. Punishment*, 10 S.W.3d 873 (Ark. 2000), or under statutes or collective bargaining agreements that set forth clearly defined criteria as to which employees are protected and which employment actions are prohibited, see pp. 20-22, *infra*.

Petitioner is also mistaken that there are settled standards governing class-of-one claims that would provide predictable guidance to public employers. As this case demonstrates, a class-of-one personnel claim threatens to permit courts to probe the subjective motives of government supervisors and second-guess the rationality of interpersonal frictions in the workplace. See pp. 13-14, *supra*; pp. 31-33, *infra*. Furthermore, although petitioner acknowledges that a plaintiff must allege she was treated differently from employees who were "similarly situated" in all "relevant" respects, Br. 38, it is entirely unclear who those employees were in this case. Pet. App. 67 & n.3 (Reinhardt, J., dissenting) (petitioner's "failure to point to any individual situated identically to herself" was irrelevant because she proved to the jury that "malice was the cause of her termination"). This uncertainty provides another reason for refusing to recognize such claims.

B. A Class-Of-One Claim By A Public Employee Is Inconsistent With The Tradition Of At-Will Employment In This Country

1. Petitioner's class-of-one employment complaint is fundamentally incompatible with at-will employment. Employment at will, including for public employers, has for centuries been the background rule of American law. *Cafeteria Workers*, 367 U.S. at 896 ("It has become a settled principle that government employment, in the

absence of legislation, can be revoked at the will of the appointing officer."); see *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 273-274 (1975) (describing common law); accord *Andrews* v. *Louisville & Nashville R.R.*, 406 U.S. 320, 324 (1972); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 (1960). The prevalence of at-will employment at the founding and during the Reconstruction Era (and afterwards) suggests that neither the framers nor the Reconstruction Congress intended to constitutionalize the type of idiosyncratic or subjective workplace disputes that petitioner's class-of-one theory would reach.[3]

Under the at-will employment doctrine, an employee may be fired for any reason (except one forbidden by another source of law, such as because of race), including one motivated by malice or for no reason at all. See, *e.g.*, *Truax* v. *Raich*, 239 U.S. 33, 38 (1915); *Ball*, 10 S.W.3d at 876-877. This Court accordingly has "never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information"; "an at-will government employee * * * generally has no claim based on the Constitution at all." *Waters*, 511 U.S. at 679 (plurality opinion). This Court repeatedly has made clear that ordinary adverse employment actions "which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or *unreasonable*."

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[3] The question whether the framers' intent or the intent of the Reconstruction Congress would be more relevant in interpreting the equal protection component of the Fifth Amendment is an intriguing one. But in the absence of a contested federal action or any obvious difference in the prevalence of at-will employment between the two time frames, it is not one the Court needs to confront.

Connick, 461 U.S. at 146-147 (emphasis added); *Collins* v. *City of Harker Heights*, 503 U.S. 115, 128 (1992).

In light of those principles, it is settled that at-will public employees cannot bring employment grievances under the Due Process Clause of the Fourteenth Amendment absent a protected property or liberty interest. *Bishop*, *supra; Paul* v. *Davis*, 424 U.S. 693 (1976); *Board of Regents of State Colls.* v. *Roth*, 408 U.S. 564 (1972). It would be highly anomalous to conclude that public employees nonetheless may bring suit under the Equal Protection Clause as long as the employee alleges that her supervisor singled her out for unfavorable treatment based on the supervisor's allegedly irrational views towards the employee. Petitioner is thus mistaken in arguing (Br. 50 n.16) that employees who bring such claims would still have the burden of establishing that an adverse action was motivated by an impermissible consideration and thus could not be said to have "*tenure*." As a practical matter, "imposing a norm of equal treatment changes employment at will * * * into something very close to tenured employment because it is so easy to invent a case of unequal treatment by a supervisor." *Lauth*, 424 F.3d at 633.

At a minimum, petitioner's theory would give every at-will government employee at least a basis to litigate over his or her discharge, and that would defeat one of the basic features of at-will employment. Indeed, application of class-of-one analysis to the employment context is wholly incompatible with the notion of at-will employment. After all, the distinguishing characteristic of a class-of-one claim is that the plaintiff does not challenge the distinction actually drawn and articulated, but rather complains about differential treatment that has never been explained (and assertedly cannot be ex-

plained). A class-of-one action can be understood as an effort to force the government to articulate a rational basis for its action. But the distinguishing feature of at-will employment is that the employer need not give any reason for its action. While it is not incompatible with that regime to ensure that race was not the reason, or to test the rationality of a classification drawn on the face of a policy, it is fundamentally inconsistent with the notion of at-will employment to give the employee a constitutional entitlement to the underlying reason why the employee was fired. In this regard, at-will employment is analogous to peremptory challenges. In both contexts, what distinguishes the government action (from a for-cause standard) is that the government need not offer any explanation at all for its reason as long as it can show that a suspect classification was not the reason where there is a substantial basis for suspecting it might be at play. Injecting class-of-one analysis into either context would be wholly incompatible with the basic nature of the government action.

2. To be sure, the federal government and the States have chosen, as a matter of policy, to protect most public employees from being discharged or otherwise subjected to adverse employment actions for impermissible reasons. Every State has laws providing civil service protection to specified public employees or permitting certain employees to engage in collective bargaining. See App., *infra*, 1a-3a. Those existing protections, however, do not support recognizing a class-of-one, *judicially-created*, remedy, as suggested by petitioner. Pet. Br. 51-52. Rather, existing remedies founded upon statutes and contract counsel heavily *against* recognition of a new remedy by this Court. Pet. App. 25-26 & n.3; *Lauth*, 424 F.3d at 633. Moreover, because limita-

tions on at-will employment are largely statutory or contractual, rather than constitutional, decisions about the contours and extent of employment protection remain subject to the reasonable policy choices of the government itself.

For instance, the vast majority of federal employees are covered by the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 2301 *et seq.*, "an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures—administrative and judicial—by which improper action may be redressed." *Bush* v. *Lucas*, 462 U.S. 367, 385 (1983). Under that scheme, a supervisor may not "discriminate for or against any employee or applicant" based on race, color, sex, national origin, age, disability, marital status, or political affiliation, 5 U.S.C. 2302(b)(1), or based on "conduct which does not adversely affect the performance of the employee or applicant or the performance of others," 5 U.S.C. 2302(b)(10).

At the same time, however, Congress has provided different levels of protection under the CSRA for different categories of covered federal employees. For example, the CSRA furnishes "no remedy whatsoever for * * * adverse personnel actions against probationary employees." *Schweiker* v. *Chilicky*, 487 U.S. 412, 423 (1988); see 5 U.S.C. 7511.[4] Congress has also excluded from the CSRA certain other employees in sensitive positions. 49 U.S.C. 44935 note (Supp. V 2005) (employees performing airport screening functions). In those contexts, recognition of a class-of-one equal protection

[4] The CSRA provides alternative remedies for probationary employees facing personnel actions. See, *e.g.*, 5 U.S.C. 1211, 1221, 2302(b), 3321.

claim would trump Congress's carefully considered decision to confer discretion on supervisors.[5]

Moreover, "[n]ot all personnel actions are covered by this system." *Bush*, 462 U.S. at 385 n.28. Nothing in petitioner's theory limits public employees to bringing class-of-one claims concerning only those personnel actions specified by the legislature as worthy of protec-

[5] As petitioner notes (Br. 52 n. 18), in *Bush*, *supra*, this Court held that a federal employee lacked an inferred cause of action under *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971), to recover damages for an employer's violation of the First Amendment because federal civil service protections provide an alternative remedy. And even where the employee lacks any remedy under the civil service laws, that lack of remedy reflects a conscious legislative judgment that would preclude a *Bivens* action. See *Robbins*, 127 S. Ct. at 2598. Moreover, the United States takes the view that punitive damages are not available in a *Bivens* action. But that does not mean that the United States does not have an active interest in the resolution of this constitutional matter. It is no small matter for an employee to allege that a federal employer acted unconstitutionally in disciplining an employee, and there is also the matter of injunctive relief. This Court has never considered whether federal employees may bring official-capacity suits for injunctive relief, assuming that the claimant can identify a waiver of sovereign immunity. See *Dotson* v. *Greisa*, 398 F.3d 156, 179-180 (2d Cir. 2005) (noting circuit split), cert. denied, 126 S. Ct. 2859 (2006). As the government has explained, Gov't Br. at 45-49, *Whitman* v. *Department of Transp.*, 547 U.S. 512 (2006) (No. 04-1131), this Court's decisions suggest that federal employees could bring colorable constitutional claims for equitable relief to a judicial forum after exhausting those claims through the statutory administrative scheme. The government also has taken the position that employees with no administrative appeal rights can obtain direct review of colorable constitutional claims for equitable relief in district court. *AFGE Local 1* v. *Stone*, 502 F.3d 1027, 1034-1039 (9th Cir. 2007) (district court had jurisdiction to consider constitutional claim seeking equitable relief by probationary airport screener). Accordingly, the Court's decision in this case could affect claims available to at least some classes of federal employees.

tion. Petitioner's theory thus might apply not only to discharges, but also to promotions, decisions about benefits and transfers, and even perhaps such issues as office selection, project assignments, or the distribution of furniture. Imposing a norm of perfectly equal treatment for public employees could thus constitutionalize virtually *any* petty slight or grievance perceived by an employee who feels she has been treated differently for some idiosyncratic reason.

A constitutional rule permitting courts to review everyday personnel decisions of public employers would "demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers." *Garcetti*, 547 U.S. at 423; *Jicarilla Apache Nation* v. *Rio Arriba County*, 440 F.3d 1202, 1209 (10th Cir. 2006) (McConnell, J.) (opining that *Olech* should not "transform the federal courts into 'general second-guessers of the reasonableness of broad areas of state and local decisionmaking: a role that is both ill-suited to the federal courts and offensive to state and local autonomy in our federal system") (quoting *Jennings* v. *City of Stillwater*, 383 F.3d 1199, 1211 (10th Cir. 2004). Such an unprecedented intrusion into the decisionmaking of state employers should not be sanctioned absent a clear constitutional command—which is lacking here.

II. IF PUBLIC EMPLOYEES MAY BRING CLASS-OF-ONE CLAIMS, RATIONAL-BASIS REVIEW PRECLUDES CONSIDERATION OF MOTIVE

If this Court nevertheless concludes that public employees may bring class-of-one claims, it should hold that ordinary rational-basis review—which requires a claimant to show that there is no conceivable rational

basis for the challenged action—applies to such claims, and reject petitioner's invitation to revamp rational-basis review in this particular context to include consideration of motive. See Br. 34, 42-45.

A. Rational-Basis Review Does Not Inquire Into The Subjective Motives Of The Government Decisionmaker

1. "[A] classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between disparity of treatment and some legitimate governmental purpose." *Central State Univ.* v. *American Ass'n of Univ. Professors*, 526 U.S. 124, 127-128 (1999) (quoting *Heller* v. *Doe*, 509 U.S. 312, 319-320 (1993)); *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 366 (2001) (Under rational-basis review, the government may act on the basis of "distinguishing characteristics relevant to interests the State has the authority to implement.") (quoting *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441 (1985) (*Cleburne*)). "[T]he Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the * * * facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Fitzgerald* v. *Racing Ass'n*, 539 U.S. 103, 107 (2003) (quoting *Nordlinger* v. *Hahn*, 505 U.S. 1, 11 (1992)); accord *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 83 (2000) ("The rationality commanded by the Equal Protection Clause does not require States to match * * * distinctions and the legitimate interests they serve with razorlike precision.").

Under that highly deferential standard, it is settled that the government need not "actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger,* 505 U.S. at 15. 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.'" *Garrett*, 531 U.S. at 367 (quoting *Heller*, 509 U.S. at 320); *Thompson* v. *Western States Med. Ctr.*, 535 U.S. 357, 373 (2002) ("hypothesized justifications" are sufficient); accord *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993).

Thus, once a conceivable rational basis supporting a difference in treatment is identified, judicial inquiry "is at an end." *United States R.R. Ret. Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980). It is "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision." *Ibid.* (quoting *Flemming* v. *Nestor*, 363 U.S. 603, 612 (1960)). A classification fails rational-basis review only in the relatively rare case in which "the facts preclude[ ] any plausible inference" that a legitimate basis underlies the difference in treatment. *Nordlinger*, 505 U.S. at 16. Here, as elsewhere, the remedy for improperly motivated governmental decisions "lies * * * in the people, upon whom * * * reliance must be placed for the correction of abuses committed in the exercise of a lawful power." *McCray* v. *United States*, 195 U.S. 27, 55 (1904); see *Cleburne*, 473 U.S. at 440.[6]

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[6] Nor is there anything extraordinary about a court's refraining from inquiring into whether a decision that is objectively reasonable has been undertaken with a malicious intent. That is precisely the rule that is followed in Fourth Amendment cases. *Graham* v. *Connor*, 490 U.S. 386, 397 (1989) ("An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force."). There is no reason a court should engage in a more probing inquiry

2. Much of the Court's rational-basis jurisprudence has involved judicial review of legislative decisions. This Court's cases make clear, however, that there is no basis for less deferential judicial review of administrative decisions. *Nordlinger*, 505 U.S. at 15-16 & n.8. As this Court explained in *Olech*, "[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." 528 U.S. at 564 (quoting *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441, 445 (1923)).

The Equal Protection Clause does not prohibit negligent or inadvertent errors in the administration of law; it is only implicated when there is an intentional difference in treatment. *Snowden* v. *Hughes*, 321 U.S. 1, 8 (1944); *Sunday Lake Iron Co.* v. *Township of Wakefield*, 247 U.S. 350, 353 (1918). Thus, once a plaintiff shows an intentional difference in treatment, the inquiry is the same as that applicable to legislative classifications: absent proof of a suspect classification or interference with a fundamental right, the relevant inquiry is whether the administrative classification is rationally related to a legitimate public end. *Nordlinger*, 505 U.S. at 15-16 & n.18.

Petitioner argues (Br. 39) that *Cleburne* establishes that a classification fails rational-basis review if it is based on "irrational prejudice." Petitioner's reliance on *Cleburne* is misplaced. In *Cleburne*, the Court held that a city that generally permitted the operation of multiple

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when it undertakes rational-basis review under the Equal Protection Clause.

dwelling facilities violated the Equal Protection Clause when it failed to permit the operation of a group home for persons with mental retardation. Applying rational-basis review, the Court held that the record failed to reveal any rational basis for the city's decision to treat the group home differently from other multiple dwelling facilities. 473 U.S. at 448. The Court examined each of the four grounds for differential treatment suggested by the city, and it concluded that each asserted rationale did not afford a plausible basis for distinguishing between the group home at issue and other multiple dwelling facilities. *Id.* at 448-450. Only after having failed to identify any rational basis for the city's decision did the Court conclude that the decision could be explained only as resting on irrational prejudice against persons with mental retardation, an illegitimate basis for government action. *Id.* at 450; see *id.* at 448. *Cleburne* therefore does not hold that a plaintiff can bypass rational-basis review by producing evidence that a decision was motivated by subjective ill-will, and petitioner's contrary formulation is inconsistent with the accepted understanding of rational-basis review.

3. In *Olech*, this Court did not suggest that motive was relevant to a class-of-one claim. Rather, the Court concluded that the plaintiff's allegations that the Village irrationally demanded a larger easement from other similarly situated property owners seeking municipal water supply, "quite apart from the Village's subjective motivation, [were] sufficient to state a claim for relief under *traditional* equal protection analysis." 528 U.S. at 565 (emphasis added). Justice Breyer, in a separate opinion concurring in the result, expressed the view that the plaintiff's additional allegation of "vindictive action," "illegitimate animus," or "ill will" was "sufficient to min-

imize any concern about transforming run-of-the-mill zoning cases into cases of constitutional right." *Id.* at 566 (quoting *Olech* v. *Village of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998), aff'd, 528 U.S. 562 (2000) (per curiam)). But that opinion was not for the Court.

In the wake of *Olech*, the courts of appeals have reached different conclusions about the extent to which motive is relevant to a class-of-one claim. Compare, *e.g.*, *Jicarilla Apache Nation*, 440 F.3d at 1211 ("pretext is not an issue"); *Tri-County Paving, Inc.* v. *Ashe County*, 281 F.3d 430, 439 (4th Cir. 2002); *Whiting* v. *University of S. Miss.*, 451 F.3d 339, 348-350 (5th Cir. 2006), cert. denied, 127 S. Ct. 1038 (2007), with Pet. App. 21; *Warren* v. *City of Athens*, 411 F.3d 697 (6th Cir. 2005); *Tapalian* v. *Tusino*, 377 F.3d 1, 5-6 (1st Cir. 2004); *DeMuria* v. *Hawkes*, 328 F.3d 704, 707 (2d Cir. 2003); *Albiero* v. *City of Kankakee*, 246 F.3d 927, 932 (7th Cir. 2001); cf. *Lauth*, 424 F.3d at 634.

Permitting a plaintiff to establish an equal protection violation by proving that a difference in treatment was actually motivated by ill-will cannot be reconciled with the decisions of this Court discussed above holding that, unless a classification is suspect or affects a fundamental right, the sole equal protection inquiry is whether there is a plausible basis for the classification. Indeed, a class-of-one claim at bottom is a claim that the government has not offered any rational basis for its differential treatment of the plaintiff. If the claim prompts the government to articulate a rational basis for its action, then the case is at an end. If the action was actually motivated by malice, that is no more relevant than in any other rational basis case.

Moreover, permitting a plaintiff to prove a bad motive caused the decision is not the appropriate way to

prevent garden-variety government decisions from turning into class-of-one claims. Rather, the way to do so is either by rejecting the claims in the public employment context altogether or, at a minimum, by applying traditional rational-basis review, which upholds government action based on any proffered rational basis supported by the record. Regardless whether motive may play any role in class-of-one claims in the regulatory context in which *Olech* arises, it should play no role in the public employment context in which this case arises.

4. Petitioner's proposed treatment of animus as a "proxy for other elements that a plaintiff must prove" (Br. 43) would invite highly intrusive inquiries into the motivations that underlie official action. In *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), the Court specifically addressed the unique harms of motive inquiries. There, the Court explained that "it is now clear that substantial costs attend the litigation of the subjective good faith of government officials." *Id.* at 816. In particular, "[n]ot only are there the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Ibid.* In addition, there are "special costs to 'subjective' inquiries of this kind." *Ibid.* Because "the judgments surrounding discretionary action almost inevitably are influenced by the decision-maker's experiences, values, and emotions," questions of subjective intent "rarely can be decided by summary judgment." *Ibid.* Allegations of bad faith or malice are classic examples of an allegation that is easy to make and difficult to disprove. Moreover, when malicious intent is the ultimate issue, "there often is no clear end to the relevant evidence." *Id.* at 817. An inquiry into malicious intent thus "may entail broad-

ranging discovery and the deposing of numerous persons, including an official's professional colleagues." *Ibid.* Such inquiries "can be peculiarly disruptive of effective government." *Ibid.* Petitioner's contention that animus is often highly relevant or even dispositive in a class-of-one claim would have precisely that effect.

5. The above discussion does not mean that judicial inquiries into actual motive are never justified. Specific constitutional provisions contemplate an inquiry into actual motive. *Farmer* v. *Brennan*, 511 U.S. 825, 835-840 (1994) (Eighth Amendment); *Mount Healthy City Sch. Dist.* v. *Doyle*, 429 U.S. 274, 287 (1977) (First Amendment). Indeed, the Equal Protection Clause itself demands such an inquiry when a classification is suspect. *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-266 (1977) (racial discrimination). When, as here, a court is reviewing official action under the Equal Protection Clause, however, and there is no suspect classification or fundamental right involved, the costs of an actual motive inquiry outweigh any possible benefit.

Moreover, as this Court has explained, there is an important distinction between bare allegations of malice and the allegations of intent that are essential elements of certain constitutional claims. *Crawford-El* v. *Britton*, 523 U.S. 574, 592 (1998). A general allegation of malice permits "an open-ended inquiry into subjective motivation." *Ibid.* In contrast, in the contexts in which the Court has approved a motive inquiry, "the primary focus is not on any possible animus directed at the plaintiff; rather, it is more specific, such as an intent to disadvantage all members of a class that includes the plaintiff * * * or to deter public comment on a specific issue of public importance." *Ibid.* It is therefore not surprising

that the Court in *Crawford-El* expressed its understanding that "[i]t is obvious, of course, that bare allegations of malice would not suffice to establish a constitutional claim." *Id.* at 588.[7]

B. Under Rational-Basis Review Petitioner's Claim Fails

If this Court were to hold that a public employee may bring a class-of-one claim, there would be no basis to depart from the settled principles discussed above governing rational-basis review and certainly no reason to *heighten* the burden that employers would face in defending against such claims. Thus, an employee who brings such a claim would have to show that "she has been intentionally treated differently from others similarly situated." *Olech*, 528 U.S. at 564.[8] Once those

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[7] To be sure, if this Court were to recognize class-of-one claims against public employers, plaintiffs would not be limited to "class of one" theories and might allege statutory as well as constitutional violations, in which case motive might be the subject of discovery even without the class-of-one claim. That does not mean, however, that the cost of introducing motive would be negligible in every—or even in most—cases. Quite to the contrary, where an employee can marshal no proof that a suspect classification was the motive for the decision, the suit would be dismissed. But under petitioner's theory, that same plaintiff could seek to proceed to trial as long as she alleges that some form of "malice" motivated the decision, even if the malice resulted from ordinary employment frictions.

[8] Several of the courts of appeals that have recognized class-of-one employment claims have noted the importance of the requirement that the plaintiff identify sufficiently similar employees. See, *e.g.*, *Neilson* v. *D'Angelis*, 409 F.3d 100, 104-106 (2d Cir. 2005) (evidentiary requirements and standards of proof might perversely make it easier to prove a class-of-one claim than a race-based claim if the standard of similarity for class-of-one employment claims is not extremely high); *Maniccia* v. *Brown*, 171 F.3d 1364, 1368 (11th Cir. 1999) ("quantity and quality of the comparator's misconduct [must] be nearly identical to prevent

showings are made, the question should be the same as in other cases of rational-basis review—whether "there is a plausible policy reason for the classification, the * * * facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Racing Ass'n*, 539 U.S. at 107 (quoting *Nordlinger*, 505 U.S. at 11). If a rational supervisor could have treated the employee differently from other employees based on any plausible criteria, judicial inquiry would be at an end. A court would have no authority to probe further into the actual underlying motive for the employment action.

The district court below failed to apply rational-basis review to petitioner's claim. Respondents advanced a rational explanation for the elimination of petitioner's position: to save money during a budget crisis. Pet. App. 15. That should have been the end of the case. Yet petitioner was allowed to prove that the elimination of her position was unconstitutional because it was actually motivated by a personal vendetta or malice rather than budgetary concerns. That approach not only conflicts with decisions of this Court holding that, unless a classification is suspect or affects a fundamental right, the sole equal protection inquiry is whether there is a plausible rational basis for the classification, but also threatens to open up "[b]reathtaking vistas of liability." *Tuffendsam* v. *Dearborn County Bd. of Health*, 385 F.3d 1124, 1127 (7th Cir. 2004) (Posner, J.). Indeed, under petitioner's theory, virtually any objectively legitimate

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courts from second-guessing employers' reasonable decisions and confusing apples with oranges").

decision by any government supervisor at any level can be transformed into a potential equal protection violation if the affected employee alleges a malicious motive. Because that theory is contrary to precedent, would significantly disrupt the operation of public employers, and could require state and federal courts to referee routine workplace disputes, it should be rejected.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

STATE CIVIL SERVICE PROTECTIONS

Alabama: Ala. Code §§ 36-26-1 *et seq*. (LexisNexis 2001).

Alaska: Alaska Stat. §§ 39.25.010 *et seq*. (2006).

Arkansas: Ark. Code Ann. §§ 14-49-101 *et seq*., 14-50-101 *et seq*. (1998).

Arizona: Ariz. Rev. Stat. § 41-783 (Supp. 2007); Ariz. Admin. Code §§ R2-5-101 *et seq*. (2007).

California: Cal. Gov't Code §§ 18500 *et seq*. (West 1995).

Colorado: Colo. Const. Art. XII, §§ 13, 14; Colo. Rev. Stat. §§ 24-50-101 *et seq*. (2006).

Connecticut: Conn. Gen. Stat. Ann. §§ 5-193 *et seq*. (West 2007).

Delaware: Del. Code Ann. tit. 19, §§ 1301 *et seq*. (2005).

Florida: Fla. Stat. Ann. §§ 110.201 *et seq*. (2002).

Georgia: Ga. Code Ann. §§ 45-20-1 *et seq*. (2002).

Hawaii: Haw. Rev. Stat. Ann. §§ 76-1 *et seq*. (2007).

Idaho: Idaho Code §§ 67-5301 *et seq*. (2006).

Illinois: 20 Ill. Comp. Stat. Ann. 415/1 *et seq*. (2001).

Indiana: Ind. Code Ann. §§ 4-15-2-1 *et seq*. (Michie 1996).

Iowa: Iowa Code §§ 8A.411 *et seq*. (West Supp. 2007).

Kansas: Kan. Stat. Ann. §§ 75-2925 *et seq*. (1997).

Kentucky: Ky. Rev. Stat. Ann. §§ 18A-005 *et seq*. (LexisNexis 2003).

Louisiana: La. Const. Art. X; La. Rev. Stat. §§ 42:721 *et seq*. (2006).

Maine: Me. Rev. Stat. tit. 5, §§ 7031 *et seq*. (2002).

Maryland: Md. Code Ann., State Pers. & Pens., tits. 1-15 (LexisNexis 2004 & Supp. 2007).

Massachusetts: Mass. Ann. Laws ch. 31, §§ 1 *et seq*. (LexisNexis 2007).

Michigan: Mich. Const. Art. XI, § 5.

Minnesota: Minn. Stat. Ann. §§ 43A.01 *et seq*. (West 2002).

Mississippi: Miss. Code. Ann. §§ 25-9-101 *et seq*. (West 2003).

Missouri: Mo. Ann. Stat. §§ 36.010 *et seq*. (West 2001).

Montana: Mont. Code Ann. §§ 2-18-101 *et seq*. (2007).

Nebraska: Neb. Rev. Stat. Ann. §§ 81-1301 *et seq*. (LexisNexis 2005).

Nevada: Nev. Const. Art. 15, § 15; Nev. Rev. Stat. §§ 284.010 *et seq*. (LexisNexis 2002).

New Hampshire: N.H. Rev. Stat. Ann. §§ 273-A:1 *et seq*. (LexisNexis 1999).

New Jersey: N.J. Stat. Ann. §§ 11A:1-1 *et seq*. (West 2002).

New Mexico: N.M. Stat. Ann. §§ 10-9-1 *et seq*. (Michie 2003).

New York: N.Y. Civ. Serv. Law §§ 200 *et seq*. (McKinney 1999).

North Carolina: N.C. Gen. Stat. §§ 126-1 *et seq*. (2007).

North Dakota: N.D. Cent. Code §§ 34-11-01 *et seq*. (2004).

Ohio: Ohio Rev. Code §§ 124.01 *et seq*. (Anderson 2001).

Oklahoma: Okla. Stat. Ann. tit. 74, §§ 840-4.1 *et seq*. (West 2002).

Oregon: Or. Rev. Stat. §§ 240.005 *et seq*. (2005).

Pennsylvania: 71 Pa. Cons. Stat. Ann. §§ 741.1 *et seq*. (West 1990).

Rhode Island: R.I. Gen. Laws §§ 36-4-1 *et seq*. (1997).

South Carolina: S.C. Code Ann. § 8-17-330 (Supp. 2007).

South Dakota: S.D. Codified Laws §§ 3-6A-1 *et seq*. (2004).

Tennessee: Tenn. Code Ann. §§ 8-30-101 *et seq*. (2002).

Texas: Tex. Loc. Gov't Code Ann. §§ 158.001 *et seq*. (West 2008).

Utah: Utah Code Ann. §§ 67-19-1 *et seq*. (2004).

Vermont: Vt. Stat. Ann. tit. 3, §§ 901 *et seq*. (2003).

Virginia: Va. Code Ann. §§ 2.2-2900 *et seq*. (2005).

Washington: Wash. Rev. Code §§ 41.06.010 *et seq*. (West 2000).

West Virginia: W. Va. Code §§ 29-6-1 *et seq*. (2004).

Wisconsin: Wis. Stat. Ann. §§ 230.05 *et seq*. (West 2001).

Wyoming: Wyo. Stat. Ann. §§ 15-5-101 *et seq*. (2007).