

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ANUP ENGQUIST, :

4 Petitioner :

5 v. : No. 07-474

6 OREGON DEPARTMENT OF :

7 AGRICULTURE, ET AL. :

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9 Washington, D.C.

10 Monday, April 21, 2008

11

12 The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States  
14 at 11:05 a.m.

15 APPEARANCES:

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17 Petitioner.

18 JANET A. METCALF, ESQ., Assistant Attorney General,  
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22 the United States, as amicus curiae, supporting the  
23 Respondents.

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll argument next in Case 07-474, Engquist v. Oregon Department of Agriculture.

Mr. Katyal.

ORAL ARGUMENT OF NEAL KATYAL  
ON BEHALF OF THE PETITIONER

MR. KATYAL: Thank you, Mr. Chief Justice, and may it please the Court:

The Ninth Circuit held that no discrimination against a public employee is prohibited by the Equal Protection Clause unless the targeted person is a member of a suspect class or exercises a fundamental right. No matter how outrageous or evil and no matter how unrelated to any legitimate government interest, the clause provides zero protection. This theory is contrary to the Constitution's text. It is inconsistent with this Court's precedents. It is unworkable and is unnecessary.

The Ninth Circuit ignored the Equal Protection Clause's guarantee to any person that the State will not use its vast powers to discriminate without a legitimate government purpose and particularly not in ways that lead to inefficient government.

1           This Court has articulated three principles  
2 that control this case. First, the Constitution  
3 protects the individual from irrational discrimination.  
4 Second, the Fourteenth Amendment applies to public  
5 employers and rational-basis review applies to public  
6 employment. And third, the clause applies to the  
7 administrative actions of State officials, not just  
8 legislatures.

9           JUSTICE SCALIA: Well, rational-basis review  
10 normally doesn't inquire into the actual motive, for  
11 example, of the State legislators who impose such a tax  
12 or impose such a restriction. We simply ask: Could  
13 there have been a rational basis for this? Now, are you  
14 willing to abide by that test?

15           MR. KATYAL: We are, Your Honor. The Ninth  
16 Circuit below said no rational-basis test ever; and,  
17 indeed, the trial in this case allowed the government to  
18 articulate any rationale, conceivable or not. We do  
19 think, even though it doesn't make --

20           JUSTICE SCALIA: Listen to what I'm saying.  
21 Not whether you could decide that, given all of the  
22 facts of this case, the criticism of the co-workers and  
23 all of that, whether it is conceivable to say that this  
24 was done on a rational basis. That isn't the  
25 rational-basis test.

1           It's just sitting back without these factual  
2 inquiries, just as we don't inquire factually into why  
3 the State legislature acted, just asking: Could there  
4 have been a rational basis for the dismissal of this  
5 employee?

6           MR. PHILLIPS: Your Honor, we do agree that  
7 that last part, Justice Scalia, looking at could there  
8 have been a rational basis, is the proper test. But  
9 that is a factual determination at some level that, as  
10 this Court in Kimel and a variety of other cases has  
11 said, that you still have to look to the underlying  
12 facts. And even the Solicitor General doesn't disagree  
13 -- page 5 of their brief when they say you have to look  
14 to whether -- that whatever that rationale is, it is  
15 supported by the record. The government had the  
16 opportunity to --

17           CHIEF JUSTICE ROBERTS: So that what you do  
18 in this case -- I mean the person is fired and that's  
19 all you know. And so you go back and see: Well, is  
20 there any possible reason? So you look at the time  
21 sheets. Oh, here are a few days where she punched in  
22 late. That's a possible reason, and that's enough?

23           MR. KATYAL: Well, we do think that that can  
24 be enough; and, indeed, that's what the government had  
25 their opportunity to argue in this case. The Ninth

1 Circuit, of course, cuts off even that very deferential  
2 inquiry altogether. Now --

3 CHIEF JUSTICE ROBERTS: So in that case --  
4 and then let's say you're at trial, and you ask: Did  
5 you fire this person because she punched in late a few  
6 times? I take it the objection would be that that's  
7 irrelevant, and that would be sustained.

8 MR. KATYAL: Well, if it is a counter-  
9 factual -- I mean, the plaintiff would have the  
10 opportunity to negate the facts on whatever that  
11 rationale.

12 CHIEF JUSTICE ROBERTS: No, no. The record  
13 shows she was -- a few times she punched in late.

14 MR. KATYAL: And if it has anything to do  
15 with government efficiency, the rational-basis test is  
16 that deferential to permit that to go forward.

17 JUSTICE BREYER: What about he didn't like  
18 him? I didn't -- I'm the supervisor; I didn't like him.

19 MR. KATYAL: Even that, Justice Breyer, is  
20 enough so long as it's related to government efficiency.  
21 That is --

22 JUSTICE BREYER: All right. Now, you say  
23 related. If the truth is I don't like this person,  
24 good-bye, now, is that rational? When you say -- I  
25 mean, you know as much about the case now as I do --

1 not this case but, you know, that's all we know. Is  
2 that rational or not?

3 MR. KATYAL: That, by itself, is not because  
4 it doesn't have anything to --

5 JUSTICE BREYER: All right. Now that seems  
6 to me to be the problem, that either -- going back to  
7 Justice Scalia's point, you're either going to say  
8 rational in these circumstances, which means you go into  
9 it whether the time sheet was this or whether it was  
10 that or the other; or you say, hey, it's always rational  
11 because you could have fired him because he doesn't like  
12 the person. That's -- and I don't see some intermediate  
13 step there.

14 To put the question differently, every  
15 government has a, State and Federal, has an  
16 administrative procedures act. That forbids  
17 unreasonable, arbitrary action. But why do they need  
18 that if the Constitution does it by itself?

19 MR. KATYAL: Okay. Let me -- let me say two  
20 things because there are two different questions there.  
21 One has to do with the State laws, and so on. And this  
22 Court has never said that the existence of other State  
23 remedies somehow displaces the Equal Protection Clause  
24 or other constitutional guarantees.

25 JUSTICE GINSBURG: What about on the Federal

1 level? Could a Federal employee who says just what was  
2 alleged here come right into Court to bring a Bivens  
3 action and says, I was discriminated against and  
4 similarly situated people were not, and it was  
5 irrational? Could a Federal employee come to court with  
6 such a complaint?

7 MR. KATYAL: The answer is no, Justice  
8 Ginsburg, and the reason is at footnote 18 of our brief,  
9 and I believe the Solicitor General doesn't disagree in  
10 large amount. That is that for Bivens the question is,  
11 is there -- will the court imply a right of action, as  
12 opposed to the issue in this case, which is Section 1983.  
13 There is a statutory right of action already in  
14 existence. If I --

15 JUSTICE GINSBURG: And it doesn't matter  
16 that the State has civil service remedies that were not  
17 used --

18 MR. KATYAL: Not --

19 JUSTICE GINSBURG: -- or there are union  
20 grievance procedures that aren't used? You can go right  
21 into Federal court and say, I don't have to use those  
22 State remedies?

23 MR. KATYAL: That is correct. It doesn't --  
24 the existence of those State remedies does not displace  
25 or -- by itself without a statutory -- without Congress



1 coming in and mandating exhaustion or something like  
2 that. But in the absence of that, this Court has not  
3 said, outside of the limited area of procedural due  
4 process, that the existence of either  
5 collective-bargaining agreements or State laws somehow  
6 displaces a Federal constitutional guarantee.

7 Now, if I could return to the first part of  
8 Justice Breyer's question, which was the dividing line  
9 in whether there is a clear standard, let me articulate  
10 this as one. We believe that when a -- when a government  
11 employer comes in and asserts some sort of objective  
12 reality, you know, so for here they said the wheat prices  
13 are declining, the plaintiff should have a chance to  
14 negate that and say, well, it turned out that actually  
15 the wheat prices weren't declining, and so on.

16 If, however, the plaintiff -- the government  
17 articulates the rationale that you had put forth before,  
18 I don't like you, and somehow the supervisor says it's  
19 interfering with my government efficiency and I can't do  
20 the job, well, that's something that the employer will  
21 never really be able to -- the employee will never be  
22 able to negate. And that is set forth in our reply  
23 brief at page 16.

24 JUSTICE KENNEDY: Well, I guess you begin  
25 with the proposition that the government must always

1 have a reason for what it does?

2 MR. KATYAL: The government must always have  
3 a reason when it discriminates against individuals. That  
4 is the way --

5 JUSTICE SOUTER: Well, discrimination, when  
6 you say "discrimination," I take it you're meaning  
7 discrimination not confined to the discrete categories  
8 of racial, age, et cetera. You're talking about  
9 discrimination for any purpose.

10 And therefore, it seems to me that when you  
11 say the government cannot discriminate, I think, in  
12 effect, you're saying a government supervisor cannot  
13 fire somebody simply because he does not like that  
14 person, because that's a discrimination in relation to  
15 the people that the supervisor does like; is that  
16 correct.

17 MR. KATYAL: That is -- that is correct as  
18 long as -- as long as, Justice Souter, it is not related  
19 to government efficiency; that is, if it's like this  
20 case, in which --

21 JUSTICE SOUTER: Right. It's not government  
22 efficiency; I just don't want to be around this person.

23 MR. KATYAL: Exactly.

24 JUSTICE SOUTER: Then it is the case, then,  
25 that if you prevail in this case, that the notion of

1 paradigmatic, at-will employment within the government  
2 in any State that recognizes that now, that will, in  
3 fact, be eliminated to -- to the degree that there is a  
4 -- a class-of-one cause of action.

5 MR. KATYAL: To the contrary, Justice  
6 Souter. I don't think that will happen and indeed has  
7 not happened and there is not a disagreement --

8 JUSTICE SOUTER: I thought you just agreed  
9 that it would happen in the hypothetical because as I --  
10 and maybe I do not understand at-will employment, but I  
11 thought the concept of at-will employment was that the  
12 individual could be fired for a good reason, a bad  
13 reason or no reason at all. Somewhere in that trinity  
14 we get Justice Breyer's hypothetical: I don't like him.  
15 And you're saying that won't pass muster, but it would  
16 pass muster under an at-will employment rule.

17 MR. KATYAL: Justice Souter, as a practical  
18 matter it won't matter -- as a practical matter it won't  
19 make a difference. And the reason is that because an  
20 employer can articulate, I don't like you, and it's  
21 undermining government efficiency, in most cases --  
22 particularly in at-will cases, where there isn't a  
23 collective bargaining agreement or a State law that will  
24 constrain the ability of the employer to even articulate  
25 some sort of efficiency --

1 JUSTICE SCALIA: No, no, no, no. I'm not  
2 working with this person; he is not going to affect my  
3 efficiency. He's under somebody below me but I just  
4 don't like him.

5 MR. KATYAL: And if there isn't an  
6 efficiency --

7 JUSTICE SCALIA: Right.

8 MR. KATYAL: -- and the State can't  
9 articulate an efficiency-based rationale --

10 JUSTICE SCALIA: Right.

11 MR. KATYAL: -- there will be some effect on  
12 at-will employment in those rare cases.

13 JUSTICE KENNEDY: So you have a national  
14 for-cause employment system. You can only be hired for  
15 cause -- fired for cause.

16 MR. KATYAL: Well, except that the cause  
17 that the equal protection mandates, the Equal Protection  
18 clauses guarantee, is so deferential that as Justice  
19 Breyer said, virtually any rationale will suffice if it  
20 is --

21 JUSTICE KENNEDY: But you're getting back to  
22 the point the government must always have a reason for  
23 what it does. Do you -- can you cite me a case that says  
24 that?

25 MR. KATYAL: That the government must always

1 have a reason?

2 JUSTICE KENNEDY: Must always have a reason  
3 for the actions it takes.

4 MR. KATYAL: Well, I read this Court's  
5 decision in *Olech* as basically mandating that as well  
6 as its, you know, as well as its long history on a  
7 class-of-one starting with *Sioux City and Sunday Lake*  
8 and *Snowden* versus --

9 JUSTICE KENNEDY: Yes, those are all tax  
10 cases, or in *Olech*, 30 feet as opposed to 15 feet, where  
11 there was a clear difference that was not sustained --  
12 but there was also an allegation of some invidious  
13 motive.

14 MR. KATYAL: And here, of course, the jury  
15 found that invidious motive. So even if we were to -- if  
16 the Court were to --

17 JUSTICE KENNEDY: It's just hard for me to  
18 get that sweeping proposition out of *Olech*.

19 MR. KATYAL: If the Court were worried about  
20 at-will employment, it has available to it the  
21 possibility of requiring animus just as Justice Kennedy  
22 -- or possibly in some --

23 JUSTICE ALITO: What happens in this  
24 situation? The government gives a reason for whatever  
25 the adverse action is. Somebody -- they give -- and

1 let's say it's -- a person had lower performance ratings  
2 than another person who was retained or given the  
3 promotion. Your position is the employee can always  
4 contest that and say that's not the real reason; that's  
5 not factually supported; is that correct?

6 MR. KATYAL: If -- if the government  
7 articulates a rationale that is objectively based,  
8 budget or something like that, yes; the plaintiff can  
9 come back and try and rebut it. It now it does so under  
10 the extremely deferential rational basis test, which is  
11 why so few causes get through. And indeed --

12 JUSTICE ALITO: How is it extremely  
13 deferential? The employee is going to say that's not  
14 the real reason; the real reason was simply spite and  
15 animus and personal dislike.

16 MR. KATYAL: Because if the government can  
17 put forth --

18 JUSTICE ALITO: And that goes to the jury.

19 MR. KATYAL: Yeah, I don't believe it goes  
20 to the jury, Justice Alito, because under this Court's  
21 decision in *Anderson v. Liberty Lobby*, the summary  
22 judgment stage will incorporate whatever the rationale  
23 basis test or review is.

24 JUSTICE ALITO: The employee says -- the  
25 employee says in an affidavit the supervisor doesn't like

1 me, and here are the 20 things that the supervisor has --  
2 has done and said over the course of the last five years  
3 to indicate personal dislike. Then -- then it goes to  
4 the jury.

5 MR. KATYAL: Again as long as the employer  
6 can articulate a reason based on government efficiency,  
7 there is no way for that employee to rebut that.

8 CHIEF JUSTICE ROBERTS: But he's going to  
9 have to articulate it in Federal court. You emphasize  
10 it's a deferential standard, it's not -- but every case  
11 now -- every case of an employee firing, in fact every  
12 case of an employee not getting as big a raise as he  
13 thought he was entitled, that's now a Federal case.

14 MR. KATYAL: Well, there are two problems  
15 with that. The first is those are already Federal cases  
16 under existing laws, Title VII, the panoply of other  
17 laws.

18 CHIEF JUSTICE ROBERTS: No -- Title VII,  
19 there's no --you know, it's "because you don't like me,"  
20 it's not because I'm a particular race or --

21 MR. KATYAL: But if we're positing a  
22 frequent filer plaintiff who's bent on trying to file a  
23 lawsuit, they can always make a Title VII. They can say  
24 you're firing me because of --

25 CHIEF JUSTICE ROBERTS: I'm not worried

1 about a frequent filer. I'm worried about 40 million  
2 single filers.

3 MR. KATYAL: And -- and the empirical  
4 evidence, Chief Justice -- Mr. Chief Justice, is that  
5 that doesn't happen. And the reason -- you know, we've  
6 had this cause of action now for 26 and 27 years in two  
7 circuits. It's now the law of the land in nine circuits;  
8 we haven't had that entire flood, nor have we had the  
9 harm to at-will employment. And the reason is that  
10 plaintiffs aren't going to bring these causes of action  
11 when they know they are so hard to win. It's because --

12 JUSTICE BREYER: I don't know if that's --  
13 that's why I started this. I read through, at least  
14 briefly, the circuit cases in this area. I was trying  
15 to figure it out. And it seemed to me that those  
16 circuit cases just really are finding some reason to  
17 dismiss the employer's -- employee's claim, that they are  
18 not taking this seriously, that it -- I mean, I don't  
19 want to criticize them because I don't know the facts of  
20 the case; but I couldn't figure out a standard.

21 And then I thought, well, the standard has  
22 to be the APA standard, and if it's -- I know that  
23 standard. And the reason that you don't have a million  
24 cases under that standard is because States have civil  
25 service systems.



1 MR. KATYAL: The existing --

2 JUSTICE BREYER: So it seemed to me that's  
3 the standard you want to apply. You want to bring all  
4 those cases into Federal court, and I'm not sure they  
5 are doing it now, really, in practice. Now what's wrong  
6 with what I've just said?

7 MR. KATYAL: Well, I don't think there is  
8 anything quite wrong with that. I would say two things:  
9 One, the existence of all of those State remedies and so  
10 on are far more attractive for the employment plaintiff  
11 than this cause of action. And so, that's one reason  
12 why you see these low numbers.

13 Second is I don't quite agree with you that  
14 the lower courts are, you know, maybe not taking it  
15 seriously or however. They have a long-established body  
16 of law now on how to dismiss these cases on 12(b)(6)  
17 motions, and the majority of the circuits have already  
18 upheld that because of the similarly situated  
19 requirements and intentionality requirements, as well as  
20 on summary judgment; that is, because the test is so  
21 deferential.

22 JUSTICE GINSBURG: But let's take this case.  
23 You say there were 30 similarly situated people with  
24 regard to this employee being let go. Wouldn't that be  
25 a contested matter? The employer will say they are not

1 similarly situated; each of them is differently  
2 situated. How does that get resolved on summary  
3 judgment?

4 MR. KATYAL: Well, normally if -- it depends  
5 on the rationale that's being offered. Here the  
6 government's rationale was declining wheat revenues, and  
7 so each of the employees who was paid out of those wheat  
8 revenues is similarly situated. The government in this  
9 case disclaimed the other rationales, performance and so  
10 on. In the ordinary case --

11 JUSTICE GINSBURG: I thought they withdrew  
12 from saying that it was a budgetary matter.

13 MR. KATYAL: Well, there were two different  
14 budgetary issues. One was the budget having to do with  
15 the Oregon State budget, and that was ultimately  
16 withdrawn by the State. The other was that Ms. Engquist  
17 and 10 other or so employees were being paid out of  
18 wheat revenues, and the State's rationale at trial was  
19 that the wheat market was collapsing, and so they  
20 couldn't pay for Ms. Engquist anymore. And she was of  
21 course --

22 JUSTICE SCALIA: Suppose the government --  
23 suppose the government comes in and says, we don't want  
24 to take a position as to -- as to what the reason was;  
25 it could have been any one of the following seven -- you

1 know, the wheat market collapsed; she came in late five  
2 days; some of the jobs she did she didn't do well; she  
3 dressed inappropriately on the job; her co-workers  
4 didn't like her -- you know. And -- can the government  
5 do that?

6 MR. KATYAL: The government can offer those.

7 JUSTICE SCALIA: Does it have to pick a  
8 reason? Does it have to pick a reason? You're --  
9 you're --

10 MR. KATYAL: Absolutely not. It can pick  
11 many reasons.

12 JUSTICE SCALIA: So long as there is  
13 conceivable reason, the court would grant summary  
14 judgment?

15  
16 MR. KATYAL: We think that's right. Now,  
17 there are --

18 JUSTICE GINSBURG: I thought you did not  
19 agree with that in your brief. I thought --

20 JUSTICE SCALIA: That's what I thought, too.

21 JUSTICE GINSBURG: -- you said no  
22 hypothetical justification is there. Not like  
23 legislation where any conceivable basis, even if the  
24 legislature didn't conceive it. I thought you were  
25 quite clear in saying no, that's not what rational basis

1 means in this context.

2 MR. KATYAL: I might have misunderstood  
3 Justice Scalia's question. I thought he was saying does  
4 the government -- can the government put forth a  
5 conceivable rationale grounded in some fact, and the  
6 answer to that is yes. It's got to be grounded in fact.  
7 That is the test.

8 JUSTICE SCALIA: All those facts are true  
9 facts, but the government isn't claiming that any one of  
10 them was the reason. It just says here are the  
11 conceivable reasons why -- why she might have been  
12 fired. We really don't know which one it was.

13 MR. KATYAL: The plaintiffs --

14 JUSTICE SCALIA: But here are seven  
15 perfectly conceivable reasons.

16 MR. KATYAL: The government has the ability  
17 to put that forth and the plaintiff has the ability to  
18 negate that. That is the rational-basis test under  
19 this.

20 JUSTICE SCALIA: What do you mean, to negate  
21 it? To negate it as the actual reason is what you mean.

22 MR. KATYAL: And -- to negate the facts.

23 JUSTICE SCALIA: But the government is not  
24 purporting that -- to say that it's the actual reason.

25 MR. KATYAL: Justice --

1 JUSTICE SCALIA: The government is saying  
2 had she been dismissed for this reason, and we really  
3 don't know whether that was the reason or not, but had  
4 she been dismissed for this reason it would have been  
5 rational.

6 MR. KATYAL: So long as, Justice Scalia,  
7 that rationale is itself grounded in the facts. That  
8 is, you can't come in and say she wasn't -- she was  
9 coming to work late when she wasn't. But if she were,  
10 then --

11 JUSTICE SCALIA: Well, I didn't understand  
12 your position to be that, but that -- -

13 MR. KATYAL: Again, the test here is -- the  
14 test I'm trying to offer is one of objective -- objective  
15 -- whether the rationale is objectively falsifiable.

16 CHIEF JUSTICE ROBERTS: Can I ask you  
17 more -- perhaps a more abstract question about this  
18 class-of-one?

19 Doesn't that have the effect of adding an  
20 equal protection claim to every violation of law? In  
21 other words, you have a Fourth Amendment search and  
22 seizure claim, and you're treated illegally; you say  
23 well, everybody else was treated legally and I wasn't,  
24 so it's an equal protection violation? You get -- you  
25 know, the zoning ordinance, it was improper under the

1 zoning law, and because everybody else was properly  
2 treated, it's a violation of equal protection.

3 MR. KATYAL: That is a problem, I think,  
4 under this Court's decision in *Olech* generally. It  
5 affects class-of-one --

6 JUSTICE KENNEDY: Do you think *Olech* was  
7 wrongly decided?

8 MR. KATYAL: I do not. I think this Court  
9 has had a long history on --

10 JUSTICE KENNEDY: But I don't find anything  
11 in *Olech* that says that every action that does not have a  
12 reason is constitutionally infirm.

13 MR. KATYAL: Let me go back, Justice  
14 Kennedy, to answer your question more directly. This  
15 Court has held in the employment case -- in the  
16 employment context, that the government must have a  
17 rational basis. It said so in *Harrah v. Martin*, *Beazer*  
18 and *Murgia*, all of which say that when an employer is  
19 dismissing employees, it must act with a rational basis.  
20 So this Court has already crossed that --

21 JUSTICE GINSBURG: All of those involved a  
22 group characteristic. One involved people -- *Beazer*,  
23 wasn't it methadone users? But none of them  
24 involved a situation like this, where she is not  
25 claiming anything about being a member of any

1 identifiable class. She is just saying, they  
2 discriminated against me -- not because of sex, race or  
3 anything else. They were out to get me.

4 MR. KATYAL: Justice Ginsburg, I don't quite  
5 think that describes the fact of Harrah v. Martin in  
6 which it was a challenge to an individual termination  
7 decision by the school board. But I do agree the other  
8 cases are group-based characteristics. We don't think  
9 that makes a difference, and indeed we think that the  
10 Solicitor General's test on this would be unworkable in  
11 practice, because everyone can assert their membership  
12 in some objective --

13 JUSTICE BREYER: No, but you could -- you  
14 could take sentiment -- I thought you could break the  
15 cases, for the most part, into two parts; one, what  
16 Justice Ginsburg said, and that's where the real reason  
17 is some kind of general characteristic, of a disfavored  
18 group. The second is the instance where the -- where  
19 the body that's acting is a body whose business it is to  
20 classify. That's zoning, taxation, and it means really  
21 classifying in fact, not some theoretical thing where  
22 you say, oh, well, they're classifying it employment  
23 because they put you in the class of such and such. But  
24 those two seem to me to handle the bulk of the cases,  
25 which, if I'm right about that, would leave your client

1 out in the cold. So I assume you'll tell me why I'm not  
2 right.

3 MR. KATYAL: Well, I will try. So the first  
4 thing is that -- that I don't quite think that describes  
5 the facts of Harrah versus Martin, which is an individual  
6 decision. And, secondly, once you start going down the  
7 line of objective, group-based characteristics and the  
8 like, it is infinitely manipulable, and that's why the  
9 Ninth Circuit decisions after, in the wake of this  
10 decision below, are dismissing group-based claims on --  
11 on disability and age and the like. Everyone can  
12 replead their claim as part of a group, that is, Ms. --  
13 you know, Ms. Engquist can say she's part of a group of  
14 two, those who complained about their supervisors and up  
15 the chain of command.

16 And so the problem is it becomes unworkable  
17 in practice. And, of course, the Constitution, Justice  
18 Ginsburg, doesn't say, the way the Solicitor General  
19 would like -- would like it be, doesn't say no State  
20 shall deny equal protection of the law to anyone who is a  
21 member of an objective group-based, you know, group and  
22 class.

23 JUSTICE GINSBURG: But you brought up -- you  
24 said this is in 1983. It's a cause of action provided by  
25 Congress. So that's why this is something State and



1 municipal employees can do, but no Federal employee  
2 could do. 1985 also uses the word "person or class of  
3 persons," and yet this Court held that 1985(3), that  
4 claim, it has to be some group-based animus, not malice  
5 directed toward a particular individual.

6 MR. KATYAL: I don't quite think that -- I  
7 think the Court has already dealt with that in *Olech* by  
8 affirming, essentially, a 1983 cause of action based on  
9 an individual person's claim. And so -- and so that is  
10 the relevant precedent here, not the section 1985  
11 precedents.

12 Now, if we --

13 JUSTICE GINSBURG: Well, maybe because  
14 1985(3) is in a discrimination context. The Court could  
15 say 1983 -- we know the classifications to which Justice  
16 Breyer was referring, tax classifications, zoning  
17 classifications, but this group of claims we're cutting  
18 out.

19 MR. KATYAL: But the statutory test -- text,  
20 Justice Ginsburg, is the same. There's one section 19  
21 --

22 JUSTICE GINSBURG: But it's a -- it's a  
23 general statute. It's not a precise statute like Title  
24 VII or the Age Discrimination Act. So it's the kind of  
25 legislation that seems much more amenable to court

1 interpretation.

2 MR. KATYAL: I would agree with that. I  
3 think it might open a whole can of worms were the Court  
4 to say that 1983 requires some group-based  
5 discrimination outside of this particular context that  
6 we are talking about. And so I think --

7 JUSTICE GINSBURG: Well, it certainly opens  
8 a can of worms to say that you take every claim against  
9 the government, every claim of wrongdoing by the  
10 government, and make it an equal protection claim  
11 because you say other people were treated properly and I  
12 was treated improperly; therefore, I have an equal  
13 protection claim.

14 MR. KATYAL: Except, Justice Ginsburg, we've  
15 had this cause of action now for 26 and 27 years in two  
16 circuits; we have it in nine. We haven't seen the  
17 effect on at-will employment nor, more generally, on the  
18 Equal Protection Clause opening up that can of worms  
19 that you're hypothesizing.

20 I'd like to reserve the balance of my time.

21 Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,

23 Mr. Katyal.

24 Ms. Metcalf.

25 ORAL ARGUMENT OF JANET A. METCALF

1 ON BEHALF OF THE RESPONDENTS

2 MS. METCALF: Mr. Chief Justice, and may it  
3 please the Court:

4 The Ninth Circuit decision in this case is  
5 consistent with this Court's recognition, in other  
6 constitutional contexts, the Federal court is simply  
7 not the forum in which to second-guess everyday  
8 decisions made by public employers. It's also  
9 consistent with this Court's recognition, again in other  
10 constitutional contexts, that the rights of public  
11 employees simply are not as expansive in a number of  
12 ways as those of citizens generally vis-a-vis their  
13 public employers.

14 We think that both of those lines of cases  
15 come at least in part out of the recognition that public  
16 employment decisions, indeed employment decisions  
17 generally, are highly subjective in nature and highly  
18 individualistic in nature.

19 We think really that the Ninth Circuit here  
20 has gone no farther than to apply those -- those concepts  
21 as a specific context of class-of-one cases brought in  
22 the public employment context.

23 JUSTICE GINSBURG: The Ninth Circuit  
24 decision would rule out the case where an employee says:  
25 I was the most qualified person for this position by

1 far, but the supervisor took a bribe from a rich uncle  
2 to promote somebody else.

3 MS. METCALF: Yes.

4 JUSTICE GINSBURG: That would be out?

5 MS. METCALF: That would be out as an equal  
6 protection claim. There undoubtedly would be other  
7 avenues -- potential other avenues, of --

8 JUSTICE GINSBURG: The scapegoat case, too,  
9 would be out?

10 MS. METCALF: Yes. Yes, it would. It would  
11 under this rationale --

12 JUSTICE SCALIA: Why -- but we have said  
13 that -- that there is a constitutional claim if the  
14 reason the person was not hired is that the person did  
15 not belong to the political party that the -- that the  
16 hiring person belonged to, the current administration.

17 MS. METCALF: And --

18 JUSTICE SCALIA: You said you can't turn  
19 down somebody just because she's a Democrat or a  
20 Republican.

21 MS. METCALF: That's correct. And our  
22 formulation I think, of the test, Your Honor, is that  
23 there should be so -- no such thing as a class-of-one equal  
24 protection claim in the public employment context, with  
25 certain exceptions, those exceptions including, for

1 example, exercising a fundamental right; membership in a  
2 suspect class; perhaps certain other -- other criteria,  
3 such as the one you mentioned, certain other  
4 classifications. But that as -- as a general matter, the  
5 broad question that the Ninth Circuit faced, is there --  
6 outside of those exceptions, is there such a thing as a  
7 class-of-one public employment?

8 JUSTICE STEVENS: May I ask, following up  
9 on Justice Ginsburg's question: Suppose it's not a  
10 class-of-one, but it's a class of two or three because,  
11 on two or three occasions they fired somebody because he  
12 wouldn't pay the supervisor a bribe. Would that cross  
13 the threshold? He had a practice of not -- of taking --  
14 getting a little money out of every promotion.

15 MS. METCALF: No, no, Justice Stevens, and  
16 again to be clear and one reason I keep throwing out --

17 JUSTICE STEVENS: If it's not a class of one  
18 --

19 MS. METCALF: Excuse me --

20 JUSTICE STEVENS: Do you say no or yes to  
21 whether there would be a cause of action?

22 MS. METCALF: There would -- no. Because --  
23 and this is why I keep using quotes for "class-of-one."  
24 "Class-of-one" doesn't literally describe the number of  
25 plaintiffs, both because in some cases there might be a

1 single plaintiff, but they're alleging discrimination  
2 based on membership and class. And because -- and  
3 Olech is an example -- as the Court pointed out in a  
4 footnote in Olech, Olech could have been described as a  
5 class of five.

6 But, again, we're talking about  
7 discrimination allegedly based on something other than  
8 the exceptions that this Court has recognized: Exercise  
9 of a fundamental right, membership in a --

10 CHIEF JUSTICE ROBERTS: No, but, as your  
11 friend points out, the constitutional provision says  
12 "any person." It doesn't say any person who is a member  
13 of a particular class or any person who is exercising a  
14 fundamental right. It's "any person."

15 MS. METCALF: Admittedly, Chief Justice  
16 Roberts. And I certainly don't think the constitutional  
17 text does us any affirmative good, but I don't think it  
18 goes as far as Petitioner would have it go.

19 JUSTICE KENNEDY: Do you think Olech was  
20 correctly decided?

21 MS. METCALF: Yes, yes. We take -- we take  
22 no issue with Olech. We --

23 JUSTICE KENNEDY: And public employment is  
24 different just because it's going to be a big problem?  
25 What --

1 MS. METCALF: Not because it's going to be a  
2 big problem, but because the regulatory context is  
3 significantly different, we think, than the employment  
4 context. Part of that is the inherently subjective  
5 nature of employment decisions. Regulatory decisions  
6 are made at arm's length; they are made under relatively  
7 --

8 JUSTICE KENNEDY: Well, but we're presuming  
9 that there is an objective reason for promoting or  
10 retaining -- the person has a college degree and so  
11 forth -- but that that person is rejected anyway because  
12 of dislike.

13 MS. METCALF: But -- but again --

14 JUSTICE KENNEDY: That's the hypothetical.  
15 Why is that hypothetical case different than Olech?

16 MS. METCALF: You might have an unusual  
17 employment case in which an employer has drawn up a list  
18 of objective criteria. That's not this case. That's  
19 not the average case. In the average case you might,  
20 for example, prefer that someone have a degree, but --

21 JUSTICE KENNEDY: But then we say that there  
22 is a subset of unusual cases where we will allow the  
23 cause of action?

24 MS. METCALF: No. We offer the subjective  
25 nature as a general reason why simply class-of-one

1 analysis should not apply in this context, period,  
2 because the average -- whereas the average in the  
3 regulatory context probably is a high degree of  
4 objectivity, the average in the employment context is a  
5 relatively high degree of subjectivity and discretion.

6 JUSTICE ALITO: But there are areas outside  
7 of employment where there's a lot of discretion.  
8 Suppose someone claims that he has repeatedly gotten  
9 speeding tickets for going five miles over the speed  
10 limit by a local police department because of some sort  
11 of personal feud with the chief of police. That I take  
12 it would be a valid claim under *Olech* because it's  
13 outside of employment?

14 MS. METCALF: Because it's regulatory and  
15 enforcing law enforcement. I think so.

16 JUSTICE KENNEDY: I'm having trouble hearing  
17 both the question and the answer.

18 MS. METCALF: As I -- as I understand -- I  
19 don't know if you want me to try to restate the question  
20 or if you want to do it.

21 JUSTICE ALITO: Well, the question was:  
22 Don't you run into the same problem of discretion  
23 outside of the employment context? For example, a  
24 police officer who is alleged to have given someone a  
25 ticket or a number of tickets simply because of -- of



1 personal malice as opposed to some sort of uniform  
2 policy.

3 MS. METCALF: But, again, there I think the  
4 -- hopefully, the norm in law enforcement is a  
5 relatively objective standard. Are you in fact  
6 speeding? Are you in fact breaking the traffic laws?  
7 Are you in fact breaking the law in some other way?  
8 Whereas the norm in employment decisions is a much more  
9 discretionary, subjective kind of decision. Yes, I may  
10 have certain criteria that I would prefer a manager  
11 have, but then I'm still going to have to weigh the  
12 qualifications and experience of various candidates and  
13 ultimately make a relatively subjective decision about  
14 who I think is the best candidate for that -- for that  
15 job. Which is why we think the regulatory context and  
16 the employment context are significantly different.

17 JUSTICE STEVENS: Yes, but those are all  
18 considerations that would be an adequate defense to a  
19 claim. If you had a judgment call to make, you say, I  
20 had a judgment call to make. And maybe there are good  
21 arguments on the other side. But you can't be liable for  
22 that kind of decision.

23 MS. METCALF: Well -- and certainly I'm  
24 somewhat perhaps surprised by Petitioner's argument  
25 today because I understand Petitioner's argument to

1 almost concede the point that summary judgment should  
2 have been given to the -- to the State's defendants in  
3 this case because in fact, with regard to each of the  
4 three employment decisions that are at issue in this  
5 case, the State and the defendants did proffer and --

6 JUSTICE KENNEDY: But we are concerned about  
7 the case -- let's just assume, just take it as a  
8 hypothetical case -- where there is an arbitrary and  
9 vindictive reason for hiring the employee and it has  
10 nothing to do with race, sex, or other recognized  
11 suspect or improper categories. And I thought your  
12 answer to me was, well, I might make an exception in  
13 that case.

14 MS. METCALF: No. My answer to you is as  
15 long -- well, my answer to you is twofold. If we're  
16 simply considering whether, in fact, there could be such  
17 a thing as a class-of-one case in the employment  
18 context, our answer is no. If we're past that and the  
19 issue is what's the test to apply, our test is as long  
20 as there is any conceivable rational basis for the  
21 action that the government employer took, the case  
22 should be at an end; it should not go to the jury.

23 CHIEF JUSTICE ROBERTS: Well, isn't that an  
24 odd system? I mean, you have -- like our time card  
25 example, you're going to have litigation over whether

1 she was late for work or was not late for work, and in  
2 fact that's got nothing to do with the reasons she was  
3 fired at all. And yet the government puts it out, well,  
4 this is a conceivable reason, and then the other side  
5 says, no, it's not, and they fight. It just seems so  
6 otherworldly; it has nothing to do with the reason at  
7 all.

8 MS. METCALF: Well, the -- often the real  
9 reason -- and this Court has made this observation in  
10 particular in legislative contexts. But often the real  
11 reason is not necessarily apparent or undisputed, and  
12 beyond that, that's simply the test that this Court has  
13 employed as a general matter in rational-basis  
14 equal-protection cases.

15 CHIEF JUSTICE ROBERTS: Well, but that's  
16 with respect to legislative or regulatory action, where  
17 there are important reasons not to inquire into the  
18 motives of the legislators. It's not clear to me that  
19 that same rationale applies here.

20 MS. METCALF: Well, two points, Your Honor.  
21 I would certainly agree that the Court has most often,  
22 if not always, said that in the -- in the legislative  
23 context. But Petitioner is not really arguing for a  
24 different test here. As I understand Petitioner's  
25 argument, and perhaps I misunderstand it, but

1 Petitioner's argument is that this Court should apply  
2 customary rational-basis analysis and applying such  
3 analysis as long as the government has some conceivable  
4 rational basis for --

5 JUSTICE GINSBURG: That's not -- you know  
6 that that's not the position they took in their brief.  
7 They said it's not a hypothetical, any conceivable.  
8 They said that by qualifying -- the -- even -- even in  
9 the at-will category, the government has to articulate a  
10 reason rooted in the facts of this case, not a  
11 hypothetical. A hypothetical reason is not good enough.

12 MS. METCALF: Agreed, Justice Ginsburg. If  
13 -- we don't agree that that would be the test. We think  
14 that the Court should stick to the customary  
15 rational-basis test as it's applied in other contexts,  
16 and say if there is any conceivable rational basis, but  
17 even if you were to --

18 JUSTICE KENNEDY: It seems to me that you  
19 want us to write an opinion that says there are some  
20 instances where the government can act arbitrarily and  
21 unreasonably.

22 MS. METCALF: We would ask you to write an  
23 opinion, Justice Kennedy, that says that, within the  
24 public employment context, there are no class-of-one  
25 equal protection claims.

1 JUSTICE BREYER: Well, you think the answer  
2 is yes, I mean, because --

3 MS. METCALF: Yes.

4 JUSTICE BREYER: -- because the  
5 Administrative Procedures Act forbids arbitrary,  
6 capricious action. So you're saying the Constitution --

7 MS. METCALF: Yes.

8 JUSTICE BREYER: -- does not  
9 constitutionalize all --

10 MS. METCALF: Yes.

11 JUSTICE BREYER: -- arbitrary, capricious  
12 behavior --

13 MS. METCALF: Yes.

14 JUSTICE BREYER: -- of the Federal  
15 Government --

16 MS. METCALF: And there --

17 JUSTICE BREYER: -- or the State government.

18 MS. METCALF: -- may well be and there  
19 probably are going to be other remedies, but not a  
20 Fourteenth Amendment remedy.

21 JUSTICE BREYER: Yes.

22 MS. METCALF: Absolutely.

23 JUSTICE BREYER: So the answer is yes.

24 Okay.

25 JUSTICE KENNEDY: And that is because of

1 existence of other avenues of redress.

2 MS. METCALF: Not solely. That, I think, is  
3 a factor. It's because of, again, this Court's  
4 recognition in other contexts that public employees  
5 simply are not on the same footing as private citizens  
6 generally with regard to their employers, and that  
7 Federal court is simply not the appropriate forum in  
8 which to review the day-to-day decisionmaking of public  
9 employers; and because of recognition of the inherently  
10 subjective nature of public employment decisions.

11 JUSTICE KENNEDY: I understood that the  
12 argument --

13 JUSTICE STEVENS: -- your opponent's  
14 statement that this really has not generated an awful  
15 lot of litigation. Do you think he's right or wrong on  
16 that?

17 MS. METCALF: I think so far as anyone can  
18 determine, he's right to date. Obviously, we have some  
19 real concern that if this Court were to say that there  
20 were such a cause of action, that things might change.  
21 Beyond that, I think the relatively few number of cases,  
22 and in particular the very, very small to-date number of  
23 successful cases is an argument against extending  
24 class-of-one equal protection analysis into this  
25 context, because there will be an adverse effect on

1 public employer discretion if the Court were to extend  
2 the analysis. Public employers would have to worry  
3 about what happened in this case, that their decisions  
4 are subject to later second-guessing in Federal court.  
5 It may well chill the exercise of public employer  
6 discretion. And I think the most common complaint about  
7 public employer discretion, it is that it's  
8 underutilized not overutilized, and there would be a  
9 real danger that for the price of a very few successful  
10 cases you would chill the exercise of public employer  
11 discretion.

12 So, we actually think that that point is an  
13 argument against the extension, not for it. But I would  
14 agree that we can't point to any enormous flood of cases  
15 to date.

16 JUSTICE GINSBURG: In Oregon, is -- would  
17 there be a civil service remedy available to someone in  
18 this situation?

19 MS. METCALF: There would be admittedly very  
20 limited remedies under the civil service laws, per se.  
21 The decision about whether to advance her as a manager,  
22 of who would pick her as a manager was one really solely  
23 within the employer's discretion. With respect to the  
24 decisions about the layoff and the bumping into someone  
25 else's position, she had essentially what were

1 procedural remedies under her collective bargaining  
2 agreement, which -- which the union would have had to  
3 assert on her behalf. If the union had failed to do so  
4 and she had thought the union erred in doing so, she  
5 could have brought an action against them.

6 She did have a common-law State-law claim in  
7 this case, which she brought, one for intentional  
8 interference with her employment relationship, which she  
9 was successful in both in the district court and which  
10 we did not challenge in the Ninth Circuit. So that --  
11 that State-law claim is certainly still a viable claim --

12 JUSTICE SCALIA: But as far as the Federal  
13 law claim is concerned, you'd urge us to come out the  
14 same way, even if this case came up before the  
15 Administrative Procedure Act was passed, right?

16 MS. METCALF: Yes. Yes, we would.  
17 Although, again, that provides yet an additional remedy  
18 to --

19 JUSTICE GINSBURG: The Administrative  
20 Procedure Act doesn't apply to State -- to State  
21 procedures. It's a Federal act --

22 MS. METCALF: Right.

23 JUSTICE GINSBURG: -- governing Federal  
24 agencies.

25 MS. METCALF: Right.



1 JUSTICE SCALIA: But as to Federal  
2 employment, you'd say the same?

3 MS. METCALF: Yes.

4 JUSTICE SCALIA: And you'd say the same as  
5 if there were no State remedies for --

6 MS. METCALF: Yes.

7 JUSTICE SCALIA: -- employment  
8 discrimination by the State.

9 MS. METCALF: Yes, we would.

10 JUSTICE SCALIA: Because the State has a  
11 right to employ at will?

12 MS. METCALF: Yes, subject to whatever  
13 limitations there may be and other affirmative sources  
14 of law such as a collective bargaining agreement or some  
15 other State or Federal statutory remedy. Yes.

16 CHIEF JUSTICE ROBERTS: What exactly is the  
17 analytic basis of that? I mean, do you think that --  
18 you don't think the Equal Protection Clause applies at  
19 all to this situation where it's just a class of one?  
20 Or do you think that the clause is always -- the claim  
21 of violation under the clause is always rebutted  
22 automatically? What is the --

23 MS. METCALF: The former -- the former  
24 within the context of public employment. We certainly  
25 again are not -- not taking issue with Olech.

1 JUSTICE KENNEDY: But what authority do you  
2 have for us to parse different governmental actions and  
3 say some are subject to the Equal Protection Clause and  
4 some are not?

5 MS. METCALF: Well, again I don't know --

6 JUSTICE KENNEDY: Other than the convenience  
7 of the government -- it might be more efficient for the  
8 government -- you want us to say that the government can  
9 act arbitrarily with respect to employees?

10 MS. METCALF: And, again, I don't know that  
11 the Federal Government discusses peremptory challenges,  
12 and I'll leave that to them. But, again, stepping  
13 outside the Fourteenth Amendment context for a moment,  
14 this Court certainly and without explicit textual  
15 support has recognized differences, for example, in  
16 the First Amendment rights of public employees  
17 vis-a-vis --

18 CHIEF JUSTICE ROBERTS: Oh, but that's very  
19 different, because those cases say that those  
20 individuals have no First Amendment rights. In other  
21 words, in the public employee context, talking about  
22 their official obligations, there is no First Amendment  
23 right to do that. I think it's quite a different  
24 situation to say there is no equal protection right in  
25 government employment.

1 MS. METCALF: But -- but -- maybe I  
2 shouldn't say again. Your Honor, I think that what we  
3 are asking for in this case is the same sort of line  
4 drawing outside textual -- atextual line drawing that  
5 this Court has done in other contexts such as -- such as  
6 the First Amendment context, where it has said that  
7 government simply can impose obligations, restrictions on  
8 its public employees that it could not on citizens  
9 generally and --

10 JUSTICE SCALIA: Why can't you simply say  
11 that they are not being denied equal protection of the  
12 law? The law that applies to her and to everybody else  
13 employed by the government is that the employment is at  
14 will?

15 MS. METCALF: And --

16 JUSTICE SCALIA: That's certainly an equal  
17 protection. She could be fired at will and everybody  
18 else can be fired at will.

19 MS. METCALF: Agreed.

20 JUSTICE SCALIA: Why isn't that equal  
21 protection of the law?

22 MS. METCALF: Yes --

23 JUSTICE GINSBURG: Except this wasn't -- this  
24 wasn't employment at will, right?

25 MS. METCALF: Not precisely. But the

1 decision whether or not to promote effective or not  
2 might have been at will in the sense that was a decision  
3 subject solely to the discretion of the employer. So,  
4 in a sense, it's analogous. I wouldn't say that it is  
5 precisely at will with respect to any of these  
6 decisions. And, again, because she had only limited  
7 rights under the collective bargaining agreement,  
8 outside of those limited rights the employer really had  
9 full discretion as to what decision it would make. So,  
10 again, I think there is an analogy to at will.

11 JUSTICE STEVENS: What proportion of your  
12 workforce is really hired at will? Haven't they all got  
13 some kind of protections under your statutes?

14 MS. METCALF: As a matter of fact, none of  
15 the assistant attorneys general, including me, have --  
16 have any protection. Most -- most State employees have  
17 some kind of collective -- I'm arguing against myself in  
18 this case -- most employees in the State of Oregon have  
19 some kind of collective bargaining protection. So at  
20 will is the exception, not the rule.

21 JUSTICE STEVENS: Don't have you some kind  
22 of civil service system, too?

23 MS. METCALF: Not precisely. It's much more  
24 a matter of collective bargaining, but it amounts to  
25 much the same thing in the end.

1 JUSTICE STEVENS: So the employed -- people  
2 who are employed at will are the exception rather than  
3 the rule?

4 MS. METCALF: Absolutely. And I would  
5 readily concede that fact.

6 If the Court gets to the second part of the  
7 case and the question becomes what sort of test,  
8 assuming that the Court finds a class-of-one analysis  
9 should apply in this context and the question becomes:  
10 What's the test? Really, all the State is asking for  
11 here is an application of a -- of the customary,  
12 rational-basis test in which if any conceivable rational  
13 basis can be offered by the government, the case should  
14 be at an end.

15 That -- that position was raised below by the  
16 State defendants, who raised the point both in their  
17 summary judgment motion and in their trial memo and urged  
18 the district court to take this case away from the jury  
19 on that basis, and the district court refused to do so.

20 JUSTICE SOUTER: What do you say to the  
21 argument that the conceivable-basis test is appropriate  
22 when we are judging legislation, because we don't know  
23 what goes through the minds of individual legislators.  
24 Whereas, these kinds of decisions, employment decisions,  
25 are, in fact, very specific state-of-mind kind of

1 decisions; and, therefore, the equal-protection standard  
2 ought to take that into consideration and look to the  
3 specific reasons?

4 MS. METCALF: I -- I think the difference is  
5 not that great. I think, admittedly, the actual  
6 rationale is harder to discern in legislative cases, in  
7 part, because you have so many decisionmakers.

8 But here, for example, it is similar because  
9 the decisionmakers might have had a number, and probably  
10 did have a number, of elements in mind from dislike to a  
11 preference for a certain kind of background.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you, Ms. Metcalf.

14 Ms. Blatt.

15 ORAL ARGUMENT OF LISA S. BLATT

16 ON BEHALF OF UNITED STATES,

17 AS AMICUS CURIAE,

18 SUPPORTING THE RESPONDENTS

19 MS. BLATT: Mr. Chief Justice, and may it  
20 please the Court:

21 There are two types of class-of-one claims  
22 that should not be recognized in the public-employment  
23 context.

24 The first is a claim of residual ill will or  
25 bad-motive simpliciter, and the second is a simple

1 demand for a rational basis for an adverse personnel  
2 decision.

3           The problem with those claims is that they  
4 would constitutionalize routine employee grievances and  
5 impose a for-cause requirement on public employers,  
6 notwithstanding the long tradition of at-will public  
7 employment.

8           JUSTICE KENNEDY: And the reason that we  
9 didn't say that same thing in *Olech* is because in the  
10 taxation area or the easement area we simply don't have  
11 the great number of cases and also because animus is  
12 more easily established.

13           MS. BLATT: It is similar. And in the  
14 regulatory context a personality conflict is not a  
15 legitimate basis for adversely treating a citizen. But a  
16 personality conflict between a supervisor and a  
17 subordinate is generally, if not always, a legitimate  
18 basis for adversely treating an employee.

19           JUSTICE BREYER: Well, I wondered if I was  
20 right in *Olech*; that I thought that maybe, looking  
21 back, that there is something about zoning and taxation  
22 where it normally is a legislative rule-making activity.

23           And that perhaps you would apply all of  
24 these things you are talking about where what the --  
25 even if it is employment, where what the employer is

1 doing, or anyone else is doing, is creating rules, is  
2 classifying. And not a made-up classification like you  
3 put me and one other fired person in the fired-person  
4 category. I don't mean that. I mean like taxation and  
5 zoning and legislation. Is there anything to that?

6 MS. BLATT: There is some -- some support in  
7 the case law, but what I think your concurring opinion  
8 was trying to do was to help local and State governments.  
9 And it is one thing to say the mayor denied my building  
10 permit, and I'm going to make the employee allege  
11 animus, and that might be difficult to do. But for  
12 someone in the -- on the mayor's staff, it's not that  
13 difficult to allege animus on the part of your  
14 supervisor.

15 Employment frictions are inherent in the  
16 workplace, and perceptions of unfair treatment readily  
17 arise by an employee who thinks he or she was unfairly  
18 treated.

19 CHIEF JUSTICE ROBERTS: Well, I agree with  
20 all of that, but -- so the Equal Protection Clause  
21 doesn't apply?

22 MR. BLATT: Sure, it applies. It just  
23 doesn't give you a right to collect what this plaintiff  
24 did: Punitive and compensatory damages based on  
25 residual ill will.



1           She ran an equal-protection claim on race,  
2 gender, national origin, sex. She had a statutory claim  
3 for imposing unlawful conduct under Title VII. The jury  
4 rejected all that and imposed punitive damages, and  
5 it went to the jury -- a legal question that has always  
6 been decided by this Court and the courts about whether  
7 there was a rational basis or whether, instead, it was  
8 solely based on vindictive, arbitrary, or malicious  
9 reasons. It went to the jury, and there was no  
10 allegation that any type of --

11           CHIEF JUSTICE ROBERTS: So you think the  
12 Equal Protection Clause applies --

13           MS. BLATT: Yes.

14           CHIEF JUSTICE ROBERTS: -- but every case of  
15 public employment -- what -- it's satisfied?

16           MS. BLATT: It doesn't -- no. If you have a  
17 membership in an identifiable group classification as  
18 opposed to purely subjective and individualized  
19 criteria. Here her class was: I was a thorn in my  
20 supervisor's side. That is not a class. And if it is a  
21 class, you would lose, because you would always have a  
22 rational basis.

23           CHIEF JUSTICE ROBERTS: But the Equal  
24 Protection Clause doesn't talk about classes. It talks  
25 about any person.

1 MS. BLATT: That's correct, and -- and in  
2 First Amendment -- and that's a different amendment, but  
3 in the Fourteenth Amendment there is the Batson context.  
4 It's just -- just like in the Batson context, the high  
5 cost of litigating every single claim to try to ferret  
6 out what would truly be an irrational decision is not  
7 worth the cost when there is such an overwhelming  
8 likelihood that a truly irrational decision would  
9 already be prohibited by some other contract or  
10 statutory source.

11 JUSTICE SCALIA: It doesn't talk about equal  
12 protection, actually, it talks about equal protection  
13 the law; and if -- if the law in the government  
14 employment context is that you can be dismissed at will,  
15 or for a number of reasons, so long as everybody is  
16 subject to that same law, it would seem to be no  
17 discrimination in the law?

18 MS. BLATT: Well, we are not relying on the  
19 text of the Equal Protection Clause.

20 JUSTICE SCALIA: Oh, don't rely on the text,  
21 certainly.

22 (Laughter.)

23 MS. BLATT: What we are relying on are two  
24 principles. And there is just a longstanding principle  
25 that the Constitution is not the appropriate forum to

1 resolve routine employment disputes.

2 JUSTICE GINSBURG: What do you do, Ms. Blatt,  
3 with the two cases that I raised with Ms. Metcalf? That  
4 is, the bribe case and the scapegoat case, they are out,  
5 too. If public employment is taken out from this  
6 class-of-one, those two cases would go as well.

7 MS. BLATT: Right, well, one is criminal  
8 conduct, and on the scapegoat case I actually don't  
9 think that's such a bad thing. One -- I mean, one can  
10 recharacterize scapegoating as public accountability, and  
11 their side would allow Federal courts and State courts to  
12 second-guess a local employment's response to a public  
13 crisis. So if there is a school board or some tragic  
14 accident in the city, and a group of employees are  
15 fired, their side would give a constitutional claim for  
16 punitive and compensatory damages based on a finding of  
17 ill will; and although the other side comes up here and  
18 tells a story about traditional rational basis, in this  
19 case it was submitted to the jury, about whether there  
20 was a rational basis or whether whatever articulated  
21 basis was a mere pretext; it was treated basically like  
22 a sex, or gender, a race claim, and not a rational basis  
23 claim. This should have never gone to the jury. It's  
24 not a fact question whether there is a rational basis.

25 JUSTICE SOUTER: Can we -- can we meet your

1 objection --

2 JUSTICE STEVENS: What if you have a mixed  
3 motives case, both ill will and a -- some reason, she was  
4 also late to work -- you would win that case.

5 MS. BLATT: Well --

6 JUSTICE STEVENS: If you have one good  
7 reason and one bad reason, the bad reason doesn't trump  
8 the good reason.

9 MS. BLATT: That's right. In a mixed-motive  
10 constitutional case involving a fundamental right, it's  
11 a fact question for the jury. In a rational basis case  
12 it would be a question for the court whether there is a  
13 conceivable rational basis.

14 JUSTICE KENNEDY: But a public employee  
15 applies for a 30-foot easement that he is entitled to,  
16 and doesn't receive it; and the mayor says and by the  
17 way I don't like you, so you're fired: A, you don't get  
18 the easement, B, you're fired. Why -- why is it -- why  
19 do we treat the cases differently? Other than the  
20 floodgate argument, et cetera?

21 MS. BLATT: Well, if the mayor doesn't give  
22 the employee -- the employee a grievance, in her capacity  
23 as a citizen she has a suit under Olech; but in her  
24 termination claim, she -- unless she can allege  
25 membership in an identifiable class, she doesn't have an

1 equal protection right to be free from just pure  
2 arbitrariness --

3 JUSTICE KENNEDY: But that just states your  
4 conclusion. I want to know why that is.

5 MS. BLATT: Why? Because personality  
6 conflicts have no role in the regulatory context and  
7 they generally if not always are the legitimate basis  
8 for a personnel decision. It's just that the -- they say  
9 this example, well, employer doesn't like you; that's  
10 sufficient; but the other side never tells you how far  
11 they would take that. Is it because the conflict arose  
12 in the workplace; is it because it arose from their  
13 neighborhood; is it because it arose from the high  
14 school debate team or law review or the cheerleading  
15 squad and that's why the person wasn't hired? And we  
16 would have courts having to go, judge by judge and court,  
17 and in their case, jury by jury, for these kinds of  
18 decisions; and these shouldn't be constitutional cases.  
19 These are more appropriately resolved under merit service  
20 protection laws and collective bargaining agreements.

21 JUSTICE SOUTER: Would it meet your concern  
22 if we held number one, yes, there may be a class of  
23 claim in the public employment context, but any reason  
24 that would be a lawful reason for discharge under the  
25 at-will rule is a -- a reason that would satisfy the

1 test; and therefore it would be the real outlier that  
2 would ever get to the jury?

3 MS. BLATT: Well, in the at-will context, if  
4 an employer says you're fired and gives no reason,  
5 that's legitimate; but in their case at least by the  
6 time a lawyer is hired and the case goes to court, the  
7 State is having -- has to articulate a basis that could  
8 be second-guessed. If you write -- if you are going to  
9 apply class-of-one and write a very broad opinion saying  
10 almost anything goes in the employment context, that's  
11 certainly preferable than having this go to juries based  
12 on pretext and bad motive, which is what happened in  
13 this case.

14 But I still think it would impose a  
15 for-cause requirement that's inconsistent with your due  
16 process cases, which presuppose that the personnel  
17 entitlement must spring from someplace other than the  
18 Constitution.

19 JUSTICE SOUTER: Well, let me ask you this.  
20 I mean, I wasn't trying a trick question but I -- let me  
21 be explicit about this. If we adopted the rule that  
22 said anything that goes under the at-will rule goes  
23 under equal protection class of one, would there be  
24 anything left?

25 MS. BLATT: No.

1 JUSTICE SOUTER: Okay. So the reason is, if  
2 we adopted that rule you'd win across the board.

3 MS. BLATT: Yes. Yes. Unless you leave --  
4 right. There is not point. I mean the at-will rule is  
5 that no reason be given, or it could be a bad reason.  
6 And if there is any concern about the line drawing, I  
7 would urge you just to look at the verdict form in this  
8 case. All that was submitted to the jury, after there  
9 was the rejection of the national origin, the gender,  
10 the race, the color, the retaliation for reporting  
11 sexual harassment, was just a simple case of -- without  
12 any rational basis, and solely for arbitrary, vindictive  
13 or malicious reasons.

14 JUSTICE KENNEDY: So we should cite there is  
15 no constitutional right to be a policeman? We can  
16 revise that?

17 MS. BLATT: Well, no. I mean, there are  
18 lots of constitutional limits on public employment.  
19 What we are talking about is where you've reduced at  
20 will to a null set, and there is any claim for  
21 arbitrary conduct. I mean, we would allow under our  
22 theory any claim that is not just a residual ill will or  
23 bad motive states a valid equal protection case. And  
24 there is many, many statutory protections as well.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 Ms. Blatt.

2 Mr. Katyal, you have four minutes remaining.

3 REBUTTAL ARGUMENT OF NEAL KATYAL

4 ON BEHALF OF THE PETITIONER

5 MR. KATYAL: The Ninth Circuit in this case,  
6 Your Honor, has cut out all claims conceivable or  
7 otherwise, and that is contrary to the text of the Equal  
8 Protection Clause in this Court's precedent.

9 JUSTICE SOUTER: Do you agree with me that  
10 if we adopted a rule that says that anything that goes  
11 for at-will employment goes for one-person-class equal  
12 protection, and that that in effect would eliminate any  
13 cause of action?

14 MR. KATYAL: It would, Justice Souter, under  
15 the formal rule; that is, no reason alone is sufficient.  
16 That of course as a practical matter is not the way  
17 at-will works anymore, because of the panoply of rules,  
18 Title 7 and otherwise that force employers to articulate  
19 rationales when they terminate at-will employees. So as  
20 a practical matter the no-reason firing doesn't exist  
21 anymore because those employees, those at-will employees  
22 who are going to sue are going to sue anyway.

23 JUSTICE ALITO: You keep stressing the text  
24 of the Equal Protection Clause. Don't you think it's  
25 rather late in the day to be arguing that the Equal



1 Protection Clause should be read with that kind of  
2 literalness?

3 MR. KATYAL: I don't. That is that this  
4 Court has consistently held that the text of the Equal  
5 Protection Clause encompasses personal claims.

6 JUSTICE ALITO: It talks about laws, but it  
7 extends to situations where what's being -- the unequal  
8 treatment is not stemming from the law, but from  
9 executive or administrative action.

10 MR. KATYAL: That's quite right, Justice  
11 Alito. And in fact since 1879 this Court has said --

12 JUSTICE ALITO: And many other examples,  
13 are there not situations where it's been held to apply  
14 that might not fall within the literal language of the  
15 clause?

16 MR. KATYAL: I'm not sure I got that. I'm  
17 sorry.

18 JUSTICE ALITO: You think in all other  
19 respects it's read literally?

20 MR. KATYAL: I'm not sure if in all other  
21 respects it is, but with respect to the relevant  
22 questions here -- that is, does this clause apply to  
23 individual agency actions, this Court has held so in  
24 1879 in Missouri versus Lewis, and has held so  
25 consistently ever since.

1           So in this case the government put forth one  
2 rationale which was an objective one, we -- and  
3 disclaimed all the others, the subjective ones; and we  
4 do think that those subjective rationales in employment  
5 is different, and would almost always be a rational  
6 basis. In this case they disclaimed all those other  
7 ones.

8           So here the government is using its power,  
9 its raw power, purely for its own personal ends and that  
10 is contrary to the whole notion of why employment should  
11 be different -- which is government efficiency.

12           CHIEF JUSTICE ROBERTS: What is your answer  
13 to their Batson analogy?

14           MR. KATYAL: Batson I think supports exactly  
15 what we are saying, which is this Court has said we  
16 don't review on rational basis, actions by a prosecutor  
17 that are motivated, strikes that are motivated by the  
18 trial, that are -- that are for a good trial; but if the  
19 rationale of the prosecutor is I don't like the disabled  
20 person, or I don't like --

21           CHIEF JUSTICE ROBERTS: No, but you're  
22 adding the class aspect. I mean, if the rationale of the  
23 prosecutor is, I don't like this person, under Batson  
24 you don't get to bring an equal protection challenge to  
25 that.

1           MR. KATYAL: I don't quite think that this  
2 Court has confronted that specific issue about whether  
3 it's an individual class-of one juror case. But the  
4 language of Batson says that we don't -- that this  
5 Court won't review on rational basis a claim when it's  
6 related to the government's motivation. They are to  
7 have a fair trial, a good trial.

8           JUSTICE GINSBURG: I thought if you have a  
9 peremptory challenge it means that you can't challenge  
10 on any basis other than the group -- the groups that  
11 Batson has recognized. You - you said you could  
12 challenge a peremptory, exercise a peremptory challenge  
13 if it's unrelated to the selection of an impartial jury.

14           Well, I thought that a peremptory, outside  
15 of the class cases, is matter of the prosecutor or the  
16 defense attorney don't like this juror.

17           MR. KATYAL: Justice Ginsburg, the language  
18 in Batson and J.E.B. was qualified by as saying so long  
19 as it related to the task at hand; and the Seventh  
20 Circuit and indeed, the D.C. Circuit last year referred  
21 to that language and talked about an exemption if the  
22 prosecutor's motive was personal, as it is in this case.

23           JUSTICE GINSBURG: Has there ever been a  
24 challenge to the exercise of peremptory challenge on the  
25 ground that the challenge was unrelated to the selection

1 of an impartial jury?

2 MR. KATYAL: In the Seventh Circuit decision  
3 the court said this would stay the cause of action.  
4 This was after this Court's decision in J.E.B., yes.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
6 The case is submitted.

7 (Whereupon, at 12:07 p.m., the case in the  
8 above-entitled matter was submitted.)

9

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