IN THE SUPREME COURT OF THE UNITED STATES

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ANUP ENGQUIST, :

Petitioner :

v. : No. 07-474

OREGON DEPARTMENT OF :

AGRICULTURE, ET AL. :

- x

Washington, D.C.

Monday, April 21, 2008

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

APPEARANCES:

NEAL KATYAL, ESQ., Washington, D.C.; on behalf of the Petitioner.

JANET A. METCALF, ESQ., Assistant Attorney General, Salem, Ore.; on behalf of the Respondents.

LISA S. BLATT, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondents.

C O N T E N T S

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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE GINSBURG: What about on the Federal

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

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

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

MR. KATYAL: Not --

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

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

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

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

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

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

have a reason for what it does?

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

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

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

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

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

MR. KATYAL: Exactly.

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

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

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

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

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

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

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

JUSTICE SCALIA: Right.

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

JUSTICE SCALIA: Right.

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

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

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

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

MR. KATYAL: That the government must always

have a reason?

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

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

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

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

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

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

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

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

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

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

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

JUSTICE ALITO: And that goes to the jury.

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: I'm not worried

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

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

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

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

MR. KATYAL: The existing --

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

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

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

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

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

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

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

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

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

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

MR. KATYAL: The government can offer those.

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

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

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

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

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

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

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

means in this context.

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

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

MR. KATYAL: The plaintiffs --

JUSTICE SCALIA: But here are seven perfectly conceivable reasons.

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

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

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

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

MR. KATYAL: Justice --

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

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

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

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

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

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

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

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

JUSTICE KENNEDY: Do you think Olech was wrongly decided?

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

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

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

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

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

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

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

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

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

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

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

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

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

Now, if we --

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

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

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

interpretation.

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Katyal.

Ms. Metcalf.

ORAL ARGUMENT OF JANET A. METCALF

ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

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

MS. METCALF: Yes.

JUSTICE GINSBURG: That would be out?

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

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

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

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

MS. METCALF: And --

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

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

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

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

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

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

MS. METCALF: Excuse me --

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

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

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

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

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

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

JUSTICE KENNEDY: Do you think Olech was correctly decided?

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

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

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

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

MS. METCALF: But -- but again --

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

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

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

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

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

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

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

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

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

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

personal malice as opposed to some sort of uniform policy.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE BREYER: Well, you think the answer is yes, I mean, because --
MS. METCALF: Yes.
JUSTICE BREYER: -- because the Administrative Procedures Act forbids arbitrary, capricious action. So you're saying the Constitution --
MS. METCALF: Yes.
JUSTICE BREYER: -- does not constitutionalize all --
MS. METCALF: Yes.
JUSTICE BREYER: -- arbitrary, capricious behavior --
MS. METCALF: Yes.
JUSTICE BREYER: -- of the Federal Government --
MS. METCALF: And there --
JUSTICE BREYER: -- or the State government.
MS. METCALF: -- may well be and there probably are going to be other remedies, but not a Fourteenth Amendment remedy.
JUSTICE BREYER: Yes.
MS. METCALF: Absolutely.
JUSTICE BREYER: So the answer is yes. Okay.
JUSTICE KENNEDY: And that is because of

existence of other avenues of redress.

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

JUSTICE KENNEDY: I understood that the argument --

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

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

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

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

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

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

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

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

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

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

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

MS. METCALF: Right.

JUSTICE GINSBURG: -- governing Federal agencies.

MS. METCALF: Right.

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

MS. METCALF: Yes.

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

MS. METCALF: Yes.

JUSTICE SCALIA: -- employment discrimination by the State.

MS. METCALF: Yes, we would.

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

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

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

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

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

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

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

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

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

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

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

MS. METCALF: And --

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

MS. METCALF: Agreed.

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

MS. METCALF: Yes --

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

MS. METCALF: Not precisely. But the

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Ms. Metcalf.

Ms. Blatt.

ORAL ARGUMENT OF LISA S. BLATT

ON BEHALF OF UNITED STATES,

AS AMICUS CURIAE,

SUPPORTING THE RESPONDENTS

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

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

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

demand for a rational basis for an adverse personnel decision.

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

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

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

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

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

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

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

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

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

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

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

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

MS. BLATT: Yes.

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

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

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

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

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

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

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

(Laughter.)

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

resolve routine employment disputes.

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

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

JUSTICE SOUTER: Can we -- can we meet your

objection --

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

MS. BLATT: Well --

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

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

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

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

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

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

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

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

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

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

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

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

MS. BLATT: No.

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you,

Ms. Blatt.

Mr. Katyal, you have four minutes remaining.

REBUTTAL ARGUMENT OF NEAL KATYAL

ON BEHALF OF THE PETITIONER

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

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

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

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

Protection Clause should be read with that kind of literalness?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

of an impartial jury?

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

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

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

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