Supreme Court, U.S.
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No. 07-474

IN THE

SUPREME COURT OF THE UNITED STATES

ANUP ENGQUIST,

Petitioner

v.

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

Respondents

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Ninth Circuit below vacated the jury's verdict in favor of Petitioner Engquist and created a divisive split with the seven Circuits that apply the "rational basis" analysis to public employees who claim their termination was a result of unequal treatment, even if that treatment did not result from the employee's membership in a suspect class. The first question presented is:

1. Whether traditional equal protection "rational basis" analysis under Village of Willowbrook v Olech, 528 US 562, 120 S Ct 1073, 145 L Ed 2d 1060 (2000) applies to public employers who intentionally treat similarly situated employees differently with no rational bases for arbitrary, vindictive or malicious reasons?

The Ninth Circuit also upheld the validity of a state statute that took 60 percent of Engquist's punitive damage award for a public use, aligning the Ninth Circuit with the six state supreme courts that have held such statutes constitutional, and furthering the split with the two state supreme courts that have held such statutes violate the Takings Clause. The second question presented is:

2. Whether a state "split recovery" punitive damages statute violates the Takings Clause of the United States Constitution?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption to the case contains the names of all the parties to this proceeding.

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Anup Engquist respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND ORDERS ENTERED IN THIS CASE

The opinion of the Ninth Circuit (App -12-69) is reported at Engquist v Oregon Dept of Agriculture, 478 F3d 985 (2007). The order of the Ninth Circuit denying Ms. Engquist's Petition for Rehearing and Suggestion for Rehearing En Banc is not reported. App - 70. The trial court judgment following an 11 day jury trial is also not reported. App - 8.

BASIS FOR JURISDICTION OF SUPREME COURT

The Ninth Circuit filed its Opinion on February 8, 2007 and its Order denying the Petition for Rehearing and Suggestion for Rehearing En Banc on July 12, 2007. This Court has jurisdiction to review the circuit court's decision on a writ of certiorari under 28 U.S.C. § 1254(1).

RULES AND STATUTES INVOLVED IN CASE

Relevant portions of the United States Constitution and Oregon Revised Statutes § 31.075 are included in the Appendix. App-72-77.

INTRODUCTION

This case involves a recognized conflict between the United States Court of Appeals for the Ninth Circuit and seven other Circuits on an issue of substantial and recurring importance - whether traditional rational basis equal protection analysis, the so-called 'class of one' legal theory, applies to public employment decisions.

A divided panel of the Ninth Circuit acknowledged that its holding conflicts directly with decisions of the First, Second, Third, Fifth, Sixth, Seventh, and Tenth Circuits, all of which apply the 'class of one' theory to public employment decisions. Engquist, *supra*, 478 F3d at 993 *citing* Scarbrough v Morgan County Bd. Of Educ., 470 F3d 250, 260-61 (6th Cir 2006); Hill v Borough of Kutztown, 455 F3d 225, 239 (3d Cir 2006); Whiting v Univ of Miss, 451 F3d 339, 348-50 (5th Cir 2006); Neilson v D'Angelis, 409 F3d 100, 104 (2d Cir 2005); Levenstein v Salafsky, 414 F3d 767, 775-76 (7th Cir 2005); Campagna v Mass Dep't of Envt'l Prot., 334 F3d 150, 156 (1st Cir 2003); and Bartell v Aurora Public Schools, 263 F3d 1143, 1148-49 (10th Cir 2001).

The dissenting judge noted the circuit split and added that the majority's holding is at odds with this Court's decision in Village of Willowbrook, 528 US 562, 120 S. Ct. 1073, 145 L Ed 2d 1060 (2000). The importance of the question presented, the millions of public employees potentially affected, and the uncertainty in the law that the split of authority creates all counsel strongly in favor of granting petitioner's petition.

This case also involves a recognized conflict in the decisions of eight state supreme courts on the separate issue of whether a state statute that confiscates a portion of a plaintiff's punitive damages award for public use violates the Takings Clause of the United State Constitution. The prevalence of such statutes, and the millions of dollars of wealth transfer that they effect, call for this Court's immediate review of the second question presented as well.

STATEMENT OF THE CASE

Facts Relevant to Petition

Anup Engquist, a female born in India, worked as an international food standards specialist for the Expert Service Center (hereinafter "ESC"), a laboratory in the Oregon Department of Agriculture (hereinafter "ODA") from December 1992 until February 2002. Norma Corristan, a female of Mexican descent, was the Director of ODA's Laboratory Services Division including the ESC. Joseph (Jeff) Hyatt worked as a systems analyst in ODA from 1990 until promoted.

Throughout her employment, Engquist had repeated difficulties with Hyatt who withheld information she needed for her job, made numerous false derogatory statements about her to others, and excessively monitored her activities even following her to the ladies room. Engquist complained to Corristan who commenced discipline against Hyatt requiring him to attend diversity training and conflict resolution or anger management training.

When he returned from required training, Hyatt told Corristan it made him angry to have to go.

When a position became vacant to manage the ESC, Hyatt approached Corristan and asked to be promoted. Corristan told him he wasn't ready to be a manager. After being disciplined for his treatment of Engquist and told he wasn't ready to be a manager, Hyatt's goal was to "get rid of" Engquist and Corristan.

In January 2001, John Szczepanski, the Assistant Director of ODA, became Corristan's supervisor. Shortly thereafter, Szczepanski became a Hyatt ally. In approximately May 2001, Szczepanski and Hyatt began a series of acts directed at getting rid of both Corristan and Engquist.

In June 2001, Szczepanski removed Corristan's ESC duties without explanation or justification and inappropriately told a client Corristan and Engquist "would be gotten rid of" and he could not "control" Engquist. At the time, the ESC was extremely successful and viewed nationally as a remarkable institution.

A short time later, Hyatt told a co-worker he was working with Szczepanski on a personnel plan for the ESC and they were "getting rid of Norma and Anup." Later, Hyatt told the same co-worker Szczepanski was working with him rather than others in the ESC because they didn't know who they could trust.

Subsequently, Hyatt inappropriately e-mailed

Szczepanski asking him to alter Engquist's and Corristan's job duties. He drafted a letter for Szczepanski to send to Corristan and told him to "put it into your own words." Hyatt's e-mail was designed to give him the upper hand in an upcoming promotional opportunity for the ESC Manager position. Szczepanski began implementing Hyatt's requests against Corristan and Engquist.

Hyatt and Engquist competed for the Manager job. Although Engquist had more advanced educational degrees and more experience with the scientific and customer service parts of the job and Hyatt did not meet the minimum qualifications for the position, Szczepanski offered the position to Hyatt.

Almost immediately, Hyatt began removing Engquist's duties, excessively monitoring her performance and circulating false statements about her to others.

In December 2001, Szczepanski eliminated Corristan's position claiming he had "unnecessary administrative personnel" in the Division. On January 31, 2002, Engquist was informed her position was being eliminated on February 15, 2002 due to budget cuts. In fact, out of 10 divisions in the ODA at the time of the budget cuts only two full-time employees lost their jobs: Corristan and Engquist. Moreover, trial evidence demonstrated that Engquist's position was not funded with state funds. As a result, the elimination of her position did not help reduce the budget deficit, the purported reason for her release.

Two days before Engquist's last work day, Hyatt offered to hire a former employee and told him that Hyatt had been promised a pay raise and a promotion, that people were willing to work "with Anup and Norma gone", that Anup was "the boss" and Norma was "the enforcer." At trial, Hyatt claimed his statements in the e-mail were false.

After Corristan's and Engquist's terminations, Hyatt told a co-worker, he "couldn't afford to get rid of any more female minorities because he had already gotten rid of two." He named Corristan and Engquist as the two he got rid of. Shortly before Engquist's last day, Szczepanski suggested to Hyatt that they get together on "the significant 15th" for drinks after work. There was no evidence of any significant event on that date other than Engquist's last day of work.

Corristan's case was tried to a jury in state court in November 2003 which resulted in an award of $1.1 million. The jury found Szczepanski and Hyatt liable on rational basis equal protection claims, Hyatt liable for discrimination based upon gender or ethnicity and Hyatt liable for intentional interference with employment.

Proceedings Below

Engquist sued the ODA, Hyatt and Szczepanski asserting Title VII, §1981 §1983, equal protection, procedural and substantive due process, as well as a state claim for intentional interference with employment.

After the trial court denied the bulk of respondent's summary judgment motions, and following an 11 day jury trial, the jury found against Engquist on her Title VII, § 1981 and her § 1983 claim based upon protected class discrimination but found in favor of Engquist on her rational basis equal protection, substantive due process and intentional interference with employment claims.

The jury awarded Engquist damages of $425,000 consisting of $175,000 in compensatory damages not tied to any claim, $125,000 in punitive damages on the equal protection claim and $125,000 in punitive damages on the intentional interference claim.

The trial court denied Respondents motions for judgment as a matter of law and entered judgment in favor of Engquist. The trial court, over Petitioner's objections, also entered judgment in favor of the Oregon Department of Justice and against the individual defendants for 60 percent of the punitive damages awarded on the state tort claim, or $75,000, pursuant to Oregon Revised Statutes § 31.735.

On appeal, a panel of the Ninth Circuit reversed the trial court's judgment on the equal protection and substantive due process claims, vacated the damages, attorney fees and cost awards based on those claims, and remanded for further proceedings. Although the panel majority acknowledged that this Court recognized in Village of Willowbrook v Olech, 528 US 562, 120 S Ct 1073, 145 L Ed 2d 1060 (2000) that traditional rational

basis equal protection analysis applies to a 'class of one' and that the Ninth Circuit had applied the Olech legal theory in other contexts, it declined to apply the Olech holding to Engquist's equal protection claim. The majority recognized that its position conflicted with that taken by the First, Second, Third, Fifth, Sixth, Seventh, and Tenth Circuit courts of appeals.

The dissenting judge remarked that "[e]very other circuit to have considered this question has applied the class-of-one theory to employment." Even before this Court articulated the class-of-one label in Olech, said the dissent, "other circuits recognized it as a straightforward application of equal protection principles. See, e.g., Ciechon v City of Chicago, 686 F 2d 511, 522-23 (7th Cir 1982)." Indeed, the majority could "not identify a single case in [the Ninth Circuit's] equal protection jurisprudence or that of any other circuit that limits equal protection rights in the context of public employment." The dissenting judge saw this case as a simple application of the principle that all government actions must be supported by a rational basis, "even when a protected class is not involved." City of Cleburne v Cleburne Living Center, 473 US 432, 448-49, 105 S Ct 3249, 87 L Ed 2d 313 (1985). The dissenting judge also rejected the majority's claim that the Olech legal theory would destroy the concept of at-will employment in the context of public employees:

> "The application of class-of-one equal protection principles is hardly fatal to at-will employment. The rational basis

> test has always been used to insulate governmental decisions from searching review that would interfere with governmental functions, while still protecting individuals against heinous governmental conduct. The rational basis test can play this role as successfully here as in other equal protection cases. It is certainly not necessary, in order to preserve the concept of at-will employment, to hold that the government may freely treat its employees maliciously and irrationally."
>
> * * *
>
> "Moreover, the experience of other circuits demonstrates that the class-of-one theory of equal protection is not in practice fatal to at-will employment. The seven circuits that have recognized the theory continue to have at-will employment."

Engquist, *supra*, 478 F3d at 1014.

Accordingly, the dissent would have affirmed the jury's verdict: "I certainly would not reject [the class-of-one theory] in favor of a rule that conflicts with that adopted by every other circuit to consider the question." *Id.*

REASONS FOR GRANTING THE PETITION

This case presents two recurring questions of

national legal and societal importance that this Court has not previously addressed. This Court should grant the petition to resolve the inter-circuit conflict regarding the scope of the Equal Protection Clause and to resolve the split among the state supreme courts regarding the constitutionality of state statutes that appropriate for public use the punitive damages award of private parties in litigation.

1. THE NINTH CIRCUIT FAILED TO APPLY THIS COURT'S EQUAL PROTECTION PRECEDENT, AND IN SO DOING, CREATED A CONFLICT BETWEEN THE NINTH CIRCUIT AND SEVEN OTHER CIRCUITS

A. The Ninth Circuit Over-Reacted To Concerns Over The Impact of Village of Willowbrook v Olech, 528 US 562 (2000)

In Village of Willowbrook v Olech, 528 US 562, 145 L Ed2d 1060, 120 S Ct 1073 (2000), this Court recognized the viability of "....equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." The Court held that a complaint alleging a Village demanded a larger easement from a plaintiff than other similarly situated property owners; that the difference in treatment was irrational and wholly arbitrary; and that the Village ultimately relented in accepting a lesser easement was "sufficient to state a

claim for relief under traditional equal protection analysis." Olech, *supra*, 528 US at 565.

Based upon Olech, seven other circuits now permit public employees to state a rational basis equal protection claim against public employers to challenge individual employment decisions. See, Campagna, *supra*, 334 F3d at 156; Neilson, *supra*, 409 F3d at 104; Hill, *supra*, 455 F3d at 239; Whiting, *supra*, 451 F3d at 348-50; Scarbrough, *supra*, 470 F3d at 260-61; Levenstein, *supra*, 414 F3d at 775-75; Bartell, *supra*, 263 F3d at 1148-49 (10th Cir 2001). Until now, no Circuit or District Court had ever held to the contrary,

The Ninth Circuit panel carved out an exception to Olech in the context of public employment, an exception with no basis in the text or reasoning of the Olech opinion or the language of the Equal Protection Clause. Rather, the Ninth Circuit made its ruling based on a purported policy concern that imposing the Olech legal theory on public employment decisions was unnecessary due to the number of legal protections public employees enjoy; would upset the common law 'at will' employment rule; and would generate a flood of cases requiring federal review of a multitude of public agency personnel decisions. Engquist, *supra*, 478 F3d at 995.

The majority's concerns about Olech are not unique to public employment claims. Rather, lower courts express similar concerns about Olech's effect on virtually every area of state and local decision-making. In Jennings v City of Stillwater, 383 F3d

1199, 1211 (10th Cir 2004), for example, the Tenth Circuit described the challenges posed by Olech as,

> "...unless carefully circumscribed, the concept of a class-of-one equal protection claim could effectively provide a federal cause of action for review of almost every executive and administrative decision made by state actors. It is always possible for persons aggrieved by government action to allege, and almost always possible to produce evidence, that they were treated differently from others, with regard to everything from zoning to licensing to speeding to tax evaluation...This would constitute the federal courts as general second-guessers of the reasonableness of broad areas of state and local decision-making..."

Jennings, *supra*, 383 F3d at 1211.

Commentators have also noted some circuits excessive reactions to Olech:

> "The U.S. Supreme Court's opinion in Olech was short and apparently rather simple, but some of the federal courts of appeal treated it like a complex puzzle, to be mined for hidden meaning. Almost immediately after it was reported, both the Seventh and Second Circuits engaged in what they must

> have viewed as damage control, that is, an attempt to limit Olech so that it would not overrun the federal courts with garden variety disputes involving claims against local government."

Farrell, Robert C., *Classes, Persons, Equal Protection, and Village of Willowbrook v Olech,* 78 Wash L Rev 367, 403 (2003).

There is evidence that the circuits are "carefully circumscribing" the Olech legal theory to address these concerns. There are at least three methods of circumscribing Olech claims in use in the lower courts, all less damaging to individual rights than the Ninth Circuit's approach: 1) requiring that a plaintiff prove illegitimate animus as an element of an Olech claim; 2) requiring proof of a specific intent to discriminate or 3) establishing a strict standard for pleading or proving when employees treated differently are similarly situated. See, Farrell, Robert C., *supra,* 78 Wash L R at 403.

While the Ninth Circuit gave no explanation why other methods of circumscribing Olech are inadequate to address concerns in the public employment context, the significant disagreement over these methods in other courts may explain the Ninth Circuit's failure to consider them. Thus, some circuits require plaintiffs to establish illegitimate animus to state an Olech claim. Shipp v McMahon, 234 F3d 907, 916 (5th Cir 2000); Boone v Spurgess, 385 F3d 923, 932 (6th Cir 2004). Other circuits require proof of illegitimate animus *plus* different treatment of others similarly situated. Bartell v

Aurora Public Schools, 263 F3d 1143, 1149 (10th Cir 2001); Jennings v Stillwater, 383 F3d 1199, 1211, 1213 (10th Cir 2004). Some circuits permit an Olech claim based upon proof of *either* illegitimate animus or different treatment of others similarly situated. Squaw Valley Dev Co v Goldberg, 375 F3d 936, 944 (9th Cir 2004). At least one circuit has contradictory lines of cases (See, Racine Charter One, Inc, v Racine Unified School District, 424 F3d 677, 683-84 (7th Cir 2005)) with the most recent decisions recognizing two types of Olech claims - one based upon proof of illegitimate animus (the "animus" test) and a second based upon proof of different treatment with no rational basis for the difference ("the rational basis" test). Lauth v McCollum, 424 F3d 631, 634 (7th Cir 2005). Yet another circuit holds an Olech claim is not dependent upon proof of a bad motive but rather requires proof of different treatment of similarly situated employees with no rational basis for the different treatment. Cobb v Pozzi, 352 F3d 79, 99 (2nd Cir 1003).

Some courts impose high standards for pleading or proving when a plaintiff is similarly situated with others treated differently. Campagna v Mass. Dept. of Envt'l, 334 F3d 150, 156 (1st Cir 2003)(affirming dismissal of complaint due to lack of specific allegations identifying similarly situated comparators in complaint); Neilson v D'Angelis, 409 F3d 100, 105 (2nd Cir 2005) (holding plaintiff's proof must identify comparators *"prima facie* identical" who were treated differently to succeed on a 'class of one' claim). Other circuits require only general allegations of different treatment or vindictive conduct to take their case in front of a jury.

Levenstein v Salafsky, 164 F3d 345, 352 (7th Cir 1998)(holding allegation of vindictive conduct without identification of comparators treated differently sufficient to survive motion to dismiss); DeMuria v Hawkes, 328 F2d 704,707 (2d Cir 2003)(holding Olech does not require a plaintiff to plead actual instances where others have been treated differently; rather, general allegations of different treatment and impermissible motive are enough); Cobb v Pozzi, 352 F2d 79, 100 (2nd Cir 2003)(holding question of whether defendants had a rational basis for treating employees differently was a question for the jury).

Some courts require proof of a specific intent to treat an individual differently as distinguished from different treatment resulting from negligence or an error in judgment. Batra v Board of Regents of University of Nebraska, 79 F3d 717, 721 (8th Cir 1996)(holding alleged different treatment of university professors which was consistent with random governmental incompetence insufficient to establish equal protection claim absent proof of purposeful discrimination); Giordano v City of New York, 274 F3d 740 (2d Cir 2001)(different treatment of two police officers using blood thinner Coumadin insufficient to establish equal protection claim absent evidence that individual terminating plaintiff knew of treatment of other police officer).

The disarray among the Circuits is exemplified by Judge Posner's[1] plea for guidance in

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[1]Judge Posner authored the Seventh Circuit's opinions in Esmail v Macrone, 53 F3d 176, 180 (7th Cir 1995)(finding

his concurring opinion in Bell v Duperrault, 367 F3d 703 (7th Cir 2004) where he wrote,

> "May the Court enlighten us; the fact that post-Olech cases are all over the map suggests a need for the Court to step in and clarify its 'cryptic' (citation omitted) *per curiam* decision."

Bell, *supra*, 367 F3d at 711.

B. This Case Is Uniquely Situated For This Court's Review

Engquist's case is uniquely situated to address the widespread and multiple court divisions over Olech. The majority described Ms. Engquist's case as "unique" because, as the majority noted, "although courts have recognized class-of-one employment claims, they have almost always ultimately concluded that the particular claim before them was insufficient. Engquist, *supra*, 478 F3d at 993-94. In contrast, none of the panel members below suggested that Engquist failed to proffer sufficient evidence to establish an equal protection violation. *Id* at 1014 n. 3.

There is no dispute that the jury made the findings necessary to establish a claim for relief

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equal protection violation based upon "a spiteful effort to 'get' [a person] for reasons wholly unrelated to any legitimate state objection in denial of liquor license.") and Olech v Willowbrook, 160 F 3d 386, 387 (7th Cir 1998)(finding complaint stated a claim for relief due to allegation that plaintiff's prior lawsuit against defendant generated "substantial ill will.")

under Olech. In addition to instructing the jury on the elements this Court held in Olech stated a claim for relief, the trial judge required the jury to sign a special interrogatory finding each of those elements. The special interrogatory, which the jury answered with a "yes" answer, asked:

> "Did the individual defendants intentionally treat the plaintiff differently than others similarly situated with respect to the denial of her promotion, the termination of her employment, or denial of bumping rights without any rational basis and solely for arbitrary, vindictive or malicious reasons."

App- 3-4.

By requiring the jury to find (1) intentional different treatment from others similarly situated; (2) with respect to an adverse action; (3) no rational basis for the different treatment; and (4) the different treatment was solely for arbitrary, vindictive or malicious reasons, the trial judge required petitioner to meet the standards used in any circuit's test for an Olech claim.

There is also no dispute petitioner's evidence was sufficient to meet any requirement for illegitimate animus. The proof of illegitimate animus was substantial enough defendants conceded in the Ninth Circuit plaintiff's trial theory focused on proving an "insidious plan to get rid of" plaintiff and conceded the jury could have found such a plan was

proven. Appellants Opening Brief at 16. Petitioner's claimed constitutional deprivation is not one based upon negligence or errors in judgment.

Third, Engquist's case is also uniquely situated because of what is not contested. On appeal, defendants did not challenge the court's jury instructions nor the sufficiency of the evidence to prove (1) there was "no rational basis" for their actions toward petitioner; (2) their actions toward petitioner were arbitrary, malicious or vindictive; or (3) their actions caused the denial of promotion, the loss of bumping rights or petitioner's termination.

Thus, both Olech's application in the public employment context and the test for establishing an Olech claim are squarely presented for this Court's review.

C. The Ninth Circuit's Reasoning In This Case Is Poor Constitutional Policy That Undermines This Court's Prior Decisions

In its decision to abrogate Olech in the public employment context, the panel majority below drew a distinction between the government acting as proprietor and the government acting as lawmaker, regulator, or licensor. In support, the majority noted that just last year in Garcetti v. Ceballos, __ U.S. __, 126 S.Ct. 1951, 1960, 164 L.Ed.2d 689 (2006), this Court agreed that courts review restrictions on employee speech with greater deference to the government than in a law-making or regulatory context. *See also* O'Connor v. Ortega, 480 U.S. 709,

721-22, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987) (O'Connor, J., plurality opinion) (holding that the government, as employer, need not obtain a warrant to search an employee's property).

Unlike in the First and Fourth Amendment contexts, however, this Court has never limited the Fourteenth Amendment's scope as applied to public employment. *See, e.g.,* Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); *see also* Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728-29, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003) (applying gender-based equal protection case law from outside the employment context to public employees).

And even in the First and Fourth Amendment contexts, government employees do not give up their right to be free from hostile, arbitrary, and malicious treatment by their employer. Garcetti, __ U.S. at __, 126 S.Ct. at 1958 ("public employees do not surrender all of their First Amendment rights by reason of their employment."); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. at 664, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989) ("Our earlier cases have settled that the Fourth Amendment protects individuals from unreasonable searches conducted by the Government, even when the Government acts as an employer."). Because every governmental action must be supported by a rational basis, Cleburne, 473 U.S. at 448-49, 105 S.Ct. 3249, an employee's equal protections rights are violated when she is "intentionally treated differently from others similarly situated and . . . there is no rational basis for the difference in treatment." Olech, 528

U.S. at 564.

This Court's prior decisions also show that excluding an area of state decision-making from the application of the Equal Protection Clause is poor constitutional policy. In Olech, the Solicitor General and the defendant argued against application of the Equal Protection Clause in Olech because of the potential for transforming ordinary zoning decisions into constitutional violations. Yet, no member of this Court advocated the exclusion of zoning disputes from the reach of the Equal Protection Clause. See, Village of Willowbrook v Olech, 528 US 562, 566, 120 S Ct 1073, 145 L Ed 2d 1060 (2000)(Justice Breyer concurring).

This view is supported by the Olech Court's reliance upon two cases applying traditional equal protection analysis to individual tax decisions. Sioux City Bridge Co v Dakota County, 260 US 441, 67 L Ed 340, 43 S Ct 190 (1923) and Allegheny Pittsburgh Coal Co., v Commission of Webster Cty, 488 US 36,109 S Ct 633,102 L Ed 2d 688 (1989). Both cases dealt with a plaintiff's claims their real properties were intentionally taxed at full value while other properties of the same class were taxed below true value. Both plaintiffs claimed the intentional different treatment of their property for tax purposes violated equal protection rights. Sioux City Bridge Co., *supra*, 260 US at 442-443.

In those cases, similar to the discretion of the state when managing its own affairs, the Court recognized the ".. States.. broad powers to impose and collect taxes." Allegheny Pittsburgh Coal Co.,

supra, 488 US at 344. Nevertheless, rather than excluding individual tax decisions from application of the Equal Protection Clause, the Court focused federal review on the meaning of discrimination in a constitutional sense by,

> "...inviting attention to the well-established rule in the decisions of this court, cited above, that mere errors in judgment do not support a claim of discrimination, but that there must be something more-something which in effect amounts to an intentional violation of the essential principle of practical uniformity..."

Sioux City Bridge Co., *supra*, 260 US at 447.

If application of Olech would be disruptive, displace established rules, or create a flood of federal cases in the public employment arena, the potential disruptive effect could be no greater than applying Olech to individual tax decisions. If as noted in Jennings, Olech creates the potential for federal review of every state actors' executive and administrative decision, why shouldn't all executive and administrative decisions be exempt from equal protection rational basis review?

Rather than narrowing equal protection's coverage, this Court's decisions affirm the broad application of the Equal Protection Clause:

> "[t]he purpose of the equal protection clause of the Fourteenth Amendment is

to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."

Village of Willowbrook, *supra*, 528 US at 566, *quoting from*, Sioux City Bridge Co., *supra*, 260 at 445.

Ms. Engquist's claims that two agents of the State of Oregon intentionally and arbitrarily discriminated against her through the improper execution of their authority, fits squarely within the scope of Olech, Sioux City Bridge Co. and Allegheny Pittsburg Coal Co.

D. The Ninth Circuit's Decision Harms State And Municipal Employees

Finally, the Ninth Circuit's decision in this case harms state and municipal employees. While the majority panel specifically held the "class of one" equal protection theory does not apply to public employment decisions, there is no principled way to distinguish the class of one legal theory from any other rational basis public employment equal protection claim. Courts currently apply traditional rational basis analysis to equal protection claims based upon disability, homosexuality and age. Gill v City of New York, 2003 WL 941607 (S.D.N.Y. 2003)(denying summary judgment on equal protection claim that police officer with seizure disorder was treated differently than others similarly

situated); Yates v Beck, 2003 WL 22231260 (W.D.N.C. 2003) (applying rational basis review to claim of disability discrimination); Pruitt v Cheney, 963 F2d 1160, 1166 (9th Cir 1992)(applying rational basis review to claim of discrimination against lesbian chaplain); Emblen v Port Auth. Of New York, 2002 WL 498634 (S.D.N.Y. 2002)(applying rational basis equal protection analysis to claim that police officer was harassed because of false perception of homosexuality); Glover v Williamsburg Local School Distr., 20 F Supp 2d 1160 (S.D. Ohio 1998) (nonrenewal of tenured teacher because of sexual orientation violates Equal Protection Clause); Miguel v Guess, 51 P3d 89 (Wash. App. Div. 200) (public employee's allegation she was terminated because of sexual orientation states an equal protection claim); Massachusetts Board of Retirement v Murgia, 427 US 307, 96 S Ct 2562, 29 L Ed 2d 520 (1976)(holding rational basis review applied to equal protection challenge to statute setting mandatory retirement age for police officers).

Does the unavailability of the class of one legal theory mean that the Ninth Circuit will not review any rational basis equal protection claim challenging individual public employment decisions? If the Ninth Circuit will not conduct rational basis review of public employment decisions, are individual employment decisions subject to 'strict scrutiny' and 'heightened scrutiny' still subject to Ninth Circuit review?

In sum, immediate intervention is necessary to settle this important and fatally fractured area of the law, and to vindicate this Court's Equal

Protection jurisprudence in an area of the law where more than 2.7 million federal and more than 16 million state and local government employees are affected[2].

2. THIS COURT SHOULD RESOLVE THE SPLIT WITHIN THE STATE COURTS AS TO WHETHER "SPLIT RECOVERY" PUNITIVE DAMAGES STATUTES ARE CONSTITUTIONAL

This Court should also accept review of a second issue of national importance presented in this case: whether a state's 'split recovery' punitive damages statute is constitutional. Applying Oregon Revised Statutes § 31.735, a so-called "split-recovery" statute, the District Court entered judgment in favor of the Oregon Department of Justice and against the individual Defendants in an amount equal to sixty percent of the punitive damages the jury awarded on the state tort claim, and it took that money away from Engquist.

Or. Rev. Stat. § 31.735 divides the proceeds of a punitive damage award between plaintiffs and the State of Oregon. The Oregon statute was enacted into law as a part of a Tort Reform package in 1987 over concerns that punitive damages awards may be driving up insurance costs and concerns that Oregon had no statutory provision for reducing excessive punitive damage awards. Graham, Kathy T., *1987 Oregon Tort Reform Legislation: True Reform or Mere*

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[2]http://ftp2.census.gov/govs/apes/06fedfun/pdf (federal), and http://ftp2.census.gov/govs/apes/06stlus.txt (state and local).

Restatement, 24 Will L Rev 283, 301 (1988).

As the Ninth Circuit panel noted, Engquist, *supra*, 478 F3d at 1004-05, the state courts are sharply divided over whether "split recovery" statutes pass constitutional muster. The supreme courts in six states have upheld the statutes against federal takings challenges[3]. Cheatham v Pohle, 789 NE 2d 467, 474-475 (Ind. 2003); Evans v State, 56 P3d 1046, 1058 (Alaska 2002); Mack Trucks, Inc., v Conkle, 263 Ga 539, 436 SE 2d 635, 639 (1993); Gordon v State, 608 So 2d 800, 801-802 (Fla. 1992)(per curiam); Shepherd Components, Inc. v Brice Petrides-Donohue & Associates, 473 NW 2d 612, 619 (Iowa 1991). But two state supreme courts have held the statutes violate the federal Takings Clause. Kirk v Denver Publishing Co., 818 P2d 262, 273 (Colo 1991); Smith v Price Development Co., 125 P3d 945 (Utah 2005). One U.S. District Court has held that a split recovery statute violates the Excessive Fines Clause. McBride v Gen. Motors, Corp., 737 F Supp 1563, 1578 (MD Ga. 1990).

Oregon's split recovery punitive damages statute provides in pertinent part:

> "Upon entry of a verdict including an award of punitive damages, the Department of Justice shall become a creditor as to the punitive damages

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[3]The Oregon Supreme Court has upheld the split-recovery statute but decided the question only under the state Constitution. DeMendoza v Huffman, 334 Or 425, 51 P3d 1232, 1245-46 (2002).

> portion of the award to which the Criminal Injuries Compensation Account is entitled pursuant to paragraph (b) of this subsection, and the punitive damage portion of an award shall be allocated as follows: [forty percent of the punitive damages award to the prevailing party with attorney fees of no more than twenty percent paid out of this amount and sixty percent to the compensation account]."

Or. Rev. Stat. § 31.735

The Ninth Circuit properly recognized that if petitioner's interest in the punitive damage award is "property," then it is a taking for the government "to confiscate 60 percent of it." Engquist, *supra*, 478 F3d at 1001 n. 18. The court went awry - and furthered the jurisdictional conflict - by holding that petitioner's legal interest in the punitive damages award is not property.

Nevertheless, the Ninth Circuit reasoned since punitive damages are not awarded as a matter of right and are an expression of a jury's discretionary moral judgment, a plaintiff's interest in receipt of any specific amount of punitive damages is too speculative to constitute property under the Takings Clause. Engquist, *supra,* 478 F3d at 1004. The Ninth Circuit erred by focusing on the certainty of an award of punitive damages rather than focusing on whether plaintiff's legal interest in the punitive damages award are a form of property cognizable under the Takings Clause.

This Court has not adopted a single, clear test for what constitutes property protected under the Takings Clause. In Phillips v Washington Legal Foundation, 524 US 156, 118 S Ct 1925, 141 L Ed 2d 174 (1998), this Court concluded that the interest gained from the State of Texas' Interest on Lawyers' Trust Account (IOLTA) involved property for Takings purposes. The Phillips Court held that "regardless of whether the owner of the principal [in the account] has a constitutionally cognizable interest in the *anticipated* generation of interest by his funds, any interest that does *accrue* attaches as a property right incident to the ownership of the underlying principal. Phillips, *supra,* 524 US at 168. The Court relied upon the common law rule that "interest follows principal" as the basis for finding a property interest in Phillips. Phillips, *supra* 524 US at 165. See also, Webb's Fabulous Pharmacies, Inc., v Beckwith, 449 US 155, 164, 101 S Ct 446, 66 L Ed 2d 358 (1980)(holding "earnings of a fund are incidents of ownership of the fund and are property just as the fund itself is property,").

Here, Engquist maintains a property interest in her underlying tort cause of action cognizable under the constitution. Logan v Zimmerman Brush Co., 455 US 422, 102 S Ct 1148, 71 L Ed 2d 265 (1982)(holding law settled that cause of action is species of property protected by due process clause) Mullane v Central Hanover Trust Co., 339 US 306, 313, 70 S Ct 652, 94 L Ed 865 (1949)(holding beneficiaries' legal right to have trustee answer for negligent impairment of, or fruitless diminution of, interest in trust corpus is property for purposes of due process clause).

At common law, Engquist's legal interest in the punitive damages award is incident to her cause of action for intentional interference with contract. Wampler v Palmerton, 250 Or 65, 439 P2d 601 (1968). Petitioner's common law cause of action is defined as "...an aggregate of operative facts giving rise to a right or rights termed 'right' or 'rights of action' which will be enforced by the courts." Dean v Exotic Veneers, Inc., 271 Or 188, 193, 531 P2d 266 (1975). Her common law right of action is a "right to bring suit in a case" that arises "from the existence of a primary right in the plaintiff, and an invasion of that right by some delict on the part of the defendant." East Side Mill & Lumber Co., v Southeast Portland Lumber Co., 155 Or 367, 374, 65 P2d 625 (1937). Before petitioner could seek seek punitive damages, she was required to establish all elements of the underlying tort including damages. A claim for punitive damages alone does not constitute a cognizable cause of action. Martin v Cambas, 134 Or 257, 262, 293 P 601 (1930).

Accordingly, regardless of whether Engquist had a constitutionally cognizable interest in the *anticipated* generation of punitive damages (the Ninth Circuit said "no"), any such damages that the jury *actually* awarded immediately attached as a property right incident to Engquist's ownership of the underlying cause of action. Indeed, this Court in Phillips recognized that even if IOLTA interest income had no economically realizable value in the abstract, "possession, control and disposition are nonetheless valuable rights that inhere in the property," Phillips, *supra*, 524 U.S. at 170, 118 S.Ct.

1925, a principle that applies equally to Engquist's interest in the punitive damages award.

While petitioner's legal interest in the punitive damages award is incident to her ownership of the common law right of action, the State has no legal interest in the common law cause of action and thus also the punitive damages. Under state law Oregon has no role in initiating or prosecuting claims for punitive damages. Tenold v Weyerhaeuser Co., 127 Or App 511, 529, 873 P2d 413 (1994); Axen v American Home Products Corp., 160 Or App 19, 23, 981 P2d 340 (1999). Rather, the State's interest is characterized as a contingent right which arises only when there is a fund of money to distribute:

> "The state ... had no interest in, or knowledge of, the case beyond its entirely contingent right under ORS 18.540[4] to a portion of whatever punitive damages might eventually be distributed. Because the state's right under ORS 18.540 is triggered only when a fund capable of distribution exists, the state may not interfere in the actual prosecution of the action."

Eulrich v Snap-On Tools Corp., 103 Or App 610, 798 P 2d 715, 717 (1990).

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[4]Or. Rev. Stat. § 18.540 was the original split recovery statute enacted in 1987. The statute was re-numbered Or. Rev. Stat. § 31.735 in 2003. Other than increasing the State's share of the punitive damages award, the substance of the two statutes is the same.

Since petitioner, not the State, is the owner of the common law cause of action and since the punitive damages award is incident to the common law cause of action, the "State, by *ipse dixit*, may not transform private property into public property without compensation" simply by legislatively abrogating traditional common law rules. Webb's Fabulous Pharmacies, Inc., *supra*, 449 US at 164.

This Court's recent punitive damages jurisprudence in the procedural due process context, directly connecting the amount of punitive damages to harm to only the plaintiff, strengthens the tie between Engquist's claims for compensation on the one hand, and the punitive damages on the other. In Philip Morris v Williams, 549 US ___, 166 L Ed 2d 940 (2007), this Court held that the "amount" of punitive awards must be based solely upon actual or potential harm to the plaintiff. Philip Morris, *supra*, 166 L Ed 2d at 948. In fact, "...the Constitution's Due Process Clause *forbids* a State to use a punitive damages award to punish a defendant for injury that it inflicts upon non-parties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation." Philip Morris, *supra*, 166 L Ed 2d at 948. This Court has mandated that lower courts assure that punitive damages awards are not grossly excessive based in part upon a mathematical comparison of the amount of punitive damages with the actual or potential harm to the plaintiff. BMW of North America, Inc., v Gore, 517 US 559, 575, 116 S Ct 1589, 134 L Ed 2d 809 (1996).

Rather than analyzing petitioner's (and the State's) legal interests in the punitive damages award, the Ninth Circuit focused its analysis on the likelihood a plaintiff will recover on a punitive damages claim:

> "..., punitive damages are 'never awarded as of right, ...Because of the inherently uncertain nature of punitive damages, which are a 'discretionary moral judgment by the jury...a plaintiff's interest in receipt of any certain amount of punitive damages is too speculative to constitute property under the Takings Clause."

Engquist, *supra,* 478 F3d at 1003.

Yet, the Ninth Circuit's reasoning simply shows why petitioner, not the State, is entitled to the punitive damages award or to just compensation. If a punitive damages claim is such a highly speculative investment than the benefit of whatever amount is awarded should go to the owner of the claim that assumes expense and risk of establishing the claim, not to an uninvolved third-party. Petitioner submitted evidence into the trial court record she incurred expenses of $37,000 and her attorney invested $162,000 of attorney time to prosecute the claim for punitive damages. Because she owned the claim and invested money to prosecute the case, she legitimately expects just compensation for the taking of the results of her investment.

In contrast, the State of Oregon invested nothing in establishing petitioner's claim. Since the case was tried in federal court, the State neither provided the forum nor the jury for the proceeding. In any event, since the State had no legal interest in the cause of action, even if it wished to, the State could not prosecute the claim.

Finally, what is most disturbing about the State of Oregon's position is the way the "split recovery" statute distorts the civil litigation process. Attorneys from the Oregon Department of Justice defended the individual defendants and opposed plaintiff's punitive damages claim through trial. After trial, the individual defendants' attorneys proposed entry of judgment in favor of their employer, the Oregon Department of Justice, against their own clients, the individual defendants. Subsequently, defendants attorneys appealed the judgment on all claims except for those under which the Oregon Department of Justice claimed judgment against the individual defendants.

This scenario certainly gives an appearance the State's financial interest in punitive damages conflicts with the individual defendants interest in avoiding a judgment entered against them.

This Court should grant the Petition and hold the "split recovery" punitive damages statutes unconstitutional for violating the Takings Clause.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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