

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

**Brief of Lambda Legal Defense and Education Fund,
Disability Rights Education and Defense Fund,
American Association of People with Disabilities,
American Civil Liberties Union,
Gay & Lesbian Advocates & Defenders,
National Center for Lesbian Rights,
Human Rights Campaign,
and National Gay and Lesbian Task Force,
as *Amici Curiae* in Support of Petitioner**

JON W. DAVIDSON
SUSAN SOMMER
LAMBDA LEGAL
120 Wall Street, Suite 1500
New York, New York 10005
(212) 809-8585 ext. 271

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION, INC.
125 Broad Street
New York, NY 10004
(212) 549-2500

WILLIAM M. HOHENGARTEN
Counsel of Record
JENNER & BLOCK LLP
601 Thirteenth Street, NW
Washington, DC 20005
(202) 639-6000

JOSHUA A. BLOCK
JENNER & BLOCK LLP
919 Third Avenue, Floor 37
New York, NY 10011
(212) 891-1600

Additional Counsel Listed on Inside Cover

KARA SUFFREDINI
NATIONAL GAY AND LESBIAN
TASK FORCE
1325 Massachusetts Ave. NW
Suite 600
Washington, DC 20005
(202) 393-5177

GARY D. BUSECK
GAY & LESBIAN ADVOCATES
& DEFENDERS
30 Winter Street, Suite 800
Boston MA 02108
(617) 426-1350

SHANNON PRICE MINTER
NATIONAL CENTER FOR
LESBIAN RIGHTS
870 Market Street Suite 370
San Francisco, CA 94102
(415) 392-6257

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii
INTEREST OF AMICI CURIAE1
INTRODUCTION AND SUMMARY.....5
ARGUMENT7
I. The Equal Protection Clause Provides Critical
Protection Against Invidious Discrimination
Based on Sexual Orientation, Age, Disability,
or Similar Characteristics.7
II. Traditional Equal Protection Principles
Should Apply With Full Force in the Public
Employment Context.11
III. Any Exception to Traditional Equal Protection
Principles Is Unwarranted, But If an
Exception Were Made, It Should at Least Be
Limited to “Class of One” Claims Narrowly
Defined.16
CONCLUSION24

TABLE OF AUTHORITIES

CASES

<i>Beall v. London City School District Board of Education</i> , No. 2:04-cv-290, 2006 WL 1582447 (S.D. Ohio June 8, 2006).....	10, 11
<i>Beren v. Board of Trustees of California State University</i> , No. C-06-4706, 2007 WL 2408884 (N.D. Cal. Aug. 21, 2007).....	5-6, 12, 23
<i>Board of Trustees of University of Alabama v. Garrett</i> , 531 U.S. 356 (2001).....	6, 8, 13, 14, 15, 20
<i>City of Cleburne v. Cleburne Living Center</i> , 473 U.S. 432 (1985).....	8, 9, 20, 21
<i>Costabile v. County of Westchester</i> , 485 F. Supp. 2d 424 (S.D.N.Y. 2007).....	22
<i>Department of Agriculture v. Moreno</i> , 413 U. S. 528 (1973)	19
<i>Emblen v. Port Authority of New York/New Jersey</i> , No. 00 Civ. 8877, 2002 WL 498634 (S.D.N.Y. Mar. 29, 2002)	10, 11
<i>Garcetti v. Ceballos</i> , 547 U.S. 410 (2006)	12
<i>Glover v. Williamsburg Local School District Board of Education</i> , 20 F. Supp. 2d 1160 (S.D. Ohio 1998).....	10
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991).....	15
<i>Hazen Paper Co. v. Biggins</i> , 507 U.S. 604 (1993).....	8

<i>Jennings v. City of Stillwater</i> , 383 F.3d 1199 (10th Cir. 2004).....	17
<i>Kimel v. Florida Board of Regents</i> , 528 U.S. 62 (2000).....	6, 14
<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003)	8, 20
<i>Lovell v. Comsewogue School District</i> , 214 F. Supp. 2d 319 (E.D.N.Y. 2002)	10, 11
<i>Marcisz v. City of New Haven</i> , No. Civ. 3:04- CV-01239WW, 2005 WL 1475329 (D. Conn. June 22, 2005).....	10
<i>Massachusetts Board of Retirement v. Murgia</i> , 427 U.S. 307 (1976)	15
<i>Miguel v. Guess</i> , 51 P.3d 89 (Wash. Ct. App. 2002).....	10, 11
<i>Monroe v. Pape</i> , 365 U.S. 167 (1961), <i>overruled on other grounds by Monell v. Department of Social Services of City of New York</i> , 436 U.S. 658 (1978)	15
<i>O'Connor v. Ortega</i> , 480 U.S. 709 (1987)	12
<i>O.H. v. Oakland Unified School District</i> , No. C-99-5123, 2000 WL 33376299 (N.D. Cal. Apr. 17, 2000).....	10
<i>Quinn v. Nassau County Police Department</i> , 53 F. Supp. 2d 347 (E.D.N.Y. 1999)	10
<i>Robinson v. Pierce County</i> , No. C06-5354, 2008 WL 375199 (W.D. Wash. Feb. 11, 2008).....	5, 12, 23
<i>Romer v. Evans</i> , 517 U.S. 620 (1996).....	6, 8, 9, 13, 19, 20, 21

<i>Scarborough v. Morgan County Board of Education</i> , 470 F.3d 250 (6th Cir. 2006).....	6, 10, 22, 23
<i>Screws v. United States</i> , 325 U.S. 91 (1945)	15
<i>Sioux City Bridge Co. v. Dakota County</i> , 260 U.S. 441 (1923)	16
<i>Sunday Lake Iron Co. v. Township of Wakefield</i> , 247 U.S. 350 (1918).....	16
<i>Tennessee v. Lane</i> , 541 U.S. 509 (2004)	14
<i>Tester v. City of New York</i> , No. 95 Civ. 7972, 1997 WL 81662 (S.D.N.Y. Feb. 25, 1997)	10
<i>Vance v. Bradley</i> , 440 U.S. 93 (1979).....	15
<i>Village of Willowbrook v. Olech</i> , 528 U.S. 562 (2000).....	6, 19
<i>Weaver v. Nebo School District</i> , 29 F. Supp. 2d 1279 (D. Utah 1998)	9, 10
<i>Webster v. Doe</i> , 486 U.S. 592 (1988)	13
STATUTES	
42 U.S.C. § 1983.....	15

INTEREST OF AMICI CURIAE¹

Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people, and those with HIV through impact litigation, education, and public policy work. Lambda Legal has appeared before this Court as counsel to parties or as amicus curiae in cases concerned with discriminatory treatment of lesbians, gay men, and those with disabilities, including in *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001). Lambda Legal also has represented in lower courts numerous individuals subjected by their public employers to irrational discrimination on the basis of sexual orientation or disability. Based on this work, Lambda Legal well understands the importance of equal protection guarantees against invidious discrimination in the government workplace.

The Disability Rights Education and Defense Fund, Inc. (“DREDF”), based in Berkeley, California, is a national law and policy center dedicated to advancing and protecting the civil rights of people with disabilities. Founded in 1979, DREDF is staff-

¹ No counsel for any party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters of consent from the parties have been filed with the Clerk.

and board-led by individuals with disabilities and parents of children with disabilities. Recognized for its expertise in the interpretation of disability civil rights laws, DREDF pursues its mission through education, advocacy, and law reform efforts, fighting to ensure that people with disabilities have the legal protections necessary to vindicate their right to be free from discrimination.

The American Association of People with Disabilities (“AAPD”) is a national membership organization founded in 1995 to organize the disability community to be a powerful force for change—socially, politically, and economically. With more than 100,000 members around the U.S., AAPD has a strong interest in how fundamental Constitutional protections are applied in the area of disability rights.

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members that is dedicated to the principles of liberty and equality embodied in the Constitution. In particular, the ACLU submitted an amicus brief in this Court’s most recent “class of one” case, *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), and has long advocated for the equal protection rights of public employees in varied contexts, both as direct counsel and as amicus curiae.

Founded in 1978, Gay & Lesbian Advocates & Defenders (“GLAD”) is New England’s leading public interest legal organization dedicated to ending discrimination based on sexual orientation, HIV

status, and gender identity and expression. GLAD has litigated widely in New England in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals, and people living with HIV and AIDS. That litigation has included the representation of gay men, lesbians, and individuals with HIV in employment discrimination claims against both public and private employers. In this Court, GLAD's work has included: *Bragdon v. Abbott*, 524 U.S. 624 (1998), *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), *Healy v. Spencer*, 127 S.Ct. 1489 (2007) (amicus brief for Petitioner), *Miller-Jenkins v. Miller-Jenkins*, 127 S. Ct. 2130 (2007) (counsel for respondent on cert petition), *L.M.M. v. E.N.O.*, 528 U.S. 1005 (1999) (same), as well as a participant on numerous amicus briefs.

The National Gay and Lesbian Task Force (the "Task Force"), founded in 1973, is the oldest national lesbian, gay, bisexual, and transgender ("LGBT") civil rights and advocacy organization. With members in every U.S. state, the Task Force works to build the grassroots political power of the LGBT community by training state and local activists and leaders; conducting LGBT-related research and data analysis; and organizing broad-based campaigns to advance pro-LGBT legislation and to defeat anti-LGBT referenda. As part of a broader social justice movement, the Task Force works to create a world in which all people may fully participate in society, including equal access for LGBT people to opportunities for employment

The National Center for Lesbian Rights (“NCLR”) is a nonprofit legal organization dedicated to achieving full equality for lesbian, gay, bisexual, and transgender people and their families. Since 1977, NCLR has litigated to end discrimination on the basis of sexual orientation and gender in family law, employment, education, immigration, and access to public accommodations. NCLR has litigated equal protection cases across the country on behalf of public employees who have been subjected to irrational discrimination based on their sexual orientation, gender, disability, or marital status.

Human Rights Campaign (“HRC”), the largest national gay, lesbian, bisexual, and transgender political organization, envisions an America where gay, lesbian, bisexual, and transgender people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the community. HRC has over 700,000 members and supporters nationwide committed to making this vision of equality a reality. The Equal Protection Clause is a critical constitutional protection for our membership and HRC is concerned by any decision that might undermine it. Especially in light of the lack of comprehensive federal law barring employment discrimination based on sexual orientation, it is critical that robust constitutional protections for gay and lesbian public employees, and others faced with invidious discrimination by the government, be preserved.

INTRODUCTION AND SUMMARY

Amici are leading national organizations advocating on behalf of persons who, historically and today, have often been subjected to invidious discrimination. The Equal Protection Clause plays a vital role in protecting against irrational discrimination by the government against members of disfavored groups—including in the context of public employment.

Amici are concerned that the Ninth Circuit's decision in this case could undermine long-standing constitutional protections for public employees against illegitimate, invidious discrimination based on sexual orientation, disability, age, or similar characteristics. On its surface, the decision below applies only to so-called "class of one" equal protection claims. But the Ninth Circuit's reasoning—that the Equal Protection Clause does not apply with full force in the context of public employment—might, if not reversed or at the very least carefully circumscribed by this Court, be extended more broadly to discrimination based on characteristics not already designated by the Court as "suspect classifications," such as sexual orientation, age, or disability. Indeed, some district courts have already applied the Ninth Circuit's decision to bar equal protection claims alleging unconstitutional discrimination based on age or disability. *See, e.g., Robinson v. Pierce County*, No. C06-5354, 2008 WL 375199, at *11 (W.D. Wash. Feb. 11, 2008); *Beren v. Bd. of Trustees of Cal. State*

Univ., No. C-06-4706, 2007 WL 2408884, at *1 (N.D. Cal. Aug. 21, 2007). And the Ninth Circuit itself, by listing an out-of-circuit case involving anti-gay animus as a “class of one” claim, implied that such claims would not be permitted under the decision below. *See* Pet. App. 22 (disagreeing with *Scarborough v. Morgan County Bd. of Educ.*, 470 F.3d 250 (6th Cir. 2006)).

This Court should reject the Ninth Circuit’s reasoning and reaffirm that the guarantee of equal protection applies with full force to all public employees. In reaching a contrary conclusion, the Ninth Circuit ignored this Court’s decisions, including *Romer v. Evans*, 517 U.S. 620 (1996), *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), and *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001), which make evident that the Equal Protection Clause protects public employees from discrimination that lacks a rational basis. Without these protections, public employees could be vulnerable to unbridled discrimination on any basis, including characteristics such as sexual orientation, age, or disability even when those characteristics have no connection at all to legitimate government interests.

Amici agree with Petitioner and the vast majority of circuit courts to address the issue that the Equal Protection Clause protects “any person” against irrational discrimination by the government, *see Village of Willowbrook v. Olech*, 528 U.S. 562, 564-65 (2000) (per curiam), and that these principles of equal protection extend to public employees. However, were the Court to reach a contrary

conclusion and decide to limit “class of one” equal protection claims, any restriction on such claims at minimum should be narrowly circumscribed and should not affect claims of discrimination based on sexual orientation, age, disability, or similar characteristics. The policy concerns adverted to by the Ninth Circuit for limiting “class of one” claims are not relevant when public employees allege irrational discrimination against a disfavored group. Nor should the Court determine that a separate showing of malice or animus is required. While malice or animus is *sufficient* to make out an equal protection violation on these bases, it is *not necessary*. Discrimination violates the equal protection guarantee when the classification lacks a rational connection to a legitimate government purpose, even absent a separate showing of animus or malice. Finally, if “class of one” claims were to be limited, they at least must be carefully defined so as to exclude cases like *Scarborough*, where discrimination is based on membership in or association with a disfavored group.

ARGUMENT

I. The Equal Protection Clause Provides Critical Protection Against Invidious Discrimination Based on Sexual Orientation, Age, Disability, or Similar Characteristics.

The Equal Protection Clause plays a crucial role in protecting public employees from invidious discrimination based on traits such as sexual orientation, age, or disability. In asserting that conventional principles of equal protection “should

not be as expansive” in the context of public employment, Pet. App. 25, the Ninth Circuit’s decision threatens to strip public employees of protections against invidious discrimination that is unrelated to job performance, or is motivated by animus or irrational prejudice.

This Court’s precedents acknowledge that individuals may be particularly vulnerable to invidious and illegitimate discrimination based on certain characteristics beyond those already designated by this Court as “suspect” or “quasi-suspect” classifications. Lesbians and gay men have experienced disparate treatment based on ignorance, irrational prejudice, moral disapproval, animus, or a bare desire to harm. *See Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer*, 517 U.S. 620.² Older workers may be “deprived of employment on the basis of inaccurate and stigmatizing stereotypes.” *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). And persons with disabilities may face adverse treatment based on irrational “negative attitudes, or fear.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985); *see also Garrett*, 531 U.S. at 375 (Kennedy, J., concurring) (“There can be little doubt . . . that persons with mental or physical impairments are confronted with

² *Romer* held that Colorado’s Amendment 2 did not further any “legitimate” state interest and accordingly could not survive even rational basis review. *Romer*, 517 U.S. at 635. This Court has not addressed whether lesbians and gay men may be a “suspect” or “quasi-suspect” class that would trigger a heightened level of scrutiny for classifications based on sexual orientation.

prejudice which can stem from indifference or insecurity as well as from malicious ill will”).

The Equal Protection Clause guarantees that individuals belonging to these and other vulnerable groups are not left “entirely unprotected from invidious discrimination.” *Cleburne*, 473 U.S. at 446. Unequal treatment fails even the most deferential equal protection review whenever there is no rational “relation between the classification adopted and the [legitimate] object to be attained,” or when “the disadvantage imposed is born of animosity toward the class of persons affected.” *Romer*, 517 U.S. at 632, 634. Appropriate equal protection review thus ensures that members of each of these groups receive, at minimum, the basic guarantee of protection against discrimination without a rational basis or based on fear or animus.

In the lower courts, the Equal Protection Clause has played a particularly vital role in protecting individual gay men and lesbians from invidious discrimination in public employment. Courts have consistently recognized that “[a]bsent some rational relationship to job performance, a decision not to assign [plaintiff to an employment position] because of her sexual orientation runs afoul of the Fourteenth Amendment’s equal protection guarantee.” *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1289 (D. Utah 1998). Likewise, courts have recognized that “a state action which discriminates against homosexuals and is motivated solely by animus towards that group necessarily violates the Equal Protection Clause, because a desire to effectuate one’s animus against homosexuals can

never be a legitimate governmental purpose.” *Glover v. Williamsburg Local Sch. Dist. Bd. of Educ.*, 20 F. Supp. 2d 1160, 1169 (S.D. Ohio 1998) (internal quotation marks omitted). Lower courts have thus consistently held that irrational or invidious discrimination against gay or lesbian public employees violates the Equal Protection Clause. *See, e.g., Beall v. London City Sch. Dist. Bd. of Educ.*, No. 2:04-cv-290, 2006 WL 1582447, at *15 (S.D. Ohio June 8, 2006); *Marcisz v. City of New Haven*, No. Civ. 3:04-CV-01239WW, 2005 WL 1475329, at *2 (D. Conn. June 22, 2005); *Lovell v. Comsewogue Sch. Dist.*, 214 F. Supp. 2d 319, 323 (E.D.N.Y. 2002); *O.H. v. Oakland Unified Sch. Dist.*, No. C-99-5123, 2000 WL 33376299, at *9-10 (N.D. Cal. Apr. 17, 2000); *Quinn v. Nassau County Police Dep’t*, 53 F. Supp. 2d 347, 356-57 (E.D.N.Y. 1999); *Glover*, 20 F. Supp. 2d at 1174; *Weaver*, 29 F. Supp. 2d at 1289; *Tester v. City of New York*, No. 95 Civ. 7972, 1997 WL 81662, at *5-*6 (S.D.N.Y. Feb. 25, 1997); *Miguel v. Guess*, 51 P.3d 89, 97 (Wash. Ct. App. 2002).

Equal protection claims have also protected individual employees who are not themselves gay but are nonetheless targeted by their public employers because they associate with gay persons, are perceived to be gay, or have declined to discriminate against those who are. *See, e.g., Scarbrough*, 470 F.3d 250; *Emblen v. Port Auth. of N.Y./N.J.*, No. 00 Civ. 8877, 2002 WL 498634, at *11 n.12 (S.D.N.Y. Mar. 29, 2002).

Indeed, it is so well-established that the equal protection guarantee bars public employers from invidiously discriminating against lesbian and gay

employees that lower courts repeatedly have rejected government employers' attempts to invoke the defense of qualified immunity from such claims. *See, e.g., Beall*, 2006 WL 1582447, at *15; *Emblen*, 2002 WL 498634, at *11; *Lovell*, 214 F. Supp. 2d at 325; *Miguel*, 51 P.3d at 99.

The Equal Protection Clause similarly sets a constitutional baseline protecting public employees from invidious discrimination on the basis of age, disability, or other historically disfavored characteristics. Independent of any applicable statutory protections, the Constitution itself sets a minimum guarantee against invidious discrimination that the legislature may not abrogate or repeal. The Equal Protection Clause thus ensures that no public employee is left entirely unprotected from invidious discrimination in the workplace. That vital protection must not lightly be withdrawn.

II. Traditional Equal Protection Principles Should Apply With Full Force in the Public Employment Context.

The Ninth Circuit's decision potentially calls into question these long-standing protections for public employees. If interpreted to foreclose all equal protection claims alleging discrimination based on characteristics not already recognized as suspect or quasi-suspect classifications, the Ninth Circuit's opinion could leave lesbians and gay men, older employees, and employees with disabilities vulnerable to invidious discrimination by governmental employers. Indeed, several district courts have already applied the Ninth Circuit's

decision to dismiss equal protection claims alleging discrimination on the basis of age or disability. *See, e.g., Robinson*, 2008 WL 375199, at *11 (dismissing claim for age discrimination); *Beren*, 2007 WL 2408884, at *1 (dismissing claim for disability discrimination).

The Ninth Circuit's decision cannot be reconciled with this Court's precedents. In concluding that "class of one" claims are a "constitutional area where the rights of public employees should not be as expansive as the rights of ordinary citizens," Pet. App. 25, the Ninth Circuit drew an analogy to this Court's decisions in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), and *O'Connor v. Ortega*, 480 U.S. 709 (1987). The panel majority concluded from these cases addressing different constitutional provisions that *equal protection* rights may be restricted when the government acts as "employer" instead of "sovereign." But in the course of analogizing to other areas of the law, the Ninth Circuit overlooked several of this Court's precedents holding that the Equal Protection Clause does protect public employees from irrational or invidious discrimination, even when the discriminatory classification is not currently designated as suspect or quasi-suspect by this Court.

The Court has previously noted that the Constitution prevents the government from invidiously discriminating against gay or lesbian public employees. In *Romer*, the Court observed with particular concern that Colorado's Amendment 2 extended beyond the private sphere and purported to withdraw from gay men and lesbians protection

against discrimination in public employment, including generally applicable laws prohibiting “unfair discrimination” or arbitrary treatment. *Romer*, 517 U.S. at 629. Far from suggesting that gay men and lesbians who are employed by the government are not entitled to “conventional” equal protection principles, *id.* at 635, *Romer* reaffirmed the applicability of venerable principles to this sphere. “Central both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection is the principle that government *and each of its parts* remain open on impartial terms.” *Id.* at 633.³

The Court has also affirmed that the Equal Protection Clause prohibits irrational discrimination against public employees on the basis of age or disability. In *Kimel* and *Garrett*, the Court examined whether the protections in the ADEA and Title I of the ADA were “congruent and proportional” remedies for unconstitutional employment discrimination based on age and disability, respectively. As the “first step” in applying the congruent-and-proportional test, *Kimel* and *Garrett* undertook to “identify with some precision the scope of the constitutional right at issue” by examining the limitations that the Equal Protection Clause places on the states’ treatment of their employees. *Garrett*,

³ Similarly, in *Webster v. Doe*, 486 U.S. 592 (1988), this Court rejected a federal agency’s claim that the Administrative Procedure Act precluded an equal protection claim brought by a gay employee, instead confirming that “a constitutional claim based on an individual discharge may be reviewed by the District Court.” *Id.* at 603-04.

531 U.S. at 365; *accord Kimel*, 528 U.S. at 83. In demarcating the “metes and bounds” of public employees’ rights, *Kimel* and *Garrett* applied the “unremarkable and widely acknowledged” principles of rational basis review. *Garrett*, 531 U.S. at 367-68; *accord Kimel*, 528 U.S. at 83. *Garrett* also acknowledged that Congress had compiled several examples of state employment discrimination—and many more examples of discrimination by cities and municipalities—that might well have been unconstitutional under the rational basis test. *Garrett*, 531 U.S. at 369-70. Thus, as the Court has subsequently observed, *Garrett* addressed Congress’s power to “enforce the Fourteenth Amendment’s prohibition on unconstitutional disability discrimination in public employment.” *Tennessee v. Lane*, 541 U.S. 509, 521 (2004).

If there were any reason to think that the Equal Protection Clause did not apply with full force when the government acts in its capacity as employer, then surely *Kimel* and *Garrett* would have said so. Ultimately, *Kimel* and *Garrett* concluded that Congress had not compiled sufficient evidence of a “pattern of unconstitutional employment discrimination by the States” in order to abrogate their Eleventh Amendment immunity. *Garrett*, 531 U.S. at 368; *accord Kimel*, 528 U.S. at 89. But not once did the Court suggest that conventional equal protection principles were inappropriate or somehow inapplicable for public employees who are

discriminated against on account of age or disability.⁴

These precedents reflect the practical reality that public employees may often be vulnerable to the irrational prejudices of their supervisors or co-workers. “[K]nowledge of our own human instincts” teaches that invidious discrimination may arise from “simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves.” *Garrett*, 531 U.S. at 374-75 (Kennedy, J., concurring). When the state cloaks a private individual with governmental authority, the Equal Protection Clause prevents him or her from abusing that authority in order to effectuate irrational prejudice or biases. Indeed, Congress enacted 42 U.S.C. § 1983 precisely to provide a federal remedy when individuals abuse positions of authority to discriminate invidiously “by reason of prejudice, passion, neglect, intolerance or otherwise.” *Monroe v. Pape*, 365 U.S. 167, 180 (1961), *overruled on other grounds by Monell v. Dep’t of Soc. Servs. of the City of N.Y.*, 436 U.S. 658 (1978).⁵

⁴ In addition to *Kimel*, this Court has on three separate occasions evaluated equal protection claims based on age discrimination in public employment without ever deviating from the traditional rational basis test or suggesting that an alternative standard should apply to public employees. See *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Vance v. Bradley*, 440 U.S. 93 (1979); *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (per curiam).

⁵ See also *Screws v. United States*, 325 U.S. 91, 116 (1945) (“The danger was not merely legislative or judicial. Nor was it

Although the Ninth Circuit’s opinion did not directly address claims by members of disfavored groups who are targeted for discrimination, amici are concerned that a broad interpretation of the opinion could strip all public employees of universal constitutional protections and leave them vulnerable to invidious discrimination based on irrational prejudices or pure malice. Nothing in this Court’s precedents suggests that government employers are exempt from the requirements of the Fourteenth Amendment. “The 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.” *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923) (quoting *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352 (1918)).

III. Any Exception to Traditional Equal Protection Principles Is Unwarranted, But If an Exception Were Made, It Should at Least Be Limited to “Class of One” Claims Narrowly Defined.

For the reasons outlined above, amici submit that the Equal Protection Clause should apply with full force in the public employment context—including to “class of one” claims. If, however, this Court were to

threatened only from the state’s highest officials. It was abuse by whatever agency the state might invest with its power capable of inflicting the deprivation”).

conclude that some exception were warranted for “class of one” claims brought by public employees, then any such exception should be confined to true “class of one” claims. Conventional equal protection analysis should continue to apply to discrimination against public employees based on characteristics such as sexual orientation, age, or disability.

First, as Petitioner demonstrates, when this Court has adapted the commands of particular constitutional provisions to the unique conditions of public employment, it has not painted with a broad brush; instead, it has made careful adjustments that balance the legitimate interests of the government as employer against due respect for the constitutional rights of individuals. Pet’r Br. 23-29. Thus, if any limitation on equal protection claims could be justified in the public employment context—which amici believe is not the case—the limitation still must not extend beyond the legitimate needs of public employers that purportedly justify it. For the reasons asserted in Petitioner’s brief, the policy rationales advanced by the Ninth Circuit do not warrant barring “class of one” claims by public employees. Even were this not the case, these rationales cannot justify any limitation on non-“class of one” claims, such as claims alleging discrimination based on sexual orientation, age, disability, or similar characteristics.

In a true “class of one” claim, the plaintiff alleges that he or she has been discriminated against as an individual, not because of any group characteristic shared with others. *See, e.g., Jennings v. City of Stillwater*, 383 F.3d 1199, 1213 (10th Cir. 2004)

(observing that “class of one” plaintiff is not part of a “group[] unified by the characteristic alleged to be the root of the discrimination”). Thus, disparate treatment is itself the defining characteristic that turns the plaintiff into a “class of one.” The Ninth Circuit appeared to be concerned that without a defining “classification” to point to, an employee may claim to be a “class of one” even when he or she is fired or disciplined on legitimate performance-based or employment-related grounds. Pet. App. 25. The Ninth Circuit was further concerned that, because every public employee is potentially a “class of one,” there was no limiting principle to stop a purported “flood” of litigation it feared could be generated by recognizing such claims. *Id.* at 26.⁶

Lacking merit in the “class of one” context, these concerns certainly do not justify limiting equal protection claims of public employees who suffer discrimination based on classifications defined by characteristics such as sexual orientation, age, or disability. When, for example, a gay or lesbian public employee is fired because of his or her sexual orientation, that personnel action is based on an articulable *classification* that channels traditional equal protection inquiry: Is the employee’s sexual orientation rationally related to a legitimate interest of the public employer that is furthered by discrimination on this basis? As *Romer* reminds us, “[t]he search for the link between [such a] classification and [a legitimate government] objective

⁶ As the Engquist dissent noted, Pet. App. 65, no “flood” of “class of one” cases has actually materialized, and amici dispute that this is a valid concern justifying the majority’s holding.

gives substance to the Equal Protection Clause.” *Romer*, 517 U.S. at 632. In addition, the identification of a classification underlying an adverse personnel action provides a limiting principle for non-“class of one” claims. There is thus no reason why equal protection principles guarding against discrimination on the basis of characteristics such as sexual orientation, age, or disability should not apply with full force in the public employment context.

Second, some courts of appeals appear to require proof of malice or animus against an individual as a limiting principle for “class of one” claims, either in the public employment context or more generally. *Cf. Olech*, 528 U.S. at 565,66 (Breyer, J., concurring). But traditional equal protection analysis does not require a separate showing of malice or animus when a public employee (or any other person) is discriminated against due to characteristics such as sexual orientation, age, or disability.

To be sure, proof that a public employee has been fired solely because of class-based malice, ill-will, or animus is always *sufficient* to establish an equal protection violation. “If the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” *Romer*, 517 U.S. at 634-35 (quoting *Dep’t of Agric. v. Moreno*, 413 U. S. 528, 534 (1973) (internal quotation marks and ellipsis omitted)). Governmental action “exhibit[ing] such a desire to harm a politically unpopular group” plainly violates the guarantee of equal protection.

Lawrence, 539 U.S. at 580 (O'Connor, J., concurring in judgment).

But a separate showing of animus or malice is *not* a *necessary* element of an equal protection claim. Discrimination is unlawful when there is no rational relation between a discriminatory classification and a legitimate government objective. *See, e.g., Cleburne*, 473 U.S. at 446 (“The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational”); *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring) (observing that invidious discrimination can result from “simple want of careful, rational reflection”).

Romer exemplifies this principle. There the Court reiterated that “even in the ordinary equal protection case calling for the most deferential of standards, [the Court] insist[s] on knowing the relation between the classification adopted and the object to be attained.” *Romer*, 517 U.S. at 632. And the Court found that Colorado Amendment 2 failed that test: “It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board.” *Id.* at 633. The Court therefore struck down the law under the “conventional and venerable” equal protection principle that “a law must bear a rational relationship to a legitimate governmental purpose and Amendment 2 does not.” *Id.* at 635 (citations omitted).

To be sure, *Romer* also concluded that Amendment 2 stemmed from anti-gay animus. But

that conclusion was not based on any separate proof of such hostility. It was *inferred* from the absence of any rational connection between the classification and a legitimate government objective. *Id.* at 634-35 (explaining that “laws of the kind now before us raise the *inevitable inference* that the disadvantage imposed is born of animosity toward the class of persons affected,” because the law “outrun[s] and belie[s] any legitimate justifications that may be claimed for it”) (emphasis added); *see also Cleburne*, 473 U.S. at 450 (inferring from lack of rational reason for disparate treatment that zoning board’s decision “appears to us to rest on an irrational prejudice”).

In short, an equal protection violation can be shown in two ways. A plaintiff may demonstrate that the government action lacks a rational basis *either* by showing that it fails “to advance a legitimate government interest,” *Romer*, 517 U.S. at 632, *or* by demonstrating that the challenged government action was motivated by “animosity” or “a bare . . . desire to harm,” *id.* at 634 (ellipsis in original). Even assuming *arguendo* that there are grounds for limiting “class of one” claims to the second prong by requiring proof of animus or ill will (which is not the case), no such departure from venerable equal protection principles is warranted when discrimination is based on classifications such as sexual orientation, age, disability, or similar characteristics.

Third, if despite the weight of argument against doing so the Court were to impose any restriction on “class of one” claims in the public employment

context, it at least should carefully define what is meant by a “class of one.” A true “class of one” claim is one in which the plaintiff alleges discrimination based on his or her individual identity as such. In contrast, when discrimination is alleged due to actual or perceived membership in, or association with, a group marked by a particular characteristic, that is *not* a “class of one.”

Some lower courts have made indiscriminate use of the “class of one” label to encompass all equal protection claims that do not allege discrimination based on a currently recognized suspect or quasi-suspect classification. *See, e.g., Costabile v. County of Westchester*, 485 F. Supp. 2d 424, 433 (S.D.N.Y. 2007) (stating, in a case alleging disability discrimination, that “[b]ecause [plaintiff] has not alleged membership in a suspect or quasi-suspect class and has not been selectively denied a fundamental right, [the] claim is a ‘class-of-one’ Equal Protection claim”).

The decision below illustrates the confusion that can result from this kind of application of “class of one” terminology. The Ninth Circuit identified the Sixth Circuit’s recent decision in *Scarborough*, 470 F.3d at 250, as a sister circuit precedent “apply[ing] *Olech*’s class-of-one theory to public employment decisions”—and thus as a decision which the Ninth Circuit was *rejecting*. Pet. App. 22; *see also id.* at 60 (Reinhardt, J., dissenting) (citing *Scarborough* as case that “applied the class-of-one theory to employment” in conflict with decision below).

But *Scarborough* is not a true “class of one” case. In *Scarborough*, a public employer refused to rehire the plaintiff because he had agreed to speak at a church with a predominantly gay and lesbian congregation. Although *Scarborough* mentions “class of one” claims while discussing the plaintiff’s fundamental right to associate under the Due Process Clause, *see Scarborough*, 470 F.3d at 261, the court resolved the plaintiff’s equal protection claim by discussing group-based animus against gay men and lesbians. The Sixth Circuit held that the plaintiff’s allegations supported an equal protection claim because “[t]he desire to effectuate one’s animus against homosexuals . . . can never be a legitimate governmental purpose, [and] a state action based on that animus alone violates the Equal Protection Clause.” *Id.* (internal quotation marks and citations omitted). By listing *Scarborough* as a “class of one” claim, the decision below could be interpreted to leave public employees in the Ninth Circuit vulnerable to invidious discrimination motivated by their supervisors’ irrational prejudices, animus, fear, or ignorance toward gay and lesbian employees, older workers, and employees with disabilities. Indeed, some district courts have already begun extending the Ninth Circuit’s analysis in precisely this way. *See, e.g., Robinson*, 2008 WL 375199, at *11 (dismissing claim for age discrimination); *Beren*, 2007 WL 2408884, at *1 (dismissing claim for disability discrimination).

In sum, the Ninth Circuit’s decision should be reversed because it is an unwarranted deviation from this Court’s precedents and the decisions that

prevail in the other Circuits. If this Court were to depart from conventional equal protection principles and limit “class of one” claims in the public employment context, it at least should carefully circumscribe that exception and make clear that it does not apply to claims of discrimination based on actual or perceived membership in, or association with, groups defined by sexual orientation, age, disability, or other characteristics not currently designated by this Court as suspect or quasi-suspect classifications.

CONCLUSION

For the foregoing reasons, the Ninth Circuit’s decision should be reversed or, at a minimum, limited as described herein.

25

Respectfully submitted,

JON W. DAVIDSON
SUSAN SOMMER
LAMBDA LEGAL
120 Wall Street, Suite 1500
New York, New York 10005
(212) 809-8585 ext. 271

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION, INC.
125 Broad Street
New York, NY 10004
(212) 549-2500

KARA SUFFREDINI
NATIONAL GAY AND LESBIAN
TASK FORCE
1325 Massachusetts Ave. NW
Suite 600
Washington, DC 20005
(202) 393-5177

WILLIAM M. HOHENGARTEN
Counsel of Record
JENNER & BLOCK LLP
601 Thirteenth Street, NW
Washington, DC 20005
(202) 639-6000

JOSHUA A. BLOCK
JENNER & BLOCK LLP
919 Third Avenue, Floor 37
New York, NY 10011
(212) 891-1600

GARY D. BUSECK
GAY & LESBIAN ADVOCATES
& DEFENDERS
30 Winter Street, Suite 800
Boston MA 02108
(617) 426-1350

SHANNON PRICE MINTER
NATIONAL CENTER FOR
LESBIAN RIGHTS
870 Market Street Suite 370
San Francisco, CA 94102
(415) 392-6257

February 27, 2008