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.

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

BRIEF FOR RESPONDENTS OREGON DEPARTMENT OF AGRICULTURE, JOSEPH (JEFF) HYATT, AND JOHN SZCZEPANSKI IN OPPOSITION

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QUESTIONS PRESENTED

The Ninth Circuit majority held that class-of-one equal protection analysis does not apply in the public employment context. In reaching that conclusion, the court contrasted government's role as an employer, where its powers are broad, with its role as a regulator. The court also noted that, in other areas of constitutional law, this Court has limited the rights of public employees as compared to ordinary citizens. The Ninth Circuit was concerned that applying class-of-one analysis in the public employment context could invalidate the practice of at-will employment and lead to an influx of new cases in federal court.

The first question presented is:

1. Whether this Court should grant certiorari: (a) when the Ninth Circuit's decision is not in conflict with any decision of this Court, (b) when its decision is solidly grounded in this Court's jurisprudence limiting judicial review of public employment decisions, (c) when the class-of-one issue presented is less significant than petitioner suggests, (d) when, although admittedly the Ninth Circuit's decision creates a circuit split, other federal appellate courts have tended merely to assume that class-of-one analysis applies in the public employment context and have had little time to consider and react to the Ninth Circuit's decision, and (e) when this case in all events is a poor vehicle to use to review the issue, because petitioner failed to prove that any other employees were similarly situated, and because she ultimately would lose on grounds of qualified immunity?

The State's split-recovery punitive damages statute provides that, upon entry of a verdict that includes punitive damages, 60 percent of punitive damages are allocated to a state fund that assists crime victims and their families. In two separate opinions, the Ninth Circuit panel unanimously held that statute does not effect a taking under the Fifth Amendment. The majority relied on the fact that a plaintiff has no more than an uncertain expectation that he or she will be awarded punitive damages. The majority also focused on the purposes for imposing punitive damages, which have nothing to do with compensating the plaintiff. The dissent agreed with the majority's conclusion, but took a more direct approach. The dissent emphasized that, under state law, a plaintiff never is afforded possession of or any right to sixty percent of a punitive damages award, as that money is awarded directly to the State.

The second question presented is:

2. Should this Court issue a writ: (a) when there is no true split among state Supreme Courts that have considered whether split recovery statutes "take" private property, but where there are instead significant differences between some States' statutes, (b) when petitioner cannot identify any independent source of law that gives her a property interest in punitive damages that attaches at or before the moment when the verdict is entered, and (c) when the Ninth Circuit's decision is not contrary to any decision of this Court?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases Cited

Constitutional & Statutory Provisions

STATEMENT OF THE CASE

A. Statement of Facts

1. The promotion

Petitioner was hired in 1992 to work as a Program Technician 1, International Food Standards Specialist, for the Export Service Center (ESC), one of two laboratories making up the Oregon Department of Agriculture's (ODA's) Laboratory Services Division. (E.R. 129-31; E.R.181-83; E.R. 114).[1] Her job was initially funded under a grant to develop a database of food additives, laws, and regulations for several different countries. (E.R. 129-31). While she traveled under that grant, she also began to market ESC's services, which include testing and certifying exported foods and providing consulting services for companies who wish to export food overseas. (E.R. 131-33). Eventually, petitioner began to market ESC's services at trade shows and to provide consulting services to clients who wanted to formulate a product that complied with a specific country's regulations. (E.R. 133-37).

In 1999, the ESC manager, Gary Carter, left the ODA. (E.R. 136). The position remained vacant for almost two years, with an ESC chemist serving as the interim acting manager and petitioner absorbing some of Carter's former duties. (E.R. 152-53; E.R. 185-88).

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[1] The citations are to the record before the Ninth Circuit Court of Appeals.

During the summer of 2001, however, defendant John Szczepanski—the ODA Assistant Director in charge of overseeing the Laboratory Services Division—started to develop some concerns about the continued viability of the ESC in the marketplace. To address those concerns, then-ODA Director Phil Ward appointed Szczepanski to directly oversee ESC's operations. (E.R. 229; E.R. 245-46; E.R. 290-91; E.R. 103). Shortly after he was appointed to oversee ESC's operations, Szczepanski learned that ESC was on the cusp of losing its wheat-testing business—75 percent of its revenue—to a private laboratory that offered "lower prices and better service." (E.R. 296-98). Because ESC's budget operated almost entirely on fees charged for its services to exporters—rather than funding provided by tax revenues—the loss of wheat-testing revenue was devastating to ESC. (E.R. 289, 297). After learning this news, Szczepanski made it a priority to fill the ESC manager position that still remained vacant with someone who could guide the laboratory through the difficult financial period. (E.R. 298).

Petitioner and defendant Joseph (Jeff) Hyatt—who had worked at the ODA since 1990—both applied for the ESC manager position. (E.R. 141; E.R. 227). Although petitioner had a more extensive educational background and more experience with the consulting and customer-service aspects of the position, Hyatt was offered the promotion. (E.R.143; E.R. 155-57; E.R. 226). At trial, Szczepanski proffered several justifications for his choice. Specifically, Szczepanski indicated that he chose Hyatt over petitioner because he felt that Hyatt's experiences starting his own

coffee company, developing business plans, managing budgets, running retail establishments, and working as a supervising chemist within the agency gave Hyatt the entrepreneurial, managerial, and marketing skills ESC needed. (E.R. 243; E.R. 300-02). Szczepanski also explained that, because Hyatt previously had worked as a chemist for the division, he understood what it takes to run a laboratory and, if need be, could "work the bench" as a chemist alongside his subordinates. (E.R. 302).

Petitioner did not get a promotion. Rather, as explained below, her position was eliminated and she was laid off several months later.

2. The lay off

In late 2001, ESC, which operated almost entirely on fee-based revenues, was running in the red because it had lost its wheat-testing business. (E.R. 216; E.R. 304-05). At that same time, the State of Oregon, along with the rest of this nation, began falling into a recession. That recession, exacerbated by the events of September 11, 2001, led to a significant revenue shortfall for the State's 2001-2003 budget. (E.R. 104). In October 2001, the governor asked state agencies funded by tax and lottery revenues to immediately begin discussing budget-reduction proposals based on the governor's office's recommendations and guidelines. (E.R. 104). The governor instructed that budget cuts should be swift and long lasting and urged agencies to develop proposals that included "eliminating or restructuring

programs." (E.R. 104; *see also* E.R. 205, 213; E.R. 223).[2]

In response to that directive, in November 2001, defendant Szczepanski submitted a plan to address the Laboratory Services Division's budget problems. (E.R. 230-31). In that plan, he suggested that the department could reorganize the Laboratory Services Division by consolidating its two physically separate laboratories—the regulatory laboratory and the ESC—into one laboratory, allowing the laboratories to share operating costs, including employees, equipment, and rent. (E.R. 204; E.R. 220; E.R. 228; E.R. 231-37; E.R.108, 109). The regulatory laboratory, unlike the ESC, is funded from the State's general fund, and was subject to the budget-cutting directive. Thus, the purpose of the laboratory reorganization was two-fold: (1) it would reduce the regulatory laboratory's general-fund expenditures; and (2) it would address ESC's financial problems resulting from the loss of wheat-testing business. (E.R. 206, 216; E.R. 228; E.R. 231-33, 236-7; E.R. 108, 109).

As a result of ESC's loss of wheat-testing revenue and as part of the reorganization, petitioner's Program Technician 1, Food Standards Specialist, position—the only position at the ODA with that classification and description[3]—was chosen for layoff.

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[2] The State is not allowed to "run in the red." Or. Const. Art. IX, § 6.

[3] Petitioner's position was one of only two Program Technician 1 positions at the ODA and the only "Food

Four "Chemist" positions were also chosen for layoffs in 2002; five additional positions were terminated in 2003. (E.R. 241-43; E.R. 308; E.R. 114, 115).[4]

3. Petitioner's bumping request

Petitioner's layoff notice explained that her termination "does not reflect adversely on [her] performance, but [was] the result of reorganization." (E.R. 114). It also explained that she had five days to select one of the three options available pursuant to her collective-bargaining agreement. (E.R. 114). She could elect to (1) displace the ODA employee with the lowest seniority in her current classification in a position for which she was qualified; (2) demote to the lowest senior position in any classification in the ODA for which she was qualified; or (3) be laid off. (E.R.126; E.R. 121; E.R. 196-201).

Unfortunately, there was only one other position classified as "Program Technician 1" within the entire agency. (E.R. 115). When she received notice of her layoff, petitioner was provided with information

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Standards Specialist" position in the entire agency. (E.R. 114, 115).

[4] The reorganization ultimately reduced the size of both the regulatory lab and the ESC, making it possible for the programs to share employees. At the time of trial, ESC's revenues were exceeding its expenses, which allowed the agency to lower the rates it charges for regulatory lab services. (E.R. 310-11; E.R. 314-16).

about that position, as the Grants Administrative Officer for the Natural Resources Division. (E.R. 196-200; E.R. 110, 114, 120). Petitioner understood that, pursuant to the collective-bargaining agreement, she would be allowed to bump into that position only if she was capable of performing the specific requirements of the position within a 30-day orientation period. (E.R. 146-47; E.R. 165-67; E.R. 196; E.R. 114). Petitioner's second option—taking a demotion—would have provided quite a few more options, but petitioner would have had to take a pay cut if she chose that option. (E.R. 197-98, 200-01).

Petitioner chose the first option—that is, she elected to attempt to displace the only other ODA employee occupying a Program Technician 1 position. (E.R. 196-97; E.R.115; E.R. 126). Petitioner was not allowed to bump into that position, however, because the ODA human resource manager, Karin Nilsson, determined that she did not have the requisite experience to perform the job within 30 days. Specifically, Nilsson concluded that petitioner did not have sufficient "knowledge of the functions, laws, statutes, rules, policies or procedures of the Soil and Water Conservation Districts, or the Agricultural Water Quality Management Program," and that it was not possible for someone without previous knowledge and experience with those matters to become familiar enough with them to "perform the duties of this job adequately with only a 30-day orientation period." (E.R. 110, 115).

B. District court proceedings

As noted, petitioner worked for the ESC from 1992 until she was laid off in February 2002. Shortly after her layoff, she brought this lawsuit alleging, among other things, that her supervisors at the ODA, defendants Hyatt and Szczepanski, subjected her to harassment, denied her a promotion, deprived her of bumping rights, retaliated against her, and terminated her employment in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 1981, and 42 U.S.C. § 1983. (E.R. 1, 4-6). Petitioner also brought a state-law claim for intentional interference with her employment relationship, and sought economic, noneconomic, and punitive damages, as well as attorney fees and costs. (E.R. 6-7).

Defendants filed an answer in which they asserted that petitioner failed to state a claim upon which relief could be granted and that they are entitled to qualified immunity. (E.R. 8, 13-15). Defendants subsequently filed a motion for summary judgment. (E.R. 19-26). The district court later issued an order granting defendants' motion for summary judgment in part and denying it in part. (E.R. 27). The court declined to grant summary judgment in defendants' favor on several of plaintiff's claims. (E.R. 50-52).

Defendants subsequently filed a motion for partial summary judgment, seeking to narrow the scope of petitioner's broadly pleaded equal-protection claim. (E.R. 58). In their memorandum in support of this motion, defendants asserted that, to the extent plaintiff's equal-protection claim rested on a class-of-one theory, it failed as a matter of law because: (1)

that theory does not apply to public-employment decisions; (2) petitioner had failed to identify other similarly situated employees; and (3) defendants are entitled to qualified immunity on that aspect of petitioner's claim. (E.R. 61-78). The district court denied defendants' motion, concluding that "there are genuine issues of fact as to whether p[etitioner] was singled out as a result of animosity" and inviting defendants to develop a record on the qualified-immunity issue at trial. (E.R. 79, 80, 88).

Defendants renewed their challenges to the class-of-one theory in their trial memorandum. (E.R. 97, 99). Defendants also moved in limine to exclude evidence in support of plaintiff's class-of-one theory. (E.R. 89, 92). The district court denied those motions, except that it agreed that petitioner could prove her class-of-one theory only if she could demonstrate that other similarly situated persons were treated differently. (E.R. 95).

The remaining claims proceeded to an 11-day jury trial, focusing in large part on petitioner's theory that Hyatt and Szczepanski had hatched and executed a plan to "get rid of" her because of her race, color, gender, or national origin or for arbitrary, malicious, or vindictive reasons. (*See, e.g.*, E.R. 326, 10B Tr. 14-18 (petitioner's closing argument)). As proof of this plan, petitioner relied primarily on evidence that, before Hyatt was promoted to the ESC manager position, he and Szczepanski each had told people that they had been working on a plan to "get rid of" petitioner. (E.R. 177, 2 Tr. 95, 112-13; E.R. 326, 10B Tr. 14-15).

After petitioner rested her case-in-chief, defendants orally moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50, renewing the challenges to the class-of-one theory they had raised on summary judgment. (E.R. 247, 6 Tr. 31-70). Defendants also asserted that they are entitled to qualified immunity on that claim. (E.R. 248, 6 Tr. 32-35). Defendants renewed their motions again at the close of their case-in-chief. (E.R. 319, 9B Tr. 17-19; *see also* E.R. 333). Defendants also objected to the jury instructions on the class-of-one theory contending that it was inappropriate for the district court to submit that claim to the jury. (E.R. 331, 10B Tr. 151).

Ultimately, the jury rejected all of petitioner's claims against the ODA and many of the claims against Hyatt and Szczepanski, including her claims relating to discrimination on the basis of a suspect classification. (E.R. 334). The jury nonetheless concluded that defendants Hyatt and Szczepanski violated petitioner's equal-protection rights and intentionally interfered with her employment relationship for other improper reasons—*i.e.*, out of malice or for arbitrary or vindictive reasons. (E.R. 336-38).[5]

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[5] The jury also ruled in petitioner's favor on her substantive due process claim, but the Ninth Circuit later reversed, concluding that petitioner had not presented sufficient evidence to sustain that claim. *Engquist v. Oregon Department of Agriculture*, 478 F.3d 985, 999 (9th Cir. 2007).

Specifically, the jury found that Hyatt and Szczepanski (1) "intentionally treat[ed] the plaintiff differently than others similarly situated with respect to the denial of her promotion, termination of her employment, or denial of bumping rights without any rational basis and solely for arbitrary, vindictive, or malicious reasons"; (2) "subject[ed] plaintiff to arbitrary and unreasonable actions causing [her] to be unable to pursue her profession"; and (3) "intentionally interfere[d] with the plaintiff's employment relationship through improper means or for an improper purpose by causing the loss of promotion, the loss of bumping rights or causing the termination of employment." (E.R. 336-38). The jury awarded economic, noneconomic, and punitive damages for each claim totaling $425,000. (E.R. 336-38, 374-76).

Following the verdict, defendants Hyatt and Szczepanski filed a written motion for judgment as a matter of law on each of the claims on which the jury found in plaintiff's favor. (E.R. 340-71). The district court denied that motion as well. (E.R. 372, 373). The district court entered judgment in favor of petitioner and against Hyatt and Szczepanski on the class-of-one, substantive-due-process, and intentional-interference claims and dismissed all other claims against defendants. (E.R. 374). The district court also awarded petitioner $172,740 in attorney fees, $5,073.58 in out-of-pocket expenses, and $16,322.58 in costs on her claims against defendants Hyatt and Szczepanski. (E.R. 379, 385).

C. The Ninth Circuit's decision

The Ninth Circuit panel majority held "that the class-of-one theory of equal protection is inapplicable to decisions made by public employers with regard to their employees." *Engquist v. Oregon Department of Agriculture*, 478 F.3d 985, 996 (9th Cir. 2007). The majority noted that, in other contexts, that court had applied class-of-one analysis, but the court had not yet decided "whether class-of-one theory should be extended to public employment decisions." *Id.* at 993. Ultimately, the majority determined that the class-of-one theory should not apply in this context. The State was acting as an employer, a setting in which its powers are broader than when government acts as a regulator, and in which "the scope of judicial review is correspondingly restricted." *Id.* at 994. The court also observed that "[i]n other areas of constitutional law, the [United States Supreme] Court has limited the rights of public employees as compared to ordinary citizens." *Id.* (citations omitted). The court concluded that "[t]he class-of-one theory of equal protection is another constitutional area where the rights of public employees should not be as expansive as the rights of ordinary citizens." *Id.* at 995.

The panel also thought that "[a] judicially-imposed constitutional proscription of arbitrary public employer actions would * * * upset long-standing personnel practices." *Id.* "[E]mployers have traditionally possessed broad discretionary authority in the employment context." *Id.* And "[t]he power of employers to discharge employees for reasons that may appear arbitrary, unless constrained by contract

or statute, is well-established under the common law of at-will employment." *Id.* (citations omitted). Applying equal protection class-of-one theory "to forbid arbitrary or malicious firings of public employees would completely invalidate the practice of at-will employment." *Id.* (citation omitted). The panel declined to "effect such a significant change in employment law[.]" *Id.* The panel also was concerned that "applying the class-of-one theory to public employment would * * * generate a flood of new cases." *Id.* Although the panel recognized and discussed this Court's decision in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam), the panel concluded that brief opinion was "too slender a reed on which to base such a transformation of public employment law." *Id.* at 996. For those reasons, the panel majority held that the class-of-one theory does not apply to a public employer's decisions regarding its employees. *Id.*

On this point, the dissent disagreed. The dissent noted that the "[t]he majority's holding relating to the class-of-one theory of equal protection creates inter-circuit conflict." *Id.* at 1011. The dissent also suggested that "[t]he majority's approach is * * * at odds with" this Court's precedent, citing *Village of Willowbrook v. Olech*. *Id.* The dissenting judge would have affirmed the award of damages on the class-of-one claim. *Id.* at 1014-15.

With regard to petitioner's takings claim concerning the State's so-called "split recovery" statute, in which the state Department of Justice is made a judgment creditor and 60 percent of punitive

damages are paid to an account that benefits crime victims, the Ninth Circuit majority held that whether this statute violates the takings clause of the Fifth Amendment, which forbids the taking "of private property * * * for public use, without just compensation," involves a two-step analysis. First, the court "determines whether the subject matter is 'property' within the meaning of the Fifth Amendment and, second, [the court] establish[es] whether there has been a taking of that property, for which compensation is due." *Id.* at 1002 (citation omitted). The court observed that in this case the dispute "focuses on the first step, *i.e.,* whether a punitive damages award constitutes property under the Takings Clause." *Id.* at 1002 (footnote omitted).

Although "[t]he question of whether punitive damages awards qualify as property for purposes of the Takings Clause is a question of first impression in the federal courts," the majority held such awards are not property after looking at two analogous lines of cases, those involving interest as property and those examining whether statutory changes to causes of action can be considered takings. *Id.* at 1002-04. In each instance, the court determined, the certainty of the expectation of the person claiming a property interest was crucial. *Id.* In addition, the majority looked to the purposes for imposing punitive damages, which are to punish and deter unlawful conduct. *Id.* at 1004, citing *BMW of N. Am., Inc v. Gore*, 517 U.S. 559, 568 (1996). The majority also canvassed state supreme court decisions regarding this question, including one from Oregon, and concluded that its "holding that punitive damages are

not cognizable as property under the Takings Clause is * * * in accord with the conclusions reached by a majority of state supreme courts who have considered the issue." *Engquist*, 478 F.3d at 1005.

The dissent agreed, but took a more direct approach, reaching its conclusion that there was no taking

> because the plaintiff has no interest at all in punitive damages, which exist to punish the defendant rather than to reward the plaintiff, unless and until such interest is created by state law. Under its statute, Oregon chose to give the plaintiff an interest in only forty percent of the amount that the jury assesses against the defendant on a state claim for malicious conduct. The plaintiff is never afforded possession of or any right to the other sixty percent of the award, as that money is awarded directly to the state in the court's judgment. Under such circumstances, the majority is correct that the plaintiff has no property right in that other sixty percent.

Id. at 1014 (Reinhardt, J., dissenting).

SUMMARY OF ARGUMENT

Petitioner urges this Court to review two issues: (1) whether class-of-one equal protection analysis applies to claims based on adverse action taken against a public employee; and (2) whether a state statute that allocates part of a punitive damages award to a state fund for crime victims upon entry of

the verdict effects a taking of private property. Neither claim warrants this Court's review.

The Ninth Circuit's decision, holding that class-of-one analysis does not apply in the public employment context, does not conflict with any decision of this Court, and is based on this Court's recognition of the significant differences between government's role as an employer and its role as a regulator. In addition, the issue is not as significant as petitioner suggests. There are many public employees, but almost no successful class-of-one public employee claims. The Ninth Circuit's decision creates a circuit split, but other courts have not given thoughtful consideration to this issue and other courts have had little time to react to the Ninth Circuit's decision. In addition, this case is not a good vehicle for review because petitioner did not prove that other similarly situated employees were treated differently and because she ultimately would lose in any event because defendants would be entitled to qualified immunity.

The Ninth Circuit also rejected petitioner's claim that the State's split-recovery punitive-damages statute violates the takings clause. That claim does not warrant review because, contrary to petitioner's argument, there is no split among state courts regarding such statutes, because petitioner cannot identify any independent source of law that gives her a property interest in punitive damages that attaches at or before the moment when the verdict is entered, and because the Ninth Circuit's decision is not contrary to any of this Court's decisions.

REASONS FOR DENYING THE PETITION

A. Petitioner's class-of-one equal protection claim

1. The Ninth Circuit's decision does not conflict with this Court's case law.

Petitioner contends that the Ninth Circuit failed to apply this Court's equal protection precedent. (Pet. Cert. 10). Apparently, she asserts that the Ninth Circuit's decision conflicts with this Court's decision in *Village of Willowbrook v. Olech*. In *Olech*, this Court, in a brief two-page per curiam decision, held that, in a case that arose out of the village's exercise of its regulatory authority, the equal protection clause could give rise to "a cause of action on behalf of a 'class of one' where the plaintiffs did not allege membership in a class or group." 528 U.S. at 564 (footnote omitted). That terse ruling does not establish that the "class-of-one" theory applies in all contexts, no matter the nature of the government action that is under attack.

Justice Breyer, concurring in *Olech*, noted the concern that the theory "would transform many ordinary violations of city or state law into violations of the Constitution." 528 U.S. at 565. He believed that concern was alleviated in that case because the plaintiffs "had alleged an extra factor as well – a factor that the Court of Appeals called 'vindictive action,' 'illegitimate animus,' or 'ill will.'" *Id.* at 566 (citation omitted). In his view, "the presence of that added factor * * * [wa]s sufficient to minimize any

concern about transforming run-of-the-mill zoning cases into cases of constitutional right." *Id.*

As noted, *Olech* dealt with the village's exercise of its regulatory authority, not with the government's role as an employer. And, as this Court's decisions recognize, that role is a very different one. In fact, it is well settled that ordinary public-employment decisions—those that do not implicate a fundamental right or a suspect classification—are not subject to federal judicial review, even if they are mistaken, unreasonable, or pretextual. *See, e.g., Waters v. Churchill*, 511 U.S. 661, 679 (1994) (plurality opinion) ("We have never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information"); *Collins v. City of Harker Heights*, 503 U.S. 115, 128 (1992) ("state law, rather than the Federal Constitution, generally governs the substance of the [public] employment relationship"); *Connick v. Myers,* 461 U.S. 138, 143, 147 (1983) ("ordinary dismissals * * * are not subject to judicial review * * * even if the reasons for the dismissal are alleged to be mistaken or unreasonable"); *Bishop v. Wood*, 426 U.S. 341, 349-50 (1976) (public-employment decisions do not implicate due-process concerns even if a supervisor "deliberately lied" about his reasons for terminating the employee). *See generally Singleton v. Cecil*, 176 F.3d 419, 425-28 (9th Cir.), *cert. denied.*, 528 U.S. 966 (1999) (en banc) (canvassing this Court's jurisprudence relating to judicial review of public-employment decisions).

In *Bishop*, for example, a police officer who had been terminated without a hearing claimed that he had been deprived of a property interest in his employment and the liberty interests to be free from public stigma and pretextual termination. In addressing the officer's second claimed liberty interest—freedom from termination based on false information—this Court concluded that the termination did not implicate a liberty interest even if the supervisor had *deliberately lied* about the reasons for terminating the officer. 426 U.S. at 349 & n. 13. The Court explained that "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." *Id.* at 349. *See also Connick*, 461 U.S. at 146-49 (relying, in part, on *Bishop* to explain why public-employment decisions involving speech on matters of private concern are not subject to federal judicial review). The rationale behind the Court's refusal to review most challenges to public-employer decisionmaking is simple: It reflects the "common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Connick,* 461 U.S. at 143.

This limited scope of review also stems from the recognition that the government agency's role as a sovereign enforcer of the law and provider of public services is fundamentally different from its role as an employer. *Waters*, 511 U.S. at 679-80. *See also Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 896 (1961) (noting difference between government action to manage its own internal affairs and action "to regulate or license").

Indeed, as this Court explained in *Waters*, "the government as employer * * * has *far broader powers* than does the government as sovereign." *Waters*, 511 U.S. at 671 (emphasis added). Therefore, a reviewing court should not treat the government's interests as an employer the same way it treats the government's interests as a sovereign. *Id.* at 674-75. "The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as an employer." *Id.* at 675. Consequently, even when a public-employment decision implicates protected speech, for example, reviewing courts must take care to assign the government's concerns as an employer "a greater value" and to give the employer's justification for its actions "greater deference." *Id.* at 673, 675.[6]

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[6] This Court has treated government action as an employer differently from government action as a sovereign in other contexts as well. *See, e.g., O'Connor v. Ortega*, 480 U.S. 709, 722 (1987) (plurality opinion) (Fourth Amendment does not require government to procure warrant for every work-related intrusion because that requirement would conflict with common-sense realization that government offices could not function if every employment decision became constitutional matter); *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) (although government might not be able to prevent private citizens from wearing long hair, it can prevent policemen from doing so); *Gardner v. Broderick*, 392

A close reading of this line of authority reveals the following about constitutional claims raised by public employees: If a public employee's challenge to an adverse employment decision does not implicate a fundamental right or a suspect classification, it is not subject to federal judicial review. Allowing federal review in such ordinary cases would conflict with the "common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Connick*, 461 U.S. at 143.[7]

U.S. 273, 277-78 (1968) (government cannot punish private citizens for refusing to provide government information that may incriminate them, but government employees can be dismissed when incriminating information they refuse to provide relates to performance of their jobs).

[7] Petitioner contends that "every governmental action must be supported by a rational basis," citing *City of Cleburne v. Cleburne Living Center,* 463 U.S. 432, 448-49 (1985). But *Cleburne* deals with a city's decision to deny a permit, and not with any government employee claim of unequal treatment. Petitioner also argues that "this Court has never limited the Fourteenth Amendment's scope as applied to public employment," citing *Washington v. Davis*, 426 U.S. 229 (1976), and *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728-29 (2003). (Pet. Cert. 19). Neither case involves class-of-one analysis. *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 1960 (2003), also cited by petitioner simply stands for the

Treating decisions the government makes as an employer differently from decisions it makes as a sovereign makes particular sense when applied to the class-of-one theory. Personnel decisions, by their very nature, single out individual employees. Sometimes employees are singled out based on obviously rational differences—*i.e.*, differences in educational background or quality and quantity of work. But oftentimes, they are based on highly subjective value judgments—*e.g.*, perceived levels of assertiveness, maturity, or the ability to work well with or manage others. Indeed, employment decisions might even boil down to a characteristic as esoteric as whether the employee is a good "fit" for the work environment.

As an employer, the government has a strong interest in having the flexibility to decide how best to manage its operations and employees. Judicial oversight of these day-to-day personnel decisions would undermine efficient decisionmaking and would ultimately trivialize the important protections guaranteed by the federal constitution. As one district court judge aptly put it, because "practically every

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proposition that "public employees do not surrender *all* of their First Amendment rights by reason of their employment." (Emphasis added). *Nat'l Treasure Employees Union v. Raab,* 489 U.S. 656, 665 (1989), recognizes that in some circumstances public employees can be subject to search (more specifically, to a urinalysis) without a warrant or individualized suspicion. None of those decisions assists petitioner here.

employee, public or private, is bound to be convinced at some point that he or she is getting the short end of the stick, it is not hard to imagine the bee hive of constitutional litigation that would be generated by this variant of the 'class of one' doctrine." *Campagna v. Commonwealth of Mass.*, 206 F. Supp. 2d 120, 127 (D. Mass. 2002), *aff'd* 334 F.3d 150 (1st Cir. 2003).

Thus, there is no conflict between the Ninth Circuit's decision that class-of-one theory does not apply in the public employment context and this Court's case law. Instead, the Ninth Circuit's decision is solidly grounded in this Court's jurisprudence.

2. This case is not as significant as petitioner contends.

Petitioner repeatedly stresses how significant she believes this case is. According to her, the class-of-one issue is one of "substantial and recurring importance[,]" that can affect "millions of public employees[.]" (Pet. Cert. 2). She also contends that the Ninth Circuit's decision harms state and municipal employees. (Pet. Cert. 22, 24).

But the case is not as important as petitioner indicates. Even when class-of-one equal protection analysis is applied in the public employment context, what is striking is how rarely such claims succeed. That is why the Ninth Circuit called petitioner's case "unique." *Engquist*, 478 F.3d at 994. The panel majority quoted the Seventh Circuit's observation that it was "'not surprised to have found no "class of one" cases in which a public employee has prevailed since the extreme case that kicked off the "class of

one" movement more than two decades ago.'" *Id.,* quoting *Lauth v. McCollum*, 424 F.3d 631, 633-34 (7th Cir. 2005) (citations omitted by Ninth Circuit).[8]

There may be millions of government employees, but the number of successful class-of-one equal protection claims brought by public employees against their employers is almost nil. Thus, even if this Court were to grant certiorari and reverse the decision of the court of appeals, the outcome in very, very few cases would be changed. The universe of public employment may be relatively large, but a tiny section of that universe is directly impacted by this case.

In any event, in arguing that the rights of public employees will be imperiled if the Ninth Circuit's decision stands, petitioner ignores the existence of remedies under state law or collective bargaining agreements. Federal court oversight is not the only remedy available, so the loss, or limitation, of federal court review does not leave public employees without remedy for adverse, impermissible employment actions.[9]

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[8] As the Ninth Circuit also noted, the "extreme case" was *Ciechon v. Chicago*, 686 F.2d 511 (7th Cir. 1982), "where a paramedic was made a scapegoat for conduct that had drawn the wrath of the local media, while her identically situated partner received no disciplinary sanction at all." *Lauth*, 424 F.3d at 634.

[9] In this case, the Ninth Circuit observed that, although petitioner was covered by a collective

3. Although a circuit split exists, this Court need not act to resolve the split now.

Petitioner notes that "seven other circuits now permit public employees to state a rational basis equal protection claim against public employers to challenge individual employment decisions." (Pet. Cert. 11, citing *Campagna v. Mass. Dep't. of Envt'l Prot.,* 334 F.3d 150, 156 (1st Cir. 2003); *Neilsen v. D'Angelis*, 409 F.3d 100, 104 (2nd Cir. 2005); *Hill v. Borough of Kutztown*, 455 F.3d 225, 239 (3rd Cir. 2006); *Whiting v. Univ. of Miss.,* 451 F.3d 339, 348-50 (5th Cir. 2006), *cert. denied* ___ U.S. ___, 127 S. Ct. 1038 (2007); *Scarbrough v. Morgan County Bd. of Educ.,* 470 F,3d 250, 260-61 (6th Cir. 2006); *Levenstein v. Salafsky,* 414 F.3d 767, 775-76 (7th Cir. 2005); *Bartell v. Aurora Public Schools*, 263 F.3d 1143, 1148-49 (10th Cir. 2001)). With regard to the class-of-one issue, there is no doubt that there is a split between the Ninth Circuit's decision in this case and the decisions of other circuits. The Ninth Circuit majority acknowledged that fact. *Engquist*, 478 F.3d at 993.

That there is a split does not necessarily mean that the split is worthy of this Court's attention at this time, however. And, at the very least, this Court should defer its consideration of this particular split.

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bargaining agreement, there was nothing to indicate she had challenged her dismissal under that agreement. *Engquist*, 478 F.3d at 995 n. 3.

First, other courts have had little opportunity to respond to and evaluate the Ninth Circuit's decision in this case. Only two published district court opinions have considered whether to follow the Ninth Circuit's approach. *Pina v. Lantz*, 495 F. Supp. 2d 290, 304 (D. Conn. 2007) (noting the circuit split, and finding that "many of the arguments advanced by the Ninth Circuit in *Engquist* have considerable merit," but ultimately not deciding whether to follow *Engquist*); *Hayden v. Alabama Dep't of Public Safety*, 506 F. Supp. 2d 944, 955-57 (M.D. Ala. 2007) (also declining to decide whether to follow *Engquist* approach). In this situation, it may be prudent at least to let the issue percolate for awhile in the lower courts.

In any event, although there is no doubt that the split exists what is notable about the other circuits' decisions, applying the class-of-one theory in the context of public employment actions, is both their lack of analysis – of any careful consideration of whether the theory should apply in this setting – and their sense of unease about the theory in general. That is, the other circuits' decisions apply the class-of-one theory, but they hardly embrace it.

None of the other circuits' decisions cited above contains any thoughtful analysis of whether the class-of-one theory should apply to review government employer decisionmaking. The usual approach is simply to cite *Olech* and then apply the theory. *See, e.g., Hill,* 455 F.3d at 239; *Campagna*, 334 F.3d at 156. That lack of analysis may flow from the fact that the plaintiff almost always is unsuccessful in these

cases. *See Engquist*, 478 F.3d at 994 (making that point, and citing cases for it).

Applying class-of-one analysis in this context has been the subject of some criticism, however. In *Lauth v. McCollum,* 424 F.3d 631 (7th Cir. 2005), the plaintiff, a village police officer, brought suit in federal court after the police chief asked the village's board to sanction the officer for misfeasance (the board obliged). Judge Posner observed that "[t]here is clearly something wrong with a suit of this character coming into federal court dressed as a constitutional case." *Lauth*, 424 F.3d at 632. If class-of-one cases can be brought in federal court, "and any unexplained or unjustified disparity in treatment by public officials is therefore to be deemed a prima facie denial of equal protection, endless vistas of federal liability are opened. Complete equality in enforcement is impossible to achieve; nor can personal motives be purged from all official action[.]" *Lauth*, 424 F.3d at 633, citing *inter alia Olech.*

Thus, although a split exists, it is in some sense a shallow one that, at least on one side, is not the result of thoughtful analysis, but of the assumption that the class-of-one theory applies in the public employment context – an assumption made easier by the fact that the plaintiff almost always loses in any event. And, despite the split, the circuits appear to be unanimous in their wariness about applying class-of-one analysis too broadly and in their recognition of the need to cabin application of the theory, even though they differ about how to reign the theory in. (Pet. Cert. 13-15). In this situation, the split does not warrant

immediate attention from this Court. With the Ninth Circuit's more-thoughtful decision now on the table, at least review should be deferred to let other courts evaluate and react to that decision.

4. This case is not a good vehicle for review because, even if class-of-one analysis applies, petitioner would lose.

As defendants argued below, petitioner did not establish that defendants treated other similarly situated employees differently. State action will trigger equal-protection review only if the person invoking equal protection was treated differently from other "similarly situated" persons. *Olech*, 528 U.S. at 564. To prevail on her class-of-one claim, petitioner had to prove that other ODA employees who were like her in all relevant respects were treated differently.

She failed to satisfy that burden with respect to any of the adverse employment actions at issue. Because only one person—Hyatt—was promoted to ESC manager, petitioner could successfully challenge the promotion on a class-of-one theory only if she proved that she and Hyatt were alike in all relevant respects. Petitioner failed to make that showing. As she conceded below, Hyatt was more qualified than her in at least two respects—he was more familiar with the laboratory's standard operating procedures and had experience working as a chemist for the Laboratory Services Division. (E.R. 155, Vol. 2 Tr. 23-26). Because petitioner and Hyatt were not similarly situated, her equal-protection challenge to the promotion decision fails as a matter of law.

Petitioner also failed to prove that defendants treated other similarly situated employees differently during the layoff and bumping processes. Several other ESC employees were laid off and were treated the same way petitioner was treated. To the extent petitioner claims that she was treated differently from ESC employees who were not laid off or who were allowed to bump into other laboratory positions, her claim fails because she did not demonstrate that those employees held similar jobs. *Cf. Vasquez v. County of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003) (employees are similarly situated "when they have similar jobs and display similar conduct"). Indeed, no other ODA employee held a job similar to petitioner's because petitioner's position was the *only* Program Technician 1, Food Standards Specialist, position in the entire agency. (E.R. 114, 115).[10] Moreover, unlike other positions in the ESC, most of the work petitioner performed could not be directly billed to a client. (E.R. 241-43; E.R. 306-08).

Assuming, for the sake of argument, that equal-protection guarantees come into play when a public employer treats unequally employees who are identical in all relevant respects, petitioner still failed to prove her claim. Petitioner failed to demonstrate that defendants treated her differently from employees who were like her in all relevant respects.

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[10] It was undisputed below that the only other "Program Technician 1" position in the agency was the "Grants Administrative Officer" position plaintiff attempted to bump. (E.R. 110, 115).

The record, viewed in the light most favorable to petitioner, shows that no other employee was similarly situated. As a result, petitioner's class-of-one claim fails as a matter of law.[11]

Moreover, even if class-of-one analysis applies in this case, ultimately petitioner would lose on grounds of qualified immunity. 42 U.S.C. § 1983 "creates a private right of action against individuals who, acting under color of state law, violate federal constitutional or statutory rights." *Devereux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001). Qualified immunity, however, operates to shield section 1983 defendants "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). *See also Saucier v. Katz*, 533 U.S. 194, 201 (2001).

The examination into whether a right was "clearly established" does not proceed at a level of broad and abstract generality, such as the "right to due process of law" or the "right to equal protection." *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987). Rather, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized,

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[11] In arguing that her case is a good one for this Court to review, petitioner points to the jury's finding that she was treated differently than "others similarly situated." (Pet. Cert. 17). That finding is not supported by any evidence, however.

and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640. *See also Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (in light of preexisting law, unlawfulness must be apparent).

Here, in late 2001 and early 2002, when defendants made the decisions at issue, the right of a public employee to be free from arbitrary adverse employment decisions under a class-of-one theory was not clearly established under equal-protection jurisprudence. While this Court and the Ninth Circuit had recognized the class-of-one theory in the "regulatory" context for some time,[12] neither this Court nor the circuit has ever held—or even intimated—that such a claim might extend to public-employment decisions. Whether class-of-one rights extend to public-employment decisions was (and is) not clearly established by binding precedent.

The inquiry therefore turns to whether such a right was clearly established in light of decisions from other jurisdictions. Admittedly, a few other circuits had applied that theory in the employment context by late 2001. *See, e.g., Bartell*, 263 F.3d at 1149; *Ziegler v. Jackson,* 638 F.2d 776 (5th Cir. 1981). But, the fact that a few jurisdictions had applied class-of-one theory in employment cases by 2001 does not

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[12] *See, e.g., Squaw Valley Development Co. v. Goldberg*, 375 F.3d 936, 944-48 (9th Cir. 2004), *reh'g denied,* 395 F.3d 1062 (2005) (water regulations).

demonstrate that the theory's application to employment cases was then clearly established law. Instead, it reflects that the law in this area was just beginning to develop. *Cf. Wilson v. Layne*, 526 U.S. 603, 617-18 (1999) (defendants entitled to qualified immunity given lack of "consensus of cases of persuasive authority" from lower courts and "undeveloped state of the law").

Moreover, all of the class-of-one cases decided by late 2001 merely *assumed* that the class-of-one theory applies to public-employment decisions without even discussing whether it properly *should*.[13] And, as explained above, the *Waters-Bishop-Connick* line of authority strongly suggests that this Court, if faced with the question, would decline to apply the class-of-one theory to public-employment decisions. Given the lack of persuasive authority from other jurisdictions, the undeveloped state of the law in 2001, and the likelihood that this Court would conclude that class-of-one theory does not apply in employment cases, defendants could not have been expected to predict that the class-of-one theory would apply to the employment decisions at issue in this case.

Thus, even if this Court were to conclude that defendants violated petitioner's equal-protection rights under a class-of-one theory, it cannot be said that such a right was "clearly established" by late 2001. A government official, familiar with the class-

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[13] The same is true of cases decided since then. *See, e.g., Neilsen*, 409 F.3d at 104-05.

of-one line of authority, reasonably could have believed that the class-of-one theory applied only where the government was acting in its "regulatory" capacity.

These weaknesses in petitioner's case – her failure to prove that defendants treated others similarly situated differently, and the fact that qualified immunity would preclude success on her claim anyway – counsel against grant of a writ in this case. Even if class-of-one analysis applies, ultimately petitioner's claim will fail. That inevitable outcome lessens the need to grant review in this case.

B. Petitioner's claim that the State's split-recovery statute, which allocates a punitive damages award between a plaintiff and a state fund, effects a taking of her property.

As noted, the Ninth Circuit panel unanimously concluded that the State's split-recovery statute, Or. Rev. Stat. § 31.735, which provides that the Criminal Injuries Compensation Account is entitled to 60 percent of punitive damages awarded in a verdict, does not effect a taking of petitioner's property. The statute provides that "[u]pon entry of a verdict including an award of punitive damages," the state Department of Justice becomes a judgment creditor as to the punitive damages portion of the award, to which the Criminal Injuries Compensation Account is entitled, with forty percent to be paid to the

prevailing party and sixty percent to be paid to the state account. Or. Rev. Stat. § 31.735(1).[14]

Petitioner contends that the Ninth Circuit erred in holding that this statute does not, within the meaning of the Fifth Amendment takings clause, effect a taking of her property. According to her, there is a "split within the state courts as to whether 'split recovery' punitive damages statutes are constitutional." (Pet. Cert. 24).

In fact, there is no such split. Although two state supreme courts have found that those States' split recovery statutes effect a taking, those statutes are significantly different from Oregon's. What is significant about Oregon's statute is that the State's interest arises upon "entry of a verdict." Or. Rev. Stat. § 31.735(1). That is what distinguishes this case from the Utah and Colorado cases that petitioner contends create a split. (Pet. Cert. 25). In *Smith v. Price Development Co.,* 125 P.3d 945, 950 (Utah S.C. 2005), the State's interest in the punitive damages arose only when the judgment was paid. The court found it significant that the statute did not make the state a judgment creditor. *Id.* The Oregon statute specifically makes the state DOJ a judgment creditor. Or. Rev. Stat. § 31.735(1). Similarly, in *Kirk v. The Denver Publishing Co.,* 818 P.2d 262, 266 (Colo. S.C. 1991), the State had no interest in the punitive damages until after the judgment was paid to the

[14] The statute is set out in the appendix to the cert petition. (Pet. Cert., App. vol. 2 at 72-74).

plaintiff. That fact was the basis of the court's decision that the punitive damages had been taken. *Id.* at 272.

In contrast to those two state court decisions, when courts have considered statutes more in line with Oregon's, they have been upheld against takings claims. *Cheatham v. Pohle*, 789 N.E.2d 467, 471-75 (Ind. S.C. 2003); *Evans v. State,* 56 P.3d 1046, 1058 (Alak. S.C. 2002); *Mack Trucks, Inc. v. Conkle*, 263 Ga. 539, 436 S.E.2d 635, 639 (1993); *Gorden v. State*, 608 So.2d 800, 801-02 (Fla. S.C. 1992), *cert. denied* 507 U.S. 1005 (1993); *Shepherd Components, Inc. v. Petrides*, 473 N.W.2d 612, 619 (Iowa S.C. 1991).

In sum, there is no true split amongst the decisions of the state supreme courts. Instead, there is simply a significant difference between some of the States' split recovery statutes.

Property interests "'are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source *such as state law* * * *.'" *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 161 (1980), quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (emphasis added). Petitioner has a difficult time trying to identify the "independent source" of law that she claims creates her supposed property interest in punitive damages to which she never is entitled as a matter of state law. She tries rhetoric. (*e.g.,* Pet. Cert. 3 – state statute "confiscates" portion of punitive damages award; such statutes effect millions of dollars "of wealth transfer"). But her

own rhetoric hardly amounts to an independent source of law. She cites Oregon court decisions for the unexceptional principle that her "legal interest in the punitive damages award is incident to her cause of action for intentional interference with contract." (Pet. Cert. 28). But she ignores the Oregon Supreme Court's decision in *DeMendoza v. Huffman*, 334 Or. 425, 449,51 P.3d 1232 (2002), holding, as a matter of state law, that "before entry of final judgment, a plaintiff in Oregon has, at most, an expectation of such an award" of punitive damages, and that "[a] vested right must be something more than a mere expectation based upon the anticipated continuance of existing law[.]" (citation and internal quotation marks omitted). In *DeMendoza*, the state court rejected a state constitutional takings challenge to the split recovery statute because in Oregon a plaintiff has no property interest in punitive damages until entry of final judgment.

Petitioner also contends that the Ninth Circuit's decision is contrary to this Court's recent case law, citing *Philip Morris v. Williams,* 549 U.S. ___, 166 L. Ed. 2d 940 (2007), and *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). That is so, petitioner claims, because in *Philip Morris*, "this Court held that the 'amount' of punitive awards must be based solely on actual or potential harm to the plaintiff." (Pet. Cert. 30, citing *Philip Morris*, 166 L. Ed. 2d at 948). And because in *BMW*, this Court "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." (Pet. Cert. 30, citing *BMW.,* 517 U.S. at 575).

But neither *Philip Morris* nor *BMW* repudiates the traditional rationales for punitive damages, which are to punish past misconduct and to deter future injurious conduct by the defendant and others. In *BMW*, this Court affirmed that "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." 517 U.S. at 568. *See also Philip Morris*, at 1062 (same). While punitive damages cannot be used directly to punish a defendant for harms to non-parties, "[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible[.]" *Id.* at 1064. *Philip Morris* and *BMW* did not change the law in any way that impacts this case. Moreover, in *BMW,* this Court reaffirmed that "States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case." 517 U.S. at 568. *See also Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 39 (1990) (Scalia, J., concurring) ("State legislatures and courts have the power to restrict or abolish the common-law practice of punitive damages").

Petitioner argues that she "should" be entitled to the entire award of punitive damages. (Pet. Cert. 31). But her opinion on that matter does not establish that a taking has occurred. She also contends that

"the 'split recovery' statute distorts the civil litigation process." (Pet. Cert. 32). She intimates that the "State's financial interest in punitive damages conflicts with the individual defendants['] interest in avoiding a judgment entered against them." (Pet. Cert. 32). But the fund into which the punitive damages are placed is used to compensate crime victims and their families and to offer grants to eligible public or private victim assistance programs. *See generally* Or. Rev. Stat. §§ 147.015, 147.035, 147.227, and 147.231. Nothing in the enumerated statutes allows the State or the state DOJ to retain any of the funds *for its own benefit*. Indeed, by statute, DOJ is prohibited even from charging fees to those who apply for funds under the program. Or. Rev. Stat. § 147.315.

Nor does the allocation of punitive damages to the fund create a conflict among DOJ's "clients." The ODA does not benefit from the allocation of the punitive-damage award to the crime-victims account any more than plaintiff does. And the individual defendants are not harmed by this allocation. Providing that a portion of the punitive-damage award must be allocated to the crime-victims fund merely indicates that, *if* punitive damages are imposed, they must be distributed in accordance with state law.

In sum, there is no reason for this Court to grant certiorari to review petitioner's claim that the State's split recovery statute effects a taking of her property. There is no conflict amongst the decisions of the state supreme courts; as a matter of state law, she has no

property interest in punitive damages that are awarded to the crime-victims fund upon entry of the verdict; and the Ninth Circuit's decision does not conflict with any decision of this Court.

CONCLUSION

For the reasons given above, this Court should not issue a writ of certiorari in this case.

Respectfully submitted,

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