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. :

8 - x

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:

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

17 Petitioner.

18 JANET A. METCALF, ESQ., Assistant Attorney General,

19 Salem, Ore.; on behalf of the Respondents.

20 LISA S. BLATT, ESQ., Assistant to the Solicitor General,

21 Department of Justice, Washington, D.C.; on behalf of

22 the United States, as amicus curiae, supporting the

23 Respondents.

24

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1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll argument next

4 in Case 07-474, Engquist v. Oregon Department of

5 Agriculture.

6 Mr. Katyal.

7 ORAL ARGUMENT OF NEAL KATYAL

8 ON BEHALF OF THE PETITIONER

9 MR. KATYAL: Thank you, Mr. Chief Justice,

10 and may it please the Court:

11 The Ninth Circuit held that no

12 discrimination against a public employee is prohibited

13 by the Equal Protection Clause unless the targeted

14 person is a member of the suspect class or exercises a

15 fundamental right. No matter how outrageous or evil and

16 no matter how unrelated to any legitimate government

17 interest, the clause provides zero protection. This

18 theory is contrary to the Constitution's text. It is

19 inconsistent with this Court's precedents. It is

20 unworkable and is unnecessary.

21 The Ninth Circuit ignored the Equal

22 Protection Clause's guarantee to any person that the

23 State will not use its vast powers to discriminate

24 without a legitimate government purpose and particularly

25 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: 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 at 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 hat 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'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 the government has --
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 he 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 say two things
20 because there are two different questions there. One
21 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 will the court imply a right of action, as opposed to
12 the issue in this case, which is Section 1983. There is
13 a statutory right of action already in existence.
14 JUSTICE GINSBURG: And it doesn't matter
15 that the State has civil service remedies that were not
16 used --
17 MR. KATYAL: Not --
18 JUSTICE GINSBURG: -- or there were union
19 grievance procedures that aren't used? You can go right
20 into Federal court and say, I don't have to use those
21 State remedies?
22 MR. KATYAL: That is correct. It doesn't --
23 the existence of those State remedies does not displace
24 by itself without a statutory -- without Congress coming
25 in and mandating exhaustion or something like that. But

1 in the absence of that, this Court has not said, outside
2 of the limited area of procedural due process, that the
3 existence of either collective-bargaining agreements or
4 State laws somehow displaces a Federal constitutional
5 guarantee.
6 Now, if I could return to the first part of
7 Justice Breyer's question, which was the dividing line
8 in whether there is a clear standard, let me articulate
9 this as one. We believe that when a government employer
10 comes in and asserts some sort of objective reality, you
11 know, so for here they said the wheat prices are
12 declining, the plaintiff should have a chance to negate
13 that and say, well, it turned out that actually the
14 wheat prices weren't declining, and so on.
15 If, however, the plaintiff -- the government
16 articulates the rationale that you had put forth before,
17 I don't like you, and somehow the supervisor says it's
18 interfering with my government efficiency and I can't do
19 the job, well, that's something that the employer will
20 never really be able to -- the employee will never be
21 able to negate. And that is set forth in our reply
22 brief at page 16.
23 JUSTICE KENNEDY: Well, I guess you begin
24 with the proposition that the government must always
25 have a reason for what it does?

1 MR. KATYAL: The government must always have
2 a reason when it discriminates against individuals.
3 JUSTICE SOUTER: Well, discrimination, when
4 you say "discrimination," I take it you're meaning
5 discrimination not confined to the discrete categories
6 of racial, age, et cetera. You're talking about
7 discrimination for any purpose.
8 And therefore, it seems to me that when you
9 say the government cannot discriminate, I think, in
10 effect, you're saying a government supervisor cannot
11 fire somebody simply because he does not like that
12 person, because that's a discrimination in relation to
13 the people that the supervisor does like; is that
14 correct.
15 MR. KATYAL: That is -- that is correct as
16 long as -- as long as, Justice Souter, it is not related
17 to government efficiency; that is, if it's like this
18 case, in which --
19 JUSTICE SOUTER: Right. It's not government
20 efficiency; I just don't want to be around this person.
21 MR. KATYAL: Exactly.
22 JUSTICE SOUTER: Then it is the case, then,
23 that if you prevail in this case, that the notion of
24 paradigmatic, at-will employment within the government
25 in any State that recognizes that now, that will, in

1 fact, be eliminated to -- to the degree that there is a
2 -- a class-of-one cause of action.
3 MR. KATYAL: To the contrary, Justice
4 Souter. I don't think that will happen and indeed has
5 not happened and there is not a disagreement --
6 JUSTICE SOUTER: I thought you just agreed
7 that it would happen in the hypothetical because as I --
8 and maybe I do not understand at-will employment, but I
9 thought the concept of at-will employment was that the
10 individual could be fired for a good reason, a bad
11 reason or no reason at all. Somewhere in that trinity
12 we get Justice Breyer's hypothetical: I don't like him.
13 And you're saying that won't pass muster, but it would
14 pass muster under an at-will employment rule.
15 MR. KATYAL: Justice Souter, as a practical
16 matter it won't matter -- as a practical matter it won't
17 make a difference. And the reason is because an
18 employee can articulate, I don't like you, and it's
19 undermining government efficiency, in most cases -- and
20 particularly in at-will cases, where there isn't a
21 collective bargaining agreement or a State law that will
22 constrain the ability of the employer to even articulate
23 some sort of efficiency --
24 JUSTICE SCALIA: No, no, no, no. I'm not
25 working with this person; he is not going to affect my

1 efficiency. He's under somebody below me but I just
2 don't like him.
3 MR. KATYAL: And if there isn't an
4 efficiency --
5 JUSTICE SCALIA: Right.
6 MR. KATYAL: -- and the State can't
7 articulate an efficiency-based rationale --
8 JUSTICE SCALIA: Right.
9 MR. KATYAL: -- there will be some effect on
10 at-will employment in those rare cases.
11 JUSTICE KENNEDY: So you have a national
12 for-clause employment system. You can only be hired for
13 cause -- fired for cause.
14 MR. KATYAL: Well, except that the cause
15 that the equal protection mandates, the Equal Protection
16 clauses guarantee, is to deferential that as Justice
17 Breyer said, virtually any rationale will suffice if it
18 is --
19 JUSTICE KENNEDY: But you're getting back to
20 the point the government must always have a reason for
21 what it does. Can you cite me a case that says that?
22 MR. KATYAL: That the government must always
23 have a reason?
24 JUSTICE KENNEDY: Must always have a reason
25 for the actions it takes.

1 MR. KATYAL: Well, I read this Court's
2 decision in Olech as basically mandating that as well
3 as -- you know, as well as its long history on a
4 class-of-one starting with Sioux City and Sunday Lake
5 and Snowden versus --
6 JUSTICE KENNEDY: Yes, those are all tax
7 cases, or in Olech, 30 feet as opposed to 15 feet, where
8 there was a clear difference that was not -- but there
9 was also an allegation of an invidious motive.
10 MR. KATYAL: And here, of course, the jury
11 found that invidious motive. So even if we were to --
12 JUSTICE KENNEDY: It's just hard for me to
13 get that sweeping provision out of Olech.
14 MR. KATYAL: If the Court were worried about
15 at-will employment, it has available to it the
16 possibility of requiring animus just as Justice Kennedy
17 -- or possibly in some --
18 JUSTICE ALITO: What happens in this
19 situation? The government gives a reason for whatever
20 the adverse action is. Somebody -- they give -- and
21 let's say a person had lower performance ratings than
22 another person who was retained or given promotion.
23 Your position is the employee can always contest that
24 and say that's not the real reason; that's not factually
25 supported; is that correct?

1 MR. KATYAL: If -- if the government
2 articulates a rationale that is objectively based,
3 budget or something like that, yes; the plaintiff can
4 come back and try and rebut. It now it does so under
5 the extremely deferential rational basis test, which is
6 why so few causes get through. And indeed --
7 JUSTICE ALITO: How is it extremely
8 deferential when the employee is going to say that's not
9 the real reason; the real reason was simply spite and
10 animus and personal dislike?
11 MR. KATYAL: Because if the government can
12 put forth --
13 JUSTICE ALITO: And that goes before the
14 jury.
15 MR. KATYAL: Yeah, I don't believe it goes
16 to the jury, Justice Alito, because under this Court's
17 decision in Anderson v. Liberty Lobby, summary judgment
18 stage will incorporate whatever the rationale basis test
19 or review is.
20 JUSTICE ALITO: The employee says -- look,
21 it seems to me, the employee says in an affidavit the
22 supervisor doesn't like me, and here are the 20 things
23 that the supervisor has done and said over the course of
24 the last five years to indicate personal dislike. Then
25 -- then it goes to the jury.

1 MR. KATYAL: Again as long as the employer
2 can articulate a reason based on government efficiency,
3 there is no way for that employee to rebut that.
4 CHIEF JUSTICE ROBERTS: But you're going to
5 have to articulate it in Federal court. You emphasize
6 it's a deferential standard, it's not -- but every case
7 now -- every case of an employee firing, in fact every
8 case of employee not getting as big a raise as he
9 thought he was entitled, that's now a Federal case.
10 MR. KATYAL: Well, there are two problems
11 with that. The first is those are already Federal cases
12 under existing laws, Title VII, the panoply of other
13 laws.
14 CHIEF JUSTICE ROBERTS: But Title VII,
15 there's no --you know, there is no, "because you don't
16 like me," it's not because I'm a particular race or --
17 MR. KATYAL: But if we're positing a
18 frequent filer plaintiff who's bent on trying to file a
19 lawsuit, they can always make a Title VII. They can say
20 you're firing me because of --
21 CHIEF JUSTICE ROBERTS: I'm not worried
22 about a frequent filer. I'm worried about 40 million
23 single filers.
24 MR. KATYAL: And -- and the empirical
25 evidence, Justice -- Mr. Chief Justice, is that that

1 doesn't happen. You know, we've had this cause of
2 action now for 26 and 27 years in two circuits. It's
3 now the law of the land in nine circuits; we haven't had
4 that entire flood, nor have we had the harm to at-will
5 employment. And the reason is that plaintiffs aren't
6 going to bring these causes of action when they know
7 they are so hard to win.
8 JUSTICE BREYER: I don't know if that's --
9 that's why I started this. I read through, at least
10 briefly, the circuit cases in this area. I was trying
11 to figure it out. And it seemed to me that those
12 circuit cases just really are finding some reason to
13 dismiss the employee's claim, that they are not taking
14 this seriously, that is -- I mean, I don't want to
15 criticize them because I don't know the facts of the
16 case; but I couldn't figure out a standard.
17 And then I thought, well, the standard has
18 to be the APA standard, and if it's -- I know that
19 standard. And the reason that you don't have a million
20 cases under that standard is because States have civil
21 service systems.
22 MR. KATYAL: The existing --
23 JUSTICE BREYER: So it seemed to me that's
24 the standard you want to apply. You want to bring all
25 those cases into Federal court, and I'm not sure they

1 are doing it now, really, in practice. Now what's wrong
2 with what I've just said?
3 MR. KATYAL: Well, I don't think there is
4 anything quite wrong with that. I would say two things:
5 One, the existence of all of those State remedies and so
6 on are far more attractive for the employment plaintiff
7 than this cause of action. And so, that's one reason
8 why you see these low numbers.
9 Second is I don't quite agree with you that
10 the lower courts are, you know, maybe not taking it
11 seriously or however. They have a long-established body
12 of law now on how to dismiss these cases on 12(b)(6)
13 motions, and the majority of the circuits have already
14 upheld that because of the similarly situated
15 requirements and intentionality requirements, as well as
16 on summary judgment; that is, because the test is so
17 deferential.
18 JUSTICE GINSBURG: Let's take this case.
19 You say there were 30 similarly situated people with
20 regard to this employee being let go. Wouldn't that be
21 a contested matter? The employer will say they are not
22 similarly situated; each of them is differently
23 situated. How does that get resolved on summary
24 judgment?
25 MR. KATYAL: Well, normally it depends on

1 the rationale that's being offered. Here the
2 government's rationale was declining wheat revenues, and
3 so each of the employees who was paid out of those wheat
4 revenues is similarly situated. The government in this
5 case disclaimed the other rationales, performance and so
6 on. In the ordinary case --
7 JUSTICE GINSBURG: I thought they withdrew
8 from saying that it was a budgetary matter.
9 MR. KATYAL: Well, there were two different
10 budgetary issues. One was the budget having to do with
11 the Oregon State budget, and that was ultimately
12 withdrawn by the State. The other was that Ms. Engquist
13 and 10 other or so employees were being paid out of
14 wheat revenues, and the State's rationale at trial was
15 that the wheat market was collapsing, and so they
16 couldn't pay for Ms. Engquist anymore. And she was --
17 JUSTICE SCALIA: Suppose the government --
18 suppose the government comes in and says, we don't want
19 to take a position as to -- as to what the reason was;
20 it could have been any one of the following seven -- you
21 know, the wheat market collapsed; she came in late five
22 days; some of the jobs she did she didn't do well; she
23 dressed inappropriately on the job; her co-workers
24 didn't like they are -- you know. And -- can the
25 government do that?

1 MR. KATYAL: The government can offer those.
2 JUSTICE SCALIA: How far -- does it have to
3 pick a reason? You're -- you're --
4 MR. KATYAL: Absolutely not. It can pick
5 many reasons.
6 JUSTICE SCALIA: So long as there is
7 conceivable reason, the court would grant summary
8 judgment?
9
10 MR. KATYAL: We think that's right. Now,
11 there are --
12 JUSTICE GINSBURG: I thought you did not
13 agree with that in your brief. I thought --
14 JUSTICE SCALIA: That's what I thought, too.
15 JUSTICE GINSBURG: -- you said no
16 hypothetical justification is there. Not like
17 legislation where any conceivable basis, even if the
18 legislature didn't conceive it. I thought you were
19 quite clear in saying no, that's not what rational basis
20 means in this context.
21 MR. KATYAL: I might have misunderstood
22 Justice Scalia's question. I thought he was saying does
23 the government -- can the government put forth a
24 conceivable rationale grounded in some fact, and the
25 answer to that is yes. It's got to be grounded in fact.

1 That is the test.

2 JUSTICE SCALIA: All those facts are true

3 facts, but the government isn't claiming that any one of

4 them was the reason. It just says here are the

5 conceivable reasons why -- why she might have been

6 fired. We really don't know which one it was.

7 MR. KATYAL: The plaintiffs --

8 JUSTICE SCALIA: But here are seven

9 perfectly conceivable reasons.

10 MR. KATYAL: The government has the ability

11 to put that forth and the plaintiff has the ability to

12 negate that. That is the rational-basis test under

13 this.

14 JUSTICE SCALIA: What do you mean, to negate

15 it? To negate it as the actual reason is what you mean.

16 MR. KATYAL: As -- to negate the facts.

17 JUSTICE SCALIA: But the government is not

18 purporting that -- to say that it's the actual reason.

19 MR. KATYAL: Justice --

20 JUSTICE SCALIA: The government is saying

21 had she been dismissed for this reason, and we really

22 don't know whether that was the reason or not, but had

23 she been dismissed for this reason it would have been

24 rational.

25 MR. KATYAL: So long as, Justice Scalia,

1 that rationale is itself grounded in the facts. That
2 is, you can't come in and say she wasn't -- she was
3 coming to work late when she wasn't. But if she were,
4 then --
5 JUSTICE SCALIA: Well, I didn't understand
6 your position to be that, but that -- -
7 MR. KATYAL: The test here is -- the test
8 I'm trying to offer is one of objective -- objective --
9 whether the rationale is objectively falsifiable.
10 CHIEF JUSTICE ROBERTS: Can I ask you
11 more -- perhaps a more abstract question about this
12 class-of-one?
13 Doesn't that have the effect of adding an
14 equal protection claim to every violation of law? In
15 other words, you have a Fourth Amendment search and
16 seizure claim, and you're treated illegally; you say
17 well, everybody else was treated legally and I wasn't,
18 so it's an equal protection violation? You get -- you
19 know, the zoning ordinance, it was improper under the
20 zoning law, and because everybody else was properly
21 treated, it's a violation of equal protection.
22 MR. KATYAL: That is a problem, I think,
23 under this Court's decision in Olech generally. It
24 affects class-of-one --
25 JUSTICE KENNEDY: Do you think Olech was

1 wrongly decided?

2 MR. KATYAL: I do not. I think this Court

3 has had a long history on --

4 JUSTICE KENNEDY: I don't find anything in

5 Olech that says that every action that does not have a

6 reason is constitutionally infirm.

7 MR. KATYAL: Let me go back, Justice

8 Kennedy, to answer your question more directly. This

9 Court has held in the employment case -- in the

10 employment context, that the government must have a

11 rational basis. It said so in Harrah v. Martin, Beazer

12 and Murgia, all of which say that when an employer is

13 dismissing employees, it must act with a rational basis.

14 So this Court has already crossed that --

15 JUSTICE GINSBURG: All of those involved a

16 group characteristic. One involved people -- Beazer,

17 wasn't it was methadone users? But none of them

18 involved a situation like this, where she is not

19 claiming anything about being a member of any

20 identifiable class. She is just saying, they

21 discriminated against me -- not because of sex, race or

22 anything else. They were out to get me.

23 MR. KATYAL: Justice Ginsburg, I don't quite

24 think that describes the fact of Harrah v. Martin in

25 which it was a challenge to an individual termination

1 decision by the school board. But I do agree the other
2 cases are group-based characteristics. We don't think
3 that makes a difference, and indeed we think that the
4 Solicitor General's test on this would be unworkable in
5 practice, because everyone can assert their membership
6 in some objective --
7 JUSTICE BREYER: No, but you could -- you
8 could take sentiment -- I thought you could break the
9 cases, for the most part, into two parts; one, what
10 Justice Ginsburg said, and that's where the real reason
11 is some kind of general characteristic, of a disfavored
12 group. The second is the instance where the -- where
13 the body that's acting is a body whose business it is to
14 classify. That's zoning, taxation, and it means really
15 classifying in fact, not some theoretical thing where
16 you say, oh, well, they're classifying it employment
17 because they put you in the class of such and such. But
18 those two seem to me to handle the bulk of the cases,
19 which, if I'm right about that, would leave your client
20 out in the cold. So I assume you'll tell me why I'm not
21 right.
22 MR. KATYAL: Well, I will try. So the first
23 thing is that -- I don't quite think that describes the
24 facts of Harrah versus Martin, which is an individual
25 decision. And, secondly, once you start going down the

1 line of objective, group-based characteristics and the
2 like, it is infinitely manipulable, and that's why the
3 Ninth Circuit decisions after, in the wake of this
4 decision below, are dismissing group-based claims on --
5 on disability and age and the like. Everyone can
6 replead their claim as part of a group, that is, Ms. --
7 you know, Ms. Engquist can say she's part of a group of
8 two, those who complained about their supervisors and up
9 the chain of command.
10 And so the problem is it becomes unworkable
11 in practice. And, of course, the Constitution, Justice
12 Ginsburg, doesn't say, the way the Solicitor General
13 would like it be, doesn't say no State shall deny equal
14 protection of the law to anyone who is a member of an
15 objective group-based, you know, group and class.
16 JUSTICE GINSBURG: But you brought up -- you
17 said this is 1983. It's a cause of action provided by
18 Congress. So that's why this is something State and
19 municipal employees can do, but no Federal employee
20 could do. 1985 also uses the word "person or class of
21 persons," and yet this Court held that 1985(3), that
22 claim, it has to be some group-based animus, not malice
23 directed toward a particular individual.
24 MR. KATYAL: I don't quite think that -- I
25 think the Court has already dealt with that in Olech by

1 affirming, essentially, a 1983 cause of action based on
2 an individual person's claim. And so -- and so that is
3 the relevant precedent here, not the section 1985
4 precedents.
5 Now, if we --
6 JUSTICE GINSBURG: Well, maybe because
7 1985(3) is in a discrimination context, The Court could
8 say 1983 -- we know the classification to which Justice
9 Breyer was referring, tax classifications, zoning
10 classifications, but this group of claims we're cutting
11 out.
12 MR. KATYAL: But the statutory test -- text,
13 Justice Ginsburg, is the same. There's one section 19
14 --
15 JUSTICE GINSBURG: But it's a -- it's a
16 general statute. It's not a precise statute like Title
17 VII or the Age Discrimination Act. So it's the kind of
18 legislation that seems much more amenable to court
19 interpretation.
20 MR. KATYAL: I would agree with that. I
21 think it might open a whole can of worms were the Court
22 to say that 1983 requires some group-based
23 discrimination outside of this particular context that
24 we are talking about. And so I think --
25 JUSTICE GINSBURG: Well, it certainly opens

1 a can of worms to say that you take every claim against
2 the government, every claim of wrongdoing by the
3 government, and make it an equal protection claim
4 because you say other people were treated properly and I
5 was treated improperly; therefore, I have an equal
6 protection claim.
7 MR. KATYAL: Except, Justice Ginsburg, we've
8 had this cause of action now for 26 and 27 years in two
9 circuits; we have it in nine. We haven't seen the
10 effect on at-will employment nor, more generally, on the
11 Equal Protection Clause opening up that can of worms
12 that you're hypothesizing.
13 I'd like to reserve the balance of my time.
14 Thank you.
15 CHIEF JUSTICE ROBERTS: Thank you,
16 Mr. Katyal.
17 Ms. Metcalf.
18 ORAL ARGUMENT OF JANET A. METCALF
19 ON BEHALF OF THE RESPONDENTS
20 MS. METCALF: Mr. Chief Justice, and may it
21 please the Court:
22 The Ninth Circuit decision in this case is
23 consistent with this Court's recognition, in other
24 constitutional contexts, that Federal court is simply
25 not the forum in which to second-guess everyday

1 decisions made by public employers. It's also
2 consistent with this Court's recognition, again in other
3 constitutional contexts, that the rights of public
4 employees simply are not as expansive in a number of
5 ways as those of citizens generally vis-a-vis their
6 public employers.
7 We think that both of those lines of cases
8 come at least in part out of the recognition that public
9 employment decisions, indeed employment decisions
10 generally, are highly subjective in nature and highly
11 individualistic in nature.
12 We think really that the Ninth Circuit here
13 has gone no farther than to apply those concepts as a
14 specific context of class-of-one cases brought in the
15 public employment context.
16 JUSTICE GINSBURG: The Ninth Circuit
17 decision would rule out the case where an employee says:
18 I was the most qualified person for this position by
19 far, but the supervisors took a bribe from a rich uncle
20 to promote somebody else.
21 MS. METCALF: Yes.
22 JUSTICE GINSBURG: That would be out?
23 MS. METCALF: That would be out as an equal
24 protection claim. There undoubtedly would be other
25 avenues, potential other avenues, where --

1 JUSTICE GINSBURG: The scapegoat case, too,
2 would be out?
3 MS. METCALF: Yes. Yes, it would. It would
4 under this rationale --
5 JUSTICE SCALIA: Why -- but we have said
6 that -- that there is a constitutional claim if the
7 reason the person was not hired is that the person did
8 not belong to the political party that the -- that the
9 hiring person belonged to, the current administration.
10 MS. METCALF: And --
11 JUSTICE SCALIA: You said you can't turn
12 down somebody just because she's a Democrat or a
13 Republican.
14 MS. METCALF: That's correct. And our
15 formulation I think, of the test, Your Honor, is that
16 there should be no such thing as a class-of-one equal
17 protection claim in the public employment context, with
18 certain exceptions, those exceptions including, for
19 example, exercising a fundamental right; membership in a
20 suspect class; perhaps certain other criteria, such as
21 the one you mentioned, certain other classifications.
22 But that as -- as a general matter, the broad question
23 that the Ninth Circuit faced, is there, outside of those
24 exceptions, is there such a thing as a class-of-one
25 public employment?

1 JUSTICE STEVENS: Let me ask, following up
2 on Justice Ginsburg's question: Suppose it's not a
3 class-of-one, but it's a class of two or three because,
4 on two or three occasions they fired somebody because he
5 wouldn't pay the supervisor a bribe. Would that cross
6 the threshold? He had a practice of not -- you know,
7 getting a little money out of every promotion.
8 MS. METCALF: No, no, Justice Stevens, and
9 again to be clear --
10 JUSTICE STEVENS: If it's not a class of one
11 --
12 MS. METCALF: I keep throwing up --
13 JUSTICE STEVENS: Do you say no or yes to
14 whether there would be a cause of action?
15 MS. METCALF: No. Because -- and this is
16 why I keep using quotes for "class-of-one."
17 "Class-of-one" doesn't literally describe the number of
18 plaintiffs, both because in some cases there might be a
19 single plaintiff, but they're alleging discrimination
20 based on membership in a class. And because -- and
21 Olech is an example -- as the Court pointed out in a
22 footnote in Olech, Olech could have been described as a
23 class of five.
24 But, again, we're talking about
25 discrimination allegedly based on something other than

1 the exceptions that this Court has recognized: Exercise
2 of a fundamental right, membership in a --
3 CHIEF JUSTICE ROBERTS: No, but, as your
4 friend points out, the constitutional provision says
5 "any person." It doesn't say any person who is a member
6 of a particular class or any person who is exercising a
7 fundamental right. It's "any person."
8 MS. METCALF: Admittedly, Chief Justice
9 Roberts. And I certainly don't think the constitutional
10 text does us any affirmative good, but I don't think it
11 goes as far as Petitioner would have it go.
12 JUSTICE KENNEDY: Do you think Olech was
13 correctly decided?
14 MS. METCALF: Yes, yes. We take no issue
15 with Olech. We --
16 JUSTICE KENNEDY: And public employment is
17 different just because it's going to be a big problem?
18 What --
19 MS. METCALF: Not because it's going to be a
20 big problem, but because the regulatory context is
21 significantly different, we think, than the employment
22 context. Part of that is the inherently subjective
23 nature of employment decisions. Regulatory decisions
24 are made at arm's length; they are made under relatively
25 --

1 JUSTICE KENNEDY: Well, but we're presuming
2 that there is an objective reason for promoting or
3 retaining -- the person has a college degree and so
4 forth -- but that that person is rejected anyway because
5 of dislike.
6 MS. METCALF: But -- but again --
7 JUSTICE KENNEDY: That's the hypothetical.
8 Why is that hypothetical case different than Olech?
9 MS. METCALF: You might have an unusual
10 employment case in which an employer has drawn up a list
11 of objective criteria. That's not this case. That's
12 not the average case. In the average case you might,
13 for example, prefer that someone have a degree, but --
14 JUSTICE KENNEDY: But then we say that there
15 is a subset of unusual cases where we will allow the
16 cause of action?
17 MS. METCALF: No. We offer the subjective
18 nature as a general reason why simply class-of-one
19 analysis should not apply in this context, period,
20 because the average -- whereas the average in the
21 regulatory context probably is a high degree of
22 objectivity, the average in the employment context is a
23 relatively high degree of subjectivity and discretion.
24 JUSTICE ALITO: But there are areas outside
25 of employment where there's a lot of discretion.

1 Suppose someone claims that he has repeatedly gotten
2 speeding tickets for going five miles over the speed
3 limit by a local police department because of some sort
4 of personal feud with the chief of police. That I take
5 it would be a valid claim under Olech because it's
6 outside his employment?
7 MS. METCALF: Because it's regulatory and
8 enforcing, law enforcement. I think so.
9 JUSTICE KENNEDY: I'm having trouble hearing
10 both the question and the answer.
11 MS. METCALF: As I understand -- I don't
12 know if you want me to try to restate the question or if
13 you want to do it.
14 JUSTICE ALITO: Well, the question was:
15 Don't you run into the same problem of discretion
16 outside of the employment context? For example, a
17 police officer who is alleged to have given someone a
18 ticket or a number of tickets simply because of personal
19 malice as opposed to some sort of uniform policy.
20 MS. METCALF: But, again, there I think the
21 -- hopefully, the norm in law enforcement is a
22 relatively objective standard. Are you in fact
23 speeding? Are you in fact breaking the traffic laws?
24 Are you in fact breaking the law in some other way?
25 Whereas the norm in employment decisions is a much more

1 discretionary, subjective kind of decision. Yes, I may
2 have certain criteria that I would prefer a manager
3 have, but then I'm still going to have to weigh the
4 qualifications and experience of various candidates and
5 ultimately make a relatively subjective decision about
6 who I think is the best candidate for that, for that
7 job. Which is why we think the regulatory context and
8 the employment context are significantly different.
9 JUSTICE STEVENS: Yes, but those are all
10 considerations that would be an adequate defense to a
11 claim. If you had a judgment call to make, you say, I
12 had a judgment call to make. And maybe there are good
13 arguments on the other side. You can't be liable for
14 that kind of decision.
15 MS. METCALF: Well -- and certainly I'm
16 somewhat perhaps surprised by Petitioner's argument
17 today because I understand Petitioner's argument to
18 almost concede the point that summary judgment should
19 have been given to the -- to the State's defendants in
20 this case because in fact, with regard to each of the
21 three employment decisions that are at issue in this
22 case, the State and the defendants did proffer and --
23 JUSTICE KENNEDY: But we are concerned about
24 the case -- let's just assume, just take it as a
25 hypothetical case -- where there is an arbitrary and

1 vindictive reason for hiring the employee and it has
2 nothing to do with race, sex, or other recognized
3 suspect or improper categories. And I thought your
4 answer to me was, well, I might make an exception to
5 that.
6 MS. METCALF: No. My answer to you is as
7 long -- well, my answer to you is twofold. If we're
8 simply considering whether, in fact, there could be such
9 a thing as a class-of-one case in the employment
10 context, our answer is no. If we're past that and the
11 issue is what's the test to apply, our test is as long
12 as there is any conceivable rational basis for the
13 action that the government employer took, the case
14 should be at end; it should not go to the jury.
15 CHIEF JUSTICE ROBERTS: Well, isn't that an
16 odd system? I mean, you have -- like our time card
17 example, you're going to have litigation over whether
18 she was late for work or was not late for work, and in
19 fact that's got nothing to do with the reasons she was
20 fired at all. And yet the government puts it out, well,
21 this is a conceivable reason, and then the other side
22 says, no, it's not, and they fight. It just seems so
23 otherworldly; it has nothing to do with the reason at
24 all.
25 MS. METCALF: Well, the -- often the real

1 reason -- and this Court has made this observation in
2 particular in legislative contexts. But often the real
3 reason is not necessarily apparent or undisputed, and
4 beyond that, that's simply the test that this Court has
5 employed as a general matter in rational-basis
6 equal-protection cases.
7 CHIEF JUSTICE ROBERTS: Well, but that's
8 with respect to legislative or regulatory action, where
9 there are important reasons not to inquire into the
10 motives of the legislators. It's not clear to me that
11 that same rationale applies here.
12 MS. METCALF: Well, two points, Your Honor.
13 I would certainly agree that the Court has most often,
14 if not always, said that in the legislative context.
15 But Petitioner is not really arguing for a different
16 test here. As I understand Petitioner's argument, and
17 perhaps I misunderstand it, but Petitioner's argument is
18 that this Court should apply customary rational-basis
19 analysis and apply such analysis as long as the
20 government has some conceivable rational basis that --
21 JUSTICE GINSBURG: That's not -- you know
22 that that's not the position they took in their brief.
23 They said it's not a hypothetical, any conceivable.
24 They said that by qualifying -- even in the at-will
25 category, the government has to articulate a reason

1 rooted in the facts of this case, not a hypothetical. A
2 hypothetical reason is not good enough.
3 MS. METCALF: Agreed, Justice Ginsburg. If
4 -- we don't agree that that would be the test. We think
5 that the Court should stick to the customary
6 rational-basis test as it's applied in other contexts,
7 and say if there is any conceivable rational basis, that
8 even if --
9 JUSTICE KENNEDY: It seems to me that you
10 want us to write an opinion that says there are some
11 instances where the government can act arbitrarily and
12 unreasonably.
13 MS. METCALF: We would ask you to write an
14 opinion, Justice Kennedy, that says that, within the
15 public employment context, there are no class-of-one
16 equal protection claims.
17 JUSTICE BREYER: Well, you think the answer
18 is yes, I mean, because --
19 MS. METCALF: Yes.
20 JUSTICE BREYER: -- because the
21 Administrative Procedures Act forbids arbitrary,
22 capricious action. So you're saying the Constitution --
23 MS. METCALF: Yes.
24 JUSTICE BREYER: -- does not
25 constitutionalize all --

1 MS. METCALF: Yes.

2 JUSTICE BREYER: -- arbitrary, capricious

3 behavior --

4 MS. METCALF: Yes.

5 JUSTICE BREYER: -- of the Federal

6 Government --

7 MS. METCALF: And there --

8 JUSTICE BREYER: -- or the State government.

9 MS. METCALF: There will and probably are

10 going to be other remedies, but not a Fourteenth

11 Amendment remedy.

12 JUSTICE BREYER: Yes.

13 MS. METCALF: Absolutely.

14 JUSTICE BREYER: So the answer is yes.

15 Okay.

16 JUSTICE KENNEDY: And that's because of

17 existence of other avenues of redress.

18 MS. METCALF: Not solely. That, I think, is

19 a factor. It's because of, again, this Court's

20 recognition in other contexts that public employees

21 simply are not on the same footing as private citizens

22 generally with regard to their employers, and that

23 Federal court is simply not the appropriate forum in

24 which to review the day-to-day decisionmaking of public

25 employers; and because of recognition of the inherently

1 subjective nature of public employment decisions.
2 JUSTICE KENNEDY: I understood that the
3 argument --
4 JUSTICE STEVENS: -- your opponent's
5 statement that this really has not generated an awful
6 lot of litigation. Do you think he's right or wrong on
7 that?
8 MS. METCALF: I think so far as anyone can
9 determine, he's right to date. Obviously, we have some
10 real concern that if this Court were to say that there
11 were such a cause of action, that things might change.
12 Beyond that, I think the relatively few number of cases,
13 and in particular the very, very small to-date number of
14 successful cases is an argument against extending
15 class-of-one equal protection analysis into this
16 context, because there will be an adverse effect on
17 public employer discretion if the Court were to extend
18 the analysis. Public employers would have to worry
19 about what happened in this case, that their decisions
20 are subject to later second-guessing in Federal court.
21 It may well chill the exercise of public employer
22 discretion. And I think the most common complaint about
23 public employer discretion, it is that it's
24 underutilized not overutilized, and there would be a
25 real danger that for the price of a very few successful

1 cases you would chill the exercise of public employer
2 discretion.
3 So, we actually think that that point is an
4 argument against the extension, not for it. But I would
5 agree that we can't point to any enormous flood of cases
6 to date.
7 JUSTICE GINSBURG: In Oregon, is -- would
8 there be a civil service remedy available to someone in
9 this situation?
10 MS. METCALF: There would be admittedly very
11 limited remedies under the civil service laws, per se.
12 The decision about whether to advance her as a manager,
13 of who would pick her as a manager was one really solely
14 within the employer's discretion. With respect to the
15 decisions about the layoff and the bumping into someone
16 else's position, she had essentially what were
17 procedural remedies under her collective bargaining
18 agreement, which -- which the union would have had to
19 assert on her behalf. If the union had failed to do so
20 and she had thought the union erred in doing so, she
21 could have filed an action against them.
22 She did have a common-law State-law claim in
23 this case, which she brought, one for intentional
24 interference with her employment relationship, which she
25 was successful in both in the district court and which

1 we did not challenge in the Ninth Circuit. So that
2 State-law claim is certainly still a viable claim --
3 JUSTICE SCALIA: But as far as the Federal
4 law claim is concerned, you'd urge us to come out the
5 same way, even if this case came up before the
6 Administrative Procedure Act was passed, right?
7 MS. METCALF: Yes. Yes, we would.
8 Although, again, that provides yet an additional remedy
9 to --
10 JUSTICE GINSBURG: The Administrative
11 Procedure Act doesn't apply to State -- to State
12 procedures. It's a Federal act --
13 MS. METCALF: Right.
14 JUSTICE GINSBURG: -- governing Federal
15 agencies.
16 MS. METCALF: Right.
17 JUSTICE SCALIA: But as to Federal
18 employment, you'd say the same?
19 MS. METCALF: Yes.
20 JUSTICE SCALIA: And you'd say the same as
21 if there were no State remedies for --
22 MS. METCALF: Yes.
23 JUSTICE SCALIA: -- employment
24 discrimination by the State.
25 MS. METCALF: Yes, we would.

1 JUSTICE SCALIA: Because the State has a
2 right to employ at will?
3 MS. METCALF: Yes, subject to whatever
4 limitations there may be and other affirmative sources
5 of law such as a collective bargaining agreement or some
6 other State or Federal statutory remedy. Yes.
7 CHIEF JUSTICE ROBERTS: What exactly is the
8 analytic basis of that? I mean, do you think that --
9 you don't think the Equal Protection Clause applies at
10 all to this situation where it's just a class of one?
11 Or do you think that the clause is always -- the claim
12 of violation under the clause is always rebutted
13 automatically? What is the --
14 MS. METCALF: The former -- the former
15 within the context of public employment. We certainly
16 again are not -- not taking issue with Olech.
17 JUSTICE KENNEDY: But what authority do you
18 have for us to parse different governmental actions and
19 say some are subject to the Equal Protection Clause and
20 some are not?
21 MS. METCALF: Well, again I don't know --
22 JUSTICE KENNEDY: Other than the convenience
23 of the government -- it might be more efficient for the
24 government -- you want us to say that the government can
25 act arbitrarily with respect to employees?

1 MS. METCALF: And, again, I don't know that
2 the Federal Government discusses peremptory challenges,
3 and I'll leave that to them. But, again, stepping
4 outside the Fourteenth Amendment context for a moment,
5 this Court certainly and without explicit textual
6 support has recognized the existence, for example, of
7 the First Amendment rights of public employees
8 vis-a-vis --
9 CHIEF JUSTICE ROBERTS: Oh, but that's very
10 different, because those cases say that those
11 individuals have no First Amendment rights. In other
12 words, in the public employee context, talking about
13 their official obligations, there is no First Amendment
14 right to do that. I think it's quite a different
15 situation to say there is no equal protection right in
16 government employment.
17 MS. METCALF: But -- but -- maybe I
18 shouldn't say again. Your Honor, I think that what we
19 are asking for in this case is the same sort of line
20 drawing outside textual, atextual line drawing that this
21 Court has done in other contexts such as the First
22 Amendment context, where it has said that government
23 simply can impose obligations, restrictions on its
24 public employees that it could not on citizens generally
25 and --

1 JUSTICE SCALIA: Why can't you simply say
2 that they are not being denied equal protection of the
3 law? The law that applies to her and to everybody else
4 employed by the government is that the employment is at
5 will?
6 MS. METCALF: And --
7 JUSTICE SCALIA: That's certainly an equal
8 protection. She could be fired at will and everybody
9 else can be fired at will.
10 MS. METCALF: Agreed.
11 JUSTICE SCALIA: Why isn't that equal
12 protection of the law?
13 JUSTICE GINSBURG: Except this wasn't --
14 this wasn't employment at will, right?
15 MS. METCALF: Not precisely. But the
16 decision whether or not to promote effective or not
17 might have been at will in the sense that was a decision
18 subject solely to the discretion of the employer. So,
19 in a sense, it's analogous. I wouldn't say that it is
20 precisely at will with respect to any of these
21 decisions. And, again, because she had only limited
22 rights under the collective bargaining agreement,
23 outside of those limited rights the employer really had
24 full discretion as to what decision it would make. So,
25 again, I think there is an analogy to at will.

1 JUSTICE STEVENS: What proportion of your
2 workforce is really hired at will? Haven't they all got
3 some kind of protections under your statutes?
4 MS. METCALF: As a matter of fact, none of
5 the assistant attorneys general, including me, have any
6 protection. Most -- most State employees have some kind
7 of collective -- I'm arguing against myself in this case
8 -- most employees in the State of Oregon have some kind
9 of collective bargaining protection. So at will is the
10 exception, not the rule.
11 JUSTICE STEVENS: Don't have you some kind
12 of civil service system, too?
13 MS. METCALF: Not precisely. It's much more
14 a matter of collective bargaining, but it amounts to
15 much the same thing in the end.
16 JUSTICE STEVENS: So that implies people who
17 are employed at will are the exception rather than the
18 rule?
19 MS. METCALF: Absolutely. And I would
20 readily concede that fact.
21 If the Court gets to the second part of the
22 case and the question becomes what sort of test,
23 assuming that the Court finds a class-of-one analysis
24 should apply in this context and the question becomes:
25 What's the test? Really, all the State is asking for

1 here is an application of the customary, rational-basis
2 test in which if any conceivable rational basis can be
3 offered by the government, the case should be at an end.
4 That position was raised below by the State
5 defendants, who raised the point both in their summary
6 judgment motion and in their trial memo and urged the
7 district court to take this case away from the jury on
8 that basis, and the district court refused to do so.
9 JUSTICE SOUTER: What do you say to the
10 argument that the conceivable-basis test is appropriate
11 when we are judging legislation, because we don't know
12 what goes through the minds of individual legislators.
13 Whereas, these kinds of decisions, employment decisions,
14 are, in fact, very specific state-of-mind kind of
15 decisions; and, therefore, the equal-protection standard
16 ought to take that into consideration and look to the
17 specific reasons?
18 MS. METCALF: I think the difference is not
19 that great. I think, admittedly, the actual rationale
20 is harder to discern in legislative cases, in part,
21 because you have so many decisionmakers.
22 But here, for example, it is similar because
23 the decisionmakers might have had a number, and probably
24 did have a number, of elements in mind from dislike to a
25 preference for a certain kind of background.

1 Thank you.

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

3 Ms. Blatt.

4 ORAL ARGUMENT OF LISA S. BLATT

5 ON BEHALF OF UNITED STATES,

6 AS AMICUS CURIAE,

7 SUPPORTING THE RESPONDENTS

8 MS. BLATT: Mr. Chief Justice, and may it

9 please the Court:

10 There are two types of class-of-one claims

11 that should not be recognized in the public-employment

12 context.

13 The first is a claim of residual ill will or

14 bad-motive complicitor, and the second is a simple

15 demand for a rational basis for an adverse personnel

16 decision.

17 The problem with those claims is that they

18 would constitutionalize routine employee grievances and

19 impose a for-cause requirement on public employers,

20 notwithstanding the long tradition of at-will public

21 employment.

22 JUSTICE BREYER: Ma'am, the reason that we

23 didn't say that same thing in Oleck is because in the

24 taxation area or the easement area we simply don't have

25 the great number of cases and also because animus is

1 more easily established.

2 MS. BLATT: It is similar. And in the

3 regulatory context a personality conflict is not a

4 legitimate basis for adversely treating citizens. But a

5 personality conflict between a supervisor and a

6 subordinate is generally, if not always, a legitimate

7 basis for adversely treating an employee.

8 JUSTICE BREYER: Well, I wondered if I was

9 right, you know; that I thought that maybe, looking

10 back, that there is something about zoning and taxation

11 where it normally is alleged that it's rule-making

12 activity.

13 And that perhaps you would apply all of

14 these things you are talking about where what the --

15 even if it is employment, where what the employer is

16 doing, or anyone else is doing, is creating rules, is

17 classifying. And not a made-up classification like you

18 put me and one other fired person in the fired- person

19 category. I don't mean that. I mean like taxation and

20 zoning and legislation. Is there anything to that?

21 MS. BLATT: There is some support in the

22 case law, but what I think your concurring opinion was

23 trying to do was to help local and State governments.

24 And it is one thing to say the mayor denied my building

25 permit, and I'm going to make the employee allege

1 animus, and that might be difficult to do. But for
2 someone on the mayor's staff, it's not that difficult to
3 allege animus on the part of your supervisor.
4 Employment frictions are inherent in the
5 workplace, and perceptions of unfair treatment readily
6 arise by an employee who thinks he or she was unfairly
7 treated.
8 CHIEF JUSTICE ROBERTS: Well, I agree with
9 all of that, but -- so the Equal Protection Clause
10 doesn't apply?
11 MR. BLATT: Sure, it applies. It just
12 doesn't give you a right to collect what this plaintiff
13 did: Punitive and compensatory damages based on
14 residual ill will.
15 She ran an equal-protection claim on race,
16 gender, national origin, sex. She had a statutory claim
17 for imposing unlawful conduct under Title VII. The jury
18 rejected all of that and imposed punitive damages, and
19 it went to the jury on a legal question that has always
20 been decided by this Court and the courts about whether
21 there was a rational basis or whether, instead, it was
22 solely based on vindictive, arbitrary, or malicious
23 reasons. It went to the jury, and there was no
24 allegation that --
25 CHIEF JUSTICE ROBERTS: So you think the

1 Equal Protection Clause applies --
2 MS. BLATT: Yes.
3 CHIEF JUSTICE ROBERTS: -- in any case of
4 public employment -- what -- that's satisfied?
5 MS. BLATT: It doesn't -- no. If you have a
6 membership in an identifiable group classification as
7 opposed to purely subjective and individualized
8 criteria. Here the class was: I was a thorn in my
9 supervisor's side. That is not a class. And if it is a
10 class, it would lose, because you would always have a
11 rational basis.
12 CHIEF JUSTICE ROBERTS: But the Equal
13 Protection Clause doesn't balk about classes. It talks
14 about any person.
15 MS. BLATT: That's correct, and -- and in
16 First Amendment -- and that's a different amendment, but
17 in the Fourteenth Amendment there is the Batson context.
18 It's just -- just like in the Batson context, the high
19 cost of litigating every single claim to try to ferret
20 out what would truly be an irrational decision is not
21 worth the cost when there is such an overwhelming
22 likelihood that a truly irrational decision would
23 already be prohibited by some other contract or
24 statutory source.
25 JUSTICE SCALIA: It doesn't talk about equal

1 protection, actually, it talks about equal protection
2 the law; and if -- if the law in the government
3 employment context is that you can be dismissed at will,
4 or for a number of reasons, so long as everybody is
5 subject to that same law, it would seem to be no
6 discrimination in the law?
7 MS. BLATT: Well, we are not relying on the
8 text of the Equal Protection Clause.
9 JUSTICE SCALIA: Oh, don't rely on the text,
10 certainly.
11 (Laughter.)
12 MS. BLATT: What we are relying on are two
13 principles. And there is just a longstanding principle
14 that the Constitution is not the appropriate forum to
15 resolve routine employment disputes.
16 JUSTICE GINSBURG: When you do that with the
17 two cases that I raised with Miss Metcalf? That is, the
18 bribe case and the scapegoat case, they are out, too.
19 If public employment is taken out from this
20 class-of-one, those two cases would go as well.
21 MS. BLATT: Right, well, one is criminal
22 conduct, and on the scapegoat case I actually don't
23 think that's such a bad thing. One can recharacterize
24 scapegoating as public accountability, and their side
25 would allow Federal courts and State courts to

1 second-guess a local employment's response to a public
2 crisis. So if there is a school board or some tragic
3 accident in the city, and a group of employees are
4 fired, their side would give constitutional claim for
5 punitive and compensatory damages based on a finding of
6 ill will; and although the other side comes up here and
7 tells a story about traditional rational basis, in this
8 case it was submitted to the jury, about whether there
9 was a rational basis or whether whatever articulated
10 basis was a mere pretext; it was treated basically like
11 a sex, or gender, a race claim, and not a rational basis
12 claim. This should have never gone to the jury. It's
13 not a fact question whether there is a rational basis.
14 JUSTICE SOUTER: Can we -- can we meet your
15 objection --
16 JUSTICE STEVENS: In a mixed motives case,
17 both ill will and a -- some reason, she was also late to
18 work -- you would win that case.
19 MS. BLATT: Well --
20 JUSTICE STEVENS: If you have one good
21 reason and one bad reason, the bad reason doesn't trump
22 the good reason.
23 MS. BLATT: That's right. In a mixed-motive
24 constitutional case involving a fundamental right, it's
25 a fact question for the jury. In a rational basis case

1 it would be a question for the court whether there is a
2 conceivable rational basis.
3 JUSTICE KENNEDY: But a public employee
4 applies for a 30-foot easement that he is entitled to,
5 and doesn't receive it; and the mayor says and by the
6 way I don't like you, so you're fired: A, you don't get
7 the easement, B, you're fired. Why -- why do we treat
8 the cases differently? Other than the floodgate
9 argument etcetera?
10 MS. BLATT: Well, if the mayor doesn't give
11 the employee a grievance, in her capacity as a citizen
12 she has a suit under Olech; but in her termination
13 claim, she -- unless she can allege membership in an
14 identifiable class, she doesn't have an equal protection
15 right to be free from just pure arbitrariness -- -
16 JUSTICE KENNEDY: But that just states your
17 conclusion. I want to know why this is.
18 MS. BLATT: Why? Because personality
19 conflicts have no role in the regulatory context and
20 they generally if not always are the legitimate basis
21 for a personnel decision. It's just that -- they say
22 this example, well, employer doesn't like you; that's
23 sufficient; but the other side never tells you how far
24 they would take that. Is it because the conflict arose
25 in the workplace; is it because it arose from their

1 neighborhood; is it because it arose from the high
2 school debate team or law review or cheerleading squad
3 and that's why the person wasn't hired? And we would
4 have courts having just to go, judge by judge and court,
5 and in their case, jury by jury, for these kinds of
6 decisions; and these shouldn't be constitutional cases.
7 These are more properly resolved under merit service
8 protection laws and collective bargaining agreements.
9 JUSTICE SOUTER: Would it meet your concern
10 if we held number one, yes, there may be a class of
11 claim in the public employment context, but any reason
12 that would be a lawful reason for discharge under the
13 at-will rule is a -- a reason that would satisfy the
14 test; and therefore it would be the real outlier that
15 would ever get to the jury?
16 MS. BLATT: Well, in the at-will context, if
17 an employer says you're fired and gives no reason,
18 that's legitimate; but in their case at least by the
19 time a lawyer is hired and the case goes to court, the
20 State is having -- has to articulate a basis that could
21 be second-guessed. If you write -- if you are going to
22 apply class-of-one and write a very broad opinion saying
23 almost anything goes in the employment context, that's
24 certainly preferable than having us go to juries based
25 on pretext and bad motive, which is what happened in

1 this case.

2 But I still think it would impose a

3 for-cause requirement that's inconsistent with your due

4 process cases, which presuppose that the personnel

5 entitlement must spring from someplace other than the

6 Constitution.

7 JUSTICE SOUTER: Well, let me ask you this.

8 I mean, I wasn't trying a trick question but I -- let me

9 be explicit about this. If we adopted the rule that

10 said anything that goes under the at-will rule goes

11 under equal protection class of one, would there be

12 anything left?

13 MS. BLATT: No.

14 JUSTICE SOUTER: Okay. So the reason is, if

15 we opted that rule you'd win across the board.

16 MS. BLATT: Yes. Yes. Unless you leave --

17 right. There is not point. I mean the at-will rule is

18 that no reason be given, or it could be a bad reason.

19 And if there is any concern about the line drawing, I

20 would urge you just to look at the verdict form in this

21 case. All that was submitted to the jury, after there

22 was the rejection of the national origin, the gender,

23 the race, the color, the retaliation for reporting

24 sexual harassment, was just a simple case of without any

25 rational basis, and solely for arbitrary, vindictive or

1 malicious reasons.

2 JUSTICE KENNEDY: So we should cite there is

3 no constitutional right to be a policeman? We can

4 revise that?

5 MS. BLATT: Well, no. I mean, there are

6 lots of constitutional limits on public employment.

7 What we are talking about is where you've reduced at

8 will for a null set, and there is any claim for

9 arbitrary conduct. I mean, we would allow under our

10 theory any claim that is not just a residual ill will or

11 bad motive states a valid equal protection case. And

12 this is many, many statutory protections as well.

13 CHIEF JUSTICE ROBERTS: Thank you,

14 Ms. Blatt.

15 Mr. Katyal, you have four minutes remaining.

16 REBUTTAL ARGUMENT OF NEAL KATYAL

17 ON BEHALF OF THE PETITIONER

18 MR. KATYAL: The Ninth Circuit in this case,

19 Your Honor, has cut out all claims conceivable or

20 otherwise, and that is contrary to the text of the Equal

21 Protection Clause in this Court's precedent.

22 JUSTICE SOUTER: Do you agree with me that

23 if we adopted a rule that says that anything that goes

24 for at-will employment goes for one-person-class equal

25 protection, and that that in effect would eliminate any

1 cause of action?

2 MR. KATYAL: It would, Justice Souter, under

3 the formal rule; that is, no reason alone is sufficient.

4 That of course as a practical matter is not the way

5 at-will works anymore, because of the panoply of rules,

6 Title 7 and otherwise that force employers to articulate

7 rationales when they terminate at-will employees. So as

8 a practical matter the no-reason firing doesn't exist

9 anymore because those employees, those at-will employees

10 who are going to sue are going to sue anyway.

11 JUSTICE ALITO: You keep stressing the text

12 of the Equal Protection Clause. Don't you think it's

13 late in the day to be arguing that Equal Protection

14 Clause should be read with that kind of literalness?

15 MR. KATYAL: No. This Court has

16 consistently held that the text of the Equal Protection

17 Clause encompasses personal claims.

18 JUSTICE ALITO: It talks about laws, but it

19 extends to situations where what's being -- the unequal

20 treatment is not stemming from the law, but from

21 executive or administrative action.

22 MR. KATYAL: That's quite right, Justice

23 Alito. And in fact since 1879 this Court has said --

24 JUSTICE ALITO: And in the other example,

25 are there not situations where it's been held to apply

1 that might not fall within the literal language of the
2 clause?
3 MR. KATYAL: I'm not sure I got that down,
4 sir.
5 JUSTICE ALITO: You think in all other
6 respects it's read literally?
7 MR. KATYAL: I'm not sure if in all other
8 respects it is, but with respect to the relevant
9 questions here -- that is, does this clause apply to
10 individual agency actions, this Court has held so in
11 1879 in Missouri versus Lewis, and has held so
12 consistently ever since.
13 So in this case the government put forth one
14 rationale which was an objective one, we -- and
15 disclaimed all the others, the subjective ones; and we
16 do think that that subjective rationales in employment
17 is different, and would almost always be a rational
18 basis. In this case they disclaimed all those other
19 ones.
20 So here the government is using its power,
21 its raw power, surely for its own personal ends and that
22 is contrary to the whole notion of why employment should
23 be different within government efficiency.
24 CHIEF JUSTICE ROBERTS: What is your answer
25 to their Batson analogy?

1 MR. KATYAL: Batson I think supports exactly
2 what we are saying, which is this Court has said we
3 don't review on rational basis, actions by a prosecutor
4 that are motivated, strikes that are motivated by the
5 trial, that are -- that are for a good trial; but if the
6 rationale of the prosecutor is I don't like the disabled
7 person, or I don't like --
8 CHIEF JUSTICE ROBERTS: No, but you're
9 adding the class aspect. If the rationale of the
10 prosecutor is, I don't like this person, under Batson
11 you don't get to bring an equal protection challenge to
12 that.
13 MR. KATYAL: I don't quite think that this
14 Court has confronted that specific issue about whether
15 it's an individual class-of one juror case. But the
16 language of Batson says that we don't -- that this
17 Court won't review on rational basis a claim when it's
18 related to the government's motivation. They are to
19 have a fair trial, a good trial.
20 JUSTICE GINSBURG: I thought if you have a
21 peremptory challenge it means that you can't challenge
22 on any basis other than the group -- the groups that
23 Batson has recognized. You - you said you could
24 challenge a peremptory, exercise a peremptory challenge
25 if it's unrelated to the selection of an impartial jury.

1 Well, I thought that a peremptory, outside
2 of the class cases, is matter of the prosecutor or the
3 defense attorney don't like this juror.
4 MR. KATYAL: Justice Ginsburg, the language
5 in Batson and J.E.B. was qualified by as saying so long
6 as it related to the task at hand; and the Seventh
7 Circuit and indeed, the D.C. Circuit last year referred
8 to that language and talked about an exemption if the
9 prosecute's motive was personal, as it is in this case.
10 JUSTICE GINSBURG: Has there ever been a
11 challenge to the exercise of peremptory challenge on the
12 ground that the challenge was unrelated to the selection
13 of an impartial jury?
14 MR. KATYAL: In the Seventh Circuit decision
15 the court said this would stay the cause of action.
16 This was after this Court's decision in J.E.B., yes.
17 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
18 The case is submitted.
19 (Whereupon, at 12:07 p.m., the case in the
20 above-entitled matter was submitted.)
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25

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