

STEVENS, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 07–474

ANUP ENGQUIST, PETITIONER *v.* OREGON
DEPARTMENT OF AGRICULTURE ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[June 9, 2008]

JUSTICE STEVENS, with whom JUSTICE SOUTER and
JUSTICE GINSBURG join, dissenting.

Congress has provided a judicial remedy for individuals whose federal constitutional rights are violated by state action, 42 U. S. C. §1983.¹ In prior cases, we have refused to craft *new* remedies for the violation of constitutional rights of federal employees, *Bush v. Lucas*, 462 U. S. 367 (1983), or for the nonconstitutional claims of state employees, *Bishop v. Wood*, 426 U. S. 341 (1976). But refusal to give effect to the congressionally mandated remedy embodied in §1983 would be impermissible. To avoid this result, the Court today concludes that Engquist suffered no constitutional violation at all, and that there was thus no harm to be remedied. In so holding, the Court—as it did in *Garcetti v. Ceballos*, 547 U. S. 410 (2006)—carves a novel exception out of state employees’ constitutional rights. In *Garcetti*, the Court created a new substantive

¹Section 1983 provides that “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress”

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rule excepting a category of speech by state employees from the protection of the First Amendment. Today, the Court creates a new substantive rule excepting state employees from the Fourteenth Amendment's protection against unequal and irrational treatment at the hands of the State. Even if some surgery were truly necessary to prevent governments from being forced to defend a multitude of equal protection "class of one" claims, the Court should use a scalpel rather than a meat-axe.

I

Our decision in *Village of Willowbrook v. Olech*, 528 U. S. 562 (2000) (*per curiam*), applied a rule that had been an accepted part of our equal protection jurisprudence for decades: Unless state action that intentionally singles out an individual, or a class of individuals, for adverse treatment is supported by some rational justification, it violates the Fourteenth Amendment's command that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

Our opinion in *Olech* emphasized that the legal issue would have been the same whether the class consisted of one or five members, because "the number of individuals in a class is immaterial for equal protection analysis." *Id.*, at 564, n. The outcome of that case was not determined by the size of the disadvantaged class, and the majority does not—indeed cannot—dispute the settled principle that the Equal Protection Clause protects persons, not groups. See *ante*, at 4–5.

Nor did the outcome in *Olech* turn on the fact that the Village was discriminating against a property owner rather than an employee. The majority does not dispute that the strictures of the Equal Protection Clause apply to the States in their role as employers as well as regulators. See *ante*, at 5. And indeed, we have made clear that "the Equal Protection and Due Process Clauses of the Four-

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teenth Amendment, and other provisions of the Federal Constitution afford protection to employees who serve the government as well as to those who are served by them, and §1983 provides a cause of action for all citizens injured by an abridgment of those protections.” *Collins v. Harker Heights*, 503 U. S. 115, 119–120 (1992).

Rather, the outcome of *Olech* was dictated solely by the absence of a rational basis for the discrimination. As we explained:

“Our cases have recognized successful 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. In so doing, we have explained that ‘[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.’

“[*Olech*’s] complaint also alleged that the Village’s demand was ‘irrational and wholly arbitrary’ These allegations, quite apart from the Village’s subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis.” 528 U. S., at 564, 565 (some internal quotation marks and citations omitted).

Here, as in *Olech*, Engquist alleged that the State’s actions were arbitrary and irrational. In response, the State offered no explanation whatsoever for its decisions; it did not claim that Engquist was a subpar worker, or even that her personality made her a poor fit in the workplace or that her colleagues simply did not enjoy working with her. In fact, the State explicitly *disclaimed* the exis-

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tence of any workplace or performance-based rationale.² See, *e.g.*, Reply Brief for Petitioner 17, 19. The jury proceeded to find that the respondents intentionally treated Engquist “differently than others similarly situated with respect to the . . . termination of her employment . . . without any rational basis and solely for arbitrary, vindictive or malicious reasons.” App. to Pet. for Cert. 3–4. The jury’s verdict thus established that there was no rational basis for either treating Engquist differently from other employees or for the termination of her employment. The State does not dispute this finding. Under our reasoning in *Olech*, the absence of any justification for the discrimination sufficed to establish the constitutional violation.

The majority nonetheless concludes, based on “unique considerations applicable when the government acts as employer,” that the “class of one” theory of equal protection is not applicable in the public employment context. *Ante*, at 5. Its conclusion is based upon speculation about inapt hypothetical cases, and an incorrect evaluation of the importance of the government’s interest in preserving a regime of “at will” employment. Its reasoning is flawed on both counts.

II

The majority asserts that public-employment decisions should be carved out of our equal protection jurisprudence because employment decisions (as opposed to, for example, zoning decisions) are inherently discretionary. I agree that employers must be free to exercise discretionary authority. But there is a clear distinction between an exercise of discretion and an arbitrary decision. A discre-

²But for this disclaimer, the lower court could have dismissed the claim if it discerned “any reasonably conceivable state of facts that could provide a rational basis for the [State’s actions],” even one not put forth by the State. *FCC v. Beach Communications, Inc.*, 508 U. S. 307, 313 (1993). The disclaimer, however, negated that possibility.

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tionary decision represents a choice of one among two or more rational alternatives. See 1 H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 162 (Tent. ed. 1958) (defining discretion as “the power to choose between two or more courses of action each of which is thought of as permissible”). The choice may be mistaken or unwise without being irrational. If the arguments favoring each alternative are closely balanced, the need to make a choice may justify using a coin toss as a tie breaker. Moreover, the Equal Protection Clause proscribes arbitrary decisions—decisions unsupported by any rational basis—not unwise ones. Accordingly, a discretionary decision with any “reasonably conceivable” rational justification will not support an equal protection claim; only a truly arbitrary one will. There is therefore no need to create an exception for the public-employment context in order to prevent these discretionary decisions from giving rise equal protection claims.

The hypothetical situations posited by the majority do not prove otherwise. The hypothetical traffic officer described in the Court’s opinion, *ante*, at 11, had a rational basis for giving a ticket to *every* speeder passing him on the highway. His inability to arrest every driver in sight provides an adequate justification for making a random choice from a group of equally guilty and equally accessible violators. As such, the Court is quite correct in stating that “allowing an equal protection claim on the ground that a ticket was given to one person and not others, even if for no discernible or articulable reason, would be incompatible with the discretion inherent in the challenged action.” *Ibid.* If there were no justification for the arrest, there would be no need to invoke the Equal Protection Clause because the officer’s conduct would violate the Fourth Amendment. But as noted, a random choice among rational alternatives does not violate the Equal Protection Clause.

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A comparable hypothetical decision in the employment context (*e.g.*, a supervisor who is required to eliminate one position due to an involuntary reduction-in-force and who chooses to terminate one of several equally culpable employees) also differs from the instant case insofar as it assumes the existence of a rational basis for the individual decision. The fact that a supervisor might not be able to explain why he terminated one employee rather than another will not give rise to an equal protection claim so long as there was a rational basis for the termination itself and for the decision to terminate just one, rather than all, of the culpable employees.

Instead of using a scalpel to confine so-called “class of one” claims to cases involving a complete absence of any conceivable rational basis for the adverse action and the differential treatment of the plaintiff, the Court adopts an unnecessarily broad rule that tolerates arbitrary and irrational decisions in the employment context.

III

The majority’s decision also rests on the premise that “[t]he Constitution does not require repudiating th[e] familiar doctrine” of at-will employment. *Ante*, at 14. In the 1890’s that doctrine applied broadly to government employment, see *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N. E. 517 (1892), but for many years now “the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.” *Keyishian v. Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589, 605–606 (1967). Indeed, recent constitutional decisions and statutory enactments have all but nullified the significance of the doctrine. See, *e.g.*, *Elrod v. Burns*, 427 U. S. 347 (1976); *Rutan v. Republican Party of Ill.*, 497 U. S. 62 (1990); see also 5 U. S. C. §2302(b)(10) (2006 ed.) (supervisor of covered federal employee may not “dis-

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criminate . . . on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others”). Accordingly, preserving the remnants of “at-will” employment provides a feeble justification for creating a broad exception to a well-established category of constitutional protections.³

IV

Presumably the concern that actually motivates today’s decision is fear that governments will be forced to defend against a multitude of “class of one” claims unless the Court wields its meat-axe forthwith. Experience demonstrates, however, that these claims are brought infrequently,⁴ that the vast majority of such claims are asserted in complaints advancing other claims as well, and that all but a handful are dismissed well in advance of trial. Experience also demonstrates that there are in fact rare cases in which a petty tyrant has misused governmental power. Proof that such misuse was arbitrary because unsupported by any conceivable rational basis should suffice to establish a violation of the Equal Protection Clause without requiring its victim also to prove that the tyrant was motivated by a particular variety of class-based animus. When the allegations of a complaint plainly identify “the proverbial needle in a haystack,” *ante*, at 16, a federal court should not misconstrue the Constitution in order to make it even easier to dismiss unmeritori-

³Moreover, equal protection scrutiny is not incompatible with at-will employment since courts applying rational-basis scrutiny are able to rely on any *conceivable* reason for government action, and the government therefore need not explain its actual reason for terminating or disciplining the employee.

⁴Prior to the Ninth Circuit’s decision this case, “class of one” claims arising in the public-employment context were permitted by every court that was presented with one. Yet there have been only approximately 150 cases—both in the district courts and the courts of appeals—addressing such claims since *Olech*.

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ous claims.

* * *

In sum, there is no compelling reason to carve arbitrary public-employment decisions out of the well-established category of equal protection violations when the familiar rational review standard can sufficiently limit these claims to only wholly unjustified employment actions. Accordingly, I respectfully dissent.